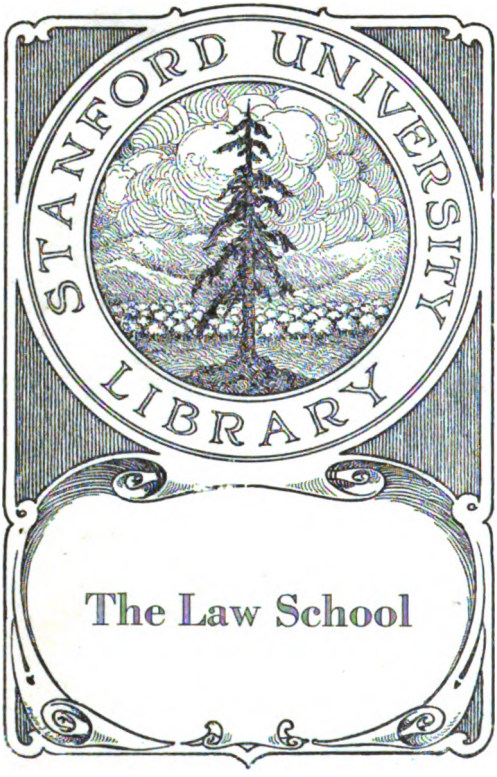

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HANDBOOK

OF THE

LAW OF TRUSTS

BY

GEORGE GLEASON BOGERT

PROFESSOR OF LAW IN THE CORNELL
UNIVERSITY COLLEGE OF LAW

ST. PAUL, MINN.
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To

EDWIN H. WOODRUFF

this book
is gratefully dedicated

*

PREFACE

THE object of this book is to give to practitioners and students a compact summary of the fundamental principles of the American law relating to trusteeships. It is hoped that lawyers will be able by the use of the book to obtain ready information on the large, outstanding problems in the field, and to gain starting points for research into the more recondite and complicated questions. The law student will, it is believed, find in the book sufficient material to furnish him that groundwork which is the maximum possible of attainment in his preliminary studies.

Space limitations have prevented detailed treatment of the English law and extended discussion of matters of principle. These must be reserved for a text-book which purports to be all-inclusive.

In the arrangement of topics the author has varied somewhat from the standard analysis. This change has been made partly with the purpose of facilitating the work of the reader in finding the law and partly because it has appealed to the author as logical. An effort has been made to classify the material under headings which represent the principal practical problems arising in the administration of trusts, as well as to develop the trust relation in sequence from beginning to end. The chapters on the trust purpose are illustrative of these departures from the customary outline. What may be the trust purpose is a frequently occurring question in practical affairs, and the trust purpose is one element of the trust relationship which logically deserves treatment.

Some statutory matters have been dealt with in considerable detail, as, for example, the Statute of Frauds. Effort has been made to set forth as far as possible the peculiarities existing in the states which have statutory trust systems, as, for instance, New York, Michigan, and California. The important distinction between the states which have modified and partially codified the law of trusts, and those jurisdictions which retain the English system almost wholly untouched by legislation, is not always appreciated. Certain rules of property

which sometimes intimately affect trusts have been discussed, although perhaps not usually treated in works on trusts. These are the rules regarding remoteness of vesting, suspension of the power of alienation, and accumulations.

References to articles in leading law periodicals have been inserted with an attempt at completeness. The value of these carefully prepared monographs on narrow points of law is increasingly apparent to bench, bar, and the law school world.

GEORGE G. BOGERT.

CORNELL UNIVERSITY COLLEGE OF LAW,
Ithaca, N. Y., March, 1921.

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HANDBOOK
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INTRODUCTION AND HISTORY

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2. Origin of uses and trusts.
3. Uses and trusts before the Statute of Uses.
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DEFINITION OF FUNDAMENTAL TERMS

1. A trust is a relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another.[1]

The settlor of a trust is the person who intentionally causes the trust to come into existence.

The trustee is the person who holds the title for the benefit of another.

The trust property is the thing, real or personal, the title to which the trustee holds, subject to the rights of another.

The cestui que trust is the person for whose benefit the trust property is held or used by the trustee.

[1] Other definitions of a trust are the following:

"A trust, in the words applied to the use, may be said to be 'A confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person touching the land, for which cestui que trust has no remedy but by subpœna in chancery.'" Lewin, Trusts (12th Ed.) 11, referring to Co. Litt., 272, b.

"A trust is an equitable obligation, either expressly undertaken, or constructively imposed by the court, under which the obligor (who is called

The trusts treated herein should not be confused with the monopolies or combinations called "trusts," or with the positions which are loosely called "places of trust." The monopolistic trusts were originally so called because the stock of the combining corporations was transferred to technical trustees to accomplish a centralization of control.[2] In common parlance, to be in a position of "trust" or to be a "trustee" often means merely to occupy a station where elements of confidence and responsibility exist.[3] The one trusted in this sense may be an agent, a servant, a partner, a guardian, or a trustee. He is not necessarily in the technical trust relation.

It is not intended that the definitions of the essential terms here given shall be final or exhaustive. The nature and incidents of the trust will be developed throughout the book, and

a trustee) is bound to deal with certain property over which he has control (and which is called the trust property), for the benefit of certain persons (who are called the beneficiaries or cestuis que trust), and of whom he may or may not himself be one." Underhill, Trusts (3d Ed.) 1, 2.

"A trust is an obligation imposed, either expressly or by implication of law, whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons, of whom he may himself be one, and any one of whom may enforce the obligation." Hart, What is a Trust? 15 Law Quart. Rev. 301.

"A trust, in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property of which the legal title is in another." Bispham, Equity (5th Ed.) 77.

"A trust may be defined as a property right held by one party for the use of another." Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292, 293.

"A trust, in its simplest sense, is a confidence reposed in one person, called a trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter." Dowland v. Staley, 201 Ill. App. 6, 7.

For other definitions, see Teal v. Pleasant Grove Local Union, No. 204, 200 Ala. 23, 75 South. 335; Keeney v. Bank of Italy, 33 Cal. App. 515, 165 Pac. 735; Drudge v. Citizens' Bank of Akron, 64 Ind. App. 217, 113 N. E. 440; Frost v. Frost, 165 Mich. 591, 131 N. W. 60; Ward v. Buchanan, 22 N. M. 267, 160 Pac. 356; Templeton v. Bockler, 73 Or. 494, 144 Pac. 405.

These and many other definitions of the trust seem concerned rather with the duty or obligation of the trustee, or the right of the cestui, than with the trust. The trust in its modern sense is conceived to be the relationship or status in which are concerned certain property and persons, and incidental to which are certain rights and duties. The whole bundle of property, persons, rights, and duties makes up the trust. It is often said that a trustee holds the trust property "subject to a trust," but it would seem to be more accurate to state that he holds it subject to the duties of a trustee.

[2] Jenks, The Trust Problem, 111.

[3] See Thompson v. Thompson, 178 Iowa, 1289, 160 N. W. 922.

the meaning of the elementary terms more fully explained. But a certain rough, general description of the trust and its parts is necessary before one can proceed to trace the history of trusts and distinguish them from other similar relationships.

The Trust Property . .

It should first be noticed that specific property, real or personal, is always an element of the trust. In certain somewhat analogous relations men only, or men and any property, may be involved, as, for example, in agency, where A. may be the agent of B. for the performance of personal services, which have no connection with any property, or no connection with any particular property. But the trust presupposes fixed, ascertained property, to be handled or held by the trustee. What may be the trust property and how it may become such are matters to be dealt with later. The trust property is sometimes called the trust res, the corpus, the subject or subject-matter, of the trust.

It is sometimes said that the legal title to the trust property is always in the trustee. His title may be a legal or an equitable one, dependent on the nature of the title which the settlor, in express trusts, or the law in implied trusts, has seen fit to give him. Thus, if the settlor has a fee-simple estate in certain lands, and conveys his interest to A. to hold in trust for B., A., the trustee, will be seised of the legal estate; but, if the settlor has contracted to buy land for which he has paid the purchase price, but a deed of which he has not yet received, and the settlor transfers his interest in the land to A. in trust for B., A., the trustee, will hold merely the equitable title of the contract vendee of the land. It is because of this possibility of legal or equitable ownership that the definition given above merely states that the trustee is a title holder, without regard to the court in which his title will be recognized. In a great majority of trusts the trustee has the legal title to the trust property.

The Trust Parties

It is customary to think of three persons as connected with every trust, namely, the settlor, the trustee, and the cestui que trust. But since, where the settlor declares himself a trustee, settlor and trustee are one and the same person, a trust may exist with only two parties. Since a man cannot be under an obligation to himself, the same individual cannot be settlor, trustee, and cestui, and the trust persons can never be less than two.[4] But a

[4] In certain rare instances private trusts have been sustained, where there were no human cestuis que trust, as where the trust was for the benefit of specified dogs or horses. In re Dean, 41 Ch. Div. 552. In these cases,

sole trustee may be one of a number of cestuis que trust, and one of several joint trustees may be the sole cestui.[5] There are no limitations upon the maximum number of persons who may be connected with a trust, except the limitations of convenience.

In some trusts there is no settlor. These are the implied trusts created by the law, because it is presumed that the parties intended a trust to exist, or for the purpose of accomplishing justice.[6] In these implied trusts no individual intentionally brings a trust into being. The court gives life to the trust. But the acts of one or more persons have caused the court to decree the trust's existence. Such persons are not settlors. Their acts merely afford the reasons which the courts give for declaring the existence of the trust. Hence, in the definition of the word "settlor" given above the word "intentionally" is used, so that the doers of acts which unintentionally result in the declaration of a trust by a court may not be included within the class of settlors.

The settlor is also sometimes called the creator of the trust, or the trustor. The phrase cestui que trust[7] is synonymous with beneficiary of the trust.

The Trust Rights and Duties

The trustee holds the property "for the benefit of" the cestui que trust. It is unnecessary now to consider how the cestui may obtain that benefit. The methods vary greatly, according to the terms of the particular trust. In one case the trustee may have no duty, except to hold the property, and the cestui que trust may take the profits directly. In another instance the trustee may be charged with the obligation of detailed management, and the cestui que trust may receive the benefits indirectly. The means of obtaining the benefits for the cestui are not at this point important. The fundamental principle is that somehow the benefit is his.

if the settlor and trustee were identical, the number of trust persons might be reduced to one. See post, § 59.

[5] Post, § 74.

[6] Post, § 28.

[7] Pronounced as if spelled "cestwe kuh trust." Anderson, Dict. of Law, 162. The words are Norman French. The plural is properly "cestuis que trust," although frequently spelled "cestui que trustent," "cestui que trusts," or "cestuis que trustent" by the courts. See City of Marquette v. Wilkinson, 119 Mich. 413, 78 N. W. 474, 43 L. R. A. 480. For a discussion of the origin, meaning, and proper form of "cestui que use" and "cestui que trust" see a note by Charles Sweet, Esq., in 26 Law Quart. Rev. 196, in which the views of Prof. Maitland are set forth. The author says: "'Cestui que use,' therefore, means 'he for whose benefit,' and 'cestui que trust' means 'he upon trust for whom,' certain property is held."

The duty of the trustee is enforceable by the cestui que trust. This quality distinguishes the trust in some jurisdictions from certain possible contracts. Thus, if A. promises B., for a consideration running from B. to A., that he (A.) will hold certain property for the benefit of C., C. will in some jurisdictions have no right to enforce the performance of A.'s promise, because C. is a stranger to the promise.[8] But, if A. declares himself a trustee of property for C., C. may everywhere enforce the trust against A., regardless of privity. This quality of enforceability by the cestui que trust, notwithstanding a lack of privity, is a characteristic of the trust.

The trustee's obligation is said to be "equitable." Originally it was recognized only by the English Court of Chancery, which alone administered the rules and applied the principles of equity. Many definers of the trust make enforceability in a court of chancery or equity a part of their definition. But in the present state of the law it is deemed preferable to define the trustee's obligation as equitable, and to omit any reference to the court in which this obligation may be enforced. In England and in many American states the separate Court of Chancery has been abolished, and both legal and equitable obligations are enforced by the same court. On the other hand, in a few states the separate court of equity is maintained.[9] The trustee's obligation is based on equitable principles, whether enforced by a court having both legal and equitable jurisdiction, or by a court having solely equitable functions. It seems wiser to omit all reference to the forum of enforcement.

Whether the right which the cestui has is a property right in the subject-matter of the trust (a right in rem), or merely a personal right against the trustee (a right in personam), is a question much debated. The arguments pro and con are stated in a later section, dealing with the nature of the interest of the cestui que trust.[10]

[8] Wald's Pollock on Contracts (3d Ed.) 243 et seq.

[9] For a discussion of the effect of constitutional changes on the separate existence of the court of equity, see 1 Pomeroy's Eq. Juris. §§ 40–42. The conclusion there reached is that the separate chancery court existed then (1905) only in Alabama, Delaware, Mississippi, New Jersey, and Tennessee.

[10] Post, § 110.

ORIGIN OF USES AND TRUSTS

2. Trusts, in their early development in England, were divided into two classes, namely, special or active trusts, and general, simple, or passive trusts. The latter were generally called uses. Prior to 1535, uses constituted by far the more important class of trusts.

Uses were introduced into England shortly after the Norman Conquest (1066 A. D.).

They were patterned after the German treuhand or salman.

The principal objects of their introduction were—

(a) To avoid the burdens of holding the legal title to land, such as the rights of the lord under feudal tenure, the rights of creditors, and the rights of dower and curtesy;

(b) To enable religious houses to obtain the profits of land, notwithstanding the mortmain acts;

(c) To secure greater freedom in conveying land inter vivos;

(d) To obtain power to dispose of real property by will.

The use was a trust in which the trustee had no active duties, but was merely a receptacle of the legal title for the cestui que trust.

The words "use" and "trust" are employed as synonyms frequently by writers and judges. However, there is a distinction in their meanings. Prior to the Statute of Uses (1535) there existed in England a relationship known as a trust. Trusts were of two classes, namely, active or special, and passive, simple, or general. In cases where a trustee held property for some temporary purpose and with active duties to perform, the trust was called active or special. Thus, if A. conveyed land to B. for ten years, to take the profits of the land and apply them to the use of C., B. was an active or special trustee. These trusts were comparatively rare prior to the Statute of Uses. But if the legal title was transferred to one as a permanent holder for the benefit of another, but with no positive duties of care or management, the trust was called general, simple, or passive, or a use. Thus, an enfeoffment of A. and his heirs to the use of B. and his heirs would create a use or general trust.[11] Uses were far more common than special trusts prior to the Statute of Uses. Indeed, by the time of Henry V (1413–1422) they were the rule rather than the exception in landholding.[12]

[11] Bacon, Uses, 8, 9; Sanders, Uses and Trusts, 3–7.

[12] Digby, History of Law of Real Property, 320.

Uses and trusts were introduced into England shortly after the Norman Conquest.[13] Recent scholars agree that they were modeled after the German treuhand or salman, rather than after the Roman fidei-commissum.[14] Under the Roman law it was not possible to give property by will to certain persons, as, for instance, persons not Roman citizens.[15] It became customary among the Romans to devise property to one capable of taking it, with a request that he deliver it to a desired devisee who was incompetent to take directly. This was the creation of a fidei-commissum. The obligation of the devisee to the desired beneficiary in this relationship was not at first legally enforceable, but later became so. This confidence was analogous in many ways to the English trust or use, but differed in that it arose by will only.

Trusts are not known to the modern civil law.[16]

"The feoffee to uses of the early English law corresponds point by point to the salman of the early German law, as described by Beseler fifty years ago. The salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions."[17]

It was said by an English lawyer many years ago that the parents of the trust were Fraud and Fear and the Court of Conscience was its nurse.[18] Certain it is that the reasons for the introduction of uses and trusts were not in all cases honorable. The common law of England attached to the holding of the legal title to land many burdens. As the feudal system prevailed when uses arose, the lord of the land was entitled to a "relief," or money payment, when the land descended to an heir of full age; to the rights of "wardship" and "marriage" when the heir was a minor; and to "aids" upon the marriage of a daughter of the lord, the knighting of his eldest son, or when the lord was held to ransom. These burdens, and others of a similar nature, fell upon the holder of

[13] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 737, 741; Maitland, The Origin of Uses, 8 Harv. Law Rev. 127, 129; Development of Trusts, G. H. J. Hurst, 136 L. T. 76.

[14] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 739, 740; Maitland, The Origin of Uses, 8 Harv. Law Rev. 127, 136. The earlier view was that the use was an evolution of the fidei-commissum. Story, Eq. Juris. §§ 966, 967; Pomeroy, Eq. Juris. §§ 976-978.

[15] Digby, History of Law of Real Property, 317.

[16] Thus in Louisiana, whose system is founded on the civil law, trusts were not recognized (Marks v. Loewenberg, 143 La. 196, 78 South. 444) until Act 107 of 1920 legalized them. Under this statute the trust term cannot exceed ten years after the death of the donor or the majority of a minor beneficiary.

[17] Holmes, Early English Equity, 2 Select Essays in Anglo-American Legal History, 705, 707.

[18] Attorney General v. Sands, Hard. 488, 491.

the legal title. By enfeoffing another of the legal title and reserving only the use, the tenant escaped such exactions. "The legal ownership, however, represented by the feoffee to uses, was subject to the incidents of tenure, which could be enforced against the land, but by vesting the seisin in two or more feoffees jointly, whose number was renewed from time to time, and the survivor of whom took the whole legal estate, the burdens incident to the descent of land were generally avoided."[19]

So, too, upon the commission of certain crimes the holders of the legal title suffered a forfeiture, which could be avoided by vesting the legal estate in another and retaining only the use. And the common law gave no remedy to a creditor against the interest of a cestui que use. Some dishonest persons escaped payment of their debts by a transfer of land to a feoffee to uses. The incidents of dower and curtesy attached only to the legal estate. A husband, desiring to prevent the attaching of a dower interest in a prospective wife, could accomplish the result by a conveyance to a feoffee to uses. And a corresponding fraud could be worked by a wife with respect to her husband's estate by the curtesy of the law of England.

Not only was the equitable estate of cestui que use free from dangers and duties, but it could be held by a large and influential class which could not hold the legal estate in lands, namely, religious corporations. The mortmain acts forbade the alienation of land to religious corporations, and thus prevented the religious orders from acquiring directly the real property they needed, and which charitably minded persons often desired to give them. Furthermore, certain of the orders had taken the vows of poverty, and could not consistently hold property in their own names. By a conveyance of land to an individual, to be held for the use of the religious order, however, the monks and friars could have the benefit of the land, though not the seisin. In the opinion of some scholars, the religious bodies were the first to employ the use extensively.[20]

The equitable estate or use was also more easily dealt with and transferred than the legal estate. The latter could be conveyed only by feoffment with livery of seisin, fine, or recovery. Publicity was essential. The use, on the other hand, could be created and transferred secretly, and with little or no ceremony. This capacity for secret transfer favored fraud on later purchasers of the land and encouraged the employment of the use by the un-

[19] 1 Tiffany, Real Property, 200.

[20] Maitland, The Origin of Uses, 8 Harv. Law Rev. 127, 130; Jenks, Short History of English Law, 96.

scrupulous. Likewise the use was capable of being disposed of by will. The legal estate was not so disposable at that period. To be able to control land after death was no doubt a great incentive to the creation of uses.

USES AND TRUSTS BEFORE THE STATUTE OF USES

3. Originally uses and trusts were not enforceable in any court, but were purely honorary.

The courts of law did not recognize the claims of the cestui que trust, because no writ existed for that purpose.

Chancery began to enforce uses and trusts in the early part of the fifteenth century.

Early English law was extremely rigid. Forms and technicalities were strictly observed. The courts of common law gave no remedy, unless a writ fitted exactly to the case could be found. The introduction of new remedies through the law courts was a matter of great difficulty.[21] The interests of cestui que use were not protected by the common-law courts, because no writ existed to fit the case. Uses were a novelty. The ecclesiastical courts had no jurisdiction to enforce them. Therefore, for many years uses and trusts existed as honorary obligations, but had no legal standing. If the trustee saw fit to deny that he held the property as trustee, and to appropriate it to his own use, he might do so with impunity.[22] Fiduciary relations with respect to money and chattels were early enforced by the common-law courts, but these were the so-called "common-law trusts," and not uses. If money were delivered to A., to be paid to B., the common-law action of account lay.[23] If a chattel were delivered to another for the use of a third, detinue could be brought by the beneficiary.[24]

But the development of the Court of Chancery wrought a change. About the time that uses and trusts were arising, it became the custom to petition the king or his council for relief in cases where the law courts gave no remedy. If no writ was available, or if the opponent was powerful enough to prevent justice, the aggrieved suitor besought the king or his council for a special and extra-legal dispensation. Of this council the Chancellor was a member, and

[21] Spence, History of the Court of Chancery, 2 Select Essays in Anglo-American Legal History, 219.

[22] Ames, Lectures on Legal History, 236, 237.

[23] Anonymous, Year Book, 6 Henry IV, folio 7, plac. 33; Ames' Cases on Trusts (2d Ed.) p. 1.

[24] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 743.

about the time of the reign of Edward I (1272–1307) it became usual to refer these petitions to the Chancellor for consideration. The Chancellor became the custodian of the king's conscience, and his court the court of conscience. Equity and fairness were supposed to rule there, rather than technicality.

It was natural that cestuis que trust who had been injured, due to a failure of their trustees to hold the property for their use, should apply to the Chancellor for relief. At some time early in the fifteenth century the justice of these petitions began to be recognized by chancery, and uses and trusts were enforced.[25] The Chancellors of those days were churchmen, and their consciences were naturally shocked by the inequity of allowing a trustee to make away with his beneficiary's property. Probably, too, the common-law trust appealed to the Chancellor as a quasi-precedent. The process by which the Chancellor acted was known as a subpœna. It commanded the defendant to do or refrain from doing a certain act. The relief was personal and specific, not merely money damages. Hence it is often said that cestui que trust has a remedy only by subpœna.

THE STATUTE OF USES

4. The Statute of Uses provided that, wherever any person should thereafter be seised of land to the use of another, the latter should be deemed the legal owner of such lands, and the taker subject to a use should have no interest in the lands.

The object of this statute was to convert the equitable interest of the cestui que use into a legal interest, and thus—

(a) Prevent the loss of feudal rights by landlords;

(b) Obviate fraud on creditors, alienees, dowresses, and tenants by the curtesy;

(c) Probably to injure the religious orders which were the beneficiaries of uses.

By the beginning of the sixteenth century uses and trusts had come to involve serious inconveniences and frauds. It has been said that the principal objects of their introduction were to relieve landowners of the burdens of feudal landholding, to enable religious orders to have the benefit of land, and to effect greater freedom in the conveyance of real property. These advantages obtained from uses were abused. From time to time prior to the Statute

[25] Ames, Origin of Uses and Trusts, 2 Select Essays in Anglo-American Legal History, 741, 742.

of Uses acts in aid of creditors, purchasers, and landowners defrauded by uses, and against the holding of lands to the use of religious houses, were enacted by Parliament,[26] but they were ineffective. The preamble to the statute catalogues the evils thought to be caused by the use in 1535.[27]

Aside from the reasons named in the statute itself, there was, according to some authorities,[28] the desire on the part of Henry VIII to destroy the monasteries and confiscate their property, which he thought could best be accomplished by abolishing the method by which they held land, namely, the use.

The famous Statute of Uses (27 Henry VIII, c. 10) was enacted in 1535.[29] Its object was to abolish uses, and this it proposed to do by wiping out the estate of the feoffee to uses, and giving to the

[26] Digby, History of the Law of Real Property, 318, 319; Cruise, Uses, 34–37.

[27] "Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made bona fide, without covin or fraud, yet nevertheless divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts, and also by wills and testaments sometimes made by nude parolx and words, sometimes by signs and tokens, and sometimes by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have had scantly any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disinherited, and lords have lost their wards, marriages, reliefs, harriots, escheats, aids, *pur fair fitz chivalier* and *pur file marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or execution for their rights, titles and duties; also men married have lost their tenancies by the curtesy, women their dowers; manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffment to the use of aliens born, and also the profits of waste for a year and a day of felons attainted, and the lords their escheats thereof. * * *" Preamble to St. 27 Henry VIII, c. 10, as quoted in Digby, History of the Law of Real Property, 347, 348.

[28] Jenks, Short Hist. of English Law, 99. Holdsworth is opposed to this view. Causes Which Shaped the Statute of Uses, 26 Harv. Law Rev. 108, 121.

[29] For a discussion of the events leading up to its passage, see Holdsworth, Causes Which Shaped the Statute of Uses, 26 Harv. Law Rev. 108.

former holder of the use the entire legal estate. The statute "executed the use," in the phrase of the day. Instead of leaving it to the feoffee to uses to transfer the legal title to the cestui que use when the latter required it, the law transferred such interest immediately on the creation of the use.[30] By this "transmutation of the use into possession" it was thought that this troublesome class of equitable interests would cease to exist, and that all estates in lands would be subject to the same burdens, the same rules of tenure and conveyance. There would be no uses in land, because the law would change them to legal interests at the instant of their birth.

THE EFFECT OF THE STATUTE OF USES

5. The Statute of Uses did not have its intended effect because—

(a) By virtue of its express provisions, and because of the construction given it by the courts of law, certain equitable interests were not converted into legal interests, namely, equitable interests in personal property, uses of estates less than freehold, active trusts, and uses upon uses;

(b) These equitable interests not so converted into legal interests were recognized and enforced by the Court of Chancery as trusts after the Statute of Uses, and form the basis of the modern law of trusts.

[30] The active portion of the statute was as follows: "That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case all and every such person or persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them." As quoted in Scott, Cases on Trusts, 3, 4.

To the common-law judges, who alone had to do with legal estates, fell the task of construing the Statute of Uses, and determining when the statute executed the use and gave to the cestui que use the legal estate. It was evident from the express words of the statute that uses in personalty were not included. The statute spoke only of real property. And since it referred only to instances in which the feoffee to uses was "seized," it was readily held that the statute had no application to interests in real property other than freeholds. Therefore, a gift to A. of a term for five years, to the use of B., was not affected by that statute. The statute was held, also, not to apply to active trusts but only to passive or general trusts. Duties of administration required the legal title in the trustee. Thus, if land were conveyed to A. for life, to collect the profits thereof and pay them to B. and his heirs, the trust would be active, and the statute would not execute the use, but leave the legal estate in A. and the equitable interest in B. separately.

Lastly, the courts of law held that the statute did not affect a use upon a use. It could operate only once. After such operation, its force was spent. Thus, if lands were conveyed to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, the statute was held to transfer the use of B. into possession and give him the legal estate, but not to convert the use of C. into possession and destroy B.'s legal estate.[31] This construction has generally been thought to be a mere quibble, which improperly caused a partial destruction of the statute.[32] But one scholar of high repute has pointed out that the use upon a use was held void by the Court of Chancery before the passage of the Statute of Uses, and that, therefore, the decision of the common-law courts in Tyrrel's Case was entirely correct.[33] Where a use upon a use was attempted, the second party named would not be seised of land to the use of the third party, but rather of a use for his benefit, so that logically a case would not be presented for the operation of the statute as to the second use.[34]

A large number of uses and trusts were, as shown above, left unaffected by the Statute of Uses and were recognized and enforced by chancery. The name "trust" was, after the Statute of Uses, ap-

[31] Tyrrel's Case, Dyer, 155 (1557).

[32] Jenks, Short History of English Law, 100. "By this means, a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add, at most, three words ["to the use"] to a conveyance." Lord Hardwicke, Hopkins v. Hopkins, 1 Atk. 581, 591.

[33] Ames, The Origin of Uses and Trusts; 2 Select Essays in Anglo-American Legal History, 747 et seq.

[34] See Perry, Trusts (6th Ed.) § 301.

plied to all the equitable interests so sustained, whether they had before been denominated uses or trusts. Perhaps the Court of Chancery had no desire to stimulate the enactment of a second Statute of Uses by continuing the name "use." Perhaps it felt that the Statute of Uses had transferred to the law courts jurisdiction over uses.[35] It will be seen that the interests thus supported by chancery after the Statute of Uses, and called "trusts," were composed of the old active or special trusts and that part of the old general trusts or uses which the statute did not destroy. These interests are the modern trusts, which form the basis of the present English and American systems.

TRUSTS IN AMERICA

6. The English system of equity jurisprudence, of which the trust was a part, was adopted almost bodily by the American states.

Just as the colonists of the thirteen original states adopted substantially entire the common law of England, so they took over with little change the English scheme of equity jurisprudence, a part of which was the system of trusts. The development of chancery in colonial America, however, was slow and difficult. In Massachusetts no equity court existed for any substantial time until 1877.[36] Redress in extraordinary cases was had only through petition to the Legislature. In minor cases the Legislature doled out to the common-law courts from time to time meager equity powers, but no inclusive jurisdiction. In Pennsylvania no court of chancery was founded until 1836.[37] The law courts often worked out equitable relief through their own forms. In New York, in 1701, by an ordinance of Governor and council, the Governor was appointed chancellor.[38] The Legislature and people objected to this method of forming the new court and sought its abolition. This movement failed, but the court was thereafter unpopular and little patronized. In Virginia chancery was at first administered by the Governor and council and later by the general court and

[35] See 17 Mich. Law Rev. 87, for a discussion of the reasons for the survival of the trust. It is there suggested that the statute did not contemplate the active trust which was then rare and little developed.

[36] Chancery in Massachusetts, E. H. Woodruff, 5 Law Quart. Rev. 370.

[37] The Administration of Equity through Common-Law Forms in Pennsylvania, S. G. Fisher, 2 Select Essays in Anglo-American Legal History, 810.

[38] History of New York, Wm. Smith (Yates' Ed.) 385-389; preface to vol. 1, Johns. Ch. Rep.

county courts. In the other colonies the governor, aided by his council, usually exercised the powers of a chancellor.[39]

Towards the close of the eighteenth century, when trusts came into more common use in America, the English system had been well developed, and was naturally adopted in substantial entirety by the American colonial and early state chancellors. The first state reports show that, considering the poverty and newness of America, trusts were involved in litigation with a fair measure of frequency.[40]

During the nineteenth century several American states by statutes somewhat changed the law of trusts as received from England, especially with respect to the trust purpose and the rule against perpetuities; but these amendments of the English system have been relatively of minor importance.

[39] Courts of Chancery in the American Colonies, S. D. Wilson, 2 Select Essays in Anglo-American Legal History, 779.

[40] In the following cases, decided before 1800, a trust was discussed or construed: *Connecticut*, Bacon v. Taylor, Kirby, 368 (1788); *Maryland*, State ex rel Hindman v. Reed, 4 Har. & McH. 6 (1797); Reeder v. Cartwright, 2 Har. & McH. 469 (1790); Swearingham v. Stull's Ex'rs, 4 Har. & McH. 38 (1797); Ridgely v. Carey, 4 Har. & McH. 167 (1798); Dorsey's Ex'rs v. Dorsey's Adm'r, 4 Har. & McH. 231 (1798); Hatcheson v. Tilden, 4 Har. & McH. 279 (1799); Bank of Columbia v. Ross, 4 Har. & McH. 456 (1799); *New Jersey*, Arrowsmith v. Van Harlingen's Ex'rs, 1 N. J. Law, 26 (1790); Green v. Beatty, 1 N. J. Law, 142 (1792); *New York*, Jackson v. Sternbergh, 1 Johns. Cas. 153 (1799); Neilson v. Blight, 1 Johns. Cas. 205 (1799); *North Carolina*, Hogg's Ex'rs v. Ashe, 2 N. C. 480 (1797); *Pennsylvania*, Kennedy v. Fury, 1 Dall. 72, 1 L. Ed. 42 (1783); Field v. Biddle, 2 Dall. 171, 1 L. Ed. 335 (1792); Knight v. Reese, 2 Dall. 182, 1 L. Ed. 340 (1792); Cox's Lessee v. Grant, 1 Yeates, 164 (1792); Fogler's Lessee v. Evig, 2 Yeates, 119 (1796); Lee's Lessee v. Tiernan, Add. 348 (1798); *South Carolina*, Lindsay v. Lindsay's Adm'rs, 1 Desaus. 150 (1787); Bethune v. Beresford, 1 Desaus. 174 (1790); Stock's Ex'x v. Stock's Ex'r, 1 Desaus. 194 (1791); Gadsden's Ex'rs v. Lord's Ex'rs, 1 Desaus. 208 (1791); Wilson v. Wilson, 1 Desaus. 219 (1791); *Virginia*, McCarty v. McCarty's Ex'rs, 2 Va. Col. Dec. 34 (1733); Hill v. Hill's Ex'rs, 2 Va. Col. Dec. 60 (1736); Coleman v. Dickenson, 2 Va. Col. Dec. 119 (1740); Pendleton v. Whiting, Wythe 38 (1791).

CHAPTER II

DISTINCTIONS BETWEEN TRUSTS AND OTHER RELATIONS

DEBT

7. The trust is distinguished from a debt in that—

(a) The trust involves specific subject-matter, whereas the debt does not;

(b) The trustee's obligations are equitable, while the debtor's are legal;

(c) The trustee occupies a fiduciary relation, but the debtor does not.

The Trust Requires a Definite Subject

The property which the trustee controls for the benefit of his cestui que trust is always definite property. A debtor does not owe his creditor definite money. He owes him any money. If A. be a trustee for B., A. always owns specific property, as, for example, the Jones farm, or certain five thousand one-dollar bills. A. may have the power under the trust to change the form of the investment, and to buy a bond with the bills originally received; but the bond then becomes the specific subject-matter. On the other hand, if A. borrow $5,000 from B., it is obvious that A. may satisfy his obligation to B. by returning any bills or coin. He need not return the identical bills or coin received from B., nor their substitutes, in case he invests the money so received from B.

The results of this contrast between trust and debt are striking. If the debtor lose any particular article through negligence or accident, he will not be absolved from payment of his debt; but, if the trust property be lost or destroyed without the fault of the trustee, his obligation is wiped out.[1]

Again, each creditor is obliged to share pro rata with his fellow

[1] Shoemaker v. Hinze, 53 Wis. 116, 10 N. W. 86.

creditors all the property of his bankrupt debtor,[3] even though the debtor have in his hands and capable of identification certain specific money lent him or goods sold him. On the other hand, the cestui que trust may take from the assets of the bankrupt trustee the specific trust property, if he can identify it.[3]

The statute of limitations begins to run against the creditor's claim from the origin of the relation of debtor and creditor—i e., from the maturity of the debt—because the sole duty of the debtor is to pay his debt, and that obligation, of course, arose at the due date fixed in the promise to pay. But, by contrast, the statute of limitations does not commence to operate against a trustee until he has repudiated the trust obligation,[4] for, as long as he is carrying out the trust, no cause of action exists against him. A trust may last for fifty years, without a destruction of the cestui's rights, if no repudiation has taken place. A debt will be barred everywhere after the lapse of such a period of time since its maturity. This distinction is based on the difference in the duties of debtor and trustee. In the case of the former, a cause of action exists against him normally; in the case of the latter, abnormally.

A debtor may, with certain exceptions unnecessary to mention here, do as he likes with the money he receives from his creditor, or with his property generally. A trustee will be guilty of the crime of embezzlement, if he convert to his own use the trust funds.[5] The specific nature of the trust property requires him to keep it separate from private use.

Debt a Legal, Trust an Equitable, Obligation

As previously stated, the trust is an obligation resting solely on equitable principles, and originally enforceable only in chancery. In a great variety of ways equity will act upon the trustee, and compel him to do or refrain from doing certain acts. The debtor's duties, however, are legal, and are enforced by an action to recover the amount of the debt ordinarily. Equity may, of course, aid the creditor; but the primary method of enforcement is by legal remedies. When a trustee states his accounts with the cestui, and admits that a certain sum is due him, the trustee may change to a debtor.[6]

No Element of the Fiduciary in Debt

The debtor's obligations are all self-imposed. He agrees to pay the creditor $100 on January 1st. That is his only duty to the

[3] City of Sturgis v. Meade County Bank, 38 S. D. 317, 161 N. W. 327.
[4] Post, § 124.
[4] Post, § 127.
[5] People v. Meadows, 199 N. Y. 1, 92 N. E. 128.
[6] Post, § 116.

creditor. There is no relationship of trust and confidence between debtor and creditor. The law imposes no obligation on the debtor to deal with the creditor with any more than ordinary fairness. The debtor may look out for himself, and take advantage of the creditor, if he can legally do so. In opposition to this the trustee is a fiduciary, whose obligations are not only those which he has voluntarily assumed by express agreement, but also those which the law imposes on him, whether he will or no. Those law-imposed duties are that the trustee treat the cestui with the utmost fairness and frankness, conceal nothing from him, and take no advantage of him. To illustrate: A debtor may buy from his creditor any property which the latter will sell him, and which he (the debtor) can pay for. But a cestui que trust may avoid a sale from himself to his trustee, unless the latter can prove the transaction was absolutely fair and open.[7]

Because of this element of good faith, a trustee is subject to arrest under some statutes making fiduciaries so liable, where a mere debtor would not be.[8]

Practical Distinctions Between Debt and Trust

In the following situations difficulty is sometimes experienced in determining whether there is a debt or a trust:

(a) Where negotiable paper is deposited for collection;

(b) Where agents and factors receive money for their principals;

(c) Where money is delivered to be applied to a specific purpose.

Collection of Negotiable Paper

The cases of negotiable paper deposited for collection may be divided into three classes, namely: (1) Cases where the paper is uncollected at the time the dispute arises, and the contending parties are the depositor of the paper and the collecting bank; (2) cases where the paper has been collected when the rights of the parties are fixed, and the litigants are depositor and collector; (3) cases where the rights of a subagent of the original collector are involved.

The majority of the courts which have considered the first class of cases, namely, those of uncollected paper in the hands of the original collector, have declared the relationship that of principal and agent, and have said that no title passed to the collector by virtue of the deposit of such paper for collection.[9] Little or no at-

[7] Post, § 42.

[8] Code Civ. Proc. N. Y. § 549; Wallace & Sons v. Castle, 14 Hun (N. Y.) 106.

[9] Giles v. Perkins, 9 East, 12; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683; Richardson v. New Orleans

tention seems to have been paid to the form of the indorsement to the collector, whether general and unqualified, or restrictive. This would seem to be an influential factor. An unrestrictive indorsement would pass title to the instrument to the collector, and, since ordinarily he would not also be the beneficial owner, he would seem to be properly a trustee. But if the indorsement were restrictive, in that it was "for collection," title would not pass to the collector, although he would have power to sue on the instrument, and he would be a mere agent.[10] Occasionally the collecting bank, prior to collection, is called a trustee,[11] or a bailee of the paper.[12]

Whether called agent, trustee, or bailee, the result reached by these courts is the same. The depositor may take back the uncollected paper, unless the collector has transferred it to an innocent purchaser for value. Since the property concerned is negotiable paper, it matters not whether the right of the depositor is an equitable or a legal one. Either would be cut off by a negotiation to a bona fide purchaser for value.[13]

In a few cases it has been held that the collector, prior to collection, was a debtor of the depositor of the negotiable paper. In these instances immediate, unconditional credit was given to the depositor for the amount of the paper. In some cases the indorsement was restrictive, "for collection" only,[14] while in others the indorsement was general.[15]

As to the second class mentioned above, namely those cases where the collector has received the money and the contest is between depositor and collector, there is a conflict of authority. It would seem logical that the collecting bank should be regarded as a

Coffee Co., 102 Fed. 735, 43 C. C. A. 583; Balbach v. Frelinghuysen (C. C.) 15 Fed. 675; Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; Bank of America v. Waydell, 187 N. Y. 115, 79 N. E. 857; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; Scott v. Ocean Bank in City of New York, 23 N. Y. 289; Hazlett v. Commercial Nat. Bank, 132 Pa. 118, 19 Atl. 55; Second Nat. Bank of Columbia v. Cummings, 89 Tenn. 609, 18 S. W. 115, 24 Am. St. Rep. 618.

[10] Negotiable Instruments Law, § 37; 1 Daniel, Neg. Inst. (6th Ed.) § 698d.

[11] Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

[12] Beal v. City of Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291.

[13] There is some ambiguity in the discussion of the relationship here existing. Thus, one writer speaks of the collector as an "agent, i. e., trustee" (Ames, Cases on Trusts [2d Ed.] 18, 19), and another calls the collector an "agent or trustee" (Tiffany, Banks and Banking, 28).

[14] First Nat. Bank of Elkhart v. Armstrong (C. C.) 39 Fed. 231; Ayres v. Farmers' & Merchants' Bank, 79 Mo. 421, 49 Am. Rep. 235.

[15] Carstairs v. Bates, 3 Camp. 301; Hoffman v. First Nat. Bank of Jersey City, 46 N. J. Law, 604; Metropolitan Nat. Bank of New York v. Loyd, 90 N. Y. 530.

debtor after collection in most cases, since it does not, in the ordinary instance, keep separate the bills and coins received for the collected paper. As a rule the collecting bank expects to pay the depositor any funds which it has conveniently at hand. It expects to have the right to use the particular bills and coins received as the proceeds of the collection for its own purposes, and to substitute others when payment is made to the depositor. Such incidents are inconsistent with a trust, which is always founded on definite subject-matter. Many courts have held the collector to be a mere debtor after collection.[16]

On the other hand, however, upon varying degrees of evidence of an intent to keep the collected funds separate, it has been held in many cases that the collector was a trustee of the amount collected.[17]

[16] Mackersy v. Ramsays, 9 Clark & F. 818; Bank of Commerce v. Russell, Fed. Cas. No. 884; Nixon State Bank v. First State Bank of Bridgeport, 180 Ala. 291, 60 South. 868; Plumas County Bank v. Bank of Rideout, Smith & Co., 165 Cal. 126, 131 Pac. 360, 47 L. R. A. (N. S.) 552; Gonyer v. Williams, 168 Cal. 452, 143 Pac. 736; Cronheim v. Postal Telegraph-Cable Co., 10 Ga. App. 716, 74 S. E. 78; Citizens' Nat. Bank of Danville, Ky., v. Haynes, 144 Ga. 490, 87 S. E. 399; Tinkham v. Heyworth, 31 Ill. 519; Union Nat. Bank v. Citizens' Bank, 153 Ind. 44, 54 N. E. 97; American Nat. Bank v. Owensboro Savings Bank & Trust Co.'s Receiver, 146 Ky. 194, 142 S. W. 239, 38 L. R. A. (N. S.) 146; Alexander County Nat. Bank v. Conner, 110 Miss. 653, 70 South. 827; Gordon v. Rasines, 5 Misc. Rep. 192, 25 N. Y. Supp. 767; North Carolina Corporation Commission v. Merchants' & Farmers' Bank, 137 N. C. 697, 50 S. E. 308; Commercial & Farmers' Nat. Bank of Baltimore v. Davis, 115 N. C. 226, 20 S. E. 370; Schafer v. Olson, 24 N. D. 542, 139 N. W. 983, 43 L. R. A. (N. S.) 762, Ann. Cas. 1915C, 653; In re Bank of Oregon, 32 Or. 84, 51 Pac. 87; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Bowman v. First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329.

In the following cases an agreement for weekly or other periodic remittances of the collected funds showed clearly that the collector was at liberty to satisfy his obligation with any money, and hence the collector was held to be a debtor after collection; People v. City Bank of Rochester, 93 N. Y. 582; National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031, 7 L. R. A. 852, 15 Am. St. Rep. 515; McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. D. 196, 87 N. W. 974.

[17] American Can Co. v. Williams, 178 Fed. 420, 101 C. C. A. 634; Western German Bank v. Norvell, 134 Fed. 724, 69 C. C. A. 330; State Nat. Bank of Little Rock v. First Nat. Bank of Atchison, Kan., 124 Ark. 531, 187 S. W. 673; Henderson v. O'Conor, 106 Cal. 385, 39 Pac. 786; Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; German Fire Ins. Co. v. Kimble, 66 Mo. App. 370; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; Anheuser-Busch Ass'n v. Morris, 36 Neb. 31, 53 N. W. 1037; Thompson v. Gloucester City Sav. Inst. (N. J. Ch.) 8 Atl. 97; Arnot v. Bingham, 55 Hun, 553, 9 N. Y. Supp. 68; People v. Bank of Dansville, 39 Hun (N. Y.) 187; Warren-Scharf Asphalt Paving Co. v. Dunn, 8 App. Div. 205, 40 N. Y. Supp. 209;

Occasionally a memorandum for separation[18] or a provision for immediate remittance of the collected fund[19] has given more secure basis for the declaration of a trust.

The third situation, under the analysis given above, is that where the collector or agent with whom the paper is originally deposited forwards it to a subagent for collection. Two questions may arise while the subagent bank has the paper or its proceeds, namely: Is the agent bank a debtor or trustee? and is the subagent bank debtor or trustee?

With reference to the first question, it would seem that the agent bank, the original collector, should have no responsibility, either as debtor or trustee, if it has used due care in selecting the subagent, and the latter has in his possession the paper or its proceeds. The agent in such a situation ought not to be held to be a debtor, because he has received no money belonging to the depositor as a result of the collection; nor should he be considered a trustee, because there is no trust res in his hands. Some courts have adopted this view.[20] But others have held the agent bank liable

In re Commercial Bank, 4 Ohio Dec. 108; Mad River Nat. Bank of Springfield v. Melhorn, 8 Ohio Cir. Ct. R. 191; White v. Commercial & Farmers' Bank, 60 S. C. 122, 38 S. E. 453; Piano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; First Nat. Bank v. Union Trust Co. (Tex. Civ. App.) 155 S. W. 989.

In the following cases the collected funds were held to have been trust funds in the hands of the collector, but the trust could not be enforced because of the inability to trace the funds into the assets of the collector: Illinois Trust & Savings Bank v. First Nat. Bank (C. C.) 15 Fed. 858; G. Ober & Sons Co. v. Cochran, 118 Ga. 396, 45 S. E. 382; Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; Frank v. Bingham, 58 Hun, 580, 12 N. Y. Supp. 767: In re Commercial Bank, 4 Ohio Dec. 108; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383.

If the collection is made after the insolvency of the collecting bank, it is held that the agency to collect is revoked and the funds are held in trust. Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, 90 Atl. 369; First Nat. Bank of Raton v. Dennis, 20 N. M. 96, 146 Pac. 948.

[18] First Nat. Bank v. Armstrong (C. C.) 36 Fed. 59.

[19] Philadelphia Nat. Bank v. Dowd (C. C.) 38 Fed. 172, 2 L. R. A. 480; National Butchers' & Drovers' Bank v. Wilkinson, 10 N. Y. St. Rep. 290; Hunt v. Townsend (Tex. Civ. App.) 26 S. W. 310.

[20] First Nat. Bank of Pawnee City v. Sprague, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644; Falls City Woolen Mills v. Louisville Nat. Banking Co., 145 Ky. 64, 140 S. W. 66; Daly v. Butchers' & Drovers' Bank, 56 Mo. 94, 17 Am. Rep. 663; Indig v. National City Bank of Brooklyn, 80 N. Y. 100.

to the depositor as a debtor, upon the failure of the subagent bank.[21]

After the subagent bank has remitted to the agent bank by sending cash or its equivalent, or by crediting the agent bank on an account, the agent bank would seem properly to be held to be a debtor of the depositor, and so many cases have held.[22]

The second question presented under the third class of cases here to be discussed is regarding the relation of the subagent to the depositor. If the subagent has the paper or its proceeds in his hands—that is, has not remitted to the agent or credited the agent —some courts have held the subagent a trustee for the depositor,[23] while others have called the subagent an "agent" of the depositor, and have stated that the title to the paper remained constantly in the depositor.[24] Occasionally the view has been taken that the subagent assumed the position of debtor upon the collection of the paper.[25]

Whatever the name they have applied to the subagent, in a great majority of the cases the courts have allowed the depositor to follow the proceeds of the paper into the hands of the subagent, if capable of identification, and the paper into the hands of all except bona fide purchasers for value. As in the case of the agent bank, so with the subagent, it would seem logically that the subagent should be held to be a trustee, when the form of the indorsement

[21] Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199; Power v. First Nat. Bank, 6 Mont. 251, 12 Pac. 597; St. Nicholas Bank of New York v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665.

[22] Mackersy v. Ramsays, 9 Clark & F. 818; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; Fifth Nat. Bank v. Armstrong (C. C.) 40 Fed. 46; First Nat. Bank v. Armstrong (C. C.) 42 Fed. 193; Briggs v. Central Nat. Bank of New York, 89 N. Y. 182, 42 Am. Rep. 285. The decision in Blair v. Hill, 50 App. Div. 33, 63 N. Y. Supp. 670, that the agent bank became a trustee of the moneys delivered to it by the subagent bank, seems erroneous.

[23] Holder v. Western German Bank, 136 Fed. 90, 68 C. C. A. 554; National Exch. Bank v. Beal (C. C.) 50 Fed. 355; State v. Bank of Commerce of Grand Island, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858.

[24] Manufacturers' Nat. Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193, 2 L. R. A. 699, 12 Am. St. Rep. 598; Bank of Sherman v. Weiss, 67 Tex. 331, 3 S. W. 299. In Gilpin v. Columbia Nat. Bank, 220 N. Y. 406, 115 N. E. 982, L. R. A. 1917F, 864, the depositor sued the subagent bank for its negligence in failing properly to present the note for payment. It was held that the defendant bank was the agent of the first bank and not of the plaintiff depositor, and hence no recovery for defendant's negligence was allowed.

[25] Old Nat. Bank v. German-American Bank, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259; San Francisco Nat. Bank v. American Nat. Bank of Los Angeles, 5 Cal. App. 408, 90 Pac. 558.

was such as to give it title, as in the case of a general indorsement, but should be held a technical agent when the indorsement was restrictive and did not give the subagent title to the paper.

Once the subagent remits properly to the agent or properly credits himself on a joint account, of course, the subagent relieves himself from all obligation to the depositor.

Money Paid to Agents or Factors

Where money is paid to one for the use of another, or as the proceeds of another's property sold, it is sometimes difficult to distinguish trust from debt. The general rule, however, is that such persons as commission agents receiving the proceeds of goods sold,[26] insurance agents collecting premiums,[27] an agent to sell bonds,[28] and a collector of rents[29] are trustees of the money so coming into their hands. But an attorney collecting money for a client is not a trustee, but rather a debtor.[30]

Money Paid for a Special Purpose

Where money or other property is delivered by one to another, to be applied to a special purpose, it is sometimes difficult to ascertain whether the receiver of the property holds the particular thing transferred subject to a trust to apply it to the use named, or whether he becomes the absolute owner of the property, subject merely to a debt or contract obligation. Either result may be effected by the use of appropriate language. Which is attained in any given case is a question of construction.

A transaction frequently resorted to is the payment of money by one to another to enable the latter to pay a bill of exchange or note of the former. It is generally held that such an action creates a trust,[31] although the payment of interest by the receiver of the money, or other exceptional circumstance, has been held to make the receiver merely a debtor.[32]

[26] Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; Wallace & Sons v. Castle, 14 Hun (N. Y.) 106; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 844.

[27] Dillon v. Connecticut Mut. Life Ins. Co., 44 Md. 386; Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693.

[28] Van Alen v. American Nat. Bank, 52 N. Y. 1.

[29] Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.

[30] Jackson v. Moore, 72 App. Div. 217, 76 N. Y. Supp. 164.

[31] Farley v. Turner, 26 L. J. Ch. 710; Massey v. Fisher (C. C.) 62 Fed. 958; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; People v. City Bank of Rochester, 96 N. Y. 32; Rabel v. Griffin, 12 Daly (N. Y.) 241.

[32] Ex parte Broad, 13 Q. B. Div. 740; In re Barned's Banking Co., 39 L. J. Ch. 635; Francis v. Gisborn, 30 Utah, 67, 83 Pac. 571.

Money left for investment has generally been considered a trust fund,[33] unless the element of interest payment pending actual investment indicated a debt.[34] A delivery of a check and cash to a bank, the sum represented thereby to be transmitted to Italy and there placed to the credit of the depositor in a bank, has been held to create a trust.[35]

The receipt of money under a promise to discharge the payor's debt to a third person has sometimes been held to create a trust,[36] and in other instances to establish a mere contract obligation.[37]

A deposit to cover advances may be construed as either a debt[38] or a trust,[39] dependent on the peculiar circumstances of each case.

The payment of interest on the amount paid usually indicates a debt, but the presumption arising from such payment may be overcome by other features of the case.[40]

Whether the payee of the money is a debtor or trustee ought to depend in each case upon the presence or absence of intent to keep the money paid separate and to apply the particular bills and coins received to the use agreed upon. If any money may be so applied, there is no res on which to base the trust, and a debt or contract obligation alone will be present.

The same parties may at different times sustain the relation of debtor and creditor and trustee and cestui que trust,[41] as where a railroad company becomes a debtor on the declaration of a dividend and changes to a trustee upon the placing of an amount sufficient to pay the dividend in a special deposit in a bank.[42]

[33] Hitchcock v. Cosper, 164 Ind. 633, 73 N. E. 264; Harrion v. Smith, 83 Mo. 210, 53 Am. Rep. 571; Rusling v. Rusling, 42 N. J. Eq. 594, 8 Atl. 534; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Merino v. Munoz, 5 App. Div. 71, 38 N. Y. Supp. 678; Keller v. Washington, 83 W. Va. 659, 98 S. E. 880.

[34] Pittsburgh Nat. Bank of Commerce v. McMurray, 98 Pa. 538.

[35] Legniti v. Mechanics & Metals Nat. Bank of New York, 186 App. Div. 105, 173 N. Y. Supp. 814.

[36] Michigan S. S. Co. v. Thornton, 136 Fed. 134, 69 C. C. A. 132.

[37] Steele v. Clark, 77 Ill. 471.

[38] Butler v. Sprague, 66 N. Y. 362.

[39] Roca v. Byrne, 145 N. Y. 162, 39 N. E. 812, 45 Am. St. Rep. 599.

[40] City of Centralia v. United States Nat. Bank of Centralia, Wash. (D. C.) 221 Fed. 755; Blair v. Follansbee, 67 Ill. App. 144; Price v. Dawson, 111 Mich. 279, 69 N. W. 500; Gutch v. Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473; Budd v. Walker, 113 N. Y. 637, 21 N. E. 72; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; Sam v. Ludtke (Tex. Civ. App.) 203 S. W. 98. In re Eshbach's Estate, 197 Pa. 153, 46 Atl. 905, is a peculiar case.

[41] Brackett's Adm'r v. Boreing's Adm'r, 131 Ky. 751, 110 S. W. 276, 33 Ky. Law Rep. 292; In re Central Trust Co., 1 Ohio N. P. 169.

[42] In re Le Blanc, 14 Hun (N. Y.) 8.

BAILMENT

8. A bailment differs from a trust—

(a) In the nature of the rights of the person intrusted with the property, the bailee having no title to the thing bailed;

(b) In the nature of the property which may be its subject-matter;

(c) In the nature of the rights of the person intrusting the property, the bailor retaining full ownership of the thing bailed.

Similarities in Two Relations

Bailment and trust are in some respects similar. In each the owner of property places it in the control of another, usually for a temporary purpose. Some definitions of bailment would seem to make it a form of trust.[43]

Distinctions; The One Trusted

But there are marked differences. The most prominent is the contrast between the rights with which the holder of the property is invested. The trustee is the owner of the subject-matter of the trust. On the other hand, the bailee is not the holder of any title to the bailed property. He does not own it. His rights over it are confined to temporary rights of possession. He may keep it for a time and perhaps during that time have the use and benefit of it; but under no circumstances can he have a permanent right to enjoy the property. "A bailment exists whenever the ownership and the possession of specific corporeal chattels are lawfully severed from each other. In a trust of personal property, the legal ownership passes to the trustee, and he has something more than bare possession. In cases of bailment the legal ownership is in the bailor, and the bailee simply has possession, which may or may not be for some specific purpose." [44]

This distinction may be illustrated. The legal ownership of the

[43] "Bailment, from the French 'bailler,' to deliver, is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee." Blackstone's Com. 451. The following definition of bailment would seem preferable: "A bailment is the transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the property is to be redelivered or delivered over to a third person." Hale, Bailments and Carriers, 5, 6.

[44] Doyle v. Burns, 123 Iowa, 488, 497, 99 N. W. 195. Thus the intended grantee in a deed, who leaves money with a bank to be paid to the grantor on the presentation of the deed, does not create a trust, but rather is a bailor. Citizens' Bank & Trust Co. v. Hale (Okl.) 177 Pac. 366.

trustee gives him capacity to pass to a bona fide purchaser for value a title freed from the trust. But ordinarily, if a bailee attempt to sell the bailed goods to another, even though that other give value and in good faith consider the bailee the owner, the purchaser will acquire no title as against the bailor.[45] The bailee's rights are not those of ownership, and he cannot transfer such rights to another.[46]

Property Intrusted

Bailment is concerned exclusively with personal property, while a trust may have as its subject any property, real or personal.

Person Intrusting

The discussion of the rights of bailee and trustee will have suggested corresponding differences between the interests of bailor and cestui que trust, namely, that the bailor is the legal owner of the bailed goods, while the cestui que trust is regarded as having merely a claim against the trustee, or at most an equitable interest in the trust res. It only remains to add that the bailor's rights are legal rights, enforceable only by courts of law, or law divisions of courts having double jurisdiction, while the cestui's rights are equitable. Occasionally it has been important for jurisdictional reasons to determine whether a relationship was a trust or a bailment.[47]

The degree of care which the cestui que trust may demand of his trustee is uniform, and is that which a reasonably prudent man would exercise in the administration of his own business. The bailor may expect extraordinary, ordinary, or slight care, dependent on the character of the bailment, whether for the sole benefit of the bailee, for mutual benefit, or for the sole benefit of the bailor.

EQUITABLE CHARGE

9. An equitable charge is distinguished from a trust by—

(a) Its lack of fiduciary relationship;

(b) The presence in it of beneficial ownership.

[45] Exception must be made in the cases of sales by sellers left in possession, sales within the factors' acts, and sales in market overt in England. See Uniform Sales Act, §§ 23, 25; English Sale of Goods Act, § 22.

[46] For a discussion of the distinction between bailment and trust, see Maitland, Equity, 45–48.

[47] Ashley's Adm'rs v. Denton, 1 Litt. (Ky.) 86. See, also, Ogden v. Larrabee, 57 Ill. 389, in which it was held that the transfer of notes and mortgages, with full power to collect the same, for the purpose of discharging a debt and returning the balance, created a trust, and not a pledge; the latter being one form of a bailment.

Similarities

An equitable charge bears many striking resemblances to a trust. In both relations the holder of the property is seized of a title, generally legal. In both the claimant or beneficiary has rights enforceable in equity.[48] In both a purchaser of the property with notice of the burden attached will hold it subject to the claim of the beneficiary. Thus, if A. devise land to B., "subject to the payment of an annuity of $500 to C.," B. will hold subject to equitable rights to the enjoyment of $500 income resting in C., just as if A. had devised the land to B., "in trust to pay C. $500 a year." In the first instance, as well as in the second, X., a purchaser with knowledge of the terms of the devise to B., will take it subject to the burden in favor of C.[49]

Dissimilarities

But the relations are not equivalent.[50] A trustee is a fiduciary. He alone can perform the duties of the trust. To transfer the trust property to another, except in exercise of a power of sale, would be a breach of the trust. In the ordinary case the trustee is expected to retain the trust property and perform the trust duties personally. By contrast, the holder of property subject to a charge has no personal relation to the beneficiary of the charge. He may sell the property to a stranger, and pass on the burden of paying the charge, in so far as the liability of the land to pay is concerned. Such an act will be no breach of any duty to the beneficiary of the charge. And so, too, the holder subject to a charge may deal with the charged property and with the beneficiary of the charge as with a stranger's property and a stranger, buying in the charge

[48] In the case of an equitable charge, the beneficiary of the charge, if the instrument show such intent, may have a remedy against the holder of the property by way of an action at law, as well as the equitable claim against the property. The acceptance of the gift with a charge attached raises an implied promise, under some circumstances, to pay the amount of the charge. Williams v. Nichol, 47 Ark. 254, 1 S. W. 243; Lord v. Lord, 22 Conn. 595; Adams v. Adams, 14 Allen (Mass.) 65; Birdsall v. Hewlett, 1 Paige (N. Y.) 32, 19 Am. Dec. 392; Harris v. Fly, 7 Paige (N. Y.) 421; Kelsey v. Western, 2 N. Y. 500; Gridley v. Gridley, 24 N. Y. 130; Loder v. Hatfield, 71 N. Y. 92; Brown v. Knapp, 79 N. Y. 136; Redfield v. Redfield, 126 N. Y. 466, 27 N. E. 1032.

[49] Wolfe v. Croft, 11 East. L. R. (Can.) 532; Harris v. Fly, 7 Paige (N. Y.) 421. But a purchaser of the land from the holder subject to a charge personally binding on such holder is entitled to have the remedies against such holder exhausted before relief is sought in equity against the property. Kelsey v. Western, 2 N. Y. 500.

[50] For a discussion of the distinctions between equitable charges and trusts, see 3 Pomeroy, Eq. Jurisprudence (3d Ed.) § 1033, note; 19 Am. & Eng. Encyc. Law (2d Ed.) 1343.

and taking any advantage of the beneficiary which is lawful. A sale of the trust property to the trustee, on the other hand, is voidable by the cestui que trust, and the trustee must show the utmost good faith in order to sustain the sale.

In the second place, the holder subject to an equitable charge is a beneficial holder; whereas the trustee is not. If B. receive property subject to a charge of $500 a year in favor of C., and the property produces $1,000 a year, B. may retain the surplus $500 for his own use. Contrariwise, if B. were a trustee of the same property for the purpose of paying C. $500 a year, B. could not keep the extra $500, but would be obliged to hold it for the benefit of the creator of the trust, or for his heirs or next of kin, if the settlor were dead. The holder subject to a charge is entitled to all benefits from the property beyond the amount necessary to satisfy the charge. The trustee is never entitled to any beneficial use of the trust property.[51]

It is often important to decide whether a relation is a trust or an equitable charge, because of the statute of limitations.[52] The statute does not begin to run against the cestui's rights until there has been a repudiation of the trust; but the statute commences to operate against an equitable charge from the time when it becomes due.

No set formula will always create a charge and refute the notion of a trust. The courts seek the creator's intent, whether it be to make a beneficial gift of the property, subject to an incumbrance, or to place upon the shoulders of the recipient of the property a fiduciary relation.[53]

[51] King v. Denison, 1 Ves. & B. 260; In re West, [1900] 1 Ch. 84; Woodbury v. Hayden, 211 Mass. 202, 97 N. E. 776.

[52] Hodge v. Churchward, 16 Sim. 71; Loder v. Hatfield, 71 N. Y. 92; Merton v. O'Brien, 117 Wis. 437, 94 N. W. 340.

[53] In the following cases the wording was construed to create an equitable charge: King v. Denison, 1 Ves. & B. 260 (subject to payment of annuities); Wood v. Cox, 2 Myl. & C. 684 ("trusting and wholly confiding that he will act in strict conformity with my wishes"); Hodge v. Churchward, 16 Sim. 71 (paying £10 a year); Wolfe v. Croft, 11 East. L. R. (Can.) 532; Merchants' Nat. Bank v. Crist, 140 Iowa, 308, 118 N. W. 394, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267 (support made a lien); Lang v. Everling, 3 Misc. Rep. 530, 23 N. Y. Supp. 329 ("upon the express condition that"); Loder v. Hatfield, 71 N. Y. 92 ("on the following conditions and proviso"); Chew v. Sheldon, 214 N. Y. 344, 108 N. E. 552, Ann. Cas. 1916D, 1268 (subject to a duty to support daughter); Dixon v. Helena Soc. of Free Methodist Church of North America (Okl.) 166 Pac. 114 (direction to a devisee to pay a legacy).

In the following instances the courts found a trust: Buffinton v. Maxam, 140 Mass. 557, 5 N. E. 519 (for the support of); Baker v. Brown, 146 Mass. 369, 15 N. E. 783 (subject to the condition that); Woodbury v. Hayden, 211

ASSIGNMENT OF A CHOSE IN ACTION

10. An assignment of a chose in action at common law differs from a trust in which the subject-matter is a chose in action, in that—

(a) The assignee's remedy is solely at law, while the cestui que trust's is equitable;

(b) The assignor's duty is purely negative, whereas a trustee always has some positive duty.

Similarities

At common law a chose in action was not assignable, in the sense that the assignee could sue upon it in his own name. He could enforce it only by an action in the name of the assignor. The legal title to the chose in action remained in the assignor, while the assignee received merely a power of attorney to enforce the claim in the name of the assignor. In nearly all American jurisdictions statutes requiring actions to be brought in the name of the real party in interest, or making choses in action assignable, now enable the assignee to sue in his own name.[54]

Yet recent decisions in a few states indicate that in some cases it is still necessary for the assignee to sue in his assignor's name.[55]

Mass. 202, 97 N. E. 776 (to be used as far as necessary for the support and maintenance of); Pierce v. McKeehan, 3 Watts & S. (Pa.) 280 (subject to the maintenance of); Hoyt v. Hoyt, 77 Vt. 244, 59 Atl. 845 (on condition that); Barnes v. Dow, 59 Vt. 530, 10 Atl. 258.

In the following cases neither an equitable charge nor a trust was held to exist, the recipient of the property taking it absolutely: Zimmer v. Sennott, 134 Ill. 505, 25 N. E. 774 (upon condition that); Dee v. Dee, 212 Ill. 338, 72 N. E. 429 (for the benefit of); Crandall v. Hoysradt, 1 Sandf. Ch. (N. Y.) 40 (for the maintenance of).

[54] Reios v. Mardis, 18 Cal. App. 276, 122 Pac. 1091; Rambo v. Armstrong, 45 Colo. 124, 100 Pac. 586; Birdsall v. Coon, 157 Mo. App. 439, 139 S. W. (Mo.) 243; Sternberg & Co. v. Lehigh Val. R. Co., 80 N. J. Law. 468, 78 Atl. 1135; N. Y. Code Civ. Proc. § 449; Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works, 62 Tex. Civ. App. 422, 131 S. W. 415; Carozza v. Boxley, 203 Fed. 673, 122 C. C. A. 69 (construing a Virginia statute); Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430. In two important states the change was made but recently. See Gilman v. American Producers' Controlling Co., 180 Mass. 319, 62 N. E. 267 (construing St. 1897, c. 402), and Neyens v. Hossack, 142 Ill. App. 327 (construing section 18 of Practice Act of 1907 [Laws 1907–08, p. 448]).

[55] Snead v. Bell, 142 Ala. 449, 38 South. 259 (1904); Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714 (1908); Durant Lumber Co. v. Sinclair & Simms Lumber Co., 2 Ga. App. 209, 58 S. E. 485 (1907); Croyle v. Guelich, 35 Pa. Super. Ct. 356 (1908); Martin & Garrett v. Mask, 158 N. C. 436, 74 S. E. 343, 41 L. R. A. (N. S.) 641 (1912).

Wherever such is the case, the assignor resembles a trustee of a chose in action, in that he holds the title to property the beneficial interest in which belongs to another. Both assignor and trustee own something, which they are not entitled to use for their benefit, but solely for the benefit of another, namely, the assignee or the cestui que trust.

Distinctions

But, while both assignee and cestui que trust are entitled to the benefit of property, the title to which is in another, their methods of obtaining that benefit differ. The cestui que trust's right is equitable. The assignee's interest is legal, namely, a power of attorney to sue on the chose in action in a court of law, and it is only in cases where the assignor threatens to collect the claim for his own benefit, or where some other extraordinary circumstance endangers the collection by the assignee suing at law in the name of the assignor, that the assignee may resort to equity.[56]

Secondly, the assignor has the sole duty of refraining from action which will prevent the collection of the chose in action by the assignee. The assignor has no positive duty. On the other hand, in active trusts the trustee has the duty of collection of the chose in action for the cestui que trust, and, if the trustee refuse to collect, the cestui may go into equity and join the debtor and trustee as defendants.[57] In passive trusts the trustee has at least the positive duty of conveyance to the beneficiary.

EXECUTORSHIP

11. An executor[58] differs from a trustee, in that—

(a) The rights of the legatee against the executor are legal, enforced through a probate or law court, while the cestui que trust's remedy is equitable;

(b) The executor's duties toward the property in his control are temporary duties of collection, conversion into money, and disbursement, whereas the trustee has more permanent functions of administration and management.

Executors and trustees often bear great likenesses to each other because of the title which each holds to definite property, the

[56] Hammond v. Messenger, 9 Sim. 327; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; Walker v. Brooks, 125 Mass. 241; Carter v. United Ins. Co., 1 Johns. Ch. (N. Y.) 463.

[57] Thomassen v. Van Wyngaarden, 65 Iowa, 687, 22 N. W. 927; Fogg v. Middleton, 2 Hill Eq. (S. C.) 591.

[58] The position of administrators is identical with that of executors in this

right to the enjoyment of which is in another. Indeed, an executorship is sometimes called in a nontechnical sense a trust.[59] If A. bequeaths $5,000 to B. and appoints C. his executor, C. becomes, upon the death of A., the holder of the legal title to the $5,000, but subject to the right on B.'s part to have the $5,000 paid over to him in due time. If A. had, on the other hand, by his will created C. a trustee of $5,000 for B., C. would likewise hold the legal title to the $5,000, but subject to a right on B.'s part that it be used for B.'s benefit. Often it is difficult to tell whether the person who is to deal with the property for another's benefit is merely an executor, or has a double capacity, and has trust duties to perform after the completion of his executorial functions, or alongside such functions.

Distinctions

If the officer be an executor, the rights of the claimant against him are legal, and will be enforced through probate or law courts; while if the officer be a trustee, as we have seen, it is only principles of the Court of Chancery which enable the claimant, the cestui que trust, to obtain the benefit of the property.

Whether the officer in question is an executor or a trustee can only be told by an examination of the work which the testator expects him to perform. An executor is required only to collect his testator's property, reduce it to cash, so far as is necessary for the payment of debts and legacies, and pay the debts and legacies. An executor is not ordinarily expected to invest the funds, collect the income, and make periodic payments over a long series of years. Such duties of more or less permanent administration mark the trustee.[60] "The distinction between the office of executor and that

regard, and what is here said of the latter will apply equally to the former. There is apt to be little doubt, however, as to whether a given officer is an administrator or a trustee, since, if a man die intestate, there will be no opportunity for a declaration of a trust. For a case in which an administrator was held to be a true trustee, see Rubey v. Barnett, 12 Mo. 3, 49 Am. Dec. 112.

[59] In re Crawford's Estate, 21 Ohio Cir. Ct. R. 554, 563.

[60] In the following cases the duties of officers appointed by will were considered for the purpose of determining whether a trustee or an executor had been created: Jones v. Broadbent, 21 Idaho, 555, 123 Pac. 476; Dingman v. Beall, 213 Ill. 238, 72 N. E. 729; Fenton v. Hall, 235 Ill. 552, 85 N. E. 936; Drake v. Price, 5 N. Y. 430; In re Leonard, 168 App. Div. 12, 153 N. Y. Supp. 852; Teel v. Hilton, 21 R. I. 227, 42 Atl. 1111.

The trust does not merge in the executorship because of the union of both offices in the same person. West v. Bailey, 196 Mo. 517, 94 S. W. 517. If a will calls for the performance of duties properly pertaining to a trustee and none is appointed, the executor will be considered a trustee. Bean v. Commonwealth, 186 Mass. 348, 71 N. E. 784; In re Fritsch, 80 Misc. Rep. 385, 142

of a testamentary trustee lies in the duties imposed upon them respectively. The duty of an executor as such, and his duty as a trustee of an express trust under the will, are entirely different. As executor, it is his duty to collect the property, and pay the debts and general legacies; while, as trustee, it is his duty to invest and manage the particular fund or trust estate in accordance with the directions of the will." [61]

It is often of material importance to define the officer accurately as trustee or executor, since the statute of limitations has different application with respect to the two relations,[62] and the powers of trustees are joint, whereas one executor may act for all.[63]

AGENCY

12. Agency and trust resemble each other, in that both are relations of trust and confidence. Their points of difference are:

(a) That an agent is ordinarily not the owner of property for the benefit of his principal, while a trustee always holds the title to property for his cestui que trust;

(b) That agency is generally a personal relation, dependent on the will and continued existence of both parties, whereas a trust is ordinarily an impersonal, indestructible relation;

(c) That the agent is a mere instrument in the hands of the principal, and incurs no personal responsibility when the agency is disclosed, but the trustee binds himself personally by his official contracts.

Points of Similarity

It is probable that both agency and trust arose from the same ill-defined intermediary relation.[64] Agency was molded by the courts of law and received one set of characteristics. The trust was fostered by chancery and developed along different lines. But, though

N. Y. Supp. 555. Where one person is executor and trustee, and the executor's duties cease and those of trustee begin, no formal transfer from one officer to the other is necessary. Goodsell v. McElroy Bros. Co., 86 Conn. 402, 85 Atl. 509. Where no time is fixed for the change from executorship to trusteeship, the duties will be presumed to be exercised at the same time. In re McDowell, 178 App. Div. 243, 164 N. Y. Supp. 1024.

[61] Redfield, Surrogates' Courts (7th Ed.) § 514.

[62] Scott v. Jones, 4 Clark & F. 382; Maitland, Equity, 48.

[63] Pease v. National Lead Co., 162 App. Div. 766, 147 N. Y. Supp. 989.

[64] "The germ of agency is hardly to be distinguished from the germ of another institution, which in our English law has an eventful future before it, the 'use, trust, or confidence.'" 2 Pollock & Maitland, History of English Law, 226.

wide apart now, each possesses the element of trust and confidence. Each is a fiduciary relation. Both agents and trustees are placed in positions of intimacy, where it is easy for them to take advantage of those who have trusted them. Because of this fiduciary element, agents and trustees are under a common prohibition against acting for their private interests when managing the affairs of those for whom they act. For example, neither can purchase the property which is the subject of his dealings, if the principal or cestui que trust objects.[65] And they are classed together as "fiduciaries" under statutes making such persons liable to arrest in given cases.[66] This common feature has led some authors to confuse the two relationships,[67] and others to call the agent a "quasi trustee";[68] but the distinctions stated below show good reasons for keeping them separate.

Points of Difference

It has been seen that an essential feature of the trust is the ownership by the trustee of property for the benefit of the cestui que trust. The agent, on the other hand, need own no property. He acts for his principal, and often cares for, or transports, or sells property; but it is ordinarily[69] property to which the legal and equitable titles are in the principal.

A trust is indestructible and irrevocable by its settlor, in the absence of a power of revocation expressly reserved.[70] Once a trust is fully created, it must continue throughout the term provided. The death of the settlor or of the trustee will not affect the life of the trust.[71] If the latter die, a new trustee will succeed him. On the contrary, an agency is revocable at the option of the principal, unless it be coupled with an interest, and is revoked by the death of either party.[72] The personality of the particular parties with

[65] Bain v. Brown, 56 N. Y. 285; Copeland v. Mercantile Ins. Co., 6 Pick. (Mass.) 198; Story, Agency (9th Ed.) § 211.

[66] Code Civ. Proc. N. Y. § 549.

[67] "The terms 'trustee' and 'agent' are frequently used in a loose way, as though those terms marked off absolutely distinct and separate duties and liabilities. All trustees, however, are agents; but all agents are not trustees. A trustee is an agent and something more." Ewell's Evans on Agency, 349.

[68] Marvin v. Brooks, 94 N. Y. 71.

[69] There seems to be no reason why a principal may not transfer the legal title to property to his agent for the purposes of the agency; but such agencies are not common, and the courts would probably be apt to declare a trust created.

[70] Kraft v. Neuffer, 202 Pa. 558, 52 Atl. 100.

[71] Lyle v. Burke, 40 Mich. 499.

[72] Viser v. Bertrand, 16 Ark. 296; Rowe v. Rand, 111 Ind. 206, 12 N. E. 377; Flaherty v. O'Connor, 24 R. I. 587, 54 Atl. 376.

whom the relation begins is of the essence, and no others can be substituted therefor.

Furthermore, the agent, contracting in the name of his principal, incurs no personal responsibility for the performance of his contracts. The trustee is personally liable upon contracts made in the performance of the trust, though he has the right of indemnity, and the cestui que trust is not responsible on such contracts.[73] The agent is a mere tool or instrument in the principal's hands, but the trustee is a separate, responsible party.

It should be noticed that the principal's rights against the agent are legal rights, and that ordinarily his remedy is in a court of law.[74] The cestui's rights are equitable.

Frequent occasions arise for making this distinction between trust and agency.[75]

GUARDIANSHIP

13. Guardianship resembles trusteeship, in that it is a fiduciary relation, but it is distinguished by the guardian's lack of title to the property concerned.

Guardians (sometimes called committees or curators) of infants, spendthrifts, and incompetents resemble trustees by virtue of the

[73] Taylor v. Davis, 110 U. S. 330, 335, 4 Sup. Ct. 147, 28 L. Ed. 163; Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782; Hartley v. Phillips, 198 Pa. 9, 47 Atl. 929.

[74] A principal may, however, obtain an accounting from his agent in equity. Warren v. Holbrook, 95 Mich. 185, 54 N. W. 712, 35 Am. St. Rep. 554; Marvin v. Brooks, 94 N. Y. 71.

[75] In the following cases the question was one of revocation: Viser v. Bertrand, 16 Ark. 296; Rowe v. Rand, 111 Ind. 206, 12 N. E. 377; Lyle v. Burke, 40 Mich. 499. In others the problem was one of personal liability by agent or trustee. Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782; Hartley v. Phillips, 198 Pa. 9, 47 Atl. 929; Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163. In Coggeshall v. Coggeshall, 2 Strob. (S. C.) 51, the occasion for distinction was a question of evidence, while in Weer v. Gand, 88 Ill. 490, the preference of a claim against an estate depended upon the distinction between agency and trust.

That the officer is called a "trustee" has not prevented the courts from finding that he was in fact an agent. Viser v. Bertrand, 16 Ark. 296; Rowe v. Rand, 111 Ind. 206, 12 N. E. 377.

Where A. sent a check to B., payable to the order of B., to be used in paying an assessment against realty, and B. deposited it to his own credit and gave a clerk his own check to pay the assessment, and the clerk embezzled the proceeds of this second check; and thereafter A. and B. died; it was held that B. was not a trustee, but a mere agent, and the agency was revoked by death. Title Guarantee & Trust Co. v. Haven, 214 N. Y. 468, 108 N. E. 819.

relation of trust and confidence which they sustain to their wards. Both guardians and trustees control property of others, toward whom the most scrupulous honesty and good faith must be observed. The guardian, as the trustee, when acting officially, must act solely for his beneficiary and never in his own interest. If a guardian purchase outstanding claims against his ward's property, for example, he can derive no benefit therefrom. The purchase will inure to the benefit of the ward.[76]

A guardian is sometimes said to be a strict trustee.[77] But the better view in America is that the guardian has no title to the property of his ward, but only a right to its possession and a power to deal with it in certain ways.[78]

The lack of title to the property of his ward distinguishes the guardian from the true trustee, since the latter always holds the title to some property for the benefit of his cestui.

Guardianships are dealt with largely in courts of probate or surrogate's courts, whereas trusts are the special province of chancery.

POWERS

14. A beneficial power bears no resemblance to a trust. A power in trust is a trust in which the trust res is a power to dispose of property.

Powers are "beneficial" and "in trust." A power is beneficial "where no person other than the grantee has, by the terms of its

[76] Lee v. Fox, 6 Dana (Ky.) 171, 176.

[77] Eversley, Domestic Relations (2d Ed.) 659; Tiffany, Persons and Domestic Relations, 319; Schouler, Domestic Relations (5th Ed.) § 322. "The view I take of this case is that the relation of guardian and ward is strictly that of trustee and cestui que trust. I look on it as a peculiar relation of trusteeship, and this appears from the case of Duke of Beaufort v. Berty. A guardian is not only a trustee of the property, as in an ordinary case of trustee, but he is also the guardian of the person of the infant, with many duties to perform, such as to see to his education, and maintenance." Mathew v. Brise, 14 Beav. 341, 345.

[78] Longmire v. Pilkington, 37 Ala. 296, 297; Welles v. Cowles, 4 Conn. 189, 10 Am. Dec. 115; Muller v. Benner, 69 Ill. 108; Hutchins v. Dresser, 26 Me. 76, 78; Moore v. Hazelton, 9 Allen (Mass.) 102, 104; Manson v. Felton, 13 Pick. (Mass.) 206, 211; Rollins v. Marsh, 128 Mass. 116, 118; Grist v. Forehand, 36 Miss. 69; Judson v. Walker, 155 Mo. 166, 55 S. W. 1083; Seilert v. McAnally, 223 Mo. 505, 515, 122 S. W. 1064, 135 Am. St. Rep. 522; Newton v. Nutt, 58 N. H. 599, 601; McDuffie v. McIntyre, 11 S. C. 551, 560, 32 Am. Rep. 500; Woerner, The American Law of Guardianship, 172. But see McColl v. Weatherly, 5 Strob. (S. C.) 72; Hunter v. Lawrence's Adm'r, 11 Grat. (Va.) 111, 62 Am. Dec. 640. In the following cases the right of the guardian

creation, any interest in its execution." [79] A power is in trust when another than the grantee of it is entitled to any benefit from its execution.[80] It is obvious that a beneficial power has no likeness to a trust. The holder of the power has a right which exists solely for his own benefit. He is no more like a trustee than the absolute owner of a horse. Thus, if A. be given a life estate in real property, with a general power of disposal, by deed or will, A.'s power is his own property, as much as his life estate.

The donee of a power in trust is a trustee. He is not vested with the legal title to corporeal property for the benefit of another, but he is intrusted with an incorporeal right over property for the benefit of another. Thus, if A. devise real property to B. for life, subject to a power in B. to dispose of the property by will in favor of B.'s children, B. is the holder of a power in trust, and the beneficiaries are his children. B. is a trustee, just as he would be if the legal title in fee to the land had been given him to hold for the benefit of his children.

Many cases have arisen in which the courts have had some difficulty in deciding whether a given instrument created a trust or a power; [81] but the difficulty has been in ascertaining the intent of the testator ordinarily, and not in keeping clear the nature of trusts and powers.

PROMOTERS AND OFFICERS OF CORPORATIONS.

15. Promoters and officers of corporations are in relations of trust and confidence toward the stockholders and the corporation, but are not technical trustees for either the stockholders or corporation, because they do not hold title to any specific property to the benefit of which the latter are entitled.

is said to be a power coupled with an interest: Lincoln v. Alexander, 52 Cal. 482, 28 Am. Rep. 639; Van Doren v. Everitt, 5 N. J. Law, 528, 8 Am. Dec. 615; People v. Byron, 3 Johns. Cas. (N. Y.) 53; Pepper v. Stone, 10 Vt. 427.

[79] New York Real Property Law (Consol. Laws, c. 50) § 136.

[80] New York Real Property Law (Consol. Laws, c. 50) §§ 137, 138.

[81] In re Campbell's Estate, 149 Cal. 712, 87 Pac. 573; Allen v. McFarland, 150 Ill. 455, 37 N. E. 1006; Thieme v. Zumpe (Ind.) 51 N. E. 86; Haug v. Schumacher, 166 N. Y. 506, 60 N. E. 245; Post v. Hover, 33 N. Y. 593; Neff's Ex'rs v. Neff's Devisees, 3 Ohio Dec. 75; Manierre v. Welling, 32 R. I. 104, 78 Atl. 507, Ann. Cas. 1912C, 1311.

Promoters

Promoters of corporations have sometimes been loosely called "trustees" for the corporation to be organized or its stockholders.[82] The promoter, like the trustee, is no doubt a fiduciary. He occupies a position of trust and confidence, where he has unusual opportunities to take advantage of others, and where he is prohibited from acting for his individual interest in any way.[83] But he is not a technical trustee. He holds title to no definite property for the benefit of others. The corporation is not yet in existence. He cannot be a trustee for it. He does not hold any definite property for the prospective stockholders' benefit. Such property as the promoters become the owners of, in preparation for the organization of the corporation, they own absolutely.[84] Their position seems to be that of "anticipatory" agents.[85]

The promoter may become a trustee for stockholders or a corporation. Thus, if he make a secret profit for himself out of transactions with the corporation, equity will fasten a constructive trust upon such profits in favor of the stockholders.[86] But such a trust arises out of wrongdoing by the promoters. In their normal relation, promoters are not in any true sense trustees.

Officers

Directors, trustees, and other officers of corporations are often spoken of by judges and legal writers as "trustees," or as in a

[82] Central Trust Co. v. East Tennessee Land Co. (C. C.) 116 Fed. 743; Yeiser v. United States Board & Paper Co., 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Wills v. Nehalem Coal Co., 52 Or. 70, 96 Pac. 528; Jordan & Davis v. Annex Corporation, 109 Va. 625, 64 S. E. 1050, 17 Ann. Cas. 267; Mangold v. Adrian Irr. Co., 60 Wash. 286, 111 Pac. 173. See Wilgus, Corporations and Express Trusts as Business Organizations, 13 Mich. Law Rev. 205; Maitland, Collected Papers, vol. 3, p. 321.

[83] Goodwin v. Wilbur, 104 Ill. App. 45; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Torrey v. Toledo Portland Cement Co., 158 Mich. 348, 122 N. W. 614; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; Goodman v. White, 174 N. C. 399, 93 S. E. 906.

[84] Reynolds v. Title Guaranty Trust Co., 196 Mo. App. 21, 189 S. W. 33; Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762; Alger, Law of Promoters, § 21.

[85] Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762; 1 Thompson on Corporations (2d Ed.) § 103; 2 Cook on Corporations (6th Ed.) § 651; 1 Clark & Marshall on Priv. Corp. § 110b.

[86] Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Groel v. United Electric Co. of New Jersey, 70 N. J. Eq. 616, 61 Atl. 1061; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; Shawnee Commercial & Savings Bank v. Miller, 24 Ohio Cir. Ct. R. 198; Pietsch v. Milbrath, 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, 68 L. R. A. 945, 107 Am. St. Rep. 1017.

"trust relation," or as "charged with a trust." [87] But they are not technical trustees. They lack wholly the element of property ownership. The corporation itself is holder of the title to the property with which the officers have to do. The officers have no equitable or legal ownership.[88]

Directors, trustees, and other corporate officers are fiduciaries, as are agents, executors, guardians, and strict, technical trustees. As corporate officers they owe a duty of extraordinary good faith to the stockholders, because of the peculiar intimacy of the relations and the ease with which the officers could take advantage of the stockholders. The officers must act solely for the interest of the stockholders, as the trustee must work solely for the benefit of his cestui.[89] But, aside from this fiduciary element, the two relations are not similar.

Officers of corporations, like promoters, may become trustees in a technical sense for the stockholders, if they are guilty of wrongdoing which results in a secret profit to themselves. Equity will declare the officers constructive trustees of such unlawful profits. But the corporate officer who performs his duty is not a technical trustee.

WILLS

16. A trust which provides for benefits to commence at the death of the settlor, and in which a power of revocation is reserved to the settlor, differs from an absolute devise or bequest, in that the rights of the cestui que trust arise upon the execution and delivery of the trust deed, whereas the rights of the legatee or devisee arise only at the death of the testator.

[87] Jackson v. Ludeling, 88 U. S. (21 Wall.) 616, 22 L. Ed. 492; Gillett v. Bowen (C. C.) 23 Fed. 625; Beers v. Bridgeport Bridge Co., 42 Conn. 17; Colquitt v. Howard, 11 Ga. 556; Cumberland Coal & Iron Co. v. Parish, 42 Md. 598; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; 2 Thompson on Corporations (2d Ed.) § 1269.

[88] Appeal of Spering, 71 Pa. 11, 20, 10 Am. Rep. 684; Wallace v. Lincoln Sav. Bank, 89 Tenn. 630, 649, 15 S. W. 448, 24 Am. St. Rep. 625; Boyd v. Mutual Fire Ass'n of Eau Claire, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. Rep. 948; 3 Clark & Marshall on Priv. Corp. § 748; 2 Cook on Corporations (6th Ed.) p. 1856, note.

[89] Coons v. Tome (C. C.) 9 Fed. 532; Wright v. Oroville Gold, Silver & Copper Min. Co., 40 Cal. 20; Slee v. Bloom, 20 Johns. (N. Y.) 669; Hedges v. Paquett, 3 Or. 77; Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128; Hope v. Valley City Salt Co., 25 W. Va. 789.

Occasionally it is difficult to decide whether a given disposition of property was testamentary, or created a trust which provided for benefits to begin at the death of the settlor. If the instrument gives the creator of it the power of revocation during his life,[90] which he has in the case of a will, and provides that the interest of the donee shall commence at the settlor's death,[91] the only important distinction between the trust and the will is that the trust deed takes effect at once, and creates a vested or contingent right in the cestui, dependent on the terms of the trust instrument, while the will takes effect only as of the date of the testator's death. The cestui's rights under the deed presumed arise on the execution and delivery of that instrument, and whether they are vested or contingent depends only on the terms of the instrument; the devisee's or legatee's rights, because of the ambulatory nature of the instrument which creates them, cannot arise, no matter what the wording of the will, until the testator's death.[92] "So far as their legal effect is concerned, the characteristic distinction between a will and a trust is that, while the former becomes operative only at the death of the testator, a trust passes an interest to the trustee and beneficiary instantly upon the execution and delivery of the writing by which it is created." [93]

It might, at first thought, appear that a distinction might be made on the ground that the cestui's rights are equitable, while the devisee's or legatee's rights are legal; but the latter statement is not universally or necessarily true. The devise or legacy may be of an equitable interest.[94]

[90] "A power of revocation in a deed of trust does not render the instrument testamentary." Wilcox v. Hubbell, 197 Mich. 21, 39, 163 N. W. 497, 503. See, also, Kelly v. Parker, 181 Ill. 49, 54 N. E. 615; Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257; Windolph v. Girard Trust Co., 245 Pa. 349, 91 Atl. 634.

[91] "The general rule is that, if the intention of the grantor at the time he delivered the deed was to part with the legal title, the trust will be enforced in favor of the beneficiaries, even though their enjoyment of the estate is postponed until the death of their benefactor." Wilson v. Anderson, 186 Pa. 531, 539, 540, 40 Atl. 1096, 44 L. R. A. 542. Such a postponement of the enjoyment does not make the gift testamentary. Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914; Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249; Scrivens v. North Easton Sav. Bank, 166 Mass. 255, 44 N. E. 251.

[92] Jarman on Wills (6th Ed.) 27.

[93] Lewis v. Curnutt, 130 Iowa, 423, 429, 106 N. W. 914.

[94] In the following cases, where the question of construction arose, it was held that a trust was created: Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 Pac. 765; Ward v. Conklin, 232 Ill. 553, 83 N. E. 1058; Ewing v. Jones, 130 Ind. 247, 29 N. E. 1057, 15 L. R. A. 75; Baxter v. Smith, 64 N. J. Eq. 793, 53 Atl. 1125; Lauterbach v. New York Investment Co., 62 Misc.

CONTRACT

17. Differences between trust and contract are:
   (a) Historical, namely, that the contract obligation was first enforced by the courts of law, while the trust duty was a creature of chancery;
   (b) That contracts require consideration to render them enforceable, while trusts do not;
   (c) That the object of the agreement which is called a contract is generally solely the creation of obligations, while the object of a trust agreement is the creation of a status, incidental to which are certain obligations;
   (d) That in contract the parties assume by virtue of the contract no duties except those expressly stated, whereas the trust instrument gives rise to certain law-imposed duties, as well as those expressly assumed;
   (e) That in contract no specific property need be the subject of the agreement, while in trust definite property is essential.

Distinctions Elaborated

It sometimes happens that an agreement raises the question whether contract duties or trust obligations have been created.[95] Thus, in an interesting case,[96] A. delivered money to B. for the purpose of having masses said for the soul of A. after her death, and B. agreed to use the money for that purpose. The court held the transaction valid as a contract, although it would not have been good as a trust, because of the lack of beneficiaries capable of enforcing it.

Treating the agreement as a contract, B.'s obligation was a common-law obligation; that is, it was one originally enforceable in England in courts of law. Had B. been a trustee and the trust been valid, B. would have been subject to duties originally recognized as binding only by Courts of Chancery. This historical distinction is increasingly of less importance, due to the quite general

Rep. 561, 117 N. Y. Supp. 152; Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Hamlin v. Hamlin, 59 Wash. 182, 109 Pac. 362. In other cases the intent was construed to be testamentary. Bullen v. State of Wisconsin, 240 U. S. 625, 36 Sup. Ct. 473, 60 L. Ed. 830; Niccolls v. Niccolls, 168 Cal. 444, 143 Pac. 712; McEvoy v. Boston Five Cents Sav. Bank, 201 Mass. 50, 87 N. E. 465; Russell v. Webster, 213 Mass. 491, 100 N. E. 637.

[95] The distinctions between some special contracts, as agency and bailment, have been previously considered. See ante, §§ 8, 12. This section deals only with the differences between contracts as a class and trusts.

[96] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

abolition of separate courts of equity; but it is said by one learned author to be the source of all differences now maintained between trust and contract.[97]

It should be noted in addition that B.'s obligation to use the money for the procurement of masses, in the illustration given, is enforceable as a contract obligation only when B. has received consideration for his promise so to apply the money, while, on the other hand, as a trust duty, B.'s obligation so to use the money would be capable of enforcement regardless of consideration passing to B., or passing from the cestuis que trust, if they were defined persons.[98]

In England and a few American states the distinction might also be made that B.'s contractual obligation to apply the money for masses could not be enforced by any third person for whose benefit it was made, but only by the promisee, or his representatives,[99] while a trust duty on B.'s part to apply the money for the benefit of cestuis, were they definite persons, could be enforced by them, notwithstanding that no promise was made to them. But in American states generally a contract for the benefit of a third person is enforceable by such third person, and hence this distinction is not of large importance.[1]

It may be further noticed that the sole object of the agreement between A. and B., if it be an agreement creating a contract, is to give rise to an obligation from B. to A. to apply the money for the procuring of masses. This is true of a great majority of contracts, whereas, if A. and B. agree upon a trust for this purpose, their intent is not only to create obligations from B. to A. to apply the money as agreed, but also to create a status in which A. and B. are parties, namely, a trust. The trust agreement, unlike the contract, universally creates a status, as well as gives rise to obligations.[2]

Likewise, B.'s position as a contractor differs from his position as a trustee, in that in the former place his obligations to A. by virtue of the agreement which they make are all expressly assumed by B.; while, if B. becomes a trustee, his duties are measured, not only by what he expressly promises, but also by the duties which the law imposes on him, as, for example, the duty to act solely in the interest of the cestui que trust.

[97] Maitland, Equity, 54.

[98] See post, § 22; Underhill, Trusts and Trustees (4th Ed.) 5.

[99] Hart, What is a Trust?, 15 Law Quart. Rev. 294, 300.

[1] Wald's Pollock on Contracts (Williston's Ed.) 237.

[2] Anson, Contracts (Huffcut's Ed.) 4, 10.

Contracts may or may not deal with specific property. B., in the illustration given, had specific money given to him for use in procuring the masses; but he might have agreed for a consideration to use any money of his own for that purpose. The trust, contrariwise, as often stated, presupposes definite property as its subject-matter.

CHAPTER III

CREATION OF EXPRESS TRUSTS

EXPRESS AND IMPLIED TRUSTS

18. Trusts are classified, with respect to their method of creation, as express and implied. Express trusts are created by the stated intent of the settlor that they shall exist, accompanied by the necessary disposition of the trust property. Implied trusts are those adjudged to exist by courts of equity, either because of a presumed intent that they shall exist or for the purpose of preventing the unjust enrichment of the holder of a title.

In considering the origin of trusts two classes are usually fixed. Those trusts which come into being because the parties concerned have formed the actual intent that they shall arise, have expressed that intent in written or spoken words or otherwise, and have made the requisite property transfers, are called express trusts. Thus, if A. executes a writing whereby he declares himself trustee of certain lands for B., using the words "trustee" and "cestui que trust," and describing the particular land as the subject of the trust, there is an express trust.

But there are certain trusts which do not have back of them any written instrument or oral expression or other acts showing a trust intent. These latter trusts are called implied, and are divided into two classes, namely, resulting and constructive.[1] The for-

[1] Messrs. Lewin and Perry, respectively the authors of the best-known English and American texts on the subject of trusts, have introduced some confusion into the classification of trusts by giving to the phrase "implied trusts" a peculiar meaning. They define as implied those trusts which exist because of certain language used by the parties which does not directly create a trust, but is construed by the courts to have that intent. Under this definition implied trusts arise from ambiguous or doubtful language

mer occur where the courts presume from certain acts that the parties intended a trust to exist, although the parties expressed no such trust intent and may not actually have had it. The latter, namely, constructive trusts, are imposed by chancery on the holders of legal or equitable titles as a means of accomplishing justice and preventing unjust enrichment. Constructive trusts are not based on the intent of the parties, either actual or presumed. They are often called involuntary trusts, or trusts ex maleficio. Thus, if A. pay the purchase price of land which is conveyed to B. in consideration of such purchase price, equity will presume that A. intended B. to act as trustee for A. and a trust will result. While if A., when occupying a fiduciary relation to B., fraudulently obtains B.'s property, B. may have A. declared a constructive trustee of the property. The further definition of implied trusts is left to a later section, where their origin is considered. The steps leading to the creation of express trusts will first be described.

LANGUAGE NECESSARY

19. The language relied upon for the creation of an express trust must—

(a) Manifest an intent that an express trust arise, and

(b) Describe with certainty and completeness the trust essentials, except the trustee.

. No particular words or phrases need be used to express this intent and embody this description.

used by the parties, which is held by the courts to disclose an actual trust intent. Lewin, Trusts (12th Ed.) 124, note; 1 Perry on Trusts (6th Ed.) § 112. These authorities have led several American courts into the classification of trusts into four groups, namely, express, implied, resulting, and constructive. Kayser v. Maughan, 8 Colo. 232, 6 Pac. 803; Plum Tree Lime Co. v. Keeler, 92 Conn. 1, 101 Atl. 509, Ann. Cas. 1918E, 831; Weer v. Gand, 88 Ill. 490; Holsapple v. Schrontz, 65 Ind. App. 390, 117 N. E. 547; Stevens v. Fitzpatrick, 218 Mo. 708, 723, 118 S. W. 51; Burks v. Burks, 7 Baxt. (Tenn.) 353, 355; Olcott v. Gabert, 86 Tex. 121, 127, 23 S. W. 985; Gottstein v. Wist, 22 Wash. 581, 590, 61 Pac. 715.

But the prevailing view in America is that implied trusts should be defined as including resulting and constructive trusts only. Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593; Rice v. Dougherty, 148 Ill. App. 368; Heil v. Heil, 184 Mo. 665, 675, 84 S. W. 45; Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896; Gorrell v. Alspaugh, 120 N. C. 362, 366, 27 S. E. 85; McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; 15 Am. & Eng. Enc. Law (2d Ed.) 1123; 39 Cyc. 24. Even though it might be desirable, if one were treating the matter de novo, to use "implied" in its natural sense, as, for example, as it is used in the law of contract, the terminology herein used is so deeply imbedded in the law that it would seem unwise to attempt a change.

Precatory expressions are words of request or recommendation. Whether they create a trust is a matter of construction. In determining the supposed settlor's intent the following facts, among others, should be considered:

(a) The definiteness of the subject-matter and the beneficiaries;

(b) The amount of discretion allowed the trustee;

(c) The relationship of the alleged cestui que trust to the supposed settlor and the obligations of the latter to the former;

(d) The wording of the gift, whether first made absolutely and then affected by precatory words in a later and separate part of the will, or whether the words of gift and precatory expressions are bound up together in a single clause, sentence or paragraph.

The burden is upon the party alleging the existence of an express trust to prove by unequivocal evidence that the language used was sufficient for its creation.

Language Used Must Express Intent That Trust Shall Arise

Obviously, unless the language used by the settlor indicates an intent that a trust come into existence, no express trust will be created, whatever the words employed.[2] The very definition of express trusts indicates that they spring from the will of the parties. Thus, words expressing an intent to make an absolute gift will not, when the gift is imperfect, create a trust;[3] and words showing an intent to convey in trust at some time in the future do not establish a present trust.[4] A purpose to give property to a corporation absolutely for its corporate purposes will not found an express trust with the corporation as trustee.[5]

[2] Seabrook v. Grimes, 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400; Colmary v. Fanning, 124 Md. 548, 92 Atl. 1045; Richardson v. Inglesby, 13 Rich. Eq. (S. C.) 59. In expressing this intent the settlor's mind must act freely. Thus, if undue influence affects it, the creation of the trust will be set aside. Beard v. Beard, 173 Ky. 131, 190 S. W. 703, Ann. Cas. 1918C, 832. For practical suggestions concerning the creation of trusts, see Thulin, Formal Creation of a Trust Inter Vivos, 11 Ill. Law Rev. 619.

[3] Pratt v. Griffin, 184 Ill. 514, 56 N. E. 819; In re Ashman's Estate, 223 Pa. 543, 72 Atl. 899; Johnson v. Williams, 63 How. Prac. (N. Y.) 233. This is true even though the donor expresses a hope that the donee will at some time return the property or its avails. Murray v, Ray, 251 Fed. 866, 164 C. C. A. 82.

[4] Reynolds v. Thompson, 161 Ky. 772, 171 S. W. 379.

[5] Clarke v. Sisters of Society of the Holy Child Jesus, 82 Neb. 85, 117 N. W. 107; In re Durand, 194 N. Y. 477, 87 N. E. 677.

No Particular Words Required

If the words used convey the intent to establish a trust, they will have that effect. No formal or technical expressions are required.[6] For example, it is not necessary that the settlor use the words "trust" or "trustee,"[7] and the designation of one as a "trustee" does not conclusively show the creation of a trust.[8]

The language used may be sufficient, although the person actually intended to be a trustee is called an "executor," [9] an "attorney," [10] an "agent," [11] or a "guardian." [12] If the duties required of the officer appointed are those of a trustee, the party nominated will be held to be a trustee, regardless of terminology used.[13]

So free from technicality are the rules regarding the creation of trusts that the trustee of a real property trust will take whatever estate is necessary for the performance of his duties, regardless of the presence or absence of the word "heirs" or other technical words limiting the estate granted.[14]

[6] Teal v. Pleas. Grove Local Union No. 204, 202 Ala. 23, 75 South. 335; In re Heywood's Estate, 148 Cal. 184, 82 Pac. 755; Anderson v. Crist, 113 Ind. 65, 15 N. E. 9; Citizens' Loan & Trust Co. v. Herron, 186 Ind. 421, 115 N. E. 941; Reeder v. Reeder, 184 Iowa, 1, 168 N. W. 122; Blake v. Dexter, 66 Mass. (12 Cush.) 559; O'Neil v. Greenwood, 106 Mich. 572, 64 N. W. 511; Moulden v. Train, 199 Mo. App. 509, 204 S. W. 65; Putnam v. Lincoln Safe Deposit Co., 191 N. Y. 166, 83 N. E. 789; Martin v. Moore, 49 Wash. 288, 94 Pac. 1087. In some states recent statutes require a description of the trust and identification of the cestui que trust. A conveyance to one "as trustee" merely is presumed to be absolute. Laws N. D. 1917, c. 239; Laws Or. 1919, c. 436; Laws Wis. 1919, c. 47.

[7] Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617; Morse v. Morse, 85 N. Y. 53.

[8] Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 18, 82 Pac. 374; In re Hawley, 104 N. Y. 250, 10 N. E. 352; Sansom v. Ayer & Lord Tie Co., 144 Ky. 555, 139 S. W. 778. A gift to two brothers, "to be placed in savings bank in trust," with no mention of a trustee, is an absolute gift. Birge v. Nucomb, 93 Conn. 69, 105 Atl. 335.

[9] In re Anck's Estate, 11 Phila. (Pa.) 118.

[10] Mersereau v. Bennet, 124 App. Div. 413, 108 N. Y. Supp. 868.

[11] Anderson v. Fry, 116 App. Div. 740, 102 N. Y. Supp. 112.

[12] In re Lichtenstadter, 5 Dem. Sur. (N. Y.) 214.

[13] Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573; Rantz v. Dale, 158 Ill. App. 244; Mee v. Gordon, 187 N. Y. 400, 80 N. E. 353, 116 Am. St. Rep. 613, 10 Ann. Cas. 172.

[14] Tyler v. Triesback, 69 Fla. 595, 69 South. 49; West v. Fitz, 109 Ill. 425; Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Fisher v. Fisher, 41 N. J. Eq. 16, 2 Atl. 608; Welch v. Allen, 21 Wend. (N. Y.) 147; Williams v. First Presbyterian Soc. in Cincinnati, 1 Ohio St. 478; contra, Evans v. King, 56 N. C. 387; Allen

Precatory Expressions

The cases in which greatest difficulty arises in discovering whether a property owner intended a trust to be created are those in which he uses "precatory expressions." Precatory expressions are "words of entreaty, request, wish, or recommendation." [15] If, for example, instead of giving property to A. "in trust for B.," the owner devise it to A. "with a request that A. care for B. from the income of such property," the latter expression of desire is called precatory.[16]

The basic principle in the construction of precatory expressions is well stated by a distinguished judge. "The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended." [17]

The words "request," "desire," and the like, do not naturally import a legal obligation. But the early view in England was that such words, when used in a will, were to be given an unnatural meaning, and were to be held to be courteous and softened means of creating duties enforceable by the courts.[18] According to that opinion words of request prima facie created a trust. But since the beginning of the nineteenth century the English courts have changed their stand upon this question, and now hold that the natural significance of precatory words is not a trust, but that such an obligation may be shown by other portions of the instrument

v. Baskerville, 123 N. C. 126, 31 S. E. 383. But see Fulbright v. Yoder, 113 N. C. 456, 18 S. E. 713.

[15] Black's Law Dict. (2d Ed.) 928.

[16] The trusts sometimes created by such words of entreaty or request are often called "precatory trusts." Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292; Simpson v. Corder, 185 Mo. App. 398, 170 S. W. 357; Hunt v. Hunt, 18 Wash. 14, 19, 50 Pac. 578. But it is submitted that it is more satisfactory to reserve the word "precatory" for the description of the expression to be construed. If the construction is that a trust is created, there is no object in distinguishing it from any other trust by calling it a "precatory" trust. "A great deal has been said in argument and a great many cases have been cited as to what are awkwardly, and in my opinion incorrectly, called 'precatory trusts.' As I understand the law of the court, this phrase is nothing more than a misleading nickname. When a trust is once established, it is equally a trust, and has all the effect and incidents of a trust, whether declared in clearly imperative terms by a testator, or deduced upon a consideration of the whole will from language not amounting necessarily in its prima facie meaning to an imperative trust." Rigby, L. J., in In re Williams [1897] 2 Ch. 12, 27.

[17] Finch, J., in Phillips v. Phillips, 112 N. Y. 197, 205, 19 N. E. 411, 8 Am. St. Rep. 737.

[18] Malim v. Keighley, 2 Ves. Jr. 333; Knight v. Knight, 3 Beav. 148.

or by extrinsic circumstances.[19] The American courts have adopted this natural construction of precatory expressions.[20]

Precatory Expressions—Guides to Intent

The particular words used will be of little assistance in guiding the searcher to a discovery of the intent. Thus the words "desire," [21] "request," [22] "wish," [23] "hope," [24] "recommend," [25] "in confidence that," [26] and "rely," [27] have been held in some instances to create trusts, and in others to be of no legal effect. The use of any particular precatory word will not determine the question of intent. Aid in solving the problem must be sought in consideration of other portions of the instrument and the facts surrounding the supposed settlor at the time of the execution of the instrument.

In the first place, a failure on the part of the settlor definitely to describe the subject-matter of the supposed trust or the beneficiaries or objects thereof is strong evidence that he intended no trust. Unless these elements, namely, subject and object, are definite, the trust will be unenforceable, even if it could come into being. A property owner will not be presumed to have disposed of his estate in an ineffectual and useless way. "Whenever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will, not expressly creating a trust, the indefinite nature and quantum of the subject, as well as the indefinite nature of the objects, are

[19] "Words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind, either at law or in equity. But in any particular case there may be circumstances which would oblige the court to say that such words have a meaning beyond their ordinary meaning and import a legal obligation." Lord Esher, in Hill v. Hill [1897] 1 Q. B. 483, 486.

[20] In re Pennock's Estate, 20 Pa. 268, 59 Am. Dec. 718; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75.

[21] In re Browne's Estate, 175 Cal. 361, 165 Pac. 960; Lines v. Darden, 5 Fla. 51; Manley v. Fiske, 139 App. Div. 665, 124 N. Y. Supp. 149; Hardy v. Hardy, 174 N. C. 505, 93 S. E. 976; In re Dewey's Estate, 45 Utah, 98, 143 Pac. 124, Ann. Cas. 1918A, 475.

[22] McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75; In re Forscht's Estate, 2 Pa. Dist. R. 294.

[23] Phillips v. Phillips, 112 N. Y. 197, 19 N. E. 411, 8 Am. St. Rep. 737; Sears v. Cunningham, 122 Mass. 538.

[24] Van Duyne v. Van Duyne, 15 N. J. Eq. 503; Eaton v. Watts, L. R. 4 Eq. 151.

[25] Ford v. Fowler, 3 Beav. 146; Gilbert v. Chapin, 19 Conn. 342.

[26] People v. Powers, 83 Hun, 449, 29 N. Y. Supp. 950, 31 N. Y. Supp. 1131; Buffum v. Town, 16 R. I. 643, 19 Atl. 112, 7 L. R. A. 386.

[27] Blanchard v. Chapman, 22 Ill. App. 341; Willets v. Willets, 35 Hun (N. Y.) 401.

always used by the court as evidence that the mind of the testator was not to create a trust." [28] In many cases the uncertainty of the subject-matter has influenced the courts in holding that no trust was intended by the precatory words,[29] while the lack of clearness regarding the cestuis que trust has had a similar effect in other cases.[30]

Secondly, the nature of the donee's duties may be determinative. A trustee is under an imperative obligation to act for the cestuis. That he may elect to keep the property as his own or give all or part of it to the cestuis is inconsistent with the fundamental notion of a trust, namely, that it is an equitable obligation. Hence, if the discretion given to the supposed trustee in connection with the precatory words is so broad as to allow him to bestow no benefit on the supposed cestuis, if he likes, the courts will consider it unlikely that a trust was intended;[31] whereas, if the discretion is merely as to manner, time, or choice of persons from a class, and the alleged trustee may under no circumstances keep the property for himself, the courts will be more apt to presume that the precatory words were intended as words of binding obligation.[32]

Thirdly, if the alleged beneficiary has any natural claim on the supposed author of the trust and the conditions are such that the latter would naturally provide for the former, the courts will be more ready to construe precatory words as creating a trust. Thus,

[28] Lines v. Darden, 5 Fla. 51, 73. Accord: Floyd v. Smith, 59 Fla. 485, 51 South. 537, 37 L. R. A. (N. S.) 651, 138 Am. St. Rep. 133, 21 Ann. Cas. 318; Handley v. Wrightson, 60 Md. 198; Lucas v. Lockhart, 18 Miss. (10 Smedes & M.) 466, 48 Am. Dec. 766; Noe v. Kern, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544; Harrisons v. Harrison's Adm'x, 2 Grat. (Va.) 1, 44 Am. Dec. 365.

[29] Bryan v. Milby, 6 Del. Ch. 208, 24 Atl. 333, 13 L. R. A. 563; Coulson v. Alpaugh, 163 Ill. 298, 45 N. E. 216; Hazlewood v. Webster, 7 Ky. Law Rep. 164; Williams v. Worthington, 49 Md. 572, 33 Am. Rep. 286; Whitesel v. Whitesel, 23 Grat. (Va.) 904; but see Cox v. Wills, 49 N. J. Eq. 130, 22 Atl. 794.

[30] Seymour v. Sanford, 86 Conn. 516, 86 Atl. 7; In re Gardner, 140 N. Y. 122, 35 N. E. 439; In re Roger's Estate, 245 Pa. 206, 91 Atl. 351, L. R. A. 1917A, 168; Baker v. Baker, 53 W. Va. 165, 44 S. E. 174.

[31] Toms v. Owen (C. C.) 52 Fed. 417; In re Purcell's Estate, 167 Cal. 176, 138 Pac. 704; George v. George, 186 Mass. 75, 71 N. E. 85; Corby v. Corby, 85 Mo. 371; Eberhardt v. Perolin, 49 N. J. Eq. 570, 25 Atl. 510; Wilde v. Smith, 2 Dem. Sur. (N. Y.) 93.

[32] Bull v. Bull, 8 Conn. 47, 20 Am. Dec. 86; Dexter v. Evans, 63 Conn. 58, 27 Atl. 308, 38 Am. St. Rep. 336; Erickson v. Willard, 1 N. H. 217; Ide's Ex'rs v. Clark et al., 5 Ohio Cir. Ct. R. 239; In re Pennock's Estate, 20 Pa. 268, 59 Am. Dec. 718; Walker v. Quigg, 6 Watts (Pa.) 87, 31 Am. Dec. 452; Seefried v. Clarke, 113 Va. 365, 74 S. E. 204.

in one case,[33] where the estate was large and given to the deceased's widow with a request that she care for the deceased's mother and sister, for whom no other provision was made, the court held that the precatory words could naturally be construed to create a trust.[34]

Fourthly, an absolute gift of property will not be construed to be a trust because there are later precatory expressions. Where the testator has once made an unrestricted transfer of the property, subsequent inconsistent precatory words will not be construed to show an intent to create a trust. Thus, if the gift is made to A. "absolutely,"[35] or "in his own right,"[36] the courts will be inclined to construe the precatory words to have no legal effect. So, too, if to create a trust from the precatory words would be repugnant to other provisions of the instrument of undisputed validity,[37] or if the words "and it is only a request" follow the precatory expressions,[38] or, of course, if the implication of a trust

[33] Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138.

[34] In the following cases trusts were declared where the supposed cestuis were parents: Whittingham v. Schofield's Trustee, 67 S. W. 846, 68 S. W. 116, 23 Ky. Law Rep. 2444; Foster v. Willson, 68 N. H. 241, 38 Atl. 1003, 73 Am. St. Rep. 581; Carroll v. Adams (Sup.) 105 N. Y. Supp. 967. In other cases children were the cestuis. Warner v. Bates, 98 Mass. 274; Patterson v. Humphries, 101 Miss. 831, 58 South. 772; Kidder's Ex'rs v. Kidder, 56 Atl. (N. J. Ch.) 154; Appeal of Coate, 2 Pa. 129; Knox v. Knox, 59 Wis. 172, 18 N. W. 155, 48 Am. Rep. 487. And a trust result has been reached where an adopted child (Murphy v. Carlin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699) and a niece (Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586) were to be benefited. But in the following cases of close relationship the precatory words were construed not to have created trusts: Bliss v. Bliss, 20 Idaho, 467, 119 Pac. 451 (wife); Holmes v. Dalley, 192 Mass. 451, 78 N. E. 513 (child); In re Mitchell's Estate, 160 Cal. 618, 117 Pac. 774 (grandchild); Post v. Moore, 181 N. Y. 15, 73 N. E. 482, 106 Am. St. Rep. 495, 2 Ann. Cas. 591 (sister); Russell v. United States Trust Co. of New York, 136 Fed. 758, 69 C. C. A. 410 (nephews and nieces).

[35] McDuffie v. Montgomery (C. C.) 128 Fed. 105; In re Molk's Estate, Myr. Prob. (Cal.) 212; Haight v. Royce, 274 Ill. 162, 113 N. E. 71; Riechauer v. Born, 151 Iowa, 456, 131 N. W. 705; Pierce v. Pierce, 114 Me. 311, 96 Atl. 143; Williams v. Worthington, 49 Md. 572, 33 Am. Rep. 286; Bacon v. Ransom, 139 Mass. 117, 29 N. E. 473; Noe v. Kern, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544; Snyder v. Toler, 179 Mo. App. 376, 166 S. W. 1059; Carter v. Strickland, 165 N. C. 69, 80 S. E. 961, Ann. Cas. 1915D, 416; Ringe v. Kellner, 99 Pa. 460; Wilmoth v. Wilmoth, 34 W. Va. 426, 12 S. E. 731.

[36] Frierson v. General Assembly of Presbyterian Church of U. S., 7 Heisk. 683.

[37] Clay v. Wood, 153 N. Y. 134, 47 N. E. 274.

[38] Sale v. Thornberry, 86 Ky. 266, 5 S. W. 468.

is expressly excluded by words to the effect that no trust was intended,[39] the precatory words will be given no legal effect.

Fifthly, many other guiding facts of a miscellaneous character may exist. For example, if the precatory expression concerns property which the devisee already owns, as well as that given to the devisee by the testator, the courts will consider the words as of no legal effect.[40] The testator will not be deemed to have intended a trust as to property which he did not own. That the testator clearly created a trust in another part of the instrument, using appropriate words of trust, has been held to show that precatory words were not intended to create a trust.[41] And so, also, that the testator was a lawyer, and hence would presumably understand how to create a trust clearly, tends to prove that a use of precatory words was not intended to give rise to a trust.[42] That the legatee was personally interested in carrying out the objects mentioned in the precatory phrases has been held to point to an absolute gift, a trust being apparently unnecessary.[43] In a gift to a corporation, a request that the funds be applied to some particular corporate purpose is generally held not to indicate an attempted trust, but to be a mere suggestion, which the directors may or may not carry out.[44] That a trust, if created by precatory words, would be void as violating the rule against accumulations, is an argument for showing that no trust was intended.[45]

Precatory Expressions—Construction of Particular Words or Phrases

The following phrases have been held to show an intent to create a trust: "For the education * * * and support of;"[46] "for the support and maintenance of;"[47] "for the support of;"[48] "shall be held, controlled, and invested by my executors for;"[49]

[39] Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; Enders' Ex'r v. Tasco, 89 Ky. 17, 11 S. W. 818; In re Havens, 6 Dem. Sur. (N. Y.) 456.

[40] Palmer v. Schribb, 2 Eq. Cas. Abr. 291, pl. 9; Parnall v. Parnall, 9 Ch. Div. 96; Hopkins v. Glunt et al., 111 Pa. 287, 2 Atl. 183.

[41] In re Whitcomb's Estate, 86 Cal. 265, 24 Pac. 1028; Williams v. Committee of Baptist Church, 92 Md. 497, 48 Atl. 930, 54 L. R. A. 427.

[42] Burnes v. Burnes, 137 Fed. 781, 795, 70 C. C. A. 357.

[43] Poor v. Bradbury, 196 Mass. 207, 81 N. E. 882.

[44] Pratt v. Trustees of Sheppard & Enoch Pratt Hospital, 88 Md. 610, 42 Atl. 51; Williams v. Committee of Baptist Church, 92 Md. 497, 48 Atl. 930, 54 L. R. A. 427; In re Crane's Will, 159 N. Y. 557, 54 N. E. 1089.

[45] In re Lynch's Will, 102 Misc. Rep. 650, 169 N. Y. Supp. 321.

[46] Clifford v. Stewart, 95 Me. 38, 49 Atl. 52. See, also, Johnson v. Johnson, 215 Mass. 276, 102 N. E. 465.

[47] Rudd v. Van der Hagan, 86 Ky. 159, 5 S. W. 416.

[48] O'Riley v. McKiernan, 90 Ky. 116, 13 S. W. 360.

[49] Hurst v. Weaver, 75 Kan. 758, 90 Pac. 297.

"upon condition that he pay;" [50] "for herself and three children." [51] On the other hand, the following words have been construed as failing to show an intent to establish a trust: To A. "the use of my farm;" [52] to A. "for his use;" [53] to my daughters "the income from" certain property; [54] to A. "for the purpose of dividing the same" among needy relatives; [55] to A. to "keep" for the depositor; [56] to A. to be paid for by him by furnishing necessaries to the grantor at cost prices; [57] declaration of intention to apply specific property to payment of a specific debt; [58] to a son in full confidence that the son would make a proper adjustment of relations to other children. [59]

Language Must Describe Trust Elements Completely and with Certainty

Uncertainty and ambiguity in the description of the trust elements tends to show that no trust was designed; [60] but, if the intent to create a trust be assumed, it cannot be effective unless the trust elements are properly described. Those elements are the subject-matter, the trust purpose, the cestuis que trust, and the trustee. [61]

Thus, if the property to be administered by the trustee be indefinite and incapable of identification, no trust can arise. [62] The residue of the testator's property is a sufficiently definite subject-matter for a trust. [63] So, too, if the trust purpose be omitted, [64]

[50] In re Hasbrouck, 153 App. Div. 394, 138 N. Y. Supp. 620.
[51] Stratton v. McKinnie (Tenn. Ch.) 62 S. W. 636.
[52] Little v. Colman, 74 N. H. 215, 66 Atl. 483.
[53] Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73.
[54] Little v. Colman, 74 N. H. 215, 66 Atl. 483.
[55] Walter v. Walter, 60 Misc. Rep. 383, 113 N. Y. Supp. 465.
[56] Tucker v. Linn (N. J. Ch.) 57 Atl. 1017.
[57] Maxwell v. Wood, 133 Iowa, 721, 111 N. W. 203.
[58] Cook v. Black, 54 Iowa, 693, 7 N. W. 121.
[59] Lanigan v. Miles, 102 Wash. 82, 172 Pac. 894.
[60] Pratt v. Trustees of Sheppard & Enoch Pratt Hospital, 88 Md. 610, 42 Atl. 51.
[61] Inglis v. Sailor's Snug Harbor, 28 U. S. (3 Pet.) 99, 7 L. Ed. 617; Drinkhouse v. German Savings & Loan Soc., 17 Cal. App. 162, 118 Pac. 953; Crowley v. Crowley, 131 Mo. App. 178, 110 S. W. 1100.
[62] Mills v. Newberry, 112 Ill. 123, 1 N. E. 156, 54 Am. Rep. 213; Barkley v. Lane's Ex'r, 69 Ky. (6 Bush) 587; Roddy v. Roddy, 3 Neb. 96.
[63] Glover v. Baker, 76 N. H. 393, 83 Atl. 916.
[64] Bank v. Rice, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; Ingram v. Fraley, 29 Ga. 553.

or the description of the beneficiaries be vague,[65] the trust will be defectively declared.

That a trustee is not named is not important, since the court will supply that element.[66] It is also not needful that the settlor should expressly give the trust property to the trustee. If the trust is fully described, the gift of the property to the trustee will be implied.[67]

Where the settlor uses repugnant words, at one point showing an intent to create a trust and at another an opposing intent, whether any trust was created is a difficult question of construction. In many instances of repugnant wordings a trust has been found,[68] while in other cases of the same sort the construction was against a trust.[69]

Burden of Proof and Character of Evidence Necessary

The burden lies upon the party asserting the existence of a trust to show that the language used is sufficient for that purpose.[70] In Texas a rule has been established that the evidence of a single witness, coupled with corroborating circumstances, is adequate to prove a trust.[71]

It is frequently stated by courts that the evidence to establish the existence of a trust must be "clear," "convincing," "explicit," and "unequivocal."[72] In practically all instances in which such requirements regarding the evidence have been laid down, the

[65] Condit v. Reynolds, 66 N. J. Law, 242, 49 Atl. 540; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997.

[66] Trustees of McIntire Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 203, 34 Am. Dec. 436; Appeal of Varner, 80 Pa. 140.

[67] Haywood v. Wachovia Loan & Trust Co., 149 N. C. 208, 62 S. E. 915; In re Eppig, 63 Misc. Rep. 613, 118 N. Y. Supp. 683.

[68] Harris v. Ferguy, 207 Ill. 534, 69 N. E. 844; Brown's Lessee v. Brown, 12 Md. 87; Robinson v. Cogswell, 192 Mass. 79, 78 N. E. 389; Fairchild v. Edson, 77 Hun, 298, 28 N. Y. Supp. 401; In re Lejee's Estate, 181 Pa. 416, 37 Atl. 554; In re Luscombe's Will, 109 Wis. 186, 85 N. W. 341.

[69] Thompson v. Adams, 205 Ill. 552, 69 N. E. 1; Blakeshere v. Trustees, 94 Md. 773, 51 Atl. 1056; Spooner v. Lovejoy, 108 Mass. 529; Dunshee v. Goldbacher, 56 Barb. (N. Y.) 579.

[70] Prevost v. Gratz, 19 U. S. (6 Wheat.) 481, 5 L. Ed. 311; Miller v. Hill, 64 Misc. Rep. 199, 118 N. Y. Supp. 63; Russell v. Fish, 149 Wis. 122, 135 N. W. 531; Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497.

[71] Smalley v. Paine (Tex. Civ. App.) 130 S. W. 739; Hall v. Latton, 16 Tex. 262.

[72] Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543; Lurie v. Sabath, 208 Ill. 401, 70 N. E. 323; Crissman v. Crissman, 23 Mich. 217; Hoffman v. Union Dime Saving Inst'n, 109 App. Div. 24, 95 N. Y. Supp. 1045; Boughman v. Boughman, 69 Ohio St. 273, 69 N. E. 430; Appeal of Hollingshead, 103 Pa. 158; Watts v. McCloud (Tex. Civ. App.) 205 S. W. 381.

proof offered has been oral; but occasionally similar remarks have been made regarding written evidence.[73] Occasionally it has been stated that the evidence must establish a trust beyond a reasonable doubt,[74] or be so positive as to leave no doubt.[75]

On principle it would seem that no stronger evidence should be required to prove the creation of a trust than to prove any other fact in a civil action. The rule requiring an extraordinarily high degree of proof has been actually applied rarely, except in cases where an attempt was made by oral proof to fasten a trust upon property which appeared to be owned absolutely.

FORMALITY—STATUTE OF FRAUDS

20. In England, prior to 1677, trusts of real and personal property required no writing for their creation.

The seventh section of the English Statute of Frauds, enacted in 1677, required express trusts of real property to be "manifested and proved" by a writing signed by the party enabled to declare the trust.

A great majority of American states have passed similar statutes, though with many minor variations. In a few jurisdictions parol trusts in land are allowed.

Implied trusts and trusts of personal property have always, both in England and America, been provable by oral evidence.

A trustee may be estopped to set up the Statute of Frauds.

The statute makes oral trusts in realty voidable only, not void.

Any writing, however informal, is sufficient to satisfy the statute, if it contain a complete statement of the trust, and is signed or subscribed by the proper party.

Common Law Required No Formality

Trusts of both real and personal property could be created at common law, without writing or other formal evidence.[76] A mere parol declaration or agreement was sufficient to give the trust life and legal standing.

The Statute of Frauds

The seventh section of the English Statute of Frauds provided that "all declarations or creations of trusts or confidences of any

[73] Otjen v. Frohbach, 148 Wis. 301, 134 N. W. 832.

[74] Rogers v. Rogers, 87 Mo. 257.

[75] Harrison v. McMennomy, 2 Edw. Ch. (N. Y.) 251.

[76] Smith v. Smith (Ky.) 121 S. W. 1002; Fleming v. Donahoe, 5 Ohio, 255; Young v. Holland, 117 Va. 433, 84 S. E. 637. The English Statute of Frauds was St. 29, Chas. II, c. 3. For a discussion of the origin of the statute, see Hening, 61 Pa. Law Rev. 283.

lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." This section has been adopted, with many modifications, by a majority of the American states.[11]

[11] *Statute of Frauds in Force.*—A section analogous to the seventh section of the English statute is found in the following jurisdictions: Alabama, Code 1907, § 3412; Alaska, Comp. Laws 1913, § 1878; Hubbard v. Hubbard, 5 Alaska, 478; Arkansas, Kirby & Castle's Dig. 1916, § 3997; California, Civ. Code, § 852; Colorado, Mills' Ann. St. 1912, § 3059; Florida, Comp. St. 1914, § 2452; Georgia, Park's Ann. Civ. Code 1914, § 3733; Oglesby v. Wilmerding, Morris & Mitchell, 149 Ga. 45, 99 S. E. 29; Idaho, Rev. Codes 1908, § 6007; Illinois, Jones & A. Ann. St. 1913, § 5875; Iowa, Code 1897, § 2918; Kansas, Gen. St. 1915, § 11674; Maine, Rev. St. 1916, c. 78, § 17; Maryland, Gordon v. McCulloh, 66 Md. 245, 7 Atl. 457; Massachusetts, Rev. Laws 1902, c. 147, § 1; Michigan, Howell's Ann. St. 1913, § 11393; Minnesota, Gen. St. 1913, § 7002; Mississippi, Hemingway's Ann. Code 1917, § 3124; Missouri, Rev. St. 1909, § 2868; Montana, Rev. Codes 1907, § 4537; Nebraska, Rev. St. 1913, § 2623; Nevada, Cutting's Comp. Laws, § 2694; New Hampshire, Pub. St. 1901, c. 137, § 13; New Jersey, 2 Comp. St. 1910, p. 2611; New York, Real Property Law (Consol. Laws, c. 50) § 242; Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446; North Dakota, Civ. Code 1913, § 5364; Oklahoma, Rev. Laws 1910, § 6659; Oregon, Code Civ. Proc. (L. O. L.) § 804; Pennsylvania, Purdon's Dig. (13th Ed.), p. 4838; Rhode Island, Gen. Laws 1909, c. 253, § 2; South Carolina, Civ. Code 1912, § 3676; South Dakota, Rev. Code 1919, § 371; Utah, Comp. Laws 1907, § 2461; Vermont, Pub. St. 1906, § 2583; Wisconsin, Stat. 1913, § 2302. The equivalent of the English Statute of Frauds is also enforced in the District of Columbia. McCartney v. Fletcher, 11 App. D. C. 1.

No Statute of Frauds.—In fifteen American jurisdictions no statute corresponding to the seventh section is to be found. This is true in Arizona, Connecticut, Delaware, Hawaii, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming.

But, notwithstanding the absence of such a statute, oral trusts in land are not allowed in several of these states. Thus, in Washington and Kentucky, apparently the fourth section of the Statute of Frauds, which forbids the transfer of an interest in lands without a writing, is held to be broad enough to prevent the creation of trusts without written evidence. Spaulding v. Collins, 51 Wash. 488, 99 Pac. 306; Arnold v. Hall, 72 Wash. 50, 129 Pac. 914, 44 L. R. A. (N. S.) 349; Brown v. Kausche, 98 Wash. 470, 167 Pac. 1075; Lanigan v. Miles (Wash.) 172 Pac. 894; Rem. & B. Codes, vol. 2, § 8745. Sherley v. Sherley, 97 Ky. 512, 522, 31 S. W. 275; Vizard Inv. Co. v. York, 167 Ky. 634, 181 S. W. 370. But see Stone v. Middleton, 144 Ky. 284, 137 S. W. 1047; St. Catherine's Cemetery v. Fidelity Trust Co., 152 Ky. 797, 154 S. W. 29; Best v. Melcon, 183 Ky. 785, 210 S. W. 662.

In Virginia a learned writer expressed the opinion that the fourth section controls the creation of trusts. 2 Minor's Inst. (4th Ed.) 847. In Garrett v. Rutherford, 108 Va. 478, 62 S. E. 389, it was held that the question was an open one whether express trusts in land could be created by parol. But in more recent cases the court has taken the position that no formality

The general rule in America therefore is that trusts in land must be proved or created by a writing.

is required. Young v. Holland, 84 S. E. 637; Shield v. E. S. Adkins & Co., 117 Va. 616, 85 S. E. 492; Clary v. Spain, 119 Va. 58, 89 S. E. 130; Berry v. Berry's Ex'rs, 119 Va. 9, 89 S. E. 242; Fleenor v. Hensley, 121 Va. 367, 93 S. E. 582. See Benson, Parol Trusts in Real Estate, 1 Va. Law Reg. (N. S.) 81.

In West Virginia trusts in favor of a grantor of real property cannot be proved orally, although trusts in favor of one other than the grantor may be manifested by parol. This seems to be a recognition of the fourth section of the statute as affecting trusts. The decision is also based on the parol evidence rule. Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883; Crawford v. Workman, 64 W. Va. 19, 61 S. E. 322; Troll v. Carter, 15 W. Va. 567.

In Connecticut and New Mexico express trusts in land must be proved by a writing, notwithstanding the absence of any statutory requirement to that effect. Wilson v. Warner, 84 Conn. 560, 80 Atl. 718; Eagle Mining & Imp. Co. v. Hamilton, 14 N. M. 271, 91 Pac. 718.

In North Carolina a landowner may not declare himself a trustee by parol; but one who intends to become the holder of the legal title may validly agree by parol to hold it in trust. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776; Kelly v. McNeill, 118 N. C. 349, 24 S. E. 738; Anderson v. Harrington, 163 N. C. 140, 79 S. E. 426; Jones v. Jones, 164 N. C. 320, 80 S. E. 430; Brogden v. Gibson, 165 N. C. 16, 80 S. E. 966; Lutz v. Hoyle, 167 N. C. 632, 83 S. E. 749; Boone v. Lee, 175 N. C. 383, 95 S. E. 659; Williams v. Honeycutt, 176 N. C. 102, 96 S. E. 730; Wilson v. Jones, 176 N. C. 205, 97 S. E. 18.

In Louisiana trusts were first sanctioned by Act 107 of 1920 which makes no provision for a requirement of written evidence.

In other states there seem to be no rules of any sort requiring trusts in land to be manifested by a writing. Pierson v. Pierson, 5 Del. Ch. 11; Russell v. Bruer, 64 Ohio St. 1, 59 N. E. 740; Richards v. Parsons et al., 7 Ohio App. 422; Martin v. Lincoln, 4 Lea (Tenn.) 334, 337; Young v. Brown, 136 Tenn. 184, 188 S. W. 1149; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; Williams v. Neill (Tex. Civ. App.) 152 S. W. 693; Hambleton v. Southwest Texas Baptist Hospital (Tex. Civ. App.) 172 S. W. 574; Matthews v. Deason (Tex. Civ. App.) 200 S. W. 855; Johnston v. Johnston (Tex. Civ. App.) 204 S. W. 469; Schultz v. Scott (Tex. Civ. App.) 210 S. W. 830. On the Texas situation, see note 61 Pa. Law Rev. 687.

Nature of the Writing Required.—In the following states the English Statute of Frauds is substantially copied, and the trust need only be manifested and proved by a writing: Arkansas, District of Columbia, Florida, Illinois, Maryland, Missouri, New Jersey, New York, Pennsylvania, and South Carolina. In New York, between 1830 and 1860, the trust had to be "created" by a writing. Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446. In other states the trust must be "created or declared in writing," but no special form of writing is mentioned: Alabama, California, Georgia, Indiana, Kansas, Maine, Massachusetts, Montana, New Hampshire, North Dakota, Oklahoma, South Dakota, and Vermont. On the subject of what facts the writing must state, and taking the position that any writing "identifying the land and clearly indicating that the person alleged to be a trustee

When Statute Does Not Apply—Implied Trusts

It is frequently stated by the courts that parol evidence is not admissible to establish a trust in real property in the absence of

has no beneficial interest therein, or only a specified interest," is sufficient, see 17 Mich. Law Rev. 266. Elsewhere the trust must be "created or declared by a conveyance of other instrument in writing." Alaska, Idaho, and Oregon.

In yet other states the wording is "created or declared by a deed or conveyance in writing." Colorado, Michigan, Minnesota, Nebraska, Nevada, Utah, and Wisconsin.

In Iowa, Mississippi, and Rhode Island the trust must be "created and declared" by an instrument executed, acknowledged, and recorded as a deed of real property. But in a number of states above mentioned, in which the statute requires creation or declaration by writing, the courts have allowed instruments which merely proved or manifested the trust to satisfy the statute. Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899; McClellan v. McClellan, 65 Me. 500; Urann v. Coates, 109 Mass. 581; White v. Fitzgerald, 19 Wis. 504.

Party Who Must Sign or Subscribe.—In Alabama, Alaska, Colorado, Idaho, Indiana, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New York, Oregon, Utah, Vermont, and Wisconsin the writing must be signed or subscribed "by the party creating or declaring the trust."

In Arkansas, Florida, Illinois, Maryland, Missouri, New Jersey, and South Carolina the words are "the party who is or shall be by law enabled to declare" the trust.

In California, Montana, North Dakota, Oklahoma, and South Dakota the requirement is that the signing or subscribing shall be "by the grantor" or by the party executing the instrument under which the trustee claims the estate.

In Maine the signature must be "by the party"; in Pennsylvania, "by the party holding the legal title"; in Rhode Island the instrument must be "duly signed"; while in Georgia and Iowa no express provision is made as to the identity of the signer or subscriber.

In Alabama, Alaska, California, Colorado, Idaho, Indiana, Kansas, Michigan, Minnesota, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Wisconsin the signature of an agent or attorney authorized in writing will also be sufficient. In Maine, Massachusetts, New Hampshire, and Vermont signature by an agent or attorney is expressly authorized, but no requirement of written authorization is fixed.

In Arkansas, Florida, Georgia, Illinois, Iowa, Maryland, Mississippi, Missouri, Nebraska, New Jersey, Pennsylvania, Rhode Island, and South Carolina signature by an agent or attorney is not provided for in the statute.

Signature or Subscription.—In Alabama, Arkansas, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, and Vermont the requirement is that the writing be "signed."

In Alaska, California, Colorado, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Da-

fraud, mistake or accident.[78] The implication is that express trusts in land based solely on oral evidence will be enforced if fraud, accident, or mistake exist. What is generally meant by these expressions is that if there is fraud, accident, or mistake of the proper kind, a trust of some sort, namely, an implied trust, will be enforced, even though the express trust fails for want of a writing. It is not meant that in the ordinary instance fraud, mistake, or accident cause equity to ignore the Statute of Frauds and allow parol evidence to create an express trust.

The eighth section of the English Statute of Frauds expressly exempts from the operation of the seventh section trusts which "arise or result by implication or construction of law."[79] This exception has been generally copied in America. These are the implied trusts, the creation of which is considered later.[80]

The requirement of writing, therefore, has no application to those trusts. Fraud, accident, and mistake constitute important grounds for the creation of one form of these implied trusts, namely, constructive trusts. Hence the exception frequently made, as above stated. The Statute of Frauds will not prevent the creation of an implied trust without a writing, even if the parties attempted to create an express trust orally and the statute forbade such a result.[81] If A. grant lands to B. under an oral express trust, the Statute of Frauds will prohibit the enforcement of the trust. But equity may hold B. as trustee of the lands under an implied trust, if there are present elements on which such a trust can be raised, as, for example, fraud, accident, or mistake.[82]

When Statute Does Not Apply—Personal Property

The seventh section of the English Statute of Frauds applies only to trusts of "lands, tenements and hereditaments," and such is the scope of similar statutes in America. Trusts of personal property may everywhere be created and proved without writing.[83]

kota, Utah, and Wisconsin the writing must be "subscribed"; that is, signed at the end.

In Georgia and Iowa the statutes make no express provision either for signing or subscribing.

[78] Jones v. Van Doren, 18 Fed. 619; Amidon v. Snouffer, 139 Iowa, 159, 117 N. W. 44; Baker v. Baker, 75 N. J. Eq. 305, 72 Atl. 1000.

[79] St. 29 Chas. II, c. 3.

[80] Post, § 30.

[81] Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Rozell v. Vansyckle, 11 Wash. 79, 39 Pac. 270.

[82] Post, § 39, for a discussion of the circumstances under which equity will declare implied trusts.

[83] Souza v. First Nat. Bank of Hanford, 36 Cal. App. 384, 172 Pac. 175; Noble v. Learned, 153 Cal. 245, 94 Pac. 1047; Bay Biscayne Co. v. Baile, 73

It has sometimes been held that, if the subject-matter of the oral trust was originally real property, but has been converted by the trustee into personal property, the trust becomes enforceable, even in the absence of written evidence, and even though there is no recognition of the trust after the change in the form of the property. The trustee is said to have abandoned the shelter of the Statute of Frauds.[84] An agreement to hold land in trust, and, if the land be sold, to be a trustee of the proceeds, has been held to create a valid trust when the land has been converted into money, although there was no writing.[85]

When Statute Does Not Apply—Relief by Equity

The Statute of Frauds is ordinarily as binding on courts of equity as on courts of law, but equity has power to relieve against its operation in certain cases, as in the instance of equitable estoppel. Wherever the trustee has partly carried out the oral trust in land and thus recognized its existence, and the cestui que trust has done acts on the strength of such recognition which place him in a position from which he cannot withdraw without damage, equity will hold the trustee estopped to set up the Statute of Frauds and will enforce the trust.[86] "In such a case, the party is held, by force of his acts or silent acquiescence, which have misled

Fla. 1120, 75 South. 860; People v. Schaefer, 266 Ill. 334, 107 N. E. 617; Taber v. Zehner, 47 Ind. App. 165, 93 N. E. 1035; Richards v. Wilson, 185 Ind. 335, 112 N. E. 780; Sturtevant v. Jaques, 96 Mass. (14 Allen) 523; Bradford v. Eastman, 229 Mass. 499, 118 N. E. 879; Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790; Moulden v. Train, 199 Mo. App. 509, 204 S. W. 65; Day v. Roth, 18 N. Y. 448; First Nat. Bank v. Hinkle (Okl.) 162 Pac. 1092; In re Washington's Estate, 220 Pa. 204, 69 Atl. 747; McElveen v. Adams, 108 S. C. 437, 94 S. E. 733; Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664.

[84] Thomas v. Merry, 113 Ind. 83, 15 N. E. 244; Bork v. Martin, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570. Contra: Johnson v. McKenzie, 80 Or. 160, 154 Pac. 885, 156 Pac. 791. For a consideration of these and similar agreements from the point of view of constructive trusts, see post, § 39.

[85] Craft v. Craft, 74 Fla. 262, 76 South. 772; Mohn v. Mohn, 112 Ind. 285, 13 N. E. 859; Chace v. Gardner, 228 Mass. 533, 117 N. E. 841; Logan v. Brown, 20 Okl. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298. And a similar holding has been made where the agreement was to account for a part only of the proceeds of the sale. Hall v. Hall, 8 N. H. 129; Graves v. Graves, 45 N. H. 323. In Bier v. Leisle, 172 Cal. 432, 156 Pac. 870, it was held that there was a trust, even if the realty was not sold. McGinness v. Barton, 71 Iowa, 644, 33 N. W. 152, and White v. McKenzie, 193 Mich. 189, 159 N. W. 367, are contrary to the weight of authority. In the latter case it was held that, where A. agreed orally to buy land and sell it for the joint benefit of A. and B., and A. did sell the land, there was no enforceable trust.

[86] Browne on Statute of Frauds (5th Ed.) § 447 et seq.

the other to his harm, to be estopped from setting up the statute of frauds." [87]

The theory of the courts in these cases is that it would be a fraud on the cestui to allow the trustee to rely on the Statute of Frauds after he has encouraged the cestui to change his position on the faith of the trustee's recognition of the oral trust. Hence the trustee is held to be estopped to set up the statute as a defense to an action for the enforcement of the trust.[88] Equity has frequently held these doctrines of fraud and estoppel sufficient to enable it to relieve against the Statute of Frauds and to enforce a parol trust in land.[89]

Oral Trusts Voidable, Not Void

The express wording of the English statute and of many of its American copies would lead to the natural belief that oral trusts in land are wholly unenforceable under all conditions. The wording is that they are "utterly void and of none effect." [90] But, in line with the construction of other sections of the same statute, it has been generally held that "void" in this connection means "voidable" and that the oral trust may be enforced, if the parties are willing and raise no objection to the lack of written evidence.[91]

Thus, if the trustee desire, he may waive the Statute of Frauds, and the trust will be enforced against him, and, if the trust is completely executed, the validity of acts performed under it will not be open to question. If a father convey realty to a son on an oral promise by the son that he will convey the land to his mother after the father's death, and the son makes such conveyance, the creditors of the son have no standing to attack the validity of the trust. The son having seen fit to carry it out, the effect is the same as if the trust had been declared with due formality.[92] Titles

[87] Glass v. Hulbert, 102 Mass. 24, 36, 3 Am. Rep. 418.

[88] Buckmaster v. Harrop, 7 Ves. 340; Miller v. Ball, 64 N. Y. 286; Meach v. Stone & Perry, 1 D. Chipman (Vt.) 182, 191, 6 Am. Dec. 719. Some of the cases cited under this section are oral contracts to convey interests in land, rather than oral agreements for express trusts in land; but the same principles apply. Browne on Statute of Frauds (5th Ed.) §§ 113, 447 et seq.

[89] Church v. Sterling, 16 Conn. 388; Harman v. Fisher, 90 Neb. 688, 134 N. W. 246, 39 L. R. A. (N. S.) 157; Canda v. Totten, 157 N. Y. 281, 51 N. E. 989; McLain v. School Directors of White Tp., 51 Pa. 196; Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305.

[90] St. 29 Chas. II, c. 3, § 7.

[91] Myers v. Myers, 167 Ill. 52, 47 N. E. 309; Forest v. Rogers, 128 Mo. App. 6, 106 S. W. 1105.

[92] Arntson v. First Nat. Bank of Sheldon, 39 N. D. 408, 167 N. W. 760, L. R. A. 1918F, 1038. For a similar case, see Delvol v. Citizen's Bank, 92 Or. 606, 179 Pac. 282, 181 Pac. 985.

conveyed by the trustee and other rights accruing, due to such performance of the oral trust, will be recognized by the courts, just as if the trust had been reduced to writing. If the oral trust is not avoided, it is as valid as a trust complying with the statute.[93]

What Writings Satisfy the Statute—General Requisites

The written evidence required under the statute has previously been considered from the point of view of the statutory statement,[94] but some discussion of the construction of such statutes will be useful.

First, the writing must contain a complete statement of the trust.[95] "To take the case out of the Statute of Frauds, the trust must appear in writing, under the hand of the party to be charged, with absolute certainty as to its nature and terms, before the court can undertake to execute it." [96] Where there is not sufficient identification of the trust res, for example, the memorandum is defective,[97] but that the length of the trust period is not stated in the memorandum is not important,[98] since the trust will last as long as necessary to accomplish its purpose.

Upon the question when the writing must be created, there can be no doubt, in states where the statute requires the trust to be "created or declared" in writing and the statute has been strictly construed, that the writing must be contemporaneous with the creation of the trust. In several of these states, however, the statute has been held to be satisfied by a writing made after the trust arose. In such case the writing merely proves the trust.[99] In states, on the other hand, where the requirement is only that the

[93] Polk v. Boggs, 122 Cal. 114, 54 Pac. 536; Hayden v. Denslow, 27 Conn. 335; King v. Bushnell, 121 Ill. 656, 13 N. E. 245; Stringer v. Montgomery, 111 Ind. 489, 12 N. E. 474; Johnston v. Jickling, 141 Iowa, 444, 119 N. W. 746; Ratigan v. Ratigan, 181 Iowa, 860, 162 N. W. 580, 165 N. W. 85; Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950; Lasley v. Delano, 139 Mich. 602, 102 N. W. 1063; Robbins v. Robbins, 89 N. Y. 251; Oklahoma Nat. Bank v. Cobb, 52 Okl. 654, 153 Pac. 134; Robertson v. Howerton, 56 Okl. 555, 156 Pac. 329; Shippey v. Bearman, 57 Okl. 603, 157 Pac. 302; Ryan v. Lofton (Tex. Civ. App.) 190 S. W. 752; Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047.

[94] Ante, p. 56.

[95] Marie M. E. Church v. Trinity M. E. Church, 253 Ill. 21, 97 N. E. 262; Holsapple v. Shrontz, 65 Ind. App. 390, 117 N. E. 547; H. B. Cartwright & Bro. v. United States Bank & Trust Co., 23 N. M. 82, 167 Pac. 436.

[96] Kent, Ch., in Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256.

[97] Snyder v. Snyder, 280 Ill. 467, 117 N. E. 465.

[98] Willats v. Bosworth, 33 Cal. App. 710, 166 Pac. 357.

[99] Gaylord v. City of Lafayette, 115 Ind. 423, 428, 17 N. E. 899; McClellan v. McClellan, 65 Me. 500; Urann v. Coates, 109 Mass. 581, 585; White v. Fitzgerald, 19 Wis. 504, 511.

trust be manifested or proved by a writing, it is clear that the writing may be made at the time of the creation of the trust or at any time thereafter, either before the commencement of the action or after such event.[1] Of course, the writing must be executed while the maker of it is the owner of the property concerned.[2] Naturally the owner of the property cannot admit that he holds it in trust for another before that trust arises. Hence the writing cannot ordinarily precede the creation of the trust.[3] But a written offer to hold in trust, later accepted by parol, is a sufficient writing.[4]

"It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust."[5] The intent with which the writing was made is immaterial.[6] Indeed, a paper which expressly repudiates the intention of fastening a trust upon the property by virtue of the writing, but which shows as a whole that the relation of trustee and cestui que trust exists, is sufficient.[7] But the admission that an oral trust exists made in a pleading which sets up the Statute of Frauds, will not be an effective writing.[8] It is not requisite that the writing be addressed to the cestui que trust, or any particular person.[9] A signature by initials is satisfactory.[10]

The following have been held sufficient to satisfy the statute: a deed of trust;[11] a memorandum below the signature on a deed;[12] an answer or other legal pleading;[13] a letter;[14] a receipt;[15] a contract regarding the improvement or control of the

[1] Smith v. Howell, 11 N. J. Eq. 349; McArthur v. Gordon, 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667; Reid v. Reid, 12 Rich. Eq. (S. C.) 213.

[2] Phillips v. South Park Com'rs, 119 Ill. 626, 10 N. E. 230.

[3] See, however, Jackson ex dem. Erwin v. Moore, 6 Cow. (N. Y.) 706, 726.

[4] Morton v. Tewart, 2 Younge & C. Ch. 67.

[5] Urann v. Coates, 109 Mass. 581, 584. See also Viele v. Curtis, 116 Me. 328, 101 Atl. 966.

[6] Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67; McClellan v. McClellan, 65 Me. 500.

[7] Urann v. Coates, 109 Mass. 581.

[8] Whiting v. Gould, 2 Wis. 552.

[9] Bates v. Hurd, 65 Me. 180; McCandless v. Warner, 26 W. Va. 754.

[10] Smith v. Howell, 11 N. J. Eq. 349.

[11] Miles v. Miles, 78 Kan. 382, 96 Pac. 481.

[12] Ivory v. Burns, 56 Pa. 300.

[13] Garnsey v. Gothard, 90 Cal. 603, 27 Pac. 516; McLaurie v. Partlow, 53 Ill. 340; Patten v. Chamberlain, 44 Mich. 5, 5 N. W. 1037.

[14] Brackenbury v. Hodgkin, 116 Me. 399, 102 Atl. 106; Montague v. Hayes, 76 Mass. (10 Gray) 609; Moulden v. Train, 199 Mo. App. 509, 204 S. W. 65; Malin v. Malin, 1 Wend. (N. Y.) 625.

[15] Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256; Appeal of Roberts, 92 Pa. 407.

property;[16] a recital in a mortgage or lease;[17] a power of attorney;[18] a deposition;[19] a book account;[20] an account rendered.[21] A defective will is not sufficient to create a trust, but it may operate as an admission that a trust already exists.[22]

The writing may be composed of more than one document.[23] If two or more papers are relied upon, they must be shown to be connected with each other. This connection may be shown by physical attachment or inclosure in the same receptacle,[24] or by reference to and adoption of one by another,[25] or by clear reference to the same transaction upon the face of each.[26]

What Writings Satisfy the Statute—Parol Evidence

Oral evidence cannot be used to bind several writings together. Their connection must appear from their physical attachment or from their contents.[28] The writing or writings relied on to satisfy the statute must contain a complete statement of the trust, without the necessity of relying on parol testimony to supply any missing element.[29] The parol evidence rule naturally forbids the admission of oral evidence to vary or contradict the terms of a

[16] Nolan v. Garrison, 151 Mich. 138, 115 N. W. 58; Jones v. Davis, 48 N. J. Eq. 493, 21 Atl. 1035.

[17] Commercial & Farmers' Bank of Raleigh v. Vass, 130 N. C. 590, 41 S. E. 791; Aller v. Crouter, 64 N. J. Eq. 381, 54 Atl. 426.

[18] Hutchins v. Van Vechten, 140 N. Y. 115, 35 N. E. 446.

[19] Baker v. Baker, 3 Cal. Unrep. 597, 31 Pac. 355.

[20] Corse v. Leggett, 25 Barb. (N. Y.) 389; In re Smith's Estate, 8 Pa. Co. Ct. R. 539.

[21] Denton v. McKenzie, 1 Desaus. (S. C.) 289, 1 Am. Dec. 664.

[22] Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64; Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056; Leslie v. Leslie, 53 N. J. Eq. 275, 31 Atl. 170.

[23] Tyler v. Granger, 48 Cal. 259; McCreary v. Gewinner, 103 Ga. 528, 29 S. E. 960; Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256; Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886; Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Van Cott v. Prentice, 104 N. Y. 46, 10 N. E. 257; In re Greenfield's Estate, 14 Pa. 489.

[24] Wiggs v. Winn, 127 Ala. 621, 29 South. 96; Hall v. Farmers' & Merchants' Bank, 145 Mo. 418, 46 S. W. 1000.

[25] McClellan v. McClellan, 65 Me. 500; Packard v. Putnam, 57 N. H. 43; Kimball v. De Graw, 9 N. Y. St. Rep. 339.

[26] Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Tenney v. Simpson, 37 Kan. 579, 15 Pac. 512; Gates v. Paul, 117 Wis. 170, 94 N. W. 55.

[28] Illinois Steel Co. v. Konkel, 146 Wis. 556, 131 N. W. 842.

[29] Cook v. Barr, 44 N. Y. 156; Kimball v. De Graw, 9 N. Y. St. Rep. 339; Appeal of Dyer, 107 Pa. 446; Martin v. Baird, 175 Pa. 540, 34 Atl. 809; Braun v. First German Evangelical Lutheran Church, 198 Pa. 152, 47 Atl. 963; Jourdan v. Andrews, 258 Pa. 347, 102 Atl. 33. But see Kendrick v. Ray, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289.

trust which is evidenced by a writing.[30] But ambiguities or uncertainties in a written instrument creating, or proving a trust may be explained by parol evidence.[31] "When the writing relied upon to satisfy the Statute of Frauds has been lost or destroyed, its contents may be shown by parol proof which is reasonably clear and certain in its character. * * * And the same rule should prevail where the party to the suit who is alleged to have signed the writing, and who has or should have possession thereof, fails to produce on notice and denies its existence." [32]

FORMALITY—STATUTE OF WILLS

21. If a will is relied upon to create a trust, rather than to evidence a pre-existing trust, the will must comply with the formalities prescribed by the Statute of Wills. Otherwise, no valid trust will arise.

Since the Statute of Wills[33] and the Statute of Frauds[34] in England some formality has been necessary to the execution of a valid will. Modern American legislation now very generally requires wills of real and personal property to be executed with certain formalities; the common provisions being that such instruments be in writing, signed or subscribed by the testator, and attested by one or more witnesses.[35]

It is self-evident that, if an instrument is relied upon as a will to pass the title to property to a trustee, it must be executed with the formality required by the laws of the state in question. But, if the instrument is relied on, not to pass the property to another and fasten a trust upon it, but to constitute an admission of a pre-existing trust of which the one executing the will is a trustee, then it is immaterial that the instrument is imperfectly executed as a will. It may be void as a will, and yet constitute sufficient evidence to make a valid memorandum of a pre-existing trust.[36]

[30] Chadwick v. Perkins, 3 Me. (Greenl.) 399; Gale v. Sulloway, 62 N. H. 57; Peer v. Peer, 11 N. J. Eq. 432; Wallace v. Berdell, 97 N. Y. 13; Richards v. Crocker, 66 Hun, 629, 20 N. Y. Supp. 954, affirmed 143 N. Y. 631, 37 N. E. 827.

[31] Fox v. Fox, 250 Ill. 384, 95 N. E. 498; Nesbitt v. Stevens, 161 Ind. 519, 69 N. E. 256; Wolf v. Pearce, 45 S. W. 865, 20 Ky. Law Rep. 296; Adams v. Canutt, 66 Wash. 422, 119 Pac. 865.

[32] Hiss v. Hiss, 228 Ill. 414, 423, 81 N. E. 1056.

[33] St. 32 Henry VIII, ch. 1.

[34] St. 29 Chas. II, ch. 3.

[35] See, for example, New York Decedent Estate Law (Consol. Laws, c. 13) § 21.

[36] Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056; Leslie v. Leslie, 53 N. J. Eq. 275, 31 Atl. 170.

In other words, a defective will may prove an express trust, although it cannot create such a relation.

CONSIDERATION

22. If a trust is completely created, lack of consideration will not render it revocable or invalid.

In order that an unexecuted promise to create a trust may give rise to a trust, consideration is necessary; and voluntary agreements to settle property in trust, as well as voluntary incomplete trusts, are not bases for the declaration by equity of either express or implied trusts.

An incomplete gift will not be converted into a trust by equity.

When Trust is Completely Created

It is thoroughly established that no consideration is necessary to make a trust enforceable, if all acts essential to be done by the settlor in order to create the trust have been done.[37] "It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery."[38] And another court has thus expressed itself: "If the deed under which they [the volunteer cestuis] claim be defective and inoperative at law, they cannot have the aid of a court of equity to complete and perfect it, any more than they can have the aid of the court to enforce a promise, or even a covenant, without consideration, to execute a deed."[39]

Once the owner of the property has placed the legal title in the trustee and created the equitable right in the cestui que trust, the trust becomes enforceable. If the trust has come into existence, the question whether the settlor received value for his act of settlement is immaterial. "The creation of a trust is but the gift

[37] Ellison v. Ellison, 6 Vesey, 656; Padfield v. Padfield, 72 Ill. 322; Harris Banking Co. v. Miller, 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N. S.) 790; Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257; Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505.

[38] Bigelow, J., in Stone v. Hackett, 12 Gray (Mass.) 227, 230.

[39] Ames, C. J., in Stone v. King, 7 R. I. 358, 365, 84 Am. Dec. 557.

of the equitable interest. An unequivocal declaration as effectually passes the equitable interest to the cestui que trust as delivery passes the legal title to the donee of a gift inter vivos."[40]

It is sometimes said that voluntary "executed" trusts are enforceable, but that voluntary "executory" trusts are of no effect legally.[41] "A trust may be said to be executed when it has been perfectly and explicitly declared in a writing duly signed, in which the terms and conditions upon which the legal title to the trust estate has been conveyed, or is held, and the final intention of the creator of the trust in respect thereto, appear with such certainty that nothing remains to be done, except that the trustee, without any further act or appointment from the settlor carry into effect the intention of the donor as declared."[42] But there is objection to the use of the words "executory" and "executed" in this connection, since the phrase "executory trust" is somewhat ambiguous. It is sometimes employed in another sense, namely, to indicate a trust, the details of the execution of which are not definitely and fully laid down in the original instrument, but which may, nevertheless, be completely created.[43]

Agreements to Create Trusts and Incomplete Trusts

On the other hand, if the property owner has merely contracted to create a trust, or has taken only part of the steps necessary to give the trust existence, or has taken all such steps, but some of them in a defective manner, and the cestui que trust is a volunteer, equity will not intervene in his behalf.[44] The trust not being in existence, the intended cestui can have nothing more on which to rely than a naked promise, which is of no more effect in equity than at law.

Equity's refusal to aid the volunteer prevents her from declaring implied trusts in the case of incomplete gifts.[45] If the property owner intended to give A. the legal title, but failed to carry out his intent by the acts which the law requires, there is no reason why equity should aid the intended donee and give him an

[40] Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 69, 51 Atl. 249.

[41] Massey v. Huntington, 118 Ill. 80, 7 N. E. 269.

[42] Gaylord v. City of Lafayette, 115 Ind. 423, 429, 17 N. E. 899.

[43] Post, § 45.

[44] Estate of Webb, 49 Cal. 541; Hamilton v. Hall's Estate, 111 Mich. 291, 69 N. W. 484; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535; Harding v. St. Louis Union Trust Co., 276 Mo. 136, 207 S. W. 68; Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N. Y. Supp. 902; Rousseau v. Call, 169 N. C. 173, 85 S. E. 414.

[45] Talcott v. American Board Com'rs for Foreign Missions, 205 Ill. App. 339; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634.

equitable estate. His condition is no worse since the failure to execute the gift than it was before the intention to make a gift was formed; the injustice and unjust enrichment necessary to give rise to a constructive trust do not exist, nor does the intent necessary to an express trust.

Doubtless if the intended voluntary cestui has sufficiently changed his position in justifiable reliance on the settlor's agreement to create a trust, the settlor may be estopped to deny his duty to settle a trust.[46]

The consideration required to support an agreement to create a trust is a valuable consideration; that is, money or its equivalent. It is, indeed, stated in some cases that meritorious or good consideration—love and affection or a duty to support—are recognized by equity as sufficient consideration.[47] But the weight of modern authority in England and America denies the validity of meritorious consideration as a support for an agreement to create a trust.[48]

It is occasionally hinted by the courts that a seal will induce equity to carry out an agreement otherwise unenforceable.[49] But the better view is that chancery will go behind the seal to learn the true consideration, and that the presence of a seal will not of itself render a voluntary agreement enforceable.[50] "It [equity] will doubtless not enforce a contract to create a trust, though it were under hand and seal; and in this respect it carries the doctrine of nudum pactum further than even the law does. * * *"[51] Modern legislation, making the seal merely presumptive evidence of consideration or otherwise altering its common-law effect, will probably lead equity to decrease still further, if possible, its esteem for the seal.

If one contracting to create a trust has received consideration for his promise, and then fails to perform, equity will decree a trust. "If there be a valuable consideration between the alleged

[46] Dillwyn v. Llewellyn, 4 De Gex, F. & J. 517.

[47] Ellis v. Nimmo, Lloyd & Goold, temp. Sugden, 333; Mahan v. Mahan, 7 B. Mon. (Ky.) 579; McIntire v. Hughes, 4 Bibb (Ky.) 186; Landon v. Hutton, 50 N. J. Eq. 500, 25 Atl. 953; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Pomeroy, Eq. Jur. (3d Ed.) § 588.

[48] Jefferys v. Jefferys, 1 Craig & P. 137; Phillips v. Frye, 14 Allen (Mass.) 36; Whitaker v. Whitaker, 52 N. Y. 368, 11 Am. Rep. 711; Matter of James, 146 N. Y. 78, 94, 40 N. E. 876, 48 Am. St. Rep. 774.

[49] Caldwell v. Williams, Bailey, Eq. (S. C.) 175.

[50] Selby v. Case, 87 Md. 459, 39 Atl. 1041; Hayes v. Kershow, 1 Sandf. Ch. (N. Y.) 258; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 498; Pomeroy, Eq. Jur. (3d Ed.) § 370, note, 383, 1293.

[51] Gibson, C. J., in Dennison v. Goehring, 7 Pa. 175, 178, 47 Am. Dec. 505.

trustee and cestui que trust, then, under the equitable rule that what ought to be done will be considered as done, the court may decree a contract to declare a trust as equivalent to an acutal declaration." [52]

DISPOSITION OF TRUST INSTRUMENT

23. Where the settlor makes himself trustee, delivery of the declaration of trust to the beneficiary is not requisite to the completion of the trust.

If the creator of the trust transfer the title to another to hold in trust, delivery of the trust deed to the trustee is necessary only so far as the rules of conveyancing require delivery to pass property. The instrument need not be manually handed over to the trustee. Placing the cestui in possession of the trust instrument in such a trust is not necessary or natural.

Except as required by statute in a few states, the recording of the trust document is not necessary to the creation of the trust.

Delivery

If the property owner has agreed to declare a trust, or to convey in trust for a consideration, failure to deliver the trust instrument will be of little importance, since equity can readily give relief to the intended cestui, whether the trust be considered complete or incomplete. But, if the trust is voluntary, its enforceability will depend on its completeness, and it is therefore important to ascertain whether delivery of the trust instrument in cases where there is a written statement of the trust is necessary to the completeness of a voluntary trust.

It is well established that it is not essential that the settlor actually deliver the trust instrument to the cestui or to the trustee in order to complete the trust. In numerous cases, in which the property owner has declared himself a trustee by formal written document, it has been held unnecessary to give the cestui possession of that document.[53] If the declarant has shown an intent to effect

[52] Janes v. Falk, 50 N. J. Eq. 468, 472, 26 Atl. 138, 35 Am. St. Rep. 783.

[53] In re Way's Trusts, 2 De Gex, J. & S. 365; Linton v. Brown's Adm'rs, (C. C.) 20 Fed. 455; Janes v. Falk, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783; Moloney v. Tilton, 22 Misc. Rep. 682, 51 N. Y. Supp. 19; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; In re Eshbach's Estate, 197 Pa. 153, 46 Atl. 905. Contra: Govin v. De Miranda, 76 Hun, 414, 27 N. Y. Supp. 1049, in which the court states at page 419: "In no case has it ever been held as yet that a party may, by transferring his

a complete trust, his failure to place the instrument stating the trust in the possession or control of the cestui will not be of determining importance.

When the property owner transfers the res to a third person as trustee, an additional element is involved, namely, the passage of property from settlor to trustee. The necessity of delivery of the trust instrument will be determined here by the law of conveyancing. The declaration of a trust involves only a theoretical transfer of the property from the declarant as an individual to the declarant as a trustee. It is almost universally held, in cases of transfers to third persons in trust, that the trust deed need not be actually placed in the manual possession of the trustee.[54]

Thus, in Adams v. Adams [55] the settlor signed, sealed, acknowledged, and recorded the trust deed but did not actually deliver it into the hands of the trustee or notify him of its existence. Mr. Justice Hunt, speaking for the Supreme Court, made the following statement: "In the case before us the settlor contemplated no further act to give completion to the deed. It was not an intention simply to create a trust. He had done all that was needed. With his wife he signed and sealed the deed. With her he acknowledged it before the proper officers, and himself caused it to be recorded in the appropriate office. He retained it in his own possession, but where it was equally under her dominion. He declared openly and repeatedly to her, and to her brothers and sisters, that it was a completed provision for her, and that she was perfectly protected by it. He intended what he had done to be final and binding upon him. Using the name of his friend as trustee, he made the placing of the deed upon record and keeping the same under the control of his wife, as well as himself, a delivery to the trustee for the account of all concerned, or he intended to make himself a trustee by actions final and binding upon himself." And in Huse v. Den [56] it is said that there need be no "formal and physical handing of

property from one pocket to another, make himself a trustee. In every case where a trust has been established the party creating it has placed the evidence thereof in the custody of another and has thereby shown that it was intended to be a completed act."

[54] Doe v. Knight, 5 B. & C. 671; Adams v. Adams, 21 Wall. 185, 22 L. Ed. 504; Huse v. Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232; Barr v. Schroeder, 32 Cal. 609; Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Steele v. Lowry, 4 Ohio, 72, 19 Am. Dec. 581. Contra: Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. Rep. 301.

[55] 21 Wall. 185, 193, 22 L. Ed. 504.

[56] 85 Cal. 390, 398, 24 Pac. 790, 20 Am. St. Rep. 232.

it [the trust deed] over" to the trustee. Constructive delivery will be adequate.

While the failure to deliver the trust instrument is not necessarily fatal to the existence of the trust, it will constitute important evidence that a completed trust was not intended. "It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust. It is a question of fact, in all cases, whether the trust had been perfectly created; and upon that question the delivery or nondelivery of the instrument is a significant fact, of greater or less weight according to the circumstances." [57]

It has been held that delivery of a trust deed was conclusively shown by an acceptance by the trustee written upon the trust instrument,[58] by signing and acknowledging a trust deed and leaving it to be recorded,[59] by signing, acknowledging, and recording the trust instrument,[60] and by a recital of delivery in the deed coupled with signature, acknowledgment, and recording.[61]

A valid delivery of the trust instrument will not be affected by a later return of that writing to the settlor.[62] A delivery to a third person on behalf of the trustee is sufficient delivery to the trustee.[63] Mere custody of the deed by the trustee on behalf of the settlor is not sufficient to show delivery to the trustee.[64]

Recording

It is hardly necessary to state that recording of the trust paper, in the absence of statute, is not an essential to completion of the

[57] Urann v. Coates, 109 Mass. 581, 584. See, also, Roosevelt v. Carow, 6 Barb. (N. Y.) 190, in which case the retention of the trust deed, together with other circumstances, was held to prove that no completed trust was intended. And see Welch v. Henshaw, 170 Mass. 409, 49 N. E. 659, 64 Am. St. Rep. 309, and Ambrosius v. Ambrosius, 239 Fed. 473, 152 C. C. A. 351. In Geoghegan v. Smith, 133 Md. 535, 105 Atl. 864, the trust was held incomplete where the memorandum was not delivered and the supposed settlor exercised absolute control over the property after the making of the memorandum.

[58] New South Building & Loan Ass'n v. Gann, 101 Ga. 678, 29 S. E. 15.

[59] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918.

[60] Walker v. Crews, 73 Ala. 412; Chilvers v. Race, 196 Ill. 71, 63 N. E. 701.

[61] Schreyer v. Schreyer, 43 Misc. Rep. 520, 89 N. Y. Supp. 508, affirmed, 182 N. Y. 555, 75 N. E. 1134.

[62] Stone v. King, 7 R. I. 358, 84 Am. Dec. 557; Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221.

[63] Woodward v. Camp, 22 Conn. 457; Withers v. Jenkins, 6 S. C. 122.

[64] Abert v. Lape (Ky.) 15 S. W. 134.

trust.[65] The effect of the recording statutes is the same upon trust deeds as upon other conveyances.

The recording of a trust instrument is strong evidence that a complete trust was intended,[66] but it has been held not to be conclusive.[67]

In some states the Statute of Frauds requires the recording of all instruments creating or proving trusts in real property.[68] In these states recording is a necessary step in the creation of trusts in land enforceable by action.

NOTICE OF THE TRUST

24. Neither notice to the trustee nor to the cestui que trust is essential to the existence of a completed trust, but the lack of such notice may have evidentiary value in showing that the settlor did not intend a completed trust.

Notice to the Cestui Que Trust

Is notice to the beneficiary a prerequisite to a complete trust? Obviously the cestui cannot bring suit to enforce the trust until he knows of it, but the trust may nevertheless exist without his knowledge. If the settlor's intent is clear that a trust shall arise, failure to notify the beneficiary of such intent will not be important.[69] "The question in such a case is not so much whether in the lifetime of the decedent the declaration was actually ex-

[65] Sprague v. Woods, 4 Watts & S. (Pa.) 192.

[66] Ante, p. 69.

[67] Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652, 40 L. R. A. 127, 64 Am. St. Rep. 301. But see Bailey v. Wood, 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A, 950.

[68] Code Iowa 1897, § 2918; Code Miss. 1906, § 4780; Gen. Laws R. I. 1909, c. 253, § 2; Cornelison v. Roberts, 107 Iowa, 220, 77 N. W. 1028; Board of Trustees of M. E. Church South v. Odom, 100 Miss. 64, 56 South. 314.

[69] Fowler v. Gowing (C. C.) 152 Fed. 801; Johnson v. Amberson, 140 Ala. 342, 37 South. 273; O'Brien v. Bank of Douglas, 17 Ariz. 203, 149 Pac. 747; Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 Pac. 765; Security Trust & Safe Deposit Co. v. Farrady, 9 Del. Ch. 306, 82 Atl. 24; Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914; Marshall's Adm'r v. Marshall, 156 Ky. 20, 160 S. W. 775, 51 L. R. A. (N. S.) 1208; City of Boston v. Turner, 201 Mass. 190, 87 N. E. 634; City of Marquette v. Wilkinson, 119 Mich. 413, 48 N. W. 474, 43 L. R. A. 840; Janes v. Falk, 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783; Neilson v. Blight, 1 Johns. Cas. (N. Y.) 205; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; Williams v. Haskin's Estate, 66 Vt. 378, 29 Atl. 371; Fleenor v. Hensley, 121 Va. 367, 93 S. E. 582. The courts of Massachusetts have shown a greater tendency than those of any other state to require notice to the beneficiary. In Boynton v. Gale, 194 Mass. 320, 323, 80 N. E. 448, the courts said: "What-

hibited to the inspection of others, as whether, under all the circumstances of the case, it would appear to have been written and preserved for the inspection of others." [70]

If it be said that the cestui should be notified in order that he might exercise the option of accepting or rejecting the trust, the reply is that acceptance of a beneficial property interest is presumed. If for any reason the beneficiary does not desire to retain the bounty of the settlor, he may disclaim after he receives knowledge of the trust.

The failure of the settlor to notify the cestui of his intent to create a trust will be considered, with all other circumstances, in determining whether the settlor intended a complete trust, but such notice is not an absolute essential to the perfected trust. In an English case [71] that the alleged settlor had written words of trust in a book, but had not communicated them to the intended beneficiary, was held to show an intent that there should be no completed trust.

Notice to the Trustee

It is likewise well settled that notice to the trustee of the trust conveyance is unnecessary to the perfection of the trust.[72] "Although the trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part." [73]

A trustee, as will appear later herein,[74] cannot be compelled to accept a trust, but it is unnecessary that he know of it or accept it. If he declines to act, another trustee will be appointed by equity. Since the principal object of requiring notice to the trustee would be to enable him to determine whether he wished to accept or reject the trust, and since the acceptance or rejection of any particular individual as trustee has no effect on the life of the trust, the rule which makes notice unnecessary is easily understandable.

As a matter of course the giving or failure to give notice to the trustee will have some value as evidence of the settlor's state of mind with respect to the completeness of the trust, but it is not conclusive.

ever may be the doctrine elsewhere, it is settled in this state that a mere declaration of trust by a voluntary settlor, not communicated to the donee and assented to by him, is not sufficient to perfect a trust, especially when the property is retained by him subject to his own control."

[70] Smith's Estate, 144 Pa. 428, 442, 22 Atl. 916, 27 Am. St. Rep. 641.

[71] In re Cozzens, 109 Law Times, 306, commented on in 62 Pa. Law Rev. 482.

[72] In re Way's Trusts, 2 De Gex, J. & S. 365; Thatcher v. Wardens, etc., of St. Andrew's Church of Ann Arbor, 37 Mich. 264; Adams v. Adams, 21 Wall. 185, 22 L. Ed. 504.

[73] Adams v. Adams, 21 Wall. 185, 192, 22 L. Ed. 504.

[74] Post, § 78.

ACCEPTANCE

25. Acceptance of the trust by the beneficiary is presumed, and proof of express acquiescence in the trust by the cestui is not essential to the completion of the trust.

Likewise acceptance of the trust by the trustee is not a requisite to the creation of the trust; for, if the trustee nominated does not accept, equity will appoint a substitute. Acceptance of the trust by the trustee is presumed.

Acceptance by the Cestui Que Trust

No man can be compelled to become the owner of property. The transferee or donee must assent.[75] The creation of a trust involves the transfer of rights to the cestui. It follows that acceptance of the trust by the beneficiary must occur before the trust will be complete,[76] just as the grantee of real property must acquiesce in the deed to him before the grantor's title will pass to him.

But the law presumes that the transferee of beneficial property rights accepts them. Commonly the rights of cestui que trust are purely beneficial and not burdensome. Hence, in the ordinary trust, there is a presumption that the cestui que trust assents to the trust. No express proof of acceptance of the trust is necessary.[77] But, if the gift of the trust interest imposes onerous conditions, the consent of the beneficiary will not be presumed.[78]

This presumption of acceptance of the trust by the cestui may be overcome.[79]

[75] 1 Devlin on Real Estate (3d Ed.) § 285.

[76] Libby v. Frost, 98 Me. 288, 56 Atl. 906; Bailey v. Worster, 103 Me. 170, 68 Atl. 698; Cunniff v. McDonnell, 196 Mass. 7, 81 N. E. 879. In Sloan v. Sloan, 282 Ill. 399, 118 N. E. 709, it was held that acceptance by all the cestuis que trust was necessary, and that a trust accepted by two of three only was revocable.

[77] O'Brien v. Bank of Douglas, 17 Ariz. 203, 149 Pac. 747; Barr v. Schroeder, 32 Cal. 609; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256; Devol v. Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914; Libby v. Frost, 98 Me. 288, 56 Atl. 906; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204; Suydam v. Dequindre, Har. (Mich.) 347; H. B. Cartwright & Bro. v. United States Bank & Trust Co., 23 N. M. 82, 167 Pac. 436; Stone v. King, 7 R. I. 358, 84 Am. Dec. 557; Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358; Furman v. Fisher, 4 Cold. (Tenn.) 626, 94 Am. Dec. 210; Fleenor v. Hensley, 121 Va. 367, 93 S. E. 582.

[78] Kemp v. Porter, 7 Ala. 138.

[79] Gwynn v. Gwynn, 11 App. D. C. 564; Lytle's Ex'r v. Pope's Adm'r, 11 B. Mon. (Ky.) 297; Breedlove v. Stump, 3 Yerg. (Tenn.) 257.

If the refusal to accept the trust occur before the attempt of the settlor to create it, no trust will ever arise, and the settlor will remain the absolute owner of the property. If the disclaimer of the trust by the beneficiary take place after the acts of the settlor necessary to the creation of the trust have been performed, the trust will have had a short life, based on the presumption of the acceptance by the cestui, but will be destroyed by the later disclaimer, and the title to the trust property will revest in the settlor.[80]

Acceptance by the Trustee

No man can be compelled to accept the duties of a trusteeship. Hence, for the purpose of fastening the trust duties upon any given individual, proof of acceptance by such individual is necessary.[81] No formal acceptance of the trust is needed. Acts in performance of the trust show implied acceptance.[82]

But acceptance by the trustee originally named is not essential to the creation of the trust. Equity will not allow a trust to fail for want of a trustee.[83] Even the neglect to name any trustee will not be fatal to the perfection of the trust in the ordinary case. Hence the rule is general that proof of acceptance of the trust by the trustee is not an essential part of the evidence necessary to show that an express trust has been established.[84] "It is said, indeed, that the trustee never accepted the trusts of the deed, and hence that it was incomplete. It is not essential to the validity of a trust created by the beneficial owner of the trust property that there should be an acceptance or a declaration of the trusts by the trustee in whom the legal interest is vested." [85]

As in the case of cestui que trust, the law presumes that the

[80] Post, § 108.

[81] Civ. Code Cal. § 2222; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673. Whether the trustee, in accepting intended to perform or not, is immaterial. Pearl v. Pearl, 177 Cal. 303, 177 Pac. 845.

[82] Pepper v. Walling (Tex. Civ. App.) 195 S. W. 892. Merely standing mute, when there is opportunity to reject, may show acceptance. Heitman v. Cutting, 37 Cal. App. 236, 174 Pac. 675.

[83] Post, § 75.

[84] Braswell v. Downs, 11 Fla. 62; Wells v. German Ins. Co. of Freeport, 128 Iowa, 649, 105 N. W. 123; Roche v. George's Ex'r, 93 Ky. 609, 20 S. W. 1039; Thatcher v. Wardens, etc., of St. Andrew's Church of Ann Arbor, 37 Mich. 264; , Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; Stone v. King, 7 R. I. 358, 84 Am. Dec. 557; Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358; Saunders v. Harris, 1 Head (Tenn.) 185.

[85] Ames, C. J., in Stone v. King, 7 R. I. 358, 366, 84 Am. Dec. 557.

trustee accepts the conveyance in trust.[86] This presumption of acceptance by the trustee is based on the further presumption that "any gift by deed, will, or otherwise is supposed prima facie, unless the contrary appears, to be beneficial to the donee."[87] In this instance the application of this latter presumption seems rather unsatisfactory, since "the contrary" does expressly appear in every deed of trust. In such instruments it appears that the grantee cannot hold beneficially, but rather solely for the use of another.

If the trustee decline the trust in advance of the settlement, the result will be that the settlor (or in case of wills the testator's heirs or next of kin) will hold the property in trust for the cestui que trust. If the disclaimer of the trust occur after the trust has been perfected, the legal title to the property will vest again in the settlor (or in cases of wills in the testator's heirs or next of kin) subject to the trusts declared.[88]

DISPOSITION OF TRUST PROPERTY

26. Transfer of title in the trust res to the trustee is fundamental to the idea of a trust and an important step in the act of creating a trust.

The investing of the trustee with possession of the property is not necessary to the completion of the trust, except in so far as possession is essential to the passage of title.

Transfer of Title

The very definition of a trust involves the idea that the trustee shall be the holder of a title to property. Hence transferring title to him is one of the acts which the settlor must perform before the trust can be complete.[89] "To create a trust of this species, it is essential that the delivery of the property to the alleged trustee

[86] Kennedy v. Winn, 80 Ala. 165; Harvey v. Gardner, 41 Ohio, 642; McLean v. Nelson, 46 N. C. 396; Eyrick v. Hetrick, 13 Pa. 488; Goss v. Singleton, 2 Head (Tenn.) 67; Bowden v. Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873.

[87] Harvey v. Gardner, 41 Ohio St. 642, 649. See, also, Goss v. Singleton, 2 Head (Tenn.) 67, and Bowden v. Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873.

[88] Adams v. Adams, 21 Wall. 185, 22 L. Ed. 504; Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470; Goss v. Singleton, 2 Head (Tenn.) 67. But see King v. Donnelly, 5 Paige (N. Y.) 46.

[89] Mahan v. Schroeder, 142 Ill. App. 538; West v. White's Estate, 56 Mich. 126, 22 N. W. 217; Citizen's Nat. Bank v. McKenna, 168 Mo. App. 254, 153 S. W. 521; Smith's Estate, 144 Pa. 428, 436, 22 Atl. 916, 27 Am. St. Rep. 641.

be with the purpose and intent of passing the legal estate to the trustee and vesting in him the absolute control over the property, even as against the person creating the trust, subject only to the declared purpose of the trust; and if such original owner reserves to himself or his heirs the power to control the property, and has only vested in the alleged trustee a possession, without any intention of vesting the property in him, but simply for the purpose of constituting him her agent to do certain acts, and at the same time of reserving the power to dispose of the property at his or her will, with or without the concurrence of the trustee, this would be an imperfect trust, and would not vest title in the trustee." [90]

Whether the trustee must become the holder of a legal or an equitable title to the property before the trust can be complete depends upon the nature of the title which the settlor intends the trustee shall have. Ordinarily the settlor transfers to the trustee the legal title, but occasionally he places in the trustee's hands the equitable title to the property to hold in trust for the beneficiaries.[91] Whatever title the trustee is to have during the administration of the trust must be given to him before the trust can be said to be completely created.

If the property owner makes himself the trustee, the transfer of title is formal or theoretical; but, if a third person is to become trustee, the transfer is actual, and the formalities necessary to convey the title to real or personal property from one to another must be complied with.

In order that there may be a complete trust, the interest of the cestui que trust, whether regarded as an estate or as a right in personam, must be presently vested in him and not made contingent.[92]

Transfer of Possession

It has already been stated that the trustee must receive the title to the trust res before the trust can be considered complete.[93] In some instances no title to property can be passed without delivery of the thing concerned. The transferee must have possession before he can have title. An oral gift of personal property is an example. Where the creation of a trust is attempted by such a gift, the settlor must give the trustee possession of the trust property before the trust can be completed. The reason lies in the law of gifts,

[90] West v. White's Estate, 56 Mich. 126, 128, 22 N. W. 217.

[91] Sloane v. Cadogan, 3 Sugden, Vendors & Purchasers (10th Ed.) Append. 66.

[92] Hess v. Sandner, 198 Mo. App. 636, 198 S. W. 1125; O'Gorman v. Jolley, 34 S. D. 26, 147 N. W. 78.

[93] Ante, p. 69.

rather than in the rules governing the creation of trusts.[94] A retention by the creator of the power to have access to the trust property in connection with the trustees, whereas the latter are allowed to handle the property without the joinder of the settlor, is sufficient delivery to the trustees and possession by them to make the trust effective.[95]

Where possession of the trust property is not necessary to the passage of title to the trustee, the trust may well be complete without a transfer of possession to the trustee.[96] "But the validity of the trust is not affected by the failure of the trustee to take possession of the property. * * *"[97] Indeed, delivery of the trust property to the trustee does not conclusively show that a trust has been created.[98]

Obviously it is only in cases of transfers to third persons that the change of possession can be important. If the property owner declares himself a trustee, any change of possession will be formal and theoretical only.

Ordinarily the cestui que trust is not expected to obtain possession of the trust res at any time during the life of the trust. It is well settled that possession of the corpus by him, either in cases of declarations of trust or transfers in trust, is not indispensable to the creation of the trust relationship.[99]

[94] Badgley v. Votrain, 68 Ill. 25, 18 Am. Rep. 541; Wellington v. Heermans, 110 Ill. 564; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535; Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. Supp. 1045; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14; Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547.

[95] Meldahl v. Wallace, 270 Ill. 220, 110 N. E. 354.

[96] Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 Pac. 765; Otis v. Beckwith, 49 Ill. 121; Roche v. George's Ex'r, 93 Ky. 609, 20 S. W. 1039; Schreyer v. Schreyer, 43 Misc. Rep. 520, 89 N. Y. Supp. 508, affirmed, 182 N. Y. 555, 75 N. E. 1134; Young v. Cardwell, 6 Lea (Tenn.) 168.

[97] Young v. Cardwell, 6 Lea (Tenn.) 168, 171.

[98] Lloyd v. Brooks, 34 Md. 27.

[99] Williamson v. Yager, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184; Mize v. Bates County Nat. Bank, 60 Mo. App. 358; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

SAVINGS BANK TRUSTS

27. That one has deposited his own money in a bank and directed that the account be entitled in trust for another does not alone establish a trust in the bank account. Depositors are frequently actuated by other motives than trust intent in making such deposits. The courts require confirmation of the trust by other acts.

Acts confirmatory of a trust intent are express statements by the depositor that he intended a trust; allowing the deposit to remain until the depositor's death; notice of the deposit to the beneficiary; notice to a third person; delivery of the bank book to the beneficiary or a third person; making a will consistent with a trust intent; and payment of part of the deposit to the supposed cestui. Near relationship between depositor and cestui tends to strengthen the notion of a trust.

Facts which rebut the inference that a trust was intended are the depositor's express statement that he intended no trust; death of the beneficiary before notice to him of the trust account; leaving the account untouched after the beneficiary's death; reservation of the right to withdraw all or a part of the account; dealing with the interest or principal as the depositor's property; obliteration of the trust words on the bank book by the depositor; admissions by the supposed cestui inconsistent with a trust; the making of a will by the depositor which is inconsistent with a trust; that the depositor's financial condition is such that a trust would be unnatural; that the taxation laws or rules restricting the size of deposits favored small deposits as against large ones.

Reasons for Special Rule

If A. deposit his own money in a bank, and by his direction the deposit is entitled "A., in trust for B.," is a trust created? If any further acts on the part of A. are necessary to the creation of a trust, what are such acts?

Under the elementary principles concerning the creation of trusts, previously stated, it might be assumed that the mere deposit of money in a bank under the circumstances mentioned in this question would lead to the establishment of a trust. The depositor calls himself a trustee of specific trust property, namely, the claim against the bank. His declaration is communicated to a third

party, namely, the officer of the bank. The beneficiary is definite and clearly identified.

But the peculiarity with respect to these so-called "savings bank trusts" is that the courts require that the declarant shall express his intent to create a trust more clearly and by a larger number of acts than in the case of an ordinary trust. The deposit of money in a bank under a trust title is considered equivocal. Men frequently deposit money under a trust title from other motives than that of creating a trust. The attitude of the courts toward a deposit entitled "in trust" is well stated by Andrews, J., in Beaver v. Beaver.[1] "The form of the account is the essential fact upon which the plaintiff relies. It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with the intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a passbook, the possession and presentation of which, by the rules of the bank, known to the depositor, is made evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intent of divesting themselves of ownership. It is attributable to various reasons—reasons connected with taxation; rules of the bank limiting the amount which any individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire, on the part of many persons, to veil or conceal from others knowledge of their pecuniary condition. In most cases, where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor."

The possibility that the depositor may be influenced by other motives than the trust motive has caused the courts very generally to hold that the bare deposit under a trust title does not

[1] 117 N. Y. 421, 430, 431, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531.

result in the creation of a trust. The depositor must show by other acts than the mere deposit that his object is the creation of a true trust.[2]

The bare deposit must be supported by other facts indicative of trust intent. The sole problem with respect to savings bank trusts is the weighing of the effect to be given these collateral facts. It is a problem of evidence. Do the collateral facts, when considered with the deposit, bring out clearly the intent to create a trust? Or do they establish that the form of the deposit is deceptive and was intended merely to accomplish an ulterior purpose, not a trust purpose?

The evidence bearing upon the intent of the depositor, aside from the deposit itself, may be divided into three classes, namely: (a) Express statements of intent; (b) acts of the depositor with respect to the deposit, or the supposed beneficiary, aside from express statements; (c) the circumstances of the depositor.

Express Statements of Intent

The most direct form of evidence as to the depositor's intent, aside from the deposit itself, is the express statement of the depositor concerning his intent. If the depositor stated, otherwise than by a direction as to the title of the deposit, at the time of the deposit, that he actually intended a trust, such evidence will be admissible, and ordinarily conclusive, as showing a trust.[3] So, too, evidence that the depositor stated at the time of the deposit that he intended no trust is receivable as a part of the res gestæ and is of great force.[4] Direct statements by the depositor that he intended a trust, made after the deposit, are given much weight;[5]

[2] Austin v. Central Sav. Bank of Baltimore, 126 Md. 139, 94 Atl. 520; Powers v. Provident Institution for Savings, 124 Mass. 377; Parkman v. Suffolk Savings Bank for Seamen, 151 Mass. 218, 24 N. E. 43; Cleveland v. Hampden Savings Bank, 182 Mass. 110, 65 N. E. 27; Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900; Rambo v. Pile, 220 Pa. 235, 238, 69 Atl. 96; People's Savings Bank v. Webb, 21 R. I. 218, 42 Atl. 874.

[3] Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Bath Savings Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Littig v. Vestry of Mt. Calvary Protestant Episcopal Church, 101 Md. 494, 61 Atl. 635; Martin v. Martin, 46 App. Div. 445, 61 N. Y. Supp. 813, appeal dismissed 166 N. Y. 611, 59 N. E. 1126; Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115. Contra: Clark v. Clark, 108 Mass. 522.

[4] Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994; Connecticut River Savings Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

[5] Alger v. North End Savings Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; Peck v. Scofield, 186 Mass. 108, 71 N. E. 109; Mable v. Bailey,

but they are not necessarily conclusive in showing the existence of a trust.[6] On the other hand, statements by the depositor, after the deposit, to the effect that no trust was intended, if the depositor be dead, are inadmissible.[7] But, if the depositor be alive, he may testify to his intent in making the deposit, whether such testimony is favorable to a trust [8] or unfavorable.[9]

A statement by the supposed beneficiary that she had no property, made with knowledge of the deposit,[10] or a statement by the beneficiary that the deposit was made for the purpose of getting better interest rates and not as a trust [11] is receivable as strong evidence that the depositor intended no trust.

Intent Implied from Acts of the Depositor Other Than Express Statements

(a) *Giving Notice of the Deposit.*—If the depositor notifies the beneficiary that the deposit has been made in trust form, a strong presumption of a trust arises;[12] but this presumption may be overcome by other facts in the case.[13]

95 N. Y. 206. The failure to admit declarations of the depositor favorable to a trust was held ground for ordering a new trial in Walso v. Latterner, 140 Minn. 455, 168 N. W. 353.

[6] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858.

[7] Tierney v. Fitzpatrick, 195 N. Y. 433, 88 N. E. 750; Matter of Bunt, 96 Misc. Rep. 114, 160 N. Y. Supp. 1118; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

[8] Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544.

[9] Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; Barefield v. Rosell, 177 N. Y. 387, 69 N. E. 732, 101 Am. St. Rep. 814; People's Sav. Bank v. Webb, 21 R. I. 218, 42 Atl. 874.

[10] Barefield v. Rosell, 177 N. Y. 387, 69 N. E. 732, 101 Am. St. Rep. 814.

[11] Matter of Mueller, 15 App. Div. 67, 44 N. Y. Supp. 280.

[12] Alger v. North End Saving Bank, 146 Mass. 418, 15 N. E. 916, 4 Am. St. Rep. 331; Peck v. Scofield, 186 Mass. 108, 71 N. E. 109; Grafing v. Heilmann, 1 App. Div. 260, 37 N. Y. Supp. 253, affirmed 153 N. Y. 673, 48 N. E. 1104; Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808; Meislahn v. Meislahn, 56 App. Div. 566, 67 N. Y. Supp. 480; Matter of Pierce, 132 App. Div. 465, 116 N. Y. Supp. 816; Matter of Hewitt, 40 Misc. Rep. 322, 81 N. Y. Supp. 1030; Matter of Halligan's Estate, 82 Misc. Rep. 30, 143 N. Y. Supp. 676; Matter of Brennan, 92 Misc. Rep. 423, 157 N. Y. Supp. 141; Willard v. Willard, 103 Misc. Rep. 544, 170 N. Y. Supp. 886; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447; Petition of Atkinson, 16 R. I. 413, 16 Atl. 712, 3 L. R. A. 392, 27 Am. St. Rep. 745; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

[13] Nutt v. Morse, 142 Mass. 1, 6 N. E. 763; Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Smith v. Speer, 34 N. J. Eq. 336; Matthews v. Brooklyn Sav. Bank, 208 N. Y. 508, 102 N. E. 520; Devlin v. Hinman, 34 App. Div.

Notice of the existence of the deposit given by the depositor to the beneficiary is not absolutely essential to the existence of a trust.[14] In several cases notice of the existence of a deposit in trust form given by the depositor to a third person has been accorded weight as tending to show an intent to create a trust.[15] But in other instances, notwithstanding such notice to a third person, no trust was found.[16] The Massachusetts courts have been inclined to give very little weight to the bare deposit in trust form, or to such deposit accompanied by notice to a third person unconnected with the beneficiary. The statement of Holmes, J., in Cleveland v. Hampden Savings Bank[17] is characteristic: "An owner of property does not lose it by using words of gift or trust concerning it in solitude or with the knowledge of another not assuming to represent an adverse interest. He may amuse himself as he likes."

Naturally notice of the existence of the deposit, obtained without the depositor's knowledge or consent, has no effect in showing the depositor's intent.[18]

(b) *Transactions Respecting the Bank Book.*—A trust may exist without delivery of the bank book by the depositor to another.[19] In fact, it is more natural that the trustee should retain possession of the evidence of the trust property than that he should deliver it to the beneficiary or to a third person.[20]

But the delivery of the bank book by the depositor to the beneficiary constitutes strong evidence of intent to make a gift of the

107, 54 N. Y. Supp. 496; Hessen v. McKinley, 155 App. Div. 496, 140 N. Y. Supp. 724; Weber v. Weber, 58 How. Prac. (N. Y.) 255; Weber v. Weber, 9 Daly (N. Y.) 211.

[14] In re Podhajsky's Estate, 137 Iowa, 742, 115 N. W. 590; Milholland v. Whalen, 89 Md. 212, 43 Atl. 39, 44 L. R. A. 485; Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Gerrish v. New Bedford Inst. for Sav., 128 Mass. 159, 35 Am. Rep. 365.

[15] Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994; Mabie v. Bailey, 95 N. Y. 206; In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214; In re King's Will, 51 Misc. Rep. 375, 101 N. Y. Supp. 279.

[16] Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Cleveland v. Hampden Sav. Bank, 182 Mass. 110, 65 N. E. 27; People's Sav. Bank v. Webb, 21 R. I. 218, 42 Atl. 874.

[17] 182 Mass. 110, 111, 65 N. E. 27.

[18] Matter of United States Trust Co., 117 App. Div. 178, 102 N. Y. Supp. 271.

[19] Willard v. Willard, 103 Misc. Rep. 544, 170 N. Y. Supp. 886; In re Gaffney's Estate, 146 Pa. 49, 23 Atl. 163.

[20] Milholland v. Whalen, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205; Weaver v. Emigrant, etc., Savings Bank, 17 Abb. N. C. (N. Y.) 82; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994.

account by way of a trust.[21] A direction by the depositor to deliver the book to the bank for the beneficiary is also strong evidence of the trust intent.[22]

But the delivery of the book to the beneficiary is not conclusive of a trust. The delivery may be so qualified as to show no intent to create a trust, but merely an intent to have the beneficiary hold the book as a bailee of the depositor.[23] The bare fact that the bank book is found in the possession of the beneficiary's sole heir and next of kin does not show that a trust exists.[24]

When the book has been delivered by the depositor to the beneficiary, the presumption of a trust is strong, notwithstanding a redelivery to the depositor or his nominee;[25] but in a recent case the New York Court of Appeals has held that under some circumstances such redelivery shows that no trust exists.[26]

In other cases the delivery of the book by the depositor to a third person[27] or to the depositor's executor,[28] or the leaving of the book with the bank,[29] has been considered as tending to prove that a trust was established. But other facts may overcome the presumption of a trust raised by the delivery of the book to a third person.[30]

The obliteration of the words of trust from the bank book by the depositor tends to show that he intended no trust.[31]

[21] Decker v. Union Dime Sav. Inst., 15 App. Div. 553, 44 N. Y. Supp. 521; Proseus v. Porter, 20 App. Div. 44, 46 N. Y. Supp. 656; Jennings v. Hennessy, 40 App. Div. 633, 58 N. Y. Supp. 1142; Matter of Davis, 119 App. Div. 35, 103 N. Y. Supp. 946; Matter of Pierce, 132 App. Div. 465, 116 N. Y. Supp. 816; Matter of Rudolph, 92 Misc. Rep. 347, 156 N. Y. Supp. 825; In re Beaman's Estate (Sur.) 163 N. Y. Supp. 800.

[22] Board of Domestic Missions of Reformed Church in America v. Mechanics' Sav. Bank, 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582.

[23] Nutt v. Morse, 142 Mass. 1, 6 N. E. 763; Matter of Halligan's Estate, 82 Misc. Rep. 30, 143 N. Y. Supp. 676; Markey v. Markey (Com. Pl.) 13 N. Y. Supp. 925.

[24] In re Duffy, 127 App. Div. 74, 111 N. Y. Supp. 77.

[25] Scrivens v. North Easton Sav. Bank, 166 Mass. 255, 44 N. E. 251; Macy v. Williams, 55 Hun, 489, 8 N. Y. Supp. 658, affirmed 125 N. Y. 767, 27 N. E. 409; Stockert v. Dry Dock Sav. Inst., 155 App. Div. 123, 139 N. Y. Supp. 986; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447.

[26] Matthews v. Brooklyn Sav. Bank, 208 N. Y. 508, 102 N. E. 520.

[27] Peck v. Scofield, 186 Mass. 108, 71 N. E. 109.

[28] Martin v. Martin, 46 App. Div. 445, 61 N. Y. Supp. 813, appeal dismissed 166 N. Y. 611, 59 N. E. 1126; Scallan v. Brooks, 54 App. Div. 248, 66 N. Y. Supp. 591.

[29] Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115.

[30] Lattan v. Van Ness, 107 App. Div. 393, 95 N. Y. Supp. 97, affirmed 184 N. Y. 601, 77 N. E. 1190.

[31] In re Bulwinkle, 107 App. Div. 331, 95 N. Y. Supp. 176.

(c) *Additions to and Withdrawals from the Account.*—No presumption for or against a trust arises from the mere addition to the original account during the life of the supposed beneficiary. The additions become trust property or not, according to the status of the original deposit.[32]

But a deposit made after the death of the supposed beneficiary tends to show that the trust is not real, but rather a mere form for the convenience of the depositor.[33]

The use by the depositor of the interest accruing upon the deposit for his personal benefit has some tendency to show that no trust was intended, and in some cases, in connection with other facts, it has defeated a trust;[34] but neither the reservation by the depositor of the right to use the interest on the account during his life,[35] nor the actual use of such interest by the depositor,[36] is necessarily inconsistent with a trust as to the principal. The crediting of the interest to the trust account is an act of no significance.[37]

The reservation by the depositor of the right to withdraw any or all of the principal fund for his own use has been viewed differently by the several courts which have considered the question. It has been regarded as militating against a trust,[38] while other courts have treated it as not inconsistent with a trust,[39] but as

[32] Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808; Proseus v. Porter, 20 App. Div. 44, 46 N. Y. Supp. 656; Hyde v. Kitchen, 69 Hun, 280, 23 N. Y. Supp. 573; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

[33] In re Bulwinkle, 107 App. Div. 331, 95 N. Y. Supp. 176.

[34] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858; Garvey v. Clifford, 114 App. Div. 193, 99 N. Y. Supp. 555; Thomas v. Newburgh Sav. Bank, 73 Misc. Rep. 308, 130 N. Y. Supp. 810, affirmed 147 App. Div. 937, 132 N. Y. Supp. 1148.

[35] Gerrish v. New Bedford Inst. for Sav., 128 Mass. 159, 35 Am. Rep. 365.

[36] Gerrish v. New Bedford Inst. for Sav., 128 Mass. 159, 35 Am. Rep. 365; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Willis v. Smyth, 91 N. Y. 297; Grafing v. Hellmann, 1 App. Div. 260, 37 N. Y. Supp. 253, affirmed 153 N. Y. 673, 48 N. E. 1104; Meislahn v. Meislahn, 56 App. Div. 566, 67 N. Y. Supp. 480; Witzel v. Chapin, 3 Bradf. Sur. (N. Y.) 386; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447.

[37] Hyde v. Kitchen, 69 Hun, 280, 23 N. Y. Supp. 573.

[38] Nutt v. Morse, 142 Mass. 1, 6 N. E. 763; Smith v. Speer, 34 N. J. Eq. 336.

[39] Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261; Drinkhouse v. German Savings & Loan Soc., 17 Cal. App. 162, 118 Pac. 953; Culver v. Lompoc Valley Sav. Bank, 22 Cal. App. 379, 134 Pac. 355; Scrivens v. North Easton Sav. Bank, 166 Mass. 255, 44 N. E. 251; Witzel v. Chapin, 3 Bradf. Sur.

indicating merely a power to revoke a trust which was fully created.[40] So, too, actual withdrawal of part or all of the principal deposit for the use of the depositor has been held in many instances to show the lack of trust intent,[41] and yet in other cases the withdrawals from the principal were regarded as consistent with the trust.[42]

Formal notice to the bank of intent to withdraw has been held to be equivalent to actual withdrawal.[43] That the account has remained untouched as to principal and interest since the principal deposit has been held to indicate a trust intent.[44] Withdrawal of part of the principal by the depositor and application of it to the use of the beneficiary tends to show a trust.[45] That the account is used by the depositor as his sole active account for the transaction of business is strong evidence against a trust.[46] An offer by the depositor to lend the principal to a third party has been held not antagonistic to a trust.[47] If the trust is complete, withdrawals from the fund for his own use will render the trustee liable

(N. Y.) 386; In re Bunt, 96 Misc. Rep. 114, 160 N. Y. Supp. 1118; In re Beaman's Estate (Sur.) 163 N. Y. Supp. 800.

[40] Littig v. Vestry of Mt. Calvary Protestant Episcopal Church, 101 Md. 494, 61 Atl. 635.

[41] Jewett v. Shattuck, 124 Mass. 590; Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858; Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900; Lattan v. Van Ness, 107 App. Div. 393, 95 N. Y. Supp. 97, affirmed 184 N. Y. 601, 77 N. E. 1190; Matthews v. Brooklyn Sav. Bank, 208 N. Y. 508, 102 N. E. 520; Devlin v. Hinman, 34 App. Div. 107, 54 N. Y. Supp. 496; Hessen v. McKinley, 155 App. Div. 496, 140 N. Y. Supp. 724; Lee v. Kennedy, 25 Misc. Rep. 140, 54 N. Y. Supp. 155; In re Barbey's Estate (Sur.) 114 N. Y. Supp. 725; In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214; Weber v. Weber, 58 How. Prac. (N. Y.) 255.

[42] Milholland v. Whalen, 89 Md. 212, 43 Atl. 43, 44 L. R. A. 205; Scott v. Harbeck, 49 Hun, 292, 1 N. Y. Supp. 788; Mabie v. Bailey, 95 N. Y. 206; Macy v. Williams, 55 Hun, 489, 8 N. Y. Supp. 658, affirmed 125 N. Y. 767, 27 N. E. 409; Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808; Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115; Decker v. Union Dime Sav. Inst., 15 App. Div. 553, 44 N. Y. Supp. 521; Robertson v. McCarty, 54 App. Div. 103, 66 N. Y. Supp. 327; Jenkins v. Baker, 77 App. Div. 509, 78 N. Y. Supp. 1074; Marsh v. Keogh, 82 App. Div. 503, 81 N. Y. Supp. 825; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

[43] Rush v. South Brooklyn Sav. Inst., 65 Misc. Rep. 66, 119 N. Y. Supp. 726.

[44] Harrison v. Totten, 53 App. Div. 178, 65 N. Y. Supp. 725.

[45] Grafing v. Heilmann, 1 App. Div. 260, 37 N. Y. Supp. 253, affirmed 153 N. Y. 673, 48 N. E. 1104; Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808.

[46] Rambo v. Pile, 220 Pa. 235, 69 Atl. 807.

[47] Willis v. Smyth, 91 N. Y. 297.

to the cestui que trust therefor,[48] but if the trust is incomplete, the withdrawals by the depositor for his own benefit entail no responsibility.[49]

(d) *Failure of Depositor to Withdraw Money Before his Death.*— The depositor's failure to act, as well as his actions, are of significance in ascertaining whether he intended a trust. Many courts have held the failure of the depositor to withdraw the deposit before his death to be strong evidence of his desire to create a trust.[50] The mere dis-

[48] Mabie v. Bailey, 95 N. Y. 206; Macy v. Williams, 55 Hun, 489, 8 N. Y. Supp. 658, affirmed 125 N. Y. 767, 27 N. E. 409; Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808; Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115; Decker v. Union Dime Sav. Inst., 15 App. Div. 553, 44 N. Y. Supp. 521; Robertson v. McCarty, 54 App. Div. 103, 66 N. Y. Supp. 327; Marsh v. Keogh, 82 App. Div. 503, 81 N. Y. Supp. 825.

[49] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858; Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; Matter of Totten, 179 N. Y 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900; Lattan v. Van Ness, 107 App. Div. 395, 95 N. Y. Supp. 97, affirmed 184 N. Y. 601, 77 N. E. 1190; Matthews v. Brooklyn Sav. Bank, 208 N. Y. 508, 102 N. E. 520; Hessen v. McKinley, 155 App. Div. 496, 140 N. Y. Supp. 724; In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214.

[50] Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Littig v. Vestry of Mt. Calvary Protestant Episcopal Church, 101 Md. 494, 61 Atl. 635; Fiocchi v. Smith (N. J. Ch.) 97 Atl. 283; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Willis v. Smyth, 91 N. Y. 297; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; Grafing v. Heilmann, 1 App. Div. 260, 37 N. Y. Supp. 253, affirmed 153 N. Y. 673, 48 N. E. 1104; Williams v. Brooklyn Sav. Bank, 51 App. Div. 332, 64 N. Y. Supp. 1021, appeal dismissed 165 N. Y. 676, 59 N. E. 1132; Martin v. Martin, 46 App. Div. 445, 61 N. Y. Supp. 813, appeal dismissed 166 N. Y. 611, 59 N. E. 1126; Board of Domestic Missions of Reformed Church in America v. Mechanics' Sav. Bank, 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582; Harrison v. Totten, 53 App. Div. 178, 65 N. Y. Supp. 725; Scallan v. Brooks, 54 App. Div. 248, 66 N. Y. Supp. 591; Meislahn v. Meislahn, 56 App. Div. 566, 67 N. Y. Supp. 480; Marsh v. Keogh, 82 App. Div. 503, 81 N. Y. Supp. 825; O'Brien v. Williamsburgh Sav. Bank, 101 App. Div. 108, 91 N. Y. Supp. 908; Beakes Dairy Co. v. Berns, 128 App. Div. 137, 112 N. Y. Supp. 529; Warburton Ave. Baptist Church v. Clark, 158 App. Div. 230, 142 N. Y. Supp. 1089; In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214; Matter of Hewitt, 40 Misc. Rep. 322, 81 N. Y. Supp. 1030; In re King's Will, 51 Misc. Rep. 375, 101 N. Y. Supp. 279; Wait v. Society for Political Study of New York City, 68 Misc. Rep. 245, 123 N. Y. Supp. 637; Matter of Halligan's Estate, 82 Misc. Rep. 30, 143 N. Y. Supp. 676; In re Hammer, 102 Misc. Rep. 193, 169 N. Y. Supp. 684; Weaver v. Emigrant, etc., Savings Bank, 17 Abb. N. C. (N. Y.) 82; In re Barbey's Estate (Sur.) 114 N. Y. Supp. 725; Witzel v. Chapin, 3 Bradf. Sur. (N. Y.) 386; In re Gaffney's Estate, 146 Pa. 49, 23 Atl. 163; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994; Petition of

appearance of the depositor is not equivalent to his death for this purpose.[51] But failure to remove the deposit before death is not conclusive evidence of the trust intent. Other facts may overpower it, and cause an adjudication that no trust exists.[52] In a few cases it has been held that, where the only facts proved were the deposit in trust form and the failure to remove before the death of the depositor, there was not sufficient evidence to show the creation of a trust.[53]

(e) *Attitude of Depositor to the Account Before and After Death of Beneficiary.*—It is quite generally recognized that failure to indicate the trust intent by notice, delivery of the book, or in some other way, before the death of the supposed beneficiary, is very strong proof that no trust was intended.[54] Allowing the account to stand as a trust account after the death of the supposed cestui que trust,[55] or adding to the account after his death,[56] does not, if no act decisively indicative of trust intent has been done before the cestui que

Atkinson, 16 R. I. 413, 16 Atl. 712, 3 L. R. A. 392, 27 Am. St. Rep. 745; Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944. See section 144 of the New York Banking Law (Consol. Laws, c. 2), second paragraph: "When any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the deposit was made." A similar statute was adopted in North Dakota by Laws 1919, c. 111.

[51] Hemmerich v. Union Dime Sav. Inst., 205 N. Y. 366, 98 N. E. 499, Ann. Cas. 1913E, 514.

[52] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858; Matter of Mueller, 15 App. Div. 67, 44 N. Y. Supp. 280; Rush v. South Brooklyn Sav. Inst., 65 Misc. Rep. 66, 119 N. Y. Supp. 726; Rambo v. Pile, 220 Pa. 235, 69 Atl. 807.

[53] Stone v. Bishop, 4 Cliff. 593, Fed. Cas. No. 13482; Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Clark v. Clark, 108 Mass. 522; Bartlett v. Remington, 59 N. H. 364.

[54] Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; Haux v. Dry Dock Sav. Inst., 2 App. Div. 165, 37 N. Y. Supp. 917, affirmed 154 N. Y. 736, 49 N. E. 1097; In re Bulwinkle, 107 App. Div. 331, 95 N. Y. Supp. 176; Garvey v. Clifford, 114 App. Div. 193, 99 N. Y. Supp. 555; Matter of United States Trust Co. of New York, 117 App. Div. 178, 102 N. Y. Supp. 271; In re Duffy, 127 App. Div. 74, 111 N. Y. Supp. 77; In re Smith's Estate, 40 Misc. Rep. 331, 81 N. Y. Supp. 1035; In re Thompson's Estate, 85 Misc. Rep. 291, 147 N. Y. Supp. 402; Rambo v. Pile, 220 Pa. 235, 69 Atl. 807. The case of Bishop v. Seamen's Bank for Saving, 33 App. Div. 181, 53 N. Y. Supp. 488, is out of accord with the other cases.

[55] Garvey v. Clifford, 114 App. Div. 193, 99 N. Y. Supp. 555; Rambo v. Pile, 220 Pa. 235, 69 Atl. 807.

[56] In re Bulwinkle, 107 App. Div. 331, 95 N. Y. Supp. 176.

trust's death, show a complete trust. Nor does a withdrawal of the fund after the beneficiary's death render the depositor liable to the representative of the beneficiary; no acts irrevocably showing the trust intent having occurred prior to the death of the beneficiary.[57]

But if the depositor has decisively shown his trust intent before the beneficiary's death, as by an express statement in a formal application to the bank,[58] or by the delivery of the book to the beneficiary,[59] then the death of the cestui que trust has no effect on the completed trust. The retention of the maiden name of a woman beneficiary in the trust account after her marriage is not inconsistent with the trust intent.[60]

(f) *The Making of a Will Inconsistent or Consistent with a Trust.*—That the depositor left a will inconsistent with a trust is strong evidence that he intended no trust in making the deposit;[61] but if the trust was completed by acts of the depositor before his death, an inconsistent will cannot destroy the trust.[62] That a will is consistent with a trust is of some force in favor of the trust.[63]

That the depositor had expressed a desire to provide for the cestui que trust and made no provision for him in his will is evidence favorable to a trust as to the bank account,[64] but a gift in the will to the person named as a beneficiary in the bank account is not, under similar circumstances, fatal to the finding of a trust through the savings bank account.[65]

Intent Implied from Circumstances of the Depositor

(a) *His Relationship to the Beneficiary.*—That the beneficiary occupies a close relationship to the depositor has often been considered as having some evidentiary value in favor of the trust intent.[66] But

[57] Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St. Rep. 641; In re Smith's Estate, 40 Misc. Rep. 331, 81 N. Y. Supp. 1035.

[58] Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115.

[59] Matter of Davis, 119 App. Div. 35, 103 N. Y. Supp. 946.

[60] Willis v. Smyth, 91 N. Y. 297.

[61] Thomas v. Newburgh Sav. Bank, 73 Misc. Rep. 308, 130 N. Y. Supp. 810, affirmed 147 App. Div. 937, 132 N. Y. Supp. 1148.

[62] Stockert v. Dry Dock Sav. Inst., 155 App. Div. 123, 139 N. Y. Supp. 986; Weaver v. Emigrant, etc., Savings Bank, 17 Abb. N. C. (N. Y.) 82.

[63] In re King's Will, 51 Misc. Rep. 375, 101 N. Y. Supp. 279.

[64] In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214.

[65] Marsh v. Keogh, 82 App. Div. 503, 81 N. Y. Supp. 825.

[66] Garrigus v. Burnett, 9 Ind. 528 (granddaughter); Mabie v. Bailey, 95 N. Y. 206 (stepdaughter); Farleigh v. Cadman, 159 N. Y. 169, 53 N. E. 808 (adopted daughter); Williams v. Brooklyn Sav. Bank, 51 App. Div. 332, 64 N. Y. Supp. 1021, appeal dismissed, 165 N. Y. 676, 59 N. E. 1132 (brother);

other facts in the case may weigh so strongly against a trust that the effect of the kinship will be overcome and a finding of no trust result.[67] That the party claiming to be a beneficiary was not related at all to the depositor, but merely occupied the business relationship of lessor to him, is some proof that no trust was intended by the depositor.[68]

(b) *Depositor's Financial Condition.*—The financial condition of the depositor may be such that he would be very unlikely to desire to make a gift of the moneys deposited. Thus, that the depositor is an aged man, having no money except that deposited in the account in question,[69] or that the depositor was not in business, but lived from the interest of his money and had a large part of his money entitled "in trust," [70] is strong evidence that no trust was intended.

(c) *The Depositor's Other Bank Accounts.*—That the depositor has twenty-seven accounts entitled "in trust," that he has $80,000 on deposit in banks, that all but $26,000 of it is in accounts entitled "in trust," and that the depositor made some deposits in trust and delivered the books to the beneficiaries, tends to show that no trust was intended by an account entitled "in trust for B.," when the bank book was not delivered to B.[71] That the depositor had other bank accounts labeled "in trust" for certain letters of the alphabet, and others merely "in trust," without mention of the name of any beneficiary, tends to

Bishop v. Seaman's Bank, 33 App. Div. 181, 53 N. Y. Supp. 488 (husband); Harrison v. Totten, 53 App. Div. 178, 65 N. Y. Supp. 725 (grandniece and nearest relative); Meislahn v. Meislahn, 56 App. Div. 566, 67 N. Y. Supp. 480 (child); Jenkins v. Baker, 77 App. Div. 509, 78 N. Y. Supp. 1074 (husband); Marsh v. Keogh, 82 App. Div. 503, 81 N. Y. Supp. 825 (adopted child); Matter of Davis, 119 App. Div. 35, 103 N. Y. Supp. 946 (husband); Stockert v. Dry Dock Sav. Inst., 155 App. Div. 123, 139 N. Y. Supp. 986 (niece); Miller v. Seaman's Bank for Savings, 33 Misc. Rep. 708, 68 N. Y. Supp. 983 (brother); In re Biggars, 39 Misc. Rep. 426, 80 N. Y. Supp. 214 (child); Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994 (in loco daughter); Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447 (in loco daughter); Petition of Atkinson, 16 R. I. 413, 16 Atl. 712, 3 L. R. A. 392, 27 Am. St. Rep. 745 (son).

[67] People's Sav. Bank v. Webb, 21 R. I. 218, 42 Atl. 874 (son); Cunningham v. Davenport, 147 N. Y. 43, 41 N. E. 412, 32 L. R. A. 373, 49 Am. St Rep. 641 (brother); Haux v. Dry Dock Sav. Inst., 2 App. Div. 165, 37 N. Y. Supp. 917, affirmed 154 N. Y. 736, 49 N. E. 1097 (child); Devlin v. Hinman, 34 App. Div. 107, 54 N. Y. Supp. 496 (child); In re Smith's Estate, 40 Misc. Rep. 331, 81 N. Y. Supp. 1035; Weber v. Weber, 58 How. Prac. (N. Y.) 255 (daughter).

[68] Rambo v. Pile, 220 Pa. 235, 69 Atl. 807.

[69] Weber v. Weber, 58 How. Prac. (N. Y.) 255.

[70] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858.

[71] Macy v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620, affirmed 144 N. Y. 701, 39 N. E. 858.

show that an account in trust for a stepdaughter was intended to create legal rights in the stepdaughter regarding the money so deposited.[72] That the depositor had no other bank account than the one in question, and did an active business through it, militated against a trust in one case.[73]

(d) *Rules Limiting the Amount of Savings Bank Deposits.*—It is customary for legislatures to place a limit upon the amount which may be deposited under a single name in a savings bank.[74] Thus, in New York, neither natural persons, societies, nor corporations may deposit more than $5,000 in a savings bank.[75]

That there is such a limit, and that the depositor in question had reached it in a deposit in his own name, shows a motive other than a trust motive for entitling another deposit "in trust." Such motive is the avoidance of the deposit limit rule. Such evidence is therefore relevant on the question of trust intent and may, with other facts, show the absence of a trust intent.[76] But in some cases this evidence has not been considered as conclusive against a trust, although it has been given weight.[77] "Inasmuch as the interest limit of this bank was $3,000, it is argued from these facts that these accounts were opened to gain interest. But the argument at best is speculation upon a possible motive. There were other savings banks open to him. We have seen that on the same day the depositor made a deposit in another savings bank, and this tends to refute the inference of his ignorance of the existence of other banks, or of his exclusion of them. Moreover, if he sought a scheme to gain interest, he could have deposited $3,000, instead of $2,700, in this particular account under discussion, out of the $7,482 received by him on that day. The argument based upon a scheme for interest does not carry special force in any case; for it is available in every case where the depositor's own funds in the same bank have reached the limit. It has not received much con-

[72] Mable v. Bailey, 95 N. Y. 206.

[73] Rambo v. Pile, 220 Pa. 235, 69 Atl. 807.

[74] St. 26 & 27 Vict. ch. 87, § 39; St. 56 & 57 Vict. c. 69, §§ 1, 2, 3.

[75] New York Banking Law (Consol. Laws, c. 2) § 247, as amended by Laws 1920, c. 167.

[76] Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222 (no trust); Parkman v. Suffolk Sav. Bank for Seamen, 151 Mass. 218, 24 N. E. 43 (no trust); Thomas v. Newburgh Sav. Bank, 73 Misc. Rep. 308, 130 N. Y. Supp. 810, affirmed 147 App. Div. 937, 132 N. Y. Supp. 1148 (no trust).

[77] Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994; Williams v. Brooklyn Sav. Bank, 51 App. Div. 332, 64 N. Y. Supp. 1021, appeal dismissed 165 N. Y. 676, 59 N. E. 1132; Meislahn v. Meislahn, 56 App. Div. 566, 67 N. Y. Supp. 480.

sideration where the depositor has named a beneficiary of the trust." [78]

(e) *Rules Giving Greater Interest Rates on Small Deposits.*—That the savings bank in question gave a higher rate of interest on deposits below a certain amount, and that the depositor had already reached this limit in an account under his own name, is of some evidentiary value, as tending to show a motive for the deposit in trust form other than the trust motive; [79] but, notwithstanding such evidence, the existence of a trust intent may otherwise be shown.[80]

(f) *Rules of Taxation Favoring Small Deposits.*—If the laws of the state in question tax savings bank deposits only when larger than a specific sum, and the depositor's individual account has already reached that amount, those facts may be shown as some proof that the depositor did not intend a trust by placing the account in a trust form, but merely intended to avoid taxation. But, notwithstanding such a motive, other circumstances may show a trust.[81]

[78] Williams v. Brooklyn Sav. Bank, 51 App. Div. 332, 336, 337, 64 N. Y. Supp. 1021, appeal dismissed 165 N. Y. 676, 59 N. E. 1132.

[79] Weber v. Weber, 58 How. Prac. (N. Y.) 255; Weber v. Weber, 9 Daly (N. Y.) 211.

[80] Mabie v. Bailey, 95 N. Y. 206.

[81] Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571, 25 Atl. 487, 33 Am. St. Rep. 944.

CHAPTER IV

CREATION OF RESULTING TRUSTS

INTRODUCTION

28. Implied trusts are trusts declared to exist by courts of equity, either for the purpose of carrying out the presumed intent of the parties or to rectify fraud and prevent unjust enrichment. They are of two classes, namely:

(a) Resulting trusts, which are declared by equity to exist because of a presumed intent that they shall exist; and

(b) Constructive trusts, which are created by equity as a convenient means of rectifying fraud and preventing unjust enrichment.

In previous sections[1] the creation of express trusts has been considered. The origin of implied trusts will now be studied.

Reference has previously been made to the unsatisfactory and conflicting classifications of trusts made by various judges and authors.[2] "Implied trusts" have been defined by some to mean trusts in which the settlor consciously intended a trust, but expressed his intent in doubtful or ambiguous language, as, for example, by the use of such precatory words as "I request." In such cases the court has sometimes been said to imply or construe the trust from the words of the parties.[3] But the more common definition of implied trusts is that they are trusts which owe their existence to the courts, and not to expressed intent of the parties (either clear or ambiguous); that they are law-created trusts, and not trusts created by act of the parties. This more common definition has also divided implied trusts into two classes, namely, resulting and constructive trusts; the former implied by the courts, because the parties involved are presumed to have

[1] Ante, § 18 et seq. [2] See note, ante, p. 43.
[3] Lewin, Trusts (12th Ed.) p. 124, note; 1 Perry, Trusts (6th Ed.) § 112.

intended them, and the latter created by the courts for the purpose of preventing the unjust enrichment of the holder of a title, usually the legal title.[4]

The classification of trusts has been discussed by several able writers.[5] Undoubtedly a desirable division would be that of Professor Costigan, into "intent-enforcing" and "fraud-rectifying" trusts. Within the former class would fall: (1) Cases where the parties have clearly expressed an intent to have a trust exist; (2) cases in which the parties have expressed an ambiguous intent, which the court, construing their acts, holds to be a trust intent; and (3) cases in which the parties have expressed no intent by words, but have done acts from which the court presumes that a trust was intended. In this latter case the court declares that as a result of these acts a trust exists. To the second class, that of "fraud-rectifying," would be assigned those cases now usually classed as constructive or involuntary trusts, in which the parties have expressed no intent to have a trust, nor does the court presume that any such intent existed, but the court uses the trust as the most convenient method of working out justice and preventing one party from unjustly enriching himself.

The statement that resulting trusts are created by operation of law may be criticized. It may be urged that they are created by the acts of the parties; that their basis is the intent of the parties; that the law does not bring them into being, but adjudges that they have existed ever since the parties did the acts in question; and that resulting trusts are like the contracts which are properly called "implied." Such contracts are inferred by the courts from the acts of the parties, as where one takes a newspaper from a news-stand without making any statement. Ordinarily the courts would infer that as a matter of fact there was a contract for the purchase of the newspaper.

[4] See authorities cited, ante, p. 44, note.

"Some courts have been disposed to divide these trusts into categories, with distinctive names, as 'resulting trusts' and 'constructive trusts,' but have so confused the lines which divide them from each other as to have materially impaired their usefulness for the purpose of legal exposition. Generally speaking, however, a resulting trust is one which the law implies to meet the requirement of justice that a legal status be given to what is the clear intention of the parties; while constructive trusts rest upon the sound public policy which requires that the laws themselves should not become the instruments of designing persons to be used for the purpose of fraud and oppression." Ferguson v. Robinson, 258 Mo. 113, 129, 167 S. W. 447, 452.

[5] See Maitland, Equity, pp. 75–76; "The Classification of Trusts as Express, Resulting and Constructive," G. P. Costigan, Jr., 27 Harv. Law Rev. 437; "Resulting Trusts and the Statute of Frauds," H. F. Stone, 6 Col. Law Rev. 326.

On the other hand, it may be said that constructive trusts are analogous to quasi contracts, which are imposed by law upon parties for the purpose of preventing unjust enrichment. If A. has paid $500 to B. under a contract which is unenforceable because of the Statute of Frauds, and B. sets up the statute as a bar against performance, A. may recover of B. the $500 thus paid, not because of any true contract for its return, but because the law imposes on B. a quasi contract obligation to return the $500. In the same way constructive trusts are imposed on parties who were never intended to be trustees, but who now hold property which does not equitably belong to them.

Although the common classification of trusts is illogical, it seems inadvisable to depart from it in an elementary text-book. Resulting and constructive trusts will be treated together, and under the common heading of implied trusts, although they do not logically belong together. To do otherwise would produce confusion rather than clarity.

UNDERLYING PRINCIPLE OF RESULTING TRUSTS

29. Resulting trusts are based on the presumption that one parting with property expects a return. They exist in certain cases where the holder of the legal title to property has given no value therefor.

Resulting trusts are based on the fundamental notion that one is presumed not to give away his property. "All resulting uses or trusts will be found to be some variation of this principle, viz. that one is presumed not to be a donor of property conveyed or caused to be conveyed by him." [6] If A. owns property and conveys it gratuitously to B., there is a presumption that A. did not intend a gift to B. If A. pays X. for property which he has X. convey to B., there is a presumption that A. expected to receive some value for his money, and that B. was not to be the absolute owner of the property. The idea that one who gives value expects to get value in return is at the root of resulting trusts. The one furnishing the value may furnish it directly or indirectly, but in either case equity presumes that he intended that some interest should accrue to him in return for such value. Wherever equity finds a holder of the legal title to real or personal

[6] H. F. Stone, "Resulting Trusts and the Statute of Frauds," 6 Col. Law Rev. 326, 329. For a case in which resulting trusts are confused with constructive trusts, and fraud is said to be a necessary element of resulting trusts, see Havner Land Co. v. MacGregor, 169 Iowa, 5, 149 N. W. 617.

property, who has furnished no consideration for the transfer of that legal title to himself, equity presumes that the person who furnished the consideration for such transfer intended that the holder of the legal title should be a trustee for the payer of the consideration. The further definition of resulting trusts can best be accomplished by a consideration of the various cases in which they have been held to arise.

STATUTE OF FRAUDS

30. The Statute of Frauds has no application to resulting trusts. They may be created and proved by oral evidence, whether they relate to real or personal property.

The eighth section of the English Statute of Frauds [7] excepts from the operation of the seventh section trusts arising or resulting "by the implication or construction of law," and the American state statutes have universally followed the English model in this respect.[8] It is everywhere held that a resulting trust may be proved by parol evidence.[9] Resulting trusts need not be created or proved by a written instrument.

[7] St. 29 Charles II, c. 3 (1677).

[8] See note, ante, p. 55. But the statutes of Pennsylvania require an acknowledged and recorded declaration of a resulting trust or an action of ejectment begun by the cestui que trust in order to make the resulting trust valid against creditors of or bona fide purchasers from the legal title holder, without notice. 4 Purdon's Dig. (13th Ed.) p. 4850; Rochester Trust Co. v. White, 243 Pa. 469, 90 Atl. 127; Rosa v. Hummel, 252 Pa. 578, 97 Atl. 942.

[9] Caple v. McCollum, 27 Ala. 461; Bayles v. Baxter, 22 Cal. 575; Poulet v. Johnson, 25 Ga. 403; Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; McCollister v. Willey, 52 Ind. 382; Culp v. Price, 107 Iowa, 133, 77 N. W. 848; Lehrling v. Lehrling, 84 Kan. 766, 115 Pac. 556; Nickels v. Clay, 14 Ky. Law Rep. 925; Davis v. Downer, 210 Mass. 573, 97 N. E. 90; Butler v. Carpenter, 163 Mo. 597, 63 S. W. 823; Baker v. Baker, 75 N. J. Eq. 305, 72 Atl. 1000; Ross v. Hegeman, 2 Edw. Ch. (N. Y.) 373; Coffin v. McIntosh, 9 Utah, 315, 34 Pac. 247.

The courts frequently state that the evidence to establish a resulting trust must be clear, strong, unequivocal and convincing. Hunter v. Feild, 114 Ark. 128, 169 S. W. 813; Steward v. Hackler, 117 Ark. 655, 173 S. W. 425; McGill v. Chappelle, 71 Fla. 479, 71 South. 836. "Since such a trust works in a sense uphill against the statute of frauds, the rule has ever been to require strong, unequivocal, and convincing proof before finding and decreeing the existence of such a trust." Hunnell v. Zinn (Mo.) 184 S. W. 1154, 1156. It is not understood why the proof of a resulting trust should require stronger evidence than any other fact in a civil action.

VOLUNTARY CONVEYANCES

31. It was a doctrine of early English equity that a common-law conveyance, in which no consideration was named and no use expressed, was presumed to create a resulting trust in favor of the grantor. Trusts of this variety are now obsolete, because of changes in conveyancing.

In the early history of the English common law practically all land was held to uses. It was almost universal to mention in conveyances the use to which the property conveyed was to be held. Wherever A. conveyed land to B. by a common-law conveyance (feoffment with livery of seizin, fine, or recovery), and no consideration was mentioned and no use named, chancery presumed that the universal custom of holding to uses would be followed, and that a use was intended for the benefit of A., the person naturally entitled to the profits of the property.[10] It was presumed that A. did not intend to give away his property, and, if any use were to exist, it would seem natural that it should exist in favor of A. This use was called a resulting use.

Later, when the Statute of Uses was enacted, and uses were recognized as trusts, chancery continued to enforce A.'s rights in the form of a resulting trust.

Changes in conveyancing have rendered this form of resulting trust now obsolete. The old common-law forms of conveyancing are superseded by conveyances operating under the Statute of Uses, in which there is no room for a presumption of a trust in favor of the grantor. The conveyances by lease and release and bargain and sale practically always mention a consideration or name the person to whose use the land is to be held. The conveyance by bargain and sale relied for its operation on the raising of a use in the grantee. Hence such a conveyance without mention of a use was impossible. Modern conveyances in the form of grants always state that consideration passed, or name the use, or do both, and hence leave no room for presumptions as to the identity of the person who is entitled to the use of the property.

The resulting trust of this nature is, therefore, very generally held to be nonexistent.[11] Naturally, if any consideration[12] or

[10] Digby, History of Real Property (5th Ed.) 329, 355; Bacon, Uses, 217.

[11] Leman v. Whitley, 4 Russ. Ch. 423; Tainter v. Broderick Land & Investment Co., 177 Cal. 664, 171 Pac. 679; McClenahan v. Stevenson, 118 Iowa,

[12] See note 12 on following page.

any use[13] is named, no trust can result to the grantor. A statute declaring that all conveyances shall pass a fee, unless a contrary intent clearly appears in the conveyance, prevents the occurrence of resulting trusts of this class.[14]

"The old common-law conveyances operated to pass the title without the machinery of a declaration of uses, and where no use was declared, and in the absence of an actual consideration paid, the courts raised a resulting trust in favor of the grantor. But modern conveyances, of which the one in hand is a sample, operate under the Statute of Uses, and contain an express declaration of uses, and it is contrary to first principles to permit this declaration to be contradicted by parol, except in cases of fraud, accident, or mistake." [15]

Under the early common law, when resulting trusts of this class arose, the presumption of a trust in favor of the grantor could always be overcome by parol evidence that a gift was intended. The duty of a man to support his wife and children raised a presumption that a voluntary conveyance to wife or child was by way of gift, and not with the intent that wife or child should hold as a resulting trustee.[16]

106, 91 N. W. 925; Philbrook v. Delano, 29 Me. 410; Groff v. Rohrer, 35 Md. 327; Titcomb v. Morrill, 10 Allen (Mass.) 15; Bartlett v. Bartlett, 14 Gray (Mass.) 277; Taylor v. Thompson, 88 Mo. 86; Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896; Coffey v. Sullivan, 63 N. J. Eq. 296, 49 Atl. 520. But see Bayles v. Crossman, 5 Ohio Dec. 354; Boyd v. Winte (Okl.) 164 Pac. 781. But a voluntary conveyance, coupled with other facts, may raise a resulting trust. Gray v. Beard, 66 Or. 59, 133 Pac. 791. It has been recently held that a voluntary conveyance by one trustee for a charity to another trustee, without mention of a trust purpose, created a resulting trust. Deutsche Presbyterische Kirche v. Trustees of Presbytery of Elizabeth, 89 N. J. Eq. 242, 104 Atl. 642.

[12] Verzier v. Convard, 75 Conn. 1, 52 Atl. 255; Gould v. Lynde, 114 Mass. 366; Jackson v. Cleveland, 15 Mich. 94, 90 Am. Dec. 266; Farrington v. Barr, 36 N. H. 86.

[13] Bragg v. Geddes, 93 Ill. 39; Donlin v. Bradley, 119 Ill. 412, 10 N. E. 11; Salisbury v. Clarke, 61 Vt. 453, 17 Atl. 135.

[14] Campbell v. Noble, 145 Ala. 233, 41 South. 745.

[15] Lovett v. Taylor, 54 N. J. Eq. 311, 318, 34 Atl. 896.

[16] Christ's Hospital v. Budgin, 2 Vern. 683; Jennings v. Sellick, 1 Vern. 467.

IMPERFECT OR ILLEGAL DECLARATIONS OF TRUST

32. Whenever property is voluntarily conveyed in trust by deed or will, and the statements of the trust are imperfect or illegal, or for any other reason the trust fails, a trust results in favor of the transferor of the property or his representatives.

Whenever real or personal property has been conveyed inter vivos or by will, without consideration, to another under a private trust, and the beneficiaries of the trust are not named, or are named as to a part of the property only, or the beneficiaries named are incapable of taking, or the purpose of the trust is illegal, or impossible, or the trust is void for indefiniteness, or the purpose of the trust is accomplished, or for any other reason the trust fails in whole or in part, a trust results as to the property thus undisposed of in favor of the grantor, or in favor of his successors, if he be dead. The trustee named in the instrument is declared a trustee, not under the original instrument as to the undisposed property, but a trustee of a resulting trust. If the property be personal, and the settlor be dead, the cestuis under the resulting trust will be the next of kin of the settlor; if the property be real, the heirs of the settlor will benefit by the resulting trust.[17] Thus, where the beneficiary has died, so that the further performance of the trust is impossible, it is held that a trust results to the donor or his successors;[18] and where the trust is too indefinite to be carried out the trustee named will hold under a resulting trust for the next of kin.[19] "If by lapse of time or for other reasons the trustees could no longer apply the object of

[17] Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739; Cagwin v. Buerkle, 55 Ark. 5, 17 S. W. 266; John M. C. Marble Co. v. Merchant's Bk., 15 Cal. App. 347, 115 Pac. 59; Taylor v. Crosson (Del. Ch.) 98 Atl. 375; Drew v. Wakefield, 54 Me. 291; Blake v. Dexter, 66 Mass. (12 Cush.) 559; Amory v. Trustees of Amherst College, 229 Mass. 374, 118 N. E. 933; Hargadine v. Henderson, 97 Mo. 375, 11 S. W. 218; Sprague v. Trustees of Protestant Episcopal Church of Diocese of Michigan, 186 Mich. 554, 152 N. W. 996; Bowker v. Wells, 2 How. Prac. (N. S.) 150; Casey v. Casey, 161 App. Div. 427, 146 N. Y. Supp. 348; Dover v. Rhea, 108 N. C. 88, 13 S. E. 164; Broadup v. Woodman, 27 Ohio St. 553; In re Bacon's Estate, 202 Pa. 535, 52 Atl. 135; Ford v. Dangerfield, 8 Rich. Eq. (S. C.) 95.

[18] Chater v. Carter, 238 U. S. 572, 35 Sup. Ct. 859, 59 L. Ed. 1462; Giersch v. Grady, 85 Conn. 685, 84 Atl. 103.

[19] Haskell v. Staples, 116 Me. 103, 100 Atl. 148, L. R. A. 1917D, 819; Davison v. Wyman, 214 Mass. 192, 100 N. E. 1105; Blunt v. Taylor, 230 Mass. 303, 119 N. E. 954; Bond v. Dukate, 118 Miss. 516, 79 South. 86.

the trust to any purpose within the intention of the donor, their title as trustees would not be defeated; but they would hold the trust property, not for their own benefit, but for the grantor's heirs as a resulting trust."[20]

It is often said that the result of the partial or imperfect or illegal declaration of trust, or of the failure or accomplishment of the trust is, in the case of wills, that the property concerned passes as if the deceased had died intestate so far as it is concerned; that is, that real property passes directly to the testator's heirs and personal property directly to an administrator for the next of kin.[21] It is submitted, however, that a more complete statement of the result is that the will is given effect to pass the legal title to the trustee named therein, but that the trustee holds such legal title in trust for the heirs or next of kin. To speak of intestacy in such a case is to declare the will void. The will takes effect, the trustee gets the legal title, but must hold it for the benefit of the heirs or next of kin, and the same decree which declares the resulting trust will doubtless decree a conveyance by the resulting trustee to the cestui que trust of such resulting trust, since the resulting trust is always passive.

In cases of public or charitable trusts, a declaration void for indefiniteness will have the effect of raising a resulting trust for the heirs or next of kin, as in the case of a private trust.[22] But, when the defect in the charitable trust is merely that the testator's scheme for administering the trust breaks down, equity will apply the cy pres doctrine, and administer the trust for a purpose as near like that of the settlor as possible.[23] This cy pres doctrine often prevents the application of this theory of resulting trusts to defective charitable trusts.[24]

Where a testator gives property to a trustee under an imperfect or illegal trust, and inserts a residuary clause in his will, the trustee will hold as a resulting trustee for the residuary legatees or devisees. The general statement is that the persons named in

[20] Lyford v. City of Laconia, 75 N. H. 220, 223, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680. See, also, Vizard Inv. Co. v. York, 167 Ky. 634, 181 S. W. 370.

[21] In re Fair's Estate, 136 Cal. 79, 68 Pac. 306; Bristol v. Bristol, 53 Conn. 242, 5 Atl. 687; Wilce v. Van Arden, 248 Ill. 358, 94 N. E. 42, 140 Am. St. Rep. 212, 21 Ann. Cas. 153; In re Eaton's Estate, 160 Mich. 230, 125 N. W. 85; Vail v. Vail, 4 Paige (N. Y.) 317; Miller v. London, 60 N. C. 628.

[22] Minot v. Attorney General, 189 Mass. 176, 75 N. E. 149; Wilcox v. Attorney General, 207 Mass. 198, 93 N. E. 599, Ann. Cas. 1912A, 833.

[23] Adams v. Page, 76 N. H. 96, 79 Atl. 837.

[24] For a further discussion of the effect of imperfect charitable trusts, see post § 63.

the residuary clause take the property named in the defective trust.[25]

It will be observed that the principle underlying this class of resulting trusts is the same as that which formed the basis of such trusts arising out of voluntary conveyances. Here, as there, a presumption against gift arises. The grantor or testator is presumed not to have intended that the voluntary trustee under the imperfect or illegal trust should hold for the trustee's benefit. The trustee has given no value for the property he holds under the defective trust. The presumption is that the settlor intended that, if the trust proved defective, the property subject to it should go back to the settlor, if living, or to his successors, if he be dead. Such presumption causes equity to fasten a trust on the property in the hands of the trustee named in the defective instrument. This action gives effect to the settlor's deed or will, and at the same time confers the beneficial ownership of the property on him who is equitably entitled to it.

PAYMENT OF CONSIDERATION FOR CONVEYANCE TO ANOTHER

33. One who pays the consideration for a transfer of real or personal property, but has the title taken in the name of another, is presumed to be the beneficiary of a resulting trust as to such property.

The consideration paid must be the money or other property of the alleged cestui at the time of the conveyance, if a trust is to exist.

The consideration must be paid or agreed to be paid at or before the time when the property is conveyed.

The whole of the consideration must be paid, or, according to the weight of authority, an aliquot part of the consideration under an agreement for an interest in an aliquot part of the property.

If the payor of the consideration is the husband or parent of the grantee, there is a presumption that the transfer of the property was by way of gift or advancement.

In seven states resulting trusts of this kind are abolished by statute.

[25] Phelps v. Robbins, 40 Conn. 250; Trunkey v. Van Sant, 176 N. Y. 535, 68 N. E. 946; Woolmer's Estate, 3 Whart. (Pa.) 477; Craig v. Beatty, 11 S. C. 375.

(a) General Principle

The third and most important class of resulting trusts is that arising where A. pays the consideration for conveyance of property, real or personal, and has the property conveyed to B. "On account of the improbability of a gift to a stranger, the law implies that the one who holds the title, without having paid any value for it, is a trustee for the one who in fact paid the purchase price." [26] This principle is one universally recognized,[27] except in certain states, where statutes have been passed controlling the situation. The statutes declaring or modifying the general rule above stated will be discussed later.[28]

This form of trust arises only when the purchase in the name of a stranger is made with the payor's consent. If such consent be lacking—that is, if the grantee uses the money of another to buy the property, without such other's knowledge or consent—a trust is declared by equity, which, although sometimes called a resulting trust, is more properly a constructive trust, one created to avoid the unjust enrichment of the legal title holder, and not one to carry out a presumed intent.[29] If the title is taken in the name of a stranger by mistake, equity will declare a trust in favor of the payor of

[26] Howe v. Howe, 199 Mass. 598, 602, 85 N. E. 945, 127 Am. St. Rep. 516.

[27] Dyer v. Dyer, 2 Cox, 93; In re Spencer (D. C.) 128 Fed. 654; Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848; Leroy v. Norton, 49 Colo. 490, 113 Pac. 529; Lander v. Persky, 85 Conn. 429, 83 Atl. 209; Pittock v. Pittock, 15 Idaho, 426, 98 Pac. 719; Masters v. Mayes, 246 Ill. 506, 92 N. E. 945; Ratliff v. Elwell, 141 Iowa, 312, 119 N. W. 740, 20 L. R. A. (N. S.) 223; Buck v. Pike, 11 Me. 9; Euler v. Schroeder, 112 Md. 155, 76 Atl. 164; Mahorner v. Harrison, 21 Miss. (13 Smedes & M.) 53; Brown v. Alexander, 118 Miss. 848, 79 South. 842; Plumb v. Cooper, 121 Mo. 668, 26 S. W. 678; Cowles v. Cowles, 89 Neb. 327, 131 N. W. 738; Mershon v. Duer, 40 N. J. Eq. 333; Summers v. Moore, 113 N. C. 394, 18 S. E. 712; Creed v. President, etc., of Lancaster Bank, 1 Ohio St. 1; De Roboam v. Schmidtlin, 50 Or. 388, 92 Pac. 1082; Asam v. Asam, 239 Pa. 295, 86 Atl. 871; Butler v. Rutledge, 2 Cold. (Tenn.) 4; Burns v. Ross, 71 Tex. 516, 9 S. W. 468; Larisey v. Larisey, 93 S. C. 450, 77 S. E. 129; Fisk v. Patton, 7 Utah, 399, 27 Pac. 1; Flanary v. Kane, 102 Va. 547, 46 S. E. 312. That the grantee was ignorant of the conveyance does not affect the resulting trust. Mereness v. Delemos, 91 Conn. 651, 101 Atl. 8; Froemke v. Marks, 259 Ill. 146, 102 N. E. 192. But if the placing of title in another than the payor of the consideration was with the object of preventing the collection of a judgment, and so the defrauding of creditors, there will be no resulting trust. Higginbotham v. Boggs, 234 Fed. 253, 148 C. C. A. 155.

[28] See post, p. 111.

[29] Keller v. Keller, 45 Md. 269; Shrader v. Shrader, 119 Miss. 526, 81 South. 227; Gogherty v. Bennett, 37 N. J. Eq. 87; Lloyd v. Woods, 176 Pa. 63, 34 Atl. 926.

the purchase price.[30] The general rule above stated applies to cases of personal property as well as real property.[31]

That the stranger who has acquired title as a result of consideration paid by another is a resulting trustee for that other is a presumption merely. The stranger may prove that a gift of the property to him was intended. He may rebut the presumption of a trust,[32] and the evidence which rebuts the presumption may be parol evidence.[33] While a resulting trust is not based on an express agreement, yet, if the payor of the consideration and the grantee make an agreement equivalent in effect to what the law would imply, under the facts of the case, a resulting trust will be decreed, and the express agreement will be ignored.[34]

(b) Source of Consideration

It is essential that the money or other consideration furnished for the conveyance shall, at the time of the conveyance, have been the property of the person who claims to be a cestui que trust.[35] Hence, that A. has lent money to B., and that B. has purchased

[30] Fairhurst v. Lewis, 23 Ark. 435; Hayward v. Cain, 110 Mass. 273; Turner v. Home Ins. Co., 195 Mo. App. 138, 189 S. W. 626; Oberthier v. Stroud, 33 Tex. 522.

[31] Baker v. Terrell, 8 Minn. 195 (Gil. 165); McClung v. Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961.

[32] Tryon v. Huntoon, 67 Cal. 325, 7 Pac. 741; Livermore v. Aldrich, 59 Mass. (5 Cush.) 431; Irvine v. Marshall, 7 Minn. 286 (Gil. 216); Baldwin v. Campfield, 8 N. J. Eq. 891; Warren v. Steer, 112 Pa. 634, 5 Atl. 4. The presumption has been overcome where the payor of the consideration was indebted at least morally to the grantee for maintenance in old age (Morford v. Stephens [Mo.] 178 S. W. 441), and where there was long-continued acquiescence by the payor of the consideration in the use of the property by the grantee (Akin v. Akin, 276 Ill. 447, 114 N. E. 908), and where an employer paid the consideration for a house in which her secretary lived, the object being to reward services (Reizenberger v. Shelton, 86 N. J. Eq. 92, 97 Atl. 293).

[33] Bayles v. Baxter, 22 Cal. 575; Blasdel v. Locke, 52 N. H. 238; Peer v. Peer, 11 N. J. Eq. 432; Strimpfler v. Roberts, 18 Pa. 283, 57 Am. Dec. 606; Smith v. Strahan, 16 Tex. 314, 67 Am. Dec. 622.

[34] Breitenbucher v. Oppenheim, 160 Cal. 98, 116 Pac. 55; Barrows v. Bohan, 41 Conn. 278. A resulting trust is not changed to an express trust by a writing acknowledging its existence. Lasker-Morris Bank & Trust Co. v. Gans, 132 Ark. 402, 200 S. W. 1029.

[35] Crawford v. Manson, 82 Ga. 118, 8 S. E. 54; Mercer v. Coomler, 32 Ind. App. 533, 69 N. E. 202, 102 Am. St. Rep. 252; Dehaven v. Sterrit, 3 J. J. Marsh. (Ky.) 27; Anderson v. Gile, 107 Me. 325, 78 Atl. 370; Shaw v. Shaw, 86 Mo. 594; Eisenberg v. Goldsmith, 42 Mont. 563, 113 Pac. 1127. The source of the money is not important so long as it belonged to the one claiming to be a cestui que trust. Harrison v. Harrison, 265 Ill. 432, 107 N. E. 128.

property with such money and taken title in his own name, is not ground for the declaration of a resulting trust in A.'s favor. The money furnished for the property had become B.'s by virtue of the loan, and it cannot be said that A. furnished the consideration for the conveyance to B.[36]

On the other hand, if the payor of the consideration has received it as a loan from the grantee of the property, a trust will arise in favor of the payor. If A. borrows $500 from B., and later A. pays this money to C., who, in return therefor and at A.'s request, conveys land to B., a presumption of a resulting trust arises. The money furnished was A.'s money. It had ceased to be the property of B., because of the loan from B. to A.[37]

It is obvious that the payor of the consideration, who claims the resulting trust in his favor, need not himself have delivered the consideration. It is sufficient if his money was paid by another for him, with his consent.[38]

(c) Time of Payment

The trust results, if at all, at the time of the transfer of the title to the real or personal property involved. It is the taking of the legal title, considered with the payment of the consideration by another at that time or previously, which gives rise to the presumption of a trust. Hence the time of the payment of consideration is important. Payment must be made before or at the time of

[36] Chapman v. Abrahams, 61 Ala. 108; Pain v. Farson, 179 Ill. 185, 53 N. E. 579; Reminger v. Joblonski, 271 Ill. 71, 110 N. E. 903; Meredith v. Citizens' Nat. Bank, 92 Ind. 343; Kennerson v. Nash, 208 Mass. 393, 94 N. E. 475; Phillips v. Phillips, 81 N. J. Eq. 459, 86 Atl. 949; In re Gorham, 173 N. C. 272, 91 S. E. 950; Jordan v. Jordan (Tex. Civ. App.) 154 S. W. 359; Aaron Frank Clothing Co. v. Deegan (Tex. Civ. App.) 204 S. W. 471. A trust will not be declared on a showing that A. owed B. and that A. thereafter bought realty for an amount equal to the debt. The funds of the alleged cestui que trust must be clearly traced to the property. Orear v. Farmers' State Bank & Trust Co., 286 Ill. 454, 122 N. E. 63. A fortiori if money is given to A. by B. and property is purchased by B. with the money, no resulting trust arises in A.'s favor. Metropolitan Trust & Savings Bank v. Perry, 259 Ill. 183, 102 N. E. 218; Stephens v. St. Louis Union Trust Co., 260 Ill. 364, 103 N. E. 190.

[37] Bates v. Kelly, 80 Ala. 142; Caruthers v. Williams, 21 Fla. 485; Reeve v. Strawn, 14 Ill. 94; Weekly v. Ellis, 30 Kan. 507, 2 Pac. 96; Burleigh v. White, 64 Me. 23; Dryden v. Hanway, 31 Md. 254, 100 Am. Dec. 61; Howe v. Howe, 199 Mass. 598, 85 N. E. 945, 127 Am. St. Rep. 516; Page v. Page, 8 N. H. 187; Rogan v. Walker, 1 Wis. 527.

[38] Breitenbucher v. Oppenheim, 160 Cal. 98, 116 Pac. 55; Barroilhet v. Anspacher, 68 Cal. 116, 8 Pac. 804. Thus, where a wife's interest in land is credited to her husband on payment of the price, the wife is a payor of part of the consideration and a resulting trust occurs. Hinshaw v. Russell, 280 Ill. 235, 117 N. E. 406.

the conveyance.[39] Payments made to an owner of real or personal property after the time of purchase do not create any resulting trust in favor of the payor. The trust arises at the time of the conveyance, if ever.[40] Payments made to assist the owner of property in improving it do not give the payor any rights as a resulting trustee.[41]

In a few cases it has been held that a payment of part of the consideration at the time of the conveyance and the giving of a note to the grantor for the balance, or the mere payment of the balance later, gave rise to a presumption of a resulting trust as to the whole property.[42] A resulting trust as to the amount actually paid or secured to be paid would seem correct on principle, but it is difficult to see why later payments alone should be given any retroactive effect. If A. pays for the property by giving his note, rather than by delivering cash, it would seem that a trust in A.'s favor should arise. In an early New York case the court expressed itself on this point as follows: "In this case there can be no doubt that, whilst the grant was made to one person, the consideration therefore was paid by another. The defendant objects that but a part of the purchase money was paid when the deed was executed, and that, if there could have been a resulting trust in favor of the plaintiff, it would have been only pro tanto. But a note was given for the residue at the time, in her behalf, by her then friends, and it is

[39] Long v. King, 117 Ala. 423, 23 South. 534; Pickler v. Pickler, 180 Ill. 168, 54 N. E. 311; Hays v. Hollis, 8 Gill (Md.) 357; Brooks v. Shelton, 54 Miss. 353; Lynch v. Herrig, 32 Mont. 267, 80 Pac. 240; Lee v. R. H. Elliott & Co., 113 Va. 618, 75 S. E. 146; Whiting v. Gould, 2 Wis. 552. Payment before the conveyance is satisfactory. Guin v. Guin, 196 Ala. 221, 72 South. 74.

[40] Butterfield v. Butterfield, 79 Ark. 164, 95 S. W. 146, 9 Ann. Cas. 248; Motherwell v. Taylor, 2 Idaho (Hasb.) 254, 10 Pac. 304; Alexander v. Tams, 13 Ill. 221; Westerfield v. Kimmer, 82 Ind. 365; Warner v. Morse, 149 Mass. 400, 21 N. E. 960; Ostheimer v. Single, 73 N. J. Eq. 539, 68 Atl. 231; Lescaleet v. Rickner, 16 Ohio Cir. Ct. R. 461; Sisemore v. Pelton, 17 Or. 546, 21 Pac. 667; Appeal of Cross, 97 Pa. 471; Musselman v. Myers, 240 Pa. 5, 87 Atl. 425; Guest v. Guest (Tex. Civ. App.) 208 S. W. 547; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Beecher v. Wilson, 84 Va. 813, 6 S. E. 209, 10 Am. St. Rep. 883; Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46. In Shelton v. Harrison, 182 Mo. App. 404, 167 S. W. 634, payments made after the conveyance seem to have been given effect as creating a resulting trust as to a portion of the property.

[41] Bodwell v. Nutter, 63 N. H. 446, 3 Atl. 421; Krauth v. Thiele, 45 N. J. Eq. 407, 18 Atl. 351; Rogers v. Murray, 3 Paige (N. Y.) 390. Nor does a payment to discharge a mortgage give rise to a resulting trust for the payor. Thomson v. Thomson (Mo.) 211 S. W. 52.

[42] Skahen v. Irving, 206 Ill. 597, 69 N. E. 510; Lynch v. Herrig, 32 Mont. 267, 80 Pac. 240; Hickson v. Culbert, 19 S. D. 207, 102 N. W. 774; Pearce v. Dyess, 45 Tex. Civ. App. 406, 101 S. W. 549.

apparent that it was the understanding at the time when the conveyance was made. It is not necessary that the consideration should be paid in specie, but anything representing it, coming from or in behalf of the cestui que trust, will be equally available to protect the beneficial interest. The cases which declare the unavailability of subsequent payments have reference to such as are made pursuant to arrangements concocted after the conveyance had been made and consummated." [43] It is sufficient if the obligation to pay is incurred by the alleged cestui at the time of the conveyance, whether the obligation is evidenced by a writing or not.[44] The "consideration must be paid or assumed to be paid by the cestui que trust at the time of the conveyance."[45]

(d) Amount of Payment

If the claimant has paid *all* the consideration for the conveyance at or before the time when such conveyance was made, there is no difficulty in declaring a presumption in favor of a resulting trust. But, if a *part* only of the money used to pay for the property was furnished by the alleged cestui, a question of some difficulty arises. Some of the leading American courts have laid down the rule that a part payment, in order to create a resulting trust, must have been an "aliquot part" of the purchase price and paid for a corresponding interest in the property. The word "aliquot," as used in this connection, means "a 'particular fraction of the whole,' as distinguished from a general contribution to the purchase money." [46] "There is no doubt of the correctness of the doctrine that where the purchase money is paid by one person, and the conveyance taken by another, there is a resulting trust created by implication of law in

[43] Lounsbury v. Purdy, 16 Barb. (N. Y.) 376, 380. See, also, "Subsequent Payments under Resulting Trusts," C. E. Grinnell, 1 Harv. L. R. 185, and the following cases cited therein: Runnels v. Jackson, 1 How. (Miss.) 358; White v. Sheldon, 4 Nev. 280; Gibson v. Foote, 40 Miss. 788; Dudley v. Bachelder, 53 Me. 403; Cramer v. Hoose, 93 Ill. 503; Barrows v. Bohan, 41 Conn. 278; Morey v. Herrick, 18 Pa. 123; Willis v. Willis, 2 Atk. 71.

[44] Wrightsman v. Rogers, 239 Mo. 417, 144 S. W. 479, citing Weiss v. Heitkamp, 127 Mo. loc. cit. 31, 29 S. W. 709, and Clowser v. Noland, 133 Mo. 221, 34 S. W. 64. See, also, Yetman v. Hedgeman, 82 N. J. Eq. 221, 88 Atl. 206.

[45] Williams v. Wager, 64 Vt. 326, 333, 24 Atl. 765. See Hornbeck v. Barker (Tex. Civ. App.) 192 S. W. 276, where the grantee gave his own notes for part of the price at the time of the conveyance, and payment of such notes later by another was allowed to create a resulting trust in favor of the payor of the notes. This seems an erroneous result.

[46] Skehill v. Abbott, 184 Mass. 145, 147, 68 N. E. 37. In Hinshaw v. Russell, 280 Ill. 235, 117 N. E. 406, "aliquot" is said to mean "a definite and distinct interest, as opposed to an indefinite and unascertainable one," and not a part contained in the whole a certain number of times without remainder.

favor of the former. And where a part of the purchase money is paid by one, and the whole title is taken by the other, a resulting trust pro tanto may in like manner, under some circumstances, be created. But in the latter case we believe it to be well settled that the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced must be shown to have been paid for some specific part or distinct interest in the estate, for 'some aliquot part,' as it is sometimes expressed; that is, for a specific share, as a tenancy in common or joint tenancy of one-half, one-quarter, or other particular fraction of the whole, or for a particular interest, as a life estate, or tenancy for years, or remainder, in the whole, and that a general contribution of a sum of money toward the entire purchase is not sufficient." [47] In New York resulting trusts are abolished, except in cases where the title is taken in the name of another without the consent of the payor. Speaking of this statute, the Court of Appeals has said: "The exception in the fifty-third section applies in favor of a person who *pays the consideration.* That means the whole consideration, and not, as in this case, a part of it. * * * It may be that, in cases where an aliquot part or some other definite part of the consideration has been advanced, the parties intending that some specific interest shall vest in the person paying it, or in proportion to the sum paid, there might be a resulting trust to that extent." [48]

On the other hand, some courts have repudiated the notion that payment of an aliquot part or agreement for an aliquot share is necessary. "In order to establish a resulting trust arising from the payment of the purchase money by another, it is not necessary that the beneficiary should have furnished the whole of the purchase money, nor an exact aliquot part thereof. If the amount paid is certain, a trust will result with respect to an undivided share of the land proportioned to his share of the whole price." [49] "In this state a resulting trust does not depend upon the fact that the one who seeks to establish it had paid the entire consideration, nor that what he may have contributed was for an aliquot part of the estate." [50]

[47] Hoar, J., in McGowan v. McGowan, 14 Gray (Mass.) 119, 121, 74 Am. Dec. 668, citing Crop v. Norton, 2 Atk. 74; Sayre v. Townsend, 15 Wend. (N. Y.) 647; White v. Carpenter, 2 Paige (N. Y.) 217; Perry v. McHenry, 13 Ill. 227; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617. See, also, Feingold v. Roeschlein, 276 Ill. 79, 114 N. E. 506; Pollock v. Pollock, 223 Mass. 382, 111 N. E. 963.

[48] O'Brien, J., in Schierloh v. Schierloh, 148 N. Y. 103, 107, 42 N. E. 409.

[49] Neathery v. Neathery, 114 Va. 650, 656, 77 S. E. 465.

[50] Gerety v. O'Sheehan, 9 Cal. App. 447, 449, 99 Pac. 545.

It is obvious that, if the amount of money contributed by the alleged cestui is uncertain, no trust can result in his favor. The portion of the property claimed as the subject-matter of the trust must be a fixed share.[51]

When the amount paid by the claimant is certain, the cases may be divided into two classes, namely: (1) Those in which there was no express agreement between payor and the grantee of the property for any interest in the property; and (2) those in which there was an express agreement between payor and grantee that the payor should have an interest in the property corresponding to the payment.

The cases where no express agreement is shown will first be considered. It has been held that the mere payment of an even fraction of the purchase price, as one-half or one-third, with no understanding as to an interest in the property to be obtained by the payor, does not give the payor a right to have a resulting trust declared in his favor. The payment seems to be presumed to be a loan.[52] And so, also, it has been held that the payment of an uneven fraction of the purchase price, as, for example, $1,251.16 out of a total of $9,500, with no agreement regarding an interest in the property to be obtained by the payor, does not give rise to a resulting trust in favor of the payor.[53] But in other cases such payment of an uneven fraction of the purchase price, without express agreement, has been held to create a resulting trust.[54] Whether the payment was a loan to the grantee or a part payment of the price should be, it would seem, a question of fact, to be determined by the peculiar facts of each case. The presumption is undoubtedly stronger in favor of an intended trust where all the consideration is paid than where only a part is paid. But there seems to be no reason why a resulting trust arising out of part payment should be impossible. If the payor did not intend a loan or a gift, such resulting trust should be found.

The second class of cases, namely, those where an express agree-

[51] Harton v. Amason, 195 Ala. 594, 71 South. 180; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Cutler v. Tuttle, 19 N. J. Eq. 549.

[52] German v. Heath, 139 Iowa, 52, 116 N. W. 1051; Wheeler v. Kirtland, 23 N. J. Eq. 13.

[53] Olcott v. Bynum, 17 Wall. 44, 21 L. Ed. 570; McGowan v. McGowan, 14 Gray (Mass.) 119, 74 Am. Dec. 668; Storm v. McGrover, 189 N. Y. 568, 82 N. E. 160; Sayre v. Townsend, 15 Wend. (N. Y.) 647; O'Donnell v. White, 18 R. I. 659, 29 Atl. 769.

[54] Lowell v. Lowell, 185 Iowa, 508, 170 N. W. 811; Chadwick v. Felt, 35 Pa. 305; Neathery v. Neathery, 114 Va. 650, 77 S. E. 465. See, also, dictum of Chancellor Kent, Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405.

ment is made between the payor of part of the consideration and the grantee, will next be considered. It may first be supposed that payor and grantee agreed that the title to the property to be purchased should be taken in the names of both payor and grantee; that is, that the deed should run to them as tenants in common or as joint tenants. In such case, if one party takes the title in his own name, without the knowledge or consent of the other, a trust has been held in some cases to result in favor of the one paying part of the consideration, whose name was not mentioned in the deed.[55] In one case of this class it was said that, while no trust resulted in favor of the defrauded payor of part of the consideration, he had an equitable lien on the land for the amount of his payment.[56] It is submitted that in this class of cases there is actual fraud, and that the misappropriation of funds should result in a constructive trust being declared.

It may be supposed, in the second place, that the agreement was that title should be taken in the name of A., and that A. should pay one-half and B. one-half, and that B. should have an interest in the property, either legal or equitable. It has been held that a contract that B. have a legal interest in the property under such circumstances amounted to an agreement to convey land to B., and, being oral, was void, and that it gave rise to no constructive trust, since the only fraud involved was the refusal to perform a contract within the Statute of Frauds.[57] It would seem that the only trust which could properly be established by equity here would be a constructive trust, because of the violation of an oral contract for an interest in lands where payment has been made. Such a trust is maintained in some states, while in others it is not.[58] In other cases, however, it has been held that a resulting trust will be implied in the situation just described.[59] On the other hand, if the interest which B. contracts for is that of a cestui que trust under an express trust, it has been held by some courts that a valid resulting trust in his favor arises where A. refuses to carry out his

[55] Ahrens v. Simon, 101 Neb. 739, 164 N. W. 1051; Skehill v. Abbott, 184 Mass. 145, 68 N. E. 37; Puckett v. Benjamin, 21 Or. 370, 28 Pac. 65; O'Donnell v. McCool, 89 Wash. 537, 154 Pac. 1090.

[56] Leary v. Corvin, 181 N. Y. 222, 73 N. E. 984, 106 Am. St. Rep. 542, 2 Ann. Cas. 664.

[57] Allen v. Caylor, 120 Ala. 251, 24 South. 512, 74 Am. St. Rep. 31.

[58] See post, § 39.

[59] Davis v. Dickerson, 137 Ark. 14, 207 S. W. 436; Wrightsman v. Rogers, 239 Mo. 417, 144 S. W. 479; Bear v. Koenigstein, 16 Neb. 65, 20 N. W. 104; Levy v. Ryland, 32 Nev. 460, 109 Pac. 905; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371.

agreement,[60] while elsewhere it has been maintained that no resulting trust exists.[61] In this latter situation there has been an attempt to create an express trust. If the Statute of Frauds has been satisfied, it would seem that such attempt should be effectual. If the statute has not been satisfied, it would seem that the only trust properly implied would be a constructive trust arising out of fraud, in those states where violation of a promise void under the Statute of Frauds is regarded as fraud. It is difficult to see how a resulting trust can logically be held to exist in any case where the parties have made an express agreement. The fundamental conception of a resulting trust is that it is presumed to arise where certain acts have been done and their intended effect is not explained by express agreement.

In the situation where A. pays part of the consideration, and agrees with B. that B. shall pay the balance, and that title to the property shall be taken in the name of A., it has been held that no trust results in favor of A. when B. uses A.'s money and his own to buy the land and takes title in B.'s name, without A.'s consent.[62]

On one theory and another American courts have, in cases where part payment of the consideration has been made by one and title taken in the name of another, found resulting trusts in favor of such part payor to the extent of the payment.[63]

(e) Effect of Relationship of Payor and Grantee

If the payor of the consideration is related to the person to whom title is conveyed in such a way that there is a duty on the part of the payor to support the grantee, the presumption of a resulting trust does not prevail, but the presumption of advancement or gift is established. Thus, if A., the husband of B., pay the considera-

[60] Breitenbucher v. Oppenheim, 160 Cal. 98, 116 Pac. 55; Gerety v. O'Sheehan, 9 Cal. App. 447, 99 Pac. 545; Pavlovich v. Pavlovich, 22 Cal. App. 500, 135 Pac. 303; Barrows v. Bohan, 41 Conn. 278.

[61] Dudley v. Dudley, 176 Mass. 34, 56 N. E. 1011.

[62] Schierloh v. Schierloh, 148 N. Y. 103, 42 N. E. 409.

[63] Moultrie v. Wright, 154 Cal. 520, 98 Pac. 257; Price v. Hicks, 14 Fla. 565; Crawford v. Manson, 82 Ga. 118, 8 S. E. 54; Smith v. Smith, 85 Ill. 189; Derry v. Derry, 98 Ind. 319; Sullivan v. McLenans, 2 Iowa, 437, 65 Am. Dec. 780; Pierce v. Pierce, 46 Ky. (7 B. Mon.) 433; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Johnson v. Johnson, 96 Md. 144, 53 Atl. 792; Barton v. Magruder, 69 Miss. 462, 13 South. 839; Baumgartner v. Guessfeld, 38 Mo. 36; Hall v. Young, 37 N. H. 134; Warren v. Tynan, 54 N. J. Eq. 402, 34 Atl. 1065; Bryant v. Allen, 54 App. Div. 500, 67 N. Y. Supp. 89; Morey v. Herrick, 18 Pa. 123; McGee v. Wells, 52 S. C. 472, 30 S. E. 602; Shoemaker v. Smith, 30 Tenn. (11 Humph.) 81; Neill v. Keese, 13 Tex. 187; Rogers v. Donnellan, 11 Utah, 108, 39 Pac. 494; Pinney v. Fellows, 15 Vt. 525; Pumphry v. Brown, 5 W. Va. 107.

tion for a conveyance of property to B., there is a presumption that A. intended to give this property to B., because of the duty which A. has to support B.[64] But this presumption of gift may be overcome by oral proof that no advancement was intended, and that a trust in favor of the husband was the object of the husband.[65]

So, too, if the payor of the consideration is the parent of the grantee of the property, or a person in loco parentis, equity presumes that the payor intended to make a gift or advancement, and not to raise a trust.[66] However, this presumption of gift is rebuttable by evidence that the parent intended a trust and did not have in mind a gift.[67]

Since the wife does not owe her husband a duty of support, there is no ground for presuming an advancement or gift from her to the

[64] Ciffo v. Ciffo, 44 App. D. C. 217; Goelz v. Goelz, 157 Ill. 33, 41 N. E. 756; Sunderland v. Sunderland, 19 Iowa, 325; Spring v. Hight, 22 Me. 408, 39 Am. Dec. 587; Hayes v. Horton, 46 Or. 597, 81 Pac. 386; Edgerly v. Edgerly, 112 Mass. 175; Ilgenfritz v. Ilgenfritz, 116 Mo. 429, 22 S. W. 786; Gray v. Gray, 13 Neb. 453, 14 N. W. 390; Dickinson v. Davis, 43 N. H. 647, 80 Am. Dec. 202; McGee v. McGee, 81 N. J. Eq. 190, 86 Atl. 406; Scott v. Calladine, 79 Hun, 79, 29 N. Y. Supp. 630; Egerton v. Jones, 107 N. C. 284, 12 S. E. 434; Coe v. Coe, 75 Or. 145, 145 Pac. 674; Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848; Kennedy v. Kennedy (Tex. Civ. App.) 210 S. W. 581. Improvements put on the wife's land with the husband's money do not inure to his benefit by way of resulting trust. Nelson v. Nelson, 176 N. C. 191, 96 S. E. 986; Anderson v. Anderson, 177 N. C. 401, 99 S. E. 106.

[65] Poole v. Oliver, 89 Ark. 85, 115 S. W. 952; Hubbard v. McMahon, 117 Ark. 563, 176 S. W. 122; Kern v. Beatty, 267 Ill. 127, 107 N. E. 794; Towles v. Towles, 176 Ky. 225, 195 S. W. 437; Price v. Kane, 112 Mo. 412, 20 S. W. 609; Woodward v. Woodward, 89 Neb. 142, 131 N. W. 188; Shotwell v. Stickle, 83 N. J. Eq. 188, 90 Atl. 246; Flanner v. Butler, 131 N. C. 155, 42 S. E. 557, 92 Am. St. Rep. 773; Toney v. Toney, 84 Or. 310, 165 Pac. 221; Wallace v. Bowen, 28 Vt. 638. If the wife expressly agrees to hold under conditions identical with those of a resulting trust, the presumption of a gift is rebutted. Wilson v. Warner, 89 Conn. 243, 93 Atl. 533. Contra: Jackson v. Jackson, 146 Ga. 675, 92 S. E. 65.

[66] Foster v. Treadway, 98 Ark. 452, 136 S. W. 934; Doll v. Gifford, 13 Colo. App. 67, 56 Pac. 676; Euans v. Curtis, 190 Ill. 197, 60 N. E. 56; McGinnis v. McGinnis, 159 Iowa, 394, 139 N. W. 466; Clark v. Creswell, 112 Md. 339, 76 Atl. 579, 21 Ann. Cas. 338; Page v. Page, 8 N. H. 187; Astreen v. Flanagan, 3 Edw. Ch. (N. Y.) 279; Wheeler v. Kidder, 105 Pa. 270; Miller v. Blose's Ex'r, 30 Grat. (Va.) 744. But see Madsen v. Madsen, 35 Cal. App. 487, 170 Pac. 435, contra, the decision being affected by statute.

[67] In re Peabody, 118 Fed. 266, 55 C. C. A. 360; Hartley v. Hartley, 279 Ill. 593, 117 N. E. 69; Rankin v. Harper, 23 Mo. 579; Long v. Long (Mo.) 192 S. W. 948; Peer v. Peer, 11 N. J. Eq. 432; Jackson ex dem. Benson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Elrod v. Cochran, 59 S. C. 467, 38 S. E. 122; Shepherd v. White, 10 Tex. 72; Law v. Law, 76 Va. 527; Clary v. Spain, 119 Va. 58, 89 S. E. 130.

husband. If the wife pay the consideration for a conveyance to the husband, the ordinary presumption of a resulting trust arises;[68] and, likewise, a child's payment of the consideration for a deed taken in the name of the parent is presumed to result in a trust in favor of the child.[69]

Where the payor of the consideration was the common-law wife,[70] fiancé,[71] or brother or sister,[72] of the grantee, a trust has been held to result, there being no presumption of a gift.

(f) Statutes

In California, Georgia, Montana, North Dakota, Oklahoma, and South Dakota there are statutes declaring the rule of equity with respect to resulting trusts which is set forth above.[73]

In Indiana, Kansas, Kentucky, Michigan, Minnesota, New York, and Wisconsin the statutes do away with resulting trusts of this

[68] Shaw v. Bernal, 163 Cal. 262, 124 Pac. 1012; Loften v. Witboard, 92 Ill. 461; Resor v. Resor, 9 Ind. 347; Southern Bank of Fulton v. Nichols, 235 Mo. 401, 138 S. W. 881; Mayer v. Kane, 69 N. J. Eq. 733, 61 Atl. 374; Barnes v. Spencer, 79 Or. 205, 153 Pac. 47; McCormick v. Cooke, 199 Pa. 631, 49 Atl. 238; Chalk v. Daggett (Tex. Civ. App.) 204 S. W. 1057. Prior to the Married Women's Acts the wife's money became her husband's property, and hence the purchase of property by him with the money formerly held by her as separate property created no resulting trust for her. Brooks v. Brooks, 275 Ill. 23, 113 N. E. 919. But a gift has been presumed where the wife paid the consideration and had the title taken in the names of both husband and wife. Doyle v. Doyle, 268 Ill. 96, 108 N. E. 796; Haguewood v. Britain, 273 Mo. 89, 199 S. W. 950. This seems correct, because the indication by the payor of the consideration that she was to have a certain interest in the property bought, namely, that of a tenant by the entirety, warrants the presumption that she did not expect to receive any greater interest. But in Deese v. Deese, 176 N. C. 527, 97 S. E. 475, the court held that payment of the consideration by the wife and a conveyance to the husband and wife created a resulting trust in her favor as to one-half.

[69] Champlin v. Champlin, 136 Ill. 309, 26 N. E. 526, 29 Am. St. Rep. 323; Harlan v. Eilke, 100 Ky. 642, 38 S. W. 1094; Detwiler v. Detwiler, 30 Neb. 338, 46 N. W. 624; Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190; O'Neill v. O'Neill, 227 Pa. 334, 76 Atl. 26.

[70] McDonald v. Carr, 150 Ill. 204, 37 N. E. 225.

[71] Lufkin v. Jakeman, 188 Mass. 528, 74 N. E. 933.

[72] Kuncl v. Kuncl, 99 Neb. 390, 156 N. W. 772; Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182. But see Printup v. Patton, 91 Ga. 422, 18 S. E. 311, contra. It will not be presumed that a son is making a gift of property to his mother. Martin v. Thomas, 74 Or. 206, 144 Pac. 684; nor an uncle to his nephew, Doll v. Doll, 99 Neb. 82, 155 N. W. 226.

[73] Civ. Code Cal. § 853; Park's Ann. Civ. Code Ga. § 3739; Rev. Codes Mont. 1907, § 4538; Comp. Laws N. D. 1913, § 5365; Clark v. Frazier (Okl.) 177 Pac. 589; Rev. Code S. D. 1919, § 372. The California statute reads as follows: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

variety, unless the title was taken in the name of another than the payor without the payor's consent.[74]

It should be observed that these statutes do not apply to personal property.[75] Partnership realty being deemed personalty, if a partner use partnership money to buy land and take the title in his own name, a trust will result to the other members of the firm, even in those states which have abolished resulting trusts of this type in real property.[76]

In at least one state these statutes have been given a narrow construction, which has resulted in very much limiting their intended effect. Thus, in New York it has been held that if A. pay the purchase price of land, and have B., the seller, convey the land to C. upon an oral understanding that the conveyance is to be for the benefit of D., the statute does not apply, and a trust results in D.'s favor.[77] And so, too, if the payor of the consideration and the grantee sustain any confidential relations towards each other, the courts are quick to seize upon that fact as a basis for a constructive trust, even though the statute prohibits a resulting trust.[78]

The construction of these various statutes cannot be traced here, but some of the more important decisions are cited.[79]

[74] Burns' Ann. St. Ind. 1914, §§ 4017–4019; Gen. St. Kan. 1915, §§ 11679, 11680; Ky. St. 1915, §§ 2353, 2354; How. Ann. St. Mich. 1912, §§ 10675, 10676; Gen. St. Minn. 1913, §§ 6706–6708; Real Property Law (Consol. Laws N. Y. c. 50) § 94; St. Wis. 1913, §§ 2077–2079. The New York statute is typical and reads as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either, 1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or 2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

[75] Baker v. Terrell, 8 Minn. 195 (Gil. 165); Robbins v. Robbins, 89 N. Y. 251; Bork v. Martin, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570; Tobin v. Tobin, 139 Wis. 494, 121 N. W. 144.

[76] Fairchild v. Fairchild, 64 N. Y. 471.

[77] Siemon v. Schurck, 29 N. Y. 598.

[78] Jeremiah v. Pitcher, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed 163 N. Y. 574, 57 N. E. 1113.

[79] *California:* Broder v. Conklin, 77 Cal. 330, 19 Pac. 513; Hellman v. Messmer, 75 Cal. 166, 16 Pac. 766; Porter v. Douglass, 7 Cal. App. 429, 94 Pac. 591; Parks v. Parks, 179 Cal. 472, 177 Pac. 455. *Georgia:* Brooks v. Fowler, 82 Ga. 329, 9 S. E. 1089; Manning v. Manning, 135 Ga. 597, 69 S. E. 1126; Hall v. Edwards, 140 Ga. 765, 79 S. E. 852. *Indiana:* Wynn v. Sharer, 23 Ind. 573; Malady v. McEnary, 30 Ind. 273; Mitchell v. Colglazier, 106

USE OF TRUST FUNDS FOR PURCHASE OF PROPERTY

34. If a trustee or other person occupying a fiduciary relation use the funds of his beneficiary or principal, with the consent of the beneficiary or principal, for the purchase of property in the name of the trustee or other fiduciary, a trust is presumed to result in favor of the beneficiary or principal.

It is very generally held that, where a trustee, agent, guardian, administrator, executor, partner, or other person in a fiduciary relation, uses the funds of the person trusting him for the purchase of property, and takes title in his own name, a trust results in favor of the cestui que trust, principal, or other person whose funds are thus employed.[80]

This trust has been held to result, regardless of whether the owner of the money—the principal, cestui que trust, legatee, or other person in like position—consented to the purchase of the property

Ind. 464, 7 N. E. 199; Noe v. Roll, 134 Ind. 115, 33 N. E. 905; Koehler v. Koehler (Ind. App.) 121 N. E. 450; Makeever v. Yeoman (Ind. App.) 121 N. E. 672. *Kansas:* Franklin v. Colley, 10 Kan. 260; Chantland v. Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230; Hanrion v. Hanrion, 73 Kan. 25, 84 Pac. 381, 117 Am. St. Rep. 453; Garten v. Trobridge, 80 Kan. 720, 104 Pac. 1067; Anderson v. Hultberg, 247 Fed. 273, 159 C. C. A. 367. *Kentucky:* Watt v. Watt, 39 S. W. 48, 19 Ky. Law Rep. 25; Clay v. Clay's Guardian, 72 S. W. 810, 24 Ky. Law Rep. 2016; Martin v. Martin, 68 Ky. (5 Bush.) 47; Wright v. Yates, 140 Ky. 283, 130 S. W. 1111; Neel's Ex'r v. Noland's Heirs, 166 Ky. 455, 179 S. W. 430; Dalzell v. Dalzell, 170 Ky. 297, 185 S. W. 1107. *Michigan:* Fisher v. Fobes, 22 Mich. 454; McCreary v. McCreary, 90 Mich. 478, 51 N. W. 545; Winans v. Winans' Estate, 99 Mich. 74, 57 N. W. 1088; Waldron v. Merrill, 154 Mich. 203, 117 N. W. 631; Signs v. Bush's Estate, 199 Mich. 192, 165 N. W. 820. *Minnesota:* Durfee v. Pavitt, 14 Minn. 424 (Gil. 319); Johnson v. Johnson, 16 Minn. 512 (Gil. 462); Petzold v. Petzold, 53 Minn. 39, 54 N. W. 933; Haaven v. Hoaas, 60 Minn. 313, 62 N. W. 110. *Montana:* Lynch v. Herrig, 32 Mont. 267, 80 Pac. 240. *New York:* McCartney v. Bostwick, 32 N. Y. 53; Foote v. Bryant, 47 N. Y. 544; Everett v. Everett, 48 N. Y. 218; Reitz v. Reitz, 80 N. Y. 538; Haack v. Weicken, 118 N. Y. 67, 23 N. E. 133; Church of St. Stanislaus v. Algemeine Verein, 31 App. Div. 133, 52 N. Y. Supp. 922, affirmed 164 N. Y. 606, 58 N. E. 1086; O'Brien v. Gill, 166 App. Div. 92, 151 N. Y. Supp. 682; Hegstad v. Wysiecki, 178 App. Div. 733, 165 N. Y. Supp. 898. *North Dakota:* Currie v. Look, 14 N. D. 482, 106 N. W. 131. *South Dakota:* Hickson v. Culbert, 19 S. D. 207, 102 N. W. 774; Bucknell v. Johnson, 39 S. D. 212, 163 N. W. 683. *Wisconsin:* Knight v. Leary, 54 Wis. 459, 11 N. W. 600; Campbell v. Campbell, 70 Wis. 311, 35 N. W. 743; Meier v. Bell, 119 Wis. 482, 97 N. W. 186; Perkinson v. Clarke, 135 Wis. 584, 116 N. W. 229; Friedrich v. Huth, 155 Wis. 196, 144 N. W. 202.

[80] Irvine v. Marshall, 61 U. S. (20 How.) 558, 15 L. Ed. 994; Thompson v. Hartline, 105 Ala. 263, 16 South. 711; O'Connor v. Irvine, 74 Cal. 435, 16

in the name of his representative or not.[81] In some cases there was consent,[82] while in others there was not.[83]

In a few cases the trust has been called a *constructive* trust where the fiduciary invested the money in his own name without the beneficiary's consent, and a *resulting* trust where the beneficiary consented that the fiduciary take title in his own name.[84] This would seem to be the proper distinction. If the fiduciary uses the beneficiary's money to buy property in the fiduciary's name wrongfully, there is fraud, and an involuntary or constructive trust should be fastened on the property for the use of the beneficiary. But if the beneficiary consents that the fiduciary employ the beneficiary's money in the purchase of property, to stand in the name of the fiduciary as a private individual, there is no fraud, and a trust can be constructed only on the theory that the beneficiary must be presumed to have intended that the fiduciary should hold the property in trust for the beneficiary, and not absolutely.

If the beneficiary or principal consents to the use of funds belonging to him legally or equitably in the purchase of property, to stand in the name of the trustee or agent as an individual, the presumption that a man does not intend to give away his property again applies. It will be presumed that the one furnishing the consideration for the purchase and consenting that title be taken in another's name intended that such other should hold for the payor's benefit.

Pac. 236; Waterman v. Buckingham, 79 Conn. 286, 64 Atl. 212; Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Katzing v. Wiegand, 286 Ill. 646, 122 N. E. 97; Brannon v. May, 42 Ind. 92; Allen v. Malone, 2 Iowa, 591; Merket v. Smith, 33 Kan. 66, 5 Pac. 394; Stone v. Burge, 74 S. W. 250, 24 Ky. Law Rep. 2424; Brown v. Dwelley, 45 Me. 52; Alterauge v. Christiansen, 48 Mich. 60, 11 N. W. 806; Bitzer v. Bobo, 39 Minn. 18, 38 N. W. 609; Cooper v. Cooper, 61 Miss. 676; Phillips v. Overfield, 100 Mo. 466, 13 S. W. 705; Johnson v. Dougherty, 18 N. J. Eq. 406; Storm v. McGrover, 70 App. Div. 33, 74 N. Y. Supp. 1032; Gashe v. Young, 51 Ohio St. 376, 38 N. E. 20; Wallace v. Duffield, 2 Serg. & R. (Pa.) 521, 7 Am. Dec. 660; Watson v. Thompson, 12 R. I. 466; Green v. Green, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525; Hows v. Butterworth (Tenn. Ch. App.) 62 S. W. 1114; Long's Adm'rs v. Steiger, 8 Tex. 460; Francis v. Cline, 96 Va. 201, 31 S. E. 10; Case v. Seger, 4 Wash. 492, 30 Pac. 646; Hill v. True, 104 Wis. 294, 80 N. W. 462.

[81] Bostleman v. Bostleman, 24 N. J. Eq. 103.

[82] Work v. Work, 14 Pa. 316; Gumaer v. Barber, 182 Pa. 31, 37 Atl. 848.

[83] Houseman-Spitzley Corporation v. American State Bank, 205 Mich. 268, 171 N. W. 543; Dougan v. Bemis, 95 Minn. 220, 103 N. W. 882, 5 Ann. Cas. 253; Shrader v. Shrader, 119 Miss. 526, 81 South. 227; Buffalo, N. Y. & E. R. Co. v. Lampson, 47 Barb. (N. Y.) 533; Kaphan v. Toney (Tenn. Ch. App.) 58 S. W. 909.

[84] Whaley v. Whaley, 71 Ala. 159; Barger v. Barger, 30 Or. 268, 274, 47 Pac. 702; Hanson v. Hanson, 78 Neb. 584, 592, 111 N. W. 368.

There is much confusion on this subject, the courts failing to distinguish accurately between constructive and resulting trusts. It may make a practical difference which is declared, since the statute of limitations runs against a constructive trustee from the beginning of the trust, while in many jurisdictions it operates against a resulting trustee only from the date of the repudiation of the trust by him.[85]

[85] Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368.

CHAPTER V

CREATION OF CONSTRUCTIVE TRUSTS

DEFINITION

35. Constructive trusts are created by courts of equity whenever the legal title to property is found in one who is not an express trustee, but who is not equitably entitled to retain such legal title. They are based on fraud, actual or constructive, or other wrongful conduct, and are sometimes called "involuntary trusts," or "trusts ex maleficio." They exist merely for the purpose of enabling equity to work out a remedy.

Constructive trusts do not arise because of the intent of parties that they shall arise, but often directly contrary to such intent. They are not "intent-enforcing" trusts, but in a general way may be called "fraud-rectifying" trusts.[1]

These trusts are *created* by courts of equity, not merely declared to exist as a result of acts of the parties. Whenever equity finds that one has obtained or now retains the legal title to property, real or personal, by any kind of wrongdoing, actual or constructive, so that a retention of such title will result in his unjust enrichment, equity may declare such legal title holder to be the trustee of a trust constructed by it for the purpose of working out justice. The trust is merely a convenient means of remedying wrong. It is not a permanent trust, in which the trustee is to have any duties of

[1] These terms are used in an article by Professor G. P. Costigan, Jr., on "The Classification of Trusts as Express, Resulting and Constructive," in 27 Harv. Law Rev. 437.

administration, but a passive, temporary trust, in which the trustee's sole duty is to transfer the legal title to the cestui que trust.[2]

Naturally, if the reason why the holder of the legal title cannot equitably retain the beneficial use of the property is that such person is an express trustee, there is no occasion for declaring him a constructive trustee. The situations in which equity works out a remedy by a constructive trust are without number. An attempt will be made in the subsequent sections of this chapter to consider some of the more important instances in which constructive trusts have been created or seriously considered.

Constructive trusts are sometimes called "trusts ex maleficio," or "involuntary trusts."

[2] For cases discussing the definition and underlying theory of constructive trusts, see Maltbie v. Olds, 88 Conn. 633, 92 Atl. 403; Miller v. Miller, 266 Ill. 522, 107 N. E. 821; Kern v. Beatty, 267 Ill. 127, 107 N. E. 794; Farrell v. Wallace, 161 Iowa, 528, 143 N. W. 488; Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648; May v. May, 161 Ky. 114; 170 S. W. 537; Ferguson v. Robinson, 258 Mo. 113, 167 S. W. 447; Hayden v. Dannenberg, 42 Okl. 776, 143 Pac. 859, Ann. Cas. 1916D, 1191. In Maltbie v. Olds, supra, the court makes the following statement: "Fraud, actual or constructive, is the foundation on which the law raises a constructive trust. * * *" In May v. May, supra, the following definition is given: "But where a trust is raised by equity in behalf of one who has been imposed upon by another, it is enforced to work out justice and in spite of the intention of one of the parties. A trust of this character must necessarily involve some element of fraud, actual or constructive, perpetrated by or arising out of the conduct of the party charged with the trust. Such a trust, though frequently called a resulting trust, is more strictly a constructive trust." In Ferguson v. Robinson, supra, the court said: "While constructive trusts rest upon the sound public policy which requires the laws themselves should not become the instruments of designing persons to be used for the purpose of fraud and oppression. Dishonesty and deceit are not necessarily ingredients of the former [resulting trusts], while fraud, either actual or constructive, is the very foundation of the latter, which are accordingly called, by those who delight in garnering expressions from the ripened fields of the classical languages, 'trusts ex maleficio.'" And see also the following statement from Hayden v. Dannenberg, supra: "All instances of constructive trusts may be referred to what equity denominates fraud, either actual or constructive, including acts or omissions in violation of fiduciary obligations. If one should obtain the legal title to property, not only by fraud or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out this theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In California constructive trusts are defined by statute: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civ. Code, Cal. § 2224.

STATUTE OF FRAUDS

36. The Statute of Frauds has no application to constructive trusts. They are created by equity, regardless of whether the evidence on which they are based is oral or written, whether the property involved is real or personal.

By the express provisions of the eighth section of the English Statute of Frauds [3] trusts arising "by the implication or construction of law" are not subject to the Statute of Frauds. The American state statutes have universally adopted this exception,[4] and the decisions that no written evidence is necessary as a basis for constructive trusts are numerous.[5]

CONSTRUCTIVE TRUSTS NOT BASED ON FRAUD

37. In the following cases, where there is no fraud, actual or constructive, but in which the legal title holder is not entitled to the beneficial ownership of the property, equity may create a constructive trust:

(a) Where the legal title has been obtained by mistake.

(b) Where the transaction by which the legal title was obtained has been set aside or rescinded.

(c) Where the legal title was obtained by wrongdoing other than strict fraud, as, for example, by undue influence, conversion, forgery, theft, meddling with trust funds, or breach of trust.

(a) If by mistake the legal title is conveyed to another than the intended grantee, or the wrong property is conveyed to the in-

[3] St. 29 Chas. II, ch. 3 (1677). [4] See note, ante, p. 55.

[5] Whitney v. Hay, 181 U. S. 77, 21 Sup. Ct. 537, 45 L. Ed. 758; McNeil v. Gates, 41 Ark. 264; De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; Bohm v. Bohm, 9 Colo. 100, 10 Pac. 790; Larmon v. Knight, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229; Buck v. Voreis, 89 Ind. 116; Becker v. Neurath, 149 Ky. 421, 149 S. W. 857; Gilpatrick v. Glidden, 81 Me. 137, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245; Cameron v. Lewis, 56 Miss. 76; Pratt v. Clark, 57 Mo. 189; Brannin v. Brannin, 18 N. J. Eq. 212; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776; Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550; Ewing v. Ewing, 33 Okl. 414, 126 Pac. 811; Kroll v. Coach, 45 Or. 459, 78 Pac. 397, 80 Pac. 900; Schrager v. Cool, 221 Pa. 622, 70 Atl. 889; Morris v. Reigel, 19 S. D. 26, 101 N. W. 1086; Orr v. Perky Inv. Co., 65 Wash. 281, 118 Pac. 19; Floyd v. Duffy, 68 W. Va. 339, 69 S. E. 993, 33 L. R. A. (N. S.) 883; Fairchild v. Rasdall, 9 Wis. 379.

tended grantee, the actual grantee may be declared by equity to hold the legal title under a constructive trust for the grantor.[6] "But there is another principle, recognized in equity, that when one person, through fraud or mistake, obtains the legal title and apparent ownership of property, which in justice and good conscience belongs to another, such property is impressed with a use in favor of the equitable owner." [7]

No trust was intended here, but the declaration of one by equity will prevent the person accidentally holding the legal title from unjustly enriching himself at the expense of him in equity entitled to the property.

(b) When a transaction by which the legal title to property is transferred, is set aside, declared void, rescinded, or annulled, the holder of the legal title by virtue of such transaction may be declared by equity to be a constructive trustee for the person who transferred the property.[8]

Thus, when a receiver of a corporation sells some of its property, and later the order appointing such receiver is vacated the purchasers of the property hold it as constructive trustees for the corporation.[9]

It is inequitable that the transferee under the void transaction should retain the property. Equity uses the constructive trust to place the legal title again in the real owner.

(c) If one acquire property through any kind of inequitable conduct, equity may create a constructive trust as to the property for the purpose of working out the ends of justice.

Thus, property obtained through the exercise of undue influence or duress may be declared by equity to be subject to a constructive trust;[10] a convertor of property may be held in equity as a constructive trustee of the converted property or of its proceeds;[11] and, where one meddles with trust property and wrongfully as-

[6] Wilson v. Castro, 31 Cal. 421; Andrews v. Andrews, 12 Ind. 348; Harris v. Stone, 8 Iowa, 322; Smith v. Walser, 49 Mo. 250; Lamb v. Schiefner, 129 App. Div. 684, 114 N. Y. Supp. 34; Anderson v. Nesbit, 2 Rawle (Pa.) 114.

[7] Cole v. Fickett, 95 Me. 265, 270, 49 Atl. 1066.

[8] Clapp v. Vatcher, 9 Cal. App. 462, 99 Pac. 549; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691; Butte Hardware Co. v. Cobban, 13 Mont. 351, 34 Pac. 24; Medical College Laboratory v. New York University, 178 N. Y. 153, 70 N. E. 467; Ross v. Davis, 122 N. C. 265, 39 S. E. 338; Long v. Fuller, 21 Wis. 121.

[9] Lutey v. Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

[10] Mullin v. Mullin, 119 App. Div. 521, 104 N. Y. Supp. 323.

[11] Thompson v. Thompson, 107 Ala. 163, 18 South. 247; Ellett v. Tyler, 41 Ill. 449; Ramsden v. O'Keefe, 9 Minn. (Gil. 63) 74; Phillips v. Hines, 32 Miss. 163; Tecumseh Nat. Bank v. Russell, 50 Neb. 277, 69 N. W. 763; Newton v. Taylor, 32 Ohio St. 399.

sumes control of it, equity may charge him as a constructive trustee of such property.[12]

So, too, if a trustee, in violation of his trust, convey away the trust property, the proceeds of the trust property in the hands of the trustee,[13] and the trust property itself, if in the hands of a taker who has had knowledge of the breach of trust, or has not paid value,[14] will be held subject to a constructive trust in favor of the cestui que trust of the violated trust.

Property acquired through crime may be the basis of a constructive trust. Thus the proceeds of stolen property in the hands of a thief are often held to be bound by a constructive trust;[15] property acquired by forgery has been held to be the subject-matter of a constructive trust;[16] and the logical theory on which to dispose of the cases of property acquired by an heir or devisee through the murder of his ancestor or testator is that of a constructive trust.[17]

[12] Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; Tarbox v. Tarbox, 111 Me. 374, 89 Atl. 194; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839; Bailey v. Bailey, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 826; Brown v. Lambert's Adm'r, 33 Gratt. (Va.) 256; Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386.

[13] Small v. Hockinsmith, 158 Ala. 234, 48 South. 541; Rice v. Rice, 108 Ill. 199; Rebesher v. Rebesher (N. Y. Sup.) 126 N. Y. Supp. 572; Harmon v. Harmon, 96 S. C. 393, 71 S. E. 815; Oaks v. West (Tex. Civ. App.) 64 S. W. 1033. The same rule applies where the proceeds of the trust property consist of realty standing in the name of the trustee's wife as a dummy. Clingman v. Hill, 104 Kan. 145, 178 Pac. 243.

[14] Murphy v. Farmers' & Merchants' Bank of Los Angeles, 131 Cal. 115, 63 Pac. 368, 731; Taylor v. Fox's Ex'rs, 162 Ky. 804, 173 S. W. 154; Elliott v. Landis Mach. Co., 236 Mo. 546, 139 S. W. 356.

[15] Pioneer Mining Co. v. Tyberg, 215 Fed. 501, 131 C. C. A. 549, L. R. A. 1915B, 442; National Mahaiwe Bank v. Barry, 125 Mass. 20; Lamb v. Rooney, 72 Neb. 322, 100 N. W. 410, 117 Am. St. Rep. 795; Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747.

[16] Blair v. Hennessy (Tex. Civ. App.) 138 S. W. 1076.

[17] Hall v. Knight, 135 L. T. J. 550. Some courts have taken the view that the will or the Statute of Descents does not operate in favor of the murderer; that is, that he acquires no title, legal or equitable. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819. Others have held that, in the absence of express statutory provision, the murderer will obtain both legal and equitable title. Holloway v. McCormick, 41 Okl. 1, 136 Pac. 1111, 50 L. R. A. (N. S.) 536; Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785, L. R. A. 1915C, 328, Ann. Cas. 1916A, 674 (discussed in 9 Ill. Law Rev. 502, 505). The better view would seem to be to allow the will or the statute to operate, but to fasten a constructive trust on the property in favor of the innocent heirs or next of kin immediately upon the testator's or ancestor's death. In Van Alstyne v. Tuffy, 103 Misc. Rep. 455, 169 N. Y. Supp. 173, where a tenant by the entirety murdered his cotenant, the doctrine of nullification of

ACTUAL FRAUD

38. Where the legal title to property has been obtained through actual fraud equity may declare the fraudulent holder a constructive trustee of the property in favor of the one defrauded.

Fraud is a well-known ground of equitable jurisdiction. "It is a well-settled rule of equity that a misrepresentation constitutes fraud relievable in equity only when (a) it is untrue; (b) the party making it knew, or should have known, it to be untrue, and it was made by him to induce the other party to act or omit to act; (c) it induced the other party to act or omit to act; and (d) it is a material fact." [18] "That courts of equity have concurrent jurisdiction with the law courts to grant relief from the consequences of fraud and misrepresentation is a proposition too firmly established in the jurisprudence of this state to be now questioned." [19]

If adequate relief cannot be accomplished by setting aside the fraudulent transaction, equity "will suffer the title to rest in the fraudulent grantee as a trustee ex maleficio." [20] The cases in which equity has held a fraudulent grantee or transferee as a constructive trustee are very numerous.[21]

Examples of the fraud which gives rise to a constructive trust are the cases where an agent violates the contract of agency, and

the law by which the surviving tenant takes the whole property was applied, although the survivor immediately after the murder committed suicide, and hence apparently did not commit the murder to gain the property. For a discussion of this case, see 27 Yale Law J. 964, and 16 Mich. Law Rev. 561.

[18] Taylor v. Mullins, 151 Ky. 597, 599, 152 S. W. 774.

[19] Culver v. Avery, 161 Mich. 322, 126 N. W. 439, 442.

[20] Westphal v. Williams (Ind. App.) 107 N. E. 91, 94.

[21] Cunningham v. Pettigrew, 169 Fed. 335, 94 C. C. A. 457; Smith v. Smith, 153 Ala. 504, 45 South. 168; Hays v. Gloster, 88 Cal. 560, 26 Pac. 367; Frick Co. v. Taylor, 94 Ga. 683, 21 S. E. 713; Smith v. Wright, 49 Ill. 403; Norris v. Kendall, 48 Ind. App. 304, 93 N. E. 1087; Hall v. Doran, 13 Iowa, 368; Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648; Vanderpool v. Vanderpool, 163 Ky. 742, 174 S. W. 727; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. Rep. 407; Hanold v. Bacon, 36 Mich. 1; Nesbitt v. Onaway-Alpena Tll. Co., 202 Mich. 567, 168 N. W. 519; Winona & St. P. R. Co. v. St. Paul & S. C. R. Co., 26 Minn. 179, 2 N. W. 489; Moore v. Crump, 84 Miss. 612, 37 South. 109; Aspinall v. Jones, 17 Mo. 209; South End Mining Co. v. Tinney, 22 Nev. 19, 35 Pac. 89; Valentine v. Richardt, 126 N. Y. 272, 27 N. E. 255; Edwards v. Culberson, 111 N. C. 342, 16 S. E. 233, 18 L. R. A. 204; Currie v. Look, 14 N. D. 482, 106 N. W. 131; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Tetlow v. Rust, 227 Pa. 292, 76 Atl. 22; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Blakeslee v. Starring, 34 Wis. 538.

in that way acquires his principal's property;[22] where a conveyance is made in fraud of creditors;[23] and cases of fraud by a buyer at a judicial sale in obtaining the property at an unusually low figure by means of false representations, or in obtaining title for himself when supposed to buy for the debtor.[24]

Mere inadequacy of consideration for the transfer of property is not sufficient ground for declaring a trust;[25] but coupled with other facts, it may be sufficient to show fraud on which a trust may be based.[26]

Naturally, the *retention* of property by fraud, as well as the *obtaining* of it, gives rise to a constructive trust.[27] Where property has been conveyed to an innocent grantee, due to the fraud of a third person, such innocent grantee will hold the property under a constructive trust.[28]

VIOLATION OF VOIDABLE PROMISE AS FRAUD

39. Ordinarily equity will not raise a constructive trust merely because of the violation of an oral promise, voidable under the Statute of Frauds—

(a) To convey or devise real property;

(b) To buy land in the name of the promisee, or in the joint names of the promisee and the promisor;

(c) To hold real property in trust for the promisee or for another.

[22] Sanford v. Hamner, 115 Ala. 406, 22 South. 117; Collins v. Rainey, 42 Ark. 531; Wells, Fargo & Co. v. Robinson, 13 Cal. 134; Boswell v. Cunningham, 32 Fla. 277, 13 South. 354, 21 L. R. A. 54; Barton v. Moss, 32 Ill. 50; Hitchcock v. Cosper, 164 Ind. 633, 73 N. E. 264; Bellinger v. Collins, 117 Iowa, 173, 90 N. W. 609; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Hoehne v. Breitkreitz, 5 Neb. 110; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; Jackson v. Sternbergh, 1 Johns. Cas. (N. Y.) 153.

[23] Eiler v. Crull, 112 Ind. 318, 14 N. E. 79; Kingman Plow Co. v. Knowlton, 143 Iowa, 25, 119 N. W. 754; Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. Supp. 80.

[24] McRarey v. Huff, 32 Ga. 681; Estill v. Estill, 3 Bibb (Ky.) 177; Huxley v. Rice, 40 Mich. 73; Dickel v. Smith, 38 W. Va. 635, 18 S. E. 721.

[25] Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1066; Chandler v. Roe, 46 Okl. 349, 148 Pac. 1026 (semble).

[26] Parkhurst v. Hosford (C. C.) 21 Fed. 827; Bither v. Packard, 115 Me. 306, 98 Atl. 929.

[27] Anglo-American Savings & Loan Ass'n v. Campbell, 13 App. D. C. 581; Bell v. McJones, 151 N. C. 85, 65 S. E. 646.

[28] Saar v. Weeks, 105 Wash. 628, 178 Pac. 819; Ruhe v. Ruhe, 113 Md. 595, 77 Atl. 797.

If the promisor has, however, been guilty of fraud other than the breach of his promise, and in some cases where the existence of a confidential relation between promisor and promisee gives ground for presumed fraud, equity will construct a trust in favor of the promisee.

A constructive trust is frequently created by equity when—

(a) A grantee, having made a promise to sell the land and account for all or a part of the proceeds, sells the property, but fails to account for the proceeds;

(b) There has been a breach of a parol promise to buy real property at a judicial sale and hold it for the benefit of, or convey it to, one having an interest in the property to be offered at such judicial sale.

(a) Contract to Convey or Devise Land

It is elementary that the fourth section of the English Statute of Frauds, which is adopted generally in America, provides that oral contracts for the conveyance of an interest in land are voidable. The question has frequently arisen as to whether the refusal to perform such a contract is fraud on which equity will construct a trust.

It is generally held that the violation of a promise to convey or reconvey, or buy and convey, or devise real property is not fraud of the nature justifying the creation of a constructive trust.[29]

[29] Scribner v. Meade, 10 Ariz. 143, 85 Pac. 477; Bland v. Talley, 50 Ark. 71, 6 S. W. 234; Hunter v. Feild, 114 Ark. 128, 169 S. W. 813; Taylor v. Kelley, 103 Cal. 178, 37 Pac. 216; Lyons v. Bass, 108 Ga. 573, 34 S. E. 721; Houston v. Farley, 146 Ga. 822, 92 S. E. 635; Miller v. Miller, 266 Ill. 522, 107 N. E. 821; Moore v. McClain (Ind. App.) 119 N. E. 258; Revel v. Albert (Iowa) 162 N. W. 595; Goff v. Goff, 98 Kan. 201, 158 Pac. 26, rehearing denied, 98 Kan. 700, 158 Pac. 662; Fields v. Hoskins, 182 Ky. 446, 206 S. W. 763; McIntyre v. McIntyre, 205 Mich. 496, 171 N. W. 393; Ostheimer v. Single, 73 N. J. Eq. 539, 68 Atl. 231; Watson v. Erb, 33 Ohio St. 35; Chadwick v. Arnold, 34 Utah, 48, 95 Pac. 527; In re Mason's Estate, 95 Wash. 564, 164 Pac. 205; Parkes v. Burkhart, 101 Wash. 659, 172 Pac. 908. On this and other topics considered in this section, see Costigan, "Trusts Based on Oral Promises to Hold in Trust, to Convey, or to Devise, Made by Voluntary Grantees," 12 Mich. Law Rev. 423, 515.

The fourth section of the Statute of Frauds covers oral contracts to devise real property. Dicken v. McKinley, 163 Ill. 318, 45 N. E. 134, 54 Am. St. Rep. 471; Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573; Henning v. Miller, 66 Hun (N. Y.) 588, 21 N. Y. Supp. 831, 5 Am. & Eng. Ann. Cas. 495, note. If the promise to devise was made with fraudulent intent, naturally a constructive trust arises from the breach. Manning v. Pippen, 86 Ala. 357, 5 South. 572, 11 Am. St. Rep. 46. In some cases the confidential relation existing between the promisee and the one who makes the promise to devise has given rise to a constructive trust. Bradley Co. v. Bradley, 37 Cal.

fraudulent although it may be morally wrong.[37] "When, therefore, one makes an oral contract with another that the latter shall buy land on joint account, and he in violation of the contract takes the deed to himself, no trust results in favor of the former as to one-half of the land, unless it is shown that he furnished the money for the one-half—in other words, that it was bought with his money." [38]

On principle it would seem that a contract to buy land for another was a mere contract to act as an agent, and did not involve the transfer of any interest in land as far as the parties to the contract are concerned. The promisor agrees to procure another, a third party, to convey an interest in lands to the promisee. It is a contract *concerning* lands but not *for* an interest in lands.

(c) Contract to Hold Real Property in Trust

It is held by the majority of American courts that the violation of an oral promise to hold real property in trust for the promisee or for another is not such fraud as will cause equity to create a constructive trust. If A. own real property, and orally promise to hold it in trust for B., and later decline to carry out the trust, equity will not make A. a constructive trustee of the property; and the same result is reached, if A. convey real property to B. upon B.'s oral promise to hold the land in trust for A., which promise is later violated. If the only fraud proved is the breach of the oral contract, and if promisor and promisee do not occupy a confidential relationship, from which fraud can be presumed, equity will not declare the promisor a trustee.[39]

[37] Emerson v. Galloupe, 158 Mass. 146, 32 N. E. 1118; Levy v. Brush, 45 N. Y. 589; Rische v. Diesselhorse (Tex. Civ. App.) 26 S. W. 762; Cushing v. Heuston, 53 Wash. 379, 102 Pac. 29.

[38] Bailey v. Hemanway, 147 Mass. 326, 328, 17 N. E. 645.

[39] Patton v. Beecher, 62 Ala. 579; Brindley v. Brindley, 197 Ala. 221, 72 So. 497; Wright v. Young, 20 Ariz. 46, 176 Pac. 583; Ussery v. Ussery, 113 Ark. 36, 166 S. W. 946; Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142; Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Verzier v. Convard, 75 Conn. 1, 52 Atl. 255; Lawson v. Lawson, 117 Ill. 98, 7 N. E. 84; Davis v. Stambaugh, 163 Ill. 557, 45 N. E. 170; Ryder v. Ryder, 244 Ill. 297, 91 N. E. 451; Roche v. Roche, 286 Ill. 336, 121 N. E. 621; Westphal v. Heckman, 185 Ind. 88, 113 N. E. 299; Orear v. Farmers' State Bank & Trust Co., 286 Ill. 454, 122 N. E. 63; Dunn v. Zwilling, 94 Iowa, 233, 62 N. W. 746; Andrew v. Andrew, 114 Iowa, 524, 87 N. W. 494; Titcomb v. Morrill, 10 Allen (Mass.) 15; Ryan v. Williams, 92 Minn. 506, 100 N. W. 380; Weiss v. Heitkamp, 127 Mo. 23, 29 S. W. 709; Ferguson v. Robinson, 258 Mo. 113, 167 S. W. 447; Dailey v. Kinsler, 31 Neb. 340, 47 N. W. 1045; Lovett v. Taylor, 54 N. J. Eq. 311, 34 Atl. 896; Sturtevant v. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Wheeler v. Reynolds, 66 N. Y. 227; Braun v. First German Evangelical Lutheran

In England and a few American states it is held that a constructive trust will be declared on account of a breach of an oral agreement to hold land in trust.[40] The reason given for the prevailing view is that, to declare a constructive trust because of a breach of an agreement voidable on account of the Statute of Frauds, would be practically to destroy the Statute of Frauds concerning trusts. It will be of slight importance to the beneficiary whether his trust is called implied or express, so long as it is enforced. This view has been forcibly stated by Brickell, C. J., in a leading case.[41] "The plain meaning of the statute is that a trust in land, not arising by implication or construction of law, cannot be created by parol—that a writing signed by the party creating or declaring the trust is indispensable to its existence. Fraud, imposition, mistake, in the original transaction, may constitute the purchaser, or donee, a trustee ex maleficio. It is *fraud then,* and not *subsequent fraud,* if any exist, which justifies a court of equity in intervening for the relief of the party injured by it—as it is the payment of the purchase money, at the time the title is acquired, which creates a resulting trust, and not a subsequent payment, whatever may be the circumstances attending it. * * * When the original transaction is free from the taint of fraud or imposition, when the written contract expresses all the parties intended it should, when the parol agreement which is sought to be enforced, is intentionally excluded from it, it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a

Church, 198 Pa. 152, 47 Atl. 963; McCloskey v. McCloskey, 205 Pa. 491, 55 Atl. 180; Farrell v. Mentzer, 102 Wash. 629, 174 Pac. 482; Krouskop v. Krouskop, 95 Wis. 296, 70 N. W. 475. See 39 L. R. A. (N. S.) 906, for a good discussion of the subject. See, also, Harlan F. Stone, "Resulting Trusts and the Statute of Frauds," 6 Col. Law Rev. 326; J. B. Ames, "Constructive Trusts Based upon the Breach of an Express Oral Trust of Land," Lectures on Legal History, p. 425, 20 Harv. Law Rev. 549.

[40] Davies v. Otty, 35 Beav. 208; Rochefoucauld v. Bonstead [1897] 1 Ch. 196; Tinkler v. Swaynie, 71 Ind. 562; Myers v. Jackson, 135 Ind. 136, 34 N. E. 810 (but see General Convention of New Church in United States v. Smith, 52 Ind. App. 136, 100 N. E. 384); Feesner v. Cooper, 39 Okl. 133, 134 Pac. 379.

In some California cases, where the relationship of promisor and promisee was close, a constructive trust has been created, upon a breach of the oral contract. Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506.

Breach of the oral agreement was held enough in Willats v. Bosworth, 33 Cal. App. 710, 166 Pac. 357. See, also, Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776, and Troll v. Carter, 15 W. Va. 567. In North Carolina and West Virginia as well as some other states, the Statute of Frauds respecting the creation of real property trusts has a very limited application or is not in force. See ante, pp. 55, 56.

[41] Patton v. Beecher, 62 Ala. 579, 592, 593.

basis for a similar imputation, whenever any promise or contract is broken. It is annihilation of the statute to withdraw a case from its operation because of such violation or repudiation of an agreement or trust it declares shall not be made or proved by parol. There can be no fraud if the trust does not exist, and proof of its existence by parol is that which the statute forbids. In any and every case, in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation."

In answer to this argument, however, it may be said that parol agreements to hold in trust are of two classes, namely, those in which a refusal to enforce the promise will result in the unjust enrichment of the promisor, and those in which the failure to enforce the promise will not cause unjust enrichment of the promisor. If A. agrees, voluntarily, to hold in trust for B. real property which at the time of the promise belongs to A., and A. later declines to carry out his agreement, the refusal of the courts to enforce A.'s promise will not result in A.'s being unjustly enriched at the expense of B. But if A. voluntarily transfers real property to B., in consideration of an oral promise by B. to hold such property in trust for A., and B. later repudiates his promise and seeks to hold the real property for his own benefit, the failure of the courts to enforce the express oral trust will result in the unjust enrichment of B. at the expense of A.

It is submitted that, in cases where unjust enrichment would result, equity might well create a constructive trust. This would not be enforcing the original oral express trust, but would be creating an implied trust for the sole purpose of preventing unjust enrichment. The original oral express trust might call for the collection of the rents and the delivery of them to the cestui que trust for a period of ten years. The constructive trust would be a mere passive trust, on the basis of which equity would decree a conveyance of the property to the beneficiary.

The holding suggested in cases of unjust enrichment would be in accord with the stand taken by the courts with respect to other agreements, voidable because not complying with the Statute of Frauds. Money paid and the reasonable value of services rendered, under a contract avoided because of the Statute of Frauds, may be recovered in quasi contract.[42]

[42] Cook v. Doggett, 2 Allen (Mass.) 439; Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Erben v. Lorillard, 19 N. Y. 299; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125.

(d) Actual Fraud at the Time of the Promise

If the promisor, who has agreed to hold the real property in trust for the promisee, has a fraudulent intent at the time he makes the promise, then equity will declare the promisor a constructive trustee, notwithstanding that the promise was oral and the Statute of Frauds requires trusts in land to be manifested or proved by a writing.[43]

Active solicitation of the conveyance by the grantee under the oral trust will be important evidence of an intent to defraud the grantor and break the oral contract.

It has been held that, if the parties have agreed that the oral trust agreement shall be reduced to writing, a fraudulent intent at the time of the agreement need not be shown, in order to fasten a constructive trust upon the property.[44]

(e) Confidential Relations Between Promisor and Promisee as a Basis for Presumed Fraud

A further exception to the strict rule regarding oral promises to hold in trust is found in the case of confidential relations existing between promisor and promisee. Many courts have been eager to avoid the hardship which the Statute of Frauds imposed upon promisees under oral agreements. These courts have therefore seized upon every evidence of fraud as a basis for a constructive trust. The breach of the voidable promise could not, according to their established theory, constitute fraud. But if the promisor and promisee sustained relations of confidence, due to kinship or business association, equity might easily presume that advantage had been taken of this confidential relation, and that fraud existed. This presumption has often been relied upon.[45]

[43] Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Brown v. Doane, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381; Lantry v. Lantry, 51 Ill. 458, 2 Am. Rep. 310; Gregory v. Bowlsby, 126 Iowa, 588, 102 N. W. 517; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Grote v. Grote, 121 App. Div. 841, 106 N. Y. Supp. 986; Parrish v. Parrish, 33 Or. 486, 54 Pac. 352; Meek v. Meek, 79 Or. 579, 156 Pac. 250.

[44] Wolford v. Herrington, 74 Pa. 311, 15 Am. Rep. 548. Where there was such agreement to execute a written statement of the trust, and the deed was delivered to the grantee for examination only, and he had it recorded, a constructive trust was decreed in Hardman v. Ryan, 106 Wash. 433, 180 Pac. 142.

[45] Bradley Co. v. Bradley, 165 Cal. 237, 131 Pac. 750; Hillyer v. Hynes, 33 Cal. App. 506, 165 Pac. 718; Milloglav v. Zacharias, 33 Cal. App. 561, 165 Pac. 977; Appeal of Fisk, 81 Conn. 433, 71 Atl. 559; Stahl v. Stahl, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, 2 Ann. Cas. 774; Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905; Erdman v. Kenney, 159 Ky. 509, 167 S. W. 685; Apgar v. Connell, 79 Misc. Rep. 531, 140 N. Y. Supp. 705; Jere-

For example, where a son received real property from his mother under an oral promise to hold the same for the benefit of the mother and the promisor's brothers and sisters, a repudiation of the promise was held to give rise to a constructive trust.[46] The fact of near relationship and the natural confidence placed by mother in son enabled the court to presume fraud. Although no actual fraud in the making of the promise was shown, and although the breach of the oral contract to hold in trust was not legal fraud, the court found a basis for a constructive trust in the presumed fraud arising from the confidential relationship.

This theory seems somewhat of a subterfuge, since there must always be a relation of trust and confidence between promisor and promisee in these cases; otherwise, the land would scarcely be conveyed to the promisor upon his oral promise. The promisee must always trust the promisor. The fact that he conveys the land to the promisor, or has the land conveyed to the promisor shows this fact. Why should this presumption of undue influence and fraud arise in one case of trust and confidence and not in another?

(f) Oral Promise by Grantee to Sell Land and Account for Proceeds

Frequently the grantee of real property agrees orally to sell the land and account to the grantor for all or a part of the proceeds.[47] The question arises, when the grantee breaks his contract and declines to deliver to the grantor all or any part of the proceeds, whether the grantee is to be considered a trustee of such proceeds in favor of the grantor. It has been held by many courts that, after the sale of the property, the grantee holding the proceeds would be adjudged a trustee for the grantor. This is true both in cases where a part only of the proceeds were to be delivered,[48] and in cases where the entire proceeds were to be paid to the grantor.[49]

miah v. Pitcher, 163 N. Y. 574, 57 N. E. 1113, affirming 26 App. Div. 402, 49 N. Y. Supp. 788; Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067; Hanson v. Svarverud, 18 N. D. 550, 120 N. W. 550; Hatcher v. Hatcher, 264 Pa. 105, 107 Atl. 660.

[46] Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067.

[47] On this subject, see matter under Statute of Frauds, ante, § 20.

[48] Collar v. Collar, 75 Mich. 414, 42 N. W. 847, 4 L. R. A. 491; Mulrooney v. Irish-American Sav. & Bldg. Ass'n, 249 Mo. 629, 155 S. W. 804; Spencer v. Richmond, 46 App. Div. 481, 61 N. Y. Supp. 397; Bechtel v. Ammon, 199 Pa. 81, 48 Atl. 873; Contra: Benson v. Dempster, 183 Ill. 297, 55 N. E. 651; McGinness v. Barton, 71 Iowa, 644, 33 N. W. 152; Cameron v. Nelson, 57 Neb. 381, 77 N. W. 771.

[49] Collins v. Tillou's Adm'r, 26 Conn. 368, 68 Am. Dec. 398; Craft v. Craft, 74 Fla. 262, 76 South. 772; Thomas v. Merry, 113 Ind. 83, 15 N. E. 244; Bork v. Martin, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570; Logan v.

The courts are not clear in their statements as to whether this is the case of an express trust in personal property or of an implied trust in realty arising out of fraud. The former view would seem preferable. The New York Court of Appeals has explained its position as follows:[50]

"Though the statutes might have justified the defendant's refusal to dispose of the land as he had orally agreed, yet, having disposed of it, he has voluntarily emerged from the field of their protection, and exposed himself to the law which deals with him as a trustee of personal property realized for plaintiff's benefit, by virtue of an agency for the plaintiff which he has so far performed pursuant to the plaintiff's instructions and his own agreement, as to obtain the moneys his agency was constituted to produce. Equity approves his performance, so far as he has performed, and as the statutes referred to no longer apply, there is no law which he can invoke to shield him from the full performance of his duty."

In cases where the agreement is entirely executory—that is, where the promisor has neither sold the real property nor accounted for its proceeds—the breach of contract by the grantee will not cause equity to create him a constructive trustee. The promise is voidable under the Statute of Frauds, and a breach of it is not fraud.[51]

Breach of an oral agreement to deliver to the promisee a share in the profits from the sale of real property has been held to be ground for the declaration of a constructive trust.[52]

(g) Oral Agreement to Buy Land at Judicial Sale and Hold for Promisee

In numerous cases the owner of an interest in land, as, for example, an equity of redemption or a fee simple subject to the lien of a judgment, has made an agreement with a stranger to the title that such stranger should bid in the land on the judicial sale of it, hold it for the promisee, and dispose of it for the promisee, or re-

Brown, 20 Okl. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298. Contra: Marvel v. Marvel, 70 Neb. 498, 97 N. W. 640, 113 Am. St. Rep. 792.

Where the grantee agreed to hold the proceeds of the realty in trust for the grantor if the realty was sold, and it was sold, it was held in Chace v. Gardner, 228 Mass. 533, 117 N. E. 841, that there was a valid express trust in the proceeds.

[50] Bork v. Martin, 132 N. Y. 280, 284, 285, 30 N. E. 584, 28 Am. St. Rep. 570.

[51] Adams v. Adams, 79 Ill. 517; Pearson v. Pearson, 125 Ind. 341, 25 N. E. 342; Byers v. McEniry, 117 Iowa, 499, 91 N. W. 797; Kinsey v. Bennett, 37 S. C. 319, 15 S. E. 965. Contra: Bier v. Leisle, 172 Cal. 432, 156 Pac. 870.

[52] Green v. Brooks, 81 Cal. 328, 22 Pac. 849. But see contra, Ruggles v. Merritt, 166 Mich. 457, 132 N. W. 112; White v. McKenzie, 193 Mich. 189, 159 N. W. 367.

convey it to him upon certain conditions. It has been quite generally held that a breach of the promise so to buy and hold is fraud sufficient to give rise to a constructive trust in favor of the owner of the interest in the property, who has relied on the promise and therefore taken no steps himself to protect his interest at the time of the judicial sale.[53]

But other courts have declined to establish a constructive trust on like or similar facts.[54] The case of Ryan v. Dox[55] is illustrative of the prevailing view upon this subject. There a mortgagor agreed with the defendant that the defendant should buy the mortgaged real estate at the foreclosure sale; that title should be taken in the name of the defendant; that defendant should pay the amount of the bid with his own funds; that defendant should hold the real property as security for the repayment of his advances; and that defendant should convey the property to the mortgagor, the plaintiff, upon repayment of his advances. The defendant bid at the sale and obtained the property for a reduced price, because it was understood he was bidding for the mortgagor. The mortgagor remained away from the sale and took no steps to protect his interest, relying on the defendant. Upon the repudiation

[53] Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Strasner v. Carroll, 125 Ark. 34, 187 S. W. 1057, Ann. Cas. 1918E, 306; Price v. Reeves, 38 Cal. 457; Thomas v. Goodbread (Fla.) 82 South. 835; Rives v. Lawrence, 41 Ga. 283; Arnold v. Cord, 16 Ind. 177; Eadie v. Hamilton, 94 Kan. 214, 146 Pac. 323; Griffin v. Schlenk, 139 Ky. 523, 102 S. W. 837; Miller's Heirs v. Antle, 2 Bush (Ky.) 407, 92 Am. Dec. 495; Doom v. Brown, 171 Ky. 469, 188 S. W. 475 (trust called resulting); Northcraft v. Martin, 28 Mo. 469; O'Day v. Annex Realty Co. (Mo.) 191 S. W. 41; Robinson v. Cruzen (Mo. App.) 202 S. W. 449; Dickson v. Stewart, 71 Neb. 424, 98 N. W. 1085, 115 Am. St. Rep. 596; Day v. Devitt, 79 N. J. Eq. 342, 81 Atl. 368; Eckerson v. McCulloh, 39 N. J. Eq. 115; Van Horne v. Fonda, 5 Johns. Ch. 388; Allen v. Arkenburgh, 2 App. Div. 452, 37 N. Y. Supp. 1032; Ryan v. Dox, 34 N. Y. 307, 90 Am. Dec. 696; Goldman v. Cohen, 167 App. Div. 666, 153 N Y. Supp. 41; Rush v. McPherson, 176 N. C. 562, 97 S. E. 613; Beegle v. Wentz, 55 Pa. 369, 93 Am. Dec. 762; Wolford v. Herrington, 86 Pa. 39; Jenckes v. Cook, 9 R. I. 520; Denton v. McKenzie, 1 Desaus. 289, 1 Am. Dec. 664; Haywood v. Ensley, 8 Humph. (Tenn.) 460; Chandler v. Riley (Tex. Civ. App.) 210 S. W. 716; Harras v. Harras, 60 Wash. 258, 110 Pac. 1085. In analogy to this principle it was held in Prescott v. Jenness, 77 N. H. 84, 88 Atl. 218, that a constructive trust would be declared where a mortgagor had been promised the right to redeem, although his technical right had expired, and the defendant bought the property from the mortgagee under an oral agreement to allow the mortgagor to redeem within two years.

[54] La Cotts v. La Cotts, 109 Ark. 335, 159 S. W. 1111; Walter v. Klock, 55 Ill. 362; Kellum v. Smith, 33 Pa. 158; Barnet v. Dougherty, 32 Pa. 371; Fox v. Peoples, 201 Pa. 9, 50 Atl. 226; Lancaster Trust Co. v. Long, 220 Pa. 499, 69 Atl. 993; Stafford v. Stafford, 29 Tex. Civ. App. 73, 71 S. W. 984.

[55] 34 N. Y. 307, 90 Am. Dec. 696.

of his promise by the defendant, it was held that the defendant would be declared a constructive trustee for the mortgagor, the plaintiff.

It is difficult to see why there should be any difference between judicial sales and private sales. According to the weight of authority, breach of an oral agreement to hold in trust ought to be regarded as no fraud upon which to found a constructive trust.[56] On authority it would seem that some fraud at the time of the promise would be necessary to the existence of a constructive trust in the case of judicial sales, as well as in the case of private transfers.

On principle the purchasers at judicial sales, who violate their promises to hold for the promisees, are attempting unjustly to enrich themselves, and should be made constructive trustees for the promisees, even though the express trust involved cannot be enforced.

VIOLATION OF PAROL PROMISE MADE TO SECURE GIFT BY WILL OR INTESTACY

40. The Statute of Wills, with some exceptions, prevents an oral testamentary disposition of property. An oral promise to transfer property after the death of its owner and a written direction as to the disposition of property after the owner's death, not executed with testamentary formality, cannot, therefore, be enforced as testamentary provisions.

The Statute of Frauds requires trusts of real property to be created or proved by writing. Parol promises by a donee of real property to hold it in trust for an ancestor or testator cannot be enforced as express trusts.

If the promisor, who has secured property by the laws of intestacy or by will, had a fraudulent intent at the time he made the promise upon the basis of which he secured the property, and declines to hold for the agreed purpose, he will be charged with a constructive trust.

If the recipient of property by will or intestacy learns of the donor's desire that he use the property for another only after the donor's death, no constructive trust will attach as a result of a refusal to carry out the donor's wishes.

If the recipient promises to hold the property for others, but the names of such others are not communicated until after the donor's death, the recipient will hold under an implied trust for the heirs, next of kin, or residuary devisees

[56] See ante, pp. 126–128.

or legatees of the donor, and not for the intended beneficiaries.

If a gift is made by will in reliance on the promise of the donee to hold for another, a breach of such promise will cause equity to hold the donee as a constructive trustee for the intended beneficiary.

If an ancestor allows property to pass to his next of kin or heir in reliance on the promise of such next of kin or heir that he will apply the property to the benefit of another, a repudiation of such promise by the next of kin or heir will give rise to a constructive trust for the intended beneficiary.

A promise by one joint donee of property, by will or intestacy, will not ordinarily bind the other donees; but it may have that effect if made on behalf of all.

(a) The Statute of Wills and the Statute of Frauds

It is well known that wills of real and personal property are, with some exceptions, required to be in writing. The Statute of Wills [57] first made possible wills of real property. Modern American statutes require testamentary dispositions of property, with some important exceptions, to be written.[58]

It is rudimentary law, also, that in a large majority of jurisdictions express trusts in land must be evidenced by or created in writing.[59]

On account of these statutory provisions affecting the disposition of property by will and the creation of trusts in land, it is obviously impossible that equity should declare that property left by a deceased person, either in a case of testacy or intestacy, should be burdened by any express oral obligation or affected by any express oral trust. Thus, if A. leaves a will by which real property is devised to B. absolutely, and A. tells B. orally that he desires him to hold the land in trust for C., and B. agrees so to hold it, the obligation of B. to hold the property for C. cannot be enforced directly without violating the Statute of Wills and the Statute of Frauds. To enforce such oral obligation would be to allow the making of an oral will or the creating of an oral trust in land.[60]

It is an important question what attitude equity should assume toward B., in the illustration just given, if B. refuse to hold for

[57] St. 32 Henry VIII, c. 1.

[58] See, for example, Decedent Estate Law N. Y. (Consol. Laws, c. 13) §§ 10–22.

[59] See ante, pp. 54–58.

[60] Reynolds v. Reynolds, 224 N. Y. 429, 121 N. E. 61.

C. after the will has taken effect and B. has become the legal owner of the property. Is B., in repudiating his promise, guilty of any fraud which will be recognized by equity, as the basis of a constructive trust? Or is the breach of an obligation attempted to be imposed in violation of the Statute of Frauds and the Statute of Wills not legal fraud, though wrong morally?

The situation is the same on principle if the promise of the recipient of the property induces, not a gift by will, but intestacy, as a result of which the property comes to the promisor. Thus if A., the owner of real property, is induced by the promise of B., his sole heir, not to make a will, but to allow the real property to descend to B., upon B's oral promise to hold the land for X., the same question is presented. Is the refusal of B., the heir who has obtained the property, to perform the promise on the strength of which he obtained it, such fraud as to give rise to a constructive trust? [61]

(b) Actual Fraud at the Time of the Promise

It has already been shown that one who obtains property by actual fraud may be held as a constructive trustee of it.[62] It is therefore obvious that, if the person obtaining property by will or the laws of inheritance on account of a promise made to the testator or intestate to hold it for another had the actual intent at the time he made the promise not to perform it, he has been guilty of actual fraud, and equity will hold him as a constructive trustee of the property so obtained.[63] "It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the Statute of Frauds, or the Statute of Wills." [64]

In a few cases the courts seem to have held that actual fraud at the time of the promise was an essential.[65] A fraudulent intent later conceived seems not to have been considered sufficient. This theory is, however, the view of a small minority of the courts which

[61] For an able discussion of the questions covered by this section, see G. P. Costigan, Jr., "Constructive Trusts, Based on Promises Made to Secure Bequests, Devises, or Intestate Succession," 28 Harv. Law Rev. 237, 366.

[62] See ante, § 38.

[63] Hoge v. Hoge, 1 Watts (Pa.) 163, 26 Am. Dec. 52.

[64] Winder v. Scholey, 83 Ohio St. 204, 216, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, 21 Ann. Cas. 1379.

[65] Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443; Evans v. Moore, 247 Ill. 60, 93 N. E. 118, 39 Am. St. Rep. 302 (discussed by Prof. Costigan in 6 Ill. Law Rev. 67; see, however, People v. Schaefer, 266 Ill. 334, 107 N. E. 617, discussed by Prof. Costigan in 10 Ill. Law Rev. 139); Sprinkle v. Hayworth, 26 Gratt. (Va.) 384; Tennant v. Tennant, 43 W. Va. 547, 27 S. E. 334.

have considered the question. The prevailing view is that a mere violation of the oral promise is ground for a constructive trust, and that therefore actual fraud at the time of the promise is a priori reason for a constructive trust.

(c) Directions of Testator or Ancestor Not Communicated During His Life

Under this heading two situations may be imagined:

First, the testator or ancestor may not communicate to the devisee or heir that he intends the devisee or heir to hold otherwise than for his own benefit. For example, A., a testator, may die leaving a will by which real property is given to B. absolutely, but by a separate instrument, not executed as a will, and not discovered until after A.'s death, it may appear that A. intended B. to hold the property for C., or pay money to C. In this case B. has made no promise in return for the gift. The directions to hold for C. are of no force, since they attempt to make a testamentary disposition of property without the formalities required. In this case it is generally held that B. may hold for his own benefit, and that there is no constructive trust either for C. or for A.'s heirs or residuary devisees.[66] The Statute of Wills makes the informal testamentary document inadmissible as evidence. Hence it cannot be proven, against the devisee's objection, that the testator intended the devisee to hold for another. That proof being lacking, there is no fraud or injustice on which to found a constructive trust.

Secondly, it may be supposed that the devisee or heir promises to hold for a purpose later to be communicated to him by the testator or ancestor, but that such purpose is not communicated during the life of the testator or ancestor. Thus, A. may devise real property to B. in trust, without naming the beneficiaries in the will, and B. may promise to hold the property in trust for persons later to be named. If no persons are named as beneficiaries during A.'s life, and the names of such beneficiaries appear only by a writing, not executed with testamentary formality, discovered after A.'s death, B. will be held as a trustee for A.'s heirs or residuary devisees.[67] It would obviously be an unjust enrichment to allow B. to hold for his own benefit. He cannot be compelled to hold for the purposes mentioned in the informal writing, for that would violate the Statute of Wills. Therefore the only just thing is to compel him to hold for the representatives of A., his heirs or residuary devisees.

[66] Juniper v. Batchelor (1868) Wkly. Notes 197; Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64; Nash v. Bremner, 84 N. J. Eq. 131, 92 Atl. 938; Schultz's Appeal, 80 Pa. 396.

[67] In re Boyes, L. R. 26 Ch. D. 531. See cases cited under ante, § 32.

(d) Directions of Testator or Ancestor Communicated During His Life

If the testator or ancestor tells the devisee or heir during the former's life that he desires the devisee or heir to hold for a third person, and the devisee or heir promises so to hold the property, and the gift is made to the heir or devisee in reliance on such promise, and the recipient of the property later repudiates the promise and attempts to hold for himself, equity will declare such recipient a constructive trustee of the property for the benefit of the beneficiary named in the promise.

"Trusts, in cases of this character, are impressed on the ground of fraud, actual or constructive, and the basis or ground upon which fraud is imputed is that of holding the estate of testator against conscience. It is not based necessarily on any imputation of fraud, or intention to defraud, at the time of making the promise, but of afterwards holding, or attempting to hold, the estate, as if the promise, on which the estate was received in its original condition, had not been made. The fraud consists in holding, or attempting to hold, the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received, and which it is obligatory in conscience to carry out. Where the estate or interest therein is thus received by the person who made the promise, the attempt to hold the estate without performing the promise is an actual fraud, for the reason that the recipient, having actually made the promise, knows personally of the obligation, and is guilty of actual fraud in holding, or attempting to hold, the estate without performing the promise, so far as his interest in the estate extends. As to such promisor, it is clearly not a question of modifying or cutting down plain and ambiguous (sic) devises in a will by parol evidence or unattested papers, in violation of the statute of frauds or of wills, for the devise to the promisor is not modified, but he is dealt with as a holder by fraud of property under the will, and a trust ex maleficio is raised from these facts." [68]

"It may be stated at the outset that fraud is the foundation of an action of this nature, and that the object of such an action is to arrest the consummation of a fraud. But for the element of fraud, equity would be without excuse for interposing against the statute of wills and the statute of frauds, which require certain solemn written formalities for wills and certain writings (where lands are involved) for trusts. * * * Therefore, since a willfully broken promise, made in aid of the promisee's definite intention, which

[68] Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892, 896.

thwarts such intention and prevents other action, is a fraud, equity affords relief to the beneficiaries of the promise. There must not only be an expressed intention, but there must be a promise made to carry out such intention; otherwise there would be no breach of promise, and consequently no fraud by the promisor."[69]

The breach of the promise of the heir, next of kin, devisee, or legatee is regarded by equity as fraud. In order to prevent the unjust enrichment of the promisor and to obviate fraud, equity constructs a trust and compels the recipient of the property to hold it for the intended beneficiary.[70]

Of course it is essential that the testator or ancestor should have relied on the promise of the donee in transferring, or allowing the laws of intestacy to transfer, the property to the donee. If a testator, for example, would have transferred the property to the donee, regardless of the promise, and the making of the promise had no influence in causing him to make the gift, then the failure to perform the promise will not give rise to a constructive trust.[71]

The promise to hold for another need not be expressly made. It

[69] Mead v. Robertson, 131 Mo. App. 185, 191, 110 S. W. 1095.

[70] Shields v. McAuley (C. C.) 37 Fed. 302; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; De Laurencel v. De Boom, 48 Cal. 581; People v. Schaefer, 266 Ill. 334, 107 N. E. 617 (discussed by Prof. Costigan in 10 Ill. Law Rev. 139); Rice Stix Dry Goods Co. v. W. S. Albrecht & Co., 273 Ill. 447, 113 N. E. 66; Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; Orth v. Orth, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185; Meador v. Manlove, 97 Kan. 706, 156 Pac. 731; Taylor v. Fox's Ex'rs, 162 Ky. 804, 173 S. W. 154; Baylies v. Payson, 5 Allen (Mass.) 473; Hooker v. Axford, 33 Mich. 453; Barrett v. Thielen, 140 Minn. 266, 167 N. W. 1030; Benbrook v. Yancy, 96 Miss. 536, 51 South. 461; Crinkley v. Rogers, 100 Neb. 647, 160 N. W. 974; Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267; Williams v. Vreeland, 29 N. J. Eq. 417; Casey v. Casey, 161 App. Div. 427, 146 N. Y. Supp. 348; Jimmerson v. Ferguson, 57 Misc. Rep. 504, 109 N. Y. Supp. 845; Miller v. Hill, 64 Misc. Rep. 199, 118 N. Y. Supp. 63; Arntson v. First Nat. Bank, 39 N. D. 408, 167 N. W. 760, L. R. A. 1918F, 1038; Winder v. Scholey, 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, 21 Ann. Cas. 1379; Church v. Ruland, 64 Pa. 432; Jones v. McKee, 3 Pa. 496, 45 Am. Dec. 661; Appeal of Socher, 104 Pa. 609; Towles v. Burton, Rich. Eq. Cas. (S. C.) 146, 24 Am. Dec. 409; McLellan v. McLean, 39 Tenn. (2 Head.) 684; Bennett v. Harper, 36 W. Va. 546, 15 S. E. 143. Contra: Chapman v. Whitsett, 236 Fed. 873, 150 C. C. A. 135; Brown v. Kausche, 98 Wash. 470, 167 Pac. 1075.

[71] Whitehouse v. Bolster, 95 Me. 458, 50 Atl. 240; Mead v. Robertson, 131 Mo. App. 185, 110 S. W. 1095; Tyler v. Stitt, 132 Wis. 656, 112 N. W. 1091, 12 L. R. A. (N. S.) 1087, 122 Am. St. Rep. 1012. And, of course, a mere statement by the legatee to the claimant that he would share the legacy, not referring to any promise to the testator, has no effect to create a constructive trust. Hollis v. Hollis, 254 Pa. 90, 98 Atl. 789.

may appear by silent acquiescence.[72] "While a promise is essential, it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If the legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of the legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator." [73]

Where the purpose communicated to the donee during the lifetime of the donor is an illegal purpose, and therefore one which cannot be enforced by the courts, the donee will not be held under a constructive trust for the intended beneficiaries of the illegal trust, but will be held under a resulting trust for the next of kin or heirs of the donor. Thus, where the purpose of the donor was a charitable purpose, and the gift was made in a state where charitable gifts were invalid, the donee under a promise to hold for charitable uses will be compelled by equity to hold for the benefit of the next of kin or heirs of the donor, depending upon whether the property was real or personal.[74]

Trusts under this heading may be divided into three classes: First, there are those cases in which a testator has been induced to make a devise or legacy upon a promise by devisee or legatee to hold the property for another.[75] Secondly, the testator may be induced by the promise to abstain from revoking a gift by will.[76]

[72] Russell v. Jackson, 10 Hare (Eng.) 198; Barron v. Stuart, 136 Ark. 481, 207 S. W. 22; Mead v. Robertson, 131 Mo. App. 185, 110 S. W. 1095; In re O'Hara's Will, 95 N. Y. 403, 47 Am. Rep. 53; Edson v. Bartow, 154 N. Y. 199, 48 N. E. 541; Stirk's Estate, 232 Pa. 98, 81 Atl. 187.

[73] Trustees of Amherst College v. Ritch, 151 N. Y. 282, 324, 45 N. E. 876, 37 L. R. A. 305.

[74] In re O'Hara's Will, 95 N. Y. 403, 47 Am. Rep. 53. See, also, cases cited under ante, § 32.

[75] In re Fleetwood, L. R. 15 Ch. Div. 594; Buckingham v. Clark, 61 Conn. 204, 23 Atl. 1085; Chapman's Ex'r v. Chapman, 152 Ky. 344, 153 S. W. 434; Gilpatrick v. Glidden, 81 Me. 137, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245; Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Ham v. Twombly, 181 Mass. 170, 63 N. E. 336; Hooker v. Axford, 33 Mich. 453; Benbrook v. Yancy, 96 Miss. 536, 51 South. 461; Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267; Williams v. Vreeland, 29 N. J. Eq. 417; Edson v. Bartow, 154 N. Y. 199, 48 N. E. 541; Winder v. Scholey, 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, 21 Ann. Cas. 1379; Jones v. McKee, 3 Pa. 496, 45 Am. Dec. 661; Rutledge's Adm'r v. Smith's Ex'rs, 1 McCord Eq. (S. C.) 119; McLellan v. McLean, 2 Head (Tenn.) 684; Bennett v. Harper, 36 W. Va. 546, 15 S. E. 143.

[76] Norris v. Frazer, L. R. 15 Eq. Cases 318; De Laurencel v. De Boom,

And in the third place the promise may have been made for the purpose of securing intestacy; the promisor agreeing that, if the owner would allow the property to pass to him by the laws of inheritance, he would apply the property to the benefit of another.[77] By the great weight of authority in each of these three instances the breach of the promise of the person receiving the property will cause equity to create a constructive trust in favor of the intended beneficiary of the property.

Where one receiving no property under a will promises the testator that he will transfer certain property to one of the testator's children, if the testator does not remember such child in his will, a failure to perform the promise does not cause the creation of a constructive trust in favor of the person intended to be benefited by this promise.[78]

(e) Direction of Testator or Ancestor Communicated to One or More of Several Donees, but Not to All

A difficult question arises where the property passes by will or inheritance to several persons, and one or more, but not all, of these donees have agreed to hold the property for others. Shall the promise of part of the donees bind all, or only the actual promisors?

The English courts have held that one tenant in common will not be bound by a promise made by a cotenant, while a joint tenant will be bound by a promise made by another for the purpose of inducing the gift, but not by a promise which merely prevented the revocation of the gift.[79]

In America, in some cases where the cotenant made a promise for himself, which did not purport to bind all the donees, it has been held that only the actual promisor was bound.[80] But in other

48 Cal. 581; Dowd v. Tucker, 41 Conn. 197; Gaither v. Gaither, 3 Md. Ch. 158; Ragsdale v. Ragsdale, 68 Miss. 92, 8 South. 315, 11 L. R. A. 316, 24 Am St. Rep. 256; Belknap v. Tillotson, 82 N. J. Eq. 271, 88 Atl. 841; Heinisch v. Pennington, 73 N. J. Eq. 456, 68 Atl. 233; Rutherfurd v. Carpenter, 134 App. Div. 881, 119 N. Y. Supp. 790; Richardson v. Adams, 10 Yerg. (Tenn.) 273; Brook v. Chappell, 34 Wis. 405.

[77] McDowell v. McDowell, 141 Iowa, 286, 119 N. W. 702, 31 L. R. A. (N. S.) 176, 133 Am. St. Rep. 170; Gemmel v. Fletcher, 76 Kan. 577, 92 Pac. 713, 93 Pac. 339; Browne v. Browne, 1 Har. & J. (Md.) 430; Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165; Tyler v. Stitt, 132 Wis. 656, 112 N. W. 1091, 12 L. R. A. (N. S.) 1087, 122 Am. St. Rep. 1012. In the case of Cassels v. Finn, 122 Ga. 33, 49 S. E. 749, 68 L. R. A. 80, 106 Am. St. Rep. 91, 2 Ann. Cas. 554, it was held that in this situation no constructive trust would be enforced against the promisor.

[78] Robinson v. Denson, 3 Head (Tenn.) 395.

[79] See In re Stead [1900] 1 Ch. 237, and authorities there collected.

[80] Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892; Heinisch v. Penning-

cases, where the cotenant purported to make a promise for all, so that the entire title could be said to be tainted with fraud, it has been held that all the cotenants must hold under a constructive trust.[81]

FRAUD CONCLUSIVELY PRESUMED—BENEFIT OBTAINED BY FIDUCIARY WHILE ACTING FOR PRINCIPAL

41. If one acting in a fiduciary capacity, as, for example, as trustee, executor, administrator, guardian, attorney, agent, director, or promoter, obtain any secret profit for himself, the transaction is conclusively presumed to be fraudulent, and his principal may, at his option, regardless of the good faith of the fiduciary, have the fiduciary declared by equity to be a constructive trustee of the benefit so obtained.

Where one is acting in a representative and fiduciary capacity, equity demands that he seek only the profit and advantage of his principal. The fiduciary is not allowed to have conflicting interests. He must not be seeking his own financial advancement, as well as that of his principal. The word "fiduciary" is here used in a broad, general sense, to include strict trustees, executors, administrators, guardians, committees of lunatics and feeble-minded persons, partners, co-tenants, agents, attorneys, directors, and promoters of corporations, and many others in similar relations. The word "principal" is here used to designate the persons who are represented in the relationships above suggested, namely, the cestuis que trust, legatees, next of kin, wards, and others.

It is a broad principle of equity, having a highly varied application, that the fiduciary will hold any private profit which he obtains, while acting in his representative capacity, under a constructive trust for the principal, if the principal so elect. The principal may allow the fiduciary to retain the profit he has made—may ratify the transaction. But, if the principal desires, he may by a bill in equity have the fiduciary declared a constructive trustee of the profit which the fiduciary has obtained.

This rule applies, regardless of the actual good faith of the fidu-

ton, 73 N. J. Eq. 456, 68 Atl. 233; Fairchild v. Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609.

[81] Hooker v. Axford, 33 Mich. 453; Amherst College, Trustees of, v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Winder v. Scholey, 83 Ohio St. 204, 93 N. E. 1098, 33 L. R. A. (N. S.) 995, 21 Ann. Cas. 1379.

ciary. He may have intended no fraud. He may have paid value for what he has received and done no actual harm to the principal. Equity will nevertheless declare the fiduciary a constructive trustee of the property he has obtained. The transaction is conclusively presumed to be fraudulent. To discourage such dangerous dealings equity declares them all, regardless of the peculiar circumstances of individual cases, fraudulent at the election of the principal.

Thus, if the fiduciary buy the trust property at a sale thereof, he may, at the option of the principal be held a constructive trustee of it for the principal, regardless of the price paid or the loss or gain to the principal.[82] It is immaterial whether the fiduciary buys the trust property directly or indirectly. The constructive trust will be created, at the option of the principal.[83] Of course, if the principal consents to the purchase of the property by the fiduciary, either in advance [84] or after the sale,[85] by way of ratification, the sale will be valid, and no trust will arise from it. And if the principal sees fit to set aside the sale and have the fiduciary

[82] *Attorney and Client:* Stockton v. Ford, 52 U. S. (11 How.) 232, 13 L. Ed. 676; Holmes v. Holmes, 106 Ga. 858, 33 S. E. 216; Harper v. Perry, 28 Iowa, 57; Rolikatis v. Lovett, 213 Mass. 545, 100 N. E. 748; Johnson v. Outlaw, 56 Miss. 541; Aultman, Miller & Co. v. Loring, 76 Mo. App. 66; Levara v. McNeny, 73 Neb. 414, 102 N. W. 1042; Case v. Carroll, 35 N. Y. 385; Miles v. Ervin, 1 McCord Eq. (S. C.) 524, 16 Am. Dec. 610; Wheeler v. Willard, 44 Vt. 640; Newcomb v. Brooks, 16 W. Va. 32; O'Dell v. Rogers, 44 Wis. 136.

Agent: Peabody v. Burri, 255 Ill. 592, 99 N. E. 690; Witte v. Storm, 236 Mo. 470, 139 S. W. 384; Luscombe v. Grigsby, 11 S. D. 408, 78 N. W. 357; Frost v. Perfield, 44 Wash. 185, 87 Pac. 117.

Administrator: Powell v. Powell, 80 Ala. 11; Williford v. Williford, 102 Ark. 65, 143 S. W. 132; Carrier v. Heather, 62 Mich. 441, 29 N. W. 38.

Trustee: Eisert v. Bowen, 191 N. Y. 544, 85 N. E. 1109, affirming 117 App. Div. 488, 102 N. Y. Supp. 707; Barrett v. Bamber, 81 Pa. 247.

Executor: Merrick v. Waters, 171 N. Y. 655, 63 N. E. 1119, affirming 51 App. Div. 83, 64 N. Y. Supp. 542.

Cotenants: Carpenter v. Carpenter, 58 Hun, 608, 12 N. Y. Supp. 189.

Guardian: Sparhawk v. Allen, 21 N. H. 9.

Assignee for creditors: Ex parte Lacey, 6 Ves. 625; Broder v. Conklin, 121 Cal. 282, 53 Pac. 699.

Members of church society: Fort v. First Baptist Church of Paris (Tex. Civ. App.) 55 S. W. 402.

But see the following cases, apparently out of line with the weight of authority: Hess v. Voss, 52 Ill. 472; Grayson v. Weddle, 63 Mo. 523.

[83] Lovell v. Felkins, 181 Ala. 165, 61 South. 262; Turner v. Turner, 34 Okl. 284, 125 Pac. 730; Irwin v. Monongahela River Consol. Coal & Coke Co., 238 Pa. 558, 86 Atl. 491.

[84] Page v. Stubbs, 39 Iowa, 537.

[85] Ward v. Brown, 87 Mo. 468; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

declared a constructive trustee of the property bought, he must, of course, reimburse the fiduciary for money advanced from his own pocket as payment for the property bought.[86]

"The rule which disables one occupying a confidential or fiduciary relation, in respect to property the subject of a sale, from purchasing for his own benefit, and regarding him as a trustee if he do purchase, is absolute, and looks to no other facts than the relation and the purchaser. 'No fraud in fact need be shown by the cestui que trust, and no excuse will be heard from the trustee. The fact established, and the result inevitably follows.'" [87]

If officers of a corporation buy property on which the corporation had an option, they may be held by the corporation as constructive trustees of the property.[88] So, too, the rule is well established that, if a fiduciary buys an outstanding claim against the trust property, the principal may hold him as a constructive trustee of such title or claim.[89] And if the fiduciary use the trust property in his own business, and thereby make a profit, he may be held as a constructive trustee of such profit by the principal.[90] If the fiduciary make a profit on the sale of the trust property to a third person,[91] or purchase for himself property which he should have bought for the principal,[92] equity will declare the fiduciary, at the option of the principal, a constructive trustee of the property which he holds as a result of the reprehensible transaction.

A very common application of this principle with respect to constructive trusts is found in the cases where a promoter or agent has made a secret profit upon a sale of property to a corporation or other principal. In some instances the promoter or other agent

[86] Gaston v. King, 63 Miss. 326; Maynard's Case, 1 Walk. (Pa.) 472.

[87] King v. Remington, 36 Minn. 15, 25, 29 N. W. 352.

[88] Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496, 28 South. 199; Trenton Banking Co. v. McKelway, 8 N. J. Eq. 84.

[89] Downard v. Hadley, 116 Ind. 131, 18 N. E. 457; Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703.

[90] Kyle v. Barnett, 17 Ala. 306; Bond v. Lockwood, 33 Ill. 212; Chanslor v. Chanslor's Trustees, 11 Bush (Ky.) 663; Clarkson v. De Peyster, Hopk. Ch. (N. Y.) 424.

[91] Griggs v. Griggs, 66 Barb. 287.

[92] Turner v. Sawyer, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; Koyer v. Willmon, 150 Cal. 785, 90 Pac. 135; McPherrin v. Fair, 57 Colo. 333, 141 Pac. 472; Ainsworth v. Harding, 22 Idaho, 645, 128 Pac. 92; Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Byington v. Moore, 62 Iowa, 470, 17 N. W. 644; Nester v. Gross, 66 Minn. 371, 69 N. W. 39; Winn v. Dillon, 27 Miss. 494; Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; Maltz v. Westchester County Brewing Co. (N. Y. Sup.) 140 N. Y. Supp. 521; Sawyer v. Issenhuth, 31 S. D. 502, 141 N. W. 378; Henyan v. Trevino (Tex. Civ. App.) 137 S. W. 458.

himself sells to the principal, in other cases he obtains a consideration from a third party for arranging a sale to the principal. The promoter or other agent is universally held as a constructive trustee of the secret profit thus obtained; the principal, of course, being the beneficiary of such trust.[93] Thus the directors of a corporation, who act for their own benefit in the purchase of corporation property, may, at the election of the corporation or its stockholders, be held as constructive trustees of the profits which they have obtained;[94] and a partner or quasi partner, who conceals from his associates at the time of the purchase of a play by the partnership that he is entitled to one-fourth of the royalties from the play, is a constructive trustee of the royalties which he receives after the sale;[95] and a city officer, who, while advising a committee regarding building sites, buys land himself and sells it to the city through a third person, is a trustee for the city of the profits made—that is, the difference between the price paid by him for the land and the price paid by the city.[96]

These cases are all variations of the same principle, namely, that one who is acting in a representative capacity must act for his principal alone, and must not seek his own private gain. Whatever such a fiduciary obtains secretly, while acting for his principal, he must hold for the benefit of the principal.

REBUTTABLE PRESUMPTION OF FRAUD—DIRECT TRANSFER FROM PRINCIPAL TO FIDUCIARY

42. Wherever two persons are in a confidential relation, because of kinship, business connection, guardianship, or for any other reason, a transfer of property from the one bestowing confidence to the one trusted is viewed with suspicion by equity and a prima facie presumption of fraud is raised therefrom. Unless this presumption of fraud is rebutted by the grantee, equity will declare him a constructive trustee for the grantor.

[93] Davis v. Las Ovas Co., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426; Johnston v. Little, 141 Ala. 382, 37 South. 592; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Exter v. Sawyer, 146 Mo. 302, 47 S. W. 951; Arnold v. Searing, 78 N. J. Eq. 146, 78 Atl. 762; Colton Imp. Co. v. Richter, 26 Misc. Rep. 26, 55 N. Y. Supp. 486; Shawnee Commercial & Savings Bank Co. v. Miller, 24 Ohio Cir. Ct. R. 198.

[94] Billings v. Shaw, 209 N. Y. 265, 103 N. E. 142.

[95] Selwyn & Co. v. Waller, 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B, 160.

[96] City of Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812, 48 L. R. A. (N. S.) 842, Ann. Cas. 1914D, 804.

Dealings between persons on an unequal footing are viewed with suspicion by courts of equity. The opportunities for fraud are so great that equity places a burden on the stronger party to prove the fairness and good faith of the transaction. Where a person placed in a position of trust obtains a direct conveyance of property from the person trusting him, equity looks with suspicion on the transaction. The conveyance may be fair, made upon full information, and for a sufficient consideration. But, since the position of influence of the fiduciary makes fraud and undue influence easy, equity will presume fraud and place the burden on the grantee of showing the fairness of his conduct. If he can show that the grantor has acted upon full information as to his rights, has not been misled or deceived, and has received a consideration reasonably adequate, he (the grantee and fiduciary) will be allowed by equity to retain the property. But, if he cannot show these facts, he will be decreed by equity to hold the property under a constructive trust for the grantor and one trusting him.

Attorney and Client

A typical illustration of the cases here under discussion is that of a transfer from client to attorney during the existence of the relationship. It is said by the courts that this transaction will be closely scrutinized,[97] that the greatest good faith will be required on the part of the attorney,[98] and that the burden is on the attorney to prove the fairness of the transaction between himself and his client.[99] But an attorney is not incapacitated from becoming a grantee of his client. The grant from client to attorney is only presumptively fraudulent, and the presumption may be overcome by evidence of good faith. Proof by the attorney that he paid value, that the client acted with full knowledge of his rights and free from the influence of his attorney, will rebut the presumption of fraud and establish the sale as a valid transaction.[1] Of course, the presump-

[97] Dawson v. Copeland, 173 Ala. 267, 55 South. 600; Lewis v. Helm, 40 Colo. 17, 90 Pac. 97; Mills v. Mills, 26 Conn. 213; Gruby v. Smith, 13 Ill. App. 43; State v. Johnson, 149 Iowa, 462, 128 N. W. 837; Yeamans v. James, 27 Kan. 195; Palms' Adm'rs v. Howard, 129 Ky. 668, 112 S. W. 1110; Gray v. Emmons, 7 Mich. 533; Eysaman v. Nelson, 79 Misc. Rep. 304, 140 N. Y. Supp. 183.

[98] In re Danford, 157 Cal. 425, 108 Pac. 322; McCormick v. Malin, 5 Blackf. (Ind.) 509; Ryan v. Ashton, 42 Iowa, 365; Payne v. Avery, 21 Mich. 524; Hames v. Stroud, 51 Tex. Civ. App. 562, 112 S. W. 775; Young v. Murphy, 120 Wis. 49, 97 N. W. 496.

[99] Day v. Wright, 233 Ill. 218, 84 N. E. 226; Donaldson v. Eaton & Estes, 136 Iowa, 650, 114 N. W. 19, 14 L. R. A. (N. S.) 1168, 125 Am. St. Rep. 275; Manheim v. Woods, 213 Mass. 537, 100 N. E. 747; Phipps v. Willis, 53 Or. 190, 96 Pac. 866, 18 Ann. Cas. 119.

[1] Myers v. Luzerne County (C. C.) 124 Fed. 436; Cooley v. Miller, 156 Cal. 510, 105 Pac. 981; Appeal of St. Leger, 34 Conn. 434, 91 Am. Dec. 735;

tion of fraud arises only during the continuance of the relation of attorney and client.[2] Ratification by the client may prevent an attack on the sale on the ground of presumptive fraud.[3]

"Wherever a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against overweening confidence, will interpose to prevent a man from stripping himself of his property. * * * The relation requires the parties to abstain from all selfish projects. The general principle is, if a confidence is reposed and that confidence is abused, courts of equity will grant relief. In such cases it is not necessary to prove the actual exercise of overweening influence, misrepresentation, importunity, or fraud aliunde the act complained of. * * * The general rule is that he who bargains in a matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence, a rule applying equally to all persons standing in confidential relations to each other." [4]

Trustee and Cestui

The rule of presumptive fraud which applies to direct transfers from client to attorney also controls transfers from cestui que trust to trustee. "Defined principles of public policy are clearly opposed to the unrestricted right of a trustee to acquire the property of a cestui que trust. A sale by a trustee to himself of the trust property is uniformly held to be voidable at the option of the cestui que trust, even though the trustee may have given an adequate price and gained no advantage. * * * But where trust property has been acquired by a trustee through the medium of direct dealing with the cestui que trust, it is manifest that the right of the cestui que trust to avoid the contract should not be without limitation. While some courts have held such dealing to be contrary to public policy, and voidable at the instance of the cestui

Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Morrison v. Smith, 130 Ill. 304, 23 N. E. 241; Mitchell v. Colby, 95 Iowa, 202, 63 N. W. 769; Yeamans v. James, 27 Kan. 195; Merryman v. Euler, 59 Md. 588, 43 Am. Rep. 564; Crocheron v. Savage, 75 N. J. Eq. 589, 73 Atl. 33, 23 L. R. A. (N. S.) 679; Nesbit v. Lockman, 34 N. Y. 167; Helms v. Goodwill, 64 N. Y. 642; Tippett v. Brooks, 95 Tex. 335, 67 S. W. 495, 512; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192. But see West v. Raymond, 21 Ind. 305; Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422; Lane v. Black, 21 W. Va. 617; Keenan v. Scott, 64 W. Va. 137, 61 S. E. 806.

[2] Zeigler v. Hughes, 55 Ill. 288.

[3] Wills v. Wood, 28 Kan. 400; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444.

[4] Thiede v. Startzman, 113 Md. 278, 77 Atl. 666, 670, quoting Highberger v. Stiffler, 21 Md. 352, 83 Am. Dec. 593.

que trust, the better and prevailing view appears to be that such dealings are presumed to be invalid, but will be supported if the trustee can establish that the cestui que trust acted voluntarily and with entire freedom from any influence arising by reason of the trust relationship, and with intelligence and full knowledge of all the circumstances." [5] The trustee who has received the property of cestui que trust by means of a direct grant from the cestui is held to be a constructive trustee of the property, unless he can establish the fairness of the transaction.[6]

And so, too, a direct transfer from distributee to administrator, or legatee to executor, raises a prima facie presumption of fraud, and the grantee will be held a constructive trustee for the grantor, unless the grantee can establish that the transfer was fair and above board.[7]

Guardian and Ward

A transfer from ward to guardian will be closely scrutinized by equity,[8] and will not be sustained if the guardian obtains any advantage from the transfer.[9] By the weight of authority it is held that the transfer from ward to guardian is not void nor voidable under all circumstances by the ward, but is voidable by the ward unless the guardian proves that the transaction was a bona fide conveyance for value, freely made by the ward. The transaction is presumed to be fraudulent, and the burden is on the guardian to show its fairness.[10] The ward may affirm the sale from himself to

[5] Swift v. Craighead, 75 N. J. Eq. 102, 103, 75 Atl. 974.

[6] Malone v. Kelley, 54 Ala. 532; Metropolis Trust & Savings Bank v. Monnier, 169 Cal. 592, 147 Pac. 265; Bryan v. Duncan, 11 Ga. 67; Brown v. Cowell, 116 Mass. 461; Field v. Middlesex Banking Co., 77 Miss. 180, 26 South. 365; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

Section 2235 of the Civil Code of California provides as follows: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

[7] Williams v. Powell, 66 Ala. 20, 41 Am. Rep. 742; Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576; Richards v. Pitts, 124 Mo. 602, 28 S. W. 88; State ex rel. Jones v. Jones, 53 Mo. App. 207; Lovell v. Briggs, 2 N. H. 218; Leach v. Leach, 65 Wis. 284, 26 N. W. 754.

[8] Taylor v. Calvert, 138 Ind. 67, 37 N. E. 531; Hart v. Cannon, 133 N. C. 10, 45 S. E. 351.

[9] Fidelity Trust Co. v. Butler, 91 S. W. 676, 28 Ky. Law Rep. 1268; Williams v. Palmer, 2 Baxt. (61 Tenn.) 488.

[10] Willis v. Rice, 157 Ala. 252, 48 South. 397, 131 Am. St. Rep. 55; Waldstein v. Barnett, 112 Ark. 141, 165 S. W. 459; McParland v. Larkin, 155 Ill. 84, 39 N. E. 609; Meek v. Perry, 36 Miss. 190; Brandau v. Greer, 95 Miss. 100, 48 South. 519, 21 Ann. Cas. 1118; Goodrick v. Harrison, 130 Mo. 263, 32

the guardian, although it was originally voidable.[11] But in some cases it has been held that a guardian cannot buy from his ward, and that a conveyance from ward to guardian is unenforceable.[12]

The question as to what constitutes a relation of trust and confidence sufficient to give rise to a presumption of fraud has arisen in a variety of ways. A transfer from cotenant to cotenant,[13] from son-in-law to father-in-law,[14] from stepdaughter to stepfather,[15] from minor niece to aunt,[16] from uncle to nephew,[17] and from parishioner to priest[18] has been held to give rise to a presumption of fraud upon which a constructive trust could be founded. On the other hand, in some cases transfers from uncle to nephew,[19] grandfather to grandson,[20] cousin to cousin,[21] and brother to sister[22] have been held not to give rise to any presumption of fraud on the ground of confidential relationship. A transfer from principal to agent has been held to be presumptively fraudulent.[23]

The doctrine applied in these cases is well stated in a New York case:[24] "Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood."

S. W. 661; Mann v. McDonald, 10 Humph. (Tenn.) 275; Baylor v. Fulkerson's Ex'rs, 96 Va. 265, 31 S. E. 63.

[11] Appeal of Schur (Pa.) 2 Atl. 336.

[12] Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490; Dohms v. Mann, 76 Iowa, 723, 39 N. W. 823; Williams v. Davison's Estate, 133 Mich. 344, 94 N. W. 1048.

[13] Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268.

[14] Bowler v. Curler, 21 Nev. 158, 26 Pac. 226, 37 Am. St. Rep. 501.

[15] Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

[16] Butler v. Hyland, 89 Cal. 575, 26 Pac. 1108.

[17] Ward v. Conklin, 232 Ill. 553, 83 N. E. 1058.

[18] Henderson v. Murray, 108 Minn. 76, 121 N. W. 214, 133 Am. St. Rep. 412.

[19] Doheny v. Lacy, 168 N. Y. 213, 61 N. E. 255.

[20] Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428.

[21] Schneider v. Schneider, 125 Iowa, 1, 98 N. W. 159.

[22] Reeves v. Howard, 118 Iowa, 121, 91 N. W. 896.

[23] Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Vorse v. Vorse (Iowa) 171 N. W. 186; Hunter v. Hunter, 50 Mo. 445.

[24] Cowee v. Cornell, 75 N. Y. 91, 99, 100, 31 Am. Rep. 428.

Doubtless the exact relationship of the parties is not so important as their relative ages, their mental and physical condition, and their respective abilities and characters.

In the case of transfers from wife to husband, there is a presumption of fraud, which, unless rebutted, will give rise to a constructive trust in favor of the wife.[25] "A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a relation to the wife, and the equitable principles referred to would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in ordinary business transactions, which the wife may legally engage in. When this relation exists the person obtaining the benefit must show, by the clearest evidence, that the gift was freely and deliberately made. The burden is upon the person taking the gift to show that the transaction was fair and proper."[26]

"It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support of her family, or in charge of an elegant mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants. * * * Surely, if anywhere, the rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence, and that the arrangement is fair and conscientious, should be applied in a case where the wife conveyed her property to her husband."[27]

But the wife is not presumed to occupy a position of influence with her husband. A transfer from the husband to wife is not presumed, because of the mere relationship, to have been obtained by fraud.[28]

[25] Wood v. Wood, 116 Ark. 142, 172 S. W. 860; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Heinrich v. Heinrich, 2 Cal. App. 479, 84 Pac. 326. But see Clester v. Clester, 90 Kan. 638, 135 Pac. 996, L. R. A. 1915E, 648. The decision in Laird v. Vila, 93 Minn. 45, 100 N. W. 656, 106 Am. St. Rep. 420, was affected by statute.

[26] Boyd v. De La Montagnie, 73 N. Y. 498, 502, 29 Am. Rep. 197.

[27] Darlington's Appeal, 86 Pa. 512, 519, 520, 27 Am. Rep. 726. This statement of the husband's dominating position seems an exaggeration as applied to present-day family, business, and political conditions.

[28] McDougall v. McDougall, 135 Cal. 316, 67 Pac. 778; Ford v. Ford, 193 Pa. 530, 44 Atl. 561.

It has been held in a number of cases that no presumption of fraud arises from the transfer of property from parent to child,[29] or from child to parent,[30] where there is no basis for fraud except the bare relationship. But, on the other hand, where other circumstances beside the mere relationship, are found the courts have held that a constructive trust would be created upon a conveyance from parent to child[31] or from child to parent.[32] Frequently in these cases the conveyance was of real property, and there was a voidable oral promise by the grantee to hold the property in trust for the grantor. The confidential relation was seized upon as a ground for avoiding the Statute of Frauds.

MISCELLANEOUS IMPLIED TRUSTS

43. Implied trusts are used by equity as a means of working out justice in a number of miscellaneous instances, as, for example:

(a) In favor of a contract vendee of land who has paid the price, where the legal title remains in the vendor;

(b) In favor of the assignee of notes for the purchase money, where the assignor of the notes (the vendor of the land) still holds the legal title.

It is difficult to classify all the implied trusts which equity creates. Some can hardly be said to be based on presumed intent, and therefore resulting, or based on fraud, actual or implied, and therefore constructive. The implied trust is used by equity with great freedom as a means of working out justice in cases where a trust is a convenient medium. Thus, where a contract for the sale of real property has been made and the price has been paid, but the legal title still remains in the vendor, equity regards the vendor as a trustee of the land for the vendee.[33] And also, where a contract is made

[29] Tenbrook v. Brown, 17 Ind. 410; Carpenter v. Soule, 88 N. Y. 251, 42 Am. Rep. 248.

[30] Bonham v. Doyle, 39 Ind. App. 438, 77 N. E. 859, 79 N. E. 458; Gregory v. Bowlsby, 115 Iowa, 327, 88 N. W. 822; Apgar v. Connell, 160 App. Div. 743, 145 N. Y. Supp. 1079.

[31] Goldsmith v. Goldsmith, 145 N. Y. 313, 39 N. E. 1067.

[32] Markley v. Camden Safe Deposit & Trust Co., 74 N. J. Eq. 279, 69 Atl. 1100; Wood v. Rabe, 96 N. Y. 414, 48 Am. Rep. 640.

[33] Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 C. C. A. 380; Wimbish v. Montgomery Mut. Building & Loan Ass'n, 69 Ala. 575; Scadden Flat Gold-Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Conner v. Lewis, 16 Me. 268; Bowie v. Berry, 3 Md. Ch. 359; Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836; Lovejoy v. Potter, 60 Mich. 95, 26 N. W. 844; Taylor v. Lowenstein,

for the sale of real property, the buyer gives a note for the price, and the seller assigns this note, the seller is regarded as holding the legal title to the real property in trust for the assignee of the purchase money note.[84]

50 Miss. 278; Fonda v. Sage, 46 Barb. 109; Cole v. Tyson, 43 N. C. 170; Russell v. Stinson, 3 Hayw. (Tenn.) 1; Bartz v. Paff, 95 Wis. 95, 69 N. W. 297, 37 L. R. A. 848.

[84] Conner v. Banks, 18 Ala. 42, 52 Am. Dec. 209; Kelly v. Payne, 18 Ala. 371; Guy v. Butler, 6 Bush (Ky.) 508; Tanner v. Hicks, 4 Smedes & M. (Miss.) 294; Lindsey v. Bates, 42 Miss. 397, 400 (semble).

CHAPTER VI

THE TRUST PURPOSE—PRIVATE TRUSTS

TRUSTS CLASSIFIED AS TO PURPOSE

44. Trusts are classified as to purpose as—

(a) Private or public; and

(b) Active or passive.

A private trust is a trust for the benefit of a known, defined individual or individuals.

A charitable or public trust is a trust in which unascertained, indefinite persons, to be selected by the trustee from the whole world or from a certain class, are the beneficiaries.

An active trust is a trust in which the trustee has affirmative duties of management and administration to perform.

A passive trust is one in which the trustee is a mere receptacle of the legal title and has no affirmative duties toward the cestui que trust.

With respect to the purposes for which trusts may be created there are two large classes. A trust may be private in its purpose; that is, have as its objects or beneficiaries certain known identified persons. A trust created by a father for the benefit of his son is of this variety. Or a trust may have as its purpose the assistance or benefit of the public or a large class thereof. This second sort of trust is called a public or charitable trust. If A. bequeathed money to X., as trustee, to invest and apply the income in aid of worthy retired clergymen, the trust is public or charitable. The cestuis are indefinite and unascertained persons, to be selected by the trustees from the entire class of clergymen.

"The requisites of a valid private trust and one for a charitable use are materially different. In the former, there must not only

be a certain trustee who holds the legal title, but a certain specified cestui que trust, clearly identified or made capable of identification by the terms of the instrument creating the trust, while it is an essential feature of the latter that the beneficiaries are uncertain—a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi public character. Indeed, it is said a public charity begins where uncertainty in the recipient begins."[1]

The purposes for which private trusts are and may be created will first be considered. In a separate chapter the purposes properly called charitable and the characteristics of such trusts will be set forth.

All trusts are also distinguished with respect to the active or passive nature of their purpose. "Where the trustee is not merely the recipient of the title for the use of the beneficiary, where he has a duty to perform in relation to the property which calls for the exercise of judgment or discretion, it is an active trust, and is not affected by the Statute of Uses."[2]

A passive trust is purely formal. "The prime requisite of a passive trust is that the trustee is made in form a mere holder of the legal title, the right to the possession and the profits being in another. If there are any active duties for the testator [sic] to perform with respect to administering the property, and the primary use be expressly or impliedly, by reason of such active duty, vested in the trustee, the trust is necessarily active and not affected by the statute which would otherwise execute the use and thus vest the legal title in the equitable owner."[3]

Since passive trusts are comparatively unimportant and have no permanent existence, they will be considered first. Later active trusts, which constitute by far the larger and more important part of private trusts, will be discussed.

PASSIVE TRUSTS

45. The English Statute of Uses attempted to abolish uses, which were practically equivalent to passive trusts, by providing that, wherever uses were created, the statute would execute the use and transfer from the feoffee to uses to the cestui que use the legal estate.

[1] Pennoyer v. Wadhams, 20 Or. 274, 278, 25 Pac. 720, 11 L. R. A. 210.
[2] Webb v. Hayden, 166 Mo. 39, 48, 65 S. W. 760.
[3] Holmes v. Walter, 118 Wis. 409, 416, 417, 95 N. W. 380, 62 L. R. A. 986. And see Randolph v. Read, 129 Ark. 485, 196 S. W. 133.

In many American states the Statute of Uses is considered a part of the common law. In others statutes abolishing passive trusts and transferring the legal title to the cestui que trust have been adopted. On one ground or another it is universally held that the creation of a passive trust results in the conveyance of the legal title directly to the beneficiary. The trustee takes nothing.

Passive trusts are also sometimes called simple,[4] dry,[5] naked,[6] formal,[7] or executed[8] trusts.

A passive trust has already been defined as one in which the trustee is the bare receptacle of the legal title and has no affirmative duties to perform. Thus, where a testatrix bequeathed $500 to A., to be kept in trust for A. by her daughter, the bequest amounts to a passive trust, and A. will be entitled to the payment of the legacy free from any trust.[9] And where land is patented to one in trust, without setting out the nature of the trust,[10] or where the purpose of the original trust is accomplished,[11] or the only duty of the trustee is to convey to the beneficiary,[12] or where the trust is an implied trust, that is, either constructive or resulting,[13] the trust will be treated as a passive trust by equity.

The reasons for the enactment and the effect of the Statute of Uses have been previously explained.[14] It provided, in substance,

[4] Atkins v. Atkins, 70 Vt. 565, 41 Atl. 503.

[5] Commonwealth v. Louisville Public Library, 151 Ky. 420, 152 S. W. 262.

[6] Wilkinson v. May, 69 Ala. 33.

[7] Dyett v. Central Trust Co., 64 Hun, 635, 19 N. Y. Supp. 19.

[8] Woodward v. Stubbs, 102 Ga. 187, 29 S. E. 119; Park's Ann. Civ. Code Ga. 1914, § 3736; Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819; Ranzau v. Davis, 85 Or. 26, 165 Pac. 1180; Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399; Porter v. Doby, 2 Rich. Eq. (S. C.) 49. Unfortunately "executed trust" is also used by some courts to mean a trust completely created. Lynn v. Lynn, 135 Ill. 18, 25 N. E. 634; Gaylord v. City of Lafayette, 115 Ind. 423, 17 N. E. 899; Miles v. Miles, 78 Kan. 382, 96 Pac. 481; Watson v. Payne, 143 Mo. App. 721, 128 S. W. 238; Morris v. Linton, 74 Neb. 411, 104 N. W. 927; Skeen v. Marriott, 22 Utah, 73, 61 Pac. 296. The confusion of terminology is increased by an occasional use of the phrase as meaning a trust fully outlined and planned by the settlor as distinguished from one where the details of administration are left to the trustee. Saunders v. Edwards, 55 N. C. (2 Jones, Eq.) 134.

[9] Guild v. Allen, 28 R. I. 430, 67 Atl. 855.

[10] Brown v. Harris, 7 Tex. Civ. App. 664, 27 S. W. 45.

[11] Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078.

[12] Adams v. Guerard, 29 Ga. 651, 76 Am. Dec. 624. Contra: Sprague v. Sprague, 13 R. I. 701.

[13] Shelton v. Harrison, 182 Mo. App. 404, 167 S. W. 634.

[14] See section 4, ante.

that whenever any person should be seised of real property to the use of another by reason of any conveyance or will, the person to whom the use was given should thereafter have the legal title and the feoffee to uses should take no interest.[15] The use of that day was practically equivalent to the modern passive trust. The feoffee to uses was a mere holder of the legal title. The Statute of Uses abolished uses and rendered impossible thereafter passive trusts.

The Statute of Uses is regarded as a part of the common law of a majority of the American states. "The Statute of Uses being in force in England when our ancestors came here, they brought it with them as an existing modification of the common law, and it has always been considered a part of our law." [16]

In several states statutes directly abolishing passive trusts, and declaring that attempts to create them shall result in passing the legal title directly to the beneficiary, have been adopted.[17]

On one ground or another, either because of the operation of the Statute of Uses, or because of a local statute having an effect similar to that of the Statute of Uses, or because of a rule of equity, an attempt to create a passive trust is generally held to result in the passage of the legal estate to the cestui que trust.[18]

[15] St. 27 Henry VIII, c. 10 (1535). See Digby's History of the Law of Real Property (5th Ed.) p. 347.

[16] Marshall v. Fisk, 6 Mass. 24, 31, 4 Am. Dec. 76. And see Alford v. Bennett, 279 Ill. 375, 117 N. E. 89; Newcomb v. Masters, 287 Ill. 26, 122 N. E. 85. In some states, although the Statute of Uses has never been in force, the result accomplished by that statute is achieved by direct action of a court of equity, decreeing that the legal title is in the beneficiary of the passive trust. Farmers' & Merchants' Ins. Co. v. Jensen, 56 Neb. 284, 76 N. W. 577, 44 L. R. A. 861; Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; Helfenstine's Lessee v. Garrard, 7 Ohio, 276, pt. 1; Gorham v. Daniels, 23 Vt. 600.

[17] Code Ala. 1907, § 3408; How. Ann. St. Mich. 1912, § 10671; Gen. St. Minn. 1913, § 6703; 2 Comp. St. N. J. 1910, p. 1536, § 7; New York Real Property Law (Consol. Laws, c. 50) § 93. The New York statute is typical and reads as follows: "Every disposition of real property, whether by deed or devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding sections of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter." See Kidd v. Cruse, 200 Ala. 293, 76 South. 59; Berry v. Wooddy, 16 Ala. App. 348, 77 South. 942; Cutler v. Winberry (Sup.) 160 N. Y. Supp. 712.

[18] Speed v. St. Louis M. B. T. R. Co., 86 Fed. 235, 30 C. C. A. 1; Huntington v. Spear, 131 Ala. 414, 30 South. 787; Ringrose v. Gleadall, 17 Cal. App.

The Statute of Uses by its express wording is confined to real property, and it has been construed to have no application to personal property.[19] But the rule of the statute has often been applied to personal property, on the theory that the reason of the rule was equally applicable.[20]

The Statute of Uses has no application to resulting and constructive trusts.[21] In a few states it is held not to apply to uses created by devise.[22] It has no application to trusts to preserve contingent remainders.[23] The authorities are in conflict as to whether it operates in the case of a passive trust for the benefit of a married woman, created for the purpose of preserving her separate estate.[24] Charitable trusts, being active, are not subject to

664, 121 Pac. 407; Teller v. Hill, 18 Colo. App. 509, 72 Pac. 811; Slater v. Rudderforth, 25 App. D. C. 497; Smith v. McWhorter, 123 Ga. 287, 51 S. E. 474, 107 Am. St. Rep. 85; Smith v. Smith, 254 Ill. 488, 98 N. E. 950; Allen v. Craft, 109 Ind. 476, 9 N. E. 919, 58 Am. Rep. 425; Commonwealth v. Louisville Public Library, 151 Ky. 420, 152 S. W. 262; Hamlin v. Mansfield, 88 Me. 131, 33 Atl. 788; Brown v. Reeder, 108 Md. 653, 71 Atl. 417; Simonds v. Simonds, 199 Mass 552, 85 N. E. 860, 19 L. R. A. (N. S.) 686; Everts v. Everts, 80 Mich. 222, 45 N. W. 88; Thompson v. Conant, 52 Minn. 208, 53 N. W. 1145; Van Vacter v. McWillie, 31 Miss. 563; Jones v. Jones, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424; Fellows v. Ripley, 69 N. H. 410, 45 Atl. 138; Melick v. Pidcock, 44 N. J. Eq. 525, 15 Atl. 3, 6 Am. St. Rep. 901; Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676; Hallyburton v. Slagle, 130 N. C. 482, 41 S. E. 877; Troy & North Carolina Gold Min. Co. v. Snow Lumber Co., 170 N. C. 273, 87 S. E. 40; Springs v. Hopkins, 171 N. C. 486, 88 S. E. 774; Lee v. Oates, 171 N. C. 717, 88 S. E. 889, Ann. Cas. 1917A, 514; Smith v. Security Loan & Trust Co., 8 N. D. 451, 79 N. W. 981; Fogarty v. Hunter, 83 Or. 183, 162 Pac. 964; In re West's Estate, 214 Pa. 35, 63 Atl. 407; Darling v. Witherbee, 36 R. I. 459, 90 Atl. 751; Breeden v. Moore, 82 S. C. 534, 64 S. E. 604; Brown v. Hall, 32 S. D. 225, 142 N. W. 854; Turley v. Massengill, 7 Lea (Tenn.) 353; Henderson v. Adams, 15 Utah, 30, 48 Pac. 398; Sims v. Sims, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772; Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147; Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986.

[19] Smith v. Smith, 254 Ill. 488, 98 N. E. 950; In re Hagerstown Trust Co., 119 Md. 224, 86 Atl. 982; Slevin v. Brown, 32 Mo. 176; Harley v. Platts, 6 Rich. (S. C.) 310.

[20] Bowman v. Long, 26 Ga. 142; Prince de Bearn v. Winans, 111 Md. 434, 74 Atl. 626; In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. Supp. 159.

[21] Trask v. Green, 9 Mich. 358; Strimpfler v. Roberts, 18 Pa. 283, 57 Am. Dec. 606.

[22] Bass v. Scott, 2 Leigh (Va.) 356; Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

[23] Vanderheyden v. Crandall, 2 Denio (N. Y.) 9; Kay v. Scates, 37 Pa. 31, 78 Am. Dec. 399.

[24] That the statute applies to trusts for married women, see Marvel v. Wilmington Trust Co., 10 Del. Ch. 163, 87 Atl. 1014; Wilder v. Ireland, 53 N. C. (8 Jones Law) 85; Milton v. Pace, 85 S. C. 373, 67 S. E. 458. That

the Statute of Uses;[25] but a grant to trustees for a charitable corporation, if passive, will be executed by the statute.[26]

ACTIVE TRUSTS—VALIDITY OF PURPOSE

46. Except in states which have statutory systems, private trusts in real and personal property may be created for any purpose which does not violate law or public policy.

If the purpose of a trust is wholly illegal, the trust will not be enforced by equity. If the trust is partially for a valid purpose and partially for an illegal purpose, that portion of the trust having a valid purpose will be enforced, if it is independent of the invalid portion, so that the two can be separated without frustrating entirely the testator's intention.

The validity of the purpose of a trust of real property is determined by the situs of the real property which is the subject of the trust. Personal property trusts are controlled as to validity of purpose when created by will by the law of the domicile of the testator; when created by instrument inter vivos, by the law of the place where the instrument is executed.

Active trusts have previously been described as trusts in which the trustee has affirmative duties of administration to perform. Examples of such trusts are trusts to collect rents and pay them over to the beneficiary for life,[27] trusts to sell property and pay the debts of the settlor with the proceeds thereof,[28] and trusts for the conduct of business, in which the trustees occupy a position analogous to that of directors and the cestuis que trust correspond to stockholders.[29]

the statute has no application to such trusts, see Glasgow v. Missouri Car & Foundry Co., 229 Mo. 585, 129 S. W. 900; Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. Rep. 791.

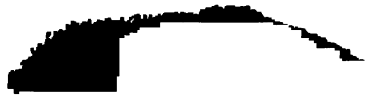
[25] Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385; In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

[26] Schenectady Dutch Church v. Veeder, 4 Wend. (N. Y.) 494; Voorhees v. Presbyterian Church of Village of Amsterdam, 8 Barb. (N. Y.) 135; Van Deuzen v. Trustees of Presbyterian Congregation, 4 Abb. Dec. (N. Y.) 465.

[27] McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

[28] McHardy v. McHardy's Ex'r, 7 Fla. 301.

[29] For an illustration of this use of the trust as a substitute for a corporation, see Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909. For a statutory authorization of such trust, see Laws Okl. 1919, c. 16, which reads in part as follows: "Express trusts may be created in real or personal property



An active, private trust may be created, except in a few jurisdictions which have established statutory systems of trusts, for any purpose which does not contravene some statute of the state[30] or its public policy.[31] It is obvious that a trust designed to encourage treason, or to aid in the commission of murder, would not be enforced by the courts. Nor would a trust in restraint of marriage. In the Southern states, prior to emancipation, trusts for the freeing of slaves were invalid.[32] But, aside from such restrictions regarding crime and public policy which surround all transactions, the purposes for which trusts of real and personal property may be created in England and the majority of American states are limited only by the imagination of the creators of such trusts.

The validity of the purpose of a trust is not affected by the reservation of a power of revocation in the settlor;[33] nor by the reservation of an interest in the property in favor of the settlor;[34] nor by a provision that the cestui's right to enjoy the trust property is postponed to a future date.[35] Naturally the purpose for which the trust is founded must be certain. An indefinite trust instrument can no more be enforced than an indefinite contract.[36] But the trust instrument need not provide for every possible contingency.[37]

or both with power in the trustee, or a majority of the trustees, if there be more than one, to receive title to, hold, buy, sell, exchange, transfer and convey real and personal property for the use of such trust; to take, receive, invest or disburse the receipts, earnings, rents, profits or returns from the trust estate; to carry on and conduct any lawful business designated in the instrument of trust, and generally to do any lawful act in relation to such trust property which any individual owning the same absolutely might do." For a comparison of express trusts and corporations as business organizations, see Wilgus, 13 Mich. Law Rev. 71, 205.

[30] A trust designed to carry out a void act of a Legislature has an invalid purpose. Disston v. Board of Trustees of Internal Improvement Fund, 75 Fla. 653, 79 South. 295.

[31] A trust having the object of suppressing a criminal prosecution is void. Bettinger v. Bridenbecker, 63 Barb. (N. Y.) 395.

[32] Lemmond v. Peoples, 41 N. C. (6 Ired. Eq.) 137.

[33] Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535, Ann. Cas. 1912C, 1221.

[34] In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617.

[35] Noble v. Learned, 153 Cal. 245, 94 Pac. 1047; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914.

[36] Angus v. Noble, 73 Conn. 56, 46 Atl. 278; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267; Gueutal v. Gueutal, 113 App. Div. 310, 98 N. Y. Supp. 1002; Weaver v. Spurr, 56 W. Va. 95, 48 S. E. 852.

[37] In re Hoffman's Will, 201 N. Y. 247, 94 N. E. 990.

If the trust instrument have but one purpose and that purpose be invalid, because, for example, of a violation of the rule against perpetuities, it is obvious that the entire trust must fall to the ground. But in many instances trusts have several purposes. The same trust instrument may provide for payments to A. during his life, payments to his children after his death, and finally a payment of the principal to X. at a given time. If one of these several purposes is valid and the remainder invalid, will the entire trust fail? The answer depends upon whether the purposes are separable or are inextricably connected. If the valid purpose is independent of the invalid, if the two can be separated, and the valid enforced without doing violence to the settlor's intent, then the valid purpose may be enforced, and the invalid stricken out.[38] But if, on the other hand, the valid purpose and the invalid purpose are so connected that to enforce one without enforcing the other would doubtless have been contrary to the settlor's intent, and would cause an injustice, then the entire trust must be declared void because of its partial invalidity.[39]

Conflict of Laws

Real property is almost entirely controlled by the laws of the jurisdiction in which it lies. The validity of the purpose of trusts of real property is, in accordance with this principle, determined by the law of the situs.[40] If the trust be one of personal property, however, and be created by will, the law of the domicile of the testator controls ordinarily. Personal property is presumed to follow the person of the owner.[41] If the instrument is one taking effect

[38] Younger v. Moore, 155 Cal. 767, 103 Pac. 221; Andrews v. Rice, 53 Conn. 566, 5 Atl. 823; Sinnott v. Moore, 113 Ga. 908, 39 S. E. 415; Viney v. Abbott, 109 Mass. 300; Amory v. Trustees of Amherst College, 229 Mass. 374, 118 N. E. 933; Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359; Culross v. Gibbons, 130 N. Y. 447, 29 N. E. 839; In re Denis' Estate, 201 Pa. 616, 51 Atl. 335; Appeal of Ingersoll, 86 Pa. 240.

[39] Carpenter v. Cook, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118; Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110; Rong v. Haller, 109 Minn. 191; 123 N. W. 471, 26 L. R. A. (N. S.) 825; Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906.

[40] Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184; Appeal of Fisk, 81 Conn. 433, 71 Atl. 559; Kerr v. White, 52 Ga. 362; Hobson v. Hale, 95 N. Y. 588; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413.

[41] Farmers' & Mechanics' Sav. Bank v. Brewer, 27 Conn. 600; Cross v. United States Trust Co. of New York, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407; Townsend v. Allen, 59 Hun, 622, 13 N. Y. Supp. 73, affirmed 126 N. Y. 646, 27 N. E. 853; Merritt v. Corlies, 71 Hun, 612, 24 N. Y. Supp. 561; Jones v. Jones, 8 Misc. Rep. 660, 30 N. Y. Supp. 177; Sullivan v. Babcock, 63 How. Prac. (N. Y.) 120; Wood v. Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697; Lanius v. Fletcher, 100 Tex. 550, 101 S. W. 1076.

inter vivos, ordinarily the law of the state of execution will decide the question of validity of purpose.[42]

In a number of New York decisions respecting the validity of the purpose of personal property trusts, it has been held that the law of the jurisdiction of administration was the determinative feature. Thus, where a testator, domiciled in and a resident of New York, made a will by which he left personal property to trustees to be administered in the state of Pennsylvania, it has been held that the laws of Pennsylvania control as to the validity of the purpose of the trust.[43] If the trust is to be administered in New York, and was created in a foreign jurisdiction, the New York courts treat the law of the domicile of the settlor as controlling; but if the trust is to be administered in a foreign jurisdiction, the New York courts seem to treat the law of the place of administration as controlling.[44] Thus, the only trusts of personal property, the validity of the purpose of which is tested by the laws of New York, are those which are created in New York and to be administered there.

ACTIVE TRUSTS—STATUTORY RESTRICTIONS

47. In California, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, South Dakota, and Wisconsin the purposes for which real property trusts may be created are limited by statute.

While an attempt to create a trust for a purpose not named in the statute does not result in the creation of a trust, the instrument will be enforced as a power in trust, if otherwise lawful.

In nine states, namely, California, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, South Dakota, and Wisconsin, the legislatures have established statutory systems of trusts in real property and have expressly limited the purposes for which such trusts may be created.[45] The theory of the foun-

[42] Mercer v. Buchanan (C. C.) 132 Fed. 501; Codman v. Krell, 152 Mass. 214, 25 N. E. 90; Wyse v. Dandridge, 35 Miss. 672, 72 Am. Dec. 149.

[43] Chamberlain v. Chamberlain, 43 N. Y. 424. See, also, In re Crum, 98 Misc. Rep. 160, 164 N. Y. Supp. 149.

[44] Kerr v. Dougherty, 79 N. Y. 327; Hope v. Brewer, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359; Hasbrouck v. Knoblauch, 130 App. Div. 378, 114 N. Y. Supp. 949; Peabody v. Kent, 153 App. Div. 286, 138 N. Y. Supp. 32.

[45] *California.*—Civ. Code, § 847: "What Uses and Trusts may Exist.—Uses

ders of this system, for the statutory purposes named in the several states are very similar, was that all trusts, except those involving active administration and requiring the holding of the legal title, should be abolished, because they render uncertain the record title to land and result in fraud and confusion. If the legal title is really necessary or highly convenient, said these reformers,

and trusts in relation to real property are those only which are specified in this title." Civ. Code, § 857: "For What Purposes Express Trusts may be Created.—Express trusts may be created for any of the following purposes: 1. To sell and convey real property and to hold or reinvest or apply or dispose of the proceeds in accordance with the instrument creating the trust. 2. To mortgage or lease real property for the benefit of annuitants, or devisees or legatees, or other beneficiaries, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property, and pay them to, or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of title two or division two of part one of this code. 4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same title; or 5. To convey, partition, divide, distribute or allot real property, in accordance with the instrument creating the trust, subject to the limitations of the same title."

Section 857 has received construction in a large number of cases. For cases construing subdivision 1, see the following: Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 Pac. 810; In re Delaney's Estate, 49 Cal. 76; Keogh v. Noble, 136 Cal. 153, 68 Pac. 579; Ward v. Waterman, 85 Cal. 488, 24 Pac. 930; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Thompson v. McKay, 41 Cal. 221; Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219; Auguisola v. Arnaz, 51 Cal. 435; Bennalack v. Richards, 116 Cal. 405, 48 Pac. 622; Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; In re Fair's Estate, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; In re Sanford's Estate, 136 Cal. 97, 68 Pac. 494; McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748; In re Pichoir's Estate, 139 Cal. 682, 73 Pac. 606; Carpenter v. Cook, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118; In re Hinckley's Estate, 58 Cal. 457; Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Hyatt v. Argenti, 3 Cal. 151; Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449. For cases construing subdivision 2, see the following: Gunter v. Janes, 9 Cal. 643; Bateman v. Burr, 57 Cal. 480; Tyler v. Granger, 48 Cal. 259; Johnson v. Miner, 144 Cal. 785, 78 Pac. 240. In construction of subdivision 3, see the following cases: Carpenter v. Cook, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118; In re Dolan's Estate, 79 Cal. 65, 21 Pac. 545; Cutter v. Hardy, 48 Cal. 568; In re Sanford's Estate, 136 Cal. 97, 68 Pac. 494; Toland v. Toland, 123 Cal. 140, 55 Pac. 681; Simpson v. Simpson, 80 Cal. 237, 22 Pac. 167; Heintz v. Hoover, 138 Cal. 372, 71 Pac. 447; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43. In construction of subdivision 4, see the following cases: Blackburn v. Webb, 133 Cal. 420, 65 Pac. 952; In re Steele's Estate, 124 Cal. 533, 57 Pac. 564.

Michigan.—How. Ann. St. 1912, § 10679: "Express trusts may be created for any or either of the following purposes: 1. To sell lands for the benefit of creditors; 2. To sell, mortgage or lease lands, for the benefit of legatees,

we will allow a trust; but in cases where a trust is an unnecessary formality, and the work desired to be done could be done equally well by means of a power, we will abolish the trust.

The trusts allowed fall into four main classes, namely, those to sell property for the benefit of creditors; those to sell, mortgage, or lease for the benefit of annuitants or other legatees, or to pay off a charge; those to collect income and apply it to the use

or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter; 4. To receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for either of the purposes and within the limits prescribed in the preceding chapter; 5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations prescribed in this title."

For construction of subdivision 1, see Chicago Lumbering Co. v. Powell, 120 Mich. 51, 78 N. W. 1022; Geer v. Traders' Bank of Canada, 132 Mich. 215, 93 N. W. 437; State Bank of Bay City v. Chapelle, 40 Mich. 447; Iron Cliffs Co. v. Beecher, 50 Mich. 486, 15 N. W. 558; Thatcher v. St. Andrew's Church of Ann Arbor, 37 Mich. 271; Crane v. Reeder, 22 Mich. 339. Subdivision 2: Haddon v. Hemingway, 39 Mich. 615; Everts v. Everts, 80 Mich. 222, 45 N. W. 88; Cummings v. Corey, 58 Mich. 494, 25 N. W. 481. Subdivision 4: Burdeno v. Amperse, 14 Mich. 96, 90 Am. Dec. 225. Subdivision 5: Methodist Episcopal Church of Newark v. Clark, 41 Mich. 741, 3 N. W. 207; Wheelock v. American Tract Soc., 109 Mich. 141, 66 N. W. 955, 63 Am. St. Rep. 578; White v. Rice, 112 Mich. 403, 70 N. W. 1024; Gilchrist v. Corliss, 155 Mich. 126, 118 N. W. 938, 130 Am. St. Rep. 568.

Minnesota.—Gen. St. 1913, § 6710: "Purposes of Express Trusts—Duration.—Express trusts may be created for any of the following purposes: 1. To sell lands for the benefit of creditors. 2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term, subject to the rules prescribed in chapter 59. 4. To receive the rents and profits of lands, and to accumulate the same, for either of the purposes, and within the limits prescribed in chapter 59. 5. To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, upon petition and hearing have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust as to the court may seem right and proper; and express trusts created under the provisions of this paragraph shall be administered under the direction of the court. 6. For the beneficial interests of any person or persons, whether such trust embraces real or personal property or both, when the trust is fully expressed and clearly defined on the face of the instrument creating it: Provided, that the trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-two years after the death of the survivor of them, and that the free aliena-

of beneficiaries; and those to collect income and accumulate it for persons entitled to receive accumulations. To accomplish these purposes the trust form is deemed necessary or very convenient. To accomplish other purposes sometimes reached by trusts, it is felt that powers in trust will be equally efficacious and convenient and more conducive to an orderly system of land-holding.

tion of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed in chapter 59. * * *"

Montana.—Rev. Codes, § 4540: "For What Purposes Express Trusts may be Created.—Express trusts may be created for any of the following purposes: 1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. 2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust, or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title II, of this part; or, 4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same title."

New York.—Real Property Law (Consol. Laws, c. 50) § 96: "Purposes for Which Express Trusts may be Created.—An express trust may be created for one or more of the following purposes: 1. To sell real property for the benefit of creditors; 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto; 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."

For constructions of this statute by the New York Court of Appeals, see Leggett v. Perkins, 2 N. Y. 297; Selden v. Vermilya, 3 N. Y. 525; Savage v. Burnham, 17 N. Y. 561; Beekman v. Bonsor, 23 N. Y. 298, 80 Am. Dec. 269; New York Dry Dock Co. v. Stillman, 30 N. Y. 174; Kiah v. Grenier, 56 N. Y. 220; Moore v. Hegeman, 72 N. Y. 376; Heermans v. Burt, 78 N. Y. 259; Cooke v. Platt, 98 N. Y. 35; Weeks v. Cornwell, 104 N. Y. 325, 10 N. E. 431; People v. Stockbrokers' Bldg. Co., 49 Hun, 349, 2 N. Y. Supp. 113, affirmed 112 N. Y. 670, 20 N. E. 414; Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; Cassagne v. Marvin, 143 N. Y. 292, 38 N. E. 285, 25 L. R. A. 670; Salisbury v. Slade, 160 N. Y. 278, 54 N. E. 741; Hubbard v. Housley, 43 App. Div. 129, 59 N. Y. Supp. 392, affirmed 160 N. Y. 688, 55 N. E. 1096; Thompson v. Hart, 58 App. Div. 439, 69 N. Y. Supp. 223, affirmed 169 N. Y. 571, 61 N. E. 1135; Russell v. Hilton, 80 App. Div. 178, 80 N. Y. Supp. 563, affirmed 175 N. Y. 525, 67 N. E. 1089; Murray v. Miller, 85 App. Div. 414, 83 N. Y. Supp. 591, affirmed 178 N. Y. 316, 70 N. E. 870; Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359.

North Dakota.—Comp. Laws 1913, § 5367: "For What Trusts may be Created.—Express trusts may be created for any of the following purposes: 1. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust. 2. To mortgage or lease real property for

The statutes of these same states ordinarily provide that, if an attempt is made to create a trust in land for an unauthorized purpose, the trustee shall take no estate as a trustee; but, if the trust directs the performance of an act which may lawfully

the benefit of annuitants or other legatees or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person or for any shorter term, subject to the rules of chapter 28 of this code; or, 4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same chapter."

Oklahoma.—Rev. Laws 1910, § 6662: "Express Trusts.—Express trusts may be created for any of the following purposes: First. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust. Second. To mortgage or release real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. Third. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for a shorter term, subject to the provisions of Article II of this chapter. Fourth. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same article."

See McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146. See, also, Laws 1919, Okl. c. 16.

South Dakota.—Rev. Code 1919, § 374: "Express trusts may be created for any of the following purposes: 1. To sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust. 2. To mortgage or release real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or his family, during the life of such person, or for any shorter term, subject to the rules of chapter 7 of this part; or, 4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same chapter."

Wisconsin.—St. 1913, § 2081: "Express trusts may be created for any or either of the following purposes: (1) To sell lands for the benefit of creditors. (2) To sell, mortgage or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon. (3) To receive the rents and profits of land and apply them to the use of any person during the life of such person or for any shorter term, subject to the rules prescribed in the last preceding chapter. (4) To receive the rents and profits of lands and to accumulate the same for the benefit of any married woman or for any of the purposes and within the limits prescribed in the preceding chapter. (5) For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time and the exceptions thereto relating to literary and charitable corporations prescribed in this title. * * *."

For construction, see the following cases: Walker v. Colby Wringer Co. (C.

be performed as a power in trust, the instrument shall be given effect as a power in trust.[46]

Thus, under this statutory system, if A. devised real property to B. for the purpose of having B. partition the property between C. and D., the will would fail to create a valid trust, because a trust to partition real estate is not provided for in this statutory scheme.[47] But the direction of A. would be enforced as a power in trust. The real property would descend to A's heirs, as if he had died intestate, and B. would hold a power in trust over the property. The legal title would pass to A.'s heirs, but B. would have the power to partition the property between C. and D.

These statutes do not apply to personal property. Trusts of personal property may be created for any lawful purpose.[48]

RULE AGAINST REMOTENESS

48. The common-law rule against remoteness, which is the rule against perpetuities in a majority of American states, is that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

This rule restricts the creator of a trust by requiring him to make all interests under his trust vest not later than twenty-one years after the end of some life in being at the time the trust instrument goes into effect.

C.) 14 Fed. 517; Marvin v. Titsworth, 10 Wis. 320; McLenegan v. Yeiser, 115 Wis. 304, 91 N. W. 682; McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550; Patton v. Patrick, 123 Wis. 218, 101 N. W. 408; Pietsch v. Marshall & Ilsley Bank, 164 Wis. 368, 160 N. W. 184.

[46] How. Ann. St. Mich. 1912, § 10682; Gen. St. Minn. 1913, § 6713; Real Property Law N. Y. (Consol. Laws, c. 50) § 99; Comp. Laws N. D. § 5370; Rev. Laws Okl. 1910, § 6665; Rev. Code S. D. 1919, § 377; St. Wis. 1913, § 2085.

For construction of these statutes, see Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Hawley v. James, 5 Paige (N. Y.) 318; Selden v. Vermilya, 3 N. Y. 525; Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; New York Dry Dock Co. v. Stillman, 30 N. Y. 174; Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805; Cutler v. Winberry (Sup.) 160 N. Y. Supp. 712; Murphey v. Cook, 11 S. D. 47, 75 N. W. 387; McLenegan v. Yeiser, 115 Wis. 304, 91 N. W. 682. But this rule does not seem to prevail in California. In re Fair's Estate, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70.

[47] By an amendment going into effect August 10, 1913 (St. 1913, p. 438), a trust to partition is valid in California. In re Aldersley's Estate, 174 Cal. 366, 163 Pac. 206.

[48] In re Schwartz, 145 App. Div. 285, 130 N. Y. Supp. 74; Hammerstein v. Equitable Trust Co. of New York, 156 App. Div. 644, 141 N. Y. Supp. 1065.

The rule against remoteness of vesting does not, according to the better view, restrict the length of time for which a trust may continue.

Trusts, like all property interests, are subject in their creation to two restrictive rules, namely, the rule against remoteness, and the rule against suspension of the power of alienation. Ordinarily in any given state only one of these rules will apply, for the states which have the common-law rule against remoteness do not usually have the statutory rule against suspension of the power of the alienation, and vice versa; but occasionally, as, for example, in New York, both rules are in force. Each of these rules is sometimes referred to as "the rule against perpetuities," and sometimes this rule is construed to include both a prohibition of undue remoteness of vesting and a prohibition of undue suspension of the power of alienation. For the purpose of clearness these two entirely distinct rules will be treated in separate sections and the term "perpetuities" will be avoided as much as possible.

First, how does the rule against remoteness restrict the purposes for which trusts may be created? This rule has been stated in the following words by the most learned American commentator upon it: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." [49] A child en ventre sa mere is regarded as in being for the purposes of the rule.[50] This rule, it will be seen, has to do only with the date at which property interests must vest. They must not remain contingent for too long a period, for longer than during the continuance of lives in being at the time the instrument takes effect and twenty-one years. "The rule governs both legal and equitable interests, and interests in both realty and personalty." [51]

This rule against remoteness is the rule against perpetuities in a majority of the American states.[52]

[49] Gray, Perpetuities (3d Ed.) p. 175.

[50] Long v. Blackall, 7 Term R. 100.

[51] Gray, Perpetuities (3d Ed.) p. 175.

[52] *Alabama.*—The common-law rule as to real property has been superseded by a peculiar local statute, found in Code 1907, § 3417, which reads as follows: "Lands may be conveyed to the wife and children, or children only, severally, successively, and jointly; and to the heirs of the body of the survivor, if they come of age, and in default thereof, over; but conveyances to other than the wife and children, or children only, cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter." This rule now governs dispositions of real property, but the common-law rule as to remoteness is still in effect as to personal property. Lyons v. Bradley, 168 Ala. 505,

The rule against remoteness may affect trusts in two ways. The trust instrument may provide for an equitable interest in property,

53 South. 244. For further construction of this statute, see Guesnard v. Guesnard, 173 Ala. 250, 55 South. 524; Farr v. Perkins, 173 Ala. 500, 55 South. 923; Ashurst v. Ashurst, 181 Ala. 401, 61 South. 942; Montgomery v. Wilson, 66 South. 503, 189 Ala. 209.

Arkansas.—The common-law rule against remoteness is in force. Moody v. Walker, 3 Ark. 147; Clark v. Stanfield, 38 Ark. 347.

Colorado.—The common-law rule is in force. Chilcott v. Hart, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; Miller v. Weston, 25 Colo. App. 231, 138 Pac. 424.

Connecticut.—Since the enactment of chapter 249 of the Public Acts of 1895, which repealed a peculiar local rule, the common-law rule against remoteness has been in force. Bates v. Spooner, 75 Conn. 501, 54 Atl. 305; Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167; Wolfe v. Hatheway, 81 Conn. 181, 70 Atl. 645; Bartlett v. Sears, 81 Conn. 34, 70 Atl. 33; Allen v. Almy, 87 Conn. 517, 89 Atl. 205, Ann. Cas. 1917B, 112.

District of Columbia.—In addition to the statutory statement of a rule against undue suspension of the power of alienation there seems to be recognition of the common-law rule against remoteness. Wills v. Maddox, 45 App. D. C. 128; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

Florida.—The common-law rule seems to be in force. Cawthon v. Stearns Culver Lumber Co., 60 Fla. 313, 53 South. 738.

Georgia.—Park's Ann. Civ. Code 1914, § 3678, lays down the practical equivalent of the common-law rule against remoteness. It limits the period to lives in being, 21 years, and the period of gestation. Phinizy v. Wallace, 136 Ga. 520, 71 S. E. 896.

Illinois.—The common-law rule is in force. Hale v. Hale, 125 Ill. 399, 17 N. E. 470; Keyes v. Northern Trust Co., 227 Ill. 354, 81 N. E. 384; Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246; French v. Calkins, 252 Ill. 243, 96 N. E. 877; Dime Savings & Trust Co. v. Watson, 254 Ill. 419, 98 N. E. 777; Barrett v. Barrett, 255 Ill. 332, 99 N. E. 625; Kolb v. Landes, 277 Ill. 440, 115 N. E. 539.

Kansas.—The common-law rule is in force. Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541; Henderson v. Bell, 103 Kan. 422, 173 Pac. 1124.

Kentucky.—Ky. St. 1915, § 2360, reads as follows: "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a period longer than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter." This appears to be a rule against suspension of the power of alienation and to have nothing to do with remoteness, but it seems to have been construed to be a rule against remoteness of vesting. Brown v. Columbia Finance & Trust Co., 123 Ky. 775, 97 S. W. 421, 30 Ky. Law Rep. 110; United States Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993; Miller v. Miller, 151 Ky. 563, 152 S. W. 542; Tyler v. Fidelity & Columbia Trust Co., 158 Ky. 280, 164 S. W. 939; Pond Creek Coal Co. v. Runyan, 161 Ky. 64, 170 S. W. 501; Curd's Trustee v. Curd, 163 Ky. 472, 173 S. W. 1148. In Tyler v. Fidelity & Columbia Trust Co., supra, the court says (158 Ky. at page 286, 164 S. W. 941): "The test, therefore, for determining the existence of a perpetuity, is not whether the event or contingency named upon which the estate devised may vest in the ultimate takers

to come into existence as a vested interest at a period too remote and prohibited by the rule. For example, a provision that trusts should arise when a gravel pit was worked out violated the rule against remoteness, because the time within which the trust interests must vest was not necessarily limited by any number of lives

does happen or may happen, but whether it is possible that it might not happen within that time. If it is possible that the event or contingency upon which the estate will finally vest may not happen within the limit prescribed by the rule against perpetuities, the instrument is void, or at least so much thereof is void as relates to this remote event or contingency. In other words, a possible perpetuity is a perpetuity denounced by the statute." Pond Creek Coal Co. v. Runyan, supra, is, however, repudiated in Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247, L. R. A. 1916D, 924.

Maine.—The common-law rule applies. Slade v. Patten, 68 Me. 380; Towle v. Doe, 97 Me. 427, 54 Atl. 1072.

Maryland.—The common-law rule is in force. Lee v. O'Donnell, 95 Md. 538, 52 Atl. 979; Robinson v. Bonaparte, 102 Md. 63, 61 Atl. 212; Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N. S.) 1135; Starr v. Starr Methodist Protestant Church, 112 Md. 171, 76 Atl. 595; Gambrill v. Gambrill, 122 Md. 563, 89 Atl. 1094.

Massachusetts.—The common-law rule governs. Fosdick v. Fosdick, 88 Mass. (6 Allen) 41; Otis v. McLellan, 95 Mass. (13 Allen) 339; Loring v. Blake, 98 Mass. 253; Lovering v. Worthington, 106 Mass. 86.

Mississippi.—A peculiar local statute exists: "Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple." Hemingway's Ann. Code 1917, § 2269. This rule as to vesting seems to supersede the common-law rule as far as limitations of real property are concerned. Gully v. Neville, 55 South. 289; Gwin v. Hutton, 100 Miss. 320, 56 South. 446; Henry v. Henderson, 101 Miss. 751, 58 South. 354; Redmond v. Redmond, 104 Miss. 512, 61 South. 552. But the common-law rule is in force as to personal property. Thomas v. Thomas, 97 Miss. 697, 53 South. 630.

Missouri.—The common-law rule applies. Lockridge v. Mace, 109 Mo. 162, 18 S. W. 1145; Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289; Stewart v. Coshow, 238 Mo. 662, 142 S. W. 283. See Hudson, The Rule against Perpetuities in Missouri, 15 Mo. Law Bul., No. 11, p. 3.

New Hampshire.—The rule is against remoteness. Wood v. Griffin, 46 N. H. 230; Wentworth v. Wentworth, 77 N. H. 400, 92 Atl. 733.

New Jersey.—The rule is the common-law rule against remoteness. Siedler v. Syms, 56 N. J. Eq. 275, 38 Atl. 424; In re Corle, 61 N. J. Eq. 409, 48 Atl. 1027; Van Riper v. Hilton, 78 N. J. Eq. 371, 78 Atl. 1055; In re Smisson, 79 N. J. Eq. 233, 82 Atl. 614.

New York.—Recent decisions (In re Wilcox, 194 N. Y. 288, 87 N. E. 497, and Walker v. Marcellus & O. L. Ry. Co., 226 N. Y. 347, 123 N. E. 736) have made it apparent that there exists in New York a rule against remoteness of vesting, as well as against undue suspension of the power of alienation.

or by the twenty-one year period.[53] And so, too, a trust to begin when mortgages were paid off out of rents was held to provide for the vesting of an interest at a too remote time, since the time of vesting was not fixed by lives in being and twenty-one years.[54]. The first restriction, then, is that the interests of trustee and bene-

Thus, this state seems to have two rules against perpetuities. See 5 Cornell Law Quarterly, 189.

North Carolina.—The rule is against remoteness. Baker v. Pender, 50 N. C. (5 Jones Law) 351; O'Neal v. Borders, 170 N. C. 483, 87 S. E. 340.

Ohio.—A peculiar local statute provides what persons may be grantees and devisees of lands lying within the state: "No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will." Page & A. Ann. Gen. Code, § 8622; Phillips v. Herron, 55 Ohio St. 478, 45 N. E. 720. The rule against remoteness seems also to be in force. Stevenson v. Evans, 10 Ohio St. 307, 315; Dayton v. Phillips, 28 Wkly. Law Bul. (Ohio) 327.

Oregon.—The rule is that of the common law. In re John's Will, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

Pennsylvania.—The common-law rule of remoteness is in force. Briggs v. Davis, *81 Pa. 470; In re Johnston's Estate, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621; Stephens v. Dayton, 220 Pa. 522, 70 Atl. 127; Barton v. Thaw, 246 Pa. 348, 92 Atl. 312, Ann. Cas. 1916D, 570.

Rhode Island.—The common-law rule applies. Williams v. Herrick, 19 R. I. 197, 32 Atl. 913; Storrs v. Burgess, 29 R. I. 269, 67 Atl. 731; In re Tyler, 30 R. I. 590, 76 Atl. 661.

South Carolina.—The rule is one of remoteness. Breeden v. Moore, 82 S. C. 534, 64 S. E. 604.

Tennessee.—The rule is the common-law rule against remoteness. Davis v. Williams, 85 Tenn. 646, 4 S. W. 8; Armstrong v. Douglass, 89 Tenn. 219, 14 S. W. 604, 10 L. R. A. 85.

Texas.—The rule is one against remoteness. Dulin v. Moore, 96 Tex. 135, 70 S. W. 742; Anderson v. Menefee (Civ. App.) 174 S. W. 904.

Virginia.—The common-law rule is in force. Otterback v. Bohrer, 87 Va. 548, 12 S. E. 1013.

West Virginia.—The rule is against remoteness. Whelan v. Reilly, 3 W. Va. 597; Starcher Bros. v. Duty, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990; Thaw v. Gaffney, 83 S. E. 983, 75 W. Va. 229, 3 A. L. R. 495.

[53] In re Wood [1894] 3 Ch. 381. See, also, Taylor v. Crosson (Del. Ch.) 98 Atl. 375; Overby v. Scarborough, 145 Ga. 875, 90 S. E. 67; Ortman v. Dugan, 130 Md. 121, 100 Atl. 82; Ewalt v. Davenhill, 257 Pa. 385, 101 Atl. 756; Rhode Island Hospital Trust Co. v. Peck, 40 R. I. 519, 101 Atl. 430. A provision for the payment of one-half the income of the trust fund to the settlor or his eldest male heir on demand at any time is void, as creating an interest too remote. Amory v. Trustees of Amherst College, 229 Mass. 374, 118 N. E. 933. But discretionary power in the trustee as to the time of payment of the cestui que trust's interest does not cause a violation. Strout v. Strout, 117 Me. 357, 104 Atl. 577.

[54] In re Bewick, [1911] 1 Ch. 116.

ficiary must vest within the fixed period in states having the rule against remoteness. The trust must begin and the property rights of trustee and cestui must vest within a time limited by lives in being and twenty-one years.

The second question to be asked is whether the rule against remoteness, affects the duration of trusts. May a trust last for a period not measured by lives in being and twenty-one years? May a trust last for a gross period, as, for example, for fifty years?

In the first place, it should be noticed that all contingent interests following after trust estates are subject to the rule against remoteness, and may drag the trust down with them, if they violate the rule. For example, if a trust is created to last for seventy-five years, and contingent remainders are provided to follow the trust term, it is obvious that these contingent interests violate the rule against remoteness. They need not vest within lives in being and twenty-one years. They are to vest only at the end of a period of years, not in any way connected with lives. Hence, of course, the remainders to take effect and vest at the end of the trust are void for remoteness. It may well be that the falling of these remainders will so destroy the scheme of the testator that it will be necessary, in order to prevent an unjust disposition of the property, to declare the trust for the term of seventy-five years void also, This was done in a Pennsylvania case. The trust was valid in itself, but it was destroyed, due to its inseparable connection with an unlawful contingent remainder.[55]

On the other hand, although there is a remainder following the trust which is too remote, and therefore void, yet the trust may be separable and may stand alone. In many cases the only effect of the violation of the rule against remoteness by a contingent remainder is that the remainder is void. The trust preceding the remainder is enforced.[56]

In the second place, there remains for discussion the direct effect of the rule against remoteness on the duration of trusts. Here it would seem that the law ought to be certain and easy of ascertainment; that, since the rule has nothing to do with vested interests, but only to do with the time within which interests must vest, vested trust estates might continue for any length of time without coming in conflict with the rule. That the trust is to last for seventy-five years ought to be unimportant under the rule

[55] In re Johnston's Estate, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

[56] Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167; Wolfe v. Hatheway, 81 Conn. 181, 70 Atl. 645; Dime Savings & Trust Co. v. Watson, 254 Ill. 419, 98 N. E. 777; Camden Safe Deposit & Trust Co. v. Guerin, 87 N. J. Eq. 72, 99 Atl. 105.

against remoteness, if the trust begins soon enough. The rule is against too remote vesting of contingent estates, not against too remote lasting of vested estates. This view has been taken by the better reasoned decisions.[57] "There is no rule which limits the continuance of a trust to any period of time. A trust is no more invalid for the reason that it may continue thirty years than is a life estate or estate in fee simple. The essential thing is that the beneficial interest under the trust vest in the cestui que trust within the time limited by law for the vesting of legal estates."[58] But in a number of decisions the courts seem to have been confused as to the true meaning of the rule against remoteness and to have held that a trust which lasted for longer than lives in being and twenty-one years was void.[59]

It would seem that the only reasonable interpretation of the rule against remoteness as applied to trusts is that it affects only the time when they may begin, and not the period of their duration or the time of their ending. If a trust begins within lives in being and twenty-one years, it should, as far as the rule against remoteness is concerned, be allowed to continue for any period of time. Throughout its continuance the interests of trustee and cestui què trust will be vested. No question of remote vesting would seem to be involved.

RULE AGAINST SUSPENSION OF POWER OF ALIENATION

49. In many states the rule against perpetuities is that the power of alienation of property shall not be suspended longer than a given period.

In these states trusts are invalid when they result in suspending the power of alienating the trust property for a period longer than that of the rule against perpetuities.

[57] Loomer v. Loomer, 76 Conn. 522, 57 Atl. 167; Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246 (discussed by A. M. Kales in 4 Ill. Law Rev. 281); O'Hare v. Johnston, 273 Ill. 458, 113 N. E. 127; Deacon v. St. Louis Union Trust Co., 271 Mo. 669, 197 S. W. 261; In re Johnston's Estate, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621.

[58] Loomer v. Loomer, 76 Conn. 522, 527, 57 Atl. 167.

[59] Slade v. Patten, 68 Me. 380 (but see Pulitzer v. Livingston, 89 Me. 359, 36 Atl. 635); Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88; Reed v. McIlvain, 113 Md. 140, 77 Atl. 329; American Colonization Soc. v. Soulsby, 129 Md. 605, 99 Atl. 944; Siedler v. Syms, 56 N. J. Eq. 275, 38 Atl. 424; Otterback v. Bohrer, 87 Va. 548, 12 S. E. 1013; Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202. See Gray, Perpetuities (3d Ed.) §§ 232–245h.

Trusts may result in suspending the power of alienation, either because the instruments creating them expressly require the trustee to retain the trust property, or because they prohibit the beneficiary from selling his interest, or because a statute forbids alienation of the beneficiary's interest.

The rule against undue restraint upon the alienation of property is called the rule against perpetuities in many states. In substance it provides that every provision in will or deed which suspends the absolute power of alienation of real or personal property beyond a given period shall be void. The period during which suspension may occur is two lives in being in some states, and any number of lives in being in others.

This rule, it will be seen, is aimed at preventing property from being inalienable for too long a period. It aims to keep property in the market. It is entirely different from the rule against remoteness, which is aimed at preventing the fastening of contingent and uncertain interests upon real property for too long a period.

The rule against undue suspension of the power of alienation has been adopted in thirteen states and the district of Columbia.[60]

[60] *Arizona.*—The power of alienation cannot be suspended for more than two lives and twenty-one years. Civ. Code 1913, §§ 4679, 4680.

California.—The power of alienation may not be suspended beyond the existence of lives in being. Civ. Code, §§ 715, 716. See Sacramento Bank v. Montgomery, 146 Cal. 745, 81 Pac. 138; In re Fay's Estate, 5 Cal. App. 188, 89 Pac. 1065; In re Heberle's Estate, 155 Cal. 723, 102 Pac. 935; In re Gregory's Estate, 12 Cal. App. 309, 107 Pac. 566. See Hohfeld, The Need of Remedial Legislation in the California Law of Trusts and Perpetuities, 1 Cal. Law Rev. 305.

District of Columbia.—The power of alienation shall not be suspended for more than lives in being and twenty-one years. Torbert's Code 1919, § 1023. But the rule against remoteness is recognized. See page 167, ante.

Idaho.—Suspension beyond lives in being is prohibited. Rev. Codes, § 3067.

Indiana.—Suspension of the power of alienation of both real and personal property for longer than lives in being is forbidden. Burns' Ann. St. 1914, §§ 3998, 9723. See Matlock v. Lock, 38 Ind. App. 281, 73 N. E. 171; Pooler v. Hyne, 213 Fed. 154, 129 C. C. A. 506; Hayes v. Martz, 173 Ind. 279, 89 N. E. 303; Reeder v. Antrim, 64 Ind. App. 83, 110 N. E. 568. See 1 Ind. Law J. 220; 2 Ind. Law J. 18; 3 Ind. Law J. 7, 67, 100.

Iowa.—Suspension longer than lives in being and twenty-one years is forbidden. See Code 1897, § 2901. In some cases the rule appears to be considered as one dealing with vesting, while in others emphasis is laid on the power of alienation. Todhunter v. Des Moines, I. & M. R. Co., 58 Iowa, 205, 12 N. W. 267; Meek v Briggs, 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410; In re Hubbell Trust, 135 Iowa, 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640; Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; In re Ogle's Estate, 146 Iowa, 33, 124 N. W. 758.

Michigan.—The statute limits suspension of the power of alienation to two

The effect of this rule against undue suspension of the power of alienation upon the purposes for which trusts can be created is obvious. No trust which contemplates a suspension of the power of alienation for a time longer than that allowed by the statute will be valid. For example, in New York the statute prohibits the suspension of the power of alienation for longer than two lives. Hence a trust which provided that the trustee should retain the property intact, and should have no power to sell it during the lives of A., B., and C., would suspend the power of alienation of the trust property for three lives, and be void.

What trusts suspend the power of alienation? In what cases

lives in being. How. Ann. St. 1912, §§ 10636, 10637. See, also, Trustees, etc., of M. E. Church of Newark v. Clark, 41 Mich. 730, 3 N. W. 207; Fitz Gerald v. City of Big Rapids, 123 Mich. 281, 82 N. W. 56; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610; McInerny v. Haase, 163 Mich. 364, 128 N. W. 215. Personal property is not covered by the statute against restraints on alienation. Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858. The rule against remoteness is recognized in Palms v. Palms, 68 Mich. 355, 36 N. W. 419, and Niles v. Mason, 126 Mich. 482, 85 N. W. 1100.

Minnesota.—The power of alienation must not be suspended longer than during two lives in being. Gen. St. 1913, § 6665. See Rong v. Haller, 109 Minn. 191, 123 N. W. 471, 806, 26 L. R. A. (N. S.) 825; Buck v. Walker, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882. See Fraser, Future Interests in Property in Minnesota, 3 Minn. Law Rev. 320.

Montana.—Suspension of the power of alienation for longer than the period of lives in being is prohibited. Rev. Codes, § 4463.

New York.—The rule is against the suspension of the power of alienation for a longer period than two lives in being. Real Property Law (Consol. Laws, c. 50) § 42; Personal Property Law (Consol. Laws, c. 41) § 11. These statutes have given rise to an enormous amount of litigation. For illustrative cases, see Hawley v. James, 5 Paige, 318; Coster v. Lorillard, 14 Wend. 265; Woodgate v. Fleet, 64 N. Y. 566; Schermerhorn v. Cotting, 131 N. Y. 48, 29 N. E. 980; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; In re Colegrove's Estate, 221 N. Y. 455, 117 N. E. 813; Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135. See Dwight on Powers of Sale as Affecting Restraints on Alienation, 7 Col. Law Rev. 589.

North Dakota.—Comp. Laws 1913, § 5287, prohibits the suspension of the power of alienation for a period longer than lives in being. See Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; Hagen v. Jacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724.

Oklahoma.—Lives in being is the legal period for suspension of the power of alienation. Rev. Laws 1910, § 6605.

South Dakota.—The legal period of suspension of the power of alienation is during lives in being. Rev. Code. 1919, § 294.

Wisconsin.—The rule is against the suspension of the power of alienation for longer than during two lives in being and twenty-one years. St. 1913, § 2039. For construction, see Holmes v. Walter, 118 Wis. 409, 95 N. W. 380, 62 L. R. A. 986; In re Adelman's Will, 138 Wis. 120, 119 N. W. 929; Eggleston v. Swartz, 145 Wis. 106, 129 N. W. 48. The statute applies to real property only. Danforth v. City of Oshkosh, 119 Wis. 262, 97 N. W. 258.

does the existence of a trust take the trust property out of the market, and make it impossible for any person or persons to convey to another an absolute and complete title to the trust property?

A trust may suspend the power of alienation because of its own express provisions. It may by its express terms require that the alienation of the trust property shall be suspended during a given period. Thus, the settlor may provide the trustee shall retain title to certain real property, collect the rents therefrom, and deliver them to A., and divide the property between the children of A., at A.'s death. Such a trust prevents the property from being sold for a given period, namely, from the date of the creation of the trust until A.'s death. It suspends the power of alienation during A.'s life. Such a trust would be valid in all states having the rule against undue suspension. But, if the express provision were that the trust should continue under the same terms for fifty years, the trust would be invalid in all the states having the rule against undue suspension of the power of alienation. In all such states the power must not be suspended during a period which is not measured by lives.[61]

As is shown by a decision of a California court, at least two classes of trusts by their own express provisions require a suspension of the power of alienation, namely, those created for the purpose of having rents and profits collected and paid over to a beneficiary, and those created for the purpose of having a sale made at a definite date in the future. Discussing these two classes of trusts, the court says: "Under the first class are included all those whose very purpose and essence it is that the land shall not be alienated by the trustee during the trust term, and where, consequently, a sale by him would be in direct contravention of the trust. In the case of such express trusts as occasion the suspension of the absolute power of alienation, the term of duration is the vital subject of inquiry. * * * Trusts such as these under consideration in their very nature operate to suspend the power of alienation. That power must be suspended in the one case while the trustee is distributing the rents and profits, and in the other case it is suspended by the express duty imposed upon the trustee to sell only at the expiration of a fixed period." [62]

[61] In re Fay's Estate, 5 Cal. App. 188, 89 Pac. 1065.

[62] In re Walkerly's Estate, 108 Cal. 627, 650, 651, 41 Pac. 772, 49 Am. St. Rep. 97. The statutes of California, North Dakota, Oklahoma, and South Dakota provide that the beneficiary of a trust to collect rents and profits may be restrained from disposing of his interest. Civ. Code Cal. § 867; Comp. Laws N. D. 1913, § 5377; Rev. Laws Okl. 1910, § 6672; Rev. Code S. D. 1919, § 384. The California statute reads as follows: "The beneficiary of a

Not only may a trust suspend the power of alienation by its own provisions, but statutes have in some states caused certain classes of trusts to result in an automatic suspension of the power of alienation. In Michigan, Minnesota, New York, and Wisconsin there are statutes providing that a beneficiary of a trust to receive the income and profits of property and apply them to the use of another cannot transfer his interest.[63]

The result of these restraining statutes is that, in all trusts to collect rent and income and apply it to the use of another, there is a suspension of the power of alienation. The beneficiary cannot transfer his interest and, unless he can do so, a perfect title cannot be given. If the trustee, by the terms of the trust, also has no power to sell, then obviously there is a double suspension of the power of alienation. If the trustee has the power to sell the particular property in his hands at the commencement of the trust, other property will be held by him in its place, and the cestui's interest in the substituted property will be inalienable throughout the life of the trust. Trusts to collect rents and income and apply to the use of another in these four states, therefore, automatically suspend the power of alienation of the property concerned. Their duration must correspond to the statutory period of the rule against suspension of the power of alienation, which is during two lives in being at the time the suspension begins.[64]

In several states it is expressly provided by statute that the power of alienation is suspended by a trust when the trustee cannot ab-

trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust."

[63] How. Ann. St. Mich. 1912, § 10687; Gen. St. Minn. 1913, § 6718; New York Real Property Law (Consol. Laws, c. 50) § 103; New York Personal Property Law (Consol. Laws, c. 41) § 15; St. Wis. 1913, § 2089. The New York statute with respect to real property is typical: "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise, but the right of the beneficiary of any other trust in real property may be transferred."

[64] For instances in which trusts in these four states have resulted in violations of the rule against undue suspension of the power of alienation, see the following cases: Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610; Niles v. Mason, 126 Mich. 482, 85 N. W. 1100; Rong v. Haller, 109 Minn. 191, 123 N. W. 471, 806 (but see Y. M. C. A. v Horn, 120 Mnn. 404, 139 N. W. 805, as to trust of personalty); Hawley v. James, 5 Paige (N. Y.) 318; Coster v. Lorillard, 14 Wend. (N. Y.) 265; Amory v. Lord, 9 (N. Y.) 403; Schermerhorn v. Cotting, 131 N. Y. 48, 29 N. E. 980; Schlereth v. Schlereth, 173 N. Y. 444, 66 N. E. 130, 93 Am. St. Rep. 616; Central Trust Co. of New York v. Egleston, 185 N. Y. 23, 77 N. E. 989; Ford v. Ford, 70 Wis. 19, 33 N. W. 188, 5 Am. St. Rep. 117.

solutely alien his interest, but can only exchange the trust property, or sell it and reinvest the proceeds.[65]

It will be seen that, in these states having the rule against undue suspension of the power of alienation as their rule against perpetuities, the question as to the validity of trusts under that rule is a simple one. It depends upon two factors, namely, whether the trust, either by its own express provisions or by virtue of a statute, does actually result in a suspension of the power of alienating a complete and absolute title to the trust property; and, secondly, whether, if there be such suspension, the trust, and therefore the suspension of the power of alienation, continues for a period longer than that allowed by the rule.

"Ordinarily a trust does not offend against the statutes relative to perpetuities, where the trustee has a power of sale and the beneficiary may dispose of his interest, even though the trust term exceeds two lives in being and twenty-one years. But where there is no power of sale, and the statute forbids alienation by the trustee and the beneficiary during the continuance of the trust, it does create an unlawful perpetuity when the trust term exceeds the period permitted by statute." [66]

RULE AGAINST ACCUMULATIONS

50. At common law a trust may provide for the accumulation of the income of real or personal property only during the existence of lives in being at the time when the trust instrument takes effect and for the gross period of twenty-one years after the ending of such lives.

In Arizona, California, Indiana, Michigan, Minnesota, New York, North Dakota, South Dakota, and Wisconsin the period of accumulation is now restricted to the minority of an infant in being, and the accumulation must be for the benefit of such infant. In Alabama the accumulation may take place during the infancy of the beneficiary, or during a gross period of ten years where no infancy is involved.

In Pennsylvania and Illinois the English statute known as Thellusson's Act has been followed, and accumulations are subject to greater restrictions than at common law.

[65] Montana: Rev. Codes § 4491. Oklahoma: Rev. Laws 1910, § 6607. South Dakota: Rev. Code 1919, § 321.

[66] In re Adelman's Will, 138 Wis. 120, 125, 119 N. W. 929.

For how long a period and for the benefit of what persons may the income of real or personal property be accumulated? May A. devise land to X., as trustee, and provide that X. shall collect the rents, income and profits of the realty for a period of fifty years, place the same in a savings bank at compound interest and at the end of the fifty year period pay over the accumulations to A.'s eldest son, or his descendants, if he be dead? May A. bequeath $10,000 to X., as trustee, with a direction that the money be lent out at interest, the interest accumulated until A.'s youngest son reaches twenty-one and that the trustee then pay over to the son the principal and accumulated interest?

The problems involved here arose in a famous English case.[67] There an accumulation was directed to occur during the continuance of nine lives in being at the time the testator died. The accumulation was held valid, the court saying that the period during which accumulations might occur was the same as that during which the vesting of property might be postponed, namely, during lives in being and twenty-one years. "If the law is so as to postponing alienation, another question arises out of this will, which is a pure question of equity: Whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; and that he can do so is most clear law." [68]

The dangers of the vast accumulation of property which became apparent as a result of the decision in Thellusson v. Woodford led Parliament to enact the so-called Thellusson Act, which restricted accumulations. Under that act there are only four lawful periods of accumulation, namely, during the life of the giver, during twenty-one years after the giver's death, during the minorities of any persons living at the giver's death, or during the minorities of persons who would be entitled to the income of the fund, if no provision for accumulation were made.[69] This act has been later amended by the so-called Accumulations Act, which provides for accumulations for the purpose of purchasing land only during the minorities of the persons who would be entitled to the income, if there were no direction for accumulations.[70]

In the American states which are unaffected by local statutes, the common-law rule, as laid down in Thellusson v. Woodford,[71]

[67] Thellusson v. Woodford, 4 Ves. 227, 11 Ves. 112.
[68] Lord Eldon, Thellusson v. Woodford, 11 Ves. 112, 146.
[69] St. 39 & 40 George III, c. 98 (1800).
[70] St. 55 & 56 Vict. c. 58 (1892).
[71] 11 Ves. 112.

is now in force. Accumulations for the benefit of private persons, as distinguished from charities, are allowed to continue only during the existence of lives in being and twenty-one years. The measuring lives must be in existence when the accumulation begins.

"At common law, the power of controlling the rents and profits was coextensive with the power to dispose of the estate which produced them, the limit of the accumulation of annual income was the same as the limit of the creation of future estates, and the enjoyment of the profits could not be suspended for a longer period than the full power of alienating the estate itself. * * * Any directions for accumulation for the benefit of individuals until the happening of a contingency which by possibility may not take place within the period prescribed by the rule against perpetuities are void." [72] The principle is that "trusts for accumulation must be strictly confined within the limits of the rule against perpetuities, and that, if such a trust exceeds those limits, it is void." [73]

Thus, in states which have the common-law rule regarding accumulations, unaffected by local statute, a provision for accumulations for twenty years,[74] or for the life of a person in being at the death of the testator, is valid.[75] On the other hand, in such states a provision that accumulations continue for twenty-five years[76] or for thirty years[77] is void, since the gross period involved is beyond the twenty-one years allowed by the rule against perpetuities.

In Arizona, California, Indiana, Michigan, Minnesota, New York, North Dakota, South Dakota, and Wisconsin statutes exist which restrict accumulation to the period of the minority of an infant in being at the time the accumulation begins. The accumulation must also be solely for the benefit of the minor. The time at which accumulations may be directed to commence in the future is also restricted.[78]

[72] Gray, J., in Odell v. Odell, 10 Allen (Mass.) 1, 5, 9,

[73] Hoadley v. Beardsley, 89 Conn. 270, 93 Atl. 535, 539.

[74] Connecticut Trust & Safe Deposit Co. v. Hollister, 74 Conn. 228, 50 Atl. 750.

[75] Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S. W. 739.

[76] Hoadley v. Beardsley, 89 Conn. 270, 93 Atl. 535; Kimball v. Crocker, 53 Me. 263.

[77] Andrews v. Lincoln, 95 Me. 541, 50 Atl. 898, 56 L. R. A. 103.

[78] The New York Revised Statutes furnished the model for these statutes regarding accumulations. The present New York statute regarding accumulations of the profits of realty is typical: "All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by

These statutes regarding accumulations either expressly provide or have been construed to mean that, where an excessive accumulation is attempted, the entire provision will not be declared void, but only that portion which exceeds the statutory limit. Thus, if a testator attempts to create an accumulation for the benefit of his son A. until he reaches thirty years of age, and the son is an infant at the time the will takes effect, the courts will hold the direction for an accumulation valid as to the infancy of the minor, and will merely strike out that portion of the will which contemplates an accumulation from the age of twenty-one until the age of thirty.[79]

In Alabama, Illinois, and Pennsylvania peculiar local statutes re-

any will or deed sufficient to pass real property, as follows: 1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority. 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority." New York Real Property Law (Consol. Laws, c. 50) § 61. A similar statute as to personal property exists. New York Personal Property Law (Consol. Laws, c. 41) § 16.

The statutes of California, North Dakota, and South Dakota, modeled after the New York statute, apply alike to real and personal property. Civ. Code Cal. § 724; Comp. Laws N. D. 1913, § 5292; Rev. Code S. D. 1919, § 299. Similar statutes in Arizona, Michigan, Minnesota, and Wisconsin apply only to real property. Civ. Code Ariz. 1913, § 4702; How. Ann. St. Mich. 1912, § 10659; Gen. St. Minn. 1913, § 6687; St. Wis. 1913, § 2061. The Indiana statute, drawn along similar lines applies to personal property alone. Burns' Ann. St. 1914, § 9724. For cases construing these statutes, see the following: Goldtree v. Thompson, 79 Cal. 613, 22 Pac. 50; In re Steele's Estate, 124 Cal. 533, 57 Pac. 564; In re Haines' Estate, 150 Cal. 640, 89 Pac. 606; Hornung v. Sedgwick, 164 Cal. 629, 130 Pac. 212; In re Whitney's Estate, 176 Cal. 12, 167 Pac. 399; Shriver v. Montgomery, 181 Ind. 108, 103 N. E. 945; Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Wilson v. Odell, 58 Mich. 533, 25 N. W. 506; Palms v. Palms, 68 Mich. 355, 36 N. W. 419; In re Pettit's Estate, 135 Minn. 413, 161 N. W. 158; Pray v. Hegeman, 92 N. Y. 508; Hascall v. King, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302; United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970; Central Trust Co. of New York v. Falck, 177 App. Div. 501, 164 N. Y. Supp. 473; Scott v. West, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; In re Stark's Will, 149 Wis. 631, 134 N. W. 389. Under the New York statute a provision that increased capital stock or stock dividends should be added to capital is invalid, so far as accumulation of income is concerned. In re Megrue, 224 N. Y. 284, 120 N. E. 651.

[79] In re Haines' Estate, 150 Cal. 640, 89 Pac. 606; French v. Calkins, 252 Ill. 243, 96 N. E. 877; New York Real Property Law (Consol. Laws, c. 50) § 61, subd. 3; New York Personal Property Law (Consol. Laws, c. 41) § 16, subd. 3.

garding accumulations exist, and trusts in those states must comply with such statutes in order to be valid.[80]

SPENDTHRIFT TRUSTS

51. A spendthrift trust is a trust for the collection and payment of rents and profits, in which the income may not be alienated by the beneficiary by way of anticipation, and may not be subjected to the payment of the beneficiary's debts until it has been paid to the beneficiary.

Spendthrift trusts are void, as creating an unlawful restraint on alienation and as against public policy, in England and a few American states. In the majority of American states such trusts are valid, either to an unlimited extent or subject to some statutory restrictions.

"'Spendthrift trusts' is the term commonly applied to those trusts that are created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection. The provisions against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors, are the usual incidents of such trusts." [81] Spendthrift trusts have as their object the giving

[80] *Alabama.*—See Code 1907, § 3410: "No trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of conveyance, or if by will, at the death of the testator; in which case the trust may extend to the termination of such minority." See Campbell v. Weakley, 121 Ala. 64, 25 South. 694; Pearce v. Pearce (Ala.) 74 South. 952.

Illinois.—See Laws 1907, p. 1; 1 Jones & A. Ann. St. Ill. 1913, par. 189. This statute follows closely the Thellusson Act in England. The legal periods of accumulation are (1) during the life of the settlor; (2) for twenty-one years after the death of the settlor; (3) for the minorities of persons in being at the death of the settlor; (4) for the minorities of the persons who would have been entitled to the profits if no accumulation had been provided for. Kolb v. Landes, 277 Ill. 440, 115 N. E. 539.

Pennsylvania.—See Act Apr. 18, 1853, § 9 (4 Purd. Dig. [13th Ed.] p. 4036, par. 65). The Thellusson Act is followed in the main. Provision is made for an accumulation during the life of the settlor and for a period of twenty-one years after his death, or during the minorities of the persons who would be entitled to the income of the property involved if they were of full age and no provision for an accumulation were made. See In re Neel's Estate, 252 Pa. 394, 97 Atl. 502; In re McKeown's Estate, 259 Pa. 216, 102 Atl. 878; In re Neeb's Estate, 263 Pa. 197, 106 Atl. 317.

[81] Wagner v. Wagner, 244 Ill. 101, 111, 91 N. E. 66, 18 Ann. Cas. 490, quoting 26 Am. & Eng. Encyc. of Law (2d Ed.) p. 138. The intent to restrict alienation may be implied. Hopkinson v. Swaim, 284 Ill. 11, 119 N. E. 985.

of the income of real or personal property to a beneficiary, without liability to alienation by the beneficiary, voluntary or involuntary, prior to its receipt by him. Thus, if A. transfer to B., as trustee, $100,000 in bonds to hold in trust for X., with a provision that B. shall pay to X. the net income of such bonds, but that X. shall not have the right to sell or mortgage his right to receive such income, and that the creditors of X. shall not have the power to attach such income in the hands of the trustee, the trust is a spendthrift trust. Such trusts are frequently highly desirable, where provision is to be made for an inexperienced, incompetent, or wasteful person. If such person had the power to dispose of his right to receive the income from the trust, his incapacity or carelessness would lead him to anticipate his income and convey to money lenders and creditors the right to receive the income as it became due. If the hands of the incompetent or spendthrift can be tied, so that he can do nothing with the income until it is paid into his hands by the trustee, then the beneficiary may be assured against want to some extent at least.

It is never the object of the spendthrift trust to restrain the beneficiary from spending the income after it has been paid to him by the trustee, or to restrain his creditors from taking such income from him after he has obtained it from the trustee. The sole object of these trusts is to prevent anticipation of the income by assignments of the right to receive future income or by attempts by creditors of the cestui to reach this income in the hands of the trustee.

The validity of spendthrift trusts has been much debated; it being contended on the one side that they are against public policy and repugnant to correct theories of property, inasmuch as they provide for the ownership of property without the right of alienation and without the burden of liability for debts, while it is argued in behalf of such trusts that they are in accord with good public policy, that they do not violate rules of property, nor work injustice to creditors.[82]

Minority View

The English courts have consistently opposed such trusts.[83] The English view is maintained by a small number of American courts.[84]

[82] For an excellent discussion of principles and authorities, see Gray, Restraints on Alienation (2d Ed.) especially sections 134–277a. See, also, Scott, Control of Property by the Dead, 65 Pa. Law Rev. 632, 642.

[83] Brandon v. Robinson, 18 Ves. 429; Graves v. Dolphin, 1 Sim. 66.

[84] In Alabama the English rule is observed with some qualifications. A beneficial interest cannot be given to one, so that it is incapable of being reached by his creditors, unless such interest is conferred and is to be enjoyed jointly with others, and is also incapable of severance from the interest of such others. Rugely v. Robinson, 10 Ala. 702; Robertson v. Johnston, 36

The attitude which the American courts which follow the English rule have taken is well expressed by Ames, C. J., speaking for a Rhode Island court: "It is quite clear that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in fee, without the legal incidents of such an estate—alienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property—and, so far as subjectiveness to debts is concerned, to the honest policy of the law—as to be totally void, unless, indeed, which is not the case here, in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since Brandon v. Robinson, 18 Ves. 429; and in application to such a case as this is so honest and just that we would not change it if we could. Certainly no man should have an estate to live on, but not

Ala. 197; Jones v. Reest, 65 Ala. 134; Bell v. Watkins, 82 Ala. 512, 1 South. 92, 60 Am. Rep. 756.

In Florida there appear to be no decisions, but the dicta are unfavorable. Croom v. Ocala Plumbing & Electric Co., 62 Fla. 460, 57 South. 243.

In Kentucky, after some vacillation, the courts seem to have adopted the English rule that spendthrift trusts are not allowed. Hubbard v. Hayes, 98 S. W. 1034; Ratliff's Ex'rs v. Commonwealth, 139 Ky. 533, 101 S. W. 978; Cecil's Trustee v. Robertson & Bro., 105 S. W. 926. "It is not the policy of the law that a person may hold free from the claims of his creditors and enjoy property which is not exempt from execution, and no device will be allowed to work an evasion so long as a beneficial interest is vested in the beneficiary." Cecil's Trustee v. Robertson & Bro., 105 S. W. 926, 928. But if the interest of the beneficiary is owned jointly with others and is inseparable from their interests, the trust may be in effect a spendthrift trust. Hackett's Trustee v. Hackett, 146 Ky. 408, 142 S. W. 673. And the last-named case also hints at a requirement that the creditor show that there is a surplus over and above what is necessary for the support of the beneficiary before he be allowed to take any part of the income. The courts have held valid clauses restraining the cestui que trust from aliening his interest, thereby approving one element of the spendthrift trust. Gillespie v. Winston's Trustee, 170 Ky. 667, 186 S. W. 517; Sparrow v. Sparrow, 171 Ky. 101, 186 S. W. 904; Muir's Ex'rs v. Howard, 178 Ky. 51, 198 S. W. 551.

In Ohio there is a decision and dictum to the effect that spendthrift trusts are not allowed. Wallace v. Smith, 2 Handy, 78; Hobbs v. Smith, 15 Ohio St. 419. But see dictum apparently favorable to spendthrift trusts in Stanley v. Thornton, 7 Ohio Cir. Ct. R. 455. See Babcock v. Monypeny, 34 Ohio Cir. Ct. R. 434.

Spendthrift trusts were declared invalid in Tillinghast v. Bradford, 5 R. I. 205. See Newport Trust Co. v. Chappell, 40 R. I. 383, 101 Atl. 323.

The South Carolina courts are opposed to spendthrift trusts and will not uphold them. Heath v. Bishop, 4 Rich. Eq. 46, 55 Am. Dec. 654; Wylie v. White, 10 Rich. Eq. 294; Ford v. Caldwell, 3 Hill, 248.

The rule in Virginia remained in doubt for many years, but now seems to

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."[85]

Majority View

In a great majority of the American states, however, spendthrift trusts are allowed, either without qualification, or subject to statutory restrictions.[86] In California, Michigan, Minnesota, Montana, New York, North Dakota, Oklahoma, South Dakota, and Wiscon-

have been rendered certain by the decisions of Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944, and Honaker v. Duff, 101 Va. 675, 44 S. E. 900. These cases declare the interest of the beneficiary of an attempted spendthrift trust liable for the beneficiary's debts.

[85] Tillinghast v. Bradford, 5 R. I. 205, 212.

[86] Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254; Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086. *Arizona.*—Civ. Code 1913, § 1224, providing that a spendthrift trust may be created by will. *Arkansas.*—The dicta were unfavorable until the decision of Bowlin v. Citizens' Bank & Trust Co., 131 Ark. 97, 198 S. W. 288, 2 A. L. R. 575, announced that spendthrift trusts are valid. See Lindsay v. Harrison, 8 Ark. 302; Phillips v. Grayson, 23 Ark. 769; Honnett v. Williams, 66 Ark. 148, 49 S. W. 495. *California.*—Civ. Code, § 859; Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544. *Connecticut.*—Mason v. Rhode Island Hospital Trust Co., 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586; Sterling v. Ives, 78 Conn. 498, 62 Atl. 948. *Delaware.*—Gray v. Corbit, 4 Del. Ch. 135, dictum. *District of Columbia.*—Fearson v. Dunlop, 21 D. C. 236. *Georgia.*—Park's Ann. Civ. Code 1914, § 3729; Sinnott v. Moore, 113 Ga. 908, 39 S. E. 415; Moore v. Sinnott, 117 Ga. 1010, 44 S. E. 810. *Illinois.*—Wagner v. Wagner, 244 Ill. 101, 91 N. E. 66, 18 Ann. Cas. 490; Wallace v. Foxwell, 250 Ill. 616, 95 N. E. 985, 50 L. R. A. (N. S.) 632; O'Hare v. Johnston, 273 Ill. 458, 113 N. E. 127; Hartley v. Unknown Heirs of Wyatt, 281 Ill. 321, 117 N. E. 995; Hopkinson v. Swaim, 284 Ill. 11, 119 N. E. 985. *Indiana.*—McCoy v. Houck, 180 Ind. 634, 99 N. E. 97; Devin v. McCoy, 48 Ind. App. 379, 93 N. E. 1013. *Iowa.*—Merchants' Nat. Bank v. Crist, 140 Iowa, 308, 118 N. W. 394, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267; Keating v. Keating, 182 Iowa, 1056, 165 N. W. 74; Kiffner v. Kiffner, 185 Iowa, 1064, 171 N. W. 590; Horack, Spendthrift Trusts in Iowa, 4 Iowa Law Bul. 139. *Kansas.*—Everitt v. Haskins, 102 Kan. 546, 171 Pac. 632; Sherman v. Havens, 94 Kan. 654, 146 Pac. 1030, Ann. Cas. 1917B, 394. *Maine.*—Roberts v. Stevens, 84 Me. 325, 24 Atl. 873, 17 L. R. A. 266; Tilton v. Davidson, 98 Me. 55, 56 Atl. 215. *Maryland.*—Smith v. Towers, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398; Maryland Grange Agency v. Lee, 72 Md. 161, 19 Atl. 534; Jackson Square Loan & Sav. Ass'n v. Bartlett, 95 Md. 661, 53 Atl. 426, 93 Am. St. Rep. 416; Houghton v. Tiffany, 116 Md. 655, 82 Atl. 831; Safe Deposit & Trust Co. of Baltimore v. Independent Brewing Ass'n, 127 Md. 463, 96 Atl. 617; Plitt v. Yakel, 129 Md. 464, 99 Atl. 669. *Massachusetts.*—Hall v. Williams, 120 Mass. 344; Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504, Foster v. Foster, 133 Mass. 179; Wemyss v. White, 159 Mass. 484, 34 N. E. 718; Berry v. Dunham, 202 Mass. 133, 88 N. E. 904; Hale v. Bowler, 215 Mass. 354, 102 N. E. 415; Boston Safe Deposit Co. v. Collier, 222 Mass 390, 111 N. E. 163, Ann. Cas. 1918C, 962. *Michigan.*—How. Ann. St. 1912, § 10681. *Minnesota.*—Gen. St. 1913, § 6712. *Mississippi.*—Leigh v. Harrison, 69 Miss. 923, 11 South. 604, 18 L. R. A. 49; Cady v Lincoln, 100

sin, "where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal prop-

Miss. 765, 57 South. 213. *Missouri.*—Partridge v. Cavender, 96 Mo. 452, 9 S. W. 785; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968; Kessner v. Phillips, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005; Dunephant v. Dickson, 153 Mo. App. 309, 133 S. W. 165; Higbee v. Brockenbrough, 191 S. W. 994. The presumption is against a spendthrift trust. First Nat. Bank v. Burns (App.) 199 S. W. 282. *Montana.*—Rev. Codes, § 4541. *Nebraska.*—Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075. *New Jersey.*—Expressions favorable to spendthrift trusts have appeared in Hardenburgh v. Blair, 30 N. J. Eq. 645, and Wright v. Leupp, 70 N. J. Eq. 130, 62 Atl. 464, but the question has recently been declared to be an open one in Camden Safe Deposit & Trust Co. v. Schellenger, 78 N. J. Eq. 138, 78 Atl. 672, and Brooks v. Davis, 82 N. J. Eq. 118, 88 Atl. 178. See 2 Comp. St. N. J. 1910, p. 2254, §§ 30a, 30b. *New York.*—Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 N. Y. 616, 1 N. E. 251; Sherman v. Skuse, 106 N. Y. 345, 59 N. E. 990; Ullman v. Cameron, 186 N. Y. 339, 78 N. E. 1074, 116 Am. St. Rep. 553; Stringer v. Young, 191 N. Y. 157, 83 N. E. 690; Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251; New York Real Property Law (Consol. Laws, c. 50) §§ 98, 103; Code Civ. Proc. § 1391. In New York the creditors of a cestui que trust have at least three possible remedies. If the trust was created by the cestui for himself, they may resort to a creditor's bill under sections 1871–1879 of the Code of Civil Procedure. Williams v. Thorn, 70 N. Y. 270. If the settlor was another than the beneficiary, the creditor may proceed under section 98 of the Real Property Law to take all the surplus beyond the amount necessary to the support and education of the cestui que trust, or he may proceed under the Garnishment Act, section 1391 of the Code of Civil Procedure, and get 10 per cent. of the trust income, if it is $12 a week or more. Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251; Hoye v. Hipkins, 182 App. Div. 901, 168 N. Y. Supp. 1112. *North Carolina.*—Revisal 1908, § 1588; Vaughan v. Wise, 152 N. C. 31, 67 S. E. 33; Fowler & Lee v. Webster, 173 N. C. 442, 92 S. E. 157. *North Dakota.*—Comp. Laws 1913, § 5369. *Oklahoma.*—Rev. Laws 1910, § 6664. *Oregon.*—Mattison v. Mattison, 53 Or. 254, 100 Pac. 4, 133 Am. St. Rep. 829, 18 Ann. Cas. 218; Winslow v. Rutherford, 59 Or. 124, 114 Pac. 930. *Pennsylvania.*—Norris v. Johnston, 5 Pa. 287; Appeal of Ashhurst, 77 Pa. 464; Thackara v. Mintzer, 100 Pa. 151; Appeal of Grothe, 135 Pa. 585, 19 Atl. 1058; Winthrop Co. v. Clinton, 196 Pa. 472, 46 Atl. 435, 79 Am. St. Rep. 729; Board of Charities & Corrections of City of Philadelphia v. Lockard, 198 Pa. 572, 48 Atl. 496, 82 Am. St. Rep. 817; In re Minnich's Estate, 206 Pa. 405, 55 Atl. 1067. *South Dakota.*—Rev. Code 1919, § 376. *Tennessee.*—Hooberry v. Harding, 3 Tenn. Ch. 677; Staub v. Williams, 5 Lea, 458; Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92; Jobe v. Dillard, 104 Tenn. 658, 58 S. W. 324; First Nat. Bank v. Nashville Trust Co. (Ch. App.) 62 S. W. 392. *Texas.*—Patten v. Herring, 9 Tex. Civ. App. 640, 29 S. W. 388; Wood v. McClelland (Civ. App.) 53 S. W. 381; McCreary v. Robinson (Civ. App.) 57 S. W. 682; Lindsey v. Rose (Civ. App.) 175 S. W. 829; Nunn v. Titche-Goet-

erty, which cannot be reached by execution."[87] In construction of these statutes it has been held that the education and support to which the cestui is entitled is that to which he has been accustomed and to which persons of his class are used.[88] These statutes and their construction have been the subject of bitter criticism by a learned author.[89] In New York the statute has been applied to trusts of personal property as well,[90] but not so in Wisconsin.[91]

The position taken by a majority of the American courts is well stated by Morton, C. J., in a leading Massachusetts case:[92] "His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semiannually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the cestui que trust which would prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

"We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

"It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this

tinger Co. (Civ. App.) 196 S. W. 890. *Vermont.*—White's Ex'r v. White, 30 Vt. 338. *West Virginia.*—Guernsey v. Lazear, 51 W. Va. 328, 41 S. E. 405; Hoffman v. Beltzhoover, 71 W. Va. 72, 76 S. E. 968; Kerns v. Carr, 82 W. Va. 78, 95 S. E. 606, L. R. A. 1918E, 568. *Wisconsin.*—St. 1917, § 2083.

[87] See statutes cited in note 86, ante.

[88] Magner v. Crooks, 139 Cal. 640, 73 Pac. 585; Schuler v. Post, 18 App. Div. 374, 46 N. Y. Supp. 18; Williams v. Thorn, 70 N. Y. 270.

[89] Gray, Restraints (2d Ed.) preface, xi.

[90] Williams v. Thorn, 70 N. Y. 270; In re Williams, 187 N. Y. 286, 79 N. E. 1019.

[91] Williams v. Smith, 117 Wis. 142, 93 N. W. 464.

[92] Broadway Nat. Bank v. Adams, 133 Mass. 170, 173–174, 43 Am. Rep. 504.

commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire jus disponendi, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

It should be noted here that a property owner may not create a spendthrift trust in his own favor, such a trust being considered void as to the creditors of the property owner.[93] To hold otherwise would be to give unexampled opportunity to unscrupulous persons to lay aside their property before engaging in hazardous business enterprises, and thereby to work a gross fraud on creditors who might place reliance on the former prosperity and financial solidity of the debtor.

The result of the rules of law just stated may be illustrated by a practical application. Suppose that A., the owner of a farm, conveys it to X., as trustee, to hold for the benefit of the son of A., who is a spendthrift and profligate. The trust instrument directs that the entire net income shall be paid over to the son in semiannual payments, on January 1st and July 1st. It also provides that the son shall have no power to anticipate the income, and that such income shall not be liable for the debts of the son. In those states in which a spendthrift trust is condemned and held void, the provisions with respect to anticipation and the rights of creditors will be disregarded, and the son will be allowed to assign his rights, and

[93] Hexter v. Clifford, 5 Colo. 168; De Rousse v. Williams, 181 Iowa, 379, 164 N. W. 896; Wenzel v. Powder, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; Pacific Nat. Bank v. Windram, 133 Mass. 175; Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909; Jamison v. Mississippi Valley Trust Co. (Mo.) 207 S. W. 788; Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; Rienzi v. Goodin, 249 Pa. 546, 95 Atl. 259.

his creditors to attach the income as it accumulates in the hands of the trustee. On the other hand, in the majority of American states, since spendthrift trusts are allowed, the settlor's directions will be respected, the son can create no present rights by means of an assignment of his right to receive payments, and the creditors of the son can have a remedy only against such funds as are paid into the son's hands on the 1st of each January and July and cannot compel the trustee to pay any of the income to them directly.

The object of this section is to treat of spendthrift trusts from the point of view of their validity of purpose, to discuss the question as to whether the purpose of providing for spendthrifts or others by means of clauses restricting anticipation of income is a valid trust purpose. The broader question of the rights of creditors of cestuis que trust in all cases, both those of spendthrift trusts and other trusts, will be considered later.[94]

FRAUDULENT PURPOSE

52. Fraudulent conveyances in trust are subject to the same rules as other transfers tainted with fraud, and may be set aside at the instance of the person defrauded.

A voluntary transfer of property to be held in trust for the transferor is conclusively fraudulent and void as against the existing and subsequent creditors of the transferor.

The trust purpose must, of course, be free from fraud. If the trust was created with the actual intent to defraud another, it may be set aside by the person injured.[95] The subject of fraud on creditors by means of trusts will be found treated fully in books devoted to the subject of fraudulent conveyances.[96] It is impossible here to enter into a discussion of the effect of fraud on conveyances in trust. Fraud affects such conveyances as it affects all others.

An early English statute[97] provided that voluntary transfers of personal property to the use of the transferor should be void as against creditors. Many states have adopted similar statutes,[98]

[94] See section 112, post.

[95] Brundage v. Cheneworth, 101 Iowa, 256, 70 N. W. 211, 63 Am. St. Rep. 382; Halliday v. Croom, 9 Lea (Tenn.) 349. The trustee may not attack the trust as fraudulent regarding creditors. Henderson v. Segars, 28 Ala. 352.

[96] Bump, Fraudulent Conveyances; Glenn, Creditors' Rights and Remedies.

[97] St. 3 Henry VII, c. 4.

[98] A typical statute is that of New York: "A transfer of personal property, made in trust for the use of the person making it, is void as against the

and the principle that such trusts are void against creditors is generally in force in the United States.[99] The rule applies to real as well as personal property.[1]

existing or subsequent creditors of such person." Personal Property Law (Consol. Laws, c. 41), § 34.

[99] McDermott v. Eborn, 90 Ala. 258, 7 South. 751; Innis v. Carpenter, 4 Colo. App. 30, 34 Pac. 1011; Johnson v. Sage, 4 Idaho, 758, 44 Pac. 641; Camp v. Thompson, 25 Minn. 175; First Nat. Bank of Joplin v. Woelz, 197 Mo. App. 686, 193 S. W. 614; Racek v. First Nat. Bank of North Bend, 62 Neb. 669, 87 N. W. 542; Ward v. Marie, 73 N. J. Eq. 510, 68 Atl. 1084; Vilas Nat. Bank of Plattsburgh v. Newton, 25 App. Div. 62, 48 N. Y. Supp. 1009; Nolan v. Nolan, 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369; Hornsby v. City Nat. Bank (Tenn. Ch. App.) 60 S. W. 160; Petty v. Moores Brook Sanitarium, 110 Va. 815, 67 S. E. 355, 27 L. R. A. (N. S.) 800, 19 Ann. Cas. 271; Stapleton v. Brannan, 102 Wis. 26, 78 N. W. 181.

[1] Sandlin v. Robbins, 62 Ala. 477, 485.

CHAPTER VII

THE TRUST PURPOSE—CHARITABLE TRUSTS

DEFINITION

53. A charitable or public trust is a trust for the benefit of indefinite persons to be selected by the trustee from all mankind or from a certain class.

The charitable trust must tend to the physical, spiritual, or mental improvement of society; it need not be for the benefit of persons in actual poverty or distress; the beneficiaries must be indefinite, unascertained persons.

If the trust is for a mixed private and public purpose, it will fail because of indefiniteness.

The motive of the settlor of a charitable trust is unimportant, if actual charitable purposes are accomplished by it.

In the preceding chapter the purposes for which private trusts may be created have been discussed. The purposes for which charitable trusts may be created will next be treated.

A charitable trust is frequently called a public trust,[1] or merely a charity.[2]

[1] Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; Holman v. Renaud, 141 Mo. App. 399, 125 S. W. 843.

[2] Smith v. Havens Relief Fund Soc., 44 Misc. Rep. 594, 90 N. Y. Supp. 168; In re Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

The charitable trust will first be generally defined, and in later sections that definition will be amplified and illustrated.

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government." [3]

"It [a charitable trust] includes everything that is within the letter and spirit of the Statute of Elizabeth,[4] considering such spirit to be broad enough to include whatever will promote, in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons." [5] Eminent counsel has stated that it includes "whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." [6] "Lord Camden defined a charity as 'a gift to a general public use, which extends to the poor as well as to the rich.' * * * This definition is at once concise and comprehensive, and has been adopted by the Supreme Court of the United States. * * * It was also approved by Chancellor Kent. * * *" [7] "The word 'charity,' as used in law, has a broader meaning and includes substantially any scheme or effort to better the condition of society or any considerable part thereof. It has been well said that any gift not inconsistent with existing laws, which is promotive of science or tends to the education, enlightening, benefit, or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience, is a charity." [8] Other definitions of the charitable trust in America will be found to be variations of those quoted above.[9]

[3] Gray, J., in Jackson v. Phillips, 14 Allen (Mass.) 539, 556.

[4] See post, § 54.

[5] Harrington v. Pier, 105 Wis. 485, 520, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[6] Mr. Binney in Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205.

[7] Grant v. Saunders, 121 Iowa, 80, 81, 95 N. W. 411, 100 Am. St. Rep. 310.

[8] Wilson v. First Nat. Bank of Independence, 164 Iowa, 402, 145 N. W. 948, 952, Ann. Cas. 1916D, 481.

[9] Burke v. Roper, 79 Ala. 138; In re Lennon's Estate, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024; Ford v. Ford's Ex'r, 91 Ky. 572, 16 S. W. 451; Carter v. Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. (N. S.) 733; Johnson v. Bowen, 85 N. J. Eq. 76, 95 Atl. 370; Miller

An analysis of these definitions of the charitable trust and a study of other cases will, it is submitted, show several separate elements in the composition of the trust:

First, the trust must be for the mental, spiritual, or physical improvement of mankind. It must not have a useless or frivolous purpose. It is not sufficient that an indefinite number of persons, to be selected by the trustees from a class, are to receive something under the trust, unless the recipients will thereby be substantially benefited. "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."[10]

Secondly, a charitable trust is not necessarily confined to alms-giving. The beneficiaries of it need not be in poverty and unable to buy the benefits which the charity will give them. A charitable trust is for the improvement of mankind, rich or poor. "It [a charitable trust] is not confined to mere alms-giving, or the relief of poverty and distress, but has a wider signification, which embraces the improvement of the happiness of man."[11] "While poverty is the condition generally recognized in the bestowal of public charity upon individuals, it is not the only condition, as abundantly appears from the authorities. Indeed, it is not the fact of poverty alone which makes a person a proper object of charity, and this is shown by the existence of penal laws in England, along with the law of public charities, for the punishment of sturdy beggars. It is the need or want of food, clothing, shelter, or other bodily ministrations, so commonly found among the poor, which prompts the exercise of public charity to that class. But a person who is sick, injured, or afflicted, or in a helpless condition, is none the less a proper object to be included in the purposes of a public charity, although he may not be poor."[12] In accord with this principle it is held that an institution which is partly supported by

v. Porter, 53 Pa. 292; Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; Maxcy v. City of Oshkosh, 144 Wis. 238, 128 N. W. 899, 31 L. R. A. (N. S.) 787.

[10] Ould v. Washington Hospital, 95 U. S. 303, 311, 24 L. Ed. 450. For illustrations of trusts held invalid as charitable trusts, see post, § 62.

[11] New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 342, 91 N. E. 385.

[12] Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415, 420, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50. To the same effect, see American Academy of Arts and Sciences v. President, etc., of Harvard College, 78 Mass. (12 Gray) 582; Little v. City of Newburyport, 210 Mass. 414, 96 N. E. 1032, Ann. Cas. 1912D, 425; Godfrey v. Hutchins, 28 R. I. 517, 68 Atl. 317.

charges made to the public and partly by means of gifts is a charitable institution.[13]

Thirdly, it should be noticed that the beneficiaries of a charitable trust must be indefinite, unascertained persons, to be selected by the trustee. If the cestuis are known and identified, the trust may be valid as a private trust; but it cannot be a good charitable trust, although the purpose of it may be the improvement of the spiritual, mental, or physical condition of the beneficiaries. It is an essential of charitable trusts that they be for the benefit of the entire public or some class thereof, and that no certain persons shall be entitled to claim the benefit of the trust until they are chosen by the trustee as beneficiaries. This uncertainty of beneficiaries is as much a requisite of charitable trusts as certainty of beneficiaries is an essential of private trusts.[14] But, where the principal gift is to a large class of the public, an expression by the settlor of a desire that the trustees prefer his relatives in administering the fund does not make the trust a trust for definite persons and so void as a charitable trust. The trust is for unascertained persons, to be selected by the trustees, with a request that certain definite persons be preferred in the making of such selection.[15]

Fourthly, the class to be benefited by the charitable trust must not be too small. It must be some considerable portion of the public, as, for example, the poor of a given city, or needy clergymen of a given denomination. Just how small this class may be is difficult to determine. A trust for the benefit of the widows and orphans of the future ministers of a given church has been held to be a valid charitable trust, notwithstanding the fact that the class would doubtless be very small.[16] And so, too, the smallness of the class was held to be no objection to the validity of the char-

[13] New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 91 N. E. 385; Little v. City of Newburyport, 210 Mass. 414, 96 N. E. 1032, Ann. Cas. 1912D, 425; In re MacDowell's Will, 217 N. Y. 454, 112 N. E. 177, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853; Butterworth v. Keeler, 219 N. Y. 446, 114 N. E. 803.

[14] Moseley v. Smiley, 171 Ala. 593, 55 South. 143; People v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; Erskine v. Whitehead, 84 Ind. 357; Ripley v. Brown, 218 Mass. 33, 105 N. E. 637; Hunt v. Edgerton, 29 Ohio Cir. Ct. R. 377; Franklin's Adm'x v. City of Philadelphia, 2 Pa. Dist. R. 435; Richtman v. Watson, 150 Wis. 385, 136 N. W. 797. Upon the subject of the necessity of definite beneficiaries in private trusts, see post, § 108.

[15] Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110; Dexter v. Harvard College, 176 Mass. 192, 57 N. E. 371; In re MacDowell's Will, 217 N. Y. 454, 112 N. E. 177, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853.

[16] Sears v. Attorney General, 193 Mass. 551, 79 N. E. 772, 9 Ann. Cas. 1200.

itable trust where the beneficiaries were to be indigent and needy Masons in Boston and vicinity.[17] On the other hand, a trust for the benefit of the testator's lineal descendants,[18] or for the purpose of educating the descendants of two persons named,[19] is not a valid charitable trust.

Fifthly, the trust must be solely for charitable purposes. The use of the property by the trustees must be limited to charitable objects. If the trustees are allowed discretion as to the disposition of the property, and may apply it to purposes not charitable, as well as to charitable purposes, then the trust must fail. It is for a mixed private and public purpose, and, since it is impossible to decide how much of the property should be applied to the charitable purposes, the trust cannot be enforced as a charitable trust, even in part. It is too indefinite. For example, a trust to apply funds to the benefit of such charities, institutions of learning and science and to the promotion of such inventions and discoveries as the trustees shall select is a trust for mixed private and public purposes and will be held invalid.[20] And so, too, a trust for the benefit of "religious, educational or eleemosynary institutions," since it may be used to benefit noncharitable educational institutions, is for purposes which may be partly private and partly public, and is hence void.[21] And, with respect to a gift to "humanity's friend, * * * B., to use and expend the same for the promotion of the religious, moral, and social welfare of the people in any locality," the Court of Chancery in New Jersey has said: "The trust here attempted to be created must therefore fail because too general and indefinite, and by the course of decision in this state, it must fail altogether."[22] The trust might be administered for both private and charitable purposes. But that the administration of a charitable trust may incidentally benefit private persons, not beneficiaries of the trust and who needed no aid, is not an

[17] Masonic Education and Charity Trust v. City of Boston, 201 Mass. 320, 87 N. E. 602.

[18] Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667.

[19] Johnson v. De Pauw University, 116 Ky. 671, 76 S. W. 851, 25 Ky. Law Rep. 950. But see Gafney v. Kenison, 64 N. H. 354, 10 Atl. 706, and Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278, where trusts for the benefit of needy relatives were held to be charitable trusts. Such trusts might well be held to lack the unselfish motive necessary to a charitable trust and to be mere private trusts of an indefinite nature.

[20] Sutro's Estate, 155 Cal. 727, 102 Pac. 920.

[21] In re Shattuck's Will, 193 N. Y. 446, 86 N. E. 455.

[22] Livesey v. Jones, 55 N. J. Eq. 204, 207, 35 Atl. 1064. To the same effect, see Moseley v. Smiley, 171 Ala. 593, 55 South. 143; Attorney General v. Soule, 28 Mich. 153; Mason v. Perry, 22 R. I. 475, 48 Atl. 671.

objection to a charitable trust. Thus, a trust for the education of poor children within a certain district is valid, even though the administration of it might incidentally lessen the burden of taxation upon the rich as well as the poor in that district.[23]

Sixthly, the motive of the settlor of the charitable trust is not important. Whether he intended to benefit humanity or not, is irrelevant, if the actual effect of his gift will be to benefit humanity. Thus, that a settlor of a trust to establish a drinking fountain for horses provided for the erection of a monument of a certain favorite horse on the fountain, and desired to perpetuate the memory of the horse by his gift, is not important in determining the validity of the gift, since its general result will be to benefit the animals in the community. "Courts, in determining whether or not a gift is charitable, will not look to the motives of the donor, but rather to the nature of the gift and the object which will be attained by it."[24]

Nor is the wisdom of the gift made for the benefit of charity an important consideration. If it is for charitable purposes, it should be supported by the courts, even though equity believes that the settlor could have made a wiser disposition of his property.[25]

HISTORY—STATUTE OF CHARITABLE USES

54. Prior to 1601 charitable uses were recognized and enforced by the English Court of Chancery. In 1601 the Statute of Charitable Uses was enacted. It enumerated some of the more important charities then in force and provided for their better protection and enforcement.

The Statute of Charitable Uses is considered a part of the common law of some American states, while in others it is held to have no force. In nearly all states all charitable trusts are enforced, either because of the adoption of the English Statute of Charitable Uses or the English common law, or upon the basis of the broad, general powers of

[23] Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369.

[24] In re Graves' Estate, 242 Ill. 23, 29, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137. See, also, In re Coleman's Estate, 167 Cal. 212, 138 Pac. 992, Ann. Cas. 1915C, 682; Haggin v. International Trust Co. (Colo.) 169 Pac. 138, L. R. A. 1918B, 710; Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; French v. Calkins, 252 Ill. 243, 96 N. E. 877; Bills v. Pease, 116 Me. 98, 100 Atl. 146, L. R. A. 1917D, 1060; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158.

[25] Chapman v. Newell, 146 Iowa, 415, 125 N. W. 324.

equity. In a few jurisdictions charitable trusts have a very limited existence, and in one state they are prohibited by the state Constitution.

In 1601 the English Parliament enacted a statute which has come to be known as the Statute of Charitable Uses.[26] This act recited that property had been given for charitable purposes and that the trustees of the charities were, in many cases, neglecting the performance of their duties, and it then proceeded to provide for the enforcement of these charitable trusts by the appointment of commissioners by the Chancellor.

It seems to have been the view of some courts, manifested in early decisions, that the Statute of Charitable Uses *created* charities and that they have no life separate and apart from that statute and its successors.[27] This question was carefully considered by Mr. Justice Story in the important case of Vidal v. Girard's Ex'rs.[28] That learned judge there showed that charitable uses were known and supported prior to the Statute of Charitable Uses; that the Statute recognized the existence of such uses and merely provided for their enforcement. He referred to the views of English judges which supported his contention and also to the then recent report of the Commissioners of Public Records in England, in which a collection of early chancery cases involving charitable trusts was made. Of these early cases, prior to the Statute of Charitable Uses, he said: "They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature; but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees

[26] St. 43 Eliz. c. 4. It enumerated the following as purposes for which charities had been established at that time: Relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, repair of bridges, ports, havens, causeways, churches, seabanks and highways, education and preferment of orphans, relief, stock or maintenance of houses of correction, marriages of poor maids, supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed, relief and redemption of prisoners and captives, aid of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes. 7 Pickering's English Statutes, p. 43.

[27] Philadelphia Baptist Ass'n v. Hart, 4 Wheat. 1, 4 L. Ed. 499; Gass v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; Dashiell v. Attorney General, 5 Har. & J. (Md.) 392, 9 Am. Dec. 572; Griffin v. Graham, 8 N. C. (1 Hawks) 96, 9 Am. Dec. 619.

[28] 2 How. 127, 11 L. Ed. 205.

appointed, or the trustees were not competent to take."[29] To the report of this case is attached a schedule of early cases in chancery, showing the existence of charitable uses prior to the Statute of Elizabeth.[30]

That charitable uses were not created by the Statute of Charitable Uses, but have an independent existence in chancery, aside from that statute, is now well recognized.[31]

The extent to which the English Statute of Charitable Uses and the English system of charities are recognized in America varies from state to state.[32] In Virginia, West Virginia, and Maryland the courts were early led into error by the decision of the United States Supreme Court in Philadelphia Baptist Ass'n v. Hart,[33] and held that charitable uses depended on the statute, and that, the statute not being in force in those jurisdictions, no charitable trusts could exist.[34] This early mistake has been somewhat rectified by legislation, sanctioning some, though by no means all, charitable trusts.[35]

In New York the English Statute of Charitable Uses was repudiated in 1788.[36] The Revised Statutes of 1830 provided for only four classes of express trusts in land and did not mention chari-

[29] 2 How. 127, 196, 11 L. Ed. 205.

[30] 2 How. 127, 155, 11 L. Ed. 205.

[31] Carter v. Balfour Adm'r, 19 Ala. 814; In re Hinckley's Estate, 58 Cal. 457; State v. Griffith, 2 Del. Ch. 392; Beall v. Fox's Ex'rs, 4 Ga. 404; Grimes' Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; Miller v. Chittenden, 2 Iowa, 315; Tappan v. Deblois, 45 Me. 122; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Chambers v. City of St. Louis, 29 Mo. 543; Williams v. Williams, 8 N. Y. 525; Griffin v. Graham, 8 N. C. (1 Hawks) 96, 9 Am. Dec. 619; Landis v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615; Zimmerman v. Anders, 6 Watts & S. (Pa.) 218, 40 Am. Dec. 552; Shields v. Jolly, 1 Rich. Eq. (S. C.) 99, 42 Am. Dec. 349; Hopkins v. Upshur, 20 Tex. 89, 70 Am. Dec. 375; Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154.

[32] A valuable summary of the history and present status of charities is given by Mr. Carl Zollman in 19 Col. Law Rev. 91, 286. See, also, M. A. Barwise, The Modern Charitable Trust, 9 Me. Law Rev. 225.

[33] 4 Wheat. 1, 4 L. Ed. 499.

[34] Gallego's Ex'rs v. Attorney General, 3 Leigh, 450, 24 Am. Dec. 650; American Bible Soc. v. Pendleton, 7 W. Va. 79; State v. Warren, 28 Md. 338.

[35] Code Va. 1904, §§ 1396–1426; Barnes' W. Va. Code 1916, c. 57 (Code W. Va. 1913, c. 57, §§ 1–11 [secs. 3292–3304]); Const. Md. Declaration of Rights, art. 38; Ann. Code Md. art. 23, § 354; Board of Foreign Missions of General Synod of Evangelical Lutheran Church v. Shoemaker, 133 Md. 594, 105 Atl. 748. Instead of validating all charitable gifts, the Legislature of Maryland seems to adopt the cumbersome method of sanctioning specific charitable gifts from year to year. See Laws Md. 1916, c. 369; Laws Md. 1918, cc. 285, 453.

[36] Laws 1788, c. 46; Beekman v. Bonsor, 23 N. Y. 298, 307, 80 Am. Dec. 269.

table trusts.[37] It became a much-disputed question whether charitable trusts had any existence after the adoption of the Revised Statutes. On the one hand, it was claimed that no charitable trust could exist, since the Statute of Charitable Uses was not in force and since the Revised Statutes made no provision for charitable trusts. On the other, it was maintained that the original jurisdiction of chancery over charitable trusts, irrespective of the Statute of Elizabeth, ought to enable the courts to support charitable trusts. This contention went on for many years; the courts at first leaning to the view that charitable trusts could be supported under equity's general jurisdiction, but later taking a definite stand that charitable trusts were not possible in New York, in view of the statute of 1788 and the Revised Statutes of 1830.[38] The only method by means of which a charitable object could be accomplished during this period was by a gift to a charitable corporation absolutely, either by a donation to a corporation already in existence or to one to be formed within the period allowed by the rule against perpetuities; that is, two lives in being.[39] In 1893 the Legislature passed what was known as the Tilden Act, which has restored the English system of charities as it was in force before the Revolution.[40]

In Michigan, Wisconsin, and Minnesota the history of charitable trusts has been somewhat similar to that of New York. Early legislation in these three states repudiated the Statute of Elizabeth and also adopted practically verbatim the New York chapter on uses and trusts, which declared that only four enumerated real property trusts were valid and made no mention of charitable trusts.[41] In Michigan and Minnesota this was held to prohibit charitable trusts both as to real and personal property;[42] in Wisconsin,

[37] See ante, § 47.

[38] Williams v. Williams, 8 N. Y. 525; Bascom v. Albertson, 34 N. Y. 584; Holmes v. Mead, 52 N. Y. 332; Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

[39] Wetmore v. Parker, 52 N. Y. 450; Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; Riker v. Leo, 115 N. Y. 93, 21 N. E. 719; Bird v. Merklee, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423.

[40] Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Murray v. Miller, 178 N. Y. 316, 70 N. E. 870; Trustees of Sailors' Snug Harbor in City of New York v. Carmody, 211 N. Y. 296, 105 N. E. 543; New York Real Property Law (Consol. Laws, c. 50) § 113; New York Personal Property Law (Consol. Laws, c. 41) § 12.

[41] Rev. St. Mich. 1846, c. 63; Rev. St. Wis. 1849, c. 57; St. Minn. 1851, c. 44.

[42] Methodist Episcopal Church of Newark v. Clark, 41 Mich. 730, 3 N. W.

as a result of this legislation, charitable trusts of realty were held to be impossible,[43] but gifts of personalty in trust for charitable uses were allowed, because the Statute of Uses and Trusts had no application to personal property.[44] Recent legislation in Michigan and Wisconsin has validated all charitable trusts by statutes modeled after the Tilden Act of New York.[45] A general charitable trust act in Minnesota was declared unconstitutional because of a defect in its title;[46] but statutes give municipal charitable trusts of real and personal property limited scope for operation.[47]

In Mississippi a constitutional provision bars charitable trusts.[48]

In the remainder of the states charitable trusts have from the beginning been enforced, either because of the adoption of the Statute of Elizabeth or the common law of England, or because of the enactment of statutes similar to the Statute of Elizabeth, or merely on the basis of equity's general jurisdiction.[49]

207; Hopkins v. Crossley, 132 Mich. 612, 96 N. W. 499; Little v. Willford, 31 Minn. 173, 17 N. W. 282; Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948.

[43] Danforth v. City of Oshkosh, 119 Wis. 262, 97 N. W. 258.

[44] Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

[45] Pub. Acts Mich. 1907, No. 122, formerly How. Ann. St. Mich. 1912, § 10700, but repealed by Pub. Acts Mich. 1915, No. 280, which re-enacts sections 10700 and 10701, How. Ann. St. 1912, and adds the sentence, "Every such trust shall be liberally construed by such court so that the intentions of the creator thereof shall be carried out whenever possible," and validates all gifts under the former statute. In re Brown's Estate, 198 Mich. 544, 165 N. W. 929; St. Wis. 1917, § 2081, subds. 6, 7; Williams v. City of Oconomowoc, 167 Wis. 281, 166 N. W. 322.

[46] Laws Minn. 1903, c. 132; Watkins v. Bigelow, 93 Minn. 210, 100 N. W. 1104.

[47] Gen. St. Minn. 1913, § 6710, subd. 7, as amended by Laws 1915, c. 98 (Gen. St. Supp. 1917, § 6710). See E. S. Thurston, Charitable Gifts in Minnesota, 1 Minn. Law Rev. 201.

[48] Const. 269, 270.

[49] Carter v. Balfour's Adm'r, 19 Ala. 814; Biscoe v. Thweatt, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; In re Hinckley's Estate, 58 Cal. 457; Mills' Ann. St. Colo. 1912, § 6992; Clayton v. Hallett, 30 Colo. 281, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; Haggin v. International Trust Co. (Colo.) 169 Pac. 138, L. R. A. 1918B, 710; Gen. St. Conn. 1918, § 5081; Eccles v. Rhode Island Hospital Trust Co., 90 Conn. 592, 98 Atl. 129; Doughten v. Vandever, 5 Del. Ch. 51; Park's Ann. Civ. Code Ga. §§ 4603–4608; Bolick v. Cox, 145 Ga. 888, 90 S. E. 54; 6 Jones & A. Ann. St. Ill. 1913, p. 6443; Erskine v. Whitehead, 84 Ind. 357; Beidler v. Dehner, 178 Iowa, 1338, 161 N. W. 32; Ky. St. §§ 317–319; Simmons' Ex'r v. Hunt, 171 Ky. 397, 188 S. W. 495; Miller v. Tatum, 131 Ky. 490, 205 S. W. 557; Act No. 124 of 1882, La.; Succession of Meunier, 52 La. Ann. 79, 26 South. 776, 48 L. R. A. 77; Preachers' Aid Soc. of Maine Conference of Methodist Episcopal Church v. Rich, 45 Me. 552; Bills v. Pease, 116 Me. 98, 100 Atl. 146, L. R. A.

The enumeration of charitable purposes in the Statute of Charitable Uses is not considered exclusive, even in those states where that statute is adopted as a part of the common law. Many other analogous and similar purposes are allowed as valid charitable objects. The statute merely set forth some of the more common charities then in force.[50] "From the foregoing authorities, it clearly appears that the statute cannot be looked to as the sole test of what is a public charity, but that 'many other uses, not named, and not within the strict letter of the statute, but which, coming within its spirit, equity and analogy, are considered charitable.'" [51]

The English law with respect to charitable trusts is affected by two recent statutes.[52]

1917D, 1060; Sanderson v. White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204; Const. Mo. art. 2, § 8; Rev. St. Mo. 1909, § 8047; Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50; Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 175 S. W. 571; In re Nilson's Estate, 81 Neb. 809, 116 N. W. 971; In re Hartung's Estate, 40 Nev. 262, 160 Pac. 782; Gagnon v. Wellman, 78 N. H. 327, 99 Atl. 786; Board of Education of City of Albuquerque v. School Dist. No. 5 of Bernalillo County, 21 N. M. 624, 157 Pac. 668; Revisal N. C. 1908, §§ 3922, 3923; Hagen v. Sacrison, 19 N. D. 160, 123 N. W. 518, 26 L. R. A. (N. S.) 724; Landis v. Wooden, 1 Ohio St. 160, 59 Am. Dec. 615; Pennoyer v. Wadhams, 20 Or. 274, 25 Pac. 720, 11 L. R. A. 210; 1 Purd. Pa. Dig. (13th Ed.) p. 592 et seq.; In re Close's Estate, 260 Pa. 269, 103 Atl. 822; Rhode Island Hospital Trust Co. v. Olney, 14 R. I. 449; Shields v. Jolly, 1 Rich. Eq. (S. C.) 99, 42 Am. Dec. 349; Gibson v. Frye Institute, 137 Tenn. 452, 193 S. W. 1059, L. R. A. 1917D, 1062; Hopkins v. Upshur, 20 Tex. 89, 70 Am. Dec. 375; Lightfoot v. Poindexter (Tex. Civ. App.) 199 S. W. 1152; United States v. Late Corporation of Church of Jesus Christ of Latter-Day Saints, 8 Utah, 310, 31 Pac. 436; Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154; In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; Susmann v. Young Men's Christian Ass'n of Seattle, 101 Wash. 487, 172 Pac. 554; Comp. St. Wyo. 1910, § 3588.

[50] Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; Garrison v. Little, 75 Ill. App. 402; Strother v. Barrow, 246 Mo. 241, 151 S. W. 960; Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; In re Kimberly's Estate, 249 Pa. 483, 95 Atl. 86; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[51] Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415, 420, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

[52] Mortmain and Charitable Uses Act, 51 & 52 Vict. c. 2 (1888); Charitable Uses Act, 54 & 55 Vict. c. 73 (1891).

INDEFINITENESS OF PURPOSE

55. While a charitable trust must be indefinite as to beneficiaries, it must be definite as to purpose. If the attempted charitable trust is so vague or indefinite as to the class to be benefited or the purpose to be accomplished that it is incapable of being understood, equity will declare it void.

It has previously been shown that indefiniteness of *beneficiaries* is necessary to a charitable trust. On the other hand, indefiniteness of *purpose* is fatal to a charitable trust, as it is to a private trust.

If a contract is so uncertain, vague, and indefinite that its meaning cannot be ascertained by a court, the court will declare it void for uncertainty, and will not specifically enforce it or give damages for its breach. Any transaction from which it is claimed legal or equitable rights have arisen may be so ambiguous and equivocal that courts cannot give effect to it. A trust, private or public, is no exception to this rule. If the court cannot tell what the settlor meant to be done by the trustee, it cannot tell whether the trustee has performed his duty, it cannot direct the trustee, and it will decline to sustain the trust.

While the settlor of a charitable trust must leave the selection of the specific beneficiaries to the trustees, the settlor must make clear the class from which the selection is to be made. The settlor, if he wishes the trust to be charitable, must not make the beneficiaries A., B., and C., definite persons; but he must clearly name the class from which the trustee may select definite persons, as, for example, the poor of the town of X., or all the Protestant clergymen of the state of Michigan.

This rule against too great vagueness and uncertainty of purpose has been variously stated by the courts. The New York Court of Appeals has said that a charitable trust "may be so indefinite and uncertain in its purposes as distinguished from its beneficiaries as to be impracticable, if not impossible for the courts to administer." [53] "It is sufficient if there be a trust and a particular charitable purpose, as distinguished from a gift to charity generally. * * * A public charity, within the rule mentioned, is sufficiently definite as to purpose if its general nature be clearly stated, or it can be made otherwise certain by the trustees clothed with the power of administering the trust within the limits of the declared

[53] In re Shattuck's Will, 193 N. Y. 446, 451, 86 N. E. 455.

purpose." [54] "Indefiniteness as to the individual beneficiary is no objection to the validity of a charitable trust. On the contrary, such indefiniteness is rather a characteristic feature of a good devise to charitable uses. It is sufficient if the *class* to be benefited is designated in a general way and the practical application of the gift to its intended uses is confided to a trustee."[55] "It is necessary only that the object of a benevolent trust should be certain. To designate the individuals who are intended to be benefited would be to destroy its character as a charitable trust."[56]

No rules can be stated which will be of much assistance in determining when a charitable trust is too vague as to purpose and when not. The following illustrative cases will show the practical construction given to the words "vagueness" and "indefiniteness of purpose."

The following directions concerning charitable trusts have been held to be sufficiently definite as to purpose and class, and, therefore, to create enforceable trusts: To be expended in said city by the erection of schoolhouses for the education of the poor; [57] to be used for the benefit of the white public schools or for a city hospital, as the city authorities should elect; [58] to the vestrymen of a church, to be used as they deem best for the interests of the church; [59] to be devoted perpetually to human beneficence and charity; [60] in trust for the worthy poor of the town of P., as may be in needy and necessitous circumstances, and in any misfortune; [61] for the support of the poor of a certain county; [62] for the diffusion of useful knowledge and instruction among the institutes, clubs or meetings of the working classes, or manual laborers, by the sweat of their brow; [63] to establish at I. an industrial training school for children and a library to be used by the people of I.; [64] to be used in distributing Bibles to the poor and destitute; [65] for the establishment of a home for poor

[54] Harrington v. Pier, 105 Wis. 485, 504, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[55] Wilson v. First Nat. Bank of Independence, 164 Iowa, 402, 145 N. W. 948, 951, Ann. Cas. 1916D, 481.

[56] Hays v. Harris, 73 W. Va. 17, 80 S. E. 827, 830.

[57] Handley v. Palmer (C. C.) 91 Fed. 948.

[58] City of Huntsville v. Smith, 137 Ala. 382, 35 South. 120.

[59] Biscoe v. Thweatt, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136.

[60] In re Hinckley's Estate, Myr. Prob. (Cal.) 189.

[61] Strong's Appeal, 68 Conn. 527, 37 Atl. 395.

[62] Heuser v. Harris, 42 Ill. 425.

[63] Sweeney v. Sampson, 5 Ind. 465.

[64] Wilson v. First Nat. Bank of Independence, 164 Iowa, 402, 145 N. W. 948, Ann. Cas. 1916D, 481.

[65] Kasey v. Fidelity Trust Co., 131 Ky. 609, 115 S. W. 739.

Catholic men;[66] to be used in the dissemination of the gospel at home and abroad;[67] in trust to be used purely and solely for charitable purposes, for the greatest relief of human suffering, human wants, and for the good of the greatest number;[68] for benevolent and charitable purposes;[69] to the cause of Christ, for the benefit and promotion of true evangelical piety and religion;[70] for the propagation of the Christian religion among the heathen;[71] to be applied for the promotion of agricultural or horticultural improvement, or other philosophical or philanthropic purposes, at their discretion;[72] for such charitable objects as the trustee shall think proper;[73] for the repair and maintenance of parsonages and church edifices and secondarily for the general advancement of Christianity;[74] for the benefit of the poor in the state and for charitable and benevolent purposes therein;[75] for the promotion of the religion of Christian Science, as taught by me;[76] to provide shelter, necessaries of life, education, general or specific, and such other financial aid as may seem to them fitting and proper to such other persons as they shall select as being in need of the same;[77] to be applied to the benefit of such charitable and benevolent associations and institutions of learning for the general uses and purposes of such associations and institutions as my said executors shall select;[78] to the advancement of the Christian religion;[79] for foreign missionary work;[80] for such religious, charitable and benevolent purposes as the trustees think best;[81] for the tuition of

[66] Coleman v. O'Leary's Ex'r, 114 Ky. 388, 70 S. W. 1068.

[67] Attorney General v. Wallace's Devisees, 7 B. Mon. (46 Ky.) 611.

[68] Everett v. Carr, 59 Me. 325. "To be spent in charity in Italy and New York City" is not too indefinite. Stewart v. Franchetti, 167 App. Div. 541, 153 N. Y. Supp. 453.

[69] Fox v. Gibbs, 86 Me. 87, 29 Atl. 940.

[70] Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645.

[71] Phillips Academy v. King, 12 Mass. 546. A gift "for missions and like good objects" is valid. Coffin v. Attorney General, 231 Mass. 579, 121 N. E. 397.

[72] Rotch v. Emerson, 105 Mass. 431.

[73] Gill v. Attorney General, 197 Mass. 232, 83 N. E. 676.

[74] Sandusky v. Sandusky, 261 Mo. 351, 168 S. W. 1150.

[75] Haynes v. Carr, 70 N. H. 463, 49 Atl. 638.

[76] Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

[77] In re Robinson's Will, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[78] In re Cunningham's Will, 206 N. Y. 601, 100 N. E. 437.

[79] Miller v. Teachout, 24 Ohio St. 525.

[80] Presbyterian Board of Foreign Missions v. Culp, 151 Pa. 467, 25 Atl. 117.

[81] In re Dulles' Estate, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177.

poor children;[82] for the benefit of public schools;[83] for mission work in the United States;[84] for such charitable purposes and uses as the trustees may select.[85]

On the other hand, the following provisions have been held too vague and indefinite as to purpose to create valid charitable trusts: For the benefit of widows and orphans of Masons or other worthy objects of charity, and, if G. should be living and could be found, for his benefit also;[86] for the publication of a revised edition of the New Testament, King James version;[87] for the most deserving poor of the city of N.;[88] for the benefit of a designated anti-saloon league;[89] for the education of pious, indigent youth who are preparing themselves for the ministry and those who adhere strictly to the Westminster Confession in its literal meaning;[90] to be divided among the Sisters of Charity by T., M., and R.;[91] for good and charitable purposes, according to the judgment of the trustee;[92] to the Jesuit order for the purposes of education or religion;[93] for the purpose of converting and Christianizing the African race;[94] for religious and charitable purposes and objects, in such sums and in such manners as will, in the trustee's judgment, best promote the cause of Christ;[95] to the owner of a sanitarium to be used as he sees best for carrying on the work of relieving suffering;[96] to advance the cause of religion and promote the cause of charity in such a manner as the wife of the settlor might think would be most conducive to carrying out the settlor's wishes;[97] to a trustee for

[82] Dye v. Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724.

[83] Bell County v. Alexander, 22 Tex. 350, 73 Am. Dec. 268.

[84] Jordan v. Universalist General Convention Trustees, 107 Va. 79, 57 S. E. 652.

[85] In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

[86] Crim v. Williamson, 180 Ala. 179, 60 South. 293.

[87] In re Budd's Estate, 166 Cal. 286, 135 Pac. 1131.

[88] Hughes v. Daly, 49 Conn. 34.

[89] Volunteers of America v. Peirce, 267 Ill. 406, 108 N. E. 318.

[90] McCord v. Ochiltree, 8 Blackf. (Ind.) 15.

[91] Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443.

[92] Gerick's Ex'r v. Gerick, 158 Ky. 478, 165 S. W. 695. Under the Kentucky statute a gift "for charity" has been held too uncertain. Simmons' Ex'r v. Hunt, 171 Ky. 397, 188 S. W. 495.

[93] Coleman v. O'Leary's Ex'r, 114 Ky. 388, 70 S. W. 1068.

[94] Rizer v. Perry, 58 Md. 112.

[95] Maught v. Getzendanner, 65 Md. 527, 5 Atl. 471, 57 Am. Rep. 352. In Jones v. Patterson, 271 Mo. 1, 195 S. W. 1004, L. R. A. 1917F, 660, a gift "for missionary purposes for the propagation of the Christian religion" was held void.

[96] Stoepel v. Satterthwaite, 162 Mich. 457, 127 N. W. 673.

[97] Hadley v. Forsee, 203 Mo. 418, 101 S. W. 59, 14 L. R. A. (N. S.) 49.

the purpose of making such distribution among religious, benevolent and charitable objects as he may select;[98] to use as the trustee may desire in the Master's work;[99] to the poor of a certain church;[1] for the Lord's work;[2] to be applied to foreign missions and poor saints;[3] to be used in a manner best to promote the interest of the church and the cause of God;[4] for the benefit of the New Jerusalem Church, as the trustees deem best;[5] for the propagation of the gospel in foreign lands;[6] for the benefit and behoof of the Roman Catholic Church.[7]

RELIGIOUS PURPOSES

56. The maintenance and propagation of religion by providing for places of worship, the salaries and maintenance of religious workers, the education of the young in religion, the upkeep of home and foreign missions, and other similar religious objects are valid charitable purposes.

The religion to be forwarded need not necessarily be the Christian religion or any branch or sect thereof, but may be any religion which does not teach immoral or criminal doctrines.

The maintenance and encouragement of religious institutions are valid charitable purposes. A charitable trust may be for the benefit of religion in any one of many ways. Thus, the valid charitable trust for religious purposes may provide a site for the erection of a house of worship;[8] or for the erection of a church build-

[98] Hegeman's Ex'rs v. Roome, 70 N. J. Eq. 562, 62 Atl. 392.

[99] In re Seymour, 67 Misc. Rep. 347, 124 N. Y. Supp. 637.

[1] Pratt v. Roman Catholic Orphan Asylum, 20 App. Div. 352, 46 N. Y. Supp. 1035, affirmed Conkling v. Same, 166 N. Y. 593, 59 N. E. 1120.

[2] In re Compton's Will, 72 Misc. Rep. 289, 131 N. Y. Supp. 183.

[3] Bridges v. Pleasants, 39 N. C. (4 Ired. Eq.) 26, 44 Am. Dec. 94.

[4] Reeves v. Reeves, 5 Lea (Tenn.) 644.

[5] Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745.

[6] Carpenter v. Miller's Ex'rs, 3 W. Va. 174, 100 Am. Dec. 744.

[7] McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106.

[8] Grundy v. Neal, 147 Ky. 729, 145 S. W. 401; Little v. Willford, 31 Minn. 173, 17 N. W. 282; Mott v. Morris, 249 Mo. 137, 155 S. W. 434. On this general subject see Notes on the Strict Interpretation of Ecclesiastical Trusts, H. J. Laski, 36 Can. Law T. 190.

ing;[9] or to repair a church edifice;[10] or for the construction of a parsonage;[11] for the support of a particular church or denomination;[12] for the support of a course of sermons;[13] for the support of the rector or pastor of a particular church;[14] for the support of home or foreign missions;[15] for the education of young men in the ministry;[16] for the dissemination of religious books;[17] for the use of a Sabbath school or other religious educational institution;[18] or for the benefit of a Young Men's Christian Association.[19]

Must the trust, in order to be valid as a charitable trust, be for the support of any particular religion? Must the religion be some

[9] Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; In re Bartlett, 163 Mass. 509, 40 N. E. 899; Teele v. Bishop of Derry, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401; Attorney General v. Armstrong, 231 Mass. 196, 120 N. E. 678.

[10] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; French v. Calkins, 252 Ill. 243, 96 N. E. 877; Chase v. Dickey, 212 Mass. 555, 99 N. E. 410; Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

[11] In re Bartlett, 163 Mass. 509, 40 N. E. 899; Sandusky v. Sandusky, 261 Mo. 351, 168 S. W. 1150; Van Wagenen v. Baldwin, 7 N. J. Eq. 211.

[12] Biscoe v. Thweatt, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; People v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015; Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; Parish of Christ Church v. Trustees of Donations & Bequests for Church Purposes, 67 Conn. 554, 35 Atl. 552; Smith v. Gardiner, 36 App. D. C. 485; Crawford v. Nies, 220 Mass. 61, 107 N. E. 382; Osgood v. Rogers, 186 Mass. 238, 71 N. E. 306; Attorney General v. Town of Dublin, 68 N. H. 459; Glover v. Baker, 76 N. H. 393, 83 Atl. 916; De Camp v. Dobbins, 29 N. J. Eq. 36; Trustees of Associate Reformed Church in Newburgh v. Trustees of Theological Seminary at Princeton, 4 N. J. Eq. 77; Congregational Unitarian Soc. v. Hale, 29 App. Div. 396, 51 N. Y. Supp. 704; Potter v. Thornton, 7 R. I. 252.

[13] Attorney General v. Rector, etc., of Trinity Church, 9 Allen (91 Mass.) 422.

[14] Prettyman v. Baker, 91 Md. 539, 46 Atl. 1020; Trustees of Cory Universalist Soc. at Sparta v. Beatty, 28 N. J. Eq. 570; Tucker v. St. Clement's Church, 5 N. Y. Super. Ct. 242. Support of superannuated ministers is also naturally charitable. Buckley v. Monck (Mo.) 187 S. W. 31.

[15] Hitchcock v. Board of Home Missions of Presbyterian Church, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1; Miller v. Tatum, 181 Ky. 490, 205 S. W. 557; Board of Foreign Missions of General Synod of Evangelical Lutheran Church v. Shoemaker, 133 Md. 594, 105 Atl. 748; Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99; Bruere v. Cook, 63 N. J. Eq. 624, 52 Atl. 1001.

[16] Field v. Drew Theological Seminary (C. C.) 41 Fed. 371; Rainey v. Laing, 58 Barb. (N. Y.) 453.

[17] Magill v. Brown, Fed. Cas. No. 8952; Simpson v. Welcome, 72 Me. 496, 39 Am. Rep. 349.

[18] Morville v. Fowle, 144 Mass. 109, 10 N. E. 766; Newcomb v. St. Peter's Church, 2 Sandf. Ch. (N. Y.) 636.

[19] Goodell v. Union Ass'n of Children's Home of Burlington County, 29 N. J. Eq. 32.

sect or denomination of Christianity? May it be in aid of the Jewish religion, or of Mormonism, or of Mohammedanism?

The original idea of religious charitable trusts in England was undoubtedly that they were for the benefit of the Established Church; but it is now clear that religious trusts for the benefit of dissenting churches are valid,[20] and by statute Jewish and Roman Catholic religious charities have been given the same support accorded to the dissenting Protestant charities.[21]

Trusts for the purpose of having masses said for the souls of deceased persons have until recently been regarded as void as superstitious uses in England;[22] but in America the doctrine of superstitious uses has no force.[23]

In Thornton v. Howe [24] the nature of the religion which equity would support as a charity was considered. A testatrix created a trust to aid in the propagation of the writings of Joanna Southcote, a person who believed that she was with child by the Holy Ghost and had received divine revelations. The court sustained the trust, notwithstanding that much of the writings of Joanna Southcote appeared to the court foolish and profitless. The court said that "the Court of Chancery makes no distinction between one sort of religion and another. * * * Neither does the court, in this respect, make any distinction between one sect and another. It may be that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the court will not assist the execution of the bequest, but will declare it void. * * * But if the tendency were not immoral, and although this court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms of charitable bequests." [25]

[20] Shrewsbury v. Hornby, 5 Hare, 406; Attorney General v. Cock, 2 Ves. 273.

[21] St. 8 & 9 Vict. c. 59, § 2; St. 3 & 4 Wm. IV, c. 115; In re Michel's Trusts, 28 Beav. 39; Bradshaw v. Tasker, 2 Myl. & K. 221.

[22] In re Blundell's Trusts, 30 Beav. 360; In re Fleetwood, 15 Ch. Div. 594; In re Elliott, 39 Wkly. Rep. 297. The House of Lords held masses valid charitable uses in Bourne v. Keane, 121 L. T. R. 426 (1919).

[23] In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470.

[24] 31 Beav. 14.

[25] 31 Beav. 14, 19–20. In Bowman v. Secular Soc., Limited [1917] App. Cas. 406, the House of Lords manifested a liberal tendency by sustaining a gift to a society the object of which was in part to promote atheism. No trust was involved, but by analogy a trust to oppose religion would seem to be valid. The case was discussed in 31 Harv. Law Rev. 289. Compare Zeisweiss v.

In an early Supreme Court decision[26] Mr. Justice Story, by way of dictum, considered this problem. He seems to have been of the opinion that a charitable trust which repudiated or attacked the Christian religion would not be sustained. Said he: "It is unnecessary for us, however, to consider what would be the legal effect of a devise in Pennsylvania for the establishment of a school or college for the propagation of Judaism, or Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country, and therefore it must be made out by clear and indisputable proof. Remote inferences, or possible results, or speculative tendencies, are not to be drawn or adopted for such purposes. There must be plain, positive, and express provisions, demonstrating, not only that Christianity is not to be taught, but that it is to be impugned or repudiated." [27]

Probably in the United States at the present time a trust for the propagation or support of any religion which did not have immoral or criminal tendencies would be supported as a charitable trust. Thus, a trust for the benefit of Shakers has been held valid,[28] as have trusts in aid of the Swedenborgian religion [29] and trusts to promote the doctrines of Christian Science.[30]

In the case involving the propagation of Christian Science the court says: [31] "Mrs. Eddy had the constitutional right to entertain such opinions as she chose, and to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers. Her legal right to teach was not ended with her death. She might dispose of her property by a gift in public charity 'for any use that is not illegal.' Whether her opinions are theologically true, 'the court are not competent to decide.' To suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty; * * * it is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."

James, 63 Pa. 465, 3 Am. Rep. 558, where a gift to aid an infidel society was held void as a charity.

[26] Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205.

[27] 2 How. 127, 198, 199, 11 L. Ed. 205.

[28] Gass v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446.

[29] In re Kramph's Estate, 228 Pa. 455, 77 Atl. 814.

[30] Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

[31] Glover v. Baker, 76 N. H. 393, 420, 83 Atl. 916.

GIFTS FOR MASSES

57. In a majority of the American states trusts for the purpose of having masses said for the soul of the settlor or for the souls of others are valid charitable trusts for religious purposes.

In a few jurisdictions gifts for the purpose of having masses said are valid, although not considered charitable trusts.

In England trusts for the purpose of having masses said were formerly held void as for superstitious uses,[32] but a recent decision has held that the effect of modern legislation recognizing the Catholic religion in England is to make gifts for masses valid.[33] In Ireland they were regarded as valid as honorary trusts, though not legally enforceable.[34] But even in Ireland it was held the trust for masses was void, if it created a perpetuity, inasmuch as it was not a charity.[35]

The doctrine of superstitious uses never had any force in America, where freedom of worship is guaranteed to all. The New York Court of Appeals, in discussing a case where a gift for masses was made, said that "in this state, where all religious beliefs, doctrines, and forms of worship are free, so long as the public peace is not disturbed, the trust in question cannot be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use. The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic Church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here." [36]

In many American states trusts for the purpose of having masses said for the soul of the settlor, or of his family, or of persons generally, are held valid as charitable trusts. They are deemed to be trusts for the purpose of having religious services performed, and

[32] In re Fleetwood, 15 Ch. Div. 596; In re Blundell, 30 Beav. 360.

[33] Bourne v. Keane, 121 L. T. R. 426.

[34] Reichenbach v. Quin, 21 L. R. Ir. 138; Perry v. Tuomey, 21 L. R. Ir. 480.

[35] Dillon v. Reilly, Ir. R. 10 Eq. 152; Beresford v. Jervis, 11 Ir. L. T. Rep. 128.

[36] Holland v. Alcock, 108 N. Y. 312, 329, 16 N. E. 305, 2 Am. St. Rep. 420.

the performance of such service is said to be a public benefit, and not merely beneficial to the souls of the deceased persons.[37]

"The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest, and asking pardon for sinners as He did on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship—a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic Church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. * * * The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood." [38]

"Masses are religious observances, and come within the religious or pious uses, which are upheld as public charities." [39]

In one state it has been suggested that a trust for the purpose of having masses said for the benefit of all souls is valid as a charitable trust, but that a trust for masses for the souls of particular in-

[37] In re Hamilton's Estate (Cal.) 186 Pac. 587; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; Gilmore v. Lee, 237 Ill. 402, 86 N. E. 568, 127 Am. St. Rep. 330; Burke v. Burke, 259 Ill. 262, 102 N. E. 293; Coleman v. O'Leary's Ex'r, 114 Ky. 388, 70 S. W. 1068; In re Schouler, 134 Mass. 426; Kerrigan v. Tabb (N. J. Ch.) 39 Atl. 701; In re Eppig, 63 Misc. Rep. 613, 118 N. Y. Supp. 683; In re Rywolt's Estate, 81 Misc. Rep. 103, 142 N. Y. Supp. 1066; Clark v. Halligan, 158 App. Div. 33, 142 N. Y. Supp. 980; In re Morris, 227 N. Y. 141, 124 N. E. 724 (prior to the statute of 1893 in New York all charitable trusts were impossible, and trusts for masses were not sustained, therefore. See Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420); Appeal of Rhymer, 93 Pa. 142, 39 Am. Rep. 736; In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470.

[38] Hoeffer v. Clogan, 171 Ill. 462, 469, 470, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241.

[39] In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 675, 28 L. R. A. (N. S.) 470.

dividuals might be a private trust. In a case in which the masses were to be "for the repose of all poor souls" the court said: "It [the mass] is common, and public to all, as a religious ceremony, and is therefore a religious or pious use, and is a public charity, as distinguished from a private charity, which it might be if restricted to masses for the souls of designated persons." [40]

In two states trusts for masses seem to have been held valid as private trusts.[41] This is upon reasoning which is not very clear, unless the trusts are considered merely honorary and the gift practically an absolute gift to the donee.

In two other states a gift for the purpose of having masses said is held not to create any trust, but merely to amount to an absolute gift, with a request as to its disposition.[42] In a Kansas case the words of gift were: "I give and bequeath to Rev. James Collins, for mass for his grandfather's and grandmother's soul." The court said: "The will does not undertake to create a trust. The language in which it is made is advisory, persuasive, expressive of desire, 'precatory,' as called in the law of wills; but the passing of the gift is not conditioned upon the performance of the act enjoined. Upon the conscience of the donee alone is laid the duty of performing the sacred service named." [43]

Occasionally courts have taken the stand that trusts for masses are invalid, since they are not charities, and since there is no beneficiary to enforce them as private trusts.[44] An Alabama court has thus expressed its view: "The bequest, in the present case, is, according to the religious belief of the testator, for the benefit alone of his soul, and cannot be upheld, as a public charity, without offending every principle of law by which such charities are supported. * * * It is not valid as a private trust, for the want of

[40] Ackerman v. Fichter, 179 Ind. 392, 101 N. E. 493, 496, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915D, 1117.

[41] In re Lannon's Estate, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024 (but see In re Hamilton's Estate [Cal.] 186 Pac. 587); Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443; Wilmes v. Tiernay (Iowa) 174 N. W. 271, discussed in 5 Iowa Law Bul. 253.

[42] Harrison v. Brophy, 59 Kan. 1, 51 Pac. 883, 40 L. R. A. 721; Sherman v. Baker, 20 R. I. 446, 40 Atl. 11, 40 L. R. A. 717.

[43] Harrison v. Brophy, 59 Kan. 1, 2, 51 Pac. 883, 40 L. R. A. 721.

[44] Festorazzi v. St. Joseph's Catholic Church of Mobile, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48; McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106. But this case seems overruled by In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470. In Minnesota a trust for masses was declared invalid under the peculiar statutory condition there prevailing. Shanahan v. Kelly, 88 Minn. 202, 92 N. W. 948.

a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust." [45]

Where a trust for masses is regarded as invalid as a trust, it has been held that a contract inter vivos to use money for the purpose of having masses said was valid.[46]

EDUCATIONAL PURPOSES

58. Trusts for the foundation, support, and maintenance of schools, colleges, libraries, art galleries, museums, and other similar institutions, and for the aid of students, teachers, and investigators, are valid charitable trusts. Trusts to procure changes in the laws of the state or nation are valid charitable trusts.

It is elementary law that trusts for the benefit of education are charitable. "Not only are charities for the maintenance and relief of the poor, sick, and impotent charities in the sense of the common law, but also donations for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars." [47] "It is a rule in equity that a gift of real or personal estate, either inter vivos or by will, to promote education, is a charity." [48]

The range of educational benefactions which are valid as charitable trusts is wide. Trusts are valid as educational charitable trusts, if for the purpose of founding or maintaining a school [49] or college; [50] or for the purpose of aiding or supporting public

[45] Festorazzi v. St. Joseph's Catholic Church of Mobile, 104 Ala. 327, 330, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48.

[46] Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464, 52 Am. Rep. 41.

[47] Story, J., in Vidal v. Girard's Ex'rs, 2 How. 127, 191, 192, 11 L. Ed. 205.

[48] Inhabitants of Hadley v. Trustees of Hopkins Academy, 14 Pick. (Mass.) 240, 253.

[49] Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; Bolick v. Cox, 145 Ga. 888, 90 S. E. 54; Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516; Wilson v. First Nat. Bank of Independence, 145 N. W. 948, 164 Iowa, 402, Ann. Cas. 1916D, 481; Curling's Adm'rs v. Curling's Heirs, 8 Dana (Ky.) 38, 33 Am. Dec. 475; Halsey v. Convention of Protestant Episcopal Church, 75 Md. 275, 23 Atl. 781; Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Keith v. Scales, 124 N. C. 497, 32 S. E. 809; Price v. Maxwell, 28 Pa. 23; Franklin v. Armfield, 2 Sneed (Tenn.) 305; Kelly v. Love's Adm'rs, 20 Grat. (Va.) 124.

[50] Connecticut College for Women v. Calvert, 87 Conn. 421, 88 Atl. 633, 48 L. R. A. (N. S.) 485; Dexter v. President, etc., of Harvard College, 176 Mass. 192, 57 N. E. 371; Alfred University v. Hancock, 69 N. J. Eq. 470, 46 Atl. 178;

schools,[51] or to procure a site [52] or erect a building for a school; [53] or for the purpose of employing more teachers [54] or paying higher salaries to those already employed; [55] or to aid needy students in obtaining an education,[56] or to found scholarships [57] or award medals for good work in educational institutions; [58] or for the foundation or maintenance of libraries,[59] historical societies,[60] schools, laboratories, or museums dedicated to the advancement of science or art; [61] or for the education of certain classes of persons, as, for example, Indians [62] or the poor or orphans; [63] or for education in certain branches of study, as, for example, in preparation for the min-

Raley v. Umatilla County, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142; In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

[51] Trustees of New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, Ann. Cas. 1914A, 1207; Davis v. Inhabitants of Barnstable, 154 Mass. 224, 28 N. E. 165; Smart v. Town of Durham, 77 N. H. 56, 86 Atl. 821; In re John's Will, 30 Or. 494, 47 Pac. 341, 50 Pac. 226, 36 L. R. A. 242.

[52] Price v. School Directors, 58 Ill. 452; Baldwin's Ex'rs v. Baldwin, 7 N. J. Eq. 211.

[53] Meeting St. Baptist Soc. v. Hail, 8 R. I. 234.

[54] Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

[55] Price v. Maxwell, 28 Pa. 23.

[56] Sawyer v. Dearstyne (Sup.) 139 N. Y. Supp. 955; In re Curtis' Estate, 88 Vt. 445, 92 Atl. 965. It is not necessary that the trust be to aid poor students only. Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699.

[57] In re Miller, 149 App. Div. 113, 133 N. Y. Supp. 828.

[58] In re Bartlett, 163 Mass. 509, 40 N. E. 899.

[59] Duggan v. Slocum, 92 Fed. 806, 34 C. C. A. 676; Fordyce v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 435; Franklin v. Hastings, 253 Ill. 46, 97 N. E. 265, Ann. Cas. 1913A, 135; Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420; Maynard v. Woodard, 36 Mich. 423. That a library and lecture room is to have a dance hall attached does not vitiate the charity, even if it be assumed that the furtherance of dancing is not a charitable purpose. Gibson v. Frye Institute, 137 Tenn. 452, 193 S. W. 1059, L. R. A. 1917D, 1062.

[60] Missouri Historical Soc. v. Academy of Science, 94 Mo. 459, 8 S. W. 346.

[61] Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; Farmers' Loan & Trust Co. v. Ferris, 67 App. Div. 1, 73 N. Y. Supp. 475; Palmer v. Union Bank, 17 R. I. 627, 24 Atl. 109; Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414.

[62] Magill v. Brown, Fed. Cas. No. 8952.

[63] Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; Moore's Heirs v. Moore's Devisees, 4 Dana (Ky.) 354, 29 Am. Dec. 417; Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369; Mason's Ex'rs v. Trustees of Methodist Episcopal Church at Tuckerton, 27 N. J. Eq. 47; Green v. Blackwell (N. J. Ch.) 35 Atl. 375; Clement v. Hyde, 50 Vt. 716, 28 Am. Rep. 522; Kinnaird v. Miller's Ex'r, 25 Grat. (Va.) 107.

istry,[64] or in preparation for admission to the Naval Academy,[65] or in the domestic and useful arts;[66] or for the distribution of books,[67] or the diffusion of knowledge,[68] or for social service work among young men and boys,[69] or for the erection of a monument in a public park dedicated to and illustrative of music.[70]

It is not essential that the instruction to be given in the educational institution should be gratuitous. That the gift aids members of the public in obtaining an education is sufficient, even though they are obliged to bear part of the expense themselves.[71]

The question has arisen whether a trust for the purpose of procuring a change in the Constitution or laws of the nation or a state is a valid educational charitable trust. In a Massachusetts case[72] the view was taken that a trust for the purpose of obtaining laws granting the suffrage to women was not a valid charitable trust, but the later and apparently better view is that such trusts are lawful as educational trusts. If they encourage progress and change by means of evolution rather than revolution, they ought to be protected as of the highest advantage to the public. So, in a later Illinois case,[73] it has been held that a trust for the purpose of obtaining the passage of laws giving women the right to vote is a valid charitable trust. And in a New Jersey decision[74] a trust for the dissemination of the writings of Henry George was upheld, although these writings advocate a radical change in the method of landholding in the United States and characterize the present system as unjust. Beasley, C. J., makes the following statement: "I cannot perceive for what reason it is incompatible with judicial position to aid, if invested with such power, in the circulation of the works of a learned and ingenious man, putting under examination and discussion any part of the legal system. It would not seem to me that, as a judge, I was called upon to discard the use

[64] Woodroof v. Hundley, 147 Ala. 287, 39 South. 907; Trustees of Washburn College v. O'Hara, 75 Kan. 700, 90 Pac. 234.

[65] Taylor v. Columbian University, 226 U. S. 126, 33 Sup. Ct. 73, 57 L. Ed. 152.

[66] Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

[67] Pickering v. Shotwell, 10 Pa. 23.

[68] Sweeney v. Sampson, 5 Ind. 465. A trust for "the furtherance of the broadest interpretation of metaphysical thought" was sustained in Vineland Trust Co. v. Westendorf, 86 N. J. Eq. 343, 98 Atl. 314.

[69] Starr v. Selleck, 145 App. Div. 869, 130 N. Y. Supp. 693.

[70] Rhode Island Hospital Trust Co. v. Benedict, 41 R. I. 143, 103 Atl. 146.

[71] Burke v. Burke, 259 Ill. 262, 102 N. E. 293.

[72] Jackson v. Phillips, 14 Allen, 539.

[73] Garrison v. Little, 75 Ill. App. 402.

[74] George v. Braddock, 45 N. J. Eq. 757, 18 Atl. 881, 6 L. R. A. 511, 14 Am. St. Rep. 754.

of means in the development of the law, which, in every other science, are regarded as absolute essentials." In a recent Washington case [75] a gift to propagate Socialism was sustained as a valid charity.

ELEEMOSYNARY PURPOSES

59. A trust for the relief of human want or suffering is a valid charitable trust. Such trusts may provide for giving food, shelter, clothing, medical attendance, and other similar necessities to the needy.

A trust for "benevolent" objects may be declared a valid charitable trust, if the word "benevolent" is used as a synonym of "charitable," but not if "benevolent" is construed as meaning any object which indicates good will toward mankind, whether the beneficiary be needy or not.

A trust to prevent cruelty to animals generally, or to promote the comfort of animals generally, is valid as a charitable trust.

Trusts for eleemosynary purposes, as, for example, for the relief of human want or suffering, are valid charitable trusts. Instances of valid charitable trusts of this sort are found in trusts for the benefit of the poor generally or the poor of a given locality; [76] or for the friendless poor; [77] or for widows or orphans; [78] or for clothing poor children; [79] or for providing shelter and the necessaries of life; [80] or for the benefit of the aged and infirm; [81] or for the aid of

[75] Peth v. Spear, 63 Wash. 291, 115 Pac. 164.

[76] Strong's Appeal, 68 Conn. 527, 37 Atl. 395; Trustees of New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, Ann. Cas. 1914A, 1207; Grant v. Saunders, 121 Iowa, 80, 95 N. W. 411, 100 Am. St. Rep. 310; Klumpert v. Vrieland, 142 Iowa, 434, 121 N. W. 34; Bills v. Pease, 116 Me. 98, 100 Atl. 146, L. R. A. 1917D, 1060; Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110; Hesketh v. Murphy, 35 N. J. Eq. 23; State ex rel. Wardens of Poor of Beaufort County v. Gerard, 37 N. C. (2 Ired. Eq.) 210; Trim's Estate, 168 Pa. 395, 31 Atl. 1071; Derby v. Derby, 4 R. I. 414. A gift to "a fresh air fund" is a valid charity. White v. City of Newark, 89 N. J. Eq. 5, 103 Atl. 1042.

[77] Kemmerer v. Kemmerer, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; Bowden v. Brown, 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419.

[78] Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; De Bruler v. Ferguson, 54 Ind. 549; Board of Com'rs of Rush Co. v. Dinwiddie, 139 Ind. 128, 37 N. E. 795; Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

[79] Eccles v. Rhode Island Hospital Trust Co., 90 Conn. 592, 98 Atl. 129; Swasey v. American Bible Soc., 57 Me. 523.

[80] In re Robinson's Will, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[81] Fellows v. Miner, 119 Mass. 541.

freedmen and refugees,[82] fugitive slaves,[83] disabled firemen,[84] or disabled sailors and soldiers.[85]

The eleemosynary trust may also be worked out as a valid charitable trust through the establishment of an institution. Provisions for hospitals,[86] or a home for the poor;[87] or a seamen's home,[88] or an orphan asylum;[89] or homes for old men,[90] or old women,[91] or for girls,[92] are held to be valid charitable trusts.

Trusts for carrying on temperance work,[93] for aiding young men to obtain a start in business,[94] and to provide better housing conditions for laboring men[95] have been sustained as charitable trusts of this class.

A trust solely for the benefit of needy relatives of the settlor is not a charity.[96] The charitable nature of an institution is not negatived by the fact that a charge is made to those who are able to pay for its services.[97]

[82] White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends, 89 Ind. 136.

[83] Jackson v. Phillips, 14 Allen (Mass.) 539.

[84] Potts v. Philadelphia Ass'n for Relief of Disabled Firemen, 8 Phila. (Pa.) 326.

[85] Holmes v. Coates, 159 Mass. 226, 34 N. E. 190.

[86] Ould v. Washington Hospital, 95 U. S. 303, 24 L. Ed. 450; Hayden v. Connecticut Hospital for Insane, 64 Conn. 320, 30 Atl. 50; French v. Calkins, 252 Ill. 243, 96 N. E. 877; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 71 Atl. 1032; Ware v. City of Fitchburg, 200 Mass. 61, 85 N. E. 951; Ely v. Ely, 163 App. Div. 320, 148 N. Y. Supp. 691; Mayor, etc., of City of Philadelphia v. Elliott, 3 Rawle (Pa.) 170; Hays v. Harris, 73 W. Va. 17, 80 S. E. 827.

[87] Amory v. Attorney General, 179 Mass. 89, 60 N. E. 391.

[88] Petition of Pierce, 109 Me. 509, 84 Atl. 1070; Trustees of Sailor's Snug Harbor in City of New York v. Carmody, 211 N. Y. 286, 105 N. E. 543.

[89] Green's Adm'rs v. Fidelity Trust Co. of Louisville, 134 Ky. 311, 120 S. W. 283, 20 Ann. Cas. 861; In re Vaux, 16 Wkly. Notes Cas. (Pa.) 229.

[90] Cresson v. Cresson, Fed. Cas. No. 3389.

[91] Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; Norris v. Loomis, 215 Mass. 344, 102 N. E. 419.

[92] Sherman v. Congregational Home Missionary Soc., 176 Mass. 349, 57 N. E. 702; Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S). 486; In re Daly's Estate, 208 Pa. 58, 57 Atl. 180.

[93] Haines v. Allen, 78 Ind. 100, 41 Am. Rep. 555; Buell v. Gardner, 83 Misc. Rep. 513, 144 N. Y. Supp. 945; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[94] Franklin's Adm'x v. City of Philadelphia, 2 Pa. Dist. R. 435.

[95] Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

[96] Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667.

[97] Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898, 33 L. R. A. (N. S.) 141.

"Benevolent" and "Charitable"

It is a mooted question in what cases the use of the word "benevolent" will create a charitable trust. In the early leading case of Morice v. Bishop of Durham,[98] it was held that a trust "for such objects of benevolence and liberality" as the Bishop of Durham should select was not a charitable trust. Lord Eldon thought that the trustee in that case might use the property exclusively to aid persons who did not need aid, and to aid them in ways which would not result in their spiritual, mental, or physical betterment, and that, therefore, the trust was not charitable. The view that a trust for merely "benevolent" objects is not ordinarily a charitable trust has been voiced by other courts.[99] Gray, J., says in the last-cited case:[1] "The word 'benevolent,' of itself, without anything in the text to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity; but also many acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense."

But in a recent statutory provision for charitable trusts the word "benevolent" is treated as the equivalent of charitable.[2]

In a number of cases where the gift has been to "charity and benevolence," it has been held that the use of "benevolence" was merely as an explanatory term, amplifying the meaning of "charity," and that therefore the trust was a valid charitable trust.[3]

"The courts appear to have been in some cases astute to frustrate the charitable intentions of donors who, meaning to devote their property to uses strictly charitable, have, unfortunately, employed language admitting of a wider scope in the use of the gift than is judicially given to the word 'charity.' It would be far more in accordance with enlightened jurisprudence to exercise in such cases the power of construction so as to effectuate, if possible, the intention of the testator. A latitudinarian interpretation of the words 'charity' and 'charitable' has been unhesitatingly given in order to

[98] 10 Ves. 522.

[99] Chamberlain v. Stearns, 111 Mass. 267.

[1] Chamberlain v. Stearns, 111 Mass. 267, 268.

[2] New York Real Property Law (Consol. Laws, c. 50) § 113; New York Personal Property Law (Consol. Laws, c. 41) § 12.

[3] Fox v. Gibbs, 86 Me. 87, 29 Atl. 940; De Camp v. Dobbins, 29 N. J. Eq. 36; People v. Powers, 147 N. Y. 104, 41 N. E. 432, 35 L. R. A. 502; In re Murphy's Estate, 184 Pa. 310, 39 Atl. 70, 63 Am. St. Rep. 802; In re Dulles' Estate, 218 Pa. 162, 67 Atl. 40, 12 L. R. A. (N. S.) 1177.

effectuate the intention of testators; why should not, for the same purpose, a restricted one be given to the words 'benevolence' and 'benevolent'? Why may they not be interpreted according to their popular signification, and so be held to mean just what the testator, in the great majority of cases, understands them to mean?" [4]

In cases where the gift was to "charitable *or* benevolent" objects there has been a marked difference of opinion as to whether the gift could be sustained as a charitable trust. Some cases have held that the use of "benevolent" was to be qualified by its connection with "charitable," and that it was practically synonymous with "charitable." [5] "Whatever, therefore, may be the meaning, in the law of Massachusetts, of the word 'benevolence' by itself, there can be no doubt that, when used in connection with 'charity,' as in this will, it is synonymous with it; and the connecting 'or' must be taken in the sense of defining and limiting the nature of the charity intended, and of explaining one word by the other." [6]

But in other cases it has been maintained that the use of the words "benevolent or charitable" indicates an intent to provide for purposes not technically charitable; i. e., for purposes consistent only with a private trust. Hence in these cases it has been held that the trust is for a mixed charitable and private purpose, with no separation of funds to be applied to each, and that, therefore, the whole trust must fail for indefiniteness.[7]

In a recent English case the trust was for "purposes charitable or philanthropic." The court held the trust invalid as a charitable trust and said: "Then what is the meaning of the word 'philanthropic'? He means by that something distinguished from charitable in the ordinary sense; but I cannot put any definite meaning on the word. All I can say is that a philanthropic purpose must be a purpose which indicates good will to mankind in general. Can anything be looser than that? And here arises the difficulty of which the Attorney General has availed himself with great skill. He says, 'What philanthropic purpose is not charitable?' My answer is: You are dealing with two words of so vague a meaning that it is extremely difficult to say, but we can suggest purposes which might be philanthropic and not charitable—purposes indicating good will to rich men, to the exclusion of poor men. Such

[4] De Camp v. Dobbins, 29 N. J. Eq. 36, 50.

[5] Saltonstall v. Sanders, 11 Allen (Mass.) 462; Weber v. Bryant, 161 Mass. 400, 37 N. E. 203; Pell v. Mercer, 14 R. I. 412.

[6] Saltonstall v. Sanders, 11 Allen (Mass.) 462, 470.

[7] In re Macduff, [1896] 2 Ch. 451; Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489; Hegeman's Ex'r v. Roome, 70 N. J. Eq. 562, 62 Atl. 392; Smith v. Pond, 90 N. J. Eq. 445, 107 Atl. 800.

purposes would be philanthropic in the ordinary acceptation of the word—that is to say, in the wide, loose sense of indicating good will towards mankind, or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable, though not confined to the poor; but I doubt very much whether a trust would be declared to be charitable which excluded the poor." [8]

It is submitted that the word "benevolent" in a trust instrument should be given a reasonable construction, for the purpose of ascertaining the meaning which the settlor intended to give to it. If the other statements in the instrument and the surrounding circumstances show that he meant by "benevolent" the equivalent of "charitable," then it would seem proper to declare the trust a valid charitable trust. The modern tendency is toward considering the words "benevolent" and "philanthropic" as synonyms of "charitable."

Trusts to aid in studying and curing diseases of animals useful to man,[9] or to promote prosecution for cruelty to animals,[10] or to promote an anti-vivisection society,[11] or to provide a fountain where animals may drink,[12] have been held valid charitable trusts. It is probable that the advancement of the spirit of kindness and humanity among men is as important in these trusts as the aid given to animals. They may be said to be educational or moral in their effect, although they bear resemblances in other respects to eleemosynary charitable trusts.

MISCELLANEOUS PUBLIC BENEFITS

60. Trusts for relieving citizens from the burden of supporting the government, for maintaining necessary public buildings or institutions, to encourage patriotism, or to promote the general public safety, comfort, and happiness, are valid charitable trusts.

There is an important class of charitable trusts which do not fall within the subdivisions previously mentioned. They are sometimes called "governmental" trusts. Their nature can best be explained

[8] In re Macduff, [1896] 2 Ch. 451, 464. See, also, Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204.

[9] University of London v. Yarrow, 1 De Gex & J. 72.

[10] In re Vallance, Seton on Decrees (5th Ed.) 1141; In re Douglas, 35 Ch. Div. 472.

[11] In re Foveaux, [1895] 2 Ch. 501.

[12] In re Coleman's Estate, 167 Cal. 212, 138 Pac. 992, Ann. Cas. 1915C, 682.

by a reference to typical examples. Thus, trusts for the purpose of assisting in the payment of public debts,[13] or for the benefit of the inhabitants of a given town [14] or state,[15] are valid charitable trusts of this variety. And so, also, a trust to pay the general expenses of a town,[16] or to provide a townhouse [17] or a courthouse,[18] is a trust of this class.

Further illustrations of these charitable trusts may be found in trusts to repair bridges and highways,[19] to provide a fire engine and fire house,[20] to assist a fire company,[21] to aid a life-saving station,[22] to provide a fountain for furnishing drinking water [23] or for ornamental purposes,[24] and to construct a children's playhouse and playground in a public park.[25]

Trusts for laying out and improving streets,[26] planting shade trees,[27] beautifying grounds,[28] constructing or improving parks,[29] making agricultural or horticultural improvements [30] or providing municipal improvements,[31] are valid charitable trusts, because of their enhancement of human comfort and happiness and the æsthetic pleasure which they give the residents of the cities or towns concerned.

[13] Girard Trust Co. v. Russell, 179 Fed. 446, 102 C. C. A. 592. But see In re Fox's Estate, 63 Barb. (N. Y.) 157.

[14] Trustees of New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, Ann. Cas. 1914A, 1207.

[15] Franklin's Adm'x v. City of Philadelphia, 2 Pa. Dist. R. 435.

[16] Collector of Taxes of Norton v. Oldfield, 219 Mass. 374, 106 N. E. 1014.

[17] Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 292, 11 Am. Dec. 471.

[18] Stuart v. City of Easton, 74 Fed. 854, 21 C. C. A. 146. But see Kerlin v. Campbell, 15 Pa. 500.

[19] Town of Hamden v. Rice, 24 Conn. 350.

[20] Magill v. Brown, Fed. Cas. No. 8952.

[21] Bethlehem Borough v. Perseverance Fire Co., 81 Pa. 445.

[22] Richardson v. Mullery, 200 Mass. 247, 86 N. E. 319.

[23] Roach's Ex'r v. City of Hopkinsville, 13 Ky. Law Rep. 543.

[24] Hosmer v. City of Detroit, 175 Mich. 267, 141 N. W. 657.

[25] In re Smith's Estate, 181 Pa. 109, 37 Atl. 114.

[26] Beck v. City of Philadelphia, 17 Pa. 104.

[27] Appeal of Cresson, 30 Pa. 437.

[28] Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858.

[29] In re Bartlett, 163 Mass. 509, 40 N. E. 899; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; Burr v. City of Boston, 208 Mass. 537, 95 N. E. 208, 34 L. R. A. (N. S.) 143. Trusts for establishing an ornamental gate (Haggin v. International Trust Co. [Colo.] 169 Pac. 138, L. R. A. 1918B, 710), or a tabernacle (Lightfoot v. Poindexter [Tex. Civ. App.] 199 S. W. 1152), in a public park, have been held valid charitable trusts.

[30] Rotch v. Emerson, 105 Mass. 431.

[31] Trustees of New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, Ann. Cas. 1914A, 1207; Franklin's Adm'x v. City of Philadelphia, 2 Pa. Dist. R. 435.

"Among all classes there is a pervading sentiment of reverence for the burial places of the dead, which springs naturally from the Christian belief in the resurrection of the body. This sentiment is recognized in this state and elsewhere, by the creation of corporations for maintaining and adorning cemeteries, and by statutes which allow town councils to receive and hold funds in trust for the care of burial lots. However general and commendable this sentiment may be, and however desirable it may be that the graves of the dead be decently and reverently cared for, nevertheless we do not think a bequest of this kind falls within the limits of a charitable use. It is not a gift in aid of any public object, nor for a purpose which affects the public in any way. It benefits no one. Its purpose is purely private and personal. It seeks to create a perpetuity simply to insure the care of the testator's own burial lot." [40]

In a few states the view has been maintained that a trust for the perpetual care of a private grave, monument, or cemetery lot is a charitable trust. This is apparently on the theory that the public is benefited by the encouragement of reverence for the dead and that such sentiments improve the morals of the members of the community.[41]

In a number of states the care and maintenance of cemeteries is now provided for by statutes allowing gifts to be made to cemetery associations or corporations, to be held in trust for the perpetual care of the entire cemetery or of any lot or monument.[42]

In still other states a gift to any trustees for the care or maintenance of a public cemetery or any private lot or monument is made a charitable trust by statute.[43]

[40] Kelly v. Nichols, 17 R. I. 306, 317, 318, 21 Atl. 906.

[41] Ford v. Ford's Ex'r, 91 Ky. 572, 16 S. W. 451; Webster v. Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; Rollins v. Merrill, 70 N. H. 436, 48 Atl. 1088 (but see Smart v. Town of Durham, 77 N. H. 56, 86 Atl. 821); Tierney's Estate, 2 Pa. Dist. R. 524; Nauman v. Weidman, 182 Pa. 263, 37 Atl. 863. In Trustees of Methodist Episcopal Church of Milford v. Williams, 6 Boyce (Del.) 62, 96 Atl. 795, such a gift was upheld without a statement of reasons.

[42] In re Gay's Estate, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70; 1 Jones & A. Ann. St. Ill. § 1913, par. 862; Rev. Laws Mass. 1902, c. 78, § 5; Green v. Hogan, 153 Mass. 462, 27 N. E. 413; In re Bartlett, 163 Mass. 509, 40 N. E. 899; Morse v. Inhabitants of Natick, 176 Mass. 510, 57 N. E. 996; McCoy v. Inhabitants of Natick, 223 Mass. 322, 111 N. E. 874; 1 Comp. St. N. J. 1910, p. 374; 1 Purd. Dig. Pa. (13th Ed.) p. 558; In re Close's Estate, 260 Pa. 269, 103 Atl. 822.

[43] Gen. St. Conn. 1918, § 5081; Hewitt v. Wheeler School and Library, 82 Conn. 188, 72 Atl. 935; Park's Ann. Civ. Code Ga. 1914, § 4605; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Laws Mo. 1919, p. 181; New York Real Property Law (Consol. Laws, c. 50) § 114a; New York Personal Property Law (Consol. Laws, c. 41) § 13a; Driscoll v. Hewlett, 132

It is now quite generally held that a trust for the establishment and perpetual maintenance and care of a *public* cemetery is a valid charitable trust.[44] "That the providing and maintenance of a suitable place for the burial of the dead is one of public use and benefit is not open to question. A decent respect for the memory of the dead is a universal characteristic of civilized society." [45]

Trusts for the erection of monuments to soldiers, sailors, and public men are held valid as charitable trusts on the ground that they foster patriotism.[46]

PURPOSES NOT CHARITABLE

62. Trusts which are not for the general benefit of the community, as, for example, trusts for the benefit of private persons, or to encourage sport, or for the care of inanimate objects, or for purposes of mere liberality, or for carrying out mere whims, are not charitable trusts.

In numerous cases the element of public benefit has been lacking and the trusts have been held private. Thus, a trust for the benefit of a private school,[47] or a waterworks corporation,[48] or for the aid and support of the children of the testator and their descendants

App. Div. 125, 116 N. Y. Supp. 466, affirmed, 198 N. Y. 297, 91 N. E. 784; First Presbyterian Church in Village of Waterford v. McKallor, 35 App. Div. 98, 54 N. Y. Supp. 740; In re Perkins' Will, 68 Misc. Rep. 255, 124 N. Y. Supp. 998. The important portion of the New York statute relating to real property reads as follows: "Gifts, grants and devises of real property, in trust for the purpose of applying the proceeds or income thereof to the perpetual care and maintenance, improvement or embellishment of private burial lots and tombs thereon, are permitted and shall be deemed to be for charitable and benevolent uses. * * *"

[44] In re Vaughan, 33 Ch. Div. 187; Hewitt v. Wheeler School and Library, 82 Conn. 188, 72 Atl. 935; Swasey v. American Bible Soc., 57 Me. 523; Collector of Taxes of Norton v. Oldfield, 219 Mass. 374, 106 N. E. 1014; Stewart v. Coshow, 238 Mo. 662, 142 S. W. 283; Corin v. Glenwood Cemetery (N. J. Ch.) 69 Atl. 1083; Bliss v. Linden Cemetery Ass'n, 81 N. J. Eq. 394, 87 Atl. 224; Hullman v. Honcomp, 5 Ohio St. 237; Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428, 42 L. R. A. (N. S.) 1216; Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

[45] Chapman v. Newell, 146 Iowa, 415, 125 N. W. 324, 327.

[46] Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9; Beecher v. Yale (Sup.) 45 N. Y. Supp. 622; In re Smith's Estate, 181 Pa. 109, 37 Atl. 114; Petition of Ogden, 25 R. I. 373, 55 Atl. 933.

[47] Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58. For a discussion of some eccentric gifts, held invalid as charities, see Scott, Control of Property by the Dead, 65 Pa. Law Rev. 632.

[48] Doughten v. Vandever, 5 Del. Ch. 51.

who may be destitute,[49] or for the support of a home for indigent, afflicted, and aged Free Masons,[50] or for providing a home and school for the maintenance and education of the children of deceased members of the Odd Fellows,[51] or for the maintenance of a private estate,[52] is a private trust. In all these cases it was not the general public, the community at large, which was to be assisted, but named private persons, or a small class, not open to all.

An English court has considered the question whether a trust to aid a game or sport is a charitable trust.[53] The gift was of a fund in trust to provide annually a cup to be given to the most successful yacht of the season. The testator stated that his object was to encourage the sport of yacht racing. It was contended that the gift was charitable, in that it tended to promote the public health and to train men for the navy. The court held that a gift for the encouragement of a mere sport or game was not charitable, although there might result some incidental benefit to the public at large. The leading object was the amusement of private persons. Rigby, L. J., made the following statement:[54] "There are many things which are laudable and useful to society, which yet cannot be considered charitable, and this, in my opinion is one of them."

The lack of community aid or improvement is obvious in the following trusts: A gift to keep in perpetual repair the testator's clock;[55] a gift to keep a house open for the reception and entertainment of ministers and others traveling in the service of the truth;[56] a bequest to be used in making Christmas presents to the scholars of a Sunday school.[57] In the case of the first-named trust, no living person would be benefited; in the instances last mentioned certain individuals might receive benefits, but the element of charity was lacking. The bounty of the donor was evidence of liberality rather than charity.

Gifts for the purpose of carrying out mere whims of the testator are, of course, not charitable. Thus a bequest for the erection of a flagstaff in a public park in memory of the testator's father is not

[49] Kent v. Dunham, 142 Mass. 216, 7 N. E. 730, 56 Am. Rep. 667.

[50] City of Philadelphia v. Masonic Home of Pennsylvania, 160 Pa. 572, 28 Atl. 954.

[51] Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n, 66 Kan. 1, 71 Pac. 286.

[52] Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204.

[53] In re Nottage, [1895] 2 Ch. 649.

[54] [1895] 2 Ch. 649, 656.

[55] Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906.

[56] Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413.

[57] Goodell v. Union Ass'n of Children's Home of Burlington County, 29 N. J. Eq. 32.

charitable;[58] nor is a gift to be applied to the maintenance of a brass band to march to the testator's grave on holidays and other appropriate occasions and play dirges valid as a charity.[59] In one case a gift to aid an infidel society in the discussion of religion and politics was held invalid as a charity, although it might seem to have some educational features.[60]

THE CY PRES DOCTRINE

63. The attitude of chancery towards charitable trusts is extremely friendly. It exercises great liberality in the establishment and construction of such trusts.

The judicial cy pres power is the authority of equity to apply property given to charity to a purpose as nearly like that of the original purpose as possible, when the carrying out of the original charitable trust becomes impossible or inexpedient, due to changes in conditions, or when the settlor has imperfectly outlined the scheme for his charity. This power is possessed by a great majority of American courts of equity. It is exercised with varying degrees of liberality.

The prerogative cy pres power is the authority of the crown of England, through the Court of Chancery, to dispose of property to such charitable uses as it sees fit, when the original charity was unlawful, or when the original charity was too vague to be enforced and there were no trustees to render it certain. This power is rarely used in England. In America it rests in the several Legislatures and is not possessed by the courts of equity.

The attitude of equity is exceedingly favorable to charitable trusts.[61] The court will be keen-sighted to discover an intent to create a charity,[62] and, where a will is capable of two constructions, one of which sustains a charitable trust and the other of which is unfavorable to such trust, equity will be disposed to accept the

[58] Morristown Trust Co. v. Town of Morristown, 82 N. J. Eq. 521, 91 Atl. 736.

[59] Detwiller v. Hartman, 37 N. J. Eq. 347. Upon similar grounds a gift to support and maintain a person, to "show people" where testator's monument was, was held void in Re Palethorp's Estate, 249 Pa. 389, 94 Atl. 1060.

[60] Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558.

[61] In re Goodfellow's Estate, 166 Cal. 409, 137 Pac. 12; Duggan v. Slocum, 92 Fed. 806, 34 C. C. A. 676.

[62] Quimby v. Quimby, 175 Ill. App. 367.

former construction.[63] All presumptions are indulged in favor of the validity of such trusts.[64] Equity gives them a more liberal construction than it accords to private trusts,[65] and will carry them into effect wherever this can be done consistently with established rules of law.[66] But equity will not ignore established principles of law in order to give a charitable trust effect,[67] nor will it treat with favor a charitable gift made near the time of the settlor's death.[68]

"The meaning of the doctrine of cy pres, as received by us, is that when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close *approximation* to that scheme as reasonably practicable; and so, of course, it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence." [69]

The general theory of the cy pres doctrine has been well explained in a New Hampshire case.[70] "When the gift cannot be carried out in the precise mode prescribed by the donor, effect has been given to his general purpose by adopting a method which seemed to be as near his intention as existing conditions would permit. Such a construction is not the result of an arbitrary power exercised in disregard of the donor's wishes for the public benefit, but is as truly based upon a judicial finding of his intention as applied to new conditions as is the construction of a will, deed, or other written contract. The making of a gift for charitable purposes, which is unlimited as to the length of time it may continue, presupposes a knowledge on the part of the donor that material changes in the attending circumstances will occur which may render a literal compliance with the terms of the gift impracticable, if not impossible; and it is not unreasonable to infer that under such circumstances the nearest practicable approximation to his expressed wish in the

[63] In re Robinson's Will, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

[64] Franklin v. Hastings, 253 Ill. 46, 97 N. E. 265, Ann. Cas. 1913A, 135.

[65] Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320.

[66] In re Johnston's Estate, 141 Iowa, 109, 119 N. W. 275; St. James Orphan Asylum v. Shelby, 60 Neb. 796, 84 N. W. 273, 83 Am. St. Rep. 553.

[67] Klumpert v. Vrieland, 142 Iowa, 434, 121 N. W. 34.

[68] In re Kessler's Estate, 221 Pa. 314, 70 Atl. 770, 128 Am. St. Rep. 741, 15 Ann. Cas. 791.

[69] Lowrie, C. J., in City of Philadelphia v. Girard's Heirs, 45 Pa. 9, 28, 84 Am. Dec. 470.

[70] Walker, J., in Keene v. Eastman, 75 N. H. 191, 193, 72 Atl. 213.

management and development of the trust will promote his intention to make his charitable purpose reasonably effective; for it would be rash to infer that he intended that the trust fund should be used only in such a way that it could not result in a public benefit—in other words, that he wishes his general benevolent purpose to be defeated, if his method of administering the trust should become impracticable."

In some states the doctrine of cy pres has been put in statutory form.[71] Thus, in New York the statutory provision is as follows:[72]

"The Supreme Court shall have control over gifts, grants and devises in all cases provided for by subdivision one of this section, and whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein: Provided, however, that no such order shall be made without the consent of the donor or grantor of the property, if he be living."

The meaning of the cy pres rule can best be explained by illustrations of its application. In the leading case of Jackson v. Phillips,[73] a testator provided for two trusts, the first to create a sentiment which would put an end to slavery, and the second for the aid of fugitive slaves. Shortly after the death of the testator slavery was abolished by the Emancipation Proclamation. The court held that the change in conditions warranted the application of the first trust fund to the education of freedmen in the South and the use of the second fund in aiding needy negroes in the city where the testator had resided. So, too, in Ely v. Attorney General,[74] where the trust was for the founding of a home for deaf children, to be

[71] In re Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; Ford v. Thomas, 111 Ga. 493, 36 S. E. 841; Gen. Laws R. I. 1909, c. 259, § 9.

[72] New York Real Property Law (Consol. Laws, c. 50) § 113. See, also, In re Brundage's Estate, 101 Misc. Rep. 528, 167 N. Y. Supp. 694; Camp v. Presbyterian Soc. of Sackets Harbor, 105 Misc. Rep. 139, 173 N. Y. Supp. 581; Sherman v. Richmond Hose Co., No. 2, 186 App. Div. 417, 175 N. Y. Supp. 8.

[73] 14 Allen (Mass.) 539.

[74] 202 Mass. 545, 89 N. E. 166.

located on the testator's land, but, due to the inadequacy of the sum left, the exact intent of the testator could not be carried out, the court allowed the fund to be applied in assistance of a similar home a few miles distant from the testator's former residence.

In Rector, etc., of St. James Church v. Wilson [75] the trust was for the purpose of building an Episcopal Church at a specified place. When the fund became available, the place would not support a church. It was held that under the cy pres doctrine the fund would not go to the next of kin, but would be applied to the use of the Episcopal church in that neighborhood according to a scheme to be approved by the court. And so, too, in Mason v. Bloomington Library Ass'n,[76] where the trust was for the establishment of an art gallery in connection with a certain library association, but the library association conveyed its property to another institution and ceased to exist before the gift could be carried out, the court applied the cy pres rule and directed that the property given in trust be used for the benefit of the successor association, since the latter had similar purposes.

Judicial and Prerogative Cy Pres

There are two kinds of cy pres power—the prerogative cy pres and the judicial cy pres. The former is based on the authority of the crown in England. As parens patriæ the crown disposes of gifts made to charitable uses, where the purpose of the gift is unlawful, or where there is no trustee to administer the gift and the charitable purpose is stated in general terms only. This power is exercised comparatively rarely. An illustration of the application of the prerogative cy pres is found in Cary v. Abbot,[77] where property was given to trustees "for the purpose of educating and bringing up poor children in the Roman Catholic faith." At the time of this gift it was unlawful in England as for a superstitious use. The court held that the property involved was not to be given to the next of kin, but was to be applied to such charitable purposes as the king should direct. Lord Eldon describes [78] another class of cases in which this power is to be applied as those in which "there is a general indefinite purpose, not fixing itself on any object."

This prerogative cy pres power is not possessed by any courts in America,[79] but is vested in the several Legislatures.[80] "There

[75] 82 N. J. Eq. 546, 89 Atl. 519.
[76] 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603.
[77] 7 Ves. 490.
[78] Moggridge v. Thackwell, 7 Ves. 36, 86.
[79] Robbins v. Boulder County Com'rs, 50 Colo. 610, 115 Pac. 526; Kemmerer

[80] Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 481.

are some cases, however, which are beyond its jurisdiction, as where, by statute, a gift to certain uses is declared void and the property goes to the king, and in some other cases of failure of the charity. In such cases the king, as parens patriæ, under his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise. * * * In this country, there is no royal person to act as parens patriæ, and to give direction for the application of charities which cannot be administered by the court. * * * But here the Legislature is the parens patriæ, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England." [81]

The judicial cy pres power is that exercised by equity, where the execution of the charitable trust as directed by the settlor is impossible, impracticable, or inexpedient, or where the settlor has imperfectly stated his purpose or the method of administration. It is in common use in the United States.[82]

In a few states the doctrine of cy pres is not recognized, although equity treats charitable trusts with great liberality and friendliness.[83]

v. Kemmerer, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; Erskine v. Whitehead, 84 Ind. 357; Lepage v. McNamara, 5 Iowa, 124; American Academy of Arts and Sciences v. President, etc., of Harvard College, 12 Gray (Mass.) 582; In re Nilson's Estate, 81 Neb. 809, 116 N. W. 971; Dickson v. Montgomery, 1 Swan (Tenn.) 348.

[81] Mr. Justice Bradley in Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U. S. 1, 51, 52, 56, 57, 10 Sup. Ct. 792, 34 L. Ed. 481.

[82] In re Royer's Estate, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; Lewis v. Gaillard, 61 Fla. 819, 56 South. 281; Heuser v. Harris, 42 Ill. 425; Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n (Kan.) 64 Pac. 33, 5 L. R. A. (N. S.) 692; Lynch v. South Congregational Parish of Augusta, 109 Me. 32, 82 Atl. 432; Norris v. Loomis, 215 Mass. 344, 102 N. E. 419; Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 175 S. W. 571; Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; Adams v. Page, 76 N. H. 96, 79 Atl. 837; Gagnon v. Wellman, 78 N. H. 327, 99 Atl. 786; Nichols v. Newark Hospital, 71 N. J. Eq. 130, 63 Atl. 621; Utica Trust & Deposit Co. v. Thomson, 87 Misc. Rep. 31, 149 N. Y. Supp. 392; In re Kramph's Estate, 228 Pa. 455, 77 Atl. 814; Brice v. Trustees of All Saints Memorial Chapel, 31 R. I. 183, 76 Atl. 774; Inglish v. Johnson, 42 Tex. Civ. App. 118, 95 S. W. 558.

[83] Universalist Convention of Alabama v. May, 147 Ala. 455, 41 South. 515; Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346; Adams v. Bohon, 176 Ky. 66, 195 S. W. 156; McAuley v. Wilson, 16 N. C. (1 Dev. Eq.) 276, 18 Am. Dec. 587; Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186 (but see Pub. Acts Mich. 1915, No. 280); Mars v. Gibert, 93 S. C. 455, 77 S. E. 131; Fifield v. Van Wyck's Ex'r, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; Pack v. Shanklin, 43 W. Va. 304, 27 S. E. 389; McHugh v. McCole, 97

That the cy pres doctrine exists does not mean that some kind of charitable trust will be enforced every time a testator expresses a charitable intent. The court will not do violence to the settlor's intent. Conditions may be such that to carry out any other than the settlor's exact plan would be obviously unjust and contrary to the settlor's wishes. For example, when a trust was created for the benefit of the First Universalist Society of Lincoln, and later that society abandoned its religious work, and there was no other religious organization in the same vicinity having similar doctrines, equity refused to apply the property to some other charitable use.[84] And so, too, where a gift was in trust for the education of colored children for the purpose of promoting the well-being of that race, it was held that the gift could not be supported, that the prerogative cy pres power did not rest in the court, and that the charitable purpose expressed was too vague to permit of enforcement.[85]

A further illustration of the limits of the cy pres doctrine may be seen in a Maine case,[86] where funds were left in trust for the establishment and maintenance of an institution for the education of young women. An effort was made to obtain the authority of the court for the use of these funds to aid a high school in the town concerned. The court held that this would be violating rather than approximating the testator's intent, and that the case was not one for the application of the cy pres rule. Likewise in the case of Bowden v. Brown [87] the court refused to make use of this doctrine where money was left to a town for the erection of a building to be used in aiding the sick and poor. The town refused to accept the legacy or erect the building. The gift was specific, and no other similar charity would satisfy the court.

In a Kentucky case [88] the gift was to a trustee to be distributed to the poor in his discretion. The court held that the gift could

Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

[84] People v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015.

[85] Grimes' Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690.

[86] Allen v. Trustees of Nasson Institute, 107 Me. 120, 77 Atl. 638.

[87] 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419. And so, also, a gift to use a farm for aiding needy unmarried women formerly employed in the straw industry indicated a specific and not a general charitable intent, and, the trust as planned being impracticable, cy pres could not be applied. Gilman v. Burnett, 116 Me. 382, 102 Atl. 108, L. R. A. 1918A, 794. In Eliot v. Trinity Church, 232 Mass. 517, 122 N. E. 648, the court refused to order the substitution of one statue of Phillips Brooks for another under the cy pres doctrine.

[88] Thompson's Ex'r v. Brown, 70 S. W. 674, 24 Ky. Law Rep. 1066, 62 L. R. A. 398.

not be carried out under the cy pres power, and that that power was restricted to "carrying out an available charity to an identified and ascertainable object, where the mode provided by the gift is inadequate, illegal, or inappropriate, or which happens to fail."

The impracticability of carrying out the settlor's original trust plan need not amount to physical impossibility. It is sufficient to invoke the application of the cy pres doctrine that the difficulty of executing the plan is extreme.[89]

The cy pres power rests entirely with the court of equity and never in the trustees. The latter may not apply the funds, except according to the literal terms of the trust, even though it seems to them obviously desirable.[90]

The cy pres doctrine can have no application, of course, when the settlor expressly provides for the disposition of the trust property in the event of the failure of the charitable use to which he in the first instance directed that it be devoted.[91] But a mere general residuary clause, even if the residuary gift is to charity, does not prevent the use of the cy pres doctrine.[92]

THE RULE AGAINST REMOTENESS

64. Charitable trusts are not objectionable on the ground that they are to last perpetually. The law places no limits on their duration.

With one exception the rule against remoteness applies to the vesting of gifts in trust for charity and to gifts following charitable trusts. The gift must vest within lives in being and twenty-one years.

The exception exists in the case of a gift in trust for one charity, followed by a gift in trust for a second charity, to take effect on the happening of a certain event. The second charitable trust need not begin at a time measured by lives in being and twenty-one years, but may be limited to commence at any time.

The statement will frequently be found in the decisions that the rule against perpetuities does not apply to charitable trusts. "It is common knowledge that the rule as to perpetuities does not apply

[89] Women's Christian Ass'n v. Kansas City, 147 Mo. 103, 48 S. W. 960.

[90] Lakatong Lodge, No. 114, of Quakertown, etc., v. Board of Education of Franklin Tp., 84 N. J. Eq. 112, 92 Atl. 870.

[91] Larkin v. Wikoff, 75 N. J. Eq. 462, 72 Atl. 98, 79 Atl. 365, affirmed 77 N. J. Eq. 589, 78 Atl. 1134.

[92] Attorney General v. Briggs, 164 Mass. 561, 42 N. E. 118.

to property given to charities." [93] But, for the reason that "the rule against perpetuities" is an ambiguous phrase, these statements have been provocative of much confusion of thought. In some instances the rule against perpetuities means, to the court using it, the rule against remoteness; in other cases it means a rule against suspending the power of alienation. As has been well said by a Maine court: [94] "The statement is often found in the books that the law against perpetuities does not apply to public charities. But the statement is misleading. It is undoubtedly true that the principle of public policy, which declares that estates shall not be *indefinitely inalienable* in the hands of individuals, is held inapplicable to public charities. But it must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested."

That a charitable trust may be perpetual, no matter to what extent the trustees are prohibited from alienating the trust property, is not doubted. The desire of the common law that all property should be kept in the field of commerce, available for sale from hand to hand, is overcome in the case of charities by a stronger desire that the public should be benefited by the establishment and maintenance of trusts which aid the needy and improve the condition of mankind. It is no objection to a charitable trust to say that it must last forever, or that no limit to its existence is set.[95]

With respect to the application of the rule against too remote vesting to charitable trusts, four main situations may arise: (1) There may be a trust for charity, followed by a gift over to a private person; (2) there may be a gift to a private person, followed by a trust for charitable uses to take effect upon certain conditions; (3) an instrument may provide for the vesting of property in a trustee for charitable purposes at a future time; (4) provision may be made for one charitable trust which is to end on the happening of certain events, the property then to be held for the benefit of another charity, either by the same trustee, or by a new trustee.[96]

[93] Lindley, L. J., in In re Tyler, [1891] 3 Ch. 252, 257. See, also, Trustees of New Castle Common v. Megginson, 1 Boyce (Del.) 361, 77 Atl. 565, 570, Ann. Cas. 1914A, 1207; Bauer v. Myers, 244 Fed. 902, 157 C. C. A. 252.

[94] Whitehouse, J., in Brooks v. City of Belfast, 90 Me. 318, 324, 38 Atl. 222.

[95] Dexter v. Gardner, 7 Allen (Mass.) 243; Farmers' & Merchants' Bank of Jamesport v. Robinson, 96 Mo. App. 385, 70 S. W. 372; Smart v. Town of Durham, 77 N. H. 56, 86 Atl. 821; Hilliard v. Parker, 76 N. J. Eq. 447, 74 Atl. 447; Stanly v. McGowen, 37 N. C. (2 Ired. Eq.) 9; In re Smith's Estate, 181 Pa. 109, 37 Atl. 114; Young v. St. Mark's Lutheran Church, 200 Pa. 332, 49 Atl. 887; Franklin v. Armfield, 2 Sneed (Tenn.) 305.

[96] The application of the rule against remoteness to charitable trusts has

The first problem suggested above is illustrated by the case of In re Bowen.[97] In that case property was given in trust to establish schools in certain parishes; but if the government should at any time establish a general system of education, the charitable trust was to end and the property to go over to certain private persons. The gift over might take effect at any time in the future. The vesting of the property in the private persons was not certain to occur at a time measured by lives in being and twenty-one years. That the gift over followed a charitable trust was no reason why the ordinary rule against remoteness should not be followed. This is the view taken by those American courts which have considered the question.[98]

In the second instance suggested, namely, that of a gift to an individual, followed by a gift over to charity to vest at a future day, the courts are likewise unanimous in holding that the charitable gift must vest at a time which satisfies the rule against remoteness, or it will be void.[99] Thus, in Village of Brattleboro v. Mead,[1] the gift was to the testator's son absolutely, with a provision that, if the testator's heirs should fail at any time in the future, the property should be used for the establishment of an industrial school in the village of Brattleboro. It was held that the gift for the school was void as too remote, since the vesting of it was not measured by the period fixed by the rule against remoteness. In this respect it is evident that the rule against remoteness makes no exception of charitable trusts.

been learnedly and thoroughly discussed by the late Professor Gray in his Rule against Perpetuities (3d Ed.) §§ 589–628. On the English cases see Sanger, Remoteness and Charitable Gifts, 29 Yale Law J. 46.

[97] [1893] 2 Ch. 491.

[98] Starr v. Minister and Trustees of Starr Methodist Protestant Church, 112 Md. 171, 76 Atl. 595; Proprietors of Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Wells v. Heath, 10 Gray (Mass.) 17; Society for Promoting Theological Education v. Attorney General, 135 Mass. 285; Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087. But if the provision is merely that the charitable trust is to end upon the happening of a certain contingency and that the property is then to revert to the settlor's next of kin, this possibility of reverter is not void under the rule against remoteness, even though it may take effect at a time not measured by lives in being and twenty-one years. Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739.

[99] Attorney General v. Gill, 2 P. Wms. 369; Merritt v. Bucknam, 77 Me. 253; Merrill v. American Baptist Missionary Union, 73 N. H. 414, 62 Atl. 647, 3 L. R. A. (N. S.) 1143, 111 Am. St. Rep. 632, 6 Ann. Cas. 646; Leonard v. Burr, 18 N. Y. 96; Smith v. Townsend, 32 Pa. 434. In re Penrose's Estate, 257 Pa. 231, 101 Atl. 319.

[1] 43 Vt. 556.

In the third division of cases are those in which a gift to a trustee is made, the gift to vest at a future time, but no gift of the intermediate interest in the property is made. This class of cases is illustrated by Girard Trust Co. v. Russell.[2] The settlor in that case provided for the accumulation of the income of a certain fund until it was equal to the debt of the state of Pennsylvania. At that time it was to be paid to the treasurer of the state, to be held by him in trust for the payment of the state debt. The gift in trust to pay off the state debt was a charitable trust of the governmental variety. But its date of vesting was not measured according to the rule against remoteness. The charitable trust might begin at any time in the future. It was held that the trust was void, as conflicting with the rule against remoteness. Such is the general rule.[3] But a gift to a charitable corporation to be formed in the future may escape the rule against remoteness by the application of the cy pres doctrine.[4]

The only case in which the rule against remoteness makes an exception regarding charitable trusts is in the fourth class mentioned above. Where a provision is made for the transfer of property from one charity to another at a future time, the rule does not apply. The possible remoteness of the event is not important. Thus, in Christ's Hospital v. Grainger [5] property was given in 1624 to the town of Reading, in trust for the poor of the town, with a clause that, if the town neglected to perform the trust, the property should go over to London in trust for Christ's Hospital. The court held that the devise over was not objectionable, saying: "In this case there is a gift in trust for one charity, and, on the happening of a certain contingency, a gift in trust for another charity. There is no more perpetuity created by giving property to two charities, in that form, than by giving it to one. The evil meant to be guarded against by the rule of law against perpetuities is the making of the property inalienable." This view has been generally accepted in England and America.[6]

[2] 179 Fed. 446, 102 C. C. A. 592.

[3] Chamberlayne v. Brockett (1872) 8 Ch. App. 206; Jocelyn v. Nott, 44 Conn. 55; Washburn v. Acome, 74 Misc. Rep. 301, 131 N. Y. Supp. 963, affirmed 151 App. Div. 948, 136 N. Y. Supp. 1150; In re Galland's Estate, 103 Wash. 106, 173 Pac. 740 (semble). Contra: French v. Calkins, 252 Ill. 243, 96 N. E. 877; Franklin v. Hastings, 253 Ill. 46, 97 N. E. 265, Ann. Cas. 1913A, 135.

[4] See Gray, Rule against Perpetuities (3d Ed.) § 608 et seq.

[5] 16 Sim. 83.

[6] In re Tyler, [1891] 3 Ch. 252; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393; Storrs Agr. School v. Whitney, 54 Conn. 342, 8 Atl. 141; MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl.

The reason for this exception to the rule in favor of charities seems to be that where the remote gift over is to a charity the inalienability of the property is not in any way increased. Property held to charitable uses is for all practical purposes inalienable—is withdrawn from commerce. The addition of a provision for a remote gift over, thus making the title uncertain and incapable of absolute alienation, does not render the property inalienable, for it is already so.

Some courts have given as a reason for the exception that the tying up of property through two charitable trusts is no more objectionable than the restriction of the property by means of one charitable trust.[7] But this seems to be dodging the question of remoteness entirely and laying stress on the inalienable nature of property held under a charitable trust. The objection to a remote gift to a charity is not that charitable property is inalienable, but that the gift is remote, and all remote gifts seem to be prohibited by the rule against remoteness.

THE RULE AGAINST RESTRAINTS ON ALIENATION

65. It is of the essence of charitable trusts that the principal fund be kept intact and that the duration of the trust be indefinite. In those states which have as their rule against perpetuities the rule that the power of alienating property cannot be restrained for an undue length of time it is universally held that such rule has no application to charitable trusts and that by means of a charitable trust the power of alienating real or personal property may be perpetually suspended.

As has been previously noted,[8] the rule against perpetuities in many states is not a rule against remoteness, but is a rule that the power of alienating property cannot be suspended longer than a given period. In some states the period is two lives in being; in others, any number of lives in being. In the states which have this form of the rule against perpetuities it is held without exception that the rule[9] has no application to charitable trusts.[9] The

1027, 3 L. R. A. (N. S.) 227; Almy v. Jones, 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; Webster v. Wiggin, 19 R. I. 73, 31 Atl. 824, 28 L. R. A. 510.

[7] Jones v. Habersham, 107 U. S. 174, 185, 2 Sup. Ct. 336, 27 L. Ed. 401; Storrs Agr. School v. Whitney, 54 Conn. 342, 345, 8 Atl. 141.

[8] See page 171, ante.

[9] Const. Cal. art. 20, § 9; Chew v. First Presbyterian Church of Wilmington, Del. (D. C.) 237 Fed. 219; In re Coleman's Estate, 167 Cal. 212, 138 Pac.

charitable trust does naturally result in suspending the power of alienating the property which is subject to the trust. The trustees are expected to retain the principal fund intact and use the income for the carrying out of the charitable purposes of the settlor. The trust results in withdrawing from commerce a certain fund of money or certain other property. But the desirability of encouraging trusts which make for the general benefit of mankind offsets the dislike which the courts and legislators have of suspension of the power of alienating property. The settlor is allowed to suspend the power of alienation of the property involved, so long as he does it for the benefit of the public.

THE RULE AGAINST ACCUMULATIONS

66. In England all accumulations for the benefit of charity are void, on the ground that they constitute an illegal restriction on the enjoyment of property, and the charity is entitled to the income as fast as it accrues.

The leading American view is that accumulations for charity are subject to the control of equity, and will be allowed when reasonable and not prejudicial to the best interests of society. In several states the matter is now controlled by statute.

Attention has previously been directed to the so-called rule against accumulations, which provides that the income of property shall not be accumulated, except for a restricted period and in some states for the benefit of certain persons.[10] An important question is whether this rule applies with equal force to private trusts and charitable trusts. May a settlor direct that the income of prop-

992, Ann. Cas. 1915C, 682; Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; Wilson v. First Nat. Bank of Independence, 164 Iowa, 402, 145 N. W. 948, Ann. Cas. 1916D, 481; Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858; Lounsbury v. Trustees of Square Lake Burial Ass'n, 170 Mich. 645, 129 N. W. 36; In re Brown's Estate, 198 Mich. 544, 165 N. W. 929; How. Ann. St. Mich. 1912, § 10700; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Decker v. Vreeland, 170 App. Div. 234, 156 N. Y. Supp. 442; Brown v. Brown, 7 Or. 285; Lightfoot v. Poindexter (Tex. Civ. App.) 199 S. W. 1152; Staines v. Burton, 17 Utah, 331, 53 Pac. 1015, 70 Am. St. Rep. 788; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924; Danforth v. City of Oshkosh, 119 Wis. 262, 97 N. W. 258; In re Kavanaugh's Will, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470; Williams v. City of Oconomowoc, 167 Wis. 281, 166 N. W. 322; St. Wis. 1913, § 2039.

[10] See page 176, ante.

erty be accumulated for the benefit of a charity with any greater freedom than he may provide for accumulations for his own children? May a testator decree that half the income of the property given to charity shall be accumulated and added perpetually to the principal? Varying answers have been given to these questions by the several courts which have considered them.

In England it is now established that all provisions for the accumulation of income for the benefit of charity are void as illegal restraints on the use of property.[11] In the case last cited the testator had directed that the trustees should pay certain annuities and accumulate the surplus income for the benefit of certain hospitals. The court held that the charities were immediately entitled to all surplus income, and need not wait for such surplus until the time which the testator had set. The court stated that the property in the surplus was vested in the charities and that a direction that this property should not be enjoyed for a given period was void. It held that the rule of Saunders v. Vautier[12] was applicable to charitable corporations and trustees for charity as well as to private persons.

This view has not been taken by the American courts, however. The question was given careful consideration in St. Paul's Church v. Attorney General.[13] The court said: "In regard to this matter, one of three rules must be true: The accumulation must be valid forever; or it may be controlled by the court within reasonable and desirable bounds; or it must be subject to the same rules as an accumulation for private purposes. There is good reason to suppose that the rule last named should not apply, for, if the object is not subject to the rule against perpetuities, there is no good reason why an accumulation for that object should be. It certainly would be as much the policy of the law to favor an accumulation for charitable objects as to favor charitable objects. It often happens that the charitable purpose cannot be carried out without accumulation of a fund, sometimes for a long period of time. There are also good objections to a compulsory perpetual accumulation even for a charitable purpose. Much would depend on the terms under which the accumulation was to be made. There would be great public danger in allowing an accumulation indefinitely for a charitable purpose that was not to be carried out within some definite time. Such a purpose would be practically no charitable purpose at all. On the other hand, however, there are cases where

[11] Wharton v. Masterman, [1895] App. Cas. 186.
[12] 4 Beav. 115.
[13] 164 Mass. 188, 203, 204, 41 N. E. 231.

the income from property might be directed to be accumulated to form a fund, the income of which fund was to be annually applied to charitable purposes, as in the case at bar. Such an accumulation, it is evident, is less objectionable, as the income from the accumulating fund is constantly being applied to the charity year by year in larger amount. There seems to be no more objection to such an accumulation than to the holding of property constantly increasing in value for the benefit of the charity. We are of opinion, however, that the proper course is to hold that the limits of an accumulation for the benefit of charity are subject to the order of a court of equity. By this method of solving the difficulty, on the one hand an unreasonable and unnecessary trust for accumulation can be restrained, and on the other hand a reasonable accumulation can be allowed to carry out the intention of the benefactor and to secure the accomplishment of the trust in the best manner."

This view, that the limit of the accumulation for charity will be prescribed by the court of equity in each individual case, has been followed in Massachusetts and also adopted in Connecticut.[14] Thus, in Woodruff v. Marsh,[15] where the testator had given $400,000 to trustees to establish a children's home, he directed that $10,000 of the income of this $400,000 should be accumulated and added to the principal for a period of one hundred years. This was held by the Connecticut court to be a reasonable accumulation for charity.

In New York it has been held that the general statute relative to accumulations, which prohibits accumulations except during a minority for the benefit of a minor, applies to charitable trusts, and that a provision for the accumulation of the income of a fund for the benefit of a charitable corporation, pending the organization of that corporation, is invalid.[16] But by statute limited exceptions are made in favor of trusts for educational purposes.[17] An accumulation may be directed to occur until a sufficient sum is raised to accomplish a given charitable object, and the sufficiency

[14] Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008, 105 Am. St. Rep. 394; Ripley v. Brown, 218 Mass. 33, 105 N. E. 637; Collector of Taxes of Norton v. Oldfield, 219 Mass. 374, 106 N. E. 1014; Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393; Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Duggan v. Slocum, 92 Fed. 806, 34 C. C. A. 676. See, also, Girard Trust Co. v. Russell, 179 Fed. 446, 452, 102 C. C. A. 592.

[15] 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

[16] St. John v. Andrews Institute for Girls, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708.

[17] Real Property Law (Consol. Laws, c. 50) § 61; Personal Property Law (Consol. Laws c. 41) § 16.

of the sum is to be determined by the regents of the University of the State of New York. Likewise an accumulation to make up a deficiency in the capital sum is allowed, and an accumulation may be provided for as to the income of not more than one-fourth of a gift in trust for education (the sum not to exceed $50,000), the accumulation to continue till the sum has been raised to $100,000.

In Pennsylvania and Wisconsin the accumulation of income for charitable purposes is authorized to a limited extent by the Legislature.[18]

OTHER STATUTORY RESTRICTIONS ON CHARITABLE TRUSTS

67. In some states limitations upon the rights of the settlor of a charitable trust will be found in three classes of statutes, namely:

(a) Acts restricting the amount of property which a charitable corporation may hold;

(b) Laws declaring void gifts to charity made within a brief period before the death of the donor;

(c) Statutes prohibiting the giving of more than a certain part of the testator's fortune to charity, when such testator leaves given relatives.

Certain statutes, which place restrictions upon a settlor of a charitable trust and often render such trust invalid, deserve brief consideration here. They have to do with the capacity of corporations to receive gifts for charitable uses and with the power of a testator to give property to charity. A fuller discussion of such statutes will be found in works on corporations and wills.[19]

In the first place, if the charitable gift is to be made to a corporation, the settlor should ascertain that the corporation has capacity to take the property which he intends to give to it. The

[18] 1 Purd. Dig. Pa. (13th Ed.) p. 594. Charitable societies and corporations are prohibited from adding accumulated income to capital, "so as that the clear annual value thereof, as regards future acquisitions with those now held, shall exceed the limitation hereinbefore contained." The limitation mentioned seems to restrict such charitable bodies to holding property having an annual income of $30,000, unless expressly authorized by the legislature to hold more. St. Wis. 1913, § 2061, allows accumulations "for the sole benefit of a literary or charitable corporation which shall have been organized under the laws of this state, but such accumulation must terminate upon the expiration of twenty-one years from the time when the same shall be directed to commence." This statute applies to real estate only.

[19] See Underhill on the Law of Wills, §§ 841, 842.

general laws of the state or the charter of the corporation may prevent the corporation from taking the property which he desires to give to it. This class of statutes is illustrated by the case of In re McGraw's Estate.[20] A testatrix made a gift to Cornell University, to be held by it for library purposes. That corporation was, by its charter, restricted to holding property not to exceed $3,000,000 in value. The gift in question was declared void, because the University already held property in excess of the value named in the charter. The court held that the next of kin of the testatrix might raise the question of the invalidity of the gift, and that that right did not rest in the state of New York alone. Upon this latter point, namely, that as to the right to contest the validity of a gift to a corporation on the ground of its lack of capacity, there is a difference of opinion; the prevailing view being opposed to that of the New York court, and being that only the state involved is entitled to attack the gift on such ground.[21]

A second class of statutes has placed limitations upon the intending charitable settlor by declaring void gifts made to charitable uses immediately before the death of the donor. The theory of such laws is that gifts made to charity on the threshold of death are apt to be made without due consideration, in an unnatural state of mind, and often under undue influence. The Pennsylvania statute is a good illustration. It provides: "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary thereto, shall be void and go to the residuary legatee or devisee, next of kin or heirs, according to law. * * *"[22]

[20] 111 N. Y. 66, 19 N. E. 233, 2 L. R. A. 387, affirmed Cornell University v. Fiske, 136 U. S. 152, 10 Sup. Ct. 775, 34 L. Ed. 427. See 1 Purd. Dig. Pa. (13th Ed.) p. 594, for a statutory rule regarding the amount of property which charitable corporations may hold.

[21] Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393; Hewitt v. Wheeler School & Library, 82 Conn. 188, 72 Atl. 935; Francis v. Preachers' Aid Soc., 149 Iowa, 158, 126 N. W. 1027; Farrington v. Putnam, 90 Me. 405, 37 Atl. 652, 38 L. R. A. 339; Chase v. Dickey, 212 Mass. 555, 99 N. E. 410; In re Kortright's Estate, 237 Pa. 143, 85 Atl. 111; Heiskell v. Chickasaw Lodge, 87 Tenn. 668, 11 S. W. 825, 4 L. R. A. 699.

[22] 1 Purd. Dig. (13th Ed.) p. 595; Appeal of McGlade, 99 Pa. 338; Reimensnyder v. Gans, 110 Pa. 17, 2 Atl. 425; Flood v. Ryan, 220 Pa. 450, 69 Atl. 908, 22 L. R. A. (N. S.) 1262, 13 Ann. Cas. 1189, discussed in an article by Mr. G. Bryan on Judicial Evasion of Statutes, in 15 Va. Law Reg. 577. See, also, Civ. Code Cal. § 1313, and Bowdoin College v. Merritt (C. C.) 75 Fed. 480.

Still a third class of restricting statutes is illustrated by the laws of New York: "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more." [23]

The limitations upon one intending to become the settlor of a charitable trust are obvious. The statutes of the state concerned should be consulted, to learn whether the Legislature has required that the gift be made a certain time before the death of the donor, or whether there is a prohibition placed upon the giving of more than a certain proportion of the testator's fortune.

EFFECT OF PARTIAL INVALIDITY

68. If an instrument makes provision for a valid charitable trust and also for an invalid trust, the charity will be enforced by equity, if it can be separated from the invalid trust without doing violence to the settlor's apparent intent.

The questions arising when a charitable trust is linked with a trust provision which is invalid are the same as those arising in the construction of any will or deed which is partially invalid. The prime problem is always the divisibility of the two provisions. Are they inseparably woven together, so that they must stand or fall together, or may they be divided, and the invalid clause stricken out, without thwarting what would have been the settlor's intent, had he foreseen that such a condition would arise?

Thus, in a New Jersey case,[24] a testator provided for a trust to care for a private cemetery lot and graveyard, and directed that any surplus income derived from the trust funds should be applied to the payment of any deficiency in the salary of the pastor of a certain church. The provision for the cemetery trust was invalid, as not charitable, and as providing for a perpetuity. The gift for church purposes was valid. The court held that the two were, however, so connected that the valid could not be separated and stand

[23] New York Decedent Estate Law (Consol. Laws, c. 13) § 17. See, also, Civ. Code Cal. § 1313, where the amount is limited to one-third.

[24] Van Syckel v. Johnson, 80 N. J. Eq. 117, 70 Atl. 657. See, also, Andrew v. New York Bible & Common Prayer Book Soc., 6 N. Y. Super. Ct. (4 Sandf.) 156; Levy v. Levy, 33 N. Y. 97; In re Lyon, 173 App. Div. 473, 159 N. Y. Supp. 951; Commonwealth v. Levy, 23 Grat. (Va.) 21.

alone, but must fall with the illegal gift. "When an unascertainable part of a fund is given upon a void trust, and the residue upon a valid trust, the whole fails." [25]

On the other hand, in Lewis v. Lusk [26] the testator gave funds to trustees, and directed that $3,500 thereof should be paid to trustees for the American Colonization Society and the balance divided equally between two church boards. The bequest to the Colonization Society was void under the then laws of the state, as being contrary to the public policy of the state, which encouraged slavery. But the gift to the church boards was valid as a religious charitable trust, and, since the void gift was certain as to amount and not connected in any way with the gift to the churches, the court sustained the latter gift and declared void the gift to aid the emancipation of slaves.

If the settlor's heirs know of the application of funds of the estate to a void charitable trust and acquiesce in such application, they are estopped later to claim such funds, even though the court may declare the trust void.[27]

CONFLICT OF LAWS

69. The validity of the purpose of charitable trusts is determined in the same manner as that of private trusts. If the subject-matter is land, the law of the jurisdiction where the land is located controls; if the subject-matter is personalty, and the trust is created by deed inter vivos, the law of the place where the instrument was executed controls; if the subject-matter is personalty, and the trust is created by will, by the weight of authority the law of the testator's domicile controls the validity of the charitable trust.

The rules respecting the conflict of laws as applied to the validity of the purpose of trusts have previously been discussed.[28] Upon this point charitable trusts do not differ from private trusts. It is sufficient to refer to the cases dealing with the subject in connection with charitable trusts. When land is involved, the law of the situs of the land is that governing the validity of the charity.[29]

If the property devoted to charity is personal property, and the

[25] Van Syckel v. Johnson, 80 N. J. Eq. 117, 70 Atl. 657, 658.

[26] 35 Miss. 401. See, also, In re Peabody's Estate, 154 Cal. 173, 97 Pac. 184; Webster v. Morris, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278.

[27] Coleman v. O'Leary's Ex'r, 114 Ky. 388, 70 S. W. 1068.

[28] See ante, § 46.

[29] Brigham v. Peter Bent Brigham Hospital, 134 Fed. 513, 67 C. C. A. 393.

gift is made during the settlor's life by means of a deed, it is agreed that the law of the place where the trust instrument is executed is the law which determines the validity of the trust purpose.[30] On the other hand, if the instrument creating the charitable trust is a will and the property personalty, the better view is that the law of the testator's domicile at the time of his death will give the controlling rules,[31] although the courts of New York have in some cases applied the law of the domicile of the legatee.[32]

[30] Girard Trust Co. v. Russell, 179 Fed. 446, 102 C. C. A. 592.

[31] Duggan v. Slocum, 92 Fed. 806, 34 C. C. A. 676; Klumpert v. Vrieland, 142 Iowa, 434, 121 N. W. 34; In re Sturgis, 164 N. Y. 485, 58 N. E. 646; United States Trust Co. of New York v. Wood, 146 App. Div. 751, 131 N. Y. Supp. 427; American Bible Soc. v. Pendleton, 7 W. Va. 79.

[32] Kennedy v. Town of Palmer, 1 Thomp. & C. 581; Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; In re Weeks, 85 Misc. Rep. 280, 146 N. Y. Supp. 1006; Stieglitz v. Attorney General of State of New York, 91 Misc. Rep. 139, 154 N. Y. Supp. 137.

CHAPTER VIII

THE SETTLOR

THE QUALIFICATIONS OF THE SETTLOR

70. Any person capable of conveying property absolutely may create a trust therein by a declaration of trust or transfer in trust. The power to be a settlor is restricted by the same rules which govern the disposition of property free from trust.

The crown, a state, and municipal and private corporations may settle property in trust. Infants, married women, lunatics, and aliens may create trusts in their property, subject to the same rules as to disaffirmance and avoidance which affect their ordinary transactions.

The settlor of a trust has previously been defined to be the person who intentionally causes the trust to come into existence.[1] The settlor is also sometimes called the creator or trustor. Having discussed elsewhere the definition of this party to the trust, it remains to consider the small number of problems which arise with respect to him. Ordinarily, upon the complete creation of the trust, the settlor drops out of the transaction and has few, if any, rights or duties. There are, however, a few questions which concern the settlor more than any other element of the trust relation. These questions will be treated at this point.

The first query is: Who may be the settlor of a trust? What qualifications, if any, must the settlor possess, in order that equity will recognize and enforce the trust which he has attempted to create?

The answer is that the capacity to create a trust is restricted only by the ability of the party to convey or transfer property. "In general, every person competent to make a will, enter into a contract, or hold the legal title to and manage property, may dispose of it as he chooses, and, sui juris, has the power to create a trust, and dispose of his property in that way. * * *"[2] If one

[1] See ante, p. 1.

[2] Skeen v. Marriott, 22 Utah, 73, 89, 61 Pac. 296. See, also, Reiff v. Horst, 52

may legally convey his property absolutely, he may convey it upon trust, or declare himself to hold it upon trust.

The sovereign has the power to convey property upon trust. Thus, in England the crown may grant upon trust, as in the case of a conveyance of a prize in trust for the captors.[3] And so, in the United States, the Legislature of a state has the authority to convey upon trust property which is vested in the state.[4]

Corporations, both municipal[5] and private,[6] have the power to becomes settlors of property in trust for purposes which are within their corporate powers.

The conveyances of infants,[7] married women,[8] insane persons, and aliens upon trust are subject to the same restrictions as absolute transfers by such persons would be. The trust instruments may be set aside on account of the disability of the settlor whenever a grant without trust could be overturned for the same reason.

Naturally a bankrupt cannot create a trust in property already in the hands of the trustee in bankruptcy.[9]

The beneficiary of a trust may settle his equitable interest in trust in the same way that the owner of the legal title may create a trust.[10] There may be a trust within a trust.

A court of equity cannot properly be said to have the power of settling a trust. It finds trusts to exist, but does not create them itself. "Our courts have no common-law authority to create any kind of trusts, certainly not express trusts. In the exercise of equity jurisdiction, they find and adjudge trusts to exist by reason of contracts, devises, bequests, gifts, or wrongful or fraudulent acts, and may always appoint trustees when necessary to execute them, but never, by common-law authority, create them." [11]

Md. 255, 267. The beneficiary of a trust may contribute to the trust fund and thus make himself in part a settlor. Central Trust Co. of New York v. Falck, 177 App. Div. 501, 164 N. Y. Supp. 473.

[3] Stevens v. Bagwell, 15 Ves. 139; Lewin, Trusts (12th Ed.) 20.

[4] Commissioners of Sinking Fund v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

[5] Mayor of Colchester v. Lowten, 1 Ves. & B. 226.

[6] State v. President, etc., of Bank of Maryland, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Dana v. Bank of United States, 5 Watts & S. (Pa.) 223.

[7] Ownes v. Ownes, 23 N. J. Eq. 60; Starr v. Wright, 20 Ohio St. 97.

[8] Durant v. Ritchie, 4 Mason, 45, Fed. Cas. No. 4190. In Brandan v. McCurley, 124 Md. 243, 92 Atl. 540, L. R. A. 1915C, 767, it was held that, although a married woman could not convey property to her husband directly, she and he might join in a deed to him as trustee, since his capacity as grantee was different from his status as grantor.

[9] Gardner v. Rowe, 5 Russ. 258.

[10] Tierney v. Wood, 19 Beav. 330; Kronheim v. Johnson, 7 Ch. D. 60.

[11] Vanclief, C., in Simpson v. Simpson, 80 Cal. 237, 242, 22 Pac. 167, 168.

Attention has hitherto been called to some statutory limitations upon the rights of certain persons to settle property upon charitable trusts.[12] For the purpose of protecting the families of settlors and to prevent fraud and duress the creators of charitable trusts are in some states limited as to the amount of property which they may give to charity and the time before death within which it must be given.

SETTLOR'S RIGHTS—CONSTRUCTION AND ENFORCEMENT OF TRUST

71. A settlor who conveys his entire title to trustees has no right to bring a bill in equity for the construction or enforcement of the trust. Such right rests with the beneficiaries.

Ordinarily the settlor of a trust in which the fee is granted has no interest in the trust property after the complete creation of the trust.[13] He is as much a stranger to that property as a third person who has had no connection with it. The legal title to the property is in the trustee, and the equitable interest rests in the beneficiary. All estates not expressly granted by the settlor of the trust to the trustee remain in the settlor.[14]

It is obvious that the settlor has no right to obtain a construction of the trust instrument by a court of equity.[15] What the trust instrument means is of no importance financially to him, for under no construction of it will he be adjudged to have property rights.

Nor is it the right of the settlor to obtain the enforcement of the trust. Its enforcement will not make him a penny richer. Equity will give aid to such enforcement only on the application of the trustee or a cestui que trust.[16] "It is a general rule that a suit to enforce a trust can only be maintained by the trustee or the cestui que trust. As against a third person, the trustee, he

[12] See ante, p. 244.

[13] Boone v. Davis, 64 Miss. 138, 8 South. 202; Marvin v. Smith, 46 N. Y. 571.

[14] Townshend v. Frommer, 125 N. Y. 446, 26 N. E. 805; Monday v. Vance, 92 Tex. 428, 49 S. W. 516.

[15] Carroll v. Smith, 99 Md. 653, 59 Atl. 131; Levy v. Hart, 54 Barb. (N. Y.) 248.

[16] Rodney v. Shankland, 1 Del. Ch. 35, 12 Am. Dec. 70; Culbertson v. Matson, 11 Mo. 493; Foster v. Friede, 37 Mo. 36; Carter v. Uhlein (N. J. Ch.) 36 Atl. 956. Contra: Abbott v. Gregory, 39 Mich. 68, where the agreement of the trusteee to carry out the trust is viewed as a contract apparently enforceable by either the cestui or the settlor. The settlor's administrator or executor, of course, stands in his shoes. Kellogg v. White, 103 Misc. Rep. 167, 169 N. Y. Supp. 989; Barrette v. Dooly, 21 Utah, 81, 59 Pac. 718.

being regarded as the representative of the cestui que trust, is the proper party to bring the action. As against the trustee himself, the suit can only be maintained by the cestui que trust. Where the trust is for a public charity, there being no certain persons who are entitled to it, so as to be able to sue in their own names as cestuis que trust, a suit for the purpose of having the charity duly administered must be brought in the name of the Attorney General. In such a case that officer, as representative of the public, would occupy the relation of cestui que trust to trustees." [17]

Naturally, if the settlor has an interest in remainder following the trust, he can, after the expiration of the trust, compel a reconveyance, or the delivery of possession, by the trustee.[18] And obviously, if the trust is for the benefit of the settlor, he may enforce it; but here he occupies a double role, and the enforcement is by the cestui, and not by the settlor.[19]

Although in a few cases the settlor of a charitable trust has been given the power to compel the trustees to carry out the trust,[20] the general rule is that the Attorney General or other public prosecuting officer is the proper party to enforce the charitable trust.[21] He represents the public from whom the beneficiaries are to be selected. He appears for the indefinite cestuis que trust.

[17] Harris, J., in Association for the Relief of Respectable, Aged Indigent Females v. Beekman, 21 Barb. (N. Y.) 565, 568, 569.

[18] Eaton v. Tillinghast, 4 R. I. 276.

[19] Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900; Hamilton v. Muncie, 182 App. Div. 630, 169 N. Y. Supp. 826.

[20] Garrison v. Little, 75 Ill. App. 402; Chambers v. Baptist Education Society, 1 B. Mon. (Ky.) 215; Tate v. Woodyard, 145 Ky. 613, 140 S. W. 1044; Warren v. Mayor of City of Lyons, 22 Iowa, 351; Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594; In re St. Michael's Church, 76 N. J. Eq. 524, 74 Atl. 491; Chapman v. Wilbur, 4 Or. 362.

[21] People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; People v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015; Parker v. May, 5 Cush. (Mass.) 336; Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Attorney General v. Bedard, 218 Mass. 378, 105 N. E. 993; Tyree v. Bingham, 100 Mo. 451, 13 S. W. 952; New York Real Property Law (Consol. Laws, c. 50) § 113; Personal Property Law (Consol. Laws, c. 41) § 12; Buell v. Gardner (Sup.) 149 N. Y. Supp. 803; Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A. L. R. 303 (but, in Tennessee the Attorney General cannot act unless a trustee is appointed); Kemper v. Trustees of Lane Seminary, 17 Ohio, 293. In Michigan the prosecuting attorney acts. How. Ann. St. § 10701. The best-reasoned cases have denied to the settlor or his heirs the right to enforce the charitable trust. Sanderson v. White, 35 Mass. (18 Pick.) 328, 29 Am. Dec. 591; Sandusky v. Sandusky, 265 Mo. 219, 177 S. W. 390; Petition of Burnham, 74 N. H. 492, 69 Atl. 720; Glover v. Baker, 76 N. H. 393, 83 Atl. 916; Strong v. Doty, 32 Wis. 381.

SETTLOR'S RIGHTS—REVOCATION OR MODIFICATION

72. Unless a power to revoke or modify is expressly reserved, or the creation of the trust is affected by fraud, duress, or mistake, the settlor has no power to revoke or modify the trust, even though it was created without consideration.

May the settlor destroy or revoke the trust after its complete creation? If the settlement is founded on consideration, obviously it is without the powers of the settlor to revoke the trust, unless he has bargained for such a right. And so, also, if the settlement of the trust was voluntary, there may be no revocation unless that right was reserved. Of course, frequently the right to revoke is expressly provided, and in such case there can be no dispute about the power of the settlor to destroy the trust.[22]

But where such right of revocation is not retained by the settlor, and he effects a complete trust, he has lost all control over the property. There is no implied power of revocation.[23] The case of Viney v. Abbott[24] is a good illustration of this rule. There one

[22] Kansas City Theological Seminary v. Kendrick (Mo. App.) 203 S. W. 628; Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257; Wood v. Paul, 250 Pa. 508, 95 Atl. 720. Where a settlor creates a trust for herself for life and after death for her children, with a provision that, if the settlor at any time convey the land by deed, the trustee should thereafter hold for such grantee, a power to revoke the trust is reserved, and the settlor is in the position of a fee-simple owner. Culpeper Nat. Bank v. Wrenn, 115 Va. 55, 78 S. E. 620. If the right to revoke is made dependent on the consent of the trustee, of course the settlor alone cannot destroy the trust. Downs v. Security Trust Co., 175 Ky. 789, 194 S. W. 1041.

For a further discussion of the power of the settlor to terminate the trust, see section 128, post.

[23] Gray v. Union Trust Co. of San Francisco, 171 Cal. 637, 154 Pac. 306; Lovett v. Farnham, 169 Mass. 1, 47 N. E. 246; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204 (semble); Stein v. Nat. Bank of Commerce (Mo. App.) 181 S. W. 1072; New Jersey Title Guarantee & Trust Co. v. Parker, 84 N. J. Eq. 351, 93 Atl. 196; Hammerstein v. Equitable Trust Co. of New York, 156 App. Div. 644, 141 N. Y. Supp. 1065; Dorman v. Balestier (Sup.) 175 N. Y. Supp. 677; Fishblate v. Fishblate, 238 Pa. 450, 86 Atl. 469; In re Greenfield's Estate, 14 Pa. 489; Reidy v. Small, 154 Pa. 505, 26 Atl. 602, 20 L. R. A. 362; Barber v. Thompson, 49 Vt. 213; Sargent v. Baldwin, 60 Vt. 17, 13 Atl. 854; Howard v. Howard, 60 Vt. 362, 14 Atl. 702.

In Richards v. Wilson, 185 Ind. 335, 112 N. E. 780, it is held that, upon a subscription to a charitable trust fund without mention of revocation, there is an implied condition against revocation. Obviously a completed trust with no power of revocation reserved cannot be revoked by a will of the settlor. McElveen v. Adams, 108 S. C. 437, 94 S. E. 733.

[24] 109 Mass. 300.

William Viney had transferred personal property to a trustee, to be held for the support of Viney during his life, and after his death for the benefit of certain relatives. No power of revocation was expressed in the instrument. Only a week after the creation of this trust Viney married, and desired to destroy the trust and retake the property. The court said: "It is immaterial whether there was any other consideration than appears upon the face of the indenture; for, even if the settlement was purely voluntary, the case falls within the doctrine, now well established in equity, that a voluntary settlement, completely executed, without any circumstances tending to show mental incapacity, mistake, fraud, or undue influence, is binding and will be enforced against the settlor and his representatives, and cannot be revoked, except so far as a power of revocation has been reserved in the deed of settlement, and that the fact that by the terms of the deed the income of the property is to be applied by the trustee to the benefit of the settlor during his lifetime does not impair the validity or effect of the further trusts declared in the instrument." [25]

The courts of Rhode Island have taken the position that in a voluntary trust the insertion of a power of revocation is so natural and reasonable that failure to reserve such power will be regarded as prima facie evidence of mistake,[26] but this doctrine has not received general acceptance.[27] In New York by statute, upon the consent of all persons beneficially interested in a trust in personal property, the creator thereof may revoke it.[28]

[25] Gray, J., in Viney v. Abbott, 109 Mass. 300, 302, 303. For similar views see Appeal of Fellows, 93 Pa. 470; Kraft v. Neuffer, 202 Pa. 558, 52 Atl. 100.

[26] Aylsworth v. Whitcomb, 12 R. I. 298.

[27] Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300, 12 Ann. Cas. 837.

[28] New York Personal Property Law (Consol. Laws, c. 41) § 23. The wording of the statute is as follows: "Upon the written consent of all the persons beneficially interested in a trust in personal property or any part thereof heretofore or hereafter created, the creator of such trust may revoke the same as to the whole or such part thereof, and thereupon the estate of the trustee shall cease in the whole or such part thereof." For cases construing this statute, see Cazzain v. Title Guarantee & Trust Co., 175 App. Div. 369, 161 N. Y. Supp. 884, affirmed 220 N. Y. 683, 116 N. E. 1040; Sperry v. Farmers' Loan & Trust Co., 154 App. Div. 447, 139 N. Y. Supp. 192; Crackanthorpe v. Sickles, 156 App. Div. 753, 141 N. Y. Supp. 370; Whittemore v. Equitable Trust Co., 162 App. Div. 607, 147 N. Y. Supp. 1058; Goodwin v. Broadway Trust Co., 87 Misc. Rep. 130, 149 N. Y. Supp. 1033; Court v. Bankers' Trust Co. (Sup.) 160 N. Y. Supp. 477; Cruger v. Union Trust Co. of New York, 173 App. Div. 797, 160 N. Y. Supp. 480; Cram v. Walker, 173 App. Div. 804, 160 N. Y. Supp. 486; In re Berry, 178 App. Div. 144, 164 N. Y. Supp. 990; Williams v. Sage, 180 App. Div. 1, 167 N. Y. Supp. 179.

Neither the absence [29] nor the presence [30] of a power of revocation has any effect upon the validity of a trust. Either the absence or presence of such power is consistent with a completed trust. On elementary principles, a voluntary agreement to convey upon trust may be abandoned without obligation.[31]

A settlor may not modify the terms of the trust after its complete creation.[32] Thus, where land was given in trust for school purposes, the settlor could not later add to the trust the restriction that the school should admit white children only.[33] The settlor of a passive trust cannot change it to an active one.[34] A power of revocation reserved does not authorize the settlor to alter the terms of the trust by his will.[35]

[29] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918; Riddle v. Cutter, 49 Iowa, 547; Middleton v. Shelby County Trust Co., 51 S. W. 156, 21 Ky. Law Rep. 183; Carroll v. Smith, 99 Md. 653, 59 Atl. 131; Rogers v. Rogers, 97 Md. 573, 55 Atl. 450; Brown v. Mercantile Trust & Deposit Co., 87 Md. 377, 40 Atl. 256.

[30] Stone v. Hackett, 78 Mass. (12 Gray) 227; Seaman v. Harmon, 192 Mass. 5, 78 N. E. 301; Mize v. Bates County Nat. Bank, 60 Mo. App. 358; Schreyer v. Schreyer, 101 App. Div. 456 91 N. Y. Supp. 1065; Locke v. Farmers' Loan & Trust Co., 140 N. Y. 135, 35 N. E. 578; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14; Witherington v. Herring, 140 N. C. 495, 53 S. E. 303, 6 Ann. Cas. 188; Springs v. Hopkins, 171 N. C. 486, 88 S. E. 774. "The reservation of a reversion is not inconsistent with the creation of a trust to continue until the death of the reversioner." Doctor v. Hughes, 225 N. Y. 305, 311, 122 N. E. 221. A power of revocation in a deed of trust does not render the instrument testamentary. Wilcox v. Hubbell, 197 Mich. 21, 163 N. W. 497.

[31] McCartney v. Ridgway, 160 Ill. 129, 43 N. E. 826, 32 L. R. A. 555.

[32] Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122; Sewall v. Roberts, 115 Mass. 262; Pacific Nat. Bank v. Windram, 133 Mass. 175; Gulick v. Gulick, 39 N. J. Eq. 401; Taylor v. James, 4 Desaus. (S. C.) 1.

[33] Price v. School Directors, 58 Ill. 452.

[34] Fish v. Prior, 16 R. I. 566, 18 Atl. 162.

[35] Appeal of Dickerson, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547.

CHAPTER IX

THE SUBJECT-MATTER.

THE SUBJECT-MATTER OF THE TRUST

73. Every trust must have some property as its subject-matter. This property may be of any kind recognized as valuable by a court of equity. It may be legal or equitable, real or personal. The subject-matter of the trust must be certain, in order that the trust be enforceable.

A trust without subject-matter is inconceivable. It could not exist, any more than a trust without a trustee or a beneficiary.[1] Some property must be fixed as the res, to be held by the trustee for the beneficiary. In a few cases efforts have been made to prove that a trust existed where no property could be found as the subject-matter. Thus, in several cases a testator has requested that a certain person be employed by the executors as solicitor or attorney or clerk. It has been held in these cases that the testator's direction did not create a trust, because of the lack of subject-matter.[2] No sum was left in trust to employ the person named. And so, also, the proceeds of property not in existence cannot be made the subject-matter of a trust;[3] nor does any trust arise from a request that the testator's wife and sister should live together.[4]

"In general, any right, interest, or thing which may be the subject of property may be granted in trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust." [5] This property may be land, money, a patent right,[6] grow-

[1] "In order that there may be a trust of any kind, there must be a trust fund." Koehler v. Koehler (Ind. App.) 121 N. E. 450, 455.

[2] Foster v. Elsley, 19 Ch. Div. 518; Jewell v. Barnes' Adm'r, 110 Ky. 329, 61 S. W. 360, 53 L. R. A. 377; In re Thistlethwaite (Sur.) 104 N. Y. Supp. 264; Matter of Wallach, 164 App. Div. 600, 150 N. Y. Supp. 302.

[3] Mitchell v. Bilderback, 159 Mich. 483, 124 N. W. 557. In Fidelity Title & Trust Co. v. Graham, 262 Pa. 273, 105 Atl. 295, it was held that the beneficiary of a life insurance policy might declare a trust of the right to the proceeds, although such right was contingent on the failure of the insured to change the beneficiary.

[4] Graves v. Graves, 13 Ir. Ch. 182.

[5] Dunn, J., in Burke v. Burke, 259 Ill. 262, 268, 102 N. E. 293, 295. See, also, Haulman v. Haulman, 164 Iowa, 471, 145 N. W. 930, 933.

[6] In re Russell's Patent, 2 De G. & Jon. 130.

ing crops,[7] a promissory note,[8] a claim against a bank,[9] an equitable interest,[10] a ship in construction,[11] or unaccrued rents and profits.[12]

It is obvious that the subject-matter of the trust must be certain, if a court of equity is to enforce it. An uncertain trust res is as fatal to the trust as no subject-matter whatever. Thus, where a testator provided that after a certain date the trustees might give such portions of the estate as they thought proper to any of the testator's brothers and sisters who might stand in need of the aid, and that the trustees should devote the remainder of the property to the advancement of the cause of temperance or in aid of a manual training school, it was held that the gift in trust for the cause of temperance or the school was void for uncertainty, since there was no assurance that there would be any of the property of the testator left after his brothers and sisters were provided for.[13] On the other hand, a legacy in trust of a sufficient sum of money to produce $50 per annum is not void for uncertainty of the subject-matter.[14]

[7] Mauldin v. Armistead, 14 Ala. 702.

[8] Broughton v. West, 8 Ga. 248; Duly v. Duly, 2 Ohio Dec. 425.

[9] McCarthy v. Provident Institution for Savings, 159 Mass. 527, 34 N. E. 1073.

[10] Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378. In Clark v. Frazier, (Okl.) 177 Pac. 589, it was held that a school land certificate entitling its holder to a preferential right to buy the land was an equitable interest, which could be the subject-matter of a trust.

[11] Starbuck v. Farmers' Loan & Trust Co., 28 App. Div. 272, 51 N. Y. Supp. 58.

[12] Gisborn v. Charter Oak Life Ins. Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029.

[13] Wilce v. Van Anden, 248 Ill. 358, 94 N. E. 42, 140 Am. St. Rep. 212, 21 Ann. Cas. 153. Property expected to be received under the will of a relative may not be made the subject-matter of a trust. In re Lynde's Estate (Sur.) 175 N. Y. Supp. 289.

[14] Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998. For other cases, in which doubt has been raised as to the certainty of the subject-matter, but the trusts have been sustained, see Speer v. Colbert, 200 U. S. 130, 26 Sup. Ct. 201, 50 L. Ed. 403; French v. Calkins, 252 Ill. 243, 96 N. E. 877; Haynes v. Carr, 70 N. H. 463, 49 Atl. 638; Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986.

CHAPTER X

THE TRUSTEE: HIS QUALIFICATIONS, APPOINTMENT AND REMOVAL

THE TRUSTEE—HIS QUALIFICATIONS

74. Any person capable of taking and holding the title to property may be a trustee.

The crown in England, the United States, or a state may be a trustee, although the trust may be unenforceable in the courts.

Corporations, both private and municipal, may accept trusts for purposes within their corporate powers.

An unincorporated association has not the capacity to be a trustee, but a trust naming such an organization as trustee will not fail for that reason.

Married women, infants, aliens, and lunatics may be trustees, subject to the disabilities which affect them in all their transactions.

The settlor may declare himself a trustee, or may make the beneficiary trustee. Where the cestui que trust is the sole beneficiary, the trust will be destroyed by a merger of the legal and equitable interests of the trustee-beneficiary. But where the beneficiary is only one of several trustees, the trust will continue, although the trustee-beneficiary will, according to the better view, be incompetent to act where his private interests are concerned.

What are the qualifications of a trustee? What persons, natural and artificial, may hold the office of trustee?

Any person capable of taking and holding the title to real or personal property may be a trustee. If one has the power to become the owner of property absolutely and for his own benefit, he may likewise become seized of property in trust for another.

The sovereign in England may be a trustee, although the beneficiary has no power to enforce the trust against the crown. Recent statutes [1] have provided against escheat to the crown upon the death of a trustee without heirs, and have also made it possible for the crown to transfer the duties of a trusteeship to another.

By way of dictum the New York Court of Appeals has said that the United States is incapable of holding property in trust for the establishment of a school. "Is it, therefore, within the scope of its [the federal government's] political corporate capacity to administer indefinite charitable trusts? It seems to me there can be but one answer. The United States exists under grants of power, express or implied, in a written Constitution, and the functions of all the departments are definitely limited and arranged. It is not within the express or implied powers of the government, as organized, to administer a charity." [2]

While there seems to be a dearth of law on this subject, there is no reason in principle why the federal government may not hold property in trust for governmental purposes, and leading writers agree that it has such power.[3]

A state may be a trustee,[4] as for example, when the holder of property in trust to establish a home for insane persons,[5] or when taxes are illegally collected,[6] or when money is given for the benefit of the children living in the state,[7] or when the foreshore of the ocean is held for the public,[8] or where land is held for the benefit of soldiers.[9]

"It may be stated as a general proposition of law that a corporation capable of holding real estate is capable also of executing a charitable trust, unless the statute or the articles of incorporation prohibit it. And, unless specially restrained, municipal corporations may take and hold property in their own right by direct gift, conveyance, or devise, in trust, for purposes germane to the objects of the corporation, or which will promote, aid, or assist in carrying out or perfecting those objects." [10]

[1] 39 & 40 Geo. III, c. 88 (1800); 4 & 5 Wm. IV, c. 23 (1834); 13 & 14 Vict. c. 60, §§ 15, 46, 47 (1850).

[2] Wright, J., in Levy v. Levy, 33 N. Y. 97, 122.

[3] 1 Perry, Trusts (6th Ed.) p. 31; 28 Amer. & Eng. Enc. of Law (2d Ed.) p. 954; 39 Cyc. 247.

[4] Preston v. Walsh (C. C.) 10 Fed. 315.

[5] Yale College's Appeal, 67 Conn. 237, 34 Atl. 1036.

[6] Shoemaker v. Board of Com'rs of Grant County, 36 Ind. 175.

[7] Bedford v. Bedford's Adm'r, 99 Ky. 273, 35 S. W. 926.

[8] Allen v. Allen, 19 R. I. 114, 32 Atl. 166, 30 L. R. A. 497, 61 Am. St. Rep. 738.

[9] Pinson v. Ivey, 1 Yerg. (Tenn.) 296.

[10] Clayton v. Hallett, 30 Colo. 231, 249, 70 Pac. 429, 59 L. R. A. 407, 97

Instances in which gifts to cities to hold in trust for governmental or other charitable purposes have been sustained are frequent.[11] These trusts are generally in aid of objects which the municipality is under a duty to forward or might well forward. Thus, one trust was for the establishment of a hospital for foundlings,[12] another for the purpose of making loans to needy young artificers,[13] and still a third for the planting and care of shade trees in the city.[14]

A town or village may become a trustee to carry out purposes for which it was incorporated.[15] "A trust for the support of schools, or of a particular school as a high school, or for any purpose of general public utility is a valid trust. So towns can hold property in trust for purposes within the general scope of their corporate existence." [16]

It is obvious that a private corporation may be a trustee whenever the purposes of the trust are consistent with the objects of the corporation. If carrying out the trust is within the powers granted to the corporation by its charter or certificate of incorporation, then the corporation may validly act as trustee.[17] But a corporation

Am. St. Rep. 117. A legislature may authorize a county to hold property as a trustee. Pirkey v. Grubb's Ex'r, 122 Va. 91, 94 S. E. 344.

[11] McDonogh v. Murdoch, 56 U. S. (15 How.) 367, 14 L. Ed. 732; In re Coleman's Estate, 167 Cal. 212, 138 Pac. 992, Ann. Cas. 1915C, 682; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; Richards v. Wilson, 185 Ind. 335, 112 N. E. 780; Board of Trustees of Schools for Industrial Education in City of Hoboken v. City of Hoboken, 70 N. J. Eq. 630, 62 Atl. 1; State v. City of Toledo, 23 Ohio Cir. Ct. R. 327; McIntosh v. City of Charleston, 45 S. C. 584, 23 S. E. 943; Maxcy v. City of Oshkosh, 144 Wis. 238, 128 N. W. 899, 1136, 31 L. R. A. (N. S.) 787. By Laws N. H. 1915, c. 162, cities and towns are authorized to act as trustees for certain purposes.

[12] Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434.

[13] Higginson v. Turner, 171 Mass. 586, 51 N. E. 172.

[14] Cresson's Appeal, 30 Pa. 437.

[15] Roe v. Doe, 2 Boyce, 348, 80 Atl. 250; Chapman v. Newell, 146 Iowa, 415, 125 N. W. 324; Higginson v. Turner, 171 Mass. 586, 51 N. E. 172; Hatheway v. Sackett, 32 Mich. 97; Adams v. Highland Cemetery Co. (Mo.) 192 S. W. 944; Glover v. Baker, 76 N. H. 393, 83 Atl. 916; Stearns v. Newport Hospital, 27 R. I. 309, 62 Atl. 132, 8 Ann. Cas. 1176.

[16] Piper v. Moulton, 72 Me. 155, 159, in which case the trust was for educational purposes. In Sargent v. Cornish, 54 N. H. 18, the town held property for the purpose of buying and displaying flags for patriotic uses.

[17] Perin v. Carey, 65 U. S. (24 How.) 465, 16 L. Ed. 701; Hossack v. Ottawa Development Ass'n, 244 Ill. 274, 91 N. E. 439; State v. Higby Co., 130 Iowa, 69, 106 N. W. 382, 114 Am. St. Rep. 409; White v. Rice, 112 Mich. 403, 70 N. W. 1024; Chapin v. School Dist. No. 2 in Winchester, 35 N. H. 445; De Camp v. Dobbins, 29 N. J. Eq. 36; Ex parte Greenville Academies, 7 Rich. Eq. (S. C.) 471; Bell County v. Alexander, 22 Tex. 350, 73 Am. Dec. 268; Latshaw v. Western Townsite Co., 91 Wash. 575, 158 Pac. 248. In Nebraska foreign corporations may not take title to real estate, and hence may

which was empowered to establish an institution in the town of Newmarket for the instruction of youth may not be a trustee for the purpose of aiding missionaries. Such a trust would be beyond the powers of the corporation.[18]

Unincorporated Associations

The question has frequently arisen whether an unincorporated association may be a trustee. Such a body is not recognized by the law as a legal entity. It has a shifting membership. The decisions have, however, almost uniformly sustained a trust in which an unincorporated association was named as a trustee, sometimes merely with a statement that such a trust was valid;[19] in other cases with the assertion that, while the association could not act as a trustee, equity would hold the heirs or devisees as trustees for the purpose named;[20] and on other occasions the court has stated that it would appoint new trustees in place of the incompetent association.[21]

The correct view would seem to be that a trust ought not to fail because an unincorporated association was named as its trustee. Such an association is not a legal entity. The title to the trust property could not rest in it, but would necessarily rest in the members of the association, if the association were allowed to be a trustee. But such members are constantly changing, and there is no provision for the transfer of the title to the property on the change of membership. But, even if it be conceded that an unincorporated association is not competent to serve as a trustee, the trust may well be saved under the established principle that equity will not

not be trustees of real property trusts. Gould v. Board of Home Missions of Presbyterian Church, 102 Neb. 526, 167 N. W. 776. Trust companies are generally authorized by statute to act as trustee. Laws Ohio 1919, p. 118; Acts W. Va. 1919, c. 80. Banks satisfying certain conditions are also frequently given power by statute to be trustees. Laws Colo. 1915, p. 135; Acts Ind. 1915, c. 97; Code Supplemental Supp. Iowa, 1915, § 1889d; Acts Ky. 1920, c. 128; Laws N. H. 1917, c. 193; Laws N. H. 1919, c. 121; Laws Pa. 1919, p. 1032. The whole subject of the appointment, removal, and many of the powers and duties of trustees is now covered in Pennsylvania by the Fiduciaries Act of 1917, Laws Pa. 1917, p. 447. See R. J. Le Boeuf, National Banks as Fiduciaries, 5 Cornell Law Quarterly, 128.

[18] Trustees of South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317.

[19] Biscoe v. Thweatt, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Missouri Historical Society v. Academy of Science, 94 Mo. 459, 8 S. W. 346; Lilly v. Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887; Dye v. Beaver Creek Church, 48 S. C. 444, 26 S. E. 717, 59 Am. St. Rep. 724.

By Laws Neb. 1917, c. 11, fraternal orders, though not incorporated, are authorized to receive devises and bequests.

[20] Johnson v. Mayne, 4 Iowa, 180; Bartlett v. Nye, 4 Metc. (Mass.) 378.

[21] Estate of Upham, 127 Cal. 90, 59 Pac. 315; Washburn v. Sewall, 9 Metc. (Mass.) 280; Guild v. Allen, 28 R. I. 430, 67 Atl. 855.

allow a trust to fail for want of a trustee.[22] The better method of dealing with such attempts to create a trust would seem to be to appoint new trustees.

Married women, even at common law, were capable of becoming trustées, although hampered in the administration of trusts by the rules restricting their dealing with property apart from their husbands.[23] Under modern legislation, giving married women power to take, convey, and manage their property as if single, married women may, of course, act without any disability as trustees, and they frequently are appointed.[24]

An infant may be a trustee, although subject to the usual disabilities of infancy, and not accountable for acts of maladministration.[25] Equity will, on application, decree that the infant convey to a new trustee of full capacity.[26]

A lunatic may be a trustee, although subject to the same incapacities and disabilities as if acting with reference to his own property.[27] As a trustee the lunatic cannot alone or with the cestui que trust do any valid act.[28] Equity will remove the title from the lunatic trustee and vest it in a competent person.[29]

An insolvent[30] or bankrupt[31] person may be a trustee, although equity will ordinarily remove him on application.[32] Such a person has the capacity to hold and manage property, although his financial condition makes it highly dangerous to the cestui que trust that he continue in the trust office.

An alien may be a trustee to the same extent that he may own property absolutely. In most of the American states friendly aliens have full property holding rights, and the ancient disability of aliens to take and hold real property has been abolished.[33]

[22] See post, p. 261.

[23] Still v. Ruby, 35 Pa. 373.

[24] Rose v. Rose, 93 Ind. 179; In re Stewart, 56 Me. 300; Springer v. Berry, 47 Me. 330; Jones v. Roberts, 60 N. H. 216; Schluter v. Bowery Savings Bank, 117 N. Y. 125, 22 N. E. 572, 5 L. R. A. 541, 15 Am. St. Rep. 494; Clarke v. Saxon, 1 Hill Eq. (S. C.) 69.

[25] Jevon v. Bush, 1 Vernon, 342; Des Moines Ins. Co. v. McIntire, 99 Iowa, 50, 68 N. W. 565; McClellan v. McClellan, 65 Me. 500; Levin v. Ritz, 17 Misc. Rep. 737, 41 N. Y. Supp. 405.

[26] Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162. Where infant trustees have conveyed to their cestui que trust, equity will confirm this voidable title. Clary v. Spain, 119 Va. 58, 89 S. E. 130.

[27] Pegge v. Skynner, 1 Cox, Eq. Cas. 23; Eyrick v. Hetrick, 13 Pa. 488.

[28] Bailey v. Hill, 77 Va. 492.

[29] See discussion of removal of trustees, post, § 80.

[30] Shryock v. Waggoner, 28 Pa. 430.

[31] Rankin v. Barcroft, 114 Ill. 441, 3 N. E. 97.

[32] In re Barker's Trusts, 1 Ch. Div. 43.

[33] For a discussion of the comparative law on this subject in the United

Frequently a settlor of a charitable trust provides that the trustee shall be a corporation to be created in the future. In such cases the trustee is not in existence when the trust takes effect. Nevertheless equity does not allow the trust to fail, but considers the property held by the grantor, or testator's heirs, or by the court itself in trust, pending the creation of the corporation which is to be the trustee.[34]

"There is no rule of law that prohibits the donor from constituting himself a trustee for the donee, and in such case no further delivery is necessary, provided the trust is expressed." [35]

Merger

Frequently the trustee is also named as a beneficiary of the trust. Is a cestui que trust competent to act as a trustee? The question may arise in several ways. A. may have been appointed a trustee for himself alone. In such case the sole trustee is also sole beneficiary. There can be no doubt about the result in such an instance. The equitable estate merges in the legal, and A. becomes the owner of the property freed from any trust.[36] "The trustee and the beneficiary must be distinct personalities, or, otherwise, there could be no trust, and the merger of interests in the same person would effect a legal estate in him, of the same duration as the beneficial interest designed. * * * That the legal and beneficial estate can exist and be maintained separately in the same person is an inconceivable proposition." [37] And so a gift to a corporation in trust for its corporate purposes will be construed as an absolute gift, rather than as a trust.[38] But if the settlor appoints A. and B. as trustees for A., and B. fails to qualify, leaving A. as the sole trustee, there will be no merger. The court will appoint a new trustee

States, see 5 Cornell Law Quarterly, 209. By a recent statute in New York no person is competent to serve as a testamentary trustee who is an alien not an inhabitant of the state. Section 2564, Code Civ. Proc. In re Ripley, 101 Misc. Rep. 465, 167 N. Y. Supp. 162.

[34] Town of Shapleigh v. Pilsbury, 1 Me. (Greenl.) 271; Keith v. Scales, 124 N. C. 497, 32 S. E. 809; Pennoyer v. Wadhams, 20 Or. 274, 25 Pac. 720, 11 L. R. A. 210; In re Lewis' Estate, 11 Pa. Co. Ct. R. 561; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

[35] Yokem v. Hicks, 93 Ill. App. 667, 670.

[36] Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32, 85 Am. St. Rep. 227; Matter of Hitchins, 39 Misc. Rep. 767, 80 N. Y. Supp. 1125; Butler v. Godley, 12 N. C. 94; Danforth v. Oshkosh, 119 Wis. 262, 97 N. W. 258. Upon the termination of trusts by merger see post, § 128.

In Re Hance's Estate, 69 Pa. Super. Ct. 432, two sons of the testator were both trustees and cestuis que trust. The court held that the case differed from that of a single trustee holding for himself alone, and that there was no merger.

[37] Greene v. Greene, 125 N. Y. 506, 510, 26 N. E. 739, 21 Am. St. Rep. 743.

[38] Clarke v. Sisters of Society, 82 Neb. 85, 117 N. W. 107.

to take A.'s place; he being incompetent to act.[39] Equity will ordinarily refuse to appoint a cestui que trust as trustee of his own trust.[40]

A different question is raised where A. is appointed trustee for A. and B. Here A.'s legal estate is not the same as his equitable interest. Upon this case there are a variety of holdings. In some courts the validity of the trust has been sustained, and A. treated as a normal trustee.[41] In other cases the courts have held that a partial merger arose in such a situation, and that A. became the absolute owner of part of the property, freed from the trust, but continued to be trustee as to the balance for the benefit of B.[42]

In Woodward v. James the testator's widow was made trustee for herself and certain other relatives. The widow was to have one-half the income from the trust property. The court said: "It is undoubtedly true that the same person cannot be at the same time trustee and beneficiary of the same identical interest. To say that he could would be a contradiction in terms, as complete and violent as to declare that two solid bodies can occupy the same space at the same instant. Where, however, the trustee is made beneficiary of the same estate, both in respect to its quality and quantity, the inevitable result is that the equitable is merged in the legal estate, and the latter alone remains. If, then, it be granted that, as to her half of the income, the widow was not trustee, and took what was given to her by a direct legal right, it does not follow that her trust estate in the corpus of the property is in any manner destroyed, or that there is any the less a necessity for its existence. She can be trustee for the heirs, and that trust ranges over the whole estate for the purpose of its management and disposition." [43]

Still a third view has been expressed, namely, that A. may act for B., in the situation described, but is incompetent to act for himself, and that the court will act with respect to trust questions involving the interests of A. alone.[44] In a later New York case [45] the Court of Appeals indicates by way of dictum that its view is

[39] Haendle v. Stewart, 84 App. Div. 275, 82 N. Y. Supp. 823

[40] Woodbridge v. Bockes, 170 N. Y. 596, 601, 63 N. E. 362.

[41] Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Nichols v. Nichols, 42 Misc. Rep. 381, 86 N. Y. Supp. 719; Doscher v. Wyckoff (Sup.) 113 N. Y. Supp. 655.

[42] Woodward v. James, 115 N. Y. 346, 22 N. E. 150; Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969.

[43] 115 N. Y. 346, 357, 22 N. E. 150.

[44] Rogers v. Rogers, 111 N. Y. 228, 18 N. E. 636.

[45] Robertson v. De Brulatour, 188 N. Y. 301, 317, 80 N. E. 938.

that A. would not be competent to act at all when he was appointed as trustee for himself and for B.

The authorities on this second class of cases are thus seen to be in considerable conflict as to the correct theory to be followed, although the trust has been usually sustained as a valid trust.

A third possible trust, namely, one where A. and B. are appointed trustees for A. alone, does not seem to have arisen often in litigation. A trust of this kind seems to have been sustained as a valid trust by way of dictum in one case.[46]

The fourth and last contingency is that in which A. and B. are appointed trustees for A. and C. A. here has conflicting interests. He has a private interest as a beneficiary and an official interest as the representative of C. A variety of views have been expressed by the courts relative to the effect of such a settlement. The majority of courts which have had occasion to consider the question have held that the trust was a valid trust and that no merger occurred as to A.'s interest.[47] "The title held by the trustees is joint, and there is no merger of separate interests in the different trustees arising out of the fact that they are also beneficiaries." [48]

Two objections to a merger of the trustee-beneficiary's interests are urged in a New York case, namely, that the doctrine of merger is aimed at passive trusts only, and that the title of the trustees is joint, whereas the interest of the cestuis que trust is separate and several.[49] In some cases, however, the courts have taken the position that, where A. and B. are trustees for A. and C., there is a partial merger, and A. becomes the absolute owner of part of the property dedicated to the trust.[50] The New Jersey court, in making its decision, says: "It may be he is trustee for his children, but he cannot be trustee for himself. He is one of the beneficiaries of the trust, and also trustee, and therefore, to the extent of his personal interest in the trust property, both the equitable and legal estates are vested in the same person. This union works a merger of the equitable estate. Where the equitable and legal estates unite in the same person, the equitable sinks or merges into the legal, provided the legal estate is as extensive as the equitable." [51]

[46] Bull v. Odell, 19 App. Div. 605, 46 N. Y. Supp. 306.

[47] Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519; Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363; Amory v. Lord, 9 N. Y. 403; Tiffany v. Clark, 58 N. Y. 632; Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969; Cocks v. Barlow, 5 Redf. Sur. (N. Y.) 406; Moke v. Norrie, 14 Hun, 128; Denniston v. Pierce, 260 Pa. 129, 103 Atl. 557.

[48] Burbach v. Burbach, 217 Ill. 547, 550, 75 N. E. 519.

[49] Amory v. Lord, 9 N. Y. 403, 412.

[50] Bolles v. State Trust Co., 27 N. J. Eq. 308; Craig v. Hone, 2 Edw. Ch. (N. Y.) 554; Mason v. Mason's Ex'rs, 2 Sandf. Ch. (N. Y.) 432.

[51] Bolles v. State Trust Co., 27 N. J. Eq. 308, 310.

Lastly, with respect to class four of these trustee-beneficiary cases, there are some cases which maintain that the trust is valid, but that the trustee who is also a beneficiary is disabled from acting where his interests as a beneficiary are involved, but may act in all other cases. The noninterested trustees must act alone when the rights of the combination trustee and beneficiary are at stake.[52] "But, however this may be, it is clearly the law that where two or more trustees are appointed to execute a trust, and one or both is under the infirmity of being a beneficiary, neither the trust nor its execution fails, as each may act for the other where disqualification exists, and all can act with respect to that portion of the property in which they have no interest." [53]

It would seem that, where a trustee is also a beneficiary, a conflict of interest exists which is dangerous to the cestuis que trust who are not trustees. The trustee who is also a cestui que trust should be disqualified from acting where his private interests may be involved. This disqualification may be effected either by wiping out the trust as to the trustee beneficiary by applying the doctrine of merger, or by holding that the trust still exists, but that the trustee beneficiary may not act with respect to that trust, but the administration of it must be left to the noninterested trustees.

TRUST WILL NOT FAIL FOR WANT OF TRUSTEE

75. Equity will not allow a trust to fail for want of a trustee. If no trustee is named, or the trustee named is nonexistent or incompetent or refuses to accept the trust, chancery will supply a trustee, and the settlor's intent will be effectuated.

No trust can exist without a trustee, but the failure of the settlor to select a trustee or his selection of a trustee who cannot or will not act is not fatal to the trust. If the settlor has clearly indicated an intent that a trust shall exist, equity will, because of its desire to support the trust, supply the trustee in case of need. This principle is generally expressed in the maxim that "equity will not allow a trust to fail for want of a trustee." [54] Whether A. or B. is the

[52] Bundy v. Bundy, 38 N. Y. 410; Robertson v. De Brulatour, 188 N. Y. 301, 317, 80 N. E. 938; Rankine v. Metzger, 69 App. Div. 264, 74 N. Y. Supp. 649, affirmed 174 N. Y. 540, 66 N. E. 1115.

[53] Rankine v. Metzger, 69 App. Div. 264, 269, 74 N. Y. Supp. 649.

[54] Handley v. Palmer (C. C.) 91 Fed. 948; Kidd v. Borum, 181 Ala. 144, 61 South. 100; Appeal of Elliot, 74 Conn. 586, 51 Atl. 558; Hitchcock v. Board of Home Missions of Presbyterian Church, 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B, 1; In re Freeman's Estate, 146 Iowa, 38, 124 N. W. 804; Harris

trustee to administer the trust is not especially important. Any competent and honest man can carry out the intent of the settlor.

Thus, where the settlor describes the trust completely, except that he fails to name any trustee, equity will supply the want and appoint a trustee to administer the trust.[55] And by virtue of the same rule, if the trustee named by the settlor is a corporation which has passed out of existence, or a body which has no legal existence,[56] or if such trustee be dead,[57] or incompetent to act,[58] or refuse the trust,[59] equity will provide a trustee and the trust will be carried out.

v. Rucker, 52 Ky. (13 B. Mon.) 564; Attorney General v. Goodell, 180 Mass. 538, 62 N. E. 962; Penny v. Croul, 76 Mich. 471, 43 N. W. 649, 5 L. R. A. 858; Taylor v. Watkins (Miss.) 13 South. 811; Rothenberger v. Garrett, 224 Mo. 191, 123 S. W. 574; Jones v. Watford, 62 N. J. Eq. 339, 50 Atl. 180; In re Powell's Will, 136 App. Div. 830, 121 N. Y. Supp. 779; Goodrum v. Goodrum, 43 N. C. 313; Hill v. Hill, 49 Okl. 424, 152 Pac. 1122; In re Stevens' Estate, 200 Pa. 318, 49 Atl. 985; Shields v. Jolly, 1 Rich. Eq. (S. C.) 99, 42 Am. Dec. 349; Gidley v. Lovenberg, 35 Tex. Civ. App. 203, 79 S. W. 831; Whelan v. Reilly, 3 W. Va. 597.

[55] Carpenteria School Dist. v. Heath, 56 Cal. 478; Grand Prairie Seminary v. Morgan, 171 Ill. 444, 49 N. E. 516; Howard v. American Peace Society, 49 Me. 288; Brown v. Kelsey, 2 Cush. (Mass.) 243; Buckley v. Monck (Mo.) 187 S. W. 31; Case v. Hasse, 83 N. J. Eq. 170, 93 Atl. 728; Shotwell v. Mott, 2 Sandf. Ch. (N. Y.) 46; Goffe v. Goffe, 37 R. I. 542, 94 Atl. 2, Ann. Cas. 1916B, 240; Porter v. Bank of Rutland, 19 Vt. 410; In re Kavanaugh's Estate, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. (N. S.) 470. But in Tennessee, if the trust is charitable and no trustee is named, equity will not supply one. Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A. L. R. 303. See, also, in accord with the Tennessee view, Robinson v. Crutcher, 277 Mo. 1, 209 S. W. 104.

[56] In re Crawford's Estate, 148 Iowa, 60, 126 N. W. 774, Ann. Cas. 1912B, 992; Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110; Bruere v. Cook, 63 N. J. Eq. 624, 52 Atl. 1001; McBride v. Elmer's Ex'rs, 2 Halst. Ch. (6 N. J. Eq.) 107.

[57] O'Brien v. Bank of Douglas, 17 Ariz. 203, 149 Pac. 747; Babcock v. African Methodist Episcopal Zion Society, 92 Conn. 466, 103 Atl. 665; Garrison v. Little, 75 Ill. App. 402; Herrick v. Low, 103 Me. 353, 69 Atl. 314; In re De Silver's Estate, 211 Pa. 459, 60 Atl. 1048.

[58] Culver v. Lompoc Valley Sav. Bank, 22 Cal. App. 379, 134 Pac. 355; Burke v. Burke, 259 Ill. 262, 102 N. E. 293; Guild v. Allen, 28 R. I. 430, 67 Atl. 855; Willis v. Alvey, 30 Tex. Civ. App. 96, 69 S. W. 1035; Lightfoot v. Poindexter (Tex.Civ.App.) 199 S. W. 1152. In Gould v. Board of Home Missions of Presbyterian Church, 102 Neb. 526, 167 N. W. 776, the trustee named was incompetent because a foreign corporation. The court supplied a trustee, but said that it would not have done so, if the trust had been private.

[59] Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Dykeman v. Jenkines, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011; Kelly v. Anderson, 173 Ky. 298, 190 S. W. 1101; Richards v. Church Home for Orphan & Destitute Children, 213 Mass. 502, 100 N. E. 631; McLean v. Nelson, 46 N. C. 396; Atwood v. Shenandoah Val. R. Co., 85 Va. 966, 9 S. E. 748.

ORIGINAL APPOINTMENT OF TRUSTEE

76. The trustee is ordinarily originally appointed by the settlor. If the settlor fails to appoint a trustee, but creates a trust otherwise complete, equity will supply the deficiency and appoint the original trustee.

The original appointment of the trustee is, of course, ordinarily the function of the settlor.[60] By very definition the settlor is the person who selects the trustee, trust property, and beneficiary, and establishes the trust. In appointing the trustee, the settlor is not under any obligation to consider the wishes of the cestui que trust.[61] After the settlor has created the trust and named the trustee, the court of equity has no power, except in case of failure of the trustee to qualify or for cause shown, to appoint a trustee in place of the one selected by the settlor.[62]

In appointing the trustee the settlor need not use any particular language or describe the trustee as such.[63] It is sufficient if he clearly shows a purpose that a trust arise and that a given person shall administer it. Thus, that the word "committee," rather than "trustee," was used, is not important, if the intent to create a trust was evident.[64] And so, also, where a will makes a bequest in trust, but no trustee is named to carry out the trust, the executor will be deemed to have been appointed a trustee for that purpose.[65]

In some instances the original trustee may be appointed by the court of chancery rather than by the settlor. Thus, if the settlor establishes a trust, but fails to name any trustee, the court will supply the deficiency, and appoint a trustee to administer the trust.[66] Or if the trustee named by the settlor can never enter upon the performance of his duties, due to the fact that he has died prior

[60] Cruse v. Axtell, 50 Ind. 49; Leonard v. Haworth, 171 Mass. 496, 51 N. E. 7.

[61] In re Naglee's Estate, 52 Pa. 154.

[62] Gibney v. Allen, 156 Mich. 301, 120 N. W. 811; In re Goulden, 102 Misc. Rep. 642, 170 N. Y. Supp. 154.

[63] Grant Trust & Savings Co. v. Tucker, 49 Ind. App. 345, 96 N. E. 487.

[64] Boreing v. Faris, 127 Ky. 67, 104 S. W. 1022, 31 Ky. Law Rep. 1265.

[65] Groton v. Ruggles, 17 Me. 137; Dorr v. Wainwright, 13 Pick. (Mass.) 328; Holbrook v. Harrington, 16 Gray (Mass.) 102; Wheeler v. Perry, 18 N. H. 307; Terry v. Smith, 42 N. J. Eq. 504, 8 Atl. 886; Montfort v. Montfort, 24 Hun, 120.

[66] Bundy v. Bundy, 38 N. Y. 410; In re Weed, 181 App. Div. 921, 167 N. Y. Supp. 862. See ante, p. 262.

to the taking effect of the trust instrument,[67] or because he declines the trust,[68] or because he is disqualified [69] or incompetent,[70] equity will supply the trustee. In some cases, also, the number of trustees appointed by the settlor is not sufficient to manage the trust, and in such instances equity may appoint additional trustees to assist those whom the settlor has selected.[71]

The subject of the filling of vacancies in the trusteeship will later be considered.[72] At this point only the original appointment of the trustee is discussed.

TRUSTEE'S BOND

77. In the absence of statute the court of equity may in its discretion require the trustee to give a bond for the faithful performance of his duties. In many states the occasions when a trustee must give a bond are now set forth in statutes.

Whether a trustee will be required to give a bond for the faithful performance of his duties is, in the absence of statute, in the discretion of the court of equity. If the character and situation of the trustee seem to render security necessary, the court may require it. If the trust property does not appear to be in any danger, equity may dispense with the bond.[73] Where the trustee is insolvent or of weak or doubtful financial condition, the court will generally require a bond.[74] If the trustee is a nonresident of the state having

[67] Ex parte Schouler, 134 Mass. 426; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

[68] Carruth v. Carruth, 148 Mass. 431, 19 N. E. 369; In re Snyder's Will (Sup.) 136 N. Y. Supp. 670; King v. Merritt, 67 Mich. 194, 34 N. W. 689; Prince v. Barrow, 120 Ga. 810, 48 N. E. 412; Offutt v. Jones, 110 Md. 233, 73 Atl. 629; Lee v. Randolph, 2 Hen. & M. (Va.) 12.

[69] Ogilby v. Hickok, 144 App. Div. 61, 128 N. Y. Supp. 860.

[70] Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202; Eccles v. Rhode Island Hospital Trust Co., 90 Conn. 592, 98 Atl. 129; Childs v. Waite, 102 Me. 451, 67 Atl. 311; Force v. Force (N. J. Ch.) 57 Atl. 973.

[71] In re Townsend's Estate, 73 Misc. Rep. 481, 133 N. Y. Supp. 492; Crickard's Ex'r v. Crickard's Legatees, 25 Grat. (Va.) 410.

[72] See post, p. 282.

[73] Reeder v. Reeder, 184 Iowa, 1, 168 N. W. 122; Dresser v. Dresser, 46 Me. 48; Munroe v. Whitaker, 121 Md. 396, 88 Atl. 237; Holcomb v. Coryell, 12 N. J. Eq. 289; In re Burke's Estate, 1 N. Y. St. Rep. 316; In re Whitehead, 3 Dem. Sur. (N. Y.) 227; Strayhorn v. Green, 92 N. C. 119; Ex parte Conrad, 2 Ashm. (Pa.) 527; Clarke v. Saxon, 1 Hill Eq. (S. C.) 69; Dunscomb v. Dunscomb, 2 Hen. & M. (Va.) 11.

[74] Bailey v. Bailey, 2 Del. Ch. 95; Trabue v. Reynolds, 9 Ky. Law Rep. 360; In re Sears, 5 Dem. Sur. (N. Y.) 497; In re Deaven's Estate, 32 Pa. Super. Ct. 205.

jurisdiction of the trust, the court will be inclined to require security.[75] But if a trustee has been appointed by a Massachusetts court and given bond in that state, it is within the discretion of an Illinois court to relieve the trustee from giving a bond in Illinois.[76] That the trustee has refused to obey an order of the court,[77] or that the cestuis que trust are infants,[78] may easily influence the court to require security of the trustee.

It is improper for the court to require the trustee to give a bond, when no reason for apprehension as to the safety of the fund exists, and the administration of the trust has been entirely satisfactory.[79]

The settlor may provide in the trust instrument that the trustee shall not be obliged to give a bond, and this direction will be respected by the courts.[80] And in some instances the consent of the cestuis que trust has been held sufficient authority for excusing the trustee from giving security.[81]

In many states trustees are required by statute to give bond for the faithful performance of their duties.[82] It is impossible here to state the various statutory provisions.[83]

[75] In re Satterthwaite's Estate, 60 N. J. Eq. 347, 47 Atl. 226; In re Strobel's Estate, 11 Phila. (Pa.) 122; Gaskill v. Gaskill, 7 R. I. 478; Ex parte Robert, 2 Strob. Eq. (S. C.) 86.

[76] Regan v. West, 115 Ill. 603, 4 N. E. 365.

[77] Holcomb v. Coryell, 12 N. J. Eq. 289.

[78] In re Jones, 4 Sandf. Ch. (N. Y.) 615.

[79] Crawford v. Creswell, 55 Ala. 497; Ladd v. Ladd, 125 Ala. 135, 27 South. 924; Berry v. Williamson, 11 B. Mon. (Ky.) 245; Holcomb v. Coryell, 12 N. J. Eq. 289.

[80] Parker v. Sears, 117 Mass. 513; Liesemer v. Burg, 102 Mich. 20, 60 N. W. 290; In re Kelley's Estate, 250 Pa. 177, 95 Atl. 401; Kerr v. White, 9 Baxt. (Tenn.) 161.

By Laws Ga. 1918, p. 234, the court may upon the application of the cestui que trust require the trustee to give a bond, even though the trust instrument directs that none shall be required.

[81] Dexter v. Cotting, 149 Mass. 92, 21 N. E. 230.

[82] Thiebaud v. Dufour, 54 Ind. 320; Sneer v. Stutz, 102 Iowa, 462, 71 N. W. 415; Butler v. Taggart's Trustee, 86 S. W. 541, 27 Ky. Law Rep. 708; Stevens v. Burgess, 61 Me. 89; Bryan v. Hawthorne, 1 Md. 519; McClernan v. McClernan, 73 Md. 283, 20 Atl. 908; Coudon v. Updegraf, 117 Md. 71, 83 Atl. 145; Bullard v. Attorney General, 153 Mass. 249, 26 N. E. 691; Gibney v. Allen, 156 Mich. 301, 120 N. W. 811; Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; West v. Bailey, 196 Mo. 517, 94 S. W. 273; Fernald v. First Church of Christ, Scientist, in Boston, 77 N. H. 108, 88 Atl. 705; New York Code Civ. Proc. § 2639; In re Keene's Estate, 81 Pa. 133; Kerr v. White, 9 Baxt. (Tenn.) 161; Lackland v. Davenport, 84 Va. 638, 5 S. E. 540. In Wisconsin, in the case of testamentary trusts, the giving of a bond is a prerequisite to obtaining title to the trust property. In re Davies' Estate, 161 Wis. 598, 155 N. W. 152. By Laws Wis. 1919, c. 506, the requirement of a bond

[83] See note 83 on following page.

If the same person be named as executor and trustee, he must give separate bonds for the faithful performance of the duties of each office.[84]

is left to the discretion of the court. By Laws Colo. 1915, c. 177, a testamentary trustee is required to give bond, unless the will excuses him.

[83] Extracts from two of the statutes may serve as illustrations. The New York rule is now embodied in section 2639 of the Code of Civil Procedure, which reads as follows: "Whenever by any last will and testament, or by an order of the Surrogate's Court, a trustee is appointed, or an executor is appointed who is required to hold, manage, or invest any money, securities or property real or personal for the benefit of another, such trustee, or executor, before receiving any such property into his possession or control shall, unless contrary to the express terms of the will, execute to the people of the state of New York, in the usual form, a bond with sufficient surety or sureties in an amount to be fixed by the surrogate. Upon any judicial settlement and partial distribution of such estate or fund the decree may provide for the discharge of the existing bond, and the filing of a new bond covering the amount still remaining in the hands of such executor or trustee. This section shall not affect any executor or trustee named in a will executed before this section takes effect."

The Massachusetts statute provides: "An executor, administrator, administrator with the will annexed, special administrator, receiver of an absentee, temporary guardian and, unless otherwise expressly provided, a guardian or trustee under a will or appointed by the probate court, before entering upon the duties of his trust, shall give bond with sufficient sureties, in such sum as the probate court may order, payable to the judge of said court and his successors, and with condition substantially as follows: * * * 7. In case of a trustee under a will or appointed by the probate court: First, to make and return to the probate court at such time as it orders a true inventory of all the real and personal property belonging to him as trustee which at the time of the making of such inventory shall have come to his possession or knowledge; second, to manage and dispose of all such property, and faithfully to perform his trust relative thereto according to law and to the will of the testator; third, to render upon oath at least once a year until his trust is fulfilled, unless he is excused therefrom in any year by the court, a true account of the property in his hands and of the management and disposition thereof, and also to render such account at such other times as said court orders; and fourth, at the expiration of his trust to settle his account in the probate court, and to pay over and deliver all the property remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto. * * * A testamentary guardian and a trustee under a will shall be exempt from giving surety or sureties on his bond, if the testator has ordered or requested such exemption, or that no bond should be required, or in the case of a trustee, if all the persons beneficially interested in the trust who are of full age and legal capacity, other than creditors, request such exemption; but not until the guardian of any minor interested therein and such other persons as the court orders, have been notified and have had opportunity to show cause against the same. The probate court may however at any time require such guardian, trustee or trustees appointed by the probate court to give a bond with surety or sureties." Rev.

[84] Groton v. Ruggles, 17 Me. 137; Williams v. Cushing, 34 Me. 370.

The failure of a trustee to give bond when required to do so does not defeat the trust.[85] If the trustee accepts the trust, the fact that he later fails to give the bond required does not divest him of the title to the trust property.[86] But the court may remove a trustee who fails to furnish security when required,[87] and in many states the failure to give bond is deemed a declination of the trust.[88]

The failure of the trustee to give a bond as required by law cannot be set up collaterally as an attack upon the trustee's power to act under the trust.[89]

ACCEPTANCE BY TRUSTEE

78. It is not necessary to the validity of a trust that the particular trustee named by the settlor accept the trust. Equity will not allow the trust to fail for want of a trustee.

But it is necessary that a trustee accept the trust before the title to the trust property vests in him and before he is bound by the trust obligations. Acceptance of a trust by the trustee is presumed, and may be shown as well by any acts expressly or impliedly recognizing the existence of the trusteeship.

The trustee may refuse to accept the trust. He cannot be compelled to undertake the duties of the trusteeship against his will.[90] If he clearly indicates that he declines the trust, he will not become a trustee. And the trustee may also accept the trust upon a condition, as, for instance, upon the condition that he be allowed to re-

Laws Mass. 1902, c. 149, §§ 1 and 4. By St. Mass. 1908, c. 295, this provision requiring the giving of a bond was extended to charitable trustees.

[85] Butler v. Hill, 1 Baxt. (Tenn.) 375.

[86] Young v. Cardwell, 6 Lea (Tenn.) 168; McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.

[87] Appeal of Johnson, 9 Barr (9 Pa.) 416; Williams v. Gideon, 7 Heisk. (Tenn.) 617.

[88] Groton v. Ruggles, 17 Me. 137; Appeal of Sawyer, 16 N. H. 459; Foss v. Sowles, 62 Vt. 221, 19 Atl. 984. "A person required by the provisions of the preceding sections to give a bond who, for thirty days after his appointment or after the entry of the decree requiring him to give bond, fails to file the bond, duly approved, may be found to have declined or resigned the trust." Rev. Laws Mass. 1902, c. 149, § 7.

[89] Reichert v. Missouri & I. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307.

[90] Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; In re Yale College, 67 Conn. 257, 34 Atl. 1036; Silvers v. Canary, 114 Ind. 129, 16 N. E. 166; Carruth v. Carruth, 148 Mass. 431, 19 N. E. 369.

sign and surrender the trust at any time he desires.[91] As has previously been shown,[92] a trustee is presumed to accept a trust. This presumption is based on still another presumption, namely, that every grant is presumed to be beneficial. In the absence of any evidence of refusal, therefore, the trustee named will be presumed to have accepted the trust.[93]

Generally, however, there is evidence of acceptance or refusal on the part of the trustee other than mere presumptions. Some positive acts on the part of the trustee are usually to be found. Thus it has been held that an oral acknowledgment by the trustee that he had accepted the trust,[94] failure to object to the trust after knowledge of its existence for some time,[95] taking out letters testamentary when the trustee was also the executor under the will,[96] the writing of the trust deed under which the trustee was appointed,[97] accepting the delivery of that deed,[98] joining in the execution of the trust deed,[99] taking possession of the trust property [1] or exercising control over it,[2] or the performance of any acts which amount to a carrying out of the trust,[3] are all acts on the part of the trustee which show an acceptance of the trust by him. In many cases where the question of acceptance was in dispute, acts of a similar nature have been held to show an acceptance of the trust.[4]

[91] Schreyer v. Schreyer, 182 N. Y. 555, 75 N. E. 1134.

[92] See ante, p. 74.

[93] McLean v. Nelson, 46 N. C. 396; Harvey v. Gardner, 41 Ohio St. 642; Eyrick v. Hetrick, 13 Pa. 488; Goss v. Singleton, 2 Head. (Tenn.) 67; Bowden v. Parrish, 86 Va. 67, 9 S. E. 616, 19 Am. St. Rep. 873.

[94] Elizalde v. Elizalde, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861.

[95] Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249; Roberts v. Moseley, 64 Mo. 507. Standing mute on the statement of the trust was held sufficient in Heitman v. Cutting, 37 Cal. App. 236, 174 Pac. 675.

[96] Coudon v. Updegraf, 117 Md. 71, 83 Atl. 145.

[97] Young v. Cardwell, 6 Lea (Tenn.) 168.

[98] Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577.

[99] Dayton v. Stewart, 99 Md. 643, 59 Atl. 281.

[1] McBride v. McIntyre, 91 Mich. 406, 51 N. W. 1113; Pullis v. Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095; Chaplin v. Givens, Rice Eq. (S. C.) 132.

[2] Freeman v. Brown, 115 Ga. 23, 41 S. E. 385.

[3] Patterson v. Johnson, 113 Ill. 559.

[4] Kennedy v. Winn, 80 Ala. 165; St. Mary's Hospital v. Perry, 152 Cal. 338, 92 Pac. 864; Hearst v. Pujol, 44 Cal. 230; Baldwin v. Porter, 12 Conn. 473; Wilson v. Snow, 35 App. D. C. 562; Johnson v. Cook, 122 Ga. 524, 50 S. E. 367; Copeland v. Summers, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971, Henderson v. McDonald, 84 Ind. 149; Ridenour v. Wherritt, 30 Ind. 485; Barclay v. Goodloe's Ex'r, 83 Ky. 493; Sangston v. Hack, 52 Md. 173; Lyle v. Burke, 40 Mich. 499; Jamison v. Zausch, 227 Mo. 406, 126 S. W. 1023, 21

In some cases doubt has arisen as to whether certain acts amounted to a refusal of the trust by the trustee. It has been held that the failure to qualify [5] or to give a bond [6] may show a rejection of the trust. But a refusal to act as executor, when the same person is appointed trustee and executor, does not prove a refusal of the trusteeship.[7] Where a trustee refused to take any steps under his appointment for more than two years, or to file a bond, or take possession of or manage the property, and suffered the buildings to become out of repair and untenantable and the land to be sold for the payment of taxes, his acts justify the inference that he has declined the trust.[8] In numerous other cases similar acts have been held to show a rejection of the trust duties by the trustee.[9]

The validity of a trust is not affected by the acceptance or rejection of the trust by any particular trustee, except in the rare cases where the trust is personal and can be carried out only by the trustee named.[10] Ordinarily, if John Doe decline to accept the trust, Richard Roe may be substituted for Doe, and the trust carried out without difficulty.[11] The refusal of the trustee to accept the office does not cause the title to the trust property to vest in the cestui que trust,[12] but it remains in the settlor (if the trust was created inter vivos) or passes to the heir or next of kin subject to the trust (if the trust was created by will).[13] Equity will then, upon

Ann. Cas. 1132; Daly v. Bernstein, 6 N. M. 380, 28 Pac. 764; Rowe v. Rowe, 103 App. Div. 100, 92 N. Y. Supp. 491; Christian v. Yancey, 2 Pat. & H. (Va.) 240.

[5] Sells v. Delgado, 186 Mass. 25, 70 N. E. 1036; In re Robinson, 37 N. Y. 261.

[6] Attwill v. Dole, 74 N. H. 300, 67 Atl. 403. But see Coates v. Lunt, 213 Mass. 401, 100 N. E. 829.

[7] Pomroy v. Lewis, 14 R. I. 349; Garner v. Dowling, 11 Heisk. (Tenn.) 48.

[8] Adams v. Adams, 64 N. H. 224, 9 Atl. 100.

[9] White v. White, 107 Ala. 417, 18 South. 3; Dodge v. Dodge, 109 Md. 164, 71 Atl. 519, 130 Am. St. Rep. 503; Bowden v. Brown, 200 Mass. 269, 86 N. E. 351, 128 Am. St. Rep. 419; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673; Mutual Life Ins. Co. v. Woods, 121 N. Y. 302, 24 N. E. 602; Anderson v. Earle, 9 S. C. 460.

[10] Richardson v. Mullery, 200 Mass. 247, 86 N. E. 319.

[11] Braswell v. Downs, 11 Fla. 62; Wells v. German Ins. Co. of Freeport, 128 Iowa, 649, 105 N. W. 123; Stebbins v. Lathrop, 4 Pick. (Mass.) 33; Minot v. Tilton, 64 N. H. 371, 10 Atl. 682; Rhode Island Hospital Trust Co. v. Town Council of Warwick, 29 R. I. 393, 71 Atl. 644; Cloud v. Calhoun, 10 Rich. Eq. (S. C.) 358. So held in the case of a charitable trust in Winslow v. Stark, 78 N. H. 135, 97 Atl. 979.

[12] Bennett v. Bennett, 217 Ill. 434, 75 N. E. 339, 4 L. R. A. (N. S.) 470.

[13] Owens v. Cowan's Heirs, 7 B. Mon. (Ky.) 152; Cushney v. Henry, 4 Paige (N. Y.) 345; Goss v. Singleton, 2 Head (Tenn.) 67. In an English case, where the trustee under a deed disclaimed, the court said: "Under these cir-

application, appoint a new trustee to execute the trust in the place of the trustee who has declined the trust.[14] If two trustees are named in the original settlement, and one rejects the trust, the title to the trust property vests in the other trustee as if the trustee who declines had not been named.[15]

While acceptance is unnecessary to the validity of the trust, this principle should be carefully distinguished from the doctrine that acceptance of the trust is necessary to the vesting of the title to the trust property in any particular trustee and to the fastening of the trust duties upon him. In order that John Jones may become the owner of the trust property,[16] and in order that he may assume the office of trustee,[17] he must accept the trust and consent to become a trustee. If he declines, the trust will proceed to its execution by another trustee; but it cannot be carried out by him without an express or implied acceptance of its duties on his part.

When the trustee does accept, his title relates back to the time of the creation of the trust, so that he is deemed to have been the owner of the property from the time when the will or deed creating the trust took effect.[18]

It is axiomatic that when a trustee has once accepted the trust he cannot by a later act reject it. Having manifested his intent to assume the trust duties, he can only be relieved of his trust by a resignation or removal, and not by a mere casting off of the trust upon his own motion.[19] And, having once disclaimed the trust, the trustee may not thereafter change his mind and accept it.[20] His action of acceptance or renunciation is final.

cumstances I think that the trust was really created, and that the fact that the trustee subsequently disclaimed did not destroy the trust, but that upon the revesting the settlor himself held in trust. * * * Mallott v. Wilson, [1903] 2 Ch. 494, 502.

[14] Adams v. Adams, 88 U. S. (21 Wall.) 185, 22 L. Ed. 504; Storr's Agr. School v. Whitney, 54 Conn. 342, 8 Atl. 141; Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; American Academy of Arts and Sciences v. President, etc., of Harvard College, 12 Gray (Mass.) 582; Towle v. Nesmith, 69 N. H. 212, 42 Atl. 900; Stone v. Griffin, 3 Vt. 400.

[15] In re Kellogg, 214 N. Y. 460, 108 N. E. 844, Ann. Cas. 1916D, 1298.

[16] F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673.

[17] Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157.

[18] Christian v. Yancey, 2 Pat. & H. (Va.) 240.

[19] Cauhape v. Barnes, 135 Cal. 107, 67 Pac. 55; Hanson v. Worthington, 12 Md. 418; Drury v. Inhabitants of Natick, 10 Allen (Mass.) 169; In re Kellogg, 214 N. Y. 460, 108 N. E. 844, Ann. Cas. 1916D, 1298; Appeal of Brooke, 109 Pa. 188.

[20] In re Van Schoonhoven, 5 Paige (N. Y.) 559; In re Kellogg, 214 N. Y. 460, 108 N. E. 844, Ann. Cas. 1916D, 1298.

RESIGNATION BY TRUSTEE

79. The trustee may resign the trust by obtaining a decree of a court of equity accepting his resignation, or by securing the consent of all the beneficiaries, if they are competent to give their consent. The trustee cannot by his own act discharge himself from the obligations of the trust. Equity will accept a resignation for good cause shown and on such terms as seem to it just.

When and by what method may a trustee resign a trusteeship and be freed from its obligations? Chancery has the power to accept a trustee's resignation and discharge him from the trust.[21] It may use its discretion in accepting or rejecting the resignation of a trustee. His resignation will not be accepted as a matter of course. The mere filing of the resignation with the court, or notification of the cestuis que trust of his resignation, does not release the trustee.[22]

The rule is generally stated to be that the trustee cannot resign without a decree of the court permitting his resignation or the consent of all the cestuis que trust.[23] "But it is a settled rule of law that a trustee, after he has accepted the office, cannot discharge himself from liability by a subsequent resignation merely. He must either be discharged from the trust by virtue of a special provision in the deed, or will, which creates the trust, or by an order or decree of the court of chancery, or with the general consent of all persons interested in the execution of the trust." [24] "The authorities are clear that a trustee cannot divest himself of the obligation to perform the duties of the trust, without an order of the court, or the consent of all the cestuis que trust." [25]

The statements sometimes made that the trustee cannot resign without an order of the court *and* the consent of the cestuis que

[21] Du Puy v. Standard Mineral Co., 68 Me. 202, 33 Atl. 976; Bowditch v. Banuelos, 1 Gray (Mass.) 220; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Young v. Barker, 141 App. Div. 801, 127 N. Y. Supp. 211.

[22] Tucker v. Grundy, 83 Ky. 540; In re Miller, 15 Abb. Prac. (N. Y.) 277; Perkins v. McGavock, 3 Hayw. (Tenn.) 265.

[23] Badgett v. Keating, 31 Ark. 400; Jones v. Stockett, 2 Bland (Md.) 409; Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153; Green v. Blackwell, 31 N. J. Eq. 37; Shepherd v. M'Evers, 4 Johns. Ch. 136, 8 Am. Dec. 561; Thatcher v. Candee, 33 How. Prac. (N. Y.) 145; Anderson v. Robinson, 57 Or. 172, 110 Pac. 975; Breedlove v. Stump, 3 Yerg. (Tenn.) 257.

[24] Cruger v. Halliday, 11 Paige (N. Y.) 314, 319.

[25] Thatcher v. Candee, 33 How. Prac. (N. Y.) 145, 149.

trust are clearly inaccurate. The court may accept the resignation, even though the beneficiaries, or some of them, object to such acceptance.[26] Where the cestuis que trust are infants, or otherwise incapable of giving consent to the resignation of the trustee, no resignation based on their consent alone will be valid. In such instances resignation can only occur through a decree of the court.[27]

The usual method of resignation is by application to the court rather than by securing consents from the beneficiaries. In some states statutory proceedings for resignation are now provided.[28]

The trustee must allege some cause for his desire to resign.[29] If it appears that a resignation at that time will be disadvantageous to the beneficiaries, the court will refuse to allow the trustee to resign. An example of such a situation is found in the cases where pending actions brought by the trustee or other unsettled matters render it desirable to retain the trustee in office until the conclusion of the unfinished business.[30] The following have been held to be sufficient grounds for resignation: That continuance in office would be inconvenient to the trustee;[31] that the trustee is unwilling to continue and that there has been an increase in the amount of the trust property since the original acceptance;[32] that the trustee is about to leave the United States;[33] that there is friction and disagreement between the trustee and the cestuis que trust.[34]

[26] In re Nixon's Estate, 235 Pa. 27, 83 Atl. 687.

[27] Cruger v. Halliday, 11 Paige (N. Y.) 314.

[28] A New York statute upon the subject reads as follows: "An executor, administrator, guardian or testamentary trustee may, at any time, present to the Surrogate's Court a petition, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters or permitting him to resign, and discharging him accordingly; and that the same persons may be cited to show cause why such a decree should not be made who must be cited upon a petition for a judicial settlement of his account. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of his account. The surrogate may, in his discretion, entertain or decline to entertain the application." Code Civ. Proc. N. Y. § 2572. See, also, Drane v. Gunter, 19 Ala. 731.

[29] Craig v. Craig, 3 Barb. Ch. (N. Y.) 76.

[30] In re Olmstead, 52 App. Div. 515, 66 N. Y. Supp. 212, affirmed 164 N. Y. 571, 58 N. E. 1090; In re Longstreth's Estate, 12 Phila. (Pa.) 86.

[31] Bogle v. Bogle, 3 Allen (Mass.) 158.

[32] Green v. Blackwell, 31 N. J. Eq. 37.

[33] Tilden v. Fiske, 4 Dem. Sur. (N. Y.) 357.

[34] In re Bernstein, 3 Redf. Sur. (N. Y.) 20; Parker v. Allen (Sup.) 14 N. Y. Supp. 265. For other cases construing the New York statutes, see In re Cutting, 49 App. Div. 388, 63 N. Y. Supp. 246; Smith v. Lansing, 24 Misc. Rep. 566, 53 N. Y. Supp. 633; Rothschild v. Goldenberg, 33 Misc. Rep. 646, 68 N. Y. Supp. 955; In re Abbot, 39 Misc. Rep. 760, 80 N. Y. Supp. 1117.

A trustee may, at any time before the court has taken final action on his resignation, withdraw it and resume his duties as trustee.[35]

In the proceeding to obtain a release from the trust the cestuis que trust are necessary parties.[36] The court may impose a condition upon the acceptance of the trustee's resignation, as, for example, that the trustee waive his commissions.[37] Where the resignation is solely to promote the convenience of the trustee, the court will oblige him to pay the costs of the proceeding;[38] but in other instances, where the cause for resignation is not personal with the trustee, the court may direct that the costs be paid out of the trust estate.[39]

REMOVAL OF TRUSTEE

80. Unless the power of removal is expressly reserved to the settlor, beneficiary, or other person, in the trust instrument, a court of equity alone may remove the trustee against his will.

Equity will remove a trustee, upon notice to the trustee and all other parties interested in the trust, if the trustee is shown to have been guilty of such misconduct in office that the financial interests of the cestui que trust are endangered.

The general rule is that the sole power of removing a trustee rests in the court of equity. That court is admitted to have plenary power to revoke the trustee's authority, upon cause shown.[40] Neither the settlor[41] nor the cestui que trust[42] has the implied power

[35] Dillard v. Winn, 60 Ala. 285. But after action upon the resignation by the court, even if no successor has been appointed, the resignation may not be retracted. Lednum v. Dallas Trust & Savings Bank (Tex. Civ. App.) 192 S. W. 1127.

[36] Clay's Adm'r v. Edwards' Trustee, 84 Ky. 548, 2 S. W. 147.

[37] In re Curtiss, 15 Misc. Rep. 545, 37 N. Y. Supp. 586.

[38] In re Jones, 4 Sandf. Ch. (N. Y.) 615.

[39] Green v. Blackwell, 31 N. J. Eq. 37; Richmond v. Arnold (R. I.) 68 Atl. 427.

[40] Williamson v. Suydam, 6 Wall. 723, 18 L. Ed. 967; Parker v. Kelley (C. C.) 166 Fed. 968; Mazelin v. Rouyer, 8 Ind. App. 27, 35 N. E. 303; Waller v. Hosford, 152 Iowa, 176, 130 N. W. 1093; City of St. Louis v. Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561; Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938; Quackenboss v. Southwick, 41 N. Y. 117; In re McGillivray, 138 N. Y. 308, 33 N. E. 1077; Appeal of Piper, 20 Pa. 67; Bailey v. Rice, 1 Tenn. Ch. App. 645; Lamp v. Homestead Bldg. Ass'n, 62 W. Va. 56, 57 S. E. 249.

[41] Pierce v. Weaver, 65 Tex. 44.

[42] Bouldin v. Alexander, 15 Wall. 131, 21 L. Ed. 69.

to remove a trustee, but the settlor may reserve to himself [43] or vest in the cestui que trust,[44] or in the cestui que trust and a co-trustee,[45] the authority to remove a trustee from office. All reasonable provisions which the settlor makes regarding removal in the trust instrument will, of course, be respected.

No attempt can be made here to show in what courts in the several states the general equity jurisdiction which gives the right of removal is vested.[46] In many states there are now statutes which state the procedure to be followed in removal cases and the grounds upon which removal will be ordered.[47]

What are sufficient grounds for the removal of the trustee rests in the discretion of the court of equity, in the absence of statute.[48] The trustee will not be relieved of his office, except upon a showing of the clearest necessity in order to preserve the interests of the beneficiaries.[49] It has been said that fraud, negligence, or willful breach of trust alone justify the removal,[50] while another court has required proof that the trustee has been acting wrongfully or in a manner which constitutes mischievous or negligent conduct in relation to the trust,[51] and still another court has stated that danger to the trust fund alone would justify removal.[52] Where the trustee has been guilty only of a misunderstanding [53] or of an honest mistake [54] he will not be removed. In determining the question of re-

[43] Bowditch v. Banuelos, 1 Gray (Mass.) 220.

[44] May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

[45] May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179.

[46] For some decisions on the subject, see Attorney General v. Barbour, 121 Mass. 568; Widmayer v. Widmayer, 76 Hun, 251, 27 N. Y. Supp. 773; Jones v. Jones, 8 Misc. Rep. 660, 30 N. Y. Supp. 177; Stafford v. American Missionary Ass'n, 22 Ohio Cir. Ct. R. 399; Baird's Case, 1 Watts & S. (Pa.) 288; Ex parte Hussey, 2 Whart. (Pa.) 330; Jenkins v. Wilkins, 10 Heisk. (Tenn.) 52; Lewis' Adm'r v. Glenn, 84 Va. 947, 6 S. E. 866.

[47] Parker v. Kelley (C. C.) 166 Fed. 968 (construing Massachusetts statute); Nutt v. State, 96 Miss. 473, 51 South. 401; Holman v. Renaud, 141 Mo. App. 399, 125 S. W. 843; Code Civ. Proc. N. Y. § 2569; Real Property Law (Consol. Laws, c. 50) § 112; Act March 29, 1917 (107 Ohio Laws, p. 421); In re Strickler's Estate, 28 Pa. Super. Ct. 455; In re Price's Estate, 209 Pa. 210, 58 Atl. 280.

[48] Scott v. Rand, 118 Mass. 215; Ward v. Dortch, 69 N. C. 277; Lamp v. Homestead Bldg. Ass'n, 62 W. Va. 56, 57 S. E. 249.

[49] Preston v. Wilcox, 38 Mich. 578; Waller v. Hosford, 152 Iowa, 176, 130 N. W. 1093; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596; Appeal of Williams, 73 Pa. 249.

[50] Thompson v. Thompson, 2 B. Mon. (Ky.) 161.

[51] Mannhardt v. Illinois Staats-Zeitung Co., 90 Ill. App. 315.

[52] Satterfield v. John, 53 Ala. 127.

[53] Matthews v. Murchison (C. C.) 17 Fed. 760.

[54] In re Durfee, 4 R. I. 401.

moval the court should consider the wishes of the beneficiary.[55] In many of the statutes the grounds of removal are set forth at length.[56]

Grounds for Removal

The following have been held to be good reasons for the removal of a trustee; insolvency;[57] mingling the trust funds with private property;[58] inability to produce the trust funds upon an accounting;[59] misconduct in office;[60] use of the trust property for his own benefit;[61] placing himself in a position where his private interests conflict with his interests as trustee;[62] nonresidence or removal from the jurisdiction;[63] inattention to the trust business;[64]

[55] In re Morgan, 63 Barb. (N. Y.) 621, affirmed 66 N. Y. 618.

[56] Thus, by the New York statute having to do with testamentary trustees removal may be had where the trustee has become incompetent or disqualified to act; or has wasted or improperly applied or invested the funds, or otherwise improvidently managed or injured the property committed to his charge, or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding, is unfit for the due execution of his office; or where he has refused to obey an order of the court; or where his appointment was procured by fraud. Code Civ. Proc. N. Y. § 2569. And in the statute having to do with all trustees removal is allowed when the trustee has "violated or threatens to violate his trust," or when he is insolvent, or when his insolvency is apprehended, or for any other reason he is deemed an unsuitable person to execute the trust. Real Property Law N. Y. (Consol. Laws, c. 50) § 112.

[57] In re Wiggins, 29 Hun (N. Y.) 271; Cohn v. Ward, 32 W. Va. 34, 9 S. E. 41.

[58] Sparhawk v. Sparhawk, 114 Mass. 356; Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938; Lowe v. Montgomery, 117 Mo. App. 273, 92 S. W. 916; Deen v. Cozzens, 30 N. Y. Super. Ct. 178; In re Strickler's Estate, 28 Pa. Super. Ct. 455.

[59] In re Mallon's Estate, 38 Misc. Rep. 27, 76 N. Y. Supp. 879.

[60] Ehlen v. Ehlen, 63 Md. 267; Scott v. Rand, 118 Mass. 215; Billings v. Billings, 110 Mass. 225; Lister v. Weeks, 60 N. J. Eq. 215, 46 Atl. 558; In re McGillivray, 138 N. Y. 308, 33 N. E. 1077; Haight v. Brisbin, 100 N. Y. 219, 3 N. E. 74; Appeal of Johnson, 9 Pa. 416; Gilbert v. Johnson, 49 Pa. Super. Ct. 191; Cooper v. Day, 1 Rich. Eq. (S. C.) 26. A practical repudiation of the trust was held sufficient ground for removal in Keating v. Keating, 182 Iowa, 1056, 165 N. W. 74.

[61] Wheatcraft v. Wheatcraft, 55 Ind. App. 283, 102 N. E. 42; State v. Ausmus (Tenn. Ch. App.) 35 S. W. 1021.

[62] Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Barbour v. Weld, 201 Mass. 513, 87 N. E. 909; In re Keller, 142 App. Div. 454, 127 N. Y. Supp. 16, affirmed 201 N. Y. 590, 95 N. E. 1131; Elias v. Schweyer, 13 App. Div. 336, 43 N. Y. Supp. 55; In re Etgen, 146 App. Div. 932, 132 N. Y. Supp. 308; Pyle v. Pyle, 137 App. Div. 568, 122 N. Y. Supp. 256; Warren v. Burnham, 125 App. Div. 169, 109 N. Y. Supp. 202; In re Hirsch's Estate, 188 N. Y. 584, 81 N. E. 1165; Dickerson v. Smith, 17 S. C. 289; Fisk v. Patton, 7 Utah, 399, 27 Pac. 1.

[63] Ketchum v. Mobile & O. R. Co., Fed. Cas. No. 7737; Letcher's Trustee

[64] In re Boyle, 166 App. Div. 504, 151 N. Y. Supp. 1022.

refusal to obey the orders of the court;[65] disagreement and friction with the fellow trustees,[66] or with the cestuis que trust;[67] refusal to give information regarding the trust business;[68] failure to furnish the bond required;[69] intemperance;[70] lunacy[71] or other incompetency;[72] lack of discretion;[73] failure to carry out the trust.[74] The court may also remove a trustee on the ground that

v. German Nat. Bank, 134 Ky. 24, 119 S. W. 236, 20 Ann. Cas. 815; Dorsey v. Thompson, 37 Md. 25; Barkley Cemetery Ass'n v. McCune, 119 Mo. App. 349, 95 S. W. 295; Lane v. Lewis, 4 Dem. Sur. (N. Y.) 468; Ex parte Tunno, Bailey Eq. (S. C.) 395; Carr v. Bredenberg, 50 S. C. 471, 27 S. E. 925; Maxwell v. Finnie, 6 Cold. (Tenn.) 434. But see, contra, La Forge v. Binns, 125 Ill. App. 527; Bonner v. Lessley, 61 Miss. 392.

[65] Appeal of Morse, 92 Conn. 286, 102 Atl. 586; In re Pott's Petition, 1 Ashm. (Pa.) 340; Tunstall v. Wormley, 54 Tex. 476.

[66] Quackenboss v. Southwick, 41 N. Y. 117; In re Morgan, 63 Barb. (N. Y.) 621, affirmed 66 N. Y. 618; McKenna v. O'Connell, 84 Misc. Rep. 582, 147 N. Y. Supp. 922; In re Myers' Estate, 205 Pa. 413, 54 Atl. 1093. Contra: Cornett v. West, 102 Wash. 254, 173 Pac. 44.

[67] May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179; Polk v. Linthicum, 100 Md. 615, 60 Atl. 455, 69 L. R. A. 920; Wilson v. Wilson, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477; Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; Austin v. Austin, 18 Neb. 306, 22 N. W. 116; In re Chapman (Sup.) 2 N. Y. Supp. 248; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, affirmed 167 N. Y. 606, 60 N. E. 1110; In re Martin's Estate, 4 Pa. Dist. R. 219; In re Marsden's Estate, 166 Pa. 213, 31 Atl. 46; In re Price's Estate, 209 Pa. 210, 58 Atl. 280; In re Nathan's Estate, 191 Pa. 404, 43 Atl. 313. But if the disagreement between trustee and cestui que trust is not dangerous to the best interest of the trust, but a mere personal difference, the trustee will not be removed on that account. McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; Nickels v. Philips, 18 Fla. 732; Parsons v. Jones, 26 Ga. 644; Lorenz v. Weller, 267 Ill. 230, 108 N. E. 306; Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122; Clark v. Anderson, 73 Ky. (10 Bush.) 99; Polk v. Linthicum, 100 Md. 615, 60 Atl. 455, 69 L. R. A. 920; Starr v. Wiley, 89 N. J. Eq. 79, 103 Atl. 865; Trask v. Sturges, 170 N. Y. 482, 63 N. E. 534; In re Price's Estate, 209 Pa. 210, 58 Atl. 280; In re Neafie's Estate, 199 Pa. 307, 49 Atl. 129; Gibbes v. Smith, 2 Rich. Eq. (S. C.) 131. But where the trustee has discretion as to the amount to be given the cestui que trust and hostility will thus result disadvantageously to the cestui, friction will authorize removal even though the trustee has been capable and honest. Maydwell v. Maydwell, 135 Tenn. 1, 185 S. W. 712, Ann. Cas. 1918B, 1043.

[68] Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669.

[69] Suit v. Creswell, 45 Md. 529.

[70] Bayles v. Staats, 5 N. J. Eq. 513; In re Cady's Estate, 103 N. Y. 678, 9 N. E. 442, affirming In re Cady, 36 Hun (N. Y.) 122; In re Bell's Estate, 44 Pa. Super. Ct. 60.

[71] In re Wadsworth, 2 Barb. Ch. (N. Y.) 381.

[72] Savage v. Gould, 60 How. Prac. (N. Y.) 234; In re Smith's Estate (Sur.) 7 N. Y. Supp. 327.

[73] Attorney General v. Garrison, 101 Mass. 223; but see Preston v. Wilcox, 38 Mich. 578.

[74] Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, 29 L. Ed. 212; Fris-

it is expedient to intrust the management of the estate to a smaller number of trustees.[75]

But it has been held that the trustee will not be removed on the ground of insolvency, if the trust fund is guarded by a proper bond;[76] nor will he be removed on the ground of negligence alone,[77] nor because of a failure to carry out the provisions of the trust due to a misconception of his duties,[78] nor because of misconduct in office,[79] when the safety of the trust fund is not endangered; nor merely because of enemy alienage and internment.[80] And in many other cases slight misconduct, inefficiency, or impropriety has been held insufficient ground for the removal of the trustee, where the trust fund was not placed in jeopardy.[81]

Where trust duties are attached to the office of executor, and the executor is removed or resigns, he will be treated as having been relieved of his duties as trustee also;[82] but if the offices of ex-

bie v. Fogg, 78 Ind. 269; Robinson v. Cogswell, 192 Mass. 79, 78 N. E. 389; In re Mechanics' Bank, 2 Barb. (N. Y.) 446; In re McKeon, 37 Misc. Rep. 658, 76 N. Y. Supp. 312; In re Hoysradt, 20 Misc. Rep. 265, 45 N. Y. Supp. 841; Anderson v. Robinson, 63 Or. 228, 126 Pac. 988. Acquiescence in a breach by a cotrustee may also be a ground. Harvey v. Schwettman (Mo. App.) 180 S. W. 413. Threatened insolvency of the trust estate may authorize the transfer of the charity to a municipal corporation. Woods v. Bell (Tex. Civ. App.) 195 S. W. 902.

[75] Barker v. Barker, 73 N. H. 353, 62 Atl. 166, 1 L. R. A. (N. S.) 802, 6 Ann. Cas. 596.

[76] Moorman v. Crockett, 90 Va. 185, 17 S. E. 875.

[77] Waterman v. Alden, 144 Ill. 90, 32 N. E. 972.

[78] In re Rothaug's Estate, 51 Misc. Rep. 548, 101 N. Y. Supp. 973; In re Ward's Estate (Sur.) 175 N. Y. Supp. 655.

[79] Haines v. Elliot, 77 Conn. 247, 58 Atl. 718; Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; Corlies v. Corlies' Ex'rs, 23 N. J. Eq. 197; In re Engel, 83 Misc. Rep. 675, 146 N. Y. Supp. 793; Brackett v. Seavey (Sup.) 131 N. Y. Supp. 664; In re Thieriot, 117 App. Div. 686, 102 N. Y. Supp. 952; In re O'Hara, 62 Hun, 531, 17 N. Y. Supp. 91.

[80] In re Amsinck's Estate, 103 Misc. Rep. 124, 169 N. Y. Supp. 336.

[81] Chambers v. Mauldin, 4 Ala. 477; Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; McNair v. Montague, 260 Ill. 465, 103 N. E. 450; Olive v. Olive, 117 Iowa, 383, 90 N. W. 827; Berry v. Williamson, 11 B. Mon. (Ky.) 245; Dailey v. Wight, 94 Md. 269, 51 Atl. 38; Preston v. Wilcox, 38 Mich. 578; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596; Jacobus v. Munn, 37 N. J. Eq. 48; Wiggins v. Burr, 54 Misc. Rep. 149, 105 N. Y. Supp. 649; In re Wallace's Estate, 206 Pa. 105, 55 Atl. 848; Curran v. Green, 18 R. I. 329, 27 Atl. 596; Carr v. Bredenberg, 50 S. C. 471, 27 S. E. 925; Clausen v. Jones, 18 Tex. Civ. App. 376, 45 S. W. 183; Wisconsin Universalist Convention v. Union Unitarian and Universalist Soc. of Prairie du Sac, 152 Wis. 147, 139 N. W. 753.

[82] Randall v. Gray, 80 N. J. Eq. 13, 83 Atl. 482; Cushman v. Cushman, 191 N. Y. 505, 84 N. E. 1112, affirming 116 App. Div. 763, 102 N. Y. Supp. 258.

ecutor and trustee are expressly made separate by the will, but the same person occupies both offices, the revocation of the appointment as executor will not affect the trusteeship.[83]

Proceeding for Removal

The application for the removal of the trustee may be made by any one having a financial interest in the execution of the trust. It may be made by one or all of the cestuis que trust,[84] whether their interests are vested or contingent.[85] The Attorney General should apply for the removal of an improper trustee of a charitable trust.[86] The settlor, unless a beneficiary, has not the interest requisite to enable him to apply for the removal of the trustee.[87]

In a proceeding for the removal of the trustee, the cestuis que trust should all be made parties or their interests represented;[88] and all other persons interested in the trust should be joined in the action.[89] If one of several trustees is to be removed, the cotrustees should be made parties to the proceeding.[90] The trustee surely should be given notice of the proceeding to remove him, in order that he may have the opportunity to defend himself.[91]

A trustee who unsuccessfully resists an application for his removal may be held liable for the costs of the proceeding;[92] but, if he shows that there is no cause for his removal and that he has

[83] Tuckerman v. Currier, 54 Colo. 25, 129 Pac. 210, Ann. Cas. 1914C, 599.

[84] Barbour v. Weld, 201 Mass. 513, 87 N. E. 909; Goncelier v. Foret, 4 Minn. 13 (Gil. 1); Cooper v. Day, 1 Rich. Eq. (S. C.) 26.

[85] Wilson v. Wilson, 145 Mass. 490, 14 N. E. 521, 1 Am. St. Rep. 477; In re Bartells' Will, 109 App. Div. 586, 96 N. Y. Supp. 579; Bailey v. Rice, 1 Tenn. Ch. App. 645.

[86] State v. Fleming, 3 Del. Ch. 153.

[87] Thompson v. Childress, 4 Baxt. (Tenn.) 327.

[88] Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Jones v. Bryant, 204 Ill. App. 609; Butler v. Butler, 164 Ill. 171, 45 N. E. 426; Elias v. Schweyer, 13 App. Div. 336, 43 N. Y. Supp. 55.

[89] Goodwin v. Goodwin, 69 Mo. 617. But see In re Gilbert's Estate, 3 N. Y. St. Rep. 208, holding that the matter of parties is within the discretion of the court.

[90] Hamilton v. Faber, 33 Misc. Rep. 64, 68 N. Y. Supp. 144.

[91] Ex parte Kilgore, 120 Ind. 94, 22 N. E. 104; Hitch v. Stonebraker, 125 Mo. 128, 28 S. W. 443; Holcomb v. Kelly (Sup.) 114 N. Y. Supp. 1048; In re Sterling, 68 Misc. Rep. 3, 124 N. Y. Supp. 894; Foss v. Sowles, 62 Vt. 221, 19 Atl. 984. But see Letcher's Trustee v. German Nat. Bank, 134 Ky. 24, 119 S. W. 236, 20 Ann. Cas. 815, and State, to Use of Napton, v. Hunt, 46 Mo. App. 616, where no actual notice was given to the trustee. Where the trustee is a defaulter and a fugitive from justice, and his whereabouts unknown, he may be removed without citation served upon him. Commonwealth v. Allen, 254 Pa. 474, 98 Atl. 1056.

[92] Lape's Adm'r v. Taylor's Trustee (Ky.) 23 S. W. 960.

been performing his duties satisfactorily, the court may charge the costs of the proceeding to the trust estate.[93]

DEATH OF TRUSTEE

81. The death of the trustee does not affect the life of the trust. Equity will fill the vacancy, and the trust will continue.

In the absence of statute, upon the death of a sole trustee, the title to the trust property vests in the trustee's heirs or personal representative, depending upon the nature of the property, whether real or personal. Where one of several trustees dies, the surviving trustees become the sole owners of the trust property by virtue of the right of survivorship in joint tenancy.

By statute in several states, on the death of a sole trustee the title to the trust property vests in the court of equity.

There is no right of dower or curtesy in the estate of the trustee.

The death of the trustee will not terminate the trust. The continuance of the trust is not dependent on the life of any particular trustee. Equity will supply a successor.[94]

After the trustee's death, however, it is obvious that the legal title to the trust property which has been vested in him can no longer remain there. It must be transferred to some one upon the trustee's death. It cannot remain in suspense.

By common law the holding is that the ownership of the trust property devolves upon the persons who would take the absolute property of the deceased. "The general principle is not questioned that trusts of real estate upon the trustee's death devolve upon his heir at law, and trusts of personalty devolve upon the executor or administrator for the preservation of the title, until the appointment of a new trustee. * * *"[95] That the heir becomes the owner of real property[96] held in trust, and the personal representative the

[93] Appeal of Bloomer, 83 Pa. 45.

[94] See ante, p. 261. An exception must be made, of course, where the trust was personal. In such cases, on the death of the trustee, equity will not appoint a successor. Rogers v. Rea, 98 Ohio St. 315, 120 N. E. 828.

[95] Baltimore Trust Co. v. George's Creek Coal & Iron Co., 119 Md. 21, 34, 85 Atl. 949.

[96] Greenleaf v. Queen, 26 U. S. (1 Pet.) 138, 7 L. Ed. 85; Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918; Bloom v. Ray (Ky.) 16 S. W. 714; Laughlin v. Page, 108 Me. 307, 80 Atl. 753; Hawkins v. Chapman, 36 Md. 83; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Kirkman v. Wadsworth, 137 N. C. 453, 49 S. E. 962; Jenks' Lessee v. Backhouse, 1 Bin. (Pa.) 91; Watkins v. Specht, 7 Cold. (Tenn.) 585; Williams v. Moliere, 60 Vt. 378,

owner of personal property,[97] upon the death of the trustee, is well recognized.

Due to the inconveniences which would arise from tenancy in common, it is generally provided by statute or decision that trustees hold as joint tenants. Where there are several trustees, and one dies, it is preferable that the surviving trustees, who have knowledge of the trust and have been selected by the settlor, should administer the trust, rather than that the administration should be continued by such survivors in common with the heirs or personal representatives of the deceased trustee. Such heirs or personal representatives may have no special fitness for the task of carrying on the trust. It is only when the title can rest nowhere else that the trust devolves upon them.

It is, of course, a characteristic of joint tenancy that, upon the death of one of the joint tenants, the title to the property remains in the surviving joint tenants as a whole, and that no rights descend to the heirs or personal representatives of the deceased joint tenant. Thus, in cases of trusts, if A., B., and C. are trustees, and A. dies, B. and C. will hold the title to the trust property, free from any claims by the heirs or personal representatives of A.[98] "Upon the death of one of several cotrustees, the office of trustee will devolve, with the estate, upon the survivor, and ultimately upon the heir or personal representative of the last survivor. Trusts of real

15 Atl. 192. But see Birks v. McNeill, 177 Iowa, 567, 159 N. W. 210. In New Jersey and South Carolina the heir who takes the trust property, if it be real, is the eldest son; the old rule of primogeniture being followed in this respect. Zabriskie v. Morris & E. R. Co., 33 N. J. Eq. 22; Cone v. Cone, 61 S. C. 512, 39 S. E. 748; Breeden v. Moore, 82 S. C. 534, 64 S. E. 604. If the trustee devise the real property held in trust, the devisees will be held to the trust. Cresap v. Brown, 82 W. Va. 467, 96 S. E. 66.

[97] Conaway v. Third Nat. Bank, 167 Fed. 26, 92 C. C. A. 488; Gregg v. Gabbert, 62 Ark. 602, 37 S. W. 232; Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196; Friedley v. Security Trust & Safe Deposit Co., 10 Del. Ch. 74, 84 Atl. 883; Anderson v. Northrop, 30 Fla. 612, 12 South. 318; Lucas v. Donaldson, 117 Ind. 139, 19 N. E. 758; Safford v. Rantoul, 12 Pick. (Mass.) 233; Gulick v. Bruere, 42 N. J. Eq. 639, 9 Atl. 719; Appeal of Baird, 3 Watts & S. (Pa.) 459; Merriam v. Hemmenway, 26 Vt. 565. In Virginia by statute the personal representative of a deceased trustee is under a duty to complete an unexecuted trust. Williams v. Bond, 120 Va. 678, 91 S. E. 627.

[98] F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; Wilson v. Snow, 35 App. D. C. 562; Reichert v. Missouri & I. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307; Boyer v. Sims, 61 Kan. 593, 60 Pac. 309; Rutherford Land & Improvement Co. v. Sanntrock, 60 N. J. Eq. 471, 46 Atl. 648; In re Ziegler, 168 App. Div. 735, 154 N. Y. Supp. 652; Maffet v. Oregon & C. R. Co., 46 Or. 443, 80 Pac. 489; Mattison v. Mattison, 53 Or. 254, 100 Pac. 4, 133 Am. St. Rep. 829, 18 Ann. Cas. 218. But see, contra, Sander's Heirs v. Morrison's Ex'rs, 7 T. B. Mon. (Ky.) 54,

estate, upon the death of the trustee, devolve upon his heir at law. Trusts of personalty vest in his executor or administrator." [99]

Even in states where joint tenancy is generally abolished, it still exists among trustees,[1] and in other states, where all grants to two or more persons are presumed to be to them as tenants in common, there is an exception in the case of trustees, and they are to hold as joint tenants.[2]

In several states statutes modifying the common-law rule regarding the devolution of trust property have been enacted. These statutes vest the title to trust property, upon the death of the sole trustee, in the court having general equity jurisdiction, and require the court to appoint a trustee to carry out the trust to its conclusion.[3]

Where the title to the trust property passes to the heir or personal representative of a deceased trustee, the court may, upon proper application, appoint a new trustee to carry on the trust and relieve the heir or executor.[4]

It is now provided by statute in England that, if a trustee dies without heirs and the property escheats to the crown,[5] the trust shall not be destroyed thereby, and such doubtless is the rule in America, although there is a dearth of authority upon the question.

It is well settled that the widow of a trustee is not entitled to dower in the trust property,[6] and that the widower of a trustee has

18 Am. Dec. 161. The statute in California reads as follows: "On the death, renunciation, or discharge of one of several cotrustees the trust survives to the others." Civ. Code, § 2288.

[99] Schenck v. Schenck, 16 N. J. Eq. 174, 182.

[1] Boyer v. Sims, 61 Kan. 593, 60 Pac. 309.

[2] New York Real Property Law (Consol. Laws, c. 50) § 66.

[3] Code Ala. 1907, § 3415; Whitehead v. Whitehead, 142 Ala. 163, 37 South. 929; Lecroix v. Malone, 157 Ala. 434, 47 South. 725; Burns' Ann. St. Ind. 1914, § 4021; Gen. St. Kan. 1915, § 11683; Collier v. Blake, 14 Kan. 250; How. Ann. St. Mich. 1912, § 10692; Gen. St. Minn. 1913, § 6723; New York Personal Property Law (Consol. Laws, c. 41) § 20; New York Real Property Law (Consol. Laws, c. 50) § 111; Stewart v. Franchetti, 167 App. Div. 541, 153 N. Y. Supp. 453; In re Meehan's Estate, 104 Misc. Rep. 219, 171 N. Y. Supp. 766; St. Wis. 1913, § 2094.

[4] Gregg v. Gabbert, 62 Ark. 602, 37 S. W. 232; Civ. Code Cal. § 2289; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065.

[5] 47 & 48 Vict. c. 71, § 6.

[6] Barker v. Smiley, 218 Ill. 68, 75 N. E. 787; Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090; Sanford v. Sanford, 157 Ill. App. 350; Tevis v. Steele, 4 T. B. Mon. (Ky.) 339; Miller v. Miller, 148 Mo. 113, 49 S. W. 852; Van Pelt v. Parry, 218 Mo. 680, 118 S. W. 425; Kager v. Brenneman, 47 App. Div. 63, 62 N. Y. Supp. 339; Hendren v. Hendren, 153 N. C. 505, 69 S. E. 506, 138 Am. St. Rep. 680; Kaphan v. Toney (Tenn. Ch. App.) 58 S. W. 909; Wilson v. Wilson, 32 Utah, 169, 89 Pac. 643.

no rights of curtesy.[7] The seizin of the trustee not being beneficial, and his title being the dry legal title only, there is no basis for the award of dower or curtesy. "Where a person holds land in trust for another, the husband or wife of such trustee is not entitled to dower in such premises." [8]

VACANCIES IN TRUSTEESHIP—APPOINTMENT OF SUCCESSORS

82. The settlor may reserve to himself or vest in others the power of filling vacancies in the trusteeship. If he makes no such provision, the court of chancery will appoint the new trustee.

In appointing a trustee, equity will prefer unbiased persons of full capacity.

The application for the appointment is generally required to be made by a party financially interested in the trust, upon notice to all others so interested.

An administrator with the will annexed does not ordinarily succeed to trust duties conferred upon an executor.

A trustee appointed by the court becomes vested with the title to the trust property by virtue of the decree of the court. No conveyance from the retiring trustee is necessary.

The question next arises as to the method of filling a vacancy in a trusteeship. If the original trustee is removed from office by natural or artificial causes, voluntarily or involuntarily, by whom and in what way will his successor be appointed?

The settlor may devise a method of filling vacancies, and this method must be respected, if reasonable.[9]

Neither a surviving trustee [10] nor a cestui que trust [11] has implied authority to fill a vacancy in the trusteeship. Only when expressly empowered may they appoint the successor trustee.

The persons whom the settlor may empower to fill vacancies are numerous and restricted only by the settlor's imagination. He may reserve to himself the right to fill vacancies,[12] or may vest such

[7] King v. Bushnell, 121 Ill. 656, 13 N. E. 245; Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160.

[8] King v. Bushnell, 121 Ill. 656, 660, 13 N. E. 245.

[9] Tuckerman v. Currier, 54 Colo. 25, 129 Pac. 210, Ann. Cas. 1914C, 599.

[10] Whitehead v. Whitehead, 142 Ala. 163, 37 South. 929; Mallory v. Mallory, 72 Conn. 494, 45 Atl. 164; Adams v. Highland Cemetery Co. (Mo.) 192 S. W. 944; Wilson v. Towle, 36 N. H. 129.

[11] Grundy v. Drye, 104 Ky. 825, 48 S. W. 155, 49 S. W. 469.

[12] Equitable Trust Co. v. Fisher, 106 Ill. 189.

right in the surviving trustees,[13] or in the surviving trustees and the cestuis que trust,[14] or in the beneficiaries alone.[15] The creator of the trust cannot vest this power in a court which has no jurisdiction over the subject of trusts,[16] for this would be allowing an individual to enlarge the jurisdiction of the courts; but the settlor may provide that a court of chancery shall fill vacancies,[17] or that the court shall perform this duty, subject to the approval of the interested parties,[18] or that the trustees shall nominate the successor and the court appoint.[19] But in cases where the power of appointment is given to the trustee or cestui que trust the court will nevertheless supervise the filling of the vacancy.[20]

In the event that the settlor forms no plan for the filling of vacancies in the trusteeship the court of chancery has jurisdiction to supply a new trustee.[21] On the death of a trustee,[22] or his resigna-

[13] Yates v. Yates, 255 Ill. 66, 99 N. E. 360, Ann. Cas. 1913D, 143; Orr v. Yates, 209 Ill. 222, 70 N. E. 731; In re Cleven's Estate, 161 Iowa, 289, 142 N. W. 986; Carr v. Corning, 73 N. H. 362, 62 Atl. 168; Jacobs v. McClintock, 53 Tex. 72; Mitchell v. Stevens, 1 Aikens (Vt.) 16; Whelan v. Reilly, 3 W. Va. 597.

[14] Griswold v. Sackett, 21 R. I. 206, 42 Atl. 868.

[15] March v. Romare, 116 Fed. 355, 53 C. C. A. 575; Foster v. Goree, 4 Ala. 440; Leggett v. Grimmett, 36 Ark. 496; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; Fuller v. Davis, 63 Miss. 78; Clark v. Wilson, 53 Miss. 119; Guion v. Pickett, 42 Miss. 77; Frank v. Colonial & United States Mortg. Co., 86 Miss. 103, 38 South. 340, 70 L. R. A. 135, 4 Ann. Cas. 54; Miller v. Knowles (Tex. Civ. App.) 44 S. W. 927; Cates v. Mayes (Tex. Sup.) 12 S. W. 51.

[16] Harwood v. Tracy, 118 Mo. 631, 24 S. W. 214. Thus in Petition of Straw, 78 N. H. 506, 102 Atl. 628, it was held that the settlor could not give to the Supreme Court power to fill vacancies, since such power was vested by statute in the probate court.

[17] Cruit v. Owen, 203 U. S. 368, 27 Sup. Ct. 71, 51 L. Ed. 227; Appeal of Allen, 69 Conn. 702, 38 Atl. 701; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Shaw v. Paine, 12 Allen (Mass.) 293.

[18] Cole v. City of Watertown, 119 Wis. 133, 96 N. W. 538.

[19] Huston v. Dodge, 111 Me. 246, 88 Atl. 888.

[20] Bailey v. Bailey, 2 Del. Ch. 95; Yates v. Yates, 255 Ill. 66, 99 N. E. 360, Ann. Cas. 1913D, 143.

[21] Doe v. Roe, 1 Boyce (Del.) 216, 75 Atl. 704; Thompson v. Hale, 123 Ga. 305, 51 S. E. 383; Mason v. Bloomington Library Ass'n, 237 Ill. 442, 86 N. E. 1044, 15 Ann. Cas. 603; Sawtelle v. Witham, 94 Wis. 412, 69 N. W. 72.

[22] Allison v. Little, 85 Ala. 512, 5 South. 221; In re Gay's Estate, 138 Cal. 552, 71 Pac. 707, 94 Am. St. Rep. 70; O'Brien v. Battle, 98 Ga. 766, 25 S. E. 780; People, Use of Brooks, v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268; Cruse v. Axtell, 50 Ind. 49; Kennard v. Bernard, 98 Md. 513, 56 Atl. 793; Hildreth v. Eliot, 8 Pick. (Mass.) 293; Weiland v. Townsend, 33 N. J. Eq. 393; Farmers' Loan & Trust Co. v. Pendleton, 179 N. Y. 486, 72 N. E. 508; Thornton v. Harris, 140 N. C. 498, 53 S. E. 341; In re Kane Borough Park Lands Trustees' Appointment, 177 Pa. 638, 35 Atl. 874; Ex parte O'Brien, 11 R. I. 419; Somers v. Craig, 9 Humph. (Tenn.) 467; Buchanan

tion,[23] or declination [24] of the trust, or when he is unable to administer the trust,[25] or is removed,[26] or, being a corporation, ceases to exist,[27] equity will appoint a new trustee. In many states statutes prescribe when and how equity may appoint trustees.[28] It is impossible here to enter into a discussion of the jurisdiction of the various state courts over the appointment of new trustees. This subject has been litigated in many cases which are here cited for the convenience of the investigator.[29] The location of general equity jurisdiction is a purely local question.

Whether or not equity will appoint a new trustee is a matter

v. Hart, 31 Tex. 647; Fisher v. Dickenson, 84 Va. 318, 4 S. E. 737; Forsyth v. City of Wheeling, 19 W. Va. 318. But if the trust is personal, so that it ends on the death of the trustee, the court will not appoint a successor. Rogers v. Rea, 98 Ohio St. 315, 120 N. E. 828.

[23] Reese v. Ivey, 162 Ala. 448, 50 South. 223; Vernoy v. Robinson, 133 Ga. 653, 66 S. E. 928; French v. Northern Trust Co., 197 Ill. 30, 64 N. E. 105; Petition of Pierce, 109 Me. 509, 84 Atl. 1070; Massachusetts General Hospital v. Amory, 12 Pick. (Mass.) 445; Schehr v. Look, 84 Mich. 263, 47 N. W. 445; In re Pitney, 186 N. Y. 540, 78 N. E. 1110.

[24] Roberts v. Roberts, 259 Ill. 115, 102 N. E. 239; Whallen v. Kellner, 104 S. W. 1018, 31 Ky. Law Rep. 1285; Greene v. Borland, 4 Metc. (Mass.) 330; Brush v. Young, 28 N. J. Law, 237; Anderson v. Robinson, 57 Or. 172, 110 Pac. 975; Gamble v. Dabney, 20 Tex. 69.

[25] Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214; Dean v. Northern Trust Co., 259 Ill. 148, 102 N. E. 244.

[26] In re Burk's Estate, 1 N. Y. St. Rep. 316.

[27] Lanning v. Commissioners of Public Instruction of City of Trenton, 63 N. J. Eq. 1, 51 Atl. 787; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

[28] Huston v. Dodge, 111 Me. 246, 88 Atl. 888; Md. Laws 1918, ch. 431; Sells v. Delgado, 186 Mass. 25, 70 N. E. 1036; In re Satterthwaite's Estate, 60 N. J. Eq. 347, 47 Atl. 226; New York Personal Property Law (Consol. Laws, c. 41) § 20; New York Real Property Law (Consol. Laws, c. 50) § 112; Acts Va. 1910, c. 355 (applying to trusts not involving personal confidence, Roller v. Catlett, 118 Va. 185, 86 S. E. 909).

[29] Whitehead v. Whitehead, 142 Ala. 163, 37 South. 929; Appeal of Beardsley, 77 Conn. 705, 60 Atl. 664; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69; Mitchell v. Pitner, 15 Ga. 319; Woodbery v. Atlas Realty Co., 148 Ga. 712, 98 S. E. 472; Dwyer v. Cahill, 228 Ill. 617, 81 N. E. 1142; Shepard v. Meridian Nat. Bank, 149 Ind. 532, 48 N. E. 346; White v. Hampton, 10 Iowa, 238; Haggin v. Straus, 148 Ky. 140, 146 S. W. 391, 50 L. R. A. (N. S.) 642; Coudon v. Updegraf, 117 Md. 71, 83 Atl. 145; Sells v. Delgado, 186 Mass. 25, 70 N. E. 1036; Bredell v. Kerr, 242 Mo. 317, 147 S. W. 105; Zabriskie's Ex'rs v. Wetmore, 26 N. J. Eq. 18; People v. Norton, 9 N. Y. 176; Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418; Richards v. Rote, 68 Pa. 248; Mask v. Miller, 7 Baxt. (Tenn.) 527; In re Cary's Estate, 81 Vt. 112, 69 Atl. 736; Morse v. Stoddard's Estate, 90 Vt. 479, 98 Atl. 991; Shelton v. Jones' Adm'x, 26 Grat. (Va.) 891; McWilliams v. Gough, 116 Wis. 576, 93 N. W. 550.

wholly within its discretion.[30] Even though a trustee may have been removed from the trusteeship, the court may deem it unwise to fill his place. Thus, if there is a surviving trustee who is administering the trust successfully, chancery may deem it unnecessary to fill the vacancy;[31] and if the only duty left to the trustees is to transfer the property to the beneficiaries, equity may deem it superfluous to appoint new trustees and may transfer the property itself.[32]

If equity does fill the vacancy, it will, of course, select a trustee, who will be apt to administer the affairs of the trust with fairness and ability. It will not choose a prejudiced or incompetent person. Thus the court will not appoint, as a trustee of a religious charitable trust, a person hostile to the religion to be promoted;[33] nor will the court name as a successor a person who is biased and apt to favor one or more of the cestuis que trust as against the others.[34] It is the better practice to appoint a resident of the jurisdiction,[35] but circumstances may justify the choice of a nonresident.[36] The court should consider the wishes of the interested parties in its appointment, though not bound to follow them.[37]

Proceeding for Appointment

The application for the appointment of a new trustee may be made by any one interested financially in the execution of the trust. Thus a cestui que trust,[38] or the guardian of an infant cestui

[30] City Council of Augusta v. Walton, 77 Ga. 517, 1 S. E. 214; Ex parte Knust, Bailey Eq. (S. C.) 489. The discretion warrants the appointment of a trust company as sole trustee, although the instrument provided for several individual trustees. In re Battin's Estate, 89 N. J. Eq. 144, 104 Atl. 434.

[31] Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385; In re Dietz, 132 App. Div. 641, 117 N. Y. Supp. 461; In re Zerega, 81 Misc. Rep. 113, 142 N. Y. Supp. 144; In re Physic's Estate, 2 Phila. (Pa.) 278. And on the removal of two trustees the court may appoint only one in their places. Harvey v. Schwettman (Mo. App.) 180 S. W. 413.

[32] In re Kittinger's Estate, 9 Del. Ch. 71, 77 Atl. 24; Friedley v. Security Trust & Safe Deposit Co., 10 Del. Ch. 74, 84 Atl. 883; Boyer v. Decker, 5 App. Div. 623, 40 N. Y. Supp. 469.

[33] Glover v. Baker, 76 N. H. 393, 83 Atl. 916.

[34] Waller v. Hosford (Iowa) 132 N. W. 426; In re Welch, 20 App. Div. 412, 46 N. Y. Supp. 689.

[35] Dodge v. Dodge, 109 Md. 164, 71 Atl. 519, 130 Am. St. Rep. 503.

[36] Appeal of Wilcox, 54 Conn. 320, 8 Atl. 136. For example, where a trust was to be administered in Germany an Iowa court appointed a resident of Germany as trustee. Beidler v. Dehner, 178 Iowa, 1338, 161 N. W. 32.

[37] Thornburg v. Macauley, 2 Md. Ch. 425; Coster v. Coster, 125 App. Div. 516, 109 N. Y. Supp. 798. By Civ. Code Cal. § 2287, the cestui que trust, if fourteen years of age, may nominate the trustee and the court must appoint the nominee, unless he is incompetent.

[38] Cone v. Cone, 61 S. C. 512, 39 S. E. 748.

que trust,[39] may apply, and, in the case of a religious charitable trust, a member of the church to be benefited may make application,[40] although the fact that a person is a citizen and taxpayer in the county where the charity is to be carried on does not show sufficient interest to enable one to secure the ear of the court.[41]

The question of notice upon the application for the appointment of a new trustee is one affected by statute to a large extent, and the courts have not been in accord in their views upon the subject. In many instances they have held that the notice necessary to be given was entirely in the discretion of the court,[42] while in other cases notice to all interested parties has been required.[43] Occasionally new trustees seem to have been appointed ex parte.[44] It has been held that the beneficiaries are necessary parties to the application,[45] but not if their interests are of a future or contingent nature.[46] So, too, the heirs of the deceased trustee whose place is to be filled have been called necessary parties,[47] as well as the Attorney General in the case of a charitable trust.[48] But a person claiming the trust property adversely to the trustee is not a necessary party when the question of filling a vacancy in the trusteeship is being considered.[49]

Frequently an executor is given the duties of a trustee, and later a vacancy in the executorship occurs. In such a case an administrator with the will annexed is appointed. The general rule is that under such circumstances the administrator cum testamento annexo does not succeed to the position of trustee, which the former executor held; but that such administrator is vested only with the

[39] Hallinan v. Hearst, 133 Cal. 645, 66 Pac. 17, 55 L. R. A. 216.

[40] Harris v. Brown, 124 Ga. 310, 52 S. E. 610, 2 L. R. A. (N. S.) 828.

[41] Harris v. Brown, 124 Ga. 310, 52 S. E. 610, 2 L. R. A. (N. S.) 828.

[42] Dyer v. Leach, 91 Cal. 191, 27 Pac. 598, 25 Am. St. Rep. 171; In re Earnshaw, 196 N. Y. 330, 89 N. E. 825; Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S. W. 1175.

[43] Simmons v. McKinlock, 98 Ga. 738, 26 S. E. 88; Dexter v. Cotting, 149 Mass. 92, 21 N. E. 230; Greene v. Borland, 4 Metc. (Mass.) 330; Clarke v. Inhabitants of Andover, 207 Mass. 91, 92 N. E. 1013.

[44] Sullivan v. Latimer, 35 S. C. 422, 14 S. E. 933; Reigart v. Ross, 63 Wis. 449, 23 N. W. 878.

[45] In re Earnshaw (Sup.) 112 N. Y. Supp. 197; Henry v. Doctor, 9 Ohio, 49; Bolling v. Stokes, 7 S. C. 364.

[46] Whallen v. Kellner, 104 S. W. 1018, 31 Ky. Law Rep. 1285; Fitzgibbon v. Barry, 78 Va. 755.

[47] In re Abbott, 55 Me. 580; Plumley v. Plumley, 8 N. J. Eq. 511. But see, contra, Hawley v. Ross, 7 Paige (N. Y.) 103.

[48] Lakatong Lodge, No. 114, of Quakertown, etc., v. Board of Education of Franklin Tp., Hunterdon County, 84 N J. Eq. 112, 92 Atl. 870.

[49] White River Lumber Co. v. Clark, 75 N. H. 585, 70 Atl. 247.

duties of the executorship, and that a new trustee must be appointed to undertake the separate duties of the trusteeship.[50] However, in some cases the administrator with the will annexed has been held to become vested with the trusteeship as well as with the position of the deceased executor.[51] These latter cases seem to proceed upon the ground of a distinction between cases where the trust duties are attached to the office of the executor and cases where the trust duties are attached to the executor personally and are separated from the executorial functions.

This attempted distinction is [52] illustrated by the statements of a New York court: "The Revised Statutes provide that, in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and that the administrators with such will shall have the rights and powers, and be subject to the same duties, as if they had been named as executors in such will. * * * There can be no doubt, therefore, that in cases where the execution of a trust, or of a power in trust, is confided by a testator to his executors as such, they cannot execute the trust without also taking out letters testamentary, and assuming the office of executors. In such cases the administrator with the will annexed is probably entitled to execute all the trusts of the will, in the same manner as if he had been named therein, by the testator, as the executor and trustee. The difficulty in the present case, on that subject, is that the testator appears to have intended to give to the three individuals named in his will a distinct character as trustees, entirely independent of their character of executors. * * *" It is difficult to see how an executor can be a trustee, also, without having a distinct office and character. His successor in the executorial office ought not to succeed to the trust duties as incidental.

When the new trustee is appointed to fill the vacancy, his title

[50] Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279; Warfield v. Brand's Adm'r, 13 Bush (Ky.) 77; Knight v. Loomis, 30 Me. 204; Stoutenburgh v. Moore, 37 N. J. Eq. 63; Dunning v. Ocean Nat. Bank of City of New York, 61 N. Y. 497, 19 Am. Rep. 293; Kelsey v. McTigue, 171 App. Div. 877, 157 N. Y. Supp. 730; In re Sheaffer's Estate, 230 Pa. 426, 79 Atl. 651; Harrison v. Henderson, 7 Heisk. (Tenn.) 315.

[51] Jones v. Jones, 17 N. C. 387; Mathews v. Meek, 23 Ohio St. 272; Com. v. Barnitz, 9 Watts (Pa.) 252; In re Sheet's Estate, 215 Pa. 164, 64 Atl. 413.

[52] De Peyster v. Clendening, 8 Paige (N. Y.) 295, 310, 311; In re Welch, 20 App. Div. 412, 46 N. Y. Supp. 689; Guion v. Melvin, 69 N. C. 242; Pitzer v. Logan, 85 Va. 374, 7 S. E. 385; Fitzgibbon v. Barry, 78 Va. 755. But see, contra, to the effect that it is not necessary that all interested parties should be given notice. Kennard v. Bernard, 98 Md. 513, 56 Atl. 793; Jencks v. Safe Deposit & Trust Co. of Baltimore, 120 Md. 626, 87 Atl. 1031.

to the trust property is acquired by virtue of the order of the court. No conveyance from the retiring trustee is needed in order to vest the property rights in the succeeding trustee.[53] Where one is appointed trustee in place of another who has declined the trust, the title to the trust property vests in the appointee as of the date of the inception of the trust, by virtue of the doctrine of relation.[54]

[53] Reilly v. Conrad, 9 Del. Ch. 154, 78 Atl. 1080; Security Trust & Safe Deposit Co. v. Ward, 10 Del. Ch. 408, 93 Atl. 385; Golder v. Bressler, 105 Ill. 419; Reichert v. Missouri & I. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307; Bloodgood v. Massachusetts Ben. Life Ass'n, 19 Misc. Rep. 460, 44 N. Y. Supp. 563; Coster v. Coster, 125 App. Div. 516, 109 N. Y. Supp. 798; McNish v. Guerard, 4 Strob. Eq. (S. C.) 66; Wooldridge v. Planter's Bank, 1 Sneed (Tenn.) 297. "At common law the appointment of new trustees by parties (not in execution of a special power) did not vest the title in the new trustees without conveyance." But a statute changes the common law in Massachusetts. Glazier v. Everett, 224 Mass. 184, 187, 112 N. E. 1009. Contra: Koehne v. Beattie, 36 R. I. 316, 90 Atl. 211.

[54] Parkhill v. Doggett, 135 Iowa, 113, 112 N. W. 189.

CHAPTER XI

THE POWERS OF THE TRUSTEE

POWERS OF TRUSTEE CLASSIFIED

83. The powers of the trustee are called general if they are attached to the office by implication of law, and special if they are expressly granted to the trustee by the trust instrument.

The trustee's powers are also classified as discretionary and in trust. Discretionary powers are frequently called naked powers, and may be exercised or not, at the option of the trustee. Powers in trust, or in the nature of a trust, on the other hand, are imperative, and must be exercised by the trustee.

In the chapter on the powers of the trustee it is intended to discuss the authority of the trustee to perform acts while in office. The question desired to be answered by the material presented in this chapter is: Has the trustee authority to perform the act in question? In a separate chapter on the duties of the trustee, the rules and standards of action which trustees must observe in exercising their powers are stated. Thus, if A. is a trustee of land and has sold it as trustee, at least two questions may arise regarding the propriety of the sale. It may be asked whether A. had authority to sell the real estate, either by virtue of the terms of the trust instrument, or because of a power granted by implication of law. This question will be answered by the material found in the chapter on the powers of a trustee. In the second place, the inquiry

may be made whether A. has properly conducted the sale by giving notice of it and obtaining the best possible price. This question has to do with the duties of a trustee and the rules with respect to that subject will be stated in the chapter entitled "The Duties of a Trustee."

The powers of a trustee may be classed as general and special. The general powers are those which the court of equity considers attached to the office of trustee by implication. The special powers are those vested in the trustee by virtue of express provisions of the trust instrument. Thus, where a farm and dwelling house are conveyed to a trustee for the benefit of the wife of the grantor, the purchase of furniture, stock, and farming utensils, for the purpose of operating the farm and making the house habitable, is within the general powers of the trustee. The trust could not be carried out as the grantor obviously intended, unless such a power were implied.[1]

On the other hand, if a testator devises land to A. in trust for the purpose of supporting his children, and declares in the will that A. shall have the power to sell the land, this authority is called special.

Discretionary Powers

The powers of trustees are also divided into discretionary powers and powers in trust. Discretionary powers are also called naked powers. "A power annexed to the trust, which may be executed or not in the judgment or discretion of the trustee, is a mere naked power, and will not devolve upon a trustee appointed by the court upon the death of the original trustee. Such a power must be executed by the original trustee, and by no one else, and, if not executed by him, fails."[2] Thus, where trustees are authorized to convey the real estate of the testator at such times as they shall think proper, and such sale is not required for the purpose of effecting any provisions of the will, the power is a mere naked power to sell and entirely discretionary.[3]

A power given to a trustee in trust is one which is imperative and must be executed. Thus, where a fund is given to a trustee with a direction that the income be used for the support of the daughter of the settlor and with power in the trustee to pay to such daughter any portion of the principal of the trust fund which the trustee shall deem proper for the support and comfort of the beneficiary, the power to pay over the principal is imperative and a power in trust. When the original trustee dies without executing it, his successor, appointed by the court, may do so.[4]

[1] Mayfield v. Kilgour, 31 Md. 240.
[2] Osborne v. Gordon, 86 Wis. 92, 96, 56 N. W. 334.
[3] Shelton v. Homer, 5 Metc. (Mass.) 462.
[4] Osborne v. Gordon, 86 Wis. 92, 56 N. W. 334.

The powers of a trustee are, of course, limited by abnormalities or disqualifications which may exist with respect to him. Thus, if the trustee be insane, he has no power to do any valid act, no matter how much authority may be attached to the office of trustee which he occupies.[5]

A person dealing with a trustee is under the duty of learning the powers of such officer and will be charged with notice of the extent of his authority. If he acts without knowledge of the trustee's powers, he does so at his peril.[6]

Where express powers are named in the trust instrument, the trustee should follow specifically the directions there given.[7] If express power to do an act is not given, the trustee will have implied power to do such act, if it is reasonably necessary for the execution of the trust. "Where a trustee conforms with the provisions of the trust in their true spirit and meaning, he has authority 'to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making them effectual.'" [8]

ESTATE OF TRUSTEE

84. The estate which the trustee has is governed by the needs of the trust. If a fee is required in order that the trust may be properly executed, the trustee will be deemed to have that estate, regardless of the wording of the trust instrument. The settlor will be deemed to have conveyed to the trustee an interest in the property sufficient to enable him to perform the trust.

Since the trustee holds the trust property for the benefit of others and has no personal interest therein, the trust property is not liable for the payment of his debts.

On the death of the trustee intestate and without heirs, the crown or state takes subject to the rights of cestui que trust.

[5] Bailey v. Hill, 77 Va. 492.

[6] Owen v. Reed, 27 Ark. 122; Jones v. Holladay, 2 App. D. C. 279; Zion Church of Evangelical Ass'n of North America in Charles City v. Parker, 114 Iowa, 1, 86 N. W. 60; Horton v. Tabitha Home, 95 Neb. 491, 145 N. W. 1023, 51 L. R. A. (N. S.) 161, Ann. Cas. 1915D, 1139; Griswold v. Perry, 7 Lans. (N. Y.) 98.

[7] Clark v. Maguire, 16 Mo. 302; Price v. Methodist Episcopal Church, 4 Ohio, 515; Haldeman v. Openheimer, 103 Tex. 275, 126 S. W. 566; Atkinson v. Beckett, 34 W. Va. 584, 12 S. E. 717.

[8] Kipp v. O'Melveny, 2 Cal. App. 142, 144, 83 Pac. 264, 265.

The powers of the trustee are affected by the nature of the property rights which he holds in trust. Whether the estate granted to him in trust is a fee, a life estate, or other interest, is ordinarily determined by the trust instrument. But the important principle that a trustee takes such an estate or interest as is necessary to enable him to perform the trust should be observed.[9] If the trust can be administered only through the ownership of a fee simple, such an interest will be deemed granted,[10] although the limitations of the deed or will may not clearly show that a fee simple was transferred. If a life estate will suffice to enable the trustee to perform his duties, such an estate will be deemed vested in the trustee, regardless of the particular wording of the trust instrument.[11]

Ordinarily, of course, the legal estate is vested in the trustee,[12] although a trust may be created with an equitable interest as the subject-matter. The principle that, where the trust is passive, the legal estate vests in the cestui que trust by virtue of the Statute of Uses or its modern successors, has been explained at another point.[13] Attention has also been directed to the merger which sometimes takes place when the trustee is also the sole beneficiary, or one of several beneficiaries.[14]

The estate of the trustee being a bare legal interest, and not a beneficial interest, his creditors cannot satisfy their claims from the trust property. A judgment against the trustee personally is not a lien upon trust real estate.[15] The modern rule is that, if the

[9] Christopher v. Mungen, 61 Fla. 513, 55 South. 273; Nixon v. Nixon, 268 Ill. 524, 109 N. E. 294; Defrees v. Brydon, 275 Ill. 530, 114 N. E. 336; Lyon v. Safe Deposit & Trust Co., 120 Md. 514, 87 Atl. 1089; Cleveland v. Hallett, 6 Cush. (Mass.) 403; Wright v. Keasbey, 87 N. J. Eq. 51, 100 Atl. 172; Brown v. Richter, 25 App. Div. 239, 49 N. Y. Supp. 368; Walker v. Scott, 7 Ohio App. 335; Holder v. Melvin, 106 S. C. 245, 91 S. E. 97; Joy v. Midland State Bank, 26 S. D. 244, 128 N. W. 147; Ellis v. Fisher, 3 Sneed (Tenn.) 231, 65 Am. Dec. 52; Montgomery v. Trueheart (Tex. Civ. App.) 146 S. W. 284.

[10] McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

[11] In re Spreckel's Estate, 162 Cal. 559, 123 Pac. 371.

[12] Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Welch v. City of Boston, 221 Mass. 155, 109 N. E. 174, Ann. Cas. 1917D, 946.

[13] See § 45, ante; Palmer v. City of Chicago, 248 Ill. 201, 93 N. E. 765; Guild v. Allen, 28 R. I. 430, 67 Atl. 855; Schumacher v. Draeger, 137 Wis. 618, 119 N. W. 305.

[14] See § 74, ante.

[15] Lavender v. Lee, 14 Ala. 688; Alcardi v. Craig, 42 Ala. 311; H. B. Claflin Co. v. King, 56 Fla. 767, 48 South. 37; Taylor v. Brown, 112 Ga. 758, 38 S. E. 66; Cox v. Arnsmann, 76 Ind. 210; Brown v. Barngrover, 82 Iowa, 204, 47 N. W. 1082; Harrison v. Andrews, 18 Kan. 535; Emery v. Farmers' State Bank, 97 Kan. 231, 155 Pac. 34; Feagan v. Metcalfe, 150

trustee dies without heirs and escheat takes place, the crown or state holds for the beneficiary of the trust.[16]

CUSTODY OF TRUST RES

85. Except in unusual cases, where possession of the trust property by the beneficiary is directed by the settlor or is peculiarly advantageous to the beneficiary, the trustee is entitled to secure and retain possession of the trust res.

One of the important general or implied powers which the trustee possesses is that of taking and retaining possession of the trust res. There can, obviously, be no doubt about the power of a trustee to take and retain such possession as against a stranger to the trust. The only cases of difficulty arise where the beneficiary claims to be entitled to the custody of the trust property.

Ordinarily the very nature of the trust requires that the trustee have custody of the property. His duties generally include collection of the profits of the property and care and maintenance of it. These functions cannot be performed without possession.[17] But occasionally the nature of the property or peculiar purposes of the trust entitle the cestui que trust to the custody of it against the trustee. Thus, beneficiaries of a trust of slaves have been held en-

Ky. 745, 150 S. W. 988; First Nat. Bank of Catonsville v. Carter, 132 Md. 218, 103 Atl. 463; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Lee v. Enos, 97 Mich. 276, 56 N. W. 550; Fleming v. Wilson, 92 Minn. 303, 100 N. W. 4; Dalrymple v. Security Loan & Trust Co., 11 N. D. 65, 88 N. W. 1033; Arntson v. First Nat. Bank, 39 N. D. 408, 167 N. W. 760, L. R. A. 1918F, 1038; Manley v. Hunt, 1 Ohio, 257; J. I. Case Threshing Mach. Co. v. Walton Trust Co., 39 Okl. 748, 136 Pac. 769; Dimmick v. Rosenfield, 34 Or. 101, 55 Pac. 100; Barnes v. Spencer, 79 Or. 205, 153 Pac. 47; Eldredge v. Mill Ditch Co., 90 Or. 590, 177 Pac. 939; Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763; Williams v. Fullerton, 20 Vt. 346; Davenport v. Stephens, 95 Wis. 456, 70 N. W. 661. This rule applies, even though the trustee is also the settlor of the trust, in the absence of fraud. Wulff v. Roseville Trust Co. of Newark, N. J., 164 App. Div. 399, 149 N. Y. Supp. 683.

[16] St. 47 & 48 Vict. c. 71, § 6; N. Y. Public Lands Law (Consol. Laws, c. 46) § 68; New York Cent. & H. R. R. Co. v. Cottle, 102 Misc. Rep. 30, 168 N. Y. Supp. 463.

[17] Gunn v. Barrow, 17 Ala. 743; Davis v. Hunter, 23 Ga. 172; Thieme v. Zumpe, 152 Ind. 359, 52 N. E. 449; Nagle v. Conard, 80 N. J. Eq. 253, 86 Atl. 1103; Essex Co. v. Durant, 80 Mass. (14 Gray) 447; Appeal of Alsop, 9 Barr (9 Pa.) 374; In re Sheaffer's Estate, 230 Pa. 426, 79 Atl. 651; Guphill v. Isbell, 1 Bailey (S. C.) 230, 19 Am. Dec. 675; De Graffenreid v. Green, 1 Cold. (Tenn.) 109; Beach v. Beach, 14 Vt. 28, 39 Am. Dec. 204.

titled to the possession,[18] as in one case was the cestui que trust of a trust of a farm and the stock and utensils.[19]

It is elementary that the settlor may expressly provide that the cestui shall have the custody of the trust property.[20]

The power of the trustee to take and retain possession of the trust property includes the authority to receive the rents and profits of such property.[21]

REPAIRS AND IMPROVEMENTS

86. Where repairs and improvements are reasonably necessary for the maintenance and profitable conduct of the trust estate, the trustee will be regarded as having implied power to make them.

A trustee has implied or general authority to make reasonable, necessary repairs to the trust property. "A trustee cannot ordinarily make improvements, and charge the cost thereof to the beneficiary, unless clearly authorized by the instrument creating the trust. * * * He will, however, be allowed for repairs, when such repairs are necessary to the preservation of the estate." [22] The trustee should consider the value of the trust property, the probable length of the trust, and the effect of the repairs upon the income of the trust property. If, in view of these considerations, a reasonable man in the conduct of his own business would repair the property, the trustee has implied power so to do.[23] "Regard should be had to the probable duration of the trust in determining whether temporary and slight, or more permanent and thorough repairs, should be made." [24] Occasionally the trustee is given express authority to make repairs.[25]

A trustee also has implied power to make permanent improve-

[18] Cook v. Kennerly, 12 Ala. 42. See Ames, Cases on Trusts (2d Ed.) p. 467.

[19] In re Washbon, 60 Hun, 576, 14 N. Y. Supp. 672.

[20] Freeman v. Bristol Sav. Bank, 76 Conn. 212, 56 Atl. 527.

[21] Bell's Adm'r v. Humphrey, 8 W. Va. 1.

[22] Booth v. Bradford, 114 Iowa, 562, 570, 87 N. W. 685, 688.

[23] Veazie v. Forsaith, 76 Me. 172; Sohier v. Eldredge, 103 Mass. 345; Rathbun v. Colton, 15 Pick. (Mass.) 471; Kearney v. Kearney, 17 N. J. Eq. 59; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, affirmed 167 N. Y. 606, 60 N. E. 1110; In re Heroy's Estate, 102 Misc. Rep. 305, 169 N. Y. Supp. 807; In re Griffith's Estate, 4 Pa. Dist. R. 495.

[24] Rathbun v. Colton, 15 Pick. (Mass.) 471, 484.

[25] Stamford Trust Co. v. Mack, 91 Conn. 620, 101 Atl. 235; In re Rankin's Estate, 5 Pa. Co. Ct. R. 603.

ments on the trust property when such action is reasonable. Here again the condition of the trust property, its productivity or non-productivity, the duration of the trust, and other similar facts must determine the reasonableness of improving the property.[26] Thus, in a case where buildings are ancient, unsafe, and untenantable, and the property is in an unproductive condition, the trustee will be considered to have implied power to use a portion of the principal of the trust fund for the purpose of constructing new buildings on the land.[27]

In other instances the peculiar conditions of the trust have made the expenditure for improvements unreasonable and the trustee has been held to have exceeded his powers in making improvements.[28] Thus, the expenditure of $850,000 in erecting a new building upon land when the value of the entire trust property was only $920,000, has been held to be unreasonable and not within the authority of the trustee.[29] The Massachusetts court stated its position regarding improvements in general in these words: "We have no doubt that a trustee under a Massachusetts trust would be justified in tearing down an old building owned by the trust and erecting a new one in its place, when a prudent business man would do so to secure a fair return by way of income, and at the same time to maintain the corpus of the portion of the principal so invested intact, having regard to the relation which such an investment, when made, would have to the amount of the principal of the trust fund as a whole."[30]

In some states statutes expressly authorize chancery to empower a trustee to sell or mortgage the trust property for the purpose of making repairs or improvements.[31]

[26] Patterson v. Johnson, 113 Ill. 559; Myers v. Myers, 2 McCord, Eq. (S. C.) 214, 16 Am. Dec. 648; Franks v. Williams, 37 Tex. 24; Field v. Wilbur, 49 Vt. 157; White v. Hall, 113 Va. 427, 74 S. E. 212; In re Cole's Estate, 102 Wis. 1, 78 N. W. 402, 72 Am. St. Rep. 854.

[27] Smith v. Keteltas, 62 App. Div. 174, 70 N. Y. Supp. 1065. But in In re Cole's Estate, 102 Wis. 1, 78 N. W. 402, 72 Am. St. Rep. 854, it was held that, even though the cestuis que trust and remainderman consented, the trustee had no power to employ a part of the principal in making improvements.

[28] Pope's Ex'r v. Weber, 1 Ky. Law Rep. 329; Green v. Winter, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475; Herbert v. Herbert, 57 How. Prac. (N. Y.) 333; Killebrew v. Murphy, 3 Heisk. (Tenn.) 546; Hughes v. Williams, 99 Va. 312, 38 S. E. 138.

[29] Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381.

[30] 203 Mass. 328, 345, 89 N. E. 381, 387.

[31] 2 Comp. St. N. J. 1910, p. 2269; New York Real Property Law (Consol. Laws, c. 50) § 105.

POWER TO BIND ESTATE IN CONTRACT OR TORT

87. The trustee is personally liable on all contracts made by him in the administration of the trust, unless the contract expressly excludes individual liability, and except in extraordinary cases such contracts do not bind the trust estate.

The trustee is also personally liable for the torts of himself or his employees in the trust administration and the trust property may not be taken to satisfy claims for damages for such torts.

The trustee is entitled to be indemnified for money spent or liability incurred in the proper conduct of the trust affairs; and also for tort liabilities sustained in the reasonably prudent and skillful administration of the trust. In some instances where the trustee had no funds of his own or was empowered to carry on a business, the courts have allowed him to charge the trust estate by his contracts. A creditor of the trustee upon a contract which the trustee was authorized to make in the course of the trust, or upon a tort claim, where the trustee himself would be entitled to be indemnified from the trust estate if he paid the claim, may avail himself of the trustee's right of reimbursement, if in the case of a contract claim the estate has had the benefit of the contract, and if the trustee is insolvent or a nonresident, so that action against the trustee is useless or inconvenient. If the trustee is in default or arrears, he himself would have no right of indemnity and the creditor can receive none through him. When this right of reimbursement is open to the creditor, he may proceed directly against the trust estate in equity. Statutes regulate the effect of the contracts of trustees in Alabama, California, Connecticut, Georgia, Montana, North Dakota, and South Dakota.

The powers of the trustee do not ordinarily include the authority to bind the trust estate or the beneficiaries by his contracts. Even though the contracts be executed "as trustee," and be impliedly or expressly authorized by the trust instrument and for the benefit of the cestuis que trust, as a general rule the trustee alone will be liable to an action upon the contracts.[32] "The general rule is well

[32] Duvall v. Craig, 2 Wheat. 45, 4 L. Ed. 180; Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163; In re Hunter (D. C.) 151 Fed. 904; Zehnbar v. Spillman, 25 Fla. 591, 6 South. 214; Bradner Smith & Co. v. Williams,

settled in this state that executors or trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate, and thus create a liability not founded upon the contract or obligation of the testator. * * * While, as between the executor and the person with whom he contracts, the latter may rely on the contract, the beneficiaries are not concluded by the executor's act, but the propriety of the charge and the liability of the estate therefor must be determined in the accounting of the executor. In an action at law against the executor, the legatees and persons interested in the estate have no opportunity to be heard." [88]

The reason for this rule is well explained by a Mississippi court. It states that "while the trustees have a lien on the trust estate for all costs and expenses legitimately incurred by them in its administration, this privilege does not extend to agents employed by them, but such agents must look alone to the trustee for reimbursement. * * * If the trust estate was liable to be attacked and impleaded by every person who had dealt with the trustee, and forced to litigate with them the nature, value and beneficial character to the estate of the services alleged by them to have been rendered, it would be involved in endless complications, and be perhaps swallowed up or seriously injured by the accumulations of costs. The law, therefore, compels such persons to look to the trustee with whom they dealt, and against whom alone they have a legal demand. If their

178 Ill. 420, 53 N. E. 358; Bloom v. Wolfe, 50 Iowa, 286; Graves v. Mattingly, 6 Bush (Ky.) 361; Schriver v. Frommel, 183 Ky. 597, 210 S. W. 165; Knipp v. Bagby, 126 Md. 461, 95 Atl. 60, L. R. A. 1915F, 1072; Carr v. Leahy, 217 Mass. 438, 105 N. E. 445; Philip Carey Co. v. Pingree, 223 Mass. 352, 111 N. E. 857; McGovern v. Bennett, 146 Mich. 558, 109 N. W. 1055; Koken Iron Works v. Kinealy, 86 Mo. App. 199; United States Trust Co. v. Stanton, 139 N. Y. 531, 34 N. E. 1098; Whalen v. Ruegamer, 123 App. Div. 585, 108 N. Y. Supp. 38; Blewitt v. Olin, 14 Daly (N. Y.) 351; Dunlevie v. Spangenberg, 66 Misc. Rep. 354, 121 N. Y. Supp. 299; Mitchell v. Whitlock, 121 N. C. 166, 28 S. E. 292; Anderson v. Robinson, 57 Or. 172, 109 Pac. 1118, 110 Pac. 975; Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170; Kain v. Humes, 5 Sneed (Tenn.) 610; Connally v. Lyons & Co., 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935; McIntyre v. Williamson, 72 Vt. 183, 47 Atl. 786, 82 Am. St. Rep. 929; Gates v. Avery, 112 Wis. 271, 87 N. W. 1091. A fortiori if the contract is executed by the trustee without reference to the trust, although for trust purposes, it will bind the trustee individually. Frost v. Schackleford, 57 Ga. 260. On the subjects considered in this section, see Scott, Liabilities Incurred in the Administration of Trusts, 28 Harv. Law Rev. 725; Brandeis, Liability of Trust Estates on Contracts Made for Their Benefit, 15 American Law Rev. 449; Sweet, Trusteeship and Agency, 8 Law Quart. Rev. 220.

[88] O'Brien v. Jackson, 167 N. Y. 31, 33, 60 N. E. 238, 239.

claim is recognized and enforced against him, he presents it to the proper tribunal, and with him the beneficiaries of the estate will litigate the question of the propriety of its allowance against themselves." [34]

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such." [35]

The trust estate may not be rendered liable on the trustee's promise by an action at law or in equity against the trustee in his representative capacity or against the cestuis que trust, with the exceptions hereinafter noted.[36] The remedy of the promisee is an action at law against the trustee as an individual.

Persons contracting with the trustee for the rendition of services or the delivery of goods to him must, as a general rule, look solely to his individual property for their reimbursement. The trustee, after having been obliged to pay for such services or goods, may then present a claim therefor upon his accounting, and, if the claim is allowed as a fair and proper one, the trustee will be reimbursed from the trust estate. This procedure gives the cestui que trust the right and opportunity to object to the expenditure as unreasonable or unnecessary.

If the contract was not authorized by the trust instrument, ex-

[34] Clopton v. Gholson, 53 Miss. 466, 471.

[35] Mr. Justice Woods in Taylor v. Davis, 110 U. S. 330, 334–335, 4 Sup. Ct. 147, 150, 28 L. Ed. 163.

[36] Wade v. Pope, 44 Ala. 690; Blackshear v. Burke, 74 Ala. 239; Dantzler v. McInnis, 151 Ala. 293, 44 South. 193, 13 L. R. A. (N. S.) 297, 125 Am. St. Rep. 28; Johnson v. Leman, 131 Ill. 609, 23 N. E. 435, 7 L. R. A. 656, 19 Am. St. Rep. 63; Everett v. Drew, 129 Mass. 150; Feldman v. Preston, 194 Mich. 352, 160 N. W. 655; Truesdale v. Philadelphia Trust, Safe Deposit & Insurance Co., 63 Minn. 49, 65 N. W. 133; Austin v. Munroe, 47 N. Y. 360; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; O'Brien v. Jackson, 167 N. Y. 81, 60 N. E. 238; Le Baron v. Barker, 143 App. Div. 492, 127 N. Y. Supp. 979; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252; Lucht v. Behrens, 28 Ohio St. 231, 22 Am. Rep. 378; Arnold v. Randall, 121 Wis. 462, 98 N. W. 239.

pressly or impliedly, but was improper and beyond the powers of the trustee, it is obvious that he and he alone will be bound.[37] If the trust estate receives the benefit of the unauthorized contract, it might be held liable to the trustee for the reasonable value of the benefits received on quasi-contract principles; but this right of the trustee is doubtful.[38]

Torts

The trustee is also personally liable for torts committed by himself or his agents or servants in the administration of the trust, and he has no power to make the trust estate liable for the damages occasioned by such wrongful acts.[39] Thus, if the trustee is guilty of negligence in the maintenance of the trust premises,[40] or of libel while acting as trustee,[41] he will be liable; but the trust estate will not.

To cancel obligations incurred in the trust administration the trustee may pay out the trust funds,[42] or he may employ his own money to satisfy the creditors and then reimburse himself from the trust income.[43] Upon the accounting the trustee is entitled to be indemnified for all moneys expended and all liabilities incurred in the proper execution of the trust.[44] This right of indemnity en-

[37] Farmers' & Traders' Bank of Shelbyville v. Fidelity & Deposit Co. of Maryland, 108 Ky. 384, 56 S. W. 671; Maynard v. Columbus, 150 Ky. 817, 150 S. W. 1019; Dunham v. Blood, 207 Mass. 512, 93 N. E. 804; Gibney v. Allen, 156 Mich. 301, 120 N. W. 811; Appeal of Dougherty (Pa.) 9 Atl. 46; Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746; Welsh v. Davis, 3 S. C. 110, 16 Am. Rep. 690.

[38] Tuttle v. First Nat. Bank of Greenfield, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420.

[39] Everett v. Foley, 132 Ill. App. 438; Louisville Trust Co. v. Morgan, 180 Ky. 609, 203 S. W. 555, 7 A. L. R. 396; Ballou v. Farnum, 9 Allen (Mass.) 47; Baker v. Tibbetts, 162 Mass. 468, 39 N. E. 350; Keating v. Stevenson, 21 App. Div. 604, 47 N. Y. Supp. 847; Trani v. Gerard, 181 App. Div. 387, 168 N. Y. Supp. 808; Moniot v. Jackson, 40 Misc. Rep. 197, 81 N. Y. Supp. 688; Gillick v. Jackson, 40 Misc. Rep. 627, 83 N. Y. Supp. 29; Norling v. Allee (City Ct. Brook.) 13 N. Y. Supp. 791; Parmenter v. Barstow, 22 R. I. 245, 47 Atl. 365, 63 L. R. A. 227; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; O'Toole v. Faulkner, 29 Wash. 544, 70 Pac. 58. Contra: Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S. W. 56, 17 Ann. Cas. 786 (nuisance); Wright v. Caney River R. Co., 151 N. C. 529, 66 S. E. 588, 19 Ann. Cas. 384 (where the negligent act occurred in the ordinary conduct of the trust business). And the trust instrument may exclude personal liability of the trustee for torts. Prinz v. Lucas, 210 Pa. 620, 60 Atl. 309.

[40] O'Malley v. Gerth, 67 N. J. Law, 610, 52 Atl. 563.

[41] Thompson v. American Optical Co., 173 App. Div. 123, 159 N. Y. Supp. 412.

[42] In re Blundell, 40 Ch. Div. 370.

[43] Stott v. Milne, 25 Ch. Div. 710.

[44] In re Exhall Coal Co., 35 Beav. 449; Dowse v. Gorton, [1891] A. C. 190; Jennings v. Mather, [1902] 1 K. B. 1; Matthews v. Ruggles-Brise, [1911]

titles the trustee, if the trust estate has been distributed, to hold the cestuis que trust individually responsible.[45] The trustee has also been allowed the right of indemnity for liability sustained through the commission of a tort, if he acted with reasonable prudence and diligence.[46] This right would doubtless not be extended to cases of willful misconduct or gross negligence. In discussing it an English court has said[47] "that if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of his testator's estate."

Exclusion of Liability

If the person contracting with the trustee is willing to treat with the trustee on such terms, the trustee may provide expressly against any personal obligation upon his part and the trustee cannot be held individually liable for the performance of the contract.[48] "It is equally clear, on the other hand, that although one may covenant as trustee, he may limit and qualify the character in which he is to be held answerable; and where it plainly appears from the face of the instrument that he did not mean to bind himself personally, courts will construe the covenant according to the plainly expressed intention of the parties, and this, too, in cases where the covenantor had no right to bind himself in a fiduciary character. If the plaintiff be without remedy in such cases, he has no one to blame but himself, in accepting a covenant of such a character. He certainly has no right to rely upon the individual liability of the covenantor."[49] Where personal liability is thus excluded, it would seem that the only right of the promisee would

1 Ch. D. 194; Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118; Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492; In re Parry's Estate, 244 Pa. 93, 90 Atl. 443.

[45] Wells-Stone Mercantile Co. v. Aultman, Miller & Co., 9 N. D. 520, 84 N. W. 375.

[46] In re Raybould, [1900] 1 Ch. 199; In re Hunter (D. C.) 151 Fed. 904.

[47] In re Raybould, [1900] 1 Ch. 199, 201.

[48] Thayer v. Wendell, 1 Gall. 37, Fed. Cas. No. 13,873; Glenn v. Allison, 58 Md. 527; Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49; Rand v. Farquhar, 226 Mass. 91, 115 N. E. 286; Brackett v. Ostrander, 126 App. Div. 529, 110 N. Y. Supp. 779; Crate v. Benzinger, 13 App. Div. 617, 43 N. Y. Supp. 824. In Watling v. Lewis, [1911] 1 Ch. 414, it was held that where the trustees made a contract "as trustees, but not so as to create any personal liability," they were nevertheless liable; the court considering the contract to have two repugnant terms, and saying that the trustees might limit, but could not destroy their personal liability.

[49] Glenn v. Allison, 58 Md. 527, 529.

be against the trust estate in equity.[50] "Where the parties expressly contract that no personal liability shall attach to the trustee, the creditor would necessarily depend upon such liability as might lawfully be created against the estate, and it is possible that his remedy might be limited to a suit in equity." [51]

In rare cases the trustee has been allowed to obligate the trust estate by his contracts; that is, his promises have resulted in creating rights on behalf of the promisees to proceed directly against the trust property. Thus, in Jessup v. Smith [52] a trustee who was out of funds employed an attorney to perform services beneficial to the estate and expressly stipulated that the estate alone should be liable. It was held that the trust property could be subjected to the payment of the debt; the court saying: [53] "A trustee, who pays his own money for services beneficial to the trust, has a lien for reimbursement. But if he is unable or unwilling to incur liability himself, the law does not leave him helpless. In such circumstances, he 'has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services are rendered.' * * *" And in Rand v. Farquhar [54] the trust instrument provided that contracts of the trustees should bind the trust estate alone. The trustees executed a contract excluding personal responsibility and providing for liability by the trust estate only. It was held that the object desired could be accomplished under the circumstances. And in some cases where the settlor has directed the carrying on by the trustee of a certain business, and the contract in question has been made by the trustee in connection with such business, the trustee has been held to have power to charge the trust estate by his contract.[55]

Subrogation of Creditor

It is generally conceded that the creditor who has a claim against the trustee because of his contract is entitled to the benefit of the trustee's right of indemnity under some circumstances.[56] The

[50] Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

[51] Packard v. Kingman, 109 Mich. 497, 507, 67 N. W. 551, 555.

[52] 223 N. Y. 203, 119 N. E. 403. See, also, in accord, Noyes v. Blakeman, 6 N. Y. 567, and Randall v. Dusenbury, 39 N. Y. Super. Ct. 174.

[53] 223 N. Y. 203, 207, 119 N. E. 403, 404.

[54] 226 Mass. 91, 115 N. E. 286.

[55] Gisborn v. Charter Oak Life Ins. Co., 142 U. S. 326, 12 Sup. Ct. 277, 35 L. Ed. 1029; Roberts v. Hale, 124 Iowa, 296, 99 N. W. 1075, 1 Ann. Cas. 940; Cannon v. Robinson, 67 N. C. 53; Mathews v. Stephenson, 6 Pa. 496; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832; Yerkes v. Richards, 170 Pa. 346, 32 Atl. 1089.

[56] In re Johnson, 15 Ch. Div. 548; In re Richardson, [1911] 2 K. B. 705; Paul v. Wilson, 79 N. J. Eq. 204, 81 Atl. 835. A creditor, who has the personal obligation of three trustees, is entitled to be subrogated to the

courts have not clearly defined the circumstances, nor have they been unanimous in their views. But the large majority of cases in which the creditor has been allowed to step into the trustee's shoes and claim part of the trust property have been cases in which (a) the remedy against the trustee individually was worthless or difficult of enforcement; (b) the trust estate had had the benefit of the creditor's services or property; and (c) the trustee was not in debt to the trust estate, and so would have been entitled to indemnity himself, had he paid the claim.[57] "A trustee, express or implied, cannot, in the absence of express power conferred upon him, by his contracts or engagements impose a liability upon the trust estate. If he make a contract which is beneficial to the estate, the creditor, or person with whom he contracts, has no equity to charge the estate unless he be insolvent, which must be shown by the exhaustion of legal remedies against him, and the estate is indebted to him. In that event, a court of equity may subrogate the creditor to the right of the trustee to charge the trust estate."[58] The above statement would seem to be erroneous in requiring present indebtedness by the estate to the trustee. It would seem sufficient that the estate would have been indebted to the trustee if he had paid the creditor's claim.

In cases where the trustee has had a right of indemnity and he has been without the jurisdiction, the difficulty of pursuing the remedy against the trustee has induced some courts to allow the creditor to avail himself of the trustee's right of indemnity and collect from the trust estate.[59] In other cases the insolvency of the trustee has been the moving cause for allowing direct action in equity by the creditor.[60] In other cases the fact that the settlor

rights of two of the three to indemnity and recover the whole sum due from the trust estate, even though the third trustee is in default. In re Frith, [1902] 1 Ch. 342. But if the settlor devoted only part of the trust funds to the business in which the debt was contracted, the trustee's right and hence the creditor's right of indemnity relates to the property devoted to the business only and not to the general trust assets. Cutbush v. Cutbush, 1 Beav. 184; Ex parte Garland, 10 Ves. 110; Ex parte Richardson, 3 Maddock, 138; Fridenberg v. Wilson, 20 Fla. 359; Moore v. McFall, 263 Ill. 596, 105 N. E. 723, Ann. Cas. 1915C, 364. If the trustee is in arrears in his accounts, he has no right to reimbursement, which he can pass on to the creditor. Wilson v. Fridenberg, 21 Fla. 386.

[57] See, for example, Clopton v. Gholson, 53 Miss. 466; Fowler v. Mutual Life Ins. Co., 28 Hun (N. Y.) 195.

[58] Blackshear v. Burke, 74 Ala. 239, 243.

[59] Gates v. McClenahan, 124 Iowa, 593, 100 N. W. 479; Norton v. Phelps, 54 Miss. 467; Field v. Wilbur, 49 Vt. 157.

[60] Hewitt v. Phelps, 105 U. S. 393, 26 L. Ed. 1072; Wells-Stone Mercantile Co. v. Aultman, Miller & Co., 9 N. D. 520, 84 N. W. 375; Henshaw v. Freer's Adm'rs, 1 Bailey Eq. (S. C.) 311.

directed the carrying on of the business in which the contract was made was emphasized as a reason allowing action against the estate, when the trustee was irresponsible.[61] No necessity for such emphasis is seen, since the question should be whether the contract was within the powers of the trustee, and not whether it was in the management of a continued business.

In Norton v. Phelps[62] the Mississippi court states the rule to be that, "where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay, the demand, and the trustee is insolvent or nonresident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. The principle is that, while persons dealing as creditors with the trustee must look to him personally, and not to the trust estate, yet where the estate has received the benefit of expenditures procured to be made for it by the trustee, and it has not in any way borne the burden of these expenditures properly chargeable to it, and to fasten the charge upon it will do it no wrong, but simply cause it to pay what it is liable for to the trustee, or would be liable for if he had paid it, or should pay it, and because of the insolvency or nonresidence of the trustee, our tribunals cannot afford the creditor a remedy for his demand, he may proceed directly against the trust estate, and assert against it the demand the trustee could maintain if he had paid or should pay the claim, and should himself proceed against the trust estate."

But some courts have not proceeded upon the notion that the creditor was to be subrogated to the rights of the trustee, and that therefore the creditor could have no rights if the trustee was in default to the trust estate. These latter courts have allowed the claimant to proceed against the trust estate upon mere proof of the insolvency of the trustee and the propriety of the claim.[63] They have reasoned that the debt was a proper one, the trust estate had had the benefit of the creditor's goods or services, and the remedy against the trustee was useless. On equitable principles they have

[61] Willis v. Sharp, 113 N. Y. 586, 21 N. E. 705, 4 L. R. A. 493; Wadsworth, Howland & Co. v. Arnold, 24 R. I. 32, 51 Atl. 1041.

[62] 54 Miss. 467, 471.

[63] Wylly v. Collins, 9 Ga. 223; Manderson's Appeal, 113 Pa. 631, 6 Atl. 893. In Cater v. Eveleigh, 4 Desaus. (S. C.) 19, 6 Am. Dec. 596, recovery from the trust property was allowed without any statement as to the condition of the trustee's accounts.

allowed recovery from the trust property, and made the beneficiaries stand the loss, rather than the creditor.

Yet other courts have held that, if the trust estate has had the benefit of the creditor's services or property, it will be liable to the claimant, regardless of the solvency of the trustee.[64] These decisions seem to discard the indemnity theory entirely, and to rest their results on principles of quasi contract and general equity. The Massachusetts courts allow the creditor to reach the trust property where the debt was authorized by the trust instrument and the trustee is not in arrears, without proof of impossibility or difficulty of collecting from the trustee, due to his absence or insolvency.[65] They give the claimant the trustee's right of indemnity as an alternative to suit against the trustee individually.

In at least seven states the power of the trustee to bind the trust estate by contracts is now covered by statute.[66]

If the cestuis que trust authorize[67] or ratify[68] the contract made by the trustee, the trust estate will be liable therefor. The authority of the trustee to make contracts and thereby bind the trust estate may be questioned only by the cestui que trust.[69]

[64] Deery v. Hamilton, 41 Iowa, 16; In re Estate of Manning, 134 Iowa, 165, 111 N. W. 409.

[65] Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771; King v. Stowell, 211 Mass. 246, 98 N. E. 91.

[66] In Alabama the statute seems to be similar to the generally prevailing common law. Civ. Code, §§ 6085–6087. In California, Montana, North Dakota, and South Dakota a statute in the following words is found: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." Civ. Code Cal. § 2267; Civ. Code Mont. § 5399; Civ. Code N. D. § 6305; Civ. Code S. D. § 1220. The Connecticut statute gives the creditor a right to pursue the trust estate if the debt was properly contracted, or at his option to resort to the personal liability of the trustee in whole or in part. Gen. St. 1918, § 5771. In Georgia the creditor may proceed against the trust estate at law for services, money, or property furnished, where equity would render the estate liable therefor. Parks' Ann. Code 1914, §§ 3786–3790. For cases under the statute, see Malone v. Buice, 60 Ga. 152; Greenfield v. Vason, 74 Ga. 126; Miller v. Smythe, 92 Ga. 154, 18 S. E. 46; Sanders v. Houston Guano Co., 107 Ga. 49, 32 S. E. 610; Cottingham v. Equitable Building & Loan Ass'n, 114 Ga. 940, 41 S. E. 72.

[67] Robert v. Tift, 60 Ga. 566; Poland v. Beal, 192 Mass. 559, 78 N. E. 728; Crate v. Benzinger, 13 App. Div. 617, 43 N. Y. Supp. 824.

[68] Stevens v. Melcher, 80 Hun, 514, 30 N. Y. Supp. 625, modified in 152 N. Y. 551, 46 N. E. 965.

[69] Moody v. Noyes, 15 Wash. 128, 45 Pac. 732.

POWER TO SELL

88. A power of sale will be implied whenever it is necessary to enable the trustee to carry out the purposes of the trust.

If a power of sale expressly or impliedly exists, it should be exercised by the trustee with the prudence of a reasonable man in the conduct of his own affairs. A purchase by the trustee at his own sale is voidable at the option of the beneficiary.

The power to sell the trust property may be expressly given to the trustee.[70] No technical words are necessary to confer this authority upon him, it being sufficient that the settlor's intent is clear.[71]

A power of sale in favor of the trustee is implied in equity whenever such power is necessary to carry out the trust.[72] "While it is true that under the original theory of a trust the powers and duties of the trustee were confined substantially to holding and caring for the property, it is equally true that the purposes of the modern trust are of a much broader character, requiring ordinarily much greater powers on the part of the trustee, including a power of sale, which is generally expressly given. The power of sale, where not expressly given, will be implied from the fact that the trustee is charged with a duty which cannot be performed without a power of sale." [73]

But a power of sale by the trustee is not to be presumed. "A trustee ordinarily holds the property intrusted to his charge to

[70] Blair v. Hazzard, 158 Cal. 721, 112 Pac. 298; Aldersley v. McCloud, 35 Cal. App. 17, 168 Pac. 1153; Salisbury v. Bigelow, 20 Pick. (Mass.) 174; Penniman v. Howard, 71 Misc. Rep. 598, 128 N. Y. Supp. 910; Shaw v. Bridgers, 161 N. C. 246, 76 S. E. 827. If an express power is given no application to the court is necessary. Livermore v. Livermore, 231 Mass. 293, 121 N. E. 27.

[71] Holden v. Circleville Light & Power Co., 216 Fed. 490, 132 C. C. A. 550, Ann. Cas. 1916D, 443; Reeder v. Reeder, 184 Iowa, 1, 168 N. W. 122. Thus a deed to the trustee, "his successors and assigns," implies a power of sale. Crawford v. El Paso Land Imp. Co. (Tex. Civ. App.) 201 S. W. 233.

[72] Preston v. Safe Deposit & Trust Co., 116 Md. 211, 81 Atl. 523, Ann. Cas. 1913C, 975; Garesche v. Levering Inv. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232; Clark v. Fleischmann, 81 Neb. 445, 116 N. W. 290; Crown Co. v. Cohn, 88 Or. 642, 172 Pac. 804; In re Kaiser's Estate, 2 Lanc. Law Rev. 362; Dorrance v. Greene, 41 R. I. 444, 104 Atl. 12; Wisdom v. Wilson, 59 Tex. Civ. App. 593, 127 S. W. 1128. A power to sell does not include a power to exchange. Holsapple v. Schrontz, 65 Ind. App. 390, 117 N. E. 547.

[73] Robinson v. Robinson, 105 Me. 68, 71, 72 Atl. 883, 32 L. R. A. (N. S.) 675, 134 Am. St. Rep. 537.

collect the rents, issues, dividends, or profits thereof, and to apply them to some specified use. Brokers, administrators, and executors frequently have the power to dispose of the property intrusted to their charge. Trustees commonly have no such power. Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition, unless that power is specifically given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that the trustee has no power of sale." [74]

It is impossible to give details of the instances in which a power of sale has been implied. In many cases where the question of the existence of such a power has arisen, the court has thought it necessary to the proper execution of the trust and has held that it existed,[75] while in others the court has considered a sale unessential and unauthorized.[76]

Whether the trustee of a charitable trust has an implied power of sale depends upon whether the particular property is necessary to the carrying on of the trust and whether there is any necessity for a sale of it. Where a settlor has dedicated particular land for lodgeroom, church, and graveyard purposes, the trustees will not be held to have an implied power of sale under ordinary conditions;[77] but where the land devised in trust for a cemetery becomes surrounded by blast furnaces and quarries, and all the bodies

[74] Geyser-Marion Gold-Min. Co. v. Stark, 106 Fed. 558, 561, 562, 45 C. C. A. 467, 53 L. R. A. 684.

[75] McDonald v. Shaw, 81 Ark. 235, 98 S. W. 952; Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Green v. Bissell, 79 Conn. 547, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287; Flinn v. Frank, 8 Del. Ch. 186, 68 Atl. 196; Cherry v. Greene, 115 Ill. 591, 4 N. E. 257; Steinke v. Yetzer, 108 Iowa, 512, 79 N. W. 286; Morris v. Winderlin, 92 Kan. 935, 142 Pac. 944; First Nat. Bank of Carlisle v. Lee, 66 S. W. 413, 23 Ky. Law Rep. 1897; Dodson v. Ashley, 101 Md. 513, 61 Atl. 299; Smith v. Haynes, 202 Mass. 531, 89 N. E. 158; Mason v. Bank of Commerce, 90 Mo. 452, 3 S. W. 206; Varick v. Smith, 69 N. J. Eq. 505, 61 Atl. 151; Spencer v. Weber, 163 N. Y. 493, 57 N. E. 753; Foil v. Newsome, 138 N. C. 115, 50 S. E. 597, 3 Ann. Cas. 417; Brown v. Brown, 7 Or. 285; In re Streater's Estate, 250 Pa. 328, 95 Atl. 459.

[76] Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Bremer v. Hadley, 196 Mass. 217, 81 N. E. 961; Potter v. Ranlett, 116 Mich. 454, 74 N. W. 661; Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087; Alvord v. Sherwood, 21 Misc. Rep. 354, 47 N. Y. Supp. 749; Robinson v. Ingram, 126 N. C. 327, 35 S. E. 612; Self v. Krebs, 239 Pa. 423, 86 Atl. 872; Kennedy v. Pearson (Tex. Civ. App.) 109 S. W. 280; Mundy v. Vawter, 3 Grat. (Va.) 518.

[77] Tate v. Woodyard, 145 Ky. 613, 140 S. W. 1044; and see Bridgeport

are removed from it, the court may order a sale of it, in order that other land may be purchased to be held for burial purposes.[78] Equity may order a sale of property held to charitable uses, even though the trust instrument expressly forbids such sale.[79]

Authority of Chancery

Chancery has authority to direct the trustee to sell the trust property whenever it appears to be necessary for the protection of the interests of the beneficiaries.[80] In many states there are statutes regulating sales by trustees and providing when equity may decree a sale of the trust property.[81] "Every trustee for sale is bound by his office to bring the estate to a sale, under every possible advantage to the cestui que trust, * * * and when there are several persons interested, with a fair and impartial attention to the interest of all concerned. * * * He is bound to use, not only good faith, but also every requisite degree of diligence and prudence, in conducting the sale." [82]

If the trust instrument gives directions as to the manner of sale,

Public Library and Reading Room v. Burroughs Home, 85 Conn. 309, 82 Atl. 582.

[78] In re Funck's Estate, 16 Pa. Super. Ct. 434. And see Attorney General v. Wallace's Devisees, 7 B. Mon. (Ky.) 611; Lackland v. Walker, 151 Mo. 210, 52 S. W. 414; De Veaux College for Orphan & Destitute Children v. Highlands Land Co., 63 App. Div. 461, 71 N. Y. Supp. 857; Bellows Free Academy v. Sowles, 76 Vt. 412, 57 Atl. 996; Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986.

[79] Amory v. Attorney General, 179 Mass. 89, 60 N. E. 391.

[80] Gunby v. Alverson, 146 Ga. 536, 91 S. E. 556; Hegan v. Netherland, 141 Ky. 686, 133 S. W. 546; Offutt v. Jones, 110 Md. 233, 73 Atl. 629; Price v. Long, 87 N. J. Eq. 578, 101 Atl. 195; Weakley v. Barrow, 137 Tenn. 224, 192 S. W. 927; Kennedy v. Pearson (Tex. Civ. App.) 109 S. W. 280; Upham v. Plankinton, 166 Wis. 271, 165 N. W. 18.

[81] Park's Ann. Code Ga. 1914, § 3755 (trustee has no power to sell unless it is expressly given or the beneficiaries consent or the court orders a sale); Rev. Code Del. 1915, § 3879 (court may order a sale of the trust property unless the trust instrument prohibits); Carroll's Kentucky St. 1915, §§ 2356, 4707 (sales of real property must be by order of court; sales of stocks and bonds allowed in the discretion of the trustee); Ann. Code Md. 1911, art. 16, § 232 et seq. (sales by trustees to be regulated by court of chancery); St. Mass. 1917, c. 155 (probate court may authorize); Public St. N. H. 1901, c. 198, § 10 (court may authorize sale); New York Real Prop. Law (Consol. Laws, c. 50) § 105 (Supreme Court may authorize sale, Matter of O'Donnell, 221 N. Y. 197, 116 N. E. 1001); Laws Or. 1917, p. 303, § 1 (Lee v. Albro, 91 Or. 211, 178 Pac. 784); 4 Purdon's Pa. Digest (13th Ed.) p. 4924 (sales by trustees regulated); Pollard's Va. Code 1904, § 2616 (court may authorize sale). Frequently the statutes provide that a sale in contravention of the trust is void. Rev. Codes Mont. § 4549; Horsky v. McKennan, 53 Mont. 50, 162 Pac. 376.

[82] Johnston v. Eason, 38 N. C. 330, 334. See, also, Reeder v. Lanahan, 111 Md. 372, 74 Atl. 575.

naturally the trustee must follow such directions.[83] If the instrument is silent concerning the details of the sale, the trustee should exercise his discretion.[84] The court may direct a private sale,[85] and, if such a sale will be advantageous to the cestuis que trust, the trustee may conduct such a sale without court sanction.[86] If the sale is made for a grossly inadequate price,[87] or the consideration accepted is improper as, for example, stock in a speculative company[88] or a bond and mortgage, when cash should have been insisted upon,[89] or the property is sold as a whole, when it would have sold for a much greater sum if divided into lots,[90] the court of chancery will set aside the sale. If the trust estate has had the benefit of the consideration paid by the purchaser, the sale will be set aside only upon the repayment of such consideration.[91] The cestui que trust may, of course, be estopped to question the validity of a sale, as when he accepts the proceeds of the sale with knowledge of the facts surrounding it.[92]

The trustee should not purchase the trust property at the sale conducted by himself or under his authority. If he does so, even if the consideration paid is adequate and the sale bona fide, equity will set aside the sale upon the application of the cestui que trust.[93]

[83] Beebe v. De Baun, 8 Ark. 510; Mansfield v. Wardlow (Tex. Civ. App.) 91 S. W. 859.

In some cases statutes affect the method of exercise of the power of sale. See, for example, Laws N. D. 1917, c. 239, which requires deeds to and from trustees to describe the cestui que trust and the nature of the trust.

[84] Chambers v. Higgins' Ex'r, 49 S. W. 436, 20 Ky. Law Rep. 1425.

[85] McAfee v. Green, 143 N. C. 411, 55 S. E. 828.

[86] Burr v. McEwen, Fed. Cas. No. 2193; Shacklett v. Ransom, 54 Ga. 350; White v. Glover, 59 Ill. 459; Cox v. Shelby County Trust Co., 80 S. W. 789, 26 Ky. Law Rep. 50; Tyson v. Mickle, 2 Gill (Md.) 376.

[87] Dingman v. Beall, 213 Ill. 238, 72 N. E. 729; Wright v. Wilson, 2 Yerg. (Tenn.) 294; Norman v. Hill, 2 Pat. & H. (Va.) 676. But merely slight inadequacy of price is not sufficient to cause the court to overturn a sale. Starkweather v. Jenner, 27 App. D. C. 348. Inadequacy of price and lack of notice were deemed sufficient to cause the sale to be set aside in Fredrick v. Fredrick, 219 Ill. 568, 76 N. E. 856.

[88] Randolph v. East Birmingham Land Co., 104 Ala. 355, 16 South. 126, 53 Am. St. Rep. 64.

[89] Durkin v. Connelly, 84 N. J. Eq. 66, 92 Atl. 906.

[90] Hill v. Shoemaker, 1 McArthur (8 D. C.) 305; Goode v. Comfort, 39 Mo. 313.

[91] Johnson v. Bennett, 39 Barb. (N. Y.) 237; Tiffany v. Clark, 1 Thomp. & C. (N. Y.) 9; Suarez v. De Montigny, 1 App. Div. 494, 37 N. Y. Supp. 503; Abernathy v. Phillips, 82 Va. 769, 1 S. E. 113.

[92] Childs v. Childs, 150 App. Div. 656, 135 N. Y. Supp. 972.

[93] Bank of Wetumpka v. Walkley, 169 Ala. 648, 53 South. 830; Haynes v.

This subject is more fully discussed in the sections dealing with the duties of the trustee in carrying out the trust.[94]

The cestui que trust alone can raise the question of the power of the trustee to sell the trust property or the propriety of the sale as conducted.[95] The sale may be expressly required to be made only when the cestuis que trust consent, in which case such consent must be procured before a valid sale can be made.[96]

It is generally held that the lack of power on the part of the trustee to sell the trust property may be supplied by showing the consent of the beneficiary in advance that the sale take place;[97] but in some instances such consent has been held insufficient to render the sale valid.[98] After the sale has taken place, the cestui que trust may ratify[99] it, or estop himself to attack its validity.[1] Thus, acceptance of the proceeds of the sale with full knowledge of the facts shows an estoppel to assert that the sale was invalid.[2] Where the trustees are given power to sell land and distribute the proceeds among the beneficiaries of the trust, the beneficiaries may elect to revoke the power of sale and take the land, rather than the proceeds thereof.[3]

Montgomery, 96 Ark. 573, 132 S. W. 651; Mettler v. Warner, 249 Ill. 341, 94 N. E. 522; Guy v. Mayes, 235 Mo. 390, 138 S. W. 510; Ungrich v. Ungrich, 141 App. Div. 485, 126 N. Y. Supp. 419; Lewis v. Hill, 61 Wash. 304, 112 Pac. 373. A cestui que trust may of course purchase. Walker v. Brungard, 13 Smedes & M. (Miss.) 723; Wood v. Augustine, 61 Mo. 46.

[94] See § 99, post.

[95] Herbert v. Hanrick, 16 Ala. 581; Prouty v. Edgar, 6 Iowa, 353; Norris v. Hall, 124 Mich. 170, 82 N. W. 832; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Coxe v. Blanden, 1 Watts (Pa.) 533, 26 Am. Dec. 83.

[96] Berrien v. Thomas, 65 Ga. 61; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80; Walke v. Moore, 95 Va. 729, 30 S. E. 374; Norvell v. Hedrick, 21 W. Va. 523.

[97] Dykes v. McVay, 67 Ga. 502; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; Turner v. Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229; Cooper v. Harvey, 21 S. D. 471, 113 N. W. 717.

[98] Walton v. Follansbee, 165 Ill. 480, 46 N. E. 459; Mauldin v. Mauldin, 101 S. C. 1, 85 S. E. 60.

[99] Long v. Long, 62 Md. 33; Swartz v. Duncan, 38 Neb. 782, 57 N. W. 543; Johnson v. Bennett, 39 Barb. (N. Y.) 237; In re Post, 13 R. I. 495.

[1] Mitchell v. Berry, 1 Metc. (Ky.) 602; Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550.

[2] Shepherd v. Todd, 95 Ga. 19, 22 S. E. 32; Lawson v. Cunningham, 275 Mo. 128, 204 S. W. 1100.

[3] Craig v. Leslie, 3 Wheat. 563, 4 L. Ed. 460; Smith v. A. D. Farmer Type Founding Co., 16 App. Div. 438, 45 N. Y. Supp. 192; Fraser v. Bowerman, 104 Misc. Rep. 260, 171 N. Y. Supp. 835.

POWER TO MORTGAGE

89. The trustee will be allowed to exercise an implied power to mortgage the trust property when the necessities of the trust require such action.

Frequently the trustee is given express authority to mortgage the trust property.[4] It is elementary that a mortgage executed under such a power must, in order to be valid, be given only for the purpose named.[5] For instance, a power to mortgage for the benefit of the trust estate, does not render valid a mortgage, the proceeds of which were applied to the personal use of the trustee.[6]

The express grant of a power to sell is ordinarily held not to include the power to mortgage,[7] nor does the power to change the investments of the trust property permit the trustee to mortgage it.[8]

The trustee will be held to have an implied power to mortgage the trust property whenever the wording of the trust instrument or the necessities of the trust indicate that the settlor meant that such power should exist.[9] A "trustee has 'authority to adopt measures and do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making it effectual.'" [10] Thus, when a trustee is given power to take charge of, manage, and control property for the ben-

[4] Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 18, 82 Pac. 374; Guilmartin v. Stevens, 55 Ga. 203; Walter v. Brugger, 78 S. W. 419, 25 Ky. Law Rep. 1597; Boskowitz v. Held, 15 App. Div. 306, 44 N. Y. Supp. 136, affirmed 153 N. Y. 666, 48 N. E. 1104.

[5] Townsend v. Wilson, 77 Conn. 411, 59 Atl. 417; Galloway v. Gleason, 61 Mo. App. 21; Andrews v. Guayaquil & Q. Ry. Co., 75 N. J. Eq. 535, 72 Atl. 355; Williamson v. Field's Ex'rs, 2 Sandf. Ch. (N. Y.) 533; Brewster v. Galloway, 4 Lea (Tenn.) 558.

[6] Union Mut. Life Ins. Co. v. Spaids, 99 Ill. 249.

[7] Townsend v. Wilson, 77 Conn. 411, 59 Atl. 417; Hamilton v. Hamilton, 149 Iowa, 321, 128 N. W. 380; Walter v. Brugger, 78 S. W. 419, 25 Ky. Law Rep. 1597; Loring v. Brodie, 134 Mass. 453; Potter v. Hodgman, 178 N. Y. 580, 70 N. E. 1107; Kenworthy v. Levi, 214 Pa. 235, 63 Atl. 690; Greene v. Greene, 19 R. I. 619, 35 Atl. 1042, 35 L. R. A. 790; Mansfield v. Wardlow (Tex. Civ. App.) 91 S. W. 859. A power to "dispose of" does not include a power to mortgage. Beakey v. Knutson, 90 Or. 574, 174 Pac. 1149.

[8] Griswold v. Caldwell, 65 App. Div. 371, 73 N. Y. Supp. 2.

[9] Security Trust Co. v. Merchants' & Clerks' Sav. Bank, 26 Ohio Cir. Ct. R. 381; Harding v. St. Louis Life Ins. Co., 2 Tenn. Ch. 465. In In re Billinger, [1898] 2 Ch. 534, a power to mortgage was implied from a power to carry on a real estate business.

[10] Gilbert v. Penfield, 124 Cal. 234, 238, 56 Pac. 1107, 1108, quoting 2 Pomeroy's Eq. Jurisp. § 1062.

efit of a beneficiary, he has implied power to mortgage. In such a case a court has said that, "so long as it was deemed to the interest of the beneficiaries that the trustee should manage and control the property, the power to do so included the power to improve and repair, and if in the exercise of the discretion allowed him under the deed appointing him, he deemed it to the advantage of the beneficiaries that they procure the necessary funds by mortgaging the land he had the power and authority to do so." [11] The burden is upon the person taking the mortgage to satisfy himself that the trustee has power to mortgage. "Ordinarily the legal presumption exists that a trustee has no power to sell or mortgage the trust estate. Prospective purchasers and mortgagees must therefore exercise reasonable diligence to ascertain whether the trustee has authority to sell or incumber the real estate." [12]

If no power to mortgage, express or implied, is vested in the trustee, a mortgage by him will, upon objection by the cestui que trust, be held to be void.[13] In some cases a purchase-money mortgage by the trustee has been held impliedly authorized.[14]

Chancery has authority to permit the trustee to mortgage the trust property when such action is necessary to preserve the property or to enable the trustee to execute the trust as the settlor intended he should.[15]

An example of the cases in which the court authorizes a mortgage may be found in a recent case in which a testator left all his property to his widow in trust for herself and her children. Debts of the testator were a lien upon certain land which he had devised to the trustee, and the creditors were threatening suit. Equity authorized the trustee to mortgage the trust property to raise the

[11] Ely v. Pike, 115 Ill. App. 284, 287.

[12] Snyder v. Collier, 85 Neb. 552, 558, 123 N. W. 1023, 1025, 133 Am. St. Rep. 682.

[13] Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; Taylor v. Clark, 56 Ga. 309; Tuttle v. First Nat. Bank of Greenfield, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420; Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133.

[14] Mavrich v. Grier, 3 Nev. 52, 93 Am. Dec. 373; Gernert v. Albert, 160 Pa. 95, 28 Atl. 576. Contra: Mathews v. Heyward, 2 S. C. 239.

[15] Townsend v. Wilson, 77 Conn. 411, 59 Atl. 417; Jamison v. McWhorter, 7 Houst. (Del.) 242, 31 Atl. 517; Wagnon v. Pease, 104 Ga. 417, 30 S. E. 895; Long v. Simmons Female College, 218 Mass. 135, 105 N. E. 553; Butler v. Badger, 128 Minn. 99, 150 N. W. 233; In re Windsor Trust Co., 142 App. Div. 772, 127 N. Y. Supp. 586; New York Real Prop. Law (Consol. Laws, c. 50) § 105; Shirkey v. Kirby, 110 Va. 455, 66 S. E. 40, 135 Am. St. Rep. 949.

Statutes frequently authorize the court to sanction mortgages or leases by a trustee. Laws N. H. 1915, c. 11; Laws R. I. 1917, c. 1501.

money necessary to pay off the debts of the settlor and thus preserve the trust property intact.[16] The beneficiaries are necessary parties to a proceeding to procure the consent of the court to a mortgage of the trust property.[17]

If the cestuis que trust join with the trustee in the mortgage, or consent to it, or accept its benefits after it is executed, they will be estopped to assert its invalidity.[18]

POWER TO LEASE

90. The implied authority to lease the trust property exists in the trustee whenever such a step is a reasonably necessary incident of the trust management.

Power on the part of the trustee to lease the trust property is frequently found in the trust instrument in plain terms. In such case there can be no doubt about his authority.[19] Even though the authority to lease is express and the length of the lease limited by the trust instrument, equity may direct that a longer lease be given by the trustee, if it appears to be for the benefit of the trust estate.[20]

A lease is not a "sale or disposal" of the trust property within the prohibition of a trust instrument.[21]

Implied power to lease the trust property exists wherever it is necessary to enable the trustee to perform his trust duties. "It appears from these authorities that the law is that trustees possess general power to lease trust property, and as they do possess this power, their leases, if executed according to law, are valid unless they exceed the quantity of the estate vested in the trustees, or the leases are unreasonable." [22] "The general doctrine, applicable to the matter under discussion, is that an express power to lease giv-

[16] Lyddane v. Lyddane, 144 Ky. 159, 137 S. W. 838.

[17] Sampson v. Mitchell, 125 Mo. 217, 28 S. W. 768.

[18] Boon v. Hall, 76 App. Div. 520, 78 N. Y. Supp. 557; Magraw v. Pennock, 2 Grant Cas. (Pa.) 89; Hughes v. Farmers' Savings & Building & Loan Ass'n (Tenn. Ch. App.) 46 S. W. 362.

[19] Denegre v. Walker, 214 Ill. 113, 73 N. E. 409, 105 Am. St. Rep. 98, 2 Ann. Cas. 787; Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108. On the matters discussed in this section, see Kales, Powers in Trustees to Make Leases, 7 Ill. Law Rev. 427.

[20] Marsh v. Reed, 184 Ill. 263, 56 N. E. 306; In re City of Philadelphia, 2 Brewst. (Pa.) 462.

[21] In re Hubbell Trust, 135 Iowa, 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

[22] City of Richmond v. Davis, 103 Ind. 449, 452, 3 N. E. 130, 132.

en to a trustee, confers authority to make a lease for any reasonable period, considering the kind of property and the custom of the country and all the circumstances bearing on the subject. An implied power to lease growing out of the creation of a trust in real estate without power of sale, but in contemplation of its being administered to produce income, confers the same power to lease as in the first situation. 'Entire control, management, and charge' conferred on trustees, as in this case, affords discretionary power to lease within such reasonable boundaries as the trustor would have done." [23] The power to lease is frequently a necessary incident of the management of trust property.[24]

It is often a difficult question to determine whether a trustee of a charitable trust has implied power to lease the property which he holds.[25] Thus, where buildings held in trust for charity are dilapidated and the trustees have no funds for repairs or maintenance of the charity, a lease of the property to persons who agree to erect new buildings and use the property for the purposes of the trust will be upheld; [26] but, in another case, it has been held that where land was conveyed to trustees to provide a site for a schoolhouse to educate children, a lease of the premises, in consideration of a nominal rent and on the agreement of the lessee that a church should be there erected to be used to educate colored youth, was void, as not impliedly authorized by the deed of trust.[27] As with the private trust, so with the charitable, the authority of the trustee to lease depends upon the necessity of the lease. If the execution of the charity requires a lease to carry out the intent of the founder, implied power to lease will be held to exist.

Courts of equity have power to authorize a trustee to lease and frequently exercise such authority, upon proof of its necessity.[28]

[23] Upham v. Plankinton, 152 Wis. 275, 291, 140 N. W. 5, 11, 48 L. R. A. (N. S.) 1004, Ann. Cas. 1914C, 376.

[24] Davis v. Harrison, 240 Fed. 97, 153 C. C. A. 133; Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422; Geer v. Traders' Bank of Canada, 132 Mich. 215, 93 N. W. 437; Betts v. Betts, 4 Abb. N. C. (N. Y.) 317. For an instance of a case in which the trustee was held to have no implied power to lease, see In re Hoysradt, 20 Misc. Rep. 265, 45 N. Y. Supp. 841.

[25] In the following cases the circumstances of the charity were such that a lease was held to be within the implied powers of the trustee: Appeal of Trustees of Proprietors, School Fund of Providence, 2 Walk. (Pa.) 37; Black v. Ligon, 1 Harp. Eq. (S. C.) 205. But in Hendrix College v. Arkansas Townsite Co., 85 Ark. 446, 108 S. W. 514, a lease was held invalid for lack of power on the part of the trustee.

[26] Trustees of Madison Academy v. Board of Education of Richmond (Ky.) 26 S. W. 187.

[27] Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

[28] Packard v. Illinois Trust & Savings Bank, 261 Ill. 450, 104 N. E. 275;

Ordinarily the trustee has no power to lease the trust property for a term extending beyond the life of the trust.[29] Where he does make such a lease, the excessive period—that is, the period beyond the end of the trust—will be considered void and the remainder of the lease will stand.[30] But in a few cases it has been held that the trustee may, in exceptional instances, with judicial advice, create a leasehold estate to extend beyond the termination of the trust.[31] An Iowa court has summed up the law as follows: "(1) The trustees may lease for such reasonable terms as are customary and essential to the proper care of and to procure a reasonable income from the property. (2) Such terms should not, save on showing of reasonable necessity to effectuate the purposes of the trust, extend beyond the period the trust is likely to continue. (3) Should they extend unreasonably beyond such period, the excess only will be void. (4) Only upon a showing of such reasonable necessity, when not given such power by the instrument creating the trust, will the trustees be authorized to bind the estate so as to effectually deprive those ultimately entitled thereto of the property itself." [32]

POWER TO REPRESENT BENEFICIARY

91. The trustee has no implied power to bind the cestui que trust by admissions, but notice to the trustee is ordinarily notice to the beneficiary.

The trustee has implied authority to represent the cestui que trust in all actions respecting the trust estate, unless the rights

Hitch v. Davis, 3 Md. Ch. 262. In New York the statute permits trustees to lease real property for terms not exceeding five years, without application to the court, if the trust is for the purpose of collecting rents during the life of the beneficiary and applying them to his use. If a longer lease is desired, authority for it must be obtained from the Supreme Court. New York Real Prop. Law (Consol. Laws, c. 50) § 106. Equity may also validate an improper lease. Wilmer v. Philadelphia & Reading Coal & Iron Co., 130 Md. 666, 101 Atl. 588. The fact, that the interest of all cestuis que trust will be promoted must be shown before equity will authorize a lease. Schroeder v. Woodward, 116 Va. 506, 82 S. E. 192.

[29] South End Warehouse Co. v. Lavery, 12 Cal. App. 449, 107 Pac. 1008; In re Opening of 110th St., 81 App. Div. 27, 81 N. Y. Supp. 32; Tredwell v. Tredwell, 86 Misc. Rep. 104, 148 N. Y. Supp. 391.

[30] In re Hubbell Trust, 135 Iowa, 637, 113 N. W. 512, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640; In re Opening of 110th St., 81 App. Div. 27, 81 N. Y. Supp. 32.

[31] Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5, 48 L. R. A. (N. S.) 1004, Ann. Cas. 1914C, 376.

[32] In re Hubbell Trust, 135 Iowa, 637, 664, 665, 113 N. W. 512, 522, 13 L. R. A. (N. S.) 496, 14 Ann. Cas. 640.

of the cestuis que trust among themselves are involved, or the interests of the trustee are adverse to those of the cestui que trust, so that the trustee cannot properly act for the beneficiary.

The power of the trustee to represent the cestui que trust is an important power. It does not extend, however, to declarations against interest or to admissions. The trustee is appointed for the purpose of performing acts beneficial to the cestui que trust, and not for the purpose of conceding away the beneficiary's rights by loose talk. It is the general rule, therefore, that the trustee's admissions do not bind the trust estate.[33]

Generally the trustee has power to represent the cestui que trust, so that notice to the former is effective against the latter.[34] In accordance with this rule, if the trustee fails to claim the trust property when it is held adversely, and the legal title is barred by the statute of limitations, the right of the cestui que trust will be held to be destroyed likewise.[35]

The most difficult questions arise with respect to the power of the trustee to represent the cestui que trust in actions. If suit is brought by or against the trustee, is the cestui que trust a necessary party? The earlier equity rule was that the beneficiary was always a necessary party, but the present position of the courts is that the trustee may represent the cestui que trust in all actions relating to the trust, if rights of the cestui que trust as against the trustee, or the rights of the cestuis que trust between themselves, are not brought into question. In other words, in all cases where there is no conflict of interest between cestui que trust and trustee, or be-

[33] Graham v. Lockhart, 8 Ala. 9; Ludlow v. Flournoy, 34 Ark. 451; Thomas v. Bowman, 29 Ill. 426; First Nat. Bank of Peoria v. Farmers' & Merchants' Nat. Bank of Wabash, 171 Ind. 323, 86 N. E. 417; Allen v. Everett, 12 B. Mon. (Ky.) 371; Stratton v. Edwards, 174 Mass. 374, 54 N. E. 886; Thompson v. Village of Mecosta, 141 Mich. 175, 104 N. W. 694; Eitelgeorge v. Mutual House Bldg. Ass'n, 69 Mo. 52; Walker v. Dunspaugh, 20 N. Y. 170; Calwell's Ex'r v. Prindle's Adm'r, 19 W. Va. 604. But in one case an admission of the trustee was held to bind the beneficiary because it was a part of the res gestæ. Knorr v. Raymond, 73 Ga. 749.

[34] Brannon v. May, 42 Ind. 92. But see Chew v. Henrietta Min. & S. Co. (C. C.) 2 Fed. 5, where the transaction in which the notice was received had no relation to the trust business, and Henry's Lessee v. Morgan, 2 Bin. (Pa.) 497, where the trustee received the notice before his appointment.

[35] Mason v. Mason, 33 Ga. 435, 83 Am. Dec. 172; Young v. McNeill, 78 S. C. 143, 59 S. E. 986; Appel v. Childress, 53 Tex. Civ. App. 607, 116 S. W. 129. Actions of the trustee may estop the cestui que trust to set up his rights. Foster v. Jeffers, 140 Tenn. 446, 205 S. W. 122.

tween the several cestuis que trust, the trustee may sue and be sued without joining the cestui que trust. "The general rule is, that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties. * * * To this rule there are several exceptions. One of them is that, where the suit is brought by the trustee to recover the trust property or to reduce it to possession, and in no wise affects his relation with his cestuis que trust, it is unnecessary to make the latter parties." [36]

Thus, in an action by trustees to reduce trust property to their possession or to recover its value, the New York Court of Appeals held that the cestuis que trust were not necessary parties, saying: "Here these trustees, appointed to take the place of the trustees under the will of Jacob Straut, had the legal title to, and were the legal owners of, the personal property belonging to the trust estate; * * * and it has never been held that in an action by the trustees to reduce such property to possession, or to subject it to their control, it is necessary to make the beneficiaries parties. In such an action they represent the whole title and interest, and their action, in the absence of fraud or collusion, is binding upon the beneficiaries. In the action brought by these trustees there was no question between them and the beneficiaries, and no question between the beneficiaries themselves. The only question at issue was between the trustees and a stranger to the trust, who was alleged to have in his possession, or to be liable to account for, certain property belonging to the trust, and in such an action it is well settled now that the beneficiaries are not necessary parties. * * * If the purpose of the action had been, among other things, to determine rights as between the beneficiaries themselves, or as between the trustees and the beneficiaries, then it would have been necessary to bring them in as parties." [37]

It is frequently a difficult question to determine whether the trustee adequately represents the cestui que trust in the action. The cases in which the cestui que trust has been held to be a necessary party are generally instances in which equity thought it desirable that the cestui que trust be in court to look after his own interests.[38] Thus,

[36] Carey v. Brown, 92 U. S. 171, 172, 23 L. Ed. 469.

[37] Matter of Straut, 126 N. Y. 201, 211, 212, 27 N. E. 259, 262.

[38] Snelling v. American Freehold Land Mortgage Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160; Cunningham v. Bank of Nampa, 13 Idaho, 167, 88 Pac. 975, 10 L. R. A. (N. S.) 706, 121 Am. St. Rep. 257; Dunn v. Seymour, 11 N. J. Eq. 220; Reed's Ex'rs v. Reed, 16 N. J. Eq. 248; Blake v. Allman, 58 N. C. 407; Cronin v. Watkins, 1 Tenn. Ch. 119; Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345; Collins Adm'r v. Lofftus, 10 Leigh

it has been held that where the trustee has an interest adverse to that of the beneficiary,[39] or where the trustee is merely a passive trustee,[40] or where the bill is to foreclose a mortgage held by the trust estate,[41] or to compel specific performance of a contract held by the trust,[42] the cestuis que trust must be brought into the action.

The modern tendency seems to be to extend the trustee's power to represent the cestui que trust in actions.[43] Thus, in actions to recover the trust property or its avails from a stranger,[44] or to restrain a tort to the trust realty,[45] or in an action to recover the trust

(Va.) 5, 34 Am. Dec. 719; Pyle v. Henderson, 55 W. Va. 122, 46 S. E. 791; Day v. Wetherby, 29 Wis. 363. In Primitive Methodist Church v. Homer, 38 R. I. 530, 96 Atl. 818, the bill was against the trustee to declare the trust in operation and it was held, that the cestuis que trust were necessary parties.

[39] Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500. In Barbee v. Penny, 172 N. C. 653, 90 S. E. 805, it was held that, where the litigation involved the question whether the trustee had exceeded his powers, the cestuis que trust should be joined.

[40] Covington & L. R. Co. v. Bowler's Heirs, 9 Bush (Ky.) 468; Malin v. Malin, 2 Johns. Ch. (N. Y.) 238.

[41] Plum v. Smith, 56 N. J. Eq. 468, 39 Atl. 1070. Contra: Girard Trust Co. v. Paddock, 88 Neb. 359, 129 N. W. 550.

[42] Beckwith v. Laing, 66 W. Va. 246, 66 S. E. 354. Contra: Simson v. Klipstein, 88 N. J. Eq. 229, 102 Atl. 242.

[43] Tompkins v. Tompkins (C. C.) 123 Fed. 207; Plumb v. Crane, 123 U. S. 560, 8 Sup. Ct. 216, 31 L. Ed. 268; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; Allan v. Guaranty Oil Co., 176 Cal. 421, 168 Pac. 884; Tucker v. Zimmerman, 61 Ga. 599; Heinroth v. Griffin, 149 Ill. App. 103; Hord v. Bradbury, 156 Ind. 30, 59 N. E. 31; Zion Church of Evangelical Ass'n of North America in Charles City v. Parker, 114 Iowa, 1, 86 N. W. 60; McDevitt v. Bryant, 104 Md. 187, 64 Atl. 931; Murphy Chair Co. v. American Radiator Co., 172 Mich. 14, 137 N. W. 791; Grant v. Winona & S. W. Ry. Co., 85 Minn. 422, 89 N. W. 60; Pearce v. Twichell, 41 Miss. 344; Miles v. Davis, 19 Mo. 408; Stevens v. Bosch, 54 N. J. Eq. 59, 33 Atl. 293; Keneaster v. Erb, 83 N. J. Eq. 206, 89 Atl. 995 (suit to quiet title); Noe v. Christie, 51 N. Y. 270; Mebane v. Mebane, 66 N. C. 334; Wright v. Conservative Inv. Co., 49 Or. 177, 89 Pac. 387: Price v. Krasnoff, 60 S. C. 172, 38 S. E. 413; Hornbsy v. City Nat. Bank (Tenn. Ch. App.) 60 S. W. 160; Jackson v. West, 22 Tex. Civ. App. 483, 54 S. W. 297; Swift v. State Lumber Co., 71 Wis. 476, 37 S. W. 441. The trust instrument may authorize the trustee to represent the cestuis in all actions. Village Mills Co. v Houston Oil Co. of Texas (Tex. Civ. App.) 186 S. W. 785.

[44] Ashton v. President, etc., of Atlantic Bank, 3 Allen (Mass.) 217; Acts Va. 1918, c. 230. Contra: Schuster v. Crawford (Tex. Civ. App.) 199 S. W. 327 (unless the trust instrument shows an intent to grant the power); Smith v. Smith (Tex. Civ. App.) 200 S. W. 540.

[45] Smith v. City of Portland (C. C.) 30 Fed. 734; Dalton v. Hazlet, 182 Fed. 561, 105 C. C. A. 99.

res from the retiring trustee,[46] it is now usual to allow the trustee to represent the cestui que trust and to hold that the cestui que trust need not be a party to the action.

MISCELLANEOUS IMPLIED POWERS

92. The trustee has such miscellaneous implied powers as are requisite to the fulfillment of the purposes of the trust.

Miscellaneous implied or general powers have often been held to rest in the trustees. These are too numerous for complete enumeration, but examples may be given. Thus, it has been held that a trustee may dedicate lands to a public use consistent with the trust,[47] and that a trustee has power to employ an attorney to enforce a judgment belonging to the trust estate,[48] to buy an outstanding claim against the trust property as a cloud upon the title,[49] to settle a partnership when given power to carry it on,[50] to cultivate a farm conveyed in trust for the wife of the settlor,[51] to impose building restrictions upon lots belonging to the trust estate,[52] to vote stock of a corporation in an election for directors when the stock is owned by the trust estate,[53] to select the beneficiaries when the trust is a charitable trust,[54] and to settle a claim [55] or arbitrate it [56] when such action is for the best interest of the trust.

On the other hand, it has been denied that there is vested in a trustee power to confess a judgment against the trust estate,[57] or

[46] In re Lane's Will (Del. Ch.) 97 Atl. 587; Winslow v. Minnesota & P. R. Co., 4 Minn. (Gil. 230) 313, 77 Am. Dec. 519.

[47] Prudden v. Lindsley, 29 N. J. Eq. 615.

[48] Bell v. Board of Com'rs of Lake County, 26 Colo. App. 192, 141 Pac. 861.

[49] Chaffin v. Hull (C. C.) 49 Fed. 524.

[50] Jones v. Procter, 24 Ohio Cir. Ct. R. 80.

[51] Mayfield v. Kilgour, 31 Md. 240.

[52] Pleasants v. Wilson, 125 Md. 237, 93 Atl. 441.

[53] In re Barker, 6 Wend. (N. Y.) 509.

[54] Appeal of Eliot, 74 Conn. 586, 51 Atl. 558; Grant v. Saunders, 121 Iowa, 80, 95 N. W. 411, 100 Am. St. Rep. 310; Trenton Society for Organizing Charity v. Howell (N. J. Ch.) 63 Atl. 1110; Dodge v Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

[55] Stitzer v. Whittaker, 3 Neb. Unof. 414, 91 N. W. 713.

[56] Brower v. Osterhout, 7 Watts & S. (Pa.) 344.

[57] Mallory v. Clark, 20 How. Prac. (N. Y.) 418; Belcher v. Cobb, 169 N. C. 689, 86 S. E. 600; Wilhelm v. Folmer, 6 Pa. 296; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375, 35 Am. St. Rep. 832.

to give away the trust property,[58] or devise the trust,[59] or to create a homestead for his own benefit in the trust property,[60] or to incorporate the trust estate,[61] or to enter into an extended practice of discounting and indorsing bills with customers.[62] These powers are not essential to the proper administration of the ordinary trust and are not impliedly granted to the ordinary trustee.

MAINTENANCE OF ACTIONS

93. The trustee has the power to maintain such actions as are necessary to protect the rights of the trust estate and to carry out the trust.

The powers of a trustee naturally include the authority to maintain such actions as are necessary to the execution of the trust and incident to the powers expressly or impliedly granted. For example, it is elementary law that the trustee may bring ejectment for the trust property,[63] and this even against the cestui que trust,[64] except in unusual circumstances. So, too, the trustee may maintain trespass to try title,[65] replevin to recover the possession of the trust property when it is personal,[66] trover for the conversion of the trust property,[67] actions for damages for injury to the trust

[58] Julian v. Reynolds, 8 Ala. 680; Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347. The trustee, of course, has no power to change the terms of the trust. Burling v. Newlands, 112 Cal. 476, 44 Pac. 810; Vason v. Gilbert, 99 Ga. 220, 25 S. E. 409.

[59] Hinckley v. Hinckley, 79 Me. 320, 9 Atl. 897; Fonda v. Penfield, 56 Barb. (N. Y.) 503. But the cestui que trust may be estopped to deny the authority of the devisee to act. Hughes v. Caldwell, 11 Leigh (Va.) 355.

[60] Oree v. Gage, 38 Cal. App. 212, 175 Pac. 799; Rice v. Rice, 108 Ill. 199; Keller v. Keller (Tex. Civ. App.) 141 S. W. 581; Shepherd v. White, 11 Tex. 346.

[61] Garesche v. Levering Inv. Co., 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232,

[62] Loud v. Winchester, 64 Mich. 23, 30 N. W. 896.

[63] McCormick v. Provident Life & Trust Co. of Philadelphia, 249 Fed. 141, 161 C. C. A. 193; Anson v. Townsend, 73 Cal. 415, 15 Pac. 49; McLean v. Macdonald, 2 Barb. (N. Y.) 534; Phillpotts v. Blasdel, 8 Nev. 61; Bowen v. Humphreys, 24 S. C. 452.

[64] Mordecai v. Tankersly, 1 Ala. 100; Matthews v. Ward, 10 Gill & J. (Md.) 443; Baker v. Nail, 59 Mo. 265.

[65] Lewis v. Brown, 39 Tex. Civ. App. 139, 87 S. W. 704.

[66] Gates v. Bennett, 33 Ark. 475; Shipton v. Norrid, 1 Colo. 404; Jackson v. Hubbard, 36 Conn. 10; Woodruff v. H. B. Claflin Co., 133 App. Div. 874, 118 N. Y. Supp. 48.

[67] Ryan v. Bibb, 46 Ala. 323; Thompson v. Ford, 29 N. C. 418; Watson v. Pitts, 2 McMul. (S. C.) 298; Coleson v. Blanton, 3 Hayw. (Tenn.) 152.

property [68] and actions to recover for rents and profits due upon it.[69] The power to bring these and other similar actions necessarily follows from the power of the trustee to obtain possession of the trust property and use such property without interference.

POWERS AS AFFECTED BY PECULIARITY OF TRUSTEE'S STATUS

94. Where the trust is administered by two or more trustees, they hold by a joint title and must act as a unit, if the trust be private; but a majority of the trustees of a charitable trust may perform an act under the trust. However, even in the case of private trusts, one of several trustees may perform merely ministerial duties requiring the exercise of no discretion.

If powers are attached to a trusteeship, they pass to successors of the original trustees and may also be exercised by surviving trustees; but if the powers are personal, and appear to have been delegated to one or more trustees alone, successors and surviving trustees are not entitled to exercise such powers.

Where some trustees fail to qualify or disclaim, the trustees who do qualify have all the powers granted in the trust instrument to the entire set of trustees mentioned there.

The exercise of the powers of the trustee is often affected by peculiarities in the status of the trustees. The first peculiarity to be noticed is that of plural trustees. If the trust is vested in two or more trustees, they are deemed to hold as a unit and by joint tenancy. There is only one title and that is vested in the entire board of trustees rather than in the several trustees as tenants in common. From this joint tenancy arises the rule that in all matters of discretion trustees of a private trust must act as a unit. A majority may not bind the trust estate by any action. "As a general rule, cotrustees cannot act separately; but they must all join in receipts for money payable to them in respect to their office. * * * But there is this distinction, that if an authority delegated to several persons be a private confidence, all must join; but if it was conferred for public purposes, it may be executed by a majority only." [70] The concurrence of all is necessary to any valid

[68] McRaeny v. Johnson, 2 Fla. 520; Alford's Adm'r v. City of Stanford, 13 Ky. Law Rep. 876; Mordecai v. Parker, 14 N. C. 425.

[69] Ponder v. McGruder, 42 Ga. 242.

[70] Hill v. Josselyn, 13 Smedes & M. (Miss.) 597, 598.

action.[71] Thus, the united action of all the trustees is necessary to the making of a binding contract for the repair of the trust property,[72] and to the voting of the trust stock,[73] the purchasing of property for the trust,[74] or the leasing of the trust property.[75]

Charitable Trusts

But the trustees of a charitable trust are not bound by this rule requiring unanimous action. A majority of such trustees may act. And so it has been held that a majority of the trustees appointed by the will of Benjamin Franklin to expend money for the benefit of the inhabitants of the city of Boston might decide how the funds should be disposed of; the court saying: "This board is similar to a board of public officers, or a committee appointed by a public body to perform public duties. * * * It is a board appointed to act in a fiduciary capacity in the administration of the affairs of a public charity. A distinction is made between private agents, or agents or trustees of a private trust, and trustees managing business of a public charity like that entrusted to this board. In the performance of duties of this latter kind, a board may act by a majority." [76]

In exceptional cases some courts have allowed one trustee to act for the entire number. This power is usually based on urgent necessity.[77] Thus, it has been held that, where one trustee was residing in England and the other in Georgia, the latter might act with regard to property in Georgia without the concurrence of the trustee in England.[78] In New Hampshire a statute expressly al-

[71] Learned v. Welton, 40 Cal. 349; Page v. Gillett, 26 Colo. App. 204, 141 Pac. 866; Hosch Lumber Co. v. Weeks, 123 Ga. 336, 51 S. E. 439; Dingman v. Boyle, 285 Ill. 144, 120 N. E. 487; Cox v. Walker, 26 Me. 504; Latrobe v. Tiernan, 2 Md. Ch. 474; City of Boston v. Robbins, 126 Mass. 384; Shaw v. Canfield, 86 Mich. 1, 48 N. W. 873; White v. Watkins, 23 Mo. 423; Ham v. Ham, 58 N. H. 70; Carr v. Hertz, 54 N. J. Eq. 127, 33 Atl. 194; Fritz v. City Trust Co., 72 App. Div 532, 76 N. Y. Supp. 625, affirmed 173 N. Y. 622, 66 N. E. 1109; Andrews v. Kirk (Sup.) 160 N. Y. Supp. 434; In re McDowell, 97 Misc. Rep. 306, 163 N. Y. Supp. 164; Id., 102 Misc. Rep. 275, 169 N. Y. Supp. 853; Morley v. Carson, 240 Pa. 546, 87 Atl. 713; Franklin Inst. for Savings v. People's Sav. Bank, 14 R. I. 632; North Troy Grade Dist. v. Town of Troy, 80 Vt. 16, 66 Atl. 1033. Where one of two trustees executes a note purporting to bind the trust estate he will be obliged to repay the loan personally. Cornett v. West, 102 Wash. 254, 173 Pac. 44.

[72] Busse v. Schenck, 12 Daly (N. Y.) 12.

[73] Mannhardt v. Illinois Staats-Zeitung Co., 90 Ill. App. 515.

[74] Bagnell v. Ives (C. C.) 184 Fed. 466.

[75] Winslow v. Baltimore & O. R. Co., 188 U. S. 646, 23 Sup. Ct. 443, 47 L. Ed. 635; Hoosier Mining Co. v. Union Trust Co., 173 Ky. 505, 191 S. W. 305.

[76] Boston v. Doyle, 184 Mass. 373, 385, 68 N. E. 851, 854.

[77] Appeal of Vandever, 8 Watts & S. (Pa.) 405, 42 Am. Dec. 305.

[78] Duckworth v. Ocean S. S. Co., 98 Ga. 193, 26 S. E. 736.

lows a majority of a board of private trustees to act.[79] Of course, one trustee may be the agent of another for the performance of an act under the trust.[80]

Having appointed more than one trustee, the settlor is, in the case of private trusts, entitled to have the benefit of their several judgments when any act involving discretion is to be performed. But if the act does not involve discretion and is merely ministerial, action by one trustee alone will bind all, as where one trustee received money due on a mortgage belonging to the trust estate and gave a receipt therefor.[81]

The settlor may expressly empower less than the entire number of trustees to act, and his direction will be respected by the courts.[82] And action taken by less than the entire board of trustees may be ratified by the trustees who did not join [83] or by the cestui que trust.[84]

Where action is brought by or against the trust estate, all the trustees must be made parties plaintiff or defendant.[85]

Successor Trustees

Questions relating to the powers of trustees may also arise because the trustees are not the original trustees, but are successors appointed by the court or otherwise. Do successors have the same powers expressly and impliedly given to their predecessors? They do when these powers were not personal to the trustees, but were attached to the office only. A quotation from a recent Maryland case states the attitude of the courts of equity clearly: "It is the well-settled law of this state that 'if it appears that the power lodged with the trustees in connection with the trust is a special confidence in a particular trustee or set of trustees, or is to be exercised only upon his or their personal judgment and discretion, such power can only be exercised by the designated donees, and will not pass to a substituted trustee. On the other hand, if it appears that the power is annexed to the office of trustee for the

[79] Ladd v. Ladd, 75 N. H. 371, 74 Atl. 1045.

[80] Ubhoff v. Brandenburg, 26 App. D. C. 3.

[81] Bowes v. Seeger, 8 Watts & S. (Pa.) 222.

[82] Ratcliffe v. Sangston, 18 Md. 383; Heard v. March, 66 Mass. (12 Cush.) 580; Bascom v. Weed, 53 Misc. Rep. 496, 105 N. Y. Supp. 459; Draper v. Montgomery, 108 App. Div. 63, 95 N. Y. Supp. 904.

[83] Hill v. Peoples, 80 Ark. 15, 95 S. W. 990. But see, contra, Fritz v. City Trust Co., 72 App. Div. 532, 76 N. Y. Supp. 625, affirmed 173 N. Y. 622, 66 N. E. 1109.

[84] Appeal of Vanleer, 24 Pa. 224.

[85] Hazard v. Durant (C. C.) 19 Fed. 471; Caylor v. Cooper (C. C.) 165 Fed. 757; Sayre v. Sayre, 17 N. J. Eq. 349; Brinckerhoff v. Wemple, 1 Wend. (N. Y.) 470; Thatcher v. Candee, 33 How. Prac. (N. Y.) 145; Jones v. Maffet, 5 Serg. & R. (Pa.) 523.

purposes of the trust, and to promote its objects, then it will pass with the trust to the successors of the original trustee, and can be exercised by them.'" [86]

It is "purely a matter of intention, to be gathered from a consideration of the whole will and from the nature and objects of the trust created thereby, as to whether a trust is personal in its character or is annexed to the office of trustee." [87] It has been held that, "in the absence of a clearly expressed intent to the contrary, the power of *sale* conferred upon a trustee in a will is regarded as a ministerial duty, annexed to the office, and passing to any person lawfully substituted in the place of the original trustee." [88]

Thus, the power conferred upon a trustee to collect the rents and profits of property and use the income for the care and education of a daughter until she was 30, and pay her such part of the principal as he might think best after the daughter's marriage, is a power annexed to the office of the trustee, and passes to a substituted trustee; [89] while a trust empowering the trustee "and any successor appointed by him" to sell the property confers on such officer a personal trust, not capable of exercise by a successor appointed by the court. [90] Whether any particular power is personal or annexed to the office can only be told from a careful scrutiny of the trust instrument and surrounding circumstances, for the purpose of learning the settlor's intent. [91]

[86] Maryland Casualty Co. v. Safe Deposit & Trust Co. of Baltimore, 115 Md. 339, 344, 80 Atl. 903, 905, Ann. Cas. 1913A, 1279.

[87] Dodge v. Dodge, 109 Md. 164, 166, 71 Atl. 519, 521, 130 Am. St. Rep. 503. Where a settlor gives trustees power to name a trust company as their successor and gives it certain discretionary powers in case of such selection, and the trustees vacate, but do not appoint a successor, if the court appoints the trust company, it will have the discretionary powers named by the settlor. Stein v. Safe Deposit & Trust Co. of Baltimore, 127 Md. 206, 96 Atl. 349.

[88] Dodge v. Dodge, 109 Md. 164, 71 Atl. 519, 130 Am. St. Rep. 503. See, also, Shillinglaw v. Peterson, 184 Iowa, 276, 167 N. W. 709.

[89] Jacobs v. Wilmington Trust Co., 9 Del. Ch. 400, 80 Atl. 346. And so a power to inquire into the status of the beneficiary at a stated time and pay him a portion of the corpus, if advisable, has been held to be an imperative power which passed to a successor. Williams v. Gardner, 90 Conn. 461, 97 Atl. 854. See also Jackson v. Matthews, 133 Md. 282, 105 Atl. 146; Newport Trust Co. v. Chappell, 40 R. I. 383, 101 Atl. 323. Contra: Singleton v. Cuttino, 105 S. C. 44, 89 S. E. 385.

[90] United States Trust Co. v. Poutch, 130 Ky. 241, 113 S. W. 107. See, also, Chandler v. Chandler, 111 Miss. 525, 71 South. 811. Where the power of sale is a mere incident for the convenient administration of the trust, and the settlor does not expressly require the union of all trustees in the exercise of the power, a remaining trustee may sell the property. Striker v. Daly, 223 N. Y. 468, 119 N. E. 882.

[91] In the following cases the power was held personal and not capable of exercise by a successor: Security Co. v. Snow, 70 Conn. 288, 39 Atl. 153, 66

That a trustee was only one of several named in the trust instrument is an immaterial fact relating to his powers, if the others do not qualify as trustees. The trustee or trustees qualifying have all the powers given in the trust instrument to the entire set of trustees named therein. The failure to qualify or the disclaimer of certain trustees leaves the trust as if they had never been named as trustees.[92]

Surviving Trustees

Surviving trustees, after the death, resignation, or removal of one or more trustees, are ordinarily vested with the same powers as were possessed by the original set of trustees.[93] If the change in the trusteeship has occurred through death, as previously pointed out, the survivors take the entire property and trust powers by survivorship, on account of the joint tenancy under which they hold. In certain rare cases the powers of the trustees are purely personal, and the death or removal of one member of the board makes it impossible for the powers to be exercised, since the trust instrument clearly shows that the powers were to be exercised by the entire board or not at all.[94]

Am. St. Rep. 107; Whitaker v. McDowell, 82 Conn. 195, 72 Atl. 938, 16 Ann. Cas. 324; Luquire v. Lee, 121 Ga. 624, 49 S. E. 834; French v. Northern Trust Co., 197 Ill. 30, 64 N. E. 105; Snyder v. Safe-Deposit & Trust Co., 93 Md. 225, 48 Atl. 719; De Lashmutt v. Teetor, 261 Mo. 412, 169 S. W. 34; Dillingham v. Martin, 61 N. J. Eq. 276, 49 Atl. 143; Smith v. Floyd, 124 App. Div. 277, 108 N. Y. Supp. 775; Young v. Young, 97 N. C. 132, 2 S. E. 78. But in many other cases the power has been construed to be attached to the office and, therefore, to be vested in a successor. Doe ex dem. Gosson v. Ladd, 77 Ala. 223; Wilmington Trust Co. v. Jacobs, 9 Del. Ch. 77, 77 Atl. 78; Vernoy v. Robinson, 133 Ga. 653, 66 S. E. 928; Yates v. Yates, 255 Ill. 66, 99 N. E. 360, Ann. Cas. 1913D, 143; Moore v. Isbel, 40 Iowa, 383; Cox v. Shelby County Trust Co., 80 S. W. 789, 26 Ky. Law Rep. 50; Chase v. Davis, 65 Me. 102; Jencks v. Safe Deposit & Trust Co. of Baltimore, 120 Md. 626, 87 Atl. 1031; Parker v. Converse, 5 Gray (Mass.) 336; Hicks v. Hicks, 84 N. J. Eq. 515, 94 Atl. 409; Forman v. Young, 166 App. Div. 815, 152 N. Y. Supp. 417; Kadis v. Weil, 164 N. C. 84, 80 S. E. 229; Wilson v. Pennock, 27 Pa. 238; In re Blakely, 19 R. I. 324, 33 Atl. 518.

[92] Ratcliffe v. Sangston, 18 Md. 383; King v. Donnelly, 5 Paige (N. Y.) 46; Trask v. Donoghue, 1 Aikens (Vt.) 370.

[93] Parsons v. Boyd, 20 Ala. 112; Haggart v. Ranney, 73 Ark. 344, 84 S. W. 703; La Forge v. Binns, 125 Ill. App. 527; Cooley v. Kelley, 52 Ind. App. 687, 98 N. E. 653; Stewart v. Pettus, 10 Mo. 755; Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969; Striker v. Daly, 223 N. Y. 468, 119 N. E. 882; Shortz v. Unangst, 3 Watts & S. (Pa.) 45; Hughes v. Williams, 99 Va. 312, 38 S. E. 138; Bell's Adm'r v. Humphrey, 8 W. Va. 1.

[94] Boone v. Clarke, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641; Dillard v. Dillard, 97 Va. 434, 34 S. E. 60.

DISCRETIONARY POWERS MAY NOT BE DELEGATED

95. The trustee may not delegate to agents the exercise of powers which involve the use of discretion and judgment; but he may employ agents for the performance of merely ministerial and mechanical acts.

The trustee is an officer occupying a highly fiduciary relationship. He is selected because of his good judgment, honesty, and experience. The settlor has a right to rely upon the exercise of those qualities in the administration of the trust. He has a right to expect that important acts regarding the trust will not be delegated to agents and servants of the trustee. Accordingly equity has established the rule that the trustee may not delegate the performance of discretionary powers, and that, if he does so, acts done by the agent in the execution of such discretionary powers will be void.[95]

But if the acts to be performed are merely ministerial and mechanical acts, involving the exercise of no judgment or discretion, then the trustee may appoint an agent or servant for the purpose.[96] For example, where trustees are authorized to sell real estate whenever it is best, they may delegate to an agent the ministerial duty of finding a purchaser, but may not delegate to him the power to enter into a contract of sale, since that involves discretion.[97] Where the power is one of sale, the mechanical duties of posting advertisements, proclaiming the sale at an auction, and receiving bids may be performed by a servant; but the decisions as to the manner of advertisement and sale are discretionary matters, and must pass under the trustee's personal judgment.[98]

A trustee which is a corporation must necessarily act through agents in the performance of all duties.[99] In one anomalous case,

[95] North American Trust Co. v. Chappell, 70 Ark. 507, 69 S. W. 546; Chicago Title & Trust Co. v. Zinser, 264 Ill. 31, 105 N. E. 718, Ann. Cas. 1915D, 931; Morville v. Fowle, 144 Mass. 109, 10 N. E. 766; Fowler v. Coates, 201 N. Y. 257, 94 N. E. 997; In re Bohlen's Estate, 75 Pa. 304. In Stevens v. Home Ins. Co., 199 Mo. App. 536, 204 S. W. 44, the power to indorse a draft was held not to be capable of delegation.

[96] Gillespie v. Smith, 29 Ill. 473, 81 Am. Dec. 328; Annis v. Annis, 61 Iowa, 220, 16 N. W. 97; Turnbull v. Pomeroy, 140 Mass. 117, 3 N. E. 15; O'Fallon v. Tucker, 13 Mo. 262; Keim v. Lindley (N. J. Ch.) 30 Atl. 1063; Sinclair v. Jackson ex dem. Field, 8 Cow. (N. Y.) 543; Belding v. Archer, 131 N. C. 287, 42 S. E. 800; Olcott v. Gabert, 86 Tex. 121, 23 S. W. 985.

[97] Coleman v. Connolly, 242 Ill. 574, 90 N. E. 278, 134 Am. St. Rep. 347.

[98] Bales v. Perry, 51 Mo. 449.

[99] Chicago Title & Trust Co. v. Zinser, 264 Ill. 31, 105 N. E. 718, Ann. Cas. 1915D, 931.

where the trustee was infirm, the court appointed an agent to assist him.[1] The proper procedure in such a case would seem to be the removal of the trustee and the appointment of a new trustee, rather than the conduct of the trust through a substitute, not having the title or liabilities of a trustee.

Unauthorized discretionary acts performed by an agent may be ratified by the trustees so as to be binding.[2] And it has been held that consent of all parties interested will enable a trustee to delegate the performance of duties involving judgment and discretion.[3]

THE COURT'S SUPERVISION OF POWERS

96. If the trustee is in real doubt as to the existence or method of exercise of certain powers, he may apply to the court for instructions.

Chancery will not ordinarily set aside the exercise of a power by a trustee, unless there has been an abuse of authority, bad faith, or a misunderstanding.

If the trustee is justifiably in doubt as to whether he possesses certain powers, or concerning the method of exercising powers which it is admitted are vested in him, he may apply to a court of chancery, and that court will instruct him. "He must be honestly in doubt as to the proper construction of the instrument under which he is acting, or as to the disposition of the funds in his hands, or the course of action that he ought to take in any particular case, in order to authorize his application to a court of equity for aid and direction." [4] Hence it was held in the case just cited that equity would not instruct the trustee whether he should pay an attorney's bill for services rendered to the trust estate, there being no showing that there was any dispute as to the validity of the claim. The trustee should exercise his discretion regarding such matters. So, also, where the trustee applies for instructions concerning the method of exercising a power of sale, and no difficult questions are involved, the court will put the burden of exercising the discretion upon the trustee. "The questions relate to the administration of a trust, in respect to matters which the testator has expressly confided to the wise discretion of trustees selected by himself. There is no suggestion, from any quarter, that they are likely to abuse that trust, by an arbitrary or capricious exercise of authority. The

[1] Franklin v. Hays, 2 Swan (Tenn.) 521.
[2] Hill v. Peoples, 80 Ark. 15, 95 S. W. 990.
[3] Seely v. Hills, 49 Wis. 473, 5 N. W. 940.
[4] Warner v. Mettler, 260 Ill. 416, 421, 103 N. E. 259, 261.

judgment of this court cannot be substituted for the discretion of the trustees, reasonably and fairly exercised."[5] There must be some question of doubt and some real necessity for advice concerning the powers resting in the trustee.[6] Where there is a question of admitted difficulty,[7] equity will direct the trustee concerning his powers, but not if the question is prematurely presented, and relates to what the trustee's powers in the future will be, rather than to what they are now.[8]

May equity control the exercise of the trustee's powers upon its own motion or at the petition of the cestui que trust? The trustee is always subject to the orders of chancery.[9] The court has the power to supervise the exercise of the trustee's authority,[10] and will, when for the best interest of the trust, revise or overrule the decisions of the trustee regarding his powers and the method of their exercise.[11]

But, where the powers of the trustee are discretionary, chancery will interfere with their execution only when the trustee is acting in bad faith, or abusing his powers, or is under a misunderstanding

[5] Proctor v. Heyer, 122 Mass. 525, 529.

[6] Morris v. Boyd, 110 Ark. 468, 162 S. W. 69, Ann. Cas. 1916A, 1004; Connolly v. Leonard, 114 Me. 29, 95 Atl. 269; Bartlett v. Pickering, 113 Me. 96, 92 Atl. 1008. Thus advice as to the propriety of past action will not be given. Stover v. Webb, 114 Me. 386, 96 Atl. 721; Hill v. Moors, 224 Mass. 163, 112 N. E. 641. Nor will an opinion be rendered on questions which may never become of practical interest. Bridgeport Trust Co. v. Bartholomew, 90 Conn. 517, 97 Atl. 758; Passaic Trust & Safe Deposit Co. v. East Ridgelawn Cemetery (N. J. Ch.) 101 Atl. 1026. If the question is not in controversy or is too general, it will not be answered. Bailey v. Smith, 222 Mass. 600, 111 N. E. 684.

[7] Berger v. Butler, 159 Ala. 539, 48 South. 685; Stapyleton v. Neeley, 44 Fla. 212, 32 South. 868; Hills v. Putnam, 152 Mass. 123, 25 N. E. 40; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946, Ann. Cas. 1918B, 1204; Hayden's Ex'rs v. Marmaduke, 19 Mo. 403; Trustees of Princeton University v. Wilson, 78 N. J. Eq. 1, 78 Atl. 393; Coe v. Beckwith, 31 Barb. (N. Y.) 339; Meadows v. Marsh, 123 N. C. 189, 31 S. E. 476; Jones v. Creamer, 32 Ohio Cir. Ct. R. 223; Gamel v. Smith, 3 Tex. Civ. App. 22, 21 S. W. 628.

[8] Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; Wheaton v. Batcheller, 211 Mass. 223, 97 N. E. 924; Tibbetts v. Tomkinson, 217 Mass. 244, 104 N. E. 562; Hewitt v. Green, 77 N. J. Eq. 345, 77 Atl. 25; Prichard v. Prichard, 83 W. Va. 652, 98 S. E. 877.

[9] Latimer v. Hanson, 1 Bland (Md.) 51; Jordan v. Jordan's Ex'r, 4 N. C. 292; Henderson v. Peck, 3 Humph. (Tenn.) 247.

[10] Preston v. Safe Deposit & Trust Co., 116 Md. 211, 81 Atl. 523, Ann. Cas. 1913C, 799; Sanderson v. White, 18 Pick. 328, 29 Am. Dec. 591; Angell v. Angell, 28 R. I. 592, 68 Atl. 583.

[11] Russell v. Hartley, 83 Conn. 654, 78 Atl. 320; Whitelock v. Dorsey, 121 Md. 497, 88 Atl. 241; Manning v. Sheehan, 75 Misc. Rep. 374, 133 N. Y. Supp. 1006.

as to his powers.[12] If the trustee is proceeding honestly in the exercise of his discretion, even though the court would act otherwise if the discretion had been vested in it, the court will not overrule the trustee.[13] Thus, where trustees were given the power to sell church property whenever the attendance upon the church should fall off, so as to render the church of small usefulness, the decision of the trustees concerning that question will not be reviewed by the court, being a matter of discretion.[14] And equity will not, at the request of the beneficiary, direct the trustee concerning the investments which he should make, when he is proceeding in good faith.[15]

Equity may enlarge the powers granted to the trustee, when this is strictly necessary.[16] If the court assumes control of the trust, and directs the execution of the trust under its orders, the trustee must secure the sanction or ratification of each act which he performs under the trust.[17]

Where the power held by the trustee is in trust for others and is peremptory, and not a mere naked power, equity will on a proper showing compel the trustee to exercise the power.[18] Thus, where the power is to sell for the benefit of the beneficiaries, and the trustee fails to sell when he might reasonably do so, equity will compel the carrying out of the power of sale.[19]

[12] Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12; Keeler v. Lauer, 73 Kan. 388, 85 Pac. 541; McFerran v. Fidelity Trust Co., 140 Ky. 536, 131 S. W. 393; Woodward v. Dain, 109 Me. 581, 85 Atl. 660; Stein v. Safe Deposit & Trust Co. of Baltimore, 127 Md. 206, 96 Atl. 349; Baer v. Kahn, 131 Md. 17, 101 Atl. 596; Larkin v. Wikoff, 75 N. J. Eq. 462, 72 Atl. 98; In re Kohler, 96 Misc. Rep. 433, 160 N. Y. Supp. 669; Albright v. Albright, 91 N. C. 220; Givens v. Clem, 107 Va. 435, 59 S. E. 413.

[13] Hathaway v. New Baltimore, 48 Mich. 251, 12 N. W. 186; Ames v. Scudder, 83 Mo. 189; Gulick v. Gulick (N. J.) 3 Atl. 354; Turnure v. Turnure, 89 N. J. Eq. 197, 104 Atl. 293; In re Hilton, 174 App. Div. 193, 160 N. Y. Supp. 55; Cochran v. Paris, 11 Grat. (Va.) 348; Kester v. Alexander, 47 W. Va. 329, 34 S. E. 819.

[14] Larkin v. Wikoff, 75 N. J. Eq. 462, 72 Atl. 98.

[15] Caspari v. Cutcheon, 110 Mich. 86, 67 N. W. 1093.

[16] Denegre v. Walker, 214 Ill. 113, 73 N. E. 409, 105 Am. St. Rep. 98, 2 Ann. Cas. 787; Johns v. Johns, 172 Ill. 472, 50 N. E. 337; Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11, 55 Atl. 468.

[17] Gottschalk v. Mercantile Trust & Deposit Co., 102 Md. 521, 62 Atl. 810.

[18] Saunders v. Schmaelzle, 49 Cal. 59; Walker v. Smyser's Ex'rs, 80 Ky. 620; Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360; Eldredge v. Heard, 106 Mass. 579; Prewett v. Land, 36 Miss. 495; Hancox v. Wall, 28 Hun (N. Y.) 214; In re Fargo's Estate, 20 Misc. Rep. 137, 45 N. Y. Supp. 732.

[19] Kintner v. Jones, 122 Ind. 148, 23 N. E. 701.

CHAPTER XII

THE DUTIES OF THE TRUSTEE

GENERAL STANDARDS OF SKILL AND HONESTY

97. In the management of the trust the trustee is bound to display the skill, prudence, and diligence which an ordinary man would use in the conduct of his own affairs.

The highest degree of good faith, honesty, and fair dealing is required of the trustee in the performance of the trust duties.

The standards set for the trustee in the performance of his duties relate to the degree of skill and care which he must exercise, and also to the good faith which he must manifest toward the beneficiary. Only ordinary care, skill, and prudence are required of trustees. They are not expected to manifest unusual ability or extraordinary care.[1] The rule is "that trustees are bound in the management of all the matters of the trust to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent men of discretion and intelligence in like matters employ in their own affairs. The law does not hold a trustee, acting in accord with such rule, responsible for errors of judgment."[2] The trustee is not liable for every error which occurs in the administra-

[1] American Bonding Co. of Baltimore v. Richardson, 214 Fed. 897, 131 C. C. A. 565; Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639; Dillivan v. German Sav. Bank (Iowa) 124 N. W. 350; Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534; Belding v. Archer, 131 N. C. 287, 42 S. E. 800; Gilbert v. Sutliff, 3 Ohio St. 129; Appeal of Jones, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Cunningham v. Cunningham, 81 S. C. 506, 62 S. E. 845; Davis v. Harman, 21 Grat. (Va.) 194; Hutchinson v. Lord, 1 Wis. 286, 60 Am. Dec. 381.

[2] Costello v. Costello, 209 N. Y. 252, 261, 103 N. E. 148. See, also, Ainsa v. Mer-

tion of the trust. He is not required to be infallible.[3] "All that equity requires from trustees is common skill, common prudence, and common caution." [4] If the trustee has not used the skill of an ordinary man in the conduct of his own affairs, it is of no avail to him that his motives were good. Good intent will not relieve him from liability for negligent or improvident conduct.[5]

But the degree of good faith required of the trustee is not that of ordinary men in ordinary affairs. He is obliged to show the highest amount of honesty and good faith in the performance of his trust duties, and will be held liable for injuries occurring to the trust estate from conduct which is tinged with the slightest degree of mala fides.[6] "The highest degree of good faith is required of a trustee in the execution of his trust." [7] Thus, the trustee is under a duty to disclose to the cestui que trust all matters pertaining to the trust, without waiting for the beneficiary to question him, when such disclosure would be of benefit to the cestui que trust.[8] The trustee is presumed by equity to have acted in good faith, until a positive abuse of the trust is shown.[9] That the trustee is serving without compensation does not relieve him from manifesting the usual amount of skill and honesty required of trustees. If he enters upon a trust in which he is to act gratuitously, he must use ordinary skill and prudence and the greatest good faith.[10]

cantile Trust Co. of San Francisco, 174 Cal. 504, 163 Pac. 898; Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618; Shepherd v. Darling, 120 Va. 586, 91 S. E. 737.

[3] Ellig v. Naglee, 9 Cal. 683; Pine v. White, 175 Mass. 585, 56 N. E. 967; Myers' Ex'r v. Zetelle, 21 Grat. (Va.) 733.

[4] Appeal of Neff, 57 Pa. 91, 96.

[5] St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256; Moeller v. Poland, 80 Ohio St. 418, 89 N. E. 100. But, in fixing the penalty to be placed upon the trustee, equity may consider the motives of the trustee and view with indulgence honest acts. Ellig v. Naglee, 9 Cal. 683; Diffenderffer v. Winder, 3 Gill & J. (Md.) 311. So, too, bad health, while not an excuse for inefficient management of a trust, has been considered by the court in fixing the amount of the liability of the trustee. Newman v. Shreve, 229 Pa. 200, 78 Atl. 79. The advice of counsel is not an excuse. Freeman v. Cook, 41 N. C. (6 Ired. Eq.) 373. But in Miller v. Proctor, 20 Ohio St. 442, executors who took legal advice about an investment which later proved to be legally defective were held to have used due care.

[6] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59, 45 L. R. A. (N. S.) 411; Morrow v. Saline County Com'rs, 21 Kan. 484; In re Randolph (Sur.) 134 N. Y. Supp. 1117, affirmed 150 App. Div. 902, 135 N. Y. Supp. 1138; Freeman v. Cook, 41 N. C. (6 Ired. Eq.) 373; Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S. W. 1162.

[7] Minneapolis Trust Co. v. Menage, 73 Minn. 441, 448, 76 N. W. 195.

[8] Laun v. Kipp, 155 Wis. 347, 145 N. W. 183, 5 A. L. R. 655.

[9] Calvert v. Carter, 18 Md. 73.

[10] Switzer v. Skiles, 3 Gilman (8 Ill.) 529, 44 Am. Dec. 723. But see, contra, Clark v. Anderson, 10 Bush (Ky.) 99.

DUTY TO EXECUTE THE TRUST

98. The primary duty of the trustee is to execute the trust according to the terms of the trust instrument.

It is too obvious to require extended explanation that the primary duty of the trustee is to carry out the trust according to the tenor of the trust instrument. Whether the trust is to accumulate income, or to pay it over to beneficiaries, or to partition, or what not, the trustee should learn the settlor's intent and effectuate it.[11] The discussion of the trust duties in detail, which appears later herein, is merely a consideration of the means which are best adapted to the execution of the trust. "The cardinal duties, and therefore liabilities, of trustees, are these: (1) To carry out the trust; (2) to use due care thereabout; and (3) to act in good faith thereabout." [12] That the trustee has not been requested to perform the trust, is no defense. He should proceed of his own initiative.[13] Equity presumes that a trustee has carried out the trust in accordance with its provisions, in the absence of evidence to the contrary.[14]

The question of the method of forcing a trustee to carry out a trust will be taken up at a later point. It will there be shown that the right to have a private trust enforced is vested in the cestui que trust, while the right to enforce a charitable trust lies in a public officer, as a representative of the indefinite beneficiaries. This public officer is usually the Attorney General of the state. It will also appear that specific execution of the trust may be compelled either by a decree against the recalcitrant trustee or by removing the disobedient trustee and substituting a faithful trustee.[15]

[11] Morgan v. Clayton, 61 Ill. 35; Dunn v. Morse, 109 Me. 254, 83 Atl. 795; Sears v. Russell, 8 Gray (Mass.) 86; Steward v. Traverse City State Bank, 187 Mich. 387, 153 N. W. 793.

[12] Klugh v. Seminole Securities Co., 103 S. C. 120, 87 S. E. 644, 646.

[13] Cotton v. Rand (Tex. Civ. App.) 92 S. W. 266.

[14] Harton v. Little, 176 Ala. 267, 57 South. 851; Mackenzie v. Los Angeles Trust & Savings Bank, 39 Cal. App. 247, 178 Pac. 557; Cecil's Committee v. Cecil, 149 Ky. 605, 149 S. W. 965; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157; Pope v. Patterson, 78 S. C. 334, 58 S. E. 945; Cathcart v. Matthews, 105 S. C. 329, 89 S. E. 1021; McCreery v. First Nat. Bank, 55 W. Va. 663, 47 S. E. 890.

[15] See §§ 113, 125, post.

DUTY TO ACT SOLELY IN THE INTEREST OF THE BENEFICIARY

99. The trustee owes the beneficiary the duty of excluding all private interest from his transactions and of conducting the trust with the advantage of the cestui que trust solely in mind.

The trustee is estopped to deny the title of his settlor or cestui que trust, and may not purchase any title or interest in the trust property adverse to that of the cestui que trust.

In the performance of this duty the trustee should refrain from doing any act in the administration of the trust which will or may result in a profit to himself, and he should not purchase the trust property on a sale thereof conducted by himself.

While the trustee is not under a duty to refrain from making contracts with the cestui que trust, yet, if he enters into such a contract, he should exercise the utmost good faith toward the cestui que trust.

The trustee owes the cestui que trust the duty of acting solely for the interest of the cestui que trust. In other words the trustee should not, while administering the trust, take any step which may or will result in his own enrichment. All his proceedings under the trust should be with the aim of advancing the interests of the cestui que trust, and with that aim alone.[16] "It is a general principle that a trustee must act with the most scrupulous good faith. The one great duty arising from this fiduciary relation is to act in all matters relating to the trust wholly for the benefit of the beneficiary. A trustee will not be permitted to manage the affairs of his trust, or to deal with the trust property, so as to gain any advantage, either directly or indirectly, for himself." [17]

The illustrations of this principle are numerous. Many of them have been considered elsewhere under the heading of "Constructive Trusts." [18] The discussion at that point was from the point of

[16] Ensien v. Allen, 160 Ala. 529, 49 South. 430; City of Chicago v. Tribune Co., 248 Ill. 242, 93 N. E. 757; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9; In re Carmody's Estate, 163 Iowa, 463, 145 N. W. 16; Niblack v. Knox, 101 Kan. 440, 167 Pac. 741; Richardson's Adm'rs v. Spencer, 18 B. Mon. (Ky.) 450; Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; Patterson v. Booth, 103 Mo. 402, 15 S. W. 543; Jeffray v. Towar (N. J. Ch.) 54 Atl. 817; Davis v. Wright, 2 Hill (S. C.) 560; Newcomb v. Brooks, 16 W. Va. 32; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

[17] Linsley v. Strang, 149 Iowa, 690, 126 N. W. 941, 942.

[18] See §§ 41, 42, ante.

view of the creation of trusts. It was there shown that the acts of a trustee which result in his own benefit frequently give rise to constructive trusts. It may not be amiss here to review briefly certain instances in which the trustee has been held to be guilty of a breach of trust in acting for his private interest, rather than solely on behalf of the cestui.

The trustee is violating his trust duty and may be held a constructive trustee for the beneficiary of all profits made in the following cases: Where he makes a profit for himself on the sale of the trust property;[19] where he takes a profit on the sale of property to the trust estate;[20] where he secures an advantage for himself upon a lease of the trust property;[21] where he uses the trust funds to buy his own property[22] or invests the trust funds in the bonds of a corporation of which he is a stockholder and director;[23] where he purchases property for himself which he should have bought for the trust;[24] where he renews a lease in his own name which he should have taken in his name as trustee;[25] when he uses knowledge obtained in the administration of the trust for his own private benefit;[26] where he receives a bonus for lending the trust funds;[27] where he receives a commission for taking out insurance on the trust property;[28] where he accepts a gift from persons with whom he deals on behalf of the trust estate;[29] where he uses the trust funds in his own business[30] or lends them to his wife.[31]

The trustee may not buy up an outstanding title or claim to or lien upon the trust property.[32] To do so would be to assume an

[19] Frazier v. Jeakins, 64 Kan. 615, 68 Pac. 24, 57 L. R. A. 575; Rouse v. Rouse, 167 N. C. 208, 83 S. E. 305; Heckscher v. Blanton, 111 Va. 648, 69 S. E. 1045, 37 L. R. A. (N. S.) 923.

[20] Bay State Gas Co. of Delaware v. Rogers (C. C.) 147 Fed. 557; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.

[21] Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756.

[22] Prewitt v. Morgan's Heirs (Ky.) 119 S. W. 174; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314.

[23] Bermingham v. Wilcox, 120 Cal. 467, 52 Pac. 822.

[24] Zeckendorf v. Steinfeld, 12 Ariz. 245, 100 Pac. 784; Blauvelt v. Ackerman, 20 N. J. Eq. 141.

[25] Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

[26] Jarrett v. Johnson, 116 Ill. App. 592.

[27] Sherman v. Lanier, 39 N. J. Eq. 249.

[28] Sherman v. White, 62 Ill. App. 271.

[29] Jacobus v. Munn, 37 N. J. Eq. 48.

[30] In re Jones' Estate, 10 N. Y. St. Rep. 176; Campbell v. Campbell (C. C.) 8 Fed. 460.

[31] In re Randolph (Sur.) 134 N. Y. Supp. 1117, affirmed 150 App. Div. 902, 135 N. Y. Supp. 1138.

[32] Wiswall v. Stewart, 32 Ala. 433, 70 Am. Dec. 549; Cavagnaro v. Don, 63

attitude hostile to the beneficiary and to abandon his trust. If the trustee purchases any such outstanding, hostile interest in or claim to the trust property, he will be deemed to hold it for the trust, subject to a right to be indemnified for his expenditure.

A further illustration of this principle is found in the rule that a trustee is not permitted to deny the title of the cestuis que trust[33] or of the settlor.[34] Having entered into the possession of the trust property as trustee and accepted the property as subject to a trust, the trustee will not be heard to raise objections to the validity of the title under which he received possession. He will not be permitted to allege a paramount title in himself or in some one else. The trustee may, of course, repudiate the trust and begin an adverse possession of the trust property.[35] If this repudiation is brought to the notice of the cestuis, their rights may be barred by the statute of limitations. But no amount of possession by the trustee as trustee will give him title to the property, for such possession is not adverse to the beneficiary, but is on behalf of the beneficiary.[36]

Contracts Between Trustee and Cestui

The trustee is not absolutely forbidden to make contracts with the cestui que trust, but such contracts are viewed with great sus-

Cal. 227; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Taylor v. Calvert, 138 Ind. 67, 37 N. E. 531; McClanahan's Heirs v. Henderson's Heirs, 2 A. K. Marsh (Ky.) 388, 12 Am. Dec. 412; Mead v. McLaughlin, 42 Mo. 198; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839; Hussong Dyeing Mach. Co. v. Morris (N. J. Ch.) 89 Atl. 249; Brantly v. Kee, 58 N. C. (5 Jones, Eq.) 332. Purchase and collection of a claim against the trust estate to the profit of the trustee is a ground for removal. Attorney General v. Armstrong, 231 Mass. 196, 120 N. E. 678.

[33] Duncan v. Bryan, 11 Ga. 63; Green v. Otter, 3 B. Mon. (Ky.) 102; Sterling v. Sterling, 77 Minn. 12, 79 N. W. 525; Von Hurter v. Spengeman, 17 N. J. Eq. 185; Sweet v. Jacocks, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; Paull v. Oliphant, 14 Pa. 342; Anderson v. Smoot, Speers, Eq. (S. C.) 312; Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497; Morris' Ex'r v. Morris' Devisees, 48 W. Va. 430, 37 S. E. 570.

[34] Hunt v. Danforth, Fed. Cas. No. 6888; Gulifoil v. Arthur, 158 Ill. 600, 41 N. E. 1009; Associate Alumni, etc., v. General Theological Seminary, 163 N. Y. 417, 57 N. E. 626; McLeran v. Melvin, 56 N. C. (3 Jones, Eq.) 195; State v. Merrill, 1 Chand. (Wis.) 258. Nor can the trustee, after entering on the trust, attack its validity. Page v. Naglee, 6 Cal. 241; Saunders v. Richard, 35 Fla. 28, 16 South. 679; Tabernacle Baptist Church v. Fifth Ave. Baptist Church, 60 App. Div. 327, 70 N. Y. Supp. 181; Id., 172 N. Y. 598, 64 N. E. 1126.

[35] Blackett v. Ziegler, 147 Iowa, 167, 125 N. W. 874; Phillips v. Insley, 113 Md. 341, 77 Atl. 850, 140 Am. St. Rep. 408; Sommers v. Bennett, 68 W. Va. 157, 69 S. E. 690.

[36] Fleming v. Gilmer, 35 Ala. 62; Anderson v. Northrop, 30 Fla. 612, 12 South. 318; Zunkel v. Colson, 109 Iowa, 695, 81 N. W. 175; Green v. Otter, 3 B. Mon. (Ky.) 102; Dunn v. Wheeler, 86 Me. 238, 29 Atl. 895; McGuire v. Nugent, 103 Mo. 161, 15 S. W. 551; Hopping v. Gray, 82 N. J. Eq. 502, 89 Atl.

picion and jealousy by equity.[37] It cannot be said that the trustee is under a duty not to make a contract with his beneficiary, as, for example, not to buy the cestui's interest; but, if the trustee does enter into any agreements with the cestui, the trustee must make a full disclosure of all the facts, treat the cestui with the utmost fairness and openness and pay an adequate consideration for all that he receives. There is a presumption against the validity of contracts between trustee and cestui and the burden is on the trustee to prove the fairness of the transaction.[38] If the trustee cannot prove that the transaction was open and honest, equity will declare the trustee a constructive trustee of all property which he has received by virtue of his contract with the beneficiary.[39] Thus, a conveyance by the cestui que trust to the trustee of the property owned by the cestui under the trust in consideration of the support of the cestui by the trustee for life, where the cestui was of sound mind and not influenced by fraud or undue influence, will be upheld.[40] But a purchase by a trustee from a cestui que trust will be

27; Levy v. Ryland, 32 Nev. 460, 109 Pac. 905; Dresser v. Travis, 39 Misc. Rep. 358, 79 N. Y. Supp. 924; Krauczunas v. Hoban, 221 Pa. 213, 70 Atl. 740; Rhodes v. Maret (Tex. Civ. App.) 112 S. W. 433.

[37] Sallee v. Chandler, 26 Mo. 124; Murry v. King, 153 Mo. App. 710, 135 S. W. 107; Marshall v. Stephens, 8 Humph. (Tenn.) 159, 47 Am. Dec. 601.

[38] Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 571; Lathrop v. Pollard, 6 Colo. 424; Saunders v. Richard, 35 Fla. 28, 16 South. 679; Bryan v. Duncan, 11 Ga. 67; Buell v. Buckingham, 16 Iowa, 284, 85 Am. Dec. 516; Stewart v. Harris, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873; Narcissa's Ex'r v. Wathan, 2 B. Mon. (Ky.) 241; Brown v. Cowell, 116 Mass. 461; Schwarz v. Wendell, Walk. Ch. (Mich.) 267; Jones v. Smith, 33 Miss. 215; Newman v. Newman, 152 Mo. 398, 54 S. W. 19; Swift v. Craighead, 75 N. J. Eq. 102, 75 Atl. 974; Graves v. Waterman, 4 Hun (N. Y.) 687, affirmed 63 N. Y. 657; Cole v. Stokes, 113 N. C. 270, 18 S. E. 321; Appeal of Miggett, 109 Pa. 520; Coffee v. Ruffin, 4 Cold. (Tenn.) 487; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

[39] Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101; Yonge v. Hooper, 73 Ala. 119; Flowers v. Flowers, 84 Ark. 557, 106 S. W. 949, 120 Am. St. Rep. 84; Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692; Saunders v. Richard, 35 Fla. 28, 16 South. 679; Fish v. Fish, 235 Ill. 396, 85 N. E. 662; Copeland v. Bruning, 44 Ind. App. 405, 87 N. E. 1000; Avery's Trustee v. Avery, 90 Ky. 613, 14 S. W. 593; Brown v. Cowell, 116 Mass. 461; Schwarz v. Wendell, Walk. Ch. (Mich.) 267; Tatum v. McLellan, 50 Miss. 1; Davidson v. I. M. Davidson Real Estate & Investment Co., 249 Mo. 474, 155 S. W. 1; Gassert v. Strong, 38 Mont. 18, 98 Pac. 497; Marr v. Marr, 73 N. J. Eq. 643, 70 Atl. 375, 133 Am. St. Rep. 742; In re Ledrich, 68 Hun, 396, 22 N. Y. Supp. 978; Appeal of Costen, 13 Pa. 292; Waldrop v. Leaman, 30 S. C. 428, 9 S. E. 466; Cogbill v. Boyd, 77 Va. 450; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571. In a few cases it seems to have been held that a transfer from cestui to trustee is absolutely void. McKnatt v. McKnatt, 10 Del. Ch. 392, 93 Atl. 367; Butman v. Whipple, 25 R. I. 578, 57 Atl. 379.

[40] Barnard v. Stone, 159 Mass. 224, 34 N. E. 272.

set aside and a constructive trust declared where it appears that the cestui was ignorant of his rights and received an inadequate consideration.[41] The presumption of fraud applies as well to a sale by a trustee to his beneficiary as to a conveyance from cestui que trust to trustee.[42] If the cestui has the transaction with the trustee set aside, of course he must return any consideration paid by the trustee to him.[43]

Trustee Buying at Own Sale

The last application of the general rule under discussion is found in the case of a purchase by a trustee at his own sale. If a trustee were allowed to buy in the trust property on a sale thereof conducted by himself, there would be a temptation to defraud the beneficiary. The trustee would be disposed to sell the property to himself at an unduly low price, in order that he might reap a profit. His individual interest would conflict with his representative interest. For this reason equity has established the rule that a purchase by a trustee at his own sale is absolutely voidable at the option of the cestui que trust, regardless of the adequacy of the consideration paid or the fairness of the transaction.[44] This rule shows that a trustee is under a duty not to bid in property at a sale conducted by himself. If the sale was not caused by the trustee, and is not under his control, but under the control of the court, the rule does not apply, and the trustee may bid in the property.[45]

[41] Pugh's Heirs v. Bell's Heirs, 1 J. J. Marsh (Ky.) 398.

[42] McCants v. Bee, 1 McCord Eq. (S. C.) 383, 16 Am. Dec. 610.

[43] Saunders v. Richard, 35 Fla. 28, 16 South. 679; Connecticut Mut. Life Ins. Co. v. Stinson, 62 Ill. App. 319.

[44] Charles v. Dubose, 29 Ala. 367; Haynes v. Montgomery, 96 Ark. 573, 132 S. W. 651; Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Mettler v. Warner, 249 Ill. 341, 94 N. E. 522; Bank of Old Dominion v. Dubuque & P. R. Co., 8 Iowa, 277, 74 Am. Dec. 302; Baker v. Lane (Ky.) 118 S. W. 963; Clute v. Barron, 2 Mich. 192; St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256; Shelby v. Creighton, 65 Neb. 485, 91 N. W. 369, 101 Am. St. Rep. 630; Carson v. Marshall, 37 N. J. Eq. 213; Jackson v. Walsh, 14 Johns. (N. Y.) 407; Brothers v. Brothers, 42 N. C. (7 Ired. Eq.) 150; McGinn v. Shaeffer, 7 Watts (Pa.) 412; Clarke v. Deveaux, 1 S. C. 172; Armstrong's Heirs v. Campbell, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556; Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769; Smith v. Miller, 98 Va. 535, 37 S. E. 10; Reilly v. Oglebay, 25 W. Va. 36; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. A transfer to a corporation in which the trustee owns the majority of the stock is equivalent to a sale by the trustee to himself. Otier v. Neiman, 96 Misc. Rep. 481, 160 N. Y. Supp. 610. And investment in a mortgage on property of a corporation of which the trustee is president is likewise objectionable. Strong v. Dutcher, 186 App. Div. 307, 174 N. Y. Supp. 352.

[45] Steinbeck v. Bon Homme Min. Co., 152 Fed. 333, 81 C. C. A. 441; Plant v. Plant, 171 Cal. 765, 154 Pac. 1058; Sykes v. Kruse, 49 Colo. 560, 113 Pac. 1013; Starkweather v. Jenner, 27 App. D. C. 348; Chapin v. Weed, Clarke, Ch. (N. Y.) 464; Appeal of Lusk, 108 Pa. 152; Calvert v. Woods, 246 Pa. 325, 92 Atl. 301.

This rule, above stated, applies to a sale by a trustee to a cotrustee, as well as to a sale by a trustee to himself as an individual.[46]

Where the trustee violates his duty not to purchase the trust property at a sale thereof conducted by himself, the remedy of the cestui que trust is usually stated to be that he may avoid the sale.[47] Perhaps a more accurate statement of the remedy open to the beneficiary would be that he may have the trustee declared a constructive trustee of the property. The result is the same and the difference only one of theory. Of course, the beneficiary may hold the trustee to his purchase and compel him to pay the price.[48] If the trustee has sold the property at an advanced price, the cestui may compel the trustee to account for the profit he has made.[49] If the trustee has transferred the property to a bona fide purchaser for value, naturally the cestui que trust may not recover the property from such bona fide purchaser, but will be confined to his remedy against the trustee.[50] As a condition of avoiding the sale the cestui que trust must return to the trustee the consideration received.[51]

The conduct of the cestui que trust may be such as to prevent him from insisting upon the enforcement of the rule that the trustee shall not act for his own benefit. The beneficiary may expressly waive the rule.[52] He may consent that the trustee may buy at his own sale, and if this consent is given by a person of full capacity and with a full knowledge of the facts, the purchase by

[46] Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Beeson v. Beeson, 9 Pa. 279.

[47] Andrews v. Hobson's Adm'r, 23 Ala. 219; In re Wheeler's Estate (Del. Orph.) 101 Atl. 865; Thorp v. McCullum, 1 Gilman (6 Ill.) 614; Higgins v. Curtiss, 82 Ill. 28; Mason v. Martin, 4 Md. 124; Jenison v. Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; Obert v. Hammel, 18 N. J. Law, 73; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Campbell v. Pennsylvania Life Ins. Co., 2 Whart. (Pa.) 53; Sollee v. Croft, 7 Rich. Eq. (S. C.) 34; Hamilton v. Dooly, 15 Utah, 280, 49 Pac. 769.

[48] Thorp v. McCullum, 1 Gilman (6 Ill.) 614; Huff v. Earl, 3 Ind. 306; Scott v. Freeland, 7 Smedes & M. (15 Miss.) 409, 45 Am. Dec. 310; Pitt v. Petway, 34 N. C. (12 Ired.) 69; Moore v. Hilton, 12 Leigh (Va.) 1.

[49] Eberhardt v. Christiana Window Glass Co., 9 Del. Ch. 284, 81 Atl. 774; Wasson v. English, 13 Mo. 176; Romaine v. Hendrickson's Ex'rs, 27 N. J. Eq. 162; Appeal of Baker, 120 Pa. 33, 13 Atl. 487; Zimmerman v. Harmon, 4 Rich. Eq. (S. C.) 165.

[50] Farrar v. Payne, 73 Ill. 82; Mason v. Martin, 4 Md. 124; Morse v. Hill, 136 Mass. 60; Hawley v. Cramer, 4 Cow. (N. Y.) 717; Barksdale v. Finney, 14 Grat. (Va.) 338; Newcomb v. Brooks, 16 W. Va. 32.

[51] Gunn v. Brantley, 21 Ala. 633; Mason v. Martin, 4 Md. 124; Lass v. Sternberg, 50 Mo. 124; Mulford v. Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Smith v. Miller, 98 Va. 535, 37 S. E. 10.

[52] Miller v. Dodge, 28 Misc. Rep. 640, 59 N. Y. Supp. 1070.

the trustee will not be voidable.[53] So, too, after the transaction has taken place the acts or failure to act on the part of the cestui que trust may bar his right to object. By laches or acts of ratification the beneficiary may lose his right to attack a contract made between trustee and beneficiary.[54] By failure to object within a reasonable time, after full knowledge of the facts, the cestui may affirm the purchase by the trustee of the trust property.[55]

Thus, where the parties capable of avoiding a purchase by a trustee on his own sale stand by and permit the trustee to improve the property as his own, they cannot afterwards set aside the sale or have a constructive trust declared.[56]

The court of chancery may, for sufficient reason and under such restrictions as it may impose, permit the trustee to bid at his own sale.[57]

POSSESSION AND CUSTODY OF TRUST PROPERTY

100. The trustee should take the trust property into his possession and protect it against trespass, waste, and conversion. He should reduce choses in action to money as soon as possible. Except in extraordinary cases, where possession will be highly advantageous to him, the cestui que trust is not entitled to demand from the trustee the possession of the trust property.

The trustee is ordinarily vested with the legal title to the trust res and should take all steps necessary to protect such title.

[53] Faucett v. Faucett, 1 Bush (Ky.) 511, 89 Am. Dec. 639; De Caters v. Le Ray De Chaumont, 3 Paige (N. Y.) 178; Ungrich v. Ungrich, 131 App. Div. 24, 115 N. Y. Supp. 413; Roberts v. Roberts, 65 N. C. 27; Field v. Arrowsmith, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185. But see Munro v. Allaire, 2 Caines' Cas. (N. Y.) 183, 2 Am. Dec. 330.

[54] Stewart's Adm'r v. Carneal, 51 S. W. 800, 21 Ky. Law Rep. 497; Prince de Bearn v. Winans, 111 Md. 434, 74 Atl. 626; Bushe v. Wright, 118 App. Div. 368, 103 N. Y. Supp. 403; Boyd v. Hawkins, 17 N. C. (2 Dev. Eq.) 195; Inlow v. Christy, 187 Pa. 186, 40 Atl. 823.

[55] Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134; James v. James, 55 Ala. 525; Hayward v. Ellis, 13 Pick. (Mass.) 272; Jones v. Smith, 33 Miss. 215; Scott v. Freeland, 7 Smedes & M. (15 Miss.) 409, 45 Am. Dec. 310; Mulford v. Minch, 11 N. J. Eq. 16, 64 Am. Dec. 472; Greagan v. Buchanan, 15 Misc. Rep. 580, 37 N. Y. Supp. 83; Boerum v. Schenck, 41 N. Y. 182; Villines v. Norfleet, 17 N. C. (2 Dev. Eq.) 167; Beeson v. Beeson, 9 Pa. 279; Price v. Nesbit, 1 Hill Eq. (S. C.) 445; Connolly v. Hammond, 51 Tex. 635; Lewis v. Hill, 61 Wash. 304, 112 Pac. 373.

[56] Davis v. Simpson, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500.

[57] Hayes v. Hall, 188 Mass. 510, 74 N. E. 935; Gallatian v. Cunningham, 8 Cow. (N. Y.) 361; Scholle v. Scholle, 101 N. Y. 167, 4 N. E. 334. But see, contra, Linsley v. Strang, 149 Iowa, 690, 126 N. W. 941.

Whether the cestui que trust is entitled to demand a conveyance of the trust property from the trustee is a question upon which the courts are in conflict.

The trustee is under no duty to reconvey to the settlor, unless the settlor has reserved a power of revocation.

The first duty of the trustee, after acceptance of the trust and qualification, is to take possession of the trust property. The very definition of a trust indicates that the trustee is an officer who is to have possession and title to property for the benefit of another. So that, whether the property subject to the trust be real or personal, lands or money, bonds, stocks, or negotiable paper, the trustee should take such steps as are necessary to place such property under his control or in his custody.[58] If the trust property consists of choses in action, such as promissory notes or book accounts, the trustee should proceed with due diligence to their collection.[59] If he is negligent in reducing them to money, and loss results to the trust estate, he will be liable for such loss.[60] Thus, if he waits so long after the obligation becomes due that the obligor becomes insolvent, and he could have collected the debt by promptly bringing suit, the trustee will be obliged to make good the loss to the cestui.

However, the trustee need not sue upon a chose in action the instant it becomes due. "There is no peremptory obligation imposed upon a trustee (especially when acting with the knowledge and approbation of much the largest portion of those interested) to sue upon a bond passed to him as trustee, the moment or the month or the year it becomes due. A due regard to the ultimate security of the debt may require him to indulge the debtor, and if, contrary to a reasonable expectation, any portion of the debt be lost, in the exercise of a fair discretion, regulated solely by an anxious effort to increase the ultimate security of the debt, the chancery court will not visit him with the penalty of making good the loss." [61] If the

[58] Connolly v. Leonard, 114 Me. 29, 95 Atl. 269; Nagle v. Conard, 80 N. J. Eq. 252, 87 Atl. 1119; In re Harbster's Estate, 133 Pa. 351, 19 Atl. 558. A succeeding trustee should investigate the acts of his predecessor and recover from him whatever belongs to the trust estate. In re Lane's Will (Del. Ch.) 97 Atl. 587.

[59] Waterman v. Alden, 144 Ill. 90, 32 N. E. 972; Cross v. Petree, 10 B. Mon. (Ky.) 413; Hunt v. Gontrum, 80 Md. 64, 30 Atl. 620; Speakman v. Tatem, 48 N. J. Eq. 136, 21 Atl. 466; Vilas v. Bundy, 106 Wis. 168, 81 N. W. 812.

[60] Lowson v. Copeland, 2 Brown Ch. Cas. (Eng.) 156; Purdy v. Johnson, 174 Cal. 521, 163 Pac. 893. And a trustee who fails to collect a dividend from an insolvent estate in which he has wrongfully invested trust moneys is liable for the amount of the dividend. Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900.

[61] Waring v. Darnall, 10 Gill & J. (Md.) 126, 142.

best interests of the trust dictate a compromise of the debt due the trust, the trustee is under a duty to make such a compromise, and equity will uphold his action upon the accounting.[62] Corresponding to the duty of the trustee to reduce the principal of the trust property to possession is the obligation on his part to collect the income and profits of the trust estate and retain control of them.[63]

Having obtained possession of the trust property, it is the duty of the trustee to protect that possession. If there be trespass upon or waste of the trust property, he should bring the appropriate action.[64] If the trust goods are converted, he should sue in trover.[65] If real property of the trust is wrongfully occupied, he should eject the trespasser, lest his own title and the right of the cestui que trust be lost by adverse possession.[66] In keeping the property the trustee should use the same care which he would bestow on his individual property. The degree of diligence required depends upon the nature of the trust res. Thus, a trustee who places negotiable bonds in a safety deposit box will not be responsible for their loss, if they are stolen;[67] whereas, of course, he would be responsible if he left them in an unprotected situation. Greater attention is due from the trustee in the case of negotiable securities than would be expected where ordinary chattels are involved.

How Property Must be Kept

It goes almost without saying that the trustee need not retain the trust property in his personal possession constantly. He may intrust the property to agents and employees. It has previously been shown that he may lease real property, when the purposes of the trust require such action.[68]

The trustee should keep the trust property separate from his private property and also from other trust funds.[69] In order that he may be able to account accurately, and in order that the cestui

[62] Brackett v. Middlesex Banking Co., 89 Conn. 645, 95 Atl. 12; Pool v. Dial, 10 S. C. 440.

[63] Windsor Trust Co. v. Waterbury, 160 App. Div. 571, 145 N. Y. Supp. 794.

[64] Stull v. Harvey, 112 Va. 816, 72 S. E. 701. If a cotrustee has taken steps to misappropriate trust funds, the trustee should enjoin his fellow trustee. Crane v. Hearn, 26 N. J. Eq. 378.

[65] Poage v. Bell, 8 Leigh (Va.) 604.

[66] Schiffman v. Schmidt, 154 Mo. 204, 55 S. W. 451; Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728, 7 L. R. A. (N. S.) 407; Hunter v. Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

[67] Carpenter v. Carpenter, 12 R. I. 544, 34 Am. Rep. 716.

[68] See § 90, ante.

[69] Moore v. McKenzie, 112 Me. 356, 92 Atl. 296; In re Union Trust Co. of New York, 86 Misc. Rep. 392, 149 N. Y. Supp. 324; Wagner v. Coen, 41 W. Va. 351, 23 S. E. 735. See, also, the discussion under the subject of investments, post, § 101.

que trust may be able to trace his property with ease, the trustee should not mingle the trust property with other property. If he does so mingle it, and loss results, the trustee will be personally liable.

Ordinarily the trustee is entitled to the possession of the trust property as against all the world, including the cestui que trust.[70] While the cestui is the beneficial owner of the trust property in a certain sense, for a longer or shorter time, still he is expected to obtain the benefit of the property through the trustee, and not directly, except in unusual cases. In applying the general rule an English Court of Chancery has stated the possible exceptions as follows: "There may be cases in which it may be plain, from the nature of the property, that the testator could not mean to exclude the cestui que trust for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this court would deliver the possession of the property to the cestui que trust for life, although the testator's intention appeared that it should remain with the trustees, as where the personal occupation of the trust property was beneficial to the cestui que trust, there the court taking means to secure the due protection of the property for the benefit of those in remainder, would, in substance, be performing the trust according to the intention of the testator." [71]

The general rule is illustrated by a case in which a trust was created for the support and education of a son, to last during his life, with remainder to others. In such case the son is not, on reaching his majority, entitled to the possession of the trust property, a farm.[72] But it has been held that the beneficiary was entitled to the possession of such trust property as slaves, where the only benefit to be had from them would necessarily come from personal use.[73] And an equitable life tenant of stocks has been given by chancery the power to collect the dividends upon the stocks, to the exclusion of the trustee, when the only effect of allowing the trustee to collect and pay over the dividends would be to burden the trust estate with the payment of commissions. In

[70] In re Harbster's Estate, 133 Pa. 351, 19 Atl. 558; Barkley v. Dosser, 15 Lea (Tenn.) 529.

[71] Tidd v. Lister, 5 Madd. 429, 432, 433. The English situation has been affected considerably by legislation since the decision of Tidd v. Lister, Ames' Cases on Trusts (2d Ed.) 467. Possession by the beneficiary is now more generally allowed.

[72] Wickham v. Berry, 55 Pa. 70.

[73] Wade v. Powell, 20 Ga. 645; McKnight v. McKnight, 10 Rich. Eq. (S. C.) 157.

this case the trust property remained in the possession of the trustee, but the right to receive its income directly was granted to the cestui.[74]

Except in the rare cases where the trust res consists of an equitable interest in property, the trustee has the legal title to the trust property and is under a duty to protect that title.[75] All actions based upon the legal title should be brought by the trustee. "The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attack or injury tending to impair its safety or amount. The title to the fund being in them, neither the cestuis que trust nor the beneficiaries can maintain an action in relation to it, as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant." [76]

Cestui's Right to Conveyance

An important question which has given the courts some trouble is whether a cestui que trust possessing the entire beneficial interest in the trust res may demand of the trustee a conveyance of the trust property and thus destroy the trust. If a settlor creates a trust for the collection and accumulation of the income of property until the beneficiary reaches twenty-five years of age, and directs the trustee to deliver to the cestui the principal and accumulated income at that time, may the cestui, upon reaching his majority, demand that the trustee deliver to him at once the trust property? Upon these facts the English courts have held that the cestui was entitled to a conveyance; that he and he alone had "an absolute indefeasible interest in the legacy"; that he was capable of giving a valid discharge after reaching twenty-one, and, being the real owner of the property in equity, he ought to be allowed to enjoy it as he liked, either through the trust or directly.[77]

This view has met with some support in America. Thus, in a New Jersey case it was held that, where a trust to last for ten years was created for the benefit of a widow and children, the beneficiaries to receive the principal at the end of the trust, the cestuis might demand the conveyance of the property to them prior to the expiration of the trust.[78]

But the opposite view has found strong support. In a leading

[74] Williamson v. Wilkins, 14 Ga. 416.

[75] Parsons v. Boyd, 20 Ala. 112. See § 84, ante.

[76] Western R. Co. v. Nolan, 48 N. Y. 513, 518.

[77] Saunders v. Vautier, 4 Beav. 115. For a further discussion of this subject from the point of view of the power of the cestui que trust to end the trust, see § 128, post.

[78] Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495.

Massachusetts case the court declined to order a conveyance under similar circumstances and said: "This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were sui juris and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute." [79] This view has also been supported in New York, where, however, the situation is somewhat complicated by statutes forbidding both trustee and cestui from aliening their interests.[80] Doubtless the cestui could accomplish the result desired, namely, the obtaining of money immediately, in states where the alienation of the cestui's interest is not prohibited, by borrowing and pledging his interest under the trust instrument as security, or by selling his interest.

Where the trust is passive, the court may, upon the application of the cestui, decree a conveyance to him.[81] In such cases the trustee is a mere receptacle of the title and no useful end can be accomplished by continuing the trust. The Statute of Uses would vest the legal title in the cestui without a conveyance, it would seem.[82] If the trustees voluntarily convey the trust property to cestuis who possess an absolute and indefeasible interest in the property, the title thus obtained will be a valid title.[83] There is no one who can object to such an act. The cestuis might not, in some jurisdictions, have been able to force a conveyance, but, having obtained it, their title is not subject to attack.

In many cases the trustee is expressly given authority to convey the principal to the cestuis. In such cases there can be no doubt

[79] Claflin v. Claflin, 149 Mass. 19, 22, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.

[80] Lent v. Howard, 89 N. Y. 169; Cuthbert v. Chauvet, 136 N. Y. 326, 32 N. E. 1088, 18 L. R. A. 745. See, also, Rhoads v. Rhoads, 43 Ill. 239. But in New York by Laws 1909, c. 247 (now Personal Property Law [Consol. Laws, c. 41] § 23), trusts of personal property may be revoked in whole or in part by the settlor upon the written consent of all the persons interested in the trust.

[81] New England Lodge No. 4, F. & A. M. v. Weaver, 76 Ohio St. 628, 81 N. E. 1192; Inches v. Hill, 106 Mass. 575; Rothschild v. Dickinson, 169 Mich. 200, 134 N. W. 1035.

[82] See ante, § 45.

[83] Obermiller v. Wylie (C. C.) 36 Fed. 641; Taft v. Decker, 182 Mass. 106, 65 N. E. 507; Storrs v. Flint, 46 N. Y. Super. Ct. 498; Smith v. Moore, 142 N. C. 277, 55 S. E. 275, 7 L. R. A. (N. S.) 684.

about the validity of the transfer.[84] Where it is the duty of the trustee to convey to the cestui the trust res, it will be presumed that such duty has been performed and that a conveyance has been executed;[85] but where a conveyance would be a breach of duty, possession by the beneficiary will be presumed not to be under a conveyance from the trustee.[86] These cases are, of course, following the general rule that a trustee is presumed to have performed his duty.[87] Where a trustee is required to execute a conveyance to a cestui que trust, he should not be required to warrant the title except as against his own acts.[88]

Settlor's Rights

Ordinarily the settlor of a trust has no right to demand a reconveyance of the trust property to him, in the absence of a power of revocation expressly reserved.[89] It is not the duty of the trustee to convey to the settlor upon demand, unless such a power of revocation exists, and a conveyance to the settlor and consequent attempt to destroy the trust is a breach of the trustee's duty to the cestui.[90]

Where the instrument creating the trust disposes of the property after the expiration of the trust, a conveyance by the trustee to the persons entitled to the property at the end of the trust is not necessary.[91] The legal title to the property vests in the remaindermen who follow the trust without any further action. But if the trust instrument makes no provision concerning the disposition of the property in a contingency which has happened, and the court decrees that certain parties are entitled to the property after the end of the trust, a conveyance by the trustees to such parties is necessary.[92]

[84] Halper v. Wolff, 82 Conn. 552, 74 Atl. 890; Jarboe v. Griffith, 150 Ky. 549, 150 S. W. 839; Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Mt. Morris Co-op. Building & Loan Ass'n v. Smith (Sup.) 120 N. Y. Supp. 676; Paine v. Sackett 27 R. I. 300, 61 Atl. 753.

[85] Reilly v. Conrad, 9 Del. Ch. 154, 78 Atl. 1080; Marr's Heirs v. Gilliam, 1 Cold. (Tenn.) 488.

[86] Brewster v. Striker, 2 N. Y. 19.

[87] See § 98, ante.

[88] Hoare v. Harris, 11 Ill. 24; Dwinel v. Veazie, 36 Me. 509.

[89] See § 72, ante.

[90] Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153; Diefendorf v. Spraker, 10 N. Y. 246.

[91] Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Mitchell v. Mitchell, 35 Miss. 108; Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. 322; Alexander v. Springs, 27 N. C. (5 Ired.) 475; Westcott v. Edmunds, 68 Pa. 34; In re Sheaff's Estate, 231 Pa. 251, 80 Atl. 361.

[92] Sanger v. Bourke, 209 Mass. 481, 95 N. E. 894.

INVESTMENTS

101. In making investments the trustee is bound to use the highest degree of good faith and the discretion of a reasonably prudent man. He should seek to obtain the highest income return which is consistent with the safety of the principal.

The settlor may direct the trustee concerning his investments. Such instructions should be followed, but in obeying them the trustee is not relieved from the duty of exercising good faith and reasonable care.

Chancery may instruct the trustee concerning his investments. Frequently the proper trust investments are prescribed by statute.

The trustee may deposit the trust funds in a bank of good reputation for a reasonable time, while seeking an investment, but should not place the funds on time deposit.

The following forms of investment are generally disapproved as trust investments:

(1) Investments on personal security alone;
(2) Investments in trade, business or speculation, by way of stocks or otherwise;
(3) Real estate;
(4) Investments in foreign jurisdictions.

Equity generally sanctions investments in—

(1) Notes or bonds secured by mortgages on real estate, where the margin of security is ample;
(2) Government bonds;
(3) An approved list of railroad bonds in many states.

Whether it is the duty of a trustee to change an improper investment, which he receives from the settlor, is a disputed question.

A cestui que trust, of full age and sound mind, and acting with full knowledge of the circumstances, may consent to or acquiesce in an improper investment in such a way as to prevent him from holding the trustee liable therefor.

It has been previously shown [93] that, in the performance of his trust duties, the trustee is under an obligation to exercise the highest degree of good faith and the care and skill of an ordinary man in the conduct of his own affairs. This rule applies to the invest-

[93] See § 97, ante.

ment of the trust funds, as well as to the other functions of the trustee. "It has long been the rule in this commonwealth that in making investments, as well as in the general management of the trust, a trustee is held only to good faith and sound discretion, and hence that he cannot be held for the consequences of an error in judgment, unless the error is such as to show either that he acted in bad faith or failed to exercise sound discretion." [94] In deciding whether the investments of the settlor shall be continued, and in making new investments, the trustee should be strictly honest and fair toward the cestui que trust, and he should use the diligence and prudence which an ordinary business man would use in investing his own funds for like objects.[95] In determining what is ordinary skill and diligence, the court will consider extraordinary conditions such as the existence of war.[96]

In making investments the trustee should be guided by the interests of both present cestuis que trust and the remaindermen or future cestuis que trust. The trustee should look to the security of the fund, to the production of a reasonable income, and to the obtaining of an investment which is readily salable.[97] Thus, where a trust fund was for the support and education of infants, the New York court has said that "the first and obvious duty was to place that fifteen thousand dollars in a state of security; second, to see to it that it was 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." [98]

The authority of the trustee to invest the trust funds, and his corresponding duty, may be expressly set forth in the trust instrument, or it may be inferred. If the proper administration of the trust requires investment, of course, the duty to invest will be implied.[99] So, too, the power and duty to change investments is one frequently implied. Where the trust administration is to last for some time, the production of a suitable income will frequently re-

[94] Taft v. Smith, 186 Mass. 31, 32, 70 N. E. 1031.

[95] Richardson v. Morey, 18 Pick. (Mass.) 181; Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074; Roosevelt v. Roosevelt, 6 Abb. N. C. (N. Y.) 447; King v. Talbot, 40 N. Y. 76; Nance v. Nance, 1 S. C. 209; Watkins v. Stewart, 78 Va. 111.

[96] Foscue v. Lyon, 55 Ala. 440; Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389.

[97] Tarbox v. Tarbox, 111 Me. 374, 89 Atl. 194; Appeal of Pray, 34 Pa. 100.

[98] King v. Talbot, 40 N. Y. 76, 88.

[99] In re Kaiser's Estate, 2 Lanc. Law Rev. (Pa.) 362; Appeal of Grothe, 135 Pa. 585, 19 Atl. 1058.

quire the trustee to shift his investments. A power and duty to do this in liberally implied.[1]

The trustee should invest the funds of the estate within a reasonable time. What is a reasonable time is a question of fact, which will be solved by a consideration of the amount of the fund and the state of the investment market in the community. Two months has been held to be a reasonable time within which the trustee might search for an investment,[2] but more than two years delay in investing the trust funds has been held unreasonable.[3]

The propriety of an investment will, of course, be determined as of the time when it was made by the trustee.[4] It is elementary that the trustee should invest the trust funds separately from his own funds and from other trust funds,[5] that he should not invest the trust money in his own name but rather in the name of the trust;[6] that the trustee should not make the investment in such a way as to result in his private gain;[7] and that as far as possible the trust funds should be invested within the jurisdiction where the trust is

[1] Luxon v. Wilgus, 7 Bush (Ky.) 205; Citizens' Nat. Bank v. Jefferson, 88 Ky. 651, 11 S. W. 767; Spencer v. Weber, 163 N. Y. 493, 57 N. E. 753. See St. Mass. 1918, c. 68, by which the power to change trust investments is granted, in the absence of contrary directions in the trust instrument.

[2] Appeal of Witmer, 87 Pa. 120.

[3] Cavender v. Cavender (C. C.) 8 Fed. 641.

[4] Taft v. Smith, 186 Mass. 31, 70 N. E. 1031. If the trust investments depreciate in value, due to causes not involving the negligence of the trustee, he is not liable. In re Blauvelt's Estate (Sur.) 20 N. Y. Supp. 119; In re Menzie's Estate, 54 Misc. Rep. 188, 105 N. Y. Supp. 925; In re Bartol's Estate, 182 Pa. 407, 38 Atl. 527; In re Gouldey's Estate, 201 Pa. 491, 51 Atl. 315.

[5] McCullough's Ex'rs v. McCullough, 44 N. J. Eq. 313, 14 Atl. 642. But in a recent New York Case (In re Union Trust Co. of New York, 219 N. Y. 514, 114 N. E. 1057) the mingling of several trust funds in a single investment has been approved; and later statutes allow trust companies which are trustees to mix trust investments and to hold money for investment in their own names, upon the making of appropriate records. Laws N. Y., 1917, c. 385. And by Laws N. Y. 1918, c. 544, mixture of trust and private funds in the same bond and mortgage is allowed under certain conditions. The trustee should not buy a mortgage on property in which a corporation of which he is president is interested. Strong v. Dutcher, 186 App. Div. 307, 174 N. Y. Supp. 352.

[6] Morris v. Wallace, 3 Pa. 319, 45 Am. Dec. 642. By Laws N. Y. 1916, c. 588, it is made a misdemeanor and ground for removal to invest trust funds in the trustee's name individually. "One of these rules is that the trustee who invests such funds in his own name becomes personally responsible. * * * Were he permitted to do otherwise, it would place before him the constant temptation to make the trust fund a dumping ground for his own unsatisfactory ventures." Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333, 341.

[7] In re Carr's Estate, 24 Pa. Super. Ct. 369.

being administered.[8] That an investment was made by the advice of counsel is no excuse, if it was improperly made.[9] The trustee must shoulder the responsibility himself.

The trustee should obtain as high a rate of interest on the trust fund as is consistent with safety. There is no absolute standard. Each case must be solved upon its own facts, and depends upon the investment market in the community and the nature of the trust. It has been held that 4½ per cent. was a proper amount of interest to receive,[10] while in other cases the rates of 2.8 per cent.[11] and from 3 to 4 per cent.[12] have been held unreasonably low.

A direction to invest the "estate" will be construed to imply the duty to invest the accumulated income, which is to be paid over to the beneficiaries on their majorities.[13] If interest is accumulating, and will be necessarily held for some time in the hands of the trustee, he should invest it.[14]

Settlor's Directions

In considering the duties of a trustee regarding the investment of trust funds, it should be remembered that those duties may be seriously affected or wholly controlled by the directions of the settlor in the trust instrument. The settlor may expressly name the investments which the trustee is under a duty to make, or the settlor may direct the trustee to retain the investments which the settlor had made, or the settlor may give the trustee discretion to invest as he sees fit. "It is fundamental law that a testator or the creator of a trust has unlimited authority to direct how his money may be invested by his trustees, or may leave the manner of such investment completely in the discretion of such trustees." [15]

If the settlor selects a particular investment as one in which he desires the trust funds to be placed, it is the duty of the trustee to retain the trust funds in such investment, if they are already

[8] McCullough's Ex'rs v. McCullough, 44 N. J. Eq. 313, 14 Atl. 642.

[9] In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25.

[10] Appeal of Graver, 50 Pa. 189.

[11] In re Shields' Estate, 14 Phila. (Pa.) 307.

[12] In re Whitecar's Estate, 147 Pa. 368, 23 Atl. 575.

[13] In re Stewart, 30 App. Div. 368, 51 N. Y. Supp. 1050; affirmed 163 N. Y. 593, 57 N. E. 1125.

[14] Fowler v. Colt, 22 N. J. Eq. 44.

[15] In re Reid, 170 App. Div. 631, 634, 156 N. Y. Supp. 500. See, also, Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 91, 95 N. E. 59, 45 L. R. A. (N. S.) 411, where the court said: "The creator of a trust may designate how the investments may be made and what security may be taken, or that security may be dispensed with, and the trustees will be bound by the directions." The settlor may reserve the right to direct the investments after the commencement of the trust. Rice v. Halsey, 156 App. Div. 802, 142 N. Y. Supp. 58.

there, or otherwise to place them in such investment.[16] Thus, a direction of a creator of a trust to invest the shares of the cestuis que trust separately,[17] or to retain certain bonds as the subject-matter of the trust,[18] or to invest in secure stocks or other securities,[19] should be followed implicitly by the trustee.

The settlor may, by express direction, give the trustee authority to invest in ways which would ordinarily be unlawful. Thus, a provision for the lending of the trust fund on personal security to a certain business firm,[20] or a clause allowing the purchase of railroad bonds,[21] is valid, and the trustee will be protected in making such investments. But directions by a settlor, allowing a departure from ordinary trust investments, will be strictly construed, and no investment under such authority permitted which is not expressly provided for therein.[22]

It has been held that equity has no power to direct the trustee to disregard the instructions of the settlor regarding investments, unless all persons interested in the trust consent to such change.[23] But, in other cases, where obedience to the settlor's directions would result in loss or disadvantage to the cestuis and all the adult

[16] MacGregor v. MacGregor, 9 Iowa, 65; Gray v. Lynch, 8 Gill (Md.) 403; Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71; Vernon v. Marsh's Ex'rs, 3 N. J. Eq. 502; In re Watson, 81 Misc. Rep. 89, 142 N. Y. Supp. 1058; Seligman v. Seligman, 89 Misc. Rep. 194, 151 N. Y. Supp. 889; Appeal of Ihmsen, 43 Pa. 431. A direction to "preserve" present investments warrants subscribing to additional shares of stock, where such right is given to stockholders, even though the trust instrument also prohibits investments in stock. In re Tower's Estate, 253 Pa. 396, 98 Atl. 576. If the failure to follow the directions of the settlor results in no loss, the trustee will not be penalized. In re McKinney's Estate, 260 Pa. 123, 103 Atl. 590. Although the settlor directs investment in railroad bonds, an investment in Liberty Bonds in time of war will be approved. In re London's Estate, 104 Misc. Rep. 372, 171 N. Y. Supp. 981.

[17] In re Watson, 81 Misc. Rep. 89, 142 N. Y. Supp. 1058.

[18] Seligman v. Seligman, 89 Misc. Rep. 194, 151 N. Y. Supp. 889.

[19] Appeal of Ihmsen, 43 Pa. 431.

[20] In re Reid, 170 App. Div. 631, 156 N. Y. Supp. 500.

[21] In re Bartol's Estate, 182 Pa. 407, 38 Atl. 527.

[22] In re Franklin Trust Co., 84 Misc. Rep. 686, 147 N. Y. Supp. 885. Thus, a direction to invest in "first-class interest-bearing real estate mortgage securities" does not authorize the purchase of bonds secured by a blanket mortgage protecting the whole issue. The trustee should obtain a mortgage for his benefit alone. In re Mendel's Will, 164 Wis. 136, 159 N. W. 806.

[23] Clark v. St. Louis A. & T. H. R. Co., 58 How. Prac. (N. Y.) 21; Burrill v. Sheil, 2 Barb. (N. Y.) 457; Snelling v. McCreary, 14 Rich. Eq. (S. C.) 291. Thus, in International Trust Co. v. Preston, 24 Wyo. 163, 156 Pac. 1128, it was held that a court had no power to sanction an investment in Mexican bonds when the will directed investment in bonds of the United States or a state or municipality thereof.

cestuis consent, the court has decreed that the trustee might be relieved from the duty of following the direction of the settlor and might make a more advantageous investment.[24] Thus, where a trust fund amounts to but $2,000, and the trust instrument directs that it be invested in Florida real estate upon which houses are to be built for winter tourists, and it is desirable to make an investment which will yield some income at once for the beneficiaries, a New York court of equity felt justified in directing the trustee to disregard the settlor's direction and make a productive investment.[25]

If the settlor authorizes the trustee to invest the trust funds as may seem best to the trustee or according to his discretion, he has a wide margin for action. He is not required to make his selection from the securities and investments declared by equity or by statute to be legal investments for trust funds. He may choose reasonable investments outside such approved lists.[26] Thus, where the trustee has discretion with respect to the investments, he may lawfully invest in railway and street railway bonds [27] and in real estate outside the state,[28] if such investments are reasonably prudent.

But the grant of discretion in the making of investments does not protect the trustee in *any* investment which he may make. He must use good faith and reasonable prudence in exercising his discretion.[29] Just because he may go outside the selected list of trust investments approved by the court or the Legislature does not mean that he may invest the trust funds in any wildcat venture.

[24] Wood v. Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; McIntire's Adm'rs v. City of Zanesville, 17 Ohio St. 352; Perronneau v. Perronneau's Ex'rs, 1 Desaus. (S. C.) 521. In Hackett's Ex'rs v. Hackett's Devisees, 180 Ky. 406, 202 S. W. 864, the court says that the testator's direction must be followed unless no such investment as is directed can be made or the safety of the investment directed has become doubtful by supervening circumstances. As showing the recent tendency of the English courts on this subject, see In re D'Epinoix's Settlement, [1914] 1 Ch. 890.

[25] In re Snyder's Will (Sup.) 136 N. Y. Supp. 670.

[26] Cromey v. Bull, 4 Ky. Law Rep. 787; Lawton v. Lawton, 35 App. Div. 389, 54 N. Y. Supp. 760; In re Vom Saal's Will, 82 Misc. Rep. 531, 145 N. Y. Supp. 307; Willis v. Braucher, 79 Ohio St. 290, 87 N. E. 185, 44 L. R. A. (N. S.) 873, 16 Ann. Cas. 66. In Lawson v. Cunningham, 275 Mo. 128, 204 S. W. 1100, under such a grant of discretion, an investment in land was sanctioned.

[27] In re Allis' Estate, 123 Wis. 223, 101 N. W. 365.

[28] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59.

[29] Appeal of Davis, 183 Mass. 499, 67 N. E. 604. Thus, a loan to himself is not warranted by the grant of such discretion. Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135.

He must select an investment which he honestly believes will be safe and productive,[30] and he must act with reasonable prudence and diligence.[31] The fact that the trustee has authority to exercise his discretion regarding investments does not make it proper for him to invest in a manufacturing plant in another state, when he has little or no knowledge concerning the business,[32] nor to invest in stocks,[33] nor to speculate in Western lands [34] with the trust funds. In an opinion in which it disapproved of an investment in the stock of an umbrella manufacturing company by a trustee having discretion concerning investments, the New York Court of Appeals has said: [35] "We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. * * * But such a discretion, in the absence of words in the will giving greater authority, should not be held to authorize investment of the trust fund in new speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other."

Court Control

Not only may the duty of the trustee regarding investments be controlled by the settlor, but also by chancery. If the trustee is in doubt concerning the investments which he should make, he may apply to the court, and it will give him direction.[36] These de-

[30] In re Smith, [1896] 1 Ch. 71.

[31] Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; Clark v. Clark, 23 Misc. Rep. 272, 50 N. Y. Supp. 1041; In re Vom Saal's Will, 82 Misc. Rep. 531, 145 N. Y. Supp. 307. The court will review the exercise of the discretion and will disapprove such investments as loans to a corporation in which the trustees are individually interested. In re Keane, 95 Misc. Rep. 25, 160 N. Y. Supp. 200.

[32] In re Hart's Estate, 203 Pa. 480, 53 Atl. 364.

[33] In re Hirsch's Estate, 116 App. Div. 367, 101 N. Y. Supp. 893, affirmed 188 N. Y. 584, 81 N. E. 1165.

[34] In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50.

[35] In re Hall, 164 N. Y. 196, 199, 200, 58 N. E. 11.

[36] Drake v. Crane, 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653; Tillinghast v. Coggeshall, 7 R. I. 383; Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10.

crees should be implicitly obeyed, and the trustee will be protected, no matter what the result of the investment, if it was made in strict accordance with a court order.[37] Likewise, disobedience to the court order will render the trustee personally liable for losses. Thus, where a trustee submitted the trust to the jurisdiction of the court and was ordered to invest the funds in government bonds, but instead left the money in a bank in which he was interested, and the bank failed, the trustee was charged with the loss ensuing to the trust estate.[38]

The trustee's duty in the selection of investments may be expressly set forth in the statutes of the state concerned. Legislatures have, in a large number of states, approved of certain investments and required trustees to place trust funds in those investments only.[39] It is impossible here to give the details of all these acts.[40] Typical provisions are referred to below.[41] No trustee should make an investment without a careful examination of the statutes of the state within which the trust is being administered.

Having considered the general standards of care and honesty applicable to trustees in making investments, and the ways in which the duties of trustees regarding investments may be controlled by the action of the settlor or of the court, as well as by statute, it remains to discuss specifically the legality of various investments in cases where no statute, no term in the trust instrument, and no decree of court controls the trustee. What are the rules of equity concerning investments? In what ways may the trustee make the trust funds productive with the assurance that chancery will approve?

[37] Wheeler v. Perry, 18 N. H. 307; Wood v. Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; In re Old's Estate, 176 Pa. 150, 34 Atl. 1022.

[38] Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10.

[39] For a collection of the authorities upon trust investments in the several states, see McKinney, Liabilities of Trustees for Investments. This book purports to set forth the statutes of all the states.

[40] Statutory provisions regulating trust investments are construed in the following decisions: Clark v. Beers, 61 Conn. 87, 23 Atl. 717; Stone v. Clay, 103 Ky. 314, 45 S. W. 80; Aydelott v. Breeding, 111 Ky. 847, 64 S. W. 916; Robertson v. Robertson's Trustee, 130 Ky. 293, 113 S. W. 138, 132 Am. St. Rep. 368; Ridley v. Dedman, 134 Ky. 146, 119 S. W. 756; Smith v. Robinson, 83 N. J. Eq. 384, 90 Atl. 1063; In re Randolph (Sur.) 134 N. Y. Supp. 1117, affirmed 150 App. Div. 902, 135 N. Y. Supp. 1138; In re Derr's Estate, 203 Pa. 96, 52 Atl. 27; Bagnell v. Ives (C. C.) 184 Fed. 466; Branch v. De Wolf, 28 R. I. 542, 68 Atl. 543; Crickard's Ex'r v. Crickard's Legatees, 25 Grat. (Va.) 410; In re Allis' Estate, 123 Wis. 223, 101 N. W. 365.

[41] The following are statutes which illustrate the methods in which the Legislatures have regulated the duties of trustees regarding investments:

"A trustee must invest money received by him under the trust, as fast as

Bank Deposits

Naturally some time will be necessary to enable the trustee to find a proper investment. What shall he do with the funds while searching for such investment? It would be unreasonable to require that he keep the money of the trust in his actual possession at his house or place of business, or that he be required to rent a safety deposit box in which to place the funds. An ordinarily prudent business man places funds on deposit in a bank while searching for an investment. It is unquestioned law that a trustee may deposit the funds in a bank for a reasonable time after their receipt. What is a reasonable time is a question of fact, to be determined upon the circumstances of each case. De-

he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same." Civ. Code Cal. § 2261.

"Investments of trust funds by trustees may, when not otherwise provided by the will, deed, decree, gift, grant or other instrument creating or fixing the respective trust, be in the bonds of the United States or of any of the states of the United States, or in first mortgages upon real estate in any state or in the bonds of any county, city or municipality 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, but no trustee shall be authorized by this act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money and any trustee may continue to hold any investment received by him under the trust or any increase thereof." 1 Jones & A. Ann. St. Ill. 1913, par. 188.

"A trustee or other person holding trust funds for investment may invest the same in 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 fifty per centum more than the amount loaned thereon. A trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself." New York Personal Property Law (Consol. Laws, c. 41) § 21.

The investments legal for savings banks in New York, and therefore also legal for trustees under the above statute, are set forth in section 239 of the Banking Law (Consol. Laws, c. 2). The savings bank list includes United States bonds, New York state bonds, bonds of other states which have had a satisfactory record for ten years, bonds of municipalities within New York state, bonds of cities in other states, where the financial record of the city and its size are satisfactory, mortgages on real property located in New York, and certain selected railroad bonds. By subdivisions 8 and 10 notes secured by approved stocks and bonds, notes of certain savings and loan associations, and bonds of the state land bank are added.

"Executors, administrators, trustees and other fiduciaries may invest the funds held by them in a fiduciary capacity in the following securities, which are and shall be considered lawful investments: (1) In the bonds issued un-

posits for three years,[42] two years,[43] fourteen months,[44] and ten months [45] have been held to be unreasonably long, and therefore to render the trustee liable when the bank failed during the period of deposit. The Supreme Court of the United States has expressed the view that three months is ordinarily a reasonable time of deposit.[46] In many cases a temporary deposit in a bank of good repute, selected with due care, has been considered a proper act by the trustee, and the failure of such bank has not rendered the trustee liable for the amount of the loss to the trust fund.[47] "So, also, executors, trustees, or guardians will not be liable if, in the ordinary discharge of their duty, they deposit the assets temporarily in a bank, although the bank may fail. * * * A trustee

der the act approved February fourteenth, eighteen hundred and eighty-two, commonly known as the Riddleberger bonds. (2) In the stock or bonds or interest-bearing notes or obligations of the United States or those for which the faith of the United States is pledged to provide for the payment of the principal and interest, including any bonds of the District of Columbia. (3) In the bonds of any county, city or town in Virginia, provided the amount of bonds of such county, city or town, including the issue in which such investment is made does not exceed eighteen per centum of the assessed valuation of the real estate in the county, city or town subject to taxation as shown by the last preceding assessment for taxes, and provided the said bonds are the direct obligation of the county, city or town issuing the same, and for which the faith and credit of the issuing county, city or town is pledged. (4) In bonds and negotiable notes secured by first mortgage or first deed of trust on unencumbered real estate in the state of Virginia, not to exceed eighty per centum of the assessed value of said real estate and improvements. Before any loan is made upon real estate the lender shall be furnished with a satisfactory abstract of title, certificate of title or title insurance policy and a fire insurance policy in an old line company with loss if any payable to the trustee as his interest may appear." Laws Va. 1916, c. 479, in effect June 17, 1916.

See, also, Laws Wis. 1919, cc. 215, 469, 630, and Ky. St. 1915, § 4706, as amended by Laws 1918, c. 141. Farm loan bonds under Federal Farm Loan Act (U. S. Comp. St. §§ 9835a-9835z) have been made proper trust investments by several recent statutes. St. Cal. 1919, p. 270; Pub. Acts Mich. 1919, No. 94; Act Pa. April 5, 1917 (P. L. 47). The investment of trust funds held by towns and cities is regulated by St. Mass. 1916, c. 101, and Laws N. H. 1919, c. 96.

[42] Woodley v. Holley, 111 N. C. 380, 16 S. E. 419.

[43] In re Knight's Estate (Sup.) 4 N. Y. Supp. 412. In re Donohue, 88 Misc. Rep. 359, 151 N. Y. Supp. 1094, a deposit for ten years was held to render the trustee liable.

[44] Cann v. Cann, 33 Wkly. Rep. 40.

[45] Barney v. Saunders, 16 How. 535, 14 L. Ed. 1047.

[46] Barney v. Saunders, 16 How. 535, 14 L. Ed. 1047.

[47] Norwood v. Harness, 98 Ind. 134, 49 Am. Rep. 739; McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118 (affected by a local statute); Jacobus v. Jacobus, 37 N. J. Eq. 17; Odd Fellows' Beneficial Ass'n of Columbus v. Ferson, 3 Ohio Cir. Ct. 84; In re Law's Estate, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; Crane v. Moses, 13 S. C. 561.

who would continuously keep for any considerable length of time a large sum of money about his person or in his house, rather than deposit it for safe-keeping in a solvent and reputable bank or trust company, where all the precautions may be exercised for its safety, might justly be regarded as derelict in duty." [48] A New York court, in speaking of the duty of the trustee, has said that "the deposit may be continued for so long a period as will enable the trustee, in the use of ordinary diligence, to obtain its secure and proper investment, or the exigencies of the estate may require. But where he fails by his neglect within a reasonable time to secure investments, and allows the money still to remain on deposit, and it is thereby lost, the law charges the trustee with the loss." [49]

If the trustee can obtain interest on a call deposit, there is no objection to his so doing; but he should not place the funds of the estate on a time deposit. Such a deposit is a loan to the bank without security, and is not allowable. The fund should be subject to immediate call by the trustee.[50]

The trust fund should always be kept by the trustee so as to be capable of being easily followed by the cestui que trust. Any assumption of private ownership over the trust property, or mixture of the trust property with his own goods, by the trustee, makes the trust property difficult to trace, and is frowned upon by equity. The deposit of the trust moneys pending investment should, under this general rule, be made in the name of the trustee as trustee, and not on his behalf individually. If the trustee has the account entitled with his own name, without mention of the trust,[51] or places the trust moneys in a pre-existing private account,[52] the beneficiary may hold the trustee liable for all losses occurring to

[48] In re Law's Estate, 144 Pa. 499, 506, 22 Atl. 831, 14 L. R. A. 103.

[49] In re Knight's Estate (Sup.) 4 N. Y. Supp. 412, 413.

[50] Baskin v. Baskin, 4 Lans. (N. Y.) 90; Frankenfield's Appeal, 127 Pa. 369 note; Baer's Appeal, 127 Pa. 360, 18 Atl. 1, 4 L. R. A. 609. But see Smith v. Fuller, 86 Ohio St. 57, 99 N. E. 214, L. R. A. 1916C, 6, Ann. Cas. 1913D, 387.

[51] Chancellor v. Chancellor, 177 Ala. 44, 58 South. 423, 45 L. R. A. (N. S.) 1, Ann. Cas. 1915C, 47; Gilbert v. Welsch, 75 Ind. 557; Jenkins v. Walter, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; Coffin v. Bramlitt, 42 Miss. 194, 97 Am. Dec. 449; Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Baskin v. Baskin, 4 Lans. (N. Y.) 90; Booth v. Wilkinson, 78 Wis. 652, 47 N. W. 1128, 23 Am. St. Rep. 443.

[52] Henderson's Adm'r v. Henderson's Heirs, 58 Ala. 582; Webster v. Pierce, 35 Ill. 158; Cartmell v. Allard, 7 Bush (Ky.) 482; In re Stafford, 11 Barb. (N. Y.) 353; McAllister v. Commonwealth, 30 Pa. 536; Mason v. Whitthorne, 2 Cold. (Tenn.) 242; Vaiden v. Stubblefield's Ex'r, 28 Grat. (Va.) 153.

the trust fund while it is so deposited. Equity places this penalty upon the trustee for his mingling of private and trust affairs.

Personal Security

It is a fundamental rule that investment of trust funds upon personal security is a violation of the trust. The trustee should not lend the trust moneys to an individual or a corporation and take in return only the bond or note of the borrower. If he cannot obtain security of an approved nature, he should not make the loan. A trustee making a loan upon personal security only will be liable for any losses which occur, due to the failure of the debtor to repay.[53] "However conflicting in some respects the decisions may appear to be, in one respect they are reasonably uniform. It is a generally accepted rule that it is not prudent to invest trust funds in unsecured notes of an individual or of a partnership. We have found no decision which announces a contrary rule where the trust contemplated an investment of a permanent nature." [54] An English judge has said that this "is a rule that should be rung in the ears of every person who acts in the character of trustee." [55]

The sale of trust property and acceptance in return of the notes of the buyer is not allowed by equity, and the trustee will be liable for a loss resulting from the failure of the maker of the notes.[56] In a few cases the taking of certificates of deposit, which amount to nothing more than loans to a bank without security, has been held a proper procedure for a trustee in the investment of the trust funds.[57] But these holdings are out of line with the majority of the authorities.

The reason for prohibiting investment of trust moneys on per-

[53] Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333; Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271; Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900; In re Foster's Will, 15 Hun (N. Y.) 387; In re Petrie, 5 Dem. Sur. (N. Y.) 352; In re Randolph (Sur.) 134 N. Y. Supp. 1117, affirmed 150 App. Div. 902, 135 N. Y. Supp. 1138; Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665; Deobold v. Oppermann, 111 N. Y. 531, 19 N. E. 94, 2 L. R. A. 644, 7 Am. St. Rep. 760; Collins v. Gooch, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284; Roach's Estate, 50 Or. 179, 92 Pac. 118; Nobles v. Hogg, 36 S. C. 322, 15 S. E. 359; Rowe v. Bentley, 29 Grat. (Va.) 756. In a few cases it has been held that trustees on persons in similar situations might invest upon personal security in extraordinary cases. Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Scott v. Trustees of Marion Tp., 39 Ohio St. 153; Singleton v. Lowndes, 9 S. C. 465; Barney v. Parsons' Guardian, 54 Vt. 623, 41 Am. Rep. 858.

[54] Michigan Home Missionary Soc. v. Corning, 164 Mich. 395, 402, 129 N. W. 686.

[55] Holmes v. Dring, 2 Cox, Eq. Cas. 1.

[56] Miller v. Holcombe's Ex'r, 9 Grat. (Va.) 665.

[57] Hunt, Appellant, 141 Mass. 515, 6 N. E. 554; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 N. W. 74.

sonal security is obvious. The borrower may die, or fail in business, or suffer financial reverses. The value of the investment depends partly on the business ability of the borrower and the general financial prosperity of the community. Such an investment is too uncertain for a trustee. He should place the funds so that there will be reasonable assurance of a steady income and ultimate return of the principal. No matter how prosperous the borrower may be at the time of the loan, the payment of principal and interest depends upon the multitude of uncertainties incident to human affairs. The trustee should obtain a lien upon or interest in some property of reasonable permanence as security for the safety of his investment.

Trade and Business

With but few exceptions, the courts do not sanction the use of trust funds in trade or business.[58] The hazards of buying and selling, manufacturing, and transporting goods are too great to render such operations proper for trustees. The trustee may invest the trust moneys in business in any one of several ways. He may, for example, purchase land and engage in coal mining[59] or buy a farm and pursue agriculture.[60] Neither one of these steps would be a proper one for the trustee to take. They involve too much speculation and risk. The greatest possible assurance that a steady income will be produced and that the principal will be returned is required. Or, although not buying directly the property necessary to engage in trade, the trustee may purchase with the trust funds a share in a partnership which is operating a business. This transaction is likewise a breach of duty on the part of the trustee and renders him liable for losses.[61] Perhaps the most common method adopted by trustees for embarking the trust funds in business is that of the purchase of the stock of corporations engaged in business. A great majority of the American courts condemn such an investment by a trustee as too hazardous and speculative.[62]

[58] Adams v. Nelson, 31 Wkly. Law Bul. (Ohio) 46; City of Bangor v. Beal, 85 Me. 129, 26 Atl. 1112; Windmuller v. Spirits Distributing Co., 83 N. J. Eq. 6, 90 Atl. 249; Nagle v. Von Rosenberg, 55 Tex. Civ. App. 354, 119 S. W. 706.

[59] Butler v. Butler, 164 Ill. 171, 45 N. E. 426.

[60] Wieters v. Hart, 68 N. J. Eq. 796, 64 Atl. 1135.

[61] Penn v. Fogler, 182 Ill. 76, 55 N. E. 192; Trull v. Trull, 13 Allen (Mass.) 407; In re Bannin, 142 App. Div. 436, 127 N. Y. Supp. 92.

[62] Williams v. Cobb, 219 Fed. 663, 134 C. C. A. 217; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; Tucker v. State, 72 Ind. 242; Gilbert v. Welsch, 75 Ind. 557; Cropsey v. Johnston, 137 Mich. 16, 100 N. W. 182; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; King v. Talbot, 40 N. Y. 76; Adair v. Brimmer, 74 N. Y. 539; In re Hall, 164 N. Y. 196, 58 N.

The prevailing view regarding stocks is set forth in the opinion of the New York court in King v. Talbot, where the propriety of investments in railroad, canal company, and bank stocks was under consideration. The court said:[63] "It is not denied that the employment of the fund as capital in trade would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a copartnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it. The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety, and the hazard or risk of loss, is no longer dependent upon their skill, care, or discretion, in its custody or management, and the terms of the investment do not contemplate that it will ever be returned to the trustees. If it be said that, at any time, the trustees may sell the stock (which is but another name for their interest in the property and business of the corporation), and so repossess themselves of the original capital, I reply that is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condidition of uncertainty, dependent upon two contingencies: First, the practicability of making the business profitable; and, second, the judgment, skill, and fidelity of those who have the management of it for that purpose."

The courts of a few states, however, have taken the position that investments in corporate stock are not necessarily improper; that their propriety is to be determined from the nature of the stock and the amount of the investment. If the stock is one of a reputable company, of strong financial position, and the amount invested therein is not an unduly large proportion of the trust funds, the investment will be approved.[64] Thus, in Dickinson, Appellant,[65] the Massachusetts court held that an investment of more than $3,500 out of a trust fund of $16,200 in the stock of the Union

E. 11; English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697; Appeal of Worrell, 23 Pa. 44; Appeal of Pray, 34 Pa. 100; Appeal of Ihmsen, 43 Pa. 431. See, however, Costello v. Costello, 209 N. Y. 252, 103 N. E. 148, in which it was held that the statutory and court rules in force in New York, while generally denying the trustee the right to invest in stock, do not invariably make such an investment illegal and that the trustees were in that case authorized to accept corporate stock in exchange for an interest in a partnership.

[63] 40 N. Y. 76, 88, 89.

[64] Gray v. Lynch, 8 Gill (Md.) 403; McCoy v. Horwitz, 62 Md. 183; Dickinson, Appellant, 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 79; Appeal of Davis, 183 Mass. 499, 67 N. E. 604; Smyth v. Burns' Adm'rs, 25 Miss. 422; Peckham v. Newton, 15 R. I. 321, 4 Atl. 758; Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014.

[65] 152 Mass. 184, 25 N. E. 99, 9 L. R. A. 279.

Pacific Railroad Company was improper, on account of the fact that it placed too great a proportion of the funds in the stock of one corporation. The court said:[66] "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

Corporate bonds are of two general classes, those secured by mortgages on the property of the corporation, and those which have no basis except the promise of the corporation to pay. The latter are investments on personal security alone, and are not permitted any more than are investments on the credit of private individuals.[67] In the absence of statute, corporate bonds secured by mortgages on the property of business corporations are not allowable trust investments.[68] The value of the security is too uncertain. It is dependent on the chances of business. The statutes of many states now allow trustees to invest in railroad bonds of certain approved companies, which have a satisfactory record for a considerable length of time.[69]

Real Estate

Ordinarily a trustee should not invest the trust moneys in real estate.[70] The same rule is applied to quasi trustees, as, for example, guardians.[71] Real property may be productive or unproductive, dependent on many circumstances. Farm land will be productive, if the weather is good, the rainfall proper, and the farmer industrious and skillful. Business and residential property will be pro-

[66] 152 Mass. 184, 187, 188, 25 N. E. 99, 9 L. R. A. 279.

[67] Allen v. Gaillard, 1 S. C. 279.

[68] Judd v. Warner, 2 Dem. Sur. (N. Y.) 104; In re Keteltas' Estate (Sur.) 6 N. Y. Supp. 668; In re McDowell, 97 Misc. Rep. 306, 163 N. Y. Supp. 164; Id., 102 Misc. Rep. 275, 169 N. Y. Supp. 853; In re Hart's Estate, 203 Pa. 480, 53 Atl. 364.

[69] For example, see New York Personal Property Law (Consol. Laws, c. 41) § 21, and Banking Law (Consol. Laws, c. 2) § 239.

[70] Bowman v. Pinkham, 71 Me. 295; West v. Robertson, 67 Miss. 213, 7 South. 224; Williams v. Williams, 35 N. J. Eq. 100; Baker v. Disbrow, 18 Hun (N. Y.) 29; Morton's Ex'rs v. Adams, 1 Strob. Eq. (S. C.) 72; Stone v. Kahle, 22 Tex. Civ. App. 185, 54 S. W. 375. Where the trust funds are partially invested in realty and there is a shortage of income, the court will order a sale of realty and an investment of the proceeds in productive securities. Lesesne v. Cheves, 105 S. C. 432, 90 S. E. 37.

[71] Eckford v. De Kay, 8 Paige (N. Y.) 89; Fourth Nat. Bank v. Hopple, 6 Ohio Dec. 482; Scheib v. Thompson, 23 Utah, 564, 65 Pac. 499; Boisseau v. Boisseau, 79 Va. 73, 52 Am. Rep. 616.

ductive, if the buildings are kept in good repair, are not destroyed by fire, and the trustee is diligent and skillful in the management of the property. But there are too many contingencies regarding the productivity of real property to make it a safe investment for a trustee. In addition to the above objection, real property is often difficult to sell. The trustee may find great trouble in converting the investment into cash when he is required to distribute the trust funds. Nor should a trustee place the trust funds in a leasehold estate in real property.[72] But a loan of the trust funds secured by a mortgage upon real property is not, of course, an investment in lands.[73] The latter investment is approved, providing the margin of security is ample.[74]

In some instances, however, courts have sanctioned a trust investment in real estate, even though such property was without the state in which the trust was to be administered.[75] If the trust instrument expressly authorizes an investment in land, it is obvious that there is sound basis for an approval of the real estate investment.[76] If unusual conditions render desirable an investment in land, the court may grant permission to use the trust funds for such purpose,[77] or the trustee may, in rare cases, so apply the trust funds without express court direction.[78] Thus, where slaves and other property were given to a mother as trustee for her children, for the purpose of supporting the children, and the children had no land upon which the slaves could work, the mother was held entitled to invest in land in order to render the trust property useful and productive.[79]

Foreign Investments

As a general rule a trustee should not make an investment outside the jurisdiction in which he is acting. Thus, if he is appointed trustee by a will admitted to probate in New Jersey, and is thus liable to account to the courts of New Jersey for the faithful administration of his trust, he should seek investments within the state of New Jersey. He should not, unless authorized by stat-

[72] In re Anderson, 211 N. Y. 136, 105 N. E. 79.

[73] Millhous v. Dunham, 78 Ala. 48; Zimmerman v. Fraley, 70 Md. 561, 17 Atl. 560.

[74] See page 362, post.

[75] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59, 45 L. R. A. (N. S.) 411; Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074.

[76] Amory v. Green, 13 Allen (Mass.) 413; Schaffer v. Wadsworth, 106 Mass. 19.

[77] In re Bellah, 8 Del. Ch. 59, 67 Atl. 973; Ex parte Jordan, 4 Del. Ch. 615; Ridley v. Dedman, 134 Ky. 146, 119 S. W. 756.

[78] Bethea v. McColl, 5 Ala. 308; Troy Iron & Nail Factory v. Corning, 45 Barb. (N. Y.) 231.

[79] Bethea v. McColl, 5 Ala. 308.

ute or by the court, invest, for instance, in bonds secured by mortgages on real estate in Kansas. This general principle is recognized in a number of decisions.[80]

In considering the validity of an investment in a bond and mortgage on Ohio real estate, a New York court has well stated the rule:[81] "While, therefore, we are not disposed to say that an investment by a trustee in another state can never be consistent with the prudence and diligence required of him by the law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless in the presence of a clear and strong necessity, or a very pressing emergency." In that case, however, the court held that a trustee, who was seeking to recover lost trust moneys from the representatives of a defaulting, deceased trustee, was justified in taking a bond secured by a mortgage on foreign real estate as the best satisfaction which he could obtain.

In numerous cases exceptions to this general rule have been made. In some instances the court has allowed foreign investments without any special reason;[82] in other decisions there have been unusual circumstances, as, for example, that the trust instrument gave express authority for the foreign investment,[83] or that the amount invested in foreign real estate was very small in comparison to the size of the whole estate,[84] or that the property taken as security was just across the state boundary and thus within easy reach of the trustee,[85] or that the trustee necessarily took foreign real estate security in order to effect a sale of foreign real estate which the settlor had placed in his hands.[86] The court may permit an investment in foreign real property.[87] In allowing a $200,000 investment in lands located in Illinois, that sum being but a small part of the total trust funds, a Massachusetts court has thus

[80] McCullough's Ex'rs v. McCullough, 44 N. J. Eq. 313, 14 Atl. 642; In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50; Collins v. Gooch, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284; Pabst v. Goodrich, 133 Wis. 43, 113 N. W. 398, 14 Ann. Cas. 824.

[81] Finch, J., in Ormiston v. Olcott, 84 N. Y. 339, 343.

[82] Merchants' Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59, 45 L. R. A. (N. S.) 411; Stevens v. Meserve, 73 N. H. 293, 61 Atl. 420, 111 Am. St. Rep. 612.

[83] Amory v. Green, 13 Allen (Mass.) 413.

[84] Thayer v. Dewey, 185 Mass. 68, 69 N. E. 1074.

[85] In re Gouldey's Estate, 201 Pa. 491, 51 Atl. 315.

[86] Denton v. Sanford, 103 N. Y. 607, 9 N. E. 490.

[87] Ridley v. Dedman, 134 Ky. 146, 119 S. W. 756.

stated the rule:[88] "There is grave objection to the investment of a trust fund in the purchase of real estate in a foreign state, where the property is beyond the jurisdiction of our courts and is subject to laws different from our own. On this account it would not be within the exercise of a sound discretion to make such an investment without some good reason to justify the choice of it. Ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust. But in this commonwealth there is no arbitrary, universal rule that an investment will not be approved if it consists of fixed property in another state."

Mortgages

First mortgages on real property within the jurisdiction, where the margin of security is ample, are universally approved as trust investments. The permanence and indestructibility of the property taken as security render them very safe investments. Under the English common-law rule only real property security and government stocks and bonds were regarded as proper investments for a trustee.[89] The field of investment has now been much broadened by legislation and action of the courts, but naturally the old, conservative real estate and government securities remain lawful and, indeed, preferred forms of investment. Very generally statutes announce the legality of trust investments secured by mortgages upon real estate.[90]

Trustees are restricted to lending only a reasonable proportion of the value of the real property taken as security. The proportion has been fixed variously in different jurisdictions at amounts ranging from 50 per cent. to two-thirds of the value.[91] The statutes also frequently make distinctions between loans secured by mortgage upon improved, productive real property and loans secured by mortgage on unimproved, unproductive property.[92]

[88] Thayer v. Dewey, 185 Mass. 68, 70, 69 N. E. 1074.

[89] Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; King v. Talbot, 40 N. Y. 76; Nance v. Nance, 1 S. C. 209; Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561.

[90] Mills' Ann. St. Colo. 1912, § 7946; Gen. St. Conn. 1918, § 4903; Rev. Code Del. 1915, § 3875; 1 Jones' & A. Ann. St. Ill. 1913, par. 188; Code Iowa, 1897, § 364; Ky. St. 1915, § 4706; Pub. St. N. H. 1901, c. 178, § 9; 2 Comp. St. N. J. 1910, p. 2271, § 35; New York Personal Property Law (Consol. Laws, c. 41) § 21; New York Banking Law (Consol. Laws, c. 2) § 239; 4 Purd. Dig. Pa. (13th Ed.) p. 4925; Nance v. Nance, 1 S. C. 209.

[91] In Alabama a trustee may lend up to two-thirds of the value of the real estate. Foscue v. Lyon, 55 Ala. 440. In a number of states the statutes fix the margin as 50 per cent. Gen. St. Conn. 1918, § 4903, Code Iowa, 1897, § 364; 2 Comp. St. N. J. 1910, p. 2271, § 35; New York Personal Property Law (Consol. Laws, c. 41) § 21. See, also, Clark v. Anderson, 13 Bush (Ky.) 111.

[92] See New York Banking Law (Consol. Laws, c. 2) § 239; by subdivision 6 a building in course of construction makes realty "improved."

While loans secured by second mortgages on land are sometimes allowed, they are generally disapproved by courts of equity.[93] The trustee should not place the trust funds in a position where they may be endangered by the foreclosure of a prior lien. If he holds a junior mortgage, he may be obliged to pay off the senior encumbrance in order to protect his investment. Such action might involve the investment of too great a proportion of the trust funds in one piece of property. In rare cases equity will sanction an investment secured by a second mortgage, but only when the security is adequate and unusual circumstances justify the trustee in taking this form of investment.[94]

In some states the statutes approve investments in the bonds of certain specified railroads.[95] These bonds are of course generally secured by mortgages upon the property of the railroads.

Government Bonds

Government securities are everywhere regarded as safe trust investments. Probably in all jurisdictions the bonds of the United States government and of the governments of those states which have not recently repudiated their debts would be held to be proper trust investments, without statutory authorization. The statutes of many states authorize investment in United States, state, and municipal bonds. Frequently a selected list of state and municipal bonds is given.[96] The public credit is pledged for the payment of such bonds. There is not apt to be a default in their payment, unless the whole country is involved in general ruin.

[93] New Haven Trust Co. v. Doherty, 75 Conn. 555, 54 Atl. 209, 96 Am. St. Rep. 239; Shuey v. Latta, 90 Ind. 136; Mattocks v. Moulton, 84 Me. 545, 24 Atl. 1004; Gilbert v. Kolb, 85 Md. 627, 37 Atl. 423; Gilmore v. Tuttle, 32 N. J. Eq. 611; In re Petrie, 5 Dem. Sur. (N. Y.) 352; Savage v. Gould, 60 How. Prac. (N. Y.) 234; Whitney v. Martine, 88 N. Y. 535; King v. Mackellar, 109 N. Y. 215, 16 N. E. 201; National Surety Co. v. Manhattan Mortg. Co., 185 App. Div. 733, 174 N. Y. Supp. 9; In re Makin's Estate, 20 Pa. Co. Ct. R. 587.

[94] Taft v. Smith, 186 Mass. 31, 70 N. E. 1031; Sherman v. Lanier, 39 N. J. Eq. 249; In re Blauvelt's Estate (Sur.) 20 N. Y. Supp. 119, semble; In re Bartol's Estate, 182 Pa. 407, 38 Atl. 527.

[95] Gen. St. Conn. 1918, § 4903; Laws Conn. 1913, c. 127; New York Personal Property Law (Consol. Laws, c. 41) § 21; New York Banking Law (Consol. Laws, c. 2) § 239.

[96] Code Ala. 1907, § 6076; Mills' Ann. St. Colo. 1912, § 7946; Gen. St. Conn. 1918, § 4903; Rev. Code Del. 1915, § 3875; 1 Jones' & A. Ann. St. Ill. 1913, par. 188; Code Iowa, 1897, § 364; Laws N. H. 1895, c. 71, § 1; 2 Comp. St. N. J. 1910, p. 2271, § 35; New York Banking Law (Consol. Laws, c. 2) § 239; Pell's Revisal N. C. 1908, § 1792; Page & A. Gen. Code Ohio, § 11214; 4 Purd. Dig. Pa. (13th Ed.) p. 4925; Nance v. Nance, 1 S. C. 209; Shannon's Code Tenn. 1896, §§ 5433, 5434; St. Wis. 1913, § 2100b. Bonds of a Mexican state were not a proper investment between 1900 and 1906. Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333.

Changing Investments

If the settlor invests his funds in securities which would not be legal investments for a trustee, and then transfers these securities to a trustee, is it the duty of the trustee to sell the unauthorized securities and invest the proceeds in approved trust investments? Thus, if the settlor transfers to a trustee corporate stock, should the trustee sell this stock and place the funds in government bonds, or approved mortgage bonds, or may the trustee rely upon the judgment of the settlor and continue the investment in stocks? This question has caused the courts some difficulty. The courts of New York have imposed upon the trustee the duty of changing an unauthorized trust investment as soon as possible, and have held him liable for losses occurring from the continuance of an investment which the law did not approve.[97] "When a trustee finds the estate committed to him already invested in interest-bearing securities, we are not inclined to say that it is his absolute duty at once to dispose of them, without regard to the market, or the demand for them, or the ruling price, or the probability of an advance in their value. It is sufficient to say, however, that, ordinarily, if a trustee sees fit to continue such investments after he shall have had a reasonable opportunity to sell them without loss and to invest them in those securities which by law he is authorized to hold, it must be an exceptional case which will justify him in his failure to do so, where as a result of that failure there has been a loss." [98]

On the other hand, other courts have been more liberal, and have absolved the trustee from liability when he has used reasonable prudence and good faith in retaining the investment.[99] Doubtless the court may authorize the retention of the questioned investment and thus relieve the trustee from responsibility.[1]

In Delaware and New Hampshire the statutes provide that the trustee may obtain the consent of the court of chancery to his retention of the unauthorized investment and thus free himself from

[97] In re Myers, 131 N. Y. 409, 30 N. E. 135; In re Hirsch's Estate, 116 App. Div. 367, 101 N. Y. Supp. 893, affirmed 188 N. Y. 584, 81 N. E. 1165; In re New York Life Ins. & Trust Co., 86 App. Div. 247, 83 N. Y. Supp. 883. In Villard v. Villard, 219 N. Y. 482, 114 N. E. 789, the trustee was exempted by the settlor from liability for losses occasioned by holding securities purchased by the settlor, but not legal trust investments. The trustee received from the executor stocks bought by the executor. He was held to be under a duty to learn whether the settlor or the executor had purchased the stocks and to change the unauthorized investment. See, also, In re Bernheimer's Estate, 106 Misc. Rep. 719, 175 N. Y. Supp. 594.

[98] In re Wotton, 59 App. Div. 584, 587, 69 N. Y. Supp. 753.

[99] Fowler v. Gowing (C. C.) 152 Fed. 801; Harvard College v. Amory, 9 Pick. (Mass.) 446; Bowker v. Pierce, 130 Mass. 262; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; Watkins v. Stewart, 78 Va. 111.

[1] Fidelity Trust & Safety Vault Co. v. Glover, 90 Ky. 355, 14 S. W. 343.

further responsibility.[2] In Connecticut and New Jersey also trustees have statutory authorization for the retention of the investments of the settlor, under certain restrictions.[3]

If the settlor expressly directed the trustee to sell the unauthorized securities and invest the proceeds in authorized securities, obviously it is the duty of the trustee to obey instructions and he may be held liable for retention of the improper securities for too long a period.[4] And, vice versa, if the settlor has expressly authorized the trustee to retain the investment in the form in which he receives it, there will be no obligation on the part of the trustee to change the investment.[5]

Consent by Cestui

If the trustee makes an improper investment at the direction or with the consent of the cestui que trust, the trustee will not be liable for losses ensuing as a result of such improper investment.[6] And so, too, if the beneficiary acquiesces in or ratifies the unlawful investment, he will not be heard to complain of losses occurring

[2] Rev. Code Del. 1915, § 3393; Laws N. H. 1907, c. 16.

[3] "Trust funds received by executors, trustees, guardians, or conservators may be kept invested in the securities received by them, unless it be otherwise ordered by the court of probate, or unless the instrument under which said trust was created shall direct that a change of investments shall be made, and they shall not be liable for any loss that may occur by depreciation of such securities." Gen. St. Conn. 1918, § 4904; Beardsley v. Bridgeport Protestant Orphan Asylum, 76 Conn. 560, 57 Atl. 165.

"Whenever any testator shall have made, in his lifetime, any investment of money in municipal bonds or on bond secured by mortgage, or in the bonds or stock shares of any corporation, and the same bonds, mortgages or stock shares shall come or shall have come into the hands of the executor of or trustee under the will of such testator or of the administrator with the will annexed, to be administered, and such executor, administrator or trustee may, in the exercise of good faith and reasonable discretion, have continued such investment, or may hereafter continue the same, he shall not be accountable for any loss by reason of such continuance." 2 Comp. St. N. J. 1910, p. 2271, § 34; Brown v. Brown, 72 N. J. Eq. 667, 65 Atl. 739; Beam v. Patterson Safe Deposit & Trust Co., 82 N. J. Eq. 518, 91 Atl. 734, reversed, 83 N. J. Eq. 628, 92 Atl. 351.

[4] Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968.

[5] In re Wolfe's Estate (Sur.) 2 N. Y. Supp. 494; In re Bartol's Estate, 182 Pa. 407, 38 Atl. 527.

[6] Campbell v. Miller, 38 Ga. 304, 95 Am. Dec. 389; Follansbe v. Kilbreth, 17 Ill. 522, 65 Am. Dec. 691; Phillips v. Burton, 107 Ky. 88, 52 S. W. 1064; Contee v. Dawson, 2 Bland (Md.) 264; Appeal of Fidelity & Deposit Co. of Maryland, 172 Mich. 600, 138 N. W. 205; In re Hoffman's Estate, 183 Mich. 67, 148 N. W. 268, 152 N. W. 952; Furniss v. Zimmerman, 90 Misc. Rep. 138, 154 N. Y. Supp. 272; In re Westerfield, 48 App. Div. 542, 63 N. Y. Supp. 10, appeal dismissed, 163 N. Y. 209, 57 N. E. 403; In re Hall, 164 N. Y. 196, 58 N. E. 11; Hester v. Hester, 16 N. C. (1 Dev. Eq.) 328; Dennis v. Dennis, 3 Ohio Dec. 12; In re Clermontel's Estate, 12 Phila. (Pa.) 139; Arthur v. Master in Equity, Harp. Eq. (S. C.) 47; Mills v. Swearingen, 67 Tex 269, 3 S. W.

therefrom.[7] But the consent or ratification must be with full knowledge of the facts, in order that it may relieve the trustee from liability.[8] And the cestui must be of full age and sound mind, and labor under no other disability when he gives his consent or acquiescence, in order that the trustee may be protected.[9] Naturally also a consent or acquiescence obtained by fraud [10] or undue influence [11] will have no effect upon the cestui's rights. Obviously the beneficiaries who are in existence cannot consent or acquiesce in such a way as to affect the rights of cestuis not yet born.[12]

The law respecting the approval by the beneficiary of improper investments is well set forth in an Illinois decision.[13] "In order to bind a cestui que trust by acquiescence in a breach of trust by the trustee, it must appear that the cestui que trust knew all the facts, and was apprised of his legal rights, and was under no disability to assert them. Such proof must be full and satisfactory. The cestui que trust must be shown, in such case to have acted freely, deliberately, and advisedly, with the intention of confirming a transaction which he knew, or might or ought, with reasonable or proper diligence, to have known to be impeachable. His acquiescence

268; Pownal v. Myers, 16 Vt. 408; Watson v. Conrad, 38 W. Va. 536, 18 S. E. 744. Contra, Aydelott v. Breeding, 111 Ky. 847, 64 S. W. 916. Thus, where a portion of the trust assets is a claim against a mining company and the beneficiaries consent to the lending of more money to such company in an attempt to recover the sum already invested, they cannot afterward object to the investment. Mann v. Day, 199 Mich. 88, 165 N. W. 643. And acceptance by a cestui que trust of securities on a distribution bars objection to them as improper investments. In re Kent, 173 App. Div. 563, 159 N. Y. Supp. 627.

[7] See cases cited in note 6, p. 365. Failure to object for twenty-seven years was held to bar the cestui que trust from complaint in Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900. See, also, In re Union Trust Co. of New York, 219 N. Y. 514, 114 N. E. 1057; In re Keane, 95 Misc. Rep. 25, 160 N. Y. Supp. 200.

[8] White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; Appeal of Nichols, 157 Mass. 20, 31 N. E. 683; McKim v. Glover, 161 Mass. 418, 37 N. E. 443; In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50; Adair v. Brimmer, 74 N. Y. 539; Appeal of Pray, 34 Pa. 100.

[9] Murray v. Feinour, 2 Md. Ch. 418. A guardian of a minor cestui que trust cannot acquiesce in a wrongful investment and bind the minor. International Trust Co. v. Preston, 24 Wyo. 163, 156 Pac. 1128.

[10] Zimmerman v. Fraley, 70 Md. 561, 17 Atl. 560; Appeal of Nichols, 157 Mass. 20, 31 N. E. 683.

[11] Wieters v. Hart, 68 N. J. Eq. 796, 64 Atl. 1135.

[12] Wood v. Wood, 5 Paige (N. Y.) 596, 28 Am. Dec. 451. And life tenants cannot affect the rights of remaindermen. International Trust Co. v. Preston, 24 Wyo. 163, 156 Pac. 1128.

[13] White v. Sherman, 168 Ill. 589, 605, 606, 48 N. E. 128, 61 Am. St. Rep. 132.

amounts to nothing if his right to impeach is concealed from him, or if a free disclosure is not made to him of every circumstance which it is material for him to know. He cannot be held to have recognized the validity of a particular investment, unless the question as to such validity appears to have come before him. The trustee setting up the acquiescence of the cestui que trust must prove such acquiescence. The trustee must also see to it that all the cestuis que trust concur, in order to protect him from a breach of trust. If any of the beneficiaries are not sui juris, they will not be bound by acts charged against them as acts of acquiescence. The trustee cannot escape liability merely by informing the cestuis que trust that he has committed a breach of trust. The trustee is bound to know what his own duty is, and cannot throw upon the cestuis que trust the obligation of telling what such duty is. Mere knowledge and noninterference by the cestui que trust before his interest has come into possession do not always bind him as acquiescing in the breach of trust. As a general rule, acquiescence by a tenant for life, or by a cestui que trust for life, will not bind the person entitled to the remainder."

EXPENDITURES

102. The expenditures which it is the duty of a trustee to make, and for which he will be reimbursed, depend upon the purposes of the trust and the express provisions of the trust instrument.

Ordinarily it is the duty of the trustee to expend the trust funds for the following purposes, when occasion arises:

(1) Collecting and obtaining possession of the trust property;

(2) Discharging the interest and principal of debts of the trust estate and removing encumbrances upon the trust property;

(3) Defraying the expenses of necessary repairs, improvements, and insurance, and paying taxes;

(4) Buying property necessary to carry on the trust business, when the carrying on of a business is authorized;

(5) Employing necessary agents and servants;

(6) Employing attorneys, when litigation or legal advice is necessary, and paying the costs of necessary actions and proceedings which are conducted in good faith.

The trustee should pay the current expenses of the trust from the income, in the absence of express direction to the contrary in the trust instrument. Payments for the benefit of remaindermen, or which will result in the increase of the capital, should be borne wholly or partly by the capital.

In considering the duties of the trustee it is important to determine what expenditures he should incur in the administration of his trust. For what purposes should he expend the trust funds, either income or principal? In what cases, if he advances his own moneys for expenditures, will he be indemnified out of the trust property?

In general, it may be said that it is the duty of the trustee to make whatever expenditures are necessary for the proper administration of the trust and the protection and preservation of the trust property. If the outlay is necessary for one of these purposes, the trustee will be protected in making it.[14] Of course, the trustee is protected in making any expenditure which equity orders him to make.[15] It is frequently said by chancery that it will approve any disbursement made by the trustee, if the expense is one which the court would have sanctioned, if application had been made to it for instruction prior to the expenditure.[16]

It is self-evident that expenses incurred in collecting and reducing to possession the trust property are proper. Thus, if the trustee is obliged to bring an action in order to collect the trust property,[17] or has to foreclose a mortgage which belongs to the trust,[18] the expense thus incurred is justifiable.

If the trust estate has properly incurred a debt, the trustee is under a duty to pay the interest on such debt[19] and to discharge the principal.[20] He should remove an incumbrance upon the trust property,[21] but it has been held not to be his duty to purchase an outstanding claim against the trust property.[22]

[14] Miles v. Bacon, 4 J. J. Marsh. (Ky.) 457; In re Walker's Estate, 150 Iowa, 284, 128 N. W. 376, 129 N. W. 952; Hatton v. Weems, 12 Gill & J. (Md.) 83; Innis v. Flint, 106 Minn. 343, 119 N. W. 48; In re Brooklyn Trust Co., 92 Misc. Rep. 674, 157 N. Y. Supp. 547, affirmed in 173 App. Div. 948, 158 N. Y. Supp. 1109.

[15] In re Weed's Estate, 163 Pa. 595, 30 Atl. 272.

[16] Brandon v. Brandon, 50 How. Prac. (N. Y.) 328; Petition of Potts, 1 Ashm. (Pa.) 340; Williams v. Smith, 10 R. I. 280.

[17] Rains v. Rainey, 11 Humph. (Tenn.) 261.

[18] Nevitt v. Woodburn, 190 Ill. 283, 60 N. E. 500; Jones v. Jones, 50 Hun, 603, 2 N. Y. Supp. 844; In re Olmstead, 52 App. Div. 515, 66 N. Y. Supp. 212, affirmed 164 N. Y. 571, 58 N. E. 1090.

[19] Fischbeck v. Gross, 112 Ill. 208. But where the settlor directed payment of the debt at once, there is no duty upon the trustee's part to allow the debt to run and to pay interest on it. Janeway's Ex'r v. Green, 2 Sandf. Ch. (N. Y.) 415.

[20] Burroughs v. Bunnell, 70 Md. 18, 16 Atl. 447; Loud v. Winchester, 64 Mich. 23, 30 N. W. 896.

[21] Freeman v. Tompkins, 1 Strob. Eq. (S. C.) 53.

[22] Shaw v. Devecmon, 81 Md. 215, 31 Atl. 709. But see Mann v. Day, 199

It is the duty of the trustee to expend such sums as are necessary for the upkeep and protection of the trust property. Thus, if the income of the property will materially decrease, unless the buildings upon it are repaired, expenditures for that purpose are proper.[23] More infrequently the exigencies of the trust will justify the replacement of the trust buildings or permanent improvements thereto.[24] This subject of repairs and improvements has been discussed elsewhere under the heading of the trustee's powers.[25] Insurance premiums are also allowable expenses for the trustee, if the nature of the trust and the trust property justify insurance.[26]

Taxes

Under the heading of upkeep and maintenance may also be placed taxes. All taxes and assessments against the trust property should be discharged by the trustee.[27] It would be gross negligence on his part to allow the trust estate to be sold on account of the nonpayment of the taxes. Being the owner of the legal estate, the trust property is assessed against the trustee.[28] In the absence

Mich. 88, 165 N. W. 643, in which the settlement of claims against the trust estate was sanctioned.

[23] Fischbeck v. Gross, 112 Ill. 208; Parsons v. Winslow, 16 Mass. 361; Berry v. Stigall, 125 Mo. App. 264, 102 S. W. 585; Barnes v. Taylor, 30 N. J. Eq. 7; Herbert v. Herbert, 57 How. Prac. (N. Y.) 333; Cheatham v. Rowland, 92 N. C. 340.

[24] Root v. Yeomans, 15 Pick. (Mass.) 488; Little v. Little, 161 Mass. 188, 36 N. E. 795; Dickel v. Smith, 42 W. Va. 126, 24 S. E. 564. Where the object of the trust is to furnish a home for the beneficiary, money paid for the repair, improvement, and remodeling of a house is a proper expenditure. Weiderhold v. Mathis, 204 Ill. App. 3.

[25] See ante, § 86.

[26] Howard Fire Ins. Co. v. Chase, 5 Wall. 509, 18 L. Ed. 524; Lerow v. Wilmarth, 9 Allen (Mass.) 382; Goodall v. New England Mut. Fire Ins. Co., 25 N. H. 186; Disbrow v. Disbrow, 167 N. Y. 606, 60 N. E. 1110; Garvey v. Owens, 58 Hun, 609, 12 N. Y. Supp. 349; Swift v. Vermont Mut. Fire Ins. Co., 18 Vt. 305.

[27] Burr v. McEwen, Fed. Cas. No. 2,193; Cagwin v. Buerkle, 55 Ark. 5, 17 S. W. 266; Merritt v. Jenkins, 17 Fla. 593; Fischbeck v. Gross, 112 Ill. 208; City of Detroit v. Lewis, 109 Mich. 155, 66 N. W. 958, 32 L. R. A. 439; Berry v. Stigall, 125 Mo. App. 264, 102 S. W. 585; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596; McKiernan v. McKiernan (N. J. Ch.) 74 Atl. 289; Jones v. Jones, 50 Hun, 603, 2 N. Y. Supp. 844; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, affirmed 167 N. Y. 606, 60 N. E. 1110; Taylor v. Taylor, 76 W. Va. 469, 85 S. E. 652.

[28] Hawaii Laws 1917, Act 223; Ellsworth College of Iowa Falls v. Emmet County, 156 Iowa, 52, 135 N. W. 594, 42 L. R. A. (N. S.) 530; Latrobe v. Mayor, etc., of Baltimore, 19 Md. 13; Miner v. Pingree, 110 Mass. 47; Dunham v. City of Lowell, 200 Mass. 468, 86 N. E. 951; People v. Coleman, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407; People v. Feitner, 168 N. Y. 360, 61 N. E. 280; People v. Barker, 18 Misc. Rep. 712, 43 N. Y. Supp. 713. See section 33 of the New York Tax Law (Consol. Laws, c. 60) as a

of statute,[29] it is improper to assess the trust property for taxation as the property of the beneficiary.[30] Real property held in trust is, of course, assessed against the trustee in the district where the real property is located, while personal property taxes are assessed according to the residence of the trustee.[31]

on the subject. It reads as follows: "If a person holds taxable property as agent, trustee, guardian, executor or administrator, he shall be assessed therefor as such, with the addition to his name of his representative character, and such assessment shall be carried out in a separate line from his individual assessment."

[29] In some states statutes authorize the levying of the assessment against the cestui que trust under some circumstances. City of Lexington v. Fishback's Trustee, 109 Ky. 770, 60 S. W. 727; City of Baltimore v. Safe Deposit & Trust Co., 97 Md. 659, 55 Atl. 316. Rev. Laws Mass. c. 12, § 23, reads in part as follows: "Personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth; and if he resides out of the commonwealth it shall be assessed in the place where the executor, administrator or trustee resides. * * * If the executor, administrator or trustee is not an inhabitant of the commonwealth, it shall be assessed to the person to whom the income is payable, in the place where he resides, if it is not legally taxed to an executor, administrator or trustee under a testamentary trust in any other state." Under this statute in Welch v. City of Boston, 221 Mass. 155, 109 N. E. 174, Ann. Cas. 1917D, 946, a trustee residing in Massachusetts was held liable to assessment in Massachusetts, although the trust property was located in Maine and the cestuis que trust were in California. In Newcomb v. Paige, 224 Mass. 516, 113 N. E. 458, the trustees were appointed by a New York court and only one of the three lived in Massachusetts. The property was in New York and the administration carried on there, though the cestui que trust resided in Massachusetts. It was held that the trust property was not taxable in Massachusetts. See also, for construction of this statute, Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355. As to income taxes the law is regulated by St. Mass. 1918, c. 257, § 66, which provides as follows: "The income received by estates held in trust by trustees, any one of whom is an inhabitant of this commonwealth or has derived his appointment from a court of this commonwealth, shall be subject to the taxes assessed by this act to the extent that the persons to whom the income from the trust is payable, or for whose benefit it is accumulated, are inhabitants of this commonwealth."

[30] Dorr v. City of Boston, 6 Gray (Mass.) 131.

[31] Mackay v. City and County of San Francisco, 128 Cal. 678, 61 Pac. 382; Trustees of Academy of Richmond County v. City Council of Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151; McClellan v. Board of Review of Jo Daviess County, 200 Ill. 116, 65 N. E. 711; Commonwealth v. Simpson's Trustee (Ky.) 104 S. W. 274; Mayor, etc., of Baltimore v. Stirling, 29 Md. 48; Hardy v. Inhabitants of Yarmouth, 6 Allen (Mass.) 277; Hills v. City of Muskegon, 158 Mich. 551, 123 N. W. 21; State v. Willard, 77 Minn. 190, 79 N. W. 829; Board of Sup'rs of Adams County v. Dale, 110 Miss. 671, 70 South. 828; Laws N. H. 1915, c. 172; People ex rel. Brewster v. Barker, 8 Misc. Rep. 32, 28 N. Y. Supp. 651; Greene v. Mumford, 4 R. I. 313.

The trustees are authorized and under an obligation to expend such sums as are necessary for the carrying on and execution of the trust. Thus, where the trust property consists of a hotel, the trustees may spend such amounts as are necessary for the operation of the establishment.[32] And expenditures for the employment of necessary agents and servants are proper.[33] If litigation becomes necessary for the execution of the trust or the protection of the trust property, it is the duty of the trustee to employ competent legal assistance. He will be indemnified for all attorney's fees which he necessarily incurs.[34] "It is a cardinal principle in the disposition of trust estates that the trust fund shall bear the expenses of its administration, and that one who successfully conducts a litigation in autre droit, for the benefit of a fund, shall be protected in the distribution of such fund for the expenses necessarily incurred by him in the performance of his duty."[35]

Legal Advice

It is usually stated by the courts that the trustee is justified in expending the trust moneys for the employment of counsel when the litigation is "proper" or "necessary."[36] Thus, if a suit in eq-

[32] Ashley v. Winkley, 209 Mass. 509, 95 N. E. 932.

[33] Wilder v. Hast, 96 S. W. 1106, 29 Ky. Law Rep. 1181; Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076. When the trust res is a farm, expenditures for its cultivation are proper. Ranzau v. Davis, 85 Or. 26, 165 Pac. 1180. Trustees to sell real estate and distribute its proceeds may employ brokers. Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[34] Mitau v. Roddan, 149 Cal. 1, 84 Pac. 145, 6 L. R. A. (N. S.) 275; Stahl v. Stahl, 166 Ill. App. 236; Dolph v. Cincinnati, B. & C. R. Co., 56 Ind. App. 137, 103 N. E. 13; Clark v. Anderson, 13 Bush (Ky.) 111; Taylor v. Denny, 118 Md. 124, 84 Atl. 369; Rice v. Merrill, 215 Mass. 419, 102 N. E. 414; Denvir v. Park, 169 Mo. App. 335, 152 S. W. 604; Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076; Downing v. Marshall, 37 N. Y. 380; In re Brennan's Estate, 215 Pa. 272, 64 Atl. 537; In re Waller's Estate, 62 Pa. Super. Ct. 332; Burney v. Atkinson (Tenn. Ch. App.) 54 S. W. 998; West Texas Bank & Trust Co. v. Matlock (Tex. Civ. App.) 172 S. W. 162; Cochran v. Richmond & A. R. Co., 91 Va. 339, 21 S. E. 664; In re Rice's Will, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778. Where the attorney's fees and costs are occasioned by the litigiousness of one of the beneficiaries, the trustee will be indemnified from such beneficiary's share alone. Patterson v. Northern Trust Co., 286 Ill. 564, 122 N. E. 55.

[35] Woodruff v. New York, L. E. & W. R. Co., 129 N. Y. 27, 30, 29 N. E. 251.

[36] Burr v. McEwen, Fed. Cas. No. 2,193; In re Hanson's Estate, 159 Cal. 401, 114 Pac. 810; Macdonald v. Ætna Indemnity Co., 93 Conn. 140, 105 Atl. 331; Fox v. Fox, 250 Ill. 384, 95 N. E. 498; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596; Rahway Sav. Inst. v. Drake, 25 N. J. Eq. 220; In re Jones, 143 App. Div 692, 128 N. Y. Supp. 215. On an accounting, where difficult questions are involved, the trustee may charge the estate with attorney's fees. In re Starr (N. J. Prerog.) 103 Atl. 392. See, also, Mann v. Day, 199 Mich, [redacted], 643. Resistance of an unauthorized removal of a trustee [redacted] the appointment of a new trustee are proper

uity to obtain advice is necessary,[37] or proceedings are brought for the sale of the trust property,[38] or a bill is brought against the trustee to determine claims to the trust estate,[39] or the validity of the will which creates the trust is attacked,[40] the trustee will be justified in employing counsel and will be indemnified from the trust funds.

But equity will not allow the trustee attorney's fees where the action or proceeding was useless or the result of the trustee's own fault.[41] For example, if the suit is against the trustee for an accounting on account of his own mismanagement and misconduct,[42] or if the action is one in which the trustee is repudiating or resisting the trust,[43] he will not be allowed payment of his counsel fees from the trust funds.

If the trustee is a lawyer, and litigation is necessary, or for other reasons the employment of an attorney becomes imperative, the trustee may, according to the prevailing view, perform the legal services himself, and receive compensation therefor upon his accounting.[44] "It cannot be doubted that for services of an extraordinary character, rendered by a trustee, he is entitled to extra compensation beyond the usual allowance for receiving and disbursing trust funds. If professional services, necessary to the proper administration of the trust, have been rendered by a trustee in person, he is clearly entitled to such reasonable compensation as he would have paid, had he been obliged to employ counsel." [45]

A Tennessee court of chancery has said that "the rule is now established in this state that while a trustee cannot arbitrarily charge the estate he represented for legal services, and that he cannot make a valid, legal, binding contract with himself about the mat-

reasons for the employment of counsel. Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403.

[37] Grimball v. Cruse, 70 Ala. 534.

[38] Alemany v. Wensinger, 40 Cal. 288.

[39] Morton v. Barrett, 22 Me. 257, 39 Am. Dec. 575.

[40] In re Hoffman's Estate, 19 Pa. Super. Ct. 70.

[41] Page v. Boynton, 63 N. H. 190; Holcombe v. Holcombe's Ex'rs, 13 N. J. Eq. 415; In re Reich's Estate, 230 Pa. 55, 79 Atl. 151; Vaccaro v. Cicalla, 89 Tenn. 63, 14 S. W. 43; Chamberlin v. Estey, 55 Vt. 378.

[42] Melson v. Travis, 133 Ga. 710, 66 S. E. 936.

[43] Appeal of Stark, 128 Pa. 545, 18 Atl. 426; Hanna v. Clark, 204 Pa. 145, 53 Atl. 757; Towle v. Mack, 2 Vt. 19.

[44] Taylor v. Denny, 118 Md. 124, 84 Atl. 369; Shirley v. Shattuck, 28 Miss. 13; Willis v. Clymer, 66 N. J. Eq. 284, 57 Atl. 803; Appeal of Perkins, 108 Pa. 314, 56 Am. Rep. 208; Morris v. Ellis (Tenn. Ch. App.) 62 S. W. 250. This rule was applied to services in the care and rental of apartments in Cornett v. West, 102 Wash. 254, 173 Pac. 44.

[45] Appeal of Perkins, 108 Pa. 314, 318, 319, 56 Am. Rep. 208.

ter, so as to fix the amount to be paid, yet that the trustee may, in addition to his ordinary duties as such, render services as a lawyer, and that in a settlement of his accounts the chancery court, under its broad powers, may inquire into the matter, and, if it be found that the services were proper and necessary, they may be allowed, and, within its discretion, fix reasonable compensation to be paid." [46]

The New York courts have taken the view that trustees can make no contracts with themselves for the rendition of legal services, that the occupation of a double capacity by the trustee is not consistent with the proper administration of the trust, and that the only compensation or advantage which a trustee may get from the performance of his trust is the compensation allowed him by law in the form of commissions.[47] "An executor, or trustee, empowered to manage an estate, may employ a clerk or agent, and charge the estate with the expense, when, from the peculiar nature and situation of the property, the services of a clerk or agent are necessary, and he will be allowed expenses of keeping up the estate, and for taxes, repairs, etc. But executors cannot employ one of their number as clerk and allow him a salary, nor will an executor be allowed compensation for his own services as attorney in the affairs of the estate." [48]

Costs of Litigation

The costs of proceedings or actions are proper expenditures for the trustee, if they have been necessarily conducted by him and he has acted with diligence and good faith.[49] "He [the trustee] is required to protect diligently and faithfully the interest of the beneficiaries, and all of them, and he is entitled to be reimbursed for expenses honestly incurred in the administration of the trust. He is not called upon to assume any personal risk, and is entitled to the judgment of the court upon the demands of rival claimants to the fund. So long as he acts with prudence, discretion, and economy in the management of the estate and in the examination and as-

[46] Morris v. Ellis (Tenn. Ch. App.) 62 S. W. 250, 259.

[47] Green v. Winter, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475; Manning v. Manning's Ex'rs, 1 Johns. Ch. (N. Y.) 527; Binsse v. Paige, 1 Abb. Dec. 138; Collier v. Munn, 41 N. Y. 143; Lent v. Howard, 89 N. Y. 169; Parker v. Day, 155 N. Y. 383, 49 N. E. 1046; In re Wallach, 164 App. Div. 600, 150 N. Y. Supp. 302. Accord: Mayer v. Galluchat, 6 Rich. Eq. (S. C.) 1. A Kentucky court has taken the stand that, while a trustee may not be paid a separate bill for his legal services, the court may consider such services when awarding him compensation, and increase his allowance on that account. Kentucky Nat. Bank v. Stone, 11 Ky. Law Rep. 948.

[48] Lent v. Howard, 89 N. Y. 169, 178, 179.

[49] Olcott v. Maclean, 11 Hun (N. Y.) 394; Ingram v. Kirkpatrick, 43 N. C. (8 Ired. Eq.) 62; Darby v. Gilligan, 37 W. Va. 59, 16 S. E. 507.

certainment of claims, his expenses should be paid from the general fund. Where he has invoked the sanction of the court before paying over the fund, in the case of contesting claimants, no authority has been cited for the proposition that the costs and expenses of the proceeding should be saddled upon the trustee or the unsuccessful claimant, unless they have been guilty of vexatious conduct or bad faith." [50]

In numerous cases, where the trustee has acted in good faith and with reasonable skill, he has been allowed to charge against the trust fund the costs taxed in the litigation.[51] Thus, where the suit was for the determination of the rights of conflicting claimants to the trust fund and to obtain directions concerning distribution, the estate has been held properly charged with the costs of the suit.[52] But, if the trustee has been guilty of misconduct which has caused the action, or has exhibited bad faith in the conduct of the suit, or has otherwise taken an improper position, chancery may charge him personally with the costs of the litigation.[53] If, for example, the trustee has kept improper accounts of the trust funds and has misapplied them, and the beneficiary has, therefore, been obliged to bring suit, the trustee will not be allowed to charge the costs of the suit against the trust estate.[54] In many jurisdictions there are now statutes which are declaratory of the rules which equity has established respecting the question of costs.[55]

[50] Western Union Tel. Co. v. Boston Safe-Deposit & Trust Co. (C. C.) 104 Fed. 580, 581.

[51] Sterling v. Gregory, 149 Cal. 117, 85 Pac. 305; Keys v. Wohlgemuth, 240 Ill. 586, 88 N. E. 1041; Wedekind v. Hallenberg, 12 Ky. Law Rep. 46; Amory v. Lowell, 1 Allen (Mass.) 504; Loud v. Winchester, 64 Mich. 23, 30 N. W. 896; Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076; Delafield v. Colden, 1 Paige (N. Y.) 139; In re Hunt, 121 App. Div. 96, 105 N. Y. Supp. 696; In re McCormick, 40 App. Div. 73, 57 N. Y. Supp. 548, affirmed 163 N. Y. 551, 57 N. E. 1116.

[52] Cotten v. Tyson, 121 Md. 597, 89 Atl. 113.

[53] Currier v. Johnson, 19 Colo. App. 453, 75 Pac. 1079; Haines v. Hay, 169 Ill. 93, 48 N. E. 218; Knowles v. Knowles, 86 Ill. 1; Guyton v. Shane, 7 Dana (Ky.) 498; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596; Butler v. Boston & A. R. Co., 24 Hun (N. Y.) 99; American Life Ins. Co. v. Van Epps, 14 Abb. Prac. N. S. (N. Y.) 253; Duffy v. Duncan, 32 Barb. (N. Y.) 587; In re Abbot, 39 Misc. Rep. 760, 80 N. Y. Supp. 1117; Jewett v. Schmidt, 45 Misc. Rep. 471, 92 N. Y. Supp. 737.

[54] Spencer v. Spencer, 11 Paige (N. Y.) 299.

[55] The New York statute is typical. "In an action, brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed by sections 1835 and 1836 of this act; but they are exclusively chargeable

Source of Payment

Assuming that the trustee is justified in making a given expenditure, from what source should he take the funds to cover such expenditure? Is it the trustee's duty to apply income or principal to the payment of claims which necessarily arise in the administration of the trust? The answer depends upon the purpose for which the payment is to be made. The current, running expenses of the trust should be paid from income; the payments for extraordinary objects, where there is a benefit to or betterment of the capital of the trust estate, should either be paid wholly from the capital, or should be apportioned between income and capital, where there are temporary beneficiaries and remaindermen who are entitled to the principal ultimately. Thus, premiums on the trustee's bond,[56] payments for ordinary repairs to the trust property,[57] for insurance, taxes,[58] the employment of agents and servants, interest on mortgages,[59]

upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defense of the action." Code Civ. Proc. N. Y. § 3246. See, also, Code Civ. Proc. Cal. § 1031; Pell's Revisal N. C. 1908, § 1277.

[56] Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202, Ann. Cas. 1918E, 982; In re Crawford's Estate, 62 Pa. Super. Ct. 329. Contra, Wethered v. Safe Deposit & Trust Co., 79 Md. 153, 28 Atl. 812. The rent of a safety deposit box is also payable out of income. In re Boyle, 99 Misc. Rep. 418, 163 N. Y. Supp. 1095.

[57] Whittingham v. Schofield's Trustee (Ky.) 67 S. W. 846; Veazie v. Forsaith, 76 Me. 172; Little v. Little, 161 Mass. 188, 36 N. E. 795; Dickinson v. Henderson, 122 Mich. 583, 122 N. W. 583; Smith v. Gibson, 15 Minn. 89 (Gil. 66); In re Heaton, 21 N. J. Eq. 221; Herbert v. Herbert, 57 How. Prac. (N. Y.) 333; Hancox v. Meeker, 95 N. Y. 528; Cheatham v. Rowland, 92 N. C. 340; Greene v. Greene, 19 R. I. 619, 35 Atl. 1042, 35 L. R. A. 790. Grading and flagging sidewalks, grading and paving streets, fencing, new roofing, and plumbing were, in Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358, held to be "expenses incidental to the estate" and chargeable to income.

[58] McCook v. Harp, 81 Ga. 229, 7 S. E. 174; Watts v. Howard, 7 Metc. (Mass.) 478; Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202, Ann. Cas. 1918E, 982; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; Whitson v. Whitson, 53 N. Y. 479; Spangler v. York Co., 13 Pa. 322; Fitzgerald v. Rhode Island Hospital Trust Co., 24 R. I. 59, 52 Atl. 814. Under a statute inheritance taxes were charged to principal in Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202, Ann. Cas. 1918E, 982.

[59] In re Albertson, 113 N. Y. 434, 21 N. E. 117; In re Shaffer's Estate, 262 Pa. 15, 104 Atl. 853. But, if the property is unproductive, taxes, interest, and general running expenses must by necessity be charged to capital. Ogden v. Allen, 225 Mass. 595, 114 N. E. 862; Poole v. Union Trust Co., 191 Mich. 162, 157 N. W. 430, Ann. Cas. 1918E, 622; Spencer v. Spencer, 219 N. Y. 459, 114 N. E. 849, Ann. Cas. 1918E, 943; In re Montgomery, 99 Misc. Rep. 473, 165 N. Y. Supp. 1069.

for the trustee's compensation,[60] and the expenses of administration before the property reaches the trustee's hands,[61] should come from the income of the trust estate. But payments made for putting the trust real estate in a tenantable condition when it is unfit for occupation at the beginning of the trust,[62] the costs of litigation,[63] and the expense necessary for the reconstruction of wharves which are the trust subject-matter,[64] should be charged to the capital fund. "The plaintiff claims that the defendants are not entitled to have the taxes, the repairs, and the expenses of managing the estate, deducted from the income. It is conceded that in ordinary trusts such expenses must be paid from the income of the trust fund. * * * It is difficult to make any legal distinction between ordinary and extraordinary repairs. If they are necessary in order to preserve the property and make it productive, they should be paid for from the income." [65] "All trustees are entitled to a reasonable compensation for their services as they are rendered, and, unless a contrary intention appear, the compensation must come out of the income of the fund with which they are intrusted." [66]

The questions whether a certain expenditure by a trustee may properly be made by him and whether he will be reimbursed therefor upon his accounting are the same in legal effect. If a payment was properly made by a trustee, he will be entitled to be credited therewith upon his account; and if, on the other hand, the expenditure is such that chancery will not reimburse the trustee therefor upon the accounting, it is obvious that the disbursement was an improper one for the trustee to make. Hence the subject of the re-

[60] Parker v. Ames, 121 Mass. 220; In re Spangler's Estate, 21 Pa. 335.

[61] Held v. Keller, 135 Minn. 192, 160 N. W. 487; In re Frost, 184 App. Div. 702, 172 N. Y. Supp. 442.

[62] In re Heroy's Estate, 102 Misc. Rep. 305, 169 N. Y. Supp. 807; In re Deckelmann, 84 Hun, 476, 32 N. Y. Supp. 404. And see In re Young, 17 Misc. Rep. 680, 41 N. Y. Supp. 539. Where trustees hold land in trust for A., subject to an executory limitation, the expense of grading, curbing, and sewers may be paid from the proceeds of unproductive realty. Sheffield v. Cooke, 39 R. I. 217, 98 Atl. 161, Ann. Cas. 1918E, 961.

[63] But if the litigation has resulted from the negligence of the life beneficiary who is also a trustee, the expense may be charged to income. Cogswell v. Weston, 228 Mass. 219, 117 N. E. 37.

[64] Sohier v. Eldredge, 103 Mass. 345. And see, Hart v. Allen, 166 Mass. 78, 44 N. E. 116; Abell v. Abell, 75 Md. 44, 23 Atl. 71, 25 Atl. 389; Brown v. Berry, 71 N. H. 241, 52 Atl. 870; Smith v. Keteltas, 62 App. Div. 174, 70 N. Y. Supp. 1065. The expense of building a bathroom in a house should be borne by the capital. Hooker v. Goodwin, 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159.

[65] Guthrie v. Wheeler, 51 Conn. 203, 212, 213.

[66] In re Spangler's Estate, 21 Pa. 335, 337.

imbursement of the trustee for expenditures has been inferentially covered in the previous discussion regarding the propriety of the trustee's expenditures. Some further development of the rights of the trustee to be reimbursed upon his accounting will be undertaken at a later point.[67]

PAYMENTS TO BENEFICIARIES

103. The duties of the trustee in making payments to the beneficiary are usually governed by the terms of the trust instrument.

Under the Massachusetts rule, adopted in a few American states, stock dividends are regarded as capital, while cash dividends are treated as income; but the later tendency of the courts following this rule is to inquire into the source, as well as the form, of the dividend. According to the Pennsylvania and prevailing American rule dividends on corporate stock held in trust are income if they were earned during the existence of the trust, but are capital if they were declared from earnings which accrued prior to the beginning of the trust. The form of the dividend, whether stock or cash, is not important.

Profits accruing from the sale or exchange of trust property are ordinarily treated as capital.

Rents, annuities, and interest received by a trustee and partly earned during a period prior to the existence of the trust are, under modern statutes, usually apportioned; but dividends declared during the existence of a trust are not ordinarily divided, even though a portion of the earnings from which they were declared was accumulated before the trust began.

According to the weight of authority a trustee who buys securities at a premium should deduct from the income of such securities a sum sufficient to make up the premium at the maturity of the security.

Ordinarily the trustee should not, in the absence of express authorization, expend the capital of the trust fund for current expenses or in the administration of the trust; but upon extraordinary occasions the trustee may, upon his own initiative or by court order, pay out a part of the capital fund.

[67] See § 106, post.

The duties of the trustee regarding the payment of the income of the trust property to the beneficiaries are not ordinarily difficult to ascertain. The trust instrument either prescribes that definite sums shall be paid at definite times to the cestui, or it leaves the amounts and times to the discretion of the trustee. If the settlor has determined the amount of property to be delivered to the cestui and the time of such delivery, there will not ordinarily arise any question of difficulty for the trustee. If the amount and time are left to the discretion of the trustee, he may exercise his discretion, and, if he uses good faith, equity will not ordinarily interfere with his acts.[68] Thus, where a testator authorized his trustees to pay over to the cestui que trust a certain sum whenever in their opinion his mental and physical condition was such that he was competent to attend to his affairs, and the trustees did not pay over the sum to the beneficiary during his life, this exercise of discretion was not interfered with by the court.[69] But a direction to the trustees to pay the dividends of certain stock to the beneficiaries "at their discretion" does not authorize the trustees to decline to pay any dividends to the cestuis que trust. It merely gives the trustees discretion as to the time and manner of payment.[70]

The rules regarding the trustee's duties concerning payments vary so much with the terms of different trust instruments that but little profitable general discussion can be given. However, a few principles are worth noting. Money paid by a trustee to a cestui que trust is presumed to be on account of the profits of the trust estate.[71] If the beneficiary is incompetent, the payments should be made by the trustee to the guardian of the incompetent.[72] A trustee may make payments by check.[73] If the trust instrument states the times of payment, such directions should be obeyed.[74] Where the trustee has notice that the cestui que trust has assigned his interest, the trustee should make payments to the assignee.[75] A trustee who makes improper payments will, of course, be respon-

[68] Kimball v. Blanchard, 101 Me. 383, 64 Atl. 645; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; In re Wilkin, 183 N. Y. 104, 75 N. E. 1105.

[69] O'Gorman v. Crowley, 81 N. J. Eq. 520, 86 Atl. 442.

[70] Lembeck v. Lembeck, 73 N. J. Eq. 427, 68 Atl. 337.

[71] Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118.

[72] In re Fisk, 45 Misc. Rep. 298, 92 N. Y. Supp. 394. When the beneficiary has been judicially declared insane in another state, it is the trustee's duty to inquire into his mental condition before making payments. In re Thaw's Estate, 252 Pa. 99, 97 Atl. 108.

[73] In re Jones' Estate, 199 Pa. 143, 48 Atl. 865.

[74] Brown v. Berry, 71 N. H. 241, 52 Atl. 870.

[75] Seger v. Farmers' Loan & Trust Co., 73 App. Div. 293, 76 N. Y. Supp. 721, reversed, 176 N. Y. 589, 68 N. E. 1124.

sible to the cestuis.[76] If the amounts of the payments to be made are not fixed by the trust instrument and the trustee has no right to fix them, the court of chancery will determine the amounts.[77] If a trustee is directed to divide the settlor's property equally between certain beneficiaries, he is not obliged to give each an equal share of the real property and each an equal amount of the personalty, but must merely give each property equal in value to the shares of the others.[78] A trustee charged with the duty of supporting the cestui que trust may perform that duty without making any money payments to the cestui.[79] If the trustee is charged with the support of a cestui, he must honestly exercise his discretion as to the amount needed for that purpose.[80] Where the trust instrument provides for the investment of money in land and the conveyance of such land to the cestuis que trust, the latter may elect to take the money instead of the land.[81] If the trustee is ordered to pay money to the beneficiaries, he should not, obviously, offer them stock of a corporation instead.[82] If the beneficiary has disappeared, and an administrator of his estate has been appointed on the theory that he is dead, the trustee may require the administrator to give a bond before he pays money to the administrator.[83]

Dividends

In disposing of money or other property which comes into his hands as trustee it is often important for him to know whether the property is to be treated as "income" or as "capital." He will usually be under an obligation to pay the income to the cestui que trust or apply it to his use, but it will ordinarily be his duty to retain the capital in the same way in which he retains the original principal fund. This question concerning the distinction between capital and income arises in a variety of ways,[84] but perhaps the

[76] Owings v. Rhodes, 65 Md. 408, 9 Atl. 903.

[77] In re Riley's Estate, 4 Misc. Rep. 338, 24 N. Y. Supp. 309.

[78] Richardson v. Morey, 18 Pick. (Mass.) 181.

[79] Conover v. Fisher (N. J. Ch.) 36 Atl. 948.

[80] Collister v. Fassitt, 163 N. Y. 281, 57 N. E. 490, 79 Am. St. Rep. 586.

[81] Ashby v. Smith, 1 Rob. (Va.) 55.

[82] Mitchell v. Carrollton Nat. Bank, 97 S. W. 45, 29 Ky. Law Rep. 1228.

[83] Donovan v. Major, 253 Ill. 179, 97 N. E. 231.

[84] Where principal and interest are due to the trust estate, and a lump sum is received by the foreclosure of a mortgage given as security for the payment of the debt, or by a settlement or dividend in bankruptcy, the sum so received should be apportioned between capital and income on the basis of the amount of principal and interest due. Veazie v. Forsaith, 76 Me. 172; Trenton Trust & Safe Deposit Co. v. Donnelly, 65 N. J. Eq. 119, 55 Atl. 92; Meldon v. Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172, affirmed 167 N. Y. 573, 60 N. E. 1116; In re Myers' Estate (Sur.) 161 N. Y. Supp. 1111; Greene v. Greene, 19 R. I. 619, 35 Atl. 1042, 35 L. R. A. 790. If a dividend is declared before the commencement of the trust, but by its

most common occasion is that where the trustee holds stock in a corporation as trust property and dividends are declared upon such stock. The trustee is then faced with the problem whether he should deliver these dividends to the person entitled to the income of the trust funds, or whether he should retain such dividends as an addition to the principal fund.

The dividend may be a cash dividend or a stock dividend. A sharp division of the authorities exists upon this question. All are agreed, however, that the expressed intent of the settlor will control. If the settlor has in so many words stated in the trust instrument that all dividends, cash or stock, no matter when earned or from what source declared, shall go to the life beneficiary of the trust, there can be no doubt that it will be the duty of the trustee to pay to such life beneficiary all dividends declared.[85] In this case, as in all others, the intent of a testator or grantor, when not in contravention of some rule of law, will control the court.

Massachusetts Rule

If the settlor has expressed no intent regarding the disposition of dividends from trust stock, the courts seek to make an equitable distribution of them. In arriving at what is equitable in the situation, two rules, originally widely divergent, but now more nearly identical, have sprung up. The courts of Massachusetts established years ago the rule that stock dividends should be held as capital, while cash dividends should be paid to the beneficiaries as income. This rule made the criterion the *form* of the dividend, rather than the source of the dividend. In a recent case[86] the Supreme Judicial Court stated the rule as follows: "The rule for determining the

terms is not to be paid until after the trust has begun, the dividend belongs to capital. In re Kernochan, 104 N. Y. 618, 11 N. E. 149. Where an executor holds the trust fund before turning it over to the trustee, the sum received is divided between life cestui que trust and remainderman by determining what sum, if invested at the testator's death at 4½ per cent. interest, would at the time the trustee received the money, together with interest, amount to the sum received. Bradford v. Fidelity Trust Co. (Del. Ch.) 104 Atl. 777. A deferred or special dividend, paid by an insurance company twenty years after the issuance of a policy, is capital. In re Schley (Sup.) 173 N. Y. Supp. 317. The proceeds of the sale of a right to subscribe to stock are principal. Baker v. Thompson, 181 App. Div. 469, 168 N. Y. Supp. 871. On a sale of trust stock the difference in value between the date of the commencement of the trust and the date of sale is part of the corpus. In re Butler's Estate, 106 Misc. Rep. 375, 174 N. Y. Supp. 880. But where the price of stock sold represents in part income accumulated since the trust began, it should be apportioned. In re Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19.

[85] In re Robinson's Trust, 218 Pa. 481, 67 Atl. 775. And see, also, dicta to the same effect in Thomas v. Gregg, 78 Md. 545, 549, 28 Atl. 565, 44 Am. St. Rep. 310; In re Tod, 85 Misc. Rep. 298, 147 N. Y. Supp. 161.

[86] Talbot v. Milliken, 221 Mass. 367, 368, 108 N. E. 1060.

respective rights of those entitled to the income and to the principal of trust funds established long ago in this commonwealth, and constantly followed, 'is to regard cash dividends, however large, as income, and stock dividends, however made, as capital.'" The leading Massachusetts case is Minot v. Paine,[87] where the reason for the establishment of the rule is thus set forth: "A trustee needs one plain principle to guide him; and the cestuis que trust ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, especially if it is out of our jurisdiction."

This rule has been followed by the United States Supreme Court and by the courts of Connecticut, Georgia, Illinois, Maine, Rhode Island, and West Virginia.[88] The courts which have followed this Massachusetts rule have admitted that it is not logically perfect. "It was not pretended that this rule, which has been commonly known as the Massachusetts rule, was the ideal rule of reason; nor have the courts of high authority which have given their approval of it ever claimed it to be such, or one which would accomplish justice under all circumstances. What has been claimed for it is that its general application, at least if due regard be had for the substance and intent of the transaction, would prove more beneficent in its consequences, and on the whole lead to results more closely approximating to what was just and equitable, than would the application of any other rule or any attempt to go behind the declaration of the dividend to search out and discover the equities of each case according to some theoretical ideal." [89]

[87] 99 Mass. 101, 108, 96 Am. Dec. 705.

[88] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; Second Universalist Church of Stamford v. Colegrove, 74 Conn. 79, 49 Atl. 902; Smith v. Dana, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51; Jackson v. Maddox, 136 Ga. 31, 70 S. E. 865, Ann. Cas. 1912B, 1216 (controlled by statute); De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; Billings v. Warren, 216 Ill. 281, 74 N. E. 1050; Thatcher v. Thatcher, 117 Me. 331, 104 Atl. 515; Harris v. Moses, 117 Me. 391, 104 Atl. 703; Greene v. Smith, 17 R. I. 28, 19 Atl. 1081; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Newport Trust Co. v. Van Rensselaer, 32 R. I. 231, 78 Atl. 1009, 35 L. R. A. (N. S.) 563. And see Wilberding v. Miller, 88 Ohio St. 609, 106 N. E. 665, L. R. A. 1916A, 718, discussed in Farmers' Loan & Trust Co. v. Whiton (Sup.) 173 N. Y. Supp. 890. But the Rhode Island court, in Rhode Island Hospital Trust Co. v. Peckham, 107 Atl. 209, abandons the Massachusetts rule and awards an extraordinary cash dividend to capital, where it represented surplus accumulated before the trust. The West Virginia court has recently followed Massachusetts. Security Trust Co. v. Rammelsburg, 82 W. Va. 701, 97 S. E. 122. Bonds issued by a corporation to its

[89] Smith v. Dana, 77 Conn. 543, 548, 549, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51.

The original effect of the Massachusetts rule has been somewhat altered by a liberal construction given to it by the courts. They have, although stating that the form of the dividend was all-important, actually gone behind the form and declared the dividend to be income if it came from profits, but capital if it was a portion of the principal fund distributed to the stockholders.[90] Thus, in a late case [91] the dividend consisted in the shares of stock of another corporation. This was a "stock dividend," and it might have been expected that the trustee would be directed to apply it as capital; but the court declared it to be income, saying: "The answer fundamentally depends upon whether the dividend in question was paid from the accumulated surplus earnings, or out of capital of the corporation. If it was a payment of earnings, it must be considered as income for the purposes of the trust, although the amount distributed was unusually large, and consisted partly of shares in another corporation." The court has thus practically shifted its position, so that it regards the source of the dividend as the criterion, and not its mere form.[92]

Pennsylvania Rule

The second rule is the so-called Pennsylvania rule, which has been declared to be that, "when the stock of a corporation is by the will of a decedent given in trust, the income thereof for the use of a beneficiary for life, with remainder over, the surplus profits, which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the corpus of his estate; whilst the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash, scrip, or stock." [93] Under this rule the source of the dividend is the important element. If the dividend, whether cash or stock, came from the capital as it existed prior to the creation of the trust, or from the earnings which had accrued prior to

stockholders are to be added to the corpus. Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583.

[90] For other Massachusetts cases applying the rule, see Atkins v. Albree, 12 Allen, 359; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; D'Ooge v. Leeds, 176 Mass. 558, 57 N. E. 1025; Hyde v. Holmes, 198 Mass. 287, 84 N. E. 318; Gardiner v. Gardiner, 212 Mass. 508, 99 N. E. 171.

[91] Gray v. Hemenway, 223 Mass. 293–295, 111 N. E. 713. See, also, to the same effect Smith v. Cotting, 231 Mass. 42, 120 N. E. 177.

[92] The modern English rule is similar to the Massachusetts rule in theory and effect of application. Bouch v. Sproule, 12 App. Cas. 385; In re Evans, [1913] 1 Ch. 23. See Strachan, Economic and Legal Differentiation of Capital and Income, 26 Law Quart. Rev. 40; Capital and Income (Life Owner and Remainderman), 28 Law Quart. Rev. 175.

[93] In re Smith's Estate, 140 Pa. 344, 352, 21 Atl. 438, 23 Am. St. Rep. 237.

that date, the dividend must be treated by the trustee as an addition to the capital fund of the trust. But earnings which have accrued subsequent to the beginning of the trust and are later distributed in the form of dividends are to be classed as income.

An application of this rule may be found in the leading case of Appeal of Earp.[94] There the testator left to the trustee 540 shares of the stock of the Lehigh Crane Iron Works. At the time of the death of the testator and the beginning of the trust a large surplus fund had been accumulated by the corporation from its earnings, so that the shares had increased from a par value of $50 to a value of $125. The surplus fund continued to increase for a period of six years after the death of the testator, when the corporation canceled the old stock certificates and issued, in place of the original 540 shares, certificates for 1,350 shares; that is, practically declared a stock dividend of 810 shares of stock. These 1,350 shares were of the value of $80 a share at the time of their issuance. The court reasoned that the 540 shares were worth $67,500 at the time of the settlor's death; that the 1,350 shares at the time of their issuance were worth $108,000; and that the difference, or $40,500, represented the profits accumulated during the continuance of the trust. The court, therefore, directed that an amount of the stock equal in value to $40,500 be distributed to the life beneficiary as income, and that the balance be retained by the trustee as capital, to be delivered over to the remainderman.

The Pennsylvania rule has found favor with a majority of the American courts which have considered the question.[95] In a recent

[94] 28 Pa. 368. For other Pennsylvania cases construing this rule, see Appeal of Wiltbank, 64 Pa. 256, 3 Am. Rep. 585; Appeal of Merchants' Fund Ass'n, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. Rep. 894; In re Thomson's Estate, 153 Pa. 332, 26 Atl. 652, 653; In re Sloan's Estate, 258 Pa. 368, 102 Atl. 31; In re Thompson's Estate, 262 Pa. 278, 105 Atl. 273; In re McKeown's Estate, 263 Pa. 78, 106 Atl. 189; Mercer v. Buchanan (C. C.) 132 Fed. 501; Appeal of Philadelphia Trust, Safe-Deposit & Ins. Co., 16 Atl. 734; In re Eastwick's Estate, 15 Phila. 569; In re Wright's Estate, 5 Pa. Dist. Ct. R. 345.

[95] In re Duffill's Estate, 180 Cal. 748, 183 Pac. 337; Bryan v. Aikin, 10 Del. Ch. 446, 86 Atl. 674, 45 L. R. A. (N. S.) 477; Kalbach v. Clark, 133 Iowa, 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; Gilkey v. Paine, 80 Me. 319, 14 Atl. 205 (semble), overruled in Harris v. Moses, 117 Me. 391, 104 Atl. 703; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Safe Deposit & Trust Co. v. White, 102 Md. 73, 61 Atl. 295, 296; Coudon v. Updegraf, 117 Md. 71, 83 Atl. 145; In re Northern Cent. Dividend Cases, 126 Md. 16, 94 Atl. 338; Miller v. Safe Deposit & Trust Co. of Baltimore, 127 Md. 610, 96 Atl. 766; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Pritchitt v. Nashville Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856; In re Heaton's

case the New York Court of Appeals has reviewed the decisions in that state and declared the rule there prevailing. It is in effect the Pennsylvania rule. It is stated as follows:[96] "1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."

Estate, 89 Vt. 550, 96 Atl. 21, L. R. A. 1916D, 201; Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739; Miller v. Payne, 150 Wis. 354, 136 N. W. 811; In re Barron's Will, 163 Wis. 275, 155 N. W. 1087. Rhode Island has recently shifted to the Pennsylvania rule in Rhode Island Hospital Trust Co. v. Peckham, 107 Atl. 209. In Washington County Hospital Ass'n v. Hagerstown Trust Co., 124 Md. 1, 91 Atl. 787, L. R. A. 1915A, 738, cash dividends arising from the sale of a part of the property in which the capital of the corporation was invested, namely, timber, were distributed as income, since it was the business of the corporation to sell timber. Accord, in principle: Krug v. Mercantile Trust & Deposit Co. of Baltimore City, 133 Md. 110, 104 Atl. 414; Poole v. Union Trust Co., 191 Mich. 162, 157 N. W. 430, Ann. Cas. 1918E, 622. But in other cases where the distribution of the proceeds of sales of land or ore was deemed to represent a gradual liquidation of the capital of the corporation, the money was awarded to capital (Ex parte Humbird, 114 Md. 627, 80 Atl. 209; Rhode Island Hospital Trust Co. v. Bradley, 41 R. I. 174, 103 Atl. 486), or was apportioned (In re Wells' Estate, 156 Wis. 294, 144 N. W. 174). Stock distributed by a corporation and representing an increase in the value of capital due to good management and the growth of trade, not accumulated earnings, is capital. Poole v. Union Trust Co., 191 Mich. 162, 157 N. W. 430, Ann. Cas. 1918E, 622. The accumulation of earnings does not entitle the life cestui que trust to any income until the declaration of a dividend. Hence an increase in the value of shares of stock occurring since the foundation of the trust, due to undistributed earnings, does not benefit the life cestui que trust, even if such increase is realized by a sale of the stock. Guthrie's Trustee v. Akers, 157 Ky. 649, 163 S. W. 1117. And see Wallace v. Wallace, 90 S. C. 61, 72 S. E. 553.

[96] In re Osborne, 209 N. Y. 450, 477, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A, 298. For recent decisions applying this rule, see In re Affleck, 83 Misc. Rep. 659, 146 N. Y. Supp. 835; In re Tod, 85 Misc. Rep. 298, 147 N. Y. Supp. 161; In re Columbia Trust Co., 97 Misc. Rep. 566, 163 N. Y. Supp. 536; Hazzard v. Philips, 173 App. Div. 425, 159 N. Y. Supp. 264; In re Baldwin, 209 N. Y. 601, 103 N. E. 734. Mere increase in the value of the corporate assets does not entitle the beneficiary to anything as income. There must be a distribution of earnings. United States Trust Co. of New York v. Heye, 224 N. Y. 242, 120 N. E. 645. The distribution

A Kentucky court has stated the rule in that state to be as follows:[97] "It is the rule as settled by the current of authority that dividends, whether of stock or payable in money, are non-apportionable, and must be considered as accruing in their entirety as of the date when they are declared. If, for instance, the life tenancy has begun when a cash dividend is declared, it belongs to the life tenant, although it may result in part from profits previously earned. It goes to him irrespective of the time when it was earned. No inquiry will in such a case be made as to what portion of the profit upon which the dividend was based was earned before or after the death of the testator for the purpose of apportioning it between the tenant for life and the remainderman." Under this Kentucky rule the criterion seems to be the *time* of the declaration of the dividend, rather the *source* of such dividend, or its *form*.

Profits on Sales

Frequently the trustee sells the trust property and makes a profit thereon. Should the difference between the original valuation or cost of the property and its ultimate valuation or sale price be added to the corpus of the trust, or should it be delivered to the beneficiary as income? In general, such increased value is considered a part of the capital, and is added to the body of the trust estate.[98] Thus, where a testator gives to trustees a given sum to be invested in securities, and certain securities are purchased and held for a time, and then sold, producing more than the original sum invested, due to a decrease in interest rates generally prevailing, the

of shares of stock in another corporation, when such stock represents capital of the distributing corporation, is an addition to capital. In re Megrue, 224 N. Y. 284, 120 N. E. 651.

[97] Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 265, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. For a late case approving of this rule, see Cox v. Gaulbert's Trustee, 148 Ky. 407, 147 S. W. 25.

[98] Carpenter v. Perkins, 83 Conn. 11, 74 Atl. 1062; Whittingham v. Schofield's Trustee, 67 S. W. 846, 68 S. W. 116, 23 Ky. Law Rep. 2444; Smith v. Hooper, 95 Md. 16, 51 Atl. 844, 54 Atl. 95; Jordan v. Jordan, 192 Mass. 337, 78 N. E. 459; Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355; Parker v. Johnson, 37 N. J. Eq. 366; Townsend v. United States Trust Co., 3 Redf. Sur. (N. Y.) 220; Patterson v. Vivian, 63 Misc. Rep. 389, 117 N. Y. Supp. 504; Whitney v. Phœnix, 4 Redf. Sur. (N. Y.) 180; Farmers' Loan & Trust Co. v. Hall, 5 Dem. Sur. (N. Y.) 73; In re Lawrence, 7 N. Y. Supp. 332, 2 Con. Sur. 53; In re Roberts' Will, 40 Misc. Rep. 512, 82 N. Y. Supp. 805; In re Elting, 93 App. Div. 516, 87 N. Y. Supp. 833; Stewart v. Phelps, 71 App. Div. 91, 75 N. Y. Supp. 526, affirmed 173 N. Y. 621, 66 N. E. 1117; Devenney v. Devenney, 74 Ohio St. 96, 77 N. E. 688; In re Kemble's Estate, 201 Pa. 523, 51 Atl. 310; In re Neel's Estate, 207 Pa. 446, 56 Atl. 950; Slocum v. Ames, 19 R. I. 401, 36 Atl. 1127; In re Barron's Will, 163 Wis. 275, 155 N. W. 1087. The difference between an appraised value at the commencement of the trust and a later sale price is to be treated as capital. In re McKeown's Estate, 263 Pa. 78, 106 Atl. 189.

surplus over and above the original sum is a part of the trust fund, and should not be paid out as income.[99] And where the trust directs the trustee to invest the funds in productive property and pay over the income to the beneficiary until he reaches 55, and the trustee buys an unproductive farm with the trust moneys and later sells the farm at a profit, due to the natural growth of the timber upon the farm, such profit should be considered as capital, and not income.[1]

The beneficiary who is entitled to the income of the trust property obtains part of the benefit of the increased value of the trust property, for he obtains a greater income from the new trust fund than from the old. The corpus of the estate, no matter what changes of form it undergoes, should be regarded as the same property. That the trust property is originally money, later becomes bonds, and still later real estate, ought not to affect the status of the property as the capital fund. A Pennsylvania court well points out that the capital fund bears losses which occur from investments, and should, therefore, be entitled to the benefit of gains which accrue. "If, then, in case of a loss by reason of an unfortunate investment, it falls on both the legatees for life and in remainder, it seems but equitable that, if there be a profit arising from the sale of a trust security, they should both participate in it in the same manner they would bear a loss, the former receiving more income from the increased corpus and the latter more corpus." [2]

But in certain cases the general rule regarding the profits on the sale of trust property does not apply. If, for example, the trustee is the owner of a mortgage on real property, there are arrearages of interest and principal, the mortgage is foreclosed, and the trustee is obliged to buy in the property, and later the trustee sells this property at a profit, it is obvious that the profit should be apportioned between income and principal.[3] The fund tied up in the mortgaged property, and on account of which the mortgage was foreclosed, was partly income and partly principal. The unpaid interest represented income. The profit which this unpaid income has earned as the result of the entire transaction should go to the

[99] In re Gerry, 103 N. Y. 445, 9 N. E. 235. But when part of the profit on the sale of securities represents accumulated income, which should have been paid out as dividends, such portion will be distributed as income. In re Schaefer, 222 N. Y. 533, 118 N. E. 1076.

[1] Jordan v. Jordan's Trust Estate, 111 Me. 124, 88 Atl. 390.

[2] In re Graham's Estate, 198 Pa. 216, 219, 47 Atl. 1108.

[3] Parker v. Seeley, 56 N. J. Eq. 110, 38 Atl. 280. And see In re Marshall, 43 Misc. Rep. 238, 88 N. Y. Supp. 550, for a similar decision.

income account. Thus, the profits will be apportioned between income and capital in proportion to the respective amounts of the interest and capital which were due upon the mortgage. Occasionally, also, the courts find an intent on the part of the settlor that the profits from the sale of the trust property should be treated as income. This intent must be respected.[4]

The necessity for making a distinction between capital and income often arises in cases where dividends are not involved. Thus, where a trustee was the owner of corporate stock and the corporation was dissolved, the value of the plant, equipment, materials, good will, patents, trade-marks, and franchises was held to be treated as capital, while the value of the invested surplus, surplus cash capital, and accumulated surplus earnings represented income.[5] If trust buildings are insured, and a loss occurs, the insurance moneys represent capital.[6] The rentals under a perpetual lease are to be treated as income.[7] Payments on the principal of a debt due to the trust estate,[8] the proceeds of the sale of trust property,[9] an award made in proceedings where the trust property has been condemned,[10] and interest on the sale price of the trust property where credit is given,[11] have all been regarded by the courts as capital. The income of the property after the termination of the trust follows the property itself.[12]

Rents, Annuities, and Interest

A trustee frequently finds himself in possession of rents, dividends, annuities, or interest moneys which have been earned or have accrued partially before the beginning of the trust and partly after the beginning. He is confronted with the question whether he should treat such moneys as capital or income. Should such payments be apportioned between capital and income, in proportion to

[4] Billings v. Warren, 216 Ill. 281, 74 N. E. 1050; In re Park's Estate, 173 Pa. 190, 33 Atl. 884. When the settlor directs the conversion of his property into cash at the commencement of the trust, and the trustees retain certain stock, and later sell it at a profit, the profit will be regarded as income. In re Quay's Estate, 253 Pa. 80, 97 Atl. 1029.

[5] In re Stevens, 111 App. Div. 773, 98 N. Y. Supp. 28, modified 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511.

[6] Campbell v. Mansfield, 104 Miss. 533, 61 South. 593, 45 L. R. A. (N. S.) 446; In re Barron's Will, 163 Wis. 275, 155 N. W. 1087. And so damages collected by the trustees for injury to the corpus become substituted capital. Dickson v. Allen (Mo.) 195 S. W. 698.

[7] Appeal of Eley, 103 Pa. 300.

[8] In re Tietjen, 5 Dem. Sur. (N. Y.) 350.

[9] Doswell v. Anderson, 1 Pat. & H. (Va.) 185.

[10] Gibson v. Cooke, 1 Metc. (Mass.) 75; Allen v. Stewart, 214 Mass. 109, 100 N. E. 1092.

[11] Stone v. Hinton, 36 N. C. (1 Ired. Eq.) 15.

[12] Barbour v. Gallagher, 2 Ohio App. 205.

the relative periods of time which elapsed before and after the trust began, or upon some other basis? Or should the trustee refuse to apportion such funds and apply them entirely as income?

The case of rents issuing from real estate was well settled at common law. "It is a general rule of the common law, followed in chancery, that sums of money, payable periodically at fixed times, are not apportionable during the intervening periods. It is accordingly well settled, both at law and in equity, except when otherwise provided by statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time." [13] But in England and practically all American states statutes have been passed allowing the apportionment of rent.[14] Under these acts it would seem that a trustee should hold as capital the amount which had accrued at the time of the creation of the trust, and apply as income the proportion which, considering the rent as accruing from day to day, had been earned since the trust took effect.

Annuities were not at common law apportioned, in the absence of intent to that effect shown to have been entertained by the settlor.[15]

[13] Dexter v. Phillips, 121 Mass. 178, 180, 23 Am. Rep. 261. See, also, Sohier v. Eldredge, 103 Mass. 345.

[14] Kirby & Castle's Dig. Ark. 1916, § 5491; Rev. Code Del. 1915, § 4548; Jones & A. Ann. St. Ill. 1913, par. 7075; Code Iowa 1897, § 2988; Ky. St. 1915, § 3865; Rev. Laws Mass. 1902, c. 141, §§ 24, 25; Stone v. Bradlee, 183 Mass. 165, 66 N. E. 708; McElwain v. Hildreth, 203 Mass. 376, 89 N. E. 567; Rev. St. Mo. 1909, § 7871; 3 Comp. St. N. J. 1910, p. 3065; Code Civ. Proc. N. Y. § 2674; Revisal N. C. 1908, § 1988; Gen. Laws R. I. 1909, c. 254, §§ 38, 39; Civ. Code S. C. 1912, § 3495; Code Va. 1904, §§ 2809, 2810; Code W. Va. 1913, c. 94, § 1 (sec. 4152); Id., c. 95, § 1 (sec. 4155); St. Wis. 1913, § 2193.

The New York statute is typical of the others: "All rents reserved on any lease made after June 7, 1875, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. * * *"

[15] Tracy v. Strong, 2 Conn. 659; Nehls v. Sauer, 119 Iowa, 440, 93 N. W. 346; Chase v. Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347.

In many states the statutes authorize the apportionment of annuities, as well as rents.[16] The common-law theory, however, was that they accrued at one time and not gradually, day by day, and hence that the representatives of the beneficiary of the annuity were not entitled to a sum which accrued after the beneficiary's death.

Dividends upon stocks are regarded like rents and annuities, as accruing in a lump sum when declared.[17] There is, therefore, in the absence of statute, no duty on the part of a trustee to apportion dividends between principal and income. They pass as income as of the date of their declaration. Some of the statutes providing for apportionment apply to dividends.[18]

But the rule with respect to interest was different from that above stated regarding rents, annuities, and dividends. "The rule at common law was that the interest on money loans was apportionable, and in this respect it differed from other periodical payments like dividends, rent, pensions and annuities. The reason for the distinction is that in the case of money at interest, the interest accrues de die in diem, which cannot be said of some at least of the other payments mentioned." [19] Thus, if interest upon a bond or note becomes payable after the beginning of the trust, but has been partly earned before the trust took effect, the sum will be apportioned between capital and income.[20] It has been earned day by day, and a certain portion was, therefore, due at the time the trust began, and was hence a part of the capital at that time.

Where the annuity was for the benefit of a widow and in lieu of dower, it has been held that it would be apportioned. Gheen v. Osborn, 17 Serg. & R. (Pa.) 171.

[16] Rev. Laws Mass. 1902, c. 141, § 25; Code Civ. Proc. N. Y. § 2674; Revisal N. C. 1908, § 1988; Gen. Laws R. I. 1909, c. 254, § 39; Code Va. 1904, § 2810; Code W. Va. 1913, c. 95, § 1 (sec. 4155).

[17] Greene v. Huntington, 73 Conn. 106, 46 Atl. 883; Mann v. Anderson, 106 Ga. 818, 32 S. E. 870; Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 Atl. 166; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; In re Kernochan, 104 N. Y. 618, 11 N. E. 149; Rhode Island Hospital Trust Co. v. Noyes, 26 R. I. 323, 58 Atl. 999.

[18] Code Civ. Proc. N. Y. § 2674; Revisal N. C. 1908, § 1988.

[19] Appeal of Wilson, 108 Pa. 344, 346, 56 Am. Rep. 214.

[20] Bridgeport Trust Co. v. Marsh, 87 Conn. 384, 87 Atl. 865; Riggs v. Cragg, 26 Hun (N. Y.) 89; In re Fithian, 103 Misc. Rep. 568, 170 N. Y. Supp. 750; United States Trust Co. v. Tobias, 21 Abb. N. C. 393, 4 N. Y. Supp. 211; Smith v. Lansing, 24 Misc. Rep. 566, 53 N. Y. Supp. 633; Sweigart v. Frey, 8 Serg. & R. (Pa.) 299; Rhode Island Hospital Trust Co. v. Noyes, 26 R. I. 323, 58 Atl. 999. But an intent to give a life cestui the whole of such income may exist and will be effectual. Held v. Keller, 135 Minn. 192, 160 N. W. 487.

The statutes of many states now make provision to this effect.[21] In Maine and Massachusetts the view has been taken that coupons on bonds are separate promises to pay money, maturing at a given date and not capable of apportionment.[22] Naturally interest which has become due and payable before the beginning of the trust constitutes a part of the capital of the trust estate.[23]

Securities Bought at Premium

In cases where a trustee holds securities which have been purchased at a premium or at a discount, he may find it difficult to determine what is his duty regarding the payment of income. If, for example, the trustee has purchased a bond at 105, is it his duty to pay to the person entitled to the income the entire interest received by the payment of coupons, or should the trustee retain a portion of the coupon in order that he may replace the deficiency in the capital fund which will occur when the bond matures? At maturity the bond will produce only $1,000, whereas the original investment of capital in the bond was $1,050. There will thus be a loss of $50 to the principal fund, unless the trustee retains enough of the interest to make up that $50.

Divergent views have been entertained by the American courts upon this question. The majority of courts which have passed upon the question have held it to be the trustee's duty to create an amortization fund for the purpose of caring for the premium.[24] The theory of these courts is well explained by Cullen, C. J., in Re Stevens,[25] the New York case which fixed the rule where there had previously been some doubt and confusion. This judge said in part: "The justification for the rule is very apparent. The income on a bond having a term of years to run and purchased at a premium is not the sum paid annually on its interest coupons. The interest on a $1,000 ten-year 5 per cent. bond, bought at 120 per cent.,

[21] Rev. Laws (Mass.) 1902, c. 141, §§ 24, 25; Code Civ. Proc. N. Y. § 2674; Gen. St. R. I. 1909, c. 254, § 39; Code Va. 1904, § 2810; Code W. Va. 1913, c. 95, § 1 (sec. 4155).

[22] Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 Atl. 166; Sargent v. Sargent, 103 Mass. 297.

[23] Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 Atl. 166.

[24] Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968; New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493; Ballantine v. Young, 74 N. J. Eq. 572, 70 Atl. 668; In re Stevens, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511; In re Allis' Estate, 123 Wis. 223, 101 N. W. 365; In re Wells' Estate, 156 Wis. 294, 144 N. W. 174. The amortization fund should be accumulated gradually, and not deducted from a single installment of income. In re Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19. See Edgerton, Premiums and Discounts in Trust Accounts, 31 Harv. Law Rev. 447.

[25] 187 N. Y. 471, 476, 477, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511.

is not $50, but a part thereof only, and the remainder is a return of the principal. All large investors in bonds, such as banks, trust companies, and insurance companies, purchase bonds on the basis of the interest the bonds actually return, not the amount they nominally return. Nor is the premium paid on the bond an outlay for the security of the principal. All government bonds have the same security, the faith of the government; yet they vary in price, a variation caused by the difference in the rate of interest and the time they have to run. It is urged that there is often a speculative change in the market value of a bond, and a bond may be worth more at the termination of the trust than at the time of its purchase. This has no bearing on the case. The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But, apart from any speculative change in the market value, there is from lapse of time an inherent and intrinsic change in the value of the security itself as it approaches maturity. It is this, and this only, with which the life tenant is to be charged. We, therefore, adhere to the rule declared in the Baker case [New York Life Ins. & Trust Co. v. Baker, 165 N. Y. 484, 59 N. E. 257, 53 L. R. A. 544], that in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having a definite term to run, while if the bonds are received from the estate of the testator, then the rule in the McLouth case [McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230] prevails, and the whole interest should be treated as income."

The amortization rule does not apply where the settlor purchased the securities at a premium,[26] or where he expressly directed the trustee to buy the securities in question,[27] or when the settlor indicates in any way an intent that the gross income shall be paid to the life beneficiary.[28] In these instances the trustee may treat as income all the interest received upon the securities. In such cases

[26] Hemenway v. Hemenway, 134 Mass. 446; Ballantine v. Young, 74 N. J. Eq. 572, 70 Atl. 668; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; In re Fanoni, 88 Misc. Rep. 442, 152 N. Y. Supp. 218; Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938. Where securities were bought at a premium by the settlor, the trustee is not chargeable for the loss due to the depreciation of the securities as they approach maturity. In re Hunt, 121 App. Div. 96, 105 N. Y. Supp. 696. Contra: In re Wells' Estate, 156 Wis. 294, 144 N. W. 174.

[27] Shaw v. Cordis, 143 Mass. 443, 9 N. E. 794.

[28] In Higgins v. Beck, 116 Me. 127, 100 Atl. 553, 4 A. L. R. 1245, the bonds had been bought by the settlor and the court held the life beneficiaries entitled to the whole income. See, also, In re Hawk's Estate, 54 Misc.

the settlor must be deemed to have intended that the income from the securities should be the actual coupons or interest received.

The minority view is that the trustee is under no duty to accumulate a fund to care for the premium, but that the entire interest upon the security should be paid to the beneficiary, and the loss due to the payment of the premium should fall on the capital fund.[29] The arguments which appeal to the courts taking this minority view are well expressed by the Pennsylvania court in one of its latest discussions of the subject:[30] "If the whole premium is at once charged to income, or if a part of the income is withheld each year, so that the successive deductions will cover the whole time the security has to run, the life tenant, who is the primary and immediate object of the testator's bounty, will be deprived of the income provided. In one case he may be wholly deprived of the means of support for a considerable period, and receive no benefit whatever from the provision made for him; in the other, he will suffer a diminution of what is really income, it may be for the whole period of the trust. * * * The remainder has the advantage of any increase resulting from profits made on investments, and it bears the losses resulting from depreciation in value of ordinary securities. There is no substantial reason why an exception should be made in its favor, where losses result from the payment of premiums made in order to obtain safe and permanent investments. If premiums were paid to secure greater income, they should be charged, of course, to the life tenant, because he could be the only party benefited by the payment. But this is not the case. Securities that command a premium do not bear a proportionately high interest. Premiums do not represent higher interest, but safety and permanency of the investment and facility of transfer and use. These are matters in which the life tenant has less interest than the remainderman, because he has less at stake. And he pays in part for safety and permanency whenever securities are bought at a price above par."

Securities Bought at Discount

Upon the duty of the trustee where he buys securities at a discount there is but little authority.[31] If he buys a bond at 90, should

Rep. 187, 105 N. Y. Supp. 856; Lynde v. Lynde, 113 App. Div. 411, 99 N. Y. Supp. 283; Kemp v. Macready, 165 App. Div. 124, 150 N. Y. Supp. 618.

[29] American Security & Trust Co. v. Payne, 33 App. D. C. 178; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; In re Penn-Gaskell's Estate, 208 Pa. 346, 57 Atl. 715.

[30] In re Penn-Gaskell's Estate, 208 Pa. 346, 348, 349, 57 Atl. 715.

[31] In Townsend v. United States Trust Co., 3 Redf. Sur. (N. Y.) 220, the surrogate of New York county declined to allow the beneficiary of the income any sum on account of an appreciation of securities purchased at a discount. Dicta to the same effect appear in other cases. Hite's Devisees

he annually pay to the beneficiary to whom the income goes a small sum in addition to the interest actually earned, in order that the beneficiary may have the benefit of this discount? Is the remainderman or the capital fund entitled only to the sum actually invested in the bond, or should the face value of the bond, when paid at maturity, be treated as capital? It would seem that the courts which have adopted the amortization rules regarding premiums should also give the income the benefit of discounts. If the income must contribute to paying off premiums, why should it not profit from discounts? If the converse of the amortization rule were applied to discounts, the capital fund would have returned to it exactly the amount which originally went into the investment. Is it entitled to more? It is true that the trustee might perhaps be justified in awaiting the maturity of the bond before paying to the life beneficiary anything on account of a discount, because the benefit of the discount may never come to the trust estate. If the trustee sells the bond before its maturity and at a sum merely equal to or less than the original cost, there will be no discount to be distributed. It would hardly be fair to the parties interested in the corpus of the estate to allow the trustee to apply capital annually to paying the life beneficiary a bonus on account of the discount, when such discount is only contingently a benefit to the trust.

Wasting Securities

The rules for amortization established by many courts with respect to securities purchased by a trustee at a premium merely afford one example of the attitude of chancery towards "wasting" property in the hands of a trustee. If a trustee receives property which is bound to depreciate with the lapse of time, he should sell it and invest the proceeds in property having a steady and permanent value.[32] If he is obliged to retain the "wasting" property, he should provide a sinking fund out of income, so that the remainderman will receive capital equal to the original property in value.[33] Thus, where the trust property consists of household furniture which is leased by the trustee with a house, and there is naturally a rapid deterioration in the furniture, the trustee should set aside from the income of the furniture a sufficient sum to replace it when it is worn out, or to make good the depreciation if it is later sold.[34]

v. Hite's Ex'r, 93 Ky. 257, 269, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; Hemenway v. Hemenway, 134 Mass. 446; New England Trust Co. v. Eaton, 140 Mass. 532, 547, 4 N. E. 69, 54 Am. Rep. 493, in the dissenting opinion of Holmes, J.

[32] Howe v. Earl of Dartmouth, 7 Ves. 137.

[33] Kinmonth v. Brigham, 5 Allen (Mass.) 270.

[34] In re Housman, 4 Dem. Sur. (N. Y.) 404.

"It is no doubt a general rule that, where trustees or executors find a portion of the estate invested in what are termed 'wasting' securities, they should pay to the life tenant only so much of the income as represents a fair return upon the capital value, accumulating and retaining the residue for the benefit of the remainderman. * * * This rule is not rigid, however, and yields readily when it can be seen from the will itself, read in the light of the surrounding circumstances, that the testator entertained a different intention. * * *"[85] Thus, where the settlor has provided that the "whole of the net income" from certain leasehold estates shall be paid to a certain beneficiary, it would evidently be contrary to his intent to retain a portion of such income as an amortization fund, even though the leasehold estates are gradually decreasing in value and will eventually become worthless.[86]

Use of Capital

Frequently the income of a trust fund is insufficient to meet the expenses of the trust and to make the payments required under the trust instrument. The trustee is then faced with the problem as to whether he may use a portion of the principal fund to meet the emergency. Occasionally the trust instrument expressly provides the trustee with authority for the use of the principal. In such a case there can be no doubt about the duty of the trustee.[87] And an express prohibition of the use of the capital will of course be effective.[88] Where there is no express authority for the use of the principal the question is largely one of construction. The terms of the trust instrument and the circumstances of the individual case are examined for the purpose of ascertaining the actual or probable intent of the settlor. Usually it has been held that a court of chancery has authority to authorize a trustee to

[85] Frankel v. Farmers' Loan & Trust Co., 152 App. Div. 58, 61, 136 N. Y. Supp. 703.

[86] Frankel v. Farmers' Loan & Trust Co., 152 App. Div. 58, 136 N. Y. Supp. 703.

[87] Sterling v. Ives, 78 Conn. 498, 62 Atl. 948; Jackson v. Matthews, 133 Md. 282, 105 Atl. 146; Coates v. Lunt, 210 Mass. 314, 96 N. E. 685; Plummer v. Gibson, 59 N. J. Eq. 68, 45 Atl. 284; Wallace v. Wallace (N. J. Ch.) 75 Atl. 770; In re Blanck, 5 Dem. Sur. (N. Y.) 301; In re Stevens' Estate, 20 Misc. Rep. 157, 45 N. Y. Supp. 908; Erisman v. Directors of Poor of Lancaster County, 47 Pa. 509; Tiffany v. Munroe, 19 R. I. 584, 35 Atl. 302. The same rule applies to a charitable trust. Stearns v. Newport Hospital, 27 R. I. 309, 62 Atl. 132, 8 Ann. Cas. 1176. Discretion to determine the amount and time of payments from the principal may be vested in the cestui que trust. Hooker v. Goodwin, 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159. So long as the trustee does not exercise his discretion to pay the principal arbitrarily or capriciously, the court will not interfere. Wright v. Blinn, 225 Mass. 146, 114 N. E. 79.

[88] Offutt v. Divine's Ex'r (Ky.) 53 S. W. 816.

make use of the principal fund in extraordinary cases,[39] or to make advances from the income even though an accumulation was directed.[40] "The settled law in this state is that encroachment upon the principal of the estate of infant legatees, in advance of the period of distribution, is not absolutely nor under all circumstances forbidden, and that a trustee may, in a proper case, apply for and obtain the protection of an order to make such encroachment on behalf of a ward. And it appears, too, that what may be done in advance may be ratified afterwards." [41] And in a number of cases the trustee has been held warranted in expending portions of the capital for temporary purposes, as, for example, in the support and maintenance of the beneficiary, even though he did not obtain court authority therefor.[42] The trust instrument was deemed impliedly to authorize such expenditure.

Where, for example, the will of the settlor manifests an intent that his children and grandchildren shall be maintained and educated from the trust property, and the income is insufficient for that purpose, it has been held that the trustee may properly resort to the corpus of the estate.[43] In other cases of temporary emergencies the courts have held the trustee justified in borrowing from the principal fund sufficient funds to defray the expenses, but have

[39] Longwith v. Riggs, 123 Ill. 258, 14 N. E. 840; Elder v. Elder, 50 Me. 535; Hatton v. Weems, 12 Gill & J. (Md.) 83; In re Bostwick, 4 Johns. Ch. (N. Y.) 100; In re Fero, 9 How. Prac. (N. Y.) 85; In re Muller, 29 Hun (N. Y.) 418; Carter v. Rolland, 11 Humph. (Tenn.) 333. But see Hester v. Wilkinson, 6 Humph. (Tenn.) 215, 44 Am. Dec. 303. The court may also authorize the payment of income in advance of the due date. Rhoads v. Rhoads, 43 Ill. 239; Knorr v. Millard, 52 Mich. 542, 18 N. W. 349.

[40] In re Fritts' Estate, 19 Misc. Rep. 402, 44 N. Y. Supp. 344; In re Wagner, 81 App. Div. 163, 80 N. Y. Supp. 785; N. Y. Real Property Law (Consol. Laws, c. 50) § 62; New York Personal Property Law (Consol. Laws, c. 41) § 17. By Laws Tenn. 1919, c. 148, chancery is authorized to approve the use of the corpus for the support, education, and maintenance of the beneficiary, where the trust estate does not exceed $1,000 in value.

[41] Smith v. Robinson, 83 N. J. Eq. 384, 90 Atl. 1063, 1064.

[42] In re Simons' Will, 55 Conn. 239, 11 Atl. 36; Shepard v. Shepard, 57 Conn. 24, 17 Atl. 173; Cornwise v. Bourgum, Ga. Dec. 15, pt. 2; Dockins v. Vass (Ky.) 124 S. W. 290; Mills v. Michigan Trust Co., 124 Mich. 244, 82 N. W. 1046; Eggleston v. Merriam, 86 Minn. 88, 90 N. W. 118; McGill v. Young, 75 N. H. 133, 71 Atl. 637; Potts' Petition, 1 Ashm. (Pa.) 340; In re Martin's Estate, 160 Pa. 32, 28 Atl. 575; Haigood v. Wells, 1 Hill. Eq. (S. C.) 59; Sedgwick's Curator v. Taylor, 84 Va. 820, 6 S. E. 226. A devise over of "any balance that may remain" indicates power to use the principal. Gossom's Adm'r v. Gossom, 142 Ky. 118, 133 S. W. 1162; Trustees of Elizabeth Speers' Memorial Hospital v. Makibben's Guardian, 126 Ky. 17, 102 S. W. 820.

[43] Brown v. Berry, 71 N. H. 241, 52 Atl. 870.

required him to restore the sum thus taken by making reservations from later payments into the income fund.[44] But where the intent of the settlor is clearly expressed that the capital shall remain untouched, the trustee will be without power to use it. This is apt to be the case where remaindermen are entitled to a specific fund at the expiration of the trust.[45]

DUTY TO ACCOUNT

104. The trustee is under a duty to the cestui que trust—

(a) To keep accurate and complete records of the trust business;

(b) To furnish the beneficiary with all necessary information regarding the trust;

(c) To render in a court of competent jurisdiction a full account of the administration of the trust.

Ordinarily the management and control of the trust property is solely in the hands of the trustee. The cestui que trust knows nothing of the trust business directly. The nature of the trust investments, the condition of the trust property, the income actually received—these are all matters of which the beneficiary is usually ignorant, except as he obtains information regarding them from the trustee. And yet it is highly proper that the beneficiary should have knowledge of these matters, in order that he may know whether the trust is being properly administered. From this situation arises the duty of the trustee to keep accurate accounts of his transactions, to supply full information to the cestui que trust, and to render a full account of his proceedings in the proper court.

The trustee should keep books which will accurately show his disposition of the trust funds, and he should obtain vouchers for all payments.[46] "He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him." [47]

[44] In re Hurlbut's Estate, 51 Misc. Rep. 263, 100 N. Y. Supp. 1098; Downey v. Bullock, 42 N. C. (7 Ired. Eq.) 102; Morton's Ex'rs v. Adams, 1 Strob. Eq. (S. C.) 72.

[45] Einbecker v. Einbecker, 162 Ill. 267, 44 N. E. 426; Newton v. Rebenack, 90 Mo. App. 650; Cass v. Cass, 15 App. Div. 235, 44 N. Y. Supp. 186; Deen v. Cozzens, 30 N. Y. Super. Ct. 178; In re Fero, 9 How. Prac. (N. Y.) 85.

[46] Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; Richardson v. Van Auken, 5 App. D. C. 209; Potter v. Porter, 109 S. W. 344, 33 Ky. Law Rep. 129; Smallwood v. Lawson, 183 Ky. 189, 208 S. W. 808; Ithell v. Malone (Sup.) 154 N. Y. Supp. 275; Raski v. Wise, 56 Or. 72, 107 Pac. 984; Stockwell v. Stockwell's Estate, 92 Vt. 489, 105 Atl. 30.

[47] White v. Rankin, 18 App. Div. 293, 295, 46 N. Y. Supp. 228, affirmed 162 N. Y. 622, 57 N. E. 1128.

It is not necessary that the cestui que trust bring a bill for an accounting in order to obtain information about the trust business. The trustee is under the duty of furnishing all pertinent information upon demand.[48] Thus, in a leading English case it was held that a beneficiary was entitled to an order from the trustee which would enable him to learn whether any of the trust property was incumbered or any interest in it had been assigned. The court said: "The general rule, then, is what I have stated, that the trustee must give information to his cestui que trust as to the investment of the trust estate. Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee merely to say that it is so invested, but his cestui que trust is entitled to an authority from the trustee to enable him to make proper application to the bank, as has been done in this case, in order that he may verify the trustee's own statement. * * *"[49]

The same rule was well framed in a statement of a Michigan court: "The beneficiaries of a trust have the right to be kept informed at all times concerning the management of the trust, and it is the duty of the trustees to so inform them. It is not generally presumable that the beneficiaries have such information from independent sources."[50] An illustration of the enforcement of this same rule is found in the cases holding that a beneficiary is entitled to examine legal opinions which the trustee obtains for the purpose of guiding him in carrying out the trust. The trustee is not, however, under the same obligation regarding opinions which he obtains for the purpose of defending himself from charges of misconduct.[51]

Duty to Account

It is elementary that a trustee is under the obligation of rendering an account of his dealings as trustee in a court having jurisdiction of the trust, under the rules laid down by that court or by the legislature.[52] The details of such accountings will be taken up

[48] Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618; Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859; Woolf v. Barnes, 46 Misc. Rep. 169, 93 N. Y. Supp. 219; Jay v. Squire, 7 Ohio N. P. 345; In re Scott's Estate, 202 Pa. 389, 51 Atl. 1023. The cestui que trust is entitled to be informed in what securities the trust funds are invested. Baer v. Kahn, 131 Md. 17, 101 Atl. 596.

[49] In re Tillott, [1892] 1 Ch. 86, 88, 89.

[50] Loud v. Winchester, 52 Mich. 174, 183, 17 N. W. 784.

[51] Wynne v. Humberston, 27 Beav. 421.

[52] Silver King Consol. Min. Co. of Utah v. Silver King Coalition Mines Co. of Nevada, 204 Fed. 166, 122 C. C. A. 402, Ann. Cas. 1918B, 571; Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Purdy v. Johnson, 174 Cal. 521, 163 Pac. 893; Barnes v. Century Sav. Bank, 165 Iowa, 141, 144 N. W. 367; Dillivan v. German Sav. Bank (Iowa) 124 N. W. 350; Barnes v. Gardiner, 140 App. Div. 395, 125 N. Y. Supp. 433; Gray v. Heinze, 82 Misc. Rep. 618,

at a later time. It is sufficient here to state the broad, general duty. This obligation is placed upon the trustee in order that the cestui que trust may learn what property has been received by the trustee and what funds paid out, and may then object to the account, if he desires, and have the propriety of the trustee's actions passed upon. "It is well settled that, when a fiduciary relation is shown to exist, and property or property interests have been intrusted to an agent or trustee, the burden is thrown upon such agent intrusted to render an account and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed that the agent or trustee has means of knowing and does know what the principal or cestui que trust cannot know, and is bound to reveal the entire truth.[53] * * * It is not necessary in such a case as this that the plaintiff should show that there will be something found due to her on the accounting. That fact can never be known with certainty until the account has been taken. The right to this accounting results from the facts that the fiduciary relation has been created and assumed by the agent or trustee, and that the principal or cestui que trust is not informed and does not know what has been done with reference to the property or property interests confided to the agent or trustee." [54]

The forum in which the trustee may voluntarily account, or in which he may be compelled to account, is usually the forum having general equitable jurisdiction. It is impossible here to enumerate the courts of the various jurisdictions which possess the power to receive and compel accountings by a trustee.[55] Quite frequently

144 N. Y. Supp. 1045; Arnold v. Southern Pine Lumber Co., 58 Tex. Civ. App. 186, 123 S. W. 1162; Geisse v. Beall, 3 Wis. 367. An implied as well as an express trustee may be compelled to account. Tucker v. Weeks, 177 App. Div. 158, 163 N. Y. Supp. 595. Since the account need not be personally prepared, illness of the trustee is not an excuse for failure to file an account. In re Buchanan's Estate (Sur.) 171 N. Y. Supp. 953.

[53] Citing Marvin v. Brooks, 94 N. Y. 71.

[54] Frethey v. Durant, 24 App. Div. 58, 61, 62, 48 N. Y. Supp. 839. See, also, State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

[55] For cases discussing the jurisdiction of various courts, see McAdoo v. Sayre, 145 Cal. 344, 78 Pac. 874; Prindle v. Holcomb, 45 Conn. 111; Jones v. Downs, 82 Conn. 33, 72 Atl. 589; McHardy v. McHardy's Ex'r, 7 Fla. 301; Cheney v. Langley, 56 Ill. App. 86; Weaver v. Fisher, 110 Ill. 146; Waterman v. Alden, 144 Ill. 90, 32 N. E. 972; Cunningham v. Fraize, 85 Ky. 35, 2 S. W. 551; Boreing v. Faris, 127 Ky. 67, 104 S. W. 1022; Page v. Marston, 94 Me. 342, 47 Atl. 529; Nelson v. Howard, 5 Md. 327; Hobart v. Andrews, 21 Pick. (Mass.) 526; Green v. Gaskill, 175 Mass. 265, 56 N. E. 560; Hayes v. Hall, 188 Mass. 510, 74 N. E. 935; McBride v. McIntyre, 91 Mich. 406, 51 N. W. 1113; Sullivan v. Ross' Estate, 113 Mich. 311, 71 N.

statutes give to the probate courts concurrent or exclusive jurisdiction over accountings by testamentary trustees.[56]

Practice on Accounting

The practice upon trustees' accountings is usually governed by statute or court rules to such an extent that any statement of generally applicable principles is difficult.[57] The necessary parties are all those interested in the trust. Thus, all the trustees should be made parties,[58] unless the account is demanded of one trustee alone;[59] and the representatives of a deceased trustee should be joined.[60] Naturally all beneficiaries should be made parties,[61]

W. 634, 76 N. W. 309; Evans v. Evans (N. J. Ch.) 57 Atl. 872; Marsh v. Marsh's Ex'rs, 73 N. J. Eq. 99, 67 Atl. 706; Jones v. Jones, 8 Misc. Rep. 660, 30 N. Y. Supp. 177; In re Widmayer, 28 Misc. Rep. 362, 59 N. Y. Supp. 980; Meeks v. Meeks, 51 Misc. Rep. 538, 100 N. Y. Supp. 667; In re Clyne, 72 Misc. Rep. 593, 131 N. Y. Supp. 1090; Van Sinderen v. Lawrence, 50 Hun, 272, 3 N. Y. Supp. 25; Cass v. Cass, 61 Hun, 460, 16 N. Y. Supp. 229; Rutherfurd v. Myers, 50 App. Div. 298, 63 N. Y. Supp. 939; In re Fogarty's Estate, 117 App. Div. 583, 102 N. Y. Supp. 776; Post v. Ingraham, 122 App. Div. 738, 107 N. Y. Supp. 737; Mildeberger v. Franklin, 130 App. Div. 860, 115 N. Y. Supp. 903; Runk v. Thomas, 138 App. Div. 789, 123 N. Y. Supp. 523; Ungrich v. Ungrich, 141 App. Div. 485, 126 N. Y. Supp. 419; Furniss v. Furniss, 148 App. Div. 211, 133 N. Y. Supp. 535; Deering v. Pierce, 149 App. Div. 10, 133 N. Y. Supp. 582; Conant v. Wright, 22 App. Div. 216, 48 N. Y. Supp. 422, affirmed 162 N. Y. 635, 57 N. E. 1107; Code Civ. Proc. N. Y. § 2723 et seq.; Herron v. Comstock, 139 Fed. 370, 71 C. C. A. 466; In re Roach's Estate, 50 Or. 179, 92 Pac. 118; Bank of United States v. Biddle, 2 Pars. Eq. Cas. (Pa.) 31; Appeal of Simpson, 9 Pa. 416; Appeal of Jones, 3 Grant, Cas. (Pa.) 169; In re Apple, 2 Phila. (Pa.) 171; Appeal of Baskin, 34 Pa. 272; Appeal of Paisley, 70 Pa. 153; In re Walton's Estate, 174 Pa. 195, 34 Atl. 558; Meurer v. Stokes, 246 Pa. 393, 92 Atl. 506; Poole v. Brown, 12 S. C. 556; Leach v. Cowan, 125 Tenn. 182, 140 S. W. 1070, Ann. Cas. 1913C, 188; Downer v. Downer, 9 Vt. 231; Bailey v. Bailey, 67 Vt. 494, 32 Atl. 470, 48 Am. St. Rep. 826; In re Cary's Estate, 81 Vt. 112, 69 Atl. 736; Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736.

[56] Hooker v. Goodwin, 91 Conn. 463, 99 Atl. 1059, Ann. Cas. 1918D, 1159; Appeal of Morse, 92 Conn. 286, 102 Atl. 586; People ex rel. Safford v. Washburn, 105 Misc. Rep. 415, 173 N. Y. Supp. 157, affirmed 188 App. Div. 951, 176 N. Y. Supp. 833.

[57] See, for example, the New York statute having to do with the accountings of testamentary trustees, found in Code Civ. Proc. §§ 2719–2742, and Laws Vt. 1919, No. 88.

[58] McKinley v. Irvine, 13 Ala. 681; People v. Equitable Life Assur. Soc. of United States, 124 App. Div. 714, 109 N. Y. Supp. 453; German-American Coffee Co. v. Diehl, 86 Misc. Rep. 547, 149 N. Y. Supp. 413.

[59] Fleming v. Gilmer, 35 Ala. 62.

[60] Evans v. Evans (N. J. Ch.) 57 Atl. 872.

[61] Parsons v. Lyman, Fed. Cas. No. 10780; Newman v. Schwerin, 61 Fed. 865, 10 C. C. A. 129; Dill v. McGehee, 34 Ga. 438; Speakman v. Tatem, 45 N. J. Eq. 388, 17 Atl. 818; Brewster v. Brewster, 4 Sandf. Ch. (N. Y.) 22; Adams v. Purser, 126 App. Div. 20, 110 N. Y. Supp. 167.

as well as the representatives of a deceased cestui.[62] Persons in possession of the trust res may properly be joined,[63] but it is not necessary to give notice to transferees from the trustee.[64] Remaindermen are, of course, interested in the property and should be joined when their rights may be affected.[65]

After the trustee has presented his account the cestuis que trust should be allowed an opportunity of objecting to any item.[66] The trustee should present vouchers for all payments which he claims he has made,[67] but if satisfactory proof of the payment is made otherwise than by the presentation of a voucher, the claim will be allowed.[68] Where no voucher is presented and the charge seems questionable, the trustee will not be allowed the amount.[69] While the legal presumption is that a trustee has done his duty and performed the trust,[70] the burden is upon the accounting trustee to show satisfactorily the disposition of all property received by him as trustee, and to prove the necessity and propriety of all expenditures for which he claims credit.[71] He cannot throw upon the cestui que trust the burden of proving the opposite.[72] All presumptions are against the trustee upon the accounting, and obscurities and doubts in the account will be resolved against him.[73]

[62] Cogan v. McCabe, 23 Misc. Rep. 739, 52 N. Y. Supp. 48.

[63] McBride v. McIntyre, 91 Mich. 406, 51 N. W. 1113.

[64] Pondir v. New York, L. E. & W. R. Co., 72 Hun, 384, 25 N. Y. Supp. 560; Felton v. Long, 43 N. C. (8 Ired. Eq.) 224.

[65] Leonard v. Barnum, 94 App. Div. 266, 87 N. Y. Supp. 978, affirmed Same v. Pierce, 182 N. Y. 431, 75 N. E. 313, 1 L. R. A. (N. S.) 161. But see Mount v. Mount, 68 App. Div. 144, 74 N. Y. Supp. 148.

[66] Lycan v. Miller, 56 Mo. App. 79.

[67] Willis v. Clymer, 66 N. J. Eq. 284, 57 Atl. 803; Smith v. Robinson, 83 N. J. Eq. 384, 90 Atl. 1063.

[68] Groom v. Thompson (Ky.) 16 S. W. 369; Brinkerhoff's Ex'rs v. Banta, 26 N. J. Eq. 157; In re United States Mortgage & Trust Co., 114 App. Div. 532, 100 N. Y. Supp. 12; In re Froelich's Estate, 50 Misc. Rep. 103, 100 N. Y. Supp. 436; In re Davis' Estate, 43 App. Div. 331, 60 N. Y. Supp. 315.

[69] In re Quinn's Estate, 16 Misc. Rep. 651, 40 N. Y. Supp. 732.

[70] Aldridge v. Aldridge (Ky.) 109 S. W. 873.

[71] Chirurg v. Ames, 138 Iowa, 697, 116 N. W. 865; Fidelity & Deposit Co. of Maryland v. Husbands, 174 Ky. 200, 192 S. W. 51; Ashley v. Winkley, 209 Mass. 509, 95 N. E. 932; Parker's Adm'r v. Parker (N. J. Ch.) 5 Atl. 586; McCulloch v. Tomkins, 62 N. J. Eq. 262, 49 Atl. 474; Ithell v. Malone (Sup.) 154 N. Y. Supp. 275; Biddle Purchasing Co. v. Snyder, 109 App. Div. 679, 96 N. Y. Supp. 356; Choctaw, O. & G. R. Co. v. Sittel, 21 Okl. 695, 97 Pac. 363; Mintz v. Brock, 193 Pa. 294, 44 Atl. 417; Heyward v. Glover, 2 Hill, Eq. (S. C.) 515; Montgomery v. Coldwell, 14 Lea (Tenn.) 29; Stockwell v. Stockwell's Estate, 92 Vt. 489, 105 Atl. 30.

[72] Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340; Purdy v. Johnson, 174 Cal. 521, 163 Pac. 893.

[73] Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Smith v. Robinson, 83 N. J. Eq.

DUTY TO ACCOUNT—CHARGES AGAINST THE TRUSTEE

105. The trustee will be charged on the accounting with all the principal and income which he has actually received, and in some cases of breach of trust with such further amounts as he would have received if he had performed his duty.

Upon the accounting there are two elements to be considered: The sums with which the trustee is to be charged, and the amounts with which he is to be credited. The charges against the trustee include, broadly speaking, all the trust property which he has received during the continuance of the trust. In the absence of willful wrongdoing or bad faith, the trustee will be charged only with the property which he has actually received.[74] But if the trustee has been guilty of a breach of the trust, he may be held liable for what he ought to have received.[75] Thus, where the trustee refuses to render an account, he will be charged with what he ought to have received.[76] In another case, where there was a refusal or failure to account, the trustee was held liable for the original fund and such profits thereon as the most successful of business men would have made.[77]

If the trustee appropriates the trust funds to his own use, he will be charged with the value of the trust property as of the date of the misappropriation.[78] It is obvious that the trustee must be debited on the accounting with the income of the trust property, as well as with the original value of the trust res. Thus, he must account for the rents of lands held in trust, or for their reasonable rental value, where he uses them for his own benefit.[79] Where the negligence of the trustee causes expense, as where a second ac-

384, 90 Atl. 1063; Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; In re Gaston Trust, 35 N. J. Eq. 60; White v. Rankin, 18 App. Div. 293, 46 N. Y. Supp. 228, affirmed 162 N. Y. 622, 57 N. E. 1128; Landis v. Scott, 32 Pa. 495.

[74] Gray v. Lynch, 8 Gill (Md.) 403; Farmers' Loan & Trust Co. v. Pendleton, 179 N. Y. 486, 72 N. E. 508; Appeal of Greenwood, 92 Pa. 181; In re Patrick's Estate, 162 Pa. 175, 29 Atl. 639.

[75] Bridgeford v. Owen, 10 Ky. Law Rep. 116.

[76] Green v. Winter, 1 Johns. Ch. (N. Y.) 27, 7 Am. Dec. 475.

[77] Perrin v. Lepper, 72 Mich. 454, 40 N. W. 859.

[78] In re Hart's Estate, 203 Pa. 488, 53 Atl. 367.

[79] Cunningham v. Cunningham, 81 S. C. 506, 62 S. E. 845. In Van Orden v. Pitts (Tex. Com. App.) 206 S. W. 830, one who appropriated property and was made a constructive trustee thereof was charged with interest at the highest rate allowed by law, 10 per cent. And in Campbell v. Napier, 182 Ky. 182,

count has to be rendered, due to the inaccuracy of the first, the trustee will be charged with this expense.[80]

Under what circumstances the trustee will be obliged to pay simple or compound interest on an accounting or in a suit for breach of trust is a question which will receive consideration at a later point, in connection with the rights and remedies of the cestui que trust.[81]

DUTY TO ACCOUNT—CREDITS TO THE TRUSTEE

106. The trustee will be credited on the accounting with all trust moneys necessarily expended for the expenses of administration and for all trust property rightly delivered to the cestui que trust. If trust funds are lacking to pay necessary expenses or to make proper payments to the beneficiaries, the trustee may advance his own funds for such purposes and will be reimbursed therefor upon the accounting.

Upon the accounting the trustee is entitled to receive credit for all expenditures which he has necessarily and properly made in the administration of the trust. The powers and duties of the trustee regarding expenditures have previously been considered.[82] To state in detail here the payments for which a trustee is entitled to credit upon the accounting would be but repetition. If a trustee has power to make a payment, or if it is his duty to make such payment, the expenditure will be one for which he is entitled to credit when he accounts to the court. The discussion elsewhere has shown that necessary and reasonable expenditures for the following purposes were allowable: Collecting and obtaining possession of the trust property; discharging the interest and principal of debts of the trust estate and removing incumbrances upon the trust property; defraying the expenses of necessary repairs, improvements, insurance, and taxes; buying property necessary to the carrying on of authorized trust business; employing necessary agents and servants; and employing attorneys, when litigation or legal advice is necessary. "Trustees thus invested with the general power to manage and control the property of the cestui que trust are justified in laying out money for the repair and

206 S. W. 271, a trustee who repudiated his trust was charged with interest from the date of repudiation.

[80] Clark v. Anderson, 13 Bush (Ky.) 111.

[81] See § 120, post.

[82] See §§ 87, 102, ante.

ordinary improvement of property, such as draining, fencing, necessary farm buildings, etc., and they are allowed to hold the estate until the moneys thus expended are repaid." [83]

It is an application of the elementary principles of the law of trusts that a trustee who has paid out money for insurance premiums,[84] or repairs upon the trust property,[85] or taxes,[86] or lawyer's fees,[87] or the costs of an action,[88] or to discharge a claim against the trust estate,[89] or for improvements of the trust property,[90] or for office rent and office expenses,[91] should be credited in his account with such payments. The payments were for the benefit of the cestuis que trust. They should come out of the trust funds, and not out of the private moneys of the trustee. If a trustee neglects to keep proper accounts of his expenditures, the lowest possible estimate will be put upon them in allowing him remuneration.[92]

Trustee's Lien

For the purpose of protecting the trustee's right to reimbursement for expenditures of the kinds named above the trustee is given a lien on the trust property.[93] "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. * * * * If the trust fund is insufficient for such reimbursement, he may call on the cestui que trust, in whose behalf and at whose request he acted, and recover of him personally reason-

[83] Woodard v. Wright, 82 Cal. 202, 206, 22 Pac. 1118.

[84] Fisher v. Fisher, 170 N. C. 378, 87 S. E. 113.

[85] In re Parry's Estate, 244 Pa. 93, 90 Atl. 443.

[86] Tarbox v. Tarbox, 111 Me. 374, 89 Atl. 194.

[87] Locke v. Cope, 94 Kan. 137, 146 Pac. 416; In re Dreier's Estate, 83 N. J. Eq. 618, 92 Atl. 51; In re Mylin's Estate, 32 Pa. Super. Ct. 504.

[88] Ralston v. Easter, 43 App. D. C. 513.

[89] Curlett v. Emmons, 9 Del. Ch. 62, 85 Atl. 1079.

[90] Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118; Condit v. Maxwell, 142 Mo. 266, 44 S. W. 467; Wiley v. Morris, 39 N. J. Eq. 97; Dilworth's Lessee v. Sinderling, 1 Bin. (Pa.) 488, 2 Am. Dec. 469. But where the trustee has had personal use of the trust property, he may not be allowed for improvements which he has put upon it. Bradford v. Clayton (Ky.) 39 S. W. 40. And if the improvements are unnecessary, the trustee will not be reimbursed. Booth v. Bradford, 114 Iowa, 562, 87 N. W. 685. Myers v. Myers, 2 McCord, Eq. (S. C.) 214, 16 Am. Dec. 648.

[91] In re Nesmith, 140 N. Y. 609, 35 N. E. 942.

[92] McDowell v. Caldwell, 2 McCord, Eq. (S. C.) 43, 16 Am. Dec. 635.

[93] Jones v. Dawson, 19 Ala. 672; King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366; Smith v. Walker, 49 Iowa, 289; Feldman v. Preston, 194 Mich. 352, 160 N. W. 655; Fearn v. Mayers, 53 Miss. 458; Matthews v. McPherson, 65 N. C. 189. In Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 South. 860, the trustee was accorded a lien on the trust property for costs, disbursements, and counsel fees in litigation in defense of the trust.

able compensation for the time and trouble and money expended. * * * Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty."[94] "When a trustee is authorized to make an expenditure and he has no trust funds, and the expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may by express agreement make the expenditure a charge upon the trust estate. In such a case he could himself advance the money to make the expenditure, and he would have a lien upon the trust estate, and he can by express contract transfer this lien to any other party who may upon the faith of the trust estate make the expenditure."[95] Thus, under certain circumstances, the trustee may grant to another this right of lien which he himself has in the case of proper expenditures.

An obligation of the cestui que trust running to the trustee, but which arose prior to the existence of the trust, is not ordinarily a proper item of credit in behalf of the trustee in his account.[96] The trustee is entitled to credits which arise in the administration of the trust, but to none other. However, if the trust is for the purpose of paying the debts of the settlor, and the trustee is one of the creditors, he may credit himself with the amount of the debt due him.[97]

Whether the trustee may receive the costs of the accounting as an item of credit is within the discretion of chancery.[98] Usually a trustee who has been guilty of no bad faith or misconduct will be allowed the costs of the accounting.[99] But bad faith or malfeasance by the trustee may cause equity to charge the costs to him personally.[1] In some cases chancery has exercised its discretion by divid-

[94] Rensselaer & S. R. Co. v. Miller, 47 Vt. 146, 152.

[95] New v. Nicoll, 73 N. Y. 127, 131, 29 Am. Rep. 111.

[96] Angell v. Jewett, 58 Ill. App. 596; Knowles v. Goodrich, 60 Ill. App. 506; Willis v. Clymer, 66 N. J. Eq. 284, 57 Atl. 803.

[97] Smith v. Miller, 98 Va. 535, 37 S. E. 10.

[98] In re Selleck, 111 N. Y. 284, 19 N. E. 66. See, also, Code Civ. Proc. N. Y. §§ 2746, 2747.

[99] Lape's Adm'r v. Taylor's Trustee (Ky.) 23 S. W. 960; McCloskey v. Bowden, 82 N. J. Eq. 410, 89 Atl. 528; Appeal of Lowrie, 1 Grant, Cas. (Pa.) 373; Appeal of Graver, 50 Pa. 189. In Re Starr (N. J. Prerog.) 103 Atl. 392, a trustee whose account was unsuccessfully attacked was allowed a counsel fee.

[1] In re Howell, 215 N. Y. 466, 109 N. E. 572, Ann. Cas. 1917A, 527; Harris

ing the costs between the parties to the account.[2] Whether the costs of the accounting should be paid out of the income or out of the capital of the estate, assuming that they are to be paid from the trust funds, depends upon the object of the accounting. In the case of an annual accounting, primarily for the benefit of the immediate cestuis que trust, the income should bear the expense.[3] But where both rights of life tenant and remainderman are involved, the costs should be apportioned between capital and income.[4]

Where an expense actually incurred in the administration of the trust has arisen because of the carelessness of the trustee, or was unnecessary and extravagant, the trustee will not be allowed to credit himself with the amount thus spent. Thus, where the trustee unnecessarily keeps a vehicle for the administration of the trust duties,[5] or pays taxes which are not due,[6] or mingles the trust funds with his own property so that no separate allowance for taxes can be made,[7] he will not be entitled to reimbursement.

Allowance for Necessary Expenses

When the trustee pays the necessary expenses of the trust from the trust funds, he is entitled to credit therefor upon the accounting. In such cases he is not asking for reimbursement, but merely that his expenditure of the trust moneys in the ways named may be allowed as proper. But in other cases there may be demands upon the trustee which should be met, and yet there may not be sufficient trust funds on hand to enable the trustee to make the required payments. Frequently upon an accounting the question arises whether a trustee is entitled to be reimbursed from the trust funds for advances which he has made during the administration of the trust. It is a rule of equity which is of obvious justice that a trustee who has advanced his own moneys to discharge proper claims upon the trust estate, or otherwise for the benefit of the cestui que trust, will be entitled to be reimbursed from the trust funds upon his accounting.[8]

v. Sheldon (Pa.) 16 Atl. 828; In re Carr's Estate, 24 Pa. Super. Ct. 369; In re Brooke's Estate, 36 Pa. Super. Ct. 332. Thus, a trustee who is removed for fraud is not entitled to charge the costs of the accounting to the trust fund. Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333.

[2] Lyon v. Foscue, 60 Ala. 468; In re Old's Estate, 150 Pa. 529, 24 Atl. 752.

[3] In re Long Island Loan & Trust Co., 79 Misc. Rep. 176, 140 N. Y. Supp. 752.

[4] In re Cooper, 82 Misc. Rep. 324, 144 N. Y. Supp. 189.

[5] Eysaman v. Nelson, 79 Misc. Rep. 304, 140 N. Y. Supp. 183.

[6] Lorenz v. Weller, 267 Ill. 230, 108 N. E. 306.

[7] Elmer v. Loper, 25 N. J. Eq. 475.

[8] Morrison v. Bowman, 29 Cal. 337; Lowe v. Morris, 13 Ga. 165; Constant v. Matteson, 22 Ill. 546; American Bonding Co. v. State, 40 Ind. App. 559, 82 N. E. 548; Dennis v. Dennis, 15 Md. 73; Wilson v. Welles, 79 Minn. 53, 81 N. W. 549; Altimus v. Elliott, 2 Pa. 62; Boyd v. Myers, 12 Lea (Tenn.) 175.

Examples of the application of this doctrine are found in the cases where the trustee has advanced his own funds to a beneficiary, pending the accrual of the income from the trust funds;[9] or where the trustee has necessarily used his own funds to buy in an outstanding claim against trust property[10] or to remove an encumbrance therefrom,[11] or for the purpose of improving the trust property.[12] In these cases the trust estate has had the benefit of the trustee's money, and it is equitable that the income accruing after the advance should be used for the purpose of making the trustee whole. But it has been held that a trustee has no lien upon the income of a trust for reimbursement on account of a loan to the cestui que trust,[13] or because of payments made to the beneficiary when no income was due to the cestui que trust.[14]

Whether a trustee who has advanced money for the benefit of the cestui shall be entitled to interest upon the sum advanced, as well as to reimbursement for the principal, is within the discretion of the court of chancery.[15] The trust instrument may direct that the trustee be paid interest on advances, in which case there will, of course, be no doubt concerning his rights.[16] Usually the courts have allowed simple interest to trustees who have made advances and have conducted the trust with prudence and honesty.[17] Occasionally courts have taken the attitude that there should be no interest allowed where the advancement was unnecessary because of the existence of trust funds in the hands of the trustee,[18] or have repudiated altogether the right of the trustee to receive interest on

[9] Foscue v. Lyon, 55 Ala. 440; Ellig v. Naglee, 9 Cal. 683; Mallory v. Clark, 9 Abb. Prac. (N. Y.) 358; In re King's Estate, 9 Pa. Co. Ct. R. 74; In re Crane's Estate, 174 Pa. 613, 34 Atl. 348.

[10] Wiswall v. Stewart, 32 Ala. 433, 70 Am. Dec. 549; McClanahan's Heirs v. Henderson's Heirs, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412.

[11] Harrison v. Mock, 16 Ala. 616; Garvey v. New York Life Ins. & Trust Co., 54 Hun, 637, 7 N. Y. Supp. 818.

[12] Pratt v. Thornton, 28 Me. 355, 48 Am. Dec. 492. In Wright v. Chilcott, 61 Or. 561, 122 Pac. 765, one declared a resulting trustee was allowed the amount expended for improvements, which added to the permanent value of the land, and for taxes.

[13] Abbott v. Foote, 146 Mass. 333, 15 N. E. 773, 4 Am. St. Rep. 314.

[14] In re Jones' Estate, 10 N. Y. St. Rep. 176; In re Odell's Estate (Sur.) 2 N. Y. Supp. 752.

[15] Turner v. Turner, 44 Ark. 25.

[16] Booth v. Bradford, 114 Iowa, 562, 87 N. W. 685.

[17] Pettingill v. Pettingill, 60 Me. 411; Urann v. Coates, 117 Mass. 41; Cook v. Lowry, 29 Hun (N. Y.) 20; Evertson v. Tappen, 5 Johns. Ch. (N. Y.) 497; Dilworth's Lessee v. Sinderling, 1 Bin. (Pa.) 488, 2 Am. Dec. 469; Appeal of Carpenter, 2 Grant, Cas. (Pa.) 381; Jenckes v. Cook, 10 R. I. 215; Yost v. Critcher, 112 Va. 870, 72 S. E. 594; Fisk v. Brunette, 30 Wis. 102.

[18] Cook v. Lowry, 95 N. Y. 103.

advances.[19] A trustee guilty of misconduct may be denied interest on money advanced during the conduct of the trust.[20] In rare instances has compound interest been allowed.[21]

For the enforcement of his right to reimbursement the trustee is granted a lien upon the trust property. He may hold it until the advances he has made have been returned to him.[22] Thus, a trustee who has expended his own funds for needful repairs and improvements on the trust property,[23] or for the payment of taxes on the trust estate,[24] or to purchase a title outstanding against the trust,[25] or to make proper payments directly to the cestui,[26] is entitled to hold the trust property as security for repayment and to cause the property to be sold to satisfy his lien by bringing a bill in equity. But where a trustee is directed by the trust instrument to pay the income of the trust property to the cestui que trust only as it accrues, the trustee has no lien upon the trust property for reimbursement as to advances made to the beneficiary prior to accrual of such income.[27]

DUTY TO ACCOUNT—COMPENSATION OF THE TRUSTEE

107. Under early English equity rules the trustee served without compensation, but in America the trustee is now generally allowed the reasonable value of his services.

The amount of compensation is in the discretion of chancery, in the absence of statute. The compensation may be provided for in the trust instrument or by contract between trustee and cestui que trust.

The amount of property and work involved and the fidelity and efficiency of the trustee will be considered in determining the compensation to be awarded. Usually a percentage

[19] Appeal of Dexter, 147 Pa. 410, 23 Atl. 604.

[20] Adams v. Lambard, 80 Cal. 426, 22 Pac. 180.

[21] Barrell v. Joy, 16 Mass. 221.

[22] Jones v. Dawson, 19 Ala. 672; Griffin v. Pringle, 56 Ala. 486; Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492; Rensselaer & S. R. Co. v. Miller, 47 Vt. 146.

[23] Woodard v. Wright, 82 Cal. 202, 22 Pac. 1118; Turton v. Grant, 86 N. J. Eq. 191, 96 Atl. 993.

[24] Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

[25] King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366; Bennett v. Chandler, 199 Ill. 97, 64 N. E. 1052.

[26] Smith v. Greeley, 67 N. H. 377, 30 Atl. 413.

[27] Loring v. Salisbury Mills, 125 Mass. 138.

upon the amount of property handled by the trustee is awarded, rather than a lump sum.

The trustee may waive his right to compensation or forfeit it by committing a breach of trust.

Joint trustees usually receive but a single commission, which is divided between them in proportion to the amount of work done by each. The compensation due to a trusteeship is divided between successive trustees in proportion to the value of the services rendered by each. A trustee who is also an executor with respect to the same property will receive double compensation, if the offices are distinct, but not if he performs but one function though under two titles.

A trustee may be relieved of his duty to account by a private settlement under some circumstances. The laches of the cestui que trust in demanding an account may free the trustee from this obligation also.

An account once settled may not be opened or attacked, except for fraud or mistake.

Closely akin to the right of the trustee to be credited on the accounting with the amount of the trust funds properly expended on behalf of the trust, and to his corresponding right to be reimbursed for necessary advances, is the right of the trustee to be paid a reasonable sum for his time and trouble. Is a trustee entitled to compensation? Will chancery allow him pay for his services in administering the trust? It was early established in England that a trustee would be allowed no remuneration. In Robinson v. Pett [28] Lord Chancellor Talbot said: "It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble; the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the quantum of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may choose whether he will accept the trust, or not." And this is the modern English rule.[29]

Some American courts of chancery were inclined during the early history of the country to refuse compensation to trustees,[30] but the

[28] 3 P. Wms. 249, 251.

[29] Lewin on Trusts (12th Ed.) p. 780.

[30] Brooks v. Egbert, 2 Del. Ch. 83; State v. Platt, 4 Har. (Del.) 154; Constant v. Matteson, 22 Ill. 546; Huggins v. Rider, 77 Ill. 360; Cook v. Gilmore,

modern tendency in this country is to give the trustee a reasonable remuneration for his skill and industry.[31] In all American states the rule of compensation is now established, either by rule of equity or by statute. But a passive trustee is entitled to no compensation, since he is a mere dummy.[32] It is not necessary, in order that a trustee should have the right to remuneration for his labors, that there should be any stipulation for remuneration in the trust instrument.[33] Compensation is provided by the rules of equity or by statute rather than through a direction of the settlor.

Compensation Fixed by Trust Deed

The matter of compensation may be settled by the express provisions of the trust instrument. If the settlor states that the trustee shall receive a certain amount for his services, the trustee will be deemed to have acquiesced in such provision, if he accepts and enters upon the trust.[34] The trust instrument may prohibit any compensation.[35] It may provide for a reasonable compensation, in

133 Ill. 139, 24 N. E. 524; Miles v. Bacon, 4 J. J. Marsh. (Ky.) 457; Warbass v. Armstrong, 10 N. J. Eq. 263; Green v. Winter, 1 Johns. Ch. (N. Y.) 37, 7 Am. Dec. 475; Boyd v. Hawkins, 17 N. C. (2 Dev. Eq.) 195; Gilbert v. Sutliff, 3 Ohio St. 129.

[31] Clark v. Platt, 30 Conn. 282; Muscogee Lumber Co. v. Hyer, 18 Fla. 698, 43 Am. Rep. 332; Arnold v. Allen, 173 Ill. 229, 50 N. E. 704; Jarrett v. Johnson, 116 Ill. App. 592; Compher v. Browning, 219 Ill. 429, 76 N. E. 678, 109 Am. St. Rep. 346; Knight v. Knight, 142 Ill. App. 62; Hendrix's Ex'rs v. Hardin, 5 Ky. Law Rep. 333; Cotton v. Graham, 10 Ky. Law Rep. 402; Patrick v. Patrick, 135 Ky. 307, 122 S. W. 159; Devilbiss v. Bennett, 70 Md. 554, 17 Atl. 502; Rathbun v. Colton, 15 Pick. (Mass.) 471; Schwarz v. Wendell, Walk. Ch. (Mich.) 267; Maginn v. Green, 67 Mo. App. 616; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670; Marston v. Marston, 21 N. H. 491; Boyd v. Hawkins, 17 N. C. (2 Dev. Eq.) 329; Raiford v. Raiford, 41 N. C. (6 Ired. Eq.) 490; Appeal of Heckert, 24 Pa. 482; In re Rothschild's Assigned Estate, 47 Pa. Super. Ct. 234; Sartor v. Newberry Land & Security Co., 104 S. C. 184, 88 S. E. 467; Leach v. Cowan, 125 Tenn. 182, 140 S. W. 1070, Ann. Cas. 1913C, 188; Miller v. Beverleys, 4 Hen. & M. (Va.) 415. For a discussion of the abolition of the common-law rule and the reasons for such action, see Schriver v. Frommel, 183 Ky. 597, 210 S. W. 165.

[32] Wetmore v. Brown, 37 Barb. (N. Y.) 133.

[33] Burr v. McEwen, Fed. Cas. No. 2193; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Bentley v. Shreve, 2 Md. Ch. 215; Wagstaffe v. Lowerre, 23 Barb. (N. Y.) 209; Sherrill v. Shuford, 41 N. C. (6 Ired. Eq.) 228; Fox v. Weckerly, 9 Leg. Int. (Pa.) 43.

[34] Biscoe v. State, 23 Ark. 592; In re Hanson's Estate, 159 Cal. 401, 114 Pac. 810; Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756; Gossom's Adm'r v. Gossom, 142 Ky. 118, 133 S. W. 1162; Schriver v. Frommel, 183 Ky. 597, 210 S. W. 165; Thomas v. Thomas, 97 Miss. 697, 53 South. 630; Oppiger v. Sutton, 50 Mo. App. 348; Bigelow v. Tilden, 52 App. Div. 390, 65 N. Y. Supp. 140; In re Rowe, 42 Misc. Rep. 172, 86 N. Y. Supp. 253; Steinway v. Steinway, 197 N. Y. 522, 90 N. E. 1166; College of Charleston v. Willing-

[35] Wilson v. Biggama, 73 Wash. 444, 132 Pac. 43.

which case the court is not confined by the statutory allowances.[36] A valid agreement inter vivos may, of course, be made between settlor and trustee with respect to the latter's compensation.[37]

The trustee's compensation may likewise be fixed by contract between the trustee and the cestui que trust. An agreement upon that subject between those parties will, if fairly made, be enforced by the courts.[38]

In the absence of stipulation in the trust instrument, or binding contract between the parties, or statutory regulation, the amount of the remuneration is within the discretion of the court of equity.[39] The compensation must be allowed by chancery.[40] The trustee has no right to deduct from the trust funds such allowance as he deems proper.[41] His right to receive compensation must be enforced in equity, and cannot be made the basis of an action of assumpsit.[42]

Controlling Statutes

Frequently statutes control the courts in the award of compensation to trustees.[43] No attempt can be made here to give the details

ham, 13 Rich. Eq. (S. C.) 195; Southern Ry. Co. v. Glenn's Adm'r, 98 Va. 309, 36 S. E. 395. Where the settlor fixes the compensation, the court may increase it, where it deems such action equitable. In re Battin's Estate, 89 N. J. Eq. 144, 104 Atl. 434.

[36] In re Schell, 53 N. Y. 263.

[37] Louisville Trust Co. v. Warren, 66 S. W. 644, 23 Ky. Law Rep. 2118.

[38] Bowker v. Pierce, 130 Mass. 262; Ladd v. Pigott, 215 Mo. 361, 114 S. W. 984; Green v. Jones, 78 N. C. 265; Henry v. Hilliard, 157 N. C. 572, 73 S. E. 98. Where for thirteen years the cestuis que trust have received statements showing the deduction of 10 per cent. commissions and have raised no objection, they will not be heard to object. American Colonization Soc. v. Latrobe, 132 Md. 524, 104 Atl. 120.

[39] Magruder v. Drury, 37 App. D. C. 519; Weiderhold v. Mathis, 204 Ill. App. 3; Jenkins v. Whyte, 62 Md. 427; Taylor v. Denny, 118 Md. 124, 84 Atl. 369; White v. Ditson, 140 Mass. 351, 4 N. E. 606, 54 Am. Rep. 473; Rothschild v. Dickinson, 169 Mich. 200, 134 N. W. 1035; Appeal of Fidelity & Deposit Co. of Maryland, 172 Mich. 600, 138 N. W. 205; Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153; Marsh v. Marsh, 82 N. J. Eq. 176, 87 Atl. 91; Appeal of Heckert, 24 Pa. 482.

[40] Robinson v. Tower, 95 Neb. 198, 145 N. W. 348; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; Beard v. Beard, 140 N. Y. 260, 35 N. E. 488.

[41] In re Mylin's Estate, 32 Pa. Super. Ct. 504. A withdrawal of compensation without order of court constitutes conversion. Robinson v. Tower, 95 Neb. 198, 145 N. W. 348.

[42] Hazard v. Coyle, 26 R. I. 361, 58 Atl. 987.

[43] In re Prescott's Estate, 179 Cal. 192, 175 Pac. 895; Lowe v. Morris, 13 Ga. 165; Burney v. Spear, 17 Ga. 223; Warbass v. Armstrong, 10 N. J. Eq. 263; In re New Jersey Title Guarantee & Trust Co., 76 N. J. Eq. 293, 75 Atl. 232; In re Allen, 96 N. Y. 327; Disbrow v. Disbrow, 46 App. Div. 111, 61 N. Y. Supp. 614, affirmed 167 N. Y. 606, 60 N. E. 1110; In re Johnson, 170 N. Y. 139, 63 N. E. 63; Conger v. Conger, 185 N. Y. 554, 77 N. E. 1184; Robertson v. De

of the various provisions found in the statute books on this subject.[44]

Where the court is free to fix the compensation of the trustee, not being bound by statute, it will consider a variety of facts. The

Brulatour, 188 N. Y. 301, 80 N. E. 938; In re Todd, 64 App. Div. 435, 72 N. Y. Supp. 277; Chisolm v. Hamersley, 114 App. Div. 565, 100 N. Y. Supp. 38; Whitehead v. Draper, 132 App. Div. 799, 117 N. Y. Supp. 539; In re Ziegler's Estate, 85 Misc. Rep. 673, 148 N. Y. Supp. 1055; In re Dimond's Estate (Sur.) 156 N. Y. Supp. 268; Moffett v. Eames (Sup.) 143 N. Y. Supp. 357.

[44] One or two illustrations of the statutory provisions may be of value. In California there are two sections of importance. Section 2274 of the Civil Code provides as follows: "Except as provided in section seventeen hundred of the Code of Civil Procedure, when a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances. If there are two or more trustees the compensation shall be apportioned among the trustees according to the services rendered by them respectively." Section 1618, Code Civ. Proc., makes the following statement of the law: "When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for the next nine thousand dollars, at the rate of four per cent.; for the next ten thousand dollars, at the rate of three per cent.; for the next thirty thousand dollars at the rate of two per cent.; for the next fifty thousand dollars, at the rate of one half of one per cent.; and for all above one hundred thousand dollars, at the rate of one half of one per cent. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commission shall be computed on all the estate above the value of twenty thousand dollars, at one half of the rates fixed in this section. * * *"

In New York testamentary trustees are provided for by section 2753, Code Civ. Proc. The relevant portions are as follows: "For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum. For all sums above eleven thousand dollars, at the rate of one per centum." See In re Keane, 97 Misc. Rep. 213, 162 N. Y. Supp. 856; In re Potter, 106 Misc. Rep. 113, 175 N. Y. Supp. 598. There are also some further provisions regarding plural trustees and other matters. By section 3320, Code Civ. Proc., trustees appointed otherwise than by will are allowed commissions as follows: "For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars at the rate of two and one-half per centum. For receiving and paying

value of the trust estate,[45] the responsibility involved and the amount of work done,[46] the fidelity with which the trustee has acted,[47] any unusual skill or training which he may possess,[48] the success of his services,[49] are all relevant matters. The court may also consider the pay usually given to agents employed to do the same work.[50] If the trust instrument gives the trustee power to fix his own compensation, the court will nevertheless review the exercise of such discretion.[51] Compensation is ordinarily awarded by way of commissions on the amount received and paid out,[52] but may be made in a gross or lump sum.[53]

Basis of Computation

Commissions are usually computed upon the basis of the amount of principal and income received and paid out by the trustee.[54] If the trustee has merely received the property, he will be entitled to one-half the usual commission.[55] The collection of interest [56] and other income [57] of trust property should be considered in reckoning the compensation of the trustee. Where the trust is one to sell property and deliver the proceeds to the beneficiaries, the basis for computing the commissions is the sale price which has been received and disbursed.[58] The trustee will be compensated only for

out all sums of principal above eleven thousand dollars at the rate of one per centum. And for receiving and paying out income in each year, at the like rates." Rules regarding plural trustees and other questions then follow. See In re Bushe, 183 App. Div. 834, 171 N. Y. Supp. 406.

[45] Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611.

[46] Appeal of Barclay, 2 Walk. (Pa.) 17; Appeal of Duval, 38 Pa. 112; In re Tidball's Estate, 29 Pa. Super. Ct. 363; In re Harrison's Estate, 217 Pa. 207, 66 Atl. 354.

[47] Barney v. Saunders, 16 How. 535, 14 L. Ed. 1047.

[48] Follansbee v. Outhet, 182 Ill. App. 213.

[49] Fleming v. Wilson, 6 Bush (Ky.) 610; Appeal of Wagner, 3 Walk. (Pa.) 130. The amount of interest earned is important. In re May's Estate, 197 Mo. App. 555, 196 S. W. 1039.

[50] Barrell v. Joy, 16 Mass. 221.

[51] Ross v. Conwell, 7 Ind. App. 375, 34 N. E. 752.

[52] Hazard v. Coyle, 26 R. I. 361, 58 Atl. 987.

[53] Appeal of Perkins, 108 Pa. 314, 56 Am. Rep. 208.

[54] Girard Trust Co. v. McKinley-Lanning Loan & Trust Co. (C. C.) 143 Fed. 355; Woodruff v. Snedecor, 68 Ala. 437; United States Bank v. Huth, 4 B. Mon. (Ky.) 423; Ames v. Scudder, 83 Mo. 189; Phœnix v. Livingston, 101 N. Y. 451, 5 N. E. 70; In re Willets, 112 N. Y. 289, 19 N. E. 690; Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

[55] Palmer v. Dunham, 53 Hun, 637, 6 N. Y. Supp. 262; Foote v. Bruggerhof, 66 Hun, 406, 21 N. Y. Supp. 509.

[56] Kennedy v. Dickey, 99 Md. 295, 57 Atl. 621.

[57] Longley v. Hall, 11 Pick. (Mass.) 120; Appeal of McCauseland, 38 Pa. 466.

[58] Waring v. Darnall, 10 Gill & J. (Md.) 126; Dorsett v. Houlihan, 95 Ga. 550, 22 S. E. 290; McKee v. Weeden, 1 App. Div. 583, 37 N. Y. Supp. 465; In-

the performance of his trust duties,[59] and not for committing wrongful acts [60] or for performing merely ministerial or formal functions.[61] Thus, the formal act of turning over the trust property to a successor does not entitle the trustee to commissions.[62]

Where a trustee is obliged to account annually,[63] or to make payments to the cestui annually,[64] he is entitled to retain his commissions each year; but annual rests are not allowed in the computation of commissions, where such annual payments or accountings are not required.[65] When a commission is to be allowed, equity exercises a large discretion as to the amount. An examination of a number of cases in which the matter was not controlled by statute shows that the percentages allowed varied from one to ten per cent. upon the amount received and disbursed.[66] The size of the commission depended in these cases on the amount of property handled, the difficulty of the execution of the trust, the efficiency of the trustee, and many other matters. Naturally, the larger the estate, the smaller the percentage which chancery would allow by way of a commission.

Compensation may, in the discretion of equity, be allowed be-

gram v. Kirkpatrick, 43 N. C. (8 Ired. Eq.) 62; In re Wistar's Estate, 125 Pa. 526, 17 Atl. 460; Appeal of Carrier, 79 Pa. 230; Appeal of Shunk, 2 Pa. 304.

[59] Tracy v. Gravois R. Co., 84 Mo. 210; Brown v. Silsby, 10 N. H. 521.

[60] Appeal of Stearly, 38 Pa. 525; Harris v. Sheldon (Pa.) 16 Atl. 828.

[61] Jenkins v. Whyte, 62 Md. 427; Parker v. Hill, 185 Mass. 14, 69 N. E. 336; Appeal of Hemphill, 18 Pa. 303.

[62] Whitehead v. Draper, 132 App. Div. 799, 117 N. Y. Supp. 539.

[63] In re Meserole, 36 Hun (N. Y.) 298; Hancox v. Meeker, 95 N. Y. 528.

[64] In re Roberts' Will, 40 Misc. Rep. 512, 82 N. Y. Supp. 805.

[65] Hosack v. Rogers, 9 Paige (N. Y.) 461; Brush v. Smith, 1 Dem. Sur. (N. Y.) 477.

[66] Marks v. Semple, 111 Ala. 637, 20 South. 791 (lump sum allowed); Wilder v. Hast, 96 S. W. 1106, 29 Ky. Law Rep. 1181 (5 per cent. allowed); Central Trust Co. v. Johnson, 74 S. W. 663, 25 Ky. Law Rep. 55 (5 per cent. on income and 1½ per cent. on principal); Williams v. Mosher, 6 Gill (Md.) 454 (5 per cent.); Abell v. Brady, 79 Md. 94, 28 Atl. 817 (5 per cent.); Jones v. Day, 102 Md. 99, 62 Atl. 364 (2½ per cent.); Berry v. Stigall, 125 Mo. App. 264, 102 S. W. 585 (5 per cent.); Ladd v. Pigott, 215 Mo. 361, 114 S. W. 984; Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596 (lump sum); Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076 (4 per cent.); Fisher v. Fisher, 170 N. C. 378, 87 S. E. 113 (5 per cent.); Appeal of Marsteller, 4 Watts (Pa.) 267 (10 per cent.); Appeal of Lukens, 47 Pa. 356 (1½ per cent.); In re Hemphill's Estate, 9 Phila. (Pa.) 486 (1¼ per cent.); In re Lafferty's Estate, 5 Pa. Dist. R. 75 (3½ per cent.); In re Bosler's Estate, 161 Pa. 457, 29 Atl. 57 (5 per cent.); In re Dorrance's Estate, 186 Pa. 64, 40 Atl. 149 (1 per cent.); In re McCallum's Estate, 211 Pa. 205, 60 Atl. 903 (5 per cent.); In re McKinney's Estate, 260 Pa. 123, 103 Atl. 590 (5 per cent.); Cobb v. Fant, 36 S. C. 1, 14 S. E. 959 (2½ per cent. for receiving and 2½ per cent. for paying over); Whitehead v. Whitehead, 85 Va.

fore the end of the trust.[67] If a trustee dies prior to the termination of his duties, the court may make an allowance for the reasonable value of his services.[68]

If the work of the trustee has been unusually arduous, difficult, or lengthy, chancery may make him an extra allowance;[69] but additional compensation will not be given for the performance of the ordinary duties of the trustee.[70]

A trustee has a lien on the trust property for the amount due him for compensation for his services.[71]

Source of Payment

Whether the compensation of the trustee should be paid out of the capital of the trust fund or out of the income thereof depends upon the nature of the trustee's duties, the character of the trust fund, and the circumstances of the accounting at which the compensation is allowed. Ordinarily the income bears the current expenses of operation, which include the commissions of the trustee;[72] but in exceptional cases the corpus of the fund has been obliged to bear the expense of compensating the trustee.[73] Under no circumstances is there a duty upon the settlor to pay the trustee's compensation,[74] unless the settlor has expressly contracted to do so. Where the remainder consists of two parts, one real property to be conveyed to the heirs and the other personal property to be delivered to the next of kin, and the commissions are to

870, 9 S. E. 10 (8 per cent.); Thom's Ex'r v. Thom, 95 Va. 413, 28 S. E. 583 (5 per cent. excessive); Darling's Ex'r v. Cumming, 111 Va. 637, 69 S. E. 940 (5 per cent.).

[67] In re Thouron's Estate, 182 Pa. 126, 37 Atl. 861.

[68] Bentley v. Shreve, 2 Md. Ch. 215; Widener v. Fay, 51 Md. 273.

[69] Grimball v. Cruse, 70 Ala. 534; Clark v. Anderson, 13 Bush (Ky.) 111; In re Holden, 58 Hun, 611, 12 N. Y. Supp. 842, reversed in 126 N. Y. 589, 27 N. E. 1063; In re Gill, 21 Misc. Rep. 281, 47 N. Y. Supp. 706; Appeal of Perkins, 108 Pa. 314, 56 Am. Rep. 208; In re Ashman's Estate, 218 Pa. 509, 67 Atl. 841.

[70] Fanning v. Main, 77 Conn. 94, 58 Atl. 472; Parkhill v. Doggett (Iowa) 136 N. W. 665; Doom v. Howard, 64 S. W. 469, 23 Ky. Law Rep. 884; Blake v. Pegram, 101 Mass. 592; In re Froelich, 122 App. Div. 440, 107 N. Y. Supp. 173; In re Young, 15 App. Div. 285, 44 N. Y. Supp. 585; In re Brennan's Estate, 215 Pa. 272, 64 Atl. 537; Southern Ry. Co. v. Glenn's Adm'r, 98 Va. 309, 36 S. E. 395.

[71] Premier Steel Co. v. Yandes, 139 Ind. 307, 38 N. E. 849.

[72] Morgan v. Shields, 4 Ky. Law Rep. 904; Offutt v. Divine's Ex'r (Ky.) 53 S. W. 816; Parker v. Ames, 121 Mass. 220; In re Thompson's Estate (Sur.) 1 N. Y. Supp. 213; Spangler's Estate, 21 Pa. 335.

[73] Woodruff v. New York, L. E. & W. R. Co., 129 N. Y. 27, 29 N. E. 251; In re Kelsey's Estate, 89 Misc. Rep. 701, 153 N. Y. Supp. 1095; Hubbard v. Fisher, 25 Vt. 539.

[74] Patton v. Cone, 1 Lea (Tenn.) 14.

be charged against this corpus, they should be apportioned between the real and personal property.[75]

The rules regarding the source from which the trustee's compensation should be paid are well stated by a Pennsylvania court:[76] "In the case of a continuous trust, one duty of which is to preserve the fund, as a source of periodic interest, dividends, rents, etc., the authorities do not recognize a right in the trustee, except in extraordinary circumstances, or when the instrument by which the trust is created so indicates, to diminish the fund which is to create the income during the life of the trust. For services rendered by way of collecting and paying over the income, the compensation is a fit charge upon the income and is properly deducted from it. But the labor, care and responsibility pertaining to the conservation of the capital itself are properly a charge on it, and are to be deducted from it when the trust expires, or the particular trustee's relation to it ends. 'The rule which may be safely deduced from the cases' is 'that commissions upon the corpus of a trust estate are never allowable except when the fund is in the course of distribution. The reason is inherent in the nature of a trust. Its purpose is to preserve, and it may be of unlimited duration, while that of administration is to divide, and implies dispatch. Hence, if commissions upon the capital are awarded to the successive trustees who may be called to its management, the fund, instead of being intact, may be absorbed in the payment of its custodians.' * * * So far as we have been able to discover, by a somewhat extended examination of cases, the commission on the corpus is never allowed until the trust has ended, or, at least, the particular trustee has ceased to be such."

Exceptional cases may occur where it is impossible to pay the commissions out of the income of the trust estate, or where such action is inequitable. "If the commissions can be paid out of the income or interest of the capital, they should be so paid. Cases may occur, however, where this cannot be done, and then the commissions may be paid out of the body of the fund. Suppose a trustee is appointed for one year to the management of a large and troublesome property, occupying much of his time and care, and yet from some unavoidable cause (not arising from fault of his) no income is produced by it during the period of his trust, and up to the time of its termination? At his settlement with the cestui que trust, he would certainly be allowed compensation out of the corpus of the fund, or there would be no remedy for his right." [77]

[75] Grimball v. Cruse, 70 Ala. 534.
[76] In re Bosler's Estate, 161 Pa. 457, 462, 463, 29 Atl. 57.
[77] Burney v. Spear, 17 Ga. 223, 225.

Waiver or Loss

The trustee's right to receive compensation may be lost, either voluntarily or involuntarily. He may waive his claim to commissions, or he may forfeit his right to be paid for his services.

The possibility of waiver is obvious. The trustee may expressly agree to serve without compensation,[78] or, having earned compensation, he may forego it and decline to receive pay for his work.[79] "The statute allows commissions to executors and trustees; but they may waive them, if they wish, and, if there be any evidence of a waiver, their legal representatives are in no position to dispute it." [80]

An express waiver of commissions in the past is no bar to the recovery of present commissions.[81] That a trustee declines to receive compensation at one time does not prevent him from demanding it at another time. It would seem that the mere failure to ask for commissions would not constitute a waiver of them, in the absence of action on the part of the cestuis que trust sufficient to estop the trustee.[82] But the courts of New York have been inclined to regard the failure to claim commissions as evidence of a waiver of them.[83] "Where, through a long series of years, trustees voluntarily pay the net income from a trust fund to the beneficiary as the full net income thereon, it is a waiver by such trustees of their commissions." [84]

It is well settled that chancery may deprive a trustee of his commissions in cases where he has been guilty of neglect of duty or positive wrongdoing in office.[85] What conduct is sufficient warrant for refusing the trustee compensation rests within the discretion of the court. There may be a reduction of compensation, as well as a total deprivation.[86] The specific causes for the forfei-

[78] Ridgely v. Gittings, 2 Har. & G. (Md.) 58.

[79] Barry v. Barry, 1 Md. Ch. 20; Ten Broeck v. Fidelity Trust & Safety Vault Co., 88 Ky. 242, 10 S. W. 798; Cook v. Stockwell, 206 N. Y. 481, 100 N. E. 131, Ann. Cas. 1914B, 491; In re Wiener's Estate, 4 Pa. Dist. R. 422.

[80] Cook v. Stockwell, 206 N. Y. 481, 484, 100 N. E. 131, Ann. Cas. 1914B, 491.

[81] Denmead v. Denmead, 62 Md. 321.

[82] Phillips v. Burton, 107 Ky. 88, 52 S. W. 1064, 21 Ky. Law Rep. 720; Appeal of Wister, 86 Pa. 160.

[83] In re Harper, 27 Misc. Rep. 471, 59 N. Y. Supp. 373; Spencer v. Spencer, 38 App. Div. 403, 56 N. Y. Supp. 460; In re Haskin, 49 Misc. Rep. 177, 98 N. Y. Supp. 926; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748. The retention of a part only of the commission earned is a waiver of the balance. In re Schaefer, 178 App. Div. 117, 165 N. Y. Supp. 19, affirmed 222 N. Y. 533, 118 N. E. 1076.

[84] Olcott v. Baldwin, 190 N. Y. 99, 109, 82 N. E. 748.

[85] Jarrett v. Johnson, 116 Ill. App. 592; Clark v. Clark, 87 N. J. Eq. 504, 101 Atl. 300.

[86] Diffenderffer v. Winder, 3 Gill & J. (Md.) 311.

ture of the right to compensation have been numerous, as, for example, general cases of breach of trust,[87] ordinary negligence,[88] gross negligence,[89] repudiation of the trust,[90] misappropriation of the trust funds,[91] failure to keep proper records,[92] failure to account,[93] the rendition of a false account,[94] an improper investment,[95] failure to invest the trust funds,[96] refusal to obey the orders of the court,[97] mingling the trust property with private property,[98] removal from office for incompetence,[99] in some instances upon the resignation of the trustee,[1] and cases where the trus-

[87] Comingor v. Louisville Trust Co., 128 Ky. 697, 108 S. W. 950, 33 Ky. Law Rep. 53, 129 Am. St. Rep. 322; Newton v. Rebenack, 90 Mo. App. 650; Judge of Probate v. Jackson, 58 N. H. 458; Moore v. Zabriskie, 18 N. J. Eq. 51; Dufford's Ex'r v. Smith, 46 N. J. Eq. 216, 18 Atl. 1052; In re Welling's Estate, 51 App. Div. 355, 64 N. Y. Supp. 1025; In re Swartswalter's Account, 4 Watts (Pa.) 77; Fellows v. Loomis, 204 Pa. 227, 53 Atl. 999; In re Reich's Estate, 230 Pa. 55, 79 Atl. 151; Singleton v. Lowndes, 9 S. C. 465.

[88] In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98; 508; Ralston v. Easter, 43 App. D. C. 513; In re Nagle's Estate, 12 Phila. (Pa.) 25.

[89] Ward v. Shire, 65 S. W. 8, 23 Ky. Law Rep. 1279.

[90] Pollard v. Lathrop, 12 Colo. 171, 20 Pac. 251; H. B. Cartwright & Bro. v. United States Bank & Trust Co., 23 N. M. 82, 167 Pac. 436; In re Greenfield's Estate, 24 Pa. 232; Whiteside v. Whiteside, 35 Pa. Super. Ct. 481; Hanna v. Clark, 204 Pa. 145, 53 Atl. 757; Stone v. Farnham, 22 R. I. 227, 47 Atl. 211; Fuller v. Abbe, 105 Wis. 235, 81 N. W. 401.

[91] Belknap v. Belknap, 5 Allen (Mass.) 468; Harvey v. Schwettman (Mo. App.) 180 S. W. 413; McCulloch v. Tomkins, 62 N. J. Eq. 262, 49 Atl. 474; In re Lafferty's Estate, 5 Pa. Dist. R. 75.

[92] Welsh v. Brown, 50 N. J. Eq. 387, 26 Atl. 568.

[93] Folk v. Wind, 124 Mo. App. 577, 102 S. W. 1; Gilbert v. Sutliff, 3 Ohio St. 129; Ward v. Funsten, 86 Va. 359, 10 S. E. 415; but see Muckenfuss v. Heath, 1 Hill Eq. (S. C.) 182, contra.

[94] Elmer v. Loper, 25 N. J. Eq. 475.

[95] Aydelott v. Breeding, 111 Ky. 847, 64 S. W. 916, 23 Ky. Law Rep. 1146; In re Hart's Estate, 203 Pa. 496, 53 Atl. 370. But see Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076, and In re Haskin, 111 App. Div. 754, 97 N. Y. Supp. 827, where it was held that there was no forfeiture if the bad investments resulted in no loss, or the loss was made good by the trustee.

[96] Warbass v. Armstrong, 10 N. J. Eq. 263; McKnight's Ex'rs v. Walsh, 23 N. J. Eq. 136.

[97] French v. Commercial Nat. Bank, 199 Ill. 213, 65 N. E. 252.

[98] Weakley v. Meriwether, 156 Ky. 304, 160 S. W. 1054; In re Hodges' Estate, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820; Beverley v. Miller, 6 Munf. (Va.) 99. But see In re Patrick's Estate, 162 Pa. 175, 29 Atl. 639, and Appeal of Biddle, 129 Pa. 26, 18 Atl. 474, in which mingling of the trust funds with other funds was held not to be sufficient ground for the forfeiture of commissions.

[99] In re Williamsburgh Trust Co., 60 Misc. Rep. 296, 113 N. Y. Supp. 276.

[1] In re Allen, 96 N. Y. 327. But see Linsly v. Bogert, 87 Hun, 137, 33 N. Y. Supp. 975.

tee has acted for his private benefit in administering the trust.[2] Mere lack of skill in administering the trust affairs,[3] or slight improprieties of conduct,[4] will not ordinarily be regarded as ground for refusal to allow the trustee his commissions.

Plural Trustees [1]

Two or more trustees are, in the absence of statute, entitled to one commission only. This commission should be divided between them, in proportion to the amount of work done by each. The trustees are regarded as a unit which has earned compensation. The trusteeship is awarded one commission, and this is divided between the several trustees. "It is, however, said they are joint trustees. Grant it, and how does it change the attitude of the parties? By becoming joint trustees, each, no doubt, became vested with a legal right to perform one-half of the labor with his entire skill, and, on performing one-half of the duties of the trust, as between him and his cotrustee, he would be entitled to one-half of the compensation. But where he performs but one-third of the duties, he can surely have no claim to more than one-third of the emoluments, unless conceded by the beneficiary as a gratuity; but he can, in justice, have no claim to the earnings of his cotrustee over and above the sum he has himself earned." [5] In some states provision is made for commissions to each of several trustees in cases of large estates.[6]

Where two or more persons successively occupy the trusteeship, they should be compensated on a quantum meruit basis; that is, each should be paid the reasonable value of his services during his term of office. "The practice of allowing a reasonable compensation to the estate of a deceased trustee, who dies before the com-

But the discharge of the trustee by the court is not necessarily ground for the refusal of commissions. In re Welscher's Estate, 3 Walk. (Pa.) 241.

[2] Gregg v. Gabbert, 62 Ark. 602, 37 S. W. 232; Loud v. Winchester, 52 Mich. 174, 17 N. W. 784; Royal v. Royal, 30 Or. 448, 47 Pac. 828, 48 Pac. 695.

[3] Appeal of Kilgore (Pa.) 8 Atl. 441.

[4] Jacobus v. Munn, 37 N. J. Eq. 48.

[5] Huggins v. Rider, 77 Ill. 360, 364.

[6] "If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian, or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively." Code Civ. Proc. N. Y. § 2753. For a similar provision applying to trustees appointed otherwise than by will, see Id. § 3320. For cases construing these sections, see In re Holbrook's Estate, 39 Misc. Rep. 139, 78 N. Y. Supp. 972; In re Hunt's Estate, 41 Misc. Rep. 72, 83 N. Y. Supp. 652; In re Grossman's Estate, 92 Misc. Rep. 656, 156 N. Y. Supp. 268.

pletion of the trust, is well settled and sanctioned by authority." [7] The succeeding trustee receives compensation only for the work which he actually does.[8] Ordinarily a trustee will not be compensated for the merely formal act of paying over to a successor or receiving from a predecessor the trust funds.[9]

Executors and Trustees

Whether one occupying the office of executor and trustee with respect to the same property shall receive two commissions depends upon the nature of the duties he has performed. If his executorship is separate from his trusteeship, and there are two distinct sets of duties, he should be given double compensation;[10] but if he merely holds two offices and does the same work in both offices, he should be compensated by single commissions only.[11] The rule has recently been stated by the New York Court of Appeals to be as follows:[12] "Where by the terms of the will the two functions with their corresponding duties coexist and run from the death of the testator to the final discharge, interwoven, inseparable, and blended together so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin, double commissions or compensation in both capacities cannot be properly allowed. But executors are entitled to commissions as executors and also as trustees where un-

[7] Widener v. Fay, 51 Md. 273, 275. See, also, In re Barker, 186 App. Div. 317, 174 N. Y. Supp. 230. But awarding compensation to the estate of the deceased trustee is discretionary with the court. In re Bushe, 227 N. Y. 85, 124 N. E. 154, 7 A. L. R. 1590.

[8] In re Leavitt, 8 Cal. App. 756, 97 Pac. 916; Gibson's Case, 1 Bland (Md.) 138, 17 Am. Dec. 257.

[9] Jenkins v. Whyte, 62 Md. 427; In re Fisk, 45 Misc. Rep. 298, 92 N. Y. Supp. 394; In re Ward's Estate (Sur.) 112 N. Y. Supp. 763; Young v. Barker, 141 App. Div. 801, 127 N. Y. Supp. 211. But see In re Baldwin, 209 N. Y. 601, 103 N. E. 734; In re Affleck, 163 App. Div. 876, 147 N. Y. Supp. 573.

[10] Arnold v. Alden, 173 Ill. 229, 50 N. E. 704; Dunne v. Cooke, 197 Ill. App. 422; In re Gloyd's Estate, 93 Iowa, 303, 61 N. W. 975; In re Gulick, 7 N. J. Law J. 263; In re Jackson, 32 Hun (N. Y.) 200; Wildey v. Robinson, 85 Hun, 362, 32 N. Y. Supp. 1018; In re Curtiss, 15 Misc. Rep. 545, 37 N. Y. Supp. 586; In re Garth, 10 App. Div. 100, 41 N. Y. Supp. 1022; In re Slocum, 60 App. Div. 438, 69 N. Y. Supp. 1036; Olcott v. Baldwin, 190 N. Y. 99, 82 N. E. 748; In re Harteau, 125 App. Div. 710, 110 N. Y. Supp. 59. In Williams v. Bond, 120 Va. 678, 91 S. E. 627, a direction by the testator that the executor-trustee receive $500 as executor was held not to exclude his right to commissions as trustee.

[11] Clark v. Anderson, 10 Bush (Ky.) 99; Kennedy v. Dickey, 99 Md. 295, 57 Atl. 621; McKie v. Clark, 3 Dem. Sur. (N. Y.) 380; Haglar v. McCombs, 66 N. C. 345; In re Olds' Estate, 150 Pa. 529, 24 Atl. 752; Thom's Ex'r v. Thom, 95 Va. 413, 28 S. E. 583.

[12] Chase, J., in Olcott v. Baldwin, 190 N. Y. 99, 105, 106, 82 N. E. 748, quoting 18 Cyc. 1160.

der the will their duties as executors and trustees are separable and their duties as executors having ended they take the estate as trustees and afterward act solely in that capacity." Thus, where executors have had their accounts settled by the court and have been ordered to pay over to themselves as trustees the trust funds, and this act has been performed, there are two separate sets of duties and a right to double commissions, the court saying:[13] "We do not think that this is a case where the two functions of executors and trustees coexist and run from the death of the testator to a final discharge, inseparably blended together. But from the language of the will we think the duties of the respondents, as executors, were to be first discharged, and that they were to assume the duties of trustees, and as such manage the trust funds, to the final termination of the trusts."

It is frequently a difficult matter to determine just when the duties of the executorship have ended and those of the trusteeship begun. "In the absence of any direction in the will, or any evidence in relation thereto, the duties of the trustee named in the will, even though he be the person named therein as executor, would not begin until after the duties of the executor have terminated, * * * and until he commences to exercise his duties as trustee he is not entitled to compensation therefor."[14] The completion of the duties of the executorship may be shown in a variety of ways. "An accounting as executors and a transfer of the trust funds to the trustees pursuant to a decree of a court of competent jurisdiction is the most satisfactory proof of the completion of their duties in one capacity and the commencement of their duties in the other capacity; but such judicial decree is not the only means of proving that the transfer has actually been made."[15]

The same rules would seem applicable to trustees who are also guardians of the cestuis que trust. The combination trustee and guardian should receive but one compensation for performing a single set of duties, although during the performance he may hold

[13] In re Willets, 112 N. Y. 289, 296, 19 N. E. 690.

[14] Bemmerly v. Woodard, 136 Cal. 326, 331, 68 Pac. 1017.

[15] Olcott v. Baldwin, 190 N. Y. 99, 107, 82 N. E. 748. See, also, Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618. See Code Civ. Proc. N. Y. § 2768, subd. 6, which provides as follows: "The expression, 'testamentary trustee' includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator." Trustees may enter upon their duties before their final accounting as executors. In re McDowell, 178 App. Div. 243, 164 N. Y. Supp. 1024.

two titles.[16] "When the same person is both guardian and trustee, it would be a reproach to the law, and to the courts charged with the protection of such trusts, to allow him to charge full compensation in both capacities for the same service." [17]

The trustee may be relieved from the duty of rendering an account in a variety of ways. If the remedy at law is adequate, an account may be unnecessary.[18] There may be private settlement between cestuis que trust and trustee, which will excuse the trustee from making a formal report in court.[19] Laches on the part of the beneficiary in demanding an account may relieve the trustee.[20] Thus, in one case the lapse of twenty years was held to bar the right to an account,[21] while in another the passing of eight years was held not to prevent the cestui from demanding an account.[22] Action or failure to act on the part of the cestui may estop him from later claiming an account.[23]

After the account of a trustee has once been filed and settled, it is res adjudicata as to the matters involved in the accounting, and may not ordinarily be attacked or opened.[24] But for fraud or mistake equity may reopen an account.[25]

[16] Foote v. Bruggerhof, 66 Hun, 406, 21 N. Y. Supp. 509.

[17] Blake v. Pegram, 101 Mass. 592, 600.

[18] Mersereau v. Bennet, 62 Misc. Rep. 356, 115 N. Y. Supp. 20.

[19] Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Scudder v. Burrows, 7 N. Y. St. Rep. 605; Appeal of Schoch, 33 Pa. 351; Britton v. Lewis, 8 Rich. Eq. (S. C.) 271; Maffitt v. Read, 11 Rich. Eq. (S. C.) 285.

[20] McClane's Adm'x v. Shepherd's Ex'x, 21 N. J. Eq. 76; In re Engel's Estate, 180 Pa. 215, 36 Atl. 727; In re Rist's Estate, 192 Pa. 24, 43 Atl. 407.

[21] Snodgrass v. Snodgrass, 176 Ala. 276, 58 South. 201.

[22] Horine v. Mengel, 30 Pa. Super. Ct. 67. See, also, Dyer v. Waters, 46 N. J. Eq. 484, 19 Atl. 129; Felkner v. Dooly, 27 Utah, 350, 75 Pac. 854.

[23] Wooden v. Kerr, 91 Mich. 188, 51 N. W. 937; Jones v. Jones, 50 Hun, 603, 2 N. Y. Supp. 844. Acceptance by the cestui que trust of a part of the property from the trustee does not estop him from requiring an account. Schneider v. Hayward, 231 Mass. 352, 121 N. E. 76.

[24] In re Pratt's Estate, 119 Cal. 156, 51 Pac. 47; In re Blake's Estate, 157 Cal. 448, 108 Pac. 287; Hord v. Bradbury, 156 Ind. 30, 59 N. E. 31; Lindsay v. Kirk, 95 Md. 50, 51 Atl. 960; Peake v. Jamison, 82 Mo. 552; In re Elting, 93 App. Div. 516, 87 N. Y. Supp. 833.

[25] Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169, 94 Am. St. Rep. 43; Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381; In re Baker's Estate, 61 N. J. Eq. 592, 47 Atl. 1046; Jackson v. Reynolds, 39 N. J. Eq. 313.

CHAPTER XIII

THE INTEREST OF THE CESTUI QUE TRUST—ITS NATURE AND INCIDENTS

NECESSITY OF BENEFICIARY

108. No private trust can exist without a definite beneficiary. It is essential to a charitable trust that a well-defined class be described as the group from which the persons to be benefited are to be selected by the trustee.

It is rudimentary that every trust must have a cestui que trust.[1] One might as well speak of a contract with but one party as a trust lacking a beneficiary. In the words of Fowler, Surrogate, "to constitute a trust not charitable in nature there must always be a definite person, entitled to enforce the trust or power in trust in equity, and this beneficiary must be ascertained or ascertainable. * * *"[2]

The cestui que trust must be definite and certain.[3] If a trust instrument is vague or ambiguous in its naming or description of the cestui, equity cannot enforce the trust, just as uncertainty in any essential part of any legal instrument renders the courts powerless to give it effect. Thus, a trust for certain persons or either of them is too indefinite.[4] But the cestuis que trust may be named as

[1] Eldridge v. See Yup Co., 17 Cal. 44; Filkins v. Severn, 127 Iowa, 738, 104 N. W. 346; Read v. Williams, 54 Hun, 636, 8 N. Y. Supp. 24, judgment modified 125 N. Y. 560, 26 N. E. 730, 21 Am. St. Rep. 748; Wilcox v. Gilchrist, 85 Hun, 1, 32 N. Y. Supp. 608; Boskowitz v. Continental Ins. Co., 175 App. Div. 18, 161 N. Y. Supp. 680.

[2] Matter of Catlin, 97 Misc. Rep. 223, 227, 160 N. Y. Supp. 1034.

[3] U. S. v. Oregon & C. R. Co. (C. C.) 186 Fed. 861; Barkley v. Lane's Ex'r, 6 Bush. (Ky.) 587; Isaac v. Emory, 64 Md. 333, 1 Atl. 713; German Land Ass'n v. Scholler, 10 Minn. 331 (Gil. 260); First Presbyterian Soc. of Town of Chili v. Bowen, 21 Hun, 389; Ludlam v. Holman, 6 Dem. Sur. (N. Y.) 194; Jarvis v. Babcock, 5 Barb. (N. Y.) 139; Appeal of Dyer, 107 Pa. 446.

[4] Wright v. Pond, 10 Conn. 255. But a trust for three named children "or their heirs" is not in the alternative. O'Rourke v. Beard, 151 Mass. 9, 23 N. E. 576.

a class, as, for example, the children of A. at a given time,[5] and the members of the class will be presumed to have equal interests as cestuis.[6]

But the cestui que trust may be described otherwise than by naming him.[7] "The conveyance in question was to Marvin Hollister in trust for the use and benefit of ———, heirs at law of Seneca M. Conway, deceased, for whom the said Marvin Hollister is legal guardian, party of the second part. One of the principal points in controversy, on the trial below, was as to the sufficiency of this description of the persons beneficially interested, and whether the plaintiffs had shown themselves to be such persons. It is well settled that any description of parties in an instrument of this kind is sufficient, from which the court and jury, aided by a knowledge of surrounding facts and circumstances, are able to say with reasonable certainty that some and what particular persons were intended. It is not necessary that the parties should be described by their names. * * *"[8] It is sufficient that the cestuis become ascertained and definite at the beginning of the trust, and is not required that they be fixed from the date of the trust instrument.[9]

In the case of charitable trusts the requirement of a beneficiary still prevails,[10] but it is a class rather than definite individuals which must be described as the cestui que trust in such trusts. The necessity of a well-defined and certain class from which the trustee is to select has been previously discussed.[11]

That the cestui que trust must accept the trust before it can be completed, but that acceptance of a trust purely beneficial is presumed, has been shown in preceding paragraphs.[12]

[5] Heermans v. Schmaltz (C. C.) 7 Fed. 566.

[6] Loring v. Palmer, 118 U. S. 321, 6 Sup. Ct. 1073, 30 L. Ed. 211; Cowan v. Henika, 19 Ind. App. 40, 48 N. E. 809.

[7] Turner v. Barber, 131 Ga. 444, 62 S. E. 587.

[8] Sydnor v. Palmer, 29 Wis. 226, 241.

[9] Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co. (C. C.) 33 Fed. 146; Heyward-Williams Co. v. McCall, 140 Ga. 502, 79 S. E. 133; Ludlow v. Rector, etc., of St. Johns Church, 144 App. Div. 207, 130 N. Y. Supp. 679; Ashurst v. Given, 5 Watts & S. (Pa.) 323.

[10] Ex parte Lindley, 32 Ind. 367; Chamberlain v. Stearns, 111 Mass. 267; Bell County v. Alexander, 22 Tex. 350, 73 Am. Dec. 268; Heiss v. Murphey, 40 Wis. 276.

[11] Ante, § 55.

[12] Ante, § 25.

WHO MAY BE A CESTUI QUE TRUST?

109. Any person, natural or artificial, capable of taking and holding property may be a cestui que trust of a private trust. Any well-defined class of the public may be the beneficiary of a charitable trust.

Any one may be a cestui que trust who can take and hold the title to property. Disabilities with respect to the management or control of the trust property do not affect the capacity to be a cestui que trust. "Equity subjects trusts to the same construction that a court of law does legal estates. And a donee must have capacity to take, whether it is attempted to convey title directly to the party himself, or to another in trust for him." [13] Thus, under the common law the disability of an alien to hold real property after office found prevented his being the cestui que trust of a trust of realty.[14] But modern statutes have generally removed this disability to take, at least with respect to friendly aliens.[15]

Married women have always been valid cestuis que trust. Where the Married Women's Acts are not in force, a trust for a feme sole, not in immediate contemplation of marriage, is void, and she takes a legal estate.[16] Minors [17] and lunatics may, of course, hold property, and so may be beneficiaries of a trust. A person yet unborn may be described in a trust instrument as the cestui que trust of a trust to come into effect upon his birth.[18] It was held by some courts that a slave, having no capacity to enforce a trust, could not be a cestui; [19] but other judges expressed the view that such trusts, while not enforceable by the cestuis que trust, might be consid-

[13] Trotter v. Blocker, 6 Port. (Ala.) 269, 305.

[14] Hammekin v. Clayton, Fed. Cas. No. 5,996; Philips v. Crammond, Fed. Cas. No. 11,092; Leggett v. Dubois, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; Anstice v. Brown, 6 Paige (N. Y.) 448; Hubbard v. Goodwin, 3 Leigh (Va.) 492.

[15] As a sample statute, see New York Real Property Law (Consol. Laws, c. 50) § 100. Even before the modern change in New York it was held that, under the statute providing that a cestui que trust took no interest in the lands, but merely a right against the trustee, an alien might be a cestui que trust of land. Marx v. McGlynn, 88 N. Y. 357.

[16] Wells v. McCall, 64 Pa. 207; Springer v. Arundel, 64 Pa. 218; Appeal of Ogden, 70 Pa. 501; Pickering v. Coates, 10 Phila. (Pa.) 65; Appeal of Neale, 104 Pa. 214; Yard v. Pittsburgh & L. E. R. Co., 131 Pa. 205, 18 Atl. 874.

[17] Turner v. Barber, 131 Ga. 444, 62 S. E. 587.

[18] Easton v. Demuth, 179 Mo. App. 722, 162 S. W. 294; Folk v. Hughes, 100 S. C. 220, 84 S. E. 713.

[19] Bynum v. Bostick, 4 Desaus. (S. C.) 266; Blakely v. Tisdale, 14 Rich. Eq. (S. C.) 90.

ered honorary—that is, sanctioned by equity as valid if the trustee saw fit to carry them out.[20]

It has been shown that trusts for the good of animals generally, because probably of the indirect benefit to mankind, are regarded as charitable.[21] But trusts having particular animals as cestuis que trust cannot be regarded as valid and enforceable, except as the honor of the trustee may lead him to obey the direction of the settlor. An English court has held valid a trust for specified horses and dogs on the theory of an honorary trust.[22] A trust to shut up a house,[23] or to keep a clock in repair,[24] being for the benefit of an inanimate object, lacks a proper cestui que trust, and fails. A trust to erect or care for a monument lacks a living beneficiary, and ought to fail as a private trust.[25] Its aspects as a charitable trust have been discussed elsewhere.[26] And trusts for masses as private trusts are for the benefit of deceased persons, and not sustainable on principle.[27] They are generally valid charities.[28]

The state may be a cestui que trust,[29] as may a corporation, if the purpose of the trust is within its corporate powers.[30] A joint-stock company,[31] a school district,[32] and a tribe of Indians[33] have been held to be qualified to act as beneficiaries. "At common law, it is true, a deed of conveyance to an unincorporated voluntary association was bad for lack of a capable grantee, and cases will be found which hold that, where the grantee could not take directly, he or it cannot take through the medium of a trustee. But from this grew an abuse which equity was prompt to remedy. So that it is now recognized that a valid grant may be made to trustees for such an unincorporated voluntary association, and that such title will descend in perpetuity."[34]

[20] Cleland v. Waters, 19 Ga. 35; American Colonization Soc. v. Gartrell, 23 Ga. 448; Shaw v. Ward, 175 N. C. 192, 95 S. E. 164. In the case in 23 Ga. Lumpkin, J., said: "That many trusts are valid if executed by the trustee that cannot be carried into effect compulsorily I have no doubt." Page 456.

[21] Ante, § 59.

[22] In re Dean, 41 Ch. Div. 552.

[23] Brown v. Burdett, Wkly. Notes (1882) 134.

[24] Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906.

[25] Gilmer's Legatees v. Gilmer's Ex'rs, 42 Ala. 9.

[26] Ante, § 61.

[27] In re Schouler, 134 Mass. 426.

[28] Ante, § 57.

[29] Nellson v. Lagow, 12 How. 98, 13 L. Ed. 909.

[30] Sheldon v. Chappel, 47 Hun, 59; Adams v. Perry, 43 N. Y. 487; Frazier v. St. Luke's Church, 147 Pa. 256, 23 Atl. 442.

[31] Hart v. Seymour, 147 Ill. 598, 35 N. E. 246.

[32] In re Sayre's Will, 179 App. Div. 269, 166 N. Y. Supp. 499.

[33] Ruddick v. Albertson, 154 Cal. 640, 98 Pac. 1045.

[34] Ruddick v. Albertson, 154 Cal. 640, 644, 98 Pac. 1045. In re Clarke,

It is not necessary that the beneficiary be non sui juris,[35] in the absence of a statute restricting trusts to such persons.[36] The settlor may also be the sole cestui que trust or one among other cestuis que trust,[37] if he does not thereby commit a fraud upon his creditors.[38] The possibility that a trustee may also be a cestui que trust has been discussed elsewhere.[39] Subject to the chance of merger [40] if he be the sole trustee and sole cestui que trust, and to the further possibility of being disqualified to act as a trustee when his own interest as cestui que trust is concerned, the trustee may be named as cestui que trust.[41]

The beneficiaries of a charitable trust must be a well-defined class of persons from whom the individuals to be aided are to be selected by the trustees. A charitable trust for A., B., and C., known and defined persons, is a contradiction in terms. The class may be as small as the residents of a particular town,[42] and it need not be confined to residents of the state where the trust is to be established.[43] A trust to aid a charitable institution not yet in being may be a valid

[1901] 2 Ch. 110; In re Drummond, [1914] 2 Ch. 90; Austin v. Shaw, 10 Allen (Mass.) 552; Sangston v. Gordon, 22 Grat. (Va.) 755, accord. The older view is represented by Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813; German Land Ass'n v. Scholler, 10 Minn. 331 (Gil. 260); King v. Townshend, 141 N. Y. 358, 36 N. E. 513. A trust for an unincorporated village was sustained in Miller v. Rosenberger, 144 Mo. 292, 46 S. W. 167.

[35] Appeal of Ogden, 70 Pa. 501; Appeal of Williams, 83 Pa. 377.

[36] Lester v. Stephens, 113 Ga. 495, 39 S. E. 109; Armour Fertilizer Works v. Lacy, 146 Ga. 196, 91 S. E. 12. And see First Nat. Bank v. Nashville Tr. Co. (Tenn. Ch. App.) 62 S. W. 392.

[37] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918; Foster v. Coe, 4 Lans. (N. Y.) 53; Colvin v. Martin, 68 App. Div. 633, 74 N. Y. Supp. 11; Appeal of Ashhurst, 77 Pa. 464.

[38] Hackley v. Littell, 150 Mich. 106, 113 N. W. 787; Sloan v. Birdsall, 58 Hun, 317, 11 N. Y. Supp. 814. And see ante, § 51, regarding spendthrift trusts.

[39] See ante, § 74.

[40] Shope v. Unknown Claimants, 174 Iowa, 662, 156 N. W. 850; Smith v. Smith, 194 Mo. App. 309, 188 S. W. 1111; McAfee v. Green, 143 N. C. 411, 55 S. E. 828; Lee v. Oates, 171 N. C. 717, 88 S. E. 889, Ann. Cas. 1917A, 514. But an expressed intent contra may prevent merger. Highland Park Mfg. Co. v. Steele, 235 Fed. 465, 149 C. C. A. 11; Bowlin v. Citizens' Bank & Trust Co., 131 Ark. 97, 198 S. W. 288, 2 A. L. R. 575.

[41] Summers v. Higley, 191 Ill. 193, 60 N. E. 969.

[42] Richardson v. Essex Institute, 208 Mass. 311, 94 N. E. 262, 21 Ann. Cas. 1158; In re Bogart's Will, 43 App. Div. 582, 60 N. Y. Supp. 496. See, ante, § 53.

[43] In re Robinson's Will, 203 N. Y. 380, 96 N. E. 925, 37 L. R. A. (N. S.) 1023.

charity.[44] By the weight of authority an unincorporated association may be the beneficiary of a charitable trust.[45]

A RIGHT IN PERSONAM OR IN REM?

110. While legal scholars have disagreed as to whether the right of cestui que trust is in personam, in rem, or partly both, the modern tendency is to give the right of cestui que trust incidents which make it, not only a right against the trustee to have the trust carried out, but also the equivalent of ownership of the trust res in equity.

Whether cestui que trust's rights are in rem or in personam has been the subject of much discussion among legal scholars. Rights in rem have been defined as: "Rights residing in persons, and availing against other persons generally. * * * The duties which correlate with rights *in rem* are always *negative*; that is to say, they are duties to forbear or abstain." And rights in personam have been thus described: "Rights residing in persons, and availing *exclusively* against persons specifically determinate. * * * Of the obligations which correlate with rights *in personam, some* are negative, but *some* (and *most*) are *positive*; that is to say, obligations to do or perform." [46]

Is the cestui que trust the owner merely of a claim against the trustee to have the trust carried out, or the equitable owner of the trust property, or do his rights combine both a right against the trustee and an ownership of the trust res, good against the world? The theory of a right in personam is supported by Holland,[47] Maitland,[48] Langdell,[49] Ames,[50] and some present-day writers,[51] the eq-

[44] Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385; Keith v. Scales, 124 N. C. 497, 32 S. E. 809.

[45] In re Merchant's Estate, 143 Cal. 537, 77 Pac. 475; Seda v. Huble, 75 Iowa, 429, 39 N. W. 685, 9 Am. St. Rep. 495; Tappan v. Deblois, 45 Me. 122; Book Depository of Baltimore Annual Conference of M. E. Church v. Trustees of Church Rooms Fund M. E. Church, 117 Md. 86, 83 Atl. 50; White v. Rice, 112 Mich. 403, 70 N. W. 1024; Cobb v. Denton, 65 Tenn. (6 Baxt.) 235; Laird v. Bass, 50 Tex. 412. Contra: Church Extension of Methodist Episcopal Church v. Smith, 56 Md. 362; Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Downing v. Marshall, 23 N. Y. 382, 80 Am. Dec. 290. But these decisions are explained by peculiar local statutory conditions.

[46] 1 Austin on Jurisprudence (3d Ed.) 381, 382.

[47] Jurisprudence (9th Ed.) 231 et seq.

[48] Equity, 111–155.

[49] Brief Survey of Equity Jurisdiction, 1 Harv. Law Rev. 59, 60.

[50] Cases on Trusts (2d Ed.) 244–281.

[51] See, for example, Harlan F. Stone, The Nature of the Rights of the Cestui que Trust, 17 Col. Law Rev. 467.

uitable title hypothesis is maintained by Salmond,[52] while several able recent authors in the field of trusts have argued that the cestui has both a right against the trustee and an ownership of the trust res.[53]

The terminology used by the courts will be of little guidance. Some have called the right of the cestui que trust an "equitable estate," [54] some an "equitable fee," [55] others an "equitable title," [56] and others "absolute ownership in equity," [57] or even an "equitable lien"; [58] while yet other judges have described the right as only a right to enforce the trust against the trustee.[59] In several states there are statutes purporting to adopt the in personam theory and to declare the cestui que trust the owner of no interest or estate in the trust property.[60] The incidents which the decisions give to the cestui's right and their bearing on its actual nature will be treated in later sections.

[52] Jurisprudence, 278–282.

[53] Roscoe Pound, 26 Harv. Law Rev. 462; Huston, The Enforcement of Decrees in Equity, 138; Scott, The Nature of the Rights of Cestui que Trust, 17 Col. Law Rev. 269; Whitlock, Classification of the Law of Trusts, 1 Cal. Law Rev. 215.

[54] Dunkerson v. Goldberg, 162 Fed. 120, 89 C. C. A. 120; Honnett v. Williams, 66 Ark. 148, 49 S. W. 495; Leigh v. Laughlin, 211 Ill. 192, 71 N. E. 881; McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139; Handy v. McKim, 64 Md. 560, 4 Atl. 125; Mercer v. Safe-Deposit & Trust Co., 91 Md. 102, 45 Atl. 865; Wood v. Kice, 103 Mo. 329, 15 S. W. 623; Knowlton v. Atkins, 134 N. Y. 313, 31 N. E. 914; Appeal of Fowler, 125 Pa. 388, 17 Atl. 431, 11 Am. St. Rep. 902; Citizens' Nat. Bank v. Watkins, 126 Tenn. 453, 150 S. W. 96; Hutchinson v. Maxwell, 100 Va. 169, 40 S. E. 655, 57 L. R. A. 384, 93 Am. St. Rep. 944; Bank of Berkeley Springs v. Green, 45 W. Va. 168, 31 S. E. 260.

[55] Durant v. Muller, 88 Ga. 251, 14 S. E. 612; Laughlin v. Page, 108 Me. 307, 80 Atl. 753; Reardon v. Reardon, 192 Mass. 448, 78 N. E. 430; Cornwell v. Orton, 126 Mo. 355, 27 S. W. 536; Wright v. Miller, 4 Barb. (N. Y.) 600; Davis v. Heppert, 96 Va. 775, 32 S. E. 467.

[56] Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249; Mathias v. Fowler, 124 Md. 655, 93 Atl. 298; Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

[57] Ex parte Jonas, 186 Ala. 567, 64 South. 960; Badgett v. Keating, 31 Ark. 400; Ellsworth College of Iowa Falls v. Emmet County, 156 Iowa, 52, 135 N. W. 594, 42 L. R. A. (N. S.) 530.

[58] In re Hart's Estate, 203 Pa. 503, 53 Atl. 373.

[59] United States v. Devereux, 90 Fed. 182, 32 C. C. A. 564; Southern Pac. R. R. Co. v. Doyle (C. C.) 11 Fed. 253; Fortner v. Phillips, 124 Ark. 395, 187 S. W. 318; Hunt v. Hunt, 124 Mich. 502, 83 N. W. 371; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Bennett v. Garlock, 79 N. Y. 302, 35 Am. Rep. 517; Cheyney v. Geary, 194 Pa. 427, 45 Atl. 369.

[60] Civ. Code Cal. § 863; New York Real Property Law (Consol. Laws, c. 50) § 100. For cases construing the latter statute, see Crooke v. County of Kings, 97 N. Y. 421; Schenck v. Barnes, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395; Newton v. Hunt, 134 App. Div. 325, 119 N. Y. Supp. 3, affirmed in

The advocates of the in personam position claim:

(a) That the rights of the cestui que trust are not enforceable against the whole world, since a bona fide purchaser of the trust res from the trustee is excepted, and therefore, from the very definition of a right in rem, the cestui's right cannot be in rem; but in reply it is shown that many rights admittedly in rem are cut off by transfers to bona fide purchasers, as, for example, in cases of sales in market overt, sales of realty where a second deed is recorded before the first, negotiations of negotiable paper, sales by a fraudulent vendee of personal property, sales by a seller left in possession of personal property, sales by agents having apparent authority to sell, and sales by conditional vendees of goods when the contract has not been filed; and it is also answered that where the trust res is an equitable interest in property and the trustee sells it to a bona fide purchaser, the right of the cestui que trust is not cut off, showing that at least in that instance the cestui has a right in rem; and it is further alleged that the bona fide purchaser rule regarding trusts is based on the respect of equity for the legal title and on the commercial expediency of having property easily transferable, that is, that such rule is a mere exception to the general rule that the cestui que trust has a right to the trust res enforceable against all the world.

(b) It is said that equity acts in personam, and the cestui's right, being admittedly equitable, must be in personam; to which the reply is that the nature of a right is not necessarily determined by the nature of the remedy given for its enforcement, and that modern statutes give equity almost generally power to act in rem, and to transfer title or possession directly in case the trustee refuses to obey a decree.[61]

(c) The impossibility of two persons owning the same thing is also urged as favorable to the in personam theory; but to this reply has been made that one may be the legal owner of a thing and a second the equitable owner, and that both law and equity re-

201 N. Y. 599, 95 N. E. 1134. In Marx v. McGlynn, 88 N. Y. 357, it was held an alien might be a cestui que trust of a real property trust, although an alien could not then hold title to land. The court said (page 376): "The fact that Bradley is an alien does not incapacitate him from receiving the income. He had no interest in the real estate. The income does not come to him as real estate or even as an incident of real estate. It comes to him as personal property. The title, both legal and equitable, is in the trustee, and it is expressly provided that a beneficiary or cestui que trust in such a case takes no interest in the lands, but has the simple right to enforce the performance of the trust in equity."

[61] See Huston, The Enforcement of Decrees in Equity, appendix, for a list of statutes giving chancery power to act in rem and transfer title.

gard the trustee as the legal owner and the beneficiary as the equitable proprietor.

(d) Finally, it is urged that the duties which the trustee owes to the cestui que trust are positive and characteristic of rights in personam, while the obligations to the holder of a right in rem are always negative, merely to refrain from action. The answer is that the trustee has positive duties of management, and also negative duties to refrain from treating the trust res as his private property or acting in his own interest, and that these latter duties attach to the general public also in part.

In support of the contention that the cestui's rights are in rem, rights of ownership, it has been shown: (a) That, if the trust res be realty, curtesy and dower attach to the cestui's interest; (b) that his interest descends to heirs at law or personal representatives, dependent on whether the trust res is realty or personalty; (c) that, if the res is real, escheat operates on the cestui's rights; (d) that the cestui's powers of alienation show him to be an owner of the res; (e) that a disseisor of the trustee does not take the property free from the trust; (f) that creditors of the cestui que trust may take the trust res; (g) that a trust may be created without consideration, thus partaking more of the nature of a grant than of a contract; (h) that the modern tendency is to preserve the rights of cestui que trust even after the trustee is barred by the statute of limitations; (i) that the trustee's interest is purely formal and gives rise to no beneficial incidents to his wife as a dowress, to his creditors, or to the crown or state in case of forfeiture or escheat.

The situation would seem to be summarized by the statement that, while the right of cestui que trust was originally purely in personam against the trustee, it has become increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust res. The cestui que trust, of course, also has rights in personam against the trustee.

INCIDENTS OF THE CESTUI QUE TRUST'S RIGHT

111. Upon the cestui que trust's death intestate his interest passes to his heirs or personal representatives, dependent on the nature of the trust property.

The interest of the cestui que trust escheats to the state on his death without heirs or next of kin.

Curtesy and dower are incidents of the beneficiary's interest.

His right may be made the subject of a homestead claim, when the trust res is realty.

The rule in Shelley's Case operates on the equitable interest of cestui que trust, just as it would on a corresponding legal estate.

In the absence of lawful provision in the trust instrument restraining him from alienating his interest, or of statutory prohibition, cestui que trust may transfer his rights inter vivos or by will, as freely as he could a legal estate.

The interest of cestui que trust passes to his heirs at law or personal representatives, dependent on the nature of the property held in trust, if the cestui dies intestate and the trust is to continue beyond his life.[62] From this rule it would appear that the cestui que trust has a property right in the trust property, since the nature of the latter determines the course of devolution of the cestui's interest. "In the case at bar, these legatees took no legal interest in the real property. Their interest in the body of the estate, so far as the matter is now before us for determination, is an equitable one, and equitable estates are governed by the same rules of descent that govern the duration of legal estates." [63]

Escheat

The early rule in England was that the interest of cestui que trust did not escheat to the crown, but that the trustee held the property free from a trust.[64] A statute now provides for escheat of the beneficiary's interest.[65] In America the interest of cestui, whether the trust res be real or personal, passes to the state on the death of cestui without heirs or next of kin.[66] While technically escheat applies only to realty, an analogous principle has been introduced with respect to personal property. "From this review of the law it would seem that there is no substantial difference between real and personal property in respect to the rights acquired by the state, upon the death of its owner intestate, without heirs or next of kin. A clear deduction from the authorities seems to lead to the conclusion that the doctrine of escheat applies only to legal estates, and does not in a strict sense affect either equitable estates or personal property. It seems also to follow from the authorities cited, that

[62] Shackleford v. Elliott, 209 Ill. 333, 70 N. E. 745; Doran v. Kennedy, 122 Minn. 1, 141 N. W. 851; Boone v. Davis, 64 Miss. 133, 8 South. 202; Bredell v. Collier, 40 Mo. 287; Gill's Heirs v. Logan's Heirs, 11 B. Mon. (Ky.) 231; Glynn v. Maxfield, 75 N. H. 482, 76 Atl. 196.

[63] Lich v. Lich, 158 Mo. App. 400, 138 S. W. 558, 562.

[64] Burgess v. Wheate, 1 Wm. Blackstone, 123.

[65] St. 47 & 48 Vict. c. 71, § 4.

[66] Matthews v. Ward, 10 Gill & J. (Md.) 443; Scott v. Gittings, 125 Md. 595, 94 Atl. 209 (dictum); Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; Commonwealth v. Naile, 88 Pa. 429; In re Linton's Estate, 198 Pa. 438, 48 Atl. 298.

upon the death of Ellen Spicer [the cestui que trust] the state took not the land, but succeeded to the equitable right which she had to a conveyance thereof." [67] While the result would be the same whether the interest of the beneficiary were regarded as a property right in the trust res or as a mere claim against the trustee, since both would pass to the state, regardless of the nature of the trust property, yet the courts have discussed the cases where the trust property was realty upon the theory that the equitable estate of the cestui que trust passed to the state by technical escheat; that is, as real property.

Curtesy and Dower

If a wife has been cestui que trust of a fee-simple interest in real property, her widower is now generally given curtesy in the trust res.[68] This can only be on the theory of an equitable property right by the wife in the trust res. If she owned a mere claim to have the trust enforced, her interest would be personal property, regardless of the subject-matter of the trust, and so not subject to curtesy. If the wife's interest as cestui was a separate estate in equity, the prevailing view is that curtesy arises in favor of the surviving husband,[69] unless a contrary intent appears in the trust instrument.[70] The exclusion of the husband from interest in or control of the property is deemed to be limited to the period of coverture.

[67] Johnston v. Spicer, 107 N. Y. 185, 200, 13 N. E. 753. The right of cestui que trust is declared by statute in New York to be a mere right to the enforcement of the trust. Real Property Law (Consol. Laws, c. 50) § 100.

[68] Robison v. Codman, Fed. Cas. No. 11,970; Ogden v. Ogden, 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; Jackson v. Becktold Printing & Book Mfg. Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454; Payne v. Payne, 11 B. Mon. 138; Rawlings v. Adams, 7 Md. 26; Richardson v. Stodder, 100 Mass. 528; Alexander v. Warrance, 17 Mo. 228; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724; Cushing v. Blake, 30 N. J. Eq. 689; Sentill v. Robeson, 55 N. C. 510; Hunt v. Satterwhite, 85 N. C. 73; Lowry's Lessee v. Steele, 4 Ohio, 170; Dubs v. Dubs, 31 Pa. 149; Carson v. Fuhs, 131 Pa. 256, 18 Atl. 1017; Tillinghast v. Coggeshall, 7 R. I. 383; Baker v. Helskell, 1 Cold. (Tenn.) 641; Norman's Ex'x v. Cunningham, 5 Grat. (Va.) 63. But see Hall v. Crabb, 56 Neb. 392, 76 N. W. 865; In re Grandjean's Estate, 78 Neb. 349, 110 N. W. 1108, 15 Ann. Cas. 577.

[69] Luntz v. Greve, 102 Ind. 173, 26 N. E. 128; Cushing v. Blake, 29 N. J. Eq. 399; Ege v. Medlar, 82 Pa. 86; In re Steinmetz's Estate, 3 Pa. Dist. R. 440. Contra: Cochran v. O'Hern, 4 Watts & S. (Pa.) 95, 39 Am. Dec. 60; Stokes v. McKibbin, 13 Pa. 267; Ash v. Ash, 1 Phila. (Pa.) 176; Jones v. Jones' Ex'r, 96 Va. 749, 32 S. E. 463.

[70] Frey v. Allen, 9 App. D. C. 400; Tremmel v. Kleiboldt, 6 Mo. App. 549; McTigue v. McTigue, 116 Mo. 138, 22 S. W. 501; Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001; McBreen v. McBreen, 154 Mo. 8[illegible]. W. 463, 77 Am. St. Rep. 758; Jamison v. Zausch, 227 Mo. 406, 12[illegible]23, 21 A[illegible] Cas. 1132; McCulloch v. Valentine, 24 Neb. 215, 38 N[illegible] 20 R. I. 520, 40 Atl. 234.

The widow of cestui que trust was not entitled to dower in England [71] until the passage of a comparatively recent statute.[72] In America a few states follow the old English rule and refuse the widow dower,[73] but either by virtue of statute or by common law the incident of dower attaches to the estate of the cestui que trust in a great majority of American states.[74] In some states it is only when the husband was a cestui que trust at his death that the widow is endowed.[75] That dower attaches as an incident to the cestui's right where the res is real property shows the tendency of modern law to treat cestui's interest as a property right in the res.

An equitable owner of land may establish a homestead in his interest.[76] The cases arising have generally been those of contract vendees, but there seems to be no reason to differentiate the cestui que trust. If so, the rule is strong evidence that his interest is treated as a property right in land, when the trust res is land.

Where a trustee holds in trust for A. for life, with a remainder in trust for A.'s heirs, the rule in Shelley's Case applies and A. will become the owner of an equitable fee.[77] Some courts have held that the rule would not be applied in the case of active trusts, where to apply it would defeat the testator's intent.[78] The application of the rule is strongly confirmatory of the modern view that the cestui's interest is an estate in the res.

Power to Alienate

In the absence of provisions in the trust instrument or statutes to the contrary, the cestui que trust may alienate his interest as freely as he might a legal estate or interest.[79] "The law, however,

[71] D'Arcy v. Blake, 2 Sch. & Lef. 387.

[72] St. 3 & 4 Wm. IV, c. 105.

[73] Seaman v. Harmon, 192 Mass. 5, 78 N. E. 301; Hopkinson v. Dumas, 42 N. H. 296.

[74] Bush v. Bush, 5 Del. Ch. 144; Jones & A. Ann. St. Ill. 1913, par. 4237; Gen. St. Kan. 1915, § 3831; Rev. St. Mo. 1909, § 345; Comp. St. N. J. 1910, p. 2043; Gen. Code Ohio 1910, § 8606; Gen. Laws R. I. 1909, c. 329, § 1; Comp. Laws Utah 1907, § 2826.

[75] Lugar v. Lugar, 160 App. Div. 807, 146 N. Y. Supp. 37; Thomp. Shan. Ann. Code Tenn. 1917, § 4139.

[76] Rockafellow v. Peay, 40 Ark. 69; Allen v. Hawley, 66 Ill. 164; Hewitt v. Rankin, 41 Iowa, 35; Moore v. Reaves, 15 Kan. 150; Tarrant v. Swain, 15 Kan. 146; Wilder v. Haughey, 21 Minn. 101; Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Smith v. Chenault, 48 Tex. 455; Doane's Ex'r v. Doane, 46 Vt. 485.

[77] Cushing v. Blake, 30 N. J. Eq. 689; Boyd v. Small, 56 N. C. 39; Mack v. Champion, 26 Wkly. Law Bul. (Ohio) 113; Crosby v. Davis, 4 Pa. Law J. 193; Carson v. Fuhs, 131 Pa. 256, 18 Atl. 1017; Danner v. Trescot, 5 Rich. Eq. (S. C.) 356.

[78] Berry v. Williamson, 11 B. Mon. (Ky.) 245; Porter v. Doby, 2 Rich. Eq. (S. C.) 49.

[79] Drennen v. Heard (D. C.) 198 Fed. 414; Honnett v. Williams, 66 Ark.

is perfectly settled that the estate of a cestui que trust may be conveyed as well as any other." [80] He may join with the trustee and transfer the whole title, legal and equitable.[81] The consent of the trustee is not necessary to the conveyance by the cestui of his interest, unless the trust instrument provides otherwise.[82] Cestui que trust may convey to a co-cestui,[83] or to the trustee,[84] although in the latter case there is a presumption of fraud which must be overcome by the trustee, and which, if not overcome, will give rise to a constructive trust. This power of alienation exists in the cestui que trust of an implied as well as an express trust.[85] Some courts have gone so far as to allow the beneficiary to vest absolute title to the trust res in another, free and clear of the trust.[86]

148, 49 S. W. 495; Rea v. Steamboat Eclipse, 4 Dak. 218, 30 N. W. 159; Security Trust & Safe Deposit Co. v. Martin, 10 Del. Ch. 330, 92 Atl. 245; Hiss v. Hiss, 228 Ill. 414, 81 N. E. 1056; Nelson v. Davis, 35 Ind. 474; Martin v. Davis, 82 Ind. 38; Parkhill v. Doggett, 150 Iowa, 442, 130 N. W. 411; Bayer v. Cockerill, 3 Kan. 282; Beuley v. Curtis, 92 Ky. 505, 18 S. W. 357; Brain v. Bailey, 82 S. W. 582, 26 Ky. Law Rep. 853; Palmer v. Stevens, 15 Gray (Mass.) 343; Young v. Snow, 167 Mass. 287, 45 N. E. 686; Security Bank of New York v. Callahan, 220 Mass. 84, 107 N. E. 385; Boston Safe Deposit & Trust Co. v. Luke, 220 Mass. 484, 108 N. E. 64, L. R. A. 1917A, 988; Dibrell v. Carlisle, 51 Miss. 785; Kingman v. Winchell (Mo.) 20 S. W. 296; Ryland v. Banks, 151 Mo. 11, 51 S. W. 720; Freeman v. Maxwell, 262 Mo. 13, 170 S. W. 1150; Converse v. Noyes, 66 N. H. 570, 22 Atl. 556; Rogers v. Colt, 21 N. J. Law, 704; McCrea v. Yule, 68 N. J. Law, 465, 53 Atl. 210; Camden Safe Deposit & Trust Co. v. Schellenger, 78 N. J. Eq. 138, 78 Atl. 672; Jenkinson v. New York Finance Co., 79 N. J. Eq. 247, 82 Atl. 36; Branch v. Griffin, 99 N. C. 173, 5 S. E. 393, 398; Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287; Sayles v. Tibbitts, 5 R. I. 79; Ives v. Harris, 7 R. I. 413; Henson v. Wright, 88 Tenn. 501, 12 S. W. 1035; Mortimer v. Jackson (Tex. Civ. App.) 155 S. W. 341; Burnett v. Hawpe's Ex'r, 25 Grat. (Va.) 481; Morgan v. Morgan, 60 W. Va. 327, 55 S. E. 389, 9 Ann. Cas. 943; Lamberton v. Pereles, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824; Mangan v. Shea, 158 Wis. 619, 149 N. W. 378. The power of alienation is not handicapped by the contingent nature of the beneficiary's interest. Brown v. Fletcher, 165 C. C. A. 35, 253 Fed. 15.

[80] Elliott v. Armstrong, 2 Blackf. (Ind.) 198, 208.

[81] Jones v. Jones, 111 Md. 700, 77 Atl. 270.

[82] Foster v. Friede, 37 Mo. 36.

[83] Murry v. King, 153 Mo. App. 710, 135 S. W. 107.

[84] Sprague v. Moore, 130 Mich. 92, 89 N. W. 712; People's Trust Co. v. Harman, 43 App. Div. 348, 60 N. Y. Supp. 178.

[85] Sinclair v. Gunzenhauser, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Osgood v. Eaton, 62 N. H. 512.

[86] Hancock v. Ship, 1 J. J. Marsh. (Ky.) 437; Monroe's Trustee v. Monroe, 155 Ky. 112, 159 S. W. 651; Packer v. Johnson, 1 Nott & McC. (S. C.) 1. Thus, in Smith v. Witter, 174 N. C. 616, 94 S. E. 402, real property was held to be alienable by a widow, without the joinder of the trustee, where the trust had been a married woman's trust.

The interest of cestui que trust may also be devised,[87] mortgaged, or incumbered,[88] and made the subject of a gift.[89]

Naturally a right accruing to the cestui que trust under the trust, which is purely personal in character, and is intended for his sole benefit, cannot be assigned. Examples are a right to occupy the trust property and use it for grazing and pasturage,[90] and a right to a bona fide exercise of the trustee's discretion in applying the residue of the estate.[91] If the trustee has the discretion of giving the cestui que trust something or nothing, the cestui que trust has no assignable right.[92]

The date of notice to the trustee of an assignment fixes the priorities between several assignees.[93] If the assigning cestui que trust is also a trustee, the assignee takes subject to any equities in favor of the co-cestuis and against the assigning trustee-cestui.[94]

Control by Trust Instrument

The trust instrument may enlarge the power of alienation which would ordinarily exist,[95] or may expressly confer the power to mortgage [96] or exchange [97] the cestui que trust's interest. Conversely the settlor may restrain alienation by the cestui que trust until a certain age,[98] or at any time during the life of the trust in states where spendthrift trusts are lawful.[99] And not only expressed in-

[87] Newhall v. Wheeler, 7 Mass. 189.

[88] Riordan v. Schlicher, 146 Ala. 615, 41 South. 842; Tift v. Mayo, 61 Ga. 246; Tillson v. Moulton, 23 Ill. 648; Jackson v. West, 22 Md. 71; Stump v. Warfield, 104 Md. 530, 65 Atl. 346, 118 Am. St. Rep. 434, 10 Ann. Cas. 249; Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492; Newton v. Jay, 107 App. Div. 457, 95 N. Y. Supp. 413; Edwards v. Barstow, 21 R. I. 562, 45 Atl. 579; Brown v. Ford, 120 Va. 233, 91 S. E. 145.

[89] Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153.

[90] Davis v. Harrison, 240 Fed. 97, 153 C. C. A. 133.

[91] True Real Estate Co. v. True, 115 Me. 533, 99 Atl. 627.

[92] In re Coleman, 39 Ch. Div. 443.

[93] Lambert v. Morgan, 110 Md. 1, 72 Atl. 407, 24 L. R. A. (N. S.) 413, 132 Am. St. Rep. 412, 17 Ann. Cas. 439; Parker v. Parker, 71 Vt. 387, 45 Atl. 756.

[94] Belknap v. Belknap, 5 Allen (Mass.) 468.

[95] Bernheim v. Heyman, 104 S. W. 388, 31 Ky. Law Rep. 984; Mandel v. Fidelity Trust Co., 128 Ky. 239, 107 S. W. 775, 32 Ky. Law Rep. 1104.

[96] Mills v. Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594.

[97] Stratton v. McKinnie, 62 S. W. (Tenn. Ch. App.) 636.

[98] Southern Nat. Life Ins. Co. v. Ford's Adm'r, 151 Ky. 476, 152 S. W. 243.

[99] White v. Williams, 172 Ill. App. 630; In re Mehaffey's Estate, 139 Pa. 276, 20 Atl. 1056; Wenzel v. Powder, 100 Md. 36, 59 Atl. 194, 108 Am. St. Rep. 380; Hackley v. Littell, 150 Mich. 106, 113 N. W. 787; Perrine v. Perrine, 11 N. J. Eq. 142; Monroe v. Trenholm, 114 N. C. 590, 19 S. E. 377; Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287. Section 867, Civ. Code Cal., provides that "the beneficiary of a trust for the receipt of

tent, but intent implied from the nature of the trust, may result in prohibiting the beneficiary from transferring his interest.[1] Thus, where the trust is for the maintenance of a family, none of the beneficiaries has any separable alienable interest.[2] The trust instrument may affix a condition to the right of the cestui to alienate, as, for example, that the trustee consent to alienation.[3] It has been held that an attempted assignment of a portion of the principal by a beneficiary of a spendthrift trust will operate to entitle the assignee to the payment of the amount assigned on the termination of the trust.[4]

In a few states the beneficiary of certain kinds of trusts is prohibited by statute from alienating his interest.[5] This statutory rule is very important, since it causes every trust of the kind described to violate the rule against restraints on alienation, if the period of the trust exceeds the time during which the power of alienation may be suspended. The rule against restraints upon the power of alienation is the rule against perpetuities in the states having this statutory prohibition of the alienation of the cestui's interest.

the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust."

[1] First Nat. Bank v. Nashville Trust Co. (Tenn. Ch. App.) 62 S. W. 392; Monday v. Vance, 92 Tex. 428, 49 S. W. 516.

[2] Talley v. Ferguson, 64 W. Va. 328, 62 S. E. 456, 17 L. R. A. (N. S.) 1215.

[3] Colyar v. Wheeler, 110 Tenn. 58, 75 S. W. 1089.

[4] In re Hall's Estate, 248 Pa. 218, 93 Atl. 944, 2 A. L. R. 855.

[5] Howell's St. Mich. 1913, § 10687; Gen. St. Minn. 1913, § 6718; Rev. Code Mont. 1907, § 4547; St. Wis. 1917, § 2089. The New York statute (Real Property Law [Consol. Laws, c. 50] § 103) is typical: "The right of a beneficiary of an express trust to receive the rents and profits of real property, and apply them to the use of any person, cannot be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other trust in real property may be transferred." See, also, section 15, Personal Property Law (Consol. Laws, N. Y. c. 41). These statutes have no application to a trust to use income for the support of another. In re Bloodgood, 184 App. Div. 798, 172 N. Y. Supp. 509. In two states statutes restrain the power of certain cestuis to alienate their interests unless the trust instrument expressly provides otherwise. Burns' St. Ind. 1914, § 4015; Gen. St. Kan. 1915, § 11677. For decisions construing these statutes, see Collier v. Blake, 14 Kan. 250; Weaver v. Van Akin, 71 Mich. 69, 38 N. W. 677; Noyes v. Blakeman, 6 N. Y. 567; First National Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; Hooker v. Hooker, 166 N. Y. 156, 59 N. E. 769; Woodbridge v. Bockes, 170 N. Y. 596, 63 N. E. 362; Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359; In re Williams, 187 N. Y. 286, 79 N. E. 1019; Slater v. Slater, 188 N. Y. 633, 81 N. E. 1176; Newton v. Hunt, 201 N. Y. 599, 95 N. E. 1134, affirming 134 App. Div. 325, 119 N. Y. Supp.

LIABILITY FOR DEBTS

112. The interest of cestui que trust is, in the absence of statute or valid direction by the settlor to the contrary, liable for the payment of his debts in equity or at law.

In bare or passive trusts the creditor may resort to a legal execution. In active trusts a creditor's bill in chancery was originally the only remedy and is still the exclusive method available in some jurisdictions; but the modern tendency of court and Legislature is to subject the beneficiary's interest to execution, attachment, and garnishment as if it were a legal estate.

The right of cestui que trust may be unavailable to the creditor, because it is too vague, uncertain, or contingent; or because the trustee has the discretion to give something or nothing; or because the cestui is entitled merely to the application of an uncertain amount to his support; or because the interest of the debtor cestui is inseparably bound up with that of other beneficiaries.

Where spendthrift trusts are allowed either absolutely or to a limited extent, the creditors may be shut off entirely or partially from resort to trust property or its income for satisfaction of their debts.

Is liability for the payment of debts an incident of the interest of cestui que trust? Aside from statute and control by the settlor, his interest is voluntarily alienable. Is it likewise involuntarily alienable?

Passive Trusts

By the tenth section of the Statute of Frauds [6] it was provided that "it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of

3; Bull v. Odell, 19 App. Div. 605, 46 N. Y. Supp. 306; Rothschild v. Roux, 78 App. Div. 282, 79 N. Y. Supp. 833; Raymond v. Harris, 84 App. Div. 546, 82 N. Y. Supp. 689; People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. Supp. 436; In re Kirby's Will, 113 App. Div. 705, 100 N. Y. Supp. 155; Garrett v. Duclos, 128 App. Div. 508, 112 N. Y. Supp. 811; Seely v. Fletcher, 135 App. Div. 920, 120 N. Y. Supp. 1145; Ungrich v. Ungrich, 141 App. Div. 485, 126 N. Y. Supp. 419; Clute v. Bool, 8 Paige (N. Y.) 83; Grout v. Van Schoonhoven, 1 Sandf. Ch. (N. Y.) 336; Titus v. Weeks, 37 Barb. (N. Y.) 136; Craver v. Jermain, 17 Misc. Rep. 244, 40 N. Y. Supp. 1056; First Nat. Bank of Plainfield v. Mortimer, 28 Misc. Rep. 686, 60 N. Y. Supp. 47; In re Foster's Estate, 37 Misc. Rep. 581, 75 N. Y. Supp. 1067.

[6] St. 29 Car. II, c. 3 (1677).

any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued," in like manner as if the debtor had been seised or possessed of the legal estate. This statute gave a creditor of cestui que trust the right to collect his debt by an execution at law from the trust property, but it obviously applied only to trusts of land, and was construed to be effective only against freehold interests and when the trust was a bare or passive trust. In many American jurisdictions similar statutes have been enacted, or the same result achieved by adoption of the tenth section as a part of the common law, or by judicial action.[7] Thus, if the trust is passive, so that the Statute of Uses executes the use and passes title to the cestui, his creditors may take the trust res by legal process.

But, although resulting trusts are passive, the interest of the beneficiary thereunder has not generally been held to be subject to legal execution.[8] The creditor has been remitted to equity for his remedy. In one state, where A. pays the consideration for land and

[7] A typical American statute with corresponding result is section 1431, Code Civ. Proc. N. Y.: "Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law, for the mode of subjecting it to his debts." See, also, Doe ex dem. McMullen v. Lank, 4 Houst. (Del.) 648; Pitts v. McWhorter, 3 Ga. 5, 46 Am. Dec. 405; Moll v. Gardner, 214 Ill. 248, 73 N. E. 442; Copeland v. Bruning, 44 Ind. App. 405, 87 N. E. 1000, 88 N. E. 877; Hunnicutt v. Alabama Great Southern R. Co. (Miss.) 50 South. 697 (citing section 2779, Code of 1906); First Nat. Bank v. Burns (Mo. App.) 199 S. W. 282; Bogert v. Perry, 17 Johns. (N. Y.) 351, 8 Am. Dec. 411; Jackson ex dem. Livingston v. Bateman, 2 Wend. (N. Y.) 570; Jackson ex dem. Ten Eyck v. Walker, 4 Wend. (N. Y.) 462; Kellogg v. Wood, 4 Paige (N. Y.) 578; Hawkins v. Sneed, 10 N. C. 149; Freeman v. Perry, 17 N. C. 243; Lummus v. Davidson, 160 N. C. 484, 76 S. E. 474; Bristow v. McCall, 16 S. C. 545; Smitheal v. Gray, 1 Humph. (Tenn.) 491, 34 Am. Dec. 664.

[8] Smith's Ex'r v. Cockrell, 66 Ala. 64; Goodbar v. Daniel, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; Robinson v. Springfield Co., 21 Fla. 203; Mayer v. Wilkins, 37 Fla. 244, 19 South. 632; Low v. Marco, 53 Me. 45; Gray v. Chase, 57 Me. 558; Anderson v. Biddle, 10 Mo. 23; White v. Kavanaugh, 8 Rich. (S. C.) 377; Richardson v. Mounce, 19 S. C. 477; Cunningham v. Wood, 4 Humph. (Tenn.) 417; Dewey v. Long, 25 Vt. 564. Contra: Tevis v. Doe, 3 Ind. 129; Peterson v. Farnum, 121 Mass. 476; Thomas v. Walker, 6 Humph. (Tenn.) 93.

has the title taken in the name of B., by statute no trust results for A., but there is a statutory trust for the creditors of A. Thus they obtain their remedy by a bill in chancery as statutory cestuis que trust.[9]

Active Trusts

If the trust be active, it is elementary that the creditor of the cestui que trust can subject his interest in the trust to the satisfaction of the debt, either in law or equity, unless a statute or valid spendthrift trust prevents this result. The question of the rights of creditors of a trust beneficiary is, therefore, largely one of methods and procedure. "There are several ideas that are inseparable from the institution of property, among the most prominent of which are, the right of alienation, and its being subject to the payment of debts. In all cases like the present, the inquiry must be, whether the debtor has a *vested, determinate interest* in the equitable estate sought to be subjected, with the present right of enjoyment in severalty. If he has, the right of the creditor follows as a corollary in mathematical science does the main proposition. Under the above qualifications and conditions, the creditor is entitled to relief, and in some form or other the debtor's *estate,* be that more or less, should be disposed of or sequestrated for the satisfaction of his debt." [10] Another court has forcibly said: "There cannot be a legal or equitable right in or to property, or to its rents, income, or profits, not so blended with the rights of others as to be incapable of separation and identification, that may not, by some appropriate remedy, in law or in equity, according to the nature of the case, be condemned to the satisfaction of debts. It is violative of public policy, and in fraud of the rights of creditors, to create a well-defined beneficial interest, legal or equitable, in property, real or personal, or in its rents, income, or profits, which can be enjoyed by an insolvent debtor, free from liability for the payment of debts." [11] The estate or interest of cestui que trust is now recognized as a property right and liable for the owner's debts equally with his legal interests, unless specially exempted by statute or act of the settlor.

The creditor of the cestui que trust may always come into equity and ask to have the trust res or its income applied to the satisfaction of his debt.[12] And in some jurisdictions this equitable rem-

[9] New York Real Property Law (Consol. Laws, c. 50) § 94; Garfield v. Hatmaker, 15 N. Y. 475; McCartney v. Bostwick, 32 N. Y. 53.

[10] Heath v. Bishop, 4 Rich. Eq. (S. C.) 46, 50, 55 Am. Dec. 654.

[11] Taylor v. Harwell, 65 Ala. 1, 13.

[12] Raynolds v. Hanna (C. C.) 55 Fed. 783; Taylor v. Harwell, 65 Ala. 1; Burke v. Morris, 121 Ala. 126, 25 South. 759; Clarke v. Windham, 12 Ala. 798, contra (cestui in possession); Huntington v. Jones, 72 Conn. 45, 43 Atl.

edy is his only relief. "It is well settled that a judgment at common law is not a lien upon a mere equitable estate or interest, nor is such interest the subject of a levy and sale by virtue of an execution at law unaided by a decree of a court of equity." [13]

"It is a well-settled general rule that trust property, unless otherwise provided by statute, can only be subjected to the payment of debts in a court of equity. * * * It was early held in this state that the estate of cestui que trust is not subject to attachment or execution." [14] In a recent case a federal court has said: "The incidents of a legal title attach to an absolute equitable interest to such an extent as to permit alienation, and such interest may be taken for the payment of the debts of the owner. * * * If an equitable estate be chargeable with the debts of the owner, it follows that such estate may be sold to discharge the debt. It is true that an execution issuing on a judgment is not leviable on an equitable estate; but it is also true that the corpus of an equitable estate may be subjected in equitable proceedings, and sold to pay the debt of the owner of the equitable estate." [15] But in states where the creditor's remedy is equitable only, if the trust is void because for a person sui juris, the creditor may levy upon and sell the property under execution against the cestui while it is in the hands of the trustee.[16]

564; Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692; Coyne v. Plume, 90 Conn. 293, 97 Atl. 337 (by statute trust income is liable, if the trust is not for the support of the beneficiary or his family, and in the latter case only the surplus above the amount necessary for support can be reached); Gen. St. Conn. 1918, §§ 5872–5874; Macfarlane v. Dorsey, 49 Fla. 341, 38 South. 512; Johnston v. Redd, 59 Ga. 621; Jennings v. Coleman, 59 Ga. 718; De Rousse v. Williams, 181 Iowa, 379, 164 N. W. 896; Knefler v. Shreve, 78 Ky. 297; Dickison v. Ogden's Ex'r, 89 Ky. 162, 12 S. W. 191; Southern Nat. Life Ins. Co. v. Ford's Adm'r, 151 Ky. 476, 152 S. W. 243; People's Bank of Madison, Ind., v. Deweese, 144 Ky. 172, 137 S. W. 850 (citing section 439, Civ. Code Prac.); Dockray v. Mason, 48 Me. 178; Haley v. Palmer, 107 Me. 311, 78 Atl. 368; Presley v. Rodgers, 24 Miss. 520; Hunnicutt v. Ala. Great Southern R. Co. (Miss.) 50 South. 697; McGregor-Noe Hardware Co. v. Horn, 146 Mo. 129, 47 S. W. 957; Heaton v. Dickson, 153 Mo. App. 312, 133 S. W. 159; Hogan v. Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Smith v. Collins, 81 N. J. Eq. 348, 86 Atl. 957; Spencer v. Richmond, 46 App. Div. 481, 61 N. Y. Supp. 397; Bergmann v. Lord, 194 N. Y. 70, 86 N. E. 828; Lummus v. Davidson, 160 N. C. 484, 76 S. E. (N. C.) 474; Decker v. Directors of Poor, 120 Pa. 272, 13 Atl. 925; Egbert v. De Solms, 218 Pa. 207, 67 Atl. 212; Wylie v. White, 10 Rich. Eq. (S. C.) 294; Bristow v. McCall, 16 S. C. 545; Leake v. Benson, 29 Grat. (Va.) 153.

[13] Smith v. Collins, 81 N. J. Eq. 348, 350, 86 Atl. 957. Accord: Johnston v. Smith, 76 Fla. 474, 80 South. 184.

[14] Feldman v. Preston, 194 Mich. 352, 160 N. W. 655, 658.

[15] First Nat. Bank of Spartanburg v. Dougan (D. C.) 250 Fed. 510, 512.

[16] Armour Fertilizer Works v. Lacy, 146 Ga. 196, 91 S. E. 12.

Some courts have subjected the trust res to the equitable execution,[17] while others have decreed that the debt be satisfied out of the income from the trust.[18] The procedure may be said to be discretionary with chancery. "And consequently the estate, whether it consist of land or personal property, may be subjected and sold, or if practicable and to the interest of the parties, the rents, interest, or profits may be subjected and applied by a court of equity to payment of debts of the cestui que trust." [19] Where the subject-matter of the trust is applied to the satisfaction of the beneficiary's debts, considerable support of the modern theory that the cestui's right is a property right in the trust res is found.

Statutory Control

In many states the right of a creditor to proceed in equity to obtain satisfaction of his claim from cestui que trust's interest is described and defined by statute. These judgment creditor's suits are ordinarily required to be based upon evidence of the return of an execution at law unsatisfied, or proof that the remedies at law for the satisfaction of the debt have been exhausted,[20] or at least evidence that the debtor is insolvent.[21] But in Massachusetts prior judgment at law and return of execution unsatisfied are not prerequisites to the maintaining of this bill.[22] A typical statute provides: [23] "When an execution against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of any thing in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held

[17] In the following cases the res was applied to the discharge of the debt: Taylor v. Harwell, 65 Ala. 1; Southern Nat. Life Ins. Co. v. Ford's Adm'r, 151 Ky. 476, 152 S. W. 243; McGregor-Noe Hardware Co. v. Horn, 146 Mo. 129, 47 S. W. 957; McKimmon v. Rodgers, 56 N. C. 200. But in Huntington v. Jones, 72 Conn. 45, 43 Atl. 564, it was held that the corpus could not be taken by the creditor.

[18] See remaining cases cited in note 12, ante.

[19] Marshall's Trustee v. Rash, 87 Ky. 116, 118, 7 S. W. 879, 12 Am. St. Rep. 467.

[20] Burke v. Morris, 121 Ala. 126, 25 South. 759 (referring to section 814, Code Ala. 1896); Jones & A. Ann. St. Ill. 1913, par. 929; Durand v. Gray, 129 Ill. 9, 21 N. E. 610; Ladd v. Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267; Binns v. La Forge, 191 Ill. 598, 61 N. E. 382; Trotter v. Lisman, 199 N. Y. 497, 92 N. E. 1052; Ann. Code Tenn. 1918, § 6092; Hooberry v. Harding, 3 Tenn. Ch. 677.

[21] De Rousse v. Williams, 181 Iowa, 379, 164 N. W. 896.

[22] Barry v. Abbot, 100 Mass. 396. See, also, Heaton v. Dickson, 153 Mo. App. 312, 133 S. W. 159.

[23] Code Civ. Proc. N. Y. §§ 1871, 1879, in part.

in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one. * * * This article does not * * * authorize the discovery or seizure of * * * any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor. * * *"

The interest of cestui que trust passes to his assignee in bankruptcy.[24] "And the beneficial interest of a bankrupt in property held in trust passes also, in all cases where that interest might have been transferred to another by the bankrupt, or might have been levied upon under judicial proceedings against him."[25]

The principle that relief must first be sought at law has been thus expressed by a New York court: "The rule was early established in this state, that creditors, seeking the aid of a court of equity to reach equitable assets of their debtor in satisfaction of their claims, must first have exhausted their legal remedies, according to the laws of this state, by the recovery of a judgment in one of its courts and the return of execution thereon unsatisfied."[26] While the opposing view is voiced by a Connecticut court in these words: "Such a bill [a creditor's bill] is one brought to enforce the payment of a debt out of the property of the debtor, under circumstances which impede or render impossible the collection of the debt by the ordinary process of execution. * * * As, for illustration, to reach equitable interests in property belonging to the debtor which could not be reached by an execution at law. * * * In this state it is not necessary that a judgment should be rendered before the creditor's bill is brought. The judgment may be rendered in the very action in which the equitable relief is asked."[27]

Execution at Law

Courts and legislatures have increasingly taken the position that the interest of cestui que trust is subject to levy and sale under an execution at law, so that now in a number of states the creditor may seize the interest of the beneficiary without resort to chancery.[28] "It is the policy of our law that all the property of a debt-

[24] Matter of Alden, 16 Am. Bankr. Rep. 362; In re Reynolds (D. C.) 243 Fed. 268; Jenks v. Title Guaranty & Trust Co., 170 App. Div. 830, 156 N. Y. Supp. 478.

[25] In re Jersey Island Packing Co., 138 Fed. 625, 627, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560.

[26] Trotter v. Lisman, 199 N. Y. 497, 501, 92 N. E. 1052.

[27] Huntington v. Jones, 72 Conn. 45, 49–50, 43 Atl. 564.

[28] By St. 1 & 2 Vict. c. 110, execution at law against an equitable interest in land was allowed, and where the judgment debtor has the entire equitable interest in personal property it has been recently held that such inter-

or should be responsible for his debts, and in consonance with this policy we have held that our statutes regulating attachments and executions subject to these processes certain equitable interests in property. The interests which have been thus brought within the reach of execution have included the equitable title which a cestui que trust has in lands or property, the legal title of which is held by another under a trust for his benefit, the equity of redemption in property subject to a mortgage, the equity in shares of stock pledged as collateral for a loan, and the income of a trust fund which the cestui que trust is entitled to receive as a right." [29] A typical statute on the subject is that of Kentucky: "Estates of every kind held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit, they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof." [30]

The rights of attachment [31] and garnishment [32] have also been accorded to the creditor of a cestui que trust in several jurisdictions.

est may be reached on legal execution. Stevens v. Hince, 110 L. T. R. 935. See Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215 (construing a statute which is now Mills' Ann. St. Colo. § 4163); Ives v. Beecher, 75 Conn. 564, 54 Atl. 207 (action to foreclose a judgment lien on land under sections 5232–5236, Gen. St. Conn. 1918); Hempstead v. Dickson, 20 Ill. 193, 71 Am. Dec. 260; Code Iowa 1897, § 3961; Burns' Ann. St. Ind. 1914, §§ 724, 795; State Bank v. Macy, 4 Ind. 362; Maxwell v. Vaught, 96 Ind. 136; Gen. St. Kan. 1915, §§ 7426, 7428; Carroll's Ky. St. 1915,' § 2355; Eastland v. Jordan, 3 Bibb (Ky.) 186; Blanchard v. Taylor's Heirs, 7 B. Mon. (Ky.) 645; Hancock v. Twyman (Ky.) 45 S. W. 68; Ann. Code Md. 1911, art. 83, § 1 (land only); Rev. St. Mo. 1909, § 2192 (land only); Hutchins v. Heywood, 50 N. H. 491; Girard Life Ins. & Trust Co. v. Chambers, 46 Pa. 485, 86 Am. Dec. 513. Comp. St. N. J. 1910, p. 2254, §§ 30a and 30b, provide that where the trust is created by the cestui the income may be reached by proceedings supplementary to execution, and where a third person creates the trust the income over $4,000 a year may be taken by the same process.

[29] Humphrey v. Gerard, 83 Conn. 346, 355, 77 Atl. 65.

[30] Carroll's Ky. St. 1915, § 2355.

[31] Price v. Taylor, 110 Ky. 589, 62 S. W. 270; Fidelity Trust & Safety Vault Co. v. Walker, 116 Ky. 381, 76 S. W. 131; Watson v. Kennard, 77 N. H. 23, 86 Atl. 257; 1 Comp. St. N. J. 1910, p. 136; Baumann v. Ballantine, 76 N. J. Law, 91, 68 Atl. 1114; Girard Life Ins. & Trust Co. v. Chambers, 46 Pa. 485, 86 Am. Dec. 513; Ann. Code Tenn. 1918, § 5260. Contra: Feldman v. Preston, 194 Mich. 352, 160 N. W. 655.

[32] Riordan v. Schlicher, 146 Ala. 615, 41 South. 842; Gen. St. Conn. 1918, §§ 5978, 5979; Easterly v. Keney, 36 Conn. 18; Ladd v. Judson, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267 (but see May v. Baker, 15 Ill. 89); Burns' Ann. St. Ind. 1914, § 977; Estabrook v. Earle, 97 Mass. 302 (if trust revocable and controllable by cestui at will); Warner v. Rice, 66 Md. 436, 8 Atl. 84; Richards v. Merrimack & C. R. R. R., 44 N. H. 127; Comp. St.

When Nature of Trust Prevents Subjection to Debts

The courts have been disinclined to seize the interest of a cestui que trust in payment of his debts when that right has been uncertain, contingent or on condition precedent,[33] but it will be no objection to the taking of cestui's interest that it is liable to be defeated or lessened by the happening of a condition subsequent, as, for example, where the birth of children may decrease the share of the debtor.[34]

If 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. And the same is true where the trustee's duty is merely to apply the funds to the support of the cestui.[35] The benefits of the trust are personal to the cestui and too vague to be subjected to the payment of his debts.

And so, too, if the debtor is one of a group of cestuis que trust, and the interests of the several beneficiaries are inseparable, no part of the trust property or its avails may be applied in payment

Supp. N. J. 1911–1915, p. 586 (if the income is $18 a week or more, 10 per cent. on the income up to $1,000 may be taken, and beyond $1,000 the amount to be paid is in the discretion of the court); Code Civ. Proc. N. Y. § 1391 (where the income is $12 a week or more); King v. Irving, 103 App. Div. 420, 92 N. Y. Supp. 1094; Heppenstall v. Baudouine, 73 Misc. Rep. 118, 132 N. Y. Supp. 511; John G. Myers Co. v. Reynolds (Sup.) 166 N. Y. Supp. 654; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251; In re Ungrich, 201 N. Y. 415, 94 N. E. 999; Grieves v. Keane, 23 R. I. 136, 49 Atl. 501. Contra: Plunkett v. Le Huray, 4 Har. (Del.) 436; Peninsular Sav. Bank v. Union Trust Co., 127 Mich. 355, 86 N. W. 798 (construing sections 13436, 13437, How. Ann. St. Mich. 1913); Ross v. Ashton, 73 Mo. App. 254 (unless trust deed is fraudulent); Willis v. Curtze, 203 Pa. 111, 52 Atl. 5; Oglesby v. Durr (Tex. Civ. App.) 173 S. W. 275; White's Ex'r v. White, 30 Vt. 338.

[33] Russell v. Milton, 133 Mass. 180; Hill v. Fulmer (Miss.) 39 South. 53; Myer v. Thomson, 35 Hun (N. Y.) 561.

[34] First Nat. Bank of Spartanburg v. Dougan (D. C.) 250 Fed. 510.

[35] Fortner v. Phillips, 124 Ark. 395, 187 S. W. 318; Holmes v. Bushnell, 80 Conn. 233, 67 Atl. 479; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Nickerson v. Van Horn, 181 Mass. 562, 64 N. E. 204; Mitchell v. Choctaw Bank, 107 Miss. 314, 65 South. 278; Banfield v. Wiggin, 58 N. H. 155; Chase v. Currier, 63 N. H. 90; Wolfman v. Webster, 77 N. H. 24, 86 Atl. 259; Parker v. Carpenter, 77 N. H. 453, 92 Atl. 955; Raymond v. Tiffany, 59 Misc. Rep. 283, 112 N. Y. Supp. 252. Contra: Marshall's Trustee v. Rash, 87 Ky. 116, 7 S. W. 879, 12 Am. St. Rep. 467. And where necessaries were furnished to the cestui with the knowledge of the trustee recovery has been allowed from the trust property, even though the trust was one to apply income. Cooper v. Carter, 145 Mo. App. 387, 129 S. W. 224; Sherman v. Skuse, 166 N. Y. 345, 59 N. E. 990.

of the debts of any particular cestui que trust.[36] Trusts for the support of a family are illustrative. The creditors of the father or mother of the family have no rights in the trust property. But, of course, debts contracted for the benefit of the entire group are collectible from the trust estate.[37]

When Express Stipulation of Settlor Prevents Liability for Debts—Spendthrift Trusts

Spendthrift trusts have previously been defined and their legality in the various jurisdictions stated. In the few states where they are void as against public policy, of course, an attempt to prescribe in the trust instrument that the cestui's interest shall not be taken for his debts is wholly without effect. In a considerable group of states the creditor of the beneficiary of a spendthrift trust is restricted to taking the surplus income, after subtraction of an amount sufficient to maintain and educate the cestui in the style to which he has been accustomed. In the larger class of states, where spendthrift trusts flourish in their full vigor, a statement in the trust instrument by the settlor that the interest of the cestui que trust is to be free from the claims of his creditors accomplishes its object, and the creditors must look elsewhere than to the trust property for satisfaction. Reference is made to the previous discussion for a statement of the extent to which the rights of creditors are affected in any particular jurisdiction by these trusts.[38]

THE RIGHT OF CESTUI QUE TRUST AGAINST THE TRUSTEE

113. The right of cestui que trust against the trustee is that the trust be carried out as laid down in the trust instrument and in accordance with the rules of equity.

Beneficiaries of private trusts may proceed in their own behalf to enforce this right by a bill in equity against the trustee. Where the trust is charitable, the indefinite cestuis are represented by the Attorney General or other public officer.

[36] Brooks v. Raynolds, 59 Fed. 923, 8 C. C. A. 370; Bell v. Watkins, 82 Ala. 512, 1 South. 92, 60 Am. Rep. 756; St. John v. Dann, 66 Conn. 401, 34 Atl. 110; Tolland County Mut. Fire Ins. Co. v. Underwood, 50 Conn. 493; McCann v. Taylor, 10 Md. 418; Brown v. Postell, 4 Rich. Eq. (S. C.) 71; Roberts v. Hall, 35 Vt. 28.

[37] Mandell v. Fulcher, 86 Ga. 166, 12 S. E. 469; Campbell v. Brannin, 8 B. Mon. (Ky.) 478.

[38] See ante, § 51.

The settlor cannot institute a suit to enforce this right of the cestui que trust.

The rights of cestui que trust may be divided naturally into those against the trustee and those against third persons. The rights against the trustee are correlative to the duties of the trustee discussed in a previous chapter. It was there shown that the duties of the trustee toward the beneficiary include the exercise of the skill and care of a reasonably prudent man in the management of his own affairs, the manifestation of the highest degree of good faith and honesty, action solely in the interest of cestui que trust, investment of the trust fund according to the standards of chancery or the statutes of the state, payment of the necessary expenses of the trust, payments to the beneficiaries according to the terms of the trust instrument, keeping accurate records of the trust affairs, informing the cestui of the trust business on application, and rendering an account in a court of competent jurisdiction.[39] Viewed from the cestui's standpoint those are his rights against the trustee. They may be summarized by saying that the right of the cestui que trust is to have the trustee carry out the trust as laid down in the trust instrument and in accordance with the rules of equity. This right is so axiomatic as to need no treatment and has often been described and enforced by the courts on the application of the cestui que trust.[40]

Thus, expressing this fundamental idea, a Delaware court has said that "every cestui que trust, whether a volunteer or not, or be the limitation under which he claims with or without a consideration, is entitled to the aid of a court of equity, to avail himself of the benefit of a trust, * * * and that the forbearance of the trustees shall not prejudice him. * * * In these cases the principle seems to be fully established, that the person for whose benefit a trust is created may compel the performance, although he may be no party to the contract." [41]

This right to compel the execution of the trust rests in the ces-

[39] Ante, §§ 97–107.

[40] Robinson v. Mauldin, 11 Ala. 977; Smith v. Wildman, 37 Conn. 384; Cooper v. McClun, 16 Ill. 435; Wyble v. McPheters, 52 Ind. 393; Forsythe v. Lexington Banking & Trust Co. (Ky.) 121 S. W. 962; Suydam v. Dequindre, Har. (Mich.) 347; Goble v. Swobe, 64 Neb. 838, 90 N. W. 919; Brock v. Sawyer, 39 N. H. 547; Attorney General ex rel. Bailey v. Moore's Ex'rs, 19 N. J. Eq. 503; In re Scherrer's Estate, 24 Misc. Rep. 351, 53 N. Y. Supp. 714; Fogg v. Middleton, 2 Hill, Eq. (S. C.) 591; Clark v. Brown (Tex. Civ. App.) 108 S. W. 421; Bell's Adm'r v. Humphrey, 8 W. Va. 1; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

[41] Rodney v. Shankland, 1 Del. Ch. 35, 45, 46, 12 Am. Dec. 70.

tui que trust alone. A person having no financial interest in the carrying out of the trust has no standing in equity.[42] Where the interest of the beneficiary is inheritable, obviously, the right to enforce passes to the heirs[43] or personal representative[44] on the cestui's death. The right of enforcement is not affected by the contingent[45] or remote[46] nature of cestui que trust's interest. Where the interest is assignable, the assignee may come into court to demand that the trust be carried out.[47] Where a trust is for a group like a family, any member may enforce the trust.[48] Beneficiaries of resulting[49] and constructive[50] trusts have the same rights as those of an express trust in this respect. It has been held that in the case of a trust for support, one furnishing support to the cestui que trust may maintain an action to enforce the trust.[51]

Cestui Alone may Enforce

Persons having no financial interest in the trust as, for example, a relative of the cestui, who is only affected by reasons of sentiment,[52] or a claimant of the legal title in hostility to the trust,[53] cannot sue for the enforcement or construction of the trust. Where a private trust is for the aid of an individual pauper, a town cannot maintain a bill to enforce the trust, on the theory that it has a financial interest because the pauper may become a town charge.[54] The interest is too remote.

It has previously been demonstrated that the settlor retains no interest enabling him to require a construction or enforcement of

[42] Bayley v. Clark, 153 Ill. App. 154; Tarbert v. Rollins, 130 Md. 413, 100 Atl. 637; Foster v. Friede, 37 Mo. 36.

[43] Mendenhall v. Walters, 53 Okl. 598, 157 Pac. 732.

[44] Schwebel v. Wohlsen, 254 Pa. 281, 98 Atl. 864; Smith v. Smith, 38 Pa. Super. Ct. 251.

[45] Williams v. Sage, 180 App. Div. 1, 167 N. Y. Supp. 179; Clarke v. Deveaux, 1 S. C. 172.

[46] Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570; Cooper v. Day, 1 Rich. Eq. 26.

[47] Smith v. Orton, 21 How. 241, 16 L. Ed. 104; Mitchell v. Carrollton Nat. Bank, 97 S. W. 45, 29 Ky. Law Rep. 1228; Clark v. Crego, 47 Barb. (N. Y.) 599.

[48] Chase v. Chase, 2 Allen (Mass.) 101.

[49] Franklin v. Colley, 10 Kan. 260; Sherburne v. Morse, 132 Mass. 469; Leader v. Tierney, 45 Neb. 753, 64 N. W. 226. But the heirs of a person who could have elected to be a resulting trustee, but did not, are not entitled to enforce the trust. Cooper v. Cockrum, 87 Ind. 443.

[50] Fox v. Fox, 77 Neb. 601, 110 N. W. 304; Johnston v. Reilly, 66 N. J. Eq. 451, 57 Atl. 1049; Trustees of Amherst College v. Ritch, 10 Misc. Rep. 503, 31 N. Y. Supp. 885.

[51] Bulkley v. Staats, 31 Hun (N. Y.) 137.

[52] Autrey v. Stubenrauch, 63 Tex. Civ. App. 247, 133 S. W. 531.

[53] Warren v. Warren, 75 N. J. Eq. 415, 72 Atl. 960.

[54] Town of Sharon v. Simons, 30 Vt. 458.

the trust. Unless he is also a cestui que trust, his reasons for having the trust carried out are sentimental, not financial, and his right moral, not legal.[55]

It has likewise been stated that, in jurisdictions where the trustee is empowered to devise the trust res or where it descends to his heirs or representatives at his death, the devisee,[56] heir[57] or representative[58] is bound by the trust, as was the ancestor, and the right of cestui que trust to enforce the trust obligation extends to the devisee, heir, or representative. The same principle applies to a substituted trustee who replaces the original trustee by decree of chancery.[59]

As in the case of a private trust, so with the charitable trust there is a right to have the trustee enforce the trust in the manner provided by the settlor and by the rules of chancery.[60] This right is inherent in the cestuis que trust of the charitable trust, but, since they are always indefinite until they have been selected by the trustees and have received the benefits of the trust, the right must be enforced by some representative of the public generally, the prospective beneficiaries. The officer usually selected has been the Attorney General,[61] although in some states the prosecuting attor-

[55] Ante, § 71.

[56] Ante, § 81; Hill v. True, 104 Wis. 294, 80 N. W. 462.

[57] Ante, § 81; Mendenhall v. Walters, 53 Okl. 598, 157 Pac. 732; Smalley v. Paine, 62 Tex. Civ. App. 52, 130 S. W. 739.

[58] Ante, § 81; Austin v. Wilcoxson, 149 Cal. 24, 84 Pac. 417; Smith v. Darby, 39 Md. 268; Anderson v. Thomson, 38 Hun (N.Y.) 394; Devoe v. Lutz, 133 App. Div. 356, 117 N. Y. Supp. 339; Young v. Hughes, 39 Or. 586, 65 Pac. 987, 66 Pac. 272; Bible v. Marshall, 103 Tenn. 324, 52 S. W. 1077.

[59] Ante, § 82; In re Appley (Sup.) 33 N. Y. Supp. 724.

[60] Harris v. Cosby, 173 Ala. 81, 55 South. 231; Kauffman v. Foster, 3 Cal. App. 741, 86 Pac. 1108; Attorney General v. Wallace's Devisees, 7 B. Mon. (Ky.) 611; Ellenherst v. Pythian, 110 Ky. 923, 63 S. W. 37; Brunnenmeyer v. Buhre, 32 Ill. 183; Lamb v. Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Peter v. Carter, 70 Md. 139, 16 Atl. 450; President, etc., of Harvard College v. Society for Promoting Theological Education, 3 Gray (Mass.) 280; Sessions v. Doe ex dem Reynolds, 7 Smedes & M. (Miss.) 130; Chambers v. City of St. Louis, 29 Mo. 543; Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430, 6 L. R. A. 785; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Penfield v. Skinner, 11 Vt. 296; Overseers of Poor of Richmond County v. Tayloe's Adm'r, Gilmer (Va.) 336. But, of course, equity will take jurisdiction only to protect a property right. Houston v. Howze, 162 Ala. 500, 50 South. 266. And equity will not interfere merely to control the discretion of the trustee. Society of Cincinnati's Appeal (In re Washington Monument Fund) 154 Pa. 621, 26 Atl. 647, 20 L. R. A. 323.

[61] People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; Parker v. May, 5 Cush. (Mass.) 336; Burbank v. Burbank, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748; Attorney General v. Bedard, 218 Mass. 378, 105 N. E. 993; Tyree v. Bingham, 100 Mo. 451, 13 S. W. 952; N. Y. Real Property

ney [62] performs this function. If the trustees are guilty of neglect or maladministration, the Attorney General, or other corresponding officer, may, either on his own initiative or on the relation of any citizen, institute proceedings in chancery for the enforcement of the trust. "Courts of equity have jurisdiction to prevent a misuse or an abuse of charitable trusts. * * * The Attorney General or a state's attorney representing the public is charged with the duty of preventing a breach of a trust for a public charity or to restore a trust fund after it has been diverted." [63] A Massachusetts court has recently voiced the same principle as follows: "If the trustees appointed under the decree neglect or refuse to execute the trust, or abuse their powers, the Attorney General on his own initiative or at the relation of those who are beneficially interested can petition for their removal, and also can have relief in equity for an accounting, or, if the trustees are uncertain or are unable to agree among themselves as to their powers and duties, they can ask for instructions making him a party defendant." [64] Any person may act as a relator in a charitable information, regardless of personal financial interest in the enforcement of the trust.[65]

Settlor's Powers

In the discussion of the rights of the settlor the law was shown to be that, by the weight of authority, the settlor has no capacity to sue to enforce the rights of the cestuis que trust, or to obtain a construction of the charitable trust.[66] "Before it was established that a valid trust was created by the will, no question as to its execution could arise. After that was done and it was determined that the trust was charitable, it became the duty of the Attorney General to see that the rights of the public in the trust were protected and that it was properly executed. The heirs had no interest in the question apart from the general public, whose rights were represented by the Attorney General." [67] The court was speaking of the heirs of the settlor of the charity. A person expecting or

Law (Consol. Laws, c. 50) § 113; N. Y. Personal Property Law (Consol. Laws, c. 41) § 12; Buell v. Gardner (Sup.) 149 N. Y. Supp. 803; Association for the Relief of Respectable, Aged Indigent Females v. Beekman, 21 Barb. (N. Y.) 565; Ewell v. Sneed, 136 Tenn. 602, 191 S. W. 131, 5 A. L. R. 303.

[62] Howell's Ann. St. Mich., § 10701.

[63] People ex rel. Smith v. Braucher, 258 Ill. 604, 608, 101 N. E. 944, 47 L. R. A. (N. S.) 1015.

[64] Crawford v. Nies, 224 Mass. 474, 490, 113 N. E. 408.

[65] Mackenzie v. Trustees of Presbytery of Jersey City, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

[66] Ante, § 71. And see Strong v. Doty, 32 Wis. 381.

[67] Petition of Burnham, 74 N. H. 492, 494, 69 Atl. 720.

hoping to be a cestui que trust of a charity is not a proper plaintiff in a bill to enforce the trust.[68]

Visitorial Powers

The visitor of an eleemosynary corporation has no power to enforce the right of the public that the charity be carried on. The power of visitation is the authority retained by the founder for himself and his heirs, or his nominees, to inspect and regulate the internal affairs of a charitable corporation. It is not a power vested in courts of equity in the United States. It is a rule of the law of corporations, rather than of trusts.[69] After considering the common law of England upon the subject of visitation, as laid down in Philips v. Bury [1 Ld. Raym. 5, 2 Term. R. 346], an early case, a Massachusetts court has stated: "By that law the visitor of all eleemosynary corporations is the founder or his heirs, unless he has given the power of visitation to some other person or body, which is generally the case; and to the visitor thus constituted belongs the right and power of inspecting the affairs of the corporation and superintending all officers who have the management of them, according to such regulations and restrictions as are prescribed by the founder in the statutes which he ordains, without any control or revision of any other person or body, except the judicial tribunals by whose authority and jurisdiction they may be restrained and kept within the limits of their granted powers, and made to regard the Constitution and general laws of the land." [70] With respect to the possession of the power of visitation by chancery a New York court has said: "While a court of equity never had visitorial power, yet it always assumed jurisdiction over the charity and its officers when a question arose as to the proper use and disposition of the funds. The power of visitation, therefore, pertained to the supervision and regulation of the work and purpose of the charity, while the court of equity, not as a visitor, but in its inherent power over trusts, assumed jurisdiction to determine whether the funds were being spent in accordance with the trust and purpose of the charity." [71] But in England, when the visitorial power cannot be exercised by the founder or his nominee, it results to the crown and will be exercised by the Chancellor as the representative of the

[68] Association for the Relief of Respectable, Aged Indigent Females v. Beekman, 21 Barb. (N. Y.) 565.

[69] Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229; Trustees of Auburn Academy v. Strong, 1 Hopk. Ch. (N. Y.) 278; Koblitz v. Western Reserve University, 21 Ohio Cir. Ct. R. 144.

[70] In re Murdock, 7 Pick. (Mass.) 303, 321.

[71] In re Norton, 97 Misc. Rep. 289, 299, 161 N. Y. Supp. 710.

crown.[72] And courts have been given quasi-visitorial powers in some cases in America.[73]

It is self-evident that the Legislature, being a law-making rather than a law-enforcing body, has no power to enforce the right of the cestuis que trust of a charitable trust. It cannot enact statutes which modify the terms of the trust, as by a change in trustees or beneficiaries. Such acts have been held to violate the constitutional guaranty against the impairment of the obligation of contracts.[74] "The acceptance by the town [the trustee] of Maria Cary's proposition contained in her letter created a contract, which was executed on her part by the payment of the money, and which continued binding on the town and the trustees as to their conduct in reference to the charity. * * * We are of opinion that the statute which we are considering impairs the obligation of the contract under which this charity is administered." [75] The act referred to by the court changed the trustee.

THE RIGHTS OF CESTUI QUE TRUST AGAINST THIRD PERSONS

114. The cestui que trust has a right that third persons (that is, strangers to the trust) shall not injure or appropriate to their own use the trust property, and that they shall not participate or aid in a breach of the trust by the trustee.

A bank, having on deposit trust funds, is under a duty to the cestui que trust not to use such funds to satisfy individual obligations of the trustee to it, and not to aid the trustee in misappropriating the trust funds.

A buyer of property from a trustee is under no duty to the cestui que trust to see to the proper application of the purchase price paid by him to the trustee.

[72] Lewin on Trusts (12th Ed.) 622, citing St. 36 & 37 Vict. c. 66, § 17.

[73] N. Y. Membership Corporations Law (Consol. Laws, c. 35) § 16; N. Y. Religious Corporations Law (Consol. Laws, c. 51) § 14.

[74] Tharp v. Fleming, 1 Houst. (Del.) 580; Town of Greenville v. Town of Mason, 53 N. H. 515; Brown v. Hummel, 6 Pa. 86, 47 Am. Dec. 431; Plymouth v. Jackson, 15 Pa. 44; Field v. Directors of Girard College, 54 Pa. 233. But acts authorizing a change in the character of the trust property have been allowed as valid. Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502; Petition of Van Horne, 18 R. I. 389, 28 Atl. 341. And where the Legislature has appointed a corporation as the trustee (the settlor having appointed none), the Legislature can revoke the charter of the first corporation and create another to take the property in trust. Wambersie v. Orange Humane Soc., 84 Va. 446, 5 S. E. 25.

[75] Cary Library v. Bliss, 151 Mass. 364, 375, 378, 25 N. E. 92, 7 L. R. A. 765.

Every property owner, be his interest legal or equitable, has a fundamental right to have third persons refrain from injuring or appropriating the subject of his property right. It is therefore a truism that cestui que trust, being the owner of an equitable property right, has the support of the law in his claim that strangers shall not cause damage to the trust res or prevent the application of it to the purposes of the trust. An elevated railroad company which erects structures injurious to the trust property must respond in damages to the trust.[76] If a stranger converts to his own use slaves which are the subject-matter of the trust, an action of trover may be maintained.[77] If persons unconnected with the trust wrongfully retain possession of the trust estate, replevin or ejectment or a similar possessory action will lie.[78] In whose name these actions must be brought is not here the question. The actions inure to the benefit of cestui que trust. They represent rights which belong to him, or, viewed otherwise, duties owed to him by the public at large.

That the third person violates his duty to the beneficiary, or infringes upon the cestui's rights, in conjunction with the trustee is naturally of no importance as far as the liability of such third person is concerned. Such liability exists, nevertheless. "There can be no dispute that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the money and may be compelled to replace the fund which they have been instrumental in diverting."[79] Thus, a cestui que trust of a trust for creditors may maintain a bill in equity against a third person who has induced the trustees to transfer the trust assets to him;[80] and individual creditors of the trustee, who knowingly accept trust funds from the trustee as payment of their debts, are liable therefor to the cestui que trust.[81]

Rights Against Banks

This right of the beneficiary to have third persons refrain from interfering with the trust property and from aiding in a breach of trust has been frequently discussed in cases involving the rights and duties of banks holding trust funds on deposit. To what extent, if at all, may the bank apply the trust funds to its own use by taking them to satisfy a debt of the trustee to it? To what extent

[76] Roberts v. N. Y. El. R. R. Co., 155 N. Y. 31, 49 N. E. 262.

[77] Jones v. Cole, 2 Bailey (S. C.) 330.

[78] Warren v. Howard, 99 N. C. 190, 5 S. E. 424.

[79] Duckett v. National Mechanics' Bank, 86 Md. 400, 403, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

[80] Kentucky Wagon Mfg. Co. v. Jones & Hopkins Mfg. Co., 248 Fed. 272, 160 C. C. A. 350.

[81] Stratton v. Stratton's Adm'r, 149 Ky. 473, 149 S. W. 900.

is the bank obliged to scrutinize the withdrawals by the trustee from the trust fund to ascertain that the trustee is not diverting the trust funds to improper uses?

It has been almost universally held that a bank, which has notice that funds deposited with it are trust funds has no lien upon such deposit for the debts of the trustee to it, has no right to apply such trust funds to the satisfaction of the individual debt of the trustee, with or without his consent, and will be liable to the cestui que trust if it makes such application. This doctrine applies to all fiduciary accounts, even though not strictly trust accounts. It has been used in cases of funds deposited by agents, guardians, executors, and commission merchants. The bank may not take the trust money to pay the trustee's debt to it, whether the account be entitled a trust account,[82] or whether it be a personal account in which the bank knows trust funds have been deposited.[83] Where

[82] Cuthbert v. Rqbarts, Lubbock & Co. [1909] 2 Ch. 226; Ex parte Kingston, L. R. 6 Ch. App. 632; United States Fidelity & Guaranty Co. v. Union Bank & Trust Co., 228 Fed. 448, 143 C. C. A. 30; Central Nat. Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Bank of Guntersville v. Crayter, 75 South. 7, L. R. A. 1917F, 460; Sayre v. Weil, 94 Ala. 466, 10 South. 546, 15 L. R. A. 544; Keeney v. Bank of Italy, 33 Cal. App. 515, 165 Pac. 735; Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Miami County Bank v. State ex rel. Peru Trust Co., 61 Ind. App. 360, 112 N. E. 40; Washbon v. Linscott State Bank, 87 Kan. 698, 125 Pac. 17; Farmers' & Traders' Bank of Shelbyville v. Fidelity & Deposit Co. of Maryland, 108 Ky. 384, 56 S. W. 671; Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; State Bank of St. Johns v. McCabe, 135 Mich. 479, 98 N. W. 20; Jeffray v. Towar, 63 N. J. Eq. 530, 53 Atl. 182; McStay Supply Co. v. Stoddard, 35 Nev. 284, 132 Pac. 545; Fidelity & Deposit Co. of Maryland v. Rankin, 33 Okl. 7, 124 Pac. 71; United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 827. In First Nat. Bank of Sharon v. Valley State Bank, 60 Kan. 621, 57 Pac. 510, it was held that the depositary was not liable when the account from which the bank received payment was an individual account and the trustee had withdrawn from it more than the amount of the trust fund and the bank had had a right to suppose that such withdrawals were paid to the cestui. See Thulin, "Misappropriation of Funds by Fiduciaries; the Bank's Liability," 6 Cal. Law Rev. 171; Scott, "Participation in a Breach of Trust," 34 Harv. Law Rev. 454.

[83] Santa Marina Co. v. Canadian Bank of Commerce (D. C.) 242 Fed. 142; Miami County Bank v. State ex rel. Peru Trust Co., 61 Ind. App. 360, 112 N. E. 40; Nehawke Bank v. Ingersoll, 2 Neb. Unoff. 617, 89 N. W. 618; Globe Sav. Bank v. Nat. Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885; Pratt v. Commercial Trust Co., 105 Misc. Rep. 324, 174 N. Y. Supp. 88, affirmed (Sup.) 175 N. Y. Supp. 918; Hale v. Windsor Sav. Bank, 90 Vt.

a check on a trust account in the A. bank is deposited by the trustee in his individual account in the B. bank when such latter account is overdrawn, the bank is liable to the cestui for the full amount of the check so deposited.[84] In a recent New York case [85] it was held that, where a trustee drew a check on his trust account in the A. bank, deposited it to his private credit in the B. bank, and then paid the funds to the B. bank to satisfy his own debt to such bank, the B. bank was liable to the cestui que trust for the amounts it received, and also for all amounts subsequently taken from the private account to pay other debts of the trustee to third parties, since the bank had made no inquiry after receiving notice of a breach of trust by the wrongful payment to it. In another case a check payable to "A, guardian," was deposited by the guardian to his individual account and part of the credit used to pay A.'s debt to the depositary. This rendered the depositary liable to the cestui for the amount received by it.[86]

Basis of Liability

The basis of liability in this class of cases has been clearly stated by the courts. "The principle governing the defendant's liability is, that a banker who knows that a fund on deposit with him is a trust fund cannot appropriate that fund for his private benefit, or where charged with notice of the conversion join in assisting others to appropriate it for their private benefit, without being liable to

487, 98 Atl. 993. But it has been held that the bank is not liable if it merely credited the trust deposit to a personal account of the trustee which was then overdrawn and thus paid the overdraft, without any intent to make a profit (Coleman v. Bucks & Oxon Union Bank [1897] 2 Ch. 243); nor is there liability if the bank did not know that the funds deposited in the personal account were trust funds (First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337); or if the trustee's individual account, since the trust deposit has been mingled with his own moneys, has been reduced below the amount of the trust money and there is no proof that the trust money is still in the account (Mayer v. Citizens' Bank of Sturgeon, 86 Mo. App. 422).

[84] Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518.

[85] Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059. See, also, Corn Exch. Bank v. Manhattan Sav. Inst'n, 105 Misc. Rep. 615, 173 N. Y. Supp. 799; Atwood-Stone Co. v. Lake County Bank, 38 S. D. 377, 161 N. W. 539, and United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667. But in Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885, while holding the bank liable for the benefit it received from the payment of its debt out of the trust fund, the court did not extend the liability to money thereafter withdrawn by the trustee and used to pay debts of other creditors.

[86] United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667; Brovan v. Kyle, 166 Wis. 347, 165 N. W. 382.

refund the money if the appropriation is a breach of the trust." [87] Or, as the New York Court of Appeals has put it: "Inasmuch as the defendant knew that the credits to Poggenburg created by the proceeds of the checks were of a fiduciary character and were equitably owned by the executor, it had not the right to participate in a diversion of them from the estate or the proper purposes under the will. Its participation in a diversion of them would result from either (a) acquiring an advantage or benefit directly through or from the diversion, or (b) joining in a diversion, in which it was not interested with actual notice or knowledge that the diversion was intended or was being executed, and thereby becoming privy to it." [88]

When Bank Not Liable

When a trustee checks on a trust account, or on his individual account containing trust funds, the bank is entitled to presume that the withdrawal is made for the proper purposes of the trust. The mere fact that the check is payable to the trustee in his private capacity or is not payable to a beneficiary of the trust places no duty on the bank to inquire into the disposition of the trust money. It is only when the bank has actual notice of an intended misappropriation of the trust fund that it is warranted in refusing to honor the trustee's check, and is liable if it does honor it, according to the great weight of authority. Thus, the mere deposit of trust funds in an individual account is not of itself wrongful and creates no liability on the part of the bank for later withdrawals.[89] "An administrator of other person having charge of trust funds may deposit them in a bank to the credit of his personal account and check them out in the usual course of business, and the bank, though it has knowledge of the character of the funds so deposited, is not thereby made liable to the beneficial, or actual, owners of such funds, in the absence of any knowledge on its part that the funds are being misappropriated or misapplied by such trust officer." [90] But when a bank is expressly directed to credit a check to a trust account and

[87] Allen v. Puritan Trust Co., 211 Mass. 409, 422, 97 N. E. 916, L. R. A. 1915C, 518.

[88] Bischoff v. Yorkville Bank, 218 N. Y. 106, 112, 112 N. E. 759, L. R. A. 1916F, 1059.

[89] Miami County Bank v. State ex rel. Peru Trust Co., 61 Ind. App. 360, 112 N. E. 40; Batchelder v. Central Nat. Bank, 188 Mass. 25, 73 N. E. 1024; United States Fidelity & Guaranty Co. v. Adoue & Lobit (Tex. Civ. App.) 128 S. W. 636. But, if the bank knows that the deposit of trust funds in the individual account is wrongful, it will be liable for subsequent misappropriations. British America El. Co. v. Bank of British N. A., [1919] A. C. 658.

[90] Miami County Bank v. State ex rel. Peru Trust Co., 61 Ind. App. 360, 112 N. E. 40, 43.

credits it to an individual account,[91] or when a certificate of deposit belonging to a trust estate is applied by the trustee to pay his debt to the bank and to pay other debts by check, and this use of the certificate is regarded as a single fraudulent transaction,[92] the bank will be liable. And the bad reputation of the fiduciary, known to the bank, may have an effect to change the usual rule.[93]

Ordinarily the payment of a check on a trust account to the order of the trustee does not render a bank liable, if it turns out that the trustee has misappropriated the money so paid.[94] The bank is not required to demand proof that he intends to use the proceeds of the check for trust purposes. The presumption is to the contrary. It would be an intolerable burden on a bank to require it to investigate the intent and powers of every trustee doing business with it. The obligation of watching for dishonesty is rather on the cestuis que trust. But it has been held that where a trustee checked on trust funds to take up notes of a corporation in which he was interested, the bank was liable for the amount of the checks when it had previous notice of breaches of the trust by use of trust funds to pay debts of the trustee to the bank, and when the bank officials had been negligent in supervising the affairs of the bank.[95]

Nor, in the absence of special circumstances implicating the bank in the breach, is a bank liable where it honors checks of the trustee upon the trust account and these checks run to the individual credi-

[91] Blanton v. First Nat. Bank of Forrest City, 136 Ark. 441, 206 S. W. 745; Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

[92] United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667.

[93] Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541, 30 C. C. A. 247.

[94] Lowndes v. City Nat. Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; First Nat. Bank of Sharon v. Valley State Bank, 60 Kan. 621, 57 Pac. 510; Allen v. Fourth Nat. Bank, 224 Mass. 239, 112 N. E. 650; Kendall v. Fidelity Trust Co., 230 Mass. 238, 119 N. E. 861; Town of Eastchester v. Mt. Vernon Trust Co., 173 App. Div. 482, 159 N. Y. Supp. 289; Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., 174 App. Div. 160, 159 N. Y. Supp. 954; Taylor v. Astor Nat. Bank, 105 Misc. Rep. 386, 174 N. Y. Supp. 279.

[95] Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408. And so, too, where a bank is charged with notice that an account is a trust account, and, by reason of a section of the Bankruptcy Act and the countersignature of some checks, is also charged with notice that withdrawals from the fund could not lawfully be made without the signature of the clerk of the court, it is liable for moneys paid out on checks payable to the trustee individually and not countersigned. Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., 226 N. Y. 225, 123 N. E. 370.

tors of the trustee. Without facts showing an intended breach, the bank is entitled to assume that the payees are creditors of the trust estate, or that the payments are for the benefit of the cestuis que trust.[96] The bank is not obliged to require the payees to prove that the checks satisfy valid claims against the trust, or were issued in the trust business. But where a bank allows a trustee to check on the trust account to pay bucket shop debts, with full knowledge of the nature of the account and the use to which the checks were being put, it will be liable to the beneficiary.[97] And it has been held that the bank will render itself liable by paying out trust funds to the individual creditors of the trustee, when it does so without inquiry, after knowledge that the trustee has committed a breach of trust.[98]

Where a trustee draws a check on his personal account, known by the bank to contain trust funds, and the check is to pay debts of the trustee to third persons, the bank will not be liable in the absence of knowledge of an intended breach.[99] This knowledge has been held to be shown by action of the bank in crediting a trust check to the personal account when expressly ordered to place it to a trust account,[1] or by a participation by the bank in the appropriation of trust funds to the payment of the trustee's debts to it and others.[2]

Liability on the part of the B. bank has been denied when the trustee drew a check on the trust account in the A. bank, deposited it to his individual account in the B. bank, the A. bank paid the

[96] Gray v. Johnston, L. R. 3 H. L. 1; Pa. Title & Trust Co. v. Meyer, 201 Pa. 299, 50 Atl. 998; Merchants' & Planters' Nat. Bank of Union v. Clifton Mfg. Co., 56 S. C. 320, 33 S. E. 750; First State Bank of Bonham v. Hill (Tex. Civ. App.) 141 S. W. 300; Anderson v. Walker, 93 Tex. 119, 53 S. W. 821; Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 844. But see Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541, 30 C. C. A. 247.

[97] Pearce v. Dill, 149 Ind. 136, 48 N. E. 788.

[98] Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059.

[99] Coleman v. Bucks & Oxon Union Bank [1897] 2 Ch. 243; Interstate Nat. Bank v. Claxton, 97 Tex. 569, 80 S. W. 604, 65 L. R. A. 820, 104 Am. St. Rep. 885. Where the indorsement of the instrument enabling the trustee to place it to his private account was a forgery, the bank was liable for the funds thereafter withdrawn for the trustee's benefit. Hope Vacuum Cleaner Co. v. Commercial Nat. Bank of Independence, 101 Kan. 726, 168 Pac. 870.

[1] Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

[2] United States Fidelity & Guaranty Co. v. Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409, Ann. Cas. 1914B, 667.

check, and thereafter the trustee checked out the funds for his own benefit.[3]

In cases where a trustee has had in his possession a check payable to "A., trustee," and has deposited it to his individual account and checked it out for his individual benefit, the courts have disagreed upon the question of the liability of the bank, some courts taking the view that such action was a participation in the breach by the bank,[4] while others held that the facts did not necessarily imply a breach of trust and that the bank was not liable in the absence of evidence of actual knowledge of intended fraud.[5]

If a trustee holds a check to his order as trustee, indorses it to B., and B. deposits it and checks out the fund, the bank of deposit is not liable if the trustee misappropriated the moneys represented by the check.[6]

Notice to the Bank

If the bank does not know that funds are trust funds, it is not liable for their disposition by the trustee.[7] Notice of the existence of the trust acquired by an officer of the bank while acting in his official capacity will bind the bank,[8] but otherwise if the officer acquired the information outside his official duties.[9] The use of the word "trustee" or "attorney" in connection with the trust account is not ordinarily, of itself, enough to charge the bank with notice that the funds are trust funds.[10] Marginal notes on instru-

[3] Havana Cent. R. Co. v. Central Trust Co. of New York, 204 Fed. 546, 123 C. C. A. 72, L. R. A. 1915B, 715; Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; Kendall v. Fidelity Trust Co., 230 Mass. 238, 119 N. E. 861; Havana Central R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12, L. R. A. 1915B, 720; Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059.

[4] Bank of Hickory v. McPherson, 102 Miss. 852, 59 South. 934; United States Fidelity & Guaranty Co. v. People's Bank, 127 Tenn. 720, 157 S. W. 414.

[5] Safe Deposit & Trust Co. v. Diamond Nat. Bank, 194 Pa. 334, 44 Atl. 1064; United States Fidelity & Guaranty Co. v. Home Bank for Savings, 77 W. Va. 665, 88 S. E. 109.

[6] Hood v. Kensington Nat. Bank, 230 Pa. 508, 79 Atl. 714.

[7] Martin v. Kansas Nat. Bank, 66 Kan. 655, 72 Pac. 218; First State Bank of Bonham v. Hill (Tex. Civ. App.) 141 S. W. 300.

[8] Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; Tesene v. Iowa State Bank (Iowa) 173 N. W. 918; Atwood-Stone Co. v. Lake County Bank, 38 S. D. 377, 161 N. W. 539.

[9] Bank of Hartford v. McDonald, 107 Ark. 232, 154 S. W. 512; First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337.

[10] Keeney v. Bank of Italy, 33 Cal. App. 515, 165 Pac. 735; First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337; Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., 174 App. Div. 160, 159 N. Y. Supp. 954. But see Santa Marina Co. v. Canadian Bank of Commerce (D. C.) 242 Fed. 142, in which an indorsement, "S. M. Co., by H., Sec'y," was held to be notice to the bank of a trust, when the check was deposited in an individual account.

ments deposited are not notice of the trust character of the funds represented by such instruments.[11]

The theory of the bank's liability in these cases is well stated in Duckett v. National Mechanics' Bank,[12] as follows: "It is true, undoubtedly, that a bank is bound to honor the checks of its customer so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process, or are held under the bank's right of set-off. It is equally true that whenever money is placed in bank on deposit and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank upon paying the fund out on the depositor's check will be free from liability even though it should afterwards turn out that the fund in reality belonged to some one else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person or to pay it to his order. If it be deposited by one as trustee, the depositor as trustee has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversation of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and therefore, even

[11] Duckett v. National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; First Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227, Ann. Cas. 1913B, 1337; Fidelity & Deposit Co. of Maryland v. Queens County Trust Co., 174 App. Div. 160, 159 N. Y. Supp. 954.

[12] 86 Md. 400, 405, 406, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513. For further discussions of the principles underlying these bank cases, see Gray v. Johnston, L. R. 3 H. L. 1; United States Fidelity & Guaranty Trust Co. v. Union Bank & Trust Co., 228 Fed. 448, 143 C. C. A. 30; Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408; Allen v. Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518; Bischoff v. Yorkville Bank, 218 N. Y. 106, 112 N. E. 759, L. R. A. 1916F, 1059; United States Fidelity & Guaranty Co. v. Home Bank for Savings, 77 W. Va. 665, 88 S. E. 109.

though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a jus tertii against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds or if it participates in the profits or fruits of the fraud, then it will undoubtedly be liable."

Negligence by Bank

Occasionally gross negligence by the bank or palpable aid in the breach will make liability certain. Thus, where the trustee has an individual and trust account in the same bank, and the bank charges individual checks against the trust account, it is openly aiding a breach.[13] And where the cashier of the bank and the trustee are one and the same person, and the directors, after breaches of trust with notice of which they were charged, failed to exercise any supervision over the affairs of the bank, they may be held liable to the beneficiaries of the trust on the ground of negligence.[14]

The doctrine of early English equity[15] that a purchaser of trust property from a trustee was bound to see to the application of the purchase money, that is, was bound to pay direct to the cestuis que trust or make sure that they received the money, has been abolished by statute in England,[16] and has either never been accepted or has been abandoned in America.[17] An occasional trace of the old

[13] United States Fidelity & Guaranty Co. v. United States Nat. Bank, 80 Or. 361, 157 Pac. 155, L. R. A. 1916E, 610. And so in Tesene v. Iowa State Bank (Iowa) 173 N. W. 918, a bank which had knowledge of the lack of authority by a mother to receive money for her children, but which paid moneys, standing in her name as guardian for the children, to her personally, was held to have aided in a breach.'

[14] Lowndes v. City Nat. Bank of South Norwalk, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408.

[15] Lewin on Trusts (12th Ed.) 536.

[16] 56 & 57 Vict., c. 53, § 20.

[17] Dawson v. Ramser, 58 Ala. 573; Jacks v. State, 44 Ark. 61; Colesbury v. Dart, 61 Ga. 620; Davis v. Freeman, 148 Ga. 117, 95 S. E. 980; Ely v. Pike, 115 Ill. App. 284; Bevis v. Heflin, 63 Ind. 129; Pike v. Baldwin, 68 Iowa, 263, 26 N. W. 441; Henriott v. Cood, 153 Ky. 418, 155 S. W. 761; Burroughs v. Gaither, 66 Md. 171, 7 Atl. 243; Cady v. Lincoln, 100 Miss. 765, 57 South. 213; Gate City Building & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 27 L. R. A. 401, 47 Am. St. Rep. 633; Conover v. Stothoff, 38 N. J. Eq. 55; Doscher v. Wyckoff, 132 App. Div. 139, 116 N. Y. Supp. 389; N. Y. Real Property Law (Consol. Laws, c. 50) § 108; Kadis v. Weil, 164 N. C. 84, 80 S. E. 229; Stall v. City of Cincinnati, 16 Ohio St. 169; In re Streater's Estate, 250 Pa. 328, 95 Atl. 459; Petition of Van Horne, 18 R. I. 389, 28 Atl. 341; Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716; Spencer v. Lyman, 27 S. D. 471, 131 N. W. 802; Weakley v. Barrow, 137 Tenn. 224, 192 S. W. 927; Whatley v. Oglesby (Tex. Civ. App.) 44 S. W. 44; Redford v. Clarke, 100 Va. 115, 40 S. E. 630; Woodwine v. Woodrum, 19 W. Va. 67.

rule may be found in early cases,[18] and some courts have declared that it should be applied unless the trust is a general and unlimited trust.[19] The duty to see to the application of the purchase money may be placed upon the purchaser by the trust instrument in at least one state.[20] It has been held that if the purchaser or other debtor pays money to the trustee, knowing that the latter is on the verge of insolvency and will surely misappropriate the money, the purchaser will remain liable to the cestui after payment to the trustee.[21] If the purchaser knows that the sale constitutes a breach of trust, naturally he is not an innocent purchaser, and the trust property will be subject to the trust in his hands.[22]

[18] Indiana I. & I. R. Co. v. Swannell, 54 Ill. App. 260.

[19] Duffy v. Calvert, 6 Gill (Md.) 487; St. Mary's Church of Burlington v. Stockton, 8 N. J. Eq. 520.

[20] Curd v. Field, 103 Ky. 293, 45 S. W. 92; Walter v. Brugger, 78 S. W. 419, 25 Ky. Law Rep. 1597; Ky. St. § 4846.

[21] Darnaby v. Watts (Ky.) 28 S. W. 338.

[22] Grider v. Driver, 46 Ark. 109; Leake v. Watson, 58 Conn. 332, 20 Atl. 343, 8 L. R. A. 666, 18 Am. St. Rep. 270; Kenworthy v. Levi, 214 Pa. 235, 63 Atl. 690; Cardwell v. Cheatham, 2 Head (Tenn.) 14.

CHAPTER XIV

THE REMEDIES OF THE CESTUI QUE TRUST—HOW ENFORCED OR BARRED

ACTION BY TRUSTEE OR BY CESTUI QUE TRUST?

115. The remedy of cestui que trust against third persons is ordinarily enforced by an action by the trustee; but a cestui que trust, entitled to possession or in possession, may maintain actions based on possession or the right to it. The cestui que trust of a dry trust where the trust purpose has been accomplished may maintain ejectment, and the cestui que trust may sue where the trustee fails or refuses to act, has an adverse interest, or for other reason a demand on the trustee is futile or impossible.

Under the headings of Duties of the Trustee and Rights of the Cestui Que Trust consideration has been given to the rights of the beneficiary of the trust, to their definition and description. Somewhat distinct is the method of enforcing such rights. It remains to treat the mechanism by which courts give the cestui que trust the benefit of his rights. What are the remedies available to him?

A preliminary question is whether the cestui may proceed directly, that is, in his own name as a party plaintiff, to enforce his rights, or whether he must act indirectly, that is, through his trustee as an intermediary. It is apparent that if the right sought to be enforced is against the trustee himself, is a right to have the trust enforced, or to recover damages for a wrong inflicted on the beneficiary, or to prevent threatened wrong by the trustee to the

beneficiary, the question of direct or indirect action for relief cannot arise. The cestui que trust must proceed in his own name as a party plaintiff.

But if the right of cestui que trust is against a third person, the cestui might be required to depend on action by the trustee, or he might be allowed to act directly against the third person. The ordinary trust is founded on legal title, right to possession, and the duty of administration in the trustee. Hence the general rule is that causes of action in favor of the trust and against third persons are enforced by actions by the trustee.[1] Thus, an action to recover the trust property or for injury to it,[2] to restrain the wrongful taxation of the trust res,[3] to recover on a bond payable to the trustee,[4] to recover for use and occupation of the trust property,[5] in ejectment,[6] to recover on a covenant,[7] or to recover hire for the trust property,[8] should be brought by the trustee, in the absence of special circumstances.

The cestui que trust may not sue a third person for injury to or recovery of the trust property, in the absence of one or more of the special facts hereinafter mentioned.[9] Thus, the cestui has been denied relief against a third person in actions of trover,[10] ejectment,[11] for the recovery of damages to the trust property,[12] and to recover the trust fund.[13]

But an action by the cestui que trust against a third person joined with the trustee, under an allegation of a breach of trust aided by the third person, is maintainable.[14] And where the action is to cancel an assignment of the cestui's interest fraudulently obtained by the defendant, it may naturally be brought by the cestui in his

[1] Morgan v. Kansas Pac. R. Co. (C. C.) 21 Blatchf. 134, 15 Fed. 55.

[2] Robinson v. Adams, 81 App. Div. 20, 80 N. Y. Supp. 1098, affirmed 179 N. Y. 558, 71 N. E. 1139.

[3] Western R. Co. v. Nolan, 48 N. Y. 513.

[4] Forrest v. O'Donnell, 42 Mich. 556, 4 N. W. 259.

[5] Grady v. Ibach, 94 Ala. 152, 10 South. 287.

[6] Simmons v. Richardson, 107 Ala. 697, 18 South. 245.

[7] Lovell v. Nelson, 6 J. J. Marsh. (Ky.) 247.

[8] Denton's Guardians v. Denton's Ex'rs, 17 Md. 403.

[9] Weetjen v. Vibbard, 5 Hun (N. Y.) 265; Thompson v. Remsen, 27 Misc. Rep. 279, 58 N. Y. Supp. 424; Woolf v. Barnes, 46 Misc. Rep. 169, 93 N. Y. Supp. 219; Dameron v. Gold, 17 N. C. 17.

[10] Myers v. Hale, 17 Mo. App. 204; Poage v. Bell, 8 Leigh (Va.) 604.

[11] Obert v. Bordine, 20 N. J. Law, 394; Bruce v. Faucett, 49 N. C. 391.

[12] Lindheim v. Manhattan Ry. Co., 68 Hun, 122, 22 N. Y. Supp. 685; Pennsylvania R. Co. v. Duncan, 111 Pa. 352, 5 Atl. 742.

[13] Morrow v. Morrow, 113 Mo. App. 444, 87 S. W. 590.

[14] Neal v. Bleckley, 51 S. C. 506, 29 S. E. 249.

own name.[15] A cestui que trust, who has furnished the consideration for a promise running to the trustee, but for the benefit of the cestui, has been allowed to maintain an action on the promise.[16] And where the "real party in interest" statutes are in effect it has been held that the cestui might sue on a contract made by the trustee without joining the trustee.[17]

When Cestui may Sue

If the purposes of the trust are accomplished, and the trust is therefore a dry trust, the cestui que trust may maintain ejectment.[18] And likewise the beneficiary may bring ejectment, if he is entitled to the possession of the trust property.[19] And if the cestui que trust is in possession he may recover at law for an injury to the possession,[20] or enjoin a disturbance of the possession by a third party.[21]

If the trustee refuses to bring the action, after demand,[22] or fails to act,[23] or the trusteeship is vacant,[24] or the trustee has been absent for many years,[25] or the trustee has an adverse interest,[26] the cestui may bring the action against the third person. To wait until a new trustee could be appointed, or until the present trustee saw fit to act, or his disabilities were removed, would endanger the

[15] Lovato v. Catron, 20 N. M. 168, 148 Pac. 490, L. R. A. 1915E, 451.

[16] Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369.

[17] Potter v. Potter, 8 N. Y. Civ. Proc. R. 150.

[18] Doggett v. Hart, 5 Fla. 215, 58 Am. Dec. 464; Cable v. Cable, 146 Pa. 451, 23 Atl. 223; Hopkins v. Stephens, 2 Rand. (Va.) 422; Hopkins v. Ward, 6 Munf. (Va.) 38.

[19] Glover v. Stamps, 73 Ga. 209, 54 Am. Rep. 870; School Directors v. Dunkleberger, 6 Pa. 29; Presbyterian Congregation v. Johnston, 1 Watts & S. (Pa.) 9; Cape v. Plymouth Congregational Church, 117 Wis. 150, 93 N. W. 449. In McCoy v. Anderson, 137 Ark. 45, 207 S. W. 213, the cestui que trust had been in possession for many years, the trustee was dead, and the beneficiary was allowed to bring ejectment.

[20] Yates v. Big Sandy R. Co. (Ky.) 89 S. W. 108; Stearns v. Palmer, 10 Metc. (Mass.) 32.

[21] Reed v. Harris, 30 N. Y. Super. Ct. 151.

[22] Bowdoin College v. Merritt (C. C.) 54 Fed. 55; Reinach v. Atlantic & G. W. R. Co. (C. C.) 58 Fed. 33; Blackburn v. Fitzgerald, 130 Ala. 584, 30 South. 568 (semble); Eagan v. Mahoney, 24 Colo. App. 285, 174 Pac. 1119; Canada v. Daniel, 175 Mo. App. 55, 157 S. W. 1032; De Kay v. Hackensack Water Co., 38 N. J. Eq. 158; O'Beirne v. Allegheny & K. R. Co., 151 N. Y. 372, 45 N. E. 873; Anderson v. Daley, 38 App. Div. 505, 56 N. Y. Supp. 511, appeal dismissed 159 N. Y. 146, 53 N. E. 753; Phœbe v. Black, 76 N. C. 379.

[23] Wheeler v. Brown, 26 Ill. 369.

[24] Zimmerman v. Makepeace, 152 Ind. 199, 52 N. E. 992; Judd v. Dike, 30 Minn. 380, 15 N. W. 672.

[25] Hemmerich v. Union Dime Sav. Inst., 144 App. Div. 413, 129 N. Y. Supp. 267.

[26] Webb v. Vermont Cent. R. Co. (C. C.) 9 Fed. 793; Hale v. Nashua & L. R. R., 60 N. H. 333.

cause of action. The necessities of the case entitle the cestui que trust to proceed directly.

The principle is illustrated by a New York case, in which a bondholder cestui que trust was allowed to maintain a bill to foreclose a mortgage, because of the absence of the trustee in a foreign country. There was the additional allegation that the trustee was insane. The court, through Finch, J., said:[27] "It is conceded that the beneficiary may sue where the trustee refuses, but that is because there is no other remedy, and the right of the bondholder, otherwise, will go unredressed. The doctrine does not rest rigidly upon a technical ground, but upon a substantial necessity. * * * What occurred in the present case was tantamount to and an equivalent of a refusal by the trustee. He had gone beyond the jurisdiction; the whole apprehended mischief would be consummated before he could be reached; and if reached there was sufficient reason to believe that he was incompetent. But the Special Term say that in such event a new trustee should have been appointed. That simply reproduces the difficulty in another form, for a court would hardly remove a trustee without notice to him and giving him an opportunity to be heard. And why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dictates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs set the court in motion. The bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible and leaves the right of the bondholder without other reasonable means of redress should justify his appearance as plaintiff in a court of equity for the purpose of foreclosure."

The trustee and cestui que trust may unite in an action to recover the trust fund, although the addition of the cestui as a party plaintiff is ordinarily unnecessary.[28]

[27] Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189, 192, 193, 36 N. E. 1055, 40 Am. St. Rep. 587.

[28] Jennings' Ex'rs v. Davis, 5 Dana (Ky.) 127; Marble v. Whaley, 33 Miss. 157.

IN WHAT COURT?

116. Ordinarily the remedy of the cestui que trust for the enforcement of his rights against trustee or a third person is by suit in equity, but frequently the beneficiary is allowed to proceed at law, as, for example, where a definite sum is fixed as due from the trustee to the cestui que trust by virtue of a promise from the trustee, or by the terms of the trust, or by an account stated, or an order of court.

By the weight of authority the existence of an adequate remedy at law does not bar the cestui que trust from proceeding in equity. The jurisdiction of equity to enforce the rights of cestui que trust is based on its original jurisdiction over trusts, and not upon proof of the inadequacy of a remedy at law.

Are the remedies of the cestui que trust against the trustee and third persons enforceable by suits in equity, or by actions at law, or may resort be had to either forum at the option of the plaintiff?

Since the right of a cestui que trust is equitable in its nature, it may naturally be assumed that courts of chancery, or the equity side of courts having double jurisdiction, will grant a remedy to the beneficiary. Ordinarily relief should be sought by the cestui in equity.[29] Thus the recovery of the trust property from the trustee[30] or a third person[31] should be demanded in equity. And bills to establish a resulting trust,[32] to protect the trust estate,[33] or for an account and a decree against the sureties on the trustee's bond[34] are properly brought in equity.

[29] Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; Hopkins v. Granger, 52 Ill. 504; Hobart v. Andrews, 21 Pick. (Mass.) 526; Wright v. Dame, 22 Pick. (Mass.) 55; Malone v. Malone, 151 Mich. 680, 115 N. W. 716; Ewing v. Parrish, 148 Mo. App. 492, 128 S. W. 538; Husted v. Thomson, 158 N. Y. 328, 53 N. E. 20; McCoy v. McCoy, 30 Okl. 379, 121 Pac. 176, Ann. Cas. 1913C, 146; Washington Nat. Building & Loan Ass'n v. Heironimus, 62 W. Va. 6, 57 S. E. 256.

[30] McCampbell v. Brown (C. C.) 48 Fed. 795; Bullock v. Angleman, 82 N. J. Eq. 23, 87 Atl. 627; Reade v. Continental Trust Co., 27 Misc. Rep. 435, 58 N. Y. Supp. 321; Clarke v. Deveaux, 1 S. C. 172.

[31] Smith v. American Nat. Bank, 89 Fed. 832, 32 C. C. A. 368; Lee v. Simpson (C. C.) 37 Fed. 12, 2 L. R. A. 659; Lehnard v. Specht, 180 Ill. 208, 54 N. E. 315; Buck v. Lockwood, 193 Mich. 242, 159 N. W. 509; Calhoun v. Burnett, 40 Miss. 599; Luscombe v. Grigsby, 11 S. D. 408, 78 N. W. 357.

[32] Fausler v. Jones, 7 Ind. 277; Johnston v. Sherehouse, 61 Fla. 647, 54 South. 892.

[33] Dorsey's Lessee v. Garey, 30 Md. 489.

[34] Thruston v. Blackiston, 36 Md. 501.

In many cases the remedy of a cestui que trust is in equity only. He has no option but to proceed by bill in chancery. The law provides him no means of redress. This is true where the trust is open and the suit is for the statement of an account and the recovery of an unliquidated sum.[35] Equity has exclusive jurisdiction to aid the cestui likewise where the basis of the suit is the negligence of the trustee in managing the trust property,[36] or the wrongful conveyance of the trust property to another,[37] or a breach of trust in neglecting to collect and apply the trust assets according to the trust terms,[38] or damage to the trust property by the trustee which would be waste if committed by a tenant,[39] or where the possession of trust realty [40] or the value of trust property wrongfully sold [41] is sought by the cestui que trust, or where the object is an account of rents and profits of land held in trust,[42] or where the foundation is the conversion by the trustee of the trust property and its proceeds.[43]

Remedy at Law

But in many cases remedies are open to the cestui que trust in courts of law for the enforcement of rights against the trustee or third parties. Thus, where a third person has trust property under circumstances which entitle the cestui to have him declared a constructive trustee (as, for example, where the property has been obtained by fraud), the cestui may also maintain money had and received against the third party in a court of law.[44] The liability of the surety on the trustee's bond is almost always solely at law.[45] The cestui may proceed at law where the title to realty is involved and the only question is whether trust money has gone into the realty.[46] It has been held that, where the trustee has misapplied the trust fund and it cannot be followed, damages at law for the breach of trust may be recovered.[47] And a similar holding is found in cases

[35] Goldschmidt v. Maier, 140 Cal. xvii, 73 Pac. 984; Robison v. Carey, 8 Ga. 527; Davis v. Coburn, 128 Mass. 377; Upham v. Draper, 157 Mass. 292, 32 N. E. 2; Kendall v. Kendall, 60 N. H. 527; Congdon v. Cahoon, 48 Vt. 49; Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058.

[36] Hukill v. Page, 6 Biss. 183, Fed. Cas. No. 6854.

[37] Norton v. Ray, 139 Mass. 230, 29 N. E. 662.

[38] Bishop v. Houghton, 1 E. D. Smith (N. Y.) 566.

[39] Kincaird v. Scott, 12 Johns. (N. Y.) 368.

[40] Matthews v. McPherson, 65 N. C. 189.

[41] Jasper v. Hazen, 1 N. D. 75, 44 N. W. 1018.

[42] Cearnes v. Irving, 31 Vt. 604.

[43] Redwood v. Riddick, 4 Munf. (Va.) 222.

[44] Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527; Hanford v. Duchastel, 87 N. J. Law, 205, 93 Atl. 586.

[45] Hite v. Hite's Ex'r, 133 Ky. 554, 118 S. W. 357; Clagett v. Worthington, 3 Gill (Md.) 83.

[46] Nanheim v. Smith, 253 Pa. 380, 98 Atl. 602.

[47] Snyder v. Parmalee, 80 Vt. 496, 68 Atl. 649.

where the trustee has broken his trust by a wrongful sale of the trust res,[48] and where the purpose of the trust was accomplished and the trustee had no function to perform.[49]

Perhaps the most common case in which the beneficiary may proceed at law against the trustee is that where the trustee has promised to pay the cestui que trust a definite sum, or the trust has been closed, the accounts settled, a definite sum fixed as that due, and the trustee has no further duty except to pay it to the cestui que trust. In these cases very generally courts of law have entertained jurisdiction in the action for money had and received or its equivalent and have not obliged the cestui to proceed in equity.[50] "It is well settled that a cestui que trust cannot bring an action at law against a trustee to recover for money had and received while the trust is still open; but when the trust has been closed and settled, the amount due the cestui que trust established and made certain, and nothing remains to be done but to pay over money, such an action may be maintained." [51] The same doctrine has been framed somewhat differently by a Delaware court, as follows: "Where the only remaining function and duty of a trustee is to pay over to his cestui que trust a sum of money, made certain by the terms of the trust, by an account passed by the trustee, by agreement between them, or by an order of court, the cestui que trust has an action at law against the trustee to recover such amount, and it is attachable in the hands of the trustee by a creditor of the cestui que trust by attachment fi. fa., or in foreign attachment, as the case may be." [52] In Massachusetts and Pennsylvania, before

[48] Holderman v. Hood, 70 Kan. 267, 78 Pac. 838; Brys v. Pratt, 55 Wash. 122, 104 Pac. 169. In Davis v. Dickerson, 137 Ark. 14, 207 S. W. 436, the cestui que trust was held to have the alternatives of an action at law for money had and received, or a bill in equity for damages for breach of trust.

[49] Thomas v. Harkness, 13 Bush. (Ky.) 23.

[50] Vincent v. Rogers, 30 Ala. 471; Sterling v. Tantum, 5 Boyce (Del.) 409, 94 Atl. 176; Guthrie v. Hyatt, 1 Har. (Del.) 446; Daugherty v. Daugherty, 116 Iowa, 245, 90 N. W. 65; O'Neil v. Epting, 82 Kan. 245, 108 Pac. 107; Crooker v. Rogers, 58 Me. 339; Nelson v. Howard, 5 Md. 327; Rogers v. Daniell, 8 Allen (Mass.) 343; Brown v. Cowell, 116 Mass. 461; Johnson v. Johnson, 120 Mass. 465; Arms v. Ashley, 4 Pick. (Mass.) 71; Chase v. Perley, 148 Mass. 289, 19 N. E. 398; Henchey v. Henchey, 167 Mass. 77, 44 N. E. 1075; Collar v. Collar, 75 Mich. 414, 42 N. W. 847, 4 L. R. A. 491; Frank v. Morley's Estate, 106 Mich. 635, 64 N. W. 577; Pitcher v. Rogers' Estate, 199 Mich. 114, 165 N. W. 813; Batchis v. Leask, 149 App. Div. 713, 134 N. Y. Supp. 350; Van Camp v. Searle, 147 N. Y. 150, 41 N. E. 427; Spencer v. Clarke, 25 R. I. 163, 55 Atl. 329; Parker v. Parker, 69 Vt. 352, 37 Atl. 1112.

[51] Johnson v. Johnson, 120 Mass. 465, 466.

[52] Sterling v. Tantum, 5 Boyce (Del.) 409, 94 Atl. 176, 183.

the establishment there of courts of equity, all remedies of cestui que trust had to be worked out through courts of law.[53]

Inadequacy of Remedy at Law

It has been sometimes held that equity would not take jurisdiction to enforce the rights of a cestui que trust where a complete and adequate remedy at law existed.[54] But it is believed that the prevailing and better view is that the existence of a remedy at law has no effect on the equitable remedy, that originally all the remedies of the cestui que trust were in chancery, and that he continues to be entitled to enforce all his rights in that court, even though the courts of law may have conceded to him certain remedies from time to time.[55] In other words equity has original and complete jurisdiction over trusts and will enforce the rights of a cestui que trust because they arise out of a trust. No showing of inadequacy of the remedy at law is necessary to give a cestui que trust standing in a court of equity. The statement of Lord Mansfield is applicable, although it was made with reference to another question. He said: "This court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted (the attempt for the most part is not very successful) to administer such relief as originally was to be had here and here only." [56] To the same purpose is a statement of Leaming, V. C., in a recent New Jersey case: "It is undoubtedly true, as suggested by defendant, that the danger of irreparable injury may be said to constitute the foundation of a great part of equitable jurisdiction, and especially that part of equitable jurisdiction calling for relief by way of injunction, either pendente lite or perpetual; but it is not the sole ground of equitable jurisdiction by any means. Where, as here, a trust is involved, and the suit is for the purpose of preserving for the benefit of the cestui que trust the existence of property rights

[53] Newhall v. Wheeler, 7 Mass. 189; Martzell v. Stauffer, 3 Pen. & W. 398.

[54] Fidelity Trust Co. v. Alexander, 243 Fed. 162, 156 C. C. A. 28; Langdon v. Blackburn, 109 Cal. 19, 41 Pac. 814; Coe v. Turner, 5 Conn. 86; White v. White, 1 Md. Ch. 53; Van Sciver v. Churchill, 215 Pa. 53, 64 Atl. 322; Downs v. Downs' Ex'r, 75 Vt. 383, 56 Atl. 9; Franks v. Cravens, 6 W. Va. 185.

[55] Camody v. Webster, 197 Ala. 290, 72 South. 622; Thompson v. Hartline, 105 Ala. 263, 16 South. 711; Humes v. Scott, 130 Ala. 281, 30 South. 788; Hubbard v. United States Mortg. Co., 14 Ill. App. 40; Dorenkamp v. Dorenkamp, 109 Ill. App. 536; First Congregational Soc. in Raynham v. Trustees of Fund, etc., in Raynham, 23 Pick. (Mass.) 148; Flye v. Hall, 224 Mass. 528, 113 N. E. 366; Farrell v. Farrell, 91 Mo. App. 665; Gutch v. Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Farrelly v. Skelly, 130 App. Div. 803, 115 N. Y. Supp. 522; Goldrick v. Roxana Petroleum Co. (Okl.) 176 Pac. 932; Nease v. Capehart, 8 W. Va. 95; Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35.

[56] Eyre v. Everett, 2 Russell (Eng.) 381, 382.

which have arisen through and by reason of the trust or its breach, it is no answer to a bill seeking the enforcement or preservation of those property rights, with a view of preserving the corpus in which the rights exist, that adequate money damages might be recovered against the defendant for a breach of his trust. Trusts are enforced, and trust rights are established and preserved, without reference to the possibility of a money judgment in an action for damages affording a measure of compensation for threatened injuries." [57]

A probate court may of course construe a will purporting to create a trust, for the purpose of determining whether such trust was validly created,[58] and occasionally probate courts have concurrent jurisdiction with courts of equity over trusts created by will; [59] but, aside from statute, probate or surrogate's courts have no jurisdiction to declare or enforce trusts.[60]

CONDITIONS PRECEDENT

117. The right of cestui que trust to enforce the trust is subject to the conditions precedent that he come into court with clean hands and that he do equity by reimbursing the trustee or third person defendant for all expenditures which equitably ought to be paid by the beneficiary, but which have been paid by the defendant.

When, as is usually the case, the cestui que trust seeks his remedy in equity, he must, of course, comply with the fundamental maxims of equity that a complainant enter the court with clean hands [61] and himself do equity. Thus, if it is sought to make defendant a resulting trustee, and the plaintiff will by the establishment of such trust obtain the benefit of services or advances of the defendant, the plaintiff must reimburse the defendant for the services or advances as a condition to obtaining the relief asked.[62] For example, it has been held that, where the defendant had worked eighteen years without wages in a business belonging to the plaintiff, and

[57] Hussong Dyeing Mach. Co. v. Morris, 89 Atl. 249, 250.

[58] In re Hinckley's Estate, 58 Cal. 457; Carpenter v. Cook, 132 Cal. 621, 64 Pac. 997, 84 Am. St. Rep. 118.

[59] Green v. Gaskill, 175 Mass. 265, 56 N. E. 560.

[60] In re Dunn's Estate, Myr. Prob. (Cal.) 122; Haverstick v. Trudel, 51 Cal. 431; Butler v. Lawson, 72 Mo. 227; Hayes v. Hayes, 48 N. H. 219; Koch v. Feick, 81 N. J. Eq. 120, 86 Atl. 67.

[61] Tipton v. Powell, 2 Cold. (Tenn.) 19.

[62] Broatch v. Boysen, 236 Fed. 516, 149 C. C. A. 568; Robles v. Clarke, 25 Cal. 317; Second Unitarian Society in Portland v. Woodbury, 14 Me. 281; Beck v. Uhrich, 16 Pa. 499.

had invested part of the proceeds of such business in realty and taken the title in the name of the defendant, the plaintiff would be required to reimburse the defendant for such services as a condition precedent to the declaration of an implied trust in the realty.[63]

Where the suit is to recover the trust res or its substitute from a third person, and such third person has performed services or made expenditures for which the cestui should equitably pay, reimbursement will be a prerequisite to relief.[64] For example, an action to recover the trust res from a taker who has paid no consideration will succeed only upon the payment to the holder of the property of advances which he has made to cancel incumbrances on the property.[65] Frequently in bills to charge the defendants as constructive trustees because of actual or presumed fraud this principle has been applied.[66] Thus, an attorney charged as a constructive trustee because he acquired an adverse interest while acting for the plaintiff is entitled to be reimbursed for money spent to acquire titles adverse to those of the cestui que trust.[67]

On principle it would seem that a purchaser of the trust property with notice of the trust ought not to be allowed to charge the cestui que trust with the payment of the cost of improvements as a condition to the recovery of the property;[68] but the opposite view has sometimes found judicial approval.[69]

The expenses incurred by the trustee in carrying on the trust business or protecting the trust property should clearly be paid by the beneficiary as a condition of relief against the trustee.[70] But claims by the trustee against the cestui que trust arising out of other transactions unconnected with the trust cannot be required to be paid as a condition precedent to the enforcement of the trust.[71]

If the cestui que trust has already received the equivalent of the

[63] Bumpus v. Bumpus, 59 Mich. 95, 26 N. W. 410.

[64] Wormley v. Wormley, 8 Wheat. 421, 5 L. Ed. 651; Bates v. Kelly, 80 Ala. 142; Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670.

[65] Feingold v. Roeschlein, 276 Ill. 79, 114 N. E. 506.

[66] McKibben v. Diltz's Ex'r, 138 Ky. 684, 128 S. W. 1082, 137 Am. St. Rep. 408; Coburn v. Page, 105 Me. 458, 74 Atl. 1026, 131 Am. St. Rep. 575; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 223; McKennan v. Pry, 6 Watts (Pa.) 137; Haight v. Pearson, 11 Utah, 51, 39 Pac. 479; Soderberg v. McRae, 70 Wash. 235, 126 Pac. 538.

[67] Home Inv. Co. v. Strange (Tex. Sup.) 195 S. W. 849.

[68] Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670.

[69] Rines v. Bachelder, 62 Me. 95.

[70] Pujol v. McKinlay, 42 Cal. 559; Wagenseller v. Prettyman, 7 Ill. App. 192.

[71] Waller v. Jones, 107 Ala. 331, 18 South. 277; Fitzgerald v. Hollan, 44 Kan. 499, 24 Pac. 957.

trust property, and seeks to obtain the trust res, he must return the equivalent.[72]

Neither a demand [73] nor a previous action at law [74] are ordinarily conditions precedent to the maintenance of a suit in equity to enforce the trust.

VENUE

118. The venue of a suit by cestui que trust to enforce a trust against the trustee or a third person is generally determined by the jurisdiction in which the defendant can be found, except that, if the trustee has been appointed by a court, such court will have exclusive jurisdiction to compel the performance of the trust by him.

The cestui que trust may ordinarily seek his remedy in any jurisdiction where the trustee or other defendant can be found, regardless of the nature and situs of the trust res. Equity acts in personam and, if it has jurisdiction of the person of the defendant, may order him to account for or dispose of the trust property as the principles of equity dictate, even though the trust property may be situate in a foreign jurisdiction.[75] "When a court of equity acquires full jurisdiction of the trustee in whom the legal title to trust property is vested, and other necessary parties are before the court, either in obedience to process or by their voluntary appearance, it can compel the trustee to dispose of the legal title and distribute the proceeds thereof as it may direct, although a part of the trust property may be located outside of the territorial limits of its jurisdiction." [76]

But by virtue of statute, or sometimes where the question is as between different counties in the same state, it has occasionally been held that the venue of an action to enforce a trust of realty is determined by the situs of the realty.[77]

[72] Marx v. Clisby, 130 Ala. 502, 30 South. 517; Graves v. Pinchback, 47 Ark. 470, 1 S. W. 682.

[73] Garard v. Garard, 135 Ind. 15, 34 N. E. 442, 809.

[74] Neresheimer v. Smyth, 167 N. Y. 202, 60 N. E. 449.

[75] Massie v. Watts, 6 Cranch, 148, 3 L. Ed. 181; Memphis Sav. Bank v. Houchens, 115 Fed. 96, 52 C. C. A. 176; Le Breton v. Superior Court, 66 Cal. 27, 4 Pac. 777; Stone v. Fowlkes, 29 App. D. C. 379; Paget v. Stevens, 143 N. Y. 172, 38 N. E. 273; Clark v. Clark, 180 Pa. 186, 36 Atl. 747; Whittaker v. Whittaker, 10 Lea (Tenn.) 93; State v. Superior Court, 7 Wash. 306, 34 Pac. 1103.

[76] Memphis Sav. Bank v. Houchens, 115 Fed. 96, 108, 52 C. C. A. 176.

[77] Booth v. Bradford, 114 Iowa, 562, 87 N. W. 685; Morris v. Wyse, 154 Mich. 253, 117 N. W. 639, 129 Am. St. Rep. 472; Servis v. Nelson, 14 N. J. Eq. 94; Goodwin v. Colwell, 213 Pa. 614, 63 Atl. 363.

If the trustee is appointed by a court, rather than by act of a settlor, the court of appointment has exclusive jurisdiction over suits by the cestuis que trust to enforce the trust against the trustee.[78] "It is undoubtedly a well-established principle of law that a trustee appointed by a foreign court is amenable only to that court, and the fact that his residence is in another jurisdiction will not confer authority there to control the administration of his trust, or to require accountability for the trust property. The rationale of this doctrine is that, the trust relations having been created by judicial decree in another country, the trustee is accountable only to the court creating the trust. He becomes the instrumentality of the court for the administration of the property intrusted to his care and custody, which is to be considered as in custodia legis; and, if other jurisdictions were permitted to interfere with and to direct the execution of the trust, it would lead to great conflict of authority and inextricable confusion, which would hinder rather than aid in the rightful administration thereof. * * *"[79]

PARTIES

119. In an action or suit by cestui que trust to enforce his rights the necessary parties defendant are those whose presence is essential to enable the court to render a complete and binding judgment or decree with respect to the subject-matter of the action.

Proper parties are those possessing interests in the subject-matter of the action which can be conveniently, but need not necessarily be, settled by the action.

The object and nature of the action or suit determines in each individual case the necessary and proper parties.

In seeking the various remedies which are open to him, the cestui que trust must make parties to his suit or action all those persons whose presence before the court is indispensable to a complete adjudication of the controversy. These are the necessary parties. Just when trustees, co-cestuis, and various third persons are necessary parties to actions brought by a cestui que trust cannot be stated by general rule. Each case must stand on its own peculiarities. In suits against a third person to recover the trust res trustees have frequently been held necessary parties;[80] as they have in suits to

[78] Jenkins v. Lester, 131 Mass. 355; Chase v. Chase, 2 Allen (Mass.) 101; Schwartz v. Gerhardt, 44 Or. 425, 75 Pac. 698 (semble).

[79] Schwartz v. Gerhardt, 44 Or. 425, 427, 428, 75 Pac. 698.

[80] Butler v. Butler, 41 App. Div. 477, 58 N. Y. Supp. 1094; Cowdry v.

have the trust declared ended,[81] or actions for breach of trust,[82] or for an accounting,[83] or against third parties where the trustee has failed to bring the action,[84] or against a bank in which the trust fund is deposited.[85] Where the title to property owned by a sole trustee at his death is sought to be affected, naturally the personal representatives or heirs of the deceased trustee must be made parties.[86] And it is equally obvious that, when an attempt is made to fasten a trust on property in the hands of a third person, such third person is a necessary party.[87]

Where the rights of cestuis que trust inter sese are litigated, one beneficiary seeking a remedy must make his co-cestuis defendants,[88] but if there is no contention about the shares of the various co-cestuis and the sole question is one between one cestui que trust and the trustee or a third person, the remaining cestuis que trust are not necessary parties.[89] Where several separate trusts are established by the same will, it is obvious that the cestui of one trust need not make the cestuis of the other trusts parties to an action.[90] And occasionally one beneficiary is allowed to sue on behalf of all others.[91]

Former cestuis que trust quite apparently have no financial interest in the outcome of an action about the trust and are not nec-

Cheshire, 75 N. C. 285; Carter v. Jones, 40 N. C. 196, 49 Am. Dec. 425; McDaniel v. Baskervill, 13 Grat. (Va.) 228.

[81] Benton v. Benton, 84 Kan. 691, 115 Pac. 535.

[82] Hannahs v. Hammond (Sup.) 19 N. Y. Supp. 883.

[83] Hutchinson v. Ayres, 117 Ill. 558, 7 N. E. 476.

[84] Billings v. Aspen Co., 51 Fed. 338, 2 C. C. A. 252.

[85] Gregory v. Merchants' Nat. Bank, 171 Mass. 67, 50 N. E. 520.

[86] Freeman v. Russell, 40 Ark. 56; Bates v. Hurd, 65 Me. 180; Newman v. Newman, 152 Mo. 398, 54 S. W. 19; Richardson v. Richardson, 83 Mich. 653, 47 N. W. 500; Moore v. Moore, 42 App. Div. 92, 58 N. Y. Supp. 905.

[87] Babb v. Lindley, 23 Kan. 478; Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727; Van Hook v. Frey, 13 App. D. C. 543.

[88] Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Carter v. Uhlein (N. J. Ch.) 36 Atl. 956; Schuler v. Southern Iron & Steel Co., 77 N. J. Eq. 60, 75 Atl. 552; General Mutual Ins. Co. v. Benson, 12 N. Y. Super. Ct. 168; Parmenter v. Homans, 125 App. Div. 399, 109 N. Y. Supp. 800; Campbell v. Johnston, 1 Sandf. Ch. (N. Y.) 148; Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 573; Mason v. Mason's Ex'r, 4 Sandf. Ch. (N. Y.) 623; In re Aldrich's Will, 81 Vt. 308, 70 Atl. 566; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371.

[89] Bowdoin College v. Merritt (C. C.) 54 Fed. 55; Rogers v. Penobscot Min. Co., 154 Fed. 606, 83 C. C. A. 380; Pickering v. De Rochemont, 45 N. H. 67; Hitchcock v. Linsly, 17 Hun (N. Y.) 556; Hubbard v. Burrell, 41 Wis. 365.

[90] Steinway v. Steinway, 78 App. Div. 207, 79 N. Y. Supp. 541.

[91] Mann v. Butler, 2 Barb. Ch. (N. Y.) 362.

essary or proper parties.[92] The heirs of a deceased cestui que trust are necessary, if the interest was an inheritable interest;[93] but mere relationship to the beneficiary does not make one a necessary party.[94] Persons who may, upon certain contingencies, become cestuis que trust, are not necessary parties.[95]

Settlor as a Party

Neither the settlor[96] nor his heirs,[97] since they have no financial interest, are necessary parties; nor is an executor who has delivered the trust res to a trustee,[98] nor the administrator of a deceased trustee where the res is realty,[99] nor the representatives of a deceased trustee where other trustees survive,[1] nor a trustee who has removed from the state and so renounced the trust,[2] nor a defaulting trustee in an action by a cestui against a third party,[3] nor a trustee who has been relieved of his duties,[4] nor a street railway company, where the trust res is the franchise of such company.[5]

All who have or claim to have a financial interest in the subject-matter of the action which may conveniently be, but need not necessarily be, adjudicated are proper parties.[6] Thus, even though the action affect the interest of one cestui only, the others may properly be made parties,[7] or, if any be dead, the heirs or representatives of the deceased cestui que trust may be joined.[8]

One who will become the successor of a trustee is a proper party

[92] Andrews v. Hobson's Adm'r, 23 Ala. 219; Brissell v. Knapp (C. C.) 155 Fed. 809; Teeter v. Veitch (N. J. Ch.) 61 Atl. 14; Ward v. Funsten, 86 Va. 359, 10 S. E. 415.

[93] Kelly v. Karsner, 72 Ala. 106.

[94] Cody v. Cody, 98 Wis. 445, 74 N. W. 217.

[95] Green v. Grant, 143 Ill. 61, 32 N. E. 369, 18 L. R. A. 381; Darne v. Catlett, 6 Har. & J. (Md.) 475.

[96] Donegan v. Baker & Holmes Co., 73 Fla. 241, 74 South. 202. In Dorman v. Balestier (Sup.) 175 N. Y. Supp. 677, a settlor who reserved nothing was said to have a "contingent interest" and to be a necessary party.

[97] Whayne v. Davis, 66 S. W. 827, 23 Ky. Law Rep. 2174; Boyer v. Decker, 5 App. Div. 623, 40 N. Y. Supp. 469.

[98] McBride v. McIntyre, 91 Mich. 406, 51 N. W. 1113.

[99] McKee v. Downing, 224 Mo. 115, 124 S. W. 7.

[1] Steinway v. Steinway, 78 App. Div. 207, 79 N. Y. Supp. 541.

[2] Earle v. Earle, 48 N. Y. Super. Ct. 18.

[3] Mann v. Benedict, 47 App. Div. 173, 62 N. Y. Supp. 259.

[4] Hubbell v. Hubbell, 22 Ohio St. 208.

[5] Buckner v. Carter (Tex. Civ. App.) 137 S. W. 442.

[6] Broder v. Conklin, 77 Cal. 330, 19 Pac. 513; Elam v. Garrard, 25 Ga. 557; Day v. Devitt, 79 N. J. Eq. 342, 81 Atl. 368; Burns v. Niagara Co., 145 App. Div. 280, 130 N. Y. Supp. 54.

[7] Kelly v. Browning, 113 Ala. 420, 21 South. 928; Hayles v. Farmer, 58 Ga. 324; McGuire v. Devlin, 158 Mass. 63, 32 N. E. 1028; Sears v. Hardy, 120 Mass. 524; Hill v. True, 104 Wis. 294, 80 N. W. 462.

[8] Butler v. Lawson, 72 Mo. 227; Mullin v. Mullin, 119 App. Div. 521, 104 N. Y. Supp. 323.

in an action to recover the property from a defaulting trustee,[9] and in an action against the trustee, a third person holding some of the trust property under the trustee may properly be made a party,[10] as may a third person who aided in the breach.[11] A claimant adverse to the cestui is a proper party.[12] Where the trust res consists of shares of corporate stock, and the object is to compel the transfer of the stock by the trustee, the corporation may be made a party defendant.[13] Tenants at will of the trustee,[14] personal representatives of a deceased resulting trustee of land,[15] and other parties having no financial interest and against whom no relief is prayed, are not proper parties.[16]

PERSONAL LIABILITY OF THE TRUSTEE

120. If a definite sum is due the cestui que trust under the trust, or damages have resulted to him from a breach of the trust, he may recover a money judgment against the trustee, or his representatives if he is dead.

The trustees are jointly and severally liable where they unite in a breach of trust.

Where the cestui que trust is not able to obtain the trust property or its substitute by tracing such property into the assets of the trustee, he is not a preferred creditor and must share equally with the general creditors of the trustee.

A trustee is liable to the cestui que trust for wrongful acts of an agent employed by the trustee only when the trustee has been guilty of negligence in the selection or use of the agent.

In dealing with a cotrustee a trustee is required to use the care of a reasonably prudent man in the conduct of his own affairs. A trustee is liable for the wrongful acts of his cotrustee only when he negligently allows or assists the cotrustee to obtain or retain the control of the trust property, and such control gives opportunity for the default.

[9] Andrews v. Hurt's Adm'r, 14 Ky. Law Rep. 765.
[10] Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Weaver v. Van Akin, 77 Mich. 588, 43 N. W. 1081.
[11] Fort v. Amos, 108 Ga. 588, 34 S. E. 150.
[12] Beckwith v. Sheldon, 154 Cal. 393, 97 Pac. 867.
[13] Howison v. Baird, 145 Ala. 683, 40 South. 94.
[14] Reynolds v. Lynch, 64 Cal. 442, 1 Pac. 893.
[15] Shaffer v. Fetty, 30 W. Va. 248, 4 S. E. 278.
[16] Harton v. Little, 176 Ala. 267, 57 South. 851.

The cestui que trust may recover interest, simple or compound, when it is necessary to compensate him for the loss of the use of the trust property which has been occasioned by the default of the trustee.

Under many modern statutes the trustee is criminally liable for an appropriation of the trust property.

It is obvious that if the trust instrument requires the payment to the cestui que trust of a definite sum, and the trustee refuses to make the payment, the beneficiary may seek his remedy by the recovery of a money judgment against the trustee.[17] The right of cestui que trust to proceed in a court of law in this instance has already been mentioned.[18]

The personal liability of the trustee to respond in money damages for his acts in the administration of the trust which are wrongful and which cause damage to the cestui que trust is also elementary.[19] Thus, the making of unauthorized payments to other cestuis que trust,[20] the conversion of the trust property,[21] negligence in recording instruments affecting the trust property,[22] or in obtaining security,[23] or in collecting the trust property,[24] or in the re-

[17] McCollister v. Willey, 52 Ind. 382. As to the measure of the trustees' liability in various cases, see Strachan, Compensation for Breach of Trust, 34 Law Quart. Rev. 168.

[18] See ante, § 116.

[19] Miller v. Butler, 121 Ga. 758, 49 S. E. 754; Graham v. Graham, 85 Ill. App. 460; West v. Biscoe, 6 Har. & J. (Md.) 460; Moore v. Robertson, 62 Hun, 623, 17 N. Y. Supp. 554; Burris v. Brooks, 118 N. C. 789, 24 S. E. 521; Robertson v. Sublett, 6 Humph. (Tenn.) 313; Silliman v. Gano, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391.

[20] Kendall v. De Forest, 101 Fed. 167, 41 C. C. A. 259; Prince de Bearn v. Winans, 111 Md. 434, 74 Atl. 626. In re Tod, 86 Misc. Rep. 616, 148 N. Y. Supp. 618. But the trustee may recover the unauthorized payment from the one to whom it was made. Marks v. Semple, 111 Ala. 637, 20 South. 791.

[21] Milloglav v. Zacharias, 33 Cal. App. 561, 165 Pac. 977; Appeal of Fisk, 81 Conn. 433, 71 Atl. 559; White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132; United States Fidelity & Guaranty Co. v. Douglas' Trustee, 134 Ky. 374, 120 S. W. 328, 20 Ann. Cas. 993; Duckett v. National Bank of Baltimore, 88 Md. 8, 41 Atl. 161, 1062; Brown v. Cowell, 116 Mass. 461; Davis v. Hoffman, 167 Mo. 573, 67 S. W. 234; Madison Trust Co. v. Carnegie Trust Co., 215 N. Y. 475, 109 N. E. 580; Smith v. Frost, 70 N. Y. 65; Brown v. Lambert's Adm'r, 33 Grat. (Va.) 256.

[22] Appeal of Hatch (Pa.) 12 Atl. 593; Cooper v. Day, 1 Rich. Eq. (S. C.) 26; Cogbill v. Boyd, 77 Va. 450.

[23] Waterman v. Alden, 144 Ill. 90, 32 N. E. 972.

[24] Kennedy v. Winn, 80 Ala. 165; Cross v. Petree, 10 B. Mon. (Ky.) 413; Hunt v. Gontrum, 80 Md. 64, 30 Atl. 620; Bentley v. Shreve, 2 Md. Ch. 215; Tatem v. Speakman, 50 N. J. Eq. 484, 27 Atl. 636; In re Willett's Estate, 15 N. Y. St. Rep. 445.

tention of property until it is worthless,[25] wrongful sale of the trust res,[26] and negligence or misconduct in the making or retaining of investments,[27] may give rise to a right in favor of cestui que trust to have the trustee pay money damages. Where the trustee is financially responsible this affords a remedy which is usually complete and satisfactory.

The burden of proving misconduct by the trustee in these actions is on the cestui que trust. The trustee is aided by the presumption of the regularity of his proceedings.[28]

The remedy of a cestui que trust here treated, namely, that of recovery of money due under the trust or due for breach of the trust, may be asserted against the representatives of the trustee after his death, as well as against the trustee during his life.[29]

Joint and Several Liability

If several trustees unite in a breach of trust, they are jointly and severally liable, and the entire claim of the cestui may be satisfied from the property of one trustee.[30] In the words of a New Jersey court:[31] "A liability to make good a loss resulting from a breach

[25] Snyder's Adm'rs v. McComb's Ex'x (C. C.) 39 Fed. 292.

[26] Voorhees' Ex'x v. Melick, 25 N. J. Eq. 523; Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782; Cresap v. Brown, 82 W. Va. 467, 96 S. E. 66.

[27] De Jarnette v. De Jarnette, 41 Ala. 708; Johns v. Herbert, 2 App. D. C. 485; Hitchcock v. Cosper, 164 Ind 633, 73 N. E. 264; Robertson v. Robertson's Trustee, 130 Ky. 293, 113 S. W. 138, 132 Am. St. Rep. 368; Jordan v. Jordan's Trust Estate, 111 Me. 124, 88 Atl. 390; Tuttle v. Gilmore, 36 N. J. Eq. 617; Gray v. Fox, 1 N. J. Eq. 259, 22 Am. Dec. 508; Smith v. Smith, 4 Johns. Ch. (N. Y.) 281; In re Blauvelt's Estate (Sur.) 20 N. Y. Supp. 119; In re Stark's Estate (Sur.) 15 N. Y. Supp. 729; In re Hart's Estate, 208 Pa. 480, 53 Atl. 364; Metzger v. Lehigh Valley Trust & Safe Deposit Co., 220 Pa. 535, 69 Atl. 1037; Dunn v. Dunn, 1 S. C. 350; Wynne v. Warren, 2 Heisk. (Tenn.) 118; Carr's Adm'r v. Morris, 85 Va. 21, 6 S. E. 613; Key v. Hughes' Ex'rs, 32 W. Va. 184, 9 S. E. 77; Simmons v. Oliver, 74 Wis. 633, 43 N. W. 561.

[28] Mead v. Chesbrough Bldg. Co., 151 Fed. 998, 81 C. C. A. 184; Anderson v. Thero, 139 Iowa, 632, 118 N. W. 47; Kirby v. State, 51 Md. 383; Offenstein v. Gehner, 223 Mo. 318, 122 S. W. 715.

[29] Hazard v. Durant (C. C.) 19 Fed. 471; Pryor v. Davis, 109 Ala. 117, 19 South. 440; Hill v. State, 23 Ark. 604; Green v. Brooks, 25 Ark. 318; Benson v. Liggett, 78 Ind. 452; Frank v. Morley's Estate, 106 Mich. 635, 64 N. W. 577; In re Turpin's Estate, 7 Ohio N. P. 569; In re Gaffney's Estate, 146 Pa. 49, 23 Atl. 163; In re Spatz's Estate, 245 Pa. 334, 91 Atl. 492.

[30] Heath v. Erie Ry. Co., 8 Blatchf. 347, Fed. Cas. No. 6306; Hazard v. Durant (C. C.) 19 Fed. 471; Fellrath v. Peoria German School Ass'n, 66 Ill. App. 77; Furman v. Rapelje, 67 Ill. App. 31; Windmuller v. Spirits Distributing Co., 83 N. J. Eq. 6, 90 Atl. 249; Gilchrist v. Stevenson, 9 Barb. (N. Y.) 9; Sortore v. Scott, 6 Lans. (N. Y.) 271; Meldon v. Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172, affirmed 167 N. Y. 573, 60 N. E. 1116; Deaderick

[31] General Proprietors of Eastern Division of New Jersey v. Force's Ex'rs, 72 N. J. Eq. 56, 68 Atl. 914, 942.

of trust participated in by more than one trustee is both joint and several, so that each guilty trustee is liable for the whole of the loss." But where several persons are constructive trustees each is liable only for the amount of property coming into his hands.[32]

Cestui Not Preferred

The right of a cestui que trust to a money judgment against the trustee is not a preferred right. He stands on a level with other creditors of the trustee,[33] and has no lien [34] upon the general assets of the trustee. If the trustee is bankrupt, the cestui must take his dividend in the bankruptcy court with the other creditors, unless he can trace the trust res into the property in the hands of the receiver, assignee, or trustee in bankruptcy. If the trust property, or its substitute, can be traced into the property in the hands of the trustee, or his representative, then the cestui is not dependent upon the recovery of a money judgment against the trustee and its collection from the trustee's general assets; but the cestui que trust may elect the remedy of following the trust property,[35] a remedy the limitations of which are hereinafter discussed. "But to entitle the owner of trust property to a preference over the general creditors of an insolvent trustee it must appear that his property, or its proceeds, went into and became a part of the fund or estate upon which it is sought to impress a trust." [36]

v. Cantrell, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576; Thomas v. Scruggs, 10 Yerg. (Tenn.) 400; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

[32] Hunter v. Hunter, 50 Mo. 445.

[33] Wales v. Sammis & Scott, 120 Iowa, 293, 94 N. W. 840; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; Mertens v. Schlemme, 68 N. J. Eq. 544, 59 Atl. 808; Clark v. Timmons (Tenn. Ch. App.) 39 S. W. 534; Johnson's Ex'rs v. Johnson's Heirs, 83 W. Va. 593, 98 S. E. 812.

[34] Spokane County v. First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81; Burgoyne v. McKillip, 182 Fed. 452, 104 C. C. A. 590; Pharis v. Leachman, 20 Ala. 662; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Lang v. Metzger, 206 Ill. 475, 69 N. E. 493; City of St. Paul v. Seymour, 71 Minn. 303, 74 N. W. 136; In re Mumford, 5 N. Y. St. Rep. 303; MacArthur v. Gordon, 52 Hun, 615, 5 N. Y. Supp. 513; Shute v. Hinman, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265; Appeal of Cross, 97 Pa. 471; Heidelbach v. Campbell, 95 Wash. 661, 164 Pac. 247.

[35] Weiss v. Haight & Freese Co. (C. C.) 152 Fed. 479; Metropolitan Nat. Bank v. Campbell Commission Co. (C. C.) 77 Fed. 705; Gray v. Perry, 51 Ga. 180; McCutchen v. Roush, 139 Iowa, 351, 115 N. W. 903; Farnsworth v. Muscatine Produce & Pure Ice Co., 177 Iowa, 21, 158 N. W. 741; Hartsock v. Russell, 52 Md. 619; State v. Bank of Commerce, 54 Neb. 725, 75 N. W. 28; Lathrop v. Gilbert, 10 N. J. Eq. 344; Warwick v. Warwick, 31 Grat. (Va.) 70.

[36] Morrison v. Lincoln Sav. Bank & Safe Deposit Co., 57 Neb. 225, 227, 77 N. W. 655. A cestui que trust, having the right to take specific assets from the trustee's estate, may waive it and come in as a general creditor. Keller v. Washington, 83 W. Va. 659, 98 S. E. 880.

If the trustee, against whom the cestui brings his bill to recover a decree for the payment of money on account of a duty to pay under the trust instrument or on account of a breach of trust, is also a cestui que trust, and in that capacity has funds due him or property which is equitably his, the plaintiff cestui may have a lien upon this interest of the defendant as cestui que trust for the recovery of the plaintiff's claim.[37]

Where the respective rights of persons claiming to be cestuis que trust of resulting trusts and creditors of the alleged trustee of such trust come into question, a different problem from that just considered is presented. In this latter case the object of the cestui que trust is to recover the res itself, and not a money judgment. The prevailing view is that, in the absence of estoppel, the resulting cestui prevails over the creditors of the resulting trustee.[38] A similar holding has been made in the case of a constructive trust.[39]

Liability for Acts of Third Person

The trustee may be liable for the acts of another which cause injury to the interest of the cestui que trust. The trustee may, of course, employ agents to perform ministerial acts; but if he entrust the entire management of the trust to an agent, and exercise no supervision and the agent misapply the trust funds, the trustee will be responsible for the amount so lost.[40] But reasonable care in the selection and supervision of an agent will relieve the trustee of responsibility for losses resulting from the agent's acts. "A trustee is not an insurer of trust funds against the possibility of loss, and all that is required of him is good faith and reasonable diligence."[41] Hence it has been held that a trustee who intrusts an attorney of good reputation with the key to a safety deposit box containing trust securities is not liable for the theft of the securities by the attorney;[42] and a trustee may employ a broker in investing funds, and if due care is used in the selection and supervision of

[37] Raynes v. Raynes, 54 N. H. 201; Miller v. Miller, 148 Mo. 113, 49 S. W. 852.

[38] Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267; Waterman v. Buckingham, 79 Conn. 286, 64 Atl. 212; McLaurie v. Partlow, 53 Ill. 340; Robinson v. Robinson, 22 Iowa, 427; Hudson v. Wright, 204 Mo. 412, 103 S. W. 8. Contra: Buck v. Webb, 7 Colo. 212, 3 Pac. 211; Roberts v. Broom, 1 Del. Ch. 388.

[39] Arntson v. First Nat. Bank of Sheldon, 39 N. D. 408, 167 N. W. 760, L. R. A. 1918F, 1038.

[40] Earle v. Earle, 93 N. Y. 104.

[41] In re Darlington's Estate, 245 Pa. 212, 218, 91 Atl. 486.

[42] In re Darlington's Estate, 245 Pa. 212, 91 Atl. 486. See, also, Pennsylvania Co. for Ins. on Lives v. Franklin Fire Ins. Co., 5 Pa. Dist. R. 323.

the broker, the trustee will not be liable for the broker's theft of trust property.[43]

If the defendant trustee has joined with his cotrustee in a breach of trust, he is liable to the same extent as if he had separately committed the wrongful act.[44] Thus, a trustee who discovers a breach of trust by his fellow trustee, and thereafter joins with the original wrongdoer in misapplying trust property in an attempt to retrieve the earlier losses, is liable to the cestui que trust for the breaches in which he aided.[45]

A trustee who has renounced the trust is obviously not liable thereafter for wrongs committed by another trustee, because the renunciation makes him no trustee at all.[46]

Liability upon Default by Cotrustee

Frequent instances are found in the books of inactivity by one trustee and a loss to the trust estate resulting immediately from the negligence or fraud of the active cotrustee. Is an inactive trustee liable to the cestui que trust where the trust property has been dissipated by the wrongful act of the active associate in the trusteeship? Great lack of harmony has been shown by the courts in the discussion of a rule to be applied in this case. In the reign of Charles I the Lord Keeper stated the rule to be that the inactive trustee was not liable "unless some purchase, fraud, or evil dealing appear." [47] This doctrine seemed to limit liability to cases of practical joinder by the passive trustee in the breach by the active trustee.

A Pennsylvania judge in 1843 thus formulated the rule: [48] "It is said to be the harshest demand that can be made in equity to compel a trustee to make up a deficiency, where the money has not come into his hands. In such a case equity will not charge him unless he has been guilty of neglect so gross as almost amounts to fraud."

A Tennessee court has made the rule depend upon the discretionary or directory nature of the trust: "A discretionary trust is, when by the terms of the trust no direction is given as to the manner in which the trust funds shall be vested, till the time arrives at which it is to be appropriated in satisfaction of the trust. In such cases, in order to charge a trustee for an abuse by his cotrustee, some act

[43] Speight v. Gaunt (1883) 9 App. Cas. 1.
[44] In re Cozzens' Estate (Sur.) 15 N. Y. Supp. 771.
[45] Westerfield v. Rogers, 174 N. Y. 230, 66 N. E. 813.
[46] Clagett v. Hall, 9 Gill & J. (Md.) 80.
[47] Townley v. Sherborne, J. Bridgman, 35, 37.
[48] Bell, J., in Nyce's Estate, 5 Watts & S. 254, 255, 40 Am. Dec. 498.

of commission must be shown on his part, by which the trust fund was attained by his cotrustee, or some act of omission amounting, to gross neglect in permitting the fund to be wasted. * * * A directory trust is when by the terms of the trust the fund is directed to be vested in a particular manner, till the period arrives at which it is to be appropriated. In such cases, if the fund be not vested, or vested in a different manner from that pointed out, it is an abuse of trust for which both trustees are responsible, though but one received the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully, according to its terms and the intention of the person by whom it was created." [49]

Sir John Romilly, Master of the Rolls, has said that "giving one trustee the sole and absolute control over the fund was a breach of trust." [50] By this principle affirmative action by the passive trustee giving the active trustee sole control seemed to be all that was necessary in order to show liability.

The New York Court of Appeals has taken the position that an inactive trustee is liable only if he "unnecessarily do an act by which the funds are transferred from the joint possession of all to the sole possession of one," and it has said that "an act is unnecessary when done outside of the usual course of business pertaining to the subject." [51]

The Supreme Judicial Court of Massachusetts has formulated the rule as follows: [52] "It is well settled that a trustee is not responsible for the acts or misconduct of a cotrustee in which he has not joined, or to which he does not consent or has not aided or made possible by his own neglect."

This disorder in the statement of the governing principle lends some color to the statement of Woodward, J., in Irwin's Appeal,[53] that "there is, perhaps, no one subject on which English authorities are so contradictory and irreconcilable as upon the question, when is one trustee or executor liable for moneys that have been lost in the hands of a cotrustee or executor?"

The decisions may be placed in four classes, namely: (a) Those in which the inactive trustee has done nothing but passively allow his cotrustee to assume exclusive possession of the trust property; (b) those in which the sole basis of the inactive trustee's alleged

[49] Turley, J., in Deaderick v. Cantrell, 10 Yerg. 263, 269, 270, 272, 31 Am. Dec. 576.

[50] Wiglesworth v. Wiglesworth, 16 Beav. 269, 272.

[51] Purdy v. Lynch, 145 N. Y. 462, 473, 40 N. E. 232.

[52] Ashley v. Winkley, 209 Mass. 509, 528, 95 N. E. 932.

[53] 35 Pa. 294, 295.

liability is an affirmative act on his part giving the active trustee exclusive possession; (c) cases in which there is an intrusting of possession by positive or negative conduct and, in addition, a failure to supervise the administration of the trust after the cotrustee has taken exclusive control; (d) instances in which the intrusting of possession was followed by notice to the inactive trustee of a possible specific danger to the trust fund and thereafter by continued inaction by the passive trustee.

Passively Allowing Cotrustee to Take Exclusive Possession

The earliest case raising the question of an inactive trustee's liability is Townley v. Sherborne.[54] There a trustee who had passively allowed his fellow trustee to receive the rents of the trust realty was held not liable when the funds were lost, the Lord Keeper saying that the passive trustee was not liable in the absence of some "purchase, fraud or evil dealing" in allowing the cotrustee exclusive possession, "for they being by law joyntenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by; and it being the case of most men in these days, that their personal estates do not suffice to pay their debts, prefer their children, and perform their wills, they are enforced to trust their friends with some part of their real estate, to make up the same, either by the sale, or perception of profits; and if such of these friends, who carry themselves without fraud, should be chargeable out of their own estate for the faults and deficiencies of their cotrustees, who were not nominated by them, few men would undertake any such trust. And if two executors be, and one of them waste all, or any part of the estate, the devastavit shall by law charge him only, and not his coexecutor; and in that case, 'equitas sequitur legem,' there have been many precedents resolved in this court, that one executor shall not be charged for the act or default of his companion. And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receit of profits." This early case which treated exclusive possession by one trustee as natural and the liability of a trustee as confined to his own receipts, in the absence of fraud, has been followed by many English decisions.[55] This rule has also been applied to passively allowing the cotrustee to have exclusive

[54] J. Bridgman, 35, 37, 38.

[55] Spalding v. Shalmer, 1 Vern. 301; Anonymous, 12 Mod. 560; Aplyn v. Brewer, Finch's Prec. Ch. 173; Fellows v. Mitchell, 1 P. Wms. 81; Leigh v. Barry, 3 Atk. 583; In re Fryer, 3 Kay & J. 317.

possession of the evidence of trust property, as, for example, title deeds.[56] The court said in the last-cited case[57] that "no laches could be imputed to the trustees for suffering one of their number to hold the deeds. The reason is that the deeds must be held by some one person, unless they are deposited with bankers, or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys, and negligence cannot be imputed to trustees for not taking such precautions as these."

Yet in other cases passively allowing a cotrustee to take exclusive possession has been regarded as a breach of trust, rendering the inactive trustee liable for loss of the funds while in the cotrustee's hands.[58] In Rodbard v. Cooke[59] the court said: "It may be stated as a general rule of law that where there are two trustees, and one of them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. The object of having two trustees is to double the control over the trust property, and when one trustee thinks fit to give the other the sole power of dealing with the trust property he defeats that object and becomes himself responsible." The words of this quotation suggest active conduct resulting in exclusive control by the cotrustee, but the facts of the case seem to indicate mere passivity.

Rare circumstances may justify the exclusive control by one trustee and thus obviate any dispute as to the inactive trustee's liability. Thus, where the trust property consisted of shares in a company, the deed of creation of which prohibited ownership of shares by two or more jointly, obviously one trustee must hold the shares.[60]

If exclusive possession is obtained without the actual or constructive knowledge of the passive trustee, naturally there is no liability, because there is no acquiescence in the sole control of the active trustee;[61] and the same is true where exclusive control is obtained by fraud, as by altering a check.[62] Here there is lack of real consent.

In a number of American cases the doctrine of Townley v. Sherborne has been approved, passive acquiescence in exclusive posses-

[56] Cottam v. Eastern Counties Ry. Co., 1 Johns. & H. 243.

[57] Cottam v. Eastern Counties Ry. Co., 1 Johns. & H. 243, 247.

[58] Ex parte Shakeshaft, 3 Bro. Ch. 197; Gregory v. Gregory, 2 Y. & C. 313; Lockhart v. Reilly, 25 L. J. Ch. 697; Rodbard v. Cooke, 36 L. T. N. S. 504; Lewis v. Nobbs, 8 Ch. D. 591.

[59] 36 L. T. N. S. 505.

[60] Consterdine v. Consterdine, 31 Beav. 331.

[61] Derbishire v. Home, 3 De G., M. & G. 80.

[62] Barnard v. Bagshaw, 3 De G., J. & S. 355.

sion by a cotrustee has not been regarded as negligence or a breach of trust, and the inactive trustee has been absolved from liability.[63] In support of this attitude Finch, J., said in Ormiston v. Olcott:[64] "There would be neither wisdom nor justice in a rule which would practically end in making a trustee a guarantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent."

A smaller number of American courts have considered passively surrendering the trust property to the exclusive possession of a cotrustee to be negligence, and have held the inactive trustee liable.[65] Where the cotrustee was found in exclusive control,[66] or was passively allowed to assume it,[67] and the inactive trustee thereafter did nothing to return the property to joint control, he has been held liable.

If the active trustee has obtained exclusive control of the property without the knowledge or consent of the inactive trustee, obviously there is no basis for a judgment against the latter.[68]

Intrusting Cotrustee with Exclusive Control by Positive Act

The English cases are almost unanimous in regarding as a negligent breach of trust a positive act by the passive trustee (as, for example, the execution of a power of attorney), by means of which the cotrustee is enabled to get exclusive control of trust assets and

[63] Colburn v. Grant, 181 U. S. 601, 21 Sup. Ct. 737, 45 L. Ed. 1021; Taylor v. Roberts, 3 Ala. 83; Glenn v. McKim, 3 Gill (Md.) 366; Stowe v. Bowen, 99 Mass. 194; Hunter v. Hunter, 50 Mo. 445; Dyer v. Riley, 51 N. J. Eq. 124, 26 Atl. 327; Bankes v. Wilkes' Ex'rs, 3 Sandf. Ch. (N. Y.) 99; Kip v. Deniston, 4 Johns. (N. Y.) 23; Ormiston v. Olcott, 84 N. Y. 339; Purdy v. Lynch, 145 N. Y. 462, 40 N. E. 232; Westerfield v. Rogers, 174 N. Y. 230, 66 N. E. 813; Worth v. McAden, 1 Dev. & B. Eq. (21 N. C.) 199; Ochiltree v. Wright, 1 Dev. & B. Eq. (21 N. C.) 336; State v. Guilford, 18 Ohio, 500, reversing 15 Ohio, 593; Stell's Appeal, 10 Pa. 149; Estate of Fesmire, 134 Pa. 67, 19 Atl. 502, 19 Am. St. Rep. 676; Birely's Estate, 7 Pa. Dist. R. 395; Boyd's Ex'rs v. Boyd's Heirs, 3 Grat. (Va.) 113; Griffin's Ex'r v. Macaulay's Adm'r, 7 Grat. (Va.) 476, 578; Keenan v. Scott, 78 W. Va. 729, 90 S. E. 331. See, also, City Bank v. Maulson, 3 Chanc. Ch. R. (U. C.) 334.

[64] 84 N. Y. 339, 346.

[65] Royall's Adm'r v. McKenzie, 25 Ala. 363; Fox v. Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Maccubbin v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157; Laroe v. Douglass, 13 N. J. Eq. 308; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1; Bowman v. Rainetaux, Hoff. Ch. (N. Y.) 150; Spencer v. Spencer, 11 Paige (N. Y.) 299; Earle v. Earle, 93 N. Y. 104.

[66] Thomas v. Scruggs, 10 Yerg. (Tenn.) 400.

[67] Harvey v. Schwettman (Mo. App.) 180 S. W. 413.

[68] Lansburgh v. Parker, 41 App. D. C. 549.

thereby to waste them.[69] But Mendes v. Guedella [70] seems to run counter to this weight of authority. In that case two trustees placed in the hands of a third the key to a bank box, for the purpose of allowing him to get the coupons from securities. The bank was instructed to deliver to the active trustee the coupons only, and not the box; but it negligently delivered the box to the active trustee, and he defaulted. The court declined to hold the passive trustees liable, although it would seem that their act enabled the cotrustee to get exclusive control.

The American courts have not been harmonious in their treatment of the inactive trustee, whose sole negligence, if such it be, has been the taking of a positive step for the purpose of intrusting his active cotrustee with exclusive possession of the trust property. In numerous instances the passive trustee, or guardian or other fiduciary treated by the court as a trustee, has been held responsible, upon the loss of the property by the negligence or crime of the active trustee.[71] But the opposite result has been reached in several cases;[72] the courts stating that, in the absence of warning that the active trustee is in financial difficulty or is dishonest, such conduct by the inactive trustee is not negligent. In Purdy v. Lynch [73] the purpose of the trust was the payment of the debts of

[69] Bradwell v. Catchpole, 3 Swanst. 78, note; Chambers v. Minchin, 7 Ves. 186; Hanbury v. Kirkland, 3 Simon, 265; Marriott v. Kinnersley, Tamlyn, 470; Wiglesworth v. Wiglesworth, 16 Beav. 269; Brumridge v. Brumridge, 27 Beav. 5; Cowell v. Gatcombe, 27 Beav. 568; Ingle v. Partridge, 32 Beav. 661; In re Taylor, 81 L. T. N. S. 812.

[70] 2 Johns. & Hen. 259. See, also, Home v. Pringle, 8 Clark & Fin. 264, and Shepherd v. Harris, (1905) 2 Ch. 310.

[71] Wallis v. Thornton's Adm'r, 2 Brock. 422, Fed. Cas. No. 17111; Edmonds v. Crenshaw, 14 Pet. 166, 10 L. Ed. 402; Gray v. Reamer, 11 Bush (Ky.) 113; Barroll v. Forman, 88 Md. 188, 40 Atl. 883; Smith v. Pettigrew, 34 N. J. Eq. 216; Monell v. Monell, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298; Bruen v. Gillet, 115 N. Y. 10, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. Rep. 764; Matter of Litzenberger, 85 Hun, 512, 33 N. Y. Supp. 155; Graham v. Davidson, 2 Dev. & B. Eq. (22 N. C.) 155; Hauser v. Lehman, 2 Ired. Eq. (37 N. C.) 594; Clark's Appeal, 18 Pa. 175; Donnelly's Estate, 11 Pa. Dist. R. 211; Graham v. Austin, 2 Grat. (Va.) 273. To the same effect is Mickleburgh v. Parker, 17 Grant Ch. (U. C.) 503.

[72] Laurel County Court v. Trustees of Laurel Seminary, 93 Ky. 379, 20 S. W. 258; Adair v. Brimmer, 74 N. Y. 539; Purdy v. Lynch, 145 N. Y. 462, 40 N. E. 232; State v. Guilford, 18 Ohio, 500, reversing 15 Ohio, 593; Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Appeal of Hatch (Pa.) 12 Atl. 593. In Re McLatchie, 30 Ont. 179, it was held that where affirmative action of the passive trustee would put the cotrustee in sole control only if the cotrustee committed a crime (forgery), there was no negligence by the passive trustee.

[73] 145 N. Y. 462, 40 N. E. 232.

a bank. One trustee, who was also a receiver of the bank and had a good reputation, was intrusted by the other trustees with exclusive control of the trust property for the purpose of paying off the bank's debts to its depositors. This was approved by the court as reasonable conduct, and liability for the loss of the funds by the active trustee was not fastened upon the inactive trustees.

The act of intrusting the res to a cotrustee may obviously be negligent, if the passive trustee has knowledge, prior to his surrender of possession, that the cotrustee is financially embarrassed.[74]

Failure to Supervise the Conduct of the Active Cotrustee

In many cases the evidence shows, not only exclusive control by the active trustee, obtained through the acquiescence or affirmative aid of the inactive trustee, but also the lapse of a considerable period of time after such intrusting, with no investigation by the inactive trustee of the conduct of the active trustee. This situation raises the question whether failure to supervise the work of a cotrustee, as, for example, failure to examine the investments made by him, is such negligence as makes the inactive trustee liable for damage to the trust estate.

The English cases have been unanimous in asserting a duty to watch an active cotrustee in exclusive control, to examine his accounts, and to inspect his investments. To fail to give such supervision has been held negligence, rendering the passive trustee liable, whether the active trustee acquired exclusive control through the mere passivity of the inactive trustee[75] or through his positive action.[76]

The American cases also very generally place upon the inactive trustee the duty of supervising and inspecting the work of the active trustee. A trustee who has, by failure to act or by direct action, enabled his cotrustee to obtain exclusive possession of the trust subject-matter, must examine the investments and accounts of

[74] In re Evans' Estate, 2 Ashm. (Pa.) 470.

[75] Lincoln v. Wright, 4 Beav. 427; Thompson v. Finch, 22 Beav. 316; Wynne v. Tempest, 13 T. L. R. 360. In the last-named case the trustee was held not to be protected by the provision of section 3 of the Judicial Trustees Act of 1896 to the effect that a court might relieve from liability for a breach of trust a trustee who had acted "honestly and reasonably."

[76] Broadhurst v. Balguy, 1 Y. & C. Ch. 16; Wiglesworth v. Wiglesworth, 16 Beav. 269; Trutch v. Lamprell, 20 Beav. 116; Mendes v. Guedella, 2 Johns. & H. 259; Hale v. Adams, 21 W. R. 400; In re Second East Dulwich Soc., 68 L. J. Ch. (N. S.) 196. In Horton v. Brocklehurst, 29 Beav. 504, there was the additional fact that the passive trustee had represented to the cestui que trust that the funds had been properly invested by the active cotrustee, although he (the inactive trustee) knew nothing about the investments. Liability was fixed upon the inactive trustee.

the active colleague.[77] Thus, in Richards v. Seal [78] an inactive trustee, who for eleven years made no examination of the status of a bond intrusted to a cotrustee, and thus failed to learn that the cotrustee had collected it and held the proceeds uninvested, was held liable for a loss resulting from the inability of the cotrustee to turn over the money.[79] This duty to supervise exists, whether the inactive trustee, at the time he becomes a trustee, finds the cotrustee in control,[80] or has passively allowed the cotrustee to take exclusive possession,[81] or has by his own positive act put the cotrustee into possession.[82]

If the trust settlement directs that the funds be invested in a particular way, as, for example, in mortgages upon real estate, the

[77] In re Adams' Estate, 221 Pa. 77, 84, 70 Atl. 436, 128 Am. St. Rep. 727, 15 Ann. Cas. 518. But see Kerr v. Kirkpatrick, 8 Ired. Eq. (43 N. C.) 137, where it is denied that "one trustee is bound to keep a supervision over the acts of another."

[78] 2 Del. Ch. 266.

[79] To the same effect, see Estate of Hilles, 13 Phila. 402. Jones' Appeal, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282, held that mere inquiry of a coguardian was sufficient performance of the duty to investigate; Gibson, C. J., saying (page 151): "To require him to have dealt with his colleague as a rogue, by calling for the securities, would require of him the highest and most exact vigilance, a degree of it that would ruin every guardian." This seems a questionable principle as applied to trustees.

[80] Ralston v. Easter, 43 App. D. C. 513.

[81] In the following cases the loss arose from the bad management or improper investments of the active trustee: Ashley v. Winkley, 209 Mass. 509, 95 N. E. 932; Klatt v. Keuthan, 185 Mo. App. 306, 170 S. W. 374; Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665. Whereas, in other instances, the defalcation of the active trustee was the immediate cause of the loss. Bates v. Underhill, 3 Redf. Sur. (N. Y.) 365; City Bank v. Maulson, 3 Chanc. Ch. R. (U. C.) 334; Crowe v. Craig, 29 Nov. Scot. 394. In Wilmerding v. McKesson, 103 N. Y. 329, 8 N. E. 665, however, the court refused to hold the passive trustee liable for the conversion of the trust property by the active trustee, saying that there was no duty to guard against such conduct, unless there was reason to suspect the cotrustee, some fact to put the inactive trustee upon inquiry. And in Matter of Halsted, 110 App. Div. 909, 95 N. Y. Supp. 1131, affirmed without opinion in 184 N. Y. 563, 76 N. E. 1096, a trustee who for five years allowed trust securities to remain in a bank box to which both trustees had keys, without examining the securities, was held not liable when his active cotrustee stole the securities, since the passive trustee had no reason to suspect his cotrustee.

[82] Caldwell v. Graham, 115 Md. 122, 80 Atl. 839, 38 L. R. A. (N. S.) 1029; Thompson v. Hicks, 1 App. Div. 275, 37 N. Y. Supp. 340; Estate of Fesmire, 134 Pa. 67, 19 Atl. 502, 19 Am. St. Rep. 676; McMurray v. Montgomery, 2 Swan (Tenn.) 374. Contra: In re Cozzens' Estate (Sur.) 15 N. Y. Supp. 771. In Caldwell v. Graham the court says (115 Md. 129, 80 Atl. 839, 38 L. R. A. [N. S.] 1029): "In accepting the appointment the trustees assumed the joint and equal obligation of exercising their discretion and control with respect to the trust in its entirety."

duty of the inactive trustee to supervise the conduct of the active associate would seem to be accentuated, if anything. For failure to make such inspection, resulting in the continuance of an improper investment, the passive trustee has been charged.[83] The opinion of the Tennessee court is forcefully put by Turley, J., in Deaderick v. Cantrell, as follows:[84] "Two trustees are appointed to execute a trust, the final operation of which is not to be completed for years; they undertake to execute it; they are intended as checks on each other, have an equal control over the fund, are mutually bound to attend to the interest of the trust, and shall one be permitted to go to sleep and trust everything to the management of his cotrustee, and when, in the course of ten or fifteen years, the fund having been wasted, and his cotrustee insolvent, he is called upon to make it good, shall he be heard to say that he had implicit confidence in his companion, and permitted him to retain all the money, and appropriate it as he pleased, and that he ought not therefore to be charged? Surely not; it is neither law nor reason."

Warning of Danger to Trust Fund, Followed by Continued Inactivity

It frequently happens that the active trustee has got exclusive possession of the trust property, by the act of the passive trustee or without his objection, and that the inactive trustee thereafter learns of an act committed or about to be committed by the active trustee, which is or will be dangerous to the interests of the cestui que trust. In such circumstances there can be no doubt of the passive trustee's duty to act to protect the beneficiary, and, if he fails to bestir himself, he will be liable for injury to the trust estate subsequently resulting from the conduct of the active trustee.[85] Robertson, L. P., in Millar's Trustees v. Polson,[86] has graphically described the position of the inactive trustee in this case: "It is, of course, disagreeable to take a cotrustee by the throat; but if a man undertakes to act as a trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes

[83] Beatty's Estate, 214 Pa. 449, 63 Atl. 975; Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576. But in Cocks v. Haviland, 124 N. Y. 426, 26 N. E. 976, a passive trustee was not held liable, notwithstanding a direction to invest in bonds and mortgages, which, to his knowledge, had not been carried out by the cotrustee.

[84] 10 Yerg. 263, 272, 31 Am. Dec. 576.

[85] Boardman v. Mossman, 1 Bro. Ch. 68; Brice v. Stokes, 1 Ves. 319; Booth v. Booth, 1 Beav. 125; Curtis v. Mason, 12 L. J. Ch. (N. S.) 452; Millar's Trustees v. Polson, 34 Sc. L. R. 798.

[86] 34 Sc. L. R. 804.

do in their own affairs in letting things slide and losing money rather than create ill feeling."

The American courts have been equally clear that idleness after a warning of danger is a negligent breach of trust. "It is the duty of one trustee to protect the trust estate from any misfeasance by his cotrustee, upon being made aware of the intended act, by obtaining an injunction against him; and, if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property, and its application in the manner required by the trust." [87] This rule has been applied where the knowledge was of an improper investment,[88] a refusal to return the property to joint control,[89] the insolvency of the active trustee,[90] an interest in the active trustee antagonistic to that of the cestui que trust,[91] or any breach of trust.[92] A recent case of this type is In re Adams' Estate,[93] where a trustee had knowledge that a cotrustee had wrongfully assumed exclusive control of the trust property but, after restoring the property to joint control, the inactive trustee allowed his cotrustee the means of regaining exclusive possession. Such failure to guard the estate was held negligence, rendering the inactive trustee liable.

Statutory Rules

An English statute of 1859 [94] lays down important rules regarding the liabilities of trustees. It provides that every trust instrument shall be deemed to contain a clause to the effect that the several trustees shall be chargeable only for such property "as they shall respectively actually receive notwithstanding any receipt for the sake of conformity,[95] and shall be answerable and accountable

[87] Crane v. Hearn, 26 N. J. Eq. 378, 381; see, also, Elmendorf v. Lansing, 4 Johns. Ch. (N. Y.) 562.

[88] Bermingham v. Wilcox, 120 Cal. 467, 52 Pac. 822; Matter of Niles, 113 N. Y. 547, 21 N. E. 687; In re Cozzens' Estate (Sur.) 15 N. Y. Supp. 771; Meldon v. Devlin, 31 App. Div. 146, 53 N. Y. Supp. 172, affirmed without opinion 167 N. Y. 573, 60 N. E. 1116; Pim v. Downing, 11 Serg. & R. (Pa.) 66.

[89] Ralston v. Easter, 43 App. D. C. 513; contra, Stewart's Estate, 21 Pa. Dist. R. 635.

[90] Darnaby v. Watts (Ky.) 21 S. W. 333.

[91] Hill v. Hill, 79 N. J. Eq. 521, 82 Atl. 338.

[92] In re Howard, 110 App. Div. 61, 97 N. Y. Supp. 23, affirmed without opinion 185 N. Y. 539, 77 N. E. 1189.

[93] 221 Pa. 77, 70 Atl. 436, 128 Am. St. Rep. 727, 15 Ann. Cas. 518.

[94] St. 22 & 23 Vict. c. 35, § 31.

[95] Some courts in earlier cases made the distinction that trustees acting "for conformity only"—that is, merely formally—were not liable for the property received by their cotrustees. Gray v. Reamer, 11 Bush (Ky.) 113. And the same doctrine has been applied to executors. Terrill v. Mathews, 12 L. J. Ch. N. S. 31.

only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited. * * *" This act has been copied in Canada, Australia, and New Zealand,[96] and was incorporated into the English Trustee Act of 1893.[97] A statute applicable to Scotch trustees, enacted in 1861, provided that each trustee "shall only be liable for his acts and intromissions, and shall not be liable for the acts and intromissions of cotrustees, and shall not be liable for omissions." [98]

The decisions since 1859 make no mention of the statute. There are a number of cases in which an inactive trustee who had at one time had possession of the trust property has been held liable for neglect which contributed to the loss.[99] This seems logical under the statute. There are also a few cases in which an inactive trustee has been held responsible for property which he never actually received, on the basis of neglect after the receipt of it by his cotrustee.[1] These latter cases are difficult to reconcile with the express provision of the statute that a trustee shall be liable only for what he actually receives.

Another English statute bearing on the liability of trustees is that section of the Judicial Trustees Act[2] which gives the court power to excuse a trustee from liability for a breach of trust, if he has acted "honestly and reasonably." But this statute has been held not to be intended to protect the inactive trustee, who delegates the trust duties and fails to supervise the administration of the trust. Such conduct is not "reasonable" or "honest." [3] Hence this section would seem to be of little importance in determining the liabilities of inactive trustees.

A few American states have codified the law regarding the lia-

[96] Brit. Col. Tr. Act, § 88; New Brunsw. Tr. Act, § 17; Consol. St. Newf. (1892) c. 84, § 14; Nov. Sc. Tr. Act, § 24; Ont. Tr. Act, § 35; Sask. Tr. Act, § 9; New So. Wales Tr. Act (1898) § 69; Queensl. Tr. & Ex. Act (1897) § 25; Vict. St. Trusts (1864), § 78; New Zealand Tr. Act, § 82.

[97] St. 56 & 57 Vict. c. 53, § 24.

[98] St. 24 & 25 Vict. c. 84, § 1.

[99] Hale v. Adams, 21 Week. R. 400; Lewis v. Nobbs, 8 Ch. D. 591; Rodbard v. Cooke, 36 L. T. N. S. 504; Bacon v. Camphausen, 58 L. T. N. S. 851; Robinson v. Harkin, [1896] 2 Ch. 415; In re Taylor, 81 L. T. N. S. 812, semble.

[1] Bahin v. Hughes, 31 Ch. D. 390; Wynne v. Tempest, 13 L. T. R. 360; In re Second East Dulwich Soc., 68 L. J. Ch. N. S. 196.

[2] St. 59 & 60 Vict., c. 35, § 3. This act has also been copied in the Dominions. Brit. Col. Tr. Act, § 89; New Br. Tr. Act, § 49; Ont. Tr. Act, § 37; New So. Wales Tr. Amend. Act 1902, § 9; Queensl. Tr. & Ex. Act 1897, § 51; New Zeal. Tr. Act, § 89.

[3] In re Turner [1897] 1 Ch. 536. See, also, In re Second East Dulwich Soc., 68 L. J. Ch. N. S. 196. But see Dover v. Denne, 3 Ont. L. R. 664.

bility of an inactive trustee in the following form:[4] "A trustee is responsible for the wrongful acts of a cotrustee to which he consented, or which by his negligence he enabled the other to commit, but for no others." These statutes are not believed to alter the pre-existing rules of equity.

Change of Inactive Trustee's Liability by Stipulation of Parties

A settlor may provide that each of two trustees shall be liable for only a moiety of the trust property,[5] or that four trustees shall take turns in administering the trust for a year each, and that each shall be liable only during the period of his active administration.[6] English courts have not been friendly to clauses in trust instruments excusing trustees from liability except for property actually received by them, and have construed such clauses to mean that the trustee is liable for what he ought to have received, as well as for what he actually did have in his hands.[7] In Brumridge v. Brumridge, Romilly, M. R., said:[8] "This clause is constantly brought forward to sanction the misappropriation of trust property; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but, until it is, I cannot allow a trustee to say that it is not his business to act properly in the performance of his duty as trustee."

A provision in the trust deed or will that each trustee shall be liable only for his own default does not protect an inactive trustee from liability for allowing a cotrustee to have exclusive possession. Such negligence is a default as much as a positive breach would be.[9]

These constructions of the clauses inserted in trust instruments by settlors before 1859 are consistent with the decisions previously referred to as occurring since the English statute of 1859. Both sets of decisions recognize negligence as a default, and both treat a duty to get actual possession as equivalent to actual possession.

[4] Civ. Code Cal. § 2239; Civ. Code Mont. § 5385; Comp. Laws N. D. 1913, § 6292; Rev. Code S. D. 1919, § 1206.

[5] Birls v. Betty, 6 Maddock, 90.

[6] Atty. Gen. v. Holland, 2 Y. & C. 683.

[7] Mucklow v. Fuller, Jacobs, 198; Bone v. Cook, McClelland, 168; Brumridge v. Brumridge, 27 Beav. 5.

[8] 27 Beav. 7.

[9] Marriott v. Kinnersley, Tamlyn, 470; Dix v. Burford, 19 Beav. 409.

As for the American cases, we find that in Walker v. Walker's Ex'rs [10] the settlor's direction that one trustee should have exclusive possession of the trust property was held to excuse the inactive trustee from liability for the loss of such property.[11] But in Graham v. Austin [12] an attempt by the settlor to restrict the liability of a trustee to a moiety of the property was not allowed to have effect. No matter what may be the settlor's power to limit liability by insertions in the trust instrument, it is obvious that oral statements of a testator-settlor to a prospective trustee, not incorporated into the will, can have no effect to restrict the trustee's liability.[13]

The hostility of the courts to settlor's directions that a trustee's liability shall be limited to the property he actually obtains was further shown in Caldwell v. Graham,[14] where such a clause was somewhat remarkably construed to provide merely against liability for depreciation of the property while in the trustee's hands.

A clause restricting the trustee's responsibility to cases of "willful default" was sustained in Crabb v. Young; [15] Ruger, C. J., stating: [16] "The testator had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done. * * * The court has not the right to increase the measure of their responsibility or impose obligations from the burden of which he has in his will so carefully protected them." But in Litchfield v. White [17] an assignment for the benefit of creditors, containing a provision that the trustee should be liable only for gross negligence and willful default, was held void. A clause excusing the trustees from all liability for losses occurring without "willful default" was held, in Matter of Howard,[18] not to exempt from liability a trustee who, after knowledge of a breach of trust by his cotrustee, passively allowed the cotrustee to take exclusive control of the property.

The settlor's power over the details of trust administration has

[10] 88 Ky. 615.

[11] The decisions in Duckworth v. Ocean Steamship Co., 98 Ga. 193, 26 S. E. 736, and Markel v. Peck, 168 Mo. App. 358, 151 S. W. 772, allowing the settlor to alter the usual powers of the trustees, would seem to support the principle that the settlor may also change the several liabilities of the trustees.

[12] 2 Grat. (Va.) 273.

[13] Dover v. Denne, 3 Ont. L. R. 664.

[14] 115 Md. 122, 80 Atl. 839, 38 L. R. A. (N. S.) 1029.

[15] 92 N. Y. 56.

[16] 92 N. Y. 65, 66.

[17] 7 N. Y. 438, 57 Am. Dec. 534.

[18] 110 App. Div. 61, 97 N. Y. Supp. 23, affirmed without opinion 185 N. Y. 539, 77 N. E. 1189.

frequently been sustained, as, for example, in giving the trustees greater latitude than usual in the selection of investments. It would seem that this power should extend to such limitations of the trustee's liability as are not repugnant to the essential elements of a trust and do not attempt to make crime lawful.

Trustees have no power by agreement among themselves to divide their responsibilities and to limit the liability of any particular trustee to a portion of the trust property.[19] Thus, in Caldwell v. Graham,[20] where trustees divided the trust property among themselves, one taking the realty and the other the personalty, the court declined to excuse one trustee for negligence respecting the property allotted to the other trustee, and said:[21] "It was optional with him to accept or decline the trust; but, having undertaken the duty imposed by the will, it was not competent for him to limit his obligations or divest himself of any part of his fiduciary discretion."

The consent of the cestui que trust to division of responsibility among trustees has been held not to render such division proper.[22] This result is readily understandable where the consenting beneficiary possesses only a temporary interest and the rights of remaindermen cestuis que trust would also be affected.[23] But it would seem patent that any cestui que trust of full age and sound mind might estop himself from asserting liability against any particular trustee, either wholly or in part.

A contract made by trustees in the trust instrument to the effect that each shall be liable for the acts of the other is unobjectionable and valid.[24]

The power of equity to make one trustee liable primarily and another secondarily would seem unquestionable;[25] but the action of a

[19] Fellows v. Mitchell, 1 P. Wms. 81; Lewis v. Nobbs, 8 Ch. D. 591; Mickelburgh v. Parker, 17 Grant Ch. (U. C.) 503; Bermingham v. Wilcox, 120 Cal. 467, 52 Pac. 822; In re Stong's Estate, 160 Pa. 13, 28 Atl. 480; Thomas v. Scruggs, 10 Yerg. (Tenn.) 400; contra, In re Cozzens' Estate (Sur.) 15 N. Y. Supp. 771; Appeal of Jones, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282 (case of joint guardians treated as trustees).

[20] 115 Md. 122, 80 Atl. 839, 38 L. R. A. (N. S.) 1029.

[21] 115 Md. 127, 80 Atl. 839, 38 L. R. A. (N. S.) 1029.

[22] Fellows v. Mitchell, 1 P. Wms. 81.

[23] Mickelburgh v. Parker, 17 Grant Ch. (U. C.) 503.

[24] Leigh v. Barry, 3 Atk. 583.

[25] McCartin v. Traphagen, 43 N. J. Eq. 323, 11 Atl. 156. Upon the question whether a trustee who has been held liable for a breach of trust ever has a right to contribution from his cotrustee, see Fletcher v. Green, 33 Beav. 426; and as to the right of indemnity in the same case, see Lockhart v. Reilly, 25 L. J. Ch. 697; Price v. Price, 42 L. T. R. 654; Bahin v. Hughes, 31 Ch. D. 390; Bacon v. Camphausen, 58 L. T. N. S. 851; In re Turner, [1897] 1 Ch. 536; Head v. Gould, [1898] 2 Ch. 250; In re Linsley, [1904] 2 Ch. 785.

federal court [26] in approving the decree of a probate court which divided the trust property between trustees, and in limiting the liability of each trustee to his share of the property, seems to amount to violating the settlor's intent and remaking the trust for him.

The liability of the inactive trustee should, it would seem, be determined in the light of the joint title and powers of trustees, and by the aid of the rule requiring the trustee, whether active or inactive, to use the prudence of an ordinarily careful man in his own affairs, and also the rule prohibiting the delegation of discretionary powers.

The failure of an inactive trustee to act to protect the trust estate after notice of impending danger is assuredly a want of ordinary prudence. The refusal to supervise the administration of the active cotrustee would seem to be a delegation of discretionary powers and also a failure to use reasonable care. Whether the mere exclusive possession of the trust property by the active cotrustee, acquired by the aid of the inactive trustee or with his passive acquiescence, is sufficient to charge the inactive trustee would seem to be a more difficult question. In cases where there was necessity for intrusting the exclusive control to the cotrustee, and there was no apparent danger, it might well be held that such intrusting was not negligence on the part of the inactive trustee. But, on the other hand, where there was no necessity for such intrusting, and the character of the property (as, for example, its negotiability) rendered the intrusting dangerous, the inactive trustee might well be regarded as negligent if he allowed the active trustee sole control.[27]

Liability of Trustee for Interest, Simple or Compound

Frequently, where the cestui que trust pursues the remedy of recovering a money judgment or decree against the trustee, interest is included as a part of the amount directed to be paid. The trustee has deprived the cestui of the use of trust property or its proceeds, and the value of that use is estimated by interest. The sole object of allowing the cestui que trust interest is to make him whole, to place him in the position he would have been in if the trustee had performed his duty. When interest will be allowed and at what rate is wholly in the discretion of the court. "As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular

[26] American Bonding Co. of Baltimore v. Richardson, 214 Fed. 897, 131 C. C. A. 565.

[27] For a discussion of this subject on principle, see Bogert, The Liability of an Inactive Co-Trustee, 34 Harv. Law Rev. 483.

case; and where good conscience requires that the trustee be charged with interest, the payment thereof ought to be exacted." [28] This principle has been stated as follows by another court: "Independent of contract or statute, a court of equity in its sound discretion may require one who has converted to his own use the funds of another to pay damages equal to the legal rate of interest, as compensation for the loss of the use of his funds." [29]

Where the property, of the use of which the beneficiary has been deprived, has produced a known income, this furnishes a more satisfactory basis for the award of damages than interest. Thus, where the trustee mingles the trust funds with his own property, and the separate earnings of the trust property are known, recovery of such separate earnings is frequently allowed; [30] but the cestui que trust may elect between such earnings and interest.[31] And so, also, the actual rents received from real property used by the trustee,[32] and the actual interest on money justifiably left in a bank,[33] have been allowed as damages, rather than interest or estimated value. The gains actually made from the trust property by the trustee are more apt to be awarded as damages when the trustee has shown good faith than when he has been guilty of fraud.[34]

Occasionally, where the trustee has had the use of trust property, its rental value is used as the measure of damages.[35]

Whether simple or compound interest shall be allowed, where interest is the basis, is a question of discretion and fact in each case. If simple interest will adequately compensate the cestui que trust, it will be added; if compound interest will more accurately make the beneficiary whole, then that standard of computation will

[28] Stanley's Estate v. Pence, 160 Ind. 636, 644, 66 N. E. 51, 67 N. E. 441.

[29] Cree v. Lewis, 49 Colo. 186, 112 Pac. 326, 328.

[30] Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 Pac. 360; Rainsford v. Rainsford, McMul. Eq. (S. C.) 335.

[31] Treacy v. Powers, 112 Minn. 226, 127 N. W. 936; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; In re Eisenlohr's Estate, 258 Pa. 431, 102 Atl. 115.

[32] Percival-Porter Co. v. Oaks, 130 Iowa, 212, 106 N. W. 626; Hayes v. Kerr, 40 App. Div. 348, 57 N. Y. Supp. 1114; Owens v. Williams, 130 N. C. 165, 41 S. E. 93; Hill v. Cooper, 8 Or. 254; Thomson v. Peake, 38 S. C. 440, 17 S. E. 45, 725.

[33] Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333; In re Wiley, 98 App. Div. 93, 91 N. Y. Supp. 661.

[34] Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Phillips v. Burton, 107 Ky. 88, 52 S. W. 1064; Beale v. Kline, 183 Pa. 149, 38 Atl. 897; Watson v. Dodson (Tex. Civ. App.) 143 S. W. 329.

[35] Johnson v. Richey, 5 Miss. (4 How.) 233; Weltner v. Thurmond, 17 Wyo. 268, 98 Pac. 590, 99 Pac. 1128, 129 Am. St. Rep. 1113.

be followed. "Although as a general rule it may fairly be stated that, where the trustee is guilty of gross neglect or fraud, or mingles the money with his own, he should be charged with interest at the legal rate, with annual rests, and, if he is guilty of mere neglect, with simple interest only, this rule is subject to exceptions, and the real question is what the equities of the particular case demand." [36]

If the trustee has converted the trust property to his own use, simple interest on the value of the property at the time of conversion is ordinarily allowed.[37] Simple interest has also been frequently charged when the trustee has failed to invest the funds, although directed to do so by the trust instrument,[38] or when he has allowed the funds to lie idle in the absence of any express direction for investment,[39] or when he has been negligent in collecting the funds and reinvesting them.[40] The trustee should invest within a reasonable time after the receipt of the funds. A reasonable time has been variously defined, as, for example, within three months,[41] six months,[42] twelve months,[43] or by the end of the calendar year.[44]

Simple interest has also been awarded on funds improperly invested, from the date of the investment,[45] on money held by the

[36] Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900, 904, 905.

[37] Primeau v. Granfield (C. C.) 184 Fed. 480; Hall v. Glover, 47 Ala. 467; Clapp v. Vatcher, 9 Cal. App. 462, 99 Pac. 549; Cree v. Lewis, 49 Colo. 186, 112 Pac. 326; Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Campbell v. Napier, 182 Ky. 182, 206 S. W. 271; McKim v. Hibbard, 142 Mass. 422, 8 N. E. 152; Darling v. Potts, 118 Mo. 506, 24 S. W. 461; Van Rensselaer v. Morris, 1 Paige (N. Y.) 12; Mable v. Bailey, 95 N. Y. 206; Hazard v. Durant, 14 R. I. 25; Cresap v. Brown, 82 W. Va. 467, 96 S. E. 66.

[38] Nicholson v. McGuire, 4 Cranch, C. C. 194, Fed. Cas. No. 10249; Boreing v. Faris, 127 Ky. 67, 104 S. W. 1022; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Smith v. Darby, 39 Md. 268; Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900; In re Muller, 31 App. Div. 80, 52 N. Y. Supp. 565; Breneman v. Frank, 28 Pa. 475; Landis v. Scott, 32 Pa. 495; Appeal of McCauseland, 38 Pa. 466; Appeal of Stearly, 38 Pa. 525; Baker v. Lafitte, 4 Rich Eq. (S. C.) 392.

[39] McComb v. Frink, 149 U. S. 629, 13 Sup. Ct. 993, 37 L. Ed. 876; Jennings' Ex'rs v. Davis, 5 Dana (Ky.) 127; Comegys v. State, 10 Gill & J. (Md.) 175; Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782; Landis v. Scott, 32 Pa. 495; Appeal of Lukens, 47 Pa. 356; Pettus v. Sutton, 10 Rich. Eq. (S. C.) 356; Smith v. Thomas, 8 Baxt. (Tenn.) 417.

[40] Hamilton v. Reese, 18 Ga. 8.

[41] Appeal of Lukens, 47 Pa. 356.

[42] Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

[43] Weisel v. Cobb, 118 N. C. 11, 24 S. E. 782.

[44] Baker v. Lafitte, 4 Rich. Eq. (S. C.) 392.

[45] Hitchcock v. Cosper, 164 Ind. 633, 73 N. E. 264; Cogbill v. Boyd, 79 Va. 1.

trustee after he should have paid it over to the beneficiary,[46] and on trust moneys used by the trustee in his own business.[47]

Occasionally the trustee has a good reason for holding the trust property in an unproductive condition, and he will not be liable to pay to the cestui interest or the value of the use measured in any other way. Thus, where the money is held under a mistake of law,[48] or where the money is held during a period when there is no duty to pay over or invest,[49] or where the trustee has in good faith paid the money to the wrong party under a mistake of law,[50] or where the trustee is holding the money to await the determination of conflicting claims to it,[51] or there is no unreasonable delay in applying the trust money and no use of it by the trustee for his own purposes,[52] or where the money is held as probably necessary to pay debts,[53] there will be no liability to pay interest. And if, due to the neglect of the cestui que trust, there is no opportunity to pay over or invest accrued income, the trustee will not be liable for interest on it.[54]

Compound interest will be allowed where it is necessary to compensate the beneficiary. It is not awarded as punishment, but as compensation. "The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him

[46] Lasker-Morris Bank & Trust Co. v. Gans, 132 Ark. 402, 200 S. W. 1029; Knapp v. Marshall, 56 Ill. 362; Haines v. Hay, 169 Ill. 93, 48 N. E. 218; Mathewson v. Davis, 191 Ill. 391, 61 N. E. 68; Glenn's Ex'rs v. Cockey, 16 Md. 446; Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347; McBride v. McIntyre, 100 Mich. 302, 58 N. W. 994; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Macklanburg v. Griffith, 115 Minn. 131, 131 N. W. 1063; Isler v. Brock, 134 N. C. 428, 46 S. E. 951; Knight v. Reese, 2 Dall. 182, 1 L. Ed. 340; Lomax v. Pendleton, 3 Call (Va.) 538.

[47] Lehmann v. Rothbarth, 111 Ill. 185; Dorsey's Ex'rs v. Dorsey's Adm'r, 4 Har. & McH. (Md.) 231; Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 107 N. W. 1109; St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256; Kerr v. Laird, 27 Miss. 544; Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; First Congregational Soc. v. Pelham, 58 N. H. 566; Lathrop v. Smalley's Ex'rs, 23 N. J. Eq. 192; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 1; In re Muller, 31 App. Div. 80, 52 N. Y. Supp. 565; In re Jones, 143 App. Div. 692, 128 N. Y. Supp. 215; In re Bosler's Estate, 161 Pa. 457, 29 Atl. 57; Reid v. Reid, 237 Pa. 176, 85 Atl. 85; In re Hodges' Estate, 66 Vt. 70, 28 Atl. 663, 44 Am. St. Rep. 820; Miller v. Beverleys, 4 Hen. & M. (Va.) 415.

[48] Southern Ry. Co. v. Glenn's Adm'r, 102 Va. 529, 46 S. E. 776.

[49] Mathewson v. Davis, 191 Ill. 391, 61 N. E. 68; January v. Poyntz, 2 B. Mon. (Ky.) 404; Martin v. Martin, 43 Or. 119, 72 Pac. 639.

[50] Calkins v. Bump, 120 Mich. 335, 79 N. W. 491.

[51] Calkins v. Bump, 120 Mich. 335, 79 N. W. 491.

[52] Minuse v. Cox, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313; In re Selleck, 111 N. Y. 284, 19 N. E. 66.

[53] Fulton v. Davidson, 3 Heisk. (Tenn.) 614.

[54] Cassels v. Vernon, 5 Mason, 332, Fed. Cas. No. 2503.

in his own business is not adopted for the purpose of punishing him for any intentional wrongdoing in the use of such fund, but rather to carry into effect the principle, enforced by courts of equity, that the trustee shall not be permitted to make any profit from the unauthorized use of such funds." [55] As Chancellor Walworth said: "Stating the account with periodical rests, and compounding interest, is only a convenient mode, adopted by the court, to charge the trustee with the amount of profits supposed to have been made by him in the use of the money; where the actual amount of profits, which he has made, beyond simple interest, cannot be ascertained." [56] Compound interest is generally allowed in case of fraud,[57] willful misconduct,[58] or other gross delinquency.[59]

Perhaps the most common instance of the collection of compound interest from the defaulting trustee is found where he has used the trust fund in his own business and the actual profits earned by the trust fund are not claimed or are impossible of computation,[60] or where there is a strong presumption that the trustee has used the funds in his own business, because he renders no account and in no way shows the disposition of the trust money.[61] Compound interest has also been granted on money unlawfully invested,[62] and upon money not invested after a decree of a court directing its investment.[63]

Criminal Liability of Trustee

Until the enactment of recent statutes a breach of trust by a trustee, even though fraudulent, was not a crime. The trustee had the legal title, and his original possession was lawful. In discussing a

[55] Miller v. Lux, 100 Cal. 609, 616, 35 Pac. 345, 639.

[56] Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520, 524.

[57] St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256.

[58] Adams v. Lambard, 80 Cal. 426, 22 Pac. 180. But it may be awarded in the absence of any misconduct. Page's Ex'r v. Holman, 82 Ky. 573.

[59] Mathewson v. Davis, 191 Ill. 391, 61 N. E. 68.

[60] In re Thompson's Estate, 101 Cal. 349, 35 Pac. 991, 36 Pac. 98, 508; Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021; Bemmerly v. Woodward, 124 Cal. 568, 57 Pac. 561; State v. Howarth, 48 Conn. 207; Clement v. Brainard, 46 Conn. 174; Lehman v. Rothbarth, 159 Ill. 270, 42 N. E. 777; Page's Ex'r v. Holman, 82 Ky. 573; Clemens v. Caldwell, 7 B. Mon. (Ky.) 171; Montjoy v. Lashbrook, 2 B. Mon. (Ky.) 261; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Diffenderffer v. Winder, 3 Gill & J. (Md.) 311; Pullis v. Somerville, 218 Mo. 624, 117 S. W. 736; Bobb v. Bobb, 89 Mo. 411, 4 S. W. 511; Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333; McKnight's Ex'rs v. Walsh, 23 N. J. Eq. 136; Cook v. Lowry, 95 N. Y. 103; In re Reed, 45 App. Div. 196, 61 N. Y. Supp. 50.

[61] Voorhees' Adm'rs v. Stoothoff, 11 N. J. Law, 145.

[62] White v. Sherman, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132.

[63] Latimer v. Hanson, 1 Bland (Md.) 51.

fraudulent appropriation of trust funds, a New York court recently said:[64] "The acts of the defendant were not larceny at common law, and not cognizable in a criminal prosecution. The underlying concept of larceny at common law was an initial *trespass* and *trover*. Where there was no trespass, there was no larceny, though trespass and trover in themselves were not necessarily larceny. * * * The defendant's conduct amounted to what was known formerly as 'a criminal breach of trust,' and until quite recent times was cognizable only in a court of equity and punishable only as contempt of court, where restitution was not made in obedience to a judgment so decreeing. * * * Nor did the defendant's act come within the scope of the early statutes creating the crime of embezzlement, which statutes were enacted to meet some of the deficiencies of the common-law rules as to larceny."

But modern statutes frequently make the appropriation of the trust property by the trustee larceny or embezzlement, so that the cestui que trust has the additional remedy of prosecuting the trustee for a crime, and in some cases collecting a fine from him under the criminal law.[65]

[64] People v. Shears, 158 App. Div. 577, 580, 143 N. Y. Supp. 861.

[65] The New York statute (Penal Law [Consol. Laws, c. 40] § 1302) may be taken as a sample. It reads as follows: "A person acting as executor, administrator, committee, guardian, receiver, collector or trustee of any description, appointed by a deed, a will, or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, thing in action, security, evidence of debt or of property, or other valuable thing, or any proceeds thereof, in his possession or custody by virtue of his office, employment, or appointment, is guilty of grand or petit larceny in such degree as is herein prescribed, with reference to the amount of such property; and upon conviction, in addition to the punishment in this article prescribed for such larceny, may be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding, concealment, and twenty per centum thereon, in addition, and to be imprisoned for not more than five years in addition to the term of his sentence for larceny, according to this article, unless the fine is sooner paid."

See, also, Pen. Code Ariz. 1913, § 503, construed in Wooddell v. Arizona, 187 Fed. 739, 109 C. C. A. 487; Park's Ann. Pen. Code Ga. § 188; Purdon's Dig. Pa. (13th Ed.) p. 940, construed in Commonwealth v. Levi, 44 Pa. Super. Ct. 253.

PERSONAL LIABILITY OF THIRD PERSON

121. Where a third person alone, or in conjunction with the trustee, commits a wrongful act injuriously affecting the interest of the cestui que trust, the latter may hold the third person liable in damages.

When the trustee defaults, the cestui que trust may also have a remedy against the sureties upon the trustee's bond. The extent and nature of this remedy will depend upon the terms of the bond and the rules of suretyship.

The liability of a third person to the beneficiary, when the former joins with the trustee in a breach of the trust, or commits an independent tort affecting the trust property, is self-evident; but a statement of it and illustrations are inserted for the sake of completeness.

A stranger to the trust cannot convert the trust res to his own use without liability to the cestui que trust,[66] nor can he participate in a conversion by the trustee,[67] or in a wrongful sale,[68] or fraudulently induce a transfer of the trust property to him,[69] without rendering himself liable to an action for damages. "The law holds all persons aiding and assisting trustees of any character, with a knowledge of their misconduct in misapplying assets, directly accountable to the party injured, * * * and persons thus wronged may proceed against the trustees and their coadjutors jointly or severally at their option." [70]

Actions Against Sureties

As has been previously shown,[71] the trustee often gives a bond for the faithful performance of his duties and is joined in this bond by sureties. The question when such a bond will afford a cestui a remedy against a surety upon it depends partly upon the language and intent of the bond. Ordinarily the misapplication of trust funds by the trustee,[72] the failure of the trustee to turn over the

[66] Jones v. Cole, 2 Bailey (S. C.) 330.

[67] Bigham v. Coleman, 71 Ga. 176; Hickson v. Bryan, 75 Ga. 392; Stratton v. Stratton's Adm'r, 149 Ky. 473, 149 S. W. 900; Mook v. Akron Savings & Loan Co., 87 Ohio St. 273, 101 N. E. 278; Covington v. Anderson, 16 Lea (Tenn.) 310.

[68] Cocke v. Minor, 25 Grat. (Va.) 246; Patteson v. Horsley, 29 Grat. (Va.) 263.

[69] Kentucky Wagon Mfg. Co. v. Jones & Hopkins Mfg. Co., 248 Fed. 272, 160 C. C. A. 350; Polkowitz v. Nash, 87 N. J. Eq. 489, 100 Atl. 564.

[70] Hickson v. Bryan, 75 Ga. 392, 396.

[71] See ante, § 77.

[72] State v. Thresher, 77 Conn. 70, 58 Atl. 460; McKim v. Blake, 139 Mass. 593, 2 N. E. 157; McIntire v. Linehan, 178 Mass. 263, 59 N. E. 767.

trust property to his successor [73] or to render an account required by statute,[74] or the mixture of trust and private funds by the trustee with consequent loss [75] is a default which will render the surety liable. Whether the surety becomes liable for defaults occurring before the execution of the bond is a question the answer to which depends upon the wording and intention of the bond. In some cases the wording has been broad enough to cover transactions occurring prior to the bond,[76] while in others the wording has been prospective, and led to a decision that future acts of the trustee only were to be covered.[77]

In whose name the action against the surety should be brought depends upon the terms of the bond. Such bonds frequently run to the judge of the probate court,[78] the county judge,[79] or to the state.[80] The public officer or body, however, is merely the nominal plaintiff, and the cestuis que trust are the real parties in interest,[81] as is illustrated where the statute of limitations is involved.[82] When the bond runs to the clerk or master of an equity court, the cestui cannot sue without leave of court.[83]

The nature of the surety's liability and the conditions precedent to fixing responsibility upon him are questions of the law of suretyship, not of trusts. Ordinarily the surety's liability is secondary to that of the trustee, and cosureties are equally liable among themselves.[84] In pursuance of this rule the cestui has been required to prosecute an action against the trustee to have the amount of the default decreed before seeking recovery from the surety; [85] but in

[73] State v. Howarth, 48 Conn. 207; State v. Hunter, 73 Conn. 435, 47 Atl. 665; Haddock v. Perham, 70 Ga. 572; Bogard v. Planters' Bank & Trust Co. (Ky.) 112 S. W. 872; Bassett v. Granger, 136 Mass. 174; McKim v. Doane, 137 Mass. 195.

[74] Prindle v. Holcomb, 45 Conn. 111.

[75] Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609.

[76] Ladd v. Smith (Ala.) 10 South. 836; Comegys v. State, 10 Gill. & J. (Md.) 175; Commonwealth v. Fidelity & Deposit Co. of Maryland, 224 Pa. 95, 73 Atl. 327, 132 Am. St. Rep. 755.

[77] State v. Hunter, 73 Conn. 435, 47 Atl. 665; Lamar v. Walton, 99 Ga. 356, 27 S. E. 715; State v. Banks, 76 Md. 136, 24 Atl. 415; Thomson v. American Surety Co. of New York, 170 N. Y. 109, 62 N. E. 1073.

[78] Bassett v. Granger, 136 Mass. 174.

[79] Meyer v. Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

[80] Commonwealth v. Allen, 254 Pa. 474, 98 Atl. 1056; State v. Graham, 115 Md. 520, 81 Atl. 31.

[81] Close v. Farmers' Loan & Trust Co., 195 N. Y. 92, 87 N. E. 1005.

[82] Pearson v. McMillan, 37 Miss. 588.

[83] Floyd v. Gilliam, 59 N. C. 183.

[84] Clagett v. Worthington, 3 Gill (Md.) 83. But in Harmon v. Weston, 215 Mass. 242, 102 N. E. 470, the surety and the principal were held jointly liable.

[85] Crane v. Moses, 13 S. C. 561.

cases where the trustee is a nonresident,[86] or a bankrupt, fugitive from justice, and of unknown residence,[87] this requirement of prior action against the trustee has been dispensed with. The courts are not in harmony upon the effect to be given to a decree against the trustee adjudging him in default and fixing the amount of the defalcation. Some have held such decree prima facie evidence of the fact and amount of the surety's liability;[88] others have treated it as conclusive upon the surety.[89] Yet other courts have held that the surety was not at all bound by a proceeding against the trustee to which he was not a party,[90] or that he was bound only when he had agreed by his bond to be bound by such adjudication.[91] In discussing the question a Pennsylvania court recently said:[92] "As to official bonds, bonds of indemnity, and bonds to insure the faithful performance of duty and to secure a proper accounting by persons in fiduciary relations, the rule of our cases seems to be that a judgment against the principal is conclusive against his sureties as to his misconduct and failure properly to account. In this class of cases, the surety submits himself to the acts of his principal and to the judgment as a legal consequence, following the scope of the suretyship." And Winslow, J., speaking in a Wisconsin case, has said:[93] "Whatever may be the rule in other jurisdictions, this court has definitely adopted the rule that sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of the proper court, rendered upon an accounting by their principal, as to the amount of the principal's liability; and this is the rule, even though the sureties be not parties to the accounting."

[86] Yates v. Thomas, 35 Misc. Rep. 552, 71 N. Y. Supp. 1113.

[87] Commonwealth v. Allen, 254 Pa. 474, 98 Atl. 1056.

[88] Haddock v. Perham, 70 Ga. 572; Cully v. People, to Use of Dunlap, 73 Ill. App. 501.

[89] State v. Banks (Md.) 24 Atl. 540; Appeal of Glover, 167 Mass. 280, 45 N. E. 744; Commonwealth v. Fidelity & Deposit Co. of Maryland, 224 Pa. 95, 73 Atl. 327, 132 Am. St. Rep. 755; Meyer v. Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

[90] Thomson v. American Surety Co. of New York, 170 N. Y. 109, 62 N. E. 1073.

[91] People ex rel. Collins v. Donohue, 70 Hun, 317, 24 N. Y. Supp. 437.

[92] Commonwealth v. Fidelity & Deposit Co. of Maryland, 224 Pa. 95, 102, 73 Atl. 327, 132 Am. St. Rep. 755.

[93] Meyer v. Barth, 97 Wis. 352, 355, 72 N. W. 748, 65 Am. St. Rep. 124.

PERSONAL LIABILITY AND A LIEN

122. Where the trustee has been guilty of a breach of trust and has the trust res or its substitute in his hands, the cestui que trust may elect to hold the trustee personally liable and enforce the liability by means of a lien upon the res or substitute.

In treating the questions of the personal liability of the trustee and third persons in preceding sections, it has been assumed that any judgment or decree against the defendant would be collected out of the general assets of the defendant, and that no preference would be given to the judgment creditor, the cestui que trust, except as the docketing of his judgment or the levying of his execution might entitle him to superiority.

But, if the trustee who has defaulted has in his hands the trust res or its substitute, the right of the cestui que trust to hold the trustee to personal liability may be supplemented by a lien upon the res or its substitute. The cestui may obtain a judgment or decree that the defendant pay money, and also that such payment be enforced by the sale of the trust res or its substitute, if necessary. This action proceeds upon the theory that the res or its substitute belongs to the defendant, and that his property is being sold to satisfy his debt.[94] Thus, in cases where the trust property had been misapplied by the trustee and the proceeds invested,[95] or where the trustee had made a wrongful investment,[96] or where the trustee had mixed trust and personal funds and invested them in land,[97] it has been held that the cestui que trust might hold the trustee personally liable and enforce the liability by foreclosing a lien on the trust property or its substitute in the trustee's hands. In Will of Mendel a trustee was directed to invest the funds in "first-class interest-bearing real estate mortgage securities." It being held that the securities actually purchased were improper investments under this direction, the cestuis were allowed to hold the trustee personally liable and to enforce an equitable lien upon the securities.

[94] Malone v. Malone, 151 Mich. 680, 115 N. W. 716; Wood v. Stafford, 50 Miss. 370 (semble); Crawford v. Jones, 163 Mo. 577, 63 S. W. 838; Massey v. Alston, 173 N. C. 215, 91 S. E. 964; Thum v. Wolstenholme, 21 Utah, 446, 61 Pac. 537.

[95] Citizens' Bank of Paso Robles v. Rucker, 138 Cal. 606, 72 Pac. 46; Hinsey v. Supreme Lodge K. of P., 138 Ill. App. 248; Newis v. Topfer, 121 Iowa, 433, 96 N. W. 905.

[96] Primeau v. Granfield (C. C.) 184 Fed. 480.

[97] Bohle v. Hasselbroch, 64 N. J. Eq. 334, 51 Atl. 508, 61 L. R. A. 323.

The court said:[98] "Counsel for appellant contend that the judgment, affording respondents the benefit of the securities, so far as money can be realized therefrom, to restore the trust funds, is inconsistent with the judgment against the guilty trustee for the money improperly diverted; that appellant cannot have the securities in question and have a judgment for a recovery of the money invested therein, as well. The difficulty with that is that the judgment does not proceed upon the theory that the title to the securities is in the trustees, or that they are to have them; but rather upon the ground that the securities have been rejected, subject to an equitable lien thereon in favor of the trust fund. We do not perceive any difficulty in that. This is not a case of following the trust fund into the property in which it has been improperly invested, and claiming such property, and, at the same time, claiming to recover the fund upon personal liability therefor. * * * The trustees do not claim the securities. They claim that, in equity, they are entitled to hold them as property of the wrongdoer, charged with a lien to make good, so far as practicable, the damage caused by the wrong. There can be no doubt but what the cestui que trust, in such circumstances as exist here, may retain the property and thereby ratify the wrong, or reject it and claim damages for the wrongful investment therein, or claim such damages and charge such property, as belonging to the wrongdoer, with a lien for the damages suffered."

PERSONAL LIABILITY OR RECOVERY OF THE TRUST RES

123. Where the trustee or a third person has rendered himself personally liable to the cestui que trust by committing or joining in a breach of trust, and the trust res involved, or its substitute, can be traced into the hands of one not a bona fide taker for value, the cestui que trust may elect between the remedy of personal liability and that of following the trust res or its substitute.

It frequently happens that the trustee has committed a breach of trust and rendered himself personally liable, and that the trust property affected by this breach of trust, or its substitute, can be traced into the hands of the trustee or a third person. And also a third person may make himself personally liable by a joinder in a breach of trust or by other tort, and the trust res or its substitute

[98] 164 Wis. 136, 143-144, 159 N. W. 806.

may likewise be available. The question arising in these situations is whether the cestui que trust is confined to a money decree against the trustee or third person, or whether he must pursue his trust property, or whether he may have the benefit of both remedies, or whether he must make an election.

It is universally held that the cestui has the election of taking a money judgment against the wrongdoer or of tracing the trust property.[99] This right to elect exists, whether the property involved is in the hands of the trustee [1] or of a third person,[2] so long as the third person is affected by notice of the trust or has not paid value for the property. The trustee cannot compel the beneficiary to resort to either remedy. "Now, it is well settled that, when a trustee uses the property of the trust for his own benefit, the true owner is not compelled to follow the property, even though he might be able, by proving notice, to follow it successfully. He has his option, in such a case, to sue the trustee or follow the property. It would be monstrous to permit the trustee, in such cases, to say: 'Yes; I have used the trust property; I have got the benefit of that use; but you can prove that the party now in possession had notice of your claim. He trusted, it is true, to my statements; but he ought to have known me better. Your remedy is on him.' The rule is well established that the cestui que trust may sue the trustee, even though it appear that he has a right also to sue the person dealing with the trustee." [3]

Examples of the exercise of this right of election are found in cases where the trustee has made an unlawful investment, and the cestui que trust has had the option of taking the investment or of holding the trustee for the trust money thus invested, with interest.[4] And likewise where the trustee wrongfully withdraws

[99] Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Woodrum v. Washington Nat. Bank, 60 Kan. 44, 55 Pac. 333.

[1] Small v. Hockinsmith, 158 Ala. 234, 48 South. 541; Phinizy v. Few, 19 Ga. 66; Baughman v. Lowe, 41 Ind. App. 1, 83 N. E. 255; MacGregor v. MacGregor, 9 Iowa, 65; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Isom v. First Nat. Bank, 52 Miss. 902; Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000; Prondzinski v. Garbutt, 10 N. D. 300, 86 N. W. 969; In re Carr's Estate, 24 Pa. Super. Ct. 369; Shanks v. Edmondson, 28 Grat. (Va.) 804.

[2] Roberts v. Mansfield, 38 Ga. 452; Parker v. Straat, 39 Mo. App. 616; Treadwell v. McKeon, 7 Baxt. (Tenn.) 201; D. Sullivan & Co. v. Ramsey (Tex. Civ. App.) 155 S. W. 580.

[3] Roberts v. Mansfield, 38 Ga. 452, 458, 459. But in Crutchfield v. Haynes, 14 Ala. 49, it was held that, where the trustee was amply able to respond in

[4] Clark v. Anderson, 13 Bush (Ky.) 111; Baker v. Disbrow, 18 Hun (N. Y.) 29.

money from the trust funds, the cestui may sue for conversion or have the money or its product impounded in the hands of a third party.[5] An administrator who used trust money to buy realty in his own name may be compelled to restore the money or the real property may be subjected to the trust.[6]

Cestui Must Elect

The remedies in rem and in personam are naturally mutually exclusive.[7] It would be unjust to compel a trustee to restore funds unlawfully invested and at the same time to take from him the securities in which he had placed the money. This would be double recovery; it would do more than restore the cestui que trust to his former position. Hence it has been held that bringing action [8] or recovering judgment [9] against the trustee on a claim of personal liability bars later attempts to take the res or its substitute as the property of the beneficiary. The Supreme Court of Oregon in a recent decision has stated the principle as follows:[10] "When a trustee has violated the trust by purchasing property with trust funds and taking the title in his own name, the cestui que trust has the right to elect either to proceed to fasten the trust upon the purchased property, or to proceed against the trustee personally. When with knowledge of the facts he thus makes an election, it is binding upon him, and it cannot be revoked. When a cestui que trust, with knowledge of the facts, elects to proceed against the trustee personally, he waives all right to have the trust impressed upon property purchased with trust funds, but conveyed to the trustee, and, under such conditions, a court has no right to decree that the property so purchased be sold to obtain funds to satisfy the amount due the beneficiary for the violation of the trust." But unless the remedy selected results in satisfying the cestui's claim, the alternate remedy ought not to be barred. Thus, where the cestui recovered judgment against the trustee, but execution upon the judgment was returned nulla bona, it has been held that resort might be had to trust property in the hands of a transferee.[11]

damages, the title of a purchaser from the trustee should not be disturbed, even though the property could have been followed into his hands.

[5] Robinson v. Tower, 95 Neb. 198, 145 N. W. 348.

[6] Merket v. Smith, 33 Kan. 66, 5 Pac. 394.

[7] Barker v. Barker, 14 Wis. 131.

[8] Stoller v. Coates, 88 Mo. 514; Bettencourt v. Bettencourt, 70 Or. 384, 142 Pac. 326.

[9] Carter v. Gibson, 61 Neb. 207, 85 N. W. 45, 52 L. R. A. 468.

[10] Bettencourt v. Bettencourt, 70 Or. 384, 142 Pac. 326, 330.

[11] Barksdale v. Finney, 14 Grat. (Va.) 338.

RECOVERY OF THE TRUST RES OR ITS SUBSTITUTE

124. The cestui que trust may follow the trust res or its substitute into the hands of all persons except purchasers without notice of the trust.

Notice may be actual or constructive, and it may exist because the purchaser had knowledge of facts putting him on inquiry which, if investigated, would have disclosed the trust.

A purchaser is one who pays money or money's worth for the property, or for a lien upon it.

To recover the trust res or its substitute the cestui que trust must trace it into specific property or into a specific fund in the assets of the trustee or other holder. If the disposition of the trust property is unknown, or it has been dissipated so that no tangible product of it remains, the beneficiary stands on the same level as general creditors.

The first payments out of a fund containing several trust funds, but not private moneys, are to be charged to the first deposits. If trust funds and the trustee's private funds are mixed, withdrawals for the trustee's use will be charged to the private funds until they are exhausted.

Deposits of his own money by a trustee to the credit of a fund in which trust and private moneys are mixed will not inure to the benefit of the trust funds, unless expressly made as a restoration of misappropriated trust funds.

A most important remedy available to the cestui que trust is that of recovering the trust res or its substitute from the trustee or a third person.[12] That this remedy exists, subject to qualifications to be explained, whether the property or its product is in the trustee's hands [13] or is held by a third person,[14] is unquestioned. The beneficiary naturally must elect to take one or the other, the original

[12] Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622; Cooper v. Landis, 75 N. C. 526; In re Freas' Estate, 231 Pa. 256, 79 Atl. 513.

[13] Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975; Breit v. Yeaton, 101 Ill. 242; Clifford v. Farmer, 79 Ind. 529; Brothers v. Porter, 6 B. Mon. (Ky.) 106; Freeman v. Maxwell, 262 Mo. 13, 170 S. W. 1150; Lucia Mining Co. v. Evans, 146 App. Div. 416, 131 N. Y. Supp. 280; Frank v. Firestone, 132 App. Div. 932, 116 N. Y. Supp. 700; Berry v. Evendon, 14 N. D. 1, 103 N. W. 748; O'Neill v. O'Neill, 227 Pa. 334, 76 Atl. 26; Wilkinson v. Wilkinson, 1 Head (Tenn.) 305; Kaphan v. Toney (Tenn. Ch. App.) 58 S. W. 909; Mitchell v. Blanchard, 72 Vt. 85, 47 Atl. 98; Overseers of Poor of Norfolk v. Bank of Virginia, 2 Grat. (Va.) 544, 44 Am. Dec. 399; Crumrine v. Crumrine, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859; Hubbard v. Burrell, 41 Wis. 365.

[14] Cobb v. Knight, 74 Me. 253; Chaves v. Myer, 13 N. M. 368, 85 Pac. 233, 6 L. R. A. (N. S.) 793; Barnard v. Hawks, 111 N. C. 333, 16 S. E. 329.

trust property or the substitute, where both are capable of identification.[15] "The law is now well settled that as between the cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." [16] This doctrine has recently been expressed by the Supreme Court of California in the following words: "It is well settled that the beneficiary of a trust may follow and recover the trust fund, if any property in the hands of the trustee or of those taking with notice can be identified, either as the original property of the cestui que trust or as the product of it." [17]

The cestui's right is not that of a lienholder or a preferred creditor. It is based on a property right in the res or its substitute. "The right of the beneficiary to pursue a fund and impose upon it the character of a trust is based on the principle that it is the property of the beneficiary, not upon any right of lien against the wrongdoer's general estate; and this, whether the property sought to be recovered is in the form in which the beneficiary parted with its possession or in a substituted form." [18]

This remedy may be illustrated. If A. is trustee for B., and the original trust res is certain land, A. breaches the trust by selling the land to X., who knows of the breach, and A. then deposits the proceeds of the sale in a bank; B. may follow the original property into the hands of X. and recover it, or he may follow the proceeds of the original property into the bank account and take the claim against the bank as his property.

This right to recover the property is, however, qualified. Its exercise depends upon two considerations, namely: (a) The status of the holder of the property sought to be recovered; and (b) the ability of cestui que trust to identify the property in question as the original trust res or its substitute. These conditions of the exercise of the remedy will be separately considered.

(a) Status of Holder of Property

The cestui que trust can always recover the res or its substitute from the trustee, assuming satisfactory identification; but recovery

[15] Bonner v. Holland, 68 Ga. 718; Cadieux v. Sears, 258 Ill. 221, 101 N. E. 542.

[16] Hill v. Fleming, 128 Ky. 201, 107 S. W. 764, 766, 16 Ann. Cas. 840.

[17] People v. California Safe Deposit & Trust Co., 175 Cal. 756, 167 Pac. 388, 389, L. R. A. 1918A, 1151.

[18] Heidelbach v. Campbell, 95 Wash. 661, 665, 164 Pac. 247. See, also, Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952.

from a third person depends upon the so-called "bona fide purchaser rule." Ames stated this rule as follows:[19] "A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. * * * The purchaser of any right, in its nature transmissible, whether a right in rem or a right in personam, acquires the right free from all equities of which he had no notice at the time of its acquisition." Mr. Justice Story stated the same rule in Oliver v. Piatt as follows:[20] "It is a clearly established principle in that jurisprudence that, whenever the trustee has been guilty of a breach of the trust and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser, for a valuable consideration, without notice."

This rule has been frequently applied, and the holder, where he was a purchaser in good faith, has been protected in his ownership and possession of the property,[21] whether the property was equitable[22] or legal in its nature. So, also, a bona fide purchaser from

[19] 1 Harv. Law Rev. 3, 16. See, also, Kenneson, Purchaser for Value Without Notice, 23 Yale Law J. 193; Searey, Purchaser for Value Without Notice, 23 Yale Law J. 447.

[20] Oliver v. Piatt, 3 How. 333, 401, 11 L. Ed. 622. For a criticism of the rule, see Jenks, The Legal Estate, 24 Law Quart. Rev. 147.

[21] Cole v. Thompson (C. C.) 169 Fed. 729; Sorrells v. Sorrells, 4 Ark. 296; Ricks v. Reed, 19 Cal. 551; In re Lyon's Estate, 163 Cal. 803, 127 Pac. 75; Learned v. Tritch, 6 Colo. 432; Saunders v. Richard, 35 Fla. 28, 16 South. 679; Lewis v. Equitable Mortg. Co., 94 Ga. 572, 21 S. E. 224; McCaskill v. Lathrop, 63 Ga. 96; Carrie v. Carnes, 145 Ga. 184, 88 S. E. 949; Prevo v. Walters, 5 Ill. (4 Scam.) 35; Lennartz v. Popp's Estate, 118 Ill. App. 31; Beckett v. Bledsoe, 4 Ind. 256; Dillon v. Farley, 114 Iowa, 629, 87 N. W. 677; Bailey v. Dyer, 65 S. W. 595, 23 Ky. Law Rep. 1585; Bromley v. Gardner, 79 Me. 246, 9 Atl. 621; Newell v. Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908; Curtis v. Brewer, 140 Mich. 139, 103 N. W. 579; Clark v. Rainey, 72 Miss. 151, 16 South. 499; Shirley v. Shattuck, 28 Miss. 13; Groye v. Robards' Heirs, 36 Mo. 523; McWaid v. Blair State Bank, 58 Neb. 618, 79 N. W. 620; Doremus v. Doremus, 66 Hun, 111, 21 N. Y. Supp. 13; Petrie v. Myers, 54 How. Prac. (N. Y.) 513; Lincoln Soc. of Friends v. Joel (Sup.) 163 N. Y. Supp. 860; McClelland v. Myers, 7 Watts (Pa.) 160; Price v. Krasnoff, 60 S. C. 172, 38 S. E. 413; Schneider v. Sellers, 98 Tex. 380, 84 S. W. 417; Magnolia Park Co. v. Tinsley, 96 Tex. 364, 73 S. W. 5; Martin v. Granger (Tex. Civ. App.) 204 S. W. 666; Waterman v. Cochran, 12 Vt. 699; Love v. Braxton, 5 Call (Va.) 537; Chancellor v. Ashby, 2 Pat. & H. (Va.) 26.

[22] Breedlove v. Stump, 3 Yerg. (Tenn.) 257. "Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of

a trustee who has a voidable title is superior to the cestui que trust.[23]

On the other hand are many cases holding that, if the third person from whom the cestui que trust seeks to recover the trust property either has not paid value therefor, or has been affected with notice of the trust, the cestui may take the property.[24]

Purchaser Must Have Title

In order that one may be a bona fide purchaser his contract must be executed. He must have become the owner of the property, and he must have paid the purchase price. If he has merely contracted to buy the trust res at the time he receives notice of the trust, he is bound by the trust, even though he has paid part or all of the consideration.[25] And if he has received the title to the trust property,

the equity." Ames, Purchaser for Value without Notice, 1 Harv. Law Rev. 1, 9.

[23] Booraem v. Wells, 19 N. J. Eq. 87.

[24] Pennington v. Smith (C. C.) 69 Fed. 188; Harrington v. Atlantic & Pac. Tel. Co. (C. C.) 143 Fed. 329; Hallett v. Collins, 10 How. 174, 13 L. Ed. 376; Jones' Adm'r v. Shaddock, 41 Ala. 262; Randolph v. East Birmingham Land Co., 104 Ala. 355, 16 South. 126, 53 Am. St. Rep. 64; Clemmons v. Cox, 114 Ala. 350, 21 South. 426; Pindall v. Trevor, 30 Ark. 249; Crouse-Prouty v. Rogers, 33 Cal. App. 246, 164 Pac. 901; Bean v. Bean, 39 Cal. App. 785, 180 Pac. 23; Gale v. Harby, 20 Fla. 171; Harris v. Brown, 124 Ga. 310, 52 S. E. 610, 2 L. R. A. (N. S.) 828; Masters v. Mayes, 246 Ill. 506, 92 N. E. 945; Boyer v. Libey, 88 Ind. 235; Sleeper v. Iselin, 62 Iowa, 583, 17 N. W. 922; Gray v. Ulrich, 8 Kan. 112; Farmers' & Traders' Bank of Shelbyville v. Fidelity & Deposit Co. of Maryland, 108 Ky. 384, 56 S. W. 671; Safe-Deposit & Trust Co. v. Cahn, 102 Md. 530, 62 Atl. 819; Elliott v. Landis Mach. Co., 236 Mo. 546, 139 S. W. 356; Logan v. Aabel, 90 Neb. 754, 134 N. W. 523; Mazzolla v. Wilkie, 72 N. J. Eq. 722, 66 Atl. 584; Shepherd v. M'Evers, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; Havana Cent. R. R. Co. v. Knickerbocker Trust Co., 135 App. Div. 313, 119 N. Y. Supp. 1035; Reynolds v. Ætna Life Ins. Co., 28 App. Div. 591, 51 N. Y. Supp. 446, affirmed 160 N. Y. 635, 55 N. E. 305; English v. McIntyre, 29 App. Div. 439, 51 N. Y. Supp. 697; Moloney v. Tilton, 22 Misc. Rep. 682, 51 N. Y. Supp. 19; Winters v. Winters, 34 Nev. 323, 123 Pac. 17; United States Fidelity & Guaranty Co. v. Citizens' State Bank of Langdon, 36 N. D. 16, 161 N. W. 562, L. R. A. 1918E, 326; Fidelity & Deposit Co. of Maryland v. Rankin, 33 Okl. 7, 124 Pac. 71; Lane v. Wentworth, 69 Or. 242, 138 Pac. 468; Hall v. Vanness, 49 Pa. 457; Coble v. Nonemaker, 78 Pa. 501; Jackson v. Thomson, 222 Pa. 232, 70 Atl. 1095; Sullivan v. Lattimer, 35 S. C. 422, 14 S. E. 933; Folk v. Hughes, 100 S. C. 220, 84 S. E. 713; Rabb v. Flenniken, 29 S. C. 279, 7 S. E. 597; Luscombe v. Grigsby, 11 S. D. 408, 78 N. W. 357; Bass v. Wheless, 2 Tenn. Ch. 531; Merchants' Nat. Bank of Ft. Worth v. Phillip & Wiggs Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217; Chadwick v. Arnold, 34 Utah, 48, 95 Pac. 527; Haslam v. Haslam, 19 Utah, 1, 56 Pac. 243; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732; Towle v. Mack, 2 Vt. 19.

[25] Louisville & N. R. R. Co. v. Boykin, 76 Ala. 560; Dugan v. Vattier, 3 Blackf. (Ind.) 246, 25 Am. Dec. 105; Corn v. Sims, 3 Metc. (Ky.) 391; Grimstone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Hoover v. Donally, 3 Hen. & M. (Va.) 316. Contra: Wheaton v. Dyer, 15 Conn. 307, 311.

but has not yet paid the consideration at the time he receives notice, he cannot hold the property against the cestui que trust;[26] or if he has paid part of the consideration can hold the property only upon paying the beneficiary the unpaid portion of the purchase price.[27] In the words of Chancellor Kent:[28] "A plea of a purchase for a valuable consideration, with notice, must be *with the money actually paid*; or else, according to Lord Hardwicke, you are not hurt. The averment must be, not only that the purchaser had not notice, at or before the time of the execution of the deeds, but that the purchase money was paid before notice. There must not only be a denial of notice before the purchase, but a denial of notice before payment of the money." And, as said by a Kentucky court:[29] "It is the well-settled doctrine that a purchaser of land takes subject to the claim of the holder of a prior equity, although such second purchaser may have made his contract, and fully paid the purchase money before he had notice of it, provided he has such notice before his own equity is clothed with the legal title."

The bona fide purchaser may hold the trust res against the cestui que trust even though the former purchased from a volunteer,[30] or from a purchaser with notice of the trust;[31] and a purchaser with notice from a bona fide purchaser without notice is superior to the beneficiary.[32] An Illinois court quotes with approval Story's

[26] Burgett v. Paxton, 99 Ill. 288; Kitteridge v. Chapman, 36 Iowa, 348; Paul v. Fulton, 25 Mo. 156; Patten v. Moore, 32 N. H. 382; Dean v. Anderson, 34 N. J. Eq. 496; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 288; Murray v. Finster, 2 Johns. Ch. (N. Y.) 155; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314.

[27] Dowell v. Applegate (C. C.) 7 Fed. 881; Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221; Marchbanks v. Banks, 44 Ark. 48; Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Green v. Green, 41 Kan. 472, 21 Pac. 586; De Ford v. Orvis, 42 Kan. 302, 21 Pac 1105; Hardin's Ex'rs v. Harrington, 11 Bush. (Ky.) 367; Baldwin v. Sager, 70 Ill. 503; Rhodes v. Green, 36 Ind. 7; Haughwout v. Murphy, 21 N. J. Eq. 118; Phelps v. Morrison, 24 N. J. Eq. 195; Farmers' Loan & Trust Co. v. Maltby, 8 Paige (N. Y.) 361; Sargent v. Eureka Spund Apparatus Co., 46 Hun, 19; Youst v. Martin, 3 Serg. & R. 423; Beck v. Ulrich, 16 Pa. 499; Mitchell v. Dawson, 23 W. Va. 86.

[28] Jewett v. Palmer, 7 Johns. Ch. 65, 68, 11 Am. Dec. 401.

[29] Corn v. Sims, 3 Metc. (Ky.) 391, 400, 401.

[30] Richardson v. Haney, 76 Iowa, 101, 40 N. W. 115. But see Martin v. Fix, 44 Kan. 540, 24 Pac. 954, contra.

[31] Bartlett v. Varner's Ex'r, 56 Ala. 580; Hampson v. Fall, 64 Ind. 382; Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 16 Md. 456, 77 Am. Dec. 311; Wamburzee v. Kennedy, 4 Desaus. (S. C.) 474; Bracken v. Miller, 4 Watts & S. (Pa.) 102.

[32] Brodie v. Skelton, 11 Ark. 120; Lathrop v. White, 81 Ga. 29, 6 S. E. 834; St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556; Bracken v. Miller, 4 Watts & S. (Pa.) 102. But such purchaser is charged with a trust, if the trust is recog-

statement that "a purchaser with notice may protect himself by purchasing the title of another bona fide purchaser for a valuable consideration without notice; for, otherwise, such bona fide purchaser would not enjoy the full benefit of his own unexceptionable title." [33] If the title of the bona fide purchaser is good, it must be good for sale purposes, as well as a foundation for use and occupation. But the wrongdoing trustee, himself, may not get good title from a bona fide purchaser.[34] If he could, the door would be open for grave frauds on his part. If the trustee wrongfully transfers the trust res, and later purchases it from one who holds it innocently as a purchaser for value, the res will be affected with the trust in the hands of the trustee, just as it was originally.

Reason for Rule

The reason for the bona fide purchaser rule has been shown by Langdell to lie in the nature of equitable jurisdiction. "The reason why all equitable rights to property are lost the moment the legal ownership is transferred for value to a person who has no notice that it is subject to any equitable rights will be found in the fundamental nature of equitable jurisdiction, as explained in previous paragraphs. It is only by a figure of speech that a person who has not the legal title to property can be said to be the equitable owner of it. What is called equitable ownership, or equitable title, or an equitable estate, is in truth only a personal claim against the real owner; for equity has no jurisdiction in rem, and cannot, therefore, confer a true ownership, except by its power over the person with whom the ownership resides, i. e., by compelling him to convey. Thus, if A. has been clothed with the ownership of property for the sole purpose of holding it for the benefit of B., or if, being the owner, he has made a valid agreement with B. to convey it to him, or if A., though the owner of the property, acquired his title from B. by fraud; in each of these cases, equity will compel A. to convey to B.; and it is only because of this personal right of B. against A. (and because equity often creates a semblance of true ownership by treating what ought to be done as having been done), that B. can be said to be the owner

nized and administered. Appeal of Booth, 35 Conn. 165. "Undoubtedly if a person, though with notice, purchases from one without notice, he is entitled to stand in his shoes, and take shelter under his bona fides. If it were not so the bona fide purchaser without notice might be unable to dispose of the property, and thus its value in his hands be materially deteriorated. But if the second purchaser in such case be the original trustee, who reacquires the estate, he will be fixed with the trust. * * *" Church v. Ruland, 64 Pa. 432, 444.

[33] St. Joseph Mfg. Co. v. Daggett, 84 Ill. 556, 564.

[34] Oliver v. Platt, 3 How. 333, 11 L. Ed. 622; Church v. Church, 25 Pa. 278; Church v. Ruland, 64 Pa. 432.

of the property in equity. If, therefore, A. transfer the property to C., B.'s remedy in respect to the property will be gone, unless C. be privy to B.'s equity; i. e., unless he have notice of it express or implied. If he paid nothing for the property (e. g., if he received it as a gift, or in payment of a debt, or upon credit), the law will imply notice against him, and thus establish privity; but if he paid for the property its full value, and had no knowledge or notice of B.'s equity when he made the payment, it will be impossible to subject the property to B.'s claim without holding that the latter is a right in rem." [35]

The courts have sometimes suggested that the reason for the rule lay in the maxim, "Where the equities are equal, the law shall prevail," or in the fact that the conduct of the cestui in placing the property in the hands of the trustee has made possible the wrongdoing of the trustee; [36] or in the rule that "an innocent person shall not in general have his title impeached." [37]

Burden of Proof

Upon the subject of the burden of proof in the application of the bona fide purchaser rule the authorities are not harmonious. Some cases require the cestui que trust to allege and prove that the holder of the property was not a purchaser for value without notice; [38] others put the onus on the property holder to prove good faith and payment of value. [39] The reasoning of Dean Langdell is instructive, though not followed by many courts. "It follows, from what has already been said, that it is never a part of the plaintiff's case in equity (more than at law) to allege or prove that he is a purchaser for value without notice. If he has the legal title, such allegation or proof will be unnecessary; if he has not the legal title, it will be useless. It is only in reference to a defendant, therefore, that such an inquiry can arise; and it will always arise as to a defendant who has the legal title to property, and whom a plaintiff attempts to charge with an equity in respect to such property, upon the sole ground that he is in privity with the person originally subject to the equity. It has generally been supposed or assumed that a defendant under such circumstances has the burden of alleging and

[35] Summary of Equity Pleading, 90.

[36] Behrmann v. Seybel, 178 App. Div. 862, 869, 166 N. Y. Supp. 254.

[37] Groye v. Robards' Heirs, 36 Mo. 523, 525. See, also, Scott v. Gallagher, 14 Serg. & R. (Pa.) 333, 16 Am. Dec. 508.

[38] Bartlett v. Varner's Ex'r, 56 Ala. 580; Wyrick v. Weck, 68 Cal. 8, 8 Pac. 522; Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166, 31 Am. St. Rep. 209; Harris v. Stone, 15 Iowa, 273; Oaks v. West (Tex. Civ. App.) 64 S. W. 1033.

[39] Buford v. McCormick, 57 Ala. 428; Kaiser v. Waggoner, 59 Iowa, 40, 12 N. W. 754; Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490; Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115; Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143.

proving his purchase for value as an affirmative defense; and this view is countenanced by the fact that otherwise the plaintiff may be required to allege and prove a negative. It seems, however, that the plaintiff clearly has no case against the defendant until it is made to appear that the latter is privy to the plaintiff's equity; and, if so, the burden is on the plaintiff to allege and prove that the defendant had notice in fact of his equity, or that he paid no value, and so had notice in law." [40]

What is Notice?

To affect a purchaser with notice it is not essential that it be shown that he knew who the cestuis que trust were or the precise terms of the trust. It is sufficient that he knew there was a trust.[41] Notice to an agent acting within the scope of his authority is notice to the principal.[42] Thus, knowledge of a bank cashier may prevent a bank from being a purchaser in good faith; [43] but a corporation is not charged with the knowledge of an officer of it who acted solely for his own benefit in the transaction,[44] nor is notice to a mere advisor sufficient.[45] Where a trustee buys an interest in a partnership with trust funds, the other partners are not charged with notice of the trust.[46] Notice to a trustee affects the cestuis que trust.[47]

If the trust property is represented by a document, as, for example, a bond, certificate of stock, or note, and it appears on the face of such document that the holder owns as trustee, a purchaser will be held to have notice of the trust.[48] But in some cases the

[40] Summary of Equity Pleading, 90, 91.

[41] Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Zuver v. Lyons, 40 Iowa, 510; Jeffray v. Towar, 63 N. J. Eq. 530, 53 Atl. 182. But see Conner v. Tuck, 11 Ala. 794.

[42] Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Stewart v. Greenfield, 16 Lea (Tenn.) 13.

[43] Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142; Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98.

[44] Weber v. Richardson, 76 Or. 286, 147 Pac. 522, 1199.

[45] McNamara v. McNamara, 62 Ga. 200.

[46] Gilruth v. Decell, 72 Miss. 232, 16 South. 250; Hollembaek v. More, 44 N. Y. Super. Ct. 107.

[47] In Newell v. Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908, B. was trustee of the N. trust and of the P. trust. Having stolen money from the P. trust, he stole funds from the N. trust and replaced his withdrawals from the P. trust. The beneficiaries under the P. trust were held liable to the N. trust for the N. funds so used by B. to make good his thefts. B. represented the beneficiaries of the P. trust, and his knowledge of the transaction bound them. For a criticism of this case, see West, Money Stolen by a Trustee from One Trust and Used for Another, 25 Harv. Law Rev. 602.

[48] Duncan v. Jaudon, 15 Wall. 165, 21 L. Ed. 142; Eldridge v. Turner, 11

bare word "trustee" in the paper has not been deemed sufficient to charge a purchaser with notice,[49] as, for example, where a search to learn the extent of the trustee's power of sale would have been fruitless, because it would have led the purchaser to records from which no information could have been obtained, or to the trustee who might have deceived the purchaser.[50]

Frequently the purchaser receives constructive notice,[51] or is put on inquiry,[52] by the record of a deed or other instrument in his chain of title; but a deed which is not a link in that chain, but is between third parties, will not act as constructive notice.[53] It has been held that, if the purchaser makes diligent inquiry of the records and does not learn of an instrument which reveals the trust, because of an error of the clerk, the purchaser is not bound by constructive notice.[54] A voidable deed in the chain of title, as, for example, from an executor to himself, does give the purchaser notice of a constructive trust.[55] A lis pendens may prevent the purchaser of the trust res from being a purchaser in good faith.[56]

Ala. 1049; Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; Turner v. Hoyle, 95 Mo. 337, 8 S. W. 157; Gaston v. American Exch. Nat. Bank, 29 N. J. Eq. 98; Harrison v. Fleischman, 70 N. J. Eq. 301, 61 Atl. 1025; Swan v. Produce Bank, 24 Hun (N. Y.) 277; Stoddard v. Smith, 11 Ohio St. 581; Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80; Simons v. Southwestern R. Bank, 5 Rich. Eq. (S. C.) 270.

[49] Ashton v. President, etc., of Atlantic Bank, 3 Allen (Mass.) 217; Rua v. Watson, 13 S. D. 453, 83 N. W. 572; Lincoln Sav. Bank v. Gray, 12 Lea (Tenn.) 459.

[50] Grafflin v. Robb, 84 Md. 451, 35 Atl. 971.

[51] Gaines v. Summers, 50 Ark. 322, 7 S. W. 301; Bazemore v. Davis, 55 Ga. 504; Dean v. Long, 122 Ill. 447, 14 N. E. 34; Hagan v. Varney, 147 Ill. 281, 35 N. E. 219; Martin v. Fix, 44 Kan. 540, 24 Pac. 954; Knowles v. Williams, 58 Kan. 221, 48 Pac. 856; Hagthorp v. Hook's Adm'rs, 1 Gill & J. (Md.) 270; Turner v. Edmonston, 210 Mo. 411, 109 S. W. 33, 124 Am. St. Rep. 739; Johnson v. Prairie, 91 N. C. 159; Barrett v. Bamber, 81 Pa. 247; Simmons v. Dinsmore, 56 Tex. 404; Stone v. Kahle, 22 Tex. Civ. App. 185, 54 S. W. 375; Mansfield v. Wardlow (Tex. Civ. App.) 91 S. W. 859; Graff v. Castleman, 5 Rand. (Va.) 195, 16 Am. Dec. 741; Heth v. Richmond, F. & P. R. Co., 4 Grat. (Va.) 482, 50 Am. Dec. 88; Justis v. English, 30 Grat. (Va.) 565; Morgan v. Fisher's Adm'r, 82 Va. 417. But see Riley v. Cummings, 37 App. Div. 512, 56 N. Y. Supp. 60.

[52] Hassey v. Wilke, 55 Cal. 525; Webber v. Clark, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748; Mercantile Nat. Bank of Cleveland v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299.

[53] Moore v. Hunter, 6 Ill. (1 Gilman) 317; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Claiborne v. Holland, 88 Va. 1046, 14 S. E. 915.

[54] Newark Aqueduct Co. v. Joralemon, 7 N. J. Eq. 304.

[55] Cox v. Barber, 68 Ga. 836.

[56] Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566.

Open, notorious, and exclusive possession [57] of real property by a cestui que trust has been held to give a purchaser notice of the rights of the cestui,[58] or at least to put him on inquiry.[59] "What shall be deemed constructive notice in cases of this kind has been much discussed in courts, and we consider it as perfectly well settled that open exclusive possession is sufficient notice to all the world of any claim which one who is so in possession has upon the land. It is not to be supposed that any man, who wishes to purchase land honestly, will buy it without knowing what are the claims of a person who is in the open possession of it." [60] In the words of the Supreme Court of North Dakota: "An open, notorious, and adverse possession of real property is notice to the world of every right or interest owned or held by the person in possession, whether such right be legal or equitable." [61] But where a widow claims that heirs hold land in trust for her, joint occupancy by the widow and the heirs is not notice of the widow's claim to a purchaser from the heirs; [62] nor is there constructive notice of a claim by a mother-in-law, when the occupation is joint between her and her son-in-law,[63] or of an alleged equity in favor of a housekeeper, where she lives with her employer.[64] Exclusive and open possession of part of the property by a cestui is constructive notice of his claim to the whole,[65] and possession by one of several cestuis que trust of part of the land binds a purchaser with notice of the claims of all cestuis to all the land.[66]

Inadequacy of Consideration

Gross inadequacy of consideration paid alone may warrant a finding of notice, since such a fact would inevitably lead a reason-

[57] Beaubien v. Hindman, 38 Kan. 471, 16 Pac. 796.

[58] McVey v. McQuality, 97 Ill. 93; McDaniel v. Peabody, 54 Iowa, 305, 6 N. W. 538; Rogers v. Scarff, 3 Gill (Md.) 127; Jones v. Johnson Harvester Co., 8 Neb. 446, 1 N. W. 443; Oberlender v. Butcher, 67 Neb. 410, 93 N. W. 764; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Ferrin v. Errol, 59 N. H. 234; Flaherty v. Cramer, 62 N. J. Eq. 758, 48 Atl. 565; Grimstone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; Ross v. Hendrix, 110 N. C. 403, 15 S. E. 4; Krause v. Krause, 30 N. D. 54, 151 N. W. 991; Petrain v. Kiernan, 23 Or. 455, 32 Pac. 158. Contra: Scott v. Gallagher, 14 Serg. & R. (Pa.) 333, 16 Am. Dec. 508.

[59] Witter v. Dudley, 42 Ala. 616; Morrison v. Kelly, 22 Ill. 609, 74 Am. Dec. 169; Bowman v. Anderson, 82 Iowa, 210, 47 N. W. 1087, 31 Am. St. Rep. 473.

[60] Pritchard v. Brown, 4 N. H. 397, 404, 17 Am. Dec. 431.

[61] Krause v. Krause, 30 N. D. 54, 151 N. W. 991, 996.

[62] Carroll v. Draughon, 173 Ala. 327, 56 South. 207.

[63] Ellis v. Young, 31 S. C. 322, 9 S. E. 955.

[64] Harris v. McIntyre, 118 Ill. 275, 8 N. E. 182.

[65] Davis v. Hendrix, 192 Ala. 215, 68 South. 863.

[66] Ramirez v. Smith, 94 Tex. 184, 59 S. W. 258.

able man to believe that the title of his purchaser was defective or subject to an equity or burden.[67] A purchaser at a sheriff's or other judicial sale is held to be a purchaser in good faith, in the absence of actual notice. The character of the sale to him charges him with no constructive notice of equities.[68]

Facts Putting on Inquiry

If the purchaser learns of facts which, while not conclusively showing the existence of a trust with respect to the property in question, tend to excite suspicion or arouse doubt regarding the title, he will be charged with notice of such further facts as he could have ascertained by the use of reasonable diligence.[69] Thus, that the purchaser knew that a note which he bought was given for property sold by a trustee,[70] or that his grantor paid an inadequate consideration to the trustee for the property,[71] or that another had made some kind of claim to the property,[72] or that suits affecting the property were pending,[73] or that his assignor had been described as "trustee" in a paper affecting the property,[74] or that securities were trust securities and being pledged by a trustee to secure a private debt,[75] or that the records showed an indirect transfer of the property from the trustee to himself,[76] will put the purchaser upon inquiry. Information should be sought from other sources than the trustee, for he is not impartial.[77] If he wrongfully transferred the trust property, or committed another breach of trust, he will not be apt to admit it. "It is well established that one who has reason to believe that another is offering property for sale, which he holds

[67] Carpenter v. Robinson, Fed. Cas. No. 2431; Gaines v. Summers, 50 Ark. 322, 7 S. W. 301; Storrs v. Wallace, 61 Mich. 437, 28 N. W. 662; Condit v. Bigalow, 64 N. J. Eq. 504, 54 Atl. 160; Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

[68] Fahn v. Bleckley, 55 Ga. 81; Elting v. First Nat. Bank of Biggsville, 173 Ill. 368, 50 N. E. 1095; Hampson v. Fall, 64 Ind. 382; Catherwood v. Watson, 65 Ind. 576; Gifford v. Bennett, 75 Ind. 528; Rooker v. Rooker, 75 Ind. 571; Jackson ex dem. Lansing v. Chamberlain, 8 Wend. (N. Y.) 620; Lessee of Paine v. Mooreland, 15 Ohio, 435, 45 Am. Dec. 585.

[69] Bradley v. Merrill, 88 Me. 319, 34 Atl. 160; Condit v. Maxwell, 142 Mo. 266, 44 S. W. 467; Prall v. Hamil, 28 N. J. Eq. 66; Jeffray v. Towar, 63 N. J. Eq. 530, 53 Atl. 182; Federal Heating Co. v. City of Buffalo, 182 App. Div. 128, 170 N. Y. Supp. 515; Blaisdell v. Stevens, 16 Vt. 179.

[70] Bunting v. Ricks, 22 N. C. 130, 32 Am. Dec. 699.

[71] Hume v. Franzen, 73 Iowa, 25, 34 N. W. 490.

[72] Austin v. Dean, 40 Mich. 386; Cain v. Cox, 23 W. Va. 594.

[73] Swoope v. Trotter, 4 Port. (Ala.) 27.

[74] Pendleton v. Fay, 2 Paige (N. Y.) 202.

[75] Loring v. Brodie, 134 Mass. 453.

[76] Beckett v. Tyler, 3 MacArthur (D. C.) 319.

[77] Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 19 C. C. A. 130; Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173. Contra: Mercantile Nat. Bank of Cleveland v. Parsons, 54 Minn. 56, 55 N. W. 825, 40 Am. St. Rep. 299.

either as trustee or agent for a third person, cannot become a bona fide purchaser of the property for value by reliance on the statements of the suspected trustee or agent, either as to his authority or as to his beneficial ownership of the thing sold. In such a case, inquiry must be made of some one other than the agent or trustee—of some one who will have a motive to tell the truth, in the interest of the cestui que trust or principal." [78]

Who is a Purchaser?

A purchaser is one paying money or money's worth for the property. Therefore a donee inter vivos,[79] a legatee or devisee of the trustee,[80] or one taking by operation of law from the trustee,[81] is not entitled to protection, even though he may have taken the property innocently. "A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn, if he takes it without consideration, whether he has notice of the trust or not. This has been settled for three hundred years, since the time of uses." [82]

The giving of a note for the price does not constitute the maker a purchaser, unless the note has been negotiated by the payee and thus the maker absolutely bound upon it.[83]

The cancellation of an antecedent debt has not generally been regarded as value under the bona fide purchaser rule, since the debt could be reinstated if the property transferred were taken away from the creditor.[84]

[78] Jonathan Mills Mfg. Co. v. Whitehurst, 72 Fed. 496, 502, 19 C. C. A. 130.

[79] Joslyn v. Downing, Hopkins & Co., 150 Fed. 317, 80 C. C. A. 205; Lehnard v. Specht, 180 Ill. 208, 54 N. E. 315; Jacobs v. Jacobs, 130 Iowa, 10, 104 N. W. 489, 114 Am. St. Rep. 402; Otis v. Otis, 167 Mass. 245, 45 N. E. 737; Davis v. Downer, 210 Mass. 573, 97 N. E. 90; Attorney General v. Bedard, 218 Mass. 378, 105 N. E. 993; Edwards v. Welton, 25 Mo. 379; Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61; Weber v. Richardson, 76 Or. 286, 147 Pac. 522; Appeal of Sadler, 87 Pa. 154; Metzger v. Lehigh Valley Trust & Safe Deposit Co., 220 Pa. 535, 69 Atl. 1037.

[80] Evans v. Moore, 247 Ill. 60, 93 N. E. 118, 139 Am. St. Rep. 302; Talbott v. Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491; McCants v. Bee, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610; Kluender v. Fenske, 53 Wis. 118, 10 N. W. 370.

[81] Derry v. Derry, 74 Ind. 560.

[82] Holmes, J., in Otis v. Otis, 167 Mass. 245, 246, 45 N. E. 737.

[83] Davis v. Ward, 109 Cal. 186, 41 Pac. 1010, 50 Am. St. Rep. 29; Partridge v. Chapman, 81 Ill. 137; Jones v. Glathart, 100 Ill. App. 630; Kitteridge v. Chapman, 36 Iowa, 348; Rush v. Mitchell, 71 Iowa, 333, 32 N. W. 367; Freeman v. Deming, 3 Sandf. Ch. (N. Y.) 327. In Citizens' Bank of Parker v. Shaw, 14 S. D. 197, 84 N. W. 779, it was held the note constituted value, even though not negotiated.

[84] Orb v. Coapstick, 136 Ind. 313, 36 N. E. 278; Swift v. Williams, 68 Md. 236, 11 Atl. 835; Reeves v. Evans (N. J. Ch.) 34 Atl. 477; Wilson v. Doster, 42

An assignee for the benefit of creditors stands in the shoes of his assignor, and takes subject to all equities which affected the property at the time of the assignment. He is not a purchaser.[85]

A judgment creditor is not,[86] in the absence of a statute,[87] a purchaser. Property seized by him will be held subject to equities attaching to it in the hands of his debtor. "Attaching creditors, even though without notice of the equitable claims of third parties, who, in the transactions in which the debts sought to be collected were incurred, gave no credit to, and had no knowledge of, the apparent or record title of the debtor to the property attached, do not, as to the equitable owners of such property, stand in the position of bona fide purchasers for value, unless by force of some statute law to that effect." [88]

A corporation which issues its stock in return for the transfer to it of property is a purchaser,[89] as is also one receiving property in consideration of a promise to marry,[90] or of marriage;[91] but "one dollar and love and affection," being merely "good" consideration, does not constitute value under the rule.[92]

(b) Identification

The remedy of recovery of the trust property, or its substitute, is necessarily dependent on proof that the property in question is the trust res or its product. The property which the cestui seeks to have equity decree to belong to him must be shown to be the original subject-matter of the trust, or its successor. If the claim is

N. C. 231; Young v. Weed, 154 Pa. 316, 26 Atl. 420, 35 Am. St. Rep. 839; Black v. Caviness, 2 Tex. Civ. App. 118, 21 S. W. 635; Golson v. Fielder, 2 Tex. Civ. App. 400, 21 S. W. 173. Contra, First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489. The transfer of property as security for the payment of an antecedent debt has been regarded by some courts as making the transferee a purchaser for value. Atkinson v. Greaves, 70 Miss. 42, 11 South. 688; Throckmorton v. Throckmorton, 91 Va. 42, 22 S. E. 162. Contra: Chalk v. Daggett (Tex. Civ. App.) 204 S. W. 1057.

[85] Chace v. Chapin, 130 Mass. 128; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Stainback v. Junk Bros. Lumber & Mfg. Co., 98 Tenn. 306, 39 S. W. 530. Contra, Wickham v. Martin, 13 Grat. (Va.) 427; Marshall v. McDermitt, 79 W. Va. 245, 90 S. E. 830, L. R. A. 1917C, 883 (under the recording act).

[86] Flanders v. Thompson, Fed. Cas. No. 4853; Houghton v. Davenport, 74 Me. 590; Harney v. First Nat. Bank, 52 N. J. Eq. 697, 29 Atl. 221.

[87] Marshall v. Lister, 195 Ala. 591, 71 South. 411; Guin v. Guin, 196 Ala. 221, 72 South. 74.

[88] Waterman v. Buckingham, 79 Conn. 286, 291, 64 Atl. 212.

[89] Whittle v. Vanderbilt Min. & Mill. Co. (C. C.) 83 Fed. 48.

[90] Smith v. Allen, 5 Allen (Mass.) 454, 81 Am. Dec. 758; De Hierapolis v. Reilly, 44 App. Div. 22, 60 N. Y. Supp. 417. Contra: Lionberger v. Baker, 88 Mo. 447.

[91] Johnson v. Petersen, 101 Neb. 504, 163 N. W. 869, 1 A. L. R. 1235.

[92] Waddall v. Vassar, 196 Ala. 184, 72 South. 14.

made that the realty or personalty in dispute was once in the hands of the trustee as trust property, the question of identification will not ordinarily be extremely difficult; but if the cestui que trust seeks to show that certain land or chattels are the avails of trust property, that trust property has, perhaps through several transactions, been traced into this land or these chattels, the problem is apt to be more difficult. The courts have not always agreed on what is sufficient identification.

Burden of Proof and Presumptions

If the cestui que trust alleges that certain property is trust property, or that the proceeds of trust property have gone into it, the burden is on the cestui to prove that fact.[93] In this proof he may be aided by certain presumptions, which will now be stated.

If the beneficiary proves that the trust property or its substitute was in the hands of the trustee at a given date, prior to the death or insolvency of the trustee, is there any presumption that it remained among the assets of the trustee at his death or insolvency? A few courts have held that proof of receipt of the property and the existence of similar property in the estate at insolvency or death raises a presumption that the trust property was among the trustee's assets, or in other words that the burden is on the trustee or his representative to show that the property has been transferred or dissipated.[94] A somewhat similar presumption regarding the retention of property is found in a case where a trustee was ordered to invest trust funds in certain securities, he made such investment, and at his death securities of the kind ordered to be bought were found among his possessions; it was held that the securities on hand at his death were presumed to be trust securities.[95] But the majority of courts considering this question have determined that the cestui que trust is aided by no presumption of the retention of the trust property; that he must show not only its receipt by the trustee, but also that it remained among the assets of the trustee at the death or insolvency of the trustee, or other event fixing the rights of the parties.[96] Thus, a cestui que

[93] Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806; Waddell v. Waddell, 36 Utah, 435, 104 Pac. 743; Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952.

[94] Farnsworth v. Muscatine Produce & Pure Ice Co., 177 Iowa, 20, 158 N. W. 741; State v. Bank of Commerce of Grand Island, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 808; Widman v. Kellogg, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563.

[95] Kauffman v. Foster, 3 Cal. App. 741, 86 Pac. 1108.

[96] Mathewson v. Wakelee, 83 Conn. 75, 75 Atl. 93; Shields v. Thomas, 71 Miss. 260, 14 South. 84, 42 Am. St. Rep. 458; Rockwood v. School District of

trust who merely proves that a bank collected trust moneys, and does not show their disposition, has not made out a case for following trust funds.[97] He must show that such trust funds remained in the hands of the bank or its representative at the time he brought suit.

The beneficiary is occasionally aided in following trust property by a rule which is sometimes called a presumption, but which is really referable to the doctrine of the loss of property by confusion of goods. If the trustee mingles trust funds with his own, the burden will be on the trustee to make a separation and to show the amount of his individual property in the mass,[98] and if the trustee cannot separate trust and private funds, the whole will be treated as trust property.[99]

Doctrine of Clayton's Case

Several important presumptions regarding withdrawals by a trustee have been established. In Clayton's Case [1] it was held that a banking firm, receiving deposits from Clayton and making payments to him, presumably applied the first money paid in to the first drafts on the account. "Presumably it is the sum first paid in that is first drawn out." If but one cestui que trust is interested in a fund, and no moneys of the trustee are mixed with the trust moneys, this rule will not be of great importance, for ordinarily it will be immaterial to the cestui whether the trustee is regarded as having paid out first the money first deposited or the money later added to the fund. But if one trustee has mixed two or more trust funds, made a number of deposits in the joint fund to the credit of each trust fund and a number of withdrawals from the common fund, it may be of prime importance to know to which trust fund the withdrawals are to be charged. Conceivably it might be held that the balance should be divided among the several trusts in proportion to the total deposits made to the credit of each fund. Under this theory the withdrawals would be presumed to be from the several trust funds pro rata; that is, if the total credits to the A.

Brookline, 70 N. H. 388, 47 Atl. 704; Collins v. Lewis, 60 N. J. Eq. 488, 46 Atl. 1098; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; In re Hicks, 170 N. Y. 195, 63 N. E. 276; Gardner v. Whitford, 24 R. I. 253, 52 Atl. 1082.

[97] Windstanley v. Second Nat. Bank of Louisville, 13 Ind. App. 544, 41 N. E. 956.

[98] Evans v. Evans, 200 Ala. 329, 76 South. 95, semble; Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77; Moore v. First Nat. Bank of Kansas City, 154 Mo. App. 516, 135 S. W. 1005; Yellowstone County v. First Trust & Savings Bank, 46 Mont. 439, 128 Pac. 596; Watson v. Thompson, 12 R. I. 466.

[99] Byrom v. Gunn, 102 Ga. 565, 31 S. E. 560; Ward v. Armstrong, 84 Ill. 151; Hunt v. Smith, 58 N. J. Eq. 25, 43 Atl. 428; Waddell v. Waddell, 36 Utah, 435, 104 Pac. 743.

[1] Clayton's Case, 1 Meriv. 572, 608.

trust were $1,000, and the total credits to the B. trust were $2,000, one-third of the money withdrawn would be presumed to have been drawn from the A. fund and two-thirds from the B. fund, regardless of the dates of the various deposits and the dates of the withdrawals. This theory has rarely received support.[2] Generally the rule in Clayton's Case has been applied, and it has been held that the trust funds first deposited will be presumed to be those first drawn out by the trustee.[3] Thus, if the trustee deposits $500 of the money of the A. trust on January 1st and $500 of the money of the B. trust in the same account on June 1st, and no other moneys have entered into the fund, and on July 1st the trustee withdraws $500 and dissipates it, it will be presumed that it was the money of the A. trust which he withdrew, and the B. trust will be entitled to the entire balance of $500.

Mixed Funds

If, however, the fund in question contains, not merely trust funds, but also the funds of the trustee, the presumption with respect to withdrawals will be different. In such case the presumption that the trustee will perform his duty and will not be guilty of a breach of trust enters into the situation. If funds are withdrawn from this mixed account for the use of the trustee, it is logical to assume that he withdrew his own money for his own use before he touched the trust money. As long as any of the money of the trustee remains in the mixed fund, the withdrawals for his private benefit will be treated as being made from his private funds, and only after the private funds are exhausted will the trust funds be deemed to be invaded.[4] The leading case in establishing this

[2] Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769.

[3] In re Hallett's Estate, 13 Ch. Div. 696; Spokane County v. First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81; Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435; In re Bolognesi & Co., 254 Fed. 770, 166 C. C. A. 216; Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; Cole v. Cole, 54 App. Div. 37, 66 N. Y. Supp. 314.

[4] Bank of British North America v. Freights, etc., of The Hutton (D. C.) 137 Fed. 534, 70 C. C. A. 118; In re Berry, 147 Fed. 208, 77 C. C. A. 434; Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; In re City Bank of Dowagiac (D. C.) 186 Fed. 413; Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435; Clark Sparks & Sons Mule & Horse Co. v. Americus Nat. Bank (D. C.) 230 Fed. 738; Covey v. Cannon, 104 Ark. 550, 149 S. W. 514; People v. California Safe Deposit & Trust Co., 175 Cal. 756, 167 Pac. 388, L. R. A. 1918A, 1151; Keeney v. Bank of Italy, 33 Cal. App. 515, 165 Pac. 735; Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; Board of Fire & Water Com'rs of City of Marquette v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Harrison v. Smith, 83 Mo. 210, 53 Am. Rep. 571; State v. Bank of Commerce of Grand Island, 61 Neb. 181, 85 N. W. 43, 52 L. R. A. 858; Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327; Heidelbach v. National Park Bank, 87 Hun, 117, 33 N. Y. Supp. 794;

rule is In re Hallett's Estate,[5] where Jessel, M. R., referred to the principle "that, where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly," and then said: "When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers."

But this doctrine of In re Hallett's Estate has not been followed to its logical conclusion in all cases. If a trustee has trust and private funds in a single account, and then withdraws a sum less than the amount of the private funds and invests it in securities in his own name, it would seem logical that the securities would be presumed to belong to the trustee, since he would be presumed to use his own funds to make individual investments. But in some cases where such withdrawal and investment has been made, and later the trustee has withdrawn and dissipated the balance of the fund, the cestui has been allowed to take the investments made with the first withdrawals.[6] Thus, in In re Oatway [7] the trustee paid

Blair v. Hill, 50 App. Div. 33, 63 N. Y. Supp. 670, affirmed 165 N. Y. 672, 59 N. E. 1119; Widman v. Kellogg, 22 N. D. 396, 113 N. W. 1020, 39 L. R. A. (N. S.) 563; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Waddell v. Waddell, 36 Utah, 435, 104 Pac. 743; Emigh v. Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243; State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47.

[5] In re Hallett's Estate, 13 Ch. Div. 696, 727, 728.

[6] Brennan v. Tillinghast, 201 Fed. 609, 120 C. C. A. 37; City of Lincoln

[7] [1903] 2 Ch. 356, 360.

for shares in the Oceana Company by a check on an account containing trust funds and sufficient private funds to meet the check. Later the trustee withdrew and dissipated the balance of the account. The beneficiary was allowed to take the Oceana stock; Joyce, J., saying: "It is, in my opinion, equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust. In other words, where the private money of the trustee and that which he held in a fiduciary capacity have been mixed in the same banking account, from which various payments have from time to time been made, then, in order to determine to whom any remaining balance or any investment that may have been paid for out of the account ought to be deemed to belong, the trustee must be debited with all the sums that have been withdrawn and applied to his own use, so as to be no longer recoverable, and the trust money in like manner debited with any sums taken out and duly invested in the names of the proper trustees." Thus, if this presumption is advantageous to the cestui que trust, it operates; if it is disadvantageous, it is not applied. If the trustee withdraws the money and wastes it, he is deemed to withdraw his own money; but if he withdraws funds and purports to make an investment on his own account, he is presumed to be making an investment for the cestui que trust.

Presumption Regarding Deposits

It might be supposed that if the trustee reduces the mixed account below the amount of the trust funds by withdrawals for his own use, and later makes deposits of private moneys in the account, the trustee would be presumed to be restoring the trust funds; that is, that the presumption of the performance of duty would again apply. But whether because the trustee has, in such a situation, already shown an express intent not to perform his duty, or for other reason, the courts have held that subsequent deposits

v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885. But contra: State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47, where it was held that where a bank loaned money while its balance on hand exceeded the trust fund, it would be presumed that the notes resulting from such loans represented private funds of the bank and not trust funds, even though the balance later became reduced below the amount of the trust fund. And see, also, Burnham v. Barth, 89 Wis. 362, 62 N. W. 96, where it was held that a bank using part of a mixed fund to pay debts and expenses and part to buy securities, and having securities on hand at its insolvency in an amount less than the trust fund, was not presumed to have invested the trust funds in the securities.

to the credit of an account which stands in the name of the trustee individually, but which contains trust funds as well as private funds, do not inure to the benefit of the cestui que trust. The subsequent deposits are added to the private portion of the account. Hence, if trustee A. has a bank account entitled merely "A.," and into such account $500 of trust moneys have entered, and at some time in the history of the account the balance is reduced below $500,[8] or the account is wholly exhausted,[9] by withdrawals of funds for the use of A., deposits by A. after such reduction below $500, or after such exhaustion, will not operate as a restoration of the trust funds, and will inure to the benefit of A. But if the account is entitled "A., Trustee," it has been held that subsequent deposits, under the circumstances just narrated, will be credited to the trust funds.[10] And it has been held that where a trustee has a mixed account, and has on hand trust funds not deposited, and later deposits in the mixed account an amount equal to the trust funds which he was holding, it will be presumed that the funds so deposited were trust funds or trust fund replacements.[11] And, of course, there may be a restoration of misapplied trust funds by express action, as where a defaulting trustee uses his own money to buy land in his own name but with the express intent of making a restoration.[12] The principal doctrine regarding subsequent deposits is thus stated by the Supreme Court:[13] "Where one has deposited trust funds in his individual bank account, and the mingled fund is at any time wholly depleted, the trust fund is

[8] James Roscoe (Bolton), Ltd., v. Winder, [1915] 1 Ch. 62; Mercantile Trust Co. v. St. Louis & S. F. R. Co. (C. C.) 99 Fed. 485; Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; In re M. E. Dunn & Co. (D. C.) 193 Fed. 212; Covey v. Cannon, 104 Ark. 550, 149 S. W. 514; Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448. But see contra, In re T. A. McIntyre & Co., 181 Fed. 960, 104 C. C. A. 424; State Sav. Bank v. Thompson, 88 Kan. 461, 128 Pac. 1120. Supreme Lodge of Portuguese Fraternity of United States v. Liberty Trust Co., 215 Mass. 27, 102 N. E. 96 (where the withdrawal was a mistake and the subsequent deposit was expressly made as a replacement, is a different case).

[9] Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, affirming decrees in In re Brown, 193 Fed. 24, 113 C. C. A. 348, and In re A. O. Brown & Co., 193 Fed. 30, 113 C. C. A. 354.

[10] United Nat. Bank of Troy v. Weatherby, 70 App. Div. 279, 75 N. Y. Supp. 3.

[11] Jeffray v. Towar, 63 N. J. Eq. 530, 53 Atl. 182; Baker v. New York Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150.

[12] Houghton v. Davenport, 74 Me. 590.

[13] Schuyler v. Littlefield, 232 U. S. 707, 710, 34 Sup. Ct. 466, 58 L. Ed. 806.

thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account."

As a result of the presumptions regarding withdrawals and deposits which have just been discussed, it follows that the cestui que trust can never recover from a mixed account a sum greater than the lowest balance since the admixture of the funds. Thus, if trustee A. have an account standing in his own name in a bank, containing $1,000 of his own funds, and he deposits $1,000 of trust funds in the account on January 1st, makes deposits of his own moneys and withdrawals for his own benefit until July 1st, when he is declared a bankrupt, and when the balance in the account is $1,500, the cestui's right to follow his money into the claim against the bank will depend upon the state of the account between January and July 1st; and if it appear that on March 1st the account had been reduced to $500, the beneficiary will be confined to the recovery of that amount.[14] The sums added to the fund since March 1st do not benefit the cestui, for they are not deemed to be restorations of the trust money; and after the balance went below $1,000 it is obvious that the trustee must have been withdrawing and dissipating trust funds.

Degree of Identification Required—(a) Specific Property Rule

Neither the number nor the character of the changes which have affected the trust property will prevent the cestui que trust from following it, if he can make sufficient identification.[15] If the trust property is money and it has been mixed with other money, the beneficiary need not identify particular coins and bills in order to establish a right to trace his property; it is sufficient if he show that his money has gone into a certain fund and remained there.[16]

[14] Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806; Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C.) 99 Fed. 485; Board of Com'rs v. Patterson (C. C.) 149 Fed. 229; Board of Com'rs of Crawford County, Ohio, v. Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567, 134 C. C. A. 295; Covey v. Cannon, 104 Ark. 550, 149 S. W. 514; Hill v. Miles, 83 Ark. 486, 104 S. W. 198; Powell v. Missouri & Arkansas Land & Mining Co., 99 Ark. 553, 139 S. W. 299; Porter v. Anglo & London Paris Nat. Bank of San Franciso, 36 Cal. App. 191, 171 Pac. 845; Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; Gray v. Board of Sup'rs of Tompkins County, 26 Hun (N. Y.) 265, affirmed 93 N. Y. 603; Cole v. Cole, 54 App. Div. 37, 66 N. Y. Supp. 314; Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952. Contra: Myers v. Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

[15] Bostwick-Gooddell Co. v. Wolff, 19 Ga. App. 61, 90 S. E. 975.

[16] Western German Bank v. Norvell, 134 Fed. 724, 69 C. C. A. 330; School Trustees v. Kirwin, 25 Ill. 62 (orig. ed. p. 73); Shopert v. Indiana Nat. Bank 41 Ind. App. 474, 83 N. E. 515; Farmers' & Mechanics' Nat. Bank v. King,

The great majority of the courts which have considered the degree of identification required have held that the cestui que trust must be able to trace the trust res to some particular piece of property, and that proof that the trust res or its substitute is located at some unknown place among the assets of the trustee is not satisfactory. The trust fund must be traced into a particular bond, or tract of land, or bank account, for example. As said by Lewis, J., in Thompson's Appeal:[17] "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the cestui que trust. No change in its state and form can divest it of such trust. So long as it can be identified either as the *original property* of the cestui que trust, or as the *product of it*, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser, for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail." This same rule is expressed thus in a Massachusetts case:[18] "The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own, and in such case the cestui que trust can only come in and share with the general creditors." This rule requiring the cestui to trace his trust property to specific property, rather than to rely on a mere general lien or interest in the whole estate of the trustee, has been applied in many cases.[19]

57 Pa. 202, 98 Am. Dec. 215; Wulbern v. Timmons, 55 S. C. 456, 33 S. E. 568. See Scott, The Right to Follow Money Wrongfully Mingled with Other Money; 27 Harv. L. R. 125.

[17] 22 Pa. 16, 17.

[18] Little v. Chadwick, 151 Mass. 109, 110, 111, 23 N. E. 1005, 7 L. R. A. 570.

[19] Illinois Trust & Savings Bank v. First Nat. Bank (C. C.) 15 Fed. 858; American Can Co. v. Williams, 178 Fed. 420, 101 C. C. A. 634; Bettendorf Metal Wheel Co. v. P. P. Mast & Co., 187 Fed. 590, 109 C. C. A. 420; In re Brown, 193 Fed. 24, 113 C. C. A. 348, affirmed sub nom. First Nat. Bank of Princeton, Ill., v. Littlefield, 226 U. S. 110, 33 Sup. Ct. 78, 57 L. Ed. 145; In re Larkin & Metcalf (D. C.) 202 Fed. 572; In re See, 209 Fed. 172, 126 C. C. A. 120; State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, 147 C. C. A. 41; Parker v. Jones' Adm'r, 67 Ala. 234; Goldthwaite v.

In the following illustrative cases the courts have held that, under the specific property rule, the cestui que trust identified the property sufficiently to enable him to follow it: Where the cestui sent money to the bankrupt to enable the latter to buy cotton for the former, and the bankrupt bought some cotton, used some of the funds for his own purposes, employed some of his own funds to buy cotton for the beneficiary, and placed all the cotton in a ware-

Ellison, 99 Ala. 497, 12 South. 812; Hutchinson v. National Bank of Commerce, 145 Ala. 196, 41 South. 143; Lummus Cotton Gin Co. v. Walker, 195 Ala. 552, 70 South. 754; Korrick v. Robinson (Ariz.) 180 Pac. 446; Hill v. Miles, 83 Ark. 486, 104 S. W. 198; Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340; School Trustees v. Kirwin, 25 Ill. 73; Wetherell v. O'Brien, 140 Ill. 146; Seiter's Estate v. Mowe, 182 Ill. 351, 55 N. E. 526; Hauk v. Van Ingen, 196 Ill. 20, 63 N. E. 705; Richelieu Hotel Co. v. Miller, 50 Ill. App. 390; Kneisley v. Weir, 81 Ill. App. 251; Moninger v. Security Title & Trust Co., 90 Ill. App. 246; Arnold Inv. Co. v. Citizens' State Bank of Chautauqua, 98 Kan. 412, 158 Pac. 68, L. R. A. 1916F, 822; McCormick v. McCormick's Adm'r (Ky.) 121 S. W. 450; Goodell v. Buck, 67 Me. 514; Portland & H. Steamboat Co. v. Locke, 73 Me. 370; Cushman v. Goodwin, 95 Me. 353, 50 Atl. 50; Gault v. Hospital for Consumptives of Maryland, 121 Md. 591, 89 Atl. 105; Lowe v. Jones, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551; Hewitt v. Hayes, 205 Mass. 356, 91 N. E. 332, 137 Am. St. Rep. 448; Board of Fire & Water Com'rs of City of Marquette v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Watson v. Wagner, 202 Mich. 397, 168 N. W. 428; Neely v. Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; Twohy Mercantile Co. v. Melbye, 83 Minn. 394, 86 N. W. 411; Morrison v. Kinstra, 55 Miss. 71; Phillips v. Overfield, 100 Mo. 466, 13 S. W. 705; Pearson v. Haydel, 90 Mo. App. 253; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945; Heinisch v. Pennington, 73 N. J. Eq. 456, 68 Atl. 233; Pierson v. Phillips, 85 N. J. Eq. 60, 95 Atl. 622; Van Alen v. American Nat. Bank, 52 N. Y. 1; Ferris v. Van Vechten, 73 N. Y. 113; Welch v. Polley, 177 N. Y. 117, 69 N. E. 279; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14; Jaffe v. Weld, 155 App. Div. 110, 139 N. Y. Supp. 1101; People v. Bank of Dansville, 39 Hun (N. Y.) 187; Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949; Widman v. Kellogg, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563; Muhlenberg v. Northwest Loan & Trust Co., 26 Or. 132, 38 Pac. 932, 29 L. R. A. 667; Ferchen v. Arndt, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; Dunham v. Siglin, 39 Or. 291, 64 Pac. 661; Appeal of Thompson, 22 Pa. 16; Appeal of Cross, 97 Pa. 471; McLaughlin v. Fulton, 104 Pa. 161; Commonwealth v. Tradesmen's Trust Co., 250 Pa. 372, 95 Atl. 574; Appeal of Hopkins (Pa.) 9 Atl. 867; Groff v. City Savings Fund & Trust Co., 46 Pa. Super. Ct. 423; Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. 443; Buist v. Williams, 88 S. C. 252, 70 S. E. 817; Continental Nat. Bank v. Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Texas Moline Plow Co. v. Kingman Texas Implement Co., 32 Tex. Civ. App. 343, 80 S. W. 1042; Hoopes v. Mathis, 40 Tex. Civ. App. 121, 89 S. W. 36; Waddell v. Waddell, 36 Utah, 435, 104 Pac. 743; Kent v. Kent, 50 Utah, 48, 165 Pac. 272; Overseers of Poor of Norfolk v. Bank of Virginia,

house belonging to the cestui que trust;[20] where an agent to operate a store used the proceeds of sales to buy land, taking title in his own name, the land clearly might be followed as the substitute for the trust res;[21] where trust money was used to purchase a drug store which was conducted by the trustee in his own name for four years it was held that, notwithstanding the shifting stock, the trust funds were sufficiently identified as being in the store;[22] where trust moneys were used to pay off a mortgage, it has been held that the cestui que trust could not trace the funds into the land, but would be entitled to have a lien on the land in his favor;[23] where a trustee used trust funds to pay insurance premiums on a policy of life insurance on his own life, payable to his wife, it has been held that the cestui could trace the trust funds into the proceeds of the policy upon the death of the trustee.[24]

On the other hand, the identification has been held to be defective where there was merely a showing of the receipt of the trust funds, their misappropriation, and the death of the trustee leaving an estate;[25] where the proof showed $1,400 of the trust money invested in the trustee's mercantile business, that the trustee for five years did an annual business of $10,000, and that at the end of the five years he died leaving a stock worth less than $1,000;[26] where the trustee had $10,000 in trust funds, used it indiscriminately in his business, and the money was not shown to have gone into any particular remaining property;[27] and where a draft was deposited for collection, was collected, and the proceeds used to pay the debts of the collecting bank.[28]

The payment of interest on the trust fund by the trustee till his death is strong evidence that he had the fund among his assets

2 Grat. (Va.) 544, 44 Am. Dec. 399; Watts v. Newberry, 107 Va. 233, 57 S. E. 657; Chase & Baker Co. v. Olmsted, 93 Wash. 306, 160 Pac. 952; Gianella v. Momsen, 90 Wis. 476, 63 N. W. 1018; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Emigh v. Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243; State v. Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47. See Williston, The Right to Follow Trust Property When Confused with Other Property, 2 Harv. Law Rev. 28.

[20] Southern Cotton Oil Co. v. Elliotte, 218 Fed. 567, 134 C. C. A. 295.

[21] Atkinson v. Ward, 47 Ark. 533, 2 S. W. 77.

[22] Byrne v. McGrath, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127. But see Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536.

[23] Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327.

[24] Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, 34 Am. St. Rep. 463.

[25] Holden v. Piper, 5 Colo. App. 71, 37 Pac. 34.

[26] Robinson v. Woodward, 48 S. W. 1082, 20 Ky. Law Rep. 1142.

[27] Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570.

[28] Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383.

at his death.[29] If the trustee can follow the trust funds, even though the property into which he is able to trace them is now worthless, he will be obliged to accept such worthless property, if he wishes to seek a remedy in rem, and cannot have a lien on the general assets of the trustee.[30]

Where the trust res is money, and the trustee invests it and his own funds in property, the cestui que trust may claim a charge thereon for his money, or he may demand a proportionate interest in the property, on the basis of a constructive trust.[31] This right to a lien or the property itself has been previously stated.[32]

Degree of Identification Required—(b) "Increased Assets" Theory

A few courts in Western states have held that the cestui que trust might trace and recover his property, if he could show that the assets in the hands of the trustee at his death or bankruptcy had been "swelled" or increased by the use of the trust property, even though no particular piece of property could be pointed to as the product of the trust res. Their theory seems to have been that, if the estate of the trustee was larger because of the use of the trust property, then the cestui que trust ought to have a specific lien on the estate, a preference over general creditors of the trustee. Thus, in the Kansas case of Peak v. Ellicott [33] a bank received money to pay a note, used the money for its own purposes, there was no proof that the trust fund was in the assets of the bank at its insolvency, and yet the cestui was allowed a preference and recovery of the full amount deposited, apparently on the theory that the use of his money to pay checks on the bank had freed other money of the bank which was to be found in the insolvent bank's assets. And in a later case in the same state [34] a treasurer of a school board wrongfully deposited school moneys in the bank of which he was manager, the funds of the bank later became reduced below the amount of the school fund, and the cestui was allowed the entire fund on hand at the time of the bank's failure, although obviously there could be no tracing into specific property; the court saying: "As the estate was augmented by the conversion of the trust funds, no reason is seen, under the equitable principle which has been mentioned,

[29] In re Holmes, 37 App. Div. 15, 55 N. Y. Supp. 708, affirmed 159 N. Y. 532, 53 N. E. 1126.

[30] Cotting v. Berry, 50 Colo. 217, 114 Pac. 641.

[31] Primeau v. Granfield (C. C.) 184 Fed. 480.

[32] See ante, § 122.

[33] 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90. See, also, Ellicott v. Barnes, 31 Kan. 170, 1 Pac. 767.

[34] Myers v. Board of Education, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

why they should not become a charge upon the entire estate." And in a Missouri case [35] tracing was allowed and recovery from the general property of the trustee granted where the trustee had deposited trust funds in a private bank account, checked out all but a trifling sum, and then became insolvent. In a recent Montana case [36] county funds were wrongfully deposited in a bank, which resulted in making the bank a trustee of them, and recovery by the county of the entire balance due on the county account was allowed out of the assets of the insolvent bank, regardless of the state of the bank's cash account between the date of deposit and the date of failure; the court saying that it was sufficient to justify recovery that the trust fund "enhanced the apparent value of the bank's total assets." A case similar to that last mentioned is State v. Bruce,[37] in which state funds were wrongfully deposited in a bank, became thereby a trust fund in the bank's hands, were paid out to cancel checks and expenses of the bank, and yet the cestui was allowed a lien on all the property of the bank at the time of its insolvency, and not merely on the cash on hand in the bank.

This theory that mere proof of benefit to the estate of the trustee is sufficient to allow tracing has been accepted by a small number of other courts.[38] The Supreme Court of Idaho has explained the reasoning on which it founds this rule in the following words:[39] "It is conceded that it [the trust money] went into the general funds of the bank, and was paid out from day to day, together with general deposits, on the checks of depositors and in the purchase of securities and other assets. No pretense is made by the bank or its receiver that this money was embezzled, stolen, or dissipated. It was used in the due course of business as transacted by the bank. It is also conceded that no part of this fund can be traced into any

[35] Evangelical Synod of North America v. Schoenelch, 143 Mo. 652, 45 S. W. 647.

[36] Yellowstone County v. First Trust & Savings Bank, 46 Mont. 439, 128 Pac. 596.

[37] 17 Idaho, 1, 102 Pac. 831, L. R. A. 1916C, 1, 134 Am. St. Rep. 245.

[38] Hopkins v. Burr, 24 Colo. 502, 52 Pac. 670, 65 Am. St. Rep. 238; In re Knapp, 101 Iowa, 488, 70 N. W. 626; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Hubbard v. Alamo Irrigation & Mfg. Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634; Carley v. Graves, 85 Mich. 483, 48 N. W. 710, 24 Am. St. Rep. 99; Stoller v. Coates, 88 Mo. 514; McColl v. Fraser, 40 Hun (N. Y.) 111; Deering Harvester Co. v. Keifer, 20 Ohio Cir. Ct. R. 311; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769; McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287.

[39] State v. Bruce, 17 Idaho, 1, 102 Pac. 831, 833, L. R. A. 1916C, 1, 134 Am. St. Rep. 245.

particular securities, paper, or assets. The bulk of it was doubtless paid out on depositors' checks during the closing days the bank did business, and while it was struggling to maintain its credit and to continue business. We fail to see what difference it can make in point of fact, reason, or law whether the money was used in buying bonds, mortgages, and other paper to add to the general assets of the bank, or in discharging the debts of the bank. In either event, it adds to or appreciates the body and value of the bank's assets. If the money is used to-day to pay the bank's debts, and it suspends business to-morrow, the indebtedness of the bank will be just as much less than it would otherwise have been as the amount paid out represents."

But the latest cases in Idaho, Iowa, Kansas, Michigan, Missouri, Nebraska, and Wisconsin have either completely abandoned the "swelling assets" theory and accepted the "specific property" rule, or have so modified and limited the "swelling assets" doctrine as to make it differ from the opposing rule only in words. It is now quite generally held that proof that the trust property was used to pay debts or expenses of the trustee, and that thus his general estate has been relieved is not sufficient to allow tracing into the general assets.[40] Thus, in Bellevue State Bank v. Coffin,[41] the A. bank procured a loan from the B. bank by fraud, the A. bank used the money to pay checks and other debts, and on the insolvency of the A. bank it was held that the B. bank had no preferred claim or right to trace the trust funds under a constructive trust, the court maintaining that a use to discharge indebtedness did not constitute an increase in the assets. It quoted with approval the present Kansas rule, as stated in Travelers' Ins. Co. v. Caldwell,[42] as follows: "The fund itself, or something into which it has gone and which stands as its representative, must be on hand, subject to identifica-

[40] Bellevue State Bank v. Coffin, 22 Idaho, 210, 125 Pac. 816; Farnsworth v. Muscatine Produce & Pure Ice Co., 177 Iowa, 21, 158 N. W. 741; Travelers' Ins. Co. v. Caldwell, 59 Kan. 156, 52 Pac. 440; Midland Nat. Bank of Kansas City v. Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Board of Fire & Water Com'rs of City of Marquette v. Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691; Meystedt v. Grace, 86 Mo. App. 178; City of Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96.

[41] 22 Idaho, 210, 125 Pac. 816, 821.

[42] 59 Kan. 156, 158, 52 Pac. 440. For similar statements of the present rule in these states, see opinion of Roscoe Pound, C., in City of Lincoln v. Morrison, 64 Neb. 822, 829, 90 N. W. 905, 57 L. R. A. 885, and Arnold Inv. Co. v. Citizens' State Bank of Chautauqua, 98 Kan. 412, 158 Pac. 68, L. R. A. 1916F, 822.

tion, and separable from the general assets, in order to charge the assignee with the trust; or, if the fund has been so commingled with the general assets as to be incapable of identification or tracing, the estate which came to the assignee must have been augmented or bettered, in an appreciable and tangible way, in order to charge it with the trust. The mere saving of the estate by the discharge of general indebtedness otherwise payable out of it, or by the payment of current expenses of the business, is not an augmentation or betterment of the estate, within the meaning of the rule. If the estate has not been increased by specific additions to it, or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed."

The fallacy of the "increased assets" theory was in its failure to recognize that a trust requires specific property as its subject-matter, and that the very essence of the cestui's right to follow is his ability to point to the trust res or its exact substitute. As a creditor a cestui que trust is entitled to no preference over any other creditor. It is only as a property owner that he is entitled to take particular chattels or realty. The matter is illuminated by the statements of Stiness, J., in Slater v. Oriental Mills:[48] "While one who has been wronged may follow and take his own property, or its visible product, it is quite a different thing to say that he may take the property of somebody else. The general property of an insolvent debtor belongs to his creditors, as much as particular trust property belongs to a cestui que trust. Creditors have no right to share in that which is shown not to belong to the debtor, and conversely a claimant has no right to take from creditors that which he cannot show to be equitably his own. But right here comes the argument that it is equitably his own because the debtor has taken the claimant's money and mingled it with his estate, whereby it is swelled just so much. But, as applicable to all cases, the argument is not sound. Where the property or its substantial equivalent remains, we concede its force; but, where it is dissipated and gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In the former case, as in Pennell v. Deffell, 4 De G., M. & G. 372, and In re Hallett's estate, Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, the illustration may be used of a debtor mingling trust funds with his own in a chest or bag. Though the particular money cannot be identified the amount is swelled just so much, and the amount added belongs to the cestui que trust. But in the latter case there is no swelling of the estate, for the money is spent and gone; or,

[48] 18 R. I. 352, 353, 27 Atl. 443.

as respondent's counsel pertinently suggests, 'Knight Bruce's chest, Jessel's bag, is empty.' Shall we therefore order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate?"

It may be noticed that many of the earlier cases in which the "increased assets" rule was applied were cases where public funds were in danger of being lost and the temptation to prefer the public claim to private creditors perhaps caused the courts to strain the law and the logic of the situation.

CONTROL OF TRUST ADMINISTRATION

125. On the application of cestui que trust equity will control the administration of the trust for his benefit by appointing or removing a trustee, appointing a receiver, decreeing an account, directing the specific performance of the trust, enjoining a threatened breach, setting aside unlawful acts, and in many other ways compelling the execution of the trust according to its terms.

The remedies of cestui que trust stated in the preceding paragraphs have had to do with the recovery of the trust property or its substitute, or of money, from the trustee or a third person, following a breach of the trust. But the beneficiary also has many remedies connected with the enforcement of the trust. Equity will decree the performance of acts necessary to carry out the trust and will enjoin the commission of breaches of the trust. The decrees in this latter class of cases do not direct the payment of money or the delivery of property, but rather control the administration of the trust, compel the performance of acts in execution of it, and prohibit the taking of steps which would be prejudicial to the interests of cestui que trust or would be breaches of the trust. The remedies which may thus be granted to the cestui are only limited by the jurisdiction and power of chancery. No attempt at a complete capitulation of these remedies can be made, but examples are given to illustrate their nature.

Under this heading comes the right of the cestui que trust to apply for the appointment of a trustee,[44] as in the case where none has been lawfully appointed, or where the trustee has disappeared.[45] Equity will also remove the trustee on cause shown,[46] and

[44] Howard v. Gilbert, 39 Ala. 726; Wilson v. Russ, 17 Fla. 691. See discussion of the appointment of a trustee, ante, § 82.

[45] Beachey v. Heiple, 130 Md. 683, 101 Atl. 553.

[46] Lasley's Ex'r v. Lasley, 1 Duv. (Ky.) 117. See, also, ante, § 80.

if the trust fund is in danger will appoint a receiver, either pending the determination of the action, or for an indefinite period.[47] "It is said that the appointing of a receiver rests in discretion. This proposition does not teach much. A receiver is proper, if the fund is in danger; and this principle reconciles the cases found in the books. There is no case, in which the court appoints a receiver, merely because the measure can do no harm; and still less, when the trustee is such under the appointment of a testator."[48] The doctrine regarding receivers has been thus stated by a Georgia court:[49] "Besides it is an established rule of the Court of Chancery that, when a trust fund is in danger of being wasted or misapplied, it will interfere on the application of those interested in the fund, and by the appointment of a receiver, or in some other mode, secure the fund from loss."

If the cestui que trust cannot lay hands on the trust property, he may bring a bill of discovery;[50] if he is ignorant of the status of the trust, he is entitled to a decree compelling the trustee to give him information or to account;[51] if there has been misbehavior by the trustee and the solvency of the trustee's bond is doubtful, the beneficiary may have an inquiry into such solvency.[52]

While equity will not interfere with the discretion of the trustee, except when necessary,[53] if there is no discretion, or the discretion is not honestly or prudently exercised, the cestui que trust may obtain a decree compelling the trustee to perform a specific act, as, for example, to exercise a power of sale,[54] or directing the trustee to perform the trust generally.[55] If the trust is passive, or for

[47] Hagenbeck v. Hagenbeck Zoological Arena Co. (C. C.) 59 Fed. 14; Hogg v. Hoag (C. C.) 80 Fed. 595; Vose v. Reed, 1 Woods, 647, Fed. Cas. No. 17,011; Calhoun v. King, 5 Ala. 523; Jones v. Dougherty, 10 Ga. 273; Gale v. Sulloway, 62 N. H. 57; Bowling v. Scales, 2 Tenn. Ch. 63; McCandless v. Warner, 26 W. Va. 754.

[48] Orphan Asylum Society v. McCartee, Hopk. Ch. (N. Y.) 429, 435.

[49] Jones v. Dougherty, 10 Ga. 273, 287, 288.

[50] Ferguson v. Rogers, 129 Ark. 197, 195 S. W. 22; Indian Land & Trust Co. v. Owen (Okl.) 162 Pac. 818.

[51] Alexander v. Fidelity Trust Co., 249 Fed. 1, 161 C. C. A. 61; Peters v. Rhodes, 157 Ala. 25, 47 South. 183; Green v. Brooks, 81 Cal. 328, 22 Pac. 849; People v. Bordeaux, 242 Ill. 327, 89 N. E. 971; Dodge v. Black, 53 S. W. 1039, 21 Ky. Law Rep. 992; Taft v. Stow, 174 Mass. 171, 54 N. E. 506. See § 104, ante.

[52] Walker v. Sharpe, 71 N. C. 257.

[53] Cochran v. Paris, 11 Grat. (Va.) 348.

[54] Vrooman v. Virgil, 81 N. J. Eq. 301, 88 Atl. 372.

[55] Callis v. Ridout, 7 Gill & J. (Md.) 1; Associate Alumni, etc., v. General Theological Seminary, 163 N. Y. 417, 57 N. E. 626; Griffen v. Ford, 14 N. Y. Super. Ct. 123.

other reason no good will come from its maintenance, the cestui may obtain a decree for a conveyance to him of the trust res.[56]

Instances in which equity has, at the instance of the cestui que trust, enjoined the performance of a specific act on the ground that it would be a breach of the trust, or at least prejudicial to the cestui que trust, are found in the following cases: Where the making of an oil and gas lease would constitute waste as to a remainderman cestui;[57] where the transfer or incumbrance of the trust property or its substitute has been prohibited;[58] and where the act enjoined has been the misappropriation of the trust funds,[59] the submission of a question to arbitration,[60] the voting of stock in a particular way,[61] or the prosecution by persons denying the trust of an action to recover the trust res.[62] If the trust funds are jeopardized, the trustee may be compelled to give a bond.[63] The trustee may also be directed to pay the funds into court pending litigation.[64]

The cestui que trust may also regulate the administration of the trust by bringing a bill in equity to set aside wrongful acts of the trustee.[65] Thus, where a mother held property in trust for several children, and through fraud and undue influence of one child she

[56] Brainard v. Buck, 184 U. S. 99, 22 Sup. Ct. 458, 46 L. Ed. 449; Brissell v. Knapp (C. C.) 155 Fed. 809; Kirten v. Spears, 44 Ark. 166; White v. Costigan, 138 Cal. 564, 72 Pac. 178; Bell v. Solomons, 142 Cal. 59, 75 Pac. 649; McVey v. McQuality, 97 Ill. 93; Coryell v. Klehm, 157 Ill. 462, 41 N. E. 864; Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67; Stewart v. Chadwick, 8 Iowa, 463; Crawford v. Ginn, 35 Iowa, 543; Oehler v. Walker, 2 Har. & G. (Md.) 323; Rector v. Hutchison, 7 Mo. 522; Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; Hill v. Smith, 32 N. J. Eq. 473; McCulloch v. Tomkins, 62 N. J. Eq. 262, 49 Atl. 474; Bradstreet v. Schuyler, 3 Barb. Ch. (N. Y.) 608; Krause v. Krause, 30 N. D. 54, 151 N. W. 991; Beatty v. Henry, 10 Phila. (Pa.) 35; Chadwick v. Arnold, 34 Utah, 48, 95 Pac. 527; Hatfield v. Allison, 57 W. Va. 374, 50 S. E. 729; Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

[57] Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108.

[58] Preston v. Walsh (C. C.) 10 Fed. 315; Beachey v. Heiple, 130 Md. 683, 101 Atl. 553; Chamberlain v. Eddy, 154 Mich. 593, 118 N. W. 499; Raleigh v. Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1; Depau v. Moses, 3 Johns. Ch. (N. Y.) 349; Cohen v. Mainthow, 182 App. Div. 613, 169 N. Y. Supp. 889; Hunt v. Freeman, 1 Ohio, 490.

[59] Coleman v. McGrew, 71 Neb. 801, 99 N. W. 663; Commonwealth v. Bank of Pennsylvania, 3 Watts & S. (Pa.) 184.

[60] Crum v. Moore's Adm'r, 14 N. J. Eq. 436, 82 Am. Dec. 262.

[61] McHenry v. Jewett, 90 N. Y. 58, semble.

[62] St. Luke's Hospital v. Barclay, 3 Blatchf. 259, Fed. Cas. No. 12241.

[63] Starr v. Wiley, 89 N. J. Eq. 79, 103 Atl. 865.

[64] Bullock v. Angleman, 82 N. J. Eq. 23, 87 Atl. 627.

[65] Towle v. Ambs, 123 Ill. 410, 14 N. E. 689; Leiper v. Hoffman, 26 Miss. 615; Johns v. Williams, 66 Miss. 350, 6 South. 207; Price v. Estill, 87 Mo.

was induced to transfer the trust property to such child, the remaining children may maintain a suit to set aside the wrongful deed and to obtain a reconveyance to the mother.[66] And a settlor cestui has been allowed to maintain a suit to set aside the trust deed, when breaches of the trust had occurred.[67]

REMEDY BARRED BY ACT OR OMISSION OF CESTUI QUE TRUST

126. An act of the cestui que trust may bar his remedy, as where he expressly releases his claim, or elects to take an alternative remedy, or consents to a wrongful act in advance or approves it after its commission, or in any other way conducts himself so as to render it inequitable to grant him relief.

Regardless of statutes of limitation, if the cestui que trust, without reasonable excuse, fails to assert his right and seek his remedy for a certain period, and because of this inaction the position of the cestui que trust's opponent is prejudiced, the cestui que trust may be held guilty of laches, and his remedy regarded as barred.

Having, in the sections next preceding, considered the remedies available to the cestui que trust upon the breach of the trust or in aid of its enforcement, the methods by which such remedies may be lost, barred or destroyed will now be discussed.

Remedy Barred by Acts of Cestui Que Trust

A large number of confusing and ill-defined terms have come into use in connection with the barring or destruction of rights. Courts and text-writers have joined in using in different senses and with different implications such words as "release," "waiver," "election," "acquiescence," "adoption," "ratification," "confirmation," "estoppel," and "laches." The hopeless confusion in the use of the word "waiver" has been strikingly shown by an eminent author.[68] It is believed that clarity will ensue from the abandonment of these terms as far as possible and the description of the acts which result as a bar, without trying to give them technical names.

At the outset it is obvious that the remedy of cestui que trust

378; Walker v. Sharpe, 71 N. C. 257; Blake v. O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147.

[66] Reardon v. Reardon, 219 Mass. 594, 107 N. E. 522.

[67] Koefoed v. Thompson, 73 Neb. 128, 102 N. W. 268.

[68] Ewart, Waiver Distributed.

may be barred either by his act or his failure to act. The destruction of his remedy by his positive conduct will be treated first. The most direct way of barring his remedy is to execute a release to the trustee or third person against whom he has the remedy. As any one having a cause of action may discharge it, so it is elementary that the cestui que trust may contract to cancel his cause of action; that is, may release.[69] Thus, where the cestui has filed a bill for an account, a compromise has been offered, and after an examination of the accounts with the aid of attorneys the offer of compromise is accepted and a release executed by the beneficiary to the trustee, the cestui's remedy is clearly destroyed.[70] A parol release of a trust of lands has recently been held unenforceable because of the fourth section of the Statute of Frauds.[71]

Releases by cestui que trust are of course subject to attack on the ground of the lack of capacity of the cestui que trust, as, for example, in the case of infancy;[72] and they must be given with a full knowledge of the facts, and without concealment or fraud, if they are to be binding.[73]

Election

The cestui que trust may also do an act, which, while not intended by him as a bar to his remedies under the trust, will be so treated in equity because to do otherwise would be inequitable. In such a case the beneficiary has placed himself and his opponent in such positions that he cannot fairly ask equity to grant him the remedy in question. Thus, the cestui que trust may have an election between two remedies, and if he takes one he cannot thereafter demand the other. His own conduct in taking the first remedy has barred the second.[74] For example, if a trustee makes a voidable sale of the trust property, the cestui has the option of accepting the proceeds of such sale and treating it as valid or of seeking to recover the res sold and avoiding the sale; and where he has clearly shown his intention to adopt the former course, he has lost the second remedy.[75]

[69] Cocks v. Barlow, 5 Redf. Sur. (N. Y.) 406; Dearing v. Selvey, 50 W. Va. 4, 40 S. E. 478.

[70] Forbes v. Forbes, 5 Gill (Md.) 29.

[71] Hatcher v. Hatcher, 264 Pa. 105, 107 Atl. 660.

[72] Parker v. Hayes' Adm'r, 39 N. J. Eq. 469; Clark v. Law, 22 How. Prac. (N. Y.) 426.

[73] Jones v. Lloyd, 117 Ill. 597, 7 N. E. 119; Huddleston v. Henderson, 181 Ill. App. 176; Barton v. Fuson, 81 Iowa, 575, 47 N. W. 774; Appeal of Berryhill's Adm'x, 35 Pa. 245.

[74] Wiswall v. Stewart, 32 Ala. 433, 70 Am. Dec. 549; Hyatt v. Vanneck, 82 Md. 465, 33 Atl. 972; Washburn v. Rainier, 149 App. Div. 800, 134 N. Y. Supp. 301.

[75] Marx v. Clisby, 130 Ala. 502, 30 South. 517. But such election is not

The cestui que trust may also bar his remedy by consenting to the alleged wrongful act in advance, or by requesting that the act of which he now complains be done.[76] Thus, beneficiaries who consent in advance to the continuance of a business by a trustee,[77] or to the making of a wrongful investment,[78] may not thereafter question the legality of the conduct of the trustee. This doctrine was stated by Lord Eldon as follows:[79] "It is established by all the cases that if the cestui que trust joins with the trustees in that which is a breach of the trust, knowing the circumstances, such a cestui que trust can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees. * * *" And a Missouri court has stated the rule to be that "a concurring and acquiescing cestui que trust is denied redress against a defaulting trustee, on account of any injury sustained by the latter's misconduct at the former's request or with his approval." The court calls the basis of the rule "waiver," rather than estoppel, saying: "The true principle of such a decision is waiver; the rule that where one party to a contract, or a party entitled to a performance of a contract according to certain terms and conditions, acts in such a manner as to lead the opposite party to believe strict performance of the terms will not be required, and thereby induces the other party to act in a way that renders a strict performance impossible, he is not permitted afterwards to insist on the terms which he had waived."[80]

Approval of Wrongful Act

After the breach of trust or other wrong to the cestui que trust has been committed, he may approve or excuse the act in such a way as to bar his remedy. Examples of the approval of wrongful acts are frequent.[81] Thus, a cestui who joins in a petition to a court to confirm a voidable act by a trustee will not be heard later

shown by inaction without knowledge of the right to set aside the transaction. Branch v. Bulkley, 109 Va. 784, 65 S. E. 652.

[76] Chirurg v. Ames, 138 Iowa, 697, 116 N. W. 865; Preble v. Greenleaf, 180 Mass. 79, 61 N. E. 808; Richards v. Keyes, 195 Mass. 184, 80 N. E. 812; Newton v. Rebenack, 90 Mo. App. 650; Town of Verona v. Peckham, 66 Barb. (N. Y.) 103; Sherman v. Parish, 53 N. Y. 483; Woodbridge v. Bockes, 59 App. Div. 503, 69 N. Y. Supp. 417, affirmed 170 N. Y. 596, 63 N. E. 362; Ungrich v. Ungrich, 131 App. Div. 24, 115 N. Y. Supp. 413; Id., 141 App. Div. 485, 126 N. Y. Supp. 419.

[77] Quimby v. Uhl, 130 Mich. 198, 89 N. W. 722.

[78] In re Fidelity & Deposit Co. of Maryland, 172 Mich. 600, 138 N. W. 205.

[79] Walker v. Symonds, 3 Swanst. 1, 64.

[80] Newton v. Rebenack, 90 Mo. App. 650, 663, 670.

[81] Pope v. Farnsworth, 146 Mass. 339, 16 N. E. 262; Bennett v. Pierce, 188 Mass. 186, 74 N. E. 360; In re Armitage's Estate, 195 Pa. 582, 46 Atl. 117.

to question the act;[82] and, where the trustee has been guilty of neglect of duty in delaying to bring suit, approval of the suit when it is brought will prevent the cestui que trust from holding the trustee liable.[83] "There is no illegality in a cestui que trust authorizing an act which otherwise would be a breach of trust towards himself, or in his releasing or agreeing to hold harmless his trustee for such an act after it is done."[84]

But when the cestui que trust performs the act of approval he must have full knowledge of the wrong which has been committed.[85] "To establish a ratification by a cestui que trust, the fact must not only be clearly proved, but it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also in a case like the present that the cestui que trust was fully apprised of the effect of the acts ratified, and of his or her legal rights in the matter. Confirmation and ratification imply, to legal minds, knowledge of a defect in the act to be confirmed and of the right to reject or ratify it. The cestui que trust must therefore not only have been acquainted with the facts, but apprised of the law, how these facts would be dealt with by a court of equity."[86]

The approval, ratification, or confirmation of the wrongful act may not only be expressly given, but also impliedly, as where the cestui que trust accepts the benefits of the wrongful act.[87] Thus, a beneficiary, who joins the trustee in a wrongful conveyance of the trust property to a third person and thereafter takes the benefits of such transfer, will clearly be barred from suing the trustee.[88]

The cestui's act may have caused the trustee to neglect his duty, as where a beneficiary assured a trustee that he would pay the taxes and water rents, and as a result the trustee failed to look after them. The cestui's act here barred his remedy against the trustee for neglect of duty in failing to pay the taxes and water rents.[89]

[82] Richards v. Keyes, 195 Mass. 184, 80 N. E. 812.

[83] Ellig v. Naglee, 9 Cal. 683.

[84] Pope v. Farnsworth, 146 Mass. 339, 344, 16 N. E. 262.

[85] Luers v. Brunjes, 5 Redf. Sur. (N. Y.) 32; Smith v. Howlett, 29 App. Div. 182, 51 N. Y. Supp. 1018; Smith v. Miller, 98 Va. 535, 37 S. E. 10.

[86] Adair v. Brimmer, 74 N. Y. 539, 553–554.

[87] Willis v. Holcomb, 83 Ohio St. 254, 94 N. E. 486; Farish v. Wayman, 91 Va. 430, 21 S. E. 810; Trethewey v. Horton, 71 Wash. 402, 128 Pac. 632. But there must be knowledge of the unlawful nature of the act when the benefits are accepted. St. Paul Trust Co. v. Strong, 85 Minn. 1, 88 N. W. 256.

[88] Hamilton v. Hamilton, 231 Ill. 128, 83 N. E. 125.

[89] Vreeland v. Van Horn, 17 N. J. Eq. 137.

The beneficiary may make a claim which is inconsistent with a trust and which will prevent a later enforcement of a trust. Thus, one who has sought to obtain property as the heir of the legal title holder will not be heard later to allege that such title holder was a trustee for him.[90]

Remedy Barred by Omissions of the Cestui Que Trust

The failure of the beneficiary to act, his delay in asserting his rights, may also bar his remedy. This is the doctrine of "laches," the following statement of which has been approved by the United States Supreme Court:[91] "But there is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." A Colorado court has stated that: "The term 'laches,' in its broad legal sense, as interpreted by courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as should constitute in equity and good conscience a bar to recovery."[92]

The defense of laches is independent of the statute of limitations. The fact that a statutory period for the barring of causes of action has been set, and that this period has not elapsed, does not prove that the cestui que trust has not been guilty of laches. Delay for a period far shorter than the statutory limit may be sufficient to destroy the cestui's remedy.[93] "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."[94] But if the statutory period has expired there is a strong presumption of laches.[95]

Laches may bar the remedy in the case of express as well as implied trusts,[96] but the courts are reluctant to apply the doctrine to

[90] Williams v. Risor, 84 Ark. 61, 104 S. W. 547. See, also, Maggini v. Jones, 223 Pa. 301, 72 Atl. 559.

[91] Badger v. Badger, 2 Wall. 87, 94, 17 L. Ed. 836.

[92] Graff v. Portland Town & Mineral Co., 12 Colo. App. 106, 112, 54 Pac. 854.

[93] Nettles v. Nettles, 67 Ala. 599; Appeal of Evans, 81 Pa. 278.

[94] Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718.

[95] Taylor v. Coggins, 244 Pa. 228, 90 Atl. 633.

[96] Preston v. Horwitz, 85 Md. 164, 36 Atl. 710.

the rights of a cestui que trust.[97] Laches is a defense which must be pleaded.[98]

Laches Founded on Estoppel

Various reasons have been given by the courts for the laches principle, but at bottom they are found to be estoppel. Ewart, in his work on Estoppel,[99] has approved Jacob's definition that estoppel is "an impediment or bar, by which a man is precluded from alleging, or denying, a fact, in consequence of his own previous act, allegation, or denial to the contrary." And in a large number of cases it has been held that there must be something beside mere lapse of time in order to establish laches. The one who is sought to be held as trustee, or some third party, must have changed his position in reliance on the delay, or his position must have changed from external causes.[1] The definition of a learned judge has met with frequent approval: "Laches, in legal significance, is not delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right." [2]

Other courts have laid stress on the inability of the courts to do complete or certain justice where long delay has occurred, and

[97] Fellrath v. Peoria German School Ass'n, 66 Ill. App. 77; Jenkins v. Hammerschlag, 38 App. Div. 209, 56 N. Y. Supp. 534.

[98] Davis v. Downer, 210 Mass. 573, 97 N. E. 90.

[99] Ewart, Estoppel, p. 4.

[1] Etting v. Marx (C. C.) 4 Fed. 673; Haney v. Legg, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81; Lasker-Morris Bank & Trust Co. v. Gans, 132 Ark. 402, 200 S. W. 1029; Chamberlain v. Chamberlain, 7 Cal. App. 634, 95 Pac. 659; Woodruff v. Williams, 35 Colo. 28, 85 Pac. 90, 5 L. R. A. (N. S.) 986; Evans v. Moore, 247 Ill. 60, 93 N. E. 118, 139 Am. St. Rep. 302; Jones v. Henderson, 149 Ind. 458, 49 N. E. 443; Harvey v. Hand, 48 Ind. App. 392, 95 N. E. 1020; In re Mahin's Estate, 161 Iowa, 459, 143 N. W. 420; Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251; Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72; O'Day v. Annex Realty Co. (Mo.) 191 S. W. 41; Van Alstyne v. Brown, 77 N. J. Eq. 455, 78 Atl. 678; Evans' Appeal, 81 Pa. 278; Bruner v. Finley, 187 Pa. 389, 41 Atl. 334; Stephens v. Dubois, 31 R. I. 138, 76 Atl. 656, 140 Am. St. Rep. 741; Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760; Roush v. Griffith, 65 W. Va. 752, 65 S. E. 168; Ash v. Wells, 76 W. Va. 711, 86 S. E. 750. "Of course, delay without neglect, or which does not operate to the prejudice of the rights of the opposite party, is not sufficient to constitute laches." Norfleet v. Hampson, 137 Ark. 600, 209 S. W. 651, 653.

[2] Stiness, J., in Chase v. Chase, 20 R. I. 202, 203, 37 Atl. 804. See, also, Ruckman v. Cox, 63 W. Va. 74, 59 S. E. 760, 762.

have said that the basis of the doctrine of laches is the powerlessness of the courts to ascertain the truth after great lapse of time.[3] Thus, a New Jersey court,[4] has recently held that delay will be "fatal when it is operative to render the court unable to feel confident of its ability to ascertain the truth as well as it could have done when the subject for investigation was recent and before the memories of those who had knowledge of the material facts had become faded and weakened by time." And a Pennsylvania court, in referring to an attempt to establish equities on facts which occurred fifty-two years before, has said:[5] "Of the men who were then in active life, and capable of being witnesses, not one in twenty thousand is now living. Written documents whose production might have settled this dispute instantly, have been, in all human probability, destroyed, or lost, or thrown away as useless. The matter belongs to a past age of which we can have no knowledge, except what we derive from history, through whose medium we can dimly discern the outlines of great public events, but all that pertains to men's private affairs is wholly invisible, or only visible in such a sort as to confound the sense and mislead the judgment." The statement that the court will not act when it feels the delay has been such that the truth cannot be learned is essentially based on the idea of estoppel. The delay has caused the loss of evidence and thus placed the party against whom the trust is sought to be enforced in a disadvantageous position. The trust asserter ought to be estopped to set up the trust.

Still other courts have placed emphasis on the thought that the doctrine of laches is founded on the public policy of encouraging repose.[6] This is perhaps but another way of expressing the "inability to do justice" idea.

Some courts have given a presumption of abandonment or release as a reason for the application of the doctrine of laches.[7] Accord-

[3] Badger v. Badger, 2 Wall. 87, 17 L. Ed. 836; Huntington Nat. Bank v. Huntington Distilling Co. (C. C.) 152 Fed. 240, 248; Monroe v. Gregory, 147 Ga. 340, 94 S. E. 219; Taylor v. Blair, 14 Mo. 437; Hendrickson v. Hendrickson, 42 N. J. Eq. 657, 9 Atl. 742; Kellogg v. Kellogg, 169 App. Div. 395, 155 N. Y. Supp. 310; Harrison v. Gibson, 23 Grat. (Va.) 212; Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309.

[4] Cox v. Brown, 87 N. J. Eq. 462, 464, 101 Atl. 260.

[5] Strimpfler v. Roberts, 18 Pa. 283, 299, 57 Am. Dec. 606.

[6] Jewell v. Trilby Mines Co., 229 Fed. 98, 143 C. C. A. 374; Veitch v. Woodward Iron Co., 200 Ala. 358, 76 South. 124; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Sprinkle v. Holton, 146 N. C. 258, 59 S. E. 680.

[7] Sanchez v. Dow, 23 Fla. 445, 2 South. 842; Newberry v. Winlock's Ex'x, 168 Ky. 822, 182 S. W. 949; In re Kelly's Estate, 37 Pa. Super. Ct. 320; Lafferty v. Turley, 3 Sneed (Tenn.) 157.

ing to them, after the lapse of a long period, equity presumes that the trust has been satisfied and terminated. But this is an arbitrary and artificial reason, and the notion of estoppel is behind it.

Length of Time

The mere fact that a long period of time has elapsed between the date of the accrual of a right and the date of the commencement of an action to enforce the right will not alone show laches.[8] "It has long since been settled by this court that mere lapse of time, short of the period fixed by the Statute of Limitations, will not bar a claim to equitable relief, when the right is clear, and there are no countervailing circumstances." [9] But the passage of a long interval has led many courts to find laches without the placing of any emphasis on any facts of estoppel, and in some cases with little, if any proof of change of position by others than the claimant.[10] Delay for a short period, as, for example, two years,[11] has been held to be laches under certain circumstances. No rule can be set. Each case must depend on its own peculiar facts—on the reasons for and the effects of the delay.

When laches are pleaded and the delay is shown, the burden then falls on the cestui que trust to explain the delay.[12] This he may do

[8] Pryor v. McIntire, 7 App. D. C. 417; Percival-Porter Co. v. Oaks, 130 Iowa, 212, 106 N. W. 626; Reihl v. Likowski, 33 Kan. 515, 6 Pac. 886; Cantwell v. Crawley, 188 Mo. 44, 86 S. W. 251.

[9] Cantwell v. Crawley, 188 Mo. 44, 57, 86 S. W. 251.

[10] Kansas City Southern Ry. Co. v. Stevenson (C. C.) 135 Fed. 553 (9 years); Froneberger v. First Nat. Bank, 203 Fed. 429, 121 C. C. A. 539 (40 years); Benedict v. City of New York, 247 Fed. 758, 159 C. C. A. 616 (17 years); Ewald v. Kierulff, 175 Cal. 363, 165 Pac. 942 (43 years); Martin v. Martin (Del. Ch.) 74 Atl. 864 (26 years); Mayfield v. Forsyth, 164 Ill. 32, 45 N. E. 403 (31 years); Moore v. Taylor, 251 Ill. 468, 96 N. E. 229 (30 years); Rittenhouse v. Smith, 255 Ill. 493, 99 N. E. 657 (30 years); Cecil's Committee v. Cecil, 149 Ky. 605, 149 S. W. 965 (25 years); Sizemore v. Davidson, 183 Ky. 166, 208 S. W. 810 (30 years); Thorne v. Foley, 137 Mich. 649, 100 N. W. 905 (45 years); Sprague v. Trustees of Protestant Episcopal Church of Diocese of Michigan, 186 Mich. 554, 152 N. W. 996 (30 years); Quairoli v. Italian Beneficial Society of Vineland, 64 N. J. Eq. 205, 53 Atl. 622 (20 years); Phillips v. Vermeule, 88 N. J. Eq. 500, 102 Atl. 695 (50 years); Jackson v. Farmer, 151 N. C. 279, 65 S. E. 1008 (29 years); Person v. Fort, 64 S. C. 502, 42 S. E. 594; Stianson v. Stianson, 40 S. D. 322, 167 N. W. 237, 6 A. L. R. 280 (24 years); Spaulding v. Collins, 51 Wash. 488, 99 Pac. 306 (20 years).

[11] Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222. In Cowan v. Union Trust Co. of San Francisco, 38 Cal. App. 203, 175 Pac. 799, the period was three years and four months.

[12] Robb v. Day, 90 Fed. 337, 33 C. C. A. 84; Alexander v. Fidelity Trust Co. (D. C.) 215 Fed. 791; Ewald v. Kierulff, 175 Cal. 363, 165 Pac. 942; Martin v. Martin (Del. Ch.) 74 Atl. 864; Blaul v. Dalton, 264 Ill. 193, 106 N. E. 196; Sackman v. Campbell, 15 Wash. 57, 45 Pac. 895; Richardson v. McConaughey, 55 W. Va. 546, 47 S. E. 287.

by showing that he had no knowledge of the existence of any cause of action until very shortly before the commencement of his suit.[13] If he did not know that he had been wronged, naturally he is charged with no negligence in failing to seek a remedy. "It has been said that the laches which will deprive a party of claiming equitable relief is the 'intentional failure to resist the assertion of an adverse right' and that consequently there cannot be acquiescence, 'without knowledge on the part of the person of the infringement of his legal rights.'" [14]

Excuses for Delay

But mere proof of ignorance is not enough to excuse delay. The ignorance must have been reasonable—must have existed despite the exercise of due care to learn the facts and to protect the cestui's rights.[15] A cestui que trust cannot sit idly by and close his eyes to what is going on around him. "One who would repel the imputation of laches on the score of ignorance of his rights must be without fault in remaining so long in ignorance of those rights. Indolent ignorance and indifference will no more avail than will voluntary ignorance of one's rights." [16] As a Pennsylvania court has recently said: [17] "Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained, the want of knowledge so caused is no excuse for a stale claim. The test is, not what the plaintiff knows, 'but what he might have known, by the use of the means of information within his reach, with the vigilance the law requires of him.'"

If the cestui que trust has, throughout the period of alleged lach-

[13] Stanwood v. Wishard (C. C.) 134 Fed. 959; Bay State Gas Co. of Delaware v. Rogers (C. C.) 147 Fed. 557; Huntington Nat. Bank v. Huntington Distilling Co. (C. C.) 152 Fed. 240; Russel v. Huntington Nat. Bank, 162 Fed. 868, 89 C. C. A. 558; Haney v. Legg, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81; Mullen v. Walton, 142 Ala. 166, 39 South. 97; Cliff v. Cliff, 23 Colo. App. 183, 128 Pac. 860; Anderson v. Northrop, 30 Fla. 612, 12 South. 318; Manning v. Manning, 135 Ga. 597, 69 S. E. 1126; Southern Bank of Fulton v. Nichols, 235 Mo. 401, 138 S. W. 881; Delmoe v. Long, 35 Mont. 139, 88 Pac. 778; In re Roney's Estate, 227 Pa. 127, 75 Atl. 1061; Weltner v. Thurmond, 17 Wyo. 268, 98 Pac. 590, 129 Am. St. Rep. 1113. The record of a will in a foreign state is not such notice as to create laches. Mullen v. Walton, 142 Ala. 166, 39 South. 97.

[14] Mullen v. Walton, 142 Ala. 166, 172, 39 South. 97.

[15] Swift v. Smith, 79 Fed. 709, 25 C. C. A. 154; McMonagle v. McGlinn (C. C.) 85 Fed. 88; Jewell v. Trilby Mines Co., 229 Fed. 98, 143 C. C. A. 374; Weber v. Chicago & W. I. R. Co., 246 Ill. 464, 92 N. E. 931; Taylor v. Coggins, 244 Pa. 228, 90 Atl. 633; Redford v. Clarke, 100 Va. 115, 40 S. E. 630.

[16] Redford v. Clarke, 100 Va. 115, 122, 123, 40 S. E. 630.

[17] Taylor v. Coggins, 244 Pa. 228, 231, 90 Atl. 633.

es, continuously asserted his rights as a beneficiary,[18] as, for example, by maintaining exclusive possession of the trust res,[19] he will, of course, be guilty of no laches. And joint possession by cestui que trust and trustee rebuts the idea of laches,[20] since it shows a recognition of the interest of the beneficiary. Payment of taxes by the cestui que trust shows an assertion of his right and militates against laches.[21] That the land which is the subject of contention has been unoccupied during the period of laches is no excuse for inaction on the part of the cestui.[22]

Strong evidence in contradiction of the allegation of laches is found in the continuous acknowledgment and fulfillment of the trust by the trustee during the period of alleged laches. If the trustee admits the trust and performs it, either there is no breach or other wrong, or it is so concealed from the beneficiary that he may reasonably remain ignorant of it.[23] Other facts excusing delay and rebutting the imputation of laches are family relationship between the alleged cestui and trustee, making a settlement of differences out of court more natural;[24] a proven desire on the part

[18] Grayson v. Bowlin, 70 Ark. 145, 66 S. W. 658; Howe v. Howe, 199 Mass. 598, 85 N. E. 945, 127 Am. St. Rep. 516.

[19] Dufour v. Weissberger, 172 Cal. 223, 155 Pac. 984; Boyd v. Boyd, 163 Ill. 611, 45 N. E. 118; Dorman v. Dorman, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; Flaherty v. Cramer, 62 N. J. Eq. 758, 48 Atl. 565; Houston, E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. App. 633, 71 S. W. 401.

[20] Wright v. Wright, 242 Ill. 71, 89 N. E. 789, 26 L. R. A. (N. S.) 161; Doyle v. Doyle, 268 Ill. 96, 108 N. E. 796; Cox v. Brown, 87 N. J. Eq. 462, 101 Atl. 260.

[21] Johnson v. Bayley, 15 Vt. 595.

[22] Lloyd v. Kirkwood, 112 Ill. 329.

[23] Sternfels v. Watson (C. C.) 139 Fed. 505; Small v. Hockinsmith, 158 Ala. 234, 48 South. 541; Woodruff v. Jabine (Ark.) 15 S. W. 830; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506; Fleming v. Shay, 19 Cal. App. 276, 125 Pac. 761; Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617; Madison v. Madison, 206 Ill. 534, 69 N. E. 625; Snyder v. Snyder, 280 Ill. 467, 117 N. E. 465; Jones v. Henderson, 149 Ind. 458, 49 N. E. 443; Johnson v. Foust, 158 Iowa, 195, 139 N. W. 451; Reihl v. Likowski, 33 Kan. 515, 6 Pac. 886; Chadwick v. Chadwick, 59 Mich. 87, 26 N. W. 288; Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894; Murry v. King, 153 Mo. App. 710, 135 S. W. 107; Gutch v. Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473; Carter v. Uhlein (N. J. Ch.) 36 Atl. 956; Jones v. Haines, 79 N. J. Eq. 110, 80 Atl. 943; Laughlin v. Laughlin, 219 Pa. 629, 69 Atl. 288; Cetenich v. Fuvich, 41 R. I. 107, 102 Atl. 817; Miller v. Saxton, 75 S. C. 237, 55 S. E. 310; Goode v. Lowery, 70 Tex. 150, 8 S. W. 73; Nuckols v Stanger (Tex. Civ. App.) 153 S. W. 931; Hammond v. Ridley's Ex'rs, 116 Va. 393, 82 S. E. 102; Gentry v. Poteet, 59 W. Va. 408, 53 S. E. 787; Campbell v. O'Neill, 69 W. Va. 459, 72 S. E. 732.

[24] Delkin v. McDuffie, 134 Ga. 517, 68 S. E. 93; Madison v. Madison,

of the cestui que trust to avoid litigation;[25] and infancy of the beneficiary during the period of inaction.[26] The poverty of the cestui que trust during the delay will not excuse him, for the courts consider it possible for him to seek relief, even though he can advance no money to counsel.[27] That the cestui que trust sought other and fruitless remedies does not excuse him from delay in seeking the correct remedy or rebut the inference of laches.[28]

If material witnesses have died during the delay of the cestui que trust,[29] and especially if the person who the cestui claims was a trustee has died[30] or become insane,[31] the courts will be apt to regard the inaction as amounting to laches. So, too, the loss of documentary evidence during the period when the cestui que trust was idle will operate against him;[32] and if the property in question has greatly increased in value,[33] or the rights of third parties have in the meantime attached,[34] or if the cestui que trust has recognized

206 Ill. 534, 69 N. E. 625; Wright v. Wright, 242 Ill. 71, 89 N. E. 789, 26 L. R. A. (N. S.) 161; Snyder v. Snyder, 280 Ill. 467, 117 N. E. 465; Cetenich v. Fuvich, 41 R. I. 107, 102 Atl. 817.

[25] Pearson v. Treadwell, 179 Mass. 462, 61 N. E. 44.

[26] Patrick v. Stark, 62 W. Va. 602, 59 S. E. 606.

[27] Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335.

[28] Carpenter v. M. J. & M. & M., Consolidated, 212 Fed. 868, 129 C. C. A. 388; Hotchkin v. McNaught-Collins Improvement Co., 102 Wash. 161, 172 Pac. 864.

[29] C. H. Venner Co. v. Central Trust Co. of New York, 204 Fed. 779, 123 C. C. A. 591; Elliott v. Clark, 5 Cal. App. 8, 89 Pac. 455; Smick's Adm'r v. Beswick's Adm'r, 113 Ky. 439, 68 S. W. 439; Streitz v. Hartman, 35 Neb. 406, 53 N. W. 215; Heinisch v. Pennington, 73 N. J. Eq. 456, 68 Atl. 233; Backes v. Crane, 87 N. J. Eq. 229, 100 Atl. 900; Coxe v. Carson, 169 N. C. 132, 85 S. E. 224; Newman v. Newman, 60 W. Va. 371, 55 S. E. 377, 7 L. R. A. (N. S.) 370.

[30] Hume v. Beale, 17 Wall. 336, 21 L. Ed. 602; Hughes v. Letcher, 168 Ala. 314, 52 South. 914; Veitch v. Woodward Iron Co., 200 Ala. 358, 76 South. 124; Reese v. Bruce, 136 Ark. 378, 206 S. W. 658; Van Hook v. Frey, 13 App. D. C. 543; Benson v. Dempster, 183 Ill. 297, 55 N. E. 651; Smith's Guardian v. Holtheide, 74 S. W. 718, 25 Ky. Law Rep. 125; Gaither v. Gaither, 3 Md. Ch. 158; Love v. Rogers, 118 Md. 525, 85 Atl. 771; Reid v. Savage, 59 Or. 301, 117 Pac. 306; Groome v. Belt, 171 Pa. 74, 32 Atl. 1132; Pilcher v. Lotzgesell, 57 Wash. 471, 107 Pac. 340; Smith v. Turley, 32 W. Va. 14, 9 S. E. 46; Russell v. Fish, 149 Wis. 122, 135 N. W. 531.

[31] Whitney v. Fox, 166 U. S. 637, 17 Sup. Ct. 713, 41 L. Ed. 1145.

[32] Amory v. Trustees of Amherst College, 229 Mass. 374, 118 N. E. 933.

[33] Alaska Northern R. Co. v. Alaska Cent. Ry. Co., 5 Alaska, 377; Russell v. Miller, 26 Mich. 1; Delmoe v. Long, 35 Mont. 139, 88 Pac. 778; Graham v. Donaldson, 5 Watts (Pa.) 451.

[34] Lady Ensley Coal, Iron & R. Co. v. Gordon, 155 Ala. 528, 46 South. 983; Butt v. McAlpine, 167 Ala. 521, 52 South. 420.

the legal title holder as the beneficial owner,[35] there will be a strong tendency to treat the delay of the cestui que trust as laches which bar his remedy. In all these cases there is a basis for estoppel which, it is believed, is at the foundation of all laches.

REMEDY BARRED BY THE STATUTE OF LIMITATIONS

127. Where there are no statutes of limitations expressly applying to equitable causes of action, equity follows the law and by analogy applies the legal statutes of limitation to equitable rights.

The remedies of the cestui que trust of an express trust against the trustee may be barred by the statute of limitations, but the statute does not run against the cestui que trust until he has notice of a breach of the trust, a repudiation of it by the trustee, or its termination.

The cestui que trust's remedies against third persons are subject to the normal operation of the statute of limitations.

By the weight of authority a resulting trustee is deemed to hold in subordination to his cestui que trust and not adversely, unless he has repudiated the trust. The statute of limitations, therefore, does not affect the cestui que trust's remedy until notice of the trustee's repudiation reaches the cestui que trust.

One who may be held as a constructive trustee holds wrongfully and adversely, and the statute of limitations operates to bar the remedy of the possible constructive cestui que trust from the date of knowledge of the facts upon which the constructive trust might be based.

Having observed that by rule of chancery in certain cases lapse of time and inaction will bar the remedy of the cestui que trust. it remains to inquire how statutory bars to the maintenance of actions have affected trusts. Legislatures have established periods after the expiration of which actions may not be maintained. Do these statutes expressly or impliedly affect the remedies of the cestui que trust?

Express Trusts

The expression, "the statute of limitations has no application to express trusts," is frequently found in opinions and text-books.[36]

[35] Higginbotham v. Boggs, 234 Fed. 253, 148 C. C. A. 155; Havenor v. Pipher, 109 Wis. 108, 85 N. W. 203.

[36] McDonald v. Sims, 3 Ga. 383; Whetsler v. Sprague, 224 Ill. 461, 79 N.

From this one might at first thought be led to believe that no statute of limitations would ever bar the remedy of a cestui que trust of an express trust; that after a breach of the trust by a trustee the beneficiary might sue at any time and would never be met by a statutory bar. But the users of this expression have not intended to convey any such comprehensive meaning. They have merely meant that, so long as the express trust continued to be recognized and enforced by the trustee, there was no running of the statute of limitations. For example, that a trust had been in existence for forty years, during all of which time the trustee had possessed the trust property, collected the income, and turned it over to the cestui que trust, would be no reason for barring the rights of the cestui que trust to the trust property. If one had had the adverse possession of property for forty years, he would, of course, be entitled to hold it as against all the world; but the trustee in the case put did not have adverse possession of the trust property, but had possession in subordination to the rights of the cestui que trust. Hence the statement that the statute of limitations has no application to express trusts merely means that so long as the trust is continuing and enforced there is no cause of action in favor of the cestui que trust and against the trustee, and the possession of the trustee is not adverse.

When the trustee denies the trust, repudiates his obligations under it, claims the trust property as his own, then of course a cause of action arises in favor of the cestui que trust, and then the statute of limitations starts to run. It is well settled that in express trusts, and as between cestui que trust and trustee, the statute of limitations runs from the date when the cestui que trust has actual or constructive notice of a repudiation of the trust by the trustee.[37] "As between the trustee and cestui que trust, in the case of

E. 667; Decouche v. Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478 (semble); Neilly v. Neilly, 23 Hun (N. Y.) 651; In re Passmore's Estate, 194 Pa. 632, 45 Atl. 417; Horine v. Mengel, 30 Pa. Super. Ct. 67; Pinson v. Ivey, 1 Yerg. (Tenn.) 296; Charter Oak Life Ins. Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253; Redwood v. Riddick, 4 Munf. (Va.) 222.

[37] Cholmondeley v. Clinton, 2 Meriv. 171, 360; Oliver v. Platt, 3 How. 333, 11 L. Ed. 622; Seymour v. Freer, 75 U. S. (8 Wall.) 202, 19 L. Ed. 306; Philippi v. Philippe, 115 U. S. 151, 5 Sup. Ct. 1181, 29 L. Ed. 336; Ray v. United States (D. C.) 50 Fed. 166; Pinkston v. Brewster, 14 Ala. 315; Hastie v. Aiken, 67 Ala. 313; McCarthy v. McCarthy, 74 Ala. 546; Holt v. Wilson, 75 Ala. 58; De Bardelaben v. Stoudenmire, 82 Ala. 574, 2 South. 488; Alaska Northern R. Co. v. Alaska Cent. R. Co., 5 Alaska, 304; Harris v. King, 16 Ark. 122; Wren v. Followell, 52 Ark. 76, 12 S. W. 155; Williams v. Young, 71 Ark. 164, 71 S. W. 669; Schroeder v. Jahns, 27 Cal. 274; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Hearst v. Pujol, 44 Cal. 230; Janes v. Throckmorton, 57 Cal. 368; Luco v. De Toro, 91 Cal. 405, 18 Pac. 866,

Lord Redesdale, in the old case of Hovenden v. Annesley, 2 Sch. & Lef. 607: 'If a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the cestui que trust; and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title.'" [43] In numerous cases where the disavowal of the trust was brought to the notice of the cestui que trust, he has been held barred by the statute.[44] But where a trustee mixed trust funds with his own and lent the mixed funds, but this wrong was not brought to the attention of the beneficiary, it has been held that the lack of notice prevented the running of the statute.[45]

Whether a given act is consistent with the continuance of the trust, or indicates an intent to repudiate the trust and claim adversely, is a question of fact for the determination of the court in each individual case. A conveyance by the trustee in violation of the trust is clearly a repudiation of it.[46] The mere payment of taxes by the trustee out of his own funds does not necessarily show a claim to the property as private property.[47] Where the cestui que trust remains in possession of the trust property, acts of the trustee are not ordinarily construed as a repudiation of the trust, since he has so far recognized the trust as to allow the beneficial owner possession.[48]

Termination of Trust

Not only repudiation of the trust, but also the termination of the trust, may start the statute of limitations running against the claims of the cestui que trust. Thus, if the trustee effects a settlement and is discharged as trustee, his possession of the trust property, if he retains any, will be adverse to the cestui que trust, and the statute of limitations will run against the right of the cestui to reclaim the property, or to allege fraud or impropriety in the ac-

[43] Cooper v. Cooper, 61 Miss. 676, 696.

[44] Goodno v. Hotchkiss (D. C.) 237 Fed. 686; McGuire v. Inhabitants of Linneus, 74 Me. 344; Stanton v. Helm, 87 Miss. 287, 39 South. 457; Mantle v. Speculator Min. Co., 27 Mont. 473, 71 Pac. 665; Congregational Society and Church in Newington v. Town of Newington, 53 N. H. 595; Boydstun v. Jacobs, 38 Nev. 175, 147 Pac. 447; Williams v. First Presbyterian Soc. in Cincinnati, 1 Ohio St. 478; Baillie v. Columbia Gold Min. Co., 86 Or. 1, 166 Pac. 965, 167 Pac. 1167; Hayes v. Walker, 70 S. C. 41, 48 S. E. 989; Moffatt v. Buchanan, 11 Humph. (Tenn.) 369, 54 Am. Dec. 41; Robertson v. Wood, 15 Tex. 1, 65 Am. Dec. 140; Felkner v. Dooly, 27 Utah, 350, 75 Pac. 854; Id., 28 Utah, 236, 78 Pac. 365.

[45] Watson v. Dodson (Tex. Civ. App.) 143 S. W. 329.

[46] Adams v. Holden, 111 Iowa, 54, 82 N. W. 468.

[47] Warren v. Adams, 19 Colo. 515, 36 Pac. 604.

[48] American Mining Co. v. Trask, 28 Idaho, 642, 156 Pac. 1136; Clark v. Clark, 21 Neb. 402, 32 N. W. 157.

count.[49] In the words of Finch, J.: "In the case of a direct trust the statute will begin to run when it ends, and the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over or transfer it discharged of the trust." [50] When the relation of trustee and cestui que trust changes to that of debtor and creditor, obviously the statute of limitations applicable to contract claims will control.[51] Where the death of the cestui que trust causes the end of the trust, the holding by the trustee will be adverse after such death, and the statute will operate against the persons equitably entitled to the property on the death.[52] But it has been held that the mere ending of the trust, with no account rendered, or settlement had or demanded, does not cause the statute to run, simply because the cestui leaves the trust property with the trustee.[53]

The statute of limitations does not begin to run against a remainderman cestui que trust until the expiration of the precedent estate.[54] Until his right to the benefits or use of the property accrues, the possession of the trustee or another will not be adverse to the remainderman cestui que trust, but will be adverse only to the owners of the preceding interest.

What Statutes Control Equity

The original statute of limitations,[55] which, as amended from time to time, forms the basis for modern American legislation, was directed to bar legal causes of action only. It did not expressly mention equitable rights. But courts of equity, in adjudicating with respect to legal rights, are bound by the legal statutes of limitations, and in dealing with equitable rights they have followed the law, and applied the legal statutes of limitations to equitable causes of action.[56] "But it is said that courts of equity are not within the statutes of limitations. This is true in one respect: They are not within the words of the statutes, because the words

[49] Clarke v. Boorman, 18 Wall. 493, 21 L. Ed. 904; Wellborn v. Rogers, 24 Ga. 558; Spallholz v. Sheldon, 216 N. Y. 205, 110 N. E. 431, Ann. Cas. 1917C, 1017; Starke v. Starke, 3 Rich. (S. C.) 438; Sollee v. Croft, 7 Rich. Eq. (S. C.) 34; Coleman v. Davis, 2 Strob. Eq. (S. C.) 334; Van Winkle v. Blackford, 33 W. Va. 573, 11 S. E. 26.

[50] Gilmore v. Ham, 142 N. Y. 1, 10, 36 N. E. 826, 40 Am. St. Rep. 554.

[51] Treadwell v. Treadwell, 176 Mass. 554, 57 N. E. 1016, 51 L. R. A. 190.

[52] Snodgrass v. Snodgrass, 185 Ala. 155, 64 South. 594.

[53] Jones v. Home Sav. Bank, 118 Mich. 155, 76 N. W. 322, 74 Am. St. Rep. 377.

[54] Pritchard v. Williams, 175 N. C. 319, 95 S. E. 570; Stewart v. Conrad's Adm'r, 100 Va. 128, 40 S. E. 624.

[55] 21 James I, c. 16 (1623), as printed in 4 Chitty's Stats. (4th Ed.) 85.

[56] Holloway v. Eagle, 135 Ark. 206, 205 S. W. 113; Appeal of Kutz, 40 Pa. 90; Redford v. Clarke, 100 Va. 115, 40 S. E. 630.

apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. * * * I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the Legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also." [57] "In respect of the statute of limitations, equity follows the law, and a demand that would be barred if asserted in a legal forum will be equally barred in equity." [58] In America frequently statutes have been enacted creating limitations peculiar to trusts, or to all equitable causes of action.[59]

An adverse claim to the trust property for the statutory period by a third person will bar both trustee and cestui que trust. Causes of action against third persons for the recovery of the trust res or for damages on account of its injury are subject to the ordinary statutes of limitation, and delay or negligence by the trustee in

[57] Hovenden v. Annesley, 2 Sch. & Lef. 607, 630, 631.

[58] Redford v. Clarke, 100 Va. 115, 121, 40 S. E. 630. See, also, Kent, Ch., in Kane v. Bloodgood, 7 Johns. Ch. 90, 113, 11 Am. Dec. 417.

[59] In California there is a five-year statute applicable to real property trusts (Code Civ. Proc. § 318), and a four-year statute for constructive trusts (Code Civ. Proc. § 343; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981). In Iowa and Mississippi there are ten-year statutes applicable to trusts. Percival-Porter Co. v. Oaks, 130 Iowa, 212, 106 N. W. 626; Stanton v. Helm, 87 Miss. 287, 39 South. 457. In New York rights of action under trusts are barred by a blanket section covering all cases not otherwise provided for and creating a ten-year limitation. Code Civ. Proc. § 388. The Pennsylvania statute reads: "No right of entry shall accrue, or actions be maintained for a specific performance of any contract for the sale of any real estate, or for damages for non-compliance with any such contract, or to enforce any equity of redemption, after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right of entry; unless such contract shall give a longer time for its performance, or there has been in part, a substantial performance, or such contract, equity of redemption, or trust, shall have been acknowledged by writing to subsist, by the party to be charged therewith, within the same period; Provided, that as to any one affected with a trust, by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same. * * *" 2 Purdon's Dig. (13th Ed.) pp. 2278–2280. See Carson v. Painter, 69 Pa. Super. Ct. 490.

enforcing the causes of action will operate to bar the beneficiary's rights.[60] "The rule in this court, that the Statute of Limitations does not bar a trust estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on the one side and strangers on the other, for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such trust, and so the act would never take place; therefore, where a cestui que trust and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both." [61]

Resulting Trusts

Resulting trusts are created by operation of law because of a presumed intent that they shall exist. The most common example of them is found in the case of the payment of the consideration for a conveyance by one and the taking of the title in the name of another, with the consent of the payor of the consideration. The question has frequently arisen whether the statute of limitations begins to run against the rights of the cestui que trust of a resulting trust from the date when the trustee obtained title, on the theory of an adverse holding from that date, or only from the date of a repudiation by the resulting trustee of the trust, on the theory of a friendly holding until the appearance of the contrary. Many courts have taken a position that a resulting trustee is like an express trustee, that his normal position is that of a holder in subordination to the rights of the cestui que trust, and that, from the date of the event which makes possible the trust until the contrary appears, he should be regarded as holding for the cestui que trust and not adversely to him.[62] "In such cases [those of resulting trusts] the title to the property is generally taken in the name of the trustee, with his knowledge and approval, and upon his recognition of the relation thereby created. It is hardly conceivable that a trustee should fail to recognize the trust at the time of the conveyance, unless he intends to deceive the beneficiary and acquire an absolute

[60] Cruse v. Kidd, 195 Ala. 22, 70 South. 166, 2 A. L. R. 36; Fleck v. Ellis, 144 Ga. 732, 87 S. E. 1055; Hart v. Citizens' Nat. Bank, 105 Kan. 434, 185 Pac. 1, 7 A. L. R. 933; Stoll v. Smith, 129 Md. 164, 98 Atl. 530. See § 91, ante.

[61] Lord Hardwicke in Lewellin v. Mackworth, as quoted in 2 Eq. Cases Abr. 579.

[62] Lasker-Morris Bank & Trust Co. v. Gans, 132 Ark. 402, 200 S. W. 1029; Faylor v. Faylor, 136 Cal. 92, 68 Pac. 482; In re Mahin's Estate, 161 Iowa, 459, 143 N. W. 420; Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368; Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190; White v. Sheldon, 4 Nev. 280; Levy v. Ryland, 32 Nev. 460, 109 Pac. 905.

title by fraud. In that event, there would be a practical disavowal of the trust at the outset, and the statute would begin to run as in the case of a constructive trust. But so long as the trustee recognizes the trust, the beneficiary may rely upon the recognition, and ordinarily will not be in fault for omitting to bring an action to enforce his rights. The case then resembles an express trust of a continuing nature, and is subject to the statute of limitations in like manner. If the trustee is in possession by permission of the cestui que trust, the possession will be that of the latter." [63]

Other courts have seemed to take the position that the attitude of a resulting trustee is equivocal; that it may sometimes be in subordination to the rights of the cestui que trust, and sometimes adverse to such rights. Thus, according to these decisions, whether the statute of limitations started to run at the time of the conveyance to the resulting trustee can only be told by examining the attitude of the resulting trustee from the date of such conveyance. If he has throughout recognized the alleged cestui que trust as a beneficiary, then the statute will not have commenced to run; but if his position has been hostile to the cestui que trust, the statute will run from the date of the conveyance. In this class of cases fall a number of decisions to the effect that where the resulting trustee has recognized the trust, the statute does not run until repudiation; [64] and allowing the cestui que trust to have possession rebuts the notion of repudiation and shows a recognition of the trust by the trustee.[65] On the other hand, in other cases founded on this theory, where there was no recognition of the trust, the statute was held to have run from the date of acquisition of title by the resulting trustee.[66] "It is true that the statute of limitations runs against a resulting trust on the ground that the holding of the title in such case is adverse to the right of the true owner. * * * In the present case the existence of the trust has at all times been acknowledged. The trustee has at all times admitted the right of the

[63] Crowley v. Crowley, 72 N. H. 241, 245–246, 56 Atl. 190. See, also, Lufkin v. Jakeman, 188 Mass. 528, 530–531, 74 N. E. 933.

[64] Appeal of Corr, 62 Conn. 403, 26 Atl. 478; Miller v. Saxton, 75 S. C. 237, 55 S. E. 310; Cole v. Noble, 63 Tex. 432.

[65] McNamara v. Garrity, 106 Ill. 384; Doyle v. Doyle, 268 Ill. 96, 108 N. E. 796 (semble); Norton v. McDevit, 122 N. C. 755, 30 S. E. 24; Snider v. Johnson, 25 Or. 328, 35 Pac. 546 (semble); Clark v. Trindle, 52 Pa. 492; Williard v. Williard, 56 Pa. 119; Henderson v. Maclay (Pa.) 6 Atl. 52; Miller v. Baker, 160 Pa. 172, 28 Atl. 648.

[66] Currier v. Studley, 159 Mass. 17, 33 N. E. 709; Best v. Campbell, 62 Pa. 476; McNinch v. Trego, 73 Pa. 52.

cestui que trust. As the reason has failed, so the rule has failed. There has been no adverse holding." [67]

It would seem that the normal holding of one who may be made a resulting trustee is adverse until the resulting trust is established by action of equity. The resulting trust does not exist until the cestui que trust elects to have it exist and proceeds in equity to accomplish that result. If the possible cestui que trust never proceeds in equity to have a resulting trust declared, the legal title holder will continue to hold the property. No change in the nature of his possession will occur. He will remain in possession on his own behalf. Logically it would seem that the statute should run from the date of the acquisition of title until the trust is decreed by equity. Any recognition of the resulting trust by the legal title holder would seem properly to be of no legal effect, unless it amounted to the creation of an express trust and satisfied the Statute of Frauds. If it were of sufficient formality to create or prove an express trust, then it might well be held thereafter that the statute would not run until repudiation of the trust by the trustee.

Constructive Trusts

The application of the statutes of limitation to constructive trusts ought not to be difficult. These trusts are involuntary, and are imposed upon the trustee because of actual or presumed fraud. They are founded upon the notion of wrongful or adverse possession. It would seem clear, therefore, that from the instant when the constructive trustee obtains the property the statute should run. From the date when the fraudulent act is committed there is a cause of action, a right to have a constructive trust declared. From that date, therefore, the statute of limitations should operate. In accordance with this theory a great majority of the American courts have held that the statute runs against a constructive trust from the time when the existence of the facts on which the trust is based became known to the cestui que trust.[68] Thus,

[67] Appeal of Corr, 62 Conn. 403, 408, 26 Atl. 478.

[68] Lide v. Park, 135 Ala. 131, 33 South. 175, 93 Am. St. Rep. 17; Curtis v. Daniel, 23 Ark. 362; Holloway v. Eagle, 135 Ark. 206, 205 S. W. 113; Hillyer v. Hynes, 33 Cal. App. 506, 165 Pac. 718; Norton v. Bassett, 154 Cal. 411, 97 Pac. 894, 129 Am. St. Rep. 162; Benoist v. Benoist, 178 Cal. 234, 172 Pac. 1109; Croce v. Bazzuro, 37 Cal. App. 167, 173 Pac. 774; Cliff v. Cliff, 23 Colo. App. 183, 128 Pac. 860; Harrison v. Adcock, 8 Ga. 68; Terry v. Davenport, 185 Ind. 561, 112 N. E. 998; Blackett v. Ziegler, 147 Iowa, 167, 125 N. W. 874; Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1066; Washbon v. Linscott State Bank, 87 Kan. 698, 125 Pac. 17; Hinze v. Hinze, 76 Kan. 169, 90 Pac. 762, 12 L. R. A. (N. S.) 493; Stubbins' Adm'r v. Briggs, 68 S. W. 392, 24 Ky. Law Rep. 230; Blakley v. Hanberry, 137 Ky. 283, 125 S. W. 703; Brawner v. Staup, 21 Md. 328; Cooper v. Cooper, 61 Miss.

where a trustee has wrongfully conveyed trust property to a third person, and the latter is sought to be held as a constructive trustee, the date of the conveyance will govern;[69] where a trustee purchased the trust res at his own sale, the right to have a constructive trust declared arose at once, and was barred in ten years from the date of the purchase;[70] and where one standing in a fiduciary relation, as that of principal and agent, bought his principal's property, the statute ran against the right to have a constructive trust declared from the date of the purchase.[71] Constructive notice, or notice of facts which should have led to the discovery of the fraud, is sufficient to start the statute running.[72] If the person obtaining the property by fraud conceals his fraud,[73] or for any other reason, not involving negligence of the claimant, the one claiming as cestui que trust of a constructive trust is ignorant of the fraud, the statute of limitations does not operate.[74]

The correct rule regarding constructive trusts and the statute of

676; Smith v. Ricords, 52 Mo. 581; Ricords v. Watkins, 56 Mo. 553; Burdett v. May, 100 Mo. 13, 12 S. W. 1056; Reed v. Painter, 145 Mo. 341, 46 S. W. 1089; Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72; Smith v. Settle, 128 Mo. App. 379, 107 S. W. 430; Markley v. Camden Safe Deposit & Trust Co., 74 N. J. Eq. 279, 69 Atl. 1100; Lammer v. Stoddard, 103 N. Y. 672, 9 N. E. 328; Price v. Mulford, 107 N. Y. 303, 14 N. E. 298; Mills v. Mills, 115 N. Y. 80, 21 N. E. 714; King v. Mackellar, 109 N. Y. 215, 16 N. E. 201; Townsend v. Crowner (Sup.) 125 N. Y. Supp. 329, affirmed 145 App. Div. 906, 129 N. Y. Supp. 1148; Hart v. Goadby, 72 Misc. Rep. 232, 129 N. Y. Supp. 892; Roediger v. Kraft, 169 App. Div. 304, 154 N. Y. Supp. 435; Edwards v. Trustees of University, 21 N. C. 325, 30 Am. Dec. 170; Wheeler v. Piper, 56 N. C. 249; Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212; Barrett v. Bamber, 81 Pa. 247; In re Marshall's Estate, 138 Pa. 285, 22 Atl. 24; Way v. Hooton, 156 Pa. 8, 26 Ad. 784; Rice v. Braden, 243 Pa. 141, 89 Atl. 877; In re Post, 13 R. I. 495; Beard v. Stanton, 15 S. C. 164; Loyd v. Currin, 3 Humph. (Tenn.) 462; Haynie v. Hall's Ex'r, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427; Haynes v. Swann, 6 Heisk. (Tenn.) 560; Kennedy v. Baker, 59 Tex. 150; Oaks v. West (Tex. Civ. App.) 64 S. W. 1033; Briggs v. McBride (Tex. Civ. App.) 190 S. W. 1123; Sheppard v. Turpin, 3 Grat. (Va.) 373; Beecher v. Foster, 51 W. Va. 605, 42 S. E. 647; Howell v. Howell, 15 Wis. 55; Buttles v. De Baun, 116 Wis. 323, 93 N. W. 5.

[69] Smith v. Dallas Compress Co., 195 Ala. 534, 70 South. 662.

[70] Hubbell v. Medbury, 53 N. Y. 98.

[71] McKean & Elk Land & Imp. Co. v. Clay, 149 Pa. 277, 24 Atl. 211; Ackerson v. Elliott, 97 Wash. 31, 165 Pac. 899.

[72] Rider v. Maul, 70 Pa. 15; Frost v. Bush, 195 Pa. 544, 46 Atl. 80; Cooper v. Lee, 75 Tex. 114, 12 S. W. 483.

[73] Jacobs v. Snyder, 76 Iowa, 522, 41 N. W. 207, 14 Am. St. Rep. 235; West v. Sloan, 56 N. C. 102.

[74] Prewitt v. Prewitt, 188 Mo. 675, 87 S. W. 1000; Freeland v. Williamson. 220 Mo. 217, 119 S. W. 560; Johnson v. Peterson. 100 Neb. 255, 159 N. W. 414; Wamburzee v. Kennedy, 4 Desaus. (S. C.) 474.

limitations is well stated in an early Wisconsin case,[75] as follows: "It follows that the cause of action set forth was barred in the lifetime of William Howell unless, as counsel supposed, it was necessary that there should have been a denial of the trust before the statute would begin to run. But that doctrine is applicable only to express or *acknowledged* trusts, where the trustee has afterwards repudiated the rights of the cestui que trust, and set up a claim to the trust property in his own right, and not to those implied or equitable trusts which spring from the originally wrongful and fraudulent acts of the party to be charged, and which were never recognized or admitted by him. It was of such express or acknowledged trusts that the court was speaking in the case referred to, and it would be as absurd to apply that doctrine to these implied trusts as it would be to apply the ten years' limitation to those where a denial of the trust has never taken place. It would be to abrogate the statute of limitations altogether in actions of this nature, or to say that it was not intended to apply to them; for as the party to be charged has no occasion to deny the trust until called upon to execute it, which is usually done by action, and as this might be delayed until after the expiration of the ten years, so it might be postponed for an indefinite period in the future. This was clearly not the intention. The trust in such cases originates in a fraud, which is in itself as complete and absolute a denial of the rights of the injured party as it is possible to have, and every day which passes without reparation of the injury is a continuation or repetition of it."

Minority View

In a few cases the courts seem to have overlooked the fact that constructive trusts are founded on adverse holding from the beginning. In these cases the courts hold that constructive trusts are on the same footing with regard to the statute of limitations as express trusts,[76] and consequently that the statute does not run until the constructive trustee has repudiated the trust.[77] This peculiar doctrine has been applied to a few cases of constructive trusts arising out of confidential relationships,[78] and to others where an attempt was made to follow trust property.[79] Of course, if there

[75] Howell v. Howell, 15 Wis. 55, 58.

[76] Case v. Goodman, 250 Mo. 112, 156 S. W. 698; Canada v. Daniel, 175 Mo. App. 55, 157 S. W. 1032.

[77] Dennison v. Barney, 49 Colo. 442, 113 Pac. 519; Schlosser v. Schlosser, 62 Colo. 270, 162 Pac. 153.

[78] Newis v. Topfer, 121 Iowa, 433, 96 N. W. 739; Home Inv. Co. v. Strange (Tex.) 195 S. W. 849.

[79] Harvey v. Bank of Marrowbone, 178 Ky. 793, 200 S. W. 28; Goodman v. Smith, 94 Neb. 227, 142 N. W. 521.

has been a disavowal by the constructive trustee, that is, an express statement that he declines to hold for the constructive cestui que trust, such evidence, while not necessary to cause the statute to run, will certainly not impede its operation.[80] The view that the statute operates alike on all trusts is thus expressed by an Illinois court:[81] "When the possession of the trust property is taken by the trustee, under the trust, it is the possession of the cestui que trust, whether the trust be express or implied, and cannot be adverse until the trust is openly disavowed or denied, and this fact is brought home to the knowledge of the cestui que trust." An illustration of the application of this rule is found in an Iowa case,[82] where a woman in feeble health conveyed realty to her stepfather upon an oral understanding that he would care for her children. The court raised a constructive trust upon the ground of the confidential relation, and held that, since the constructive trustee had never repudiated the trust, the statute of limitations had not operated to bar the rights of the cestuis que trust.

Constructive Trustee may Consent to Trust

Yet other courts have taken the position that the possession of the constructive trustee should be treated as adverse or not, dependent on whether the constructive trustee recognized the rights of the cestui que trust. If the trustee, after committing the fraud which gave rise to the right to have the constructive trust declared, admitted the rights of the defrauded person and denied any intention of holding for his own benefit, these courts have held that the statute of limitations did not run, unless and until there was a change of attitude by the constructive trustee.[83] Thus, where a husband used his wife's money to buy land without her consent, and took the title in his name, but thereafter at all times recognized the wife's ownership of the land and made no claim to it for himself, an Alabama court has held that the possession of the husband

[80] Young v. Walker, 224 Mass. 491, 113 N. E. 363.

[81] Reynolds v. Sumner, 126 Ill. 58, 71, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523.

[82] Newis v. Topfer, 121 Iowa, 433, 96 N. W. 739.

[83] Moore v. Worley, 24 Ind. 81; Milner v. Hyland, 77 Ind. 458; Johnson v. Foust, 158 Iowa, 195, 139 N. W. 451; Hunnicut v. Oren, 84 Kan. 460, 114 Pac. 1059; Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; Donovan v. Driscoll, 93 Pa. 509; Preston v. Preston, 202 Pa. 515, 52 Atl. 192; Pearce v. Dyess, 45 Tex. Civ. App. 406, 101 S. W. 549. Contra: Parks v. Satterthwaite, 132 Ind. 411, 32 N. E. 82. In Nougues v. Newlands, 118 Cal. 102, 50 Pac. 386, it was held that the recognition of the constructive trust must be by writing, if the res is real property, in order that the recognition be effective to prevent the running of the statute.

was not adverse, though obtained fraudulently, and the statute had not begun to run against the wife's rights.[84]

In this class of cases fall those in which an agent takes title to property in his own name, but the principal remains in possession. Here, though the agent be guilty of fraud which might be made the basis of a constructive trust, yet possession by the principal amounts to a recognition of the trust and prevents the statutory bar from being imposed.[85] "The rule, however, is different with respect to constructive or resulting trusts; the general rule in such cases being that the statute commences to run from the time the act occurs which creates the trust, or, in other words, when the cestui que trust could bring an action to enforce the trust, and that no repudiation of the trust by the trustee is necessary to start the running of the statute. But to that general rule there is a well defined and recognized exception, viz., when the cestui que trust is in possession, and the trustee has done nothing inconsistent with a recognition of the trust, or has not asserted an adverse claim." [86] The holdings of many courts amount substantially to a rule that the statute of limitations commences to run against a constructive trust from the date of knowledge by the cestui que trust of the act which gives rise to the trust, unless there is a recognition of the trust by the constructive trustee.[87] The presumption is in favor of adverse holding. Holding in subordination to the cestui que trust is abnormal and exceptional.

As with resulting trusts, so with constructive, it would seem that the possession of the trustee should be regarded as adverse, unless he recognizes the trust in such a way as to change his status to

[84] Haney v. Legg, 129 Ala. 619, 30 South. 34, 87 Am. St. Rep. 81. For a similar case, see Fawcett v. Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844.

[85] Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86; Franks v. Morris, 9 W. Va. 664; Cook v. Elmore, 25 Wyo. 393, 171 Pac. 261.

[86] Cook v. Elmore, 25 Wyo. 393, 171 Pac. 261, 263.

[87] Martin v. Branch Bank of Decatur, 31 Ala. 115; Brackin v. Newman, 121 Ala. 311, 26 South. 3; Broder v. Conklin, 121 Cal. 282, 53 Pac. 699; Barker v. Hurley, 132 Cal. 21, 63 Pac. 1071, 64 Pac. 480; Earle v. Bryant, 12 Cal. App. 553, 107 Pac. 1018; Earhart v. Churchill Co., 169 Cal. 728, 147 Pac. 942; Wilmerding v. Russ, 33 Conn. 67; Gebhard v. Sattler, 40 Iowa, 152; Otto v. Schlapkahl, 57 Iowa, 226, 10 N. W. 651; Manion's Adm'r v. Titsworth, 18 B. Mon. (Ky.) 582; Commonwealth v. Clark, 119 Ky. 85, 83 S. W. 100, 9 L. R. A. (N. S.) 750; Harlow v. Dehon, 111 Mass. 195; Prewett v. Buckingham, 28 Miss. 92; Mills v. Hendershot, 70 N. J. Eq. 258, 62 Atl. 542; Seitz v. Seitz, 59 App. Div. 150, 69 N. Y. Supp. 170; Stianson v. Stianson, 40 S. D. 322, 167 N. W. 237, 6 A. L. R. 280.

that of an express trustee. If the property involved were real property, this recognition should meet the requirements of the Statute of Frauds. So long as the person obtaining the property by fraud, actual or presumed, has not made himself an express trustee, or been made a constructive trustee by act of equity, he holds the property adversely and for his own benefit, and the statute should operate in his favor.

CHAPTER XV

THE TERMINATION OF THE TRUST

METHODS OF EXTINCTION

128. The trust may end because of—

(a) The natural expiration of the trust term as defined in the trust instrument;

(b) The accomplishment of its purpose;

(c) The impossibility of its execution;

(d) Its destruction by the operation of the doctrine of merger;

(e) The exercise of a power of revocation reserved to the settlor or granted to another;

(f) A decree of termination upon the demand of the cestui que trust, where the trust is passive or its purpose accomplished;

(g) The sale of the trust property upon the foreclosure of a lien arising prior to the trust.

The death of a trust party ordinarily has no effect on the life of a trust.

By the weight of authority a cestui que trust, owning the entire equitable interest in the trust res, may not call for a termination of the trust, if it is active and its purpose unaccomplished.

Expiration of Trust Term

The termination of the trust does not ordinarily involve difficulty. Normally the term is fixed by the trust instrument or the oral settlement. Where the settlor states the period for which the trust is to continue, and this period is a lawful one, there can be little room for contention concerning the extinction of the trust by natural means. The trust will last till the date set and then naturally cease. Thus, a period of years,[1] or a life,[2] may be fixed as the trust term; or the settlor may provide that the trust shall con-

[1] Watkins v. Greer, 52 Ark. 65, 11 S. W. 1019; In re Hanson's Estate, 159 Cal. 401, 114 Pac. 810; Montgomery v. Trueheart (Tex. Civ. App.) 146 S. W. 284.

[2] Laughlin v. Page, 108 Me. 307, 80 Atl. 753; In re 110th St., 81 App. Div. 27, 81 N. Y. Supp. 32; Embury v. Sheldon, 68 N. Y. 227; Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212; In re Wilson's Estate, 49 Pa. 241; Bearden v. White (Tenn. Ch. App.) 42 S. W. 476.

tinue for a period of years, unless a life expires prior to that time.[3] A life may be fixed as the trust term, with a proviso that the trustee may in his discretion earlier end the trust.[4] The settlor may prescribe that the trust shall last during a minority,[5] or until a cestui que trust reaches a given age,[6] or until the marriage of a given person.[7]

The happening of any one of a large number of events may be fixed as the date of the termination of the trust; as, for example, the alienation of the interest of the cestui que trust,[8] a breach of trust by the trustee,[9] the failure of the cestui to perform a condition,[10] the discharge of the beneficiary from all his debts,[11] or the good moral conduct of the cestui que trust for seven years.[12]

Instead of fixing the end of the trust himself, the settlor may give that right to another. The trust period will not then be certain, but will be capable of being rendered certain by the exercise of the power of termination given to the trustee,[13] the trustee and the cestui que trust jointly,[14] the cestui que trust,[15] a majority of the beneficiaries,[16] or such other party as the settlor may select. Where the settlor nominates another to end the trust in its entirety, it is a question of fact whether he also impliedly granted the power to end the trust in part.[17]

Although a settlor may not have expressly stated the trust term, or measured it by lives, years, or similar standards, he may impliedly have fixed the duration of the trust by his statement of its purpose. It is rudimentary law that a trust will last no longer

[3] McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329.

[4] Cutter v. Hardy, 48 Cal. 568.

[5] Kuykendall v. Zenn, 78 Md. 537, 28 Atl. 412; Fogarty v. Stange, 72 Misc. Rep. 225, 129 N. Y. Supp. 610; Mason v. Paschal, 98 Tenn. 41, 38 S. W. 92.

[6] Anderson v. Messinger, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094.

[7] Thornquist v. Oglethorpe Lodge Number One, 140 Ga. 297, 78 S. E. 1086; In re Rose's Will, 156 Wis. 570, 146 N. W. 916.

[8] Cherbonnier v. Bussey, 92 Md. 413, 48 Atl. 923.

[9] Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238, 45 Atl. 1087.

[10] Short v. Wilson, 13 Johns. (N. Y.) 33.

[11] In re Ames, 22 R. I. 54, 46 Atl. 47.

[12] Ordway v. Gardner, 107 Wis. 74, 82 N. W. 696.

[13] Schreyer v. Schreyer, 101 App. Div. 456, 91 N. Y. Supp. 1065, affirmed 182 N. Y. 555, 75 N. E. 1134; In re Wilkin, 90 App. Div. 324, 86 N. Y. Supp. 360.

[14] Lippincott v. Williams, 63 N. J. Eq. 130, 51 Atl. 467.

[15] In re Stone, 138 Mass. 476.

[16] Culver v. Culver, 58 Ohio St. 172, 50 N. E. 505.

[17] In re Columbia Trust Co., 97 Misc. Rep. 566, 163 N. Y. Supp. 536.

than necessary for the accomplishment of its purpose. If the settlor has not otherwise fixed the end of the trust, he will be deemed to have intended that it should last till the trust purpose was attained.[18] Thus, a trust to collect the net income and pay it over to a beneficiary may naturally be measured by the life of the beneficiary, since the object of supporting the beneficiary would not be accomplished until his death;[19] and a trust for a married woman, to protect her property from her husband, may reasonably be construed to last during the marriage only.[20]

In some jurisdictions statutes provide that certain trusts suspend the power of alienation, and other statutes limit the lawful period of such suspension.[21] In these states the trust period must be carefully fixed, in order to avoid the rules against unlawful suspension of the power of alienation.

The rules regarding the express or implied limits of the trust term are well stated by an Illinois court, as follows:[22] "Where a testator by his will creates a trust and fixes the duration thereof, his direction will, if not in violation of the rule against perpetuities, be given effect and the trust will continue for the time indicated; but where a testator does not specifically indicate the time for which the trust is to continue, his intention must, if possible, be determined from the entire will. Where the evident purpose of a trust is the accomplishment of a particular object, the trust will terminate so soon as that object has been accomplished, and the fact that a fee is given to the trustee does not show the testator's intention that the trust estate shall continue after the active duties connected with the trust have been accomplished."

Accomplishment of Purpose

Not only may the trust terminate because of the expiration of the period stated by the settlor to be the trust period, but also because the continuance of the trust would be useless. If the result sought to be reached by the establishment of the trust has been achieved, equity will either regard the trust as ended or will end it. Many courts have held that, on the accomplishment of the trust purpose, the legal title of the trustee ceases ipso facto,

[18] Edwards v. Edwards, 142 Ala. 267, 39 South. 82; Smith v. Dunwoody, 19 Ga. 237; Cornwell v. Wulff, 148 Mo. 542, 50 S. W. 439, 45 L. R. A. 53; Augustus v. Graves, 9 Barb. (N. Y.) 595; Burke v. O'Brien, 115 App. Div. 574, 100 N. Y. Supp. 1048; Mackrell v. Walker, 172 Pa. 154, 33 Atl. 337.

[19] In re Leavitt, 8 Cal. App. 756, 97 Pac. 916.

[20] Smith v. Metcalf, 1 Head (Tenn.) 64.

[21] Jessup v. Witherbee Real Estate & Imp. Co., 63 Misc. Rep. 649, 117 N. Y. Supp. 276. See discussion, ante, §§ 49, 111.

[22] Kohtz v. Eldred, 208 Ill. 60, 72, 69 N. E. 900.

and the person entitled to the property after the end of the trust becomes automatically the holder of the legal title.[23] Other courts have reached the same result on a different theory by holding that the accomplishment of the trust purpose caused the original trust to end, and left the trustee the holder of the legal title under a passive trust for the person next entitled.[24] This latter view would seem more logical and less apt to produce confusion in titles than a change of title without action or record.

"The duration of a trust depends upon the purposes of the trust. When the purposes have been accomplished the trust ceases." [25] In Koenig's Appeal [26] a trust for a married woman had been created and divorce had later occurred. In discussing the termination of the trust the court said: "But if the sole purpose of the trust was to protect the wife's estate against her husband, it is manifest that purpose was fully accomplished when the coverture ceased. The divorce of the parties terminated all possibility of the husband's interference with the property bequeathed and devised to the wife, as completely as his death would have done. Then why should the trust be continued after its exigencies have been met? It matters not what may be the nominal duration of an estate given by will to a trustee. It continues in equity no longer than the thing sought to be secured by the trust demands. Even a devise to trustees and their heirs will be cut down to an estate for life, or even for years, if such lesser estate be sufficient for the purpose of the trust."

Examples of trusts terminating naturally or prematurely through

[23] Comby v. McMichael, 19 Ala. 747; Cherry v. Richardson, 120 Ala. 242, 24 South. 570; Snell v. Payne, 78 S. W. 885, 25 Ky. Law Rep. 1836; In re Hagerstown Trust Co., 119 Md. 224, 86 Atl. 982; Taylor v. Richards, 153 Mich. 667, 117 N. W. 208; Bellinger v. Shafer, 2 Sandf. Ch. (N. Y.) 293; Peck v. Brown, 25 N. Y. Super. Ct. 119; Quin v. Skinner, 49 Barb. (N. Y.) 128; Sharman v. Jackson, 98 App. Div. 187, 90 N. Y. Supp. 469; Kahn v. Tierney, 135 App. Div. 897, 120 N. Y. Supp. 663, affirmed 201 N. Y. 516, 94 N. E. 1095; Steacy v. Rice, 27 Pa. 75, 67 Am. Dec. 447; Appeal of Bush, 33 Pa. 85; Appeal of Koenig, 57 Pa. 352; Appeal of Williams, 83 Pa. 377; In re Lee's Estate, 207 Pa. 218, 56 Atl. 425; Wilson v. Heilman, 219 Pa. 237, 68 Atl. 674; Packer's Estate, 246 Pa. 97, 92 Atl. 65; Warland v. Colwell, 10 R. I. 369; Temple v. Ferguson, 110 Tenn. 84, 72 S. W. 455, 100 Am. St. Rep. 791; Millsaps v. Johnson (Tex. Civ. App.) 196 S. W. 202.

[24] Ringrose v. Gleadall, 17 Cal. App. 664, 121 Pac. 407; Kohtz v. Eldred, 208 Ill. 60, 69 N. E. 900; Cary v. Slead, 220 Ill. 508, 77 N. E. 234; Browning v. Fiklin's Adm'r, 12 S. W. 714, 26 Ky. Law Rep. 470; Adams v. Adams, 56 S. W. 151, 21 Ky. Law Rep. 1756; Harlow v. Cowdrey, 109 Mass. 183; Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586; Carman v. Bumpus, 244 Pa. 136, 90 Atl. 544.

[25] Winters v. March, 139 Tenn. 496, 501, 202 S. W. 73.

[26] 57 Pa. 352, 355.

the accomplishment of their purposes are found in trusts for married women where the marriage ends, either by the death of the husband,[27] or the death of the wife,[28] or by divorce.[29] Once such a trust is extinguished, it does not revive on the remarriage of the cestui que trust.[30] Similarly a trust to pay debts is ended by the cancellation of the debts through other means.[31] But where a trust was created for one who happened to be an inebriate at the time of the commencement of the trust, but the object of the trust did not appear to have been to guard against improvidence arising from such habits, a change in the condition of the cestui que trust to that of sobriety did not cause the trust to terminate.[32]

The principle that achievement of purpose causes the end of a trust is, in some states, incorporated in statutory form.[33]

Impossibility of Performance

The effect on private, express trusts of imperfection in the declaration, or illegality or impossibility, has been previously discussed.[34] If the imperfection, illegality, or impossibility existed at the time it was sought to create the trust, the express trust never comes into being. Title passes by virtue of the settlement, but the trustee holds as a resulting trustee and not under the intended express trust. If, however, the illegality or impossibility did not exist at the commencement of the trust, but arose during its execution, a different question is presented. In this latter case the express trust has admittedly had existence. The impossibility or illegality which changes it into a resulting trust will therefore cause the termination of the express trust. Such situation, therefore, presents another example of the methods by which a trust may be extinguished. For example, if a trust is created by deed to aid creditors named in an assignment for the benefit of creditors previously made by the settlor's husband, and the husband's assignment is set aside after the trust created by the wife has commenced, obviously there is an impossibility. The execution of a trust auxiliary

[27] O'Brien v. Ash, 169 Mo. 283, 69 S. W. 8.

[28] Liptrot v. Holmes, 1 Ga. 381.

[29] In re Cornils' Estate, 167 Iowa, 196, 149 N. W. 65, L. R. A. 1915E, 762; McNeer v. Patrick, 93 Neb. 746, 142 N. W. 283. But, if the trust is expressly settled to last for the life of the husband, divorce will not terminate it. Pelton v. Macy, 124 App. Div. 367, 108 N. Y. Supp. 713.

[30] Hamersley v. Smith, 4 Whart. (Pa.) 126.

[31] Selden v. Vermilya, 3 N. Y. 525.

[32] Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122.

[33] "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease." New York Real Property Law (Consol. Laws, c. 50) § 109.

[34] See ante, § 32.

to the husband's assignment has been prevented because the husband's assignment has been wiped out of existence. Therefore the original express trust ceases and the trustee holds as a resulting trustee for the settlor. The court says: "It will not be disputed, we presume, that where a trust is created by deed, and the object of such trust fails, the property conveyed by the deed reverts to the grantor or his heirs by way of resulting trust." [35]

It has been previously shown that impossibility of performance has a different effect in charitable trusts from that given to it in the case of private trusts.[36] Ordinarily if a charitable trust becomes impossible of execution as directed by the settlor, equity will apply the cy pres doctrine and carry out the settlor's intention as nearly as possible. But in a few cases impossibility of performance has had the effect of terminating a charitable trust. Thus, it has been held that where the trust funds become exhausted, the charity should be declared extinguished.[37] And where the application of the cy pres doctrine is impossible, because no other charity than the one prescribed would approximately carry out the settlor's ideas, the trust will be held to have failed and fund revert to the donor.[38] A few courts have held that where a settlor voluntarily creates a charitable trust and there is a subsequent abandonment of the charity by the trustees, there will be a reverter.[39] And in a few states, due to the failure of the court to recognize the cy pres rule, or for other reason, impossibility of performance has had the effect of the destruction of the trust.[40]

On the other hand, in the great majority of the cases considering the question, impossibility of carrying out the charitable trust as originally planned has been no bar to its continuance. Thus, the dissolution of the corporation made trustee under the trust instrument does not affect the life of the trust, for a new trustee may be supplied.[41] In the absence of a clause providing for a reverter and

[35] Witt v. Carroll, 37 S. C. 388, 393, 16 S. E. 130.

[36] Ante, § 63.

[37] Bronson v. Strouse, 57 Conn. 147, 17 Atl. 699; Acklin v. Paschal, 48 Tex. 147.

[38] People ex rel. Smith v. Braucher, 258 Ill. 604, 101 N. E. 944, 47 L. R. A. (N. S.) 1015.

[39] Grundy v. Neal, 147 Ky. 729, 145 S. W. 401 (but see, contra, Lutes v. Louisville & N. R. Co., 158 Ky. 259, 164 S. W. 792, where the reason for the abandonment of the premises was the necessity to convey them to a railroad to avoid condemnation proceedings and where other property was substituted); Cone v. Wold, 85 Minn. 302, 88 N. W. 977; Appeal of Gumbert, 110 Pa. 496, 1 Atl. 437, semble.

[40] Taylor v. Rogers, 130 Ky. 112, 112 S. W. 1105; Golding v. Gaither, 113 Md. 187, 77 Atl. 333; Pringle v. Dorsey, 3 S. C. 502.

[41] Green v. Blackwell (N. J. Ch.) 35 Atl. 375; In re Orthodox Congrega-

a termination of the trust in case of impossibility of performance according to the original directions, equity will apply the property cy pres for charitable objects as nearly like those stated by the settlor as possible.[42] "Where lands have been donated and become vested in a trustee, as herein for charitable uses, neither the donor nor his or her heirs can ever reclaim it, and all right and interest therein or thereto is gone forever." [43] For abuse of the charitable trust the remedy is not a termination of the trust, but removal of the trustee or action in equity to compel performance. From nonuse or abuse by the trustee no termination of the trust results.[44] An unreasonable delay by the trustee of the charitable trust has no effect on the life of the trust.[45]

Merger

Merger is a doctrine of limited application in equity. It will not operate when injustice or the defeat of the settlor's intent would result. But where it takes effect it may terminate a trust.

The attitude of the courts toward merger as applied to trusts is shown by an extract from a recent Iowa case,[46] as follows: "Merger takes place where a greater and less estate come together in the same person, and when there is no reason for their longer existence as separate estates. The doctrine has its foundation in the convenience of the parties interested, and therefore whenever the rights of strangers, not parties to the act, that would otherwise work an extinguishment of the particular estate, require it, the two estates will still have a separate continuance in contemplation of

tional Church in Union Village, 6 Abb. N. C. (N. Y.) 398; In re Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

[42] Barnard v. Adams (C. C.) 58 Fed. 313; Bridgeport Public Library & Reading Room v. Burroughs Home, 85 Conn. 309, 82 Atl. 582; Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S. E. 385; Goode v. McPherson, 51 Mo. 126; Women's Christian Ass'n v. City of Kansas City, 147 Mo. 103, 48 S. W. 960; Keene v. Eastman, 75 N. H. 191, 72 Atl. 213; Maxcy v. City of Oshkosh, 144 Wis. 238, 128 N. W. 899, 1136, 31 L. R. A. (N. S.) 787.

[43] Women's Christian Ass'n v. City of Kansas City, 147 Mo. 103, 126, 127, 48 S. W. 960.

[44] Bolick v. Cox, 145 Ga. 888, 90 S. E. 54; People ex rel. Ellert v. Cogswell, 113 Cal. 129, 45 Pac. 270, 35 L. R. A. 269; American Colonization Soc. v. Soulsby, 129 Md. 605, 99 Atl. 944, L. R. A. 1917C, 937; Sanderson v. White, 18 Pick. (Mass.) 328, 29 Am. Dec. 591; Stewart v. Franchetti, 167 App. Div. 541, 153 N. Y. Supp. 453; Barr v. Weld, 24 Pa. 84; In re Sellers M. E. Church's Petition, 139 Pa. 61, 21 Atl. 145, 11 L. R. A. 282; In re Toner's Estate, 260 Pa. 49, 103 Atl. 541; Clark v. Oliver, 91 Va. 421, 22 S. E. 175.

[45] Tainter v. Clark, 5 Allen (Mass.) 66.

[46] Sherlock v. Thompson, 167 Iowa, 1, 148 N. W. 1035, 1039, Ann. Cas. 1917A, 1216.

law." As said by a California court:[47] "To have a union operate a merger, the estates must unite in one and the same person, having a commensurate and coextensive interest in each, with no intervening interest in another. A legal estate in fee in one who has only a partial equitable interest, or vice versa, would not merge. * * * Wherever it would work injustice, or defeat the intention of the donor to work a merger, the two estates will be kept alive although they come together in one person. * * * While merger at law follows immediately upon the union of a greater and lesser estate in the same ownership, it does not so follow in equity. There the doctrine is not favored and the estates will be kept separate where the intention of the parties and justice require it."

Examples of the abolition of a trust by merger are found in the cases where the trustee has conveyed his legal estate to the sole cestui que trust. In such instance the separate entities necessary to the continuance of the trust are lacking, and absolute ownership by the grantee is the result.[48] The converse of this situation may produce merger also. If the cestui que trust transfer to the trustee all his interest, a merger may occur and absolute ownership by the trustee be the outcome;[49] but this will not be the case if an intent that merger should not take place is clearly expressed.[50]

If at the commencement of the trust the sole trustees are also the sole cestuis que trust, a merger and absolute ownership will result, for there is no object in maintaining the trust.[51] But the opposite result occurs where the sole cestui que trust was one of several trustees at the outset, but by survival became the sole trustee. In this latter case the substitution of trustees for the deceased trustees or the supervision of the administration of the trust by the court will prevent the necessity of merger and termination of the trust. As was said by a court which had this question to consider:[52] "When the beneficiary of an express trust becomes a sole trustee

[47] Estate of Washburn, 11 Cal. App. 735, 746, 106 Pac. 415.

[48] Brooks v. Jones, 11 Metc. (Mass.) 191; Healey v. Alston, 25 Miss. 190; Hickman v. Wood's Ex'r, 30 Mo. 199.

[49] Cunningham v. Bright, 228 Mass. 385, 117 N. E. 909. But see Bronson v. Thompson, 77 Conn. 214, 58 Atl. 692, for a case where merger did not occur.

[50] Gray v. Beard, 66 Or. 59, 133 Pac. 791.

[51] In re Selous, [1901] 1 Ch. 921. See discussion at ante, § 74. If the sole cestui is sole trustee, merger will occur, notwithstanding a direction that surplus income be accumulated for ten years; such direction being said to be inconsistent with the absolute interest given the cestui que trust. Odom v. Morgan, 177 N. C. 367, 99 S. E. 195.

[52] Irving v. Irving, 21 Misc. Rep. 743, 745, 746, 47 N. Y. Supp. 1052.

for his own benefit, as in this case, it seems to me that the true rule to adopt is this: That the trust is not thereby destroyed, but that it is improper for the beneficiary to act, except by direction of the court. Such a rule permits the intent of the testator to be fully carried out, and is also in harmony with the long and well established rule that a court of equity will endeavor to effectuate the intention of a testator, and, for that purpose, will not permit a trust to fail because of the failure to appoint a competent trustee."

Where the holder of the complete legal title is also a holder of a portion of the equitable interest, the trust is naturally not destroyed. The outstanding equitable interest in others prevents such result.[53]

Where the nature of the trust is such that all the cestuis que trust have a right to demand a termination of the relationship, merger of two equitable interests may place in the hands of one person the power to demand an end of the trust. Thus, it has been held that, where the sole cestui que trust and the sole remainderman convey their interests to a third party, equity may, at the request of the latter, extinguish the trust.[54] And a similar result has been obtained in a case where the remainderman conveyed his interest to the life cestui que trust.[55]

On the other hand, the union of the entire equitable interest in the hands of one person does not conclusively show a right to end the trust. To effectuate the intent of the settlor the trust may be continued.[56] If there are outstanding contingent interests, which would be shut out by the merger, the union of the vested interests will not cause merger.[57]

Death of Party

The death of settlor, trustee, or cestui que trust will not cause the trust to terminate unless the life of one or the other has in some way been made the measure of the life of the trust. In other words, the death of one or all of these parties will not prematurely end the trust, will not cut it off in advance of the time fixed by the settlor.

[53] Sherlock v. Thompson, 167 Iowa, 1, 148 N. W. 1035, Ann. Cas. 1917A, 1216.

[54] Brooks v. Davis, 82 N. J. Eq. 118, 88 Atl. 178.

[55] In re Bloodgood, 184 App. Div. 798, 172 N. Y. Supp. 509; In re Owens' Estate, 3 Pa. Dist. R. 331. In Langley v. Conlan, 212 Mass. 135, 98 N. E. 1064, Ann. Cas. 1913C, 421, a life cestui, having a half interest in remainder, purchased the other half, and was later appointed trustee. Merger occurred.

[56] In re Washburn's Estate, 11 Cal. App. 735, 106 Pac. 415; Martin v. Pine, 79 Hun, 426, 29 N. Y. Supp. 995.

[57] Wenzel v. Powder, 100 Md. 36, 59 Atl. 194, 108 Am. St Rep. 380.

A trust is not like an agency, where the death of the principal revokes the relationship. The death of the settlor will, unless the settlor's life has been made a measuring life, have no effect on the continuance of the trust.[58]

So, too, under the application of the doctrine that equity never allows a trust to fail for want of a trustee, the death of the trustee will not extinguish the trust relationship.[59] A substitute trustee will be supplied. But if the powers of the deceased trustee were personal, that is, if an intention had been expressed by the settlor that the deceased trustee alone should exercise the powers, then death will end the trust.[60] The life of the trustee may, of course, be made the measure of the trust's duration, expressly or by implication.[61] Where the deceased trustee had the sole power to appoint his successor and appointed none, the trust will end at the death of the trustee.[62] Where a husband is trustee for his wife, the object of the trust being to protect the property from interference by the husband during the marriage, the death of the husband trustee naturally results in the accomplishment of the trust purpose and indirectly causes the end of the trust.[63]

The death of the cestui que trust has ordinarily no effect on the life of the trust.[64] His interest, if inheritable, passes to his representatives, or goes to the succeeding cestui que trust, if provision is made for two or more successive beneficiaries. But frequently the settlor expressly or impliedly provides that the trust shall endure only during the life of the cestui que trust.[65] In the so-called

[58] Lyle v. Burke, 40 Mich. 499.

[59] Williams v. McConico, 36 Ala. 22; Spence v. Widney (Cal.) 46 Pac. 463; Shillinglaw v. Peterson, 184 Iowa, 276, 167 N. W. 709.

[60] Hadley v. Hadley, 147 Ind. 423, 46 N. E. 823; Hinckley v. Hinckley, 79 Me. 320, 9 Atl. 897. But merely giving discretion to the trustee to deliver part of the principal to the cestui que trust does not show that the trust was personal. Russell v. Hartley, 83 Conn. 654, 78 Atl. 320.

[61] Fidelity Trust Co. v. Alexander, 243 Fed. 162, 156 C. C. A. 28; Brock v. Conkwright, 179 Ky. 555, 200 S. W. 962; Farrelly v. Ladd, 10 Allen (Mass.) 127; Barbour v. Weld, 201 Mass. 513, 87 N. E. 909; Baker v. McAden, 118 N. C. 740, 24 S. E. 531; Appeal of Shoemaker, 91 Pa. 134.

[62] Brock v. Conkwright, 179 Ky. 555, 200 S. W. 962.

[63] Coughlin v. Seago, 53 Ga. 250.

[64] Slevin v. Brown, 32 Mo. 176; Mendenhall v. Walters, 53 Okl. 598, 157 Pac. 732.

[65] Snodgrass v. Snodgrass, 185 Ala. 155, 64 South. 594; Bradstreet v. Kinsella, 76 Mo. 63; Norton v. Norton, 2 Sandf. (N. Y.) 296; Deering v. Pierce, 149 App. Div. 10, 133 N. Y. Supp. 582; Ivory v. Burns, 56 Pa. 300; Appeal of Stokes, 80 Pa. 337. By Acts Ind. 1915, p. 98, unexplained absence of the cestui que trust for five years is regarded as equivalent to his death, and authorizes a termination of the trust.

"savings bank" trusts, where A. deposits his money in a bank and directs that the account be entitled "A., in trust for B.," the death of B. may prevent the trust having any existence.[66] Unless A. makes the trust irrevocable by notice to B., or delivery of the book, or in some similar way, the deposit will not result in the creation of a trust, unless B. survives A. Here the death of a tentative cestui que trust prevents him from becoming a permanent beneficiary.

Act of Party—Settlor

It remains to be considered when one of the parties to the trust may destroy it, either by the mere expression of his will to do so, or by calling upon equity for a decree of termination.

It has previously been shown herein that the settlor, whether the settlement be voluntary or for a consideration, has no control over the trust and no right to revoke it, unless he has reserved that right in the trust instrument or declaration.[67] Having created in the beneficiaries certain rights, the settlor has no power to destroy those rights or to demand of equity their destruction, unless such power has been expressly provided for. If the trustee is guilty of an abuse of the trust, the remedy is removal of the trustee by equity, on the application of a party in interest, and the settlor may not, because of such abuse, revoke the trust, where there was no power of revocation reserved.[68]

On the other hand, if there is a reservation of the right to revoke on behalf of the settlor, he obviously has the power to terminate the trust, whether it was voluntarily created or not.[69]

[66] In re United States Trust Co. of New York, 117 App. Div. 178, 102 N. Y. Supp. 271, affirmed 189 N. Y. 500, 81 N. E. 1177.

[67] See ante, § 72; Hendrix College v. Arkansas Townsite Co., 85 Ark. 446, 108 S. W. 514; Kopp v. Gunther, 95 Cal. 63, 30 Pac. 301; Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 South. 860; Riemensnider v. Riemensnider, 179 Ill. App. 209; Von Buchwaldt v. Schlens, 123 Md. 405, 91 Atl. 466; Lovett v. Farnham, 169 Mass. 1, 47 N. E. 246; Dickey v. Goldschmidt, 60 Misc. Rep. 258, 111 N. Y. Supp. 1025; In re Green, 103 Misc. Rep. 564, 170 N. Y. Supp. 843; Fidelity Title & Trust Co. of Pittsburg v. Graham, 262 Pa. 273, 105 Atl. 295; Rynd v. Baker, 193 Pa. 486, 44 Atl. 551; Wilson v. Anderson, 186 Pa. 531, 40 Atl. 1096, 44 L. R. A. 542; Strong v. Weir, 47 S. C. 307, 25 S. E. 157.

[68] Sickles v. City of New Orleans, 80 Fed. 868, 26 C. C. A. 204; Brower v. Callender, 105 Ill. 88.

[69] Hidell v. Girard Life Ins. Annuity & Trust Co., Fed. Cas. No. 6464; Stockett v. Ryan, 176 Pa. 71, 34 Atl. 973; Yard v. Pittsburgh & L. E. R. Co., 131 Pa. 205, 18 Atl. 874; Jennings v. Hennessy, 26 Misc. Rep. 265, 55 N. Y. Supp. 833, affirmed 40 App. Div. 633, 58 N. Y. Supp. 1142; Wright v. Clark, 81 Misc. Rep. 527, 142 N. Y. Supp. 812; Sims v. Brown, 252 Mo. 58, 158 S. W. 624; Brown v. Fidelity Trust Co., 126 Md. 175, 94 Atl. 523;

Some courts have been inclined to extend the settlor's right of revocation to certain cases, even though no power to revoke had been reserved. Thus, it has been held that equity would decree a termination of the trust at the instance of the settlor, where the trust was not being performed and injury to both settlor and cestui que trust was thereby occurring.[70] The Rhode Island courts have regarded the failure to insert a power of revocation in a voluntary deed as prima facie evidence of mistake, entitling the settlor to revocation;[71] but this view has been opposed in Massachusetts.[72] If the power of revocation was omitted through fraud or mistake, obviously according to elementary equitable principles the power of revocation will be supplied and termination of the trust allowed.[73] The absence of a power of reservation, the lack of advice on the need of such power, and surrounding circumstances showing an expectation on the part of the settlor that the power would exist, are facts authorizing equity to allow revocation; the court saying:[74] "That the law of the land permits any one to dispose of his property gratuitously, if he please, when not prejudicial to the interests of creditors, and that his voluntary gifts, made with full intention and knowledge of the act, are irrevocable in equity as well as in law, when the power to revoke is not reserved, may be conceded. It may be admitted, also, that the mere omission of counsel to advise the insertion of a power to revoke, will not alone be a ground in equity to set aside a voluntary conveyance. But the absence of such a power, and the failure of counsel to advise upon it, are circumstances of weight when joined to other circumstances tending to show that the act was not done with a deliberate will. Therefore, when the facts show that the instrument was executed without advice or reflection, and without an intention to bind the party after the reasons and motives for executing it have passed away, and the party is again sui juris, a court of equity will and

Gaither v. Williams, 57 Md. 625; Ewing v. Wilson, 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; Lewis v. Curnutt, 130 Iowa, 423, 106 N. W. 914.

[70] Schriver v. Frommel, 179 Ky. 228, 200 S. W. 327.

[71] Aylsworth v. Whitcomb, 12 R. I. 298. But, obviously, when a deed expressly states that the trust is irrevocable, the presumption of a mistake in failing to insert a power of revocation is overcome. Neisler v. Pearsall, 22 R. I. 367, 48 Atl. 8, 52 L. R. A. 874. And where the purpose of the trust was inconsistent with a power of revocation, the presumption of mistake is overcome. Wallace v. Industrial Trust Co., 29 R. I. 550, 73 Atl. 25.

[72] Sands v. Old Colony Trust Co., 195 Mass. 575, 577, 81 N. E. 300, 12 Ann Cas. 837.

[73] Garnsey v. Mundy, 24 N. J. Eq. 243; Barnard v. Gantz, 140 N. Y. 249, 35 N. E. 430.

[74] Russell's Appeal, 75 Pa. 269, 288, 289.

ought to relieve as against mere volunteers, claiming without consideration or a reasonable motive for continuing the donor's disability. * * * The mistake is not one simply of law. That would be so if the settlor, in full view of all the clauses and provisions in the deed, would interpret them for himself as being in law adequate to confer a power of revocation upon him, when in truth the law would not so expound the instrument. But in a case such as this the mistake is one of fact, so mixed with the legal effect of the writing, equity will use the mistake of fact as a means of relief."

In one state a statute has been recently passed allowing the settlor to revoke a trust of personal property in whole or in part, upon the written consent of all persons beneficially interested.[75]

Act of Party—Trustee

The trustee is ordinarily a mere instrument for the execution of the trust, and has no control over its duration. In the absence of unusual circumstances, therefore, the trustee has no power to end the trust or to call on chancery to end it.[76] A reconveyance by trustee to settlor has been held to have no effect on the life of the trust,[77] and, where there is reason for the continuance of the trust, a transfer of the legal title from trustee to cestui que trust has likewise been regarded as not determining the relationship.[78] By merely delivering to a court his resignation, the trustee cannot extinguish the trust.[79] The failure of a trustee to sell for the benefit of creditors within the time limited by the trust instrument will not cause the trust to cease to exist.[80] The change of the trust res does not destroy the trust,[81] but where a trustee has power to alienate trust property the trust is naturally ended as to the property alienated.[82] The settlor may confer on the trustee the power to

[75] New York Personal Property Law (Consol. Laws, c. 41) § 23; Hoskin v. Long Island Loan & Trust Co., 139 App. Div. 258, 123 N. Y. Supp. 994, affirmed in 203 N. Y. 588, 96 N. E. 1116; Whittemore v. Equitable Trust Co., 162 App. Div. 607, 147 N. Y. Supp. 1058.

[76] Cox v. Cox, 95 Va. 173, 27 S. E. 834; Heiskell v. Powell, 23 W. Va. 717; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. But if the trustee improperly end the trust, transfer the property to the cestuis que trust, and take releases from them, no one has a standing in court to complain of the destruction of the trust. Partridge v. Clary, 228 Mass. 290, 117 N. E. 332.

[77] Ewing v. Warner, 47 Minn. 446, 50 N. W. 603.

[78] Hartley v. Unknown Heirs of Wyatt, 281 Ill. 321, 117 N. E. 995; Douglas v. Cruger, 80 N. Y. 15 (on statutory grounds).

[79] Tucker v. Grundy, 83 Ky. 540.

[80] Smith v. Kinney's Ex'rs, 33 Tex. 283.

[81] United States v. Thurston Co., 143 Fed. 287, 74 C. C. A. 425; Moore v. O'Hare, 224 Mass. 283, 112 N. E. 863.

[82] Thatcher v. Wardens, etc., of St. Andrew's Church of Ann Arbor, 37 Mich. 264.

end the trust;[83] and the failure of the trustee to act may result in the title to trust property being lost by adverse possession and the trust thus extinguished.[84]

Act of Party—Cestui Que Trust

Whether the cestui que trust may call upon equity to terminate the trust is a question not without difficulty. It has been previously discussed to some extent under the heading of the trustee's duties, in connection with the point whether the trustee should convey to the cestui upon demand and thus extinguish the trust.[85] The cases which have allowed the cestui que trust to extinguish the trust may be divided into three classes. There are first those in which the trust is passive and all cestuis que trust have vested interests, are sui juris, and unite in a demand for the termination of the trust and the vesting of the legal title in them. These cases present no difficulty. The courts are unanimous in granting the demand of the cestuis que trust and determining the trust.[86] As was said by a Massachusetts court in deciding a case of this class:[87] "In the case before us the trustees hold the fund in question upon a simple trust; the plaintiff is the absolute equitable owner of the fund and its income; he may alienate them and they can be reached by his creditors. If the testator had the intention of guarding against his possible improvidence or misfortune, he failed to carry his intention into effect, and thus the reason for the existence of a trust fails."

The second class of cases comprises those in which the objects of the trust have been accomplished and there is no benefit to be obtained by continuing the trust. In these cases the courts have allowed a destruction of the trust at the request of the cestuis que trust, although the normal period of its existence had not expired.[88] The settlor's intent is not violated by such determination

[83] In re Spring's Estate, 216 Pa. 529, 66 Atl. 110.

[84] Nelson v. Ratliff, 72 Miss. 656, 18 South. 487.

[85] Ante, § 100.

[86] Ringrose v. Gleadall, 17 Cal. App. 664, 121 Pac. 407; Fox v. Fox, 250 Ill. 384, 95 N. E. 498; Reuling's Ex'x v. Reuling, 137 Ky. 637, 126 S. W. 151; Tilton v. Davidson, 98 Me. 55, 56 Atl. 215; Root v. Blake, 14 Pick. (Mass.) 271; Rector v. Dalby, 98 Mo. App. 189, 71 S. W. 1078; Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; Supreme Lodge, Knights of Pythias v. Rutzler, 87 N. J. Eq. 342, 100 Atl. 189; McKenzie v. Sumner, 114 N. C. 425, 19 S. E. 375; Fisher v. Wister (Pa.) 25 Atl. 1015; Taylor v. Taylor, 9 R. I. 119; Kennedy v. Badgett, 19 S. C. 591.

[87] Sears v. Choate, 146 Mass. 395, 398, 399, 15 N. E. 786, 4 Am. St. Rep. 320.

[88] Coltman v. Moore, 1 MacArthur (D. C.) 197; Bowditch v. Andrew, 8 Allen (Mass.) 339; Sands v. Old Colony Trust Co., 195 Mass. 575, 81 N. E. 300, 12 Ann. Cas. 837; Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151; Coram v. Davis, 39 Mont. 495, 104 Pac. 518; Heideman v. Sparks, 64 N.

of the trust, for his intent has been effectuated. It is reasonable and equitable under such circumstances to allow the sole parties in interest to decide for themselves whether they prefer to enjoy their property as legal owners or indirectly through the use of a trust. In Georgia, where trusts are limited by statute to those for the benefit of spendthrifts and persons non sui juris, if a spendthrift becomes thrifty and the trust is no longer needed for his protection, the trust purpose fails, and the cestui que trust may call for its end.[89] Where the object of a trust is the protection of the corpus of the fund during the life of the first beneficiary, and the remainderman beneficiary acquires the interest of the life beneficiary, there is an accomplishment of purpose, and the sole party in interest may call for a conveyance. In a case involving this situation a Pennsylvania court has recently said:[90] "In the case now before us, all present and future interests in the trust property having been acquired by the remainderman, the 'thing sought to be secured,' i. e., the protection of the corpus pending the duration of the life estates, has become unessential. Under such circumstances, it is the right of a cestui que trust to have the legal estate of the trustee declared terminated. * * *"

In numerous other cases where the cestui que trust and the remainderman were either identical in person at the commencement of the trust, or became so by purchase during the trust life, and the purpose of the trust had been accomplished, extinguishment of the trust has been allowed.[91] Upon this same principle a partial extinction of the trust has been allowed where the trust purpose as to a portion of the cestuis que trust has been accomplished and their interests could be severed.[92] Thus, where a portion of the trust property was being held for the purpose of ascertaining whether a son of the settlor would have any afterborn children to share in the fund, and the son died childless, it was held that the trust object

J. Eq. 374, 55 Atl. 1132; In re Wood's Estate, 261 Pa. 480, 104 Atl. 673; Megargee v. Naglee, 64 Pa. 216; Ives v. Harris, 7 R. I. 413; Angell v. Angell, 28 R. I. 592, 68 Atl. 583; Armistead's Ex'rs v. Hartt, 97 Va. 316, 33 S. E. 616.

[89] De Vaughn v. Hays, 140 Ga. 208, 78 S. E. 844.

[90] In re Stafford's Estate, 258 Pa. 595, 598, 599, 102 Atl. 222.

[91] Whall v. Converse, 146 Mass. 345, 15 N. E. 660; Simmons v. Northwestern Trust Co., 136 Minn. 307, 162 N. W. 450, L. R. A. 1917F, 736; Camden Safe Deposit & Trust Co. v. Guerin, 89 N. J. Eq. 556, 105 Atl. 189; Gloyd v. Roff, 2 Ohio Cir. Ct. R. 253; Taylor v. Huber's Ex'rs, 13 Ohio St. 288; Appeal of Yerkes, 2 Chest. Co. Rep. 410; In re Harrar's Estate, 244 Pa. 542, 91 Atl. 503; Thom's Ex'r v. Thom, 95 Va. 413, 28 S. E. 583.

[92] Williams v. Thacher, 186 Mass. 293, 71 N. E. 567; Welch v. Trustees of Episcopal Theological School, 189 Mass. 108, 75 N. E. 139; Harlow v. Weld (R. I.) 104 Atl. 832.

was, as to this property, achieved and the property might be distributed to the cestuis entitled thereto, freed from the trust.[93]

English and Minority View

A third set of decisions have proceeded yet further in recognizing the rights of the cestui que trust. They have allowed a person possessing the sole equitable interest in the trust property to call for a termination of the trust, even though the trust was still active, its natural term not completed, and the purposes of the settlor not carried out.[94] These courts have declined to respect the intent of the settlor. They have said that the sole person interested in the property might determine for himself whether he should enjoy the property through the medium of a trust or as legal owner. This theory is exemplified by a recent Maine case [95] in which the trust was created for the aid of certain relatives in time of need. Obviously it could not be accomplished according to the wish of the settlor until the beneficiaries had died, for they might at any time fall into need; but the court terminated the trust upon the written request of all the beneficiaries and allowed them to divide the property among themselves. In a similar Massachusetts case [96] the court likewise allowed the termination of the trust during the lives of the relatives to be aided, saying: "There is no legal or equitable objection to the granting of the relief prayed for in the bill. For considered collectively the plaintiffs are the real and substantial owners of the property, and it is reasonable and just that it should be disposed of in conformity to the desire and preference in which they all unite."

If the cestui que trust is non sui juris, as, for example, an infant, he will not be entitled to end the trust, regardless of its state, for his act in releasing the trustee would be voidable at least.[97]

If the cestuis que trust demanding a termination possess vested interests, but there is a possibility that other cestuis may come into being, the existing cestuis que trust will not be entitled to call for a conveyance; [98] and so, too, where the beneficiaries demanding an

[93] Wayman v. Follansbee, 253 Ill. 602, 98 N. E. 21.

[94] Saunders v. Vautier, 4 Beav. 115; Wharton v. Masterman, [1895] A. C. 186; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975; Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99; Smith v. Harrington, 4 Allen (Mass.) 566; Huber v. Donoghue, 49 N. J. Eq. 125, 23 Atl. 495; Turnage v. Greene, 55 N. C. 63, 62 Am. Dec. 208.

[95] Dodge v. Dodge, 112 Me. 291, 92 Atl. 49.

[96] Smith v. Harrington, 4 Allen, 566, 568.

[97] Wirth v. Wirth, 183 Mass. 527, 67 N. E. 657.

[98] Allen v. Allen's Trustee, 141 Ky. 689, 133 S. W. 543; Battle v. Petway, 27 N. C. 576, 44 Am. Dec. 59; In re Eshelman's Estate, 191 Pa. 68, 43 Atl. 201; In re Lewis' Estate, 231 Pa. 60, 79 Atl. 921; Greene v. Aborn, 10 R. I. 10; Dial v. Dial, 21 Tex. 529.

extinction of the trust and a conveyance to themselves are contingent cestuis only, the court will not grant their request.[99]

Majority View

Even though all the persons equitably interested in the property join, and all have vested interests and are sui juris, yet if the trust is active and its purposes therefore not accomplished, they will not be allowed to call for a determination of the trust, according to the weight of authority in America.[1] The larger number of the courts which have considered the question respect the intention of the testator, give him the power to restrict and define the way in which the beneficiaries shall take the benefits of the trust property, and refuse to allow the beneficiaries to elect how they shall enjoy the property. As has been well said by the Supreme Court of Pennsylvania in a recent case:[2] "It may, therefore, be regarded as settled that a testamentary direction to a trustee to hold, invest and manage the corpus of a fund for a definite period, and pay the income therefrom at stated times to a beneficiary creates an active trust which the statute does not execute and which will continue to be operative and cannot be terminated until the purpose for which the trust was created has been accomplished. The rule has its foundation in the well-established principle that, within the limits of the law, every man may do as he pleases with his own property. He may, therefore, dispose of it in fee, or create estates therein in dif-

[99] Olsen v. Youngerman, 136 Iowa, 404, 113 N. W. 938; In re Thistle's Estate, 263 Pa. 60, 106 Atl. 94.

[1] Ballantine v. Ballantine, 160 Fed. 927, 88 C. C. A. 109; DeLadson v. Crawford, 93 Conn. 402, 106 Atl. 326; Webster v. Bush, 39 S. W. 411, 42 S. W. 1124, 19 Ky. Law Rep. 565; Nunn v. Peak, 130 Ky. 405, 113 S. W. 493; Miller's Ex'rs v. Miller's Heirs and Creditors, 172 Ky. 519, 189 S. W. 417; Downs v. Security Trust Co., 175 Ky. 789, 194 S. W. 1041; Kimball v. Blanchard, 101 Me. 383, 64 Atl. 645; Russell v. Grinnell, 105 Mass. 425; Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; Watson v. Watson, 213 Mass. 425, 111 N. E. 904; Easton v. Demuth, 179 Mo. App. 722, 162 S. W. 294; Robbins v. Smith, 72 Ohio St. 1, 73 N. E. 1051; Hill v. Hill, 49 Okl. 424, 152 Pac. 1122; Twining v. Girard Life Ins. Annuity & Trust Co., 14 Phila. (Pa.) 74; Wickham v. Berry, 55 Pa. 70; Van Leer v. Van Leer, 221 Pa. 195, 70 Atl. 716; In re Shirk's Estate, 242 Pa. 95, 88 Atl. 873; In re Stewart's Estate, 253 Pa. 277, 98 Atl. 569, Ann. Cas. 1918B, 1216; Barkley v. Dosser, 15 Lea (Tenn.) 529; Glasscock v. Tate, 107 Tenn. 486, 64 S. W. 715; Lanius v. Fletcher, 100 Tex. 550, 101 S. W. 1076; McNeill v. St. Aubin (Tex. Civ. App.) 209 S. W. 781; Carney v. Kain, 40 W. Va. 758, 23 S. E. 650; Bussell v. Wright, 133 Wis. 445, 113 N. W. 644. In Stier v. Nashville Trust Co., 158 Fed. 601, 85 C. C. A. 423, it is said that equity may in its discretion refuse to end a trust, where it is active and has an unaccomplished purpose.

[2] In re Henderson's Estate, 258 Pa. 510, 515, 102 Atl. 217. For a discussion of the policy of this rule, see Scott, Control of Property by the Dead, 65 Pa. Law Rev. 632, 647.

ferent persons, or grant or devise it on such conditions or under such restrictions as he may desire." It follows, a fortiori, that a portion of the beneficiaries cannot cause the termination of a trust, the purpose of which is unaccomplished.[3]

In some states statutes forbid the beneficiaries of trusts to collect and pay over the income and profits from alienating their interests. These statutes have been construed to prevent the abrogation of such trusts by act of the cestuis que trust.[4] A New York court in considering the question has said:[5] "Whatever view may be taken of the general jurisdiction of courts of equity, in the absence of any statutory or legislative policy, to abrogate continuing trusts, created for the purpose of providing a sure support for the widow or children of a testator, or other beneficiary, the indestructibility of such trusts here, by judicial decree, results, we think, from the inalienable character impressed upon them by statute. The beneficiaries of trusts for the receipt of the rents and profits of land are prohibited from assigning or disposing of their interest, * * * and this provision is held to apply, by force of other sections of the statute, to the interest of beneficiaries in similar trusts of personalty. * * * This legislative policy cannot, we think, be defeated by the action of the court permitting such alienation, or abrogating the trust."

The acquiescence or opposition of the trustee in the cestui que trust's application for a termination of the trust is immaterial. If the cestui has a right to the extinction of the trust, that the trustee is hostile to such result will not deter the court from decreeing a termination.[6]

The effect of a combination of two or more of the three trust parties in applying for a termination of the trust will be determined by the principles previously stated regarding their separate applications. Thus, since neither the settlor nor the trustee ordinarily has a right to determine the trust, their union in an effort to that end will likewise be unsuccessful, in the absence of a power spe-

[3] Gray v. Union Trust Co. of San Francisco, 171 Cal. 637, 154 Pac. 306; Lobdell v. State Bank of Neuvoo, 180 Ill. 56, 54 N. E. 157; Petition of Thurston, 154 Mass. 596, 29 N. E. 53, 26 Am. St. Rep. 278; Smith v. Smith, 70 Mo. App. 448; Harris v. Harris, 205 Pa. 460, 55 Atl. 30; Carney v. Byron, 19 R. I. 283, 36 Atl. 5; Guye v. Guye, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186.

[4] Dale v. Guaranty Trust Co., 168 App. Div. 601, 153 N. Y. Supp. 1041, 1 Cornell Law Quarterly, 209; Patton v. Patrick, 123 Wis. 218, 101 N. W. 408.

[5] Lent v. Howard, 89 N. Y. 169, 181.

[6] Armistead's Ex'rs v. Hartt, 97 Va. 316, 33 S. E. 616.

cially granted or reserved.[7] Hence a conveyance of the trust property by the trustee to the settlor, and a reconveyance without mention of the trust, will not end the trust.[8] The settlor, trustee, and cestuis que trust in combination have under special circumstances been allowed to extinguish the trust;[9] and so, too, where no object would be subserved by maintaining the trust, one person, who occupies the positions of settlor, cestui que trust, and remainderman, may end the trust.[10]

The trustee and cestuis que trust have been allowed to determine active, unaccomplished trusts in jurisdictions where the policy of the court permits the cestuis que trust to achieve the same result.[11] On the other hand, those courts which refuse to the cestuis the right to extinguish the trust, so long as its purpose remains unaccomplished, have declined to decree an end of the trust upon the application of both trustee and cestuis que trust.[12] Thus, in Young v. Snow, the trust was to keep the property in repair and to pay the income over for twenty years; all the cestuis que trust and the trustee united in asking equity to end the trust before the expiration of the twenty years; but the court, following the leading case of Claflin v. Claflin,[13] declined.[14] Where contingent interests exist, the joinder of the trustee with the cestuis que trust will not induce the court to terminate the trust.[15]

By Act of Third Party

Ordinarily a third party to the trust can have no power to destroy the trust. However, if he be the owner of a mortgage or oth-

[7] Saunders v. Richard, 35 Fla. 28, 16 South. 679; Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; Kelley v. Snow, 185 Mass. 288, 70 N. E. 89; Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065; Stockard v. Stockard's Adm'rs, 7 Humph. (Tenn.) 303, 46 Am. Dec. 79.

[8] Folk v. Hughes, 100 S. C. 220, 84 S. E. 713.

[9] Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. Rep. 550 (trust treated as surrendered by cestuis que trust by written request by them to trustee to reconvey to settlor).

[10] Raffel v. Safe Deposit & Trust Co., 100 Md. 141, 59 Atl. 702; Cole v. Nickel, 43 Nev. 12, 177 Pac. 409, 185 Pac. 565.

[11] Armour v. Murray, 74 N. J. Law 351, 68 Atl. 164; Short v. Wilson, 13 Johns. (N. Y.) 33 (decided prior to the Revised Statutes).

[12] Blackburn v. Blackburn, 167 Ky. 113, 180 S. W. 48; In re Unruh's Estate, 248 Pa. 185, 93 Atl. 1000; In re Simonin's Estate, 260 Pa. 395, 103 Atl. 927.

[13] 167 Mass. 287, 45 N. E. 686.

[14] 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.

[15] Anderson v. Williams, 262 Ill. 308, 104 N. E. 659, Ann. Cas. 1915B, 720; Bailey's Trustee v. Bailey, 97 S. W. 810, 30 Ky. Law Rep. 127; Newton v. Rebenack, 90 Mo. App. 650; Isham v. Delaware L. & W. R. Co., 11 N. J. Eq. 227; Mauldin v. Mauldin, 101 S. C. 1, 85 S. E. 60.

er lien on the trust property, which lien existed prior to the creation of the trust, he may, by the foreclosure of the lien, wipe the trust res out of existence and thus terminate the trust.[16] As was said in a Kentucky case,[17] where the rights of creditors of the testator and those of cestuis que trust under a will came into conflict: "The rights of the creditors to subject the property to the satisfaction of the debts is superior to the rights of the devisees under the will. They do not have to wait on the expiration of the trust by time. If the property is sold to satisfy the debts, this removes the authority of the trustees over it, and hence the further execution of the trust becomes impossible, and the rights devised to the beneficiaries of the trust must fail. A judicial sale of the trust property under an incumbrance, which was made prior to the creation of the trust, necessarily renders the trust impossible of accomplishment."

End Presumed

In a few cases, where there has been great lapse of time since the establishment of the trust, or gross laches in its enforcement, equity has presumed the end of the trust.[18] Thus, where the trust was for the children of the settlor during their dependency on their father, it will be presumed to have been extinguished after thirty years;[19] and where the trust is to sell property and distribute the proceeds, equity will presume that it has been closed, when fourteen months have elapsed since the sale and part of the proceeds are shown to have been paid out.[20]

[16] De Bevoise v. Sandford, 1 Hoff. Ch. (N. Y.) 192; Marquam v. Ross, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1.

[17] Miller's Ex'rs v. Miller's Heirs and Creditors, 172 Ky. 519, 528, 529, 189 S. W. 417.

[18] Jones v. Haines, 79 N. J. Eq. 110, 80 Atl. 943.

[19] Bozarth v. Watts (Tenn. Ch. App.) 61 S. W. 108.

[20] Holderman v. Hood, 70 Kan. 267, 78 Pac. 838.

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