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THE LAW RELATING

TO

TRUSTS AND TRUSTEES.

BY

ARTHUR UNDERHILL, M.A., LL.D.,

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TO

THE RIGHT HONOURABLE HARDINGE STANLEY

EARL OF HALSBURY, P.C.,

SOMETIME LORD HIGH CHANCELLOR OF GREAT BRITAIN

This Work

IS

BY HIS LORDSHIP'S PERMISSION

MOST RESPECTFULLY DEDICATED.

PREFACE.

IN writing this treatise, it has been the author's desire to produce a book bearing the same relation to Mr. LEWIN'S elaborate work as Lord Justice FARWELL'S treatise on Powers bears to that of the late Lord ST. LEONARDS; that is to say, a book of a really practical, but concise, character.

The law libraries are rich in great works of reference, the store-houses, so to speak, of the Law; but they are, too often, merely collections of "that codeless myriad, that wilderness of single instances," from which it requires many years of study and experience to extract general principles. That this is so was vigorously expressed by the late Sir JAMES FITZJAMES STEPHEN in the preface to his Digest of the Law of Evidence, where he said: "It becomes obvious, that if a lawyer is to have anything better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books on the subject. No doubt such knowledge is to be gained. Experience gives by degrees, in favourable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. *He gets to see that it is shorter and simpler than it looks*, and to understand that the innumerable cases, which at first sight appear to constitute the law, *are really no more than illustrations of a comparatively small number of principles.*"

That great lawyer, the late Sir GEORGE JESSEL, also pointed out that "the only use of authorities or decided

cases is the establishment of some principle which the judge can follow out in deciding the case before him" (*a*).

In this Work the author has endeavoured to follow out the thought expressed by these great lawyers by extracting and formulating the *principles* of the law of Private Trusts in the form of a Code. By way of illustration all the important modern decisions, and such of the more ancient ones as are retained in the Revised Reports, are cited; so that the reader is enabled to see, at a glance, what the author conceives to be the *law* (*i.e.*, the *principle*) governing any particular point; he is then further presented with a series of decided cases which prove, illustrate, and explain the application of that principle; and further, in the foot-notes, he is referred to other authorities if he desires to make an exhaustive search.

For the examples, modern cases have been chosen in preference to ancient ones, because, as has been truly said, "the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and refined from time to time. The doctrines are progressive, refined, and improved; and *if we want to know what the rules of Equity are, we must look rather to the more modern* than the more ancient cases" (*b*).

For reasons above stated, it is hoped (and perhaps in this Preface to the Seventh Edition it may be permissible to say, believed) that this Work has proved of some use to practitioners.

Like most law books this one has grown larger in

(*a*) 13 Ch. D. 712.

(*b*) *Per* Sir GEORGE JESSEL, M.R., in *Re Hallett, Knatchbull* v. *Hallett*, 13 Ch. D., at p. 710.

each successive edition. Up to and including the last edition the author attempted to make it a book fitted not only for the requirements of the practitioner but also for those of the student. He has, however, now come to "the parting of the ways," and having to choose one path or the other, has elected to devote it to the practitioner. If, however, there should be any demand by students for an abridgment, the author, (while unable to undertake such a work himself), has consented to an abridgment being written by some other qualified person.

Since the last edition was published an attempt has been made to codify the law of trusts, the Bill being admittedly founded to a large extent on this work. The author cannot help thinking that the gentlemen responsible for this Bill would have done better to devote their superfluous energy to the amendment of the law of trusts, rather than to crystallising into hard statute law the existing decisions with all their imperfections, anomalies, and absurdities left intact. As matters stand, the elastic nature of Equity (as above pointed out by Sir G. JESSEL, M.R.) enables modern judges to "refine and improve," *i.e.*, to brush aside the more monstrous decisions of the past, by making astute distinctions which would be impossible were they bound by a Statutory Code. The law of trusts is anomalous in this, that it imposes upon a gratuitous agent (who in practice is very often quite unable to refuse the office) a degree of care and a responsibility for the acts and defaults of himself and others, which no other gratuitous agent is called upon to bear. Founded originally on conscience, by the Clerical Chancellors, it is even now unduly severe upon the natural failings of ordinary men. The law is, however, still undergoing a process of evolution,

and trustees are no longer dealt with in the merciless fashion of a century ago. But much still remains to be done. For instance, how can the rule be defended, which gives beneficiaries the right of making a profit out of a breach of trust committed by a perfectly honest trustee (perhaps some old lady utterly ignorant of business) who has inadvertently invested in a wrong stock, by giving them the option either to recover the amount required to purchase the exact sum of right stock which would have been acquired if the trustee had obeyed the trust, *or, if the right stock has depreciated, to call upon the trustee to make good the full original amount of the trust fund?* Why, too (seeing that the measure of a trustee's liability is the loss to the estate), should not an honest trustee be allowed to set off a gain on one breach of trust against a loss on another? The difficulties and dangers that beset a benevolent trustee who consents (for no benefit to himself) to purchase the interests of one of his beneficiaries, might also well be mitigated; while (having regard to the principle that the wishes of a settlor are not regarded, but merely the rights which he has conferred on the beneficiaries), what reasonable argument is there against candidly authorising the Court, where all adult beneficiaries are unanimous, to make orders binding the interests of infants or unborn persons if convinced that they will be benefited, just as it may now bind the interests of a married woman restrained from anticipation? Surely the judgment of a Chancery judge on such a question, after the event, is incontestably superior to the crude and imperfect foresight of some ignorant testator or his unskilful adviser, or even of those most competent jackals of the Chancery practitioner, the local curate or the parish clerk. No doubt of late years learned

judges are tentatively enlarging their jurisdiction as to this, by purporting to sanction so-called compromises on behalf of infants, even where it is clear that if the case were argued there would be nothing to compromise. But that is only adding one more legal fiction; and is not always available, especially where land is concerned. Lastly, a good Bill on repairs of trust property would be a Godsend, if it put an end to the subtleties, uncertainties, and unreasonable anomalies of the existing law.

It is therefore humbly suggested that would-be legislators on Trusts would do well to put the law on a reasonable business footing, before adventuring upon Codification.

The authorities in this edition are noted up to and including the April, 1912, numbers of the Law Reports.

ARTHUR UNDERHILL.

LINCOLN'S INN,
20*th April*, 1912.

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A

PRACTICAL AND CONCISE MANUAL

OF THE LAW RELATING TO PRIVATE

TRUSTS AND TRUSTEES.

DIVISION I.

PRELIMINARY DEFINITIONS.

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Art. 1.—*Definitions of Trust, Trustee, Trust Property, Beneficiary, and Breach of Trust.*

A trust is an equitable obligation binding a person (who is called a trustee), to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trusts*), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorised or excused by the terms of the trust instrument, or by law, is called a breach of trust.

Comparison of the above definition with others.

More than one definition of a trust is to be found in the recognised text books; but none of these learned and excellent works contains a definition which is altogether satisfactory.

Lord Coke's definition.

The late Mr. Lewin, in his treatise on Trusts, adopts Lord Coke's definition of a use as equally applicable to a trust

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namely, "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, for which *cestui que trust* has no remedy but by subpœna in Chancery." This, however, is applicable to real estate only, and certainly not to trusts of choses in action, the equities attaching to which are, generally speaking, not merely collateral. The expression "some other" is also apt to mislead, and to convey the erroneous impression that the trustee must be some other than either the person who creates the trust, or the beneficiary under it. Then, so far as the remedy is concerned, the Court of Chancery no longer exists, and all branches of the High Court take cognizance of equitable rights, although the Chancery Division is the proper branch in which to enforce express trusts.

Definitions of Mr. Spence and Mr. Justice Story.

Another eminent author, the late Mr. Spence, defines a trust as "a beneficial interest in, or beneficial ownership of, real or personal property, unattended with the possessory or legal ownership thereof"; and this definition was adopted by the late Mr. Snell, and the late Judge Josiah Smith, in their respective works on Equity. An almost similar definition is given by Mr. Justice STORY, in his comprehensive work on Equity, where he says: "A trust may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof."

These definitions, however, do not seem to be definitions of a trust at all, but rather of the beneficial interest of persons in whose favour a trust is created.

Mr. H. A. Smith's definition.

Mr. H. A. Smith in his "Principles of Equity" also points out that Mr. Spence's definition omits to take account of the most important class of trusts, viz., special trusts, in which the object of the trust is the performance of some particular duty, rather than the vesting of beneficial ownership in some person other than the legal owner; and he defines a trust as "a duty, deemed in equity to rest on the conscience of a legal owner." This definition, although decidedly superior to those hitherto discussed, is nevertheless not quite accurate, being both too wide and too narrow. It is too wide; because it would be almost, if not quite, as good a definition of any other equitable obligation. It is too narrow; because a person may be a trustee, without being the *legal* owner of property; *e.g.*, he may be trustee of an equity of redemption, or of an equitable interest arising under another trust, or even of an expectancy.

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The present writer has therefore felt himself obliged to reject all these definitions, and to endeavour to construct an independent one. And in doing this it became necessary to consider the nature of a trust.

Nature of a trust.

Sir Frederick Pollock, in his learned work on Contracts, considers that a trust is, in its inception, a form of contract; but admits that the complex relations involved in a trust cannot be conveniently reduced to the ordinary elements of a contract, and that there is sufficient justification for the course adopted by all English writers of treating trusts as a separate branch of law. There is, however, a radical distinction between contracts and trusts, viz., that an executed trust (as distinguished from a contract to create one) can only be enforced by a person for whose benefit it was made, and can neither be enforced nor released by the person who created it, unless he be also a beneficiary. On the other hand, as is shown later on in Art. 8, a contract can only, as a rule, be enforced or released by the parties to it. A trust once finally created is in fact *the equitable equivalent of a common law gift*, and leaves no right in the creator of it, as such, to enforce it. Thus if A. vests property in B. in trust to pay the income to C. for life and after C.'s death to divide the capital among X., Y., and Z., then C., X., Y., and Z. can together (if unanimous) insist on the trustee dividing the property between them at once, notwithstanding the protests of A. This quality of a trust is one which foreign lawyers find great difficulty in grasping. It has fallen to the lot of the present writer to give evidence of the English Law of Trusts for use in French courts, which had a great tendency to regard a trust as a mandate or agency created by the settlor and revocable by him, whereas the very opposite is the case, the trustee being rather the agent of the beneficiaries collectively and having no duty whatever to the settlor. In truth, the latter is a donor, the beneficiaries collectively the donees, and the trustee a sort of stakeholder for *them*.

Sir F. Pollock's view.

It has been suggested that trusts are somewhat analogous to that class of common law cases which lies on the border line between contract and tort (of which *Coggs* v. *Bernard* (*a*) is the leading instance), the principle of which is that the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in its performance. But here again there is the same difference, viz., that

Analogy of trusts and bailments.

(*a*) (1703) 2 Lord Raymond, 909; 1 Sm. Lead. Cas. 173 (ed. 11); and see also *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157.

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the duty can only be enforced in such cases by the party at whose request the service was undertaken.

Distinctive character of trusts.

However, whatever a trust may be in its inception, it radically differs from all other duties in this, that prior to recent legislation it was a duty which could not be enforced at common law, and was only enforceable in Chancery on the ground that a breach of the duty was so unconscientious as to call for the equitable interference of the Chancellor.

Analysis of a trust.

It is therefore convenient to regard a trust as "an obligation," that is to say, "a tie of equity (*vinculum juris*), whereby one person is bound to perform or forbear some act for another" (*b*). The obligation is an equitable one, and until the amalgamation of the courts of common law and equity, was enforceable only in courts of equity; and although, by recent legislation, all courts take cognizance of trusts, yet they are treated as equitable rights giving rise to defences applicable only to equitable rights, and remediable only by equitable remedies. It is also an obligation relating exclusively to property. An obligation to do or forbear some act not relating to property is not a trust, whatever else it may be; for a trust is purely a creature of equity, and equity concerns itself solely with property.

It is, further, an obligation, the due performance of which necessarily implies that the trustee has some control over the property which is the subject of the trust, for otherwise he would be unable to deal with it for the benefit of the beneficiaries; and although, as will be seen hereafter, in the case of simple trusts, the control is merely nominal (consisting solely in the trustee being the custodian of the legal title), yet some *scintilla* of control is absolutely necessary to the existence of a trust.

Persons are sometimes called trustees who are not so in the ordinary sense, *e.g.*, trustees for purposes of the Settled Land Acts and trustees of strict settlements with powers of sale to be carried out by revocation of uses and new appointment. In both cases such persons may *become* trustees when they receive purchase-money, or when they exercise the powers confided to them; but until then, they are not trustees in the sense in which the word is used in this work, but merely donees of powers.

Illustrations.

A couple of examples will illustrate the above remarks. A testator bequeaths £1,000 to A., upon trust to invest it in

(*b*) Encyc. Brit., Art. "Obligation."

government stock, and to pay the dividends to B. for life, and after B.'s death to sell the stock and divide the proceeds among B.'s children. A trust is at once created in A. In other words, he is under an equitable obligation, enforceable by B. or his children, to deal with the £1,000 (the trust property) for the benefit of B. and B.'s children (the beneficiaries) according to the testator's directions.

A., by deed, declares that he holds £1,000 government stock, standing in his own name and belonging to him, in trust to pay the dividends to himself for life, and, after his death, upon trust to pay the dividends to his wife for life, and, after the death of the survivor of them, upon trust to sell the stock and divide the proceeds among their children. Here A. is both creator of the trust, trustee, and *one* of the beneficiaries. If he were the *sole* beneficiary, the trust would never arise, for a man cannot enforce a trust against himself. Or, if he became such by surviving his wife and children, and becoming the sole personal representative and next of kin of the latter, it would cease, because the trusteeship would merge and be extinguished in the beneficial ownership.

ART. 2.—*Definitions of Legal and Equitable Estates.*

The interest of a beneficiary in trust property is called an equitable estate or interest, because it was originally only recognised in courts of equity. A legal estate or ownership, on the other hand, is that proprietary interest which has been acquired with all the formalities which are required by the common or statute law for conferring perfect ownership, or which has devolved by legal descent or devolution. A trustee usually, but not necessarily or always, has the legal ownership of trust property.

Distinction still important.

When the Judicature Act of 1873 (36 & 37 Vict. c. 66) was first passed, it was thought by many that the former distinctions between legal and equitable estates were abolished, and that thenceforth every equitable interest would be, in effect, a legal one. Such persons, however, overlooked the fact that, even if the fusion of law and equity justified the application of the adjective "legal" to rights and interests formerly ignored by the common law and invented by judicial equity,

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such a change of nomenclature would not do away with the fundamental and ineradicable distinctions which exist between legal and equitable estates. As Lord SELBORNE said, in introducing the Judicature Bill into the House of Lords, "if trusts are to continue, there must be a distinction between what we call a legal and an equitable estate. The legal estate is in the person who holds the property for another; the equitable estate is in the person beneficially interested. The distinction between law and equity is, within certain limits, real and natural, and it would be a mistake to suppose that what is real and natural ought to be disregarded, although under our present system it is often pushed beyond these limits" (*c*).

The old legal estate, therefore, still subsists; and although equitable estates are now recognised by all branches of the Supreme Court (and may therefore in a sense be called legal), it has been found more convenient to retain the old nomenclature, signifying, as it does, a real and substantial difference, which would still exist, even although the *terms* legal and equitable estates were abolished.

Estate of trustee not necessarily legal.

It must not, however, be assumed that the estate of a trustee is always legal. The estate of the beneficiary is always equitable, so long as the trust subsists; but so also may be the estate of the trustee. For instance, the trust property may consist of land mortgaged to a third party. In that case the legal estate would be in the mortgagee, an equity of redemption (which is a purely equitable estate) in the trustee, and another equitable estate in the beneficiary.

Importance of difference between legal and equitable estates.

The difference between legal and equitable estates is not merely of theoretical interest. In cases of breach of trust (as will appear later on in this treatise (*d*)), it is of vital importance, owing to the maxim that "Where the equities are equal the law prevails." In other words, where a question of priority arises between two claimants, each of whom has an equally just claim, then, if one of them has the legal estate, he will be preferred to the other, even though the title of such other arose first in point of date (*e*).

(*c*) Hansard (N. S.), Vol. 214, p. 333.

(*d*) *Infra*, Art. 95.

(*e*) The reader who is desirous of verifying this statement is referred to the following cases which have arisen since the Judicature Acts came into operation, viz.: *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Northern Counties, etc., Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482; *Garnham* v. *Skipper* (1885), 34 W. R. 135; *Taylor* v. *Blakelock* (1886), 32 Ch. D. 560; *Re Vernon, Ewens & Co.* (1886), 33 Ch. D. 402; and

To take a few examples: A. conveys freeholds by a formal deed of grant to B. in fee simple, in trust to receive the rents and pay them to C. during his life, and after C.'s death in trust to sell the land and divide the proceeds among C.'s children equally. Here B., the trustee, would have the legal estate. According to the old doctrine of the common law, he would be the absolute owner. The estates of C. and C.'s children, on the other hand, are equitable; because formerly they were only recognised by courts of equity, and still retain the incidents annexed to them by equity, although now *recognised* by all courts.

A., the owner of a copyhold estate, on the marriage of his daughter, C., covenants with her and her intended husband that he will duly vest the copyholds in B., upon trusts similar to those stated in the last illustration. Here, until the copyholds are duly surrendered by A., and until B. is duly admitted tenant on the court rolls, the latter has a mere equitable estate, although he is trustee. For copyholds can only be conveyed at common law by surrender and admittance.

A., by will, devises a freehold estate to B. in fee simple, *to the use* of C. during her life, and, after C.'s death, to the use of B., his heirs and assigns for ever, in trust to sell, and divide the proceeds among C.'s children. Here, by virtue of the Statute of Uses, the legal estate is split up into a life estate in C. (who is accordingly a *legal* tenant for life, and not a mere beneficiary under a trust), with remainder to B. in fee simple. The trust, therefore, is a trust of the reversion, and does not become an active trust until the death of C. When that event happens, the trustee steps into possession of the rents and profits, and his fiduciary duties become active.

ART. 3.—*Definitions of Express and Constructive Trusts.*

Trusts are created either intentionally by the act of the settlor (in which case they are called express trusts) or by implication of a court of equity where the legal

see also as to the value of a legal estate, *Fox* v. *Buckley* (1876), 3 Ch. D. 508; and *Re Brown*, *Dixon* v. *Brown* (1886), 32 Ch. D. 597.

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title to property is in one person, and the equitable right to the beneficial enjoyment of it is in another, in which case they are called constructive trusts.

As in other branches of law, it is sometimes difficult to draw the line between an express and a constructive trust. A trust is none the less express because the language used by the settlor is ambiguous or clumsy, if, on the true interpretation of that language, the court comes to the conclusion as a matter of fact that a trust must have been *intended*. Thus words of entreaty, prayer, or expectation (precatory words) may be held to create an express trust if on the whole instrument the court considers that the person using them intended them to be imperative and binding (*a*). Or again words apparently imposing a condition on the donee of property may be held to show an intention to create a trust of that property and not merely a condition, the breach of which might not only disappoint the party breaking it, but also the person in whose favour the apparent condition was imposed (*b*).

Even a power conferred on another to distribute property among a class of persons, may be sufficient to indicate an intention to create a trust in favour of those persons, in the event of the power not being exercised, where there is no gift over in that event (*c*). But perhaps the cases nearest to the line are those which arise out of what are called resulting trusts. Thus where the creator of an undoubted express trust does not effectually deal with the entire beneficial interest (*e.g.*, where he says that it shall be held in trust for A. for life without saying what is to happen after A.'s death) the court as a question of interpretation will imply that he *intended* that so much of the beneficial interest as was not disposed of should be held in trust for the settlor himself. On the other hand, where an express trust fails for illegality, there can be no such implied *intention*, and in such cases, although there may be a resulting trust for the settlor, it will not be treated as an express but as a resulting trust (*d*).

The distinction between express trusts and constructive trusts is, however, only important in practice with regard to the 25th section of the Statute of Limitations of

(*a*) See Art. 7 (2) (b), *infra*.
(*b*) See Art. 7 (2) (c), *infra*.
(*c*) See Art. 7 (2) (a), *infra*.
(*d*) See per Lord CAIRNS, *Cunningham* v. *Foot* (1878), 3 App. Cas. 974, 984; *Patrick* v. *Simpson* (1889), 24 Q. B. D. 128; Conf. *Re Sands to Thompson* (1883), 22 Ch. D. at p. 617.

William IV. (3 & 4 Wm. IV., c. 27), which excepts from its operation all express trusts. It is therefore intended in this work for the sake of convenience to treat all resulting trusts under the head of constructive trusts, as it would be extremely confusing to divide them into such as depend on intention and such as do not. Art. 3.

Some writers class trusts declared by words of prayer, desire, hope, or the like (precatory words) as "implied trusts." Others, again, class what are known as resulting trusts (that is, trusts arising by implication of equity in favour of a settlor where an express trust has failed, or the like) as "implied trusts." It is submitted, however, that trusts arising from precatory words are essentially express trusts—that is to say, they are *expressed*, although in ambiguous and uncertain language. Resulting trusts, on the other hand, are sometimes constructive, and sometimes express in the sense of being intentional. Moreover, the whole of the law as to express trusts is applicable to trusts created by precatory expressions or implied intention; the question is purely one of interpretation, and there is, therefore, no justification for treating them as a separate and distinct class.

A few illustrations may serve to make the matter clearer. Illustrations:

A., by his will, devises property to B., *in trust* for C.; that is an express trust. Direct express trust.

A., by his will, gives property to B., in full confidence that he will apply it for the benefit of C. and her children. If, on the whole will, the court thinks that the expression of confidence was intended to be imperative, a trust will be created. Trusts created by ambiguous words of this character would be called by some writers implied trusts. Express trust by precatory words.

A., by his will, gives property to B. in trust for C., who dies before the testator. Here the trust in favour of C. lapses; but, as it is obvious that the testator never intended that B. should have the beneficial interest in the property, equity *constructs* or implies a trust in favour of A.'s heir, or residuary devisee, or residuary legatee, as the case may require. That is an example of that species of "constructive trust" which is known as a "resulting trust," from the Latin verb *resultare*, to spring back. Resulting trust.

A trustee of a leasehold house, at the termination of the lease, uses his position to induce the landlord to renew the lease to him. Here, equity regards the attempt of the trustee to snatch a personal benefit for himself, in antagonism to his beneficiaries, as an act of ill-faith, and will consequently decree Pure constructive trust.

Art. 3. that the trustee must hold the new lease upon the same trusts as he held the old and expired one. That is an instance of a constructive trust which is not a resulting one.

ART. 4.—*Definitions of Simple and Special Trusts.*

In relation to the nature of the duty imposed on the trustee, trusts are divided into simple and special trusts:

(a) A simple trust is a trust in which the trustee is a mere passive custodian of the trust property, with no active duties to perform. Such a trustee is called a passive or custodian trustee.

(b) A special trust is a trust in which a trustee is appointed to carry out some scheme particularly pointed out by the settlor, and is called upon to exert himself actively in the execution of the settlor's intention. The trustee of a special trust is called an active trustee.

Illustration of simple trust.

A. devises property unto and to the use of B. in trust for C. Here the trust is a simple trust, as the only duty which B. has to perform is to convey the legal estate to C.; and B. is a passive trustee.

Illustration of special trust.

Again, if the trust had been during C.'s life to collect the rents and profits, and to pay thereout the cost of repairs and insurance, and to pay the residue of such rents and profits to C. during his life, and after C.'s death to hold the property in trust for D., the trust would have been a special trust during the life of C., and B. would have been an active trustee. For the trustee during that period would have had active duties to perform. But upon C.'s death, the trust would have become a simple trust, and B. a passive trustee; inasmuch as the active duties originally attached to the trustee's office lapsed by the death of C., and the only duty which remained was to convey the legal estate to D.

ART. 5.—*Definitions of Executed and Executory Trusts.* Art. 5.

Express trusts are either executed or executory.

(1) An executed trust is one in which the limitations of the estate of the trustee and the beneficiaries are perfected and declared by the settlor (*f*).

(2) An executory trust is either—

(a) an agreement or covenant for the subsequent execution of a trust instrument; or

(b) a direction or declaration (usually in a will) giving instructions or short heads from which the trustee is subsequently to model a formal settlement (*g*).

Instances of executed and executory trusts.

A father conveys freeholds to trustees upon certain trusts in favour of his daughters, and also covenants to surrender copyholds to the same trustees, to be held by them on similar trusts. Here the trust of the freeholds is an executed trust; for the estates of the trustee and of the beneficiaries are perfect, and nothing more requires to be done. The trust of the copyholds, on the other hand, is an executory trust; for something remains to be done in order to perfect the settlement, viz., that the property should be legally vested in the trustees.

So, where a testator by will gives property to trustees, in trust *to cause it to be settled* on his daughter in strict settlement, that is an executory trust; and so are agreements for settlements, such as marriage articles.

(*f*) *Stanley* v. *Lennard* (1758), 1 Eden, 87.

(*g*) See *per* CAIRNS, L.C., in *Sackville-West* v. *Viscount Holmesdale* (1870), L. R. 4 H. L. 543.

DIVISION II.

EXPRESS OR DECLARED TRUSTS.

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CHAPTER I.

INTRODUCTION.

ART. 6.—*Analysis of an Express or Declared Trust.*

(1) In order that an express trust may be *prima facie* binding on the settlor the following conditions are essential.

(a) The settlor must have used language from which the court finds, as a fact, an intention to create a trust of ascertainable property in favour of ascertainable beneficiaries. If the settled property or the beneficiaries cannot be ascertained with certainty, it is void for uncertainty (*h*).

(b) If the trust be voluntary the intention must either be contained in a will or codicil or must be what is called "executed," *i.e.*, the settlor's interest in the property must have been transferred to a trustee or the settlor must have declared himself a trustee of it. An executory trust (*i.e.*, one which is incomplete and requires some further act on the part of the settlor or his representatives) will only be binding where it is created by will or codicil or the settlor has agreed to create it by

(*h*) Art. 7.

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a contract based on valuable consideration, in which case the Court acts on the maxim that it considers that done which ought to be done (*i*).

(c) The trust property must be of such a nature as to be capable of being settled (*k*).

(d) The object of the trust must be lawful (*l*).

(e) The settlor must have complied with the provisions of the law as to evidence (*m*).

These *prima facie* essentials will be examined at length in Chapter II.

(2) But a trust, *prima facie* valid, may yet be impeachable—

(a) By the settlor or his sequels in title by reason of his incapacity (*n*); or the incapacity of the beneficiaries (*o*); or by reason of some mistake made by, or fraud practised on, the settlor, at its creation (*p*); or

(b) By the settlor's creditors, by reason of its having been made with a fraudulent intention to defeat or delay them (*q*); or because it infringes the provisions of the Bankruptcy Acts (*r*); or

(c) By future purchasers of the property from the settlor without notice of the trust, where the trust property is land, and the trust was intended by the settlor to defeat the claims of future purchasers (*s*).

These latent flaws will be considered in Chapter III.

(3) Lastly, where the trust is executory (*t*) a very liberal construction is given to the language, so as to give effect to the manifest intentions of the settlor (*u*). These questions of construction will be dealt with in Chapter IV.

(*i*) Art. 8.
(*k*) Art. 9.
(*l*) Art. 10.
(*m*) Art. 11.
(*n*) Art. 12.
(*o*) Art. 13.
(*p*) Art. 14.
(*q*) Art. 16.
(*r*) Art. 15.
(*s*) Art. 17.
(*t*) See Art. 5, *supra*.
(*u*) Arts. 18—25.

CHAPTER II.

MATTERS ESSENTIAL TO THE PRIMÂ FACIE VALIDITY OF AN EXPRESS TRUST.

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ART. 7.—*Language evincing an Intention to Create a Trust.*

(1) No technical expressions are needed for the creation of an express trust (*a*). It is sufficient if the settlor indicates an intention to create a trust, and points out with reasonable certainty—

(a) the trust property (*b*);

(b) the beneficiaries; and

(c) the purpose of the trust.

(2) Whether an intention to create a trust is sufficiently indicated is in each case a question of interpretation, and may even be inferred from the context. In particular:

(a) A power of appointment among such of a class as the donee of the power may select (*c*), unaccompanied by a gift over in default of appointment (*d*), may raise an inference that a

(*a*) *Dipple* v. *Corles* (1853), 11 Hare, 183; *Cox* v. *Page* (1852), 10 Hare, 163; *Moore* v. *Darton* (1851), 4 De G. & Sm. 517.

(*b*) *Knight* v. *Knight* (1840), 3 Beav. 148, affirmed, H. L. (*sub nom. Knight* v. *Boughton*) (1844), 11 Cl. & F. at p. 548, and explained by C. A. in *Re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*c*) This prineiple has been extended to a power of appointment in favour of a single individual, *sed quære*, *Tweedale* v. *Tweedale* (1878), 7 Ch. D. 633 (see *infra*, p. 22); *Wheeler* v. *Warner* (1823), 1 Sim. & St. 304.

(*d*) *Burrough* v. *Philcox* (1840), 5 Myl. & Cr. 72; *Grieveson* v. *Kirsopp* (1838), 2 Keen, 653; *Brown* v. *Higgs* (1799), 4 Ves. 708.

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trust was intended in favour of the class in default of appointment if there appears to be a general intention to benefit the objects of the power (*e*).

(b) A gift by will to a person, followed by precatory words expressive of the donor's request, recommendation, desire, hope or confidence, that the property will be applied in favour of others, may create a trust, if, on the whole will, it appears that the testator intended the words to be imperative (*f*). The current of modern authority is, however, against construing precatory words as imposing trusts (*g*).

(c) A devise or bequest "upon condition" or "to the intent" that a benefit may be conferred on another, may create a trust for that other if, on the whole will, the court comes to the conclusion that a trust, and not a charge merely, or a condition entailing forfeiture, was intended (*h*).

(d) A contract to create a trust of which specific performance would be ordered, is considered to be an executory trust conferring on parties who could sue for specific performance the same rights and imposing the same liabilities as if the contract had been actually performed; and a direction in a will that a trust deed shall be executed has the same effect (*i*).

(3) On the other hand, persons to whom payments are directed to be made by trustees, are not necessarily beneficiaries, and cannot enforce such directions if their object, as gathered from the whole instrument, was not to confer benefits on the payees, but to facili-

(*e*) *Re Weekes' Settlement*, [1897] 1 Ch. 289.

(*f*) See *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321.

(*g*) *Re Diggles, Gregory* v. *Edmondson* (1888), 39 Ch. D. 253; *Re Adams and Kensington Vestry* (1884), 27 Ch. D. 394; *Re Hamilton, Trench* v. *Hamilton*, [1895] 1 Ch. 373; [1895] 2 Ch. 370, and cases there cited; and *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321.

(*h*) See illustrations, *infra*, under paragraph (2) (c).

(*i*) See illustrations, *infra*, under paragraph (2) (d).

tate the administration of the trust or to relieve the settlor himself of trouble or inconvenience. Art. 7.

PARAGRAPH (1).

Reasons for the above rule.

The latitude of expression allowed to the creator of a trust is an instance of the maxim that "Equity regards the intention rather than the form." Wherever the intent is apparent, it will (other matters being in order) be carried into effect, however rudely or elliptically it may have been expressed.

Express direction.

Of course, the words "in trust for," or "upon trust to," are the most proper for expressing a fiduciary purpose; but wherever a person vests property in another and shows an intention that it is to be applied for the benefit of third parties who are sufficiently pointed out, an express trust will be created, whatever form of words may have been used. For instance, A. devises or grants freehold lands unto and to the use of B., and "directs" him to sell it and pay the proceeds to C., or directs him to apply the property for the benefit of C. In all these cases a trust is created in favour of C. (*k*), although the word "trust" is not used.

No trustee named.

Moreover, where a trust is clearly intended, then (subject to the rules as to voluntary trusts set forth in Art. 8, *infra*), the mere omission to appoint a trustee will not invalidate the trust; for equity never allows a trust to fail for want of a trustee. Thus, before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), where money was bequeathed to a married woman *for her separate use*, the executors were regarded in equity as trustees for the wife; because the intention to create a trust (by which alone the separate use could have any effect) was clear (*l*).

Direction in a will that land shall be sold.

Again, if before the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), a testator directed a sale of lands and a division of the proceeds, but named no person to sell, and did not in terms devise the property, it descended at law to his heir; but the latter was regarded in equity as a mere passive trustee, who was bound to convey the legal estate to trustees appointed by the court for the purpose of carrying out the trust (*m*). In cases since the Land Transfer Act, 1897, however, it is

(*k*) *White* v. *Briggs* (1848), 2 Ph. 583.

(*l*) *Rollfe* v. *Budder* (1725), Bunb. 187; *Tappenden* v. *Walsh* (1811), 1 Phillimore, 352; *Prichard* v. *Ames* (1823), Turn. & Russ. 222; *Green* v. *Carlill* (1877), 4 Ch. D. 882; and see *Bennet* v. *Davis* (1725), 2 P. Wms. 316.

(*m*) *Robson* v. *Flight* (1865), 4 De G. J. & S. 608; *Pitt* v. *Pelham* (1670), Freem. Ch. Cas. 134.

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apprehended that the personal representatives of the testator would be the persons to sell the property if of freehold tenure.

Failure of trustee.

So if the trustee appointed fails, either by death (*n*), or disclaimer (*o*), or incapacity (*p*), or otherwise (*q*), the trust does not fail, but fastens upon the conscience of any person (other than a purchaser for value without notice) into whose hands the property comes (*r*); and such person holds it as a passive trustee, whose only duty is to convey it to new trustees when properly appointed (*s*).

Trusts intended may yet be void for uncertainty.

However, intention to create a trust is not of itself sufficient (even where the most direct and imperative words of confidence are used (*t*)), if either the property, or the persons to be benefited, or the way in which they are to be benefited be not indicated with reasonable certainty (*t*).

Illustrations of uncertainty as to the property.

Thus where a testator gives property to, or in trust for, his wife, and directs that *such part of it as may not be required by her* shall, after her death, be held in trust for his children, the latter trust is void for uncertainty, for no one can say how much the wife may or may not require (*u*).

On similar grounds, directions to a legatee "to remember" certain persons (*x*), or "to give what should remain at her death" (*y*), or "to reward very old servants and tenants according to their deserts" (*z*), or (after an absolute gift to a wife) a direction that at her death "such parts of my estate as she shall not have sold or disposed of" should be held in trust for certain other persons (*a*), have all been held void for uncertainty in the property.

(*n*) *Moggridge* v. *Thackwell* (1729), 3 Bro. C. C. 517; *Att.-Gen.* v. *Lady Downing* (1766), Ambl. 550; *Tempest* v. *Lord Camoys* (1866), 35 Beav. 201.

(*o*) *Robson* v. *Flight* (1865), 4 De G. J. & S. 608.

(*p*) *Sonley* v. *Clockmakers Co.* (1780), 1 Bro. C. C. 81.

(*q*) *Att.-Gen.* v. *Stephens* (1834), 3 Myl. & K. 347.

(*r*) See *per* WILMOT, C.J., *Att.-Gen.* v. *Lady Downing* (1767), Wilmot's Opinions and Judgments, at pp. 21, 22.

(*s*) *Robson* v. *Flight* (1865), 4 De G. J. & S. 608.

(*t*) See *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. at p. 331.

(*u*) *Per* Sir A. HOBHOUSE, in *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. at p. 331; and see *Pope* v. *Pope* (1839), 10 Sim. 1; and *Eade* v. *Eade* (1820), 5 Madd. 118.

(*x*) *Bardswell* v. *Bardswell* (1838), 9 Sim. 319.

(*y*) *Parnall* v. *Parnall* (1878), 9 Ch. D. 96; *Sprange* v. *Barnard* (1789), 2 Bro. C. C. 585; *Tibbits* v. *Tibbits* (1816), 19 Ves. 657; *Pope* v. *Pope* (1839), 10 Sim. 1.

(*z*) *Knight* v. *Knight* (1840), 3 Beav. 148; and see *Stead* v. *Mellor* (1877), 5 Ch. D. 225.

(*a*) *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, distinguished in *Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939. For other examples of trusts void for uncertainty in the property, see *Sale* v. *Moore* (1827), 1 Sim. 534; *Hoy* v. *Master* (1834), 6 Sim. 568; *Curtis* v. *Rippon* (1820), 5 Madd. 434; *Cowman* v. *Harri-*

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Uncertainty as to the beneficiaries, or as to the way in which the property is to be applied.

The same principle is equally applicable where the uncertainty arises (*b*) in relation either to the persons intended to be benefited, or to the way in which (*c*), or the period for which, the property is to be dealt with for their benefit. In all such cases the trust is void (*d*).

Thus where a testatrix bequeathed £500 to trustees to be applied in keeping up a tomb until the expiration of the period of twenty-one years from the death of the last survivor of all persons living at her death, it was held that, quite apart from any question whether the rule against perpetuities was infringed, the trust was void for uncertainty, as it would be impossible to ascertain when the last life would be extinguished (*e*).

Cases in which this question of uncertainty has arisen have, in recent years, come before the courts in relation to attempts on the part of testators to create discretionary trusts in favour of vague objects of benevolence not falling within the legal definition of charities. As Lord HALSBURY remarked in *Grimond* v. *Grimond* (*f*): "The testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague, that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself, he has allowed some one else to make a will for him after his death, and that the law will not allow." In that case the testator had directed his trustees to divide a portion of his residuary estate among "such charitable *or* religious institutions and societies as they might select." This was held to be void for uncertainty. If the power had been in favour of charitable objects *only*, the trust would have been good, because the Attorney-General could have enforced the charitable trust and the Court could have directed a scheme; but being partly for charitable objects and partly for objects not charitable, the beneficiaries

son (1852), 10 Hare, 234; and *Green* v. *Marsden* (1853), 1 Drew. 646.

(*b*) See *Doe* d. *Hayter* v. *Joinville* (1802), 3 East, 172; *Thomas* v. *Thomas* (1796), 6 T. R. 671.

(*c*) See *Briggs* v. *Hartley* (1850), 19 L. J. Ch. 416.

(*d*) See *Thomason* v. *Moses* (1842), 5 Beav. 77.

(*e*) *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936.

(*f*) [1905] A. C. 124. See also *Blair* v. *Duncan*, [1902] A. C. 37 ("charitable or public"); *Ellis* v. *Selby* (1836), 1 Myl. & Cr. 286 ("charitable or other"); *Re Jarman's Estate, Leavers* v. *Clayton* (1878), 8 Ch. D. 584; and *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451 ("charitable or benevolent").

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were not pointed out with sufficient certainty. Thus trusts for purposes vaguely described as "benevolent" (*g*), "philanthropic" (*h*), "hospitable" (*i*), or "generally useful" (*k*) are void for uncertainty because these purposes might be satisfied without applying any part of the fund for charity. So that the Attorney-General could not interfere on behalf of charity, and no other person could interfere because no one could predicate of himself that he was a beneficiary (*l*). On the other hand, trusts for purposes "charitable *and* pious" (*m*), "charitable and deserving" (*n*), "religious and charitable" (*o*) have been upheld, for in such cases the purposes are not alternatively charitable *or* not charitable as the trustee may decide, but are confined to charities of a particular class.

Uncertainty by reason of accident.

A curious example of uncertainty in regard to the property is afforded by the case of *Boyce* v. *Boyce* (*p*). There a testator devised all his houses in Southwold to trustees, in trust for his wife for life, and after her death in trust to convey one of them, whichever she might choose, to his daughter Maria in fee, and to convey the others to his daughter Charlotte in fee. Maria died in the testator's lifetime and therefore could not choose any particular house, and it was held that in consequence the trust in favour of Charlotte was void for uncertainty.

Difference between uncertainty as to the property and uncertainty as to beneficiaries or the details of the trust.

There is, however, an important difference to be noted between trusts void for uncertainty as to the property, and those void for uncertainty as to the beneficiaries, or as to the way in which the property is intended to be applied for their benefit. Where it is held that there is uncertainty as to the property intended to be settled, it is obvious that no further question can arise: for if there is no property capable of identification there is nothing to litigate about. But where the property is described with sufficient certainty, and the words actually used, or the surrounding circumstances, make

(*g*) *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399; *James* v. *Allen* (1817), 3 Mer. 17; *Re Freeman*, *Shilton* v. *Freeman*, [1908] 1 Ch. 720.

(*h*) *Re Macduff*, *Macduff* v. *Macduff*, [1896] 2 Ch. 451.

(*i*) *Re Hewitt's Estate*, *Gateshead Corporation* v. *Hudspeth* (1883), 53 L. J. Ch. 132.

(*k*) *Kendall* v. *Granger* (1842), 5 Beav. 300; *Re Woodgate* (1886), 2 T. L. R. 674.

(*l*) See *Hunter* v. *Att.-Gen.*, [1899] A. C. 309.

(*m*) *Att.-Gen.* v. *Herrick* (1772), Ambl. 712.

(*n*) *Re Sutton*, *Stone* v. *Att.-Gen.* (1885), 28 Ch. D. 464.

(*o*) *Baker* v. *Sutton* (1836), 1 Keen, 224; *Re Scowcroft*, *Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638.

(*p*) (1849) 16 Sim. 476.

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it clear that, although the donor has not sufficiently specified the objects of his bounty or the way in which the property was intended to be dealt with, yet he never meant the trustee to take the entire beneficial interest, it is different; and in such cases (which are treated of in Division III.) the law implies a resulting trust in favour of the donor or his representatives.

PARAGRAPH (2) (a).

Powers in the nature of trusts.

With regard to trusts created by words empowering another to appoint to a class, with no gift over in default of appointment, the leading illustration is *Burrough* v. *Philcox* (*q*). There a testator directed that certain property should be held in trust for his two children for life, with remainder to their issue; and declared that if they should both die without issue, the survivor of them should have power to dispose of the property by will amongst such of the testator's nephews and nieces, or their children as such survivor should select. The testator's children having died without issue, and without any appointment having been made by the survivor, it was held that a trust was created in favour of the testator's nephews and nieces, and their children, subject only to a power of selection and distribution. Lord COTTENHAM said: "Where there appears a general intention in favour of a class, and a particular intention in favour of individuals of that class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favour of the class."

So, where a testator gave personalty to his widow for life, and to be at her disposal by her will, "therewith to apply part for charity, the remainder to be at her disposal among my relations, in such proportions as she may be pleased to direct," and the widow died without appointing the property, it was held that half was to be held in trust for charitable purposes, and the residue for the testator's relatives according to the Statutes of Distribution (*r*).

Gift over in default of appointment destroys implied trust.

The fact of there being a gift over in default of selection is, however, fatal to any trust under the present rule, even although the gift over is void (*s*); for it is inconsistent with an

(*q*) (1840) 5 Myl. & Cr. 72.

(*r*) *Salusbury* v. *Denton* (1857), 3 Kay & J. 529; *Re Caplin* (1865), 2 Dr. & Sm. 527; *Little* v. *Neil* (1862), 10 W. R. 592; *Gough* v. *Bult* (1847), 16 Sim. 45, affirmed (1848), 17 L. J. Ch. 401; and see also *Re Susanni* (1877), 47 L. J. Ch. 65; *Butler* v. *Gray* (1869), L. R. 5 Ch. 26; and *Croft* v. *Adam* (1842), 12 Sim. 639.

(*s*) *Re Sprague*, *Miley* v. *Cape* (1880), 43 L. T. 236.

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intention to benefit the class unless the donee of the power exercises it. But a residuary gift is not "a gift over" for this purpose (*t*).

No implied trust unless general intention to benefit apparent.

Moreover, even where there is no gift over, there must be a general intention apparent to benefit the class. Thus, in *Re Weekes' Settlement* (*u*), there was a gift to the testatrix's husband for life, with power by deed or will to dispose of the property amongst their children. ROMER, J., after elaborately examining all the decisions, pointed out that there was no *gift to such of the class* as the husband might appoint, but merely a bare power to appoint among a class, and that the mere giving of a power did not of itself show that general intention to benefit the class which was apparent in cases where the selection only was confided to the donee of the power. This decision appears to the present writer to be inconsistent with that in *Tweedale* v. *Tweedale* (*x*), which would probably not now be followed.

PARAGRAPH (2) (b).

Precatory trusts depend wholly on interpretation.

The subject of precatory trusts, *i.e.*, transfers or bequests of property to another, coupled with words of prayer, entreaty, recommendation, expectation, or the like (which according to ordinary usage would not bear an imperative connotation), is not free from difficulty, owing to the conflict between the earlier and the more modern decisions. If, however, it be borne in mind that this question is not one of *law*, but merely one of the true interpretation of the document which contains the precatory words, much confusion will be avoided. Regarded in that light, and applying the dictum of Lord LINDLEY, that "when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases," the conflict of authorities to a large extent becomes immaterial.

Earlier cases show a tendency to construe precatory words as imperative.

Undoubtedly the earlier cases show that Chancery judges were formerly in the habit of interpreting precatory words as being *primâ facie* euphemistic equivalents for more imperative forms, much as a master might give an order to a servant in the form of a request rather than that of a command. And historically there is justification for this view, as will be seen from the following account of the origin of precatory trusts.

According to an ancient rule of Roman law, the appoint-

(*t*) *Re Brierley, Brierley* v. *Brierley* (1894), 43 W. R. 36.

(*u*) [1897] 1 Ch. 289; and see also *Carberry* v. *M'Carthy* (1881), 7 L. R. Ir. 328.

(*x*) (1878) 7 Ch. D. 633.

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ment of a female (even an only child) as heir was forbidden. In order to evade this, it became the practice of Roman fathers to appoint a male heir, in whose honour they could confide, to restore the property to the testator's daughter. Before the time of Augustus, the performance of these trusts (*fidei commissa*) was left entirely to the honesty of the person trusted; and it is, therefore, not surprising that testators used words of entreaty or prayer, rather than of command, well knowing that the fulfilment of their wishes was dependent on the good will of the person addressed. Thus we find that Roman testators usually adopted such forms of expression as *peto, rogo, volo, fidei tuæ committo*, and the like. When, in the time of Augustus, *fidei commissa* became enforceable, the question arose whether wills made in the old precatory form were to be considered imperative; and Justinian settled the point by ordaining that, where the intention of the testator was clear, it should be equally effectual, whether it was expressed in direct or in precatory language.

Now much the same thing happened with us. Whatever may have been the origin of uses (the predecessors of trusts) in England, there is no doubt that, at an early stage, they were (on the Roman precedent) resorted to as a means of regaining the power of devising real estate, which had been abolished by the Norman kings. The property was given during the owner's lifetime to a friend, who undertook to hold it to the use of the owner during his life, and after his death to such uses as he might appoint by will. Not only did the courts of common law refuse to enforce these uses, but they were notoriously used for some time before even the Court of Chancery interfered; for in the reign of Henry IV. the Commons complained that many feoffees to uses (trustees) alienated and charged the property confided to them, for which they stated that *there was no remedy*.

Consequently (as in the case of the Roman *fidei commissa*), a non-enforceable trust would naturally be created by the use of precatory words; and, when the Chancellors took upon themselves to enforce trusts, they would, both on grounds of reason and on the analogy of the Roman precedents, naturally regard precatory trusts as equivalent to those created by more precisely imperative forms of expression. The custom of regarding precatory expressions as imperative having been thus once established, continued to be observed by successive generations of judges as a rule of interpretation, long after the reasons on which it was founded had disappeared.

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However, the current has now set strongly in the opposite direction.

Old rule and modern rule as to precatory words contrasted.

As laid down in the older cases, the rule of interpretation might be stated thus: If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, a trust to that effect will attach to it (*y*). But of late the distinction between positive rules of law and so-called rules of interpretation has become universally recognised by the courts (*z*), and the modern way of judging whether precatory expressions were intended to impose enforceable trusts might be stated in almost precisely opposite terms to the above, viz.: If a gift in terms absolute is accompanied by a desire, wish, recommendation, hope, or expression of confidence that the donee will use it in a certain way, no trust to that effect will attach to it, unless on the will, as a whole, the court comes to the conclusion that a trust was intended (*a*). In other words, it is a question of construction of the particular instrument, and not a question of any supposed rule of courts of equity.

Authorities for new rule.

As LINDLEY, L.J., observed in *Re Hamilton, Trench* v. *Hamilton* (*b*), "We are bound to see that beneficiaries are not made trustees unless intended to be made so by their testator. . . . You must take the will which you have to construe, and see what it means; and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on wills more or less similar to the one which you have to construe." The same view was expressed later by ROMER, J., in *Re Williams, Williams* v. *Williams* (*c*): "The rule you have to observe is

(*y*) See cases cited *infra*, pp. 25—26, and *Malim* v. *Keighley* (1795), 2 Ves. Jun. 333, 529; *Knight* v. *Knight* (1840), 3 Beav. 148, affirmed (*sub nom. Knight* v. *Boughton*) (1844), 11 Cl. & F. 513.

(*z*) See *per* Lord HALSBURY, *Inderwick* v. *Tatchell*, [1903] A. C. at p. 122; and *Scalé* v. *Rawlins*, [1892] A. C. at p. 343; *per* LINDLEY, L.J., *Re Stone, Baker* v. *Stone*, [1895] 2 Ch. 196, 200; *per* BOWEN, L.J., *Crawford* v. *Forshaw*, [1891] 2 Ch. at p. 267; and *per* JESSEL, M.R., *Re Sibley's Trusts* (1877), 5 Ch. D. 498.

(*a*) See *Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84; *Hill* v. *Hill*, [1897] 1 Q. B. 483, at p. 487; *Re Hamilton, Trench* v. *Hamilton*, [1895] 2 Ch. 370; *Re Williams, Williams* v. *Williams*, [1897] 2 Ch. 12; *Lambe* v. *Eames* (1871), L. R. 6 Ch. 597; *Re Adams and the Kensington Vestry* (1884), 27 Ch. D. 394; *Re Diggles, Gregory* v. *Edmondson* (1888), 39 Ch. D. 253; *Mussoorie Bank* v. *Raynor* (1882), 7 App. Cas. 321.

(*b*) [1895] 2 Ch. 370 at p. 373; approved in *Re Oldfield, Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*c*) [1897] 2 Ch. 12, at p. 14; and see also *Re Conolly, Conolly* v. *Conolly*, [1910] 1 Ch. 219; and *Re Burley, Alexander* v. *Burley*, [1910] 1 Ch. 215.

simply this: In considering whether a precatory trust attaches to any legacy the court will be simply guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed." And in *Comiskey* v. *Bowring-Hanbury* (*d*) Lord Davey said, "The words 'in full confidence' are in my opinion neutral. I think it would be impossible to regard them as technical words in any sense. They are words which may or may not create a trust, and whether they do so or not must be determined by the context."

Cases illustrative of the old rule.

As, however, the question has never been finally decided by the House of Lords (although it has been by the Privy Council in *Mussoorie Bank* v. *Raynor* (*e*)), it may be useful to contrast a selection from the older and the more modern cases.

In *Palmer* v. *Simmonds* (*f*) the gift was one of residue to a legatee, his heirs, executors, administrators and assigns for ever, for his own use and benefit, the testator "*having full confidence*" that, if he should die without issue, he would, after providing for his widow for her life, leave the bulk of such residue to persons named. Vice-Chancellor Kindersley expressed an opinion that but for the uncertainty of the subject-matter (the *bulk* of the property) he should have considered himself bound to hold that the legatee took a life estate only, with remainder to his children.

This view was followed by the late Vice-Chancellor Hall in *Curnick* v. *Tucker* (*g*). There the testator appointed his wife sole executrix, and left to her all his property for her sole use and benefit, in the full confidence that she would dispose of it amongst all their children during her lifetime and at her decease. The Vice-Chancellor held that the wife took a life interest only, with a power of appointment among the children.

The case of *Gully* v. *Cregoe* (*h*) was even stronger in favour of an absolute gift to the wife, for the gift there was for her own sole use and benefit *for ever*, the testator "feeling assured and having every confidence" that she would dispose of the same equitably amongst her two daughters and their children. Yet the court decided that she took merely a life estate with a power of appointment.

(*d*) [1905] A. C. 84, 89.
(*e*) (1882) 7 App. Cas. 321.
(*f*) (1854) 2 Drew. 221.
(*g*) (1874) L. R. 17 Eq. 320. See also to like effect *Le Marchant* v. *Le Marchant* (1874), L. R. 18 Eq. 414, and *Hart* v. *Tribe* (1854), 18 Beav. 215.
(*h*) (1857) 24 Beav. 185. See also *Shovelton* v. *Shovelton* (1863), 32 Beav. 143, and *Ware* v. *Mallard* (1851), 16 Jur. 492.

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Even so late as 1887, KAY, J., held that where real estate was devised to a lady, accompanied by an expression of the testator's "wish and request" that she should not sell it, she was, during coverture, restrained from anticipation as fully as if a trust to that effect had been declared in imperative terms (*i*).

Even under old rule precatory words were only *primâ facie* imperative.

However, even throughout the older decisions there is a clear consensus of opinion that precatory expressions are only *primâ facie* imperative, and that the inference is capable of being rebutted by the context. Thus, in *McCormick* v. *Grogan* (*k*), C. made a will leaving the whole of his property to G., whom he also appointed his executor. When about to die, C. sent for G., and, in a private interview, told him of the will, and, on G.'s asking whether that was right, said he would not have it otherwise. C. then told G. where the will was to be found, and that with it would be found a letter. This was all that was known to have passed between the parties. The letter named a great many persons to whom C. wished sums of money to be given and annuities to be paid, but it contained several expressions as to G. carrying into effect the intentions of the testator as he "might think best," and also this sentence: "I do not wish you to act strictly on the foregoing instructions, but leave it entirely to your own good judgment to do as you think I would if living, and as the parties are deserving; and as it is not my wish that you should say anything about this document, there cannot be any fault found with you by any of the parties, should you not act in strict accordance with it." G. paid the money to some of the persons mentioned in the letter, but not to others, who accordingly sued him; but it was held that the directions were not imperative, and that there was no trust created binding on G. Apart, however, from the direction not being sufficiently imperative, it would seem that it was void as a trust, under the principle as to testamentary trusts enunciated in Art. 11, *infra*. This case must be carefully distinguished from those where a settlor communicates to persons a disposition which he has formerly made in their favour, but at the same time tells them that he has a purpose to answer, which he has not expressed in the formal instrument, and which he depends upon them to carry into effect, and to which they assent. Such cases are treated of, *post*, under Art. 11.

Cases illustrative of the modern view.

Let us now contrast the foregoing cases with those in which

(*i*) *Re Hutchings*, [1887] W. N. 217.

(*k*) (1869) L. R. 4 H. L. 82.

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the more modern view against construing precatory words as imperative has been adopted. The one which perhaps marks the turn of the tide is *Lambe* v. *Eames* (*l*). There a testator had given his estate to his widow "to be at her disposal in any way she may think best *for the benefit of herself and family*." It was held that the latter words imposed no trust on the widow in favour of the family, and Lord Justice JAMES commented severely on former decisions which had imposed trusts where none were intended.

This was followed in *Re Hutchinson and Tenant* (*m*), where the testator gave all his property to his widow "absolutely, with full power to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so."

A similar decision was given in *Re Adams and the Kensington Vestry* (*n*). There a testator gave all his estate unto and to the absolute use of his wife, her heirs, executors, administrators and assigns, in full confidence that she would do what was right as to the disposal thereof between his children, either in her lifetime or by will after her decease. It was held that under these words, the widow took an absolute interest in the property, unfettered by any trust in favour of the children. This case (which was decided by the Court of Appeal) virtually overrules the decisions of HALL, V.-C., in *Curnick* v. *Tucker* (*o*), and MALINS, V.-C., in *Le Marchant* v. *Le Marchant* (*p*). In all three cases the precatory words were practically identical, and the only distinction between them is that in *Re Adams and the Kensington Vestry* the gift to the widow was expressed to be for her "absolute use," whereas in the two other cases it was for her "sole use and benefit." This difference no doubt opens the way for the argument that due force might be given to the words "sole use and benefit," by construing them as equivalent to "separate use"; whereas no such restrictive meaning can be attached to the expression "absolute use" and that consequently *Re Adams and the Kensington Vestry* does not necessarily overrule *Curnick* v. *Tucker* and *Le Marchant* v. *Le Marchant*. It would seem, however, that this distinction is too refined, having regard to the express declaration of the Lords Justices, that the doctrine of precatory trusts was not to be extended.

In *Re Diggles, Gregory* v. *Edmondson* (*q*), a testatrix gave

(*l*) (1871) L. R. 6 Ch. 597.
(*m*) (1878) 8 Ch. D. 540.
(*n*) (1884) 27 Ch. D. 394.
(*o*) (1874) L. R. 17 Eq. 320.
(*p*) (1874) L. R. 18 Eq. 414.
(*q*) (1888) 39 Ch. D. 253.

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all her property to her daughter, her heirs and assigns, followed by these words: "And it is my desire that she allows to A. G. an annuity of £25 during her life." The daughter and her husband were appointed executors. On these facts, it was held by the Court of Appeal that no trust to pay the annuity was imposed upon the daughter. At first sight this case would appear to overrule the whole doctrine of precatory trusts; but, on reading the judgments of the learned Lords Justices, it will be seen that they carefully gave reasons for their decision, which are not inconsistent with precatory words being still construed as imperative. FRY, L.J., said: "According to the ordinary meaning of the English language this only expresses a desire and does not import a trust or charge. Moreover, the expression 'that she *allows*' implies a certain amount of discretion in the daughter. Now, consider the inconvenience of what we are asked to decide, that there is a precatory trust affecting the whole property; that the whole property is held in trust to pay £25 a year to Anne Gregory for her life. No fund is directed to be set apart, so if there be a trust it is a trust affecting the whole property. If so, the residuary legatee could not sell a bedstead or give away a ring without committing a breach of trust. . . . The later cases have established the reasonable rule that the court is to consider in each particular case what was the testator's intention. Construing this will according to the ordinary use of the English language, I think that the testatrix did not mean to tie up her whole property during the life of Anne Gregory, but to give it absolutely to her daughter, trusting to her affection and honour to make such allowance to Anne Gregory as she mentioned in her will" (*r*).

In *Mussoorie Bank* v. *Raynor* (*s*) a testator gave to his widow the whole of his real and personal estate, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." It was held by the Judicial Committee of the Privy Council that the widow took an absolute interest. Sir A. HOBHOUSE said: "Their lordships are of opinion that the current of decisions, now prevalent for many years in the Court of Chancery, shows that the doctrine of precatory trusts is not to be extended; and it is sufficient for that purpose to refer to the judgments given by Lord Justice JAMES in the case of *Lambe* v. *Eames*, and by Sir GEORGE

(*r*) See also *Mackett* v. *Mackett* (1872), L. R. 14 Eq. 49; *Wilson* v. *Bell* (1869), L. R. 4 Ch. 581; *Re Atkinson, Atkinson* v. *Atkinson* (1911), 80 L. J. Ch. 370.

(*s*) (1882) 7 App. Cas. 321.

JESSEL in the case of *Re Hutchinson and Tenant*." It is to be observed, however, that, in spite of this, the judgment was mainly based on the consideration that the subject of the gift was uncertain. "If there is uncertainty as to the amount or nature of the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust, because the court does not know on what property to lay its hands, but the uncertainty in the subject of the gift *has a reflex action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be—his appeal to the conscience of the first taker—to be imperative words.* In this case nothing is given over to the children of the testator, except by an expression of confidence in his wife that she will deal justly in dividing the property among them, and that she will do it when the property is no longer required by her. If the testator had given to his children such property as was not required by his wife, or if he had given over his property if it was not required by his wife, the gift over would, according to a very well known and well-established class of cases, have been void, because of the uncertainty. It would have been void, not merely because the words of the gift over were precatory only, but it would have been void *notwithstanding that the most direct and precise words* of gift over might be used" (*t*). Art. 7.

In *Re Hamilton, Trench* v. *Hamilton* (*u*), a testatrix gave legacies to two nieces, adding, "I wish them to bequeath the same equally between the families of" O. and P. The Court of Appeal held that the gift to the nieces was absolute, and that there was no precatory trust in favour of the families of O. and P.

In *Hill* v. *Hill* (*x*) family diamonds were given to a bride, and a document signed by her contained these words: "When I married, my mother-in-law gave them to me for my life with the request that at my death they might be left as heirlooms." Here, again, the Court of Appeal negatived any trust.

(*t*) See also *Re Hutchinson and Tenant* (1878), 8 Ch. D. 540; *Re Bond, Cole* v. *Hawes* (1876), 4 Ch. D. 238, where the words were rather more imperative, but the decision was the same.

(*u*) [1895] 2 Ch. 370. This case overruled *Malim* v. *Keighley* (1795), 2 Ves. Jun. 333, 529, and is not inconsistent with *Knight* v. *Boughton* (1844), 11 Cl. & F. at p. 548, *per* C.A., in *Re Oldfield Oldfield* v. *Oldfield*, [1904] 1 Ch. 549.

(*x*) [1897] 1 Q. B. 483.

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In *Re Williams, Williams* v. *Williams* (*y*), a testator gave all his residuary estate to his wife, her heirs, executors, administrators, and assigns absolutely "in the fullest trust and confidence that she will carry out my wishes" in particulars which the testator set forth. It was held by ROMER, J., that there was no trust imposed in the wife.

On the other hand, in *Comiskey* v. *Bowring-Hanbury* (*z*), the House of Lords (reversing the majority of the Court of Appeal) held that the words "in full confidence" were, on the construction of the whole will, intended to create a trust. There the testator gave all his property to his wife "absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit. *And in default of any disposition by her thereof by her will or testament, I hereby direct* that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces." In the Court of Appeal, Lord Justice VAUGHAN WILLIAMS said that *he assumed* that, having regard to recent decisions, the words "*in full confidence*" did not constitute a trust in favour of the neices, and that that being so, the words from "in default of any disposition" down to the end of the gift imposed a condition which was repugnant to the previous absolute gift and void; and Lord Justice STIRLING was of the same opinion. In the last edition of this work it was submitted that this assumption was too wide and that there was no hard and fast rule of the kind; and that although the testator's language was ambiguous it was difficult to resist the inference (reading the will as a whole) that his intention was to restrict his widow to a life estate with a power of appointment among the nieces (*a*); and finally that to give too unbending an interpretation to the word "absolutely" was as likely to disappoint the intentions of testators as would be the case if a strict interpretation were given to any other single word irrespective of other expressions in the will of an inconsistant character. The House of Lords on appeal (Lord LINDLEY dissenting) took this view, and held that a trust had been created. If the gift is contained in a will and the precatory expressions in a codicil, the inference in favour of a trust is of course much stronger than where the

Gift in will and precatory words in codicil.

(*y*) [1897] 2 Ch. 12.

(*z*) [1905] A. C. 84, reported in the C. A. (*sub nom. Re Hanbury, Hanbury* v. *Fisher*), [1904] 1 Ch. 415.

(*a*) See *Re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438; but *cf. Re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939.

gift and the precatory words are contained in the same instrument. Thus where a testatrix by her will gave a legacy of £2,300 to R. and by a first codicil said "I wish R. to use £1,000 part of the legacy for the endowment in his own name of a cot" at a named hospital, and by a second codicil said "I wish R. after endowing the cot to use the balance of the legacy for charitable purposes," it was held that R. was merely a trustee (*b*).

PARAGRAPH (2) (c).

How far apparent conditions are construed as charges.

Whether a devise or bequest to A. in terms upon *condition* or to *the intent* that some benefit may be conferred on B. creates a trust or merely a charge or a personal liability on A. if he accepts the devise or bequest is often a most difficult question. As in the case of precatory words, however, it is entirely a question of interpretation of the will. If the true interpretation is that the property was beneficially given to A. subject to a definite sum being paid to B., then the gift to A. will not be construed as conditional; for refusal to perform such a condition would result not merely in forfeiting A.'s interest, but also in depriving B. of the benefits which were intended to be conferred on him (*c*). Nor will it be construed as a trust, if a charge or equitable lien for the sum payable to B. would meet the case (*d*). If on the other hand the true interpretation is that the testator intended that A. should hold the property for the benefit of himself and B., or *a fortiori* if he did not intend A. to take beneficially at all, a trust and not a mere charge will be created (*e*).

Illustrations.

A few illustrations may tend to throw some light on this. In *Cunningham* v. *Foot* (*e*) property was devised to A. on condition of his well and truly paying legacies. Lord CAIRNS, L.C., said: "Well and truly paying must simply mean on condition of well and truly paying, and therefore it being established law that a devise to A. 'paying' a sum of money

(*b*) *Re Burley, Alexander* v. *Burley*, [1910] 1 Ch. 215.

(*c*) *Re Oliver, Newbald* v. *Beckitt* (1890), 62 L. T. 533, where the principles of the court are very lucidly stated by CHITTY, J.

(*d*) *Cunningham* v. *Foot* (1878), 3 App. Cas. 974, *per* Lord CAIRNS; *Hughes* v. *Kelly* (1843), 3 Dru. & War. 482; *Wood* v. *Cox* (1837), 2 Myl. & Cr. 684.

(*e*) See *Cunningham* v. *Foot* (1878), 3 App. Cas. 974; *Merchant Taylors' Co.* v. *Att.-Gen.* (1871), L. R. 6 Ch. 512; *Att.-Gen.* v. *Wax Chandlers' Co.* (1873), L. R. 6 H. L. 1; *Bird* v. *Harris* (1870), L. R. 9 Eq. 204; *Re Cowley, Souch* v. *Cowley* (1885), 53 L. T. 494; *Re Oliver, Newbald* v. *Beckitt* (1890), 62 L. T. 533; *Re G.*, [1899] 1 Ch. 719; *Re Booth, Booth* v. *Booth*, [1894] 2 Ch. 282.

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to B. is not a trust, but is a charge, it must also be the law that a devise to A. to well and truly pay to B. is not a trust but is a charge; and a devise to A. 'on the condition of well and truly paying' must be a charge and not a trust" (*f*).

On the other hand, in *The Merchant Taylors' Co.* v. *Attorney-General* (*g*) a testator had devised houses to the company "to this intent and upon this condition," viz., to provide garments for twenty-four poor persons each year and to "gather the whole residue of the rents into a stock and therewith repair and if need be rebuild the houses," with a gift over to another City company for the same purposes if the Merchant Taylors failed to carry out his behests. The income in course of time greatly exceeded what was required for the purposes expressed in the will, and the question then arose whether the will created a charitable trust (in which case the balance would have to be applied for charity *cy près*), or whether it was a beneficial devise to the company merely charged with the charitable dole. It was ultimately held that it was a trust and not a mere charge on the ground, apparently, that there was no indication that any beneficial interest whatever was intended to be given to the company, the testator having expressly provided what was to be done with the whole of the rents and having merely not foreseen that there would in course of time be more than was needed for the purposes expressed.

In *Bird* v. *Harris* (*h*) the testator bequeathed all his property to persons whom he appointed executors, "in and for the consideration of paying over the rents and profits to his wife for life." It was held by JAMES, V.-C., that there was no indication of any intention to benefit the executors, and that therefore a trust was created in favour of the wife for life with remainder for the testator's next of kin.

In *Re G.* (*i*) a fund had been bequeathed to the testator's wife during widowhood, "she maintaining, educating and bringing up" the testator's infant sons and unmarried daughters. It was held that this was a trust in favour of the children and the wife herself. The case is not, however, very satisfactory, as the learned judge held that it was a *breach of trust* for the widow to live in adultery, which seems a somewhat startling proposition. It is suggested that the true view would have been that the widow, having accepted the bequest,

(*f*) And see also *Re Oliver*, *Newbald* v. *Beckitt* (1890), 62 L. T. 533.

(*g*) (1871) L. R. 6 Ch. 512.

(*h*) (1870) L. R. 9 Eq. 204.

(*i*) [1899] 1 Ch. 719.

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was personally bound to maintain and educate the children not under a trust, but on the maxim *Qui sensit commodum, debet sentire et onus* (*k*). However NORTH, J., came to a similar conclusion in *Re Booth, Booth* v. *Booth* (*l*), where the testator had given property to trustees in trust to pay or permit his widow to receive the income during her life "for her use and benefit and for the maintenance and education of my children." The learned judge said: "Suppose the gift had been made to a stranger for his use and benefit and for the maintenance and education of the testator's children, could there have been any doubt that he would have taken the income subject to a trust for the maintenance and education of the children? No doubt the widow takes a share of the income, but I cannot say that the children are excluded from all interest, any more than I could *if the widow* had been a trustee—for she is a trustee—for any other persons." It may perhaps be pointed out that there was in that case undoubtedly a trust created and trustees appointed, and the only question really was who were the beneficiaries. It would seem to have been unnecessary for the learned judge to imply (as he did) a subsidiary trust of which the wife was trustee; and indeed the inquiry which he directed "whether any and if any what provision ought to be made for the maintenance of the children out of the income" was quite consistent with the view that the trustees of the will were the trustees with liberty to bring the matter before the Court if the widow took too large a share of the income for herself personally.

Unsatisfactory state of authorities.

Generally the authorities are unsatisfactory with regard to the question when a condition will be construed as a trust, a charge, or a personal obligation binding on a person who accepts a conditional gift. But this is not surprising, as the question is really one of interpretation of the document and not a question of positive law.

Words of expectation or explanatory of motive.

It is, however, well settled that mere words of expectation, or words explanatory of the donor's motive, never impose trusts on the donee. Thus, if a legacy be given to a father "the better to enable him to bring up his children," no trust is thereby created; for such words are only explanatory of the donor's motive (*m*). But where, on the other hand,

(*k*) See *Doe* d. *Willey* v. *Holmes* (1798), 8 T. R. 1; *Pickwell* v. *Spencer* (1872), L. R. 7 Ex. 105; *Re M'Mahon, M'Mahon* v. *M'Mahon*, [1901] 1 Ir. R. 489; but *cf. Re Cowley, Souch* v. *Cowley* (1885), 53 L. T. 494.

(*l*) [1894] 2 Ch. 282.

(*m*) *Brown* v. *Casamajor* (1799), 4 Ves. 498; *Benson* v. *Whittam* (1831), 5 Sim. 22.

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there was a bequest of income to A., "*that he may use it* for the benefit of himself, and the maintenance and education of his children." it was held that a trust was intended to be imposed upon A. to maintain and educate his children (*n*).

PARAGRAPH (2) (d).

Agreements to create trusts.

The rule that a valid agreement to create a trust *in futuro*, is sufficient to create a trust *in præsenti*, so as to bind the property in the hands of the parties, or those having notice of the agreement, depends on the maxim that "Equity regards that as done which ought to be done." It follows, therefore, that where a trust is alleged to have been created by an *agreement* to do something, its validity depends on the question whether the agreement is one of which courts of equity would decree specific performance. If it was merely a voluntary promise (or even a covenant under seal, not supported by valuable consideration), no trust will be created; for equity gives no assistance to volunteers, and consequently there is nothing which can, under the foregoing maxim, be regarded by the court as done. This distinction between trusts depending on contracts, and trusts actually declared, will be emphasised in Art. 8.

Contracts to create trusts.

The most usual instance of trusts arising out of contract is afforded by marriage articles. Not infrequently it would take so long to draw up a formal settlement, that the marriage would be unduly delayed if it were postponed until the settlement was executed. In such cases articles of agreement are signed, by which, in consideration of the marriage, the parties agree to execute a formal settlement, vesting certain property upon trusts indicated more or less roughly. Thereupon equity, regarding that as done which ought to be done, fastens a trust on the property, and treats any dealings with it inconsistent with the agreement, not only as a breach of contract, but also as a breach of trust.

A marriage settlement contains a covenant by the intended husband that he will transfer to the trustees any property which may accrue to him in right of his wife during the marriage. Upon any property becoming vested in him *jure mariti*, he immediately becomes a trustee of it, upon

(*n*) *Woods* v. *Woods* (1836), 1 Myl. & Cr. 401; *Crockett* v. *Crockett* (1848), 2 Ph. 553; and *Talbot* v. *O'Sullivan* (1880), 6 L. R. Ir. 302; and see *Bird* v *Maybury* (1864), 33 Beav. 351; *Hora* v. *Hora* (1863), 33 Beav. 88; *Castle* v. *Castle* (1857), 1 De G. & J. 352.

trust to transfer it to the trustees; and until that is done he himself holds it upon the trusts declared in the settlement (*o*).

So where a father, in contemplation of his daughter's marriage, *contracts* to leave her a specified sum, or an aliquot part of his estate, if he dies without fulfilling his promise, his estate will be bound to make good the contract (*p*). There must, however, have been a binding contract; a mere representation of intention will not suffice, even although the marriage took place on the faith of it (*q*).

PARAGRAPH (3).

Illusory trusts.

That which at first sight appears to be a trust in favour of another or others may prove to be illusory, if the document or the surrounding circumstances lead to the conclusion that no trust for the benefit of such person or persons was intended.

Creditor's trust deeds.

Thus, where a man who is indebted, makes provision for payment of his debts generally, by vesting property in trustees upon trust to pay them, but does so behind the backs of the creditors and without communicating with them, the trustees do not necessarily become trustees *for the creditors* "The motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the court has therefore to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself" (*r*).

(*o*) *Lewis* v. *Madocks* (1803), 8 Ves. 150; *Wellesley* v. *Wellesley* (1839), 4 Myl. & Cr. 561; *Lyster* v. *Burroughs* (1837), 1 Dru. & Wal. 149; *Hastie* v. *Hastie* (1876), 2 Ch. D. 304; *Agar* v. *George* (1876), 2 Ch. D. 706; *Cornmell* v. *Keith* (1876), 3 Ch. D. 767; *Re Turcan* (1888), 40 Ch. D. 5; *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348. But as to the effect of the covenantor's bankruptcy *before* the expectancy vests, see *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed (*sub. nom. Clough* v. *Samuel*) [1905] A. C. 442.

(*p*) *Luders* v. *Anstey* (1799), 4 Ves. 501; (1800) 5 Ves. 217; *Hammersley* v. *de Biel* (1845), 12 Cl. & F. 45, 61, n.; *Coverdale* v. *Eastwood* (1872), L. R. 15 Eq. 121; *Synge* v. *Synge*, [1894] 1 Q. B. 466.

(*q*) *Hammersley* v. *de Biel*, *supra*; *Jorden* v. *Money* (1854), 5 H. L. Cas. 185; *Maddison* v. *Alderson* (1883), 8 App. Cas. at p. 473; *Re Fickus, Farina* v. *Fickus*, [1900] 1 Ch. 331.

(*r*) *Per* TURNER, V.-C., *Smith* v. *Hurst* (1852), 10 Hare, 30.

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Inferences arising with regard to creditor's deeds.

Primâ facie a trust deed for payment of the settlor's creditors *generally*, is deemed to have been made for the debtor's convenience. It is as if he had put a sum of money into the hands of an agent with directions to apply it in paying certain debts, and such a trust is revocable, the debtor being, in fact, the sole beneficiary (*s*). But on the other hand, where the creditors are parties to the arrangement, the inference then is that the deed was intended to create a trust *in their* favour, which they are entitled to call on the trustee to execute (*t*). And so, even though they be not made parties, yet if the debtor has given them notice of the existence of the deed, and has expressly or impliedly told them that they may look to the trust property for payment, they may become *cestuis que trusts* (*u*), (1) if they have been thereby induced to exercise forbearance in respect of their claims (*x*), or (2) if they have assented to the deed and actively (and not merely passively) acquiesced in it, or (3) have acted under its provisions and complied with its terms, and the other side has expressed no dissatisfaction; but not otherwise (*y*). Moreover, where the trust is for particular named creditors (at all events where the facts show that the object of the settlor was to give them a preference over the general body of his creditors) (*z*), the inference is that they were intended to be benefited; and a similar inference arises where the deed provides for payment of the settlor's debts *at his death* with remainders over (*a*).

(*s*) *Walwyn* v. *Coutts*, (1815) 3 Sim. 14; *Garrard* v. *Lauderdale* (1830), 3 Sim. 1, affirmed, (1831), 2 Russ. & Myl. 451; *Acton* v. *Woodgate* (1833), 2 Myl. & K. 492; *Bill* v. *Cureton* (1835), 2 Myl. & K. at p. 511; *Gibbs* v. *Glamis* (1841), 11 Sim. 584; *Henriques* v. *Bensusan* (1872), 20 W. R. 350; *Johns* v. *James* (1878), 8 Ch. D. 744; *Henderson* v. *Rothschild*, (1886), 33 Ch. D. 459. But see *Re Fitzgerald's Settlement*, *Fitzgerald* v. *White* (1887), 37 Ch. D. 18, and *Priestley* v. *Ellis*, [1897] 1 Ch. 489, deciding contra as to trusts for creditors after settlor's death.

(*t*) *Mackinnon* v. *Stewart* (1850), 1 Sim. (N. S.) 76; *La Touche* v. *Earl of Lucan* (1840), 7 Cl. & F. 772; *Montefiore* v. *Browne* (1858), 7 H. L. Cas. 241; and see *Smith* v. *Cooke*, [1891] A. C. 297.

(*u*) Lord CRANWORTH in *Synnot* v. *Simpson* (1854), 5 H. L. Cas. 121.

(*x*) *Per* Sir JOHN LEACH in *Acton* v. *Woodgate* (1833), 2 Myl. & K. 492.

(*y*) *Per* Lord ST. LEONARDS in *Field* v. *Donoughmore* (1841), 1 Dru. & War. 227; see also *Nicholson* v. *Tutin* (1855), 2 Kay & J. 18; *Kirwan* v. *Daniel* (1847), 5 Hare, 493; *Griffith* v. *Ricketts* (1849), 7 Hare, 299; *Cornthwaite* v. *Frith* (1851), 4 De G. & Sm. 552; *Siggers* v. *Evans* (1855), 5 El. & Bl. 367; *Gould* v. *Robertson* (1851), 4 De G. & Sm. 509; *Re Ashby*, *Ex parte Wreford*, [1892] 1 Q. B. 872.

(*z*) *New*, *Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19.

(*a*) See *per* Lord CRANWORTH in *Synnot* v. *Simpson* (1854), 5 H. L. Cas. 121.

And where it provides for such payment *either* in the settlor's lifetime *or* after his death, it can (it would seem) be enforced by the creditors unless he revokes it in his lifetime (*b*).

Direction to trustees to pay costs, etc.

So, where trustees are, by the settlement, directed to pay all costs, charges, and expenses of the deed, and other incidental charges and expenses of the trust, and to reimburse themselves, and then to pay over the residue to third parties, the solicitor who prepared the deed, and acted as solicitor to the trustees, is not a beneficiary. The trust might, of course, be enforced, but not by him (*c*).

Direction to employ and pay a named person.

Even a positive direction to the trustees of a will to employ a particular person and to allow him a salary, does not create a trust in his favour (*d*). Thus, a direction in a will appointing a particular person solicitor to the trust estate, imposes no trust or duty on the trustees of the will to employ and pay him (*e*).

Funds confided to State officials for distribution.

The funds voted by Parliament for the public service are not trust funds in the hands of the Secretaries of State (who receive them from the Treasury) in favour of private persons (*f*). And on similar grounds, where her late Majesty, by royal warrant, granted booty of war to the Secretary of State for India, *in trust* to distribute amongst the persons found entitled to share in it by the Court of Admiralty, it was held that the warrant did not operate as a declaration of trust in favour of such persons, but merely made the Secretary of State the *agent of the Sovereign* for the purpose of distributing the fund (*g*).

(*b*) *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

(*c*) *Worrall* v. *Harford* (1802), 8 Ves. 4; *Foster* v. *Elsley* (1881), 19 Ch. D. 518. See also *Strickland* v. *Symons* (1884), 26 Ch. D. 245; and *Staniar* v. *Evans* (1886), 34 Ch. D. 470, negativing the right of a creditor of trustees to proceed against the *estate*.

(*d*) *Shaw* v. *Lawless* (1838), 5 Cl. & F. 129.

(*e*) *Foster* v. *Elsley* (1881), 19 Ch. D. 518; *Finden* v. *Stephens* (1846), 2 Ph. 142. Nevertheless it has been held that where a professional person is appointed a trustee of a will and authorised to act in a professional capacity to the trust and to charge professional fees, he is in effect a legatee and cannot charge where the estate is insolvent (*Re White, Pennell* v. *Franklin*, [1898] 2 Ch. 217; *Re Barber, Burgess* v. *Vinnicome* (1886), 31 Ch. D. 665; *Re Pooley* (1888), 40 Ch. D. 1; *Re Thorley, Thorley* v. *Massam* [1891] 2 Ch. 613).

(*f*) *Grenville-Murray* v. *Earl of Clarendon* (1869), L. R. 9 Eq. 11.

(*g*) *Kinloch* v. *Secretary of State for India* (1880), 15 Ch. D. 1; (1882) 7 App. Cas. 619.

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ART. 8.—*How far Valuable Consideration is Necessary to bind the Settlor or his Representatives.*

(1) An "executed" trust (*i.e.*, where the settlor has either done all in his power to transfer his interest in the trust property to a trustee, or has constituted himself a trustee of it *in praesenti*) is irrevocable notwithstanding that it is purely voluntary (*h*).

(2) But an instrument or transaction intended to operate as an assignment or a gift, but invalid as such, will not constitute the assignor or donor a trustee of the property for the intended assignee or donee (*i*).

(3) With regard to contracts relating to the creation of trusts in favour of third persons, the following rules appear to be recognised:—

(a) A covenant by A. with B. even for valuable consideration to create a trust *in futuro* in favour of third parties (volunteers) is not enforceable by the volunteers (*k*).

(b) A covenant under seal by A. with B. *expressly as a trustee* that A. will transfer property to B. upon trust for C. will in equity confer on C. the same rights against A. as B. would have at common law, in the event of B. refusing to enforce them; for in effect B. is constituted a trustee of an executed trust of a legal chose in action (*l*).

(*h*) *Ellison* v. *Ellison* (1802), 6 Ves. 656; 2 Wh. & Tu. Lead. Cas. (ed. 7), 835; *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264; *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; *Dipple* v. *Corles*, (1853), 11 Hare, 183; *Antrobus* v. *Smith* (1805), 12 Ves. 39; *Re D'Angibau, Andrews* v. *Andrews* (1880), 15 Ch. D. 228; *Re Anstis, Chetwynd* v. *Morgan* (1886), 31 Ch. D. 596; *Green* v. *Paterson* (1886), 32 Ch. D. 95; *Re Richards, Shenstone* v. *Brock* (1887), 36 Ch. D. 541; *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Carter* v. *Carter*, [1896] 1 Ch. 62; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*i*) *Milroy* v. *Lord*, *supra* *Richards* v. *Delbridge*, *supra*; *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416; *Jones* v. *Lock* (1865), L. R. 1 Ch. 25; *O'Flaherty* v. *Browne*, [1907] 2 Ir. R. 416; *Re Innes, Innes* v. *Innes*, [1910] 1 Ch. 188; *Green* v. *Paterson* (1886), 32 Ch. D. 95.

(*k*) *Re Empress Engineering Co.* (1880), 16 Ch. D. 125; *Gandy* v. *Gandy* (1885), 30 Ch. D. 57.

(*l*) *Fletcher* v. *Fletcher* (1844), 4 Hare, 67; *Lloyds* v. *Harper* (1880), 16 Ch. D. 290; *Gandy* v. *Gandy*, *supra*; *Touche* v. *Metropolitan Railway Warehousing Co.* (1871), L. R. 6 Ch. 671 (where according to the C. A. in *Re Empress Engineering Co.*, *supra*,

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(c) But a covenant between A. and B., whether based on valuable consideration or not, creating rights which A. (or a trustee for him) may enforce at law against B. or *vice versâ*, and also providing benefits for third parties, is *primâ facie* a mere arrangement between A. and B. which they may vary or cancel, and is not enforceable by the third parties, unless, on the true interpretation of the covenant, the object of it was to confer an equitable interest on them (*m*). But if the contract be enforced by A. or B., it will be enforced for the benefit of the third parties as well (*n*).

Paragraph (1).

Examination of the maxim that equity affords no aid to volunteers.

It is a well-known maxim that equity gives no assistance to volunteers; but like other epigrammatic expressions it cannot be accepted literally. In order to understand the rules of equity with regard to volunteers, the distinction between legal rights and equitable rights must be kept in mind. The true principle is, that a court of equity will give no assistance to a volunteer against the donor to perfect an inchoate intention to confer a bounty. The would-be donor can be bound only in one of two ways. He is bound at common law if he has made a gift to the object of his bounty, or to a trustee for that object, or has covenanted under seal either with that object, or with a trustee for that object, to do something for breach of which a common law court will give damages; and in either case equity will enforce the trust *against the trustee*, and if the trustee refuses to enforce his legal rights against the donor the court will authorise the beneficiary to use his name. A donor is also bound in equity if he has declared *himself* a trustee for the object: for equity regards a declaration of trust as the equitable equivalent of a common law gift. But where he has not declared himself a trustee, and has merely covenanted to create a trust without any trust being declared, equity will leave the

the rule was stated too broadly); *Kelly* v. *Larkin*, [1910] 2 Ir. R. 550.

(*m*) Cases cited in note (*k*), *supra*; *Re Flavell*, *Murray* v. *Flavell* (1883), 25 Ch. D. 89.

(*n*) *Davenport* v. *Bishopp* (1843), 2 Y. & Coll. C. C. 451; affirmed (1846) 1 Ph. 698; and see *Lloyds* v. *Harper* (1880), 16 Ch. D., at p. 311.

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parties to such common law rights (if any) as they may have, and will not aid them by decreeing specific performance. On the other hand, if a trust has been once declared and the interest of the settlor in the trust property vested in the trustee (or, in technical language, is an executed trust), courts of equity will enforce it, whether the party applying for relief gave valuable consideration or not; even although the trustee should disclaim the trust and thereby revest the property in the settlor (*o*). As KAY, J., said in *Henry* v. *Armstrong* (*p*), "The law is, that anybody of full age and sound mind, who has executed a voluntary deed by which he has *denuded himself of his own property*, is bound by his own act."

Part vested in trustees and part agreed to be conveyed to them.

Thus, in *Jefferys* v. *Jefferys* (*q*), a father voluntarily conveyed freeholds to trustees upon certain trusts in favour of his daughters; and also covenanted to surrender copyholds to the use of the trustees, to be held by them upon the trusts of the settlement. The settlor afterwards died without surrendering the copyholds, having devised certain portions of both freeholds and copyholds to his wife. In a suit by the daughters to have the settlement enforced, it was held that the court would carry out the settlement of the freeholds; for with respect to them the trust was executed, the title of the daughters complete, and the property actually transferred to the trustees. On the other hand, it refused to enforce specific performance of the covenant to surrender the copyholds; for with respect to them the trust was purely executory, the settlor having neither declared himself a trustee, nor transferred the copyholds to the trustees. He had merely entered into a voluntary contract to transfer them, which a court of equity could not enforce. It will be perceived that at that date courts of equity and common law were quite distinct, so that no question could arise of the Court of Chancery giving damages for breach of covenant. The court simply left the parties to their remedy (if any) in a court of common law (*q*).

Executed trust cannot be broken.

By a marriage settlement, the wife's property was settled in default of children (after life estates to the husband and wife), in trust for the wife if she should survive the husband;

(*o*) *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*p*) (1881) 18 Ch. D. 668.

(*q*) *Jefferys* v. *Jefferys* (1841), Cr. & Ph. 138; and see also *Bizzey* v. *Flight* (1876), 3 Ch. D. 269, 24 W. R. 957, read in conjunction with the remarks of LINDLEY, L.J., in *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82; and see *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8.

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but in the event of the husband surviving the wife, then upon such trusts as the wife should *by will* appoint, and, in default of appointment, in trust for her next of kin. There being no issue of the marriage, and the wife being past the age of child-bearing, the husband and wife sought to have the capital of the trust fund paid to them on the ground that, although the trust was based on value, the next of kin were mere volunteers. The Court of Appeal, however, refused to permit this, Jessel, M.R., saying: "The fund has been transferred to the trustees. The fact of the next of kin being volunteers does not enable the trustees to part with it without the consent of their *cestuis que trusts*. That has been the rule ever since the Court of Chancery existed." And Cotton, L.J., added: "I assume that this trust would not have been enforced *if it were still executory*. But this trust is *executed*, and the next of kin have an interest as *cestuis que trusts*. It is immaterial that they are volunteers. The trust cannot be broken on that account" (*r*).

Voluntary transmutation of equitable interests.

Where, however, the settlor has himself only an equitable interest, it is not essential to the validity of a voluntary settlement by him that he should procure the transfer of the legal ownership to the trustees. Thus, in *Gilbert* v. *Overton* (*s*), A., having an agreement for a lease, executed a voluntary settlement assigning all his interest in the agreement to trustees upon certain trusts. It was objected that he had not declared himself a trustee, nor intended to declare himself one, and had not conveyed the leasehold premises to the trustees. Wood, V.-C., however, said: "In the inception of this transaction, there is nothing to show that the settlor had the power of obtaining a lease before the time when he did so, after the execution of the settlement. There is, therefore, nothing to show that the settlor did not, by the settlement, *do all that it was in his power to do to pass the property*."

So, in *Kekewich* v. *Manning* (*t*), residuary personal estate was bequeathed to a mother for life, with remainder to her daughter absolutely. The daughter assigned all her interest under the will to trustees upon trusts (which were voluntary) in favour of her nieces. These trusts were upheld on the ground that the daughter had done all she could to divest

(*r*) *Paul* v. *Paul* (1882), 20 Ch. D. 742. As to the effect, if there had merely been a *covenant* to settle, see *infra*, p. 52.

(*s*) (1864) 2 Hem. & M. 110; and see *Collinson* v. *Pattrick* (1838), 2 Keen, 123; and *Rycroft* v. *Christy* (1840), 3 Beav. 238.

(*t*) (1851) 1 De G. M. & G. 176; *Voyle* v. *Hughes* (1854), 2 Sm. & G. 18.

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herself of her interest under the will. For she had a mere equitable remainder, and the only way in which she could transfer it was by assignment. If she had been the legal owner of the fund it would have been necessary for her to transfer it in the proper way in the books of the bank; but not being the legal owner, she did all she could do to transfer it (*u*). The result would, it is conceived, have been the same, even if the daughter had been entitled in possession instead of in remainder (*x*), notwithstanding that in such a case she could have called on *her* trustees to assign the legal ownership to the trustees of the voluntary settlement.

So, again, where one effects a policy on his life, under the terms of which the money is to be paid to his children unless he shall otherwise appoint by will, the children obtain complete equitable rights subject to be defeated by the exercise of the power; for there is nothing more to be done by *the settlor* (*y*).

Debts assigned, but subsequently got in by settlor.

In *Bizzey* v. *Flight* (*z*), A. (*inter alia*) assigned certain mortgage debts to trustees upon certain trusts. The settlement, however, contained no transfer of the mortgage *securities*. A. subsequently received the money due on some of the mortgages, the trustees receiving the money due on others. It was held by HALL, V.-C., that, as the mortgaged property was not transferred to the trustees, the settlement was essentially incomplete, and, being a voluntary settlement, was void. In a more recent case before the Court of Appeal, however (*a*), in which the only difference was that the mortgage was a bill of sale of chattels, the court held that the settlement was a complete and binding assignment of the debt, and threw some

(*u*) The chief difficulty is to determine what is a complete assignment and what is not. See *Donaldson* v. *Donaldson* (1854), Kay, 711; *Edwards* v. *Jones* (1836), 1 Myl. & Cr. 226; *Pearson* v. *Amicable Assurance Co.* (1859), 27 Beav. 229; *Fortescue* v. *Barnett* (1834), 3 Myl. & K. 36; *Re King, Sewell* v. *King* (1879), 14 Ch. D. 179; *Harding* v. *Harding* (1886), 17 Q. B. D. 442; *Nanney* v. *Morgan* (1887), 37 Ch. D. 346 (equitable interest in shares); and *Re Earl of Lucan, Hardinge* v. *Cobden* (1890), 45 Ch. D. 470.

(*x*) See *Nanney* v. *Morgan*, *supra*; *Gason* v. *Rich* (1887), 19 L. R. Ir. 391; *Bentley* v. *Mackay* (1851), 15 Beav. 12; *Tierney* v. *Wood* (1854), 19 Beav. 330; *Re Walhampton* (1884), 26 Ch. D. 391; and *per* WOOD, V.-C., *Gilbert* v. *Overton* (1864), 2 Hem. & M. at p. 117; but *cf.* *Bridge* v. *Bridge* (1852), 16 Beav. 315.

(*y*) *Re Davies, Davies* v. *Davies*, [1892] 3 Ch. 63; and see also *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch. D. 89; *Wilson* v. *Lord Bury* (1880), 5 Q. B. D. 518; and *Ashby* v. *Costin* (1888), 21 Q. B. D. 401.

(*z*) (1876) 3 Ch. D. 269; 24 W. R. 957; and to same effect *Ward* v. *Audland* (1845), 8 Beav. 201, and *Woodford* v. *Charnley* (1860), 28 Beav. 96.

(*a*) *Re Patrick, Bills* v. *Tatham*, [1891] 1 Ch. 82.

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doubt on the correctness of the decision in *Bizzey* v. *Flight* and *Woodford* v. *Charnley* (*supra*). It appears, however, that their lordships distinguished the two cases on the ground that a bill of sale was different to a mortgage of land, in which a transferee of the debt would be unable to give a receipt for the money unless he could reconvey the mortgaged property, whereas on payment of a bill of sale no reassignment of the mortgaged chattels is required. It must also be remembered that before 1878 a debt could not be assigned at law, which seems to have been the *ratio decidendi* in *Ward* v. *Audland* (*b*).

It seems to be clear that a direction by a mortgagee to a mortgagor to invest the debt in securities for the benefit of third persons creates an executed and irrevocable trust (*c*).

Declaration of trust implied from conduct.

With regard to acts showing that a person has constituted himself a trustee (although there is no actual declaration of trust) the case of *Gee* v. *Liddell* (*d*) may be referred to. There a testator bequeathed £2,000 on certain trusts, and empowered his executor (who was also his residuary legatee) to retain the amount in his hands uninvested, paying interest thereon at four per cent. per annum. After the testator's death, the executor, being satisfied that the testator intended to bequeath £3,000, and not £2,000, said to the legatee's father: "It shall make no difference, and I will take care that he (the legatee) shall have £1,000 more than he is entitled to by the will." Subsequently he signed a memorandum in these words: "By the will, etc., of the late S. G. the said J. G. (the executor) pays to T. W. (the legatee) the annual sum of £120 by two equal payments, viz., the 6th July and the 6th January in each year, being interest at four per cent on £3,000." He also signed a further memorandum, stating that he had told the legatee that he should make the £2,000 up to £3,000; *and down to his death he in fact paid interest on the* £3,000. On these facts, it was held that the executor had effectually constituted himself a trustee of an additional £1,000 of the residuary estate.

In *Gray* v. *Gray* (*e*) a testatrix gave to a trustee (who was also residuary legatee) a sum of £2,000 stock upon certain

(*b*) (1845) 8 Beav. 201.

(*c*) *Paterson* v. *Murphy* (1853), 11 Hare, 88; and see also *Moore* v. *Darton* (1851), 4 De G. & Sm. 517.

(*d*) (1866) 35 Beav. 621; and see also *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19; *Thorpe* v. *Owen* (1842), 5 Beav. 224; *Armstrong* v. *Timperon*, [1871] W. N. 4; *Ex parte Pye, Ex parte Dubost* (1811), 18 Ves. 140; and *Re Bellasis' Trusts* (1871), L. R. 12 Eq. 218.

(*e*) (1852) 2 Sim. (N. S.) 273.

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trusts. She subsequently expressed to the residuary legatee a wish to add another £2,000 to the trust fund, but died before doing so. The residuary legatee, however, transferred two sums of £2,000 stock into her own name and gave the beneficiary a power of attorney to receive the dividends. Held that she had constituted herself a trustee of the second as well as of the first £2,000.

Again in *Wheatley* v. *Purr* (*f*) a sum of £2,000 was, by the direction of H. O., carried by her bankers to an account in the name of herself "as trustee for" the plaintiffs. The bankers gave H. O. a promissory note for the amount payable fourteen days after sight with interest. After H. O.'s death the £2,000 and accrued interest were paid to her executors. Held that H. O. had constituted herself a trustee of the fund irrevocably.

In *Robertson* v. *Morrice* (*g*) a trustee having (in breach of trust) used trust funds for his own benefit, directed his clerk to buy stock, and expressed to him his wish that the stock so purchased should be appropriated to replace the misappropriated stock. The clerk purchased the stock in the trustee's name. On the death of the trustee it was held that he had constituted himself a trustee of the purchased stock.

PARAGRAPH (2).

Imperfect gift not construed as declaration of trust.

On the other hand, although some judges have held that an instrument executed as a present assignment (but in reality not operative as such) is equivalent to a declaration by the donor that he holds the property in trust for the donee (*h*), the balance of authority is unmistakably the other way. For an intention to create a trust is essential to the creation of one, and when a man purports to make a gift or an assignment, he cannot reasonably be supposed to have intended to declare himself a trustee—a character which assumes that he *retains* the property (*i*).

(*f*) (1837), 1 Keen, 551; and see also *Morton* v. *Tewart* (1842), 2 Y. & Coll. C. C. 67.

(*g*) (1845), 9 Jur. 122; and see *Vandenburg* v. *Palmer* (1858), 4 Kay & J. 204.

(*h*) *Richardson* v. *Richardson* (1867), L. R. 3 Eq. 686, WOOD, V.-C. (afterwards Lord HATHERLEY); *Morgan* v. *Malleson* (1870), L. R. 10 Eq. 475, Lord ROMILLY; *Baddeley* v. *Baddeley* (1878), 9 Ch. D. 113, MALINS, V.-C.; *Airey* v. *Hall* (1856), 3 Sm. & G. 315, STEWART, V.-C.

(*i*) BACON, V.-C., in *Warriner* v. *Rogers* (1873), L. R. 16 Eq. 340; Sir GEORGE JESSEL, M.R., in *Richards* v. *Delbridge* (1874), L. R. 18 Eq. 11; and HALL, V.-C., in *Re Breton's Estate, Breton* v. *Woollven* (1881), 17 Ch. D. 416. See also *Jones* v. *Lock* (1865), L. R. 1 Ch. 25; *Heartley* v. *Nicholson* (1875), L. R. 19 Eq. 233; *Re Shield, Pethybridge* v. *Burrow* (1885), 53 L. T. 5; and it is submitted that, both on principle and authority, the law as laid down by the Master of the

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Thus, in *Antrobus* v. *Smith* (*j*), the alleged settlor made the following indorsement on a share held by him in a public company: "I do hereby *assign* to my daughter B. all my right, title, and interest of and in the enclosed call, and all other calls, in the F. and C. Navigation." The indorsement did not operate as a valid *assignment* of the share, but it was contended that it operated as a valid declaration of trust. The court, however, rejected this view, the Master of the Rolls saying: "Mr. Crawfurd (the alleged settlor) was not in form declared a trustee, nor was that mode of doing what he proposed in his contemplation. . . . He meant a gift, and there is no case in which a party has been compelled to perfect a gift which in the mode of making it he has left imperfect."

Again, a settlor had children by a first wife, and one son (an infant) by a second wife. One day, on his return from a journey, the infant's nurse said, "You have come back from Birmingham, and have not brought baby anything"; upon which the settlor answered, "Oh! I gave him a pair of boots, and now I will give him a handsome present." He then went upstairs and brought down a cheque which he had received for £900, and said, "Look you here, I *give* this to baby; it is for himself; I am going to put it away for him, and will give him a great deal more with it; it is his own, and he may do what he likes with it." He then put the cheque away. A few days after the above took place, he suddenly died, leaving the child penniless. The legal right to the cheque could, of course, only pass by indorsement (and no indorsement had been made). It was held that there was nothing more than an inchoate intention to do whatever was necessary to invest the proceeds of the cheque for the child's benefit, and that, the father having died before he had carried out his intention, a court of equity could give no aid to the child (*k*).

Rolls in *Richards* v. *Delbridge* is accurate.

(*j*) (1805) 12 Ves. 39. Shares or stocks must be transferred according to the company's regulations (*Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20; *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Mutual Provident Land and Building Society* v. *Macmillan* (1889), 14 App. Cas. 596).

(*k*) *Jones* v. *Lock* (1865), L. R. 1 Ch. 25; and see also *Re Shield, Pethybridge* v. *Burrow* (1885), 53 L. T. 5, and *Marler* v. *Tommas* (1873), L. R. 17 Eq. 8 (which seem to be inconsistent with *Re King, Sewell* v. *King* (1879), 14 Ch. D. 179, the authority of which is respectfully questioned), and *Vincent* v. *Vincent* (1886), 35 W. R. 7, and *Re Smith, Champ* v. *Marshallsay* (1890), 64 L. T. 13; and see, as to imperfect gifts at common law, *Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551, and *Cochrane* v. *Moore* (1890), 25 Q. B. D. 57.

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On similar principles, where an expectancy is ostensibly assigned to trustees, no volunteer can enforce the trust against the assignor. For an assignment of an expectancy is void at common law, and although courts of equity construe such a document as a *contract to assign it* if and when the expectancy falls in, yet it only enforces such an equitable contract when it is based on valuable consideration (*l*).

Statement of the law in *Milroy* v. *Lord*.

So in *Milroy* v. *Lord* (*m*), TURNER, L.J., laid it down that, "in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. But in order to render the settlement binding, one or other of these modes must (as I understand the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift."

It was at one time thought that there was an exception (or a seeming exception) to this principle in the case of husband and wife (*n*), but the decision of the late Vice-Chancellor HALL, *contra*, in *Re Breton's Estate*, *Breton* v. *Woollven* (*o*), has thrown considerable doubt on the soundness of that view. The point is, however, no longer of importance, as, by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), gifts made by a husband to a wife are as valid as gifts made by one stranger to another.

PARAGRAPH (3).

How far trusts arising out of contracts can be enforced by third parties who are volunteers.

The subject of trusts in favour of volunteers arising out of contracts, is one of considerable difficulty; but it is believed that the above rules will solve all the decided cases. It is quite clear that a voluntary covenant *to create a trust* is not enforceable; but there is a distinction between a voluntary covenant to create a trust, and a *voluntary trust of a covenant*

(*l*) *Re Eltenborough*, *Towry Law* v. *Burne*, [1903] 1 Ch. 697.
(*m*) (1862) 4 De G. F. & J. 264.
(*n*) *Grant* v. *Grant* (1865), 34 Beav. 623; followed by MALINS, V.-C., in *Baddeley* v. *Baddeley* (1878), 9 Ch. D. 113, and by BACON, V.-C., in *Fox* v. *Hawks* (1879), 13 Ch. D. 822.
(*o*) (1881), 17 Ch. D. 416.

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enforceable at law. The true principle is that, whether the contract is a voluntary covenant or a contract based on valuable consideration, *primâ facie* the only persons who can enforce it are those who could sue upon it at common law, viz., the persons who were parties to it. But there is an exception to this, viz., that where the contract is not merely an arrangement between A. and B., the parties to it, but is a contract by A. to transfer property or pay money to B. upon trusts set out in the covenant, the trusts being either for the covenantor and others or for others exclusively, then, as there are trusts declared and a trustee appointed, it becomes not a mere question of intention to create a trust in future, but rather a question whether, *on the true construction of the document, there was an intention to give third parties immediate equitable rights.* If that be the true construction, then the Court will either order the trustee to lend his name to the volunteers or (to avoid circuity) will, at the suit of the volunteers, enforce the covenant against the settlor to the same extent as the trustee could enforce it at common law, but the equitable remedy of specific performance will not be decreed.

Test of liability laid down by Jessel, M.R.

When a man covenants with a trustee to pay him money for a third person, the test for deciding whether or not that third person is a *cestui que trust* was stated by Jessel, M.R., in *Re Empress Engineering Co.* (*p*), as follows: "As a general rule that will not be so. A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement the next day releasing the old one. If C. were a *cestui que trust* it would not have that effect. I am far from saying that there may not be agreements which may make C. a *cestui que trust.* There may be an agreement like that in *Gregory* v. *Williams* (*q*), where the agreement was to pay out of property, *and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party.* So again it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third party; . . . a married woman may nominate somebody to contract on her behalf; but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract."

Rule stated by Cotton, L.J., and Bowen, L.J.

In *Gandy* v. *Gandy* (*r*), Cotton, L.J., put the case thus: "As

(*p*) (1880) 16 Ch. D. 125, 129.
(*q*) (1817) 3 Mer. 582.
(*r*) (1885) 30 Ch. D. 57, 66, in which the rule as stated in

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a general rule a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of, or does not perform the obligations of, that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A., *is intended to secure a benefit to B.*, so that B. is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B. would, in a court of equity, be allowed to insist upon and enforce the contract." And in the same case BOWEN L.J., said: "Whatever may have been the common law doctrine, if the true intent and true effect of this deed (a separation deed between husband and wife) were to give to the *children* a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call upon the trustees to protect their rights and interests under it, then the children would be outside the common law doctrine, and would in a court of equity be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course, depends upon its being made out that, upon the true construction of this deed it was a deed which gave the children such a beneficial right."

The question is really one of interpretation of the document.

The question, therefore, appears to be purely one of interpretation of the transaction in each case. Was the contract intended to be merely an agreement between the parties which they might vary or release; or was it intended to confer on others equitable rights capable of being enforced by the covenantee, as trustee for them, at common law? In considering this question the nature of the transaction is a most important factor.

Colyear v. *Lady Mulgrave* explained.

An excellent example of the rule in sub-paragraph (a) is afforded by the case of *Colyear* v. *Lady Mulgrave* (*s*). There a father, who had four natural daughters and a legitimate son, entered into an agreement *with the son*, whereby the father covenanted to transfer the sum of £20,000 to a trustee for the benefit of the four daughters; and the son covenanted to pay the father's debts. The son paid some of the debts, and died before the covenant by the father was performed, having by his will left the *father his sole legatee and executor.* It was held that the daughters could not force the father to perform the covenant to settle £20,000 upon them. It will be perceived

Touche v. *Metropolitan Railway Warehousing Co.* (1871), L. R. 6 Ch. 671, was held to be too wide.

(*s*) (1836) 2 Keen, 81.

that the covenant was here made *with the son*, and not with the contemplated trustee. It consequently conferred no legal right to sue on any one except the son's personal representative, who being the other party to the contract could not sue himself. It was, therefore, nothing except a voluntary covenant to create a trust *in futuro*, neither of the parties contracting *as trustee for* the daughters.

Covenant with a trustee as such, may or may not be enforceable by third parties.

Such cases are simple because there is no covenant made *with a trustee* for the third parties, but merely a covenant between two persons to make a *future trust* in favour of the volunteer. The difficulty commences when the covenant is entered into with a person who is admittedly a trustee for some one, and confers on the trustee a right to bring a common law action for breach of the covenant. In a sense he thereupon becomes the trustee of a legal chose in action (*i.e.*, of the legal right of enforcing the covenant), and the question then becomes not unlike that discussed under the head of illusory trusts on p. 35, *ante*, viz., whether on the true construction of the covenant it was merely a matter of arrangement between parties to it which either of them could release, or whether it was intended to confer immediate equitable rights on the third parties to call on the trustee to enforce his common law right under the covenant.

Where the only parties are the covenantor and the trustee.

The simplest case is where the covenant is made between the covenantor and the trustee only, and the trust is wholly for the benefit of A., who is no party to the contract. In that case it is obvious that the whole transaction would be futile except on the basis that A., and A. only, was intended to be benefited by it. Hence in such cases A. can ask the court to let him enforce those legal rights which were by the covenantor conferred on the trustee *as trustee for him*. The case usually cited on this branch of the subject is *Fletcher* v. *Fletcher* (*t*). The facts there were that the settlor, by a voluntary deed, covenanted with trustees that in case A. and B. (his natural sons) or either of them should survive him, his personal representatives should within twelve months pay £60,000 to the trustees upon trust for A. and B. or such of them as should attain twenty-one. *Held*, after the covenantor's death, that although the deed of covenant was voluntary, it nevertheless created a trust for A. (the survivor of A. and B.), and that the refusal of the trustees to sue at law upon the covenant did not prejudice the right of A. to recover payment

(*t*) (1844) 4 Hare, 67.

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of the debt out of the assets of the covenantor. In giving judgment WIGRAM, V.-C., said: "The first proposition relied upon against the claim in equity, was that equity will not interfere in favour of a volunteer. That proposition, though true in many cases, has been too largely stated. A court of equity, for example, will not, in favour of a volunteer, enforce the performance of a contract in specie. That it will, however, sometimes act in favour of a volunteer is proved by the common case of a volunteer on a bond, who may prove his bond against the assets. Again, where the relation of trustee and *cestui que trust* is constituted, (as where property is transferred from the author of the trust into the name of a trustee, so that he has lost all power of disposition over it, and the transaction is complete as regards him), the trustee having accepted the trust, cannot say he holds it, except for the purpose of the trust; and the court will enforce the trust at the suit of a volunteer. According to the authorities, I cannot, I admit, do anything to *perfect the liability of the author of the trust if it is not already perfect. This covenant, however, is already perfect. The covenantor is liable at law* and the court is not called upon to do any act to perfect it. One question made in argument has been, whether there can be a *trust of a covenant*, the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that. . . . The rule against relief to volunteers cannot, I conceive, in a case like that before me, be stated higher than this—that a court of equity will not, in favour of a volunteer, give to a deed *any effect beyond what the law will give to it.* But if the author of the deed has subjected himself to a *liability at law*, and the legal liability comes regularly to be enforced in equity, the observation that the claimant is a volunteer is of no value in favour of those who represent the author of the deed. If therefore the plaintiff himself were the covenantee, so that he could bring the action in his own name, it follows from what I have said, that, in my opinion, he might enforce payment out of the assets of the covenantor in this case. Then does the interposition of the trustee of this covenant make any difference? I think it does not. . . . I give no assistance against the testator, I only deal with him as he has dealt by himself; and if in such a case a trustee will not sue without the sanction of the court, I think it is right to allow the *cestui que trust* to sue for himself in the name of the trustee, either at law or in this court as the case may require."

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Covenant with a committee for the benefit of unascertained class.

The same point was also discussed in *Lloyd's* v. *Harper* (*u*), where a father, on the occasion of his son being admitted as an underwriting member of the association known as "Lloyd's," gave a guarantee to the managing committee of the association by which he held himself responsible for all his son's engagements in that capacity. The association, in whom the rights of the committee had become vested by statute, sixteen years after the date of contract sought to enforce the guarantee for the benefit of the persons, *whether members of Lloyd's or not*, with whom the son had contracted engagements as an underwriting member, he having become a bankrupt, and it was held that the plaintiffs were entitled so to do. It is clear that the association were not nominees on behalf of the persons who were to benefit by the guarantee, and moreover they entered into the contract for the benefit of persons who were not in existence at the date of the contract. The point was taken that, assuming that *Lloyd's* were entitled to sue on the guarantee at all, the utmost which they could recover was nominal damages, because the association had not sustained any loss, the loss having been sustained by the persons who had entered into the contracts with the son. Lord Justice James said (*x*): "The defendants say, 'You, *Lloyd's*, have sustained no loss, and can only recover nominal damages, because you can only recover for your own loss, and not for the losses sustained by other persons.' That might be true if Lloyd's were not trustees, but I am of opinion that Mr. Justice Fry was well warranted in the conclusion at which he arrived, that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested. That brings the case within the authorities, of which there are more than one, viz., *Gregory* v. *Williams* (*y*), *Lamb* v. *Vice* (*z*), and many other cases which proceed on the obvious principle that, if A. is trustee for B., A. can sue on behalf of B." Lord Justice Cotton, in giving judgment to the same effect, referred also (*a*) to *Tomlinson* v. *Gill* (*b*), and said that the principle there laid down by Lord Hardwicke "is, I think, a good and sound one, and one upon which we can properly act, and are bound to act in the present case, treating the plaintiffs, Lloyd's, as trustees for those for whose benefit this contract was entered into." And Lord Justice Lush said (*c*), "I

(*u*) (1880) 16 Ch. D. 290.
(*x*) (1880) 16 Ch. D. at p. 315.
(*y*) (1817) 3 Mer. 582.
(*z*) (1840) 6 Mee. & W. 467.
(*a*) (1880) 16 Ch. D. at p. 317.
(*b*) (1756) Ambl. 330.
(*c*) (1880) 16 Ch. D. at p. 321.

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consider it to be an established rule of law that where a contract is made with A. for the benefit of B., A. can sue on the contract for the benefit of B. and recover all that B. could have recovered if the contract had been made with B. himself" (*d*).

Covenants in partnership deeds for the benefit of a partner's widow or children.

A more complicated case arises where (as frequently happens) a covenant is contained in a partnership deed providing for the payment of an annuity to the widow or children of one of the partners in the event of his death during the partnership. It has been held (*e*) that as such provisions create a legal liability in the surviving partner to pay, *and as the object of them is to confer an equitable beneficial right on the widow or children*, they can enforce it, the personal representative of the deceased being considered as a trustee for them.

This is a somewhat extreme case, as it seems to have been admitted by the Court of Appeal that it involved the rather serious proposition that the partners could not have cancelled or varied the articles of partnership so as to deprive the widow or children of this interest. NORTH, J., in the court below seems to have felt the force of this objection, as he relied upon the fact that the widow in question was also executrix of the deceased and as such could enforce the covenant in that character at law; but the Court of Appeal do not seem to have seen any necessity for relying upon that, and both courts held that when paid to the executrix she held it as trustee for herself free from any rights of her late husband's creditors.

Covenants in marriage settlements to settle after-acquired property.

On the other hand there is no inference that an executory marriage contract is intended to confer any equitable rights on any one except the spouses and the issue of the marriage. This was recently discussed in *Re Plumptre's Marriage Settlement*, *Underhill* v. *Plumptre* (*f*). In that case a marriage settlement contained the usual covenant by husband and wife with the trustees for the settlement of after-acquired property of the wife. The husband subsequently made a present of some stocks to the wife, and, after her death without issue, the question arose whether the next of kin of the wife (who took the settled fund in default of issue) could call upon the

(*d*) And see to same effect, *Gregory* v. *Williams* (1817), 3 Mer. 582, and *Crofton* v. *Ormsby* (1806), 2 Sch. & Lef. 583.

(*e*) *Re Flavell*, *Murray* v. *Flavell* (1883), 25 Ch. D. 89; and to the same effect, *Page* v. *Cox* (1852), 10 Hare, 163.

(*f*) [1910] 1 Ch. 609; and see *Re Anstis*, *Chetwynd* v. *Morgan* (1886), 31 Ch. D. 596, 605; *Green* v. *Paterson* (1886), 32 Ch. D. 95; and *Re D'Angibau*, *Andrews* v. *Andrews* (1880), 15 Ch. D. 228.

trustees to enforce the covenant against the husband, in whom the stocks were then vested, as her administrator and *jure mariti*. It was urged on behalf of the next of kin that the case was governed by *Fletcher* v. *Fletcher* (*g*), and that where there is a right at law in trustees to enforce a covenant for the benefit of volunteers, they are bound to enforce that right—that in fact the conferring upon them of a legal right for the benefit of volunteers is an executed trust *of that right*. It was, however, held by Eve, J., that this was not so. The learned judge said: "What is their (the next of kin's) position here? They are not in my opinion *cestuis que trusts* under the settlement" (of the stocks in question), "for nothing therein amounts to a declaration of trust, or to anything more than an executory contract on the part of the husband and wife; it is, so far as the next of kin are concerned, what Cotton, L.J., calls a voluntary contract to create a trust as distinguished from a complete voluntary trust such as existed in the case of *Fletcher* v. *Fletcher* (*g*) . . . The collaterals are no parties to the contract (*h*); they are not within the marriage consideration and cannot be considered otherwise than as volunteers (*i*), and in this respect it makes no difference that the covenant sought to be enforced is the husband's and that the property sought to be brought within it comes from the wife. For each of the foregoing propositions authority is to be found in the judgment of the Court of Appeal in *Re D'Angibau, Andrews* v. *Andrews* (*k*); and in the same judgment is to be found this further statement—that where, as in this case, the husband has acquired a legal title, as administrator of the wife, to property which was subject to the contract to settle, volunteers are not entitled to enforce against that legal title the contract to create a trust contained in the settlement." It may perhaps be added, that although trustees for parties privy to valuable consideration are themselves privy to it, it is only as trustees *for such beneficial privies*, and that when (as in the above case) the only beneficial privy left is the person against whom the contract is sought to be enforced, it would be somewhat anomalous that they should be bound to proceed against him for the benefit of volunteers who could not proceed against him themselves.

(*g*) (1844) 4 Hare, 67.

(*h*) They would not be necessary parties to an action to enforce it by a party to the consideration: see *Fowler* v. *James* (1847), 1 Coop. *temp.* Cott. 290.

(*i*) See to same effect, *Anderson* v. *Abbott* (1857), 23 Beav. 457, where the contract between the husband and wife was post-nuptial.

(*k*) (1880) 15 Ch. D. 228.

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Covenants in marriage settlements benefiting children of wife by former husband.

The question whether the children of a widow, who, on a second marriage, makes or procures a settlement in their favour, can enforce the performance of a covenant or an incompleted trust is not free from difficulty. In *Clarke* v. *Wright* (*l*), some of the judges in the Exchequer Chamber went so far as to extend the marriage consideration to all relatives of an intended wife, and even to the relatives of an intended husband where *he* was not the settlor, on the ground that a benefit to these relatives must have formed part of the marriage bargain so as to take them altogether out of the category of "volunteers." As shown above, however, that is certainly not the law with regard to a wife's "next of kin"; and has been expressly overruled by the Privy Council (*m*).

The fact that they are volunteers, however, does not dispose of the question, because, as we have already seen, a covenant with trustees enforceable at law may be enforceable by volunteers if, on the construction of the instrument, beneficial rights were intended to be given to them. Contingent trusts in favour of an unascertainable class of next of kin resting on covenant, confer no equitable rights on them, because they can scarcely be supposed to have been objects of bounty in an arrangement between two persons about to marry. But the case of a widow who is about to remarry making some provision for existing children for whom personally she entertains maternal affection, is upon quite a different plane. Anyhow, where they are placed on the same footing as the children of the intended marriage, it seems clear that they would be able to enforce such legal rights as were conferred on the trustees by the covenant (*n*).

ART. 9.—*What Property is capable of being made the Subject of a Trust.*

All property, real or personal, legal or equitable, at home or abroad, and whether in possession or action,

(*l*) (1861) 6 H. & N. 849; *Gale* v. *Gale* (1877), 6 Ch. D. 144; and see also *Leonard* v. *Leonard* (1910), 44 Ir. L. T. 155.

(*m*) *De Mestre* v. *West*, [1891] A. C. 264; *Nairn* v. *Prowse* (1802), 6 Ves. 752; *Re Cameron and Wells* (1887), 37 Ch. D. 32; and *Att.-Gen.* v. *Jacobs-Smith*, [1895] 2 Q. B. 341, where such a limitation was held to be voluntary for purposes of account duty.

(*n*) *Mackie* v. *Herbertson* (1884), 9 App. Cas. 303, 337, a Scottish case, but apparently on this point applicable to English settlements; and see to same effect, *De Mestre* v. *West*, *supra*, at p. 270 of the report.

remainder, reversion, or expectancy, may be made the subject of a trust, unless—

(a) the policy of the law or any statutory enactment has made it inalienable ; or,

(b) being land, the tenure is inconsistent with the trusts sought to be created (*o*).

Equitable interests.

A person, holding an agreement for a lease, assigned all his interest under it to trustees upon certain trusts. Here, although the legal term was not in the settlor, it was held to be a good settlement, because he had conveyed his equitable interest in the property (*p*).

Choses in action.

A. owes £1,000 to B. B. assigns this debt to trustees upon certain trusts. This transaction is perfectly good. Prior to the Judicature Act, 1873 (36 & 37 Vict. c. 66), debts and other legal choses in action were not assignable at law, on the ground (as put by Lord Coke) that it "would be the occasion of multiplying of contentions and suits, of great oppression of the people, and the subversion of the due and equal execution of justice" (10 Co. 48). But even at law negotiable instruments (as debentures, bills of exchange, and promissory notes made negotiable) were exceptions to the rule; and so were all contracts where a novation took place, that is to say, where both parties to the original contract assented to the transfer of the interest of one of them. Equity, however, almost always, from its earliest days, disregarded the legal doctrine, and freely enforced contracts for the sale of choses in action ; and now, by 8 & 9 Vict. c. 106, s. 6, contingent and future interests and possibilities, *coupled with an interest in real estate*, may be granted or assigned at law. But not so possibilities in personal estate which still remain only assignable in equity (*q*). By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, and by 31 & 32 Vict. c. 86, a similar relaxation of the law was introduced in favour of marine policies; and finally, by s. 6 of the Judicature Act, 1873, debts and other legal choses in action may be assigned at law, where the assignment is absolute and not by way of charge only.

(*o*) See *Nelson* v. *Bridport* (1846), 8 Beav. 547 ; and *Allen* v. *Bewsey* (1877), 7 Ch. D. 453, and cases *infra*.

(*p*) *Gilbert* v. *Overton* (1864), 2 H. & M. 110; and see also *Knight* v. *Bowyer* (1857), 23 Beav. 609.

(*q*) See *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; and *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697.

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Reversionary interests.

A reversion, whether vested or contingent, is assignable both at law and in equity, and may therefore be made the subject of a trust (*r*).

Expectancies or possibilities.

At law, assignments of future acquired property pass nothing. Equity, however, has for some time regarded them as contracts to assign the property when it comes into existence (*s*); and although they are uncertain in their inception, inasmuch as the property is incapable of ascertainment at the date of the assignment, it is nevertheless capable of identification when the subject has come into existence and the assignment becomes enforceable (*t*), and such assignments are therefore not void for uncertainty. Thus an assignment of all moneys to which the assignor was or might become entitled under any settlement, will, or other document, was held to be good in equity (*u*); and a similar conclusion was arrived at by the House of Lords where the property assigned was all book debts due and owing or which might during a named period *become due* and owing to the assignor (*x*). Indeed in the early case of *Lewis* v. *Madocks* (*y*) specific performance was ordered of a covenant by the husband in a marriage settlement that he would "by deed or will convey give devise and assume all and singular his ready money goods chattels and personal estate and effects to and for the use and behoof of the spouses and the survivor of them" upon certain trusts; and this case was quoted in a recent judgment in the Court of Appeal as being good law (*z*). An assignment of the copyright of an unwritten book has also been held to be good (*a*). Another example is the covenant to settle after-acquired property commonly found in marriage settlements (*z*). As, however, such equitable assignments are really only regarded as contracts, it follows that they require

(*r*) *Shafto* v. *Adams* (1864), 4 Giff. 492.

(*s*) *Wethered* v. *Wethered* (1828), 2 Sim. 183; and see also *Beckley* v. *Newland* (1723), 2 P. Wms. 182; *Harwood* v. *Tooke* (1812), 2 Sim. 192; *Higgins* v. *Hill* (1887), 56 L. T. 426; *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; and *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

(*t*) See *per* Lord HERSCHELL in *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, at p. 530; and *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191.

(*u*) *Re Clarke, Coombe* v. *Carter* (1887), 36 Ch. D. 348.

(*x*) *Tailby* v. *Official Receiver, supra.*

(*y*) (1810), 17 Ves. 48.

(*z*) *Re Reis, Ex parte Clough,* [1904] 2 K. B. 769, at p. 783, *per* STIRLING, L.J.

(*a*) *Ward, Lock & Co.* v. *Long,* [1906] 2 Ch. 550.

valuable consideration to support them (*b*) (as to which see *supra*, Art. 8). Art. 9.

If during the intervening period between the assignment and the acquisition of the property the assignor becomes bankrupt and obtains his discharge, the question arises whether he is released by the order of discharge from the performance of what is merely a contract. In *Collyer* v. *Isaacs* (*c*) it was held that, as the order of discharge released the debtor from all his liabilities, it released him from a so-called assignment of after-acquired property made by way of mortgage to secure a debt. But more recently the matter has been elaborately discussed in *Re Reis, Ex parte Clough* (*d*), in which it was decided by the Court of Appeal that the true test is whether the contract created by the so-called assignment or the debt for which it is merely a security is provable in the bankruptcy, or whether the case is one in which specific performance is the appropriate remedy. In the former case the order of discharge destroys the covenant; in the latter it does not. This view was subsequently affirmed by the House of Lords (*e*). Effect of bankruptcy on assignments of after-acquired property acquired after the order of discharge.

The question whether so-called assignments of future acquired property are binding on the trustee in bankruptcy where the property is acquired *during the bankruptcy* is not so easy. In *Wilmot* v. *Alton* (*f*) it was answered in the negative on the ground that any property acquired during the bankruptcy is not acquired by the bankrupt, but (by operation of law) by the trustee in bankruptcy. This case was, however, decided before *Re Reis, Ex parte Clough* (*supra*), and it seems questionable whether it is consistent with the principles there laid down. Anyhow it is clear that an assignment of future acquired property falling within the class of contracts capable of specific performance would bind property acquired by a bankrupt *after his discharge* (*g*). Effect of bankruptcy on property acquired during the bankruptcy.

Sub-Paragraph (a).

Salaries or pensions given for enabling persons to perform duties connected with the public service, or to enable them to be in a fit state of preparation to perform those duties, are Property inalienable by reason of public policy.

(*b*) *Re Ellenborough, Towry Law* v. *Burne*, [1903] 1 Ch. 697.

(*c*) (1881) 19 Ch. D. 342.

(*d*) [1904] 2 K. B. 769; and see also *Re Bastable, Ex parte The Trustee*, [1901] 2 K. B. at p. 525; and *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193.

(*e*) S. C. (*sub nom. Clough* v. *Samuel*), [1905] A. C. 442.

(*f*) [1897] 1 Q. B. 17; *Ex parte Nichols* (1883), 22 Ch. D. 782.

(*g*) *Re Reis, Ex parte Clough, supra*, and *Clough* v. *Samuel, supra*.

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inalienable; but otherwise not. In *Grenfell* v. *Dean and Canons of Windsor* (*h*), a canon of Windsor had assigned the canonry and the profits to the plaintiff to secure a sum of money. There was no cure of souls, and the only duties were residence within the castle and attendance in the chapel for twenty-one days a year. In giving judgment for the plaintiff and upholding the assignment the Master of the Rolls said: "If he (the canon) had made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned in which it may be against public policy that the income arising from the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay, where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they—being liable to be called into public service—are enabled to keep themselves in a state of preparation for performing their duties."

So, in *Davis* v. *Duke of Marlborough* (*i*), the Lord Chancellor said: "A pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable." The emoluments of ecclesiastical livings were expressly made inalienable by 13 Eliz. c. 20 and 57 Geo. 3, c. 99.

Property inalienable by statute.

Some classes of property are expressly made inalienable by statute. Thus, in *Davis* v. *Duke of Marlborough* (*i*), a pension was granted by statute to the duke and his successors in the title "for the more honourable support of the dignities." It was held that, the object of Parliament being that "it should be kept in mind that it was for a memento and a perpetual memorial of national gratitude for public services," it was not alienable.

Pay, pensions, etc., of military and naval officers.

Pay, pensions, relief, or allowance payable to any officer of his Majesty's forces, or to his widow, or to any person on the compassionate list, are also made unassignable by statute (*j*). So also are the pay of seamen in the navy (*k*),

(*h*) (1840) 2 Beav. 544.
(*i*) (1818) 1 Swans. 74.
(*j*) 47 Geo. 3, sess. 2, c. 25, ss. 1—14.
(*k*) 1 Geo. 2, c. 14, s. 7.

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and half-pay in the marine forces (*l*); but it would seem that the right to pay actually due at the date of the assignment is assignable (*m*). Salaries or pensions, not given in respect of public services, are freely assignable (*n*).

With regard to the property of married women (whether restrained from anticipation or not) such inability to create a trust of it as still exists arises rather from the status of the settlor herself than from the nature of the property, and is therefore treated of *infra*, Chapter III., under the head of "Who may be a Settlor."

Sub-Paragraph (b).

Trust inconsistent with tenure.

Where, with respect to copyhold lands, there is no custom to create an estate tail in the manor of which they are holden, an equitable estate tail cannot be created by way of trust: for that would be inconsistent with the tenure—in other words, with the conditions—under which the lands are holden (*o*). But, on the other hand, where a trust is not inconsistent with the custom of a manor, it will be valid, although legal estates to the same extent could not be created (*p*). So, where a marriage settlement contained a covenant to settle after-acquired property, it was held to be inapplicable to lands in Jersey, where trusts of this character are not recognised and all transfers of land are required to be made for adequate pecuniary consideration (*q*).

Trusts of foreign land.

The same principle holds in the case of lands situated abroad; even if such lands are capable of being settled by way of special trust at all, a point which is not free from doubt (*r*).

As to the validity of English trusts of personal estate created by English women about to marry (and therefore to become) foreigners, and which are void according to the law of the matrimonial domicile, the reader is referred to the next Article.

(*l*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 47.

(*m*) 11 Geo. 4 & 1 Will. 4, c. 20, s. 54.

(*n*) *Feistel* v. *King's College* (1847), 10 Beav. 491; and for other cases bearing on assignments of salaries and pensions, see *Stone* v. *Lidderdale* (1795), 2 Anst. 533; *Arbuthnot* v. *Norton* (1846), 5 Moo. P. C. 219; *Carew* v. *Cooper* (1864), 10 Jur. (N. S.) 429; *Alexander* v. *Duke of Wellington* (1831), 2 Russ. & Myl. 35.

(*o*) *Allen* v. *Bewsey* (1877), 7 Ch. D. at p. 466.

(*p*) *Ibid.*

(*q*) *Re Pearse's Settlement*, *Pearse* v. *Pearse*, [1909] 1 Ch. 304; and see also *Martin* v. *Martin* (1831), 2 Russ. & Myl. 507 (land in Demerara).

(*r*) *Glover* v. *Strothoff* (1786), 2 Bro. C. C. 33; *Nelson* v. *Bridport* (1846), 8 Beav. 547; *Martin* v. *Martin* (1831), 2 Russ. & Myl. 507.

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ART. 10.—*The Legality of the Expressed Object of the Trust.*

(1) A trust created for a purpose illegal by English law is void (*s*). Private trusts of this character mostly fall under one of the following classes :

(a) trusts for the accumulation (*t*) or the tying up of property for an unlawful period ;

(b) trusts by which it is sought to create estates in personalty that are only allowed with regard to realty, or to alter the devolution of property in the event of intestacy (*u*) ;

(c) trusts providing for the continued enjoyment of the trust property by an insolvent beneficiary free from the rights of creditors (*v*) ;

(d) trusts restricting the power of alienation of the beneficiaries' interest (*x*) ;

(e) trusts promoting or encouraging immorality (*y*), fraud, or dishonesty ;

(f) trusts tending to the general restraint of marriage (*z*) (unless of a second marriage) (*a*).

(2) An illegal trust will not vitiate other provisions in the settlement unconnected with the illegal purpose (*b*).

(*s*) *Att.-Gen.* v. *Sands* (1668), Hard. 488 ; *Pawlett* v. *Att.-Gen.* (1667), Hard. 465 ; *Burgess* v. *Wheate* (1759), 1 Eden, 177 ; *Duke of Norfolk's Case* (1678), 3 Ch. Cas. 1. As to trusts void for attempting to alter the law of devolution of an absolute equitable gift, see *Re Dixon, Dixon* v. *Charlesworth*, [1903] 2 Ch. 458.

(*t*) *Cadell* v. *Palmer* (1833), 1 Cl. & F. 372, Tud. Lead. Cas. Conv. (ed. 4), 578 ; *Griffith* v. *Vere* (1803), 9 Ves. 127, Tud. Lead. Cas. Conv. (ed. 4), 618.

(*u*) *Re Walker, Maekintosh-Walker* v. *Walker*, [1908] 2 Ch. 705.

(*v*) *Graves* v. *Dolphin* (1826), 1 Sim. 66 ; *Snowdon* v. *Dales* (1834), 6 Sim. 524 ; *Brandon* v. *Robinson* (1811), 18 Ves. 429.

(*x*) *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115 ; *Sykes* v. *Sykes* (1871), L. R. 13 Eq. 56.

(*y*) *Blodwell* v. *Edwards* (1596), Cro. Eliz. 509.

(*z*) See *per* WILMOT, L.C.J., in *Low* v. *Peers*, Wilmot's Opinions and Judgments, at p. 375 ; *Morley* v. *Rennoldson* (1843), 2 Hare, 570 ; *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255.

(*a*) *Marples* v. *Bainbridge* (1816), 1 Madd. 590 ; *Lloyd* v. *Lloyd, supra* ; *Craven* v. *Brady* (1869), L. R. 4 Ch. 296 ; and as to second marriage of a man, *Allen* v. *Jackson* (1875), 1 Ch. D. 399.

(*b*) *H.* v. *W.* (1857), 3 Kay & J. 382 ; *Cartwright* v. *Cartwright* (1853), 3 De G. M. & G. 982 ; *Merryweather* v. *Jones* (1864), 4 Giff. 509 ; *Cocksedge* v. *Cock-*

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(3) Trusts of personal estate, or of English land, are not void by our law, although prohibited by the law of the domicile of the settlor (*c*); provided that by that law he had capacity to contract (*d*).

(4) A trust to perform certain acts which are of no benefit to any human being is not enforceable (*e*), unless it is a charitable trust (*f*). But it is not void unless it transgresses the rule against perpetuities (*g*), or is contrary to public policy (*h*); and the trustee may therefore perform it if he wishes (*g*).

PARAGRAPH (1) (a).

Perpetuities.

It is against public policy that property should be settled on special trusts for an indefinite period, so as to prevent it being freely dealt with; and, consequently, the power of doing so has been curtailed by a rule known as the rule against perpetuities. That rule is, that every future limitation, (whether by way of executory devise or trust), of real or personal property, the *vesting of which* absolutely as to personalty, or in fee or tail as to realty, is postponed beyond lives in being and twenty-one years afterwards (with a further period for gestation where it exists), is void (*i*). This rule does not, however,

sedge (1844), 14 Sim. 244; *Evers* v. *Challis* (1859), 7 H. L. Cas. 531; *Watson* v. *Young* (1885), 28 Ch. D. 436; *Re Harvey, Peek* v. *Savory* (1888), 39 Ch. D. 289; and *Re Bence, Smith* v. *Bence*, [1891] 3 Ch. 242.

(*c*) See *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547; *Re Hernando, Hernando* v. *Sawtell* (1884), 27 Ch. D. 284; *Re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442; *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Re Bald, Bald* v. *Bald* (1897), 76 L. T. 462; *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333.

(*d*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

(*e*) *Re Rickard, Rickard* v. *Robson* (1862), 31 Beav. 244; *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255; *Thomson* v. *Shakespeare* (1859), Johns. 612; *Fowler* v. *Fowler* (1864), 33 Beav. 616; *Fisk* v. *Att.-Gen.* (1867), L. R. 4 Eq. 521; *Hunter* v. *Bullock* (1872), L. R. 14 Eq. 45; *Dawson* v. *Small* (1874), L. R. 18 Eq. 114; and *per* NORTH, J., in *Re Dean, Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552.

(*f*) Trusts may be charitable, although not directly benefiting human beings, *e.g.*, trusts for providing a home for lost dogs, trusts for the protection of animals liable to vivisection (*Re Douglas, Obert* v. *Barrow* (1887), 35 Ch. D. 472), and trusts for repairing a church or churchyard (*Re Vaughan, Vaughan* v. *Thomas* (1886), 33 Ch. D. 187).

(*g*) *Re Dean, Cooper-Dean* v. *Stevens, ubi supra*, at p. 557.

(*h*) *Brown* v. *Burdett* (1882), 21 Ch. D. 667.

(*i*) *Cadell* v. *Palmer* (1833), 1 Cl. & F. 372, Tud. Lead. Cas. Conv. (ed. 4), 578; *London and South Western Rail. Co.* v. *Gomm* (1882), 20 Ch. D. 562, applied in *Edwards* v. *Edwards*, [1909] A. C.

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apply to trusts following estates tail, as they can be barred (*k*); nor to charitable bequests (*l*); nor to parliamentary grants for distinguished services; nor to trusts for the accumulation of income for payment of the settlor's debts (*m*). It is impossible within the scope of this work to go into the numerous questions which arise under this rule, for the elucidation of which the reader is referred to Mr. Lewis's or Mr. Gray's learned Treatises on Perpetuities. One or two salient points must, however, be adverted to.

The test of whether a trust is void for remoteness is possible, not actual, events.

First, then, in considering whether limitations or trusts offend against the rule (or are in legal language "too remote"), *possible* events are to be considered. If the trust *may* in any event be too remote, it will be void, notwithstanding that in the events which have actually happened it would have vested within the prescribed period. In short, to be good the limitation must be one of which, at its creation, it could be predicted that it *must* necessarily vest within the prescribed period (*n*). It follows (and this must never be forgotten by any one who undertakes to prepare such documents) that a trust in a marriage settlement for such of the children of the marriage as shall attain the age of twenty-two years, or any greater age, must necessarily be void for remoteness. For both husband and wife *may* die leaving a child under one year of age who could not attain a vested interest within twenty-one years. The author has known of a shocking case where the wife's money was ignorantly settled in this way, with the result that the trusts for issue were declared void and the wife's fortune resulted at her death to the husband *jure mariti*, and he promptly settled it on a new wife.

Property need not vest in possession within the prescribed period so long as it is vested in interest.

Secondly, the rule does not require that the trust property shall vest absolutely *in possession* within the prescribed period. It suffices that it must necessarily vest absolutely *in interest* in some person or persons, so that one can say with certainty at some time within that period that A. as life tenant and B. as absolute owner in remainder can collectively deal with the property. Thus in the not uncommon case of a trust for A. for life, with remainder for any woman who may become his widow

275; and see also *Pearks* v. *Moseley* (1880), 5 App. Cas. 714.

(*k*) *Heasman* v. *Pearce* (1871), L. R. 7 Ch. 275.

(*l*) *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460.

(*m*) *Lord Southampton* v. *Lord Hertford* (1813), 2 Ves. & B. 54, 65; *Bateman* v. *Hotchkin* (1847), 10 Beav. 426.

(*n*) *Dungannon* v. *Smith* (1846), 12 Cl. & F. 546; *Smith* v. *Smith* (1870), L. R. 5 Ch. 342; *Re Handcock's Trusts* (1889), 23 L. R. Ir. 34. As to trusts to take effect in remainder upon the failure of such trusts, see *infra*, p. 73 *et seq.*

for life, with remainder for his children who shall attain twenty-one the whole trust is perfectly good (*o*). For although it is possible that the woman who may become his widow is not born at the date when the settlement first comes into operation, yet one will necessarily be able at the end of twenty-one years after the death of A. to say that his widow (if any) and his children who have attained twenty-one are together the absolute owners of the property. On the other hand, all the intermediate limited interests must *begin* within the limit allowed by the rule; for otherwise you might not be able to ascertain all vested interests within that limit. Thus, where there is an indefinite discretionary trust to apply the income for the benefit of all or any one or more of a class of persons (some of whom may be unborn) during their lives or the life of the survivor of them, it is obvious that their beneficial interests might be varied from time to time so that the persons collectively entitled might not be definitely ascertained within the period allowed by the rule, and in such case the trust will be bad although the ultimate remainderman might be certainly ascertainable within the period (*p*).

Indefinite trusts of income.

The question how far a trust which is void for remoteness invalidates other trusts connected with it is discussed *infra*, p. 73 *et seq.*

Thirdly, with regard to the application of the rule to powers of appointment. Where a person has a general power to appoint a trust fund to such persons as he may think fit, the rule has no application beyond that which it would have to a disposition by an absolute owner. But where, under a settlement or will, a person has a limited or special power (*e.g.*, the power to appoint among issue almost universal in marriage settlements) it is different. In such cases, for the purposes of the rule, the effect of the appointment at the date when it comes into operation, and not its actual wording (*q*), is considered as having been written into the settlement. If judged by that standard it would have been void for remoteness as an original trust, it will be equally void for remoteness as an appointment. An excellent example is afforded by the case of *Re Thompson, Thompson* v. *Thompson*. There the

Application of the rule to trusts created under powers of appointment

(*o*) *Re Hargreaves, Midgley* v. *Tatley* (1890), 43 Ch. D. at p. 405; *Re Roberts, Repington* v. *Roberts-Gawen* (1881), 19 Ch. D. 520; *Evans* v. *Walker* (1876), 3 Ch. D. 211.

(*p*) *Re Blew, Blew* v. *Gunner*, [1906] 1 Ch. 624, dissenting from *Re Wise, Jackson* v. *Parrott*, [1896] 1 Ch. 281; and see also *Re Swain, Phillips* v. *Poole* (1908), 99 L. T. 604.

(*q*) *Re Thompson, Thompson* v. *Thompson*, [1906] 2 Ch. 199.

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original will gave a life interest to the testator's widow, with remainder upon such trusts for testator's brother T. C. and his issue as the widow should appoint. The widow by her will appointed in favour of T. C. for life with remainder to his children who being born in her lifetime should attain twenty-five, or being born after her death should attain twenty-one. At her death (when the appointment first came into operation) all T. C.'s then existing children were twenty-five. It was contended that if the *words of the appointment* had been written into the husband's will the trusts in favour of the children of T. C. who should attain twenty-five would have been void for remoteness. But JOYCE, J., said: "When it is stated that the test by which the validity of such a gift must be tried is to read it as inserted in the deed or will creating the power in place of the power, it is not meant that the precise language of the instrument exercising the power is to be read into the instrument creating it . . . . Inasmuch, therefore, as the will of the widow was so made that the persons who according to the true construction of such will were to take under it and the shares they were to take would necessarily be ascertained and their interests vest not later than the expiration of twenty-one years from the death of T. C., who was alive at the death of the testator, the appointment was perfectly valid."

Application of rule where no successive interests created.

Fourthly: Trusts may be void for remoteness although creating no interests in succession, if the effect of them might be to tie up property beyond the prescribed limits. For instance, a trust to apply a competent part of the income of a fund for keeping a tomb in repair is void unless limited to lives in being and twenty-one years after the death of the survivor (*r*). It is therefore common in wills by which such trusts are sought to be created to limit them to the lives of the existing issue of the late Queen Victoria and twenty-one years after the death of the survivor of them. As the deaths of that distinguished class can be readily verified, such a limitation is not void for uncertainty, although a more audacious attempt to extend the period to the life of the survivor of all persons living at the date when the settlement took effect and twenty-one years after has been held void on the ground that it would be impossible to identify the survivor (*s*). To what extent such trusts are valid apart from the rule against perpetuities will be considered later (p. 76 *et seq*).

So, again, a trust of real estate forbidding a sale until the

(*r*) *Re Dean, Cooper-Dean* v. *Stevens*, (1889) 41 Ch. D., at p. 557.

(*s*) *Re Moore, Prior* v. *Moore*, [1901] 1 Ch. 936.

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happening of an event (*e.g.*, when the settlor's gravel pits are worked out) which might not happen within the allowed period is void (*t*). It must not, however, be inferred that a power of or trust for sale not expressly limited in point of duration is necessarily void; for there is a presumption that it was intended to cease when all beneficial interests should have vested absolutely in possession in persons *sui juris*. Even where it can be gathered that the settlor intended it to be exercised after that for purposes of division, it can still be exercised within the period allowed by the rule (*u*). But where no successive interests are given and the property vests absolutely in persons *sui juris* directly the settlement takes effect, and no intention can be gathered that a power of sale was merely given for facility of division, it will be void for remoteness (*v*). However, although the trust for, or power of, sale might be void, it is looked upon as mere machinery and will not avoid the trusts in favour of the beneficiaries if they take vested interests within the prescribed period (*x*).

Power of or trust for sale not limited in duration.

It is not unusual in the investigation of titles to real estate to find trusts of one estate created for indemnifying another estate against a perpetual chief rent. It might seem at first sight that such trusts would offend against the rule, but it has been held by the Irish Courts (*y*) that they are good, and it is apprehended rightly; for if a perpetual chief rent on estates A. and B. is good, there seems to be no reason why the perpetual liability of A. to pay the whole in exoneration of B. should be bad.

Trusts for indemnifying against perpetual chief rent.

There is a collateral rule which prohibits a contingent remainder being limited in favour of the unborn child of an unborn child; but this rule is not applicable to special trusts, or to executory limitations (*z*), although it is applicable to pure equitable remainders (*a*).

Common law rule against double possibilities.

At common law, the power of tying up money so as to accumulate at compound interest, was co-extensive with the period for which property might be tied up under the rule

The Thellusson Act.

(*t*) *Re Wood, Tullett* v. *Colville*, [1894] 3 Ch. 381; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron, Bowen* v. *Churchill*, [1893] 3 Ch. 421.

(*u*) *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334.

(*v*) *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129; and see *Re Kaye and Hoyle's Contract* (1909), 53 Sol. J. 520.

(*x*) *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron, Bowen* v. *Churchill*, [1893] 3 Ch. 421.

(*y*) *Massy* v. *O'Dell* (1859), 10 Ir. Ch. R. 22. See also Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37) sect. 6, which seems to confirm this view.

(*z*) *Re Bowles, Amedroz* v. *Bowles*, [1902] 2 Ch. 650.

(*a*) *Re Nash, Cook* v. *Frederick*, [1910] 1 Ch. 1.

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against perpetuities. However, the late Mr. Thellusson having, by his will, directed his property to be accumulated during the lives of all his descendants living at his death (*b*), the attention of Parliament was called to the unreasonable nature of such a power. Accordingly, by the statute 39 & 40 Geo. 3, c. 98 (commonly known as the Thellusson Act), the period allowed by the common law for accumulations was further restricted to the life or lives of the grantor or grantors, settlor or settlors; *or* (not *and*) twenty-one years from the death of any grantor, settlor, devisor, or testator; *or* during the minorities of any persons who shall be living, or *en ventre sa mere*, at the time of the death of the grantor, settlor, devisor, or testator; *or* during the minorities of any persons who, under the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income directed to be accumulated. It has been recently held by NEVILLE, J., that this last period is not restricted to the minority of persons in existence at the time when the settlement came into force (*c*), although the statute does not permit the accumulations in that case to be made during the period before the birth of that person (*d*). The statute, however, does not extend to any provision for payment of debts, nor for raising portions for the children of the settlor, grantor, or devisor, or of any person taking any interest under the instrument directing such accumulations; nor to any direction as to the produce of timber upon any lands; nor to a trust or direction for keeping property in repair (*e*); nor to a direction to apply income for keeping up a leasehold policy of insurance (*f*).

It will be perceived, therefore, that the maximum period allowed for accumulation is twenty-one years, viz., either twenty-one years from the death of the testator or the twenty-one years constituting the maximum minority of any person in existence at his death, or (*semble*) if there be an intervening life estate, the twenty-one years constituting the maximum minority of the person or persons who would if of full age be entitled to the income directed to be accumulated.

Accumulations for the purpose of purchasing land.

In 1892 the period allowed by the Thellusson Act was further restricted, where the accumulation is to be made either

(*b*) *Thellusson* v. *Woodford* (1805), 11 Ves. 112.

(*c*) *Re Cattell, Cattell* v. *Cattell*, [1907] 1 Ch. 567; dissenting from *Haley* v. *Bannister* (1819), 4 Madd. 275, and *Jagger* v. *Jagger* (1883), 25 Ch. D. 729.

(*d*) *Ellis* v. *Maxwell* (1841), 3 Beav. at p. 596.

(*e*) *Vine* v. *Raleigh*, [1891] 2 Ch. 13; *Re Mason, Mason* v. *Mason*, [1891] 3 Ch. 467.

(*f*) *Re Gardiner, Gardiner* v. *Smith*, [1901] 1 Ch. 697.

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wholly or partially for the purchase of land only, to the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, "would for the time being (if of full age) be entitled to receive the rents, issues, profits, or income so directed to be accumulated" (*g*). The wording of the Act is not free from criticism, for if it be construed literally it could never be effectual, inasmuch as *under the instrument* directing an accumulation *beyond* minority there would be no person entitled, if of full age, to the rents, issues, profits, or income. It is apprehended, however, that the true meaning is sufficiently obvious. It is also apprehended that, on the analogy of the Thellusson Act, an instrument contravening the new statute would only be void as to the excess.

Paragraph (1) (b).

Attempts to alter the rules of descent or distribution.

No trust will be good which seeks to alter the rules of descent or distribution applicable to real or personal estate. Thus a trust of leaseholds for A. for life and after his death for B. and the heirs of his body gives B. the absolute interest subject to A.'s life estate. For an estate tail cannot be created in personal estate or chattels real.

For the same reason a bequest of money to A. upon the trusts and in the manner upon and in which the same would be applicable if it had arisen from the sale, under the Settled Land Acts, of freeholds settled in strict settlement by the same will, will give the money absolutely to the first tenant in tail by purchase of the freeholds, without any disentailing assurance; and on his death intestate it will go to his next of kin and not to the heir of his body. If a person wishes to settle money in that way he must impress it with an absolute trust for conversion into real estate (*h*).

A somewhat analogous case is a trust of real or personal property for A. absolutely, but if he dies intestate then for B. In such cases the divesting gift over to B. is void as an attempt to alter the ordinary law of descent (*i*). In short, any trust creating an *absolute* equitable interest in A., but attempting to negative dower, curtesy, female heirship, testamentary

(*g*) 55 & 56 Vict. c. 58. The Act applies even where the will was made before 1892 if the testator died after that date (*Re Baroness Llanover, Herbert* v. *Freshfield* (No. 2), [1903] 2 Ch. 330; and see *Re Mason, Mason* v. *Mason* and *Vine* v. *Raleigh, supra*).

(*h*) *Re Walker, Mackintosh-Walker* v. *Walker*, [1908] 2 Ch. 705.

(*i*) *Gulliver* v. *Vaux* (1746), 8 De G. M. & G. 167, n.; *Holmes* v. *Godson* (1856), 8 De G. M. & G. 152; *Barton* v. *Barton* (1857), 3 Kay & J. 512; *Re Mortlock's Trust* (1857), 3 Kay & J. 456; *Re Yalden* (1851), 1 De G. M. &

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disposition, or the right of committing waste, or of alienating or charging the estate (even where there is a condition subsequent purporting to create a forfeiture) is, *qua* such attempt, void (*j*).

PARAGRAPH (1) (c).

Settlements against policy of bankruptcy law.

A trust, with a proviso that the interest of the beneficiary shall not be liable to the claims of creditors, is void so far as the proviso is concerned (*k*), if, on the decease of the beneficiary, his executors would have a right to call upon the trustees retrospectively to account for the arrears (*l*).

Of course, however, a trust to A. *until* he becomes bankrupt, or alienates the property, and *then over* to B. is good (*m*), and may even take effect in respect of alienations preceding the settlement (*n*). And the trust over is equally good where the trustee is given a discretion to apply the income for the maintenance of the bankrupt and his wife, or children, *or any of them* (*o*). But a man cannot make a settlement of his own property (*p*) upon *himself* until bankruptcy, and then over (*q*), not even by an ante-nuptial marriage settlement, where it might fairly be urged to be part of *the wife's* terms of the marriage bargain (*r*).

G. 53; *Watkins* v. *Williams* (1851), 3 Mac. & G. 622; *Perry* v. *Merritt* (1874), L. R. 18 Eq. 152; *Re Wilcocks' Settlement* (1875), 1 Ch. D. 229; *Re Dixon, Dixon* v. *Charlesworth*, [1903] 2 Ch. 458.

(*j*) Co. Litt. 222 b. *Portington's Case*, 10 Co. Rep. 35 b, 39 a; *Shaw* v. *Ford* (1877), 7 Ch. D. 669; *Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176; *Braithwaite* v. *Att.-Gen.*, [1909] 1 Ch. 510; and see also *Carr* v. *Living* (1860), 28 Beav. 644.

(*k*) For example, see *Younghusband* v. *Gisborne* (1844), 1 Coll. C. C. 400, affirmed (1846), 15 L. J. Ch. 355; *Green* v. *Spicer* (1830), 1 Russ. & Myl. 395; *Graves* v. *Dolphin* (1826), 1 Sim. 66; *Piercy* v. *Roberts* (1832), 1 Myl. & K. 4; *Snowdon* v. *Dales* (1834), 6 Sim. 524.

(*l*) See *Re Sanderson's Trust* (1857), 3 Kay & J. 497.

(*m*) See *Billson* v. *Crofts* (1873) L. R. 15 Eq. 314; *Re Aylwyn's Trusts* (1873), L. R. 16 Eq. 585, and cases therein cited.

(*n*) *West* v. *Williams*, [1898] 1 Ch. 488.

(*o*) See *infra*, Art. 65, as to such trusts.

(*p*) See *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, overruling *Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807; *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872.

(*q*) *Knight* v. *Browne* (1861), 7 Jur. (N. S.) 894; *Brooke* v. *Pearson* (1859), 27 Beav. 181.

(*r*) *Higginbotham* v. *Holme* (1812), 19 Ves. 88; *Ex parte Hodgson* (1812), 19 Ves. 206; *Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807; but consider *Re Detmold, Detmold* v. *Detmold* (1889), 40 Ch. D. 585, and *Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K. B. 134; and see *infra*, p. 107.

PARAGRAPH (1) (d).

Restraint on alienation.

Trusts framed with the object of preventing the barring of entails, or imposing restrictions on alienation of property *which is once given absolutely*, are contrary to the policy of the law, and are therefore void (*s*); with the single exception that trusts limiting the power of married women to alienate their separate property *during coverture* are regarded as valid. It has, however, been lately held by the Court of Appeal that such a restraint may be good even in the case of a man, if the trust was created in a country (*e.g.*, Scotland) where such restraints are allowed (*t*). And of course a trust for a person *until* he attempts to alienate, and then a gift over in favour of some one else, is perfectly good (*u*).

PARAGRAPH (1) (e).

Trusts for future illegitimate children.

Where a man, *by deed*, creates a trust in favour of illegitimate children, not begotten at the date of the deed (*i.e.*, neither born nor *en ventre sa mere*), putting aside the objection as to want of certainty in the beneficiaries, the trust will be void, as being contrary to public policy and conducive to immorality (*x*). Similarly, a trust *by will* in favour of the illegitimate children *of another* not begotten at the death of the testator would clearly be a direct encouragement to such other to continue his illicit intercourse after the testator's death, and would therefore be void (*y*).

The same objection does not, however, apply to the case of a trust in favour of an illegitimate child *en ventre* at the date of the deed, for the immorality, is past (*z*); nor to the case of a testator creating a trust *by will* in favour of bastards not begotten at the date of the will so long as they are begotten before his death; for it is impossible that it can encourage an

(*s*) *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115; *Sykes* v. *Sykes* (1871), L. R. 13 Eq. 56; and as to alienation, *Snowdon* v. *Dales* (1834), 6 Sim. 524; *Green* v. *Spicer* (1830), 1 Russ. & Myl. 395; *Graves* v. *Dolphin* (1826), 1 Sim. 66; *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Ware* v. *Cann* (1830), 10 B. & C. 433; *Hood* v. *Oglander* (1865), 34 Beav. 513; *Re Dugdale*, *Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176.

(*t*) *Re Fitzgerald*, *Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

(*u*) *Re Detmold*, *Detmold* v. *Detmold* (1889), 40 Ch. D. 585.

(*x*) *Blodwell* v. *Edwards* (1596), Cro. Eliz. 509; and see *per* MELLISH, L.J., in *Occleston* v. *Fullalove* (1874), L. R. 9 Ch. 147; and *Thompson* v. *Thomas* (1891), 27 L. R. Ir. 457; *Hill* v. *Crook* (1873), L. R. 6 H. L. 265.

(*y*) *Metham* v. *Duke of Devonshire* (1719), 1 P. Wms. 529; *Dorin* v. *Dorin* (1875), L. R. 7 H. L. 568; *Re Ayles' Trusts* (1875), 1 Ch. D. 282.

(*z*) *Ebbern* v. *Fowler*, [1909] 1 Ch. 578, overruling *Re Shaw*, *Robinson* v. *Shaw*, [1894] 2 Ch. 573.

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immoral intercourse after his death. If a bequest to future bastards is to be held to be contrary to public policy, it must be because it tends to promote an immoral intercourse in the testator's lifetime. But this it cannot do, because the hypothetical parents (even if aware of the will) must know that it could be revoked at any moment (*a*).

In *Re Harrison, Harrison* v. *Higson* (*b*), a testator left property to his daughter for life, (describing her as the wife of J. H., although to his knowledge the marriage was invalid), with remainder to her children. At the date of the will the daughter had one child by J. H., and after the testator's death two more were born. Held that, although on the construction of the will the testator intended all three children to take, yet the trust in favour of the illegitimate children born after his death was void.

Where the illegitimate children are born between the date of the will and the death of the testator a difficulty may arise in relation to identifying them as the children of the person named. But it is well settled that where a gift is expressly to reputed children of a female (*c*), or of a male by a particular female, after-born children so reputed will take whether they are described by their relationship to the natural father or mother, provided in case of the father he has before the will came into operation acknowledged them as his children (*d*). Where, however, the trust is for the reputed children of a male (even of the testator himself) without reference to the mother, a child begotten after the date of the will cannot take, apparently on the ground of uncertainty (*e*).

Separation deeds.

A trust to take effect upon the future separation of a husband and wife is void, as being contrary to public morals (*f*); but a trust in reference to an immediate separation, *already agreed upon*, is good and enforceable (*g*). If,

(*a*) *Occleston* v. *Fullalove* (1874), L. R. 9 Ch. 147; and see also *Re Goodwin* (1874), L. R. 17 Eq. 345.

(*b*) [1894] 1 Ch. 561.

(*c*) *Re Hastie's Trusts* (1887), 35 Ch. D. 728; *Re Frogley*, [1905] P. 137; *Re Loveland, Loveland* v. *Loveland*, [1906] 1 Ch. 542.

(*d*) *Occleston* v. *Fullalove* (1874), L. R. 9 Ch. 147; *Re Goodwin* (1874), L. R. 17 Eq. 345.

(*e*) *Re Bolton, Brown* v. *Bolton* (1886), 31 Ch. D. 542; *Re Du Boehet, Mansell* v. *Allen*, [1901] 2 Ch. 441.

(*f*) *Westmeath* v. *Westmeath* (1830), 1 Dow. & Cl. 519; *Re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116.

(*g*) *Wilson* v. *Wilson* (1848), 1 H. L. Cas. 538, (1854), 5 H. L. Cas. 40; *Vansittart* v. *Vansittart* (1858), 2 De G. & J. 249; *Jodrell* v. *Jodrell* (1845), 9 Beav. 45; and see *Jodrell* v. *Jodrell* (1851), 14 Beav. 397.

however, the separation does not in fact take place, the trust becomes wholly void (*h*). The reason of this is obvious, when we consider that a provision for husband or wife, to take effect upon a future separation, is a direct encouragement to misconduct which may result in a separation ; whereas, when a separation is actually agreed on, there can be no encouragement to marital misconduct in agreeing to the distribution of their income for their mutual advantage.

On the other hand, a trust in favour of a wife so long only as she shall cohabit with her husband, and on the cesser of such cohabitation a gift over to the husband, has been held valid (*i*). So also a trust in favour of a deserted wife so long only as she shall be separated from her husband is not invalid (*j*).

PARAGRAPH (1) (f).

Trusts in restraint of marriage.

Where property is settled in trust for a woman *for life*, with an executory gift over if she marry a man with an income of less than £500 a year, or if she marry any person of a particular trade, the divesting gift over is bad, as its object, as gathered from its probable result (*k*), is to restrain marriage altogether. If, however, the trust over is to take effect only upon the first beneficiary marrying a particular person, it would be good, as it would not be in *general* restraint of marriage.

Exception in cases of second marriage.

Moreover, the rule does not apply to second marriages. Thus where (*l*) a person, by her will, gave her residuary estate to trustees, upon trust to pay the income to her nephew and his wife (the testatrix's niece) for their joint lives and the life of the survivor, with a gift over (in the event of the nephew surviving and *marrying again*) in trust for other persons, it was held that the gift over was good. MELLISH, L.J., in delivering his judgment, after stating the general rule, said: "It has never been decided that it (the rule) applies to second marriages. . . . It appears to me very obvious that, if it is regarded as a matter of policy, there may be very essential distinctions between a first and a second marriage. At any rate there is this, that in the case of a second marriage, whether of a man or a woman, the person who makes the gift

(*h*) *Bindley* v. *Mulloney* (1869) L. R. 7 Eq. 343.

(*i*) *Re Hope-Johnstone, Hope-Johnstone* v. *Hope-Johnstone*, [1904] 1 Ch. 470, where the cases are elaborately reviewed.

(*j*) *Re Charleton, Bracey* v. *Sherwin*, [1911] W. N. 54.

(*k*) *Lloyd* v. *Lloyd* (1852), 2 Sim. (N. S.) 255.

(*l*) *Allen* v. *Jackson* (1875), 1 Ch. D. 399.

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may have been influenced by his friendship towards the wife in the one case, and towards the husband in the other case."

Rule does not apply to gifts *until* marriage.

But although conditional or executory gifts over *divesting* an estate on marriage are void if the probable effect would be to discourage marriage altogether, yet it is well established that a trust in favour of a person *until* marriage and then over is perfectly good. As was said by WIGRAM, V.-C., in *Morley* v. *Rennoldson* (*m*): "Until I heard the argument of this case, I had certainly understood, that without doubt, where property was limited to a person *until* she married, and when she married then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond marriage. If you suppose the case of a gift of a certain interest, and that interest *sought to be abridged by a condition*, you may strike out the condition and leave the original gift in operation; but if the gift is *until* marriage, there is nothing to carry the gift beyond the marriage. . . . I am satisfied from an examination of the authorities that a gift *until* marriage, and when the party marries then over, is a valid limitation." This distinction between executory gifts over on marriage and gifts *until* marriage may no doubt seem somewhat refined and fantastic to the lay mind; but the rule is well established that there is a vast distinction between a trust temporary in character and one unlimited but liable to be forfeited by an event. The law leans strongly against forfeiture and therefore refuses to enforce it where it would tend to discourage acts which are politically desirable. But it is quite a different matter to forbid temporary trusts which are to end on the happening of the same desirable event. At the same time one cannot deny that it is somewhat anomalous that a settlor should be able by one form to effect that which if he were to use another form would be held to be against public policy and void. Probably owing to these considerations the late Lord Justice JAMES in *Allen* v. *Jackson* (*n*) showed a tendency to construe gifts over as being really gifts *until* the prohibited event should happen, but this tendency has not so far been followed.

Condition requiring consent to marriage.

Although a *forfeiture* on marriage is invalid, the same invalidity does not attach to a condition subsequent requiring

(*m*) (1843), 2 Hare, 570.

(*n*) (1875) 1 Ch. D. at p. 404; and see also the judgment of KNIGHT-BRUCE, L.J., in *Heath* v. *Lewis* (1853), 3 De G. M. & G. 954. But *cf. Re Dugdale, Dugdale* v. *Dugdale* (1888), 38 Ch. D. 176.

some person's consent to a marriage (*o*). The reasons for this are obscure and not very satisfactory (*p*); but it seems to be well settled. A consent once given, however, cannot be revoked (*q*).

PARAGRAPH (2).

Illegal trusts do not necessarily avoid the trusts in same settlement.

Assuming that a trust is void for illegality, it is sometimes difficult to determine whether, and, if so, to what extent, the illegality affects other trusts in the same instrument. Where the illegality is the consideration for the trust, then, of course, the whole instrument is tainted. For instance, trusts in favour of a mistress and her future illegitimate children are wholly void because they tend to promote continued immorality (*r*).

Cases arising under rule against perpetuities, and under Thellusson Act.

But cases in which it is not so easy to follow the reasoning of learned judges, occur with regard to the rule against perpetuities and cases arising under the Thellusson Act (*s*). All difficulty, however, vanishes when it is realised that a trust is illegal so far as it tends to infringe the object of the rule which forbids it, but no farther.

Trusts in remainder after trusts void under rule against perpetuities.

Take the case of the rule against perpetuities (more fully explained *supra*, p. 61 *et seq.*). The object of that rule is to prevent property being made inalienable for a longer period than specified lives in being and twenty-one years after the death of the survivor. Consequently, not only are trusts void which go beyond that limit, but also trusts in remainder to take effect on their failure—even trusts in favour of living persons (*t*). For if such remainders were permitted one of two alternatives would have to be faced. Either (1) the trusts in remainder would have to be accelerated (as if the illegal trusts were blotted out of the trust instrument), which would be contrary to the intention of the creator of the trust; or (2) there would be a resulting trust to the settlor or his representatives during the period for which the void trust was created, which would tie up the property beyond the legal period as effectually as if the illegal trust were itself carried out. The logical result of these considerations is, therefore,

(*o*) *Re Whiting's Settlement*, *Whiting* v. *De Rutzen*, [1905] 1 Ch. 96.

(*p*) *Per* VAUGHAN WILLIAMS, L.J., in *Re Whiting's Settlement*, *Whiting* v. *De Rutzen*, *supra*.

(*q*) *Re Brown*, *Ingall* v. *Brown*, [1904] 1 Ch. 120.

(*r*) *Supra*, p. 69.

(*s*) 39 & 40 Geo. 3, c. 98.

(*t*) *Cambridge* v. *Rous* (1802), 8 Ves. 12; *Hale* v. *Hale* (1876), 3 Ch. D. 643; and see *Watson* v. *Young* (1885), 28 Ch. D. 436; and *Re Frost*, *Frost* v. *Frost* (1889), 43 Ch. D. 246; *Re Abbott*, *Peacock* v. *Frigout*, [1893] 1 Ch. 54.

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necessarily to avoid the remainders as well as the illegal trusts themselves.

Trusts in favour of a class, some of which infringe rule against perpetuities.

So, where a trust is for A. for life, and after her death for her children who may attain twenty-one, and the issue *per stirpes* of such of them as shall die under age, *which issue shall attain twenty-one*, the whole of the limitations after the life estate of A. are void. For although the *children* must attain twenty-one within the prescribed period, the issue of deceased children may not; and the gift being to a class as a whole, the one cannot be separated from the other (*u*).

Alternative trusts, one legal and the other illegal.

But where there are alternative trusts (A. and B.), A. being illegal and B. legal; then if the contingency happens on which B. was to take effect it will not be affected by the illegality of A. (*x*). For by giving effect to trust B. the courts would in no way aid the illegality intended by trust A., nor (the contingency having happened on which B. was to come into force) would the intentions of the settlor be disregarded. If, however, the contingency on which B. was to come into operation should never occur, then, of course, the whole instrument would be void; for A. is void for illegality, and B. can never take effect because the contingency contemplated by the settlor has not happened.

So, again, where a trust for sale is void for remoteness but the beneficial interests in the proceeds are vested absolutely within the period limited by the rule, the latter will be good although the former may be bad (*y*).

Trusts infringing the Thellusson Act.

It might perhaps be thought that, by analogy to the action of the courts with regard to trusts which transgress the common law period, a trust which endeavoured to go beyond the period allowed by the Thellusson Act for accumulations (see *supra*, p. 65) would be wholly void; but this is not so. The statute is merely *prohibitory* of accumulations going beyond the period prescribed by it, and, being in derogation of a common law right, is construed strictly. Consequently, as accumulations which exceed that period, but are within the common law period, are not contrary to public policy as defined by common law, such a trust is good *pro tanto*; but, of course, if it exceeds the common law period, it is void *in toto* (*z*).

(*u*) *Pearks* v. *Moseley* (1880), 5 App. Cas. 714.

(*x*) *Evers* v. *Challis* (1859), 7 H. L. Cas. 531; *Watson* v. *Young* (1885), 28 Ch. D. 436; *Re Harvey*, *Peck* v. *Savory* (1888), 39 Ch. D. 289; *Re Bence*, *Smith* v. *Bence*, [1891] 3 Ch. 242; and see also *Re Abbott*, *Peacock* v. *Frigout*, [1893] 1 Ch. 54.

(*y*) *Re Appleby*, *Walker* v. *Lever*, [1903] 1 Ch. 565.

(*z*) See *Griffith* v. *Vere* (1803), 9 Ves. 127, Tud. Lead. Cas. Conv. (4th ed.) 618, and cases there cited.

Trusts in remainder after illegal trust to accumulate.

On similar principles, remainders to take effect after the period prescribed by the settlement for the accumulation of income are not rendered void on the ground that the prescribed period exceeds the statutory period. All that the statute does is to prohibit *accumulations* beyond a certain period. When that period comes to an end the accumulations stop, and the fact of the subsequent remainders being allowed in no way tends to a breach of the statutory rule. On the other hand, such remainders are not accelerated (for that would be contrary to the settlor's intentions); but there is a resulting trust in favour of the settlor or his representatives during the time which elapses between the expiration of the statutory period and the period prescribed by the settlement.

PARAGRAPH (3).

Trusts illegal by law of settlor's domicile.

Where a trust of personal estate is intended to take effect according to the law of England, or where there is a trust of English land, it will be valid and enforceable by our courts, notwithstanding that such trusts are prohibited by the law of the domicile of the settlor. Thus, on the marriage of an Englishwoman with a domiciled Frenchman, personal property was settled in English form with English trustees, upon trust for the lady for life, with remainder as she might by will appoint, with remainder in default of appointment to her absolutely. On her marriage she became a domiciled Frenchwoman, and by French law her power of testamentary disposition was very limited:—*Held*, nevertheless, that the settled property passed under her will (*a*).

Capacity to contract depends on law of domicile.

But although this is so, it must be remembered that the *capacity* of a person to enter into a binding contract or settlement is governed by the law of his or her domicile. Thus, an English female infant, on her marriage with an Austrian, purported to make a binding settlement. By English law, if she had not repudiated this on or shortly after attaining twenty-one, she would have been bound by it (*b*). But by the law of the matrimonial domicile not only was this not so, but she was *incapable of even* ratifying such a contract. Under these circumstances it was held that, although the trust was not illegal in its inception, it had never become binding: because according to the law of her domicile the lady had never attained to a contractual capacity (*c*).

(*a*) *Re Mégret, Tweedie* v. *Maunder*, [1901] 1 Ch. 547: and see also cases cited *supra*, p. 61, notes (*c*) and (*d*).

(*b*) *Edwards* v. *Carter*, [1893] A. C. 360.

(*c*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

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Warning as to settlements by Englishwomen about to marry foreigners.

Practitioners must, moreover, be warned that, in advising English girls of fortune who are about to marry foreigners, the trustees should be of English domicile; and, indeed, it is well to provide that none but English domiciled persons should ever be appointed new trustees. Moreover, the property should never be invested in the country of the husband's domicile; otherwise it is not improbable that the foreign courts will order it to be transferred to the husband. The reason of this is that trusts (or substitutions, as they are called) have been abolished in most foreign countries, and, as the foreign judges appear to be quite incapable of grasping our idea of dual ownership (the legal ownership of the trustee and the equitable ownership of the beneficiaries), they incontinently order the trust property (if found within their jurisdiction) to be handed over to the beneficiary for the time being entitled to the income, regarding the trustees merely as mandatories or agents for them, and not as legal owners.

Even where an Englishwoman is about to marry a person domiciled here, it must be remembered that they may subsequently change their domicile. Thus, if they were to reside permanently in Scotland, the Scottish law would apply in the absence of an English settlement; and, as the Scottish Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), only applies where the husband is domiciled in Scotland *at the date of the marriage*, he would acquire marital rights over his wife's personal estate which were never contemplated when the parties married. The moral to be derived from all this is that an English settlement with English trustees is always desirable on the marriage of an Englishwoman.

PARAGRAPH (4).

Trusts to raise and keep in repair tombs.

Although it would seem that the court could not *enforce* a trust for applying money in the erection of a tomb or monument (inasmuch as there would be no human beneficiary to set the court in motion), it has been said that such trusts are not *void*, but merely duties of imperfect obligation; and that the trustees may safely spend the money on the prescribed object if they please (*d*). The judge added that he knew of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument, if the donor took care to limit the time for which the trust was to last, so as to provide for its cesser within the limits of the rule

(*d*) *Per* NORTH, J., *Re Dean*, 41 Ch. D. at p. 557. *Cooper-Dean* v. *Stevens* (1889),

against perpetuities. Where, however, a testator creates a trust for the repair of tombs or monuments, without limiting its continuance in accordance with such rule, it will be absolutely void for remoteness (*e*). On the other hand, a similar indefinite trust for keeping a church or churchyard in repair would be valid, as it would be considered a charitable trust in favour of the congregation of the church, and the rule against perpetuities does not apply to charitable trusts (*f*). It has also been recently decided that a testator may make a gift to a charity conditionally upon his tomb being kept in repair, with a gift over to another charity in the event of the tomb being allowed to fall into disrepair (*g*).

American rule.

The American courts have held that a trust to keep in repair for ever the tombs *of a class* (*e.g.*, the testator's family) is a charitable trust and valid, although a similar trust to keep up the tomb of an individual is not; but the distinction seems somewhat fantastic (*h*).

Trusts for the benefit of dogs, horses, etc.

On the same principles, a trust, limited in point of time within the rule against perpetuities, to apply money for keeping specified pet animals in comfort during their lives, is perfectly legal, although no person could enforce it (*i*). Moreover, dogs and horses and other domestic animals are considered so useful to man, that it is settled that a *charitable* trust of undefined continuance may be established in their favour (*k*). CHITTY, J., also held that antivivisection societies are charities, on the ground that their *object* (whether rightly or wrongly) was the prevention of cruelty to animals useful to man (*l*).

Capricious trusts relating to the management of inanimate objects.

On the other hand, where directions are given to trustees to manage property in a manner absolutely capricious, and without either human interest or benefit to any living being,

(*e*) *Re Vaughan*, *Vaughan* v. *Thomas* (1886), 33 Ch. D. 187. See also *Re Moore*, *Prior* v. *Moore*, [1901] 1 Ch. 936, where an unsuccessful attempt was made to extend the period to twenty-one years after the death of the survivor of all persons living at the testator's death, which made it void for uncertainty.

(*f*) *Re Vaughan*, *Vaughan* v. *Thomas* (1886), 33 Ch. D. 187; *Hoare* v. *Osborn* (1866), L. R. 1 Eq. 585; *Re Rigby*, *Jennings* v. *Rigby* (1863), 33 L. J. Ch. 149.

(*g*) *Re Tyler*, *Tyler* v. *Tyler*, [1891] 3 Ch. 252.

(*h*) *Swasey* v. *American Bible Society* (1869), 57 Me. 527; *Piper* v. *Moulton* (1881), 72 Me. 155.

(*i*) *Re Dean*, *Cooper-Dean* v. *Stevens* (1889), 41 Ch. D. 552; and *Mitford* v. *Reynolds* (1848), 16 Sim. 105.

(*k*) *Per* NORTH, J., *Re Dean*, *Cooper-Dean* v. *Stevens*, *supra*, at p. 557; and see *Armstrong* v. *Reeves* (1890), 25 L. R. Ir. 325.

(*l*) *Re Foveaux*, *Cross* v. *London Antivivisection Society*, [1895] 2 Ch. 501. Curiously enough, it is believed that no case of trusts in favour of animals has ever been before the American courts.

Art. 10. it would seem that the trust is absolutely void, and that the person entitled to the property by law can claim it at once as if the trust had never been declared. Thus, where a house was devised to trustees in trust to block up windows and doors for twenty years, and at the end of that period upon trust to convey it to A. in fee, it was held that the first trust was void, and that the heir-at-law took the house during the twenty years [illegible]. So in America it has been held that a trust to keep a favourite clock of the testator in repair was void[m]. It is, however difficult in principle to distinguish these cases from those relating to the keeping up of tombs, unless the latter are allowed as a concession to human weakness or sentiment. The whole of the cases relating to this question require to be reviewed by the House of Lords before any intelligible principle can be extracted from them.

ART. 11.—Necessity or otherwise of Writing and Signature.

(1) An express trust (whether executed or executory) of land, or any estate or interest in land[n], and a contract to create a trust of any kind of property in consideration of marriage[o], cannot be enforced unless evidenced by writing signed by the settlor, or person who contracts to settle, or in the case of a contract to settle by his agent lawfully authorised, showing clearly what the trust or intended trust is, or referring to some other document which does so[p]. Save as above, all other trusts [illegible] may be created verbally[q].

[illegible] *Brown* v. *Burdett* 1882, 21 Ch. D. 667.

[illegible] *Kelly* v. *Nichols* 1891, 17 R. I. 306.

[illegible] Statute of Frauds, 29 Car. 2, c. 3, s. 7. Land includes copyhold: *Withers* v. *Withers* 1752, Ambl. 152 and leaseholds *Forster* v. *Hale* 1798, 3 Ves. Jun. 696.

[illegible] 29 Car. 2, c. 3, s. 4; *Lassence* v. *Tierney* 1849, 1 Mac. & G. 551.

[illegible] *Kronheim* v. *Johnson* 1877, 7 Ch. D. 60; *Tierney* v. *Wood* 1854, 19 Beav. 330; *Rudkin* v. *Dolman* 1876, 35 L. T. 791.

[illegible] *M'Fadden* v. *Jenkyns* 1842, 1 Ph. 153; *Hawkins* v. *Gardiner* 1854, 2 Sm. & G. 441; *Benbow* v. *Townsend* 1833, 1 My. & K. 506; *Middleton* v. *Pollock* 1876, 4 Ch. D. 49; *New, Prince and Garrard's Trustee* v. *Hunting*, [1897] 2 Q. B. 19.

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(2) An express trust of any kind of property, if intended to be testamentary, must be created by a duly executed and attested will or codicil (*s*). Even where property is devised or bequeathed to a person *as trustee* the trust cannot be declared by a subsequent instrument other than a codicil (*t*). In such cases there is a resulting trust in favour of the testator's heir or next of kin.

(3) The above rules do not apply where they would operate to effectuate a fraud (*u*). In particular, where a bequest or devise has been communicated to the donee in the testator's lifetime, and he has verbally undertaken to hold it merely as trustee for a specific purpose, he will be bound (*x*).

PARAGRAPH (1).

Comment on the Statute of Frauds.

This rule depends upon the Statute of Frauds (29 Car. 2, c. 3, ss. 4 and 7). By s. 4, a contract made upon consideration of marriage, and a contract relating to lands, tenements, or hereditaments or any interest in or concerning them, must be evidenced by some memorandum or note thereof in writing signed by the party to be charged or by some person lawfully authorised by him to sign it. And by s. 7 all declarations of trust of any lands, tenements, or hereditaments must "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." It will be noted that a contract to create a trust of lands, etc., *or* of any property in consideration of marriage may be signed by an agent, but there is no similar provision in s. 7 as to an executed trust of lands; nor does the statute require executed trusts of personal property made in consideration of marriage to be in writing and signed.

(*s*) 1 Vict. c. 26, s. 9, and Statute of Frauds, s. 5.

(*t*) *Adlington* v. *Cann* (1744), 3 Atk. 141; *Briggs* v. *Penny* (1851), 3 Mac. & G. 546, 3 De G. & Sm. 525; *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch. D. 531; *Habergham* v. *Vincent* (1793), 2 Ves. Jun. 204.

(*u*) *Per* Lord WESTBURY, *McCormick* v. *Grogan* (1869), L. R. 4 H. L. 82; *Stickland* v. *Aldridge* (1804), 9 Ves. 516; *Haigh* v. *Kaye* (1872), L. R. 7 Ch. 469; *Re Duke of Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; *Re Stead, Witham* v. *Andrew*, [1900] 1 Ch. 237.

(*x*) See *Re Boyes, Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

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It should be observed that in both cases the contract or trust is not required to be created by signed writing, but only proved or manifested by it. The writing therefore need not be contemporaneous with the contract or declaration of trust. It suffices if it be made afterwards (*y*).

No special form is required. The memorandum may be found in a correspondence (*a*), a recital in an instrument (*b*), an affidavit (*c*), an answer to interrogatories (*d*), in letters to a third party (*e*), or even a telegram (*f*), so long as it clearly and sufficiently shows the parties the property and the way it is to be dealt with (*g*). Moreover, although the statute requires the writing to be signed, the terms of the trust or intended trust may be manifested in an unsigned writing, provided it is referred to in or can be connected with the writing that is signed; for *certum est quod certum reddi potest*.

What writing is required must be clear and unambiguous.

These principles are well exemplified in *Forster* v. *Hale* (*h*). There a person named Burdon had a share in a colliery, and the suit was commenced for the purpose of fixing a trust upon his share for the benefit of his partners in a bank, in which he was concerned. The only written evidence of the alleged trust was contained in letters signed by the defendant. In giving judgment, Lord ALVANLEY said: "It was contended for the defendants that there is great danger in taking a declaration of trust arising from letters loosely speaking of trusts, which might or might not be actually and definitely settled between the parties, with such expressions as 'our,' 'your,' etc., intimating some intention of a trust; that upon such grounds the court may be called upon to execute a trust in a manner very different from that intended, and that it is absolutely necessary that it should be clear from the declaration what the trust is. That I certainly admit. The

(*y*) *Barkworth* v. *Young* (1856), 26 L. J. Ch. 153; *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. 45; *Re Holland*, *Gregg* v. *Holland*, [1902] 2 Ch. 360.

(*a*) *Forster* v. *Hale* (1798), 3 Ves. Jun. 696; *Luders* v. *Anstey* (1799), 4 Ves. 501, (1800) 5 Ves. 217; *Childers* v. *Childers* (1857), 1 De G. & J. 482.

(*b*) *Re Hoyle*, *Hoyle* v. *Hoyle*, [1893] 1 Ch. 84; *Moorecroft* v. *Dowding* (1725), 2 P. Wms. 314; *Deg* v. *Deg* (1727), 2 P. Wms. 412.

(*c*) *Barkworth* v. *Young*, *supra*.

(*d*) *Hampton* v. *Spencer* (1693), 2 Vern. 288; *Ryall* v. *Ryall* (1740), 1 Atk. 59; *Wilson* v. *Dent* (1830), 3 Sim. 385.

(*e*) *Gibson* v. *Holland* (1865), L. R. 1 C. P. 1; *Moore* v. *Hart* (1683), 1 Vern. 110, 201.

(*f*) *McBlain* v. *Cross* (1871), 25 L. T. (N. S.) 804; see *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295.

(*g*) *Forster* v. *Hale*, *supra*; *Morton* v. *Tewart* (1842), 2 Y. & Coll. C. C. at p. 80; *Smith* v. *Matthews* (1861), 3 De G. F. & J. 139.

(*h*) *Forster* v. *Hale* (1798), 3 Ves. Jun. 696.

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question, therefore, is whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee, and whether the terms and conditions on which he was a trustee sufficiently appear (*i*). I do not admit that it is absolutely necessary that he should have been a trustee from the first. *It is not required by the statute that a trust should be created by a writing* (*i*) . . . *but that it should be manifested and proved by writing*; plainly meaning that there should be evidence in writing, proving that there was such a trust."

Verbal contract for ante-nuptial settlement evidenced by signed writing after marriage.

After considerable conflict of judicial opinion it has been decided by the Court of Appeal in *Re Holland, Gregg* v. *Holland* (*k*), that the sufficiency of a subsequent signed memorandum equally applies to contracts to create trusts of any kind of property in consideration of marriage.

It seems difficult on the wording of the statute to see how it could ever have been held otherwise, for no distinction is made with regard to any of the cases provided for in s. 4. Nevertheless Lord COTTENHAM in *Lassence* v. *Tierney* (*l*), Lord CRANWORTH in *Warden* v. *Jones* (*m*), and JESSEL, M.R., in *Trowell* v. *Shenton* (*n*) distinctly stated that it was not enough for the parties to say in writing after marriage that there was a parol agreement before marriage, but that it must be proved that there was an ante-nuptial agreement *in writing*. Thus it was held by Lord COTTENHAM in *Lassence* v. *Tierney* (*l*) that a recital of an ante-nuptial agreement in a post-nuptial settlement which was invalid against the wife's heir for want of acknowledgment in accordance with the Fines and Recoveries Abolition Act was not sufficient. This was not, however, necessary for the determination of the case, as the contract was merely that the wife's property should belong to her for her separate use and was therefore not enforceable by any one against her or against her heir. It is conceived that it may now be regarded as settled that "there is no difference between an agreement in consideration of marriage, and any other agreement within the 4th section of the Statute of Frauds" (*o*), and that consequently a recital of an ante-nuptial agreement in a post-nuptial settlement signed by the spouse to be bound by the ante-nuptial agreement is sufficient to satisfy the statute (*o*).

(*i*) *Randall* v. *Morgan* (1806), 12 Ves. 67.

(*k*) [1902] 2 Ch. 360.

(*l*) (1849) 1 Mac. & G. at p. 571.

(*m*) (1857) 2 De G. & J. 76, 85, 86.

(*n*) (1878) 8 Ch. D. 318; and see also *Goldicutt* v. *Townsend* (1860). 28 Beav. 445, and *Barkworth* v. *Young* (1856), 4 Drew. 1 to the like effect.

(*o*) *Per* VAUGHAN WILLIAMS, L.J., in *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, at p. 375.

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Statute does not apply to trusts of personal estate.

On the other hand, it is one of the anomalies of our law, that although a trust of an acre of land requires a signed writing, a trust of £10,000 of pure personalty may be declared verbally.

Verbal trust of stock.

Thus, in *Kilpin* v. *Kilpin* (*p*), a person transferred stock into the name of an illegitimate daughter and her husband and their two eldest children, and by parol declaration, confirmed by an *unsigned* entry in a memorandum book, declared that such investments were to be for the benefit of *all* his daughter's children:—*Held*, a good declaration of trust, as the stock was personal estate.

Request to debtor to hold debt in trust.

So, in *M'Fadden* v. *Jenkyns* (*q*), a creditor desired his debtor to hold the debt in trust for A. The debtor acquiesced, and paid over part of the money to A.; and it was held that the creditor had made a valid declaration of trust, and had constituted the debtor a trustee of the debt for A.

PARAGRAPH (2).

Verbal testamentary trust, void.

But where the trust is testamentary, that is to say, only intended to operate after death, the trust must, *in the absence of fraud*, be contained in a duly executed or attested will or codicil. Thus, in *Re Boyes*, *Boyes* v. *Carritt* (*r*), a testator had made a will devising and bequeathing all his property to the defendant Carritt, and appointing him sole executor. Mr. Carritt, who was the solicitor of the testator and drew the will, gave evidence to the effect that the intention of the testator was *that he should hold the property as trustee* for objects of the testator's bounty, who were to be afterwards indicated by him. No direction, however, on the subject was given by the testator in his lifetime, but after his death two letters were found, written by him to Mr. Carritt and sealed up, in both of which he expressed a desire that Mr. Carritt should have £25 to buy a trinket in memory of him, and that all the rest of the property should go to a lady named Brown. Under these circumstances, *it being clear that Mr. Carritt was a trustee*, the question was whether the trust for the lady, Mrs. Brown, was valid and effectual, or whether he was a constructive trustee for the next of kin. KAY, J., after examining the authorities, came to the conclusion that,

(*p*) (1834) 1 Myl. & K. 520.
(*q*) (1842) 1 Ph. 153.
(*r*) (1884) 26 Ch. D. 531; and see also *Vincent* v. *Vincent* (1886), 35 W. R. 7. But a document admitted to Probate, must be taken to be a testamentary document, and, therefore, although it contains no words of gift, they must be inferred (*Re Barrance*, *Barrance* v. *Ellis*, [1910] 2 Ch. 419).

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as the law stood, if a trust was not declared by a testator when his will was made, then, in order to make the trust binding, *it was essential that it should be communicated to the devisee or legatee in the testator's lifetime, and that he should accept that particular trust.* A devisee or legatee could not, by accepting an indefinite trust of this kind, enable a testator to make an unattested codicil. Accordingly it was declared that the trust was for the next of kin. In reading this case, the reader must bear in mind that Mr. Carritt admitted that he knew that he was not meant to take beneficially, and, therefore, of course, it would have been personal fraud on his part if he had claimed to do so. If, however, he had not known the non-beneficial nature of the bequest, the subsequent letters of the testator would not have been sufficient to have deprived Mr. Carritt of the beneficial interest, and consequently neither Mrs. Brown nor the next of kin would have taken anything. Whether, however, Mr. Carritt had or had not known, when the will was made, that he was only intended to take as trustee, yet if the testator had subsequently *communicated to him* that he was not to take beneficially, and had either declared specific trusts of the property, or had simply said that he had not yet made up his mind upon what trusts it should be held, and if Mr. Carritt had *expressly assented to act as trustee*, then, as his assent would have operated to induce the testator not to alter his will, Mr. Carritt would have been bound to take the property as trustee simply, *and to carry out the testator's intention* (*s*) (as in the first illustration to paragraph (4), *infra*), or to hold the property under a resulting trust, if no intention had been declared.

A testator gave his residuary real and personal estate upon trust for sale, and upon further trust to pay the proceeds to his friends A. and B. in equal shares. And he declared that he bequeathed such proceeds "to the said A. and B., their executors, administrators and assigns, absolutely, in the full confidence that they would carry out his wishes in respect thereof." A. and B. survived the testator, but died before the distribution of the estate. On these facts, it was held by CHITTY, J., that parol evidence that the testator had communicated his wishes verbally to one of the two legatees was

(*s*) *Re Fleetwood, Sidgreaves* v. *Brewer* (1880), 15 Ch. D. 594; *Re Huxtable, Huxtable* v. *Crawfurd*, [1902] 2 Ch. 793; *Sullivan* v. *Sullivan*, [1903] 1 Ir. R. 173; *Geddis* v. *Semple*, [1903] 1 Ir. R. 73; but distinguish *Re Hetley, Hetley* v. *Hetley*, [1902] 2 Ch. 866, where a verbal *power* (as distinguished from a verbal *trust*) was held void.

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inadmissible, and that as (apart from such evidence) the precatory words were not sufficient to create a trust, A. and B. took the proceeds of the residue absolutely (*t*).

PARAGRAPH (3).

Fraud an exception to rule.

But where a father is induced not to make a will by statements of his heir presumptive that the latter would make suitable provision for his immediate relatives, the court considers that to be a fraud, and, notwithstanding the statute, will oblige the heir to make a provision in conformity with his implied obligation (*u*). For, as was said by Lord WESTBURY, in *McCormick* v. *Grogan* (*x*), "the court has, from a very early period, decided, that even an Act of Parliament shall not be used as an instrument of fraud; and that equity will fasten upon the individual who gets a title under that Act, and impose upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way a court of equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills. And if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or next of kin to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends upon the disponee

(*t*) *Re Downing's Estate* (1888), 60 L. T. 140; and see also *Re King's Estate* (1888), 21 L. R. Ir. 273, and *Smart* v. *Prujean* (1801), 6 Ves. 560.

(*u*) *Sellack* v. *Harris* (1708), 5 Vin. Abr. 521; *Stickland* v. *Aldridge* (1804), 9 Ves. 516; *Chester* v. *Urwick* (1856), 23 Beav. 407. See also *Re Pitt-Rivers*, *Scott* v. *Pitt-Rivers*, [1902] 1 Ch. 403.

(*x*) (1869) L. R. 4 H. L. 82. The American courts follow the English with regard to the admissibility of parol evidence in cases of fraud generally, but in *Bedilian* v. *Seaton* (1860), 3 Wall. Jun. 279, a distinction was taken between cases like *McCormick* v. *Grogan*, where a father was fraudulently induced *not* to make a will, and cases like those cited below, where a testator was fraudulently induced either to make or to abstain from revoking a will. In the former case the American court differed from ours, holding that no trust could be enforced on the heir, who merely took by descent or operation of law, although, in the latter class of cases, where the trustee *ex malefieio* had *procured* a devise or bequest for himself, it was admitted that the trust could be proved by parol. It would seem, too, that the American courts will not enforce a mere promise by a legatee unless there was *actual* fraud or undue influence (see *Salter* v. *Bird* (1883), 103 Pa. St. 436; *Ragsdale* v. *Ragsdale* (1890), 68 Miss. 92), whereas our courts would seem to infer fraud from the breach of such a promise.

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to carry into effect, and the disponee assents to it (either expressly or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request), then undoubtedly the heir-at-law in one case, and the disponee in the other, will be converted into trustees; simply on the principle that an individual shall not be benefited by his own personal fraud."

Fraud by one of two joint legatees.

"The authorities establish the following propositions: If A. induces B. either to make or to abstain from revoking a will leaving him property, *expressly promising or even tacitly consenting* (*e.g.* by attesting a memorandum to that effect (*y*)) to carry out B.'s wishes concerning it, the court will hold this to be a trust, and will compel A. to execute it: see *McCormick* v. *Grogan* (*z*), where Lord HATHERLEY says: 'But this doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—in cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform.' If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as *tenants in common*, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not (*a*); the reason stated being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as *joint tenants*, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A., and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C. (*b*); the reason stated being that no person can claim an interest under a fraud committed by another. In the latter case, A. and not C. is bound (*c*); the reason stated being that the gift

(*y*) *Re Maddock, Llewelyn* v. *Washington*, [1902] 2 Ch. 220; and see *French* v. *French*, [1902] 1 Ir. R. 172, and *Re Huxtable, Huxtable* v. *Crawfurd*,[1902] 2 Ch. 793.

(*z*) (1869) L. R. 4 H. L. 82.

(*a*) *Tee* v. *Ferris* (1856), 2 Kay. & J. 357.

(*b*) *Russell* v. *Jackson* (1852), 10 Hare, 204; *Jones* v. *Badley* (1868), L. R. 3 Ch. 362.

(*c*) *Burney* v. *Macdonald* (1845), 15 Sim. 6; *Moss* v. *Cooper* (1861), 1 Johns. & H. 352.

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is not tainted with any fraud in procuring the execution of the will" (*d*).

In fact, as VAUGHAN WILLIAMS, L.J., put it in *Re Pitt-Rivers, Scott* v. *Pitt-Rivers* (*e*), "I suppose one may state shortly and concisely that the court never gives the go-by, if I may use the expression, to the provisions of the Wills Act, by enforcing upon any one testamentary intentions which have not been expressed in the shape and form required by the Act, except for the prevention of fraud. That is the only ground on which it can be done."

Of course the onus of proving a secret trust lies on the plaintiff. Therefore where a testatrix desired such part of her property as was not applicable under the law as to mortmain for charitable purposes to A. and B. as joint tenants, it was held that the onus was upon her heir to prove that A. and B. had *undertaken a secret* and illegal charitable trust, and that as he could not do so A. and B. took absolutely and beneficially (*f*).

Fraud under conveyances *inter vivos*.

The rule as to admissibility of parol evidence where there is fraud, is equally applicable to cases where one has fraudulently induced the execution of a conveyance. Therefore, where the plaintiff purported to assign to the defendant an agreement for a lease absolutely, but there appeared to have been a parol collateral arrangement that the defendant should hold part of the premises in trust for the plaintiff, it was held that such a trust could be proved by parol evidence. For (assuming the arrangement to have been in fact made) to exclude parol evidence would operate to effectuate a fraud (*g*).

(*d*) *Per* FARWELL, J., in *Re Stead, Witham* v. *Andrew*, [1900] 1 Ch. 237, 240.

(*e*) [1902] 1 Ch. 403, 407.

(*f*) *Jones* v. *Badley* (1868), L. R. 3 Ch. 362, where the law as to secret trusts is stated.

(*g*) *Booth* v. *Turle* (1893), L. R. 16 Eq. 182; *Re Duke of Marlborough, Davis* v. *Whitehead*, [1894] 2 Ch. 133; and see to like effect *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, where the rule was applied to foreign land.

CHAPTER III.

VALIDITY OF DECLARED TRUSTS IN RELATION TO LATENT MATTERS.

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Art. 12.—*Who may be a Settlor.*

Every person who can hold and dispose of any legal or equitable (*a*) estate or interest in property may create a trust in respect of it.

Infants.

Broadly speaking, an infant cannot effectually dispose of property, and, therefore, cannot make an irrevocable settlement. This statement is, however, subject to several qualifications.

Infants' settlements voidable, and not void.

(1) In the first place, if an infant makes a settlement which, if made by an adult, would bind the property itself, it is not void but voidable; and unless he repudiates it on or shortly after attaining his majority (*b*), or, in case the property settled is reversionary, soon after it falls into possession (*b*), he will be taken to have ratified it (*c*). Section 2 of the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), only prohibits *actions being brought to charge the* infant on a ratification, and

(*a*) *Gilbert* v. *Overton* (1864), 2 Hem. & M. 110; *Kekewich* v. *Manning* (1851), 1 De G. M. & G. 176; *Donaldson* v. *Donaldson* (1854), Kay, 711.

(*b*) *Re Jones*, *Farrington* v. *Forrester*, [1893] 2 Ch. 461; and see *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396.

(*c*) *Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Edwards* v. *Carter*, [1893] A. C. 360.

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therefore has no effect upon settlements (*d*). But where an infant has a foreign domicile, and by the law of that domicile ratification is disallowed, the settlement will not be binding, even although not expressly repudiated (*e*).

Settlements by infants with sanction of the Court.

(2) Secondly, males over the age of twenty and females over the age of seventeen years can now, upon marriage or afterwards (*f*), with the approbation of the High Court (acting in pursuance of the power given to it by the statute 18 & 19 Vict. c. 43, explained by 23 & 24 Vict. c. 83), make binding settlements of real and personal estate belonging to them in possession, reversion, remainder, or expectancy. This Act, however, has only removed the disability of *infancy*, leaving unaffected other disabilities (if any), such as lunacy or coverture. In fact, under it, a married female infant of sound mind may do all that an adult married woman could do, and no more (*g*). It has been held (*h*) that this statute authorises the Court to insert a covenant to settle after-acquired property. But it is submitted that having regard to the Married Women's Property Act, 1882, this power ought to be exercised very sparingly (*i*), even if it exists at all.

Covenants prior to 1908 by husband of female infant.

(3) Thirdly, before the 31st of December, 1907, the personal property of a female infant was liable to be bound by a covenant to settle it, entered into by her husband (even without her joinder) in consideration of the marriage. This was the (probably unforeseen) result of s. 19 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which provides that "nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made *or to be made* whether before or after marriage respecting the property of any married woman." Under this it was held that an ante-nuptial settlement containing a covenant by the husband with the trustees that he would settle or concur with the wife in settling any property which, during the coverture, should come to her or him in her right (which

(*d*) *Edwards* v. *Carter*, [1893] A. C. 360; *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421; and see *Harle* v. *Jarman*, [1895] 2 Ch. at p. 428.

(*e*) *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87.

(*f*) *Re Phillips* (*an Infant*) (1887), 34 Ch. D. 467; *Re Sampson and Wall* (1884), 25 Ch. D. 482; and see *Re Scott, Scott* v. *Hanbury*, [1891] 1 Ch. 298.

(*g*) *Buckmaster* v. *Buckmaster* (1887), 35 Ch. D. 21, H. L. (*sub nom. Seaton* v. *Seaton*) (1888), 13 App. Cas. 61.

(*h*) *Re Johnson, Moore* v. *Johnson*, [1891] 3 Ch. 48.

(*i*) See opinions of Mr. Spencer Butler and the late Mr. Wolstenholme (two of the conveyancing counsel to the court) set forth in *Re Maddy, Maddy* v. *Maddy*, [1901] 2 Ch. 820.

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apart from the Act would have bound her personal property) did so notwithstanding the separate estate conferred by the Act, as the above section took away the rights which the wife would otherwise have taken under the Act (*k*). The covenant in that case was made before the Act of 1882, but it was subsequently held that the principle was equally applicable to a settlement by a female infant and her proposed husband executed after the Act, which, on attaining twenty-one, she expressly repudiated (*l*), and to a settlement by the husband alone without the wife's joinder (*m*).

Of course, however, these cases only related to such proprietary interests of the wife as previously to the Act would have been capable of alienation by the husband alone *jure mariti*. They therefore did not touch property *settled* to her separate use, nor the inheritance in real or copyhold estates which could only be effectually alienated by her and her husband together.

Amending Act of 1907.

By the Married Women's Property Act, 1907 (*n*) however, the above decisions are made inapplicable with regard to settlements made after the 31st of December, 1907, which are not to be valid unless executed by the wife if of full age, or confirmed by her after she attains full age; provided that if she dies an infant, any covenant or disposition by the husband contained in any settlement or agreement is to bind any interest in her property to which *he* may become entitled on her death, and which he could have bound or disposed of if the Act had not been passed. The Act expressly safeguards and excepts settlements of the property of female infants made by leave of the court under the Infant Settlement Act, 1855.

Married women.

Women married since December 31st, 1882, are in the same position with regard to their beneficial interest in property as spinsters (*o*). They can, therefore, create trusts in relation to it, either by act *inter vivos*, or by testamentary disposition. Women married prior to that date are in the same position with regard to any property as to which their title first accrued (whether as a possessory or a reversionary title (*p*)) *since* December 31st, 1882. With regard to other

(*k*) *Hancock* v. *Hancock* (1888), 38 Ch. D. 78.

(*l*) *Stevens* v. *Trevor-Garrick*, [1893] 2 Ch. 307.

(*m*) *Buckland* v. *Buckland*, [1900] 2 Ch. 534. This seems to have put it out of the power of a woman, who was about to marry, to keep the control of her own property if the bridegroom chose to make a settlement of it behind her back, unless she previously assigned it to a trustee for her herself for her separate use.

(*n*) 7 Edw. VII., c. 18, s. 2.

(*o*) 20 & 21 Vict. c. 57.

(*p*) Married Women's Property

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married women, they can only alienate (and therefore can only create trusts) in the following cases, viz.:

(1) Where they are donees of a power of appointment (*q*);

(2) Where the property is settled to their separate use (*r*) without restraint on anticipation;

(3) Where the property is their separate property under the repealed Married Women's Property Act of 1870 (33 & 34 Vict. c. 93);

(4) Where the property is real estate, and their husbands join in an acknowledged deed;

(5) Where the property is reversionary personalty, their title to which is derived under an instrument (other than their marriage settlement) executed after December 31st, 1857, and their husbands join in an acknowledged deed (*s*).

Corporations.

Prior to 5 & 6 Will. IV., c. 76, municipal corporations were able to create trusts of their property (*t*): but since that Act *corporations included in the schedule to it* are themselves made trustees of their property for public purposes, and consequently cannot create trusts of it (*u*).

Lunatics.

A lunatic cannot create either a testamentary trust, or a trust *inter vivos* in favour of volunteers, unless he possesses sufficient intelligence to recall the nature and extent of his property, or the persons who have a claim on his bounty, and a judgment sufficiently free from morbid aberration and external control to judge those claims (*x*). On the other hand, where a person who is a lunatic in fact, but is not known to be so to persons privy to valuable consideration, executes a settlement, it would seem that it would not be set aside, either at law or in equity (*y*). It must, however, be borne in mind that a lunatic may be incapable of contracting a valid marriage: and it is conceived (although not without doubt) that a settlement executed by such an one in considera-

Act, 1882 (45 & 46 Vict. c. 75): and see *Reid* v. *Reid* (1886), 31 Ch. D. 402. But as to when a title does first accrue, *cf. Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51, 62 L. T. 929.

(*q*) *Burnet* v. *Mann* (1748), 1 Ves. Sen. 156.

(*r*) *Taylor* v. *Meads* (1865), 34 L. J. Ch. 203.

(*s*) 20 & 21 Vict. c. 57.

(*t*) *Colchester Corporation* v. *Lowten* (1813), 1 Ves. & B. 226.

(*u*) 5 & 6 Will. IV., c. 76, s. 94; *Att.-Gen* v. *Aspinall* (1837), 2 Myl. & Cr. 613.

(*x*) See *Banks* v. *Goodfellow* (1870), L. R. 5 Q. B. 549, *Roe* v. *Nix*, [1893] P. 55; *Boughton* v. *Knight* (1873), L. R. 3 P. & D. 64.

(*y*) See *Molton* v. *Camroux* (1848), 2 Ex. 487, 503, affirmed (1849), 4 Ex. 17: and *Price* v. *Berrington* (1851), 3 Mac. & G. 486: *Niell* v. *Morley* (1804), 9 Ves. 478.

tion of an intended marriage, could not be said to be a settlement based on value, inasmuch as such a marriage would be null. The case in fact would come under the principle which has been applied to settlements made in consideration of marriage with a deceased wife's sister (*a*) when such marriages were illegal, as to which see *infra*, p. 157. Art. 12.

A convict (*i.e.*, one sentenced to death or penal servitude for treason or felony (*b*)) is incapable, until the expiration of his sentence or until his death (*c*), of alienating or charging his property; and therefore he is incapable of declaring a trust of it, at all events by act *inter vivos*. This incapacity, however, is suspended for any period during which the convict may be at large under ticket of leave (*d*). Convicts.

ART. 13.—*Who may be Beneficiaries.*

(1) Every person who is capable of holding property may be a beneficiary under a trust; but persons incapable of holding property cannot.

A corporation cannot be beneficiary of lands without licence under the Mortmain Acts; for without such licence it cannot hold lands, and therefore cannot take through the medium of a trust. There are, however, numerous statutory exceptions to this in relation to municipal corporations, incorporated trading companies, colleges and the like, too numerous to mention in this work. Corporations.

Similarly, before the Act 33 & 34 Vict. c. 14, an alien, as he could hold property against any one except the Crown, could also be a beneficiary of land as against any one except the Crown (*e*). But as he could not take a legal estate by operation of law, so likewise he could not be a beneficiary by act of law (*f*). As the above Act is not retrospective, it would seem that aliens who acquired lands anterior to the passing of the Act are not protected by it; and that the Crown is entitled to all lands of which they are beneficiaries (*g*). Aliens.

(*a*) See *Pawson* v. *Brown* (1879), 13 Ch. D. 202; and *Neale* v. *Neale* (1898), 79 L. T. 629.

(*b*) 33 & 34 Vict. c. 23, s. 6.

(*c*) *Ib.*, ss. 7 and 8. *Quære*, whether this Act would prevent a convict making a valid will.

(*d*) *Ib.*, s. 30.

(*e*) *Barrow* v. *Wadkin* (1857), 24 Beav. 1; *Rittson* v. *Stordy* (1855), 3 Sm. & G. 230; *Sharp* v. *St. Sauveur* (1871), L. R. 7 Ch. 343.

(*f*) *Calvin's Case* (1608), Part 7 Rep. 1.

(*g*) *Sharp* v. *St. Sauveur*, *supra*.

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Married women.

Although, by recent legislation, married women are as capable of holding property as other people, they were not, previous to 1883, in so favourable a position. At common law, the husband was entitled to all his wife's personal chattels in possession; to the rents and profits of her freeholds during their joint lives; to all her choses in action which he should reduce into possession during the marriage; and to all her leaseholds. But if he did not reduce the choses in action into possession, or dispose of the leaseholds during the marriage, they reverted to the wife if she survived him. Courts of equity, however, in this instance, did not follow the law, but invented that peculiar equitable estate known as a "separate use," under which property which is settled in trust for a woman for her separate use is freed from the *jus mariti*. With regard to property so settled, a married woman is regarded as a *feme sole*. She may dispose of it without her husband's consent, either by act *inter vivos*, or by will (*h*), unless she is expressly restrained from anticipation. In the latter case she cannot dispose of it at all without the sanction of the court; which may, however, be obtained where it is clearly for her benefit, on summons under s. 7 of the Conveyancing Act, 1911 (1 & 2 Geo. V., c. 37) repealing and re-enacting in a wider form s. 39 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

ART. 14.—*When a Trust is Voidable for Failure of Consideration, Mistake, or Fraud.*

(1) The court will cancel a trust at the suit of the settlor or his representatives (*i*), if the object with which the trust was created has failed (*k*).

(2) The court will cancel or rectify (as the case may require) a settlement executed in ignorance or mistake (*l*), or in consequence of fraud or undue

(*h*) *Peacock* v. *Monk* (1751), 2 Ves. Sen. 190; *Taylor* v. *Meads* (1865), 34 L. J. Ch. 203.

(*i*) *Anderson* v. *Elsworth* (1861), 3 Giff. 154; *Tyars* v. *Alsop* (1889), 37 W. R. 339; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

(*k*) See *Essery* v. *Cowlard* (1884), 26 Ch. D. 191; *Bond* v. *Walford* (1886), 32 Ch. D. 238.

(*l*) *Phillips* v. *Mullings* (1871), L. R. 7 Ch. 244; *Forshaw* v. *Welsby* (1860), 30 Beav. 243; and see as to mistake where a provision for daughters was omitted by the engrossing clerk, *Re Daniel's Settlement* (1875), 1 Ch. D. 375; and see *Clark* v. *Girdwood* (1877), 7 Ch. D. 9.

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influence (*m*), provided that the settlor has not acquiesced in the settlement after the influence has ceased, or after he has become aware of the legal effect of it (*n*); and that the parties can be restored to their original positions (*o*).

PARAGRAPH (1).

Total failure of consideration.

In *Essery* v. *Cowlard* (*p*), by a settlement in consideration of a then intended marriage, executed in 1877, it was declared that a sum of stock, which had been transferred by the intended wife to trustees, should be held by them on trusts for her benefit and that of the intended husband, and the issue of the intended marriage. The marriage was not solemnised, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother of these children against the trustees to have it set aside; and it was held that, the contract to marry having been absolutely put an end to, the settlement ought to be cancelled. Similar decisions were arrived at in the more recent cases of *Bond* v. *Walford* (*q*), where an intended marriage had been simply broken off, and *Re Garnett, Richardson* v. *Greene* (*r*), where a decree of nullity of marriage had been made. The earlier case of *McDonnell* v. *Hesilrige* (*s*) seems to be scarcely consistent with the above authorities, unless it can be distinguished on the somewhat slight ground that there the trust was until the lady's marriage *if any*, and not until the particular marriage in contemplation of which the settlement was made.

PARAGRAPH (2).

Cancellation for ignorance or mistake.

Cancellation on the ground of ignorance, mistake, fraud, or undue influence usually occurs where the settlement is voluntary. It is not, however, confined to voluntary settlements,

(*m*) *Osmond* v. *Fitzroy* (1731), 3 P. Wms. 129; *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Dent* v. *Bennett* (1839), 4 Myl. & Cr. 269; *Hoghton* v. *Hoghton* (1852), 15 Beav. 278; *Cooke* v. *Lamotte* (1851), 15 Beav. 234.

(*n*) *Davies* v. *Davies* (1870), L. R. 9 Eq. 468, and cases cited; *Allcard* v. *Skinner* (1887), 36 Ch. D. 145.

(*o*) *Johnston* v. *Johnston* (1881), 52 L. T. 76.

(*p*) (1884) 26 Ch. D. 191.

(*q*) (1886) 32 Ch. D. 238.

(*r*) (1905) 93 L. T. 117. But the Divorce Division has extensive statutory powers of making orders with regard to the settled property at the instance of the petitioner (22 & 23 Vict. c. 61, s. 5, as amended by 41 & 42 Vict. c. 19, s. 3, and 7 Ed. VII. c. 12, s. 1), as to which see *Attwood* v. *Attwood*, [1903] P. 7; *Leeds* v. *Leeds* (1886), 57 L. T. 373; *A.* v. *M.* (1884), 10 P. D. 178; *Dormer* v. *Ward*, [1901], P. 20.

(*s*) (1852) 16 Beav. 346.

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although the court will more readily cancel a settlement for which no consideration was given, than one based on value.

Onus of proof of ignorance or mistake.

Indeed, until comparatively recently, it was considered that, where a trust was voluntary, and the settlor invoked the aid of the court to set it aside, the *onus* was immediately cast on the beneficiaries of showing that all the provisions of the settlement were proper and usual; or that, if there were any unusual provisions, they were brought to the knowledge of, and understood by, the settlor (*t*). In particular, the absence of a power of revocation was considered to be fatal unless it could be conclusively shown that the settlor had been advised to insert one, and had deliberately elected not to do so (*u*).

This view, however, was dissented from by the Court of Appeal in *Hall* v. *Hall* (*v*), and by the late Sir GEORGE JESSEL, M.R., in *Dutton* v. *Thompson* (*x*), and appears to be no longer law. In the latter case the late Master of the Rolls said: "I emphatically disagree with the ground on which some judges have set aside voluntary settlements, namely, that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a court of justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt if the settlement were shown to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, *that is an argument that he did not understand the settlement*. But in no other way would it be a reason for setting it aside." In *Henry* v. *Armstrong* (*y*) KAY, J., said: "No doubt there are to be found in the reported cases, *dicta* to the effect that the *onus* of supporting a voluntary deed rests upon those who set it up; but I do not think that these *dicta* go so far as to say, that whenever a voluntary settlement is impeached on any ground whatever, the *onus* is at once thrown on those who would maintain it. As I understand it, the law is, that anybody of full age and sound mind, who has executed a volun-

(*t*) *Phillips* v. *Mullings* (1871), L. R. 7 Ch. 244.

(*u*) *Coutts* v. *Acworth* (1869), L. R. 8 Eq. 558; *Wollaston* v. *Tribe* (1869), L. R. 9 Eq. 44; *Everitt* v. *Everitt* (1870), L. R. 10 Eq. 405.

(*v*) (1873) L. R. 8 Ch. 430.

(*x*) (1883) 23 Ch. D. 278.

(*y*) (1881) 18 Ch. D. 668. The authorities are by no means satisfactory as to the question of *onus*.

tary deed by which he has denuded himself of his own property, is bound by his own act; and if he comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside."

Apparent conflict between authorities

This remark as to *onus* is in apparent conflict with a *dictum* of the late Lord HATHERLEY in *Phillips* v. *Mullings* (*z*), where his lordship said: "It is clear that any one taking any advantage under a voluntary deed, and setting it up against the donor, must *show* that he thoroughly understood what he was doing." It is, however, respectfully apprehended that Mr. Justice KAY'S *dictum* is not inconsistent with Lord HATHERLEY'S; for the latter merely said that where the beneficiaries set up the deed *against the donor*, the *onus* is upon the beneficiaries; while the Lord Justice said that where the *settlor asks to have the deed set aside*, the *onus* is upon him. In short, the *onus* is, in general, upon the person seeking relief, unless the beneficiary occupied a fiduciary position towards the settlor. The cases of *Dutton* v. *Thompson* (*x*), *Henry* v. *Armstrong* (*y*), and *Phillips* v. *Mullings* (*z*), coupled with *Hall* v. *Hall* must, it is submitted, be taken to have definitely overruled the previous decisions in *Coutts* v. *Acworth* (*a*), *Wollaston* v. *Tribe* (*b*), and *Everitt* v. *Everitt* (*c*), and to have left the *onus* of showing mistake, fraud, or undue influence upon the settlor who seeks relief, except (1) where the provisions of the settlement are so absurd as to raise a presumption that no sane person would have agreed to them knowingly, and (2) where the beneficiary occupied at the date of the settlement a fiduciary position towards the settlor, in which case there is a strong *primâ facie* presumption of undue influence (*d*).

Illustrations of rectification for mistake.

But although a voluntary trust will not be set aside or varied for the mere asking, yet where the settlor can show that he misunderstood the effect of it, relief will be given to him. In the recent case of *James* v. *Couchman* (*e*), it appeared that the plaintiff had, by a voluntary settlement (made with the object of protecting himself against extravagant habits), assigned property to trustees, upon trust for himself for life, remainder to his wife (if any) for life, remainder to his issue, and in default of issue to his *paternal* next of kin. NORTH, J., while

(*z*) (1871) L. R. 7 Ch. 244.
(*a*) (1869) L. R. 8 Eq. 558.
(*b*) (1869) L. R. 9 Eq. 44.
(*c*) (1870) L. R. 10 Eq. 405.
(*d*) *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Hylton* v. *Hylton* (1754), 2 Ves. Sen. 547; *Hunter* v. *Atkins* (1834), 3 Myl. & K. 113; *Tate* v. *Williamson* (1866), L. R. 2 Ch. 55; *Alleard* v. *Skinner* (1887), 36 Ch. D. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.
(*e*) (1885) 29 Ch. D. 212; and see *Cavendish* v. *Strutt* (1903), 19 T. L. R. 483.

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refusing to set aside the settlement, thought that the ultimate limitation was unusual, and that the settlor's attention was not called to it, and that he did not understand the effect of it; and accordingly his lordship ordered the settlement to be rectified so as to give the settlor a power of appointment in default or failure of issue. His lordship, however, was careful to add: "The fact that a usual power was omitted here would not weigh with me in the least, if I were satisfied that the omission of such a power had been brought to the attention of the settlor, as he would then have been competent to judge for himself; but it seems to me that in the present case his attention was not called to it."

Where a person, apparently at the point of death, executed a voluntary settlement, of which he recollected nothing, which was never read to him, and in which a power of revocation was purposely omitted by the solicitor on the ground that he knew the variable character of the settlor, and there was also evidence that the settlor thought that he was executing the settlement in place of a will, it was held that the settlement was revocable (*f*).

Even where there is valuable consideration given, but the settlor is infirm and ignorant, and there is reason to suppose that he did not fully understand the transaction, it will be set aside, unless it be proved that full value was given (*g*).

Rectification of settlements which do not express the true intention of the parties.

Whether a settlement be voluntary or based on value, it will be rectified where it is satisfactorily proved that, by a mistake of the draftsman, it does not express the real intention of the parties. Thus, where a settlement limited estates to such uses as a husband and wife should jointly appoint, with an ultimate limitation to such uses as the wife should by deed or will appoint, but omitted to give them life estates, and consequently when the error was discovered they remedied it by a deed executed pursuant to the joint power and thereby completely relimited the whole of the uses instead of merely interpolating life estates, it was held that this deed ought to be rectified after the lady's death, because as it stood it had the effect (contrary to her intention) of making void a testamentary exercise of her power of appointment made before it was executed (*h*).

(*f*) *Forshaw* v. *Welsby* (1860), 30 Beav. 243; *Re Flamank*, *Wood* v. *Cock* (1889), 40 Ch. D. 461; *Re Blake*, *Blake* v. *Power* (1889), 37 W. R. 441.

(*g*) *Baker* v. *Monk* (1864), 33 Beav. 419, affirmed 4 De G. J. & S. 388; *Clark* v. *Malpas* (1862), 31 Beav. 80; *Longmate* v. *Ledger* (1860), 2 Giff. 157; and see *O'Rorke* v. *Bolingbroke* (1877), 2 App. Cas. 814, and *Re Fry*, *Fry* v. *Lane* (1888), 40 Ch. D. 312.

(*h*) *Walker* v. *Armstrong* (1856), 8 De G. M. & G. 531.

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Rectification of marriage settlement.

Even a marriage settlement will be rectified on clear evidence of mistake. Thus in one case a proviso against anticipation was struck out, the wife having executed the settlement on an express stipulation made by her that she should retain, and upon a representation that the deed secured to her, the most unlimited control over both principal and interest (*i*).

Another recent example of the rectification of a marriage settlement is *Re Alexander's Settlement*, *Jennings* v. *Alexander* (*k*), where by mistake a gift over was directed in the event of a son becoming tenant in tail *male* under the will of a deceased person, it appearing that under that will a son could only become tenant in tail *general*.

Fraud.

If ignorance or mistake suffices to invalidate a settlement, *a fortiori*, it will be cancelled where the settlor has been induced to make it by fraud; as, for instance, where a wife induces her husband to execute a deed of separation, in *contemplation* of a renewal of illicit intercourse (*l*). Where, however, it is not in her contemplation at the time, but she does in fact subsequently commit adultery, then, as there was no original fraud, the subsequent adultery will not avoid the settlement (*m*).

Undue religious influence.

Where a confidential relationship exists between the settlor and the beneficiary at the date of the settlement, the onus is decidedly thrown on the beneficiary of proving affirmatively, not only that there was no undue influence exerted, but that the settlor had independent advice, and that the settlement contains all usual and proper powers and provisions; and, if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. Thus, in the leading case of *Huguenin* v. *Baseley* (*n*), where a widow lady, very much under the influence of a clergyman, made a voluntary settlement in his favour, it was held to be invalid. As BOWEN, L.J., said in an important leading case (*o*), "It is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another, to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and

(*i*) *Torre* v. *Torre* (1853), 1 Sm. & G. 518.

(*k*) [1910] 2 Ch. 225.

(*l*) *Brown* v. *Brown* (1868), L. R. 7 Eq. 185; and see *Evans* v. *Carrington* (1860), 2 De G. F. & J. 481, and *Evans* v. *Edmonds* (1853), 13 C. B. 777.

(*m*) *Seagrave* v. *Seagrave* (1807), 13 Ves. 439.

(*n*) (1807) 14 Ves. 273.

(*o*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145, 193; and see also *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

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free opportunity for counsel and advice outside—the means of considering his or her worldly position, and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed on the conscience of the recipient of the gift, and one which arises out of public policy and fair play."

Undue influence by solicitor or medical attendant.

On similar grounds, a gift made by a client to a solicitor, while the relation of solicitor and client exists, is voidable. And although such gift may be ratified after the relation has ceased to exist, yet, in order to establish ratification, it must be proved to the satisfaction of the court that the donor, at the time when he was a free agent, and knew of his right to recall the gift, intentionally determined to forego that right. In the absence of such evidence, the gift may be avoided, not only by the donor, but by his personal representatives (*p*). As COTTON, L.J., said (*q*), "We must find something equivalent to a present gift when the influence arising from the existence of the relationship had ceased to exist: in the words of TURNER, L.J., in *Wright* v. *Vanderplank* (*r*), there must be 'a fixed, deliberate, and unbiassed determination that the transaction should not be impeached.' In the case of a gift to a solicitor, the court looks most carefully to see if there has been a fixed, deliberate, and unbiassed determination on the part of the donor that the transaction should not be impeached." Indeed, the Court of Appeal has laid it down that, in the absence of independent advice, the presumption that the settlor was unduly influenced is absolute and irrebuttable; and has also extended the doctrine not only to gifts to the solicitor himself, but also to his wife (*s*), or his son (*t*). The same principle is equally applicable to a settlement made by a patient in favour of his medical attendant (*u*).

Undue parental influence.

So, where a deed conferring a benefit on the settlor's father is executed by a child who is not yet emancipated from his father's control, if the deed is subsequently impeached by the child, the *onus* is on the father to show that the child had independent advice, and acted on that advice (*v*); and that he

(*p*) *Tyars* v. *Alsop* (1889), 37 W. R. 339.

(*q*) *Ibid.* at p. 340; and see also *Vanney* v. *Williams* (1856), 22 Beav. 452, and *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*r*) (1856) 8 De G. M. & G. 133; and see also *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587.

(*s*) *Liles* v. *Terry*, [1895] 2 Q. B. 679; *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*t*) *Barron* v. *Willis*, [1900] 2 Ch. 121, affirmed (*sub nom.* *Willis* v. *Barron*) [1902] A. C. 271; *Wright* v. *Carter*, *supra*.

(*u*) *Radcliffe* v. *Price* (1902), 18 T. L. R. 466.

(*v*) *Powell* v. *Powell*, [1900] 1 Ch. 243; approved in *Wright* v. *Carter*, [1903] 1 Ch. 27.

executed the deed with full knowledge of its contents, and with the full intention of giving the father the benefit conferred by it (*x*). However, where such a deed is substantially a resettlement of family estates (as distinguished from a mere voluntary trust in favour of a parent), it is not essential that the child should have independent advice; and the court will not inquire whether the influence of the father was exerted with more or less force (*y*). No doubt, where the father obtains a benefit under such a deed, the jealousy of the court is aroused; yet, if, on the whole facts, the benefit is not an unfair one, the court will not set it aside (*z*). These remarks, however, do not extend to the case where a father obtains a benefit under his daughter's marriage settlement. In such cases, the daughter ought to have independent advice (*z*). In a recent case (*a*), FARWELL, J., laid it down broadly that, where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice, unless he acts on that advice; it is the duty of a solicitor independently advising an intending settlor to protect him against himself, and not merely against the personal influence of the donee in the particular transaction; and if his advice is not accepted he should decline to act further (*b*). The learned judge also considered that in every voluntary settlement *of this kind* a power of revocation should be inserted. Art. 14.

The principle has been extended by the Irish courts against a creditor of the parent where he and the parent induce the child to guarantee the debt (*c*). But unless the creditor is party to the pressure brought to bear on the child, the mere fact of the child giving the guarantee does not affect its validity (*d*).

However, in all these cases the settlor will get no relief if he has knowingly acquiesced in the settlement. Thus, where a father induced a young son, who was still under his roof, and subject to his influence, to make a settlement in favour of his step-brothers and sisters, it was held, that if the son had applied promptly, the court would have set it aside. But as he had remained quiescent for some years, and had made no Acquiescence.

(*x*) *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188; and see *Tate* v. *Williamson* (1866), L. R. 2 Ch. 55; *Kempson* v. *Ashbee* (1874), L. R. 10 Ch. 15, and cases cited; and *Tucker* v. *Bennett* (1887), 38 Ch. D. 1.

(*y*) *Hoblyn* v. *Hoblyn* (1889), 41 Ch. D. 200; and see *Bainbrigge* v. *Browne*, *supra*, and *Re Moulton*, *Grahame* v. *Moulton* (1906), 94 L. T. 454.

(*z*) *Tucker* v. *Bennett*, *supra*.

(*a*) *Powell* v. *Powell*, [1900] 1 Ch. 243.

(*b*) Approved, *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*c*) *M'Mackin* v. *Hibernian Bank*, [1905] 1 Ir. R. 296; *O'Connor* v. *Foley*, [1905] 1 Ir. R. 1.

(*d*) *Bainbrigge* v. *Browne* (1881), 18 Ch. D. 188.

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objection to the course which he had been persuaded to follow, he was not entitled to relief. For by so doing he had in his maturer years practically adopted and confirmed that which he had done in his early youth (*e*). Nor will the court interfere where the settlor subsequently acts under the deed, or does something which shows that he recognises its validity; unless, indeed, he was ignorant of the effect of the settlement at the date of such recognition (*f*).

Acquiescence by a lady who has entered a sisterhood.

So where a lady entered a religious sisterhood, and, under circumstances which amounted to undue influence, made a voluntary settlement in its favour, but omitted, for more than six years after severing her connection with it, to seek to have the settlement set aside, it was held that her acquiescence barred her claim for relief. As LINDLEY, L.J., said, "In this particular case, the plaintiff considered, when she left the sisterhood, what course she should take; and she determined to do nothing, but to leave matters as they were. She insisted on having back her will, but she never asked for her money until the end of five years or so after she had left the sisterhood. In this state of things I can only come to the conclusion that she deliberately chose not to attempt to avoid her gifts, but to acquiesce in them. I regard this as a question of fact, and upon the evidence I can come to no other conclusion than that which I have mentioned" (*g*).

Change of status.

So, again, the settlement will not be cancelled unless the parties can be replaced in their original position, even where its execution was induced by most serious misrepresentations. In one case a settlor had married a lady who represented to him that she had divorced her first husband for adultery and cruelty; whereas, in point of fact, she herself had been divorced for adultery at his suit. The settlor, on discovering this, commenced an action to have the settlement set aside. PEARSON, J., dismissed it as being frivolous and vexatious; and the Court of Appeal confirmed his decision, on the ground that the plaintiff could not set aside the settlement and yet keep the only consideration which was given for it, viz., the marriage; one essential condition of cancellation being (as FRY, L.J., observed) *restitutio in integrum*, which was there impossible (*h*).

(*e*) *Turner* v. *Collins* (1871), L. R. 7 Ch. 329.

(*f*) *Jarratt* v. *Aldam* (1870), L. R. 9 Eq. 463; *Motz* v. *Moreau* (1859), 13 Moore P. C. 376; *Wright* v. *Vanderplank* (1855), 2 Kay & J. 1, affirmed (1856), 8 De G. M. & G. 133; *Milner* v. *Lord Harewood* (1811), 18 Ves. 259; *Davies* v. *Davies* (1870), L. R. 9 Eq. 468. As to ignorance, see *Lister* v. *Hodgson* (1867), L. R. 4 Eq. 30.

(*g*) *Allcard* v. *Skinner* (1887), 36 Ch. D. 145.

(*h*) *Johnston* v. *Johnston* (1884), 52 L. T. 76.

Art. 15.—*Effect of the Bankruptcy of the Settlor on the Validity of a Settlement.* Art. 15.

(1) A voluntary trust, *or* one made in bad faith to the knowledge of the beneficiaries (*i*), will be void as against the settlor's creditors, if

(a) he becomes bankrupt or liquidates his affairs within two years (*j*); or

(b) he becomes bankrupt or liquidates his affairs after two but within ten years; unless it can be shown that he was solvent at the date of the settlement without the aid of the property comprised in it, and that his estate or interest in such property passed to the trustee of the settlement on the execution thereof.

(2) A mere covenant or contract made in consideration of marriage, for the future settlement upon the settlor's wife or children, of any specific and earmarked (*k*) money or property wherein he had not at the date of his marriage any estate or interest, vested or contingent (*l*) (not being money or property of or in right of his wife), is void as against the settlor's creditors in the event of his bankruptcy or liquidation, unless such property or money has been actually transferred or paid pursuant to such contract or covenant, before the act of bankruptcy on which he has been adjudicated bankrupt (*m*).

(3) The above provisions

(a) do not vitiate a settlement of property accrued to the settlor since marriage in right of his wife;

(*i*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Fraser* v. *Thompson* (1859), 4 De G. & J. 659, where marriage settlement executed with wife's knowledge of act of bankruptcy.

(*j*) The Act does not apply to the winding-up of a deceased debtor's estate, *Re Gould, Ex parte Official Receiver* (1887), 19 Q. B. D. 92.

(*k*) *Ex parte Bishop, Re Tonnies* (1873), L. R. 8 Ch. 718.

(*l*) See *Re Andrews' Trusts* (1878), 7 Ch. D. 635. A formal transfer of future acquired property is, in reality, nothing more than a contract to assign it when it comes into existence, and would, it is conceived, be a contract within the meaning of this rule. See *Collyer* v. *Isaacs* (1881), 19 Ch. D. 342; and *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280.

(*m*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47 (2): *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed [1905] A. C. 442 (*sub nom. Clough* v. *Samuel*).

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(b) do not vitiate the trusts of a policy effected under s. 11 of the Married Women's Property Act, 1882;

(c) do not affect the title of *bonâ fide* purchasers for value from beneficiaries under a void settlement;

(d) do not put the creditors in the place of the beneficiaries so as to give them priority over subsequent incumbrances created by the settlor.

PARAGRAPH (1).

Bankruptcy within two years.

Thus a person made a voluntary settlement of an estate which was subject to a mortgage; and covenanted with the trustees that he would pay the interest on the mortgage, and, when required, would pay off the principal. It subsequently, and within two years, turned out that his assets (exclusive of the estate in question) were sufficient to pay his debts other than the mortgage debt, but not sufficient to pay both, and he became bankrupt. It was held that whether the settlement was fraudulent or not within the 13th Elizabeth it was not material to inquire; but that it clearly fell within the provisions of the Bankruptcy Act, and was therefore void (*n*).

Bankruptcy within ten years.

Upon an application to set aside a post-nuptial settlement under clause (b) of this article, it appeared that, by the settlement, a life interest was reserved to the settlor himself; and that, if this life interest were taken into account, he was able to pay his debts at the date of the settlement; but that if it was not taken into account, he was insolvent. The court held that the settlor's life interest ought to be taken into account in estimating his solvency, and that the settlement was valid as against his trustee in bankruptcy (*o*).

Settlement to make good breach of trust.

A settlement made by a trustee for making good a breach of trust is not voluntary (*p*), and cannot be set aside under this Act unless the beneficiaries have acted in bad faith (*q*).

(*n*) *Ex parte Huxtable, Re Coulbeer* (1876), 2 Ch. D. 54. See also *Re Parry, Ex parte Salaman*, [1904] 1 K. B. 129. But premiums paid in respect of settled policies are not repayable, *Re Harrison & Ingram, Ex parte Whinney*, [1900] 2 Q. B. 710; nor presents of money, *Re Plummer*, [1900] 2 Q. B. 790.

(*o*) *Re Lowndes* (1887), 18 Q. B. D. 677.

(*p*) *Sharp* v. *Jackson*, [1899] A. C. 419.

(*q*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505. Nor is it a fraudulent preference, *Re Lake, Ex parte Dyer*, [1901] 1 Q. B. 710; *Sharp* v. *Jackson*, *supra*.

Nor is a settlement on a volunteer based on valuable consideration given by a third party (*r*). Art. 15.

Paragraph (2).

Clause 2 of the above article only applies to specific earmarked property; and therefore, where a person by his marriage settlement covenants that he will pay a sum of money to the trustees, such a covenant is perfectly valid. The intention of the Act is to prevent settlements of property expected to accrue at a future time, in which the settlor has at the date of the settlement no present interest. As Mellish, L.J., put it in *Ex parte Bishop, Re Tonnies* (*s*): "The object of the legislature was to provide that specific money or property which, but for the section, would have gone to the trustees [of the settlement] exclusively, should be divided among the creditors [of the settlor]. A covenant to settle such money or property would, in equity, have bound it when it came into actual possession, and the intention was, that if the covenantor had no interest at the time, it should go to the creditors, and not to the trustees, of the settlement. If this had been a covenant that in case any property was left to the covenantor by his father or any other person, he would settle it, and the covenantor had no interest in it at the time, the covenant would be void against the trustee in bankruptcy. The word 'money' refers to something of the same nature as 'property,' namely, something specific, and does not apply to that which is a mere debt due from the settlor." However, even in the case of property falling within the Act, if it accrued to the settlor *after his discharge*, it would remain bound by the covenant. The section in question only avoids such covenants as against the trustee in bankruptcy, who would, of course, have no claim to property which only vested in the bankrupt after his discharge; and although the bankruptcy, *ipso facto*, cancels all the debtor's ordinary contracts, it would not affect such an one as this, which is capable of being specifically performed (*t*). It will be noted that this paragraph only refers to covenants in *marriage* settlements.

Covenants to settle future acquired property are destroyed by bankruptcy, but not covenants to settle a sum of money.

Paragraph (3).

A wife who was married in 1883, and was then possessed of separate property, allowed that property, after the marriage,

Settlement of property acquired through wife not destroyed by bankruptcy.

(*r*) *Re Dale and Elsden*, [1892] W. N. 56.
(*s*) (1873) L. R. 8 Ch. 718.
(*t*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed [1905] A. C. 442 (*sub nom. Clough* v. *Samuel*); and see Art. 8, p. 38 *et seq.*, *ante*.

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ART. 16.—*When a Trust is void as against Settlor's Creditors under* 13 *Eliz. c.* 5.

(1) The last article relates exclusively to cases where the settlor has become bankrupt or liquidated his affairs by arrangement under the Bankruptcy Act. But quite apart from bankruptcy a settlement of hereditaments, corporeal or incorporeal, or of such kinds of personal property as are capable of being taken in execution, is void as against existing and future creditors of the settlor if it be executed with intent to defeat or delay their claims (*v*).

(2) The court must, however, be satisfied, on the whole of the facts and evidence, that there was an actual intention to defeat or delay creditors: with the possible exception, that where the inevitable result of the settlement at its date must have been to defeat or delay creditors the court will declare it void even although it considers that no actual intention to defeat or delay existed (*w*).

(3) But settlements otherwise void under this article are valid in favour of persons (whether original beneficiaries or their assigns) who have, *bonâ fide* and without

(*u*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505, 108.

(*v*) See cases *infra*, pp. 106—112.

(*w*) See cases *infra*, pp. 108—

notice of the intended fraud, given, or are privy to, valuable consideration (z).

(4) No delay short of the statutory period of limitation will bar an action to set aside such a settlement, the right being legal and not equitable (a).

(5) Where a settlement is set aside as against creditors it is not cancelled *in toto*, but the trustees are directed to join and concur in all acts and deeds necessary for making the settled property available for the creditors. Any surplus goes to the beneficiaries (b).

PARAGRAPH (1).

Words of statute 13 Eliz. c. 5.

This article is an attempt to digest the effect of the statute 13 Eliz. c. 5, passed "for the avoiding of feigned, covinous, and fraudulent feoffments, etc., *contrived of malice, fraud, covin, collusion, or guile, to delay, hinder, or defraud creditors or others*," by which it was enacted, that "all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution to and *for any intent or purpose before declared* and expressed, shall be deemed and taken only as against that person or persons, his or their heirs, successors, executors, administrators and assigns whose action, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs by such guileful, covinous or fraudulent devices and practices as is aforesaid are, shall, or might be in any ways disturbed, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned consideration, or any other matter or thing to the contrary notwithstanding." By the fifth section it was provided that the Act should "not extend to any estate or interest in lands, etc., or goods, etc., assured upon good consideration and *bonâ fide* to any person not having at the time of such assurance any notice or knowledge of such covin, fraud or collusion."

The scope of the statute has been enlarged from time to time, as property which was not originally within the reach of creditors has been brought within their reach. Thus copyholds were formerly not included (c), but were brought within the statute by the effect of 1 & 2 Vict. c. 110, s. 11; and now

(z) See cases *infra*, p. 113.

(a) *Re Maddever, Three Towns Banking Co.* v. *Maddever* (1884), 27 Ch. D. 523.

(b) *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157.

(c) *Mathews* v. *Feaver* (1786), 1 Cox, 278.

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it is well settled that every kind of property capable of being taken by creditors in execution (*d*), including choses in action and equitable interests of which equitable execution can be decreed by the appointment of a receiver (*e*), is within the Act.

Illustrations of direct intent to delay or defeat creditors.

Where a director of a company was sued by the company, and, fearing that a judgment would be given against him, made a voluntary assignment to his daughter of all his property, it was held that the fraudulent intention was manifest, and that the settlement was void as against the company, although they were not creditors at the time, and it did not appear that there were any creditors at the time (*f*). Even though the daughter was no party to the fraud, yet she was not protected, because she had not given valuable consideration.

Direct intent to delay future creditors.

And so, again, in *Spirrett* v. *Willows* (*g*), the settlor being solvent at the time, but having contracted a considerable debt which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts; after which he collected the rest of his assets and spent them in the most reckless way, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors, and accordingly the settlement was set aside.

So where a settlor was insolvent, and made a voluntary settlement in favour of his wife and children of a reversionary interest in stocks and shares, it was held void as against his creditors, the judge being satisfied of the intent to defeat or delay them (*h*).

Again, a trader, who had for many years carried on the business of a baker and had saved money, being about to purchase a grocery business which he intended to carry on in addition to the other, made a voluntary settlement of the bulk of his property for the benefit of his wife and children. He afterwards bought the grocery business and carried it on

(*d*) *Rider* v. *Kidder* (1805), 10 Ves. 360. As to goods, see *Barrack* v. *M'Culloch* (1856), 3 Kay. & J. 110; *Stokoe* v. *Cowan* (1861), 29 Beav. 637.

(*e*) *Norcutt* v. *Dodd* (1841), Cr. & Ph. 100; 1 & 2 Vict. c. 110; and *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157.

(*f*) *Reese River Co.* v. *Atwell* (1869), L. R. 7 Eq. 347; and see *Twyne's Case* (1601), 1 Smith's Lead. Cas. (ed. 11) 1, 3 Coke, 80, where the authorities are collected.

(*g*) (1864) 3 De G. J. & S. 293.

(*h*) *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157; and see also *Smith* v. *Cherrill* (1867), L. R. 4 Eq. 390; *Taylor* v. *Coenen* (1876), 1 Ch. D. 636; *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158; and *Adames* v. *Hallett* (1868), L. R. 6 Eq. 468.

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for about six months, but lost money by it. He then sold it for as much money as he had given for it, and afterwards carried on the baker's business alone until, about three years after the execution of the settlement, he filed a liquidation petition, his liabilities largely exceeding his assets. The debts which he owed at the date of the settlement had been all paid. On these facts, although the grocery business was not the cause of his failure, it was held that the settlement was void as against his creditors, on the ground that it was evidently executed *with the view* of putting the settlor's property out of their reach, in case he should fail in the speculation on which he was about to enter in carrying on a new business of which he knew nothing (*i*).

And so generally "a man is not entitled to go into a hazardous business, and immediately before doing so, to settle all his property voluntarily; *the object being*, 'If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.' That is the very thing which the statute of Elizabeth was meant to prevent" (*k*).

Whether settlement containing gift over on settlor's bankruptcy is fraudulent.

Most of the above examples have been cases of *voluntary* settlements; but where *all parties to the consideration are privy to the fraud*, a settlement based on value will not be valid against the settlor's creditors. Thus, where one, by marriage settlement, settles *his own* property on himself until bankruptcy, and then over, it has been said that it is so clearly intended to defraud creditors that the wife must be assumed to have been party to that intention, and the trust over on bankruptcy will therefore, as against the general body of his creditors, be void (*l*), if, but for the limitation in

(*i*) *Ex parte Russell, Re Butterworth* (1882), 19 Ch. D. 588; and see also *Townsend* v. *Westmacott* (1840), 2 Beav. 340; *Skarf* v. *Soulby* (1849), 1 Mac. & G. 364; and *Ware* v. *Gardner* (1869), L. R. 7 Eq. 317.

(*k*) *Per* JESSEL, M.R., *Ex parte Russell, Re Butterworth, supra*; following *Mackay* v. *Douglas* (1872), L. R. 14 Eq. 106. An unconscious paraphrase of Shakespeare, "If like an ill venture, it come unluckily home, I break, and you, my gentle creditors, lose."

(*l*) *Higginbotham* v. *Holme* (1812), 19 Ves. 88; *Ex parte Hodgson* (1812), 19 Ves. 206; *Bott* v. *Smith* (1856), 21 Beav. 511. The case of *Re Detmold, Detmold* v. *Detmold* (1889), 40 Ch. D. 585, seems at first sight inconsistent with this; but when the case is examined it will be seen that the sole point raised (by an originating summons in the matter of the trust) was as to the *validity* of a gift over on alienation by the husband. The larger question as to whether it was void as against creditors under the statute of Elizabeth was not raised or discussed. See *per* COZENS-HARDY, L.J., in *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. at p. 367.

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question, the income would have come to the trustee in bankruptcy of the settlor (*m*). The whole settlement will not be void, but only the gift over on bankruptcy (*n*). Moreover, the principle only applies to property of the husband, and not to property belonging to the wife or a third party (*n*). Whether it applies to property which has come to *the husband* in right of the wife, and which he has settled by a post-nuptial settlement, seems doubtful, unless other circumstances show that the settlement was not made *bonâ fide*, but for the purpose of defeating creditors (*o*). In the latter case it may be void *in toto*, unless made in pursuance of an ante-nuptial agreement (*o*). Speaking broadly, a marriage settlement can only be upset as against the wife where she has been a party to the fraud (*p*). It has recently been held that the fact of the settlement containing a covenant by the husband to settle all his after-acquired property will not of itself be evidence of fraud on her part (*q*).

Fraudulent marriage settlement where wife privy to fraud.

Where, however, a person married his mistress, and with the intention of defeating his creditors, and with her knowledge of that intention, settled all or a considerable part of his property upon her, the marriage consideration did not render the settlement valid as against the settlor's creditors; for such a marriage was a mere cloak for the fraud, and the wife was *particeps criminis* (*r*).

PARAGRAPH (2).

How far fraudulent intent presumed.

In all the foregoing cases, the court came to the conclusion that the settlor actually intended to delay or defeat his creditors; not necessarily by means of direct evidence, but because the circumstances raised a sufficient inference *which was not in fact rebutted*: for no one doubts that fraud may be *primâ facie* inferred from circumstantial evidence. But a much more difficult and doubtful question arises

(*m*) See *Re Johnson Johnson, Ex parte Matthews and Wilkinson*, [1904] 1 K. B. 134.

(*n*) *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Re Holland, Gregg* v. *Holland*, [1902] 2 Ch. 360, overruling *Re Pearson, Ex parte Stephens* (1876), 3 Ch. D. 807. As to the validity of such settlements where the matrimonial domicile is in a country where they are lawful, see *Re Fitzgerald, Surman* v. *Fitzgerald*, [1904] 1 Ch. 573.

(*o*) *Re Holland, Gregg* v. *Holland, supra*.

(*p*) *Parnell* v. *Stedman* (1883), 1 Cab. & El. 153.

(*q*) *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed (*sub nom. Clough* v. *Samuel*) [1905] A. C. 442, overruling *Ex parte Bolland, Re Clint* (1873), L. R. 17 Eq. 115.

(*r*) *Bulmer* v. *Hunter* (1869), L. R. 8 Eq. 46; and see *Colombine* v. *Penhall* (1853), 1 Sm. & G. 228.

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whether a voluntary settlement is void as against the settlor's creditors *as a matter of law* where the result of the settlement was to defeat or delay, although the tribunal may be convinced that, *as a matter of fact*, the settlor never had any such intention. In *Freeman* v. *Pope* (*s*) the late Lord HATHERLEY distinctly held that "It is established by the authorities that, in the absence of any direct proof of intention [to defeat or delay], if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it *is the necessary consequence of the settlement* (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that *they must infer the intent* of the settlor to have been to defeat or delay his creditors, and that the case is within the statute." And GIFFORD, L.J., said: "If, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, the *law infers intent*."

Ex parte Mercer, Re Wise.

These dicta as to irrebuttably inferring intent where no intent existed, seem to the author to be incapable of being reconciled with the judgments of the Court of Appeal in the later case of *Ex parte Mercer, Re Wise* (*t*). The facts of that case were as follows: A master mariner was married at Hong Kong on May 31st, 1881. In the following August an action for breach of promise of marriage was commenced against him, and the writ served upon him at Hong Kong on October 8th. By the same mail he heard that a legacy of £500 had become payable to him. On October 17th he executed a post-nuptial settlement of the £500 in favour of his wife and issue, being then indebted to no one. In July, 1882, judgment in the breach of promise action went against him for £500; and in November, 1884, he was adjudicated bankrupt. It was thereupon attempted to set aside the post-nuptial settlement under Lord HATHERLEY'S dictum in *Freeman* v. *Pope*. The bankrupt, however, swore, and the court believed, that when he made the settlement he was in no way influenced by the action having been commenced against him, which he thought would come to nothing. On this state of facts the Divisional Court and the Court of Appeal declined to set aside the settlement, and Lord ESHER, M.R., rejected emphatically the argument that, if the necessary consequence of the settlement was to defeat or delay the

(*s*) (1870) L. R. 5 Ch. 538. (*t*) (1886) 17 Q. B. D. 290.

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settlor's creditors, therefore "as a proposition of law the tribunal which had to consider whether he did *intend* to defeat or delay his creditors was bound to find that he did." He said, "in support of that proposition dicta of great and eminent judges were cited. I will venture to say as strongly as I can that to my mind that proposition is monstrous. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words 'necessary result' metaphysically, but in their ordinary business sense; and, of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend—to say that because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact." LINDLEY, L.J., in the same case added: "The language which has been used in a great many cases, that a man must *in point of law* be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact—between consequences which can be foreseen and those which cannot."

The dicta of Lord ESHER, M.R., and LINDLEY, L.J., in *Ex parte Mercer, Re Wise* appear, at first sight, to lay down that the court must decide *as a fact* in each case what, on the whole evidence, *was the intention* of the settlor in making the settlement. But although they did decide that the court cannot infer fraudulent intent where it did not in fact exist, they both introduced an element of doubt as to whether the statute as construed by the courts required intent to be proved in all cases; Lord ESHER observing that "whether the fact that the necessary result of a voluntary deed is to defeat or delay creditors will make the deed void under the statute of Elizabeth, although there was no such intent in his mind at the time when he executed it, is a question which we are not now called upon to decide. *But it is a question wholly independent of intention. That may be the law; the courts may have put that construction on the statute.*" And Lord Justice LINDLEY added: "Although I am not prepared to say that a voluntary settlement can never be set aside under the statute of Elizabeth as it has been construed, unless there

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has been in fact an intention to defraud, I am not aware of any decision which goes the length of upsetting the present deed. In this case there was no intention to defeat the plaintiff, and when the settlement was executed the probability of the plaintiff obtaining substantial damages was very slight."

Principle to be deduced from *Ex parte Mercer, Re Wise.*

It would seem, therefore, that all the court decided in *Ex parte Mercer* was that where there was no actual intent to defraud, and *the inevitable result of the settlement was not at its date to defeat or delay then existing creditors*, the statute does not apply, leaving it still open to argument whether in the latter case a settlement was avoided irrespective of intention.

Cases since *Ex parte Mercer, Re Wise.*

However in the later case of *Godfrey* v. *Poole* (*u*) the Privy Council appear to have decided that the proper principle is that, "the language of the Act being, that any conveyance of property is void against creditors if it is made with *intent* to defeat, hinder, or delay creditors, the court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors" (*x*).

That seems to be expressed without any reservation: but in a more recent case of *Re Holland, Gregg* v. *Holland* (*y*), although the Court of Appeal (reversing FARWELL, J.) refused to infer fraud from the mere *ex post facto* result of the settlement, yet VAUGHAN WILLIAMS, L.J., said: "I cannot draw the inference that this settlement was fraudulent or made with intent to defeat or delay creditors *in the absence of evidence of either indebtedness by the husband at the date of the settlement, or of an intention by the husband at the date of the settlement to enter upon a speculative business likely to result in insolvency.*" STIRLING, L.J., went still further, saying "the case does not fall within the line of authorities, such as *Freeman* v. *Pope, which establish* that under this statute a voluntary deed may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect. It lies on the trustee in bankruptcy to prove the existence of such intention."

Submitted that apparent conflict of authorities may be reconciled if question merely treated as one of *onus probandi*.

It will be observed, however, that in both the above

(*u*) (1888) 13 App. Cas. 497, at p. 503.

(*x*) *Per* KINDERSLEY, V.-C., in *Thompson* v. *Webster* (1859), 4 Drew. at p. 632, adopted and approved by the Privy Council in *Godfrey* v. *Poole*, *supra*.

(*y*) [1902] 2 Ch. 360; and see also the recent decision of WARRINGTON, J., in *Carruthers* v. *Peake* (1911), only reported in 55 Sol. J. 291, where the learned judge followed *Freeman* v. *Pope*.

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passages the observations of the learned Lords Justices are consistent with the circumstances affording *primâ facie* evidence of intent to defeat or delay, thus throwing the onus on those who seek to uphold the settlement of proving affirmatively that no such intention existed, and do not lay it down (as *Freeman* v. *Pope* appears to do) that in such cases the inference, even if rebutted in fact, is conclusive against the validity of the settlement in law.

On the whole the question appears to be one of great doubt and difficulty, and all that can be said is that, except where the inevitable result of the settlement under the circumstances existing at its date was to defeat or delay creditors, those who support the settlement may bring evidence that no such intention existed, which evidence, if believed by the court, will cause the action to fail; and that it is not clear that the same rule does not apply even where the defeat or delay of creditors was the inevitable result, if that result was not foreseen at the time—for instance, where the settlor *bonâ fide* and on the advice of a competent valuer greatly overestimated his other assets, such as pictures by old masters, or a library of unique or rare books.

It is submitted that the confusion between the older and the more modern decisions has been caused (as was pointed out by BOWEN, L.J., in a case not arising under this statute (*z*)), by the fact that equity judges have always had to decide questions of law and fact together. "An equity judge, when he had to deal with a question of fraud, discussed his reasons for coming to the conclusion that there had been fraud; and it very often happened that an equity judge decided that there was fraud in a case in which gross negligence had been proved. If the case had been tried with a jury, the judge would have pointed out to them that gross negligence *might* amount to *evidence of fraud*, if it were so gross as to be incompatible with the idea of honesty; but even gross negligence, in the absence of dishonesty, did not, *of itself*, amount to fraud. Cases of gross negligence in which the Chancery judges decided that there had been fraud, were piled one upon another, until at last *a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud. That is not so. In all these cases fraud and dishonesty were the proper ratio decidendi, and gross negligence was only one of the elements which the judge had to consider in making up his mind whether the defendant's conduct had been dishonest.*"

(*z*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491, at p. 500.

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Fraudulent settlement upheld in favour of *bonâ fide* parties to valuable consideration.

On the other hand, where a trust based on value would, as between the settlor and his creditors, be clearly void, yet it will be supported as between the creditors and persons parties to the consideration, where such parties are not privy to the settlor's fraudulent intentions. Thus, in *Keran* v. *Crawford* (*a*) a settlement was made in contemplation of marriage, in which, after reciting that the intended husband was indebted to his intended wife in a sum of £20,000, he covenanted to pay that sum to the trustees, upon trust that they should advance it to him on mortgage. It was then declared that the trustees should stand possessed of the £20,000 upon trust to pay the income to the intended wife for life for her separate use, with remainder to the husband during his life or until he should become bankrupt, with remainder to the children of the marriage. The recital that the intended husband was indebted to the intended wife in £20,000 was quite false, and he was at the time of the marriage in insolvent circumstances; but the intended wife had no knowledge of his insolvent circumstances, and understood nothing about the recitals in the deed. The settlor subsequently executed the mortgage to the trustees for securing the £20,000, (but no money actually passed,) and afterwards became bankrupt. The creditors claimed that the settlement was void as against them. It was, however, held that the settlement, and the mortgage deed consequent thereon, were valid so far as concerned the interests of the wife and children; for the former was no party to the settlor's fraud, and gave valuable consideration (viz., marriage) for the settlement, and the latter were parties privy to that consideration.

Onus of proof of beneficiaries' knowledge.

In short, where a trust based on value is sought to be invalidated as against a party privy to the consideration, or where a voluntary trust is sought to be invalidated as against a purchaser for value from a *cestui que trust*, it must be conclusively shown that such party was privy and party to the fraudulent intent. For, although he may have known that the *effect* of the assignment would be to hinder or defeat the assignor's creditors or expectant creditors, yet if the transaction was a

(*a*) (1877) 6 Ch. D. 29; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769, affirmed (*sub nom. Clough* v. *Samuel*) [1905] A. C. 442; and see *Re Home, Ex parte Home* (1885), 54 L. T. 301, and *Parnell* v. *Stedman* (1883), 1 Cab. & El. 153. The valuable consideration must be substantial, however, and not merely technical: see *Re Ridler, Ridler* v. *Ridler* (1882), 22 Ch. D. 74. But *cf. Harris* v. *Tubb* (1889), 42 Ch. D. 79.

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bonâ fide purchase, and not a mere collusive arrangement between the parties with the *intention* of causing such hindrance or delay, it will be upheld (*b*). It should also be observed that the protection afforded to *bonâ fide* purchasers for value from a beneficiary under a fraudulent deed, is not confined to purchasers of legal estates or interests, but extends to purchasers of mere equitable interests (*c*).

ART. 17.—*When a Trust is void as against Subsequent Purchasers from Settlor.*

(1) A settlement of lands is void, as against subsequent *bonâ fide* purchasers for value from the settlor, if made with intent to defeat such purchasers (*d*); or if it is revocable (*e*).

(2) Provided always, that this article in nowise prejudicially affects *bonâ fide* purchasers for value (*f*), whether they be beneficiaries under a trust based on value but fraudulent in inception, or assigns of voluntary beneficiaries (*g*).

Law on the subject before 1893.

The law on this subject, the foundation of which is the statute 27 Eliz. c. 4, has to a large extent been revolutionised by the Voluntary Conveyances Act, 1893 (*h*). Although the statute of Elizabeth does not in any way speak of voluntary conveyances, it was for nearly 300 years held, in a long

(*b*) See *Darvill* v. *Terry* (1861), 6 H. & N. 807; *George* v. *Milbanke* (1803), 9 Ves. 190; *Daubeny* v. *Cockburn* (1816), 1 Mer. 626; *Hale* v. *Saloon Omnibus Co.* (1859), 4 Drew. 492; judgment in *Harman* v. *Richards* (1852), 10 Hare, at p. 89; *Alton* v. *Harrison* (1869), L. R. 4 Ch. 622; *Middleton* v. *Pollock* (1876), 2 Ch. D. 104; *Boldero* v. *London and Westminster Discount Co.* (1879), 5 Ex. D. 47; *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31; but see *Spencer* v. *Slater* (1878), 4 Q. B. D. 13.

(*c*) *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31.

(*d*) 27 Eliz. c. 4. The word "purchasers" includes mortgagees and lessees (*Dolphin* v. *Aylward* (1870), L. R. 4 H. L. 486; *Goodright* v. *Moses* (1775), 2 W. Bl. 1019). As to copyholds see *Doe* v. *Bottriell* (1833), 5 B. & Ad. 131; *Currie* v. *Nind* (1836), 1 Myl. & Cr. 17; and as to leaseholds, last note to *Saunders* v. *Dehew* (1692), 2 Vern. 271.

(*e*) 27 Eliz. c. 4, s. 4, in Revised Statutes; and see *Standon* v. *Bullock* (1600), cited 3 Rep. 82 b; *Lavender* v. *Blackston* (1675), 3 Keb. 526; *Jenkins* v. *Keymis* (1664), 1 Lev. 150.

(*f*) 27 Eliz. c. 4, s. 4.

(*g*) *Prodger* v. *Langham* (1663), 1 Keb. 486.

(*h*) 56 & 57 Vict. c. 21.

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line of decisions, that every voluntary conveyance or settlement was impliedly fraudulent within that statute as against subsequent purchasers, even although no actual intention to defraud existed at the date of the settlement impeached (*i*). This was purely judge-made law, and rested on the theory that, by selling the property afterwards for valuable consideration, the settlor so entirely repudiated the former voluntary settlement, and showed his intention to sell, as to raise against him and the beneficiaries a conclusive presumption that such intention *existed when he made the voluntary settlement;* and consequently that the latter was made with intent to defeat the subsequent purchaser (*k*). This principle appears to be somewhat farfetched, and of late years was frequently alluded to with disapprobation by learned judges, who nevertheless intimated that nothing less than legislative interference could alter a rule which had been uniformly acted on for so long a period. At length Parliament intervened, and by the above-mentioned Act of 1893 it is enacted (sect. 2) that—

"No voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act, twenty-seven Elizabeth, chapter four, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

The Act does not extend to cases where the subsequent purchase has been made before June 29th, 1893; and, as many titles depend upon the validity of such subsequent purchases made before that date, it seems necessary to give some examples of the old law. It is also necessary to remind the reader that although, by reason of this statute, voluntary conveyances will no longer be *ipso facto* void as against subsequent purchasers for value, yet, under the general doctrines of equity, a voluntary conveyance *may* be postponed to a subsequent purchaser for value *without notice* if the latter should get a conveyance of the legal estate, or if the beneficiaries under the voluntary settlement have been guilty of negligence, and the settlement did not vest the legal estate in a trustee for them (*l*).

(*i*) *Doe* v. *Manning* (1807), 9 East, 59; *Trowell* v. *Shenton* (1878), 8 Ch. D. 318.

(*k*) *Per* Campbell, C.J., *Doe* v. *Rusham* (1852), 17 Q. B. 723.

(*l*) See *Cave* v. *Cave* (1880), 15 Ch. D. 639; *Briggs* v. *Jones* (1870), L. R. 10 Eq. 92; *Northern*

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Illustrations.

Express intent to defraud.

Instances of settlements framed with the express intention of defrauding subsequent purchasers are rare; but if A. and B. were to conspire together, that A. should sell his land to B., and that A. should retain the title deeds in order to enable him to sell the land over again to C., the conveyance to B. would be void under the statute as against C., and not only voidable in equity, as to which see *infra*, p. 527.

Power of revocation.

So, again, where there was, under a marriage settlement, a power reserved to the settlor to grant a long lease with or *without* rent, it was held that this was practically a power of revocation *pro tanto*, and that a subsequent mortgagee of the settlor was entitled to the property for the period during which a lease could have been granted (*m*).

Examples of the law prior to June, 1893.

An excellent example of the old law is afforded by the case of *Trowell* v. *Shenton* (*n*). There a voluntary settlement of houses was made, and some few years afterwards the settlor agreed to sell three of the houses to a purchaser. In an action by the purchaser for specific performance of this agreement, it was held that the settlement was void as against him. It must, however, be pointed out that, as the invalidity of voluntary deeds as against subsequent purchasers depended entirely on an original intention inferred from the fact of the *settlor's* subsequent attempt to sell, the doctrine only applied where the settlor himself subsequently sold; and not where the subsequent vendor was his heir, or a second voluntary grantee of the settlor (*o*).

Small consideration was sufficient to save the settlement.

However, even under the old law a very small consideration would suffice to remove a *bonâ fide* settlement from the category of voluntary settlements for the purposes of the Act of Elizabeth: far less than will suffice to support a settlement made by an insolvent as against his creditors (*p*). Thus it was held, in *Price* v. *Jenkins* (*q*), that a settlement of leaseholds to which liability to pay rent and perform covenants was attached was, from the very nature of the property, based on value; for the beneficiaries thereby took upon themselves the primary discharge of those liabilities. This decision

Counties, etc., Insurance Society v. *Whipp* (1884), 26 Ch. D. 482; and judgment of KEKEWICH, J., in *Harris* v. *Tubb* (1889), 42 Ch. D. 79.

(*m*) *Lavender* v. *Blackston* (1675), 3 Keb. 526.

(*n*) (1878) 8 Ch. D. 318.

(*o*) *Per* CAMPBELL, C.J., *Doe* v. *Rusham* (1852), 17 Q. B. 723; and see *Parker* v. *Carter* (1845), 4 Hare, 400.

(*p*) See *Re Ridler, Ridler* v *Ridler* (1882), 22 Ch. D. 74; *Hamilton* v. *Molloy* (1880), 5 L. R. Ir. 339; *Rosher* v. *Williams* (1875), L. R. 20 Eq. 210; *Ex parte Hillman, Re Pumfrey* (1879), 10 Ch. D. 622. But see *Harris* v. *Tubb* (1889), 42 Ch. D. 79.

(*q*) (1877) 5 Ch. D. 619.

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has no application, however, where leaseholds are settled by way of sub-demise, as no onus is thereby imposed on the trustees (*r*).

Mutual promises good consideration.

Similarly, where there were mutual promises, each was considered to be a valuable consideration for the other. Thus it was settled, that if husband and wife, *each of them having interests*, no matter how much, or of what degree or what quality, came to an agreement which was afterwards embodied in a settlement, that was a bargain between husband and wife, which was not a transaction without valuable consideration (*s*). But where property was devised to the wife for her *separate use*, the husband had no estate or interest in it ; and, consequently, if it were settled by the husband and wife, such a settlement was not considered to be based on value, inasmuch as the husband had no rights to modify (*t*). And the same principle would of course apply to property belonging to a married woman under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Under old law notice of the settlement by subsequent purchaser was immaterial.

Under the old law it was repeatedly held (although modern judges expressed strong disapproval of it) that knowledge of the existence of a voluntary settlement by a subsequent purchaser did not deprive him of the statutory priority (*u*). However, the voluntary settlement was not cancelled unless the subsequent sale was a real *bonâ fide* alienation. Thus, where the consideration for the subsequent purchase was grossly inadequate, the sale might be impeached by the voluntary beneficiaries, on the ground that it was on the face of it a collusive arrangement between the settlor and the so-called purchaser for the purpose of relieving the former from the settlement (*x*).

Settlement only void *pro tanto*.

The settlement was, however, void only so far as was necessary to give effect to the subsequent transaction. For instance, in the case of property settled by a voluntary settlement, and subsequently mortgaged, the beneficiaries under the voluntary trust were entitled, subject to the mortgage ; and if unsettled estates were included in the mortgage, the beneficiaries were entitled to throw the mortgage on to the unsettled

(*r*) *Shurmer* v. *Sedgwick* (1883), 24 Ch. D. 597.

(*s*) *Teasdale* v. *Braithwaite* (1876), 4 Ch. D. 85, affirmed (1877) 5 Ch. D. 630 ; *Re Foster and Lister* (1877), 6 Ch. D. 87 ; and *Sehrieber* v. *Dinkel* (1884), 54 L. J. Ch. 241, affirmed (1886) 54 L. T. 911.

(*t*) *Shurmer* v. *Sedgwick*, (1883) 24 Ch. D. 597.

(*u*) *Doe* v. *Manning* (1807), 9 East, 59.

(*x*) *Doe* v. *Routledge* (1777), Cowp. 705 ; *Metcalfe* v. *Pulvertoft* (1813), 1 Ves. & B. 180.

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estates, if they were sufficient to answer it (*y*). In *Mallott* v. *Wilson* (*z*), this was carried further, and it was held that the beneficiaries were entitled to have the debt discharged out of the settlor's general estate.

(*y*) *Hales* v. *Cox* (1863), 32 Beav. 118.

(*z*) [1903] 2 Ch. 494.

CHAPTER IV.

THE INTERPRETATION OF EXECUTORY TRUSTS.

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ART. 18.—*Executory Trusts not construed so strictly as Executed Trusts.*

In the construction of executed trusts, technical terms are construed in their legal and technical sense(*a*). But in the construction of executory trusts, the court is not confined to the language used. And where it is improper or informal (*b*), or would create an illegal trust (*c*), or would otherwise defeat the settlor's intentions (as gathered from the motives which led to

(*a*) *Wright* v. *Pearson* (1758), 1 Eden, 125; *Austen* v. *Taylor* (1759), 1 Eden, 361; *Brydges* v. *Brydges* (1796), 3 Ves. Jun. 120; *Jervoise* v. *Duke of Northumberland* (1820), 1 Jac. & W. 559; and see *Re Whiston's Settlement*, *Lovatt* v. *Williamson*, [1894] 1 Ch. 661.

(*b*) See *Earl of Stamford* v. *John Hobart* (1710), 3 Bro. P. C. Toml. ed. 31.

(*c*) *Humberston* v. *Humberston* (1717), 1 P. Wms. 332.

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the settlement, and from its general object and purpose, or from other instruments to which it refers, or from any circumstances which may have influenced the settlor's mind (*d*), the court will direct a settlement to be executed in such form as will best answer the intent of the parties (*e*). In the case of marriage articles there is a strong presumption that the motive was to provide for the issue: and consequently words which read in their ordinary sense would defeat that object will be bent in order to effect it. But there is no such inherent presumption in other cases: and consequently some intention must be manifested either in the instrument itself, or inferentially from its object, or from other instruments to which it refers.

Distinction between executed and executory trusts well settled.

This rule has been acted on for over 200 years, and was stated by Lord Cowper (*f*) in 1710 in the following words: "In matters executory, as in the case of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, this court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made out in a proper and legal manner, so as may best answer the intent of the parties."

Executed and executory trust in same instrument construed differently.

The rule is strikingly exemplified by the ancient case of *Papillon* v. *Voice* (*g*). There a testator had bequeathed money to trustees upon trust to purchase real estate and settle it upon A. for life, with remainder to trustees to preserve contingent remainders, with remainders to the heirs of A.'s body, with power to jointure. He also devised his own lands to precisely similar uses. Yet it was held that, as he had manifested an intention to give A. a life estate only (which the rule in *Shelley's Case* had defeated in the case of the devised lands), the court would so model the executory trust as to carry out his intention by giving him a

(*d*) See *per* Lord CHELMSFORD in *Sackville-West* v. *Viscount Holmesdale* (1870), L. R. 4 H. L. 543.

(*e*) *Earl of Stamford* v. *John Hobart* (1710), 3 Bro. P. C. Toml. Ed. 33; and see *Cogan* v. *Duffield* (1876), 2 Ch. D. 44.

(*f*) *Earl of Stamford* v. *John Hobart*, *supra*.

(*g*) (1728) 2 P. Wms. 471; and see also *Trevor* v. *Trevor* (1847), 1 H. L. Cas. 239; *Parker* v. *Bolton* (1835), 5 L. J. (N. S.) Ch. 98; and *Thompson* v. *Fisher* (1870), L. R. 10 Eq. 207.

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life estate with remainder to his first and other sons successively in tail. In fact any indication in an executory trust that an apparent devisee in tail is only to take a life estate will be given effect to; as, for instance, a direction that he is to be unimpeachable for waste, or that he shall not have power to bar the entail, or that if he should die without leaving issue the property should go to other persons or the like (*h*).

Where strict construction would make trust illegal

On similar grounds, the words of an executory trust will be departed from where a strict construction would render the trust illegal. Thus, in an early case, a testator devised lands to a corporation, in trust to convey to A. for life, and afterwards, upon the death of A., to his first son for life, and then to the first son of that first son for life, with remainder (in default of issue male of A.) to B. for life, and to his sons and their sons in like manner. That was of course an attempt to create a perpetuity, yet Lord COWPER held that, so far as was consistent with the rules of law, the devise ought to be complied with; and directed that all the sons already born at the testator's death should take estates for life, with limitations to their unborn sons in tail (*k*).

Separate use imported in executory trust.

As another illustration of the general rule may be quoted the case of *Willis* v. *Kymer* (*l*). There a testatrix had by her will, after requesting her sister Eliza to perform her wishes as therein expressed, bequeathed various legacies to her brothers and sisters and their children, including a legacy of 3,000*l.* to her brother John for life, "the principal to be divided at his death between his children John, Sophia, and Mary Ann." The testatrix subsequently made a codicil, whereby she bequeathed to Eliza "all I possess," requesting that at her death she "will leave the sums as I have directed heretofore." Eliza by her will appointed the shares of Sophia and Mary Ann to them to their separate use, and the question then arose whether she could do so; and Sir GEORGE JESSEL, M.R., said, "I am of opinion that Eliza had power to attach a limitation to separate use. . . . The original will and codicil say nothing about separate use. They merely direct her to

(*h*) *Papillon* v. *Voice* (1728), 2 P. Wms. 471; *Parker* v. *Bolton* (1835), 5 L. J. (N. S.) Ch. 98; *Thompson* v. *Fisher* (1870), L. R. 10 Eq. 207; *Lord Glenorchy* v. *Bosville* (1733), For. 3, 2 Wh. & Tu. Lead. Cas. (ed. 7), 763; *Thompson* v. *Fisher* (1870), L. R. 10 Eq. 207.

(*k*) *Humberston* v. *Humberston* (1717), 1 P. Wms. 332; *Williams* v. *Teale* (1847), 6 Hare, 239.

(*l*) (1877) 7 Ch. D. 181.

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leave the money after her brother's death to his children, and nothing more. She is, therefore, bound not to make a different disposition. Well, she has conformed to that direction by leaving the money to the children, and, in doing so, has taken care to dispose of it in such a manner that the shares of the daughters shall, in case of their marriage, still remain for their own benefit, thus effectually carrying out her sister's intention."

Cross-remainder sometimes implied.

A testator directed his trustees to purchase lands in the counties of N. and D., to be settled, on the death of the eldest son of J. S. without issue (which happened), to the use of every son of J. S. then living or who should be born in the testator's lifetime, and the assigns of such son during his life, with remainder to trustees to preserve contingent remainders; but to permit such son and his assigns to receive the rents during his life, and after his decease to the use of such son's first and every other son successively in tail male, and on failure of such issue, to the use of the testator's right heirs:—*Held*, that the younger sons of J. S. took as tenants in common for life, with remainder as to each son's share to his first and other sons in tail male, with cross-remainders over (*m*).

ART. 19.—*Distinction between Executory Trusts arising respectively under Marriage Articles and Wills.*

(1). In the case of marriage articles there is a very strong presumption that the motive was to provide for the issue of the marriage; and consequently provisions which, if construed literally, would defeat that object, will be bent in order to give effect to the presumed intention.

(2). But in the case of other deeds and wills directing the creation of trusts, there is no such inherent presumption; and consequently some intention must either be verbally manifested, or must be inferred from the object of the instrument, or from other instruments to which it refers.

(*m*) *Surtees* v. *Surtees* (1871), L. R. 12 Eq. 400.

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Distinction between executory trusts arising under marriage articles and those arising under wills.

The preceding article shows the liberal interpretation which the court gives to executory trusts generally in order to comply with the inherent evidence of intention. The present article is directed to that evidence; and here there is a distinction to be observed between executory trusts contained in marriage contracts (or marriage articles as they are generally called) and executory trusts directed by other instruments. For marriage articles by their very nature furnish more emphatically a clue to the persons intended to be provided for (viz., the spouses and issue of the marriage), than do wills or non-matrimonial settlements. It is therefore a well-settled principle, that an intention to provide for issue will, in the absence of a contrary intention, be presumed in the case of executory trusts in marriage articles.

Rule in *Shelley's Case* negatived.

Thus, in marriage articles, a *covenant* to settle estates to the use of the husband for life, with remainder to the wife for life, with remainder to their heirs male and the heirs of such heirs male, is always construed to mean that the settlement shall be so drawn as to give *life estates only* to the husband and wife successively (*n*); for it is not to be presumed that the parties meant to put it in the power of the husband to defeat the very object of the settlement, which is to make a provision for the issue of the marriage (*o*). But where the articles show that the parties understood the distinction (as, for instance, where part of the property is limited in strict settlement, and part not), the trust will be construed strictly (*p*).

Rule in *Wild's Case* negatived.

So, again, where an intended husband covenanted to settle real estate to the use of himself for life, with remainder to the use of the "wife and children," it was held that, although

(*n*) *Trevor* v. *Trevor* (1720), 1 P. Wms. 622; *Streatfield* v. *Streatfield* (1735), Cas. t. Talb. 176, 1 Wh. & Tu. Lead. Cas. (8th ed.), 440; *Jones* v. *Langhton* (1698), 1 Eq. Cas. Abr. 392; *Cusack* v. *Cusack* (1714), 5 Bro. P. C. Toml. ed. 116; *Griffith* v. *Buckle* (1686), 2 Vern. 13; *Stonor* v. *Curwen* (1832), 5 Sim. 264; *Davies* v. *Davies* (1841), 4 Beav. 54; *Lambert* v. *Peyton* (1860), 8 H. L. Cas. 1.

(*o*) As to the meaning of "issue" in marriage articles, see *Nandike* v. *Wilkes* (1715), Gilb. Eq. Rep. 114; *Burton* v. *Hastings* (1715), Gilb. Eq. Rep. 113; *Hart* v. *Middlehurst* (1746), 3 Atk. 371; *Maguire* v. *Scully* (1828), 2 Hog. 113; *Burnaby* v. *Griffin* (1796), 3 Ves. Jun. 266; *Horne* v. *Barton* (1815), 19 Ves. 398; *Phillips* v. *James* (1865), 2 Dr. & Sm. 404.

(*p*) *Howel* v. *Howel* (1751), 2 Ves. Sen. 358; *Powell* v. *Price* (1729), 2 P. Wms. 536; *Chambers* v. *Chambers* (1729), 2 Eq. Cas. Abr. 35, c. 4; *Highway* v. *Banner* (1785), 1 Bro. C. C. 584.

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in the case of an executed trust under a will, these words would (pursuant to the rule in *Wild's Case* (*q*)) have given the wife an estate tail, yet in marriage articles the true construction was that she should only take a life estate, with remainder to the children as tenants in common (*r*).

Marriage articles providing for strict settlement of wife's real estate.

Nevertheless (somewhat strangely) it has been held that marriage articles providing that real estate should be "strictly settled" in the event of the lady having issue, did not authorise any portions for younger children; apparently on the ground that the object of "strict settlement" is to keep the property in the family (*s*). But it is humbly doubted whether this case (which is a case of construction and not of law) would now be followed by the House of Lords; for a power to portion younger children is almost universal in strict settlements. A similar direction in a will has (in the Irish courts), been held to authorise a jointure for a widow (*t*), but of course a jointure is an income charge, whereas portions intrench on the capital.

Anyhow it is apprehended that where the articles provide for "powers usually contained in settlements of a like nature," powers of creating portions and jointures would be implied, as powers of sale, exchange, etc., have been (*u*), if evidence of conveyancers were adduced to prove their usual nature. A reference to specific powers, on the other hand, has been held to negative others, on the principle *expressio unius exclusio alterius est* (*x*).

Proper form where marriage articles provide for settlement of wife's personalty.

With regard to marriage articles relating to the lady's personal property, the late Lord Justice BAGGALLAY made the following remarks in *Cogan* v. *Duffield* (*y*): "The mode of settling a wife's fortune which is approved by the court, is to give her the first life interest for her separate use" without power of anticipation (*z*); "then a life interest to the husband; then (subject to the powers given to the husband and wife of appointing the fund among the issue of the marriage) it is given equally to such of the children as being sons attain twenty-one or being daughters attain that age or marry; or else to the children equally with gifts over in favour of the others if any of them being sons die under twenty-one or being daughters

(*q*) (1599) 6 Rep. 17.
(*r*) *Rossiter* v. *Rossiter* (1863), 14 Ir. Ch. R. 247.
(*s*) *Grier* v. *Grier* (1872), L. R. 5 H. L. 688.
(*t*) *Wright* v. *Wright*, [1904] 1 Ir. R. 360.
(*u*) *Duke of Bedford* v. *Marquis of Abercorn* (1836), 1 Myl. & Cr. 312; *Wise* v. *Piper* (1880), 13 Ch. D. 848.
(*x*) *Brewster* v. *Angell* (1820), 1 Jac. & W. 625.
(*y*) (1876) 2 Ch. D. 44.
(*z*) *Re Parrott*, *Walter* v. *Parrott* (1886), 33 Ch. D. 274.

die under that age unmarried. If there is no child who being a son attains twenty-one, or being a daughter attains that age or marries, then, if the wife survives, the fund is limited to her, but if she dies in the husband's lifetime she has a general power of appointment over it, and in default of any exercise of that power, it is given to her next of kin as if she had died intestate and without having been married."

Cogan v. Duffield.

In the above case the articles provided that the trusts of the income were to be "for the benefit of the said Agnes Duffield and Joseph Cogan during their lives and the trusts of the capital for and amongst the children according to the appointment" of the said J. C. and A. D. or the survivor of them, and in default of appointment to the children equally, and in the event of there being no children and of the said J. Cogan being the survivor the trust property to be at his absolute disposal. Lord Justice BAGGALLAY, after making the remarks quoted in the last paragraph, said: "Such being the form of settlement which the court thinks most expedient, what would it do as to these articles? So far as they provide for the destination of the income or capital the court must yield to them. But in construing them it will have regard to what is recognised as the most proper form of settlement. Now here as regards the income, the articles are mere heads, and do not make a complete disposition of the income during the lives of the husband and wife. It is necessary to supplement them; and I agree that they ought to be carried into effect by giving the wife the first life estate to her separate use. When we come to the provisions for the children we find only general words which must be supplemented." His lordship then proceeded to make their interests contingent on the attainment of twenty-one in the case of males and on attaining that age or marrying in case of females, *so that the husband could not take as representative of a child who died in infancy.*

Powers ordered to be inserted in settlements made pursuant to marriage articles.

It is also settled that the power of appointment among issue should be given to the spouses *and the survivor of them* (*a*), and that the settlement ought to contain the usual powers of maintenance and advancement (*b*); but not an after-acquired property clause, even where the articles provide for "such other agreements, clauses, and provisions as are usually inserted in settlements of a like nature" (*c*). Where, however,

(*a*) *Re Gowan, Gowan* v. *Gowan* (1880), 17 Ch. D. 778.
(*b*) *Ibid.*, and *Nash* v. *Allen* (1889), 42 Ch. D. 54.
(*c*) *Re Maddy, Maddy* v. *Maddy*, [1901] 2 Ch. 820.

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such a clause is expressly directed, and also a clause for varying investments of settled personalty, a settlement of after-acquired real estate ought to contain a power of sale; for that is analogous to the power of varying investments of personal estate (*d*).

PARAGRAPH (2).

In a will, it is obvious that the same presumption will not arise as in the case of marriage articles. Therefore where a testator gave £300 to trustees upon trust to lay it out in the purchase of lands, and to settle such lands to the only use of M. and her children, and if M. died without issue, "the land to be divided between her brothers and sisters then living," it was held that this gave M. an estate tail (*e*).

Direction to settle daughters' shares on themselves strictly.

So where a testator directed that his daughters' shares should "be settled on *themselves* strictly," it was held that, there being no particular intention to benefit their issue, each daughter's share should be paid to her for her separate and inalienable use, and that if she died before her husband, then her share should go as she should by will appoint, and in default of appointment to her next of kin, but if she survived her husband, then the share should belong to her absolutely (*f*).

Only difference between construction of marriage articles and wills is that in marriage articles *res ipsa loquitur*.

There is, however, no difference between the construction to be put on an executory trust created by marriage articles, and on an executory trust created by will, except so far as the former (by their very nature) furnish more emphatically the means of ascertaining the intention of those who created the trust (*g*). In *Sackville-West* v. *Holmesdale*, Lord CHELMSFORD said: "The best illustration of the object and purpose of an instrument furnishing an intention in the case of executory trusts, is to be found in the instance of marriage articles, where, the object of the settlement being to make a provision for the issue of the marriage, no words, however strong (which in the case of an executed trust would place the issue in the power of the father), will be allowed to prevail against the implied intention.

(*d*) *Elton* v. *Elton* (1860), 27 Beav. 634; *Tait* v. *Lathbury* (1865), L. R. 1 Eq. 174; *Wise* v. *Piper* (1880), 13 Ch. D. 848; *Re Garnett-Orme and Hargreaves' Contract* (1883), 25 Ch. D. 595; *Re Rayner, Rayner* v. *Rayner* [1904] 1 Ch. 177; *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; and *Re Pope's Contract*, [1911] 2 Ch. 442, from which it seems that such a power will be implied if not expressed.

(*e*) *Sweetapple* v. *Bindon* (1706), 2 Vern. 536.

(*f*) *Loch* v. *Bagley* (1867), L. R. 4 Eq. 122.

(*g*) *Sackville-West* v. *Viscount Holmesdale* (1870), L. R. 4 H. L. 543; and see also *Christie* v. *Gosling* (1866), L. R. 1 H. L. 279.

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So, as Sir W. GRANT said, in *Blackburn* v. *Stables* (*h*), "in the case of a will, if it can be clearly ascertained from anything in the will that the testator did not mean to use the expressions which he has employed in their strict technical sense, the court, in decreeing such settlement as he has directed, will depart from his words to execute his intention.' . . . There are cases of executory trusts in wills, where the words 'heirs of the body' have been made to bend to indications of intention that the estate should be strictly settled; and a direction in a will, that a settlement 'shall be made as counsel shall advise,' has been held sufficient to show that the words were not intended to have their strict legal effect" (*i*). It was therefore held that a direction to settle land "in a course of entail to correspond as near as may be with the limitations" of a barony, would be properly executed, not by giving the baron an estate tail, but by giving him a life estate only, with remainders to his first and other sons successively in tail male.

Settlement of real estate to correspond with the limitations of a barony.

In another case, freehold property was devised to trustees upon trust to convey, assign, and assure it "unto and to the use of my son T. F., and the heirs of his body lawfully issuing, but in such manner and form, nevertheless, and subject to such limitations and restrictions, as that if T. F. shall happen to die without leaving lawful issue, then that the property may after his death descend unincumbered unto and belong to my daughter R. F., her heirs, executors, administrators, and assigns":—*Held*, that the devise was an executory trust to be executed by a conveyance to the use of T. F. during his life, with remainder to his first and other sons and daughters as purchasers in tail, with remainder to R. F. in fee (*k*).

Estate tail cut down to life estate in an executory trust arising under a will.

So, where a direction in a will refers to a settlement *on marriage*, or in any other way shows an intention to benefit the issue of the legatee, effect will be given to it. The case of *Re Spicer, Spicer* v. *Spicer* (*l*), is a good example of this. There the will declared that no daughter of the testator should be entitled to receive her share, but only the income, with power to dispose of the principal by will if unmarried. But in the event of any daughter marrying he empowered his trustees to see that her share was "duly and properly settled upon her by deed so that the same should be preserved for her separate

Direction to settle a female's legacy "on marriage."

(*h*) (1814) 2 Ves. & B. 367.

(*i*) *Bastard* v. *Proby* (1788), 2 Cox, 6.

(*k*) *Thompson* v. *Fisher* (1870) L. R. 10 Eq. 207.

(*l*) (1901) 84 L. T. 195; and see also *Re Parrott, Walter* v. *Parrott* (1886), 33 Ch. D. 274.

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use independently of her husband." In giving judgment, BUCKLEY, J., pointed out that the settlement was only directed in the event of marriage, and that therefore the parties could not avail themselves of the doctrine in *Loch* v. *Bagley* (*m*), where the words were simply 'the girls' shares to be settled on themselves strictly' and there were no words relating to marriage. He therefore directed a settlement on the footing of giving the daughter a life estate for her separate and inalienable use, with no life estate to the husband, and the usual trusts in favour of issue, and in default of issue for such persons as the daughter should appoint by will, and subject thereto for the lady's next of kin if she left a husband or for her absolutely if she died a widow. It would seem, however, that a direction to settle on a lady "and her children" without reference to marriage, would be construed to give a life interest to a surviving husband, and a joint power to husband and wife to appoint among issue, and a like power to survivor, extending, in the event of the lady being the survivor, to the issue of a second marriage, with all such other powers and trusts as are set out on p. 124, *supra* (*n*).

Direction to settle on a man until marriage, etc.

Where a fund was bequeathed to a man until marriage, and then "to be settled on his wife and children, and in default of issue to revert" to the testator's estate, the court directed that the trusts should be in favour of the man for life, with remainder to the wife for life, with remainder to the children as husband and wife or survivor should appoint, (but if the husband should be the survivor his power was to extend to the children of a future marriage) with an ultimate trust in default of appointment for all the children *of the husband* attaining twenty-one or in case of daughters attaining that age or marrying, and in default of children attaining a vested interest the fund to revert to the testator's estate (*o*).

Direction to settle female's real estate on marriage.

Rule in *Shelley's Case* disregarded

Similar considerations determined the leading case of *Lord Glenorchy* v. *Bosville* (*p*). There the settlor devised real estate to trustees upon trust, upon the *happening of the marriage* of his grand-daughter, *to convey* the estate to the use of her for life, with remainder to the use of her husband for life, with remainder to the issue of her body, with remainders over. It was held that, though the grand-daughter would have taken an estate tail had it been an executed trust, yet as the trust

(*m*) (1867) L. R. 4 Eq. 122.

(*n*) *Re Parrott*, *Walter* v. *Parrott* (1886), 33 Ch. D. 274; *Nash* v. *Allen* (1889), 42 Ch. D. 54.

(*o*) *Re Gowan*, *Gowan* v. *Gowan* (1880), 17 Ch. D. 778, where the form of order is given in full.

(*p*) (1733) For. 3, 2 Wh. & Tu. Lead. Cas. (7th ed.), 763.

was executory, and as the testator's intention was to provide for the children of the marriage, that intention would be best carried out by a conveyance to the grand-daughter for life, with remainder to her husband for life, with remainder to her first and other sons in tail, with remainder to her daughters.

Departures from the ordinary form where intention apparent.

Where, however, there are indications that the settlor contemplates a different form of settlement to that favoured by the court, his wishes will have effect given to them. Thus, in *Re Parrott, Walter* v. *Parrott* (*q*), a testator had bequeathed as follows: "To my daughter A., wife of M. W., I bequeath 10,000*l.*, this amount to be settled upon her for her life, and to be invested for her in good securities, in the names of two or more trustees; at her death, 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband, if living; if deceased, then the whole amount is to be equally divided amongst her children." It was held by the Court of Appeal that, on the construction of the will, the settlement must be so framed as to confine the contingent gift of 2,000*l.* to "her husband if living" to her husband at the date of the will (*r*), and also (rather curiously) so as to confine the trusts in favour of the daughter's children to children *by that husband* who being male should attain twenty-one or being female should attain that age or previously marry. It was further held that the settlement ought to debar the daughter from anticipation during coverture, and ought to contain the usual powers of maintenance and advancement, and a general testamentary power of appointment exercisable by the daughter in default of children, with the usual limitations to herself or next of kin in default of appointment; but *not* any power of appointment among her children, as that would be inconsistent with the trust for *equal division*.

ART. 20.—*How far the Wife is bound by Covenants to Settle Property.*

(1) Whether a wife is bound by a covenant contained in a marriage settlement to which she is a party, to settle her other, or her after-acquired property, or whether such a covenant only binds the husband to

(*q*) (1886) 33 Ch. D. 274.

(*r*) But see *Nash* v. *Allen* (1889), 42 Ch. D. 54, where on the language it was held that a subsequent husband was entitled to a life interest.

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settle whatever he may acquire *jure mariti*, depends on the words used, in accordance with the following principles:

(a) If the words consist of an agreement or declaration, or even a covenant by the husband alone, that the wife's property "shall be settled" (and *a fortiori* where she joins expressly in the covenant), both spouses are bound.

(b) A mere covenant by the husband alone that *he* will settle does not bind the wife, unless the property referred to is specific. But a covenant by him alone that he, *and his wife*, or that he and all necessary parties, will settle binds her even although the property be not specific.

(2) If the covenant would be binding on the wife but for her infancy, it will be voidable only and not void; and if she wishes to repudiate it, she must do so promptly.

PARAGRAPH (1).

Proviso or declaration that property shall be settled.

A marriage settlement contained the following clauses: "It is hereby provided declared and agreed by and between the said parties to these presents and the said [*husband*] for himself," etc., "doth hereby covenant promise and grant to and with the [*trustees*]" that in case the marriage should take effect, and the wife or the husband in her right should at any time during the life of the husband become possessed of or interested in or entitled to any personal estate, etc., in possession, reversion, remainder, or expectancy, the husband and wife should and would transfer and assign the same to the trustees:—*Held*, that the wife was bound (*s*).

Covenant by the husband alone that the wife shall settle binds the wife.

The last illustration is a simple case, and is, indeed, what arises under all instruments which are well drafted. But the point is not so simple where there is not a proviso and declaration (which, of course, *primâ facie* binds all parties to the deed), but a covenant by the husband alone. In such cases it appears, from the modern authorities, that the wife is bound where the covenant is that the property "shall be settled," or that "he and the wife" will settle, on the ground that the wife is an assenting party to the covenant, and cannot

(*s*) *Townshend* v. *Harrowby* (1858), 27 L. J. Ch. 553.

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afterwards obstruct its performance. Thus, in the case of *Butcher* v. *Butcher* (*t*), the form of the husband's covenant was, that in case any personal estate should at any time thereafter, during the coverture, come to or vest in the wife, or the husband in her right, the same should be paid, assigned, or transferred *by all proper parties*:—*Held*, that a reversionary interest in certain property, to which the wife became entitled during the coverture for her separate use, was bound by the covenant.

A similar decision was given by KAY, J., in *Re De Ros' Trust, Hardwicke* v. *Wilmot* (*u*), where there was a covenant by the husband only, in general terms, but the acts which were to be done in pursuance of the covenant were expressly to be done *by the wife as well as the husband*.

Covenant by the husband alone that he will settle is not binding on the wife.

On the other hand, in *Dawes* v. *Tredwell* (*x*), where the words were very similar, except that the settlement was not to be "by all proper parties," but the acts were *only to be done by the husband*, it was held that the property which came to the wife for her separate use was not bound by the covenant. But the decision was *contra* where the covenant was that the husband *and all other necessary parties* would settle (*y*).

Aliter where the property is specific and the wife joins in the deed.

In *Lee* v. *Lee* (*z*), the late Sir G. JESSEL, M.R., decided that the wife is bound even when the husband's covenant does not expressly state that she is to do any act or that the property is to be settled *in cases where the property aimed at by the covenant is specific* and not general. In that case, an ante-nuptial settlement was signed by all parties, including the intended wife, and, by it, her parents agreed that they would appoint to her a share of certain reversionary property over which they had a power of appointment. The husband then agreed that *he* would settle such share as the wife might take *in the property in question*, either by appointment, or in default of appointment. It was held by the Master of the Rolls that although there was no express covenant by the wife, nevertheless the property was bound. He said: "then the husband proceeds to settle, or agrees to settle, what does not belong to him, as, indeed, appears by the instrument itself. Unquestionably the property was not his to settle; it was his wife's, and he could not settle it himself, because during the lives of the wife's father and mother he could have no interest whatever; therefore, his covenant or agreement to settle was a

(*t*) (1851) 14 Beav. 222.
(*u*) (1885) 31 Ch. D. 81.
(*x*) (1881) 18 Ch. D. 354.
(*y*) The unreported case of *Re Smith, Robson* v. *Tidey, per* BYRNE, J., March 15th, 1900.
(*z*) (1876) 4 Ch. D. 175.

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covenant or agreement to settle not his own estate, but somebody else's. But his wife was an assenting party to this agreement. It was, therefore, simply an agreement by A., with B.'s assent, to settle B.'s estate, and in such a case it is clear that B. is bound. So that, even if it is treated as a covenant by the husband alone, yet it is for valuable consideration, and with the assent of the wife, and she is therefore bound."

Covenant by the husband alone that the property shall be settled.

In the case of *Re Haden, Coling* v. *Haden* (*a*), a marriage settlement contained a covenant by the husband alone, that all the real and personal estate above a certain value which should at any time during the coverture by any means be acquired by the wife, or the husband in her right, *should forthwith be settled* upon the trusts of the settlement. The wife was a party to and executed the deed. During the coverture she became entitled, under the will of her father, to certain real estate. It was held by STIRLING, J., that the property in question was bound. After commenting on the cases above cited, he said: "In the present case the covenant is by the husband alone, that the property shall be settled, not saying by whom. The wife was a party to and executed the settlement. It contains no recitals, so I gain no assistance from that source. It seems to me, I confess with some hesitation, that the only way in which I can deal with such a covenant is to look and see if it has a plain meaning, and, if so, to give effect to it. Looking at it from that point of view, and reading the material words, it is a covenant that all the real and personal estate which shall at any time be acquired by the wife or the husband in her right, shall be settled. Can I fairly limit the subject-matter of the covenant to the interest of the husband in the real estate? It seems to me that I cannot. The words are, in my opinion, intended to include more than the mere interest of the husband. It is an agreement that all the real property of the wife shall be settled, and a person assenting to such a covenant must be taken to mean that the covenant shall take effect accordingly."

Effect of Married Women's Property Act.

On the assumption that a covenant to settle after-acquired property is not binding on the wife, it follows that property which has been given to her for her separate use, in equity, does not fall within the husband's covenant. With regard, however, to separate property arising by virtue of the Married Women's Property Act, 1882, between 1882 and 1907 this was not so. This question, however, has already been fully

(*a*) [1898] 2 Ch. 220.

discussed at pp. 88 and 89, *supra*, and need not be further referred to here. Art. 20.

PARAGRAPH (2).

Assuming that a woman, who is an infant, purports to covenant to settle her after-acquired property, and subsequently becomes entitled to property for her separate use, is she bound? The answer is yes, unless she has, after attaining her majority, and becoming aware of her right to repudiate, promptly disaffirmed her liability (*b*).

ART. 21.—*Property which is primâ facie excluded from a Covenant to Settle other or after-acquired Property.*

Primâ facie, covenants to settle other or after-acquired property (not definitely described) do not comprise:

(1) Income, or (*semble*) capitalisations of income.
(2) Corpus which a married woman is restrained from anticipating, unless she is simply restrained until it falls into possession.
(3) Property over which the covenantor has merely a general power of appointment, or which she has a statutory power of making her own, unless she exercises such powers in her own favour.
(4) [Possibly] gifts made by her husband.

PARAGRAPH (1).

A settlement was made by a husband of all his personal estate to which he was then or might thereafter become entitled, in trust for himself for life with remainders over:— *Held*, not to comprise his interest in a fund bequeathed to him for life (*c*).

Ordinary covenant binds corpus only, and not income.

(*b*) See *Viditz* v. *O'Hagan*, [1900] 2 Ch. 87; *Wilder* v. *Pigott* (1882), 22 Ch. D. 263; *Greenhill* v. *North British, etc., Co.*, [1893] 3 Ch. 474; and *Re Hodson, Williams* v. *Knight*, [1894] 2 Ch. 421.

(*c*) *St. Aubyn* v. *Humphries* (1856), 22 Beav. 175; *Townshend* v. *Harrowby* (1858), 27 L. J. Ch. 553; *Lewis* v. *Madocks* (1810), 17 Ves. 48; *Re Dowding, Gregory* v. *Dowding*, [1904] 1 Ch. 441.

Art. 21.

The same principle applies to an annuity bequeathed to a wife (*d*). But of course such limited interests may be caught by the covenant where it is plainly intended that they should be (*e*).

Questionable whether such covenants bind property purchased out of the savings of income.

Whether, however, a wife who has covenanted to settle after-acquired property is liable to settle property which she has purchased out of the savings of income is not settled. In *Re Bendy, Wallis* v. *Bendy* (*f*), KEKEWICH, J., held that she was. On the other hand, ROMER, J., dissented from that view in the subsequent case of *Finlay* v. *Darling* (*g*), saying: "If income which the lady receives from the settled funds and property, is not bound by the covenant (and it is clear the income is not), it appears to me on principle not right to hold that, merely because the lady does not choose at once to spend that income but accumulates it either in her purse or at her bankers, she renders that liable to be bound by the covenant which was not bound before. If one half-yearly income she received was not bound, I fail to see why, after several years' receipts of half-yearly income, when the money she had not spent of that income remained in her hands and exceeded 200*l.*, I should hold that that accumulated income passed from her and went to the trustees of the settlement. In my opinion that is not the meaning or intent of the covenant here; and, on principle I think that the covenant ought not to be extended to that. If the accumulations in her hands or at her bankers are not held to be bound by the covenant, I fail to see on principle why I should hold the money bound when it becomes invested by her in some investment, such as consols or the like." This was followed by BUCKLEY, J., in *Re Clutterbuck's Settlement, Bloxam* v. *Clutterbuck* (*h*); and it is humbly conceived that this reasoning is correct, and that where a woman covenants to settle after-acquired property she contemplates merely the settlement of property which may come to her by gift or bequest, and not property which she may acquire out of the savings of her income.

This view is strengthened by the case of *Churchill* v. *Denny* (*i*). There, a naval officer had covenanted to settle any property which he might thereafter acquire. Some years afterwards, he commuted his half-pay for a capital sum which

(*d*) *Re Dowding, Gregory* v. *Dowding*, [1904] 1 Ch. 441.
(*e*) *Scholfield* v. *Spooner* (1884), 26 Ch. D. 94, explained in *Re Dowding, Gregory* v. *Dowding*, *supra*.
(*f*) [1895] 1 Ch. 109.
(*g*) [1897] 1 Ch. 719.
(*h*) [1905] 1 Ch. 200.
(*i*) (1875) L. R. 20 Eq. 534.

was then claimed by the trustees. It was, however, held that it was not liable. Art. 21.

Paragraph (2).

Property coming to a lady with restraint on anticipation or alienation, is not bound by a covenant to settle, unless she is merely restrained while her interest remains reversionary (*k*). Such covenants only refer to property which a wife *can* assign, and a restraint on anticipation effectually prevents her doing so during coverture (*l*). It is conceived that, although the restraint can now be removed by a judge, under s. 7 of the Conveyancing Act, 1911 (repealing and re-enacting in wider form s. 62 of the Conveyancing Act, 1881), a lady is under no obligation to seek that removal at the request of the trustees (see illustration to paragraph (3), *infra*). Nor will the court remove the restraint unless it is clearly for her benefit (*m*).

Property given to wife without power of alienation is not subject to the covenant.

Paragraph (3).

In *Townshend* v. *Harrowby* (*n*), the wife had joined in a covenant to settle after-acquired property. She subsequently became the donee of a general power of appointment over some property; but it was held that the covenant did not apply to it so as to oblige her to exercise the power in favour of herself or the trustees of the settlement. Kindersley, V.-C., said: "It was very important to uphold the broad distinction between property and power, and he (the Vice-Chancellor) had always endeavoured to do so. It was true that power might result in property, and the exercise of it, if general, might affect property in an indirect manner; but so long as it was unexercised it was distinct from property. In one sense it was interest in property, because if there was a power it could not be said that there was not some interest. Technically, however, in the eye of a court of law or equity, a power was not an interest, and an interest was not a power. This covenant was clearly not intended to apply to a mere power."

Covenants to settle after-acquired property do not oblige a donee of a general power of appointment to appoint the property to herself.

But where property was given for such purposes as A. should appoint, and in default of appointment to her absolutely, it was held that she could not defeat a covenant in her marriage

(*k*) *Re Bankes, Reynolds* v. *Ellis*, [1902] 2 Ch. 333; *Re Clarke's Trusts* (1882), 21 Ch. D. 748; *Re Parkin, Hill* v. *Schwarz*, [1892] 3 Ch. 510.

(*l*) *Re Currey, Gibson* v. *Way* (1886), 32 Ch. D. 361; *Re Blundell*, [1901] 2 Ch. 221.

(*m*) *Re Blundell*, *supra*.

(*n*) (1858) 27 L. J. Ch. 553; and see also *Ewart* v. *Ewart* (1853), 11 Hare, 276, and *Bower* v. *Smith* (1871), 19 W. R. 399, L. R. 11 Eq. 279.

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settlement to settle after-acquired property exceeding 200*l.* by making a succession of appointments to herself of 199*l.* each (*o*). It would seem to follow that wherever there is a gift to the lady herself in default of appointment the fund is caught by the covenant.

On the other hand, a wife is not bound to disentail an estate tail in order to convey the fee simple to the trustees of her settlement (*p*).

PARAGRAPH (4).

Whether covenants to settle after-acquired property extend to gifts made by husband himself.

Whether such covenants *primâ facie* exclude gifts made by the husband to the wife is at present doubtful. In *Coles* v. *Coles* (*q*), JOYCE, J., held that such gifts were excluded. On the other hand, in *Re Ellis's Settlement*, *Ellis* v. *Ellis* (*r*), SWINFEN EADY, J., held the contrary view, and said that he did not think that JOYCE, J., meant to lay down any general rule; and in *Re Plumptre's Marriage Settlement*, *Underhill* v. *Plumptre* (*s*), EVE, J., (while admitting that it seemed somewhat anomalous), followed the view of SWINFEN EADY, J. The present writer with great humility submits that JOYCE, J., did lay down a general rule of *primâ facie* interpretation and that he was right in that view. These covenants are (as decided by EVE, J., in *Re Plumptre's Marriage Settlement*, *Underhill* v. *Plumptre*) purely executory, and should therefore, like marriage articles, be construed so as to answer the presumed intentions of the parties. But if so, it is difficult to believe that any man and woman, about to intermarry, ever intended by such covenants to preclude the husband making a present to his wife. A covenant so construed might embrace every chattel (such as a diamond necklace, a motor car, a ring, or even a dog) which the husband might wish to give to his wife for her personal use and enjoyment, and every cheque which he might give her to take a trip on the Continent, which is, it is submitted, a *reductio ad absurdum*. Moreover, what was the object of these covenants? Surely to protect the wife against the old common law doctrine which handed her chattels to her

(*o*) *Re O'Connell*, *Maule* v. *Jagoe*, [1903] 2 Ch. 574; and see also *Bower* v. *Smith* (1871), 19 W. R. 399, explained in *Steward* v. *Poppleton*, [1877] W. N. 29; and *Re Lord Gerard*, *Oliphant* v. *Gerard* (1888), 58 L. T. 800, observed upon in *Re O'Connell*, *Maule* v. *Jagoe*, *supra*.

(*p*) *Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200; *Re Dunsany's Settlement*, *Nott* v. *Dunsany*, [1906] 1 Ch. 578.

(*q*) [1901] 1 Ch. 711, following MALINS, V.-C., in *Dickinson* v. *Dillwyn* (1869), L. R. 8 Eq. at p. 551, and followed by the Irish court in *Kingan* v. *Matier*, [1905] 1 Ir. R. 272.

(*r*) [1909] 1 Ch. 618.

(*s*) [1910] 1 Ch. 609.

husband absolutely and her lands to him for his life. That that was the primary object of such covenants was distinctly stated by JAMES, L.J., in *Re Edwards* (*t*), where it was held that they were restricted to property coming to the wife during the marriage (*infra*, p. 139). SWINFEN EADY, J., seems to have dissented from this last view and said that such covenants were also intended for the benefit of the issue. No doubt the issue are within the valuable consideration which supports them, for otherwise the issue could not enforce them; but the view that these covenants are intended for the benefit of the issue, seems to be inconsistent with the cases (*supra*, p. 134) which have *primâ facie* excluded the wife's income and capitalisations of income from the purview of such covenants, and with those in which it has been held that they only apply to property falling to the wife during the coverture although they extend to property falling to the husband *jure mariti* after the coverture has been determined by death or divorce (see *infra*, Art. 23), the *ratio decidendi* of which is that these covenants are intended for the wife's protection. If it be argued that these covenants may exclude personal chattels, but not gifts of money or securities, it is answered that such exclusion can only be justified by implied intention and that it is a safer and more logical rule to apply the intention to all gifts made by a husband than to some only. It must also not be forgotten that, before the Married Women's Property Act, a husband was incapable of making a common law gift to his wife; so that, as a matter of law, such apparent gifts remained his property, and could not be caught by such covenants; and it would be a strange effect of the Act to bring within such covenants, common law gifts which the law previously excluded from them. Art. 21.

It is much to be desired that the question should be considered by the Court of Appeal, as the writer knows of several instances in which trustees have claimed such gifts, and, rather than litigate the matter, the husband and wife have given way.

In a somewhat analogous case, it has been held that an indemnity given by a Scottish husband to his wife against an act (*e.g.*, change of domicile) which would deprive her of her *jus relictæ* under the law of Scotland, does not bring her *jus relictæ* within a covenant to settle after-acquired property (*u*).

(*t*) (1873) L. R. 9 Ch. at p. 100.
(*u*) *Re Simpson, Simpson* v. *Simpson*, [1904] 1 Ch. 1.

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ART. 22.—*What Property is comprised in a General Covenant to settle Property to which the Wife is presently entitled.*

Where the covenant is to settle property to which the wife "is now entitled," or words to that effect, all property to which she then has any title, whether it be in possession, reversion, or contingency, is bound.

Covenants to settle present property comprise property to which the wife has a title, whether in possession, reversion, or contingency.

In *Re Jackson's Will* (*v*), the covenant was, "that if at the time of the solemnization of the intended marriage, the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife she or her husband in her right shall become, beneficially entitled to any real or personal property estate or effects for any estate or interest whatsoever, then and in every such case" it should be settled. *Held*, that a reversionary interest in personalty which was vested in the wife at the date of the marriage, but was liable to be divested by the exercise of a power of appointment, was included in the covenant, although it did not fall into possession until after the husband's death (*x*).

ART. 23.—*What is comprised in a Covenant to settle after-acquired Property of the Wife, or of the Husband in her Right.*

(1) A covenant to settle after-acquired property of the wife is limited, *primâ facie*, to property acquired during the marriage.

(2) A covenant to settle property to which "the wife *or the husband in her right* shall become entitled," *primâ facie* binds, not only future property of the wife, but also property to which she is entitled at the date of the marriage; (*sed quære*, when the marriage took place since 1882).

(3) A covenant to settle property to which *the wife* shall become entitled, binds—

(a) property to which she is then entitled in

(*v*) (1879) 13 Ch. D. 189.

(*x*) See also *Re Mackenzie* (1867), L. R. 2 Ch. 345; *Agar* v. *George* (1876), 2 Ch. D. 706; *Cornmell* v. *Keith* (1876), 3 Ch. D. 767; and *Sweetapple* v. *Horlock* (1879), 11 Ch. D. 745.

reversion, remainder, or contingency; provided that it falls into possession during the period covered by the covenant; and

(b) property to which she has no title at the date of the marriage, but in which she acquires a reversionary or contingent interest during the period covered by the covenant, even although it may not fall into possession during that period.

PARAGRAPH (1).

Primâ facie a covenant to settle after-acquired property is to be limited to property acquired during the coverture.

In *Re Edwards* (*y*), JAMES, L.J., said: "The primary object of a covenant to settle the future property of a wife, is to prevent its falling under the sole control of the husband, and it therefore, *primâ facie*, is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the Lord Chancellor [SELBORNE] on the case, and he agrees with us in the opinion that, in the absence of any expression showing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words 'during the said intended coverture' had been inserted. It appears to his lordship, as well as to us, that the rule laid down in *Dickinson* v. *Dillwyn* (*z*) and *Carter* v. *Carter* (*a*) is to be followed, and not the rule which was acted upon in *Stevens* v. *Van Voorst* (*b*)." The rule has been more lately carried to its logical conclusion, the court holding that it applies where the coverture has been determined either by divorce or judicial separation (*c*).

But where the husband survives, it binds him to settle property acquired *jure mariti* after the wife's death.

The rule, as above stated, was, however, expressed somewhat too broadly by the late Lord Justice JAMES; for a general covenant to settle a wife's future property will not be restricted to property falling in during the coverture if the *husband* survives, though it will be so restricted when the wife survives. In *Fisher* v. *Shirley* (*d*), the wife was entitled to a vested reversionary interest in personal estate, which fell into possession after her death, and was claimed by her husband *jure mariti*. STIRLING, J., however, held that it was bound by

(*y*) (1873) L. R. 9 Ch. 97, at p. 100.
(*z*) (1869) L. R. 8 Eq. 546.
(*a*) (1869) L. R. 8 Eq. 551.
(*b*) (1853) 17 Beav. 305; and see *Re Campbell's Policies* (1877), 6 Ch. D. 686; *Re Coghlan*, *Broughton* v. *Broughton*, [1894] 3 Ch. 76.
(*c*) *Davenport* v. *Marshall*, [1902] 1 Ch. 82; *Re Simpson*, *Simpson* v. *Simpson*, [1904] 1 Ch. 1.
(*d*) (1889) 43 Ch. D. 290.

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the husband's covenant to settle the wife's after-acquired property. The learned judge, commenting upon Lord Justice JAMES' judgment in *Re Edwards, supra,* said: "No doubt the concluding words of the Lord Justice in that judgment at first sight support the contention on behalf of the husband. But when the literal construction of a covenant is departed from, one ought to look at the reason for so doing, and the reason assigned is, that the object of the covenant is to protect the property, the subject of the covenant, from the husband's marital right, and preserve it for the benefit of the wife and children. There is no need to protect property against the husband's marital right where the wife does not become entitled until after the husband's death: but there is need of such protection where the husband is the survivor and the property falls in after the wife's death. If effect were given to the husband's claim, his marital right would be enforced instead of the wife's property being protected against it, and the very object of the covenant would be defeated. The words of the covenant in the present case are quite general, and the reason assigned for limiting them does not appear to apply, and, in my opinion, they cannot, in the present case, be limited as suggested."

Quære, whether a husband's covenant would bind separate property of the wife vesting in him as her administrator.

Whether the distinction made by Mr. Justice STIRLING would apply where the property is separate estate of the wife, otherwise than under the Married Women's Property Act, is not clear. On the one hand, if she died intestate, her husband would take it, and it would therefore fall within the mischief aimed at by Mr. Justice STIRLING. On the other hand, if she made a will bequeathing a vested remainder, the mischief in question would seem not to arise. Possibly the difficulty might be solved if the rule were still more elaborated, and such covenants were held binding on the *wife* with regard to property falling into possession during the coverture only, and on the husband as to property coming to him *jure mariti*, whether during the coverture or afterwards. But this is a question for future decision.

PARAGRAPH (2).

Covenants which apparently comprise future acquired property only

The cases in relation to what words do, and what do not, indicate an intention to settle property acquired after the marriage, are very conflicting, and probably each case must be judged on the actual words used. But in *Williams* v. *Mercier* (*e*) it was held that, in the absence of any explanatory recitals, a covenant to settle property to which "the wife *or*

(*e*) (1884) 10 App. Cas. 1.

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the husband in her right shall become entitled during the coverture," comprised property to which *she* was entitled at the moment of the marriage, inasmuch as by the fact of the marriage the husband became entitled *jure mariti*.

may sometimes bind present property as well.

Whether the Married Women's Property Act altered this between 1882 and 1908 would seem to be a nice question, having regard to the decision in *Hancock* v. *Hancock* (*f*). It is, however, conceived that it has; as it would be a *petitio principii* to assume that s. 19 of the Act applied, when the very object of the inquiry is whether a settlement of the property in question was in existence.

However this may be, it seems clear, that where the covenant is merely to settle property to which the *wife* shall become entitled, then the covenant will not embrace present property of the wife's. And the rather thin and scholastic construction adopted in *Williams* v. *Mercier*, *supra*, will readily yield to anything in the context, showing that property to which the wife was *then* entitled was not intended to be included; *e.g.*, a recital (*g*).

PARAGRAPH (3).

On the assumption that the covenant only relates to future property, question arises what future property is bound.

Assuming that the covenant is restricted to *future* property of the wife, the question then arises, what constitutes *future* property. Paragraph (3) is believed to enunciate correctly the principles which regulate that question.

Argument proving that there must be a new ownership, or a change in the old one, to bring property within a covenant to settle future property.

That this is so, is apparent from the following considerations. A covenant to settle future acquired property (without more) is sufficiently wide to embrace (1) that which may be hereafter acquired in possession, although it has already been acquired in title, and (2) that which may be acquired in title only, although possession may never be obtained during the coverture; but it cannot possibly embrace that to which a *title* has already been acquired, which title is not followed during the coverture by the actual right to possession. In short, such a covenant is aimed at some future change of ownership, which may be either a change of title or a change of the actual right to enjoy; and where neither one nor the other occurs, there is nothing on which the words of the covenant can act.

A remainder vested at the marriage not bound unless it falls in during the husband's life.

Thus, where a vested remainder, to which the wife is entitled at the date of the settlement, does *not* fall in during the coverture or the life of the husband (if he be survivor), it will not be bound by the covenant to settle future-acquired property; for

(*f*) (1888) 38 Ch. D. 78; see p. 89, *supra*.

(*g*) See *Re Garnett, Robinson* v. *Gandy* (1886), 33 Ch. D. 300; and see also *Re Viant* (1874), L. R. 18 Eq. 436.

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the wife, *ex hypothesi*, has acquired no new right in it since the settlement (*h*).

Aliter if it does fall in.

But when such a vested remainder does fall in during the coverture (or where the period for which the covenant is to be operative is not named during the life of the husband (*i*)), then it is bound; for the wife has acquired a new right since the settlement, viz., the right to the present enjoyment of the property (*k*). The same rule applies with increased force to an interest, contingent at the date of the marriage, which falls into possession during the coverture (*l*).

A remainder which is not in existence at date of marriage is bound, even although it does not fall in during the husband's life.

A fortiori will the property be bound, where the wife had no title whatever to it at the date of the marriage, if she acquires a title, (although it be only in remainder or reversion,) during the period which the covenant covers. For it is clearly an entirely new proprietary right, and not (as in the last case) merely the change of a right in reversion to a right in possession (*m*).

ART. 24.—*Covenants to settle a Definite Interest in Property.*

Where the covenant is to settle a definite estate or interest in property, if that interest subsequently becomes enlarged, the covenant does not bind the enlarged interest; and if the definite interest fails, but the covenantor acquires the property under another title, it will not be bound.

Property not bound if it comes to the covenantor in a different way from that contemplated by the settlement.

In *Sweetapple* v. *Horlock* (*n*) (corrected in *Re Jackson's Will* (*o*)), the intended wife, being entitled to a reversionary interest under her parents' settlement, liable to be defeated by

(*h*) See *Re Jones* (1876), 2 Ch. D. 362; *Re Pedder's Settlement Trusts* (1870), L. R. 10 Eq. 585; *Re Clinton's Trust* (1872), L. R. 13 Eq. 295; see also *Re Michell's Trusts* (1878), 9 Ch. D. 5, where the wife's interest was contingent at the date of the settlement, became vested during the coverture, but did not fall into possession until after the coverture determined, and it was held to fall within the covenant.

(*i*) *Fisher* v. *Shirley* (1889), 43 Ch. D. 290.

(*k*) *Blythe* v. *Granville* (1842), 13 Sim. 190; *Spring* v. *Pride* (1864), 4 De G. J. & S. 395; *Re Clinton's Trust* (1872), L. R. 13 Eq. 295.

(*l*) *Archer* v. *Kelly* (1860), 1 Dr. & Sm. 300; *Brooks* v. *Keith* (1861), 1 Dr. & Sm. 462; *Re Williams' Settlement, Williams* v. *Williams*, [1911] 1 Ch. 441.

(*m*) *Hughes* v. *Young* (1862), 32 L. J. Ch. 137; *Dickinson* v. *Dillwyn* (1869), L. R. 8 Eq. 546; *Cowper-Smith* v. *Anstey*, [1877] W. N. 28.

(*n*) (1879) 11 Ch. D. 745.

(*o*) (1879) 13 Ch. D. 189.

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the exercise by her father of a power of appointment, covenanted to settle all property which she was "*then* seised of or interested in or entitled to." The father subsequently exercised his power, and appointed to her exactly the same proportion of the property which she would have taken in default of appointment. On these facts, JESSEL, M.R., held that the wife's covenant did not comprise the appointed share, although it would have done so if the share had come to her in default of appointment, saying: "A conveyance by a person by innocent assurance, of an interest expressed as being subject to be defeated by the exercise of a power, does not convey an interest which that person might take under the power. This is not like a settlement of all property which might come to the wife in any event, but only of that which was then vested in or belonging to her."

So, in *Smith* v. *Osborne* (*p*), it was laid down, that where a man, in his marriage settlement, describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" shall become vested in possession he will convey it to the uses of his settlement; if he becomes possessed of either of these pieces of land by a title different from that described in the covenant, the covenant will not bind him. As Lord WENSLEYDALE put it, the point resolved itself into this: "Is this a covenant to convey the townlands of Stonehouse to the trustees absolutely, whenever the covenantor was entitled to them in possession? Or is it a bargain only with respect to the contingent interest, or *spes successionis*, or more correctly, a bargain to convey the estates conditionally, if they should vest in possession in Mr. Boyse Osborne, the covenantor, under the will of the grandfather, Thomas Carr?" His lordship then pointed out that, in the words of the covenant, it was only to take effect if the estate became vested in the covenantor under the will of his grandfather, and that, as a matter of fact, it became vested in him in defiance of that will, by gift from a tenant in tail under that will, who had disentailed. He further remarked (in reference to an argument of the trustee's counsel that there was an obvious intention to settle the estates themselves), that that was "to apply a wrong rule of construction. It is to interpret the covenant, not according to the meaning of the words used, but according to what the parties may be reasonably supposed (judging from the circumstances in which they were placed) to have been likely to intend to do when they entered into the contract . . . The only safe rule of construction is to

(*p*) (1857) 6 H. L. Cas. 375.

Art. 24. ascertain the meaning of the words used, and in this case I think it is too clear to admit of any doubt."

ART. 25.—*Covenants to settle Property exceeding a Certain Value.*

Where the covenant is to settle property exceeding a certain value:

(1.) That value is the actual value of the property itself after deducting duty (*q*), and not the actuarial value of the wife's interest in it; and

(2.) That value is, *primâ facie*, construed to mean the value of funds derived from the same source. But two legacies under the will of the same testator, are so derived (*q*).

Where the covenant is to settle property which is worth more than a minimum sum, the property itself, and not the value of the covenantor's interest in it, governs the question.

In *Re Mackenzie* (*r*), a marriage settlement contained a covenant that, if the wife then was, or should at any time during the coverture become, entitled to any real or personal estate of the value of 400*l*., for any estate or interest, it should be settled. At the date of the settlement she was entitled (under a prior settlement) in remainder, expectant on her mother's death, to (*a*) a share of a sum of stock in her own right, and (*b*) a further share of the same stock as one of the next of kin of a deceased brother. The value of the two shares taken together was above 400*l*., but the actuarial value of the wife's reversionary interest in them, at the date of the settlement, was considerably less than 400*l*. *Held*, that both shares were included in the settlement, the true interpretation of the covenant being that it referred to the value of the property itself, and not to the value of the wife's reversionary interest in it. In giving judgment, CAIRNS, L.J., said: "It is admitted that the share payable to her out of the fund, on her brother's death, would exceed 400*l*. after all deductions; but it is said that the value of this share in the year 1861 [the date of the marriage] was under 400*l*. The covenant, however, in

(*q*) *Re Pares, Scott Chad* v. *Pares*, [1901] 1 Ch. 708. But *cf. Re Harcourt's Trusts, White* v. *Harcourt*, [1911] W. N. 214, where SWINFEN EADY, J., held that an endowment policy effected by the husband in favour of the wife was not caught, because it was not worth the limit at the date when she first became entitled to the policy, and the marriage had necessarily determined when the money (beyond the limit) became payable.

(*r*) (1867) L. R. 2 Ch. 345.

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my opinion, does not refer to the value of her interest in the fund, but to the value of the fund in which she has an interest; just as we should say that a man was entitled to an estate of the value of 100,000*l.* on the death of his father, merely to describe the value of the estate, and not the interest in the estate."

Implied term that the prescribed value refers to property derived from the same source.

It will be seen that, in the case last cited, the aggregate of the two funds was held to be bound, although singly they were of insufficient amount. But although they accrued to the lady under two titles, they were derived from the same source, viz., the original settlement. Care must, however, be taken to distinguish between covenants where nothing is said upon this point, and those in which the question is distinctly dealt with. For instance, in the case last cited, it appeared that there were two distinct funds, neither of which taken alone would have fallen under the covenant, but which, taken together, exceeded the value mentioned in the covenant, and although they came to the lady under different titles, they were held to be bound by the covenant. Nevertheless, it seems to be well settled that in such cases the fund will not be bound unless all its parts are derived from *the same source* (*s*). The same source, however, does not necessarily mean under the same title. In *Re Mackenzie* (*supra*) both funds were derived from the same source (viz., the prior settlement) although part was derived by the lady directly and part as the next of kin of her brother. And in the same way two legacies derived from the same testator are derived from the same source (*t*).

Cases where the covenant limits the fund to be settled to funds acquired "at one time."

Care must be taken to distinguish between covenants such as those in *Re Hooper* (*s*) and *Hood* v. *Franklin* (*s*), where nothing is said upon the point, and those in which the fund to be settled is expressly declared to be a minimum sum derived from one and the same source and "at one and the same time." For instance, in *Bower* v. *Smith* (*u*) the covenant was to settle property exceeding 500*l.* in value which the wife should acquire "at any one time." She afterwards became the donee of a general power of appointment over a fund of 5,499*l.* 19*s.* 1*d.* This power she exercised by eleven successive appointments in favour of herself for sums under 500*l.* each. On these facts it was held that the appointed funds were not bound, for

(*s*) *Re Hooper* (1865), 13 W. R. 710; *Hood* v. *Franklin* (1873), L. R. 16 Eq. 496.

(*t*) *Re Pares*, *Scott Chad* v. *Pares*, [1901] 1 Ch. 708.

(*u*) (1871) 19 W. R. 399 (the report in L. R. 11 Eq. 279 is misleading and incorrect: see *Steward* v. *Poppleton*, [1877] W. N. 29).

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although they were all derived from the same source, they were not acquired at the same time, *i.e.*, at the same moment.

Sums already advanced to the lady out of a fund.

Where the fund originally exceeds the minimum named in the covenant, but, by reason of advances made to the lady while it was still reversionary, the fund has been reduced below that minimum, the amount so advanced must be included for the purpose of determining whether the fund is large enough to be brought into settlement.

DIVISION III.

CONSTRUCTIVE TRUSTS.

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CHAPTER I.

INTRODUCTION.

ART. 26.—*Analysis of Constructive Trusts.*

(1) Constructive trusts are either resulting trusts (in which the equitable interest springs back or results to a settlor or his representatives), or non-resulting trusts.

(2) Resulting trusts arise in the three following cases, viz. :—

(a) when property is given to a trustee, upon express trusts which do not wholly dispose of the beneficial interest (*a*) ;

(b) when a trust is declared which the law will not permit to be carried out (*b*) ;

(c) when a purchase has been made in the name of some other person than the real purchaser (*c*), or personal property has been transferred to a stranger in blood without consideration, and there is no evidence that such persons were intended to take beneficially.

(3) Constructive trusts which are not resulting arise :

(a) when some person holding a fiduciary position has made a profit out of the trust property (*d*) ;

(*a*) Art. 27.
(*b*) Art. 28.
(*c*) Art. 29.
(*d*) Art. 31.

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(b) in all other cases where there is no express trust, but the legal and equitable rights in property are nevertheless not co-extensive and united in the same individual (*e*).

(*e*) Art. 32.

CHAPTER II.

RESULTING TRUSTS.

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ART. 27.—*Where Equitable Interest not wholly disposed of.*

(1) When it appears to have been the intention of a donor (*a*) that the donee was not to take beneficially, there will be a resulting trust in favour of the donor or his representatives in the following cases, viz.:

(a) if the instrument is either silent as to the way in which the beneficial interest is to be applied; or

(b) if it directs that it shall be applied for a particular purpose (as distinguished from a mere subjection to such purpose (*b*)) which turns out to be insufficient to exhaust the property; or

(c) if an express trust cannot be carried into effect (*c*).

(2) Where the non-beneficial character of the gift appears on the face of the instrument, no evidence to the contrary is admissible (*d*). But where it is merely presumed from the general scope of the instrument,

(*a*) *Per* Lord Hardwicke, *Hill* v. *Bishop of London* (1737), 1 Atk. 618; *Walton* v. *Walton* (1807), 14 Ves. 322; *King* v. *Denison* (1813), 1 Ves. & B. 260.

(*b*) *Watson* v. *Hayes* (1839), 5 Myl. & Cr. 125; *Wood* v. *Cox* (1837), 2 Myl. & Cr. 684; *Cunningham* v. *Foot* (1878), 3 App. Cas. 974; *Re West, George* v. *Grose*, [1900] 1 Ch. 84.

(*c*) *Stubbs* v. *Sargon* (1838), 3 Myl. & Cr. 507; *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503.

(*d*) See *Langham* v. *Sanford* (1811), 17 Ves. at p. 442; *Irvine* v. *Sullivan* (1869), L. R. 8 Eq. 673.

Art. 27. parol evidence is (at all events in the case of gifts *inter vivos*) admissible, both in aid and in contradiction of the presumption (*e*).

PARAGRAPH (1) (a).

Statement of the law by James, L.J.

The law on this subject was compendiously stated by the late Lord Justice JAMES in *Merchant Taylors' Co.* v. *Attorney-General* (*f*) in the following words:—"As a general rule of law, it is clear that where there is a gift to trustees merely as trustees, they cannot take any benefit arising from the fact that the expressed trusts do not, whether originally or from any subsequent event, exhaust the whole estate. In ordinary trusts the results are, that there is an implied trust for the donor's heirs or representatives. In most gifts for charitable purposes there is an implied trust for charity. But there is a class of cases—not confined or peculiar, as it seems to me, to gifts to colleges, municipal corporations, or city guilds—in which it is a fairly moot question, whether in a gift of property to trustees they take as trustees solely for the purposes of the trusts, or take *subject only* to the due execution of the specified trusts. And, in considering that question where it fairly arises, every surrounding circumstance, the character and position of the donor and the donee, the more or less probability of one intention or another, the current of authorities in similar, or nearly similar cases, are all matters which the court of construction not only may, but must, look to for aid and guidance. But where the testator or donor has in express words directed the whole of the property, or the whole of the rents and profits, to go to purposes which exclude all beneficial interest in the donee, and his words are not controlled or interpreted by plain implication arising from other parts of the same instruments, there is in my judgment no legitimate power in any court of construction to resort to the surrounding circumstances or to the character or position of the parties, or to the probability of intention, or the current of authority, or to do anything but give effect to the very words."

(*e*) 29 Car. 2, c. 3, s. 8; *Gascoigne* v. *Thwing* (1686), 1 Vern. 366; *Willis* v. *Willis* (1740), 2 Atk. 71; *Cook* v. *Hutchinson* (1836), 1 Keen, 42. As to parol evidence explanatory of a *testator's* intention, see *Docksey* v. *Docksey* (1708), 2 Eq. Cas. Abr. 506; *North* v. *Crompton* (1671), 1 Ch. Cas. 196; *Walton* v. *Walton* (1807), 14 Ves. 322; *Langham* v. *Sanford* (1811), 17 Ves. 435; *Lynn* v. *Beaver* (1823), Turn. & Russ. 63; and *Biddulph* v. *Williams* (1875), 1 Ch. D. 203.

(*f*) (1871) L. R. 6 Ch. 512, 518.

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Thus, where real estate was devised to "my trustees," but no trusts were declared in relation to it, it was held that the trustees must hold it in trust for the testator's heir. For by the expression "trustees," unexplained by anything else in the instrument (*g*) all notion of a beneficial interest being intended in their favour was negatived (*h*).

Devise to trustees *eo nomine*.

Again, a testator *devised* and bequeathed all his estate and effects to A. and B., their heirs, executors, and administrators, *upon trust* to convert his *personal* estate, and to stand possessed of the proceeds and of the residue of his estate and effects, upon trusts only applicable to personalty. It was held that the real estate of the testator passed to the trustees by the use of the word "devise" in the gift, and the word "heirs" in the limitation; but that as the trusts were rigidly and exclusively applicable to personal property, and as the trustees had been designated by that name, and so could not take beneficially, there was a resulting trust of the real estate in favour of the settlor's heirs (*i*).

Devise upon trusts not declared.

PARAGRAPH (1) (b).

So where there is a devise to A. upon trust to pay debts, or to answer an annuity, there is a resulting trust of what remains after payment of the debts or satisfaction of the annuity (*k*). And, on similar principles, where there was a trust for a widower until he should die or marry again, and *upon his death* the property was to be held in trust for his children (the will not saying what was to be done with it in the event of his second marriage), it was held that upon his marrying again there was a resulting trust of the income in favour of the settlor's next of kin during the residue of the widower's life (*l*). But although this case was doubtless correct on the assumption that the gift over took effect only on death, it would appear that that assumption was wrong, and that on the authorities and as a matter of interpretation it took effect on death *or marriage* (*m*).

Residue after satisfaction of express trust.

(*g*) As, for instance, if the expression is used with reference to one only of two separate funds (*Batteley* v. *Windle* (1786), 2 Bro. C. C. 31; *Pratt* v. *Sladden* (1807), 14 Ves. 193; *Gibbs* v. *Rumsey* (1813), 2 Ves. & B. 294).

(*h*) *Dawson* v. *Clarke* (1811), 18 Ves. 247; *Barrs* v. *Fewkes* (1864), 2 H. & M. 60; and see *Ellcock* v. *Mapp* (1851), 3 H. L. Cas. 492.

(*i*) *Longley* v. *Longley* (1871), L. R. 13 Eq. 133; *Dunnage* v. *White* (1820), 1 Jac. & W. 583; *Lloyd* v. *Lloyd* (1869), L. R. 7 Eq. 458; *cf. D'Almaine* v. *Moseley* (1853), 1 Drew. 629; *Coard* v. *Holdernesse* (1855), 20 Beav. 147.

(*k*) *King* v. *Denison* (1813), 1 Ves. & B. 260; *Watson* v. *Hayes* (1839), 5 Myl. & Cr. 125; but see *contra*, *Croome* v. *Croome* (1889), 61 L. T. 814.

(*l*) *Re Wyatt, Gowan* v. *White* (1889), 60 L. T. 920.

(*m*) See *Upton* v. *Brown* (1879),

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No resulting trust where it appears that donee was to take beneficially.

On the other hand, there will be no resulting trust where a contrary intention can be collected. Thus, where debtors assigned their property to trustees in trust to sell, and *divide the proceeds* amongst their creditors in rateable proportions according to the amounts of their respective debts, it was held by the House of Lords that there was no resulting trust in favour of the debtors, in the event of there being more than sufficient to pay twenty shillings in the pound (*n*). This decision was, however, founded entirely on the construction of the particular deed, and turned apparently to some extent upon the fact that all the best precedents contained an *express* trust of any surplus in favour of the debtors. It must, therefore, not be rashly assumed that the same decision would be arrived at if, on the language of another creditor's deed, it should appear that the object was to *pay debts* (or a dividend on debts), and not to assign the property for better or for worse by way of accord and satisfaction. It may be observed that where, under a similar assignment to that mentioned in the last illustration, there is not enough to pay all the creditors in full, any unclaimed dividends must be applied in augmentation of the dividends of the creditors who do claim (*o*).

Resulting trusts of voluntary contributions for assisting distressed individuals.

It is sometimes a question of difficulty whether the balance of a fund formed by means of voluntary contributions for the relief of particular individuals (and therefore not falling within the legal conception of a charitable trust), results *pro rata* to the contributors or not. In *Re Abbott's Trust, Smith* v. *Abbott* (*p*), a fund had been subscribed for the maintenance of two distressed ladies, and on the death of the survivor, STIRLING, J., held that the balance resulted to the subscribers. On the other hand, in *Re Andrew's Trust, Carter* v. *Andrew* (*q*), where a fund had been subscribed solely for the education of the children of a distressed clergyman and "not

12 Ch. D. 872, and *Underhill* v. *Roden* (1876), 2 Ch. D. 494, and cases there cited; and *Re Akeroyd's Settlement, Roberts* v. *Akeroyd*, [1893] 3 Ch. 363.

(*n*) *Smith* v. *Cooke*, [1891] A. C. 297. It is difficult, if not impossible, to reconcile this case with *Green* v. *Wynn* (1869), L. R. 4 Ch. 204, which does not seem to have been quoted to their lordships. Lord HALSBURY spoke, in his judgment, of it being the "ordinary and familiar method in such cases to *express* a *resulting* trust on the face of the instrument." This, at first sight, seems to be inconsistent with the idea of a resulting trust; but doubtless his lordship used the phrase "resulting trust," not in the narrow technical sense of a *constructive* resulting trust, but in the wider, original etymological sense, of a trust (whether express or implied) springing back, or resulting, to its creator.

(*o*) *Wild* v. *Banning* (1866), L. R. 2 Eq. 577.

(*p*) [1900] 2 Ch. 326.

(*q*) [1905] 2 Ch. 48.

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for equal division among them," KEKEWICH, J., held that when their education was completed there was no resulting trust of the balance, and that it was divisible equally among the children, on the ground that education was merely the special purpose assigned for the gift—the motive—and that the subscribers parted with all interest in the money when they gave it. This seems to be common sense, but the distinction between the two cases is somewhat fine and seems to consist only in the fact that the first fund was subscribed for the *personal support* of living ladies and not for the benefit of their next of kin, whereas in the second case the money was given for the benefit of living children generally with special reference to their education.

Charge does not imply resulting trust of residue.

Where there is a devise to A., charged with the payment of debts and legacies (*r*), or charged with the payment of a contingent legacy (*s*) which does not take effect, there will be no resulting trust; but the whole property will go to the devisee beneficially, subject only to the charge. And the same result will follow even where property is devised to A. "upon trust" to pay specific legacies, if on the whole will it appears that the testator merely meant to *charge* the legacies on the property (*t*). In all such cases the inference is that the donee was to take everything not required to satisfy the charge.

PARAGRAPH (1) (c).

Lands vested in trustee, but no written trust.

Where lands have been conveyed to a trustee but the trusts have not been manifested and proved by a signed writing in accordance with the Statute of Frauds, there will be a resulting trust to the settlor (*u*).

Uncertainty or failure of express trust.

So, if a declared trust is too uncertain or vague to be executed (*v*), or cannot be carried out by reason of lapse (*y*), or by complete failure of beneficiaries (*z*), or otherwise, or becomes in the event too remote (*a*); then, as it is expressed

(*r*) *King* v. *Denison* (1813), 1 Ves. & B. 260; *Wood* v. *Cox* (1837), 2 Myl. & Cr. 684.

(*s*) *Tregonwell* v. *Sydenham* (1815), 3 Dow. 194.

(*t*) *Croome* v. *Croome* (1889), 61 L. T. 814; *Re West*, *George* v. *Grose*, [1900] 1 Ch. 84.

(*u*) *Rudkin* v. *Dolman* (1876), 35 L. T. 791; or Statute of Wills; *Re Boyes*, *Boyes* v. *Carritt* (1884), 26 Ch. D. 531; and *Re King's Estate* (1888), 21 L. R. Ir. 273.

(*x*) *Stubbs* v. *Sargon* (1837), 2 Keen, 255; *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399, and (1805), 10 Ves. 522; *Kendall* v. *Granger* (1842), 5 Beav. 300.

(*y*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503; *Spink* v. *Lewis* (1791), 3 Bro. C. C. 355.

(*z*) *Hedderwick's Trustees* v. *Hedderwick's Executors*, [1910] Sc. Cases, 333.

(*a*) *Tregonwell* v. *Sydenham* (1815), 3 Dow. 194, 210.

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on the face of the instrument that the trustee was not intended to take beneficially, there will be a resulting trust. Thus, where a trade union was dissolved, and no provision was made by its rules for the distribution of its surplus assets, it was held that there was a resulting trust in favour of the members in the proportions in which they had contributed to its funds (*b*).

Total failure of consideration for express trust.

So where a settlement is executed in contemplation of a marriage which is subsequently broken off, there is a total failure of the consideration on which the settlement was based, and the property results to the settlor (*c*). And it has been held that the same result follows where the marriage is declared to be a nullity (*d*). But this is subject to the powers vested in the Divorce Division by 22 & 23 Vict. c. 61, s. 5, and 41 & 42 Vict. c. 19, s. 3, as to which see p. 93, note (*r*), *ante*.

PARAGRAPH (2).

Evidence not admissible where donee is a trustee on the face of settlement.

Where a testator bequeathed money to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted," it was held (1) that it was clear on the face of the will that D. did not take the whole beneficially; (2) that therefore parol evidence was not admissible to show that the testator's intention was that she should take beneficially; and (3) that in accordance with paragraph (1) (b), *supra*, after satisfying the purposes communicated to her by the testator she was beneficially entitled to the balance, and that there was no resulting trust (*e*).

Evidence admissible in other cases.

But where a person purchased sums of stock in the names of herself and the son of her daughter-in-law, verbal evidence was admitted to rebut the presumption of a resulting trust (arising under Art. 29, *infra*), because there was nothing to show on the face of the instrument that the son of the daughter-in-law was merely a trustee. JAMES, L.J., said: "Where the

(*b*) *Re Printers, etc., Society*, [1899] 2 Ch. 184; distinguishing *Cunnack* v. *Edwards*, [1896] 2 Ch. 679, where under the special circumstances no resulting trust arose. See also *Re Wilcock*, *Wilcock* v. *Johnson* (1890), 62 L. T. 317, where there was an ultimate trust contained "in a settlement of even date," which was never in fact executed.

(*c*) *Essery* v. *Cowlard* (1884), 26 Ch. D. 191; *Bond* v. *Walford* (1886), 32 Ch. D. 238. But see *M'Donnell* v. *Hesilrige* (1852), 16 Beav. 346, which appears to be inconsistent with the modern cases; see p. 93, *ante*.

(*d*) *Re Garnett, Richardson* v. *Greenep* (1905), 93 L. T. 117; but see *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639.

(*e*) *Irvine* v. *Sullivan* (1869), L. R. 8 Eq. 673.

Court of Chancery is asked, *on an equitable assumption or presumption*, to take away from a man that which, by the common law of the land, he is entitled to, he surely has a right to say 'Listen to my story as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances'" (*f*). Art. 27.

So evidence is admissible to rebut the legal presumption as to part only—for instance, to prove that the donee was intended to take a *life interest*, although there is a resulting trust as to the remainder; and *vice versâ* (*g*).

ART. 28.—*Resulting Trusts where Trusts declared are Illegal.*

When a person has intentionally created an executed trust (*h*) for an illegal consideration or purpose, then (if the trustee or beneficiary expressly relies (*i*) upon the maxim "*in pari delicto, potior est conditio possidentis*") the settlor cannot recover it (*k*) under a resulting trust unless:

(a) the illegal purpose is not carried into execution (*l*); or

(b) the effect of allowing the trustee to retain the property might be to effectuate an unlawful

(*f*) *Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. 343, 349.

(*g*) *Lane* v. *Dighton* (1762), Ambl. 409; *Rider* v. *Kidder* (1805), 10 Ves. 360; *Benbow* v. *Townsend* (1833), 1 Myl. & K. 506; *London and County Banking Co.* v. *London and River Plate Bank* (1888), 21 Q. B. D. at p. 542; *Re Blake, Blake* v. *Power* (1889), 60 L. T. 663.

(*h*) No question of resulting trust can accrue where an illegal trust is executory. In such cases it simply cannot be enforced.

(*i*) *Haigh* v. *Kaye* (1872), L. R. 7 Ch. 469.

(*k*) *Duke of Bedford* v. *Coke* (1751), 2 Ves. Sen. 116; *Curtis* v. *Perry* (1802), 6 Ves. 739; *Cottington* v. *Fletcher* (1740), 2 Atk. 155; *Brackenbury* v. *Brackenbury* (1820), 2 Jac. & W. 391; *Taylor* v. *Chester* (1869), L. R. 4 Q. B. 309; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275.

(*l*) *Symes* v. *Hughes* (1870), L. R. 9 Eq. 475; *Childers* v. *Childers* (1857), 1 De G. & J. 482; *Davies* v. *Otty* (1865), 35 Beav. 208; *Birch* v. *Blagrave* (1735), Ambl. 264; *Platamone* v. *Staple* (1815), G. Coop. 250. In the United States of America this distinction does not prevail. There the question whether the illegal purpose has failed or succeeded is deemed to be immaterial, and the only question considered is whether the *trust* is executed or executory. In the former case there is no resulting trust; in the latter the expressed trust will not be enforced.

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object, to defeat a legal prohibition, or to protect a fraud (*m*).

Conveyance to qualify for game licence or office.

Thus where a father granted land to his son, in order to give him a colourable qualification to shoot game under the old game laws, and without any intention of conferring any beneficial interest upon him, the court would not enforce any resulting trust in favour of the father. For he and the son were *in pari delicto*, and there was no detriment to the public in allowing the son to retain the estate (*n*). Of course, if there had been no illegality (if, for instance, a bare legal estate had been a sufficient qualification), there would have been a resulting trust (*o*).

Settlement for immoral consideration.

In *Ayerst* v. *Jenkins* (*p*), a widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a settlement by which it was recited that he was desirous of making a provision for the lady, and had transferred certain shares into the names of trustees, upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint. They afterwards lived together as man and wife until the widower's death. Some time afterwards, his personal representatives instituted a suit to set aside the settlement, on the ground that it was founded on an immoral consideration. Lord SELBORNE, however, said: "Relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees for the sole benefit of the defendant. I know of no doctrine of public policy which requires or authorises a court of equity to give assistance to such a plaintiff under such circumstances. When the immediate

(*m*) See *per* Lord SELBORNE in *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. at p. 283; and see *per* KNIGHT-BRUCE, L.J., in *Reynell* v. *Sprye* (1852), 1 De G. M. & G. 660, where he said: "Where the parties are not *in pari delicto*, and where public policy is considered as advanced by allowing either party, or at least the more excusable of the two, to sue for relief, relief is given to him." And see also, to same effect, *Law* v. *Law* (1735), 3 P. Wms. 391, and *St. John* v. *St. John* (1805), 11 Ves. 526.

(*n*) *Brackenbury* v. *Brackenbury* (1820), 2 Jac. & W. 391.

(*o*) *Childers* v. *Childers* (1857), 1 De G. & J. 482.

(*p*) (1873) L. R. 16 Eq. 275.

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and direct effect of an estoppel in equity against relief to a particular plaintiff, might be *to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud*, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished (*q*), a gift intended as a bribe to iniquity. If public policy is opposed, as it is, to vice and immorality, it is no less true, as was said by Lord TRURO in *Benyon* v. *Nettlefold* (*r*), that the law in sanctioning the defence of *particeps criminis* does so on the grounds of public policy,—namely, that those who violate the law must not apply to the law for protection." In the more recent case of *Phillips* v. *Probyn* (*s*), NORTH, J., distinguished *Ayerst* v. *Jenkins* on the ground that in the case before him the settlement was made *in consideration* of a contemplated and then illicit *marriage* with a deceased wife's sister, and that there was a total failure of consideration. It is, however, humbly submitted that the settlement in *Ayerst* v. *Jenkins* was also made in contemplation of, and as part of, the arrangements consequent on such a marriage, and that there is really no valid distinction between the two cases. But where (under the old law invalidating such marriages) property was transferred to trustees in trust for the settlor *until an intended marriage* with his deceased wife's sister should be solemnised, and then in trust for the lady and issue of the marriage, the trust was void, inasmuch as such a *marriage* could not take place (*t*), and therefore the condition precedent could never be performed. Nor (it is conceived) does the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII., c. 47), affect such settlements with regard to marriages solemnised prior to the Act, as it is expressly enacted by sect. 2 that the Act is not to affect any right or title to property (*u*).

SUB-PARAGRAPH (a).

Fraudulent conveyance.

But where an illegal purpose is only contemplated, there is a *locus pœnitentiæ*. Thus, in *Symes* v. *Hughes* (*v*), the plaintiff, being in pecuniary difficulties, assigned certain leasehold

(*q*) As in *Symes* v. *Hughes* (1870), L. R. 9 Eq. 475.
(*r*) (1850) 3 Mac. & G. at p. 102.
(*s*) [1899] 1 Ch. 811.
(*t*) *Pawson* v. *Brown* (1879), 13 Ch. D. 202; *Neale* v. *Neale* (1898), 79 L. T. 629.
(*u*) See *Re Whitfield, Hill* v. *Mathie*, [1911] 1 Ch. 310.
(*v*) (1870) L. R. 9 Eq. 475.

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property to a trustee with a view of defeating his creditors. Two and a half years afterwards he was adjudicated bankrupt, but obtained the sanction of his creditors to an arrangement by which his estate was re-vested in him, he covenanting to prosecute a suit for the recovery of the assigned property, and to pay a composition of two-and-sixpence in the pound to his creditors, in case his suit should prove successful. Lord ROMILLY, M.R., in delivering judgment, said: "Where the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."

Conveyance to avoid forfeiture for felony.

So, again, the plaintiff, being apprehensive of an indictment for bigamy (conviction for which then involved forfeiture of property), conveyed his real estate to the defendant, on a parol agreement to re-transfer when the difficulty should have passed over. It subsequently transpired that the plaintiff was not liable to be indicted, and thereupon he filed a bill praying for a re-transfer of his property. It was held, that although there was no enforceable express trust (inasmuch as there was no written proof of it), yet there was a resulting trust to which the statute did not apply; and as there was no illegality in fact, but only in intention, the court ordered the transfer prayed for (*x*).

Conveyance to escape serving as sheriff.

And where a father conveyed the legal estate in property to his daughter, with the intention of thus escaping from serving as sheriff, but afterwards repented, and paid the fine, Lord HARDWICKE said: "I am of opinion that the conveyance ought not to take effect against his intention *unless he had actually taken the oath*" that he had not the requisite qualification (*y*).

SUB-PARAGRAPH (b).

Attempt to evade rule against perpetuities or accumulations.

There will also be a resulting trust where otherwise the illegal object might be attained. Thus, where a settlor attempts to settle property so as to infringe the policy of the law with regard to perpetuities, such trusts will not only not be carried into effect, but the person nominated to carry them out is held to be a mere trustee for the settlor or his

(*x*) *Davies* v. *Otty* (1865), 35 Beav. 208. *Cf. Field* v. *Lonsdale* (1850), 13 Beav. 78, where, to evade the statute restricting the amount of each person's account, a man had deposited money in the name of his sister in a savings bank and was yet held entitled to it.

(*y*) *Birch* v. *Blagrave* (1735), Ambl. 264.

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representatives. For the attempt was made either through ignorance or carelessness, or else with a direct intention to contravene the law. In the former case, as there would be no *delictum*, the usual maxim would not apply. In the latter, equity would not allow the trustee to retain the property and so put it in his power to carry out the illegal intentions of the testator, and to defeat the policy of the law (*z*). So where the settlor directs accumulations beyond the statutory period, there is a resulting trust between the end of the twenty-one years and the period for which the accumulations were directed (*a*).

Attempt to evade Mortmain Acts.

And so, again, where lands, or the proceeds of land, were devised to charitable uses, or were devised to one who was, under a secret agreement with the testator, pledged to apply them to charitable purposes, then, notwithstanding the improper intentions of the testator, there was a resulting trust. For the result of allowing the gift to stand would probably have been to effect an object prohibited by law (*b*). But of course this is no longer so since the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73).

ART. 29.—*Resulting Trusts, where Purchase made in Another's Name.*

(1) When real or personal property (*c*) is vested in the purchaser and others, or in another or others alone, and whether jointly or successively, a resulting trust will be presumed in favour of the person who is proved (by parol (*d*) or other evidence) to have paid the purchase-money (*e*) in the character of purchaser (*f*).

(*z*) *Carrick* v. *Errington* (1726), 2 P. Wms. 361; *Tregonwell* v. *Sydenham* (1815), 3 Dow. 194; *Gibbs* v. *Rumsey* (1813), 2 Ves. & B. 294.

(*a*) *Re Travis; Frost* v. *Greatorex*, [1900] 2 Ch. 541. And the same rule applies where a tenant for life disclaims: *Re Scott, Scott* v. *Scott*, [1911] 2 Ch. 374.

(*b*) *Arnold* v. *Chapman* (1748), 1 Ves. Sen. 108; *Adlington* v. *Cann* (1740), Barn. Ch. 130; *Springett* v. *Jenings* (1870), L. R. 10 Eq. 488; but see *Rowbotham* v. *Dunnett* (1878), 8 Ch. D. 430.

(*c*) *Dyer* v. *Dyer* (1788), 2 Cox, 92; *Ebrand* v. *Dancer* (1680), 2 Ch. Ca. 26; *Wheeler* v. *Smith* (1860), 1 Giff. 300.

(*d*) 29 Car. 2, c. 3, s. 8; *Ryall* v. *Ryall* (1740), 1 Atk. 59; *Lench* v. *Lench* (1805), 10 Ves. 511; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*e*) *Dyer* v. *Dyer*, *supra*; *Wray* v. *Steele* (1814), 2 Ves. & B. 388.

(*f*) *Rochefoucauld* v. *Boustead*, *supra*.

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(2) This presumption may be rebutted—

(a) by parol (*g*) or other evidence that the purchaser intended to benefit the others; or

(b) by the fact that the person in whom the property was vested was the lawful (*h*) wife (*i*) or child of the purchaser (*k*), or was some person towards whom he stood *in loco parentis* (*l*), or was trustee of a settlement by which he previously settled property (*m*).

In any of these cases a *prima facie* (but rebuttable (*n*)) presumption will arise that the purchaser intended the ostensible grantee or grantees to take beneficially.

(3) Similar principles apply to voluntary *transfers* made by owners of *personal estate;* but there is no presumption of a resulting trust in a voluntary conveyance of *real estate* to another's use (*o*).

PARAGRAPH (1).

Where purchase-money furnished by two persons.

Where the purchase-money is advanced, partly by the person in whose name the property is taken, and partly by another; then, if they advance it in equal shares, they will (in the absence of evidence or circumstances showing a contrary intention (*p*)) take as joint tenants, because the advance being equal the interest is equal; but if in unequal shares, then a trust results to each of them, in proportion to his advance (*q*).

(*g*) *Rider* v. *Kidder* (1805), 10 Ves. 360; *Standing* v. *Bowring* (1885), 31 Ch. D. 282.

(*h*) See *Re Scottish Equitable Life Assurance Society* (*Policy No.* 6402), [1902] 1 Ch. 282.

(*i*) *Re Eykyn* (1877), 6 Ch. D. 115; *Drew* v. *Martin* (1864), 2 H. & M. 130.

(*k*) *Soar* v. *Foster* (1858), 4 Kay & J. 152; *Beckford* v. *Beckford* (1774), Lofft. 490.

(*l*) *Beckford* v. *Beckford, supra*; *Currant* v. *Jago* (1844), 1 Coll. C. C. 261; *Tucker* v. *Burrow* (1865), 2 Hem. & M. 515; *Forrest* v. *Forrest* (1865), 13 W. R. 380.

(*m*) *Re Curteis* (1872), L. R. 14 Eq. 217.

(*n*) *Tumbridge* v. *Care* (1871), 19 W. R. 1047; *Williams* v. *Williams* (1863), 32 Beav. 370.

(*o*) As to personal estate, *per* COTTON, L.J., in *Standing* v. *Bowring* (1885), 31 Ch. D. 282; and *per* JESSEL, M.R., in *Fowkes* v. *Pascoe* (1874), L. R. 10 Ch. 345, n.; but see JAMES, L.J., *dubitante*, *S. C.*, at p. 348, and *contra*, *per* RICHARDS, C.B., in *George* v. *Howard* (1819), 7 Price, 646. As to real estate, *per* Lord HARDWICKE, in *Young* v. *Peachy* (1741), 2 Atk. at p. 257; and *per* JAMES, L.J., in *Fowkes* v. *Pascoe, supra*.

(*p*) See *Robinson* v. *Preston* (1858), 4 Kay & J. 505; *Edwards* v. *Fashion* (1712), Pr. Ch. 332; *Lake* v. *Gibson* (1729), 1 Eq. Cas. Abr. 291; *Bone* v. *Pollard* (1857), 24 Beav. 283.

(*q*) *Lake* v. *Gibson, supra*; *Rigden* v. *Vallier* (1751), 3 Atk 735.

But if one pay the purchase-money at the request of and by way of loan to the person in whose name the property is taken, there will be no resulting trust. For the lender did not advance the purchase-money as purchaser (*r*), but merely as lender. Art. 29.

Paragraph (2).

In *Standing* v. *Bowring* (*s*) the facts were as follows: The plaintiff, a widow, in the year 1880 transferred £6,000 consols into the joint names of herself and her godson, the defendant. This she did *with the express intention* that the defendant, in the event of his surviving her, should have the consols, but that she herself should retain the dividends during her life. She had been previously warned that her act was irrevocable. In delivering judgment, Cotton, L.J., said: "The rule is well settled, that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *primâ facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted, by showing that, at the time, the transferor intended a benefit to the transferee; and in the present case there is ample evidence that at the time of the transfer, and for some time previously, the plaintiff intended to confer a benefit, by this transfer, on her late husband's godson." Evidence of intention to benefit.

So, in *Wheeler* v. *Smith* (*t*), a man had transferred stock into the joint names of himself and his sister, and received the income during his life. Here, *primâ facie*, there was a resulting trust; yet, on the evidence of letters written by the deceased, it was held that he meant his sister to take beneficially by survivorship, and consequently the inference of a resulting trust was rebutted.

In *Crabb* v. *Crabb* (*u*), a father transferred a sum of stock from his own name into the joint names of his son and of a broker, and told the latter to carry the dividends to the son's account. The father, by a codicil to his will executed subsequently, bequeathed the stock to another; but it was held that the son took absolutely. The Master of the Rolls said: "If the transfer is not ambiguous, but a clear and unequivocal act, Advancement of son.

(*r*) *Aveling* v. *Knipe* (1815), 19 Ves. 441.

(*s*) (1885) 31 Ch. D. 282; and see also *Fowkes* v. *Pascoe* (1875), L. R. 10 Ch. 343.

(*t*) (1860) 1 Giff. 300.

(*u*) (1834) 1 Myl. & K. 511; and see also *Birch* v. *Blagrave* (1735), Ambl. 264; *Standing* v. *Bowring* (1885), 31 Ch. D. 282; and *Batstone* v. *Salter* (1875), L. R. 10 Ch. 431, where a mother transferred stock into the joint names of herself, her daughter, and her son-in-law.

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as I must take it on the authorities, for explanation there is no place. The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto*, can ever be allowed to alter what has been already done." In short, a resulting trust will not be allowed to arise merely because a donor subsequently changes his mind. On this ground it has been held that a subsequent decree of nullity of marriage does not rebut the presumption of advancement where the husband had transferred property into the name of the wife (*x*).

Rebutting evidence of advancement.

But a declaration made by the father *at or before* the date of the purchase, is admissible to rebut the presumption, although it might not be good as a declaration of trust, on account of its not being reduced into writing. For, "as the trust would result to the father were it not rebutted by the sonship as a circumstance of evidence, the father may counteract that circumstance by the evidence arising from his parol declaration" (*y*).

Surrounding circumstances.

Surrounding circumstances may also tend to rebut the presumption. Thus, a father, upon his son's marriage, gave him a considerable advancement, having several younger children who had no provision. He subsequently sold an estate, but £500 only of the purchase-money being paid, he took a security for the residue in the joint names of himself and his said son. He himself, however, received the interest, and a great part of the principal without any opposition from the son, as did his executrix after his death, the son writing receipts for the interest. Under these circumstances it was held that the son took nothing; the Lord Chancellor saying: "Where a father takes an estate in the name of his son, it is to be considered as an advancement; but that is liable to be rebutted by subsequent acts. So if the estate be taken jointly, so that the son may be entitled by survivorship, that is weaker than the former case, and still depends on circumstances. The son knew here that his name was used in the mortgage, and must have known whether it was for his own interest or only as a trustee for the father; and instead of making any claim, his acts are very strong evidence of the latter; nor is there any colour why the father should make him any further advancement when he had so many children unprovided for" (*z*). The dictum of the learned Chancellor, that the

(*x*) *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639.

(*y*) *Williams* v. *Williams* (1863), 32 Beav. 370.

(*z*) *Pole* v. *Pole* (1748), 1 Ves. Sen. 76; *Stock* v. *McAvoy* (1872),

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presumption may be rebutted by subsequent acts, cannot be taken to mean subsequent acts *of the father*, which are only admissible against, and not for, him (*a*); but must, it is apprehended, refer only to subsequent acts of the son (and only to them when there is nothing to show that the father did actually intend to advance the son (*b*)), or to subsequent acts of the father so acquiesced in by the son, as to raise the presumption that the son always knew that no benefit was intended for him. It is also to be remarked, that the fact of the father having previously made provision for the son, would not of *itself* have been sufficient to rebut the usual presumption, although, taken together with other circumstances, it was a strong link in the chain (*c*).

Where express trust of stock impossible owing to rules of company.

So, where a man directed his agent to invest stock in the joint names of himself and his wife in trust for their son, and the agent made the investment but could not (owing to the Bank of England's refusal) fix a trust on it, it was held that any claim of the wife was rebutted, and that the trust being incomplete the son could not claim either (*d*).

Where the son is the father's solicitor.

So the relationship of solicitor and client between the son and the parent, has been considered a circumstance that will, of itself, rebut the presumption of advancement (*e*).

Augmentation of settled property.

Again, a sum of consols was vested in the trustees of a marriage settlement upon the usual trusts. The husband directed the bankers who received the dividends (and paid them to him as tenant for life under a power of attorney from the trustees), to invest an additional sum of £2,000 consols in the names of the same trustees, so that they might receive the dividends as before. This was done, and the husband received the income of the whole during his life. No notice of the new investment was ever given to the trustees. It was held that there was no resulting trust of the £2,000 to the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund (*f*).

Whether presumption of advancement by married woman.

In *Re De Visme* (*g*) it was laid down that, where a married woman had, out of her separate estate, made a purchase in the

L. R. 15 Eq. 55; *Bone* v. *Pollard* (1857), 24 Beav. 283; and *Marshal* v. *Crutwell* (1875), L. R. 20 Eq. 328.

(*a*) *Redington* v. *Redington* (1794), 3 Ridge, P. C. at p. 177.

(*b*) *Sidmouth* v. *Sidmouth* (1840), 2 Beav. 447; *Hepworth* v. *Hepworth* (1870), L. R. 11 Eq. 10.

(*c*) See *per* Lord Loughborough, *Redington* v. *Redington* (1794), 3 Ridge, P. C. at p. 190.

(*d*) *Smith* v. *Warde* (1845), 15 Sim. 56.

(*e*) *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244, *sed quære*.

(*f*) *Re Curteis* (1872), L. R. 14 Eq. 217.

(*g*) (1863) 2 De G. J. & S. 17.

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name of her children, no presumption of advancement arose, inasmuch as a *married* woman was under no obligation to *maintain* her children. This case was followed by the late Sir GEORGE JESSEL, M.R., in *Bennet* v. *Bennet* (*h*), where a mother was entitled to property under the Married Women's Property Act, 1870, by which married women were made as liable *as widows* for the maintenance of their children. The Master of the Rolls, however, gave it as his opinion, that the presumption of intention to advance depended, not on the *liability to maintain*, but on the moral obligation on the part of a father to provide a provision or fortune for a child; and that there was no such obligation recognised on the part of a mother. If that be so, the law still remains the same, notwithstanding that the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), renders a wife as liable for the maintenance of her children as a husband is. However, it is conceived that the point is still an open one, as Sir GEORGE JESSEL's judgment is admittedly in direct conflict with that of the late Vice-Chancellor STUART in *Sayre* v. *Hughes* (*i*), where the presumption of intention to benefit was based by the Vice-Chancellor rather on motive than on duty. His lordship said: "*Maternal affection as a motive* of bounty is perhaps the strongest of all, although *the duty* is not so strong as in the case of a father, inasmuch as it is the duty of a father to advance his child. That, however, is a moral obligation, and not a legal one." On the whole, it is with much diffidence conceived that if the authorities should hereafter come under review, the views of the late Vice-Chancellor STUART would be found to have as much to be said in their favour as those of Sir GEORGE JESSEL. Neither judge bases the presumption on legal obligation. Both admit that the presumption is founded on a moral presumption of intention. But if so, surely there is as much moral presumption of an intention by a mother to benefit her offspring as there is in the case of a father. And if neither law nor equity imposes any obligation on a father to advance his child, it is difficult to see on what principle an equity judge should invent an imperfect obligation of this kind as a foundation for a presumption of intention to benefit, while at the same time rejecting a similar moral obligation on the part of a wealthy mother. In reason and in custom, there is assuredly as much obligation on the part of a mother *who has*

(*h*) (1879) 10 Ch. D. 474.

(*i*) (1868) L. R. 5 Eq. 376. This was the case of a *widowed* mother, but the principle appears to be the same. See also *Re Orme, Evans* v. *Maxwell* (1883), 50 L. T. 51.

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the command of money to benefit her children with it as there is in the case of a father. It must in any case be borne in mind, that even if the view of Jessel, M.R., be the correct one, yet if it be proved *aliunde* that the mother did in fact intend to benefit her offspring, there will be no resulting trust (*k*).

Primâ facie presumption of resulting trust in favour of a wife whose money is invested in husband's name.

Although, where a husband purchases property in his wife's name, there is a *primâ facie* presumption of an intention to advance the wife, the converse does not hold good. Therefore, if property is purchased in the name of the husband out of money belonging to the separate estate of his wife, there is a presumption of a resulting trust in favour of the wife, which is, of course, like all other cases of resulting trust, capable of being rebutted by parol or other evidence showing that it was intended to be a gift. It was formerly thought that this presumption only applied where the property was purchased with the wife's capital, and not where it was purchased with her income. But in the more recent case of *Mercier* v. *Mercier* (*l*) the Court of Appeal laid it down that there is no such inherent distinction between capital and income except in degree. Romer, L.J., said: "No doubt, in certain cases, in considering whether a gift was intended, the fact of the money having been income received by him with her consent, may be material in respect of the weight of evidence; but there is no other distinction, so far as I am aware, between capital and income." In short, it would seem that where there is no evidence one way or the other, a resulting trust will be presumed whether the property was paid for out of capital or income; but that where there is some evidence of intention to benefit the husband, then the fact that the payment was made out of income will, to some extent, support that evidence.

Advancement by persons *in loco parentis*.

With regard to the presumption of advancement in favour of persons to whom the purchaser stands *in loco parentis*, it has been held that the presumption arose in the case of an illegitimate child (*m*), a grandchild *when the father was dead* (*n*), and the nephew of a wife, who had been practically adopted by the husband as his child (*o*). But it would seem that the person alleged to have been *in loco parentis* must have intended to put himself in the situation of the person

(*k*) *Beecher* v. *Major* (1865), 2 Drew. & Sm. 431.

(*l*) [1903] 2 Ch. 98.

(*m*) *Beckford* v. *Beckford* (1774), Lofft. 490; *Kilpin* v. *Kilpin* (1834), 1 Myl. & K. at p. 542, *sed quære Soar* v. *Foster* (1858), 4 Kay & J. 152.

(*n*) *Ebrand* v. *Dancer* (1680), 2 Ch. Cas. 26.

(*o*) *Currant* v. *Jago* (1844), 1 Coll. C. C. 261; and see *Re Howes, Howse* v. *Platt* (1905), 21 T. L. R. 501, the case of a niece.

Art. 29. described as the natural father of the child with reference to those parental offices and duties which consist in *making provision for a child*. The mere fact that a grandfather took care of his daughter's illegitimate child and sent it to school, has been held to be insufficient to raise the presumption, PAGE-WOOD, V.-C., saying: "I cannot put the doctrine so high as to hold that if a person educate a child to whom he is under no obligation either morally or legally, the child is therefore to be provided for at his expense" (*p*).

ART. 30.—*To whom Property results.*

(1) Where a resulting trust arises under an instrument *inter vivos*, the beneficial interest results to the settlor himself (*q*). Where the instrument is a will, the property results to the heir or devisee of the testator if real estate, or to the residuary legatees or next of kin if personal estate (*r*), whether the will contains a direction for conversion or not (*s*).

(2) Provided that where, on the true interpretation of the instrument, property is first given to A. absolutely, and then trusts are engrafted or imposed on that absolute interest which fail, the property results to A. absolutely to the exclusion of the donor or the testator's residuary devisees, legatees, heir, or next of kin (*t*).

(3) Where a resulting trust has once arisen under an instrument which directs a conversion, and the person to whom it results dies before getting it in; then as between his real and personal representatives it devolves (whether actually converted at the date of

(*p*) *Tucker* v. *Burrow* (1865), 2 Hem. & M. 515; and see *per* JESSEL, M.R., *Bennet* v. *Bennet* (1879), 10 Ch. D., p. 477.

(*q*) *Symes* v. *Hughes* (1870), L. R. 9 Eq. 475; *Davies* v. *Otty* (1865), 35 Beav. 208.

(*r*) *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503, 1 Wh. & Tu. Lead. Cas. (8th ed.) 394, and cases there cited.

(*s*) *Curteis* v. *Wormald* (1878), 10 Ch. D. 172; *Ackroyd* v. *Smithson*, *supra*.

(*t*) *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551; *Hancock* v. *Watson*, [1902] A. C. 14.

his death or not) as if it were actually converted, unless the trust for conversion has *wholly* failed (*u*). Art. 30.

Paragraph (1).

Resulting trust under marriage settlement.

By a marriage settlement, real estate of the husband, and personal estate of the wife, are vested in trustees, in trust for the husband for life, with remainder in trust for the wife for life, with remainder upon the usual trusts in favour of the issue of the marriage, without any gift over in default of issue. Upon the death of the wife without issue, the real estate will result to the husband; and similarly on the death of the husband without issue, the personal estate will result to the wife.

Resulting trust under will where no conversion directed.

A. by his will gives his real estate unto and to the use of trustees, and his personal estate to them absolutely, upon trust for certain persons for life, with an ultimate remainder in trust for the testator's two nephews B. and C. as tenants in common. B. dies in the testator's lifetime. His share of the real estate will result to the testator's heir or residuary devisee, and his share of the personalty to the testator's next of kin or residuary legatees.

Resulting trust where conversion directed.

The preceding examples speak for themselves, and require no comment. But the following case presents at first sight more difficulty. A testator devises real estate to trustees, upon trust to sell and divide the proceeds between his nephews B. and C. If B. should die in the testator's lifetime, his share of the proceeds of the sale will lapse, and result to the testator's heir or residuary devisee, and not to his next of kin or residuary legatees, although it is pure personalty. The principle from which this proceeds (settled by the leading case of *Ackroyd* v. *Smithson* (*x*)) is, that conversion directed by a will is presumed to be only intended for the purposes therein expressed; and so far as these purposes fail, equity presumes that the testator did not intend to rob his heir of property which, but for those objects, would have been his, and to give such property to his next of kin, whose only possible ground of claim arises from the fact that the testator's expressed intentions have been disappointed. Moreover, this presumption is not even rebutted by a declaration that the

(*u*) *Re Richerson, Scales* v. *Heyhoe*, [1892] 1 Ch. 379; *Curteis* v. *Wormald* (1878), 10 Ch. D. 172; *Cogan* v. *Stephens* (1835), 5 L. J. (N. S.) Ch. 17; *Clarke* v. *Franklin* (1858), 4 Kay & J. 257; *Re Lord Grimthorpe, Beckett* v. *Lord Grimthorpe*, [1908] 2 Ch. 675.

(*x*) (1780) 1 Bro. C. C. 503, 1 Wh. & Tu. Lead. Cas. (8th ed.) 394.

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proceeds of the sale of realty are to be personalty *for all purposes* (*y*), the latter words being construed as all purposes *of the will*.

The question was explained with his customary lucidity by the late Sir GEORGE JESSEL in the case of *Curteis* v. *Wormald* (*z*). There personal estate had been bequeathed upon trust to purchase real estate, which was to be held on trusts some of which eventually failed. It was held that land, purchased before the failure, resulted in favour of the testator's next of kin, and not his heir. The Master of the Rolls, in giving judgment, after stating the facts, said: "The limitations took effect to a certain extent, and then, by reason of the failure of issue of the tenants for life, the ultimate limitations failed, and there became a [resulting] trust for somebody. Now for whom? According to the doctrine of the court of equity, this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed-of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate; that is, the persons who take under the Statute of Distributions as next of kin (*a*). Their right to the residue of the personal estate is a statutory right independent of the will."

PARAGRAPH (2).

Rule in *Lassence* v. *Tierney*.

This principle, usually known as the rule in *Lassence* v. *Tierney* (*b*), is well exemplified by the more recent case of *Hancock* v. *Watson* (*c*). There a testator directed his estate to be divided into five portions and then said "to S. D. I give two of such portions." He then directed that the two portions given to S. D. should remain in trust for her for life, and after her decease for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marrying in the case of daughters, "but in default of any such issue" there

(*y*) *Shalleross* v. *Wright* (1850), 12 Beav. 505; *Taylor* v. *Taylor* (1853), 3 De. G. M. & G. 190; and see also *Fitch* v. *Weber* (1848), 6 Hare, 145.

(*z*) (1878) 10 Ch. D. 172.

(*a*) *Cogan* v. *Stephens* (1835), 5 L. J. (N. S.) Ch. 17; *Lord Beetive* v. *Hodgson* (1864), 10 H. L. Cas. 656.

(*b*) (1849) 1 Mac. & G. 551.

(*c*) [1902] A. C. 14.

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was a gift over to the children of C.: *Held*, that, the limitations after the life estate to S. D. being void for remoteness, the original gift to her remained intact and passed to her representatives and did not go to the testator's next of kin under a partial intestacy. Lord Davey said: "In my opinion it is well-settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted and imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin, as the case may be. Of course, as Lord Cottenham has pointed out in *Lassence* v. *Tierney* (*d*), if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next of kin are excluded in any event. In the present case I cannot feel any doubt that the original gift of two-fifths of the residuary estate to S. D. was in terms an absolute gift to her. The testator uses the words 'I give' and speaks of the shares subsequently as 'allotted' to her. Mr. Levett contended that there are words in the will which confine her interest in the allotted portions to her life. But that is not what the testator has said; he has directed that during her life she shall have only the income of *her share* for her separate use without power of anticipation. But that is quite consistent with a power to dispose of the capital after her death, so far as it should not be exhausted by the trusts declared of it, and with the right of her representatives to claim it. In other words, as between herself and the estate, there is a complete severance and disposition of her share so as to exclude an intestacy, though as between herself and the parties taking under the engrafted trusts she takes for life only" (*e*).

Gift over to issue of legatee on death before specified period does not take effect if legatee dies without issue.

So where there is a gift to A. for life with remainder to his children, with a proviso that if any child dies in A.'s lifetime then the property shall go to the issue of that child, the original gift to a child of A. remains absolute if he dies in A.'s lifetime *without issue* (*f*). Similarly where there is a

(*d*) (1849) 1 Mac. & G. 551.

(*e*) See also *Kellett* v. *Kellett* (1868), L. R. 3 H. L. 160.

(*f*) *Smither* v. *Willock* (1804), 9 Ves. 233; *Hodgson* v. *Smithson* (1856), 8 De G. M. & G. 604.

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devise to A. in fee, with an executory limitation over to B. *for life* if A. dies without issue, the fee remains in A., subject to letting in B.'s life estate (*g*).

Gift to a class or such of them as shall survive A. goes to all if none survive A.

Again, a bequest to several, or to a class, "or to such of them as shall be living at" the period of distribution or any other specified time, is a vested gift to all, subject to being divested for the benefit of those living at the time indicated. Consequently, if *none* survive, the original vested gift will remain intact, and all will be held to have taken as tenants in common (*h*). A testatrix bequeathed all her estate except two specified sums to her sister B., and added the words "I would wish my money to be divided in equal shares after my sister's death between my sister G. and my niece H., *should they survive her*." G. and H. both predeceased B.:—*Held*, by the Court of Appeal in Ireland, that B. took an absolute interest which, though liable to be divested if G. and H. survived her, became indefeasible on her surviving them (*i*).

So, in *Crozier* v. *Crozier* (*k*), a testator had given all his residue to his wife, "and after her death to be equally divided to the children, should there be any." There were no children, and the court held that the wife took absolutely. The rule equally applies where there is an absolute gift by will which is afterwards settled by a codicil (*l*).

Rule equally applicable to settlements *inter vivos*.

The rule is not confined to wills. Thus, where on the marriage of his daughter a father settled £800 on her and her children, it being held that on the true construction of the settlement he gave her the £800 on condition of its being settled, it followed that on her death without issue the £800 resulted to her estate and not to the father (*m*).

Initial difficulty in all these cases is to determine whether the gift over is a divesting gift or a gift in remainder.

In all these cases, however, the initial difficulty must be borne in mind of determining whether, on the true interpretation of the instrument, there really was *an absolute gift* afterwards partially divested, or whether all that the legatee was intended to take was the restricted interest. Of course, where the gift is by a will, and the partial divesting is by a codicil, there is no difficulty (*n*), nor where, as in *Hancock* v. *Watson*, *supra*, there are clear words of gift and allotment. But there

(*g*) *Galenby* v. *Morgan* (1876), 1 Q. B. D. 685.

(*h*) *Browne* v. *Lord Kenyon* (1818), 3 Madd. 410; *Sturgess* v. *Pearson* (1819), 4 Madd. 411; *Belk* v. *Slack* (1836), 1 Keen, 238; *Re Sanders's Trusts* (1866), L. R. 1 Eq. 675; *Marriott* v. *Abell* (1869), L. R. 7 Eq. 478.

(*i*) *Monck* v. *Croker*, [1900] 1 Ir. R. 56.

(*k*) (1873) L. R. 15 Eq. 282.

(*l*) *Re Wilcock, Kay* v. *Dewhurst*, [1898] 1 Ch. 95.

(*m*) *Doyle* v. *Cream*, [1905] 1 Ir. R. 252.

(*n*) *Norman* v. *Kynaston* (1861), 3 De G. F. & J. 29.

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are numerous cases on the border line which nothing but verbal criticism of the particular instrument will solve; and, as was said in *Lassence* v. *Tierney* (*o*), "in the case of a will containing such a disposition, the intention of the testator is to be collected from the whole will, and not from words which, standing alone, would constitute an absolute gift. In this connection, in doubtful cases, the subsequent disposition of the subject-matter of the gift in every possible event which can arise, forms an important consideration in putting a construction on the instrument; such a disposition being apparently inconsistent with the intention of giving an absolute interest in the first instance" (*p*).

Paragraph (3).

How the person to whom converted property results holds it.

It is frequently an important question as to what nature property directed to be converted assumes in the hands of persons to whom it results. For instance, if, by a will, real estate be directed to be sold, and is actually sold, and the trusts as to one moiety of the proceeds fail, that moiety will of course result to the testator's heir. But the question then arises, does it become in his hands real or personal estate? That is to say, in the event of *his* death before he receives it, does it devolve on *his* heir or his next of kin? At one time it was considered that there was a difference, as to this, between a resulting trust of converted realty and a resulting trust of converted personalty. It was thought that as to the former, where a sale of realty was necessary for carrying out the subsisting trusts of a will, that which resulted to the heir was retained by him as personalty, and on his death devolved as such. So far, that is still the law. But it was also considered that wherever personal estate directed to be converted into land resulted to next of kin, they held it as *personalty*, although it came to them in the form of land (*q*). This view was, however, scouted by Jessel, M.R., and finally overruled by the Court of Appeal, in the case of *Curteis* v. *Wormald* (*r*). The Master of the Rolls said: "Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed-of interest? The

(*o*) (1849) 1 Mac. & G. 551.

(*p*) Examples will be found in *Rucker* v. *Scholefield* (1862), 1 Hem. & M. 36; *Gompertz* v. *Gompertz* (1846), 2 Ph. 107; *Re Richards*, *Williams* v. *Gorvin* (1883), 50 L. T. 22; *Waters* v. *Waters* (1857), 26 L. J. Ch. 624; and *Harris* v. *Newton* (1877), 46 L. J. Ch. 268.

(*q*) *Head* v. *Godlee* (1859), Johns. 536 (overruled).

(*r*) (1878) 10 Ch. D. 172.

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answer is *he takes it as he finds it.* If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representatives: and consequently his executor takes it as part of his personal estate. On the other hand, if the next of kin, having become entitled to a freehold estate [under a resulting trust of converted personalty], dies, there is no equity to change the freehold estate into anything else on his death. It will go to the devisee of the real estate, or to the heir-at-law if he has not devised it, and will pass as real estate." And JAMES, L.J., in the Court of Appeal, said: "With all deference to the judgment of Lord HATHERLEY in *Head* v. *Godlee* (*s*), it is impossible, I think, to arrive at any other conclusion than that at which the Master of the Rolls has arrived. It was settled by *Cogan* v. *Stephens* (*t*), that what was the right rule as between the real and personal estates where land was directed to be sold, was also the right rule as between the two estates in the case where money was directed to be laid out in the purchase of land. . . . The same principle applies in both cases, which is this, that where you trace property into a man, there is no equity between his different classes of representatives as to altering the position in which that property is. If it is money arising from the sale of land, it remains money; that is to say, the heir-at-law of the person who has become beneficially entitled to it as heir-at-law, has no right to have it reconverted into land. If it is land purchased under a direction to invest in land, the persons interested in the personal estate of the persons who have become entitled to it as next of kin, have no right to have it reconverted into money."

Immaterial that property not actually converted if it ought to be.

The broad statement by JESSEL, M.R., in *Curteis* v. *Wormald* (quoted in the last illustration), that the party to whom property results "takes it as he finds it," is apt to mislead the unwary. It would be more accurate to say that he takes it as he *ought* to find it. That is to say, if the trust for conversion *wholly* fails, he takes it as unconverted (*u*); but if it only partially fails, then, as the conversion dates from the death of the testator (even though it is directed to be made at a future date (*x*)), he takes it as converted, and it devolves accordingly, notwithstanding that in point of fact

(*s*) (1859) Johns. 536.
(*t*) (1835) 5 L. J. (N. S.) Ch. 17.
(*u*) *Re Lord Grimthorpe, Beckett* v. *Lord Grimthorpe*, [1908] 2 Ch. 675.
(*x*) *Clarke* v. *Franklin* (1858), 4 Kay & J. 257.

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the conversion is not, as it ought to be, carried out in accordance with the trust (*y*). A learned reviewer of a previous edition of this work stated that he could not agree that this view applied to personal estate directed to be converted; and he contended that it was restricted to real estate directed to be sold (*z*). With great respect, however, and after full consideration, the present writer still remains of opinion that the decision of the late Mr. Justice Chitty in *Re Richerson, Scales* v. *Heyhoe* (*y*), is as applicable to personal estate as to real estate.

Same rules applicable to instruments *inter vivos*.

It must be pointed out that precisely the same rule applies where property results on failure of trusts created by instruments *inter vivos*. As has been pointed out above, such property results to the settlor in the first instance; but the character in which he retains it is determined by precisely the same principles as have been indicated in the last illustration. That is to say, if the conversion ought to take place, that which results is retained in its converted form, notwithstanding that the actual conversion may not be carried out until after the settlor's death. But where there has been a total failure of the objects for which conversion was directed, it results to the settlor in its unconverted form, and so devolves.

Thus in *Re Lord Grimthorpe, Beckett* v. *Lord Grimthorpe* (*a*), land was settled on the settlor for life and then in trust for sale, the purchase-money to be held upon certain trusts for his widow and issue, with an ultimate trust in default of widow and issue for himself absolutely. He died without leaving a widow or issue, having devised the lands to certain uses. It was held by the Court of Appeal, that, as there was no longer any enforceable trust for sale, the property resulted to the settlor and passed under his will as land. Cozens-Hardy, M.R., said: "The property could not be sold until after the settlor's death. At the very moment that the trustees came into possession, and when alone any duty or power was vested in the trustees, there was no enforceable trust; for I think it is well settled that as between the executors and the heir, or putting it more generally, between the real and personal

(*y*) *Re Richerson, Scales* v. *Hoyhee*, [1892] 1 Ch. 379, and cases there cited.

(*z*) Law Notes, June, 1894.

(*a*) [1908] 2 Ch. 675; and see also *Davenport* v. *Coltman* (1842), 12 Sim. at p. 610, and *Stead* v. *Newdigate* (1817), 2 Mer. 521. For cases where there was an enforceable trust, see *Att.-Gen.* v. *Hubbuck* (1884), 13 Q. B. D. 275, and *Clarke* v. *Franklin* (1858), 4 Kay & J. 257.

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representatives of a deceased person, there is no equity. . . . If there was no enforceable trust for sale, the property is, to use a phrase which is commonly found in some of the old authorities, 'at home.' It was real estate *de facto*, and the court will not, in favour of the personal representative and as against the real representative, convert it into money."

Mere power to convert.

The reader must be warned that a mere power to convert, as distinguished from an imperative trust, does not effect any conversion (*b*). But if it be exercised, the property will then be converted as from the date of the sale (*c*), unless there be a trust declared of the proceeds sufficient to reconvert it (*d*), which is always a question of construction (*e*). Where the court rightly directs a sale (which is not otherwise directed) the property is converted from the date of the order (*f*).

(*b*) *Fletcher* v. *Ashburner* (1779), 1 Bro. C. C. 497, 1 Wh. & Tu. Lead. Cas. (8th ed.) 347.

(*c*) *Re Dyson, Challinor* v. *Sykes*, [1910] 1 Ch. 750.

(*d*) *De Beauvoir* v. *De Beauvoir* (1852), 3 H. L. Cas. 524; *Greenway* v. *Greenway* (1860), 29 L. J. Ch. 601.

(*e*) Where there is a trust to re-invest the proceeds in real *or leasehold* estate, see *Re Bird, Pitman* v. *Pitman*, [1892] 1 Ch. 279.

(*f*) *Burgess* v. *Booth*, [1908] 2 Ch. 648.

CHAPTER III.

CONSTRUCTIVE TRUSTS WHICH ARE NOT RESULTING.

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Art. 31.—*Constructive Trusts of Profits made by Persons in Fiduciary Positions.*

Where a person has the management of property, either as an express trustee, or as one of a succession of persons partially interested under a settlement, or as a guardian, or other person clothed with a fiduciary character, he is not permitted to gain any personal profit by availing himself of his position; and he will be a constructive trustee of any profit so made for the benefit of the persons equitably entitled to the property.

Trustee renewing lease to himself.

In the leading case of *Keech* v. *Sandford* (*a*), a lessee of the profits of a market had devised the lease to a trustee for an infant. On the expiration of the lease, the trustee applied for a renewal; but the lessor would not renew, on the ground that the infant could not enter into the usual covenants. Upon this, the trustee took a lease to himself for his own benefit. It, was however, decreed by Lord King, that he must hold it in trust for the infant; his lordship saying: "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestuis que trusts*." The same principle is equally applicable to

(*a*) (1726) Sel. Cas. Ch. 61; *Fitzgibbon* v. *Scanlan* (1813), 1 Dow, 261; and see *Re Morgan*, *Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93; *Re Ludham*, *Brinton* v. *Ludham* (1885), 53 L. T. 9; and *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40, where the whole subject is elaborately discussed.

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renewals by the husband or wife of a person in a fiduciary position (*b*).

Tenant for life of leaseholds renewing to himself.

So also a tenant for life of leaseholds (even though they be held under a mere yearly tenancy (*c*)), who claims under a settlement, cannot renew them for his own sole benefit. For he is not permitted to avail himself of his position as the person in possession under the settlement, to get a more durable term, and so to defeat the probable intentions of the settlor that the lease should be renewed for the benefit of *all* persons claiming under the settlement (*d*).

In the case of *Longton* v. *Wilsby* (*e*), STIRLING, J., is reported to have said that the above cases must be restricted to leases where there was a *right* of renewal either by custom or contract; but it has more recently been pointed out by WARRINGTON, J. (*f*), that this is an obvious mistake, and that the learned judge was only referring to the purchase of *reversions on*, and not to the *renewal* of, leases.

Fiduciary lessee purchasing the reversion expectant on the lease.

Whether a trustee or other fiduciary person is equally precluded from purchasing the reversion expectant on a lease of which he is trustee, is a more difficult question. The answer seems to be that he is not (*g*), unless the lease is one which is renewable by contract, or if not renewable by contract there has been such a long-standing custom of granting renewals as to lead to the inference that a renewal would be highly probable (*h*).

Renewals of leases by partial owners other than tenants for life.

In the case of renewals of leases by trustees or tenants for life, the presumption against the validity of the renewal for the sole benefit of the party renewing, is absolute and irrebuttable (*i*). But when we come to consider renewals by

(*b*) *Ex parte Grace* (1799), 1 Bos. & P. 376; explained in *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40, at p. 58.

(*c*) *James* v. *Dean* (1808), 15 Ves. 236.

(*d*) *Eyre* v. *Dolphin* (1813), 2 B. & B. 290; *Mill* v. *Hill* (1852), 3 H. L. Cas. 828; *Yem* v. *Edwards* (1857), 1 De G. & J. 598; *James* v. *Dean*, *supra*. The reader is also referred to *Re Payne's Settlement*, *Kibble* v. *Payne* (1886), 54 L. T. 840; and *infra*, Art. 54. But *cf. Blake* v. *Blake* (1786), 1 Cox, 266.

(*e*) (1897) 76 L. T. 770. Strangely omitted from the authorised reports. See also *Holmes* v. *Williams*, [1895] W. N. 116.

(*f*) *Bevan* v. *Webb*, [1905] 1 Ch. 620.

(*g*) *Randall* v. *Russell* (1817), 3 Mer. 190; *Hardman* v. *Johnson* (1815), 3 Mer. 347; *Longton* v. *Wilsby* (1897), 76 L. T. 770; *Bevan* v. *Webb*, *supra*. But *cf. Re Lord Ranelagh's Will* (1884), 26 Ch. D. 590, *contra*.

(*h*) *Phillips* v. *Phillips* (1885), 29 Ch. D. 673; *Bevan* v. *Webb*, *supra*.

(*i*) *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40.

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mortgagees (*k*), joint tenants (*l*), tenants in common (*m*), possibly partners (*n*), and owners of land subject to a charge (*o*), the proposition requires modification. In such cases there is no irrebuttable presumption of law against the validity of the transaction, but at most a rebuttable presumption of fact, that it lies on the party renewing to show that he acted *bonâ fide*, and took no undue advantage of the other parties interested (*p*). If, therefore, on the evidence, the court considers that there was no bad faith and no undue advantage taken, the renewer will be allowed to retain the benefit of the renewed lease. For instance, where a lease formed part of the personal estate of an intestate, and the lessor refused to renew to the administratrix, a subsequent renewal obtained by one of the next of kin was held to be unimpeachable (*p*).

Tenant for life of equity of redemption purchasing fee simple from mortgagee.

The principle precluding a tenant for life from renewing a lease for his own benefit, equally precludes a tenant for life of an equity of redemption from purchasing the fee simple from the mortgagee. If he does so he must hold it upon the trusts of the settlement subject, of course, to a charge for what he has paid (*q*).

Additions to trust property.

It need scarcely be said, that any property acquired by trustees by reason of their legal ownership of the trust property, for instance a Crown grant of salmon fishings opposite the trust property (*r*), must be held by them as trustees only.

Tenant for life receiving money in relation to inheritance.

Upon similar grounds, if a tenant for life accepts money in consideration of his allowing something to be done which is prejudicial to the trust property (as, for instance, the unopposed passage of an Act of Parliament sanctioning a railway), he

(*k*) *Rushworth's Case* (1676), Freem. 13.

(*l*) *Palmer* v. *Young* (1684), 1 Vern. 276. But dist.: *Holmes* v. *Williams*, [1895] W. N. 116, where ROMER, J., held that one of several beneficiaries who obtained a lease to himself of property previously leased to his trustees, and forfeited by them, was not a constructive trustee for the other *cestuis que trusts*.

(*m*) *Hunter* v. *Allen*, [1907] 1 Ir. R. 212; *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*n*) *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Clegg* v. *Fishwick* (1849), 1 Mac. & G. 294; *Bell* v. *Barnett* (1872), 21 W. R. 119; but as to partners, *see Dean* v. *McDowell* (1878), 8 Ch. D. 345; and *Piddocke* v. *Burt*, [1894] 1 Ch. 343, where a partner was held not to be a constructive trustee. But *cf.* judgment of WARRINGTON, J., in *Bevan* v. *Webb*, [1905] 1 Ch. at p. 625.

(*o*) *Jackson* v. *Welsh* (1836), L. & G. *temp.* Plunkt. 346; *Winslow* v. *Tighe* (1812), 2 Ba. & B. 195; *Webb* v. *Lugar* (1836), 2 Y. & Coll. Ex. 247.

(*p*) *Re Biss*, *Biss* v. *Biss*, [1903] 2 Ch. 40.

(*q*) *Griffith* v. *Owen*, [1907] 1 Ch. 195.

(*r*) *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544.

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will be a trustee of such money for all the persons interested under the settlement (*s*).

Profit made by trustee.

So where the solicitors in an administration action presented their client, the trustee, with half of their profit costs, NORTH, J. (while holding that in the administration action he had no jurisdiction in the matter), intimated that if a separate action were brought against the trustee, he would have no defence to it (*s*).

Bribing trustee to retire.

Again, where a testator, by codicil, substituted two persons as trustees in place of those named in his will, and one of the excluded persons gave £75 to one of the persons appointed by the codicil as an inducement to retire and appoint him (the excluded one) in his stead, it was held that the transaction must not only be set aside, but that the £75 should form part of the estate as a profit illegally made by the trustee who retired (*t*). The one who paid it was of course precluded from claiming its return under the maxim *in pari delicto potior est conditio possidentis*.

How far directors and other agents are constructive trustees of profits.

Directors of a company cannot avail themselves of their position to enter into beneficial contracts with the company (*u*), nor can they buy property, and then sell it to the company at an advanced price. Promoters of a company hold a fiduciary relation towards the company, and cannot be allowed to retain a secret commission received from the vendors of property which the company is formed for the purpose of purchasing (*x*). Directors cannot receive commissions from other parties on the sale of any of the property of the company (*y*); and generally they cannot deal for their own advantage with any part of the property or shares of the company (*z*).

Profits made by agents.

However, notwithstanding some dicta to the contrary, it would seem that where profits are illegally made by agents, although they must give them up to their principals, they are not always considered to be constructive trustees, so as to give the principals the right of following the profits if converted into other kinds of property. This question is considered more fully *infra*, p. 183.

(*s*) *Re Thorpe*, *Vipont* v. *Radcliffe*, [1891] 2 Ch. 360.

(*t*) *Sugden* v. *Crossland* (1856), 3 Sm. & Giff. 192.

(*u*) *Great Luxembourg Rail. Co.* v. *Magnay* (1858), 25 Beav. 586; *Aberdeen Rail. Co.* v. *Blackie* (1854), 1 Macq. H. L. 461; *Flanagan* v. *Great Western Rail. Co.* (1868), 19 L. T. (N. S.) 345.

(*x*) *Hitchens* v. *Congreve* (1828) cited 1 Russ. & Myl. 150; *Fawcett* v. *Whitehouse* (1829), 1 Russ. & Myl. 132; *Beck* v. *Kantorowicz* (1857), 3 Kay & J. 230; *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371; *Emma Silver Mining Co.* v. *Grant* (1879), 11 Ch. D. 918.

(*y*) *Gaskell* v. *Chambers* (1858), 26 Beav. 360.

(*z*) *York, etc. Rail. Co.* v. *Hudson* (1853), 16 Beav. 485.

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Solicitor buying from client.

A solicitor who purchases property from a client must, if the sale be impeached, not only show that he gave full value for it, but also that the client was actually benefited by the transaction (*a*). And persons who subsequently purchase from the solicitor with notice of the transaction are under a similar liability (*b*).

ART. 32.—*Constructive Trusts where Equitable and Legal Estates are not united in the same Person.*

In every case (not coming within the scope of any of the preceding articles) where the person in whom real or personal property is vested has not the whole equitable interest therein, he is *pro tanto* a trustee of that property for the persons having such equitable interest (*c*).

Relation of vendor and purchaser before completion.

Thus, where a binding contract is entered into between two persons for the sale of land by one to the other, then, in the words of Lord CAIRNS, in *Shaw* v. *Foster* (*d*), "There cannot be the slightest doubt of the relation subsisting in the eye of a court of equity between the vendor and the purchaser. The vendor is a trustee of the property for the purchaser; the purchaser is the real beneficial owner in the eye of a court of equity of the property; subject only to this observation, that the vendor (whom I have called a trustee) is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subsists subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." He is, therefore, only

(*a*) And see also *infra*, Art. 54.

(*b*) *Spencer* v. *Topham* (1856), 2 Jur. (N. S.) 865.

(*c*) *Per* Lord LINDLEY in *Hardoon* v. *Belilios*, [1901] A. C. 118, 123. This article, doubtless, includes all those relating to constructive trusts which have preceded it; but as it would be an endless task to enumerate every kind of constructive trust (for they are, as has been truly said, conterminous with equity jurisprudence), I have thought it better to call special attention to those classes which are most important, and to bring all others within one sweeping general clause.

(*d*) (1872) L. R. 5 H. L. 321; *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469.

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trustee *pro tanto*, and his duties are strictly matter of contract (*e*).

Constructive trust arising out of contract restricted to contracts which equity would specifically perform.

The last-mentioned case depends on the maxim that equity regards that as done which ought to be done. In other words a constructive trusteeship only arises by reason of a contract of sale where the contract is one which a court of equity would specifically perform. Consequently, as the court will not enforce the specific performance of ordinary contracts for the sale and purchase of chattels (unless there be something very special in the nature of the contract, as in the case of a picture or other unique article), so no constructive trust of ordinary chattels will be inferred in favour of the purchaser merely from the fact of his contract to purchase it. If the relation of trustee and *cestui que trust* in such cases exist at all, it must be shown to exist from something beyond the mere contract. For instance, if the seller has been paid every penny that he was entitled to and had no claim upon or interest in the chattels, and the contract only remains unperformed to this extent, that the chattel has not been delivered to the purchaser, the seller would then be a mere trustee of the chattel for the purchaser or his assigns (*f*). To raise a constructive trust of chattels in favour of a purchaser, therefore, the chattels must exist, and either the contract must be one which the court would specifically perform, or (if not) everything must have been done by the purchaser necessary to entitle him to immediate delivery.

Vendor's lien after conveyance.

In the converse case, where the vendor has actually conveyed the property, but the purchaser has not paid the purchase-money, or has only paid part of it, the vendor has a lien upon the property for the unpaid portion (*g*), and the purchaser will hold the estate as a trustee *pro tanto*, unless by his acts or declarations the vendor has plainly manifested his intention to rely not upon the estate, but upon some other security, or upon the personal credit of the individual (*h*). A mere collateral security will not, however, suffice (*i*); but where it appears that a bond, covenant, mortgage, or annuity was itself the actual consideration—the thing bargained

(*e*) See *per* Lord WESTBURY in *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; distinguished in *Beljemann* v. *Beljemann*, [1895] 2 Ch. 474; but see *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469, and *cf. Clarke* v. *Ramuz*, [1891] 2 Q. B. 456.

(*f*) *Per* ROMILLY, M.R., *Pooley* v. *Budd* (1851), 14 Beav. 34; and see *Gunn* v. *Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. 491.

(*g*) *Mackreth* v. *Symmons* (1808), 15 Ves. 329, 2 Wh. & Tu. Lead. Cas. (7th ed.) 926.

(*h*) *Ibid.*

(*i*) *Collins* v. *Collins* (1862), 31 Beav. 346; *Hughes* v. *Kearney* (1803), 1 Sch. & Lef. 132.

for—and not merely a collateral security for the purchase-money (*k*), there will be no lien, and consequently no trust.

Equitable mortgages.

It need scarcely be pointed out that a mortgagor, in the case of an equitable mortgage, is *pro tanto* a trustee for the mortgagee. For even where there is no written memorandum, a deposit of title deeds is of itself evidence of an agreement for the mortgage of the property (*l*): and, in accordance with the maxim that "equity regards that as done which ought to be done," the mortgagor holds the legal estate in trust to execute a legal mortgage to the mortgagee.

Devolution of mortgaged property.

Upon the death of a mortgagee, the mortgaged property (if assured to him in fee) descended at law before 1882 to his heir; but being in reality only a security for money, it equitably belonged to his personal representatives, and the heir was, therefore, held to be a mere trustee for the administrators or executors of the mortgagee (*m*).

Mortgagee in possession.

A mortgagee is not in the position of a trustee with regard to the exercise of his power of sale, which is given to him for his own benefit; the only obligation incumbent on him is that he should act in good faith (*n*). On the other hand, a mortgagee in possession is constructively a trustee of the rents and profits, and bound to apply them in a due course of administration (*o*). But there has been considerable conflict of opinion as to the extent of his responsibility. For instance, it has been held that he is liable even after transferring the mortgage without the mortgagor's consent (*p*); but this decision has been questioned, and, it is respectfully apprehended, rightly so (*q*). In another case, it was said that a mortgagee in possession who, after the mortgagor's death, bought up the

(*k*) *Buckland* v. *Pocknell* (1843), 13 Sim. 406; *Parrott* v. *Sweetland* (1835), 3 Myl. & K. 655; *Dixon* v. *Gayfere* (No. 3) (1855), 21 Beav. 118; *Dyke* v. *Rendall* (1852), 2 De G. M. & G. 209; and see *Re Brentwood Brick and Coal Co.* (1876), 4 Ch. D. 562.

(*l*) *Russell* v. *Russell* (1783), 1 Bro. C. C. 269, 2 Wh. & Tu. Lead. Cas. (7th ed.) 76; *Ex parte Wright* (1812), 19 Ves. 255; *Pryce* v. *Bury* (1853), 2 Drew. 41; *Ferris* v. *Mullins* (1854), 2 Sm. & Giff. 378; *Ex parte Moss* (1849), 3 De G. & Sm. 599.

(*m*) *Thornborough* v. *Baker* (1677), 1 Ch. Cas. 283, 2 Wh. & Tu. Lead. Cas. (7th ed.) 1; but see 37 & 38 Vict. c. 78, ss. 4, 5.

(*n*) *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*o*) *Coppring* v. *Cooke* (1684), 1 Vern. 270; *Bentham* v. *Haincourt* (1691), Pr. Ch. 30; *Parker* v. *Calcraft* (1821), 6 Madd. 11; *Hughes* v. *Williams* (1806), 12 Ves. 493; *Maddocks* v. *Wren* (1680), 2 Ch. Rep. 109.

(*p*) *Venables* v. *Foyle* (1660), 1 Ch. Cas. 3.

(*q*) *Kingham* v. *Lee* (1846), 15 Sim. at p. 400.

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widow's right to dower was obliged to hold it in trust for the heir, upon his paying the purchase-money (*r*); and although this case has called forth much comment (*s*), it is difficult to distinguish it in principle from the class of cases considered in the last article.

Limited owners paying off charge on inheritance or calls on shares.

Another important illustration of the rule now under consideration occurs when a limited owner (*e.g.*, a tenant for life) pays off a specific (*t*) incumbrance out of his own money. In such a case (in the absence of evidence showing an intention to extinguish the incumbrance) he is held to be, in equity, in the position of a transferee of the incumbrance, notwithstanding that he took an ordinary reconveyance (*u*); and, on his death, the remainderman holds the legal estate subject to the equitable lien or charge so created (*x*). On the same ground, it has been held that a tenant for life under a settlement comprising shares in a company has a lien on the shares for repayment, with interest, of advances made at the request of the trustees, for the purpose of paying calls (*y*).

Improvements effected by partial owner.

In some cases, where a person partially interested in land has raised the value of it by effecting permanent improvements at his own expense, the amount expended, or the additional value imparted to the property by the expenditure (whichever is the smallest sum), has been charged by the court on the property in favour of the party who found the money. But it is believed that this has only been done in two classes of cases, viz., (1) where equitable relief is being sought by the other parties interested in the estate; in which case such equitable relief has been given only on the terms of their doing equity by bearing the charge in question (*z*);

(*r*) *Baldwin* v. *Bannister*, cited in *Robinson* v. *Pett* (1734), 3 P. Wms. 251.

(*s*) *Dobson* v. *Land* (1850), 8 Hare, 216; *Arnold* v. *Garner* (1847), 2 Ph. 231; *Matthison* v. *Clarke* (1854), 3 Drew. 3.

(*t*) See *Morley* v. *Morley* (1855), 25 L. J. Ch. 1; *e.g.* a Local Government charge, *Re Smith's Settled Estates*, [1901] 1 Ch. 689.

(*u*) *Lord Gifford* v. *Lord Fitzhardinge*, [1899] 2 Ch. 32.

(*x*) *Redington* v. *Redington* (1809), 1 Ba. & B. 131; *St. Paul* v. *Dudley & Ward* (1808), 15 Ves. 167; *Drinkwater* v. *Combe* (1825) 2 Sim. & St. 340. As to case where tenant for life of a lease for lives purchases the reversion and settles it, see *Isaac* v. *Wall* (1877), 6 Ch. D. 706; and, as to evidence showing contrary intention, see *Astley* v. *Milles* (1827), 1 Sim. 298; *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244.

(*y*) *Rowley* v. *Unwin* (1855), 2 Kay & J. 138; *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69.

(*z*) *Henderson* v. *Astwood*, [1894] A. C. 150; *Rowley* v. *Ginnever*, [1897] 2 Ch. 503; and see *Re Cook's Mortgage*, *Lawledge* v. *Tyndall*, [1896] 1 Ch. 923, and *Re Coulson's Trusts*, *Prichard* v. *Coulson* (1907), 97 L. T. 754.

and (2) in cases of salvage, *i.e.*, where the expenditure has been necessary to avoid actual loss (*a*). But except in such cases as these, or under the provisions of the Settled Land Acts or the Improvement of Land Act, it would seem that the court has no jurisdiction either to sanction in advance a charge, on the property, of the expense of permanent improvements, or to create such charge where the partial owner has already incurred the expense (*b*). In such cases, however, Parliament has on several occasions given relief by private legislation. Art. 32.

Conversely where a tenant for life in possession, who is also the only person *in esse* entitled to the first estate of inheritance, commits waste, he is a trustee of the proceeds for all parties ultimately interested (*c*); for, there being no one in existence to sue him at common law, equity steps in.

Considerable difficulty frequently arises with regard to the question whether an agent is a trustee for his principal. The point generally arises either in reference to the Statutes of Limitation, or to the application of the Debtors Act, 1869 (32 & 33 Vict. c. 62), in relation to the attachment of defaulting trustees. It is submitted that where property is handed to an agent either for investment, sale, safe custody (*d*), or otherwise, then he is a trustee of that property (*e*). But where an agent merely collects rents, or debts, or the like on commission, or receives illicit commissions, the relation of trustee and *cestui que trust* does not generally arise, unless the agency is of an exceptionally fiduciary character; the remedy of the principal being confined to a common law action for money had and received (*f*). As Chitty, J., said in Confidential agents.

(*a*) *Re Montagu, Derbishire* v. *Montagu*, [1897] 2 Ch. 8; *Frith* v. *Cameron* (1871), L. R. 12 Eq. 169; but see *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

(*b*) *Re Montagu, Derbishire* v. *Montagu, supra;* and see *Floyer* v. *Bankes* (1869), L. R. 8 Eq. 115; *Re Willis, Willis* v. *Willis*, [1902] 1 Ch. 15. As to improvements by trustees, see *post*, Art. 56, and as to repairs, Art. 46.

(*c*) *Williams* v. *Bolton* (1784), 1 Cox, 72; *Powlett* v. *Bolton* (1797), 3 Ves. Jun. 374; *Garth* v. *Cotton* (1753), 3 Atk. 755; *Bagot* v. *Bagot* (1863), 32 Beav. 509; *Re Barrington, Gamlen* v. *Lyon* (1886), 33 Ch. D. 523. If a tenant for life *un*impeachable for waste afterwards comes into existence he will take the fund: *Lowndes* v. *Norton* (1877), 6 Ch. D. 139, and cases there cited).

(*d*) *Re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154; *North American Land and Timber Co., Ltd.* v. *Watkins*, [1904] 1 Ch. 242.

(*e*) See *Burdick* v. *Garrick* (1870), L. R. 5 Ch. 233; *Crowther* v. *Elgood* (1887), 34 Ch. D. 691; *Dooby* v. *Watson* (1888), 39 Ch. D. 178.

(*f*) *Piddocke* v. *Burt*, [1894] 1 Ch. 343; and see *Friend* v. *Young*, [1897] 2 Ch. 421, explained and distinguished in *North American Land and Timber Co., Ltd.* v. *Watkins*, [1904] 1 Ch. 242.

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Piddocke v. *Burt* (*g*), "it is not every agent who is fiduciary." Thus a partner who collected debts due to the firm and misapplied the money so collected, was held not to be liable as a trustee. So directors of a company, although "they have been always considered and treated as trustees of money *which comes to their hands or which is under their control*" (*h*), are not liable, as trustees, for carelessness,—as for instance, for accepting shares in another company in lieu of cash (*h*). But, on the other hand, an auctioneer is a trustee of a deposit paid to him (*i*); and so is a broker of stock handed to him for sale (*j*). A solicitor to whom money is handed for investment (*k*), a solicitor of a mortgagee who receives purchase-moneys arising under an exercise of his client's power of sale (*l*), land agents, bailiffs, and receivers, are all fiduciary agents (*m*). But a solicitor employed to get in a debt, and who ought to hand it over *at once* to his client, is curiously enough not a trustee of it (*n*); possibly on the ground that he is not intended to keep it in his custody, custody being of the very essence of trusteeship.

Partnership liens.

So, again, where the plaintiff was induced, by fraud of the defendant, to purchase a share of his business, and to enter into partnership with him, and judgment was given for the rescission of the agreement and the dissolution of the partnership, it was held that the plaintiff was entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets after satisfying the partnership debts and liabilities; and that, in respect of any sums which he had paid or might pay in satisfaction of partnership debts, he was entitled to stand in the place of the partnership creditors to whom he had made the payments (*o*). So where one partner wrongfully sells the partnership securities, he is a trustee of the proceeds (*p*).

(*g*) [1894] 1 Ch. 343.

(*h*) *Per* LINDLEY, L.J., *Re Lands Allotment Co.*, [1894] 1 Ch. at p. 631; and see *Re Sharpe, Masonic, etc., Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154.

(*i*) *Crowther* v. *Elgood* (1887), 34 Ch. D. 691.

(*j*) *Ex parte Cooke, Re Strachan* (1876), 4 Ch. D. 123.

(*k*) *Burdick* v. *Garrick* (1870), L. R. 5 Ch. 233; *Dooby* v. *Watson* (1888), 39 Ch. D. 178; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

(*l*) *Re Bell, Lake* v. *Bell* (1886), 34 Ch. D. 462.

(*m*) *Marris* v. *Ingram* (1879), 13 Ch. D. 338.

(*n*) *Re Hindmarsh* (1860), 1 Dr. & Sm. 129; *Burdick* v. *Garrick, supra*; *Watson* v. *Woodman* (1875), L. R. 20 Eq. 721.

(*o*) *Mycock* v. *Beatson* (1879), 13 Ch. D. 384: and as to sale of land obtained by fraud, see *Rose* v. *Watson* (1864), 10 H. L. Cas. 672; and see also *Aberaman Ironworks* v. *Wickens* (1868), L. R. 4 Ch. 101.

(*p*) *Kendal* v. *Wood* (1871), L. R. 6 Ex. 243.

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Property acquired by fraud.

Upon similar principles, a court of equity converts a party who has obtained property by fraud into a trustee for the party who is injured by that fraud (*q*). For instance, where an heir apparent, by fraud, prevents a will being made (*r*), or, being the testator's solicitor as well as his heir, advises him to do an act which has the effect of revoking a will (*s*), it has been held that he is a constructive trustee for the disappointed devisees. But, that being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, or *malus animus*, is proved by the clearest and most indisputable evidence ; it is impossible to supply presumption in the place of proof (*t*).

Capital of company distributed *ultra vires*.

So where the shareholders of a company receive capital *ultra vires*, they are trustees of it for the company (*u*) ; and *a fortiori* directors are liable as trustees who have misapplied trust funds (*x*).

Trust funds received by a stranger.

So, again, where a stranger to a trust receives money or property from the trustee, which he knows (1) to be part of the trust estate, and (2) to be paid or handed to him in breach of the trust, he is a constructive trustee of it for the persons equitably entitled, but not otherwise (*y*). This question of the responsibility of third parties as constructive trustees is more fully discussed in Division IV., Chap. III., *infra*.

(*q*) See *Booth* v. *Turle* (1873), L. R. 16 Eq. 182 ; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*r*) *Dixon* v. *Olmius* (1787), 1 Cox, 414.

(*s*) *Bulkley* v. *Wilford* (1834), 2 Cl. & Fin. 177.

(*t*) *Per* Lord Westbury in *McCormick* v. *Grogan* (1869), L. R. 4 H. L. at p. 88. But *cf.* judgment of Lord Eldon in *Bulkley* v. *Wilford*, *supra*, where his lordship stated that gross professional ignorance was equivalent to fraud. As to a person who has by fraud prevented a will being made in plaintiff's favour, see *Dixon* v. *Olmius* (1787), 1 Cox. 414 ; and see also, as to gifts made under undue influence to fiduciary persons, Art. 14, *supra*.

(*u*) *Russell* v. *Wakefield Waterworks Co.* (1875), L. R. 20 Eq. 474 ; *Moxham* v. *Grant*, [1900] 1 Q. B. 88.

(*x*) *Re Sharpe*, *Masonic*, *etc.*, *Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154.

(*y*) *Barnes* v. *Addy* (1874), L. R. 9 Ch. 244 ; *Re Spencer* (1881), 51 L. J. Ch. 271 ; *Re Blundell*, *Blundell* v. *Blundell* (1888), 40 Ch. D. at p. 381 ; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390 ; *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282 ; *Re Barney*, *Barney* v. *Barney*, [1892] 2 Ch. 265.

DIVISION IV.

THE ADMINISTRATION OF A TRUST.

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CHAPTER I.

DISCLAIMER AND ACCEPTANCE OF TRUSTS.

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Art. 33.—*Disclaimer of a Trust.*

No one is bound to accept the office of trustee (*a*). Both the office and the estate may be disclaimed *before acceptance* (but not afterwards (*b*)), in the case of a married woman by deed (*c*), and in other cases by deed or by conduct tantamount to a disclaimer (*d*). The

(*a*) *Robinson* v. *Pett* (1734), 3 P. Wms. 249, 2 Wh. & Tu. Lead. Cas. (7th ed.) 606.

(*b*) *Noble* v. *Meymott* (1851), 14 Beav. 471.

(*c*) 8 & 9 Vict. c. 106, s. 7.

(*d*) *Stacey* v. *Elph* (1833), 1 Myl. & K. 195; *Townson* v. *Tickell* (1819), 3 B. & Ald. 31; *Begbie* v. *Crook* (1835), 2 Bing.

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disclaimer should be made within a reasonable period, having regard to the circumstances of the particular case (*e*). Part of a trust cannot be disclaimed if other part be accepted (*f*). The onus of proving disclaimer is on those who assert it (*g*).

Consent to undertake future trust not binding.

Thus, even though a person may have agreed in the lifetime of a testator to be his executor, he is still at liberty to recede from his promise at any time before proving the will (*h*).

Methods of disclaiming.

A prudent man will, of course, always disclaim by deed, in order that there may be no question of the fact; but a disclaimer by counsel at the bar (*i*), or even by conduct inconsistent with acceptance, is sufficient (*j*). For instance, in *Stacey* v. *Elph* (*k*), a person, named as executor and trustee under a will, did not formally renounce probate until after the death of the acting executor, nor formally disclaim the trusts of the will; but he purchased a part of the real estate, and took a conveyance from the tenant for life, *and the heir-at-law in whom the estate could only rest by the disclaimer of the trust*. It was held, under these circumstances, that he had by his conduct disclaimed the office and estate of trustee under the will.

Deed of disclaimer not necessary.

In *Re Ellison's Trusts* (*l*), Sir W. PAGE-WOOD, V.-C., expressed some doubt whether a *freehold estate* could be disclaimed by parol, or otherwise than by deed; but his honour's attention does not appear to have been called to *Stacey* v. *Elph*. Moreover, in the more recent case of *Re Gordon, Roberts* v. *Gordon* (*m*), where real estate was devised to trustees upon trust to sell and to form a mixed fund (consisting of the proceeds of such sale and of the testator's personal estate), and the trustees were also nominated executors, and renounced probate, and never acted in the trusts, it was held by Sir GEORGE JESSEL, M.R., that the renunciation of probate, coupled with the fact that the trustees

N. C. 70; *Bingham* v. *Lord Clanmorris* (1828), 2 Moll. 253; and *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436.

(*e*) See *Doe* v. *Harris* (1847), 16 Mee. & W. at p. 522; *Paddon* v. *Richardson* (1855), 7 De G. M. & G. 563; *James* v. *Frearson* (1842), 1 Y. & Coll. C. C. 370.

(*f*) *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228. See *infra*, p. 192.

(*g*) See *infra*, p. 190.

(*h*) *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231.

(*i*) *Norway* v. *Norway* (1834), 2 Myl. & K. 278; *Bray* v. *West* (1838), 9 Sim. 429.

(*j*) *Forster* v. *Dawber* (1860), 8 W. R. 646.

(*k*) (1883) 1 Myl. & K. 195.

(*l*) (1856) 2 Jur. (N. S.) 62.

(*m*) (1877) 6 Ch. D. 531.

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had never assumed to act as such, was conclusive evidence of disclaimer. Lastly, in *Re Birchall, Birchall* v. *Ashton* (*n*), the Court of Appeal held that a trustee had by conduct disclaimed the office; and that having disclaimed the office, he must of necessity have also disclaimed the estate.

Where a deed is executed with the intention that it shall operate as a disclaimer, it will have that effect, notwithstanding that the disclaiming trustee purports to convey or release his estate to the accepting trustees, an action which logically raises the inference that he has accepted the estate (*o*).

Costs of disclaimer.

With regard to the costs of a disclaimer, a person nominated a trustee who refuses to accept the office is not to be put to expense. He is therefore entitled, as a condition of executing a deed of disclaimer, to be paid out of the trust estate all his costs of and incident thereto, including the costs of taking counsel's opinion (*p*). If (not having previously disclaimed) he is made a defendant to an action concerning the trust, he should, generally speaking, disclaim at once and offer to execute all necessary documents on his costs being paid. He will then be entitled to have the action dismissed, against him with costs, but only as between party and party (*q*). What would happen in the case of a person nominated a trustee who unreasonably refuses either to accept or disclaim, seems never to have been decided in any reported case. It is apprehended, however, that he would in these days get no costs of any proceedings rendered necessary by his ill-conditioned conduct, but it is difficult to see how he could be ordered to pay costs. Indeed in one case (before the present wide judicial discretion as to costs) where the executrix of a deceased trustee refused to act in the trust (she could not disclaim) she was allowed her costs of a suit for the appointment of new trustees and a transfer of the trust property (*r*).

Effect of disclaimer.

The effect of disclaimer is to avoid the devise, bequest, or grant *ab initio*, so that where there are two trustees and one disclaims, the title of the other who accepts is complete *ab initio*, and devolves on his death as such (*s*).

(*n*) (1889) 40 Ch. D. 436; and see *Lancashire* v. *Lancashire* (1848), 2 Ph. 657.

(*o*) *Nicloson* v. *Wordsworth* (1818), 2 Swans. 365.

(*p*) *Re Tryon* (1844), 7 Beav. 496.

(*q*) See *Benbow* v. *Davies* (1848), 11 Beav. 369; *Norway* v. *Norway* (1834), 2 Myl. & K. 278; *Bray* v. *West* (1838), 9 Sim. 429. As to where he is a defendant in a foreclosure action by a mortgagee of the trust estate, see *Ford* v. *Lord Chesterfield* (1853), 16 Beav. 516.

(*r*) *Legg* v. *Mackrell* (1860), 2 De G. F. & J. 551.

(*s*) *Peppercorn* v. *Wayman* (1852), 5 De G. & Sm. 230.

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ART. 34.—*Acceptance of a Trust.*

A person may accept the office of trustee expressly; or he may do so constructively by doing such acts as are only referable to the character of trustee or executor; or he may do so by long acquiescence. In the absence of evidence to the contrary, acceptance will be presumed (*t*).

Express acceptance.

A trustee expressly accepts the office by executing the settlement (*u*), or by making an express declaration of his assent (*x*).

Acceptance by acquiescence.

Permitting an action concerning the trust property to be brought in his name (*y*), or otherwise allowing the trust property to be dealt with in his name (*z*), is such an acquiescence as will be construed to be an acceptance of the office.

Acceptance by exercise of dominion.

So, exercising any act of ownership, such as advertising the property for sale, giving notice to the tenants to pay the rents to himself or an agent, or requesting the steward of a manor to enrol a deed in relation to the trust property, and *a fortiori* active interference in the affairs of the trust (*a*), is sufficient to constitute acceptance of a trust (*b*).

Acceptance by taking out probate.

Again, where the office of executor is clothed with certain trusts, or where the executor is also nominated the trustee of real estate under a will, he is construed to have accepted the office of trustee if he takes out probate to the will (*c*). And acceptance of the trusts of a will was, prior to 1882, constructive acceptance of the office of trustee of estates, devised thereby,

This equally applies to powers *annexed to the office* (*Browell* v. *Reed* (1842), 1 Hare, 434; *Adams* v. *Taunton* (1820), 5 Madd. 435), but not to personal powers (*Wetherell* v. *Langston* (1847), 1 Ex. 634; *Crawford* v. *Forshaw* (1890), 43 Ch. D. 643).

(*t*) *Townson* v. *Tickell* (1819), 3 B. & Ald. 31; *Re Arbib and Class's Contract*, [1891] 1 Ch. 601.

(*u*) *Buckeridge* v. *Glasse* (1841) 1 Cr. & Ph. 126; *Jones* v. *Higgins* (1866), L. R. 2 Eq. 538.

(*x*) *Doe* v. *Harris* (1847), 16 Mee & W. 517.

(*y*) *Lord Montford* v. *Lord Cadogan* (1810), 17 Ves. 485.

(*z*) *James* v. *Frearson* (1842), 1 Y. & Coll. C. C. 370.

(*a*) *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231; *Harrison* v. *Graham* (undated), 1 P. Wms. (6th Ed.), 241, n.; *Urch* v. *Walker* (1838), 3 Myl. & Cr. 702.

(*b*) *Bence* v. *Gilpin* (1868), L. R. 3 Ex. 76. As to acceptance of executorship by intermeddling, and its effect on subsequent *devastavit* by administrator, see *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231.

(*c*) *Mucklow* v. *Fuller* (1821), Jac. 198; *Ward* v. *Butler* (1824), 2 Mol. 533; *Booth* v. *Booth* (1838), 1 Beav. 125; *Styles* v. *Guy* (1849), 1 Mac. & G. 422.

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of which the testator was trustee (*d*). Now, however, trust estates (except copyholds) cannot be so devised, but vest in the executors *virtute officii* (*e*).

Acceptance by conduct.

In *Conyngham* v. *Conyngham* (*f*), one Coleman was appointed trustee of a will, but he never expressly accepted the appointment. One of the trusts was in respect of the rents of a plantation then in lease to the testator's son. Coleman acted as agent of the son, who was also heir-at-law, and received the rents of the estate from him. It was held that, by so interfering with the trust property, he could not repudiate the trust and say that he merely acted as the son's agent. He received the rents; and it was incumbent on him, if he did not desire to act as trustee, to disclaim expressly, and not to leave himself at liberty to say he acted as trustee or not. It is, however, not every interference with trust property which will be construed as an acceptance of the office of trustee; for if such interference be *plainly* (not *ambiguously*) referable to some other ground, it will not operate as an acceptance (*g*). Nor (it has been said) will merely taking charge of a trust until a new trustee can be found, constitute, of itself, a constructive acceptance (*h*). But it would be a highly dangerous act, even if that decision were now followed, which seems doubtful.

Acceptance by long silence.

In a modern case, the joining in the legacy duty receipt for the trust fund, unaccompanied by the actual receipt of the money, was held to be of itself insufficient to fix a trustee who desired to disclaim, with acceptance of the trusteeship (*i*). But, on the other hand, there is a *primâ facie* presumption of acceptance; so that where a trustee, with notice of the trust, has indulged in a passive acquiescence for some years, he will be presumed to have accepted it, in the absence of any satisfactory explanation (*k*). And where a testator nominated A., who was living in Australia, to be one of his trustees if he should return to England, and some years after the testator's death he did return for a temporary visit, and there was no evidence

(*d*) *Re Perry* (1840), 2 Curt. 655; *Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25.

(*e*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30.

(*f*) (1750) 1 Ves. Sen. 522.

(*g*) *Stacey* v. *Elph* (1833), 1 Myl. & K. 195; *Dove* v. *Ererard* (1830), 1 Russ. & Myl. 231; *Lowry* v. *Fulton* (1838), 9 Sim. 104.

(*h*) *Evans* v. *John* (1841), 4 Beav. 35.

(*i*) *Jago* v. *Jago* (1893), 68 L. T. 654.

(*k*) *Wise* v. *Wise* (1845), 2 Jo. & Lat. 403; *Re Uniacke* (1844), 1 Jo. & Lat. 1; *Re Needham* (1844), 1 Jo. & Lat. 34; *Doe* v. *Harris* (1847), 16 Mee & W. 517.

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of disclaimer, it was held that the *primâ facie* presumption of acceptance had not been rebutted, and that a title could not be made by the other trustees (*l*).

Acceptance of part and attempted disclaimer of other part.

Acceptance of part of a trust is acceptance of the whole, notwithstanding any attempted disclaimer of part. Thus, where a testator, having property here and abroad, gave the whole to trustees upon the same trusts, it was held that one of the trustees could not disclaim the English property while accepting the trusts of the foreign property; and that consequently he was a necessary party to a sale of the former (*m*).

Lastly, when once a trust has been effectually disclaimed, interference by the disclaiming trustee will not cancel the disclaimer or raise an inference of acceptance of the trust—*e.g.*, where he acts as agent for the trustees or adviser to the family (*n*).

The question of a trustee *de son tort* (*i.e.*, where a person *not* nominated as trustee gets possession of trust property with notice of the trust) is treated of later on.

(*l*) *Re Arbib and Class's Contract*, [1891] 1 Ch. 601.

(*m*) *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228.

(*n*) *Dove* v. *Everard* (1830), 1 Russ. & Myl. 231; *Lowry* v. *Fulton* (1838), 9 Sim. 104; *Stacey* v. *Elph* (1833), 1 Myl. & K. 195.

CHAPTER II.

THE ESTATE OF THE TRUSTEE, AND ITS INCIDENTS.

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ART. 35.—*Cases in which the Trustee takes any Estate.*

(1) Where the trust is a simple trust, and the trust property is of freehold tenure, then, in consequence of (or in the case of wills by analogy to) the Statute of Uses, the trustee takes no estate, unless the property be limited *to his use*, or unless there be a clear intention to vest an estate in him. But where the trust is a special trust, the statute does not apply, and the trustee will take a legal estate of some duration.

(2) Where the trust property is of copyhold or leasehold tenure, or is pure personalty, the Statute of Uses is inapplicable, and the trustee takes a legal estate of some duration, whether the trust be simple or special.

(3) This article has no application where the legal estate is outstanding.

Trust to permit beneficiary to receive rents.

Thus, where the legal estate in freeholds is limited to trustees, and the words used are "in trust to pay to" a specified person the rents and profits, there the trustees take the legal estate, because they must receive before they can pay. But where the words are "in trust to permit and suffer A. B. to take the rents and profits," there the legal estate passes directly to the

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party beneficially entitled, the purposes not requiring that it should remain in the trustees (*a*).

Trust to permit beneficiary to receive net rents.

Where, however, the trustees are to permit and suffer the beneficiary to receive the *net* or clear rents and profits, the trustees take the legal estate: it being presumed that the trustees are to take the *gross* rents, and, after payment of outgoings, to hand over the *net* rents to the beneficiary (*b*).

Trust to pay or permit beneficiary to receive.

Where the language is ambiguous, and may be read either as implying a simple or a special trust, it has been said that the question must be determined according to the general rules of construction. Thus, in *Doe* v. *Biggs* (*c*), it was decided that the words "to pay or permit him to receive" would, if contained in a deed, create a special trust, inasmuch as of two inconsistent expressions in a deed the first prevails; whereas the same words occurring in a will would create a simple trust, as a testator's last words are preferred. However, this case cannot be relied on. As LINDLEY, L.J., said in *Re Lashmar, Moody* v. *Penfold* (*d*), "I do not think it is a sensible decision. I do not think that case could be possibly so decided now if the question arose for the first time; and I am not disposed to extend it. On the other hand, I do not wish to shake titles; and I shall do precisely what our predecessors have always done—leave the case where it is." BOWEN, L.J., went even further, saying, "I agree with the late Master of the Rolls that the case is not one the precedent of which is really applicable to other cases. In most cases, *there is sure to be a context which displaces the conclusion at which the court arrived in that instance.*" The reader is therefore warned that *Doe* v. *Biggs* cannot be safely relied upon as a precedent. Nevertheless it was more recently followed by STIRLING, J., in *Re Adams and Perry's Contract* (*e*).

Control or discretion in trustees.

So, again, where the trustees are to exercise any control or discretion they take some estate. For instance, where the beneficiary is empowered to give receipts for the rents with the *approbation* of the trustees (*f*); or the trust is for the

(*a*) *Per* PARKE, J., *Barker* v. *Greenwood* (1838), 4 Mee. & W. at p. 429; *Doe* v. *Biggs* (1809), 2 Taunt. 109; *Doe* v. *Bolton* (1839), 11 Ad. & El. 188.

(*b*) *Barker* v. *Greenwood*, *supra*; *White* v. *Parker* (1835), 1 Bing. N. C. 573; *Shapland* v. *Smith* (1780), 1 Bro. C. C. 75.

(*c*) (1809) 2 Taunt. 109; *Baker* v. *White* (1875), L. R. 20 Eq. 166, 171.

(*d*) [1891] 1 Ch. 258; and see *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465.

(*e*) [1899] 1 Ch. 554.

(*f*) *Gregory* v. *Henderson* (1813), 4 Taunt. 772; and see also *Davies to Jones and Evans* (1883), 24 Ch. D. 190, where a legal estate was implied without any devise to the trustees. But *cf. Re Cameron, Nixon* v. *Cameron* (1884), 26 Ch. D. 19.

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separate use of a married woman (in cases where the Married Women's Property Act, 1882 (45 & 46 Vict. 75), does not apply), who consequently requires protection, the trustees take the legal estate (*g*); at all events, where the trust is created by will. But where it was created by deed, the common law courts, not recognising the separate estate of a *feme covert*, held that such a trust was a simple trust, and therefore came within the Statute of Uses (*h*). However, it seems more than questionable whether, having regard to the Judicature Acts, this would now be followed. It is, however, apprehended that in cases to which the Married Women's Property Act applies the trustee would not now take the legal estate, because the power of the husband no longer exists.

Charge of debts.

Where property was devised to trustees charged with payment of debts, and subject thereto in trust for A., there, as the trustees were not directed *to pay* the debts, they had no duties, and consequently took no estate (*i*). It is, however, suggested that in the case of wills coming into operation between Lord St. Leonards' Act (22 & 23 Vict. c. 35) and the Land Transfer Act, 1897, this might not be so, as in such cases the former Act casts the duty of selling the property on the trustees. Anyhow, they always took the legal estate if they had to pay the debts (*k*).

Freeholds or copyholds in one trust.

In *Houston* v. *Hughes* (*l*), it was held that (notwithstanding the Statute of Uses), under a devise of freeholds and copyholds to A. and his heirs, in trust for B. and his heirs, the circumstance that A. took an estate in the copyholds was an argument in favour of an intention that he should take the legal estate in the freeholds. However, this doctrine was dissented from by JESSEL, M.R., in *Baker* v. *White* (*m*), and it is clear that, even if it could be supported in the case of a will, a similar limitation in a deed would be construed far more strictly.

Devise to the use of trustees.

So, where lands are devised unto and *to the use* of trustees in trust for B., the trustees take the legal estate irrespective of any active trust (*n*).

(*g*) *Harton* v. *Harton* (1798), 7 T. R. 652. But query whether this would be so since the Married Women's Property Act, 1882.

(*h*) *Williams* v. *Waters* (1845), 14 Mee. & W. 166; see *Nash* v. *Ash* (1862), 1 H. & C. 160.

(*i*) *Kenrick* v. *Lord Beauclerk* (1802), 3 Bos. & P. 175.

(*k*) *Smith* v. *Smith* (1861), 11 C. B. (N. S.) 121; *Marshall* v. *Gingell* (1882), 21 Ch. D. 790; and see as to what amounts to a direction *to the trustees* to pay debts, *Spence* v. *Spence* (1862), 10 W. R. 605; *Creaton* v. *Creaton* (1856), 3 Sm. & G. 386; and *Re Brooke, Brooke* v. *Brooke*, [1894] 1 Ch. 43.

(*l*) (1827) 6 B. & C. 403.

(*m*) (1875) L. R. 20 Eq. 166; approved by STIRLING, J., in *Re Townsend's Contract*, [1895] 1 Ch. 716.

(*n*) *Doe* v. *Field* (1831), 2 B. & Ad. 564.

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Trust to convey to beneficiaries.

Again, even where the active trust is of a trivial description, yet, if it implies an intention to vest the legal estate in the trustee, effect will be given to that intention. Thus, if a testator devises Greenacre to A. and B. and their heirs, upon trust forthwith *to convey and assure* the same to C. in fee, A. and B. will take the legal estate, for they have an active duty to perform, viz., to convey it to C. (*o*).

Power of sale given to trustee.

The circumstance that a testator gives his trustees a power to sell, lease, or mortgage has in several cases been held to show that they were intended to take the legal estate in fee, for the exercise of the power might become an active duty (*p*). But in *Re Lashmar, Moody* v. *Penfold* (*q*), the Court of Appeal considered that at all events a power of sale might take effect as a common law power and therefore did not necessarily import a devise of the fee simple to the trustee. It seems difficult to reconcile this case with the older cases (*p*) at common law, but being a decision of the Court of Appeal it would, it is presumed, govern the question in future.

ART. 36.—*The Quantity of Estate taken by the Trustee of Lands.*

Whenever, under the preceding article, a trustee takes a legal estate of some kind in land, the quantity of that estate is determined by the following principles:

(a) If the settlement is a deed, it will be construed strictly, and the estate of the trustee will not be enlarged or diminished by any reference to the exact estate required to carry out the trust (*r*), unless a strict construction would lead to an inconsistency (*s*).

(*o*) *Doe* v. *Edlin* (1836), 4 Ad. & El. 582; *Doe* v. *Bolton* (1839), 11 Ad. & El. 188; *Van Grutten* v. *Foxwell*, [1897] A. C. 658. Even where the tenant for life is to *receive* the rents, *Keene* v. *Deardon* (1807), 8 East, 248.

(*p*) *Watson* v. *Pearson* (1848), 2 Ex. 581; *Doe* v. *Ewart* (1838), 7 Ad. & El. 636.

(*q*) [1891] 1 Ch. 258.

(*r*) *Cooper* v. *Kynock* (1872), L. R. 7 Ch. 398; *Blaker* v. *Anscombe* (1804), 1 Bos. & P. (N. R.) 25; *Venables* v. *Morris* (1797), 7 T. R. 342; *Wykham* v. *Wykham* (1811), 18 Ves. 395, *per* Lord ELDON; *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605. If a sufficient estate be not given to the trustee, it is conceived that it would be ground for rectification (see *Re Bird's Trusts* (1876), 3 Ch. D. 214).

(*s*) *Curtis* v. *Price* (1805), 12 Ves. 89; *Beaumont* v. *Marquis of Salisbury* (1854), 19 Beav. 198.

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(b) If the settlement is a will dated before the Wills Act, 1837 (1 Vict. c. 26), the legal estate given to a trustee will be enlarged or diminished to such an estate as will enable him to perform the trusts; and if no words of limitation are used, the estate will be limited to a definite or indefinite term of years, unless the trust requires the trustee to take the fee (*t*).

(c) If the settlement is a will executed since the Wills Act, an indefinite devise to a trustee *primâ facie* passes the fee simple, or other the whole estate of the testator; and if the trusts by their nature extend over an indefinite period, that presumption is irrebuttable. But if, on the face of the will, it is apparent that an estate *pur autre vie* would certainly enable the trustee to fulfil all the trusts, he will take that estate only, notwithstanding a limitation to him and his heirs, unless there is a clear intention expressed that he shall take the fee or some other defined estate (*u*).

(*t*) *Cordal's Case* (1594), Cro. Eliz. 316; *Doe* v. *Simpson* (1804), 5 East, 162; *Ackland* v. *Lutley* (1839), 9 Ad. & El. 879; *Heardson* v. *Williamson* (1836), 1 Keen, 33; *Doe* v. *Nichols* (1823), 1 B. & C. 336; *Watson* v. *Pearson* (1848), 2 Ex. 581; *Bush* v. *Allen* (1695), 5 Mod. 63; *Doe* v. *Homfray* (1837), 6 Ad. & El. 206.

(*u*) Sub-paragraph (c) of this article is intended and believed to give the effect of ss. 30 and 31 of the Wills Act (1 Vict. c. 26). By the first of these sections it is enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall be given to him expressly or by implication. Section 31 enacts, that where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or shall be given for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the purposes of the trust shall be satisfied. Both these sections have been subjected to much criticism, and, strange and almost

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SUB-PARAGRAPH (a).

Gift by deed to trustees and their heirs.

In *Colmore* v. *Tyndall* (*x*), under a deed, lands were limited to the use of A. for life, with remainder to the use of B. and his heirs during the life of A., to support contingent remainders, remainder to the use of C. for life, remainder to the same B. and his heirs during the life of C. to support contingent remainders, remainder to the first and other sons of C. in tail male, remainder to divers other uses, remainder to the said B. and his heirs (without saying during the life of the tenant for life) to support and preserve contingent remainders, with divers remainders over. The question arose whether, under the last limitation to B. and his heirs, he took the fee simple, or whether he only took that which was necessary for the purpose of the trust, namely, an estate *pur autre vie*. But the court held that although the estate given to the trustee seemed to be larger than was essential to its purpose, it was not a sufficient ground for restricting an estate limited *by deed* to a trustee *and his heirs* to an estate for life.

Inconsistent limitations.

But even in a deed, where there are limitations which, on a strict construction, would be inconsistent and repugnant, the court will, by supplying obviously omitted words, endeavour to carry out the intention. Thus in *Curtis* v. *Price* (*y*) the facts were as follows. A deed of settlement purported to convey freeholds to P. and J. and their heirs, to the use of M. for life; remainder to the use of E. (his wife) during widowhood; but if she should marry again, *to the use of P. and J. and their heirs*, in trust out of the rents to pay E. an annuity, and to apply the residue to the maintenance of the children of M. and E.; with remainder, after the decease of the survivor of M. and E., *to the use of P. and J. for* 1,000 *years*, upon divers trusts. It was held that, as the limitation of the 1,000 years' term to P. and J. was absolutely inconsistent with an intention to give them the fee, the limitation

incredible as it may appear, it is believed that the real history of the two sections is that they were drafted as alternative ones, but, by some carelessness, were both allowed to remain in the Act when passed (see *per* JESSEL, M.R., *Freme* v. *Clement* (1881), 18 Ch. D. at p. 514). Their meaning is by no means clear; but it is apprehended that their effect is as above stated (see Hawkins Wills, 30).

(*x*) (1828) 2 Y. & J. 605; and see also *Cooper* v. *Kynock* (1872), L. R. 7 Ch. 398; and *Re White and Hindle's Contract* (1877), 7 Ch. D. 201.

(*y*) (1805) 12 Ves. 89; and see *Beaumont* v. *Marquis of Salisbury* (1854), 19 Beav. 198.

to them and their heirs must be cut down to an estate during the life of E. Art. 36.

SUB-PARAGRAPHS (b), (c).

Gift by will to trustees and their heirs.

If the limitations stated in *Colmore* v. *Tyndall* (*supra*), had been declared by a will, whether executed before or since the Wills Act, 1837 (1 Vict. c. 26), instead of by a deed, the decision would clearly have been different. Thus, if lands are devised to trustees and their heirs, upon trust to pay the *net* rents to A. for life, and after A.'s death in trust for B., the trustees, notwithstanding the words of inheritance, only take an estate *pur autre vie* (viz., during A.'s life); for the active trust reposed in them ends with the life of A., and consequently the purposes of their trust do not require them to take a larger estate (*z*).

Larger estate not implied to rectify testator's mistake.

Nor will the court imply a larger estate (where it is not necessary to carry out the definite *trusts* of the will), on the ground that by doing so effect would *incidentally* be given to the testator's intentions. Thus, if freeholds be given to A. for life, with remainder to trustees and their heirs in trust to preserve contingent remainders, with remainder to the heirs of A., it is obvious that, if the trustees could be held to take the fee in reversion expectant on A.'s life estate, the rule in *Shelley's Case* would be rendered inapplicable, and the obvious intention of the testator to give A. a mere life interest would be preserved. But, notwithstanding this, the court holds that the trustees only take an estate *pur autre vie*, that being sufficient to enable them to preserve contingent remainders, which alone was the object of the trust reposed in them (*a*).

Estate in trustee to preserve contingent remainder not implied.

On similar grounds, the court will not imply a larger estate in the trustees than the trust requires, merely because, if they took such larger estate, it would support a contingent remainder, and so prevent it from failing for want of a particular estate of freehold (*b*).

Direction to pay rents to married women.

On the other hand, where, by will, the rents of certain lands (which are not expressly devised to any one) are directed to be paid to a married woman's separate use by the testator's executors, there is an implied devise to the executors of such

(*z*) *Blagrave* v. *Blagrave* (1849), 4 Ex. 550; *Watson* v. *Pearson* (1848), 2 Ex. 581; *Doe* v. *Cafe* (1852), 7 Ex. 675.

(*a*) *Nash* v. *Coates* (1832), 3 B. & Ad. 839; *Haddelsey* v. *Adams* (1856), 22 Beav. 266.

(*b*) *Cunliffe* v. *Brancker* (1876), 3 Ch. D. 393, and cases there cited; *Festing* v. *Allen* (1843), 12 Mee. & W. 279; *Marshall* v. *Gingell* (1882), 21 Ch. D. 790.

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an estate in the land as will enable them to execute the trust (*c*), viz., an estate *par autre vie*.

Trusts requiring a fee simple imply that estate.

So if land be devised to trustees without any words of limitation, by a will executed since the Wills Act (1 Vict. c. 26), and they are expressly directed to sell (*d*), or impliedly authorised to do so (*e*) (as by a direction to pay debts (*f*)), whether certainly or contingently, or are authorised to lease or to mortgage (*g*), or to allow maintenance to infants during a period of suspended vesting (*h*), or to do any other act which requires the complete control over the property (*i*), the trustees will take an estate in fee simple, or other the whole estate which the testator could dispose of. With regard, however, to wills executed before the Wills Act, this would not have been so except under a direction *to sell* (*k*); for a trust to mortgage or lease, or a trust to maintain infants, could equally have been carried out by a trustee who had merely an indefinite term of years (*l*).

Clear intention to vest fee, although not required for trust.

And so, too, the trustees will take the fee simple where there is a clear intention to give it them, notwithstanding that a less estate would certainly enable them to perform the trust. Thus, if lands be devised unto and *to the use* of A. and his heirs, in trust for B. and his heirs, A. takes the legal fee simple (*m*), because there can be no other meaning given to the words used. But a devise unto and to the use of A. and his heirs, in trust for A. for life, and after A.'s death a direct devise to C., gives the trustees merely an estate

(*c*) *Bush* v. *Allen* (1695), 5 Mod. 63; *sed quære* since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

(*d*) *Shaw* v. *Weigh* (1828), 2 Str. 798; *Bagshaw* v. *Spencer* (1748), 1 Ves. Sen. 142; *Watson* v. *Pearson* (1848), 2 Ex. 581; *Croplon* v. *Davies* (1869), L. R. 4 C. P. 159.

(*e*) *Gibson* v. *Lord Montfort* (1750), 1 Ves. Sen. 485. But *cf.* dicta of LINDLEY, L.J., in *Re Lashmar, Moody* v. *Penfold*, [1891] 1 Ch. at p. 267, where he considered that a power of sale might take effect as a common law power apart from any estate.

(*f*) *Marshall* v. *Gingell*, (1882), 21 Ch. D. 790; *Re Brooke, Brooke* v. *Brooke*, [1894] 1 Ch. 43; but see *Carlyon* v. *Truscott* (1875), L. R. 20 Eq. 348.

(*g*) *Doe* v. *Ewart* (1838), 7 Ad. & El. 636; *Watson* v. *Pearson, supra*; *Doe* v. *Willan* (1818), 2 B. & Ald. 84; *Re Eddel's Trusts* (1871), L. R. 11 Eq. 559.

(*h*) *Berry* v. *Berry* (1878), 7 Ch. D. 657; *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465.

(*i*) *Villiers* v. *Villiers* (1740), 2 Atk. 71.

(*k*) *Doe* v. *Ewart* (1838), 7 Ad. & El. 636.

(*l*) See *Cordal's Case* (1594), Cro. Eliz. 316; *Doe* v. *Simpson* (1804), 5 East, 162; *Aekland* v. *Lutley* (1839), 9 Ad. & El. 879; *Heardson* v. *Williamson* (1836), 1 Keen, 33.

(*m*) *Doe* v. *Field* (1831), 2 B. & Ad. 564.

during the life of A. (*n*); for the remainder is not limited by way of trust. Art. 36.

So where there was a devise of freeholds and copyholds to trustees and *their heirs*, in trust for A. for life for her separate use, and after her death upon trust *to stand seised* of them for such persons as she should by will appoint, with a direct devise of the properties to A. in fee in default of appointment, it was held that the trustees took the legal estate in fee. And STIRLING, J., intimated that even if the power of appointment had not been executed he should have held that the ultimate gift to A. in fee was equitable, and not an executory legal devise (*o*).

Trust to convey to another.

Where a testator devises property to trustees and their heirs, upon trust to pay the net rents to A. for life, and after his death upon trust to convey the property to B. in fee simple, the direction to convey constitutes a special and active trust, which necessarily implies that the trustees should have the legal fee in them; for *non dat qui non habet* (*p*).

Recurring trusts.

Again, where there are recurring trusts which require the legal estate to be in the trustees, with intervening limitations which, taken alone, would vest the legal estate in the persons beneficially entitled, and there is *no repetition before each of the recurring trusts* of the gift of the legal estate to the trustees; then the legal estate is held to be in the trustees throughout, and the intermediate estates are equitable only (*q*). To show the importance of this principle, it is well to refer to the leading case of *Harton* v. *Harton* (*q*). There the limitations were to trustees, in trust for A. for life for her separate use, remainder to the heirs of her body, remainder to B. for life, for her separate use, with remainder to the heirs of *her* body. Here the separate use gave the trustees an estate during A.'s life, and also during B.'s life; but had it not been for this last trust, they would not have taken the legal estate during the intermediate trust in favour of the heirs of A.'s body. As, however, there was a recurring trust, they did so; and, therefore, as the estate of A., and the estate given to the heirs of her body, were both equitable

(*n*) *Doe* d. *Woodcock* v. *Barthrop* (1814), 5 Taunt. 382.

(*o*) *Re Townsend's Contract*, [1895] 1 Ch. 716.

(*p*) *Doe* v. *Edlin* (1836), 4 Ad. & El. 582; *Doe* v. *Bolton* (1839), 11 Ad. & El. 188.

(*q*) *Harton* v. *Harton* (1798), 7 T. R. 652; *Hawkins* v. *Luscombe* (1818), 2 Swans. 375; *Brown* v. *Whiteway* (1846), 8 Hare, 145; *Toller* v. *Attwood* (1850), 15 Q. B. 929.

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estates, the rule in *Shelley's Case* applied, and A. took an estate tail. *Harton* v. *Harton* has been followed by the House of Lords in *Van Grutten* v. *Foxwell* (*r*), where precisely the same point arose.

Trust of indefinite duration.

In *Collier* v. *Walters* (*s*) a testator, by will dated before the Wills Act, 1837 (1 Vict. c. 26), devised his estate to trustees and their heirs, upon trust that they and their heirs should stand seised of the same during the life of W. C., and also until the whole of the testator's debts and the legacies thereinafter mentioned were paid, upon trust to let the same, and apply the rents in discharge of his debts; after payment of which they were to apply the rents in payment of legacies, and finally hold the property upon trust to pay the rents to W. C. and his assigns during his life. And after the decease of W. C. and payment of the debts and legacies and all expenses, the testator *devised* the property to the heirs of the body of W. C., with remainders over. In 1830, W. C., relying on the rule in *Shelley's Case*, suffered a common recovery and barred the entail. Upon his right to do this coming in question, Sir GEORGE JESSEL, M.R., held that the trustees took the legal fee, and that consequently W. C., under the rule in *Shelley's Case*, took an equitable estate tail.

ART. 37.—*The Effect of the Statutes of Limitation on the Trustee's Estate.*

(1) A trustee of an express trust is not divested of the legal estate by the exclusive possession even of a sole beneficiary who is absolutely entitled for the statutory period.

(2) A trustee, like a beneficial owner, may be barred by the adverse possession of a stranger; and if he be so barred, his beneficiaries will be barred also. But beneficiaries will not be barred by the adverse possession of a person who claims through or under, and not adversely to the trustee, unless he be a purchaser for value; and even then time will only run against beneficiaries under disability from the cesser of it, or against reversioners from their interests vesting in possession.

(*r*) [1897] A. C. 658.

(*s*) (1873) L. R. 17 Eq. 252.

(3) (*Submitted.*) Where one of several trustees disappears, the others, or, if a new trustee be appointed in his place, the new trustee and the continuing trustees, will acquire the legal estate in the entirety by possession for the statutory period. Art. 37.

PARAGRAPH (1).

History of the law on the point.

Before the Act of William IV. it was held that the long-continued possession of a beneficiary was no bar to the estate of the trustee, as it was not adverse. This was preserved by s. 7 of 3 & 4 Will. IV., c. 27, by which it was enacted that a *cestui que trust* is not to be deemed a tenant at will of the trustee so that the latter would be barred by the possession of the *cestui que trust* for the statutory period. The probable intention of this was to prevent one beneficiary getting a possessory title as against others, but the somewhat inconvenient effect is that an outstanding legal estate in a bare trustee can never be acquired by his sole beneficiary by possession, however long continued (*t*).

Quære whether rule applies to constructive trusts.

Whether the rule applies to constructive trusts is not altogether free from doubt. In *Drummond* v. *Sant* (*t*) it was held that where a lessor was under an implied trust to grant a lease to a lessee the latter could not get an adverse title against the lessor under s. 7, and this was expressly accepted by KAY, L.J., in *Warren* v. *Murray* (*u*) as applying the exception in s. 7 to implied as well as to express trusts. On the other hand, in *Doe* v. *Rock* (*x*) it was held that a purchaser who paid his money but never obtained a conveyance, acquired the legal estate by possession for the statutory period, notwithstanding that the vendor was an implied trustee for him; and the same conclusion was arrived at by FRY, J., in *Sands to Thompson* (*y*), where a mortgage had been paid off but no reconveyance taken. It would seem, however, from a careful perusal of the judgment of KAY, L.J., that he only excepted implied trusts from the operation of the statute, where the implied trustee had rights to recover possession in certain events (as the lessor had in that case); and that where the implied trustee is a mere bare trustee of the legal estate without either rights or duties (other than that of executing

(*t*) *Garrard* v. *Tuck* (1849), 8 C. B. at p. 251; *Drummond* v. *Sant*, *per* BLACKBURN, J. (1871), L. R. 6 Q. B. at p. 768.

(*u*) [1894] 2 Q. B. at p. 657, explained in *Drummond* v. *Sant*, *supra*, at p. 768.

(*x*) (1842) Car. & M. 549.

(*y*) (1883) 22 Ch. D. 614.

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a conveyance) the statute will run against him unless he is trustee under an express trust.

PARAGRAPH (2).

Rule does not apply as between beneficiaries and strangers.

It is well settled that "the rule 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 make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place; and 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" (*z*).

It has sometimes been suggested (but still remains doubtful) whether, in such cases, the statutory period may be extended where the *cestui que trust* is under disability, or is merely entitled in reversion, to the same extent as he would be if his estate were legal and not merely equitable. It is apprehended, however, that it cannot be so, as the *cestui que trust* could only bring an action of ejectment in the name of the trustee who is *ex hypothesi* barred (*a*). Anyhow, where the statute has once begun to run against a *cestui que trust* absolutely entitled, it will not be stopped by reason of the subsequent disability of persons claiming through or under such *cestui que trust* (*b*).

PARAGRAPH (3).

Question whether new trustees can give statutory title as against old trustees where no conveyance or vesting order.

It sometimes happens that a trustee goes abroad and is never heard of again. In such cases, of course, the proper course is in due time to appoint a new trustee in his place and to execute a vesting declaration under s. 12 of the Trustee Act. But in the investigation of titles one sometimes finds that this has not been done and no vesting order obtained, and the question then arises whether the *de facto* trustees have acquired the legal estate in the entirety under the Statute of Limitations.

It seems clear that in the simple case of a trustee disappearing for twelve years and no appointment of a new

(*z*) *Per* Lord HARDWICKE, *Lewellin* v. *Mackworth* (1740), 2 Eq. Cas. Abr. 579, and to same effect *per* Lord REDESDALE in *Hovenden* v. *Annesley* (1806), 2 Sch. & Lef. 629, and *per* Lord MANNERS in *Pentland* v. *Stokes* (1812), 2 B. & B. at p. 75.

(*a*) See Lewin on Trusts (12th ed.) 1130, where the subject is discussed.

(*b*) *Murray* v. *Watkins* (1890), 62 L. T. 796; *Garner* v. *Wingrove*, [1905] 2 Ch. 233.

trustee in his place the legal estate in the entirety will be acquired by the continuing trustees under s. 12 of the Real Property Limitation Act, 1833, which expressly includes the case of joint tenants holding for the benefit of any person or persons other than the joint tenant out of possession. And it seems equally clear, that where the one who disappears is a sole trustee, and new trustees are appointed in his place, they will, as joint tenants, acquire the legal estate in the entirety by possession for the statutory period. But where one new trustee is appointed to act jointly with the continuing trustees in place of the trustee who has disappeared, it seems questionable whether he and the other trustees would acquire a possessory title to the entirety in twelve years, and it is difficult to see how they could possibly do so as joint tenants, which requires unity of title. The present writer is not aware of any authority on the point, which he considers eminently doubtful, but the bent of his opinion is that the new trustee would in course of time acquire the share of the displaced trustee as tenant in common with the continuing trustees, who would still continue to be joint tenants *inter se*.

Exception where one new trustee appointed to act with some of the old ones.

ART. 38.—*Bankruptcy of the Trustee.*

(1) The property of a bankrupt divisible among his creditors, does not comprise property held by him as trustee for any other person (*c*), notwithstanding that it is property in his order and disposition at the commencement of the bankruptcy (*d*).

(2) If he has converted it into money or other property which would be subject to the trust in the hands of the trustee, it will remain so subject notwithstanding the trustee's bankruptcy (*e*).

The only part of this rule which requires any illustration is

(*c*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44. It may be conveniently mentioned here that on the conviction of a trustee the trust property does not vest in the administrator appointed under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23). See Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

(*d*) *Ex parte Barry, Re Fox* (1873), L. R. 17 Eq. 113; *Ex parte Marsh* (1744), 1 Atk. 158. As to constructive trustees, see *Ex parte Pease* (1812), 19 Ves. at p. 46, and *Whitfield* v. *Brand* (1847), 16 Mee. & W. 282.

(*e*) *Frith* v. *Cartland* (1865), 2 Hem. & M. 417; *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. at p. 719.

Art. 38. sub-clause (2): but as the doctrine of following trust property into other property into which it has been converted is fully treated of hereafter, the reader is referred to Art. 96 (*infra*).

ART. 39.—*The Incidents of the Trustee's Estate at Law.*

At law, the estate of the trustee is subject to the same incidents as if he were also beneficial owner, except where such incidents are modified by statute.

Power to commence actions.

Thus, he is the proper person to bring actions arising out of wrongs formerly cognizable by common law courts, and which necessitated the possession of the legal estate in those bringing them (*f*).

Curtesy and dower.

So, at law, the estate of the trustee in real property was liable to curtesy (*g*), dower (*h*), and, if of copyhold tenure, to freebench (*i*); but of course the persons so taking could only take as trustees for those beneficially entitled (*k*). Since the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), the devolution of freehold trust estates is entirely changed, and dower and curtesy no longer attach. Formerly the estate of a trustee was also liable to forfeiture and escheat, but there can no longer be forfeiture or escheat of a trust estate (*l*).

Trustees of copyholds must be admitted.

So, again, trustees of copyholds who take an *estate* must be admitted by the lord of the manor on the customary terms (*m*).

Trustees prove in bankruptcies.

Where a debtor to the trust estate becomes bankrupt, the trustee is the proper person to prove without the concurrence of the beneficiaries (*n*), unless in the case of a simple trust. Where, however, it is probable that the debtor has paid the beneficiaries direct, it lies in the discretion of the judge to require their concurrence in the proof (*o*).

(*f*) *May* v. *Taylor* (1843), 6 Man. & Gr. 261; and see R. S. C., 1883, O. 16, r. 8.

(*g*) *Bennet* v. *Davis* (1725), 2 P. Wms. 316.

(*h*) *Noel* v. *Jevon* (1678), Freem. 43; *Nash* v. *Preston* (1630), Cro. Car. 190.

(*i*) *Hinton* v. *Hinton* (1755), 2 Ves. Sen. 631.

(*k*) *Noel* v. *Jevon*, *supra*; *Lloyd* v. *Lloyd* (1843), 4 Dru. & War. 354.

(*l*) 13 & 14 Vict. c. 60, s. 46; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 48.

(*m*) *Wilson* v. *Hoare* (1831), 2 B. & Ad. 350.

(*n*) *Ex parte Green* (1832), 2 Deac. & C. 116.

(*o*) *Ex parte Dubois* (1787), 1 Cox, 310; *Ex parte Gray* (1835), 4 Deac. & C. 778.

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The trustee of a private trust is, as legal owner, liable to be rated in respect of the trust property (*p*).

Trustee liable to rates.

If the trustee, in pursuance of the trust, carry on a business for the benefit of the beneficiaries, he will yet be personally liable to the creditors of the business (*q*), and may be made a bankrupt (*r*).

Trustee of a business liable to creditors.

A trustee in whom the legal estate is vested, is entitled to the custody of the deeds (*s*); but the beneficiaries are entitled, at all reasonable times, to inspect them (*t*).

Trustee entitled to custody of deeds.

On the other hand, the ordinary legal incident of voting for members of Parliament does not belong to the trustee in respect of the trust estate, as the Act 6 & 7 Vict. c. 18, s. 74, confers that right on the beneficiary.

Not entitled to exercise franchise.

ART. 40.—*Trustee's Estate on Total Failure of Beneficiaries.*

(1) Where a trust (as distinguished from a mere executorship), does not exhaust the whole of the trust property, and there is no one in whose favour it can result, it is now held in trust for the Crown (*u*).

(2) Where, however, the person to whom it would have resulted died before August 14th, 1884, intestate and without an heir, and the trust property was real estate, it devolved beneficially on the trustees in whom the legal estate was vested, absolutely (*x*).

PARAGRAPH (1).

Bona vacantia.

From the time of Lord THURLOW's decision in *Middleton* v. *Spicer* (*y*) it has been an accepted proposition of law that

(*p*) *R.* v. *Sterry* (1840), 12 Ad. & El. 84; *R.* v. *Stapleton* (1863), 4 B. & S. 629.

(*q*) *Farhall* v. *Farhall* (1871), L. R. 7 Ch. 123; *Owen* v. *Delamere* (1872), L. R. 15 Eq. 134. But of course he has a right to indemnity, as to which see Art. 78, *infra*.

(*r*) *Wightman* v. *Townroe* (1813), 1 Man. & S. 412; *Ex parte Garland* (1804), 10 Ves. 110; *Farhall* v. *Farhall*, *supra*. See *infra*, Art. 78.

(*s*) *Evans* v. *Bicknell* (1801), 6 Ves. 174.

(*t*) *Wynne* v. *Humberston* (1858), 27 Beav. 421.

(*u*) As to personal estate, see *Taylor* v. *Haygarth* (1844), 14 Sim. 8; *Middleton* v. *Spicer* (1783), 1 Bro. C. C. 201; and as to real estate, see 47 & 48 Vict. c. 71, s. 4.

(*x*) *Burgess* v. *Wheate* (1759), 1 Eden, 177; and *Re Lashmar*, *Moody* v. *Penfold*, [1891] 1 Ch. 258.

(*y*) (1783), 1 Bro. C. C. 201.

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chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of *bona vacantia*. It has been illustrated by many cases which show that the possession conferred on the trustee for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown (*z*).

Thus, where personal estate is bequeathed to A. (whether A. be also executor or not) *upon trusts* which fail, and there is no next of kin of the testator, the trustee holds in trust for the Crown; for by the use of the words "upon trust" all notion of the trustee taking beneficially is excluded (*a*). Nor is the rule confined to trusts created by will, but equally applies to trusts *inter vivos*. For instance, where a trustee in bankruptcy held a dividend in trust for the bankrupt's creditors, one of whom had been a corporation which had since the bankruptcy been dissolved, it was held that the dividend was held in trust for the Crown (*b*).

Exception in case of residuary personalty.

There is, however, an exception or quasi-exception to the rules with regard to executors, where there is no gift to them or anyone else of the residuary personal estate, and *no trust of residuary personalty* is declared and there is no next of kin. In such cases, even when there were next of kin, the law prior to 1830, as stated by KINDERSLEY, V.-C. (*c*), (adopted by COZENS-HARDY, M.R., in *Re Glukman, Attorney-General* v. *Jefferys* (*d*)), was that the appointment of executors was a gift to them of the personal estate; and a court of equity would not deprive them of the beneficial interest unless it saw that a strong and violent presumption arose from the will, that the intention of the testator was that the executors should not *virtute officii* take the personalty; and if there was that violent presumption, then a court of equity held the executors trustees for the next of kin. Then in 1830 an Act was passed (11 Geo. IV. & 1 Wm. IV. c. 40) taking away this right of executors unless it appeared by the will that they were

(*z*) *Barclay* v. *Russell* (1797), 3 Ves. Jun. 424; *Powell* v. *Merrett* (1853), 1 Sm. & G. 381; *Cradock* v. *Owen* (1854), 2 Sm. & G. 241; *Read* v. *Stedman* (1859), 26 Beav. 495; *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; *Dyke* v. *Walford* (1846), 5 Moo. P. C. 434.

(*a*) *Read* v. *Stedman*, *supra*.

(*b*) *Re Higginson and Dean*, *Ex parte Att.-Gen.*, [1899] 1 Q. B. 325; and see *per* JAMES, L.J., in *Ashley* v. *Ashley* (1877), 4 Ch. D. at p. 763. But *cf. Re Ruddington Land*, [1909] 1 Ch. 701.

(*c*) *Daere* v. *Patrickson* (1860), 1 Drew. & Sm. 184.

(*d*) [1908] 1 Ch. 552, at p. 555; and see *Re Roby, Howlett* v. *Newington*, [1908] 1 Ch. 71.

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intended to take beneficially; but this statute expressly excepted the case where there were no persons to take under an intestacy. In such cases, therefore, the old law still applies, viz., that the executors take as against the Crown unless there is the violent presumption above referred to (*e*). There have been a considerable number of cases in which the question has been what circumstances afford a violent presumption. Apart from the actual declaration of a trust it has been held that pecuniary legacies of equal amount to each executor or of a pecuniary legacy to a sole executor raises a violent presumption against the intention of the testator to give them or him the residue (*f*); but that the same presumption does not arise where the pecuniary legacies are of unequal amount (*g*).

Real estate.

With regard to real estate vested in trustees, the law previously to August, 1884, was very different, and on failure of beneficiaries (including those claiming under a resulting trust) the trustees took the property beneficially by virtue of their legal estate. However, by the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), it was enacted that:—

"From and after the passing of this Act, where a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

And by s. 7 intestacy is to include partial intestacy in respect of such part of the beneficial interest as is ineffectually disposed of.

Question whether Land Transfer Act, 1897, gives executors any claim to real estate on failure of trusts.

It may perhaps be asked whether the effect of s. 1 of the Land Transfer Act, 1897, is to give to executors the same rights in residuary real estate of which no trusts are declared as they still have in residuary personalty. The answer is, however, clearly in the negative, as that Act does not affect the rights of the Crown to escheat under the Act of 1884; and so far as the heir-at-law is concerned it is expressly enacted by s. 2 (1) that the personal representative is to hold real estate "as trustee for the persons by law beneficially entitled thereto."

PARAGRAPH (2).

Old law as to real estate.

The law as to real estate which prevailed before the Act of 1884 may still be of some importance in the investigation

(*e*) See note (*d*), p. 208.

(*f*) *Southcot* v. *Watson* (1745), 3 Atk. 226; *Blinkhorn* v. *Feast* (1750), 2 Ves. Sen. 27.

(*g*) *Re Glukman, Att.-Gen.* v. *Jeffreys*, [1908] 1 Ch. 552.

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of titles, and therefore a few examples of it may still be of use.

In the leading case of *Burgess* v. *Wheate* (*h*), the settlor conveyed real estate unto and to the use of trustees, in trust for herself her heirs and assigns, to the intent that she should appoint, and for no other use whatever. She subsequently died without having appointed, and without heirs; and it was held that, there being holders of the legal estate—namely, the trustees—the Crown could not claim by escheat; and that the trustees (no person remaining who could sue them in equity) retained, as the legal proprietors, the beneficial interest also.

Devise of equitable interest to another set of trustees.

But if the settlor in the last case had appointed or devised her *equitable interest* to C., in trust for purposes which could not take effect, then, as between the original trustees and C., the latter would be entitled to the property as the nominee under the will. The court would, as between those parties, only carry out the testator's directions, and would not inquire how far the directions could be executed in their integrity (*i*).

On the other hand, where the legal estate was in P. as trustee of A.'s will, under which the equitable fee was ultimately given to B.; and B. by his will gave it to M. upon trust for X. for life (who died), with remainder to Z. absolutely, and Z. died intestate and without heirs, it was held that P., in whom the legal estate was vested, was entitled to keep it as against M., on the ground that even if M. was intended to take any legal estate at all under B.'s will he was at most a bare trustee, with no duties to perform and no equity to *call* for the transfer to himself of the legal estate (*k*).

Old law applied to constructive trustees.

The rule also applied to a constructive trustee. Thus, a mortgagee in fee, whose mortgagor died intestate and without heirs, took the property absolutely, subject to the mortgagor's debts (*l*). Whether this would have been the case if the mortgagee had been a mere equitable mortgagee seems to be more doubtful; but it is submitted that, on the principle of *Onslow* v. *Wallis* (*i*), the result would have been the same as if he were the legal mortgagee.

(*h*) (1759) 1 Eden, 177; and *Re Lashmar, Moody* v. *Penfold*, [1891] 1 Ch. 258.

(*i*) *Onslow* v. *Wallis* (1849), 1 Mac. & G. 506; and see *Jones* v. *Goodchild* (1730), 3 P. Wms. 33.

(*k*) *Re Lashmar, Moody* v. *Penfold*, [1891] 1 Ch. 258.

(*l*) *Beale* v. *Symonds* (1853), 16 Beav. 406.

CHAPTER III.

THE TRUSTEE'S DUTIES.

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ART. 41.—*Duty of Trustee on Acceptance of Trust.*

(1) Before accepting a trust *inter vivos*, the trustee ought to disclose any circumstances which might tempt him to exercise discretionary powers unfairly (*a*).

(2) Having accepted the trust, it is the duty of the trustee to acquaint himself, as soon as possible, with the nature and circumstances of the trust property, the terms of the trust, and the contents of the documents handed over to him relating to the trust.

(*a*) *Peyton* v. *Robinson* (1823), 1 L. J. (o. s.) Ch. 191.

Art. 41. Where necessary, he should obtain a transfer of the trust property to himself, and (subject to the provisions of the settlement) get in trust money invested on insufficient or hazardous security (*b*).

PARAGRAPH (1).

Making discretionary payments to beneficiary in order to enable him to liquidate debt due to trustee.

A person who is asked to become a trustee of a trust which contains a discretionary power to make payments to one of the beneficiaries who is indebted to him (a fact unknown to the settlor) should disclose that fact; and if he does not do so, he cannot accept payment of his debt out of payments so made by him to such beneficiary (*c*). Indeed (as explained *infra* under Art. 52), even if the fact were disclosed, he could not make a bargain with the beneficiary to make the payment on the terms of receiving his debt out of it (*d*); although in the absence of such stipulation it would be otherwise (*e*).

PARAGRAPH (2).

Inquiries as to the property and the trusts and the trust documents.

A person who undertakes to act as a trustee takes upon himself serious and onerous duties; and when, as too often happens, he adopts a "policy of masterly inactivity," he entirely misapprehends the nature of the office to which he has been appointed. As KEKEWICH, J., said in *Hallows* v. *Lloyd* (*f*), "What are the duties of persons becoming new trustees of a settlement? Their duties are quite onerous enough, and I am not prepared to increase them. I think that when persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust."

Inquiries as to acts of predecessors.

They should further ascertain that the trust fund is properly invested, and that their predecessors have not committed breaches of trust which ought to be set right. For if, through not inquiring into such matters, the trust estate should suffer, a new trustee may be liable; although he himself took no

(*b*) *E.g.*, in trade: *Kirkman* v. *Booth* (1848), 11 Beav. 273; *Ex parte Geaves, Re Strahan* (1856), 8 De G. M. & G. 291.

(*c*) *Peyton* v. *Robinson* (1823), 1 L. J. (o. s.) Ch. 191.

(*d*) *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648.

(*e*) *Butler* v. *Butler* (1877), 7 Ch. D. 116.

(*f*) (1888) 39 Ch. D. at p. 691. Precisely the same duties are binding on persons appointed *original* trustees.

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part, and could have taken no part, in committing the original breaches of trust (*g*). There is, however, no obligation upon a new trustee to reinvestigate the title to, or value of, existing securities of a nature authorised by the trust (*h*).

It would seem that where the old trustees had claims against third parties (*e.g.*, against their solicitor for negligence), the new trustees cannot sue the third parties, but must go to the court for directions (*i*).

Duty of new trustees to inquire as to losses.

Where part of the trust estate has been lost, it is the duty of new trustees to inquire as to the circumstances, and as to whether there is a probability of recovering the loss or any part of it by appropriate proceedings (*k*). Nor can new trustees escape this duty by purporting to be appointed trustees of what remains of the estate only (*l*); for the effect of doing so might be to discharge parties who were liable for breach of trust from their liability, or at least to interpose difficulties in the way of the beneficiaries recovering the loss. The proper course in such cases is to appoint the new trustees to be trustees of the whole, and for them to take out a summons for directions as to whether any and, if so, what steps ought to be taken at the cost of the estate for the recovery of the loss (*m*).

Effect of not searching for notices of incumbrances.

A new trustee is liable to make good moneys which he may have honestly paid to a beneficiary, if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary. For if the trustee had acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (*n*). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search which the law casts upon him (*n*). For trustees are not insurers, and their conduct ought to be judged with reference to the facts and circumstances existing at the time when they have to act, and which either are known *or ought to be known* by them at that time (*o*). Moreover, he is not bound to inquire of the old trustees whether they have received

(*g*) *Harvey* v. *Olliver* (1887), 57 L. T. 239; and see *Millar's Trustees* v. *Polson* (1897), 34 Sc. L. R. 798.

(*h*) *Rawsthorne* v. *Rowley* (1907), 24 T. L. R. 51.

(*i*) *Plaskitt* v. *Eddis* (1898), 79 L. T. 136.

(*k*) *Bennett* v. *Burgis* (1846), 5 Hare, 295.

(*l*) See *Bennett* v. *Burgis* (1846), 5 Hare, 295.

(*m*) *Ibid.*

(*n*) See *Hallows* v. *Lloyd* (1888), 39 Ch. D. 686.

(*o*) *Re Hurst, Addison* v. *Topp* (1892), 67 L. T. 96; *Youde* v. *Cloud* (1874), L. R. 18 Eq. 634.

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notice of any incumbrances (*p*). Nor is he liable if he honestly, but erroneously (*e.g.*, from forgetfulness), informs an intended incumbrancer that he has no knowledge of any prior incumbrance (*q*).

Must not allow property to remain under sole control of co-trustee.

A trustee who leaves the trust fund in the sole name, or under the sole control, of his co-trustee will be liable if it be lost (*r*).

Should invest money as soon as possible.

A trustee who keeps money for an unreasonable length of time without investing it is liable if it be lost, however pure his motives may have been (*s*).

ART. 42.—*Duty of Trustee to obey the Directions of the Settlement unless Deviation sanctioned by the Court.*

(1) A trustee must obey the lawful directions of the settlement if practicable, except so far as these directions are modified by the consent of all the beneficiaries collectively.

(2) Where, however, there arises an emergency or state of circumstances not foreseen or anticipated by the settlor, which renders it desirable that the strict terms of the trust should be departed from in order to prevent obvious injury to the beneficiaries, the court has jurisdiction to sanction such departure (*t*); but it is questionable whether it has a corresponding power to sanction a departure merely in order to render the trust more profitable to the beneficiaries (*u*).

(3) A trustee who ventures (without the sanction of the court) to deviate from the letter of his trust, does so under the obligation and at the peril of afterwards having to satisfy the court that the deviation was necessary and beneficial (*x*).

(*p*) *Phipps* v. *Lovegrove* (1873), L. R. 16 Eq. 80.

(*q*) *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Porter* v. *Moore*, [1904] 2 Ch. 367.

(*r*) *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.

(*s*) *Moyle* v. *Moyle* (1831), 2 Russ. & Myl. 710.

(*t*) *Re New*, [1901] 2 Ch. 534, as modified by *Re Tollemache*, [1903] 1 Ch. 457, affirmed [1903] 1 Ch. 955.

(*u*) The effect (*semble*) of *Re Tollemache*, *supra*.

(*x*) *Harrison* v. *Randall* (1852), 9 Hare, 397.

PARAGRAPH (1). Art. 42.

This is the most important of all the rules relating to the duties of trustees. It is founded on common sense, and overshadows and modifies all other rules, which must be read as if they contained an expressed declaration that they are subject to any provisions to the contrary contained in the settlement itself. As will be seen, however, in Art. 64, the rule is subject to modification, if all parties beneficially interested are *sui juris*, and concur in putting an end to or amending the trust. For the beneficiaries collectively, being the only parties beneficially interested, are entitled, at any moment, to depose the trustee, and distribute the trust property between themselves as they may think fit. The rule is also, as we have seen (*y*), not binding upon a trustee where the directions of the settlement are illegal. Another exception necessarily arises where the directions of the settlement are impracticable (*e.g.*, if it directs an immediate sale, and no purchaser can be found).

Neglect to purchase or sell where directed to do so.

If trustees are, by the settlement, directed to call in trust moneys, and to lay them out on a purchase, and they fail to do so, and the fund is lost, they are liable for the loss (*z*). Similarly if a trustee for sale omits to sell property when it ought to be sold, and it is afterwards lost, although without any default on his part, he is liable for the loss, which would not have happened had he not failed in performing the prescribed duty (*a*).

No power to sell trust property unless expressed or implied.

Conversely, trustees of things specifically settled, such as lands, chattels, etc., cannot, in the absence of express power, sell them, however beneficial such a sale might be (*b*); unless, indeed, all parties beneficially interested are *sui juris* and consent, as to which see *infra*, Art. 64. And for the same reason, they cannot mortgage such things, *e.g.*, for repairs or the like (*c*), without the leave of the court, as to which see Art. 46, *infra*.

Direction to invest on particular securities.

So, where the settlement orders trust funds to be invested on particular securities, the trustees are bound to invest in such securities *or* in those prescribed by statute (as to which see *infra*, Art. 48). But it would seem that if they are directed to invest in specified securities and *none other*, they may not even now invest in the securities authorised by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, the powers of which are

(*y*) Arts. 10 and 28, *supra*.

(*z*) *Craven* v. *Craddock*, [1868] W. N. 229 (actual decision reversed by C. A. (1869), 20 L. T. (N. S.) 638, on the interpretation of a will).

(*a*) *Fry* v. *Fry* (1859), 27 Beav. 144.

(*b*) Art. 57, *infra*.

(*c*) Art. 57, *infra*.

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only exercisable *if not forbidden by the settlement* (*d*). The former, repealed, statutory power contained no such restriction (*e*). It has been held by KEKEWICH, J., that where trustees were directed to set apart a sum of money to answer an annuity "in any of the investments in which the proceeds of sale and conversion of my estate is hereby authorised," they were restricted to the securities authorised by the will, and impliedly forbidden to invest in securities authorised by the Act: *sed quære* (*f*).

Must observe conditions imposed on their discretionary powers.

So, where there are any conditions attached to the exercise of any of their functions, they must strictly perform those conditions. For instance, where they are authorised to lend to a husband with the consent of his wife, they cannot make the advance without first getting the required consent, even though they subsequently get it (*g*).

Again, trustees were empowered to vary investments "with the consent of the tenant for life." They sold consols, and first made an investment with such consent upon a contributory mortgage (which was not an authorised security), and subsequently called the money in, and *without* such consent reinvested it upon a mortgage which was an authorised one. It was held that, although there was no loss of capital, they were nevertheless bound to *replace the consols* which had since risen in price. For they sold the consols for the purpose of investing in an unauthorised security, which was contrary to the directions of the settlement: and then, when they realised that investment, they reinvested the proceeds without the consent of the tenant for life, which was again contrary to the directions of the settlement. In both transactions, therefore, they disobeyed the rule now under consideration, and consequently committed breaches of trust, and were bound to place the beneficiaries in the same position as they would have occupied if no such breach had been committed (*h*). The case, however, seems a monstrously hard one.

Cannot accelerate a trust for sale.

On the same principle, where an estate is given in trust for

(*d*) *Orey* v. *Orey*, [1900] 2 Ch. 524.

(*e*) *Re Wedderburn* (1878), 9 Ch. D. 112, decided on s. 11 of Lord St. Leonards' Act, repealed by the Trust Investment Act, 1889 (52 & 53 Vict. c. 32).

(*f*) *Re Owthwaite*, *Owthwaite* v. *Taylor*, [1891] 3 Ch. 494.

(*g*) *Bateman* v. *Davis* (1818), 3 Madd. 98; but see *Stevens* v. *Robertson* (1868), 37 L. J. Ch. 499, where it was held that a consent as to the mode of investing the trust fund might be given, *ex post facto*.

(*h*) *Re Massingberd's Settlement*, *Clark* v. *Trelawney* (1890), 63 L. T. 296; and see also *Re Bennison*, *Cutler* v. *Boyd* (1889), 60 L. T. 859; and *Stokes* v. *Prance*, [1898] 1 Ch. 212.

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A. for life, and *after his death* upon trust for sale, the trustees cannot sell during the life of A., even with A.'s consent; unless indeed, all parties beneficially interested in remainder are *sui juris* and consent. For the settlor has prescribed the time at which the sale is to be made, and the trustees must follow out his direction (*i*). Indeed, it has been held that even the court has no jurisdiction to order an earlier sale (*k*); although, of course, if the trust were being administered by the court, and the court did in point of fact order an earlier sale, the *trustee* would not be liable for obeying the order, and the purchaser would get a good title under s. 70 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41).

But tenant for life may sell under Settled Land Acts.

It must be pointed out, however, that, notwithstanding such a trust, and notwithstanding the consequent inability of the trustees to sell during the life tenancy, it is now competent for the tenant for life himself to sell under the provisions of the Settled Land Acts, 1882 to 1890, and to cause the purchase-money to be paid to the trustees, they being (by virtue of their future trust for sale) trustees for purposes of those Acts, under s. 16 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69). But a premature sale by *trustees* cannot be forced on an unwilling purchaser simply because all the beneficiaries are *subsequently* willing to concur (*l*), although it would be otherwise if the sale had been made at their request (*m*).

The inability to accelerate a sale does not necessarily apply to the acceptance of a debt before it is due.

But although trustees cannot accelerate a sale, it must not be assumed that they cannot accept a debt due to the estate before the time named for payment, if, on the facts, it is obvious that postponement of payment was intended merely for the benefit of the debtor (*n*). Thus, it is apprehended that, where a father covenants in the marriage settlement of his daughter, to pay a sum of money to the trustees *at his decease*, the trustees would be quite justified in accepting payment during his lifetime.

(*i*) *Leedham* v. *Chawner* (1858), 4 Kay & J. 458; *Want* v. *Stallibras* (1873), L. R. 8 Ex. 175; *Re Bryant and Barningham* (1890), 44 Ch. D. 218; *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310. But see also *Soper* v. *Arnold* (1889), 14 App. Cas. 429.

(*k*) *Johnstone* v. *Baber* (1845), 8 Beav. 233; *Blacklow* v. *Laws* (1842), 2 Hare, 40; *Smith* v. *Great Northern Rail. Co.* (1874), 23 W. R. 126; and *Corlyon* v. *Truscott* (1875), L. R. 20 Eq. 348.

(*l*) *Re Bryant and Barningham*, *supra*, and *Re Head's Trustees and Macdonald*, *supra*.

(*m*) *Re Baker and Selman's Contract*, [1907] 1 Ch. 238.

(*n*) *Mills* v. *Osborne* (1834), 7 Sim. 30.

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Formerly doubtful how far the court could sanction deviation from trust.

Down to the middle of the year 1901 it was very doubtful to what extent the court had jurisdiction to sanction any departure from the terms of a trust, however beneficial it might be for the beneficiaries. In *Re Morrison, Morrison* v. *Morrison* (*o*), BUCKLEY, J., held that he had no jurisdiction to sanction an agreement by which trustees concurred in the conversion into a limited company of a business in which the testator was a partner, on the terms of the testator's share in the business being exchanged for shares and debentures in the new company, which were not investments authorised by the will. On the other hand, in *West of England, etc., Bank* v. *Murch* (*p*), FRY, J., found it possible to sanction such an agreement. In July, 1901, however, the leading case of *Re New* (*q*) came before the Court of Appeal, which, in the exercise of its general jurisdiction, authorised the trustees of three separate trust instruments to concur in a shareholders' scheme for the reconstruction of a limited company, under which shares settled in specie were to be exchanged for shares in the new company which the trustees were not, by their settlements, authorised to hold; the court imposing on them an undertaking to apply for leave to further retain the new shares and debentures if they desired to retain them beyond one year. The judgment of the court was delivered by ROMER, L.J., who said: "As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not on the face of the instrument creating the trust authorised by its terms. . . . But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the *cestuis que trusts*, that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, *which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust*, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent

Decision of the Court of Appeal in *Re New*.

Judgment of ROMER, L.J.

(*o*) [1901] 1 Ch. 701; and see, to same effect, *Re Crawshay, Dennis* v. *Crawshay* (1888), 60 L. T. 357.

(*p*) (1883) 23 Ch. D. 138.

(*q*) [1901] 2 Ch. 534.

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of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the court, *and the court in a proper case would have jurisdiction*, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to. By way merely of illustration, we may take the case where a testator has declared that some property of his shall be sold at a particular time after his death; and then, owing to unforeseen change of circumstances since the testator's death, when the time for sale arrives it is found that to sell at that precise time would be ruinous to the estate, and that it is necessary or right to postpone the sale for a short time in order to effect a proper sale. In such a case the court would have jurisdiction to authorise, and would authorise, the trustees to postpone the sale for a reasonable time. It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the court will exercise the jurisdiction; but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries *merely because it may appear beneficial to the estate*; and certainly the court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the court must be considered and dealt with according to its special circumstances. As a rule, these circumstances are better investigated and dealt with in chambers. Very often they involve matters of a delicate and private nature, the publication of which is not requisite on any good ground, and might cause great injury to the trust estate."

Common cases in which court sanctions deviations from trust.

The following are the more common instances of the exercise of the inherent power of the court: making advances out of capital for the benefit of an infant (*r*); carrying on a business which is not presently saleable until it can be sold as a going concern (*r*); selling a business to a company in exchange for shares therein, and holding such shares for a limited period (*r*); holding, for a period, land which has been mortgaged to the trustees, and which mortgage they have

(*r*) *Per* KEKEWICH, J., in *Re Tollemache*, [1903] 1 Ch. 457, affirmed [1903] 1 Ch. 955.

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foreclosed (*s*); authorising the raising of money by mortgage of the trust property, where the estate would be ruined if money were not expended on it (*t*), or a settled policy would lapse if premiums were not paid (*u*); authorising a sale of a trust policy where it has become impossible to pay the premiums (*v*); approving a compromise or scheme of family arrangement on behalf of infants who are interested under the trust (*x*), and making to an infant a larger allowance for maintenance than the settlor has named where the result would otherwise be to injure the infant's prospects or to cause real property belonging to him to fall into ruin (*y*). In the latter case the court has even gone to the extent of allowing subscriptions to charities, on the ground that the testator must have intended that the infant should be brought up and the property maintained in the mode usual amongst gentlemen holding the position to which he was born, so as to keep up the reputation of the family and estate which incidentally involves the payment of subscriptions to local charities (*z*). The question in such cases is whether there is not a paramount intention to be found in the settlement, to which particular directions are to be read as subordinate.

Jurisdiction only exercised in cases of emergency to prevent manifest injury, and not merely for purpose of improving position of beneficiaries.

It has been said that the court will not sanction something not authorised by the trust, merely because the course proposed will be beneficial to the beneficiaries, unless there is some real urgency in the case (*a*). Nor does s. 3 of the Judicial Trustees Act, 1896, extend the powers of the court in this matter so as to enable it to excuse a contemplated breach of trust (*a*). For instance, in one case the court refused to sanction the investment of the trust fund in a safe but unauthorised security, although the effect of it would have been primarily to increase the income of the tenant for life, and, secondarily, to enable her to keep up the family home and otherwise to benefit her children the immediate remaindermen (*a*).

(*s*) See last note.

(*t*) *Neill* v. *Neill*, [1904] 1 Ir. R. 513.

(*u*) *Ibid.*, and *Moore* v. *Ulster Bank* (1909), 43 Ir. L. T. 136.

(*v*) *Hill* v. *Trenery* (1856), 23 Beav. 16; *Beresford* v. *Beresford* (1857), 23 Beav. 292; *Re Wells*, *Boyer* v. *Maclean*, [1903] 1 Ch. 848.

(*x*) *Re Wells*, *Boyer* v. *Maclean*, [1903] 1 Ch. 848.

(*y*) *Re Walker*, *Walker* v. *Duncombe*, [1901] 1 Ch. 879; and see also *Griggs* v. *Gibson* (1866), 14 W. R. 538; *Havelock* v. *Havelock* (1881), 17 Ch. D. 807; *Re Collins*, *Collins* v. *Collins* (1886), 32 Ch. D. 229; *Bennett* v. *Wyndham* (1857), 23 Beav. 521; *Revel* v. *Watkinson* (1748), 1 Ves. Sen. 93; *Greenwell* v. *Greenwell* (1800) 5 Ves. 194; and *Barnes* v. *Ross*, [1896] A. C. 625.

(*z*) See note (*y*), *supra*.

(*a*) *Per* KEKEWICH, J., *Re Tollemache*, [1903] 1 Ch. 457.

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It was also held in the same case that the court would not sanction something the effect of which was to create a new trust and not to administer the existing one. On the other hand, in *Re Wells, Boyer* v. *Maclean* (*b*), FARWELL, J., on behalf of infants, distinctly authorised the extinguishment of an existing trust and the creation of a new one, where the effect was to give the infants vested instead of merely contingent interests, saying that in his opinion the Court had ample jurisdiction to authorise such a transaction. The question, therefore, remains somewhat doubtful, as it seems impossible to reconcile the dicta of KEKEWICH, J., in *Re Tollemache* (*c*), with the elaborate judgment of FARWELL, J., in *Re Wells, Boyer* v. *Maclean* (*b*). It is, however, suggested that the true rule is that the court (and, it is submitted, the trustees without the sanction of the court, as stated in previous editions of this work (*d*)), can depart from the trust in order to prevent grave loss or injury to the property or the beneficiaries; or where the proposed transaction is distinctly and obviously, and not merely speculatively, for the benefit of the beneficiaries, so that the rejection of it would in effect certainly cause them loss; but not for any other reason. The rule is, in fact, founded on the principle of salvage in the sense of avoiding obvious loss, rather than on expediency; and regarded in that light the cases are perhaps not so conflicting as they appear at first sight. A judge may in one case well hold that he has jurisdiction to sell trust property to a company for shares, where any other mode of sale is impossible or ruinous; and that he has no jurisdiction to sanction a similar scheme, where the only object of it is to get what is nominally an increased price which may never be realised if the shares fall in value. It must also be understood that these orders are always made with reluctance, and that, in the words of COZENS-HARDY, L.J., "*Re New* constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts" (*e*).

(*b*) [1903] 1 Ch. 848; and see also the judgment of the same learned judge in *Re Walker, Walker* v. *Duncombe*, [1901] 1 Ch. 879.

(*c*) [1903] 1 Ch. 457.

(*d*) See Art. 56, *infra*. But trustees would be very rash to act without the court's protection.

(*e*) *Re Tollemache*, [1903] 1 Ch. 955.

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ART. 43.—*Duty of Trustee to act impartially between the Beneficiaries.*

(1) A trustee must be impartial in the execution of his trust, and not exercise his powers so as to confer an advantage on one beneficiary at the expense of another.

(2) Where the capital of the trust property is in any way augmented, the augmentation accrues for the benefit of all the beneficiaries; and is accordingly to be treated as capital, and not as income (*f*).

(3) But a trustee may, unless forbidden by the settlement, pay over a share to a beneficiary to whom it is presently payable, or appropriate a share to a beneficiary to whom it is not presently payable, without liability for any subsequent inequality which may occur by reason of the depreciation of the investments of one share, or the appreciation of the investments of another.

PARAGRAPH (1).

Powers of sale and purchase.

Where trustees are empowered to sell real estate and to lay out the proceeds in the purchase of another estate, they would not be justified in selling to promote the exclusive interest of the tenant for life. They must look to the intention of the settlement, and whether another and better purchase is practicable, and not merely probable; or at all events there must be some strong reasons of family prudence (*g*).

Trust to raise debts by sale of land.

Conversely, if lands be devised to trustees upon trust to sell so much as may be required for payment of debts, and subject thereto upon trust for divers persons successively *without impeachment of waste*, the trustees must not raise the money by sale of the timber, for that would be a hardship on the tenant for life (*h*).

Trustees should not purchase woodland estate or mining property or advowson.

Where money is directed to be laid out in the purchase of land to be settled on a person for life, the trustees should not purchase an estate with an overwhelming proportion of trees on it. For if the tenant for life be impeachable for waste, he would lose the fruit of so much as was the value of the timber;

(*f*) *Re Barton's Trust* (1868), L. R. 5 Eq. 238; *Re Bouch*, *Sproule* v. *Bouch* (1887), 12 App. Cas. 385.

(*g*) *Mortlock* v. *Buller* (1804), 10 Ves. at p. 309; *Mahon* v. *Stanhope* (1809), cited Sug. Pow. (8th ed.) 863.

(*h*) *Davies* v. *Wescomb* (1828), 2 Sim. 425.

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and if he be not impeachable, he could, by felling the timber, possess himself of a great part of the corpus of the trust property (*i*). Similar observations apply to the purchase of mining property, or an advowson, both of which might give an undue preference to one beneficiary.

Choice of investments.

Again, where trustees have a choice of investments, they must not exercise that choice for the *sole* benefit of the tenant for life, by investing upon a highly productive but insecure property (*k*). And where any change of investment is to be made with the consent of the tenant for life, and he *improperly* withholds his consent, the court will compel him to give it (*l*).

Trustee must not exert influence against the interest of a beneficiary.

On the principle enunciated in the article now under consideration, trustees must not threaten to exert their influence with third parties to the prejudice of one of their beneficiaries, in order to coerce him into consenting to a disposition of the trust property more favourable to another of the beneficiaries than would be the case if the settlement were strictly performed (*m*).

PARAGRAPH (2).

Augmentation of capital.

Where a company, out of a reserve fund, creates new capital, and allots it gratis among the old shareholders, any shares so allotted to trustees will be held by them as capital, and will not belong to the person entitled to the trust income (*n*).

Bonuses.

So where bonuses are paid *as part of capital*, they will be retained by the trustee; but where bonuses are mere expressions for extra dividends, this will not be the case. As FRY, L.J., said in *Re Bouch, Sproule* v. *Bouch* (*o*), in a passage quoted with approval by Lord HERSCHELL in giving judgment on the same case in the House of Lords (*p*), "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested in the shares under the testator or settlor; and consequently what is paid by the company as dividend goes to

(*i*) *Burges* v. *Lamb* (1809), 16 Ves. 174.

(*k*) *Raby* v. *Ridehalgh* (1855), 7 De G. M. & G. 104; and *Stuart* v. *Stuart* (1841), 3 Beav. 430.

(*l*) *Costello* v. *O'Rorke* (1869), 3 Ir. R. Eq. 172.

(*m*) *Ellis* v. *Barker* (1871), L. R. 7 Ch. 104.

(*n*) *Re Bouch, Sproule* v. *Bouch* (1887), 12 App. Cas. 385; *Re Northage, Ellis* v. *Barfield* (1891), 60 L. J. Ch. 488.

(*o*) (1885) 29 Ch. D. 635, at p. 653.

(*p*) (1887) 12 App. Cas. 385, at p. 397. See also *Re Malam, Malam* v. *Hitchens*, [1894] 3 Ch. 578; *Re Piercy, Whitwham* v. *Piercy*, [1907] 1 Ch. 289.

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the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital" (*q*). The bonus of a quarter per cent. which was offered to the holders of consols and reduced threes as an inducement to convert their holdings into new $2\frac{3}{4}$ per cents., was, by the National Debt (Conversion) Act, 1888 (51 & 52 Vict. c. 2), s. 10, specially declared to be income and not capital. On the other hand, the compensation payable under the Licensing Act, 1904 (4 Edw. VII., c. 23), ss. 2 and 3, on the extinguishment of the licence of a settled public-house, is capital (*r*).

Profit on realisation of investments

It need scarcely be pointed out that where, on a change of investment, trust securities realise more than was given for them originally, the profit accrues to capital, and is not considered as income payable to the tenant for life. In the same way, where trustees of a mortgage debt foreclose, and subsequently sell the property for more than the debt and arrears of interest and costs, the balance is to be held by them as an augmentation to the capital of the trust fund. For as any diminution of the trust property would have to be borne by all the beneficiaries, and would not fall on the tenant for life only, so it is only fair that any casual augmentation should belong to all, and not merely to the life tenant.

Stocks purchased by trustees "*cum dire*."

When trustees invest capital in the purchase of stocks or shares, on which, at the date of purchase, dividends have been earned and declared, but not paid, such dividends must be carried to capital and not paid as income (*s*). The fairness of this is obvious. But it is also settled (with less obvious fairness) that, in the absence of special circumstances, no apportionment of income will be made where stocks are purchased

(*q*) See also *Re Alsbury, Sugden* v. *Alsbury* (1890), 45 Ch. D. 237; and *Re Northage, Ellis* v. *Barfield* (1891), 60 L. J. Ch. 488, in both of which bonuses were treated as income; and *Re Despard, Hancock* v. *Despard* (1901), 17 T. L. R. 478, where a special dividend was held to be income, although the directors proposed to appropriate it to paying up unpaid shares unless shareholders required it in cash; whereas in *Re Bouch, Sproule* v. *Bouch* (1885), 29 Ch. D. 635 (1887), 12 App. Cas. 385, they were treated as corpus; and *cf. Re Hopkins's Trusts* (1874), L. R. 18 Eq. 696; *Straker* v. *Wilson* (1871), L. R. 6 Ch. 503; *Ibbotson* v. *Elam* (1865), L. R. 1 Eq. 188; *Browne* v. *Collins* (1871), L. R. 12 Eq. 586; *Blythe's Trustees* v. *Milne* (1905), 7 F. (Ct. of Sess.) 799; and *Re Hume-Nisbet's Settlement* (1911), 27 T. L. R. 461. As to the principles on which profits ought to be ascertained by companies, see *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198.

(*r*) *Re Bladon, Dando* v. *Porter*, [1911] 2 Ch. 350, affirmed [1912] 1 Ch. 45.

(*s*) *Re Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389.

between two dividend days (*t*). This appears to be founded merely on convenience, for Kindersley, V.-C., in *Scholefield* v. *Redfern* (*u*), while admitting that much might be said in favour of apportionment in such cases, said: "When we consider a little further, it is obvious, that if the tenant for life is to have something out of the sale money, as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend and add that to the capital, in order to make things equal as between him and the remainderman. It is clear that if there is an equity one way, there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this court is, that by attempting it, a grievous burthen would be imposed upon the estates of testators, by reason of the complex investigations which it would lead to." Art. 43.

But in special circumstances the court will make such an apportionment. For instance, where stocks are directed to be transferred in specie to a class on the death of a life tenant, but for convenience of division they are sold and the proceeds divided, then, as his personal representatives would, under the Apportionment Act, have been entitled to an apportionment of the income up to his death if the trust had been strictly carried out, the court will direct that a similar apportionment shall be made in respect of the proceeds of the sale (*v*).

Profit on reconstruction of company.

A testator gave his estate upon the usual trusts for conversion, with power to postpone, and directed that, pending conversion, the income actually produced should be treated as income. Part of the residue consisted of shares in a company with £8 per share paid up. The company was reconstructed, and the new company paid £9 5*s*. for each of the old shares. The £1 5*s*. was the proceeds partly of the regular reserve fund, and partly of profits which the directors had retained to meet contingencies:—*Held*, that the right of a tenant for life of shares is only to receive dividends and *bonuses in the shape of dividends*, and that, although the £1 5*s*. was profits, it was under the circumstances not payable as income (*x*).

(*t*) *Bulkeley* v. *Stephens*, [1896] 2 Ch. 247; *Scholefield* v. *Redfern* (1863), 2 Drew. & Sm. 173; *Freman* v. *Whitbread* (1865), L. R. 1 Eq. 266.

(*u*) *Scholefield* v. *Redfern* (1863), 2 Drew. & Sm. 173, at p. 182.

(*v*) *Bulkeley* v. *Stephens*, *supra*.

(*x*) *Re Armitage*, *Armitage* v. *Garnett*, [1893] 3 Ch. 337.

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Rents directed to be accumulated beyond statutory period, treated as corpus.

On similar principles, where rents were directed to be accumulated beyond the statutory period, it was held that after twenty-one years from testator's death they fell into his residuary estate during the remainder of the period for which they were directed to be accumulated; but that as between tenant for life and remaindermen (of the residue) they must be treated as corpus and not as income (*y*).

PARAGRAPH (3).

Whether trustees can safely pay the share of one beneficiary before paying the others.

The question sometimes arises, whether trustees can safely pay the share of one beneficiary who has attained a vested interest in possession, before paying the other beneficiaries who may not have attained a vested interest, or whose shares (by reason of incapacity or otherwise) are not presently payable. If they do so, it may happen that, by reason of subsequent depreciation of securities, the balance retained by the trustee may be insufficient to pay the other beneficiaries in full, in which case the first beneficiary will have got more than the others. It appears, however, to be well settled that if, when the first payment was made, the trustees have, and retain in their hands, assets which, fairly valued, are then sufficient to meet shares which are not presently payable, but have to be held in trust, they are justified in paying other shares payable *pari passu* but payable at once, and are not liable if the assets so retained should, in the event, prove insufficient to pay the unpaid beneficiaries in full (*z*). For the conduct of trustees is regarded with reference to the facts and circumstances existing at the time when they have to act; and therefore, if they make the valuation impartially at the time, they are not liable for an unforeseen loss.

Raising of portions successively.

It is apprehended that the same rule would apply to the raising of portions by mortgage, and that the trustees of a portions term would be justified in raising those presently payable, without raising the whole; provided that, at the date, the estate is an ample security for the entire sum charged by the settlement for portions (*a*).

Whether trustees can appropriate particular securities to answer particular shares payable *in futuro*.

Another question sometimes arises—whether trustees of

(*y*) *Re Pope, Sharp* v. *Marshall*, [1901] 1 Ch. 64.

(*z*) *Per* LINDLEY, L.J., *Re Hurst, Addison* v. *Topp* (1892), 67 L. T. at p. 99; *Re Winslow, Frere* v. *Winslow* (1890), 45 Ch. D. 249; *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240; *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210; and see also *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226.

(*a*) See *Wynter* v. *Bold* (1823), 1 Sim. & St. at p. 510; *Sheppard* v. *Wilson* (1845), 4 Hare, 392, 394; *Otway-Cave* v. *Otway* (1866), L. R. 2 Eq. 725; *Gillibrand* v. *Goold* (1833), 5 Sim. 149.

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a will can treat their trust as severable into several trusts, appropriating specific securities to each; or whether they must treat the trust property as one undivided fund, until it becomes necessary, on the death of a life tenant, to pay and distribute his share among his children. For instance, where a testator settles money either in a specific sum or as a share of residue upon each of his daughters for life, with remainder for her children, ought the trustees to treat the daughters' fortunes as one trust, or as several? If a severance and appropriation of securities be lawful, it may sometimes be convenient; but on the other hand the result may obviously be that (by reason of the appreciation of one appropriated set of securities, or the depreciation of another or by both such causes) one family may get less, and the other more than their due proportion of the entire fund. Where the form of the trust is a trust of specific sums (*e.g.*, £1,000 to be held upon trust for a testator's daughter A. for life, with remainder for her children equally, and £1,000 to be held upon a similar trust for his daughter B. and her children), such appropriation is not only undoubtedly legitimate, but ought to be made (*b*). So where the form of the trust is to divide a testator's residuary estate between his children equally, the daughters' shares to be retained, and invested upon trust for them respectively for life, with remainder to their respective children; if, when the appropriation is made, the securities are fairly valued and fairly appropriated, there can be no objection; and when once the appropriation is made, the subsequent depreciation of one appropriated fund cannot be made good out of the appreciation of another (*c*). Moreover, it was held by STIRLING, J., that even where the form of the trust is such that no immediate severance into shares is directed until a share of corpus becomes distributable, an appropriation may be lawfully made; although the usual practice, both of trustees and of the court itself (in the administration

(*b*) *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855; *Re Walker*, *Walker* v. *Walker* (1890), 62 L. T. 449; and see also *Re Lepine*, *Dowsett* v. *Culver*, [1892] 1 Ch. 210, and *Barclay* v. *Owen* (1889), 60 L. T. 220. But an appropriation of securities is only valid if the appropriated securities were both authorised and sufficient at the date of the appropriation: see *Re Waters*, *Preston* v. *Waters*, [1889] W. N. 39. It is not, however, necessary that where a trustee appropriates securities to one beneficiary he should contemporaneously appropriate to all: (*Re Richardson*, *Morgan* v. *Richardson*, [1896] 1 Ch. 512; *Re Nickels*, *Nickels* v. *Nickels*, [1898] 1 Ch. 630).

(*c*) *Re Nickels*, *Nickels* v. *Nickels*, *supra*; *Re Brooks*, *Coles* v. *Davis* (1897), 76 L. T. 771.

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of estates and trusts), has been to make no appropriation in such cases (*d*).

Appropriation of land or chattels to answer a particular share.

The question is somewhat different where the estate is not wholly converted into money or securities for money. In that case, it is scarcely possible to value the estate with certainty. Nevertheless, executors (and also trustees with power of sale) can appropriate a specific part of the estate (*e.g.*, leaseholds or freeholds) as part of the share of one beneficiary, *with his consent*, on the ground that they can sell it to him and set off the purchase-money against his share (*e*).

No appropriation can be made to answer a contingent legacy of a fixed sum.

There can be no appropriation, however, to answer a contingent pecuniary legacy when the legatee is not entitled to the intermediate income; for the legatee is entitled, if and when the contingency happens, to the exact sum, neither more nor less. In such cases, therefore, executors must take care to set aside funds with an ample margin for depreciation; otherwise, they may find themselves personally responsible (*f*).

On the other hand, if by the will some of the income arising from the legacy is to go to the legatee *before the contingency on which it becomes payable happens*, then the inference is said to be that the testator intended that a fund should be segregated and invested to answer the legacy (*f*).

ART. 44.—*Duty of Trustee to sell Wasting and Reversionary Property.*

Where residuary personal estate is settled by will for the benefit of persons in succession, all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorised securities, must be converted into property of a permanent and income-bearing character, unless:

(a) the will contains a direction or implication to the contrary; or

(b) the will confers on the trustee a discretion to

(*d*) *Re Nickels, Nickels* v. *Nickels*, [1898] 1 Ch. 630; and see *Re Brooks, Coles* v. *Davis* (1897), 76 L. T. 771.

(*e*) *Re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681.

(*f*) *Re Hall, Foster* v. *Metcalfe*, [1903] 2 Ch. 226.

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postpone such conversion, which he *bona fide* and impartially exercises.

Rule in *Howe* v. *Lord Dartmouth*.

The above rule, known as the rule in *Howe* v. *Lord Dartmouth* (*g*), is really a corollary of the principle stated in Art. 43, viz., that the trustee must act impartially between the beneficiaries. For if wasting property (such as leaseholds, terminable annuities, and the like) were to be retained, the tenant for life would profit at the expense of the remaindermen; and if reversionary property were not converted, the remaindermen would profit at the expense of the tenant for life. It must, however, be borne in mind that the rule is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him. Courts of equity have consequently always declined to apply the rule in cases where the settlor has indicated an intention that the property should be enjoyed in specie, though he may not, in a technical sense, have specifically said so. The real question, therefore, in all such cases, is whether the settlor has, with sufficient distinctness, indicated his intention that the property should be enjoyed in specie (*h*); for the burden of showing this lies upon the party who desires that the rule in *Howe* v. *Lord Dartmouth* should not be applied (*i*).

Not applicable to settlements *inter vivos*.

The rule is confined to residuary personal estate settled by will (*k*), with regard to which a testator cannot be presumed to foresee its nature. Settlements of existing property by deed are necessarily specific, and therefore excluded from the rule. It has, however, been suggested that the rule may apply to covenants to settle after-acquired property (*l*), but this was negatived by COZENS-HARDY, J., in a recent case (*m*), on the ground that such covenants are contracts between the parties, and not wills, and must be performed in strict accordance with their terms; so that, unless the covenant contains a direction to convert such after-acquired property and invest the proceeds, the inference is that the parties meant it to be enjoyed in specie (*m*).

Not applicable to property given specifically.

Although the mere absence of a direction to convert wasting

(*g*) (1802) 7 Ves. 137, 1 Wh. & Tu. Lead. Cas. (8th ed.) 68; and see also *Hinves* v. *Hinves* (1844), 3 Hare, 609; and *Pickering* v. *Pickering* (1839), 4 Myl. & Cr. 289.

(*h*) *Per* BAGGALLAY, L.J., *Macdonald* v. *Irvine* (1878), 8 Ch. D. at p. 112.

(*i*) *Per* JAMES, L.J., same case.

(*k*) *Re Van Straubenzee, Boustead* v. *Cooper*, [1901] 2 Ch. 779.

(*l*) Vaizey on Settlements, p. 421.

(*m*) *Re Van Straubenzee, Boustead* v. *Cooper, supra*. See also *Milford* v. *Peile* (1854), 2 W. R. 181; *Hope* v. *Hope* (1855), 1 Jur. (N. S.) 770.

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property has never been construed to mean that it should be enjoyed in specie, yet, where such property is given *specifically* in the strict sense of the term, *i.e.*, where it is expressly referred to, the rule has no application. For in such cases, in the absence of express direction, the presumption is that the testator, by naming the specific property, intended that it should be enjoyed in the shape in which he left it. If, therefore, a testator bequeaths specific leaseholds in trust for persons successively, it will not be the duty of the trustees to sell them and invest the proceeds on permanent investments; but they must pay the entire rents to the first taker, notwithstanding that, by reason of the terminable nature of the property, the ultimate remainderman may be disappointed (*n*). This distinction between specific trust bequests and residuary trust bequests is observed even where the specific bequest and the residuary bequest are given to the same person for life (*o*).

Corollary where specific trust property purchased under compulsory powers.

As a corollary to the rule that the tenant for life is entitled to the whole of the income of specifically settled leaseholds, it has been held that where they are compulsorily purchased by a railway company (*p*), or are sold by the court in an administration action (*q*), the tenant for life is entitled to receive out of principal and interest of the proceeds an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leaseholds had to run.

Illustrations of the general rule.

Where a testator's residuary estate was settled upon one for life, with remainders over, it was held that long, but terminable, annuities, which formed part of it, ought to be sold, and the proceeds invested on permanent trust securities (*r*).

Intermediate income of sum set aside.

On similar grounds, where part of the estate consists of the intermediate income of a fund set apart to answer a future liability, the intermediate income must be treated as capital (*s*).

Leaseholds.

A testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, with remainders over. He died possessed of leaseholds, among

(*n*) *Re Beaufoy's Estate* (1852), 1 Sm. & Giff. 20; and see *Stanier* v. *Hodgkinson* (1903), 73 L. J. Ch. 179.

(*o*) *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101 (BAGGALLAY, L.J., diss.).

(*p*) *Askew* v. *Woodhead* (1880) 14 Ch. D. 27.

(*q*) *Re Lingard*, *Lingard* v. *Squirrell*, [1908] W. N. 107.

(*r*) *Tickner* v. *Old* (1874), L. R. 18 Eq. 422; *Porter* v. *Baddeley* (1877), 5 Ch. D. 542; but see *contra*, *Wilday* v. *Sandys* (1869), L. R. 7 Eq. 455, where, on the construction of the will, it was held that the trustees were authorised to hold long annuities.

(*s*) *Re Whitehead*, *Peacock* v. *Lucas*, [1894] 1 Ch. 678.

other property. It was held that the widow was not entitled to retain the leaseholds, but that they must be sold and the proceeds invested in stock (*t*).

Rule applies to all unauthorised securities.

The rule is equally applicable to a testator's investments which are not authorised to be retained either by the will or by statute. Such investments being regarded as speculative, and therefore possibly wasting, ought to be converted as soon as possible.

Foreclosed mortgages.

So where trustees are obliged to foreclose a mortgage, or, under the Statutes of Limitation or otherwise, the right of redemption is barred, they hold the property not as real estate but formerly on an implied trust (and now under a statutory obligation (*u*)), to sell the property promptly if they can get a fair price for it; unless, of course, they are authorised to invest in the purchase of land. Where, however, a serious loss would result from an immediate sale, the court will authorise the retention of the land for a limited period (*x*).

SUB-PARAGRAPHS (a), (b).

Rule in *Howe* v. *Lord Dartmouth* not applicable where contrary intention expressed.

As already stated, the rule in *Howe* v. *Lord Dartmouth* is subject to any contrary intention which may be expressed or implied in the settlement. Moreover, it is immaterial whether the contrary intention is imperatively expressed, or whether a discretion to convert or not is expressly given to the trustees; for the court will not interfere with a discretion so long as trustees exercise it in good faith (*y*). Thus, in one case, a testator gave his residuary estate, which included several leasehold houses (held upon short terms), to trustees, upon trust to pay the income to his wife for life, with remainder to his grandchildren, and gave his trustees *power to retain any portion of his property in the same state in which it should be at his decease*, or to sell and convert the same as they should think fit. It was held that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds, and any other investments held by the testator, for such period as they should think fit (*z*). A similar decision was arrived at where a

(*t*) *Benn* v. *Dixon* (1840), 10 Sim. 636. The same conclusion was arrived at, where "the rents and profits of my residuary real and personal estate" were bequeathed to the wife. *Re Game, Game* v. *Young*, [1897] 1 Ch. 881.

(*u*) Conveyancing Act, 1911 (1 & 2 Geo. V, c. 37), s. 9

(*x*) *Per* KEKEWICH, J., *Re Tottemache*, [1903] 1 Ch. 457, 461.

(*y*) *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300; *Tabor* v. *Brooks* (1878), 10 Ch. D. 273.

(*z*) *Gray* v. *Siggers* (1880), 15 Ch. D. 74.

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testator authorised his trustees to postpone the sale of his business (*a*).

Discretion given to trustees as to time of sale.

So, again, where the testator devised wasting property to trustees, upon trust to sell "when in their discretion they should deem it advisable," it was held that the trustees were not bound to sell until they thought fit (*b*).

Rule not applicable where impliedly negatived.

The above cases are instances of an express intention that the trustees should have a discretion; but the same result will follow where that intention can be implied. Thus, a testator, after a specific bequest, gave all his residuary estate, both real and personal, to trustees, upon trust, to *sell so much and such part thereof as they might think necessary for paying all his mortgage and other debts and funeral and testamentary expenses*, and to invest the balance of the proceeds, and to stand possessed of such investments, *and all other his residuary estate*, upon trust for several persons successively for their respective lives, with remainders over. Part of the testator's estate consisted of leaseholds, which were retained unsold. On this state of facts it was held that, on the construction of the will, the trustees had a discretion as to what part of the testator's estate should be converted, and that the court could not interfere with such discretion (*c*).

So it has been held that an express direction for sale at a particular period, indicates an intention that there should be no previous sale (*d*); and even a *power* to sell all or any part of the estate in the absolute discretion of the trustees, has been held to negative the *primâ facie* duty of selling wasting or reversionary property forthwith (*e*). A similar view has been taken of a direction to *divide* property after the death of the life tenant (*f*). So, in some cases, it has been decided that a trust to pay *rents* to the tenant for life, *where the testator has only leaseholds* (*g*); or a direction that the trustees should give a power of attorney to the life tenant to receive the

(*a*) *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56; but see *Re Smith, Arnold* v. *Smith*, [1896] 1 Ch. 171.

(*b*) *Miller* v. *Miller* (1872), L. R. 13 Eq. 263; *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395; and see also *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch. D. 42; and *Re Crowther, Midgley* v. *Crowther, supra*, in both of which cases the property consisted of a business.

(*c*) *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; and see also *Simpson* v. *Earles* (1847), 11 Jur. 921.

(*d*) *Alcock* v. *Sloper* (1833), 2 Myl. & K. 699; *Daniel* v. *Warren* (1843), 2 Y. & Coll. C. C. 290.

(*e*) *Re Pitcairn, Brandreth* v. *Colvin*, [1896] 2 Ch. 199.

(*f*) *Collins* v. *Collins* (1833), 2 Myl. & K. 703.

(*g*) *Goodenough* v. *Tremamondo* (1840), 2 Beav. 512; *Cafe* v. *Bent* (1845), 5 Hare, 24; *Vachell* v. *Roberts* (1863), 32 Beav. 140.

income (*h*), is a sufficient indication of a contrary intention to take the case out of the general rule.

A testator gave his residuary estate to trustees in trust to convert into money such parts thereof as should not consist of money, *or be invested in any of the public funds or government securities*, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths to hold the property upon other trusts. On the construction of these words it was held that long annuities, of which the testator died possessed, fell within the exception of "public funds or government securities," and ought not to be converted (*i*). On the other hand, in *Tickner* v. *Old* (*k*), where the direction was to convert the residue and invest in *government* or real securities, with power to continue invested any *government stocks* or real securities of which the testator might die possessed, it was held that government securities meant only such as were of a permanent character, and that long annuities ought to be converted. It will be perceived that it is not easy to distinguish these two cases, which convey a warning to the practitioner how extremely dangerous it is to advise trustees to act upon implied intentions, either one way or the other, without taking the opinion of the court on originating summons.

ART. 45.—*Duty of Trustee as between Tenant for Life and Remainderman in Relation to Property pending Conversion.*

(1) Where property ought to be converted, and the proceeds invested, the tenant for life is entitled, pending conversion, to the whole income of income-bearing property, if the settlement so directs or implies (*l*).

(2) In the absence of any such direction or implica-

(*h*) *Neville* v. *Forteseue* (1848), 16 Sim. 333.

(*i*) *Wilday* v. *Sandys* (1869), L. R. 7 Eq. 455.

(*k*) (1874) L. R. 18 Eq. 422: and see also *Porter* v. *Baddeley* (1877), 5 Ch. D. 542.

(*l*) See *Re Sheldon*, *Nixon* v. *Sheldon* (1888), 39 Ch. D. 50; *Re Thomas*, *Wood* v. *Thomas*, [1891] 3 Ch. 482. Where the property is of a non-wasting nature, the court will accept very slight evidence of implied intention.

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(a) He is entitled to the whole of the ordinary rents of real estate (*m*), but not to royalties for minerals (*n*).

(b) Where the property is of a wasting nature (and *semble*, even where, being personal estate, it is not), he is only entitled to a fair equivalent for the income which he would have received if the property had been sold and invested in trustee securities (*o*).

(c) Where the property is of a reversionary nature, he is entitled, when it falls in, to a proportionate part of the capital, representing 3 (*p*) per cent. compound interest (with yearly rests) on the true actuarial value of the property at the testator's death; calculated on the assumption that the actual date when the property fell into possession could have been then predicted with certainty (*q*).

(d) Upon complete realisation of an insufficient security, where interest is in arrear, the money realised must be divided between tenant for life and remainderman in proportion to the amount due for arrears of interest and the amount of capital remaining due (*r*); unless the security

(*m*) *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361; *Re Searle*, *Searle* v. *Baker*, [1900] 2 Ch. 829; *Re Oliver*, *Wilson* v. *Oliver*, [1908] 2 Ch. 74; *Re Earl of Darnley*, *Clifton* v. *Darnley*, [1907] 1 Ch. 159.

(*n*) *Wentworth* v. *Wentworth*, [1900] A. C. 163. The rate of interest allowed was formerly 4 per cent., but of late years it has been dropped to 3 per cent. on the ground that that rate is roughly the rate produced by trust securities. But it is liable to increase again if the ordinary rate of interest on good securities should once more rise.

(*o*) *Brown* v. *Gellatly* (1867), L. R. 2 Ch. 751; *Meyer* v. *Simonsen* (1852), 5 De G. & Sm. 723; *Wentworth* v. *Wentworth*, *supra*.

(*p*) See *Re Goodenough*, *Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Morley*, *Morley* v. *Haig*, [1895] 2 Ch. 738; *Re Hobson*, *Walker* v. *Appaek* (1885) 53 L. T. 627; and *Re Duke of Cleveland*, *Hay* v. *Wolmer*, [1895] 2 Ch. 542; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*q*) *Re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643; followed, with variations as to rate of interest, in *Re Goodenough*, *Marland* v. *Williams*, *supra*; *Re Morley*, *Morley* v. *Haig*, *supra*; *Re Hobson*, *Walker* v. *Appaek*, *supra*; and *Re Duke of Cleveland*, *Hay* v. *Wolmer*, *supra*.

(*r*) *Re Atkinson*, *Barbers' Co.*

is of such a nature that interest is only payable if earned (*s*). Art. 45.

(3) This article has no application to investments made by trustees in breach of trust where no loss results; but is confined to cases where unavoidable delay takes place in converting property in due course of administration (*t*), and to cases where a security (whether authorised or not) has turned out to be insufficient.

Not confined to settled residue.

This article is a further corollary of Art. 43, and its main principle forms the second part of the rule in *Howe* v. *Lord Dartmouth*, viz., that, pending a conversion which ought to be made, the tenant for life is, *primâ facie*, entitled to the income which would be produced by the proceeds of the conversion, if it were made, and nothing more.

It is not, however (like the main rule), confined to settled residuary personal estate under a will, but is equally applicable to all settled property which is subject to a direction for sale exercisable forthwith, even although there is an express power to postpone it. But it does not apply where the sale is only to take place at a future date; for in that case the intention must have been that until that date arrived the tenant for life should enjoy the property in specie.

A question of interpretation of the trust instrument.

Where the rule applies at all, the first question that arises is one of fact, viz., whether on the true interpretation of the trust instrument the tenant for life is either expressly or impliedly intended to take the actual income pending the sale. If that question is answered in the affirmative, *Cadit quæstio*. But if no such intention is expressed or is reasonably to be inferred, then the question becomes one of law, to be answered in accordance with the rules in paragraph (2).

PARAGRAPH (1).

Rules have no application where a future sale is directed.

The rules in paragraph (2) have no application where only a *future* sale is directed. In *Re North, Garton* v. *Cumberland* (*u*), a testator, part of whose property consisted of land

v. *Grose-Smith*, [1904] 2 Ch. 160, overruling *Re Foster, Lloyd* v. *Carr* (1890), 45 Ch. D. 629, and *Re Phillimore, Phillimore* v. *Herbert*, [1903] 1 Ch. 942.

(*s*) See *Re Taylor's Trusts, Matheson* v. *Taylor*, [1905] 1 Ch. 734.

(*t*) See *per* BYRNE, J., *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565, at p. 566; and *Stroud* v. *Gwyer* (1860), 28 Beav. 130; but *cf. Re Hill, Hill* v. *Hill* (1881), 50 L. J. Ch. 551; *Slade* v. *Chaine*, [1908] 1 Ch. 522; *Re Hoyles, Row* v. *Jagg* (No. 2) [1912] 1 Ch. 67.

(*u*) [1909] 1 Ch. 625.

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with brick earth upon it which was being worked under a lease granted by him at a royalty, gave his real estate to trustees upon trust "to pay the rents issues and profits" to certain persons for life with remainder *after the death of the last surviving life tenant* upon trust for sale. It was held that the trustees had power, after the expiration of the lease, to let the brick earth from year to year at a royalty, and that the life tenants were entitled to the whole of such royalty. No one seems to have suggested (nor indeed could have suggested) that the rules in paragraph (2) (*supra*) applied, the argument being mainly directed to the power of the trustees to let the brick earth at all, and to the fact that if the tenants for life had let it under the powers of the Settled Land Acts, a proportion of the royalties would have had to be carried to capital account. The judge holding, on the interpretation of the will, that the trustees had power to continue the letting of the brick earth, it followed that the tenants for life were entitled to the royalties, there being no immediate trust for conversion.

So where a testator devised and bequeathed "a life rent in all my property" to his wife, and gave his trustees a mere power to sell and invest the proceeds, it was held that the wife was entitled to the whole of the income (*x*).

Rules in paragraph (2) may be expressly or impliedly negatived.

Even where mineral property is subject to a trust for immediate sale, yet, if the trust expressly or impliedly gives the whole of the royalties pending sale to the tenant for life, he will be entitled to them. Thus, where a testator devised his brickfield to trustees upon trust to sell when in their discretion it might seem advisable, and directed that the rents and profits should until sale be *applicable and applied in the same manner as the dividends or interest to arise from the investments of the sale moneys*, it was held that the tenant for life was entitled to the whole of the royalties paid by tenants of the brickfield, although the trustees did not sell the property for ten years (*y*). If, however, the italicised words had not been inserted in the will, it seems plain that the power to postpone conversion would not of itself have authorised the payment of the whole of the royalties to the tenant for life. For, in that case, the inference would have been that the power to postpone conversion was for the purpose of efficiently

(*x*) *Re Bentham, Pearce* v. *Bentham* (1906), 94 L. T. 307; see also *Gray* v. *Siggers* (1880), 15 Ch. D. 74.

(*y*) *Miller* v. *Miller* (1872), L. R. 13 Eq. 263; and see also *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395, where the whole of colliery royalties were held to be payable to the tenant for life, and *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56.

selling the estate, and not for the benefit of the tenant for life (*a*).

Sale of business directed as soon as practicable.

The most recent case illustrating this part of the rule is *Re Elford, Elford* v. *Elford* (*b*), where a testator directed the sale of his business as soon as practicable, but in a subsequent clause declared that pending conversion "all the income arising from my estate" shall be applied as if it were income arising from the proceeds of the conversion. *Held*, that the tenant for life was entitled to the whole of the profits of the business.

Purchase of land directed with all convenient speed.

On the other hand, where a testator directs that a fund shall be invested in the purchase of land "with all convenient speed," and that in the meantime the income should be accumulated, the rule of the court is that a year is a reasonable time, and that if the purchase is not made within such year the accumulations stop, and the income is payable to the tenant for life of the land (*c*).

The question is really one of construction, viz., whether the testator intended that the power to postpone should be exercised for the benefit of the tenant for life, or merely for the more convenient realisation of the estate; and if the former intention is found, no distinction is made by the court between unauthorised securities of a wasting and those of a permanent nature (*d*).

Settlement implying that income is to be enjoyed in specie.

A testator empowered his trustees, at their discretion, *to continue* all or any part of his personal estate in the state of investment in or upon which the same should be at his death; or to convert it, and invest the proceeds in the names of the trustees in certain specified securities. Part of the personal estate consisted of securities not specifically authorised, which were retained:—*Held*, that the tenants for life were entitled to receive the actual income of those securities which were retained (*e*). It will be perceived that the testator authorised the *continuance* of securities, and not merely the postponement

(*a*) *Re Woods, Gabellini* v. *Woods*, [1904] 2 Ch. 4. See *Re Carter* (1892), 41 W. R. 140; *Brown* v. *Gellatly* (1867), L. R. 2 Ch. 751.

(*b*) [1910] 1 Ch. 814, following *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch. D. 42, and *Re Crowther, Midgley* v. *Crowther*, [1895] 2 Ch. 56.

(*c*) *Parry* v. *Warrington* (1820), 6 Madd. 155, followed by JESSEL, M.R., *Wing* v. *Wing* (1876), 34 L. T. (N. S.) 941; and see *Sitwell* v. *Bernard* (1801), 6 Ves. 520.

(*d*) *Re Nicholson, Eade* v. *Nicholson*, [1909] 2 Ch. 111.

(*e*) *Re Sheldon, Nixon* v. *Sheldon* (1888), 39 Ch. D. 50; *Gray* v. *Siggers* (1880), 15 Ch. D. 74; *Re Bates, Hodgson* v. *Bates*, [1907] 1 Ch. 22 (power "to retain"); and *Re Wilson, Moore* v. *Wilson*, [1907] 1 Ch. 394, and *Re Nicholson, Eade* v. *Nicholson*, *supra*, to same effect.

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of their conversion; otherwise, the decision would have been different, as was held in *Re Chaytor, Chaytor* v. *Horn* (*f*), where the testator only authorised the *continuance pending a favourable opportunity for selling*. The real point in such cases is whether the power to continue or retain is to be construed as a power to continue or retain permanently, or only until the trustees can sell advantageously. In the first case, the inference is that the power was for the benefit of the tenant for life; in the latter, the inference is that it was merely for the convenient administration of the estate.

Another example of an implied intention that income should, pending conversion, be enjoyed in specie is afforded by the case of *Re Thomas, Wood* v. *Thomas* (*g*). There a testator gave his residuary estate to trustees upon trust for conversion and investment of the proceeds in specified securities; with power to the trustees in their absolute discretion to retain any securities or property belonging to him at his death unconverted, for such period as they should think fit. He then declared that they should stand possessed of "the stocks, funds, shares, and securities for the time being *constituting* or representing the residuary personal estate and effects thereinbefore bequeathed *and of the income thereof*," upon trust to pay the income to certain persons for life with remainders over. The estate comprised certain American bonds, which were not included among the securities authorised by the will as investments, but were retained by the trustees in exercise of the discretion given to them:—*Held*, that, on the true construction of the will, the tenants for life were entitled to the whole income of the bonds in specie. In giving judgment, KEKEWICH, J., said: "I am not prepared to hold, that, where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention *necessarily* gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion. But I have no doubt that one looks out with an expectant eye for a direction that the tenant for life shall receive the income, when there is an express direction to the trustees to retain securities, or any indication of the testator's intention that they shall retain them indefinitely for so long as they may think fit."

(*f*) [1905] 1 Ch. 233; and see cases, *infra*, under paragraph (2) (b).

(*g*) [1891] 3 Ch. 482.

PARAGRAPH (2) (a). Art. 45.

Even where there is no intention manifested that the tenant for life is to have the whole income pending conversion, yet, in the case of real estate, it would seem that the tenant for life is entitled to the whole of the rents. Thus in *Hope* v. *D'Hédouville* (*h*) real estate was settled upon trust to sell and invest the proceeds, and to pay the dividends to B. for life, with certain limitations over after his death. There was no direction as to payment of the intermediate rents pending sale. The land was sold *without undue delay*; but, pending the sale, the rents produced more than four per cent. per annum on the amount realised by the sale. On these facts it was held by KEKEWICH, J., that, notwithstanding the absence of any power to postpone the sale, or any direction as to the interim rents, the whole rents belonged to B., the tenant for life (*h*). His lordship carefully rested his judgment upon implied intention, and not upon any rule of law differentiating real estate which ought to be converted, from personal estate subject to a like trust. It is, however, difficult to understand how any such implied intention was found in this case, apart from the obvious convenience of the decision; and if convenience is to be the test of intention, it would seem to follow that such intention should be implied in every case where land is directed to be sold, unless the contrary is expressed. Indeed, the learned judge seems to have come to that conclusion in the subsequent case of *Re Searle*, *Searle* v. *Baker* (*i*), where he laid the rule down broadly that the tenant for life of real estate is always entitled to the intermediate rents where the sale is postponed (either under a power, or otherwise), without impropriety; and this has been since followed in *Re Lord Darnley*, *Clifton* v. *Lord Darnley* (*j*), and *Re Oliver*, *Wilson* v. *Oliver* (*k*). But rents and produce (even where expressly given to the tenant for life) do not include damages recovered from a lessee for breach of covenant (*l*).

Rule does not usually apply to rents of real estate pending conversion.

Rents of real estate pending conversion.

Whether, however, the same principle extends to the case of royalties or mineral rents does not appear to be settled. In *Wentworth* v. *Wentworth* (*m*), Lord MACNAGHTEN, delivering the decree of the Privy Council, stated distinctly that it did not. But in the subsequent case of *Re Lord Darnley*, *Clifton* v. *Lord Darnley* (*j*), in which *Wentworth* v. *Wentworth* was cited, KEKEWICH, J., nevertheless held that moneys payable by lessees

Mineral royalties.

(*h*) [1893] 2 Ch. 361.
(*i*) [1900] 2 Ch. 829.
(*j*) [1907] 1 Ch. 159.
(*k*) [1908] 2 Ch. 74.
(*l*) *Re Pyke*, *Birnstingl* v. *Birnstingl*, [1912] W. N. 81; but *conf.* *Re Lacon's Settlement*, *Lacon* v. *Lacon*, [1911] 2 Ch. 17.
(*m*) [1900] A. C. 163.

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for the right to work chalk pits must go to the tenant for life. The learned judge, however, did not attempt to distinguish the case from *Wentworth* v. *Wentworth*; and in *Re Oliver, Wilson* v. *Oliver* (*n*), WARRINGTON, J., commenting upon Lord MACNAGHTEN's dictum, said: "but the subject-matter of that case was mining property, and the question which the Privy Council had to determine was not whether the tenant for life was entitled to mining rents in specie—*for to them she was of course not entitled*—but in what manner her interest was to be ascertained." It is therefore submitted that, on the balance of authority, a tenant for life of mining property which is subject to an immediate trust for conversion is not entitled, pending sale, to the whole of the royalties, unless, of course, the settlement so directs or implies.

PARAGRAPH (2) (b).

Tenant for life not entitled to whole income of destructible property or unauthorised investments if settlement silent.

In the leading case of *Brown* v. *Gellatly* (*o*), the testator, who was a shipowner, directed his trustees to convert his personal estate into money, when and in such manner as they should see fit, and *gave them power to sail his ships until they could be disposed of satisfactorily*. The proceeds of his personal estate were then settled upon tenants for life, with remainders over. The will contained a wide power of investment in specified securities. On his death, the testator possessed (1) numerous ships; (2) securities falling within those authorised by the will; and (3) shares and investments not so authorised. The ships could not be immediately sold, nor could the unauthorised securities. Both, pending sale, produced a high rate of income; and the question arose whether the tenants for life were entitled to the whole of that income, or only to some, and, if so, what, proportion thereof. In giving judgment, Lord CAIRNS said: "We find no indication whatever of an intention that the ships were to remain unconverted for any specific time. The testator, who had been engaged in the shipping business, knew perfectly well, and shows that he knew, that some time would necessarily be taken in converting the ships; and therefore he very wisely provided that, until they were sold, the executors should have a power (which otherwise they would not have possessed), viz., the power to sail the ships for the purpose of making profit. But, in giving that power, he does not

(*n*) [1908] 2 Ch. 74.

(*o*) (1867) L. R. 2 Ch. 751; and see also *Hume* v. *Richardson* (1862), 4 De G. F. & J. 29; *Le Lynch Blosse, Rickards* v. *Lynch Blosse*, [1899] W. N. 27; and *Mousley* v. *Carr* (1841), 4 Beav. 49.

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give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers. In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir JAMES PARKER, in the case of *Meyer* v. *Simonsen* (*p*); and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have four per cent. on such value; and the residue of the profits must of course be invested and become part of the estate. Then, secondly, as to the authorised securities; the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been three per cent. consols. I understand the words of the will as amounting to the constitution by the testator of a larger class of authorised securities than this court itself would have approved of; and the court has merely to follow his directions, and treat the income accordingly, as being the income of authorised securities. Then comes the third question in the case; the securities not ranging themselves under any of those mentioned in the last clause of the will. As they do not come within the class of authorised securities, it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year after testator's death, but I think that the rights of the parties must be regulated as if they had been so converted. I think the proper order to make is that which was made in *Dimes* v. *Scott* (*q*), followed by WIGRAM, V.-C., in the case of *Taylor* v. *Clark* (*r*), namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much three per cent. stock as would have been produced by the conversion and investment of the property at the end of the year."

Income derived from property of which testator was mortgagee in possession.

On the same principle, where part of a testator's residuary estate consisted of a colliery of which he was mortgagee in possession, the question arose as to how accumulations of the income, derived from working the colliery since the testator's death, were to be apportioned between tenant for life and remaindermen. It was held that the proper principle was

(*p*) (1852) 5 De G. & Sm. 723.
(*q*) (1828) 4 Russ. 195.
(*r*) (1841) 1 Hare, 161.

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that so much as would, if invested at the testator's death at four per cent. with yearly rests, have amounted to the sum in the hands of the trustees should be treated as capital, and the rest as income (*s*).

Rate of interest allowed to tenant for life.

It will be perceived that in the above cases the rate of interest on the capital value allowed to the life tenant was four per cent. In recent years, however, owing to the drop in the current rate of interest, three per cent. has been substituted for four (*t*). But in *Wentworth* v. *Wentworth* (*u*) the Privy Council stated that they did not think it expedient to hamper the court by laying down any fixed rule as to the rate of interest to be allowed to tenants for life on the estimated value of the capital of the property, and directed an inquiry as to what annual sum would, under all the circumstances of the case, be fair. It is conceived, that at the present time and in this country three per cent. would still be the normal rate allowed, although three and a quarter to three and a half is obtainable from trust securities. The question has recently (*v*) been mooted whether the interest payable to a life tenant pending conversion is limited to the actual income produced by the estate as a whole (*e.g.*, where the actual income does not amount to four (or three) per cent. on the capital value). The judge, in the case referred to, refused to decide the general proposition, on the ground that the case really turned on the interpretation of a former order. It is conceived, however, that where conversion is delayed for the benefit of the corpus, the tenant for life is entitled to three (or four) per cent. on the capital value whether the actual income produces that amount or not. It would indeed be a strange anomaly if a tenant for life were entitled to three per cent. in respect of property producing no income (as shown in paragraph 2 (c)), and yet were only entitled to one per cent. if income of that amount is actually yielded.

PARAGRAPH (2) (c).

Tenant for life entitled to part of corpus of non-income-bearing property when realised.

In the above cases, the income actually received by the trustees, exceeded that which they were authorised to pay to the tenant for life; but the same principle applies in favour of the tenant for life, where the property is not presently saleable or realisable except at an unreasonable loss, and,

(*s*) *Re Godden, Teague* v. *Fox*, [1893] 1 Ch. 292.

(*t*) *Re Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; and *Re Duke of Cleveland's Estate, Hay* v. *Wolmer*, [1895] 2 Ch. 542. But *cf. Re Owen, Slater* v. *Owen, infra.*

(*u*) [1900] A. C. 163.

(*v*) *Re Owen, Slater* v. *Owen*, [1912] 1 Ch. 519.

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pending realisation, produces no income. For instance, where part of the estate consists of a policy of assurance on another's life which does not fall in for some years after the testator's death, or a reversion (*w*). In such cases, unless the settlor contemplated that it should not be sold (*x*), it would be unfair to the tenant for life that he should lose intervening income. Therefore, when it does fall in, the money must be apportioned, as between capital and income, by ascertaining the sum which, put out at three per cent. (*t*) per annum on the day of the testator's death, and accumulated at compound interest with yearly rests, and deducting income tax, would, with the accumulations, have produced the amount actually received. The sum so ascertained must be treated as capital, and retained by the trustees. The residue is income, and must be paid to the tenant for life (*y*). The same principle applies where a debt due to the estate is recovered by the trustees without interest (*z*).

Rule may be negatived expressly or by inference.

This branch of the rule, like all the others, is subject to any express or implied direction to the contrary in the trust instrument, and so much dissatisfaction has been felt with the entire doctrine of the court both as to the income of unauthorised securities pending conversion, and as to the income to be attributed to reversionary properties or policies while still unpayable, that nothing is more common now than to find a clause in a will expressly providing that, pending sale calling in and conversion of property, the whole of the income shall be applied as income, and on the other hand no part of the proceeds of the sale, calling in, or conversion of reversionary property or policies of assurance shall be paid or applied as income.

Sometimes the latter part of such a clause is so worded that "no property not actually producing income shall be treated as producing income or as entitling any tenant for life to the receipt of income." This form is not, however, desirable, as it may raise awkward questions as to whether it extends beyond the case of reversionary property, *e.g.*, to interest in arrear or to interest which is only payable at a future date. Thus, in a recent case where the testator used the above form of words, the question arose whether they applied to a mortgage

(*w*) *Re Hobson*, *Walker* v. *Appack* (1885), 53 L. T. 627; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*x*) *Re Pitcairn*, *Brandreth* v. *Colvin*, [1896] 2 Ch. 199; but *cf. Re Hubbuck*, *Hart* v. *Stone*, [1896] 1 Ch. 754.

(*y*) *Re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643; and see also *Massy* v. *Gahan* (1889), 23 L. R. Ir. 518; *Re Morley*, *Morley* v. *Haig*, [1895] 2 Ch. 738; and *Wilkinson* v. *Duncan* (1857), 23 Beav. 469.

(*z*) *Re Duke of Cleveland's Estate*, *Hay* v. *Wolmer*, [1895] 2 Ch. 542.

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made in the testator's favour, where the principal, together with simple interest, was only to be paid on the mortgagor's death. It was held that they did not, however, on the ground that such clauses only apply to property which is not *producing* income, and not to property which is *producing* income payment of which is merely postponed (*a*).

PARAGRAPH (2) (d).

Corpus realised by insufficient security is divided between capital and income if latter in arrear.

Where a trust security turns out to be insufficient, and interest is in arrear, the sum ultimately realised by the depreciated security is divisible between capital and overdue income —even where the settlor has directed that the actual income of his estate pending conversion shall be treated as income, but that no property not actually producing income shall be treated as producing any (*b*). But the principles on which such division ought to be made have only just been firmly settled by the Court of Appeal.

In *Re Foster, Lloyd* v. *Carr* (*c*), KAY, J., held that the security is to be regarded as a security for the amount actually realised plus the interest actually received by the tenant for life (apparently from the beginning); and that the sum so ascertained should be divided between tenant for life and remainderman in the proportion which the interest which the tenant for life ought to have received bears to the capital sum which was secured by the security; the tenant for life giving credit for all income actually received by him.

This principle was, however, dissented from by NORTH, J., in *Lyon* v. *Mitchell* (*d*), and more recently was not followed by KEKEWICH, J., in *Re Alston, Alston* v. *Houston* (*e*), where his lordship divided the sum realised between tenant for life and remainderman in proportion to the amounts due to each at the date of realisation, without regarding on either side of the account the interest actually received in the past by the tenant for life, except so far as it reduced the arrears. The same principle had been previously followed in *Re Moore, Moore* v. *Johnson* (*f*), by PEARSON, J.

In the more recent case of *Re Phillimore, Phillimore* v.

(*a*) *Re Lewis, Davies* v. *Harrison*, [1907] 2 Ch. 296.

(*b*) *Re Hubbuck, Hart* v. *Stone*, [1896] 1 Ch. 754; and *Re Lewis, Davies* v. *Harrison*, [1907] 2 Ch. 296.

(*c*) (1890) 45 Ch. D. 629; and see *Re Auchetill, Ex parte Scottish Provident Institution* (1891), 27 L. R. Ir. 331; *Delves* v. *Newington* (1885), 52 L. T. 512; and *Re Godden, Teague* v. *Fox*, [1893] 1 Ch. 292.

(*d*) [1899] W. N. 27.

(*e*) [1901] 2 Ch. 584.

(*f*) (1885) 54 L. J. Ch. 432; and see *Re Barker, Barker* v. *Barker*, [1897] W. N. 154; and *Stewart* v. *Kingsale*, [1902] 1 Ir. R. 496.

Herbert (*g*), however, SWINFEN EADY, J., adopted a third course, and divided the amount realised between tenant for life and remainderman, making the tenant for life bring into hotch-pot all that he had received by way of income *since the date when the security first became insufficient*. Art. 45.

The defect of the rule, as stated by his lordship, and still more as stated by KAY, J., is that if the principle were carried out logically, a tenant for life who had rightfully received income might be called upon to refund it—a thing unheard of. However the point was fully threshed out before the Court of Appeal in the case of *Re Atkinson, Barbers' Co.* v. *Grose-Smith* (*h*), in which *Re Alston, Alston* v. *Houston*, and *Re Moore, Moore* v. *Johnson*, were followed, and *Re Foster, Lloyd* v. *Carr*, and *Re Phillimore, Phillimore* v. *Herbert*, overruled.

Rule only applies where insufficient security is realised. Prior to that tenant for life entitled to whole of income actually received.

The rule only applies where the insufficient security has been realised. Until then, the tenant for life is entitled to keep all the interest actually paid, or which is in hand ready to be paid (*i*). Thus, where the trustees are mortgagees in possession of property, and interest was in arrear at their testator's death, it was held that they must first apply each instalment of rent in satisfaction of the arrears of interest due to the testator, and then distribute the balance as income up to but not exceeding the interest accrued since the testator's death on the mortgage, and apply any excess as capital (*k*).

PARAGRAPH (3).

How far rule applies to unauthorised investments made by trustee.

The rule as to the tenant for life being only entitled to three per cent. on investments made by the settlor which ought to be converted, does not apply to investments made by the trustee in breach of trust. Under these circumstances, if no loss of capital is sustained, the remainderman is not entitled to have the capital increased by adding to it the difference between the income actually paid to the tenant for life and three per cent. (*l*). For in such cases (herein differing from speculative or wasting property settled by the settlement) the amount of the trust fund is definitely ascertained; and if it has not in fact been depreciated by the breach of trust, the remainderman has no equity to have it appreciated at the expense of the life

(*g*) [1903] 1 Ch. 942; and see also *Cox* v. *Cox* (1869), L. R. 8 Eq. 343; and *Turner* v. *Newport* (1846), 2 Ph. 14.

(*h*) [1904] 2 Ch. 160.

(*i*) *Re Broadwood's Settlement, Broadwood* v. *Broadwood*, [1908] 1 Ch. 115.

(*k*) *Re Coaks, Coaks* v. *Bayley*, [1911] 1 Ch. 171.

(*l*) *Per* BYRNE, J., *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565, at p. 566; *Stroud* v. *Gwyer* (1860), 28 Beav. 130; but *cf. Re Hill, Hill* v. *Hill* (1881), 50 L. J. Ch. 551, which was distinguished in *Slade* v. *Chaine*, [1908] 1 Ch. 522.

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tenant. And in a recent decision SWINFEN EADY, J., has held that the principle holds good where no loss has been sustained, even although the tenant for life was also one of the trustees (*m*).

But where, by reason of a breach of trust, the capital has become depreciated, then when it is realised, although the tenant for life, who was no party to the breach, cannot be ordered to refund income, yet he will not get any part of the amount realised to make up arrears (if any), without bringing into hotchpot all the income he has received from the security *during its entire continuance*. For that is the only way of approximately placing the beneficiaries in the positions in which they would have been if no breach had been committed (*n*).

ART. 46.—*Duty of Trustee in Relation to the Payment of Outgoings out of Corpus and Income respectively.*

Subject to the directions of the settlement, and of particular statutes, the following rules govern the incidence of outgoings :—

(a) The corpus bears capital charges, and the income bears the interest on them (*o*). If the current income is insufficient, arrears must be paid out of subsequent income (*p*).

(b) The income usually bears current expenses (*q*), including the entire cost of keeping leaseholds in repair (*r*).

(c) Where repairs to trust freeholds or copyholds are necessary to save them from destruction (*s*), or fines become payable for the renewal of

(*m*) *Re Hoyles, Row* v. *Jagg* (No. 2), [1912] 1 Ch. 67.

(*n*) *Re Bird, Dodd* v. *Evans*, [1901] 1 Ch. 916 ; and comments thereon of Warrington, K.C., *arguendo* in *Re Alston, Alston* v. *Houston*, [1901] 2 Ch. at p. 587.

(*o*) *Marshall* v. *Crowther* (1874), 2 Ch. D. 199 ; *Whitbread* v. *Smith* (1854), 3 De G. M. & G. 727 ; and see and consider *Norton* v. *Johnstone* (1885), 30 Ch. D. 649.

(*p*) *Honywood* v. *Honywood*, [1902] 1 Ch. 347 ; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511.

(*q*) *Fountaine* v. *Pellet* (1791), 1 Ves. Jun. 337, 342, rates and taxes ; *Shore* v. *Shore* (1859), 4 Drew. 501, receiver's commission and expenses of passing accounts.

(*r*) See *Re Gjers, Cooper* v. *Gjers*, [1899] 2 Ch. 54 ; and *Re Betty, Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821.

(*s*) *Re Courtier, Coles* v. *Courtier* (1886), 34 Ch. D. 136 ; *per* COTTON and LINDLEY, L.JJ., *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408.

leases (*t*), or for putting in repair leasehold property which was out of repair at the date of the creation of the trust (*u*), the court may empower the trustees to raise the necessary amount in such a way as will be equitable between income and corpus.

(d) All costs incident to the administration and protection of the trust property, including legal proceedings, are borne by corpus (*x*), unless they relate exclusively to the tenant for life (*y*).

Sub-Paragraph (a).

Charges and incumbrances.

Where a capital sum is secured on property, it is payable out of corpus; but the interest on it is payable out of income (*z*) arising not only from the incumbered property, but from all other property comprised in the same trust (*a*). If the current income is insufficient to keep down the interest, the arrears are payable out of subsequent income (*a*), and this is so, even where the charge in respect of which the arrears have arisen has been paid off by means of a sale of part of the property (*a*).

The rule as to capital charges being borne by corpus prevails even where a debt is secured by, or is payable as, an *annuity* or by instalments. In such a case the tenant for life will have to contribute an amount equal to interest on the capital value (*b*).

(*t*) *White* v. *White* (1804), 9 Ves. 554; *Nightingale* v. *Lawson* (1785), 1 Bro. C. C. 440. The law as between tenant for life and remainderman in respect to renewal of leases is not altered by s. 19 of the Trustee Act, 1893 (*Re Baring, Jeune* v. *Baring*, [1893] 1 Ch. 61).

(*u*) *Re Copland's Settlement, Johns* v. *Carden*, [1900] 1 Ch. 326.

(*x*) *Lord Brougham* v. *Lord Poulett* (1855), 19 Beav. at p. 135; *Sanders* v. *Miller* (1858), 25 Beav. 154; *Re Earl De la Warr's Estates* (1881), 16 Ch. D. 587; *Stott* v. *Milne* (1884), 25 Ch. D. 710; explained by *Re Weall, Andrews* v. *Weall* (1889), 42 Ch. D. 674.

(*y*) See *Re Marner's Trusts* (1866), L. R. 3 Eq. 432; *Re Evans's Trusts* (1872), L. R. 7 Ch. 609; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374.

(*z*) *Marshall* v. *Crowther* (1874), 2 Ch. D. 199; *Whitbread* v. *Smith* (1854), 3 De G. M. & G. 727; and see *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295.

(*a*) *Honywood* v. *Honywood*, [1902] 1 Ch. 347; *Freven* v. *Law Life Assurance Society*, [1896] 2 Ch. 511; *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408.

(*b*) *Bulwer* v. *Astley* (1844), 1 Ph. 422; *Playfair* v. *Cooper* (1853), 17 Beav. 187; *Ley* v. *Ley* (1868), L. R. 6 Eq. 174; Re *Muffett, Jones* v. *Mason* (1888), 39 Ch. D. 534 (purchase-money consisting of a life annuity).

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How the respective liabilities of corpus and income computed.

There has, however, been a curious conflict of judicial authority as to how the respective contributions of capital and income ought to be computed in such cases. *In re Bacon, Grissell* v. *Leathes* (*c*), and *Re Henry, Gordon* v. *Henry* (*d*), KEKEWICH, J., laid it down that the proper way was to raise the required amount out of corpus as required, in which way the tenant for life would lose a corresponding amount of income. This view was, however, dissented from by SWINFEN EADY, J., in *Re Dawson, Arathoon* v. *Dawson* (*e*), where his lordship held that the successive instalments of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death. But in the subsequent case of *Re Perkins, Brown* v. *Perkins* (*f*), where it was pointed out that this actuarial method would act unfairly, the same judge directed that each instalment of the annuity should be met by calculating what sum with three per cent. simple interest from the commencement of the life tenancy to the day of payment would have met the instalment; the sum so ascertained to come out of capital and the balance out of income. This case was subsequently followed by JOYCE, J., in *Re Thompson, Thompson* v. *Watkins* (*g*), and by PARKER, J., in *Re Poyser, Landon* v. *Poyser* (*h*), and is presumably now the recognised rule.

Local government charges.

Expenses incurred by a local authority in sewering, paving, and flagging a new street, and charged by statute on the adjacent land, are a charge on corpus and not income, even although they, with interest, are repayable to the local authority by instalments (*i*), and by 55 & 56 Vict. c. 57, s. 17, any person who could sell such lands under the Lands Clauses Consolidation Acts may mortgage them for raising the charge. Arrears of interest on incumbrances accrued in the lifetime of the settlor are a charge on corpus, the tenant for life merely paying interest on them (*k*).

The strong inclination of the court to saddle capital charges on corpus is well exemplified by *Norton* v. *Johnstone* (*l*). There a testator had directed that the income of certain estates should be accumulated until the amount of the

(*c*) (1893) 62 L. J. Ch. 445.
(*d*) [1907] 1 Ch. 30.
(*e*) [1906] 2 Ch. 211.
(*f*) [1907] 2 Ch. 596.
(*g*) [1908] W. N. 195.
(*h*) [1910] 2 Ch. 444.
(*i*) *Re Legh's Settled Estates*, [1902] 2 Ch. 274; but *cf.* 55 & 56 Viet. c. 57, s. 17.
(*k*) *Revel* v. *Watkinson* (1748), 1 Ves. Sen. 93; *Playfair* v. *Cooper* (1853), 17 Beav. 187.
(*l*) (1885) 30 Ch. D. 649; and see also *Re Harrison, Townson* v. *Harrison* (1889), 43 Ch. D 55.

accumulations should be sufficient to pay off existing mortgages; and that, subject thereto, the property should be held to the use of the plaintiff for life, with remainders over. Before the accumulations were sufficient to discharge the mortgages, the mortgagees sold a part of the property; and with the moneys so produced, and part of the moneys already accumulated, the mortgages were paid off. The tenant for life then claimed to be let into possession, and also to have the balance of the accumulations paid to him. On the other hand, the remainderman urged that, inasmuch as the mortgage debt had been paid off by means of a sale of the corpus (which was not what was contemplated by the testator), the accumulation of rents ought to continue, until such a sum was obtained as would be equal to the amount raised by the sale; and that the sum thus obtained ought to be employed in recouping the inheritance, the tenant for life receiving only the interest of it. PEARSON, J., however, decided in favour of the tenant for life, on the ground that the mortgage debts had been paid in a way different from that which the testator intended—that he had not provided for that event, and that consequently the ordinary rule as to the incidence of capital charges must govern the case.

Mortgage debt paid off by sale of corpus.

Where, however, on the expiration of a lease granted by the settlor, the tenant for life is obliged to pay compensation for improvements to the outgoing lessee *under a covenant in the lease*, he has no claim to saddle the compensation on corpus. For, as JESSEL, M.R., said, "If he lives long enough he will let the land again, and get the outlay from the incoming tenant, and so if he recovered it now he would be repaid twice over" (*m*). But this seems to assume that the life tenant is empowered to require (and keep for his own use) a premium from the new lessee. However, this rule does not apply to compensation payable under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), as the incidence of such compensation is expressly provided for by s. 29 of that Act.

Calls on shares which form part of a trust estate are outgoings attributable to capital and not to income, and are accordingly payable out of corpus (*n*).

Calls on shares.

SUB-PARAGRAPH (b).

All charges of an annual character, except annual charges to secure capital sums, are payable out of income; for otherwise the corpus would inevitably decrease year by year, and

Current annual charges.

(*m*) *Mansel* v. *Norton* (1883), 22 Ch. D. 769.

(*n*) *Todd* v. *Moorhouse* (1874), L. R. 19 Eq. 69.

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would ultimately be swallowed up. Thus, the income must bear rates and taxes (*o*); the commission of house agents for obtaining tenants (*p*); the rent payable for, and the expenses incident to the observance and performance of the covenants and conditions in relation to, leasehold hereditaments (*q*). But a tenant for life is not liable to have his income taken for breaches of covenant not occurring in his time (*r*). It would seem that even the cost of complying with a sanitary notice under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), or a dangerous structure notice under the London Building Act, 1894 (*s*), are, as a rule, payable by the tenant for life; but not, apparently, the cost of a thorough reconstruction of the sewers of a house (*t*), or other permanent improvements insisted on by the local authority (*u*). In the United States of America it has been held (and it is conceived rightly) that an extraordinary tax in relation to matters which have increased capital value, such as a tax for betterment, or for making up a highway, is chargeable to corpus (*x*). Of course annuities charged on income (*y*), the commission or poundage payable to a receiver, and the expenses incident to the preparation and passing of his accounts must be borne by income (*z*).

Insurance premiums.

So where a life policy forms part of settled residuary personal estate, the premiums are (in the absence of express direction) payable out of capital raised from time to time by a charge on the policy (*a*). In practice such premiums are usually paid in the first instance out of income, and are then repayable to the tenant for life when the policy falls in with interest at four per cent. (*b*). Of course, where a policy is

(*o*) *Fountaine* v. *Pellet* (1791), 1 Ves. Jun. 337, 342.

(*p*) *Re Leveson-Gower's Settled Estate*, [1905] 2 Ch. 95.

(*q*) *Re Gjers, Cooper* v. *Gjers*, [1899] 2 Ch. 54; *Re Betty, Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821; *sed cf. Re Tomlinson, Tomlinson* v. *Andrew*, [1898] 1 Ch. 232.

(*r*) *Re Betty, Betty* v. *Att.-Gen.*, *supra*.

(*s*) *Re Copland's Settlement, Johns* v. *Carden*, [1900] 1 Ch. 326; and *Re Lever, Cordwell* v. *Lever*, [1897] 1 Ch. 32.

(*t*) *Re Thomas, Weatherall* v. *Thomas*, [1900] 1 Ch. 319; and see *infra*, p. 253 *et seq.*; and *Re McClure's Trusts, Carr* v. *Commercial Union Insurance Co.*, [1906] W. N. 200.

(*u*) See *Re Farnham's Trusts, Law Union and Crown Insurance Co.* v. *Hartopp*, [1904] 2 Ch. 561.

(*x*) *Tupper* v. *Fuller* (1855), 7 Rich. Eq. 170; *Varney* v. *Stevens* (1843), 22 Me. 331; *Harvard College* v. *Alderman* (1870), 104 Mass. 470; *Plympton* v. *Dispensary* (1871), 106 Mass. 544. The cost of private street works is specially provided for by 55 & 56 Vict. c. 57, s. 17.

(*y*) *Playfair* v. *Cooper* (1853), 17 Beav. 187, 193; *Miller* v. *Huddleston* (1851), 3 Mac. & G. 513.

(*z*) *Shore* v. *Shore* (1859), 4 Drew. 501.

(*a*) *Macdonald* v. *Irvine* (1878), 8 Ch. D. 101 (C. A.). *Re Waugh's Trusts* (1877), 25 W. R. 555, which is *contra*, appears to be overruled by it.

(*b*) *Re Morley, Morley* v. *Haig*, [1895] 2 Ch. 738.

specifically settled, express directions are almost invariably given for payment of the premiums, and where they are directed to be paid out of income, and for some reason the policy lapses without breach of trust, the amounts which would have been paid for keeping it up must thenceforth be paid to capital account (*c*). Where trustees are directed to insure the trust property against loss or damage by fire, the premiums must be borne by income. Up to the end of 1888 it was questionable whether trustees could in the absence of such direction lawfully expend trust moneys in insuring against loss or damage by fire. However, by s. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), re-enacting a corresponding provision in the Act of 1888, trustees are authorised to make such insurances to an amount not exceeding three-fourths of the value of the building or property insured, and to pay the premiums out of income. The section does not apply to simple trusts, nor is it imperative, so that if the trustees differ as to the necessity of insuring against fire, or as to the amount of such insurance, nothing can be done, and they are not responsible for loss if a fire ensues (*d*).

Money paid for redemption of rent-charge.

On the same ground, where a rent-charge is redeemed by the tenant for life, he is only entitled to be recouped, out of corpus, the amount paid, less the value of the redemption to his life estate (*e*).

Losses on trust business.

Where a business is vested in trustees in trust for successive tenants for life and remainderman, the net losses on one year's trading must, *under ordinary circumstances*, be made good out of the profits of subsequent years, and not out of capital (*f*). For the outgoings of a business are part of the regular current expenses, and there can be no profits until all losses are paid, whether such losses are incurred in a year in which gross profits exceed the losses, or were incurred in prior years. The same rule, however, does not seem to apply where a business is not carried on under a direction in the settlement, but is merely carried on temporarily until it can be sold profitably. In such cases, the annual loss or profit (if any) ought to be apportioned between capital and income as follows: Calculate the sum which, put out at interest at four (qu. three) per cent. per annum on the day when the business ought to have been sold (if it could have been) and accumulated at compound

(*c*) *Re Fitzgerald, Surman* v. *Fitzgerald* (1904), 90 L. T. at p. 274 (C. A.).

(*d*) *Re McEacharn, Gambles* v. *McEacharn*, [1911] W. N. 23.

(*e*) *Re Duke of Leinster* (1889), 23 L. R. Ir. 152.

(*f*) *Upton* v. *Brown* (1884), 26 Ch. D. 588.

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interest at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income tax, be equivalent at the end of each year to the amount of the loss or profit sustained or made during that year. The sum so ascertained will be charged against, or credited to, capital, and the rest of the loss will be charged against, or the rest of the profit will be credited to, income (*g*). The charges for the compensation fund imposed by the Licensing Act, 1904 (*h*), are payable out of income and not out of capital.

Secus where intention can be implied that losses shall be borne by capital.

However, where, on the facts, it appears to have been the settlor's intention that losses on a trust business should be borne by capital, effect will be given to that intention. For instance, where partners carry on a business, each partner having the right to bequeath his share, *and it has been the partnership custom* to write off the losses of unprosperous years from each partner's share of capital, that custom will be continued, even as between a tenant for life and remainderman, in whose favour one of the partners has bequeathed his share (*i*).

SUB-PARAGRAPH (c).

Repairs.

Well-drawn settlements of house property usually provide that the trustees shall keep it in repair, and insured against loss or damage by fire, out of the rents and profits. Where this is omitted, a *legal* tenant for life of freeholds is not compellable to keep property in repair (*k*); and as the court has no jurisdiction (where there is no trust) to make any order charging the cost of repairs, or any part of it, on corpus (*l*), the result is not infrequently extremely embarrassing and prejudicial to all parties (*m*). Thus, even in the case of leaseholds (where the equitable tenant for life is bound to keep in repair so as to satisfy the covenants of the lease), yet after

(*g*) *Re Hengler*, *Frowde* v. *Hengler*, [1893] 1 Ch. 586.

(*h*) *Re Smith*, *Smith* v. *Dodsworth*, [1906] 1 Ch. 799.

(*i*) *Gow* v. *Forster* (1884), 26 Ch. D. 672.

(*k*) *Re Cartwright*, *Avis* v. *Newman* (1889), 41 Ch. D. 532, overruling the so-called doctrine of permissive waste. But *aliter* where there is a condition to keep in repair expressly imposed by the settlements (*Woodhouse* v. *Walker* (1880), 5 Q. B. D. 404).

(*l*) *Re De Teissier's Settled Estates*, *De Teissier* v. *De Teissier*, [1893] 1 Ch. 153.

(*m*) The same difficulty occurs in the United States of America, where it is settled that, in the absence of express power, an equitable life tenant cannot be interfered with by the trustee for the purpose of making repairs; and that, on the other hand, if the life tenant makes repairs, he must pay the costs himself (*Thurston* v. *Dickinson* (1846), 2 Rich. Eq. 317; *Cogswell* v. *Cogswell* (1834), 2 Edw. Ch. 231).

his death the cost of dilapidations cannot be recovered by the remainderman from his executors (*n*). Indeed, few statutes would be more useful than a well-considered one dealing with this subject. Where, however, the legal estate in fee is in trustees (at all events where they have a power of or trust for sale (*o*)), it would seem that the court has jurisdiction, under the principle of salvage (*p*), to make an order empowering them to raise money for making repairs necessary for the preservation of the property (*q*), or even for erecting additional buildings necessary for rendering the property tenantable or saleable (*r*), and of apportioning the cost equitably between income and corpus (*s*). Indeed, it has been held that trustees may, without any order, do such repairs to leasehold property as are necessary to prevent a forfeiture of the lease (*t*), and repay themselves out of the income (*t*), but without prejudice to the rights of tenant for life and remainderman *inter se* (*u*); on the ground that trustees may expend money by way of salvage, and have a lien both on income and corpus for expenses properly incurred by them, as will be seen later on (*v*). But although the court has jurisdiction to authorise a charge on the entire estate which is the subject of the settlement, for the purpose of raising money for repairs, where the legal estate is in trustees, it does not follow that the whole, or even any part, of the cost of such repairs will be saddled on the corpus. The cases are somewhat obscure as to this, but the following propositions are submitted, viz.:

Property out of repair at commencement of trust.

(1) Where the property was in disrepair when the tenant for life came into possession, then, whatever its tenure may be, the court will not throw the cost exclusively on him, but will sanction a mortgage, equitably apportioning the ultimate cost between corpus and income (*x*). There is, however no reported case showing how this equitable

(*n*) *Re Parry and Hopkins*, [1900] 1 Ch. 160.

(*o*) See *per* CHITTY, J., *Re De Teissier's Settled Estates, De Teissier* v. *De Teissier*, [1893] 1 Ch. 153.

(*p*) *Re Willis, Willis* v. *Willis*, [1902] 1 Ch. 15; *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

(*q*) See *per* COTTON and LINDLEY, L.JJ., *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408; *Re Courtier, Coles* v. *Courtier* (1886), 34 Ch. D. 136; but see *contra*, *Hibbert* v. *Cooke* (1824), 1 Sim. & St. 552, and *Dent* v. *Dent* (1862), 30 Beav. 363.

(*r*) *Conway* v. *Fenton* (1888), 40 Ch. D. 512; *Re Household, Household* v. *Household* (1884), 27 Ch. D. 553; and see *Drake* v. *Trefusis* (1875), L. R. 10 Ch. 364, and *Frith* v. *Cameron* (1871), L. R. 12 Eq. 169; but *cf. Re De Tabley, Leighton* v. *Leighton* (1896), 75 L. T. 328.

(*s*) *Re Hotchkys, Freke* v. *Calmady, supra*; *Re Farnham's Trusts, Law Union and Crown Insurance Co.* v. *Hartopp*, [1904] 2 Ch. 561.

(*t*) *Re Fowler, Fowler* v. *Odell*, (1881), 16 Ch. D. 723.

(*u*) *Re Hotchkys, Freke* v. *Calmady, supra*.

(*v*) Art. 78, *infra*.

(*x*) *Re Courtier, Coles* v.

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apportionment will be carried out; but in one case in which the present writer appeared before ROMER, J., in chambers, that learned judge approved a scheme under which the trustees were to pay for a new roof in a tropical climate (which was estimated to last for twenty years only) by a sinking fund extending over that period. And where trustees, under a power, invested money in the purchase of real estate out of repair, the cost for putting it in repair was thrown exclusively on capital (*y*). On the other hand, the present writer has known of cases in his own practice where the judge has made a rough and ready apportionment, such as an arbitrator might make. There is in fact no technical rule—the judge directs what he considers to be fair and reasonable.

Current repairs of leaseholds.

(2) Where the property was not in disrepair when the tenant for life came into possession, and is of leasehold tenure, the question is governed by the maxim *qui sensit commodum debet sentire et onus;* and the equitable tenant for life, as he enjoys the income of the property, must perform the conditions of the lease as to repairs (*z*). But it seems that if he fails to do so during his life the remainderman has no remedy against his executors (*a*).

Current repairs of freeholds.

(3) But where it is freehold, it would seem that, unless the case falls under the provisions as to improvements of the Settled Land Acts, or the settlement expressly or impliedly authorises the trustees to pay for current repairs out of the rents, nothing can be done either by the trustees or the court unless it becomes a clear case of salvage (*b*). In the latter case it is the duty of the trustees to apply to the court for directions, when it will equitably apportion the cost of the repairs

Courtier (1886), 34 Ch. D. 136, as explained in *Re Redding, Thompson* v. *Redding*, [1897] 1 Ch. 876; *Re Betty, Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821, and *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; acquiesced in by KEKEWICH, J., in *Re Gjers, Cooper* v. *Gjers*, [1899] 2 Ch. 54, contrary to his previous decision in *Re Tomlinson, Tomlinson* v. *Andrew*, [1898] 1 Ch. 232.

(*y*) *Re Freman, Dimond* v. *Newburn*, [1898] 1 Ch. 28; but *cf. Re Lord de Tabley, Leighton* v. *Leighton* (1896), 75 L. T. 328.

(*z*) *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; *Re Redding, Thompson* v. *Redding*, [1897] 1 Ch. 876; *Re Betty, Betty* v. *Att.-Gen.*, [1899] 1 Ch. 821; *Re Gjers, Cooper* v. *Gjers*, [1899] 2 Ch. 54; and see *Re Partington, Reigh* v. *Kane*, [1902] 1 Ch. 711, as to re-drainage of a leasehold house being borne by income.

(*a*) *Re Parry and Hopkins*, [1900] 1 Ch. 160.

(*b*) *Re Willis, Willis* v. *Willis*, [1902] 1 Ch. 15; *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

between capital and income (*c*). The fact that the trustees are expressly authorised to pay for repairs out of income or capital will not justify them in throwing on to capital the cost of repairs which ought to be borne by income for the purpose of relieving the tenant for life, such powers being *primâ facie* intended for the benefit of the estate and to be used so as to adjust the burden equitably (*d*).

Alterations in the nature of repairs under Settled Land Acts.

(4) By s. 13 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), improvements authorised by the Act of 1882 are to include additions to or alterations in buildings reasonably necessary or proper to enable the same to be let, and also the rebuilding of the principal mansion house. But, in the latter case, the sum to be applied out of capital money is not to exceed one half of the annual rent of the settled land. Under this provision it has been held, that although mere repairs and improvements will not amount to a "rebuilding" of the principal mansion house (*e*), yet reconstruction, alteration, and enlargement of a considerable part of the house may (*f*). For instance, the Act was held to apply where the house had become infested with dry rot, and portions had to be rebuilt in order to save the whole (*g*). It has been likewise held that the substitution of a block floor over concrete for ordinary floor boards in order to keep dry rot out of the basement of a large house let in separate offices was an alteration reasonably necessary or proper to enable the same to be let (*h*). With regard to the repair of estates belonging absolutely to infants, the reader is referred to the classification made by the late Mr. Kenyon Parker, and set forth in *Re Jackson, Jackson* v. *Talbot*, (1882) 21 Ch. D. at p. 787, and to the case of *Re Hawker's Settled Estates, Duff* v. *Hawker* (*i*).

(*c*) See note (*y*) on p. 254.

(*d*) *Re Lord de Tabley, Leighton* v. *Leighton* (1896), 75 L. T. 328.

(*e*) *Re De Teissier's Settled Estates, De Teissier* v. *De Teissier*, [1893] 1 Ch. 153; *Re Lord de Tabley, Leighton* v. *Leighton, supra*; *Re Wright's Settled Estates* (1900), 83 L. T. 159.

(*f*) *Re Walker's Settled Estate*, [1894] 1 Ch. 189; and see *Re Leveson-Gower's Settled Estate*, [1905] 2 Ch. 95.

(*g*) *Re Legh's Settled Estates*, [1902] 2 Ch. 274.

(*h*) *Stanford* v. *Roberts*, [1901] 1 Ch. 440; and see also *Re Clarke's Settlement*, [1902] 2 Ch. 327; *Re Gaskell's Settled Estates*, [1894] 1 Ch. 485; both approved by Court of Appeal in *Re Blagrave's Settled Estates*, [1903] 1 Ch. 560; *Standing* v. *Gray*, [1903] 1 Ir. R. 49.

(*i*) (1897) 66 L. J. Ch. 341.

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Renewal of renewable leases.

By s. 19 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), a trustee of renewable leases may if he thinks fit, and must if required by any beneficiary so to do, use his best endeavours to obtain a renewal; and for that purpose is empowered to surrender existing leases. But where the beneficiary in possession is entitled, under the settlement, without any obligation to renew or to contribute to the renewal, then the Act does not apply unless he gives his consent. The second sub-section provides that—

"If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the new lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose."

Act does not alter ultimate incidence of burthen.

This section applies to trusts created before, as well as after, the Act, but is of course subject to the directions of the settlement. It was held by KEKEWICH, J., that its object was merely to assist trustees in renewing leases, and in no way affects the ultimate incidence of the expense as between tenant for life and remainderman, and that the fines and expenses were distributable among the beneficiaries according to their enjoyment, such enjoyment to be ascertained by actuarial valuation (*k*).

Fencing of unfenced land.

Where the question arises as to the incidence of the cost, not of mere repairs, but of putting property into a better condition than it was originally in, it would seem that no part of the cost falls on income. Thus, the expense of fencing waste lands granted to a trustee for the benefit of the estate must be paid out of corpus exclusively (*l*).

SUB-PARAGRAPH (d).

General costs incident to administration.

Legal expenses incident to the administration of a trust almost exclusively fall on capital, unless the settlor has expressly provided for them; for they are for the benefit of

(*k*) *Re Baring, Jeune* v. *Baring*, [1893] 1 Ch. 61.

(*l*) *Earl Cowley* v. *Wellesley* (1866), L. R. 1 Eq. 656; and see now Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 25, and judgment of KEKEWICH, J., in *Re Verney's Settled Estates*, [1898] 1 Ch. 508.

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all persons interested. Thus, the costs of the appointment of new trustees (*m*), the costs incident to the investment or change of investment of trust funds (*n*), the costs of obtaining legal advice (*o*), and of taking the direction of the court (*p*), the costs of an administration action (*q*), the costs of paying money into court under the Trustee Act, 1893 (56 & 57 Vict. c. 53) (*r*), the costs of bringing or defending actions against third parties for the protection of the estate (*s*) (*e.g.*, against lessees for breach of their covenants to repair (*t*)), and the like, are all payable out of corpus. On the other hand, where money is paid into court under the Trustee Act, 1893, the costs of all necessary parties to a petition for obtaining an order for the payment of the *income* to the tenant for life have been held to be payable out of income (*u*); but it is difficult to see why. And where a testator gave a fund to trustees upon trust for investment in land, which was to be settled to the use of several persons successively for their lives, and the fund was paid into court *in an administration suit*, it was held by MALINS, V.-C., that the costs of a petition by a tenant for life for payment of the dividends to him were payable out of corpus. As the Vice-Chancellor said: "If the fund had been invested in land, the tenant for life would simply have entered into possession without incurring the expense of a petition, and I do not see why he should be in a worse position because the fund is in court. The fund remains here for the advantage of all persons interested, and it seems to me that all should bear the costs of this petition." It is apprehended that this is common sense.

(*m*) *Re Fellow's Settlement* (1856), 2 Jur. (N. S.) 62; *Re Fulham* (1850), 15 Jur. 69; *Ex parte Davies* (1852), 16 Jur. 882.

(*n*) But *secus* of petition to vary investment of funds in court, see *Equitable Reversionary Interest Society* v. *Fuller* (1861), 1 Johns. & H. 379.

(*o*) *Poole* v. *Pass* (1839), 1 Beav. 600.

(*p*) *Re Elmore's Will* (1860), 9 W. R. 66; *Re Leslie* (1876), 2 Ch. D. 185.

(*q*) *Re Turnley* (1866), L. R. 1 Ch. 152.

(*r*) *Re Whitton's Trusts* (1869), L. R. 8 Eq. 352.

(*s*) See *Stott* v. *Milne* (1884), 25 Ch. D. 710; *Hamilton* v. *Tighe*, [1898] 1 Ir. R. 123; and see also *Re Earl De la Warr's Estates* (1881), 16 Ch. D. 587, and *Re Earl of Berkeley's Will* (1874), L. R. 10 Ch. 56. And as to defending foreclosure actions and obtaining transferees of the mortgage, see *More* v. *More* (1889), 37 W. R. 414.

(*t*) *Re McClure's Trusts*, *Carr* v. *Commercial Union Insurance Co.* (1906), 76 L. J. Ch. 52.

(*u*) *Re Marner's Trusts* (1866), L. R. 3 Eq. 432; *Re Evans's Trusts* (1872), L. R. 7 Ch. 609; *Re Whitton's Trusts* (1869), L. R. 8 Eq. 352; *Re Smith's Trusts* (1870), L. R. 9 Eq. 374. *Scrivener* v. *Smith* (1869), L. R. 8 Eq. 310; *Lonquet* v. *Hockley* (1870), 22 L. T. (N.S.) 198; but see *Eady* v. *Watson* (1864), 12 W. R. 682, *contra*.

Art. 47. ART. 47.—*Duty of Trustee to exercise Reasonable Care.*

Trustees are not insurers (*y*), and except where courts of equity have imposed distinct and stringent duties upon them (which duties are mentioned in the succeeding articles of this chapter), they are only bound to use such due diligence and care in the management of the estate as men of ordinary prudence and vigilance would use in the management of their own affairs (*z*). The mere fact that a trustee has acted under the advice of his counsel or solicitor will not necessarily excuse him (*a*), even from paying the costs of the action (*b*), where a breach of trust has been committed; nor, on the other hand, does the fact that a trustee is remunerated add to his liability (*c*).

Difficulty of applying the principle.

Although the rule is well settled that a trustee discharges his duty if he manage the trust estate with those precautions which an ordinary prudent man of business would take in managing similar affairs of his own, it is a rule which is not easy of application. The difficulty arises from the fact, pointed out by Lord BLACKBURN in the leading case of *Speight* v. *Gaunt* (*d*), that "Judges and lawyers, who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash."

The principal cases in which the care demanded of a

(*y*) *Re Hurst, Addison* v. *Topp* (1892), 67 L. T. 96.

(*z*) *Brice* v. *Stokes* (1805), 11 Ves. 319, 2 Wh. & Tu. Lead. Cas. (7th ed.) 633; *Massey* v. *Banner* (1820), 1 Jac. & W. 241; *Bullock* v. *Bullock* (1886), 56 L. J. Ch. 221; *Speight* v. *Gaunt* (1883), 9 App. Cas. 1. As to the protection now accorded to trustees who have *de facto* committed breaches of trust where they have acted honestly and reasonably, see *infra*, Art. 90.

(*a*) *Doyle* v. *Blake* (1804), 2 Sch. & L. 231; *Re Knight's Trusts* (1859), 27 Beav. 45; *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373. But it may be evidence of diligence, in cases where the alleged breach is negligence. See *per* Lord WATSON, *Learoyd* v. *Whiteley* (1887), 12 App. Cas. at p. 734, and *Stott* v. *Milne* (1884), 25 Ch. D. 710; and see now also Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35).

(*b*) *Devey* v. *Thornton* (1851), 9 Hare, 222; *Boulton* v. *Beard* (1853), 3 De G. M. & G. 608.

(*c*) *Jobson* v. *Palmer*, [1893] 1 Ch. 71. But it may be ground for refusing to excuse a breach of trust under the Judicial Trustees Act, 1896, as to which see *infra*, Art. 90.

(*d*) *Supra*.

trustee has been considered are those arising out of the investment of trust funds; but as the duties of a trustee in regard to investment are of extreme importance, they will be discussed separately in the next article. Art. 47.

Realisation of debts.

It is the duty of a trustee to realise debts owing to the trust estate with all convenient speed (*e*). He should not only press for payment, but, if they are not paid within a reasonable time, should enforce payment by means of legal proceedings (*f*). It has been said that the only excuse for not taking action to enforce payment of such debts, is a *well-founded* belief, on the trustee's part, that such action would be fruitless (*g*); that the burden of proving the grounds of such belief is on the trustee; and that no consideration of delicacy and no regard for the feelings of relatives or friends will exonerate him from this disagreeable duty (*f*). Whether, however, this broad dictum is consistent with s. 21 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), (a re-enactment of s. 37 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which curiously enough was not referred to), is respectfully questioned. The late Sir GEORGE JESSEL, M.R., at all events, thought that the probable effect of that enactment was to make the question entirely one of *good faith* and not one of *well-founded* belief (*h*). And the provisions of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), by which the court is now empowered to relieve trustees against breaches of trust where they have acted honestly and reasonably, would seem to give statutory effect to this view (*i*). A recent decision of EVE, J., however, shows that "good faith" involves the exercise of "active discretion" on the part of the trustee, and that loss arising from his supineness or carelessness is altogether outside the section (*j*).

On the other hand, it has been held that a trustee is not bound to commence legal proceedings when, in the exercise of a reasonable discretion, he considers it inexpedient to do so. For instance, in a case where one beneficiary would have been ruined by the immediate realisation of a debt due

(*e*) *Buxton* v. *Buxton* (1835), 1 Myl. & Cr. 80.

(*f*) *Re Brogden*, *Billing* v. *Brogden* (1888), 38 Ch. D. 546, and *Millar's Trustees* v. *Polson* (1897), 34 Sc. L. R. 798; *Fenwell* v. *Greenwell* (1847), 10 Beav. 412; *Grove* v *Price* (1858), 26 Beav. 103.

(*g*) *Maitland* v. *Bateman* (1844), 13 L. J. Ch. 273; *Simes* v. *Eyre* (1847), 6 Hare, 137.

(*h*) *Re Owens*, *Jones* v. *Owens* (1882), 47 L. T. 61, and *infra*, p. 262.

(*i*) See *infra*, Art. 90, and *per* KEKEWICH, J., *Re Houghton*, *Hawley* v. *Blake*, [1904] 1 Ch. 622.

(*j*) *Re Greenwood*, *Greenwood* v. *Firth* (1911), 105 L. T. 509.

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from him to the trust estate, and the other beneficiaries (his children) would have been seriously prejudiced, the House of Lords held that the trustee exercised a reasonable discretion in refraining from suing the debtor and in allowing him time, and that the trustee was consequently discharged from liability for any consequent losses (*k*). However, the practitioner must be warned that he would incur the most serious responsibility if he were to advise a trustee to act in a similar manner. For if the dictum cited on the preceding pages (as to the necessity of a well-founded belief) is correct, the onus would lie on the trustee to prove that the *facts were* as he believed them; and the difficulty of proving this (perhaps many years afterwards) is obvious. In all such cases, therefore, the proper course is to issue an originating summons asking the direction of the court (*l*).

How far trustee who is executor of debtor is bound to retain.

In *Re Benett, Ward* v. *Benett* (*m*), the question was discussed in the Court of Appeal as to how far a trustee who is also the personal representative of a debtor to the trust, is bound to retain the debt as against the debtor's other creditors. In that case the alleged trustee was personal representative of the last surviving trustee, who had committed a breach of trust, and the case went off on the ground that the personal representative was *not* a trustee of the trust funds, but merely a bare depositary of the legal title to the trust property, and was therefore not bound to exercise her right of retainer because she could have been sued by the beneficiaries. In giving judgment, however, STIRLING, L.J., after pointing out that if the claim were well founded the result would be that, in every case in which a sole surviving trustee had died insolvent and having committed a breach of trust, it would be the duty of his legal personal representative to exercise the right of retainer for the benefit of the beneficiaries, for which there was no authority, added: "I do not deny that there may be cases in which the legal personal representative of the deceased trustee might be called upon by the *cestuis que trusts* to exercise a legal right of retainer vested in him. It would be easy to cite examples of this. For instance, one might take the case of a surviving trustee of a marriage settlement

(*k*) *Ward* v. *Ward* (1843), 2 H. L. Cas. 777, n., at p. 784; *Clack* v. *Holland* (1854), 19 Beav. 262; and see *Re Hurst, Addison* v. *Topp* (1892), 67 L. T. 96.

(*l*) *Re Brogden, Billing* v. *Brogden* (1888), 38 Ch. D. at p. 556.

(*m*) [1906] 1 Ch. 217, following *Re Ridley, Ridley* v. *Ridley*, [1904] 2 Ch. 774, and distinguishing *Fox* v. *Garrett* (1860), 28 Beav. 16, and *Re Owen* (1889), 23 L. R. Ir. 328.

containing a covenant on the part of one of two trustees to pay a sum of money which would, when paid, form part of the trust estate: supposing that the trustee who entered into that covenant died insolvent and intestate, and the surviving co-trustee as a *legal* creditor in respect of the debt or the covenant took out administration to his estate, then in my opinion, having obtained that administration by *virtue of his position as surviving trustee* of the settlement, he would be bound to exercise such powers as the law gave him for the benefit of the *cestuis que trusts*." It appears, therefore, that a trustee who happens to be also personal representative of a person who owes a legal debt to the estate must exercise his power of retainer, but *secus* where the debt is merely equitable (*e.g.* a liability for breach of trust), although even then the trustee *may*, if he so pleases, exercise the right of retainer (*n*).

Not bound to realise a depreciated investment.

The question not infrequently arises whether, when a security, proper at the date of investment, subsequently becomes deteriorated, so as to leave no safe margin, it is the duty of the trustees to call the money in. In *Re Medland, Eland* v. *Medland* (*o*), NORTH, J., held that it was not necessarily their duty to do so, but they have a discretion, which they must exercise as practical men, with a due regard to all the circumstances, including the position and solvency of the mortgagor. However, this particular matter is now provided for by s. 4 of the Trustee Act, 1893, Amendment Act, 1894 (57 Vict. c. 10), by which it is enacted that—

"A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law."

Whether this enactment is retrospective seems doubtful (*p*). KEKEWICH, J., held that it was not (*q*), but on appeal the Court expressed no opinion on the point. Whether it exempts a trustee from making periodic inspections of mortgaged property appears to be doubtful (*p*).

Compounding debts.

Trustees might always release or compound debts due to the

(*n*) *Sander* v. *Heathfield* (1874), L. R. 19 Eq. 21; *Re Faithfull, Hardwick* v. *Sutton* (1887), 57 L. T. 14, quoted without disapproval by STIRLING, L.J., in *Re Benett, Ward* v. *Benett*, [1906] 1 Ch. 217,

(*o*) (1889) 41 Ch. D. 476; and see also *Robinson* v. *Robinson* (1851), 1 De G. M. & G. 247; *Harrison* v. *Thexton* (1858), 4 Jur. (N. S.) 550; *Re Chapman, Cocks* v. *Chapman*, [1896] 2 Ch. 763; and *Rawsthorne* v. *Rowley*, [1909] 1 Ch. 409, note.

(*p*) *Re Chapman, Cocks* v. *Chapman*, [1896] 1 Ch. 323.

(*q*) See *per* PARKER, J., in *Shaw* v. *Cates*, [1909] 1 Ch. 389, at the end of his judgment on p. 409.

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trust estate, where they *bonâ fide* and *reasonably* believed that this course was for the benefit of their beneficiaries (*r*). And now by s. 21 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), (which is merely a re-enactment of s. 37 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41)), two or more trustees acting together, or a sole acting trustee, *where a sole trustee is, by the settlement, authorised to execute the trusts and powers thereof*, may (1) accept any composition, (2) accept any security, real or personal, for any debt or for any property, real or personal, claimed, (3) allow time for payment of any debt, (4) compromise, compound, abandon, submit to arbitration, or otherwise settle, any account, claim, or thing whatever relating to the trust, and (5) enter into and execute all such agreements, releases, etc., as they or he may deem expedient, *without being responsible for any loss occasioned by any act or thing so done by him or them in good faith*. The exact effect of this enactment has, so far, not been judicially decided; but, as above stated, the late Sir GEORGE JESSEL, M.R., intimated that "it might have a revolutionary effect on this branch of the law. It looks as if the only question left would be whether the [trustees] have acted in good faith or not" (*s*). In view of the decision in *Re Brogden*, *Billing* v. *Brogden* (*t*), however, trustees would, in most cases, be ill-advised to act upon this dictum.

The reader is warned that the words "two or more trustees acting together", do not mean that two only of a greater number can exercise the power. One of several executors may, and may even compromise a claim by a co-executor (*u*), but trustees must act jointly. This is probably the explanation of the fact that no reference to this section was made in *Re Brogden*, *Billing* v. *Brogden*.

Allowing rents to fall in arrear.

Where trustees allowed rents to get in arrear, it was held that they were liable to make good the arrears, though without interest (*v*).

Bankrupt trustee indebted to trust should prove.

Where a trustee, indebted to the trust, becomes bankrupt, it is his duty to prove the debt; and if he neglect to do so he will be liable for the loss, notwithstanding that he may have

(*r*) *Blue* v. *Marshall* (1735), 3 P. Wms. 381; *Forshaw* v. *Higginson* (1857), 8 De G. M. & G. 827.

(*s*) *Re Owens*, *Jones* v. *Owens* (1882), 47 L. T. 61.

(*t*) (1888) 38 Ch. D. 546.

(*u*) *Re Houghton*, *Hawley* v. *Blake*, [1904] 1 Ch. 622; but *cf. Re Fish*, *Bennett* v. *Bennett*, [1893] 2 Ch. 413.

(*v*) *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; and see as to interest, *Lowson* v. *Copeland* (1787), 2 Bro. C. C. 156; *Wiles* v. *Gresham* (1854), 2 Drew. 258; *Rowley* v. *Adams* (1849), 2 H. L. Cas. 725.

obtained his certificate (*x*). If he absconds, the beneficiaries may prove (*y*); and if a co-trustee has paid part, the beneficiaries may nevertheless prove for the whole (*z*).

Enforcing covenant against settlor.

So, again, where a settlor has, for valuable consideration, covenanted to settle property, a trustee who neglects to enforce the covenant is liable for any loss occasioned, thereby (*a*), unless expressly excused by the settlement.

Neglect to register in register county.

Again, it has been held that if a trustee neglects to register the trust instrument (where it requires to be registered), and the settlor is thereby enabled to effect a mortgage on the property, the trustee will be liable (*b*).

Joining in sale of contiguous properties.

In the exercise of due diligence, trustees for sale will, of course, use their best endeavours to sell to the best advantage. They should, therefore (in general), abstain from joining with the owners of contiguous property in a sale of the whole together, unless such a course would be clearly beneficial to their beneficiaries. For, by doing so, they expose the trust property to deterioration on account of the flaws, or possible flaws, in the title to the other property. But "suppose there were a house belonging to trustees, and a garden and forecourt belonging to somebody else, it must be obvious that those two properties would fetch more if sold together than if sold separately. You might have a divided portion of a house belonging to trustees, and another divided portion belonging to somebody else. It would be equally obvious if these two portions were sold together, that a more beneficial result would thereby take place. . . . But in those cases where it is not *manifest on a mere inspection* of the properties that it is more beneficial to sell them together, then you ought to have reasonable evidence that it is a prudent and right thing to do; and that evidence, as we know by experience,

(*x*) *Orrett* v. *Corser* (1855), 21 Beav. 52.

(*y*) *Re Bradley, Ex parte Walton* (1910), 54 Sol. J. 377.

(*z*) *Edwards* v. *Hood-Barrs*, [1905] 1 Ch. 20.

(*a*) *Woodhouse* v. *Woodhouse* (1869), L. R. 8 Eq. 514; *M'Gachen* v. *Dew* (1851), 15 Beav. 84; and *Re Brogden, Billing* v. *Brogden* (1888), 38 Ch.D. 546. Where a testator directed that a beneficiary was to lose all interest in the estate if he did not, *at the request of the trustee*, stay all proceedings which he might have instituted for disputing the will, it was held that it was the trustee's duty to make such request (*Re Allan, Havelock* v. *Havelock-Allan* (1896), 12 T. L. R. 299).

(*b*) *Macnamara* v. *Carey* (1867), 1 Ir. R. Eq. 9; and as to neglect to give notice to an assurance company of an assignment to the trustees of a policy, see *Kingdon* v. *Castleman* (1877), 25 W. R. 345. But query whether these neglects of a skilled agent would now be held to fall on the trustee.

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is obtained from surveyors and other persons who are competent judges" (*c*).

"Where trustees for sale are joint owners with a third party, or are reversioners, it is obvious that they may in general join in a sale; for everybody knows that as a general rule (of course there are exceptions to every rule) the entirety of a freehold estate fetches more than the sum total of the undivided parts, or the separate value of the particular estate and reversion" (*d*). This view has now received the express sanction of the legislature (*e*).

Depreciatory conditions of sale.

Again, trustees for sale ought not to do any act which will depreciate the property; therefore they ought not *unnecessarily* to limit the title, for no reasonable man would unnecessarily depreciate his own property by such means. The subject of depreciatory conditions was formerly of great importance, because a purchaser might have objected to complete, on the ground that such conditions constituted a breach of trust for which he himself, taken with notice, might be held responsible (*f*). However, since 1888, the state of the law with regard to such conditions has been altered. Now, no sale made by a trustee *can be impeached* at all, unless the beneficiaries prove that the consideration was thereby rendered inadequate; and, after the execution of the conveyance, no such sale can be impeached as against the purchaser, unless the beneficiaries also prove that such purchaser was acting in collusion with the trustee at the time when the contract for sale was made. Moreover, no purchaser can any longer make any requisition or objection on any such ground; and a trustee who is either a vendor or purchaser is not bound to exclude the application of s. 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) (*g*). The meaning of this enactment is not, however, so clear as could be desired. Is it intended exclusively to protect purchasers, and to free them from the necessity of taking the objection; or is it also intended to protect the trustee in the event of the beneficiaries suing the trustee for breach of trust? The words "no sale shall be impeached" are certainly more apt for expressing the first of such purposes than the second. Yet it is conceived that the trustee would receive the benefit of

(*c*) *Per* JESSEL, M.R., *Re Cooper and Allen to Harlech's Contract* (1876), 4 Ch. D. at p. 817.

(*d*) *Ibid.*

(*e*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13.

(*f*) *Dance* v. *Goldingham* (1873), L. R. 8 Ch. 902; *Dunn* v. *Flood* (1883), 25 Ch. D. 629; and on appeal (1885), 28 Ch. D. 586.

(*g*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 14, 15.

the doubt if the case should ever arise, and that henceforth the onus of proving loss in such transactions will fall upon the beneficiaries.

Improvident sale.

Again, if trustees for sale, or those who act under their authority, fail in reasonable diligence in inviting competition, or if they contract to sell under circumstances of great improvidence or waste, they will be personally responsible (*h*); and the onus of proving that they acted reasonably is upon them (*i*). It is, therefore, the duty of trustees for sale to inform themselves of the real value of the property, and for that purpose to employ, if necessary, some experienced person to value it (*k*). But if they perform this duty, they will not be responsible if the beneficiaries impeach the sale as improvident (*l*).

Improvident leasing or letting.

Precisely the same principles apply to the leasing or letting of trust property; and if the trustees do not take proper steps, by consulting a practical valuer, to ascertain the proper rent, or, *a fortiori*, knowing the proper rent accept a lower rent, they will be liable to make good the difference (*m*). Nor must they give a future option to the tenant to purchase the estate; for if the estate should increase in value they will have given the increase away, whereas if it should decrease, the person to whom the option is given would not exercise it (*n*). Whether they can give an option to the tenant to determine the lease (say at the seventh or fourteenth year), or to remain, does not seem to be quite clear. But in *Re Lander and Bagley's Contract* (*o*), CHITTY, J., seemed to assume that a trustee with power to lease for a term of ten years could give the lessee an option to determine the lease at the end of three years, saying: "It was argued that it must necessarily be a breach of trust to grant a lease for a term of years at a rent of £80 a year, with an option, on the part of the tenant to continue for another seven years, or less term, at an increased rent. It would take a good deal of argument to convince me of the soundness of that proposition. As at present advised I do not see any substantial difference between an agreement to let for ten

(*h*) *Ord* v. *Noel* (1820), 5 Madd. 438; and *Anon.* (1821), 6 Madd. 10; *Pechel* v. *Fowler* (1795), 2 Anst. 549.

(*i*) *Norris* v. *Wright* (1851), 14 Beav. 291.

(*k*) *Oliver* v. *Court* (1820), 8 Pr. 127; *Campbell* v. *Walker* (1800), 5 Ves. 678; and see *per* JESSEL, M.R., *Re Cooper and Allen to Harleeh's Contract* (1876), 4 Ch. D. at p. 816.

(*l*) *Grove* v. *Search* (1906), 22 T. L. R. 290.

(*m*) *Ferraby* v. *Hobson* (1847), 2 Ph. 255.

(*n*) *Clay* v. *Rufford* (1852), 5 De G. & Sm. 768; and *Oceanic Steam Navigation Co.* v. *Sutherberry* (1880), 16 Ch. D. 236.

(*o*) [1892] 3 Ch. 41, at p. 49.

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years, with the power to the tenant to determine it at the end of three years, and an agreement to let for three years with the power to the tenant to continue for another seven years. *But I will leave this point open.*" It seems to be clear, however, that where a right to renew is given, the original plus the renewed term must not exceed the maximum term for which the trustees can lease (*p*).

Improvident purchase.

The same principles hold good in the case of trustees for purchase, who ought clearly to satisfy themselves of the value of the property, and for that purpose to employ a valuer of their own, and not trust to the valuer of the vendor. For a man may *bonâ fide* form his opinion, but he looks at the case in a totally different way when he knows on whose behalf he is acting; and if the trustees rely upon the vendor's valuer, and he, however *bonâ fide*, values the property at more than its true value, they will be liable (*q*).

Trustees for purchase should also take reasonable care that they get a good marketable title, and that they do not, by conditions of sale, bind themselves not to require one (*r*); and they should never purchase without getting the legal estate (*s*). Moreover, they should never purchase land merely as a speculation without having money in hand to pay for it (*t*).

Error of judgment.

Even before the Judicial Trustees Act, 1896, gave the court power to excuse a trustee who has acted reasonably and honestly, a trustee was not responsible for a mere error of judgment, if he had exercised a reasonable discretion and acted with diligence and good faith. Thus, where an executor omitted to sell some foreign bonds for a year after the testator's death, although there was a direction in the will to convert with all reasonable speed, he was held irresponsible for a loss caused by the bonds falling in price; for although the conclusion he came to was unfortunate, yet having exercised a *bonâ fide* discretion, the mere fact of the loss was not sufficient to charge him (*u*). *A fortiori* will this be so where there is power

(*p*) See *Bellringer* v. *Blagrave* (1847), 1 De G. & Sm. 63; *Magrane* v. *Archbold* (1813), 1 Dow, 107.

(*q*) *Ingle* v. *Partridge* (1865), 34 Beav. 411; and see also *Fry* v. *Tapson* (1884), 28 Ch. D. 268; *Waring* v. *Waring* (1852), 3 Ir. Ch. Rep. 331.

(*r*) *Eastern Counties Rail. Co.* v. *Hawkes* (1855), 5 H. L. Cas. 331.

(*s*) And as to advancing trust money on a covenant to surrender copyholds, see *Wyatt* v. *Sharratt* (1840), 3 Beav. 498; and as to equitable mortgages generally, *Norris* v. *Wright* (1851), 14 Beav. 291; *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464; and *infra*, Art. 48.

(*t*) *Ecclesiastical Commissioners* v. *Pinney*, [1900] 2 Ch. 736.

(*u*) *Buxton* v. *Buxton* (1835), 1 Myl. & Cr. 80; and see *Paddon* v. *Richardson* (1855), 7 De G. M. & G. 563.

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to postpone a sale (*x*). As to what constitutes a reasonable delay, this depends on the particular circumstances affecting each case. *Primâ facie*, a trustee ought not to delay realisation beyond a year, even where he has apparently unlimited discretion (*y*); and if he procrastinates beyond that period, the onus will be cast upon him of proving that the delay was reasonable and proper (*z*). If he considers further delay very desirable he should apply to the court (*a*).

Theft of trust property.

A trustee will not be liable if the trust property be stolen, provided he has taken reasonable care of it (*b*), even although the thief be his own servant, if, on the facts proved, it appear that the trustee was justified in deputing the custody of the property to such servant (*e.g.*, the manager of a trust business) (*c*). Yet, by a curious anomaly, it has been held that a trustee is liable if he is induced by fraud or forgery to hand it over to the wrong person (*d*). It is difficult to understand how this latter rule could have come into being, except upon the false analogy of a trustee to a banker or creditor. As has been shown in this article, a trustee is in the position of a gratuitous bailee; he must take reasonable care of the trust property, and if it is lost or stolen he is discharged from responsibility, provided that he was guiltless of negligence. If, then, a careful trustee is not responsible for property stolen from his custody, upon what conceivable ground should he be held responsible for property obtained from him by false pretences or forgery, which are crimes far more subtle, and against which it is much more difficult to safeguard himself? Since the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), such a technical breach of trust can and ought to be excused by the court (*e*).

Neglect in keeping trust securities.

Where a trustee of a policy of insurance neglected to indorse on it a memorandum of the trust, or to give notice to the office, and subsequently carelessly allowed it to get into the settlor's hands, who mortgaged it to a third party, the trustee

(*x*) *Re Schneider*, *Kirby* v. *Schneider* (1906), 22 T. L. R. 223.

(*y*) *Sculthorpe* v. *Tipper* (1871), L. R. 13 Eq. 232; and as to the propriety of an executor allowing the testator's money invested on mortgage to remain so until wanted, see *Orr* v. *Newton* (1791), 2 Cox, 274; *Robinson* v. *Robinson* (1851), 1 De G. M. & G. 247.

(*z*) See *per* WOOD, L.J., in *Grayburn* v. *Clarkson*, (1868), L. R. 3 Ch. at p. 606, and *Hughes* v. *Empson* (1856), 22 Beav. 181.

(*a*) See *Morris* v. *Morris* (1858), 4 Jur. (N. S.) 802.

(*b*) *Jones* v. *Lewis* (1751), 2 Ves. Sen. 240; *Job* v. *Job* (1877), 6 Ch. D. 562.

(*c*) *Jobson* v. *Palmer*, [1893] 1 Ch. 71; and see also *Weir* v. *Bell* (1878), 3 Ex. D. 238.

(*d*) See Art. 49, and illustrations thereto, *infra*.

(*e*) See Art. 90, *infra*; *Re Smith*, *Smith* v. *Thompson* (1902), 71 L. J. Ch. 411.

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was held liable (*f*). Where trustees hold securities payable to bearer, the proper course is to deposit them with their bankers (*g*), and not with their solicitor (*h*), nor with one only of the trustees (*i*), unless for purposes of sale in cases where he is a stockbroker (*k*).

Inventory of chattels.

So a trustee of chattels should make and keep an inventory of them, so that if lost by the neglect or fraud of others, proper evidence of the nature and value of the chattels may be preserved (*l*).

Neglect to invest trust fund.

A trustee ought to invest moneys in his hands subject to the trust within a reasonable time; and if he omits to do so, he will be charged interest (*m*); and if the fund be lost, he will be liable to make it good (*n*). *A fortiori* will he be liable where he has left the trust fund in the sole custody of his co-trustee (*o*). And, on similar grounds, trustees ought to accumulate infants' property by way of compound interest (*p*).

Not bound to insure.

A trustee is not bound to insure premises against loss by fire (*q*); but by s. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees are expressly authorised to do so to an amount not exceeding three-fourths of the value of the property insured, and to pay the premiums out of the income of that property or of any other property subject to the same trusts. The section applies to heirlooms settled to accompany land in strict settlement, where the trustees can pay premiums out of the income of capital moneys in their hands (*r*). It does not, however, apply to property held on simple trust for beneficiaries absolutely, and is, of course, subject to the express directions (if any) of the settlement. If trustees do not insure, and a beneficiary does so out of his own moneys, he may keep

(*f*) *Kingdon* v. *Castleman* (1877), 25 W. R. 345; and see *Barnes* v. *Addy* (1874), L. R. 9 Ch. 244, and *Hobday* v. *Peters* (No. 3) (1860), 28 Beav. 603.

(*g*) *Re De Pothonier, Dent* v. *De Pothonier*, [1900] 2 Ch. 529. But *aliter* with regard to non-bearer securities, see Art. 50, *infra*.

(*h*) *Field* v. *Field*, [1894] 1 Ch. 425.

(*i*) *Candler* v. *Tillett* (1855), 22 Beav. 257.

(*k*) *Re Gasquoine, Gasquoine* v. *Gasquoine*, [1894] 1 Ch. 470.

(*l*) *Temple* v. *Thring* (1887), 56 L. J. Ch. 767.

(*m*) See *Gilroy* v. *Stephen* (1882), 30 W. R. 745; *Stafford* v. *Fiddon* (1857), 23 Beav. 386; and *Re Jones, Jones* v. *Searle* (1883), 49 L. T. 91. In *Cann* v. *Cann* (1884), 51 L. T. 770, KAY, J., considered that six months was the maximum period.

(*n*) *Moyle* v. *Moyle* (1831), 2 Russ. & Myl. 710.

(*o*) *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.

(*p*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43.

(*q*) *Bailey* v. *Gould* (1840), 4 Y. & Coll. 221; and *Dobson* v. *Land* (1850), 8 Hare, 216.

(*r*) *Re Earl of Egmont's Trusts, Lefroy* v. *Earl of Egmont*, [1908] 1 Ch. 821.

whatever is paid under the policy for himself (*s*); but *secus* where the premiums are paid out of the trust income (*t*).

How far bound to see to repairs.

Trustees are generally bound to see that trust premises do not fall into decay (*u*). But, as we have seen, the cost of repairs is not necessarily thrown exclusively on income (*x*), and trustees should apply to the court for directions as to raising the necessary money (*u*). It has, however, been decided that when *leasehold* houses are held in trust to receive the rents and pay them to A. for life, and after his death in trust for B., the trustees, in order to avoid forfeiture, are entitled to apply the rents in keeping the houses in a proper state (*y*). But this is without prejudice to the ultimate incidence of the costs (*z*).

Mala fides.

Trustees being liable for gross negligence, are *a fortiori* liable where they combine reckless disregard of the interests of their *cestuis que trusts* with *mala fides*. Thus, where one trustee retires from the trust in order, as he thinks, to relieve himself from the responsibility of a wrongful act meditated by his co-trustee, he will be held as fully responsible as if he had been *particeps criminis* (*a*). But to make him responsible it must be proved that the very breach of trust which was in fact committed was not merely the outcome of, or rendered easy by, the retirement, but was contemplated by the trustee who retired (*b*).

ART. 48.—*Duty of Trustee in Relation to the Investment of Trust Funds.*

(1) A trustee can only lawfully invest trust funds upon securities authorised by the settlement or by statute (*c*); and not upon the latter if the settlement forbids such investment (*d*).

(2) Even with regard to such securities, a trustee is

(*s*) *Gaussen* v. *Whatman* (1905), 93 L. T. 101.

(*t*) *Re Quicke's Trusts, Poltimore* v. *Quicke*, [1908] 1 Ch. 887.

(*u*) *Per* COTTON, L.J., *Re Hotchkys, Freke* v. *Calmady* (1886), 32 Ch. D. 408.

(*x*) Art. 46, *supra*.

(*y*) *Re Fowler, Fowler* v. *Odell* (1881), 16 Ch. D. 723. But see *Re Courtier, Coles* v. *Courtier* (1886), 34 Ch. D. 136, and also Art. 46, *infra*.

(*z*) *Re Courtier, Coles* v. *Courtier, supra*, and *Re Hotchkys, Freke* v. *Calmady, supra*; and see p. 252, *et seq.*, *supra*.

(*a*) *Norton* v. *Pritchard*, Reg. Lib. B. (1844), 771; *Webster* v. *Le Hunt* (1861), 9 W. R. 918; *Palairet* v. *Carew* (1863), 32 Beav. 564; *Clark* v. *Hoskins* (1868), 37 L. J. Ch. 561.

(*b*) *Head* v. *Gould*, [1898] 2 Ch. 250.

(*c*) As to what securities are authorised by statute, see *infra*, p. 271 *et seq.*

(*d*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1 (p. 271, *infra*).

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bound to consider whether, having regard to all the circumstances, and to the rules laid down in Arts. 43 and 47, it is prudent to make the investment (*e*). But the mere fact that stock is above par does not necessarily make it improper to purchase it (*f*).

(3) In particular, in investing on mortgage, he should (unless expressly authorised by the settlement)—

(a) accept only a first legal mortgage (*g*) of freehold or copyhold property, which is not of a wasting character (such as brickfields or coal mines) (*h*);

(b) never join in a contributory mortgage (*i*); and

(c) always obtain a report as to the value of the property made by, and act upon the advice as to its propriety *as a trust investment* of, a person whom he reasonably believes to be an able practical surveyor or valuer, instructed and employed independently of the owner of the property; and should never advance more than two-thirds of the value stated in such report (*k*).

(4) A trustee (unless authorised by the settlement) (*l*), must not apply for, or hold any certificate to bearer issued under the authority of—

(a) the Indian Stock Certificate Act, 1863;

(b) the National Debt Act, 1870;

(c) the Local Loans Act, 1875; or

(d) the Colonial Stock Act, 1877 (*m*).

(5) Where there is power to invest, such power carries with it the power to vary investments from

(*e*) See *per* COTTON and LOPES, L.JJ., in *Re Whiteley*, *Whiteley* v. *Learoyd* (1886), 33 Ch. D. 347, affirmed, (*sub nom. Learoyd* v. *Whiteley*) (1887), 12 App. Cas. 727, and *Hutton* v. *Annan*, [1898] A. C. 289.

(*f*) See Trustee Act, 1893, s. 2 (*infra*, p. 273).

(*g*) *Norris* v. *Wright* (1851), 14 Beav. 291; *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464; and *Swaffield* v. *Nelson*, [1876] W. N. 255; and see dicta in *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*h*) *Re Whiteley*, *Whiteley* v. *Learoyd*, *supra*; *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490. As to copyholds, *Wyatt* v. *Sharratt* (1840), 3 Beav. 498; *Re Turner*, *Barker* v. *Ivimey*, [1897] 1 Ch. 536.

(*i*) *Webb* v. *Jonas* (1888), 39 Ch. D. 660; *Re Massingberd's Settlement*, *Clark* v. *Trelawney* (1890), 63 L. T. 296.

(*k*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8.

(*l*) See *Re Roth*, *Goldberger* v. *Roth* (1896), 74 L. T. 50.

(*m*) Trustee Act, 1893, s. 7. Nothing in this section, however,

time to time, including power to re-sell purchased real estate (*n*). Art. 48.

(6) Where part of a testator's residuary trust estate consists of securities on which the trustees are permitted to invest, they are not bound to convert and then to procure others of the same nature; unless, having regard to all the surrounding circumstances, it would be imprudent to retain them (*o*).

Paragraph (1).

Investments authorised by statute.

The powers of trustees as to investment have been from time to time extended by statutes which are now consolidated in ss. 1—6 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as extended by s. 2 of the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), and s. 17, sub-s. (4), of the Metropolis Water Act, 1902 (2 Edw. 7, c. 41). By the Colonial Stock Act it is enacted that the securities in which a trustee may invest under the powers of the Trustee Act, 1893, shall include any colonial stock registered in the United Kingdom in accordance with the provisions of the Colonial Stock Acts, 1877 to 1900, and with respect to which there have been observed such conditions as the Treasury may by order prescribe. The restrictions in s. 2 (2) of the Trustee Act, 1893, are to apply to such colonial stocks. By the Metropolis Water Act the "B" stock of the Metropolitan Water Board is added to the list of investments authorised by the Trustee Act, 1893.

The sections of the Trustee Act, 1893, above referred to are as follows:

1. A trustee may, unless expressly forbidden (*p*) by the instrument (if any) creating the trust, invest any trust funds in his hands, whether

is to impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificate, any obligation to inquire whether a person applying for such certificate is or is not a trustee, or to subject them to any liability in the event of their granting such certificate to a trustee, or to invalidate any such certificate if granted.

(*n*) *Re Clergy Orphan Corporation* (1874), L. R. 18 Eq. 280; and see also *Re Dick*, *Lopes* v. *Hume-Dick*, [1891] 1 Ch. 423; affirmed (*sub nom. Hume* v. *Lopes*), [1892] A. C. 112; *Re Tapp and London and India Dock Co.* (1905), 92 L. T. 829; *Re Pope's Contract*, [1914] 2 Ch. 442.

(*o*) See *Ames* v. *Parkinson* (1844), 7 Beav. 379, apparently not even a second mortgage, *Robinson* v. *Robinson* (1851), 1 De G. M. & G. 247; and see also *Re Chapman*, *Cocks* v. *Chapman*, [1896] 2 Ch. 763.

(*p*) A direction to invest in specified securities does not "expressly forbid" investment in the statutory securities: *Re Burke*, *Burke* v. *Burke*, [1908] 2 Ch. 248.

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at the time in a state of investment or not, in manner following, that is to say:

(a) In any of the parliamentary stocks or public funds or government securities of the United Kingdom:

(b) On real or heritable securities in Great Britain or Ireland (*q*):

(c) In the stock of the Bank of England or the Bank of Ireland:

(d) In India three and a half per cent. stock and India three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:

(e) In any securities the interest of which is for the time being guaranteed by Parliament (*r*):

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of *not less than three per centum per annum* on its ordinary stock (*s*):

(h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (*g*), either alone or jointly with any other railway company:

(i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India:

(j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company:

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed:

(*q*) This would seem to include a *mortgage* of ground rents but not a *purchase* of them (*Re Peyton's Settlement Trust* (1869), L. R. 7 Eq. 463). But an express power to "invest on ground rents," as distinguished from *on the security* of them, authorises a purchase (*Re Mordan, Legg* v. *Mordan*, [1905] 1 Ch. 515).

(*r*) This includes Canadian 4 per cent. stock (Pacific Railway), 36 & 37 Vict. c. 45.

(*s*) This paragraph does not of itself empower trustees to invest in the securities specified in s. 5 (3), *infra*, p. 274 (*Re Tattersall, Topham* v. *Armitage*, [1906] 2 Ch. 399); nor probably does paragraph (b) authorize investments in those specified in s. 5 (1).

(l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock:

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment (*t*), a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order:

(n) In nominal or inscribed stock issued, or to be issued, by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (*u*),

and may also from time to time vary any such investment (*v*).

2.—(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

(2) Provided that a trustee may not under the powers of this Act purchase at a price exceeding its redemption value any stock mentioned

(*t*) See *Re Druitt, Druitt* v. *Dehler*, [1903] 1 Ch. 446.

(*u*) These at present (see R. S. C., Ord. XXII., r. 17) are rather more restricted than the statutory investments, except as to that specified in sub-s. (g) of the Act, with regard to which all that the court requires is that the railway company has paid *a dividend* (not necessarily of 3 per cent.) on ordinary capital for ten years next before the date of investment. The City Editor of "The Times," some years since, stated that "lawyers differ" as to the effect of this, some contending that, with regard to investments open to trustees, the rule of court is governed and restricted by the Act. It is, however, conceived that this is an absurd contention. The Act enumerates a series of investments that are to be permanently permissible, and then, by way of further extension and certainly not by way of restriction, says that also all stocks, etc., shall be permissible on which the court may for the time being authorise its funds to to invested. *At present* the court permits its funds to be invested on the debenture stocks of railway companies which have paid *any* dividend for ten years past; and therefore it follows that, *at present*, trustees may follow suit. It is difficult to understand how any lawyer could be of a contrary opinion, which would render sub-s. (o) absolutely meaningless.

(*v*) This applies even where the settlement contains no power to vary (*Re Dick, Lopes* v. *Hume-Dick*, [1891] 1 Ch. 423, affirmed (*sub nom. Hume* v. *Lopes*) [1892] A. C. 112; and see *Re Owthwaite, Owthwaite* v. *Taylor*, [1891] 3 Ch. 494). The court will not, as a rule, interfere with the discretion of trustees as to varying investments (*Lee* v. *Young* (1843), 2 Y. & Coll. C. C. 532).

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or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate (*x*).

(3) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

4. The preceding sections shall apply as well to trusts created before as to trusts created after the passing of this Act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

5.—(1) A trustee having power to invest in real securities (*y*), unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3) A trustee having power (*z*) to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(4) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(5) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of

(*x*) This, of course, overrides the more stringent restrictions imposed on trustees by the local Acts under which these stocks were formerly made conditional trustee investments. It may be that there are still some corporations which do not fall under the above paragraph, where stocks are nevertheless made conditional investments under local Acts.

(*y*) It is apprehended that this means express power, on the analogy of the case cited in the next note.

(*z*) *I.e.*, express power. The statutory power, s. 1 (g), p. 272, *supra*, is not sufficient (*Re Tattersall, Topham* v. *Armitage*, [1906] 2 Ch. 399).

Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865. Art. 48.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

Investments by Settled Land Act.

The foregoing securities refer to ordinary trusts (*a*). Where, however, the trust fund consists of capital money arising under the Settled Land Acts, 1882 to 1890, *or* is money which is liable to be laid out, under the trusts of a settlement, in the purchase of land (*b*), the trustees *must* invest it, *according to the direction of the tenant for life*, in some of the modes specified in s. 21 of the Settled Land Act, 1882; or, *at the option of the tenant for life*, on the securities in which money produced by the exercise of a power of sale in the settlement might be invested thereunder (*c*). But the trustees may bring the matter before the court, which will, in a proper case, restrain the tenant for life (*d*).

Trustees.

Investments authorised by the settlement itself.

Although the range of trust investments has, as above stated, been greatly increased, the court still scrutinises with considerable (but decreasing) jealousy any direction to invest in securities not authorised by Parliament. The following examples (which of course turn on the construction of particular settlements, and some of which would scarcely, it is thought, be followed at the present day) will show how careful a trustee ought to be, before assuming that the language of his settlement really authorises investments which it appears at first sight to do. Thus, where a settlor empowered his trustees to place out

(*a*) The Act does not apply to trust funds of a building society (*Re National Permanent Building Society* (1889), 43 Ch. D. 431); but it does to trust funds held by a corporation in trust for a charity (*Re Manchester Royal Infirmary, Manchester Royal Infirmary* v. *Att.-Gen.* (1889), 43 Ch. D. 420).

(*b*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 33; and *Re Mackenzie's Trusts* (1883), 23 Ch. D. 750.

(*c*) Settled Land Act, 1882, ss. 22, 33. It is apprehended that, notwithstanding the word "thereunder," trustees, for purposes of the Settled Land Act, would now be authorised to invest in any of the securities permitted by the Trustee Act, 1893 (56 & 57 Vict. c. 53). As to their duties when the tenant for life directs them to invest on a particular mortgage, see *Re Hotham, Hotham* v. *Doughty*, [1902] 2 Ch. 575.

(*d*) *Re Hunt's Settled Estates, Bulteel* v. *Lawdeshayne*, [1906] 2 Ch. 11, distinguishing *Re Lord Coleridge's Settlement*, [1895] 2 Ch. 704.

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the trust fund at interest "at their discretion," it was held that the discretion of the trustees was limited to a discretion as to which of the several forms of security *authorised by law* they should invest in, and did not give them power to invest in securities not so authorised; such, for instance, as ordinary railway stock (*e*). And indeed the word "invest" has been said to point to a loan and not to an employment in a trading speculation, as also a direction to place out at *interest* (*f*) or on *security* (*g*).

Where authorised to *retain* shares, must not increase their holding.

Where trustees are authorised to *retain* a settlor's shares in a particular company, it has been held in some cases that they must not accept new shares on reconstruction of the company (*h*). But in a recent case, where the trustee was authorised to continue the estate in its present *form* of investment, BUCKLEY, J., held the contrary (*i*). This case was, however, doubted by KEKEWICH, J., in *Re Anson, Lovelace* v. *Anson* (*k*), but distinguished from that case where the trust was a very unusual one. It is conceived that under no circumstances ought they to increase their holding in the company; so that even if they accept an allotment of bonus shares, they must promptly sell them (*l*). As to the power of the court to permit of a sale of a trust business to a company in consideration of shares, the reader is referred to p. 218, *supra*.

Where authorised to lend to a firm.

On similar grounds, where trustees are authorised to invest money by placing the same in the hands of a specified firm at interest, it is a breach of trust to continue the loan after a change has taken place in the constitution of the firm (*m*).

Government securities and public companies.

On the other hand, in *Cadett* v. *Earle* (*n*), it was held that a direction to invest in foreign government securities, authorised an investment in the securities of one of the states of the

(*e*) *Bethell* v. *Abraham* (1873), L. R. 17 Eq. 24, *per* JESSEL, M.R., and see *Re Brown, Brown* v. *Brown* (1885), 29 Ch. D. 889, where this principle seems to have been admitted, although under the circumstances the court would not say that the trustees were liable.

(*f*) *Bethell* v. *Abraham, supra*; and see *Cock* v. *Goodfellow* (1722), 10 Mod. 489; *Dickonson* v. *Player* (1838), C. P., Coop. 178.

(*g*) *Harris* v. *Harris* (No. 1) (1861), 29 Beav. 107; *Murphy* v. *Doyle* (1892), 29 L. R. Ir. 333; *Re Kavanagh* (1891), 27 L. R. Ir. 495.

(*h*) *Re Morris, Bucknill* v. *Morris* (1885), 52 L. T. 462; and see also *Blount* v. *O'Connor* (1886), 17 L. R. Ir. 620.

(*i*) *Re Smith, Smith* v. *Lewis*, [1902] 2 Ch. 667.

(*k*) [1907] 2 Ch. 424.

(*l*) *Re Pugh, Banting* v. *Pugh*, [1887] W. N. 143; and see *Re Anson, Lovelace* v. *Anson*, [1907] 2 Ch. 424.

(*m*) *Re Tucker, Tucker* v. *Tucker*, [1894] 1 Ch. 724, affirmed, [1894] 3 Ch. 429; *Smith* v. *Patrick*, [1901] A. C. 282; *Cummins* v. *Cummins* (1845), 3 Jo. & Lat. 64.

(*n*) (1877) 5 Ch. D. 710; and see also *Arnould* v. *Grinstead* (1872), 21 W. R. 155.

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United States of America, although no one state is an independent nation. But in a recent case it was held, on the other hand, that a power to invest in the stocks or shares of a colony does not extend to the stock of a province of the Dominion of Canada (*o*), which seems to throw some doubt on *Cadett* v. *Earle*. It has been held that a power to invest in the securities of any "public company," extended to the securities of companies incorporated under the Companies Acts, and was not restricted to companies incorporated by statute or royal charter (*p*); and that a company incorporated by charter under the provisions of a general Act of Parliament was a "company incorporated by statute" (*q*). But an ordinary joint stock company is not "created *by* statute" (*r*), nor are unincorporated dock commissioners a "public company or body corporate" (*s*); and it would seem that *primâ facie* a power to invest in public companies is restricted to public companies in the United Kingdom (*t*); but so long as they are domiciled (*i.e.*, registered) here, the fact that they carry on their business abroad is immaterial (*u*). A power to invest in preference stock of a company does not authorise an investment in preference shares (*x*).

Should never, unless explicitly authorised, invest on personal security.

It must be pointed out that, in the absence of clear direction, trustees (even where they have a discretion) cannot, without breach of trust, lend trust funds on the security of a personal promise, or of personal property, however apparently trustworthy (*y*); and, as Lord KENYON said in *Holmes* v. *Dring*, this "ought to be rung into the ears of every one who acts in the character of trustee" (*z*). It is true that, in one case, BACON, V.-C., held that where trustees were authorised to invest on real or personal security, they might permit money to remain merely on the security of a personal promise or

(*o*) *Re Maryon-Wilson's Estate*, [1911] 2 Ch. 58, affirmed, [1912] 1 Ch. 55.

(*p*) *Re Sharp*, *Rickett* v. *Sharp* (1890), 45 Ch. D. 286.

(*q*) *Elve* v. *Boyton*, [1891] 1 Ch. 501.

(*r*) *Re Smith*, *Davidson* v. *Myrtle*, [1896] 2 Ch. 590.

(*s*) *Wood* v. *Middleton* (1898), 79 L. T. 155; as to the securities issued by Scottish municipal corporations, see *Hutton* v. *Annan*, [1898] A. C. 289.

(*t*) *Re Castlehow*, *Lamonby* v. *Carter*, [1903] 1 Ch. 352. But see *Re Stanley*, *Tennant* v. *Stanley*, [1906] 1 Ch. 131, where an express power was not so restricted by BUCKLEY, J.

(*u*) *Re Hilton*, *Gibbes* v. *Hale-Hinton*, [1909] 2 Ch. 548.

(*x*) *Re Willis*, *Spencer* v. *Willis*, [1911] 2 Ch. 563.

(*y*) *Styles* v. *Gye* (1849), 1 Mac. & G. 422; *Child* v. *Child* (1855), 20 Beav. 50; *Mills* v. *Osborne* (1834), 7 Sim. 30.

(*z*) (1788) 2 Cox, 1; *Pocock* v. *Reddington* (1801), 5 Ves. 794; *Potts* v. *Britton* (1871), L. R. 11 Eq. 433; *Bethell* v. *Abraham* (1873), L. R. 17 Eq. 24; *Ryder* v. *Bickerton* (1743), 3 Swans. 80, n.

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bond (*a*). But it is humbly submitted that however this might be if the expression "personal security" stood alone, its juxtaposition in this case with the alternative "real security" ought to have restricted its meaning to "the security of personal property," and that to enlarge it so as to cover the security of a personal promise was scarcely justifiable (*b*). However, it has been held by KEKEWICH, J., that even where the direction is not imperative, trustees may lend on personal security if satisfied that there is a reasonable prospect of repayment; and may lend to the tenant for life, although his consent to the loan is required (*c*). If the settlement requires a bond to be taken from the borrower, the trustees must insist upon a bond being given (*d*). Of course it is quite clear that where trustees (authorised to invest on personal security) do so merely for the purpose of accommodating the borrower, and not *bonâ fide* for the benefit of their beneficiaries, they will be liable for any loss, notwithstanding the authorisation (*e*); and *a fortiori* is that so where they lend in consideration of a bribe (*f*). But if the trustees are not merely authorised, but are imperatively directed to invest on certain forms of investment, they are bound to obey the direction, however much they may disapprove (*g*). And also where they are expressly authorised to allow money to remain on an unsatisfactory security *for the purpose of conveniencing a purchaser*, they are justified in doing so (*h*).

Should not invest in trade, or shares of trading companies.

Again, a trustee must not, in the absence of express authority, invest in trade security; as, for instance, in the shares of a public company, which are in reality no security at all, but merely documents conferring a right to speculative profits (*i*). It was on this ground that, before the passing of the Acts of Parliament before referred to, trustees were not entitled to invest even in stock of the Banks of England or Ireland, or in the stock of the old East India Company (*k*).

(*a*) See *Pickard* v. *Anderson* (1872), L. R. 13 Eq. 608, *sed quære*.

(*b*) See *Re Johnson*, *Johnson* v. *Hodge*, [1886] W. N. 72.

(*c*) *Re Laing's Settlement*, *Laing* v. *Radcliffe*, [1899] 1 Ch. 593, *sed quære*.

(*d*) *Cocker* v. *Quayle* (1830), 1 Russ. & Myl. 535.

(*e*) *Langston* v. *Ollivant* (1807), G. Coop. 33; and see *Stewart* v. *Sanderson* (1870), L. R. 10 Eq. 26; and *Francis* v. *Francis* (1854), 5 De G. M. & G. 108.

(*f*) *Re Smith*, *Smith* v. *Thompson*, [1896] 1 Ch. 71.

(*g*) *Cadogan* v. *Essex* (*Lord*) (1854), 2 Drew. 227; *Beauclerk* v. *Ashburnham* (1845), 8 Beav. 322. And see now *Re Wedderburn* (1878), 9 Ch. D. 112.

(*h*) *Re Hurst*, *Addison* v. *Topp* (1890), 63 L. T. 665.

(*i*) *Harris* v. *Harris* (No. 1) (1861), 29 Beav. 107; *Cock* v. *Goodfellow* (1722), 10 Mod. 489.

(*k*) *Howe* v. *Earl of Dartmouth* (1802), 7 Ves. 137; 1 Wh. & Tu. Lead. Cas. (8th ed.) 68.

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Paragraph (2).

Trustees not necessarily protected by investing in authorised securities.

It is a mistake to suppose that a trustee is absolutely safeguarded if he invests trust funds in some of the securities authorised by the settlement or by statute. To invest in any other securities would, of itself, be a breach of trust; but, even with regard to those which are permissible, he must take such care as a reasonably cautious man would use, having regard not only to the interests of those who are entitled to the income, but to the interests of those who will take in future. All that the statute, or the express power, does is to shift the onus of proof; so that instead of the trustee having to prove affirmatively that the investment was prudent, the beneficiary who attacks it has to prove that it was imprudent (*l*). It is not like a man investing his own money, where his object may be a larger present income than he can get from a safer security. Trustees are bound to preserve the money for those entitled to the corpus in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present; and, in doing so, they must use such caution as a reasonably prudent man would use with reference to transactions of a similar nature in which he might be engaged (*m*). Not that this means that a different degree of care is required in regard to the conduct of the business of a trust, according to whether there are persons to take in the future, or whether the trust fund is held in trust for one beneficiary absolutely. The question, in either case, is the due care of the capital sum (*n*); and, in either case, the trustee is not allowed the same discretion in investing the trust fund as if he were a person, *sui juris*, dealing with his own estate. His duty, rather, is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide: that is, the kind of business "the ordinary prudent man" is supposed to be engaged in (*o*). Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself not only to the class of investments which are permitted by the settlement or by statute, *but to avoid all* such investments of that class as are attended with hazard (*p*).

(*l*) See *per* Parker, J., *Shaw* v. *Cates*, [1909] 1 Ch. 389, at p. 395.

(*m*) *Per* Cotton, L.J., *Re Whiteley*, *Whiteley* v. *Learoyd* (1886), 33 Ch. D. at p. 350.

(*n*) *Per* Lord Halsbury, same case when before H. L.; see *sub nom. Learoyd* v. *Whiteley* (1887), 12 App. Cas. at p. 732.

(*o*) *Per* Lindley, L.J., *Re Whiteley*, *Whiteley* v. *Learoyd*, *supra*.

(*p*) *Per* Lord Watson, same

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Illustrations of permissible securities which might be improper under certain circumstances.

Thus, if any of the securities mentioned in the Trustee Act, 1893 (56 & 57 Vict. c. 53), which are now very numerous (as may be seen by reference to any broker's stock and share list), and in some cases yield interest exceeding 4 per cent. on current prices, were to become very much depreciated, so as to render them a hazardous investment, the fact that they are made permissible as trust investments by that statute would not, it is conceived, protect a trustee who should invest trust funds upon them. And, *a fortiori*, would this be the case if he were to make such an investment for the purpose of procuring a larger income for the tenant for life (*q*). At the same time it must be acknowledged that, save with regard to investments on mortgage, the statutory power is so guarded that it is difficult to foresee any case in which a trustee could be held liable for investing on any of the permitted securities. It is also conceived that a trustee might well be excused for investing in a speculative stock *specifically* authorised by a testator, although he might have been held liable for selecting the same stock *out of a class* so authorised.

Stocks above par.

Formerly it was held that where a non-British government stock was above par, and within a few years of redemption at par, it was not a proper investment for trust funds; because the effect of such an investment might be to benefit the tenant for life at the expense of those in remainder (*r*). However, the intention of Parliament, as expressed in the Act of 1893, appears to be to fix a standard of prudence in such cases, viz., that a trustee should not pay more than a premium of fifteen per cent. above the redemption price, and that the period of redemption should be at least fifteen years distant at the date of investment. This clause, no doubt, only refers to the investments in sub-ss. (g), (i), (k), (l), and (m) of s. 1, but, *a fortiori*, a trustee who applied the rule to the other permissible securities would be safe. It may also be mentioned here that, under special circumstances, a change of investment from one which is safe to one which (although permitted) is less safe, for the purpose of affording a larger income to the life tenant, may be proper enough if the trustee acts in good faith: for instance, where property is settled on a parent for life with remainder to his children, and it is very important that the parent should have an increased income for their

case (1887), 12 App. Cas. at p. 733. But *cf. Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261.

(*q*) This even applies to trustees for purposes of the Settled Land Acts (*Re Theobald* (1903), 19 T. L. R. 536).

(*r*) See *Cockburn* v. *Peel* (1861), 3 De G. F. & J. 170; *Ungless* v. *Tuff* (1861), 9 W. R. 729; *Waite* v. *Littlewood* (1872), 41 L. J. Ch. 636.

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better support and education (*s*). In such a case, an investment in a redeemable stock above par would not merely benefit the tenant for life, but the remaindermen also.

Changing investments.

Generally it may (it is conceived) be safely laid down that where trustees act in good faith, and not collusively for the manifestly sole benefit of the tenant for life, they will not now be held liable for changing a first class security for one which is authorised by the Act and which pays a better interest (*t*). Nevertheless, trustees should not invest on mortgage *where it is not reasonable*, merely to accommodate one of their beneficiaries. Still less ought they to do so merely to accommodate an outsider. Thus they would never be justified in lending a sum of stock (and, *a fortiori*, they would not be justified in selling it and lending the proceeds) on mortgage of real estate bearing interest at the same rate as the stock itself. For no possible benefit could accrue to the beneficiaries; and, on the other hand, the security of the government would be changed for the less reliable security of private property. Consequently, such a transaction would afford the strongest presumption of an intention to accommodate the mortgagor (*u*). Indeed it has been said that whenever a trustee varies an investment the onus lies on him of showing that the transaction was proper (*x*); but whether this dictum would now be followed where the statutory power to vary is exercised would seem questionable.

Not always justified in investing on mortgage.

Paragraph (3).

Precautions to be observed by trustees who invest on mortgage.

As above stated, trustees are not freed from responsibility because they invest on authorised securities; but more especially is this the case when they lend trust funds on the security of a mortgage. The very simplicity of the authority empowering them to invest on "real securities" is apt to mislead, and gives no indication of the severity with which the court regards such loans.

First legal mortgage alone permissible.

In the first place, in the absence of express authority, trustees who desire to invest on mortgage, are restricted to *first legal mortgages of land*. The mortgage should be a first

(*s*) *Cockburn* v. *Peel* (1861), 3 De G. F. & J. 170, *per* Turner, L.J.; and see *Montefiore* v. *Guedalla*, [1868] W. N. 87; *Re Ingram's Trust* (1863), 11 W. R. 980.

(*t*) See *per* Turner, L.J., in *Cockburn* v. *Peel* (1861), 3 De G. F. & J. 170; and *per* Kekewich, J., in *Re Walker, Walker* v. *Walker* (1890), 62 L. T. 449.

(*u*) *Whitney* v. *Smith* (1869), L. R. 4 Ch. at p. 521; and see also *Re Walker, Walker* v. *Walker* (1890), 62 L. T. 449, where trustees were held liable for varying investments without any reasonable cause.

(*x*) *Norris* v. *Wright* (1851), 14 Beav. 291.

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mortgage (*y*), because otherwise trustees might not have funds available to redeem a prior incumbrancer who might threaten to foreclose. It should be a *legal* mortgage (*a*), because the protection afforded by the legal estate prevents any prior incumbrancer, of whom the trustees may have no notice, getting priority over them; and if trustees do invest in a mere equitable mortgage (for instance, a mortgage by way of covenant to surrender copyholds), and any loss accrues, they will, it is apprehended (although this has never been expressly decided), be liable to make it good (*b*). It would seem, however, that there is no objection to the security being a sub-mortgage, as the trustees get the legal estate and in effect the additional security of the covenant of the original mortgagor (*c*). Unless the settlement expressly authorised a mortgage of leaseholds, trustees could, formerly, only properly advance trust funds on the security of freeholds or copyholds, for the statutes which empowered trustees to invest on mortgage confined them to mortgages of *real* estate, and leaseholds, however long and however free from rent and covenants, were not *real* estate (*d*). However, as above stated (*c*), s. 5 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), authorises investment on mortgage of certain long leaseholds held at nominal rents.

Must not join in a contributory mortgage.

In the second place, the mortgage must not be a contributory mortgage, that is, a mortgage where the trustees join with other persons in a joint loan; for, in that case, the trustees would be putting it out of their power to realise without the joinder of third parties. In other words, they would be entrusting the trust property to persons who were not trustees of it. A contributory mortgage is therefore *primâ facie* a breach of trust (*f*).

Precautions formerly necessary as to ascertaining value of property.

In the third place, they must take precautions not to

(*y*) *Norris* v. *Wright* (1851), 14 Beav. 291, and *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464; and dicta in *Chapman* v. *Browne*, [1902] 1 Ch. 785; and see also *Worman* v. *Worman* (1889), 43 Ch. D. 296, where it was held that trustees with power to *purchase* real estate must not purchase an equity of redemption. But see *contra*, *per* WRIGHT, J., *Want* v. *Campain* (1893), 9 T. L. R. 254.

(*a*) *Swaffield* v. *Nelson*, [1876] W. N. 255.

(*b*) See *Norris* v. *Wright* (1851), 14 Beav. 291; *Drosier* v. *Brereton* (1852), 15 Beav. 221; *Lockhart* v. *Reilly* (1857), 1 De G. & J. 464; *Swaffield* v. *Nelson* *supra*; and dicta in *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*c*) *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490.

(*d*) *Leigh* v. *Leigh* (1886), 35 W. R. 121; *Re Boyd's Settled Estates* (1880), 14 Ch. D. 626; but see as to long terms at peppercorn rents, *Re Chennell*, *Jones* v. *Chennell* (1878), 8 Ch. D. 492.

(*e*) *Supra*, p. 274.

(*f*) *Webb* v. *Jonas* (1888), 39 Ch. D. 660; *Re Massingberd's Settlement*, *Clark* v. *Trelawney* (1890), 63 L. T. 296; *Stokes* v. *Prance*, [1898] 1 Ch. 212; *Re Dive*, *Dive* v. *Roebuck*, [1909] 1 Ch. 328.

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advance too much money on the security offered. The law on this point was altered in favour of trustees by s. 4 of the Trustee Act, 1888 (51 & 52 Vict. c. 59) (now repealed, and re-enacted in s. 8 of the Trustee Act, 1893). Before December 24th, 1888, the duty of a trustee who was proposing to advance money on mortgage was as follows: He was bound (as he still is) to ascertain the real value of the property, and for that purpose to employ a valuer and solicitor (*g*) of his own, and not trust to the valuer of the mortgagor (*h*); and to instruct such valuer that the valuation was required for the purpose of considering the advisability of investing trust funds on the security of the property (*i*). For a man may *bonâ fide* form his opinion, and yet look at the case in a totally different way when he knows on whose behalf he is acting. Moreover, he was (as he still is) bound to exercise his own judgment in the selection of the valuer, and not leave it to his solicitor (*k*). In the next place, he was not entitled to advance more than two-thirds of the amount at which the property was valued (*l*) (and that is still the same); and if it were house property, not more than one-half (*m*); and if it were trade property, the value of which depended on the continued prosperity of the trade, it would have been hazardous to advance even so much as that (*n*). If he did invest on the security of real property used for trade purposes, he was bound to altogether disregard the value of the trade (*o*). However, these proportions were not inflexibly observed; and if, when the advance was made, the property was approximately up to the standards above indicated, trustees were not held liable for subsequent deterioration (*p*).

(*g*) *Waring* v. *Waring* (1852), 3 Ir. Ch. Rep. 331.

(*h*) *Fry* v. *Tapson* (1884), 28 Ch. D. 268; *Walcott* v. *Lyons* (1886), 54 L. T. 786; *Waring* v. *Waring* (1852), 3 Ir. Ch. Rep. 331; *Ingle* v. *Partridge* (1865), 34 Beav. 411.

(*i*) See *per* Kay, J., *Re Olive*, *Olive* v. *Westerman* (1886), 34 Ch. D. 70.

(*k*) *Fry* v. *Tapson*, *supra*; and see on all the points, *Re Somerset*, *Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.

(*l*) *Stickney* v. *Sewell* (1835), 1 Myl. & Cr. 8; *Drosier* v. *Brereton* (1852), 15 Beav. 221; *Re Godfrey*, *Godfrey* v. *Faulkner* (1883), 23 Ch. D. 483.

(*m*) *Budge* v. *Gummow* (1872), L. R. 7 Ch. 719; *Stretton* v. *Ashmall* (1854), 3 Drew. 9; *Smethurst* v. *Hastings* (1885), 30 Ch. D. 490; *Stickney* v. *Sewell*, *supra*; *Re Olive*, *Olive* v. *Westerman* (1886), 34 Ch. D. 70. As to cottage property, see *Re Salmon*, *Priest* v. *Uppleby* (1889), 42 Ch. D. 351; but since the Act of 1888, *Re Solomon*, *Nore* v. *Meyer*, [1912] 1 Ch. 261.

(*n*) *Stretton* v. *Ashmall*, *supra*; *Royds* v. *Royds* (1851), 14 Beav. 54; *Walcott* v. *Lyons* (1886), 54 L. T. 786.

(*o*) *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727.

(*p*) *Re Godfrey*, *Godfrey* v. *Faulkner*, *supra*; *Re Olive*, *Olive* v. *Westerman*, *supra*.

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Precautions as to value prescribed by Trustee Act, 1893.

By s. 8 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which applies to all mortgages made since December 24th, 1888, the duty of a trustee under such circumstances is considerably lightened. By that section it is enacted that—

"(1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer (*q*) instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

Digest of the precautions as to value now to be observed.

It will be seen, therefore, that the Act makes a very considerable alteration in the law; and it is apprehended that, in future, a trustee (*r*) advancing trust money on mortgage will be safe if he observes the following particulars, viz.:

(1) He must act on the valuation and report of a surveyor or valuer; not necessarily a local one.

(2) He must have reasonable grounds for believing the surveyor or valuer to be an able practical man. For this purpose it is apprehended that the trustee must still exercise his own judgment, and not trust blindly to the nomination of his solicitor without inquiry; and still less to the solicitor of the mortgagor (*s*).

(3) The surveyor must not be the surveyor of the mortgagor in the matter. He must be instructed and employed independently of the mortgagor (*t*). Nor must his fee be paid by the mortgagor nor be dependent on the mortgage going through (*u*).

(4) The surveyor must be instructed by the trustee to make the valuation *for him*; and it is apprehended that his instructions should state that the trustee

(*q*) The words "reasonably believed" do not refer to the words "instructed and employed" (*Re Walker, Walker* v. *Walker* (1890), 62 L. T. 449; *Re Somerset, Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.

(*r*) With regard to trustees for purposes of the Settled Land Acts investing on a particular mortgage by the direction of the tenant for life, the rule is somewhat modified. As to this, see *Re Hotham, Hotham* v. *Doughty*, [1902] 2 Ch. 575.

(*s*) *Per* PARKER, J., *Shaw* v. *Cates*, [1909] 1 Ch. 389; but *cf. Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261.

(*t*) *Shaw* v. *Cates, supra.*

(*u*) *Marquis of Salisbury* v. *Keymer* (1909), 25 T. L. R. 278; *Re Dive, Dive* v. *Roebuck*, [1909] 1 Ch. 328; *Shaw* v. *Cates, supra.*

requires a valuation *for the purpose of considering the advisability of investing trust funds* on the security of the property.

(5) The surveyor must not merely value the property, but must *advise the trustee that the property is a proper investment for the money proposed to be lent*; and he is not justified in advising an advance of two-thirds of the valuation if, having regard to the speculative nature of the property, such an advance would be hazardous (*v*). If, however, he does so advise, it has recently been held that the trustee will be safeguarded if he follows the advice (*v*).

(6) Where the report relates to several properties intended to be comprised in the mortgage it affords no protection, if the trustees only advance a less sum than was originally contemplated on some only of the properties (*v*).

(7) The trustee must not lend more than two-thirds of the surveyor's *valuation* even if the surveyor advises that a greater proportion may be advanced, but he may lend that much, irrespective of the tenure of the property, or the purposes for which it is used.

statutory precautions only relate to value, and not to the nature of the security.

It must, however, be borne in mind that the Act merely says that if the above precautions are taken a trustee shall not be liable for breach of trust by reason *only of the proportion* borne by the amount of the loan to the value of the property. Therefore it has always seemed to the author that a trustee would still be liable for advancing the money on property of a speculative character (such as a manufactory), and *a fortiori* on property of a wasting character (such as a brickfield (*w*), or a china clay field (*x*)); not on the ground that he advanced too large a sum (*y*), but that he ought not to have advanced trust money on such a security at all (*z*). But the dicta of PARKER, J., in *Shaw* v. *Cates* (*v*), and the decision of WARRINGTON, J., in *Re Solomon, Nore* v. *Meyer* (*v*), certainly appear to be inconsistent with this view as to property of *a merely speculative* character.

(*v*) *Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261, and see judgment of PARKER, J., *Shaw* v. *Cates*, [1909] 1 Ch. 389.

(*w*) *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727.

(*x*) *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536.

(*y*) *Palmer* v. *Emerson*, [1911] 1 Ch. 758.

(*z*) *Jones* v. *Julian* (1890), 25 L. R. Ir. 45. Consider *Re Walker, Walker* v. *Walker* (1890), 62 L. T. 449; and see particularly *Shaw* v. *Cates*, *supra*, where the matter was elaborately discussed by PARKER, J.; and *cf. Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261, where a trustee was held irresponsible for advancing money on mortgage of weekly cottage property on the faith of the report.

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If the requirements of s. 8 not complied with, the Act affords no protection.

However, if the surveyor's appointment or his report does not comply with the Act, the old law applies. As PARKER, J., said in *Shaw* v. *Cates* (*b*), "Section 8 of the Act merely protects trustees who, within certain limits and under certain circumstances, act on expert opinions as to the amount they may advance. It does not, as has been suggested, abrogate all distinction between agricultural land and houses or buildings used for trade in determining the margin of protection to be required by a prudent man, or indicate that a prudent man may, *primâ facie*, be content in all cases with a margin of one-third the value of the property. At most it suggests that the extra margin of protection beyond one-third the value depends on the particular circumstances of each case, and assumes that, whatever may be the nature of the property, the expert employed will give the matter his *bonâ fide* consideration, advising with a view to the security of the trust money, and not only in such a way as to protect the trustees from liability for breach of trust."

Duty of trustees with regard to title of property mortgaged to them.

But in addition to getting a legal first mortgage of property of a proper value, the trustee was formerly bound to see that the mortgagor had a good legal title free from incumbrances (other than rent-charges created under the Drainage Acts or the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114)). Here, again, the burden on the shoulders of a trustee has been lightened by s. 8 of the Trustee Act, 1893 (re-enacting s. 4 of the repealed Act of 1888), by which it is enacted that—

"(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

"(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title be such as a person acting with prudence and caution would have accepted.

"(4) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto on the twenty-fourth day of December one thousand eight hundred and eighty-eight."

Provisions of the mortgage deed.

The mortgage deed ought of course to contain all such clauses as are usual and proper; but a trustee is not, "in ordinary cases, guilty of negligence merely because he does not insist on having in the mortgage either (1) a clause pre-

(*b*) [1909] 1 Ch. 389.

cluding the mortgagor from granting occupation leases under s. 18 of the Conveyancing Act, 1881; or (2) a covenant by the mortgagor to keep the mortgaged hereditaments in repair" (*c*). Art. 48.

Lastly, trustees should not enter into any arrangement with the mortgagor for the continuance of the loan for a period of years (*d*); for they would thereby fetter themselves in the event of it being desirable (by reason of depreciation of the land or otherwise) to realise. Must not engage not to realise for a long period.

ART. 49.—*Duty of Trustee to see that he pays Trust Moneys to the Right Persons.*

(1) The responsibility of handing the trust property to the persons entitled, formerly fell upon the trustee; mistake (*e*) or fraud was no excuse. The court has now power to excuse such a mistake made honestly and reasonably (*f*); but, nevertheless, in cases of doubt the trustee should apply to the court for its direction (*g*).

(2) If, however, the person who is really entitled to trust property is not the beneficiary who appears on the face of the settlement (but some one who claims through him), and the trustees, having neither express nor constructive notice of such derivative title, pay upon the footing of the original title, they cannot be made to pay over again (*h*).

(3) On the other hand, if they have notice of the derivative title they cannot refuse to pay to the person entitled under it, on the ground that such title has been

(*c*) *Per* PARKER, J., *Shaw* v. *Cates*, [1909] 1 Ch. 389, at p. 408; but *cf. Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261.

(*d*) *Vicery* v. *Evans* (1863), 33 Beav. 376.

(*e*) *Re Hulkes, Powell* v. *Hulkes* (1886), 33 Ch. D. 552; as to fraud, see *Re Bennison, Cutler* v. *Boyd* (1889), 60 L. T. 859. See comments on this rule, p. 267, *supra*.

(*f*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3, as to which see *infra*, Art. 90.

(*g*) *Talbot* v. *Earl Radnor* (1834), 3 Myl. & K. 252; *Merlin* v. *Blagrave* (1858), 25 Beav. 125; *Ashby* v. *Blackwell* (1765), 2 Eden, 302; *Eares* v. *Hickson* (1861), 30 Beav. 136; *Sporle* v. *Burnaby* (1864), 10 Jur. (N. S.) 1142.

(*h*) *Cothay* v. *Sydenham* (1788), 2 Bro. C. C. 391; *Leslie* v. *Baillie* (1843), 2 Y. & Coll. C. C. 91; *Re Lord Southampton's Estate, Allen* v. *Lord Southampton* (1880), 16 Ch. D. 178.

Art. 49. improperly obtained and is liable to be set aside (*i*), unless it is on the face of it *primâ facie* voidable, or is an appointment under a power in the trust instrument which they suspect is a fraud on the power.

PARAGRAPH (1).

Forged authority.

Where a trustee made a payment to one who produced a forged authority from the beneficiary, the trustee and not the beneficiary had to bear the loss. For, as was said by Lord NORTHINGTON (*k*), "a trustee, whether he be a private person or a body corporate, must see to the reality of the authority empowering him to dispose of the trust money; for if the transfer is made without the authority of the owner, the act is a nullity."

False certificate.

So, again, trustees who paid over the trust fund to wrong persons, upon the faith of a forged marriage certificate, were made responsible for so much of the trust fund as could not be recovered from those who had wrongfully received it (*l*).

Honest and reasonable mistake.

The question whether an honest and reasonable mistake as to the nature of a forged document, or as to the construction of an obscure one, would now be excused under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), is discussed *infra*, Art. 90.

Mistake as to construction of settlement.

A trustee who, by mistake, pays the capital to the tenant for life, instead of investing it and paying him the income only, will in general have to make good the loss to the estate; although he will, as will be seen hereafter, be entitled to be recouped out of the life estate (*m*). And similarly, trustees who have distributed a trust fund upon what turns out to be an erroneous, although *bonâ fide*, construction of the trust instrument have always been held liable to refund the property distributed, together with interest thereon at four (probably now three) per cent. (*n*); and this notwithstanding that they have acted under the advice of counsel (*o*).

(*i*) *Devey* v. *Thornton* (1851), 9 Hare, at p. 231.

(*k*) *Ashby* v. *Blackwell* (1765), 2 Eden 302; but see *Re Smith, Smith* v. *Thompson* (1902), 71 L. J. Ch. 411.

(*l*) *Eaves* v. *Hickson* (1861), 30 Beav. 136; and see also *Bostock* v. *Floyer* (1865), L. R. 1 Eq. 26, and *Sutton* v. *Wilders* (1871), L. R. 12 Eq. 373.

(*m*) *Barratt* v. *Wyatt* (1862), 30 Beav. 442; *Davies* v. *Hodgson* (1858), 25 Beav. 177; *Griffiths* v. *Porter* (1858), 25 Beav. 236.

(*n*) *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389; and see also *Re Ward, Bemment* v. *Balls* (1878), 47 L. J. Ch. 781; and *Re Hulkes, Powell* v. *Hulkes* (1886), 33 Ch. D. 552.

(*o*) See *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373.

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Paying under power of attorney.

Formerly, a trustee who paid trust money to the attorney of a beneficiary was liable, if it turned out that the power was revoked by death of the beneficiary or otherwise. However, by s. 23 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting 22 & 23 Vict. c. 35, s. 26), it was enacted that—

"A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee."

PARAGRAPH (2).

Not bound to know of derivative title.

In *Leslie* v. *Baillie* (*p*), a testator who died, and whose will was proved in England, bequeathed a legacy to a married woman whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after the testator. After his decease, the executors of the testator paid the legacy to the widow. It was proved that, according to the Scotch law, the payment should have been made to the husband's personal representatives. It was, however, held that, in the absence of proof that the executors of the settlor knew the Scotch law on the subject, the payment to the widow was a good payment.

So where a solicitor for A. receives, and according to A.'s directions disposes of, the proceeds of property, without notice that in reality A. has settled the property, he is not liable to the beneficiaries (*q*).

Disputes between beneficial claimants.

Trustees are not bound to hand over the trust fund to the mortgagee of their beneficiary, where accounts are pending between the mortgagee and mortgagor (*r*).

Effect of not searching for notices of incumbrances.

On the other hand, a new trustee is liable to make good moneys paid by him *bonâ fide* to a beneficiary, if the papers relating to the trust comprise a notice of an incumbrance created by that beneficiary depriving him of the right to

(*p*) (1843), 2 Y. & Coll. C. C. 91; and see also *Re Cull's Trusts* (1875), L. R. 20 Eq. 561.

(*q*) *Williams* v. *Williams* (1881), 17 Ch. D. 437.

(*r*) *Hockey* v. *Western*, [1898] 1 Ch. 350.

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receive the money (*s*); and so is a trustee who dispenses with an investigation of the title of an alleged assign whose title is in fact bad (*t*). And this is none the less so if the alleged assign is the trustee's own solicitor (*t*); for if the trustee had acquainted himself, as he was bound to do, with the trust documents and papers, he would have found what the true state of the case was (*s*). Where, however, no amount of search would have disclosed the notice, the trustee would of course not be liable, as his liability entirely depends upon his shirking the duty of search, which the law casts upon him (*s*).

Trustee not entitled to the deed of assignment.

Where a person claims as the assign of a *cestui que trust*, it might be thought that the trustee would, on payment be entitled to the custody of the deed of assignment as evidence of authority for paying the assign. But this is not so (*u*), although it would seem that he is entitled to the statutory acknowledgment for production and undertaking for safe custody (*u*), and he would be wise also to take an attested copy. As SWINFEN EADY, J., said in *Re Palmer, Lancashire and Yorkshire Reversionary Interest Co.* v. *Burke* (*u*), "Where money is paid by a trustee to a person who receives it under a power of attorney, the trustee cannot claim that the power of attorney should be given up to him. It was said that the trustee would be in a very unfortunate position if an action were brought against him for the fund, and he had not the deeds: but it might equally be said that the company (the assigns) would be in a very unfortunate position if they handed over the deeds and the assignor disputed the assignment and brought an action against the company to set it aside."

PARAGRAPH (3).

Question whether trustee bound to investigate where he merely suspects *mala fides* by assignee of beneficiary.

The question of how far a trustee can refuse to pay an assign where he suspects unfair dealing, is by no means easy.

It appears to be well settled, that, where his beneficiary is dead, he cannot refuse to pay his personal representative on

(*s*) *Hallows* v. *Lloyd* (1888), 39 Ch. D. 686. This is so even where the trustees have a discretion to pay the income to or for the benefit of the assignor, "his wife or children," if they do in fact pay it to the assignor: *Re Neil, Hemming* v. *Neil* (1890), 62 L. T. 649; *Lord* v. *Bunn* (1843), 2 Y. & Coll. C. C. 98. See also *Burrowes* v. *Lock* (1805), 10 Ves. 470, and *Re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443.

(*t*) *Davis* v. *Hutchings*, [1907] 1 Ch. 356.

(*u*) *Re Palmer, Lancashire and Yorkshire Reversionary Interest Co.* v. *Burke*, [1907] 1 Ch. 486.

the ground that he obtained probate or administration unfairly (*x*). It is for other persons interested to take action in such a case, and not the trustee.

The same principle also seems to apply to an assignment *inter vivos*. It is not for the trustee to question its validity if the assignor does not do so. If the deed is not a forgery, it stands good until it is cancelled by the court, and it cannot be cancelled by the court at the instance of the trustee (*x*). This class of cases would, it would seem, cover assignments and mortgages by reversioners where the trustee may suspect unfair dealing or oppression.

Bound to investigate where instrument is *primâ facie* invalid.

But the problem becomes much more difficult when we approach transactions which are either (1) *primâ facie* invalid, or (2) appointments in the exercise of powers contained in the trust instrument.

(1) With regard to instruments *primâ facie* invalid, one may take, as typical, an assignment, whether voluntary or for value, by a beneficiary (especially a female or youthful one) to one of the trustees. It is apprehended that in such a case the other trustees would not only be justified, but bound, to refuse payment to their co-trustee without an order of the court; for *res ipsa loquitur*, and the deed, on the face of it, cannot be supported without some outside evidence that the parties were at arms' length, and that no unfair advantage was taken by the assign. Anyhow, it is scarcely open to doubt that in such a case the co-trustee would be justified in issuing an originating summons for the direction of the court.

Where trustee suspects a fraud on a power.

(2) Where the trustee has reasonable ground for suspicion that an appointment is a fraud on a power in the trust instrument, he certainly ought not to pay without the direction of the court. For, as pointed out by FARWELL, L.J., in *Cloutte* v. *Storey* (*y*), an appointee can only claim an equitable right if the appointment is valid. If it is not valid, it passes nothing, and the property remains the property of the person who takes in default of appointment. It is therefore the duty of a trustee to satisfy himself that an alleged appointment is valid before acting on it; and if

(*x*) *Devey* v. *Thornton* (1851), 9 Hare, at p. 226.

(*y*) [1911] 1 Ch. 18, at pp. 32 and 33; and see *Duke of Portland* v. *Topham* (1864), 11 H. L. Cas. 32; and see order thereon, Seton on Judgments (ed. 6), p. 1742; and see also *Hopkins* v. *Myall* (1830), 2 Russ. & Myl. 86; *Cocker* v. *Quayle* (1830), 1 Russ. & Myl. 535; *Reid* v. *Thompson* (1851), 2 Ir. Ch. R. 26.

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he has reasonable doubts, he is not only justified in acting but bound to act under the direction of the court (*z*). In the older cases it was held that, although it may be the duty of a trustee to make inquiry in such cases, yet, if he cannot prove *mala fides*, the mere possibility of fraud will not justify his refusal to act on the appointment, and that in such cases he will have to pay the costs of a suit to compel him to act upon the appointment (*a*). No doubt that was so; but it is conceived that the cheap and summary procedure of modern days, would probably be held to justify a trustee in applying to the court for directions in a case where there was strong suspicion but no proof.

The reader may perhaps ask: if a fraudulent appointment is futile and void *ab initio*, is not a trustee who acts upon it, although without knowledge of the fraud, paying to the wrong beneficiary, and if so, does he not come within paragraph (1) of the above rule? It is apprehended that this would have been so before the Judicial Trustee Act, 1896, as it is difficult to distinguish between a payment made on the faith of a fraudulent certificate of marriage, and one made on the faith of an appointment which turns out to be fraudulent. But there can be no reasonable doubt that since the above Act, a trustee who innocently, and reasonably, assumed the *bona fides* of an appointment would be excused (*b*).

ART. 50.—*Duty of Trustee not to Delegate his Duties or Powers.*

(1) A trustee must not delegate his duties or powers (or *a fortiori* the receipt of trust moneys) either to a stranger (*c*) or to his co-trustee (*d*), save only

(*z*) See *Hannah* v. *Hodgson* (1861), 30 Beav. 19; *King* v. *King* (1857), 1 De G. & J. 663.

(*a*) See *Firmin* v. *Pulham* (1848), 2 De G. & Sm. 99; *Campbell* v. *Home* (1842), 1 Y. & Coll. C. C. 664.

(*b*) See *Re Smith, Smith* v. *Thompson* (1902), 71 L. J. Ch. 411, and Art. 90, *infra*.

(*c*) *Adams* v. *Clifton* (1826), 1 Russ. 297; *Chambers* v. *Minchin* (1802), 7 Ves. 186; *Wood* v. *Weightman* (1872), L. R. 13 Eq. 434; *Re Bellamy and Metropolitan Board of Works* (1883), 24 Ch. D. 387.

(*d*) *Langford* v. *Gascoyne* (1805), 11 Ves. 333; *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490; *Cowell* v. *Gatcombe* (1859), 27 Beav. 568; *Eaves* v. *Hickson* (1861), 30 Beav. 136; *Re Flower and Metropolitan Board of Works* (1884), 27 Ch. D. 592.

(a) where authorised by the settlement (*e*), or by statute (*f*); Art. 50.

(b) where obliged to do so from necessity, acting conformably to the common usage of mankind, and as prudently as if acting for himself (*g*), and the agent is employed in the ordinary scope of his particular business (*h*);

(c) where the delegated act is merely ministerial, and involves no personal discretion (*i*).

(2) But even where a trustee may safely permit another to receive trust property, he will not be justified in allowing it to remain in such other person's custody without due inquiry (*k*) for a longer period than the circumstances of the case require (*l*).

PARAGRAPH (1).

This rule is founded on the maxim *delegatus non potest delegare*. It is therefore an invariable rule that, even in cases where a trustee may employ an agent, he must still exercise his own judgment on every question, and must not give the agent *carte blanche* to do what he may think fit (*m*). General principle.

The general principle as to the impropriety of delegating fiduciary duties and powers has been modified, both by judicial decisions and by statute. The Act 22 & 23 Vict. c. 35, s. 31 (now repealed and re-enacted by s. 24 of the Trustee Act, 1893), enacted that—

"a trustee shall (without prejudice to the provisions of the instrument, if any, creating the trust) be chargeable only for money and securities actually received by him, notwithstanding his signing any receipt for the sake of conformity, and shall be accountable only for his own acts, receipts, neglects, or defaults, *and not for those of any other trustee, nor for*

(*e*) *Kilbee* v. *Sneyd* (1828), 2 Moll. 186; *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 17 (3).

(*g*) *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; *Ex parte Belchier*, *Ex parte Parsons* (1754), Ambl. 218; *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490; *Benett* v. *Wyndham* (1862), 4 De G. F. & J. 259.

(*h*) *Fry* v. *Tapson* (1884), 28 Ch. D. 268.

(*i*) Farwell Pow. (2nd. Ed.) 358, 360.

(*k*) *Carruthers* v. *Carruthers*, [1896] A. C. 659.

(*l*) *Brice* v. *Stokes* (1805), 11 Ves. 319, 2 Wh. & Tu. Lead. Cas. (7th ed.) 633; *Gregory* v. *Gregory* (1836), 2 Y. & Coll. Ex. Eq. 313; *Re Fryer*, *Martindale* v. *Picquot* (1857), 3 Kay. & J. 317; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*m*) See *Re Weall*, *Andrews* v. *Weall* (1889), 42 Ch. D. 674.

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any banker, broker, or other person with whom any trust moneys or securities may be deposited."

Effect of statutory modification.

This statute, however (as was pointed out by Lord SELBORNE, in the leading case of *Speight* v. *Gaunt* (*n*)), does not authorise a trustee, at his own mere will and pleasure, to delegate the execution of the trust and the custody of the trust moneys to strangers, in the absence of a moral necessity from the usage of mankind for the employment of such an agency. Indeed, the only effect of the section appears to be to shift the onus of proof from the trustee to the beneficiaries; so that whereas formerly it lay upon a trustee whose conduct was impugned to prove that he had acted from necessity according to ordinary business usage, it now lies on the beneficiaries, who make a charge of breach of trust, to prove that the trustee did not act from necessity or conformably to the universal custom (*o*).

Opinion of KEKEWICH, J., as to trustee's liability for his agents.

The question was treated with great lucidity by KEKEWICH, J., in the case of *Re Weall, Andrews* v. *Weall* (*p*), where his lordship said: "Consider for a moment the position of that special agent called a trustee as regards the position of sub-agents. He certainly has the right to appoint them, if and so far as the work of the trust reasonably requires. For instance, he may appoint a broker to make or realise investments, or a solicitor to do legal business: and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of *Speight* v. *Gaunt* (*q*) reasonableness: and reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but, so long as he selects persons properly qualified, he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is *his* conclusion—that is the outcome of such consideration as might reasonably be expected to be given to a like matter, by a man of ordinary prudence, guided by such

(*n*) (1883) 9 App. Cas. 1.
(*o*) See *Re Brier, Brier* v. *Evison* (1884), 26 Ch. D. 238.
(*p*) (1889) 42 Ch. D. 674.
(*q*) (1883) 9 App. Cas. 1.

rules and arguments as generally guide such a man in his own affairs."

Trustee may consult his beneficiaries.

It must also be pointed out, that although trustees must always exercise their own judgment, and not surrender it to agents and, *a fortiori*, not to beneficiaries, yet they are not debarred from inquiring what are the wishes and opinions of any of the parties interested. As Lord SELBORNE said in *Fraser* v. *Murdoch* (*r*): "In this case, I find no indication of an improper purpose. . . . It would be extremely dangerous to hold that trustees, having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right in the first instance to direct attention."

Must not leave trust business entirely to co-trustee.

Nevertheless, although a trustee may listen to the opinions and wishes of others, he must exercise his own judgment. Thus a trustee for sale of ordinary property, who leaves the whole conduct of the sale to his co-trustee, cannot shield himself from responsibility for the latter's negligence by saying that he left the matter entirely in his hands (*s*). For the settlor has entrusted the trust property and its management to all the trustees, and the beneficiaries are entitled to the benefit of their collective wisdom and experience (*t*).

Should not associate a stranger in the management.

Conversely, a trustee must not associate with himself another person (who is not one of the trustees) in the management of the trust estate. For the settlor has trusted him, and not the other person; and by allowing the latter to have the joint control of the property, the trustee puts it out of his own power to deal with it promptly and effectually in case of necessity (*u*).

Choice of advisers.

So, again, where trust property has to be valued for the purposes of sale, or property offered to trustees as a security for trust money has to be valued, or trust money has to be invested, the trustees must themselves choose the valuer or broker, and must not delegate that duty to their solicitors, nor even to one of themselves (*v*). No doubt trustees can

(*r*) (1881) 6 App. Cas. 855.

(*s*) *Oliver* v. *Court* (1820), 8 Pr. 127; *Re Chertsey Market* (1819), 6 Pr. 261; *Hardwick* v. *Mynd* (1792), 1 Anst. 109; *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*t*) See *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121.

(*u*) *Salway* v. *Salway* (1831), 2 Russ. & Myl. 215; *White* v. *Baugh* (1835), 3 Cl. & Fin. 44. As to permitting their solicitor or one of themselves to have the custody of bearer bonds, see *infra*, p. 304.

(*v*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

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employ a solicitor for legal matters which the trustee is not competent to undertake, for that is *necessary*; but the choice of a broker or valuer is not properly the business of solicitors, but is a matter on which a trustee should exercise his own judgment (*x*). Of course, it must be understood that this does not preclude a trustee from asking advice or information as to the character of a broker, valuer, or other necessary agent, or from asking his solicitors to submit the names of such. All that is meant is that he must judge for himself on the facts reported to him to guide his choice, and must not delegate the duty of choosing the agent either to his solicitors or to any one else. In any case he should not choose an "outside" broker (*y*).

Power to lease, sell, etc.

A power of leasing cannot be delegated, for in its exercise much judgment is required. The fitness and responsibility of the lessee, the adequacy of the rent, the length of the term to be granted, and the nature of the covenants, stipulations, and conditions which the lease should contain, are all matters requiring knowledge and prudence (*z*). On similar grounds, a trustee cannot delegate (as, for instance, by power of attorney) the execution of a trust or power to sell property. For the settlor has placed confidence in his discretion as to price and conditions, and it is a breach of that confidence to pitch-fork the entire business on to another person, without retaining any control or authority over it (*a*). On the other hand, a trustee may appoint an attorney merely to pass the legal estate, as such an act involves no discretion (*b*). So where trustees had power to elect a clergyman, it was held that they could not appoint proxies *to vote;* but when the choice was once made, they could appoint proxies for the purpose of signing the formal presentation (*c*). However, the rule yields to necessity, and trustees may appoint an attorney to act for them in a foreign country, even in matters involving judgment and discretion (*d*).

May employ agents where morally obliged to do so.

On the other hand, where the property is of a kind (such as stocks or shares) which, practically speaking, a trustee cannot personally sell, or which it would be distinctly contrary to the ordinary usage of mankind for him to sell personally, he may

(*x*) See *per* KAY, J., in *Fry* v. *Tapson* (1884), 28 Ch. D. 268.

(*y*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*z*) *Robson* v. *Flight* (1865), 4 De G. J. & S. 608.

(*a*) *Oliver* v. *Court* (1820), 8 Pr. 127; *Hardwick* v. *Mynd* (1792), 1 Anst. 109; *Hawkins* v. *Kemp* (1803), 3 East, 410.

(*b*) *Re Hetling and Merton*, [1893] 3 Ch. 269.

(*c*) *Att.-Gen.* v. *Scott* (1750), 1 Ves. Sen. 413.

(*d*) *Stuart* v. *Norton* (1860), 14 Moo. P. C. 17.

employ an agent or broker, so long as he acts as prudently as he would have done for himself in a like case (*e*). For where an investment of trust moneys is proper to be made upon securities which are purchased and sold upon the public exchanges, either in town or country, the employment of a broker (including a co-trustee who is a broker and is by the trust instrument authorised to act as such (*f*)), for the purpose of purchasing those securities and doing all things usually done by a broker which may be necessary for that purpose (*e.g.*, attending at the bank to accept transfer (*f*)), is *primâ facie* legitimate and proper. A trustee is not bound himself to undertake the business (for which he may be very ill-qualified) of seeking to obtain them in some other way; as, for example, by public advertisement or by private inquiry (*g*). Art. 50.

So trustees may appoint stewards, bailiffs, workmen and other agents of the like kind; for there is a moral necessity for them to do so (*h*). And on the same ground, they may employ solicitors, valuers (*i*), auctioneers, and other skilled persons to do acts which they themselves are not competent to do. They may employ an accountant where their accounts are of a complicated nature, and where the occasion is one in which, according to the usage of business, a prudent man acting for himself would employ such a person (*k*). But of course trustees are not entitled to have their books of account of income and expenditure regularly kept by an accountant, merely in order to save themselves trouble. As Lord HALSBURY said in *Learoyd* v. *Whiteley* (*l*), "I think it is quite clear, that a trustee is entitled to rely upon skilled persons in matters in which he cannot be expected to be experienced. He may perhaps rely upon a lawyer on some matters of law, and in this case I do not deny that he would be entitled to rely upon a valuer upon a pure question of valuation. But unless one examines with reference to what question the skilled person gives advice, it is possible to confuse the reliance which may be properly placed upon the skill of a skilled person with the judgment which the trustee himself

May employ skilled persons.

Not entitled to have accounts kept by accountants.

(*e*) *Ex parte Belchier*, *Ex parte Parsons* (1754), Ambl. 218.

(*f*) *Shepherd* v. *Harris*, [1905] 2 Ch. 310.

(*g*) *Per* Lord SELBORNE, L.C., *Speight* v. *Gaunt* (1883), 9 App. Cas. 1.

(*h*) *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727.

(*i*) With regard to valuers, a trustee is now expressly authorised to act on a valuer's report and advice as to the value of property offered as a security for trust funds (Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8, see *supra*, p. 284).

(*k*) See *New* v. *Jones* (1833), 1 Mac. & G. 668, n.; *Henderson* v. *M'Iver* (1818), 3 Madd. 275.

(*l*) (1887) 12 App. Cas. 727, at p. 731.

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is bound to form on the subject of the performance of his trust. I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence."

Whether liable for negligence of solicitor.

Lord HALSBURY's phrase, "he may, *perhaps*, rely upon a lawyer in some matters of law," referred, it is conceived, to the doubt thrown upon that proposition by the decision of the late Lord ROMILLY in *Hopgood* v. *Parkin* (*m*). In this the learned judge carried the liability of trustees for the acts and defaults of their agents to a height which, it is with humility suggested, could not be justified, either on principle or authority. In that case, trustees, having trust funds to lend on mortgage, employed a solicitor to investigate the mortgagor's title. Owing to the solicitor's negligence in failing to make proper inquiries as to previous incumbrances, the trust moneys advanced on the mortgage were to a large extent lost; and his lordship held that the trustees must replace them. But it is difficult to understand upon what grounds the learned judge based his opinion. The trustees were right in investing on mortgage: they were right in employing a skilled person to investigate the real value of the security; indeed, it is apprehended, from the remarks of the late Sir GEORGE JESSEL, M.R., in *Re Cooper and Allen to Harlech's Contract* (*n*), that it was the *duty* of the trustees to employ a skilled person. In addition to which, there was a moral necessity for them to employ a skilled agent to investigate the title, and they were but acting conformably to the general "usage of mankind, and as prudently for the trust as for themselves, and according to the usage of business" (*o*). If, then, they were right in employing the solicitor to investigate the title for them, upon what possible ground could they be held responsible for their agent's default? As Lord HARDWICKE said, in *Ex parte Belchier* (*p*), if the defendant "is chargeable in this case, no man in his senses would act. . . . This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own"; and his lord-

(*m*) (1870) L. R. 11 Eq. 74.
(*n*) (1876) 4 Ch. D. at p. 815.
(*o*) *Per* Lord HARDWICKE, *Ex parte Belchier, Ex parte Parsons* (1754), Ambl. 218; and to the same effect, Lord SELBORNE in *Speight* v. *Gaunt* (1883), 9 App. Cas. 1.
(*p*) *Supra.*

ship then proceeded to lay down the rule as above stated. It is with great respect submitted that Lord ROMILLY confused the case with those in which it has been held that a trustee is responsible for a *breach of trust* which he has committed *bonâ fide* and under skilled advice. The distinction is, however, clear. The trustees had not *done* anything wrong. They had not committed any breach of trust at the instance of another. They had merely lent money through the medium of an agency, which they were entitled, and indeed bound, to employ, on the ground of moral necessity; and they ought therefore to have been discharged from the loss. Had there been a distinct breach of some duty which the settlor had cast upon the trustees, then, although they might have taken and followed the best advice procurable, they would, no doubt, have been properly held responsible. But here, the only possible breach of duty was the *negligence* of an agent; and, as has been said above, a trustee is only responsible for his agent where he has improperly employed one. However, since the above was written, LINDLEY, L.J., in *Re Speight, Speight* v. *Gaunt* (*q*), has expressly dissented from *Hopgood* v. *Parkin*, and, indeed, it seems to be quite inconsistent with the judgments of the learned Lords of Appeal in that case (*r*). Art. 50.

Interpretation of instrument.

But if a trustee is justified in acting on the advice of his solicitor in matters of law which he cannot be expected to determine for himself (such as the title to real estate), it is clear that he cannot rely on his solicitor or his counsel with regard to the interpretation of the trust instrument, and that, therefore, if he pays the trust fund to the wrong persons under a mistake of this kind he will be liable (*s*). As to how far (if at all) that would induce the court to excuse such a breach of trust the reader is referred to Art. 90. *infra*.

When a trustee justified in employing an agent may trust him with trust money.

Even where a trustee is justified in delegating the sale or purchase of property to other persons (such as brokers, solicitors, and the like), it does not necessarily follow that he is justified in giving them the control of the purchase-money. That question must be regarded as a separate and distinct one, to be solved on its own merits, but by the application of the same principle, viz., whether or not there is a moral necessity or a conformity to common usage.

(*q*) (1883) 22 Ch. D. at p. 761; and see *per* PEARSON, J., in *Re Pearson, Oxley* v. *Scarth* (1884), 51 L. T. 692; *Re Weall, Andrews* v. *Weall* (1889), 42 Ch. D. 674.

(*r*) (1883) 9 App. Cas. 1.

(*s*) See *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373.

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Thus, where a trustee handed money to a solicitor for the purpose of re-investment, and the solicitor professed to have invested it, but in reality had used it for his own purposes, and himself paid interest on it for some years until his death, it was held that the trustee was liable (*t*); for he ought not to have entrusted the money to a solicitor when there was no necessity.

Statutory authority to entrust trust bond to solicitor or banker.

On similar grounds, it was formerly held, in *Re Bellamy and Metropolitan Board of Works* (*u*), that trustees were not entitled to authorise their solicitor to receive purchase-money payable to them; notwithstanding s. 56 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). However, by s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting s. 2 of the Trustee Act, 1888), it is enacted as follows:

"(1) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in section 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

"(2) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

"(3) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

"(4) This section applies only where the money or valuable consideration or property is received after the 24th day of December, one thousand eight hundred and eighty-eight.

"(5) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

(*t*) *Bostock* v. *Floyer* (1865), L. R. 1 Eq. 26; *Rowland* v. *Witherden* (1851), 3 Mac. & G. 568; *Hanbury* v. *Kirkland* (1829), 3 Sim. 265; *Re Dewar*, *Dewar* v. *Brooke* (1885), 33 W. R. 497. But see *Re Bird*, *Oriental Commercial Bank* v. *Savin* (1873), L. R. 16 Eq. 203, *contra*, a decision which, it is conceived, cannot be supported.

(*u*) (1883) 24 Ch. D. 387.

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Criticisms on the above Section.

The section is not, perhaps, so happily expressed as it might be. For instance, can a trustee authorise his solicitor to receive consideration money, except by permitting him to have the custody of the deed, etc.? And where the receipt is indorsed on a deed, and not contained in the body thereof, (*e.g.*, where property is purchased out of funds in court), can that deed be said to be "a deed *containing* any such receipt as is referred to in s. 56 of the Conveyancing and Law of Property Act, 1881"?

The first of these queries is, it is submitted, by no means hypercritical; and in cases where any money or property is receivable by a trustee on any occasion where the execution of a deed by the trustee is not necessary (as, for example, the payment of a legacy by executors to the trustees of the legatee's marriage settlement), considerable doubt must exist as to whether the payment can be properly made to the trustee's solicitor under this sub-section, even although the solicitor be expressly authorised by the trustee to receive it. This view receives some support from the provisions contained in sub-s. (2), which expressly authorise a trustee to appoint a solicitor his agent to receive policy moneys *by permitting him to have the custody of and to produce the policy with a receipt signed by the trustee.* "Policy money" would certainly fall within the first sub-section as "money receivable by such trustee." If, therefore, under sub-s. (1), the trustee could appoint a solicitor in any other way than that indicated, there would have been no necessity for expressly authorising (by sub-s. (2)) a trustee to appoint a solicitor to be his agent to receive and give a discharge for policy moneys; nor for declaring that no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making an appointment of a solicitor for *that* purpose. Lastly in a recent case, PARKER, J., assumed that "it is only by permitting the solicitor to have the custody of the deed that the statutory authority is conferred" (*x*).

With regard to the second query, it is probable that the court would consider an indorsed receipt as equivalent to a receipt contained in the deed on which it is indorsed, within the meaning of the sub-section.

Query whether authority revoked by death of one of several trustees.

Whether the authority conferred on a solicitor or banker by the custody of such a deed is revoked by the death of one of several trustees seems to be a moot point (*x*). It is also a moot point whether the statute authorises a trustee to accept purchase or mortgage money by instalments (*x*).

(*x*) *Re Sheppard, De Brimont* v. *Harvey*, [1911] 1 Ch. 50, 59.

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It will be perceived that sub-s. (1) does not authorise a trustee to appoint any one to receive money, valuable consideration, or property, *except a solicitor*. Consequently, the decision in *Re Flower and Metropolitan Board of Works* (*y*), that one of several trustees cannot in general be authorised by his co-trustees to receive and give a good receipt for trust moneys, still holds good. It is apprehended, however, that where one of the trustees is a solicitor, the money may be paid to him on production of a deed containing a receipt; notwithstanding that he may not be acting as the solicitor to the trustees. As to the question dealt with by sub-s. (3) of s. 17 of the Act, viz., the liability of a trustee for permitting money properly receivable by a solicitor or banker under the section to remain in his hands, see *infra* under paragraph (2), p. 304.

Entrusting trust money to stock-broker.

Apart from statutory authority, where there is a moral necessity to entrust the agent with the money, a trustee will be justified in doing so, as was decided by the House of Lords in the important case of *Speight* v. *Gaunt* (*z*). There, the respondent, Isaac Gaunt, being acting trustee under the will of John Speight, a stuff manufacturer at Bradford, wished to invest the sum of £15,275, part of the trust estate, in the securities of municipal corporations in Yorkshire. For that purpose he employed a stockbroker, named Cooke, to buy the stock for him. Cooke having falsely represented that he had purchased the stock, the respondent gave him cheques for the amount, which Cooke embezzled. The beneficiaries then sought to make the trustee liable for the sum embezzled by Cooke. In giving judgment, exonerating the trustee from liability, the Earl of SELBORNE said: "In the early case of of *Ex parte Belchier*, before Lord HARDWICKE (*a*), it was determined, that trustees are not bound personally to transact such business connected with, or arising out of, the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents. Also that when, according to the usual and regular course of such business, moneys, receivable or payable, ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other

(*y*) (1884) 27 Ch. D. 592.
(*z*) (1883) 9 App. Cas. 1.
(*a*) (1754) Ambl. 218.

misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss." His lordship, after discussing the question whether it was proper to employ a broker at all, which he answered in the affirmative, continued: "The next subject of inquiry is, whether it was a just and proper consequence of that employment, according to the principle of *Ex parte Belchier*, that the trust money should pass through his hands. . . . The whole evidence satisfies me that the usual and regular course of business on the London Exchange is, for the money, under such circumstances, to pass through the broker's hands." Their lordships, therefore, exonerated the trustee from responsibility. Art. 50.

May employ a debt collector.

So, again, where there are numerous small debts to be collected, it cannot be expected of executors or trustees that they should personally call on each debtor. Consequently, if, under such circumstances, they employ, in the usual course of business, a debt collector, and the money collected is lost by reason of the collector's insolvency, the trustees are *primâ facie* not responsible (*b*).

Estate management.

So where trustees are justified either by express authority or by the nature of the property in appointing an agent for the general management of great estates, the mere fact of allowing balances to remain against him at the annual settlement of accounts, where it is impossible to include his whole receipts and payments for the year, is not a breach of trust or such culpable negligence as would make the trustees liable for the ultimate balance due from him to the trust; although it would be different if they assented to larger balances than were necessary remaining in his hands (*c*). Whether, however, a trustee is justified in entrusting his solicitor with trust money for the payment of duties seems to be open to doubt, but it would seem that he is (*d*).

Remitting money through banker.

On the ground of conformity to universal usage, trustees may remit money through the medium of a respectable bank as being the most convenient and the safest mode (*e*); but they should pay the money into the bank *as* trustees, and *eo nomine* (*f*).

(*b*) *Re Brier, Brier* v. *Evison* (1884), 26 Ch. D. 238.

(*c*) *Home* v. *Pringle* (1841), 8 Cl. & Fin. 264.

(*d*) See *Re Mackay, Griessemann* v. *Carr*, [1911] 1 Ch. 300, at p. 308.

(*e*) *Knight* v. *Earl of Plymouth* (1747), 1 Dick. 120.

(*f*) *Wren* v. *Kirton* (1805), 11 Ves. 377.

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Leaving money in hands of auctioneer.

On similar principles (viz., conformity to ordinary business usage), a trustee may allow an auctioneer who is selling the trust property to receive the deposit money.

Custody of securities.

It is obvious that several trustees cannot all have the physical custody of the trust securities. This is of no great importance where they have the legal estate in lands, or where they are holders of registered stocks; and in such cases the court will not order one trustee, who has possession of such securities, to deposit them with bankers in the joint names of all (*g*). But where the securities are "bearer securities," the matter becomes of importance. In such cases they should not leave them either with their solicitor (*h*) or with one of themselves (*i*), but should place them in a box in the custody of their banker (*k*).

Joining with others in a sale.

On the principles enunciated in the article now under consideration, it has been held, that if "trustees for sale join with any other person in a joint sale of the trust property and any other property, whether that person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them; and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, when they do join with other people the purchase-money must be apportioned before the completion of the purchase, and must be paid by the purchaser, the apportioned part coming to the trustees to be paid to them" (*l*), or, now, to their solicitor, under s. 17 of the Trustee Act, 1893 (*m*).

PARAGRAPH (2).

Permitting purchase-moneys for trust property to remain in the hands of solicitor to the trust.

Although s. 17 of the Trustee Act, 1893, allows trustees to delegate the receipt of purchase-money to their solicitor or banker, sub-s. (3) expressly retains the former law prohibiting trustees from permitting the solicitor or banker to retain the money longer than is reasonably necessary (*n*). On this provision it has been recently decided that to make the trustee responsible the circumstances must be such that the trustee

(*g*) *Re Sisson's Trusts, Jones* v. *Trappes*, [1903] 1 Ch. 262.

(*h*) *Field* v. *Field*, [1894] 1 Ch. 425.

(*i*) *Candler* v. *Tillett* (1855), 22 Beav. 257; *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.

(*k*) *Re De Pothonier, Dent* v. *De Pothonier*, [1900] 2 Ch. 529.

(*l*) *Per* JESSEL, M.R., *Re Cooper and Allen to Harlech's Contract* (1876), 4 Ch. D. at p. 815.

(*m*) *Supra*, p. 300.

(*n*) See words of sub. sec. (3), *supra*, p. 300.

knew or ought to have known of the receipt of the money by the solicitor or banker (*o*). Art. 50.

As stated above, trustees are justified in allowing money to be paid to an auctioneer; but they must not allow it to remain in the auctioneer's hands (or in the hands of any agent) for an unreasonable time (*p*). Leaving money in auctioneer's hands.

So, again, a trustee may, and indeed should, deposit trust moneys in a respectable bank pending investment; and he will not be liable for the failure of the bank, unless he left the money there for an unnecessarily long period. For it is according to the common usage of mankind to make use of banks for the safe custody of money (*q*). But a trustee will be liable where he has *unnecessarily* left trust moneys in the hands of a banker who fails, when he ought to have invested them; or paid them to new trustees (*r*), or to the beneficiaries (*s*); or where he has paid money to a banker or broker for investment, and has neglected for some time to make inquiries as to such investment (*t*); and the *usual* clause indemnifying him against the acts or defaults of others will not protect him (*u*). In one case, KAY, J., held that six months was the maximum time for which trustees should deposit money in a bank; and that if at the expiration of that period no other investment was available, the trustees ought to invest in consols. In the case in question the trustees had kept the money on deposit for fourteen months, and were held responsible for the loss caused by the failure of the bank (*x*). Entrusting moneys to a banker.

ART. 51.—*Duty of Trustees to act jointly where more than one.*

Where there are more trustees than one, all must join in the execution of the trust (*y*), save only—

(*o*) *Re Sheppard, De Brimont* v. *Harvey*, [1911] 1 Ch. 50.

(*p*) *Edmonds* v. *Peake* (1843), 7 Beav. 239; *Wyman* v. *Paterson*, [1900] A. C. 271.

(*q*) *Johnson* v. *Newton* (1853), 11 Hare, 160; *Fenwick* v. *Clarke* (1862), 4 De G. F. and J. 240; and *per* Lord HARDWICKE, *Ex parte Belchier* (1754), Ambl. 219; *Adams* v. *Claxton* (1801), 6 Ves. 226.

(*r*) *Lunham* v. *Blundell* (1857), 27 L. J. Ch. 179.

(*s*) *Macdonnell* v. *Harding* (1834), 7 Sim. 178.

(*t*) *Challen* v. *Shippam* (1845), 4 Hare, 555; *Rehden* v. *Wesley* (1861), 29 Beav. 213; *Matthews* v. *Brise* (1843), 6 Beav. 239 (affirmed (1845), 15 L. J. Ch. 39); *Moyle* v. *Moyle* (1831), 2 Russ. & Myl. 710; *Bacon* v. *Clark* (1837), 3 Myl. & Cr. 294.

(*u*) *Rehden* v. *Wesley*, *supra*.

(*x*) *Cann* v. *Cann* (1884), 51 L. T. 770; and to same effect, *Darke* v. *Martyn* (1839), 1 Beav. 525.

(*y*) *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121;

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(a) where the settlement or a competent court otherwise directs;
(b) as to the receipt of income (*z*);
(c) as to such matters as can be lawfully delegated under Art. 50.

This article is a corollary of Art. 50. For, if trustees cannot delegate their duties, it follows that they must all personally perform those duties, and not appoint one of themselves to manage the business of the trust. It is not unusual to find one of several trustees spoken of as the "acting trustee," meaning the trustee who personally interests himself in the trust affairs, and whose decisions are merely indorsed by his co-trustees. The court, however, does not recognise any such distinction; for the settlor has trusted *all* the trustees, and it behoves each and every of them to exercise his individual judgment and discretion on every matter, and not blindly to leave all questions to his co-trustees or co-trustee (*a*).

Cannot act by vote of majority.

Thus, the act of a majority of private trustees cannot bind a dissenting minority, nor the trust estate. In order to bind the trust estate the act must be the act of all (*b*). For instance, where there is a trust to sell real estate with a discretionary power to postpone the sale, the property must be sold within a reasonable time, unless the trustees are unanimously in favour of a postponement (*c*); and the same rule applies to a power to retain existing investments (*d*). At the same time, in such cases a trustee may defer to what he considers the better judgment of his co-trustee so long as he acts *bonâ fide*, although he does so with reluctance (*e*).

Must all join in receipt.

So, all the trustees must join in the receipt of money, unless,

Ex parte Griffin, Re Dixon (1826), 2 Gl. & J. 114; *Re Flower and Metropolitan Board of Works* (1884), 27 Ch. D. 592.

(*z*) As to shares and stocks, see Companies Act, 1862 (25 & 26 Vict. c. 89), Clause 1 of Table A., and same Act, s. 30; but consider *Binney* v. *Ince Hall Coal and Cannel Co.* (1866), 35 L. J. Ch. 363. As to rents, see *Townley* v. *Sherborne* (1834), Bridg. 35; 2 Wh. & Tu. Lead. Cas. (7th ed.) 629; *Gouldsworth* v. *Knights* (1843), 11 Mee. & W. 337; and *Gough* v. *Smith*, [1872] W. N. 18.

(*a*) *Munch* v. *Cockerell* (1839), 5 Myl. & Cr. 178.

(*b*) *Luke* v. *South Kensington Hotel Co.* (1879), 11 Ch. D. 121; *Swale* v. *Swale* (1856), 22 Beav. 584. It is otherwise, however, with regard to charitable trustees: see Charitable Trusts Act, 1869 (32 & 33 Vict. c. 110), s. 13. There is also an exception in the case of trustees of a manor with regard to enfranchisement, as to which, see Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 40.

(*c*) *Re Roth, Goldberger* v. *Roth* (1896), 74 L. T. 50.

(*d*) *Re Hilton, Gibbes* v. *Hale-Hinton*, [1909] 2 Ch. 548.

(*e*) *Re Schneider, Kirby* v. *Schneider* (1906), 22 T. L. R. 223.

of course, the settlement authorises one of them to give good receipts and discharges. For, as KAY, J., said in *Re Flower and Metropolitan Board of Works* (*f*), "The theory of every trust is, that the trustees shall not allow the trust moneys to get into the hands of any one of them, but that all shall exercise control over them. They must take care that they are in the hands of all, or invested in their names, or placed in a proper bank in their joint names. The reason why more than one trustee is appointed, is, that they shall take care that the moneys shall not get into the hands of one of them alone; and they have no right, as between themselves and the *cestuis que trusts* (unless the circumstances are such as to make it imperatively necessary to do so), to authorise one of themselves to receive the moneys" (*g*).

Investments should be in joint names.

All investments of trust moneys should be made in the joint names of the trustees, for otherwise one trustee would be able to realise and appropriate the money (*h*). But this must of course yield to necessity; as, for instance, where shares are specifically bequeathed to trustees upon certain trusts, and it is found that by the regulations of the company the shares can only be registered in the name of one trustee (*i*).

Income.

As a general rule, however, although trustees must join in the receipt of capital, it is permissible for them to allow one of their number to receive the income. Thus, in the case of rents, the trustees may delegate the collection to one of their number or to a rent collector. For it would be impossible for them all to collect the rents (*k*). But if there is any fear of misappropriation by the collecting trustee, the others should notify the tenants not to pay him again (*l*). A similar rule applies to the receipt of dividends on stocks or shares, from the necessity of the case; because the companies are not bound to recognise trusts, and always pay to the first of several joint holders (*m*).

(*f*) (1884) 27 Ch. D. 592.

(*g*) See also *Lee* v. *Sankey* (1873), L. R. 15 Eq. 204; *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490; and *Walker* v. *Symonds* (1818), 3 Swans. 1, at p. 61.

(*h*) *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591; *Swale* v. *Swale* (1856), 22 Beav. 584.

(*i*) *Consterdine* v. *Consterdine* (1862), 31 Beav. 330.

(*k*) *Townley* v. *Sherborne* (1634), Bridg. 35; 2 Wh. & Tu. Lead. Cas. (7th ed.) 629.

(*l*) *Gough* v. *Smith*, [1872] W. N. 18.

(*m*) See s. 30, Companies Act, 1862 (25 & 26 Vict. c. 89), and the Acts or charters of all the great companies. But the court may interfere in case of necessity (*Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29; *Binney* v. *Ince Hall Coal and Cannel Co.* (1866), 35 L. J. Ch. 363). As to cases in which the court will order dividends to be paid to one of several trustees, *cf. Re Pryor*

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Trustee joining in receipt for conformity.

In cases where, from necessity, a trustee permits his co-trustee to receive moneys owing to the estate (*e.g.*, where he permits him to collect rents), then, even though he join in the receipt for such moneys, and thereby acknowledge that he has received them, he will not be liable *if he can prove* (*n*) that he did not in fact receive them, that he only joined in the receipt for the sake of conformity (*o*), and that the delegation of the right to receive was necessary (*p*). For one of several trustees cannot alone give a good receipt so as to discharge the payer, unless expressly empowered to do so by the settlement; and all must, therefore, join (*q*). Consequently, although the receipt is an admission that the money came to his hands, "equity, which pursues truth, will decree according to the justice and verity of the fact" (*r*), and will hold that, under the circumstances (seeing that it is an act which the very nature of his office will not permit him to decline (*s*)), it does not amount to conclusive evidence that he actually received the money.

Must not permit co-trustee to retain trust money.

Even where a trustee may safely permit his co-trustee to receive trust moneys, he will, nevertheless, be liable if he permit him to retain them for a longer period than the circumstances of the case necessitate (*t*).

Must not permit co-trustee to sign cheques.

For like reasons, trustees in whose names trust moneys are banked should not authorise the bankers to pay cheques

(1876), 35 L. T. 202; and *Re Carr, Carr* v. *Carr* (1888), 36 W. R. 688.

(*n*) *Brice* v. *Stokes* (1805), 11 Ves. 319, 2 Wh. & Tu. Lead. Cas. (7th ed.) 633; *Townley* v. *Sherborne* (1634), Bridg. 35; 2 Wh. & Tu. Lead. Cas. (7th ed.) 629; *Re Fryer, Martindale* v. *Picquot* (1857), 3 Kay & J. 317.

(*o*) *Fellows* v. *Mitchell* (1705), 1 P. Wms. 81; *Re Fryer, Martindale* v. *Picquot*, *supra*.

(*p*) *Brice* v. *Stokes*, *supra*; *Lord Shipbrook* v. *Lord Hinchinbrook* (1810), 16 Ves. 477.

(*q*) See *Ex parte Belchier* (1754), Ambl. 218; *Walker* v. *Symonds* (1818), 3 Swans. 1; *Hall* v. *Franck* (1849), 11 Beav. 519; *Webb* v. *Ledsam* (1855), 1 Kay. & J. 385; *Lee* v. *Sankey* (1873), L. R. 15 Eq. 204; *Re Flower and Metropolitan Board of Works* (1884), 27 Ch. D. 592; but *cf. Husband* v. *Davis* (1851), 10 C. B. 645.

(*r*) See *per* Lord HENLEY, *Harden* v. *Parsons* (1758), 1 Eden, 147.

(*s*) As to executors' receipts, see *Westley* v. *Clarke* (1759), 1 Eden, 357; *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328; *Langford* v. *Gascoyne* (1805), 11 Ves. 333; and *Lord Shipbrook* v. *Lord Hinchinbrook*, *supra*.

(*t*) *Brice* v. *Stokes*, *supra*; *Thompson* v. *Finch* (1856), 8 De G. M. & G. 560; *Walker* v. *Symonds* (1818), 3 Swans. 1; *Hanbury* v. *Kirkland* (1829), 3 Sim. 265; *Styles* v. *Guy* (1849), 1 Mac. & G. 422; *Wiglesworth* v. *Wiglesworth* (1852), 16 Beav. 269; *Egbert* v. *Butler* (1856), 21 Beav. 560; *Rodbard* v. *Cooke* (1877), 25 W. R. 555; *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591; *Consterdine* v. *Consterdine* (1862), 31 Beav. 330; and *Carruthers* v. *Carruthers*, [1896] A. C. 659.

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signed by one only of their number; for that would be equivalent to giving the sole control of the trust funds to one trustee; whereas the beneficiaries are entitled to the safeguard of the trustees' joint control (*u*). A trustee may, however, entrust his co-trustee with a crossed cheque, signed by both of them, for delivery to the beneficiary (*x*).

May allow title deeds to remain in custody of co-trustee.

On the ground of necessity, trustees may allow the custody of title deeds to remain with one of their number; for any other rule would be productive of the greatest inconvenience (*y*). But it seems that the rule is different with regard to bonds payable to bearer (*z*).

Must be joint mortgagees.

Apart from other reasons, the trust money cannot be advanced to one of the trustees on mortgage, however good the security may seem. For he cannot act both as mortgagor and mortgagee; and without his joinder in the latter capacity, his co-trustees cannot legally act (*a*). Moreover, if the security were taken in the joint names of all the trustees, the covenants for payment of principal and interest, if made by the mortgagor with himself and the other trustees, would be void (*b*), and if they were made with the other trustees alone, the debt would be divorced from the security. It is apprehended that the same incapacity attaches where he is mortgagor as trustee of another settlement, and not merely on his own account.

ART. 52.—*Duty of Trustee not to set up Jus Tertii.*

A trustee, who has acknowledged himself as such, must not set up, or aid, the adverse title of a third party against his beneficiary (*c*). But (*semble*) he has a right to have the direction of the court as to whether he should resist it (*d*); and if with notice of

(*u*) *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490; *Trutch* v. *Lamprell* (1855), 20 Beav. 116.

(*x*) *Barnard* v. *Bagshaw* (1862), 3 De G. J. & S. 355.

(*y*) *Per* WOOD, V.-C., *Cottam* v. *Eastern Counties Rail. Co.* (1860), 1 Johns. & H. 243; *Re Sisson's Trusts, Jones* v. *Trappes*, [1903] 1 Ch. 262.

(*z*) *Lewis* v. *Nobbs* (1878), 8 Ch. D. 591.

(*a*) *Stickney* v. *Sewell* (1835), 1 Myl. & Cr. 8; *Francis* v. *Francis* (1854), 5 De G. M. & G. 108; *Fletcher* v. *Green* (1864), 33 Beav. 426.

(*b*) *Ellis* v. *Kerr*, [1910] 1 Ch. 529; *Napier* v. *Williams*, [1911] 1 Ch. 361.

(*c*) *Newsome* v. *Flowers* (1861), 30 Beav. 461; *Devey* v. *Thornton* (1851), 9 Hare, 222.

(*d*) *Neale* v. *Davies* (1854), 5 De G. M. & G. 258, *per* WOOD, V.-C., and TURNER, L.J. (KNIGHT-BRUCE, L.J., *dissentiente*).

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it he continues to pay his beneficiaries, he will do so at his peril (*e*).

Chapel trustees joining seceders.

In *Newsome* v. *Flowers*, *supra*, a chapel was vested in trustees, in trust for Particular Baptists. Subsequently a schism took place, and part of the congregation seceded, and went to another chapel. Still later, the surviving trustees were induced (not knowing the real object) to appoint new trustees, and vest the property in them. Immediately afterwards, the new trustees—who were in fact attached to the seceding congregation—brought an action to obtain possession of the chapel. Their appointment was, however, set aside, and it was held that they could not raise the adverse claims of the seceders as a defence against the congregation of the chapel, who were their beneficiaries.

Must not contest the title of their beneficiaries.

Nor, however honestly trustees may believe that the trust property belongs of right to a third party, are they justified in refusing to perform the trust they have once undertaken, or in communicating with such other person on the subject; but they must assume the validity of the title of their beneficiaries until it be negatived (*f*).

They may appeal to court to relieve them of the trust.

The above cases show that trustees are not justified in taking an actively hostile attitude towards the validity of their trust. The case, however, is by no means so simple where they have received notice of a paramount claim, and of the intention of the notifying party to hold them responsible if they deal with the fund in a manner contrary to such claim. So far as the present writer knows, the only authority as to whether, in face of such notice, the trustees are bound to go on steadily executing the trust which they have undertaken, or whether they can apply to the court for relief, is the case of *Neale* v. *Davies* (*g*), where the Lords Justices KNIGHT-BRUCE and TURNER differed on the point. In the court below Vice-Chancellor WOOD and in the Court of Appeal Lord Justice TURNER held that the trustees were entitled to refuse to execute the trust under such circumstances, and had a right to come to the court for its direction. KNIGHT-BRUCE, L.J., however, energetically dissented, saying: "I am of opinion that it is not competent in law, equity, or honesty, for men so to act. I am of opinion that if, by paying the fund to their *cestuis que trusts* they would make themselves personally liable to the adverse claimant in the event of his being successful, they were and

(*e*) *Wright* v. *Chard* (No. 1) (1859), 4 Drew. 673, affirmed (1860) 29 L. J. Ch. 415.

(*f*) *Beddoes* v. *Pugh* (1859), 26 Beav. 407.

(*g*) (1854) 5 De G. M. & G. 258.

are bound to perform the trust which they undertook" (*h*). This counsel of fiduciary perfection would indeed place trustees between the devil and the deep sea, and cannot, it is humbly conceived, be correct. For a trustee is always entitled to act under the direction of the court when he is placed in a position of difficulty or danger—even for instance where his own interests so conflict with those of his beneficiaries as to expose his conduct to suspicion. What essential difference can there be between the case where a trustee seeks the direction of the court as to whether he should defend an action for tort caused by trust premises falling and injuring a third party, and the case where a third party brings an action of ejectment against the trustee in respect of part of the trust property? It is therefore conceived that the rule as enunciated in the article is correct. It is certainly in accordance with modern practice, and is probably justified by Order 55, r. 3 (g), of the Rules of the Supreme Court. Art. 52.

This view is to some extent borne out by the case of *Wright* v. *Chard* (No. 1) (*i*), where a trustee, who was also committee of the estate of a lunatic third party, took upon himself to decide a question of title in favour of the trust. After the lunatic's death his personal representative sued the trustee for the rents of the land in question, and obtained judgment in his favour. The point, of course, did not directly arise as to what the trustee ought to have done to protect himself; but in the course of his judgment TURNER, L.J., said: "he took on himself to decide the question to which title preference should be given; he decided wrongly, and how can his erroneous decision alter the rights of the parties as they stood at the time? *He was wrong in taking upon himself to decide it: he clearly had no right to do so, and he must abide the consequences.*"

ART. 53.—*Duty of Trustee to act gratuitously.*

A trustee has no right to charge for his time and trouble (*k*) except—

(*h*) *Neale* v. *Davies* (1854), 5 De G. M. & G. 258; see also *Neligan* v. *Roche* (1873), Ir. Reps. 7 Eq. 332; *Hurst* v. *Hurst* (1874), L. R. 9 Ch. 762; and as to agents, *Nicholson* v. *Knowles* (1820), 5 Madd. 47.

(*i*) (1859) 4 Drew. 673, affirmed (1860) 29 L. J. Ch. 415.

(*k*) *Robinson* v. *Pett* (1734), 3 P. Wms. 249, 2 Wh. & Tu. Lead. Cas. (7th ed.) 606. By a recent Act of the Canadian Parliament, trustees in the Dominion are authorised to retain a commission.

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(a) where the settlement provides for it (*l*);

(b) where he has, at the time of accepting the trust, expressly stipulated for remuneration (*m*), and the beneficiaries being *sui juris* have freely and without unfair pressure assented to such stipulation (*n*), or the court has sanctioned it (*o*);

(c) where one who is not an express trustee has properly traded with another's money under circumstances which make him a constructive trustee of the profits (*p*);

(d) where the trust property is abroad, and it is the custom of the local courts to allow remuneration (*q*).

Solicitor-trustee must not generally charge.

Thus, a trustee who is a solicitor will not be allowed to charge for his time and trouble, nor for his professional attendance; for, as was somewhat dryly said by Lord LYNDHURST, in *New* v. *Jones* (*r*), "A trustee placed in the position of a solicitor might, if allowed to perform the duties of a solicitor, and to be paid for them, find it very often proper to institute and carry on legal proceedings which he would not do if he were to derive no emolument from them himself, and if he were to employ another person." In short, the principle is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty (*s*). The incapacity not only applies to the solicitor-trustee personally, but also to his firm, who cannot, by acting as *his* solicitors, charge profit costs, either in an action, or for preparing leases and the like on behalf of the trust estate (*t*); unless possibly there is an

(*l*) *Robinson* v. *Pett* (1734), 3 P. Wms. 249, 2 Wh. & Tu. Lead. Cas. (7th ed.) 606; *Webb* v. *Earl of Shaftesbury* (1802), 7 Ves. 480; *Willis* v. *Kibble* (1839), 1 Beav. 559.

(*m*) *Re Sherwood* (1840), 3 Beav. 338; *Douglas* v. *Archbutt* (1858), 2 De G. & J. 148.

(*n*) *Ayliffe* v. *Murray* (1740), 2 Atk. 58.

(*o*) *Marshall* v. *Holloway* (1820), 2 Swans. 432, 435, 452. But the court is very loth to do this unless the trustee's services are exceptionally desirable. *Brocksopp* v. *Barnes* (1820), 5 Madd. 90; *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148.

(*p*) *Brown* v. *Litton* (1711), 1 P. Wms. 140.

(*q*) *Chambers* v. *Goldwin* (1804), 9 Ves. 254.

(*r*) (1833) 1 Mac. & G. 668, n.; and see to same effect, *Barrett* v. *Hartley* (1866), 12 Jur. (N. S.) 426; *Moore* v. *Frowd* (1837), 3 Myl. & Cr. 45; *Todd* v. *Wilson* (1846), 9 Beav. 486, where the court ordered a return of the sums charged even after a release by the beneficiaries.

(*s*) *Per* STIRLING, J., *Re Doody*, *Fisher* v. *Doody*, [1893] 1 Ch. at p. 134.

(*t*) *Re Corsellis*, *Lawton* v.

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express and *bonâ fide* agreement between the trustee and his partners that he is to take no part of such costs (*u*). In one case (*v*) it was held, however, that the rule is not inflexible and that compensation may in special cases be made under the authority of the court by a fixed allowance, but not by allowing professional charges.

Where authority is given by the settlement

But if the settlement provides that the trustee *may* charge, he will be allowed to do so; but his charges will be strictly limited to those indicated by the settlor. Thus, if a solicitor-trustee is authorised to make "professional charges" (*w*) (even where the words "for his time and trouble" are added (*x*)), he will not be allowed to charge for time and trouble expended other than in his position as solicitor (*w*). But, on the other hand, where a will authorises any trustee thereof who may be a solicitor to make "the usual professional, *or other proper and reasonable charges*, for all business done and time expended in relation to the trusts of the will, *whether such business is usually within the business of a solicitor or not*," the taxing master has power to allow to a solicitor-trustee the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate (*y*), although not for work altogether outside his professional avocations (*z*). And this holds good even where a legacy is given to the solicitor-trustee conditionally upon his accepting the trust (*a*). However, in all such cases the trustees cannot, in the absence of special powers, settle the amount payable to the solicitor-trustee so as to bind the beneficiaries, and the latter are consequently entitled to have the solicitor's costs investigated (*a*):

Elwes (1887), 34 Ch. D. 675; *Collins* v. *Carey* (1839), 2 Beav. 128; *Christophers* v. *White* (1847), 10 Beav. 523.

(*u*) See *Claek* v. *Carlon* (1861), 30 L. J. Ch. 639, and *Re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675.

(*v*) *Bainbrigge* v. *Blair* (1845), 8 Beav. 588.

(*w*) *Harbin* v. *Darby* (1860), 28 Beav. 325; *Re Chapple, Newton* v. *Chapple* (1884), 27 Ch. D. 584. As to how far a right to receive remuneration affects the protection accorded to trustees by the Judicial Trustees Act, see *infra*, Art. 90.

(*x*) *Re Chalinder and Herington*, [1907] 1 Ch. 58.

(*y*) *Re Ames, Ames* v. *Taylor* (1883), 25 Ch. D. 72. Where the trust is created by will, the solicitor's charges in such cases are considered to be legacies for purposes of legacy duty (*Re Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613). By similar reasoning he loses the right if he attests the will (*Re Pooley* (1888), 40 Ch. D. 1); and he cannot charge at all if the estate is insolvent (*Re White, Pennell* v. *Franklin*, [1898] 2 Ch. 217). But whether these cases can be supported on principle is respectfully questioned.

(*z*) *Clarkson* v. *Robinson*, [1900] 2 Ch. 722.

(*a*) *Re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413; and *cf. Re Wellborne*, [1901] 1 Ch. 312.

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and it is the duty of the solicitor-trustee to inform them of their right to tax his bill (*b*).

Rule applicable even where third party pays the costs.

Where a solicitor-trustee is acting *for the trust estate*, he will not be allowed to make profit costs merely on the ground that a third party (*e.g.*, a lessee or mortgagor) has to repay the costs to the trust estate (*c*).

Exception where solicitor acts for self and another.

There is a curious exception to the rule that a solicitor-trustee cannot, in the absence of an enabling clause, charge profit costs. This exception (known as the rule in *Cradock* v. *Piper* (*d*)) has been enunciated in the following terms: "Where there is work done *in court*, not on behalf of the trustee who is a solicitor alone, but on behalf of himself and a co-trustee, the ordinary principle will not prevent the solicitor, or his firm, from receiving the usual costs, if the costs of appearing for, or acting for, the two, have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee" (*e*). This exception is, however, limited to the costs incurred in respect of business done in an *action or matter*, and does not apply to business done out of court (*e*).

Cannot generally claim a salary.

In general, a trustee, whether express or constructive, will not be permitted to claim a salary or any remuneration for managing a trade or business (*f*). Thus, in *Barrett* v. *Hartley* (*g*), where a trustee had carried on a business for six years, in consequence whereof great advantage had accrued to his beneficiaries, it was held that he had no right to exact or charge any remuneration or bonus in respect of such services; for his exertions were incident to the performance of the duties imposed by the deed of trust which he had accepted. But in exceptional cases, where the work is heavy, or requires skill and knowledge, and no competent person can be got to act without remuneration, the court will, before the trustee is appointed, authorise him to retain a commission (*h*).

Exception.

There is authority for saying that this does not apply to one who *rightfully* becomes possessed of another's money and rightfully trades with it; and that he will be entitled to a reasonable remuneration, although he is of course a constructive

(*b*) *Re Webb, Lambert* v. *Still*, [1894] 1 Ch. 73.

(*c*) *Re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675, but see and distinguish last paragraph, p. 317, *infra*.

(*d*) (1850) 1 Mac. & G. 664.

(*e*) *Per* COTTON, L.J., in *Re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675; and see to same effect *Re Barber, Burgess* v. *Vinicome* (1886), 34 Ch. D. 77.

(*f*) *Stocken* v. *Dawson* (1843), 6 Beav. 371; *Burden* v. *Burden* (1813), 1 Ves. & B. 170. In the United States of America this rule is exactly reversed.

(*g*) (1866) L. R. 2 Eq. 789.

(*h*) See *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148.

trustee of the profits of the trade (*i*). For instance, in *Brown* v. *Litton* (*j*), the plaintiff's testator was the captain of a ship, who, being on a voyage, had 800 dollars which he intended to invest in trade. The captain died, and the defendant, who was the mate of the ship, becoming captain in his place, took possession of these 800 dollars, and by judiciously trading with them made considerable profits. Upon a bill being filed against him for an account, the Lord Keeper HARCOURT ordered that the master should settle a proper salary for the pains and trouble he had been at. ART 53

ART. 54.—*Duty of Trustee not to traffic with or otherwise profit by Trust Property.*

(1) A trustee must not use or deal with trust property for his own private advantage (*k*).

(2) A trustee is absolutely incapacitated while he remains a trustee from purchasing, leasing, or accepting a mortgage of trust property either from himself (*l*) or his colleagues (*m*), however fair the transaction may be (*n*), unless :

(a) under an express power in the settlement ; or

(b) by leave of a competent court (*o*).

(3) A trustee may, however, purchase, or lease, or accept a mortgage of trust property direct from beneficiaries (*p*), but in that case, if the transaction be impeached, it is incumbent on the trustee to prove (*q*) affirmatively and conclusively :

(*i*) *Brown* v. *De Tastet* (1821), Jac. 284 ; *Wedderburn* v. *Wedderburn* (No. 4) (1856), 22 Beav. 84.

(*j*) (1711) 1 P. Wms. 140. Probably decided on the principle that he who seeks equity must do equity.

(*k*) *Webb* v. *Earl of Shaftesbury* (1802), 7 Ves. 480 ; *Ex parte Lacey* (1802), 6 Ves. 625 ; and see *Re Imperial Land Co. of Marseilles, Ex parte Larking* (1877), 4 Ch. D. 566 ; *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544 ; and *Rochefoucauld* v. *Boustead*, [1898] 1 Ch. 550.

(*l*) *Fox* v. *Mackreth* (1788), 2 Bro. C. C. 400, 2 Wh. & Tu. Lead. Cas. (7th ed.) 709.

(*m*) *Ib.* ; and *Whichcote* v. *Lawrence* (1798), 3 Ves. Jun. 740, and *Morse* v. *Royal* (1806), 12 Ves. 355.

(*n*) *Ex parte Lacey*, *supra* : *Ex parte Bennett* (1805), 10 Ves. 381 ; *Gibson* v. *Jeyes* (1801), 6 Ves. 266.

(*o*) *Farmer* v. *Dean* (1863), 32 Beav. 327 ; and see *Tennant* v. *Trenchard* (1869), L. R. 4 Ch. 537.

(*p*) *Gibson* v. *Jeyes*, *supra* ; *Morse* v. *Royal*, *supra* ; *Ex parte Lacey*, *supra*.

(*q*) Cases in note (*p*) ; and also *Randall* v. *Errington* (1805), 10 Ves. 423 ; *Coles* v. *Trecothick* (1804), 9 Ves. 234.

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(a) that he and the beneficiaries were at arm's length, and that no confidence was reposed in him;

(b) that the transaction was for the advantage of the beneficiaries; and

(c) that full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction (*r*).

(4) A trustee cannot qualify himself to become a purchaser by retiring from a trusteeship with that view (*s*).

PARAGRAPH (1).

Must not trade with trust fund.

Thus, a trustee must not actively import trust moneys into his trade or business, or use them in speculations of his own. If he does so (as has been said before) he will be a constructive trustee of the profits: and if there be no profits he will be liable for the breach of trust, and will have to pay compound interest at five per cent., as will be seen hereafter (*t*). Where, however, there has been no *active* breach of trust, but only an omission on the part of a trustee, in whose business the settlor had money invested, to settle up the accounts and properly invest the balance, such an omission will not make him liable to account for the profits (*u*).

Must not get lease renewed to himself.

On similar principles, a trustee of leaseholds cannot use his position for the purpose of getting a new lease granted to himself on the expiration of the term of which he is trustee (*x*). This question has been fully discussed under Article 31, *ante*, and need not be further enlarged upon here.

Father of infant remaindermen cannot purchase from mortgagee for himself.

In like manner the father of infants entitled in remainder to an equity of redemption, cannot purchase the property for himself from the mortgagee selling under his power of sale (*y*).

Commission paid to trustee by

Where the solicitors in an administration action presented their client, the trustee, with half their profit costs, NORTH, J. (while holding that in the administration action he had no jurisdiction in the matter), intimated that if a separate action

(*r*) See *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*s*) *Ex parte James* (1803), 8 Ves. 337; *Spring* v. *Pride* (1864), 4 De G. J. & S. 395. But *cf. Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.

(*t*) *Infra*, Art. 84; *Phayre* v. *Peree* (1815), 3 Dow, 116.

(*u*) *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318.

(*x*) *Keech* v. *Sandford* (1726), Sel. Cas. Ch. 61; *Bennett* v. *Gaslight and Coke Co.* (1882), 52 L. J. Ch. 98; *Re Lord Ranelagh's Will* (1884), 26 Ch. D. 590; and *Re Lulham, Brinton* v. *Lulham* (1885), 53 L. T. 9.

(*y*) *Griffith* v. *Owen*, [1907] 1 Ch. 195.

were brought against the trustee by the beneficiaries to make him hand over the sum so received, he would have no defence (*z*). The illicit sharing of such profits does not, however, make the trustee liable for the agent's fraud (*a*). Of course, a bribe paid to the trustee, to induce him to lease or sell the trust property, altogether invalidates the transaction (*b*).

Where trust moneys were lent on mortgage, and the mortgagor, being a person of eccentric character, devised the equity of redemption to "the mortgagee," it was held that, although the mortgagor did not know that the mortgagee was a trustee, yet, as the devise was made to him as mortgagee, and as it was the trust which caused him to occupy that position, the devise of the equity of redemption belonged to the trust, and not to the trustee beneficially (*c*).

Lord ELDON once directed an inquiry whether the right of sporting over the trust property could be let for the benefit of the beneficiaries, and, if not, he thought that the game should belong to the heir of the settlor. The trustee might appoint a gamekeeper, if necessary, for the preservation of the game, but must not keep an establishment of mere pleasure for his own enjoyment (*d*).

It is sometimes a question of difficulty to determine whether the rule applies to indirect gains. Speaking generally, the rule does not apply where a trustee remotely, and only incidentally, profits by his connection with the trust; as, for instance, where a trustee who is a solicitor lends trust moneys on mortgage to one of his own clients, and thereby obtains a fee *from the latter* for preparing the security (*e*). On the other hand, it has been held that an advance made by a trustee to one of his beneficiaries under a power of advancement, made *in order to enable* that beneficiary to repay a debt due from him to the trustee, was a breach of trust, for his personal interest and fiduciary duty were conflicting (*f*). But where there is no such stipulation it would be otherwise (*g*).

(*z*) *Re Thorpe, Vipont* v. *Radcliffe*, [1891] 2 Ch. 360; and see *Re Smith, Smith* v. *Thompson*, [1896] 1 Ch. 71. For further examples of profits made by fiduciary persons the reader is referred to p. 97 *et seq.*, and p. 175 *et seq.*, *supra*.

(*a*) *Shepherd* v. *Harris*, [1905] 2 Ch. 310.

(*b*) *Chandler* v. *Bradley*, [1897] 1 Ch. 315.

(*c*) *Re Payne's Settlement, Kibble* v. *Payne* (1886), 54 L. T. 840. But see *Re Bagnall's Trusts, Flynn* v. *Dalgleish*, [1901] 1 Ir. R. 255.

(*d*) *Webb* v. *Earl of Shaftesbury* (1802), 7 Ves. 480.

(*e*) *Whitney* v. *Smith* (1869), L. R. 4 Ch. 513; and see also *Butler* v. *Butler* (1877), 7 Ch. D. 116. But *cf. Re Corsellis, Lawton* v. *Elwes* (1887), 34 Ch. D. 675.

(*f*) *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648; *Peyton* v. *Robinson* (1823), 1 L. J. (o. s.) Ch. 191.

(*g*) *Butler* v. *Butler*, *supra*.

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Trustee occupying office of profit in a company by virtue of shares held as trustee.

A more difficult case is where a person holds an office of profit in a firm or company, shares in which are vested in him as a trustee. The better opinion seems to be that the trustee may in such cases legitimately keep the office of profit, and is not bound to account to the trust for the emoluments. Thus, in *Re Dover Coalfield Extension, Limited* (*h*), the Dover Company transferred certain shares which it held in the K. company to one of its own directors, in order to qualify him to become a director of the K. company. *Held* by the Court of Appeal, that the director's fees which the director in question received from the K. company belonged to him personally, and that he was not bound to hand them over to the Dover Company.

This case seems to be irreconcilable with *Re Francis, Barrett* v. *Fisher* (*i*) (which was not cited), where KEKEWICH, J., held that where trustees are appointed directors of a company in virtue of shares held therein by them as trustees, they must (in the absence of special provision) account for the remuneration received by them as directors, and that it must be treated as an accretion to the capital of the trust fund.

The question came before WARRINGTON, J., in *Re Lewis, Lewis* v. *Lewis* (*k*), where a person employed as a salesman by a partnership firm at a salary of £600 per annum became one of the trustees of a deceased partner. *Held* that he was not bound to account to the trust for this salary. But the learned judge pointed out that the trustee did not make the profit by *virtue* of being a trustee, but by virtue of a pre-existing contract of service.

Rule inapplicable where trustee is the beneficiary subject to specific charge.

The rule does not apply where the trustee is also the ultimate beneficiary subject to setting aside a specific sum for another. For although in form a trustee, he is substantially beneficial owner, subject to an equitable mortgage for securing the specific sum in question (*l*).

PARAGRAPH (2).

Purchases of trust property by trustees.

Perhaps the most important branch of the subject is that relating to the purchase or lease by trustees of the trust property. With regard to such purchases from *themselves* (as distinguished from purchases from their beneficiaries), the doctrine stands much more upon general principle than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case, however honest the circumstances, the general interests of

(*h*) [1908] 1 Ch. 65.
(*i*) (1905) 74 L. J. Ch. 198.
(*k*) [1910] W. N. 217.
(*l*) *Re Campbell, Campbell* v. *Campbell*, [1893] 3 Ch. 468.

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justice requiring it to be destroyed in every instance; because no court is equal to the examination and ascertainment of the truth (*m*). Consequently, under no circumstances can an active trustee, nor, indeed, a passive trustee *who has been* (at all events within a recent period) *an active one*, nor even a person who has been erroneously treated by all parties as a trustee (*n*) (*i.e.*, a trustee *de son tort*), purchase trust property from himself or his colleagues, either directly, or collusively through the intervention of a third party (*o*). Such a transaction is voidable at the instance of a beneficiary *ex debito justitiæ*, and without proof of any injury or loss, and the purchaser will also have to repay the rents, but without interest (*p*); and if he resells at a profit the beneficiaries may adopt the resale and clear such profit (*q*), facts which ought to be borne in mind by every trustee. Such a sale also affects all subsequent purchasers with notice, from the trustee (*r*); and therefore, even if a trustee cares to risk such a purchase as between himself and the beneficiaries, he should remember that it practically precludes him from ever parting with the property to a subsequent purchaser. However, this rule does not prevent a trustee selling to a joint stock company in which he is a mere shareholder (as distinguished from a "one man company" (*s*)); for a sale by a person to a corporation of which he is a member is not, either in form or substance, a sale by him to himself and others. Nevertheless, in such a case, there is such a conflict of interest and duty, that if the sale be impeached by the beneficiaries, the onus will lie on the company to show affirmatively that the trustee had taken all reasonable pains to secure a purchaser at the best price, and that the price given by the company was not inadequate at the time, although a better price might have been obtained by waiting (*t*).

However, the fact that a trustee has sold trust property in the hope, subsequently realised, of being able to repurchase part of the trust property (*Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244).

(*m*) *Per* Lord ELDON in *Ex parte James* (1803), 8 Ves. 337, at p. 345; and see *Beningfield* v. *Baxter* (1886), 12 App. Cas. 167.

(*n*) *Plowright* v. *Lambert* (1885), 52 L. T. 646. As to executor, see *Hall* v. *Hallett* (1784), 1 Cox, 134.

(*o*) *Campbell* v. *Walker* (1800), 5 Ves. 678; *Knight* v. *Majoribanks* (1849), 2 Mac. & G. 10. But in a recent case it was held that a trustee who had retired for upwards of twelve years was not precluded from purchasing

(*p*) *Silkstone, etc., Coal Co.* v. *Edey*, [1900] 1 Ch. 167.

(*q*) *Baker* v. *Carter* (1835), 1 Y. & Coll. Ex. 250.

(*r*) *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544; *Cookson* v. *Lee* (1853), 23 L. J. Ch. 473.

(*s*) *Silkstone, etc., Coal Co.* v. *Edey*, [1900] 1 Ch. 167.

(*t*) *Farrar* v. *Farrars, Limited*, (1888), 40 Ch. D. 395.

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it for himself at a future time, is not of itself a sufficient ground for setting aside the sale, where the price was not inadequate at the time, and there was no agreement or understanding existing at the time of the first sale that the purchaser should sell or reconvey the property to the trustee. The fact that the trustee many years afterwards made a handsome profit by the property makes no difference (*u*). However, in the case just cited, over twenty years had elapsed without the sale being impeached, and many of the parties were dead; and, as the court said, the presumption of law that a transaction was legal and honest is a presumption that is strengthened by lapse of time. It is, however, clear that where trustees have rightly sold to A., so long as that sale is not completed and remains executory, one of the vendor trustees cannot repurchase the property from A. for himself (*x*).

Same rule applies to agents.

An agent employed for the sale of an estate cannot purchase it for himself or another (*y*), for he is a constructive trustee (*z*).

Cannot lease or mortgage to himself.

So trustees cannot lease or mortgage the trust estate to one of themselves (*a*), and if they do so the lessee will have to account for the profits (*b*).

Purchase by trustee by leave of the court.

But where there are infant beneficiaries or beneficiaries not *in esse*, the court will, on the application of the trustee, allow him to purchase, if it can see that, *under* the circumstances, it is clearly for the benefit of the beneficiaries, but not otherwise (*c*). The best course of procedure in such an application is to issue a summons under R. S. C. 1883, Order 55, r. 3, asking for an inquiry whether it is for the benefit of the infant beneficiaries that the trustee should be permitted to purchase for a certain sum. If the master certifies that it is, the order will be made as a matter of course. In one case in which the present writer was counsel (*d*), PEARSON, J., ordered the costs of the

(*u*) *Re Postlethwaite, Postlethwaite* v. *Rickman* (1888), 37 W. R. 200; and see also *Dover* v. *Buck* (1865), 5 Giff. 57, and *Baker* v. *Peek* (1861), 9 W. R. 472; but cf. *Att.-Gen.* v. *Lord Dudley* (1815), G. Coop. 146.

(*x*) *Williams* v. *Scott*, [1900] A. C. 499; *Delves* v. *Gray*, [1902] 2 Ch. 606; *Parker* v. *McKenna* (1874), L. R. 10 Ch. at p. 125.

(*y*) *Ex parte Bennett* (1805), 10 Ves. 381.

(*z*) *Re Bloye's Trust* (1849), 1 Mac. & G. 488, (affirmed (*sub. nom. Lewis* v. *Hillman*) (1852), 3 H. L. Cas. 607); *De Bussche* v. *Alt* (1878), 8 Ch. D. 286.

(*a*) See *supra*, Art. 51.

(*b*) *Ex parte Hughes, Ex parte Lyon* (1802), 6 Ves. 617; *Stickney* v. *Sewell* (1835), 1 Myl. & Cr. 8; *Francis* v. *Francis* (1854), 5 De G. M. & G. 108.

(*c*) *Farmer* v. *Dean* (1863), 32 Beav. 327; *Campbell* v. *Walker* (1800), 5 Ves. 678.

(*d*) *Nunneley* v. *Nunneley* April 18th, 1883.

action to be paid out of the trust estate, on the ground that it was for the infant's benefit, the trustee offering more than the market price; and it is conceived that the course followed by his lordship was correct.

Rule inapplicable to bare trustees.

The rule as to selling to himself only applies where the express or constructive trustee is substantially an active trustee. Where he is the mere depository of the legal estate without any duties, and without ever having had any, he may be a purchaser; for instance, where he is a trustee to preserve contingent remainders (*e*), or a person nominated trustee who has disclaimed (*f*). But one who was originally an executive trustee, and has become a mere bare trustee by performance of the trusts, would, it is apprehended, be disqualified; for he would have had an opportunity of becoming acquainted with the property and its value (*g*).

Whether trustee of share of proceeds can purchase.

A question sometimes arises in practice, whether, on a sale by trustees, the property can be purchased beneficially by a person who is a trustee of a subsidiary settlement by which a share in the proceeds of the sale is settled. Curiously enough, this point seems never to have been decided; but it is submitted that such a purchase might be impeached. For it is the duty of the subsidiary trustee to watch over the interests of *his* beneficiaries. It is obviously to their interest that the sale shall realise a high price, whereas it is the interest of a purchaser that it shall be sold cheap. By becoming a purchaser, therefore, the subsidiary trustee is acting in a character wholly inconsistent with his fiduciary duty; and little doubt is entertained that, if the sale were impeached by his *cestuis que trusts*, the onus would be cast on him of proving that he acted *bonâ fide*, and gave an adequate price.

Trustee of trustee's settlement not debarred from purchasing.

Although a trustee cannot purchase from himself, it has been held that the rule does not preclude the trustees of his marriage settlement from purchasing the property (*h*).

PARAGRAPH (3).

May purchase from beneficiaries.

But although a trustee is incapable of purchasing from himself or his colleagues, there is no fixed and arbitrary rule that he cannot, under any circumstances, purchase the interests of his beneficiaries from the beneficiaries themselves. Thus, a sale by the beneficiaries to a trustee was upheld where

(*e*) *Sutton* v. *Jones* (1809), 15 Ves. 584.

(*f*) *Stacey* v. *Elph* (1833), 1 Myl. & K. 195.

(*g*) *Ex parte Bennett* (1805), 10 Ves. 381. But, *cf. Re Boles and British Land Co.'s Contract*, [1902] 1 Ch. 244.

(*h*) *Hickley* v. *Hickley* (1876), 2 Ch. D. 190.

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a beneficiary took the whole management of a sale upon himself, and then agreed to sell a lot, which he had bought in, to one of the trustees (*i*). Yet the court regards such transactions with great jealousy; and, if impeached, they cannot stand unless the trustee can affirmatively and clearly show that the parties were completely at arm's length in making the bargain, that the bargain was a beneficial one to the *cestuis que trusts*, and that the trustee candidly disclosed all facts known to him which could in any way influence the vendors (*j*).

Mortgage by beneficiary to trustee.

A trustee may take a fair mortgage from his beneficiary; and, in that case, may rely on his possession of the legal estate, as giving him priority over prior mortgagees of whose claims he had no notice when he made the advance (*k*).

Purchase by solicitor from client.

So, where a client was very desirous of selling property, and, after vainly endeavouring to do so, finally sold it to his solicitor (who was, of course, a constructive trustee), and it was proved that the transaction was fair and the price adequate, and indeed more than could have been obtained elsewhere at the time, and the client quite understood his position, it was held that such a sale was good and binding, although it lay upon the solicitor to prove that it was unimpeachable (*l*). A solicitor purchasing from his client should, however, always make him employ a separate solicitor (*m*). The rule equally applies where the solicitor purchases, not directly from the client, but from the latter's trustee in bankruptcy (*n*).

Purchase by person occupying a position of confidence towards vendor.

The rule applies even where the party from whom advice is sought is not a professional adviser; for the fact that he accepts the position of adviser places him in a fiduciary position towards the party seeking advice (*o*).

The rule does not apply to certain constructive trustees.

The rule as to the extreme fairness to be observed by trustees in purchasing from beneficiaries does not apply to persons who are only constructive trustees by virtue of some business contract entered into with the so-called beneficiaries.

(*i*) *Coles* v. *Trecothick* (1804), 9 Ves. 234; and *Clarke* v. *Swaile* (1762), 2 Eden, 134.

(*j*) See *per* Lord CAIRNS in *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215, 236; *Williams* v. *Scott*, [1900] A. C. 499; *Dougan* v. *Macpherson*, [1902] A. C. 197, where the trustee had had a valuation made for himself which he did not communicate to the beneficiary.

(*k*) *Newman* v. *Newman* (1885), 28 Ch. D. 674.

(*l*) *Spencer* v. *Topham* (1856). 22 Beav. 573; 2 Jur. (N. S.) 865; *Gibson* v. *Jeyes* (1801), 6 Ves. 266; *Johnson* v. *Fesemayer*, (1858), 3 De G. & J. 13; *Edwards* v. *Meyrick* (1842), 2 Hare, 60.

(*m*) *Cockburn* v. *Edwards* (1881), 18 Ch. D. 449.

(*n*) *Luddy's Trustee* v. *Peard* (1886), 33 Ch. D. 500; and see also *Barron* v. *Willis*, [1900] 2 Ch. 121 (affirmed (*sub. nom. Willis* v. *Barron*) [1902] A. C. 271). But this seems rather absurd.

(*o*) *Tate* v. *Williamson* (1866), L. R. 2 Ch. 55.

Thus mortgagees can purchase from their mortgagors (*p*); a second mortgagee from the first, selling under his power of sale (*q*); partners from the representatives of a deceased partner (*r*); one tenant in common from the mortgagee of the entirety, or of the share of a co-tenant (*s*); and other persons bearing analogous relations enjoy a similar freedom; for though contracting parties may by a metaphor be said to be trustees for each other, the trust is strictly limited by the contract. They are trustees only to the extent of their obligation to perform that contract, and the trust is limited to the discharge of that obligation (*t*).

ART. 55.—*Duty of Trustee to be ready with his Accounts.*

(1) A trustee must—

(a) keep clear and accurate accounts of the trust property (*u*); and

(b) at all reasonable times, at the request of a beneficiary, give him full and accurate information as to the amount and state of the trust property (*v*), and permit him or his solicitor (*w*) to inspect the accounts and vouchers, and other documents relating to the trust (*x*). But a trustee is under no obligation to tell his beneficiary (and still less any third person) what notices he has received of dealings with that beneficiary's equitable interest (*y*).

(*p*) *Knight* v. *Majoribanks* (1849), 2 Mac. & G. 10.

(*q*) *Shaw* v. *Bunny* (1855), 2 De G. J. & S. 468; *Kirkwood* v. *Thompson* (1865), 2 Hem. & M. 392 (affirmed (1865), 2 De G. J. & S. 613).

(*r*) *Chambers* v. *Howell* (1847), 11 Beav. 6.

(*s*) *Kennedy* v. *De Trafford*, [1897] A. C. 180.

(*t*) See *per* WESTBURY, L.C., in *Knox* v. *Gye* (1872), L. R. 5 H. L. 656; but see *per* JESSEL, M.R., *Earl of Egmont* v. *Smith* (1877), 6 Ch. D. 469; and *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

(*u*) *Springett* v. *Dashwood* (1860), 2 Giff. 521; *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233; *Newton* v. *Askew* (1848), 11 Beav. 145, 152; *Pearse* v. *Green* (1819), 1 Jac. & W. 135.

(*v*) *Re Tillott, Lee* v. *Wilson*, [1892] 1 Ch. 86; *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304, 309; *Talbot* v. *Marshfield* (1868), L. R. 3 Ch. 622; *Ryder* v. *Bickerton* (1743), 3 Swans. 80, n.

(*w*) *Kemp* v. *Burn* (1863), 4 Giff. 348.

(*x*) *Re Cowin, Cowin* v. *Gravett* (1886), 33 Ch. D. 179; *Ottley* v. *Gilby* (1845), 8 Beav. 602.

(*y*) *Low* v. *Bouverie*, [1891] 3 Ch. at p. 99.

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(2) A trustee is, nevertheless, not bound to supply copies of accounts or trust documents (*z*), or to supply information which necessitates expenditure (*a*), except at the cost of the beneficiary requiring the same.

PARAGRAPH (1).

Failure to keep accounts.

The estate of a testator who died in 1832 was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate, which fell in in 1852, was distributed, also at the request of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries against the surviving trustee for administration was dismissed; but owing to the breach of duty committed by the trustees in not keeping accounts and vouchers, the surviving trustee had to bear his own costs (*b*). If, however, the action had been successful, the trustee would in all probability have had to pay the plaintiff's costs as well (*c*) up to the hearing (*d*). But, as the reason of this is that such costs are caused by the trustee's neglect to keep and furnish accounts, the plaintiff will not in general be entitled to costs against the trustee beyond the time when the account is actually rendered, or ordered by the court to be rendered. From this time, if the accounts are substantially accurate, the trustee will be entitled to his costs out of the estate (*e*), or, if the plaintiff sues alone, out of his share in the estate (*f*). In a recent case, however, it was held that where a trustee by his gross and indefensible neglect to furnish accounts renders an originating summons necessary, he may be ordered to pay all the costs, including the costs of taking and vouching the account (*g*). It is no defence that the trustees are illiterate and incapable of keeping accounts; for in that case they would be justified by necessity in employing, and be bound in point of law to employ, a competent agent to keep the accounts for them (*h*).

(*z*) *Ottley* v. *Gilby* (1845), 8 Beav. 602.

(*a*) *Re Bosworth*, *Martin* v. *Lambe* (1889), 58 L. J. Ch. 432.

(*b*) *Payne* v. *Evens* (1874), L. R. 18 Eq. 356; and see to same effect, *Re Page*, *Jones* v. *Morgan*, [1893] 1 Ch. 304.

(*c*) *Eglin* v. *Sanderson* (1862), 3 Giff. 434; *Newton* v. *Askew* (1848), 11 Beav. 145.

(*d*) *Springett* v. *Dashwood* (1860), 2 Giff. 521; *Re Linsley*, *Cattley* v. *West*, [1904] 2 Ch. 785.

(*e*) *Ottley* v. *Gilby* (1845), 8 Beav. 602.

(*f*) *Thompson* v. *Clive* (1848), 11 Beav. 475.

(*g*) *Re Skinner*, *Cooper* v. *Skinner*, [1904] 1 Ch. 289.

(*h*) *Wroe* v. *Seed* (1863), 4 Giff. 425, 429.

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Where trustees have rendered no account, or an insufficient one, some judges have ordered the application for an account to stand over, in order that a proper account might be rendered and vouched out of court, the costs being reserved (*i*); but it is understood that this practice has not been successful in saving expense, and that it is but rarely followed now (*k*). If the plaintiff has been over-hasty in seeking the assistance of the court, he may have to pay the costs, or even his solicitor may be ordered to bear them personally (*l*).

Practice.

The importance of keeping accounts is shown by the fact, that although the court will generally saddle with costs a trustee whose only fault is that he has failed to do so, yet where a trustee has kept and furnished accounts, which, by an honest mistake, turn out to be inaccurate, he will be allowed his costs (*m*).

Inaccurate accounts.

"A trustee is bound to give his *cestui que trust* proper information as to the investment of the trust estate; and where the trust estate is invested on mortgage, it is not sufficient for the trustee merely to say, 'I have invested the trust money on mortgage,' but he must produce the mortgage deeds, so that the *cestui que trust* may thereby ascertain that the trustee's statement is correct, and that the trust estate is so invested. . . . Where a portion of the trust estate is invested in consols, it is not sufficient for the trustee 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 in order that he may verify the trustee's own statement; there may be stock standing in the name of a person who admits he is a trustee of it, which at the same time is incumbered; some other person having a paramount title may have obtained a charging order on the stock, or placed a *distringas* upon it" (*n*).

Supplying information.

At the same time, although it is the duty of a trustee to give all his beneficiaries, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is, yet it is no part of the duty of the trustee to tell his *cestui que trust* what incumbrances the latter has created, nor which of his incumbrancers have given notice of their respective charges.

Not bound to give information as to notices of incumbrances.

(*i*) See *Re Hayter*, (1883), 32 W. R. 26, and *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389.

(*k*) See *per* KEKEWICH, J., *Re Brown, Benson* v. *Grant*, [1895] W. N. 115.

(*l*) *Re Dartnall, Sawyer* v. *Goddard*, [1895] 1 Ch. 474.

(*m*) *Smith* v. *Cremer* (1875), 24 W. R. 51.

(*n*) *Per* CHITTY, J., in *Re Tillott, Lee* v. *Wilson*, [1892] 1 Ch. at p. 88.

Art. 55. It is no part of the duty of a trustee to assist his *cestui que trust* in selling or mortgaging his beneficial interest, and in squandering or anticipating his fortune; and it is clear that a person who proposes to buy or lend money on it has no greater rights than the *cestui que trust* himself (*o*). If, however, the trustee has notice of an incumbrance, and deliberately represents to a proposed purchaser or mortgagee that he has no such notice, he will be liable on the ground of estoppel. This would be so even if he had forgotten the notice; unless his language was open to the interpretation—"so far as I know, there is no charge" (*p*). But where a trustee was induced by intending mortgagees of a beneficiary to sign a memorandum that he had received no notices, without informing him that the memorandum had been submitted to and was still under the consideration of his solicitors, whose practice was to refuse to advise trustees to sign such documents, and also giving him the impression that he was signing with his solicitors' approval, it was held that the mortgagees could not hold the trustee responsible for the existence of notices which he had forgotten (*q*).

PARAGRAPH (2).

Expensive information.

As above stated, a beneficiary is entitled, either personally or by his solicitor, to *inspect* the trust accounts and documents. If, however, he requires a copy of an account or document, he must pay the necessary expense himself; for it is not fair that it should be saddled on the trust estate, nor, of course, can the trustee be expected to incur the expense personally (*r*). On the same ground, where a beneficiary demands information as to his rights under the settlement which cannot be furnished by the trustee without the assistance of a solicitor, the trustee is not bound to incur that expense (or if he be himself a solicitor with power to charge, he is not bound to incur the loss of time), unless the beneficiary is willing to pay the costs of complying with his requisition (*s*).

(*o*) *Low* v. *Bouverie*, [1891] 3 Ch. at p. 99.

(*p*) *Burrowes* v. *Lock* (1805), 10 Ves. 470, as explained in *Low* v. *Bouverie*, [1891] 3 Ch. 82.

(*q*) *Porter* v. *Moore*, [1904] 2 Ch. 367.

(*r*) *Ottley* v. *Gilby* (1845), 8 Beav. 602.

(*s*) *Re Bosworth, Martin* v. *Lambe* (1889), 58 L. J. Ch. 432.

CHAPTER IV.

THE POWERS OF THE TRUSTEE (*a*).

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ART. 56.—*General Powers of Trustees.*

(1) A trustee may, subject to article 63—

(a) exercise *bonâ fide* all powers expressly (*b*) confided to him by the settlement, without interference by the court; and

(b) subject to any restrictions contained in the settlement, and to the provisions of any statute requiring the consent of the court, do such reasonable and proper acts for the realisation or protection of the trust property (*c*), or the protection, support, or

(*a*) All reference to the powers of managing infants' estates conferred by s. 42 of the Conveyancing Act, 1881, and also the powers conferred by the Settled Land Act on "trustees for purposes of that Act," are excluded from this work, because the trustees referred to in those enactments are not ordinary trustees, but rather guardians, or mere donees of powers.

(*b*) *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300; *Austin* v. *Austin* (1876), 4 Ch. D. 233; *Tabor* v. *Brooks* (1878), 10 Ch. D. 273; *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913; *Lord Gainsborough* v. *Watcombe Terra Cotta Co.* (1885), 54 L. J. Ch. 991.

(*c*) *Ward* v. *Ward* (1843), 2 H. L. Cas. 777, n.; *Waldo* v. *Waldo* (1835), 7 Sim. 261; *Bright* v. *North* (1847), 2 Ph. 216; *Bowes* v. *East London Water Co.* (1821), Jac. 324.

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reputation of a beneficiary who is incapable of taking care of himself (*d*), as the court would sanction if applied to (*e*) :

(2) Provided that he acts honestly (*f*), and does not benefit one beneficiary at the expense of another (*g*), and does not interfere with any *legal* beneficial interest.

PARAGRAPH (1) (a).

Discretionary powers.

The leading case of *Gisborne* v. *Gisborne* (*h*) is the best example of the right of trustees to exercise a discretion expressly given to them by the settlement. There a testator devised his real and personal estate to trustees upon various trusts, one of which was, that "my said trustees, in their discretion and of their uncontrollable authority, pay and apply the whole, *or such portion only*, of the annual income of my real and personal estate as they shall think expedient, to and for the clothing, board, etc., and for the personal and peculiar benefit and comfort, of my dear wife." The wife also had property of her own, and was a lunatic, and one of the trustees was the residuary legatee under the testator's will. Under these circumstances, the trustees, *bonâ fide* (as the court found), refused to permit the whole income of the trust fund to be applied for the wife's support in the asylum, and proposed to allow only so much for that purpose as would be sufficient, after taking into account the income of the wife's own property. The House of Lords, on these facts, held that the trustees had an absolute discretion in the application of the fund, and that so long as they exercised that discretion *bonâ fide*, the court could not interfere with them ; although if no such discretion had existed, the court would have ordered the trust fund to have been applied primarily in the support of the lunatic (*i*).

(*d*) *Sisson* v. *Shaw* (1804), 9 Ves. 285 ; *Maberly* v. *Turton* (1808), 14 Ves. 499 ; *Cotham* v. *West* (1839), 1 Beav. 381 ; *Ex parte Green* (1820), 1 Jac. & W. 253 ; *Re Howarth* (1873), L. R. 8 Ch. 415 ; *De Witte* v. *Palin* (1872), L. R. 14 Eq. 251 ; *Swinnock* v. *Crisp* (1681), Freem. 78.

(*e*) *Lee* v. *Brown* (1798), 4 Ves. 362 ; *Inwood* v. *Twyne* (1762), 2 Eden, 153 ; *Seagram* v. *Knight* (1867), L. R. 2 Ch. 628 ; *Brown* v. *Smith*, [1878] W. N. 202. As to what acts the court can and will sanction, see p. 218 *et seq.*, *supra*.

(*f*) See *Re Smith*, *Smith* v. *Thompson*, [1896] 1 Ch. 71.

(*g*) *Seagram* v. *Knight*, *supra* ; *Lee* v. *Brown*, *supra* ; *Wood* v. *Patteson* (1847), 10 Beav. 541.

(*h*) (1877) 2 App. Cas. 300 ; and see also *Costabadie* v. *Costabadie* (1847), 6 Hare, 410.

(*i*) See also *Tabor* v. *Brooks* (1878), 10 Ch. D. 273 ; *Re Lofthouse* (1885), 29 Ch. D. 921 ; *Re Courtier*, *Coles* v. *Courtier* (1886), 34 Ch. D. 136 ; and as to discretionary trust for maintenance, *Re Bryant*, *Bryant* v.

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So, too, where absolute discretion has been given to trustees to do a particular act (*e.g.*, to sell the trust property), the court cannot compel them to exercise the power; but if they do exercise it, the court will see that they do not exercise it improperly or unreasonably (*k*).

Power to sell to a particular person at a price to be fixed by trustees.

So where a testator empowered his son to purchase part of his estate at a price which "should seem a fair and reasonable value" to his trustees, the court refused to interfere in the absence of fraud, although the property was valued at the instance of other interested parties at one-third more than the trustees' valuation (*l*).

Not liable for *bonâ fide* error of judgment in exercising discretionary powers.

Not only will the court refuse to restrain the exercise of discretionary powers, but it will give no relief to beneficiaries where the honest exercise of such a power has by error of judgment led to loss. Thus, where a testator directed the sale of his residuary estate, with power nevertheless to his trustees to postpone sale so long as they should in their uncontrolled discretion deem proper, the trustees were held to be free from any liability for loss caused by their having honestly retained certain shares for some years in a continually falling market (*m*).

Discretion sometimes limited to time and manner.

The practitioner must, however, carefully scrutinise the words conferring the authority and discretion, and must not assume that a discretion as to the *mode* of applying a fund for a person's benefit gives trustees a discretion as to *how much* of the fund is to be so applied. Thus, in *Re Weaver* (*n*) the trustees were directed to pay the income of the trust property, *at such time and in such manner* as the trustees should think fit, towards the maintenance of a lunatic during her life, with power to invest any surplus, not required for the purpose, as capital. The Court of Appeal held, however, that the trustees had only a discretion *as to the time and manner* of the application, and not as to the amount.

Hiekley, [1894] 1 Ch. 324; *Train* v. *Clapperton*, [1908] A. C. 342; and *Collins* v. *Vining* (1837), C. P. Cooper, 472. No discretionary powers can be exercised after the trustees have paid the trust fund into court (*Re Murphy's Trust*, [1900] 1 Ir. R. 145).

(*k*) *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571; *Marquis of Camden* v. *Murray* (1880), 16 Ch. D. 161; *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913; *Re Courtier, Coles* v. *Courtier* (1886), 34 Ch. D. 136; *Re Burrage, Burningham* v. *Burrage* (1890), 62 L. T. 752; *Longmore* v. *Elcum* (1843), 2 Y. & Coll. C. C. 363.

(*l*) *Edmonds* v. *Millett* (1855), 20 Beav. 54.

(*m*) *Re Schneider, Kirby* v. *Schneider* (1906), 22 T. L. R. 223.

(*n*) (1882) 21 Ch. D. 615; *Re Sanderson's Trust* (1857), 3 Kay & J. 497. See also similar distinctions as to time and mode of sale, *Re Atkins, Newman* v. *Sinclair* (1899), 81 L. T. 421.

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Implied gifts of corpus when trusts for maintenance ended.

In the same way the practitioner must carefully distinguish between a discretionary power for maintenance, and an implied gift of the corpus when the period of maintenance has come to an end. Thus, in *Re Andrew's Trust, Carter* v. *Andrew* (*o*), a fund had been subscribed by the friends of a deceased clergyman for the education of his children, and the trust deed declared that the money was not intended for the exclusive use of any one of them in particular nor for equal division among them, but *as deemed necessary* to defray the expenses of all, and that solely in the matter of education. When all the children had attained twenty-one a portion of the fund remained still unexpended:—*Held*, that education was merely the motive of the gift, and that, that having been satisfied, the balance of the fund belonged to the children equally.

Powers in the nature of trusts.

A careful distinction must also be made between true discretionary powers and powers which, although discretionary in form, are really coupled with a duty. For instance, where a testator devises real estates to trustees, in trust to manage them during the minority of an infant, with power to lease in their discretion, the trustees will not be allowed to decline to exercise the power of letting. For, as BOWEN, L.J., said in *Re Courtier, Coles* v. *Courtier* (*p*), "one can understand that, where the machinery for management of the estates is given to the trustees, and the court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilise the machinery entrusted to them." In fact, the court looks at the substance rather than the form: and where what appears to be a mere discretionary power is, in reality, part of a trust for management, the court will order the trustees to exercise the power (*q*).

PARAGRAPH (1) (b).

Implied discretionary powers.

With regard to the principles enunciated in sub-clause (b) the case of *Ward* v. *Ward* (*r*) may be cited. There, by the immediate realisation of the trust property, the trustee would have ruined one beneficiary from whom a large debt was due to the trust estate, and would have very seriously prejudiced others. Instead of doing so, the trustee made an arrangement with the debtor for payment of the money by instalments;

(*o*) [1905] 2 Ch. 48.

(*p*) (1886) 34 Ch. D. 136. See also *Re Hill, Hill* v. *Pilcher*, [1896] 1 Ch. 962.

(*q*) *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 576, n.; *Nickisson* v. *Cockill* (1863), 3 De G. J. & S. 622.

(*r*) (1843) 2 H. L. Cas. at p. 784.

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and it was held that he was justified in taking that course, because he had exercised a sound discretion, and such as the court would have approved. But in all such cases a trustee should apply for the sanction of the court, under Order 55, r. 3.

Power to do all necessary acts for protecting the trust property.

So, again, as was said by Lord Cottenham in *Bright* v. *North* (*s*), "Every trustee is entitled to be allowed the reasonable and proper expenses incurred in protecting property committed to his care. But if they have a right to protect property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable"; and, therefore, his lordship allowed the trustees (who were, in that instance, trustees of public works) the expenses of opposing a bill in Parliament which would have been prejudicial to those works if passed. Here again, however, trustees should always be advised to obtain the sanction of the court before incurring such serious expense, either under Order 55, r. 3, or under s. 36 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Power to take necessary steps for keeping property in repair.

On the same grounds, a trustee whose duty it is to keep property, forming part of the trust estate, in repair, may, it would seem, retain income for that purpose; but without prejudice to the ultimate rights of the tenant for life and remainderman *inter se* (*t*).

Power to exchange policy for a fully paid up one.

On similar grounds, it would seem that a trustee may surrender a policy of assurance forming part of the trust property, in exchange for a fully paid up one of less amount, in cases where the party liable to pay the premiums cannot possibly do so (*u*). But of course no sane lawyer would allow a trustee who was his client to do this without the sanction of the court.

Power to thin timber.

So, again, in cases where the court would, if applied to, authorise the cutting down of timber which has arrived at maturity, and which would only degenerate if allowed to stand, or where it is necessary to cut it for the purpose of thinning it, the trustee may fell it on his own authority (*x*).

Power to grant certain leases.

On the same principle, a trustee who has the management of property, may grant a reasonable agricultural or occupation

(*s*) (1847) 2 Ph. at p. 220; and see *Stott* v. *Milne* (1884), 25 Ch. D. 710.

(*t*) *Re Fowler, Fowler* v. *Odell* (1881), 16 Ch. D. 723; but see *supra*, p. 252 *et seq.*

(*u*) *Re Steen, Steen* v. *Peebles* (1890), 25 L. R. Ir. 544.

(*x*) *Waldo* v. *Waldo* (1835), 7 Sim. 261; and see *Seagram* v. *Knight* (1867), L. R. 2 Ch. 628; but see Illustration, p. 334, *infra*.

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lease (*y*), unless expressly or impliedly (*z*) restrained from doing so by the settlement. But he may not grant a mining lease of unopened mines, for that would benefit the tenant for life at the expense of the reversioner (*a*). On the other hand (at all events where there is an express power "to grant leases") trustees may grant a mining lease of opened mines and join with others in doing so (*b*). However, where there is a tenant for life, his consent would now be necessary under s. 56 of the Settled Land Act, 1882.

No power to make problematical or speculative improvements.

On the other hand, trustees must not do acts, however beneficial they may possibly be to the property, if they are in their nature unreasonable or problematical. For instance, they ought not to make merely ornamental improvements (*c*), nor to take down a mansion-house for the purpose of rebuilding a better one (*d*), nor to build a villa for the mere improvement of the estate (*e*). If, however, they are by the settlement expressly given a power "generally to superintend the management of the estate," it would seem that their powers of management are almost unlimited, so long as they are exercised *bonâ fide* (*f*). Trustees are also empowered with the sanction of the Board of Agriculture and Fisheries to carry out certain specified improvements by the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), s. 24; but practically these have been superseded by the corresponding powers given to the tenant for life by the Settled Land Acts.

Trustee mortgagees releasing part of the security

The question not infrequently arises whether trustee mortgagees can, on sale of part of the mortgaged property by the mortgagor, release it, without insisting on the whole purchase money being paid to them. It is apprehended that it is purely

(*y*) *Naylor* v. *Arnitt* (1830), 1 Russ. & Myl. 501; *Bowes* v. *East London Water Co.* (1821), Jac. 324; *Att.-Gen.* v. *Owen* (1805), 10 Ves. 555; *Fitzpatrick* v. *Waring* (1882), 11 L. R. Ir. 35.

(*z*) *Evans* v. *Jackson* (1836), 8 Sim. 217; and see *Micholls* v. *Corbett* (1866), 34 Beav. 376.

(*a*) *Wood* v. *Patteson* (1847), 10 Beav. 541; *Re Baskerville*, *Baskerville* v. *Baskerville*, [1910] 2 Ch. 329, following dictum of KINDERSLEY, V.-C., in *Clegg* v. *Rowland* (1866), L. R. 2 Eq. 160, 165; but *cf. Re North*, *Garton* v. *Cumberland*, [1909] 1 Ch. 625; *Daly* v. *Beckett* (1857), 24 Beav. 114; and *Re Barker*, *Wallis* v. *Barker* (1903), 88 L. T. 685. But this is now provided for on equitable terms by the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

(*b*) *Re Baskerville*, *Baskerville* v. *Baskerville*, *supra*.

(*c*) *Bridge* v. *Brown* (1843), 2 Y. & Coll. C. C. 181.

(*d*) *Bleazard* v. *Whalley* (1854), 2 Eq. Rep. 1093.

(*e*) *Vyse* v. *Foster* (1874), L. R. 7 H. L. 318.

(*f*) *Bowes* v. *Earl of Strathmore* (1843), 8 Jur. 92; and see also as to powers of building, etc., *Re Leslie* (1876), 2 Ch. D. 185; and consider principle in *Gisborne* v. *Gisborne* (1877), 2 App. Cas. 300.

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a question of the value of the rest of the property as a security for the balance of the debt, and that if the margin is sufficient they may do so.

Power to retain married women's trust funds to enable them to claim equity to a settlement.

With regard to acts for the benefit of the beneficiaries, it was formerly a common practice for trustees of personal estate belonging absolutely to a married woman to pay it into court, so that the wife might have every facility for enforcing her equity to a settlement (*g*). But this right has, it is apprehended, ceased in the case of property coming under the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Power to allow maintenance to infants.

So, trustees might always allow, by way of maintenance, a competent part of the income of property to the father of an infant beneficiary (*h*), where the father could not support it *according to its position* (*i*), even where there was a trust for accumulation (*k*), if the circumstances showed that the settlor looked on the infant as his heir (*l*); and, if the infant were an orphan, maintenance might be allowed to the mother (*m*), or stepfather (*n*), whether they could support it or not. And now, as will be seen under Article 61 (*infra*, p. 348), the powers of trustees in relation to the maintenance of infants are greatly enlarged. It has been also held that a trustee may under special circumstances, as, for instance, where the capital is considerably under a thousand pounds (*o*), allow maintenance out of the capital; but a trustee would be very ill-advised to take upon himself the responsibility of doing so (*p*).

Power to advance.

Upon the same principle, a trustee may apply part of an infant's capital for its advancement in the world (*q*).

(*g*) *Re Swan* (1864), 2 Hem. & M. 34; *Re Bendyshe* (1857), 3 Jur. (N. S.) 727.

(*h*) *Sisson* v. *Shaw* (1804), 9 Ves. 285; *Maberly* v. *Turton* (1808), 14 Ves. 499; *Cotham* v. *West* (1839), 1 Beav. 381.

(*i*) Maintenance has been allowed to a father with an income of £6,000 a year (*Jerroise* v. *Silk* (1813), G. Coop. 52; and see *Re Allan, Havelock* v. *Havelock* (1881), 17 Ch. D. 807).

(*k*) *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229; *Re Allan, Havelock* v. *Havelock, supra*; *Re Colgan* (1881), 19 Ch. D. 305; *Re Thatcher's Trusts* (1884), 26 Ch. D. 426.

(*l*) See *Re Alford, Hunt* v. *Parry* (1886), 32 Ch. D. 383.

(*m*) *Douglas* v. *Andrews* (1849), 12 Beav. 310.

(*n*) *Billingsley* v. *Critchett* (1783), 1 Bro. C. C. 268, as affected by 4 & 5 Will. IV., c. 76, s. 57.

(*o*) *Barlow* v. *Grant* (1684), 1 Vern. 255; *Ex parte Green* (1820) 1 Jac. & W. 253; *Re Howarth* (1873), L. R. 8 Ch. 415; *De Witte* v. *Palin* (1872), L. R. 14 Eq. 251.

(*p*) See *Walker* v. *Wetherell* (1801), 6 Ves. 473.

(*q*) *Swinnock* v. *Crisp* (1681), Freem. 78; *Boyd* v. *Boyd* (1867), L. R. 4 Eq. 305; *Roper-Curzon*

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But here, again (in the absence of express power), he would be undertaking an unnecessary risk in acting without the sanction of the court.

Sems where infant only contingently entitled.

But where, by making an advancement, the trustee would injure the contingent rights of another beneficiary, he will do it at his peril as against the latter (*r*). For instance, where £100 was bequeathed upon trust to apply the income towards the maintenance and education of A. during his minority, and upon trust to pay the corpus to him on attaining twenty-one, but in case of his dying before that age, upon trust for X., it was held that, as against X., the trustees had no authority to advance part of the capital to A., who died before attaining his majority (*s*).

PARAGRAPH (2).

For illustrations of the principle that a trustee must not exercise his powers so as to unduly benefit one beneficiary at the expense of others, the reader is referred to Article 43, p. 222, *supra*.

No power to interfere with legal remainders.

With regard to the principle that the court in general cannot interfere with legal interests, it is apprehended that a trustee for another for life only (the trustee merely taking an estate *pur autre vie*) would not be justified, without the consent of the *legal* remainderman, in cutting timber which had arrived at maturity. For, not being the trustee for the remainderman, he could not do acts for the benefit of the estate generally which would be in derogation of the latter's legal rights (*t*).

On the same principle, it would seem that although, where the whole legal estate is vested in trustees, the court can authorise them to mortgage the trust property for the purpose of raising money to carry out necessary repairs (*u*), yet, on the other hand, where the legal estate is not in the trustees, but in an infant tenant for life, the court has no jurisdiction to do so (*x*).

v. *Roper-Curzon* (1871), L. R. 11 Eq. 452.

(*r*) *Worthington* v. *M'Craer* (1856), 23 Beav. 81; *Re Breeds' Will* (1875), 1 Ch. D. 226.

(*s*) *Lee* v. *Brown* (1798), 4 Ves. 362.

(*t*) See and consider *Seagram* v. *Knight* (1867), L. R. 2 Ch. 628, and compare it with *Waldo* v. *Waldo* (1835), 7 Sim. 261, and *Gent* v. *Harrison* (1859), Johns. 517.

(*u*) *Re Jackson, Jackson* v. *Talbot* (1882), 21 Ch. D. 786.

(*x*) *Jesse* v. *Lloyd* (1883), 48 L. T. 656.

Art. 57.—*Power of Trustees to sell or mortgage the Trust Property.* Art. 57.

(1) A trustee can neither sell, mortgage, exchange, or partition the trust property, except—

(a) under a direction or authority in the settlement itself, which may be either expressed or implied; or

(b) under some statutory authority.

(2) Where there is a mere power (as distinguished from an imperative trust) to sell settled land, the trustees cannot during the existence of a life tenancy sell without the consent of the tenant for life (*y*).

Paragraph (1).

Trustees' first duty is to preserve the trust property and not to sell it.

Where property, whether real or personal, is vested in trustees in trust for another or for others, either as co-owners or successively, their duty is *primâ facie* to preserve the property in specie for the benefit of all parties interested. Therefore, in the absence of any direction or power to the contrary, they must neither sell, exchange, partition, nor mortgage it. Mr. Cyprian Williams, in his work on Vendors and Purchasers (*z*), says that "To enable trustees to sell lands (*a*) without the concurrence of their *cestuis que trusts* an express power to that effect must be inserted in the instrument creating the trust, or the lands must be vested in them upon a special trust for sale. When such powers of, or trusts for, sale are created they must be carried out in all respects according to the intention of their creator; they must not, for example, be exercised before the time at which it has been declared that they shall arise (*b*). Thus where lands are vested in trustees on trust for one for life, and after his death on trust for sale or on trust for others with power of sale, the trust for or power of sale cannot be validly exercised in the lifetime of the tenant for life—not even with his consent (*c*) and concurrence, nor by order of the court" (*d*).

Where trust or power to sell, it must be exercised in strict conformity with its details.

(*y*) Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 56.

(*z*) Page 268.

(*a*) As to partition or exchange, see *ib.*, p. 267; and *M'Queen* v. *Farquhar* (1805), 11 Ves. 467; *Brassey* v. *Chalmers* (1853), 4 De G. M. & G. 528.

(*b*) See *Johnstone* v. *Baber* (1845), 8 Beav. 233.

(*c*) *Want* v. *Stallibrass* (1873), L. R. 8 Ex. 175; *Re Bryant and Barningham's Contract* (1890), 44 Ch. D. 218; *Re Head's Trustees and Macdonald* (1890), 45 Ch. D. 310.

(*d*) *Want* v. *Stallibrass*, *supra*.

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Power to sell, etc., may be implied.

The above observations of Mr. Williams need, however, some qualification, viz., that the power or direction need not be expressed directly, but may be inferred from other directions which logically import a direction or power to sell, and also that under divers statutes trustees are empowered to sell in particular cases. Speaking generally, however, a trustee can neither sell nor mortgage either trust land or trust chattels except under some power derived from the trust instrument or from some Act of Parliament.

PARAGRAPH (1) (a).

Implied powers of sale.

Express trusts and powers to sell need no further comment, but implied powers or trusts need some further consideration. Thus, where a testator devised his real and personal estate to his wife "absolutely and at her own disposal for the maintenance of herself and bringing up of my children," Lord LANGDALE held that although the widow took as trustee for herself and children, yet, as the property was to be held by her "absolutely and at her own disposal" for that purpose, there was an implied power to sell and give a good receipt for the purchase-money (*e*).

Under rule in *Howe* v. *Lord Dartmouth*.

The above case may no doubt be open to the observation that on the true *construction of the will* there was an express power of sale merely badly worded. But the same remark is inapplicable to the case of a trust of *residuary personal* estate settled on persons in succession (including leasehold lands) where (as we have already seen (*f*)), the trustee is (in the absence of contrary intention) bound to sell such parts of it as are not invested on trust securities. There is an implied direction to do this inferred from the facts (1) that the property is not given specifically and (2) that unless converted and invested on trust securities the value of the corpus would not be preserved. But where specified chattels or leaseholds are made the subject of a trust there is no such implication (*f*), and an ultimate direction to "divide" the trust property among individuals or a class does not of itself imply a power to sell for convenience of division (*g*). But where the purposes of a will could not be effected without a conversion of the whole estate, a direction "to *pay* and divide" was held to imply a trust for sale (*h*).

(*e*) *Wood* v. *Richardson* (1840), 4 Beav. 174.
(*f*) Art. 44, p. 228, *supra*.
(*g*) *Corwick* v. *Pearce* (1848), 7 Hare, 477; *Re Wintle, Tucker* v. *Wintle*, [1896] 2 Ch. 711.
(*h*) *Mower* v. *Orr* (1849), 7 Hare, 473.

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Powers of sale and exchange authorise a partition.

On the other hand, a power of sale *and exchange* impliedly authorises a partition (*i*); but not a power of sale alone, nor a power of exchange alone (*k*). It is conceived, however, that where trustees have both a power to sell and a power to invest in the purchase of real estate, a partition or exchange may be effected by way of cross sales (*l*).

In what cases power to mortgage is implied.

With regard to mortgages, the general rule is, clearly, that apart from authority in the settlement, trustees have no power to mortgage or pledge the trust property, however desirable it may be to raise money for the general purposes of the trust. Nor does an express trust to sell impliedly confer on them any power to mortgage—indeed the inference is the other way (*m*).

On the other hand, it would seem that a mere power to sell may impliedly authorise a mortgage, instead of a sale, if the power to sell is merely for the purpose of raising a sum of money charged on the property (*n*). In *Re Bellinger, Durell* v. *Bellinger* (*o*), KEKEWICH, J., held that a power to make outlays in repairs or improvements out of income *or capital*, impliedly authorised trustees to mortgage the property for that purpose.

A direction to raise a gross sum, impliedly authorises a mortgage, even although the rents and profits are alone specified (*p*); but *secus* where the power is to raise the sum out of *annual* rents and profits with power to mortgage *in case the necessary sum cannot be* so raised (*q*). Where the trustees have power to raise out of rents and profits *or* by mortgage, the court (if the trustees ask it to exercise the discretion for them) will so raise the amount as to throw the burden on the beneficiaries in proportion to their respective interests in the property (*r*). So the arrears of a rent-charge may in the discretion of the court be raised by mortgage of the fee where the estate and the burden of the charge are in the same hands, notwithstanding the existence of a right to recover by distress

(*i*) *Re Frith and Osborne* (1876), 3 Ch. D. 618. Where there is no express or implied power it can only be done either by a partition action, or by the Board of Agriculture and Fisheries.

(*k*) See *M'Queen* v. *Farquhar* (1805), 11 Ves. 467; *Att.-Gen.* v. *Hamilton* (1816), 1 Madd. 214; and judgment of JESSEL, M.R., in *Re Frith and Osborne, supra.*

(*l*) Sug. on Pow. 858.

(*m*) See *Walker* v. *Southall* (1887), 56 L. T. 882; *Devaynes* v. *Robinson* (1857), 24 Beav. 86; and *Haldenby* v. *Spofforth* (1839), 1 Beav. 390.

(*n*) *Ball* v. *Harris* (1839), 4 Myl. & Cr. at p. 267, explained by Lord ST. LEONARDS in *Stroughill* v. *Anstey* (1852), 1 De G. M. & G. 635.

(*o*) [1898] 2 Ch. 534.

(*p*) *Per* Lord ELDON, *Bootle* v. *Blundell* (1815), 1 Mer., at p. 233; *Countess of Shrewsbury* v. *Earl of Shrewsbury* (1790), 1 Ves. Jun. 227.

(*q*) *Solley* v. *Wood* (1861), 29 Beav. 482.

(*r*) *Jones* v. *Jones* (1846), 5 Hare, 440; *Ainslie* v. *Harcourt*

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and entry (*s*). But this is not so where there is a term of years for securing it (*t*).

Where trustees are empowered to mortgage, they have an implied power to raise the incidental costs by mortgage of the same property (*u*).

PARAGRAPH (1) (b).

Statutory powers of selling and mortgaging.

The general incapacity of trustees to sell or mortgage the trust property, unless empowered by their trust to do so, has been modified in several instances by Parliament.

Under Lands Clauses Acts.

Section 7 of the Lands Clauses Consolidation Act, 1845, empowers (*inter alios*) trustees, to sell by agreement, lands vested in them which are required by bodies empowered to acquire such lands by a statute incorporating the Act. This section, however, does not apply to bare trustees, *e.g.*, a trustee for a married woman who is not restrained from anticipation (*w*); for if the *cestui que trust* is *sui juris*, and the trustee is the mere holder of the bare legal estate for him, he, and not the trustee, is the proper person to have the conduct of the negotiation (*x*), the trustee of course joining in the conveyance to convey the legal estate (*y*). Sales under this Act may be either for a gross sum or a perpetual rent-charge (*z*). But in either case, where a trustee is selling under the statutory power, the consideration must not be less than the amount fixed by two surveyors under s. 9—one appointed by either party—or the umpire of such surveyors; and if it be a gross sum exceeding £200, it must be paid into court and not to the trustees (*a*). The price may be agreed on, subject to subsequent confirmation by the surveyors or their umpire. It would serve no good purpose to enlarge on sales under this Act in this work, as it is an exceptional matter which is more appropriately discussed in treatises on the Act itself.

(1860), 28 Beav. 313; *Redman* v. *Rymer* (1891), 65 L. T. 270.

(*s*) *Cupit* v. *Jackson* (1824), 13 Pr. 721; *Philipps* v. *Philipps* (1844), 8 Beav. 193; *White* v. *James* (No. 2) (1858), 26 Beav. 191; *Horton* v. *Hall* (1874), L. R. 17 Eq. 437; *Taylor* v. *Taylor* (1874), L. R. 17 Eq. 324; *Scottish Widows Fund* v. *Craig* (1882), 20 Ch. D. 208; *Re Tucker, Tucker* v. *Tucker*, [1893] 2 Ch. 323.

(*t*) *Blackburne* v. *Hope-Edwardes*, [1901] 1 Ch. 419.

(*u*) *Armstrong* v. *Armstrong* (1874), L. R. 18 Eq. 541.

(*w*) *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429.

(*x*) *Re Pigott and The Great Western Rail. Co.* (1881), 18 Ch. D. at p. 149.

(*y*) *Lippincott* v. *Smyth* (1860), 29 L. J. Ch. 520.

(*z*) 23 & 24 Vict. c. 106, ss. 1 and 2.

(*a*) 8 & 9 Vict. c. 18, s. 69. Where it is less than £200 and more than £20, it can either be paid into court or to two trustees nominated by the parties entitled to the rents (s. 71), and if it does not exceed £20, to the selling trustees.

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Under Lord St. Leonards' Act, 1859.

Prior to 1859, where a testator had charged his lands with the payment of debts or legacies, but had omitted to provide any means of raising the charge by sale or mortgage, nothing less than a suit in Chancery for the general administration of his estate would meet the case. To obviate this, Lord St. Leonards' Act, 1859 (*b*), conferred on devisees in trust to whom a testator dying after August 13th, 1859 should devise real estate *for the whole of his estate or interest therein* charged with payment of debts or legacies, a power to raise the same by sale or mortgage (*c*). This Act has been largely superseded by the Land Transfer Act, 1897, which vests all the *freeholds* of a deceased person in his personal representatives, with full powers of sale or mortgage. But as the Act of 1897 does not apply to copyholds of which the deceased person was tenant on the court rolls (although it *does* apply to merely equitable interests in copyholds), Lord St. Leonards' Act is still occasionally used for the purpose of raising, by sale or mortgage, debts or legacies charged on copyholds, and therefore demands some notice.

Under this Act, if the estate be charged with debts or legacies or both, generally, a purchaser or mortgagee is not bound to demand proof that there are any unpaid debts or legacies, nor to see to the application of the purchase-money or loan (*d*); but it is otherwise where the charge is of a specified debt or a specified legacy (*e*). This exemption from inquiry extends for a period of twenty years after the testator's decease; but after that, a purchaser or mortgagee from *trustees* (*f*) (herein differing from a purchaser or mortgagee of leaseholds from an executor (*g*)) must make reasonable inquiry as to the existence of unpaid debts or legacies. It would seem that in all cases the trustees or personal representative must sell and convey *as such* to give a good title under the Act (*h*).

Whether trustees or executors selling copyholds under Lord St. Leonards' Act can present purchaser for admission.

It is apprehended that trustees to whom copyholds are devised cannot, by virtue of this Act, present a purchaser for admission without either being admitted themselves or allowing the customary heir to take admission. It is not like a common

(*b*) 22 & 23 Vict. c. 35, ss. 14 and 15.

(*c*) The Act also provides by s. 16 that if there be no devise of his whole estate to trustees, the power may be exercised by his executors, but this is beyond the scope of the present work.

(*d*) *Stroughill* v. *Anstey* (1852), 1 De G. M. & G. 635; and see *Johnson* v. *Kennett* (1835), 3 Myl. & K. 624 *Forbes* v. *Peacock* (1844), 1 Ph. 717; *Robinson* v. *Lowater* (1854), 5 De G. M. & G. 272.

(*e*) *Elliot* v. *Merriman* (1734), Barn. Ch. 78.

(*f*) *Re Tanqueray-Willaume and Landau* (1882), 20 Ch. D. 465.

(*g*) *Re Whistler* (1887), 35 Ch. D. 561; *Re Venn and Furze's Contract*, [1894] 2 Ch. 101.

(*h* See *Solomon* v. *Attenborough* (1912), 106 L. T. 87.

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law power, where a testator devises his copyholds to such uses as his executors may appoint by way of sale. Under such powers the purchaser is regarded as the devisee; but it seems impossible to say that a statutory power of sale given *to a devisee* in trust stands on the same plane. The case where there is no devise of the copyholds, and the statutory power is exercisable by the executors is more difficult, as they certainly take no estate, and without an administration action cannot compel the customary heir to be admitted for the purpose of surrendering to the use of a purchaser. The present writer is not aware of any case in which this point has been raised, and it scarcely falls within the limits of this treatise.

Sales under Succession Duty and Finance Acts.

The Succession Duty Act (*i*), s. 44, authorises trustees to raise the duty "at interest on the security of" the property, with power to give effectual discharges; and such securities have priority over any charge or incumbrance created by the successor.

By s. 9 (5) of the Finance Act, 1894 (*k*), a person authorised or required to pay estate duty (which seems to include settlement estate duty (*l*)) has power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on the property. This section of course embraces trustees by whom such duty is payable. The Act (sub-s. 7) also authorises trustees to pay the duty out of any money arising from the sale of property, or held upon trust to lay it out under the settlement; and also authorises Settled Land Act trustees to pay it out of capital money in their hands.

Raising money for purpose of renewing leases.

By s. 19, sub-s. 2, of the Trustee Act, 1893 (*m*), it is provided that where money is required to pay for the renewal of renewable leases, and the trustees have not sufficient money in hand for the purpose, they may raise it by mortgage of the property to be comprised in the renewed leases, or of any other property subject to the same trusts. This sub-section is printed in full and commented upon *supra*, p. 256.

Sales, etc., by Settled Land Act trustees on behalf of infants.

Lastly, trustees for purposes of the Settled Land Acts may, on behalf of an infant who is tenant for life, or would be if he were of full age, or would have the powers of a tenant for life under s. 58 of the Settled Land Act, 1882, exercise, on his behalf, all the powers of selling, partitioning, exchanging, leasing, and mortgaging conferred on tenants for life by that Act. It is

(*i*) 16 & 17 Vict. c. 51.
(*k*) 57 & 58 Vict. c. 30.
(*l*) See *Re Leveridge, Spain* v. *Lejoindre*, [1901] 2 Ch. 830.
(*m*) 56 & 57 Vict. c. 53.

apprehended that this would also apply where under a settlement the infant is owner in fee, provided the trustees of the settlement have been expressly appointed as trustees for the purposes of the Settled Land Acts or have an express power of sale during the minority of the infant. Otherwise an application would have to be made to the court under s. 60 to appoint some person *ad hoc*.

On the other hand, the fact that trustees are trustees of an estate *pur autre vie* does not give them the powers of sale, etc., conferred on tenants for the life of another by s. 58 (1) (v.) of the Settled Land Act, 1882, that Act only relating to beneficial owners (*n*).

Under s. 10 of Conveyancing Act, 1911.

By s. 10 of the Conveyancing Act, 1911 (1 & 2 Geo. V., c. 37), it is enacted that where a settlement within the meaning of the 63rd section of the Settled Land Act, 1882, or other settlement of property as personal estate contains a power to invest money in the purchase of land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale, with power to postpone the sale; and the net rents and profits until sale, after keeping down costs of repairs and insurance and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase-money would be payable or applicable if a sale had been made and the proceeds had been duly invested in personal estate. This, however, only applies to settlements coming into operation after 1911.

Foreclosed mortgages on which trust funds invested.

The same Act (s. 9) also expressly directs trustees of funds which have been invested on mortgage of lands, the equity of redemption of which has in any way become barred, to hold such lands in trust for sale; but this appears to be merely declaratory of the pre-existing law of the court.

ART. 58.—*Power of Trustees in relation to the Conduct of Sales.*

(1) Where a trust for sale is vested in trustees they may carry out the sale as follows:

(a) In such manner, and either alone or jointly with any adjoining or any co-owner, as (having regard to all the surrounding circumstances) may be reasonable and for the probable benefit

(*n*) *Re Jemmett and Guest's Contract*, [1907] 1 Ch. 629.

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of the beneficiaries (*o*). But, unless the trust was created by a settlement coming into operation after August 27th, 1860 (*p*), they cannot buy in the property at an auction (*q*), or, *semble*, rescind a contract for sale. They may accept a cheque for the deposit (*r*).

(b) If the settlement first came into operation after the 31st of December, 1883, then (unless expressly forbidden) they may sell subject to prior charges or not, and may concur with any other person in selling, without the necessity of making inquiries as to whether the course adopted is the best (*s*).

(c) By leave of the court (but not otherwise, unless expressly authorised) they may sell the surface, reserving the minerals with incidental powers of working the same. But when such leave has been once obtained they may (unless forbidden by the settlement) from time to time dispose of surface and minerals separately without any further application (*t*).

(2) Where the property is of leasehold tenure, the sale can (if several properties comprised in one lease are sold in lots) be made by way of underleases (*u*) at apportioned rents.

(3) The conditions subject to which the sale is made should not be unnecessarily depreciatory (*x*).

(4) A trustee who is either a vendor or a purchaser

(*o*) See *Re Cooper and Allen to Harleeh's Contract* (1876), 4 Ch. D. 802.

(*p*) Lord Cranworth's Act (23 & 24 Vict. c. 145), ss. 1, 2, 34.

(*q*) *Taylor* v. *Tabrum* (1833), 6 Sim. 281; *Ex parte Lewis* (1819), 1 Gl. & J. 69.

(*r*) *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 42.

(*s*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13 (1), re-enacting Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 35.

(*t*) Trustee Act, 1893, s. 44.

(*u*) *Re Walker and Oakshott*, [1901] 2 Ch. 383; affirmed, [1902] W. N. 147.

(*x*) But a depreciatory condition does not now avoid the sale unless it appears that the price was thereby rendered inadequate, nor can the sale be impeached after conveyance on that ground unless the purchaser and trustee were acting collusively; nor can a purchaser now make any objection to a title on the ground that a condition of sale was unnecessarily restrictive. See Trustee Act, 1893, ss. 14, 15, and *supra*, p. 264.

may sell or buy without excluding the application of section 2 of the Vendor and Purchaser Act, 1874 (*y*).

Paragraph (1) (a) and (b).

Power to sell under the old law independent of statute.

For an example of the law relating to old settlements, the case of *Re Cooper and Allen to Harlech's Contract* (*z*) may be cited. The question in that case was whether persons who were mortgagees of a life estate, and also mortgagees (for a different sum) of the reversion, with power of sale under both mortgages, could sell the fee simple in possession. The late Sir George Jessel, M.R., in giving judgment, said: "First of all, on principle, what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the *cestuis que trusts*. It is, further, their duty to take care to receive the purchase-money, and to invest it properly according to the trusts. If, therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts, and performing their duty in so obtaining that higher price. . . . Secondly, it is their duty, as I have already said, to receive the purchase-money. If, therefore, they do join with any other person, whether that other person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore, where they do join with other people, the purchase-money must be so apportioned before the completion of the purchase, and must be paid by the purchaser; the apportioned part coming to the trustees being paid to them." His lordship then proceeded to point out that the trustees were the proper persons to make the apportionment, and that unless a purchaser has notice that the apportionment is an improper one, he would be quite safe in accepting the trustees' apportionment. He then examined the cases in which the joinder with other parties was *primâ facie* right, and those in which it required evidence to support it; pointing out that in the case of adjacent properties, as a general rule, trustees should not agree to a joint sale without some evidence of its desirability, but that in the case of trustees entitled only to a limited or partial estate

(*y*) Trustee Act, 1893, s. 14. (*z*) (1876) 4 Ch. D. 802.

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in property, it is obviously, and without the necessity of proof, for the benefit of the estate that they should join in a sale of the entire fee simple with the other parties interested.

No power formerly to buy in at a sale by auction.

As an instance of the inability of trustees under old settlements to buy in the property at an auction may be mentioned a case in which the assignees of a bankrupt had bought in two lots of the bankrupt's property, and, upon the subsequent sale of the two lots, had gained on one and lost on the other. It was held by Lord ELDON, that the original buying in of the two lots being a breach of trust, the assignees were liable for the loss (if any) on each lot, and could not set off the gain on one against the loss on the other (*a*). But it is conceived that this somewhat harsh decision would scarcely be followed at the present day.

PARAGRAPH (1) (c).

Selling surface and minerals separately.

At one time it was impossible for trustees, in the absence of express power, to sell surface and minerals separately. To remedy this the Confirmation of Sales Act (*b*) gave the court power to sanction such sales. This Act was repealed by the Trustee Act, 1893 (*c*), but re-enacted in a slightly different form by s. 44 of that Act, which, as amended by s. 3 of the Trustee Amendment Act, 1894 (57 & 58 Vict. c. 10), is in the following words:—

(1) Where a trustee or other person (*d*) is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, . . . with or without the said rights or powers, separately from the residue of the land.

(2) Any such trustee or other person, with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the Court, so dispose of any such land or minerals.

(3) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

It will be perceived that this enactment does not apply

(*a*) *Ex parte Lewis* (1819), 1 Gl. & J. 69.

(*b*) 25 & 26 Vict. c. 108.

(*c*) 56 & 57 Vict. c. 53, s. 51 and Schedule.

(*d*) This (introduced by s. 3 of the Trustee Amendment Act, 1894) extends the Act to mortgagees with power of sale: see *Re Beaumont's Mortgage Trusts* (1871), L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates* (1872), L. R. 13 Eq. 634; *Re Hirst's Mortgage* (1890), 45 Ch. D. 263.

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to leases (*e*), nor presumably to mortgages (where a mortgage is allowable). Applications under the section are made by petition in the Chancery Division (*f*), and the *cestuis que trusts* in the jurisdiction must be served (*g*).

Paragraph (2).

Sale of leaseholds carried out by underleases.

It is often extremely convenient for trustees for sale of leaseholds, to carry out the sale by means of sub-leases. For instance, where several houses are comprised in a single building lease, it is simpler if they be sold separately to execute a sub-demise to each purchaser for the residue of the term less one day, at a proportionate part of the entire rent. If this be not done, the rent would have to be apportioned, and if the landlord did not consent, there would have to be elaborate cross covenants and powers of distress and entry between the several purchasers (*h*). However, until recently, it was generally considered that, notwithstanding its convenience, this method could not be adopted by trustees for sale (*i*). This view has now been reversed by the case of *Re Judd and Poland and Skelcher's Contract* (*k*), where the Court of Appeal, overruling *Re Walker and Oakshott's Contract* (*i*) on this point, held that the device was quite legitimate. The conditions of sale, however, in that case provided that if all the lots were sold, the whole lease should be assigned to the purchaser of the largest lot, and that he should grant the sub-leases to the other purchasers; and that if all the lots were not sold, the sub-leases of the lots sold should be granted by the vendors. Thus, if all the lots were sold, the trustees would have got rid of their liability as assigns of the lease as completely as if they had conveyed *each* lot to the purchaser by way of assignment; and if all the lots were not sold, they would as between themselves and the lessor be in no worse position than they would have been in if they had assigned the sold lots instead of sub-demising them. It is apprehended, however, that trustees for sale of leaseholds would not be justified in retaining the nominal reversion permanently and granting sub-leases to every one of the

(*e*) *Re Newell and Nevill's Contract*, [1900] 1 Ch. 90. This case was overruled by *Re Gladstone, Gladstone* v. *Gladstone*, [1900] 2 Ch. 101, but on another point.

(*f*) R. S. C., Ord. 54B, rr. 2, 3, and 4a.

(*g*) See *Re Hardstaff*, [1899] W. N. 256. Where a remainderman is out of the jurisdiction service is dispensed with, even if he is known to object (*Re Skinner*, [1896] W. N. 68).

(*h*) See *Re Webb, Still* v. *Webb*, [1897] 1 Ch. 144.

(*i*) *Re Walker and Oakshott's Contract*, [1901] 2 Ch. 383, (affirmed, [1902] W. N. 147).

(*k*) [1906] 1 Ch. 684.

Art. 58. purchasers: for that would leave them (as privies in estate) liable to the lessor for the payment of the entire rent and for breaches of covenant by any one or more of the sub-lessees. As pointed out by ROMER, L.J., the sub-demises should recite the contract *for sale* and the condition as to the form of carrying it out, so as to show that in substance it was a real sale.

ART. 59.—*Power of Trustees to give Receipts.*

The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power, will effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof (*l*).

The above rule is comparatively modern, dating only from 1881, when it formed s. 36 of the Conveyancing Act of that year. It applies, however, quite irrespective of the date of the settlement, and consequently no questions of practical interest can arise under the old law, which is therefore omitted in this edition.

ART. 60.—*Power to Compound and to Settle Disputes.*

"(1) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient" (*m*).

"(2) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to

(*l*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20.

(*m*) Trustee Act, 1893, s. 21 (1).

arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith" (*n*).

"(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained" (*o*).

The above article constitutes the first three sub-sections of s. 21 of the Trustee Act, 1893, which is merely a re-enactment of s. 37 of the Conveyancing Act, 1881. What the effect of the section may be is by no means clear. In *Re Owens, Jones* v. *Owens* (*p*), the late Sir GEORGE JESSEL, M.R., intimated that the probable effect of it was to "revolutionise the law on the subject," and to make the question in every case one entirely of *good faith*, quite apart from any question of prudence. On the other hand, it has been suggested that the section is merely a statutory expression of the law of the court (*q*), with this important difference, that it "shifts the onus of proof, where any particular transaction is impeached, from the trustee to the *cestui que trusts*. Formerly a trustee had to justify his action in compromising, compounding, etc.; henceforth the dissatisfied *cestuis que trusts* must prove *impropriety of motive*" (*r*). However, in a case decided since the Act, LOPES, L.J., laid it down broadly, that the only excuse for not taking action to enforce payment of a debt due to the trust is "a *well-founded* belief on the trustee's part, that such action would be useless, and *that the burden of proving the grounds of such well-founded belief* is on the trustee" (*s*). If this be indeed so, it is difficult to give any meaning whatever

(*n*) Trustee Act, 1893, s. 21 (2).

(*o*) *Ibid.*, s. 21 (3).

(*p*) (1882) 47 L. T. 61; and see p. 259, *supra*.

(*q*) *Wiles* v. *Gresham* (1854), 5 De G. M. & G. 770; *Ex parte Ogle* (1873), L. R. 8 Ch. 711.

(*r*) Brett and Clerke's Conveyancing, etc., Acts, 3rd ed., 159.

(*s*) *Re Brogden, Billing* v. *Brogden* (1888), 38 Ch. D. 546, 574.

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to the section; but it is only fair to add that the section was not drawn to the attention of the court when the Lord Justice made the above observation, and that very probably it was not applicable to that case (*t*).

Power must be exercised by all the trustees jointly.

Although the wording of the Act is open to criticism, it must (it is conceived) be construed to mean that the power must be exercised by all the trustees jointly, and can only be exercised by a sole trustee in cases where he is expressly authorised to execute the trusts; and that it cannot be construed (as doubtfully suggested by the learned authors above quoted) to enable *any two* of a greater number of trustees to compromise or compound without the joinder of their fellows. Nevertheless, it was held by KEKEWICH, J., that it enabled trustees to enter into a compromise with one of themselves (*u*).

ART. 61.—*Power to allow Maintenance to Infants.*

(1) Where property is held in trust for an infant for life or for any greater interest, and whether absolutely or contingently on his attaining the age of *twenty-one* years, or on the occurrence of any event *before his attaining that age*, the trustees may make an allowance for his maintenance, education, or otherwise for his benefit.

(2) This power is discretionary, but is exercisable notwithstanding that there is another fund applicable to the same purpose, or some person bound by law to provide for such maintenance and education.

(3) The trustees may pay the allowance to the guardian or parent (*v*) of the infant instead of expending it directly themselves (*x*).

(4) The balance of the income not applied for maintenance must be accumulated at compound interest, and where the gift is contingent the accumulated fund accrues to the capital for the benefit of the person who ultimately becomes entitled to that capital,

(*t*) The neglect in that case took place before the Act of 1881. Moreover two of the trustees were also executors of the debtor and personally interested in his estate.

(*u*) *Re Houghton, Hawley* v. *Blake*, [1904] 1 Ch. 622; but see *De Cordova* v. *De Cordova* (1879), 4 App. Cas. 692.

(*v*) *Re Cotton* (1875), 1 Ch. D. 232.

(*x*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43.

with liberty for the trustees to apply such accumulations as income.

(5) The above power may be negatived or modified by the settlement.

(6) The above power only applies to a contingent interest:

(a) where the intermediate income goes along with the corpus (*y*); or

(b) in case of portions charged on land (*z*).

Paragraph (1).

Examination of the statutory power of maintenance.

It will be perceived that this statutory power is confined to cases where an infant is entitled either

(a) for life;

(b) absolutely, or for a greater interest than for life;

(c) contingently on attaining twenty-one or on the occurrence of some event *before attaining that age*.

Consequently, where an infant is only contingently entitled on attaining twenty-five or marrying before attaining that age, no maintenance can be allowed (*a*). This is often a source of great distress. Jessel, M.R., got over the difficulty in *Re Breeds' Will* (*a*) by utilising a power of *advancement* in the testator's will, which permitted advances to be made "for the benefit or advantage" of his children; but all wills do not contain such powers. In cases where the statutory power is inapplicable, the only hope is to apply to the court, which will generally sanction maintenance upon a policy of insurance being effected on the infant's life for a sum sufficient to cover the allowance for maintenance the premiums on the policy and the costs, the policy only to become payable if the infant dies before attaining a vested interest.

Paragraphs (2) and (3).

Statutory power of maintenance is purely discretionary.

The power being discretionary, the court will not interfere with that discretion so long as the trustees exercise it *bonâ*

(*y*) *Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D. 331; *Re Judkin's Trusts* (1884), 25 Ch. D. 743; *Re George* (1877), 5 Ch. D. 837; *Re Collins, Collins* v. *Collins* (1886), 32 Ch. D. 229; *Re Jeffery, Burt* v. *Arnold*, [1891] 1 Ch. 671; *Re Burton's Will, Banks* v. *Heaven*, [1892] 2 Ch. 38; *Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1; *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.

(*z*) *Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. 683.

(*a*) *Re Judkin's Trusts* (1884), 25 Ch. D. 743; *Re Breeds' Will* (1875), 1 Ch. D. 226.

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fide (*b*). Nor, where there are two funds applicable, will the court order each fund to contribute *pro rata* (*c*). But the trustees must exercise their discretion, and not blindly pay, nor (*semble*) refuse to pay, without duly considering the circumstances (*d*). And it is apprehended that they should ask the parent or guardian for some sort of explanation as to how he intends to apply the sum allowed, although they are not bound to see that he so applies it.

PARAGRAPH (4).

Trust of accumulations of surplus.

The words of the Act are by no means free from criticism as to the ultimate ownership of the accumulations, which (in the words of the Act) are to be held "for the benefit of the person who ultimately becomes entitled to the property from which the same arise"; i.e., they are to form capital and not income. Read literally, it would follow that where a testator leaves property in trust for his infant daughter for life, with remainder to her children (the gift of income to the daughter not being contingent, but immediate and vested), the Act would give all accumulations of *her* income not required for her maintenance to her children as capital. Such a construction of the Act would do such violence to the words of the will (which gives the whole of the income to her from the testator's death) that it has been held that the gift of an *immediate* life interest is a sufficient expression of a contrary intention to take the case out of the words in question (*e*). This is a common-sense view of the matter; but the Act might have been more precise on the point.

Where, however, the gift is contingent on attaining twenty-one, and the infant takes only a life interest, the words in question apply, and all accumulations of income during infancy are added to capital (*f*). For, as was pointed out by the Court of Appeal in the very instructive case of *Re Bowlby, Bowlby* v. *Bowlby* (*f*), it does not follow from the fact that a contingent gift *carries* intermediate income, that such income belongs to the first person who acquires a beneficial interest. For instance, if

(*b*) *Re Bryant, Bryant* v. *Hickley*, [1894] 1 Ch. 324; and see *supra*, p. 328, *et seq.*

(*c*) *Smith* v. *Cock*, [1911] A. C. 317.

(*d*) *Wilson* v. *Turner* (1883), 22 Ch. D. 521.

(*e*) *Re Humphreys, Humphreys* v. *Levett*, [1893] 3 Ch. 1; and see *per* VAUGHAN WILLIAMS, L.J., *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. at p. 705; *Re Wells, Wells* v. *Wells* (1889), 43 Ch. D. 281; and *Re Buckley's Trusts* (1883), 22 Ch. D. 583.

(*f*) *Re Bowlby, Bowlby* v. *Bowlby*, [1904] 2 Ch. 685, overruling *Re Scott, Scott* v. *Scott*, [1902] 1 Ch. 918, on this point.

the infant in such a case dies, the balance of income up to its death does not belong to its personal representative (*g*). In truth, where a contingent gift carries intermediate income, it is, in the absence of intention to the contrary, regarded as an accretion to the corpus of the contingent legacy; and just as an infant who takes absolutely on attaining twenty-one will not get the accumulated income unless he attains that age, so an infant who only takes a *life interest* on attaining twenty-one will only take the interest on such accumulations as from that date.

PARAGRAPH (5).

This requires no comment, except that an express direction to accumulate the income during the infancy, is not a contrary intention sufficient of itself to negative the statutory power (*h*).

PARAGRAPH (6).

Statutory power not always applicable.

Although the statute allows maintenance out of the income of a *contingent* legacy or fund, yet if, on the true construction of the settlement, that income is payable to some one else during the infancy, and is not to be accumulated so as to pass along with the corpus if and when it vests, the infant will not (with the exception hereinafter referred to of portions charged on land) be entitled to be maintained. For if he were, his maintenance would come, not out of his own contingent property, but out of somebody else's income, which would be manifestly unjust. Consequently, the first question which the practitioner has to solve in all cases of maintenance (except as aforesaid), is whether or not the income of the fund will go along with the capital if and when the latter vests. If it will, then maintenance may be safely allowed. If it will not, then maintenance must be refused.

Whether the gift comprises intermediate income is a question of construction.

The question is not so much a question of law as one of the interpretation of the settlement. Still, it may be useful to sum up the decisions so far as they afford any principle or rule of construction. It would seem, then, that a general *residuary* but contingent bequest of *personal* estate, includes the intermediate income (*i*); that a similar devise of *real* estate does not (*j*); but that a blended gift of both real and personal estate *primâ facie* includes the intermediate income of both (*k*).

(*g*) See last note.

(*h*) *Re Thatcher's Trusts* (1884), 26 Ch. D. 426.

(*i*) *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.

(*j*) *Lord Beetive* v. *Hodgson* (1864), 12 W. R. 625.

(*k*) *Genery* v. *Fitzgerald* (1822), Jac. 468; *Re Dumble, Williams* v. *Murrell* (1883), 23 Ch. D.

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On the other hand, a general or specific legacy or devise does not carry the intermediate income: unless (1) the donor stands *in loco parentis* to the infant, and has provided no other fund for maintenance (*l*); (2) the income is expressly or impliedly (*m*) to be applied for maintenance; or (3) the gift is expressly or impliedly directed to be at once set apart (*n*).

Portions charged on land.

There is, however, an exception to the general rule with regard to contingent portions charged on land. Although such gifts do not vest until they are wanted, viz., in case of sons at twenty-one, or in case of daughters at twenty-one or marriage, and do not carry intermediate income, yet an infant contingent portioner is entitled to such a rate of interest or allowance in respect of his or her portion as the court may deem necessary for maintenance (*o*).

Residuary gift to infant.

It may be added, that a gift of residue to an infant *makes the executor a trustee*, and enables him to allow maintenance under this article (*p*).

ART. 62.—*Power of Trustees to pay to Attorney appointed by Beneficiary.*

A trustee acting or paying money, in good faith and without notice, under or in pursuance of any power of attorney, is not liable by reason of the fact that, at the time of the payment or act, the person who gave the power of attorney was dead or had done some act to avoid the power. But this does not affect the right of any person entitled to the money against the person to

360; *Re Burton's Will, Banks* v. *Heaven*, [1892] 2 Ch. 38.

(*l*) *Re Moody, Woodroffe* v. *Moody*, [1895] 1 Ch. 101; *Re George* (1877), 5 Ch. D. 837.

(*m*) See *Re Churchill, Hiscock* v. *Loder*, [1909] 2 Ch. 431, where WARRINGTON, J., implied such an intention from a power to apply the whole or any part of a contingent share for the advancement *or otherwise for the benefit* of the infant. See also *Pelt* v. *Fellows* (1733), 1 Swans. 561, n., and *Leslie* v. *Leslie* (1835), Ll. & G. *temp.* Sugd. 1.

(*n*) *Re Clements, Clements* v. *Pearsall*, [1894] 1 Ch. 665; *Re Medlock, Ruffle* v. *Medlock* (1886), 54 L. T. 828; as to leaseholds, *Re Woodin, Woodin* v. *Glass*, [1895] 2 Ch. 309. See also *Re Holford, Holford* v. *Holford*, [1894] 3 Ch. 30; *Guthrie* v. *Walrond* (1883), 22 Ch. D. 573; and *Re Adams, Adams* v. *Adams*, [1893] 1 Ch. 329.

(*o*) *Per* FARWELL, J.: *Re Greaves' Settled Estates, Jones* v. *Greaves*, [1900] 2 Ch. 683.

(*p*) *Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch. D. 302. The same rule applies to an administration: see *Re Adams, Verrier* v. *Haskins* (1906), 51 Sol. J. 113.

whom the payment is made; and the person so entitled has the same remedy against the person to whom the payment is made as he would have had against the trustee (*q*). Art. 62.

The above article, although restricted in terms to trustees, is but little more than the general law now applicable to all persons acting upon the faith of a power of attorney. For s. 47 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), gives protection to every person so acting, notwithstanding that before the payment or act the donor of the power had died, or become lunatic or of unsound mind, or bankrupt, or had revoked the power, provided the fact of such death, lunacy, unsoundness of mind, or bankruptcy or revocation was not, at the time of the payment or act, known to the person making or doing the same.

ART. 63.—*Suspension of the Trustee's Powers by Administration Action.*

(1) Where a judgment has been given for the execution of the trust by the court, or (before judgment) an injunction has been granted, or a receiver appointed, the trustee can only exercise his powers with the sanction of the court (*r*).

(2) But although its sanction must be obtained, the court will not interfere with a discretion reposed in a trustee and expressed to be absolute and uncontrollable, so long as it is exercised in good faith (*s*).

(3) A decree for administration does not absolve a trustee from the performance of his *duties* (*t*).

(*q*) Trustee Act, 1893, s. 23, re-enacting 22 & 23 Vict. c. 35, s. 26.

(*r*) *Mitchelson* v. *Piper* (1836), 8 Sim. 64; *Shewen* v. *Vanderhorst* (1830), 2 Russ. & Myl. 75; *Minors* v. *Battison* (1876), 1 App. Cas. 428; *Re Gadd, Eastwood* v. *Clark* (1883), 23 Ch. D. 134. The mere issue of a writ for administration does not affect the trustee's powers (*Berry* v. *Gibbons* (1873), L. R. 8 Ch. 747).

(*s*) *Gisborne* v. *Gisborne* (1877) 2 App. Cas. 300; and see Illustrations, Art. 56, *supra*, p. 328, *et seq.*

(*t*) *Garner* v. *Moore* (1855), 3 Drew. 277.

Art. 63. ILLUSTRATIONS.

After judgment.

Thus a trustee cannot, after a decree in an administration suit, prosecute or defend legal proceedings (*u*), nor execute a power of sale (*x*), nor make repairs (*y*), nor invest (*z*), nor exercise any other power, without applying to the court to sanction his doing so. However, it would seem that, although a trustee may be personally liable for acting without the consent of the court after judgment for general administration, yet, if he does so act, he will be able to confer a good title on parties who have no notice of the judgment with regard to personal estate, although the action be registered as a *lis pendens* (*a*). It is, however, submitted that this would not apply to real estate where the *lis pendens* is duly registered.

Before judgment.

But where an executor or administrator, after the commencement of a creditor's administration action, and before judgment, has voluntarily paid any creditor in full, he will be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment; and it is apprehended the same principle would be equally applicable to trustees. To prevent such payments being made in any such case, the plaintiff should, immediately upon issuing his writ, apply for and obtain a receiver (*b*).

Powers of trustees who have paid money into court.

It may be conveniently mentioned here, that where trustees have paid the trust fund into court under s. 42 of the Trustee Act, 1893 (which re-enacts the Trustee Relief Act), they can no longer exercise any of their powers, discretionary or otherwise. For the payment into court is, in effect, a retirement by the trustees from their office, and a relinquishment of the judgment and discretion confided to them by the settlor (*c*).

(*u*) *Jones* v. *Powell* (1841), 4 Beav. 96.

(*x*) *Walker* v. *Smallwood* (1768), Ambl. 676.

(*y*) *Mitchelson* v. *Piper* (1836), 8 Sim. 64.

(*z*) *Bethell* v. *Abraham* (1873), L. R. 17 Eq. 24.

(*a*) *Berry* v. *Gibbons* (1873), L. R. 8 Ch. 747.

(*b*) *Re Radcliffe, European Assurance Society* v. *Radcliffe* (1878), 7 Ch. D. 733; and see also *Re Barrett, Whitaker* v. *Barrett* (1889), 43 Ch. D. 70, where it was held that, notwithstanding an *order for an account*, an executrix could still prefer a creditor, even although that creditor was herself in the character of trustee of a settlement.

(*c*) *Re Nettlefold's Trusts* (1888), 59 L. T. 315.

CHAPTER V.

POWER OF THE BENEFICIARIES.

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ART. 64.—*Power of a Sole Beneficiary or of the Beneficiaries collectively to extinguish the Trust.*

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under any disability (*a*), the specific performance of the trust may be arrested, and the trust modified or extinguished by them without reference to the wishes of the settlor or the trustees.

Illustration in case of a simple trust.

Thus, if property be devised unto and to the use of a trustee in fee simple, upon trust to pay testator's debts, and subject thereto, upon trust for testator's widow for life, and after her death upon trust for B. absolutely; B., on the death of the widow and after payment of the debts, will be entitled to call upon the trustees to vest the property absolutely in him. For in equity B. is the sole and absolute owner, and the court will not permit a person, solely and absolutely entitled, to be subjected to the tutelage or interference of a trustee. The court, in fact, regards a trustee as a kind of intermediary or stakeholder, whose office is to hold the scales evenly, and to see that the rights of several persons are mutually respected. But where there is only

(*a*) *I.e.*, infants, lunatics, and married women, restrained from antieipation. If a married woman, who is *not* so restrained, is yet not entitled for her separate use either by settlement or statute, she can only arrest the trust subject to the provisions of the Fines and Recoveries Abolition Act (3 & 4 Will. IV., c. 74), and Malins' Act (20 & 21 Vict. c. 57). Nor must it be forgotten that the latter statute does not enable such a *feme covert* to deal with future interests in personal estate coming to her under her marriage settlement.

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one person interested, and that person is *sui juris*, the trustee's *raison d'être* ceases to exist; and consequently he himself becomes merely a person in the legal possession of another person's estate (*b*).

Illustration in case of a special trust where parties interested elect to stop it.

The above is a case of a simple trust where, even under the terms of the trust, the trustees had no longer any active duties to perform. But the same result follows even where the settlor has contemplated and intended that the trustee shall have the control of the property, if the sole party beneficially interested, or the parties collectively if there are several of them, are unanimously in favour of "breaking the trust," and are all *sui juris*. For a trust is the equitable equivalent of a common law gift, and when once declared, the settlor, like the donor of a gift, has no further rights over the property unless he be also one of the beneficiaries or has reserved to himself a power of appointment. Thus, in one case, a testator gave his residuary personal estate to an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal and accumulations to the infant on his attaining twenty-*four*, and in the meantime to allow £60 a year for his maintenance. In the event of the infant's dying under twenty-*one* the testator gave the estate to third persons. The court held that, on the true construction of the will, the infant took an absolute vested and transmissible interest on attaining twenty-one; and that, consequently, being the only person beneficially interested, he could put an end to the trust, and was entitled to have the residue and accumulations at once transferred to him (*c*). For, as the late Vice-Chancellor PAGE WOOD said, in the case of *Gosling* v. *Gosling* (*d*), "The principle of this court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and

(*b*) *Smith* v. *Wheeler* (1669), 1 Mod. 16; *Brown* v. *How* (1741), Barn. Ch. 354; *Att.-Gen.* v. *Gore* (1740), Barn. Ch. 145; *Kaye* v. *Powel* (1791), 1 Ves. Jun. 408; and *per* FRY, J., *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. at p. 627.

(*c*) *Josselyn* v. *Josselyn* (1837), 9 Sim. 63; *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; *Wharton* v. *Masterman*, [1895] A. C. 186; *Re Johnston, Mills* v. *Johnston*, [1894] 3 Ch. 204; and distinguish *Re Lord Nunburnholme, Wilson* v. *Nunburnholme*, [1911] 2 Ch. 510, (reversed on appeal, [1912] W. N. 46, on the construction of the will); and *Re Travis. Frost* v. *Creatorex*, [1900] 2 Ch. 541. *Talbot* v. *Jevers* (1875), L. R. 20 Eq. 255, appears to be inconsistent with the other cases.

(*d*) (1859) Johns. 265; and see judgment of MALINS, V.-C., *Bubb* v. *Padwick* (1880), 13 Ch. D. 517. FRY, J., dissented from this case in *Re Chaston, Chaston* v. *Seago* (1881), 18 Ch. D. 218, but on grounds immaterial to the present point.

enjoyment of the property given to them by will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one."

Otherwise where intermediate interest does not go to same beneficiary.

The above cases must, however, be carefully distinguished from those in which the settlement gives the trustees a discretion to apply the income until the given age for the maintenance of a class of beneficiaries, *or any one or more of them to the exclusion of the others*. For, in that case, until the youngest member of the class attains the given age, it is impossible to say that any member of the class has an absolute right to the income of his share. Consequently, he is not the only person interested in his share, and cannot call for the payment of it (*e*). But of course the class collectively could do so if *sui juris*.

Bequest of a sum of consols to purchase a life annuity.

Again, in *Re Browne's Will* (*f*) there was a bequest of consols in trust to purchase a life annuity for a lady, to be held for her separate use without power of anticipation; and in case of her illness or incapacity, the testator gave the trustees a discretionary power as to the application of the annuity for her maintenance. The legatee *being unmarried*, and the restraint on anticipation being therefore nugatory, it was held that she was entitled to a transfer of the consols into her own name (*g*). A similar result followed even where the testator directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell it, it should cease, and form part of the residuary estate (*h*).

Absolute gift to daughters with direction to settle upon themselves at marriage.

So, where a testator directed his property to be divided into nine shares, and gave one and a half share to each of his two daughters, "to be settled on themselves at their marriage,"

(*e*) *Re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443. But distinguish *Kearsley* v. *Woodcock* (1843), 3 Hare, 185, where the words above italicised were not in the will, and it was held that the trustee in bankruptcy of one beneficiary was entitled to a part of the income to be ascertained by inquiry (*sed quære*).

(*f*) (1859) 27 Beav. 324.

(*g*) See also *Tullett* v. *Armstrong* (1840), 4 Myl. & Cr. 377; *Buttanshaw* v. *Martin* (1859), Johns. 89; *Wright* v. *Wright* (1862), 2 Johns. & H. 647; *Cooke* v. *Fuller* (1858), 26 Beav. 99; *Barton* v. *Briscoe* (1822), Jac. 603; *Re Gaffee* (1849), 1 Mac. & G. 541; *Re Linzee's Settlement* (1856), 23 Beav. 241.

(*h*) *Hunt-Foulston* v. *Furber* (1876), 3 Ch. D. 285; and see also *Re Robbins, Robbins* v. *Legge*, [1907] 2 Ch. 8; and *Parkes* v. *Royal Botanic Society* (1908), 24 T. L. R. 508.

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it was held by Sir JAMES BACON, V.-C., that, *on the true construction of the will* (inasmuch as there was no reference to grandchildren, or any intimation of the testator's desire to restrict the gift to a life interest), the daughters took absolutely; and, if so, then, under the above rule, they were entitled to have their shares paid over to them on attaining twenty-one, free from all liability to have the same settled (*i*). Whether the learned judge's construction of the will was correct may perhaps be respectfully doubted (*k*). Anyhow, the reader must carefully distinguish the above case from those in which there is a direction to settle on her daughter *and her issue* (*l*), where of course she would not be the only person beneficially interested, and consequently would not be entitled to demand the capital.

Direction to sell estate and divide proceeds.

On similar principles, where an estate is directed to be sold and the proceeds to be divided among several persons, although no one singly can elect that his own share shall not be disposed of, but shall remain realty (*m*), yet if *all* the beneficiaries agree to take the land unconverted, they can put an end to the trust, and insist upon their right to do so (*n*). But until they do so elect, the trust subsists; and by s. 10 (3) of the Conveyancing Act, 1911, it was enacted that so far as concerns the protection of a purchaser thereunder the trust for sale is to be deemed subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale. This therefore obviates the necessity of enquiring whether (where all the beneficiaries are *sui juris* and absolutely entitled), they have elected to take the property in specie.

Power to sell and divide proceeds.

Where, however, there is no *trust* for sale, but merely a *power* of sale, the statute does not seem to apply, and moreover the rule is subject to this modification, viz., that the trustees can still exercise the power after all the beneficial interests in the property have, under the trusts, become

(*i*) *Magrath* v. *Morehead* (1871), L. R. 12 Eq. 491; *Re Jordan's Trusts*, [1903] 1 Ir. R. 119.

(*k*) See *Loch* v. *Bagley* (1867), L. R. 4 Eq. 122.

(*l*) See, for example, *Wise* v. *Piper* (1880), 13 Ch. D. 848.

(*m*) *Holloway* v. *Radcliffe* (1857), 23 Beav. 163; *Biggs* v. *Peacock* (1882), 22 Ch. D. 284; *Re Tweedie and Miles* (1884), 27 Ch. D. 315; and see judgment of CHITTY, J., *Re Daveron*, *Bowen* v. *Churchill*, [1893] 3 Ch. at p. 424; and *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296.

(*n*) *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Harcourt* v. *Seymour* (1851), 2 Sim. (N. S.) 12; *Cookson* v. *Reay* (1842), 5 Beav. 22; *Dixon* v. *Gayfere* (1853), 17 Beav. 421.

absolutely vested in persons who are *sui juris*, *if, on the construction of the settlement, it appears to be the intention of the settlor that it should be then exercised*, and provided that the power in its creation was not obnoxious to the rule against perpetuities (*o*). It follows that, in such a case, no one of the beneficiaries can insist upon having his undivided share in the legal estate conveyed to him by the trustees; for that would place it out of the trustees' power to exercise the power of sale confided to them for the benefit of all the beneficiaries (*p*). *A fortiori* is this so where one of the beneficiaries is not *sui juris*, *e.g.*, a lunatic (*q*). But of course the beneficiaries collectively could stop the sale. Art. 64.

Trust for sale infringing rule against perpetuities.

Where, however, there is a trust for sale to be made at a date which might infringe the rule against perpetuities (*e.g.*, on the death of the survivor of the testator's daughter and any husband whom she might leave surviving her), then, although the trust for sale will be void, the trust in favour of the beneficiaries will be valid if they be persons who could certainly be ascertained within the period allowed by the rule; *e.g.*, children of the daughter who should attain twenty-one. In such cases the trust for sale will be construed as mere machinery for effecting a division, and will be disregarded, and the beneficiaries will take the property as real estate (*r*).

Powers void for remoteness.

However, a *power* not expressly limited in point of duration is not necessarily void; for there is a presumption that it was intended to cease when all beneficial interests should have vested absolutely in possession in persons *sui juris*. Even where it can be gathered that the settlor intended it to be exercised after that event "for facility of division," it can still be exercised within the period allowed by the rule against perpetuities (*s*). But where no *successive* interests are given, and the property vests absolutely in persons *sui juris directly the settlement takes effect*, and no intention can be gathered that the power was merely given for facility of division, it will be void for remoteness (*t*).

Joinder of all beneficiaries where entitled successively.

The above examples deal only with cases in which there

(*o*) *Re Cotton's Trustees and London School Board* (1882), 19 Ch. D. 624; *Peters* v. *Lewes and East Grinstead Rail. Co.* (1881), 18 Ch. D. 429; *Re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334, discussed in *Re Dyson and Fowke*, [1896] 2 Ch. 720; *Re Jump, Galloway* v. *Hope*, [1903] 1 Ch. 129.

(*p*) *Re Horsnaill, Womersley* v. *Horsnaill*, [1909] 1 Ch. 631.

(*q*) *Re Jump, Galloway* v. *Hope*, *supra*.

(*r*) *Re Appleby, Walker* v. *Lever*, [1903] 1 Ch. 565; *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron, Bowen* v. *Churchill*, [1893] 3 Ch. 421.

(*s*) *Re Lord Sudeley and Baines & Co.*, *supra*; and see also *Re Kaye and Hoyle's Contract* (1909), 53 Sol. J. 520.

(*t*) *Re Dyson and Fowke*, *supra*.

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was either one beneficiary only, or several entitled as tenants in common or joint tenants. The same principle, however, is equally applicable where the trust is for persons in succession, and they unanimously desire to put an end to the trust (*u*). Thus, if the trust be for A. for life with remainder for his wife B. for life for her separate use, with remainder to X., Y. and Z. absolutely, then A., B., X., Y. and Z., being collectively the absolute and only owners, can join together in putting an end to the trust, and calling on the trustees to deal with the property, whether real or personal, as they may direct. The same result follows even where there is a discretionary trust for A., B., or C. or any one or more of them if all three concur (*x*). Even where it is not *absolutely* certain that no more beneficiaries can come into existence, but it is morally so (*e.g.*, where the ultimate remainder is in trust for the children of a woman who is past the age of child-bearing), the court will on summons give the trustees liberty to act according to the directions of the beneficiaries *in esse* so long as the contingent rights of living persons are not prejudiced (*y*), although it is understood that the court will not in such cases imperatively *order* the trustees to do so (*z*).

Mortgagee of all the beneficial interests.

The question is sometimes asked, whether a mortgagee of an only beneficiary, or, what comes to the same thing, of the several beneficial interests of *all* the beneficiaries, can put an end to a trust (say, for sale), and demand a conveyance of the legal estate from the trustees. It is, however, clear on principle that so long as any equity of redemption is in existence (that is to say, until sale or foreclosure) he could not. For while an equity of redemption subsists, the mortgagee is not the *sole* person beneficially interested in the property, and therefore cannot, under the rule above enunciated, assume absolute dominion over it. No doubt, when he has obtained a decree of absolute foreclosure, he could put an end to the trust; and so, if he sold the entire beneficial interest of *all* the mortgagees, could the

(*u*) *Palairet* v. *Carew* (1863), 32 Beav. 564; *Re White*, *White* v. *Edmond*, [1901] 1 Ch. 570. Even where the parties entitled in remainder are merely trustees of a subsidiary settlement they and the life tenant under the original settlement can call for a transfer of the fund (*Anson* v. *Potter* (1879), 13 Ch. D. 141).

(*x*) *Rippon* v. *Norton* (1839), 2 Beav. 63.

(*y*) *Re White*, *White* v. *Edmond*, [1901] 1 Ch. 570; *Davidson* v. *Kimpton* (1881), 18 Ch. D. 213; *Re Widdow's Trusts* (1871), L. R. 11 Eq. 408; *Re Milluer's Estate* (1872), L. R. 14 Eq. 245; *Re Jordan's Trusts*, [1903] 1 Ir. R. 119; *Re Thornhill*, *Thornhill* v. *Nixon*, [1904] W. N. 112; but *cf. Croxton* v. *May* (1878), 9 Ch. D. 388.

(*z*) There is no reported decision as to this, but it is the well-known practice.

purchaser (*a*). Moreover, if the mortgage, or all the mortgages (as the case may be), contained powers authorising the mortgagee to stay, or agree with others in staying, the trust, he might, under such powers, do so; but nothing short of a most explicit power would enable him before foreclosure or sale to demand a conveyance of the legal estate.

The above view seems to be borne out by the cases of *Re Bell, Jeffery* v. *Sayles* (*b*), and *Hockey* v. *Western* (*c*), in which it was held that a mortgagee of a share in a trust fund cannot demand to be paid the entire share of his mortgagor, but only his principal, interest, and costs (*b*); although the trustees might pay the whole share if they pleased (*c*).

ART. 65.—*Power of one of several Beneficiaries partially interested in a Special Trust.*

(1) The authority of one of several beneficiaries in a special trust in general depends upon the terms of the trust as construed by the court, coupled with the powers conferred on equitable tenants for life by the Settled Land Acts, 1882—1890. But a beneficiary, who is *sui juris*, cannot be prohibited from assigning his or her interest, save only in the case of a married woman during coverture (*d*).

(2) The court has a discretion to order the trustees to give the actual possession of settled land to the person entitled for the time being to the net income, on such terms and conditions as the court may think fit (*e*).

(*a*) Which he could do at one price (*Re Cooper and Allen to Harlech's Contract* (1876), 4 Ch. D. 802).

(*b*) [1896] 1 Ch. 1.

(*c*) [1898] 1 Ch. 350.

(*d*) *Pybus* v. *Smith* (1791), 3 Bro. C. C. 340; *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409; *Horlock* v. *Horlock* (1852), 2 De G. M. & G. 644; *Tullett* v. *Armstrong* (1840), 4 Myl. & Cr. 377; *Re Gaffee* (1849), 1 Mac. & G. 541; *Buttanshaw* v. *Martin* (1859), Johns. 89. Coverture means effective marriage, and ceases to exist not only by the death of the husband, but also by divorce (*Re Linzee's Settlement* (1856), 23 Beav. 241), judicial separation, or the granting of a protection order (*Cooke* v. *Fuller* (1858), 26 Beav. 99).

(*e*) *Re Bagot's Settlement, Bagot* v. *Kittoe*, [1894] 1 Ch. 177; *Re Richardson, Richardson* v. *Richardson*, [1900] 2 Ch. 778; *Re Hunt, Pollard* v. *Geake*, [1900] W. N. 65; *Re Money Kyrle, Money Kyrle* v. *Money Kyrle*, [1900] 2 Ch. 839. As to the old law of the court, see *Tidd* v. *Lister* (1820), 5 Madd. 429.

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PARAGRAPH (1).

Equitable interest of beneficiary cannot be made inalienable except during coverture.

The interest of a beneficiary (save only in the case of a married woman during her coverture) cannot be made inalienable (*f*), except by means of a shifting clause giving it over, or practically giving it over, to some other person upon alienation (*g*); in which case such other person, having a contingent interest, is also a beneficiary. For instance, a trust to apply income for another's maintenance entitles him to have the income paid to him or to his alienee, even although he be restrained from alienation; for no one in remainder is injured by it (*h*).

Otherwise where gift over on alienation.

Where, however, there is a trust to pay income to A. *until* he shall alienate it or become bankrupt, etc.; and, upon the happening of any of those events, a further trust to pay to him, or apply for his benefit during the remainder of his life, the whole *or so much only* of such income as the trustees may in their discretion think fit, and, subject thereto, the residue of such income (if any) is to be *paid to other persons*; then, as the trustees have an absolute discretion as to what part of the income they will apply for the benefit of the tenant for life, his alienees or creditors cannot force the trustees to pay them any part of the income (*i*). Moreover, it appears that, although the trustees would not be justified in *paying* any part of the income to the life tenant (because it no longer belongs to him, but to his alienees or creditors), they would nevertheless be justified in expending it for his benefit (*k*). It need scarcely be said that until they have

(*f*) *Snowdon* v. *Dales* (1834), 6 Sim. 524; *Green* v. *Spicer* (1830), 1 Russ. & Myl. 395; *Brandon* v. *Robinson* (1811), 18 Ves. 429; *Hood* v. *Oglander* (1865), 34 Beav. 513. But *cf.* p. 68, *supra*.

(*g*) See *Oldham* v. *Oldham* (1867), L. R. 3 Eq. 404; *Billson* v. *Crofts* (1873), L. R. 15 Eq. 314; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585; *Ex parte Eyston, Re Throckmorton* (1877), 7 Ch. D. 145; and see *Re Porter, Coulson* v. *Capper*, [1892] 3 Ch. 481.

(*h*) *Younghusband* v. *Gisborne* (1844), 1 Coll. 400, (affirmed (1846) 15 L. J. Ch. 355); *Snowdon* v. *Dales* (1834), 6 Sim. 524.

(*i*) *Re Bullock, Good* v. *Lickorish* (1891), 64 L. T. 736; *Train* v. *Clapperton*, [1908] A. C. 342; and *cf. Lord* v. *Bunn* (1843), 2 Y. & Coll. C. C. 98, which seems *contra* at first sight, but really turned on a question of construction.

(*k*) *Re Bullock, Good* v. *Lickorish, supra*; and *cf. Re Coleman, Henry* v. *Strong* (1888), 39 Ch. D. 443, and *Re Neil, Hemming* v. *Neil*, (1890) 62 L. T. 649. But see *Re Ashby, Ex parte Wreford*, [1892] 1 Q. B. 872, where VAUGHAN WILLIAMS, J., thought the bankrupt might have to account for sums paid to him.

notice of an act amounting to forfeiture the trustees are justified in paying the income to the first beneficiary (*l*).

Restraint on alienation by married woman does not prevent her barring an entail.

Even where a married woman who is tenant in tail for her separate use is restrained from anticipation, she can bar the entail and turn her estate into a fee simple; for she does not thereby anticipate her interest, but only enlarges it (*m*).

PARAGRAPH (2).

How far equitable life tenant may claim actual possession.

Whatever the law may have been at one time, the court has, since the passing of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), exercised much more freely its undoubted discretion as to allowing an equitable life tenant to have actual possession (*n*). The principles on which the court now acts in such cases are stated in *Re Bagot's Settlement, Bagot* v. *Kittoe* (*o*). There CHITTY, J., said: "It is clear that Mrs. Bagot (the equitable life tenant) has no *right* to claim to be let into possession, and she can only claim to be let into possession through the exercise of the judicial discretion. . . . On the point of convenience, it is convenient that the lady and her husband, to the extent to which she may desire to obtain his assistance, should have the management of the property, the income of which she is entitled to receive; and that she should get that income with as little expense in the way of commission for collecting rents, employment of agents, and the like, as is practicable under the circumstances. . . . Therefore, if I were dealing with this case quite apart from the Settled Land Acts, I should consider it a proper exercise of my discretion to let the lady into possession. I am not disposed myself to say that the Settled Land Acts have abrogated the old cases. It really appears to me that the proper expression with regard to the Settled Land Acts, with reference to the doctrine which I am considering is, that the Settled Land Acts afford an additional ground for exercising the discretion favourably to the person who has conferred upon her or him, as tenant for life, by the Settled Land Acts, the extensive powers therein contained." The court therefore ordered that the tenant for life should be let into possession, upon giving certain undertakings in the form set forth in the case of *Re Wythes, West* v. *Wythes* (*p*). In *Re Newen, Newen* v.

(*l*) *Re Long, Lovegrove* v. *Long*, [1901] W. N. 166.
(*m*) *Cooper* v. *Macdonald* (1877), 7 Ch. D. 288.
(*n*) *Re Richardson, Richardson* v. *Richardson*, [1900] 2 Ch. 778.
(*o*) [1894] 1 Ch. 177.
(*p*) [1893] 2 Ch. 369.

Art. 65. *Barnes* (*q*), KEKEWICH, J., appears to have considered that an equitable tenant for life is *entitled* to be let into possession on a proper case being made, but if and so far as he intended to hold that the matter was not discretionary, that view has been dissented from by STIRLING, J. (*r*).

(*q*) [1894] 2 Ch. 297. See also *Re Money Kyrle*, *Money Kyrle* v. *Money Kyrle*, [1900] 2 Ch. 839.

(*r*) *Re Hunt*, *Pollard* v. *Geake*, [1900] W. N. 65. As to an equitable tenant for life having the possession of the title deeds, see *Wheeler* v. *Tootell* (1903), 51 W. R. 693.

CHAPTER VI.

THE DEATH, RETIREMENT, OR REMOVAL OF TRUSTEES, AND THE APPOINTMENT OF NEW TRUSTEES.

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ART. 66.—*Survivorship of the Office and Estate.*

(1) Upon the death of a trustee, the office, as well as the estate, survives to the surviving trustees (*a*); and the survivors can carry out the trust and exercise all such powers as were given to the original trustees of dealing with the trust property (*b*), unless there be an intention to the contrary (*c*).

(2) An express power to appoint new trustees is not evidence of an intention to the contrary (*d*).

Surviving trustee may exercise all powers given to the original trustees as such.

This was always the law with regard to trusts as distinguished from mere bare powers (*e*). And now, by s. 22 of the Trustee Act, 1893 (re-enacting a repealed section of the Conveyancing Act, 1881), it is expressly enacted that where, in the case of a trust created after December 31st, 1881, a power or trust is given to, or vested in, two or more trustees jointly,

(*a*) *Warburton* v. *Sandys* (1845), 14 Sim. 622; *Eyre* v. *Countess of Shaftesbury* (1723), 2 P. Wms. 102.

(*b*) *Lane* v. *Debenham* (1853), 11 Hare, 188; *Eyre* v. *Countess of Shaftesbury*, *supra*; *Re Cookes' Contract* (1877), 4 Ch. D. 454; and as to settlements coming into operation since 1881, see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22.

(*c*) *Foley* v. *Wontner* (1820), 2 Jac. & W. 245; and see *Jacob* v. *Lucas* (1839), 1 Beav. 436; *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. 139.

(*d*) *Per* FARWELL, J., *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. at p. 144.

(*e*) *Warburton* v. *Sandys*, *supra*; *Doe* v. *Godwin* (1822), 1 D. & R. 259; *Re Bacon, Toovey* v. *Turner*, [1907] 1 Ch. 475.

Art. 66. then, unless the contrary is expressed in the settlement (if any), the same may be exercised or performed by the survivor or survivors of them for the time being.

It would seem, however, that the statute only applies to powers which are incident to the office of trustee; and that it is in all cases a question of interpretation whether a discretionary power was intended to be incident to the office, or was a mere naked power given to the individuals who were also nominated trustees (*f*). *Primâ facie*, however, "every power given to trustees which enables them to deal with or affect the trust property is given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being."

The mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude this *primâ facie* presumption, and little regard is now paid to such minute differences as those between such expressions as "my trustees," "my trustees, A. & B.," and "A. & B., my trustees." In short, the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language (*g*).

ART. 67.—*Devolution of the Office and Estate on Death of the Survivor.*

(1) Upon the death of a last surviving trustee, since the 31st of December, 1881, the trust property (with the sole exception of copyholds) devolves on his legal personal representative, and is incapable of being devised or bequeathed (*h*). Copyholds, however, devolve

(*f*) *Crawford* v. *Forshaw*, [1891] 2 Ch. 261; and see also *Re Perrott and King's Contract* (1904), 90 L. T. 156.

(*g*) See note (*d*), *supra*.

(*h*) Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, as amended by s. 45 of the repealed Copyhold Act, 1887, now re-enacted in s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46). It is conceived that a last surviving trustee cannot evade this prohibition by appointing "special executors" for the purpose of executing the trust (see *Re Parker's Trusts*, [1894] 1 Ch. 707; *Rose* v. *Bartlett* (1633), Cro. Car. 292; *Clough* v. *Dixon* (1841), 10 Sim. 564); and this view seems to receive some support from the case of *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187, where the general executors were held to be alone the personal representatives within the meaning of the Land Transfer Act, 1897.

on the customary heir, unless (*semble*) they are expressly devised.

(2) The question whether the person on whom the trust property devolves, or to whom it was devised or bequeathed, could exercise the powers and duties incident to the office (*i*) of trustee depended down to the end of 1911 upon whether he was pointed out in the trust instrument as being in the contemplation of the settlor a person who was to exercise them (*k*).

(3) But from and after the 1st of January, 1912, until the appointment of new trustees, the proving executors or executor or the administrators or administrator of a sole or last surviving or continuing trustee (where the trust came into operation since 1881) are capable of exercising or performing any power or trust which was capable of being performed by a sole or last surviving or continuing trustee, unless the trust instrument contains a contrary intention. But this power does not extend to the personal representatives of the last trustee of copyhold lands on the court rolls (*l*).

(4) The person upon whom the estate devolves cannot be compelled to execute the office of active trustee (*m*); nor, on the other hand, can he insist upon doing so against the wishes of a donee of a power of appointing new trustees in substitution for deceased ones (*n*).

PARAGRAPH (1).

Modern changes in the law as to the devolution of trust property.

Before 1874 the devolution of trust *estates* was regulated by the ordinary common law rules in relation to the devolution of property of a similar character, to which the trustee was beneficially entitled. Thus, trust personalty, or trust leaseholds,

(*i*) As to what powers are incident to the office, see *supra*, p. 365.

(*k*) *Per* PARKER, J., *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690, 696, and cases there cited.

(*l*) Conveyancing Act, 1911 (1 & 2 Geo. V., c. 37), s. 8.

(*m*) *Re Ridley*, *Ridley* v. *Ridley*, [1904] 2 Ch. 774; *Legg* v. *Mackrell* (1860), 2 De G. F. & J. 551; but *cf. Brooke* v. *Haymes* (1868), L. R. 6 Eq. 25.

(*n*) *Re Routledge*, *Routledge* v. *Saul*, [1909] 1 Ch. 280.

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devolved upon the trustee's legal personal representatives; and trust real estate devolved upon his heir, *or passed to his devisee* if he made a will which either expressly or impliedly passed the legal estate in such lands.

This state of the law has, however, been altered from time to time in a fashion even more half-hearted and complex than is usual with the attempts of Parliament to amend our law of property. The net result of this legislation seems to be as follows:

(1) If a trustee of real estate died between August 7th, 1874, and January 1st, 1882, and was *not a bare trustee* (*o*), the property descended to his heir-at-law or customary heir, unless he devised it.

(2) If he died between August 7th, 1874, and January 1st, 1876, and *was a bare trustee*, the trust property *during that period* was vested in his personal representatives; but unless they conveyed it during that period, it shifted to his heir-at-law or customary heir on January 1st, 1876 (*p*).

(3) If he died between January 1st, 1876, and January 1st, 1882, and *was a bare trustee*, it devolved upon his personal representatives (*q*).

(4) If he died on or after January 1st, 1882, *and the property was freehold*, it devolved (and still would devolve) upon his personal representatives, quite irrespective of whether he was or was not a bare trustee, and whether he attempted to devise it or not (*r*).

(5) If he died between December 31st, 1881, and September 16th, 1887, and the trust property was of customary or copyhold tenure, it was during that period vested in his personal

(*o*) The statutory expression "bare trustee" has given rise to considerable difference of opinion. The late Sir GEORGE JESSEL thought it meant a trustee who had no beneficial interest in the property (*Morgan* v. *Swansea Urban Sanitary Authority* (1878), 9 Ch. D. 582). On the other hand, the late Vice-Chancellor HALL, in *Christie* v. *Orington* (1875), 1 Ch. D. 279; BACON, V.-C., in *Re Docwra*, *Docwra* v. *Faith* (1885), 29 Ch. D. 693; and Mr. Justice STIRLING, in *Re Cunningham and Frayling*, [1891] 2 Ch. 567, all considered that it meant a trustee with no duties except to convey the property to or by the direction of the *cestuis que trusts*, and that a trustee who also took a beneficial interest (*e.g.*, as tenant in common) might be a bare trustee. It is considered that the latter view is the correct one.

(*p*) The extraordinary effect of s. 48 of 38 & 39 Vict. c. 87 (Land Transfer Act, 1875), repealing 37 & 38 Vict. c. 78 (Vendor and Purchaser Act, 1874), s. 5, as construed by HALL, V.-C., in *Christie* v. *Orington* (1875), 1 Ch. D. 279.

(*q*) 38 & 39 Vict. c. 87, s. 48.

(*r*) 44 & 45 Vict. c. 41 (Conveyancing Act, 1881), s. 30, and possibly also under the Land Transfer Act, 1897.

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representatives; but unless they conveyed it during that period it shifted to his customary heir (or possibly to his devisee) on the latter date (*s*).

(6) If he died on or after September 16th, 1887, and the trust property was of customary or copyhold tenure, it devolved (and still would devolve) on his customary heir (*t*), or (probably) his devisee.

Devise of trust estates.

As above stated, a sole or last surviving trustee who died on or before December 31st, 1881, was empowered to devise or bequeath the legal estate in the trust property of whatever tenure or nature (*u*); and a trustee of customary or copyhold lands can, it is apprehended, still do so. Trust estates capable of being devised, pass under a general devise or bequest, unless the will contains expressions authorising a narrower construction, or the disposition of the estate so devised or bequeathed be such as a testator would be unlikely to make of property not his own (*x*). Thus, where a testator subjected the property, passing under a general devise, to the payment of debts or legacies (*y*), or directed them to be sold (*z*), or devised them to persons as tenants in common or to a numerous and unascertained class (*a*), or limited them in strict settlement, or in any other way which made it impossible to say the intention could be to give a dry trust estate, trust estates would not pass.

PARAGRAPH (2).

Party on whom trust estate devolves not necessarily able to execute the trust.

Whether the person on whom the trust property devolved could exercise the duties and powers confided to the trustees by the settlement, depended, down to the end of the year 1911, on the intention of the settlor as expressed in the settlement. *Primâ facie* he could not, as all the authorities with the exception of *Osborne to Rowlett* (*b*) proceeded on the footing

(*s*) Copyhold Act, 1887, s. 45, as construed in *Re Mills' Trusts* (1887), 37 Ch. D. 312; (1888), 40 Ch. D. 14.

(*t*) Copyhold Act, 1894, s. 88; *quære*, whether this is so if he be a bare trustee (*Re Mills' Trusts* (1888), 40 Ch. D. 14).

(*u*) Constructive trust estates (as land agreed to be sold) passed under a devise of trust estates (*Lysaght* v. *Edwards* (1876), 2 Ch. D. 499); but see Conveyancing Act, 1881, s. 4.

(*x*) *Braybroke* v. *Inskip* (1803), 8 Ves. 417, Tud. Lead. Cas. Conv. (4th ed.) 322; *Ex parte Morgan* (1804), 10 Ves. 101; *Langford* v. *Auger* (1845), 4 Hare, 313.

(*y*) *Re Morley's Will* (1852), 10 Hare, 293; *Re Packman and Moss* (1875), 1 Ch. D. 214; *Re Bellis's Trusts* (1877), 5 Ch. D. 504; but see *Re Brown and Sibley's Contract* (1876), 3 Ch. D. 156, *contra*.

(*z*) *Re Morley's Will*, *supra*.

(*a*) *Martin* v. *Laverton* (1870), L. R. 9 Eq. 563; *Re Finney's Estate* (1862), 3 Giff. 465; see also *Re Packman and Moss*, *supra*, and compare with *Re Brown and Sibley's Contract*, *supra*.

(*b*) (1880) 13 Ch. D. 774.

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that the person who was to execute a trust or power, must be a person who was in some way pointed out by the creator of the trust or power as a proper person to execute it (*e*). Thus, where the settlor gave personal property to A. B., upon trust "that the said A. B." do carry out certain specified objects, then upon the death of A. B., although the estate vested in his executor, the latter was unable to execute the trusts. For, as was said by Lord COTTENHAM in *Mortimer* v. *Ireland* (*d*), "whether the property is real or personal is no matter; for suppose a man appoints a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. . . . The property may vest in the representative, but that is quite another question from his being a trustee." However, his lordship's observation must not be taken literally. The representative would clearly be a trustee, not perhaps a trustee to administer the express trust, but at all events a passive or bare trustee of the property until new trustees were properly appointed to whom he could hand it over.

Where representatives mentioned, *secus*.

But a very slight indication of intention sufficed. Thus, where freeholds were given to "A. and B. and their heirs upon trust for sale" (*e*), and *a fortiori* where they were vested in trustees, upon trust that "they or the survivor of them, or the heirs . . . of such survivor," should perform the trust, or where personal property was vested in trustees upon trust that they or the survivor of them or the executors or administrators of the survivor should perform the trust, then, upon the death of the survivor, the person on whom the trust *estate* devolved was able to execute the trust (*f*). That person was not, however, the heir, since December 31st, 1881, because since that date freehold trust estates have devolved on the trustee's personal representatives, and not upon his heir; and notwithstanding that the settlement has conferred the trust upon the trustee *and his heirs*, the office will devolve on his personal representatives. For, by s. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), it is enacted that for this

(*c*) *Per* PARKER, J., *Re Crunden and Meux's Contract*, [1909] 1 Ch. 690, 695; and see to same effect *Cooke* v. *Crawford* (1842), 13 Sim. at p. 96; *Re Rumney and Smith*, [1897] 2 Ch. 351, 356; *Re Morton and Hallett* (1880), 15 Ch. D. 143; *Re Ingleby and Boake and Norwich Union Insurance Co.* (1883), 13 L. R. Ir. 326; *Re Pixton and Tong's Contract* (1897), 46 W. R. 187; *Re Waidanis, Rivers* v. *Waidanis*, [1908] 1 Ch. 123.

(*d*) (1847) 11 Jur. 721.

(*e*) *Re Morton and Hallett* (1880), 15 Ch. D. 143.

(*f*) *Re Burtt's Estate* (1853), 1 Drew. 319; *Re Cunningham and Frayling*, [1891] 2 Ch. 567.

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purpose "the personal representatives for the time being, of the deceased [trustee], shall be deemed in law his heirs and assigns, *within the meaning of all trusts and powers*" (*g*). This Act does not, however, extend to copyhold or customary estates (*h*). As stated on the next page, all the foregoing difficulties and doubts are done away with so far as regards trustees dying since 1911, where the trust instrument came into operation since 1881.

Questionable whether devisee of trust estates could execute trust unless the settlement confided trust to trustee and his assigns.

As above stated, a trustee who died before January 1st, 1882, could devise (and where it consists of copyhold or customary land, can still devise (*i*)) the estate, unless expressly, or by necessary implication, prohibited from doing so. Whether, however, a valid devise of the estate would confer on the devisee the right of executing the trust depended (like the cases above considered) upon whether the settlor contemplated that such devisees should execute the trust. Where the settlement expressly confided the trust to the trustee his heirs executors administrators *or assigns*, the latter words were held to be sufficient to enable the devisee to execute the trust (*k*). On the other hand, SHADWELL, V.-C., in *Cooke* v. *Crawford* (*k*), considered that in the absence of the word "assigns" a devisee of a trust estate could not execute the trust—that otherwise, in fact, the trustee had no power to delegate the administration of the trust to a devisee of the estate. That doctrine was, however, energetically dissented from by the late Sir GEORGE JESSEL, M.R., in the case of *Osborne to Rowlett* (*l*), where his lordship, after reviewing the whole of the authorities, said: "Therefore, looking at this state of things, we must consider *Cooke* v. *Crawford* overruled." His lordship was of opinion that where the trust is confided to the trustee *and his heirs*, that is sufficient indication of intention that it was not confided to him personally and exclusively, but to his successor on his death; and that in such cases, the person to execute the trust is the person who takes the estate, not by accident, so to speak (as in case of intestacy), but in accordance with the provisions of the instrument by

(*g*) See *Re Pixton and Tong's Contract* (1897), 46 W. R. 187, where the power was given to "the trustees for the time being" and it was held to be exercisable by the personal representative of the last survivor.

(*h*) Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 45.

(*i*) Section 45 of Copyhold Act, 1887, *semble*.

(*k*) (1842) 13 Sim. 91; and see *Hall* v. *May* (1857), 3 Kay & J. 585; *Titley* v. *Wolstenholme* (1844), 7 Beav. 425; *Saloway* v. *Strawbridge* (1855), 1 Kay & J. 371; *Re Waidanis*, *Rivers* v. *Waidanis*, [1908] 1 Ch. 123.

(*l*) (1880) 13 Ch. D. 774.

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which the trust was created. "There is a *trust annexed to the estate*, and when we find who is the person who takes the estate under the will [of the trustee], then we find who is the person to execute the trust." That view was, however, questioned by JAMES and BAGGALLAY, L.JJ., in *Re Morton and Hallett* (*m*), where their lordships said that, as at present advised, they were not prepared to dissent from *Cooke* v. *Crawford*, or to concur in the opinion, expressed by Sir GEORGE JESSEL, that it had been overruled. The elaborate and learned judgment of PARKER, J., in *Re Crunden and Meux's Contract* (*n*), throws further doubt upon Sir GEORGE JESSEL'S decision. The law, therefore, on the point is in a far from satisfactory state. It is not now, however, of so much interest as it was formerly, because, by s. 30 of the Conveyancing Act, 1881, trust estates (except those of copyhold and customary tenure, which were taken out of that statute by s. 45 of the Copyhold Act, 1887, now s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46)) can no longer be devised; but the question may nevertheless, for some years, remain of some importance in the investigation of titles.

PARAGRAPH (3).

Now law since 31st Dec., 1911.

Moreover, although the cases above cited will be of importance for some years in the investigation of titles, the point has been now settled with regard to the future by s. 8 of the Conveyancing Act, 1911 (1 & 2 Geo. V., c. 37), by which it is enacted that with regard to trusts which have come into operation since 1881 (except where the last trustee was tenant on the rolls of copyhold trust property) the *proving* executors or executor or the administrators or administrator of a sole or last surviving or continuing trustee shall be capable of exercising and performing any power or trust which was given to or capable of being exercised by the sole or last surviving or continuing trustee, unless an intention to the contrary is expressed in the trust instrument. This section does not seem to be retrospective so as to validate acts done by such personal representatives prior to 1912.

It will be perceived that the new Act does not deal with the question whether a devisee of copyhold trust property (which is the only case now in which the question can arise) is to be capable of executing the trust. It is therefore apprehended that the old law still applies to such cases.

(*m*) (1880) 15 Ch. D. 143. (*n*) [1909] 1 Ch. 690.

ART. 68.—*Retirement or Removal of a Trustee.* Art. 68.

(1) A trustee can only retire—

(a) under an express power;

(b) under the statutory power conferred by the Trustee Act, 1893, either on the appointment of a new trustee in his place, or without such appointment if two at least will remain;

(c) by the consent of *all* the beneficiaries, which can only be obtained where all are *sui juris* (*o*);

(d) by order of the court (*p*).

(2) A trustee may be removed from his office—

(a) under an express power;

(b) under the statutory power of appointing new trustees contained in s. 10 of the Trustee Act, 1893, in cases where he remains out of the kingdom for more than twelve months consecutively (*q*), refuses or is unfit to act, or is incapable of acting;

(c) by the court (*r*), appointing a new trustee in his place, at the instance of any of the beneficiaries, where he has behaved improperly (*s*), or is incapable of acting properly (*t*), or from faults of temper or want of tact is in a permanent condition of hostility with his co-trustees and beneficiaries (*u*), or is a felon or dishonest misdemeanant, or a recent bankrupt (*x*), or is residing permanently, or for a long or indefinite period, abroad (*y*), or

(*o*) *Wilkinson* v. *Parry* (1828), 4 Russ. 272; and see Art. 66, *supra*.

(*p*) *Re Gregson's Trusts* (1886), 34 Ch. D. 209; *Re Chetwynd's Settlement, Searisbrick* v. *Nevinson*, [1902] 1 Ch. 692.

(*q*) See *infra*, p. 382.

(*r*) Under s. 25 of the Trustee Act, 1893. Procedure is by originating summons even where the trustee resists (*Re Danson* (1899), 48 W. R. 73).

(*s*) *Millard* v. *Eyre* (1793), 2 Ves. Jun. 94; *Palairet* v. *Carew* (1863), 32 Beav. 564.

(*t*) *Buchanan* v. *Hamilton* (1801), 5 Ves. 722; and *Re Lemann's Trusts* (1883), 22 Ch. D. 633; and *Re Phelps' Settlement Trusts* (1885), 31 Ch. D. 351, where trustees were incapable from old age and infirmity.

(*u*) *Letterstedt* v. *Broers* (1884), 9 App. Cas. at p. 386; see *Earl of Portsmouth* v. *Fellows* (1820), 5 Madd. 450.

(*x*) *Re Adams' Trust* (1879), 12 Ch. D. 634; *Re Barker's Trusts* (1875), 1 Ch. D. 43.

(*y*) *Buchanan* v. *Hamilton*, *supra*; *Re Bignold's Settlement*

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cannot be heard of (*z*), or where any other good reason exists (*a*).

PARAGRAPH (1).

Retirement under powers of appointing new trustees.

The most usual way in which a trustee retires is under a power enabling some person or persons to appoint a new trustee in his place in (*inter alia*) the event of his desiring to retire. This mode of retiring necessitates the appointment of a new trustee in the place of the one retiring. No question, however, can ever arise as to the costs of such an appointment, inasmuch as *ex hypothesi* the power provides for the retirement of the trustee *if he so desires*. The costs, therefore, in such cases always fall on the estate and not on the retiring trustee. At one time such powers could only exist under the express provisions of the settlement; but, for many years past, such a power has been implied by statute in all trust instruments irrespective of the date at which they first came into operation (*b*). These statutory powers will be discussed in the next article.

Retirement under statutory power without appointment of successor.

Before 1882 a trustee could only be discharged without the appointment of a successor in two cases, viz., (1) by the consent of all the beneficiaries (as to which see *infra*) or (2) by order of the court, which had (and still has) jurisdiction in a proper case (in an administration action or summons, but not in a summons under the Trustee Act (*c*)) to discharge one of two or more trustees without appointing a person to succeed him (*d*).

However, Parliament has now provided that "if and so far as a contrary intention is not expressed" in the trust instrument, where there are *more than two* trustees, and one of them declares by deed that he is desirous of being discharged, and if his co-trustees and such other person (if any) as is empowered to appoint new trustees, by deed consent to his discharge and to the vesting in his co-trustees alone of the trust property, then he shall be discharged without any new trustee being appointed in his place (*e*). Whether a new trustee can be subsequently appointed in his place before

Trusts (1872), L. R. 7 Ch. 223; and *Re The Moravian Society* (1858), 26 Beav. 101.

(*z*) *Re Harrison's Trusts* (1852), 22 L. J. Ch. 69.

(*a*) *See Assets Realization Co.* v. *Trustees, etc., Corporation* (1895), 65 L. J. Ch. 74.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10.

(*c*) *Re Chetwynd's Settlement, Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692.

(*d*) *See Re Stokes' Trusts* (1872), L. R. 13 Eq. 333.

(*e*) Trustee Act, 1893, s. 11.

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another vacancy occurs seems questionable, and is discussed *infra* at p. 385.

Retirement by consent of all the beneficiaries.

The method of retirement by consent of all the beneficiaries is merely a corollary of Art. 64. The beneficiaries collectively being the sole owners of the property, and able to put an end to the trust, can *a fortiori* permit the trustee to retire.

Retirement by order of the court.

Retirement by order of the court, is now a comparatively rare method of retirement from a trust. It might arise where the trustee wishes to retire and either cannot procure a person to take his place, or, being himself the appointing party, has a dispute with his beneficiaries in relation to the person to be appointed, or where the persons to appoint are out of the country, or cannot be found (*f*). In such cases he would be justified in issuing an originating summons under Order 54B, r. 5, of the Rules of the Supreme Court for the appointment of a new trustee in his place. No doubt it was formerly considered that a trustee could not retire from his trust without some good reason, and that "if the circumstances preventing his continuing to perform his duties arose from any act of his own, or anything relating to himself, he ought to pay the costs of the appointment of a new trustee" (*g*); or in some cases be simply disallowed his own costs (*h*). But this was long before the statutory power which enables a trustee to retire *if desirous of being discharged*; and it is conceived that, now, a trustee would not only be exempt from bearing the costs of an application to appoint a new trustee on his retirement (where it is difficult or impossible to appoint such a person under an express or the statutory power), but would also be entitled to his own costs (*i*); anyhow, it is the common practice (*k*).

PARAGRAPH (2) (a).

Illustration of express power to remove a trustee.

An instance of a trustee being removable under an express power, is afforded by the form of bankers' mortgage which has of late years become common, viz., a declaration by a mortgagor who has deposited his title deeds, that he will hold the legal estate in trust for the mortgagees, with power for

(*f*) See *Re Humphry's Estate* (1855), 1 Jur. (N. S.) 921; and *Re Somerset*, [1887] W. N. 122.

(*g*) *Forshaw* v. *Higginson* (1855), 20 Beav. 485.

(*h*) *Porter* v. *Watts* (1852), 21 L. J. Ch. 211.

(*i*) See *Coventry* v. *Coventry* (1837), 1 Keen, 758; *Greenwood* v. *Wakeford* (1839), 1 Beav. 576; *Re Stokes' Trusts* (1872), L. R. 13 Eq. 333; and *Barker* v. *Peile* (1865), 2 Dr. & Sm. 340.

(*k*) See *Re Chetwynd's Settlement*, *Scarisbrick* v. *Nevinson*, [1902] 1 Ch. 692.

Art. 68. the mortgagees, during the continuance of the security, to remove him or any other trustee from the trusteeship, and to appoint themselves or any other person in his place. In such cases the mortgagees can, by a deed removing the trustee and appointing another person, coupled with a vesting declaration, take the legal estate out of the mortgagor, or even of an assign to whom he has conveyed it with notice (*l*).

PARAGRAPH (2) (b) and (c).

The removal of a trustee under the statutory power of appointing new trustees, or by the court, is so mixed up with the appointment of new trustees, that the reader is referred to the next article for further information on the subject.

ART. 69.—*Appointment of New Trustees* (*m*).

(1) New trustees of a settlement may be appointed—

(a) under an express power;

(b) under the statutory power conferred by s. 10 of the Trustee Act, 1893, unless a contrary intention is expressed in the settlement;

(c) by a person appointed for that purpose by the Lunacy Court, where the person having power to appoint is a lunatic or a person of unsound mind (*n*);

(d) by the Chancery Division of the High Court (or, where a trustee is a lunatic, by the Lunacy Court) on the application of any trustee or beneficiary (*o*), whenever it is found inexpedient, difficult, or impracticable to appoint a trustee without the assistance of the court; and particularly where it is desirable to appoint a new trustee in place of one who is convicted of felony, or is a bankrupt (*p*), or is

(*l*) *London and County Banking Co.* v. *Goddard*, [1897] 1 Ch. 642.

(*m*) The appointment of a judicial trustee is treated of separately in Art. 71, *infra*.

(*n*) *Re Shortridge*, [1895] 1 Ch. 278.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 36, and Lunacy Act, 1890 (53 Vict. c. 5), s. 141. The court can charge the costs of such appointment, and of vesting orders, on the trust estate (Trustee Act, 1893, s. 38).

(*p*) Trustee Act, 1893, s. 25.

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a lunatic or person of unsound mind. Where, however, there is a donee of a power of appointing new trustees able and willing to exercise it, the court has no power to appoint new trustees contrary to his wishes (*q*).

(2) Every new trustee, both before and after the trust property is vested in him, has the same powers, authorities, and discretions (incident to the office of trustee) (*r*), and may in all respects act as if he had been an original trustee.

(3) Any person, including a corporation (*s*), who can hold property, is capable of being appointed; but a person ought not to be appointed who is not *sui juris;* nor (except under very exceptional circumstances) one who resides out of the jurisdiction of the court; nor one who is a beneficiary, or husband of a beneficiary. The donee of a power of appointing new trustees ought not to appoint himself (*t*) without the sanction of the court (*u*); and (*semble*) cannot do so under the statutory power.

(4) Where an attempted appointment is invalid, the old trustee remains liable, and the invalidly appointed new trustee also becomes liable if he intermeddles with the trust property (*x*).

PARAGRAPH (1) (a).

Appointment of new trustees under expres power.

Express powers to appoint new trustees are construed somewhat strictly. Thus, where an express power to appoint new trustees is vested in "the surviving or continuing

(*q*) *Re Higginbottom*, [1892] 3 Ch. 132. But this does not relate to applications for the appointment of a judicial trustee under the Judicial Trustees Act, 1896, as to which see Art. 71, *infra*, and *Douglas* v. *Bolam*, [1900] 2 Ch. 749; nor, it is apprehended, to cases in which a judgment for general administration has been given, as to which see *infra*, p. 379.

(*r*) As to the difference between powers incident to the office and powers confided to persons who are also trustees, see *per* FARWELL, J., in *Re Smith, Eastick* v. *Smith*, [1904] 1 Ch. at p. 144; and *supra*, p. 365 *et seq.*

(*s*) *Re Thompson's Settlement Trusts, Thompson* v. *Alexander*, [1905] 1 Ch. 229.

(*t*) *Re Skeats' Settlement, Skeats* v. *Evans* (1889), 42 Ch. D. 522; *Re Newen, Newen* v. *Barnes*, [1894] 2 Ch. 297.

(*u*) *Montefiore* v. *Guedalla*, [1903] 2 Ch. 723.

(*x*) *Pearce* v. *Pearce* (1856), 22 Beav. 248.

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trustees or trustee, or the heirs executors or administrators of the last surviving and continuing trustee," and all the trustees are desirous of retiring, they cannot do so by appointing new trustees in their place by one deed; but one must appoint a new trustee in the place of the first retiring trustee, and then the new trustee must appoint one in the place of the second retiring trustee, and so on (*y*). This singular instance of verbal subtlety all turns upon the idea that trustees who are *about to retire cannot be said to be continuing* (*z*), but that if one retired first, the other would be a continuing trustee, although he might intend to retire the next day. If, in addition to the words "surviving and continuing," the words "or other trustee or trustees" had been added, the retiring trustees might have appointed new ones by the same deed (*y*).

"Continuing trustees or trustee."

So, again, the words "unfit and incapable" are very strictly construed. Thus, where a new trustee was to be appointed if a trustee became "incapable of acting," it was held that the bankruptcy of one of the trustees did not fulfil the condition, as it only rendered him *unfit* but not *incapable* (*a*). And so where the words were "unable to act," it was held that absence in China or Australia did not *disable* (*b*), although it clearly unfitted (*c*), a trustee for the office. But where the power was to arise in case a trustee should "be abroad," the fact of his having taken a five years' lease of a residence in Normandy was held to be sufficient to enable the donee of the power to displace him (*d*). So, it has been held that

"Unfit and incapable," or "unable to act," or going abroad.

(*y*) *Lord Camoys* v. *Best* (1854), 19 Beav. 414; *Re Coates to Parsons* (1886), 34 Ch. D. 370; *Re Norris, Allen* v. *Norris* (1884), 27 Ch. D. 333. This notion was strongly disapproved by BACON, V.-C., in *Re Glenny and Hartley* (1884), 25 Ch. D. 611; but the Vice-Chancellor's dicta were equally strongly disapproved by PEARSON, J., in *Re Norris, Allen* v. *Norris, supra*, and by NORTH, J., in *Re Coates to Parsons, supra*.

(*z*) With regard to appointments made under the statutory power, this is not so, as the statute enacts that a continuing trustee shall include a refusing or retiring trustee, *if willing to act*, as donee of the power (Trustee Act, 1893, s. 10 (4)); but he is not a necessary party if unwilling to act (see *Re Norris, Allen* v. *Norris* (1884), 27 Ch. D. 333).

(*a*) *Turner* v. *Maule* (1850), 15 Jur. 761; see *Re Watts's Settlement* (1851), 9 Hare, 106.

(*b*) *Withington* v. *Withington* (1848), 16 Sim. 104; *Re Harrison's Trusts* (1852), 22 L. J. Ch. 69; but see *Re Bignold's Settlement Trusts* (1872), L. R. 7 Ch. 223.

(*c*) *Mennard* v. *Welford* (1853), 1 Sm. & G. 426; and *Re Harrison's Trusts* (1852), 22 L. J. Ch. 69. A mere temporary absence abroad would not unfit a trustee for the office (*Re The Moravian Society* (1858), 26 Beav. 101.

(*d*) *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288.

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lunacy *disables* a trustee so as to bring a power into operation (*e*).

With regard to a trustee becoming *unfit* to act, bankruptcy (at all events where the trust property consists of money or other property capable of being misappropriated, and where the *cestuis que trusts* desire his removal (*f*)), and liquidation or composition (*f*), or conviction of a dishonest crime (*g*), are grounds for his removal *by the court*, under s. 25 of the Trustee Act, 1893 (which has taken the place of s. 147 of the Bankruptcy Act, 1883). Whether, however, they would enable a donee of a power of appointing new trustees to displace him hostilely on the ground of *unfitness* seems questionable. Anyhow, it has been held that infancy is not *unfitness*, although an infant will be removed by the court (*h*). Lastly, with regard to *incapacity*, the word is strictly limited to incapacity of the trustee arising from some personal defect (*i*), as illness, lunacy (*k*), or, possibly, infancy.

Power personal and not incident to donee's estate.

Where the power is vested in a tenant for life, he may exercise it even after alienating his life estate (*l*). On the other hand, where a decree for administration by the court has been made, the donee of a power (whether express or statutory) can only appoint a new trustee under the supervision of the court, which will, however, accept his nominee, unless there be strong grounds for rejecting him (*m*).

PARAGRAPH (1) (b).

Appointment of new trustees under the statutory power.

If there be no express power, or even if there be one and the statutory power is not expressly negatived or modified (*n*), and the express power is for some reason inapplicable to the state of circumstances that has arisen, new trustees may be appointed under the provisions of s. 10 of the Trustee Act,

(*e*) *Re East* (1873), L. R. 8 Ch. 735.

(*f*) See *Re Barker's Trusts* (1875), 1 Ch. D. 43; *Re Adams' Trust* (1879), 12 Ch. D. 634.

(*g*) *Turner* v. *Maule* (1850), 15 Jur. 761.

(*h*) *Re Tallatire*, [1885] W. N. 191.

(*i*) See *Re Watts's Settlement* (1851), 9 Hare, 106; *Turner* v. *Maule* (1850), 15 Jur. 761; *Re Bignold's Settlement Trusts* (1872), L. R. 7 Ch. 223.

(*k*) *Re East* (1873), L. R. 8 Ch. 735; *Re Blake*, [1887] W. N. 173.

(*l*) *Hardaker* v. *Moorhouse* (1884), 26 Ch. D. 417.

(*m*) *Re Gadd*, *Eastwood* v. *Clark* (1883), 23 Ch. D. 134; *Re Hall*, *Hall* v. *Hall* (1885), 33 W. R. 508; *Re Sales*, *Sales* v. *Sales*, [1911] W. N. 234.

(*n*) *Cecil* v. *Langdon* (1884), 28 Ch. D. 1; and *Re Wheeler and de Rochow*, [1896] 1 Ch. 315.

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1893 (56 & 57 Vict. c. 53). In that case, it has been held that the persons to exercise the *statutory* power are *not* the persons nominated to exercise the *express* power, but the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee (*o*). This seems a rather narrow construction of the Act, the words of which are as follows:

(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust (*p*), or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being (*q*), or the personal representatives of the last surviving or continuing trustee (*r*), may, by writing (*s*), appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid.

(2) On the appointment of a new trustee for the whole or any part of trust property—

(a) the number of trustees may be increased; and

(b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no

(*o*) *Re Wheeler and de Rochow*, [1896] 1 Ch. 315.

(*p*) Where there was no express power but merely a declaration in a marriage settlement that the husband and wife and the survivor of them should have power to appoint new trustees, it was held that they could exercise this statutory power as the persons nominated for the purpose, etc. (*Re Walker and Hughes' Contract* (1883), 24 Ch. D. 698).

(*q*) This does not apply to a new judicial trustee to be appointed in place of a retiring judicial trustee, so as to oust the discretion of the court: see *Re Johnston, Mills* v. *Johnston*, [1911] W. N. 234.

(*r*) This includes the executor of a sole trustee (*Re Shafto's Trusts* (1885), 29 Ch. D. 247), but not the executor of a person who was nominated trustee of a will but died before the testator (*Nicholson* v. *Field*, [1893] 2 Ch. 511; but *cf. Re Ambler's Trusts* (1888), 59 L. T. 210). It is apprehended that all the living executors who have not renounced probate (see *Granville* v. *McNeile* (1849), 7 Hare, 156) must join in the appointment, and not merely those who have actually proved, as the reasoning on which the decision in *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58, was founded in relation to the Land Transfer Act is equally applicable to this statute. Under Lord Cranworth's repealed Act, 23 & 24 Vict. c. 145, s. 27, the words were "the acting executor," which have been held to enable the *proving* executor to execute the power in that Act where still applicable (*Re Boucherett, Barne* v. *Erskine*, [1908] 1 Ch. 180).

(*s*) Nevertheless the power cannot be exercised by will (*Re Parker's Trusts*, [1894] 1 Ch. 707).

new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and

(c) it shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed (*t*), or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust; and

(d) any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(6) This section applies to trusts created either before or after the commencement of this Act.

Cases in which statutory power is exercisable.

This section (which is a re-enactment of s. 31 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41)), has put an end to many questions which formerly presented much difficulty. For instance, where a trustee had gone abroad, it was always a source of trouble to determine what amount of absence constituted a disability or unfitness for his continuing a trustee (*u*). Now, however, twelve months is specified as the period. It will be seen that the power is exercisable in six cases, viz.: (1) on the death of a trustee; (2) where he remains out of the kingdom for twelve months; (3) where he desires to be discharged; (4) where he refuses to act; (5) where he is unfit to act; and (6) where he is incapable of acting.

(*t*) Mere disclaimer by one of two trustees does not enable the other one to retire and appoint one only in his place (*Earl of Lonsdale* v. *Beckett* (1850), 4 De G. & Sm. 73).

(*u*) See *Re Harrison's Trusts* (1852), 22 L. J. Ch. 69; *Re Bignold's Settlement Trusts* (1872), L. R. 7 Ch. 223.

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Trustee residing abroad.

The first case requires no comment. With regard to residence abroad, the twelve months means an unbroken period of twelve months (*x*). Whether such a person could be displaced under this power against his will would seem on the wording of the section and apart from authority to be questionable. Sub-s. 4 makes a "retiring trustee" one of the donees of the power if willing to act. Under an express power enabling a "surviving or continuing trustee" to appoint a new trustee in the place of a trustee dying, *going to reside abroad*, becoming incapable of acting, etc., a *surviving* trustee, although himself residing abroad, was held to be *able* to exercise the power (*y*). But under the statutory power it is conceived that a trustee who is being displaced either for unfitness or incapacity, or for residing abroad, is not a "retiring trustee." On the other hand, it is difficult to see, when he is one of two or more surviving trustees, why he should not fall directly within the power itself, unless the word "or" in the expression "surviving or continuing trustees" is to be read "and."

Meaning of "surviving or continuing trustee."

Practically that is how the phrase has been construed with regard to express powers. In *Travis* v. *Illingworth* (*z*), KINDERSLEY, V.-C., said: "A retiring trustee cannot be regarded as a surviving or continuing trustee within the meaning of the power. T. was indeed a surviving trustee because the other two were dead; and if he had intended to continue to be a trustee, and had made the appointment to supply the places of the deceased trustees, such appointment would have been valid; but he had resolved to retire, that is to be no longer a continuing trustee." The point came directly before NORTH, J., in *Re Coates to Parsons* (*a*). The learned judge there followed *Travis* v. *Illingworth* (*z*), and held that apart from sub-s. 4 a surviving *or* continuing trustee would not confer the power on a surviving but not continuing trustee. He, however, avoided deciding whether a trustee who was being displaced for residing abroad was a *retiring* trustee by holding that sub-s. 4 would not include such a person *unless it is shown that he was competent and willing to act*, which had not been proved there. In other words he held that *primâ facie* surviving and continuing trustees may, under the power displace a trustee resident abroad; at all events unless he, being

(*x*) *Re Walker, Summers* v. *Barrow*, [1901] 1 Ch. 259.

(*y*) *O'Reilly* v. *Alderson* (1849), 8 Hare, 101.

(*z*) (1865) 2 Dr. & Sm. 344.

(*a*) (1886) 34 Ch. D. 370; and see also *Re Norris, Allen* v. *Norris* (1884), 27 Ch. D. 333; but *cf. contra, Re Glenny and Hartley* (1884), 25 Ch. D. 611.

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able and willing to act, intervenes and insists upon his right to join in the appointment; but the twelve months must be unbroken (*b*).

Trustee desiring to be discharged.

With regard to the third ground it is conceived that it is clearly applicable to the case of an executor who, having paid debts, and funeral and testamentary expenses, has assented to a settled legacy where the testator has not appointed trustees to administer it. In such cases, where the executor has assented to the legacy, he becomes *functus officio qua* executor, and thenceforth holds the legacy as trustee (*c*), and (it is submitted) can, like any other trustee, retire, and appoint a new one in his place under the section now under consideration (*d*). Whether, however, the section is equally applicable where the legacy is not settled (*e.g.*, a legacy to an infant for which the executor cannot get a receipt), or where an administrator holds a share of residue, seems much more doubtful. The present writer (apart from authority) would have thought that the retention of a legacy by an executor or administrator until he can get a receipt is in his legal character of personal representative, and that no trusts having been declared with regard to the legacy, there can be no implication that he has changed his legal character of executor or administrator (whose legal duty is to pay the legatee or next of kin) for that of a trustee responsible only in equity (*e*). At the same time, having regard to the judgment of NORTH, J., in *Re Smith, Henderson-Roe* v. *Hitchins* (*c*), and the definition of trustee in s. 50 of the Trustee Act, 1893, the language of s. 10 seems wide enough to cover such cases. But the fact that s. 25 expressly forbids the court to appoint an executor or administrator seems to show that Parliament did not intend s. 10 to be applicable where legacies remain unpaid, or personal estate of an intestate remains undistributed. The point seems, therefore, to be too doubtful to enable practitioners to advise personal representatives to appoint trustees in their stead under s. 10.

Filling up place of trustee who has already retired under section 12.

The question occasionally crops up, as to whether, where one of three or more trustees has retired under s. 12 of the Act without appointing a new trustee in his place, that place can be subsequently filled up before another vacancy occurs.

(*b*) See note (*x*), p. 382, *ante*.

(*c*) See *Re Smith, Henderson-Roe* v. *Hitchins* (1889), 42 Ch. D. 302; *Re Earl of Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288; *Re Willey*, [1890] W. N. 1.

(*d*) *Ib.*; and see also *Re Moore, McAlpine* v. *Moore* (1882), 21 Ch. D. 778; and comments thereon of KEKEWICH, J., in *Eaton* v. *Daines*, [1894] W. N. 32.

(*e*) See *Eaton* v. *Daines*, *supra*.

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The present writer considers the point to be very doubtful and has always declined to accept titles to real estate which depend on the validity of such an appointment. The statutory power only authorises an appointment where a trustee "is desirous of being discharged"—a phrase couched in the present tense and incapable without violence to the language of being construed as equivalent to where a trustee "has retired." If it be argued that the whole section shows an intention to enable vacancies to be filled, it is answered that this is a *casus omissus*.

Refusal to act as trustee.

With regard to the fourth case, viz., refusal to act, it is apprehended that it clearly extends to the case of a disclaimer —*i.e.*, to a case where the person nominated trustee has never accepted the office (*f*).

Unfitness or incapacity.

With regard to a trustee becoming unfit to act or incapable of acting, the reader is referred to p. 378, *supra*.

Increase or reduction in numbers of trustees.

By sub-s. 2 (a) and (c), on an appointment under the statutory power the number of the trustees may be increased or diminished so long as the number does not fall below two, unless a sole trustee was originally appointed. Thus a sole surviving trustee will not be discharged by the appointment of one only in his place. The question whether the number can be increased or diminished under a special power, depends on the interpretation of the power itself (*g*); but *primâ facie* such powers do not authorise a reduction (*h*), and the court itself is generally indisposed to reduce the number unless an administration action is pending, or the fund is about to be paid into Court or is immediately divisible (*i*).

Severance of trusts.

The provision in sub-s. 2 (b) reversed the old law of the Court which forbade the severance of trusts by donees of the power of appointing new trustees, although the court imposed no such restriction on itself, but frequently appointed separate trustees of separate shares (*j*). The sub-section applies notwithstanding that the trusts, although separate

(*f*) See *Re Hadley* (1851), 5 De G. & Sm. 67.

(*g*) *Meinertzhagen* v. *Davis* (1844), 1 Coll. C. C. at p. 341; *Miller* v. *Priddon* (1852), 1 De G. M. & G. 335; *Re Bathurst's Estate* (1854), 2 Sm. & Giff. 169.

(*h*) See *Earl of Lonsdale* v. *Beckett* (1850), 4 De G. & Sm. 73; but *cf. Re Cunningham and Bradley to Wilson*, [1877] W. N. 258; and *West of England, etc., Bank* v. *March* (1883), 23 Ch. D. 138.

(*i*) *Re Skeats' Settlement, Skeats* v. *Evans* (1889), 42 Ch. D. 522; *Re Newen, Newen* v. *Barnes*, [1894] 2 Ch. 297; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590.

(*j*) See *Re Cotterill's Trusts*, [1869] W. N. 183; *Re Grange, Cooper* v. *Todd*, [1881] W. N. 50; *Re Dennis's Trusts* (1864), 12 W. R. 575; *Re Cunard* (1878), 27 W. R. 52; *Re Moss's Trusts* (1888), 37 Ch. D. 513.

for a time, may ultimately again unite in favour of one individual (*k*).

Increase, reduction, or severance only possible on appointment of new trustees.

It will be perceived that paragraphs (a) and (b) are governed by the opening words of sub-s. 2, viz., "on the appointment of a new trustee for the whole or any part of the trust property." Therefore an additional trustee cannot be appointed except on a vacancy in the trusteeship (*l*). Nor, it is conceived, could four existing trustees of a will split themselves into two sets, one for fund A and the other for fund B, for there would be no appointment of a *new* trustee for the whole *or any part* of the trust property. Under the somewhat different language of the Conveyancing Act, 1882, s. 5, it was considered doubtful whether an appointment of separate trustees of a separate part could be made under paragraph (b) for the mere purpose of abstracting that part from the custody of the existing trustees who were to retain the residue (*m*). But the wording of the present sub-section allowing severance on the appointment of a new trustee for the whole *or any part* of the trust property appears to put the doubt at rest. Whether, after a total extinguishment of all the trustees, new trustees can be appointed of part of the trust property, leaving the residue in the hands of the executors of the last surviving trustee, seems more doubtful, and has been answered in the negative by the Irish Courts (*n*).

Questionable device for appointing additional trustee where no vacancy.

In order to get out of the difficulty of appointing an additional trustee where there is no vacancy, a questionable practice has sprung up, of one trustee X. purporting to retire, followed by the appointment of A. and B. in his place, followed again by the immediate retirement of B. and the reappointment of X. the original trustee in *his* place. It is, however, difficult to understand how X. can be said to be a trustee "desirous of being discharged" under such circumstances. He is really only pretending to desire to be discharged, and has not the least intention of being. In the author's opinion the device savours too much of the chicanery of past generations to be relied on.

Where donees of express power differ, or one incapable, the statutory power is available.

Where there are joint donees of a power of appointment named in the settlement, and they differ as to the person to be appointed, they will be deemed to be "unable or unwilling" to appoint, so as to vest the statutory power in

(*k*) *Re Hetherington's Trusts* (1886), 34 Ch. D. 211.

(*l*) *Re Gregson's Trusts* (1886), 34 Ch. D. 209; *Re Driver's Settlement* (1875), L. R. 19 Eq. 352; but the court can. S. C.

(*m*) *Savile* v. *Couper* (1887), 36 Ch. D. 520; *Re Moss's Trusts* (1888), 37 Ch. D. 513.

(*n*) *Re Nesbitt* (1887), 19 L. R. Ir. 509.

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the surviving or continuing trustees (*o*). So where one of several trustees has an express power of appointing new trustees and becomes lunatic, his co-trustees can appoint in his place under s. 10 (*p*). It has also been held, that where the trust instrument (in that case a private Act of Parliament) incorporated the corresponding power in Lord Cranworth's Act, with the addition of requiring the sanction of the court, s. 10 of the Act of 1893 is available without the sanction of the court (*q*). It may be observed that the statutory power is not imperative, and imposes no obligation on the donee of the power to appoint new trustees (*r*); and that it is exercisable by an express donee, notwithstanding that the personal representatives of the last surviving trustee have acted as trustees (*s*). By s. 47 the power applies to the appointment of trustees for purposes of the Settled Land Acts.

PARAGRAPH (1) (c).

Power vested in or only exercisable with consent of a lunatic.

Where the *power of appointing* new trustees is vested in a person who is lawfully detained as a lunatic, or where the power is only exercisable with the consent of that person, the proper course is to apply to the Masters in Lunacy, by summons, to appoint a person *to exercise the power* or to give the required consent on behalf of the lunatic (*t*). The master who makes the order has also jurisdiction, under s. 129 of the Lunacy Act, 1890 (53 Vict. c. 5), to make an order vesting the property in the new trustees when appointed (*u*).

Advantage of this procedure.

Thus, where a sole surviving trustee was a person lawfully detained in an asylum, and was the person to exercise the statutory power of appointing new trustees, it was held that the master had jurisdiction to appoint a person to exercise the power by appointing two new trustees, and to make an order vesting the trust property in the trustees so appointed. The advantage of this simple procedure appears to be, that although the court has no jurisdiction to *appoint new trustees itself*, and make a vesting order under ss. 135 to 142 of the

(*o*) *Re Sheppard's Settlement Trusts*, [1888] W. N. 234.

(*p*) *Re Blake*, [1887] W. N. 173.

(*q*) *Re Lloyd's Trusts*, [1888] W. N. 20.

(*r*) *Peacock* v. *Colling* (1885), 33 W. R. 528; *Re Knight's Will* (1884), 26 Ch. D. 82.

(*s*) *Re Routledge*, *Routledge* v. *Saul*, [1909] 1 Ch. 280.

(*t*) *Re Fuller*, [1900] 2 Ch. 551; *Re Shortridge*, [1895] 1 Ch. 278; and s. 128 of the Lunacy Act, 1890.

(*u*) *Re Fuller*, [1900] 2 Ch. 551: but not where the new trustees are appointed in any other way, in which case application for a vesting order must be made to the court, as to which see *Re Langdale*, [1901] 1 Ch. 3, and *infra*, p. 493.

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Lunacy Act in substitution for a lunatic *not so found* if the alleged lunatic opposes the application on the ground that he is not of unsound mind (a fact which can only then be determined either by inquisition or in an action in the Chancery Division for his removal), yet, under this procedure, the mere fact that the party is lawfully detained as a lunatic, is sufficient to give the court jurisdiction. The summons in such matters ought merely to be entitled "in the matter of A.B." (the lunatic). Whether this method is still available, having regard to the new Lunacy Act, 1911 (*infra*), seems questionable where a vesting order is required.

PARAGRAPH (1) (d).

Appointment of new trustees by the court.

The Lunacy Court had formerly concurrent jurisdiction with the High Court to appoint a new trustee where an existing one was a lunatic, whether so found or not (*x*). The High Court had, however, no jurisdiction to make a vesting order as to property vested in a lunatic trustee, unless he was also an infant, or out of the jurisdiction (*y*); and, consequently, the proper course, where a vesting order was required, was, until lately, to apply to the Lunacy Court, and not to the High Court (*y*). However, by the new Lunacy Act, 1911 (1 & 2 Geo. V. c. 40), this has been altered, and now the whole of the sections in the Lunacy Act relating to vesting orders where the lunatic is a trustee are transferred to the Chancery jurisdiction. The following are the statutes relating to the appointment of trustees by the High Court, including the cases where the trustee is a lunatic:

Statutory power of High Court.

By s. 25 of the Trustee Act, 1893, it is enacted that—

(1) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt (*z*).

(2) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3) Nothing in this section shall give power to appoint an executor or administrator.

(*x*) Lunacy Act, 1890, ss. 141—143.

(*y*) *Re M.*, [1899] 1 Ch. 79; *Re Gardner's Trusts* (1878), 10 Ch. D. 29.

(*z*) The procedure by originating summons is applicable even where the incriminated trustee refuses to retire (*Re Danson* (1899), 48 W. R. 73).

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And by s. 37 of the same Act it is enacted that—

Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Statutory power of Lunacy Court.

Section 141 of the Lunacy Act, 1890 (53 Vict. c. 5), is as follows:

In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

Sections 135 and 136 in effect provide, that the judge may make vesting orders whenever a lunatic is solely or jointly seised or possessed of land or entitled to stock or chose in action upon trust or by way of mortgage.

Section 1 of the Lunacy Act, 1911 (1 & 2 Geo. V. c. 40), however, now provides as follows:

The powers of the judge in Lunacy under sections 135 to 143 of the Lunacy Act, 1890, as amended by any subsequent enactment, to make such vesting and other orders as are in those sections mentioned, shall, except so far as they relate to lunatic mortgagees, not being also trustees, be transferred to, and, subject to rules of the Supreme Court, be exercisable by, the High Court, and, except as aforesaid, those sections as so amended shall have effect accordingly as if for references to the judge in Lunacy there were substituted references to the High Court (*a*).

Examples of cases in which application to court is proper.

Application should only be made to the court to appoint new trustees, in cases where, for some reason or other, it is difficult, inexpedient, or impracticable to appoint them otherwise. Thus, where the donee of a power was anxious to exercise it corruptly, the court could not *under the statutory power* appoint over his head; although, of course, in an *action* to restrain him and to administer the trust it would have been a different matter (*b*).

No donee of the power, or none capable of acting.

However, there are many cases in which it is inexpedient or impracticable to appoint new trustees out of court. Thus, if a last surviving or a sole trustee died intestate, and left no personal estate, so that no one could take out letters of administration to him, and no one was named in the settlement to appoint new trustees, it was formerly necessary to apply to the High Court. But probably this is no longer so, as the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3), enables letters of administration to be granted in respect of

(*a*) The practice is the same as under the Trustee Act; and the summons is intituled in the matter of the trust, and of the Trustee Act, and of the Lunacy Acts, 1890 to 1911.

(*b*) See *Re Hodson's Settlement* (1851), 9 Hare, 118; and *cf. Middleton* v. *Reay* (1849), 7 Hare, 106. But where the donee neglects to appoint *sceus* (*Finlay* v. *Howard* (1842), 2 Dru. & War. 490).

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real estate alone. And so where a trustee has become, through old age and infirmity, incapable of acting in the trust, the court has exercised its jurisdiction of appointing new trustees (*d*).

Appointment by court where no original trustees.

Again, where, by inadvertence, or by reason of disclaimer, death, or otherwise, there never were any original trustees of the settlement, and no express power of appointing any, the court will appoint some (*e*).

Appointment by court where trustee an infant.

So, where a trustee is an infant, the court will appoint another in his place; but this will be done without prejudice to any application by the infant, on coming of age, to be restored (*f*).

Appointment by court in cases of doubt.

So, if there be a doubt whether the statutory (or an express) power applies, the court will solve it by appointing new trustees itself (*g*).

So, where it is desirable to increase the number of trustees without waiting for a vacancy, the court can do it (*h*), although the donees of the statutory power cannot.

Appointment by court where the donees of power cannot agree.

So it has been held that where the power of appointing new trustees is given to a husband and wife jointly, and they are judicially separated (*i*), or where the donees of the power cannot agree upon the choice of the new trustees, the court will appoint. But see as to this *supra*, p. 385.

Where last surviving trustee has left no representative.

Again, where a last surviving trustee has died, and there is no personal representative of him, the court cannot make a vesting order except in connection with an order for the appointment of new trustees. Consequently, that is a case where "it is inexpedient" to appoint without the assistance of the court (*k*).

Appointment by court where trustee a felon or bankrupt.

Where a trustee is a felon, or a bankrupt, and refuses to join in the appointment of a new trustee in his place, the court can and will remove him, and appoint another person if the beneficiaries desire it (*l*); and a similar observation

(*d*) *Re Lemann's Trusts* (1883), 22 Ch. D. 633; *Re Phelps' Settlement Trusts* (1885), 31 Ch. D. 351.

(*e*) *Dodkin* v. *Brunt* (1868), L. R. 6 Eq. 580; *Viscountess D'Adhemar* v. *Bertrand* (1865), 35 Beav. 19; *Re Smirthwaite's Trusts* (1871), L. R. 11 Eq. 251; *Re Davis' Trusts* (1871), L. R. 12 Eq. 214; *Re Moore, McAlpine* v. *Moore* (1882), 21 Ch. D. 778; *Re Williams' Trusts* (1887), 36 Ch. D. 231.

(*f*) *Re Shelmerdine* (1864), 33 L. J. Ch. 474. An infant cannot be displaced under the statutory power contained in s. 10 of the Act (*Re Tallatire*, [1885] W. N. 191; *sed. quære*, see *Re Gartside's Estate* (1853), 1 W. R. 196).

(*g*) *Re Woodgate's Settlement* (1856), 5 W. R. 448.

(*h*) *Re Gregson's Trusts* (1886), 34 Ch. D. 209; and see *Re Driver's Settlement* (1875), L. R. 19 Eq. 352; *Ex parte Tunstall* (1851), 4 De G. & Sm. 421.

(*i*) *Re Somerset*, [1887] W. N. 122.

(*k*) See note (*u*), p. 402, *infra*.

(*l*) *Coombes* v. *Brookes* (1871), L. R. 12 Eq. 61; *Re Adams' Trust*

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applies to a trustee who has become a lunatic (*m*), or has gone to reside permanently abroad (*n*), or has absconded.

Trustee charged with breach of trust appointing a new trustee against plaintiff's wishes.

Where a trustee, charged with breach of trust, appointed a new trustee against the plaintiff's wishes, both were removed (*o*); and a similar course was followed where the donee of the power appointed a new trustee because the old one would not commit a breach of trust (*p*). Indeed the court will remove a trustee and appoint a new one in his stead where the only complaint against him is that, from faults of temper, it has become impossible to transact the trust business with him. This sometimes appears to be a slur upon a perfectly honest but impracticable trustee: but, as Lord BLACKBURN said in *Letterstedt* v. *Broers* (*q*), "In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule, beyond the very broad principle that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. . . . It is true that friction or hostility between trustees and the immediate possessor of the trust estate, is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered, . . . it is certainly not to be disregarded. . . . If it appears clear that the continuance of a trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give the trustee a benefit or otherwise, the trustee is always advised by his counsel to resign and does so. If without any reasonable ground, he refuses to do so, it seems to their lordships that the court might think it proper to remove him."

Summary procedure only applicable where trust is clear.

The regular procedure for the appointment of new trustees by the court under the statutory jurisdiction, is by originating

(1879), 12 Ch. D. 634; *Re Foster's Trusts* (1886), 55 L. T. 479; *Re Danson* (1899), 48 W. R. 73.

(*m*) If a vesting order is also required the application must be made to the Lunacy Court (*Re M.*, [1899] 1 Ch. 79), unless the lunatic is out of the jurisdiction (*Re Gardner's Trusts* (1878), 10 Ch. D. 29).

(*n*) *Re Bignold's Settlement Trusts* (1872), L. R. 7 Ch. 223. As to the length of absence abroad, see *Hutchinson* v. *Stephens* (1834), 5 Sim. 498.

(*o*) *Peatfield* v. *Benn* (1853), 17 Beav. 522.

(*p*) *Pepper* v. *Tuckey* (1844), 2 Jo. & Lat. 95.

(*q*) (1884) 9 App. Cas. 371 at p. 387; and see *Earl of Portsmouth* v. *Fellowes* (1820), 5 Madd. 450.

summons (*r*); but it would seem that where the trust is not clear on the face of written documents (*e.g.*, where a conveyance is taken in the name of some other person than the real purchaser (*s*)), the court first requires the trust to be established to its satisfaction, and that can only be done by an action.

Court will not reappoint existing trustees.

It was at one time thought that where there were properly appointed trustees in existence, and it was impossible otherwise to vest the trust property in them, or where it was desirable to remove one of several trustees and impossible to get any one to serve in his place, the court could, in the one case, reappoint all the existing trustees and order the trust property to vest in them; or, in the other case, reappoint the continuing trustees in the place of themselves and the trustee whom it was desired to remove. However, it is now well settled that the court has no jurisdiction to reappoint existing trustees (*t*).

Appointing person to perform the duties incident to office of executor.

Although s. 25 (3) of the Trustee Act, 1893 (56 & 57 Vict. c. 53), expressly prohibits the court from appointing an executor or administrator, yet where a testator has not appointed a trustee of trust legacies, (and, consequently, the trusteeship is incident to the office of executor,) the court has jurisdiction, (the debts, funeral and testamentary expenses having been paid and the executor having assented to the legacy), to appoint some one to perform those fiduciary duties in his place (*u*).

PARAGRAPH (2).

Only such powers pass to new trustees as are incident to the office.

As above stated, every new trustee has the same powers, authorities, and discretions as if he had been an original trustee. This, however, only applies to powers, authorities, and discretions which, on the true construction of the trust

(*r*) R. S. C., Order 54. Even where the trustee whom it is desired to displace opposes (*Re Danson* (1899), 48 W. R. 73).

(*s*) *Re Martin's Trusts, Land, etc., Improvement Co.* v. *Martin* (1887), 34 Ch. D. 618; and see also *Re Carpenter* (1854), Kay, 418, and *Re Weeding's Estate* (1858), 4 Jur. (N. S.) 707.

(*t*) *Re Vieat* (1886), 33 Ch. D. 103; *Re Dewhirst's Trusts* (1886), 33 Ch. D. 416; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590; *Re Batho* (1888), 39 Ch. D. 189, overruling *Re Rathbone* (1876), 2 Ch. D. 483; *Re Dalgleish's Settlement* (1876), 4 Ch. D. 143; and *Re Crowe's Trusts* (No. 2) (1880), 14 Ch. D. 610.

(*u*) *Re Moore, McAlpine* v. *Moore* (1882), 21 Ch. D. 778; *Eaton* v. *Daines*, [1894] W. N. 32; and *Re Willey*, [1896] W. N. 1; *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50 (interpretation of "trust" and "trustee,") And see also *supra*, p. 383.

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instrument, are incident to the office, and not to mere naked powers given to the original trustees personally. The same principles are applicable to this as those already discussed under Art. 64 in relation to the survivorship of powers on the death of one of several trustees.

PARAGRAPH (3).

General principles as to persons proper to be appointed new trustees.

In selecting persons to be new trustees, the court acts upon the following principles, and it is apprehended that donees of powers *ought* to be guided by the same considerations, although, no doubt, their appointments would not be invalidated if they failed to observe them.

First, regard will be paid to the wishes of the settlor as expressed in, or plainly deduced from, the settlement.

Secondly, a person will not be appointed with a view to the interest of some of the beneficiaries in opposition to the interest of others. But it is not proper to appoint new trustees without communicating with the beneficiaries and hearing their objections; at all events where it is likely that they would object (*x*).

Thirdly, regard will be had to the question whether the appointment will promote or impede the execution of the trust; but (*semble*) the mere fact of a continuing trustee refusing to act with the proposed new trustee will not be sufficient to induce the court to refrain from appointing him (*y*).

Persons proper to be appointed new trustees.

With reference to the question as to the personal fitness of a proposed new trustee, an infant can, no doubt, be appointed an original trustee, but it would not be a wise appointment; and a retiring trustee most certainly ought not to concur in the appointment of an infant to replace him. For an infant cannot properly carry out a special trust during his minority, and a person who should appoint one might not improbably find that he would have to pay the costs of an action instituted for the purpose of removing the infant (*z*), as he cannot be supplanted as "unfit" by the appointment of a new trustee under s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (*a*).

Appointment by the donee of the power of himself.

It is not perhaps quite settled to what extent the donee of a

(*x*) *Marshall* v. *Sladden* (1849), 7 Hare, 428; S. C. (1851), 4 De G. & Sm. 468; and *O'Reilly* v. *Alderson* (1849), 8 Hare, 101.

(*y*) *Re Tempest* (1866), L. R. 1 Ch. 485.

(*z*) See *Raikes* v. *Raikes* (1863), 32 Beav. 403.

(*a*) *Re Tallative*, [1885] W. N. 191.

power of appointing new trustees can appoint himself. It would seem that the statutory power does not authorise such an appointment, as it only empowers the appointment of "some other person," which has been held to mean some other person than the appointor (*b*), although it would seem to the present writer more aptly applicable to some other person than the trustee dead, retiring, etc. But where there is a special power "to appoint a new trustee or new trustees," it has been held that the donee of the power is capable of appointing himself (*b*), although he ought not to do so except under very special circumstances, and perhaps not without the sanction of the court (*c*). KEKEWICH, J., however, in *Re Sampson, Sampson* v. *Sampson* (*b*), stated that in his opinion the case of *Montefiore* v. *Guedalla* (*d*), affirming the validity of such an appointment, would require reconsideration at some future time; a dictum which has made it somewhat difficult to advise such appointments without the sanction of the court. Anyhow, where the only power is the statutory power or a special power in similar terms, the only course is to ask the court to make the appointment. Art. 69.

A tenant for life has been held to be not improperly appointed (*e*); but such an appointment is certainly not advisable. For one of the main objects of a trustee is to protect the remainderman against the tenant for life. Appointment of tenant for life to be trustee.

It has been held (*f*) that a remainderman is not a person whom *the court* will appoint, at all events where there is an infant tenant for life. For the interest of a person entitled in remainder is somewhat opposed to that of a tenant for life; and it would be for his advantage to lay out trust money in making improvements on the property, instead of making accumulations for the benefit of the tenant for life. Of course, however, such an objection would be inapplicable where a tenant for life is *sui juris* and consents to the appointment. And under special circumstances the court will appoint a beneficiary (*g*). Appointment of remainderman.

The solicitor to the trust is not a proper person to be appointed a new trustee. Such an appointment would not, Appointment of solicitor to the trust.

(*b*) *Re Sampson, Sampson* v. *Sampson*, [1906] 1 Ch. 435.

(*c*) *Montefiore* v. *Guedalla*, [1903] 2 Ch. 723; and *Tempest* v. *Lord Camoys* (1888), 58 L. T. 221.

(*d*) [1903] 2 Ch. 723; and *Re Skeats' Settlement, Skeats* v. *Evans* (1889), 42 Ch. D. 522; and *Re Newen, Newen* v. *Barnes*, [1894] 2 Ch. 297; *Re Shortridge*, [1895] 1 Ch. 278.

(*e*) *Forster* v. *Abraham* (1874), L. R. 17 Eq. 351.

(*f*) *Re Paine's Trusts* (1885), 33 W. R. 564.

(*g*) *Ex parte Coaybeare's Settlement* (1853), 1 W. R. 458.

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however, be bad, so as to invalidate the acts of the trustee so appointed: but the court would not make, or sanction, such an appointment (*h*).

Husband of beneficiary appointed trustee.

The husband of a beneficiary entitled for her separate use ought not to be appointed; for his interests are entirely in conflict with those of his wife. The court will never make such an appointment unless it is impossible to get another person, and even then will generally do so only upon condition that a direction is inserted in the order, stipulating that, upon his becoming sole trustee, there shall be another appointed (*i*). In one case (*k*), KAY, J., appointed two persons, one of whom was a beneficiary and the other the husband of a beneficiary, upon their both undertaking, if either were left sole trustee, to endeavour to obtain the appointment of a new trustee.

Near relations.

It used to be said that the court would never appoint a near relation of a beneficiary, except in case of necessity (*l*). But this seems to be a counsel of perfection, and is not now followed in practice.

Persons out of jurisdiction appointed trustee.

It is not proper to appoint a trustee who resides out of the jurisdiction, save under very exceptional circumstances (*m*). But where all the beneficiaries were resident in Australia, the court appointed a person resident there (*n*).

Appointing alien trustee.

An alien may, since the passing of the statute 33 & 34 Vict. c. 14, hold real estate. He may therefore, it is apprehended, be either a settlor or a trustee; although the court usually objects to appoint an alien unless he be permanently domiciled in England.

Appointment of married woman.

A married woman may undoubtedly be a trustee (*o*), but before 1907 she was not a desirable person for the office, at all events where real estate was concerned. No doubt she could

(*h*) *Re Norris, Allen* v. *Norris* (1884), 27 Ch. D. 333, and *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch. 288. The same rule is equally applicable to appointments of trustees for purposes of the Settled Land Acts: *Re Kemp's Settled Estates* (1883), 24 Ch. D. 485; *Re Spencer's Settled Estates*, [1903] 1 Ch. 75.

(*i*) *Re Parrott* (1881), 30 W. R. 97.

(*k*) *Re Lightbody* (1885), 33 W. R. 452.

(*l*) *Wilding* v. *Bolder* (1855), 21 Beav. 222.

(*m*) *Re Custis's Trusts* (1871), 5 Ir. R. Eq. 429; *Re Guibert* (1852), 16 Jur. 852; but *cf. Re De Quetteville, De Quetteville* v. *De Quetteville* (1903), 19 T. L. R. 383.

(*n*) *Re Freeman's Settlement Trusts* (1887), 37 Ch. D. 148; *Re Liddiard* (1880), 14 Ch. D. 310; *Re Cunard* (1878), 27 W. R. 52; *Re Austen's Settlement* (1878), 38 L. T. 601; *Re Hill's Trusts* [1874] W. N. 228.

(*o*) *Smith* v. *Smith* (1856), 21 Beav. 385.

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always exercise powers collateral, or in gross, or appendant (*p*); but she could only execute a trust to sell real estate (or *semble* chattels real, unaccompanied by a power of appointment) with her husband's consent and joinder. For the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), did not apply to land vested in a married woman as trustee (*q*), and consequently she could only convey it with the joinder of her husband, and by an acknowledged deed. And it is apprehended, that even where a *power* was vested in her to sell, she would not have been capable of entering into a binding *contract* to execute the power, as it was no question affecting her separate estate (*r*). Moreover, the necessity of getting her husband's joinder (which he might possibly have withheld), the expense of acknowledgments, and the probability that the trust would be really executed by her husband, and not by herself, made a married woman a far from desirable trustee in most cases. However, only the last of these objections now remains, as by the Married Women's Property Act, 1907 (*s*), it was enacted that "a married woman is able without her husband to dispose of or join in disposing of real or personal estate held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*." Moreover the section operates retrospectively without prejudice to any rights acquired through or with the concurrence of the husband before the commencement of the Act.

Appointment of unmarried women.

Some judges have even objected to appoint spinsters as trustees; probably on account of their objectionable habit of marrying persons whose fiduciary capacity the court cannot foresee. Thus in *Re Peake's Settled Estates* (*t*), NORTH, J., at first refused to appoint two ladies, one a widow and one a spinster, to sell land under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), but subsequently relented. In a subsequent case, however (*u*), KEKEWICH, J., took a more favourable view of the business capabilities of the sex, and this was followed by FARWELL, J., in *Re Dickinson's Trusts* (*x*).

Appointment of a trust company.

An incorporated company could always be appointed an original sole trustee; but owing to the impossibility of making it a joint tenant with a natural person, it was impracticable

(*p*) *Godolphin* v. *Godolphin* (1727), 1 Ves. Sen. 21.
(*q*) *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358.
(*r*) *Avery* v. *Griffin* (1868), L. R. 6 Eq. 606.
(*s*) 7 Edw. 7, c. 18.
(*t*) [1894] 3 Ch. 520.
(*u*) *Re Newen*, *Newen* v. *Barnes*, [1894] 2 Ch. 297.
(*x*) [1902] W. N. 104.

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to appoint such a company one of two or more trustees. This difficulty was, however, obviated by the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), by which a body corporate was rendered capable of being a joint tenant; and in *Re Thompson's Settlement Trusts, Thompson* v. *Alexander* (*y*), SWINFEN EADY, J., held that a company could be appointed one of several trustees under a power the words of which authorised the appointment "of a new trustee or new trustees." It is apprehended that the statutory power contained in s. 10 of the Trustee Act, 1893, equally authorises the appointment of a company, as although that section empowers the appointment of "another person or other persons," yet by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the word person in an Act of Parliament includes a corporation. Whether, however, the same result would follow under a special power in similar terms seems somewhat doubtful.

PARAGRAPH (4).

Effect of invalid appointment of new trustee.

An illustration of this paragraph of the present article is afforded by the case of *Pearce* v. *Pearce* (*z*). There A. and B. were trustees. A deed was prepared appointing C. a new trustee in place of B. This was executed by C.; but by inadvertence it was not executed by the donees of the power. It was therefore invalid. The trust fund was nevertheless transferred from the names of A. and B. into those of A. and C. Afterwards A. and C. authorised the husband of the life tenant to receive the fund, and it was lost. It was held that both B. and C. were liable—B. because he had never ceased to be a trustee, and had yet denuded himself of the trust property, and C. because she had intermeddled with trust property, and therefore became a constructive trustee. Whether B. would now get relief under such circumstances under s. 3 of the Judicial Trustee Act, 1896, is, of course, another matter, depending on his reasonableness and honesty.

ART. 70.—*Vesting of Trust Property in New Trustees.*

(1) On a change in the trusteeship, out of court, the trust property should be vested jointly in the

(*y*) [1905] 1 Ch. 229. (*z*) (1856) 22 Beav. 248.

persons who are for the future to be the trustees (*a*). This may be done: Art. 70.

(a) by the ordinary modes of transferring property;

(b) since the 31st December, 1881, by a vesting declaration in the deed by which a trustee is appointed (or by which one retires) under s. 12 of the Trustee Act, 1893; but this section does not apply to legal estates in copyhold or customary lands, lands in mortgage, or stocks or shares transferable in books of a company or corporation;

(c) where neither of the foregoing means are available, application may be made to a judge of the Chancery Division of the High Court for a vesting order (*b*).

(2) On the appointment of a new trustee by the court, a vesting order will be made, vesting the trust property in the new trustee or trustees, either alone, or jointly with the continuing trustee or trustees, as the case may require.

Paragraph (1) (b).

Vesting declarations on appointments out of court.

Before the year 1882, difficulties frequently arose in relation to the vesting of the trust property on the appointment of new trustees, owing to the fact that the legal estate could only be transferred *by* the persons in whom it was legally vested, or by a vesting order of the court. For instance, a trustee might leave the country permanently, or become a lunatic, or (being a sole trustee) die intestate and without any heir. The legal estate, being vested in him, could only be got out

(*a*) Trustee Act, 1893, s. 10 (2) d), and s. 11 (2).

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 26, 32, 34, 35, and 36; and as to lunatic trustees, or trustees of unsound mind, Lunacy Act, 1890 (53 Vict. c. 5), ss. 133—143, as amended by the Lunacy Act, 1911 (1 & 2 Geo. V. c. 40). As to simpler procedure, where the lunatic is the person who has power to appoint the new trustee, see *supra*, p. 386. The court cannot, however, under this Act make a vesting order where the legal estate in the entirety, and the beneficial interest in part of land, is vested in the Crown. In such a case the proper procedure is to issue a summons asking for a sale under s. 5 of the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71) (*Re Pratt's Trusts* (1886), 55 L. T. 313).

Art. 70. of him by a duly executed conveyance or assignment, or by an order of the court; and as the former could not be obtained, the latter became a matter of necessity. However, by s. 34 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), re-enacted by s. 12 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), this difficulty was to a great extent obviated, although not completely; for it does not apply to all kinds of property, so that applications to the court for vesting orders will still have to be made in many cases.

The section in question is in the following words, viz.:

(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration *by the appointor* to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

(2) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned *by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees*, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(5) This section applies only to deeds executed after the thirty-first of December one thousand eight hundred and eighty-one.

It will be perceived that the declaration must be contained in *the deed by which the new trustee is appointed*. With regard to the property which does not pass by a vesting declaration, copyholds must be vested by surrender and admittance in the usual way. Mortgages are invariably transferred without disclosing the trust, so as to keep it off the face of the mortgagor's title. Stocks, shares, etc., are transferred by deed of transfer, duly registered with the bank or company.

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Vesting orders made by the Chancery Division of the court (*c*).

The jurisdiction of the Chancery Division to make orders vesting trust property in any part of His Majesty's dominions except Scotland (*c*) in the trustees for the time being of a settlement is codified in ss. 26, 32, 34, 35, and 36 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). Similar powers are conferred on the Lunacy Court, where a trustee has become lunatic or of unsound mind, by ss. 129, 135, and 136 of the Lunacy Act, 1890 (53 Vict. c. 5)(*d*). The sections of the Trustee Act, 1893, above referred to are set out below, and for the sake of convenience the writer's comments are placed in footnotes.

Trustee Act, 1893, s. 26.

As to vesting orders relating to land.

26. In any of the following cases, namely:

(i.) Where the High Court appoints or has appointed (*e*) a new trustee (*f*); and

(ii.) Where a trustee (*g*) entitled to or possessed of any land (*h*), or

(*c*) Sect. 41 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). See *Re Hewitt's Estate* (1858), 6 W. R. 537, and *Re Lamotte* (1876), 4 Ch. D. 325. Similar powers were given to the Irish courts by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10).

(*d*) See *infra*, p. 404.

(*e*) See *Re Kenny's Trusts*, [1906] 1 Ir. R. 531.

(*f*) It is apprehended that the intention of the legislature was that *each* of these paragraphs should stand alone, and that the circumstances enumerated in *each* should give jurisdiction to make a vesting order. That was so under the Trustee Act, 1850, and the court made vesting orders on the appointment of new trustees, even though there was no incapacity in the person in whom the estate was vested to convey it to the new trustees (*Re Manning's Trusts* (1854), Kay, App. xxviii.; *Hancox* v. *Spittle* (1857), 3 Sm. & G. 478). However, in the new section, the language is not very happy, as, if we read paragraph (i.), and omit paragraphs (ii.) to (vi.), there is nothing to show to what the words "the land," which is to be vested, refer.

(*g*) The word "trustee" includes a constructive trustee, *e.g.*, the heir of a testator whose trustees have predeceased him or disclaimed (*Wilks* v. *Groom* (1856), 6 De G. M. & G. 205; and see Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 50.

(*h*) It is apprehended that "land" includes leaseholds; for it was stated in the memorandum annexed to the bill that the words "entitled to or possessed of" were substituted for the words "seised or possessed of" (which were used in the Act of 1850), for the express purpose of including leaseholds. See also s. 50, where land is defined as including land of any tenure. The matter might, however, with advantage, have been made plainer. Under the old Act there was no power to vest leaseholds, except on the appointment of new trustees by the court. The corresponding section of the Lunacy Act, 1890, contains the old words "seised or possessed," and consequently it seems questionable whether the lunacy judges have power to make vesting orders of leaseholds. As to whether the court has jurisdiction to vest the right to the title deeds, see *De Soyres* v. *De Soyres* (1889), 87 L. T. Journal, 93.

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entitled to a contingent right therein, either solely or jointly (*i*) with any other person,—

(a) is an infant (*k*), or

(b) is out of the jurisdiction of the High Court (*l*), or

(c) cannot be found; and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v.) Where there is no heir or personal representative to a trustee (*m*) who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully (*n*) refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement;

the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate (*o*) as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

Provided that—

(a) Where the order is consequential on the appointment of a new

(*i*) The word "jointly" is not to be construed strictly. It includes coparceners (*Re Greenwood's Trusts* (1884), 27 Ch. D. 359).

(*k*) Even if the infant be also a lunatic, this gives the Chancery Division jurisdiction. See Lunacy Act, 1890 (53 Vict. c. 5), s. 143.

(*l*) A merely temporary absence (*e.g.*, that of a sailor on a voyage) is not sufficient (*Hutchinson* v. *Stephens* (1834), 5 Sim. 498). On the other hand, where a person out of the jurisdiction is a lunatic, this paragraph gives to the Chancery Division a jurisdiction which in the case of a lunatic in England would be only exercisable by the lunacy judges (*Re Gardner's Trusts* (1878), 10 Ch. D. 29).

(*m*) See *Re Williams' Trusts*, (1887), 36 Ch. D. 231; *Re Rackstraw's Trusts* (1885), 52 L. T. 612; *Re Pilling's Trusts* (1884), 26 Ch. D. 432.

(*n*) A trustee's conduct in not conveying, cannot be considered wilful, if the title of the applicant to call for a conveyance is subject to a dispute which leads the trustee to entertain a *bonâ fide* doubt as to his title (*Re Mills' Trusts* (1888), 40 Ch. D. 14). But if he has acted unreasonably he may have to pay the costs (*Re Knox's Trust*, [1895] 1 Ch. 538, affirmed, [1895] 2 Ch. 483). The summons must not be even issued until the twenty-eight days have elapsed (*Re Knox's Trust, supra*).

(*o*) Under these words the court can vest the estate of a tenant in tail in a purchaser in fee simple, but it usually appoints some person to execute a regular disentailing assurance under s. 33. See *Caswells* v. *Sheen*, [1893] W. N. 187; *Powell* v. *Matthews* (1855), 1 Jur. (N. S.) 973; *Mason* v. *Mason* (1878), 7 Ch. D. 707.

trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees; and

(b) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person.

Trustee Act, 1893, s. 32.

Effect of vesting orders relating to land.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Trustee Act, 1893, s. 33.

Appointment of a person to convey in lieu of vesting order of land.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

Trustee Act, 1893, s. 34.

Vesting orders of copyholds.

34.—(1) Where an order vesting copyhold land (*p*) in any person is made under this Act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance.

(2) Where an order is made under this Act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things.

Trustee Act, 1893, s. 35.

Vesting orders of personal estate.

35.—(1) In any of the following cases, namely:

(i.) Where the High Court appoints or has appointed (*q*) a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock (*r*) or to a chose in action—

(*p*) As to what fines are payable, see *Paterson* v. *Paterson* (1866), L. R. 2 Eq. 31; and *Hall* v. *Bromley* (1887), 35 Ch. D. 642.

(*q*) *Re Kenny's Trusts*, [1906] 1 Ir. R. 531.

(*r*) Stock includes fully paid-up shares, and any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein (s. 50). Under the repealed Act of 1850, stock includes shares *not* fully paid up (*Re New Zealand Trust and Loan Co.*, [1893] 1 Ch. 403); but query whether the above definition would admit of such a construction being given to the

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(a) is an infant (*s*), or
(b) is out of the jurisdiction of the High Court (*t*), or
(c) cannot be found; or
(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled, or
(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead (*u*),

the High Court may make an order vesting the right to transfer (*x*) or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint:

Provided that—

(a) Where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who on the appointment, are the trustees; and
(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in

new Act. As to orders under Lunacy Act, 1890, see *Re Gregson*, [1893] 3 Ch. 233.

(*s*) This applies where the infant is both trustee and also the person beneficially entitled: *Re Dehayuin*, [1910] 1 Ch. 223.

(*t*) Where one trustee was a lunatic and the other out of the jurisdiction, and two new ones had been appointed under a power, the Court of Appeal, acting in lunacy, vested the stock in the one out of the jurisdiction, and then, acting under their Chancery jurisdiction, "it appearing that he was out of the jurisdiction," vested it in the new trustees (*Re Batho* (1888), 39 Ch. D. 189; *Re Stewart* (1860), 8 W. R. 297).

(*u*) It will be perceived that, except where the court is appointing new trustees, it has no jurisdiction, to make a vesting order of stock where the last surviving or only trustee has died without leaving a legal personal representative. At one time (as also in the case of leaseholds) the court used to get over this difficulty by *reappointing* trustees already appointed out of court, and by making a vesting order consequential on such reappointment (*Re Rathbone* (1876), 2 Ch. D. 483; *Re Dalgleish's Settlement* (1876), 4 Ch. D. 143; *Re Crowe's Trusts* (No. 2) (1880), 14 Ch. D. 610). However, it is now well settled that the court has no jurisdiction to reappoint trustees who are already validly appointed (*Re Vieat* (1886), 33 Ch. D. 103; *Re Dewhirst's Trusts* (1886), 33 Ch. D. 416; *Re Gardiner's Trusts* (1886), 33 Ch. D. 590; *Re Batho* (1888), 39 Ch. D. 189). Consequently, the former device is no longer available, and a legal personal representative has to be constituted in such cases. This difficulty may be avoided by asking the court to appoint new trustees, on the ground that it is inexpedient to appoint them out of court.

(*x*) Where the trust funds are invested in unauthorised stocks, the order will give the new trustees, *or purchasers from them*, the right to call for a transfer, etc. (*Re Peacock* (1880), 14 Ch. D. 212).

that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

Trustee Act, 1893, s. 36.

Persons who may apply for vesting orders.

36.—(1) An order under this Act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested (*y*) in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

Vesting orders made by the lunacy judges.

With regard to vesting orders of property held by trustees who are lunatics or persons of unsound mind, s. 129 of the Lunacy Act, 1890 (53 Vict. c. 5), enables a Master in Lunacy to make on summons any such vesting order as the High Court can make under the Trustee Act, 1893, on the appointment of the new trustees, in those cases where, under s. 128 of the Lunacy Act, he appoints some person to exercise in the name of the lunatic *any power vested in the lunatic of appointing new trustees* (*z*); as to which the reader is referred to p. 387, *supra*. Where, however, the lunatic on whom the trust property is vested has not the power of appointing new trustees, a summons had formerly to be issued "in Lunacy" under ss. 135, 136 (*a*). But where the lunatic was "not so found," there was always the danger of his appearing on the hearing

(*y*) This includes a person contingently interested (*Re Sheppard's Trusts* (1862), 4 De G. F. & J. 423); but not the committee of a lunatic beneficiary (*Re Bourke* (1864), 2 De G. J. & S. 426).

(*z*) *Re Fuller*, [1900] 2 Ch. 551.

(*a*) *Re Langdale*, [1901] 1 Ch. 3; and Lunacy Rules, Nov., 1900.

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of such summons, and disputing the alleged lunacy. In that case the Lunacy Court had no jurisdiction to entertain the summons until the question of lunacy had been determined by means of an inquisition or a regularly constituted action for his removal in the Chancery Division (*b*). However, as pointed out on p. 388, the Lunacy Act, 1911 (1 & 2 Geo. V. c. 40), has altered this and substituted the High Court for the Lunacy Court throughout ss. 135 to 143 of the Lunacy Act, except where the lunatic is a mortgagee *not being a trustee*, so that all applications under those sections are now made in the Chancery Division.

Sections 135 and 136 of the Lunacy Act, 1890, are as follows:

Lunacy Act, 1890, s. 135. Vesting orders relating to land.

135.—(1) When a lunatic (*c*) is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the judge in Lunacy may by order vest such land in such person or persons (*d*) for such estate, and in such manner, as he directs.

(2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

(3) An order under sub-ss. (1) and (2) shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

(4) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-ss. (1) and (2).

(5) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6) Where an order is made appointing any person or persons to

(*b*) *Re Combs* (1884), 51 L. T. 45; *Re Walker* (1841), Cr. & Ph. 147.

(*c*) This word includes lunatics not so found (s. 341). As to what the word comprises, see *Re Martin's Trusts, Land, etc., Improvement Co.* v. *Martin* (1887), 34 Ch. D. 618, and *Re Barber* (1888), 39 Ch. D. 187, and *cf. Re Dewhirst's Trusts* (1886), 33 Ch. D. 416.

(*d*) The court will not vest the property in a beneficiary who is absolutely entitled, but will appoint a new trustee (*Re Holland, Re Howarth's Trusts* (1881), 16 Ch. D. 672; *cf. Re Godfrey's Trusts* (1883), 23 Ch. D. 205; and *Re Currie* (1878), 10 Ch. D. 93). Where one of several trustees becomes insane, the court will now vest the property in the remaining trustees (*Re Leon*, [1892] 1 Ch. 348), and the same course can be followed in Chancery where one of the trustees has absconded (*Re Lees' Settlement Trusts* [1896] 2 Ch. 508). Formerly the power was doubted (*Re Nash* (1881), 16 Ch. D. 503), unless the fund was immediately divisible (*Re Watson* (1881), 19 Ch. D. 384, and *Re Martyn, Re Toutt's Will* (1884), 26 Ch. D. 745). As to whether this jurisdiction extends to leaseholds, see *supra*, p. 399, note (*h*).

convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord and lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things.

Lunacy Act, 1890, s. 136.

Vesting orders relating to personal estate.

136.—(1) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in Lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action.

(2) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3) When any stock is standing in the name of a deceased person, whose personal representative is a lunatic, or when a chose in action is vested in a lunatic as the personal representative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6) After notice in writing of an order under this section, it shall not be lawful for the bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

CHAPTER VII.

APPOINTMENT OF A JUDICIAL TRUSTEE.

ART 71.—*Statutory Power of the Court to Appoint a Judicial Trustee.*

(1) Where application is made to the court (*a*) by or on behalf of the person creating or intending to create a trust (*b*), or by or on behalf of a trustee or beneficiary, the court may in its discretion appoint a person (called a judicial trustee) to be a trustee for that trust, either jointly with any other person, or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (*c*).

(2) Any fit and proper person nominated in the application may be appointed, including a married woman, a beneficiary, or the husband, wife, or relation of a beneficiary, or a solicitor to any of such parties, or the solicitor to the trust (*d*), or a person who is already a trustee (*d*). In the absence of such nomination, or if the court disapproves it (*e*), the official solicitor of the court, or some other person approved by the judge, may be appointed (*f*). An unofficial judicial trustee must give security (*g*).

(3) Remuneration may be assigned by the court to the judicial trustee (*h*).

(*a*) The High Court or the Palatine Court (Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 2).

(*b*) The administration of the estate of a deceased is a trust, and his personal representative a trustee for the purposes of the Act (*ib.*, s. 1 (2)).

(*c*) Judicial Trustees Act, 1896, s. 1 (1).

(*d*) Judicial Trustees Rules, 1897, r. 5 (1).

(*e*) Judicial Trustees Act, 1896, s. 1 (3).

(*f*) Judicial Trustees Rules, 1897, r. 7. *Douglas* v. *Bolam*, [1900] 2 Ch. 749.

(*g*) Judicial Trustees Act, 1896, s. 4 (1), and Judicial Trustees Rules, r. 9.

(*h*) Judicial Trustees Act, 1896, s. 1 (5).

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(4) A judicial trustee must, so soon as may be after his appointment, (unless the court directs to the contrary) furnish the court with a complete statement of the trust property, accompanied by an approximate estimate of the income and capital value of each item (*i*).

(5) Once in every year the accounts of a judicial trustee have to be audited by an officer of the court, or a professional accountant appointed by the court (*k*).

(6) A judicial trustee must pay all money coming into his hands, without delay, to the trust account at a bank appointed by the court, and in default is liable to pay interest not exceeding 5 per cent. per annum on it (*l*).

(7) The court may direct an inquiry into the administration of the trust by the judicial trustee (*m*), and may, either with or without any request, give any special or general directions in regard to the trust or its administration (*n*).

(8) In all cases a judicial trustee is to be subject to the control and supervision of the court as an officer thereof (*o*), and may at any time request the court to give him directions (*p*).

(9) A judicial trustee may be suspended or removed by the court without any application (*q*).

(10) A judicial trustee may with the sanction of the court retire (*q*).

ILLUSTRATIONS.

This Act was a new departure in English law, founded on the analogy of the law of Scotland, where a "Judicial Factor" has been established for many years. Its object was to give to trust property the same protection as would be given by a general administration order, but at less cost, and without the necessity of making numerous applications to the court. This protection was secured (1) by the appointment of an official,

(*i*) Judicial Trustees Rules, r. 8.

(*k*) Judicial Trustees Act, 1896, s. 1 (6), and Judicial Trustees Rules, r. 14.

(*l*) Judicial Trustees Rules, r. 11.

(*m*) Judicial Trustees Act, 1896, s. 1 (6).

(*n*) *Ib.*, s. 1 (4).

(*o*) *Ib.*, s. 1 (3).

(*p*) Judicial Trustees Rules, r. 12. This is done quite informally by a simple letter addressed to the officer of the court: r. 28.

(*q*) Judicial Trustees Rules, rr. 20 and 21.

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or, (2) in the alternative, of a person who gives security for his honesty, and (3) by having the accounts audited once a year. It does not, however, appear that if an official judicial trustee should commit a breach of trust (innocent or otherwise), the beneficiaries would be indemnified by the Government.

Act not popular.

Having regard to the fact that judicial trustees are almost always appointed in chambers, it is difficult to judge as to the extent to which this Act has been utilised. The present writer's experience, however, is that it has not found the same favour in England as the corresponding law in Scotland has done. His experience may, of course, be misleading; but although the Act has been in operation for seventeen years, he has never had a single case in which the appointment of a judicial trustee has been even suggested.

Moreover, the appointment of a Public Trustee, which seems to find much more favour with settlors, testators, and beneficiaries, seems likely to supersede the judicial trustee, and to render those sections of the Act which are treated of in this section practically obsolete. Under these circumstances no detailed comment appears to be necessary.

The power of the court to appoint, is purely discretionary, and will not be exercised if the application is opposed, where no charge of improper conduct is made against an existing trustee, even where he or she is a sole trustee (*r*); nor where the donee of the power of appointing trustees has appointed persons able and willing to act (*s*); nor will the court as a rule appoint a judicial trustee, to act with a private one (*t*).

In compliance with s. 4 of the Act, a code of thirty-five rules was made in 1897, dealing in detail with the appointment of official and non-official judicial trustees, the administration of the trust, the security to be given, the custody of securities and money, accounts and audit remuneration, removal, suspension, resignation and discontinuance of judicial trustees, the communication between judicial trustees and the court, fees, and so on. As, however, these rules will be found set out in the "Yearly Practice," it is not thought necessary to call further attention to them here.

(*r*) *Re Rateliff*, [1898] 2 Ch. 352.

(*s*) *Re Chisholm, Legal Reversionary Society* v. *Knight* (1898), 43 Sol. J. 43.

(*t*) See also *Re Martin*, [1900] W. N. 129.

CHAPTER VIII.

THE PUBLIC TRUSTEE.

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ART. 72.—*The Nature and Functions of the Public Trustee and the Guarantee of the State to be answerable for his Breaches of Trust.*

(1) In the year 1906 a statutory corporation sole called "the Public Trustee" was established (*a*). He is a salaried official, prohibited from acting for personal reward (*b*) and empowered to act where appointed (*c*)—

(a) as an ordinary trustee either alone or jointly with others (*d*);

(b) as a mere "custodian trustee," or treasurer, the administration being confided to ordinary trustees called "managing trustees";

(c) as a judicial trustee (*e*); and

(d) in certain other capacities not falling within the law of private trusts (*f*).

(*a*) Public Trustee Act, 1906 (6 Edw. VII., c. 55).

(*b*) Public Trustee Act, s. 11 (1).

(*c*) *Ib.*, s. 2 (1).

(*d*) *Ib.*, s. 5 (1).

(*e*) As to judicial trustees, see *supra*, Chapter VII., p. 407.

(*f*) Such as the office of executor or administrator, the administration of small estates under £1,000 (which means estates of deceased persons not trust estates) (*Re Deveraux, Toovey* v. *Public Trustee* (1911), 27 T. L. R. 574.

Art. 72.

(2) The Public Trustee is, on the other hand, forbidden to accept—

(a) any trust exclusively for religious or charitable purposes (*g*);

(b) any trust made solely by way of security for money (*h*);

(c) any trust for the benefit of creditors (*i*);

(d) any trust involving the management or carrying on of a business (*i*); save only—

(i.) where he is merely custodian trustee, without power of management, and either holds no property which exposes him to risk, or the circumstances are exceptional, and he is fully indemnified; or

(ii.) where, being an ordinary trustee, the circumstances are exceptional, and he either obtains the consent of the Treasury, or accepts the trusteeship for a time not exceeding eighteen months with a view only to winding up the business, and is satisfied that it can be carried on without risk of loss.

(3) The Public Trustee is only offered by the State as an alternative to ordinary private persons, and therefore can only act where appointed as mentioned in Art. 73, *infra*. Moreover he may decline to act, or may prescribe conditions on which alone he will accept the appointment; save only that he is forbidden to decline merely on the ground that the estate is of small value (*k*).

(4) The Public Trustee has the same powers, duties, and liabilities, and is entitled to the same rights and immunities and is subject to the same control and jurisdiction of the court, as a private person acting in the same capacity (*l*), and the State

(*g*) Public Trustee Act, s. 2 (5).
(*h*) Public Trustee Rules, r. 7.
(*i*) Public Trustee Act, s. 2 (4).
(*k*) *Ib.*, s. 2 (3).
(*l*) *Ib.*, s. 2 (2).

guarantees the beneficiaries against his breaches of trust, including the acts and defaults of his officers (*m*). Art. 72.

(5) For the services of the Public Trustee and the State guarantee, the State charges fees in the nature of a commission on both capital and income and also on each occasion of making an investment (*n*).

PARAGRAPH (1).

General comment on the Act.

By the Public Trustee Act, 1906 (6 Edw. VII. c. 55), and the Public Trustee Rules, 1907, made pursuant thereto, a new public official was constituted as a corporation sole under the name of the Public Trustee. The Act was no doubt passed with the object of meeting the increasing difficulty of finding suitable persons to act as trustees, but mainly to safeguard beneficiaries against those fraudulent misappropriations by trustees which have of late years been unpleasantly frequent. The authors of the Act, however, took the opportunity of introducing amendments in the general law of trusts, of considerable importance, particularly as to the constitution of what are in the Act called custodian trustees (as distinguished from those trustees who actively manage the trust), and the auditing of trust accounts. It also provides for the administration of small estates not exceeding £1,000 in value by the Public Trustee in place of the court, and enables the Public Trustee to accept the offices of executor or administrator. As, however, those are matters outside the law of trusts, it is proposed in this work to confine the consideration of the Act to matters affecting the appointment of the Public Trustee (and certain corporate bodies) to trusteeships, custodian and ordinary. The provisions relating to the auditing of ordinary trust accounts by the Public Trustee will be considered later on in Art. 81.

PARAGRAPH (2).

Trusts prohibited to the Public Trustee.

It is conjectured that the exception of trusts *exclusively* for religious or charitable purposes does not include the trusts of a will some of which are private and others charitable; *e.g.*, where residue is given to testator's widow for life, and after her death to divers charities; but the phrase is not very lucid.

(*m*) Public Trustee Act, s. 7 (1).

(*n*) *Ib.*, s. 9, and Public Trustee (Fees) Orders, 1907, obtainable through any bookseller or direct from Wyman & Sons, Limited, Fetter Lane, E.C. See also, for summary of fees, *infra*, p. 414 *et seq.*

Art. 72.

The exception of trusts by way of security for money, rules out trust deeds for securing debentures or debenture stock, and those rare mortgages which are drafted in the form of trusts. Deeds of arrangement for the benefit of creditors do not, it is conceived, include those trust deeds which are made for the convenience of the debtor rather than for the benefit of the creditors, which have been discussed *supra*, p. 35 *et seq.*

The exception of trusts which involve the management of a business was obviously necessary, as no public official could be expected to carry on commercial undertakings.

PARAGRAPH (3).

Not compulsory.

The Public Trustee is not, like the office of Land Registry, forced upon the public. He is merely offered as a convenience and safeguard to those who care to avail themselves of his services, and not to all of those, as he is given a discretion as to whether or not he will accept a trust, the only restriction being that he must not refuse solely on the ground that the property is small.

PARAGRAPH (4).

State guarantee.

The Public Trustee is in exactly the same position as a private trustee with regard to the beneficiaries, with the addition that the State guarantees that it will make good *any losses which an ordinary trustee would be liable to make good.* There seems to be an impression among the general public that the State not only gives this guarantee, but goes further, and guarantees the beneficiaries against all loss, whether arising from breach of trust or depreciation of securities. Needless to say that is a popular error. Still a guarantee which covers fraud and gross negligence is not to be treated lightly, particularly when it is united with that official *non possumus* which precludes all chance of those frequent breaches of trust which result from tender-heartedness.

PARAGRAPH (5).

Fees payable to the Public Trustee.

But of course the above advantages have to be paid for. The fees at present sanctioned by the Treasury in the schedule to the Public Trustee (Fees) Order, 1907, are as follows.

I. CAPITAL FEES.

A.—*In respect of the Duties of the Public Trustee acting in the Administration of a Small Estate under s. 3 of the Act.*

Small estates.

1. Upon acceptance of the trust—a fee at the rate of 10*s.* for every £100 of the gross capital value of the estate as proved for the purposes of s. 3 (1) of the Act.

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2. Upon the making of an order under s. 3 (5) of the Act—a fee at the rate of 10*s.* for every £100 of the gross capital value of the estate at the date of the order.

3. Upon the withdrawal (whether upon the distribution amongst the beneficiaries or otherwise) of any capital from the estate—a fee at the rate of 10*s.* for every £100 of the value of capital withdrawn.

B.—*In respect of the Duties of the Public Trustee acting as Ordinary Trustee or Executor or Administrator (except in cases provided for under Heads A or D).*

As ordinary trustee.

1. Upon the acceptance of the trust—a fee at the following rates :

(a) If the gross capital value of the trust property at the date of such acceptance does not exceed £1,000—15*s.* per cent. in respect of that value ; and

(b) If such gross capital at the said date exceeds £1,000, then—15*s.* per cent. in respect of that value up to £1,000 ;

5*s.* 0*d.* per cent. in respect of any excess of that value over £1,000 up to £20,000 ;

2*s.* 6*d.* per cent. in respect of any excess of that value over £20,000 up to £50,000 ;

1*s.* 3*d.* per cent. in respect of any excess of that value over £50,000.

2. Upon the withdrawal (whether upon distribution amongst beneficiaries or otherwise) of any capital from the trust property—a fee at a rate, for every £100 or part of £100 of the value of the property withdrawn, equal to the rate per cent. at which the fee upon the acceptance of the trust was payable in respect of the entire trust property.

3. Provided that the fees chargeable under the two preceding clauses of this head shall be so regulated that the total fees so chargeable in respect of a trust shall not be less than £5.

C.—*In respect of the Duties of the Public Trustee acting as Custodian Trustee only (except in cases provided for under Head D).*

As custodian trustee.

Upon any occasion mentioned under head B, one half of the fee payable under that head upon that occasion.

D.—*In respect of the Duties of the Public Trustee acting as Ordinary Trustee, or Custodian Trustee, in respect of Land not subject to a Trust for Conversion.*

In respect of land.

1. Upon acceptance of the trust—a fee of £5.

2. Upon raising any money under any trust or power in the trust instrument—a fee at the rate of 2*s.* 6*d.* for every £100 so raised. Minimum fee £1.

3. Upon the withdrawal from the trust property (whether upon transfer to or distribution amongst the beneficiaries or otherwise) of the land, or the moneys or property representing the land, or any part thereof respectively—

(a) when the Public Trustee is acting as ordinary trustee, a fee at a rate for every £100, or part of £100, of the value of the property withdrawn, equal to the rate per cent. at which, in pursuance of clause 1 of head B, the fee would be payable if such withdrawal were an acceptance of a trust chargeable under that head and comprising only the property withdrawn ; and

(b) when the Public Trustee is acting as custodian trustee only, one half of the fee payable under paragraph (a) of this clause—

Art. 72. Provided that a re-settlement of property subject to a strict settlement shall not be deemed to be a withdrawal within the meaning of this clause.

II. INVESTMENT FEES.

In respect of the Duties of the Public Trustee acting as Ordinary Trustee or Executor or Administrator or Custodian Trustee or in the Administration of a Small Estate under s. 3 of the Act.

Fees on investment.

1. Upon any investment (other than a purchase of land, or any mortgage of, or charge on, property)—a fee at the rate of 10*s.* for every £100 invested (such fee to include any sum paid by the Public Trustee for brokerage).

2. Upon any purchase or sale of land, or any investment by way of mortgage of, or charge on, property—a fee at the rate of 2*s.* 6*d.* for every £100 of the purchase money or money advanced.

III. INCOME FEES.

In respect of the Duties of the Public Trustee acting in any of the Capacities mentioned under Division II.

Income fees.

Upon the annual income of the trust property—a fee at the rate of £2 per cent. in respect of that income up to £500, and at the rate of £1 per cent. in respect of any excess of that income over £500. Provided as follows:

(a) where income is paid direct to the person entitled, or to his bank, or is collected by such person, the income fee shall not be charged in respect of that income at a higher rate than £1 per cent.; and

(b) Except where the Public Trustee is acting in the administration of a small estate under s. 3 of the Act the minimum income fee shall be 10*s.* 6*d.*

ART. 73.—*The Appointment of the Public Trustee as Ordinary Trustee.*

(1) The Public Trustee may be appointed an ordinary trustee of any trust (other than those which he is forbidden to accept (*o*)), whether the trust was created before or since the Act, unless the instrument creating the trust contains a direction to the contrary; and even then he may be appointed by the Court (*p*).

(2) The appointment must be made either by (*q*)—

(a) the creator of the trust;

(*o*) Art. 72 (2), p. 412, *supra*; and Public Trustee Act, s. 2 (4), and Public Trustee Rules, r. 7.

(*p*) Public Trustee Act, s. 5 (1) and (3).

(*q*) Public Trustee Act, s. 5 (1).

(b) the person having power to appoint new trustees; or

(c) the court.

(3) Where he is appointed a new trustee he may (unlike an ordinary individual) be appointed sole trustee (even where the trust instrument or a statute forbids the appointment of a sole trustee (*r*)); and correspondingly all his co-trustees may retire under s. 12 of the Trustee Act, 1893, leaving him sole trustee, and without any of the consents required by that section (*s*).

(4) Where, however, it is proposed to appoint the Public Trustee to be a new trustee or additional trustee, notice of the proposed appointment must, where practicable, be given to all the beneficiaries in the United Kingdom whose addresses are known or the guardians of such of them as are infants, who may within twenty-one days apply to the court to prohibit the appointment, which the court may do if it considers it expedient. Nevertheless, failure to give the notice does not invalidate the appointment (*t*).

PARAGRAPHS (1) AND (2).

How Public Trustee appointed.

Where the creator of the trust (as not infrequently happens now, where the trust is created by will) appoints the Public Trustee no question can well arise. He can be appointed by will or codicil without any previous communication to him, but he does not become a trustee until he has accepted the appointment (*u*). In every other case he cannot be appointed without his previous consent (*x*), the effect of which would seem to be to make such appointments absolutely waste-paper, even although he does subsequently consent.

Where a person is appointed by a testator to act with the Public Trustee and does not disclaim, it is his duty to communicate the Public Trustee's appointment to him as soon as practicable (*y*). In any case, however, the following

(*r*) *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611.
(*s*) Public Trustee Act, s. 5 (1) and (2).
(*t*) Public Trustee Act, s. 5 (4).
(*u*) Public Trustee Rules, r. 9.
(*x*) *Ib.*, rr. 9, 10.
(*y*) *Ib.*, r. 10 (2).

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persons (*z*) can apply to the Public Trustee to accept the appointment, viz.:—

(a) any trustee or beneficiary,

(b) any person having power to appoint the Public Trustee under paragraph (1).

Appointment by the court.

With regard to appointments by the court, it is believed that the tendency is not to appoint the Public Trustee against the wishes of a continuing trustee, where nothing is alleged against him (*a*), or against the wishes of any considerable proportion of the beneficiaries.

In one case in which the present writer was counsel, where a testator had directed a sum of £10,000 to be settled in the event of his granddaughter being married, and that sum had been paid into court, and owing to family differences no persons could be obtained to act as trustees, the court refused at the request of the husband and wife to appoint the Public Trustee, on the ground of unnecessary expense, remarking that the fund was perfectly safe in the custody of the Court.

Where it is proposed to appoint the Public Trustee in place of a retiring judicial trustee, the court ought to make an order that there shall cease to be a judicial trustee (*b*).

PARAGRAPH (3).

Public Trustee may be sole trustee in cases where an appointment of any other sole trustee would be irregular.

Owing, no doubt, to the State guarantee, the Act provides that the Public Trustee may be appointed a sole trustee in cases where no other sole trustee could be appointed without breach of trust. It has been held that this not only applies to cases where the appointment of a sole trustee is forbidden by the law of the court, but also to cases where it is expressly directed by the settlement that the trustees shall be kept up to a prescribed number, and even to the case of trustees for the purposes of the Settled Land Acts, notwithstanding that s. 39 of the Settled Land Act, 1882, forbids the payment of capital money to less than two trustees unless the *settlement* authorises payment to one only (*c*).

PARAGRAPH (4).

Effect of not giving notice of intention to appoint Public Trustee as a new trustee.

It seems that the proviso at the end of s. 5 (4), that "failure to give the notice is not to invalidate the appoint-

(*z*) Public Trustee Rules, r. 10 (1).

(*a*) See *per* NEVILLE, J., *Re Kensit*, [1908] W. N. 235.

(*b*) *Re Johnston, Mills* v. *Johnston*, [1911] W. N. 234.

(*c*) *Re Leslie's Hassop Estates*, [1911] 1 Ch. 611.

ment," makes the sole effect of failure to give such notice a ground on which any beneficiary may *at any time* (and not merely within twenty-one days) apply to the court to remove the Public Trustee. It should be noticed that this provision as to notice, is confined to cases where the Public Trustee is appointed an ordinary trustee, and has no application to his appointment as a custodian trustee. Art. 73.

ART. 74.—*The Appointment and Removal of the Public Trustee or certain Corporate Bodies as "Custodian Trustee."*

(1) The Public Trustee (with regard to trusts which he is not forbidden to accept (*d*)), and also any such banking, insurance, guarantee, or trust company, or friendly society or body corporate established for charitable or philanthropic purposes, as may be approved by the Public Trustee and the Treasury, may be appointed custodian trustee of any trust (*e*).

(2) The appointment may be made (*f*)—

(a) by the creator of the trust;

(b) by the court on the application of any one who could apply for the appointment of a new trustee;

(c) by the person having power to appoint new trustees, even (*semble*) where the trust instrument forbids it.

(3) The court may terminate the custodian trusteeship on the application of the custodian trustee or the managing trustees or of any beneficiary, if—

(a) it is the general wish of the beneficiaries, or

(b) it is expedient on any other grounds,

and thereupon the Court may give general directions and make the requisite vesting orders (*g*).

(*d*) See Art. 72 (2), p. 412, *supra*; and Public Trustee Act, s. 2 (4), and Public Trustee Rules, r. 7.

(*e*) Public Trustee Act, s. 4 (3), and Public Trustee Rules, r. 36.

(*f*) Public Trustee Act, s. 4 (1).

(*g*) *Ib.*, s. 4 (2) (i).

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PARAGRAPH (1).

Custodian trustee a new statutory addition to the law of trusts.

The provisions of the Public Trustee Act, 1906 (*h*), relating to the appointment of a custodian trustee, introduced a new element into the law of trusts, and one which seems to be of considerable value. Such an appointment has obvious advantages; for (1) it absolutely safeguards the capital against loss either by reason of fraud or breach of trust, and (2) it saves the periodic expense caused by the necessity of transferring the trust property on every appointment of new trustees. On the other hand, it leaves the management in the hands of ordinary active trustees. This custodian trusteeship is doubtless founded on the analogy of the Official Trustees of Charity Lands and Charity Funds.

Certain corporate bodies may be appointed custodian trustees.

Moreover the Act enables not only the Public Trustee to be appointed, but also any such banking or insurance or guarantee or trust company, or friendly society or body corporate established for charitable or philanthropic purposes, as may be approved by the Public Trustee or the Treasury; and any such body so appointed may charge fees not exceeding those charged by the Public Trustee. As, however, the State does not guarantee their solvency and integrity, as it does in the case of the Public Trustee, there seems to be little inducement to prefer them. In spite of its obvious advantages, the present writer is disposed to doubt whether the invention of a custodian trustee has commended itself to the public. Anyhow, he has not so far personally come across a custodian trustee in the course of his practice. Perhaps there is a feeling of awkwardness in asking friends to act as managing trustees, while intimating at the same time that one is not prepared to entrust them with the custody of the capital.

ART. 75.— *The respective Duties, Rights, and Liabilities of the Custodian Trustee and Management Trustee.*

The respective functions and rights of a custodian trustee and the managing trustees are as follows (*i*):—

(a) The trust property must be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act,

(*h*) 6 Ed. VII. c. 55. (*i*) Public Trustee Act, s. 4 (2).

1893 (*j*). And subject and without prejudice to the rights of any other persons, the custodian trustee is to have the custody of all securities and documents of title relating to the trust property; but the managing trustee is to have free access thereto, and be entitled to take copies thereof or extracts therefrom (*k*).

(b) The management of the trust property, and the exercise of any power or discretion exercisable by the trustees under the trust, remain vested in the managing trustees (*l*).

(c) The custodian trustee must concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management, or any other power or discretion vested in them (including the power to pay money or securities into court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise. But unless he so concurs, the custodian trustee is not liable for any act or default on the part of the managing trustees or any of them (*m*).

(d) All sums payable to, or out of the income or capital of the trust property, shall be paid to or by the custodian trustee: Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees, or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof, and shall not be answerable for any loss or misapplication thereof (*n*).

(e) The custodian trustee, if he acts in good faith, is not liable for accepting as correct, and acting upon the faith of, any written

(*j*) Public Trustee Act, s. 4 (2) (a).
(*k*) *Ib.*, (2) (c).
(*l*) *Ib.*, (2) (b).
(*m*) *Ib.*, (2) (d).
(*n*) *Ib.*, (2) (e).

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statement by the managing trustees as to the birth, death, marriage, or other matter of pedigree or relationship, or other matter of fact, upon which the title to the trust property or any part thereof may depend, nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee (*o*).

(f) The power of appointing new trustees, when exercisable by the trustees, is to be exercised by the managing trustees alone, and in determining the number of trustees the custodian trustee is not to be counted: Provided nevertheless that the custodian trustee has the same right of applying to the court to appoint a new trustee as any other trustee has (*p*).

ART. 76.—*Special Rules relating to the Public Trustee.*

(1) Any person aggrieved by any act or omission or decision of the Public Trustee in relation to the trust, may apply to a judge of the Chancery Division to whom such work is specially assigned, who may make such order as he thinks fit (*q*).

(2) The Public Trustee may employ for the purposes of the trust, such solicitors, bankers, accountants and brokers, or other persons as he may deem necessary, having regard to the interests of the trust; and in doing so shall, where practicable, take into consideration the wishes of

(a) the creator of the trust;

(b) the other trustees (if any);

(c) the beneficiaries,

either expressed or implied from the previous practice of the creator or trustees (*r*). He may also take and use professional advice and assistance in regard to legal

(*o*) Public Trustee Act, s. 4 (2) (h).

(*p*) *Ib.*, (2) (f) and (g).

(*q*) Public Trustee Act, s. 10.

(*r*) Public Trustee Act, s. 11 (2).

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and other matters, and act on credible information (though less than legal evidence) of facts (*s*).

(3) The Public Trustee may make advances out of public money for the purposes of any trust estate (*semble* of which he is trustee) (*t*).

(4) The entry of the name of the Public Trustee in the books of a company does not constitute notice of the trust, nor is any one affected with notice of a trust by the mere fact of dealing with the Public Trustee (*u*).

(5) The Public Trustee is bound to keep a register of every trust of which he is trustee (*x*) and to allow any beneficiary to inspect it, and at their expense to furnish them with copies of the register or of any account, notice, or document in his possession relating to their trust, but otherwise he is bound to observe complete secrecy (*y*).

Procedure by way of appeal from decisions of Public Trustee.

At present no rules have been made under the 10th section for appealing from a decision of the Public Trustee to a judge. But Mr. Justice JOYCE recently stated (*z*) that it was high time they were. In the meantime it seems that the proper procedure is by originating summons in the chambers of any judge of the Chancery Division (*a*), and that the Public Trustee should not be sued (*b*), although the opinions of JOYCE and PARKER, JJ., on this point appear to be in conflict (*c*). Probably this question will be settled by the rules when made. Anyhow it is open to the court to invite him to state his opinion. The Public Trustee ought to hear the parties, before deciding a point judicially against them, if they desire to be heard (*d*). The practitioner is warned that the simple and inexpensive procedure for taking the opinion of the court on any question arising in the course of *any administration* without judicial proceedings under s. 3 (4) of the Act, has no application to cases where the Public Trustee is *acting as trustee*, but is

(*s*) Public Trustee Rules, r. 18.
(*t*) *Ib.*, r. 29.
(*u*) Public Trustee Act, s. 11 (5).
(*x*) Public Trustee Rules, r. 19.
(*y*) *Ib.*, r. 32.
(*z*) *Re Oddy, Connell* v. *Oddy* (1910), 104 L. T. 128, at p. 130.
(*a*) Not necessarily to the judge assigned to hear applications under s. 3 (4): *per* JOYCE, J., *Re Oddy, Connell* v. *Oddy*, *supra*.
(*b*) See *Re Oddy* (1911), 104 L. T. 338, PARKER, J.
(*c*) *Cf.* cases cited in notes (*a*) and (*b*), *supra*.
(*d*) *Per* PARKER, J., *Re Oddy*, [1911] 1 Ch. 532.

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confined to "the administration of small estates" (*e*) (*i.e.*, of deceased persons (*f*)). All applications in relation to trusts, must either be by beneficiaries in the nature of appeals from the Public Trustee under s. 10, or by the Public Trustee or any beneficiary under the general law of trusts as made applicable to the Public Trustee by s. 2 (2). In the latter case the procedure is either by action or by originating summons under R. S. C., Order 55, rr. 3 and 4.

(*e*) *Re Oddy*, [1911] 1 Ch. 532.

(*f*) *Ib.*, and *Re Oddy, Connell v. Oddy* (1910), 104 L. T. 128.

CHAPTER IX.

ADMINISTRATION OF NEW TRUSTS CREATED UNDER LIMITED POWERS IN THE ORIGINAL SETTLEMENT.

ART. 77.—*By whom New Trusts created by Appointments are to be carried out.*

(1) Where the donee of a general power creates new trusts:

(a) if the appointment is made by an instrument not testamentary, he can nominate new trustees for carrying them out, to whom the old trustees must transfer the property;

(b) if the appointment is made by a testamentary instrument the old trustees must transfer the property to the personal representatives of the appointor to be dealt with by them in due course of administration (*a*).

(2) Where the donee of a special power creates new trusts (*semble*) he cannot confide the administration of them to new trustees unless the power, either expressly or impliedly, authorises him to do so (*b*).

PARAGRAPH (1) (a).

Donee of general power may appoint by deed to new trustees.

A general power being a power to appoint to any one in the world, it follows that the donee may, by instrument *inter vivos*, appoint not merely in favour of persons to take beneficially, but in favour of persons who are to hold upon new special trusts. In either case the trusts of the old settlement are spent, and the trustees *functus officio*; and their sole remaining

(*a*) *Re Hoskin's Trusts* (1877), 5 Ch. D. 229; (1877) 6 Ch. D. 281; *Hayes* v. *Oatley* (1872), L. R. 14 Eq. 1; *Re Philbrick* (1865), 13 W. R. 570; *Re Peacock's Settlement*, *Kelcey* v. *Harrison*, [1902] 1 Ch. 552 (administration with will annexed).

(*b*) *Busk* v. *Aldam* (1874), L. R. 19 Eq. 16; *Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172; *Re Tyssen*, *Knight-Bruce* v. *Butterworth*, [1894] 1 Ch. 56; and *per* COTTON, L.J., in *Scotney* v. *Lomer* (1886), 31 Ch. D. 380; but *cf.* *Re Redgate*, *Marsh* v. *Redgate*, [1903] 1 Ch. 356.

Art. 77. duty is to transfer the property to the appointees, whether they be beneficial or fiduciary.

PARAGRAPH (1) (b).

Where general power exercised by will, property must in first instance be handed to personal representative.

But where the appointment is made by a testamentary instrument the matter is somewhat different. In that case the appointor by exercising the power makes the property assets for the payment of his debts in due order of administration (*c*). He therefore, by the mere fact of the appointment, gives an interest to his personal representative, who may require the fund for debts or death duties. Consequently the trustees of the settlement must transfer the fund to the personal representative or according to his direction (*d*). If the appointor has declared new trusts, and appointed new trustees for carrying them out, then, of course, it will be the duty of the personal representative to transfer or direct the transfer to them of so much as he may not require for debts or duties. But the functions of the old trustees cease in either case on the death of the appointor.

PARAGRAPH (2).

Whether donee of special power can appoint to new trustees is a question of construction.

Appointments creating new trusts under special or limited powers, give rise to more difficulty. As Mr. Justice FARWELL says in his work on "Powers" (*e*): "A settlor or testator who vests funds in trustees, and provides machinery for filling up vacancies in their number, may well be taken to have intended that the fund shall remain in the custody of the persons to whom he has entrusted it, until some beneficiary absolutely entitled is ready to receive it; although he has given power to another to say who the beneficiary shall be. He may well trust, (say) his daughter, to select which of her children shall take the fund, and yet not desire her to nominate the trustees who are to hold it."

Mere power of selection.

Thus, in *Re Tyssen, Knight-Bruce* v. *Butterworth* (*f*), under a special power in favour of children, the donees appointed in favour of one daughter upon certain trusts in favour of another daughter; but it was held that the fund ought not to be transferred to the first daughter as trustee under the appointment, but ought to be retained by the trustees of the

(*c* *Lassells* v. *Cornwallis* (1704), 2 Vern. 465; *Holmes* v. *Coghill* (1802), 7 Ves. 499, (affirmed (1806), 12 Ves. 206); *Pardo* v. *Bingham* (1868), L. R. 6 Eq. 485.

(*d*) See cases cited, p. 425, note (*a*), *supra*.

(*e*) Farwell on Powers, 2nd ed., p. 326.

(*f*) [1894] 1 Ch. 56.

settlement. The same view had been previously taken in *Busk* v. *Aldam* (*g*).

Power to appoint in such manner and form as donee may think fit.

On the other hand, in the more recent case of *Re Redgate*, *Marsh* v. *Redgate* (*h*), BUCKLEY, J., held that, under a power to appoint to children "for such estate or estates manner and form" as the donee of the power should direct, the power was well exercised by an appointment to new trustees upon trust for sale and distribution of the proceeds among the children. His lordship seems to have based his judgment on the analogy of powers operating to transfer the legal estate under the Statute of Uses, with regard to which it had been held, in several cases (*i*), that such powers authorised an appointment to trustees upon trust for sale. But, with unfeigned respect, it is suggested, that where a settlor has confided the property to trustees upon such trusts as another shall appoint, he has himself chosen the hands to administer the trust; whereas in the case of powers operating under the Statute of Uses he has not done so. His lordship, however, seems impliedly to admit in his judgment that he was bound to find something in the language of the settlement justifying the appointment to new trustees; and accordingly fixed on the words "manner and form," which, by contrast with the words "estate or estates," seemed to him to imply a power to do something else than to give an estate to children: in other words to imply a power to "give to a child in some manner and form an interest in the property which shall not be an estate in the property itself." This ingenious distinction, however, seems somewhat subtle for these degenerate days.

However, in a later case of *Re Adams' Trustees and Frost's Contract* (*k*), WARRINGTON, J., came to the same conclusion, where the words "manner and form" were absent and the settlement merely directed the trustees to transfer "or

(*g*) (1874) 19 Eq. 16; and see *per* COTTON, L.J., in *Scotney* v. *Lomer* (1886), 31 Ch. D. 380.

(*h*) [1903] 1 Ch. 356.

(*i*) *Kenworthy* v. *Bate* (1802), 6 Ves. 793; *Cowx* v. *Foster* (1860), 1 Johns. & H. 30; *Fowler* v. *Cohn* (1856), 21 Beav. 360; *Webb* v. *Sadler* (1873), L. R. 8 Ch. 419; *Re Paget, Mellor* v. *Mellor*, [1898] 1 Ch. 290.

(*k*) [1907] 1 Ch. 695; and see *Re Falconer's Trusts, Property and Estates Co., Ltd.* v. *Frost*, [1908] 1 Ch. 410, as to the power of a donee of a special power of appointment to enlarge the range of investments; and see also *Re Taylor, Kidd* v. *Tatham*, not yet reported, but decided on the 28th of February, 1912, where PARKER, J., went a step further, and held that a donee of a power to appoint the proceeds of sale of real and *personal estate directed to be sold* can stop the direction for sale and appoint a house to A. (an object of the power) so long as she remains a spinster and inhabits it. But this is respectfully queried.

Art. 77. pay." From these words, the learned judge inferred a power in the donee to direct a sale, and then took one step further and inferred that he might appoint his own trustees to carry the sale out, notwithstanding that under the settlement the trustees thereof had an express power of sale.

CHAPTER X.

THE RIGHTS OF THE TRUSTEE.

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ART. 78.—*Right to Reimbursement and Indemnity.*

(1) A trustee is entitled to be reimbursed out of the trust property (*a*) all expenses which he has properly incurred (*b*), having regard to the circumstances of each particular case (*c*), but without interest (*d*), unless he has paid an interest-bearing claim, in which case he stands in the shoes of the creditor by subrogation (*e*).

(2) Although, as between the beneficiaries, such expenses are generally payable out of capital (*f*), the trustee has a lien for them, on both capital and income (*g*), in priority to the claims of the beneficiaries (*h*).

(3) Where the only beneficiary is a person *sui juris*, who himself created the trust, the right of the trustee to indemnity against liabilities incident to the legal ownership of the trust property, is not limited to that

(*a*) *Re Earl of Winchilsea's Policy Trusts* (1888), 39 Ch. D. 168.

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 24; *Worrall* v. *Harford* (1802), 8 Ves. 4; *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19.

(*c*) *Leedham* v. *Chawner* (1858), 4 Kay & J. 458.

(*d*) *Gordon* v. *Trail* (1820), 8 Pr. 416.

(*e*) *Re Beulah Park Estate* (1872), L. R. 15 Eq. 43; *Finch* v. *Pescott* (1874), L. R. 17 Eq. 554.

(*f*) *Carter* v. *Sebright* (1859), 26 Beav. 374.

(*g*) *Stott* v. *Milne* (1884), 25 Ch. D. 710; *Ex parte James, Re Davis* (1832), 1 Deac. & C. 272; *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19; and see *Walters* v. *Woodbridge* (1878), 7 Ch. D. 504.

(*h*) *Dodds* v. *Tuke* (1884), 25 Ch. D. 617; *Mathias* v. *Mathias* (1858), 3 Sm. & G. 552; *Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807.

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property, but is enforceable in equity against the beneficiary personally, unless he is in a position to disclaim the property (*i*).

(4) Where a trustee has committed a breach of trust, he will not be allowed his expenses until he has made good the breach (*j*).

(5) A person against whose claims the trustee is, by the settlement, entitled to be indemnified, is allowed to stand in the trustee's place, by way of subrogation, against the fund which the settlor has expressly dedicated for the purpose (*k*).

PARAGRAPH (1).

Damages recovered by third parties.

In *Benett* v. *Wyndham* (*l*), a trustee, in the due execution of his trust, directed a bailiff, employed on the trust property, to have certain trees felled. The bailiff ordered the wood-cutters usually employed on the property to fell the trees. In doing so they negligently allowed a bough to fall on to a passer-by, who, being injured, recovered heavy damages from the trustee in a court of law. These damages were, however, allowed to the trustee out of the trust property.

Calls on shares.

So where a trustee of shares has been obliged to pay calls upon them, he is entitled to be reimbursed (*m*); and the right to be indemnified accrues directly the liability is proved to exist (*n*). However, there must be some proof that the liability is not merely imaginary; for a person entitled to be indemnified cannot claim a declaration of his right to indemnity before the contingency which creates the damage has arisen (*o*). Therefore, although a trustee may, as such, be a member of a company which is being wound up, he cannot bring an action

(*i*) *Hardoon* v. *Belilios*, [1901] A. C. 118. The previous cases at *law*, such as *Hosegood* v. *Pedler* (1896), 66 L. J. Q. B. 18, are inapplicable, the right being peculiarly an equitable one. *Cf. Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. at p. 24; *Fraser* v. *Murdoch* (1881), 6 App. Cas. at p. 872; *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19, 54; *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256.

(*j*) *Re Knott, Bax* v. *Palmer* (1887), 56 L. J. Ch. 318.

(*k*) See cases cited *infra*, pp. 439, 440, notes (*x*), (*y*) and (*z*).

(*l*) (1862) 4 De G. F. & J. 259; and see *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199.

(*m*) *James* v. *May* (1873), L. R. 6 H. L. 328; *Re National Financial Co., Ex parte Oriental Commercial Bank* (1868), L. R. 3 Ch. 791; *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855. See also, as to right of executor to recover calls from a residuary legatee, *Re Kershaw, Whitaker* v. *Kershaw* (1890), 45 Ch. D. 320.

(*n*) *Hobbs* v. *Wayet* (1887), 36 Ch. D. 256.

(*o*) See next note.

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to establish his right to an indemnity, unless he can establish the fact that calls *must* be made (*p*). And where the court makes an order for the distribution of a trust fund it will not set aside any part of the fund to indemnify the testator's executors against possible liabilities which may arise in respect of leases formerly held by him, unless there is privity of estate between the executors and the lessors (*q*).

Indemnity for liabilities incurred in carrying on trust business.

So where trustees or executors have *rightly* carried on a business in accordance with the provisions of a will or settlement, they are entitled to be indemnified out of the trust estate against any liabilities which they have properly incurred (*r*). And this right will prevail even against creditors *of the testator* himself if they have assented to the business being carried on in the interest as well of themselves as of the beneficiaries under the will (*r*). But where the settlement has directed a trustee to employ a specific portion only of the estate for the purpose of carrying on the business, the rule is that, although the trustee is personally liable to creditors for debts incurred by him in carrying on the trade pursuant to the settlement, his right to indemity is limited to the specific assets so directed to be employed (*s*).

Solicitor's costs.

A trustee or executor will be allowed the amount of a solicitor's bill of costs which he has paid for services rendered in the matter of the trust (*t*) ; even, it would seem, where the necessity for the services arose through want of caution on the part of the trustee: *e.g.*, where proceedings had to be taken by an administrator against an agent to whom he had entrusted money to make payments (*u*). However, under the Solicitors Act (6 & 7 Vict. c. 73), s. 39, beneficiaries may, at the discretion of the court, obtain an order to tax the costs of the trustee's solicitor (*x*).

Costs of administration suit, together with "costs, charges, and expenses."

Unless trustees have been guilty of misconduct, they are entitled to their costs of an action for the administration of the trust as between solicitor and client, and not merely as between

(*p*) *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1882), 22 Ch. D. 561.

(*q*) *Re Nixon, Gray* v. *Bell*, [1904] 1 Ch. 638.

(*r*) *Dowse* v. *Gorton*, [1891] A. C. 190 ; *Re Evans, Evans* v. *Evans* (1887), 34 Ch. D. 597.

(*s*) *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548 ; *Re Webb, Leedham* v. *Patchett* (1890), 63 L. T. 545. As to the right of creditors of the business to be placed in the shoes of the trustee by way of subrogation, see *infra*, p. 439 *et seq.*

(*t*) *Macnamara* v. *Jones* (1784), Dick. 587.

(*u*) *Re Davis, Muckalt* v. *Davis* [1887] W. N. 186, *sed quære.*

(*x*) But see *Re Wellborne*, [1901] 1 Ch. 312. As to the principle on which such taxations should proceed, see *Re Miles*, [1903] 2 Ch. 518.

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party and party (*y*); and, in addition thereto, any other costs, charges, and expenses properly incurred by them in the execution of the trust.

Depriving trustees of costs of litigation.

Where, however, the court, on the hearing of a summons for administration, "does not think fit to make any order as to costs," that is merely a euphemistic way of *depriving* the trustees of their costs of the summons, and they cannot afterwards claim them as "costs, charges, and expenses" incurred in the execution of the trust (*z*). To deprive a trustee of his costs has, however, been called "a violent exercise" of the court's discretion (*a*); and, contrary to the usual rule of the court, an order depriving a trustee of costs, or limiting him to a particular fund, is appealable by him on that ground (*b*). On the other hand, if he be allowed costs, the beneficiaries cannot appeal against such allowance (*c*). Nevertheless a trustee who acts unreasonably, may not only be deprived of costs, but be ordered to pay those of the plaintiff. For instance, in one case, a trustee whose trust had become a simple trust, and who neglected for twenty-eight days after demand to transfer the trust property to the beneficiary, was not only deprived of costs, but ordered to pay those of the plaintiff (*d*).

Costs of trustees who have committed a breach of trust.

Where the sole object of a suit is to make trustees answerable for breach of trust, and a judgment to that effect is obtained, the trustees will not only not get their costs allowed, but will almost invariably have to pay the costs of the plaintiffs up to the judgment (*e*). The costs subsequent to the judgment will be in the discretion of the judge, who may disallow the trustee his costs if he considers that, but for the trustee's misconduct, there would have been no need for the action at all (*f*). And the same result will follow where the conduct of a trustee is vexatious or oppressive (*g*), or unreasonably cautious (*h*).

(*y*) *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348.

(*z*) *Re Hodgkinson, Hodgkinson* v. *Hodgkinson*, [1895] 2 Ch. 190.

(*a*) *Birks* v. *Micklethwait* (1864), 34 L. J. Ch. 362.

(*b*) See *Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492; *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348; *Re Knight's Will*, (1884), 26 Ch. D. 82.

(*c*) *Charles* v. *Jones* (1886), 33 Ch. D. 80.

(*d*) *Re Knox's Trust*, [1895] 2 Ch. 483; and to same effect, *Re Ruddock, Newberry* v. *Mansfield* (1910), 102 L. T. 89 (C. A.).

(*e*) *Per* Lord LANGDALE, *Byrne* v. *Norcott* (1851), 13 Beav. 336; *Gough* v. *Etty* (1869), 20 L. T. (N. S.) 358; *Easton* v. *Landor* (1892), 67 L. T. 833.

(*f*) *Easton* v. *Landor, supra.*

(*g*) See *Marshall* v. *Sladden* (1851), 4 De G. & Sm. 468; *Patterson* v. *Wooler* (1876), 2 Ch. D. 586; *Att.-Gen.* v. *Murdoch* (1856), 2 Kay & J. 571; *Palairet* v. *Carew* (1863), 32 Beav. 564; *Griffin* v. *Brady* (1869), 39 L. J. Ch. 136.

(*h*) *Smith* v. *Bolden* (1863), 33 Beav. 262; *Re Cull's Trusts*

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But where an administration action is necessary *apart from the breach of trust*, and the latter only forms an incidental feature of the action, or where although there has been a technical breach of trust no loss has ensued (*i*), the trustee will, as a rule, be allowed his general costs of the action as between solicitor and client, although where loss has been incurred he may have to pay the special costs caused by the breach (*k*).

One set of costs only allowed where trustees unreasonably sever.

If trustees are co-plaintiffs or co-defendants, they ought, except under special circumstances, to sue or defend jointly (*l*), and will only be allowed one set of costs between them (*m*), to be apportioned by the taxing master (*n*); and if a trustee improperly refuses to join his co-trustee as plaintiff, and consequently has to be made a defendant, he may be deprived of costs altogether (*m*). But, on the other hand, where, owing to one trustee being also a beneficiary, it is necessary that one should be plaintiff, and the other defendant, they will each be allowed separate sets of costs as between solicitor and client (*o*); and the same rule prevails where one of the trustees is attacked hostilely, in which case he may employ two counsel (*p*).

Other instances of costs, charges, and expenses allowed trustees.

It has been held that a trustee is entitled to be reimbursed costs of former trustees, paid by him to their personal representatives previously to the latter transferring the trust estate (*q*). He is also entitled to be reimbursed costs incurred by him previously to his appointment in obtaining a statement of the trust property and ascertaining that the power of appointing new trustees was being properly exercised (*r*); and also costs incurred by the donee of the power of appointment in relation to the trustee's appointment (*q*).

Expenses incurred in unsuccessfully defending an action.

But where a trustee takes upon himself the responsibility of unsuccessfully defending an action in relation to the trust

(1875), L. R. 20 Eq. 561; *Firmin* v. *Pulham* (1848), 2 De G. & Sm. 99; *Cockcroft* v. *Sutcliffe* (1856), 25 L. J. Ch. 313; and see also cases collected in Morgan and Wurtzburg's Treatise on the Law of Costs, 2nd ed., p. 412 *et seq.*

(*i*) *Royds* v. *Royds* (1851), 14 Beav. 54; *Re Chennell, Jones* v. *Chennell* (1878), 8 Ch. D. 492; *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727.

(*k*) *Pride* v. *Fooks* (1839), 2 Beav. 430; *Campbell* v. *Bainbridge* (1868), L. R. 6 Eq. 269; *Bell* v. *Turner* (1877), 47 L. J. Ch. 75.

(*l*) Morgan and Wurtzburg's Treatise on Costs, 2nd ed., pp. 124—126 and 403.

(*m*) *Hughes* v. *Key* (1855), 20 Beav. 395; *Gompertz* v. *Kensit* (1872), L. R. 13 Eq. 369.

(*n*) *Re Isaac, Cronbach* v. *Isaac*, [1897] 1 Ch. 251.

(*o*) *Re Love, Hill* v. *Spurgeon* (1885), 29 Ch. D. 348.

(*p*) *Re Maddock, Butt* v. *Wright*, [1899] 2 Ch. 588.

(*q*) *Harvey* v. *Olliver*, [1887] W. N. 149.

(*r*) *Re Pumfrey, Worcester, etc., Banking Co.* v. *Blick* (1882), 27 Ch. D. 255.

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estate without procuring the sanction of the court, the onus lies upon him of proving that he had reasonable grounds for defending it. If he cannot prove such grounds, he is not entitled to retain out of the trust property the costs of the action beyond the amount which he would have incurred if he had applied for leave to defend (*s*).

Costs of premature sale.

And so where trustees attempted, at the solicitation of their beneficiaries, *some of whom were married women without power of anticipation*, to sell the trust property before the date named in the settlement, it was held that they were not entitled to be indemnified against the costs of an action brought against them by the purchaser (*t*).

Unreasonable expenses disallowed.

Neither will trustees be allowed to reimburse themselves *every* out-of-pocket expense, but only such as are reasonable and proper under the circumstances. Thus, the expenses of a trustee's journeys to Paris, in order that he might be present at the hearing of a suit brought in the French courts (the sole question being one of French law, and not of fact), were disallowed (*u*).

Voluntary subscriptions.

As a general rule, the payment, by trustees, of voluntary subscriptions for public or charitable objects is not allowed. But nevertheless they may be in exceptional cases—for instance, where they are reasonable and made in the honest belief that the payment will benefit the estate (*x*). Upon this ground the payment of subscriptions to a church school were allowed by KEKEWICH, J., there being evidence that if the subscriptions had been denied, a school board would have become necessary, in which case the estate would have had to pay considerably more than the subscriptions in the way of rates (*x*).

Unnecessary law costs.

A trustee, although entitled to obtain legal advice in relation to the execution of the trust, is not entitled, out of an excess of caution, to charge the estate with unnecessary legal proceedings. For instance, on retirement, he is not entitled to have an attested copy of the settlement, or of the appointment of new trustees, made at the expense of the estate (*y*). And on an appeal between beneficiaries it is said that trustees ought

(*s*) *Re Beddoe*, *Downes* v. *Cottam*, [1893] 1 Ch. 547.

(*t*) *Leedham* v. *Chawner* (1858), 4 Kay & J. 458.

(*u*) *Malcolm* v. *O'Callaghan* (1837), 3 Myl. & Cr. 52.

(*x*) *How* v. *Earl Winterton* (1902), 51 W. R. 262. See also *Re Walker*, *Walker* v. *Duncombe*, [1901] 1 Ch. 879, where the court sanctioned the payment of charitable subscriptions.

(*y*) *Warler* v. *Anderson* (1853), 11 Hare, 301; and see Art. 79, *infra*.

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not, as a rule, to brief counsel (*z*). This, however, appears to be a counsel of perfection where the appellant serves notice of appeal on the trustee.

Interest.

But although a trustee is entitled to be reimbursed his out-of-pocket costs and expenses, he is not, as a rule, entitled to interest on them—a rule not altogether in accordance with justice (*a*); and although by 33 & 34 Vict. c. 28, s. 17, a solicitor may charge interest on disbursements made for his client, this does not seem to apply to disbursements made by a solicitor trustee. There is, however, an exception to the rule, viz., that where a trustee has paid out of his own moneys an interest-bearing claim against the estate, he stands by way of subrogation in the shoes of the creditor, and is entitled to interest (*b*).

PARAGRAPH (2).

Paramount lien on trust property for trustees' expenses.

In an administration action, if it appears probable that the trust fund will be insufficient for the payment of the whole of the costs in full, the trustees are entitled to have inserted in the order a direction, that their costs, charges, and expenses shall be paid in priority to those of the beneficiaries (*c*). In short, the trustees' lien takes precedence of all beneficial interests, and this not only as against original beneficiaries, but also all purchasers or mortgagees claiming through or under them (*d*). Even where property is settled on a married woman for life, without power of anticipation, and she improperly commences administration proceedings, which are dismissed with costs against her personally, the court may authorise the trustees to recoup themselves out of her life interest (*e*).

Trustees' lien good even where settlement void under Bankruptcy Act.

One Holden executed a post-nuptial voluntary settlement. He subsequently commenced an action to set it aside, but failed in his contention, the action being dismissed with costs. He then became bankrupt within two years of the date of the

(*z*) *Carroll* v. *Graham*, [1905] 1 Ch. 478.

(*a*) *Gordon* v. *Trail* (1820), 8 Pr. 416.

(*b*) *Re Beulah Park Estate* (1872), L. R. 15 Eq. 43; *Finch* v. *Pescott* (1874), L. R. 17 Eq. 554.

(*c*) *Dodds* v. *Take* (1884), 25 Ch. D. 617. But even without this direction the trustees would be entitled to be paid in priority to the other parties (*Re Griffith, Jones* v. *Owen*, [1904] 1 Ch. 807; *Re Turner, Wood* v. *Turner*, [1907] 2 Ch. 126.)

(*d*) *Re Knapman, Knapman* v. *Wreford* (1881), 18 Ch. D. 300.

(*e*) *Re Andrews, Edwards* v. *Dewar* (1885), 30 Ch. D. 159; and *cf.* Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

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settlement, which accordingly became void under s. 47 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). It was held that, although the settlement was void, yet, as it had originally been valid, but voidable, and as the trustees had incurred costs in the execution of their duty which they could not recover from the bankrupt, they were entitled to be fully indemnified out of the trust funds (*f*). It would seem doubtful, however, whether the same principle applies to settlements void under the 13 Eliz. c. 5, or to cases where the execution of the settlement was an act of bankruptcy (*g*).

Trustee of invalid will.

It has been held that where a trustee of a will, which was declared invalid as to real estate, had, *pendente lite*, incurred costs with the acquiescence of the heir-at-law, he was entitled to be indemnified out of the personal estate (*h*).

Exception where trustee has mixed his money with trust fund.

Where, however, a trustee for purchase has advanced money of his own to enable a particular property to be purchased, the price of which exceeded the whole trust fund, it was held that he had not a *first* charge on the property for reimbursing himself his advance; but that the beneficiaries had a first charge on the estate for the amount of the trust fund, and that he only had a second charge for the amount of his advance (*i*). The *ratio decidendi* in this case would seem to have been, that it was not so much a question of indemnity for *costs and expenses incurred in the performance of his duty* as of a gratuitous mixing of his own moneys with the trust moneys; and that this (as will be seen later on (*k*)) gave the trust estate a first and paramount charge. So where a trustee paid premiums on a settled policy out of his own pocket, instead of applying a fund provided for that purpose by the settlement, he was disallowed the payments (*l*).

Whether trustee can refuse to transfer property to new trustees until his lien is satisfied.

It seems to be questionable whether a trustee, having a lien for costs, charges, and expenses, can refuse to transfer the property to new trustees until his lien is satisfied. The only reported authority known to the present writer (*m*) was a very special case of a trustee-director of a company under an Act of Parliament claiming to be paid his director's fees; and

(*f*) *Re Holden, Ex parte Official Receiver* (1887), 20 Q. B. D. 43.

(*g*) See *Re Butterworth, Ex parte Russell* (1882), 19 Ch. D. 588; *Dutton* v. *Thompson* (1883), 23 Ch. D. 278; *Ex parte Vaughan, Re Riddeough* (1884), 14 Q. B. D. 25. But *cf. Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157, where such costs were allowed.

(*h*) *Edgecumbe* v. *Carpenter* (1839), 1 Beav. 171.

(*i*) *Re Pumfrey, Worcester, etc., Banking Co.* v. *Blick* (1882), 22 Ch. D. 255.

(*k*) Art. 87, *infra*.

(*l*) *Clack* v. *Holland* (1854), 19 Beav. 262.

(*m*) *Wilson* v. *Parker* (1846), 10 Jur. 979.

KNIGHT-BRUCE, V.-C., seems to assume in his judgment that if it had been the case of an ordinary trustee demanding to be paid his charges and expenses incurred in reference to the trust fund he might well have succeeded. Art. 78.

PARAGRAPH (3).

Personal indemnity by beneficiary under a simple trust.

Fifty shares in a company were placed in the plaintiff's name, in 1891, by his employers, who were share brokers. He had no beneficial interest in them, and was merely a bare trustee for the employers. Ultimately the defendant, as successor in title of the employers, became beneficially entitled to the shares, and received the dividends. Subsequently a call was made which the plaintiff was obliged to pay, and thereupon he sued the defendant, who refused to indemnify him. On these facts it was held that the plaintiff was entitled to be indemnified by the defendant personally. Lord LINDLEY said: "The plainest principles of justice require that the *cestui que trust*, who gets all the benefit of the property, should bear its burdens, unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of the trustee to be indemnified *out of the whole trust estate* against any liabilities accruing out of any part of it is clear and indisputable; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incident to one of them cannot be thrown on the beneficial owners of the others. . . . But where the only *cestui que trust* is a person *sui juris*, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but as old as trusts themselves. . . . Although the defendant did not create the trust, he accepted a transfer of the beneficial ownership in the shares with full knowledge of the fact that they were registered in the plaintiff's name as trustee for the original purchasers and their assigns, whoever they might be" (*n*).

(*n*) *Hardoon* v. *Belilios*, [1901] A. C. 118; and see also *Jervis* v. *Wolferstan* (1874), L. R. 18 Eq. 18, 24; and *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855.

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A case of this kind recently arose, where two partners had taken a lease, as trustees, for the firm, and ultimately the executors of one of the trustees was compelled to pay large arrears of rent. It was held that he could insist upon contribution from all the co-partners, and that the fact of the lease having been assigned to a limited company who made default in paying the rent, did not free the co-partners from the trustees' right to contribution (*o*).

Right to personal indemnity does not extend to special trusts.

The above decision, however, only relates to the case of simple trusts in favour of a person or persons absolutely entitled who created the trust themselves. As Lord LINDLEY observed, "it is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff on trusts for tenants for life or for infants, or upon special trusts limiting the right to indemnity. In these cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the burdens incident to his legal ownership; and the trustee accepts the trust *knowing that under such circumstances, and in the absence of special contract, his right to indemnity cannot extend beyond the trust estate—i.e.*, beyond the respective interests of his *cestuis que trusts*. In this case their lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim." In short, as Lord BLACKBURN compendiously put it in *Fraser* v. *Murdoch* (*p*), "the rule has no application to a case where the maker of the trust is not a *cestui que trust*" (*q*).

Trustees of clubs have no right to personal indemnity.

As an illustration of the remarks in the last paragraph, may be cited the case of trustees of a members' club. "It is a fundamental condition of clubs that members are not legally liable to any one beyond the amount of their subscriptions." There is therefore in the nature of the transaction an implied bargain that, unless the rules of the club provide to the contrary (as they certainly ought to do), they shall not as beneficiaries be liable to indemnify the trustees (*r*), and the trustees are taken to accept the office with knowledge of this condition.

PARAGRAPH (4).

Trustee can only receive costs where he has discharged his own indebtedness to the estate.

It sometimes happens that, in the course of an administration action or summons, a trustee is ordered to refund to the estate money lost by reason of some breach of trust for which

(*o*) *Matthews* v. *Ruggles-Brise*, [1911] 1 Ch. 194.

(*p*) (1881) 6 App. Cas. 855 at p. 872.

(*q*) And see also *per* SWINFEN EADY, J., in *Matthews* v. *Ruggles-Brise*, *supra*.

(*r*) *Wise* v. *Perpetual Trustee Co., Ltd.*, [1903] A. C. 139.

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he is responsible, but that he is nevertheless allowed his costs of the litigation, either in the whole (*s*), or limited to costs incurred after the judgment. In all such cases, however, he will not be allowed to receive them (or his costs, charges, and expenses properly incurred outside the litigation) until he has made good the loss to the estate caused by his breach (*t*). In practice the costs are set off against the liability, the trustee either receiving or paying the balance only. This principle sometimes causes hardship to the solicitor of an insolvent trustee, as he loses the security of the estate for the costs of what may have been a costly litigation, and cannot recover them from his own insolvent client (*u*).

Paragraph (5).

Persons employed by, or who supply goods to, the trustee have no direct claim on estate.

Indeed, persons to whom a trustee has incurred liability, have no original or direct right to claim payment out of the trust estate. This question usually arises in relation to the business of a testator carried on rightly or wrongly by his trustees. If a testator's will is silent on the question, his business ought to be sold as a going concern, or wound up with reasonable despatch. If (as sometimes happens) trustees carry it on for the benefit of the family, they do so at their own risk; and if losses ensue, have no right to reimbursement. On the other hand, a testator not infrequently directs his business to be carried on, and authorizes the employment in it of all, or a specific portion, of his assets; and in that case, of course, the trustees are entitled to reimbursement of losses out of the assets so appropriated. Now in such cases the creditors of the business have no original right to claim payment of their debts out of the *trust estate* (*x*), their remedy being against the trustee whom they trusted; but nevertheless, they have also a right to be *put in his place* against the trust estate (*x*) by subrogation. But this right is strictly limited to the right of the trustee himself. Therefore, if he is (by reason of breach of trust or otherwise) himself indebted to the trust

(*s*) See *supra*, p. 432.

(*t*) *Re Knott*, *Bax* v. *Palmer* (1887), 56 L. J. Ch. 318.

(*u*) *Lewis* v. *Trask* (1882), 21 Ch. D. 862; *Re Basham*, *Hannay* v. *Basham* (1883), 23 Ch. D. 195; *McEwan* v. *Crombie* (1883), 25 Ch. D. 175. But *cf.* *Re Clare*, *Clare* v. *Clare* (1882), 21 Ch. D. 865, *contra*.

(*x*) *Re Johnson*, *Shearman* v. *Robinson* (1880), 15 Ch. D. 548; *Re Webb*, *Leedham* v. *Pulchett* (1890), 63 L. T. 545; *Strickland* v. *Symons* (1884), 26 Ch. D. 245; and see also *Redman* v. *Rymer* (1889), 60 L. T. 385; *Lady Wenlock* v. *River Dee Commissioners* (1887), 19 Q. B. D. 155; *Moore* v. *M'Glynn*, [1904] 1 Ir. R. 334; and as to torts, *Re Raybould*, *Raybould* v. *Turner*, [1900] 1 Ch. 199.

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estate to an extent exceeding his claim to indemnity, then, inasmuch as he cannot be entitled to an indemnity except upon the terms of making good his own indebtedness to the trust, the creditors are in no better position, and can have no claim against the estate (*y*). But in a recent case it was held by KEKEWICH, J., that the right of the creditors to subrogate was not precluded by the fact that *one* of several trustees was a defaulter, inasmuch as the non-defaulting trustees were entitled to be indemnified (*z*).

Right of subrogation not extended to liabilities not authorised by settlement even where trustee would be excused breach of trust.

The right of subrogation is, of course, confined to cases where the settlor has, by the settlement, authorised the liabilities, and dedicated either the whole or a specific part of the trust estate for meeting them; and has no application to cases where a trustee has, contrary to the trust but by way of salvage, incurred liabilities; even although as between him and his beneficiaries the court would allow him to reimburse himself out of the estate (*a*). In short, in the words of Lord SELBORNE, "the creditor can only have recourse to the particular part of the property of which there has been *an express dedication*."

ART. 79.—*Right to Discharge on Completion of Trusteeship.*

Upon the completion of his trusteeship, a trustee is entitled to have his accounts examined and settled by the beneficiaries; and either to have a formal discharge given to him or to have the accounts taken in court. He cannot, however, as a rule, demand a release under seal (*b*), nor to have deeds relating to the trust, or to the title of an assign of one of the original beneficiaries, handed over to him; but (*semble*) he is entitled to an examined copy and to an acknowledgment for production and an undertaking for safe custody.

(*y*) *Re Johnson, Shearman* v. *Robinson* (1880), 15 Ch. D. 548; *Ex parte Garland* (1804), 10 Ves. 110; recognised in *Re Blundell, Blundell* v. *Blundell* (1890), 44 Ch. D. at p. 11. As to the right of the trustee to indemnity against the estate, see *supra*, p. 435.

(*z*) *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342.

(*a*) *Strickland* v. *Symons* (1884), 26 Ch. D. 245; and see *Re German Mining Co., Ex parte Chippendale* (1854), 4 De G. M. & G. 19; and *Labouchere* v. *Tupper* (1857), 11 Moo. P. C. 198. Whether the decision in *Re Raybould, Raybould* v. *Turner*, [1900] 1 Ch. 199, is consistent with this seems questionable.

(*b*) *Chadwick* v. *Heatley* (1845), 2 Coll. C. C. 137; *Re Wright's*

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A trustee, on finally transferring stock to a beneficiary, demanded from the latter a deed of release. The beneficiary, however, refused to give him anything except a simple receipt for the amount of stock actually transferred; which, of course, left it open to him to say that that amount was not the amount to which he was entitled. The court held that no *deed* was demandable; but the judge said: "Though it may not have been the right of the trustee to require a deed, I think that it was his right to require that his account should be settled: that is to say that he and his family should be delivered from the anxiety and misery attending unsettled accounts" (*c*).

Release under seal not usually demandable.

"In the case of an express trust, when the trust is apparent on the face of the deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of the fund, if he is paying it in strict accordance with the trusts he has no right to require a release under seal. It is true that in the common case of *executors*, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore, he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release: but such a claim on the part of *a trustee* would, in strictness, be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release" (*d*).

But although a trustee is entitled to have his accounts settled before handing over the trust fund, this right is confined to the accounts of that particular trust. Where therefore a person is trustee of two distinct trusts for the same beneficiaries, he cannot mix up the two, and refuse to pay over the first fund until all questions as to the second have been settled (*e*).

Right to settlement of account restricted to the actual trust fund.

Where trust moneys have been resettled, the trustees or executors of the original settlement or will are, it has been said, entitled to a release under seal from their beneficiaries; though they are entitled only to a mere receipt from the trustees to whom they pay the moneys (*f*). But on the other hand, where a person having a *general* power of appointment by will, appoints

Release may be required in exceptional cases.

Trusts (1857), 3 Kay & J. 419; *King* v. *Mullins* (1852), 1 Drew. 308; and see *Re Lord Stamford, Payne* v. *Stamford*, [1896] 1 Ch., at p. 301.

(*c*) *Chadwick* v. *Heatley* (1845), 2 Coll. C. C. 137.

(*d*) *Per* KINDERSLEY, V.-C., in *King* v. *Mullins* (1852), 1 Drew. at p. 311.

(*e*) *Price* v. *Loaden* (1856), 21 Beav. 508.

(*f*) *Re Cater's Trusts* (No. 2) (1858), 25 Beav. 366.

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the fund in pursuance of the power and appoints executors, the trustees of the fund can safely hand it over to the executors on their receipt, and cannot demand a release under seal from the beneficiaries (*g*); for, by appointing, the donee of the power makes the property assets of his own.

Trustee cannot demand custody of assignments of shares of the original beneficiaries.

It is well settled that, on the distribution of a trust fund, a share in which has been previously assigned, the trustee has no right to require the delivery to him of the assignment and other documents of title before payment of his share to the assignee (*h*); and of course it follows that a trustee cannot demand to have a power of attorney handed to him (*i*).

How far a trustee entitled to copies of deeds, etc.

This, however, does not dispose of the question whether a trustee can demand *copies* of those documents which justify him in doing what he has in fact done. This certainly does not seem unreasonable in principle, especially where he is paying money to a person who claims as attorney or assignee of one of the original beneficiaries. The authorities seem to show that he can demand plain examined copies, but not attested copies or *a fortiori* duplicates, except perhaps at his own expense. Thus in *Warter* v. *Anderson* (*k*), the representative of a deceased trustee was held not to be entitled, upon transferring the property to new trustees, to be furnished at the expense of the trust with a duplicate of the appointment of the new trustees, nor even to an attested copy thereof, although the Vice Chancellor intimated that he had a right to have an examined copy and possibly at his own expense an attested copy or even a duplicate. And it would seem from the judgment of SWINFEN EADY, J., in a recent case (*h*) that possibly a trustee may be entitled to insist upon an acknowledgment for production and an undertaking for safe custody as well as to a copy.

ART. 80.—*Right to pay Trust Funds into Court under certain Circumstances.*

"(1) Trustees, or the majority (*l*) of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same

(*g*) *Re Hoskin's Trusts* (1877), 5 Ch. D. 229; (1877) 6 Ch. D. 281; and see *supra*, p. 435.

(*h*) *Re Palmer, Lancashire and Yorkshire Reversionary Interest Co.* v. *Burke*, [1907] 1 Ch. 486.

(*i*) S. C., judgment of SWINFEN EADY, J.

(*k*) (1853) 11 Hare, 301.

(*l*) The court can compel a dissentient minority to stand aside. See Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42 (3).

into the High Court; and the same will, subject to rules of court, be dealt with according to the Orders of the High Court" (*m*). Art. 80.

(2) Payment into Court is not, however, justifiable merely in order to raise some question which can be determined more cheaply by means of an originating summons (*n*), nor where the equities are perfectly clear (*o*); and if trustees pay in under such circumstances, they may have to pay the costs of getting the money paid out (*p*).

Payment into court where beneficiaries are under disability.

A trustee is justified in paying money into court where he cannot get a valid discharge; as, for instance, where beneficiaries who are absolutely entitled are infants (*q*) or lunatics (*r*).

Dispute between beneficiaries.

Formerly, where, under a creditor's deed, money was claimed both by the settlor and the creditors, the trustee was held to have been justified in paying the money into court (*s*).

Where money claimed by a representative.

It has been said that a trustee may properly pay money into court where it is claimed by the representative of a beneficiary; for *non constat* but that the latter may have disposed of it (*t*). But here again an originating summons would seem to be the more appropriate course.

Payment to one who claims in default of appointment.

A trustee ought not to hesitate to pay the money to a beneficiary who claims in default of appointment, if he has no notice

(*m*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 42. It would seem at first sight that by the operation of sub-s. 6 of s. 25 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), these provisions are extended to all constructive trustees, such as insurance companies, etc. But although in one case (*Re Haycock's Policy* (1876), 1 Ch. D. 611) this was held to be so, that view has been twice dissented from (*Matthew* v. *Northern Assurance Co.* (1878), 9 Ch. D. 80, and *Re Sutton's Trusts* (1879), 12 Ch. D. 175). Whether, however, these cases are still binding authorities, having regard to s. 10 of the Trustee Act, 1893 (definition of "Trustee"), seems open to question.

(*n*) *Re Giles* (1886), 34 W. R. 712.

(*o*) *Re Cull's Trusts* (1875), L. R. 20 Eq. 561; *Re Elliot's Trusts* (1873), L. R. 15 Eq. 194.

(*p*) *Ib.*, and *Re Leake's Trusts* (1863), 32 Beav. 135; *Re Heming's Trust* (1856), 3 Kay & J. 40.

(*q*) *Re Cawthorne* (1848), 12 Beav. 56; *Re Beauclerk* (1862), 11 W. R. 203; *Re Coulson* (1857), 4 Jur. (N. S.) 6.

(*r*) *Re Upfall's Trust* (1851), 3 Mac. & G. 281; *Re Irby* (1853), 17 Beav. 334; and see *Re Carr's Trusts*, *Carr* v. *Carr*, [1904] 1 Ch. 792.

(*s*) *Re Headington's Trust* (1857), 6 W. R. 7; but see *Re Provident Clerks' Mutual Life Assurance Association*, *Re Moseley's Policy* (1869), 18 W. R. 126.

(*t*) *Re Lane's Trust* (1854), 24 L. T. (O. S.) 181; *King* v. *King* (1857), 1 De G. & J. 663, *sed quære*.

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of any appointment by the donee of the power, and no ground for believing that any appointment has been made. For in that case he could not be made liable if he paid over the fund, even if an appointment were subsequently discovered (*u*). Anyhow, now, a trustee in such a case would only be allowed the costs of a summons.

Payment into court to enable married woman to assert equity to a settlement.

Where the beneficiary is a married woman, married before 1883, and whose *title* accrued prior to that date, it has been held that the trustee may pay into court, in order that she may assert her equity to a settlement. But this would not be so in cases to which the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), applies.

Reasonable doubt or claim.

Again, where the trustee has a *bonâ fide* doubt as to the law (*x*), or has received a *bonâ fide* claim sanctioned by respectable solicitors (*y*), he may properly pay the fund into court, unless the question can be settled by summons. For instance, where a necessary party to a summons is out of the jurisdiction, so that the summons could not be served, payment into court would be justifiable.

Undue caution.

But where a beneficiary in reversion who had gone to Australia, and had not been heard of for some years, suddenly reappeared, and there was no reasonable doubt as to his identity, it was held that the trustee was not entitled to pay the trust fund into court, and he was ordered to *pay* the costs of all parties (*z*).

General warning.

Lastly, the reader must be warned that, now that most questions of doubt or difficulty can be decided on originating summons, the right of paying money into court can only be used with safety in very rare cases. It seems matter for regret that those who were responsible for the drafting of the Trustee Act, 1893 (56 & 57 Vict. c. 53), did not insert some words in s. 42 warning trustees of the danger they run in accepting the apparently unconditional invitation extended to them by the words of that section, an invitation which in many cases can only be accepted at the risk of having to pay costs.

(*u*) *Per* JESSEL, M.R., *Re Cull's Trusts* (1875), L. R. 20 Eq. 561, distinguishing *Re Wylly's Trusts* (1860), 28 Beav. 458; but see also *Re Swan* (1864), 2 Hem. & M. 34; *Re Roberts' Trust* (1869), 17 W. R. 639; *Re Bendyshe* (1857), 5 W. R. 816; *Re Williams' Settlement* (1858), 4 Kay. & J. 87.

(*x*) *King* v. *King* (1857), 1 De G. & J. 663; *Re Metcalfe* (1864), 2 De G. J. & S. 122; *Gunnell* v. *Whitear* (1870), L. R. 10 Eq. 664.

(*y*) *Re Maclean's Trusts* (1874), L. R. 19 Eq. 274.

(*z*) *Re Elliot's Trusts* (1873), L. R. 15 Eq. 194; *Re Foligno's Mortgage* (1863), 32 Beav. 131; *Re Knight's Trusts* (1859), 27 Beav. 45; *Re Woodburn's Trusts* (1857), 1 De G. & J. 333.

CHAPTER XI.

THE RIGHT OF TRUSTEES AND BENEFICIARIES TO SEEK THE ASSISTANCE OF THE PUBLIC TRUSTEE OR THE COURT IN AUDITING OR ADMINISTERING THE TRUST.

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ART. 81.—*Right of Trustee or Beneficiary to Official Audit of the Trust Estate through the Public Trustee.*

(1) Unless the court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given by any trustee or beneficiary, be investigated and audited by such solicitor or accountant as may be agreed on between the applicant and the trustees, or in default of agreement by the Public Trustee or some person appointed by him (*a*).

(2) Except by leave of the court there must be at least twelve months' interval between any such audit and a second application (*b*).

PARAGRAPH (1).

Where the applicant is a beneficiary, he must deliver, or send by post, to the last known address of each trustee, a notice requesting such audit. Where the applicant is a trustee, he must in like manner send such a notice to his co-trustees and the beneficiaries entitled to the income. In either case, the Procedure.

(*a*) Public Trustee Act, 1906 (6 Edw. VII., c. 55), s. 13 (1 .

(*b*) *Ibid.*

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applicant must also make a formal application in writing to the Public Trustee for the audit (*c*).

If the parties fail to agree on an auditor within three calendar months from the date of the notice, the Public Trustee or his nominee will make the required investigation (*d*).

Costs.

If, on the other hand, the parties agree on an auditor, the sole function of the Public Trustee is the remuneration of the auditor in case the parties cannot agree upon it, and the manner in which the costs are to be borne. *Primâ facie* they are borne by the estate unless the Public Trustee orders them to be paid by the applicant or the trustees, which he has power to do subject to an appeal to a judge of the Chancery Division (*e*).

Powers of auditor.

The auditor can call for books, accounts, vouchers, and information (*f*), and, if obstructed, may apply to a judge of the Chancery Division in chambers for an order in that behalf (*g*). To such an application there can be no defence (*h*). Any false and material misstatements are punishable by fine or imprisonment, with or without hard labour (*i*).

Duty of auditor.

The auditor has to forward to the applicant, and every trustee, a copy of the accounts and his report thereon, and a certificate that the accounts exhibit a true view of the trust affairs, and that he has had the securities produced and verified, or that the accounts are deficient in specified respects (*k*).

Rights of beneficiaries to inspect proceedings.

Every beneficiary is entitled to inspect and at his own expense to take copies of the above accounts, report, and certificate (*l*).

Removal of auditor.

The auditor may be removed by the court. If he is removed, or dies, or resigns, or becomes bankrupt, or incapable pending the completion of the investigation, a new auditor may be appointed in the same way as he himself was (*m*).

(*c*) Public Trustee Rules, r. 37.

(*d*) *Ib.*, r. 38.

(*e*) Public Trustee Act, s. 13 (5) and s. 10, and Public Trustee Rules, r. 39; and see *Re Oddy*, [1911] 1 Ch. 532. On such an appeal the Public Trustee ought not to be served (S. C.). He ought to hear the parties before making an order for payment of costs personally (S. C.).

(*f*) Public Trustee Act, s. 13 (2).

(*g*) *Ib.* (6).

(*h*) *Re Williams* (1910), 26 T. L. R. 604.

(*i*) Public Trustee Act, s. 13 (8).

(*k*) *Ib.* (2).

(*l*) *Ib.* (3).

(*m*) *Ib.* (4).

ART. 82.—*Right of Trustee or Beneficiary to take the Direction of the Court or a Judge in relation to Specific Matters.* Art. 82.

(1) The trustees under any deed or instrument, or any of them, or any of the beneficiaries, whether original or by assignment, may take out, as of course, an originating summons in the chambers of a judge of the Chancery Division for such relief of the following kind as may be specified by the summons, *i.e.*, the determination without an order for general administration of any of the following questions:—

(a) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;

(b) the approval of any specific (*n*) sale, purchase, compromise, or other transaction;

(c) directing the trustees to do or abstain from doing any specified act which it is their duty to do or abstain from doing (*o*);

(d) directing the payment into court of any money actually (*p*) in the hands of the trustees.

(e) any other question arising in the administration of the trust, including the construction of the trust instrument, but excluding

(i.) hostile claims against the *trustees* for wilful default or any other breach of trust where the facts are in dispute (*q*);

(ii.) contingent questions, unless the contingency is about to be destroyed and the parties reasonably desire to ascertain their positions (*r*);

(iii.) matters affecting third parties (*s*).

(*n*) *Re Robinson, Pickard* v. *Wheater* (1885), 31 Ch. D. 247.

(*o*) See *Suffolk* v. *Lawrence* (1884), 32 W. R. 899.

(*p*) *Nutter* v. *Holland*, [1894] 3 Ch. 408.

(*q*) See *per* Lord MACNAGHTEN, *Dowse* v. *Gorton*, [1891] A. C. at p. 202; *Nutter* v. *Holland*, [1894] 3 Ch. at p. 410; *Re Powers, Lindsell* v. *Phillips* (1885), 30 Ch. D. 291; *Re Giles, Real and Personal Advance Co.* v. *Michell* (1890), 43 Ch. D. 391.

(*r*) See *Re Berens, Berens* v. *Berens*, [1888] W. N. 95.

(*s*) See *Re Bridge, Franks* v. *Worth* (1887), 56 L. J. Ch. 779; *Re Royle, Royle* v. *Hayes* (1889), 43 Ch. D. 18; *Re Turcan* (1888), 58 L. J. Ch. 101; *Herrick* v. *Cooper*, [1899] 1 Ir. R. 321.

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(3) It is not now necessary to serve such a summons on all parties interested. It suffices if (a) all the trustees and (b) one beneficiary to argue each distinct question *pro* and *con* be before the court (*t*).

(4) Where the trustees issue such a summons to construe the trust instrument for their guidance, or to have determined some question arising in the administration, the costs of all parties will be ordered to be paid out of the estate, and generally as between solicitor and client; and the same practice is followed where a beneficiary, instead of the trustees, issues a summons which if issued by the trustees would entitle all parties to their costs out of the estate. But where a beneficiary issues such a summons adversely to the other beneficiaries, and uses this procedure to effect that which would properly form the subject of a writ action, and falls within the term litigation, the costs will as a rule follow the event (*u*).

PARAGRAPH (1).

Effect of R. S. C., Ord. 55, r. 3.

The above is an attempt to give the effect of R. S. C., Order 55, r. 3, and Order 54A, as construed by the court.

Order 55, r. 3, is in the following words:—

> The executors or administrators of a deceased person or any of them *and the trustees under any deed or instrument or any of them*, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require, (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:—
>
> (a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*:
>
> (b) the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others:
>
> (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:

(*t*) Order 55., r. 5. *Buckton, Buckton* v. *Buckton*,
(*u*) *Per* KEKEWICH, J., *Re* [1907] 2 Ch. 406.

(d) the payment into court of any money in the hands of the executors or administrators or trustees:
(e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees:
(f) the approval of any sale, purchase, compromise, or other transaction:
(g) the determination of any question arising in the administration of the estate or trust.

Comments on the rule.

It will be perceived that the rule is not very artistically framed, as paragraphs (a) and (g) seem to be little more than paraphrases of each other. Moreover their language is so wide as to be capable of embracing every question touching the trust, whereas the interpretation given by the court is very different. For these reasons it has been deemed advisable to give in the above article the net result (or what seems to the author to be the net result) of the rule and the decisions upon it.

Questions determinable on originating summons restricted to such as could be determined in an action for the general administration of the trust.

In the first place, then, an originating summons under this rule is, according to FRY, L. J., merely equivalent to the old Chancery practice, before the Judicature Acts, of commencing a suit for general administration, raising the particular points of difficulty on the pleadings, obtaining inquiries, accounts, or directions at the hearing on the points raised, and then staying all further proceedings (*x*). That course has still occasionally to be taken, *e.g.*, where a person who must be served is out of the jurisdiction, as there is no means of serving an originating summons out of the jurisdiction. But this rule was devised in order to substitute a shorter and cheaper form of procedure and for no other purpose. It follows that the rule extends only to matters which before the rule could have been determined in an action for general administration of the trust. Thus questions affecting a person entitled to a *legal* remainder in real estate after the determination of a trust, could not be determined in an administration suit, and therefore could not be determined under this rule (*y*).

Questions of construction of legal rights as distinguished from rights under a trust now determinable on summons.

To cure this omission Order 54A was added to the Rules of the Supreme Court in 1893, and is in the following words:—

1. "In any division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the parties interested."

(*x*) *Re Medland, Eland* v. *Medland* (1889), 41 Ch. D. at p. 492.
(*y*) *Re Carlyon, Carlyon* v. *Carlyon*, (1886) 35 W. R. 155; *Re Davies, Davies* v. *Davies* (1888), 38 Ch. D. 210.

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4. "The Court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

General result as to questions of construction.

The result now is, that, either under Order 55, r. 3, or Order 54A any question as to the interpretation of a trust instrument, whether it be a will or a deed, and whether the question relates to the equitable rights under a trust or to legal rights arising on the determination of a trust, can be decided on originating summons, unless the court or a judge considers that it is a question which ought to be the subject of an action (*z*).

Rights of third parties claiming adversely to a trust cannot be determined on summons.

But the rules do not extend to the determination of questions affecting persons claiming adversely to the trust instrument, *e.g.*, the creditors of a testator, or mortgagees of the trust estate or the like, although such questions undoubtedly "affect the rights or interests of the person claiming to be . . . . *cestui que trust*" (*a*). Such questions may in certain cases no doubt be determined in proceedings for general administration commenced by summons under Order 55, r. 4, but not under the rules now under consideration.

Not applicable to claims for breach of trust.

Again, it is not "competent for an applicant by originating summons to ask for, or obtain, otherwise than by consent, an order founded on breach of trust, or inquiries pointing to *wilful default*" (*b*). On the other hand, it has been held that a trustee whose accounts, when taken under paragraph (c) of Order 55, r. 3, show an investment on improper security (which it is conceived means for this purpose *an obviously and indisputably improper security*, and not one depending on insufficient value or the like), may be ordered on the summons to make it good (*c*). It is generally inadvisable, however, to employ these originating summonses for hostile proceedings against a trustee, and they are of course quite unsuitable where the facts are in dispute, as the evidence is by way of affidavit (*d*).

Order on trustee to pay money into court.

Another instance of the tendency of the court to restrict

(*z*) As to cases falling under Ord. 54A, see *Mason* v. *Sehuppisser* (1899), 81 L. T. 147; and *Lewis* v. *Green*, [1905] 2 Ch. 340.

(*a*) See *Re Bridge*, *Franks* v. *Worth* (1887), 56 L. J. Ch. 779; *Re Royle*, *Royle* v. *Hayes* (1889), 43 Ch. D. 18; *Herrick* v. *Cooper*, [1899] 1 Ir. R. 321.

(*b*) *Per* Lord MACNAGHTEN, *Dowse* v. *Gorton*, [1891] A. C. at p. 202; *cf. Re Garnett*, *Gandy* v. *Macaulay* (1884), 32 W. R. 474; and *Re Ellis' Trusts*, *Kelson* v. *Ellis* (1888), 59 L. T. 924.

(*c*) See *Re Newland*, *Bush* v. *Sumners*, [1904] W. N. 181, following dictum of STIRLING, J., in *Re Stuart*, *Smith* v. *Stuart* (1896), 74 L. T. 546.

(*d*) See *Nutter* v. *Holland*, [1894] 3 Ch. at p. 410; *Re*

applications under Order 55, r. 3, to cases of administration, and not to extend them to breaches of trust, is the way in which paragraph (d) has been construed, viz., that it applies only to cases where the trustee *admits* that he has money actually in his hands, and not to cases where he *has* had it but has misapplied it (*e*). It would seem, however, that if a common account be first taken under paragraph (c) and the sum were found due from the trustee, an order for payment into court might be made (*f*). It would, however, be safer, even in that case, to frame the summons not only under Order 55, r. 3, but as a summons for general administration under Order 55, r. 4 (*g*), as to which see next article.

Orders on trustees to do or abstain from doing specific act.

Again, paragraph (e) seems at first sight to be broad enough to include an order upon the trustees to do, or abstain from doing, anything relating to the trust; yet it has been held not to enable the court to compel trustees of an undivided share in real estate, to concur in a sale of the entirety in a partition action, apparently on the ground that the paragraph only enables an order to be made to do or abstain from doing an act which it is their duty to do or abstain from doing, and not an act which is within their discretion (*h*). Such an order can only be made when the court administers the trust.

Approval of sales, purchases, compromises, etc.

Paragraph (f) again has been held to be restricted to the approval of a sale, purchase, compromise, or other transaction which has been conditionally agreed to, and which the trustees have power to carry out, but which power they wish to exercise under the court's sanction, so as to protect themselves from future charges of negligence and the like; and not to extend to an application to *direct* a sale, which can only be made in an action under Order 51, r. 1 (*i*). On the other hand, an order was made under it by the late Vice-Chancellor BACON (*k*) allowing trustees, who had no such power, to expend money in stocking a farm in which the testator had given a life estate to his son, but without providing means of carrying it on. The question of jurisdiction does not seem, however, to have been raised in this case, and there was no opposition, and possibly

Powers, *Lindsell* v. *Phillips* (1885), 30 Ch. D. 291; *Re Giles*, *Real and Personal Advance Co.* v. *Michell* (1890), 43 Ch. D. 391; and *Beamish* v. *Whitney*, [1908] 1 Ir. R. 38.

(*e*) *Nutter* v. *Holland*, [1894] 3 Ch. 408.

(*f*) See *Re Newland*, *Bush* v. *Sumners*, [1904] W. N. 181, and *Re Stuart*, *Smith* v. *Stuart* (1896), 74 L. T. 546.

(*g*) See judgment of DAVEY, L.J., in *Nutter* v. *Holland*, *supra*.

(*h*) *Suffolk* v. *Lawrence* (1884), 32 W. R. 899.

(*i*) *Re Robinson*, *Pickard* v. *Wheater* (1885), 31 Ch. D. 247.

(*k*) *Re Household*, *Household* v. *Household* (1884), 27 Ch. D. 55

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the trustees might be held to have had power to apply the money without any order by way of salvage. The case can scarcely be relied upon as deciding that such an application falls within paragraph (f), and in practice it would be wise to ask for general administration as well under Order 55, r. 4. Indeed it has become the common practice in issuing originating summonses under Order 55, r. 3, to add a paragraph claiming, "If and so far as may be necessary to give the Court jurisdiction, general administration under R. S. C., Order 55, r. 4," which avoids a multitude of objections.

The "Yearly" and "Annual" Practices give a number of cases decided on originating summons, but in many if not most of them no objection was taken to the jurisdiction, and they can scarcely be regarded as authorities on the point.

Contingent questions not usually decided.

With regard to contingent questions, *i.e.*, questions which may never arise, the court is very averse to decide them either on summons or in an action, particularly where the decision affects the rights, or possible rights, of unborn persons. But exceptions are made where a person's present title to deal with an interest under a trust, depends on an event which is presently contemplated, so that until the question is decided he is practically unable to shape his conduct. Thus where a lady is engaged to be married, the validity of a trust in her father's will forbidding marriage with a person of different faith has been raised and determined on originating summons (*l*). On the other hand, in a case where the author appeared for the trustees, the court refused to consider the question whether a tenant for life (who had been married some years and had no issue) would, if he died without issue, be absolutely entitled to a trust fund, or whether it would go over to his brother's issue. His plea was that if it were decided that he would be absolutely entitled in the event of no issue he need not save so much of his income as would otherwise be necessary, but this was held to be insufficient. He appealed, but Lord Justice VAUGHAN WILLIAMS unsympathetically remarked, that it was doubtless a very interesting question for a Gray's Inn moot, but not one for a busy Court of Appeal to waste its time over. The moral seems to be, that contingent questions will not be decided unless the contingent event depends on the applicant's volition, and he convinces the court that he intends to exercise that volition forthwith if the result of doing so would not deprive him of his rights under the

(*l*) See *Re Berens, Berens* v. *Berens*, [1888] W. N. 95; and see also *Re Freme's Contract*, [1895] 2 Ch. 259, 778.

settlement. For example, if a will gave income of a trust fund to testator's son until he quits the kingdom and then over to another, it is probable that if the son contemplated accepting an official appointment in one of the colonies the court would say whether the effect of doing so would cause a forfeiture; but it would certainly not decide the question if the son had no present intention of quitting the kingdom. Art. 82.

PARAGRAPH (2).

It was formerly necessary to serve all parties interested in the decision of the question unless they were a numerous class, in which case a classification order could be obtained. This great expense is now, however, obviated by Order 55, r. 5, the net result of which is, that, in the first instance, it is only necessary to have before the court the trustees (either as applicants or respondents) and one person to represent each distinct interest. In other words, where several persons are in the same interest with regard to the question raised only one of them need be served. The judge may, however, order others to be served if he thinks it desirable. Parties to be served.

PARAGRAPH (3).

With regard to the costs of summonses under Order 55, r. 3 (and presumably under Order 54A also), the judgment of KEKEWICH, J., in *Re Buckton, Buckton* v. *Buckton* (*m*), is so important that it is considered well to give the words of the learned judge himself. He said: "Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand costs are so largely in the discretion of the judge, that it is more difficult to secure uniformity in that department than in any other, and it is well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases. In a large proportion of the summonses adjourned into court for argument, the applicants are trustees of a will or settlement who ask the court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character, I regard the costs of all parties as necessarily incurred Costs.

(*m*) [1907] 2 Ch. 406 at p. 413 *et seq.*

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for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is of course possible that trustees may come to the court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded and leave him to take whatever course he thinks fit. But although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the court can give them, and that I must give them credit for not applying to the court except under advice which, though it may appear to me to be unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned. There is a second class of cases differing in form but not in substance from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents) but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole. There is yet a third class of cases, differing in form and substance from the first and in substance though not in form from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought I think to be rigidly enforced in adverse litigation and order the unsuccessful party to pay the costs.

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Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the court."

The question in the case before the learned judge, was whether the plaintiff was, as he claimed, equitable tenant in tail or only equitable tenant for life of copyholds under a trust, and although the court considered it on the border line, yet, as it was a question which the trustees could not ultimately have decided for themselves, it was held to fall under the second class in the above judgment, and the costs of all parties as between solicitor and client were ordered to be borne by the estate.

ART. 83.—*Right under certain Circumstances to have the Trust administered under the direction of the Court.*

(1) Where the trustee reasonably wishes to be discharged from the *office of trustee*, or where difficulties arise which cannot be determined summarily under Order 55, r. 3, or Order 54A, or where it is dangerous to administer the trust except under the direction of the court, any trustee or any beneficiary may institute an action for the administration of the trust by the court (*n*), and this can now be done by originating summons under Order 55, r. 4. But it is not obligatory on the court to make an order for administration, if the questions between the parties can be properly determined without it (*o*).

(2) Where the equities are perfectly clear and unambiguous (*p*), or a trustee-plaintiff merely craves to be released from caprice or laziness, or there is no real

(*n*) *Talbot* v. *Earl Radnor* (1834), 3 Myl. & K. 252; *Goodson* v. *Ellisson* (1827), 3 Russ. 583; and as to summons, R. S. C., 1883, Ord. 55, r. 4.

(*o*) R. S. C., 1883, Ord. 55, r. 10; *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913; *Re De Quetteville, De Quetteville* v. *De Quetteville* (1903), 19 T. L. R. 383.

(*p*) *Re Knight's Trusts* (1859), 27 Beav. 45; *Lowson* v. *Copeland* (1787), 2 Bro. C. C. 156; *Re Elliot's Trusts* (1873), L. R. 15 Eq. 194; *Re Foligno's Mortgage* (1863), 32 Beav. 131; *Re Woodburn's Trusts* (1857), 1 De G. & J. 333; *Bealy* v. *Curzon* (1868), L. R. 7 Eq. 194; *Re Hoskin's Trusts* (1877), 5 Ch. D. 229.

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difficulty in administering the trust, and no reasonable allegation of dishonesty or incompetence against the trustees (*q*), the plaintiff will have to pay all the costs. Even where he acts *bonâ fide*, but without any real cause, he will not be allowed his own costs (*r*); and where he brings an action when the same object might have been obtained by payment into court or by a summons in chambers, under Order 55, r. 3 (*s*), he will not be allowed the extra costs occasioned thereby (*t*). He will always appeal from an order of the court at his own risk (*u*).

When general administration will be ordered.

Actions for the administration of a trust are now comparatively rare. Formerly, a decree for general administration (that is to say, a decree whereby the court took upon itself to supervise the execution of the trust) was granted to a trustee or a beneficiary as a matter of course. The only check upon an abuse of the process of the court was the rather remote contingency that the plaintiff might possibly be deprived of his costs, or, in very flagrant cases, have to pay the costs of all parties, upon the action coming on for further consideration. However, by the Rules of the Supreme Court, 1883, Order 55, r. 10, the old practice was reversed; and it is now no longer obligatory upon the court or a judge to pronounce or make a judgment or order for the administration of any trust, if the questions between the parties can be properly determined on summons (without such judgment or order), as mentioned in Article 82. The principles on which the court will, under this new rule, grant or refuse general administration, have been discussed in two cases; one before the late Mr. Justice PEARSON (*x*), and the other before the Court of Appeal (*y*), in which the learned Lords Justices were more inclined to restrict the right to a decree than Mr. Justice PEARSON was. Lord Justice COTTON in the latter case said:

(*q*) *Forshaw* v. *Higginson* (1855), 20 Beav. 485; *Re Stokes' Trusts* (1872), L. R. 13 Eq. 333; *Re Cabburn, Gage* v. *Rutland* (1882), 46 L. T. 848.

(*r*) *Re Leake's Trusts* (1863), 32 Beav. 135; *Re Heming's Trust* (1856), 3 Kay & J. 40; *Re Hodgkinson, Hodgkinson* v. *Hodgkinson*, [1895] 2 Ch. 190.

(*s*) *Re Giles* (1886), 34 W. R. 712.

(*t*) *Wells* v. *Malbon* (1862), 31 Beav. 48; but see *Smallwood* v. *Rutter* (1851), 9 Hare, 24.

(*u*) *Rowland* v. *Morgan* (1848), 13 Jur. 23; *Tucker* v. *Hernaman* (1853), 4 De G. M. & G. 395.

(*x*) *Re Wilson, Alexander* v. *Calder* (1885), 28 Ch. D. 457.

(*y*) *Re Blake, Jones* v. *Blake* (1885), 29 Ch. D. 913; and see also *Re Gyhon, Allen* v. *Taylor* (1885), 29 Ch. D. 834.

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"Formerly, if any one interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and as a matter of course obtained, the full decree for the administration of the estate; and the court, even if it thought that, although there were really questions which required decision, these questions might be decided upon some only of the accounts and inquiries which formed part of the decree, found itself fettered and unable to restrict the accounts and inquiries to such only as were necessary in order to work out the question. Now, however, the practice is laid down by r. 10 of Order 55, as follows:—" (His lordship here read the rule and continued) "Where there are questions which cannot properly be determined without some accounts and inquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the court may restrict the order simply to those points which will enable the question which requires to be adjudicated upon to be settled. That is the result of Order 55, r. 10. Then we have Order 65, r. 1, which says, 'subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge.' These two rules must be read together, and we then find this: that if a party comes and insists that there is a question to be determined, and, for the purpose of determining that question, asks for an administration judgment, the court cannot refuse the judgment unless it sees that there is no question which requires its decision. But r. 1 of Order 65 puts the party who applies for the judgment and insists upon it in this position—that if it turns out that what has been represented as the substantial question requiring adjudication is one which was not a substantial question, or that the applicant was entirely wrong in his contention as to that particular question, the court can, and, in my opinion, ought ordinarily to make the person who gets the judgment pay the costs of all the proceedings consequent upon his unnecessary, or possibly vexatious, application to the court" (*z*).

Deductions from Lord Justice COTTON'S judgment.

It will be seen from the above judgment, that now that almost all isolated questions of construction or administrative

(*z*) This seems to refer rather to the case of an action commenced by a beneficiary. It requires a very flagrant case to render a trustee liable to pay costs; see p. 431 *et seq.*, *supra*.

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difficulty can be dealt with singly, comparatively few cases can arise necessitating general administration; except (1) where the trustees cannot pull together, or (2) the circumstances of the estate give rise to ever recurring difficulties requiring the frequent direction of the court, or (3) where a *primâ facie* doubt is thrown on the *bona fides* or the discretion of one or more of the trustees. Possibly, also, it would still be held that a trustee would be entitled to a judgment for general administration to relieve him of trouble and annoyance, in a case such as the following, viz., where there were divers disputes as to the proper beneficiaries, out of which disputes several actions had sprung, to all of which the trustee was a necessary defendant (*a*). For if he brings the money into court under the Act, he still remains a trustee; and though he would be under no liability *quoad* the fund brought in, he would not be discharged from liability *quoad* the past income. Moreover, he must be served with notice of all proceedings under the Act in relation to the fund, and this of necessity would compel him to incur some expense in employing a solicitor.

But where there is no dispute respecting the *amount* of a trust fund, and no justifiable ground for the trustee retiring from his office, the only doubt being as to the proper persons entitled; and the trustee, instead of paying the money into court under the Trustee Act, or issuing an originating summons, institutes a suit for the purpose of having the rights of the beneficiaries declared, he will be allowed such costs only as he would have been entitled to if he had paid the fund into court under the Act (*b*), or had issued a summons (*c*).

It has also been held that the court will not necessarily order general administration because a testator has directed his trustees to commence an action for it (*d*); for the court is for the benefit of the living and not the dead.

(*a*) *Barker* v. *Peile* (1865), 2 Dr. & Sm. 340.

(*b*) *Wells* v. *Malbon* (1862), 31 Beav. 48.

(*c*) *Re Giles* (1886), 34 W. R. 712.

(*d*) *Re Stocken, Jones* v. *Hawkins* (1888), 38 Ch. D. 319.

DIVISION V.

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CHAPTER I.

THE LIABILITY OF THE TRUSTEES.

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ART. 84.—*The Measure of the Trustee's Responsibility.*

(1) The measure of a trustee's responsibility for a breach of trust is as follows:—

(a) Where the breach consists merely of negligence, the measure is the actual loss suffered by the beneficiaries whether as regards capital or income without regard to any loss which would have been sustained if the trustee had strictly performed the trust (*a*), with this statutory qualification, that where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller

(*a*) See examples, *infra*, p. 460 *et seq.*

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sum than is actually advanced thereon, the security is deemed an authorised investment for the smaller sum; and the trustee is only liable to make good the sum advanced in excess thereof with interest (*b*).

(b) Where the breach consists in using trust money for his own private purposes he must not only replace the capital but account for the actual income which he has made by the use of the money, *or* at the option of the beneficiaries pay interest at such a rate (usually 5 per cent. per annum) and either simple or compound as in the opinion of the court fairly represents the profit usually made by the employment of money for purposes similar to those for which he has used it (*c*).

(2) The actual loss for which he is liable, includes not only the direct loss attributable to the breach, but all loss which happens before the fund is properly reinvested in authorised securities (*d*).

(3) The liability is not lessened by the fact that the trustee was himself the voluntary creator of the trust (*e*).

PARAGRAPH (1) (a).

Measure where the breach is merely neglect (wilful default).

It is quite clear that where a breach of trust is what is usually called "innocent" (*i.e.*, where the trustee has not been using the trust funds for his own purposes) the measure of his responsibility is the loss which has actually taken place; for the court has no jurisdiction to punish a trustee.

Not open to trustee to show that an equal or greater loss would have followed if no breach had taken place nor to set off excess interest against his liability.

On the other hand, it is not open to the trustee, where there has been a breach, and loss has followed, either to tender evidence that if he had strictly followed the directions of the trust an equal or greater loss would have taken place, nor to claim that the tenant for life shall bring into hotchpot against future income all excess of past income over that which would have been received if the fund had been properly invested. Thus, if trustees were by a will coming into operation twenty years ago expressly directed to invest in consols and nothing

(*b*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 9, retrospective.

(*c*) See examples, *infra*, p. 464 *et seq.*

(*d*) *Lander* v. *Weston* (1885), 3 Drew. 389; *Bacon* v. *Clark* (1837), 3 Myl. & Cr. 294; *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490.

(*e*) *Drosier* v. *Brereton* (1851), 15 Beav. 221; but *cf. Robinson* v. *Robinson* (1851), 1 De G. M. & G. 247.

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else, and, in spite of this, they invested on other stock yielding 4 per cent. which by reason of the general depreciation of securities turned out insufficient in 1910, they would (as the authorities stand) be liable at the election of the beneficiaries either to replace the exact amount of stock which they could have purchased with the fund at the date when they ought to have purchased it, *or to make good the fund itself notwithstanding the great depreciation of consols during the last twenty years* (*f*). Nor would the trustees be entitled to call on the life tenant either to recoup, or bring into account as against future income, the extra percentage he had received from the irregular investment (*g*), unless he had been the instigator of the breach (as to which see *infra*, Art. 94). It is, however, apprehended that after a judgment declaring that an investment of trust funds was a breach of trust altogether, the trustee is (subject to the lien of the beneficiaries) entitled to the whole of the interest produced by the repudiated security, and bound to pay interest at 4 per cent., on the judgment debt.

Nor can trustee plead that the breach was immaterial.

Another instance arises where trustees are empowered to lend the trust fund to a husband with the written consent of his wife. If they dispense with that consent they will be liable, and cannot tender evidence to show that if the wife had been applied to for her consent she would certainly have given it (*h*).

Principles on which the above cases turn.

The above examples are hard cases, but they are logical deductions from the underlying principle stated in the case of *Knott* v. *Cottee* (*i*), viz., that unless a trustee invests in authorised securities the case is either treated "as if the investments had not been made, or had been made for his own benefit out of his own moneys; and that he had at the same time retained moneys of the testator in his hands. . . . I cannot concur in the argument that the court must charge him as if the money had been invested in consols. It that were so the court must charge him the other way where the funds have fallen, which it never does. . . . The persons interested were entitled to earmark them as being bought with the testator's assets, in the same manner as if the executor had

(*f*) *Shepherd* v. *Mouls* (1845). 4 Hare, 500, 504; *Watts* v. *Girdlestone* (1843), 6 Beav. 188; *Byrchall* v. *Bradford* (1822), 6 Madd. 235; and see also *Re Massingberd's Settlement, Clark* v. *Trelawney* (1890), 63 L. T. 296.

(*g*) See *Re Whiteley, Whiteley* v. *Learoyd* (1886), 33 Ch. D. at p. 354, affirmed (*sub nom. Learoyd* v. *Whiteley*) (1887) 12 App. Cas. 727; dissenting from, *Fry* v. *Tapson* (1884), 28 Ch. D. 268; and see also *Slade* v. *Chaine*, [1908] 1 Ch. 522, where it was held that such excess could be kept by the tenant for life and was not capital.

(*h*) *Bateman* v. *Davis* (1818), 3 Madd. 98.

(*i*) (1852) 16 Beav. 77; and see *Re Whiteley, Whiteley* v. *Learoyd*, *supra*.

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bought a house with the trust funds; and though they do not recognise the investment, they had a right to make it available for what was due." Whether this principle is a just one is quite another matter, and, as will be seen later on, Parliament has (in the usual half-hearted way) made an anomalous exception to it in the case of mortgages of land, where the wilful default has consisted merely in advancing too much. Doubtless there is something to be said for the principle on the ground that, if trustees were allowed to contend that a loss would have been suffered in any event, it would introduce so much uncertainty and lead into such far reaching inquiries as to be oppressive to beneficiaries, and might also encourage carelessness in dealing with trust funds. Nevertheless, seeing that trustees act gratuitously, the author has never been able to understand upon what principle of elementary equity, beneficiaries should be allowed to make an actual profit out of a trustee's mistake. Surely the actual amount of consols which ought to have been purchased is the proper measure of the trustee's responsibility. This is one of those instances in which the law requires careful revision before being crystallized in a code.

Where trustees have a choice of investments the beneficiaries can only claim the money lost and not the actual stocks which might have been purchased.

Of course where trustees have a choice of investments the beneficiaries can only claim to have the trust fund made good, and not to have the amount of stocks, etc., purchased, which could have been purchased at the date when the investment ought to have been made, with interest at 3 per cent., because it would be impossible to say which of the permitted securities the trustees would have chosen and what interest they would have yielded (*k*).

Where specified investment imperative, trustees allowed outgoings which they would have had to pay.

On the other hand, where the investment is specified and not left to the choice of the trustees, they will be allowed to deduct any outgoings which would have been with certainty payable if the investment had been made. Thus in one case the trustee of gas shares allowed the husband of one of the beneficiaries to get them into his hands. The husband surrendered them to the company, accepting allotments of new shares in their stead, on which new shares he paid calls, and finally became bankrupt. On these facts, it was held that the trustee was only liable for the value of the shares, less the calls paid by the husband, that being the true measure of the loss to the trust (*l*).

Cases where there must always have been a loss.

So, where there must always have been a loss on the

(*k*) *Robinson* v. *Robinson* (1851), 1 De G. & M. G. 247; *Marsh* v. *Hunter* (1822), 6 Madd. 295; and as to the rate of interest, *Re Barclay*, *Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Whiteford*, *Inglis* v. *Whiteford*, [1903] 1 Ch. 889, 896.

(*l*) *Briggs* v. *Massey* (1882), 30 W. R. 325; and see also *Re Hulkes*, *Powell* v. *Hulkes* (1886), 33 Ch D. 552.

realisation of trust property, apart from any breach of trust, then if a breach of trust further depreciates it, the measure of the trustee's responsibility is confined to the further depreciation; and he is not responsible for the difference between the nominal value and the actual amount realised (*m*).

Loss of interest caused by unreasonable delay in investing.

A trustee who is guilty of unreasonable delay in investing trust funds, will be answerable to the beneficiaries for simple interest at 3 (*n*) per cent. during the continuance of such delay (*o*); for if he had done his duty, interest would in fact have been received.

Duty to accumulate.

On the same ground, where an executrix allowed trust money to remain uninvested in her solicitor's hands for nine years during the infancy of the beneficiary, she was charged with compound interest at the rate of 3 per cent. per annum, with half-yearly rests; as it was her duty to have accumulated the income, by investing it from time to time in consols (*p*). And *à fortiori* is this the case where there is an express trust for accumulation (*n*).

Improper calling in of good security.

So, a trustee who, without proper authority, calls in trust property invested on mortgage at 5 per cent. would be liable for that rate of interest; for although he may not actually have received that rate, he would have done so (*q*) but for his unauthorised act.

Statutory exception to general rule where loss caused by insufficient mortgage security.

Prior to the Trustee Act, 1888 (51 & 52 Vict. c. 59), where a trustee invested the trust fund on mortgage, and advanced more than two-thirds of the value, that *primâ facie* constituted *the entire investment* a breach of trust. It was not an investment which the trustee ought to have made at all, and consequently having, by making it, committed a breach of trust, the whole item—the entire sum so invested—was (on the principle discussed *supra*, pp. 460, 461) disallowed him in his accounts, and the mortgage was either realised and he was charged with the actual deficiency, or (at all events where the security was wholly unauthorised and not merely deficient (*r*))

(*m*) *Lord Gainsborough* v. *Watcombe Terra Cotta Co.* (1885), 54 L. J. Ch. 991.

(*n*) See *Amiss* v. *Hall* (1857), 3 Jur. (N. S.) 584; *Re Barclay, Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Re Goodenough, Marland* v. *Williams*, [1895] 2 Ch. 537; *Re Hill's Trusts, Hill* v. *Equitable, etc., Society* (1896), 75 L. T. 477; *Re Lynch Blosse, Rickards* v. *Lynch Blosse*, [1899] W. N. 27; *Raphael* v. *Boehm* (1805), 11 Ves. 92.

(*o*) *Stafford* v. *Fiddon*, (1857) 23 Beav. 386.

(*p*) *Gilroy* v. *Stephen* (1882), 30 W. R. 745 (FRY, J.); and see also *Re Emmet's Estate, Emmet* v. *Emmet* (1881), 17 Ch. D. 142.

(*q*) See judgment in *Jones* v. *Foxall* (1852), 15 Beav. 388; and see principles stated in *Re Massingberd's Settlement, Clark* v. *Trelawney* (1890), 63 L. T. 296; and *Mosley* v. *Ward* (1805), 11 Ves. 581.

(*r*) *Re Salmon, Priest* v. *Uppleby* (1889), 42 Ch. D. 351.

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he was directed to replace the entire sum, and upon doing so the mortgage became his absolutely (*s*). Consequently, although a trustee might only have erred in advancing, say, one-eighth more than two-thirds of the value, he thereby became liable to repay to the estate the whole of the amount invested, recouping himself so far as possible out of the mortgage. But although this is still the rule with regard to securities generally, it is no longer so with regard to mortgage securities where the only breach of trust was that *too much* was advanced. In such cases s. 9 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (re-enacting s. 5 of the Act of 1888), provides, that where the *mortgage security* "*would at the time of the investment be a proper investment in all respects for a smaller sum*," he will only be liable for the excess over that smaller sum, although that may not represent the loss to the estate. A trustee is not, however, protected by this enactment where he ought not to have invested on the security of such property at all, *e.g.*, where he has invested on mortgage of leaseholds, or wasting property, such as mines or brickfields or the like (*t*). In such a case, if the trustee in fault retires, the new trustees need not put him to his election to take over the security, but may realise the security without notice to him, and charge him with the entire deficiency (*u*), or (if he has become bankrupt) prove for it (*x*).

Rule only applies where the breach is solely as to the amount advanced.

This, however, is not so where the security is one of a class not authorised at all. In such cases, unless the beneficiaries are under disability (*y*), they must give the trustee the option of taking over the security before realising it (*z*).

PARAGRAPH (1) (b).

Mixing trust funds with trustee's own moneys.

The above examples relate to honest breaches of trust and are supposed to be based on the actual amount of loss. But if a trustee keeps the money in his hands, meaning to appropriate it, or even to use it temporarily only (and indeed even where he does so in order that the beneficiaries may have a larger income (*a*)), the actual loss ceases to be the measure of his responsibility. As

(*s*) *Fry* v. *Tapson* (1884), 28 Ch. D. 268; *Re Whiteley*, *Whiteley* v. *Learoyd* (1886), 33 Ch. D. at p. 354.

(*t*) *Re Walker*, *Walker* v. *Walker* (1890), 59 L. J. Ch. 386. And see also *Head* v. *Gould*, [1898] 2 Ch. 250.

(*u*) *Re Salmon*, *Priest* v. *Uppleby* (1889), 42 Ch. D. 351.

(*x*) *Re Lake*, *Ex parte Howe*, [1903] 1 K. B. 439, where the mortgage was a contributory one, and the mortgagor brought an action to set it aside for fraud, which action the beneficiaries compromised behind the back of the trustee.

(*y*) *Head* v. *Gould*, [1898] 2 Ch. 250.

(*z*) *Re Salmon*, *Priest* v. *Uppleby*, *supra*.

(*a*) *Re Davis*, *Davis* v. *Davis*, [1902] 2 Ch. 314.

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Lord CRANWORTH said in the leading case of *Att.-Gen.* v. *Alford* (*b*), "in such a case, I think the court would be justified in dealing, in point of interest, very hardly with an executor; *because it might fairly infer that he used the money in speculation, by which he either did make 5 per cent., or ought to be estopped from saying that he did not.* The court would not inquire what had been the actual proceeds, but in application of the principle, *in odium spoliatoris omnia præsumuntur*, would assume that he did make the higher rate, *that is, if that were a reasonable presumption.*"

Solicitor-trustee using trust funds in his business.

In *Burdick* v. *Garrick* (*c*), a solicitor, as the agent of the plaintiff, held a power of attorney from him, under the authority of which he received divers sums of money, and paid them into the bank to the credit of his (the solicitor's) firm. On a bill being filed by the client for an account, the Vice-Chancellor made a decree for payment of the principal with *compound interest.* The Court of Appeal, however, reversed this decision, Lord HATHERLEY saying: "The Vice-Chancellor has directed interest to be charged at the rate of 5 per cent., which appears to me to be perfectly right, and for this reason, that the money was retained in the defendants' own hands, and was made use of by them (*d*). That being so, the court presumes the rate of interest made upon money to be the ordinary rate of interest, viz., 5 per cent. I cannot, however, think the decree correct in directing half-yearly rests; because the principle laid down in the case of *Attorney-General* v. *Alford* appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle, that either he has made, or has put himself into such a position that he is presumed to have made, 5 per cent., or compound interest, as the case may be." His lordship then pointed out that no doubt where a trustee employs money in ordinary

(*b*) (1855) 4 De G. M. & G. at p. 851; *Stafford* v. *Fiddon* (1857) 23 Beav. 386; *Jones* v. *Foxall* (1852), 15 Beav. 388; *Re Jones, Jones* v. *Searle* (1883), 49 L. T. 91; *Re Emmet's Estate, Emmet* v. *Emmet* (1881), 17 Ch. D. 142; and *Re Davis, Davis* v. *Davis*, [1902] 2 Ch. 314.

(*c*) (1870) L. R. 5 Ch. 233. See also *Hale* v. *Sheldrake* (1889), 60 L. T. 292, where a husband of the tenant for life was ordered to replace a trust fund, but without interest, as the wife had allowed him to receive the income.

(*d*) See to same effect *Bate* v. *Scales* (1806), 12 Ves. 402; *Ex parte Ogle* (1873), L. R. 8 Ch. 711; *Jones* v. *Foxall, supra*; *Heathcote* v. *Hulme* (1819), 1 Jac. & W. 122; *Docker* v. *Somes* (1834), 2 Myl. & K. 655; and *Berwick-upon-Tweed Corporation* v. *Murray* (1857), 7 De G. M. & G. 497.

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trade, he may be made liable for compound interest, where trade capital is presumed to yield it; but that that reason had no application to capital employed in a solicitor's business, upon which a solicitor is frequently receiving no interest at all. It is suggested that the present tendency of the court is not to give compound interest unless there is evidence to prove that it would fairly represent the trustee's probable profits. And anyhow, in order to charge a trustee with compound interest, or with actual profits for employing the trust funds in trade, there must be an active calling in of the trust moneys for the purpose of embarking them in the trade or speculation; a mere neglect to withdraw funds *already embarked by the settlor in the trustee's trade* is not sufficient (*e*).

Partner-trustee allowing trust fund to remain in business.

Five per cent. still charged against trustee using money.

It will be perceived that in the last cited judgment the learned Vice-Chancellor gave 5 per cent. interest, explaining that the court presumed that to be the "ordinary rate." But in the more recent case of *Re Davis, Davis* v. *Davis* (*f*), FARWELL, J., gave 5 per cent. (although he admitted that it was no longer the mercantile rate), the money having been employed in the trustee's trade. In that case compound interest was not asked for; probably because the circumstances showed that it had not been earned, and probably also because there was no *mala fides*, the trustee having employed the money in his business in order to produce a larger income for the beneficiaries.

The ground upon which five per cent. interest is still given in these cases, in place of the lower interest which would have been earned if the fund had been properly invested, would seem to be based on the principle stated by Sir W. GRANT, M.R., in *Bate* v. *Scales* (*g*), viz.: "it is just the same, whether he had it actually, or by his representation is to be taken as bound. See the consequence; supposing, that representation could be made without any interference against the trustee, except that when the falsehood of the representation is discovered he should invest the fund in stock. The trustee might always take his chance of being able to purchase stock upon a subsequent day at a less price. He shall not have that chance."

PARAGRAPH (2).

The authorities show that the court does not confine a trustee's liability to the loss immediately arising from the breach,

(*e*) *Vyse* v. *Foster* (1872), L. R. 8 Ch. 309, affirmed (1874) L. R. 7 H. L. 318; *Smith* v. *Nelson* (1905), 92 L. T. 313; *Brown* v. *Sansome* (1825), McClel. & Y. 427; but *cf. Townend* v. *Townend* (1859), 1 Giff. 201.

(*f*) [1902] 2 Ch. 314.

(*g*) (1806) 12 Ves. 402.

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but, on the principle discussed *supra* (p. 460 *et seq.*), extends it to whatever losses occur before (if at all) the fund is reinvested properly in authorised securities. Until that is done it remains in theory uninvested in the trustee's hands.

The loss to be made good extends to all losses occurring between the breach and the date of reinvestment in authorised securities with prescribed consents.

These cases are sometimes extremely hard, and it is quite conceivable that when they come to be reviewed they may be considerably modified. Thus in one case trustees, who were empowered to vary investments with the consent of the life tenant, sold consols and (with such consent) invested the proceeds in a contributory mortgage (which was of course a breach of trust). They subsequently called in the money, received it, and reinvested it on a mortgage (which was an authorised security), but *without* getting the life tenant's consent, and *on which there was no loss*. Nevertheless it was held that they were bound to replace the consols (which had risen in price). For they sold them for the purpose of investing in an unauthorised security, and then when they realised that investment, they again invested without the consent of the life tenant, so that *the original breach was never set right*, and consequently the loss was the difference between the price of the consols when sold and the price at which alone they could be replaced at the date of the judgment (*h*). This decision seems somewhat startling, as although the *motive* for the sale of the consols was to reinvest in an unauthorised security, the sale itself was authorised, and it is difficult to see why, if the sale was authorized, the trustees were mulcted for having sold at all.

Executors of deceased trustee who was party to a breach liable for loss incurred after his death.

Again, two trustees, in breach of trust, sold consols and advanced the proceeds to the husband of the life tenant. He subsequently *repaid the advance to the surviving trustee*, who reinvested it in unauthorised stock for a few days, and then sold such stock and again lent the proceeds to the husband, with the result that the fund was lost. It was held that not only was the surviving trustee liable for the loss (which was obvious), but also the executors of the deceased trustee; for but for the original sale of the stock to make the advance to the husband, that stock would have remained intact; and that the mere repayment by the husband to the surviving trustee and the investment in unauthorised stock did not set matters right and so condone the original breach, and that consequently the executors of the deceased trustee were liable for all loss which happened (even after his death) before the fund was

(*h*) *Re Massingberd's Settlement, Clark* v. *Trelawney* (1890), 63 L. T. 296; and see also *Re Bennison, Cutler* v. *Boyd* (1889), 60 L. T. 859; and *Stokes* v. *Prance*, [1898] 1 Ch. 212.

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ultimately replaced (*i*). But seeing that the surviving trustee was competent to receive and give a good discharge for the money, it is very difficult to follow the reasoning on which this case was founded, which seems inconsistent with the cases cited on p. 473, *infra*.

PARAGRAPH (3).

Trustee none the less liable because he was also voluntary creator of the trust.

The fact that a trustee is also the voluntary creator of the trust makes no difference to his legal liability (*k*). This at first sight, no doubt, seems somewhat revolting, but it logically follows from the fact that a voluntary settlement (if complete and executed) is binding and irrevocable. If it were possible for a trustee (on the ground that he voluntarily made the settlement) to waste or appropriate the trust property, the settlement would be in effect revocable, and the rule as to the irrevocable nature of executed trusts rendered futile.

ART. 85.—*The Liability, Joint and Several.*

(1) Each trustee is in general liable for the whole loss when caused by the joint default of all the trustees, even although all may not have been equally blameworthy (*l*); and a decree against all may be enforced against one or more only (*m*).

(2) But although the liability is several as well as joint, all the actual trustees or the personal representatives of the last surviving trustees are necessary parties to the action (*n*).

PARAGRAPH (1).

All parties to breach are equally liable.

All parties to a breach of trust are equally liable, and there is between them no primary liability (*o*); and this liability is not confined to express trustees, but extends to all who are actually privy to the breach of trust. Thus, where trustees

(*i*) *Lander* v. *Weston* (1855), 3 Drew. 389; and see also *Bacon* v. *Clarke* (1837), 3 Myl. & Cr. 294; and *Clough* v. *Bond* (1838), 3 Myl. & Cr. 490.

(*k*) *Drosier* v. *Brereton* (1851), 15 Beav. 221.

(*l*) *Wilson* v. *Moore* (1833), 1 Myl. & K. 126; *Lyse* v. *Kingdon* (1844), 1 Coll. C. C. 184; *Ex parte Norris, Re Biddulph* (1869), L. R. 4 Ch. 280. This applies not only to express trustees, but to all persons who meddle with the trust property with notice of the trust. See *Cowper* v. *Stoneham* (1893), 68 L. T. 18.

(*m*) *Att.-Gen.* v. *Wilson* (1840), Cr. & Ph. at p. 28; *Fletcher* v. *Green* (1864), 33 Beav. 426.

(*n*) *Re Jordan, Hayward* v. *Hamilton*, [1904] 1 Ch. 260.

(*o*) *Per* Master of the Rolls, in *Wilson* v. *Moore* (1833), 1 Myl. & K. 126.

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delegated their trusteeship to their solicitors, who received the moneys, and did not invest them, but made use of them in their business, it was held that both the trustees and the solicitors were equally liable, and that judgment might be executed by the beneficiaries against the solicitors only (*p*). This principle does not, however, apply to professional payments made by trustees to a solicitor or other agent who knows that the money is trust money, unless facts are brought home to him which show that, to his knowledge, the money was being applied in a manner inconsistent with the trust; or, in other words, that the solicitor or other agent was party either to a fraud, or to a breach of trust on the part of the trustees. "To make an agent liable to return costs, he must be fixed with notice that, at the time when he accepted payment, the trustee had been guilty of a breach of trust such as would preclude him altogether from resorting to the trust estate for payment of costs; so that in fact the application of the trust estate in payment of costs would be a breach of trust" (*q*).

Beneficiaries entitled to claim the whole from any one of the trustees.

It follows from the nature of the liability being several as well as joint, that until the plaintiffs have received twenty shillings in the pound they are entitled to claim the whole debt from any one trustee in respect of his several liability, notwithstanding that they have accepted a sum from another trustee in satisfaction of *his* liability. If, therefore, the former becomes bankrupt, the plaintiffs can prove for the full amount against his estate, without first deducting the sum received from the other trustee (*r*). Nevertheless a release of one trustee *may* incidentally operate as a release of the others if the beneficiary elects to accept an investment the making of which was the breach of trust complained of (*s*).

ART. 86.—*No Set-off allowed of Gain on one Breach against Loss on another.*

A trustee is only liable for the actual loss in each distinct and complete transaction which amounts to a breach of trust, and not for the loss in each particular

(*p*) *Cowper* v. *Stoneham* (1893), 68 L. T. 18; and see also *Blyth* v. *Fladgate*, [1891] 1 Ch. 337, and Art. 96, *infra*, where the liability of third parties is more fully discussed.

(*q*) *Per* Stirling J., *Re Blundell*, *Blundell* v. *Blundell* (1888), 40 Ch. D. 370.

(*r*) *Edwards* v. *Hood-Barrs*, [1905] 1 Ch. 20.

(*s*) See *Blackwood* v. *Burrowes* (1843), 4 Dru. & War. 441.

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item of it (*t*). A loss in one transaction or fund is not, however, compensated by a gain in another and distinct one (*u*).

Where breach of trust causes benefit to the estate, not liable for outlay.

In *Vyse* v. *Foster* (*t*), a testator devised his real and personal estates upon common trusts for sale, making them a *mixed fund*. His trustees were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that, to develop their value, it was desirable to build a villa upon part of them. They accordingly built one at a cost of £1,600 out of the testator's personal estate. The evidence showed that the outlay had benefited the estate, but Vice-Chancellor BACON disallowed the £1,600 to the trustees in passing their accounts. The Court of Appeal (and subsequently the House of Lords), however, reversed this, Lord Justice JAMES saying: "As the real and personal estate constituted one fund, we think it neither reasonable nor just to fix the trustees with a sum, part of the estate, *bonâ fide* laid out on other part of the estate, in the exercise of their judgment as the best means of increasing the value of the whole."

Loss on one transaction cannot be set off against gain on another.

In *Wiles* v. *Gresham* (*x*), on the other hand, by the negligence of the trustees of a marriage settlement, a bond debt for £2,000 due from the husband was not got in, and was totally lost. Certain other of the trust funds were without proper authority invested in the purchase of land upon the trusts of the settlement. The husband, out of his own money, greatly added to the value of this land, and upon a claim being made against the trustees for the £2,000 they endeavoured to set off against that loss the gain which had accrued to the trust by the increased value of the land, but their contention was disallowed, the two transactions being separate and distinct.

Again, trustees had kept invested on unauthorised security a sum of money which they ought to have invested in consols, and which was in consequence depreciated. Eventually part of the money was invested in consols, at a far lower rate than it would have been if invested according to the directions in the will. The trustees claimed to set off the gain against the loss, but were not allowed to do so, because "at whatever period the unauthorised security was realised, the estate

(*t*) *Vyse* v. *Foster* (1872), L. R. 8 Ch. 309; affirmed (1874) L. R. 7 H. L. 318.

(*u*) *Wiles* v. *Gresham* (1854), 2 Drew. 258; *Dimes* v. *Scott* (1828), 4 Russ. 195; *Ex parte Lewis* (1819), 1 Gl. & J. 69.

(*x*) (1854) 2 Drew. 258; *Re Barker*, *Ravenshaw* v. *Barker* (1898), 77 L. T. 712.

was entitled to the whole of the consols that were then bought, and if it was sold at a later period than it ought to have been, the executor was not entitled to any accidental advantage thence accruing" (*y*). This case is at first sight difficult to be distinguished from *Vyse* v. *Foster*, but it will be perceived that the loss and gain resulted from two distinct transactions. The loss resulted from a breach of trust in not realising the securities; the gain arose from a particular kind of stock being at a lower market value than usual at the date at which the trustees bought it. Still it may be reasonably doubted whether it would be followed at the present day.

Where, however, trustees committed a breach of trust in lending trust moneys on mortgage; and upon a suit by them the mortgaged property was sold, and the money paid into court, and invested in consols pending the suit, and the consols rose in value, the trustees were allowed to set off the gain in the value of the consols against the loss under the mortgage; for the gain and loss arose out of one transaction (*z*). It is however, very difficult to reconcile this case with the last one, but it seems to be reasonable and in accordance with common sense, and common justice.

Art. 87.—*Property Acquired either wholly or partly out of Trust Property becomes Liable to the Trust.*

(1) If a trustee has, in breach of trust, converted trust property into some other form, the property into which it has been so converted becomes subject to the trust. If *all* the beneficiaries are *sui juris*, they can collectively elect to adopt the breach, and take the property as it then stands; but if one of them objects to do so, he may require it to be reconverted. In that case any gain accrues to the trust estate, and any loss falls on the trustee (*a*).

(*y*) *Dimes* v. *Scott* (1828), 4 Russ. 195.

(*z*) *Fletcher* v. *Green* (1864), 33 Beav. 426.

(*a*) See *per* Pearson, J., *Re Patten and Edmonton Union* (1883), 31 W. R. 785; *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696; *Taylor* v. *Plumer* (1815), 3 Mau. & S. 562; *Frith* v. *Cartland* (1865), 2 Hem. & M. 471; *Hopper* v.

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(2) If a trustee has mixed trust moneys with his own, or has, partly with his own and partly with trust moneys, purchased other property, then the beneficiaries cannot elect to take the whole of the mixed fund or the entire property so purchased. If, however, the mixed fund can be traced (into whatever form it may have been converted), the beneficiaries will be entitled to a first charge on it (*b*).

PARAGRAPH (1).

Stock bought with trust money.

Thus, where money is handed to a broker for the purpose of purchasing stock, and he invests it in unauthorised stock, and absconds, the stock which he has purchased will belong to the principal, and not to the broker's trustee in bankruptcy. For a broker is a constructive trustee for his principal; and, as was said by Lord ELLENBOROUGH, "the property of a principal, entrusted by him to his factor for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in form, so long as such property is capable of being identified and distinguished from all other property" (*c*). Nor does a personal judgment against the trustees to make good the loss release the lien of the beneficiaries on an unauthorised investment (*d*).

Money produced by trust chattels.

So, if goods consigned to a factor be sold by him and reduced into money, yet if the money can be traced—as for instance, where it has been kept separate and apart from the factor's own moneys, or kept in bags, or the like (*e*), or has been changed into bills or notes (*f*), or into any other form (*g*), or has been paid into the factor's account at the bank (*h*)—the employer, and not the creditors of the factor, will, upon his bankruptcy,

Conyers (1866), L. R. 2 Eq. 549; *Lane* v. *Dighton* (1762), Ambl. 409; *Scales* v. *Baker* (1859), 28 Beav. 91; *Cook* v. *Addison* (1869), L. R. 7 Eq. 466; *Ernest* v. *Croysdill* (1860), 2 De G. F. & J. 175; *Ex parte Barber, Re Anslow* (1880), 28 W. R. 522.

(*b*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696; *Re Oatway, Hertslet* v. *Oatway*, [1903] 2 Ch. 356; *Lupton* v. *White* (1808), 15 Ves. 432; *Pennell* v. *Deffell* (1853), 4 De G. M. & G. 372; and see also *Re Pumfrey, Worcester, etc., Banking Co.* v. *Blick* (1882), 22 Ch. D. 255.

(*c*) *Taylor* v. *Plumer* (1815), 3 Mau. & S. 562; *Ex parte Cooke, Re Strachan* (1876), 4 Ch. D. 123; *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696.

(*d*) *Francis* v. *Francis* (1854), 5 De G. M. & G. 108.

(*e*) *Tooke* v. *Hollingworth* (1793), 5 T. R. 215.

(*f*) *Ex parte Dumas* (1754), 2 Ves. Sen. 582.

(*g*) *Frith* v. *Cartland* (1865), 2 Hem. & M. 417; *Birt* v. *Burt* (1877), 11 Ch. D. 773, n.

(*h*) *Re Hallett's Estate, Knatchbull* v. *Hallett, supra.*

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be entitled to the property into which it has been converted. For the creditors of a defaulting trustee can have no better right to the trust property than the trustee himself (*i*).

Sale by trustees of property wrongfully acquired out of trust moneys.

So, where the trustees of a will invested trust moneys in an unauthorised purchase of land, and afterwards contracted to sell it for a largely increased price, it was held that they were acting properly in so doing, and that the concurrence of one beneficiary was sufficient to make a good title (*k*). For, as Mr. Justice PEARSON put it: "I see no reason why the trustees should not now do what it was all along their duty to do, and what the court would have ordered them to do. At the same time, I agree that it would be proper to take the concurrence of one of the *cestuis que trusts*; because, if all of them elected to take their shares of the land after it had been purchased, they would have been entitled to do so." The report states that the learned judge said that a good title could be made on the purchasers seeing that the purchase-money was invested in the names of the trustees as trustees; but no such requirement has been suggested in subsequent cases (*l*), and it seems to be quite inconsistent with section 20 of the Trustee Act, 1893, and the language of COZENS-HARDY, J. in *Power* v. *Banks* (*l*) where he said, "by means of the sales . . . the *purchase money got into the proper hands*, and I cannot see what harm was done by this. To affect the purchasers with the consequences of any subsequent misappropriation . . . would be unjust unless the sale itself was wrongful."

On the same principle, where the beneficiaries or any of them are infants, the trustees can sell without anyone's consent; because in that case the beneficiaries collectively are not in a position to adopt the breach (*l*).

PARAGRAPH (2).

Trust property mixed with other property so as to be untraceable.

The case is comparatively simple where (as in the foregoing illustrations) the trustee has spent or converted the trust property, and nothing but the trust property. It becomes more difficult, however, when the trustee has mixed the trust moneys with his own, and either kept the mixed fund, or spent it in the purchase of other property. The case then turns

(*i*) *Taylor* v. *Plumer* (1815), 3 Mau. & S. 562.

(*k*) *Re Patten and Edmonton Union* (1883), 52 L. J. Ch. 787. Although, until recently, this was the only reported case on the subject, it has been very frequently followed in judges' chambers.

(*l*) *Re Jenkins and Randall's Contract*, [1903] 2 Ch. 362; and see *Power* v. *Banks*, [1901] 2 Ch. 487 at p. 496.

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entirely upon the question whether the mixed fund, so formed, can be identified; or, if it has been spent, whether it can be traced into the property which has been purchased with it. If it has become so mixed up with the trustee's private property as to render it impossible to trace it (for instance, where it has been converted into money, which has been put into circulation (*m*), or has otherwise become indistinguishable), then, as the actual property is gone, and that which stands in its place cannot be identified, the beneficiary can only proceed against the trustee personally for the breach of trust, or, if the latter be bankrupt, can only prove as a creditor (*n*). For the right of the beneficiary is only to have the actual trust property or that which stands in its place, or to have a charge on it.

Trust property mixed with other property which can be traced.

But where the mixed fund can be traced (as, for instance, where the trustee has paid in the trust fund to his general banking account (*o*)), the beneficiaries will have a charge, or lien, upon the whole mixed fund. In the case of *Re Hallett's Estate, Knatchbull* v. *Hallett* (*o*), the late Sir GEORGE JESSEL, M.R., elaborately reviewed all the authorities touching on this question. His lordship said: "Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns. But if, instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person you can follow it. If in the case supposed the trustee had lent the £1,000 to a man without security, you could follow the debt and take it from the debtor. . . . If instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference is this, that instead of taking the debt, the *cestuis que trusts* would have a charge for the amount of the trust money on the debt."

(*m*) *Miller* v. *Race* (1758), 1 Burr. 452.

(*n*) *Ex parte Dumas* (1754), 2 Ves. Sen. 582; *Scott* v. *Surman* (1743), Willes, 404; *Re Hallett & Co., Ex parte Blane*, [1894] 2 Q. B. 237.

(*o*) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch. D. 696, overruling the decision of FRY, J., in *Ex parte Dale & Co., Re West of England, etc., Bank* (1879), 11 Ch. D. 772. But *cf.* and dist. *Re Hallett & Co., Ex parte Blane, supra*, and *Re Ulster Land, etc., Co., Ex parte Fitzsimon* (1889), 25 L. R. Ir. 24.

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Again, a trustee paid trust money into his current account, and, out of money drawn upon that account, purchased an investment in his own name, but subsequently applied the balance to his own purposes. It was held that his representatives were not entitled to maintain that the investment was purchased out of the trustee's own money, and that what he had subsequently spent was the trust money (*p*).

A judgment creditor of a stockbroker obtained a garnishee order on a balance at a bank standing to the credit of the broker. All moneys in the bank to the broker's credit *were, in fact, moneys received for clients.* Since money of a client had been paid in, drawings out in excess of the then balance had been made. And so in the case of another client. Except those two, there was no client who claimed any part of the fund:—*Held*, on appeal, that as no part of the moneys in the bank was the debtor's own, the judgment creditor had no right against the balance (*q*). Where, however, a trustee has overdrawn his banking account, his bankers have a first and paramount lien on all moneys paid in if they have no notice that they are trust moneys (*r*); for where the equities are equal the law prevails, and, in the case supposed, the bankers have in point of law received the money in payment of their debt.

Again, trustees had power, with the consent of the tenant for life, to sell the trust property, and they were directed to invest the purchase-money in the purchase of other real estate, to be settled on the like trusts. The trust property was sold under this power for £8,440, and the tenant for life was allowed (wrongly) to keep the purchase-money. About the same time he purchased another estate for £17,400, of which sum £8,124 was part of the above-mentioned trust money. This estate was conveyed to him in fee simple. The tenant for life ultimately became bankrupt, and it was held that, as against his assignees in bankruptcy, the original trustees of the settlement had a lien on the estate which he had purchased, to the extent of the moneys invested in its purchase (*s*).

(*p*) *Re Oatway, Hertslet* v. *Oatway*, [1903] 2 Ch. 356, treating *Brown* v. *Adams* (1869), L. R. 4 Ch. 764, as overruled; and to same effect, *Jopp* v. *Johnston's Trustees*, [1904] 6 F. (Ct. of Sess. Cases) 1028.

(*q*) *Hancock* v. *Smith* (1889), 41 Ch. D. 456. And see *Mutton* v. *Peate*, [1900] 2 Ch. 79. But *cf. Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433, where *Hancock* v. *Smith* was distinguished.

(*r*) *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282; and see also the still stranger case of *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243, where the bank seems to have had notice that the fund was affected with a trust of some kind.

(*s*) *Price* v. *Blakemore* (1843), 6 Beav. 507; and see also *Hopper* v. *Conyers* (1866), L. R.

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No lien unless it can be shown that trust fund forms part of a specific fund or property.

However, wherever the trustee has mixed the trust fund with his own moneys, then, before a charge or lien can be substantiated, it must be shown that the trust fund in fact forms part of the fund or property on which the lien is claimed. Where, therefore, it appeared that the actual bank notes, of which the trust fund consisted, had not been paid by the trustee into his banking account, it was held that the *cestuis que trusts* had no lien on the balance lying at the trustee's banker's, because the trust fund could not be traced to the bank (*t*). Of course, if the trust fund could have been proved to have been paid into the trustee's account, then, notwithstanding that he might subsequently have drawn out and paid in moneys, the lien would have been upheld.

ART. 88.—*Any of the Trustees or Beneficiaries may apply to the Court by Interlocutory Motion to safeguard the Trust Property if endangered.*

(1) Where the court is satisfied that trust property is in danger—

(a) by reason of the active (*u*) or passive (*x*) misconduct of the trustees; or

(b) by reason of the trustees residing out of the jurisdiction of the court (*y*);

an injunction will be granted on interlocutory motion at the instance of any person with an existing vested or contingent interest (*z*), or even of one of the

2 Eq. 549; *Middleton* v. *Pollock* (1876), 4 Ch. D. 49; and *Cook* v. *Addison* (1869), L. R. 7 Eq. 466.

(*t*) *Ex parte Hardcastle* (1881), 29 W. R. 615. If it cannot be traced, yet if the trustee has repaid the amount to the trust, it will not be a fraudulent preference although he may forthwith become bankrupt: *Sharp* v. *Jackson*, [1899] A. C. 419.

(*u*) *Earl Talbot* v. *Hope-Scott* (1858), 4 Kay & J. 139; *Middleton* v. *Dodswell* (1806), 13 Ves. 266; *Dance* v. *Goldingham* (1873), L. R. 8 Ch. 902.

(*x*) *Foley* v. *Burnell* (1783), 1 Bro. C. C. 274; *Fletcher* v. *Fletcher* (1844), 4 Hare, 67.

(*y*) *Noad* v. *Backhouse* (1843), 2 Y. & Coll. C. C. 529.

(*z*) *Scott* v. *Becher* (1817), 4 Pr. 346; but see as to contingent *cestuis que trusts*, *Davis* v. *Angel* (1862), 10 W. R. 722; *Clowes* v. *Hilliard* (1876), 4 Ch. D. 413; *Re Parsons*, *Stockley* v. *Parsons* (1890), 45 Ch. D. 51; and *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648. Where the trustee has also become sole personal representative of a beneficiary, a legatee under the latter's will may sue the trustee for breach of trust

trustees in default (*a*), either compelling the trustees to do their duty (*b*), or restraining them from interfering with the trust property (*c*), as the case may require; and, if expedient, a receiver will be appointed (*d*).

(2) Where a trustee has admitted that he has trust moneys in his hands, and the court considers the trust property is endangered, an order on interlocutory motion may be made for payment of the amount into court; but there must be an admission direct or implied, written or verbal, and no dispute as to the defendant's liability, as the court cannot try the question on motion (*e*).

PARAGRAPH (1).

Loss of a portion of the trust property.

The loss of a portion of the trust property affords *primâ facie* ground for appointing a receiver on interlocutory motion (*f*); and so is reasonable anticipation of a loss.

Right to use name of trustee in action at law.

Thus, if a person commits some trespass upon lands in the possession of the trustee, and the latter refuses to sue him, the court will oblige him to lend his name for that purpose, on receiving a proper indemnity from the beneficiaries (*g*).

Trustee will be ordered to renew leases.

And so, if a tenant for life (who is a constructive trustee for this purpose) refuses to renew leaseholds, the court will compel him to do so, and a receiver of the income of the trust property will be appointed to collect a sufficient sum to pay the renewal fine (*h*).

Where same persons trustees under conflicting settlements.

In *Earl Talbot* v. *Hope-Scott* (*i*), lands were vested in trustees by Act of Parliament, upon trust for sale, and, subject thereto, upon trusts inalienably annexing the rents to the earldom of

(*Sandford* v. *Jodrell* (1854), 2 Sm. & Giff. 176).

(*a*) *Baynard* v. *Woolley* (1855), 20 Beav. 583.

(*b*) See note (*x*), *supra*.

(*c*) See note (*u*), *supra*.

(*d*) See cases in note (*u*), and *Bennett* v. *Colley* (1832), 5 Sim. 182.

(*e*) *London Syndicate* v. *Lord* (1878), 8 Ch. D. at p. 90; *Freeman* v. *Cox* (1878), 8 Ch. D. 148; *Hampden* v. *Wallis* (1884), 27 Ch. D. 251; *Dunn* v. *Campbell* (1879), 27 Ch. D. 254, n.; *Porrett* v. *White* (1885), 31 Ch. D. 52; *Wanklyn* v. *Wilson* (1887), 35 Ch. D. 180; *Re Beeny, Ffrench* v. *Sproston*, [1894] 1 Ch. 499; *Neville* v. *Matthewman*, [1894] 3 Ch. 345; *Re Benson, Elletson* v. *Pillers*, [1899] 1 Ch. 39.

(*f*) *Evans* v. *Coventry* (1854), 5 De G. M. & G. 911.

(*g*) *Foley* v. *Burnell* (1783), 1 Bro. C. C. 274.

(*h*) *Bennett* v. *Colley*, *supra*, and Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19.

(*i*) (1858) 4 Kay & J. 139; and see to same effect *Price* v. *Loaden* (1856), 21 Beav. 508.

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Shrewsbury. The Earl of Shrewsbury attempted to disentail (which of course he could not do effectually), and demised the lands to the same trustees, upon trust for a particular claimant of the title. The trustees accepted this trust, and claimed to receive the rents in that character, pending proceedings by the plaintiff to establish his claim to the earldom. A receiver of the rents was, however, appointed on his application, upon the ground that the trusts of the will were in conflict with the prior trusts upon which they held the estate.

Beneficiaries may get a receiver appointed where property in danger.

The court will appoint a receiver and grant an injunction where, from the character or condition of the trustee, he is not a fit person to have the control of the trust property; as, for instance, where he is insolvent (*j*), or about to become bankrupt (*k*), or is a person of dissolute habits, or dishonest (*l*).

Where trustees not acting jointly.

So where, there being some disagreement between three trustees, the majority acted alone and took securities in their own names, omitting the name of the dissentient trustee, it was held that the plaintiff (a beneficiary) was entitled to a receiver (*m*).

Injunction granted to restrain improper sale.

Again, the court will grant an injunction to restrain a sale by trustees at an undervalue (*n*), (although this was at one time doubted (*o*)).

PARAGRAPH (2).

Payment ordered into court on motion.

It is obviously a severe measure to order a trustee to pay money into court pending the trial of an action. It will, therefore, only be done where the trustee has admitted that he has the money *in his hands*, or possibly where he has admitted that he has had it and has either misappropriated it or not accounted for it (*p*), or not invested it (*q*), or has invested or paid it away improperly (*r*), and it is clear that he has no real defence (*s*).

(*j*) *Mansfield* v. *Shaw* (1818), 3 Madd. 100; *Gladdon* v. *Stoneman* (1808), 1 Madd. 143, n., followed in *Bowen* v. *Phillips*, [1897] 1 Ch. 174.

(*k*) *Re H.'s Estate, H.* v. *H.* (1875), 1 Ch. D. 276.

(*l*) See *Everett* v. *Prythergch* (1841), 12 Sim. 363.

(*m*) *Swale* v. *Swale* (1856), 22 Beav. 584.

(*n*) *Anon.* (1821), 6 Madd. 10; and see *Webb* v. *Earl of Shaftesbury* (1802), 7 Ves. 480; *Milligan* v. *Mitchell* (1833), 1 Myl. & K. 446; *Dance* v. *Goldingham* (1873), L. R. 8 Ch. 902.

(*o*) *Pechel* v. *Fowler* (1795), 2 Anst. 549.

(*p*) *Freeman* v. *Cox* (1878), 8 Ch. D. 148.

(*q*) *Wiglesworth* v. *Wiglesworth* (1852), 16 Beav. 269.

(*r*) *Bourne* v. *Mole* (1845), 8 Beav. 177; *Re Whiteley, Whiteley* v. *Learoyd* (1886), 33 Ch. D. 347, H. L. (*sub nom. Learoyd* v. *Whiteley*) (1887), 12 App. Cas. 727; *Scott* v. *Becher* (1817), 4 Pr. 346; *Meyer* v. *Montriou* (1841), 4 Beav. 343; but *cf. Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711.

(*s*) *Neville* v. *Matthewman*, [1894] 3 Ch. 345, *per* LINDLEY,

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Practice no longer favoured.

The court does not now, however, favour these interlocutory applications so readily as it once did; and the Court of Appeal laid it down in *Neville* v. *Matthewman* (*t*) that "unless care is taken in making such orders a very dangerous precedent may be established. Such orders may easily become very oppressive. Under the old practice of the Court of Chancery such orders could only have been made upon an admission contained in the defendant's answer. We all know with what care answers were framed; and if by his answer the defendant admitted that he had in his hands money belonging to the plaintiff, there could be no danger in ordering him to pay it into court." Lord Justice DAVEY added that an extension of the doctrine was made by JESSEL, M.R., in *Freeman* v. *Cox* (*u*), and that he (the Lord Justice) was not disposed to carry the practice any further. In his opinion such orders ought to be made only when it is made out to the satisfaction of the court that the defendant has the sum claimed *in his hands and that he has no real defence*. In *Re Benson, Elletson* v. *Pillers* (*x*), however, NORTH, J., ordered payment into court, although the trustee deposed that he had spent it.

ART. 89.—*Fraudulent Breach of Trust is a Crime.*

A trustee who *fraudulently* appropriates or disposes of the trust property in any manner inconsistent with the trust, is guilty of a misdemeanour, and is liable to a maximum punishment of seven years' penal servitude. No criminal proceedings can, however, be instituted without the sanction of the Attorney- or Solicitor-General, or (if civil proceedings have been commenced) of the judge of the court wherein they have been commenced (*y*). The fact that a breach of trust is a crime does not affect the validity of any civil proceeding, nor any agreement for restoration of the trust property (*z*).

L.J., p. 353. The subsequent case of *Nutter* v. *Holland*, [1894] 3 Ch. 408, was an application by originating summons under Ord. 55, r. 3. See also *Crompton and Evans' Union Bank* v. *Burton*, [1895] 2 Ch. 711.

(*t*) See last note.

(*u*) (1878) 8 Ch. D. 148.

(*x*) [1899] 1 Ch. 39.

(*y*) 24 & 25 Vict. c. 96, s. 80.

(*z*) *Ib.*, s. 86.

CHAPTER II.

PROTECTION ACCORDED TO TRUSTEES IN CASE OF BREACH OF TRUST.

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Art. 90.—*General Protection where they have acted Reasonably and Honestly.*

If it appears to the court that a trustee (*a*) is or may be personally liable for any breach of trust, but,

(a) has acted honestly;

(b) has acted reasonably;

(c) and ought fairly to be excused for the breach or for omitting to obtain the directions of the court in the matter in which he committed such breach,

then the court may relieve him, either wholly or partly, from personal liability for the same (*b*). The onus of proving honesty and reasonableness is cast upon the trustee (*c*), and is a question of fact depending on the circumstances of each case, no general principle or rule being possible (*d*).

(*a*) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3. It includes a judicial trustee.

(*b*) *Ib.*; and see *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373. The Act is retrospective. The relief may be given without the Act being pleaded: *Singlehurst* v. *Tapscott Steamship Co.*, [1899] W. N. 133.

(*c*) *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 583.

(*d*) *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; *Re*

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Act requires reasonableness as well as honesty.

This is a statutory rule introduced for the first time in the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35). It is not confined to judicial trustees, but is equally applicable to all trustees and is retrospective (*e*). It will be perceived that all three circumstances must co-exist to entitle a trustee to the benefit of the section, viz., he must have acted (1) honestly, and (2) reasonably (honest folly is not excused (*f*)), and (3) ought reasonably to be excused, etc. (*g*).

Examples of unreasonable conduct.

Thus, where the breach of trust consists in investing the trust funds upon insufficient mortgage security, *primâ facie* the requirements of s. 8 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as to the employment of an independent surveyor constitute a standard by which the reasonable conduct is to be judged: although non-compliance with those requirements is not necessarily a fatal obstacle to an application for relief. It is also a matter of consideration whether the trustee would have acted in the same way if he had been lending money of his own. Where, therefore, the trustee acted on the valuation of a valuer employed by the solicitor *who acted for the mortgagors also*, and the valuation in one case merely stated the amount for which the property was a good security, without stating the value of the property itself, and in another, although the value was stated, the sum advanced exceeded two-thirds of that value, it was held that no relief could be given to the trustee (*h*).

So, again, where the trustee invested the trust fund on the security of a second mortgage he was not excused under this section (*i*).

So it has been held that a trustee does not act reasonably (however honest he may have been) in allowing his co-trustee to receive trust money without inquiry as to its application (*k*); or in allowing his co-trustee to act without check or inquiry (*l*), even where he is a solicitor who transacts the trust business (*m*).

Barker, Ravenshaw v. *Barker*, (1898), 77 L. T. 712; *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 583.

(*e*) See s. 3 of the Act.

(*f*) *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; *Re Barker, Ravenshaw* v. *Barker* (1898), 77 L. T. 712; *Re Stuart, Smith* v. *Stuart*, [1897] 2 Ch. 583.

(*g*) *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373.

(*h*) *Re Stuart, Smith* v. *Stuart*, *supra*.

(*i*) *Chapman* v. *Browne*, [1902] 1 Ch. 785.

(*k*) *Wynne* v. *Tempest* (1897), 13 T. L. R. 360.

(*l*) *Re Second East Dulwich, etc., Building Society* (1899), 68 L. J. Ch. 196.

(*m*) *Re Turner, Barker* v. *Ivimey*, *supra*; *Williams* v. *Byron* (1901), 18 T. L. R. 172.

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However, the above cases, and those which follow, must only be taken as examples of the general trend of judicial opinion; for, in the words of Byrne, J., it is "impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and each case must depend upon its own circumstances" (*n*).

Examples of reasonable conduct.

On the other hand, a mistake of law in consequence of which leaseholds were sold, although there was no power of sale, has been held to be reasonable and excusable (*o*); and so has the payment by executors to their solicitor of money for the specific purpose of paying debts and administration expenses, which the solicitor misappropriated (*p*). Wilful default in not suing a debtor to the estate has been excused, where the trustee had reasonable grounds for believing that proceedings would have been ineffectual (*q*); and also where the debt was small, and he reasonably believed that the debtor was a man of good credit, and that, having regard to the testator's will, he was not bound to take proceedings (*r*).

So where a testator left an estate of £22,000, and it appeared that his debts only amounted to £100 or so, it was held that the executor acted reasonably in paying the widow an immediate legacy of £300, and in permitting her (under the trusts of the will) to receive so much of the income of the estate as was necessary for the maintenance of herself and family, before advertising for claims, although it subsequently turned out that there was a large claim for fraudulent misappropriation of rents received and not accounted for by the testator, which caused his estate to be insolvent (*s*). But the executor was not excused for allowing the widow to take the income after the claimant had issued his writ; and, apparently, the learned judge (Romer, J.) felt considerable doubts as to whether he ought to have excused payment of income after the executor had notice of the claim.

Again, where a testator authorised his trustees to employ agents to act for them under his will and declared that they should be indemnified for the acts and omissions of such agents, it was held that, even if such words did not authorise them to pay money to their solicitor for the discharge of death duties

(*n*) *Per* Byrne, J., *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536, and *per* Romer, J., *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. at p. 524.

(*o*) *Perrins* v. *Bellamy*, [1898] 2 Ch. 521 (affirmed [1899] 1 Ch. 797).

(*p*) *Re Lord De Clifford, De Clifford* v. *Quilter*, [1900] 2 Ch. 707.

(*q*) *Re Roberts, Knight* v. *Roberts* (1897), 76 L. T. 479.

(*r*) *Re Grindey, Clews* v. *Grindey*, [1898] 2 Ch. 593.

(*s*) *Re Kay, Mosley* v. *Kay*, [1897] 2 Ch. 518.

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(which was doubtful), yet their conduct was honest and reasonable, and that they ought to be excused (*t*).

Honesty and reasonableness do not always suffice if court thinks the trustees nevertheless ought not to be excused.

It must not be assumed, however, that where a trustee has acted both honestly and reasonably he ought to be excused as a matter of course. Unless honesty and reasonableness are proved, "the court cannot help the trustees; but if both are made out, there is then a case *for the court to consider* whether the trustee ought fairly to be excused for the breach, looking at all the circumstances" (*u*). Therefore where the trustee is a joint stock company formed for the purpose of accepting trusteeships as a commercial undertaking and charging a commission, their position is widely different from that of a private gratuitous trustee; and if they are misled by their solicitor's advice they must, like other persons, be responsible for the negligence of their agents. And, again, even perhaps in the case of a private person who has honestly and reasonably acted on the ill-advice of his solicitor, yet if he abstains from recovering the loss from the solicitor (where the latter is responsible for negligence), the court will not excuse him (*u*).

ART. 91.—*Statute of Limitations.*

(1) "In any action or other proceeding against a trustee (*x*), or any person claiming through him (*y*), except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

(a) "All rights and privileges conferred by any

(*t*) *Re Mackay, Griesemann* v. *Carr*, [1911] 1 Ch. 300.

(*u*) *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373.

(*x*) Does not apply to a trustee in bankruptcy (*Re Cornish, Ex parte Board of Trade*, [1896] 1 Q. B. 99), but does apply to a director of a company (*Re Lands Allotment Co.*, [1894] 1 Ch. 616, and *Whitwam* v. *Watkin* (1898), 78 L. T. 188).

(*y*) This does not apply to an action against beneficiaries by third parties on the ground that they claim through a trustee (*Leahy* v. *De Moleyns*, [1896] 1 Ir. R. 206). As to concealed fraud, see *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143, and of trustees' agent, *Thorne* v. *Heard*, [1895] A. C. 495; *Re Fountaine, Fountaine* v. *Lord Amherst*, [1909] 2 Ch. 382.

statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: Art. 91.

(b) "If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding, in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession (*z*).

(2) "No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded."

PARAGRAPH (1).

State of the law before the Trustee Act, 1888.

Before 1888, no statute of limitations barred claims for breach of trust. Moreover, so far as land and rents were concerned, the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 25, expressly negatived the application of that Act

(*z*) As to when the statute begins to run in cases where the plaintiff has always been in possession, but acquires a new title, see *Mara* v. *Browne*, [1895] 2 Ch. 69, *sed quære*. Although this case was subsequently reversed ([1896] 1 Ch. 199), it was on another point.

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in the following words: "Provided always, that when any land or rent shall be vested in a trustee upon any *express* trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him to recover such land or rent, shall be deemed to have first accrued according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." Then s. 25 (2) of the Judicature Act, 1873 (36 & 37 Vict. c. 66), expressly enacted that "no claim of a *cestui que trust* against his trustee for *any property* held on an *express* trust or in respect of *any breach of such trust*, shall be held to be barred by any Statute of Limitations," which had the effect of extending s. 25 of the Real Property Limitation Act to trusts of personal estate (*a*). This was slightly modified by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, which enacted that as from the 1st of January, 1879, no money or legacy charged on land or rent shall though secured by an *express* trust, be recoverable except within the time within which it might have been recovered had there been no express trust (*b*).

The net result was that, prior to the Trustee Act, 1888, a trustee under an *express* trust could not plead any Statute of Limitations. But where the trust was not express (the meaning of which is discussed *infra*), he could apparently plead the Statutes of Limitation, either in a court of law or in a court of equity.

Effect of Trustee Act, 1888.

By s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), the first and second sub-sections of which are set out in the above article, the law was completely changed. The Act is not a model of lucid legislation, and no one has yet solved the mystery as to the meaning of paragraph (a) of sub-s. (1). It could not have been aimed at claims for the recovery of land or other property, or the proceeds thereof retained by the trustee personally (and excluded from the Act of 1833 by s. 25 of that Act) because such claims are again expressly excluded. Nor could it have been aimed at claims against purchasers from the trustee with notice of a breach of trust, because such claims are already provided for by s. 25 of the

(*a*) *Banner* v. *Berridge* (1881), 18 Ch. D. at p. 262.

(*b*) See *Re Davis, Evans* v. *Moore*, [1891] 3 Ch. 119; *Re Barker, Buxton* v. *Campbell*, [1892] 2 Ch. 491; *Williams* v. *Williams*, [1900] 1 Ch. 152; *Fearnside* v. *Flint* (1883), 22 Ch. D. 579; *Hughes* v. *Cole* (1884), 27 Ch. D. 231.

Act of 1833. Nor, it is conceived, could it have been intended to apply to actions for what may be called negligent breaches of trust, or breaches arising from mistake or the like, because such actions are for equitable wrongs *sui generis* neither arising out of tort or contract, and not falling within the provisions of any pre-existing Statute of Limitations (*c*); indeed, such claims are obviously intended to be provided for by paragraph (b). The conundrum proved too tough for Sir EDWARD FRY (*d*), but the Court of Appeal grappled with it in the subsequent case of *How* v. *Earl Winterton* (*e*), and expressed an opinion that there might be cases (such as a claim for an account) where the old statutes of limitation applied unless the claim was against a trustee; and RIGBY, L.J., hinted that where the trust was created by deed executed by the trustee, there might possibly be an action on the implied covenant by him to perform the trust, which would only be barred after twenty years. But this speculation appears to be quite inconsistent with the judgment of Lord ST. LEONARDS in *Adey* v. *Arnold* (*f*), where he pointed out that the mere fact of a trust being under seal does not create a specialty debt. "There is an obligation to perform certain trusts, which equity will enforce, but nothing on which to ground an action of covenant. This court will enforce a trust, but only *quâ* trust, and only so far as to make it fall within the rule which constitutes the claim under it a simple contract debt."

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But whatever may have been in the mind of the draftsman of the Act, it is clear that the general effect of the section is that, except in the three cases of (1) fraud, (2) retention of the property by the trustee, and (3) conversion by the trustee to his own use, the trustee is as much entitled to the protection of the several statutes of limitation as if actions or proceedings for breach of trust were enumerated in them (*g*). And so far no other period than six years has been applied.

General effect of the Act.

Thus trustees, in breach of trust, carried on a testator's business until the youngest child attained twenty-one in the year 1882, when they sold everything, and divided the proceeds between all the children. In 1890, one of these children commenced an action seeking to make the trustees liable for a loss incurred through carrying on the business. It was held, however, that it was not an action for a legacy to which twelve

Failure to convert according to imperative direction.

(*c*) See *Re Bowden, Andrew* v. *Cooper* (1890), 45 Ch. D. 444.
(*d*) *Ib.*
(*e*) [1896] 2 Ch. 626.
(*f*) (1852) 2 De G. M. & G. 432 at p. 438.
(*g*) *How* v. *Earl Winterton*, [1896] 2 Ch. 626; and see *Re Taylor, Atkinson* v. *Lord* (1900), 81 L. T. 812.

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years was a bar under 37 & 38 Vict. c. 57, s. 8, but an action for breach of trust to which no existing Statute of Limitations applied before 1889; and that, consequently, under the Act of 1888, s. 8 (1) (b), the lapse of six years was a bar (*h*).

The whole fund expended in maintenance.

Where property was held in trust for an infant on attaining twenty-one (which he did in 1880), and in 1892 he sued the trustee for an account, and the trustee deposed that he had (which was not contradicted) expended the entire fund in the maintenance and education of the infant, it was held that the Act of 1888 barred any claim to an account or other relief (*i*).

Payment of capital to life tenant.

In one case a testator's estate was divisible into fourths. He gave one-fourth to each of his three executors absolutely, and directed them to retain the remaining fourth upon trust for his daughter for life with remainder in trust for her children. The executors paid the daughter's share to her instead of retaining it. More than six years after her death one of her children sued them for the breach of trust. Held that the trustees were originally liable as trustees and not as executors, and that therefore the claim was barred at the end of six years from the death of the life tenant (*k*).

Effect where tenant for life barred, but remainderman not barred.

The statute runs from the breach as against the beneficiary in possession. Thus, where the breach consisted of an investment on insufficient mortgage security, the tenant for life was barred at the expiration of six years *from the date of the mortgage*, although the remainderman (who was co-plaintiff) was entitled to an order on the trustees to replace the loss (*l*). In such cases when the loss is replaced by the trustees, they are entitled to receive the income of it during the life of the tenant for life (*l*); but until they have replaced the *whole loss*, the income has to be accumulated (*m*).

Payment of income to life tenant not an acknowledgment that capital is intact, nor are accounts kept by the solicitors to the trust for the trustees.

The more recent case of *Re Fountaine, Fountaine* v. *Lord Amherst* (*m*) is of a somewhat similar character, but it also decided an additional point, viz., whether the payment of full income to the tenant for life is an acknowledgment that the capital is intact, so as to take the case out of the Statutes of Limitation (all of which negative the running of the statute where part payments or acknowledgments of the plaintiff's right have been given). It was decided by the Court of Appeal that payment of income could not possibly be construed as an acknowledgment as to the capital. As FARWELL, L.J., put it,

(*h*) *Re Swain, Swain* v. *Bringeman*, [1891] 3 Ch. 233.
(*i*) *Re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304.
(*k*) *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176.
(*l*) *Re Somerset, Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.
(*m*) *Re Fountaine, Fountaine* v. *Lord Amherst*, [1909] 2 Ch. 382.

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"The defence is to be treated as if it were a plea of the Statute of Limitations pleaded at common law to an action for money had and received. Take an action at common law by a person entitled to an annual sum for arrears of that annual income. No part payment on account of any of these annual sums could possibly be read as a promise to pay the principal, because the plaintiff is not entitled to the principal. . . . The effect of the argument would be to deprive innocent trustees (for s. 8 only applies to innocent trustees) of the very benefit which the legislature intended to give them." By the same case it was decided that accounts kept by the solicitors to the trustees, as between them and their clients, did not operate as acknowledgments that the capital falsely stated therein to be intact was in fact so.

Applicable to a claim for accounts.

The Act is applicable to a claim for accounts to the extent that the plaintiff cannot pick holes in the account for more than six years before action (*n*). Thus where trustees had for many years paid an annuity without deducting income tax (which they had paid on the entire income of the estate) it was held that they could only be called upon to recoup to the persons entitled to the income of the estate the tax which the annuitant ought to have borne for six years before the action (*o*).

Defendant retaining the trust property cannot plead the statute.

Where a husband forcibly deprived a wife of a legacy given to her for her separate use, and retained it until his death, it was held that his executors could not plead the statute in answer to an action by the wife. For the husband took the property with notice of the trust affecting it, and was, therefore, in the position of a trustee who retained possession of the trust property (*p*).

Fraud or fraudulent breach of trust.

It will be perceived that the Act has no application where "the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." This, however, means fraud to which the trustee was *actually* a party, and does not apply to the fraud of his agent or solicitor (*q*), unless he

(*n*) *How* v. *Earl Winterton*, [1896] 2 Ch. 626. For form of order, as subsequently amended, see S. C., as reported in 79 L. T. 344, n; and *Re Davies, Ellis* v. *Roberts*, [1898] 2 Ch. 142.

(*o*) *Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793.

(*p*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554. See *Re Tufnell, Byng* v. *Tufnell* (1902), 18 T. L. R. 705. See also *North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242, a case of misappropriation by a fiduciary agent entrusted with money for investment.

(*q*) *Thorne* v. *Heard*, [1895] A. C. 495; *Re Fountaine, Fountaine* v. *Lord Amherst*, [1909] 2 Ch. 382; and see also *Re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143.

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was aware of it, or, having become aware of it, concealed it from the beneficiaries (*r*).

How far the Act applies, where trustee has remotely benefited by breach.

The exceptions in s. 8 of the Act of 1888 do not prevent a trustee having the benefit of the statute, where a trust fund advanced on an insufficient security was in fact applied by the borrower in payment of a debt to his bankers, of whom the trustee was one (*s*).

How far former statutes affect resulting trusts.

It is by no means clear whether the statute has had any effect upon resulting trusts. In the case of resulting trusts of land or rents retained by the trustee, the question, before the Act of 1888, was (as above pointed out) whether they could be said to be *express* trusts within the meaning of the 25th section of the Act of 1833, and with regard to personal estate so retained whether they are *express* trusts within s. 25 (2) of the Judicature Act, 1873. With regard to this the courts did not construe the expression "express trusts" as being restricted to those actually *expressed*, but extended it to resulting trusts arising by reason of the trusts expressed not having exhausted the entire beneficial ownership, so that an ultimate equitable reversion remained in the settlor. On the other hand, they refused to apply the expression "express trust" to a resulting trust which depended on an expressed trust being illegal, on the ground that in that case the resulting trust was inconsistent with the trusts expressed. The following examples will perhaps elucidate this:—

Resulting trusts depending on illegality of express trust.

It has been held that trustees of a void charitable conveyance, if in possession for twelve years, gain a title by the ordinary Statute of Limitations, on the ground that the express trust was illegal, and that the resulting trust, although discoverable on the face of the settlement, *was inconsistent with it* (*t*).

Resulting trusts depending on absence of express trust.

But on the other hand, in *Patrick* v. *Simpson* (*u*), where there was a resulting trust depending, not on illegality, but on

(*r*) *Moore* v. *Knight*, [1891] 1 Ch. 547; and see also *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196.

(*s*) *Re Gurney*, *Mason* v. *Mercer*, [1893] 1 Ch. 590; and see *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Butler* v. *Butler* (1877), 7 Ch. D. 116; and *Whitney* v. *Smith* (1869), L. R. 4 Ch. 513.

(*t*) *Churcher* v. *Martin* (1889), 42 Ch. D. 312; *Re Lacy*, *Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149.

(*u*) (1889), 24 Q. B. D. 128, following *Salter* v. *Cavanagh* (1838), 1 Dru. & Wal. 668; and see *per* Lord CAIRNS, L.C., in *Cunningham* v. *Foot* (1878), 3 App. Cas. 974, at p. 984; but *cf. per* FRY, J., in *Sands to Thompson* (1883), 22 Ch. D. 614, at p. 617. But this seems to imply a knowledge of law (or equity) which is not very widespread.

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the absence of an express trust, it was held that the trustee could not retain the property and plead the statute; for the resulting trust was as obvious on the face of the settlement as if it had been expressed, and *was not inconsistent with it*.

Other constructive trusts.

However, a resulting or other constructive trust *depending upon evidence* outside the written instrument, was always within the Statutes of Limitation (*x*). Therefore a tenant for life of leaseholds who renews in his own name (*y*), or a mortgagee in possession (even although the mortgage be in the form of a trust (*z*)), is entitled to plead the statute and keep the property. But this does not apply to one who gets trust property from an express trustee with full notice of the trust, for such a person becomes *ipso facto* trustee of an express trust (*a*).

Trust apparently constructive but really express.

But, although, as a general rule, constructive trustees of this class can avail themselves of the statute whilst keeping the property for their own benefit, the mere fact that a person is called an *agent*, instead of a trustee, does not confer on him the statutory protection accorded to constructive trustees, if he was in fact expressly trusted with money or property *for a particular purpose*, for in that case he becomes an express trustee (*b*); and *à fortiori* is this so where he was the agent of an express trustee (*b*).

Question whether the Act of 1888 has altered the law with regard to resulting trusts.

The question still remains whether the Act of 1888 has extended the disability of *express* trustees continuing in possession of real or personal trust property to *all* trustees (*e.g.*, of resulting and constructive trusts) retaining possession of such property. Section 8 applies existing Statutes of Limitation to actions for breach of trust against "a trustee" (not necessarily an express trustee), "*except* where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the *trustee*, or previously received by the trustee or converted to his own use." These are merely words of exception, however, and appear to leave trustees under resulting trusts who still retain the trust property in precisely the same position as they were in before the Act. The Act clearly does not make any distinction between

(*x*) *Beckford* v. *Wade* (1805), 17 Ves. 87.

(*y*) *Petre* v. *Petre* (1853), 1 Drew. 371.

(*z*) *Locking* v. *Parker* (1872), L. R. 8 Ch. 30.

(*a*) See *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561.

(*b*) See *Burdick* v. *Garrick* (1870), L. R. 5 Ch. 233; *Foley* v. *Hill* (1848), 2 H. L. Cas. 28; *Re Bell*, *Lake* v. *Bell* (1886), 34 Ch. D. 462; *Dooby* v. *Watson* (1888), 39 Ch. D. 178; *North American Land and Timber Co.* v. *Watkins*, [1904] 1 Ch. 242; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

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trustees of express and trustees of resulting trusts, but it does not interfere with the pre-existing law, whatever it may have been, with regard to the protection of resulting or constructive trustees before the Act. It is therefore conceived that the former cases as to what constituted an express trust within s. 25 of the Act of 1833 and s. 25 of the Judicature Act, 1873, are still of importance.

Charges.

Simple charges are expressly provided for by the old statute (*c*). Where, however, a charge is so coupled with a trust as to be in reality a trust itself, the old statute does not apply. For instance, where a testator charged his property with payment of his debts, and imposed an obligation on the devisee to exert himself *actively* in paying the debts, the case did not fall within the old statute (*d*); and it is conceived that it would not fall within the provisions of the new Act.

ART. 92.—*Concurrence of or Waiver or Release by the Beneficiaries.*

(1) A beneficiary who has assented to, or concurred in, a breach of trust (*e*), or who has subsequently released or confirmed it (*f*), or even acquiesced in it (*g*), cannot afterwards charge the trustees with it: Provided—

(a) that the beneficiary was *sui juris* at the date of such assent or release (*h*);

(b) that he had full knowledge of the facts, and knew what he was doing (*i*) and the legal effect

(*c*) (1833) 3 & 4 Will. IV., c. 27, s. 40.

(*d*) *Hunt* v. *Bateman* (1848), 10 Ir. Eq. Rep. 360.

(*e*) *Brice* v. *Stokes* (1805), 11 Ves. 319; *Wilkinson* v. *Parry* (1828), 4 Russ. 272; *Nail* v. *Punter* (1832), 5 Sim. 555; *Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 58; *Walker* v. *Symonds* (1818), 3 Swans. 1; *Evans* v. *Benyon* (1887), 37 Ch. D. 329.

(*f*) *French* v. *Hobson* (1803), 9 Ves. 103; *Wilkinson* v. *Parry*, *supra*; *Cresswell* v. *Dewell* (1863), Giff. 460.

(*g*) See *Broadhurst* v. *Balguy* (1841), 1 Y. & Coll. C. C. 16.

(*h*) *Underwood* v. *Stevens* (1816), 1 Mer. 712; *Leneh* v. *Lench* (1805), 10 Ves. 511; *Lord Montford* v. *Lord Cadogan* (1816), 19 Ves. 635.

(*i*) *Re Garnett*, *Gandy* v. *Macauley* (1885), 31 Ch. D. 1; *Buckeridge* v. *Glasse* (1841), Cr. & Ph. 126; *Hughes* v. *Wells* (1852), 9 Hare, 749; *Cockerell* v. *Cholmeley* (1830), 1 Russ. & Myl. 418; *Strange* v. *Fooks* (1863), 4 Giff. 408; *March* v. *Russell* (1837), 3 Myl. & Cr. 31; *Aveline* v. *Melhuish* (1864), 2 De G. J. & S. 288; *Walker* v. *Symonds* (1818), 3 Swans. 1.

thereof (*k*), and has had and retains the benefit of the breach (*l*) ; Art. 92.

(c) that no undue influence was brought to bear upon him to extort the assent or release (*m*).

(2) Where a beneficiary has obtained judgment in an action for breach of trust, or merely for general administration, it is not competent for him afterwards in that action to charge the trustees with breaches of trust committed before action and not alleged in the pleadings and proved at the trial, or even to ask for their removal on that ground (*n*) ; nor (*semble*) can a fresh action be brought for that purpose without the leave of the court (*o*).

Paragraph (1).

Distinction between right to plead concurrence and the right to indemnity.

The reader must carefully distinguish between the rules stated in the present article and those stated in Art. 94, *infra*. The present article relates exclusively to the circumstances under which a trustee may plead concurrence or assent, by way of defence to an action by the concurring or assenting beneficiary. Article 94, on the other hand, deals with the question as to the circumstances under which a trustee, who may possibly have no defence to an action for breach of trust, may yet call upon his co-trustee, or a concurring or assenting beneficiary, to indemnify him against the consequences of the breach.

Plaintiff party to breach of trust.

Stock was settled on a married woman for her separate use for life, with a power of appointment by will. The trustees, at the instance of the husband, sold out the stock and paid the proceeds to him. The wife filed a bill to compel the trustees to replace the stock, and obtained a decree, under which the trustees transferred part of the stock into court, and were allowed time to re-transfer the remainder. The wife then died, having by her will appointed the stock to the husband. He then filed a bill against the trustees, claiming the stock under the appointment, and praying for the same relief as his

(*k*) *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1 ; *Cockerell* v. *Cholmeley* (1830) 1 Russ. & Myl. 418 ; *Marker* v. *Marker* (1851), 9 Hare, 1 ; *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233 ; *Stafford* v. *Stafford* (1857), 1 De G. & J. 193 ; *Strange* v. *Fooks*, (1863) 4 Giff. 408.

(*l*) *Crichton* v. *Crichton*, [1895] 2 Ch. 853.

(*m*) *Bowles* v. *Stewart* (1803), 1 Sch. & Lef. 226 ; *Chesterfield* v. *Janssen* (1751), 2 Ves. Sen. 125.

(*n*) *Re Wrightson, Wrightson* v. *Cooke*, [1908] 1 Ch. 789

(*o*) *Ib.* at p. 800.

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wife might have had. It is needless to say that his claim was promptly rejected (*p*).

Release need not be under seal.

A formal release under seal, or an express confirmation, will, of course, estop a beneficiary from instituting subsequent proceedings; and it would seem that any positive act or expression indicative of a clear intention to waive a breach of trust will, *if supported by valuable consideration (however slight)*, be equivalent to a release (*q*). Thus, in *Ghost* v. *Waller* (*r*), a marriage being in contemplation, the lady executed a settlement of real estate under which, in default of issue and in the event of her surviving the husband, she became once more absolutely entitled to the settled property. Between the date of the settlement and the marriage a breach of trust took place through the fraud of the trustees' agent; but in consideration of the trustees undertaking to assist in getting back part of the loss from the agent's estate she through her solicitor agreed (merely by letter) "to give up all claims if she has any against her trustees for negligence." Years afterwards, after the death of the husband without issue, she sought to sue the trustees, but it was held that she had effectually released them.

Release may be inferred from conduct.

A release may be inferred from conduct. Thus, where a mother bequeathed property to her son and "prohibited him from setting up any claim on account of any error, irregularity, or impropriety in the execution of the trusts" of her father's will, it was held that having accepted the bequest the son could not sue the executor of his grandfather's will for employing part of the estate in his own business (*s*).

Acquiescence.

Even before the Trustee Act, 1888 (51 & 52 Vict. c. 59), a beneficiary under a declared trust might disentitle himself to relief by acquiescence. Thus, where a trustee, with the knowledge, but without the consent, of the beneficiary, accepted a reduced rent from a lessee of the trust property, and the beneficiary complained of the abatement, but took no steps to put an end to it for some years, it was held that, after the expiration of the lease, the trustee could not be called upon to make up the deficiency (*t*). And, generally speaking, the same result follows where, with full knowledge of a breach of trust,

(*p*) *Nail* v. *Punter* (1832), 5 Sim. 555.

(*q*) See *Stackhouse* v. *Barnston* (1805), 10 Ves. 453, *per* Sir W. GRANT; and *Farrant* v. *Blanchford* (1862), 1 De G. J. & S. 107.

(*r*) (1846) 9 Beav. 497.

(*s*) *Egg* v. *Devey* (1847), 10 Beav. 444.

(*t*) *McDonnel* v. *White* (1865), 11 H. L. Cas. 570; and see to same effect *Fletcher* v. *Collis*, [1905] 2 Ch. 24.

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the beneficiaries take no steps for many years (*u*). But where the delay can be reasonably explained, and the trustees have not been damnified by it, it is otherwise (*x*).

Acquiescence by reversioner.

It must not, however, be assumed that where a person entitled in reversion knows of a breach of trust, and protests, but takes no steps until he becomes entitled in possession, he thereby loses his remedy. In such cases it is apprehended that much must depend on the surrounding circumstances. For instance, where the reversioner was a young lady living with her mother, and the breach consisted in a loan by the trustees at the mother's request to her son (which the daughter objected to), it was held that seven years' delay was no evidence of acquiescence, having regard to her relation to the mother and brother and the difficulty of taking proceedings without a family quarrel (*y*). But where there were no similar circumstances a reversion was held to be barred after fourteen years' acquiescence (*z*).

Laches not always a bar.

Although long acquiescence is a bar to relief, the reason for so holding is that the fact of lying by for a considerable period is evidence of an *intention* or election on the part of the beneficiary not to exercise his strict rights. Consequently, where the circumstances are such as to afford no ground for any such presumption, acquiescence, however long, will be no bar to relief (1) unless the Statute of Limitations is applicable (*a*), or (2) unless under the circumstances it appears to be for the general convenience that a suit in respect of a long dormant grievance should be disallowed. In the latter case the court will refuse relief on the ground that "*Expedit reipublicæ ut sit finis litium.*" For instance, where a plaintiff seeks to set aside a purchase obtained from him by his solicitor, a delay of less than twenty years *may* bar the right to relief, if it would be inconvenient to grant it (*b*). So where, in an action for an account, the plaintiff, by lying by, has rendered it impossible or

(*u*) *Sleeman* v. *Wilson* (1871), L. R. 13 Eq. 36; and see also *Jones* v. *Higgins* (1866), L. R. 2 Eq. 538; *Broadhurst* v. *Balguy* (1841), 1 Y. & Coll. C. C. 16; *Newham* v. *Newham* (1822), 1 L. J. (O. S.) Ch. 23; *Griffiths* v. *Porter* (1858), 25 Beav. 236; *Davies* v. *Hodgson* (1858), 25 Beav. 177.

(*x*) See *Story* v. *Gape* (1856), 2 Jur. (N. S.) 706.

(*y*) *Phillipson* v. *Gatty* (1848), 7 Hare, 516.

(*z*) *Farrar* v. *Barraclough* (1854), 2 Sm. & G. 231; and see also *Bate* v. *Hooper* (1855), 5 De G. M. & G. 338; *Browne* v. *Cross* (1851), 14 Beav. 105; *Farrant* v. *Blanchford* (1862), 1 De G. J. & S. 107.

(*a*) See and consider *Re Cross*, *Harston* v. *Tenison* (1882), 20 Ch. D. 109.

(*b*) *Gresley* v. *Mousley* (1859), 4 De G. & J. 78; *Gregory* v. *Gregory* (1815), G. Cooper, 201.

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very inconvenient for the defendant to render the account, he will get no relief (*c*).

PARAGRAPH (1) (a).

Infants incapable of release or acquiescence.

An infant cannot lose his right to relief, either by concurrence or release; for the law presumes that he has not the requisite discretion to judge. Nor would this be in any way affected (at least it is so submitted) by the fact that he falsely represented himself to be of age, unless he thereby fraudulently caused the breach of trust of which he complains (*d*).

Married women, how far capable of releasing or acquiescing.

Even where a married woman is entitled to the fund for her separate use (either expressly or under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75)), without restraint on anticipation, the court looks with grave suspicion (*e*) upon a defence that she has concurred in or assented to a breach of trust, as will be seen *infra*, p. 507. And where it is not her separate property, of course she can in any event only concur by deed executed with her husband's consent and with all the formalities required by the statutes 3 & 4 Will. IV., c. 74, or 20 & 21 Vict. c. 57, as the case may be. But if *she is restrained from alienating or anticipating it* (*f*), she is not competent to consent to, or to release, a breach of trust at all; and her concurrence or release would, at all events before the passing of the Trustee Act, 1888 (51 & 52 Vict. c. 59), afford no protection to the trustee even if the breach had been procured by her fraud (*g*). However (as will be seen from Art. 94, *infra*), by s. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (which re-enacts s. 6 of the Act of 1888), the court may, *if it thinks fit*, impound the interest of a married woman restrained from alienation, who has instigated, or requested, or consented in writing to a breach of trust, for the purpose of indemnifying the trustee.

Danger of yielding to the requests of *femme covert*.

The danger incurred by trustees who listen to the supplications of married women who are restrained from anticipation

(*c*) See *per* Lord ALVANLEY, in *Pickering* v. *Lord Stamford* (1793) 2 Ves. Jun. 272; and see also *Clegg* v. *Edmonson* (1857), 3 Jur. (N. S.) 299; *Tatam* v. *Williams* (1844), 3 Hare, 347.

(*d*) See *Cory* v. *Gertcken* (1816), 2 Madd. 40; *Overton* v. *Banister* (1844), 3 Hare, 503; *Wright* v. *Snowe* (1848), 2 De G. & Sm. 321.

(*e*) But where she clearly consented to a breach she was always bound: see *Mant* v. *Leith* (1852), 15 Beav. 524.

(*f*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589.

(*g*) *Stanley* v. *Stanley*, *supra*; *Sharpe* v. *Foy* (1868), L. R. 4 Ch. 35; and see *Re Lush's Trusts* (1869), L. R. 4 Ch. 591; *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35; and *Brown* v. *Dimbleby*, [1904] 1 K. B. 28.

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was very vigorously pointed out by Lord LANGDALE in *Fyler* v. *Fyler* (*h*), in a passage which ought to be learnt by heart by every trustee. "We find," said his lordship, "a married woman throwing herself at the feet of the trustee, begging and entreating him to advance a sum of money out of the trust fund, to save her husband and her family from utter ruin, and making out a most plausible case for that purpose. His compassionate feelings are worked upon, he raises and advances the money; the object for which it was given entirely fails, the husband becomes bankrupt, and in a few months the very same woman who induced the trustee to do this, files a bill in the Court of Chancery to compel him to make good that loss to the trust. These are cases which, when they happen, shock everybody's feelings at the time; *but it is necessary that relief should be given in such cases; for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust could ever be preserved.*"

PARAGRAPH (1) (b).

Full knowledge of beneficiary essential.

Even a release under seal (and *à fortiori* mere concurrence or subsequent acquiescence) will not avail the trustee unless the beneficiary had full knowledge. Thus a release to a trustee has been set aside after the lapse of more than twenty years, and after the death of the trustee, on evidence of the plaintiff (corroborated by the tenor of the release) that it was executed in error, although no fraud was imputed (*i*).

So where, on the footing of a supposed illegitimacy, the title of a beneficiary to a trust legacy was disputed and denied by the trustee, and the former was thereby induced to accept from the trustee a smaller sum than that to which he was entitled under the will, and, by deed, to release the trustee from the payment of the legacy, the court would not permit the release to stand even after the lapse of more than twenty-five years (*k*).

Necessity of reciting actual breaches of trust in a deed of release.

For these reasons a release, where intended to cover known breaches of trust, must contain recitals showing fully and precisely the circumstances under which the breach took place,

(*h*) (1841), 3 Beav. 550.

(*i*) *Re Garnett, Gandy* v. *Macaulay* (1885), 31 Ch. D. 1; and see also *Sawyer* v. *Sawyer* (1885), 28 Ch. D. 595; and *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233.

(*k*) *Thomson* v. *Eastwood* (1877), 2 App. Cas. 215; and see *McDonnel* v. *White* (1865), 11 H. L. Cas. 570; *Dougan* v. *Macpherson*, [1902] A. C. 197; and *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A. C. 373.

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including the amount of the loss (if any), and that such circumstances did in fact amount to a breach of trust. If this be not done, the general words will be controlled and restricted in their operation by the recitals to the matters actually stated (*l*). Indeed it is the duty of the trustees to see that the beneficiary, who is about to execute a release, is properly advised as to his rights; and where the trustees rely on the beneficiary having been separately advised, they must *prove* that he did in point of fact employ a separate solicitor, and not merely some one nominated by the trustees or their solicitor (*m*).

Ignorance of beneficiary where he has had the advantage of the breach.

It seems that where a beneficiary has, for valuable consideration (*e.g.*, marriage) had the advantage of a breach of trust, but without any knowledge of the breach, he can sue the trustee without replacing the amount which he himself has received by reason of the breach. Thus, where part of the proceeds of trust funds misappropriated by a father were made subject to the marriage settlement of his son (a beneficiary in remainder who was ignorant of the source whence the property proceeded, and thought it was a gift from his father), it was held that the son's representatives were entitled to have his share of the trust funds replaced without deducting the value of the proceeds settled (*n*).

ART. 93.—*Protection against the Acts of Co-Trustee.*

(1) A trustee is not answerable for the receipts, acts, or defaults of his co-trustee (*o*), save only—

(a) where he *hands* the trust property to him without seeing to its proper application (*p*);

(b) where he allows him to *receive* the trust property without making due inquiry as to his dealing with it (*q*);

(*l*) *Lindo* v. *Lindo* (1839), 8 L. J. (N. S.) Ch. 284; *Ramsden* v. *Hylton* (1751), 2 Ves. Sen. 305; *Pritt* v. *Clay* (1843), 6 Beav. 503.

(*m*) *Lloyd* v. *Attwood* (1859), 3 De G. & J. 614.

(*n*) *Crichton* v. *Crichton*, [1896] 1 Ch. 870, reversing decision of NORTH, J., [1895] 2 Ch. 853.

(*o*) *Dawson* v. *Clarke* (1811), 18 Ves. 247; and as to settlements made since August 13th, 1859, see 22 & 23 Vict. c. 35, s. 31.

(*p*) *Walker* v. *Symonds* (1818), 3 Swans. 1; and *Bone* v. *Cook* (1824), McClel. 168. The case of *Re Fryer, Martindale* v. *Piequot* (1857), 3 Kay. & J. 317, merely turned upon a question of procedure, wilful default not having been pleaded.

(*q*) See *Wynne* v. *Tempest* (1897), 13 T. L. R. 360: *Brad-*

(c) where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution and redress, or to prevent the meditated wrong (*r*). Art. 93.

(2) Even in the above three cases he may be made irresponsible by express declaration in the settlement (*s*).

Thus, in the case of *Wilkins* v. *Hogg* (*t*), which now governs the subject, a testatrix, after appointing three trustees, declared that each of them should be answerable only for losses arising from his own default, and not for involuntary acts or for the acts or defaults of his co-trustees; and particularly, that any trustee who should pay over to his co-trustees, or should do or concur in any act enabling his co-trustees to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered liable by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to insurance companies for sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had invested it. This trustee having misapplied it, it was sought to make his co-trustees responsible; but Lord WESTBURY held that they were not, saying: "There are three modes in which a trustee would become liable according to the ordinary rules of law—first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. The framer of the clause under examination knew these three rules, and used words sufficient to meet all these cases. There remained, therefore, only personal misconduct, in respect of which a trustee acting under this will would be responsible. Leading case.

well v. *Catchpole* (*circa* 1711), 3 Swans. 78, n.; *Marriott* v. *Kinnersley* (1830), Taml. 470.

(*r*) *Millar's Trustees* v. *Polson* (1897), 34 Sc. L. R. 798.

(*s*) As to the whole of the article, see judgment of WESTBURY, L.C., in *Wilkins* v. *Hogg* (1861), 3 Giff. 116, 8 Jur. (N. S.) 25; and see also *Dix* v. *Burford* (1854), 19 Beav. 409; *Mucklow* v. *Fuller* (1821), Jac. 198; *Brumridge* v. *Brumridge* (1858), 27 Beav. 5.

(*t*) *Supra*.

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He would still be answerable for collusion if he handed over trust money to his co-trustee with reasonable ground for believing or suspecting that that trustee would commit a breach of trust; but no such case as this was made by the bill."

In the more recent case of *Pass* v. *Dundas* (*u*), the settlement contained a similar protective clause to that stated in the last illustration. Part of the trust estate consisted of a business, and one of the trustees authorised his co-trustee to draw money out of the bank for the purposes of the business, which money the co-trustee misapplied. It was held that, under the words of the clause, the trustee was protected.

Above protective clause only applies to acts of co-trustees and not of agents.

These clauses do not, however, protect a trustee against the acts of an agent who is *not a co-trustee* (*x*).

ART. 94.—*Trustees generally entitled to Contribution inter se, but may be entitled to be Indemnified by Co-Trustee or Beneficiary who instigated Breach.*

(1) As a general rule, where several trustees have been guilty of a breach of trust not amounting to actual fraud (*y*), those who are obliged to pay will be entitled to exact contribution from the others (*z*), notwithstanding that the former may be more blameworthy, or that the loss caused by the breach only occurred after the death or retirement of the trustee from whom contribution is sought (*a*). Provided nevertheless that:

(a) where one of the trustees who was guilty of the breach is, or subsequently becomes (*b*), also a beneficiary, he will in general be unable to claim contribution from his co-trustees until he has made good to the trust estate any loss

(*u*) (1880) 29 W. R. 332.

(*x*) *Rae* v. *Meek* (1889), 14 App. Cas. at p. 572; *Wyman* v. *Paterson*, [1900] A. C. 271 (both Scotch cases but equally applicable to the English law: see latter case at p. 279).

(*y*) *Att.-Gen.* v. *Wilson* (1840), Cr. & Ph. at p. 28; see *Lingard* v. *Bromley* (1812), 1 Ves. & B. 114; *Tarleton* v. *Hornby* (1835), 1 Y. & Coll. Ex. 336.

(*z*) *Lingard* v. *Bromley*, *supra*; *Birks* v. *Micklethwait* (1864), 33 Beav. 409; *Att.-Gen.* v. *Daugars* (1864), 33 Beav. 621. This claim to contribution is now considered a specialty debt (19 & 20 Vict. c. 97).

(*a*) *Jackson* v. *Dickinson*, [1903] 1 Ch. 947.

(*b*) *Evans* v. *Benyon* (1887), 37 Ch. D. 329.

sustained by reason of the breach over and above his own beneficial interest (*c*); and

(b) where one of several trustees has been guilty of fraud, or has been the confidential solicitor of his co-trustees, he may have to indemnify them and to bear the *whole loss* himself (*d*).

(2) But the above rule gives no right of contribution to a trustee who alone committed a breach of trust, against a new trustee (even a beneficiary) subsequently appointed, notwithstanding that if he had insisted upon the matter being put right on his appointment, no loss would have occurred.

(3) "Where a trustee commits a breach of trust at the instigation or request (*e*) or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, (and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation), make such order as to the court seems just, for impounding all or any part of the interest of such beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him" (*f*).

(4) Such contribution or indemnity may be ordered in the action in which the liability for breach of trust is established without any counter-claim (*g*).

Paragraph (1).

Contribution between trustees.

A., one of the trustees of a settlement, allowed his co-trustee B. to have the trust fund to invest. B. handed it to an "outside broker," who misappropriated parts of it:—*Held*, that

(*c*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, *per* A. L. Smith, L.J.

(*d*) *Bahin* v. *Hughes* (1886), 31 Ch. D. 390; *Blyth* v. *Fladgate*, [1891] 1 Ch. at p. 365; *Fetherstone, H.* v. *West* (1871), Ir. R. 6 Eq. 86; *Lockhart* v. *Reilly* (1856), 25 L. J. Ch. 697; *Thompson* v. *Finch* (1856), 22 Beav. 316; 8 De G. M. & G. 560; and see *Butler* v. *Butler* (1877), 7 Ch. D. 116; *Wynne* v. *Tempest*, [1897] 1 Ch. 110.

(*e*) The *request* need not be in writing, although a mere *consent* must be: *per* Kekewich, J., in *Griffith* v. *Hughes*, [1892] 3 Ch. 105; and *per* Lindley, L.J., in *Re Somerset*, *Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231.

(*f*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45.

(*g*) *Priestman* v. *Tindall* (1857), 24 Beav. 244; *Re Holt*, *Holt* v. *Holt*, [1897] 2 Ch. 525.

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both trustees were *in pari delicto*, and that B. was, therefore, entitled to contribution from A., although he had taken a more active part in the transaction which led to the loss; and that, as between the trustees, time did not begin to run under the Statute of Limitations until the judgment declaring them liable for breach of trust (*h*).

Lien of trustee for contribution, on costs awarded to co-trustee.

So where a large balance was found to be due jointly from a trustee and the representatives of a deceased co-trustee (*i*), but costs were given to both out of the trust estate, it was held (the estate of the deceased co-trustee being insolvent, and therefore unable to contribute) that the surviving trustee, upon paying the whole of the loss, was entitled to a lien for half of it on the costs awarded to the representatives of his deceased co-trustee (*k*).

PARAGRAPH (1) (a).

Trustee-beneficiary generally bound to indemnify co-trustee to extent of his beneficial interest.

This sub-paragraph is well illustrated by the case of *Chillingworth* v. *Chambers* (*l*), where the whole of the authorities were elaborately discussed by the Court of Appeal. There the plaintiff and defendant, the trustees of a will, had committed breaches of trust by investing on insufficient securities, bearing a high rate of interest, and were declared to be jointly and severally liable to make good the loss to the trust estate. The plaintiff trustee, after some and before others of the investments in question had been made, became also beneficially entitled to a share in the trust estate, as the successor in title of his deceased wife. He claimed to be entitled to contribution from the defendant trustee on the ground that they were both *in pari delicto*. The court, however, rejected his claim, on the ground that the rule as to the right of a trustee to contribution from his co-trustee for loss occasioned to the estate by a breach of trust for which both are equally to blame, does not apply

(*h*) *Robinson* v. *Harkin*, [1896] 2 Ch. 415. As to contribution by directors of a company where one of them has been made responsible for a breach of trust in misapplying the company's assets, see *Ramskill* v. *Edwards* (1885), 31 Ch. D. 100.

(*i*) It need scarcely be pointed out that the representatives of a deceased trustee are not liable for a breach of trust committed after his death, where he has left the trust fund in a proper state of investment (*Re Palk*, *Chamberlain* v. *Drake* (1892), 41 W. R. 28). Of course they may be liable where he has not so left it (*Gibbins* v. *Taylor* (1856), 22 Beav. 344).

(*k*) *Fletcher* v. *Green* (1864), 33 Beav. 426; and see also *Collings* v. *Wade*, [1903] 1 Ir. R. 89, where the insolvent trustee subsequently died a rich man.

(*l*) [1896] 1 Ch. 685. See also *Moxham* v. *Grant*, [1900] 1 Q. B. 88, where directors of a company were held entitled to indemnity from shareholders who had been paid capital *ultra vires*.

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where one of them is also a beneficiary, until he has made good any loss sustained over and above his own beneficial share in the property. In that case, the rule to be applied is, that under which the *share or interest* of a trustee-beneficiary who has assented to a breach of trust has to bear the whole loss; and the trustee who is a beneficiary must therefore indemnify his co-trustee to the extent of his share or interest in the trust estate, and not merely to the extent of the benefit he has received. Lindley, M.R., in giving judgment, made the following important observations: "The plaintiff and the defendant being *in pari delicto*, the plaintiff's right as trustee to contribution from the defendant as co-trustee to the extent of one half the loss is established by a long series of authorities, of which it is only necessary to mention *Lingard* v. *Bromley* (*m*) and *Bahin* v. *Hughes* (*n*). On the other hand the right of the defendant as trustee to be indemnified out of the share of the plaintiff as *cestui que trust* against the consequences of a breach of trust committed at his request and for his benefit is equally indisputable. It was treated by Lord Eldon as clear law in his day, that a *cestui que trust* who concurs in a breach of trust is not entitled to relief against his co-trustee in respect of it: see *Walker* v. *Symonds* (*o*). In Lewin on Trusts, 8th ed., p. 918, 9th ed., p. 1053, many other authorities will be found to the same effect; and Lord Eldon's statement of the law was distinctly approved and followed in *Farrant* v. *Blanchford* (*p*). Moreover it was decided, in *Evans* v. *Benyon* (*q*), that this doctrine applies to a person who becomes a *cestui que trust* after his concurrence. Further, in *Butler* v. *Carter* (*r*) Lord Romilly stated distinctly, that where one of two trustees was himself a *cestui que trust*, he could not call upon his co-trustee to replace stock which they had both permitted to be misapplied. These cases are all based on obvious good sense; for if I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw the blame on him. Whatever our liabilities may be to other people, still, as between him and me, the loss clearly ought to fall on me. Whether I am solely entitled to the property, or have only a share or a limited interest, still the loss which I sustain in respect of my share or interest must clearly be borne by me, not by him . . . The plaintiff contended on the authority of *Raby* v. *Ridehalgh* (*s*) that the plaintiff's liability as *cestui que*

(*m*) (1812) 1 Ves. & B. 114.
(*n*) (1886) 31 Ch. D. 390.
(*o*) (1818) 3 Swans. 1, 64.
(*p*) (1863) 1 De G. J. & S. 107.
(*q*) (1887) 37 Ch. D. 329.
(*r*) (1868) L. R. 5 Eq. 276, 281.
(*s*) (1855) 7 De G. M. & G. 104.

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trust to indemnify the defendant, and the extent of the plaintiff's inability to obtain relief against the defendant, was limited, not by the amount of the plaintiff's share in the trust estate, *but by the benefit derived by the plaintiff from the breach of trust.*" [His lordship then showed that that case was no authority for such a proposition, and continued:] "Suppose a *cestui que trust* in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other *cestui que trust* compels them to make the loss good? *I apprehend not; and yet in the case supposed, the* cestui que trust *in remainder might not himself have derived any benefit at all from the breach.*" Lord Justice KAY in the same case does not seem to have been willing to commit himself to the extent of the words above italicised (*t*); but decided that, as in that case, the plaintiff *had* received some benefit from the breach, he was primarily liable not merely to the extent of that benefit, but to the extent of his whole share.

PARAGRAPH (1) (b).

Cases in which one trustee is bound to indemnify his less guilty co-trustees.

In *Bahin* v. *Hughes* (*u*), COTTON, L.J., said: "On going into the authorities there are very few cases in which one trustee who has been guilty with a co-trustee of breach of trust, and held responsible, has successfully sought indemnity as against his co-trustee. *Lockhart* v. *Reilly* (*x*) and *Thompson* v. *Finch* (*y*) are the only cases which appear to be reported. Now, in *Lockhart* v. *Reilly*, it appears from the report of the case in the Law Journal, that the trustee by whom the loss was sustained had been not only trustee, but had been and was a solicitor, and acting as solicitor for himself and his co-trustee; and it was on his advice that Lockhart had relied in making the investment which gave rise to the action of the *cestui que trust* (*z*). . . . Of course where one trustee has got the money into his own hands, and made use of it, he will be

(*t*) *Chillingworth* v. *Chambers*, [1896] 1 Ch., top of p. 707.

(*u*) (1886) 31 Ch. D. 390, 394; and see also *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

(*x*) (1856) 25 L. J. Ch. 697.

(*y*) (1856) 22 Beav. 316, 8 De G. M. & G. 560; but see also *Warwick* v. *Richardson* (1842), 10 Mee. & W. 284.

(*z*) See also to same effect *Re Turner, Barker* v. *Ivimey*, [1897] 1 Ch. 536; and *Re Linsley, Cattley* v. *West*, [1904] 2 Ch. 785, where WARRINGTON, J., made a solicitor-trustee indemnify his co-trustee against costs, merely because he was negligent in furnishing accounts to the beneficiaries.

liable to his co-trustee to give him an indemnity (*a*). Now I think it wrong to lay down any limitation of the circumstances under which one trustee would be held liable to the other for indemnity, both having been held liable to the *cestui que trust*; but so far as cases have gone at present, relief has only been granted against a trustee *who has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation which will justify the court in treating him as solely liable for the breach of trust.*" Art. 94.

Solicitor-trustee not necessarily liable to indemnify co-trustee.

It must not, however, be assumed from this judgment that a solicitor-trustee who advises the commission of a breach of trust is necessarily bound to indemnify his co-trustees; for where the co-trustee has himself been an active participator in the breach of trust, and has not participated in it merely in consequence of the advice and control of the solicitor, he will have no right to be indemnified. Thus, where one of the trustees (a lady) joined in the importunities of her brother, and thus induced her co-trustee (a solicitor) to commit a breach of trust for the brother's benefit, it was held that she was not entitled to call upon the solicitor-trustee for an indemnity (*b*).

Even where trustee incidentally benefits by breach, not always liable to indemnity co-trustee.

Although, as stated by Lord Justice Cotton in *Bahin* v. *Hughes* (*c*), a trustee who has got the trust money into his own hands and made use of it, will in general be liable to indemnify his co-trustee, yet he will not have to do so where his breach of trust is only remotely connected with the loss; unless, of course, he was guilty of actual fraud. Thus the fact of a borrower of trust funds on insufficient security repaying out of the money so borrowed a debt due from him to one of the trustees is not, of itself, sufficient to render the trustee accepting repayment liable, the borrower being under no restriction as to its application (*d*).

Paragraph (2).

The primary liability of a trustee-beneficiary for a breach of trust, is confined to breaches committed with his privity, and does not extend to the case where his only breach consists in failing to take steps to put the original breach right when he subsequently becomes a trustee, even although, if he had done

(*a*) See *Fetherstone, H.* v. *West* (1871), Ir. R. 6 Eq. 86.

(*b*) *Head* v. *Gould*, [1898] 2 Ch. 250.

(*c*) (1886) 31 Ch. D. 390.

(*d*) *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685; *Butler* v. *Butler* (1877), 7 Ch. D. 116; and see also *Whitney* v. *Smith* (1869), L. R. 4 Ch. 513.

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so, there would probably have been no loss suffered. In such a case the trustee who committed the original breach and the subsequently appointed trustee-beneficiary who merely failed in his duty of not insisting on the breach being set right are not *in pari delicto*. Both may be liable to the other beneficiaries, but the original breach is the *fons et origo mali*, and the original trustee who alone committed it is primarily responsible as between himself and the trustee subsequently appointed. This was decided by WARRINGTON, J., in *Re Fountaine, Fountaine* v. *Lord Amherst*, in 1908 (in which the present writer was counsel), but the case is not reported on this point (which was not appealed). The facts are, however, reported in relation to other points (which were appealed) in [1909] 2 Ch. 382.

PARAGRAPH (3).

Breaches of trust committed at the instigation, or request, or with consent of beneficiaries.

Section 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (which is set out verbatim in paragraph (3) of the present article), merely gave legislative sanction to the former rule of the court (*e*) with the following slight extensions, viz., it conferred on the court power (1) to impound the interest of a married woman although restrained from anticipation, and (2) to extend the relief to cases where the beneficiary has merely passively "consented in writing" to the breach as distinguished from cases where he actively requested or instigated it (*f*). The Act, therefore, did not operate to curtail or affect the previously existing rights and remedies of trustees, nor alter the law except by giving greater power to the court to protect trustees (*f*).

To render beneficiary liable to indemnify trustee, he must have known that act was a breach of trust.

In order to make a beneficiary liable under s. 45 of the Act of 1893, he must not only have instigated or requested or consented in writing to the breach, but must also have known the facts which would render what was done a breach of trust. Thus, where a tenant for life undeniably requested trustees to invest the trust fund on a certain security, but it did not appear that he intended to be a party to a breach of trust, and in effect he left it to the trustees to determine whether the security was a proper one for the sum to be advanced, it was held that the trustees could not impound his life interest to

(*e*) *Fletcher* v. *Collis*, [1905] 2 Ch. 24; and see *Hanchett* v. *Briscoe* (1856), 22 Beav. 496.

(*f*) With regard to the procedure where the plaintiff is an innocent beneficiary and the trustee desires to claim indemnity against another beneficiary, see *Re Holt, Holt* v. *Holt*, [1897] 2 Ch. 525.

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make good the breach (*g*). But if the tenant for life had been proved to have *knowingly requested a breach of trust*, the decision would (even before the statute) have been otherwise (*h*); and in a more recent case it has been held that, quite apart from the statute, a tenant for life who consents to the trustee handing over the capital to his (the life tenant's) wife, cannot, neither can his trustee in bankruptcy, deny the right of the trustee who has had to replace the capital, to impound the income by way of indemnity during the life of the life tenant; and this notwithstanding that the consent was not in writing (*i*).

No right to impound in order to make good the trustee's beneficial interest.

The right of a trustee to impound the interest of beneficiaries who have instigated a breach is, however, only applicable for the purpose of indemnifying him against the claims of other beneficiaries. It does not extend to indemnify him against other losses. Thus, where a trustee subsequently became entitled to share in the trust fund as one of the next of kin of a beneficiary, it was held that he could not call on a beneficiary at whose instigation the breach was committed to indemnify him against loss as such next of kin, even although the beneficiary had given him an express covenant of indemnity (*k*). It is submitted that the same principle would apply *à fortiori* to the statutory right, which is not so strong in favour of the trustee as an express covenant.

Guilty knowledge must be conclusively proved in the case of a married woman.

In the case of a married woman, the court will require stricter proof of her guilty knowledge than in the case of a man. Even where she was not restrained from anticipation, and the charge by way of indemnity was express and not merely statutory, it was held that her position was very different to that of a male beneficiary. Fry, L.J., said (*l*): "Before a trustee can claim the benefit of any charge or right of retainer against the interest of a married woman in the fund, it appears to us to be reasonable that he should show that the charge or right of retainer was created by her with a full knowledge of all the circumstances. It is probable that, in the case of a man of full years, the court would presume him so to be acting; but in the case of a *feme covert*, we do not think the presumption exists in favour of the trustee, whose primary duty it was to

(*g*) *Re Somerset*, *Somerset* v. *Lord Poulett*, [1894] 1 Ch. 231; *Mara* v. *Browne*, [1895] 2 Ch. 69.

(*h*) *Raby* v. *Ridehalgh* (1855), 7 De G. M. & G. 104; *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*i*) *Fletcher* v. *Collis*, [1905] 2 Ch. 24.

(*k*) *Evans* v. *Benyon* (1887), 37 Ch. D. 329; *cf. Orrett* v. *Corser* (1855), 21 Beav. 52.

(*l*) *Sawyer* v. *Sawyer* (1885 28 Ch. D. 595.

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protect the fund for her benefit. . . . All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, as far as we are aware, cases in which she has been an actual actor in the transaction herself; such are the cases of *Crosby* v. *Church* (*m*), *Clive* v. *Carew* (*n*), and *Pemberton* v. *M'Gill* (*o*). In no case, so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust." (*p*).

Where married woman restrained from alienation.

Indeed, where the married woman is restrained from alienation, it would seem that the statutory power of the court to impound her interest (which is merely discretionary) will only be exercised in the plainest cases, as, for instance, where she has been guilty of fraud; and never, apparently, where the trustee knew that he was committing a breach of trust and yielded weakly to her solicitations (*q*).

Where trustees have wrongfully parted with trust fund to trustees of subsidiary settlement.

In any case where trustees, at the request of a beneficiary, advance the trust fund to her, with notice that she has settled it by another settlement, they cannot impound her income under such other settlement, because that income is not the interest of a beneficiary in the trust estate *of which they are the trustees* (*r*).

(*m*) (1841) 3 Beav. 485.

(*n*) (1859) 1 Johns. & H. 199.

(*o*) (1860) 1 Dr. & Sm. 266.

(*p*) *Quære* see *Hanchett* v. *Briscoe* (1856), 22 Beav. 496.

(*q*) *Ricketts* v. *Ricketts* (1891), 64 L. T. 263; *Bolton* v. *Curre*, [1895] 1 Ch. 544; *Re Holt, Holt* v. *Holt*, [1897] 2 Ch. 525. But *cf. Griffith* v. *Hughes*, [1892] 3 Ch. 105, where KEKEWICH, J., exercised the power, and *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648, where KENNEDY, J., seemed to hint that he might have exercised the power if the lady had been party to the action.

(*r*) *Ricketts* v. *Ricketts*, *supra*.

CHAPTER III.

LIABILITY OF THIRD PARTIES AND BENEFICIARIES.

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ART. 95.—*Liability of Third Parties or Beneficiaries who are Parties to a Breach of Trust.*

(1) All persons who knowingly (*a*) meddle with trust funds, or mix themselves up with a breach of trust, are equally liable with the trustees; and equally subject to the restrictions on the right of pleading the Statutes of Limitation (*b*).

(2) Where a person who is indebted to the trust estate (*c*) (whether by reason of being mixed up in a breach of trust or in respect of a simple debt) has an equitable interest in the trust property (whether original or derivative (*d*)), it may be impounded to make good his liability to the trust estate. This right is available not only against him personally (*e*), but also against all persons claiming under him, including

(*a*) See *Re Kingston Cotton Mill Co.* (No. 2), [1896] 1 Ch. 331; *Williams* v. *Williams* (1881), 17 Ch. D. 437.

(*b*) *Re Barney, Barney* v. *Barney*, [1892] 2 Ch. 265; *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587; *Morgan* v. *Elford* (1876), 4 Ch. D. 352; *Lee* v. *Sankey* (1872), L. R. 15 Eq. 204; *Rolfe* v. *Gregory* (1865), 11 Jur. (N. S.) 98; *Raekham* v. *Siddall* (1850), 1 Mac. & G. 607; and see *Lyell* v. *Kennedy* (1889), 14 App. Cas. at p. 459.

(*c*) *Re Taylor, Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*d*) *Jacubs* v. *Rylance* (1874), L. R. 17 Eq. 341; *Doering* v. *Doering* (1889), 42 Ch. D. 203; *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685.

(*e*) *Woodyatt* v. *Gresley* (1836), 8 Sim. 180; *Fuller* v. *Knight* (1843), 6 Beav. 205; *M'Gachen* v. *Dew* (1851), 15 Beav. 84; *Vaughton* v. *Noble* (1864), 30 Beav. 34; *Jacubs* v. *Rylance* (1874), L. R. 17 Eq. 341; *Re Taylor, Taylor* v. *Wade*, *supra*; *Re Weston, Davies* v. *Tagart*, [1900] 2 Ch. 164.

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purchasers for value without notice (*f*). But where he takes a *legal* (as distinguished from an equitable) beneficial interest under the same settlement, that cannot be touched (*g*).

(3) Paragraph (2) is *semble* now applicable (in the discretion of the court) where the party is a married woman restrained from anticipation, if she has instigated or requested a breach of trust, or consented to it in writing (*h*); but not otherwise (*i*).

PARAGRAPH (1).

Trust fund lent to tenant for life.

A trustee, in breach of trust, lends the trust fund to the tenant for life. Here both the trustee and the tenant for life, (who has got the trust funds into his own hands by a breach of trust to which he was himself a party (*k*)), will be jointly and severally liable to the beneficiaries.

Tenant for life may have to account for excessive interest.

It would seem also, that where a tenant for life has been privy to an unauthorised investment made in order to give him an increased income, and a loss of capital has resulted, he is liable to be ordered to recoup so much income as represents the difference between what he has received and what he ought to have received (*l*).

Third party with notice of breach is liable.

A testator bequeathed a sum of £600 (which he described as being in the hands of one Gregory, to whom he had lent the same on the security of his note of hand) to his son-in-law Rolfe, upon certain trusts. Rolfe, the trustee, became indebted to Gregory, and in order to discharge part of that debt he delivered to Gregory the note of hand for £600. It was held that, as Gregory had information of the manner of the bequest, he was a party to the fraudulent abstraction of the trust property, and liable to refund the amount; and that being founded on fraud, the Statute of Limitations did not apply (*m*).

Devisee or heir interfering.

So a party assuming to act as heir or devisee of a trustee,

(*f*) *Jaeubs* v. *Rylance* (1874), L. R. 17 Eq. 341; *Doering* v. *Doering* (1889) 42 Ch. D. 203; *Bolton* v. *Curre*, [1895] 1 Ch. 544; *Edgar* v. *Plomley*, [1900] A. C. 431.

(*g*) *Egbert* v. *Butter* (1856), 21 Beav. 560; *Fox* v. *Buckley* (1876), 3 Ch. D. 508; but see *Woodyatt* v. *Gresley* (1836), 8 Sim. 180.

(*h*) *Semble*, under s. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), the beneficiaries being subrogated to the trustees.

(*i*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589, and *Hale* v. *Sheldrake* (1889), 60 L. T. 292.

(*k*) *Cowper* v. *Stoneham* (1893), 68 L. T. 18.

(*l*) See *Griffiths* v. *Porter* (1858), 25 Beav. 236; but *secus* where no loss has resulted, see pp. 245, 246, *supra*.

(*m*) *Rolfe* v. *Gregory* (1865), 11 Jur. (N.S.) 98; *Dixon* v. *Dixon* (1878), 9 Ch. D. 587.

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and committing an act which, if done by the trustee, would have been a breach of trust, cannot relieve himself of liability by asserting that he was not acting as trustee (*n*).

Bankers with notice of trust fund.

Again a fund was standing to the account of two trustees in the books of some bankers, who had notice that it was a trust fund; and by the *direction of the tenant for life only*, they transferred it to his account, and thereby obtained payment of a debt due from him to them. *Held* that the trustees might sue the bankers to have the trust fund replaced, and that the Statute of Limitations was not applicable (*o*). In this case the bankers profited by the breach, but it would seem to be immaterial; for where a debtor to A., with full knowledge that she had assigned the debt to the trustees of her marriage settlement, paid part of it to her husband, he was held liable (*p*).

Trust fund paid to wrong person on faith of forged certificate.

In *Eaves* v. *Hickson* (*q*), trustees had paid over trust funds bequeathed to the children of one William Knibb, upon the faith of a forged marriage certificate which *William Knibb produced to them*, from which it appeared that certain illegitimate children of his were legitimate. It was held that William Knibb, who had produced the certificate, must be made responsible for the money as well as the trustees.

Trustee *de son tort.*

In general, beneficiaries may proceed against an agent of their trustee where he has not confined himself to the duties of an agent (*r*), but, by accepting a delegation of the trust (*s*), or by fraudulently mixing himself up with a breach of trust, has become a trustee by construction of equity (*t*). It is, however, essential to the character of a *trustee de son tort* that he should have trust property either actually vested in him, or so far under his control, that he is in a position to require that it should be vested in him (*u*). For instance, solicitors who prepare deeds relating to contemplated technical breaches of trust, but advise against their execution, are not liable if they have no reason to suspect dishonesty (*x*). But

(*n*) *Rackham* v. *Siddall* (1850), 1 Mac. & G. 607.

(*o*) *Bridgman* v. *Gill* (1857), 24 Beav. 302. As to rights of bankers where trust funds are paid in to the trustee's private account, see *infra*, p. 520.

(*p*) *Andrews* v. *Bousfield* (1847), 10 Beav. 511; and see to like effect *Sheridan* v. *Joyce* (1844), 1 Jo. & Lat. 401.

(*q*) (1861) 30 Beav. 136.

(*r*) See *Brinsden* v. *Williams*, [1894] 3 Ch. 185; *Myler* v. *Fitzpatrick* (1822), 6 Madd. 360.

(*s*) *Cowper* v. *Stoneham* (1893), 68 L. T. 18.

(*t*) *Re Barney*, *Barney* v. *Barney*, [1892] 2 Ch. 265; *Myler* v. *Fitzpatrick*, *supra*.

(*u*) *Ib.*, and see *Re Blundell*, *Blundell* v. *Blundell* (1888), 40 Ch. D. 370.

(*x*) *Barnes* v. *Addy* (1874), L. R. 9 Ch. 244.

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where the capital of a trust fund, having got into the hands of the trustee's solicitor, was, through his intervention, spent by the trustee, the solicitor was held liable (*y*); for where trust funds come into the custody and under the control of a solicitor, or indeed of any one else, with notice of the trusts, he can only discharge himself of liability by showing that the property was duly applied in accordance with the trusts (*z*). It is not sufficient, for example, to show that the solicitor invested it by the direction of the trustees in an *unauthorised* (as distinguished from an insufficient (*a*)) investment (*z*); nor that he paid it to *one of several* trustees who misappropriated it (*b*); nor that by the direction of the trustee he paid it to a person to whom he knew it was not payable (*c*): for all of these acts are clear infringements of the trust, as a solicitor ought to be well aware. Of course, however, a solicitor would be justified in paying, and indeed would be compellable to pay, it to the whole of the trustees jointly.

Party getting possession of property by breach of trust only discharged when it is repaid to trustees.

Again, trustees of real estate in trust for sale, sold and conveyed it to the purchaser, but (in breach of trust) only received part of the purchase-money, the deeds being deposited with one of the trustees as an equitable security for the balance. Some years afterwards the purchaser paid the balance to this trustee in exchange for the deeds, and the trustee misappropriated it. *Held* that the purchaser had mixed himself up in a breach of trust and was responsible for the loss (*d*).

Solicitor knowingly assisting in getting fund in court paid to wrong person.

If a solicitor, knowing that money which is in court belongs to one person, commences proceedings in the name of another, and obtains payment to such other, he is personally chargeable with the amount. Nay, even if he has not actual knowledge of the falseness of the claim, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the

(*y*) *Morgan* v. *Stephens* (1861), 3 Giff. 226.

(*z*) *Blyth* v. *Fladgate*, [1891] 1 Ch. 337; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390.

(*a*) *Brinsden* v. *Williams*, [1894] 3 Ch. 185, and *Mara* v. *Brown*, [1896] 1 Ch. 199; and see and consider *Stokes* v. *Prance*, [1898] 1 Ch. 212, a case of contributory mortgage, in which it was held that the solicitors who contributed to the mortgage were not postponed to the trustees.

(*b*) *Lee* v. *Sankey* (1873), L. R. 15 Eq. 204.

(*c*) *Midgley* v. *Midgley*, [1893] 3 Ch. 282, where the debt which was paid had been declared by the court to be barred by the Statute of Limitations, notwithstanding which the trustee by the hand of the solicitor paid it.

(*d*) *Webb* v. *Ledsam* (1855), 1 Kay & J. 385; and see also *Kellaway* v. *Johnson* (1842), 5 Beav. 319.

truth, he will be made personally responsible for the loss which his want of consideration may cause (*e*). Art. 95.

Solicitor receiving and retaining trust money.

Again, where a solicitor receives trust moneys on payment off of a mortgage, and retains them, he is in the position of an express trustee; and, as has been stated above, he can never plead the Statutes of Limitation in respect of money which he has received and converted to his own use (*f*).

PARAGRAPH (2).

Where party who has joined in breach is a partial beneficiary his beneficial interest is liable to make good the loss.

As stated in the second paragraph of the present article, the equitable interest of a partial beneficiary who has made himself liable by joining in a breach of trust, may be stopped at the instance of his co-beneficiaries, until the whole loss to the estate has been made good. This right *of the beneficiaries* must not, however, be confused with the limited right *of the trustee* (treated of in Article 94, *supra*) to impound the interest of a beneficiary who has requested, instigated, or consented in writing to a breach of trust, by way of *indemnifying the trustee himself*. The two rights are essentially different, and it is apprehended that beneficiaries might have the right referred to in paragraph 2 of the present article, in cases where the trustee (who is after all *particeps criminis*) might be refused the right of impounding the interest of the instigating beneficiary. It must also be understood that the rule laid down in paragraph 2 of the present article, applies *à fortiori* to the case of a beneficiary who is also a trustee; for the liability of the beneficiary is really founded upon his having made himself a *trustee de son tort*. In both cases the trustee, or *trustee de son tort*, is personally liable; and in both cases in his capacity of beneficiary he must make good his indebtedness to the trust estate before he can claim to share in it (*g*).

Retainer of life income to make good breach instigated by tenant for life.

A trustee, in breach of trust, lent the trust fund to A. B., the tenant for life. The trustee afterwards concurred in a creditor's deed, by which A. B.'s life interest was to be applied in payment of his debts, and the trustee received thereunder a

(*e*) *Ezart* v. *Lister* (1842), 5 Beav. 585; *Todd* v. *Studholme* (1857), 3 Kay & J. 324; and *Re Dangar's Trusts* (1889), 41 Ch. D. 178, where the cases are collected.

(*f*) *Moore* v. *Knight*, [1891] 1 Ch. 547; *Soar* v. *Ashwell*, [1893] 2 Q. B. 390; *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561; but *cf.* *Doyle* v. *Foley* (No. 1), [1903] 2 Ir. R. 95, a case of executor *de son tort*; and *M'Ardle* v. *Gaughran*, [1903] 1 Ir. R. 106.

(*g*) See *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212, and cases there cited; and *Booth* v. *Booth* (1838), 1 Beav. 125.

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debt due to him from A. B. Before the other creditors had been paid, the trustee retained the life income to make good the breach of trust. It was held that the court would not restrain the trustee from making good the breach of trust out of the life income; for although the trustee, being a creditor and party to the deed, had *quâ* himself, no right to retain the life interest, yet, as representing the beneficiaries, he was justified in doing so (*h*).

Rule applies to derivative as well as to original shares.

The rule applies not only to shares taken directly under the settlement creating the trust, but also to shares purchased from or otherwise derived through or under immediate beneficiaries. Thus, where a Mrs. D., who was trustee and life tenant under a will, took assignments from two of the beneficiaries entitled in remainder, and committed divers breaches of trust which only came to light on her death, it was held that the two shares which she had purchased were liable to make good the loss to the estate. Moreover, this right of the beneficiaries was held to take priority over persons to whom Mrs. D. had mortgaged the shares in question (*i*). The fact that the mortgagees were *bonâ fide* mortgagees for value without notice was immaterial; for the equitable interest in question was a *chose in action*, and purchasers of *choses in action* take subject to all equities. Indeed, so far has this been carried, that such purchasers have been held to take subject to breaches of trust committed *subsequent* to the purchase (*k*).

But not to distinct trust created by same instrument.

The rule, however, has no application to beneficial interests under distinct trusts even although created by the same settlor and by the same instrument. Thus where a person is beneficially interested in (or even a trustee of) settled residuary estate and is liable for a breach of trust committed in relation to it, his beneficial interest under a trust of specific property created by the same will cannot be impounded (*l*).

Retainer of beneficiary's interest to make good a debt due from him to the trust estate, even where statute barred.

The rule now under consideration is not confined to cases of breach of trust, but is equally applicable where a beneficiary

(*h*) *Fuller* v. *Knight* (1843), 6 Beav. 205; and see also *Carson* v. *Sloane* (1884), 13 L. R. Ir. 139; *Bolton* v. *Curre*, [1895] 1 Ch. 544.

(*i*) *Doering* v. *Doering* (1889), 42 Ch. D. 203, and cases there cited; and see also Re *Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212.

(*k*) *Per* HALL, V.-C., *Hooper* v. *Smart* (1875), 1 Ch. D. 90, 98; and see also *Morris* v. *Livie* (1842), 1 Y. & Coll. C. C. 380; *Irby* v. *Irby* (1858), 25 Beav. 632; *Barnett* v. *Sheffield* (1852), 1 De G. M. & G. 371; and *Cole* v. *Muddle* (1852), 10 Hare, 186.

(*l*) *Re Towndrow*, *Gratton* v. *Macken*, [1911] 1 Ch. 662.

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is indebted to the trust estate. By a separation deed, after reciting that the husband and wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds (in the events which happened) in trust for himself; and he covenanted to make up the wife's income to £300 a year. The husband paid nothing under the covenant, and in 1868 he was adjudicated a bankrupt. The trustees proved for arrears due down to the date of the bankruptcy, but there were further arrears due to them since that date. On the death of the wife, the husband's assignee in bankruptcy claimed the leaseholds. It was held, however, that the trustees were entitled to retain them until the arrears were satisfied; and *semble*, that the right of trustees to retain trust property as against a beneficiary who owes money to them as trustees under the instrument creating the trust, exists in favour of trustees of a voluntary settlement which has been so completed as to be enforceable by the court (*m*). The rule applies even where the debt is statute barred (*n*), provided that it was a debt for which, but for the Statute of Limitations, the debtor could have been sued (*o*). Trustees cannot, however, retain the share of a beneficiary as against *future instalments* of a debt repayable by instalments (*p*).

Acceptance of a composition from defaulting trustee-beneficiary.

Where a defaulting trustee who is also a beneficiary in remainder makes a composition which is accepted by the new trustees they cannot afterwards claim to retain his beneficial interest to make good the balance of the loss (*q*).

Where plaintiff is also the residuary legatee of person who has benefited by breach.

A somewhat curious complication arises where money has, in breach of trust, been paid to a person whose estate subsequently devolves or is bequeathed to the plaintiff. Thus where a trustee had wrongfully paid part of the capital of the trust fund to the plaintiff's father under whose intestacy the plaintiff was entitled to and received two-thirds of his estate, it was held that the father's assets in the hands of the plaintiff were primarily liable to make good two-thirds of the trust fund in exoneration of the trustee (*r*).

(*m*) *Re Weston*, *Davies* v. *Tagart*, [1900] 2 Ch. 164; *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; and see and consider analogous right of executors, *Re Taylor*, *Taylor* v. *Wade*, [1894] 1 Ch. 671.

(*n*) *Re Akerman*, *Akerman* v. *Akerman*, *supra*; *Re Wheeler*, *Hankinson* v. *Hayter*, [1904] 2 Ch. 66.

(*o*) See *Wheeler*, *Hankinson* v. *Hayter*, [1904] 2 Ch. 66.

(*p*) *Re Abrahams*, *Abrahams* v. *Abrahams*, [1908] 2 Ch. 69.

(*q*) *Re Sewell*, *White* v. *Sewell*, [1909] 1 Ch. 806.

(*r*) *Orrett* v. *Corser* (1855), 21 Beav. 52.

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How far beneficiary who has been innocently overpaid is liable to refund.

Where a trustee has made any over-payment to a beneficiary in error, he can, on behalf of the other beneficiaries (but not on behalf of himself if he also be a beneficiary (*s*)), recoup the trust out of any other interest (if any) of that beneficiary in the trust estate (*t*); but the court will not, as a rule, order the over-paid beneficiary personally to refund to the trustee who has been disallowed the item in his accounts (*u*). However, it would seem that a *co-beneficiary* could compel repayment of the excess (*x*); but the onus would lie upon him of proving that what the other beneficiary had received was an over-payment, having regard to the value of the estate at the date of the payment, and did not arise merely by reason of *subsequent* depreciation (*y*). This, of course, presupposes that payment at all, at the date in question, was proper; for otherwise, if the date for payment had not arisen, the payment would itself have been a breach of trust to which the payee would have been privy.

No recouping of excess income derived from improper investment.

However, it appears to be settled, that where a beneficiary for life has received a high rate of interest from a security on which the trustees ought not to have invested, and which subsequently turns out to be insufficient, he will not be liable to account for any part of the income received (*z*); unless he was either one of the trustees (*a*) or, with full knowledge, a consenting party to the investment (*b*). But *per contra* he will not get any arrears of income on realisation of the security without bringing into hotchpot all income received by him during its continuance (*b*). Not so, however, where the security was not improperly made (*e.g.*, where it was made by the testator himself (*c*)).

But where a testator devised certain real estate for life to

(*s*) *Re Horne, Wilson* v. *Cox Sinclair*, [1905] 1 Ch. 76.

(*t*) *Livesey* v. *Livesey* (1827), 3 Russ. 287; *Dibbs* v. *Goren* (1849), 11 Beav. 483.

(*u*) *Downes* v. *Bullock* (1858), 25 Beav. 54; *Bate* v. *Hooper* (1855), 5 De G. M. & G. 338; but *cf. Hood* v. *Clapham* (1854), 19 Beav. 90, where it was allowed; and consider *Allcard* v. *Walker*, [1896] 2 Ch., at p. 384, as to the converse case, where funds have been erroneously paid to the trustees.

(*x*) *Harris* v. *Harris* (No. 2) (1861), 29 Beav. 110; *Baynard* v. *Woolley* (1855), 20 Beav. 583.

(*y*) *Re Winslow, Frere* v. *Winslow* (1890), 45 Ch. D. 249; *Fenwick* v. *Clarke* (1862), 4 De G. F. & J. 240; *Peterson* v. *Peterson* (1866), L. R. 3 Eq. 111; and *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389.

(*z*) See *Re Bird, Dodd* v. *Evans*, [1901] 1 Ch. 916, and comments thereon of Warrington, K.C., *arguendo* in *Re Alston, Alston* v. *Houston*, [1901] 2 Ch., at p. 587; *Re Horne, Wilson* v. *Cox Sinclair* [1905], 1 Ch. 76.

(*a*) See *Re Sharp, Rickett* v. *Rickett*, [1906] 1 Ch. 793, 796.

(*b*) See *Griffiths* v. *Porter* (1858), 25 Beav. 236.

(*c*) *Re Coaks, Coaks* v. *Bayley*, [1911] 1 Ch. 171; and see *supra*, Art. 45, p. 245.

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one of his executors and trustees, and the devisee afterwards committed a breach of trust, and filed his petition for liquidation, it was held that, as against the trustee in liquidation, the other beneficiaries had no lien on the interest of the trustee; Lord Justice JAMES saying: "the estate of a *legal* devisee is, under no circumstances, under the control of the court" (*d*). Whether, however, the same rule applies to legal estates or interests under a settlement to which the beneficiary in default is a party seems questionable. In *Woodyatt* v. *Gresley* (*e*), it was held that it did not. On the other hand, in the more recent case of *Re Brown, Dixon* v. *Brown* (*f*), KAY, J., said: "It has always been a rule of the Court of Chancery that if a trustee misappropriates trust money, and has an equitable interest under the trust deed, the court will not allow him to receive any part of the trust fund in which he is equitably interested under the trust, until he has made good his default as trustee. That is a doctrine which is not in the least in question, and is very thoroughly established. But if the trustee has, under the will *or other instrument* which created the trust, a legal interest in land which is not bound by the trust at all, then the Court of Equity has no power to lay hold of that legal interest or to assert anything in the nature of a lien or charge upon it in order to recoup the breach of trust."

Rule does not apply to legal beneficial interests.

PARAGRAPH (3).

It seems to be clear that, apart from s. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), beneficiaries have no right to demand that the interest of a beneficiary who has been party to a breach of trust shall be impounded to make good the loss to the trust estate, where she is a married woman restrained from anticipation (*g*). It is, however, submitted that s. 45 of the Trustee Act, 1893, enables the court, in the exercise of its discretion, to entertain such a demand where the breach has been committed at the instigation, or at the request, or with the written consent of such a beneficiary. No doubt the words of the statute confer this power on the court for the indemnity of *the trustee*, and not for the indemnity of the other beneficiaries; unless the concluding words, "or persons claiming through him," can be said to embrace the beneficiaries, which

Whether interest of married woman restrained from anticipation can be impounded.

(*d*) *Fox* v. *Buckley* (1876), 3 Ch. D. 508.

(*e*) (1836) 8 Sim. 180.

(*f*) (1886) 32 Ch. D. 597; and see also *Hallett* v. *Hallett* (1879), 13 Ch. D. 232, and *Re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212.

(*g*) *Stanley* v. *Stanley* (1878), 7 Ch. D. 589; *Hale* v. *Sheldrake* (1889) 60 L. T. 292.

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seems doubtful. But on the analogy of cases in which creditors of a trust business have been allowed to stand in the place of a trustee who has a right to be indemnified out of the trust estate (*h*), it is submitted that the beneficiaries ought to be allowed, by way of subrogation, to take the benefit of the indemnity which is given by the statute to a trustee in cases where that trustee is unable to make good the loss himself. If this be not so, it is, indeed, a strange anomaly that the authors of the Trustee Acts of 1888 and 1893, should have inserted a section dealing with the right of the trustee to impound the interest of a beneficiary *particeps criminis* by way of indemnity to himself, but should have omitted to make any similar statutory provision as to the rights of innocent *co-beneficiaries* to set off the loss against the share of the one in fault.

ART. 96.—*Following Trust Property into the Hands of Third Parties.*

(1) If trust property comes into the hands of any person inconsistently with the trust, he will be a mere trustee for the beneficiaries under the trust, unless he or some person through whom he claims (*i*), has *bonâ fide* acquired the property for valuable consideration, and without receiving notice before the transaction was completed (*k*), that the acquisition was a breach of trust, and—

(a) has got the legal (as distinguished from a mere equitable) title (*l*); or

(b) having acquired a mere equitable title he has been induced to buy it by the fraud or negligence of the persons having the legal title (*m*); or

(*h*) See *supra*, p. 439.

(*i*) *Harrison* v. *Forth* (1695), Pr. Ch. 51; *Mertins* v. *Joliffe* (1756), Ambl. 313; *M'Queen* v. *Farquhar* (1805), 11 Ves. 467.

(*k*) *Bassett* v. *Nosworthy* (1674), Finch, 102, 2 Wh. & Tu. Lead. Cas. (ed. 7) 150; *Boursot* v. *Savage* (1866), L. R. 2 Eq. 134; *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Pilcher* v. *Rawlins* (1872), L. R. 7 Ch. 259; *London, etc. Co.* v. *Duggan*, [1893] A. C. 506; and as to the time at which the notice is effectual, *Lady Bodmin* v. *Vandenbendy* (1683), 1 Vern. 179; *Jones* v. *Thomas* (1734), 3 P. Wms. 243; *Attorney-Gen.* v. *Gower* (1736), 2 Eq. Cas. Abr. 685, pl. 11; *More* v. *Mahow* (1663), 1 Ch. Cas. 34.

(*l*) See *per* Lord WESTBURY, *Phillips* v. *Phillips* (1861), 4 De G. F. & J. 208; *Rimmer* v. *Webster*, [1902] 2 Ch. 163.

(*m*) See *Walker* v. *Linom*, [1907] 2 Ch. 104.

(c) the property being a chose in action (*n*), consists of a negotiable instrument (*o*), or an instrument which was intended by the parties to it to be transferable free from all equities attaching to it (*p*).

(2) A person who has notice of a trust is bound to see that it is discharged; and he will be liable if he accepts a forged discharge, however careful he may have been (*q*).

Paragraph (1).

Relative rights of legal and equitable claimants.

The rule enunciated in this article is derived from two well-known maxims, viz.: (1) where the equities are equal the law prevails; and (2) as between mere equitable claimants *qui prior in tempore, potior in jure est.* In fact, where one of two innocent parties must suffer, then as equity is not called upon to interfere on behalf of either of them, the common law must take its course; and he who has got the legal estate, or its equivalent, will take priority over him who has a mere equitable claim, notwithstanding that the title of the legal claimant may have accrued after that of the equitable one. The rule is very strikingly and completely illustrated by the case of *Cave* v. *Cave* (*r*). There a trustee, who was a solicitor, fraudulently misappropriated the trust fund, and with it bought an estate which was conveyed to his brother. The brother then mortgaged the property, by legal, and afterwards by equitable mortgages, the solicitor trustee acting on all such occasions as the solicitor both for mortgagor *and mortgagees.* The parties beneficially entitled under the trust, claimed to follow their trust money into the property which had been bought with it, on the ground that, as the solicitor of the mortgagees had notice of the breach of trust, that notice must be imputed to the mortgagees themselves. It was held, however, that, as the

(*n*) *Turton* v. *Benson* (1718), 1 P. Wms. 497; *Ord* v. *White* (1840), 3 Beav. 357; *Mangles* v. *Dixon* (1852), 3 H. L. Cas. 702; *Doering* v. *Doering* (1889), 42 Ch. D. 203.

(*o*) *Anon.* (1697), Com. Rep. 43.

(*p*) *Re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation* (1867), L. R. 3 Ch. 154; *Re General Estates Co., Ex parte City Bank* (1868), L. R. 3 Ch. 758; *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374; and see Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

(*q*) *Jared* v. *Clements,* [1903] 1 Ch. 428.

(*r*) (1880) 15 Ch. D. 639; and see also *Powell* v. *London and Provincial Bank,* [1893] 2 Ch. 555; and *Capell* v. *Winter,* [1907] 2 Ch. 376.

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solicitor was a party to the fraud, notice of the equity of the beneficiaries could not be constructively imputed to the clients, the mortgagees; for the conduct of the agent raised a conclusive presumption that he would not communicate to the client the fact in controversy. Consequently their equities and the equity of the beneficiaries were equal; whence it followed, on the maxim "where the equities are equal the law prevails," that the legal mortgagee, having the legal estate, took priority over the beneficiaries, but that the latter took priority over the equitable mortgagees because their equity was first in point of date (*s*).

Notice of doubtful equity.

To deprive a person who has acquired for valuable consideration a legal right to property, the notice of a superior equity must be notice of facts which would clearly show the existence of such equity, at all events, to a lawyer. Thus, a *bonâ fide* purchaser for value is not bound by notice of a very doubtful equity; for instance, where the construction of a trust is ambiguous or equivocal (*t*).

Purchasing from two sets of trustees who are mortgagees under a contributory mortgage.

It has been held that where two sets of trustees have joined in advancing money on a contributory mortgage (on the face of which their fiduciary characters appeared), and they sell under their power of sale, the purchaser is not bound to see that each set of trustees get their due proportion of the purchase money—on the ground, apparently, that the purchase money is not the debt, but only a security for it (*u*).

Trust money paid in to trustee's private overdrawn account.

So, as has been already stated (*x*), where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all monies paid in by him, unless they have notice, not only that they are trust monies (*y*), but also that the payment to them constitutes a breach of trust (*z*). It seems, however, difficult to reconcile this with the decision of KEKEWICH, J. in *Re Blaiberg and Abrahams* (*a*) that where a purchaser from mortgagees inadvertently learns that the mortgagees are such as trustees of a settlement, he is entitled

(*s*) See also *Pilcher* v. *Rawlins* (1872), L. R. 7 Ch. 259.

(*t*) *Hardy* v. *Reeves* (1800), 5 Ves. 426; *Cordwell* v. *Mackrill* (1766), Ambl. 515; *Warrick* v. *Warrick and Kniveton* (1745), 3 Atk. 291; but see and consider *per* Lord ST. LEONARDS, *Thompson* v. *Simpson* (1841), 1 Dru. & War. 459.

(*u*) *Re Parker and Beech* (1887), 56 L. J. Ch. 358, *sed quære*.

(*x*) *Supra*, p. 475.

(*y*) *Thomson* v. *Clydesdale Bank*, [1893] A. C. 282.

(*z*) *Coleman* v. *Bucks and Oxon Union Bank*, [1897] 2 Ch. 243; *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693; *Re Spencer* (1881), 51 L. J. Ch. 271, but *cf. Mutton* v. *Peate*, [1900] 2 Ch. 79.

(*a*) [1899] 2 Ch. 340.

to require proof that they are the properly appointed trustees of such settlement.

Costs paid by defaulting trustee to his solicitor.

On similar grounds it has been held that the solicitor of a trustee is not debarred from accepting payments out of the estate in respect of costs properly incurred, unless notice be brought home to him that, at the time when he accepted them, the trustee had been guilty of a breach of trust, such as would preclude him from resorting to the trust estate for payment of costs (*b*). But where a solicitor receives money with knowledge of a breach of trust, a summary order may be made upon him to pay it into court, without the necessity of an action (*c*).

What constitutes notice.

The subject of notice is now governed by s. 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), which is retrospective; consequently the old cases may be considered obsolete, except so far as they may throw light on the construction of the new rules. Notice is usually spoken of as either actual or constructive. Actual notice, under the new law, is defined as "an instrument, fact, or thing which is in the party's own knowledge." Constructive notice is defined as "an instrument, fact, or thing which would have come to the party's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, *or* which (in the same transaction with respect to which the question of notice arises) has come to the knowledge of his counsel, solicitor, or agent *as such*, or would have come to the knowledge of his solicitor or agent if such inquiries and inspections had been made as ought reasonably to have been made by them."

Actual notice.

With regard to actual notice, knowledge is absolutely necessary. Mere gossip or report is not sufficient. Whether the notice must be given by a party interested or his agent is perhaps doubtful. Lord ST. LEONARDS seemed to think that it must. Mr. Dart, on the other hand, doubted it, and said it is one thing to say that "mere flying reports are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim, unless made by a party interested. The credibility of the informant must surely be considered; nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the court should not

(*b*) *Re Blundell, Blundell* v. *Blundell* (1888), 40 Ch. D. 370.

(*c*) *Re Carroll, Brice* v. *Carroll*, [1902] 2 Ch. 175.

Cf. p. 432 *et seq.*, *supra*.

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consider whether such notice must not have been present to his mind during the treaty." That passage was written by Mr. Dart before the passing of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), and that statute seems to adopt his view, as the definition of actual notice (therein differing from the definition of constructive notice) does not state that the instrument, fact, or thing, must have come to the party's knowledge in the *same* transaction, nor have been notified by a party interested. Indeed, it would seem that actual notice is entirely a matter of evidence; and if the court comes to the conclusion that a party had in fact, at the date of the transaction, such knowledge as would operate on the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired, then he will be taken to have had actual notice. Whether he acquired his knowledge before or at the time of the transaction, and whether he acquired it from a party interested or not appears to be immaterial (*d*).

Constructive notice.

With regard to constructive or imputed notice, on the other hand, it is quite clear that a man is not liable for notice acquired by his counsel, solicitor, or agent, unless it has come to their knowledge in the very transaction with respect to which the question of notice arises. The fact that a solicitor has been in the habit of acting for a particular person cannot reasonably constitute that solicitor the agent of the client to bind him by receiving notices or information; for apart from the burden which it would impose on the memory of a solicitor, *non constat* that the client may not have ceased to regard him as his solicitor (*e*). It has also been held that constructive notice of an equity through counsel, solicitor, or agent, is not imputed to the client, where the counsel, solicitor, or agent is party to a fraud which would be exposed if he had communicated the notice to his client (*f*). This case must, however, be carefully distinguished from the earlier cases of *Boursot* v. *Savage* (*g*) and *Bradley* v. *Riches* (*h*), which seem at first sight in direct conflict with it. The point in *Boursot* v. *Savage* was, that where a client has *notice of the existence of a trust*, and intends to get the equitable interests of beneficiaries *from them*, the

(*d*) *Lloyd* v. *Banks* (1868), L. R. 3 Ch. 488; and see also *London, etc. Co.* v. *Duggan*, [1893] App. Cas. 506, and *Redman* v. *Rymer* (1889), 60 L. T. 385.

(*e*) *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 406.

(*f*) *Cave* v. *Cave* (1880), 15 Ch. D. 639, cited as the 1st Illustration to this Article.

(*g*) (1866) L. R. 2 Eq. 134.

(*h*) (1878) 9 Ch. D. 189.

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fact that he gets the legal estate from a trustee who happens to be his solicitor, does not protect him if the solicitor forges the signatures of the beneficiaries. For he had notice of the equitable interests, and the fact that he was the innocent victim of a forgery does not give him an equal equity with the beneficiaries. In *Bradley* v. *Riches* the point decided was, that the presumption that a solicitor has communicated to his client facts which he ought to have made known is not rebutted by proof that it was the solicitor's *interest* to conceal the facts. There the fact omitted to be communicated was the existence of a valid mortgage; whereas in *Care* v. *Care* the fact omitted to be communicated was the prior commission of a fraud by the solicitor himself (*i*).

Omission to make inquiries and inspections.

There is another species of imputed notice mentioned in the Conveyancing Act of 1882, of quite as much importance as that mentioned in the last illustration, viz., notice of "an instrument, fact, or thing which would have come to the party's knowledge, or to the knowledge of his solicitor or agent (not his counsel), if such inquiries or inspections had been made as ought reasonably to have been made by them." Thus, it has been held that whenever a purchaser, mortgagee or lessee, foregoes his strict right to title, whether by express contract *or even by not negativing implied statutory conditions*, he runs the risk of having constructive notice imputed to him of anything contained in any of the documents which he ought to have examined (*k*). It must also be borne in mind, that notice of the existence of a deed affecting the title, or which *necessarily* affects it, is notice of its contents if it can be got at. "Of course there may be cases where the deed cannot be got at, or for some other reason where, with the exercise of all the prudence in the world, you cannot see it, and then there will be no constructive notice affecting the title. There is also a class of cases, of which I think *Jones* v. *Smith* (*l*) is the most notorious, where a purchaser is told of a settlement which may or may not affect the title, and is told at the same time that it does not affect it, and in such cases there is no constructive notice (*m*). Supposing, as in *Jones* v. *Smith*, you are buying land of a married man, and you are told at the same time that

(*i*) And see also and dist. *Lloyd's Bank* v. *Bullock*, [1896] 2 Ch. 192.

(*k*) *Patman* v. *Harland* (1881), 17 Ch. D. 353.

(*l*) (1841) 1 Hare, 43.

(*m*) *A fortiori* where he has no notice of the existence of any settlement. For instance, there is a dictum of PEARSON, J., to the effect that a person dealing with a married woman is not bound to inquire whether she has a marriage settlement or not: *Lloyd's Banking Co.* v. *Jones* (1885), 29 Ch. D. 221.

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there is a marriage settlement but that it does not embrace the land in question, you have no constructive notice of its contents. Because, although you know there is a settlement, you are told it does not affect the land at all. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents if you are told at the same time that it does not affect the land" (*n*).

Transfers of mortgages on appointment of new trustees.

A similar instance of the same rule occurs in the case of mortgages, where the purchase-money is expressed to be advanced by several mortgagees on a joint account. No doubt in ninety-nine cases out of a hundred such mortgagees are trustees; but as there is nothing on the face of the deed to show that the money is trust money, and as the fact of persons advancing money on a joint account does not necessarily imply that it is trust money, a purchaser or transferee never inquires whether there is a trust (*o*). It has even been the practice to ignore the fact that transfers of such mortgages on a change in the trusteeship only bear 10*s*. stamps *if adjudicated*, and this practice has now received statutory sanction by section 13 of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), by which it is enacted that where on the transfer of a mortgage the stamp duty, if payable according to the amount of the debt transferred, would exceed the sum of 10*s*. a purchaser shall not, by reason only of the transfer bearing a 10*s*. stamp, *whether adjudicated or not*, be deemed to have, or to have had notice of any trust, or that the transfer was made for effectuating the appointment of a new trustee. This section is retrospective. It is difficult, however, to see what was in the draftsman's mind when he included non-adjudicated stamps in the section, as in such cases the transferee would be still confronted with an apparently insufficiently stamped document, and yet if he enquired, and was told that it was merely a transfer on the appointment of new trustees, the Act would not protect him, as he would then have express notice of the trust.

In addition to documents, constructive notice may be imputed to a purchaser from the state, appearance or occupation of property. For instance, the existence of a seawall

(*n*) *Per* JESSEL, M.R., *Patman v. Harland* (1881), 17 Ch. D. 353.

(*o*) *Re Harman and The Uxbridge and Rickmansworth Ry. Co.* (1883), 24 Ch. D. 720.

bounding property has been held to give constructive notice of a liability to keep it in repair (*p*). So notice of a tenancy is notice of its terms: and generally, where a person purchases property where a visible state of things exists, which could not legally exist, or is very unlikely to exist without the property being subject to some burden, he is taken to have notice of the nature and extent of the burden (*q*).

Absence of notice will not protect a volunteer.

If an alienee of trust property is a volunteer, then the estate will remain burdened with the trust, whether he had notice of the trust (*r*) or not (*s*); for a volunteer has no equity as against a true owner.

Transfer of fund into court equivalent to alienation for value.

However, some transfers, apparently voluntary, have been held to be equivalent to alienations for value. Thus, in *Thorndike* v. *Hunt* (*t*), a trustee of two different settlements having applied to his own use funds subject to one of the settlements, replaced them by funds which, under a power of attorney from his co-trustee under the other, he transferred into the names of himself and his co-trustee in the former. In a suit in respect of breaches of trust of the former settlement, the trustees of it transferred the fund thus replaced into court: and it was held by the Court of Appeal that the transfer into court was equivalent to an alienation for value without notice, and that the beneficiaries under the other settlement could not follow the trust fund.

Part of trust fund in court transferred to a separate account.

So incumbrancers on a fund in court which has been transferred to a separate account before the incumbrances were created, are not postponed to prior equitable claims of other beneficiaries under the same settlement, subsequently discovered (*u*). For, when a fund is carried over to a separate account in an action for administering the trust, it is released from the general questions in the action, and becomes earmarked as being subject only to the questions arising upon the particular matter referred to in the heading of the account (*x*). All other questions are in fact treated as *res judicata*. The fund has been awarded by the court to the parties falling under the heading of the separate account, and it is too late for others to try to upset the court's award. It is in fact equivalent to a transfer of the legal estate or interest.

(*p*) *Morland* v. *Cook* (1868), L. R. 6 Eq. 252.

(*q*) *Allen* v. *Seckham* (1879), 11 Ch. D. 790.

(*r*) *Mansell* v. *Mansell* (1732), 2 P. Wms. 678.

(*s*) *Ib.*; *Spurgeon* v. *Collier* (1758) 1 Eden, 55.

(*t*) (1859), 3 De G. & J. 563; and see *Case* v. *James* (1861), 3 De G. F. & J. 256; *Re Bankhead's Trust* (1856), 2 Kay & J. 560; and *Dawson* v. *Prince*, (1857), 2 De. G. & J. 41; but *cf. Cloutte* v. *Storey*, [1911] 1 Ch. 18.

(*u*) *Re Eyton, Bartlett* v. *Charles* (1890), 45 Ch. D. 458.

(*x*) *Per* Lord LANGDALE, M.R., *Re Jervoise* (1849), 12 Beav. 209.

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Purchaser with notice from purchaser without.

A purchaser with notice from a purchaser without notice is safe. If he were not, an innocent purchaser for value would be incapable of ever alienating the property which he had acquired without breach of duty: and such a restraint on alienation would necessarily create that stagnation against which the law has always set its face (*y*).

Where purchaser has only acquired equitable interest.

The preceding examples all refer to cases in which the third party has acquired the legal title to property the subject of a trust, in which case the validity of his title depends entirely on the absence of notice. Where, however, the third party has only acquired an equitable interest, the question of notice is, as a rule, immaterial. For he has not got the legal estate, and therefore his equity, being no stronger than that of the *cestuis que trusts*, the maxim, "*Qui prior in tempore, potior in jure est*" applies. Thus, where a trustee, holding a mortgage (*z*) or a lease (*a*), deposits the deed with another to secure an advance to himself, the lender will have no equity against the beneficiaries however *bonâ fide* he may have acted, and however free he may have been of notice of the trustee's fraud.

Where equities are equal and no legal estate in either claimant.

On the same principle, where a trustee has wrongfully spent trust funds in the purchase of property, which he has afterwards sold to a third party without notice, then, if the legal estate has not been conveyed to the third party, the beneficiaries will have priority over him (*b*). For they have a right (as has been shown in Art. 87) to follow the trust fund into the property into which it has been converted, and to take it or to have a charge upon it, at their election; and as their right was prior in time to that of the third party, and as he has not got the legal estate, the maxim above referred to applies (*c*).

Protection of legal estate may be lost by negligence.

It would seem, however, from the most recent decision (*d*), that the protection of the legal estate may be lost by fraud, or by mere negligence in parting with the deeds if that negligence has alone rendered a fraud possible. Moreover, the decision in question went to the extent of affirming that if such negligence is committed by trustees, their beneficiaries are as much

(*y*) See *Brandlyn* v. *Ord* (1738), 1 Atk. 571; *Lowther* v. *Carlton* (1741), 2 Atk. 242; *Peacock* v. *Burt* (1834), 4 L. J. (N.S.) Ch. 33; but the doctrine is not to be extended (*West London Commercial Bank* v. *Reliance Permanent Building Society* (1885), 29 Ch. D. 954).

(*z*) *Newton* v. *Newton* (1868), L. R. 4 Ch. 143; and *Joyce* v. *De Moleyns* (1845), 2 Jo. & Lat. 374.

(*a*) *Re Morgan, Pillgrem* v. *Pillgrem* (1881), 18 Ch. D. 93.

(*b*) *Frith* v. *Cartland* (1865), 2 Hem. & M. 417.

(*c*) And see as to deposit of share certificates with blank transfers forming part of a trust estate, *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555.

(*d*) *Walker* v. *Linom*, [1907] 2 Ch. 104.

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postponed as the trustees themselves would be if they were beneficial owners. Neither of these propositions can, however, be accepted as free from doubt, owing to the conflict of authorities which seem to the present writer irreconcilable. Thus, one line of authorities lays down the principle, that either direct fraud, or negligence so gross as to amount to evidence of fraud, must be proved against a legal owner, to deprive him of the protection afforded by the legal estate (*e*). And another line of authorities supplements this by asserting that where the relation between the legal owner and custodian of the deeds and other persons claiming beneficially is that of trustee and *cestui que trust* or solicitor and client, then the *cestui que trust* or client does not lose priority by reason of the improper or negligent acts of the trustee or solicitor, unless of course the *cestui que trust* or client has notice of and is privy to the impropriety or negligence (*f*). On the other hand, in the case of *Walker* v. *Linom* (*g*), PARKER, J., after elaborately reviewing all the authorities, came to the conclusion, that where trustees of a marriage settlement (to whom the legal fee simple in lands had been conveyed), negligently left, in the hands of the husband, the deed by which he had purchased the property, and thus enabled him to pose as the owner and mortgage it, their negligence was such that their legal estate must be postponed to the subsequent equitable estate of the mortgagee and a purchaser from him, *and that the beneficiaries were in no better position than the trustees.* Whether this decision was correct time alone can show, as no one of less authority than a Lord Justice of Appeal can effectively settle it. But if beneficiaries are to lose the benefit of their trustees' legal estate by reason of the latters' negligence, it seems a strange anomaly that they should not be equally prejudiced by their trustees' fraud, as in *Newton* v. *Newton* (*h*), *Joyce* v. *De Moleyns* (*i*), *Cave* v. *Cave* (*k*) and *Frith* v. *Cartland* (*l*).

(*e*) *Evans* v. *Bicknell* (1801), 6 Ves. 174; *Hewitt* v. *Loosemore* (1851), 9 Hare 449; *Ratcliffe* v. *Barnard* (1871), L. R. 6 Ch. 652; *Northern Counties, etc. Insurance Co.* v. *Whipp* (1884), 26 Ch. D. 482; *Re Greer*, [1907] 1 Ir. R. 57; and see doubt expressed by H. L. in *Taylor* v. *Russell*, [1892] A. C. at p. 262; *Re Castell and Brown, Ltd.*, *Roper* v. *The Co.*, [1898] 1 Ch. 315; *Re Valletort Sanitary Steam Laundry Co.*, *Ward* v. *The Co.*, [1903] 2 Ch. 654.

(*f*) *Per* STIRLING, L.J., *Taylor* v. *London and County Banking Co.*, [1901] 2 Ch., at p. 261; and see *Oliver* v. *Hinton*, [1899] 2 Ch. 264; and see *Capell* v. *Winter*, [1907] 2 Ch. 376; but *cf. Lloyd's Bank* v. *Bullock*, [1896] 2 Ch. 192.

(*g*) [1907] 2 Ch. 104.

(*h*) (1868) L. R. 4 Ch. 143.

(*i*) (1845) 2 Jo. & Lat. 374.

(*k*) (1880) 15 Ch. D. 639.

(*l*) (1865) 2 Hem. & M. 417.

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Choses in action are assigned subject to all equities.

Choses in action are generally taken subject to all equities affecting them, because at law they were originally transferable; and although they are now transferable by statute, it directed that they should be transferred subject to all equities. Thus, in *Turton* v. *Benson* (*m*), a mother agreed to give her son, on his marriage, as a portion, a sum equal to that with which his intended father-in-law should endow the intended wife. The son, in order to induce the mother to give him a larger portion, entered into a collusive arrangement with the father-in-law, whereby, in consideration of the latter nominally endowing his daughter with £3,000, the son gave him a bond to repay him £1,000, part of it. This bond, being made upon a fraudulent consideration, was void in the hands of the father-in-law, and it was held that, being a chose in action, he could not confer a better title upon his assignee.

Negotiable instruments.

Negotiable instruments are, however, an exception to the rule as to choses in action passing subject to all prior equities. For the *common law*, with regard to them, adopted the custom of merchants, and recognised that such instruments were transferable. Consequently, the transferee of a negotiable instrument has a legal, as well as an equitable, interest; and where the equities are equal he is protected against prior equities by his legal title (*n*). Of course, however, where the transferee has notice (express or imputed (*o*)) of prior equities, he will be postponed.

Bonâ fide purchasers from trustees cannot after notice get legal estate from them.

The *bonâ fide* purchaser of an equitable interest, without notice of an express trust, cannot defend his position by subsequently, and after notice, getting in an outstanding legal estate *from the trustee*; for by so doing he would be guilty of taking part in a new breach of trust (*p*). But if he can perfect his legal title without being a party to a new breach of trust (as, for instance, by registering a transfer of shares which have been actually transferred before notice, or by getting in the legal estate from a third party), he may legitimately do so (*q*).

(*m*) (1718) 1 P. Wms. 497.

(*n*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201. It is not infrequently a task of difficulty to determine whether debentures issued by public companies are negotiable instruments passing free from undisclosed equities or not. As to this, the reader is referred to *Re Natal Investment Co.* (1868), L. R. 3 Ch. 355; *Re General Estates Co., Ex parte City Bank* (1868), L. R. 3 Ch. 758; and *Re Romford Canal Co.* (1883), 24 Ch. D. 85.

(*o*) See *Lord Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333.

(*p*) *Saunders* v. *Dehew* (1692), 2 Vern. 271; *Collier* v. *M'Bean* (1865), 34 Beav. 426; *Sharples* v. *Adams* (1863), 32 Beav. 213; *Carter* v. *Carter* (1857), 3 Kay & J. 617.

(*q*) *Dodds* v. *Hills* (1865), 2 Hem. & M. 424.

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BRINGING THE WORK DOWN TO THE 31ST DECEMBER, 1920

BY

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PREFACE.

THE Seventh Edition of Underhill on the Law of Trusts and Trustees was published in April, 1912. Needless to say the Great War stopped its sale and by the end of the Great War it was somewhat out of date. It is hoped that this supplement, bringing the case law down to the end of 1920, will make the Seventh Edition as useful as if it were only now published.

A. U.

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SUPPLEMENT

TO THE SEVENTH EDITION OF

UNDERHILL'S LAW OF

TRUSTS AND TRUSTEES.

Page 18. Note (*u*). Add: See also *Re Dunstan, Dunstan* v. *Dunstan*, [1918] 2 Ch. 304; but conf. *Re Wilson, Wilson* v. *Wilson* (1916), 142 L. T. Jour. 41, where on the construction of the will it was held that the first taker was limited to a life interest only.

Note (*a*). Add: See also *Re Booth, Hattersley* v. *Cowgill* (1917), 86 L. J. Ch. 270, and *Re Howell, Liggins* v. *Buckingham*, [1915] 1 Ch. 241.

Page 19. Note (*f*). Add: See also *Houston* v. *Burns*, [1918] A. C. 337; *Re Gardom, Le Page* v. *Att.-Gen.*, [1914] 1 Ch. 662; aff. H. L. (*sub nom. Le Page* v. *Gardom*), [1915] W. N. 216; *Re Rowe, Merchant Taylors' Co.* v. *London Corporation* (1914), 30 T. L. R. 528; *Re Moore, Moore* v. *The Pope*, [1919] 1 Ir. R. 316.

Page 20. Note (*g*). Add: *Houston* v. *Burns, supra.*

Note (*m*). Add: But conf. *Re Eades, Eades* v. *Eades*, [1920] 2 Ch. 353, where "and" was read "or."

Page 21. Note (*q*). Add: *Matthews* v. *Kieran*, [1916] 1 Ir. R. 289.

Page 29. Note (*u*). Add: See also *Re Humphrey's Estate*, [1916] 1 Ir. R. 21.

Page 32. Note (*i*). Add: See also *Young* v. *Young* (1918), 52 Ir. L. T. 40.

Page 41. Note (*r*). Add, after "*Paul* v. *Paul* (1882), 20 Ch. D. 742", *Re Daw, Binney* v. *Daw* (1917), 87 L. J. Ch. 441.

Page 44. After line 21. Add new paragraph: On the other hand, where a declaration of trust is relied on, the Court must be satisfied that a present irrevocable declaration of trust has been intended. Thus where entries in pencil had been

made in accounts kept by A, who had appropriated certain moneys of B, which pointed to an intention to charge these moneys upon a certain house, but which entries were not communicated to B, and appeared to have been altered from time to time, it was held that no charge had been created, the entries pointing rather to intention to create a charge by a deposit of deeds which was never fulfilled; *Re Cozens, Green* v. *Brisley*, [1913] 2 Ch. 478.

Page 46. Note (*m*). Add: See also *Re Parry, Ex parte Salaman*, [1904] 1 K. B. 129.

After "another," end of third paragraph. Add following new paragraph: There is, however, a real exception to the rule under discussion where the donor dies and makes the intended donee his executor (*Strong* v. *Bird* (1874), L. R. 18 Eq. 315; *Re Pink, Pink* v. *Pink*, [1912] 2 Ch. 528), or where he afterwards by inadvertence conveys the property to the donee under circumstances which, apart from the incompleteness of the gift, would raise a resulting trust (*Carter* v. *Hungerford*, [1917] 1 Ch. 260). In both such cases the otherwise imperfect gift will be upheld.

Page 49. Note (*l*). Add: See also *Re Cavendish Browne, Hornor* v. *Rawle*, [1916] W. N. 341.

Page 52. Note (*f*). Add: See also *Pullan* v. *Coe*, [1913] 1 Ch. 9; *Re Pryce, Nevill* v. *Pryce*, [1917] 1 Ch. 234. But, of course, if the trust was executed and not executory the rights of such persons would be upheld (see *Paul* v. *Paul* (1882), 20 Ch. D. 742, and *Re Daw, Binney* v. *Daw* (1917), 87 L. J. Ch. 441).

Page 57. Note (*e*). Add: See also *Re Mudge*, [1914] 1 Ch. 115, following *Re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51. In considering the question whether the assignment of a mere *spes successiones* is destroyed by bankruptcy or whether it remains capable of being ordered to be specifically performed it would seem that the latter result will depend upon whether the *spes* is sufficiently defined. An assignment of *all spes* would be too vague, but an assignment of whatever may accrue to the assignor as one of the next of kin of A, a living person, would remain good (*Re Lind, Industrials Finances Syndicate, Ltd.* v. *Lind*, [1915] 2 Ch. 345).

Page 62. Note (*k*). Add: *Re Haygarth, Wickham* v. *Holmes*, [1912] 1 Ch. 510. As to personal estate settled upon trusts corresponding with the limitations of real estate, but not to vest absolutely until some person should become adult tenant

in tail (without the words "by purchase"), see *Re Atkinson, Atkinson* v. *Atkinson*, [1916] 1 Ch. 91.

Note (*m*). Add: But see *Re Berwick, Ryle* v. *Ryle*, [1911] 1 Ch. 116, where it was held that a trust for issue living when all the debts are paid was void for remoteness.

Page 63. Note (*o*). For a good example of the difference between vesting and date of distribution, see *Re Lodwig, Lodwig* v. *Evans*, [1916] 2 Ch. 26.

Note (*p*). Add: For example of a devise to "A and his children and their children for ever," see *W. Gardiner & Co., Ltd.* v. *Dessaix*, [1915] A. C. 1096; and of a trust of income for a voluntary association unlimited in point of time, see *Re Swain, Phillips* v. *Poole* (1908), 99 L. T. 604; and of a gift to a club, *Re Drummond, Ashworth* v. *Drummond*, [1914] 2 Ch. 90; and *Re Smith, Johnson* v. *Bright-Smith*, [1914] 1 Ch. 937.

Page 65. Note (*z*). Add: This rule is now generally known as the rule in *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85. It does not extend to cases where one of the parents is born at the date when the settlement takes effect, but the other is not then ascertainable, and may therefore be unborn; *e.g.* a devise in trust for A for life, with remainder to any widow whom he may leave for life, with remainder to their first son in fee (*Re Bullock, Bullock* v. *Bullock*, [1915] 1 Ch. 493, dissenting from *Re Park's Settlement, Foran* v. *Bruce*, [1914] 1 Ch. 595, and followed in *Re Garnham, Taylor* v. *Baker*, [1916] 2 Ch. 413); see also as to the application of the rule to equitable remainders as distinguished from executory limitations, *Re Clarke, Wanklyn* v. *Streatfield*, [1916] 1 Ch. 467.

Page 66. Middle of page. Insert: As to the meaning of "portions" in the Thellusson Act, see *Re Elliott, Public Trustee* v. *Pinder*, [1918] 2 Ch. 150.

Note (*c*). Add: *Re Cattell, Cattell* v. *Cattell*, was affirmed by the C. A., [1914] 1 Ch. 177.

2nd Paragraph ought to read: "It will be perceived therefore that the maximum period allowed for accumulation other than the life of the settlor is either twenty-one years from the death of the testator or settlor, or during the minority or successive minorities of all persons who would, if of full age, be entitled to the income directed to be accumulated. *Re Cattell, Cattell* v. *Cattell, supra.*"

Page 67. Note (*h*). Add: *Re Aspinall's Settled Estates, Aspinall* v. *Aspinall*, [1916] 1 Ch. 15.

Pp. 67-8. Note (*i*). Add: See also *Re Ashton, Ballard* v. *Ashton*, [1920] 2 Ch. 481 (gift over if donee should die *non compos*, held void).

Page 68. Note (*m*). Add: As to income accrued before forfeiture, but not paid over, see *Re Jenkins, Williams* v. *Jenkins*, [1915] 1 Ch. 46.

Note (*q*). Add: *Re Burroughs-Fowler, Trustee of Burroughs-Fowler* v. *Burroughs-Fowler*, [1916] 2 Ch. 251.

Note (*r*). Add: But it is submitted that a man might on marriage settle his own property on an immediate discretionary trust for himself, etc., during his life, as there would then be no alteration of the trust to take effect on bankruptcy.

Page 70. Note (*a*). Add: See *Re Homer, Cowlishaw* v. *Rendell* (1916), 86 L. J. Ch. 324.

Page 72. Note (*m*). Add: See also *Re Lovell, Sparks* v. *Southall*, [1920] 1 Ch. 122.

Text, three lines from bottom, after the word "followed." Add: except in *Re Hewett, Eldridge* v. *Iles*, [1918] 1 Ch. 458, and *Re Elliot, Montgomery* v. *Potterton*, [1918] 1 Ir. R. 41.

Page 74. Note (*x*). Add: See *Re Bullock, Bullock* v. *Bullock*, [1915] 1 Ch. 493, and *Re Davey, Prisk* v. *Mitchell*, [1915] 1 Ch. 837.

Page 77. Note (*g*). Add: See also *Re Davies, Lloyd* v. *Cardigan County Council*, [1915] 1 Ch. 543.

Page 82. Note (*r*). Add: See also *Re Louis, Louis* v. *Treloar* (1916), 32 T. L. R. 313.

Page 83. Note (*s*), after *Geddis* v. *Semple*, [1903] 1 Ir. R. 73. Add: *Re Gardner, Huey* v. *Cunnington*, [1920] 2 Ch. 523.

Page 84. Note (*u*). Add: See also *Tharp* v. *Tharp*, [1916] 1 Ch. 142.

Page 85. Note (*b*). Add: For another case where a secret trust was communicated to one trustee only but was held to be void, see *Le Page* v. *Gardom*, [1915] W. N. 216.

Note (*c*). Add: Conf. *Re Gardom, Le Page* v. *Att.-Gen.*, [1914] 1 Ch. 662, and in H. L. (*sub nom. Le Page* v. *Gardom*), [1915] W. N. 216.

Page 97. Paragraph (4) *et seq.*: It must be understood that the law as to undue influence stated in the text is only true with regard to settlements and gifts *inter viros*. With regard to dispositions by will when once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue

influence rests on the person who so alleges (*Craig* v. *Lamoureux*, [1920] A. C. 349).

Page 101. Note (*i*). Before *Mackintosh* v. *Pogose*, interpolate Bankruptcy Act, 1914, s. 42.

Note (*l*). Add: As to the difference between property in which the settlor had, or had not, at the date of the marriage any interest, see *Re Bulteel*, *Bulteel* v. *Manley*, [1917] 1 Ch. 251, and *Doherty* v. *Power*, [1916] 1 Ir. R. 337.

Page 102. Note (*o*). Add: On the other hand, a variation of a marriage settlement without valuable consideration will be void under this section, *Re Macdonald*, *Ex parte McCullum*, [1920] 1 K. B. 205; 88 L. J. K. B. 1226.

Page 104. End of first paragraph, after "apply (*u*)." Add: A voluntary settlement is not void against the settlor's trustee in bankruptcy from its date, but is only void from the time when his title accrues; so that if before that time the property comprised in the settlement has been sold *bona fide* to a purchaser for value the title of the latter will be good (*Re Holden*, *Ex parte Official Receiver* (1887), 20 Q. B. D. 43; *Re Brall*, *Ex parte Norton* (1893), 2 Q. B. 381; *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776; even although the purchase is subsequent to the act of bankruptcy, *Re Hart*, *Ex parte Green*, [1912] 3 K. B. 6, unless, of course, he has notice of it, *Re Schrager* (1913), 108 L. T. 346).

Page 109. Note (*t*). Add: See also *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

Page 113. Note (*a*). Add: *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

Page 114. Note (*b*). Add, after *Halifax Joint Stock Bank* v. *Gledhill*, [1891] 1 Ch. 31; See also *Re Cozens*, *Green* v. *Brisley*, [1913] 2 Ch. 478, appropriation by defaulting trustee of securities to make good his breach.

Page 119. Note (*a*). Add: In executed trusts of land the absence of words of limitation will be as fatal to an equitable fee simple as to a legal one where the trust is a simple trust (*Re Tringham*, *Tringham* v. *Greenhill*, [1904] 2 Ch. 487); but *secus* where the intention to pass the fee can be found (*Re Nutt*, *McLaughlin* v. *McLaughlin*, [1915] 2 Ch. 431; *Re Gillies*, *Archer* v. *Penney*, [1917] 2 Ch. 205; *Re Willis*, *Crossman* v. *Kirkaldy*, [1917] 1 Ch. 365; *Re Colles' Estate*, [1917] 1 Ir. R. 260; *Re Murphy and Griffin's Contract*, [1919] 1 Ir. R. 187).

Page 120. Note (*e*). Add: As to the construction to be placed on an executory trust of heirlooms, see *Re Beresford-Hope, Aldenham* v. *Beresford-Hope*, [1917] 1 Ch. 287, where the form of settlement is indicated.

Note (*g*). Add: But conf. *Re Davison, Cattermole Davison* v. *Mumby*, [1913] 2 Ch. 498, where it was held that the rule in *Shelley's Case* did not apply.

Page 121. Note (*k*). Add: See also *Re Mountgarret, Mountgarret* v. *Ingilby*, [1919] 2 Ch. 294.

Page 126. Notes (*e*) and (*g*). Add: See also *Re Howarth, Macqueen* v. *Kirby*, [1916] W. N. 50.

Page 127. Note (*h*). Add: *Re Beresford-Hope, Aldenham* v. *Beresford-Hope*, [1917] 1 Ch. 287.

Page 128. Note (*n*). Add: See also *Nash* v. *Allen* (1890), 42 Ch. D. 54.

Page 130. Add to Art. 20, new paragraph after paragraph (2). (3) Breach of such covenants may give rise to an ordinary claim for damages: *Re Cavendish Browne, Hornor* v. *Rawle*, [1916] W. N. 341.

Page 131. Note (*y*). *Re Smith, Robson* v. *Tidy* is reported, [1900] W. N. 75.

Page 133. Add to Art. 21, new paragraph after paragraph (4). (5) Probably property substituted for that which she possessed at the date of the marriage (*Re Biscoe, Biscoe* v. *Biscoe*, [1914] W. N. 302).

Page 134. Note (*e*). Add: *Beatty* v. *Vance*, [1916] 1 Ir. R. 66.

Page 136. Note (*s*). Add: Followed, *Leigh-White* v. *Ruttledge*, [1914] 1 Ir. R. 135.

Page 139. Note (*b*). Add: *Re Bland, Bland* v. *Perkin*, [1905] 1 Ch. 4; *Re Capel, Arbuthnot* v. *Galloway*, [1914] W. N. 378.

Note (*c*). Add: But not where there has merely been a *decree nisi*: *Sinclair* v. *Fell*, [1913] 1 Ch. 155.

Page 140. Note (*e*). Add: But see *Re Capel, Arbuthnot* v. *Galloway*, [1914] W. N. 378.

Page 144. Add to Art. 25, new paragraph after paragraph (2): (3) Where part of an estate falls under the covenant it must be valued, and where the covenant excludes pictures, yet they will be included if they merely form part of a residuary estate: *Vanneck* v. *Benham*, [1917] 1 Ch. 60. For a case where chattels were excluded and £1000 was bequeathed to the wife to purchase a necklace of diamonds, see *Re Thorne, Thorne* v. *Campbell-Preston*, [1917] 1 Ch. 360.

Page 152. Note (*p*). Add: See *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson*, [1914] 2 Ch. 419, and *Re Customs and Excise Officers' Mutual Guarantee Fund, Robson* v. *Att.-Gen.*, [1917] 2 Ch. 18.

Page 159. Note (*a*). Add: But this is not so where the remainders are equitable: *Re Willis, Crossman* v. *Kirkaldy*, [1917] 1 Ch. 365; followed, *Re Conyngham, Conyngham* v. *Conyngham*, [1920] 2 Ch. 495, where all the cases are examined. This case was heard on appeal in January, 1921, when judgment was reserved. The result will probably be reported in the March, 1921, number of the Law Reports.

Page 160. Note (*i*). Add: followed, *Re Condrin, Colohan* v. *Condrin*, [1914] 1 Ir. R. 89.

Page 166. Note (*t*). Add: *Re Cohen, Cohen* v. *Cohen*, [1915] W. N. 361; *O'Connor* v. *Tanner*, [1917] A. C. 25.

Page 167. Note (*u*). Add: *Re Ffennell's Settlement, Wright* v. *Holton*, [1918] 1 Ch. 91; *Re Lyne, Lyne* v. *Gibbs*, [1919] 1 Ch. 80. As to the effect of a direction to convert money into land on the now obsolete right of the Crown to forfeit the goods of a felon, see *Talbot* v. *Jevers*, [1917] 2 Ch. 363.

Page 168. Note (*c*). Add: See also *Re Bernard, Bernard* v. *Jones*, [1916] 1 Ch. 552, where there was a good appointment to a daughter by will, and an attempt to settle it on her and her issue by codicil which was void for remoteness. The doctrine is equally applicable whether the fund is bequeathed to a trustee in trust for the legatee and then settled, or whether it is bequeathed directly to the legatee and trusts declared of it (*Re Harrison, Hunter* v. *Bush*, [1918] 2 Ch. 59).

Page 170. Note (*m*). Add: But conf. *Re Connell, Fair* v. *Connell*, [1915] 1 Ch. 867.

Page 172. Note (*u*). Add: Conf. *Re Newbould, Carter* v. *Newbould* (1914), 110 L. T. 6.

Page 174. Note (*b*). Add: See also *Re Goswell's Trusts*, [1915] 2 Ch. 106. As to the effect of a trust to convert *with the consent of the tenant for life*, see *Re Ffennell's Settlement, Wright* v. *Holton*, [1918] 1 Ch. 91.

Page 176. Note (*f*). Add: For other cases of renewals of leases by fiduciary persons, see *Smyth* v. *Byrne*, [1914] 1 Ir. R. 53; *Hahasy* v. *Guiry*, [1917] 1 Ir. R. 371; *Re Smith* (1918), 52 Ir. L. T. 113; *Kiernan* v. *M'Cann*, [1920] 1 Ir. R. 99; and *Brady* v. *Brady*, [1920] 2 Ir. R. 170.

Page 180. Note (*f*). Add: As to a constructive trust of a patent where the patentee had contracted with his employers that the benefit of all his inventions should belong to them, see *British Reinforced Concrete Engineering Co., Ltd.* v. *Lind* [1917], W. N. 38; 86 L. J. Ch. 486.

Page 188. Note (*f*). Add: Conf. *Wellesley* v. *Withers* (1855), 4 Ell. & Bl. 750.

Page 195. Note (*k*). Add: See *Re Oxley, John Hornby and Sons* v. *Oxley*, [1914] 1 Ch. 604.

Page 200. Note (*g*). Add: But *quære* whether this is consistent with the decision in *Re Lashmar, Moody* v. *Penfold*, cited on p. 196, *supra*.

Page 203. Note (*t*). Add: It follows as a corollary that one of several *cestuis que trust* cannot gain a statutory title as against his fellow *cestuis que trust* by reason of a long-continued mistake made by the trustee in his favour: *Lister* v. *Pickford* (1865), 34 L. J. Ch. 582.

Page 204. Note (*z*). Add: As to whether a *purchaser* of the equitable interest of a beneficiary gets the legal estate by twelve years possession, see *Re Cussons, Ltd.* (1904), 73 L. J. Ch. 296.

Page 216. Note (*g*). Add: But it would seem that where there is a trust for sale *at such time* as A shall approve, the trustees may sell after the death of A, see *Re Powell, Bodvell-Roberts* v. *Poole* (No. 2) (1918), 144 L. T. Jour. 459, following *Pearce* v. *Gardner* (1852), 10 Hare 287, 292; and also *Re Ffennell's Settlement, Wright* v. *Holton*, [1918] 1 Ch. 91.

Page 222. Add to Art. 43 the following new paragraph, viz.: (4) Where advances have to be brought into hotchpot, then, between the period of distribution and the actual payment or appropriation of the property to or among the persons entitled, where the actual value of the estate cannot be definitely ascertained, interest at 4 per cent. per annum must for the purposes of computation be charged against the advances and added to the income of the whole estate which is then divisible, each advanced person taking his share of the income less the 4 per cent. on his advance (see *Re Forster-Brown, Barry* v. *Forster-Brown*, [1914] 2 Ch. 584; and *Re Cooke, Randall* v. *Cooke*, [1916] 1 Ch. 480, and cases there cited; and see also *Re Foster, Hunt* v. *Foster*, [1920] 1 Ch. 391). But it would seem to be otherwise if the value of the whole estate can be definitely ascertained at the period of distribution, in which case the

advance is merely considered as a part payment of the share (*Re Hargreaves, Hargreaves* v. *Hargreaves* (1903), 88 L. T. 100).

Page 223. Add to paragraph (1), after "performed (*m*)." : On somewhat similar grounds where an annuity is payable out of income, in the absence of intention to the contrary the trustees cannot accumulate surplus income for the purpose of better securing the annuity (*Re Platt, Sykes* v. *Dawson*, [1916] 2 Ch. 563). But where the trust property is a business they are justified in setting aside part of the profits for depreciation, etc., *Re Crabtree, Thomas* v. *Crabtree*, [1912] W. N. 24; 106 L. T. 49.

Note (*o*). Add: Followed, *Re Evans, Jones* v. *Evans*, [1913] 1 Ch. 23.

Note (*p*). Add: *Re Hatton, Hockin* v. *Hatton*, [1917] 1 Ch. 357, and *Re Ogilvie, Ogilvie* v. *Ogilvie*, [1919] W. N. 32; 88 L. J. Ch. 159.

Page 224. Line 8, after the word "capital." Add: A similar course was taken with regard to the bonus of ½ per cent. payable by the Treasury on deposited Foreign Bonds during the war (see *Re Oppenheim, Oppenheim* v. *Oppenheim*, [1917] 1 Ch. 274).

After first paragraph. Add: Where debentures are issued in lieu of arrears of interest they must be treated as income even although an additional bonus of 1 per cent. is added as a solatium (*Re Pennington, Stevens* v. *Pennington*, [1915] W. N. 333); and the same course is adopted on the distribution of a reserve fund which has never been capitalised (*Re Thomas, Andrew* v. *Thomas*, [1916] 2 Ch. 331).

Page 225. At the end of first paragraph. Add: But the practice does not hold where the dividend is declared, but not paid at the date of the sale (*Re Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389).

Note (*v*). Add: *Re Muirhead, Muirhead* v. *Hill*, [1916] 2 Ch. 181; *Re Oppenheimer, Oppenheimer* v. *Boatman*, [1907] 1 Ch. 399. On the other hand, where there has been no dividend paid during the tenancy for life on cumulative preferred shares, his executors have no claim to any part of the dividends paid after his death (*Re Sale, Nisbet* v. *Philp*, [1913] 2 Ch. 697; and *Re Grundy, Grundy* v. *Holme* (1917), 117 L. T. 471; following *Re Taylor's Trusts, Matheson* v. *Taylor*, [1905] 1 Ch. 734, and distinguishing *Re Griffith, Carr* v. *Griffith* (1879), 12 Ch. D. 655; *Re Wakley, Wakley* v. *Vachell*, [1920] 2 Ch. 205).

Page 226. Note (*y*). Add: But in *Re Hawkins, White* v. *White,* [1916] 2 Ch. 570, SARGANT, J., dissented from *Re Pope, Sharp* v. *Marshall, supra,* and this was followed by ASTBURY, J., in *Re Garside, Wragg* v. *Garside,* [1919] 1 Ch. 132. But of course *unapplied* income accrued during the valid period of accumulation goes as *corpus* (*Re Woolf, Public Trustee* v. *Lazarus,* [1920] 1 Ch. 184).

Note (*a*). Add: *Re Lambert, Lambert* v. *Lambert,* [1910] 1 Ir. R. 280. Trustees for raising portions ought to have regard to the interests not only of the portioners, but also of the beneficiaries of the estate itself (*per* SARGANT, J., *Re Sandys, Union of London and Smiths Bank* v. *Litchfield,* [1916] 1 Ch. 511). As to whether such trustees ought to raise any portion before it is payable except under the direction of the Court, see *Lamb* v. *French,* [1918] 1 Ir. R. 420.

Page 227. Note (*b*). After *Re Waters, Preston* v. *Waters* (1889), W. N. 39. Add: See also *Re Forster-Brown, Barry* v. *Forster-Brown,* [1914] 2 Ch. 584.

Page 228. Note (*e*). Add: Followed *Re Craven, Watson* v. *Craven,* [1914] 1 Ch. 358; and when the appropriation is so made the beneficiary absolutely entitled can call for a transfer of the appropriated securities (*Re Marshall, Marshall* v. *Marshall,* [1914] 1 Ch. 192.) On similar principles it has been held that the Court has jurisdiction to distribute real estate directed to be sold in specie even where there are settled shares if the settlement contains power to invest in the purchase of land (*Re Wragg, Wragg* v. *Palmer,* [1919] 2 Ch. 58).

Note (*f*). Add: Of course the trustees can safeguard themselves by paying the legacy into Court under the Trustee Act (*Re Salaman, De Pass* v. *Sonnenthal,* [1908] 1 Ch. 4).

Page 231. Note (*u*). Add: But see *Re Bogg, Allison* v. *Paice,* [1917] 2 Ch. 239, as to land foreclosed long before the Act.

Note (*y*). Add: *Re Rogers, Public Trustee* v. *Rogers,* [1915] 2 Ch. 437, and *Re Slater, Slater* v. *Jonas* (1915), 113 L. T. 691.

Page 235. Note (*s*). Add: Conf. *Re Sale, Nisbet* v. *Philp,* [1913] 2 Ch. 697, and *Re Grundy, Grundy* v. *Holme* (1917), 117 L. T. 471.

Page 237. Note (*a*). Add: *Re Owen, Slater* v. *Owen,* [1912] 1 Ch. 519, and *Re Aste, Mossop* v. *Macdonald* (1918), 87 L. J. Ch. 660.

Note (*b*). Add: A direction that pending sale the *whole* income is to be paid to a tenant for life does not negative the Apportionment Act (*Re Edwards, Newbery* v. *Edwards*, [1918] 1 Ch. 142).

Page 237. Note (*d*). This statement of the law was approved and adopted by NEVILLE, J., in *Re Inman, Inman* v. *Inman*, [1915] 1 Ch. 187.

Note (*e*). Add: See also *Re Rogers, Public Trustee* v. *Rogers*, [1915] 2 Ch. 437, and *Re Slater, Slater* v. *Jonas* (1915), 113 L. T. 691; but conf. *Re Wareham, Wareham* v. *Brewin*, [1912] 2 Ch. 312.

Page 238. Note (*f*). Add: Conf. *Re Johnson, Cowley* v. *Public Trustee*, [1915] 1 Ch. 435.

Note (*g*). Add: followed by WARRINGTON, J., *Re Godfree, Godfree* v. *Godfree*, [1914] 2 Ch. 110.

Page 239. Note (*l*). It seemed that this is confined to the case of a legal life tenant; but see *per* EVE, J., *Re Dealtry, Davenport* v. *Dealtry*, [1913] W. N. 138.

Page 240. End of first paragraph. Add: For an instance of express direction, see *Re Morgan, Vachell* v. *Morgan*, [1914] 1 Ch. 910.

Note (*o*). Add: Followed in *Re Hazeldine, Public Trustee* v. *Hazeldine*, [1918] 1 Ch. 433.

Page 241. End of first paragraph. Add: But where the property consists of an annuity of varying amount or uncertain duration (so that no reasonably accurate valuation can be made) then each instalment must be treated as a reversion falling in, as in *Re Earl of Chesterfield's Trusts* (1883), 24 Ch. D. 643; *Re Busfield*, 20th February, 1919, SARGANT, J. (unreported).

Page 242. Note (*u*). Add: The rate of interest now allowed is 4 per cent.; *Re Beech, Saint* v. *Beech*, [1920] 1 Ch. 40.

Page 243. Note (*z*). Add: And to instalments of purchase money payable over a series of years (*Re Hollebone, Hollebone* v. *Hollebone*, [1919] 2 Ch. 93).

Page 244. Note (*c*). Add: See also *Re Southwell, Carter* v. *Hungerford* (1915), 113 L. T. 311; and *Re Pennington, Pennington* v. *Pennington*, [1914] 1 Ch. 203.

Page 247. Note (*z*). For explanation and variation of *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295, see *Re McEuen, McEuen* v. *Phelps*, [1913] 2 Ch. 704.

Note (*b*). Add: But this does not apply to the case of a jointure, there being no covenant and therefore no debt: *Re Popham, Buller* v. *Popham*, [1914] W. N. 257.

Page 248. Note (*h*). Add: And *Re Tod, Bradshaw* v. *Turner*, [1916] 1 Ch. 567.

Page 250. Note (*o*). Add: including income tax even where there is a direction to pay income not exceeding £*x* per annum to A (*Re Cain, Cain* v. *Cain*, [1919] 2 Ch. 364).

Note (*z*). Add: Where leaseholds have to be let at a loss, the loss falls on income (*Re Owen, Slater* v. *Owen*, [1912] 1 Ch. 519).

Note (*a*). Add: *Re Sherry, Sherry* v. *Sherry*, [1913] 2 Ch. 508; and *Re Bennett, Jones* v. *Bennett*, [1896] 1 Ch. 778, 787.

Page 252. Note (*k*). Add: Where the settlement provides that the life tenant is to keep the property in repair, it is construed in the same way as a covenant to the like effect in a lease; *Evans* v. *Shotton*, [1918] W. N. 201. As to keeping settled chattels in repair, see *Re Swan, Witham* v. *Swan*, [1915] 1 Ch. 829; and as to keeping up a herd of deer, *White* v. *Paine* (1914), 83 L. J. K. B. 895. Where the settlement empowers trustees to make improvements out of capital or income, they must exercise a fair discretion and not throw the cost wholly on income (*Re Earl of Stamford and Warrington, Payne* v. *Grey*, [1916] 1 Ch. 404).

Page 254. Note (*y*). *Re Freman, Dimond* v. *Newburn*, [1898] 1 Ch. 28, was distinguished by EVE, J., in *Re Jervis, Turner* v. *Jervis* (1919), 146 L. T. Jour. 215.

Page 257. Line 10, after "corpus." Insert: Even where the costs of management are directed by the settlement to be paid out of income, the Court may in exceptional cases order them to be paid out of *corpus* (see *Re Tubbs, Dykes* v. *Tubbs*, [1915] 2 Ch. 137, and *Re Hicklin, Public Trustee* v. *Hoare*, [1917] 2 Ch. 278.

Page 259. Note (*f*). Add: But one trustee ought not to do so without consulting his co-trustees; and if he is condemned in costs to a third party he will have to bear them himself (*Re England, Dobb* v. *England*, [1918] 1 Ch. 24).

Page 261. Note (*v*). Add: But a trustee before making an appropriation of a mortgage to answer a particular share is bound to make reasonable inquiries as to whether the security is sufficient to produce the amount of the share (*Re Brookes, Brookes* v. *Taylor*, [1914] 1 Ch. 558, where *Rawsthorne* v. *Rowley*, [1909] 1 Ch. 409, note, was distinguished).

Page 268. Line 1, after "(*f*)." Add: And where part of the trust

property was a policy of assurance on the settlor's life which he failed to keep on foot, and the trustees neglected to get the surrender value, they were held liable (*Re Godwin's Settlement, Godwin* v. *Godwin* (1918), 87 L. J. Ch. 645). But a trustee was held not to be liable where he kept up the policy, but forgot the receipt, and the company wrongly refused to pay in consequence (*Re McGaw, McIntyre* v. *McGaw*, [1919] W. N. 288).

Page 271. An example of paragraph (6) is afforded by *Re Lane, National Gallery of Ireland* v. *Att.-Gen.* (1918), 52 Ir. L. T. 60, where a testator bequeathed his residuary estate upon trust for sale the proceeds to be invested in the purchase of pictures for the National Gallery of Ireland. *Held* that the trustees could retain interesting pictures belonging to the testator. When trustees do retain existing securities (*e.g.* mortgages) they should have them valued, otherwise they may be liable (*Re Brookes, Brookes* v. *Taylor*, [1914] 1 Ch. 558).

Final paragraph, line 1: The word "instrument" is defined by section 50 as including Act of Parliament.

Note (*p*). Add: But a direction to invest in specific securities "and no other" does; *Orey* v. *Orey*, [1900] 2 Ch. 524. However, the War Loan Acts expressly permit of investments in War Loans even where the settlement forbids investments on any securities except those specified (see *Re Head, Head* v. *Head*, [1919] W. N. 109; 88 L. J. Ch. 236).

Page 276. End of first paragraph. Add: But this seems to be scarcely reconcileable with *Re Wragg, Wragg* v. *Palmer*, [1919] 2 Ch. 58, where an authority "to invest on investments of whatsoever nature as they should in their absolute discretion deem fit, and as if they were absolute owners" was held to authorise the purchase of real estate (see also *Re Hazeldine, Public Trustee* v. *Hazeldine*, [1918] 1 Ch. 433, and *Re Sudlow, Smith* v. *Sudlow*, [1914] W. N. 424).

Note (*l*). Add: But these cases were distinguished by SARGANT, J., in *Re Whitfield*, [1920] W. N. 256, where a company declared and capitalised a bonus by the creation of new shares. His Lordship said that the statement in the text must be taken to mean that if trustees accept bonus shares on which any *moneys were payable* they must promptly sell; but that where the bonus shares were gratis so that the trustees still held the same *proportion* of the company's shares they need not sell.

Page 277. First paragraph: As to the meaning of "Public stocks of the Bank of England," see *Re Hill, Fettes* v. *Hill*, [1914] W. N. 132.

Page 279. Note (*p*): *Re Solomon, Nore* v. *Meyer*, [1912] 1 Ch. 261 was compromised on appeal, [1913] 1 Ch. 200.

Page 280. Second paragraph: Where the 4 per cent. tax free War Loan was at a premium it was held to be an improper stock to appropriate as security for an annuity, as it might be paid off at par during the annuitant's life (*Re Hollins, Hollins* v. *Hollins*, [1918] 1 Ch. 503).

Page 282. Note (*d*). Add: As to the propriety of investing on mortgage of subleaseholds, see observations of WARRINGTON, J., in *Re D'Epinoix's Settlement, D'Epinoix* v. *Fettes*, [1914] 1 Ch. 890, 893.

Page 288. Note (*n*). Add: But a trustee may now be excused for such a misinterpretation (*Re Allsop, Whittaker* v. *Bamford*, [1914] 1 Ch. 1).

Page 290. Note (*t*). Add: This decision was overruled by the C. A. in *Re Allsop, Whittaker* v. *Bamford, supra*.

Page 307. Note (*m*). After *Bradford Banking Co.* v. *Briggs* (1886), 12 App. Cas. 29. Add: *Mackereth* v. *Wigan Coal and Iron Co.*, [1916] 2 Ch. 293.

Page 313. Note (*y*). After "*Re Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613." Add: and for purposes of abatement, *Re Brown, Wace* v. *Smith*, [1918] W. N. 118.

Note (*a*). Add: Where the settlement provides for a yearly salary to the trustee, the fact of a receiver being appointed does not deprive him of it: *Re British Consolidated Oil Corporation, Ltd., Howell* v. *The Co.*, [1919] 2 Ch. 81.

Page 324. Note (*g*). Add: *Re Holton's Settlement Trusts, Holton* v. *Holton*, [1918] W. N. 78; 119 L. T. 304.

Page 327. Note (*a*). Add: See *Re Lethbridge, Couldwell* v. *Lethbridge*, [1917] W. N. 243.

Page 328. Note (*h*). Add: See also *Re Charteris, Charteris* v. *Biddulph*, [1917] 2 Ch. 379, and *Martin* v. *Martin*, [1919] P. 283, at page 288. Where the trustees disagree the Court will (at all events where a trustee has spitefully refused to exercise a power) order it to be exercised (*Klug* v. *Klug*, [1918] 2 Ch. 67). And it would seem that even where trustees claim to exercise their discretion as to investments, the Court will in a proper case direct an inquiry whether it is for the interest of the beneficiaries that a particular investment should be continued or called

in (*Re D'Epinoix's Settlement, D'Epinoix* v. *Fettes*, [1914] 1 Ch. 890).

Page 331. Note (*x*). Add: Where there is express power to cut timber for sale, see *Re Terry, Terry* v. *Terry*, [1918] W. N. 273.

Page 332. Note (*a*). Add: See also *Re Harter, Harter* v. *Harter*, [1913] W. N. 104, where the power was very wide.

Page 333. End of first paragraph. Add: But where the *whole* purchase money is paid to the trustees there can be no doubt (*Re Morrell and Chapman's Contract*, [1915] 1 Ch. 162).

Page 336. The last four lines are inaccurate. They ought to read: "Where a testator gave real and personal estate to his grandchildren in twenty aliquot shares and directed the investment of infants' shares and requested his executors 'to get his property together and divide it,' a trust for sale was implied."

Page 341. End of third paragraph. Add: And see, apart from this Act, but to the same effect (*Re Pope's Contract*, [1911] 2 Ch. 442, 446; *Re Gent and Eason's Contract*, [1905] 1 Ch. 386; and *Re Wragg, Wragg* v. *Palmer*, [1919] 2 Ch. 58).

Page 343. Add, at the end of Art. 58 the following: (5) They can only sell in consideration of a price paid in money, and not in consideration of a rent charge, nor of stocks and shares (see *Read* v. *Shaw* (1807), Sugden on Powers, 8th ed. 953; *per* STIRLING, J., *Payne* v. *Cork Co., Ltd.* [1900] 1 Ch. 308, 314), unless the trust or power expressly or impliedly authorises a sale for any other consideration (see *Re Jackson, Jackson* v. *Jackson* (1900), 44 Sol. J. 573).

Page 345. Note (*h*). Add: Conf. *Alexander* v. *Clarke*, [1920] 1 Ir. R. 47.

Page 348. Note (*x*). Add: Where the Public Trustee was appointed trustee of the moneys of infant next-of-kin under Rule 6A of the Public Trustee Rules: *held* that he was entitled to allow maintenance from the intestate's death (*Re Bass, Bass* v. *Public Trustee*, [1914] W. N. 368). As to cases where the infant is domiciled abroad, see *Re White, Ingram* v. *White*, [1918] 1 Ir. R. 19.

Page 349. Note (*y*). After *Re Dickson, Hill* v. *Grant* (1885), 29 Ch. D. 331. Add: explained, *Re Boulter, Capital and Counties Bank* v. *Boulter*, [1918] 2 Ch. 40.

Page 349. Add to Art. 61 the following: (*c*) Where the infant is

only a life tenant entitled contingently on attaining twenty-one (*Re Boulter, Capital and Counties Bank* v. *Boulter,* [1918] 2 Ch. 40); for otherwise such an infant never could be maintained, which would make the statute contradictory.

Page 350. Note (*e*). Add: But conf. *Re Boulter, Capital and Counties Bank* v. *Boulter, supra.*

Note (*f*). Add: The dictum of COZENS-HARDY, L.J., in *Re Bowlby, Bowlby* v. *Bowlby,* [1904] 2 Ch. 685, was dissented from by YOUNGER, J., in *Re Boulter, Capital and Counties Bank* v. *Boulter, supra.*

Page 351. Note (*h*). Add: Nor is a direction to pay to a daughter until she marries if she in fact marries under twenty-one (*Re Cooper, Cooper* v. *Cooper,* [1913] 1 Ch. 350).

Page 352. Note (*l*). Add: As to whether a mother is *in loco parentis,* see *Re Eyre, Johnson* v. *Williams,* [1917] 1 Ch. 351.

Note (*m*). Add: A contingent bequest of leaseholds neither vested in trustees nor preceded by a vested limited interest, with a gift over, does not carry the intermediate rents (*Re Eyre, Johnson* v. *Williams,* [1917] 1 Ch. 351).

Note (*n*). Add: *Semble,* that a contingent legacy is segregated so as to carry intermediate income by being subject to a prior vested limited interest (*Re Eyre, Johnson* v. *Williams, supra*).

After the second paragraph. Add: YOUNGER, J., has recently added another exception, viz. where the infant only takes a *life interest* contingently on attaining twenty-one, on the ground that in such a case the intermediate income if not applied never could belong to the infant, but must go to *corpus;* but nevertheless the State expressly says that maintenance is allowable where the infant is entitled for life whether absolutely or contingently (*Re Boulter, Capital and Counties Bank* v. *Boulter,* [1918] 2 Ch. 40).

Page 356. Note (*d*). Add: But, of course, where on the true construction of the will the gift is *contingent* on the legatee attaining the given age, the rule in *Gosling* v. *Gosling* would not apply (see *Re Lord Nunburnholme, Wilson* v. *Nunburnholme,* [1912] 1 Ch. 489).

Page 357. Note (*h*). Add: Where the annuitant does elect to take the price, it is ascertainable on the basis of a government annuity (*Re Castle, Nesbitt* v. *Baugh,* [1916] W. N. 195; and see also *Re Marsh, Rhys* v. *Needham,* [1917] W. N. 373).

Page 358. Note (*m*). Add: Where, however, residue consists of a large number of shares in a company, one of several legatees can insist upon having his proportion of the shares transferred to him, notwithstanding a trust to convert; for shares are in their nature divisible (*Re Marshall, Marshall* v. *Marshall*, [1914] 1 Ch. 192).

Page 359. Note (*p*). Add: Followed, *Re Kipping, Kipping* v. *Kipping*, [1914] 1 Ch. 62.

Page 362. Note (*i*). Add: See also *Re Laye, Turnbull* v. *Laye*, [1913] 1 Ch. 298.

Page 363. Note (*l*). Add: The release by the first taker of his interest in part of the property to his daughter on her marriage has been held not to work a forfeiture in such cases (*Re Hodgson, Weston* v. *Hodgson*, [1913] 1 Ch. 34). Where the *corpus* becomes vested in the same person who has a protected life interest there is no merger (*Re Chances' Settlement, Chance* v. *Billing*, [1918] W. N. 34).

Page 366. Note (*f*). Add: See *Re Eades, Eades* v. *Eades*, [1920] 2 Ch. 353; and *Re Willis, Shaw* v. *Willis*, [1920] 2 Ch. 358, ASTBURY, J., but reversed by C. A., [1921] 1 Ch. 44.

Note (*g*). Add: Conf. *Re de Sommery, Coelenbier* v. *de Sommery*, [1912] 2 Ch. 622.

Page 367. Note (*k*). Add: But new trustees appointed under the Conveyancing Act, 1881, or, since 1893, under the Trustee Act of that year, could always exercise the powers.

Page 370. End of first paragraph, after word "over." Add: Where, however, a testator confides a trust "to my executors," the execution of the trust would seem *prima facie* to devolve on the executor of the last surviving executor, as the person or persons occupying the position of "executor" is in such cases appointed *ex officio* as trustee (Farwell on Power, 2nd ed. 93; followed by WARRINGTON, J., in unreported case of *Re Bragg*, 16th October, 1912). But *secus* in the case of an administration *de bonis non*.

Page 371. Line 7. Substitute "transactions after" for "trustees dying since."

Page 372. Six lines from bottom. Add: But it applies to the personal representatives of a trustee who died before that year.

Page 376. Lines 7 and 8 from bottom. Strike out the words: "or, where a trustee is a lunatic, by the Lunacy Court," the Lunacy Act, 1911, having transferred the Lunacy Jurisdiction to the Chancery Division.

Page 379. Note (*m*). Add: Followed, *Re Cotter, Jennings* v. *Nye*, [1915] 1 Ch. 307.

Page 380. Note (*o*). Add: Followed, with reluctance, by NEVILLE, J., *Re Sichel's Settlements, Sichel* v. *Sichel*, [1916] 1 Ch. 358. Where the Council of a College was the donee of the power and all its functions were, by Parliament, transferred to the Senate of a University, the latter was held to be incapable of exercising the power (*Re Spencer, Duncan* v. *Royal Geological Society* (1916), 33 T. L. R. 16; and see also *Re Marshal Beresford's Fund, Aldenham* v. *Archbishop of Armagh* (1917), 33 T. L. R. 208).

Page 381. Note (*t*). Add: see *Re Birchall, Birchall* v. *Ashton* (1889), 40 Ch. D. 436.

Page 383. Note (*c*). Add: *Re Timmis, Nixon* v. *Smith*, [1902] 1 Ch. 176; and *Re de Sommery, Coelenbier* v. *de Sommery*, [1912] 2 Ch. 622.

Page 384. Note (*f*). Add: *Re Birchall, Birchall* v *Ashton* (1889), 40 Ch. D. 436.

Page 389. End of line 18. Add: The Court will not, however, appoint an additional trustee against the wishes of a sole trustee appointed by the settlor, in the absence of allegations against his honesty, even at the unanimous request of the beneficiaries *in esse*: *Re Badger, Badger* v. *Woolley*, [1915] W. N. 166, 84 L. J. Ch. 567; see *Re Rendell's Trusts* (1915), 139 L. T. Jour. 249.

Page 390. Strike out note (*m*), the jurisdiction having been transferred to the Chancery Division by the Lunacy Act, 1911.

Page 391. Line 7 *et seq.*: This paragraph is no longer accurate, and should read thus: The authorities are in a somewhat confused state as to whether before the Trustee Act, 1893, where there were properly appointed trustees in existence, and it was impossible otherwise to vest the trust property in them (a case which since the Act could not occur), or where it is desirable to remove one of several trustees and impossible to get any one to serve in his place, the Court could in the one case reappoint all the trustees, or in the other reappoint the continuing trustees and then make a vesting order. The earlier cases decided that it could be done. Then there were a series of decisions that, even if the Court had jurisdiction, it would not exercise it (*t*). But of late on several occasions vesting orders have been made in two continuing trustees where the third had become of unsound mind or bankrupt, although, as the Court recognised the effect was to remove the trustee by a

side wind (see *Re Jessel* (1913), J. No. 27, followed by SWINFEN EADY, J., in *Re James* (1913), J. No. 2026, neither case reported apparently). The form of order is "that A and B do remain and be trustees in substitution for A, B. and C. a person of unsound mind."

Page 392. Line 4: Substitute Art. 66 for Art. 64.
End of line 5. Add: "*Prima facie* such powers are so incident (*Re de Sommery, Coelenbier* v. *de Sommery*, [1912] 2 Ch. 622)."

Page 394. Note (*i*). Add: But if the appointment is made by the donee of the power it will be good (*Re Coode, Coode* v. *Foster* (1913), 108 L. T. 94; *Re Cotter, Jennings* v. *Nye*, [1915] 1 Ch. 307).

Page 396. Note (*y*). Add: As to the effect on the legal estate of a corporation trustee being wound up, see *Hastings Corporation* v. *Letton and Sons*, [1908] 1 K. B. 378; *Re Bomore Road*, [1906] 1 Ch. 359; and *Re Albert Road, Norwood*, [1916] 1 Ch. 289. But distinguish *Re Queenstown Dry Docks Shipbuilding and Engineering Co.*, [1918] 1 Ir. R. 356.

Page 400. Note (*l*). Line 11: For "would be" substitute "would prior to 1912 have been."

Page 403. Line 5 from bottom: Substitute "in" for "on."

Page 404. Line 9: Where the lunatic was a mortgagee, but, the money having been repaid, is merely a constructive trustee of the legal estate, the application must still be in Lunacy (*Re James' Mortgage Trusts*, [1919] 1 Ch. 61; *Re Hayter's Mortgage Trusts*, [1919] W. N. 32).

Page 407. End of paragraph 1. Add: For instance of appointment of two banks, each as sole Judicial Trustee of part of the trust estate, see *Re Cohen, Cohen* v. *Cohen*, [1918] W. N. 252.

Page 411. Note (*a*). Add: The statute only applies to English trusts and the Public Trustee has no power to accept the trusts of a foreign instrument, *e.g.* a Scottish trust disposition and settlement (*Re Hewitt's Settlement, Hewitt* v. *Hewitt*, [1915] 1 Ch. 228; but conf. *Re Ardagh's Estate*, [1914] 1 Ir. R. 5).

Page 412. Note (*g*). Add: This includes trusts under which the trustee has to select charitable objects (*Re Hampton, Public Trustee* v. *Hampton* (1918), 63 Sol. J. 68).
Note (*h*). Since the work was published the Public Trustee Rules have been redrafted, and are now called The Public Trustee Rules, 1912. In this note Rule 6 should be substituted for Rule 7.

Note (*k*). Add: The consent to act should be obtained before his appointment (see *Re Shaw, Public Trustee* v. *Little*, [1914] W. N. 141). The acceptance must be under his seal (*ib.*, and Public Trustee Rules 1912. Rule 8 (2)).

Page 414. The statement of fees payable to the Public Trustee on pages 414–416 are now obsolete, having been cancelled by "The Public Trustee (Fees) Order, 1920." By this order the fees have been largely increased, but as the order takes up ten pages of print the reader is referred to the order itself, which can be obtained from Wyman and Sons, Ltd., the Government printers in Fetter Lane. Suffice it to say, that in the case of ordinary active trusts, the capital fee begins at 1 per cent. for the first £5000, 15*s.* per cent. for the next £20,000, 10*s.* per cent. for the next £25,000, 2*s.* 6*d.* per cent. for the next £25,000, and 1*s.* 3*d.* per cent. for any excess over £75,000.

The income fees in ordinary trusts begins at 2 per cent. up to £500, and 1 per cent. for any excess over that sum up to £2000, and 10*s.* per cent. for any excess over £2000. These income fees have to be borne rateably by the several persons entitled to the trust income, and not exclusively by persons entitled to the income of residue. Thus annuitants must bear their share (*Re Bentley, Public Trustee* v. *Bentley*, [1914] 2 Ch. 456). In addition to these charges, there are management fees payable on investment of trust funds on mortgage, 10*s.* per cent.; on sale or purchase of stocks and shares, 3*s.* per cent. in the case of trustee securities, and 6*s.* per cent. in other cases; on the sale of land, 10*s.* per cent.; on mortgage of the trust property, 10*s.* per cent.; on the sale of business, 5 per cent. in respect of goodwill, and 1 per cent. for the other assets. Visits by the Public Trustee's representative are also charged for, as also are inspections of land or buildings (not exceeding 5*s.* per cent. on the gross capital value of the land or building). Further, where rents are collected by an agent a percentage of 5*s.* per cent. is payable; and where collected by the Public Trustee himself, such a fee as might have been charged for such collection by an agent, not exceeding the fee chargeable according to the scale for the time being authorised by the Surveyors Institute. Lastly, if the Public Trustee recovers overpaid income tax, he is entitled to a fee not exceeding 10 per cent. on the amount recovered as *he* may determine in each case.

Page 416. Note (*o*). For last line, substitute Public Trustee Rules, 1912, Rule 6.

Page 417. Notes (*u*) and (*x*). Substitute Public Trustee Rules, 1912, Rule 8 (2).

Note (*y*). Substitute Public Trustee Rules, 1912, Rule 8 (3).

Page 418. Note (*c*). Add: *Re Moxon*, [1916] 2 Ch. 595.

Page 419. Art. 74, end of paragraph (2), (*c*). Add: *Re Cherry's Trusts, Robinson* v. *Trustees for Wesleyan Methodist Chapel Purposes*, [1914] 1 Ch. 83.

Page 423. Note (*s*). Substitute: Public Trustee Rules, 1912, Rule 26.

Note (*t*). Substitute: Public Trustee Rules, 1912, Rule 25.

Note (*x*). Substitute: Public Trustee Rules, 1912, Rule 16.

Page 427. Note (*h*). Add: Distinguished by ASTBURY, J., *Re Mackenzie, Bain* v. *Mackenzie*, [1916] 1 Ch. 125.

Page 431. Note (*r*). Add: This was dissented from by the C. A. in *Re Oxley, John Hornby and Sons* v. *Oxley*, [1914] 1 Ch. 604.

Page 432. Note (*c*). Add: and a trustee against whom misconduct is alleged unsuccessfully will be allowed the expense of a leading Counsel, although no relief may be asked against him (*Bruty* v. *Edmundson*, [1918] 1 Ch. 112).

Page 434. Note (*s*). Add: Followed, *Re England, Dobb* v. *England*, [1918] 1 Ch. 24.

Page 440. Note (*z*). Add: But this was dissented from in *Re Oxley, John Hornby and Sons* v. *Oxley*, [1914] 1 Ch. 604.

Page 443. Note (*q*). Add: It is unsafe to keep and invest an infant's legacy, as if the investment depreciates the executor will be liable (*Re Salomons, Public Trustee* v. *Wortley*, [1920] 1 Ch. 290).

Page 444. Note (*z*). Add: As to when payment into Court is justifiable, see *Re Davies' Trusts* (1914), 138 L. T. Jour. 162.

Page 463. Note (*m*). Add: See *Re Godwin, Godwin* v. *Godwin* (1918), 87 L. J. Ch. 645, where a policy was allowed to lapse and the trustees bought consols to answer the loss, but not at a price equal to the surrender value. *Held* liable for the balance.

Page 474. Note (*o*). Add: Followed, *Re Dacre, Whitaker* v. *Dacre*, [1915] 2 Ch. 480; [1916] 1 Ch. 344; but conf. *James Roscoe (Bolton), Ltd.* v. *Winder*, [1915] 1 Ch. 62, where

Re Hallett's Estate, Knatchbull v. *Hallett* (1880), 13 Ch. D. 696, was distinguished.

Page 477. Note (*g*). Add: But this does not apply to actions by one beneficiary against another (*Twigg and Franks* v. *Mason* (1916), 50 Ir. L. T. 173, H. L.).

Page 483. Note (*o*). Add: and so also has a mistaken interpretation of the trust instrument (*Re Allsop, Whittaker* v. *Bamford*, [1914] 1 Ch. 1 (C. A.).

Page 485. Note (*z*). Add: The statute must be specially set up before an order for an account is made, otherwise it will not be limited to six years (*Re Williams, Jones* v. *Williams*, [1916] 2 Ch. 38).

Page 487. Note (*e*). Add: See also *Re Blow, St. Bartholomew's Hospital* v. *Cambden*, [1914] 1 Ch. 233, 243; and *Re Richardson, Pole* v. *Pattenden*, [1919] 2 Ch. 50, PETERSON, J., and in C. A., [1920] 1 Ch. 423.

Page 507. Note (*g*). Add: For another instance, see *Re Hatch, Hatch* v. *Hatch*, [1919] 1 Ch. 351, where an annuity had been paid without deducting income tax, and it was held that the trustees could not deduct the over-payments from subsequent instalments of the annuity. But conf. *Re Musgrave, Machell* v. *Parry*, [1916] 2 Ch. 417.

Page 511. Note (*o*). Add: And see also *British America Elevator Co.* v. *Bank of British North America*, [1919] A. C. 658.

Page 514. Note (*i*). Add: *Re Dacre, Whitaker* v. *Dacre*, [1915] 2 Ch. 480; [1916] 1 Ch. 344; *Re Melton, Milk* v. *Towers*, [1918] 1 Ch. 37; and *Re Jewell's Settlement, Watts* v. *Public Trustee*, [1919] 2 Ch. 161.

Page 516. Note (*t*). Add: And also out of future income (*Re Musgrave, Machell* v. *Parry*, [1916] 2 Ch. 417). But conf. *Re Hatch, Hatch* v. *Hatch*, [1919] 1 Ch. 351.

Note (*u*). Add: But as a general rule a trustee can claim adjustment on his own account where trust property is still in his hands (see *Re Reading, Edmands* v. *Reading*, [1916] W. N. 262).

Page 517. Note (*g*). Add: *Secus* where she was not so restrained, although her assignment was invalid by reason of non-compliance with Malin's Act (see *Re Barrow's Policy Trusts*, [1918] 1 Ch. 452).

Page 520. Note (*y*). Add: As to notice, see *Texas Co.* v. *Bombay Banking Co.* (1919), L. R. 46 Ind. App. 250.

Page 521. On the subject of notice, see also *Mackereth* v. *Wigan Iron and Coal Co.*, [1916] 2 Ch. 293, where a joint stock company, which made advances to a shareholder whom

the directors knew to be a trustee only, was held to be precluded from setting up a lien on the shares, notwithstanding that the company was by its articles not bound to recognise any trust.

Page 524. Note (*o*). Add: This principle has now been extended to sales and conveyances as well as to mortgages (see *Re Chafer and Randall's Contract*, [1916] 2 Ch. 8; *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258). And where a deed recites that A is trustee for himself and B, a purchaser need not go further into the question of how and by what instrument the trust in favour of B arose (*ib.*).

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