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A TREATISE

ON THE LAW OF

TRUSTS AND TRUSTEES

BY

JAIRUS WARE PERRY

SIXTH EDITION

REVISED AND ENLARGED

BY EDWIN A. HOWES, JR.

IN TWO VOLUMES

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rary. Temporary repairs of trust property are chargeable to the income, and not to the principal.[1] A trust to "receive and pay over rents and profits, beyond necessary expenses" gives power to repair and make valid contracts for that purpose.[2]

§ 478. Superintendents of public works and similar *quasi* trustees may apply the funds under their control in opposing legislation which would operate injuriously to the interests confided to them. Lord Cottenham said that "every trustee is to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care." So they have a right to protect it from indirect and probable injuries;[3] but

[1] Veazie *v.* Forsaith, 76 Maine, 173. [*Infra*, § 552.]

[2] Cheatham *v.* Rowland, 92 N. C. 343. [See Att. Gen. *v.* Brecon, 10 Ch. D. 204; Reg. *v.* White, 11 Q. B. D. 309.]

[3] Bright *v.* North, 2 Phill. 220; Queen *v.* Norfolk Comm'rs, 15 Q. B.

$850,000 when the whole estate totaled $920,000.

In England the Settled Estates Acts have given trustees authority to expend the principal of personalty held in trust upon alterations and repairs of a permanent nature which are needed to put the real estate into tenantable condition where it is to be let, and upon reasonable improvements, such as rebuilding, to the extent of one half the rental value of the property improved. Conway *v.* Fenton, 40 Ch. Div. 512; *In re* Calverley's Settled Estates, [1904] 1 Ch. 150; *In re* Keck's Settlement, [1904] 2 Ch. 22; *In re* Legh's Settled Estates, [1902] 2 Ch. 274; *Re* Lord de Tabley, 75 L. T. 328; *In re* Teissier's Settled Estates, [1893] 1 Ch. 153.

Even when the trustee has no authority to make such expenditures from the principal of trust funds as an investment, the courts will authorize repairs and improvements which are necessary to preserve the trust property from destruction or from irreparable damage. *In re* Thomas, [1900] 1 Ch. 319; *In re* Courtier, 34 Ch. Div. 136; Booth *v.* Bradford, 114 Iowa, 562; Conway *v.* Fenton, 40 Ch. Div. 512. See also Estate of Cole, 102 Wis. 1; Pennington *v.* Metropolitan Museum, 65 N. J. Eq. 11; *Re* Lord de Tabley, 75 L. T. 328.

When a trustee is without authority to incumber the property to pay for repairs or improvements, a contractor who has furnished material and labor upon the property acquires no mechanics' lien. Hall *v.* Bullock's Trustee, 97 S. W. 351 (Ky. 1906).

As to what expenditures in the nature of repairs and improvements are properly chargeable to income and what to principal, see *infra*, § 522.

these *quasi* trustees cannot apply the funds of an existing undertaking for the purpose of obtaining larger powers from the legislature, at least without the consent of all parties interested.[1]

§ 479. An executor is allowed a reasonable time to close up the testator's establishment. In one case a period of two months was not considered too long.[2] In most States the time that the testator's family may remain in his house, and use the provisions and other materials on hand, is fixed by statute.

§ 480. An executor or a trustee may appropriate a legacy without suit where the appropriation is such as the court would have directed;[3] and the trustee may expend money for the protection, safety, and support of a *cestui que trust* who is incapable from any cause of taking care of himself, but the better way is to apply to the court.[4]

§ 481. An executor may waive the statute of limitations, by which a debt due from his testator before his death is barred, and if he pays such debt it will be allowed in his accounts.[5] But in most States there are statutes which limit the time of bringing actions against executors and administrators for debts due from the deceased person. In England, there is a decree of administration. After the action is barred against the executor

549; Att. Gen. *v.* Andrews, 2 McN. & G. 225; Att. Gen. *v.* Eastlake, 11 Hare, 205.

[1] Att. Gen. *v.* Andrews, 2 McN. & G. 225; Vance *v.* East Lancashire R. Co., 3 K. & J. 50; Att. Gen. *v.* Guardians of Poor, &c., 17 Sim. 6; Att. Gen. *v.* Norwich, 16 Sim. 225; Stevens *v.* South Devon R. Co., 13 Beav. 48.

[2] Field *v.* Peckett, 29 Beav. 576.

[3] Hutcheson *v.* Hammond, 3 Bro. Ch. 145, 148; Cooper *v.* Douglas, 2 Bro. Ch. 231; Green *v.* Pigot, 1 Bro. Ch. 103; Sitwell *v.* Bernard, 6 Ves. 543; Att. Gen. *v.* Manners, 1 Price, 411; Hill *v.* Atkinson, 2 Mer. 45; Webber *v.* Webber, 1 S. & S. 311; 2 Wms. Ex'rs, pp. 861–864.

[4] Duncombe *v.* Nelson, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798; *Ex parte* Price, 2 Ves. 407; Williams *v.* Wentworth, 5 Beav. 325; Wentworth *v.* Tubb, 1 Y. & C. Ch. 171; Barnsley *v.* Powell, Amb. 102.

[5] Stahlschmidt *v.* Lett, 1 Sm. & Gif. 415; Hill *v.* Walker, 4 K. & J. 166; Hunter *v.* Baxter, 3 Gif. 214; Dring *v.* Greetham, 1 Eq. R. 442.

by statute, or by decree of administration, he must plead the statute bar at his peril; and if he should pay after all actions were barred against him by statute, decree of administration, or otherwise, he would pay upon his own responsibility.[1]

§ 482. A trustee may generally, acting in *good faith*, release or compound a debt due to his trust estate.[2] But if he releases or compromises a debt without sufficient reason or justification, or if he sells a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts.[3] (*a*) In many States there are statutes authorizing executors, administrators, guardians, and trustees to refer or compromise all claims due to and from the estates which they represent. Such statutes are constitutional,[4] and courts will ratify and confirm such compromises.[5]

§ 483. Trustees who hold an equity of redemption in lands mortgaged for more than their value may release the equity

[1] Alston *v.* Trollope, L. R. 2 Eq. 205; Dring *v.* Greetham, 1 Eq. R. 442; Fuller *v.* Redman, 26 Beav. 614; Shewen *v.* Vanderhorst, 1 R. & M. 347; 2 R. & M. 75; Briggs *v.* Wilson, 5 De G., M. & G. 12; 2 Eq. R. 153; *Ex parte* Dewdney, 15 Ves. 496; Pool *v.* Dial, 10 S. C. 440; Bacot *v.* Hayward, 5 S. C. 441.

[2] Blue *v.* Marshall, 3 P. Wms. 381; Ratcliffe *v.* Winch, 17 Beav. 216; Forshaw *v.* Higginson, 8 De G., M. & G. 827.

[3] Jevon *v.* Bush, 1 Vern. 342; Gorge *v.* Chansey, 1 Ch. R. 125; Wiles *v.* Gresham, 5 De G., M. & G. 770; *Re* Alexander, 13 Ir. Ch. 137.

[4] Clark *v.* Cordis, 4 Allen, 466.

[5] Zambaco *v.* Cassanetti, L. R. 11 Eq. 439.

(*a*) 1 Ames on Trusts (2d ed.), 494, n. A trustee of a naked legal trust cannot, without the assent of the beneficiary, compromise or yield a right already accrued to the trust. Bizzell *v.* McKinnon, 121 N. C. 186.

When a deed of trust is given to secure bonds, the trustee cannot release until the bonds are surrendered for cancellation; it is not sufficient that the bonds were delivered to a third person in escrow for surrender upon the performance of a condition never performed. Chicago, &c., Land Co. *v.* Peck, 112 Ill. 408. This does not apply when the debtor and all the creditors agree that the security may be released. Pearce *v.* Bryant Coal Co., 121 Ill. 590.

of redemption to avoid the costs of a foreclosure suit, where such suit will lie, and where costs would be imposed upon them as defendants.[1] If a trustee is a mortgagee, he would not be justified in releasing part of his security for the convenience of the mortgagor merely, nor unless there was some advantage to be gained to the *cestui que trust* or the trust estate.[2]

§ 484. Trustees of lands must of course have a general power to lease them, otherwise they could obtain no income; but they must make reasonable leases. (*a*) In one case a lease

[1] Lewin on Trusts, 423 (5th ed.) [2] Ibid.

(*a*) The power of managing the trust property usually includes power to give leases upon terms and for a time which are reasonable. Such leases will bind the trust property so long as the trust continues. Hutcheson *v.* Hodnett, 115 Ga. 990. *In re* Hubbell Trust, 135 Iowa, 637; Corse *v.* Corse, 144 N. Y. 569, 572; *In re* Odell's Estate, 4 N. Y. S. 463; *In re* James, 64 L. J. Ch. 686. See also, *infra*, § 528. But if the lease is unreasonable as to time or as to its other terms, equity may interfere to protect the interests of the *cestuis*, always having due regard for the equitable rights of *bona fide* lessees. Hutcheson *v.* Hodnett, 115 Ga. 990.

Whether or not a lease given for a reasonable term is binding on the remainder-man in case the trust terminates before the end of the term, has not been clearly settled. The nature of the trustee's legal estate at the time of the lease is given has an important bearing. If the trustee's original legal estate is for the life of another or for a term of years, the legal effect of a lease seems to be limited to his legal estate, and it has no binding effect upon the remainder-men after the termination of the trust unless his power to lease is construed to be a power over the property in addition to his powers as legal owner of a life estate. *In re* Hubbell Trust, 135 Iowa, 637. See Edghill *v.* Mankey, 79 Neb. 347 (case of a lease by a life tenant). In cases of this kind the weight of authority is to the effect that the lease is not binding upon the remainder-men after the termination of the trust, Bergengren *v.* Aldrich, 139 Mass. 259; Gomez *v.* Gomez, 147 N. Y. 195; Matter of McCaffrey, 50 Hun, 371; Matter of City of N. Y. (110th St.), 81 N. Y. S. 32, 81 App. Div. 27; *In re* Armory Board, 60 N. Y. S. 882; Weir *v.* Barker, 93 N. Y. S. 732, 104 App. Div. 112; Standard Metallic Paint Co. *v.* Prince M'f'g Co., 133 Pa. St. 474; Hutcheson *v.* Hodnett, 115 Ga. 990; see also Wood *v.* Patteson, 10 Beav. 541; *In re* Shaw's Trusts, 12 Eq. 124. But see Shannon *v.* Bradstreet, 1 Sch. & Lef. 52; Clarke *v.* Moore, 1 Jon. & Lat. 723; Lowe *v.* Swift, 2 B. &. B. 529, 535; IV N. Y. Consol.

for ten years was allowed.[1] Trustees have a general power of leasing, if the lease does not exceed the quantity of estate that

[1] Naylor *v.* Arnitt, 1 R. & M. 501; Bowes *v.* East London, &c., Jac. 324; Drohan *v.* Drohan, 1 B. & B. 185; Middleton *v.* Dodswell, 13 Ves. 268. [See *In re* Shaw's Trusts, L. R. 12 Eq. 124; Fitzpatrick *v.* Waring, 11 L. R. Ir. 35; Butler *v.* Topkis, 63 A. 646 (Del. Ch. 1906).]

Laws, (1909) p. 3393, § 106; English Settled Land Act of 1882, § 36; unless the trustee has been given express power to make leases which shall bind the remainder-men. Taussig *v.* Reel, 134 Mo. 530.

If the trustee has a fee simple estate, the lease is binding at law after the termination of the trust, and the consequent vesting of the fee in the remainder-men either by his conveyance or by operation of the statute of uses. Any relief given to the remainder-men must be by the intervention of equity. *In re* Hubbell Trust, 135 Iowa, 637. As to the attitude of equity in cases of this kind, there is very little authority. In the case of *In re* Hubbell Trust, 135 Iowa, 637, the court treats reasonableness as the test, and lays down the following general rules for the guidance of trustees: "(1) The trustee may lease for such reasonable terms as are customary and essential to the proper care of and to procure a reasonable income from the property. (2) Such terms should not, save on showing of reasonable necessity to effectuate the purposes of the trust, extend beyond the period the trust is likely to continue. (3) Should they extend unreasonably beyond such period, the excess only will be void. (4) Only upon a showing of such reasonable necessity, when not given such power by the instrument creating the trust, will the trustees be authorized to bind the estate so as to effectually deprive those ultimately entitled thereto of the property itself." And later in the opinion the court says, "In determining what terms are reasonable much necessarily depends on the nature of the property, the customs of the locality, and the conditions of the estate and the probable period of the trust." In this case the trustees had the fee, and the period of the trust was the duration of seven lives and for twenty-one years after the death of the last survivor. The court refused to confirm a lease for 99 years, suggesting that the trustees might properly have given a lease for twenty-one years with rights of renewal at the end of each term until the termination of the trust. The case contains an examination of practically all the authorities upon the point.

In England the Settled Land Act of 1882, § 6, gave to tenants for life power to give ordinary leases for terms not exceeding 21 years, building leases for terms not exceeding 99 years, and mining leases for terms not exceeding 60 years. See Boyce *v.* Edbrooke, [1903] 1 Ch. 836; Middlemas *v.* Stevens, [1901] 1 Ch. 574. § 106, of the New York Real Property Law, IV Consol. Laws (1909), p. 3393, provides that trustees to hold for the life of a beneficiary may lease for five years or less without application to court,

is in them, and is a reasonable one. In case of charitable trusts the general rule is that the trustees should lease only for years, but even a perpetual lease will not be set aside in a collateral attack unless clearly unreasonable or detrimental to the beneficiaries; and the lessees who have in good faith made valuable improvements will be protected in equity if the lease is set aside.[1] In the case of farming lands, husbandry leases only can be made: in England, such leases never exceed ten years.[2] Probably there is no such general custom in this country. But if it is a simple trust, and the *cestui que trust* is in possession, the trustee can do nothing without the consent of the beneficiary.

§ 485. A trustee may reimburse himself for money advanced in good faith for the benefit of the *cestui que trust*, or for the protection of the property, or for his own protection in the management of the trust. (*a*) It is a rule that the *cestui que trust* ought to save the trustee harmless where the trustee has honestly, fairly, and without possibility of gain to himself, paid out money for the benefit of the *cestui que trust*. And a trustee who accepts office at the request of a *cestui que trust* is entitled

[1] Richmond *v.* Davis, 103 Ind. 449.
[2] Att. Gen. *v.* Owen, 10 Ves. 560.

and that the court may authorize longer leases. See Weir *v.* Barker, 93 N. Y. S. 732, 104 App. Div. 112.

It has been held that a court of equity may authorize a lease for 99 years on the same grounds on which it may authorize a sale where the trust instrument has given no such power, viz., the necessity of preserving the trust estate for the main purposes of the trust. Denegre *v.* Walker, 214 Ill. 113; Marsh *v.* Reed, 184 Ill. 263.

As to the effect of authorization of a lease by the court with all parties in interest represented, see Gomez *v.* Gomez, 147 N. Y. 195.

(*a*) Anderson *v.* Kemper, 116 Ky. 339; Winslow *v.* Young, 94 Me. 145; Western Union Tel. Co. *v.* Boston Safe Dep. & Tr. Co., 104 Fed. 580; Dantzler *v.* McInnis, 151 Ala. 293; Johnson *v.* Leman, 131 Ill. 609.

Even when the trust is subsequently set aside as invalid. Beck *v.* Kinealy, 89 Mo. App. 418.

As to rights of creditors by way of substitution to the trustee's right of indemnity, see *infra*, § 815 *b*, note.

to be indemnified by the *cestui* against all loss which may accrue in the proper administration of the trust.[1] (*a*)

§ 486. The trustees or managers of a trading company or partnership have no power in *any case* to borrow money beyond the capital prescribed in the deed of settlement, and bind the company or its members.[2] And where the trustees borrow money, without special authority conferred by the deed, for launching and enlarging the business, and make themselves personally liable, they have no remedy against the other members of the company.[3] But if the trustees incur expenses and debts, within the scope of their authority, and in the ordinary business of the company, or borrow money to pay for such expenses or debts, the company are in equity liable to pay or contribute to the payment of such debts.[4] (*b*)

[1] Balch *v.* Hyham, 2 P. Wms. 453; Jervis *v.* Wolferstan, 18 L. R. Eq. 18; Snyder's app., 72 Mo. 253. [Hobbs *v.* Wayet, 36 Ch. Div. 256.]

[2] Burmester *v.* Norris, 6 Exch. 796; Ricketts *v.* Bennett, 4 C. B. 688; Hawtayne *v.* Bourne, 7 M. & W. 595; Hawken *v.* Bourne, 8 M. & W. 703.

[3] *In re* Worcester Corn Exch. Co., 3 De G., M. & G. 180; *Ex parte* Chippendale, 4 De G., M. & G. 43; Australian, &c. Co. *v.* Mounsey, 4 K. & J. 733.

[4] Ibid.; Tramp's Case, 29 Beav. 353; Hoare's Case, 30 Beav. 225.

(*a*) In Hardoon *v.* Belilios, [1901] A. C. 118, the court had to consider the liability of the beneficiary, who was not the creator of the trust, to reimburse the trustee of shares of stock in a banking company for calls upon the stock in excess of the value of the shares. It was held that where the beneficiary is *sui juris* the trustee's right to indemnity against liability incurred by his retention of the trust property is not limited to the trust property but extends further and imposes upon the beneficiary a personal obligation, enforceable in equity, to indemnify his trustee, and the latter need not prove any request from the *cestui* to incur such liability. But see Fraser *v.* Murdoch, 6 A. C. 855; *In re* Earl of Winchilsea's Policy Trusts, 39 Ch. Div. 168.

(*b*) In Warren *v.* Pazolt, 203 Mass. 328, 349, it was held that trustees with power to sell the trust property and to change investments had no implied power to borrow money for the purpose of paying beneficiaries whose shares had become due, and that notes given by the trustees for this purpose should not have been paid out of the trust property. But it was held that, to avoid selling bonds and other securities at a disadvantageous time, they had authority to

§ 487. A trustee would probably be justified in insuring the property, and in case of loss the insurance money would belong to the *cestui que trust;* [1] but where there is a tenant for life entitled to the income, it would be safer to have such tenant's consent before paying the premium out of his income.[2] (*a*) A mortgagee cannot insure at the expense of the mortgagor without a special stipulation to that effect; and if he insures without such stipulation, he cannot charge the premiums to the mortgagor in his accounts.[3] If a lessor and a lessee insure on their own accounts, neither can claim anything under the policy of the other.[4] So, if a tenant for life insures out of the income, the remainder-man can claim no benefit from the policy. (*b*) If, however, a common carrier insures property in his hands as a carrier, and there is a loss, he holds the proceeds, after defraying his charges, in trust for the owners of the property, even although such owners might not be able to recover of him for the loss of the property.[5]

[1] Lerow *v.* Wilmarth, 9 Allen, 382. [Bridge *v.* Bridge, 146 Mass. 373; Stevens *v.* Melcher, 152 N. Y. 551.]

[2] See *post*, § 553; *Ex parte* Andrews, 2 Rose, 412; Fry *v.* Fry, 27 Beav. 146. If an annuity and a policy on the life of *cestui que vie* are made the subject of a settlement, it is implied that the trustees shall pay the premiums out of the income. Darcy *v.* Croft, 9 Ir. Ch. 19.

[3] Dobson *v.* Land, 8 Hare, 216; Phillips *v.* Eastwood, Llo. & Goo. t. Sugd. 289; *Ex parte* Andrews, 2 Rose, 412.

[4] Duncombe *v.* Nelson, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798.

[5] Lauderdale, &c. *v.* Glyn, 1 El. & El. 612.

borrow for a short time on security of the property they contemplated selling, the loan to them with interest to be repaid out of the proceeds of the security when it should be sold. Interest paid on such temporary loans to them was held to be a proper charge in their accounts.

(*a*) That a trustee should pay insurance premiums out of income, see Bridge *v.* Bridge, 146 Mass. 373; Stevens *v.* Melcher, 152 N. Y. 551; *In re* Earl of Egmont's Trusts, [1908] 1 Ch. 821.

(*b*) See Gaussen *v.* Whatman, 93 L. T. 101; Spalding *v.* Miller, 103 Ky. 405; *infra*, § 553 and note. But see Welch *v.* London Assurance Co., 151 Pa. St. 607; Green *v.* Green, 50 S. C. 514; Clyburn *v.* Reynolds, 31 S. C. 118.

§ 488. As there are legal estates and equitable estates, so there are legal powers and equitable powers. Legal powers operate upon the legal estate, and are cognizable in courts of law; equitable powers affect the equitable estate alone, and are exclusively cognizable in courts of equity. Thus, if land is given to A. for life, remainder to B. and his heirs, and a power is given to C. in such manner as to operate under the statutes of uses, the execution of the power conveys the legal estate, and the common law will notice it. But if lands are limited to the use of A. and his heirs, in trust for B. for life, remainder in trust for C. and his heirs, and a power not operating under the statute of uses is given, either to the trustee or the *cestui que trust*, the execution of the power will have no effect at law. It will only convey an equitable or beneficial interest, and can be recognized only in equity.[1]

§ 489. An equitable power, like a legal power, may be appendant to an interest in the estate, and grow out of it, or it may be simply a collateral power given to some person who has no interest whatever in the estate, legal or equitable. Thus a testator gave an estate to his sister and her heirs in trust, to settle it upon such descendants of the donor's mother as she should think fit. The sister married, and it became a question whether she could execute the power under coverture. But Lord Hardwicke held, "that it was a naked equitable power, not coupled with any beneficial interest, and that a *feme covert* can execute such naked power."[2] But where a donor gave a legal estate to trustees in trust for an *infant feme covert* for life, and to permit her by deed or writing to dispose of the estate as she should think fit, and the donor died leaving the *infant feme covert* his heir-at-law, and she, during her infancy and coverture, executed the power, — Lord Hardwicke held this to be bad, as she had the trust in equity for life, and the trust of the inheritance, as the heir-at-law of the donor, therefore the whole

[1] Lewin on Trusts, 427.

[2] Godolphin *v.* Godolphin, 1 Ves. 21; *ante*, § 49.

equitable inheritance was in her, and this was a power over her own inheritance, and neither infants nor married women can execute a power coupled with an interest.[1] (*a*)

§ 490. Courts have treated powers as either *strict* or simply *directory*. *Strict* powers are such as are to be executed only under the exact circumstances prescribed in the instrument of trust, and in the exact manner and in favor of the particular class of persons named.[2] *Directory* powers are monitory only, and may be executed with some degree of latitude; as where an advowson was vested in trustees, to present a fit person within *six months* of the incumbent's decease, the direction was held to be monitory, and that the power might be executed after that time had elapsed.[3] So, when *six* trustees were empowered, when reduced to *three*, to appoint others, and all died but one, this power was held to be simply directory, and that one might fill the vacancies.[4] Where a power was given to sell with all convenient speed, and within *five years* after the testator's decease, these words were held to be directory only, and that a sale and a good title could be made after that time.[5] And when twenty-five trustees were appointed with a direction that when reduced to fifteen the vacancies should be filled, the court held that the trustees were at *liberty* to fill the vacancies when

[1] Hearle *v.* Greenbank, 1 Ves. 298; Blithe's Case, Freem. 91; Penne *v.* Peacock, For. 43.

[2] Loring *v.* Blake, 98 Mass. 253; Hall *v.* Culver, 34 Conn. 403; Beatty *v.* Clark, 29 Cal. 11; Boorum *v.* Wells, 4 Green, Ch. 87.

[3] Att. Gen. *v.* Scott, 1 Ves. 413; Shalter's App., 43 Penn. St. 83.

[4] Att. Gen. *v.* Floyer, 2 Vern. 748; Att. Gen. *v.* Bishop of Litchfield, 5 Ves. 825; Att. Gen. *v.* Cuming, 2 Y. & C. Ch. 139; Foley *v.* Wontner, 2 J. & W. 245.

[5] Smith *v.* Kenney, 33 Tex. 283; Pearce *v.* Gardner, 10 Hare, 287; Cuff *v.* Hall, 1 Jur. (N. S.) 973; Shalter's App. 43 Penn. St. 83.

(*a*) In *In re* D'Angibau, 15 Ch. Div. 228, it was held that an infant could exercise a power of appointment over property when he had no interest of his own in the property that would be affected or disposed of by such exercise of the power.

reduced to only seventeen, and that they would be compelled to exercise the power when reduced to fifteen.[1] Again, when powers are coupled with an interest in an estate, a substantial compliance with the directions in executing the powers will be sufficient.[2]

§ 491. Although powers may be given to trustees in the same words which are used in giving them an estate, yet different rules of construction will apply to the gift. Thus, if an estate is given to A. and B. and their heirs, A. and B. may convey it to strangers, and the survivor, where joint-tenancy is not abolished, may devise it; but if a power is given to A. and B. and their heirs, it can neither be assigned by both, nor devised by the survivor.[3] Thus, where a *mere naked* power was given to A. and B. and their heirs, Lord Chief-Justice Wilmot said: "It was equivalent to saying, the power is to be executed by consent of both while they live; but when one dies, that consent shall devolve on the heir; the heir of the dead trustee shall consent, as well as the surviving trustee. One may abuse the power. I will supply the loss of one by his heir, and the loss of both by the heirs of both."[4] But where the estate itself is given to A. and B. and their heirs in trust, with certain powers appendant, the power is an essential part of the trust, and passes to the survivor.

§ 492. In one case, a naked power of sale was given to *three trustees and their heirs*, to preserve contingent remainders. The money was to be paid into the hands of the trustees, the survivors or survivor of them, and the executors, administrators, or assigns of such survivor. New trustees were to be appointed as often as one or more of the trustees died. One trustee died, and the Court of Queen's Bench determined that

[1] Doe *v.* Roe, Anst. 86.
[2] Rowe *v.* Becket, 30 Ind. 154; Rowe *v.* Lewis, id. 163.
[3] Cole *v.* Wade, 16 Ves. 46.
[4] Mansell *v.* Vaughn, Wilmot, 50.

the survivors could not execute the power.[1] Lord Eldon was dissatisfied with the judgment, and said, Did the court "consider that the two surviving trustees and the heir of the deceased trustee were to act together? for it was one thing to say that the survivors should not act until another was appointed, and a different thing to say that the heir of the deceased trustee could act in the meantime."[2] But his Lordship felt himself bound by the authority, and refused to compel a purchaser to take a title under similar circumstances.[3] It will be noticed, that, in this case, the estate itself was not in the trustees; if it had been, the survivors would have had an interest and could have executed the power: for it has been held, that where an estate was devised to three trustees and their respective heirs, upon the trust that they and their respective heirs should sell, the word "respective" was surplusage, and that the survivors could make a title.[4]

§ 493. A power limited to "executors" or "sons-in-law" may be exercised by the survivors, so long as the plural number remains;[5] and if the power is limited to a number of trustees, it may reasonably be concluded, that whether they have any estate or not, *i. e.*, whether the power is an adjunct to the trust, or collateral to it, it may be exercised by the surviving trustees. A power given to "executors" will, if annexed to the office of executor, be continued to the single survivor.[6] So a power

[1] Townsend *v.* Wilson, 1 B. & A. 608; 2 Madd. 261; Cooke *v.* Crawford, 13 Sim. 91.

[2] Hall *v.* Dewes, Jac. 193; Jones *v.* Price, 11 Sim. 557.

[3] Hall *v.* Dewes, Jac. 189.

[4] Jones *v.* Price, 11 Sim. 557; Hewett *v.* Hewett, 2 Eden, 332; Amb. 208.

[5] 1 Sugd. Pow. 128 (8th ed.).

[6] 1 Sugd. Pow. 128, Howell *v.* Barnes, Cro. Car. 382; Brassey *v.* Chalmers, 4 De G., M. & G. 528, reversing same case in 16 Beav. 231; Colsten *v.* Chandos, 4 Bush, 666. [Bredenburg *v.* Bardin, 36 S. C. 197; Dick *v.* Harby, 48 S. C. 516; Fitzgerald *v.* Standish, 102 Tenn. 383 But it is otherwise if the power is not annexed to the office. Dillard *v.* Dillard, 97 Va. 434, 440.]

given to "trustees" will, as annexed to the estate and office, be exercisable by a single survivor;[1] (*a*) but it cannot be exercised by one trustee in the lifetime of the other who has not effectually renounced the trust.[2] (*b*) If a power is communicated to the *trustees* for the time being, it cannot be exercised by a *single* trustee.[3] Where there was a trust for sale, but no sale was to be made without the consent of the testator's sons and daughters, and there were seven sons and daughters, and one died, it was held that a sale with the consent of the survivors was too

[1] Lane *v.* Debenham, 11 Hare, 188; Colsten *v.* Chandos, 4 Bush, 666; *Re* Bernstein, 3 Redf. (N. Y.) 20.

[2] Lancashire *v.* Lancashire, 2 Phill. 664; 1 De G. & Sm. 28. [As to express provision that a majority may execute the power and as to lunacy of a trustee, see Bascom *v.* Weed, 105 N. Y. S. 459.]

[3] Ibid. [Coleman *v.* Connolly, 242 Ill. 574.]

(*a*) The same is true where the donees who survive are beneficially interested in the subject of the power, unless there is something to show that the donor intended there should be no survival. Easy Payment Property Co. *v.* Vonderhide, 123 Ky. 352.

Where a power is to be exercised only upon the approval of two or more who are beneficially interested, the approval of the survivors or survivor of those whose approval is a condition precedent is ordinarily sufficient, provided they continue to have a beneficial interest in the exercise of the power. IV N. Y. Consol. Laws (1909), p. 3407, § 174. But the death of all of those whose approval is made a condition precedent ordinarily puts an end to the power. Peirsol *v.* Roop, 56 N. J. Eq. 739; Gulick *v.* Griswold, 160 N. Y. 399; Wells *v.* Brooklyn, etc., R. Co., 106 N. Y. S. 77, 121 App. Div. 491.

(*b*) Where the same person is named as executor and trustee and powers are given to him which are evidently designed to be in aid of the trust, they will be held to attach to the office of trustee and not to the office of executor in case it happens that the two offices become separated. Lahey *v.* Kortright, 132 N. Y. 450; Pollock *v.* Hooley, 67 Hun, 370. Thus where a power of sale for reinvestment was given to the person named as executrix and trustee, and she renounced her executorship, it was held that the power of sale remained in her as trustee and did not pass to an administrator *c. t. a.* Mordecai *v.* Schirmer, 38 S. C. 294; Casselman *v.* McCooley, 73 N. J. Eq. 253. In a case where the executor-trustee had power to sell as executor but not as trustee it was held that after he had turned the property over to himself as trustee he had no power of sale. Gibney *v.* Allen, 156 Mich. 301.

doubtful a title to be specifically enforced.[1] But where trustees had power to sell, with the consent of a majority of the testator's children then living, and all the children were dead, it was held that the trustees could execute the power by a sale, and make a good title.[2]

§ 494. Where powers are confided to trustees "and their heirs," and not "assigns," they cannot be exercised by persons claiming by assignment under the trustees or their heirs.[3] (*a*) So they cannot be exercised by a "devisee" of the original trustee, for a devise is an assignment;[4] if the word "assigns" is added to the limitation to the trustees, the devisees can execute such part of the trusts as may be delegated to third persons.[5]

§ 495. When a discretionary legal power is expressly given to A. and his assigns, the assignee or devisee of A., or any one claiming under him by operation of law as heir or executor, may execute the power.[6] As where a power in a mortgage is limited to the mortgagee, his heirs, executors, administrators, and assigns, the power goes along with and is annexed to the security, and the power can be executed by all those to whom

[1] Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Alley *v.* Lawrence, 12 Gray, 374.

[2] Leeds *v.* Wakefield, 10 Gray, 514; Williams *v.* Williams, 1 Duvall, 221.

[3] Bradford *v.* Belfield, 2 Sim. 264.

[4] Cooke *v.* Crawford, 13 Sim. 91. See Midland Counties Ry. Co. *v.* Westcombe, 11 Sim. 57; Titley *v.* Wolstenholme, 7 Beav. 425; Mortimer *v.* Ireland, 6 Hare, 196; Ockleston *v.* Heap, 1 De G. & Sm. 640; Beasley *v.* Wilkinson, 13 Jur. 649; Wilson *v.* Bennett, 20 L. J. Ch. 279; Macdonald *v.* Walker, 14 Beav. 556; 2 Jarm. on Wills, 716; 1 Greenl. Cruise, 407; *Re* Burtt's Est., 1 Drew. 319.

[5] Lane *v.* Debenham, 11 Hare, 188; Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

[6] How *v.* Whitfield, 1 Vent. 338; 1 Freem. 476; Montague *v.* Dawes, 14 Allen, 369.

(*a*) If real estate is devised to trustees and "their heirs" (without "assigns") in trust for sale, the trust is not personal, but is annexed to the fee taken by the trustees, so that it can be exercised by the surviving trustee's devisees. Osborne to Rowlett, 13 Ch. D. 774; but see *In re* Morton & Hallett, 15 id. 143.

any interest in the estate may come, whether heir, executor, administrator, or assignee.[1] When a mortgage is made to A. and B., their heirs and assigns, to secure a joint advance, the power and security are coupled together and go to the survivor, who may execute the power by sale or otherwise.[2] But if an estate is vested in a trustee upon trust, that he, his heirs, executors, administrators, or "assigns," shall sell, &c., the word "assigns" will not authorize the trustee to assign the estate to a stranger;[3] nor, if assigned, can the stranger execute the power.[4]

§ 496. Where the power is matter of personal confidence in the trustee, it cannot be extended beyond the express words and clear intention of the donor; so if a power, indicating personal confidence, is given to a trustee and his *executors*, and the executor of the trustee dies, his executor, or the executor of the executor, who by law in England is executor both of the trustee and his executor, cannot execute the power.[5] Still less could the executor of the executor of the trustee execute such power in this country; for if an executor dies before completing his trust, an executor *de bonis non* must be appointed. (*a*)

§ 497. A discretionary power to four trustees and the *survivors* of them cannot be executed by the last survivor; for, though the power may generally be held to survive, an inten-

[1] See *ante*, § 199; Salowąy *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

[2] Hind *v.* Poole, 1 K. & J. 383.

[3] Lewin on Trusts, 431; Cooke *v.* Crawford, 13 Sim. 98.

[4] Ibid.; Mortimer *v.* Ireland, 11 Jur. 721; 6 Hare, 196; Wilson *v.* Bennett, 5 De G. & Sm. 495; Stevens *v.* Austen, 7 Jur. (N. S.) 873; Burtt's Est., 1 Drew. 319; Titley *v.* Wolstenholme, 7 Beav. 425; Ockleston *v.* Heap, 1 De G. & Sm. 542; Ashton *v.* Wood, 3 Sm. & Gif. 436; Hall *v.* May, 3 K. & J. 585; Hardwick *v.* Mynd, 1 Anst. 109, is not law.

[5] Cole *v.* Wade, 16 Ves. 44; Stile *v.* Thompson, Dyer, 210 a; Sugd. Pow. 129 (8th ed.).

(*a*) But see Reeves *v.* Tappan, 21 S. C. 1.

tion to the contrary, if it can fairly be inferred, will control. The settlor may be supposed to have said, "I repose confidence in any two of the trustees jointly, but in neither one of them individually."[1] (*a*) But if the power is to four trustees, and the *survivor* of them, it may well be urged that on the death of one, the power may still be exercised by the survivors; for the settlor has said that he reposes confidence in the four jointly, and in each one of them individually.[2]

§ 498. If a power is given to trustees, to be exercised during the *continuance* of the trust, it cannot be exercised after the time when the trust ought to have ceased, though, from the delay of the trustees, it happens that the trust has not in fact been executed.[3] If the powers are not confined to the continuance of the trust, yet they will cease when the objects of the trust have been fully exhausted, and not before.[4] (*b*) If there is no direction as to the continuance of the trust, the powers will

[1] Hibbard *v.* Lamb, Amb. 309; Eaton *v.* Smith, 2 Beav. 236.

[2] Crewe *v.* Dicken, 4 Ves. 97.

[3] Wood *v.* White, 2 Keen, 664; the matter of fact was charged in this case on appeal in 4 Myl. & Cr. 460.

[4] Wolley *v.* Jenkins, 23 Beav. 53; Mortlock *v.* Buller, 10 Ves. 315; Wheete *v.* Hall, 17 Ves. 86; Lantsbery *v.* Collier, 2 K. & J. 709; McWhorter *v.* Agnew, 6 Paige, 111; Moore *v.* Shultz, 13 Penn. St. 101; Salisbury *v.* Bigelow, 20 Pick. 174; Huckabee *v.* Billingsby, 16 Ala. 417; Hetzel *v.* Hetzel, 69 N. Y. 1; Brown *v.* Meigs, 11 Hun (N. Y.), 203.

(*a*) But in Sweet *v.* Schliemann, 88 N. Y. S. 916, 95 App. Div. 266, where power of sale was given to two trustees "and the *successors* of them, one having failed to qualify and the other having died, it was held that the power vested in a single substituted trustee.

(*b*) Power to sell usually ends when the trust ends, but if it affirmatively appears that it was the intention of the testator that the trustees should have a power of sale after the trust in other respects has terminated, such power may be exercised after the termination of the trust. Heard *v.* Read, 171 Mass. 374; Dodson *v.* Ashley, 101 Md. 513; Parker *v.* Seeley, 56 N. J. Eq. 110; Corse *v.* Chapman, 153 N. Y. 466, 473; Mimms *v.* Delk, 42 S. C. 195. As where it was intended that the trustee should divide among several who were entitled in remainder. *In re* Sudeley, [1894] 1 Ch. 334.

subsist till the end of the trust, although there may be delay by the trustees in making the conveyances directed by the settlor.[1] If the trust continues as to part of the property, but has ceased as to part, the power will remain, and can be exercised over the whole,[2] unless there is a clear direction to the contrary.[3] As where an estate was vested in trustees, one-half in trust for A. for life, remainder to her children at twenty-one, and the other half in trust for B. for life, remainder to her children at twenty-one, with power to the trustees to sell during the continuance of the trust, and the children of one had arrived at twenty-one, and the trust had determined as to their share, it was held that the trustees had power to sell the whole under the terms of the settlement; it being necessary that the trustees should have the right to sell the whole, in order to preserve the trust for the full benefit of the other half.[4]

§ 499. A power of sale, whether a common-law or equitable power, or taking effect under the statute of uses, can be exercised only by the persons to whom it is expressly given.[5] If a power of sale or any other power is given to two or more persons by name, with no words of survivorship, and one dies, or refuses to act, the others cannot execute the power.[6] (*a*) But

[1] Wood *v.* White, 4 Myl. & Cr. 460; Bolton *v.* Jacks, 6 Rob. (N. Y.) 166; Cresson *v.* Ferree, 70 Penn. St. 446.

[2] Trower *v.* Knightley, 6 Madd. 134; Taite *v.* Swinstead, 26 Beav. 525.

[3] Wood *v.* White, 4 Myl. & Cr. 460.

[4] Trower *v.* Knightley, 6 Madd. 134; Taite *v.* Swinstead, 26 Beav. 525; Jefferson *v.* Tyrer, 9 Jur. 1083; *Re* Cooke, 4 Ch. D. 454; *Re* Brown, L. R. 10 Eq. 349.

[5] 1 Sugd. Pow. 141, 144 (6th ed.); Boston Franklinite Co. *v.* Condit, 4 Green, Ch. 395.

[6] Ibid. [Hadley *v.* Hadley, 147 Ind. 423, 429, a naked power.]

(*a*) This statement should be confined to naked powers given to several jointly, and even then if a surviving donee is beneficially interested in the exercise of the power, the *prima facie* presumption is that the donor intended the power to continue in him alone by survival. *Supra*, § 493, and note. If the power is attached to the office of trustee or executor, it will continue in the survivor in the absence of expressed

where the power is given to the *trustees as a class*, or to the office of trustee, whether their names are mentioned or not, the power will continue and can be exercised as long as there are more trustees than one, although there are no words of survivorship.[1] In the United States, a power given to executors or trustees, as such, to sell real estate may be exercised so long as a single donee survives; and so, if land is given to trustees to sell, the trustees are joint-tenants, and the survivor will have the freehold, and may exercise the power of sale, it being a power coupled with an interest.[2] And only the acting

[1] Ibid.; Co. Litt. 113 a, n. 2; In Matter of Bull, 45 Barb. 334.

[2] Peter *v.* Beverley, 10 Pet. 532; 1 How. 134; Shelton *v.* Homer, 5 Met. 466; Treadwell *v.* Cordis, 5 Gray, 388; Gibbs *v.* Marsh, 2 Met. 252; Wells *v.* Lewis, 4 Met. (Ky.) 269; Bonifaut *v.* Greenfield, Cro. Eliz. 80; Franklin *v.* Osgood, 2 Johns. Ch. 19; Zeback *v.* Smith, 3 Binn. 69; Davoue *v.* Fanning, 2 Johns. Ch. 254; Muldrow *v.* Fox, 2 Dana, 79; Hunt *v.* Rousmaniere, 2 Mason, 244; Wood *v.* Sparks, 1 Dev. & Bat. 389; Burr *v.* Sim, 1 Whart. 266; Niles *v.* Stevens, 4 Denio, 399; Coykendall *v.* Rutherford, 1 Green, Ch. 360; Putnam Free School *v.* Fisher, 30 Maine, 526; Jackson *v.* Burtis, 14 Johns. 391; Robertson *v.* Gaines, 2 Humph. 367; Miller *v.* Meetch, 8 Barr,

or implied intention that it should not do so. *Supra*, § 493. And when a power of sale or a similar power is given to persons who are named as trustees or executors there is a natural *prima facie* presumption of an intention that the power should survive the death, resignation, or removal of one or more of those named as donees. N. Y. Code of Civil Procedure, § 2642; Rankine *v.* Metzger, 74 N. Y. S. 649, 69 App. Div. 264 (affirmed, 174 N. Y. 540); Draper *v.* Montgomery, 95 N. Y. S. 904, 108 App. Div. 63; Sweet *v.* Schliemann, 88 N. Y. S. 916, 95 App. Div. 266; Haggart *v.* Ranney, 73 Ark. 344; Hunter *v.* Anderson, 152 Pa. St. 386; Lippincott *v.* Wikoff, 54 N. J. Eq. 107.

It has been pointed out that lunacy of one of several trustees does not have the same effect as death or resignation. He still continues to be a trustee, and it is the duty of his cotrustees to ask for his removal. Bascom *v.* Weed, 105 N. Y. S. 459.

When the surviving trustee is the sole life beneficiary, it has been held in New York that she is incompetent to execute the trust. Losey *v.* Stanley, 147 N. Y. 560, 569; Haendle *v.* Stewart, 82 N. Y. S. 823, 84 App. Div. 274; Hilton *v.* Sowenfield, 104 N. Y. S. 942; Weeks *v.* Frankel, 112 N. Y. S. 562. See *contra*, Davis *v.* Davis, 112 S. W. 948 (Tex. Civ. App. 1908). But the fact that the surviving trustee or a substituted trustee is one of the beneficiaries does not disqualify her. Sweet *v.* Schliemann, 88 N. Y. S. 916, 95 App. Div. 266.

executors or trustees need join in executing such powers.[1] In many States, statutes have been enacted which authorize the survivor of several executors to execute even naked powers given by will. A grave question has arisen upon these statutes, whether they extend to the execution of discretionary powers given to trustees, or whether they are confined to powers connected with the administrative functions of executors.[2] In general, it would be a question as to the intention of the donor, whether the powers given should be executed by all the trustees named, or any one or more of them; or whether it was the intention that successors or others connected with the trust should have and execute the powers conferred; in other words, the question is, whether the donor reposed a personal trust and confidence in the trustees appointed, or whether he reposed the power in whomsoever might in fact fill the office of trustee.[3] (*a*)

417; Sharp *v.* Pratt, 15 Wend. 610; Wardwell *v.* McDowell, 31 Ill. 364; Golder *v.* Bressler, 105 Ill. 419; Jackson *v.* Given, 16 Johns. 167; Jackson *v.* Bates, 14 id. 391; Jackson *v.* Ferris, 15 id. 391; Watson *v.* Pearson, 2 Exch. 594, n.; Cadogan *v.* Ewart, 7 Ad. & El. 636; Taylor *v.* Morris, 1 Comst. 341; Tainter *v.* Clark, 13 Met. 220; Warden *v.* Richards, 11 Gray, 277; Gould *v.* Mather, 104 Mass. 283; Parker *v.* Sears, 117 Mass. 513; Collier *v.* Grimsey, 36 Ohio St. 17. This matter is regulated in several States by statutes which cannot be cited, but which the reader will consult in his own State. In some States, if one of several trustees has been discharged after acceptance, the court must fill the vacancy before the trustees can execute the power. Matter of Van Wyck, 1 Barb. 565.

[1] In Matter of Bull, 45 Barb. 334; Hutchins *v.* Baldwin, 7 Bosw. 236.

[2] In Kentucky, South Carolina, and Mississippi, it is held that they do not extend to discretionary powers, but are confined to the functions of the executors in settling up estates. Woodbridge *v.* Watkins, 3 Bibb, 350; Clay *v.* Hart, 7 Dana, 1; Brown *v.* Hobson, 3 A. K. Marsh, 381; Mallet *v.* Smith, 6 Rich. Eq. 22; Bartlett *v.* Southerland, 2 Cush. (Miss.), 401. In New York, the statute was held to apply to powers to be executed by trustees generally. Taylor *v.* Morris, 1 Comst. 341. And see Chanet *v.* Villeponteaux, 3 McCord, 29; Wood *v.* Sparks, 1 Dev. & Bat. 389.

[3] Granville *v.* McNeile, 13 Jur. 252; 7 Hare, 156; Affleck *v.* James, 17 Sim. 121; Shelton *v.* Homer, 5 Met. 462; Ross *v.* Barclay, 18 Penn. St. 179; Pratt *v.* Rice, 7 Cush. 209; Cole *v.* Wade, 17 Ves. 27; Lorings *v.* Marsh,

(*a*) See *infra*, §§ 503, 505.

§ 500. As general rule, administrators with the will annexed are clothed only with the ordinary duties and powers

6 Wall. 337; Fontain *v.* Ravnell, 17 How. 369; Gibbs *v.* Marsh, 2 Met. 252. Where the language of the will clearly indicates an intention on the part of the testator to convert realty into personalty, as where the proceeds of the sale are directed to be distributed or applied by the executor or trustee, or the produce of the real estate is blended in a common fund with the personalty in the scheme provided for the settlement of the estate, there is no room for doubt upon this question, and the cases hold that the power to sell is attached to the office, and may be executed by the acting executors or trustees, or by the survivor of them. Bonifaut *v.* Greenfield, Cro. Eliz. 80; Tylden *v.* Hyde, 2 S. & S. 238; Forbes *v.* Peacock, 11 Sim. 152; Gray *v.* Henderson, 71 Penn. St. 368; Dorland *v.* Dorland, 2 Barb. 63; Sharp *v.* Pratt, 15 Wend. 610; Meakings *v.* Cromwell, 2 Sandf. 512; Putnam Free School *v.* Fisher, 30 Maine, 523; De Saussure *v.* Lyons, 16 Rich. 492; Lockhart *v.* Northington, 1 Sneed, 318; Going *v.* Emery, 16 Pick. 111; Alley *v.* Lawrence, 12 Gray, 373; Warden *v.* Richards, 11 Gray, 277; Terre *v.* Am. Board, 53 Vt. 171. To effect a conversion by power of sale, the will or deed must order sale absolutely for all purposes, irrespective of contingencies or discretion. Anewalt's App., 42 Penn. St. 414; Bleight *v.* Bank, 10 id. 131; Henry *v.* McCloskey, 9 Watts, 145; Wright *v.* Trustees, &c., 1 Hoff. 203; Dominick *v.* Michael, 4 Sandf. 274; Evans *v.* Kingsbury, 2 Randolph, 120. The principle deduced from the decisions seems to be, that a power of sale of the realty, with a direction to distribute the proceeds as personalty, makes an equitable conversion of the realty, and the estate takes the character of personalty from the date of the death of the testator, whether for the payment of debts or legacies, or other purposes of trust declared. And it is said the cases upon this subject seem to depend upon the question whether the testator meant to give the quality to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention, not only that realty shall be converted into personalty for the particular purposes of the will, but that the produce of the real estate shall be taken as personalty whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficacy of the will or from subsequent lapse) will result to the heir. Cruse *v.* Barley, 3 P. Wms. 21. And in Ackroyd *v.* Smith, 1 Bro. Ch. 503, the Master of the Rolls says: "I used to think that when it is necessary for any purpose of the testator's disposition to convert land into money, the undisposed money would be personalty; but the cases prove the contrary." Wheldale *v.* Partridge, 5 Ves. 388. Where the power of sale is discretionary, no conversion of realty into personalty takes place until a sale is actually made. Peterson's App., 88 Penn. St. 397; Gest *v.* Flock, 1 Green, Ch. 108; Cook *v.* Cook, 20 N. J. Eq. 375. In order to work a conversion, an actual sale, either immediately, or in the

of administrators, and they can exercise none of the powers given to executors or trustees, in reference to the real estate, unless such powers are specially conferred upon them by the terms of the will.[1] (*a*) This rule has been altered by statute in

future, or upon the happening of some contingency, must be directed in terms or by necessary implication. Christler *v.* Meddis, 6 B. Mon. 35; Haggard *v.* Rout, id. 247. And see Wms. Exrs., 6 Am. Ed. p. 656 *et seq.* and notes, for full statement and citations. [For a note on the topic of equitable conversion, see *supra*, § 448, note *b*, p. 717 *et seq.*]

[1] Tainter *v.* Clark, 13 Met. 224; Moody *v.* Vandyke, 4 Binn. 31; Dunning *v.* National Bank, 6 Lans. 296; Moody *v.* Fulmer, 3 Grant, 17; Waters *v.* Margerum, 60 Penn. St. 39, 44; Drury *v.* Natick, 10 Allen, 169; Evans *v.* Chew, 71 Penn. St. 47; Conklin *v.* Egerton, 21 Wend. 430; Greenough *v.* Welles, 10 Cush. 571; Lucas *v.* Doe, 4 Ala. 679; Hall *v.* Irwin, 2 Gilm. 180; Hunt *v.* Holden, 2 Mass. 168; Knight *v.* Loomis, 30 Maine, 208; Wills *v.* Cowper, 2 Ohio, 124; Jackson *v.* Potter, 4 Wend. 672; Roome *v.* Phillips, 27 N. Y. 357; McDonald *v.* King, Coxe, 432; Armstrong *v.* Park, 9 Humph. 195; Drane *v.* Bayliss, 1 id. 174; Ashburn *v.* Ashburn, 16 Ga. 213; Smith *v.* McConnell, 17 Ill. 135; Kidwell *v.* Brumagim, 32 Cal. 436; Brown *v.* Hobson, 3 A. K. Marsh, 380; Vardeman *v.* Ross, 36 Tex. 111. In such cases

(*a*) When the same person is named as both executor and trustee, a power given to him as executor cannot be exercised by him as trustee after his executorship has come to an end, and similarly a power given to him in his capacity of trustee cannot be exercised by him as executor when he does not qualify as trustee. Goad *v.* Montgomery, 119 Cal. 552; Gibney *v.* Allen, 156 Mich. 301. See also Poole *v.* Anderson, 80 Md. 454. The point becomes of especial importance when for any reason the offices become separated, as by his death and the appointment of one person as administrator *de bonis non* and another person as substituted trustee. In such a case neither can exercise the powers which were attached exclusively to the office of the other. Varick *v.* Smith, 67 N. J. Eq. 1.

Whether in such a case a power is attached to the office of executor, and so passes to the administrator *de bonis non*, or is attached to the office of trustee and so passes to the substituted trustee, is a question of the intention of the testator. Frequently this intention must be gathered from the purpose for which the power was given. Sweet *v.* Schliemann, 88 N. Y. S. 916; 95 App. Div. 266; Greenland *v.* Waddell, 116 N. Y. 234; Joralemon *v.* Van Riper, 44 N. J. Eq. 299.

Sometimes a power given to a person named as executor and trustee will not pass to either an administrator *de bonis non* or a substituted trustee, as where the power was intended to be a personal discretion. *Infra*, § 503 and notes; § 505.

several States, but the statutes have been held not to apply to discretionary trusts or personal confidences,[1] but only to the general functions of executors in settling estates.[2] A power of

a trustee should be specially appointed to execute the powers which may not be exercised by administrators with the will annexed, and the heirs at law or *cestuis que trust* should be parties to the proceedings. Roome *v.* Phillips, 27 N. Y. 357. [Hinson *v.* Williamson, 74 Ala. 180; Mordecai *v.* Schirmer, 38 S. C. 294; Lahy *v.* Kortright, 132 N. Y. 450; Greenland *v.* Waddell, 116 N. Y. 234.]

[1] Comm'rs *v.* Forney, 3 Watts & S. 357; Hester *v.* Hester, 2 Ired. Eq. 330; Smith *v.* McCrary, 3 id. 204; Drayton *v.* Grimke, 1 Bail. Eq. 392; Brown *v.* Armistead, 6 Rand. 594; Owens *v.* Cowan's Heirs, 7 B. Mon. 156; Moody *v.* Fulmer, 3 Grant, 17. [See Reeves *v.* Tappan, 21 S. C. 1.]

[2] Brown *v.* Hobson, 3 A. K. Marsh. 381; Woolridge *v.* Watkins, 3 Bibb, 350; Conklin *v.* Egerton, 21 Wend. 430; 25 id. 224; Montgomery *v.* Milliken, 5 Sm. & M. 188; Tainter *v.* Clark, 13 Met. 220; Ross *v.* Barclay, 18 Penn. St. 179; Bailey *v.* Brown, 9 R. I. 79. The cases upon this point are somewhat conflicting, — the result in some cases of different language of the statute, and in others of difference of opinion as to the power of an administrator *cum testamento annexo*. In Conklin *v.* Egerton, *ubi supra*, in an elaborate discussion of the subject, it is held that the power given to the executors to sell the real estate, and divide the proceeds among devisees to whom the estate was given by a previous clause of the will, cannot be executed by an administrator *cum testamento annexo*, notwithstanding the statute enactment that "in all cases where letters of administration *cum testamento annexo* shall be granted, the will of the deceased shall be observed and performed; and the administrators of such shall have the rights and powers, and be subject to the same duties as if they had been named executors in the will." So in Dominick *v.* Michael, 4 Sandf. 274. But the judgment in Conklin *v.* Egerton seems to have been affirmed upon another ground in the Court of Appeals, Egerton *v.* Conklin, 25 Wend. 237; while the doctrine in question was left undetermined, Chancellor Walworth saying that his opinion had been that it was the intention by the statute to subtitute the administrator *cum testamento annexo* in the place of the executor as to all trusts of the will, both real and personal, and suggesting that if the doctrine of the court was law, some further legislation was needed, as it would be impossible to carry out the intentions of testators. And in Roome *v.* Phillips, 27 N. Y. 363, the doctrine is acquiesced in, with an intimation that if it had been a new question the result might have been different. And in Elstner *v.* Fife, 32 Ohio St. 371, under statute of that State, it is held that the power of the executors ceased upon their resignation, but an administrator *de bonis non cum testamento annexo* may execute the power. See also, in Virginia, Brown *v.* Armistead, 6 Rand. 594; in North Carolina, Hester *v.* Hester, 2 Ired. Eq. 330; and in Kentucky, Galley *v.* Panther, 7 Bush, 167; and Dilworth *v.* Rice, 48 Mo. 124. And in Penn-

sale in a mortgage given to the mortgagee, his executors, administrators, or assigns, may be executed by any of the personal representatives of the mortgagee who have the duty of

sylvania, power to sell the residue for the purpose of distributing the proceeds among the beneficiaries passes under the statute to the administrator *de bonis non cum testamento annexo*. Jackman *v.* Delafield, 85 Penn. St. 381; Cornell *v.* Green, 10 Serg. & R. 14; Allison *v.* Wilson, 13 Serg. & R. 330. And a discretionary power of sale for the purpose of distributing the estate as personalty may be exercised by the administrator *cum testamento annexo*, where the executors and trustees renounce the trust. Wyman *v.* Carter, L. R. 12 Eq. 309. The early cases and some of the later ones, notably the case of Conklin *v.* Egerton, *ubi supra*, and Tainter *v.* Clark, 13 Met. 220, maintain the distinction between the duties of executors *qua* executors for the ordinary purposes of administration, and their duties under powers conferred upon them outside of the ordinary duties of administration; and hold these latter powers to be either a personal confidence in the persons named executors, or powers to them as trustees, which, being in form, when granted to more than one, joint powers, must, by the common law, be exercised jointly, and so could not pass to the survivor; while as to the ordinary duties of executors in the administration of estates, such as might qualify in the office possessed all authority given by the will to the persons named as executors. The statute of 21 Henry VIII. c. 4, seems to have been adopted to enable these powers to be conveniently combined with the duties of executors, and gave to those who should qualify under the will the full power, although others nominated by the will should disclaim; restricting the application of this statute to the cases embraced by it, where some failed to qualify, it would still have been impossible for the survivor of several qualifying executors to exercise such a power. But the courts, carrying out the principle of the statute, held that the powers to convert realty could be exercised by the survivor of several qualifying executors, thus treating the power as a part of the executorship, — "an incident of the administration," it is called in a recent case, — rather than as a distinct power. Gould *v.* Mather, 104 Mass. 286; Meakings *v.* Cromwell, 1 Seld. 136; Bogert *v.* Hestell, 4 Hill, 492; Smith *v.* Claxton, 4 Madd. 484. In view of these decisions, and of the cases which hold a power of sale by implication in the executors where no person is designated to exercise it, in cases where the proceeds from the sale are directed to be applied by an executor, *post*, § 501, note, it seems to follow that where there is an intent shown by the will to convert realty and to apply or distribute the proceeds by the hand of the executor, the power of sale must be considered a part of the scheme of administration of the estate; and as such, intended by the testator to be exercised by whomsoever should lawfully be charged with the duty of administering, whether he be designated executor or administrator *cum testamento annexo*. Blake *v.* Dexter, 12 Cush. 559. [See note *a*, *supra*; § 264, note *a*, p. 461, vol. 1.]

settling his estate.[1] A husband cannot exercise a power given to his wife.[2]

§ 501. If a power of sale is created by a will without stating by whom it is to be exercised, but the proceeds of the sale are directed to be applied or distributed by an executor, trustee, or other person, such executor, trustee, or other person will by implication take the power of selling, unless there is some other intention to be gathered from the whole will.[3] If the will gives a power of sale to pay debts and legacies, or for distribution, without stating by whom the sale is to be made, the executor takes the power by implication.[4] But if there is a power of sale, but no person is named to execute the power, and there is no purpose of the sale but a mere division of the estate, the executors cannot exercise the power; and if they sell and purchase themselves, they cannot be compelled to complete the purchase.[5] A devise to three children in fee, to be divided or sold as two of the three children could agree, conferred no power of

[1] Doolittle *v.* Lewis, 7 Johns. Ch. 48.

[2] May's Heirs *v.* Frazer, 4 Litt. 391.

[3] Newton *v.* Bennett, 1 Bro. Ch. 135; Bentham *v.* Wiltshire, 4 Madd. 44; Blatch *v.* Wilder, 1 Atk. 420; Elton *v.* Harrison, 2 Swanst. 276, n.; Tylden *v.* Hyde, 2 S. & S. 238; Forbes *v.* Peacock, 11 Sim. 152; Ward *v.* Devon, cited id. 160; Patton *v.* Randall, 1 J. & W. 189; Curtis *v.* Fulbrook, 8 Hare, 28: Watson *v.* Pearson, 2 Exch. 580; Gosling *v.* Carter, 1 Coll. 644; Doe *v.* Hughes, 6 Exch. 223; Lippincott *v.* Lippincott, 4 Green, Ch. 121; Jones's App., 5 Grant, 19. [Sweeney *v.* Warren, 127 N. Y. 426; Drake *v.* Paige, 127 N. Y. 569; Taber *v.* Willetts, 37 N. Y. S. 233, 1 App. Div. 285 (affirmed 153 N. Y. 663); Lesser *v.* Lesser, 32 N. Y. S. 167. See Bradt *v.* Hodgdon, 94 Me. 559.]

[4] Ibid.; Bogert *v.* Hertell, 4 Hill, 492; Meakings *v.* Cromwell, 2 Sandf. 512; 1 Selden, 136; Dorland *v.* Dorland, 2 Barb. 63; Gray *v.* Henderson, 71 Pa. St. 368; and see Dunning *v.* National Bank, 6 Lans. 296; Davoue *v.* Fanning, 2 Johns. Ch. 254; Houck *v.* Houck, 5 Penn. St. 273; Silverthorn *v.* McKinster, 12 id. 67; Lloyd *v.* Taylor, 2 Dallas, 223; Putnam Free School *v.* Fisher, 30 Maine, 523; Foster *v.* Craige, 2 Dev. & B. Eq. 209; Robertson *v.* Gaines, 2 Humph. 378; Magruder *v.* Peter, 11 Gill & J. 217; Peter *v.* Beverley, 10 Peters, 532; 1 How. 134; Lockhart *v.* Northington, 1 Sneed, 318.

[5] Drayton *v.* Drayton, 2 Des. 250, n.; Shoolbred *v.* Drayton, id. 246.

sale on any one.[1] And so where an estate was conveyed to a trustee in trust for a corporation, to be conveyed by him under the direction of the directors, and upon his failure to convey, they to appoint other trustees by deed, a deed signed by the president and directors conveyed no estate, though it recited that they were the successors of the trustee.[2] If an estate is given to the executor for life, to be sold at his death, he can neither sell the land, nor devise the power to *his* executor.[3]

§ 502. If a power is given to several trustees, and one of them refuses to accept, the power may be exercised by the continuing trustee or trustees.[4] Even where the testator desired the remaining trustee to fill the vacancy caused by refusal of the other, and instead of doing so he acts alone, sales and deeds and other acts of such remaining trustee are valid.[5] If the power is not given to the trustees by name, but to the office, and one disclaims, there can be no doubt that the acting trustees can execute the power.[6]

§ 503. A power, though appendant to an estate, is not so appendant that it goes with the estate in every transfer made by the trustee, or in every devolution by course of law.[7] But

[1] Geroe *v.* Winter, 1 Halst. Ch. 655.

[2] Bumgarner *v.* Coggswell, 49 Mo. 259.

[3] Walter *v.* Logan, 5 B. Mon. 516. In many of the States, there are statutes which give directions as to who shall exercise powers of sale. And see Carroll *v.* Stewart, 4 Rich. 200.

[4] See *ante*, § 499; Crewe *v.* Bicken, 4 Ves. 97; Granville *v.* McNeile, 7 Hare, 156; Hawkins *v.* Kemp, 3 East, 410; Cooke *v.* Crawford, 13 Sim. 96; Adams *v.* Taunton, 5 Madd. 435; Bayly *v.* Cummings, 10 Ir. Eq. 410; Sands *v.* Nugee, 8 Sim. 130. [Haggart *v.* Ranney, 73 Ark. 344; Draper *v.* Montgomery, 95 N. Y. S. 904, 108 App. Div. 63; Rankine *v.* Metzger, 74 N. Y. S. 649, 69 App. Div. 264 (affirmed 174 N. Y. 540). See Coleman *v.* Connolly, 242 Ill. 574.]

[5] Bailey, Pet'r, 15 R. I. 60.

[6] Worthington *v.* Evans, 1 S. & S. 165; Boyce *v.* Corbally, t. Plunk. 102; Clarke *v.* Parker, 19 Ves. 1; Welles *v.* Lewis, 4 Met. (Ky.) 269; White *v.* McDermott, I. R. 7 C. L. 1.

[7] Cole *v.* Wade, 16 Ves. 47; Crewe *v.* Dicken, 4 Ves. 97; Burtt's Est., 4 Drew. 319; Wilson *v.* Bennett, 5 De G. & Sm. 475; Hardwick *v.* Mynd, Anst. 109, is not law.

where the estate is transferred to trustees duly appointed under a power, the transferees take the estate and office together, and can exercise the power. But where the court appoints new trustees, it cannot communicate arbitrary or discretionary powers to them,[1] unless the instrument of trust confers such powers upon the trustees for the time being, or they are annexed to the office.[2] If a power is given to a trustee, his heirs and assigns, and a new trustee is appointed, and a vesting order made, the new trustee may execute the power under the word "assigns." But statutes in England, and in many of the States, now give new trustees the same power as the old. (*a*) Under

[1] Doyley *v.* Att. Gen., 2 Eq. Ca. Ab. 194; Fordyce *v.* Bridges, 2 Phill. 497; Newman *v.* Warner, 1 Sim. (N. S.) 457; Cole *v.* Wade, 16 Ves. 44; Hibbard *v.* Lambe, Amb. 309.

[2] Bartley *v.* Bartley, 3 Drew. 384; Brassey *v.* Chalmers, 4 De G., M. & G. 528; Byam *v.* Byam, 19 Beav. 66; Bailey *v.* Brown, 9 R. I. 79; Burdick *v.* Goddard, 11 R. I. 516.

(*a*) The courts frequently have occasion to determine whether a power to be exercised in the discretion of a trustee is personal to the trustee named in the trust instrument or passes to a substituted trustee upon the death, removal, renunciation or resignation of the former. The determination depends entirely upon the intention of the creator of the trust, for if he intended that the exercise of the power should rest solely upon the personal judgment or discretion of the trustee whom he has named, the court cannot vest the power in a successor. Mercer *v.* Safe Dep. Co., 91 Md. 102, 118; Kennard *v.* Bernard, 98 Md. 513; Lowe *v.* Convention, 83 Md. 409; Dodge *v.* Dodge, 109 Md. 164; French *v.* Northern Trust Co., 197 Ill. 30, 39; U. S. Trust Co. *v.* Poutch, 130 Ky. 241.

When the power is given to the trustee "and his successor" or to "the trustee for the time being," there usually is no doubt of the intention that it shall pass with the office to a substituted trustee. Godfrey *v.* Hutchins, 28 R. I. 517; Luquire *v.* Lee, 121 Ga. 624; *In re* Cunningham, [1891] 2 Ch. 567. In the absence of such words, the courts seek to determine the intention of the creator of the trust, not only from the words of the trust instrument, but from all the circumstances which tend to show his intention. Each case must to a very large extent depend upon its own facts. Cases cited *infra*.

When the power is ministerial in its nature and one which is usually given to a trustee to enable him to carry out the trust properly, such as a power of sale for the purpose of changing investments, the courts incline to hold that it is attached to the office of trustee and is intended to continue as long as the

some of these statutes a new trustee may come in and prosecute a suit begun by his predecessors, without recourse to a bill

trust, however extensive may have been the discretion given. Kennard *v.* Bernard, 98 Md. 513; Safe Deposit & Tr. Co. *v.* Sutro, 75 Md. 361; Dodge *v.* Dodge, 109 Md. 164; Lahy *v.* Kortright, 132 N. Y. 450; Reeves *v.* Tappan, 21 S. C. 1; Dick *v.* Harby, 48 S. C. 516; Bradford *v.* Monks, 132 Mass. 405. But see Hinson *v.* Williamson, 74 Ala. 180; Luquire *v.* Lee, 121 Ga. 624; Snyder *v.* Safe Dep. & Tr. Co., 93 Md. 225; Lowe *v.* Convention, 83 Md. 409.

When the trustee has been given the discretion to determine the amount and times of payment of income to the beneficiary, the courts are somewhat less inclined to hold that the discretion was intended to be attached to the office of trustee, unless it appears from the circumstances that the main purpose of the trust will be defeated by holding that the discretion was a personal confidence in the named trustee. For cases holding that the power attached to the office, see French *v.* Northern Trust Co., 197 Ill. 30; Cutter *v.* Burroughs, 100 Me. 379; Matter of Wilkin, 183 N. Y. 104; Button *v.* Hemmens, 86 N. Y. S. 829, 92 App. Div. 40; Willis *v.* Alvey, 69 S. W. 1035 (Tex. Civ. App. 1902); Osborne *v.* Gordon, 86 Wis. 92. For cases holding that the power was a personal confidence, see Benedict *v.* Dunning, 97 N. Y. S. 259, 110 App. Div. 303; Smith *v.* Floyd, 108 N. Y. S. 775, 124 App. Div. 277. And when power has been given to terminate the trust by turning over the entire property to the beneficiary or to make payments of principal to him from time to time, the courts are still less inclined to hold that the power was intended to pass to a substituted trustee. French *v.* Northern Trust Co., 197 Ill. 30, 39; Dillingham *v.* Martin, 61 N. J. Eq. 276; Security Co. v. Snow, 70 Conn. 288; Whitaker *v.* McDowell, 72 A. 938 (Conn. 1909); Benedict *v.* Dunning, 97 N. Y. S. 259, 110 App. Div. 303; Smith *v.* Floyd, 108 N. Y. S. 775, 124 App. Div. 277; Dillard *v.* Dillard, 97 Va. 434, 440. But see Cutter *v.* Burroughs, 100 Me. 379; Mercer *v.* Safe Dep. Co., 91 Md. 102, 118; Hayes *v.* Robeson, 29 R. I. 216; Stanwood *v.* Stanwood, 179 Mass. 223.

In Sells *v.* Delgado, 186 Mass. 25, it was held that a power to pay over the principal of the trust to the beneficiary upon the latter's majority if in the trustee's discretion he "deem it prudent or advantageous," passed to a substituted trustee. The court was of opinion that a discretionary power would pass to a substituted trustee unless the words of the deed or will "clearly indicate that the donor placed special confidence in the donee, so that the element of personal choice or selection is found." A similar rule has been applied in Rhode Island in regard to a discretion as to making and changing investments. Smith *v.* Hall, 20 R. I. 170; Blakely, Petitioner, 19 R. I. 324. In the English case of *In re* Smith, [1904] 1 Ch. 139, the result of the authorities and statutes is stated as follows: "Every power given to

of revivor.[1] A release by one trustee to the others, with an intention of disclaiming, will operate as a formal disclaimer.[2]

§ 504. Though an assignment of the trust estate will not transfer a power to the assignee, neither will the power remain in the assignor; for if the settlor intended the estate and the power to be coupled together, their severance will intercept the execution of the power. (*a*) As where an estate is given to A. and his heirs in trust, with a power to be executed by A. and his heirs, and A. sells the estate in his lifetime or devises it by his will, the heir of A. cannot execute the power; for the heir is

[1] Murray *v.* Dehon, 102 Mass. 11; Mass. Gen. Stat. Ch. 100, § 9. [Rev. Laws (1902), c 147, §§ 5, 6.]

[2] Nicloson *v.* Wordsworth, 2 Swanst. 372; Hussey *v.* Markham, Finch, 258; Sharp *v.* Sharp, 2 B. & Ald. 405; Urch *v.* Walker, 3 Myl. & Cr. 702; Richardson *v.* Hulbert, 1 Anst. 65.

trustees which enables them to deal with or affect trust property is *prima facie* 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; whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide discretion is not enough to exclude the *prima facie* presumption, and little regard is now paid to such minute differences as those between 'my trustees,' 'my trustees A. and B.,' and 'A. and B. my trustees'; 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." The rule of interpretation set forth in the foregoing cases seems not yet to have been adopted by the courts of other jurisdictions, except possibly where the power given is one which is usually incidental to the management of trust property. Cases cited *supra*, this note.

(*a*) A trustee with power of sale cannot execute the power after he has been removed from or has resigned his office; Kenady *v.* Edwards, 134 U. S. 117; and a substituted trustee who has been expressly made subject to the control and order of the court cannot convey without an order from the court. Kenady *v.* Edwards, *ubi supra*.

Where a trustee was given power to sell upon the request of the life beneficiary and the latter incumbered his interest and also became bankrupt, it was held that the power might be exercised upon the consent of the beneficiary, the trustee in bankruptcy and the incumbrancer. *In re* Bedingeld & Herring's Contract, [1893] 2 Ch. 332.

no heir as to this estate.[1] But in charities it frequently happens that the estate or fund may vest in one set of donees, and the power of selecting the *cestuis que trust* may exist in another.[2]

§ 505. The survivorship of the estate carries with it survivorship of such powers as are annexed to the trust.[3] But a mere personal power given to A., B., and C. cannot be exercised by the survivors, if one die. If, however, an *equitable* power is annexed to the trust, and forms an integral part of it, as if an estate is vested in three trustees upon a trust to sell, there, as the power is coupled with an interest, and the interest survives, the power also survives.[4] And this is as old as Lord Coke, who says "If a man deviseth land to his executors to be sold, and maketh two executors, and one dieth, yet the survivor may sell the land, because as the estate, so the trust shall survive; and so note the diversity between a bare trust and a trust coupled with an interest."[5] At the present day, a trust, that is, a power imperative, whether a bare power or a power coupled with an interest, would equally be carried into execution in courts of equity; for the maxim now is, that "the trust or power imperative is the estate." And it is well settled that, even in trusts reposed in trustees by name, the survivor, *if he takes the estate* with a duty annexed to it, can execute the power; and the rule of survivorship now applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are intended to form an integral part of it.[6] But powers merely

[1] Wilson *v.* Bennett, 5 De G. & Sm. 475; Burtt's Est., 1 Drew. 319; Cole *v.* Wade, 16 Ves. 27.

[2] *Ex parte* Blackburn, 1 J. & W. 297; Hibbard *v.* Lambe, Amb. 309.

[3] See *ante*, §§ 499, 502.

[4] Lane *v.* Debenham, 11 Hare, 188; Peyton *v.* Bury, 2 P. Wms. 628; Eyre *v.* Shaftesbury, id. 108; Mansell *v.* Vaughn, Wilm. 49; Butler *v.* Bray, Dyer 189 b; Byam *v.* Byam, 19 Beav. 58; Co. Litt. 112 b, 113 a; Flanders *v.* Clarke, 1 Ves. 9; Potter *v.* Chapman, Amb. 100; Jones *v.* Price, 11 Sim. 557.

[5] Co. Litt. 113 a, 181 b.

[6] Lane *v.* Debenham, 11 Hare, 188; Hall *v.* May, 3 K. & J. 185; War-

arbitrary and independent of the trust, and not an integral part of it, are governed by the rules applicable to ordinary powers; as where the trustees by name have power to revoke the limitations, and change the property into a different channel, the discretion is evidently intended to be personal, and not annexed to the estate or office.[1]

§ 506. An unlimited power, to be exercised during successive estates tail, is not invalid for remoteness, for such power may be destroyed with the estate tail.[2] A power, collateral to a limitation in fee, has been supported where it was exercised by sale within the limits prescribed against perpetuities.[3] But how far the execution of such an unlimited power for an indefinite period, and beyond the limits of a perpetuity, could be supported, is not clearly settled.[4] (*a*) Where a testator devised an estate to trustees in trust for his brother's first

burton *v.* Sandys, 14 Sim. 622; Foley *v.* Wontner, 2 J. & W. 246; Doe *v.* Godwin, 1 D. R. 259; Townsend *v.* Wilson, 1 B. & Ald. 608; Jacob *v.* Lucas, 1 Beav. 436. [Haggart *v.* Ranney, 73 Ark. 344; Lippincott *v.* Wikoff, 54 N. J. Eq. 107; Sweet *v.* Schliemann, 88 N. Y. S. 916, 95 App. Div. 266; Rankine *v.* Metzger, 74 N. Y. S. 649, 69 App. Div. 264; Hunter *v.* Anderson, 152 Pa. St. 386.]

[1] Lane *v.* Debenham, 11 Hare, 192; Hazel *v.* Hogan, 47 Mo. 277; Hazel *v.* Woods, id. 298.

[2] Biddle *v.* Perkins, 4 Sim. 135; Powis *v.* Capron, id. 138, n.; Waring *v.* Coventry, 3 Myl. & K. 249; Wallis *v.* Freestone, 10 Sim. 225.

[3] Boyce *v.* Hanning, 2 Cr. & Jer. 334.

[4] 2 Sugd. Pow. 495.

(*a*) A trust for sale is invalid if not limited to take effect within the period of a life in being and twenty-one years after; but this does not invalidate a trust in the same instrument until the sale is made. Goodier *v.* Johnson, 18 Ch. D. 441; Goodier *v.* Edmunds, [1893] 3 Ch. 455. Discretion given by will to trustees to sell if and when they think fit is treated as inconsistent with an intention that the property should be sold at the testator's death. *In re* Pitcairn, 65 L. J. Ch. 120. Such a power may be exercised even after the death of the tenant for life, if so intended, and if then exercised within a reasonable time, it is not within the rule against perpetuities. *In re* Sudeley, [1894] 1 Ch. 334. On the application of the rule against perpetuities to powers of appointment, see *supra*, § 383, note.

and other sons successively in fee, so that the estate and interest of each should go to his next brother on his dying without issue under the age of twenty-one, and if all died without issue under that age, then in trust for the person who should be his next heir, and the trustees had power to sell the estate at their discretion at any time after his decease, it was held that a purchaser must take the estate, as the title was good, and the power did not contravene the rule against perpetuities.[1]

§ 507. Some powers are entirely discretionary; that is, it is left entirely to the judgment of the trustees whether they will execute them at all or not; as where the trustees are authorized or directed to do a certain act, or to abstain from it, "if they think fit" [2] or "proper," [3] or "at their discretion;" [4] or the power may be imperative, and the discretion of the trustees be confined to the time, manner, and place of executing the power, or to the selection of the objects of the trust, as where the trust fund is directed to be applied, paid, or distributed, "when," or "in such manner," [5] or "in such proportions," [6] or to such person [7] or persons,[8] within a certain class or otherwise, as the trustees shall determine. So the discretion may be implied, as where the execution of the power calls for judgment and discretion in the trustee, or for his approbation or consent to a settlement, or sale, or marriage; [9] or

[1] Nelson *v.* Callow, 15 Sim. 353; Cresson *v.* Ferree, 70 Penn. St. 446.

[2] Maddison *v.* Andrew, 1 Ves. 53.

[3] Crossling *v.* Crossling, 2 Cox, 396; Kemp *v.* Kemp, 5 Ves. 849; Longmore *v.* Broom, 7 Ves. 124; Pink *v.* De Thuisey, 2 Madd. 157.

[4] Morice *v.* Bishop of Durham, 9 Ves. 399; Keates *v.* Burton, 14 Ves. 434; Potter *v.* Chapman, Amb. 98; Gibbs *v.* Rumsey, 2 V. & B. 294; Naglee's Est., 52 Penn. St. 154.

[5] Cassidy *v.* Hynton, 44 Ohio St. 532.

[6] Downer *v.* Downer, 9 Vt. 231; Marlborough *v.* Godolphin, 2 Ves. 61; Walsh *v.* Wallinger, 2 R. & M. 78.

[7] Brown *v.* Higgs, 4 Ves. 708.

[8] Grant *v.* Lyman, 4 Russ. 292; Loring *v.* Blake, 98 Mass. 253.

[9] Brereton *v.* Brereton, 2 Ves. 87, n.; Clarke *v.* Parker, 19 Ves. 12; Mortlock *v.* Buller, 10 Ves. 314.

where he is called upon to decide upon the conduct of a party,[1] or upon the necessity or expediency of any payment or other act;[2] or where he is directed to pay an annuity, "unless circumstances should render it unnecessary, inexpedient, or impracticable."[3] All such matters must be mere matters of opinion and discretion.

§ 508. Discretionary powers of trustees are usually divided into four principal classes, as follows: (1) Where it is left to the discretion of the trustees to make or withhold a gift or appointment of the trust property to a specified donee, or *cestui que trust*, or class of donees. In this class, if it is a condition precedent to the gift, legacy, or other interest, that the trustees shall exercise their power in favor of the donee, whether of appointment or assent, no interest will vest in the donee until the power is exercised; and if the trustees refuse to exercise it, the gift cannot be enforced.[4] The court cannot decide upon the propriety or impropriety of the refusal of the trustees to give their assent,[5] unless it proceed from selfish, corrupt, or improper motives; and the burden is upon the donee to prove such motives, and not upon the trustees to show good reasons for their action.[6] The court will, however, always strive to construe this class of powers into trusts, which will give the donee a vested interest, and the trustee only the power of selection, apportionment, and distribution.[7] (2) Where the dis-

[1] Walker *v.* Walker, 5 Madd. 424; Robinson *v.* Smith, 6 id. 194; Eaton *v.* Smith, 2 Beav. 236.

[2] Gower *v.* Mainwaring, 2 Ves. 87.

[3] French *v.* Davidson, 3 Madd. 396.

[4] Pink *v.* De Thuisey, 2 Madd. 157; Weller *v.* Weller, id. 160, n.; French *v.* Davidson, 3 id. 396; Walker *v.* Walker, 5 id. 424; Brown *v.* Higgs, 4 Ves. 719; 5 Ves. 508; 8 Ves. 568; Marlborough *v.* Godolphin, 2 Ves. 61; Lyman *v.* Parsons, 26 Conn. 493; 28 Barb. 564; reversing 4 Bradf. 268. See s. c., 20 N. Y. 103; N. Y. Rev. St. part 2, c. 1, tit. 2, art. 3, § 9; Grace *v.* Phillips, 2 Phill. 701; Leavitt *v.* Beirne, 21 Conn. 1. [See *supra*, § 248 and note.]

[5] Pink *v.* De Thuisey, 2 Madd. 162, n.

[6] Clarke *v.* Parker, 19 Ves. 11; French *v.* Davidson, 3 Madd. 402.

[7] Wainwright *v.* Waterman, 1 Ves. Jr. 311; Keates *v.* Burton, 14 Ves. 434; *ante*, §§ 248–258; Cochran *v.* Paris, 11 Grat. 356.

cretionary power is confined to the selection from, or apportionment to, or distribution among, the objects of the trust. This class of powers is held to create trusts. The beneficial interest is generally vested in the whole class of objects from which the trustees have the power of selection, to be divested out of those who are not selected by the trustees in the exercise of the power; and if the trustees die, or refuse to execute the powers, the whole class takes the property.[1] (3) Where the discretion applies to some ministerial act connected with the estate, such as powers of leasing, selling, appointing new trustees, felling timber, and the like. This class of powers is much more under the control of courts than powers depending upon the exercise of opinion and judgment.[2] The court can enter into all matters in relation to those things that are beneficial to the estate, and into the motives of the trustees for exercising or refusing to exercise these powers; and the courts will not allow the trustees to exercise their powers in this respect in an arbitrary or capricious manner;[3] but if the court has acquired jurisdiction of the case by bill or decree, the trustees must act under the sanction of the court in appointing new trustees, making investments, sales, leases, and in varying the securities,[4] unless the instrument of trust declares that their discretion is to be uncontrolled.[5] And (4) where the discretion to be exercised is a mere matter of personal judgment, as where the consent or approbation of the trustees is required to a mar-

[1] Loring *v.* Blake, 98 Mass. 253. The whole matter of powers as trusts is discussed, *ante*, §§ 248–258, and the cases are cited, which see.

[2] Milsington *v.* Mulgrave, 4 Madd. 491; Hewit *v.* Hewit, Amb. 508; Mortimer *v.* Watts, 14 Beav. 616.

[3] Ibid.; Webb *v.* Shaftesbury, 7 Ves. 480; Att. Gen. *v.* Clack, 1 Beav. 467; De Manneville *v.* Crompton, 1 V. & B. 359; Druid Park Heights Co. *v.* Oettinger, 53 Md. 63. [*Infra*, § 511, note *a*.]

[4] Ibid.; Booth *v.* Booth, 1 Beav. 125; Pocock *v.* Reddington, 5 Ves. 794; Parry *v.* Warrington, 6 Madd. 155; Lord *v.* Godfrey, 4 id. 459; Brice *v.* Stokes, 11 Ves. 324; Broadhurst *v.* Balguy, 1 Younge & C. Ch. 28. And see Cafe *v.* Bent, 3 Hare, 245, and Hitch *v.* Leworthy, 2 Hare, 405.

[5] Milsington *v.* Mulgrave, 3 Madd. 403; Lee *v.* Young, 2 Younge & C. Ch. 536.

riage, or to the conduct of an individual. The trustees alone can exercise these powers, and courts cannot generally interfere to control these mere personal judgments upon personal matters.[1] But the trustees must exercise a reasonable discretion; thus they ought not to pay money into the hands of a lunatic or drunkard to be wasted.[2] If they have power to make advances to set up children in business, they may make advances to a married daughter to set up her husband in business, but not to pay off his debts.[3] And if they have once executed the power by naming a sum to be paid, they cannot reduce it,[4] but in some cases they may make a further advance.[5] And it is always a question for the courts to determine whether the action of the trustees in a given case is within the discretionary powers given them by the instrument of trust.[6]

§ 509. A general power in trustees to vary securities confers upon them power to do all the acts incidental or essential to the performance of that duty; and therefore they may sell and give receipts to purchasers for the purchase-money.[7] This is a power given for the security of the estate and benefit of the trust property;[8] and it ought not to be exercised except when required by necessity or convenience,[9] and upon proper inquiry and circumspection.[10] Therefore trustees ought always

[1] Cole *v.* Wade, 16 Ves. 47; Walker *v.* Walker, 5 Madd. 424; Eaton *v.* Smith, 2 Beav. 236; Cochran *v.* Paris, 11 Grat. 356; French *v.* Davidson, 3 Madd. 396; Brereton *v.* Brereton, 2 Ves. 87, n.; Clarke *v.* Parker, 19 Ves. 11; Weller *v.* Ker, 1 Macq. H. L. Sc. Cas. 11. [*Infra*, § 511, note *a*.]

[2] Gott *v.* Cook, 7 Paige, 538; Mason *v.* Jones, 2 Barb. S. C. 248.

[3] Talbot *v.* Marshfield, L. R. 4 Eq. 661.

[4] Mason *v.* Mason, 4 Sandf. Ch. 631; Weller *v.* Ker, 1 Macq. H. L. Sc. Cas. 11.

[5] Webster *v.* Boddington, 16 Sim. 177.

[6] Trustees of Smith *v.* Northampton, 10 Allen, 498. [*Infra*, § 511, note *a*.]

[7] Wood *v.* Harman, 5 Madd. 368. See *ante*, § 466.

[8] Lord *v.* Godfrey, 4 Madd. 459.

[9] Broadhurst *v.* Balguy, 1 Younge & C. Ch. 28.

[10] Hanbury *v.* Kirkland, 3 Sim. 271; Wormley *v.* Wormley, 1 Brock. 330; 8 Wheat. 421.

to have an immediate and advantageous investment in view before they sell the existing securities.[1] A sale for the mere purpose of converting real estate into personal, or *vice versa*, or without some well-defined and proper purpose in view, would render them responsible for any loss.[2] Each trustee must be satisfied by inquiries of the propriety of the act, and he must not trust to the representations of his cotrustee.[3] This power is necessarily left in a large degree to the sound discretion of the trustees;[4] and if any check is imposed upon their discretion, as if the consent, or the consent in writing, of the *cestui que trust*, or any other formalities are required before the trustees can act, they must strictly comply with all such requirements.[5] If the trustees have a discretionary power of changing the investments with the consent of the tenant for life, the court cannot compel them to exercise the power at the request of the tenant for life, if they refuse to do so in the *bona fide* exercise of their discretion.[6] But where the power is imperative on the trustees to invest in any particular securities, at the request of the *cestuis que trust*, the court will compel them to exercise the power.[7] But if the power is *imperative*, and there has been a great change of circumstances, as where the *cestuis que trust*, or their connections, to whom the trustees were required to loan the trust fund, have become bankrupt, the court will not compel the trustees to exercise the power.[8] The exercise of the power of varying the securities cannot alter or change the rights of the *cestuis que trust;* on the other hand, the rights of

[1] Ibid.; Watts *v.* Girdlestone, 6 Beav. 188.

[2] Brice *v.* Stokes, 11 Ves. 324; Meyer *v.* Montriou, 5 Beav. 146.

[3] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Younge & C. Ch. 16.

[4] De Manneville *v.* Crompton, 1 V. & B. 354.

[5] Ibid.; Cocker *v.* Quayle, 1 R. & M. 535; Greenwood *v.* Wakeford, 1 Beav. 579; Kellaway *v.* Johnson, 5 Beav. 319.

[6] Prendergast *v.* Prendergast, 3 H. L. Cas. 195; Lee *v.* Young, 2 Younge & C. Ch. 532.

[7] Ross *v.* Goodsall, 1 N. C. C. 618; Beauclerk *v.* Ashburnham, 8 Beav. 322.

[8] Ibid.

the *cestuis que trust* will be the same whether the trustees invest the fund in real or personal estate.[1] Power to vary the securities is a *usual* power, to be inserted in settlements with the *usual* powers.[2]

§ 510. In early times, courts assumed jurisdiction and control over discretionary powers in trustees, and compelled trustees to execute them, or the court itself executed the powers in such manner as it judged most beneficial for the *cestuis que trust;*[3] but this jurisdiction is now repudiated, and courts will not exercise a mere discretionary power, either during the lifetime of the trustees, or after their death or refusal to execute it.[4] But if the power is in the nature of a trust for a class, with a power of selection in the trustees of particular persons of the class, and the trustees die or refuse to make the selection, the courts will still execute the trust for the whole class.[5] In one case a distinction was attempted to be established between a discretion in the trustee to be exercised upon matters of

[1] Lord *v.* Godfrey, 4 Madd. 455; Walter *v.* Maunde, 19 Ves. 424. [Gray *v.* Whittemore, 192 Mass. 367; Hovey *v.* Dary, 154 Mass. 7; Henszey's Estate, 220 Pa. St. 212. On the doctrine of equitable conversion, see *supra*, § 448, note.]

[2] Sampayo *v.* Gould, 12 Sim. 426.

[3] Flanders *v.* Clarke, 1 Ves. 10; Wainwright *v.* Waterman, 1 Ves. Jr. 311; Clarke *v.* Turner, 2 Freem. 198; Gower *v.* Mainwaring, 2 Ves. 87, 110; Hewit *v.* Hewit, Amb. 508; Carr *v.* Bedford, 2 Ch. R. 77; Warburton *v.* Warburton, id. 420; 1 Bro. P. C. 34; Wareham *v.* Brown, 2 Vern. 153. Where one is unable to execute the trust given him, the courts will execute it; and where a widow, named coexecutrix of a will which directed that so much of the estate be sold as may be necessary for her support, has been supported on the understanding that the support should be paid out of the property, the party furnishing such support is entitled to be subrogated to the rights of the widow, and to have the court exercise the power in that behalf. Terve *v.* Am. Board, 53 Vt. 171.

[4] Maddison *v.* Andrew, 1 Ves. 60; Alexander *v.* Alexander, 2 Ves. 640; Kemp *v.* Kemp, 5 Ves. Jr. 849; Keates *v.* Burton, 14 Ves. 437; 2 Sugd. Pow. 190; Gower *v.* Mainwaring, 2 Ves. 88; Brereton *v.* Brereton, id. 88, n.; Potter *v.* Chapman, Amb. 98; Lee *v.* Young, 2 Younge & C. Ch. 522; Caplin's Will, 11 Jur. (N. S.) 383; Prendergast *v.* Prendergast, 3 H. L. Cas. 195; Coe's Trust, 4 K. & J. 199; Eldredge *v.* Head, 106 Mass. 582.

[5] *Ante*, §§ 255–258, and cases cited.

opinion and judgment, and a discretion to be exercised upon *matters of fact;* as where the trustees were to exercise certain powers over the estate, if the conduct of one of the beneficiaries was such as to gain their confidence and approval, the court seemed to distinguish between matters of judgment and matters of fact, and directed an inquiry.[1] Lord Hardwicke seemed to give some countenance to this distinction,[2] but the distinction is not established and acted upon; and, in the nature of things, such a distinction cannot be applied to the execution of powers by trustees. It is sufficient to hold them to good faith and fair intentions in the conduct of the trust. It was held, however, in Holcomb *v.* Holcomb, that a discretion entirely beyond the control of courts of equity could not be conferred upon trustees, and that courts could set aside acts done by trustees under a power so unlimited.[3] The discretion of the trustee will not be controlled or questioned so long as he is not guilty of bad faith or abuse of his power and trust; but it is difficult if not impossible to create in the trustee such unbounded power as to preclude a court of equity from controlling him when he acts fraudulently, or palpably abuses his power, as by unreasonably refusing to exercise it, or undertaking to exercise it in an unreasonable manner.[4] As where a discretionary trustee refuses to pay for proper medical attendance upon the *cestui,* the court will interfere.[5] If a trustee having arbitrary power dies and there is no provision for a successor, equity will appoint a new trustee to act under equitable principles in place of the arbitrary discretion.[6]

[1] Walker *v.* Walker, 5 Madd. 424.

[2] Gower *v.* Mainwaring, 2 Ves. 87–110.

[3] Holcomb *v.* Holcomb, 3 Stockt. 281.

[4] Cromie *v.* Bull, 81 Ky. 646. [Dickson *v.* N. Y. Biscuit Co., 211 Ill. 468; Kimball *v.* Blanchard, 101 Me. 383; Patterson *v.* Lanning, 62 Neb. 634; Angell *v.* Angell, 28 R. I. 592; Dubois *v.* Barbour, 27 R. I. 281; Givens *v.* Clem, 107 Va. 435; Whelan *v.* Palmer, 39 Ch. Div. 648; *Re* Stanger, 64 L. T. 693; *Re* Burrage, 62 L. T. 752.]

[5] Pole *v.* Pietsch, 61 Md. 570. [See also *In re* Hodges, 7 Ch. Div. 754.]

[6] Weiland *v.* Townsend, 33 N. J. Eq. 393.

§ 511. If the trustees exercise their discretionary powers in *good faith* and without fraud or collusion, the court cannot review or control their discretion.[1] Nor will a bill be entertained to compel the execution of a mere discretionary power.[2] The refusal of a trustee to exercise such a power is no breach of trust for which he can be removed, though he gives no reason for his refusal, and though the execution of the power would appear to be proper and beneficial to the estate.[3] But while the court cannot interfere with a discretion honestly exercised, a party interested in property subject to the discretion of a trustee has a right to institute a bill for a discovery of the property, and also of all the acts of the trustee, and the reasons for the acts, in order that it may be seen whether the discretion of the trustee is honestly exercised or not. And if the administration of the trust is thus rightfully brought within the jurisdiction of the court, the power may be required to be exercised under the eye of the court, though the exercise of it must still remain in the discretion of the trustee, and not in that of the court.[4] And so if the exercise of a discretionary power entirely miscarries, the court may take jurisdiction of the administration of the trust.[5] It has been ruled, however,

[1] Smith *v.* Wildman, 37 Conn. 384; Potter *v.* Chapman, Amb. 98; Cowley *v.* Hartsonge, 1 Dow, 378; Prendergast *v.* Prendergast, 3 H. L. Cas. 195; Att. Gen. *v.* Moseley, 12 Jur. 889; 2 De G. & Sm. 398; Clarke *v.* Parker, 19 Ves. 11; Pink *v.* De Thuisey, 2 Madd. 157; French *v.* Davidson, 3 id. 396; Wood *v.* Richardson, 4 Beav. 177; Morton *v.* Southgate, 28 Maine, 41; Littlefield *v.* Cole, 33 Me. 552; Leavitt *v.* Beirne, 21 Conn. 2; Hawley *v.* James, 5 Paige, 485; Arnold *v.* Gilbert, 3 Sandf. Ch. 556; Mason *v.* Mason, 4 id. 623; Bunner *v.* Storm, 1 id. 357; Gochenauer *v.* Froelich, 8 Watts, 19; Chew *v.* Chew, 28 Penn. St. 17; Cowles *v.* Brown, 4 Call, 477; Cochran *v.* Paris, 11 Grat. 356; Cloud *v.* Martin, 1 Dev. & Bat. 397; Aleyn *v.* Belchier, 1 Lead. Cas. Eq. 304. And see Berry *v.* Hamilton, 10 B. Mon. 135; O'Bannon *v.* Musselman, 2 Dev. 523; Eldredge *v.* Head, 106 Mass. 582; Pulpress *v.* African Church, 48 Penn. St. 204. [Kimball *v.* Blanchard, 101 Me. 383.]

[2] Brereton *v.* Brereton, 2 Ves. 87 n.; Pink *v.* De Thuisey, 2 Madd. 157; Green *v.* McBeth, 12 Rich. Eq. 254.

[3] Lee *v.* Young, 2 Younge & C. Ch. 532; Matter of Vanderbilt, 20 Hun (N. Y.), 520.

[4] Costabadie *v.* Costabadie, 6 Hare, 410.

[5] Feltham *v.* Turner, 23 L. T. (N. S.) 345.

that the trustees might exercise their discretionary powers, although a bill had been filed for the purpose of having the trusts declared and carried into effect.[1] The trustee cannot, however, exercise his discretion for any fraudulent, selfish, or improper purposes, nor can he refuse to exercise a discretionary power for any such purposes; nor can the power be executed in an illusory or collusive manner.[2] (*a*) And if he acts,

[1] Sillibourne *v.* Newport, 1 K. & J. 603.

[2] Carson *v.* Carson, 1 Wins. (N. C.) 24. [Whelan *v.* Palmer, 39 Ch. Div. 648.]

(*a*) In case of discretionary powers given to trustees the courts will usually assume that the creator of the trust intended the discretion to be exercised not only with an honest intention of carrying out the purposes of the trust but in a manner which might reasonably be expected to accomplish the purpose for which the power was given. Accordingly the courts will interfere to prevent or to correct a dishonest or a capricious exercise of such a power. Dingman *v.* Beall, 213 Ill. 238; Keeler *v.* Lauer, 73 Kan. 388; Cromie *v.* Bull, 81 Ky. 646; Lovett *v.* Farnum, 169 Mass. 1; Price *v.* Bassett, 168 Mass. 598; Read *v.* Patterson, 44 N. J. Eq. 211; Collister *v.* Fassitt, 163 N. Y. 281; Jones *v.* Jones, 30 N. Y. S. 177; Angell *v.* Angell, 28 R. I. 592; Barbour *v.* Cummings, 26 R. I. 201; Trout *v.* Pratt, 106 Va. 431, 8 L. R. A. (N. S.) 398, note; Stephenson *v.* Norris, 128 Wis. 242, 259; Bound *v.* So. Car. Ry. Co., 50 Fed. 853; Rowlls *v.* Bebb, [1900] 2 Ch. 107; *In re* Hodges, 7 Ch. Div. 754; *Re* Stanger, 64 L. T. 693; *Re* Burrage, 62 L. T. 752. See Cal. Civ. Code (1907), § 2269; Rev. Codes of So. Dak. (1903), § 1644.

Thus where property was left in trust with directions to the trustee to make payments out of the income and principal to certain beneficiaries, "the times, amounts, and methods of such payments being left absolutely in the discretion of the trustee," it was held the trustee's discretion must be exercised reasonably and would always be subject to the control of the court in case of unreasonable detention of income. Angell *v.* Angell, 28 R. I. 592. In Cromie *v.* Bull, 81 Ky. 646, the trustee was empowered "in his discretion" to pay to life beneficiaries out of profits "the whole or a part of their portion of the same, as he shall deem proper, in view of their necessities or capacity to use the same advantageously in business." The court was of opinion that it could interfere to prevent an improper exercise of the discretionary power or to compel a proper exercise of it: "If the trustee acts fraudulently, or abuses the power confided to his discretion, by refusing to execute the trust, or, in the attempt to exercise it, does that which is unreasonable and calculated to defeat the purpose of its creation, the chancellor will interfere . . . for the preser-

or refuses to act, upon such grounds, the court will interfere and give a remedy to the parties injured by the fraudulent act, or refusal to act, not for the purpose of controlling the discretion of the trustee, but to relieve the parties from the consequences of an improper exercise of the discretion;[1] and if the trustee refuses to exercise his discretion from selfish and interested motives, as where he declines to give his consent to a

[1] Clarke *v.* Parker, 19 Ves. 12; Peyton *v.* Bury, 2 P. Wms. 628; French *v.* Davidson, 3 Madd. 396; Dashwood *v.* Bulkeley, 10 Ves. 245; D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Kemp *v.* Kemp, 5 Ves. 849; Mesgrett *v.* Mesgrett, 2 Vern. 580; 10 Ves. 243; Topham *v.* Portland, L. R. 5 Ch. 40.

vation of the trust estate, and will see that the trustee discharges his duties as such. . . . It is difficult, in fact, to create a trust where the trustee has such unlimited power over the trust property as to preclude the chancellor from controlling his action, when his conduct is such as to indicate a palpable or fraudulent abuse of his power to the injury of the parties in interest."

Where trustees have been authorized in their discretion to postpone the conversion of wasting or unproductive investments or to continue the testator's business, the English courts incline to take the view that the power was given for the purpose of getting the best possible bargain for the estate as a whole, and not for the purpose of allowing the trustee to vary the relative interests of life beneficiaries and remainder-men. Rowlls *v.* Bebb, [1900] 2 Ch. 107; *In re* Smith, [1896] 1 Ch. 171; Porter *v.* Baddeley, 5 Ch. Div. 542; Blake *v.* O'Reilly, [1895] 1 Ir. R. 479; *In re* Courtier, 34 Ch. Div. 136. As to the adjustment of income in such cases see *infra*, § 549, note. But if the testator's clear intention was to give the trustees the right to exercise such a power for the benefit of one or the other of two classes of beneficiaries, the courts will not interfere with an honest exercise of the discretion for such a purpose. *In re* Crowther, [1895] 2 Ch. 56; *In re* Chancellor, 26 Ch. Div. 42; *In re* Pitcairn, [1896] 2 Ch. 199; *Re* Leonard, 43 L. T. 664; Yates *v.* Yates, 28 Beav. 637.

The courts will not substitute their own discretion for that of the trustee unless it appears in view of all the circumstances, that he has abused or is about to abuse the discretion confided in him. Dickson *v.* N. Y. Biscuit Co., 211 Ill. 468; Kimball *v.* Blanchard, 101 Me. 383; Proctor *v.* Heyer, 122 Mass. 525; Patterson *v.* Lanning, 62 Neb. 634; Read *v.* Patterson, 44 N. J. Eq. 211; Dubois *v.* Barbour, 27 R. I. 281; Givens *v.* Clem, 107 Va. 435; Trout *v.* Pratt, 106 Va. 431, 8 L. R. A. (N. S.) 398; Matthews *v.* Capshaw, 109 Tenn. 480; *In re* Bryant, [1894] 1 Ch. 324; Tabor *v.* Brooks, 10 Ch. Div. 273; *Re* Atkins, 81 L. T. 421; *Re* Stanger, 64 L. T. 693; *Re* Burrage, 62 L. T. 752.

sale, marriage, or settlement, the court may compel him to assent.[1] In a Kentucky case, where the deed gave the trustee power to sell, on written request of the lady who was the *cestui*, if he deemed it to be for her interest, it was held that he had no right to refuse to sell when he admitted it was necessary, and that the written request had been made. And the court remarked that although the chancellor could not compel a trustee to exercise a naked power, or a power coupled with a trust, if his refusal was a *bona fide* exercise of the discretion placed in him, yet if he perverts the trust or refuses without excuse to exercise the power, the chancellor's authority to compel him to execute his duties is unrestricted.[2]

§ 511 *a.* It is proper further to say, that courts do not favor constructions that confer upon trustees absolute and uncontrollable powers. The donee of the power is not the absolute owner of the property; most frequently he has no beneficial or other interest in it, but simply a power over it for the benefit of third persons.[3] The owner of property may of course confer upon another an absolute and uncontrollable power over it; but it is the policy of the law to limit irresponsible power as much as possible, and to subject the conduct of every person having the rights and interests of others in his power, to the regulations and control of the rules of law.[4] Wherever the law can control the exercise of a discretionary power, it will do so; as where a trustee had power to expend the principal of an estate for the benefit of a poor woman, "if urgent necessity should require," it was held that the court could compel the execution of the power.[5] So, also, courts can interfere and prevent, by

[1] Norcum *v.* D'Oench, 2 Bennett, Mo. 98.

[2] Walker *v.* Smyser's Ex'rs, 80 Ky. 620.

[3] Topham *v.* Duke of Portland, 1 De G., J. & S. 568; Haydel *v.* Hurck, 5 Mo. App. 267.

[4] *Ante*, § 249. [Compare *In re* Hodges, 7 Ch. Div. 754, and Tabor *v.* Brooks, 10 Ch. Div. 273.]

[5] Erisman *v.* Directors of Poor, 47 Penn. St. 509. [See Elias *v.* Loeb, 65 S. E. 724 (S. C. 1909).]

injunction or decree, an abusive, fraudulent, collusive, illusive, or other improper exercise of a discretionary power.[1] To determine what is an abuse of a discretionary power, or what is a fraudulent or improper execution of it, is frequently a matter of great difficulty. In the nature of things, only very general rules can be laid down upon a subject where so much must depend upon the facts of each individual case. Some general propositions have, however, been stated. It has been said, (1) That where a power of electing is given to trustees, as to the rights of third persons, they are bound to exercise such power most beneficially for the *cestuis que trust*.[2] (2) Reference must always be had, in the execution of a power, *to the end or purpose intended* by the creator of the power, and this end or purpose must be gathered from a construction of the written instrument; and a power must always *be executed bona fide for the end and purpose designed*.[3] (3) A power cannot be executed in favor of the donee of the power, or of his family, unless the instrument specially authorized him so to do.[4] (4) The donee of a power cannot execute it for any pecuniary gain, directly or indirectly, to himself.[5] Nor (5) can he exer-

[1] *Ante*, § 511; McFarland's App., 37 Penn. St. 205; Pulpress *v.* African Church, 48 id. 210.

[2] Haynesworth *v.* Cox, Harp. Eq. R. 149.

[3] Aleyn *v.* Belchier, 1 Eden, 132; 1 Lead. Cas. in Eq. 304, and cases cited. [See Dubois *v.* Barbour, 27 R. I. 281; *supra*, § 511, note.]

[4] *Ante*, § 254, and cases cited.

[5] Lord Sandwich's Case, referred to in McQueen *v.* Farquhar, 11 Ves. 480, and in Keily *v.* Keily, 4 Dr. & War. 55; Lady Wellesley *v.* Earl of Mornington, 2 K. & J. 143; *In re* Marsden's Trust, 4 Drew. 594; Fearon *v.* Desbrisay, 14 Beav. 635; Beere *v.* Hoffmister, 23 id. 101; Birley *v.* Birley, 25 id. 299; Daubeny *v.* Cockburn, 1 Mer. 640; Watt *v.* Creyke, 3 Sm. & Gif. 362; Lee *v.* Fernie, 1 Beav. 483; Vane *v.* Dungannon, 2 Sch. & Lef. 118; Horne *v.* Askham, 12 Beav. 503; Rowley *v.* Rowley, Kay, 242, 262; Lysaght *v.* Royse, 2 Sch. & Lef. 151; Lane *v.* Page, Amb. 233; Butcher *v.* Johnson, 14 Sim. 444; Wright *v.* Goff, 22 Beav. 207; Campbell *v.* Home, 1 Y. & C. Ch. 664; Wheete *v.* Hall, 17 Ves. 80; Carver *v.* Bowles, 2 Russ. & My. 301; *Re* Beloved Wilkes's Charity, 3 Mac. & G. 440; 7 Eng. L. & Eq. 85; Henchinbroke *v.* Seymour, 1 Bro. Ch. 394; Huguenin *v.* Baseley, 14 Ves. 273; Ring *v.* Hardwick, 2 Beav. 352; Lassence *v.* Tierney, 1 Mac. & G. 551; Saunders *v.* Vautier, 1 Cr. & Phill. 240; Sadler *v.* Pratt, 5 Sim.

cise it for any other purposes personal to himself.[1] A distinction is made between the *motives* which lead to the execution of a power, and *the purpose or end* for which it is executed. Thus, a power may be properly executed according to the true purpose and intent of the creator of the power, but the motives which led the donee to such execution may have been corrupt. On the other hand, a power may have been improperly executed by the donee of the power, induced thereto by motives commendable in themselves, as by filial obedience, or affection.[2] A trust is always to be discharged in the most faithful and conscientious manner, and equity takes care to guard and protect a trustee in the discharge of his duties, while by its strict rule it shields him from temptation so far as possible, by rendering it difficult for him to gain any advantage to himself by his dealings with the trust fund. More especially is this the rule in the exercise, by a trustee, of so many and so great discretionary powers over the rights and interests of persons who are in no position to protect themselves. In the exercise of such powers, the trustee should act with purity of purpose, and with a single view to carry out the exact purpose of the power, and the intention of the settlor. If the execution of a power of appointment fails, or if the appointment is set aside as improperly made, the donee may make a new appointment;[3] but if an appointment is set aside by reason of what has taken place between the donee of the power and the appointee, a second ap-

632; Sugd. on Powers, 606 (8th ed.); Agassiz *v.* Squire, 18 Beav. 431; Farmer *v.* Martin, 2 Sim. 502; Wallgrave *v.* Tebbs, 2 K. & J. 313; Tee *v.* Ferris, id. 357; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Stroud *v.* Norman, Kay, 313; Alexander *v.* Alexander, id. 242; White *v.* St. Barbe, 1 Ves. & B. 399; Scroggs *v.* Scroggs, Amb. 272. And when the purpose becomes unattainable the power ceases. Hetzel *v.* Hetzel, 69 N. Y. 1; Brown *v.* Meigs, 11 Hun (N. Y.), 203. [Degman *v.* Degman, 98 Ky. 717; *In re* Perkins, [1893] 1 Ch. 283; Whelan *v.* Palmer, 39 Ch. Div. 648; *In re* Kirwan's Trusts, 25 Ch. Div. 373; Tempest *v.* Camoys, 21 Ch. Div. 571.]

[1] Dummer *v.* Chippenham, 14 Ves. 245; *Re* Beloved Wilkes's Charity, 3 Mac. & G. 440; 7 Eng. L. & Eq. 85.

[2] Topham *v.* Portland, L. R. 5 Ch. 57; 1 De G., J. & S. 571.

[3] Topham *v.* Portland, 11 H. L. Cas. 32; L. R. 5 Ch. 40.

pointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof, on the part of the appointee, that the second appointment is perfectly free from the original taint which attached to the first appointment.[1]

[1] Topham *v.* Portland, L. R. 5 Ch. 60, 61; Birley *v.* Birley, 25 Beav. 299; Carver *v.* Richards, 27 Beav. 488, 1 De G., F. & J. 548.

The great case of Topham *v.* Duke of Portland involved most of the learning upon the subject of appointment under powers. The great question was whether an appointment, which excluded Lady Mary Bentinck from the enjoyment of certain property, was made in accordance with the intent and purpose of the power, or whether the appointment was made under the influence of personal reasons, she having married Colonel Topham contrary to the wishes of her family. It was first heard by Sir John Romilly, Master of the Rolls, and reported 31 Beav. 525. The Master of the Rolls decided that the appointment was void. The duke appealed, and the case was heard by the Lord Justices Turner and Knight Bruce. 1 De G., J. & S. 517. The decree of the Master of the Rolls was affirmed. An appeal was taken to the House of Lords, where the decree was again sustained. 11 H. L. Cas. 32. The Duke of Portland then made a new appointment of the same appointee, and Lady Mary again brought her bill to set aside the second appointment. It was heard before the Vice-Chancellor, Sir William M. James, and the second appointment set aside. See L. R. 5 Ch. 49. An appeal was again taken, which was heard before the Lord Justices, and the decree setting aside the second appointment was sustained. See Topham *v.* Portland, L. R. 5 Ch. 40. Lord Justice Sir George M. Gifford concluded his opinion as follows: "If the object of the appointment in this case had been simply the benefit of the Duke of Portland himself, I am persuaded he would never have come into court. The real object, though morally speaking far different, must, legally speaking, be considered on precisely the same principles as though he sought a benefit for himself; or the object is to bring about a state of things not warranted by the powers. It may be that, on consideration, the Duke of Portland will concur in the opinion that the matter may from henceforth be well left at rest." And it has rested.

In Library Co. of Philadelphia *v.* Williams, 30 Legal Intel. 177 (May 20, 1873), 73 Penn. St. 249, the exercise of a discretionary power by a trustee was much discussed. Dr. Rush gave to his trustee a large amount of property in trust for the Library Company, and gave the trustee power to select a parcel of land, and construct a library building for the company. Dr. Rush afterwards negotiated for the purchase of a lot of land, and procured a pledge or promise from the trustee that he would select that particular lot for the purpose of the library building. Having made the selection, after the death of Dr. Rush, the Library Company brought a bill to correct the execution of the power, on the ground that the trustee had incapacitated himself from exercising the power with a sound judgment

§ 511 *b*. The execution of a power requires careful consideration. If the manner of its execution is not pointed out, it must be executed in good faith, in the usual manner of doing the business to be done under the power; and there must be a strict adherence, not only to the substance of the power, but also to all the formalities required in its execution by the instrument. These formalities and solemnities are required for the protection of those persons whose rights may be defeated by the exercise of the power, and to prevent the donee of the power from acting with haste and without proper consideration.[1] If a writing is required, a parol disposition would be void, although the property might otherwise be disposed of by parol at law.[2] If it is to be by deed, nothing but a deed will execute the power, even though it is to be executed by a married woman; and it must be signed, sealed, acknowledged, delivered, and recorded.[3] If the number of witnesses is named, that number must witness to the instrument that purports to execute the power.[4] If the

and a free discretion, for the reason that he had bound his judgment and discretion by his promise and pledge to the testator. This view of the case was sustained in an able opinion in the court below; but, upon appeal to the Supreme Court of Pennsylvania, the judges, without expressly affirming or disaffirming the law as claimed by the Library Company, found the facts to be, that the trustee was not incapacitated, and that he had made a full and free exercise of his judgment and discretion in the execution of his power, and that the power was properly executed. The court, however, seemed to be of the opinion that the donee of a power might pledge himself to the creator of the power to execute it in a certain manner, and that an execution of the power in pursuance of the pledge might still be good.

[1] Hawkins *v*. Kemp, 3 East, 410; Rex *v*. Anstrey, 6 M. & Sel. 324; Holmes *v*. Coghill, 7 Ves. 506; Day *v*. Thwaites, 3 Ch. Cas. 69, 107; Ferry *v*. Laible, 31 N. J. 566.

[2] Thruxton *v*. Att. Gen., 1 Vern. 340.

[3] Digges's Case, 1 Rep. 73; Dundas *v*. Biddle, 2 Barr, 160.

[4] Bath *v*. Montague's Case, 3 Ch. Cas. 55; 2 Freem. 193; Kibbett *v*. Lee, Hob. 312; Ch. Cas. 90; Doe *v*. Keir, 4 Man. & Ry. 101; Wright *v*. Wakeford, 17 Ves. 459. It was formerly held that the attestation of the witnesses must be noticed in the deed itself. Wright *v*. Wakeford, 17 Ves. 459; Wright *v*. Barlow, 3 Man. & Sel. 512. But the rule is now relaxed, and it is sufficient that the witnesses in fact attest the writing. Vincent *v*. Beshopre, 5 Exch. 683; Burdett *v*. Spilsbury, 6 Man. & G. 386; Ladd *v*. Ladd, 8 How. 30–40.

consent of any third person must be had to the execution, such consent must appear;[1] so if the deed is to be sealed.[2] If it is to be signed, it must be signed by the donee of the power.[3] If notice is to be given of the execution of the power, such notice must be shown,[4] and so of the slightest formality prescribed. If the power is to be executed by deed, it cannot be executed by will.[5] The converse of the proposition is also true, and a power to be executed by a will cannot be executed by a deed, or any instrument to take effect during the lifetime of the donee of the power.[6] Whether the execution of the power is to be by will or deed, or either, depends upon the words of the instrument. If the trustee is "to will it," the power must be executed by will;[7] and so if "afterwards to leave it," *i. e.* after the life-estate; but after the death of a tenant for life, *then* "to be at the disposal of A." does not imply a will.[8] If a power is to be executed by a will, all the solemnities of making a will, according to the statutes in force, must be observed, in order that the will may be duly probated;[9] but if the creator of the power point out all the formalities to be used in executing the will, a will executed according to the formalities prescribed in the power will be a valid execution of the power, although the

[1] Hawkins *v.* Kemp, 3 East, 410; Mansell *v.* Mansell, Wilm. 36.

[2] Dormer *v.* Thurland, 2 P. Wms. 506.

[3] Bird *v.* Stride, Bridg. 21; Thayer *v.* Thayer, Palm. 112; Blackville *v.* Ascott, 2 Eq. Cas. Abr. 654.

[4] Ward *v.* Lenthal, 1 Sid. 143.

[5] Woodward *v.* Halsey, 1 Sugd. on Pow. 255 (3d Am. ed.); Earl of Darlington *v.* Putney, Cowp. 260; Doe *v.* Cavan, 5 T. R. 567; 6 Bro. P. C. Taml. 175; Bushell *v.* Bushell, 1 Rep. t. Redesdale, 96; 4 Taunt. 297; Follett *v.* Follett, 2 P. Wms. 469; Alley *v.* Lawrence, 12 Gray, 373; Moore *v.* Demond, 5 R. I. 130.

[6] Whaley *v.* Drummond, 1 Sugd. on Pow. 257 (3d Am. ed.); Reid *v.* Shergold, 10 Ves. 370; Anderson *v.* Dawson, 15 Ves. 532. But see Heatly *v.* Thomas, 15 Ves. 596. [Hood *v.* Haden, 82 Va. 588.]

[7] Paul *v.* Hewestón, 2 Myl. & K. 434.

[8] Anon. 3 Lev. 71; Thomlinson *v.* Dighton, 1 Com. 194; 1 P. Wms. 149; *Ex parte* Williams, 1 J. & W. 89; Doe *v.* Thorley, 10 East, 488; Walsh *v.* Wallinger, 2 Russ. & My. 78; Taml. 425; Brown *v.* Chambers, 1 Hayes, 597; Archibald *v.* Wright, 9 Sim. 161.

[9] 1 Sugd. on Pow. 257. [See *In re* Broad, [1901] 2 Ch. 86.]

instrument is invalid as a will.[1] (a) The general rule is rigidly adhered to, that powers can be executed only in the mode, and at the time, and upon the conditions prescribed in the instrument creating the power or trust.[2] A power to sell and to change investments gives no power to pledge some investments in order to raise money to enter upon hazardous enterprises for

[1] Eyre *v.* Fitton, 1 Sugd. on Pow. 155; Day *v.* Thwaites, 3 Ch. Cas. 69, 92; 2 Vern. 80; Wilkes *v.* Holmes, 9 Mod. 485; 16 Ves. 237, 268; Goodhill *v.* Brigham, 1 Bos. & Pul. 198; Longford *v.* Eyre, 1 P. Wms. 740; Habergham *v.* Vincent, 2 Ves. Jr. 204.

[2] See *ante*, § 254, and *post*, §§ 778, 779, 783–785. If in executing the power something is also stipulated which is not authorized to be done, but which can be clearly distinguished from the rightful execution of the power, the execution so far as authorized is valid, and void for the excess. Laskey *v.* Perrysburg Board, &c., 35 Ohio St. 519.

(a) When the creator of the power has directed that it be executed by will of the donee, the validity of the will is to be determined by the law of the donee's domicile at the time of the latter's death. Ward *v.* Stanard, 81 N. Y. S. 906, 82 App. Div. 386. See also Barretto *v.* Young, [1900] 2 Ch. 339. But as the appointment takes effect under the will or other instrument creating the power, the sufficiency of the execution in other respects is to be determined by the law of the domicile of the donor, *e. g.*, whether or not a general residuary clause without reference to the power is a sufficient execution. Lane *v.* Lane, 4 Pennewill (Del.) 368, 64 L. R. A. 849, 892; Cotting *v.* De Sartiges, 17 R. I. 668. The legality of the disposition attempted in an appointment which conforms to the terms of the power is to be determined by the law of the jurisdiction where the property is situated. Thrasher *v.* Ballard, 33 W. Va. 285; Pouey *v.* Hordern, [1900] 1 Ch. 492; Newton *v.* Hunt, 112 N. Y. S. 573. A will executing a power is revoked *in toto*, including the exercise of the power, by general words of revocation in a subsequent will, even although the subsequent will is not a good execution of the power. *In re* Kingdon, 32 Ch. D. 604. But if a subsequent will, insufficient as an execution of the power, makes no reference to it and does not expressly revoke the first will, there is no revocation of the appointment. Cadell *v.* Wilcocks, [1898] P. 21.

As a married woman can execute a power of appointment over property belonging to another without the concurrence of her husband, marriage of a woman appointor after appointing by will does not revoke the appointment. Osgood *v.* Bliss, 141 Mass. 474; Heath *v.* Withington, 6 Cush. 497. Although the will may not be valid as a disposition of her own property, it should be probated, and the allowance should be qualified and limited. Ibid.

the possible profit of the trust estate.[1] In Maryland, the intention to execute a power of appointment by will must appear by reference to the power or the subject of it in the will, or from the fact that the will would be inoperative without the aid of the power (*a*); but in Massachusetts, a general devise or bequest is construed to include all property of which the testator had the general power of appointment, unless the contrary intent appears by his will, and where the power was created by the will of one domiciled in Massachusetts and in respect to property situated in that State, a will made in Maryland will operate as an execution of the power just as if made here.[2]

§ 511 *c*. The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power.[3] The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear, — (1) When there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) where the instrument of execution would have no operation, but would be utterly insensible and

[1] Loring *v*. Brodie, 134 Mass. 453, 466.

[2] Sewall *v*. Wilmer, 132 Mass. 131, 134.

[3] Gindrat *v*. Montgomery Gaslight Co., 82 Ala. 596, 606. [Young *v*. Sheldon, 139 Ala. 444; Gulf Red Cedar Lumber Co. *v*. O'Neal, 131 Ala. 117, 130; Guarantee & Trust Co. *v*. Jones, 103 Tenn. 245, 255; Kent *v*. Kent, L. R. [1902] Prob. 108; *In re* Mayhew, [1901] 1 Ch. 677; *In re* Sharland, [1899] 2 Ch. 536; *In re* Milner, [1899] 1 Ch. 563; *In re* Adams, 54 Weekly Rep. 42; Lee *v*. Giles, 124 Ga. 494.]

(*a*) This has been changed by a statute enacted in 1888. Pub. Gen. Laws of Md. (1904), Art. 93, § 323. As to execution of a power of sale or of appointment without specific reference to it, see *infra*, § 511 *c* and notes.

absurd, if it was not the execution of a power. (*a*) Thus, if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest; for there is a subject-matter for the deed to operate upon, excluding the power, and, therefore, as it does not conclusively appear that the deed was intended to be an execution of the power as well as a conveyance of the grantor's interest in the land, it will be held not to be an execution of the power: but if the grantor has no interest in the land, his deed will be insensible and a mere absurdity, if not intended as an execution of the power; therefore, it will be held to be an execution of the power, if it refers to the subject-matter of the power, or describes the land over which his power extends.[1] It will be seen that this last conclu-

[1] Bingham's App., 64 Penn. St. 349; Drusadow *v.* Wilde, 63 id. 172; Coryell *v.* Dunton, 7 id. 530; Wetherell *v.* Wetherell, 18 id. 265; Meconkey's App., 13 id. 259; Keefer *v.* Schwartz, 47 id. 503; Allison *v.* Kurtz, 2 Watts, 185; Thompson *v.* Garwood, 3 Whart. 287; Commonwealth *v.* Duffield, 2 Jones, 280; Hefferman *v.* Addams, 7 Watts, 116; Cler's Case, 6 Rep. 17 b; Mo. 476, 577; Cro. Eliz. 877; Cro. Jac. 31; Brooke *v.* Turner, 2 Bing. N. C. 422; Wykham *v.* Wykham, 18 Ves. 419; Scrope's Case, 10 Rep. 143 b; Frampton *v.* Frampton, 6 Rep. 144 b; Snape *v.* Turton, Cro. Car. 472; Deg *v.* Deg, 2 P. Wms. 413; Sel. Cas. 44; Fitzgerald *v.* Fauconberge, Fitz, 107; Roscommon *v.* Fowke, 4 Bro. P. C. 523; George *v.* Lansley, 8 East, 13; Guy *v.* Dormer, Raym. 295; 3 Ch. Cas. 91; Udal *v.* Udal, Al. 81; Att. Gen. *v.* Brackenbury, 1 Hurl. & Colt. 782; Baton *v.* Jacks, 6 Rob. (N. Y.) 166; Collins *v.* Will, 40 Mo. 28; Hamilton *v.* Crosby, 32 Conn. 342; White *v.* Hicks, 43 Barb. 64; 33 N. Y. 383; Davis *v.* Vincent, 1 Houst. 416; Parcher *v.* Daniel, 12 Rich. Eq. 349; Myers *v.* McBride, 13 Rich. L. 178; Pease *v.* Pilot Knob Co., 49 Mo. 124; Blagge *v.* Miles, 1 Story, 426; Amory *v.* Meredith, 7 Allen, 397; Owen *v.* Switzer, 5 Mo. 322; Clark *v.* Hornthal, 47 Miss. 434. [Middlebrooks *v.* Ferguson, 126 Ga. 232; Kirkman *v.* Wadsworth, 137 N. C. 453; Walke *v.* Moore, 95 Va. 729.]

(*a*) Papin *v.* Piednoir, 205 Mo. 521; Farlow *v.* Farlow, 83 Md. 118. Thus where persons who were both executors and trustees and in their capacity of trustees had power of sale, executed a deed which they inadvertently signed as executors, it was held that the deed transferred the title. Philbin *v.* Thurn, 103 Md. 342. See also Renner *v.* Marshall, 58 S. W. 863, 870 (Tenn.). But see Clarke *v.* East Atlanta Land Co., 113 Ga. 21.

sion is a presumption of law; this presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power.[1] (a) If a man has

[1] Bingham's Appeal, 64 Penn. St. 350. [Weinstein v. Weber, 178 N. Y. 94. See Daniel v. Felt, 100 Fed. 727.] A mere quitclaim deed contains no apt words to indicate an intent to sell under a power, and only the beneficial interest of the grantor will pass by deed in that form. Towle v. Erving, 23 Wis. 336; Griswold v. Bigelow, 6 Conn. 258; Johnson v. Stanton, 30 Conn. 297; Mory v. Mitchell, 18 Mo. 227.

(a) When the donee of the power has executed an instrument which is otherwise sufficient to execute the power, but has failed to refer to the power, the whole question for the court is whether or not the donee intended to execute the power. Cooper v. Haines, 70 Md. 282; Lee v. Simpson, 134 U. S. 572; Scott v. Bryan, 194 Pa. St. 41.

The fact that he has no interest of his own in the property described in the deed or will is usually sufficient evidence that he intended to execute the power. Kirkman v. Wadsworth, 137 N. C. 453, 457; Walke v. Moore, 95 Va. 729.

When the donee of the power has also an individual interest of his own in the property which he has described in the deed and fails to refer to the power, the conveyance will be presumed to have been intended to pass only his own interest unless a contrary intention appears. Merolla v. Lane, 107 N. Y. S. 439, 122 App. Div. 535; Weinstein v. Weber, 178 N. Y. 94; Kirkman v. Wadsworth, 137 N. C. 453, 457; N. E. Mortgage Co. v. Buice, 98 Ga. 795; Ridgely v. Cross, 83 Md. 161. Thus where a husband and wife who had equitable life estates in certain land and also a power to sell, executed a deed of "all the right, title, or interest we may have either severally or jointly" in the land, it was held that the deed conveyed merely their equitable life interests and was not an execution of the power. Ridgely v. Cross, 83 Md. 161. To a similar effect is Weinstein v. Weber, 178 N. Y. 94, where a life tenant with power to sell executed a quitclaim deed of all her right, title, and interest. But a quitclaim deed by a life tenant does not necessarily have this limited effect. Goff v. Pensenhafer, 190 Ill. 200; Ladd v. Chase, 155 Mass. 417.

If the deed of conveyance, though making no reference to the power, purports to convey an interest greater than or different from the individual interest of the donee of the power, this fact is usually strong evidence that an execution of the power was intended. Scott v. Bryan, 194 Pa. St. 41; Walke v. Moore, 95 Va. 729, 738. Thus if the deed of a life tenant with power to sell the fee purports to convey the fee, courts will usually inter-

several powers, and refers to some and not to others, the execution will exclude those not referred to.[1] From these propositions it may be seen why a conveyance of specific property, or a specific devise of property, will generally operate at the execution of a power, if the grantor or testator has no other interest in the property but the power, although he makes no reference to the power in his deed or will.[2] On the other hand, the student will understand why it was so long held that a general conveyance or assignment of all a grantor's property which named no particular property, or a general devise of all a testator's property, without referring to any particular property, and without referring to any power to be executed, did not operate to execute a power the grantor or testator might have.[3]

[1] Att. Gen. *v.* Vigor, 8 Ves. 256; Maundrell *v.* Maundrell, 10 Ves. 246; Trollope *v.* Linton, 1 S. & S. 477; Bailey *v.* Lloyd, 5 Russ. 330; Pidgely *v.* Pidgely, 1 Col. C. C. 255; Hougham *v.* Sandys, 2 Sim. 95; Roach *v.* Haynes, 6 Ves. 153; 8 Ves. 584; Monk *v.* Mawdesly, 1 Sim. 286; Lawson *v.* Lawson, 3 Bro. Ch. 272. [See note *a*, *supra*, p. 835.]

[2] See 1 Sugd. Pow. 356, 383 (3d Am. ed.)

[3] 1 Sugd. Pow. 383 *et seq.* (3d Am. ed.); Doe *v.* Roake, 2 Bing. 497; Blagge *v.* Miles, 1 Story, 426; 4 Kent, 336; Jones *v.* Tucker, 2 Mer. 533; Doe *v.* Vincent, 1 Houst. 416, 427; Hughes *v.* Turner, 3 Myl. & K. 688. But the English statutes, 7 Will. IV and 1 Vict. c. 26, § 27, have altered the rule; and at the present day a general devise of real or personal estate operates as an execution of all the power that a testator may have over such property, unless it appears to have been the intention not to execute such power. See Collard *v.* Sampson, 16 Beav. 543; 4 De G., M. & G. 224; Lake *v.* Currie, 2 De G., M. & G. 536; West *v.* Ray, 1 Kay, 385; Orange *v.* Pickford, 4 Drew. 363; Wilson *v.* Eden, 16 Beav. 153; Enniss *v.* Smith, 2 De G. & Sm. 722; Wisden *v.* Wisden, 2 Sm. & Gif. 396; Blagge *v.* Miles,

pret the deed as an execution of the power. Grace *v.* Perry, 197 Mo. 550; Rinkenberger *v.* Meyer, 155 Ind. 152; McMillan *v.* Deering, 139 Ind. 70; Vines *v.* Clarke, 97 N. Y. S. 532, 111 App. Div. 12; Underwood *v.* Cave, 176 Mo. 1, 18; Matthews *v.* Capshaw, 109 Tenn. 480; Young *v.* Mutual Life Ins. Co., 101 Tenn. 311.

The size of the consideration may help to determine the intention of the grantor, McMillan *v.* Deering, 139 Ind. 70; Ladd *v.* Chase, 155 Mass. 417; or the age of the life tenant, Morffew *v.* S. F. & S. R. R. Co., 107 Cal. 587; or the fact that the life tenant signs the deed as executrix. Thomas *v.* Wright, 66 S. W. 993 (Ky. 1902). See also McCreary *v.* Bomberger, 151 Pa. St. 323; Hill *v.* Conrad, 91 Tex. 341.

In the one case, a specific reference to the property indicates an intention to execute a power, if the act can have no other sense,

1 Story, 426. [See *In re* Marten, [1902] 1 Ch. 314.] The court in Massachusetts has adopted the rule of the English statute. See Amory *v.* Meredith, 7 Allen, 400. (*a*)

(*a*) The English statute has been interpreted to refer only to general powers of appointment and to have no application to limited or special powers. Doyle *v.* Coyle, [1895] 1 Ir. R. 205; *In re* Huddleston, [1894] 3 Ch. 595; *In re* Hayes, [1900] 2 Ch. 332. With regard to powers of the latter class, general residuary words are not sufficient execution, unless it appears from the whole will that the donee intended thereby to execute his power of appointment. But it has been held that the donee's use of the word "appoint" in a residuary clause, when she had no other power of appointment may be sufficient evidence of her intention to execute a limited power, and that the fact that she had no other power of appointment is admissible as evidence. *In re* Mayhew, [1901] 1 Ch. 677. In general, however, the intention of the testator must be gathered from the will. *In re* Huddleston, [1894] 3 Ch. 595; *In re* Marsh, 38 Ch. Div. 630.

Several States have enacted statutes similar to the 27th section of the English Wills Act. See Pub. Gen. Laws of Md. (1904) Art. 93, § 323; IV N. Y. Consol. Laws (1909), p. 2846, § 18, p. 3408, § 176; Brightly's Purdon's Digest Pa., p. 1205, § 26; Safe Dep. & Trust Co. *v.* Friend, 201 Pa. St. 429. In several States it has become established law without legislation, that a general disposition of the residue of a testator's estate will operate as an execution of a general power of appointment unless the testator's purpose appears to have been otherwise. Tudor *v.* Vail, 195 Mass. 18, 26; Stone *v.* Forbes, 189 Mass. 163, 168; Talbot *v.* Field, 173 Mass. 188; Hassam *v.* Hazen, 156 Mass. 93; Cumston *v.* Bartlett, 149 Mass. 243, 248; Emery *v.* Haven, 67 N. H. 503; Johnston *v.* Knight, 117 N. C. 122. In Stone *v.* Forbes, 189 Mass. 163, 168, the court intimated that it would follow the sam reule in regard to limited or special powers of appointment. See also Johnston *v.* Knight, 117 N. C. 122.

Other jurisdictions have abided by the common-law rule, that a general devise or bequest by the donee of a power of appointment is not sufficient evidence of an intention of the donee to execute the power. Hollister *v.* Shaw, 46 Conn. 248; Lane *v.* Lane, 4 Pennewill (Del.), 368, 64 L. R. A. 849 and note; Wooster *v.* Cooper, 59 N. J. Eq. 204, 223; Harvard College *v.* Balch, 171 Ill. 275; Mason *v.* Wheeler, 19 R. I. 21.

Under the English statute, a residuary clause in a will executed prior to the creation of the power of appointment is a good execution of a general power unless the court is satisfied that the donee could not have intended his will to have that effect. This rule is based upon the doctrine that a will is a continuing instrument, and speaks from

as if the donee of the power has no other interest in the property; but a general devise or conveyance, which neither refers to specific property nor to the power to be executed, indicates no intention to execute a power. It will be understood that there is a wide distinction between executing a special or discretionary power, and a simple devise of the trust estate; for it will be remembered that a trust estate passes under general words in a will to the devisee, but the devisee takes the trust estate subject to the same trusts under which the original trustee held them.[1] It will also be remembered, that there is a difference between a trustee's executing a power of appointment, or otherwise, in his last will, and a *cestui que trust* devising his beneficial interest in a trust estate. It has been considerably discussed, whether general words in the will of a *cestui que trust* devises all his interest in a trust fund, as well as all the estate to which he may have the legal title. It is established by statute in England, that general words in a will shall convey the *cestui que trust's* legal and beneficial estates, and this rule is followed in Massachusetts.[2]

§ 512. A *personal* power is sometimes given to trustees to consent to or approve the marriage of the *cestui que trust;* and the enjoyment of the bounty of the testator by the beneficiaries is sometimes made to depend upon the exercise of this power by trustees. These powers, if exercised in restraint of mar-

[1] See *ante*, §§ 335–345.

[2] Amory *v.* Meredith, 7 Allen, 397.

the death of the testator. Boyes *v.* Cook, 14 Ch. Div. 53. See also *In re* Hayes, [1900] 2 Ch. 332; Phillips *v.* Cayley, 43 Ch. Div. 222; *In re* Tarrant's Trust, 58 L. J. Ch. 780. The same view has been taken in Massachusetts. Stone *v.* Forbes, 189 Mass. 163, 168. See also Burkett *v.* Whittemore, 36 S. C. 428. But see Estate of Vaux, 11 Phila. 57; Estate of Fry, 11 Phila. 305.

The fact that the will of the donee of the power speaks of the property as if it were his own property will not prevent his disposition of it from being a valid execution of his power. Loring *v.* Wilson, 174 Mass. 132, 141.

riage, are not favored in equity.[1] Therefore, if an interest is *vested* in a beneficiary, subject to be divested in case the beneficiary marries without the consent or approbation of the trustee, and there is *no gift over* to take effect upon the marriage without such consent, the power or condition will be treated as void, and will not be enforced.[2] But this rule will not apply to a charge on real estate.[3] If the condition is *subsequent*, and the interest is given over on the failure of the donee to comply with it, the court will enforce the gift over if the first donee marry without the consent of the trustees.[4] (*a*) It is said to be doubtful, whether a general gift of the residue will be a sufficient gift over to give validity to such power; [5] but if the direction is, that the particular gift shall fall into the residue, in case the donee marries without the consent of the trustees, it is a good gift over.[6]

§ 513. If the property once vests absolutely in the donee, and there is a general and unlimited condition that he shall not marry without the consent of the trustees, the necessity of the consent ceases as soon as the interest vests; as where a legacy is given to a child at twenty-one, provided, if he marry without the consent of the trustees, he should forfeit it. The legacy vests at twenty-one, and if he marry afterwards without

[1] Stackpole *v.* Beaumont, 3 Ves. Jr. 89; Long *v.* Dennis, 4 Burr. 2052; Daley *v.* Desbouverie, 2 Atk. 261.

[2] Semphill *v.* Hayley, Pr. Ch. 562; Garrett *v.* Pritty, 2 Vern. 293; 3 Mer. 120; Jervoise *v.* Duke, 1 Vern. 20; Harvey *v.* Aston, 1 Atk. 378; Wheeler *v.* Bingham, 3 Atk. 364; Lloyd *v.* Branton, 3 Mer. 117; 1 Rop. Leg. 715; W. *v.* B., 11 Beav. 621; Poole *v.* Bate, 11 Hare, 33; Marples *v.* Bainbridge, 1 Madd. 590; McIlvaine *v.* Gether, 3 Whart. 575; Hooper *v.* Dundas, 10 Barr, 75; Maddox *v.* Maddox, 11 Grat. 804.

[3] Ibid.; Reynish *v.* Martin, 3 Atk. 333; Berkely *v.* Ryder, 2 Ves. 535.

[4] Ibid.; Stratton *v.* Grimes, 2 Vern. 357; Dashwood *v.* Bulkeley, 10 Ves. 230; Scott *v.* Tyler, 2 Bro. Ch. 431; 2 Lead. Cas. Eq. 105, and notes.

[5] Harvey *v.* Aston, 1 Atk. 375; *contra*, Wheeler *v.* Bingham, 3 Atk. 364; Lloyd *v.* Branton, 3 Mer. 118; Scott *v.* Tyler, 2 Lead. Cas. Eq. 396.

[6] Wheeler *v.* Bingham, 3 Atk. 368; Lloyd *v.* Branton, 3 Mer. 118.

(*a*) See *In re* Moore, 39 Ch. D. 116, 123, 131.

consent, the condition, being subsequent, is gone, and there is no forfeiture;[1] and where a child marries in the testator's lifetime, with his consent, but after the date of the will, such conditions, as to consent of trustees, are of no effect; and they do not apply to a second marriage.[2]

§ 514. Where power is given to a trustee to consent to a marriage, as a condition precedent to the gift's taking effect, nothing will vest in the donee until the condition is complied with; as where there is a gift in trust for a party *upon his marriage*, or *upon his marriage with the proper consent of the trustee*, the gift will not vest in the beneficiary until his marriage with the consent of the trustee.[3] Under such form of gift, it is immaterial whether there is a gift over or not.[4] The rule will apply, whether the consent to the marriage is required until a certain age, or during the whole life.[5] Where there was a gift in trust to a party, if he should marry with the consent of the

[1] Pullen *v.* Ready, 2 Atk. 587; Desbody *v.* Boyville, 2 P. Wms. 547; Knapp *v.* Noyes, Amb. 662; Osborn *v.* Brown, 5 Ves. 527; Stackpole *v.* Beaumont, 3 Ves. Jr. 89; Malcolm *v.* O'Callaghan, 2 Madd. 354; Lloyd *v.* Branton, 3 Mer. 108; Graydon *v.* Hicks, 2 Atk. 18; Garrett *v.* Pritty, 2 Vern. 293; 3 Mer. 120, n.

[2] Clarke *v.* Berkely, 2 Vern. 720; Crommelin *v.* Crommelin, 3 Ves. Jr. 227; Parnell *v.* Lyon, 1 V. & B. 479; Wheeler *v.* Warner, 1 S. & S. 304; Smith *v.* Cowdery, 2 S. & S. 358; Coventry *v.* Higgins, 8 Jur. 182.

[3] Reeves *v.* Herne, 5 Vin. Abr. 343, pl. 41; Reynish *v.* Martin, 3 Atk. 330; Frye *v.* Porter, 1 Ch. Cas. 138; 1 Mod. 300; Bertie *v.* Falkland, 3 Ch. Cas. 129; Holmes *v.* Lysight, 2 Bro. P. C. 261; Hemmings *v.* Munckley, 1 Bro. Ch. 303; Scott *v.* Tyler, 2 Bro. Ch. 489; 2 Lead. Cas. Eq. 105, notes; 2 Dick. 712; Knight *v.* Cameron, 14 Ves. 289; Creagh *v.* Wilson, 2 Vern. 572; Gillett *v.* Wray, 1 P. Wms. 284; Harvey *v.* Aston, 1 Atk. 375; Newton *v.* Marsden, 2 John. & H. 356; Hotz's Est., 38 Penn. St. 422; Cornell *v.* Lovett, 35 id. 100; Taylor *v.* Mason, 9 Wheat. 350; Collier *v.* Slaughter, 2 Ala. 263; Stratton *v.* Grymes, 2 Vern. 357; Barton *v.* Barton, id. 308; Hawkins *v.* Skeggs, 10 Humph. 31; Bennett *v.* Robinson, 10 Watts, 348; Com'th *v.* Stauffer, 10 Penn. St. 350; McCullough's App., 2 Jones, 197; Phillips *v.* Medbury, 7 Conn. 568.

[4] Ibid.; Clarke *v.* Parker, 19 Ves. 8; Malcolm *v.* O'Callaghan, 2 Madd. 349; Long *v.* Ricketts, 2 S. & S. 179; Stackpole *v.* Beaumont, 3 Ves. Jr. 89; 1 Rop. Leg. 658.

[5] Ibid.; Lloyd *v.* Branton, 3 Mer. 108.

trustees, and *over*, if he should marry *against* their consent, it was held, that *against* was equivalent to *without*, and that the gift went over, although it did not appear that the trustees opposed the marriage.[1] The trustees' powers are exhausted by consent to one marriage; if, therefore, they consent to one marriage, the beneficiary may marry a second time without their consent.[2] But the rule in relation to a first marriage without consent, and a second marriage with consent, is uncertain.[3]

§ 515. A general restraint of marriage, with or without the consent of trustees, or with any person, is illegal and void, as contrary to the policy of the law. Therefore, a gift, in trust, upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void.[4] So all conditions, leading to a probable prohibition of marriage, are void.[5] But a condition, restraining marriage under the age of twenty-one, or before a reasonable age without consent, is valid.[6] So conditions that restrain marriage with a particular person, or with natives of a particular country, or of a particular religion, or conditions that prescribe the ceremonies of the marriage, are valid, and may be enforced in relation to the property.[7]

[1] Long *v.* Ricketts, 2 S. & S. 179; and see Harvey *v.* Aston, 1 Atk. 375; Pollock *v.* Croft, 1 Mer. 184.

[2] Hutcheson *v.* Hammond, 3 Bro. Ch. 128; Crommelin *v.* Crommelin, 3 Ves. Jr. 227; Low *v.* Manners, 5 B. & Ald. 967; 1 Rop. Leg. 709.

[3] Malcolm *v.* O'Callaghan, 2 Madd. 349.

[4] Waters *v.* Tazewell, 9 Ind. 291; Maddox *v.* Maddox, 11 Grat. 804; Keily *v.* Monck, 3 Ridgw. P. C. 205, 244, 249, 261; Harvey *v.* Aston, Comyn, 726; 1 Atk. 361; 1 Eq. Cas. Ab. 110, pl. 2, n. (a); Rishton *v.* Cobb, 9 Sim. 615; Morley *v.* Rennoldson, 2 Hare, 570; Connelly *v.* Connelly, 7 Moore, P. C. 438.

[5] Ibid.; Long *v.* Dennis, 4 Burr. 2052.

[6] Sutton *v.* Jewke, 2 Ch. R. 9; Creagh *v.* Wilson, 2 Vern. 573; Ashton *v.* Ashton, Pr. Ch. 226; Chauncy *v.* Graydon, 2 Atk. 616; Hemmings *v.* Munckley, 1 Bro. Ch. 304; Dashwood *v.* Bulkely, 10 Ves. 230; Stackpole *v.* Beaumont, 3 Ves. Jr. 96; Pearce *v.* Loman, 3 Ves. 139; Yonge *v.* Furse, 3 Jur. (N. S.) 603.

[7] Jervois *v.* Duke, 1 Vern. 19; Randall *v.* Payne, 1 Bro. Ch. 55; Perrin *v.* Lyon, 9 East, 170; Duggan *v.* Kelly, 10 Ir. Eq. 295; 1 Eq. Cas. Ab. 110, pl. 2, n. (a); Haughton *v.* Haughton, 1 Moll. 611.

§ 516. Where there is a limitation of property to a person until marriage, and, upon marriage *over* to some other person, or during widowhood, or while single, or where there is an annuity, payable to a person until such time, or during such time, and then to cease, the limitation is valid. Such a gift is upon no condition at all, but is a clear limitation, that marks the duration and continuance of the interest.[1] But where a testator devised lands to trustees in trust for B. for life, provided she does not marry, and, after her decease or marriage, over to other persons, and the testator afterwards married B. himself, and republished his will, with the same proviso in it, it was held that B. was entitled to the property notwithstanding her marriage.[2]

§ 517. Where such powers of consent are given to trustees, the marriage of the *cestui que trust*, during the testator's lifetime with his consent or subsequent approval, renders them inapplicable, and they cannot be executed.[3] The assent of the trustees, when necessary, may be implied, as where they allow a courtship and marriage to take place, and make no objection.[4] In this case no particular form of consent was prescribed. Even where a written consent was prescribed, and the trustees negotiated the settlement and the marriage, it was held suffi-

[1] Jordan *v.* Holkam, Amb. 209; Barton *v.* Barton, 2 Vern. 308; Scott *v.* Tyler, 2 Lead. Cas. Eq. 396; Lowe *v.* Peers, Wilm. 369; Bird *v.* Hunsdon, 2 Swanst. 342; Marples *v.* Bainbridge, 1 Madd. 590; Webb *v.* Grace, 2 Phill. 701, reversing 15 Sim. 394; Richards *v.* Baker, 2 Atk. 321; Sheffield *v.* Orrery, 3 Atk. 282; Gordon *v.* Adolphus, 3 Bro. P. C. 306; Heath *v.* Lewis, 3 De G., M. & G. 954. The early case of Parsons *v.* Winslow, 6 Mass. 169, is not in accordance with the authorities, nor can it be sustained on principle.

[2] Cooper *v.* Cooper, 6 Ir. Ch. 217; Corkers *v.* Minons, 1 Ir. Jur. 316; West *v.* Kerr, 6 id. 141.

[3] Clarke *v.* Berkely, 2 Vern. 720; Coffin *v.* Cooper, cited 1 Ves. & B. 481; Parnell *v.* Lyon, id. 479; Wheeler *v.* Warner, 1 S. & S. 374; Coventry *v.* Higgins, 14 Sim. 30; Crommelin *v.* Crommelin, 3 Ves. Jr. 227; Smith *v.* Cowdery, 2 S. & S. 358.

[4] Mesgrett *v.* Mesgrett, 2 Vern. 580; Clarke *v.* Parker, 19 Ves. 12; Harvey *v.* Aston, 1 Atk. 375; O'Callaghan *v.* Cooper, 5 Ves. 126.

cient:[1] they should be estopped to deny their consent to a marriage of their own procurement. There need be no consent to a particular marriage, if the *cestui que trust* has a general consent or license to marry whom she chooses.[2] If the consent is required to be in writing, very loose and general expressions of consent in letters, if acted upon, will be construed into assent.[3] If the consent is required to be in writing, any fraud or procurement, on the part of the trustees, will estop them from insisting upon the forfeiture;[4] but if there is no collusive conduct, and consent is required to be in writing, an implied or verbal consent cannot satisfy the condition.[5] A deed is not necessary, unless specially required by the will.[6] The consent must be given previously to the marriage, and the approbation of the trustees afterwards is immaterial, because no subsequent approbation could be a performance of the condition, or avoid a forfeiture for a breach of it.[7] If the time is stated for the exercise of the power, the consent cannot be three years before the time named.[8] If, however, the trustees gave their consent to the marriage at the proper time, but were prevented by accident from executing the formal writings until after the solemnization of it, it was held to be a compliance with the condition, as courts of equity may at all times relieve from accidents and

[1] Strange *v.* Smith, Amb. 263; Worthington *v.* Evans, 1 S. & S. 165.

[2] Mercer *v.* Hall, 4 Bro. Ch. 328; Pollock *v.* Croft, 1 Mer. 181.

[3] Daley *v.* Desbouverie, 2 Atk. 261; D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Merry *v.* Ryves, 1 Eden, 1; Worthington *v.* Evans, 1 S. & S. 165; Le Jeune *v.* Budd, 8 Sim. 441. [*In re* Smith, 44 Ch. Div. 654.]

[4] Strange *v.* Smith, Amb. 263; Clarke *v.* Parker, 19 Ves. 18; Farmer *v.* Compton, 1 Ch. R. 1.

[5] D'Aguilar *v.* Drinkwater, 2 V. & B. 225; Clarke *v.* Parker, 19 Ves. 12.

[6] Worthington *v.* Evans, 2 S. & S. 165.

[7] Reynish *v.* Martin, 3 Atk. 331; Clarke *v.* Parker, 19 Ves. 21; Berkley *v.* Ryder, 2 Ves. 532; Long *v.* Ricketts, 2 S. & S. 179; Malcolm *v.* O'Callaghan, 2 Madd. 349; Hemmings *v.* Munckley, 1 Bro. Ch. 304; Frye *v.* Porter, 1 Ch. Cas. 138; 1 Mod. 300. In Burleton *v.* Humphrey, Amb. 256, Lord Hardwicke held a different doctrine; but it has not been acted upon, and is not the law.

[8] Weller *v.* Ker, 1 Macq. H. L. Sc. App. Cas. 11.

mistakes.[1] If the trustees have once given their full consent to the marriage, with a knowledge of all the facts, they cannot withdraw it; for they have allowed the affections and feelings of the parties to become entangled, and it would be in the nature of a fraud to withdraw their consent.[2] But if any new facts should come to the knowledge of the trustees, which would render the marriage an improper one, they may withdraw their consent, and they ought to do so.[3]

§ 518. The consent of the trustees may be given conditionally, if the condition is not unreasonable. Thus an assent, *if a proper settlement is made*, or *if the cotrustees consent*, is conditional;[4] and if the parties fail or refuse to perform the condition, the consent may be withdrawn;[5] but if, in pursuance of the condition, a settlement is made after marriage, it will save the forfeiture.[6] All the trustees who accept the trust must consent,[7] unless the dissenting trustee is influenced by selfish and improper motives;[8] for if the testator has named the parties who are to assent, although he has used words to indicate that he attached no particular importance to the assent of all, yet the court cannot change the condition, and deprive those of their interest, to whom there is an express devise over.[9] A trustee may, however, authorize his cotrustee to consent for him, for that would be his own consent.[10] In general, the power

[1] Worthington *v.* Evans, 2 S. & S. 172; O'Callaghan *v.* Cooper, 5 Ves. 117.

[2] Le Jeune *v.* Budd, 6 Sim. 441; Farmer *v.* Compton, 1 Ch. R. 1; Strange *v.* Smith, Amb. 263; Merry *v.* Ryves, 1 Edm. 1; Dashwood *v.* Bulkely, 10 Ves. 242.

[3] D'Aguilar *v.* Drinkwater, 2 V. & B. 234; 1 Rop. Leg. 699.

[4] O'Callaghan *v.* Cooper, 5 Ves. 517; Dashwood *v.* Bulkely, 10 Ves. 230; D'Aguilar *v.* Drinkwater, 2 V. & B. 235.

[5] Dashwood *v.* Bulkely, 10 Ves. 230.

[6] O'Callaghan *v.* Cooper, 5 Ves. 117; 10 Ves. 230.

[7] Clarke *v.* Parker, 19 Ves. 12. The *dictum* in Harvey *v.* Aston, 1 Atk. 375, has not been followed.

[8] Peyton *v.* Bury, 2 P. Wms. 626; Mesgrett *v.* Mesgrett, 2 Vern. 580.

[9] Clarke *v.* Parker, 19 Ves. 12, 15.

[10] Daley *v.* Desbouverie, 2 Atk. 261; Clarke *v.* Parker, 19 Ves. 12; D'Aguilar *v.* Drinkwater, 2 V. & B. 225, 235, 236.

to assent is given to the executors or trustees, *in that character*, and not *personally*, and those who renounce the trust have no power;[1] yet the power may be conferred upon an executor or trustee *personally*, so that his assent may be required, although he renounce the trust.[2] And a power may be so given to executors to sell lands that they may execute the power of selling the lands although they renounce the executorship.[3] If the power becomes impossible by the death of one or more of the trustees, it will be dispensed with so far as it is impossible to execute it literally;[4] and if all the trustees die, the power is absolutely gone. So, if the condition is subsequent, and the consent of the executors or trustees in the plural number is required, and one dies, the condition is gone;[5] but if the death of the original trustee is provided for by the appointment of a new one, and the power extends to him, then the consent of the trustees must be had.[6] After a considerable lapse of time, and no action taken to disturb the possession of the property, the consent of the trustees will be presumed to have been given in proper form.[7]

§ 519. The exercise of this discretionary power, of assenting to the marriage of the *cestui que trust*, is of so peculiar a nature that courts of equity will exercise a control over it, and will not suffer the power to be abused; they will examine into the conduct and motives of the persons refusing their assent, and ascertain whether the refusal proceeds from a corrupt, selfish, or improper motive; and if it does, the court will relieve from a forfeiture incurred by a marriage without consent.[8]

[1] Worthington *v.* Evans, 1 S. & S. 165.

[2] Graydon *v.* Graydon, 2 Atk. 16, explained in 1 Rop. Leg. 695.

[3] Moody *v.* Fulmer, 3 Grant, 17.

[4] 1 Rop. Leg. 691.

[5] Peyton *v.* Bury, 2 P. Wms. 626; Jones *v.* Suffolk, 1 Bro. Ch. 528; Graydon *v.* Hicks, 2 Atk. 16–18; Aislabie *v.* Rice, 3 Madd. 256; 8 Taunt. 459; Grant *v.* Dyer, 2 Dow. 93.

[6] Clarke *v.* Parker, 19 Ves. 15.

[7] *Re* Birch, 17 Beav. 358.

[8] 1 Rop. Leg. 697.

Lord Eldon said, this was a "dangerous power" in the court, and one delicate and difficult to exercise.[1] But there is no question that the courts will exercise it in a proper case, as where the trustees refuse their assent from anger, pique, resentment, or from interested motives, as where some interest in the property would come to them or their families, in case of a marriage without their assent, or the death of the *cestui que trust* before marriage, or where the trustees have themselves promoted and procured the marriage.[2] So, where a trustee refused to assent or dissent to a proposed marriage of the beneficiary, the court sent the case to a master to inquire whether the marriage was a proper one, and to receive proposals for a settlement.[3]

[1] Dashwood *v.* Bulkely, 10 Ves. 245; Clarke *v.* Parker, 19 Ves. 12.

[2] Mesgrett *v.* Mesgrett, 2 Vern. 580; 10 Ves. 243; Strange *v.* Smith, Amb. 264; Merry *v.* Ryves, 1 Eden, 6; Peyton *v.* Bury, 2 P. Wms. 328; Daley *v.* Desbouverie, 2 Atk. 261; Clarke *v.* Parker, 19 Ves. 19.

[3] Goldsmid *v.* Goldsmid, 19 Ves. 368; Coop. 225.

CHAPTER XVII.

TRUSTEES OF THE DRY LEGAL TITLE; TO PRESERVE CONTINGENT REMAINDERS; OF TERMS ATTENDANT; OF FREEHOLDS; AND OF LEASEHOLDS.

§§ 520, 521. Powers and duties of trustees of the dry legal title.
§§ 522, 523. Trustees of contingent remainders.
§§ 524, 525. Trustees of attendant terms.
§ 526. Powers and duties of trustees in possession of freeholds.
§ 527. Must pay rates and taxes and collect rents.
Leases.
§ 528. Trustee's power of leasing.
§§ 529, 530. Their power where special directions are given as to leasing.
§ 531. Trustees of leaseholds.
§§ 532, 533. Power and duty to renew leases.
§ 534. Who is to bear the expense of renewing leases.
§ 535. When trustees may not renew leases.
§ 536. Liability of trustees for covenants in leases.
§ 537. The fine for renewing a lease.
§ 538. The right to renew leases a valuable right. Trustees cannot renew in their own names.

§ 520. It is a *simple* or dry trust, when property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of law.[1] In such case the *cestui que trust* is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyances of

[1] Abolished in Alabama. The *cestui* takes at once the estate given to the trustee (Code of 1876, § 2185). [Code of 1907, § 3408.] See Wilkinson *v.* May, 69 Ala. 33; Webb *v.* Crawford, 77 Ala. 440; Gosson *v.* Ladd, id. 224; see also Sutton *v.* Aiken, 62 Ga. 733; Elliot *v.* Deason, 64 id. 63. The same thing is held in Illinois. Witham *v.* Brooner, 63 Ill. 344; Lynch *v.* Swayne, 83 id. 336; Kirkland *v.* Cox, 94 id. 600; Long *v.* Long, 62 Md. 33; Owens *v.* Crow, 62 Md. 491; Farmers' Nat'l Bank *v.* Moran, 30 Minn. 165. But if the *cestuis* are are not *sui juris*, the estate vests in the trustee. Dean *v.* Long, 122 Ill. 458.

the legal estate as he directs.[1] In short, the *cestui que trust* has an absolute control over the beneficial interest, together with a right to call for the legal title, and the person in whom the legal title vests is a *simple* or *dry trustee*.[2] (*a*) Settlors sometimes convey estates in this manner for an ulterior purpose; or an active trust having been accomplished, the legal title and the beneficial interest may have fallen into this condition. The duties and powers of such dry trustees of the legal estate are few and simple. They are usually said to be threefold, and similar to those of the old feoffees to uses: (1) To permit the *cestui que trust* to occupy and receive the incomes and profits of the estate. (2) To execute such conveyances, or make such disposition of the estate as the *cestui que trust* may direct. In such case, if the trustee has made advances to the *cestui que trust* upon the credit of the land, the decree to convey should provide for the repayment of them.[3] The *cestui que trust* cannot, however, call for a conveyance, if such conveyance is inconsistent with all the agreements and purposes of the trust.[4] (*b*) If a trustee is to convey to children, he cannot be compelled to convey before all the children who may take under gift are born.[5] (3) To protect and defend the title, or to allow their names to be used for that purpose.[6] At law they are the legal

[1] Lewin on Trusts, 18.
[2] Hill on Trustees, 316.
[3] Robles *v.* Clarke, 25 Cal. 317.
[4] Thompson *v.* Galloupe, 100 Mass. 435. [See *infra*, § 920 and notes.]
[5] Dial *v.* Dial, 21 Tex. 529.
[6] Cruise, Dig. tit. 12, c. 4, § 6.

(*a*) As to when the courts will decree the termination of an express trust because it is or has become a dry or passive trust, see *infra*, § 920, and notes.

(*b*) When the trust instrument provides that the property is to be sold by the trustee and that the proceeds are to be divided, the beneficiaries have no right to a partition of the property itself. Gerard *v.* Buckley, 137 Mass. 475; 1 Ames' Cases on Trusts, (2d ed.) 452, 453, 455; Brown *v.* Miller, 45 W. Va. 211; Story *v.* Palmer, 46 N. J. Eq. 1. But if all the beneficiaries unite in asking partition in specie, courts of equity will usually order partition if no material purpose of the trust will thereby be defeated. Brown *v.* Miller, 45 W. Va. 211.

owners of the estate, and their names must be used in all suits at law affecting the legal title;[1] but in equity the *cestui que trust* is the owner, and the trustees will be restrained by injunction from using their power over the legal title to the injury of the *cestui que trust*.[2] If such trustees refuse from improper motives to convey the dry legal title when required by a person clearly entitled to the equitable interest, the court will decree a conveyance, and impose costs upon the trustees for their refusal.[3] (*a*) Even in an action at law, in the name of the trustee for the benefit of the *cestui que trust*, the trustee cannot release or discontinue the action, without the consent of the beneficiary; and if he does so, courts of law will set aside the release;[4] but where a trustee's name is thus used for the benefit of the *cestui que trust*, he is entitled to be indemnified against the costs, and the *cestui que trust* may be restrained in equity from proceeding until he has furnished such security.[5]

[1] Goodtitle *v.* Jones, 7 T. R. 47; Wake *v.* Tinkler, 16 East, 36; Cox *v.* Walker, 26 Me. 504; Methodist Soc. of Georgetown *v.* Bennett, 39 Conn. 293; First Bap. Soc. in Andover *v.* Hazen, 100 Mass. 322; Beach *v.* Beach, 14 Vt. 28; Matthews *v.* Ward, 10 G. & John. 443; Moore *v.* Burnet, 11 Ohio, 334; Wright *v.* Douglass, 3 Barb. 559; Mordecai *v.* Parker, 3 Dev. 425. In Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* can maintain it for the possession even against the trustee.(*b*)

[2] Balls *v.* Strutt, 1 Hare, 146.

[3] Boteller *v.* Allington, 1 Bro. Ch. 73; Willis *v.* Hiscox, 4 Myl. & Cr. 197; Jones *v.* Lewis, 1 Cox, 199; Lyse *v.* Kingdom, 1 Coll. 184; Penfold *v.* Bouch, 4 Hare, 471; Watts *v.* Turner, 1 R. & M. 634; Buttanshaw *v.* Martin, Johns. V. C. 89; Boskerck *v.* Herrick, 65 Barb. 250.

[4] Manning *v.* Cox, 7 Moore, 617; Barker *v.* Richardson, 1 Yo. & Jer. 362; Chitty, Contr. 605; McClurg *v.* Wilson, 43 Penn. St. 439. [See Bizzell *v.* McKinnon, 121 N. C. 186; Chicago, etc., Land Co. *v.* Peck, 112 Ill. 408; Pearce *v.* Bryant Coal Co., 121 Ill. 590.]

[5] Annesley *v.* Simeon, 4 Madd. 390; Chambersburg Ins. Co. *v.* Smith, 11 Penn. St. 120. [Falmouth Bank *v.* Cape Cod Canal Co., 166 Mass. 550, 567.]

(*a*) If the trustee is properly before the court, it may order him to transfer to the *cestuis* the legal title of real estate situated in another State, if the purposes of the trust have been accomplished or have become impossible of accomplishment. Donaldson *v.* Allen, 182 Mo. 626.

(*b*) See *supra*, § 328.

§ 521. In a simple trust of this nature, the dry trustee has no power of managing, or disposing of the estate, even although the *cestui que trust* is an infant, married woman, lunatic, or other person incapable of the management or control. Nor can he alter the nature of the property, by changing real estate into personal, or *vice versa*.[1] But there is this qualification of the rule, — if a trustee, having the legal title, and being in possession, makes a conveyance for a valuable consideration to a purchaser who has no notice of the trust, the title of the purchaser will prevail.[2] Such a transaction, however, under our registry laws is almost impossible, for the recording of the settlement or other deeds of the property is notice to all the world of the trust. So impersonal are the relations of dry trustees to the *cestui que trust*, that it is said they may purchase the estate of the beneficiary.[3] It is further to be remarked, that there can be but few of these dry trusts; for where there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust;* and he thus unites both the legal and beneficial estate in himself.[4]

§ 522. Trusts to preserve contingent remainders are less frequent in this country than in England; and they are less frequent in England since the statute of 8 & 9 Vict. c. 106, which enacted that a contingent remainder should be deemed capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner and in all respects as if such determination had not happened. In consequence of this act, there is no necessity for any machinery to preserve contingent

[1] Furiam *v.* Saunders, 7 Bac. Abr. Uses and Trusts, E.; Witter *v.* Witter, 3 P. Wms. 100.

[2] Millard's Case, 2 Freem. 43; Bovey *v.* Smith, 1 Vern. 149.

[3] Parker *v.* White, 11 Ves. 226. [See also Heckscher *v.* Blanton, 66 S. E. 859 (Va. 1910).]

[4] Peck *v.* Brown, 2 Rob. (N. Y.) 119; Davis *v.* Rhodes, 39 Miss. 152. [Everts *v.* Everts, 80 Mich. 222. See *supra*, § 299 *et seq.*]

remainders. Previous to the act, where there were no trustees to preserve them, they could be destroyed in two ways: First, contingent remainders were extinguishable by the surrender or merger of the particular estate in the inheritance; as, if lands were limited to A. for life, with remainder to his unborn children, with remainder to B., A. might surrender his life-estate to B., or B. might release his remainder to A., or both A. and B. might join in a conveyance of the fee; and thus in each case the contingent remainder was squeezed out, and if children were afterwards born to A. they had no remedy in law or equity. Second, they could be extinguished by the tenant for life with the concurrence of the person who stood next in the series of limitations; as, where the oldest son or heir of the tenant for life, being of age and next in the series, could unite with his father in making a tenant to the *præcipe* to bar all subsequent remainders. Thus the estate became the absolute property of the father and son, and the subsequent interests in remainder were sacrificed, except so far as father and son might choose to give them effect.[1]

§ 523. To obviate these results, settlements were drawn in one of two modes: First, the legal estate was limited to the use of the parent for ninety-nine years, if he should live so long, with remainder to the use of trustees and their heirs, during the life of the termor upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs, during the life of the parent in trust for him, and on his death to the other uses in remainder. Secondly, the use was to the parent for life, with remainder to trustees and their heirs, during the life of the parent, in trust to preserve the contingent limitations, and on his death to other uses in remainder. In the first form of settlement, the object in view, by vesting the freehold in trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been prac-

[1] Lewin on Trusts, 308.

ticable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorized by the spirit of the settlement. In the second form, it was the duty of the trustees, as before, to preserve the contingent limitations; but, as the freehold in possession was vested in the parent, the trustees had no power to prevent a recovery by the father and son as soon as the son came of age; but if the tenant for life committed a forfeiture, as by a feoffment in fee in order to defeat the contingent remainders, it was then the duty of the trustees to enter and so vest the possession of the freehold in themselves; and it was their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper.[1]

§ 524. Where a term for years is created by mortgage or by will for securing jointures or portions, or where a term is carved out of the inheritance for any particular purpose, and there is no condition in the instrument that the term shall cease when

[1] Lewin on Trusts, 309 (5th Lond. ed.), 404 (2d Amer. ed.). There is a very considerable amount of learning in the books upon the duty of trustees under these circumstances: when they should concur in determining the contingent estates, when they should concur in changing the uses and the limitations for the accommodation and benefit of families, and when they should apply to the court for instruction and direction in the performance of their duties. The statute 8 & 9 Vict. c. 106 renders the machinery of trustees to preserve contingent remainders no longer necessary in England, and Mr. Lewin has left all the learning upon the subject out of the last edition of his valuable treatise on Trusts. The reader will find it in the second American edition, and in Hill on Trustees, 318. It is not thought necessary to pursue the subject further, as, in nearly all the American States, statutes similar to the statute of 8 & 9 Vict. render trustees unnecessary to preserve such remainders. Mr. Washburn cites the statutes of the various States. 2 Wash. Real Prop., pp. 202, 262, 263, 266 (1st ed.). See also Hill on Trustees, 318, n.; 2 Green. Cruise, 270, and n.; 285, n.; 4 Kent, Com. 255. In Pennsylvania, however, trustees may still be necessary for this purpose. Dunwoodie *v.* Reed, 3 Serg. & R. 435; Toman *v.* Dunlop, 8 Penn. St. 72. The case of Vanderheyden *v.* Crandall, 2 Denio, 9, was decided before the change by the statutes in New York.

the purposes of its creation are satisfied, although the term or time for which it was carved out has not elapsed, the holder of the term for the remainder of the time holds it in trust for the owner of the inheritance, and it is said to be a term attendant upon the legal title. It is sometimes convenient in English conveyancing to keep these terms outstanding in the hands of a trustee, as the owner has the right to call at any time for a conveyance of them to himself; and such term may give the owner of the inheritance a legal title to the possession, anterior to some possible incumbrances that may have been put upon the estate prior to his purchase of the inheritance. In the same manner, purchasers in America sometimes take assignments of mortgages made long before their purchase, in order, by foreclosure or otherwise, to gain a title prior to other possible incumbrances, anterior to their purchase of the fee.

§ 525. Trustees of these dry terms hold them in trust for the owners of the inheritance. The rights and duties of the trustees of such terms are very similar to the rights and duties of trustees of the dry legal estate.[1]

§ 526. Trustees of freeholds are the legal owners of the estate, and they alone can be recognized in a court of law.[2] Their right to the possession will depend entirely upon the construction of the instrument of trust, and the nature of the duties required.[3] If their duties are such that they cannot perform them without the possession, the court will give it to them.[4] The situation and condition, therefore, of the *cestuis que trust* may be important on the question of the possession

[1] These terms are now abolished in England by stat. 8 & 9 Vict. c. 112, and have ceased to be important. They never prevailed to any great extent in this country, and it is not necessary to enlarge upon the subject. The reader who desires to see the learning upon this matter will find it in Hill on Trustees, 324, 329; 1 Green. Cruise, 414, 418, 424, 442, 443; 2 Green. Cruise, 63, 170.

[2] *Ante*, § 523; Wickhem *v.* Berry, 55 Penn. St. 70.

[3] *Ante*, § 329.

[4] Ibid.; Tidd *v.* Lister, 5 Madd. 433.

and control of the trustee; as, if the *cestui que trust* is a married woman, an infant, or a lunatic, incapable of managing or controlling the estate, the trustee must of necessity have the possession and management.[1] If the trustees have the possession, control, and management, they may make necessary repairs;[2] but, without some general or special authority, they cannot enter upon large improvements.[3] If they are trustees for the sale of land they will not be allowed for improvements,[4] and no allowance can be made for cultivating such lands;[5] nor will the trustees be responsible for not renting land that comes to them in trust for sale.[6]

§ 527. Where trustees are in possession, and have the management of the estate, they must pay all rates and taxes,[7] and protect the estate from tax sales; they may, therefore, insure, and good management would demand it, but they are not

[1] Tidd *v.* Lister, 5 Madd. 433.

[2] Fontaine *v.* Pellet, 1 Ves. Jr. 337; Green *v.* Winter, 1 Johns. Ch. 26. A trustee, having authority to make repairs, may by express agreement make the expenditure for repairs a charge upon the estate, but he cannot, by a subsequent promise to pay out of the estate, give a lien upon it. New *v.* Nicoll, 73 N. Y. 127; Stanton *v.* King, 8 Hun (N. Y.), 4; Austin *v.* Munro, 47 N. Y. 360. [See *supra*, § 479 and notes.]

[3] Ibid.; Cogswell *v.* Cogswell, 4 Edw. Ch. 231; L'Amoureux *v.* Van Rensselaer, 1 Barb. Ch. 34; Wykoff *v.* Wykoff, 3 Watts & S. 481; Ames *v.* Downing, 1 Bradf. 321; Dickinson *v.* Conniff, 65 Ala. 581. [*In re* Cole's Estate, 102 Wis. 1.] The cost of improvements made in reliance on the trust estate with a promise by trustee to pay for them, may be a charge upon the estate to the extent that the value of the estate is enhanced thereby, at least in cases where the trustee resides abroad, and so cannot be personally reached by the persons making the improvements. Field *v.* Wilbur, 49 Ver. 157. But the general rule is that the trustee must be looked to, and it is clear that an administrator has no power to borrow money and charge the trust estate. Bank *v.* Weeks, 53 Vt. 115. A general power of management may give a power to make permanent improvements. Bowes *v.* Strathmore, 8 Jur. 92. [See *supra*, § 479 and notes.]

[4] Green *v.* Winter, 1 Johns. Ch. 28; Thompson *v.* Thompson, 16 Wis. 91.

[5] Ibid.

[6] Burr *v.* McEwen, Baldw. C. C. 154; Griffin *v.* Macaulay, 7 Grat. 476.

[7] Burr *v.* McEwen, Baldw. C. C. 154; Lovat *v.* Leeds, 31 L. J. Ch. 503. [See *infra*, § 554 and notes.]

bound to do so.[1] Where they have the management, they must use due diligence in collecting rents. If they are directed to accumulate the rents, or to receive them for any other purpose, they will become personally liable if they allow the tenants to fall in arrear, and a loss is thus imposed upon the estate.[2]

§ 528. When trustees are charged with the payment of annuities, debts, or legacies, or any other sums out of the estate, but have no power of sale, they have an implied power of leasing upon the ordinary terms or custom of the State or town in which the land is situated.[3] (*a*) If the trust consists of farming lands, the trustees can grant ordinary farming leases; if of houses in a city, they can grant the ordinary leases of such property.[4] But they will not be justified in granting any unusual leases; as building-leases (*b*), or leases for a long term,[5] or of unopened mines.[6] If, under such circumstances, a trustee uses due diligence in granting a lease at a proper rent, and for a proper term, he will not be responsible, although a much larger sum may be obtained, before the lease expires, by reason of an increase or rise in rents.[7] It is said that the neglect must approximate fraud to impose such a liability upon a trustee.[8] If, however, the estate consists of a plantation and slaves, or of a farm fully stocked, the trustee may not lease it at all, but he

[1] Ibid. [See *supra*, § 487, and *infra*, § 553.]
[2] Tebbs *v.* Carpenter, 1 Madd. 290.
[3] Naylor *v.* Arnitt, 1 R. & M. 501; Newcomb *v.* Ketcltas, 19 Barb. 608; Hedges *v.* Riker, 5 Johns. Ch. 163; Black *v.* Ligon, Harp. Eq. 205.
[4] Ibid.; Greason *v.* Ketcltas, 17 N. Y. 491; Pearse *v.* Baron, Jac. 158.
[5] Greason *v.* Ketcltas, 17 N. Y. 491; Pearse *v.* Baron, Jac. 158.
[6] Clegg *v.* Rowland, L. R. 2 Eq. 160.
[7] Ferraby *v.* Hobson, 2 Phill. 255.
[8] Ibid.

(*a*) As to powers of trustees to lease in general, see *supra*, § 484 and notes.

(*b*) Where trustees of city property were given power of sale and power to lease "upon such terms and conditions as they may consider most advisable," it was held that they had power to give building leases. *In re* James, 64 L. J. Ch. 686.

may employ the personal property upon the estate in its cultivation.[1] If the tenant for life in occupation of the lands becomes insolvent, and his rent is largely in arrear, the trustees will be reimbursed for all the necessary expenses of ejecting him, and they will be justified in releasing to him the arrears of rent, and in paying a *bonus* as among the expenses of obtaining the possession. These expenses are for the benefit of the estate.[2] Under the general implied powers of leasing, trustees can only grant a lease in possession, and cannot grant a lease in reversion;[3] and it is doubted if they can make a lease to commence at a future day.[4] If the trust is only for a life, the trustees cannot bind the remainder-men by a covenant to renew in a lease executed by them.[5] (*a*)

§ 529. If special powers of leasing are conferred upon trustees, they must follow the powers strictly. Any deviation from the manner of leasing pointed out in the trust instrument would be a breach of the trust. Thus, where leases are to be in possession and not in reversion, or where the lessor is not to take any fine or premium from the lessee, a lease made contrary to these powers is improper and would be set aside.[6] Where there is power to lease for a certain number of years, a lease for a less number is good,[7] but a lease for a longer term than that prescribed is bad, as contrary to the power;[8] although it is

[1] Dennis *v.* Dennis, 15 Md. 73.
[2] Blue *v.* Marshall, 3 P. Wms. 381.
[3] Sussex *v.* Worth, Cro. Eliz. 5; 2 Sugd. on Pow. 370. [See *supra*, § 484, note.]
[4] Sinclair *v.* Jackson, 8 Cow. 581.
[5] Bergengren *v.* Aldrich, 139 Mass. 259.
[6] Bowes *v.* East London Water Works Co., 3 Madd. 375; Jac. 324.
[7] Isherwood *v.* Oldknow, 3 M. & S. 382.
[8] Sinclair *v.* Jackson, 8 Cow. 581.

(*a*) But if the trustee has been given power to bind the remainderman by leases to begin in *futuro*, or by covenants to renew, equity will enforce specific performance by the remainder-man of a valid contract to lease, especially if the lessor is in possession and has improved the property in reliance on the contract. Taussig *v.* Reel, 134 Mo. 530.

said, that such a lease may be sustained in equity for the proper number of years, and that the excess only is void.[1] It has been held, however, where there was a direction to keep mines constantly leased upon leases not exceeding five years, and it was found that good tenants could not be obtained for so short a term, and that leases for such a term would destroy the mines, that a court of equity could direct leases to be made for a longer term, as for fifteen years.[2] Under a power to lease for twenty-one years, a lease for twenty-one years, determinable at the option of the lessee, is a good execution of the power;[3] but where lands, not within the authority to lease, are joined in the same lease at one rent with lands within the power, the whole lease is without authority, for there can be no apportionment of the rent.[4] If the lease is not strictly within the terms of the special power, the receiving of rent by the *cestui que trust* for several years will not confirm the lease, unless they are aware of the defective execution of the power.[5] It seems to be in accordance with sound principle, that a lease, which is void for want of power in the trustee to execute it, is incapable of confirmation by the *cestuis que trust*, who have no power either to make or confirm leases;[6] but perhaps a long acquiescence by them in occupation under the lease, accompanied by valuable improvements made by the lessee, might estop them from setting up a claim to avoid the lease.[7] (*a*) If the freehold is vested in the trustees, the lease will take effect out of their legal interest, and will be valid in law, though it may be a breach of the trust;

[1] Pawcey *v.* Bowen, 1 Ch. Cas. 23; 3 Ch. R. 11.

[2] Matter of Philadelphia, 2 Brews. 426. [See Donegre *v.* Walker, 214 Ill. 113; Marsh *v.* Reed, 184 Ill. 263, where the court authorized leases for 99 years upon a showing of necessity.]

[3] Edwards *v.* Millbank, 4 Drew. 606.

[4] Doe *v.* Stevens, 6 Q. B. 208.

[5] Bowes *v.* East London Water Works Co., 3 Madd. 375; Jac. 324.

[6] Sinclair *v.* Jackson, 8 Cow. 581.

[7] Black *v.* Ligon, Harp. Eq. 205. But see 4 Kent, 107.

(*a*) A lease by a mere naked trustee, when assented to by the beneficiary, is practically the act of the latter, who has the rights of the landlord. White *v.* Cannon, 125 Ill. 412.

but a court of equity can in all cases set aside any conveyance or lease which is a breach of the trust.[1] If there is any fraud or collusion in the trustee, the lease will be set aside, or the lessee may be converted into a trustee; as, where the trustee and a third person by collusion suffered a lease to be forfeited, in order that such person might obtain the lease to himself, he was held to be a constructive trustee.[2] (*a*)

§ 530. Where the special power is to lease lands usually let, or upon the usual rent, it will apply *prima facie* to such lands only as have been generally let, and to the ordinary adequate rent;[3] but where the general scope of the whole instrument involves an intention that all the lands shall be let, the words will be construed to embrace all;[4] and the joining of several parcels of land in one lease, which have been *usually* let separately, will not vitiate the execution of the power.[5] The *usual* rent means the old and uniform custom, and not the rent reserved on a single lease, executed just before the creation of the power.[6] Where the power is to make a lease containing "usual and reasonable covenants," the rule is to follow a lease of the lands in existence at the time of the creation of the power, if there is such a lease.[7] Where a widow was to have the right to cultivate as much land as she pleased, and the executors were to lease the balance, the power of leasing was held to extend to the whole estate, upon the death of the widow.[8]

[1] Bowes *v.* East London Water Works Co., 3 Madd. 375; Jac. 324. [Gomez *v.* Gomez, 147 N. Y. 195; *In re* Hubbell Trust, 135 Iowa, 637.]

[2] Aspinall *v.* Jones, 2 Bennett (Mo.), 209.

[3] Cardigan *v.* Montague, 2 Sugd. Pow. App. 14, 339; Orbey *v.* Mohun, 2 Vern. 531; Pr. Ch. 257; 2 Roll. Ab. 261, pl. 11, 12.

[4] Goodtitle *v.* Funucan, Doug. 565; 2 Sugd. Pow. 349.

[5] Doe *v.* Stephens, 6 Q. B. 208; Doe *v.* Williams, 11 Q. B. 688.

[6] Doe *v.* Hole, 15 Q. B. 848.

[7] Doe *v.* Stephens, 6 Q. B. 208.

[8] Hoyle *v.* Stowe, 2 Dev. 318.

(*a*) As to effect of leases for a term which extends beyond the duration of the trust, see *supra*, § 484, note.

If the trustees have a fee, determinable upon a contingent event, they nevertheless have power to make a lease to extend beyond their interest in the land.[1] A power to lease for lives will not authorize a lease for years; but under a power to lease not exceeding twenty-one years, or three lives, a lease for years may be granted.[2] So a lease for two lives will be good under a power to lease for three lives.[3] In granting a lease for lives, it must be during lives in being, and all must be running at the same time;[4] if some of the lives have expired, there is authority to grant a lease during the life of the survivor.[5] A power to lease land generally will not authorize a lease of unopened mines, but a general power will authorize a lease of opened mines.[6] (*a*) Trustees should not grant leases of mines without impeachment of waste.[7] In deciding the length of the term for which the lease may be granted, trustees must be guided by the best interests of the estate; at law they may exercise the power by granting the longest term;[8] but in equity they are subject to the supervision of the court.[9] If they enter into covenants in leases, they will be personally bound.[10] Whether the heirs of the testator, the trustee having refused to act, can execute the power of leasing depends upon the terms of the power, whether it is a personal confidence, or is a trust that goes with the estate and office of the trustee.[11]

[1] Greason *v.* Keteltas, 17 N. Y. 491. [But see *supra*, § 484, note *a*.]
[2] Whitlock's Case, 8 Co. R. 69 b; 1 Sugd. Pow. 514; 2 id. 354.
[3] 2 Sugd. Pow. 365.
[4] Doe *v.* Halcombe, 7 T. R. 13; 2 Sugd. Pow. 364; Raym. 263.
[5] Doe *v.* Hardwicke, 10 East, 549.
[6] Clegg *v.* Rowland, L. R. 2 Eq. 160.
[7] Campbell *v.* Leach, Amb. 740; Daly *v.* Beckett, 6 C. B. 114; Lee *v.* Balcarras, id. 849.
[8] Muskerry *v.* Chinnery, Llo. & Goo. 185; 1 Sugd. Pow. 548.
[9] Sutton *v.* Jones, 15 Ves. 587; Black *v.* Ligon, Harp. Eq. 205; 4 Kent, 107. [*In re* Hubbell Trust, 135 Iowa, 637; *supra*, § 484, note *a*.]
[10] Greason *v.* Keteltas, 17 N. Y. 491.
[11] Robson *v.* Flight, 10 Jur. (N. S.) 1228; 11 Jur. (N. S.) 147; 5 N. R. 344; 34 Beav. 110.

(*a*) As to whether rent or royalties from mines or oil-wells belong to income or to principal, see *infra*, § 546, note.

§ 531. Where the trust property consists of leasehold estates, questions often arise respecting the duty of the trustees to renew, and on whom the expense shall fall. These estates are not so common in the United States as in England; but it may be important to state the law on the subject, together with the American authorities. It has before been stated, that where a leasehold is limited in the instrument of trust to a tenant for life with remainder over, and is rapidly diminishing in value through the expiration of the term, it is the duty of the trustee to sell the lease and invest the proceeds, and to pay the income of such investment to the tenant for life, and the principal to the remainder-man. Where there is a *specific* gift of the leasehold, or other depreciating property, the tenant is entitled to receive the income *in specie*.

§ 532. It is the duty of the trustees to renew all leases at the regular periods, where an *express* trust is created for that purpose.[1] In the absence of such trust, the duty may be *implied* from the expressions used by the settlor, or from the whole scope of the instrument.[2] In the absence of such guides, it has been held that where a leasehold interest is settled in trust for life with remainders over, it must be the general intention that the interest should continue, and be preserved for the benefit of all who take under the limitations of the trust; and that it is the duty of the trustees to renew, although there are no particular or general expressions directing a renewal.[3] So in the case of marriage articles, if renewable leaseholds are part of the estates to be settled, the court will order a direction

[1] Montford *v.* Cadogan, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; Colegrave *v.* Manby, 6 Madd. 72; 2 Russ. 238; Bennett *v.* Colley, 5 Sim. 181; 2 Myl. & K. 235.

[2] Curtis *v.* Lukin, 5 Beav. 147; Lock *v.* Lock, 2 Vern. 666; Hulkes *v.* Barrow, Taml. 264.

[3] Verney *v.* Verney, Amb. 88; 1 Ves. 428; White *v.* White, 4 Ves. 33; Montford *v.* Cadogan, 17 Ves. 485; 19 Ves. 638; Lock *v.* Lock, 2 Vern. 666; Milsington *v.* Mulgrave, 3 Madd. 491; 5 Madd. 471; Hulkes *v.* Barrow, Taml. 264.

to the trustees to renew to be inserted in the settlement.[1] If the trustees have a power of renewal in the form of a *discretionary* power, it will generally be construed as an absolute direction to renew, but the manner and time may be optional; for where trustees are appointed to preserve estates for those who are to take in succession, it can hardly be supposed that it would be left discretionary with them to destroy the interests of those who are to take in the future.[2]

§ 533. The mere fact that renewable leaseholds are settled upon persons to take in succession does not *per se* give the remainder-man a right to call upon the tenant for life to pay the expenses of a renewal.[3] In such case it is within the discretion of the tenant for life to renew. And even where a devise was made to a tenant for life, subject to all fines as they became due yearly and for every year, the tenant for life was not obliged to renew.[4] But if the tenant for life does renew, he cannot use his renewal to deprive the remainder-man of his rights, but such remainder-man will be entitled to the interest given him under the settlement, upon paying the proportional part of the expenses of renewal;[5] nor will the mere fact of the *interposition of a trustee* in the settlement indicate an intention that the tenant for life shall renew;[6] but such duties may be imposed directly, or by implication that a renewal must be made.[7]

[1] Graham *v.* Londonderry, cited Stone *v.* Theed, 2 Bro. Ch. 246; Pickering *v.* Vowles, 1 id. 197.

[2] Milsington *v.* Mulgrave, 3 Madd. 491; 5 id. 472; Mortimer *v.* Watts, 14 Beav. 616; Verney *v.* Verney, 1 Ves. 430; Harvey *v.* Harvey, 5 Beav. 134; Luther *v.* Bianconi, 10 Ir. Eq. 208.

[3] White *v.* White, 4 Ves. 32; 9 Ves. 561; Nightingale *v.* Lawson, 1 Bro. Ch. 443; Stone *v.* Theed, 2 id. 248; Capel *v.* Wood, 4 Russ. 500.

[4] Capel *v.* Wood, 4 Russ. 500.

[5] Stone *v.* Theed, 2 Bro. Ch. 248; Coppin *v.* Fernyhough, id. 241; Nightingale *v.* Lawson, 1 id. 440; Fitzroy *v.* Howard, 3 Russ. 225. [Bradford *v.* Brownjohn, 37 L. J. Ch. 198. See *infra*, § 538, note.]

[6] O'Ferrall *v.* O'Ferrall, Llo. & Goo. t. Plunk. 79; French *v.* St. George, 1 Dr. & Wals. 417; Lawrence *v.* Maggs, 1 Eden, 453.

[7] Verney *v.* Verney, 1 Ves. 429; White *v.* White, 4 Ves. 33; Hulkes *v.* Barrow, Taml. 264; Lock *v.* Lock, 2 Vern. 666.

§ 534. If trustees neglect to renew leases, they will be liable to the *cestuis que trust* for all the loss and damage that accrue by reason of the neglect. Thus, if a remainder-man subsequently effects a renewal at an increased cost and expense, they must reimburse him, or they may be ordered to renew at their own expense.[1] If the tenant for life has received an increased income by reason of the non-renewal, the trustees may withhold income from him to equalize what they may have been obliged to pay. If there are two successive tenants for life, they must contribute according to the duration of their respective interests.[2] The same principles are applicable where estates are settled without the intervention of a trustee, and the tenant for life is directed to renew. The remainder-man may renew in case of neglect by the tenant for life, and call upon his estate for reimbursement; and if the lease has expired and is lost, so that it cannot be renewed, the remainder-man may have compensation in damages.[3] But if the remainder-man pays an unreasonable sum for the renewal, the estate of the tenant for life will not be compelled to pay the whole, but the court will refer it to a master to determine a reasonable amount.[4] A purchaser from the tenant for life is not, however, compelled to make these payments, although he has notice of the settlement, unless the assignment to him expressly provides that the interest taken by him is subject to a trust for renewal.[5]

§ 535. Trustees, however, will not be liable for not renewing, where the trust for renewal cannot be carried into effect on account of its illegality, or their covenant to renew cannot be fulfilled because of the termination of their trust.[6] If there is an illegal direction to accumulate rents and profits,

[1] Montford *v.* Cadogan, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; Colegrave *v.* Manby, 6 Madd. 87; 2 Russ. 238; Milsington *v.* Mulgrave, 2 Madd. 491; 5 Madd. 472.

[2] Ibid.

[3] Colegrave *v.* Manby, 6 Madd. 87; 2 Russ. 238; Bennett *v.* Colley, 5 Sim. 181; 2 Myl. & K. 225.

[4] Ibid.

[5] Montford *v.* Cadogan, 19 Ves. 635.

[6] See § 528.

for the purpose of renewal, the trustee cannot be called upon to renew, for the reason that the fund, from which he is to pay the expenses of renewal, cannot legally exist.[1] So a lessor is not obliged to renew a lease unless it contains covenants to that effect. Therefore, if the lessor refuses to renew, or if he demands unreasonable terms, the trustees are not liable for not renewing.[2] In such case, however, the tenant for life cannot be allowed the exclusive benefit of the non-renewal; but so much of the expenses as would have come out of his interest will be invested for the benefit of the *cestuis que trust*, including the remainder-men.[3] If a leasehold is a loss to the estate, by calling for the payment of more rent than is received, the trustees must get rid of the leasehold by assignment, and they have been held responsible for not doing so.[4]

§ 536. The trustee in whom the leasehold interest vests, by the settlement or will, is liable, as assignee of the lease, to perform all its covenants during the continuance of his interest. Therefore, if he ceases to be trustee or assigns the lease, he will be liable for no covenants, unless they are broken while it was held by him.[5] But an executor of a lessee is liable upon the covenants, by reason of the privity of estate;[6] and so a trustee will be liable, if he has bound himself personally. On this account, an executor or trustee cannot be required by the *cestuis que trust* to assign over the estate before he is indemnified for such liability.[7] (*a*)

[1] Curtis *v.* Lukin, 5 Beav. 147.

[2] Colegrave *v.* Manby, 6 Madd. 82; Tardiff *v.* Robinson, id. 83, n.

[3] Ibid.; Bennett *v.* Colley, 2 Myl. & K. 231; 5 Sim. 181.

[4] Rowley *v.* Adams, 4 Myl. & Cr. 534.

[5] Onslow *v.* Corrie, 2 Madd. 330; Valliant *v.* Dodemede, 2 Atk. 546; Pitcher *v.* Toovey, 1 Salk. 81; 2 Ventr. 228; Taylor *v.* Shum, 1 B. & P. 21; Rowley *v.* Adams, 4 Myl. & Cr. 532; Trevele *v.* Coke, 1 Vern. 165.

[6] Brett *v.* Cumberland, Cro. Jac. 521.

[7] Simmonds *v.* Borland, 3 Mer. 567; Marsh *v.* Wells, 2 S. & S. 90.

(*a*) As to the option of a trustee under a voluntary assignment for creditors, to abandon assignable leases or to accept them, see *infra*, § 598, note.

§ 537. By the law of tenures, as established under the feudal system, the tenant was obliged to pay a fee or fine to his superior lord, upon every alienation of his land, whether in fee, or for life or for years. Hence, to this day in England, upon every renewal of a lease, there is a fine or a fee, considerable in amount, to be paid.[1] In the United States, all such restraints upon the alienation of lands are inconsistent with the spirit of our laws and institutions, and are absolutely void, even if annexed as terms or conditions in the instruments under which the lands are held.[2] Therefore, one great head of equity jurisdiction, in the matter of trust in leasehold estates, is obsolete in the United States. In England, it is frequently a matter of doubt and construction to determine whose estate and interest shall pay the fine and expenses of the renewal.[3]

§ 538. The right to renew a lease is a valuable right, and may be sold and conveyed.[4] Courts recognize this right, and protect it for the benefit of the trust estate. If trustees are deprived of this right by the acts of third persons, they are entitled to compensation; as where the land is taken for public works, by virtue of some statute, trustees, having a right by custom or by covenant to renew a lease, will have the right to compensation for the land taken.[5] Nor can a trustee renew a lease, in his individual name and for his private benefit, even if the lessor utterly refuses to renew the lease for the benefit of the *cestui que trust;*[6] for the reason that the trustee cannot

[1] 2 Black. Com. 72.

[2] Livingston *v.* Stickles, 8 Paige, 398; De Peyster *v.* Michael, 6 N. Y. 467; Overbagh *v.* Petrie, id. 510; 8 Barb. 28.

[3] For the reasons stated in the text, it is not important in this country to notice all the rules and distinctions which have been established by the authorities in England. If important, they may be found in Lewin on Trusts, 295-308, and Hill on Trustees, 434-439.

[4] Phyfe *v.* Wardwell, 5 Paige, 268; Anderson *v.* Lemon, 8 N. Y. 236.

[5] Jones *v.* Powell, 4 Beav. 96.

[6] Keech *v.* Sandford, Sel. Cas. Ch. 61; 1 Lead. Cas. Eq. 36, notes; Holt *v.* Holt, 1 Cas. Ch. 190; Fitzgibbon *v.* Scanlan, 1 Dow. P. C. 269; James *v.* Dean, 11 Ves. 392; 15 Ves. 236; Parker *v.* Brooke, 9 Ves. 583; Rowe *v.*

avail himself of his situation to make any advantage or profit to himself, and if he makes a profit by renewing a lease in his own name, it inures to the benefit of the trust estate, or he shall continue to hold it as trustee.[1] The same rule extends to all persons who hold any position of influence and confidence in respect to others, as tenants for life, (*a*) tenants in common,

Chichester, Amb. 719; Killick *v.* Flexney, 4 Bro. Ch. 161; Griffin *v.* Griffin, 1 Sch. & Lef. 352; Holdridge *v.* Gillespie, 2 Johns. Ch. 33; McClanahan *v.* Henderson, 2 A. K. Marsh. 388; Galbraith *v.* Elder, 8 Watts, 81; Heager's Ex'rs, 15 Serg. & R. 65; Fisk *v.* Sarber, 6 Watts & S. 18.

[1] Nesbitt *v.* Tredennick, 1 B. & B. 29; James *v.* Dean, 11 Ves. 396.

(*a*) The principle on which the courts have in the main proceeded is stated as follows in Robinson *v.* Jewett, 116 N. Y. 40: "Those who are in possession of lands under a lease have an interest therein beyond the subsisting term usually called the tenant's right of renewal. Between the landlord and the tenant this interest cannot strictly be denominated a right or estate, but is merely a hope or expectation, there being in the absence of contract, no way, legal or equitable, of compelling a renewal. But, as between third persons, the law recognizes this interest as a valuable property right, and the renewal as a reasonable expectancy of the tenants in possession." The new lease is said to be a "graft," upon the old one and a trustee, partner, agent or even cotenant will not be allowed to retain it for his own benefit. Mitchell *v.* Reed, 61 N. Y. 123; Sneed *v.* Deal, 53 Ark. 152; Leach *v.* Leach, 18 Pick. 68, 76. See also Bevan *v.* Webb, [1905] 1 Ch. 620; Longton *v.* Wilsby, 76 L. T. 770; Phillips *v.* Phillips, 29 Ch. Div. 673; *In re* Biss, [1903] 2 Ch. 40; Johnson's Appeal, 115 Pa. St. 129; Lacy *v.* Hall, 37 Pa. St. 360, 365. See *supra*, § 196.

In regard to a cotenant or a life tenant, who is not strictly a fiduciary, the basic principle is that "all persons interested in a lease have something in the nature of a special advantage over others, which the Court of Equity will recognize; and if one of those persons tries to avail himself of that interest by getting the benefit of a renewal for himself, the court will say that he must hold it for the benefit of all." Lord Romer in *In re* Biss, [1903] 2 Ch. 40, 53. On this principle a mere cotenant cannot renew for his own sole benefit and thus appropriate to himself the whole "expectancy" of renewal, unless he is able to show that the others had no expectancy of renewal. *In re* Biss, [1903] 2 Ch. 40; *In re* Lulham, 53 L. J. Ch. 928, 931. But if he shows that the landlord without solicitation on his part has refused to renew in favor of the others, there seems to be no reason why he should not take a new lease for himself provided he has taken no undue advantage of the others. *In re* Biss, [1903] 2 Ch. 40. Likewise when the others have announced that they do not intend to renew. Tygart *v.* Wilson, 39 App. Div. (N. Y.) 58. See also

and partners. All such persons, if they obtain the renewal of a lease, hold it for the benefit of those interested with them in the estate.[1] The parties, however, who undertake to enforce this trust, must do equity by repaying their proportion of the expenses incurred in the renewal.[2]

[1] Palmer *v.* Young, 1 Vern. 276; Pickering *v.* Bowles, 1 Bro. Ch. 197; Fitzgerald *v.* Raynsford, 1 B. & B. 37, n.; Giddings *v.* Giddings, 3 Russ. 241; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Rowe *v.* Chichester, Amb. 715; Eyre *v.* Dolphin, 2 B. & B. 290; Foster *v.* Marriott, Amb. 658; Tanner *v.* Elworthy, 4 Beav. 487; Randall *v.* Russell, 3 Mer. 196; Vanhorn *v.* Fonda, 5 Johns. Ch. 388; Smiley *v.* Dixon, 1 Pa. 439. [Sneed *v.* Deal, 53 Ark. 152; Leach *v.* Leach, 18 Pick. 68, 76; Mitchell *v.* Reed, 61 N. Y. 123; Johnson's Appeal, 115 Pa. St. 129.]

[2] Randall *v.* Russell, 3 Mer. 196; James *v.* Dean, 11 Ves. 396; Miller *v.* Stanley, 2 De G., J. & S. 185.

Chittenden *v.* Witbeck, 50 Mich. 401; Phillips *v.* Reeder, 18 N. J. Eq. 95.

In regard to a trustee or agent, and usually a partner, there is the additional principle that the fiduciary shall not be allowed to avail himself of his position to make a profit for himself. Accordingly, a fiduciary, especially a trustee, whose duty required him to renew for the benefit of others, will not usually be permitted to hold the new lease for his own benefit, even when the landlord has refused to renew the lease with him in his fiduciary capacity. See *In re* Biss, [1903] 2 Ch. 40; Mitchell *v.* Reed, 61 N. Y. 123.

The purchase of the reversion, or of the premises subject to the lease, stands on different ground; and it has been held to be settled law in England that a life tenant of leasehold property who purchases the reversion expectant on the termination of the lease is not a trustee for the remainder-men, when the leaseholds are not renewable by contract or custom. Longton *v.* Wilsby, 76 L. T. 770. And the same has been held true of a trustee purchasing the reversion, since it is a matter of indifference to the lessees, who owns the reversion. Bevan *v.* Webb, [1905] 1 Ch. 620; Randall *v.* Russell, 3 Mer. 190. See Anderson *v.* Lemon, 8 N. Y. 236.

But it has been held that where the leaseholds are renewable by custom, a life tenant who purchases the reversion comes within the principle applied to the renewal of leaseholds. Phillips *v.* Phillips, 29 Ch. Div. 673.

Doubtless the courts would prevent a trustee who purchased for himself the premises of which he holds a lease as trustee, from using his position as landlord to the injury of the trust. See Mitchell *v.* Reed, 61 N. Y. 123, 143.

CHAPTER XVIII.

POWERS AND DUTIES OF TRUSTEES AS BETWEEN TENANT FOR LIFE AND REMAINDER-MAN.

§ 539. Trustee must act impartially between tenant for life and remainder-man.
§ 540. When tenant for life is entitled to the possession.
§ 541. Where the trust fund is personal property.
§ 542. In what place personal property may be used.
§ 543. Trustee must have possession of stocks and similar securities. Power of attorney to tenant for life.
§§ 544, 545. As to extra-cash dividends and stock dividends by corporations.
§ 546. As to the increase of stock upon a farm or plantation, partnership, profits, &c.
§ 547. Of property that perishes or is consumed in the use, or decreases in value.
§ 548. Rights of tenant for life under an absolute direction for conversion.
§ 549. Reversionary interests must be sold for benefit of tenant for life.
§ 550. As to the right of tenant for life to income during the first year,—and after the first year.
§ 551. Various rules upon the same subject.
§ 552. As to repairs by tenant for life.
§ 553. As to insurance.
§ 554. As to taxes, rates, and incumbrances.
§ 555. Where tenant for life becomes bankrupt.
§ 556. As to the apportionment of rent, income, dividends, and annuities.

§ 539. WHERE property is settled upon a trustee to hold in trust for one person for life, and the remainder over for some other person or persons, it is the duty of the trustee to consult the interest of both the tenant for life and the remainder-man. The trustee must act impartially, and not give either an advantage at the expense, or to the prejudice, of the other.[1] The

[1] Mortlock *v.* Buller, 10 Ves. 308; Cowgill *v.* Oxmantown, 3 Y. & C. 369; Watts *v.* Girdlestone, 6 Beav. 188; Langston *v.* Ollivant, Coop. 33;

principal of the trust fund must not be converted to the use of the life *cestui*.[1] (*a*) A court of equity can correct any mismanagement between the trustee and either the tenant for life or the remainder-man; it has even set aside a decree obtained by collusion between the trustee and tenant for life.[2] The court will not allow property to be sold if the interests of remainder-men, known or unknown, would be thereby imperilled.[3] And when the remainder takes effect, equity will compel the trustee to fulfill his last duty to the remainder-men by turning over the property to them.[4]

§ 540. The right of the tenant for life to the possession has already been stated.[5] Where property is devised specifically, and the right of the trustees to convert it is excluded, and the tenant for life can have no beneficial enjoyment without possession, the trustees must allow him such possession.[6] As was before said, if the title of the tenant for life is a legal and not an equitable title, he is, of course, entitled to the possession;[7]

Stuart *v.* Stuart, 3 Beav. 430; Pechel *v.* Fowler, 2 Anst. 550; Mahon *v.* Stanhope, cited 2 Sugd. Pow. 512; Marshall *v.* Sladden, 4 De G. & Sm. 468; Moseley *v.* Marshall, 22 N. Y. 200; McNeil *v.* McDonald, 22 Ark. 477. [Rowlls *v.* Bebb, [1900] 2 Ch. 107.]

[1] Woodburn *v.* Woodburn, 23 Ill. App. 289; Mitchell *v.* Colburn, 61 Md. 244.

[2] Wright *v.* Miller, 4 Seld. 9; Clerke *v.* Devereux, 1 S. C. 172; Cunningham *v.* Schley, 41 Ga. 476.

[3] Dunham *v.* Milhous, 70 Ala. 606.

[4] Haddock *v.* Perham, 70 Ga. 576.

[5] *Ante*, § 329.

[6] Tidd *v.* Lister, 5 Madd. 432; 10 B. Mon. 290.

[7] *Ante*, § 328; Moseley *v.* Marshall, 22 N. Y. 200.

(*a*) In an exceptional case, where the chief purpose of the trust was to provide for the comfortable support of the testator's daughters, but there was an express provision that no part of the principal should be paid to them, the court authorized the trustee to encroach upon the principal for the support of the daughters, unforeseen circumstances having swept away so much of the principal that the income was insufficient for the purpose. Offutt *v.* Devine's Ex'r, 49 S. W. 1065 (Ky. 1899). To the same effect see Brown *v.* Berry, 71 N. H. 241.

but the tenant for life is, in such case, an implied or *quasi* trustee for the remainder-man, and a court of equity can enjoin him from injuring the inheritance.[1] (*a*) But if the title is equitable merely, the trustees must see that the equitable tenant for life does not commit waste of any kind;[2] and if he is tenant without impeachment for waste, the trustees must see that the estate is not materially lessened in value by the use made of it.[3] But the trustees cannot compel the tenant for life to repair; and neither the court nor the trustees can interfere with the possession on such grounds.[4] It has been held, however, in the United States, that the tenant for life is obliged to keep the buildings in which he lives from going to decay, by using

[1] Joyce *v.* Gunnels, 2 Rich. Eq. 259; Horrey *v.* Glover, 2 Hill, Ch. 515; Clarke *v.* Saxon, 1 id. 69; Shibley *v.* Ely, 2 Halst. Ch. 181; Wilson *v.* Edmonds, 4 Fost. 545; Broom *v.* Curry, 19 Ala. 805.

[2] Tidd *v.* Lister, 5 Madd. 432; Freeman *v.* Cook, 6 Ired. Eq. 376; Woodman *v.* Good, 6 Watts & S. 169.

[3] Waldo *v.* Waldo, 7 Sim. 261; Leeds *v.* Amherst, 14 Sim. 357; 2 Phill. 117; Burge *v.* Lambe, 16 Ves. 174; Marker *v.* Marker, 9 Hare, 1; 4 Eng. L. & Eq. 95; Newdigate *v.* Newdigate, 1 Sim. 131; Wykham *v.* Wykham, 19 Ves. 14; Smythe *v.* Smythe, 2 Swanst. 251; Morris *v.* Morris, 15 Sim. 510; Brydges *v.* Brydges, 2 Sim. 150; Davies *v.* Lee, 6 Ves. 786; Chamberlain *v.* Dummer, 3 Bro. Ch. 549; Woodman *v.* Good, 6 Watts & S. 169; Briggs *v.* Oxford, 19 Jur. 817; 1 De G., M. & G. 363; Whitfield *v.* Burnett, 2 P. Wms. 242.

[4] Powis *v.* Blagrave, 1 Kay, 495; 4 De G., M. & G. 448; Gregg *v.* Coates, 23 Beav. 33. [*In re* Courtier, 34 Ch. Div. 136; *In re* Hotchkys, 32 Ch. Div. 408; *In re* Cartwright, 41 Ch. Div. 532.]

(*a*) Even when the legal title is given for life to a widow by her husband's will, with full possession and power to use, dispose of, and consume the estate for her life-support, a duty rests upon her, in the nature of a trust, to have due regard to the rights of the remainder-men, and not to recklessly squander or give away the estate, and such trust is enforceable against purchasers with knowledge of the trust. Johnson *v.* Johnson, 51 Ohio St. 446; Cox *v.* Wills, 49 N. J. Eq. 130, 573; Hoxie *v.* Finney, 147 Mass. 616; Stocker *v.* Foster, 178 Mass. 591; Garland *v.* Smith, 164 Mo. 1; Terry *v.* Rector, etc., 81 N. Y. S. 119, 79 App. Div. 527; Gardner *v.* Whitford, 23 R. I. 396; Phillips *v.* Wood, 16 R. I. 274; Sires *v.* Sires, 43 S. C. 266. See O'Brien *v.* Flint, 74 Conn. 502. As to whether the limited estate is raised to a fee by powers of disposal, see *supra*, § 252, note.

ordinary care, but that he is not obliged to expend any extraordinary sums.[1] Although the rules as to waste are the same in this country and in England, yet it has been said that there should be a different application of them here, on account of the difference of circumstances, and that tenants for life are encouraged to open mines and cut timber, for the reason that such acts are rather improvements than waste, in America.[2] This may be true in some parts of the country, where it is important to clear the land and develop its resources, but it is not true in the older States. (*a*)

[1] Wilson *v.* Edmonds, 11 Fost. 545. [Murch *v.* Smith M'f'g Co., 47 N. J. Eq. 193; Kearney *v.* Ex'r of Kearney, 17 N. J. Eq. 504; Clemence *v.* Steere, 1 R. I. 272; See Pratt *v.* Douglas, 38 N. J. Eq. 516, 542; Caldecott *v.* Brown, 2 Hare, 144.]

[2] Williams on Real Prop., 23 n.; Lynn's App., 31 Penn. St. 44. [See Smith *v.* Smith, 105 Ga. 106, 111; Drown *v.* Smith, 52 Me. 141; King *v.* Miller, 99 N. C. 583; Sayers *v.* Hoskinson, 110 Pa. St. 473; Owen *v.* Hyde, 6 Yerg. 334; Wilkinson *v.* Wilkinson, 59 Wis. 557, 561; Keeler *v.* Eastman, 11 Vt. 293. See *contra*, Clark *v.* Holden, 7 Gray, 8.]

(*a*) In Stonebraker *v.* Zollickoffer, 52 Md. 154, a wind-storm having blown down a large quantity of timber on an estate held in trust, the trustee converted part of the fallen trees into cooper-stuff and sold it. He sold the remainder, consisting of the tops and smaller branches, for firewood. It was held that the proceeds of the cooper-stuff belonged to principal but that the proceeds of the firewood belonged to income of the life beneficiary. The court applied the general rule applicable to life-tenant and remainder-man, that the former is entitled to old trees which cannot be used as timber, and to the tops and smaller branches of trees which are felled for timber, and to the regular thinnings and trimmings of trees in the woods.

In Keniston *v.* Gorrell, 74 N. H. 53, where timber was damaged by fire for which a railroad was responsible and paid damages amounting to $600, and the damaged timber was sold for $600, it was held that the $1200 should be apportioned between life tenant and remainder-man, according to the mortality tables, as a fund of which the life tenant was entitled to the income.

The rights of the tenant for life as to proceeds of timber may be modified by the custom of the testator in his treatment of the timber, it being presumed that he intended the life tenant to have the customary use of the property. Findlay *v.* Smith, 6 Munf. 134; Williard *v.* Williard, 56 Pa. St. 119; Eley's Appeal, 103 Pa. St. 300; Bedford's Appeal, 126 Pa. St. 117.

§ 541. Where the tenant for life is entitled to the beneficial use of movable articles, heirlooms, furniture, plate, pictures, and similar things, the trustees must take in the first instance a schedule of the articles delivered to such tenant for life signed by him;[1] but if there is any danger that the articles will be wasted, secreted, or carried away, security may be insisted upon and the trustees or the *cestui que trust* in remainder may apply to the court for an injunction, and a decree that the tenant for life be required to give proper security for their safety.[2] But where trustees under a will were directed to hold property for a certain term, and then to pay it over to persons named, to be held by them during their own lives, security cannot be required from the tenants for life for its preservation for the remainder-men, if no such security is required by the terms of the will.[3] In Pennsylvania, there is special legislation authorizing the executor to take security.[4] In case of a legacy

[1] Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kynaston, 2 Atk. 82; Cheshire *v.* Cheshire, 2 Ired. Eq. 590; Westcott *v.* Cady, 5 Johns. Ch. 334; Henderson *v.* Vaulx, 10 Yerg. 30; Covenhoven *v.* Shuler, 2 Paige, 122; De Peyster *v.* Clendining, 8 Paige, 295; Spear *v.* Tinkham, 2 Barb. Ch. 211; Emmons *v.* Cairnes, 3 Barb. 243; Langworthy *v.* Chadwick, 13 Conn. 42; Hudson *v.* Wadsworth, 8 Conn. 363; Nance *v.* Coxe, 16 Ala. 125; Mortimer *v.* Moffatt, 4 Hen. & Munf. 503; Slanning *v.* Style, 3 P. Wms. 336.

[2] Woodman *v.* Good, 6 Watts & S. 169; Swann *v.* Ligan, 1 McCord, Ch. 227; Henderson *v.* Vaulx, 10 Yerg. 30; Covenhoven *v.* Shuler, 2 Paige, 122; Braswell *v.* Morehead, 1 Busb. Eq. 26; Lippincott *v.* Warder, 14 Serg. & R. 118; Ramey *v.* Green, 18 Ala. 771; Kinnard *v.* Kinnard, 5 Watts, 108; Westcott *v.* Cady, 5 Johns. Ch. 334; Langworthy *v.* Chadwick, 13 Conn. 42; Bill *v.* Kynaston, 2 Atk. 82; Frazer *v.* Beville, 11 Grat. 9; Foley *v.* Burnell, 1 Bro. Ch. 279; Hudson *v.* Wadsworth, 8 Conn. 363; Holliday *v.* Coleman, 2 Munf. 162; Mortimer *v.* Moffatt, 4 Hen. & Munf. 503; Chisholm *v.* Starke, 3 Call, 25; McLemore *v.* Good, 1 Harp. Eq. 272; Cheshire *v.* Cheshire, 2 Ired. Eq. 569; Sutton *v.* Cradock, 1 id. 134; Howell *v.* Howell, 3 Ired. Eq. 522; Clarke *v.* Saxon, 1 Hill, Ch. 75; Condy *v.* Adrian, id. 154; Spear *v.* Tinkham, 2 Barb. Ch. 211. A purchaser from the tenant for life may be compelled to give security. Pringle *v.* Ellen, 1 Hill, Ch. 135; Cordes *v.* Adrian, id. 154; Howe *v.* Dartmouth, 2 Lead. Cas. Eq. 262.

[3] Waldo *v.* Cummings, 43 Ill. 421.

[4] Act, 1834, [Purdon's Digest, (1903) p. 1123, § 165]; Dunlop, 528; Rodgers *v.* Rodgers, 7 Watts, 19; Lippincott *v.* Warder, 14 Serg. & R. 118; and Kinnard *v.* Kinnard, 5 Watts, 108, were decided before this legislation.

for life of money or stocks, the tenant for life cannot have possession of them without giving security for the protection of the remainder-man.[1] But the right of possession by the tenant for life, even in such a case, may depend upon the terms of the will.[2] When the trustee holds funds and there is no evidence that part of it is income, it is presumed to be capital.[3]

§ 542. Personal chattels, like furniture and other articles, may be used by the tenant for life, if he is entitled to the possession in any house or place; or he may let them out for hire,[4] but he cannot pawn or sell them beyond the extent of his interest;[5] but articles in a house, in the nature of heirlooms, are annexed to the house, and go with it, therefore they cannot be removed.[6]

§ 543. Where the trust property consists of stocks and other personal securities, the trustee must retain possession for the benefit of the remainder-man; but he may put the tenant for life in possession of the dividends, interest, or income, by giving him a power of attorney to collect them as they become due. The power should be restricted to the collection of the income; for if he gave the tenant for life power to sell the securities, he would commit a breach of trust. Nor should it be used after the death of the tenant for life; for the trustee would be responsible to the remainder-man for all income received by the representatives of the tenant, accruing after his death. Care must be taken by the trustee, after giv-

[1] Patterson *v.* Devlin, 1 McMul. Eq. 459; Freeman *v.* Cooke, 6 Ired. 679; Eichelberger *v.* Barnitz, 17 Serg. & R. 293; Rodgers *v.* Rodgers, 7 Watts, 19; Kinnard *v.* Kinnard, 5 Watts, 108. [Scott *v.* Scott, 137 Iowa, 239; Reed *v.* Reed, 80 Conn. 411; Maguire *v.* Maguire, 110 La. 279; McKee *v.* McKee's Ex'r, 82 S. W. 451 (Ky. 1904); Wilkinson *v.* Rosser's Ex'r, 104 S. W. 1019 (Ky. 1907); Matter of McDougall, 141 N. Y. 21; *In re* Roffo, 64 N. Y. S. 455, 51 App. Div. 35.]

[2] De Graffenreid *v.* Green, 1 Cold. 109.

[3] Peirce *v.* Burroughs, 58 N. H. 302.

[4] Marshall *v.* Blew, 2 Atk. 217.

[5] Hoare *v.* Parker, 2 T. R. 376.

[6] Cadogan *v.* Kennett, Cowp. 432.

ing the power, himself not to receive the dividends; for that would be a revocation of the power, and a new one would be necessary. So the death of the trustee, or of one of several trustees, would be a revocation.[1] If, at any time, the tenant for life obtains more than belongs to him, the trustee may withhold, or recoup from, subsequent income.[2]

§ 544. Considerable difference of opinion and practice has existed respecting the rights of the tenant for life, and of the remainder-man, to extraordinary dividends or bonuses from corporations. The early English rule held that *extra* dividends paid in cash, and *a fortiori* if they were declared or paid in capital stock, went to the capital of the trust fund, and were held by the trustee for the remainder-man; and that the income only from such extra dividends belonged to the tenant for life.[3] This rule, applied to extra-cash dividends from the earnings of the capital stock of corporations, worked a great hardship upon the tenant for life, and it is unreasonable. In Barclay *v.* Wainwright, Lord Eldon first threw a doubt over the cases, by decreeing an increased or extra dividend to the tenant for life.[4] It was afterwards said, that wherever the increased dividend was made clearly and distinctly as a dividend only, the tenant for life should have it; but where it was not clearly given as a dividend, it was considered as an accretion to the capital, and went to the remainder-man.[5] Thus cash dividends, extra dividends, or bonuses declared from the earnings of corporations, are now held to be income and to belong to the tenant for life.[6] So also

[1] Sadler *v.* Lee, 6 Beav. 324; Hill on Trustees, 386; Lewin, 485.

[2] Williams *v.* Allen, 32 Beav. 650; Barratt *v.* Wyatt, 30 Beav. 442. [But see *In re* Horne, [1905] 1 Ch. 76.]

[3] Brander *v.* Brander, 4 Ves. 801; Paris *v.* Paris, 10 Ves. 184; Witts *v.* Steele, 13 Ves. 363; Clayton *v.* Gresham, 10 Ves. 288; Hooper *v.* Rossiter, 13 Price, 774; 1 McClel. 527; Preston *v.* Melville, 16 Sim. 163.

[4] Barclay *v.* Wainwright, 14 Ves. 66; Norris *v.* Harrison, 2 Madd. 279.

[5] Hooper *v.* Rossiter, 1 McClel. 527.

[6] Price *v.* Anderson, 15 Sim. 473; Bates *v.* Mackinlay, 31 Beav. 280; Johnson *v.* Johnson, 15 Jur. 714; 5 Eng. L. & Eq. 164; Murray *v.* Glasse, 17 Jur. 816; Cuming *v.* Boswell, 2 Jur. (N. S.) 1005; Clive *v.* Clive, Kay, 600;

dividends and bonuses earned before the testator's death, but declared afterwards, are held to be income and to belong to the tenant for life.[1] (*a*) But the enhanced price for which

Plumbe *v.* Neild, 6 Jur. (N. S.) 529; Wright *v.* Tucket, 1 Johns. & H. 266; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Ware *v.* McCandlish, 10 Leigh, 595; Read *v.* Head, 6 Allen, 174.

[1] Bates *v.* Mackinlay, 31 Beav. 280. [*In re* Alsbury, 45 Ch. Div. 237.]

(*a*) With regard to extra dividends paid from earnings accumulated wholly or partly before the legal or equitable life interest in the stock came into existence, there is a well defined difference of authority. 19 Am. Law Rev. 571, 737; 26 id. 1; 36 Cent. L. J. 452. Massachusetts and several other American jurisdictions abide by the common-law rule that the whole dividend in such a case, if it is a cash dividend, belongs to the life tenant, because he is the person entitled to the income at the time the dividend is declared. It is reasoned that earnings of a corporation do not become income of a stockholder until they are declared as dividends and that it is impracticable to go deeply enough into the affairs of the corporation, in a collateral inquiry, to determine justly when the basis of the dividend accrued. Minot *v.* Paine, 99 Mass. 101; Hemenway *v.* Hemenway, 181 Mass. 406; Adams *v.* Adams, 139 Mass. 449, 452; Gifford *v.* Thompson, 115 Mass. 478; Rand *v.* Hubbell, 115 Mass. 461; Richardson *v.* Richardson, 75 Me. 570; Waterman *v.* Alden, 42 Ill. App. 294, 144 Ill. 90; De Koven *v.* Alsop, 205 Ill. 309; Hite's Devisees *v.* Hite's Ex'r, 93 Ky. 257; Second Universalist Church *v.* Colegrove, 74 Conn. 79; Bulkeley *v.* Worthington Ecc. Soc., 78 Conn. 526, 530; Matter of Kernochan, 104 N. Y. 618; Gibbons *v.* Mahon, 136 U. S. 549. See also Gen. Statutes Conn. (1902), § 377; Millen *v.* Guerrard, 67 Ga. 284; *In re* Alsbury, 45 Ch. Div. 237.

It has also been held, as a corollary of this doctrine, that if a corporation comes to a final liquidation with a surplus of undivided earnings which have not been capitalized, and makes a distribution of the property of the corporation in a large final dividend without a separation of earnings from capital, the whole dividend should be treated as belonging to principal, because there has been no declaration of a dividend from earnings as earnings. Gifford *v.* Thompson, 115 Mass. 478; Second Univ. Church *v.* Colegrove, 74 Conn. 79; *In re* Armitage, [1893] 3 Ch. 337; Curtis *v.* Osborn, 79 Conn. 555. See also Brownell *v.* Anthony, 189 Mass. 442.

But the courts of New York will in such a case give to income so much of the final dividend as is based upon accumulated earnings which have not been put into the working capital of the corporation. Matter of Rogers, 161 N. Y. 108. See also *In re* Stevens, 98 N. Y. S. 28, 111 App. Div. 773; 187 N. Y. 471; Robertson *v.* De Brulatour, 188 N. Y. 301; 111 App. Div. 882.

Pennsylvania and several other jurisdictions hold that a dividend

stocks sell, by reason of dividends earned, but not declared, belongs to the remainder-man and not to the tenant for life.[1] Where a tenant for life is entitled to the income a year or more after the testator's death having expired, and stocks are sold before the day of the dividend, in order to complete a purchase of land which was directed by the will, the tenant for life is entitled to compensation for the loss of his income.[2] So if, under a gift in a will to an executor of so much stock or other property as will produce $2,000 per year, which is to be paid over to a tenant for life, property is set apart in good faith, with the consent of all parties, sufficient to produce $2,000, and afterwards the property produces much more, and there is no provision in the will for such a contingency, the tenant for life will be entitled to the whole income, and may maintain a bill in equity for it.[3]

§ 545. Another question has lately arisen, upon which there is much diversity of opinion and practice. The question

[1] Scholfield *v.* Refern, 32 L. J. Ch. 627. [Connolly's Estate No. 1, 198 Pa. St. 137.] [2] Londesborough *v.* Somerville, 19 Beav. 295.
[3] Russell *v.* Loring, 3 Allen, 126.

based upon earnings should be apportioned so that the life-tenant should get no more than the portion earned during the period when he was entitled to income; the balance of the dividend is given to the *corpus* of the estate. Earp's Appeal, 28 Pa. St. 368; Smith's Estate, 140 Pa. St. 344; Thomas *v.* Gregg, 78 Md. 545; Van Doren *v.* Olden, 19 N. J. Eq. 176; Lang's Ex'r *v.* Lang, 56 N. J. Eq. 603; Cobb *v.* Fant, 36 S. C. 1; Goodwin *v.* McGaughey, 108 Minn. 248 (*semble*). See also Conn. Gen. Stats. (1902), § 377; Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472. It is reasoned in these jurisdictions that earnings accumulated during the life of a testator, or before the stock was bought by the trustee or life tenant, are represented in the value of the stock at the time the life tenant's right to income began, and that to give him the whole dividend would seriously impair the *corpus*. It is urged with great force that when testators speak of "profits and income," they mean only such as are made by the corporation after the trust has been established. Cases cited *supra*. See also Quinn *v.* Safe Dep. & Tr. Co., 93 Md. 285.

In all jurisdictions the clear intention of the creator of the trust as expressed in the will or other trust instrument will control, and the rule established in any jurisdiction is merely one of interpretation of probable intention.

is, to whom stock dividends, so called, belong. Are they income, and belong to the tenant for life; or capital, and belong to the remainder-man? By the early English rule, they went with all extra-cash dividends of *bonuses* to the remainder-man.[1] This rule has been so far changed, that dividends in money which come from the earnings of the capital invested belong to the tenant for life.[2] But this question has arisen where a corporation has capitalized a part of its earnings, by using them to enlarge its property, or to improve its value. In such cases, corporations sometimes vote to issue and apportion among their stockholders new certificates of stock, which certificates (in whole or in part) represent the amount of earnings that have been capitalized, as some of the books call it. On one side of this question, it is urged that nothing is income from the stock of a corporation until the corporation itself has set it apart as income, and declared it to be payable in money as a dividend; that a corporation may in good faith determine whether it will declare a dividend or not, and it may also declare whether any part of its earnings shall be turned into capital or not; that if a corporation in good faith uses a part of its earnings in enlarging and improving its works, and thereby increases the value of its stocks, such increased value belongs to the remainder-man; that it is immaterial whether a corporation allows the old shares to stand at this increased value, or whether it issues new certificates of shares to represent this new and increased value of its capital stock; that nothing is a dividend, in the legal sense of the word, which is not a division of money from what the corporation has determined to be in-

[1] Brander *v.* Brander, 4 Ves. 800; Paris *v.* Paris, 10 Ves. 185; Witts *v.* Steele, 13 Ves. 363; Clayton *v.* Gresham, 10 Ves. 288; Hooper *v.* Rossiter, 13 Price, 774; 1 McClel. 527; Preston *v.* Melville, 16 Sim. 163.

[2] Barclay *v.* Wainwright, 14 Ves. 66; Norris *v.* Harrison, 2 Madd. 279; Hooper *v.* Rossiter, 1 McClel. 527; Price *v.* Anderson, 15 Sim. 473; Bates *v.* Mackinlay, 31 Beav. 280; Johnson *v.* Johnson, 5 Eng. L. & Eq. 164; 15 Jur. 714; Murray *v.* Glasse, 17 Jur. 816; Cuming *v.* Boswell, 2 Jur. (N. S.) 1005; Clive *v.* Clive, Kay, 600; Plumbe *v.* Neild, 6 Jur. (N. S.) 529; Wright *v.* Tucket, 1 John. & H. 266; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Ware *v.* McCandlish, 11 Leigh, 595; Lord *v.* Brooks, 52 N. H. 77.

come; that if a corporation determines to apply a certain sum of money in its hands to purposes for which capital is usually applied, and to issue new certificates of stock to its shareholders, in the proportion of their number of shares, to represent such sum, it is in no legal sense a dividend, but an apportionment of capital, and although such proceedings are in popular language and in corporate votes often called stock dividends, they are not dividends in law, but are accretions to the capital, and go to the remainder-man. (*a*) It is further urged, in illustration, that if the trust fund is invested in land, and the land rises in value from its situation, or from the use and necessary improvements made by the tenant for life, such increased value becomes capital and belongs to the remainder-man. Chief-Baron Alexander, Vice-Chancellor Wood, now the Lord Chancellor, and the Supreme Court of Massachusetts, have adopted this view, and have determined that such appropriations of earnings and the new certificates of stock, representing additions to the capital stock, whether declared under the name of stocks, dividends, or however appointed or apportioned by the corporation or its directors, are capital, and belong to the remainder-man.[1] The rule laid down in these several cases seems

[1] Hooper *v.* Rossiter, 1 McClel. 527; *In re* Barton's Trust, L. R. 5 Eq. 238; Minot *v.* Paine, 99 Mass. 101; Balch *v.* Hallett, 10 Gray, 408. [D'Ooge *v.* Leeds, 176 Mass. 558; Daland *v.* Williams, 101 Mass. 571; Adams *v.* Adams, 139 Mass. 449, 452; Rand *v.* Hubbell, 115 Mass. 461; Second Univ. Church *v.* Colegrove, 74 Conn. 79; Spooner *v.* Phillips, 62 Conn. 62; De Koven *v.* Alsop, 205 Ill. 309; Richardson *v.* Richardson, 75 Me. 570; Greene *v.* Smith, 17 R. I. 28; Brown & Larned, Petitioners, 14 R. I. 371; Bouch *v.* Sproule, 12 App. Cas. 385; Gibbons *v.* Mahon, 136 U. S. 549, 558; Billings *v.* Warren, 216 Ill. 281.]

(*a*) This view of stock dividends is set forth as follows in Gibbons *v.* Mahon, 136 U. S. 549, 558, by Gray, J.: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares representing the same proportional interest that the original shares represented before the issue of new ones."

to be this, that where the apportionment of shares, or stock dividend, so called, creates new capital, in addition to that already existing, thereby enlarging and increasing the value of the property, whether it comes from earnings or from other sources, as from rise in value, it belongs to the remainder-man; while all dividends paid in cash or otherwise, not in addition to or in diminution of the capital, go to the tenant for life. These courts, observing this general distinction, range all cases under one or the other head, without so much regard to the name given to the dividend as to the actual character of the transaction. (*a*) Thus, *In re* Barton's Trust, and in Minot *v.* Paine,[1] where the earnings were not divided as cash, but were expended on the property, the capital increased, and a stock dividend declared, it was held to go to the remainder-man; while in Leland *v.* Hayden,[2] the corporation having purchased its own stock with its earnings, and then divided it among its stockholders, it was held that it went to the tenant for life, it

[1] Hooper *v.* Rossiter, 1 McClel. 527; *In re* Barton's Trust, L. R. 5 Eq. 238; Minot *v.* Paine, 99 Mass. 101; Balch *v.* Hallett, 10 Gray, 408.

[2] Leland *v.* Hayden, 102 Mass. 550.

(*a*) A dividend in the form of interest-bearing bonds, based upon a fund of accumulated earnings which are put in trust by the company, has been held to belong to the principal of a trust fund, because no property was taken out of the business or was changed in its relation to the business. D'Ooge *v.* Leeds, 176 Mass. 558.

In passing upon precisely the same question, the Connecticut court lays stress upon the fact that the bonds were in form the unlimited obligations of the company and might ultimately have to be paid out of the capital of the company, although the property set aside in trust as a provision for the payment of both interest and principal was evidently designed to provide amply for the bonds without such resort to the fundamental capital. Bishop *v.* Bishop, 81 Conn. 509. See Mills *v.* Britton, 64 Conn. 4.

An interesting inquiry might be made as to the distribution of the principal of these bonds if ultimately paid by the company out of the fund of surplus earnings set apart for the purpose. As the time for payment was set far in advance the courts did not feel called upon to discuss that point.

In Thayer *v.* Burr, 119 N. Y. S. 755, 134 App. Div. 889, the Supreme Court of New York held this bond dividend to be a division of earnings and therefore income of a life beneficiary.

not being an accretion to the capital. But in Daland *v.* Williams, the court, looking to the substance of the transaction, held that, although the dividend was declared in stock or cash at the option of the stockholder, yet if he, being a trustee, elected to take the stock, and it was for the interest of the estate that he should, and all the parties so agreed, it then belonged to the remainder-man and not to the tenant for life.[1] On the other hand, it has been claimed in behalf of the tenant for life, that, as nothing but profits can be divided, all dividends declared, whether in stock or cash, being the produce, proceeds, or result of the property, belong to the tenant for life. Cases involving this question have been decided in several States, contrary to the decisions in Massachusetts and the courts in England; and it has been decreed that stock dividends, in whole or in part, belong to the tenant for life, and not to the remainder-man. In Pennsylvania, it was held that all accumulations in stock, after the death of a testator, are as much a part of the income of the principal as current dividends, and as such belong to the tenant for life; and that no action whatever of the corporation could deprive the tenant for life of them and give them to the remainder-man; that the value of stock held by the testator at the time of his death is the capital of the trust, and must remain subject to the trusts in the will; that all income of such capital, whether in the form of other certificates or not, must be regarded as income.[2] (*a*) While in New York

[1] Daland *v.* Williams, 101 Mass. 571. [See Hyde *v.* Holmes, 198 Mass. 287; *In re* Northage, 60 L. J. Ch. 488, cases where the new stock was worth more than par. See notes *infra* this section.]

[2] Earp's App., 28 Penn. St. 368. [Smith's Estate, 140 Pa. St. 344.] The question stated at length in this section is important to tenants for life and to remainder-men; and from the character of the decisions in the various States, and from the great number of States in which no decision has yet been had, it may be considered an open question, [in many] of the States. There is no doubt of the doctrine in England. Beginning with the rule, that all extra dividends or "bonuses," even if paid in cash, should go to the

(*a*) Several other jurisdictions have adopted the Pennsylvania rule, that stock dividends based upon earnings should be given to income

and New Jersey, masters were appointed to inquire and determine how much of the stock divided was capital, or made to

remainder-man [see cases before cited], it gradually came about that all such dividends made as "dividends" from the earnings, produce, proceeds, interest, or income of the corporation, should be considered income, and should belong to the tenant for life. But while such was the rule in regard to all dividends, made as dividends, it became equally well settled that all appropriations from the earnings made to the capital, or stock dividends, as they are sometimes called, belong to the remainder-man. Thus in Hooper *v.* Rossiter, 1 McClel. 536, (1824) Ch. Baron Alexander said: "All the cases proceed upon the same principle. It seems from all of them, from the first to the last, that wherever the addition was made clearly and distinctly, as dividend only, the tenant for life was to have it; but wherever it was not clearly given as a dividend, it was considered as an accretion of capital, divisible among the proprietors. I have looked into all the cases with great care, and that seems to be the result of them. Whether the testator makes use of the expression, 'dividends,' or 'dividends and profits,' or 'dividends, interest, and profits,' or (as in this case) 'interest, dividends, profits, and proceeds,' I look upon all of them to come to the same thing, and that this is too nice a circumstance to found any distinction on. This disposes of the claim of the plaintiff, as tenant for life." And see Maclaren *v.* Stainton, 3 De G., F. & J. 202; Kinmonth *v.* Brigham, 5 Allen, 270. Again, in 1868, *In re* Barton's Trusts, L. R. 5 Eq. 244, Vice-Chancellor Wood, in answer to the argument and the observation of Lord Eldon, that the corporation has the power to give the property to the tenant for life, or to the

when, and to the same extent as, a cash dividend resting upon the same basis. Kalbach *v.* Clark, 133 Iowa, 215; Atlantic Coast Line Dividend Cases (Safe Deposit Co. *v.* White), 102 Md. 73; Thomas *v.* Gregg, 78 Md. 545; Goodwin *v.* McGaughey, 108 Minn. 248; Lang's Ex'r *v.* Lang, 56 N. J. Eq. 603; Ballantine *v.* Young, 70 A. 668 (N. J. Ch. 1908); Ashhurst *v.* Field's Adm'r, 26 N. J. Eq. 1, 11; Van Doren *v.* Olden, 19 N. J. Eq. 176; Brown *v.* Brown, 72 N. J. Eq. 667; Smith's Estate, 140 Pa. St. 344; Pritchitt *v.* Nashville Tr. Co., 96 Tenn. 472. See also Holbrook *v.* Holbrook, 74 N. H. 201; Peirce *v.* Burroughs, 58 N. H. 302; Lord *v.* Brooks, 52 N. H. 72; Cobb *v.* Fant, 36 S. C. 1. In some jurisdictions also where extraordinary cash dividends are not apportioned, the entire stock dividend is given to income if based upon earnings, regardless of when the earnings were accumulated by the corporation. Hite *v.* Hite, 93 Ky. 257; Lowry *v.* Farmers' L. & Tr. Co., 172 N. Y. 137; McLouth *v.* Hunt, 154 N. Y. 179; Robertson *v.* De Brulatour, 98 N. Y. S. 15, 188 N. Y. 301. See also Millen *v.* Guerrard, 67 Ga. 284. But the language of the New York decisions indicates that the court would not give to a life tenant a stock dividend based upon earnings accumulated mostly during the life of the testator.

represent an increase in the value of the property, and how much came from income or earnings, and also how much of the

remainder-man, said: "The dividend to which the tenant is entitled is the dividend which the company chooses to declare. And when the company meet and say, that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain. . . . If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said, that they 'will not divide' this money, but turn it into capital, capital it must be from that time. I think that is the true principle." The meaning of this is, that where a corporation votes "not to divide" its earnings, but to turn it into capital, it becomes capital to the corporation, and that what is capital to the corporation must be capital to its shareholders; and although the corporation may vote that such increased capital shall be apportioned or divided among its shareholders *pro rata*, it is not a "dividend" of "profits," or "interest," or "income," or "proceeds," or "produce," within the meaning of the testator in his will, or within the meaning of the law. The same principle was reiterated by V. C. Malins, in December, 1870, in Ricketts *v.* Harling, Weekly Notes, Dec. 17, 1870, p. 260. The Supreme Court of Massachusetts, in Minot *v.* Paine, 99 Mass. 101, probably intended to establish this general doctrine; but the opinion went somewhat further, and laid down a rule which is not properly guarded, and as a rule it has been modified or abandoned in the later decisions. The rule, as stated, is "to regard cash dividends, however large, as income, and stock dividends, however made, as capital." [The rule has been taken to apply only to dividends which are based upon earnings. See *infra*, § 546, note.] In Simpson *v.* Moore, 30 Barb. 637, there was a cash dividend of eighteen per cent., which embraced a part of the capital of the corporation, it being a bank in process of liquidating and winding up its affairs. This manner of declaring a dividend would not prejudice where the same person was entitled to the whole sum beneficially, but where a tenant for life was entitled to the income, and a remainder-man was entitled to have the capital reinvested, it became necessary, of course, to determine the proportions belonging to each. And so in Leland *v.* Hayden, 102 Mass. 550, where a dividend was made of the stock of the corporation, which stock had been bought in by the corporation itself with its earnings, and the dividend so made did not represent any increase of the capital stock, the court decreed it to be income and to belong to the tenant for life. If the court had been content to reaffirm the principle of the later English cases, such as Hooper *v.* Rossiter, and *In re* Barton's Trusts, and had not laid down the rule as quoted above from Minot *v.* Paine, it would have saved some misapprehension. This rule, in the broad terms in which it is stated, has been thus

stock dividend was made up of accumulations of earnings before, and how much from earnings after, the investment.[1] (a)

[1] Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 id. 638; Van Doren v. Olden, 19 N. J. 117. [Brown v. Brown, 72 N. J. Eq. 667.]

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modified in Leland v. Hayden, and the rule as stated in the text seems to be the result of the Massachusetts decisions on this subject.

Earp's App., 28 Penn. St. 368, is a leading case against the authority of the English and Massachusetts cases. In that case a testator had 541 shares of stock in a corporation, the par value of which was $50, but which at the time of his death, in 1848, were worth $125 per share. The shares went on increasing in value, in addition to regular dividends, so that, in 1854, the corporation called in the old certificates, and issued certificates for 1350 shares of the value of $80 per share, in place of the 541 held by the testator at his death. Or, by another mode of calculating, the shares were worth $67,500 at the time of the testator's death, and $108,000 in 1854. The question arose whether this increase of $40,500 belonged to the tenants for life or the remainder-men. The action of the corporation, in making this change of certificates, does not very clearly appear; nor does it very clearly appear whether the increased value was wholly from accumulation of profits, or whether any part of it was from the rise of the value of the property. Perhaps this is not material, from the view taken by the court. Chief Justice Lewis in the opinion says: "It is equally clear, that the profits, arising since the death of the testator, are 'income' within the meaning of the will, and should be distributed among the appellants (tenants for life). The profits amounted at the time of the issue of new certificates of stock, to the sum of $40,500, exclusive of the current semi-annual dividends which have been previously declared and paid. That sum is the rightful property of the appellants. The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled. But they could not, by any form of procedure whatever, deprive the owners of it, and give it to others not entitled. The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders, in the form of new certificate, has no effect whatever upon the equitable right to it. It makes no kind of difference whether this fund is secured by 541 or by 1350 certificates. Its character cannot be changed by the evidence given to secure it. Part of it is 'principal,' the rest is 'income' within the meaning of the will. The principal must remain unimpaired during the lives of the appellants, and the 'income' arising since the death of the testator is to be distributed among them. Standing upon principle, and upon the intent of the testator plainly ex-

(a) When stockholders are given an option to take their dividend, declared from earnings, either in cash or in new stock of the same

Where new certificates of stock are issued to one who already holds shares as trustee, if the new certificates represent earn-

pressed in his will, we have no difficulty whatever in making this disposition of the fund." In regard to this case, it may be said that it goes too

value, courts which adhere to the Massachusetts rule in regard to stock dividends have held that the dividend should be treated as a cash dividend to the extent of its par value and should go to income, even though it is actually taken in the form of new stock. The transaction is treated as in substance the declaration of a cash dividend and a simultaneous sale by the company of new stock at par. Hyde *v.* Holmes, 198 Mass. 287; Lyman *v.* Pratt, 183 Mass. 58: Davis *v.* Jackson, 152 Mass. 58; Waterman *v.* Alden, 42 Ill. App. 294, 144 Ill. 90. See also *In re* Malam, [1894] 3 Ch. 578; *In re* Northage, 60 L. J. Ch. 488.

But if the new stock is worth more than par value the difference, being the value of the rights to subscribe for the new stock at par, will belong to the principal. Hyde *v.* Holmes, 198 Mass. 287; *In re* Northage, 60 L. J. Ch. 488.

A division by a corporation of its own stock which it has bought or taken in satisfaction of a debt after it has been issued, is equivalent to a cash dividend, and should be treated as such even though it is improperly described as a "stock dividend." Leland *v.* Hayden, 102 Mass. 542; Green *v.* Bissell, 79 Conn. 547, 8 L. R. A. (N. S.) 1011. But if the corporation has paid for such stock with money raised by an issue of bonds, and the distribution of the stock actually impairs its fundamental capital, the dividend should be credited to principal. Gilkey *v.* Paine, 80 Me. 319. To the same effect, see Pabst *v.* Goodrich, 133 Wis. 43.

A distinction has been made between extraordinary dividends and large dividends which are delayed payments of guaranteed regular dividends. In Meldrim *v.* Trustees of Trinity Church, 100 Ga. 479, lessees of a railroad had agreed with the lessor corporation to declare and pay to the latter's stockholders, semi-annual dividends of seven per cent, but for several years had failed to do it. A successor under the lease later paid over a portion of these back dividends. A life tenant of stock had meanwhile died, but it was held that his estate was entitled to these back dividends which should have been paid during his life. It was said that the dividends were not undeclared during the ownership of the life tenant, but had been predeclared by the contract between the two corporations. It is important to note that the delayed dividends were not to be paid by the corporation in which the life tenant held stock, but by a lessee corporation which, under its contract, might be considered a debtor of the stockholder without having declared the guaranteed dividends, whether it had earned them or not. For this reason the decision cannot be considered authority for cases of delayed payments of guaranteed dividends when the guaranty is between the corporation and its own stock-

ings or income of the corporation, they belong to the *cestui*, but if they are issued simply to equalize the value of the inter-

far. It cannot be sustained in all its broad assertions, whether they are necessary for the decision of the case or not. For instance, it has

holders. Doubtless such dividends would not be income until declared, or at least until the basis for them has been earned. See *In re* Taylor's Trusts, [1905] 1 Ch. 734.

Rights given to stockholders to subscribe at par for new shares of stock in a corporation whose stock is worth more than par do not belong to income even in jurisdictions which give to income stock dividends which are based upon earnings. Brinley *v.* Grou, 50 Conn. 66; De Koven *v.* Alsop, 205 Ill. 309; Hite's Devisees *v.* Hite's Ex'r, 93 Ky. 257; Hyde *v.* Holmes, 198 Mass. 287; Atkins *v.* Albree, 12 Allen, 359; Robertson *v.* De Brulatour, 188 N. Y. 301, 98 N. Y. S. 15; Eisner's Appeal, 175 Pa. St. 143; Biddle's Appeal, 99 Pa. St. 278; Moss's Appeal, 83 Pa. St. 264; Greene *v.* Smith, 17 R. I. 28; Richmond *v.* Richmond, 108 N. Y. S. 298, 123 App. Div. 117.

This disposition of rights is not inconsistent with the Pennsylvania rule that stock dividends based upon earnings should be given to those entitled to income during the time when the earnings were accumulated, for they are not dividends in any sense. Although the value of the rights may be due to the existence of a fund of undivided earnings, and although the issue of new stock increases the number of shares which may at some time become entitled in a division of these earnings, there is no division of these earnings and no change in the manner in which the corporation holds them. There is no certainty that the earnings will ever be divided and usually no way of determining accurately how much of the value of the rights is due to their existence and how much to other causes. Moss's Appeal, 83 Pa. St. 264.

But in Holbrook *v.* Holbrook, 74 N. H. 201, it was held that rights should be apportioned on the same principle as extraordinary dividends, and that income is entitled to them in so far as they stand for increase of value due to earnings accumulated during the time when the life beneficiary was entitled to income. See also Wiltbank's Appeal, 64 Pa. St. 256 (compare Eisner's Appeal, 175 Pa. St. 143).

It has also been held in Pennsylvania that, where rights are given to stockholders to subscribe for shares in another company, so that there is no resulting decrease in the value of the shares held in trust, the rights should be treated as a product or earnings of the shares and should be given to income. Eisner's Appeal, 175 Pa. St. 143.

The mere accumulation of earnings by a corporation and a consequent increase of the value of its stock does not give the life beneficiary a right to have the shares sold and the increase of value paid to him as income. No court would hold that earnings of the corporation are available as income of the stock-

ests of stockholders in two corporations about to be consolidated, they belong to the *corpus* of the estate.[1] (*a*)

[1] Goldsmith *v.* Swift, 25 Hun, 201.

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never been supposed that a stockholder in a corporation had any ownership in the earnings of a corporation before the corporation itself had set apart a sum as earnings, and declared and divided it as a dividend. Crawford *v.* North Eastern Railw., 3 K. & J. 744; Williston *v.* Michigan, &c. Railw., 13 Allen, 400. If, therefore, a corporation, acting in good faith, uses its earnings in improving its property, and neglects to apportion or divide them, how can a tenant for life enforce his ownership? Can a court of equity compel a corporation, acting in good faith, to declare a dividend? Further, it has generally been supposed, that if a corporation does not declare a dividend, and the value of the stock increases from the use of the earnings, as capital in its business, or if the value of its stock rises from any reason, and the stock is sold by the trustee for an enhanced price, all the increased value over the original appraised value belongs to the trust fund, and the income thereof only goes to the tenant for life, and the fund to the remainder-men. But if this is not so, and the increased value of the stock goes to the tenant for life, as held by Chief Justice Lewis, is the converse of his proposition true; and if stock sells for less than its appraised value at the time of the institution of the trust, can the trustee withhold dividends or income from the tenant for life until the original appraised value is made good? The authority of a corporation to apply any part of its earnings to the permanent improvement of its property, and thus to deprive the tenant for life of his share of the income or earnings of the corporation, is denied in this case, at least so far as the rights of a tenant for life are concerned. In short, the proposition or assertion of this case, that the earnings are the rightful property of the tenant for life, and that no action of the corporation can alter his rights to them, cannot be sustained in practice, for the simple reason that nothing belongs to the stockholder until a dividend is made; and, until a dividend is made, the tenant for life has no rights or ownership to be altered or affected by the action of the corporation. Coleman *v.* Columbia Oil Co., 51 Penn. St. 74; Granger *v.* Bassett, 98 Mass. 462; March *v.* Eastern R. R. Co., 43 N. H. 515; Crawford *v.* North Eastern Railw., 3 K. & J. 744. But see Johnson *v.* Bridgewater Co., 14 Gray, 274; Taft *v.* Providence, &c. Railw., 8 R. I. 310; McLaughlin *v.* Detroit, &c., 8 Mich. 100; Williston *v.* Michigan, &c., 13 Allen, 400; Foote's App.,

holder until a dividend of some kind had been declared. Tubb *v.* Fowler, 118 Tenn. 325; Boardman *v.* Boardman, 78 Conn. 451.

(*a*) Dividends, whether regular or extraordinary, which are paid out of the "fundamental" capital of the corporation are not income, but

§ 546. A different rule seems to apply to the gift of a farm and stock of cattle for life. In such cases, all improvements

22 Pick. 299. It was said by Lord Eldon, that the corporation has it in its power to give the benefit to the tenant for life or not; and this he said, not as a proposition of law, but as a statement of the practice of the courts. The corporation cannot alter any of the rights of the tenant for life, nor can it invest any of his money in a manner not agreeable to him, for the simple reason that until the corporation has declared the dividend, the tenant for life has no rights to be altered, and no money to be invested. It is only after the corporation has made a dividend, and the trustee has it in hand, that the tenant for life has any right, or is in any position to claim anything. The corporation must deal with its stockholders as absolute owners. If, therefore, the corporation has a right to turn any part of its "income" into capital, as against the absolute owner, who has not only the life-interest, but the whole interest in himself, it must have the same right as against the trustee, who, so far as the corporation is concerned, is the absolute owner of the stocks. The corporation, then, would seem to have the right, acting in good faith, to apply its income as capital to its business, especially if the corporation itself, or its directors, acting within the scope of their authority, vote to do so. If the corporation votes to do so, and thus increases the value of the shares in the hands of the trustees, but creates no new shares, can the tenant for life call for this increased value? If he can, and the case in Pennsylvania seems so to decide, a new principle will be established in the government of corporations and in the administration of trusts. It is apparent from these observations, that the opinion in the case of Earp's Appeal cannot be carried to the logical conclusions to which it leads. It is proper to say, however, that the nature of the acts by the corporation does not very clearly appear. Whether the corporation intended to make a stock dividend or not, or whether the accumulations were used in the legitimate business of the corporation as capital, or whether it remained accumulated income not divided, and not applied to capital, does not certainly appear; perhaps for the reason that the court treats such considerations as immaterial.(a) In New York, the

should be preserved as part of the principal of the trust in the absence of a contrary intention manifested in the instrument creating the trust. This would be true of dividends from a mining company which provided no fund for the purchase of new mines. In such a case the declaration of a dividend by the corporation, although giving the stockholders a right to cash payments, does not make these cash payments income. They are distributions of capital and part of

(a) An answer to the foregoing criticisms of the doctrine enunciated in Earp's Appeal and followed in later cases in Pennsylvania and

made upon the real estate by the tenant for life will accrue to the remainder-man as of course. (*a*) But any increase in the

case of Simpson *v.* Moore, 31 Barb. 638, has little to do with the question, for the reason that the cash dividend made in that case was partly composed

(*a*) Pratt *v.* Douglas, 38 N. J. Eq. 516, 541; Caldecott *v.* Brown, 2 Hare, 144.

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the corpus of the investment, whatever the directors may call them. Heard *v.* Eldredge, 109 Mass. 258; Walker's Ex'r *v.* Walker, 68 N. H. 407; Wheeler *v.* Perry, 18 N. H. 307; Vinton's Appeal, 99 Pa. St. 434; Gilkey *v.* Paine, 80 Me. 319; Mercer *v.* Buchanan, 132 Fed. 501. By fundamental capital is meant that on which the capital stock is based, being the original investment of the stockholders with such additions from earnings as were made to repair waste and such other additions to working capital as have formed the basis for new issues of shares. It is immaterial that the property thus distributed is no longer needed in the business of the company (cases cited *supra*), or that it has been taken from the company by right of eminent domain. Heard *v.* Eldredge, 109 Mass. 258.

For a case of this kind where the regular dividends, although wasting, were given to the equitable life tenant because the testator evidently intended that they should belong to him, see Reed *v.* Head, 6 Allen, 174.

As the officers of a corporation usually have no right to use up the capital of the corporation in dividends, a dividend is presumed to be from earnings unless the contrary is shown. Walker's Ex'r *v.* Walker, 68 N. H. 407; Smith *v.* Dana, 77 Conn. 543. This is especially true of the regular dividends, and trustees would usually be safe in treating them as income, unless it clearly appears that they were paid from capital.

As the vote declaring an extraordinary dividend usually specifies the source, the trustee may be called upon to decide whether this source is income of the corporation or part of the capital. But it has been held that in the absence of evidence to the contrary the court will presume that an extraordinary dividend, whether in cash or in stock, is based upon earnings. Kalbach *v.* Clark, 133 Iowa, 215.

It is also immaterial that the value of the property remaining in the capital of the corporation is as large as or even many times larger than the sum total of the capital stock at par, Smith *v.* Hooper, 95 Md. 16; Wheeler *v.* Perry, 18 N. H. 307; Matter of Rogers, 161 N. Y. 108; for the increase in value of property in which the capital is invested is not income

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in several other jurisdictions, is that a stockholder does have a certain equitable interest in the earnings of the corporation as they ac-

farming stock will belong to the tenant for life. He is under no obligation to increase the stock upon the farm; and if he

of earnings, and partly of capital of a corporation that was winding up its affairs. But the case of Clarkson *v.* Clarkson, 18 Barb. 646, is a direct decision upon the point, that, if a corporation makes a stock dividend from its gains, profits, income, and proceeds, such stock dividend must be considered as income from the original investment, and belongs to the tenant for life; but if anything is given to the trustee, not as interest, dividend, or proceeds, but as part of the capital, it is capital, and belongs to the remainder-man. The court sent the case to a referee to determine the facts. In New Jersey, in the case of Van Doren *v.* Olden, 19 N. J. Eq. 117, the chancellor approved of the reasoning of the courts in New York and Pennsylvania, and sent the case to a master to inquire and report how much of the stock dividend was capital, and how much income, and also how much of the stock dividend was made up of accumulations before the investment of the trust fund in the stock of the corporation, and how much of it came from earnings after the investment. The court of Massachusetts notices a difficulty in making satisfactory inquiries on these points, as corporations might refuse to expose their business, or they might be out of the jurisdiction of the court, and situated so that it would be impossible to arrive at a satisfactory result. It is quite important that a principle should be established to guide trustees in the performance of their duties, as in many cases the remainder-men are infants, or they are not even in existence when the question arises, and should be settled. Generally, the rights of such *cestuis que trust* cannot be definitely adjusted until they are competent to act for themselves, and call for a settlement of the accounts. Thus trustees may be compelled to rectify any mistake they may make in this matter years after the event. See the question further discussed by Mr. Justice Ladd in Lord *v.* Brooks, 52 N. H. 77.

In Read *v.* Head, 6 Allen, 174, it was decided that dividends of a land company, whose income was made from sales of its land or capital in business, belonged to the tenant for life under the will of a testator, although such sales might exhaust the capital of the corporation and entirely defeat the remainder-man. This decision went upon the ground that it was the intention of the testator when he devised the income of such stock to one for life, that, as the tenant for life could have no income except from such dividends as came from capital, he must take the dividends as made. All the cases profess to go upon the intention of the testator. Therefore a testator may foreclose this question in his will by giving such directions

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(cases cited *supra*) except where the business of the corporation is speculation. Thus the increase in value of land on which a manufacturing cor-

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crue. Although he cannot as a mere stockholder compel a distribution of them, they are held for the ultimate benefit of all the

does so, the increase will not be capital, but will inure to the benefit of the tenant for life or his representatives.[1] A different

as to leave no question as to his intention. And see Balch *v.* Hallett, 10 Gray, 403; Heard *v.* Eldredge, 109 Mass. 258.

The great argument in Massachusetts, which does not seem yet to have been considered by the court, is this: Corporations are forbidden to make dividends except from profits; if, therefore, a corporation declares a dividend, whether payable in stock or in money, such dividend must accrue from profits upon the capital invested, and, it being profit upon the capital stock invested, it must belong to the tenant for life.

[1] Robertson *v.* Collier, 1 Hill, Eq. 370; Calhoun *v.* Furgeson, 3 Rich. Eq. 170; Woods *v.* Sullivan, 1 Swanst. 507; Horrey *v.* Glover, 2 Hill, Eq.

poration has its factory does not belong to income, but a profit due to the increase in value of land of a corporation engaged in buying and selling land for profit is properly income. Thomson's Estate, 153 Pa. St. 332; Oliver's Estate, 136 Pa. St. 43; Balch *v.* Hallet, 10 Gray, 402.

Dividends from capitalized earnings, that is, earnings which have been made the basis of a new issue of stock, belong to principal, even in jurisdictions where the new issue of stock is not treated as income. Hemenway *v.* Hemenway, 181 Mass. 406; Smith *v.* Dana, 77 Conn. 543.

Dividends from earnings which have been made part of the "floating capital" of the corporation are not divisions of *corpus*, and in States where extraordinary cash dividends are not apportioned, belong entirely to income. Hemenway *v.* Hemenway, 181 Mass. 406; Matter of Rogers, 161 N. Y. 108; *In re* Stevens, 98 N. Y. S. 28. See also Quinn *v.* Safe Dep. & Tr. Co., 93 Md. 285; Robertson *v.* De Brulatour, 188 N. Y. 301. "Floating capital" is meant to include accumulated earnings invested to produce income outside of the corporation's regular business: for example, an investment of a fund of accumulated earnings in stocks, bond, and securities of other companies, Hemenway *v.* Hemenway, 181 Mass. 406; Matter of Rogers, 161 N. Y. 108; see also Stewart *v.* Phelps, 173 N. Y. 621, 71 App. Div. 91; or in the purchase of the company's own stock, Leland *v.* Hayden, 102 Mass. 542.

Dividends out of earnings which have been temporarily added to the "working capital" of the corporation, have been held to belong to income for the same reason. Smith *v.* Dana, 77 Conn. 543. See Bouch *v.* Sproule, 12 App. Cas. 385, 402; *In re* Stevens, 98 N. Y. S. 28; Weschler's Estate, 212 Pa. St. 508. These temporary additions of earnings to the "working capital" are meant to include the investments of earnings in the main business of the corporation, which go beyond

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stockholders, and their accumulation adds to the market value of each share of stock. If they are distributed in the form of a cash

rule was applied in the Southern States in relation to the gift of negro slaves for life. In Virginia, Alabama, North Carolina,

515; Patterson *v.* High, 8 Ired. Eq. 52; Scott *v.* Dobson, 1 H. & McH. 160; Wooten *v.* Burch, 2 Md. Ch. 191; Holmes *v.* Mitchell, 4 id. 163; Patterson *v.* Devlin, 1 McMul. 459; Evans *v.* Inglehart, 6 G. & J. 172; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Saunders *v.* Houghton, 8 id. 217; Hunt *v.* Watkins, 1 Humph. 498.

the mere repairing of waste and depreciation, and with respect to which there has been no action of the corporation definitely and formally making them part of the fundamental capital. The language of the opinion in Hemenway *v.* Hemenway, 181 Mass. 406, 411, may indicate that the Massachusetts court will take a different view, because of its holding that extraordinary cash dividends cannot be apportioned.

Dividends in liquidation. In jurisdictions which hold that it is the declaration of the dividend which makes it income as between life tenant and remainder-man, a division in liquidation of the propererty of the corporation without any separation of income from capital by the corporation, belongs entirely to principal, even though a large part of the assets consisted of accumulated earnings in the form of floating capital. Curtis *v.* Osborn, 79 Conn. 555; Second Universalist Church *v.* Colegrove, 74 Conn. 79; Brownell *v.* Anthony, 189 Mass. 442; Gifford *v.* Thompson, 115 Mass. 478; *In re* Armitage, [1893] 3 Ch. 337; Bulkeley *v.* Worthington Ecc. Soc., 78 Conn. 526. See Hemenway *v.* Hemenway, 181 Mass. 406. But the courts of New York will in such a case give to income so much of the final dividend as is based upon accumulated earnings which have not been put into the working capital of the corporation. Matter of Rogers, 161 N. Y. 108. See Robertson *v.* De Brulatour, 188 N. Y. 301; *In re* Stevens, 98 N. Y. S. 28, 111 App. Div. 773. There seems to be no reason why courts of jurisdictions, where extraordinary dividends are usually apportioned, should make any exception in a case of a dividend in liquidation. See Weschler's Estate, 212 Pa. St. 508.

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dividend while a life tenant is entitled to income, all courts regard them as income, at least to the extent that they were earned by the corporation during the time when the life tenant was entitled to the income. If, instead of being distributed, they are added to the permanent capital of the corporation and new stock is issued based entirely upon them, why should not the new stock be classed as income? As between persons equitably entitled, should the courts distinguish between a distribution of actual earnings and a distribution of salable stock based upon the earnings? If the corporation votes a cash dividend out of surplus earnings and contemporaneously votes increase of its capital stock to the same amount, with the design that

and South Carolina, the increase of such slaves was added to the capital, and went to the remainder-man.[1] In Maryland, the general rule was applied, and the tenant for life took the increase of the slaves;[2] but where the *income* of a farm, on which there were slaves, was given to one for life, the increase was allowed to the remainder-man.[3] In Pennsylvania, it was held that the remainder-men were entitled to farm stock and implements purchased by the tenant for life to keep up the stock and tools; but this was under the special words of a will.[4] The general rule is, that the tenant for life is under no obligation to replace those things given for life, which are consumed by the using, and, if he purchases other articles in the place of them, such articles are his own.[5] Underbrush and timber cut

[1] Ellison *v.* Woody, 6 Munf. 368; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Covington *v.* McEntire, 2 Ired. Eq. 316; Patterson *v.* High, 8 id. 52; Milledge *v.* Lamar, 4 Des. 616; Strong *v.* Brewer, 7 Ala. 713; Robertson *v.* Collier, 1 Hill, Eq. 370; Patterson *v.* Devlin, 1 McMul. 459; Horrey *v.* Glover, 2 Hill, Eq. 515.

[2] Scott *v.* Dobson, 1 H. & McH. 160; Holmes *v.* Mitchell, 4 Md. Ch. 163; Wooten *v.* Burch, 2 id. 191; Evans *v.* Inglehart, 6 G. & J. 172.

[3] Holmes *v.* Mitchell, 4 Md. Ch. 263; 4 Md. R. 532.

[4] Flowers *v.* Franklin, 5 Watts, 265.

[5] Patterson *v.* Devlin, 1 McMul. 459; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Black *v.* Ray, 1 Dev. & B. Eq. 443; Covenhoven *v.* Shuler, 2 Paige, 131.

the stockholders may pay for new stock with their dividends, the Massachusetts courts treat the dividend as income to the extent of its par value. In such a case the stockholder is given the money with the privilege of turning it into new stock; in the case of a stock dividend he is given new stock which he has the undoubted right to turn into money by sale. It seems hard to justify on equitable principles a rule of law which gives the entire dividend to the life tenant in one case and to the remainder-man in the other case.

Although it is true that a stock dividend does not turn over any property from the corporation to its stockholders, nevertheless, it is a definite appropriation of undivided earnings to the permanent capital of the corporation and a declaration of the share of this new capital to which each stockholder is entitled. The treatment of the new shares of stock as income to the extent of their par value is no more an impairment of the principal of a stockholder's investment than would be the treatment of a cash dividend of equal amount as income.

periodically in the regular course of thinning forests, are to be treated as income, and belong to the tenant for life; but timber not cut in the regular course of thinning, but to improve the growth of the remaining trees, belongs to the capital of the trust. (*a*) Gravel sold from land is income, and the proceeds belong to the tenant for life; (*b*) but the expense of fencing waste lands given for the general benefit of the trust must be paid out of the capital.[1] The share of the testator in the profits of a partnership which is to continue after his death belongs to the life *cestui*.[2] (*c*) But any accretion to the fund itself which is to be invested as by the rise in value of securities goes to the remainder-man. The life tenant also derives advantage from this increased value through the larger income resulting, but

[1] Cowley *v.* Wellesley, L. R. 1 Eq. 657; 35 Beav. 637; and see Honywood *v.* Honywood, L. R. 18 Eq. 306.

[2] Heighe *v.* Littig, 63 Md. 301.

(*a*) Honywood *v.* Honywood, 18 Eq. 306; Dashwood *v.* Magniac, [1891] 3 Ch. 306; *In re* Harrison's Trusts, 28 Ch. Div. 220; Noyes *v.* Stone, 163 Mass. 490; Smith *v.* Smith, 105 Ga. 106, 111; Stonebraker *v.* Zollickoffer, 52 Md. 154; Keniston *v.* Gorrell, 74 N. H. 53; Modlin *v.* Kennedy, 53 Ind. 267; Lester *v.* Young, 14 R. I. 579; Morehouse *v.* Cotheal, 22 N. J. Law, 521; Williard *v.* Williard, 56 Pa. St. 119. *Supra*, § 540, note *a*, p. 870.

(*b*) The product of mines, oil wells, and quarries which are opened by a trustee belongs to principal and should be invested to produce income, which alone belongs to the life beneficiary. McFadden's Estate, 224 Pa. St. 443; Blakley *v.* Marshall, 174 Pa. St. 425; Wilson *v.* Youst, 43 W. Va. 826; Swayne *v.* Lone Acre Oil Co., 98 Tex. 597; *In re* Ridge, 31 Ch. Div. 504. 508. See also Ohio Oil Co. *v.* Daughetee, 240 Ill. 361. But the product of mines, oil wells, or quarries which were open when the trust was established, or which the trust instrument gave the trustee the right to open, belongs entirely to income. Woodburn's Estate, 138 Pa. St. 606; Eley's Appeal, 103 Pa. St. 300; McClintock *v.* Dana, 106 Pa. St. 386; Wentz's Appeal, 106 Pa. St. 301; Bedford's Appeal, 126 Pa. St. 117; *In re* Ridge, 31 Ch. Div. 504, 508.

(*c*) But not if it is a case of delay in converting into the permanent trust investments. Kinmonth *v.* Brigham, 5 Allen, 270; Westcott *v.* Nickerson, 120 Mass. 410; Mudge *v.* Parker, 139 Mass. 153; Willard's Ex'r *v.* Willard, 21 A. 463 (N. J. Ch. 1891). As to what should go to the life beneficiary as income in such a case, see *infra*, § 548, note *a*.

if the securities mature or are sold, the increased value belongs to the remainder.[1]

§ 547. Where there is a *specific* gift for life of things which are consumed in the using, the tenant for life must have the possession and the use, according to the gift.[2] But if the gift of such articles, or of perishable articles, is *residuary* or *general*, the trustee must sell the articles and invest the proceeds, so that the tenant for life may receive the interest or income, and the principal sum may remain for the remainder-man.[3] If the property consists of leaseholds, annuities, or other interests, which grow less valuable by lapse of time, they must be sold, and the proceeds invested in some permanent form, so that the interest can be paid to the tenant for life, and the remainder-man can receive a proper sum as principal.[4] If the trustee does not con-

[1] *In re* Gerry, 103 N. Y. 450. [Boardman *v.* Boardman, 78 Conn. 451; Tubb *v.* Fowler, 118 Tenn. 325.]

[2] Tyson *v.* Blake, 22 N. Y. 558; Shaw *v.* Huzzey, 41 Maine, 495; Scott *v.* Perkins, 28 id. 22; McDonnald *v.* Walgrove, 1 Sandf. Ch. 275; McLane *v.* McDonald, 2 Barb. S. C. 537; Wright *v.* Miller, 8 N. Y. 25.

[3] Clark *v.* Clark, 8 Paige, 152; Williamson *v.* Williamson, 6 Paige, 298; Randall *v.* Russell, 3 Mer. 194; Porter *v.* Tournay, 3 Ves. Jr. 314; Andrew *v.* Andrew, 1 Col. C. C. 690; Spear *v.* Tinkham, 2 Barb. Ch. 211; Emmons *v.* Cairns, 3 Barb. 243; Cairns *v.* Chaubert, 9 Paige, 160; Woods *v.* Sullivan, 1 Swanst. 507; Covenhoven *v.* Shuler, 2 Paige, 122; Eichelberger *v.* Barnitz, 17 Serg. & R. 293; Booth *v.* Ammerman, 4 Bradf. 132; Bradner *v.* Falkner, 2 Kern. 472; Patterson *v.* Devlin, 1 McMul. Eq. 459; Robertson *v.* Collier, 1 Hill, Eq. 373; Horrey *v.* Glover, 2 Hill, Eq. 515; Calhoun *v.* Furgeson, 7 Rich. Eq. 165; Saunders *v.* Houghton, 8 Ired. Eq. 217; Taylor *v.* Bond, 1 Busb. Eq. 25; Homer *v.* Shelton, 2 Met. 194. In Maryland, however, under the act of 1798, c. 101, it was held that the general rule as to conversion was not in force in that State, and that the tenant for life under a *general* residuary clause was entitled to enjoy the articles of property that fell into the residue *in specie*. Evans *v.* Inglehart, 6 G. & J. 192. But if the residue consists of money, or property, the use of which is a conversion into money, the executor or trustee must convert it into money and invest it. Evans *v.* Inglehart, 6 G. & J. 192; Wooten *v.* Burch, 2 Md. Ch. 199.

[4] *Ante*, §§ 449, 450; Minot *v.* Thompson, 106 Mass. 584; Howe *v.* Dartmouth, 7 Ves. 137; Mills *v.* Mills, 7 Sim. 501; Lichfield *v.* Baker, 2 Beav. 481; Alcock *v.* Sloper, 2 Myl. & K. 701; Fearns *v.* Young, 9 Ves. 552; Pickering *v.* Pickering, 2 Beav. 57; 4 Myl. & Cr. 298; Dimes *v.* Scott, 4 Russ. 200; Cairns *v.* Chaubert, 9 Paige, 160; Clark *v.* Clark, 8 Paige, 152; Benn *v.*

vert such property within a reasonable time, the remainder-man can proceed against him as for a breach of trust. The tenant for life will be compelled to refund whatever he has received beyond his equitable proportion, and the trustees, in the event of the failure or inability of the tenant for life to refund, must make good the difference.[1] If, however, the remainder-man acquiesces for a long time in the receipt of the whole actual income by the tenant for life, or does not claim any relief for such payments, the court will confine its decree to conversion. So, if all parties consent that annuities and other rights may not be sold, the court will sanction their retention by the trustees.[2] The rights of tenant for life and remainder-man will depend very much upon the construction of the will and the directions contained in it.[3] If leaseholds and terminable annuities are rapidly growing less valuable, or if other property is perishing, and they are given *specifically* in the will for the tenant for life, he is entitled to them, although the remainder-man will be

Dixon, 10 Sim. 636; Eichelberger *v.* Barnitz, 17 Serg. & R. 293; Covenhoven *v.* Shuler, 2 Paige, 132; Wooten *v.* Burch, 2 Md. Ch. 190; Kinmonth *v.* Brigham, 5 Allen, 270. [*In re* Game, [1897] 1 Ch. 881. But see *Re* Leonard, 433 L. T. 664. *Infra*, § 548, note.] Farming stock is not within the rule. Groves *v.* Wright, 2 K. & J. 347.

[1] Ibid.; Kinmonth *v.* Brigham, 5 Allen, 270. In Meyer *v.* Simonson, 5 De G. & Sm. 726, Vice-Chancellor Parker stated the rules which govern the court on the subject as follows: The personal estate of a testator may be considered as divided into three different classes: (1) Property which is found at the testator's death invested in such securities as the court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. (2) Property which can be converted into money without sacrificing anything by a forced sale. As to this the rule is clear: It must be converted, and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. (3) Property which, according to a reasonable administration, is not capable of an immediate conversion, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value. Kinmonth *v.* Brigham, 5 Allen, 270.

[2] Lichfield *v.* Baker, 2 Beav. 481; Pickering *v.* Pickering, 4 Myl. & Cr. 298; Glengall *v.* Barnard, 5 Beav. 245.

[3] Moseley *v.* Marshall, 22 N. Y. 205.

entirely excluded; for the reason that the testator himself had the right to make such disposition of his estate as he saw fit, and if he conferred upon the remainder-man only the possible chance of taking what might be left by the tenant for life unexhausted, the remainder-man will receive all that was intended for him, and he has no right to complain.[1] So where discretion was given to trustees, to pay the income to a tenant for life, or to purchase an irredeemable annuity, and there was a gift over, and the trustees did not purchase the annuity, but paid the *cestui que trust* from time to time more than the income, but less than the principal, it was held to be a proper exercise of the discretion.[2] In England, whenever a fund is held on an authorized permanent investment, the life tenant is to receive the entire actual income, and no part of it is to be set aside to indemnify the remainder-men for the disadvantage resulting to them from the purchase above par of stock that has only a short time to run, and for which they will receive only par. Massachusetts follows the English law though refusing to lay down any universal rule, preferring to deal with each case as it arises.[3] The case cited is a very strong one; the court covers the ground thoroughly, and goes to the pith of the matter, remarking that substantial justice between life tenant and remainder-men is the object, that the object of investment in stocks that are above par is not alone the increased interest, but the higher security of the capital, and that if the interest

[1] Howe *v.* Dartmouth, 7 Ves. 149; 2 Wh. & T. L. C. 321; Lord *v.* Godfrey, 4 Madd. 455; Vaughan *v.* Buck, 1 Phill. 80; Bethune *v.* Kennedy, 1 Myl. & Cr. 116; Pickering *v.* Pickering, 4 id. 299; Phillips *v.* Sargent, 7 Hare, 33, where it was held that, if the trustees wrongfully converted such property, the tenant for life was entitled to the whole fund to the exclusion of the remainder-man. Beaufoy's Est., 1 Sm. & Gif. 22; *Re* Steward's Est., 1 Dru. 636; Howe *v.* Howe, 14 Jur. 359; Cotton *v.* Cotton, id. 950; Morgan *v.* Morgan, 14 Beav. 72; Pickup *v.* Atkinson, 4 Hare, 628; Prendergast *v.* Prendergast, 3 H. L. Cas. 195. [See *infra*, § 548, note *a*.]

[2] Messena *v.* Carr, L. R. 9 Eq. 260, and see Miller *v.* Miller, L. R. 13 Eq. 267.

[3] Hemenway *v.* Hemenway, 136 Mass. 447. [But see note *a*, *infra*, pp. 896–898.]

is to be divided between life tenant and remainder-men, a problem of infinite difficulty arises in the question, how, upon what line or principle, shall the division be made? In a later case in Massachusetts, however, the majority of the court held that if a trustee holding a fund to pay the income to a certain person for life, with remainder over, makes an investment at a premium in bonds payable at a day certain, he may retain from the income enough to make good to the capital the amount of premium paid. The court notices Hemenway *v.* Hemenway, and seeks, not to seem to overrule, but to avert its force, and distinguish it. The effort does not seem successful, and the dissent of Morton, C. J., and Allen and Holmes, JJ., contains far the weightier argument.[1] (*a*) Where a trustee buys at the fore-

[1] New England Trust Co. *v.* Eaton, 140 Mass. 532.

(*a*) Bonds bought at a premium are ordinarily a wasting investment if the whole interest on the bonds is treated as income, because if the bonds are held until maturity the premium will be entirely lost, and even if they are not held until maturity, other things being equal, the premium will gradually grow smaller as maturity approaches. For this reason it has been held in some jurisdictions that a trustee who has purchased bonds at a premium should deduct from the various collections of interest, and add to the principal, such sums as will replace the premium if the bonds are held until maturity. That is to say, he should establish a sort of sinking fund to repair the yearly waste of principal. N. Y. Life Ins. Co. *v.* Baker, 165 N. Y. 484; Matter of Stevens, 187 N. Y. 471; Curtis *v.* Osborn, 79 Conn. 555; *In re* Allis's Estate, 123 Wis. 223 (even though the bonds will not mature until after the termination of the trust); Ballantine *v.* Young, 70 A. 668 (N. J. Ch. 1908). See Matter of Johnson, 57 N. Y. App. Div. 494, 502, modified in 170 N. Y. 139.

If after this has been done the bonds should be sold at a larger premium than was paid for them, it has been held that the increase of premium belongs to the principal, and also such of the sinking fund as has already been accumulated, the increase of premium being regarded as an increase in the value of the *corpus*. N. E. Trust Co. *v.* Eaton, 140 Mass. 532.

Although the premium on bonds frequently varies from month to month in the bond market, these fluctuations should have no effect upon the amount of deductions from the interest payments, but the purpose of the trustee should be to regulate his sinking fund so that the total at the time of maturity shall exactly replace the premium he has paid. If the bonds are held until maturity, it is certain that this premium will be entirely wiped out, and the original principal will be

closure sale of his mortgage and afterwards sells the land at a profit, this belongs to the *corpus* of the estate, and not to the life tenant.[1] (*a*)

[1] Parker *v.* Johnson, 37 N. J. Eq. 366.

reduced by the amount of the premium which he had previously paid, unless there is some such provision to repair the loss. This view of such investments is well stated in the majority opinion, written by Devens, J., in N. E. Trust Co. *v.* Eaton, 140 Mass. 532: "There can ordinarily be no better test of the true income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainderman, than the interest which can be received from a bond which sells above par and is payable at the termination of a fixed time, deducting from such interest, as it becomes due, such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should be made, it is because a change in the rates of interest, or some similar cause, has altered market values."

In some other jurisdictions it has been held that no part of the interest on the bonds should be used to replace a premium. Hite's Devisees *v.* Hite's Ex'r, 93 Ky. 257; Penn-Gaskell's Estate (No. 2), 208 Pa. St. 346. Whitridge *v.* Williams, 71 Md. 105 (*semble*). It is pointed out that premiums are not paid to secure greater income, but usually represent safety and permanency of investment and facility of transfer and use, and in fact usually accompany a low rate of interest. It is argued from this fact that the premium is paid more for the benefit of the remainder-man than for the benefit of the life tenant, and should therefore be considered as a payment that the fund itself ought to endure, as a charge for the benefit of the whole fund. See dissenting opinion of Holmes, J., in N. E. Trust Co. *v.* Eaton, 140 Mass. 532, 545.

In Massachusetts, notwithstanding the strong language of the majority opinion in N. E. Trust Co. *v.* Eaton, 140 Mass. 532, there is considerable doubt as to whether a trustee is obliged to repair a premium paid by him. The actual decision goes no further than to hold that a trustee who had done so had acted properly. Moreover, there was a strong dissent by three of the seven judges and the decision of Hemenway *v.* Hemenway, 134 Mass. 446, was not expressly overruled, although the minority considered that case inconsistent with the majority opinion. In the last cited case, which was a bill for instructions by trustees under a will, the trustees had bought a comparatively few railroad bonds at a small

(*a*) But it has been held that part of this profit should be apportioned to income where there has been default in the payment of

§ 548. If there is a *positive direction* in a will that the trustees shall convert the personal property into government or

premium. The court refused to lay down any general rule which would control all cases of bonds bought at a premium, but said, "The trustee, who has the fund always in his hands and under his eyes, must take reasonable care to hold the balance even between opposing interests." It was found as a fact in this case that the balance had been evenly held, and the court refused to hold that the fact of payment of a small premium was not, of itself alone, enough to prevent those entitled to income from receiving the entire net interest on the bonds. In view of these two cases, the safe course for trustees to follow in Massachusetts seems to be, to set aside a proportional part of each interest payment to replace the premium paid by them.

If the intention of the creator of the trust appears to have been that wasting premiums should not be replaced out of current interest, of course that intention controls. Shaw *v.* Cordis, 143 Mass. 443; Matter of Hoyt, 160 N. Y. 607. But it has been held in a recent New York case that the premiums must be repaired unless an intention to the contrary appears in the very clearest manner. The purpose of the court was to furnish a rule which trustees could safely follow. Matter of Stevens, 187 N. Y. 471.

Where bonds which are rated at a premium are part of the identical property left by the testator and the trustees have properly allowed the investment to remain, deductions should not be made from current interest to replace the wasting premium, unless it appears that the creator of the trust intended that such provision should be made. Conn. Trust, etc., Co.'s Appeal, 80 Conn. 540; Sargent *v.* Sargent, 103 Mass. 297; Robertson *v.* De Brulatour, 188 N. Y. 301; Matter of Stevens, 187 N. Y. 471. See also Reed *v.* Head, 6 Allen, 174; Lynde *v.* Lynde, 99 N. Y. S. 283, 113 App. Div. 411.

If bonds are sold at a larger premium than was paid for them, all the increase belongs to the principal. Matter of Gerry, 103 N. Y. 445; Matter of Proctor, 85 Hun, 572; N. E. Trust Co. *v.* Eaton, 140 Mass. 532; Graham's Estate, 198 Pa. St. 216. But see Park's Estate, 173 Pa. St. 190.

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income. Parker *v.* Seeley, 56 N. J. Eq. 110. See Fanning *v.* Main, 77 Conn. 94. But see Park's Estate, 173 Pa. St. 190. This is upon the theory that part of the purchase money on foreclosure sale must be taken to be unpaid interest to which the life beneficiary was entitled. Accordingly, in Parker *v.* Seeley, the profit was apportioned between income and principal in the ratio that the unpaid interest bore to the principal of the mortgage debt.

Where, however, a trustee bought in real estate at a receiver's sale in order to protect the interest of the estate in a partnership and later realized a profit on the sale of the

real securities, and hold them in trust for one for life and remainder over, the *cestui que trust* for life is entitled to receive only so much income as would have arisen from the personal estate if converted and invested at the date of the testator's death. If, therefore, a security bearing a much higher rate of interest remains undisposed of, they cannot pay the whole interest so arising to the tenant for life; and if they pay to him the whole extra interest, they would be liable to make good to the remainder-man the difference between what should have been paid under the above rule, and the sum actually paid.[1] If they afterwards dispose of the security, thus bearing a higher rate of interest, more advantageously than they could have done within the year, they will not be allowed to reimburse themselves for the sums they are liable to pay to the remainder-man; but they will be charged with all the interest they received,

[1] Dimes *v.* Scott, 4 Russ. 195.

property, no part of the profit was given to income. Neel's Estate, 207 Pa. St. 446. See also Slocum *v.* Ames, 19 R. I. 401. The two cases are not inconsistent, because in the latter case no income was invested in the purchase.

In cases where there has been a default in the payment of both principal and interest of a debt due the trustee, *e. g.*, a debt secured by mortgage, and the sum realized on foreclosure is insufficient to make good both principal and interest, the net sum realized must be apportioned between principal and income in the ratio that the principal of the debt bears to the unpaid interest on it at the agreed rate. Hagan *v.* Platt, 48 N. J. Eq. 206; Tuttle's Case, 49 N. J. Eq. 259; Trenton Trust, etc., Co. *v.* Donnelly, 65 N. J. Eq. 119; Meldon *v.* Devlin, 31 App. Div. (N. Y.) 146; Parsons *v.* Winslow, 16 Mass. 361; *In re* Hubbuck, [1896] 1 Ch. 754; *In re* Alston, [1901] 2 Ch. 584. See also Greene *v.* Greene, 19 R. I. 619. But the life tenant's claim to any part of the sum ultimately realized is absolutely dependent upon the default in the payment of interest on income that was due him. See *In re* Taylor's Trusts, [1905] 1 Ch. 734; Slocum *v.* Ames, 19 R. I. 401.

The expense of carrying the property after foreclosure should be paid in the first instance from principal of the trust fund if the property itself is unproductive. *In re* Pitney, 99 N. Y. S. 588, 113 App. Div. 845. But this expense should be deducted from the gross proceeds realized upon a sale of the the property. Neel's Estate, 207 Pa. St. 446; Trenton Trust, etc., Co. *v.* Donnelly, 65 N. J. Eq. 119.

and with the full amount for which they sold the securities, and will be credited only with the amount that they should have paid the tenant for life.[1] It is said, however, that if there is no express direction in the will for conversion, the trustees will be justified in paying over to the tenant for life all the income received from the securities, whatever the rate of interest,[2] for trustees have a discretion to convert or not as they see fit.[3] (*a*)

[1] Dimes *v.* Scott, 4 Russ. 195.

[2] Howe *v.* Dartmouth, 7 Ves. 150; Williamson *v.* Williamson, 6 Paige, 303; Prendergast *v.* Prendergast, 3 H. L. Cas. 195; Meyer *v.* Simonson, 5 De G. & Sm. 726.

[3] Yates *v.* Yates, 28 Beav. 637.

(*a*) When there has been an express or implied direction to convert the property into a certain kind of investment or when conversion is necessary because the fund is not properly invested, the question frequently arises as to what income the life beneficiary should receive during the period between the testator's death and the actual conversion. The actual income is frequently more, and sometimes less, than the income of the trust funds when properly invested. When the testator has indicated his intention that all of the actual income, and no more, during the period of delay shall go to the life beneficiaries, there is no reason why that intention should not be carried out, if the delay has been a proper one. See Rowlls *v.* Bebb, [1900] 2 Ch. 107; *Re* Leonard, 43 L. T. 664.

But when there is nothing in the will to show his intention one way or the other, the well established rule of the courts is to treat the fund as equitably converted into the proper investments as of the date of the testator's death, and to give the life beneficiaries the equitable income, *i. e.*, income at the rate which the converted fund would have earned if invested at that date. Any excess of actual income is treated as part of the principal and any deficiency of actual income is to be made up from the *corpus* of the fund unless there is a sufficient reason for making the trustee pay it. Edwards *v.* Edwards, 183 Mass. 581; Kinmonth *v.* Brigham, 5 Allen, 270; Westcott *v.* Nickerson, 120 Mass. 410; Mudge *v.* Parker, 139 Mass. 153; Minot *v.* Thompson, 106 Mass. 583; Healey *v.* Toppan, 45 N. H. 243; Willard's Ex'r *v.* Willard, 21 A. 463 (N. J. Ch. 1891); Brown *v.* Gellatly, 2 Ch. 751; Greene *v.* Greene, 19 R. I. 619.

The method of finding the amounts which should belong respectively to principal and income is to treat the total amount of the proceeds upon actual conversion and the actual net income received less the expenses of conversion, as the principal and income of a sum invested at the testator's death at

§ 549. The trustee must exert himself equally to protect the tenant for life and the remainder-man. Therefore, if there

a rate of interest which it would have earned if then invested in the authorized manner. Thus, suppose the converted property realizes $100,000 net at the end of one year, and that the actual net income received before conversion amounts to $6,000; assuming that the equitable rate of income is 4 per cent, the equitable *corpus* at the time of conversion will be found by dividing $106,000 by $1.04, giving $101,923.08 as the equitable principal and $4,076.92 as the equitable income. If the conversion has been delayed for a period of more than a year and nothing has been paid as income, the equitable income should be reckoned at compound interest. Edwards *v.* Edwards, 183 Mass. 581; Greene *v.* Greene, 19 R. I. 619.

Mr. Lewin has suggested that where the income of the life tenant remains in the business after the first year a proportion of the actual profits should be given the equitable life tenant to the extent that the profits are attributable to his share of income remaining in the business. Lewin (11th ed.), 337; *In re* Hill, 50 L. J. Ch. 551. Possibly the Massachusetts court had this in mind when in several cases it reckoned equitable interest of the life beneficiary at 6 per cent, the *corpus* having been tied up in business and earning more than 6 per cent. Westcott *v.* Nickerson, 120 Mass. 410; Kinmonth *v.* Brigham, 5 Allen, 270.

In England where the original property was unproductive of income, *e. g.*, was a reversionary interest, the courts used to reckon the equitable income at 4 per cent, but in recent cases, they have reduced the rate to 3 per cent. *In re* Goodenough, [1895] 2 Ch. 537; Rowlls *v.* Bebb, [1900] 2 Ch. 107.

Recent cases in England have held that the rule does not apply to income producing real estate when the sale has not been improperly postponed, even when the trustee is not authorized by the will to postpone conversion; and the life tenant is given the full income. *In re* Oliver, [1908] 2 Ch. 74; *In re* Searle, [1900] 2 Ch. 829; *In re* Darnley, [1907] 1 Ch. 159. See also Hope *v.* D'Hédouville, [1893] 2 Ch. 361; Casamajor *v.* Strode, 19 Ves. 390, n.; Lewin (11th ed.), 339. But in these cases the actual income was apparently as large as the equitable income would have been. None of them was a case like Edwards *v.* Edwards, 183 Mass. 581, where the unconverted property was unproductive land and conversion was delayed because of inability to find a purchaser at the proper price. It is doubtful if many jurisdictions in America will follow the English decisions in making this distinction between personalty and real estate.

It has also been held in England that the rule of Howe *v.* Dartmouth has no application to trusts established by deed. *Re* Van Straubenzee, [1901] 2 Ch. 779.

When it appears that the testator intended that until the trust property should actually be converted, the actual income, and that only, should be paid to the life beneficiary, his intention controls. *In re* Hab-

are reversionary interests or rights that may not fall in during the life of the tenant for life, so that he can enjoy a benefit

buck, [1896] 1 Ch. 754; Mackie *v.* Mackie, 5 Hare, 70; Hope *v.* D' Hédouville, [1893] 2 Ch. 361; Jordan *v.* Jordan, 192 Mass. 337, 344. If he has given his trustees or executors authority to continue the investments unconverted at their discretion, this fact is considered by some courts a strong indication that he intended the actual income to be paid to the life beneficiary. Buckingham *v.* Morrison, 136 Ill. 437; Hite's Devisees *v.* Hite's Ex'r, 93 Ky. 257; Heighe *v.* Littig, 63 Md. 301; Green *v.* Crapo, 181 Mass. 55; Outcalt *v.* Appleby, 36 N. J. Eq. 73; *In re* Thomas, [1891] 3 Ch. 482. See Patterson *v.* Vivian, 117 N. Y. S. 504. But this fact is not usually conclusive as to his intention. Brown *v.* Gellatly, 2 Ch. 751; Westcott *v.* Nickerson, 120 Mass. 410; Mudge *v.* Parker, 139 Mass. 153.

The effect of the Engilsh decisions on this point seems to be that authority to delay conversion will be presumed to have been given for the benefit of the whole estate, and not for the purpose of enabling the trustee to vary the rights of the life tenant and remainder-man. In the absence of an apparent intention that the discretion to postpone conversion was given to be exercised for the benefit of either of the parties in interest and in the absence of a positive direction, that pending conversion the actual income was to be paid to the life tenant, the rule seems to be to adjust the rights of the parties in interest as if the conversion had been made at the date of the testator's death. Thus it has been held that authority to trustees to postpone conversion without naming any particular investment does not entitle the life tenant to the actual income of wasting investments such as leaseholds and annuities. Porter *v.* Baddeley, 5 Ch. Div. 542; Blake *v.* O'Reilly, [1895] 1 Ir. R. 479; Rowlls *v.* Bebb, [1900] 2 Ch. 107. See Walker *v.* Shore, 19 Ves. 387.

But where the testator has authorized his trustees to postpone conversion as long as they think fit and pending conversion to pay the actual income to the tenant for life, it has been held that the entire profits of the testator's business should go to the life tenant, the trustees having delayed conversion for two years for the purpose of selling it profitably as a going concern. *In re* Chancellor, 26 Ch. Div. 42. See also *In re* Crowther, [1895] 2 Ch. 56; *In re* Smith, [1896] 1 Ch. 171. It was, however, intimated that it would have been otherwise if they had continued the business for the purpose of earning profits since that would not have been a proper exercise of their discretion.

Where trustees have been given the absolute discretion whether or not to convert at all, as well as discretion as to time, the actual income, and that only, would usually, if not always, be given to the life tenant. *Re* Leonard, 43 L. T. 664; *In re* Pitcairn, [1896] 2 Ch. 199; Yates *v.* Yates, 28 Beav. 637.

In a recent English decision where a trustee had improperly

from them, the trustee must sell and convert them into money if they have a value and admit of conversion.[1] As the tenant for life, if entitled to the possession, is a *quasi* or implied trustee for the remainder-man, and is accountable for the highest good faith,[2] so the trustee and the remainder-man must exercise the like good faith towards the tenant for life; and if they join in evicting him from the possession, they will be compelled to make good the rent, whether they received any or not, and that without any equitable allowances.[3] (*a*)

§ 550. In Sitwell *v.* Bernard, the testator directed his personal estate to be laid out in lands to be settled upon A. for life with remainder over, and that "the interest of his personal estate," meaning interest upon debts due that could not be collected immediately, "should be accumulated and laid out in lands to be settled to the same uses." Of course, if the collections of some outstanding debts were deferred for a considerable time, and the interest accumulated as directed, the tenant for life would lose the income of all the estates to be purchased with the accumulated interest. To obviate this hardship upon the tenant for life, the court confined the accumu-

[1] Howe *v.* Dartmouth, 7 Ves. 150; Fearns *v.* Young, 9 Ves. 549; Dimes *v.* Scott, 4 Russ. 200; *ante*, § 450. [*Supra*, § 548, note.]

[2] *Ante*, § 540.

[3] Kaye *v.* Powell, 1 Ves. Jr. 408.

used trust funds in his own business, paying 5 per cent interest and later repaying the principal, it was held that none of the 5 per cent should be given to the principal, although the fund if properly invested would not have yielded so large an investment. Slade *v.* Chaine, [1908] 1 Ch. 522.

The doctrine set forth in the foregoing note is confined to cases of delayed conversion and has not been extended to cases of improper investments by the trustee.

(*a*) If trustees have a discretion as to the manner of raising a charge, and the remainder is prejudiced by their postponing the raising of the charge from a wasting security, the court may adjust the burden of the charge according to the parties' interests and require the tenant for life to contibute. Blake *v.* O'Reilly, [1895] 1 Ir. R. 479; *In re* Harrison, 43 Ch. D. 55; *In re* Muffett, 39 Ch. Div. 534.

lation to one year from the testator's death, on the ground that one year was allowed for settling estates and collecting debts, and that, at the expiration of that time, the trustees should be presumed to be ready to make the investment as directed; and if it was not made at that time, that the tenant for life would be entitled to the interest received upon the personal estate, in the place of the income that he would receive from the real estate if the investment was made at the end of one year.[1] On the other hand, if a testator devises his real estate to be sold, and the proceeds thereof, and the rents and profits in the meantime, to be laid out in securities to be settled on A. for life, with remainders over, the accumulation of the rents and profits will be allowed for only one year; that is, there will be one year allowed for the sale of the estate, and the rents and profits may accumulate for that time. If the investment is not then made, the tenant for life is entitled to the rents and profits, as if the sale and investment had been made, and until it is made.[2] From the expressions used by Lord Eldon, in the case of Sitwell *v.* Bernard, it was supposed that in no case could the tenant for life receive any part of the income, where there was a direction to convert personalty into land, or land into personalty; and it was so determined in two cases,[3] but it is now settled that the tenants for life shall have the first year's income, where there is no express direction to accumulate.[4] (*a*)

[1] Sitwell *v.* Bernard, 6 Ves. 520; Entwistle *v.* Markland, and Stuart *v.* Bruere, cited 6 Ves. 528, 529; Griffith *v.* Morrison, cited 1 J. & W. 311; Tucker *v.* Boswell, 5 Beav. 607; Kilvington *v.* Gray, 2 S. & S. 396; Parry *v.* Warrington, 6 Madd. 155; Stair *v.* Macgill, 1 Bligh (N. S.), 662; Walker *v.* Shore, 19 Ves. 387; Taylor *v.* Clark, 1 Hare, 167; Cassamajor *v.* Pearson, 8 Cl. & Fin. 69.

[2] Noel *v.* Henley, 7 Price, 241; Vickers *v.* Scott, 3 Myl. & K. 500; Vigor *v.* Harwood, 12 Sim. 172; Greisley *v.* Chesterfield, 13 Beav. 288; Beauland *v.* Halliwell, 1 C. P. Coop. t. Cott. 169, note (a).

[3] Sitwell *v.* Bernard, 6 Ves. 520; State *v.* Hollingworth, 3 Madd. 161; Taylor *v.* Hibbert, 1 J. & W. 388.

[4] Angerstein *v.* Martin, T. & R. 238; Hewitt *v.* Morris, id. 244; Mac-

(*a*) The general rule is now well established that when property is devised or bequeathed in trust to pay the income to a person for life

§ 551. The rule, that a tenant for life has an interest in the first year's income, varies according to the circumstances of

pherson *v.* Macpherson, 16 Jur. 847; Green *v.* Blackwell, 32 N. J. Eq. 773; Van Blarcom *v.* Dager, 31 id. 783.

or for a limited time, he is entitled to either actual or equitable income from the date of the testator's death, unless the testator has indicated an intention that the enjoyment of income shall not begin until some later date. Cal. Civ. Code (1903), §§ 1366, 1368; Mass. Rev. Laws (1902), c. 141, § 24; Jordan *v.* Jordan, 192 Mass. 337, 345; Sargent *v.* Sargent, 103 Mass. 297; Keith *v.* Copeland, 138 Mass. 303; Weld *v.* Putnam, 70 Me. 209; Doherty *v.* Grady, 72 A. 869 (Me. 1908); Wethered *v.* Safe Dep. & Tr. Co., 79 Md. 153; Matter of Stanfield, 135 N. Y. 292; Bank of Niagara *v.* Talbot, 110 App. Div. (N. Y.) 519 (affirmed 184 N. Y. 576); Flickwir's Estate, 136 Pa. St. 374; Eichelberger's Estate, 170 Pa. St. 242; Baker *v.* Fooks, 8 Del. Ch. 84; Bishop *v.* Bishop, 81 Conn. 509; Macpherson *v.* Macpherson, 16 Jur. 847; Lewin (11th ed.), 333. See also *In re* Whitehead, [1894] 1 Ch. 678.

In a case where a certain share of income was directed to be paid to A. "quarterly during his natural life," and A. died three days before the end of the first quarter, it was held that his estate was nevertheless entitled to the income up to the time of his death. Union Safe Dep., etc., Co. *v.* Dudley, 104 Me. 297. To the same effect see Welch *v.* Apthorp, 203 Mass. 249; *In re* Hoyt, 116 N. Y. App. Div. 217 (189 N. Y. 511); *In re* Keogh, 98 N. Y. S. 433, 112 App. Div. 414.

Any income which accumulates in the hands of executors before the principal is turned over to trustees should be treated by the trustees as income, if the life beneficiary is entitled to it under the rules of law. Cushing *v.* Burrell, 137 Mass. 21; Smith *v.* Fellows, 131 Mass. 20. And if for any reason income to which the life beneficiary is entitled has meantime been invested, its earnings also belong to him. Lovering *v.* Minot, 9 Cush. 151.

When the trust principal is a residue which cannot be exactly ascertained until after the payment of debts and legacies which do not bear interest during the first year after the testator's death, it has been held, and seems to be the rule in England, that the life tenant should be given, not the income of the whole estate, but the income only of so much of the estate as is ultimately to constitute the trust fund. This principal of the residuary estate is to be determined by deducting from the entire fund out of which debts and legacies are to be paid, the sum which, "together with the income of such part for a year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted." Allhusen *v.* Whittell, 4 Eq. 295.

In making these adjustments as

each case. Mr. Lewin [1] states the following propositions and distinctions, gathered from the cases: (1) The tenant for life of a residue is not entitled to the income accruing, during the delay allowed for the payment of the legacies, on so much of the testator's property as is subsequently applied in paying them.[2] (2) If a testator desires that his personal estate shall be laid out and invested either in government or real securities in trust for one for life, with remainders over; or in a purchase of lands, with a direction, express or implied, for the investment thereof in the meantime in government or real security, and that the lands to be purchased shall be in trust for A. for life, with remainders over, — the income of the "government and real securities," of which the testator was possessed at the time of his death, these being the very investments contemplated by his will, belongs from the time of the death to the tenant for life.[3] (3) If the sale and investment, or conversion, is made immediately, during the first year, the tenant for life is entitled to the produce of the property in the converted form "from the time of the conversion," although the trustee had the whole year to convert it.[4] (4) Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life, before the conversion, is entitled, as the court has decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the

[1] Lewin on Trusts, 247, 248, 249 (5th ed.). [11th ed., 337–349.]

[2] Holgate *v.* Jennings, 24 Beav. 623; Crawley *v.* Crawley, 7 Sim. 427; Crawley *v.* Dixon, 23 Beav. 512; Fletcher *v.* Stevenson, 9 Hare, 371. [See *In re* Whitehead, [1894] 1 Ch. 678; Allhusen *v.* Whittell, 4 Eq. 295; *supra*, § 550, note *a*.]

[3] Hewitt *v.* Morris, T. & R. 241; La Terriere *v.* Bulmer, 2 Sim. 18; Angerstein *v.* Martin, T. & R. 232; Caldicott *v.* Caldicott, 1 Y. & C. Ch. 337. [See *supra*, § 548, note *a*.]

[4] La Terriere *v.* Bulmer, 2 Sim. 18; Gibson *v.* Bott, 7 Ves. 89; Angerstein *v.* Martin, T. & R. 240. [See *supra*, § 548, note *a*.]

between principal and income, interest upon such debts as bear interest should be treated as payable from income. Marshall *v.* Crowther, 2 Ch. Div. 199.

testator up to the time of the conversion, whether made in the course of the first year or subsequently; as, if personal estate is directed to be laid out in government or real securities, and part of the personal estate consists of bonds, stocks, &c., not being government or real securities, the tenant for life is entitled to the dividends from the death of the testator, or so much three per cent consolidated bank annuities as such part of the personal estate, not being government or real securities, would have purchased at the expiration of one year from the testator's death.[1] (5) Where the non-conversion is attended with any risk to the property, as in case of bonds, &c., the remainder-man, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce;[2] but suppose land to have yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainder-man call back the extra rent received by the tenant for life; or, as the remainder-man gets all that was ever intended for him, viz., the undepreciated property, may the tenant for life keep the full rent? (*a*) If not, then conversely, if the land yields no annual fruit, or less than what the purchase-money would yield, the tenant for life should have a claim against the remainder-man.[3] But if the tenant for life is also a trustee for sale, and neglects to sell, he cannot be allowed to put into his own pocket the higher annual produce which has arisen "from his own" laches; for no trustee can derive a profit from the exercise or non-exercise of his own

[1] Dimes *v.* Scott, 4 Russ. 495; Douglass *v.* Congreve, 1 Keen, 410; Taylor *v.* Clark, 1 Hare, 161; Morgan *v.* Morgan, 14 Beav. 72; Holgate *v.* Jennings, 24 Beav. 623; Llewellyn's Trust, 29 id. 171; Hume *v.* Richardson, 8 Jur. (N. S.) 686. [See *supra*, § 548, note *a*.]

[2] Dimes *v.* Scott, 4 Russ. 495; Stroud *v.* Gwyer, 28 Beav. 130.

[3] Yates *v.* Yates, 28 Beav. 637. [Edwards *v.* Edwards, 183 Mass. 581.]

(*a*) It has been held that he can, but on the ground that the rule of Howe *v.* Dartmouth does not apply to land. *In re* Oliver, [1908] 2 Ch. 74; *In re* Searle, [1900] 2 Ch. 829; *In re* Darnley, [1907] 1 Ch. 159. See Hope *v.* D'Hédouville, [1893] 2 Ch. 361; Casamajor *v.* Strode, 19 Ves. 390, n.

office.[1] (6) In Gibson *v.* Bott,[2] leaseholds from a defect of title could not be sold, and the court gave the tenant for life interest at four per cent on the value from the death of the testator. It does not appear from the report at what time the value was to be taken; but according to recent cases it should have been ascertained at the expiration of one year from the testator's death.[3] (7) If a testator's estate comprises funds not immediately convertible, but receivable by instalments, such as a testator's share in a partnership, assessed at a certain sum and payable by instalments, carrying interest at five per cent, the tenant for life is allowed four per cent, from the death of the testator, on the value taken at the expiration of one year from the testator's death.[4] (8) If it appears from the terms of the will, that the testator intended to give his trustees a discretion as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule.[5]

[1] Wightwick *v.* Lord, 6 H. L. Cas. 217.

[2] 7 Ves. 89.

[3] Caldicott *v.* Caldicott, 1 Y. & C. Ch. 312; Sutherland *v.* Cook, 1 Col. C. C. 503. [See *supra*, § 550, note *a*.]

[4] Llewellyn's Trust, 29 Beav. 171; Meyer *v.* Simonson, 5 De G. & Sm. 723. [See Rowlls *v.* Bebb, [1900] 2 Ch. 107; *In re* Goodenough, [1895] 2 Ch. 537; Wentworth *v.* Wentworth, [1900] A. C. 163.]

[5] Mackie *v.* Mackie, 5 Hare, 70; Wrey *v.* Smith, 14 Sim. 202; Sparling *v.* Parker, 9 Beav. 524; Johnstone *v.* Moore, 4 Jur. (N. S.) 356; Murray *v.* Glasse, 17 Jur. 816. [See Blake *v.* O'Reilly, [1895] 1 Ir. R. 479; Rowlls *v.* Bebb, [1900] 2 Ch. 107, to the effect that merely giving trustees discretion as to the time of conversion is not usually sufficient to show an intention that they have the right to vary the interests of the life tenants and the remainder-men. See also § 548, note *a*.]

Mr. Hill says, that "the interest which the tenant for life will take during the first year after the testator's death is yet an unsettled question. This question admits of four possible solutions, and the decisions of very eminent judges may be urged in support of each: (1) First, the tenant for life may be entitled to nothing until the expiration of a twelvemonth from the testator's death, according to the opinion of Sir John Leach in Scott *v.* Hollingworth, 3 Madd. 161; Vickers *v.* Scott, 3 Myl. & K. 509, and of Sir Thos. Plumer in Taylor *v.* Hibbert, 1 J. & W. 308 (see Tucker *v.* Boswell, 5 Beav. 607); and the income in the meantime is to be added

§ 552. The liability of the equitable tenant for life in respect to repairs and waste is substantially the same as the

to and form a part of the capital of the residue. Both those learned judges appear to have assumed that this opinion was in accordance with the established rule of the court, and Sir Thos. Plumer treats this general rule as having been so settled by Lord Eldon in the case of Sitwell *v.* Bernard, 6 Ves. 522. However, in the subsequent case of Angerstein *v.* Martin, T. & R. 238, and see Hewitt *v.* Morris, id. 244, that great judge himself disclaimed any intention of establishing any such general rule by his decision in Sitwell *v.* Bernard, 6 Ves. 522, — a decision which he stated to have been founded on the direction to accumulate, which formed an ingredient in that case; and his lordship's further observations on the decisions in Sitwell *v.* Bernard and Scott *v.* Hollingworth have materially weakened the authority of those cases, if indeed they do not expressly overrule them. The case of Vickers *v.* Scott, 3 Myl. & K. 500, arose upon real estate, which was directed to be sold, and the point in question does not seem to have been much argued in that case. (2) According to the decision of A. Hart, V. C., in La Terriere *v.* Bulmer, 2 Sim. 18, the *cestui que trust* for life during the first year after the testator's death will take the income of such parts of the estate as are properly invested at the testator's death, or may become so invested during that year. Lord Eldon's decisions in Gibson *v.* Bott, 7 Ves. 95; Hewitt *v.* Morris, T. & R. 241, are also in favor of this doctrine, which is also strongly supported by the observations of Sir J. Wigram, V. C., in the recent case of Taylor *v.* Clark, 1 Hare, 173. See also Caldicott *v.* Caldicott, 1 Younge & C. Ch. 312. (3) The tenant for life may be entitled to the income arising from the property in its existing state during the first year from the testator's death. And this view of the law is supported by Lord Eldon's decision in the case of Angerstein *v.* Martin, T. & R. 232, and that of Lord Langdale, M. R., in Douglass *v.* Congreve, 1 Keen, 410. It has been observed by Vice-Chancellor Wigram, 1 Hare, 172, 1 Younge & C. Ch. 318, that it might be a question whether Lord Eldon's decree in Angerstein *v.* Martin was intended to impeach the law as laid down in La Terriere *v.* Bulmer; and even if such were Lord Eldon's intentions, it must have been considered as overruled in Lord Lyndhurst's decision in Dimes *v.* Scott, 4 Russ. 209. The later case of Douglass *v.* Congreve, 1 Keen, 410, which is clearly inconsistent with Dimes *v.* Scott, was also strongly questioned by Vice-Chancellor Wigram in the recent case of Taylor *v.* Clark, 1 Hare, 172, in which all the authorities on this subject are collected and reviewed, and his honor's decision, in which he followed Dimes *v.* Scott in preference to Douglass *v.* Congreve, is directly at variance with the latter case. (4) According to the determination of Lord Lyndhurst in Dimes *v.* Scott, the tenant for life will take, not the interest actually arising from the property during the first year after the testator's death, but the amount of the dividends on so much three per cent stock as would have been produced by the conversion of the property at the end of that year. And this solution of the

liability of a legal tenant for life,[1] except that the trustee cannot interfere with the possession of the equitable tenant for life if he neglects to repair; nor for permissive waste,[2] if there is nothing in the settlement that gives him the management or control of the estate. A legal tenant for life may cut timber for repairs,[3] though he cannot cut timber for sale, or to pay for repairs.[4] So a trustee may cut timber for repairs, if the tenant for life will furnish the means for using the timber in repairing;

question has recently been adopted by Vice-Chancellor Wigram in the case of Taylor *v.* Clark, 1 Hare, 161." Hill on Trustees, pp. 388, 389.

Mr. Hill further observes, " that, in this conflict of authority, the question can be put to rest only by the decision of the court of the highest authority. And that in the mean time the fourth alternative, as established by Lord Chancellor Lyndhurst in Dimes *v.* Scott, 4 Russ. 299, and adopted in Taylor *v.* Clark, 1 Hare, 172, must be considered as carrying with it the greatest authority in its favor." Mr. Spence, Eq. Jur. 564, fully discusses the authorities, and approves of Dimes *v.* Scott. That case was also followed in Morgan *v.* Morgan, 14 Beav. 72, in which the case of Douglass *v.* Congreve was overruled. Holgate *v.* Jennings, 24 Beav. 623; *Re* Llewellyn's Trust, 29 Beav. 171; Hume *v.* Richardson, 8 Jur. (N. S.) 686, followed Dimes *v.* Scott. And see Robinson *v.* Robinson, 1 De G., M. & G. 247; Scholefern *v.* Redfen, 2 Dr. & Sm. 173; 32 L. J. Ch. 627; Meyer *v.* Simonson, 5 De G. & Sm. 726.

In the United States, the question has not been largely discussed, but in Evans *v.* Inglehart, 6 G. & J. 191, and Williamson *v.* Williamson, 6 Paige, 303, the court assumed that the law was correctly stated in the third alternative, or in Angerstein *v.* Martin, 2 Sim. 18. In Massachusetts, the matter is regulated by statute, that the tenant for life shall be entitled to the income for the first year upon the fund given for his use. Gen. Stat. c. 97, § 23 [R. L. (1902) c. 141, § 24]; Sohier *v.* Eldredge, 103 Mass. 351; Sargent *v.* Sargent, id. 297; Brown *v.* Gellaty, L. R. 2 Ch. 751; Lamb *v.* Lamb, 11 Pick. 371; Minot *v.* Amory, 2 Cush. 377, 388; Lovering *v.* Minot, 9 id. 151. [For recent American decisions to the same effect, see *supra*, § 550, note *a*.]

[1] Powys *v.* Blagrave, 4 De G., M. & G. 458, and cases cited; Harnett *v.* Maitland, 16 M. & W. 257.

[2] Powys *v.* Blagrave, Kay, 495; 4 De G., M. & G. 448; *Re* Skingley, 3 M. & G. 221; Gregg *v.* Coates, 23 Beav. 33. [*In re* Courtier, 34 Ch. Div. 136; *In re* Hotchkys, 32 Ch. Div. 408; *In re* Cartwright, 41 Ch. Div. 532.]

[3] Co. Litt. 54 b.

[4] Co. Litt. 53 b; Gower *v.* Eyre, G. Coop. 156; Marlborough *v.* St. John, 5 De G. & Sm. 181. [Armstrong *v.* Wilson, 60 Ill. 226; Noyes *v.* Stone, 163 Mass. 490; McKee *v.* Dail, 1 Tenn. Ch. App. 689.]

for the trustee can sell no timber for repairs, nor can he use any other trust funds for the purpose, unless specially authorized by the instrument of trust. Nor can the trustees raise any sum out of, or make any charge upon, the *corpus* of the estate itself for repairs, however the want of such repairs may be occasioned.[1] (*a*) The equitable tenant for life must defray the expenses of such repairs out of his own income, or the trustee must defray them out of the interest of the tenant for life. The repairs of the tenant for life are his own voluntary act; and, however substantial and beneficial to the estate and the remainder-man, he can make no claim for them upon the inheritance. Nor would a court, upon his application, direct any repairs to be made at the expense of the remainder-man;[2] though it was said in one case that the rule might not be without exception; as where an estate was settled to certain uses, and a fund was directed to be applied to the purchase of an estate to be settled to the same uses, it might be more beneficial to the remainder-man that part of the fund should be applied to the repair and preservation of the estate already settled.[3] (*b*) It would be an extraordinary case, however, to

[1] *Ante*, § 477; Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hibbert *v.* Cooke, 1 S. & S. 552; Nairn *v.* Majoribanks, 3 Russ. 582; Caldicott *v.* Brown, 2 Hare, 144; Thurston *v.* Dickinson, 2 Rich. Eq. 317; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Jones *v.* Dawson, 19 Ala. 672; Thurston *v.* Thurston, 6 R. I. 296; Martin's App., 23 Penn. St. 438. In this case it was doubted if it was constitutional for the legislature to authorize such an expenditure by the trustee.

[2] Amory *v.* Lowell, 104 Mass. 265; Hibbert *v.* Cooke, 1 S. & S. 552; Caldicott *v.* Brown, 2 Hare, 144; Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hamer *v.* Tilsley, Johns. (Eng.) 486; Dent *v.* Dent, 30 Beav. 363; Nairn *v.* Marjoribanks, 3 Russ. 582; Corbett *v.* Laurens, 5 Rich. Eq. 301; Sharshaw *v.* Gibbs, 1 Kay, 333.

[3] Caldicott *v.* Brown, 2 Hare, 145; *Re* Barrington's Est., 1 John. & H. 142.

(*a*) But see note (*b*), *infra* this section.

(*b*) The strict rule that a life tenant cannot make the remainder-man pay for permanent improvements and alterations which benefit the estate in remainder ought not to be applied to trustees who have the duty of managing the trust property for the interests of both;

justify such a proceeding.[1] But where trustees are directed to purchase, or invest in real estate, they may put such estate

[1] Dunne *v.* Dunne, 3 Sm. & Gif. 22; 7 De G., M. & G. 207; Dent *v.* Dent, 30 Beav. 363.

and cases frequently arise where the trustee has the authority to use the trust principal to pay for outlay upon the trust property which he cannot properly pay from income. See *supra*, § 477, and notes.

Repairs of the ordinary kind, such as are made to keep the property in as good condition as when it became part of the trust estate, should be paid out of income. Little *v.* Little, 161 Mass. 188; Abell *v.* Brady, 79 Md. 94; Jordan *v.* Jordan, 192 Mass. 337, 343; Smith *v.* Keteltas, 70 N. Y. S. 1065, 62 App. Div. 174; *In re* Tracy, 83 N. Y. S. 1049, 87 App. Div. 215.

But the expense of permanent improvements, such as are likely to outlast the life estate, or of permanent alterations should not be charged to income, but should be paid from the *corpus* if the trustee had the right to use *corpus* for this purpose. Abell *v.* Brady, 79 Md. 94, 101; *In re* Parr, 92 N. Y. S. 990; Boon *v.* Hall, 78 N. Y. S. 557, 76 App. Div. 520; Smith *v.* Keteltas, 70 N. Y. S. 1065, 62 App. Div. 174; Stevens *v.* Melcher, 152 N. Y. 551; Greene *v.* Greene, 19 R. I. 619. Thus the cost of changing into stores the lower story of buildings which had been used as dwelling houses has been held to have been properly charged to principal, as was also the cost of changing an apartment hotel into an office building. But the cost of entirely replumbing a house, repapering, painting, and putting in a new elevator to replace an old one, all amounting to nearly double the annual rent, has been held to have been properly charged to income. Little *v.* Little, 161 Mass. 188. New construction, such as entirely rebuilding, would usually come out of principal, although the result is to increase the income. Stevens *v.* Melcher, 152 N. Y. 551; Smith *v.* Keteltas, 70 N. Y. S. 1065, 62 App. Div. 174. And the duty to pay for repairs and to repair waste out of income does not usually oblige a trustee to set aside a sinking fund out of income for the purpose of rebuilding when structures on the property shall become antiquated. Smith *v.* Keteltas, 70 N. Y. S. 1065, 62 App. Div. 174.

Where alterations and additions benefit both the life tenant and the remainder-man, the courts will not usually set aside or revise the trustee's apportionment unless it is clearly wrong. Little *v.* Little, 161 Mass. 188; Jordan *v.* Jordan, 192 Mass. 337.

Where trustees with power to sell property left by the testator and to reinvest, choose to retain the property and expend considerable sums in repairs and alterations, it has been held that the expense might be properly charged to principal as a new investment of trust funds. Sohier *v.* Eldredge, 103 Mass. 345. But this is not necessarily true of all repairs needed at the

in tenantable repair, and the expense of such repair will be chargeable to the trust fund as part of the purchase-money.[1] A testator may be under such obligations in his leases or leaseholds which he devises for life to one, with remainder over, that the trustees must make repairs, and charge the expense to the *corpus* of the estate.[2] So it has been held, that where a tenant for life makes large and permanent repairs, and subsequently the trustee sells the estate for the accommodation of all parties, the tenant for life may have a fair proportion for his repairs out of the *corpus* of the proceeds of the sale.[3] And in one case the court ordered the trustee to apply a sum from the personal estate to the construction of warehouses, and provided for a reservation from the rents of interest upon the sum expended during the continuance of the life-estate.[4] Where a testator directs that the "net proceeds" after paying charges and expenses shall go to the life tenants, all ordinary repairs and improvements and replacement of articles worn out are chargeable to the income; but probably a different rule would apply to a large and unusual expenditure, as for additional buildings.[5]

§ 553. Both the equitable tenant for life and the remainder-man have an insurable interest in the trust estate; and if one insures his own interest in the buildings, and they are burned, neither can call upon the other for any part of the insurance money. (*a*) The trustee also has an insurable interest in the

[1] Parsons *v.* Winslow, 16 Mass. 361. [Greene *v.* Greene, 19 R. I. 619. See Sohier *v.* Eldredge, 103 Mass. 345.]

[2] Harris *v.* Poyner, 1 Drew. 174. And see a distinction in Hickling *v.* Boyer, 1 De G., M. & G. 762. [*In re* Courtier, 34 Ch. Div. 136.]

[3] Gambril *v.* Gambril, 3 Md. Ch. 259.

[4] Cogswell *v.* Cogswell, 2 Edw. 231.

[5] *In re* Jones, 103 N. Y. 621.

death of the testator. Little *v.* Little, 161 Mass. 188.

In England the Settled Estates Acts have greatly enlarged the powers of trustees in respect to repairs and improvements. See *supra*, § 477 and notes.

(*a*) A life tenant usually has no duty of insuring the interest of the remainder-man, and insurance

buildings upon the trust estate; and if he insures, and the buildings are entirely destroyed by fire, the insurance money received is so far a conversion of the property into personalty that the trustee cannot rebuild, unless he is specially directed by the instrument of trust to do so; but the money so received must remain personal property, and the tenant for life and the remainder-man will receive their respective rights and interests according to the terms of the settlement.[1] If a building is partially burned or injured, and the trustees have an insurance policy, they should apply the money to the repair of the building.[2] Of course the repair of trust property is frequently the

[1] See *ante*, § 487; Graham *v.* Roberts, 8 Ired. Eq. 99; Haxall *v.* Shippen, 10 Leigh, 536; Lerow *v.* Wilmarth, 9 Allen, 382. [See *In re* Miller, 62 N. J. Eq. 764, 67 N. J. Eq. 431.]

[2] Brough *v.* Higgins, 9 Grat. 408.

money received upon his own interest belongs entirely to him. Spalding *v.* Miller, 103 Ky. 405; Harrison *v.* Pepper, 166 Mass. 288; De Witt *v.* Cooper, 18 Hun, 67.

It has been held in one or two cases that a life tenant as a *quasi* trustee for the remainder-man can insure, not merely his own life interest, but the whole estate, and that, where he has insured the whole estate in his own name and there has been a total loss, he may recover from the insurance company the whole amount as trustee for himself and the remainder-man. Welch *v.* London Assurance Co., 151 Pa. St. 607; Green *v.* Green, 50 S. C. 532; Clyburn *v.* Reynolds, 31 S. C. 118. But it has also been held, and it seems upon the better reasoning, that where he insures in his own name and carries the policy at his own expense, the contract and the rights under it are wholly his, and if he succeeds in collecting from the insurance company the value of more than his insurable interest, the remainder-man has no interest in it. Gaussen *v.* Whatman, 93 L. T. 101. See also Spalding *v.* Miller, 103 Ky. 405.

Insurance by a trustee who represents both life beneficiaries and remainder-men naturally goes to the whole estate, and insurance money received by him in case of loss is held upon the same trust as the property itself. Bridge *v.* Bridge, 146 Mass. 373.

A trustee who holds the legal title for both life tenant and remainder-man usually has the duty of insuring; and accordingly insurance premiums paid by a trustee would probably be universally treated as an ordinary expense of holding and managing the property, and therefore payable out of income. Bridge *v.* Bridge, 146 Mass. 373; Stevens *v.* Melcher, 152 N. Y. 551. As to the practice of trustees, see Loring's Trustee's Handbook, (3d ed.) 140.

subject of express provisions in wills and settlements, and trustees must be governed by the directions contained in the instrument of trust. So there are frequent directions in instruments of trust respecting insurance of property, and the use and application of the insurance money in case of loss or damage by fire. Trustees will be governed by such directions in all cases. In Pennsylvania, there are express enactments by which repairs can be made upon trust property at the mutual expense of the tenant for life and the remainder-man; the manner of the repairs and the proportion of the expenses are to be determined by a court upon the application of any party in interest.[1]

§ 554. The ordinary taxes, and expenses in the care and management of the capital, are charges on the life estate, to be paid out of the [income].[2] (*a*) But in some cases where an ar-

[1] Act May 3, 1855, § 3; Purdon's Dig. 973. [4 Purdon's Digest (13th ed.), p. 4885, § 42.]

[2] Peirce *v.* Burroughs, 58 N. H. 302.

(*a*) A life tenant enjoying the income of property must keep it free from incumbrance by paying the ordinary yearly taxes; and a trustee must pay such taxes out of income of the property taxed. Hagan *v.* Varney, 147 Ill. 281; Varney *v.* Stevens, 22 Me. 331; Bridge *v.* Bridge, 146 Mass. 373; Holmes *v.* Taber, 9 Allen, 246; Dufford *v.* Smith, 46 N. J. Eq. 216; Cairns *v.* Chabert, 3 Edw. Ch. 312; Matter of Tracy, 87 N. Y. App. Div. 215, 218; Peirce *v.* Burroughs, 58 N. H. 302.

The same is true of water rates. Bridge *v.* Bridge, 146 Mass. 373.

It has been held that an annual tax assessed on trust property on May first for the year following is payable out of income of a life beneficiary who died before the end of the year, and is not apportionable. Holmes *v.* Taber, 9 Allen, 246. But it seems to be the practice in Pennsylvania to apportion the tax in such cases. Crump's Estate, 13 Pa. Co. Ct. R. 286.

Taxes assessed on an estate before the death of a testator constitute a liability of his estate, even though they are for a period which begins only a few days before his death. Matter of Babcock, 52 Hun, 142.

Taxes assessed because of betterments in the form of permanent improvements in the locality or in the property itself, such as laying out a new street or putting in a new sewer, should be borne by both life tenant and remainder-man. Moore *v.* Simonson, 27 Or. 117; Plympton *v.* Boston Dispensary,

rangement which gives rise to taxes is entered into for the benefit of both capital and income, the taxes may be divided between them.[1] The *income* of a trust estate must bear the expense of administering it.[2] It is the duty of the trustee to see that the equitable tenant for life, in rightful possession of the estate, pays all rates and taxes; but if the trustee pays them he cannot charge them in his account with other parties in interest.[3] If, however, an assessment is made against the estate for something in the nature of permanent improve-

[1] Barger's App., 100 Penn. St. 239.

[2] Butterbaugh's App., 98 Penn. St. 351.

[3] Amory *v.* Lowell, 104 Mass. 265; Fountaine *v.* Pellett, 1 Ves. Jr. 342; Tupper *v.* Fuller, 7 Rich. Eq. 170; Cairns *v.* Chalbert, 2 Edw. Ch. 312; Jones *v.* Dawson, 19 Ala. 672; Varney *v.* Stevens, 22 Maine, 331. In case of a widow being tenant for life, one-third of the taxes and repairs were charged to her, Cochran *v.* Cochran, 2 Des. 521; but no general principle can be stated upon this case.

106 Mass. 544; Estate of Miller, 1 Tuck. (N. Y. Sur.) 346. Where such a tax is assessed upon an estate held in trust, the trustee has simply to pay the whole tax out of the principal in which both life tenant and remainder-man are interested. Plympton *v.* Boston Dispensary, 106 Mass. 544.

Taxes assessed because of lasting improvements which, however, are likely to wear out during the probable existence of the life estate, should be paid out of income or by the life tenant. Reyburn *v.* Wallace, 93 Mo. 326; Hitner *v.* Ege, 23 Pa. St. 305; Delker *v.* Owensboro, 98 S. W. 1031 (Ky. 1907). If the betterments, though not permanent, are likely to last beyond the probable life of the life tenant, the tax should be equitably apportioned according to the benefit likely to be received by each estate. Wordin's Appeal, 71 Conn. 531; Huston *v.* Tribbetts, 171 Ill. 547; Bobb *v.* Wolff, 54 Mo. App. 515; Pratt *v.* Douglas, 38 N. J. Eq. 516; 542; Pack *v.* Sherwood, 56 N. Y. 615; Fleet *v.* Dorland, 11 How. Pr. 489.

Taxes upon unimproved property which produces no income should be paid out of the *corpus* of the estate. Patterson *v.* Johnson, 113 Ill. 559, 576; Clark *v.* Middlesworth, 82 Ind. 240; Stone *v.* Littlefield, 151 Mass. 485; Murch *v.* Smith M'f'g Co., 47 N. J. Eq. 193; *In re* Martens' Estate, 39 N. Y. S. 189.

Inheritance taxes upon the interest of a life tenant or a life beneficiary are payable out of income. Such a tax upon the interest of the remainder-man is payable out of the *corpus*. Sohier *v.* Eldredge, 103 Mass. 345; Brown's Estate, 208 Pa. St. 161.

ment or betterment of the whole estate, the assessment may be ratably and equitably divided between the tenant for life and the remainder-man.[1] (*a*) And if a third person with consent of the executor advances money to pay the taxes, neither the executor nor the life *cestui* having means to pay them, such advances become a charge on the estate.[2] The equitable tenant for life must pay the interest upon all incumbrances upon the estate,[3] to the extent of the rents and profits.[4] If a tenant pays off, and takes an assignment of an incumbrance to himself, his representatives may claim from the remainder-man the difference between the rents and profits of the estate and the interest upon the incumbrance, if he notifies the remainder-man that the rents and profits are insufficient to pay the interest;[5] in such cases, the tenant for life cannot be charged with wilful default, like a mortgagee in possession, except upon some very peculiar ground.[6] A second tenant for life is not under any obligation to apply the rents and profits accruing to him to pay off arrears of interest which accrued during the life of the preceding tenant for life; but such arrears become, as between the second tenant for life and the remainder-man, a

[1] Plympton *v.* Boston Dispensary, 106 Mass. 546. [Moore *v.* Simonson, 27 Or. 117; Estate of Miller, 1 Tuck. (N. Y.) 346.]

[2] Griffin *v.* Fleming, 72 Ga. 703.

[3] Jones *v.* Sherrard, 2 Dev. & Bat. Eq. 187; Hinves *v.* Hinves, 3 Hare, 609; Caulfield *v.* Maguire, 2 Jo. & La. 141; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; 4 Kent, 74.

[4] Kensington *v.* Bouverie, 7 De G M. & G. 134; 19 Beav. 39.

[5] Ibid.; Kensington *v.* Bouverie, 7 H. L. Cas. 557. [See Tindall *v.* Peterson, 71 Neb. 166.]

[6] Ibid. See Campbell *v.* Campbell, 27 Mich. 454; Swaine *v.* Perine, 5 Johns. Ch. 482; Van Vronker *v.* Eastman, 7 Met. 157.

(*a*) In the absence of statute provisions to the contrary, personal property held in trust is taxable in the city or town where the trustee resides; and if there are two or more trustees not residing in the same city or town, the tax is divided, the trustees being treated as equal owners. Trustees *v.* Augusta, 90 Ga. 634, 20 L. R. A. 151 and note. But the matter of taxation of trust property has been largely dealt with by statute. See Mass. R. L. (1902), c. 12, § 23, cl. 5.

charge upon the inheritance.[1] The expenses of cultivating a farm or plantation, or of running a manufacturing establishment, must be wholly defrayed by the tenant for life, or the person entitled to the income arising from such operations.[2] If the land under incumbrance is sold, the proceeds may be invested, and the tenant for life may take the income for life, or the net proceeds may be divided according to the annuity tables. The tables, however, are not to be taken absolutely; for reference must be had to the health of the tenant for life, and also to the condition of the land and its annual income, and whether the land is so situated that the price is rising or falling, and whether it can be easily improved.[3] (*a*)

[1] Sharshaw *v.* Gibbs, 1 Kay, 333. Penrhyn *v.* Hughes, 5 Ves. 99, appears to be overruled.

[2] Tupper *v.* Fuller, 7 Rich. Eq. 170; Jones *v.* Dawson, 19 Ala. 672; North Amer. Coal Co. *v.* Dyett, 7 Paige, 9.

[3] Niemcewicz *v.* Gahn, 3 Paige, 652; Atkins *v.* Kron, 8 Ired. Eq. 1; Gambril *v.* Gambril, 3 Md. Ch. 259; Chesson *v.* Chesson, 8 Ired. Eq. 141; Williams' Case, 3 Bland, 186; Jones *v.* Sherrard, 2 Dev. & Bat. 189; 4 Kent, 74.

(*a*) A trustee who places an incumbrance on the trust property or allows one to remain, should pay the interest out of income. If he pays off the principal of the incumbrance, he should pay it all out of the trust fund of which both life tenant and remainder-man are beneficiaries. Martin *v.* Martin, 146 Mass. 517; Plympton *v.* Boston Dispensary, 106 Mass. 544. See *In re* Muffett, 39 Ch. Div. 534; *In re* Harrison, 43 Ch. Div. 55.

If a remainder-man pays off the incumbrance, the life tenant must continue to pay interest to the remainder-man, or must pay to the remainder-man the present worth of an annuity equal to the annual interest running during the number of years which constitute the expectancy of life of the tenant. Moore *v.* Simonson, 27 Or. 117; Plympton *v.* Boston Dispensary, 106 Mass. 544.

There is not much authority upon the question of whether brokerage charges upon the sale of trust property should be paid from income or from principal. Much doubtless depends upon the purpose of the sale. If the purpose is to convert the property into the form of investment authorized or directed by the trust instrument, it would seem that the expense of making the conversion ought to be paid from the *corpus* of the property unless a different intention is apparent. If the sale is made merely for the purpose of

§ 555. If an equitable tenant for life becomes bankrupt or insolvent, all his interest goes to his assignees, and the trustee must hold it subject to their disposition;[1] unless the property is so given that it goes over upon the bankruptcy of the *cestui que trust*. And although it is held that a general provision that a *cestui que trust* shall not alienate his interest, or that it shall not go to his creditors or to his assignees, if the interest is an absolute one, is void, as contrary to the rule of law, that when an estate is given to a man no restrictions inconsistent with the gift are valid,[2] yet a gift made in such form that it is to go over upon alienation or bankruptcy of the *cestui que trust* is good.[3] And if the limitations are interwoven into the gift

[1] *Ante*, § 386; Wells *v.* Ely, 3 Stockt. 172.

[2] Rockford *v.* Hackman, 9 Hare, 475; 10 Eng. L. & Eq. 67; Co. Litt. 223 a; Hallett *v.* Thompson, 5 Paige, 583; Heath *v.* Bishop, 4 Rich. Eq. 46; Dick *v.* Pitchford, 1 Dev. & Bat. 480; Rider *v.* Mason, 4 Sandf. Ch. 352; Co.Litt. 223 a; Blackstone Bank *v.* Davis, 21 Pick. 43; Bramhall *v.* Ferris, 14 N. Y. 44; Etches *v.* Etches, 3 Drew. 441; Tillinghast *v.* Bradford, 5 R. I. 205; Sparhawk *v.* Cloon, 125 Mass. 263; Daniels *v.* Eldridge, id. 350; Smith *v.* Moore, 37 Ala. 327; McIllvaine *v.* Smith, 42 Mo. 45; Bremer *v.* Bremer, 18 Hun (N. Y.), 147. But see *per contra* in the United States, *ante*, § 386 *a*, *et seq.*

[3] Dommett *v.* Bedford, 3 Ves. 149; Cooper *v.* Wyatt, 5 Madd. 482; Shee *v.* Hale, 13 Ves. 404; Brandon *v.* Aston, 2 N. C. C. 24; Twopenny *v.* Peyton, 10 Sim. 487; Page *v.* Way, 3 Beav. 20; Lewes *v.* Lewes, 6 Sim. 304; Rock-

changing an investment, the expense of the change would usually be one of the ordinary expenses of management, and as such payable from income. See R. I. Hospital Trust Co. *v.* Waterman, 23 R. I. 342. Thus it has been held in Massachusetts that brokerage on the sale and purchase of shares of stock was payable from income. Heard *v.* Eldredge, 109 Mass. 258. In Jordan *v.* Jordan, 192 Mass. 337, it was held that the same rule applied to the large commissions payable upon the sale of real estate. Soon after the last decision, the legislature of Massachusetts provided by statute that "trustees' and brokers' commissions and other expenses properly incurred and paid by trustees for or in connection with the sale, exchange, or purchase of property shall be charged to capital." Acts of 1907, c. 371. This statute obviates all necessity in Massachusetts of distinguishing between sales and purchases for the purpose of converting to the authorized form of investment and mere changes of investment in the course of management.

itself, they are valid; as if an estate is given to A. until he becomes bankrupt, the limitation is part of the gift, and the estate will go over upon the happening of the event.[1] If, however, any interest remains in the *cestui que trust* for life, it must go to his assignees.[2] If it is in the discretion of the trustees whether the *cestui que trust* shall have an interest or not, the assignees will take nothing;[3] but if the trustees have exercised their discretion, the assignees will take the interest conferred by it.[4] If the limitation is to take effect only upon alienation by the *cestui que trust*, it will not take effect upon bankruptcy, and the assignees will be entitled.[5] The law does not permit a man to settle his property on himself, with a limitation over in case of bankruptcy.[6] (*a*) If the income is given to the *cestui*

ford *v.* Hackman, 9 Hare, 475; Dickson's Trust, 1 Sim. (N. S.) 37; *Ex parte* Baddam, 2 De G., F. & J. 625; Muggridge's Trusts, John. (Eng.) 625; Dorsett *v.* Dorsett, 31 L. J. Ch. 122; Joel *v.* Mills, 3 K. & J. 458; *In re* Stultz, 17 Jur. 615. [See *supra*, § 388, note *a*.]

[1] Stagg *v.* Beekman, 2 Edw. Ch. 89; Ashhurst *v.* Given, 5 Watts & S. 323; Vaux *v.* Parke, 7 id. 19; Eyrick *v.* Hetrick, 13 Penn. St. 491; Girard Ins. Co. *v.* Chambers, 46 id. 485; Norris *v.* Johnston, 5 id. 289; Fisher *v.* Taylor, 2 Rawle, 33; Shee *v.* Hale, 13 Ves. 404; Cooper *v.* Wyatt, 5 Madd. 482; *Ex parte* Oxley, 1 B. & B. 257; Sharpe *v.* Cosserat, 20 Beav. 470; Yarnold *v.* Moorhouse, 1 R. & M. 364; Lockyer *v.* Savage, 2 Strange, 947; Stevens *v.* James, 4 Sim. 499; Kearsly *v.* Woodcock, 3 Hare, 185; Churchill *v.* Marks, 1 Coll. C. C. 441; Large's Case, 2 Leon. 82. As to other limitations see Grace *v.* Webb, 2 Phil. 701; Lloyd *v.* Lloyd, 2 Sim. (N. S.) 255; Heath *v.* Lears, 1 Eq. R. 55; Potts *v.* Richards, 24 L. J. Ch. 488; Hooper *v.* Dundass, 10 Barr, 75; Com'th *v.* Stauffer, id. 350; Maddox *v.* Maddox, 11 Grat. 804.

[2] Rippon *v.* Norton, 2 Beav. 63; Younghusband *v.* Gisborne, 1 Coll. N. C. C. 400; Piercy *v.* Roberts, 1 Myl. & K. 4; Lord *v.* Bunn, 2 Younge & C. Ch. 98; Green *v.* Spicer, 1 R. & M. 395; Snowden *v.* Dales, 6 Sim. 524; Rockford *v.* Hackman, 9 Hare, 475.

[3] Godden *v.* Crowhurst, 10 Sim. 642; Kearsley *v.* Woodcock, 3 Hare, 185; Lord *v.* Bunn, 2 Younge & C. Ch. 98; Twopenny *v.* Peyton, 10 Sim. 487; 1 Col. C. C. 400; 10 Jur. 419. [Stone *v.* Westcott, 18 R. I. 685; *In re* Coleman, 39 Ch. Div. 443.]

[4] Ibid.

[5] Lear *v.* Leggett, 2 Sim. 479; 1 R. & M. 690; Whitfield *v.* Pricket, 2 Keen, 608; Wilkinson *v.* Wilkinson, G. Coop. 259; 3 Swanst. 528. [*Re* Harvey, 60 L. T. 710.]

[6] Mackason's App., 42 Penn. St. 330; Higginbottam *v.* Holmes, 19 Ves.

(*a*) The objection to such a provision is that it is a fraud upon creditors when the limitation over is voluntary, even though the

que trust for a particular purpose which would be defeated, the property interest may not go to the assignees.[1] (*a*)

§ 556. At common law rent could not be apportioned; and if a tenant for life died near the end of a quarter, his representatives could receive no part of the rent for the term.(*b*) Statutes have now changed that rule in England;[2] and there are statutes in many of the United States making rent apportionable.[3] In States where there are such statutes the trustees must pay so much of the rent as accrued before the death of the tenant for life to his representatives, and the balance to the remainder-man.[4] (*c*) But an annuity to a tenant for life

98; *Ex parte* Hill, 1 Cooke, Bank. Law, 291; Murphy *v.* Abraham, 15 Ir. Ch. 371; *In re* Murphy, 1 Sch. & Lef. 44.

[1] See *ante*, §§ 386 *a*, 386 *b*, 387, 388.

[2] 11 Geo. II. c. 19; 4 Wm. IV. c. 22; St. Aubin *v.* St. Aubin, 1 Dr. & Sm. 611; Longworth's Est., 23 L. J. Ch. 104. [Apportionment Act of 1870, 33 and 34 Vict. c. 35.]

[3] 3 Kent, Com. 471; 3 Green. Cruise, Dig. 117, note. [Ark. St. (1894) § 4453; Laws of Del. (1893) c. 120, § 15; Ill. R. S. (1903) c. 80, § 35; Ind. St. (1901) § 7104; Ind. Terr. St. (1899) § 2837; Iowa Code (1897), § 2988; Ky. St. (1909) § 3896; Mass. Rev. Laws (1902), c. 141, §§ 24, 25; Miss. Code (1892), § 2543; Mo. R. S. (1899) § 4098; N. J. Gen. St. (1893) II. p. 1915, § 2; N. Y. Code Civ. Pro. § 2870; N. C. Code (1908), § 1988; Pa. St. 1 Brightly's Purdon, (12th ed.) p. 584, §§ 71, 72; R. I. Gen. Laws (1909), c. 254, §§ 38, 39; S. C. Civ. Code (1902), §§ 2408, 2409; Tenn. Code 1896, § 4184; Va. Code (1904), §§ 2809, 2810; W. Va. Code (1899), c. 94, § 1; c. 95, § 1; Wis. St. (1898) § 2193.]

[4] Price *v.* Pickett, 21 Ala. 741.

settlor was not indebted at the time of making the settlement. Mackintosh *v.* Pogose, [1895] 1 Ch. 505. The provision is valid as against the settlor, and when in case of bankruptcy the creditors have been satisfied, the limitation over takes effect, so that creditors in a second bankruptcy have no rights. *In re* Johnson Johnson, [1904] 1 K. B. 134. See Godefroi on Trusts (3d ed.), p. 919.

(*a*) The various points touched upon in this paragraph are dealt with more fully in § 386 *et seq.* and notes.

(*b*) See Dexter *v.* Phillips, 121 Mass. 178; Sohier *v.* Eldredge, 103 Mass. 345.

(*c*) These statutes do not usually change the common-law rule as to rent which is not due at the death of a testator, but are limited to rent as between life tenant and re-

is not apportionable; and if the tenant dies within three days of the day of payment, his representatives are not entitled to any proportion of the annuity.[1] But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant.[2] (*a*) [Regular] dividends upon shares in corporations and upon stocks are not

[1] Wiggin *v.* Swett, 6 Met. 194; Tracy *v.* Strong, 2 Conn. 659; Earp's Will, 1 Pars. Eq. 468; Mannings *v.* Randolph, 1 Southard, 144; Waring *v.* Purcell, 1 Hill, Eq. 199; Gheen *v.* Osborn, 17 Serg. & R. 171; McLemore *v.* Goode, Harp. Eq. 275. [Nehls *v.* Sauer, 119 Iowa, 440; Chase *v.* Darby, 110 Mich. 314.]

[2] Hay *v.* Palmer, 2 P. Wms. 581; Pearly *v.* Smith, 3 Atk. 260; Howell *v.* Hanforth, 2 Bl. R. 1016; Gheen *v.* Osborn, 17 Serg. & R. 171. [Henry *v.* Henderson, 81 Miss. 743; Quinn *v.* Madigan, 65 N. H. 8; *In re* Lackawanna Co., 37 N. J. Eq. 26; Parker *v.* Seeley, 56 N. J. Eq. 110; Blight *v.* Blight, 51 Pa. St. 420; R. I. Hospital Trust Co. *v.* Harris, 20 R. I. 160; *In re* Cushing's Will, 58 Vt. 393.] But see Tracy *v.* Strong, 2 Conn. 659; Fisher *v.* Fisher, 4 Am. Law Jour. (N. S.) 539.

mainder-man. Sargent *v.* Sargent, 103 Mass. 297; Dexter *v.* Phillips, 121 Mass. 178; Marshall *v.* Moseley, 21 N. Y. 280; Huff *v.* Latimer, 33 S. C. 255; Rowan *v.* Riley, 6 Bax. (Tenn.) 67.

(*a*) Some States have refused to include in the exception, annuities given in lieu of dower. Mower *v.* Sanford, 76 Conn. 504; Chase *v.* Darby, 110 Mich. 314. See note to Henry *v.* Henderson, 63 L. R. A. 616 (81 Miss. 743). Other States have extended the exception to include all annuities which seem to have been intended for the support of the annuitant. Quinn *v.* Madigan, 65 N. H. 8; *In re* Lackawanna Co., 37 N. J. Eq. 26; *In re* Cushing's Will, 58 Vt. 393. In England and several States statutes have made annuities apportionable up to the death of the annuitant. English Apportionment Act of 1870, 33 & 34 Vict. c. 35; Ky. Statutes (1909), § 3846; Mass. R. L. (1902) ch. 141, § 25; N. Y. Code Civ. Pro. § 2720; Code of N. C. (1908) § 1988; Va. Code (1904), § 2810; W. Va. Code (4th ed. 1899), ch. 95, § 1; Gen. Laws R. I. (1909) ch. 254, § 39 (confined to annuities given by testamentary instruments).

When no different intention is apparent in the instrument creating the annuity, it is taken to be payable yearly on the anniversary of the date of the instrument, or, in case of a will, on the anniversary of the date of testator's death. Henry *v.* Henderson, 81 Miss. 743; Kearney *v.* Cruikshank, 117 N. Y. 99; Gibson *v.* Bott, 7 Ves. 89 and note.

apportionable, and nothing is earned for the shareholders until the dividends are declared.[1] (*a*) But interest-money upon notes, bonds, mortgages, and similar securities accrues from day to day, although it is not payable until a fixed day; it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives.[2] (*b*) In Massachusetts, annuities, rent, interest, and in-

[1] *Ante*, § 545, n.; Earp's Will, 1 Pars. Eq. 453; Earp's Appeal, 28 Penn. St. 368; Wilson *v.* Harman, 2 Ves. 672; Rashleigh *v.* Master, 3 Bro. Ch. 99. [Greene *v.* Huntington, 73 Conn. 106, 115; Mann *v.* Anderson, 106 Ga. 818; Hyatt *v.* Allen, 56 N. Y. 553; Clapp *v.* Astor, 2 Edw. Ch. 379; Ross's Estate, 2 Kulp, 472; Union Safe Dep. etc. Co. *v.* Dudley, 104 Me. 297.] But see *Ex parte* Rutledge, Harp. Eq. 65; Foote's App., 22 Pick. 299; Moseley *v.* Eastern R. R. Co., 43 N. H. 558; Granger *v.* Bassett, 98 Mass. 462; Johnson *v.* Bridgewater, 14 Gray, 274; Crawford *v.* North Eastern Ry., 3 K. & J. 744; Coleman *v.* Columbia Oil Co., 51 Penn. St. 74. [See *supra*, §§ 544, 545 and notes, as to extraordinary dividends.]

[2] Earp's Will, 1 Pars. Eq. 453; Sweigart *v.* Berks, 8 Serg. & R. 299; Roger's

(*a*) The same reasoning applies to profits of a partnership between the days of accounting. Profits of a business do not accrue at a steady rate from day to day, and are therefore incapable of apportionment. Browne *v.* Collins, 12 Eq. 586; Jones *v.* Ogle, 8 Ch. 192; McKeen's Appeal, 42 Pa. St. 479. The important dates are the dates marking the beginning and the end of the period for which the profits are ascertained, not the date on which they are ascertained. For example, profits of a partnership for a period of accounting ending May 1 would belong to the person entitled to income on that date, although the profits were not ascertained until several months after his interest had ceased. Browne *v.* Collins, 12 Eq. 586; Jones *v.* Ogle, 8 Ch. 192.

This same rule has been applied to a dividend declared by a corporation during the life of the life tenant, but payable on a date before which he dies. Hill *v.* Newichawanick Co., 8 Hun, 459, 71 N.Y. 593. And it has been held that a corporation dividend expressly declared for a period ending May 31 belonged to a life tenant who died on June 12, although the dividend was not declared until June 23, after his death. Johnson *v.* Bridgewater, etc., Co., 14 Gray, 274. See Bates *v.* Mackinley, 31 Beav. 280; Londesborough *v.* Somerville, 19 Beav. 295.

Under the English Apportionment Act, regular dividends of corporations are apportioned as if the earnings accrued from day to day. This seems to be true under the North Carolina statute. N. C. Code (1908), § 1988. For a different interpretation of the New York statute, see Matter of Kane, 64 App. Div. (N. Y.) 566.

(*b*) The English courts used to distinguish between interest on

come are made apportionable in all cases by statute, unless the instrument of trust manifests a different intention.[1] (a)

Trust, 1 Dr. & Sm. 611. [Dexter *v.* Phillips, 121 Mass. 178; Riggs *v.* Cragg, 26 Hun, 89, 98; Banner *v.* Lowe, 13 Ves. 135; Union Safe Dep. & Tr. Co. *v.* Dudley, 104 Me. 297, 312.]

[1] Gen. St. c. 97, § 24; [Rev. Laws (1902), c. 141, § 25;] Sohier *v.* Eldredge, 103 Mass. 345.

debts or notes and interest on the public funds, holding that the latter is not apportionable at common law, being within the class of payments coming due at fixed times. Pearly *v.* Smith, 3 Atk. 260; Wilson *v.* Harman, 2 Ves. Sen. 671. See also Warden *v.* Ashburner, 2 De G. & Sm. 366.

The Massachusetts court has followed the English rule as to interest on the public debt, except in cases coming within the Massachusetts statute of apportionment, and has applied the rule to interest on coupon bonds, including those of private corporations. The court reasons that each coupon is a separate contract to pay a definite amount at a certain time, and represents an obligation distinct from the bond and from every other coupon. Dexter *v.* Phillips, 121 Mass. 178. To the same effect, see Union Safe Dep. etc. Co. *v.* Dudley, 104 Me. 297, 312. In Pennsylvania and New York a different view seems to have been taken. Wilson's Appeal, 108 Pa. St. 344 (overruling Earp's Will, 1 Pars. Eq. 453); U. S. Trust Co. *v.* Tobias, 21 Abb. N. C. 393.

Semi-annual dividends paid to depositors in savings banks, though often spoken of as interest, are in the class of dividends of corporations, and as such are not apportionable except by statute provisions. Green *v.* Huntington, 73 Conn. 106, 114. But interest on deposits which are subject to check has been held to be apportionable. Union Safe Dep. etc. Co. *v.* Dudley, 104 Me. 297, 312.

(a) It is important to note that the Massachusetts statute (R. L. (1902) c. 141, § 25) applies only to cases where the limited estate is created by will or other instrument, and so does not apply where a widow or husband acquires a life estate under statute. Moreover, the statute applies only as between life tenants or persons whose estate or enjoyment of income is to terminate on the happening of some contingency, and the persons entitled after them. As it applies only at the termination of such limited estate, it has no application to apportionment on changes of investment. Sargent *v.* Sargent, 103 Mass. 297; Hemenway *v.* Hemenway, 134 Mass. 446. The Rhode Island statute is similar in this respect. R. I. Gen. Laws (1909), ch. 254, §§ 38, 39. See also Huff *v.* Latimer, 33 S. C. 255; Rowan *v.* Riley, 6 Bax. (Tenn.) 67.

Dividends on shares of stock are not apportionable even under the statute, and probably not profits of a business. Granger *v.* Bassett, 98 Mass. 462.

§ 556 *a*. Where a trustee died largely indebted to his trust estate by a breach of the trust, the income of which trust estate was payable to a tenant for life, and the principal sum went over, and, several years after the trustee's death, a compromise was effected, by which a part of the original sum was received, it was held that, as between the tenant for life and the remainder-man, the sum paid was to be treated as composed of a principal debt due at the date of the transaction out of which the claim originated, or the date of the breach of the trust, and of interest from that day up to the day of the testator's death, and of interest upon said aggregate of principal and interest from the testator's death to the day of settlement and payment; and that the principal sum thus ascertained, and the interest thereon up to the testator's death, were chargeable against the *corpus* of the trust fund, and the interest since the testator's death was to be charged as income.[1] The administrator of a tenant for life can maintain a bill for an account against the trustee for income accruing before the death of the tenant.[2]

[1] Maclaren *v.* Stainton, L. R. 4 Eq. 448; L. R. 11 Eq. 382; Turner *v.* Newport, 2 Phill. 14; Cox *v.* Cox, L. R. 8 Eq. 343; *In re* Grabowski's Settlement, L. R. 6 Eq. 12. [See Parsons *v.* Winslow, 16 Mass. 361; Cook *v.* Lowry, 95 N. Y. 103.]

[2] Brown *v.* Hicks, 30 Ga. 777. [Union Safe Dep. etc. Co. *v.* Dudley, 104 Me. 297.]

CHAPTER XIX.

TRUSTS UNDER A WILL FOR THE PAYMENT OF DEBTS; FOR THE PAYMENT OF LEGACIES; AND FOR RAISING PORTIONS.

§ 557. Payment of testator's debts at common law and under statutes.
§ 558. The present law of England.
§ 559. The law in the United States as to the payment of a testator's debts.
§§ 560, 561. The character of trusts under a will for the payment of debts.
§§ 562–566. The order in which assets are marshalled for the payment of debts, as between heirs, legatees, and devisees.
§ 567. The effect of charging debts upon real estate.
§ 568. Legacies generally payable out of personal property.
§ 569. The effect of charging legacies upon real estate.
§§ 570–572. When legacies are charged upon real estate.
§ 573. When some legacies are charged upon real estate, and others are not.
§ 574. What amounts to the payment of a legacy so as to discharge the testator's estate.
§ 575. Where legacies bear interest.
§ 576. The charge of a legacy upon real estate follows the land.
§ 577. Trusts for raising portions.
§§ 578, 579. Whether a portion is to be raised during the life of a tenant for life.
§ 580. The usual forms of drawing settlements at the present time.
§ 581. Powers of trustees to raise portions.
§ 582. At what time portions are to be raised.
§ 583. Where trustees neglect to raise portions as directed.
§ 584. Interest, expenses, and accumulations.

§ 557. At common law, the personal estate only of a deceased person was liable for his debts, unless they were debts by specialty or matter of record. However large his real estate might be, no recourse could be had to it to pay simple-contract debts, although his personal property was utterly insufficient to meet them.[1] The common law has been changed, and it is

[1] Kidney *v.* Coussmaker, 1 Ves. Jr. 436, Mr. Sumner's notes.

now provided by statute that copyhold and freehold estates shall be assets for the payment of simple-contract and other debts. The operation of the act is confined to those estates where no provision is made by will for payment of debts, or to those which the person dying has not by his last will charged with, or devised subject to, the payment of his debts.[1]

§ 558. The law in England stands thus: personal estate always has been liable for debts, and is now primarily liable, so far as it will go. All creditors have the right to proceed for payment of their claims out of such personalty, and the deceased person can make no provision, or trust by will, which shall in any way change, alter, postpone, or defeat the rights of creditors in personal property; that is to say, a trust created by will in personal property was and is wholly inoperative in relation to creditors.[2] But real estate, being wholly exempt from simple-contract debts of the deceased person, may be devised in trust for their payment. Courts favored these trusts, for the reason that it was just and equitable that a man's debt should be paid; and if he charged his lands in any way for their payment, or created a trust for that purpose, such trust would be so carried into effect as to answer the purposes for which they were created, and the ends of justice. By the statute above cited, real estate in England is now made assets for the payment of debts; but if the deceased person in his will has charged the whole or a particular part of his real estate, or created a trust in the whole or any part of it, creditors must have recourse to such real estate for the payment of their claims in the manner pointed out in the will.[3] Thus, in England, a trust created by a will in real estate, unlike a trust in

[1] 3 & 4 Wm. IV. c. 104.

[2] Evans *v.* Tweedy, 1 Beav. 55; Freake *v.* Cranefeldt, 4 Myl. & Cr. 499; Scott *v.* Jones, 4 Cl. & Fin. 398, overruling Lord Brougham in same case, 1 R. & M. 255.

[3] Collis *v.* Robins, 1 De G. & Sm. 139; Hunt *v.* Bateman, 10 Ir. Eq. 371; Francis *v.* Gower, 5 Hare, 39; Young *v.* Wilton, 10 Ir. Eq. 10.

chattels, is valid and of controlling effect for the payment of debts. (*a*)

§ 559. In the United States, both real and personal property are liable for the debts of a deceased person; and no valid trust can be created by will for the payment of debts in either personal or real estate to the injury of the rights of creditors. The statutes of the several States point out how estates shall be administered for the payment of debts. Creditors in all cases have the right to demand payment, according to the provisions of the statutes. Thus trusts, charges, or other directions in wills for the payment of debts have no legal operation, so far as creditors are concerned. If a testator gives to A. his real estate in trust to pay his debts, creditors may still claim that the estate shall be settled in a probate court, and the land sold under a license, and the proceeds applied according to law, and not according to the terms of the will. So absolute is this rule that creditors do not hold the relation of *cestuis que trust* to the trustees, or other persons appointed under a will to apply the property to the payment of debts. It is well understood, that the statute of limitations does not run against a *cestui que trust* so long as the relation of trustee and *cestuis que trust* is acknowledged to exist; but a trust or charge in a will upon certain property for the payment of debts creates no such relation, between the trustee and creditor, that the statute of limitations ceases to operate. On the contrary, the claims of a creditor against the estate of a deceased person will be barred by the statute of limitations, notwithstanding certain property is given in trust, or charged with the payment of such claims.[1] (*b*) The princi-

[1] Carrington *v.* Manning, 13 Ala. 628; Lewis *v.* Bacon, 3 Hen. & Mun. 106; Bull *v.* Bull, 8 B. Mon. 332; Agnew *v.* Fetterman, 4 Penn. St. 62; Cornish *v.* Wilson, 6 Gill, 318; Hines *v.* Spruill, 2 Dev. & Bat. Eq. 93; Man *v.* Warner, 4 Whart. 455; Jones *v.* Scott, 4 Cl. & Fin. 398; Freake *v.* Cranefeldt, 3 Myl. & Cr. 499; Evans *v.* Tweedy, 1 Beav. 55; Hall *v.* Bumstead, 20 Pick. 2; Smith *v.* Porter, 1 Binn. 209; Rooseveldt *v.* Mark, 5 Johns. Ch.

(*a*) See *In re* Stephens, 43 Ch. D. 39, 44.

(*b*) It has been held that where a will provides that the executor

ple is, that the statutes having limited the time within which claims against a deceased person's estate must be presented, the mere fact that he designates certain property to pay his debts (which the creditors are not obliged to resort to) shall not avail to prolong the time for presentation of claims. But if the creditors assent to the trust thus created in a will, and an executor settles the estate accordingly, the creditors will be estopped from claiming a legal settlement of the estate; and the executor will become a trustee to settle the estate, as directed in the will and assented to by the creditors.[1] And it is said that a trust thus created to pay debts will prevent the lien of a judgment from expiring without being renewed, unless the creditor has neglected to renew the judgment within the statute period.[2] So it has been held that if a testamentary trustee to pay debts sells the land which he is directed to sell for their payment, and applies the money to the purposes named, the land will be discharged from the lien of the other creditors.[3]

§ 560. But while the creation of a trust by will, in personal or real estate, is wholly without legal operation so far

266; Rogers *v.* Rogers, 3 Wend. 503; Dundas *v.* Blake, 11 Ir. Eq. 138; Steele *v.* Steele's Adm'r, 64 Ala. 460.

[1] Bank of U. S. *v.* Beverly, 1 How. 134.

[2] Baldy *v.* Brady, 15 Penn. St. 111; Alexander *v.* McMurry, 8 Watts, 504; Trinity Church *v.* Watson, 50 Penn. St. 518; Pettingill *v.* Pettingill, 60 Maine, 412. To have this effect, the will must clearly show an intention to create such a trust and to take the estate out of pale of the law. Steele *v.* Steele's Adm'r, 64 Ala. 460.

[3] Cadbury *v.* Duval, 10 Penn. St. 267.

hold the property in trust to pay debts, the creditors must at least present their claims to the executor within the time provided by the statute; that otherwise their claims will be barred by the statute. Foley *v.* McDonnell, 48 Wash. 272. But if a creditor manifests his acceptance of such a provision for his benefit before his claim has been barred by the statute of limitations, there seems no reason why the tentative lien provided in the will should not become fully operative and take the place of the lien which the law gives him. McKinley *v.* Coe, 66 N. J. Eq. 70; Gordon *v.* McDougall, 84 Miss. 715. See *In re* Stephens, 43 Ch. Div. 39.

as creditors are concerned, it may be of the utmost consequence, as between heirs, legatees, devisees, and other persons interested in the estate. Thus, where a testator gave two-thirds of a farm and all the stock and property connected with it to a son, in fee, with an express order and direction that the son should pay all his just debts out of the estate so given, and then gave all the residue, both real and personal, to his wife in fee, and made her executrix of the will, the debts not being paid by the son, the creditors brought suits at law against the executrix. The son had sold the farm, but part of the purchase-money had been applied to pay a debt due to the purchaser from the son, and part was unpaid, the purchaser having notice of the terms of the bequest to the son. The executrix brought a bill against the son and the purchaser, who had the purchase-money in his hands, to compel the performance of the trust, and the payment of the debts out of the farm thus bequeathed to the son. It was held that the debts were not a mere charge on the devisee, but also a charge on the lands devised.[1]

[1] Gardner *v.* Gardner, 3 Mason, 178. See Sands *v.* Champlin, 1 Story, 376; *In re* Butler, [1894] 3 Ch. 250; Turner *v.* Laird, 68 Conn. 198; Creesy *v.* Willis, 159 Mass. 249; Mitchell's Estate, 182 Penn. St. 530; Hattersley *v.* Bissett, 52 N. J. Eq. 693; Bergman *v.* Bogda, 46 Ill. App. 351; Kelly *v.* Richardson, 100 Ala. 584; Nash *v.* Ober, 2 App., D. C. 304; Deering *v.* Kerfoot, 89 Va. 491. Mr. Justice Story said, in Gardner *v.* Gardner: "It remains only to advert to the objection that the present plaintiffs are not competent to maintain the present suit, because they have not yet paid the testator's debts. The argument is, that the creditors alone have a right to maintain a suit to enforce the charge, unless they have been paid by the executrix or the devisees. The right of the creditors to enforce the charge in equity cannot be doubted. Green *v.* Lowe, 3 Bro. Ch. 218. But I am also of the opinion, that the executrix, who, by the law of the State, is responsible for the payment of the debts, where there are real or personal assets, has also a right to enforce the charge. She might procure a license from the proper authority to sell the real estate, upon the deficiency of the personal assets, pursuant to the statute. She might in this way, perhaps, reach the estate charged with the debts, but the remedy would be circuitous, and might be inadequate to all the purposes of equity. She is not compellable to adopt that course; but may directly, by the assistance of a court of equity, reach the fund which, in the eyes of such a court, is appropriated

§ 561. This case of Gardner *v.* Gardner, and Mr. Justice Story's opinion, sufficiently explain the effect of a testator's attempting to create a trust or charge upon a portion of his property for the payment of his debts. Though the creditors may reach the property directly through the executor, and seize that which the testator has charged, or any other property, those of the testator's heirs, legatees, or devisees, who have been disappointed or may be disappointed and deprived of their rights by being compelled to part with the property given to them, may bring a process against the devisee or trustee who has received the property charged with the payment of debts, and compel him to execute the trust imposed upon him, or charged upon the property given to him.

§ 562. The general rule of the English and American courts is, that the personal property of a deceased person is primarily liable for the payment of his debts. It has been seen that, at common law, personal assets were exclusively liable for simple-contract debts. When real estate in England became subject to debts, the same rule applied as was always held in the United States, — that real estate should not be called upon for payment until the personal property was exhausted. This rule extends to the payment of debts secured by mortgage, so that the heir to whom the mortgaged property has descended has a

for the payment of the debts. If she can do this after payment of the debts, there is no reason why she may not do it before, since she is entitled to avert an impending mischief, and is not bound to advance her own money to pay the creditors. Besides, the testator has disposed of all his real and personal estate by his will; and the executrix, who is a residuary legatee and devisee, has no right to apply the personal estate bequeathed to other legatees to the payment of the debts where there are other funds appropriated to the purpose; and she has a direct interest to relieve property devised to herself from the burden of the debts. The like remark equally applies to the other plaintiffs, who are devisees exonerated by the will from any contribution or lien. I entertain no doubt, therefore, that the plaintiffs are competent to maintain the present suit. It is the common case of a party subjected to a burden chargeable upon her in law, but from which she is entitled to be relieved in equity by a paramount obligation on another to exonerate her from the whole burden."

right to call upon the executor to apply the personal assets to the discharge of the mortgage.[1] But if a testator purchases land subject to a mortgage, his personal estate is not bound to pay off and discharge such mortgage, unless an intention to that effect can be gathered from his will.[2]

§ 563. The next fund in order for the payment of debts is that portion of the real estate specially set apart in the will, or charged with, or given in trust for, the payment of debts. Of course, where a testator has indicated what part of his real estate shall be devoted to the payment of debts, it is just and equal between those interested in his estate, aside from creditors, that his will should be carried out. A distinction is drawn between a particular and specific charge upon a particular parcel or portion of land, and a general charge of debts.[3]

[1] McCampbell *v.* McCampbell, 5 Lit. 95; Wyse *v.* Smith, 4 G. & J. 295; M'Dowell *v.* Lawless, 6 Monr. 141; Haleyburton *v.* Kershaw, 3 Des. 105; Dunlop *v.* Dunlop, 4 Des. 305; Stuart *v.* Carson, 1 Des. 500; Garnet *v.* Macon, 6 Call, 608; 2 Brock. 185; Rogers *v.* Rogers, 1 Paige, 188; Livingston *v.* Livingston, 3 Johns. Ch. 148; Hoye *v.* Brewer, 3 G. & J. 153; Stevens *v.* Gregg, 10 G. & J. 143; Tessier *v.* Wyse, 3 Bland, 185; Lewis *v.* Thornton, 6 Munf. 87; Hawley *v.* James, 5 Paige, 318; Ancaster *v.* Mayer, 1 Bro. Ch. 454; McKay *v.* Green, 3 Johns. Ch. 56; Livingston *v.* Newkirk, id. 312; Stroud *v.* Barnett, 3 Dana, 394; Schemerhorn *v.* Barhydt, 9 Paige, 29; Chase *v.* Lockerman, 11 G. & J. 185; Seaver *v.* Lewis, 14 Mass. 83; Adams *v.* Brackett, 4 Met. 280; Gore *v.* Brazier, 4 Mass. 354; Brydges *v.* Phillips, 6 Ves. 570; Kelsey *v.* Western, 2 Comst. 500; Gibson *v.* McCormick, 10 G. & J. 65; Holman's App., 24 Penn. St. 174; Dandridge *v.* Minge, 4 Rand. 397; Lupton *v.* Lupton, 2 Johns. Ch. 614; Morris *v.* Mowatt, 2 Paige, 587; Mollan *v.* Griffith, 3 Paige, 402; Hancock *v.* Minot, 8 Pick. 29; Ruston *v.* Ruston, 2 Yeates, 54; Todd *v.* Todd, 1 Serg. & R. 453; Martin *v.* Frye, 17 Serg. & R. 426; Miller *v.* Harwell, 3 Murph. 195; McLoud *v.* Roberts, 4 Hen. & M. 443; Foster *v.* Crenshaw, 3 Munf. 514; Waring *v.* Waring, 2 Bland, 673; Marsh *v.* Marsh, 10 B. Mon. 360; Leavitt *v.* Wooster, 14 N. H. 551; Sims *v.* Sims, 2 Stock. Ch. 158; Clinefetter *v.* Ayers, 16 Ill. 329; Hayes *v.* Jackson, 6 Mass. 149; 4 Kent, 421; Hewes *v.* Dehon, 3 Gray, 206.

[2] Andrews *v.* Bishop, 5 Allen, 490; Cumberland *v.* Codrington, 2 Johns. Ch. 229, 257, 272; Rogers *v.* Rogers, 1 Paige, 188; Hewes *v.* Dehon, 3 Gray, 206, 208.

[3] Manning *v.* Spooner, 3 Ves. 114; Donne *v.* Lewis, 3 Bro. Ch. 257; Milnes *v.* Slater, 8 Ves. 295; Davies *v.* Topp, 1 Bro. Ch. 524; Powis *v.* Corbet,

§ 564. Next in order for the payment of debts is land which descends to the heir. There being no intention expressed concerning this land, it comes next after the personalty, which is always first, and that part of the land which by an express direction is made liable for debts. If these two funds are not sufficient, that part of the testator's land which had descended to his heirs, without any intention whatever expressed in regard to them, must, if necessary, be taken to discharge his debts.[1]

§ 565. The last fund to be resorted to for the payment of debts is land specifically devised, although there may be a general charge of debts upon all the lands. The testator may be supposed to have expressed a particular intention that the specific devisees of land shall have it at any rate, unless all other funds for the payment of his debts have been exhausted, and it is necessary to resort to the specifically devised land, in order that his debts may be paid.[2]

§ 566. Thus the general rule is, that a deceased person's estate is to be applied to the payment of his debts in the following order: (1) The general personal estate; (2) Estates specifically devised for the payment of debts; (3) Estates descended; (4) Estates specifically devised, though charged generally with the payment of debts. And it requires express words, or the clear intent of the testator, to disturb this order.[3] Therefore,

3 Atk. 556; Harmood *v.* Oglander, 8 Ves. 131; Martin *v.* Frye, 17 Serg. & R. 426.

[1] Oneal *v.* Mead, 1 P. Wms. 693; Cope *v.* Cope, 2 Salk. 449; Howell *v* Price, 1 P. Wms. 291; White *v.* White, 2 Vern. 43; Johnson *v.* Milksopp, id. 112; Evelyn *v.* Evelyn, 2 P. Wms. 659; Gray *v.* Gray, 1 Ch. Cas. 296; Gower *v.* Mead, Pr. Ch. 2; Commonwealth *v.* Shelby, 13 Serg. & R. 348; Warley *v.* Warley, 1 Bail. Eq. 398; Robards *v.* Wortham, 2 Dev. Eq. 173; Livingston *v.* Livingston, 3 Johns. Ch. 148. [Scott *v.* Cumberland, 18 Eq. 578.]

[2] Livingston *v.* Livingston, 3 Johns. Ch. 148; Chase *v.* Lockerman, 11 G. & J. 186; Ruston *v.* Ruston, 2 Yeates, 54.

[3] Stephenson *v.* Heathcote, 1 Ed. 38; Inchquin *v.* French, 1 Cox, 1; Webb *v.* Jones, id. 245; Bootle *v.* Blundell, 1 Mer. 193; Barnwell *v.* Cawdor,

while creditors are not generally confined to this order for the payment of their claims, legal representatives, heirs, legatees, and devisees have rights against each other for relief in case this order is disarranged; for instance, if land, specifically devised, is taken for the payment of debts, the specific devisee may call upon the legal representatives to make up his loss from the personal estate in their hands; if that has been already exhausted, he may call upon the land that was specifically devised for the payment of debts; if that has been applied, he may call upon the heir to whom any portion of the land has descended; if such land has already been taken, then the specific devisees shall contribute ratably to each other.[1] (*a*)

§ 567. This order of payment or contribution among those interested in an estate is called the marshalling of assets. Of course, it is subject to the will of the testator, for he may direct out of what part of his estate his debts shall be paid; but it requires a direct expression, or a manifest intent, to change this order. It might be supposed, that, if a testator gave away his personal property, and charged his debts upon his real estate, it would be a plain manifestation of an intention to change the order. But such is not the case; for when a testator gives his personal estate, he is supposed to give it subject to the payment of his debts, that being the first fund available for the purpose; and when he charges his real estate with the payment of his debts, he is supposed to charge his real estate with the payment of such debts as may remain unpaid after his personal estate is exhausted. Merely giving away personal estate and

3 Madd. 453; Watson *v.* Brickwood, 9 Ves. 447; Livingston *v.* Newkirk, 3 Johns. Ch. 312; Livingston *v.* Livingston, id. 148; Stroud *v.* Barnett, 3 Dana, 394; Warley *v.* Warley, 1 Bail. Eq. 397; Schemerhorn *v.* Barhydt, 9 Paige, 29; Chase *v.* Lockerman, 11 G. & J. 185; Cook *v.* Dawson, 29 Beav. 123; Seaver *v.* Lewis, 14 Mass. 83; Hewes *v.* Dehon, 3 Gray, 205; Plympton *v.* Fuller, 11 Allen, 140.

[1] Livingston *v.* Livingston, 3 Johns. Ch. 148; Gen. Stat. Mass. c. 92, §§ 29–36 [R. L. (1902), c. 135, §§ 26, 27]; Blaney *v.* Blaney, 1 Cush. 107.

(*a*) See 1 Ames on Trusts (2d ed.), 438, n.

charging debts upon the real estate is not inconsistent with the application of the personal estate to the payment of debts, so far as it will go, and of calling upon the real estate only when the personal estate is exhausted. Therefore the rule is, that there must not only be a giving away of the personalty, and a charging of debts on the realty, but there must be something further to show that the testator intended to exonerate the whole personalty from the payment of the debts, and to charge all the debts upon the realty, and not simply what debts may remain after exhausting the personal estate.[1] (*a*)

§ 568. Legacies, whether specific or general, are payable out of the personal assets of a testator, and the duty of paying them devolves upon the executor in the due course of his administration. If all the personal assets are exhausted in the payment of debts, specific legatees have a claim for compensation out of some other fund, if in law they have a higher equitable claim in the marshalling of the assets; or for contribution, if they stand upon the same equitable equality. If, however, the personal assets are exhausted in the payment of debts, general legacies must fail, unless the testator has charged the

[1] Ancaster *v.* Mayer, 1 Bro. Ch. 454; 1 Lead. Cas. Eq. 505, with English and American notes; Aldrich *v.* Cooper, 8 Ves. 382; 2 Lead. Cas. Eq. 56, English and American notes; Silk *v.* Prime, 1 Bro. Ch. 138, n.; 1 Dick. 384, 2 Lead. Cas. Eq. 82, and notes; Allan *v.* Gott, L. R. 4 Ch. 439; Tench *v.* Cheese, 6 De G., M. & G. 453. The purpose of this work, in treating of trusts for the payment of debts, does not call for a more particular statement of the rules that govern the marshalling of assets among all the persons who may call for such marshalling by reason of some interest being taken from them or endangered. The reader will find the cases, both English and American, collected in the notes to the leading cases above referred to, and the rules of law stated and illustrated with a clearness and affluence of learning rarely equalled.

(*a*) Mere authority to pay debts does not, it seems, create a charge upon real estate. *In re* Head's Trustees, 45 Ch. D. 310, 315. McGlaughlin *v.* McGlaughlin, 43 W. Va. 226. And even a direction to pay debts out of real estate has been held insufficient to show an intention to exonerate the personalty. Kilford *v.* Blaney, 31 Ch. Div. 56; *In re* Banks, [1905] 1 Ch. 547.

payment of them upon his real estate. If there is a charge for the payment of legacies out of the real estate, the devisee or the heir, as the case may be, will hold the real estate as a trustee for their payment.[1] (*a*)

§ 569. If the trust is created in express words, or if the payment of the legacy is directly charged upon a particular part, or the whole of the real estate, there can be no question as to the trust, or liability of the estate to pay the legacy;[2] but where the trust depends upon the construction to be put upon general words, or upon implication from the use of certain phrases, it has been a question of considerable doubt whether expressions and words sufficient to charge the payment of debts upon real estate are also adequate to charge it with legacies. The ground of the doubt is this, that the payment of

[1] Stevens *v.* Gregg, 10 G. & J. 143.
[2] Schnure's App., 70 Penn. St. 400.

(*a*) It seems more accurate to describe such a charge upon the devised or descended property as an equitable lien rather than a technical trust. The lien is merely the legatee's security for payment of his legacy when it becomes due. Gee *v.* Gee, 204 Ill. 588; Spangler *v.* Newman, 239 Ill. 616; Merchants' Nat. Bank *v.* Crist, 140 Iowa, 308; Holt's Ex'r *v.* Deshon, 126 Ky. 310; Whitehouse *v.* Cargill, 86 Me. 60; Stringer *v.* Gamble, 155 Mich. 295; Conkling *v.* Weatherwax, 173 N. Y. 43; *In re* Taber, 116 N. Y. S. 960; Hunt *v.* Wheeler, 116 N. C. 422; Dodge *v.* Hogan, 19 R. I. 4; Isner *v.* Kelley, 51 W. Va. 82; Merton *v.* O'Brien, 117 Wis. 437. Upon failure of payment after the legacy has become due, equity will enable the legatee to foreclose the lien, even against a purchaser for value unless he has purchased without notice. Conkling *v.* Weatherwax, 173 N. Y. 43; Dodge *v.* Hogan, 19 R. I. 4; Korn *v.* Friz, 128 Wis. 428; Smith *v.* Jackman, 115 Mich. 192. Until the legacy has fallen due and there has been a failure to pay it, the only fiduciary duty of the owner of the property seems to be not to destroy the lien by transferring to a purchaser without notice and not to commit waste which would impair the value of the security. Merton *v.* O'Brien, 117 Wis. 437. Where the legatee's lien is foreclosed by a judicial sale of the property, he is entitled only to payment of his legacy with interest from the time it ought to have been paid. Bowen *v.* True, 74 S. C. 486.

debts is a duty, and courts will construe very general and loose expressions into an intention to pay such debts out of the real estate, in case of the failure of the personal estate, but that legacies are mere voluntary gifts, and they will not be charged upon real estate, unless there is a manifest intent to do so.[1] In the late cases, however, the doubt is not referred to, and the general tendency is to charge the real estate with the payment of legacies by the same words that would charge the payment of debts upon real estate.[2] Whether legacies are charged upon lands or not is in all cases a matter of intention, to be gathered from the whole will.[3] Thus a mere direction that all debts and legacies are to be paid is not a charge of legacies upon the real estate; nor is a devise of all the rest of his real and personal estate, not before devised, a charge of legacies upon land, — there being no other words tending to show that the legacy is first to be paid from the land. But if real estate is devised, after the payment of debts and legacies, there is no question; for the *residue*, after the payment of the legacies, is devised.[4]

§ 570. Where a testator gives several legacies, and blends both his real and personal estate into one fund for the pay-

[1] Davis *v.* Gardner, 2 P. Wms. 187, 190; Kightley *v.* Kightley, 2 Ves. Jr. 328; Williams *v.* Chitty, 3 id. 551; Kneeling *v.* Brown, 5 Ves. 362.

[2] Williams *v.* Chitty, 3 Ves. 551; Trott *v.* Vernon, Pr. Ch. 430; 1 Vern. 708; Tompkins *v.* Tompkins, Pr. Ch. 397; Elliot *v.* Hancock, 2 Vern. 143; Lypet *v.* Carter, 1 Ves. 499; Ellison *v.* Airey, 2 Ves. 568; Mirehouse *v.* Scaife, 2 Myl. & Cr. 708; Patterson *v.* Scott, 1 De G., M. & G. 531; Sherman *v.* Sherman, 4 Allen, 392.

[3] Jones *v.* Selby, Pr. Ch. 288; Trent *v.* Trent, 1 Dow, 102; Austen *v.* Halsey, 6 Ves. 475; Miles *v.* Leigh, 1 Atk. 574; Minor *v.* Wicksteed, 3 Bro. Ch. 627; Webb *v.* Webb, Barn. 86; Downman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 191; Lupton *v.* Lupton, 2 Johns. Ch. 618; Paxson *v.* Potts, 2 Green, Ch. 322; Harris *v.* Fly, 7 Paige, 421; Logan *v.* Deshay, 1 Clarke, Ch. 209; Brandt's App., 8 Watts, 198; Wright's App., 12 Pa. St. 256; Ripple *v.* Ripple, 1 Rawle, 386; Montgomery *v.* McElroy, 3 Watts & S. 370; Hoes *v.* Van Hoesen, 1 Comst. 122; Gridley *v.* Andrews, 8 Conn. 1; Stevens *v.* Gregg, 10 G. & J. 143; Simmons *v.* Drury, 2 G. & J. 32.

[4] Ibid.; Newman *v.* Johnson, 1 Vern. 45; Harris *v.* Ingledew, 3 P. Wms. 91; Trott *v.* Vernon, 2 Vern. 708; Bench *v.* Biles, 4 Madd. 187; Tompkins *v.* Tompkins, Pr. Ch. 397; Kentish *v.* Kentish, 3 Bro. Ch. 257.

ment of his debts and legacies, and devises the residue, the legacies are charged upon the real estate, if the personal estate is insufficient to pay both debts and legacies; for a devise of the *residue* can only refer to what is left after satisfying all previous gifts.[1] But whatever may be the disposition made of the property, or however the legacies may be given, there must be a manifest intent, clearly deducible from the will, that legacies are to be paid from the real estate upon failure of the personal estate, or they cannot be charged upon the land.[2] Thus, where the devisee of real estate is appointed executor, and he is expressly directed to pay debts and legacies, he will be held to be a trustee for the legatee, or the land in his hands will be subject to the charge or trust for the debts and legacies.[3] (*a*) But

[1] Cornish *v.* Willson, 6 Gill, 299; Kirkpatrick *v.* Rogers, 7 Ired. Eq. 44; Tracy *v.* Tracy, 15 Barb. 503; Canfield *v.* Bostwick, 21 Conn. 550; Aubrey *v.* Middleton, 2 Eq. Cas. Ab. 479; Hassel *v.* Hassel, 2 Dick. 256; Bright *v.* Larcher, 3 De G. & J. 148; Kidney *v.* Coussmaker, 1 Ves. Jr. 436; Bench *v.* Biles, 4 Madd. 187; Brudenell *v.* Boughton, 2 Atk. 268; Mirehouse *v.* Scaife, 2 Myl. & Cr. 695; Cole *v.* Turner, 4 Russ. 376; Edgell *v.* Haywood, 3 Atk. 358; Greville *v.* Brown, 7 H. L. Cas. 689; Field *v.* Peckett, 29 Beav. 568; Hassanclever *v.* Tucker, 2 Binn. 525; Witman *v.* Norton, 6 Binn. 395; Nichols *v.* Postlethwaite, 2 Dall. 131; McLanahan *v.* Wyant, 1 Pa. R. 111; McGlaughlin *v.* McGlaughlin, 24 Pa. St. 22; Gallagher's App., 48 Pa. St. 121; Adams *v.* Brackett, 5 Met. 280; Downman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 172; Carter *v.* Balfour, 19 Ala. 815; Lewis *v.* Darling, 16 How. 10; Buckley *v.* Buckley, 11 Barb. 43. [Hill *v.* Bean, 86 Me. 200; Walker *v.* Follett's Estate, 73 A. 1092 (Me. 1909); Lacey *v.* Collins, 134 Iowa, 583; Willcox *v.* Willcox, 106 Va. 626; Paterson Gen. Hosp. Ass'n *v.* Blauvelt, 72 N. J. Eq. 725; Simonsen *v.* Hutchinson, 231 Ill. 508; Moerlein *v.* Heyer, 100 Tex. 245; Sloan's Appeal, 168 Pa. St. 422.]

[2] Adams *v.* Brackett, 5 Met. 282; Lupton *v.* Lupton, 2 Johns. Ch. 614; Stevens *v.* Gregg, 10 G. & J. 143; Gridley *v.* Andrews, 8 Conn. 1; and see Paxson *v.* Potts, 2 Green, Ch. 320; Francis *v.* Clemow, 1 Kay, 435; Wheeler *v.* Howell, 3 K. & J. 198; Gyett *v.* Williams, 2 John. & H. 429; Owing's Case, 1 Bland, 290. [Tyler *v.* Tallman, 29 R. I. 57; Simonsen *v.* Hutchinson, 231 Ill. 508; Getchell *v.* Rust, 8 Del. Ch. 284; *In re* Will of Newcomb, 98 Iowa, 175.]

[3] Henvell *v.* Whittaker, 3 Russ. 343; Dober *v.* Gregory, 10 Sim. 393;

(*a*) This rule applies whether the executor takes the whole beneficial interest, or only a life estate, or no beneficial interest at all. *In*

if land is devised to an executor, and there is no direction to pay legacies, they cannot be charged upon the land in his hands.[1] If, however, the personalty is grossly insufficient to pay the debts and legacies, very slight indications in the will will be laid hold of by the court to raise an implied intention that the executor is to pay the legacies out of the real estate given to him.[2] (*a*) The use of the word "devise," in giving the legacies, has been relied upon as some evidence that the testator intended to charge them upon his real estate;[3] and so stress has been laid upon the fact that the heir-at-law was appointed residuary legatee, devisee, and executor;[4] and so the fact that the legacy

Alcock *v.* Sparhawk, 2 Vern. 228; Doe *v.* Pratt, 6 Ad. & El. 180; Elliot *v.* Hancock, 2 Vern. 143; Cross *v.* Kennington, 9 Beav. 150; Downman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 172. But see Parker *v.* Fearnley, 2 S. & S. 592; Paxson *v.* Potts, 2 Green, Ch. 313; Nyssen *v.* Gretton, 2 Y. & C. Exch. 222.

[1] Stevens *v.* Gregg, 10 G. & J. 143.

[2] Harris *v.* Fly, 7 Paige, 421; Luckett *v.* White, 10 G. & J. 480. [Irwin *v.* Teller, 188 N. Y. 25.]

[3] Trott *v.* Vernon, 2 Vern. 708; Hassel *v.* Hassel, 2 Dick. 526.

[4] Aubrey *v.* Middleton, 2 Eq. Cas. Ab. 497; Alcock *v.* Sparhawk, 2 Vern.

re Tanqueray-Willaume, 20 Ch. D. 465, 476.

(*a*) Although an insufficiency of personal property to pay legacies may oftentimes be strong evidence of an intention that real estate shall be used so far as necessary, McQueen *v.* Lilly, 131 Mo. 9; Price *v.* Price, 52 N. J. Eq. 326; the mere fact that the personalty proves to be insufficient is ordinarily not enough to show such an intention. Heathcote's Estate, 209 Pa. St. 522; Moerlein *v.* Heyer, 100 Tex. 245; Burns *v.* Allen, 89 Hun, 552; Wentworth *v.* Read, 166 Ill. 139. It is otherwise by statute in California and Maryland. Estate of Ratto, 149 Cal. 552; Pearson *v.* Wartman, 80 Md. 528. Thus where the deficiency of personalty which may be used for the purpose has been caused by waste or misappropriation by the executor, the intention to charge the real estate cannot be implied. Allen *v.* Mattison, 39 A. 241 (R. I. 1898). But when it is clear that the testator intended to charge the real estate with payment of legacies, the lien is not extinguished by the mere fact that enough personalty comes into the hands of the executor to pay the legacies. Paterson Gen. Hosp. Ass'n *v.* Blauvelt, 72 N. J. Eq. 725. In the last cited case it was held to be immaterial that the executor had wasted or misappropriated personalty which, if properly used, would have exonerated the real estate.

was to a child, or other person whom the testator was under some moral obligation to support, has been considered as some evidence that the testator intended the legacy to be paid out of his real estate, if the personal estate was insufficient.[1]

§ 571. Where there is a general direction given to the executor to pay debts and legacies, he is to pay them out of the personal estate only.[2] If there is a deficiency of personal assets, they must be first applied to the payment of debts, and the legacies fail in the absence of a manifest intention to pay them out of the real estate.[3] Where real estate is devised, subject to the payment of debts and legacies, the real estate is to be resorted to in aid of the personal; and the personal must be first exhausted before the real estate can be called upon, unless there is a plain intention that the personal estate is to be entirely exonerated.[4] There is a distinction, however, between a general charge of legacies on land, and a devise of land subject to the payment of a specific sum of money, or upon condition that the devisee pays a certain sum, or in trust to pay a certain sum.[5] In such cases, the gift of the sum is contained in the devise of the land; and such sum is not to come out of the personalty at all, but is confined to the land *exclusively*.[6] There is a

238; Downman *v.* Rust, 6 Rand. 587; Van Winkle *v.* Van Houten, 2 Green, Ch. 191.

[1] Lypet *v.* Carter, 1 Ves. 499.

[2] Parker *v.* Fearnley, 2 S. & S. 592; Warren *v.* Davies, 2 Myl. & K. 49.

[3] Hoover *v.* Hoover, 5 Penn. St. 351.

[4] Amesbury *v.* Brown, 1 Ves. 481; Holford *v.* Wood, 4 id. 76; Hancock *v.* Minot, 8 Pick. 29; Leavitt *v.* Wooster, 14 N. H. 550; Hassanclever *v.* Tucker, 2 Binn. 525; Ruston *v.* Ruston, 2 Yeates, 65; Fenwick *v.* Chapman, 9 Pet. 466; Bank of U. S. *v.* Beverly, 1 How. 134; Lewis *v.* Darling, 16 How. 10; Hoes *v.* Van Hoesen, 1 Comst. 122; Buckley *v.* Buckley, 11 Barb. 43; Chase *v.* Lockerman, 11 G. & J. 186.

[5] Clery's App., 35 Penn. St. 54.

[6] Whaley *v.* Cox, 2 Eq. Cas. Ab. 549; Amesbury *v.* Brown, 1 Ves. 481; Noel *v.* Henley, 7 Price, 241; Phipps *v.* Annesley, 2 Atk. 57; Wood *v.* Dudley, 2 Bro. Ch. 316; Holford *v.* Wood, 4 Ves. 89; Read *v.* Lichfield, 3 Ves. 479; Fowler *v.* Willoughby, 2 S. & S. 354; Spurway *v.* Glynn, 9 Ves. 483; Gitting *v.* Steele, 1 Swanst. 24; Hoover *v.* Hoover, 5 Barr, 351; Halliday *v.* Summerville, 2 Pa. R. 533.

great difference between this class of legacies and debts; for debts are a charge upon the personalty at all events, and independent of the will, while general legacies are given by will voluntarily, and are confined to payment out of the personalty, unless an intention can be found in the will to charge them on the real estate upon failure of the personal; but these gifts out of the real estate have no existence except in the gift of the real estate, and can in no event be made a charge upon the personal estate.[1]

§ 572. As the charge of legacies upon real estate is wholly a matter of intention in the testator, it may happen that some of the legacies given in a will are charged upon the real estate, and some are not. Thus, where a testator devised lands subject to certain legacies mentioned, and then gave *other* legacies, and devised the residue of his lands, it was held by Lord Thurlow, that the last-named legacies were not charged upon the real estate.[2] So the testator may direct that certain portions of his real estate shall be exempt from the payment of legacies, although he charges the legacies generally upon his real estate.[3]

§ 573. If a testator charges some legacies on his land, and leaves others not so charged, and the legacies payable out of the land are paid out of the personal estate, those legacies not payable out of the land have a right to stand in the place of the legacies that were expressly charged upon the land. For although there is generally no marshalling in favor of general legatees or annuitants, yet if legatees who can resort to the real estate exhaust the personal, the legatees who have only the personal shall be subrogated, and their legacies become a

[1] Bickham *v.* Cruttwell, 3 Myl. & Cr. 763; Noel *v.* Henley, 7 Price, 241; 2 Jarm. Pow. Dev. 708.

[2] Howe *v.* Medcroft, 1 Bro. Ch. 261; Masters *v.* Masters, 1 P. Wms. 421; Strong *v.* Ingraham, 6 Sim. 197; Radburn *v.* Jervis, 3 Beav. 450. But see Rooke *v.* Worrell, 11 Sim. 216.

[3] Birmingham *v.* Kirwin, 2 Sch. & Lef. 448.

charge upon the real estate.[1] So if debts are expressly charged upon real estate, legatees shall be paid out of the personal estate, as against the heir or devisee.[2]

§ 574. Where an executor, who is also appointed trustee for the investment and holding of legacies, has set apart and invested the legacies, he will cease to be executor as to those particular legacies, but will be holden as trustee; and the testator's estate will no longer be holden for the payment of the legacy, if it is afterwards lost.[3] (*a*) In the United States, it is

[1] Hanby *v.* Roberts, Amb. 127; Masters *v.* Masters, 1 P. Wms. 421; Bligh *v.* Darnley, 2 id. 619; Bonner *v.* Bonner, 13 Ves. 379.

[2] Patterson *v.* Scott, 1 De G., M. & G. 531; Conron *v.* Conron, 7 H. L. Cas. 168; Bardwell *v.* Bardwell, 10 Pick. 19; Mollan *v.* Griffith, 3 Paige, 402; Smith *v.* Wyckoff, 11 Paige, 49; Loomis's App., 10 Penn. St. 390. Mirehouse *v.* Scaife, 2 Myl. & Cr. 695, is overruled. This rule does not apply, in England, to legacies for charitable purposes, as the statutes of mortmain might thereby be eluded. Mogg *v.* Hodges, 2 Ves. 62; Williams *v.* Kershaw, note to Hobson *v.* Blackburn, 1 Keen, 273; Philanthropic Soc. *v.* Kemp, 4 Beav. 581; Sturge *v.* Dimsdale, 6 Beav. 462; Robinson *v.* Geldard, 3 Mac. & Gor. 735. It is not within the purpose of this work to trace the rules in regard to the marshalling of assets. See Aldrich *v.* Cooper, 2 Lead. Cas. Eq. 56, for an able review of the cases and statement of all the rules; and see Teas's App., 23 Penn. St. 228; Miller *v.* Harwell, 3 Murph. 194; Toombs *v.* Roch, 2 Col. C. C. 494; Fleming *v.* Buchanan, 3 De G., M. & G. 976.

[3] Page *v.* Leapingwell, 18 Ves. 463; Jenkins *v.* Wilmot, 1 Beav. 401; Tyson *v.* Jackson, 30 Beav. 384; Byrchall *v.* Bradford, 6 Madd. 13, 235;

(*a*) As to the liability of the executor in such a case where the property set apart proves insufficient to satisfy the trust legacies and he has meanwhile paid out the remainder of the estate to other legatees, some of whom were merely residuary legatees, see *Re* Hurst; Addison *v.* Topp, 67 L. T. 96. It is there said, on the authority of Fenwick *v.* Clark, 4 De G., F. & J. 240, and Frere *v.* Winslow, 45 Ch. Div. 249, that the executor is not liable for a deficiency due to a depreciation in value of the property set apart by him unless he was negligent, and is not responsible for having paid too much to the other legatees. But on the facts of the principal case he was held liable for having unnecessarily paid residuary legatees, where the only property held for the trust legacies was a compulsory investment upon somewhat risky security.

usual for the executor in such cases to receive an appointment as trustee, and give a bond to the judge of probate for the performance of the trust; but the executor may act as trustee, and the sureties on his bond as executor will be holden for his acts.[1] The estate of the testator will not be holden for any loss, if the executor has clearly set aside any fund as payment of a legacy, although he holds the same in his own hands as trustee for the legatee. If, however, the executor has not settled an account in probate court, and charged off the amount of the legacy paid to him as trustee, he must show some act, such as setting apart and payment, or the legatee will still be entitled to receive the legacy out of the estate of the testator. The mere mental determination of the executor to set aside a certain fund as payment of a legacy, and to hold the same thereafter as trustee, is not sufficient.[2]

§ 575. If the testator names any time for the payment of legacies, they will bear interest from that time. It has already been seen, that the tenant for life is entitled to income upon the estate given for his use, after the expiration of one year from the testator's death, on the ground that the executor or trustee has one full year to reduce the estate to possession, and to convert and invest it.[3] (*a*) So if a testator names no

Ex parte Chadwin, 3 Swanst. 380; Philippo *v.* Munnings, 2 Myl. & Cr. 309; Newman *v.* Williams, 10 L. J. (N. S.) Ch. 106.

[1] Dorr *v.* Wainwright, 13 Pick. 388; Brown *v.* Kelsey, 2 Cush. 248; Hubbard *v.* Lloyd, 6 Cush. 524; Prior *v.* Talbot, 10 Cush. 1; Hall *v.* Cushing, 9 Pick. 395.

[2] Miller *v.* Congdon, 14 Gray, 114; Newcomb *v.* Williams, 9 Met. 534; Conkey *v.* Dickinson, 13 Met. 63; *ante*, §§ 263, 281.

[3] *Ante*, § 548.

(*a*) It has become a general rule that the life beneficiary in such a case is entitled to income from the date of the testator's death in the absence of a contrary intention, although the executor cannot be compelled to actually pay it over until the expiration of a year. Wethered *v.* Safe Dep. & Tr. Co., 79 Md. 153; Union Safe Dep., etc., Co. *v.* Dudley, 104 Me. 297, 312; Doherty *v.* Grady, 105 Me. 36; Weld *v.* Putnam, 70 Me. 209; Jordan *v.* Jordan, 192 Mass.

time for the payment of legacies, they will be payable in one year after his death, and will bear interest from that time,[1] unless a contrary intention is shown in the will.

§ 576. Where an express trust is created in lands for the payment of legacies, or they are devised to an executor, trustee, or other person beneficially, and he is to pay the legacies charged, and such trustee, executor, or other person accepts the devise and the trust, he will become personally liable to execute the trusts and pay the legacies.[2] (*a*) The lands so charged with the trust of paying legacies may be followed into whosesoever hands they come; for the title of the devisee or trustee being by will and recorded, purchasers will be charged with constructive

[1] 2 Rop. Leg. 222; 2 Kent, 417; Hite *v.* Hite, 2 Rand. 409; Birdsall *v.* Hewlett, 1 Paige, 32; Glen *v.* Fisher, 6 Johns. Ch. 33; Trippe *v.* Frazier, 4 H. & J. 446; 2 Redf. on Wills, 465–475.

[2] Lockwood *v.* Stockholm, 11 Paige, 387; Dodge *v.* Manning, id. 334; Bank of United States *v.* Beverly, 1 How. 134; Mahar *v.* O'Hara, 4 Gilm. 424; Solliday *v.* Gruver, 7 Penn. St. 452; Mittenberger *v.* Schlegel, id. 241; Bugbee *v.* Sargent, 23 Maine, 269; Glen *v.* Fisher, 6 Johns. Ch. 33; Larkin *v.* Mason, 53 Barb. 267.

337, 345; Ayer *v.* Ayer, 128 Mass. 575; Sargent *v.* Sargent, 103 Mass. 297; Baker *v.* Fooks, 8 Del. Ch. 84; Bishop *v.* Bishop, 71 A. 583 (Conn. 1909); Matter of Stanfield, 135 N. Y. 292; Bank of Niagara *v.* Talbot, 110 App. Div. (N. Y.) 519 (affirmed 184 N. Y. 576); Eichelberger's Estate, 170 Pa. St. 242; Flickwir's Estate, 136 Pa. St. 374. See *supra*, § 550 and notes.

(*a*) A devise or bequest to a person "upon condition" that he pay a certain legacy or an annuity, or provide for the support and proper maintenance of another is usually held to create a personal obligation of such devisee or legatee, arising upon his acceptance, together with a lien upon the property as security for the performance of this personal obligation. Spangler *v.* Newman, 239 Ill. 616; Stringer *v.* Gamble, 155 Mich. 295; Merchants' Nat. Bank *v.* Crist, 140 Iowa, 308; Cunningham *v.* Parker, 146 N. Y. 29. See Spearman *v.* Foote, 126 Ill. App. 370; *In re* Taber, 116 N. Y. S. 960; Waddell *v.* Waddell, 68 S. C. 335. The ordinary statute of limitations will run against the personal obligation from the time of its breach. Merton *v.* O'Brien, 117 Wis. 437. But it does not necessarily follow that the lien, if it is an interest in land, is lost. See McKinley *v.* Coe, 66 N. J. Eq. 70.

notice.[1] A payment of the legacy by the note of the trustee or devisee, and a receipt in full signed by the legatee, will not discharge the lien upon the land, if the legatee cannot collect a judgment on the note against the devisee.[2] This rule, however, would probably be confined to the original parties; for if, after the note and receipt, there should be a sale of the land, a purchaser would not probably be holden. So the statute of limitations will not bar the claim of the legatee or *cestui que trust* to receive his legacy from the devisee or trustee;[3] but the lapse of twenty years will create a presumption of payment.[4]

§ 577. In marriage and family settlements, whether by deed or will, provisions are sometimes inserted that the trustee shall raise portions for children at certain times or upon certain events, as upon their marriage, or arrival at the age of twenty-one. In England, a term of years is generally carved out of the estate, and limited to the trustees to secure the payment of such portions as are directed to be raised. In the United States, it is more usual to direct the portions to be raised from the rents and profits of the estate, or by sale or mortgage of some part of it. These directions are in the nature of charges upon the real estate, and although there may be a covenant in the deed of settlement that the settlor will pay the amount, yet the charge on the real estate is generally the *primary* fund, and the covenants of the settlor or his personal estate are merely

[1] Harris *v.* Fly, 7 Paige, 421; Aston *v.* Galloway, 3 Ired. Eq. 126; Wallington *v.* Taylor, Saxton, 314; Howard *v.* Chaffee, 2 Dr. & Sm. 236; Dodge *v.* Manning, 11 Paige, 334; Mahar *v.* O'Hara, 3 Gilm. 424; Mittenberger *v.* Schlegel, 7 Penn. St. 241; Solliday *v.* Gruver, id. 452; Bank of U. S. *v.* Beverly, 1 How. 134; Hallett *v.* Hallett, 2 Paige, 15; Owing's Case, 1 Bland, 290; Kemp *v.* McPherson, 7 H. & J. 320; Phillips *v.* Gutteridge, 3 De G., J. & S. 332.

[2] Terhune *v.* Colton, 2 Stockt. 21; Schanck *v.* Arrowsmith, 1 id. 314.

[3] Watson *v.* Saul, 1 Gif. 188. [See Merton *v.* O'Brien, 117 Wis. 437; McKinley *v.* Coe, 66 N. J. Eq. 70.]

[4] Henderson *v.* Atkins, 28 L. J. Ch. (N. S.) 913. As to the duty of purchasers to look to the application of the purchase-money of lands sold for the payment of legacies, see chapter upon that subject.

auxiliary to the charge upon the land.[1] If the charge or trust is created by will, it is of course to be executed precisely as created, and the land only is liable for the amount to be raised.[2] (a)

§ 578. It sometimes happens, that trustees are directed to hold an estate for the life of parents, for their use, and to pay the parents the rents during their lives, or to permit them to use, occupy, and improve the same; and they are directed to raise portions for the children, to be paid them upon the happening of certain events, as their marriage, or arrival at twenty-one, which events frequently happen during the lifetime of the parents, or tenants for life. Under such directions, very vexatious questions have arisen: whether the trustees are to raise the portions *immediately* on the happening of the event upon which the children are to be paid, or whether the raising of the money should be postponed to the end of the life-estate of the parents. A vast number of conflicting decisions have been made upon this question.[3] In one class of cases, it has been held that the portions should be raised, during the life-estate of the parents, by a sale or mortgage of the reversion;[4] in other cases, that the sale or mortgage should be postponed until the determination of the life-estate.[5] "The raising or not raising

[1] Lanoy *v.* Athol, 2 Atk. 444; Lechmere *v.* Charlton, 15 Ves. 193.

[2] Burgoyne *v.* Fox, 1 Atk. 576; Edwards *v.* Freeman, 2 P. Wms. 437; 1 Story's Eq. Jur. § 575.

[3] 4 Kent, 149, 150; 2 Story's Eq. Jur. § 1003.

[4] Hillier *v.* Jones, 1 Eq. Cas. Ab. 337; Smith *v.* Evans, Amb. 533; Mitchell *v.* Mitchell, 4 Beav. 549; Staniforth *v.* Staniforth, 2 Vern. 460; Gerrard *v.* Gerrard, id. 458; Hebblethwaite *v.* Cartwright, Forr. 30; Sandys *v.* Sandys, 1 P. Wms. 707; Codrington *v.* Foley, 6 Ves. 364; Hall *v.* Carter, 2 Atk. 354; Smith *v.* Foley, 3 Y. & C. 142; Mills *v.* Banks, 3 P. Wms. 9.

[5] Reresby *v.* Newland, 2 P. Wms. 94; 6 Bro. P. C. 75; Verney *v.* Verney, 2 Eden, 25; Stanley *v.* Stanley, 1 Atk. 545; Conway *v.* Conway, 3 Bro. Ch. 267; Clinton *v.* Seymour, 4 Ves. 440; Stevens *v.* Dethick, 3 Atk. 39;

(a) In a case where, for the purpose of paying debts, it became necessary to resort to real estate charged with the payment of portions, it was held that nothing was to be deducted from the amount of the portions. *In re* Saunders-Davies, 34 Ch. Div. 482.

will depend upon the particular penning of the trust and the intention of the instrument;"[1] and the court will have no leaning one way or the other.[2]

§ 579. The general rule is now established, that where there is a direction to raise the portion by sale or mortgage, and to pay the same at a particular time or on the happening of a particular event, as on marriage, or at twenty-one, and there is nothing in the will or settlement to indicate a different intention, the portions must be raised by the trustees by an immediate sale or mortgage;[3] but if there are any expressions from which it may be inferred that the portions are not to be raised during the continuance of the life-estate of the parents, effect will be given to such expressions. Thus where the parents were to appoint the portions, by deed or *will*;[4] or where the trustee was to raise the portions from and after the end of the life-estate,[5] it was held that these expressions were conclusive that the portions were not to be raised during the lifetime of the parents. The intention must be sought in the instrument only, and no extraneous evidence can be used.[6]

§ 580. At the present day, it is the usual practice to insert in settlements a clause to the effect that portions shall not be raised during the continuance of the life-estate, or during the lifetime of the parents.[7] Upon the happening of the

Wynter *v.* Bold, 1 S. & S. 507; Corbett *v.* Maydwell, 2 Vern. 640; Brome *v.* Berkley, 2 P. Wms. 484; Butler *v.* Duncomb, 1 id. 448.

[1] Lord Talbot in Hebblethwaite *v.* Cartwright, Forr. 32, and Lord Eldon in Codrington *v.* Foley, 6 Ves. 379.

[2] Codrington *v.* Foley, 6 Ves. 380; contrary to Stanley *v.* Stanley, 1 Atk. 549, and Clinton *v.* Seymour, 4 Ves. 460, where it was said that the court would lean against the raising.

[3] Codrington *v.* Foley, 6 Ves. 380.

[4] Wynter *v.* Bold, 1 S. & S. 507. But see Gough *v.* Andrews, 1 Coll. 69.

[5] Butler *v.* Duncomb, 1 P. Wms. 448.

[6] Corbett *v.* Maydwell, 2 Vern. 641.

[7] Hall *v.* Carter, 2 Atk. 356.

event upon which the portion is payable, the child takes a vested interest in the portion; and if he dies before it is paid, the right to the portion will vest in his representatives, to be paid when the portion is raised. Courts adopt this construction wherever it is possible to sustain it,[1] though they never do violence to the express words of the instrument in order to uphold it.[2] Thus, if it is manifest on the face of the instrument that no child was intended to take a portion unless he survived his parents, the expressed intention will prevail.[3] So, in the case of a voluntary settlement, the children of a deceased child, for whom a portion was to be raised, will take such portion, and the consideration of love and affection extended to grandchildren will be a sufficient consideration to uphold the settlement, though voluntary, so far as the settlor has placed himself *in loco parentis*.[4] Therefore it is now the usual practice to insert a clause in the settlement to the effect, that such portion shall, or shall not, be payable to such child's representatives in case he dies before his parents, or before the portion is payable to him. (*a*)

§ 581. If the portions to be raised are effectually charged upon the land, the trustees will take, by implication, the power

[1] Clayton *v.* Glengall, 1 Dr. & W. 1; Howgrave *v.* Cartier, 3 V. & B. 86; Coop. 66; Whatford *v.* Moore, 2 Myl. & Cr. 291; Emperor *v.* Rolfe, 1 Ves. 208; Powis *v.* Burdett, 9 Ves. 428; Frye *v.* Shelbourne, 3 Sim. 243; Combe *v.* Combe, 2 Atk. 185; Hope *v.* Clifden, 6 Ves. 499; Woodcock *v.* Dorset, 3 Bro. Ch. 569; King *v.* Hake, 9 Ves. 438.

[2] Whatford *v.* Moore, 7 Sim. 574; 3 Myl. & Cr. 274; Fitzgerald *v.* Field, 1 Russ. 430; Hotchkin *v.* Humphrey, 2 Madd. 65. [3] Ibid.

[4] Swallow *v.* Binns, 1 K. & J. 417; 19 Jur. 843; Henderson *v.* Kennicott, 12 Jur. 848; Jones *v.* Jones, 13 Sim. 568; Evans *v.* Scott, 1 Cl. & Fin. (N. S.) 57.

(*a*) In construing a marriage settlement, there is a presumption that the settlor, in providing for his unborn children, intends that their portions shall become vested at twenty-one or marriage. Wakefield *v.* Maffet, 10 A. C. 422, 435. The rule that that construction is to be favored which will give portions to all of a class of children who may live to require them, applies both to settlements and to wills. *In re* Knowles, 21 Ch. D. 806.

of selling or mortgaging it for the purpose, although that power is not given to them in the instrument; for that is the most natural way of carrying out the intention of the parties in raising the portions.[1] Even where the trust is to raise the portion from rents and profits, if a *particular time* is named for the payment so near that it is impossible to raise the sum before the appointed time, it will be considered that it was inconsistent that the settlor intended that the whole sum should be raised from the annual rents and profits, and a mortgage or sale will be ordered.[2] (*a*) So if the directions to the trustees are to raise the portions "as soon as conveniently may be," or "as soon as possible."[3] The rule has been carried to the extent, that where the trustees were directed to raise a gross sum for portions from the *rents and profits*, and there were no words restricting the authority to *annual* rents and profits, they have been held to be authorized to raise the required sum at once by sale or mortgage.[4] The intention of the settlor, however, must prevail, and if the portions are to be raised from *annual* rents and profits, or if any words are used implying such an intention, there can be no sale or mortgage.[5] In cases where the portions are to be raised from rents and profits, and a power of sale or mortgage is also given by implication or in express words, the rents and profits must

[1] Backhouse *v.* Middleton, 1 Ch. Cas. 175; Sheldon *v.* Dormer, 2 Vern. 310; Ashton *v.* ——, 10 Mod. 401; Maynel *v.* Massey, 2 Vern. 1.

[2] Sheldon *v.* Dormer, 2 Vern. 310; Okeden *v.* Okeden, 1 Atk. 551; Backhouse *v.* Middleton, 1 Ch. Cas. 175; Allan *v.* Backhouse, 2 V. & B. 65.

[3] Trafford *v.* Ashton, 2 P. Wms. 416; Ashton *v.* ——, 10 Mod. 401; Bloom *v.* Waldron, 3 Hill, 367.

[4] Ivy *v.* Gilbert, 2 P. Wms. 19; Evelyn *v.* Evelyn, id. 669; Baines *v.* Dixon, 1 Ves. 42; Green *v.* Belcher, 1 Atk. 505; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 234; Warburton *v.* Warburton, 2 Vern. 420; Mills *v.* Banks, 3 P. Wms. 7; Hall *v.* Carter, 2 Atk. 358; Anon., 1 Vern. 104; Schermerhorne *v.* Schermerhorne, 6 Johns. Ch. 70; 1 Story's Eq. Jur., § 1063 *et seq.*

[5] Garmstone *v.* Gaunt, 9 Jur. 78.

(*a*) A direction in a will to pay debts out of rents and profits of realty *prima facie* charges the debts on the *corpus*. Metcalfe *v.* Hutchinson, 1 Ch. D. 591; *In re* Green, 40 id. 610.

first be applied so far as they will go, in order to sell as small a part of the estate as possible.[1] The trustees may also raise portions by selling the wood and timber upon an estate, or the minerals and mines may be worked for the raising of portions.[2]

§ 582. If a *gross* sum is directed to be raised for the portions of several children, to be paid at twenty-one or any other appointed time, and the shares of each are vested, though not payable, the gross sum should be raised as soon as the first portion becomes payable;[3] and the portions not then payable should be invested in the securities allowed by law, or in safe securities, where there are no investments pointed out by statutes or orders of court. It is not a proper administration to incumber an estate with as many different mortgages as there are portions, when one gross sum is directed to be raised.[4] But if *several distinct sums* are directed to be raised and paid at different times, the several portions cannot be raised until they become payable; and if the trustees raise them before, and lose or misapply the money, the land would still be liable to the charge, although some of the portions were payable.[5]

§ 583. Where trustees are directed to apply the rents and profits of an estate for a certain period to the maintenance and education of children or other persons, such direction will constitute a charge upon the estate in the hands of the trustees.[6] If the trustees are directed to raise a portion or portions out of the rents and profits, at or before a certain

[1] Okeden *v.* Okeden, 1 Atk. 552; Warter *v.* Hutchinson, 1 S. & S. 276; Hall *v.* Carter, 2 Atk. 358.

[2] Offley *v.* Offley, Pr. Ch. 27.

[3] Gillbrand *v.* Goold, 5 Sim. 149.

[4] Ibid.

[5] Dickinson *v.* Dickinson, 3 Bro. Ch. 19; Breedon *v.* Breedon, 1 R. & M. 413; Sowarsby *v.* Lacy, 4 Madd. 142; Lavender *v.* Stanton, 6 Madd. 46.

[6] Robinson *v.* Townshend, 3 G. & J. 413; Fox *v.* Phelps, 17 Wend. 393; 20 Wend. 437.

time, and they suffer the term to expire without raising the portions, the court can direct them to be raised out of the rents and profits on hand, or it can order those persons to whom such rents and profits have been distributed, to refund or contribute to the raising of the portions.[1]

§ 584. Interest is payable upon portions from and after the time named for their payment, although nothing is said in the settlement upon that subject.[2] If, however, there are any provisions in the will or settlement upon the subject of interest, or for the payment of any particular sum in place of interest, such provisions must be carried into effect.[3] So the directions of the settlement must be followed in relation to the expenses of raising the portions; but if there are no such directions, the expenses must be paid out of the estate.[4] Trusts for accumulations to raise portions for children are specially excepted from the operation of the Thellusson Act,[5] (*a*) so called, regulating trusts for accumulation; but such trusts are not excepted in the statutes of New York[6] and Pennsylvania[7] against accumulations.

[1] Hawley *v.* James, 5 Paige, 318.

[2] Beal *v.* Beal, Pr. Ch. 405; Bagenal *v.* Bagenal, 6 Bro. P. C. 81; Roseberry *v.* Taylor, id. 43; Hall *v.* Carter, 2 Atk. 358; Pomfret *v.* Winsor, 2 Ves. 472; Boycott *v.* Cotton, 1 Atk. 552; Leech *v.* Leech, 2 Dr. & W. 568, overruling Hays *v.* Bayley, 3 Sugd. V. & P. (10th ed.); Guillam *v.* Holland, 2 Atk. 343; Trimlestown *v.* Colt, 1 Ves. Sr. 277.

[3] Clayton *v.* Glengall, 1 Dr. & W. 1; Boycott *v.* Cotton, 1 Atk. 553; Mitchell *v.* Bower, 3 Ves. 286.

[4] Mitchell *v.* Mitchell, 4 Beav. 549.

[5] 39 & 40 Geo. III. c. 98; Edwards *v.* Tuck, 3 De G., M. & G. 40; Barrington *v.* Liddell, 2 De G., M. & G. 480; Jones *v.* Maggs, 9 Hare, 605; Evans *v.* Hellier, 5 Cl. & Fin. 114; Burt *v.* Sturt, 10 Hare, 415; Beech *v.* Vincent, 3 De G. & Sm. 678; 19 L. J. Ch. 131; Morgan *v.* Morgan, 20 L. J. Ch. 109; Halford *v.* Stains, 16 Sim. 488.

[6] R. S. pt. 2, tit. 2, c. 1, art. 1, § 37. [IV Consol. Laws (1909), pp. 2844 & 3384.]

[7] Purd. L. 507; 1853, April 18, § 9. [4 Purdon's Digest (13th ed.), p. 4036, § 65.]

(*a*) See *Re* Walker, 54 L. T. 322; *In re* Heathcote, [1904] 1 Ch. 792; *In re* Stephens, [1904] 1 Ch. 826; *supra*, § 394, *et seq.*

CHAPTER XX.

TRUSTS UNDER ASSIGNMENTS FOR CREDITORS; TRUSTS UNDER DEEDS FOR PARTICULAR CREDITORS; AND TRUSTS UNDER POWER OF SALE MORTGAGES.

§ 585. Trusts for creditors, and assignment to them of beneficial interests.
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§ 588. A corporation may create a trust for its creditors.
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§ 602 *dd* Irregularities in the execution of the power of sale may be waived by the party for whose benefit it is created.
§ 602 *ee*. When courts may enjoin the sale.
§ 602 *ff*. How the trustee or mortgagor executes his trust after a sale.
§ 602 *gg*. Mortgages with power of sale may be foreclosed in any other legal manner.

§ 585. A DEBTOR may convey or assign both his real and personal estate to trustees for the payment of his debts; and such trust may be limited to the payment of one particular debt due to the trustees[1] or some third person,[2] or of several debts specified in the deed or schedule annexed to it.[3] This trust may be extended generally for the benefit of all the

[1] Foster *v.* Latham, 21 Ill. App. 165.

[2] Page *v.* Broom, 4 Russ. 6; De Wol *v.* Chapin, 4 Pick. 59; Cooper *v.* Whitney, 3 Hill, 95; Chaplin *v.* Maglaughlin, 65 Penn. St. 492.

[3] Boasman *v.* Johnson, 3 Sim. 377; Hamilton *v.* Houghton, 2 Bligh,169; Garrard *v.* Lauderdale, 3 Sim. 1; Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Shirly *v.* Ferrers, 1 Bro. Ch. 41; Purefoy *v.* Purefoy, 1 Vern. 28.

debtor's or grantor's creditors,[1] or to all who execute the deed or otherwise assent thereto.[2] (*a*) The trust may be further limited to pay equally without distinction;[3] or at common law, it may be limited to make certain priorities and preferences in the payments.[4] The deed may direct the debts to be paid in full,[5] or a certain proportion or composition may be determined to be paid.[6] The deed may contain a trust for creditors, and also a settlement upon a wife and children.[7] An arrangement of this kind, fairly made by a contract with the creditors, or accepted or acted upon by them, is valid and binding upon all parties;[8] even a creditor not concurring but only standing by and without objection seeing the trustee act under the

[1] Carr *v.* Burlington, 1 P. Wms. 228; Boswell *v.* Parker, 2 Ves. 364; Hinde *v.* Blake, 3 Beav. 234; Acton *v.* Woodgate, 2 Myl. & K. 492.

[2] Dunch *v.* Kent, 1 Vern. 260; *Ex parte* Richardson, 14 Ves. 184; Spottiswoode *v.* Stockdale, Coop. 102; Hatch *v.* Smith, 5 Mass. 42.

[3] Carr *v.* Burlington, 1 P. Wms. 228.

[4] Lanning *v.* Lanning, 2 Green, Ch. 228; McColghan *v.* Hopkins, 17 Md. 395; Purefoy *v.* Purefoy, 1 Vern. 28; Cunningham *v.* Freeborn, 11 Wend. 241; Stevenson *v.* Agry, 7 Ham. (2d pt.) 247; Pearson *v.* Rockhill, 4 B. Mon. 296; Niolon *v.* Douglas, 2 Hill, Ch. 443; Moffatt *v.* McDowall, 1 McCord, Ch. 434; Tompkins *v.* Wheeler, 16 Pet. 106; McCollough *v.* Sommerville, 8 Leigh, 415; Hickley *v.* Farmers' & Merch. Bank, 5 Gill & J. 377; Williams *v.* Brown, 4 Johns. Ch. 427; Brashear *v.* West, 7 Pet. 608; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268; Hatch *v.* Smith, 5 Mass. 42; Stevens *v.* Bell, 6 Mass. 339; Lippincott *v.* Barker, 2 Binn. 174; Wilkes *v.* Ferris, 8 Johns. 335; Rankin *v.* Loder, 2 Ala. 380; How *v.* Camp, Walk. Ch. 427; Holbrook *v.* Allen, 4 Fla. 87.

[5] Ibid.

[6] Stephenson *v.* Hayward, Pr. Ch. 310; Tatlock *v.* Smith, 6 Bing. 339; Constantein *v.* Blache, 1 Cox, 287; Vernon *v.* Morton, 8 Dana, 247.

[7] Johnson *v.* Malcomb, 6 Jones, Eq. 120.

[8] Small *v.* Marwood, 9 B. & Cr. 300.

(*a*) The scope of this book does not premit a full examination of all the recent decisions upon the topic of assignments for the benefit of creditors. As the text has dealt with the topic only in outline, the editor of the sixth edition has tried to confine his notes and new citations to the original purpose of the chapter. The citation of authorities is, therefore, not exhaustive, but is designed only to indicate the various questions that have arisen and the various differences of authority.

trust may be bound by tacit acquiescence;[1] and courts will enjoin or restrain any act in violation of this trust by any of the parties.[2] Such a trust deed for the payment of debts is favorably regarded in equity; and it will be supported, if possible, without regard to the strict technicalities of the law;[3] as, where a party, with power of leasing in possession, made a lease to commence in the future, in trust for the payment of his debts, or where a party covenanted to stand seized of land to the use of another, in consideration of his paying the debts of the covenantor out of the profits of the land, the transactions were upheld in equity as trusts for the payment of debts, though they would not have been good at law.[4] In such a deed the recital of debts raises a presumption of indebtedness, but it may be rebutted.[5] Where one creates a trust, making himself the *cestui* for life, and then assigns his beneficial interest as security for debt, he cannot, as against the creditor, subsequently alter the terms of the trust so as to make the payment of the income discretionary with the trustee.[6]

§ 586. At common law, an insolvent debtor has the right to prefer any of his creditors. He may prefer one to all, or all to one, for the reason that it is not illegal to pay debts; and as creditors may sue and obtain judgment, and levy executions, each one for himself, and obtain as much advantage as possible by gaining priority of time, so the debtor may voluntarily do what each of his creditors may do by law, that is, obtain a preference.[7] Under the bankrupt law of the United States now in force, all conveyances and assignments

[1] Condict *v.* Flower, 106 Ill. 105.

[2] Spottiswoode *v.* Stockdale, Coop. 102; Mackenzie *v.* Mackenzie, 16 Ves. 372; *Ex parte* Sadler, 15 Ves. 52; Beck *v.* Parker, 65 Pa. St. 262.

[3] Dunch *v.* Kent, 1 Vern. 260; Spottiswoode *v.* Stockdale, Coop. 102; Turner *v.* Jaycox, 40 Barb. 164.

[4] Pollard *v.* Greenville, 1 Ch. Cas. 10; Lord Paget's Case, 1 Leon. 194; 4 Cruise, Dig. tit. 32, c. 9, §§ 25, 26.

[5] Graham *v.* Anderson, 42 Ill. 514.

[6] Pacific Nat'l B'k *v.* Windram, 133 Mass. 175.

[7] *Ante*, § 585, and cases cited.

made within six months of filing a petition of bankruptcy, which give a preference to any creditor, are fraudulent and void, if the debtor knows himself to be insolvent, and there is an intent to prefer.[1] (*a*) Substantially the same provisions are enacted in the English statutes of bankruptcy.[2] In some of the States preferences are prohibited, and an assignment containing a preference is fraudulent and void; but in others, as in Ohio and Pennsylvania, the assignment is not void, but the provision only containing the preference is void, and the assignment enures to all creditors equally in proportion to their demands:[3] but if the assignment is in trust for such creditors as release, no releasing creditors are excluded.[4] In States where preferences have not been prohibited by statute, courts lean strongly against them, and will not support them if they can be avoided for any good reason.[5] But these statutes against preferences apply only to general assignments, and not to *bona fide* sales to a creditor to pay a valid debt, or partial assignments for particular purposes.[6] While the general bankrupt law is in force, assignments will be infrequent; but, as they may still be made, a general outline of the law only will be stated. (*b*)

[1] Stat. 1867, March 2, §§ 81, 82, 83.

[2] 24 & 25 Vict. c. 134.

[3] Law *v.* Mills, 18 Penn. St. 185; Wiener *v.* Davis, id. 331; Hulls *v.* Jeffrey, 8 Ohio, 390; Harshman *v.* Lowe, 9 id. 92; Wilcox *v.* Kellogg, 11 id. 394; Mitchell *v.* Gazzam, 12 id. 315. [See note *b*.]

[4] Lea's App., 9 Barr, 504.

[5] Boardman *v.* Halliday, 10 Paige, 224; Cram *v.* Mitchell, 1 Sandf. 251; Webb *v.* Daggett, 2 Barb. 10; Nicholson *v.* Leavitt, 4 Sandf. 279.

[6] McWhorter *v.* Wright, 5 Ga. 555; Bates *v.* Coe, 10 Conn. 281; Mer. Man. Co. *v.* Smith, 8 N. H. 347; Beard *v.* Kimball, 11 N. H. 471; Barker *v.* Hall, 13 N. H. 298; Henshaw *v.* Sumner, 23 Pick. 446. [Maloney *v.* Gonhue, 152 Mich. 325, 336; Morriss *v.* Blackman, 179 Ill. 103; United Rys. & Elec. Co. *v.* Rowe, 97 Md. 656. See Walker *v.* Ross, 150 Ill. 50; Grimes Dry Goods Co. *v.* Malcolm, 164 U. S. 483; Adler-Goldman Co. *v.* Phillips, 63 Ark. 40.]

(*a*) Under the U. S. Bankruptcy Law of 1898, § 60, the period within which the petition must be filed is four months. See *infra*.

(*b*) In some States statutes have been enacted which deal specifically with preferences in voluntary assignments. These statutes, how-

§ 587. If a debtor assigns his whole property, he becomes insolvent and bankrupt. The bankrupt laws require a bank-

ever, usually provide that the attempted preference, not the assignment itself, shall be void. See Shillito Co. *v.* McConnell, 130 Ind. 41; Sturtevant *v.* Sarbach, 58 Kan. 410; Dwight *v.* Scranton, etc., Lumber Co., 67 Mich. 507, 513; Pollock *v.* Sykes, 74 Miss. 700, 713; Royster *v.* Stallings, 124 N. C. 55. It does not seem to be within the scope of this book to state the various provisions of these statutes. For a comprehentive examination of them see Burrill on Assignments (6th ed.), Appendix I.

Provisions in the insolvency statutes of the various States to the effect that preferences shall be void were usually limited to preferences made within a limited period, usually six months or less, before the beginning of the proceedings in insolvency. For a typical statute of this kind see Mass. R. L. (1902), c. 163, § 110. Steel Edge, etc., Co. *v.* Manchester Bank, 163 Mass. 252; Nat. Mechanics' & Traders' Bank *v.* Eagle Sugar Ref., 109 Mass. 38.

Under the United States Bankruptcy Law of 1898, which has superseded the various insolvency statutes though apparently not the assignment statutes, a mere preference is not fraudulent unless made within four months before the filing of a petition in bankruptcy. Even then it is only constructively fraudulent. This kind of fraud is essentially different from the fraud which taints a conveyance made for the purpose of "hindering, delaying or defrauding creditors." The payment or the creation of a trust for the payment of one or more creditors in full when the debtor has insufficient to pay all, is not fraud of the latter kind, and is not fraud under the United States Bankruptcy Law unless made within four months before a petition in bankruptcy is filed by or against the insolvent debtor. Although the Federal Bankruptcy Law expressly provides that a general assignment for the benefit of creditors, even without preferences, is an act of bankruptcy, if the petition is filed within four months after the assignment, this provision does not affect assignments made more than four months before the petition. The validity of such assignments is dependent upon the local law, and it is only when they are in violation of some local statute or are fraudulent under the principles of the Statute of Elizabeth that the trustee in bankruptcy can have them set aside. Randolph *v.* Scruggs, 190 U. S. 533; Cohen *v.* Am. Surety Co., 192 N. Y. 227.

The effect of the Bankruptcy Act upon general assignments is stated as follows in Cohen *v.* Am. Surety Co., *ubi supra:* "A general assignment, even though without preferences, is now, if made within four months of the filing of the petition, a constructive fraud on the Bankruptcy Act and in itself without either insolvency or intent an available act of bankruptcy. This does not mean that

rupt's estate to be under the control of commissioners or assignees appointed by and amenable to a court of law, and not under the control of persons appointed by the debtor.[1] Therefore every general assignment is an act of bankruptcy; if there are preferences, it is a fraud upon the other creditors.[2] If it is an assignment for an equal distribution, it is a fraud upon the policy of the law.[3] Such deed will be fraudulent and an act of bankruptcy, although it contains a proviso that it shall be void if the trustees think fit, or a proviso that, if the creditor or creditors to a certain amount do not execute within

[1] Dutton *v.* Morrison, 17 Ves. 199; Worsley *v.* Demattos, 1 Burr. 476; Simpson *v.* Sikes, 6 M. & S. 312; Hobson *v.* Markson, 1 Dillon, 420; *In re* Burt, id. 439.

[2] Wilson *v.* Day, 2 Burr. 827; Alderson *v.* Temple, 4 Burr. 2240; Lewin on Trusts, 375 (5th ed.).

[3] Kettle *v.* Hammond, 1 Cook's B. L. 108; Tappenden *v.* Burgess, 4 East, 239; Lewin on Trusts, 375. [See *supra*, § 586, note.]

general assignments are no longer lawful, rather that the assignor and his counsel thereby set the door of the court of bankruptcy ajar for such creditors as may choose to bid them enter." For a good discussion of the Massachusetts decisions in reference to the effect upon general assignments in that State of a similar provision in the state bankruptcy statute, see 8 Harvard L. Rev. 270.

In England under the provisions of the Bankruptcy Act, 1883, it has been held that a voluntary assignment which becomes void by reason of bankruptcy proceedings within the time fixed by the act, is void, not from the time it was made, but only from the time when the title of the trustee in bankruptcy accrued, with the result that a *bona fide* sale for value by the assignee in the interim is valid. *In re* Carter and Kenderdine's Contract, [1897] 1 Ch. 776, overruling *In re* Briggs and Spicer, [1891] 2 Ch. 127. See *In re* Poppleton and Jones' Contract, 74 L. T. 582. But in the United States the title of the voluntary assignee is tentative from the beginning until four months have elapsed without the filing of a petition in bankruptcy. The assignee, however, is given a preferred claim upon the assets for his services and necessary disbursements in collecting and preserving the assets, in so far as his services and disbursements have been beneficial to the estate in his hands, even if the assignment is rendered void by a petition in bankruptcy within the four months. Randolph *v.* Scruggs, 190 U. S. 533. See also Louisville Tr. Co. *v.* Columbia Finance & Tr. Co., 59 S. W. 867 (Ky. 1900); Clark *v.* Sawyer, 151 Mass. 64.

a certain time, a decree of bankruptcy shall be entered; or if the trustees did not accept the deed or intend to act; or if the trustees induced the debtor to execute the deed.[1] The same general principles prevail in the United States under the national bankrupt law. A general assignment for the benefit of creditors is an act of bankruptcy, and so is the sale or mortgage of a stock of goods or property out of the usual and ordinary course of the debtor's business.[2] But, in order to avoid the deed of assignment, there must be a debt due at the time of its execution;[3] and the deed, though voidable by creditors and assignees in bankruptcy, is good between the parties themselves.[4]

§ 588. A corporation has the same right as a natural person to make assignments for the benefit of its creditors;[5] and it may make preferences among its creditors[6] though grave doubts have been raised whether it can do anything but make an equal division of its property among its creditors in case of insolvency.[7] A general assignment by a corporation of all the

[1] Tappenden *v.* Burgess, 4 East, 230; Back *v.* Gooch, 4 Camp. 232; Holt, 13; Dutton *v.* Morrison, 17 Ves. 193; Lewin on Trusts, 376.

[2] See Brightly's Annotated Bankrupt Law of the United States, pp. 72–74, 78–80, and the cases cited by him. [See U. S. Bankruptcy Law of 1898, § 3.]

[3] *Ex parte* Taylor, 5 De G., M. & G. 392; *Ex parte* Louch, 1 De G. 612; Oswald *v.* Thompson, 2 Exch. 215.

[4] Bessey *v.* Windham, 6 Q. B. 166.

[5] Catlin *v.* Eagle Bank, 6 Conn. 233; Savings Bank *v.* Bates, id. 506; Dana *v.* Bank of the United States, 5 Watts & S. 224; Hopkins *v.* Gallatin Turnpike, 4 Humph. 403; Tower *v.* Bank of River Raisin, 2 Doug. 530; 6 Humph. 532; State of Maryland *v.* Bank of Maryland, 6 Gill & J. 205; Bank of U. S. *v.* Huth, 4 B. Mon. 423; *Ex parte* Conway, 4 Pike, 305; Ringo *v.* R. E. Bank, 13 Ark. 575; Arthur *v.* Commercial, &c. Bank of Vicksburg, 9 Sm. & M. 396; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119; 3 Comst. 238; Union Bank of Tennessee *v.* Ellicott, 6 Gill & J. 363. In New York a corporation has no such right. Loring *v.* United States Co., 30 Barb. 644.

[6] Ibid.

[7] Robins *v.* Embry, 1 Sm. & M. Ch. 207; Montgomery *v.* Commercial Bank, id. 632; Bean *v.* Bullis, 57 Penn. St. 221.

property with which it does its business is a good cause for taking away its charter and ending its existence.[1]

§ 589. No formalities are required in an assignment in trust for creditors, if the instrument is so constructed that the intention of the parties can be inferred from it.[2] In those States where there are statutes regulating such assignments, the instrument must be substantially according to the statute: thus a lease reserving rent in trust for creditors may be an assignment;[3] and a power of attorney to collect money and pay it to creditors, in an order named, is an assignment;[4] and a letter sent to an absent creditor, assigning personal property for the benefit of himself and other creditors, is valid as an assignment.[5] But an assignment directly to creditors to pay their own debts does not come within the rules respecting assignments in trust, although the surplus may go to the debtor.[6] Nor is a judgment confessed to a creditor in trust an assignment;[7] nor is a mortgage in trust to pay debts, with or without a power of sale, an assignment.[8]

§ 590. A conveyance of all a debtor's property in trust, for the payment of all or any number of his creditors, is not within the statute of 13 Eliz. c. 5, or 29 Eliz. c. 5, which makes void all conveyances made to hinder, delay, or defraud creditors; although the assignment may operate to change the rights of a creditor, and may result in delaying him.[9] But all such

[1] State *v.* Real Estate Bank, 5 Pike, 596.

[2] Harvey *v.* Mix, 24 Conn. 406.

[3] Lucas *v.* Sunbury & Erie R. R. Co., 32 Penn. St. 458; Bittenger *v.* R. R. Co., 40 id. 269.

[4] Watson *v.* Bagaley, 12 Penn. St. 164.

[5] Dargan *v.* Richardson, 1 Cheves, L. 197; Shubar *v.* Winding, id. 218.

[6] Henderson's App., 31 Penn. St. 502; Chaffees *v.* Risk, 24 id. 432; Vallance *v.* Miners' Life Ins. Co., 42 id. 441.

[7] Guy *v.* McIlree, 26 Penn. St. 92; Lord *v.* Fisher, 19 Ind. 7.

[8] Barker *v.* Hall, 13 N. H. 298; Manuf. and Mech. Bank *v.* Bank of Pa., 7 Watts & S. 335; Harkrader *v.* Leiby, 4 Ohio St. 602.

[9] Meux *v.* Howell, 4 East, 9; Estwick *v.* Callaud, 5 T. R. 424; Wilt *v.*

assignments will be void if affected by *actual fraud:* [1] as if the purpose is to hinder, delay, and defraud the creditors,[2] or any one or more of them;[3] or if a fictitious debt is preferred;[4] or there is the reservation of a power of revoking the assignment, or the reservation of any other right and power which gives the debtor the control of the property;[5] or if a clause is introduced which exempts the assignees from the ordinary duties affixed by law to the office of assignee, as that the assignees shall not be liable for any loss not happening from their own gross negligence or misfeasance.[6] So the selection of a sick, weak, or incapable assignee, or of one at a distance from the locality, or of an insolvent person, or of one of such moral or pecuniary character as to evince a purpose on the part of the debtor to keep the control of the property, or to render it unprofitable to the creditors, will be strong evidence of fraud in fact, and will avoid the assignment.[7] The postponement, for an unreasonable length of time, of the sale of the property, and of the settlement of the accounts and payment of the creditors

Franklin, 1 Binn. 514. [Billings *v.* Parsons, 17 Utah, 22; Roberts *v.* Norcross, 69 N. H. 533; Geer *v.* Traders' Bank, 132 Mich. 215.]

[1] Twyne's Case, 3 Co. 80 a; Dutton *v.* Morrison, 17 Ves. 197; Wilson *v.* Day, 2 Burr. 827; Hungerford *v.* Earle, 2 Vern. 261; Tarback *v.* Marbury, id. 510; Pickstock *v.* Lyster, 3 M. & S. 371; Law *v.* Skinner, W. Black. 996; Stone *v.* Grantham, 2 Buls. 218; Worsley *v.* Demattos, 1 Burr. 467; Wilson *v.* Gray, 2 Stock. 233; Jessup *v.* Hulse, 29 Barb. 539; Gazzam *v.* Poyntz, 4 Ala. 374.

[2] Sheldon *v.* Dodge, 4 Denio, 218; Bodley *v.* Goodrich, 7 How. 277; Hart *v.* McFarland, 13 Penn. St. 185.

[3] Knight *v.* Packer, 1 Beasley, 214.

[4] Waters *v.* Comly, 3 Harr. 117; Webb *v.* Daggett, 2 Barb. 10; Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Irwin *v.* Keen, 3 Whar. 347. But if a creditor extinguishes his claim by fraud, his share goes into the residue for the other creditors. Hardcastle *v.* Fisher, 24 Mo. 70.

[5] Whallon *v.* Scott, 10 Watts, 237; Riggs *v.* Murray, 2 Johns. Ch. 565; 15 Johns. 571; Grover *v.* Wakeman, 11 Wend. 187.

[6] Litchfield *v.* White, 3 Sandf. Ch. 547; Olmstead *v.* Herrick, 1 E. D. Smith, 310; Hutchinson *v.* Lord, 1 Wis. 286.

[7] Currie *v.* Hart, 2 Sandf. Ch. 251; Reede *v.* Emery, 8 Paige, 417; Connah *v.* Sedgwick, 1 Barb. 211; Cram *v.* Mitchell, 1 Sandf. 251; Hayes *v.* Doane, 3 Stock. 84.

by the trustees, is evidence of fraud.[1] (*a*) So is the assignment of property which, on the face of the paper, the assignee is not authorized to distribute.[2] So any unusual powers given to the trustees that may prejudice the claims of the creditors and favor the debtor, will render the settlement fraudulent; as a power given to the trustees to compound with the creditors, or a right reserved either to the grantor or trustee to make preferences or to alter them.[3] (*b*) In some States a power

[1] Adlum *v.* Yard, 1 Rawle, 163; Mitchell *v.* Beal, 8 Yerg. 134. Three years is an unreasonably long time. Adlum *v.* Yard, *ut supra*. The length of time which will be reasonable depends upon the nature and situation of the property. Hafner *v.* Irwin, 1 Ired. L. 490; Hardy *v.* Skinner, 9 id. 191; Browning *v.* Hart, 6 Barb. 91; Robins *v.* Embry, 1 Sm. & M. Ch. 205; Rundlett *v.* Dale, 10 N. H. 458; Hardy *v.* Simpson, 13 Ired. L. 138; Grover *v.* Wakeman, 11 Wend. 187; Bennett *v.* Union Bank, 5 Humph. 612; Farmer's Bank *v.* Douglass, 11 Sm. & M. 472; Arthur *v.* Com. & Railw. Bank of Vicksburg, 9 Sm. & M. 396; Henderson *v.* Downing 24 Miss. 119. A year's suspension was deemed fraudulent in one case. Ward *v.* Trotter, 3 Mon. 1; Johnson *v.* Thweatt, 18 Ala. 745. In Pennsylvania a year was deemed a proper time, and a longer time was deemed fraudulent. Sheener *v.* Lautzerbeizer, 6 Watts, 543; Dana *v.* Bank of U. S., 5 Watts & S. 224; Abercrombie *v.* Bradford, 16 Ala. 560; Hodge *v.* Wyatt, 10 Ala. 271; Hindman *v.* Dill, 11 Ala. 689; Lockhart *v.* Wyatt, 10 Ala. 231. Three months in most cases would not be unreasonably long. Christopher *v.* Covington, 2 B. Mon. 357. But if the trustee may use his own discretion, it is void. D'Invernois *v.* Leavitt, 23 Barb. 63.

[2] Hooper *v.* Tuckerman, 3 Sandf. 316.

[3] Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Hudson *v.* Maze, 3 Scam. 579; Sheldon *v.* Dodge, 4 Denio, 218; Mitchell *v.* Stiles, 13 Penn. St. 306; Barnum *v.* Hampstead, 7 Paige, 569; Boardman *v.* Halliday, 10 Paige, 224; Strong *v.* Skinner, 4 Barb. 547; Averill *v.* Loucks, 6 Barb. 471; Gazzam *v.* Poyntz, 4 Ala. 374; D'Invernois *v.* Leavitt, 23 Barb. 63. But the assignees may compromise claims due to the debtor. White *v.* Monsarrat, 18 B. Mon. 809; Dow *v.* Platner, 16 N. Y. 562; Robins *v.* Embry, 1

(*a*) A provision that the assignee shall continue the business for a reasonable time does not render the assignment void for fraud. Hurst *v.* Leckie, 97 Va. 550; Bowling *v.* Davidson, 107 Va. 389. But a power to continue the business for a longer time than is reasonably necessary for realizing on the assets would usually be considered an attempt to hinder and delay creditors, unless there is a provision that the power is dependent upon consent of the creditors.

(*b*) But a power given to the

to sell on credit is considered evidence of fraud;[1] and so is a power to mortgage, or lease, or incumber the estate.[2] The trust may be to sell at either public or private sale.[3]

§ 591. So the reservation of a use or benefit to the grantor will render a general assignment void. It is a settled principle that a reservation to the grantor or his family, or to any one not a creditor, of any trust, profit, or benefit out of the property, or of a credit on account of any part of it, or

Sm. & M. Ch. 207; Bellows *v.* Partridge, 19 Barb. 176; Meacham *v.* Sternes, 9 Paige, 398.

[1] Mussey *v.* Noyes, 26 Vt. 426; Sutton *v.* Hanford, 11 Mich. 513; Pierce *v.* Brewster, 32 Ill. 268; Page *v.* Olcott, 28 Vt. 465; Barney *v.* Griffin, 2 Comst. 366; Nicholson *v.* Leavitt, 2 Seld. 510, overruling 4 Sandf. 366; Billings *v.* Billings, 1 Cal. 113; Swoyer's App., 5 Penn. St. 317; Estate of Davis, 5 Whart. 530; Kellogg *v.* Slauson, 1 Kern. 305; American Exch. Bank *v.* Inloes, 7 Md. 380; Porter *v.* Williams, 5 Seld. 142; Hutchinson *v.* Lord, 1 Wis. 286; Keep *v.* Sanderson, 2 Wis. 42; Booth *v.* McNair, 11 Mich. 19; Mower *v.* Hanford, 6 Minn. 535. In other States a power to sell on credit is good. Grinell *v.* Adams, 11 Humph. 85; Shackleford *v.* Bank of Mobile, 2 Ala. 238; Abercrombie *v.* Bradford, 16 Ala. 560; Neally *v.* Ambrose, 21 Pick. 185; Hopkins *v.* Ray, 1 Met. 79. A power to convert the estate into money, in such convenient time as to the assignees should seem meet, is a power to sell on credit, and is void. Woodburn *v.* Mosher, 9 Barb. 255; Murphy *v.* Bell, 8 How. Pr. Cas. 468. So a power to complete the manufacture of stock in such manner as, in the judgment of the assignees, to obtain the most money, was void. Dunham *v.* Waterman, 17 N. Y. 9. But to sell for the best interests of the parties is not a power to sell on credit. Whitney *v.* Krows, 11 Barb. 200; Kellogg *v.* Slauson, 1 Kern. 302; Maennel *v.* Murdock, 13 Md. 164; Clark *v.* Fuller, 21 Barb. 128; Nichols *v.* McEwen, 21 id. 65; Ely *v.* Hair, 16 B. Mon. 230. If there is no power in the assignment to sell on credit, but the trustee sells on credit, the assignment is not void. Small *v.* Ludlow, 20 N. Y. 155.

[2] Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Barnum *v.* Hempstead, 7 Paige, 568.

[3] Bellows *v.* Partridge, 19 Barb. 176.

assignee to accept the assent and release of a creditor after the time limit fixed by the deed of assignment does not render the assignment fraudulent, since he will not be allowed to delay the settlement of the estate by means of the power. National Union Bank *v.* Copeland, 141 Mass. 257.

of any control by the grantor,[1] is a fraud in law, and avoids the whole assignment.[2] So a stipulation that the grantor should retain the possession avoids the assignment.[3] But in many States the possession by the assignor of the property after the assignment is only evidence, more or less stringent, of fraud under the circumstances of each case, and may be explained.[4] A stipulation for the maintenance of the grantor or his family, or that the grantor shall be employed to manage and dispose of the property at a fixed salary,[5] or the reservation of a fixed sum of money, or of so much a year, avoids the assignment.[6] (*a*) An express reservation of the surplus

[1] Smith *v.* Conkwright, 28 Minn. 23.

[2] Thomas *v.* Jenks, 1 Amer. Lead. Cas. 69; Mackie *v.* Cairns, 5 Cow. 549; Jackson *v.* Parker, 9 Cow. 73; Byrd *v.* Bradley, 2 B. Mon. 239; Kissam *v.* Edmundson, 1 Ired. Eq. 180; Goodrich *v.* Downs, 6 Hill, 438; Farmer *v.* Lesley, 6 Penn. St. 121; Shaffer *v.* Watkins, 7 Watts & S. 219; Leadman *v.* Harris, 3 Dev. 144; Mead *v.* Phillips, 1 Sandf. 83; Anderson *v.* Fuller, 1 McMul. Eq. 27; McAllister *v.* Marshall, 6 Binn. 338; Peacock *v.* Tompkins, Meigs, 317; Austin *v.* Johnson, 7 Humph. 191.

[3] Twyne's Case, 3 Co. 80 b; 1 Smith Lead. Cas. 1, and notes; Dewey *v.* Adams, 4 Edw. Ch. 21; Connah *v.* Sedgwick, 1 Barb. 210; Rogers *v.* Vail, 16 Vt. 329; Caldwell *v.* Williams, 1 Cart. 405.

[4] In Massachusetts, such stipulations are not fraudulent. Baxter *v.* Wheeler, 9 Pick. 21; Foster *v.* Saco Manuf. Co., 12 Pick. 451. If the assignment is good on its face, it is not void for an illegal act done afterwards, as the assignor's carrying away a bag of $5,000 in gold, unless the assignment was executed with a fraudulent intent. Wilson *v.* Forsyth, 24 Barb. 105. Perhaps, in most States, the retention of the possession by the assignor is only evidence of fraud, and not in itself fraud. Brooks *v.* Marbury, 11 Wheat. 82; Vernon *v.* Morton, 8 Dana, 247; Pike *v.* Bacon, 8 Shep. 280; Osborne *v.* Fuller, 14 Conn. 530; Strong *v.* Carrier, 17 Conn. 239; Klapp *v.* Shurk, 13 Penn. St. 589; Fitler *v.* Maitland, 5 Watts & S. 307; Dallam *v.* Fitler, 6 Watts & S. 323; Dewey *v.* Littlejohn, 2 Ired. Eq. 495; Christopher *v.* Covington, 2 B. Mon. 357; Hardy *v.* Skinner, 9 Ired. L. 191; Ravisies *v.* Allston, 5 Ala. 297; Darwin *v.* Handley, 3 Yer. 502; Barker *v.* Hall, 13 N. H. 298; Shackleford *v.* Bank of Mobile, 22 Ala. 238; Lockhart *v.* Wyatt, 10 Ala. 231.

[5] Johnson *v.* Harvey, 2 Pen. & Watts, 82; McClug *v.* Lecky, 3 Pen. & Watts, 83; Henderson *v.* Downing, 24 Miss. 117.

[6] Mackie *v.* Cairns, 5 Cow. 549; Butler *v.* Van Wyck, 1 Hill, 463; Good-

(*a*) But the actual employment of the assignor without a previous stipulation therefor, and payment for his services does not render the

to the grantor, upon a partial assignment for a portion of the creditors, renders the assignment void.[1] So it is said that an express reservation of the surplus in a general assignment renders it void.[2] On the other hand, it has been held that the reservation of the surplus, after paying all the creditors, is only what the law implies, and is therefore not void.[3] But

rich *v.* Downs, 6 Hill, 440, overruling Riggs *v.* Murray, 2 Johns. Ch. 565, 15 Johns. 571, and Austin *v.* Bell, 20 Johns. 442; Harris *v.* Sumner, 2 Pick. 129; Richards *v.* Hazzards, 1 Stew. & Por. 139. A reservation of so much as is allowed by law avoids the deed in Tennessee, Sugg *v.* Tillman, 2 Swanst. 210; but not in Pennsylvania, Mulford *v.* Shurk, 28 Pa. St. 473. But the courts will be governed by circumstances and the intent of the parties, in determining whether certain reservations are fraudulent, as if the sum is small and reasonable. Canal Bank *v.* Cox, 6 Maine, 395; Skipwith *v.* Cunningham, 8 Leigh, 272; Kevan *v.* Branch, 1 Grat. 275. The trustees may employ the assignor, at reasonable compensation, to assist in disposing of the property. Shattuck *v.* Freeman, 1 Met. 10; Vernon *v.* Morton, 8 Dana, 247; Pearson *v.* Rockhill, 4 B. Mon. 296; Bank of Mobile *v.* Clark, 7 Ala. 765; Jones *v.* Whitbread, 11 C. B. 406; Fitler *v.* Maitland, 5 Watts & S. 307; Nicholson *v.* Leavitt, 4 Sandf. 270; Mulford *v.* Shurk, 28 Penn. St. 473. So the trustees may employ other agents in managing the property. Hennessey *v.* Western Bank, 6 Watts & S. 300; Kelly *v.* Lank, 7 B. Mon. 220; Coates *v.* Williams, 7 Exch. 208; Peck *v.* Whiting, 21 Conn. 206. The trustee may act and convey by attorney. Blight *v.* Schenck, 10 Penn. St. 285; Maennel *v.* Murdock, 13 Md. 164; Gillespie *v.* Smith, 22 Ill. 473.

[1] Doremus *v.* Lewis, 8 Barb. 124; Suidam *v.* Martin, Wright, 698; Goodrich *v.* Downs, 6 Hill, 438; Strong *v.* Skinner, 4 Barb. 547; Cole *v.* Jessup, id. 307; Griffin *v.* Barney, 2 Comst. 365; Leitch *v.* Hollister, 4 Comst. 214; Dana *v.* Lull, 17 Vt. 390.

[2] Ibid.

[3] Hall *v.* Denison, 17 Vt. 311; Ely *v.* Cook, 18 Barb. 612; Beatty *v.* Davis, 9 Gill, 213; Rahn *v.* McElrath, 6 Watts, 151; Hindman *v.* Dill, 11 Ala. 689; Austin *v.* Johnson, 7 Humph. 191. [See Farnsworth *v.* Doom, 109 Ky. 794; Bole *v.* McKelvy, 189 Pa. St. 505; Ralston's Appeal, 169 Pa. St. 254; Early *v.* Early, 75 S. C. 15; Provident Life & Tr. Co. *v.* Fidelity Ins., etc., Co., 203 Pa. St. 82.]

assignment fraudulent. Hurst *v.* Leckie, 97 Va. 550. A reservation by the assignor of property which by statute is exempt from being taken on execution does not render the assignment fraudulent. Thompson *v.* Shaw, 104 Me. 85; 2 Bigelow on Fraud, 214; Bump on Fraudulent Conveyances (4th ed.), § 220.

all secret reservations are fraudulent.[1] If the assignor secretly, and without the knowledge of the general creditors, pays extra money, or gives a special advantage to some particular creditor to procure his assent to the assignment, or to secure his influence with the other creditors in gaining their assent or discharge, such assignment will be illegal and void, as a fraud upon the general creditors; and if the general creditors have signed a release of their claims, such release will be no bar to an action against the debtor.[2] If such creditor has taken notes or other securities from the debtor, as an extra consideration for assenting to such assignment, such notes and securities are void.[3] A deed may be fraudulent by reason of delaying creditors in the collection of their debts; but a conveyance for the benefit of creditors cannot be impeached for fraud by a creditor who assents with knowledge of the facts;[4] otherwise as to one who, though present at the proceedings and expressing no dissent, yet took no part and gave no assent.[5]

§ 592. A condition in a deed of assignment, requiring the creditors to release the assignor from all claims before receiving any benefit under the deed, the surplus returning to the debtor and not to the non-releasing creditors, renders the deed fraudulent and void; and such a stipulation, as a condition of preference, although the only effect is to postpone the non-releasing creditors to a share of the surplus, renders the assignment void. The principle is, that although preferences are allowed, yet the appropriation of the property to the creditors must be absolute and unconditional, and a trust which coerces the creditors into a relinquishment of part of their

[1] M'Cullock *v.* Hutchinson, 7 Watts, 434; Smith *v.* Lowell, 6 N. H. 67; Smith *v.* Smith, 11 N. H. 460.

[2] Mare *v.* Sandford, 1 Gif. 288; Case *v.* Gerrish, 15 Pick. 50; Ramsdell *v.* Edgarton, 8 Met. 227; Lothrop *v.* King, 8 Cush. 382; Partridge *v.* Messer, 14 Gray, 180.

[3] Ibid.

[4] Greene *v.* Sprague, Manuf. Co., 52 Conn. 330.

[5] Waterman *v.* Sprague Manuf. Co., 55 Conn. 554.

claims, in order to enjoy any benefit under the deed, is fraudulent and void, although no portion of the surplus may go to the grantor.[1] (*a*) An assignment to a trustee of *part* of a

[1] Doe *v.* Scribner, 41 Maine, 277; Owen *v.* Arvis, 2 Dutch. 23; Miller *v.* Conklin, 17 Ga. 430; Goddard *v.* Hapgood, 25 Vt. 351; Green *v.* Trieber, 3 Md. 13; Hysloop *v.* Clarke, 14 Johns. 458; Austin *v.* Bell, 20 Johns. 442; Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Goodrich *v.* Downs, 6 Hill, 438; Hafner *v.* Irwin, 1 Ired. L. 490; Robins *v.* Embry, 1 Sm. & M. Ch. 208; Whallom *v.* Scott, 10 Watts, 237; Hastings *v.* Belknap, 1 Denio, 197; Atkinson *v.* Jordan, 5 Ham. 293; Woolsey *v.* Verner, Wright, 606; Barrett *v.* Reids, id. 701; Brown *v.* Knox, 6 Mo. 302; Drake *v.* Rogers, id. 317; Ingraham *v.* Wheeler, 6 Conn. 277; Howell *v.* Edgar, 3 Scam. 417; Ramsdell *v.* Sigerson, 2 Gill, 78; Swearingin *v.* Slicer, 5 Mo. 241; The Watchman, Ware, 232; Todd *v.* Buckman, 2 Fairf. 41; Pearson *v.* Crosby, 23 Maine, 261; Hurd *v.* Silsbee, 10 N. H. 108; Jacot *v.* Corbett, 1 Cheves, Ch. 71; Grimshaw *v.* Walker, 12 Ala. 101; Brown *v.* Lyon, 17 Ala. 659; West *v.* Snodgrass, id. 549; Fox *v.* Adams, 5 Maine, 245; Ashurst *v.* Martin, 9 Porter, 567; McCall *v.* Hinkley, 4 Gill, 129. In the early cases in Alabama, such a condition was held not to vitiate the assignment. Gazzam *v.* Poyntz, 4 Ala. 374; Wiswall *v.* Ticknor, 6 Ala. 179. In Pennsylvania, Virginia, South Carolina, Massachusetts, and Rhode Island, such conditions have been held to be good, and not to vitiate the deeds of assignments. Lippincott *v.* Barker, 2 Binn. 174; Livingston *v.* Ball, 3 Watts, 198; Bayne *v.* Wylie, 10 Watts, 309; Mechanics' Bank *v.* Gorman, 8 Watts & S. 304; Pierpont *v.* Graham, 4 Wash. 232; Skipwith *v.* Cunningham, 8 Leigh, 272; Kevan *v.* Branch, 1 Grat. 275; Niolon *v.* Douglas, 2 Hill, Ch. 443; Le Prince *v.* Guillemont, 1 Rich. Eq. 187; Brashear *v.* West, 7 Pet. 609; Dana *v.* Bank of U. S., 5 Watts & S. 224; Borden *v.* Sumner, 4 Pick. 265; Andrew *v.* Ludlow, 5 Pick. 28; Nostrand *v.* Atwood, 19 Pick. 281; Canal Bank *v.* Cox, 6 Maine, 395; Curtis *v.* Leavitt, 15 N. Y. 9; Halsey *v.* Whitney, 4 Mason, 207. A release by a separate deed, not part of the assignment, does not avoid the assignment. Renard *v.* Graydon, 39 Barb. 548; Nightingale *v.* Harris, 6 R. I. 321; Livermore *v.* Jenckes, 21 How. 126.

(*a*) A common provision is that the assignment shall be for the benefit only of those creditors who shall become parties to the deed and shall release the assignor from personal liability for the balance of his debt to each of them. The better opinion is that this kind of a preference is valid, in the absence of statute provisions to the contrary, if a reasonable opportunity is given to all creditors to accept, and if the assignment includes all the property of the debtor except his statutory exemptions. Thompson *v.* Shaw, 104 Me. 85; Reddy v. Raymond, 194 Mass. 367; Moulton *v.* Bartlett, 195 Mass. 33; National Bank of Commerce *v.* Bailey, 179 Mass. 415; Hurst *v.* Leckie, 97 Va. 550; Davis Co. *v.* Augustus, 105 Va.

debtor's property, on condition of a full release, is fraudulent everywhere.[1] A void assignment may be remedied by an additional assignment,[2] but it cannot be helped by parol evidence.[3]

§ 593. In England, a voluntary assignment to a trustee for creditors, not communicated to them, and they not being parties thereto and privy to its execution, conveys a mere power or agency to the trustees, which may be altered or revoked at the will of the assignor. (*a*) The creditors, though

[1] Seaving *v.* Brinkerhoff, 5 Johns. Ch. 329; Skipwith *v.* Cunningham, 8 Leigh, 272; Le Prince *v.* Guillemont, 1 Rich. Eq. 187; Jacot *v.* Corbett, 1 Cheves, Ch. 71. This question was left open in Nostrand *v.* Atwood, 19 Pick. 284; Fassit *v.* Phillips, 4 Whart. 399; Thomas *v.* Jenks, 5 Rawle, 221; 1 Am. Lead. Cas. 70; Hennessey *v.* Western Bank, 6 Watts & S. 301; Sangston *v.* Gaither, 3 Md. 41; Greene *v.* Trieber, id. 11. [Hurst *v.* Leckie, 97 Va. 550; Long *v.* Meriden Britannia Co., 94 Va. 594; Davis Co. *v.* Augustus, 105 Va. 843.]

[2] Merrill *v.* Englesby, 2 Vt. 150.

[3] Inloes *v.* American Ex. Bank, 11 Ind. 173; Groschen *v.* Page, 6 Cal. 138; Hampstead *v.* Johnston, 18 Ark. 123.

843; Long *v.* Meriden Britannia Co., 94 Va. 594; McElwee *v.* McGill, 57 S. C. 6 (*semble*). See also Boston *v.* Turner, 201 Mass. 190; Hudson *v.* Parker Machine Co., 173 Mass. 242; Andrews *v.* Tuttle-Smith Co., 191 Mass. 461. But see Ralston's Appeal, 169 Pa. St. 254.

Where the assignment contains such a provision, it is essential that the assignor shall have included in the assignment all the property which creditors could have reached by legal process for the satisfaction of their demands. If he has failed to do this, the assignment is a fraudulent attempt to hinder and delay creditors. Hurst *v.* Leckie, 97 Va. 550; Long *v.* Meriden Britannia Co., 94 Va. 594. But an accidental omission of a small part of his unexempt property will not have this effect. Davis Co. *v.* Augustus, 105 Va. 843; Long *v.* Meriden Britannia Co., 94 Va. 594.

In regard to the effect of such an assignment before assented to by creditors whose claims are sufficient to absorb the whole estate, it has been said that the surplus is held in trust for the assignor and that non-assenting creditors can reach it by trustee process. Thompson *v.* Shaw, 104 Me. 85; Reddy *v.* Raymond, 194 Mass. 367; Avery *v.* Monroe, 172 Mass. 132; Weston *v.* Nevers, 72 N. H. 65. See Ralston's Appeal, 169 Pa. St. 254.

(*a*) In England the rule is, as

named in the deed, cannot enforce the trust against the assignor or trustee;[1] but it is said that the communication of the trust by the trustees to the creditors takes away the power to revoke it,[2] and if the trustees have made payments or advances, they are entitled to possession of the property until they are reimbursed.[3] If the deed declares that it shall be void unless executed by all the creditors within a certain time, yet it is not void in equity if the creditors accept and act under it, though it is not signed by them.[4] And even though one of the trustees

[1] La Touch *v.* Lacom, 7 Cl. & Fin. 772; Walwyn *v.* Coutts, 3 Mer. 707; 3 Sim. 14; Page *v.* Broom, 4 Russ. 6; Garrard *v.* Lauderdale, 3 Sim. 1; 2 R. & M. 451; Bill *v.* Cureton, 2 Myl. & K. 511; Simmonds *v.* Pallas, 2 Jo. & Lat. 489, 8 Ir. Eq. 335, 489; Griffiths *v.* Ricketts, 7 Hare, 307; Siggers *v.* Evans, 22 Eng. L. & Eq. 139; Nicholson *v.* Tutin, 2 K. & J. 18; Wilding *v.* Richards, 1 Col. C. C. 659; Kirwan *v.* Daniel, 5 Hare, 499; Evans *v.* Bagwell, 2 Con. & Law. 616; 4 Dru. & War. 398; Brown *v.* Cavendish, 1 Jo. & Lat. 635; Synnot *v.* Simpson, 5 H. L. Cas. 141.

[2] Acton *v.* Woodgate, 2 Myl. & K. 495. [Lewin on Trusts (11th ed.), p. 598; Johns *v.* James, 8 Ch. Div. 744.]

[3] Hind *v.* Blake, 3 Beav. 234.

[4] Spottiswoode *v.* Stockdale, G. Coop. 104; Dunch *v.* Kent, 1 Vern. 260; Whitmore *v.* Turquand, 3 De G., F. & J. 110; *Re* Baber, L. R. 10 Eq. 554. The creditor must put himself in the same relation as if he had signed the deed. Forbes *v.* Limond, 4 De G., M. & G. 298. And within the time fixed, if there is a limit of time within which he must execute the assignment, or assent thereto. Halsey *v.* Whitney, 4 Mason, 206; Aston *v.* Woodgate, 2 Myl. & K. 492; Phœnix Bank *v.* Sullivan, 9 Pick. 410; De Caters *v.* Chaumont, 9 Paige, 490. The creditors are not necessarily excluded if they do not come in within the prescribed time, as they may show reasons why they should not be excluded. See cases before cited. Tennant *v.* Stoney, 1 Rich. Eq. 222; Hosack *v.* Rogers, 6 Paige, 415; Nicholson *v.* Tutin, 2 K. & J. 18; Watson *v.* Knight, 19 Beav. 369; Pierpont *v.* Graham, 4 Wash. C. C. 232; Stoddart *v.* Allen, 1 Rawle, 258; Dedham Bank *v.* Richards, 2 Met. 105; Furman *v.* Fisher, 4 Cold. 626. But if the time within which creditors are to come in is unreasonably short, the assignment will be fraudulent and void. Brashear *v.* West, 7 Pet. 609; Vaughn *v.* Evans, 1 Hill,

stated by Kekewich, J., in Priestley *v.* Ellis, [1897] 1 Ch. 489, 500: "A debtor, minded to provide for his creditors, and to that intent vesting the property in another with directions to apply it in payment of his debts, does not thereby constitute an irrevocable trust, at all events during his life. The trustee is only his agent for effecting his wishes, and is responsible only to him."

does not sign the deed, it is good at law as well as in equity.[1] If the deed itself declares that it is made for those *only* who *become parties* to it, only those who become parties can claim anything under it;[2] though it has been held that they need not sign it, if they perform all its conditions, and take no step inconsistent with it.[3] In the United States the rule is different. If an assignment, not fraudulent, is made to trustees for the benefit of creditors, their assent is not necessary; or their assent will be presumed in all cases, if it is for their benefit, and contains no unusual clauses or restrictions.[4] (*a*) A debtor

Ch. 414; Vernon *v.* Morton, 8 Dana, 447; Skipwith *v.* Cunningham, 8 Leigh, 272; Biron *v.* Mount, 24 Beav. 642; Lancaster *v.* Elce, 31 id. 325. If a *third party* conveys property in trust for a debtor's liabilities, only those creditors can avail themselves of the fund who come strictly within the terms of the trust, and execute the assignment and comply with all its conditions. Williams *v.* Moslyn, 33 L. J. Ch. 54.

[1] Small *v.* Marwood, 9 B. & Cr. 360; Good *v.* Cheesman, 2 B. & Ad. 328.

[2] Garrard *v.* Lauderdale, 3 Sim. 1; Balfour *v.* Welland, 16 Ves. 151.

[3] Field *v.* Donoughmore, 1 Dr. & War. 227.

[4] Nicoll *v.* Mumford, 4 Johns. Ch. 523; Cunningham *v.* Freeborn, 11 Wend. 241; Houston *v.* Nowland, 7 Gill & J. 480; Bank of U. S. *v.* Huth, 4 B. Mon. 423; Smith *v.* Leavitt, 10 Ala. 93; Kinnard *v.* Thompson, 12 Ala. 487; Governor, &c. *v.* Campbell, 17 Ala. 566; Rankin *v.* Duryer, 21 Ala. 392; Klapp *v.* Shurk, 13 Penn. St. 539; Harland *v.* Binks, 15 Ad. & E. (N. S.) 721; Brooks *v.* Marbury, 11 Wheat. 78; Brown *v.* Minturn, 2 Gall. 557; Wheeler *v.* Sumner, 4 Mason, 183; Halsey *v.* Whitney, id. 206; New England Bank *v.* Lewis, 8 Pick. 113; Ward *v.* Lewis, 4 Pick. 518; North *v.* Turner, 9 Serg. & R. 244; Wiley *v.* Collins, 2 Fairf. 193; Wilt *v.* Franklin, 1 Binn. 502; Reinhard *v.* Bank of Kentucky, 6 B. Mon. 252; Moses *v.* Murgatroyd, 1 Johns. Ch. 129; Neilson *v.* Blight, 1 Johns. Cas. 205; Weston *v.* Barker, 12 id. 281; 4 Kent, 307; Marigny *v.* Remy, 15 Martin, 607; Gray *v.* Hill, 10 Serg. & R. 436; De Forrest *v.* Bacon, 2 Conn.

(*a*) This must necessarily be otherwise where the deed contains a valid provision expressly limiting the benefit of the assignment to those creditors who shall sign the deed and release the assignor from his personal liability for so much of their demands as shall not be paid out of the assigned property. Thompson *v.* Shaw, 104 Me. 85; Reddy *v.* Raymond, 194 Mass. 367; Avery *v.* Monroe, 172 Mass. 132; Weston *v.* Nevers, 72 N. H. 65 (*semble*). See Kingman *v.* Cornell-Tebbetts Co., 150 Mo. 282 (*semble*); Gonzales *v.* Batts, 20 Tex. Civ. App. 421.

cannot revoke the assignment where the property has vested in the trustees, or the creditors have had notice of it, or any of the trusts have been performed.[1] The English rule prevailed in Massachusetts before the court had jurisdiction in equity over such assignments;[2] but after the Act of 1836, c. 238, the assent of creditors was not necessary.[3] (a) If the conveyance is made *directly to the creditors*, in consideration of the debts due them, their assent to the conveyance is necessary; but it may be presumed under some circumstances.[4] If the assignment is made to a trustee not present, his assent will be presumed; and the deed will take effect from its delivery, subject to be defeated by the refusal of the trustee.[5]

633; Rankin *v.* Lodor, 21 Ala. 380; Stewart *v.* Hall, 3 B. Mon. 218. [Robinson *v.* Thomason, 113 Ala. 526; Smith *v.* Herrell, 11 App. D. C. 425; Fearey *v.* O'Neill, 149 Mo. 467; Kingman *v.* Cornell-Tebbetts Co., 150 Mo. 282; McClain *v.* Pittsburg Stock Exch., 219 Pa. St. 435; Gonzales *v.* Batts, 20 Tex. Civ. App. 421; Billings *v.* Parsons, 17 Utah, 22; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409; Burrill on Assignments (6th ed.), §§ 257, 258. But see Robertson *v.* Desmond, 62 Ohio St. 487.]

[1] Robinson *v.* Sublett, 6 Humph. 313; Lawrence *v.* Davis, 3 McLean, 177; Petriken *v.* Davis, 1 Morris, 296.

[2] Russell *v.* Woodward, 10 Pick. 408; Stephens *v.* Bell, 6 Mass. 339; Widgery *v.* Haskell, 5 Mass. 144.

[3] Shattuck *v.* Freeman, 1 Met. 10.

[4] Tompkins *v.* Wheeler, 16 Pet. 106; Nicoll *v.* Mumford, 4 Johns. Ch. 522.

[5] Wilt *v.* Franklin, 1 Binn. 502; McKinney *v.* Rhoades, 5 Watts, 343; Skipwith *v.* Cunningham, 8 Leigh, 272; Merrill *v.* Swift, 18 Conn. 257; Ward *v.* Lewis, 4 Pick. 518; Moore *v.* Collins, 3 Dev. 126; Read *v.* Robinson, 6 Watts & S. 329; Dargan *v.* Richardson, 1 Cheves, L. 197; Shubar *v.* Winding, id. 218. [See McClain *v.* Pittsburg Stock Exch., 219 Pa. St. 435.]

(a) This statute has been repealed. See Burrill on Assignments (6th ed.), § 258; 8 Harvard Law Rev. 270. The usual form of assignment for creditors in Massachusetts contains a provision requiring the express assent of creditors as a condition of their becoming entitled to its benefits. See note (a), *supra*, p. 970. But see Boston *v.* Turner, 201 Mass. 190.

Where the assignee himself is a creditor, his signature to the deed of assignment will be taken as both an acceptance of the legal title and trust, and an assent as creditor. Reddy *v.* Raymond, 194 Mass. 367.

But if there is any doubt concerning the trustee's acceptance, all liens put upon the property during such delay, and before the trustee actually accepts, will take preference of the deed of assignment.[1]

§ 594. As soon as an assignee accepts a general assignment for the payment of debts to creditors, either directly or by implication, he becomes a trustee for them; and, as soon as they have notice, they may compel the execution of the trust in a court of equity.[2] Failure of the trustee to execute the trust within the time named in the deed will not divest the rights of the beneficiaries. The court may remove the trustee or compel him to do his duty.[3] (*a*) But the assign-

[1] Crosby *v.* Hillyer, 24 Wend. 280.

[2] Moses *v.* Murgatroyd, 1 Johns. Ch. 119; Shepherd *v.* McEvers, 4 Johns. 136; Hulse *v.* Wright, Wright, 61; Pingree *v.* Comstock, 18 Pick. 46; Weir *v.* Tannehill, 2 Yerg. 57; Nicoll *v.* Mumford, 4 Johns. Ch. 523; Ward *v.* Lewis, 4 Pick. 518; New Eng. Bank *v.* Lewis, 8 Pick. 113; Robertson *v.* Sublett, 6 Humph. 313; Pearson *v.* Rockhill, 4 Mon. 296; Kelley *v.* Babcock, 49 N. Y. 320.

[3] Clark *v.* Wilson, 77 Ind. 176.

(*a*) In some States statutes have especially provided for oversight and control of such trusts by the courts, and sometimes the assignee must qualify by giving bond. Matter of Sheldon, 173 N. Y. 287. In the absence of such statutes, courts of equity have general jurisdiction to enforce the proper performance. Brockett *v.* Lewis, 144 Mich. 561.

They have jurisdiction to remove a trustee for misconduct or incapacity and to appoint a new trustee in his place upon complaint of the creditors for whose benefit the trust exists. Haven *v.* Sibbald, 41 A. 371 (N. J. Ch. 1898); Assigned Estate of Ahl, 192 Pa. St. 370; Taylor *v.* Mahoney, 94 Va. 508; Bryson *v.* Wood, 187 Pa. St. 366; State *v.* Johnson, 105 Wis. 164, 178; Morgan *v.* So. Milwaukee, etc., Co., 100 Wis. 465. But if the trust is valid the courts have no power to take the property out of the hands of a trustee and appoint a receiver except upon proof of misconduct or other cause which justifies his removal. Dozier *v.* Logan, 101 Ga. 173; Pollard *v.* Southern Fertilizer Co., 122 Ala. 409; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565.

Courts of equity have jurisdiction to permit the assignee to resign, Andrews *v.* Wilson's Assignee, 114 Ky. 671, and to appoint a new trustee to carry out the trust where the office becomes vacant by

ment must be accepted according to its terms, and within the time named.[1] In bringing a bill to seek the benefit of such an assignment, all the creditors must join in the suit, or one may sue in behalf of the others, who may come in and join him. Such bill must be brought for the enforcement of the trust generally, and for a sale of the property, the settlement of the accounts, and the payment of all the debts: a decree for the payment of a single debt would be erroneous.[2] But if the bill is to set aside the assignment for any reason, a single creditor may maintain it.[3] As a general rule, if the assignment

[1] First Nat'l Bank of Easton *v.* Smith, 133 Mass. 26.

[2] Atherton *v.* Worth, 1 Dick. 375; McDougald *v.* Dougherty, 11 Ga. 570; Wakeman *v.* Grover, 4 Paige, 24; Bryant *v.* Russell, 23 Pick. 523; Edmeston *v.* Lyde, 1 Paige, 637; Hamilton *v.* Houghton, 2 Bligh, P. C. 169; Reynolds *v.* Bank of Va., 6 Grat. 174; Fisher *v.* Worth, 1 Busb. Eq. 63. But where one creditor filed a bill when no claim had been made for twenty years, and the trustee had stated that all the other creditors had been satisfied, he was allowed to maintain his bill. Mumford *v.* Murray, 6 Johns. Ch. 1.

[3] Russell *v.* Lasher, 4 Barb. 233; Wakeman *v.* Grover, 4 Paige, 24;

failure of the assignee to accept or to qualify, or upon his death, resignation, or removal. Claflin Co. *v.* Middlesex Banking Co., 113 Fed. 958; Brown *v.* Parker, 97 Fed. 446; Tuttle *v.* Merchants' Nat. Bank, 19 Mont. 11; Rogers *v.* Pell, 166 N. Y. 565.

A creditor has no standing to petition for the removal of the assignee or for the enforcement of the trust, until he has brought himself within the class of those for whose benefit the assignment was made. Loucheim *v.* Casperson, 61 N. J. Eq. 529. There is an important difference between such a proceeding and a proceeding by a creditor to have the assignment declared invalid, and the two proceedings are inconsistent. Brockett *v.* Lewis, 144 Mich. 561.

It has been held in Massachusetts that a creditor who has failed to accept the terms of the assignment within the time limited in the deed cannot compel the assignee to exercise his discretionary power to accept the assent after the time has expired, unless possibly upon a showing that his refusal to accept the assent was not justified. Moulton *v.* Bartlett, 195 Mass. 33; National Bank of Commerce *v.* Bailey, 179 Mass. 415.

Where the deed of assignment does not provide that the assignee shall have power to accept the assent of a creditor after the time fixed by the deed, he cannot extend the time even for a day. McElwee *v.* McGill, 57 S. C. 6.

is set aside and a receiver appointed, or the court orders the estate to be settled, claims will be paid *pari passu;* but some creditors may have obtained legal preferences at law, and in such case the court will order them to be paid according to their priority.[1]

§ 595. In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous.[2] If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties;[3] but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be parties.[4] So if the trust to pay debts is created under a will, the heir of the testator must be made a party to a suit.[5] A creditor may maintain a suit in behalf of such creditors as may join him against the assignees, for an administration of the trust; and, upon public notice being given for creditors to come in and prove their claims, all creditors will be barred, although they may have had no actual notice.[6] But a single creditor cannot sue a trustee for neglect or default, the remedy is by bill in equity on behalf of all the creditors; nor can an individual creditor sue at law to recover any larger part of his debt than is ascertained or admitted to be due from the trustee.[7]

Stout *v.* Higbee, 4 J. J. Marsh. 632. In Ohio, the creditor that procures the assignment to be set aside obtains a priority in the distribution of the assets. Atkinson *v.* Jordan, Wright, 247. The Rev. Statutes of N. Y. are to the same effect. Corning *v.* White, 2 Paige, 567; Burrall *v.* Leslie, 6 Paige, 445; Lucas *v.* Atwood, 2 Stew. 378.

[1] Gracey *v.* Davis, 3 Strob. Eq. 58; Austin *v.* Bell, 20 Johns. 442; McDermutt *v.* Strong, 4 Johns. Ch. 687; McMeekin *v.* Edmonds, 1 Hill, Eq. 293; Codwise *v.* Gelston, 10 Johns. 519; Le Prince *v.* Guillemont, 1 Rich. Eq. 220.

[2] Hamilton *v.* Houghton, 2 Bligh, 169; Routh *v.* Kinder, 3 Swanst. 144, n.

[3] Hobart *v.* Andrews, 21 Pick. 532.

[4] Houghton *v.* Davis, 23 Maine, 28.

[5] Harris *v.* Ingledew, 3 P. Wms. 93.

[6] Kerr *v.* Blodgett, 48 N. Y. 62.

[7] Bouvé *v.* Cottle, 143 Mass. 313.

§ 596. As a matter of course, mortgagees, judgment creditors, and all others having a lien upon the trust property prior to the assignment, are not affected by it. Their rights remain as before the assignment; and an attachment or any lien that is fastened upon the property after the assignment is made, but before it is accepted by the trustee, takes preference of the assignment.[1] (*a*) A creditor as one of the *cestuis que trust* may be a trustee;[2] in such case he has no power to prefer his own claim, but must take equally with the others, unless by the terms of the deed a preference is given him.[3] By accepting the trust according to its terms, a creditor trustee waives all claims and liens upon the property inconsistent with the deed.[4] But it is said, that the rule which prohibits

[1] Crosby *v.* Hillyer, 24 Wend. 280; Codwise *v.* Gelston, 10 Johns. 517; Hayes *v.* Heidelberg, 9 Penn. St. 203; Hogan *v.* Strayhorn, 65 N. C. 279; Bloomer *v.* Waldron, 3 Hill, 367.

[2] Balfour *v.* Welland, 16 Ves. 151; Boazman *v.* Johnston, 3 Sim. 377; Acton *v.* Woodgate, 2 Myl. & K. 49; Siggers *v.* Evans, 32 Eng. L. & Eq. 139; Hobson *v.* Thelluson, L. R. 2 Q. B. 642. [State *v.* Johnson, 105 Wis. 164, 182. But see Farrar *v.* Powell, 71 Vt. 247.]

[3] Boazman *v.* Johnston, 3 Sim. 382; Anon., 2 Ch. Cas. 54; Child *v.* Stephens, 1 Eq. Cas. Ab. 141; 1 Vern. 102; Garrard *v.* Lauderdale, 3 Sim. 1; Miles *v.* Bacon, 4 J. J. Marsh. 468; Harrison *v.* Mock, 10 Ala. 185.

[4] Harrison *v.* Mock, 10 Ala. 185.

(*a*) In some States it is provided by statute that the assignee under a voluntary assignment for the benefit of creditors may proceed, as the representative of creditors, to set aside a previous transfer of property by the assignor in fraud of creditors. Dickson *v.* Kittson, 75 Minn. 168, 173; Swedish-Am. Bank *v.* First Nat. Bank, 89 Minn. 98; Huey *v.* Prince, 187 Pa. St. 151. It has been held even in the absence of statute provisions that the assignee has this right and duty to the extent that the property fraudulently transferred is needed to satisfy the claims of creditors. Wimpfheimer *v.* Perrine, 67 N. J. Eq. 597; Taylor *v.* Lauer, 127 N. C. 157. But the sounder view seems to be that he acquires by the assignment only such rights and interests as the assignor himself could have enforced. First Nat. Bank *v.* Menke, 128 Cal. 103; Maiders *v.* Culver's Assignee, 1 Duv. (Ky.) 164; Jacobi *v.* Jacobi, 101 Mo. 507; Babcock *v.* Maxwell, 29 Mont. 31, 34; Murchie *v.* Wentworth, 74 N. H. 3; Smith *v.* Equitable Trust Co., 215 Pa. St. 418.

a trustee from acquiring an interest adverse to his *cestui que trust* does not apply to a *bona fide* creditor who has become trustee; and that such trustee may purchase a judgment against his *cestui que trust*.[1] But the fact that the trustee is a *bona fide* creditor, ignorant of any fraud, will not prevent the assignment from being declared void, if it is fraudulent upon any legal grounds.[2] So creditors who accept the benefits conferred under such deed, and receive dividends or other advantages thereby, cannot set up rights inconsistent with the deed; nor can they, after receiving such advantages, impeach it, and procure it to be set aside, but they must comply with its provisions.[3] The assignee of an insolvent affirms a fraudulent sale made by his assignor by suing the fraudulent purchaser for the price.[4] A creditor, before he can commence process to set aside a fraudulent assignment or conveyance, must first obtain judgment on his claim.[5] If the debtor B. is unwilling to give a mortgage directly to one of his creditors A., but executes one to another creditor C., to secure C. in regard to what is owing to C. directly, and in respect to any liabilities incurred by C. on B.'s account, and C. guarantees to A. the payment of B.'s debt to him, A. can enforce the trust thus created against C. to the full extent of the mortgage, if necessary in order to pay debts to A. not otherwise secured.[6]

§ 597. When an assignment is made and executed, and all parties assent that the estate shall be managed and settled by trustees, the deed that vests the estate in the trustees for the payment of the debts, may prescribe the manner of carry-

[1] Prevost *v.* Gratz, Peters, C. C. 373.

[2] Rathburn *v.* Platner, 18 Barb. 272.

[3] Adlum *v.* Yard, 1 Rawle, 163; Gutswiller *v.* Lackman, 23 Miss. 168; Pratt *v.* Adams, 7 Paige, 615; Burrows *v.* Alter, 7 Miss. 424; Jewett *v.* Woodward, 1 Edw. Ch. 195; Lanahan *v.* Latrobe, 7 Md. 268.

[4] Butler *v.* Hildreth, 5 Met. 49.

[5] Neustadt *v.* Joel, 2 Duer, 532. [Loucheim *v.* Casperon, 61 N. J. Eq. 529.]

[6] Parsons *v.* Clark, 132 Mass. 569.

ing the trust into execution, and paying the debts.[1] These directions may be contrary to law, and may be set aside on proceedings had for that purpose, yet if all parties proceed under the deed, the trustees must find their power in the deed of assignment or settlement, and they must proceed in accordance with it in selling the property and in paying the debts; if preferences are made, the trustees must pay them;[2] if all are to be paid equally, the trustees must pay in that manner.[3] If the trust is to pay only a certain class of debts, or a certain number of debts named, the trustees must confine themselves to their power.[4] The principle on which this rests is, that the assignor was the owner of the property, and he could give such directions as to the disposal of it as he pleased; and, so long as the law does not interfere to set aside the assignment, the assignee must follow the only power given to him, to wit, the deed of assignment. In England, the deed generally specifies the mode of raising the money for the purpose of the trust, by directing a sale or mortgage. In the absence of such direction, the intention is to be gathered from the scope of the whole deed, whether a sale or mortgage was intended; for the intention is to govern.[5] If the property is conveyed in trust to pay debts generally, the trustees can make a good title to the purchaser, either in fee or in mortgage, and the purchaser is not bound to see whether there are debts, or whether a sale is necessary, or to see to the application of the purchase-money:

[1] Boazman *v.* Johnston, 3 Sim. 381; Carr *v.* Burlington, 1 P. Wms. 229.

[2] Garrard *v.* Lauderdale, 3 Sim. 1; Douglass *v.* Allen, 2 Dr. & War. 213; Pearce *v.* Slocombe, 3 Y. & Col. 84.

[3] Ibid.; Anon. 3 Ch. Cas. 54; Wolestoncroft *v.* Long, 1 id. 32; Child *v.* Stevens, 1 Vern. 102; Hamilton *v.* Houghton, 2 Bligh, 169.

[4] Purefoy *v.* Purefoy, 1 Vern. 28; Loddington *v.* Kime, 3 Lew. 433; Pratt *v.* Adams, 7 Paige, 615; Stoddart *v.* Allen, 1 Rawle, 258; Brainard *v.* Dunning, 30 N. Y. 211.

[5] Spalding *v.* Shalmer, 1 Vern. 301; Ball *v.* Harris, 8 Sim. 485; Sheldon *v.* Dormer, 2 Vern. 310; Shrewsbury *v.* Shrewsbury, 1 Ves. Jr. 234; Ivy *v.* Gilbert, 2 P. Wms. 13; Mills *v.* Banks, 3 id. 1; Allen *v.* Backhouse, 2 V. & B. 65; Wilson *v.* Halliley, 1 R. & M. 590; 1 Sugd. Pow. 116; Stroughill *v.* Anstey, 1 De G., M. & G. 635.

the creditors must look to the trustees.[1] But if the trust is to pay one particular debt, or debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money,[2] unless the trustees are authorized to give receipts, or there is a clause in the trust-deed discharging the purchaser from such obligations.[3]

§ 598. In the United States, a deed of assignment to pay debts necessarily implies a power to sell; and if it is an insolvent estate, a power to mortgage contained in the deed would render it fraudulent and void;[4] therefore all deeds of assignment for the payment of debts generally, without any limitations or directions, confer upon the trustees a right to sell.[5] But if there are special directions given as to the time, manner, and conditions of sale, they must be followed as given.[6] Thus a conveyance of land in trust to pay out of the rents and profits the grantor's debts, and to support the grantor, his wife, and children, and at his death divide it among his children, gave no right to sell for payment of debts, or for any purpose.[7] An unsealed writing purporting to convey land in trust to pay

[1] Johnson *v.* Kennett, 3 Myl. & K. 631; Shaw *v.* Borrer, 1 Keen, 559; Eland *v.* Eland, 4 Myl. & Cr. 428; Forbes *v.* Peacock, 11 Sim. 152; Page *v.* Adam, 4 Beav. 269; Culpepper *v.* Aston, 2 Ch. Cas. 115; Anon., Salk. 153; Dunch *v.* Kent, 1 Vern. 260; Jenkins *v.* Hiles, 6 Ves. 654, n.; Williamson *v.* Curtis, 3 Bro. Ch. 96; Doran *v.* Wiltshire, 3 Swanst. 699; Jones *v.* Price, 11 Sim. 558; Glyn *v.* Locke, 3 Dr. & War. 11; 2 Sugd. V. & P. 32; Doe *v.* Hughes, 6 Exch. 223; Lock *v.* Lomas, 21 L. J. Ch. 503; Robinson *v.* Lowater, 17 Beav. 601; 5 De G., M. & G. 277.

[2] Doran *v.* Wiltshire, 3 Swanst. 701; Elliott *v.* Merryman, Barn. 78; 1 Keen, 573; 2 Atk. 41; Spalding *v.* Shalmer, 1 Vern. 301; Lloyd *v.* Baldwin, 1 Ves. 73; Balfour *v.* Welland, 16 Ves. 151.

[3] Binks *v.* Rokeby, 2 Madd. 227; Roper *v.* Hallifax, 2 Sugd. Pow. 501, App. 3; Jones *v.* Price, 11 Sim. 557; Culpepper *v.* Aston, 2 Ch. Cas. 115; Spalding *v.* Shalmer, 1 Vern. 301; Braybroke *v.* Inskip, 8 Ves. 417.

[4] Planck *v.* Schermerhorn, 3 Barb. Ch. 644.

[5] Goodrich *v.* Proctor, 1 Gray, 567; Purdie *v.* Whitney, 20 Pick. 25; Gould *v.* Lamb, 11 Met. 84; Williams *v.* Otey, 8 Humph. 563. [Lumbering Co. *v.* Powell, 120 Mich. 51.]

[6] Walker *v.* Brungard, 13 Sm. & M. 723.

[7] Mundy *v.* Vawter, 3 Grat. 518.

one debt, does not confer a power of sale, but creates a simple lien to be enforced in equity.[1] If a trustee sells, however, without power, and all parties are present, acquiescing in the sale, they are estopped in equity to deny the title of the purchaser.[2] (*a*) An assignment that does not purport to convey land in trust will not give the trustees power to sell.[3] If the trustee has power to sell land to pay debts generally, it is impossible for the purchaser to know what the debts are, or whether there is a necessity for the sale. This is a part of the trust and duty confided in the trustee, and a purchaser is not obliged to look to the application of the purchase-money.[4] The English rules upon this subject are not favored in this country, and they will not be applied if any circumstance can be found to take the case out of their operation. But if the trust is to pay a particular debt, or certain debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money, unless there is some circumstance or power to take the case out of the rule.[5] If there is collusion or fraud between the trustee and purchaser, or knowledge in the purchaser that there are no debts, or that the sale is unnec-

[1] Linton *v.* Boly, 12 Mo. 567.

[2] Spencer *v.* Hawkins, 4 Ired. Eq. 288.

[3] Baker *v.* Crookshank, 1 Whart. Dig. (6th ed.) Debt. & Cred. pl. 370.

[4] Goodrich *v.* Proctor, 1 Gray, 670; Andrews *v.* Sparhawk, 13 Pick. 393; Gardner *v.* Gardner, 3 Mason, 178; Williams *v.* Otey, 8 Humph. 568; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308; Grant *v.* Hook, 13 Serg. & R. 259; Bruch *v.* Lants, 2 Rawle, 392; Coombs *v.* Jordan, 3 Bland, 284; Redheimer *v.* Pyron, Spears, Eq. 134; Cadbury *v.* Duval, 10 Penn. St. 267; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Hannum *v.* Spear, 1 Yeates, 553; 2 Dall. 291; Hauser *v.* Shore, 5 Ired. Eq. 357; Sims *v.* Lively, 14 B. Mon. 433; Lining *v.* Peyton, 2 Des. 378; Wilson *v.* Davisson, 2 Rob. (Va.) 385; Nicholls *v.* Peak, 12 N. J. Eq. 69; Rutledge *v.* Smith, 1 Busb. Eq. 283.

[5] Gardner *v.* Gardner, 3 Mason, 178; Duffy *v.* Calvert, 6 Gill, 487; Wormley *v.* Wormley, 8 Wheat. 422; Cadbury *v.* Duval, 10 Penn. St. 267; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Elliott *v.* Merryman, 1 Lead. Cas. Eq. 45, n. [See *infra*, § 790, note.]

(*a*) When there is no chance of a surplus over the claims of creditors, it is not necessary to have the assent of the assignor to an advantageous sale for other than cash. Whitman *v.* McIntyre, 199 Mass. 436.

essary or not authorized, it is all void as fraudulent.[1] Although there is fraud, or a misapplication of the purchase-money with the knowledge of the purchaser, he will take a good *title at law;* but equity will convert him into a trustee, and make him accountable to the creditors or *cestuis que trust.*[2] (*a*)

[1] Potter *v.* Gardner, 12 Wheat. 498; Garnett *v.* Macon, 2 Brock. 185; Redheimer *v.* Pyron, Spears, Eq. 134. [See *infra*, § 800, note.]

[2] D'Oyley *v.* Loveland, 1 Strob. L. 46. A sale by a trustee holding the legal title, though unauthorized or collusive, will generally pass the legal title; but the grantee will take the estate charged with the same trusts that the original trustee was charged with. [See *supra*, § 789 *et seq.*]

(*a*) When a large part of the assigned estate consists of goods in the process of manufacture or when a large part of the value of the estate depends upon the ability to sell the assignor's business as a going concern, the assignee is sometimes justified in continuing the business for a short time. But if he does so without the previous consent of creditors or authority from court and a loss results, he runs great danger of being held liable for the loss, even though the deed of assignment purports to give him power to continue the business. Cooper *v.* Lankford, 117 Ky. 792; Hill *v.* Cornwall, 95 Ky. 526; Brown's Assigned Estate, 193 Pa. St. 281; Quimby *v.* Uhl, 130 Mich. 198, 211; Wilhelm *v.* Byles, 60 Mich. 561, 567. Under the common form of assignment in Massachusetts which requires creditors to become parties to the deed, a provision in the deed authorizing the assignee to continue the business for a reasonable time would seem to be sufficient authority from the creditors who become parties to it.

Even when the continuance of the business has been expressly authorized by the creditors, they are not liable as proprietors upon the trustee's contracts. The trustee is neither an agent nor a partner, but is primarily liable upon his contracts. A right to reach the trust assets or the beneficiaries must be worked out through the trustee's right to indemnity. Wells-Stone Co. *v.* Grover, 7 N. D. 460; Smith *v.* Williams, 178 Ill. 420; Sterns Paper Co. *v.* Williams, 178 Ill. 626. See *contra*, Wright *v.* Caney River Ry. Co., 66 S. E. 588 (N. C. 1909). As to the trustee's right to reimbursement from creditors who have received dividends, when the trust estate is insufficient, see Wells-Stone Co. *v.* Aultman, 9 N. D. 520.

When the assigned assets include the unexpired term of a lease which is not forfeited by the assignment, the assignee has a reasonable time in which to decide whether he will accept the lease and assume the burdens of its covenants on behalf of the estate, or abandon it. Walton *v.* Stafford,

§ 599. As a general rule, the assets of a partnership are holden to pay partnership debts, and the separate property of each individual partner is holden, first, to pay his private debts; so, if an insolvent partnership make an assignment, the trustee must apply the joint property to the joint debts, and the separate property to private debts.[1] So a partnership assignment that prefers private debts is void; and a general assignment by an individual partner that preferred partnership debts, would be void.[2] But where it is legal to make preferences, an assignment may probably prefer either class.[3] So it is said that provisions in a partnership assignment that

[1] Pearce *v.* Slocombe, 3 Y. & Col. 84; Merrill *v.* Neill, 8 How. 414.
[2] Jackson *v.* Cornell, 1 Sandf. Ch. 348.
[3] Kirby *v.* Schoonmaker, 3 Barb. Ch. 46.

162 N. Y. 558; Wilder *v.* McDonald, 63 Ohio St. 383; Trust Co. *v.* Wabash Ry. Co., 150 U. S. 299; N. H. Trust Co. *v.* Taggart, 68 N. H. 557; Rand *v.* Francis, 168 Ill. 444.

Like other trustees, the assignee is entitled to reasonable compensation for his services. McDougal *v.* Fuller, 148 Cal. 521; Branch *v.* Am. Nat. Bank, 57 Kan. 282; Pickerell *v.* Thompson, 109 Ky. 498; Nat. Bank *v.* Dulaney, 96 Md. 159, 171; Hay *v.* Bacon, 80 Minn. 188; Sliker *v.* Fisher, 45 N. J. Eq. 132; Matter of Assignment of Hulburt, 89 N. Y. 259; *Re* Assignment of Woodall, 33 Or. 382; *Re* Assignment of Bank of Oregon, 32 Or. 84; Tustin's Appeal, 176 Pa. St. 382; Coleman's Assigned Estate, 200 Pa. St. 29; Real Estate Inv. Co.'s Estate, 212 Pa. St. 304; Mann *v.* Poole, 48 S. C. 154; Woodcock *v.* Reilly, 16 S. D. 198; German Bank *v.* Haller, 103 Tenn. 73; Morris *v.* Ellis, 62 S. W. 250 (Tenn. Ch. Ap. 1901); Beecher *v.* Foster, 51 W. Va. 605, 621. And he is entitled to employ counsel where reasonably necessary, and to pay reasonable counsel charges out of the assigned estate. National Bank *v.* Dulaney, 96 Md. 159, 171; Berkeley *v.* Green, 102 Va. 378, 381; Courier-Journal Co. *v.* Columbia Fire Ins. Co., 54 S. W. 966 (Ky. 1900).

Like other trustees, he is chargeable with losses due to his failure to use the care and prudence of an ordinarily prudent man. Matter of Leventritt, 58 N. Y. S. 256, 40 App. Div. 429; Wright's Estate, 182 Pa. St. 90.

He is not allowed to make a profit for himself by his dealings with reference to the trust estate, and is not allowed to purchase, either directly or indirectly, the trust property without the assent of those beneficially interested. Allison's Estate, 183 Pa. St. 555; Nabours *v.* McCord, 97 Tex. 526; McCord *v.* Nabours, 101 Tex. 495.

do not go beyond the provisions of the law will not avoid it though releases are stipulated for.[1] But a partnership assignment that provides for a release, must convey all the property, joint and separate, held by the firm;[2] and the deed must be signed and sealed by all the members of the firm; for a general assignment by one partner will not pass the partnership assets;[3] nor will a general assignment by a single member of a limited partnership pass the property of the firm.[4] By statutes in nearly all the States, all preferences by limited partnerships are forbidden.[5]

§ 600. If by the terms of an assignment no debts are to be paid until they have been examined by the trustees, a creditor can claim no benefit under the deed, until he has submitted his claim to the trustees.[6] If the trustees are clothed with absolute power to allow or reject all claims, the court cannot interfere with their discretion;[7] but such a power in a general assignment by an insolvent debtor would render the assignment void. So a power given to the trustees to prefer such debts as they please would render the assignment void.[8] A general power to pay debts will not justify the trustees in paying fictitious debts;[9] nor will it include debts founded upon a usurious consideration:[10] but, where such debts are specially named and directed to be paid, the trustee cannot

[1] Andress *v.* Miller, 15 Penn. St. 318.

[2] Hennessey *v.* Western Bank, 6 Watts & S. 300.

[3] Ibid.; Moddewell *v.* Keever, 8 Watts & S. 63.

[4] Merritt *v.* Wilson, 29 Maine, 58.

[5] Mills *v.* Argall, 6 Paige, 577.

[6] Wain *v.* Egmont, 3 Myl. & K. 445; Drever *v.* Mawdesley, 16 Sim. 511; Nunn *v.* Wilsmore, 8 T. R. 521; Cosser *v.* Radford, 1 De G., J. & Sm. 585.

[7] Ibid.

[8] Wakeman *v.* Grover, 4 Paige, 24; 11 Wend. 187; Hudson *v.* Maze, 3 Scam. 579. But a power given to the trustees to compromise claims due to the estate does not avoid it. Bellows *v.* Partridge, 19 Barb. 178.

[9] Irwin *v.* Keen, 3 Whart. 347; Webb *v.* Daggett, 2 Barb. 10; Hardcastle *v.* Fisher, 24 Mo. 70.

[10] Pratt *v.* Adams, 7 Paige, 617; Beach *v.* Fulton Bank, 3 Wend. 584.

refuse to pay them, deducting the usurious excess.[1] If a debt is specially directed to be paid, and afterwards a bill is sustained to set aside such debt as illegal or fraudulent, the trustees cannot pay it.[2] So a general direction in a will to pay debts applies only to legal debts, due upon good consideration, and enforceable against the testator's estate.[3] A trust to pay debts named in the schedule does not convert such debts into interest-bearing debts if they did not bear interest before. Even if the direction is to pay certain debts with interest, debts that do not bear interest will not be thus converted into interest-bearing debts.[4] But debts that bear interest, by the contract proving them, must be paid with interest.[5] If interest is realized by trustees upon funds in their hands, interest must be paid.[6] If the trustees permit a creditor to sign the deed for a specified sum, they cannot afterwards contest the debt.[7] But if there is gross fraud, they can apply to the court to set it aside.[8] If

[1] Green *v.* Morse, 4 Barb. 332; Pratt *v.* Adams, 7 Paige, 641.

[2] Morse *v.* Crofoot, 4 Comst. 114.

[3] Rogers *v.* Rogers, 3 Wend. 503; Chandler *v.* Hill, 2 Hen. & M. 124. Chancellor Kent, in an opinion, printed 6 Humph. 532, advised that a preference given by a bank to pay notes illegally issued for borrowed money was valid, and that the trustees should pay them. The bank should be liable for money had and received, though the issuing of its bills was illegal. It had had the consideration and ought to pay, though it had done such acts as to forfeit its charter.

[4] Carr *v.* Burlington, 1 P. Wms. 229; Bothomly *v.* Fairfax, id. 334; Maxwell *v.* Wettenhall, 2 id. 27; Lloyd *v.* Williams, 2 Atk. 111; Barwell *v.* Parker, 2 Ves. 364; Creuze *v.* Hunter, 2 Ves. Jr. 157; 4 Bro. Ch. 316; Tait *v.* Northwick, 4 Ves. 816; Shirley *v.* Ferrers, 1 Bro. Ch. 41; Hamilton *v.* Houghton, 2 Bligh, 169.

[5] Hamilton *v.* Houghton, 2 Bligh, 187; Tait *v.* Northwick, 4 Ves. 816; Bath *v.* Bradford, 2 Ves. 588; Stewart *v.* Noble, Vern. & Scriv. 528, 536; Anon. 1 Salk. 154; Burke *v.* Jones, 2 V. & B. 284; Hughes *v.* Wynne, 1 Myl. & K. 20; Pearce *v.* Slocombe, 3 Y. & Col. 84; Bryant *v.* Russell, 23 Pick. 508; Winslow *v.* Ancrum, 1 McCord, Ch. 100. But it has been held, that, in cases of preferred debts, the preference applied only to the principal debt, and that the interest was to be paid *pro rata* with the unpreferred debts. Morris's App., 1 Am. Law Reg. 631.

[6] Pearce *v.* Slocombe, 3 Y. & Coll. 84.

[7] Lancaster *v.* Elce, 31 Beav. 335.

[8] Ibid.

a creditor repudiates the deed and sues the debtor, the trustee cannot allow him to retrace his steps and sign the deed; and if he should allow it to be done, the other creditors may procure it to be set aside.[1]

§ 601. It has been held in some cases that a devise for the payment of debts will prevent the statute of limitations from running against such debts as are not barred at the time of the testator's death; but it will not revive a debt already barred[2] upon the principle that, as soon as a trust is created for the payment of a debt, the statute of limitations ceases to apply, as it does not run against trusts generally. Mr. Hill inclines to the opinion, that the same principle would apply to trusts under deeds for the payment of debts;[3] but it is held in the United States, that an assignment by deed for the benefit of creditors, or an assignment in insolvency, does not prevent the statute from running, and it would be a good plea in bar at law, although the debts were specially named in the deeds or schedules.[4] But the creditors may enforce their claims in equity against the assets in the hands of the trustees.[5]

[1] Field *v.* Donoughmore, 1 Dr. & War. 227; reversing 2 Dru. & Walsh, 630.

[2] Fergus *v.* Gore, 1 Sch. & Lef. 107; Hughes *v.* Wynne, T. & R. 307; Culton *v.* Oughton, 3 Beav. 1; Burke *v.* Jones, 2 V. & B. 275; Hargreave *v.* Mitchell, 6 Madd. 326; Harcourt *v.* White, 28 Beav. 303; Jones *v.* Scott, 1 R. & M. 225; 4 Cl. & Fin. 382; O'Connor *v.* Haslam, 5 H. L. Cas. 177. [See *In re* Tanqueray-Willaume, 20 Ch. Div. 465; Foley *v.* McDonnell, 48 Wash. 272; Gordon *v.* McDougall, 84 Miss. 715; McKinley *v.* Coe, 66 N. J. Eq. 70.]

[3] Hill on Trustees, 341.

[4] Reed *v.* Johnson, 1 R. I. 81; Christy *v.* Flemington, 10 Penn. St. 129.

[5] Gary *v.* May, 16 Ohio, 66. And this must be upon the principle of Mr. Hill's opinion above cited. As soon as a trust is created for the payment of a debt, and the relation of trustee and *cestui que trust* is established, the statute of limitations does not run so long as the relation exists, but that does not prevent the statute from running at law against the original debtor; though how far the execution of the deeds or schedules naming a debt would be a memorandum in writing acknowledging the debt, and thus taking it out of the statute, is not very well settled.

§ 602. In settling an estate under an assignment, the preferred debts will first be paid. The remainder is then distributed to the unpreferred debts due at the date of the assignment, *pro rata*, if there is a deficiency of assets.[1] If there is a residue, after paying all the creditors who come in under the deed, it results to the assignor.[2] If there are non-assenting creditors who have no rights under the deed, they can reach the surplus in the hands of the trustee, by the process of foreign attachment, garnishment, or trustee process.[3]

§ 602 *a*. Intimately connected with general assignments in trust for creditors, thus far treated of in this chapter, are trusts created by deeds to secure the payment of particular debts, — deeds which give the grantee certain powers over the estate, but do not exhaust the entire interest of the grantor in it. Such a trust was the subject of discussion in a recent case, in which the will of the trustee discharged the land from liability for the debts to cover which the trust had been created.[4] In an Illinois case A. took title to certain land to secure a debt due him, and to pay any surplus to B. and equity enforced the trust.[5] These deeds of trust and mortgage-deeds containing powers of sale create a peculiar kind of trust, which it is proper to discuss in this connection.

[1] Purefoy *v.* Purefoy, 1 Vern. 28.

[2] 3 P. Wms. 251, n.; Poole *v.* Pass, 1 Beav. 600; Dubose *v.* Dubose, 7 Ala. 235; Hall *v.* Denison, 17 Vt. 311; Rahn *v.* McElrath, 6 Watts, 151; Stevens *v.* Earles, 25 Mich. 41. [Farnsworth *v.* Doom, 109 Ky. 794; Bole *v.* McKelvy, 189 Pa. St. 505; Early *v.* Early, 75 S. C. 15. See also Ralston's Appeal, 169 Pa. St. 254; Provident Life and Trust Co. *v.* Fidelity Ins., etc., Co., 203 Pa. St. 82.] So if there is a residue in the hands of an assignee in bankruptcy.

[3] Hastings *v.* Baldwin, 17 Mass. 558; Hearn *v.* Crutcher, 4 Yerg. 461; Wright *v.* Henderson, 7 How. (Miss.) 539; Todd *v.* Bucknam, 2 Fairf. 41; Dubose *v.* Dubose, 7 Ala. 235; Vernon *v.* Morton, 8 Dana, 247. [Avery *v.* Monroe, 172 Mass. 132; Reddy *v.* Raymond, 194 Mass. 367; Thompson *v.* Shaw, 104 Me. 85; Weston *v.* Nevers, 72 N. H. 65.]

[4] Damon *v.* Bibber, 135 Mass. 458.

[5] Gillett *v.* Hickling, 16 Brad. (Ill.) 392.

§ 602 *b*. There are several forms of mortgages: (1) A mortgage in the common form of a conveyance of the estate, with a defeasance inserted which provides, that if a certain sum of money shall be paid within a certain time the deed shall be void. (2) A mortgage in the form of a deed absolute on its face, but which was made to pay or secure a debt, and the grantor takes back from the grantee an agreement that when the debt is paid, or when a certain sum of money is paid to the grantee, he will sell and convey the premises to the grantor. The parties sometimes resort to ingenious devices to disguise the transaction; but if the substance of the transaction is the security of an antecedent debt, it will be decreed to be a mortgage, whatever may be the form of the writings, or whatever may be their recitals; and even parol evidence is admissible in some States under some circumstances to prove that a deed absolute on its face is in fact a mere security for a debt or a mortgage.[1] Both these forms of mortgage can be foreclosed only by proceedings in equity for a foreclosure, or by an entry and taking possession according to the law or the statutes in force where the land is situated, and by the expiration of three years or other limit of time fixed to bar the mortgagor's equity of redemption. (3) A mortgage may be in the form of a deed of trust from the grantor to the grantee, providing that if the grantor shall not pay a certain sum of money at a certain time, the grantee may sell the estate in a certain manner, or do whatever other thing the deed of trust points out to be done. (4) A fourth form of mortgage is a deed of conveyance with a defeasance inserted as in ordinary mortgages, and with a power of sale superadded to enable the grantee or mortgagee to sell the property at any time after default of payment, according to the terms of the power contained in the mortgage. It is quite apparent that many questions peculiar to the law of trusts must arise under deeds and mortgages which contain such powers and provisions.

[1] *Ante*, § 226; Campbell *v.* Dearborn, 109 Mass. 130, where the cases are reviewed. [Potter *v.* Kimball, 186 Mass. 120; Weiseham *v.* Hocker, 7 Okla. 250; *supra*, § 76, note *a*, p 70.]

§ 602 c. In the civil law a power of sale was implied in every mortgage upon default of payment according to the terms of the pledge, and an express agreement did not deprive the mortgagee of this right.[1] By the common law, at first, mortgages became absolute deeds, if the terms of the defeasance were not strictly performed at the day; but courts of equity succeeded in establishing an equity of redemption in the mortgagor in the land, which remained an equity in him until the mortgage was duly foreclosed by process of law. Courts were astute in protecting this equity of redemption, and leaned strongly against all agreements between the mortgagor and mortgagee which abridged it. "Once a mortgage always a mortgage" became a maxim. Therefore, when provisions began to be inserted in deeds which enabled the mortgagee to destroy at once this equity of redemption, courts looked upon them with suspicion, if not with aversion, as devices intended to oppress and injure mortgagors, who are, from the nature of the case, more or less in the power of mortgagees. Perhaps, where the rights of the mortgagor were not properly guarded, the fears of Lord Eldon and others, who opposed the introduction of these forms and trusts, were not unreasonable or groundless. But, notwithstanding all opposition, the use of them has steadily increased, until they are common in England and in nearly all the States. They are regulated by statutes, and are under the jurisdiction of courts of equity, which can interfere, by injunctions, prohibitions, orders, and decrees, to prevent oppression and remedy abuses. A large proportion of the mortgage-deeds of real estate now contain powers of sale in case of default, and the laws regulate and protect them.[2]

[1] 1 Domat, 360.

[2] Croft *v.* Powell, 1 Comyn, 603 (1729); 2 Cruise, Dig. 90; Clay *v.* Sharpe, Sugd. V. & P. App. 21; Corder *v.* Morgan, 18 Ves. 344; 2 Call, 465, 568; Curling *v.* Shuttleworth, 6 Bing. 121; Forster *v.* Hoggart, 15 Q. B. 155; Clay *v.* Willis, 1 B. & C. 364; 4 Kent's Com. 146; 2 Story, Eq. Jur. § 1027; Longwith *v.* Butler, 3 Gilm. 32; Slee *v.* Manhattan Co., 1 Paige, 57; Lawrence *v.* Farmer's Loan & Trust Co., 3 Kern. 200; Bronson *v.* Kinsie, 1 How. 321; Fogarty *v.* Sawyer, 17 Cal. 589; Bradley *v.* Phil. R. R. Co., 36 Penn. St. 141; Hyde *v.* Warren, 46 Miss. 13.

§ 602 *d.* Mortgages containing powers of sale and deeds of trust to secure a debt due to a creditor are as a rule substantially the same thing in law and equity; but a deed of trust may be made so as to contain no forfeiture (no limit to the right to redeem so long as the land remains in the hands of the trustee), but merely a power in the trustees to enter on default and manage, sell, etc., as agents of the grantor for the purpose of paying his debts and handing over any surplus to the grantor, and in such case it is very different from a mortgage. No foreclosure by entry and lapse of time is possible under such a deed, for foreclosure can exist only where there is an equity of redemption to foreclose, and there can be no equity of redemption where there is no forfeiture agreed upon, for equities of redemption came into existence and live in the law only to relieve against forfeitures.[1] At law, both kinds of deeds purport to convey the legal title to the grantee, or creditor, or trustee; but in equity the land, the title, and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land called an equity of redemption; if he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. In some circumstances a discharge of the mortgage upon payment or a reconveyance is not material, as by the terms of the mortgage and by the law it becomes null and void. A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage-deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey, or to sell, or to do any other thing upon the payment of a certain sum of money; courts of equity look upon it as a mortgage, and deal with it as such. The test in all these forms is this, Does

[1] Shepard *v.* Richardson, 145 Mass. 32, 36.

the transaction resolve itself into a security for the payment of a sum of money or a debt; and until a default in the payment of a sum of money or a debt, has the grantor any right to pay the money and keep or receive back the title to his property?[1] And it is immaterial that the conveyance is made to a third person, and not to the creditor himself. In such case the grantee is a trustee by an express or a resulting trust, as the case may be, to the amount of the debt, and the grantor has an equity in all beyond, or if the deed is absolute on its face, or a deed of trust, the grantee is a trustee for the grantor for what remains over and above the debt.[2] Thus a bank authorized to hold lands mortgaged for security may take deeds of trust to themselves or to trustees for their use;[3] and a railroad company authorized to mortgage its property was held to have authority to make a deed of trust;[4] and where there are special statutes in relation to the recording of mortgages, it has been held that these statutes embrace deeds of trust made as security for debts;[5] and so the statutes relating to the satisfaction and discharge of mortgages embrace deeds of trust,[6] and it has been held that an agent, having a general power to execute a mortgage in the name of his principal, may execute a mortgage containing a power of sale.[7]

[1] 4 Kent's Com. 136, 146; 2 Story, Eq. Jur. § 1018; Cotterell *v.* Long, 20 Ohio, 464, 472; Wilcox *v.* Morris, 1 Murph. (N. C.) 116; Eaton *v.* Whiting, 3 Pick. 484; Bloom *v.* Rensselaer, 15 Ill. 505; Woodruff *v.* Robb, 19 Ohio, 217; Sargent *v.* Howe, 21 Ill. 149; Fanning *v.* Kerr, 7 Iowa, 450; Crocker *v.* Robertson, 8 Iowa, 404; Flagg *v.* Mann, 2 Sumn. 533; Jackson *v.* Blount, 2 Dev. Eq. 555; Rogan *v.* Walker, 1 Wis. 527; Johnson *v.* Clark, 5 Ark. 321. A judgment against the grantor who remains in possession after default with the acquiescence of the mortgagee, is a lien on the premises subject to the mortgage, or trust-deed in the nature of a mortgage. Martin *v.* Aliter, 42 Ohio St. 94.

[2] Woodruff *v.* Robb, 19 Ohio, 217; Sargent *v.* Howe, 21 Ill. 450.

[3] Bennett *v.* Union Bank, 5 Humph. 612.

[4] Wright *v.* Bundy, 11 Met. 398, 404.

[5] Magee *v.* Carpenter, 4 Ala. 469; Fogarty *v.* Sawyer, 23 Cal. 570.

[6] McGregor *v.* Hall, 3 Stew. & Por. 397; Woodruff *v.* Robb, 19 Ohio, 212; Wolfe *v.* McDowell, 13 Sm. & M. 103; Smith *v.* Doe, 26 Miss. 291; Crosby *v.* Huston, 1 Tex. 239.

[7] Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Cowen, 195; 4 Kent, Com. 147.

There are incidental differences between mortgages with or without powers of sale and deeds of trust, as there are differences in mortgage-deeds themselves in the special stipulations that may be inserted. Parties can make their own contracts; and the contracts must be performed according to the special stipulations;[1] but both mortgages and deeds of trust are alike in their great characteristics. They both stand as security for the payment of money or the performance of some other obligation; under both the grantor has an equitable right of redemption, or to have the property again upon the performance of his obligation, and this equity of redemption can only be barred by regular proceedings according to the law, or according to the provisions and conditions contained in the respective deeds.

§ 602 *e*. Mortgages with power of sale and deeds of trust are executed like all other instruments of trust. They need not be signed by the grantee, trustee, or *cestuis que trust*. Acceptance of the trusts created under them may be proved by parol, whether such acceptance was manifested by words or acts.[2] The assent of the creditors to be secured by such deeds will be presumed, if they are beneficial to them; but if the effect of the deeds is to hinder and delay the creditors, their assent must be shown,[3] and such deeds cannot be revoked after the assent of the parties to be benefited.[4]

§ 602 *f*. Such deeds may be executed for the payment of debts, or for the performance of any kind of a legal obligation, whether of the grantor or of a third person. So they may be

[1] Elliott *v*. Wood, 45 N. Y. 71.

[2] *Ante*, §§ 589, 593, 594; Scull *v*. Reeves, 2 Green, Ch. 84; Flint *v*. Clinton Co., 12 N. H. 432; Spencer *v*. Ford, 1 Rob. (Va.) 648; Liffler *v*. Armstrong, 4 Iowa, 482; Pope *v*. Brandon, 2 Stew. (Ala.) 401; Skipwith *v*. Cunningham, 8 Leigh, 271; Hipp *v*. Hutchell, 4 Tex. 20; Field *v*. Arrowsmith, 3 Humph. 442; Robertson *v*. Sublett, 6 id. 313; Brevard *v*. Neely, 2 Sneed, 164; Mayer *v*. Pullam, 2 Head, 347.

[3] *Ante*, § 593; Shearer *v*. Loften, 26 Ala. 703; Wiswall *v*. Ross, 4 Porter (Ala.), 328; Mauldin *v*. Armstead, 14 Ala. 702.

[4] *Ante*, §§ 593, 594; Gate *v*. Debrett, 10 Yerg. 146.

given to indemnify one against contingent obligations. Thus a trust-deed to indemnify sureties upon a bond or note or endorser of notes will be upheld;[1] and so mortgages with power of sale, made by a married woman to pay the debt or note of her husband, have been upheld in law and equity.[2]

§ 602 *g*. The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some of the States have regulated their execution, but such statutes do not create the powers themselves.[3] (*a*) Therefore it is that purchasers of land under powers take under the deed in which the powers are created; it is as if the purchaser's name was inserted in that deed. It follows that the purchaser must look carefully to the intention and purpose of the power as well as to its extent, for if it is executed contrary to its intent or purpose, or outside of its true scope, or not in the manner in which it is provided that it should be executed, the purchaser will take no title. The purchaser is bound to know the full particulars and purpose of the power under which he purchases; and if he makes any mistake in the construction of the power, or if he does not

[1] Griffin *v*. Doe, 12 Ala. 783; Hawkins *v*. May, id. 673; Thurston *v*. Prentiss, 1 Mich. 194, Walk. Ch. 529; Graham *v*. King, 15 Ala. 563, 5 Port. 191; Boden *v*. Jaco, 17 Ala. 344. But see Jackson *v*. Hampton, 8 Ind. 457.

[2] Young *v*. Graff, 28 Ill. 20; Bartlett *v*. Bartlett, 4 Allen, 440.

[3] Doolittle *v*. Lewis, 7 Johns. Ch. 45; Beatie *v*. Butler, 21 Mo. 313; Turner *v*. Johnson, 7 Ohio, 216, 220; Elliott *v*. Wood, 45 N. Y. 71; Hyde *v*. Warren, 46 Miss. 13; Richmond *v*. Hughes, 9 R. I. 228.

(*a*) See Jones on Mortgages, *passim; supra*, § 199, n.

fully inform himself and acts in ignorance, he will take no title if the power is not properly executed.[1] The power to sell need not be contained in the same instrument with the conveyance of the title. Thus a simple mortgage may be made without a power of sale to secure debt, and at the same time the mortgagor may give a power to the mortgagee or to a third person to sell the land upon default of payment, and to pay the debt from the proceeds, and to account for the balance, if any; and such power will be valid, and the execution of it will bar the equity of redemption of the mortgagor;[2] and so the power may be changed by consent of parties, by a writing under seal of equal solemnity with the original instrument.[3] The power of sale should be expressed in plain terms, but no particular form is necessary, and a power of sale may arise by implication, as where a duty is imposed upon a trustee which he cannot perform without selling;[4] and the right to sell implies the right to convey.[5] So the mortgagee may bind himself to execute any other power or perform some other act, as to convey the land to some other person or to the mortgagor's wife upon the payment of the mortgage debt.[6] The power to sell may be made to depend upon almost any circumstance, as upon default in payment of the taxes by the mortgagor.[7] A condition may be annexed to the power that the mortgagor shall concur in the sale, and join in the deed.[8]

[1] Wallis *v.* Thornton, 2 Brock. 422; Demall *v.* Morgan, 5 Call, 417; Wilson *v.* Troup, 7 Johns. Ch. 25; Ormsby *v.* Tarascon, 3 Litt. 410; Williams *v.* Otey, 8 Humph. 518; Walker *v.* Brungbad, 13 Sm. & M. 723. See *ante*, §§ 511 *a*, 511 *b*, 511 *c*, and *post*, §§ 764–787.

[2] Brisbane *v.* Stoughton, 17 Ohio, 482.

[3] Baldridge *v.* Walton, 1 Mo. 520.

[4] *Post*, § 766; Purdie *v.* Whitney, 20 Pick. 25; Williams *v.* Otey, 8 Humph. 563; Munday *v.* Vattier, 3 Grat. 518; Linton *v.* Boly, 12 Mo. 567; Goodrich *v.* Proctor, 1 Gray, 567. See Wing *v.* Cooper, 37 Vt. 169; Hyman *v.* Devereux, 63 N. C. 624.

[5] Williams *v.* Otey, 8 Humph. 563; Fogarty *v.* Sawyer, 17 Cal. 589.

[6] Blount *v.* Carroway, 67 N. C. 396.

[7] Pope *v.* Durant, 26 Iowa, 233.

[8] Kissam *v.* Dierkes, 49 N. Y. 602.

§ 602 *h*. It is a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage or contained in a deed of trust to a creditor to secure a debt or to a third person for his benefit, is a power coupled with an interest, it cannot be revoked by any act of the grantor or donor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them. In other words, the power is annexed to the property, and is an irrevocable part of the security, and goes with it.[1] The mortgagor cannot disseize the mortgagee by an exclusive possession in such manner as to defeat the power of sale.[2] A mere power of attorney, however, from a debtor to a creditor, authorizing him to sell property, and, after deducting the amount due to himself, to account for the balance, is a naked power, revocable at the will of the donor. Such a power is not connected with the estate, and is no part either of the estate or the debt due.[3]

§ 602 *i*. The mortgagee in a deed of mortgage and the trustee in a deed of trust take the *legal* title and estate for the purposes of their security. In all cases the legal title is in the trustee under the trust-deed, if the deed purports to convey the

[1] *Ante*, § 593; Wiswall *v*. Ross, 4 Port. (Ala.) 328; Bergen *v*. Bennett, 1 Caines, Cas. in Er. 1; Wilson *v*. Troup, 7 Johns. Ch. 25; Wilbur *v*. Spofford, 4 Sneed, 698; Hyde *v*. Warren, 46 Miss. 13; Berry *v*. Skinner, 30 Md. 567; Collins *v*. Hopkins, 7 Clarke (Iowa), 463; Bancroft *v*. Ashhurst, 2 Grant's Cas. 513; Hannah *v*. Carrington, 18 Ark. 104; Beattie *v*. Butler, 21 Mo. 313; Walker *v*. Crowder, 2 Ired. Eq. 478; Stimpson *v*. Fries, 2 Jones, Eq. 156; Doe *v*. Duval, 1 Ala. 745. In Robertson *v*. Paul, 16 Tex. 472, and 26 Tex. 205, the court admitted these general principles, but thought that powers of sale to be executed after the death of a donor were inconsistent with the statutes authorizing the settlement of the estates of deceased persons. Buchanan *v*. Monroe, 22 Tex. 587; Brewer *v*. Winchester, 2 Allen, 389; and see Encking *v*. Simmons, 28 Wis. 272, where a sale was set aside for the reason that the mortgagor was insane and the price very low.

[2] Sheridan *v*. Welch, 8 Allen, 166.

[3] Mansfield *v*. Mansfield, 6 Conn. 559.

estate.[1] (*a*) Such a title, however, is defeasible upon the performance by the grantor of the obligations undertaken by him. Performances of the condition of the deed on the part of the grantor, or tender of performance before the sale, will defeat the power of sale in a mortgage or deed of trust. Such performance or tender extinguishes the power; and a sale afterwards under the power, even to an innocent purchaser, will be void.[2]

§ 602 *j*. In law, a mortgage is considered, as between the mortgagor and mortgagee, and so far as it is necessary to give full effect to the mortgage as a security for the performance of

[1] White *v*. Whitney, 3 Met. 81; Greenleaf *v*. Queen, 1 Pet. 138; Morris *v*. Way, 16 Ohio, 469; Anderson *v*. Holloman, 1 Jones, L. 169; Thornhill *v*. Gilmer, 4 Sm. & M. 153; Brown *v*. Bartie, 10 Sm. & M. 268, 275; Sargent *v*. Howe, 21 Ill. 148; Hannah *v*. Carrington, 18 Ark. 85; Taylor *v*. King, 6 Munf. 358; Newman *v*. Jackson, 12 Wheat. 570.

[2] Cook *v*. Dillon, 9 Iowa, 407; King *v*. Merchants' Ex. Co., 1 Seld. 547; Cameron *v*. Irwin, 5 Hill, 272; Deyo *v*. Van Valkenburg, id. 246; Wood *v*. Colvin, 2 id. 566.

(*a*) There is a wide-spread conflict of authority as to whether prior to breach of condition such a deed passes the legal title to a mortgagee or trustee who has no right to possession until breach of condition. In some States it is held that, notwithstanding the language of the deed, the legal title remains in the grantor. Benton Land Co. *v*. Zeitler, 182 Mo. 251, 272; Clark *v*. Wilson, 53 Miss. 119; Driskill *v*. Rebbe, 117 N. W. 135 (S. D. 1908). See Wood *v*. Grayson, 22 App. D. C. 432, 445; McNutt *v*. Life Ins. Co., 181 Mo. 94. In other States it is established that the deed passes the bare legal title. See Weber *v*. McCleverty, 149 Cal. 316, 320; Collier *v*. Alexander, 142 Ala. 422. The rule of each State is set forth in detail in Jones on Mortgages (6th ed.), § 17 *et seq*.

The tendency of the American courts seems to be to treat the legal interest of a mortgagee or trustee under such a deed as an inchoate title only, an interest to vest in future on the happening of certain contingencies, *viz*., breach of condition and foreclosure proceedings. Under this view, until entry to foreclose the mortgagor's interest is such a legal title that he may maintain ejectment, and his interest may be attached and levied upon as a legal estate. Benton Land Co. *v*. Zeitler, 182 Mo. 251, 272.

A full discussion of this point and of the decisions bearing upon it belongs to the subject of mortgages and seems outside the scope of this book.

the condition, as a conveyance in fee. But for all other purposes it is considered, especially until entry for condition broken, as a mere charge or incumbrance, which does not divest the estate of the mortgagor. He is deemed seized so far that he can convey it subject to the mortgage; he may make a second mortgage; it may be attached for his debts; he is considered as having all the rights and powers of an owner, except so far as it is necessary to hold otherwise in order to give effect to the mortgage. The interest of a mortgagor is therefore regarded as an estate; though, in legal strictness and as against the mortgagee, it is an equity of redemption. It may be levied upon and seizin delivered by the officer; in which case the creditor will hold in fee subject to the mortgage. The same principles apply to the rights and title of the grantor in deeds of trust.[1]

§ 602 *k*. The legal estate being thus in the mortgagee or trustee for the purpose of the security, the power of sale is a power appendant to the estate itself, and takes effect out of it.[2] If the mortgagee or trustee ceases in any way to have an interest in the estate, he ceases to have any power over it. If, therefore, they totally alienate the estate to which the power is appendant, they extinguish the power.[3] If a trustee conveys the property, even in breach of the trust, he extinguishes his power, and a subsequent sale will be void.[4] But a court of equity can give relief from fraud and breaches of trust. If, however, a

[1] White *v.* Whitney, 3 Met. 81; Harrison *v.* Battle, 1 Dev. Eq. 541; Poole *v.* Glover, 2 Ired. L. 129; Anderson *v.* Jones, 1 Jones, Law, 169. The text states the prevailing rule in the majority of States. McGregor *v.* Hall, 3 Stew. & Por. 397; 4 Kent, 160, 161, 195, n. If the trustee make a sale, and there is a surplus, the wife of the grantor is entitled to dower in it as in an equity of redemption. In a few States, — Mississippi, Ohio, Arkansas, and perhaps others, — this equity of the grantor in a deed of trust cannot be reached at law. A creditor is compelled to have resort to a proceeding in equity.

[2] *Post*, § 765; Alger *v.* Fay, 12 Pick. 322.

[3] Sugd. Pow. 54.

[4] Huckabee *v.* Billingsby, 16 Ala. 414; Hogan *v.* Lepretre, 1 Port. 392; Doe *v.* Robinson, 24 Miss. 688.

trustee has sold the property in breach of the trust, and he afterwards obtains the legal title, the old trust will reattach to it in his hands, and he may again have a power of sale as a part of the terms of the trust.[1]

§ 602 *l*. The trustee, or mortgagee with a power of sale, holds the lands in trust for the purposes for which the deeds are made, which purposes are generally specified in the deeds themselves. The trusts are, generally, (1) to sell the lands upon default of payment in the manner pointed out in the deed; (2) to apply so much of the proceeds of the sale as is necessary to the payment of the debts secured by the deeds; and (3) to account for and pay over the balance, after paying the expenses of the trust and the sale to the grantor or mortgagor, his legal representatives or assigns. The interest of the mortgagee with a power of sale is the same as the interest of the other mortgagees under the old form of mortgage; and the *cestuis que trust* under deeds of trust have a mere equitable interest, which can only be enforced in equity. Neither the interests of mortgagees nor of *cestuis que trust* can be reached at law by the levy of execution; but proceedings must be in equity for such purposes.[2]

§ 602 *m*. The trustee, in a deed of trust for security, is subject to the same rules that govern all trustees. He may refuse the office, as no one is compelled to accept a trust;[3] but if he once accepts the trust, or does any acts, he cannot abandon it without the consent of all parties in interest or the decree of the court.[4] In all cases of a trust or power coupled with an interest, the power survives so long as the interest survives, and

[1] Salisbury *v*. Bigelow, 20 Pick. 174.

[2] 4 Kent, Com. 159, 160; McIntire *v*. Agricultural Bank, 1 Freem. Ch. 105; Harrison *v*. Battle, 1 Dev. Eq. 541; Jenks *v*. Alexander, 11 Paige, 619, 624; Leonard *v*. Ford, 8 Ired. L. 418; McGregor *v*. Hale, 3 Stew. & Por. 408.

[3] *Ante*, § 259.

[4] *Ante*, §§ 94, 268; Drane *v*. Gunter, 19 Ala. 731; 3 Yerg. 307; 21 Ill. 148.

it goes with the interest and the estate.[1] If a part of the trustees named in a deed refuse to accept, or die or resign, those who accept the trust and survive can execute the trust, even to the last one.[2] Upon the death of the last trustee, the estate descends to his heirs,[3] but the court can appoint new trustees; and in many States there are statutes that vest the estate and all powers that are appendant to the estate in the new trustee;[4] if there are no such statutes, courts can order the heirs to convey the estate to the new trustees.[5] The same rules apply to the appointment of new trustees under deeds of trust that apply to the removal and appointment of trustees in any other case.[6] So, the same rules apply in relation to the concurrence of all the trustees in the execution of the trust,[7] and to the liabilities of the trustees for the acts of their cotrustees.[8] Nor can they delegate their power.[9] The creditors are the *cestuis* and may sue for waste or mismanagement.[10] (*a*)

§ 602 *n.* Powers of sale contained in a mortgage deed stand upon somewhat different principles. A mortgage is personal

[1] *Ante*, §§ 502, 503, 505.

[2] Williams *v.* Otey, 8 Humph. 562; Taylor *v.* Benham, 5 How. 233; Scull *v.* Reeves, 2 Green, Ch. 84; Hannah *v.* Carrington, 18 Ark. 104; Parsons *v.* Boyd, 20 Ala. 118; Franklin *v.* Osgood, 14 Johns. 527; Robertson *v.* Gaines, 2 Humph. 367; In Matter of Stevenson, 3 Paige, 420; Hawkins *v.* May, 12 Ala. 672; Peters *v.* Beverly, 10 Peters, 532.

[3] *Ante*, §§ 273, 341; Mauldin *v.* Armstead, 14 Ala. 708.

[4] *Ante*, § 284; Woolridge *v.* Planters' Bank, 1 Sneed, 297; Goss *v.* Singleton, 2 Head, 67; Duffy *v.* Calvert, 6 Gill, 487; Gibbs *v.* Marsh, 2 Met. 243, 253.

[5] *Ante*, § 284; Greenleaf *v.* Queen, 1 Pet. 138.

[6] See *ante*, § 275 *et seq.* [Sulphur Mines Co. *v.* Thompson, 93 Va. 293; Converse *v.* Davis, 90 Tex. 462; Clark *v.* Wilson, 53 Miss. 119.]

[7] *Ante*, § 411.

[8] *Ante*, § 405.

[9] *Ante*, § 401. [Grover *v.* Hale, 107 Ill. 638; Fuller *v.* O'Neil, 69 Tex. 349.]

[10] Cohen *v.* Morris, 70 Ga. 313.

(*a*) After the trustee has taken possession, the mortgagor also is a *cestui*. Charles Green R. E. Co. *v.* Building Co., 196 Mo. 358.

assets, and goes to the administrator or executor; the right to foreclose the mortgage goes to the administrator, with the debt, and also the power of sale contained in the mortgage. Therefore the administrator or executor of a deceased mortgagee with a power of sale may or must execute the power of sale if it is necessary to resort to the power to collect the debt or enforce the mortgage.[1] And it is said that this power of sale is in an administrator by virtue of his being named in the deed of mortgage, and by virtue of an appointment in any jurisdiction; so that, if the mortgagee was a non-resident, and his administrator is appointed by a court foreign to the State in which the land is situated, the administrator may execute the power and convey the land.[2] Powers of sale differ from deeds of trust in another respect. Ordinarily a trustee cannot assign or delegate his trust, or its duties or powers, to another, and it is a breach of the trust to attempt to do so; but powers of sale in a mortgage may be assigned with the debt and the mortgage, and such assignee of the mortgage may execute the power of sale.[3] If the mortgagee assigns the debt for which the mortgage is security, but does not assign the mortgage deed, in equity he holds the security and the power of sale in trust for the assignee of the debt, and the assignee may call upon him to execute the power;[4] and if he assigns a part of the debts, or a part of the notes secured by the mortgage, he holds the security and the power in trust *pro tanto*.[5] But the partial assignee of a mortgage cannot execute the power of sale, as the power is not divisible.[6]

[1] *Ante*, §§ 338, 495; Doolittle *v.* Lewis, 7 Johns. Ch. 45; Collins *v.* Hopkins, 7 Iowa, 463; Turner *v.* Johnson, 7 Ohio, 216, 220; Brewer *v.* Winchester, 2 Allen, 389; Varnum *v.* Meserve, 8 id. 158; Anderson *v.* Austin, 34 Barb. 319; Harnickell *v.* Orndorff, 35 Md. 341.

[2] Doolittle *v.* Lewis, 7 Johns. Ch. 45; Baldwin *v.* Allison, 4 Minn. 25.

[3] *Ante*, §§ 338, 495; Strother *v.* Law, 54 Ill. 413.

[4] Sargent *v.* Howe, 21 Ill. 148; Keyes *v.* Wood, 21 Vt. 331, 550; Anderson *v* Baumgartner, 27 Mo. 80; Wood *v.* Snow, 1 Mich. 128; Slee *v.* Manhattan Co., 1 Paige, 48; Wilson *v.* Troup, 1 Johns. Ch. 25; 2 Cowen, 195; Lacas *v.* Harris, 20 Ill. 165; Trustee, &c. *v.* Prentiss, 29 Miss. 46; Hinds *v.* Mooers, 11 Iowa, 211; Sangster *v.* Love, id. 580.

[5] Ibid.

[6] Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Cow. 195.

§ 602 *o*. Trustees and mortgagees, in the execution of their powers, must use the utmost good faith toward all parties in interest. This proposition cannot be too strongly stated and enforced. They must act impartially for every person who has any rights in the estate. If they allow the debtor to take the rents and profits of the estate they hold for the benefit of creditors, they will become personally liable to the creditors.[1] They must use every effort to sell the estate under every possible advantage of time, place, and publicity. They must exercise their discretion, so far as they have any, in an intelligent and reasonable manner. A mortgagee is bound, in the exercise of his power, not to use it to oppress the debtor, nor to sacrifice the estate. If he unfairly or unnecessarily prejudices the rights or interests of the mortgagor, or any other party, the sale may be set aside, or he may be made personally responsible for the injury.[2] The creditors cannot make the trustee their agent to purchase the property to the best advantage, for he owes a duty to the debtor and those claiming through him any residue after the debts are satisfied. The creditors may, however, send the trustee their bid, and he may sell the land to them if no one else bids more.[3] After the power has been exercised, the mortgagee may bring a suit to recover any balance due to him after applying the proceeds of the sale; but the mortgagor may defend such suit, if he can show that the sale was unfairly or fraudulently conducted,[4] and this he may do although he may still have a right to redeem.[5]

[1] Ely *v*. Turpin, 75 Mo. 83.

[2] See *post*, § 770, and cases cited; Howard *v*. Ames, 3 Met. 311; Mathie *v*. Edwards, 2 Coll. 465; Hobson *v*. Bell, 2 Beav. 17; Goldsmith *v*. Osborne, 1 Edw. Ch. 561; Driver *v*. Fortner, 2 Port. (Ala.) 9; Prewett *v*. Laud, 36 Miss. 495; Richards *v*. Holmes, 18 How. 143; Lane *v*. Tidhall, 1 Gilm. (Va.) 132; Quarles *v*. Lacy, 4 Munf. 251; Singleton *v*. Scott, 11 Iowa, 589, 597; Jenks *v*. Alexander, 11 Paige, 619; Hunt *v*. Ball, 2 Dev. Eq. 292; Johnson *v*. Eason, 3 Ired. Eq. 330; Rossett *v*. Fisher, 11 Grat. 492; Outwater *v*. Berry, 2 Halst. Eq. 63. [Cassady *v*. Wallace, 102 Mo. 575; Givens *v*. McCray, 196 Mo. 306; Hinton *v*. Pritchard, 120 N. C. 1; Preston *v*. Johnson, 105 Va. 238.]

[3] Seesel *v*. Ewan, 35 Ark. 127. [Easton *v*. German-Am. Bank, 127 U.S. 532.]

[4] Howard *v*. Ames, 3 Met. 311; Sabin *v*. Stickney, 9 Vt. 164.

[5] Lowell *v*. North, 4 Min. 32.

§ 602 *p*. It must be constantly borne in mind that the power of sale given in the deed or mortgage must be strictly followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally, and precisely. Such a power admits of no substitution and of no equivalent, even in unimportant details. If the power contains the details, the parties have made them important; and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner. If the power is not executed as it is given in all particulars, it is not executed at all, and the mortgagor still has his equity of redemption. And so, if a statute of a State regulates the execution of these powers of sale, they must be executed as they are created in the deed and as they are regulated by the statute. When one mode of executing such powers is pointed out in the deed, and such mode is regulated by statute, all other modes of executing the power are negatived and excluded.[1] If, however, the power is a general power, and no modes of executing it are pointed out in the power, it is an authority to execute the power in any legal mode.[2] Thus a power to *sell* on default will not authorize a lease or mortgage.[3] If the trustee is to sell partly for cash and partly on credit, he cannot sell wholly for credit.[4] If the power is to sell for the amount then due at the time of the sale, a sale for more will be void.[5] But a sale to be made in default of payment of interest when due, may be made for the whole amount of

[1] *Ante*, §§ 511 *a*, 511 *b*, 511 *c*; *post*, §§ 770–785; Greenleaf *v*. Queen, 1 Pet. 138; Waldron *v*. Chastney, 2 Blatchf. 62; Gunter *v*. Jones, 10 Cal. 643; Taylor *v*. Atkins, 1 Burr. 60; Ormsby *v*. Tarascon, 3 Litt. 405; Hawkins *v*. Kemp, 3 East, 410; Crosby *v*. Heston, 1 Tex. 225; Bush *v*. Stamps, 26 Miss. 463; Gray *v*. Howard, 14 Mo. 341; Foster *v*. Goree, 4 Ala. 428; Beebe *v*. De Baum, 3 Eng. 510; Stine *v*. Wilkson, 10 Mo. 75; Baldridge *v*. Walton, 1 Mo. 520; Smith *v*. Provin, 4 Allen, 514; Griffin *v*. Marine Co., 52 Ill. 130; Elliott *v*. Wood, 53 Barb. 285; Hall *v*. Towne, 45 Ill. 493.

[2] Foster *v*. Goree, 4 Ala. 428; 1 Sugd. Pow. 266.

[3] *Post*, §§ 768, 769; Walker *v*. Brungard, 13 Sm. & M. 723; 4 Kent, Com. 148; Sparks *v*. Kearney, 2 Jones, Eq. 481.

[4] Norman *v*. Hill, 2 Pat. & H. 676.

[5] Ormsby *v*. Tarascon, 3 Litt. 405.

the debt.[1] If the sale is to be at public auction, a private sale will be set aside.[2] If the power authorizes sureties to sell before they have paid the debt or have been damnified, they can do so; but if they become the purchasers, they will hold the property upon the original trust or mortgage, and the mortgagor may redeem:[3] and powers of sale may be executed to secure future advances, but the exact terms of the mortgage and the power must be complied with, and the rights of intervening parties or interests cannot be defeated.[4] If there are conditions precedent, they must all be strictly complied with and performed before a sale can be made.[5] So the execution of the deed under the power must correspond to the power. If the trustee is to execute the deed as the attorney of the debtor, he cannot execute in his own name.[6] The original purchaser under the power will be held to have notice of all the irregularities of the proceedings of sale, and his deed will be void; but remote purchasers will take a good title, unless they can be affected with notice of the irregularities attending the sale.[7]

§ 602 *q*. Powers may authorize sales to be public or private, and they must be executed as they are given. In the absence of any directions upon the subject, the sale may be either public or private, as circumstances render it for the advantage of the estate,[8] unless there are statutes that require all sales under

[1] Richards *v*. Holmes, 18 How. 143.

[2] Greenleaf *v*. Queen, 1 Pet. 138.

[3] Thurston *v*. Prentiss, 1 Mich. 194, Walker Ch. 529; Hawkins *v*. May, 12 Ala. 673, 5 Porter, 191; Roden *v*. Jaco, 17 Ala. 344; Wheeler *v*. Stone, 4 Gill, 38.

[4] Curling *v*. Shuttleworth, 6 Bing. 121.

[5] *Post*, §§ 784, 785; Roarty *v*. Mitchell, 7 Gray, 243; Dutton *v*. Cotton, 10 Iowa, 408. Where the power was that, in case of default in payment, the mortgagor might enter and take possession and sell, it was held that he could not sell without making an entry and taking possession. Roarty *v*. Mitchell, 7 Gray, 243.

[6] Speer *v*. Hadduck, 31 Ill. 439. As to the forms of executing powers in general, see *ante*, §§ 511 *a*, 511 *b*, 511 *c*.

[7] Hamilton *v*. Lubukee, 51 Ill. 415.

[8] *Post*, §§ 780–782.

powers to be at public auction.[1] If the form of notice, and the manner of giving it, whether by posting in public places or by advertising in a newspaper, are prescribed in the power, they must be strictly followed; and if the particular place of notice is named, notice must be posted in that place; if the newspaper is named, publication of notice must be made in that paper. It is not necessary to give other notice of the sale than that prescribed in the power, but it is necessary to follow the power in good faith.[2] If the notice named in the power cannot be given, as if the newspaper named has ceased to be published, the mortgagee cannot sell without recourse to a court of equity.[3] If the form of notice and manner of giving it are not prescribed, the mortgagee must give a proper notice in a reasonable manner; and if he fails to do so, the sale will be set aside.[4] If no particular form is prescribed, no particular form is required.[5] But it should be sufficient to identify the land and to invite competition.[6] In Massachusetts, it has been held that the notice should state the name of the owner of the land, or of the equity of redemption, and also of the holder of the mortgage, especially if the original mortgagor has sold his equity of redemption, or if the original mortgagee has assigned the mortgage; and a sale under a notice which did not give this full information was set aside.[7] If no specific directions are given in the power as to where notices are to be posted, or in what newspapers publication is to be made, the mortgagee must use a fair and honest discretion in posting the notices, or in selecting the newspaper in which to insert notice of the sale. If the notices of sale were posted in remote or isolated places, where they would be seen by few persons and where they could give no

[1] Lawrence *v.* Farmers', &c. Co., 3 Kern. 200, 210.

[2] Ormsby *v.* Tarascon, 3 Litt. 405, 411; Crocker *v.* Robertson, 8 Clarke (Iowa), 404.

[3] Dutton *v.* Cotton, 10 Iowa, 408.

[4] 4 Kent. Com. 490; Anon. 6 Madd. 15.

[5] *Post*, § 782.

[6] Ibid.

[7] See Hoffman *v.* Anthony, 6 R. I. 282.

publicity to the sale and invite little competition, or if they were inserted in an obscure newspaper, in an obscure manner, or if they were inserted in a remote newspaper, it would be strong evidence of fraud, and the sale would be set aside.[1] If several lots in different counties are embraced in the same deed, notice of the sale must be given in different counties.[2]

§ 602 *r*. The notice of the sale must be certain as to *time* and *place* of sale,[3] and the description must be sufficient to apprise the public of what property is to be sold.[4] Mere clerical errors or inaccuracies or omissions in a notice, which do not mislead or which correct themselves on their face, will not vitiate a sale.[5] Notice of sale on the "28th of December next," omitting the year, was held good;[6] notice of a sale "at the town of St. Joseph" was held good, the town being small, and no injury having been done;[7] notice of sale at "City Hall," or "Merchants' Exchange," or any other public place, is good, if the sale is actually made in that part of such buildings or place where sales are usually made.[8] If the power provides that the sale shall be on the premises, or names any other place, of course the sale must be notified for that place, and it must be made at that place. Notice for sale on the 23d of May was changed to the 25th, without the debtor's knowledge. He attended on the 23d; but the sale was made on the latter day, and it was held to

[1] Singleton *v.* Scott, 11 Iowa, 589; Newman *v.* Jackson, 12 Wheat. 570; Johnson *v.* Eason, 3 Ired. Eq. 530; Jenks *v.* Alexander, 11 Paige, 619; 2 Am. L. Rev. (N. S.) 719.

[2] Wells *v.* Wells, 47 Barb. 416. But see Berthold *v.* Holmes, 12 Minn. 335.

[3] Burnett *v.* Denniston, 5 Johns. Ch. 35; Gray *v.* Howard, 14 Mo. 341; Dana *v.* Farrington, 4 Minn. 437.

[4] Newman *v.* Jackson, 12 Wheat. 570; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

[5] Ibid.; White *v.* Malcomb, 15 Md. 529; Rathburn *v.* Clark, 9 Abbott, Pr. (N. Y.) 12, 66, n.

[6] Gray *v.* Howard, 14 Mo. 341.

[7] Beatie *v.* Butler, 21 Mo. 313.

[8] Harmon *v.* Carver, 12 How. Pr. (N. Y.) 490.

be void.[1] It is usual to specify the precise hour of the sale, and probably a notice that did not state the hour of the sale would be bad;[2] but a notice specifying a day, between twelve and five of the clock, in the absence of any unfair practice, was held good.[3] Where a notice of sale was given for Friday the 17th, but Friday was the 16th, and the correction was made on Friday the 16th, it was held to be void.[4] In Massachusetts, a sale upon notice to be published three weeks successively in a newspaper, is good, although made less than three weeks from the time of the first publication, provided there has been a publication of the notice three successive weeks before the sale.[5] In New York, if a notice is to be given once in each week for twelve successive weeks, the first publication must be eighty-four days, or twelve full weeks, before the day of the sale.[6] If thirty days' notice is required, there need not be thirty days between the first and last publication, but thirty days between the first publication and the day of the sale. The publication of the notice must be continued for the requisite time.[7] Where twenty days' notice in two daily newspapers was required, it was held not to be necessary that daily notice should be given in each newspaper.[8]

§ 602 *s*. All the statements made in the notice, or required to be stated in a notice, must be stated truly and according to the facts. Thus, where the notice stated that the premises were to be sold for default upon three mortgages, and there were but

[1] Dana *v*. Farrington, 4 Minn. 433. And so where a mistake was made in the year. Fenner *v*. Tucker, 6 R. I. 557.

[2] Fitzpatrick *v*. Fitzpatrick, 6 R. I. 64.

[3] Cox *v*. Halstead, 1 Green, Ch. 311.

[4] Wellman *v*. Lawrence, 15 Mass. 326; Fenner *v*. Tucker, 6 R. I. 551.

[5] Frothingham *v*. March, 1 Mass. 247.

[6] Bunce *v*. Reed, 16 Barb. 350; Early *v*. Doe, 16 How. 610; Howard *v*. Hatch, 29 Barb. 297; Worley *v*. Naylor, 6 Minn. 192.

[7] Bunce *v*. Reed, 16 Barb. 350; Stine *v*. Wilkson, 10 Mo. 75; Leffer *v*. Armstrong, 4 Iowa, 482.

[8] White *v*. Malcomb, 15 Md. 529. See also Johnson *v*. Dorsey, 7 Gill, 286; Gibbs *v*. Cunningham, 1 Md. Ch. 44.

two, the equity of redemption was not bound.[1] The power is to sell the estate, not the equity of redemption, although the sale operates as a foreclosure; and the notice must state that it is to be a sale of the estate, and not of the mere equity of redemption,[2] but the mortgagee in a junior power of sale mortgage cannot sell the entire estate, free from incumbrances of prior mortgages, without consent of the holders of such prior mortgages.[3] If neither the power nor any statute requires the amount of the claim or debt, for which the sale is made, to be stated, it need not be stated in the notice, and the sale will not be affected by such omission;[4] but if such statement in the notice is required by the power or by a statute, the amount of the debt must be stated with substantial accuracy;[5] or if, not being required, a greatly exaggerated claim should be fraudulently stated in the notice, the sale would not bar the equity of redemption.[6] So, if the sale is proposed to be made for more than is due to the creditor, equity will restrain the sale;[7] and, if actually made, it will be set aside.[8]

§ 602 *t*. If the notices of sale are not made and published according to the power, the sale is absolutely void, not merely voidable, and no title passes to the purchasers. This is upon the ground that the power was not executed according to the terms of it upon its face;[9] and so if a sale is made upon a wrong

[1] Bennett *v*. Denniston, 5 Johns. Ch. 35; Johnson *v*. Turner, 7 Ohio, 216; Matthie *v*. Edwards, 2 Coll. 465.

[2] Merrill *v*. Fowle, 10 Allen, 350.

[3] Donohue *v*. Chase, 130 Mass. 139.

[4] Wiswall *v*. Ross, 4 Port. (Ala.) 321.

[5] Burnett *v*. Denniston, 5 Johns. Ch. 35; Johnson *v*. Turner, 7 Ohio, 216.

[6] Klock *v*. Cronkhite, 1 Hill, 107; Jenks *v*. Alexander, 11 Paige, 619; Bunce *v*. Reed, 16 Barb. 347; Spencer *v*. Anon., 4 Minn. 544; Ramsey *v*. Merriam, 6 Minn. 168.

[7] Ibid.

[8] Ibid.

[9] Bunce *v*. Reed, 16 Barb. 350; Baldridge *v*. Walton, 1 Mo. 520; Gibson *v*. Jones, 5 Leigh, 370; Jackson *v*. Clark, 7 Johns. 217, 226; Bigler *v*. Walker, 14 Wall. 297.

day or at a wrong place.[1] After the lapse of a long time, however, courts will presume that everything was correctly done which the power or the law required to be done,[2] and the mortgagor or grantor and his privies in blood or estate, or the parties having a right in the estate, can alone object to any defects in the proceedings. Strangers have no rights in the estate, and cannot take advantage of such informalities for any purpose.[3]

§ 602 *u*. If an adjournment of the sale is not prohibited by the power, the donee of the power may adjourn the sale to another time and to another place. Such power is implied. Of course it is a discretionary power, and must be exercised in good faith; it may be the clear *duty* of the trustee to adjourn the sale, and evidence of bad faith not to adjourn; as if there are few or no purchasers present, and the bids are very low and inadequate to the value of the property.[4] The adjournment should regularly be made at the time and place of sale; public proclamation should be made of it at the time; and if there is nothing in the power or in any statute, the same notice of sale should be given as was given in the first instance,[5] except that it need not be for the same length of time;[6] but the adjournment made on the premises and the published notice of it should correspond.[7] If notice of an intended adjournment should

[1] Miller *v*. Hull, 4 Denio, 104; Dana *v*. Farrington, 4 Minn. 433.

[2] Bergen *v*. Bennett, 1 Caines' Cas. 1; Demarest *v*. Wynkoop, 3 Johns. Ch. 129.

[3] Edmondson *v*. Walsh, 27 Ala. 578; Wightman *v*. Doe, 24 Miss. 675; Casy *v*. Colvin, 11 Ala. 514; Hellegas *v*. Hellegas, 5 Barr, 97; Franklin *v*. Greene, 2 Allen, 519.

[4] Richard *v*. Holmes, 18 How. 143; Jackson *v*. Clark, 7 Johns. 217, 225; Sayles *v*. Smith, 12 Wend. 57; Miller *v*. Hall, 4 Denio, 104; Baldridge *v*. Walton, 1 Mo. 520.

[5] Richard *v*. Holmes, 18 How. 147; Johnson *v*. Eason, 3 Ired. Eq. 366. If a postponement is duly proclaimed at the time and place advertised for the sale, new notices need not be given in any State. Cox *v*. Halstead, 1 Green, Ch. 311; 1 Stockt. 287. But a postponement may be made before the day of sale arrives. Bennett *v*. Brundage, 8 Minn. 432.

[6] Jackson *v*. Clark, 7 Johns. 217, 225; Dana *v*. Farrington, 4 Minn. 433.

[7] Miller *v*. Hull, 4 Denio, 104; Cole *v*. Moffit, 2 Barb. 18; Sayles *v*. Smith, 12 Wend. 57; Westgate *v*. Handlin, 7 How. Pr. (N. Y.) 372.

be published, and the sale should notwithstanding be made on that day originally appointed, it would be void.[1]

§ 602 *v.* It is necessary to repeat, on every occasion, that a trustee for sale, and a mortgagee with a power of sale, or the assignee cannot execute the trust or the power in favor of themselves.[2] A trustee cannot purchase the trust property directly or indirectly, nor can the mortgagee, under a power of sale mortgage, purchase directly or indirectly. He cannot purchase for himself, nor can any one purchase for him, nor can he purchase as agent for any third person. Nor can any agent, auctioneer, attorney, or other person employed in the selling of the estate, purchase it for the mortgagee or for themselves or for any other person.[3] (*a*) There is so much danger of fraud or

[1] Jackson *v.* Clark, 7 Johns. 217.

[2] *Ante*, §§ 254, 511 *a*, 511 *b*, 511 *c*; *post*, § 787; Allen *v.* Chatfield, 8 Minn. 455; Mapps *v.* Sharpe, 32 Ill. 13; Griffin *v.* Marine Co., 52 Ill. 130.

[3] *Ante*, §§ 195, 199, and cases cited; Arnot *v.* McClure, 4 Denio, 41; Hall *v.* Towne, 45 Ill. 493; Jackson *v.* Calden, 4 Cow. 266; Huff *v.* Earle, 3 Port. (Ind.) 306; Nichols *v.* Baxter, 5 R. I. 491; Parmenter *v.* Walker, 9 R. I. 225; Hyndman *v.* Hyndman, 19 Vt. 9; Pettibone *v.* Perkins, 6 Wis. 616; Bailey *v.* Robertson, 1 Grat. 4; Robinson *v.* Butler, 24 Ill. 387; Saltmarsh *v.* Burn, 4 Port. 283; Blackley *v.* Fowler, 21 Cal. 326; Jeffersonville Assoc. *v.* Fisher, 7 Port. (Ind.) 699; Bunce *v.* Reed, 16 Barb. 347; Sabin *v.* Stickney, 9 Vt. 164; Field *v.* Arrowsmith, 3 Humph. 442; Hunt *v.* Bass, 2 Dev. Eq. 292; Hester *v.* Hester, 3 Ired. Eq. 330; Scott *v.* Gamble, 1 Stockt. 218; Remick *v.* Butterfield, 11 Foster, 70; Winter *v.* Geroe, 1 Halstead, Ch. 319; Armstrong *v.* Campbell, 3 Yerger, 201; Ringgold *v.* Ringgold, 1 Har. & Gill, 11. But it is said that such sale by the mortgagee to himself is not void, but voidable only, at the instance of the mortgagor. Robinson *v.* Cullom, 41 Ala. 693; Thornton *v.* Irwin, 43 Mo. 153.

(*a*) That a mortgagee with power of sale cannot purchase on his own account either directly or indirectly, see Douthit *v.* Nabors, 133 Ala. 453; Payton *v.* McPhaul, 128 Ga. 510, 517; Nichols *v.* Otto, 132 Ill. 91; Patten *v.* Pearson, 57 Me. 428; Korns *v.* Shaffer, 27 Md. 83; Houston *v.* National Mut. B'ld'g Ass'n, 80 Miss. 31; McNees *v.* Swaney, 50 Mo. 388; Very *v.* Russell, 65 N. H. 646; Rich *v.* Morisey, 149 N. C. 37. But it is common to insert in power of sale mortgages a provision that the mortgagee may himself be a purchaser. Mutual Loan & Banking Co. *v.* Haas, 100 Ga. 111; Hall *v.* Bliss, 118 Mass. 554.

The principle applies with greater

collusion, and it is so difficult to trace and expose them, in the execution of such powers, that the law has placed almost an absolute prohibition in the front of such an execution of trusts or powers.[1] If, however, a trustee or mortgagee buys in a prior mortgage, he will hold it in trust for the *cestui que trust* or mortgagor, with the right of being reimbursed for so much as he fairly paid for such mortgage.[2] If a trustee or mortgagee purchases the property thus within his power to sell, and the title is conveyed to him, either directly or indirectly, through a third person, he will continue to hold the property upon the old trust, or the mortgagor may redeem. The execution of the trust or the foreclosure of the mortgage has not been advanced.[3] The *cestui que trust* may, however, buy in the property.[4] And so the power itself may authorize the mortgagee to purchase, or the statutes of a State upon that subject may authorize such purchase.[5]

§ 602 *w*. This distinction must be carried along. If a trustee or mortgagee with a power of sale should execute a deed under the trust or power directly to himself, the deed would be simply void, and would pass nothing or make no change in the situa-

[1] *Ante*, §§ 195–197.

[2] Critchfield *v*. Haynes, 14 Ala. 49; Gunter *v*. Jones, 9 Cal. 643; Jones *v*. Dawson, 9 Ala. 672. [*Supra*, § 195, note *a*, p. 318.]

[3] Hyndman *v*. Hyndman, 19 Vt. 1; Benham *v*. Rowe, 2 Cal. 387.

[4] Lyons *v*. Jones, 6 Humph. 533; Wade *v*. Harper, 3 Yerger, 383; Walker *v*. Brungard, 13 Sm. & M. 723; Lucas *v*. Oliver, 34 Ala. 626; Richards *v*. Holmes, 18 How. 143. [Easton *v*. German-Am. Bank, 127 U. S. 532.]

[5] Ramsey *v*. Merriam, 6 Minn. 168; Griffin *v*. Marine Co., 52 Ill. 130; Elliott *v*. Wood, 53 Barb. 285. [Wygal *v*. Bigelow, 42 Kan. 477; Galvin *v*. Newton, 19 R. I. 176.]

force to a trustee under a deed given for security, since he is trustee for both creditor and debtor when he exercises his power of sale. Lass *v*. Sternberg, 50 Mo. 124; Harrison *v*. Manson, 95 Va. 593; Parks *v*. Worthington, 101 Tex. 505. Not only is he not allowed to purchase for himself either directly or indirectly, but he is not allowed to purchase as a representative and on behalf of either debtor or creditor or of a third party. Smith *v*. Downey, 38 Colo. 165.

tions and relations of the parties, on the ground that no man can contract with himself, or make a deed to himself, or from himself in one capacity to himself in another;[1] (a) but if a mortgagee or trustee execute deeds to third persons, and take back the title to themselves, such deeds are not void, but voidable only; and the *cestui que trust* or mortgagor can avoid them, or compel the purchaser to keep the property and pay the money.[2] And such deeds are voidable by the *cestuis que trust* alone: third persons cannot interfere.[3](b) It follows that, if the *cestuis que trust* are *sui juris*, they must elect to avoid the deed within a reasonable time after the facts come to their knowledge.[4] The deed being voidable only, an innocent purchaser from the trustee, for value and without notice, will take an indefeasible title.[5]

§ 602 *x*. Sales under powers in deeds of trust or mortgage are a harsh mode of foreclosing the rights of the mortgagor. They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity.[6] Upon very slight proof of fraud or unfair conduct, or of any departure from the terms of the power, they will be set aside.[7] If proper notices of the sale

[1] *Ante*, § 207, 1 Sugd. V. & P. 97 (8th ed. Am.).

[2] *Ante*, § 198, and cases; Pitt *v.* Pitnay, 12 Ired. L. 69; Brothers *v.* Brothers, 7 Ired. Eq. 150; Parmenter *v.* Walker, 9 R. I. 225. [Houston *v.* National Mutual Building, etc. Ass'n, 80 Miss. 31; Payton *v.* McPhaul, 128 Ga. 510, 517; Nichols *v.* Otto, 132 Ill. 91; Very *v.* Russell, 65 N. H. 646.]

[3] Edmondson *v.* Walsh, 27 Ala. 578.

[4] Scott *v.* Freeland, 7 Sm. & M. 409; Smith *v.* Frost, 70 N. Y. 65.

[5] Robbins *v.* Bates, 4 Cush. 104; Cranston *v.* Crane, 97 Mass. 459; Montague *v.* Dawes, 12 Allen, 397.

[6] Bloom *v.* Rensselaer, 15 Ill. 507.

[7] Longwith *v.* Butler, 3 Gilm. 32, 44; Dana *v.* Farrington, 4 Minn. 433; Spencer *v.* Anon., id. 542.

(a) But it has been held in Massachusetts that a mortgagee expressly authorized to purchase at his own foreclosure sale may do so directly and make the deed to himself. Hall *v.* Bliss, 118 Mass. 554.

(b) But a junior mortgagee may avoid the sale. Douthit *v.* Nabors, 133 Ala. 453; Elrod *v.* Smith, 130 Ala. 212.

are not given, or if the proceedings are in any way contrary to justice and equity, the sale will not be allowed to stand.[1] And so, as the trustee cannot delegate his power or duty, if the power is not executed by the proper person, or in good faith, or with due diligence, or if proper notices have not been given, or if the power has been extinguished, sales under it will be set aside.[2] Thus, if the mortgagee should deceive the debtor by a promise to extend the time of payment, and the debtor, relying on such promise, should go away temporarily, a sale made in his absence would be set aside.[3] So also of a sale made in violation of an agreement to extend the time.[4] So a sale will be set aside if the creditor is guilty of any fraud or collusion, or if he pursues a course calculated to prevent competition.[5] So the sale will be set aside if made after the full amount of the debt is paid [6] or tendered.[7] A sale ought not to be made when the debt is uncertain or in dispute; and, if made, it may be set aside.[8] But the expression of an erroneous opinion at the sale, upon any subject, by third persons, is not a ground for setting the sale aside; [9] nor will an innocent purchaser be affected by private agreements to extend the time of payment not recorded and not notified to him.[10]

§ 602 *y*. The directions of the power must be complied with in selling the property as a whole or in lots or parcels.

[1] Bronson *v*. Kinsie, 1 How. 321; Singleton *v*. Scott, 10 Iowa, 408; King *v*. Duntz, 11 Barb. 191.

[2] Rowan *v*. Lamb, 4 G. Greene, 468; Johnson *v*. Eason, 3 Ired. 330; Jenks *v*. Alexander, 11 Paige, 619.

[3] Schoonhoven *v*. Pratt, 25 Ill. 457.

[4] Ibid.

[5] Longwith *v*. Butler, 3 Gilman, 32.

[6] Wade *v*. Harper, 3 Yerg. 383; Cameron *v*. Irwin, 5 Hill, 272; Ledyard *v*. Chapin, 6 Port. (Ind.) 320; Sherman *v*. ——, 3 Port. (Ind.) 320. See Montague *v*. Dawes, 12 Allen, 397; Cranston *v*. Crane, 97 Mass. 369.

[7] Burnett *v*. Denniston, 5 Johns. Ch. 35.

[8] Gibson *v*. Jones, 5 Leigh, 370; Lane *v*. Tidhall, 1 Gilm. 230. [See Hartman *v*. Evans, 38 W. Va. 669, 679.]

[9] Bloom *v*. Rensselaer, 15 Ill. 503.

[10] Beatie *v*. Butler, 21 Mo. 313.

If a sale in either mode is excluded, the sale must not be made in that mode. If nothing is said about the manner of selling, whether by parcels or not, the donee of the power must exercise a sound and wise discretion for the purpose of procuring the largest price for the property, and if he exercises such discretion with due diligence and without fraud or collusion or for improper purposes, the sale will be good whether he sell in parcels or the whole.[1] A sale may be made in parcels, although the property is advertised as a whole, if a proper exercise of the trustee's discretion points out such mode.[2] It has been said that if the purchaser is ignorant of any abuse in the exercise of the discretion of the trustee he will take a good title, although the trustee abused his power; but this may be doubted.[3] If the value of the property is greatly above the amount of the mortgage, and the creditor sells in lots, he cannot sell after he has sold enough to satisfy his debts, and the court may decree a sale by lots or of part of the estate.[4]

§ 602 *z*. The sale will not be set aside for mere inadequacy of price, if due diligence was used by the donee of the power to sell under every possible advantage.[5] But there may be cases where the price is so grossly inadequate that the mere statement of it demonstrates that there must have been some mismanagement or collusion, as if land worth $500 should be sold for $50.[6] In such case, if the bidders are few, and the sum offered low, the trustee should exercise his discretion to adjourn the sale, and not to do so might be fraud, which would demand that the sale should be avoided.[7] If, however, the price is rendered inade-

[1] *Post*, § 774, and cases cited. Quarles *v.* Lacy, 4 Munf. 25; Singleton *v.* Scott, 11 Iowa, 589; Turner *v.* Johnson, 10 Ohio, 204; 7 id. 216; Lamerson *v.* Morvin, 8 Barb. 9.

[2] Gray *v.* Howard, 14 Mo. 341.

[3] Singleton *v.* Scott, 11 Iowa, 597.

[4] Johnson *v.* Williams, 4 Minn. 260.

[5] See *ante*, § 187; Singleton *v.* Scott, 11 Iowa, 589.

[6] See *ante*, § 187; Wright *v.* Wilson, 2 Yerg. 294.

[7] *Ante*, § 602, n.; Runkle *v.* Gaylord, 1 Nev. 123; Encking *v.* Simmonds, 28 Wis. 272; Horsey *v.* Hough, 38 Md. 130; Marfield *v.* Ross, id. 85.

quate by any action of the *cestui que trust*, as by his forbidding the sale, or by any other conduct, the sale will be good if the trustee acted in good faith.[1]

§ 602 *aa.* In a conveyance to a trustee or mortgagee, the title as between the grantor or mortgagor and the trustee, passes to the trustee or mortgagee. A trustee who has the fee in himself may convey it even if the conveyance is a breach of the trust, and his grantee takes a title upon which he can maintain actions at law. And so it is said that, although a trustee may convey the legal title in breach of the trust, and without complying with the power, yet the grantee will take a title good at law.[2] But such a purchaser in equity will still hold the property upon the same trusts upon which the trustee held it, for the reason that the purchaser will be held to know the record title of his vendor. He will have notice of the trust and of the power, and must be treated in equity as a trustee.[3] The law regards only the legal title; if that passes, it will prevail at law; but if a trustee

[1] Jones *v.* Neale, 2 Pat. & H. (Va.) 339; Forde *v.* Herron, 4 Munf. 316.

[2] *Ante*, §§ 321, 328, 334; Reece *v.* Allen, 5 Gilm. 236; Taylor *v.* King, 6 Munf. 356; Harris *v.* Harris, id. 367; Carrington *v.* Goddin, 13 Grat. 600; Gibson *v.* Jones, 5 Leigh, 370; Christian *v.* Yancey, 2 Pat. & H. 240; Skepworth *v.* Cunningham, 8 Leigh, 271; 10 Leigh, 183; Stimpson *v.* Fries, 2 Jones, Eq. 136; Newman *v.* Jackson, 12 Wheat. 270; Rowan *v.* Lamb, 4 G. Greene, 468; Conoy *v.* Troutman, 7 Ired. L. 418; Singleton *v.* Scott, 11 Iowa, 589; Gale *v.* Mensing, 20 Mo. 461; Bank *v.* Benning, 4 Cranch, C. C. 81; Jackson *v.* Clark, 7 Johns. 217; Miller *v.* Hull, 4 Denio, 104; King *v.* Buntz, 11 Barb. 192; Sherwood *v.* Reed, 7 Hill, 431; Dana *v.* Davenport, 4 Munf. 433; Huntley *v.* Buckner, 6 Sm. & M. 7; Brown *v.* Bartee, 10 Sm. & M. 268. This rule is founded upon a general principle, and prevails in all the States; see *ante*, § 334; except in New York, which converts the title of a trustee into a power by forbidding and making void all sales in breach of the trust.

[3] Norman *v.* Hill, 2 Pat. & H. 676; Rowan *v.* Lamb, 4 G. Greene, 468; Singleton *v.* Scott, 11 Iowa, 589; Newman *v.* Jackson, 12 Wheat. 570; Waldron *v.* Chastney, 2 Blatchf. 62; Bayard *v.* Colefax, 4 Wash. C. C. 38. In equity a purchaser of a trustee under a power must show that the sale was regular, that due notices were given, and he must prove all the facts that make a good title. Gibson *v.* Jones, 5 Leigh, 370; Norman *v.* Hill, 2 Pat. & H. 676.

has not the legal title but only a naked power over it, the legal title does not pass unless the power is strictly executed according to its terms. A trustee cannot bind the trust fund in his hands by entering into covenants in respect to it, and he is not authorized so to do. Therefore courts will not compel him to covenant except against his own acts. If, however, he enters into covenants, he will only bind himself personally. It is his duty, however, to make a good title, and if in his proposal for sale he states that the title is good, or that there is to be a good title, he cannot compel the purchaser to complete the sale if it is otherwise.[1] If the trustee once executes the power by a sale and deed, his power is extinguished, and he cannot afterwards give a new deed or make any recitals or admissions binding upon the parties.[2]

§ 602 *bb*. The execution of the power of sale in a deed of trust or mortgage conveys the title to the mortgaged land to the purchaser, and deprives the mortgagee of all interest in the premises,[3] and it bars the rights of all persons claiming under the mortgagor by conveyances made subsequent to the creation of the power or in other ways.[4] The purchaser's title, if the power has been properly and regularly executed, is absolute and irredeemable, and the sale bars infants, heirs, and married women of their dower.[5] The purpose of the power is to extinguish the equity of redemption of the mortgagor;[6] and, after its regular execution, his only right is to the surplus that may remain after

[1] *Post*, §§ 784, 787; Ennis *v.* Leach, 1 Ired. Eq. 416.

[2] Doe *v.* Robinson, 24 Miss. 688.

[3] Clay *v.* Sharp, Sugd. V. & P. Appendix No. 14; Corder *v.* Morgan, 18 Ves. 344; Sims *v.* Huntley, 2 How. (Miss.) 896; Tuthill *v.* Tracy, 31 N. Y. 157.

[4] Corder *v.* Morgan, 18 Ves. 344; Eaton *v.* Whiting, 3 Pick. 484; Turner *v.* Johnson, 10 Ohio, 204; Brisbane *v.* Stoughton, 17 id. 482; Bloom *v.* Rensselaer, 15 Ill. 506; Bancroft *v.* Ashhurst, 2 Grant, Cas. 513.

[5] Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Burnett *v.* Denniston, 7 id. 45; Johnson *v.* Turner, 10 Ohio, 204; 7 Ohio, 216; Brackett *v.* Baum, 50 N. Y. 8.

[6] Calkins *v.* Isbell, 20 N. Y. 147.

the liquidation of the debt for which the property was sold. If he remains in possession of the premises, he is a mere tenant at sufferance,[1] and the purchaser is entitled to the crops growing upon the land at the time of the sale.[2] The statutes of the States that provide for redemption upon sales by license of courts, or upon executions, have no application to sales under powers.[3] But if there are statutes in any State broad enough to give a right of redemption for a certain time after a sale under a power, the sale confers an inchoate title upon the purchaser, subject to be defeated if redeemed within the time, and to become absolute, if not redeemed, and it then relates back to the time of purchase. When the title becomes thus perfected, the purchaser may maintain an action for injury to the premises by the mortgagor or others after the purchase, and before the title becomes irredeemable.[4] A sale under such prior power cuts off all subsequent mortgages, attachments, judgments, and liens,[5] even although the sale should be made to the mortgagor.[6] But a sale under a junior power of sale mortgage conveys only the equity of redemption. It cuts off all liens, attachments, and judgments subsequent to the power under which it was made, but does not affect prior ones.[7] A sale under a power which does not pass the title may yet operate as an assignment of the mortgage debt or a part of it.[8] The same rules apply to the enforcement of sales and purchases under these powers as apply to other sales by trustees.[9] After a sale has been made under a

[1] Kinsley *v.* Ames, 2 Met. 29; Bank *v.* Guttschlick, 14 Pet. 19.

[2] Shepherd *v.* Philbrick, 2 Denio, 174.

[3] Bloom *v.* Rensselaer, 15 Ill. 503.

[4] Stone *v.* Keyes, 2 Doug. 184; Reil *v.* Baker, 2 Denio, 79; Smith *v.* Colvin, 7 Barb. 157.

[5] Wiswall *v.* Ross, 4 Port. (Ala.) 321; Brown *v.* Bartee, 10 Sm. & M. 268; Bodine *v.* Moore, 18 N. Y. 347; Pahlman *v.* Shumway, 24 Ill. 127; Collyer *v.* Collins, 9 Iowa, 127.

[6] Brown *v.* Bartee, 10 Sm. & M. 268.

[7] Graham *v.* King, 15 Ala. 568.

[8] Gilbert *v.* Cooley, Walk. Ch. 494; Grosvenor *v.* Day, 1 Clark, 109; Jackson *v.* Bowen, 7 Cow. 13.

[9] Hem *v.* Rushowski, 18 Mo. 216.

power, a tender of the amount of the debt will not revest the title in the mortgagor even when there is a right to redeem, but recourse must be had to a court of equity.[1] It follows that the creditor, in making the sale, is absolutely accountable for the proceeds of the sale; if he gives any credit, or the money is lost in any way, he must still account for it.[2]

§ 602 *cc.* If a power of sale in a mortgage or deed of trust in the nature of a mortgage is not regularly executed, the right of redemption is not foreclosed or barred; but the mortgagor may still redeem the estate of the purchaser. Therefore, it is said that a bill in equity cannot be sustained to set aside such sale, but that the bill should be framed as for a bill to redeem. If the sale is relied upon as a bar to redemption, its regularity according to the power must be shown.[3]

§ 602 *dd.* The provisions in the power limiting and regulating the sale are for the benefit of the debtor. They are for his protection, and they may be waived by him, or his conduct may estop him from taking advantage of any irregularities, as if being present at the sale and knowing of the irregularity he should make no objection, but permit the sale to proceed, or if he should procure some one to purchase the property under such circumstances. Any conduct of the debtor that would render it inequitable for him to take advantage of such defects would debar him from setting them up.[4] And so, if the debtor has acquiesced in the sale for a long time, and has seen the property resold to innocent purchasers, or has seen valuable improvements made upon the land, or has in any way been guilty of

[1] Smith *v.* Anders, 21 Ala. 728.

[2] Bailey *v.* Ætna Ins. Co., 10 Allen, 286.

[3] Goldsmith *v.* Osborne, 1 Edw. Ch. 560; Schwarz *v.* Sears, Walk. Ch. 170. This may be the rule to avoid circuity of action. The opposite doctrine was held in Driver *v.* Fortner, 5 Port. (Ala.) 9.

[4] Lamb *v.* Goodwin, 10 Ired. Eq. 320; Chowning *v.* Cox, 1 Rand. 306; 3 Leigh, 654; Beebe *v.* De Baum, 3 Eng. 510; Hall *v.* Harris, 1 Tex. 300; Gift *v.* Anderson, 5 Humph. 577; Echols *v.* Dimik, 2 Stew. 144; Greenleaf *v.* Queen, 1 Pet. 138; Foster *v.* Gover, 5 Ala. 428.

negligence or laches in claiming his rights, equity will not interfere in his favor.[1] Nor will equity interfere at the suggestion of strangers who show no interest in the property,[2] nor when the sale is in accordance with the agreement of all the parties in interest, entered into for the protection of all their interests.[3]

§ 602 *ee.* It may be stated as a general proposition, that where the proceedings are so irregular that a sale would be nugatory or void, equity would enjoin it, if application was made.[4] If the trustee or creditor acts in bad faith, or exceeds his power, or proceeds in an irregular or oppressive manner, equity will enjoin the sale. This must be the rule, for the reason that if a debtor knows of the irregularity or of the fraud, and stands by and allows the proceedings to go on, he may be estopped from afterwards taking advantage of it.[5] If there is a dispute or doubt concerning the title, which would injure the sale of the property and greatly reduce the price of it, it is the duty of the trustee to clear up the title before the sale, and equity will enjoin the sale until it is done, and if there is doubt or dispute as to how much is due, or if the debt is unliquidated, a sale will be enjoined. The amount of the debts must be certain;[6] and if it is not so, the creditor must file a bill to ascer-

[1] Chowning *v.* Cox, 3 Leigh, 654; Cresop *v.* McLean, 5 Leigh, 391; Caldwell *v.* Chapline, 11 Leigh, 342.

[2] Hannah *v.* Carrington, 18 Ark. 85; Foster *v.* Gover, 5 Ala. 428; Bayard *v.* Colefax, 4 Wash. C. C. 38; Drake *v.* Moore, 18 Ala. 597; Franklin *v.* Greene, 2 Allen, 519.

[3] Pollock *v.* Keasley, 24 N. J. Eq. 94.

[4] York, &c. Railw. Co. *v.* Myers, 4 Maine, 109; Van Berghen *v.* Demarest, 4 Johns. Ch. 37, 38; Platt *v.* McClure, 3 Wood. & Minot, 151; Matthie *v.* Edwards, 2 Coll. 465.

[5] Doolittle *v.* Lewis, 7 Johns. Ch. 45, 50; Johnson *v.* William, 4 Minn. 260; Johnson *v.* Henry, 10 Johns. 185, 186.

[6] Peck *v.* Peck, 9 Yerg. 301; Cole *v.* Savage, Clark (N. Y.), 361; Johnson *v.* Eason, 3 Ired. Eq. 330; Wilkins *v.* Gordon, 10 Leigh, 547; Ord *v.* Noel, 5 Madd. 440; Lane *v.* Tidball, 1 Gil. (Va.) 130; Gibson *v.* Jones, 5 Leigh, 370; Bassett *v.* Fisher, 11 Grat. 499; Hunt *v.* Bass, 2 Dev. Eq. 292; James *v.* Gibbs, 1 Pat. & H. 277; Miller *v.* Argyle, 5 Leigh, 460; Fisher *v.* Bassett, 9 Leigh, 119; Guy *v.* Hancock, 1 Rand. 72; Sandford *v.* Flint, 24 Mich. 26.

tain the amount, and pray for leave to sell to pay the amount found due. And it is said that equity will enjoin a sale when new and further litigation would be prevented.[1] So when the whole debt is disputed, as for usury, or for any other defence to the claim made in good faith.[2] If, however, any amount is admitted to be due, or appears to the court to be due, that sum must be brought into court or tendered to the creditor before an injunction would be granted.[3] Nor would the court grant an injunction in order that different debtors might settle their individual rights among themselves; the sale must be made, and they can settle their own relations among themselves.[4] And equity will not interfere to give the mortgagor a further time to pay the debt.[5]

§ 602 *ff.* The trust of the creditor under his deed or mortgage, if not otherwise expressed in the deed, is to sell the property, and after deducting the amount of his debt and the expenses of the sale, to pay the balance, if any, to the debtor, his heirs, executors, administrators, or assigns, and the surplus must be paid according to the terms of the trust.[6] If there are subsequent liens, mortgages, judgments, or assignments, the creditor must pay the surplus to the persons holding such liens or assignments, in the order in which they attach to the property.[7] No subsequent lien or assignment can displace a pre-

[1] Echliff *v.* Baldwin, 16 Ves. 267; Curtis *v.* Buckingham, 3 Ves. & B. 168.

[2] Marks *v.* Morris, 3 Munf. 407.

[3] Sloan *v.* Coolhaugh, 10 Iowa, 30; Stringham *v.* Brown, 7 id. 33; Casady *v.* Bosler, 11 id. 242.

[4] Brinckerhoff *v.* Lansing, 4 Johns. Ch. 65; Cooper *v.* Stevens, 1 id. 425; Gill *v.* Lyon, id. 447.

[5] Hyman *v.* Devereux, 63 N. C. 624.

[6] Goulden *v.* Buckelew, 4 Cal. 107; Pierce *v.* Robinson, 13 Cal. 116; Russell *v.* Duflon, 4 Lans. 399.

[7] Bodine *v.* Moore, 18 N. Y. 347; Calkins *v.* Isbell, 20 N. Y. 152; Bartlett *v.* Gage, 4 Paige, 503; Averill *v.* Loucks, 6 Barb. 470; Eddy *v.* Smith, 13 Wend. 488; Waller *v.* Harris, 7 Paige, 167; 20 Wend. 555; White *v.* Watkins, 23 Mo. 429; Doniphan *v.* Paxton, 19 Mo. 288; Kennedy *v.* Hammond, 16 Mo. 341; Cook *v.* Dillon, 9 Iowa, 407; Chase *v.* Parker, 14 id.

vious lien, and although a debtor can assign any surplus that may be coming to him, yet such assignment cannot defeat a prior lien on the property.[1] To entitle a judgment creditor to follow or claim the surplus, he must have made his judgment a lien on the property or upon the equity of redemption. If there are no liens or assignments of the surplus by the debtor, creditors can reach the surplus in the mortgagor's hands by attachment,[2] trustee process, or garnishment, or, in some cases, by a creditor's bill. If there are no subsequent claims upon the surplus, it goes to the debtor; if he is dead, it goes as real estate to his heirs, for a conversion under a deed of trust or mortgage with a power of sale extends to so much only as is necessary to pay the debt, and the widow is entitled to dower in the surplus, as in an equity of redemption, or she is entitled to dower in the whole estate if she has not released it by joining in the deed.[3] If the sale is made under a second deed of trust or mortgage, nothing is to be paid to the prior mortgagee, as such sale does not affect such prior lien, but it cuts off all subsequent mortgages, liens, judgments, or assignments; therefore they are to be paid as before stated.[4] Whether the trustee is to search for such subsequent liens upon the property, or whether he can dispose of the surplus in the absence of notice of subsequent liens with safety to himself, is not entirely settled; but it would

207; Pahlman *v.* Shumway, 24 Ill. 127; Presnell *v.* Landers, 5 Ired. Eq. 251; Palmer *v.* Yarborough, 1 id. 310; Harrison *v.* Battle, 1 Dev. Eq. 541; Marlow *v.* Johnson, 31 Miss. 128; Russell *v.* Duflon, 4 Lans. 399. A mortgagee who sells property subject to his mortgage and other liens becomes trustee for the benefit of all concerned, and if he acts in good faith and within the scope of his authority, the court will not hold him responsible for mere errors of judgment, however unfortunate, which he could not reasonably have anticipated. Mackay *v.* Langley, 92 U. S. 142.

[1] Doniphan *v.* Paxton, 19 Mo. 288; Palmer *v.* Yarborough, 1 Ired. 310.

[2] Bailey *v.* Merritt, 7 Minn. 159.

[3] Wright *v.* Rose, 2 S. & S. 323; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; Tabele *v.* Tabele, id. 45; Hinchman *v.* Stiles, 1 Stockt. 454. But see Pahlman *v.* Shumway, 24 Ill. 127; and see Varnum *v.* Meserve, 8 Allen, 158, where the mortgagor had died, leaving a will.

[4] Helmey *v.* Heitcamp, 20 Mo. 569; Graham *v.* King, 15 Ala. 563.

appear that a mortgagee is not compelled to search the record for liens subsequent to the date of his own deed.[1]

§ 602 *gg*. These powers of sale in mortgage-deeds do not change their character as mortgages, but the powers of sale are superadded to mortgages. It is a cumulative power of foreclosure; and if the mortgagee does not choose to exercise the power, he may foreclose the mortgage by any of the other methods provided by law,[2] and the power need not be coextensive with the mortgage or its conditions;[3] and so, if the mortgagee has once entered to foreclose, he may afterwards exercise the power of sale.[4]

[1] Cook *v*. Dillon, 9 Iowa, 407.

[2] Cormerais *v*. Genella, 22 Cal. 116; Thompson *v*. House, 48 Miss. 445; Merriott *v*. Givens, 8 Ala. 694; Morrison *v*. Bean, 15 Tex. 257.

[3] Butler *v*. Ladue, 12 Mich. 173; Montgomery *v*. McEwen, 9 Minn. 103.

[4] Montague *v*. Dawes, 12 Allen, 397.

CHAPTER XXI.

TRUSTEES FOR INFANTS.

§ 603. The special care of courts of equity over infants.
§ 604. Investments for infants.
§§ 605, 606. Power to convert an infant's personal property into real estate.
§ 607. Conversion in cases of necessity.
§ 608. Leases of infants' lands.
Conversion of infants' estate.
§ 609. Power to convert real estate into personal property.
§ 610. Powers of courts of equity to decree a conversion of an infant's property.
§ 611. The rights of an infant will remain the same whether his property is converted or not.
Maintenance, see also § 623.
§ 612. Duty of a father to maintain his infant children, — duty of trustees as to maintenance.
§ 613. Power of the court to order maintenance.
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§ 615. In what manner infants are to be maintained.
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§ 618. Trustees must not expend the principal of an infant's estate without the sanction of the court.
§ 619. Whether the court can authorize the expenditure of part of the principal of an infant's property.
§ 620. Where the settlement or will contains directions as to maintenance.
§ 621. An infant *cestui que trust* has the same rights and remedies as other *cestuis que trust*.
§ 622. Trustees for infants must account. When.
§ 623. Infants may be maintained out of the jurisdiction of the court.
§ 624. To whom a trustee may pay money for an infant.

§ 603. INFANTS and their property are, in an especial manner, under the protection of courts of equity. The court has an inherent jurisdiction, which extends to the care of the persons

of infants, so far as it is necessary for their protection and education, and also of their property, real and personal, and its due management, preservation, and proper application to their maintenance.[1] The court is their general guardian, and upon the institution of proceedings therein, involving their personal or pecuniary rights, they are regarded as wards of the court, and under its special cognizance and protection, and no act can be done affecting either their persons, property, or condition, except under the express or implied direction of the court itself; and everything done without such direction is treated as a violation of the authority of the court, and the offending party is deemed guilty of a contempt, and treated accordingly.[2] (*a*)

§ 604. In England it is a settled rule of the court that money, in trust for an infant must be laid out in three per cent consols; and the court will not even refer it to a master to inquire whether it would be for the benefit of the infant that the trustee should invest the sum in real or any other security, unless there is something very special in the case to induce the court to relax the rule.[3] In the United States, there is no such general rule, and there are no statutes directing how trustees shall invest the trust funds; but in some States there are statutes directing how savings-banks shall invest money deposited with them, and

[1] Hope *v.* Hope, 4 De G., M. & G. 328; Dawson *v.* Jay, 3 id. 764; Stuart *v.* Bute, 9 H. L. Cas. 440; Johnson *v.* Beattie, 10 Cl. & Fin. 440; Nugent *v.* Vetzera, L. R. 2 Eq. 704; Spring *v.* Woodworth, 4 Allen, 326; Anderson *v.* Mather, 44 N. Y. 229.

[2] *Per* Nelson, J., Williamson *v.* Berry, 8 How. 555; 2 Story, Eq. Jur. §§ 1341, 1352, 1353; Smith *v.* Smith, 3 Atk. 304; Eyre *v.* Shaftesbury, 2 P. Wms. 103; Gilb. 172; 2 Eq. Cas. Ab. 710, pl. 3; 755, pl. 4; 3 Lead. Cas. Eq. 538–600; Aymar *v.* Roff, 3 Johns. Ch. 49; In Matter of Whittaker, 4 Johns. Ch. 378; Garr *v.* Drake, 2 Johns. Ch. 542; Van Duzer *v.* Van Duzer, 6 Paige, 366; De Manneville *v.* De Manneville, 10 Ves. 52.

[3] Norbury *v.* Norbury, 4 Mod. 191.

(*a*) The foregoing statement in the text seems not to have been intended to apply to a trustee's exercise of powers expressly or impliedly given him by the instrument of trust, unless the exercise of the powers was made dependent upon the consent of the infant *cestuis*.

courts have sometimes directed trustees to invest the trust funds in those securities that have been legalized for savings-banks.

§ 605. In England, trustees or guardians are not ordinarily permitted to change the nature of the infant's property by converting personalty into realty, or *vice versa;* [1] as, where the trustees of an infant had saved £3,000 out of the profits of real estate, and laid it out in lands adjoining the infant's estate, with the consent of the guardian, and the infant died under age, the trustees were held not justified in making such an investment, and were ordered to account to the infant's executors.[2] The rule originated in the fact that formerly an infant at seventeen might make a will of personalty, and to convert his personalty into real estate took away a power that the law gave him; on the other hand, to convert his real estate into personalty gave him a power contrary to the policy of the law.[3] (*a*) This reason ceased with the statute of wills, which takes away the right of infants to make wills, either of real or personal estate, before they are twenty-one. Lord Eldon seemed to think that the rule was established for the protection of the relative interests of the real and personal representatives of the infant; [4] but it is now established that the court will not regard the interests of an infant's representatives, nor interfere to protect them, but will look only to the best interest of the

[1] 1 Madd. Ch. Pr. 269; 2 Story, Eq. Jur. § 1357; *Ex parte* Phillips, 19 Ves. 122; Witter *v.* Witter, 3 P. Wms. 101; Rook *v.* Worth, 1 Ves. 461; Tullett *v.* Tullett, Amb. 370.

[2] Winchelsea *v.* Norcliffe, 1 Vern. 341; Gibson *v.* Scudmore, 1 Dick. 45.

[3] Ware *v.* Polhill, 11 Ves. 278; *Ex parte* Phillips, 19 Ves. 122; Ashburton *v.* Ashburton, 6 Ves. 6; Sergeson *v.* Sealey, 2 Atk. 413; Rook *v.* Worth, 1 Ves. 461; Witter *v.* Witter, 3 P. Wms. 99; Inwood *v.* Twyne, 2 Eden, 152; *Ex parte* Bromfield, 1 Ves. Jr. 461; Pierson *v.* Shore, 1 Atk. 480; *Ex parte* Grimstone, Amb. 708.

[4] Ware *v.* Polhill, 11 Ves. 278.

(*a*) See Att. Gen. *v.* Ailesbury, 12 A. C. 672, 682, 694; 16 Q. B. D. 439.

infant.[1] There seems now to be no principle at the bottom of the rule; and therefore it has been said in some cases, that where the advantage or convenience of the infants called for a change in the nature of the property, the court would order it.[2] In other and later cases, the jurisdiction and power of the court to change the nature of an infant's property have been denied; and it seems now to be the established rule, that such change cannot be made even for the advantage of the infant.[3]

§ 606. In the United States, a guardian or trustee cannot convert an infant's personalty into real estate.[4] If such conversion is made, the wards, on coming of age, may elect to receive their personal property, and the trustee or guardian must account and pay it over to them;[5] or they may acquiesce in the purchase after becoming of age, and if they so acquiesce for a long time, they cannot afterwards claim the money, although the original conversion into real estate was wrongful.[6] So to use any part of the ward's personal property in making permanent improvements upon his real estate, is a conversion of personalty into real estate, and is unauthorized, and will not be allowed to the trustee or guardian.[7] Where a guardian used his own money in constructing buildings upon the ward's land, it was held that he could not recover the money back from the

[1] Pierson *v.* Shore, 1 Atk. 480; Oxenden *v.* Compton, 2 Ves. Jr., 69; 4 Bro. Ch. 201; *Ex parte* Grimstone, Amb. 706; 4 Bro. Ch. 235, n.; In Matter of Salisbury, 3 Johns. Ch. 347; Lloyd *v.* Hart, 2 Penn. St. 477.

[2] Inwood *v.* Twyne, Amb. 419; 2 Eden, 147; Terry *v.* Terry, Ch. Pr. 273.

[3] Taylor *v.* Phillips, 2 Ves. 23; Simpson *v.* Jones, 2 R. & M. 365; Calvert *v.* Godfrey, 6 Beav. 97; Peto *v.* Gardner, 12 L. J. (N. S.) Ch. 371; 2 Y. & C. Ch. 312; Garmstone *v.* Gaunt, 1 Col. C. C. 577; Anderson *v.* Mather, 44 N. Y. 249.

[4] Eckford *v.* De Kay, 8 Paige, 89; Rogers *v.* Paterson, 4 Paige, 409; *Ex parte* Crutchfield, 3 Yerg. 335; Moore *v.* Moore, 12 B. Mon. 651; Bonsall's App., 1 Rawle, 273; Wolf *v.* Eichelberger, 2 Pen. & W. 346; Royer's App., 11 id. 36. [Manternach *v.* Studt, 240 Ill. 464.]

[5] Eckford *v.* De Kay, 8 Paige, 89; Rogers *v.* Paterson, 4 Paige, 409.

[6] Moore *v.* Moore, 12 B. Mon. 651.

[7] Hassard *v.* Rowe, 11 Barb. 22; Bellinger *v.* Shafer, 2 Sandf. Ch. 297; Alexander *v.* Alexander, 8 Ala. 796; Copely *v.* O'Neil, 39 How. (N. Y.) 41.

infant.[1] But where the enlargement of a tenement upon the ward's land greatly increased the rents, the trustee was allowed a credit for the expenditure.[2] In one case, it was referred to a master to report whether it was for the interest of the infant to spend money in repairs upon real estate of which he was tenant in tail in expectancy ;[3] and in another case it was said that an allowance for permanent improvements may be made where it is obviously for the ward's interest.[4] But a trustee or guardian should not venture to expend the ward's personalty in that manner without first obtaining the sanction of the court; for if an unauthorized act is first done, the court will not sanction it, though in the particular case it might be proper if first sanctioned by the court; for the principle is that trustees and guardians of infants should take no important step without leave of the court, and the court will punish such action taken on their own responsibility, by refusing to sanction the expenditures.[5]

§ 607. It is said that, in case of necessity, the guardian or trustee may purchase land with the personalty of an infant.[6] No rules can be laid down to govern the conduct of the guardian or trustee as to such necessity, and the safest course is to apply to the court having jurisdiction of the ward's estate. In a proceeding to divide an estate, in which the infant owned a third, it was held that a guardian might purchase the interest of other heirs to prevent a sacrifice of the estate and the ward's property.[7] A guardian may relieve his ward's real estate from

[1] Hassard *v.* Rowe, 11 Barb. 22.

[2] Miller's Estate, 1 Penn. St. 326.

[3] Hood *v.* Bridport, 11 Eng. L. & Eq. 271.

[4] Jackson *v.* Jackson, 1 Grat. 143.

[5] Worth *v.* Curtis, 3 Shep. 228; Miller's Estate, 1 Penn. St. 326; Mason *v.* Wait, 4 Scam. 127.

[6] Bonsall's App., 1 Rawle, 273; Royer's App., 11 Penn. St. 36; Billington's App., 3 Rawle, 55.

[7] Bowman's App., 3 Watts, 369. This was held not to be a conversion of personalty into real estate, but simply the expenditure of such money as was necessary to preserve the estate.

an elegit, extent, mortgage, or lien, which, if left unredeemed, would probably destroy the ward's interest.[1] If a guardian purchases real estate for his ward, he cannot convey it again without the leave and sanction of the court; as where a guardian purchased real estate in trust for his wards, and upon their marriage he conveyed it to their husbands, the fee was held to be still in the wards.[2]

§ 608. There can be no doubt that it is the duty of the trustees or guardians of infants to lease the lands of their wards, as the wards are incapable of acting for themselves; and they must collect the rents and account for them:[3] but they cannot execute leases extending beyond the majority of the infants; if they do, the infants, on coming of age, can disaffirm the lease and take the possession.[4]

§ 609. Reference thus far has been made only to the power of trustees or guardians to convert their ward's personalty into real estate, for the reason that under no circumstances can a trustee or guardian of an infant convert the ward's real estate into personalty by a sale, without the order, decree, or license of a court. If such sale is already made, and an application is made to have it sanctioned, the court will refuse.[5] (*a*)

§ 610. Whether a court of general equity powers has an inherent jurisdiction, without some enabling statute, to decree a

[1] Ronald *v.* Buckley, 1 Brock. 356.

[2] Kauffman *v.* Crawford, 9 Watts & S. 131; Robinson *v.* Robinson, 22 Iowa, 427.

[3] Field *v.* Schieffelin, 7 Johns. Ch. 150; Byrne *v.* Van Hoesen, 5 Johns. 66; Ross *v.* Gill, 4 Call, 250; Genet *v.* Talmadge, 1 Johns. Ch. 561; Emerson *v.* Spicer, 55 Barb. 418.

[4] Ross *v.* Gill, 4 Call, 250; Emerson *v.* Spicer, 55 Barb. 428.

[5] Worth *v.* Curtis, 3 Shep. 228; Miller's Estate, 1 Penn. St. 326; Mason *v.* Wait, 4 Scam. 127.

(*a*) This, of course, is not intended to apply to sales by a trustee in execution of a power given him in the instrument of trust.

conversion of an infant's property, is a matter of doubt and much conflict of opinion. The jurisdiction to decree such conversion has been sustained in some cases,[1] and denied in others.[2] The reasoning of the cases where the jurisdiction is denied is, that where statutes have been enacted, giving power to surrogates or probate courts to authorize the sale of lands belonging to infants and minors by their guardians, trustees, or other persons, such statutes are to be followed; that they give an exclusive jurisdiction, and prescribe all the rules of the sale, and enact what securities shall be taken for the protection of the ward; and that courts of equity can have no jurisdiction where such formal proceedings and such adequate remedies are given by statute. Nearly all the States have statutes giving guardians, or other persons appointed by the court, power to sell the real estate of infants, on applying in due form, and showing

[1] William's Case, 3 Bland, 186; *Ex parte* Jewett, 16 Ala. 409; Troy *v.* Troy, 1 Busb. Eq. 87; Williams *v.* Harrington, 11 Mod. 616; Huger *v.* Huger, 3 Des. 18; Stapleton *v.* Langstaff, id. 22; Matter of Salisbury, 3 Johns. Ch. 347; Wood *v.* Mather, 38 Barb. 573. [Thorington *v.* Thorington, 82 Ala. 489; Goodman *v.* Winter, 64 Ala. 410, 434; Gorman *v.* Mullins, 172 Ill. 349; Hale *v.* Hale, 146 Ill. 227, 249; Downin *v.* Sprecher, 35 Md. 474, 483 (*semble*); Johns *v.* Smith, 56 Miss. 727, 731; Houston *v.* Houston, 62 N. C. 95; Sutton *v.* Schonwald, 86 N. C. 198; Marsh *v.* Dellinger, 127 N. C. 360; Ricardi *v.* Gaboury, 115 Tenn. 484; Lenow *v.* Arrington, 111 Tenn. 720; Holt *v.* Hamlin, 120 Tenn. 496. See Pennington *v.* Met. Museum, 65 N. J. Eq. 11.]

[2] In Baker *v.* Lorillard, 4 Comst. 257, the court said that it had no jurisdiction to order a sale of an infant's real estate, except by the statute giving it that power. Rogers *v.* Dill, 6 Hill, 415, decided that a title taken under a decree of sale by a court of equity, contrary to the testator's will, was bad. Forman *v.* Marsh, 1 Kern. 547, was the exercise of the jurisdiction under the statute. Nelson, J., denied the jurisdiction in Williamson *v.* Berry, 8 How. 531; 3 Lead. Cas. in Eq. 269 (3d Amer. ed.). In Anderson *v.* Mather, 44 N. Y. 249, it was held that chancery has an inherent power over an infant's lands held in trust, not derived from the statute; that the statute relates to lands owned in fee by the infant, and not to his equitable estates; and that the prohibitions of the statute are restrictions upon trustees, and not limitations upon the power of courts. [For cases holding that the courts have no such inherent power, see Elliott *v.* Fowler, 112 Ky. 376; Liter *v.* Fishback, 75 S. W. 232 (Ky. 1903); Messner *v.* Giddings, 65 Tex. 301; Rhea *v.* Shields, 103 Va. 305; Hoback *v.* Miller, 44 W. Va. 635.]

that it will be advantageous to the infant to convert his real estate into some other kind of property.(*a*) The authority or license given by the court to the guardian, trustee, or other person who may be appointed to sell and convey the estate, confers upon them the same power that is given to executors and administrators to sell the real estate of a deceased person for payment of debts.[1] Legislatures, in the absence of general statutes authorizing courts to act, may authorize the sale and conversion of an infant's real estate, and such legislation in particular cases, or generally in enabling courts to grant authority, is constitutional.[2] In addition to these statutes, there are statutes in several of the States authorizing trustees to apply to the court,

[1] Field *v.* Schieffelin, 7 Johns. Ch. 150; Bank of Va. *v.* Clegg, 6 Leigh, 399; Garland *v.* Loring, 6 Rand. 396; Matter of Wilson, 2 Paige, 412; Pope *v.* Jackson, 11 Pick. 113; Talley *v.* Starke, 6 Grat. 339; Duckett *v.* Skinner, 11 Ired. 431; Brown's Case, 8 Humph. 200; Peyton *v.* Alcorn, 7 J. J. Marsh. 500; Dow's Pet., Walk. Ch. 145; Young *v.* Keogh, 11 Ill. 642; Harding *v.* Larned, 4 Allen, 426; Dalrymple *v.* Taneyhill, 4 Md. Ch. 171; Joor *v.* Williams, 9 George, 546; *Ex parte* Jewett, 16 Ala. 409; Morris *v.* Morris, 2 McCarter, 239; Beal *v.* Harman, 36 Mo. 435; Wood *v.* Mather, 38 Barb. 473.

[2] Snowhill *v.* Snowhill, 2 Green, Ch. 20; Norris *v.* Clymer, 2 Penn. St. 277; Davis *v.* Johannot, 7 Met. 388; Spotswood *v.* Pendleton, 4 Call, 514; Dorsey *v.* Gilbert, 11 G. & J. 87; Powers *v.* Bergen, 2 Seld. 358; Nelson *v.* Lee, 10 B. Mon. 495; In Matter of Bull, 45 Barb. 524. For other cases of sale and conversion of trust estates authorized by legislatures, see Leggett *v.* Hunter, 19 N. Y. 445; Clark *v.* Van Surley, 15 Wend. 436; Cochran *v.* Van Surley, 20 id. 365; Bambaugh *v.* Bambaugh, 14 Serg. & R. 191; Blagge *v.* Miles, 1 Story R. 426; Matthew *v.* Holman, 16 Pet. 25; Wilkson *v.* Leland, 2 Pet. 627; Ward *v.* Screw Co., 1 Cliff. 565; Florentine *v.* Barton, 2 Wall. 210; Thurston *v.* Thurston, 6 R. I. 296; Sohier *v.* Mass. General Hospital, 3 Cush. 483; and Ervin's App., 16 Penn. St. 256, where a sale made under an act of the legislature, but before the time prescribed in the instrument of trust, was held invalid. [See Estate of Hamilton, 120 Cal. 421; Elliott *v.* Fowler, 112 Ky. 376; Rhea *v.* Shields, 103 Va. 305; Hoback *v.* Miller, 44 W. Va. 635; Beauchamp *v.* Bertig, 90 Ark. 351; Baker *v.* Lane, 118 S. W. 963 (Ky. 1909); Commonwealth *v.* Lee, 120 Ky. 433.]

(*a*) The power of a court of equity to fully administer a trust is not curtailed, so as to give the probate court jurisdiction *pro tanto*, by the fact that infants are parties interested in the sale, mortgage or lease which it authorizes. Mayall *v.* Mayall, 63 Minn. 511.

by petition or bill, for license to sell real estate held in trust, whether for infants or adults, although there may be interests that may devolve upon persons not yet in being. The statutes authorize the courts to appoint some one to appear for and represent minors and persons not in being; and if, upon the hearing of all parties interested, it appears to be for the interest of all that the real estate should be sold, a sale is decreed, and the trustees are ordered to invest the proceeds in safe securities upon the same trusts.[1] If, however, there is any particular privilege conferred upon an infant, of which he would be deprived by a sale of the estate, a sale will be denied; as where a testator gave his mansion-house and farm to a son for life, and his mansion-house and a portion of his farm to such one of his grandsons, by this or another son, in remainder, as should elect the mansion-house and land as his share. Upon a petition setting forth that it was for the interest of all parties that the estate should be sold, the court held that it was a specific devise to such grandson in remainder as should elect to take the mansion-house; that to decree a sale would defeat the intention of the testator; that if the mansion-house was going to decay and the income was insufficient to repair it, so that the devise over would be substantially defeated, a sale might be ordered, but, no such case appearing, a sale was denied.[2] If, however, a power of conversion is given in the instrument of trust, the trustee may exercise all the powers of conversion given him.[3] In such cases, the trustee for an infant may exercise even larger powers than a trustee for a person *sui juris;* for such person's signature to receipts may be required,[4] but as an infant can do

[1] Public Stat. Mass. [R. L. (1902), c. 146, § 4 *et seq.*] It has been said, however, that the court ought to retain the title to the land for security of the purchase-money.

[2] Davis's Pet., 14 Allen, 24. In Rogers *v.* Dill, 6 Hill, 415, the court went further, and declared that a purchaser, under a decree of sale that ought not to have been made by the court, took no title. See Matter of Heaton, 21 N. J. Eq. 221.

[3] Ashburton *v.* Ashburton, 6 Ves. 6; Terry *v.* Terry, Pr. Ch. 273; Rogers *v.* Dill, 6 Hill, 415.

[4] 2 Sugd. V. & P. 45.

no valid act, a trustee for sale of his property takes by implication the power to sign receipts and receive the purchase-money.[1]

§ 611. If an infant's lands are sold by order of the court the proceeds remain real estate, so far as the guardian and infant are concerned, until he is of age;[2] but if he dies after coming of age the proceeds are treated as personalty.[3] Timber cut upon an infant's estate, and the proceeds and the accumulation of the proceeds, remain real estate, if the infant is tenant in fee;[4] but if he is tenant in tail, they are considered personalty, to prevent them from going to the remainder-man.[5] If an infant's personal property is used to pay off incumbrances on the estate, it is still looked upon as part of the personalty.[6] But necessary expenses for keeping up the estate, as ordinary repairs, are thrown upon the personalty;[7] and so where an estate was devised to an infant, in consideration of his paying off the original cost, such payment was held to be a necessary

[1] Lavender *v.* Stanton, 2 Madd. 46; Sowarsby *v.* Lacy, 4 Madd. 142; Breedon *v.* Breedon, 1 R. & M. 413.

[2] Genet *v.* Talmadge, 1 Johns. Ch. 564; Snowhill *v.* Snowhill, 2 Green, Ch. 20; Lloyd *v.* Hart, 2 Pa. St. 473; March *v.* Berrier, 6 Ired. Eq. 524; Shumway *v.* Cooper, 16 Barb. 556; Sweezy *v.* Thayer, 1 Duer, 286; Forman *v.* Marsh, 1 Kern. 544; Fidler *v.* Higgins, 21 N. J. Eq. 138. [Matter of McMillan, 110 N. Y. S. 622, 126 App. Div. 155; Wetherill *v.* Hough, 52 N. J. Eq. 683; Merriam *v.* Dunham, 62 N. J. Eq. 567; Major *v.* Hunt, 64 S. C. 97; Findley *v.* Findley, 42 W. Va. 372.]

[3] Snowhill *v.* Snowhill, 2 Green, Ch. 20.

[4] Tullet *v.* Tullet, 1 Dick. 352; Amb. 370; Mason *v.* Mason, cited Amb. 371; *Ex parte* Phillips, 19 Ves. 124; Rook *v.* Worth, 1 Ves. 461; *Ex parte* Bromfield, 1 Bro. Ch. 516.

[5] Ibid.; Dyer *v.* Dyer, 34 Beav. 504.

[6] Ibid.; Seys *v.* Price, 9 Mod. 220; Dowling *v.* Belton, 1 Flan. & Kelly. 462; 2 Freem. 114, 126; *Ex parte* Grimstone, Amb. 708; Palmes *v.* Danby, Pr. Ch. 137; Zoach *v.* Lloyd, cited Awdley *v.* Awdley, 2 Vern. 192; Dennis *v.* Badd, — see Winchelsea *v.* Norcliffe, 1 Vern. 436; Mason *v.* Dry, Pr. Ch. 319; Pierson *v.* Shore, 1 Atk. 480. [See Matter of Bolton, 159 N. Y. 129.]

[7] *Ex parte* Grimstone, cited Oxenden *v.* Compton, 4 Bro. Ch. 235, n.; Amb. 708.

expense and to fall upon the personalty.[1] Generally, the proceeds of an estate, as timber, go with the estate;[2] but in a late case, an infant dying under age, the proceeds of timber cut during his life was held to be personalty.[3] These distinctions are quite immaterial in the United States, as in most of them, if not all, both real and personal estate descend to the same persons as heirs, and both real and personal estates are equally liable for debts.

§ 612. A father is bound to maintain his infant children, if he has sufficient ability; therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance[4] without an order of court.[5] If the father has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instrument of trust.[6] (*a*) But if there is an agreement in a

[1] Vernon *v.* Vernon, cited *Ex parte* Bromfield, 1 Ves. Jr. 456.

[2] Field *v.* Brown, 27 Beav. 90.

[3] Dyer *v.* Dyer, 34 Beav. 504.

[4] Fawkner *v.* Watts, 1 Atk. 408; Jackson *v.* Jackson, id. 513; Butler *v.* Butler, 3 Ark. 60; Darley *v.* Darley, id. 399; Stocken *v.* Stocken, 4 Myl. & Cr. 98; Cruger *v.* Heyward, 2 Des. 94; Matter of Kane, 2 Barb. Ch. 375; Bethea *v.* McColl, 5 Ala. 312; Sparhawk *v.* Buell, 9 Vt. 41; Walker *v.* Crowder, 2 Ired. Eq. 478; Chaplin *v.* Moore, 7 Mon. 173; Dupont *v.* Johnson, 1 Bail. Eq. 279; Myers *v.* Myers, 2 McCord, Ch. 214. [Kinsey *v.* State, 98 Ind. 351; Burke *v.* Turner, 85 N. C 500; Stigler's Ex'x *v.* Stigler, 77 Va. 163, 171; Windon *v.* Stewart, 43 W. Va. 711, 718.]

[5] McKnight *v.* Walsh, 23 N. J. Eq. 136.

[6] Mundy *v.* Howe, 4 Bro. Ch. 224; Hughes *v.* Hughes, 1 id. 387; Andrews *v.* Partington, 3 id. 60; 2 Cox, 223; Hamley *v.* Gilbert, Jac. 354; Thompson *v.* Griffin, 1 Cr. & Ph. 317. To apply the income of an infant's property in the hands of a trustee to the maintenance of the infant is to convert it into a gift to the father, which the donor does not generally intend. Addison *v.* Bowie, 2 Bland, 606; Spear *v.* Spear, 9 Rich. Eq. 188.

(*a*) Unless it is clear that the intention was to relieve the father from the burden of maintenance and education, as where the property was left to a father in trust for the express purpose of applying the income to the support and education of infant children. Camden Safe Dep. & Tr. Co. *v.* Ingham, 40 N. J. Eq. 3.

That the duty of a father to supply necessaries for his minor

marriage settlement that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children, without reference to the father's ability to support them.[1] If, however, the trustees have a discretionary power in that respect, the father cannot compel them to exercise it in his favor;[2] nor will the court interfere if they choose to exercise their discretion.[3] (*a*) But where the income is expressly given to the father for the maintenance of his children, these rules do not apply; for such gift is in some sort a gift to the father.[4] If income is directed to be paid to a parent "for" or "towards" the maintenance of children, and, in case of their death under twenty-one, the share of each with all accumulations is to go to the survivors, the father having maintained the children is entitled to the income without an account.[5] (*b*)

[1] Mundy *v.* Howe, 4 Bro. Ch. 224; Meachey *v.* Young, 2 Myl. & K. 490; Stocken *v.* Stocken, 4 Myl. & Cr. 95; 4 Sim. 152; Stephens *v.* Lawry, 2 N. C. C. 87; White *v.* Grane, 18 Beav. 571; Ransome *v.* Burgess, L. R. 3 Eq. 773.

[2] Thompson *v.* Griffin, 1 Cr. & Ph. 322.

[3] Brophy *v.* Bellany, L. R. 8 Ch. 798.

[4] Brown *v.* Casamajor, 4 Ves. 498; Hammond *v.* Neame, 1 Swanst. 35; Blackburn *v.* Byne, 26 Beav. 41. [Camden Safe Dep. & Tr. Co. *v.* Ingham, 40 N. J. Eq. 3.]

[5] Browne *v.* Paull, 1 Sim. (N. S.) 92; 15 Jur. 5; Hadow *v.* Hadow, 9 Sim. 438; Rainsford *v.* Rainsford, Rice, Eq. 343.

children is a legal as well as a moral duty, see Porter *v.* Powell, 79 Iowa, 151; 30 Am. L. Reg. (N. S.) 20, 28; 30 Cent. L. J. 286, 288, note.

(*a*) Although the court will not interfere with a reasonable and honest exercise of discretion of the trustees either in paying over or in withholding income in such cases, *In re* Bryant, [1894] 1 Ch. 324; Read *v.* Patterson, 44 N. J. Eq. 211; if it appears that the father is unable to maintain and educate the infant beneficiary in a manner suitable to the latter's station in life and expectations, the court will order a sufficient allowance to the father, or other guardian, for the purpose. King-Harman *v.* Cayley, [1899] 1 Ir. 39; *In re* Lofthouse, 29 Ch. Div. 921; *In re* Birch's Trusts, 15 L. R. Ir. 380. See Wilson *v.* Turner, 22 Ch. Div. 521.

(*b*) This does not apply when the income is not given to the father, but he is clothed only with a power to use it for the support and education of the beneficiary. Neal *v.* Bleckley, 51 S. C. 506, 531.

Where the income of a life-estate under a marriage settlement was given to parents for the support of their children, and they became bankrupt, the court ordered the whole income to be applied to the support of the children.[1] But where there is a provision to parents for the maintenance of their children, and a third person voluntarily supports one of the children, the parents being ready to render such support, they cannot be called upon to reimburse such third person, nor can the fund be charged.[2] Where a testatrix devised her property, in trust to apply the income to the maintenance of the children of her daughter M., who at that time had four children, and who afterwards married again and had five other children, it was held that the maintenance must be applied to the support of all the children, and that it commenced with their birth, and continued during their minority, or until the females were married.[3] If the trustee has a discretion, he cannot apply the whole income, if the infant can be properly maintained on a less sum.[4]

§ 613. A stepfather is not compelled to maintain his wife's children, and he will be entitled to receive maintenance out of the income, if the trustee can pay it for that purpose;[5] (*a*) but if the support of the infant costs the stepfather nothing,

[1] Dalton's Settlement, 1 De G., M. & G. 265.

[2] Crawford *v.* Patterson, 11 Grat. 364.

[3] Connor *v.* Ogle, 4 Md. Ch. 425.

[4] McKnight *v.* Walsh, 24 N. J. Eq. 498. [See Wilson *v.* Turner, 22 Ch. Div. 521.]

[5] Freto *v.* Brown, 4 Mass. 675; Gay *v.* Ballou, 4 Wend. 403. [Livingston *v.* Hammond, 162 Mass. 375; *In re* Besonby, 32 Minn. 385; Dissenger's Case, 39 N. J. Eq. 227; Ela *v.* Brand, 63 N. H. 14; Wilson's Guardianship, 40 Or. 353; Gerber *v.* Bauerline, 17 Or. 115.]

(*a*) But where he has taken them into his family and assumed the relation of parent to them without evidence of an intention to charge them for maintenance, his subsequent claim for an allowance for *past* maintenance stands upon practically the same basis as would such a claim by the infant's father. Ela *v.* Brand, 63 N. H. 14; Dissenger's Case, 39 N. J. Eq. 227. See Livingston *v.* Hammond, 162 Mass. 375.

though the ward lives with him, he will not be allowed anything.[1] So a mother is not legally obliged to support her children, whether she is living with the husband by whom she had the children, or is a widow, or is married to a second husband; therefore she is entitled to maintenance out of the income of the trust fund.[2] If a father makes application for maintenance out of the income of his children in the hands of trustees, it will be referred to a master to inquire and report respecting the father's ability to support them.[3] (*a*) But no inquiry is made when the mother makes application for maintenance, as her ability is immaterial, she not being obliged to maintain her children.[4] (*b*) If the fact of the poverty of the father is apparent,

[1] Booth *v.* Sineath, 2 Strob. Eq. 31.

[2] Haley *v.* Bannister, 4 Mod. 275; Hodgson *v.* Hodgson, 4 Cl. & Fin. 323; 11 Bligh (N. S.) 62; Llo. & Goo. Sugd. 259; Llo. & Goo. Plunk. 137; Lanoy *v.* Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Beasley *v.* Magrath, 2 Sch. & L. 35; Greenwell *v.* Greenwell, 5 Ves. 194; Douglass *v.* Andrews, 12 Beav. 310; Heyward *v.* Cuthbert, 4 Des. 445; Matter of Bostwick, 4 Johns. Ch. 100; Whipple *v.* Dow, 2 Mass. 415; Dawes *v.* Howard, 4 Mass. 97; Bruin *v.* Knott, 1 Phil. 573; Anderton *v.* Yates, 5 De G. & Sm. 202; Smee *v.* Martin, 1 Bunb. 131. [See note *b*, *infra*.]

[3] Hughes *v.* Hughes, 1 Bro. Ch. 386; Lucknow *v.* Brown, 12 Jur. 1017; McKnight *v.* Walsh, 23 N. J. Eq. 136.

[4] Billingsley *v.* Critchett, 1 Bro. Ch. 268; Douglass *v.* Andrews, 12 Beav. 311, n. [*In re* Beisel, 110 Cal. 267; Perkins *v.* Westcoat, 3 Colo. App. 338; *In re* Besondy, 32 Minn. 385.]

(*a*) The necessity for an allowance from the estate of an infant and the amount must depend upon the circumstances of each case; and the court will be guided entirely by a consideration of what is best for the infant in view of his station in life and his prospects. In the case of a father, the purpose of the allowance is to furnish to him what he lacks to enable him to bring up the child and educate him in the manner calculated to fit him for the station in life which in view of his means and natural aptitudes he will probably occupy. In some of the English cases the parent has been allowed sufficient to maintain a suitable family establishment. King-Harman *v.* Cayley, [1899] 1 Ir. 39; *In re* Walker, [1901] 1 Ch. 879. See Brown *v.* Smith, 10 Ch. Div. 377. But in America different social conditions render the English cases on this point of but little help. See McKnight's Ex'rs *v.* Walsh, 23 N. J. Eq. 136; Stephens *v.* Howard's Ex'r, 32 N. J. Eq. 244.

(*b*) In some recent cases it has

the court will not send the matter for inquiry,[1] nor if the property is small,[2] or no allowance is asked for.[3] If the children are taken from the custody of a father on account of his misconduct, the court must order maintenance for them out of the income in the hands of the trustees, as there is no principle upon which a court can take children from a father, and then order him to support them from his own means, in a manner dictated by the court.[4]

§ 614. In inquiring into the ability of a father to support his children, no account will be made of the fortune of his wife settled to her own use, as the property of the wife is in no way bound for the maintenance of the children.[5] In making the inquiry, reference will be had to the position of the children in society, their expectations, and the relative style and expense in which they ought to live; as where a father had £6,000 per year, maintenance was allowed to enable him to educate his children properly for the position which they would probably fill.[6] In all these matters, the best interests of the children are

[1] *Ex parte* Mountford, 15 Ves. 449; *In re* England, 1 R. & M. 499; Payne *v.* Low, id. 223.

[2] Walker *v.* Shore, 15 Ves. 387; *Ex parte* Swift, 1 R. & M. 575; Payne *v.* Low, id. 223; *Ex parte* Dudley, 1 J. & W. 254, n.

[3] *In re* Neale, 15 Beav. 250.

[4] Wellesley *v.* Beaufort, 2 Russ. 29; 2 Bligh N. S. 124.

[5] *Ante*, § 613.

[6] Jervoise *v.* Silk, 1 Geo. Cooper, 52; *Ex parte* Williams, 2 Col. C. C. 740; Moulton *v.* De M'Carty, 6 Rob. (N. Y.) 533.

been held that a widowed mother has the same obligation to support her children that the father had, and that she should be allowed to use the estate of her infant children for their maintenance and education only when she has insufficient means of her own. Ellis *v.* Soper, 111 Iowa, 631; Alling *v.* Alling, 52 N. J. Eq. 92 (disapproving of a dictum to the contrary in Pyatt *v.* Pyatt, 46 N. J. Eq. 285). See Melanefy *v.* O'Driscoll, 164 Mass. 422. But even when the circumstances are such that the court would grant her an allowance, her creditors cannot compel her to ask for it. Hanford *v.* Prouty, 133 Ill. 339.

consulted, rather than mere pecuniary considerations;[1] as where two infant daughters were entitled to a large fortune on coming of age, and had an income of $4,000 per year, their father not being able to keep a house in accordance with their expectations and future prospects, an allowance of $2,500 per year was made to him, that he might keep up an establishment proper for his daughters, and educate them at home, although the expense of sending them to a boarding-school would not have been more than $1,200 per year.[2] Such an allowance will be made, that the wards may have the means of bestowing charity, where the fortune is ample, and such an expenditure reasonable.[3] Regard will be had to all the circumstances of the family, as where there was a large number of young children, and all were destitute; a liberal allowance was made for the maintenance of an older boy, in order that the younger children might be better maintained and educated.[4] So a liberal maintenance will be allowed to relieve the distress of the parents,[5] even where the indigence arises from their own misconduct.[6]

§ 615. Upon these principles, courts will order maintenance for infants out of their income, where the father is unable to support them. (*a*) This inability does not mean absolute pov-

[1] *Ex parte* Burke, 4 Sandf. Ch. 617; Owens *v.* Walker, 2 Strob. Eq. 289. But see McKnight *v.* Walsh, 23 N. J. Eq. 136. [See *In re* Walker, [1901] 1 Ch. 879; Brown *v.* Smith, 10 Ch. Div. 377; King-Harman *v.* Cayley, [1899] 1 Ir. 39.]

[2] Ibid.

[3] Langton *v.* Brackenburgh, 2 Col. C. C. 446.

[4] Pierpont *v.* Cheney, 1 P. Wms. 493; Harvey *v.* Harvey, 2 P. Wms. 22; Lanoy *v.* Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Tweddell *v.* Tweddell, T. & R. 13; *Ex parte* Williams, 2 Col. C. C. 740; Petre *v.* Petre, 3 Atk. 511; Bradshaw *v.* Bradshaw, 1 J. & W. 647. [See King-Harman *v.* Cayley, [1899] 1 Ir. 39; *In re* Walker, [1901] 1 Ch. 879; Brown *v.* Smith, 10 Ch. Div. 377. But see *contra*, McKnight's Ex'rs *v.* Walsh, 23 N. J. Eq. 136; Stephens *v.* Howard's Ex'r, 32 N. J. Eq. 244.]

[5] Roach *v.* Gavan, 1 Ves. 160; Hill *v.* Chapman, 2 Bro. Ch. 231; Heysham *v.* Heysham, 1 Cox, 179.

[6] Allen *v.* Coster, 1 Beav. 202.

(*a*) Perkins *v.* Westcoat, 3 Colo. App. 338; McGeary *v.* McGeary, 181 Mass. 539; Stephens *v.* Howard's Ex'r, 32 N. J. Eq. 244.

erty, but an inability to give the child an education suitable to his fortune and expectations.[1] The allowance will be made, although the settlement contains no directions for maintenance, and although there is a direction to accumulate the income.[2] (*a*) Generally, application should be made to the court for leave to apply the income in that way, but the trustees may apply the income for maintenance without an express decree, taking the risk of having it disallowed by the court.[3] (*b*) There is a difference between past expenses and an allowance for future maintenance. If a trustee takes the risk of supporting the

[1] Buckworth *v.* Buckworth, 1 Cox, 80; Jervoise *v.* Silk, 1 G. Coop. 52; Matter of Burke, 4 Sandf. Ch. 617; Rice *v.* Tonnele, id. 568; Heyward *v.* Cuthbert, 4 Des. 445; Wilkes *v.* Rogers, 6 Johns. 566; McKnight *v.* Walsh, 24 N. J. Eq. 498. [Bedford *v.* Bedford, 136 Ill. 354, 360.]

[2] Ibid.; Greenwell *v.* Greenwell, 5 Ves. 194, 195, n.; 197, n.; Evans *v.* Massey, 1 Y. & J. 196; Stretch *v.* Watkins, 1 Madd. 253. [*In re* Walker, [1901] 1 Ch. 879; Read *v.* Patterson, 44 N. J. Eq. 211; Pitts *v.* R. I. Hospital Trust Co., 21 R. I. 544.]

[3] Rice *v.* Tonnele, 4 Sandf. Ch. 568; Bethea *v.* McColl, 5 Ala. 312; Corbin *v.* Wilson, 2 Ashm. 178; Newport *v.* Cook, id. 337.

(*a*) The express intention of a testator should not, of course, be interfered with. In Havelock *v.* Havelock, 17 Ch. D. 807, where there was a direction to accumulate, the court felt justified in making an allowance for the benefit of infants, on the ground of want; and this was followed in *Re* Collins, 32 Ch. D. 229. But in Kemmis *v.* Kemmis, 13 L. R. Ir. 372; 15 id. 90, this decision was disapproved, and it was held that when there is an imperative trust to accumulate, the court cannot make an allowance for maintenance. See also *Re* Smeed, 54 L. T. 929.

(*b*) Doubtless courts will usually ratify a payment by the trustee or guardian to the parent for the purpose of maintenance and education upon the same facts upon which it would have authorized the allowance in advance. Melanefy *v.* O'Driscoll, 164 Mass. 422; Wilson's Guardianship, 40 Or. 353; Alling *v.* Alling, 52 N. J. Eq. 92; Brown *v.* Smith, 10 Ch. Div. 377. See also Pfefferle *v.* Herr, 71 A. 689 (N. J. Prerog. 1909); Bellamy *v.* Thornton, 103 Ala. 404; Gott *v.* Culp, 45 Mich. 265, 273; Boyd *v.* Hawkins, 60 Miss. 277. Even when the father himself is the guardian or trustee, upon proof of his own inability to support and educate the child in a manner suitable to the latter's station and prospects, reasonable expenditures of the child's funds have been ratified. McGeary *v.* McGeary, 181 Mass. 539.

infant, he will be allowed only for actual expenses;[1] but if an application is made for future maintenance, a liberal allowance is made according to the circumstances of the case.[2] And the court has power to order trustees to anticipate the time of payment upon a case made showing the necessity of maintenance.[3] In England, a father cannot have an allowance for past expenses, except under peculiar circumstances.[4] And the court may disallow all the payments for maintenance, if they were made improperly and without leave first obtained.[5] If, however, the circumstances are such that the court would have made the allowance if asked, they will be allowed.[6] If the annual amount to be paid for the infant's support is named in the instrument of trust, the trustee of his own motion cannot exceed that amount,[7] unless he is clothed with a discretion;[8] but if the fund goes absolutely to the infant, the *court* can increase the amount if the circumstances require it.[9] If the exigencies are very pressing, the court will increase the amount although there is a direction for accumulation, and the infant's interest is contingent.[10] If there are two funds from which main-

[1] Bruin *v.* Knott, 1 Phil. 572, overruling 12 Sim. 436; *Ex parte* Bond, 2 Myl. & K. 439; Stephens *v.* Lawry, 2 Y. & Col. Ch. 87; Corbin *v.* Wilson, 2 Ashm. 178; Newport *v.* Cook, id. 337; Matter of Bostwick, 4 Johns. Ch. 100.

[2] Ibid.

[3] Rhoades *v.* Rhoades, 43 Ill. 239.

[4] Reeves *v.* Brymer, 6 Ves. 425; Sherwood *v.* Smith, id. 454; Presley *v.* Davis, 7 Rich. Eq. 109; See Carmichael *v.* Hughes, 20 L. J. Ch. 396; Ransome *v.* Burgess, L. R. 3 Eq. 773.

[5] Andrews *v.* Partington, 3 Bro. Ch. 60; Cotham *v.* West, 1 Beav. 381; Bridge *v.* Brown, 2 Y. & C. Ch. 187.

[6] Lee *v.* Brown, 4 Ves. 369; Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Green, 2 Vern. 137; 1 Rop. Leg. 768; Sisson *v.* Shaw, 9 Ves. 288; Maberly *v.* Turton, 14 Ves. 499; *Ex parte* Darlington, 1 B. & B. 241.

[7] Hearle *v.* Greenbank, 2 Atk. 697, 716; Long *v.* Long, 3 Ves. 286, n.

[8] Rawlins *v.* Goldfrap, 5 Ves. 440.

[9] Aynsworth *v.* Pratchett, 13 Ves. 321; Allen *v.* Coster, 1 Beav. 202; Josselyn *v.* Josselyn, 9 Sim. 63; Stretch *v.* Watkins, 1 Madd. 253; Newport *v.* Cook, 2 Ashm. 332; Corbin *v.* Wilson, id. 178; Evans *v.* Massey, 1 Y. & J. 196.

[10] Ibid.

tenance may be ordered, it will be ordered from that fund from which it will be most beneficial for the infant to take it.[1] If maintenance is directed for the infant until twenty-one, its marriage does not determine the maintenance;[2] and if the maintenance is directed during the life of A., the allowance will continue during the life of A., although the children are more than twenty-one years of age.[3] If maintenance is directed, but no time is limited, it will cease when the infants are of age.[4] In making the allowance the trustee is not confined to the income of the year; but he may set off the gross amount of the maintenance against the gross amount of income.[5] If maintenance is directed by will during minority, and the property is given over in case the infant dies under age, the court will not permit the infant to be deprived of proper maintenance for the benefit of the remainder-man, nor will it permit a wasteful maintenance in disregard of the contingent rights of others.[6]

§ 616. A distinction is made between property coming to a child from a parent, or from a person in the place of a parent, and property given in trust for an infant by a stranger. When the gift comes from parents, or persons in the place of parents, whose duty it is to support the children, maintenance will be ordered where the subject of the trust is residuary personal estate, or a contingent interest only, although there was no power in the will, and there was an express direction for an accumulation, and although there was a gift over to other children,

[1] Bruin *v.* Knott, 1 Phil. 572; Lygon *v.* Lord, 14 Sim. 41; Rawlins *v.* Goldfrap, 5 Ves. 440; Foljambe *v.* Willoughby, 2 S. & S. 165; *Re* Ashley, 1 R. & M. 371; Winch *v.* Winch, 1 Cox, 433; Methold *v.* Turner, 20 L. J. Ch. 201; Chisolm *v.* Chisolm, 4 Rich. Eq. 266.

[2] Chambers *v.* Goldwin, 11 Ves. 1.

[3] Badham *v.* Mee, 1 R. & M. 631.

[4] Ibid.

[5] Carmichael *v.* Wilson, 3 Moll. 79; Edwards *v.* Grove, 2 De G., F. & J. 210. [*In re* Wise, [1896] 1 Ch. 281; Robinson *v.* Bonaparte, 102 Md. 63.]

[6] Curtis *v.* Smith, 6 Blatch. 537.

if the chance of survivorship is equal.[1] (*a*) If the chance of survivorship is not equal, maintenance will not be allowed;[2] nor will it, if the interest is real estate and contingent or residuary.[3] But maintenance will be refused out of a contingent interest, or where the fund is given over; or where the gift proceeds from a stranger, or from a grandfather; or where the infant is a natural child not adopted by the father.[4]

[1] Aherley *v.* Vernon, 1 P. Wms. 783; Rogers *v.* Soutten, 2 Keen, 598; Incledon *v.* Northcote, 3 Atk. 433; Harvey *v.* Harvey, 2 P. Wms. 22; Lambert *v.* Parker, Coop. 143; Brown *v.* Temperly, 3 Russ. 263; Mills *v.* Robarts, 1 R. & M. 555; *Ex parte* Chambers, id. 577; Boddy *v.* Dawes, 1 Keen, 362; Rhoades *v.* Rhoades, 43 Ill. 239; Fairman *v.* Green, 10 Ves. 45; Lomax *v.* Lomax, 11 Ves. 48; Mole *v.* Mole, 1 Dick. 310; Greenwell *v.* Greenwell, 5 Ves. 194; Cavendish *v.* Mercer, id. 195; Collis *v.* Blackburn, 9 Ves. 470; McDermot *v.* Kealy, 3 Russ. 264; Stretch *v.* Watkins, 1 Madd. 253; Seibert's App., 19 Penn. St. 49; Corbin *v.* Wilson, 2 Ashm. 208; Newport *v.* Cook, id. 342; Matter of Ryder, 11 Paige, 185; *Ex parte* Kebble, 11 Ves. 604; Turner *v.* Turner, 4 Sim. 434.

[2] Errat *v.* Barlow, 14 Ves. 202; Kime *v.* Welpitt, 3 Sim. 533; Turner *v.* Turner, 4 Sim. 430; Cannings *v.* Flower, 7 Sim. 523.

[3] Green *v.* Ekins, 2 Atk. 476; Bullock *v.* Stones, 2 Ves. 521; Leake *v.* Robinson, 2 Mer. 384.

[4] Errington *v.* Chapman, 12 Ves. 24; Lowndes *v.* Lowndes, 15 Ves.

(*a*) By section 43 of the English Conveyancing, etc., Act of 1881 (44 & 45 Vict. c. 41), it is provided that: — "Where any property is held by trustees in trust for infants, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or education, or not," — except where a contrary intention is expressed in the instrument under which the interest of the infant arises.

This is a modification of a similar provision in Lord Cranworth's Act (23 & 24 Vict. c. 145). For decisions on questions involved in these statutes, see *In re* Dickson, 28 Ch. Div. 291; *In re* Judkin's Trusts, 25 Ch. Div. 743; *In re* George, 5 Ch. Div. 837; *In re* Cotton, 1 Ch. Div. 232; *In re* Moody, [1895] 1 Ch. 101; *In re* Woodin, [1895] 2 Ch. 309; Best *v.* Donmall, 40 L. J. Ch. 160. See also *In re* Greaves' Settled Estates, [1900] 2 Ch. 683, as to allowances to children out of portions.

§ 617. If the fund goes absolutely to the infant, and no conflicting interests can arise, the order for maintenance will be made on petition and without suit.[1] But if there are opposing and complicated interests, the court will not act without a regular suit and notice to all parties.[2]

§ 618. It is a settled rule, that trustees for infants should never, on their own authority, break in upon the capital of the trust fund for the maintenance, and seldom for the advancement of their ward. This is a rule for the protection of children, and if trustees break it, their accounts will be disallowed, although the particular case is a hardship; as it is better that a single individual should suffer a hardship which he might have avoided, than that the interests of all infants should be endangered.[3] Sir William Grant expressed a doubt whether the court itself had power to authorize the expenditure of the trust fund for the infant's support and advancement.[4] It is now, however, well established, that the court has such power, and will exer-

301. But see Greenwell *v.* Greenwell, 5 Ves. 194. In Seibert's App., 19 Penn. St. 49, maintenance was allowed, though the gift came from a grandfather not in *loco parentis*. See Chisolm *v.* Chisolm, 4 Rich. Eq. 266, and Corbin *v.* Wilson, 2 Ashm. 208.

[1] *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Kent, 3 Bro. Ch. 88; *Ex parte* Salter, id. 500; *Ex parte* Mountford, 15 Ves. 445; *Ex parte* Starkie, 3 Sim. 399; *Ex parte* Chambers, 1 R. & M. 577; *Ex parte* Green, 1 J. & W. 253; *Ex parte* Myercough, id. 151; *Ex parte* Hayes, 13 Jur. 765; 3 De G. & Sm. 485; Matter of Bostwick, 4 Johns. Ch. 100; Rice *v.* Tonnele, 3 Sandf. Ch. 571; Cross *v.* Bevan, 2 Sim. (N. S.) 53.

[2] Fairman *v.* Green, 10 Ves. 45.

[3] *Per* Sir R. P. Arden, Walker *v.* Wetherell, 6 Ves. 473; Davis *v.* Austen, 1 Ves. Jr. 247; Lee *v.* Brown, 4 Ves. 362; Anon., Moseley, 41; Davis *v.* Harkness, 1 Gilm. 173; Prince *v.* Logan, Spears, Eq. 29; McDowell *v.* Caldwell, 2 McCord, Ch. 43; Davis *v.* Roberts, 1 Sm. & M. Ch. 543; Hesters *v.* Wilkinson, 6 Humph. 219; Frelick *v.* Turner, 26 Miss. 393; Martin's App., 23 Penn. St. 438; Petit's App., 39 id. 324; Villard *v.* Chovin, 2 Strob. Eq. 40; Bybee *v.* Thorp, 4 B. Mon. 313; Carter *v.* Rolland, 11 Humph. 339; Cornwise *v.* Bourgum, 2 Ga. Dec. 15; Haigood *v.* Wells, 1 Hill, Eq. 59; Swinnock *v.* Crisp, Freem. 78; Caffey *v.* McMichael, 64 N. C. 507; Matter of Bostwick, 4 Johns. Ch. 101.

[4] Walker *v.* Wetherell, 6 Ves. 474.

cise it with caution in a proper case.[1] But if the trustee exercises the power by breaking in upon the trust fund for mere maintenance, without leave of the court, he will be compelled to replace it.[2] It has been said, that a trustee may pay from the capital fund upon his own authority in case of necessity;[3] but it would not be safe to follow this. The burden would be on the trustee to prove a case of necessity, and that it was impossible to apply to a court for direction; for courts look with disfavor upon the assumption of such authority by guardians and trustees.[4] (*a*) When such a case can be made, the trustee will

[1] Barlow *v.* Grant, 1 Vern. 255; *Ex parte* Green, 1 J. & W. 253; *Ex parte* Chambers, 1 R. & M. 577; *Ex parte* Knott, id. 499; *Ex parte* Swift, id. 575; Evans *v.* Massey, 1 Y. & J. 196; Bridge *v.* Brown, 2 N. C. C. 181; Williams's Case, 3 Bland, 186; *Ex parte* Potts, 1 Ashm. 340; *Ex parte* Bostwick, 4 Johns. Ch. 100; Long *v.* Norcom, 2 Ired. Eq. 354; Haigood *v.* Wells, 1 Hill, Eq. 79; Maupin *v.* Dulany, 5 Dana, 593; Worthington *v.* McCreer, 23 Beav. 81; Prince *v.* Hine, 26 id. 634; *Ex parte* Hayes, 3 De G. & Sm. 485; 13 Jur. 762; *Ex parte* Allen, 3 De G. & Sm. 485; Withers *v.* Hickman, 6 B. Mon. 293; Prince *v.* Logan, 1 Spears, Eq. 29; Teague *v.* Dendy, 2 McCord, Ch. 207.

[2] Davis *v.* Austen, 3 Bro. Ch. 178; Lee *v.* Brown, 4 Ves. 362; Walker *v.* Wetherell, 6 Ves. 473.

[3] Davis *v.* Austen, 3 Bro. Ch. 178; Barlow *v.* Grant, 1 Vern. 255; Carmichael *v.* Wilson, 3 Moll. 79; Bridge *v.* Brown, 2 Y. & Col. Ch. 181.

[4] Prince *v.* Logan, Spears, Eq. 29; Teague *v.* Dendy, 2 McCord, Ch. 207; McDowell *v.* Caldwell, id. 43; Davis *v.* Roberts, 1 Sm. & M. Ch. 543; Myers *v.* Wade, 6 Rand. 444; Davis *v.* Harkness, 1 Gilm. 173; Holmes *v.* Joslin, 5 Strob. 31; Downey *v.* Bullock, 7 Ired. Eq. 102; Villard *v.* Chovin, 2 Strob. Eq. 40.

(*a*) When the infant's income is insufficient for his support and maintenance and his parents are unable to supply the deficiency, the courts will authorize reasonable encroachments on the principal, but do so with considerable reluctance and only when satisfied of the necessity. Bellamy *v.* Thornton, 103 Ala. 404; Gott *v.* Culp, 45 Mich. 265, 273; Alling *v.* Alling, 52 N. J. Eq. 92; Pfefferle *v.* Herr, 71 A. 689 (N. J. Prerog. 1909); Wilson's Guardianship, 40 Or. 353. Usually the courts will ratify an unauthorized use of principal for this purpose, if on the facts it would have authorized the use beforehand. Bellamy *v.* Thornton, 103 Ala. 404; Gott *v.* Culp, 45 Mich. 265, 273; Pfefferle *v.* Herr, 71 A. 689 (N. J. 1909); Wilson's Guardianship, 40 Or. 352. But it has been held that under the Mississippi statute previous authority is essential. Boyd *v.* Hawkins, 60 Miss. 277.

No allowance from principal

be allowed the amount paid out in his accounts.[1] Courts are much more willing to authorize an expenditure of the capital fund of the trust to establish the minor in life, or to pay his entrance fee as an apprentice, or to educate him properly for business and life, than for mere maintenance. In such cases courts look upon the capital, not as consumed and extinguished, but as converted into another and useful form.[2] This allowance from the capital fund is confined to cases where the trust fund is small: if the capital consists of several thousand pounds, and the income is sufficient to educate and support the infant, the court will not allow nor justify any expenditure of the principal.[3]

§ 619. Where there is a limitation over to a stranger on the death of the infant, neither the trustee nor the court can expend any part of the capital fund for the maintenance or advancement of the ward. As where £100 was given to trustees to apply the income to the support and education of an infant, and to transfer the principal to him at twenty-one; but if he

[1] Long *v.* Norcom, 2 Ired. Eq. 354; Sparhawk *v.* Buell, 9 Vt. 41; Withers *v.* Hickman, 6 B. Mon. 203; Matter of Bostwick, 4 Johns. Ch. 100.

[2] Williams's Case, 3 Bland, 186; Hanson *v.* Chapman, id. 198; Matter of Bostwick, 4 Johns. Ch. 100; Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Green, 2 Vern. 137; *In re* England, 1 R. & M. 499; *Ex parte* Chambers, id. 577; *Re* Welch, 23 L. J. Ch. 344; Nunn *v.* Harvey, 2 De G. & Sm. 301; *Re* Clarke, 17 Jur. 362; *Re* Lane, id. 219; Worthington *v.* McCreer, 23 Beav. 81; *Ex parte* Swift, 1 R. & M. 575; *Ex parte* Green, 1 J. & W. 253; Bridge *v.* Brown, 2 Y. & Col. Ch. 181; Davies *v.* Davies, 2 De G., M. & G. 53; Walsh *v.* Walsh, 1 Drew. 64; *Ex parte* Hayes, 3 De G. & Sm. 485; Swinnock *v.* Crisp, Freem. 78; *Ex parte* McKey, 1 B. & B. 405; Sisson *v.* Shaw, 9 Ves. 285; Prince *v.* Hine, 26 Beav. 634.

[3] Barlow *v.* Grant, 1 Vern. 255; Davis *v.* Austen, 1 Ves. Jr. 247; 3 Bro. Ch. 178; Beasley *v.* Magrath, 2 Sch. & Lef. 35; Deen *v.* Cozzens, 7 Rob. (N. Y.) 178.

can be made when the infant's interest in the principal is only contingent, unless all the others who are interested consent, for the court cannot take away the property of another person for the purpose. Pitts *v.* R. I. Hospital Trust Co., 21 R. I. 544; *In re* Smeed, 54 L. T. 929. See *In re* Jobson, 44 Ch. Div. 154.

died under that age, the said sum was to be paid over to other persons, the court refused leave to expend any part of the capital.[1] Where an infant, upon a certain contingency, was to lose certain rights, and the trustee made an advancement before the contingency happened, and it afterwards happened in the ward's favor, the advancement was allowed to the trustee.[2] So where a legacy is given to a class of children, with a limitation over to the others in case of the death of one before marriage or twenty-one, an allowance may be made, on the ground that all have an equal chance of surviving, before their particular proportions are vested so that they cannot be divested.[3] An advancement may be made if all the parties in remainder are competent to consent, and do consent to the allowance.[4] But advancements cannot be made where the gift is to a class of children, though not absolutely to them, but in certain events to go over to a stranger.[5] If the limitation over is to the issue of a deceased child, such issue is a stranger, and no allowance can be made.[6] So where the children in being are not all the persons interested in the fund, as where another child may be born.[7] If a legacy is given to children when they become twenty-one, the court cannot anticipate the time and make an allowance,[8] as it may not come to them at all. If, however,

[1] Lee *v.* Brown, 4 Ves. 362; Van Vechten *v.* Van Vechten, 8 Paige, 104; Dean *v.* Cozzens, 7 Rob. (N. Y.) 178.

[2] Worthington *v.* McCreer, 23 Beav. 81.

[3] Franklin *v.* Green, 2 Vern. 137; Greenwell *v.* Greenwell, 5 Ves. 194, and notes; Brandon *v.* Aston, 2 Y. & Col. Ch. 30; Marshall *v.* Holloway, 2 Swanst. 436.

[4] Evans *v.* Massey, 1 Y. & J. 196; Cavendish *v.* Mercer, 5 Ves. 195, n. [Pitts *v.* R. I. Hospital Trust Co., 21 R. I. 544.]

[5] *Ex parte* Kebble, 11 Ves. 604, overruling Greenwell *v.* Greenwell, 6 Ves. 194; Errington *v.* Chapman, 12 Ves. 20. [*In re* Smeed, 54 L. T. 929.]

[6] *Ex parte* Kebble, 11 Ves. 606; Turner *v.* Turner, 4 Sim. 430; Errington *v.* Chapman, 12 Ves. 20; *Ex parte* Whitehead, 2 Y. & J. 243; Fendall *v.* Nash, 5 Ves. 197, n.; *contra*, but disapproved by Lord Eldon, 14 Ves. 203.

[7] *Ex parte* Kebble, 11 Ves. 604.

[8] Lomax *v.* Lomax, 11 Ves. 48. See Haley *v.* Bannister, 4 Madd. 275; Errat *v.* Barlow, 14 Ves. 202; Cannings *v.* Flower, 7 Sim. 253; Turner *v.* Turner, 4 Sim. 430. [See *In re* Jobson, 44 Ch. Div. 154.]

there is a clear intention, to be gathered from the whole will, that the children are to have a maintenance, the court will order it, although there is a gift over.[1]

§ 620. When a trust is created, and the trustees are directed to pay the income to a person for the support of his children, he will be entitled to receive the income so long as he continues to maintain them.[2] Where the income was directed to be paid by the trustees to M. H. H. for the maintenance of her children, the fund to be divided among her children at twenty-one, and, in default of issue, over to another person, it was held that the income was payable to M. H. H., although she had no child.[3] Where a widow was to receive the income from trustees for the support of herself and children, and she eloped, she was held entitled only to a part of the income.[4] So where a trustee was to pay the income to the testator's son for the support of himself and children, and the son misapplied the income, the court said that he took the income as a subtrustee for his wife and children, and that the court had power to regulate and control it, by directions to the original trustee, in such manner as to accomplish the purpose for which it was given.[5] The fund is in some sort payable to the father, but the trustee will be held accountable for its proper application.[6] In paying

[1] Lambert *v.* Parker, G. Coop. 143. [Dockins *v.* Vass, 124 S. W. 290 (Ky. 1910).]

[2] Hadow *v.* Hadow, 9 Sim. 438; Jubber *v.* Jubber, id. 503; Berkely *v.* Swinburne, 6 Sim. 613; Thurston *v.* Essington, Jac. 361, n.; Longmore *v.* Elcum, 2 Y. & Col. Ch. 363; Leach *v.* Leach, 13 Sim. 304; Hart *v.* Tribe, 19 Beav. 149; Brown *v.* Paull, 1 Sim. (N. S.) 92; Hammond *v.* Neame, 1 Swanst. 35; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phil. 553; Chase *v.* Chase, 2 Allen, 104; Loring *v.* Loring, 100 Mass. 340.

[3] Hammond *v.* Neame, 1 Swanst. 35; Loring *v.* Loring, 100 Mass. 340.

[4] Castle *v.* Castle, 3 Jur. (N. S.) 723; 1 De G. & J. 352; Loring *v.* Loring, 100 Mass. 340. [*In re* G., [1899] 1 Ch. 719.]

[5] Chase *v.* Chase, 2 Allen, 104; Loring *v.* Loring, 100 Mass. 340.

[6] Andrews *v.* Partington, 2 Cox, 223; Robinson *v.* Tickell, 8 Ves. 142; Woods *v.* Woods, 1 Myl. & Cr. 409; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phil. 553; Webb *v.* Wool, 2 Sim. (N. S.) 267; Joddrell *v.* Joddrell, 14 Beav. 397; Biddles *v.* Biddles, 16 Sim. 1; Wetherell *v.* Wetherell, 1

the income for maintenance, the trustee must exercise a sound discretion. He may apply it himself, or he may place it in the hands of parents or guardians; but he must not place it in the hands of a beneficiary, who mentally or morally is incapable of using it properly or profitably; and he must not allow the income to be thrown away, or perverted from its purpose.[1]

§ 621. In most respects, the relation between the trustee and an infant *cestui que trust* is the same as between trustees and other *cestuis que trust*. An infant has the same remedies for a breach of trust as if of full age. If a trustee employs the infant's money in his own business, the infant has an election to take the profits or the interest;[2] or if an improper investment is made by the trustee, the infant can enforce compensation for the loss.[3] If, by any neglect or violation of duty by a trustee, a loss happens to the infant, the trustee must make it up; as if a trustee should allow the statute of limitations to run without suit on a claim in favor of an infant, the trustee would be held to account for the loss.[4] So if he should suffer five years to elapse without claim, after a stranger had entered upon the infant's estate and levied a fine.[5] In all such cases the trustees will be responsible for all the loss that occurs from their negligence or mismanagement.

§ 622. It is the duty of trustees to accumulate all the income of a trust for infants which is not employed in mainte-

Keen, 80; Brown *v.* Casamajor, 4 Ves. 498; Hamley *v.* Gilbert, Jac. 354; Collier *v.* Collier, 3 Ves. 33.

[1] Mason *v.* Jones, 2 Barb. 248; Gott *v.* Cook, 7 Paige, 538; Van Vechten *v.* Van Vechten, 8 id. 104.

[2] Anon., 2 Ves. 630.

[3] Holmes *v.* Dring, 2 Cox, 1; Terry *v.* Terry, Pr. Ch. 273.

[4] Williams *v.* Otey, 8 Humph. 563; Smilie *v.* Biffle, 2 Barr, 52; Wyck *v.* East India Co., 3 P. Wms. 309; Wooldredge *v.* Planters' Bank, 1 Sneed, 297; Worthy *v.* Johnson, 10 Ga. 358; Long *v.* Cason, 4 Rich. Eq. 60; Blake *v.* Allman, 5 Jon. Eq. 407.

[5] Huntington *v.* Huntington, 3 P. Wms. 310, n.; Allen *v.* Sayer, 2 Vern. 368, is the other way, but it is not considered the true exposition of the law. Pentland *v.* Stokes, 2 B. & B. 75.

nance and education as before stated, whether a direction for such accumulation is contained in the instrument of trust or not. (*a*) This rule applies where the subject of the trust is a *residue* of the testator's personal estate, and the interest of the infant is *contingent*, as where the trust is for a child, "if" or "when" it becomes twenty-one.[1] But the rule will not apply where a *sum certain* is to be paid to the infant when twenty-one;[2] nor to the income of real estate where such estate is given to the infant if he shall reach twenty-one;[3] unless there is a direction that the income in the mean time shall be used for the infant's benefit.[4] Without such direction the income in the first case would fall into the residue,[5] and in the second case it would go to the heirs-at-law.[6] If the infant takes a vested interest in the trust fund, and the payment only is postponed, and an accumulation is directed until he is twenty-four, he is absolutely entitled to the fund at twenty-one, and will be entitled to receive the income at that time, and the *corpus* of the trust at the time fixed, so that accumulation will cease at twenty-one.[7]

§ 623. The court has power to apply the income in support of the infant although he is abroad, or out of the jurisdiction of the court. In such cases the court may require a guardian [8]

[1] Green *v.* Ekins, 2 Atk. 473; Studholme *v.* Hodgson, 3 P. Wms. 299; Trevanion *v.* Vivian, 2 Ves. 430; Bullock *v.* Stones, id. 521.

[2] Leake *v.* Robinson, 2 Mer. 363, 384.

[3] Green *v.* Ekins, 2 Atk. 473; Studholme *v.* Hodgson, 3 P. Wms. 299; Bullock *v.* Stones, 2 Ves. 521.

[4] Bullock *v.* Stones, 2 Ves. 521.

[5] Ibid.

[6] Ibid.

[7] Saunders *v.* Vautier, 4 Beav. 115; Cr. & Ph. 240. [*In re* Wrey, 30 Ch. Div. 507.]

[8] Logan *v.* Fairlee, Jac. 193.

(*a*) The accumulation of unexpended income to which the infant is absolutely entitled is held for his benefit until he attains majority and is not added to the principal unless there is a direction to that effect in the trust instrument. *In re* Wells, 43 Ch. Div. 281. See *Re* Martin, 57 L. T. 471.

or attorney [1] to be appointed within the jurisdiction to receive the income; or the court may appoint a guardian who resides in the same jurisdiction with the infant, and who has been appointed guardian by the courts in that jurisdiction.[2] In some instances where the fund is small, the court has ordered not only the income, but the whole *corpus* of the trust, to be paid to the parents residing abroad,[3] or who were about emigrating.[4] If the trustee is within the jurisdiction, the court can take administration of the trust fund, and compel a proper application of the income to the purposes for which it was given; [5] and it may use its power to compel the parents residing abroad to bring the infants within the jurisdiction, by refusing any allowance from the income for maintenance.[6]

§ 624. If a trustee holds in his hands a sum of money to be paid absolutely to an infant, he must not pay it to the infant, nor to his father or other person, without the sanction of the court.[7] Should he do so, he may be compelled to pay it again to the infant when he comes of age.[8] Even a receipt or release taken from the infant under age is worthless; [9] but an infant, after coming of age, can confirm such payments by acts, clearly intended to sanction and confirm them.[10] If the infant fraudulently represents himself to be of age, and thus procures payments from the trustees, he will be estopped to claim the fund

[1] De Weever *v.* Rockport, 6 Beav. 391; *In re* Morrison, 16 Sim. 42; Hart *v.* Tribe, 19 Beav. 149.

[2] Daniel *v.* Newton, 8 Beav. 485.

[3] Volans *v.* Carr, 2 De G. & Sm. 242.

[4] Walsh *v.* Walsh, 1 Drew, 64; *Ex parte* Hayes, 3 De G. & Sm. 485.

[5] Chase *v.* Chase, 2 Allen, 101.

[6] Lockwood *v.* Fenton, 1 Sm. & G. 73.

[7] Furman *v.* Coe, 1 Caines's Cas. 96; Sparhawk *v.* Buell, 9 Vt. 41.

[8] Dagley *v.* Tolferry, 1 P. Wms. 285; Phillips *v.* Paget, 2 Atk. 80; Davis *v.* Austen, 3 Bro. Ch. 178; Lee *v.* Brown, 1 Ves. 369.

[9] Overton *v.* Bannister, 3 Hare, 503; 8 Jur. 996.

[10] Dagley *v.* Tolferry, 1 P. Wms. 285; Lee *v.* Brown, 4 Ves. 362; Cooper *v.* Thornton, 3 Bro. Ch. 97; Cory *v.* Gertcken, 2 Madd. 40.

again.[1] (*a*) In the United States, guardians are appointed by probate courts to take charge of infants' estates. Such guardians are required to give bonds for the security of such estates, and payments may safely be made to them.[2] In some instances where the sums are small, courts have directed them to be paid directly to the persons maintaining the children, to save the expenses of obtaining guardianship.[3] Where the instrument of trust directs the manner of paying over the money, the trustee will be safe in following the directions.[4]

[1] Cory *v.* Gertcken, 2 Madd. 40; Overton *v.* Bannister, 3 Hare, 503. [Hayes *v.* Parker, 41 N. J. Eq. 630.]

[2] Furman *v.* Coe, 1 Caines's Cas. 96; Sparhawk *v.* Buell, 9 Vt. 41; Hoyt *v.* Hilton, 2 Edw. Ch. 202.

[3] Farrance *v.* Viley, 21 L. J. Ch. 313; Ker *v.* Buxton, 16 Jur. 491.

[4] 2 Wms. Ex'rs, 866; 1 Rop. Leg. 771; Cooper *v.* Thornton, 3 Bro. Ch. 96, 186; Robinson *v.* Tickell, 8 Ves. 142.

(*a*) On the question of estoppel of an infant when he has made false representations that he is of age, there is some conflict of authority. See Bigelow on Estoppel, (5th ed.) pp. 605–607; Beauchamp *v.* Bertig, 90 Ark. 351; Rowe *v.* Allison, 87 Ark. 206, 213; Tobin *v.* Spann, 85 Ark. 556; Slayton *v.* Barry, 175 Mass. 513; Brooks *v.* Sawyer, 191 Mass. 151; Pace *v.* Cawood, 110 S. W. 414 (Ky. 1908); Pemberton B'ld'g, etc., Ass'n *v.* Adams, 53 N. J. Eq. 258.

CHAPTER XXII.

TRUSTEES FOR MARRIED WOMEN.

§§ 625, 626. Rights of married women to property at common law and in equity.

Settlements, see also § 645.

§ 627. Right of a married woman to a settlement of her equitable property.

§ 628. When proceedings must be taken to obtain a settlement.

§ 629. How the proceedings may be taken.

§ 630. A trustee may decline to pay to the husband before a settlement is made.

§ 631. In case of the marriage of a ward of court.

§ 632. Against whom the equity of a settlement will be enforced.

§§ 633, 634. To what property a wife's right to a settlement extends.

§ 635. Where a wife is entitled to a second settlement.

§ 636. What amount will be settled on a wife.

§ 637. Where a husband refuses to make a settlement.

§ 638. Distinction between survivorship and the right to a settlement.

Husband's possession and rights.

§ 639. Whether a husband has reduced a wife's *choses in action* to possession.

§§ 640–642. What is and what is not a reduction to possession.

§ 643. Effect of a reduction to possession by the husband.

§ 644. Husband entitled to joint property.

§ 645. A settlement extends to children, when.

§ 646. The right of a married woman to hold property to her separate use, see § 667.

§ 647. How a trust for her separate use may be created.

§ 648. The words that create a separate use.

§ 649. Words that do not create a separate use.

§ 650. State of the authorities, and the general rule as to her separate use.

§ 651. Must be for the separate use of the wife alone.

§ 652. Changeable rights of a woman to property settled to her separate use.

§ 653. To what marriages the separate use extends.

§ 654. How a married woman may deal with her separate property, see §§ 668, 679, 682, 684, 685.

§ 655. General rule as to the right of a married woman to deal with her separate estate.
§ 656. As to real estate.
§ 657. Power to contract debts.
§§ 658, 659. How far her contracts bind her separate estate.
§§ 660, 661. Rules in England and the various States.
§ 662. Married woman not personally bound by her contracts.
§ 663. The principles that apply to a wife's separate estate.
§ 664. Savings and accumulations out of her separate estate.
§ 665. Rights of the wife against her husband's estate where he receives the income of her separate estate.
§ 666. If a husband receives her separate estate, he becomes a trustee.
§ 667. Right of a married woman to the possession of her separate estate.
§ 668. Disposition of a wife's separate estate by will, descent, or otherwise.
§ 669. Where a breach of trust is committed by a married woman or by her procurement.
§§ 670, 671. Restraints upon anticipation or alienation by a married woman.
§§ 672, 673. Deeds of separation between husband and wife.
§ 674. Rights of the wife under deeds of separation.
§ 675. Statutes of various States in relation to the rights of married women to property.
§ 676. These statutes do not affect rights which were vested before the passage of the statutes.
§ 677. Nor do they affect settlements made before the statutes.
§ 678. Husband and wife may be agents for each other. How far a husband may deal with his wife's separate property.
§ 679. A wife may give her separate property to her husband.
§ 680. Separate estate for married women under the statutes governed by same rules that governed separate estates under settlements.
§ 681. Right of husband to curtesy; cannot convey his right.
§ 682. Rights of married women to make wills under the statutes; rights of the husband in the absence of a will.
§ 683. Rights of married women to be trustees, &c., and to sue and be sued.
§ 684. A married woman may sell her personal property.
§ 685. But cannot convey her real estate without the consent of her husband.
§ 686. The statutes only refer to the property of married women. If they have no property, their rights are not altered.

§ 625. At common law, a husband became entitled to receive the rents and profits of his wife's real estate during their joint lives, and he became absolutely entitled to all her personal

property in possession, and to all her *choses in action* if he reduced them to possession during his life. If he did not reduce them to possession, and survived her, he was entitled to be her administrator, and he thus took all her *choses in action.* He also was entitled to all her chattels real, and had full power to sell and convey them. But if the husband died without having aliened her chattels real, or without having reduced her *choses in action* to possession, she, as survivor, continued to hold them as if she had never been married. The principle was this: by the marriage the husband became bound to pay all debts due from the wife before marriage; he also became bound to support and maintain the wife and her children in a proper manner. In consideration of these obligations, and to enable him to perform these duties, the law gave him the property of the wife as before stated. But the common law had this defect: the husband could sell and dispose of all the rights of property which he thus received from his wife, or he might become bankrupt the day after his marriage, and all these rights would go to his assignees or strangers, and he might be left entirely unable to perform the obligations and duties which were imposed upon him by marriage, and in consideration of which he received his wife's property. The common law had no power or machinery by which to afford a wife any protection or remedy under such circumstances. But in courts of equity remedies were devised whereby the property of a wife, or some portion of it, might be withdrawn from the operation of the rules of the common law, and preserved for her maintenance, in case her husband was improvident or unfortunate. This improvement in the law was effected through a system of trusts. It is apparent that trusts for women may be of two kinds: (1) Trusts for a woman generally, as for any other individual or individuals in the community; (2) Special trusts for a woman, with special provisions as to the ownership and enjoyment of the property or its income, and special directions as to the rights of any present or future husband over it. Growing out of this last class of trusts, there have been statutes passed changing the common law, and determin-

ing the rights of married women in and to property that they may possess at the time of their marriage, or that may come to them during marriage. It is the purpose of this chapter: (1) To discuss general trusts for women, and the rights and duties of trustees under them; (2) To consider special trusts for women, or trusts for their sole and separate use of their property, and the rights and duties of trustees; and (3) To notice the legislation of the several States respecting the property of married women.

§ 626. If a sum of money is given to trustees to pay either the principal or the income to a woman, and such woman is married at the time, or is married subsequently, the husband is entitled to receive the principal or the income, as the case may be. In law the husband has the same right to his wife's equitable property that he has to her legal property. All personal property held in trust for a wife belongs to the husband.[1] But this right of the husband over his wife's *choses in action* is perfected only by his reducing them to possession during his life; and the same rule applies to her equitable *choses in action*.[2] (*a*)

[1] Murray *v.* Elibank, 10 Ves. 90; Glaister *v.* Hewer, 8 Ves. 206; Dunkley *v.* Dunkley, 2 De G., M. & G. 390; Napier *v.* Napier, 1 Dr. & W. 410; Mumford *v.* Murray, 1 Paige, 620; Shaw *v.* Mitchell, Davies, 216; Crook *v.* Turpin, 10 B. Mon. 244; *Ex parte* Blagden, 2 Rose, 251; Oswell *v.* Probert, 2 Ves. Jr. 680; Sturgis *v.* Champneys, 5 Myl. & Cr. 103.

[2] Murphy *v.* Grice, 2 Dev. & Bat. Eq. 199; Tidd *v.* Lister, 5 Madd. 432.

(*a*) In Tennessee the common-law rule still prevails that personal property in possession of the wife is in law the property of the husband, and that he is entitled to reduce to possession during coverture all her *choses in action*, belonging to her at the time of the marriage or accruing subsequently. Williford *v.* Phelan, 120 Tenn. 589. In most if not all of the other States as well as in England the common-law rule has been changed by statute. See statutes of the different States. This change in the law brought about by the varying provisions of the statutes relating to the property rights of married women has rendered practically obsolete the questions discussed in succeeding sections, *viz.*, §§ 626–645. See note to § 645. It been thought best, however, to retain the original text, since the common-law rule has had an important effect on the interpretation of the statutes.

If such property is not reduced to possession during the life of the husband, the wife takes it, as survivor, as if she had never been married. If a wife dies before her *choses in action* have been reduced to possession by her husband, he may take administration of her estate, and thus entitle himself to receive all the personal property, legal and equitable, that came to her.[1] But nothing short of actual reduction to possession during his life will give a husband such right to the property as will defeat the wife's title, if she survives him. If, therefore, it cannot be reduced to possession during his life, as if it is a *reversion* only during the whole of his life, he can have no possession, and it will remain to her, if she survives him.[2] So, where the interest of the wife is partly possessory, and partly reversionary, the husband cannot bind the property beyond the duration of his own life.[3] So if a husband assigns his wife's reversionary interest, and subsequently and during his life it becomes possessory, but is never reduced to actual possession, it survives to the wife.[4]

§ 627. A trustee may pay over a wife's equitable property to the husband if he pleases, and such payment will discharge the responsibility of the trustee. But if the trustee refuses to deliver the possession to the husband, and the husband, in order to reach the funds in the hands of the trustee and reduce them to possession, commences proceedings in equity, the court, on the maxim that he who seeks equity must do equity, may order a proper settlement to be made upon the wife out of her equitable property in the hands of the trustee. This is called the wife's equity to a settlement.[5] It is an equitable right which

[1] Proudley *v.* Fielder, 2 Myl. & K. 57; Molony *v.* Kennedy, 10 Sim. 254; Drury *v.* Scott, 4 Y. & C. 264; Musters *v.* Wright, 2 De G. & Sm. 777.

[2] Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 Russ. 65; Stanton *v.* Hall, 2 Russ. & My. 175; Elliott *v.* Cordell, 5 Madd. 149; Tidd *v.* Lister, 17 Eng. L. & Eq. 567; 3 De G., M. & G. 857.

[3] Stiffe *v.* Everitt, 1 Myl. & Cr. 37; Harley *v.* Harley, 10 Hare, 335.

[4] Ellison *v.* Elwin, 13 Sim. 309; Ashby *v.* Ashby, 1 Col. 553; Baldwin *v.* Baldwin, 5 De G. & Sm. 319; Hamilton *v.* Mills, 29 Beav. 193.

[5] Murray *v.* Elibank, 13 Ves. 1; 1 Lead. Cas. Eq. 360; Bosvil *v.* Branden, 1 P. Wms. 458; Browne *v.* Elton, 3 P. Wms. 202; Wallace *v.* Auldjo,

a married woman has to a provision out of her own fortune, before her husband reduces it to possession, and it stands upon a peculiar doctrine of courts of equity. The extent of the doctrine cannot be ascertained from any general reasoning. It is the creation of courts of equity, and, to ascertain its extent or its limitations, recourse must be had to the practice of the courts. Whenever the fortune of a married woman is within the jurisdiction of the court, either by having been paid into court or by a suit concerning its possession, the court always directs an inquiry whether a settlement has been made; and the constant habit is to direct a settlement, not only upon the wife, but upon the children also. The wife cannot say that she claims a settlement for herself, and not for the children. She has the option to have no settlement; but if a settlement is made, it must be upon the wife and children. The wife is examined in

2 Dr. & Sm. 216; Osborn *v.* Morgan, 9 Hare, 432; Ward *v.* Amory, 1 Curtis, 432; Davis *v.* Newton, 6 Met. 537; Gassett *v.* Grout, 4 Met. 486; Carter *v.* Carter, 14 Sm. & M. 59; Stevenson *v.* Brown, 3 Green, Ch. 503; Tucker *v.* Andrews, 13 Maine, 124; Chase *v.* Palmer, 25 id. 342; Short *v.* Moore, 10 Vt. 446; Wilks *v.* Fitzpatrick, 1 Humph. 54; Page *v.* Estes, 19 Pick. 269; Barron *v.* Barron, 29 Vt. 375; Andrews *v.* Jones, 10 Ala. 401; Guild *v.* Guild, 16 Ala. 122; Wiles *v.* Wiles, 3 Md. 1; James *v.* Gibbs, 1 Pat. & Heath, 277; Carleton *v.* Banks, 7 Ala. 34; Van Duzer *v.* Van Duzer, 6 Paige, 368; Whitesides *v.* Dorris, 7 Dana, 107; Thomas *v.* Shepperd, 2 McCord, Ch. 36; Crook *v.* Turpin, 10 B. Mon. 243; Moore *v.* Moore, 14 id. 259; Lay *v.* Brown, 15 id. 295; Wardlaw *v.* Gray, 2 Hill, Ch. 651; Wright *v.* Arnold, id. 642; Poindexter *v.* Jeffries, 15 Grat. 363; Van Eppes *v.* Van Deusen, 4 Paige, 64; Dumond *v.* Magee, 4 Johns. Ch. 315; Corley *v.* Corley, 22 Ga. 178; Dearin *v.* Fitzpatrick, Meigs, 551; Gallego *v.* Gallego, 2 Brock, 286; Browning *v.* Headley, 2 Rob. (Va.) 342; Durr *v.* Bowyer, 2 McCord, Ch. 368; Helms *v.* Franciscus, 2 Bland, 545; Bell *v.* Bell, 1 Kelly, 637; Howard *v.* Moffatt, 2 Johns. Ch. 206; Glen *v.* Fisher, 6 id. 33; Duvall *v.* Farmers' Bank, 4 Gill & J. 283; Groverman *v.* Diffenderffer, 11 id. 15; Myers *v.* Myers, 1 Bail. Eq. 24; Yeldell *v.* Quarles, Dudl. Eq. 56; Hill *v.* Hill, 1 Strob. Eq. 2; Bennett *v.* Dillingham, 2 Dana, 436; Thomas *v.* Kennedy, 4 B. Mon. 235; Napier *v.* Howard, 3 Kelly, 193; Smith *v.* Kane, 2 Paige, 303; Abernethy *v.* Abernethy, 8 Fla. 243; Haviland *v.* Bloom, 6 Johns. Ch. 178. In North Carolina, this equity of the wife to a settlement is not allowed. Bryan *v.* Bryan, 1 Dev. Eq. 47; Lassiter *v.* Dawson, 2 id. 383. In Pennsylvania, this equity is enforced in the courts of law, by imposing terms upon the husband's rights to recover his wife's *choses in action*. Rees *v.* Waters, 9 Watts, 90.

open court, whether she wishes a settlement or not; if she does not desire one, the possession of the property is delivered over to her husband.[1]

§ 628. The steps for a settlement must be taken before the husband has obtained the actual possession; for courts will not compel a husband who has possession to refund the property, in order that a settlement may be made,[2] unless such possession was obtained by fraud,[3] or the property came to the husband's hands after suits for its possession or for a settlement had been instituted,[4] or unless the payment to him was in some way wrongful,[5] in which case equity will follow the property and order a settlement; and where a husband had once reduced his wife's property to possession, and afterwards settled it upon her in the hands of a trustee, by an invalid deed of separation, and brought a suit to recover back the possession, the court ordered a settlement.[6] If the husband has the money in hand in another right, as trustee for the wife, a settlement may be ordered.[7]

§ 629. If a suit is already pending for the possession, or if the property is in court, the wife may intervene by petition.[8] It was for some time thought that a wife could not proceed by

[1] See cases in last note.

[2] 1 Rop. Husb. and Wife, 270; Carter *v.* Carter, 14 Sm. & M. 59; Carleton *v.* Banks, 7 Ala. 34; Van Duzer *v.* Van Duzer, 6 Paige, 368; Wiles *v.* Wiles, 3 Md. 1; Whitesides *v.* Dorris, 7 Dana, 107; Rees *v.* Waters, 9 Watts, 90; Thomas *v.* Shepperd, 2 McCord, Ch. 36; Van Epps *v.* Van Deusen, 4 Paige, 64; Wickes *v.* Clarke, 8 id. 161; Heath *v.* Heath, 2 Hill, Ch. 100; Perryclear *v.* Jacobs, id. 504; Mitchell *v.* Sevier, 9 Humph. 146; Udell *v.* Kenney, 3 Cow. 591; Dold *v.* Geiger, 2 Grat. 98; State *v.* Krebs, 6 Har. & J. 31; Glaister *v.* Hewer, 8 Ves. 205; Pool *v.* Morris, 29 Ga. 374.

[3] Colmer *v.* Colmer, 2 Atk. 98; Moseley, 113; Watkyns *v.* Watkyns, 2 Atk. 96; 2 Spence, Eq. Jur. 488.

[4] Crook *v.* Turpin, 10 B. Mon. 243.

[5] Wardlaw *v.* Gray, 2 Hill, Ch. 651.

[6] Carter *v.* Carter, 14 Sm. & M. 59.

[7] Barron *v.* Barron, 24 Vt. 375; Gray's Estate, 1 Penn. St. 329; Goochenaur's Est., 23 id. 460.

[8] Greedy *v.* Lavender, 13 Beav. 62; Scott *v.* Spashett, 3 Mac. & G. 599.

original bill; but it is now well established that a wife may bring a bill for a settlement,[1] and that she may have an injunction against her husband from proceeding in the ecclesiastical or probate courts to recover the property.[2] In America, some cases have gone so far as to compel a settlement when the suits to recover the property were in the common-law courts.[3] But the better opinion is, that where a husband, or a creditor or assignee, is pursuing a strictly legal or statutory right in a court of law, a court of equity cannot interfere for the purpose of enforcing a settlement. As where a wife was entitled to a distributive share in an estate, and her husband became a bankrupt, whereby his right to receive his wife's distributive share vested in his assignee, the court held that the assignee had the absolute legal right to collect the wife's distributive share; but inasmuch as the court had equity jurisdiction over the distribution of the assets of the bankrupt, it had jurisdiction to order a settlement upon the wife, before the assignee distributed the assets among the husband's creditors.[4] In cases where the court would have no jurisdiction of the assets, as where a wife's distributive share was trusteed for a husband's debt, the court could not interfere.[5]

§ 630. A trustee may refuse to pay over the wife's equitable property to her husband, if he thinks there should be a settlement; and the husband and wife and trustee can arrange a settlement for the wife, and by such agreement the trustee can

[1] Elibank *v.* Montalieu, 5 Ves. 737; Duncombe *v.* Greenacre, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 175; 1 Lead. Cas. Eq. 362; 2 Story, Eq. Jur. § 1414; Wiles *v.* Wiles, 3 Md. 1; Moore *v.* Moore, 14 B. Mon. 259; Wright *v.* Arnold, id. 642; Poindexter *v.* Jeffries, 15 Grat. 363.

[2] Jewson *v.* Moulson, 2 Atk. 419; Dumond *v.* Magee, 4 Johns. Ch. 318; Gardner *v.* Walker, 1 Strange, 503.

[3] Van Epps *v.* Van Deusen, 4 Paige, 64; Dewall *v.* Covenhoven, 5 id. 581; Fry *v.* Fry, 7 id. 461; Corley *v.* Corley, 22 Ga. 178; Dearin *v.* Fitzpatrick, Meigs, 551; Martin *v.* Martin, 1 Hoff. 462.

[4] Davis *v.* Newton, 6 Met. 537.

[5] Holbrook *v.* Waters, 19 Pick. 354; Wheeler *v.* Bowen, 20 Pick. 563; Sturgis *v.* Champneys, 5 M. & C. 105; Jewson *v.* Moulson, 2 Atk. 419; Parsons *v.* Parsons, 9 N. H. 309; Wiles *v.* Wiles, 3 Md. 1; Barron *v.* Barron, 24 Vt. 375; Allen *v.* Allen, 6 Ired. Eq. 293.

pay the whole or part of the equitable assets into the hands of a trustee under an existing settlement; and such arrangement will be as valid a settlement as if made by order of court.[1] The trustee is always justified in bringing the fund into court, although the wife may desire it to be paid to her husband;[2] for the wife cannot consent out of court that no settlement shall be made if the fund is in court, but she must be examined in open court.[3] If suit is commenced, neither the trustee nor executor, holding the equitable interests of the wife, can pay them over to the husband, until it is finally determined whether a settlement shall be made.[4]

§ 631. In practice courts of equity proceed upon principles of their own, and settle all the property of a ward of the court upon herself, if a man marries her without permission, and thereby commits a contempt of the court. In such cases the husband, and his creditors and assignees, will be restrained from interfering with the property, either at law or in equity.[5] So if a husband has abandoned his wife, or maltreats and abuses

[1] Motefiore *v.* Behrens, L. R. 1 Eq. 171.

[2] *Re* Swan, 2 Hem. & Mil. 34; Campbell *v.* French, 3 Ves. 323; Tasburgh's Case, 1 V. & B. 507; Minet *v.* Hyde, 2 Bro. Ch. 663; Parsons *v.* Dunne, Belt's Supp. Ves. 276. An infant cannot consent. Stubbs *v.* Gargan, 2 Beav. 496; Abraham *v.* Newcombe, 12 Sim. 566, overruling Gullin *v.* Gullin, 7 Sim. 236; Udall *v.* Kenney, 3 Cow. 590; Phillips *v.* Hassell, 10 Humph. 197; *Ex parte* Warfield, 11 Gill & J. 23. Nor can the consent be given until the amount of the fund is known. Edmunds *v.* Townshend, 1 Anst. 93; Jernegan *v.* Baxter, 6 Madd. 32; Sperling *v.* Rochfort, 8 Ves. 180; Packer *v.* Packer, 1 Coll. 93; Watson *v.* Marshall, 17 Beav. 363; *In re* Bendyshe, 3 Jur. (N. S.) 727. But if a married woman stands by and assents to a sale by her husband, she will be estopped to claim a settlement. Wright *v.* Arnold, 14 B. Mon. 638; Smith *v.* Atwood, 14 Ga. 402. The wife cannot consent to the transfer of any interest in reversion or remainder until it becomes possessory. Socket *v.* Wray, 2 Atk. 6, n.

[3] Ibid.

[4] Macauley *v.* Phillips, 4 Ves. 18; Murray *v.* Elibank, 10 Ves. 90; Delagarde *v.* Lampriere, 6 Beav. 344; Crook *v.* Turpin, 10 B. Mon. 243.

[5] Eyre *v.* Shaftsbury, 2 P. Wms. 108, 121, 124; Kenney *v.* Udall, 5 Johns. Ch. 464; 3 Cow. 591; Van Duzer *v.* Van Duzer, 6 Paige, 366; Helms *v.* Franciscus, 2 Bland, 545; Chambers *v.* Perry, 17 Ala. 726; Van Epps *v.* Van Deusen, 4 Paige, 65; Layton *v.* Layton, 1 Sm. & Gif. 179.

her, the court may interfere and settle all the wife's *choses in action*, not reduced to possession, upon her for her support; although no suit is pending concerning it, and it is not in court, and although it may not even be within the jurisdiction of the court.[1] It is said further, that if the husband is entirely insolvent, and the wife is without means of support, she may maintain a bill against him, and his creditors and assignees, to restrain them from getting possession of her *choses in action* in a suit at law, until she can obtain an adequate provision for herself out of her property.[2] The court can give relief if the parties are within the jurisdiction, although the property may be in another jurisdiction.[3]

§ 632. This equity of a settlement may be enforced against the husband, and all persons claiming under him, as his assignees in bankruptcy, or under a general assignment for creditors.[4] Even if the husband makes an assignment for a valuable consideration, the equity of the wife will prevail over it.[5] The

[1] Ibid.; Renwick *v.* Renwick, 10 Paige, 421; Martin *v.* Martin, 1 Hoff. 462; Haviland *v.* Myers, 6 Johns. Ch. 25, 178; Rees *v.* Waters, 9 Watts, 90.

[2] Ibid.; Bell *v.* Bell, 1 Kelly, 627; Guild *v.* Guild, 16 Ala. 122.

[3] Guild *v.* Guild, 16 Ala. 122.

[4] Jewson *v.* Moulson, 2 Atk. 420; Burdon *v.* Dean, 2 Ves. Jr. 607; Oswell *v.* Probert, id. 680; Pryor *v.* Hill, 4 Bro. Ch. 138; Sturgis *v.* Champneys, 5 Myl. & Cr. 97; Gassett *v.* Grout, 4 Met. 486; Davis *v.* Newton, 6 Met. 537; Page *v.* Estes, 19 Pick. 269; Kenney *v.* Udall, 5 Johns. Ch. 464; 3 Cow. 591; Haviland *v.* Myers, 6 Johns. Ch. 25; Mumford *v.* Murray, 1 Paige, 620; Van Epps *v.* Van Deusen, 4 id. 65; Phillips *v.* Hassell, 10 Humph. 197; Bennett *v.* Dillingham, 2 Dana, 436; Moore *v.* Moore, 14 B. Mon. 259; Elliott *v.* Waring, 5 id. 338; Thomas *v.* Kennedy, 4 id. 235; Bowling *v.* Winslow, 5 id. 29; Hord *v.* Hord, id. 81; Athey *v.* Knotts, 6 B. Mon. 24; Bowling *v.* Bowling, id. 31; Bell *v.* Bell, 1 Kelly, 637; Napier *v.* Howard, id. 193; Andrew *v.* Jones, 10 Ala. 401; Browning *v.* Headley, 2 Rob. (Va.) 342; Sherrard *v.* Carlisle, 1 Pat. & Heath, 12; Durr *v.* Bowyer, 2 McCord, Ch. 368; Heath *v.* Heath, 2 Hill, Ch. 100; Perryclear *v.* Jacobs, id. 504; Riley, Ch. 47; Duvall *v.* Farmers' Bank, 4 Gill & J. 283; State *v.* Reigart, 1 Gill, 3; Dunkley *v.* Dunkley, 2 De G., M. & G. 390; Napier *v.* Napier, 1 Dr. & W. 410; Crook *v.* Turpin, 10 B. Mon. 244; Ball *v.* Montgomery, 4 Bro. Ch. 338; Brown *v.* Clarke, 3 Ves. 166; Freeman *v.* Parsley, id. 421.

[5] Macauley *v.* Phillips, 4 Ves. 19; Scott *v.* Spashett, 3 Mac. & G. 599; Marshall *v.* Gibbings, 4 Ir. Ch. 276.

wife's equity is paramount to all rights of set-off against the husband.[1]

§ 633. The wife's right to a settlement extends to all her property, legal or equitable, where it is necessary for her husband, or those claiming under him, to come into court for its recovery;[2] and to all her interests, whether absolute and in fee, or for life,[3] or whether legal or equitable;[4] or to a trust for a term,[5] or to the estate of the wife as tenant in tail in possession,[6] or to the wife's interest as a mortgagee,[7] or to an equity of redemption,[8] or to her interests in chattels real, whether legal or equitable,[9] or to her contingent interests.[10] She is also

[1] Hall *v.* Hall, 1 Dr. & W. 109; Carr *v.* Taylor, 10 Ves. 574; *Ex parte* Blagden, 2 Rose, 294; *Ex parte* O'Farrall, 1 G. & J. 347; McMahon *v.* Burchall, 3 Hare, 97; 5 id. 335; Reeve *v.* Rocher, 1 De G. & Sm. 626; Lee *v.* Egremont, 5 De G. & Sm. 348; McCormick *v.* Garnett, 2 Sm. & Gif. 37.

[2] Milner *v.* Colmer, 2 P. Wms. 639; Bosvil *v.* Brander, 1 id. 458; Sturgis *v.* Champneys, 5 Myl. & Cr. 97; Oswell *v.* Probert, 2 Ves. Jr. 680; Brown *v.* Clarke, 3 Ves. 166; Freeman *v.* Parsley, id. 421; Mitford *v.* Mitford, 9 Ves. 87.

[3] Ibid.; Burdon *v.* Dean, 2 Ves. Jr. 607; Ball *v.* Montgomery, 4 Bro. Ch. 338; Wright *v.* Morley, 11 Ves. 12; Pryor *v.* Hill, 4 Bro. Ch. 139.

[4] Ibid.; Wortham *v.* Pemberton, 1 De G. & Sm. 644.

[5] Macauley *v.* Phillips, 4 Ves. 19; Turner's Case, 1 Ch. Cas. 307; 1 Vern. 7; Sanders *v.* Page, 3 Ch. R. 223; Hanson *v.* Keating, 4 Hare, 1; Pitt *v.* Hunt, 1 Vern. 18; Jewson *v.* Moulson, 2 Atk. 417; Wortham *v.* Pemberton, 1 De G. & Sm. 644; Durham *v.* Crackles, 8 Jur. (N. S.) 1174; Gleaves *v.* Paine, 1 De G., J. & Sm. 87; Smith *v.* Matthews, 3 De G., F. & J. 139.

[6] Wortham *v.* Pemberton, 1 De G. & Sm. 644.

[7] Ibid.; Bates *v.* Dandy, 2 Atk. 207; Packer *v.* Wyndham, Pr. Ch. 418; Walter *v.* Saunders, 1 Eq. Cas. Ab. 58; Incledon *v.* Northcote, 3 Atk. 335; Mitford *v.* Mitford, 9 Ves. 99; Hore *v.* Becher, 12 Sim. 465; Jones *v.* Gibbons, 9 Ves. 407; Rees *v.* Keith, 11 Sim. 338; Duncombe *v.* Greenacre, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 178.

[8] Clark *v.* Cook, 3 De G. & Sm. 333; Hatchell *v.* Eggleso, 1 Ir. Ch. 215; Hill *v.* Edmonds, 5 De G. & Sm. 603.

[9] Roupe *v.* Atkinson, Bunb. 162; Mitford *v.* Mitford, 9 Ves. 99; Packer *v.* Wyndham, Pr. Ch. 418; Franco *v.* Franco, 4 Ves. 528; Bullock *v.* Knight,

[10] Donne *v.* Hart, 2 R. & M. 360.

entitled to a settlement in estates that come to her after marriage, as well as before.[1] But she cannot have a settlement out of her interests in remainder or in reversion, until they fall into possession or become possessory.[2] The amount of the property is not material,[3] though it was once said that the court would not make a settlement of property of less value than £200.[4] Nor will her living separate from her husband defeat her right to a settlement.[5]

1 Ch. Ca. 266; Sanders *v.* Page, 3 Ch. R. 223; Macauley *v.* Phillips, 4 Ves. 19; Wike's Case, Lane, 54; Roll. Ab. 343; Jewson *v.* Moulson, 2 Atk. 421; Incledon *v.* Northcote, 3 id. 435; Clark *v.* Burgh, 2 Coll. 221; Sturgis *v.* Champneys, 5 Myl. & Cr. 97; Duberly *v.* Day, 16 Beav. 33; Hanson *v.* Keating, 4 Hare, 1; Wortham *v.* Pemberton, 1 De G. & Sm. 644; Robertson *v.* Norris, 11 Q. B. 916.

[1] Barrow *v.* Barrow, 18 Beav. 529.

[2] Socket *v.* Wray, 2 Atk. 6, n.; Frazer *v.* Bailie, 1 Bro. Ch. 518; Richards *v.* Chambers, 10 Ves. 580; Woollands *v.* Crowcher, 12 Ves. 175; Ritchie *v.* Broadbent, 2 J. & W. 456; Packard *v.* Roberts, 3 Madd. 384; Whittle *v.* Henning, 2 Phil. 731; Greedy *v.* Lavender, 13 Beav. 62; Osborn *v.* Morgan, 9 Hare, 432; 8 Eng. L. & Eq. 192; Taylor *v.* Austen, 9 Dr. 459; Marshall *v.* Fowler, 15 Eng. L. & Eq. 430; Duberly *v.* Day, 16 Beav. 33; Cunningham *v.* Antrobus, 16 Sim. 436; Brandon *v.* Woodthorpe, 10 Beav. 463; Rogers *v.* Acaster, 14 Beav. 445, overruling Hall *v.* Hugonin, 14 Sim. 595; Browning *v.* Headley, 2 Rob. (Va.) 340; Moore *v.* Thornton, 7 Grat. 99; Terry *v.* Brunson, 1 Rich. Eq. 78; Reese *v.* Holmes, 5 id. 531; Sale *v.* Saunders, 24 Miss. 24; Goodwin *v.* Moore, 4 Humph. 221; Caplinger *v.* Sullivan, 2 Humph. 548. In Pennsylvania, Kentucky, and North Carolina, however, the English rule is not followed; but a husband may assign and convey vested remainders and reversions to his wife. Knight *v.* Leak, 2 Dev. & Bat. 133; Howell *v.* Howell, 3 Ired. Eq. 528; Weeks *v.* Weeks, 5 id. 111; Merriweather *v.* Booker, 5 Litt. 254; Davenport *v.* Prewett, 9 B. Mon. 95; Jackson *v.* Sublett, 10 id. 469; Turner *v.* Davis, 1 id. 151; Siter's Case, 4 Rawle, 461; Smilie's Est., 22 Penn. St. 130; Woelper's App., 2 id. 71; Webb's App., 21 id. 248. And see Scott *v.* James, 3 How. (Miss.) 307.

[3] *In re* Kincaid's Trusts, 17 Eng. L. & Eq. 396; 1 Dr. 326; Cutler's Trusts, 14 Beav. 224; *Re* Morriman's Trust, 10 Weekly Rep. 334; Roberts *v.* Collett, 6 Sm. & Gif. 138.

[4] Foden *v.* Finney, 4 Russ. 428; March *v.* Head, 3 Atk. 721; Bourdillon *v.* Adair, 3 Bro. Ch. 237; Elworthy *v.* Wickstead, 1 J. & W. 69.

[5] Eedes *v.* Eedes, 11 Sim. 569; Greedy *v.* Lavender, 13 Beav. 62; Carter *v.* Carter, 14 Sm. & M. 59. But see Carr *v.* Estabrooke, 4 Ves. 146; Ball *v.* Montgomery, 2 Ves. Jr. 191; Watkyns *v.* Watkyns, 2 Atk. 97; *In re* Lewin's Trusts, 20 Beav. 378; Ball *v.* Coutts, 1 V. & B. 302; *In re* Walker, Ll. & Goo. Sugd. 299.

§ 634. If a husband is solvent, and is living with his wife and maintaining her as well as he can, he is entitled to the income of her *life*-estates, and no settlement can be made.[1] If, however, he deserts her, or she is divorced for his misconduct, she may receive the whole or a part of the income of her life-estates for her support.[2] So if the husband is a bankrupt, and the wife is without means, the court will enforce a settlement out of the income of a *life*-estate as against the assignee.[3] If a husband, while living with and maintaining his wife, assigns the income of her life-estates for a valuable consideration, she can have no settlement, as the assignment may have been made to enable him to support her.[4] But a fraudulent conveyance will not defeat her right.[5] If the wife already has an adequate provision, a settlement will not be made out of her *life*-estate;[6] nor will it be made if she is living in adultery,[7] or refuses to accompany her husband when he removes from place to place, in the performance of the duties of his profession or occupation.[8] If she fraudulently induce a purchaser to advance his money upon a purchase of her interests, a settlement will not be made.[9]

§ 635. If, however, a husband has already made a settlement upon his wife, he will not be required to make another on coming

[1] Bullock *v.* Menzies, 4 Ves. 798; *Re* Duffy's Trust, 28 Beav. 386; Vaughan *v.* Buck, 13 Sim. 404.

[2] Barrow *v.* Barrow, 5 De G., M. & G. 782; Tidd *v.* Lister, 3 id. 870; Wright *v.* Morley, 11 Ves. 12; Allerton *v.* Knowell, 4 Ves. 799; Oxenden *v.* Oxenden, 2 Vern. 493; Williams *v.* Callow, 2 Vern. 572; Atherton *v.* Mowell, 1 Cox, 229; Eedes *v.* Eedes, 11 Sim. 569.

[3] Vaughan *v.* Buck, 1 Sim. (N. S.) 284; Squires *v.* Ashford, 23 Beav. 132; Barnes *v.* Robinson, 1 N. R. 257; Elliott *v.* Cordell, 5 Madd. 149; Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clarke, 3 Ves. 166; Jacobs *v.* Amyatt, 1 Madd. 376, n.; Sturgis *v.* Champneys, 5 Myl. & Cr. 97; Gilchrist *v.* Cator, 1 De G. & Sm. 188; Koeber *v.* Sturges, 22 Beav. 588.

[4] Tidd *v.* Lister, 10 Hare, 140; 3 De G., M. & G. 857; Duffy's Trust, 28 Beav. 386.

[5] Colmer *v.* Colmer, Mose. 113.

[6] Aguilar *v.* Aguilar, 5 Madd. 414.

[7] Ball *v.* Montgomery, 2 Ves. Jr. 191; Duncan *v.* Campbell, 12 Sim. 616; Alexander *v.* McCulloch, 2 Ves. Jr. 192.

[8] Bullock *v.* Menzies, 4 Ves. 798.

[9] Lush's Trust, L. R. 4 Eq. 591; Sharpe *v.* Toy, id. 35.

into court to reduce her property to possession.[1] A settlement, however, will apply *prima facie* only to the property then belonging to the wife, unless by the terms of the instrument it embraces her subsequently acquired property.[2] The court may, however, in particular circumstances decline to interfere with marital rights.[3] If in terms it does not embrace subsequent property, he will be required to make an additional settlement.[4] If a settlement in terms states that it is in consideration of his wife's fortune, it will entitle him to her present fortune, however inadequate the settlement may be, if made before marriage;[5] but if it is inadequate, it will be an additional reason for requiring another settlement, upon the accession of additional property to her.[6] But even an adequate settlement, made after marriage, will not bar her equity to an additional settlement.[7] It is not important that the settlement should refer to the present fortune of the wife: it will be presumed to embrace it.[8] If the settlement is made in consideration of a part of the wife's equitable property, it will not be extended beyond its express terms.[9] By these settlements the husband becomes the purchaser of so much of the wife's property as they embrace; but they simply give him the power to reduce the equitable

[1] Druce *v.* Denison, 6 Ves. 395; Carr *v.* Taylor, 10 Ves. 579; Garforth *v.* Bradley, 2 Ves. 677; Mitford *v.* Mitford, 9 Ves. 96; Martin *v.* Martin, 1 Comst. 473.

[2] Ibid.; Barrow *v.* Barrow, 5 De G., M. & G. 782; 18 Beav. 529; Matter of Beresford, 1 Des. 263. The fact that a woman lives separate from her husband will not entitle her to an additional settlement, if the first settlement in terms embraced her future fortune. *Re* Erskine's Trusts, 1 K. & J. 302.

[3] Giacometti *v.* Prodgers, L. R. 14 Eq. 253.

[4] Ibid.; Spirrett *v.* Willows, 3 De G., J. & S. 293; L. R. 1 Ch. 520.

[5] Lanoy *v.* Athol, 2 Atk. 448; 3 P. Wms. 199, n.; Adams *v.* Cole, 2 Atk. 449, n.; Forr. 168; Brett *v.* Forcer, 3 Atk. 405.

[6] March *v.* Head, 3 Atk. 720; Tomkyns *v.* Ladbroke, 2 Ves. 595; Stackpole *v.* Beaumont, 3 Ves. Jr. 98; Elibank *v.* Montolieu, 5 Ves. 737.

[7] Dunkley *v.* Dunkley, 2 De G., M. & G. 390; Matter of Beresford, 1 Des. 263.

[8] Blois *v.* Hereford, 2 Vern. 502; and see Salway *v.* Salway, Amb. 602.

[9] Cleland *v.* Cleland, Pr. Ch. 63; Burdon *v.* Dean, 2 Ves. Jr. 607.

and legal *choses in action* to possession: if he dies without doing so, she takes them by survivorship.[1]

§ 636. The amount that will be settled upon the wife is subject to the sound discretion of the court, acting upon all the circumstances, such as the solvency or insolvency of the husband, the amount of the wife's property he has already received, the amount that remains, their position in society, and the fact whether a settlement has already been made upon the wife, the conduct of the husband, and whether he lives with her and maintains her as well as he can. There is no general rule. In some cases one-half the property has been settled on her, and the other half allowed to go to his assignees. In other cases, and especially where there has been misconduct on the part of the husband, the whole sum has been settled; and the court will be inclined to do this, if the husband has already expended a large part of his wife's fortune, or if the sum remaining is barely sufficient to support the wife and children,[2] or if the husband has married a ward of the court without permission.[3]

[1] Rudyard *v.* Neirin, Pr. Ch. 209; Lister *v.* Lister, 2 Vern. 68; Mitford *v.* Mitford, 9 Ves. 96; Salway *v.* Salway, Amb. 692; Heaton *v.* Hassell, 4 Vin. Ab. 40.

[2] Jewson *v.* Moulson, 2 Atk. 423; Worrall *v.* Marlar, 1 Cox, 153; 1 Dick. 647; Brown *v.* Clarke, 3 Ves. 166; Bagshaw *v.* Winter, 5 De G. & Sm. 466; Dunkley *v.* Dunkley, 2 De G., M. & G. 396; Green *v.* Otte, 1 S. & S. 250; Napier *v.* Napier, 1 Dr. & W. 407; Aubrey *v.* Brown, 4 W. Rob. 425; Coster *v.* Coster, 9 Sim. 597; *Ex parte* Pugh, 1 Dr. 202; Vaughan *v.* Buck, 1 Sim. (N. S.) 284; Beresford *v.* Hobson, 1 Madd. 362; Jacobs *v.* Amyatt, id. 376; Brett *v.* Greenwell, 3 Y. & Col. Ex. 230; Gardner *v.* Marshall, 14 Sim. 575; Francis *v.* Brooking, 19 Beav. 347; Scott *v.* Spashett, 3 Mac. & G. 599; Marshall *v.* Fowler, 16 Beav. 249; *Re* Kincaid's Trusts, 1 Dr. 326; *In re* Cutler, 14 Beav. 220; Gent *v.* Harris, 10 Hare, 383; Layton *v.* Layton, 1 Sm. & Gif. 179; Walker *v.* Drury, 17 Beav. 482; Helms *v.* Franciscus, 2 Bland, 545; Kenney *v.* Udell, 5 Johns. Ch. 464; 3 Cow. 591; Napier *v.* Howard, 3 Kelly, 205; Bowling *v.* Winslow, 5 B. Mon. 31; Browning *v.* Headley, 2 Rob. (Va.) 340; Hall *v.* Hall, Md. Ch. 283; McVey *v.* Boggs, 3 Md. Ch. 94; Barron *v.* Barron, 24 Vt. 375; Bennett *v.* Oliver, 7 Gill & J. 191.

[3] *Ante*, § 631; Stackpole *v.* Beaumont, 3 Ves. Jr. 89; Stevens *v.* Savage, 1 id. 154; Chassaing *v.* Parsonage, 5 Ves. 15; Millett *v.* Rowse, 7 Ves. 419; Bathurst *v.* Murray, 8 Ves. 74; Wells *v.* Price, 5 Ves. 398; Winch *v.* James,

§ 637. If a husband refuses to make a settlement upon his wife, the court will give him no aid in reducing her *choses in action*, whether legal or equitable, to possession; and the court will retain the capital, if within its jurisdiction, so that the wife may take the same by survivorship. But his marital rights will not be otherwise taken away, and he will be allowed to receive the income, so long as he lives with and maintains her.[1] Where, however, a husband has deserted his wife and left her unprovided for;[2] or where he has received a large part of her fortune, and refuses to make any settlement;[3] or where he is a lunatic,[4] and incapable of taking care of her; or where he is a bankrupt or totally insolvent,[5] — the court will order the income to be paid to her.

§ 638. The right to a settlement and the survivorship of the wife are two different things; although they both depend upon the fact whether the husband has reduced the wife's *choses in action* to possession. A settlement is ordered by the court for the present benefit of the wife, where the husband has not actually received the property. Survivorship of the wife is her right to her *choses in action* at the death of her husband, in case he has not already reduced them to possession: the one is the act of the court; the other is operation of law.

§ 639. It frequently becomes a question whether a wife's *choses in action*, legal or equitable, have been so dealt with by

4 Ves. 386; Priestly *v.* Lamb, 6 Ves. 421; Hallett *v.* Halsey, 9 Ves. 471; Pearce *v.* Crutchfield, 14 Ves. 206; *In re* Healey, 1 C. & L. 393; *In re* Walker, Ll. & Goo. Sugd. 325; Hodgens *v.* Hodgens, 11 Bligh (N. S.), 52; 4 C. & F. 323; Birkett *v.* Hibbert, 3 Myl. & Cr. 227; Like *v.* Beresford, 3 Ves. 506; Ball *v.* Coutts, 1 V. & B. 305. See Bennett *v.* Biddles, 10 Jur. 534.

[1] Sleech *v.* Thorrington, 2 Ves. 562; Oxenden *v.* Oxenden, id. 493; Williams *v.* Callow, 2 Vern. 751; Atcheson *v.* Atcheson, 11 Beav. 485; Att. Gen. *v.* Bacchus, 9 Price, 30; 11 Price, 547; Grute *v.* Locroft, Cro. Eliz. 287.

[2] Ibid.; Watkyns *v.* Watkyns, 2 Atk. 96; Peters *v.* Grote, 7 Sim. 238; Rishton *v.* Cobb, 9 Sim. 620.

[3] Bond *v.* Simmonds, 3 Atk. 21.

[4] Stead *v.* Culley, 2 M. & K. 52.

[5] *Ante*, §§ 634–636.

her husband as to be reduced to his legal possession, in such manner as to bar her right to a settlement, or to destroy her right of survivorship in the property in case he dies. There is no difference in the rule between legal and equitable property.[1] If the husband has not done some act to vest the legal property in himself, the wife can claim a settlement, or will take it as survivor.[2] An actual payment or delivery by the legal holder to the husband himself, or to his assignee, or other person appointed or authorized to receive the fund, will be a reduction to possession;[3] but if the assignee has not actually received the property, there is no possession that affects the rights of the wife.[4] The husband must, in all cases, do some *act* to reduce the wife's *choses* to possession. The mere manual possession of them as an administrator, executor, or trustee will not be enough, unless accompanied by some act manifesting an intention to

[1] Twisden *v.* Wise, 1 Vern. 161; Hornsby *v.* Lee, 2 Madd. 16; Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 id. 65.

[2] Pike *v.* Collins, 33 Maine, 43; Parsons *v.* Parsons, 9 N. H. 309; Poor *v.* Hazleton, 15 N. H. 568; Legg *v.* Legg, 8 Mass. 99; Stanwood *v.* Stanwood, 17 Mass. 57; Hayward *v.* Hayward, 20 Pick. 517; Dunn *v.* Sargeant, 101 Mass. 336; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Searing *v.* Searing, 9 Paige, 283; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Dare *v.* Allen, id. 419; Krumbaar *v.* Burt, 2 Wash. C. C. 406; Lodge *v.* Hamilton, 2 S. & R. 491; Bohn *v.* Headly, 7 H. & J. 257; Browning *v.* Headley, 2 Rob. (Va.) 340; Revel *v.* Revel, 2 Dev. & B. 272; Pickett *v.* Everett, 11 Mo. 568; Clarke *v.* McCreary, 12 Sm. & M. 347; Rice *v.* Thompson, 14 B. Mon. 379; Killar *v.* Beclor, 5 B. Mon. 573; Whitehurst *v.* Harker, 2 Ired. Eq. 292; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Terry *v.* Brunson, 1 Rich. Eq. 78; Sayre *v.* Flournoy, 3 Kelly, 541; Bibb *v.* McKinley, 9 Port. 636. *Choses in action* in Connecticut, accruing to a wife during coverture, vest immediately in the husband, and do not survive to the wife if the husband dies, even though he has done nothing to reduce them to possession, Griswold *v.* Penniman, 2 Conn. 564; although this is not altered by statute. Edwards *v.* Sheridan, 24 Conn. 165; Jennings *v.* Davis, 31 Conn. 134; Blount *v.* Bestland, 5 Ves. 515; Macauley *v.* Phillips, 4 Ves. 17; Fort *v.* Fort, Forrest, 171.

[3] Ryland *v.* Smith, 1 Myl. & Cr. 53; Glaister *v.* Hewer, 8 Ves. 207; Johnson *v.* Johnson, 1 J. & W. 472; Hanson *v.* Miller, 8 Jur. 209.

[4] Ibid.; Browning *v.* Headley, 2 Rob. (Va.) 340; Mathews *v.* Guess, 2 Hill, Eq. 63; George *v.* Goldsby, 23 Ala. 333; Arrington *v.* Yarborough, 1 Jones, Eq. 72; Bugg *v.* Franklin, 4 Sneed, 129; Lynn *v.* Bradley, 1 Met. (Ky.) 232; Smith *v.* Atwood, 13 Ga. 420; State *v.* Robertson, 5 Harrington, 201; Needles *v.* Needles, 7 Ohio St. 432; Ryan *v.* Spruill, 4 Jones, Eq. 27.

make them his own,[1] as if he charges a legacy as paid to him, and the account is allowed,[2] or if he expends the money in his own business,[3] or sells the property, or takes notes in his own name.[4] A mere suit in the name of himself and wife is not a reduction to possession,[5] nor is a bill in equity for a division,[6] nor a suit for distribution; [7] nor is a judgment or decree in such joint suits enough.[8] There must be an execution, and the actual delivery of the property to the husband or his agent.[9] A joint receipt is not sufficient; [10] so a joint recognizance for a wife's legacy is not enough.[11] Mere possession of notes, bonds, and mortgages is not enough; [12] if the money is received by virtue of agreements inconsistent with his receiving it in his *marital* right, the rights of the wife will not be barred.[13] Where a hus-

[1] Wallace *v.* Taliaferro, 2 Call, 376; Mayfield *v.* Clifton, 3 Stew. 375; Elms *v.* Hughes, 3 Des. 155; Ross *v.* Morton, 10 Yerg. 190; Kintzinger's Est., 2 Ashm. 455; Miller's Est., id. 223; Gochenaur's Est., 23 Penn. St. 460.

[2] Pierce *v.* Thompson, 17 Pick. 391.

[3] Ellis *v.* Baldwin, 1 Watts & S. 253.

[4] Wardlaw *v.* Gray, 2 Hill, Eq. 644.

[5] Pike *v.* Collins, 33 Maine, 43; Thompson *v.* Ellsworth, 1 Barb. Ch. 624; Arnold *v.* Ruggles, 1 R. I. 165; Bell *v.* Bell, 1 Kelly, 637; Knight *v.* Brawneer, 14 Md. 1; Hall *v.* McLain, 11 Humph. 425; 3 Sneed, 536; Pierce *v.* Thornley, 2 Sim. 167.

[6] Gregory *v.* Marks, 1 Rand. 355.

[7] Bennett *v.* Dillingham, 2 Dana, 436; Short *v.* Moore, 10 Vt. 446; Probate Court *v.* Niles, 32 Vt. 775; Lewis *v.* Price, 3 Rich. Eq. 172.

[8] Pike *v.* Collins, 33 Maine, 43; Mason *v.* McNeill, 23 Ala. 201; Nanney *v.* Martin, 1 Eq. Cas. Ab. 68; 3 Atk. 726; Forbes *v.* Phillips, 1 Ed. 502; Nightingale *v.* Lockman, Fitzgib. 148; Hore *v.* Woufle, 2 B. & B. 424; Adams *v.* Lavender, 1 McCl. & Y. 41; *Re* Jenkins, 5 Russ. 183.

[9] Ibid.; Alexander *v.* Crittenden, 4 Allen, 342.

[10] McDowell *v.* Potter, 8 Penn. St. 191; Timbers *v.* Katz, 6 Watts & S. 290.

[11] Lodge *v.* Hamilton, 2 S. & R. 491; Hake *v.* Fink, 9 Watts, 336.

[12] Hunter *v.* Hallett, 1 Edw. Ch. 383; Pickett *v.* Everett, 11 Mo. 568; Miller's Est., 1 Ashm. 330; Barber *v.* Slade, 30 Vt. 191; Hall *v.* Young, 37 N. H. 134; Barron *v.* Barron, 24 Vt. 375; Holmes *v.* Holmes, 28 Vt. 765.

[13] Barron *v.* Barron, 24 Vt. 375; Durant *v.* Lalley, 3 Strob. 159; Rogers *v.* Bumpass, 4 Ired. Eq. 385; Savage *v.* Benham, 17 Ala. 120; Davis *v.* Davis, 46 Penn. St. 362; Wall *v.* Tomlinson, 16 Ves. 413; Ryland *v.* Smith, 1 Myl. & Cr. 53; Burnham *v.* Bennett, 2 Col. C. C. 254; Baker *v.* Hall, 12 Ves. 497.

band sold his wife's *choses in action*, and invested the proceeds in other securities, which he enclosed in an envelope and marked as his own to dispose of, it was held to be a perfect reduction to possession.[1] Where the *act* depends upon the husband's intention at the time, it may be shown, by his declarations and other circumstances, that it was not his intention to reduce the property to possession.[2] If, however, the husband wishes to qualify his acts, and show that he did not reduce the *choses* to possession, the evidence must be demonstrative.[3] If the *choses* are once reduced to possession, no words of the husband can revive the rights of the wife or defeat the rights of creditors.[4]

§ 640. The receipt of interest by the husband due on a mortgage, bond, or note to the wife, is the reduction of the money received, but it is not a reduction of the principal sum due;[5] nor is the collection of dividends on stocks a reduction of the stocks. To reduce the stocks themselves to possession, they must be transferred into the name of the husband.[6] Part payment of the principal of a note to the husband is not a reduction to possession of the remainder due.[7] A note payable to a married woman may be indorsed and transferred by the husband, and the signature of the wife is not necessary. Such indorsement and transfer of a negotiable instrument is a reduction to possession by the husband.[8] An agreement to sell the *chose* is

[1] Dunn *v.* Sargeant, 101 Mass. 336.

[2] Hind's Est., 5 Whart. 138; Gray's Est., 1 Barr, 327; Gochenaur's Est., 23 Penn. St. 460; McDowell *v.* Potter, 8 id. 191.

[3] Gray's Estate, 1 Penn. St. 327; Gochenaur's Estate, 23 id. 460.

[4] Nolen's App., 23 Pa. St. 35.

[5] Howman *v.* Corrie, 2 Vern. 190; Hart *v.* Stephens, 6 Q. B. 937; Stanwood *v.* Stanwood, 17 Mass. 57; Burr *v.* Sherwood, 3 Brad. Sur. 85.

[6] Arnold *v.* Ruggles, 1 R. I. 165.

[7] Nash *v.* Nash, 2 Madd. 133; Schuyler *v.* Hoyle, 5 Johns. Ch. 196.

[8] Scarpellini *v.* Acheson, 7 Q. B. 864; Gatens *v.* Madderly, 6 M. & W. 428; McNeilage *v.* Holloway, 1 B. & Ald. 218; Sherrington *v.* Yates, 12 M. & W. 855; Mason *v.* Morgan, 2 Ad. & El. 30; Evans *v.* Secrest, 3 Ind. 545; Wall *v.* Tomlinson, 16 Ves. 413; Hemmingway *v.* Mathews, 10 Tex. 207; Tryon *v.* Sutton, 13 Cal. 490; Wildman *v.* Wildman, 9 Ves. 174; Twis-

not a reduction;[1] nor is the set-off of the *chose* against the husband's debt, no money being paid or receipts given;[2] nor is a pledge or assignment of it as collateral security.[3] If a wife's real estate is sold, and notes are taken in the name of the husband, they become his; or if notes are taken in the name of the wife, the husband may collect them and reduce them to possession.[4] The money due on a mortgage to the wife may be received by the husband, and a court of equity will compel her to discharge it, if he dies.[5] The reduction must be complete before the husband's death; mere initiatory steps, which have not resulted in the actual receipt of the money by the husband or his agents, will not be sufficient.[6] And although his debt due to an estate in which his wife has a legacy may be set off against the legacy during his life,[7] it cannot be after his death;[8] nor can the legacy be applied to the debt of the husband due to a third person.[9]

den *v.* Wise, 1 Vern. 161; Ryland *v.* Smith, 1 Myl. & Cr. 53; Stevens *v.* Beals, 10 Cush. 291; Garforth *v.* Bradey, 2 Ves. Sr. 675; Richards *v.* Richards, 2 B. & Ad. 447; Hart *v.* Stephens, 6 Q. B. 937; Allen *v.* Wilkins, 3 Allen, 322.

[1] Harwood *v.* Fisher, 1 Y. & Coll. Ex. 110.

[2] Harrison *v.* Andrews, 13 Sim. 595; Carr *v.* Taylor, 10 Ves. 574. A debt due to an estate by a husband may be set off against a legacy to his wife from the same estate. Yoke *v.* Barnet, 1 Binn. 358; Flory *v.* Becker, 2 Penn. St. 471. But not after his death. Kreider *v.* Boyer, 10 Watts, 58; Stout *v.* Levan, 3 Penn. St. 235.

[3] Latourette *v.* Williams, 1 Barb. 9; Hartman *v.* Dowdel, 1 Rawle, 279; Siter's Case, 4 id. 468; Titt *v.* Colwell, 31 Penn. St. 228.

[4] Taggart *v.* Boldin, 10 Md. 104; McCrory *v.* Foster, 1 Iowa, 271; Peacock *v.* Pembroke, 4 Md. 280; Ramsdale *v.* Craighill, 9 Ohio, 199; Dixon *v.* Dixon, 18 Ohio, 113; Talbot *v.* Dennis, 1 Cart. 471; Casey *v.* Wiggin, 8 Gray, 231; Ellsworth *v.* Hinds, 5 Wis. 613; Bartlett *v.* Janeway, 4 Sandf. Ch. 396; Barber *v.* Slade, 30 Vt. 191.

[5] Rees *v.* Keith, 11 Sim. 388; Bosvill *v.* Brander, 1 P. Wms. 458; Bates *v.* Dandy, 2 Atk. 208; Siter *v.* McClanachan, 2 Grat. 280.

[6] Mason *v.* McNeill, 23 Ala. 201; Donaldson *v.* West Branch Bank, 1 Barr, 288.

[7] Yoke *v.* Bennett, 1 Binn. 358; Flory *v.* Becker, 2 Penn. St. 471.

[8] Ibid.; Kreider *v.* Boyer, 10 Watts, 58; Stout *v.* Levan, 3 Penn. St. 285.

[9] Frauenfeldt's Est., 3 Whart. 415.

§ 641. In some of the United States, the transfer, assignment, or release of a *chose in action*, in which the wife has a present interest, is such an act of ownership, on the part of the husband, that it will bar the right of survivorship in the wife, although the assignee may not have reduced the *chose* to actual possession.[1] In some States, the wife's *choses in action* will not pass to the husband's assignees in bankruptcy, under general words;[2] nor by a voluntary assignment in trust for creditors.[3] But if the *choses* are specifically named, they will pass to such assignees, whether they are assignees in bankruptcy or voluntary.[4] But it is said that assignees in bankruptcy will take, subject to the wife's right of survivorship, if they do not reduce the *chose* to actual possession.[5] A fraudulent assignment of his wife's *choses*, as after desertion, or after proceedings for a divorce are begun, cannot be supported;[6] nor can a voluntary assignment without consideration.[7]

[1] Chandos *v.* Talbot, 2 P. Wms. 601; Bates *v.* Dandy, 2 Atk. 207; Hawkins *v.* Obin, id. 549; Parsons *v.* Parsons, 9 N. H. 309; Tucker *v.* Gordon, 5 N. H. 564; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Tuttle *v.* Fowler, 22 Conn. 58; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Thomas *v.* Kelsoe, 7 Mon. 521; Lowry *v.* Houston, 3 How. (Miss.) 396; Shuman *v.* Reigart, 7 Watts & S. 168; Siter's Case, 4 Rawle, 468; Webb's App., 21 Penn. St. 248; Smilie's Est., 22 id. 130; Hill *v.* Townsend, 24 Tex. 575; Manion *v.* Titsworth, 18 B. Mon. 582.

[2] Eshelman *v.* Shuman, 13 Penn. St. 561.

[3] Skinner's App., 5 Penn. St. 263; Slaymaker *v.* Bank, 10 id. 373; Wright *v.* Rutter, 2 Ves. Jr. 673.

[4] Richwine *v.* Keim, 1 Penn. 373; Shuman *v.* Reigart, 7 Watts & S. 168; Eshelman *v.* Shuman, 13 Penn. St. 561; Siter's Case, 4 Rawle, 468; Barnes *v.* Pearson, 6 Ired. Eq. 482.

[5] Van Epps *v.* Van Deusen, 4 Paige, 64; Poor *v.* Hazleton, 16 N. H. 568; Outcalt *v.* Van Winkle, 1 Green. Ch. 513; Shay *v.* Sessaman, 10 Barr, 434; Krumbaar *v.* Burt, 2 Wash. C. C. 406; Shaw *v.* Mitchell, Davis, 216; Purdew *v.* Jackson, 1 Russ. 1; Hutchings *v.* Smith, 9 Sim. 137; Elwyn *v.* Williams, 7 Jur. 338; 12 L. J. Ch. 440; 13 Sim. 309; Ashby *v.* Ashby, 1 Coll. 554; Wilkinson *v.* Charlesworth, 10 Beav. 328; Le Vasseux *v.* Scratton, 14 Sim. 118; Boston *v.* Boston, 13 Jur. 247; 16 Sim. 552; Macq. Husb. and Wife, 54; 2 Spence, Eq. Jur. 476.

[6] Krupp *v.* Scholl, 10 Penn. St. 194; Blenkinsop *v.* Blenkinsop, 1 De G., M. & G. 495. And see Tuttle *v.* Fowler, 22 Conn. 58.

[7] Wright *v.* Rutter, 2 Ves. Jr. 673; Burnett *v.* Kinnaston, 2 Vern. 401;

§ 642. In some States, the *choses in action* of the wife so far vest in the husband, although he does no act to reduce them to possession, that creditors may attach and seize them on execution, or by the trustee process.[1] But if the husband dies before judgment, his wife will take the *choses* by survivorship.[2] In other States, it is held that nothing vests in the husband until he has elected to reduce the *chose in action* to possession, and has done some act to that end; and that creditors cannot reach such *choses* until they vest in the husband; and that the husband cannot be compelled to elect, or reduce them to possession.[3] It has been held that the right is so far personal to the husband that it cannot be exercised by a guardian if he is insane.[4]

§ 643. When the necessary steps are taken, a wife's *chose* is reduced to possession, her right to a settlement is barred, and her right by survivorship is destroyed, as where a bond is taken from an executor to the husband alone for a legacy due the wife, with or without judgment on the bond,[5] or a new security is taken in any form to the husband for the old security to the wife,[6] or a receipt is given by the husband alone for the *choses* of the wife,[7] or where a deed is made of the wife's property to trustees, in trust for the wife and her children.[8]

Mitford *v.* Mitford, 9 Ves. 87; Johnson *v.* Johnson, 1 J. & W. 472; Jewson *v.* Moulson, 2 Atk. 417; Hartman *v.* Dowdel, 1 Rawle, 279.

[1] Wheeler *v.* Bowen, 20 Pick. 263; Holbrook *v.* Waters, 19 Pick. 354; Vance *v.* McLaughlin, 8 Grat. 289; Dodd *v.* Greiger, 2 Grat. 98; James *v.* Gibbs, 1 Pat. & H. 277.

[2] Strong *v.* Smith, 1 Met. 476; Hayward *v.* Hayward, 20 Pick. 517.

[3] Skinner's App., 5 Penn. St. 263; Sayre *v.* Flournoy, 3 Kelly, 541; Dennison *v.* Nigh, 2 Watts, 90; Robinson *v.* Woelper, 1 Whart. 179; Wheeler *v.* Moore, 13 N. H. 478; Andrews *v.* Jones, 10 Ala. 400; Coffin *v.* Morrill, 2 Fost. 352; Mellingen *v.* Vausmann, 45 Penn. St. 522; Stoner *v.* Commonwealth, 16 id. 387; Nolen's App., 23 id. 37; Peacock *v.* Pembroke, 4 Md. 280; Harris *v.* Taylor, 3 Sneed, 536; Gallego *v.* Gallego, 2 Brock. 287.

[4] Andover *v.* Merrimac County, 37 N. H. 437. But see *In re* Jenkins, 5 Russ. 183.

[5] Stewart's App., 3 Watts & S. 476; De Witt *v.* Eldred, 4 id. 422; Yerby *v.* Lynch, 3 Grat. 460. [6] Searing *v.* Searing, 9 Paige, 283.

[7] Starke *v.* Starke, 2 Rich. 438.

[8] Siter's Case, 4 Rawle, 464; Hansen *v.* Miller, 8 Jur. 209.

§ 644. If a note, bond, or legacy is given to a husband and wife jointly, the husband can collect the whole during his life, but if he does not reduce them to possession, they survive to his wife on his death.[1] If the property is in court, a settlement can be ordered; or the fund can be reserved, and the interest paid to the husband during his life.[2] In case of the settlement of property jointly upon husband and wife, the husband may receive the entire income during his life, and his interests may be seized by his creditors, and they pass to his assignees in bankruptcy, although the instrument of settlement contains provisions attempting to avoid such a result.[3]

§ 645. It has already appeared that a wife cannot ask for a settlement for herself alone, without including her children;[4] but this is a personal right, and the children cannot ask for a settlement after her death.[5] The wife, at any time before the settlement is actually executed, may waive it, and consent in court that her husband may take the property.[6] In some cases it was held, however, that the equity of the children attached upon the filing of the bill or petition of the wife; and that, if she died before further proceedings, the children might still be protected.[7] But, in the later cases, it has been held that the

[1] Pike *v.* Collins, 33 Maine, 43; Hayward *v.* Hayward, 20 Pick. 517; Laprimaudaye *v.* Teissier, 12 Beav. 206; Atcheson *v.* Atcheson, 11 id. 485.

[2] Ibid.

[3] Carson *v.* O'Bannon, 7 Rich. Eq. 219; Rivers *v.* Thayer, id. 166.

[4] Murray *v.* Elibank, 10 Ves. 90; 1 Lead. Cas. Eq. 360; Lloyd *v.* Williams, 1 Madd. 450; Grobes *v.* Clark, 1 Keen, 132; Napier *v.* Howard, 3 Kelly, 193; Udell *v.* Kenney, 3 Cow. 609; Groberman *v.* Diffenderffer, 1 Gill & J. 22; Howard *v.* Moffatt, 2 Johns. Ch. 206; Andrews *v.* Jones, 10 Ala. 401.

[5] Scriven *v.* Tapley, 2 Ed. 337; Amb. 509; Lloyd *v.* Williams, 1 Madd. 450; Martin *v.* Sherman, 2 Sandf. Ch. 341; Barker *v.* Woods, 1 Sandf. Ch. 129; Bell *v.* Bell, 1 Kelly, 637.

[6] Row *v.* Jackson, 2 Dick. 604; Murray *v.* Elibank, 10 Ves. 84; 1 Lead. Cas. Eq. 360, notes; Martin *v.* Mitchell, 10 Ves. 89; 2 J. & W. 425.

[7] Wallace *v.* Auldjo, 1 De G., J. & Sm. 643; Steinmetz *v.* Haltkin, 1 Gl. & J. 64; Murray *v.* Elibank, 10 Ves. 84; Groves *v.* Clark, 1 Keen, 132; Groves *v.* Perkins, 6 Sim. 584; Lloyd *v.* Williams, 1 Madd. 450; Mumford

rights of the children to have the settlement attach only after decree; and that, if the wife dies before the decree, the husband takes all by survivorship as his wife's administrator.[1] If there are no children, the order or decree for a settlement will not affect the husband's rights, if the wife dies before the execution of the instrument; but if the settlement is drawn and approved by the court, it will control the property.[2] Where there are no children, the husband's next of kin will take the property,[3] or the husband himself.[4]

§ 646. At common law, a husband became liable for his wife's debt contracted before marriage; he was also bound to maintain her and her children, and was entitled to the enjoyment of her property. In equity a woman, in contemplation of marriage, might contract with an intended husband for the continued separate use and control of a certain portion, or the whole of her property.[5] (*a*) These agreements were sustained

v. Murray, 1 Paige, 621; Helms *v.* Franciscus, 2 Bland, 581; Hill *v.* Hill, 3 Strob. Eq. 94.

[1] Delagarde *v.* Lampriere, 6 Beav. 344.

[2] Macauley *v.* Phillips, 4 Ves. 19.

[3] Carter *v.* Taggart, 1 De G., M. & G. 286; Bagshaw *v.* Winter, 5 De G. & Sm. 466.

There will be for the future little occasion to consider settlements in the United States, since the statutes settle nearly all a married woman's property upon herself, without even the intervention of a trustee. It may happen, however, that questions may arise in relation to marriages previous to the passage of the acts in several States; or the property may come to the wife in some manner not embraced in the statutes, so that a husband's common-law rights may still extend to it. Wright *v.* Brown, 44 Pa. St. 224; Colvin *v.* Currier, 22 Barb. 387; Haines *v.* Ellis, 24 Penn. St. 253; Foster *v.* Penn. Ins. Co., 34 id. 134; Yale *v.* Dederer, 18 N. Y. 265; 22 N. Y. 450; Richen *v.* White, 43 Barb. 92; Rider *v.* Hulse, 33 Barb. 264; 24 N. Y. 372. It has, therefore, been necessary to refer to the matter briefly. In a few years this branch of the law will be entirely obsolete in this country.

[4] Walsh *v.* Wason, L. R. 8 Ch. 482.

[5] Parkes *v.* White, 11 Ves. 228; 2 Rop. Hus. and Wife, 151.

(*a*) Equity will give effect to antenuptial contracts between husband and wife by which either renounces rights in the present or

in equity, on the principle that a person may waive or renounce a valuable right if he pleases, and that the right of the husband to his wife's property could be renounced by him, as it was one of his privileges. Equity also permits a stranger to give and settle property upon a married woman to her sole and separate use, free from the interference and control of the husband.[1] It was at first thought to be an infringement upon marital rights for a stranger to confer property upon a wife, independent of her husband, over which he could have no control, and in which he he could have no interest. Equity has sustained these gifts of property to the wife, independent of the husband, upon the ground that the donor of the property, being the absolute owner, has the absolute right to dispose of it to such persons, and upon such conditions and limitations, not contrary to law, as he chooses; and as the husband has no rights in such property, it

[1] Anderson *v.* Anderson, 2 M. & R. 427; Davies *v.* Thornycroft, 6 Sim. 420; Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 390; Scarborough *v.* Borman, 1 Beav. 34; 4 Myl. & Cr. 377. In Massey *v.* Parker, 2 Myl. & K. 174, Lord Cottenham remarked, that property settled to the separate use of an unmarried woman vested in her husband at her marriage, and a few cases in America have seemed to countenance the remark. Lindsay *v.* Harrison, 3 Eng. 311; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Hamersley *v.* Smith, 4 Whart. 126; Miller *v.* Bingham, 1 Ired. 423; Apple *v.* Allen, 3 Jones, Eq. 342; Bridges *v.* Wilkins, id. 342; Gully *v.* Hall, 31 Miss. 20. But the great body of American cases sustain the law, as established in England by Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & C. 377; Fears *v.* Brooks, 12 Ga. 197; Robert *v.* West, 15 Ga. 123; Nix *v.* Bradley, 6 Rich. Eq. 43; Fellows *v.* Tann, 9 Ala. 1003; Shirley *v.* Shirley, 9 Paige, 363; Beauford *v.* Collier, 6 Humph. 487; Bridges *v.* Wilkins, 3 Jones, Eq. 342.

future property of the other, provided the consideration is fair and equitable. Rieger *v.* Schaible, 81 Neb. 33; Appleby *v.* Appleby, 100 Minn. 408; Bright *v.* Chapman, 105 Me. 62; Collins *v.* Bauman, 125 Ky. 846; Unger *v.* Mellinger, 43 Ind. App. 524; Colbert *v.* Rings, 231 Ill. 404; Birkbeck's Estate, 215 Pa. St. 323; Cole *v.* Society, 64 N. H. 445; *In re* Deller's Estate, 124 N. W. 278 (Wis. 1910). In case of an antenuptial release of this sort by the wife, especial care is taken to see that she has not been imposed upon and that a reasonable provision has been made for her in lieu of what she has given up. Rieger *v.* Schaible, 81 Neb. 33; Colbert *v.* Rings, 231 Ill. 404; Maze's Ex'rs *v.* Maze, 99 S. W. 336 (Ky. 1907).

is depriving him of no rights to confer none upon him. Thus it becomes a mere question of public policy, whether proprietary rights should be conferred upon a wife independent of her husband. Public policy in regard to the matter has settled down upon the propriety of conferring separate proprietary rights upon married women. Equity has taken one other step in favor of married women, which is not generally permitted in favor of men or unmarried women. In general, conditions or limitations forbidding the alienation of property by persons *sui juris* cannot be maintained; but courts of equity early sanctioned a condition or limitation of property upon married women, forbidding them to anticipate the income in any way; that is, prohibiting them in any way from selling the property or its future produce for a present sum in hand. Thus protected, a married woman may enjoy property in her own right, in such manner that neither she nor her husband, nor both together, can alienate or anticipate the income. (*a*)

§ 647. When these settlements or trusts for the separate use of married women were first established, it was supposed that a trustee was necessary,[1] but it is now determined that the interposition of an express trustee is not absolutely necessary; that if it is necessary in order to carry out the intention of the settlor to have a trustee, the husband shall be construed to take the legal title in trust for the wife, and he may be compelled to act accordingly.[2] But in order to sustain a trust for the sep-

[1] Harvey *v.* Harvey, 1 P. Wms. 125; 2 Vern. 659; Burton *v.* Pierpont, 2 P. Wms. 78; 2 Rop. Hus. and Wife, 152.

[2] Richardson *v.* Stodder, 100 Mass. 528; Wilkinson *v.* Cheatham, 45 Ala. 337; Marsh *v.* Marsh, 43 Ala. 677; Lampley *v.* Watson, id. 377; Burnett *v.* Davis, 2 P. Wms. 316; Parker *v.* Brooke, 9 Ves. 583; Rollfe *v.* Budder, Bunb. 187; Prichard *v.* Ames, T. & R. 222; Newlands *v.* Poynter, 10 Sim. 377; 4 Myl. & Cr. 408; Turnley *v.* Kelley, Wallis R. by Lyne, 311; Archer *v.* Rooke, 7 Ir. Eq. 478; Darley *v.* Darley, 3 Atk. 399; Lee *v.* Prideaux, 3 Bro. Ch. 383; Baggett *v.* Meux, 1 Phil. 627; Rich *v.* Cockell, id. 375; Gardner *v.* Gardner, 1 Gif. 129; Major *v.* Lansley, 1 R. & M. 355; Herr's App., 5

(*a*) See *infra*, §§ 670, 671, and notes.

arate use of a married woman, the intention to exclude the husband must be clear and certain, and not a matter of inference; upon this principle that the husband is bound to maintain the wife, and bear the burdens incident to marriage, and he has *prima facie* a right to her property to enable him to discharge these obligations.[1] No particular form of words is necessary to create a trust for the separate use of the married woman; but the intention to exclude the husband must be unequivocal,[2] and when the meaning is clear, the court will carry the intention into effect.[3]

Watts & S. 494; Reade *v.* Livingstone, 3 Johns. Ch. 490; Searing *v.* Searing, 9 Paige, 284; Shirley *v.* Shirley, id. 364; Pinney *v.* Fellows, 15 Vt. 536; Barron *v.* Barron, 24 Vt. 375; Grant *v.* Grant, 34 L. J. Ch. 641; Wade *v.* Fisher, 9 Rich. Eq. 362; Boykin *v.* Ciples, 2 Hill, Ch. 200; Bosken *v.* Giles, Rice, Eq. 316; Clark *v.* Makenna, Cheves, Eq. 163; Long *v.* White, 5 J. J. Marsh. 226; Trenton Banking Co. *v.* Woodruff, 1 Green, 118; Steel *v.* Steel, 1 Ired. Eq. 452; Freeman *v.* Freeman, 9 Mo. 772; Hamilton *v.* Bishop, 8 Yerg. 33; Jamison *v.* Brady, 6 Serg. & R. 466; Heck *v.* Clippenger, 5 Penn. St. 385; Fears *v.* Brooks, 12 Ga. 195. [Jones *v.* Jones, 96 Va. 749; Dezendorf *v.* Humphreys, 95 Va. 473; Holliday *v.* Hively, 198 Pa. St. 335; Armstrong *v.* Ross, 20 N. J. Eq. 109, 112; Short *v.* Battle, 52 Ala. 456.]

[1] Wills *v.* Sayers, 4 Madd. 409; Massey *v.* Parker, 2 Myl. & K. 181; Kensington *v.* Dolland, id. 188; Moore *v.* Morris, 4 Dr. 37; *Ex parte* Ray, 1 Madd. 207; Rudisell *v.* Watson, 2 Dev. Eq. 430; Ashcroft *v.* Little, 4 Ired. Eq. 236; Hunt *v.* Booth, 1 Freem. 215; Williams *v.* Clairborne, 7 Sm. & M. 488; Carroll *v.* Lee, 3 Gill & J. 505; Evans *v.* Knorr, 4 Rawle, 66; Evans *v.* Gillespie, 1 Swan, 128; Cook *v.* Kennedy, 12 Ala. 42; Moss *v.* McCall, id. 630; Pollard *v.* Merrill, 15 Ala. 170; Mitchell *v.* Gates, 23 Ala. 428; Welch *v.* Welch, 14 Ala. 76; Hale *v.* Stone, id. 803; Fears *v.* Brooks, 12 Ga. 197.

[2] Nightingale *v.* Hidden, 7 R. I. 115. [Leete *v.* Bank of St. Louis, 141 Mo. 574; Duke's Heirs *v.* Duke's Devisees, 81 Ky. 308; Wilson *v.* Bryn Mawr Tr. Co., 225 Pa. St. 139; McKenzie *v.* Sumner, 114 N. C. 425; Foster *v.* Glover, 46 S. C. 522; Bland *v.* Dawes, 17 Ch. Div. 794; *In re* Peacock's Trusts, 10 Ch. Div. 490.]

[3] Darley *v.* Darley, 3 Atk. 399; Stanton *v.* Hall, 2 R. & M. 180; Stuart *v.* Kissam, 2 Barb. 294; West *v.* West, 3 Rand. 373; Lewis *v.* Adam, 6 Leigh, 320; Perry *v.* Boileau, 10 Serg. & R. 208; Ballard *v.* Taylor, 4 Des. 550; Davis *v.* Cain, 1 Ired. Eq. 305; Heathman *v.* Hall, 3 id. 414; Hamilton *v.* Bishop, 8 Yerg. 33; Beaufort *v.* Collier, 6 Humph. 487; Somers *v.* Craig, 9 id. 467; Nixon *v.* Rose, 12 Grat. 485; Fears *v.* Brooks, 12 Ga. 195; Clark *v.* Maguire, 16 Mo. 362; Duvall *v.* Graves, 7 Bush, 461; Baal *v.* Morgner, 46 Mo. 48.

§ 648. A husband's right will not attach, if the gift is to the wife "for her sole and separate use;" [1] or "solely for her own use;" [2] or "for her livelihood;" [3] or "that she may receive and enjoy the profits;" [4] or "to be at her disposal;" [5] or "to be by her laid out in what she shall think fit;" [6] or "for her own use independent of the husband;" [7] or "not subject to his control;" [8] or "to her own use and benefit independent of any other person;" [9] or "to receive the rents while she lives, whether married or single;" [10] and not to sell or mortgage, or "her receipt to be a sufficient discharge;" [11] or "to be delivered to her on demand;" [12] or if the gift is to the husband, should he be living with his wife, but if separate, then half to the husband and the other

[1] Parker *v.* Brooke, 9 Ves. 583; Petty *v.* Booth, 19 Ala. 633; Scarborough *v.* Borman, 1 Beav. 34; 4 Myl. & Cr. 377; Archer *v.* Rooke, 7 Ir. Eq. 498.

[2] *Re* Tarsley's Trust, L. R. 1 Eq. 561; Adamson *v.* Armitage, 19 Ves. 416; Coop. 283; *Ex parte* Ray, 1 Madd. 199; *Ex parte* Killick, 3 Mont. D. & D. 480; Davis *v.* Prout, 7 Beav. 288; Arthur *v.* Arthur, 11 Ir. Eq. 511; Lindsell *v.* Thacker, 12 Sim. 178; Massey *v.* Parker, 2 Myl. & K. 181; —— *v.* Lyne, Yo. 562; Tullett *v.* Armstrong, 4 Myl. & Cr. 403; Gilbert *v.* Lewis, 1 De G., J. & S. 39; Lewis *v.* Mathews, L. R. 2 Eq. 177; Inglefield *v.* Coghlan, 2 Coll. 247; Jamison *v.* Brady, 6 Serg. & R. 466; Snyder *v.* Snyder, 10 Penn. St. 423; Fisher *v.* Filbert, 6 id. 61; Jarvis *v.* Prentice, 19 Conn. 273; Goodrum *v.* Goodrum, 8 Ired. Eq. 313; Cuthbert *v.* Rolf, 19 Ala. 373; Warren *v.* Haley, 1 Sm. & M. Ch. 647; Stuart *v.* Kissam, 3 Barb. 494; Griffith *v.* Griffith, 5 B. Mon. 113; Collins *v.* Rudolph, 19 Ala. 616.

[3] Darley *v.* Darley, 3 Atk. 399; Cape *v.* Cape, 2 Y. & C. 543; Lee *v.* Prideaux, 3 Bro. Ch. 383; Wardle *v.* Claxton, 9 Sim. 524.

[4] Tyrrell *v.* Hope, 2 Atk. 558.

[5] Prichard *v.* Ames, T. & R. 222; Kirk *v.* Paulin, 7 Vin. 96; Tyler *v.* Lake, 2 R. & M. 188; Stanton *v.* Hall, id. 180.

[6] Atcherley *v.* Vernon, 10 Mod. 531.

[7] Waggstaff *v.* Smith, 9 Ves. 520; Dixon *v.* Olmius, 2 Cox, 414; Simmons *v.* Horwood, 1 Keen, 9; Newlands *v.* Paynter, 4 Myl. & Cr. 408; Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 377.

[8] Bain *v.* Lescher, 11 Sim. 397.

[9] Margetts *v.* Barringer, 7 Sim. 482; Newman *v.* James, 12 Ala. 29; Brown *v.* Johnson, 17 Ala. 232; Gould *v.* Hill, 18 Ala. 84; Williams *v.* Maull, 20 Ala. 721; Gillespie *v.* Burleson, 28 Ala. 551; Ashcraft *v.* Little, 4 Ired. Eq. 236; Glover *v.* Hare, 16 Sim. 568.

[10] Goulder *v.* Camm, De G., F. & J. 146; 6 Jur. (N. S.) 113.

[11] Lee *v.* Prideaux, 3 Bro. Ch. 381, n., 383; Stanton *v.* Hall, 2 R. & M. 180; Tyler *v.* Lake, id. 188.

[12] Dixon *v.* Olmius, 2 Cox, 414.

half to the wife "absolutely;" [1] or "to be for her own and her family's use during her natural life;" [2] or "to be paid to her semi-annually during her life, and afterwards to her children;" [3] or "to be at her own disposal in true faith to her and her heirs forever;" [4] or "for the use and benefit of the wife and her heirs;" [5] or "for the entire use, benefit, profit, and advantage of the wife;" [6] or "not to be sold, bartered, or traded by the husband;" [7] or "for her support." [8] A conveyance by a husband in trust for his wife is for her separate use; [9] a gift to her separate use and a subsequent legacy in addition thereto are separate; [10] and so is a provision not to be liable for a husband's debts,[11] the devisee and her heirs to use and enjoy the rents,[12] "to be hers and hers only;" [13] or that her husband shall not dispose of the property without her consent; [14] or that she enjoy and receive the rents and profits.[15] A gift to the wife "exclusively" will exclude the husband.[16]

§ 649. On the other hand, it has been held that the following expressions are not so unequivocal as to afford certain evidence

[1] Shewell *v.* Dwarris, 1 Johns. (Eng.) 172; Brown *v.* Johnson, 17 Ala. 232.

[2] Heck *v.* Clippenger, 5 Penn. St. 385.

[3] Tyson's App., 10 Penn. St. 221; Heck *v.* Clippenger, 5 id. 385; Hamilton *v.* Bishop, 8 Yerg. 33; Strong *v.* Gregory, 19 Ala. 146.

[4] Bridges *v.* Wood, 4 Dana, 610.

[5] Good *v.* Harris, 2 Ired. Eq. 630.

[6] Heathman *v.* Hall, 3 Ired. Eq. 414.

[7] Woodrum *v.* Kirkpatrick, 2 Swan, 218; Clarke *v.* Windham, 12 Ala. 798.

[8] Markley *v.* Singletary, 11 Rich. Eq. 393.

[9] Steele *v.* Steele, 1 Ired. Eq. 452, is inconsistent with Wade *v.* Fisher, 9 Rich. Eq. 362. [Barnum *v.* Le Master, 110 Tenn. 638.]

[10] Warwick *v.* Hawkins, 21 L. J. Ch. 796; Davis *v.* Cain, 1 Ired. Eq. 334.

[11] Martin *v.* Bell, 9 Rich. Eq. 42; Young *v.* Young, 3 Jones, Eq. 216.

[12] Gardenhire *v.* Hinds, 1 Head. 402.

[13] Ellis *v.* Woods, 9 Rich. Eq. 19; Ozley *v.* Ikelheimer, 26 Ala. 332.

[14] Johnes *v.* Lockhart, 3 Bro. Ch. 383, n.

[15] Tyrrell *v.* Hope, 2 Atk. 561; Atcherley *v.* Vernon, 10 Mod. 531; Goulder *v.* Camm, 1 De G., F. & J. 146.

[16] Gould *v.* Hill, 18 Ala. 84.

of an intention to exclude the husband from all control: "In trust to pay to her;" [1] or "to her and her assigns;" [2] or "to her use;" [3] or "to her own use;" [4] or to "her absolute use;" [5] or "to her heirs and assigns for her or their own sole use;" [6] or "to pay into her own proper hands for her own use;" [7] or "to pay to her to be applied to the maintenance of herself, and such child as the testator might happen to leave at his death;" [8] or "for the joint use of the husband and wife;" [9] or "the gift not to extend to any other person;" [10] or "to her and the heirs of her body, and to them alone;" [11] or "to A. during her life, and after her death to her issue;" [12] or "to her use and benefit;" [13] for maintenance and support; [14] or "not to be liable for the husband's debts." [15] The mere gift to a trustee is not enough; [16] nor a mere direction to pay the income to the wife; [17] nor a bond to

[1] Dakins *v.* Berisford, 1 Ch. Cas. 194; Lumb *v.* Milnes, 5 Ves. 517; Brown *v.* Clarke, 3 Ves. 166; Stanton *v.* Hall, 2 R. & M. 175; Beales *v.* Spencer, 2 N. C. C. 65.

[2] Ibid.

[3] Jacobs *v.* Amyatt, 1 Madd. 376, n.; Wills *v.* Sayers, 4 id. 411; Anon. cited 7 Vin. 96; Torbett *v.* Twining, 1 Yeates, 432; Tenant *v.* Stoney, 1 Rich. Eq. 222.

[4] Johnes *v.* Lockhart, 3 Bro. Ch. 383, n.; Wills *v.* Sayers, 4 Madd. 409; Roberts *v.* Spicer, 5 Madd. 491; Beales *v.* Spencer, 2 Y. & C. Ch. 651; Darcy *v.* Croft, 9 Ir. Eq. 19.

[5] Rycroft *v.* Christy, 3 Beav. 328; *Ex parte* Abbott, 1 Deacon, 338.

[6] Lewis *v.* Mathews, L. R. 2 Eq. 177; Rudisell *v.* Watson, 2 Dev. Eq. 430; Houston *v.* Embry, 1 Sneed, 480.

[7] Tyler *v.* Lake, 2 R. & M. 183; Kensington *v.* Dolland, 2 Myl. & K. 184; Blacklow *v.* Laws, 2 Hare, 48; Hartley *v.* Hurle, 5 Ves. 545, *contra.*

[8] Wardle *v.* Claxton, 9 Sim. 524; Chipchase *v.* Simpson, 16 Sim. 485.

[9] Bender *v.* Reynolds, 12 Ala. 446; Geyer *v.* Branch Bank, 21 Ala. 414.

[10] Ashcroft *v.* Little, 4 Ired. Eq. 236.

[11] Foster *v.* Kerr, 4 Rich. Eq. 390; Clevestine's App., 15 Penn. St. 499.

[12] Bryan *v.* Duncan, 11 Ga. 67.

[13] Fears *v.* Brooks, 12 Ga. 198; Clevestine's App., 15 Penn. St. 499.

[14] Austin *v.* Austin, 4 Ch. D. 233; Cape *v.* Cape, 2 Y. & C. Ex. 543.

[15] Gillespie *v.* Burlison, 28 Ala. 551. *Contra* are Martin *v.* Bell, 9 Rich. Eq. 42; Young *v.* Young, 3 Jones, Eq. 266.

[16] Williams *v.* Maull, 20 Ala. 727; Hunt *v.* Booth, 1 Freem. Ch. 215; Mayberry *v.* Neely, 5 Humph. 339; Evans *v.* Knorr, 4 Rawle, 66; Welch *v.* Welch, 14 Ala. 77; Pollard *v.* Merrill, 15 Ala. 170.

[17] Fitch *v.* Ayer, 2 Conn. 143.

convey to the wife;[1] nor a conveyance to a wife and her heirs.[2] A direct devise to a widow to her sole use and benefit is not enough;[3] nor a gift to a wife only.[4]

§ 650. The authorities in the several States, and even in the same State, are conflicting with each other, as to what words are sufficient, and what are not sufficient, to create a separate use in a married woman. It is wholly a matter of intention to be gathered from the whole instrument; therefore the context may compel the court to give a different meaning to the same words; or, rather, the court may be compelled to draw different conclusions of fact from the same words in different wills, the burden always being upon those who attempt to exclude the husband to show that such is the necessary intention of the instrument. In one case it was said that the expressions which create a separate estate may be arranged in three classes: (1) Where the technical words "sole and separate use" or equivalent words are used; (2) Where the marital rights of the husband are expressly excluded; (3) Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the disabilities of coverture.[5]

§ 651. The trust must be for the benefit of the wife, exclusive of all other persons; for if the gift is to trustees for the benefit of the wife and her husband, or of the wife and her children, or of the wife and any other person or persons, the marital rights of the husband will not be excluded; although the terms of the gift are such that if the gift was to the wife alone, a separate estate would be created in her.[6] So, if the gift is to the hus-

[1] Moore *v.* Jones, 13 Ala. 296.

[2] Hall *v.* Sayre, 10 B. Mon. 46; Fitch *v.* Ayer, 2 Conn. 143; Shirley *v.* Shirley, 9 Paige, 364.

[3] Gilbert *v.* Lewis, 1 De G., J. & M. 38.

[4] Spirett *v.* Willows, 11 Jur. (N. S.) 70.

[5] Nix *v.* Bradley, 6 Rich. Eq. 48.

[6] Wardle *v.* Claxton. 9 Sim. 524; Ashcroft *v.* Little, 4 Ired. Eq. 236; Inge *v.* Forrester, 6 Ala. 418; Jasper *v.* Howard, 12 Ala. 652; Good *v.* Harris, 2 Ired. Eq. 630; Hamilton *v.* Bisshop, 8 Yerg. 33; Chipchase *v.* Simpson, 16

band and another as trustees for the wife, it will not be to her separate use;[1] but a gift to the husband alone, in trust for his wife, will be to her separate use.[2]

§ 652. As before said, if property is conveyed to a single woman for her sole and separate use, she has the same control of it before marriage as if it was given to her absolutely; but the limitation to her sole and separate use will take effect upon her marriage.[3] Until then, the words have no effect upon the prop-

Sim. 485; Bender *v.* Reynolds, 12 Ala. 446; Geyer *v.* Branch Bank, 2 Ala. 414; Lewis *v.* Matthews, L. R. 2 Eq. 177; Rudisell *v.* Watson, 2 Dev. Eq. 430; Houston *v.* Embry, 1 Sneed, 480. But see Heck *v.* Clippenger, 5 Penn. St. 385.

[1] *Ex parte* Bulby, 1 Glyn & Jam. 167; Kensington *v.* Dolland, 2 M. & K. 184.

[2] Ibid.; Darley *v.* Darley, 3 Atk. 399.

[3] Schaforth *v.* Ambs, 46 Mo. 114; Brandon *v.* Robinson, 18 Ves. 429; Hallett *v.* Thompson, 5 Paige, 383; Dick *v.* Pitchford, 1 Dev. & B. 480; Blackstone Bank *v.* Davis, 21 Pick. 42; Nickel *v.* Hanley, 10 Grat. 336; Tullett *v.* Armstrong, 4 M. & C. 377; Newlands *v.* Paynter, 4 M. & C. 408; Russell *v.* Dickson, 2 Dr. & War. 138; Scarborough *v.* Borman, 1 Beav. 34; Clark *v.* Wyndham, 12 Ala. 870; Miller *v.* Bingham, 1 Ired. Eq. 423; Smith *v.* Starr, 3 Whart. 62; Hammersley *v.* Smith, 4 id. 126. The proposition stated in the text is not the law of Pennsylvania, unless the trust is an active trust which requires the legal title to continue in the trustee. In that State, to create a valid trust for the sole and separate use of a woman, it is necessary that she should be married at the time, or that she should be in the immediate contemplation of a marriage. This rule is supposed to follow from the doctrine laid down in Lancaster *v.* Dolan, 1 Rawle, 231. It was first expressly decided in Smith *v.* Starr, 3 Whart. 63, and is now the established rule. See Hammersley *v.* Smith, 4 Whart. 129; McBride *v.* Smyth, 54 Penn. St. 250; Yarnall's App., 70 id. 339; Ogden's App., id. 501; Snyder's App., 92 id. 504. The case of Smith *v.* Starr was based upon Massey *v.* Parker, 2 Myl. & K. 174; and although Massey *v.* Parker was soon overruled (see Tullett *v.* Armstrong, 4 Myl. & Cr. 174; 1 Beav. 1), the doctrine of the case, after considerable litigation and some variety of decisions, has become the settled law of that State. See Dodson *v.* Ball, 60 Penn. St. 492; Frevogle *v.* Hughes, 54 id. 228; Hepburn's App., 65 id. 472; Megargee *v.* Naglee, 64 id. 216; Springer *v.* Arundell, id. 218; Shonk *v.* Brown, 61 id. 325; Pickering *v.* Coates, 10 Phila. (Pa.) 65. [Kuntzleman's Estate, 136 Pa. St. 142; Quin's Estate, 144 Pa. St. 444; Wells *v.* McCall, 64 Pa. St. 207; Hays *v.* Leonard, 155 Pa. St. 474; MacConnell *v.* Lindsay, 131 Pa. St. 476.] It follows from this rule, that if a trust is created for a *feme sole* not in contemplation of marriage, the property vests at once in her,

erty. Where the conveyance is directly to a single woman to her separate use without a trustee, the husband becomes her trustee on marriage.[1] But if a fund is given to a married woman for her separate use without a trustee, and her husband dies, and she sells the fund, and converts it into other property, and marries again, her husband will take it in the ordinary manner at common law.[2] Thus property conveyed to a married woman to her sole and separate use becomes absolutely hers, and may be sold by her as soon as her husband dies, or creditors may seize it for her debts.[3]

or she may call for a conveyance at once, provided the trust is not otherwise an active one. And even if she is married after the creation of the trust, but did not contemplate a marriage at the time of its creation, she may still call for a conveyance of the property. So if her husband dies the trust ceases, although well created in the first instance, and does not revive upon a second marriage. Wells *v.* McCall, 64 Penn. St. 207; Megargee *v.* Naglee, id. 216; Frevogle *v.* Hughes, 56 id. 230. It need not appear, however, upon the face of the will or settlement, that the trust for a *feme sole* is created in contemplation of her marriage, if the fact can be shown in any reasonable manner, and that it was known to the testator or settlor. Wells *v.* McCall, 64 Penn. St. 207; Springer *v.* Arundell, id. 218. See §§ 310, 310 *a*, and cases cited. See also, upon the general subject, Potts's App., 30 Penn. St. 168; Dubs *v.* Dubs, 31 id. 149; Lyne's Ex'rs *v.* Crouse, 1 id. 111; Wallace *v.* Coston, 9 Wall. 137; Snyder *v.* Snyder, 10 Penn. St. 423; Harrison *v.* Brolaakey, 20 id. 302; Farie's App., 23 id. 30; Van Rensselaer *v.* Dunkin, 24 id. 252; Talbot *v.* Calvert, id. 328; Nice's App. 49 id. 148; Tassey's Trust, L. R. 1 Eq. 561; Scarborough *v.* Borman, 4 Myl. & Cr. 392; Beable *v.* Dodd, 1 T. R. 193; Anderson *v.* Anderson, 2 Myl. & Cr. 427; —— *v.* Lyne, Younge, 562; Newton *v.* Reid, 4 Sim. 1; Woodmeston *v.* Walker, 2 R. & M. 187; Brown *v.* Pocock, id. 218; Barton *v.* Briscoe, Jac. 603; Jones *v.* Salter, 2 R. & M. 208; Davies *v.* Thornycroft, 6 Sim. 420. A deed of trust made by a young woman within a year before her marriage held to be in contemplation of her marriage. Ash *v.* Bowen, 10 Phila. 96. (*a*)

[1] Ibid.; Archer *v.* Rooke, 7 Ir. Eq. 478.

[2] Ibid.; Wright *v.* Wright, 2 John. & H. 647; Spicer *v.* Dawson, 5 W. R. 431; Mayd *v.* Field, 3 Ch. D. 587.

[3] Ibid. See all the cases before cited to this section. Barton *v.* Briscoe,

(*a*) In Kuntzleman's Estate, 136 Pa. St. 142, it was said that a trust for the sole and separate use of a woman not married or contemplating marriage will not be kept alive by the fact that active duties have been given to the trustee, unless it appears that these duties were intended to be irrespective of coverture.

§ 653. If property is settled to the separate use of a woman, and the separate use is *intended* to be confined to a particular marriage, and the husband dies, and the widow marries again, the second husband will take his common-law rights in the property.[1] So if property is settled on a married woman for her separate use, independent of her husband, "B.," and "B." dies, and the widow marries again, her second husband will take his common-law rights over the property.[2] But if the separate use is plainly intended by the instrument to extend to all future marriages, the intent will be carried into effect, so long as it can be applied to the property, and to all the income, whether in arrears or not at the time of the marriage.[3] Whether the separate use shall continue through several marriages is wholly a matter of intention. (*a*) There was at one time a disposition to confine it to the first or present coverture; for, the moment the first husband is dead, the widow has an absolute power of disposal, and it was thought that, if a husband took a wife with such powers over her property, he must take his common-law rights over it;[4] but it is now established, that, if the property is clearly settled to the separate use of a

Jac. 603; Jones *v.* Salter, 2 R. & M. 208; Woodmeston *v.* Walker, id. 197; Parker *v.* Converse, 5 Gray, 336; Megargee *v.* Naglee, 64 Penn. St. 216; William's App., 83 id. 377–395.

[1] Barton *v.* Briscoe, Jac. 603; Benson *v.* Benson, 6 Sim. 126; Knight *v.* Knight, id. 121; Jones *v.* Salter, 2 R. & M. 208; Moore *v.* Harris, 4 Dr. 33; Tudor *v.* Samyne, 2 Vern. 270; Turner's Case, 1 Ch. Cas. 307; 1 Vern. 7; Saunders *v.* Page, 3 Ch. R. 224; Pitt *v.* Hunt, 1 Vern. 18; Howard *v.* Hooker, 2 Ch. R. 81; Edmonds *v.* Dennington, cited 2 Vern. 17.

[2] Moore *v.* Harris, 4 Dr. 33.

[3] Ashton *v.* McDougall, 5 Beav. 56; *Re* Gaffee, 7 Hare, 101; 1 Mac. & G. 541.

[4] Hammersley *v.* Smith, 4 Whart. 126; Lindsay *v.* Harrison, 3 Eng. 311; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Miller *v.* Bingham, 1 Ired. Eq. 423; Massey *v.* Parker, 2 M. & K. 174; Smith *v.* Starr, 3 Whart. 62. See Harrison *v.* Brolaskey, 20 Penn. St. 299; Steacy *v.* Rice, 27 id. 75; Clarke *v.* Wyndham, 12 Ala. 800.

(*a*) See Winchester *v.* Machen, 75 Md. 538; Duke's Heirs *v.* Duke's Devisees, 81 Ky. 308.

woman, such separate use will attach so often as she may be married.[1] (*a*)

§ 654. A married woman may deal with property settled to her separate use precisely as she could deal with it if she were a single woman, and without the concurrence of the trustees, unless the power of anticipation is restrained, and unless there are provisions in the instrument of settlement preventing her.[2] Lord Thurlow said that "a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*."[3] But she will be protected against fraud, and the improper influence of her husband.[4] Therefore a married woman may sue and be sued in regard to her separate property.[5] She may obtain an order to answer separately as a defendant,[6] and she may be served with process by leave of court if out of the jurisdiction.[7] She may present a petition with or without her husband;[8] and she will be bound by her submission in her bill,[9] or answer,[10] or by a settlement of ac-

[1] Roberts *v.* West, 15 Ga. 123; Gaffee's Trust, 1 Mac. & Gor. 541, overruling 7 Hare, 101; Beaufort *v.* Collier, 6 Humph. 487; Shirley *v.* Shirley, 9 Paige, 364; Waters *v.* Tazewell, 9 Md. 291; Tullett *v.* Armstrong, 1 Beav. 1; 4 Myl. & Cr. 377; Scarborough *v.* Borman, 1 Beav. 34. See § 652, and notes. [Robinson *v.* Randolph, 21 Fla. 629, 645.]

[2] Grigby *v.* Cox, 1 Ves. 518; Dowling *v.* Maguire, Plunket, 19; Essex *v.* Atkins, 14 Ves. 552; Coryell *v.* Dunton, 7 Penn. St. 532.

[3] Hulme *v.* Tenant, 1 Bro. Ch. 20; 1 Lead. Cas. Eq. 398, and notes.

[4] Knight *v.* Knight, 11 Jur. (N. S.) 618.

[5] Jackson *v.* Haworth, 1 S. & S. 161; Thompson *v.* Beaseley, Eq. R. 59. [See the statutes of the various States.]

[6] Ibid. But if she answer separately, without leave of the court, her answer will be quashed. Perine *v.* Swaine, 1 Johns. Ch. 24; see Ferguson *v.* Smith, 2 id. 139.

[7] Copperthwaite *v.* Tuite, 13 Ir. Eq. 68.

[8] *Re* Crump, 34 Beav. 570.

[9] Allen *v.* Papworth, 1 Ves. 163.

[10] Clerk *v.* Miller, 2 Atk. 379; Bailey *v.* Jackson, C. P. Cooper, 495; Cowdery *v.* Way, Lewin on Trusts, 541 (5th ed.); Callow *v.* Howle, 1 De G. & Sm. 531; Beeching *v.* Morphew, 8 Hare, 120; Clive *v.* Carew, 1 John. & H. 207.

(*a*) The law is otherwise in Pennsylvania. See notes, *supra*, § 652.

counts,[1] or by a contract of sale,[2] and she may be made a contributor in the winding-up order of a corporation;[3] her declarations may be read in evidence against her,[4] and she will be liable to attachment for want of an answer when she answers separately,[5] or for disobeying the orders of the court;[6] or her separate property may be ordered to be sequestered.[7] But in all proceedings in equity in relation to the wife's separate estate, the husband ought to be made a defendant, especially if he claims any interest, or any of his acts are in question.[8]

§ 655. In England a married woman, being considered a woman in relation to her separate property,[9] may exercise all the rights incident to the ownership of property, unless her power is restricted by the instrument of conveyance; therefore, if personal property is simply given to her separate use, she may sell the same as if she were single.[10] In New Jersey,[11] Connecti-

[1] Wilton *v.* Hill, 25 L. J. Ch. 156.

[2] Davidson *v.* Gardner, Sugd. V. & P. 891 (11th ed.); Stead *v.* Nelson, 2 Beav. 248; Harris *v.* Mott, 14 id. 169; Vansittart *v.* Vansittart, 4 K. & J. 70; Milnes *v.* Busk, 2 Ves. Jr. 498.

[3] *Re* Leeds Banking Co., 1 W. N. 361.

[4] Peacock *v.* Monk, 2 Ves. 193.

[5] Graham *v.* Fitch, 2 De G. & Sm. 246; Taylor *v.* Taylor, 12 Beav. 271; Home *v.* Patrick, 30 id. 405.

[6] Ottway *v.* Wing, 12 Sim. 90.

[7] Keogh *v.* Cathcart, 11 Ir. Eq. 280.

[8] Thorby *v.* Yates, 1 Y. & Coll. Ch. 438; Bradley *v.* Emerson, 7 Vt. 369; Clarkson *v.* De Peyster, 3 Paige, 336; Dewall *v.* Covenhoven, 5 id. 581; Grout *v.* Van Schoonhoven, 9 id. 255; Stuart *v.* Kissam, 2 Barb. S. C. 493; Sherman *v.* Burnham, 6 Barb. 403; Wilson *v.* Wilson, 6 Ired. Eq. 236.

[9] Hulme *v.* Tenant, 1 Bro. Ch. 21; 1 Lead. Cas. Eq. 398; Socket *v.* Wray, 4 Bro. Ch. 486; Peacock *v.* Monk, 2 Ves. 190; Pybus *v.* Smith, 4 Bro. Ch. 346; Lillia *v.* Airey, 1 Ves. Jr. 278; Wagstaff *v.* Smith, 9 Ves. 524; Witts *v.* Dawkins, 12 Ves. 501; Sturgis *v.* Corp, 13 Ves. 190.

[10] Fettiplace *v.* Gorges, 3 Bro. Ch. 10. [See Married Women's Property Act of 1882, 45 & 46 Vict. c. 75.]

[11] Leaycraft *v.* Hedden, 3 Green, Ch. 512.

cut,[1] Kentucky,[2] Virginia,[3] North Carolina,[4] Alabama,[5] Georgia,[6] Missouri,[7] the same rule is followed. (*a*) But if a particular mode of dealing with her separate personal estate is prescribed in the instrument of settlement, and particular powers are given to her to be exercised, and alienation is forbidden, either in express or implied terms, she cannot deal with the estate, except in the manner pointed out, and she cannot sell in any other or different manner,[8] even by proceedings in court.[9] This rule is followed in all the American States, with this further addition in some of the States, that, unless the power of alienation is given to her in the instrument of settlement, she cannot sell the personal estate at all; for the reason that she, as a married woman, can exercise no powers not conferred upon her by the gift, and the mere gift of personal property to her sole and separate use does not in express terms, nor by necessary implication,

[1] Imlay *v.* Huntington, 20 Conn. 175; Dunlap *v.* Plumb, 8 Conn. 447; Leavitt *v.* Beirne, 21 Conn. 1; Wells *v.* Thorman, 37 Conn. 319.

[2] Coleman *v.* Woolley, 10 B. Mon. 320; Shipp *v.* Bowmar, 5 id. 163. [See Brain *v.* Bailey, 82 S. W. 582 (Ky. 1904).]

[3] Vizoneau *v.* Pegram, 2 Leigh, 183. [Price *v.* Planters' Nat. Bank, 92 Va. 468; Chapman *v.* Price, 83 Va. 392; Kiracofe *v.* Kiracofe, 93 Va. 591; Jones *v.* Jones, 96 Va. 749; Averett *v.* Lipscombe, 76 Va. 404.]

[4] Newlin *v.* Freeman, 4 Ired. Eq. 312. [See *contra* Kirby *v.* Boyette, 118 N. C. 244; Monroe *v.* Trenholm, 112 N. C. 634; 114 N. C. 590.]

[5] Bradford *v.* Greenway, 17 Ala. 805; Collins *v.* Lavenberg, 19 Ala. 685.

[6] Fears *v.* Brooks, 12 Ga. 200; Wylly *v.* Collins, 9 Ga. 223.

[7] Coats *v.* Robinson, 10 Mo. 757; Kirwin *v.* Weippert, 46 Mo. 532. [Ryland *v.* Banks, 151 Mo. 1; Cadematori *v.* Gauger, 160 Mo. 352.]

[8] Ross *v.* Ewer, 2 Atk. 156; Croft *v.* Slee, 4 Ves. 60; Anderson *v.* Dawson, 15 Ves. 532; Hopkins *v.* Myall, 2 R. & M. 86; Albany Ins. Co. *v.* Bay, 4 Comst. 9; Fears *v.* Brooks, 12 Ga. 200; Leaycraft *v.* Hedden, 3 Green, Ch. 512; Williamson *v.* Beckham, 8 Leigh, 20.

[9] Richards *v.* Chambers, 10 Ves. 580.

(*a*) For decisions to the same effect in other States, see Zeust *v.* Staffan, 14 App. D. C. 200, 215; Phillips *v.* Graves, 20 Ohio St. 371; Cooke *v.* Husbands, 11 Md. 492, 503; Ives *v.* Harris, 7 R. I. 413; Webster *v.* Helm, 93 Tenn. 322; Bank *v.* Lumber Co., 100 Tenn. 479; Martin *v.* Fort, 83 Fed. 19; Hughes *v.* Hamilton, 19 W. Va. 366; Witzell *v.* Charleston, 7 S. C. 88 (*semble*). See Gray, Restraints on Alienation (2d ed.), § 275 a, *et seq.*

confer upon her the power of acting as a single woman, and of selling the same. This is the law in Pennsylvania,[1] South Carolina,[2] Rhode Island,[3] Maryland,[4] Mississippi,[5] and Tennessee.[6] (*a*) In New York, this limitation of a wife's power of

[1] Lancaster *v.* Dolan, 1 Rawle, 236. [Holliday *v.* Hively, 198 Pa. St. 335; Lewis *v.* Bryce, 187 Pa. St. 362; Wilson *v.* Bryn Mawr Tr. Co., 225 Pa. St. 139.]

[2] Dunn *v.* Dunn, 1 S. C. 350; Ewen *v.* Smith, 3 Des. 417; Reid *v.* Lamar, 1 Strob. Eq. 27; Calhoun *v.* Calhoun, 2 Strob. 231; Porcher *v.* Reid, 12 Rich. Eq. 349; Nix *v.* Bradly, 6 id. 53. [But see Witsell *v.* Charleston, 7 S. C. 88.]

[3] Metcalf *v.* Cook, 2 R. I. 355. [Overruled by Ives *v.* Harris, 7 R. I. 413, 425.]

[4] Miller *v.* Williamson, 5 Md. 219; Tarr *v.* Williams, 4 Md. Ch. 68. [Overruled by Cooke *v.* Husbands, 11 Md. 492, 503.]

[5] Doty *v.* Mitchell, 9 Sm. & M. 435.

[6] Marshall *v.* Stephens, 8 Humph. 159; Litton *v.* Baldwin, id. 209; Young *v.* Young, 7 Cold. 461; Sherman *v.* Turpin, id. 382. [Now settled otherwise in Tennessee: Webster *v.* Helm, 93 Tenn. 322; Martin *v.* Fort, 83 Fed. 19; Shannon's Code (1896), § 4246.]

(*a*) In North Carolina the same rule seems to have been adopted as in Pennsylvania: *viz.*, that the right to alienate or incumber is not an incident of the equitable separate estate unless the instrument creating the estate expressly or by implication provides that the owner shall have such right. Kirby *v.* Boyette, 118 N. C. 244; Monroe *v.* Treholm, 112 N. C. 634; 114 N. C. 590. The only other State wherein this rule now prevails seems to be Pennsylvania. See Gray, Restraints on Alienation (2d ed.), § 275 a, *et seq.*

In Pennsylvania it is held that the statutes giving a married woman the powers of a *feme sole* over her separate property do not apply to property in which she has only an equitable separate estate during coverture. In regard to such property the rule remains that she has no other power to dispose or incumber than has been given her by the instrument creating her separate estate. Holliday *v.* Hively, 198 Pa. St. 335; MacConnell *v.* Lindsay, 131 Pa. St. 476; Hays *v.* Leonard, 155 Pa. St. 474; Lewis *v.* Bryce, 187 Pa. St. 362; Wilson *v.* Bryn Mawr Tr. Co., 225 Pa. St. 139.

In South Carolina, on the other hand, since the enactment of a provision in the constitution giving married women power to alienate their separate property, a settlement creating an equitable separate estate without mentioning alienation or anticipation has been construed to give the same powers of alienation as have been given by statute over statutory separate estate. Witsell *v.* Charleston, 7 S. C. 88.

Probably in no State would the

selling was first established by Chancellor Kent;[1] but he was overruled, and the English doctrine, that a wife may sell her separate personal property, unless prohibited, has prevailed.[2] In States where the English rule prevails, if a power is given to a married woman to be exercised in relation to her separate personal property, and the absolute interest is given to her in default of her exercise of the power, she may decline to exercise the power, and thereby acquire the right to sell the property as a single woman.[3] Where a wife disposes of her separate property in trust, under a power contained in the instrument, the trustee must see to it that the power is executed as it is given; for if a married woman should dispose of the property in a manner not authorized by the power, and the trustee should part with the fund, he would be liable to replace it.[4]

§ 656. Where real estate is conveyed, either absolutely to the separate use of a married woman, or to a trustee for her absolute separate use, she can sell and dispose of it only in the manner provided by law. She must execute and acknowledge a deed. In most States it is provided by law that a married woman shall not convey her real estate without the consent of her husband in writing, for the reason that the husband is entitled to his curtesy in both the legal and equitable real estate of the wife, though conveyed to her separate use.[5] But in those States

[1] Methodist Church *v.* Jaques, 3 Johns. Ch. 78.

[2] Methodist Church *v.* Jaques, 17 Johns. 548, overruling 3 Johns. Ch. 78; Dyett *v.* Coal Co., 20 Wend. 570.

[3] Elton *v.* Shepherd, 1 Bro. Ch. 532; Anderson *v.* Dawson, 15 Ves. 532; Barford *v.* Street, 16 Ves. 135; Barrymore *v.* Ellis, 8 Sim. 1; 2 Rop. Hus. and Wife, 230.

[4] Hopkins *v.* Myall, 2 R. & M. 86; Mant *v.* Leith, 15 Beav. 526; McClintic *v.* Ochiltree, 4 W. Va. 249.

[5] Peacock *v.* Monk, 2 Ves. 192; Dillon *v.* Grace, 2 Sch. & L. 462; Wright

separate property statutes have the effect of removing or making invalid a restraint upon the power of alienation imposed by the settlement itself either before or after the enactment of the statute. Fields *v.* Gwynn, 19 App. D. C. 99; Bolitho *v.* Gidley, [1905] A. C. 98; Musson *v.* Trigg, 51 Miss. 172. See Phillips *v.* Graves, 20 Ohio St. 371, 388; Miller *v.* Newton, 23 Cal. 554.

where a wife may sell personal estate which is limited to her separate use, she may sell the income of real estate which is limited in the same manner; for the rents and profits may be disposed of without an express power, in the same manner as her personal estate.[1] So if an annuity, charged on land, is given to her separate use, she may sell it.[2] If a power of sale is given to her in the same instrument that conveys real estate to her separate use, she may exercise the power in the manner pointed out in the settlement, with or without the consent of her husband;[3] and equity compels her to execute such power, if she has for a valuable consideration entered into a contract to do so.[4]

§ 657. Intimately connected with the right of a married woman to dispose of her separate estate, is the right or power of such *feme covert* to contract debts, and charge her separate estate, either by specific agreements in relation to it, or by general engagements. In England, the courts have determined that if a married woman, having property to her separate use, binds herself by a written instrument to pay a sum of money, the implication of law is, that she intended to charge her separate estate, although she makes no reference, direct or indirect, to such separate estate; for, otherwise, the instrument is without meaning and nugatory, she having no power to make such an

v. Cadogan, 2 Eden, 257; Amb. 468; 2 Rop. Hus. and Wife, 185; 2 Story, Eq. Jur. § 138; Shipp *v.* Bowmar, 5 B. Mon. 163. But in New York a married woman may convey any interest in her lands without joining her husband, and it seems without acknowledging the deed; it being in the nature of an appointment. Albany Fire Ins. Co. *v.* Bay, 4 Comst. 9; Lechmere *v.* Brotheridge, 32 Beav. 353; Taylor *v.* Meads, 34 L. J. (N. S.) Ch. 203; 11 Jur. (N. S.) 166; Adams *v.* Gamble, 11 Ir. Eq. 269; 12 id. 103; Hall *v.* Waterhouse, id. 361; *Ex parte* Shirley, 5 Bing. 226; Harris *v.* Mott, 14 Beav. 169; Taylor *v.* Meads, 11 Jur. (N. S.) 166; 4 De G., J. & S. 597.

[1] Vizoneau *v.* Pegram, 2 Leigh, 183.

[2] Major *v.* Lansley, 2 R. & M. 355.

[3] Rippon *v.* Dawding, Amb. 565; Rich *v.* Beaumont, 3 Bro. P .C. 308; Tomlinson *v.* Dighton, 1 P. Wms. 149; Peacock *v.* Monk, 2 Ves. 191; Downes *v.* Timperon, 4 Rus. 334; Wright *v.* Cadogan, 2 Eden, 239. [Armstrong *v.* Kerns, 61 Md. 364; Antonini *v.* Straub, 130 Ky. 10.]

[4] Dowell *v.* Dew, 12 L. J. (N. S.) Ch. 158; 1 Y. & C. Ch. 345; 7 Jur. 117.

instrument except as a charge upon her separate estate. (*a*) Therefore, if a married woman executes a bond,[1] even to her husband,[2] or joins her husband or other person in executing a bond,[3] or signs a promissory note,[4] or bill of exchange,[5] or takes a lease agreeing to pay rent,[6] or gives a written retainer to a solicitor,[7] or if she enters into a written contract to purchase an estate,[8] her separate estate will be bound to make good her contract, and it may be reached by proper proceedings, though she is not liable personally;[9] and it is not necessary that her contract should refer to her separate estate, or that the other party should know that she was a married woman.[10] Where a single woman signed a bond, and afterwards property was settled upon her at marriage, to her separate use, the holder of the bond filed his bill to have the bond paid out of her separate estate, and, the husband having absconded, the decree was made.[11]

[1] Lillia *v.* Airey, 1 Ves. Jr. 277; Norton *v.* Turvill, 2 P. Wms. 144; Peacock *v.* Monk, 2 Ves. 193; Tullett *v.* Armstrong, 4 Beav. 323.

[2] Heatley *v.* Thomas, 15 Ves. 596.

[3] Ibid.; Stanford *v.* Marshall, 2 Atk. 68; Hulme *v.* Tenant, 1 Bro. Ch. 20; 1 Lead. Cas. Eq. 398, notes.

[4] Bullpin *v.* Clarke, 17 Ves. 365; Field *v.* Sowle, 4 Russ. 112; Tullett *v.* Armstrong, 4 Beav. 323; Fitzgibbon *v.* Blake, 3 Ir. Eq. 328.

[5] Ibid.; Stuart *v.* Kirkwall, 3 Madd. 387; Coppin *v.* Gray, 1 Y. & C. Ch. 205; Owen *v.* Homan, 4 H. L. Cas. 997.

[6] Gaston *v.* Frankum, 2 De G. & Sm. 561; 16 Jur. 507; Master *v.* Fuller, 4 Bro. Ch. 19; 1 Ves. Jr. 513.

[7] Murray *v.* Barlee, 4 Sim. 82; 3 Myl. & K. 209. But if the business relates to her husband's affairs, or to her children's, and not to her separate estate, her mere employment of a solicitor will not create a charge against her estate. Callow *v.* Howle, 1 De G. & Sm. 531; *Re* Pugh, 17 Beav. 336.

[8] Dowling *v.* Maguire, Llo. & Goo. t. Plunket, 1; but see Chester *v.* Platt Sugd. V. & P. 173.

[9] Syke's Trust, 2 John. & Hem. 415; Croft *v.* Middleton, 2 K. & J. 194; 2 Jur. (N. S.) 528.

[10] Dowling *v.* Maguire, Llo. & Goo. t. Plunket, 1.

[11] Briscoe *v.* Kennedy, cited 1 Bro. Ch. 17.

(*a*) This rule has been incorporated into statute. Married Women's Property Act of 1893, 56 & 57 Vict. c. 63.

§ 658. The principles upon which the general contracts of married women have been held to create charges or liabilities to be answered out of their separate estates have been the subject of much controversy and discussion. Thus it was held by high authority, that every dealing of a married woman in relation to her separate estate must be in the nature of an appointment, or a disposition; and that a married woman cannot enter into general contracts, and therefore she cannot bind her separate estate by general engagements.[1] It is now, however, well established in England, that a married woman may contract in relation to her separate estate, and that her contracts are not in the nature of appointments, or sales of her separate estate.[2] If a married woman can charge her separate estate only by some contract in the nature of an appointment, then a *written* instrument is necessary to constitute a valid appointment; but if the general contracts of a married woman are valid contracts to be paid out of her separate estate, then there is no distinction in principle between *written* and *verbal* contracts in that respect; and it is now substantially settled that the *verbal* contracts of a married woman are equally binding upon her separate estate.[3] But a parol contract will not bind a married woman where the statute of frauds requires it to be in writing;[4] nor is the enforcement of the general engagement of a married woman, out of her separate estate, in the nature of a proceeding for the specific performance of a contract.[5]

[1] Bolton *v.* Williams, 2 Ves. Jr. 142; Whistler *v.* Newman, 4 Ves. 145; Greatly *v.* Noble, 3 Madd. 94; Stuart *v.* Kirkwell, id. 389; Aguilar *v.* Aguilar, 5 Madd. 418; Field *v.* Sowle, 4 Russ. 114; Chester *v.* Platt, Sugd. V. & P. 173 (13th ed.); Murray *v.* Barlee, 4 Sim. 82; Digby *v.* Irving, 6 Ir. Eq. 149.

[2] Owen *v.* Dickenson, 1 Cr. & Phil. 53; Dowling *v.* Maguire, Plunket, 19; Master *v.* Fuller, 4 Bro. Ch. 19; Stead *v.* Nelson, 2 Beav. 245; Bailey *v.* Jackson, C. P. Coop. 495; Francis *v.* Wigzell, 1 Madd. 261; Crosby *v.* Church, 3 Beav. 489; Tullett *v.* Armstrong, 4 Beav. 323.

[3] Murray *v.* Barlee, 3 M. & K. 223; Clinton *v.* Willes, 1 Sugd. Pow. 208, n.; Owens *v.* Dickenson, 1 Cr. & Phil. 53; Vaughn *v.* Vanderstegen, 2 Dr. 183; Wright *v.* Chard, 4 Dr. 673; Newcomen *v.* Hassard, 1 Ir. Eq. 274; Blatchford *v.* Woolley, 2 Dr. & Sm. 204; Shattock *v.* Shattock, L. R. 2 Eq. 182.

[4] Syke's Trust, 2 John. & H. 415.

[5] In Burke *v.* Tuite, 10 Ir. Eq. 467, it was held that contracts of a wife

§ 659. But while the general engagements of a married woman are not in the nature of appointments of her separate estate, yet in making those engagements the married woman must have a general intention that such contracts shall be satisfied out of her separate estate, or they cannot be enforced against either her or her property. Thus the torts of a married woman cannot be satisfied out of her separate property, because there can be no intention to create a charge upon her estate. So where there is no contract that implies such an intention, there can be no proceeding against her separate estate. Thus, where an annuity was charged on her separate estate, and was set aside for non-compliance with some rule of law, it was held that the purchase-money of the annuity could not be recovered back out of her separate estate, because it had never been in the contemplation of either party that the purchase-money should be paid back, and, as there was no contract, there could have been no intention of charging her separate estate.[1] And where a married woman had received money, claiming it as her own, it could not be recovered back from her separate estate; for there had never been an intention of paying it back at all.[2] It is difficult to reconcile all the English authorities. The common-law principle is, that a married woman can make no valid or binding contract. This principle is recognized in equity; and all the cases hold that a married woman can make no contract valid and binding upon herself personally; consequently that no judgment or decree can be made against her personally: that her contracts can be satisfied only out of her property, and that they can be satisfied out of her property only when she contracts upon the faith and credit of her separate

not in writing could not be satisfied out of her real estate, because such a contract created an interest in land. This would be so if the contract was in the nature of an appointment. And see Shattock *v.* Shattock, L. R. 2 Eq. 192; Johnson *v.* Gallagher, 3 De G., F. & J. 514.

[1] Jones *v.* Harris, 9 Ves. 486; Aguilar *v.* Aguilar, 5 Madd. 414; Bolton *v.* Williams, 4 Bro. Ch. 297; 2 Ves. Jr. 138; Johnson *v.* Gallagher, 3 De G., F. & J. 494; Shattock *v.* Shattock, L. R. 2 Eq. 182; Callow *v.* Howle, 1 De G. & Sm. 531.

[2] Wright *v.* Chard, 4 Dr. 673.

property. The whole position is anomalous, and has been produced by the conflicting practices of courts of law and courts of equity.[1] Lord Justice Turner stated the true principles, thus far established, as follows: "In order to bind her separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith and credit of that estate; and the question whether it was so or not is to be judged of by the court, upon all the circumstances of the case." [2]

§ 660. It is thus established in England, that a wife's general contracts may be satisfied out of her separate estate, if they were entered into with reference to, or upon the faith and credit of, such estate; and that the contract of a married woman, being a nullity unless made with reference to her separate estate, will be presumed by the court, unless something else appears, to be made in reference to her separate estate, and therefore binding upon it.[3] (*a*) This rule has been sanctioned and adopted in the States of Connecticut,[4] Maryland,[5] Alabama,[6] Kentucky,[7]

[1] Vice-Chancellor Kindersley considers the law in a transition state, and not yet established clearly in all points; and says, "that the tendency is, having put a married woman in the position of a single woman in relation to her separate property, to carry that position to its fullest extent, short of making her personally responsible." Wright *v.* Chard, 4 Dr. 685.

[2] Johnson *v.* Gallagher, 3 De G., F. & J. 515, approved in Leeds Banking Co., 12 Jur. (N. S.) 984.

[3] *Ante*, §§ 657–659.

[4] Imlay *v.* Huntington, 20 Conn. 149; Wells *v.* Thorman, 37 Conn. 319; Donald *v.* Plumb, 8 Conn. 447; Leavitt *v.* Beirne, 21 Conn. 1. [See § 661, note *a*.]

[5] Chew *v.* Beall, 13 Md. 348; Cook *v.* Husbands, 11 Md. 492. The early cases, Tarr *v.* Williams, 4 Md. Ch. 68; Williams *v.* Donaldson, id. 414; and Miller *v.* Williamson, 5 Md. 219, were the other way; but the last case, 11 Md. 492, seems to establish the English rule. Jackson *v.* West, 22 Md. 21. [See § 661, note *a*.]

[6] Ozley *v.* Ikelheimer, 26 Ala. 382; Forrest *v.* Robinson, 4 Porter, 44; Saddler *v.* Houston, id. 208; Bradford *v.* Greenway, 17 Ala. 797; Puryear *v.* Beard, 14 Ala. 122; Puryear *v.* Puryear, 16 Ala. 486; Collins *v.* Lavenberg, 19 Ala. 682; Sprague *v.* Tyson, 44 Ala. 338. [See § 661, note *a*.]

[7] Bell *v.* Kellar, 13 B. Mon. 381; Lillard *v.* Turner, 16 id. 374; Coleman

(*a*) By the Married Women's Property Act of 1893 (56 & 57 Vict. c. 63), it was provided that contracts of a married woman

North Carolina,[1] Missouri,[2] Florida,[3] and Georgia.[4] In New York, Chancellor Kent held that a married woman is not to all intents and purposes a single woman in regard to her separate estate, but only so far as the instrument of settlement or trust makes her a single woman; and instead of holding that she has the full power of a single woman over her separate estate, unless restrained by the instrument of trust, the distinguished chancellor held that she has no power unless it is specially given; that her incapacity is the general rule, and the exception is to be strictly shown in every case.[5] But this doctrine was overruled on appeal;[6] and a modified rule has been acted upon, which concedes the power of the married woman to contract debts to be satisfied out of her separate estate, unless restrained by the instrument of conveyance, but limits her power to a power of contracting in relation to her separate estate, or for the benefit of such estate, or for her own personal benefit upon

v. Woolley, 10 id. 320; Jarmon *v.* Wilkinson, 7 id. 293. In Burch *v.* Breckenridge, 16 B. Mon. 482, it was held that the general contract of a married woman could not be enforced against her separate real estate, unless it was in writing. Long *v.* White, 5 J. J. Marsh. 226. Now altered by Rev. Stat. c. 47, § 17; Daniel *v.* Robinson, 18 B. Mon. 301; Williamson *v.* Williamson, id. 329–385; Stocker *v.* Whitlock, 3 Met. 244; Hanly *v.* Downing, 4 Met. 95. [See § 661, note *a*.]

[1] Harris *v.* Harris, 7 Ired. Eq. 311; Frazier *v.* Brownlow, 3 id. 237; Newlin *v.* Freeman, 4 id. 312.

[2] Whitesides *v.* Carman, 23 Mo. 457; Segond *v.* Garland, id. 547; Coats *v.* Robinson, 10 Mo. 757; Claflin *v.* Van Wagoner, 30 Mo. 252.

[3] Lewis *v.* Yale, 4 Fla. 418. [Prentiss *v.* Paisley, 25 Fla. 927.]

[4] Wylly *v.* Collins, 9 Ga. 223; Roberts *v.* West, 15 Ga. 123; Fears *v.* Brooks, 12 Ga. 195; Weeks *v.* Sego, 9 Ga. 201. [See § 661, note *a*.]

[5] Methodist Church *v.* Jaques, 3 Johns. Ch. 78.

[6] Cases cited in last note; 17 Johns. 548–585; Dyett *v.* Coal Co., 7 Paige, 9; 20 Wend. 570; Powell *v.* Murray, 2 Edw. Ch. 636; Wadham *v.* Society, &c., 2 Kern. 415; Albany Ins. Co. *v.* Bay, 4 Comst. 9; Cruger *v.* Cruger, 5 Barb. 227; 10 Barb. 597.

should be deemed entered into with respect to her separate property and should bind it even though she should not be possessed of any at the time. Her contract obligations are enforceable against after acquired separate property.

the faith and credit of such estate.[1] By this rule her general engagements, which have no reference at the time to her separate estate, or to her own benefit, cannot be enforced against such separate property.[2] In Virginia, the weight of authority seems to be in favor of the English rule.[3] (*a*) In Vermont, the rule is substantially the same as the doctrine followed in New York.[4] In Wisconsin, the rule is substantially the same as in New York.[5] And so in New Jersey.[6]

§ 661. In Pennsylvania, the doctrine held by Chancellor Kent, in the case of Methodist Church *v.* Jaques, has been fully adopted and firmly settled by the courts. By the practice in that State, a married woman cannot sell, convey, alienate, or in any way charge her separate estate, unless such power is expressly given to her in the deed of trust or settlement. Therefore no contract made by her, whether it is a general engagement by bond, note, or bill of exchange, or a special contract in relation to her separate estate, is valid, and it cannot be enforced

[1] Ibid.; Gardner *v.* Gardner, 7 Paige, 112; Cumming *v.* Williamson, 1 Sandf. 17; Dickerman *v.* Abrahams, 21 Barb. 551; Coon *v.* Brook, id. 546.

[2] Curtis *v.* Engel, 2 Sand. 287; Knowles *v.* McCamley, 10 Paige, 343; Vanderheyden *v.* Mallory, 3 Barb. Ch. 10; 1 Comst. 453; Yale *v.* Dederer, 18 N. Y. 265; 22 N. Y. 456, overruling s. c. 21 Barb. 286; L'Amoureux *v.* Van Rensselaer, 1 Barb. Ch. 34; Rogers *v.* Ludlow, 3 Sand. 104; Corn Exchange *v.* Babcock, 57 Barb. 222, 231; Heywood *v.* City of Buffalo, 14 N. Y. 540; Barnett *v.* Lichtenstein, 39 Barb. 194; Kelso *v.* Tabor, 52 Barb. 125; White *v.* McNutt, 33 N. Y. 371; Noyes *v.* Blakeman, 3 Sand. 531.

[3] Nixon *v.* Rose, 12 Grat. 425; Woodson *v.* Perkins, 5 id. 346. But Tucker, P., in Williamson *v.* Beekman, 8 Leigh, 20, expressed a different opinion. [Price *v.* Planters' Bank, 92 Va. 468; Crockett *v.* Doriot, 85 Va. 240.]

[4] Frary *v.* Booth, 37 Vt. 78; Partridge *v.* Stocker, 36 Vt. 108. [See § 661, note *a*.]

[5] Todd *v.* Lee, 15 Wis. 365; 16 Wis. 480. [See Breed *v.* Breed, 125 Wis. 100; Stack *v.* Padden, 111 Wis. 42; Nelson *v.* McDonald, 80 Wis. 605.]

[6] Perkins *v.* Elliott, 23 N. J. Eq. 526. [See § 661, note *a*.]

(*a*) By a statute enacted in 1900, a married woman in Virginia may now contract generally as if *sole* and may be sued upon her contracts without proof that they were made in reference to her separate estate. Young *v.* Hart, 101 Va. 480.

in any manner.[1] In South Carolina, in the case of Ewing v. Smith,[2] the English rule was at first established; but the decision in that case was reversed, and the rule, as held in Pennsylvania, was laid down and is now steadily acted on.[3] But a contract, whether made by the wife or trustee, for the protection, preservation, or benefit of the trust estate, or in furtherance of the purposes of the trust, can be enforced.[4] The rule, as held in Pennsylvania and South Carolina, is also held in Rhode Island,[5] Tennessee,[6] and Mississippi.[7] In New Hampshire, her separate estate is not bound by a general engagement,[8] nor is it in Massachusetts.[9] (*a*)

[1] Lancaster *v.* Dolan, 1 Rawle, 231; Lyne *v.* Crouse, 1 Penn. St. 111; Rogers *v.* Smith, 4 id. 93; Thomas *v.* Folwell, 2 Whart. 11; Dorance *v.* Scott, 3 Whart. 309; Wallace *v.* Coston, 9 Watts, 137. [Purdon's Digest Pa. Stat. (13th ed.), p. 2454; Holliday *v.* Hively, 198 Pa. St. 335; Lewis *v.* Brice, 187 Pa. St. 362; Hays *v.* Leonard, 155 Pa. St. 474; MacConnell *v.* Lindsay, 131 Pa. St. 476.]

[2] Ewing *v.* Smith, 3 Des. 417.

[3] Ibid.; Frazier *v.* Center, 1 McCord, Ch. 270; Magwood *v.* Johnston, 1 Hill, Ch. 228; Robinson *v.* Dart, Dudl. Eq. 128; Clark *v.* Makenna, Cheves, Eq. 163; Reid *v.* Lamar, 1 Strob. Eq. 27; Rachell *v.* Tompkins, id. 114; Adams *v.* Mackey, 6 Rich. Eq. 75; Mayer *v.* Galluchat, id. 1; Brown *v.* Postall, 4 Rich. Eq. 71. [See note *a*.]

[4] Cater *v.* Eveleigh, 4 Des. 19; James *v.* Mayrant, id. 591; Montgomery *v.* Eveleigh, 1 McCord, 267; Magwood *v.* Johnston, 1 Hill, Ch. 228; Clark *v.* Makenna, Cheves, Eq. 163; Reid *v.* Lamar, 1 Strob. Eq. 27; Rachell *v.* Tompkins, id. 114; Adams *v.* Mackey, 6 Rich. Eq. 75.

[5] Metcalf *v.* Cook, 2 R. I. 355. [But see Ives *v.* Harris, 7 R. I. 413, 425.]

[6] Ware *v.* Sharp, 1 Swan, 489; Morgan *v.* Elam, 4 Yerg. 375; Marshall *v.* Stevens, 8 Humph. 159; Litton *v.* Baldwin, id. 209. [See note *a*.]

[7] Armstrong *v.* Stobal, 26 Miss. 275; Dotey *v.* Mitchell, 9 Sm. & M. 435; Montgomery *v.* Agricultural Bank, 10 Sm. & M. 567; Dickson *v.* Miller, 11 id. 594; Prewett *v.* Land, 36 Miss. 495.

[8] Bailey *v.* Pearson, 29 N. H. 77. [See note *a*.]

[9] Willard *v.* Eastman, 15 Gray, 328; Rogers *v.* Ward, 8 Allen, 388. [Under R. L. (1902), c. 153, giving her full power to contract except with her husband and to sue and be sued as if *sole*, her separate estate is liable.]

(*a*) In many States this question has become practically obsolete by reason of the enactment of statutes enabling married women to bind themselves personally by their contracts, whether relating to their separate property or not. Without attempting to deal comprehensively with the statute law upon this point, it seems sufficient to

§ 662. No action at law can be maintained upon her contracts against a married woman personally, although she is en-

note that of the States mentioned in the two preceding sections, the following have given to married women such power to contract that it seems no longer necessary to consider whether or not their contracts relate or refer to their separate estate: Alabama, Connecticut, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, South Carolina, Vermont, Virginia. See also the statutes of West Virginia. See Middleborough Nat. Bank *v.* Cole, 191 Mass. 168; Iona Sav. Bank *v.* Boynton, 69 N. H. 77; Sticken *v.* Schmidt, 64 Ohio St. 354; Commonwealth *v.* Abbott, 168 Mass. 471; Young *v.* Hart, 101 Va. 480; Williamson *v.* Cline, 40 W. Va. 194.

The effect of such statutes, whether specifically referring to the separate property of married women or not, seems to be that her equitable separate estate stands on the same basis as other property held in trust for her; and her creditor usually has a means of reaching and applying such an interest in the absence of valid restraints on alienation or anticipation. Where, however, as is true in some States, her power to contract is limited to contracts with reference to her separate estate, the question is still a live one, and the decisions show some difference of opinion as to the effect of her general engagements which do not in terms purport to bind her separate property. Thus in Nebraska it has been held that there is no presumption that a married woman's contract was in reference to her separate estate, and a person seeking to recover from her has the burden of proving this. Grand Island Banking Co. *v.* Wright, 53 Neb. 574; State Nat. Bank *v.* Smith, 55 Neb. 54. See also Bank of Commerce *v.* Baldwin, 12 Idaho, 202; Dismukes *v.* Shafer, 54 S. W. 671 (Tenn. 1899); Breed *v.* Breed, 125 Wis. 100; Stack *v.* Padden, 111 Wis. 42; Nelson *v.* McDonald, 80 Wis. 605; Mercantile Nat. Bank *v.* Benbow, 150 N. C. 781; Barlow *v.* Delany, 36 Fed. 577; 40 Fed. 97. In Virginia, on the other hand, it used to be presumed that her general engagements were intended to bind her separate property, if she had any at the time. Price *v.* Planters' Nat. Bank, 92 Va. 468; Crockett *v.* Doriot, 85 Va. 240. But the Virginia statute of 1900 has given her full capacity to contract generally. Young *v.* Hart, 101 Va. 480.

In States where her capacity to contract is limited to contracts binding her separate estate, she is not bound at all unless she was possessed of separate estate at the time of her contract, Crockett *v.* Doriot, 85 Va. 240; Parratt *v.* Hartsuff, 75 Neb. 706, 711; McKell *v.* Merchants Bank, 62 Neb. 608; Kocher *v.* Cornell, 59 Neb. 315; Megraw *v.* Woods, 93 Mo. App. 647; Ankeney *v.* Hannon, 147 U. S. 118; even in the face of a signed statement by her that the contract is for the benefit of her separate

titled to the benficial interests of property in trust for her sole and separate use; nor can a bill in equity be filed against a married woman as a sole defendant in order to make her personally liable. There is no case in which a court has made a personal decree against a married woman. She may make her separate property answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is sought against her, the bill cannot be sustained.[1] But the party claiming a debt must file a bill against her and *her trustees*, and must pray payment of his demand out of her personal estate in the hands of trustees, to which she is absolutely entitled, and also out of the income of her real estate, including *arrears* of rent and accruing interest or rents, if there is no clause against anticipation, until the claim and costs have been satisfied.[2] The death of the husband, either before or while the suit is

[1] Sir T. Plumer, in Francis *v.* Wigzell, 1 Madd. 262.

[2] Hulme *v.* Tenant, 1 Bro. Ch. 20; Stanford *v.* Marshall, 2 Atk. 68; Murray *v.* Barlee, 4 Sim. 82; 3 M. & K. 209; Field *v.* Sowle, 4 Russ. 112; Nantes *v.* Corrock, 9 Ves. 182; Jones *v.* Harris, id. 492; Bullpin *v.* Clarke, 17 Ves. 365; Stuart *v.* Kirkwall, 3 Madd. 387; Robertson *v.* Johnson, 36 Ala. 197.

estate. Ritter *v.* Bruss, 116 Wis. 55.

A provision in her contract expressly binding her separate estate is usually effective for the purpose, even when the consideration of the contract was not for her own benefit. Bain *v.* Buff's Adm'r, 76 Va. 371; Finch *v.* Marks, 76 Va. 207; Bank *v.* Lumber Co., 100 Tenn. 479; Merrell *v.* Purdy, 129 Wis. 331. But see Feather *v.* Feather's Estate, 116 Mich. 384; Whelpley *v.* Stoughton, 112 Mich. 594. This, however, involves her power to alienate her separate estate, and in Pennsylvania and North Carolina she could not charge her equitable separate estate in this manner unless she had been given the power of alienation. *Supra*, § 655.

In view of the many statutes fixing the property rights and the liabilities of married women upon their contracts and torts, especially since the terms of these statutes are not uniform and in many States are doubtless transitory, it does not seem wise to multiply citations upon this topic. The effect of legislation has usually been to do away with the necessity of equitable separate estates, and, except as regards restraints on alienation, trusts for the separate use of a married woman do not differ essentially from other trusts.

§ 662. No action at law ... change its character; for all contracts against a married ... puts an end to the separate ... and perfect right of dealing ... contracts were made while she ... judgments or decrees can ever be entered ... at law such contracts have no validity, ... husband does not give them a validity ... otherwise have.[1] Determined cases go thus ... general engagements of the wife operate upon her ... property, and upon the rents and profits of her real ... trustees are obliged to apply her personal estate, ... profits of real estate when they arise, to the ... such general engagements; but courts do not ... processes against the separate estate of the wife, ... manner of reaching her separate property is by decree ... the trustees to apply the personal estate in their hands, ... rents and profits of the real estate, according to the ... of the engagement to be carried into effect. There is ... case where the remedy against the wife has been carried to ... extent of decreeing that the trustees shall sell or mortgage ... separate real estate to raise money to meet her general engagements.[2] But Mr. Lewin thinks that if the instrument of trust is so worded as to place the entire interest and inheritance of the real estate at her disposal, the general engagements of the wife may bind the whole *corpus* of the real estate, whether *corpus* or *income*.[3] In all proceedings to enforce the general engagements of a married woman upon her separate property, it must be remembered that such engagements are enforced in equity, not because a married woman can make a valid contract in law or equity, but because in justice and equity a married

[1] Field *v.* Sowle, 4 Russ. 112; Heatly *v.* Thomas, 15 Ves. 596; Kenge *v.* Delavell, 1 Vern. 326.

[2] *Per* Lord Thurlow in Hulme *v.* Tenant, 1 Bro. Ch. 20; Broughton *v.* James, 1 Coll. 26; Nantes *v.* Carrock, 9 Ves. 189. [See Price *v.* Planters' Nat. Bank, 92 Va. 468; Patton *v.* Merchants' Bank, 12 W. Va. 587.]

[3] Lewin on Trusts, 548, 552.

man's honest engagements ought to be answered.[1] Of course propositions of this section apply only in those States where the English doctrine prevails. They have no application in those States where a married woman can make no charge upon her separate estate not specially authorized in the instrument of settlement.

§ 663. Two conflicting principles are struggling in the courts: one is, that the engagements of the wife are charges on her separate property, equivalent to so many assignments or appointments, to be satisfied out of her separate property in the order of their date;[2] the other is, that the wife's general contracts are not charges, but create a liability, the remedy for which, if the woman is single, is against the person; but if she is married, there is no remedy against the person, but the law gives an equitable execution against her separate property. On this last principle, which is the one generally adopted, her separate property is liable, *pari passu*, as assets.[3] The remedy being wholly equitable, the statute of limitations does not apply to a proceeding against the separate property of the married woman;[4] and in case the nature of the property is such that the legal title to it cannot be reached by a legal execution, the equitable interest cannot be reached by a decree in equity.[5] Thus if there has been a *bona fide* assignment, or conveyance, or mortgage to a purchaser,[6] or if there is a clause in the settlement against anticipation,[7] the equitable execution cannot reach the property. Nor can charges after her decease be imposed upon her separate estate; and as a husband is bound to bury his wife,

[1] Cummins *v.* Sharpe, 21 Ind. 331; Pentz *v.* Simonson, 13 N. J. Eq. 232; Glass *v.* Warwick, 40 Pa. St. 140. But see Maclay *v.* Love, 25 Cal. 367; Hanly *v.* Downing, 4 Met. (Ky.) 95. [Fletcher *v.* Brainerd, 75 Vt. 300.]

[2] Shattock *v.* Shattock, L. R. 2 Eq. 182.

[3] Anon., 18 Ves. 258; Johnson *v.* Gallagher, 3 De G., F. & J. 520.

[4] Norton *v.* Turville, 2 P. Wms. 144; Vaughan *v.* Walker, 6 Ir. Ch. 471; 8 id. 458.

[5] Nantes *v.* Carrock, 9 Ves. 182.

[6] Johnson *v.* Gallagher, 3 De G., F. & J. 520.

[7] Murray *v.* Barlee, 4 Sim. 95.

it would seem that her separate estate could not be made liable for her funeral expenses.[1]

§ 664. The savings and accumulations by a married woman, out of her separate estate, are governed by the same rules as the separate estate itself, as "the sprout is to savor of the root and go the same way."[2] The same rule applies to the savings out of an allowance for maintenance on separation.[3] But savings out of money given by the husband to the wife for household and personal purposes belong to the husband.[4]

§ 665. If the husband and wife live together, and the husband receives from the trustees the income of the wife's separate estate, the wife or her representatives cannot claim to recover from the husband, or his estate, more than one year's income.[5] Whether one year's income can be recovered or not is a matter of great conflict of opinion and authority in England. There are many cases that hold that one year's income can be recovered,[6] and as many that it cannot.[7] Mr. Lewin says, that the

[1] Gregory *v.* Lockyer, 6 Madd. 90. [It is otherwise in some States under statute. Schneider *v.* Breier, 129 Wis. 446; Constantinides *v.* Walsh, 146 Mass. 281; Morrissey *v.* Mulhern, 168 Mass. 412.]

[2] Gore *v.* Knight, 2 Vern. 535; Malony *v.* Kennedy, 19 Sim. 254; Humpherey *v.* Richards, 2 Jur. (N. S.) 432; Barron *v.* Barron, 24 Vt. 375; Churchill *v.* Dibben, 9 Sim. 447, n.; 2 Kenyon, 85; Messenger *v.* Clarke, 5 Exch. 392; Merritt *v.* Lyon, 3 Barb. 110; Hoot *v.* Sorrell, 11 Ala. 386; Kee *v.* Vasser, 2 Ired. Eq. 553; Gentry *v.* McReynolds, 12 Mo. 533; Yardley *v.* Raub, 5 Whart. 123; Towers *v.* Hagner, 3 id. 57; Young *v.* Jones, 9 Humph. 551; Rush *v.* Vought, 55 Penn. St. 437; Rogers *v.* Fales, 5 id. 104; Miller *v.* Williams, 5 Md. 226, 236.

[3] Brooke *v.* Brooke, 25 Beav. 347; Messenger *v.* Clarke, 5 Exch. 388.

[4] Barrack *v.* M'Cullock, 3 K. & J. 114; Mews *v.* Mews, 15 Beav. 529.

[5] Payne *v.* Little, 26 Beav. 1; *Ex parte* Elder, 2 Madd. 286, n.; Brodie *v.* Barry, 2 Ves. & B. 36; Rowley *v.* Unwin, 2 K. & J. 138.

[6] Powell *v.* Hankey, 2 P. Wms. 82; Fowler *v.* Fowler, 3 id. 353; Squire *v.* Dean, 4 Bro. Ch. 325; Smith *v.* Camelford, 2 Ves. Jr. 716; Arthur *v.* Arthur, 11 Ir. Eq. 511.

[7] Burdon *v.* Burdon, 2 Madd. 286; Warwick *v.* Edwards, 1 Eq. Cas. Ab. 170; Thomas *v.* Bennett, 2 P. Wms. 341; Townshend *v.* Wyndham, 2 Ves. 7; Peacock *v.* Monk, id. 190; Aston *v.* Aston, 1 Ves. 267; Parker *v.* White, 11 Ves. 225; Brodie *v.* Barry, 2 Ves. & B. 36; Thrubb *v.* Harman,

better opinion is, independent of authority, that the wife can recover nothing; and he pertinently asks if she could recover anything of the trustees on the ground of a misapplication of the income. The principle is, that the court presumes the consent of the wife to the husband's receipt *de anno in annum*, and the wife's assent is presumed to continue until revoked by something expressed or implied.[1] If, therefore, the wife did not in fact consent, but required the separate income to be paid to herself, the court will give her the arrears out of her husband's estate, back to the time of her dissent.[2] But the court will not pay any attention to idle complaints not seriously insisted upon, but will demand very clear evidence of an earnest and persistent claim on the part of the wife.[3] If the income has not come to the hands of the husband, but is still in the hands of a receiver, the acquiescence of the wife will not be presumed, and it will belong to her.[4] If the wife is insane or incapable of assenting, the husband's estate must account for the whole income received by him; but his estate will be allowed in equity for payments made for his wife's benefit which ought to have fallen upon her separate estate.[5] And the court may order the income of an insane woman's estate to be applied to her support where her husband is in indigent circumstances.[6] But there is a distinction between a married woman's separate estate and *pin-money* allowed to a wife for her personal use and

3 M. & K. 513; Lea *v.* Grundy, 1 Jur. (N. S.) 953; Corbally *v.* Grainger, 4 Ir. Eq. 173; Mackey *v.* Maturin, 15 Ir. Eq. 150; Howard *v.* Digby, 2 Cl. & Fin. 643; 4 Sim. 601; Arthur *v.* Arthur, 11 Ir. Eq. 513; Beresford *v.* Armagh, 13 L. J. (N. S.) Ch. 235; Caton *v.* Rideout, 1 Mac. & G. 519; 2 H. & Tw. 55.

[1] Lewin on Trusts, 550; Caton *v.* Rideout, 2 H. & Tw. 41; McGlinsey's App., 14 S. & R. 64; Towers *v.* Hagner, 3 Whart. 48; Naglee *v.* Ingersoll, 7 Penn. St. 204; Yardley *v.* Raub, 5 Whart. 123; Methodist Church *v.* Jaques, 3 Johns. Ch. 77.

[2] Ridout *v.* Lewis, 1 Atk. 269; Moore *v.* Moore, 2 Atk. 272; Moore *v.* Scarborough, 2 Eq. Cas. Ab. 156; Parker *v.* Brooke, 9 Ves. 583.

[3] Thrupp *v.* Harman, 3 M. & K. 512; Corbally *v.* Grainger, 4 Ir. Eq. 173.

[4] Foss *v.* Foss, 15 Ir. Ch. R. 215.

[5] Att. Gen. *v.* Parnther, 3 Bro. Ch. 441; 4 Brock. 409; Howard *v.* Digby, 2 Cl. & Fin. 671; Nettleship *v.* Nettleship, 10 Sim. 236.

[6] Erisman *v.* Directors of the Poor, 47 Penn. St. 509.

ornament, and it has been held that there can be no claim upon the husband or his estate for any arrearages in such an allowance.[1] So there can be no claim upon his estate if the will directs the income to be paid to him.[2]

§ 666. If a husband receives the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him, but he is *prima facie* a trustee for her, and a gift from her to him will not be presumed without clear evidence;[3] and if he undertakes to act as trustee for his wife to invest her money, he will be held responsible as a stranger;[4] but if the husband uses the property in his business, or for the support of his family, with her knowledge and assent, a gift may be inferred in the absence of a contrary agreement.[5] But if there is an express agreement that the goods, furniture, or other property into which the wife's separate estate is converted by the husband, shall remain the property of the wife, her interest continues, and will be protected by the law;[6] or if the property still stands in the name of the trustee.[7] The mere concurrence of the wife in the receipt of a legacy by the husband, given to her separate use, is not a gift to him.[8]

§ 667. Where the absolute beneficial interest in the trust fund is given to the separate use of a married woman, without any restriction or direction as to the mode of possession or enjoyment, or in such manner that the statute of uses would exe-

[1] Howard *v.* Digby, 2 Cl. & Fin. 634; 4 Sim. 588; 8 Bligh, N. P. 224; Aston *v.* Aston, 1 Ves. 267; Fowler *v.* Fowler, 3 P. Wms. 355; Barrack *v.* M'Cullock, 3 K. & J. 110; Miller *v.* Williams, 5 Md. 219, 231.

[2] Maston *v.* Barnard, 33 Ga. 520.

[3] Rich *v.* Cockell, 9 Ves. 369; Lamprey *v.* Watson, 43 Ala. 377; Marsh *v.* Marsh, id. 677.

[4] Walker *v.* Walker, 9 Wall. 753.

[5] Gardner *v.* Gardner, 1 Gif. 126; McGlinsey's App., 14 S. & R. 64; Shirley *v.* Shirley, 9 Paige, 363.

[6] Taggard *v.* Talcott, 2 Edw. 628; Shirley *v.* Shirley, 9 Paige, 363; Ashworth *v.* Outram, 5 Ch. D. 923.

[7] Yardley *v.* Raub, 5 Whart. 117.

[8] Rowe *v.* Rowe, 2 De G. & Sm. 294; 12 Jur. 909.

cute the use or title in her, if it was real estate, she is entitled to call upon the trustees for an immediate conveyance or transfer of the legal title to her; and if they refuse, they will be decreed to convey with costs.[1] It is immaterial that the trust was created while she was single; for marriage has no effect upon her separate estate in that respect.[2] So where the absolute beneficial interest is subject to the control and alienation of the wife, the concurrence of the trustee is not necessary to the validity of an alienation by her, unless it is made requisite by the terms of the trust.[3] The trustees will be compelled to give legal effect to any such alienation by transferring the property,[4] even if it is a gift and transfer to the husband, or for his benefit;[5] for a direct gift to the husband himself will be sustained if not made under the improper or undue influence of the husband.[6] The court will investigate the circumstances under which a gift is made to the husband; and if there appear to be any suspicious circumstances attending the gift, the court will refuse to carry it into effect.[7] If a married woman pledges or mortgages her separate estate for her husband's debts, she is entitled to all the rights of a surety against him, and to security for her liability out of his estate.[8] The wife cannot consent to

[1] Thorby *v.* Yeats, 1 Y. & Coll. Ch. 438; Taylor *v.* Glanville, 3 Madd. 179.

[2] Ibid.

[3] Grigby *v.* Cox, 1 Ves. 518; Essex *v.* Atkins, 14 Ves. 552; Corgell *v.* Dunton, 7 Barr, 532. [Ryland *v.* Banks, 151 Mo. 1; Brain *v.* Bailey, 82 S. W. 582 (Ky. 1904). See Monroe *v.* Trenholm, 112 N. C. 634; 114 N. C. 590.]

[4] Marrick *v.* Grice, 3 Nev. 52.

[5] Stanford *v.* Marshall, 2 Atk. 69; Parker *v.* White, 11 Ves. 209; Essex *v.* Atkins, 14 Ves. 542; Hughes *v.* Wells, 9 Hare, 749.

[6] Freeman *v.* Moore, 1 Bro. P. C. 237; Frederic *v.* Hatwell, 1 Cox, 193; Parker *v.* White, 11 Ves. 209; Dallam *v.* Wampole, 1 Pet. C. C. 116; Nedby *v.* Nedby, 5 De G. & S. 377; Jaques *v.* Methodist Church, 17 Johns. 548; Whitall *v.* Clark, 2 Edw. Ch. 149; Cruger *v.* Cruger, 5 Barb. 225; Hoover *v.* Samaritan Soc., 4 Whart. 445; Merriam *v.* Harsen, 2 Barb. Ch. 232; Woodward *v.* Woodward, 3 De G., J. & Sm. 672; Green *v.* Carlil, 4 Ch. D. 882.

[7] Pybus *v.* Smith, 1 Ves. Jr. 189; Nedby *v.* Nedby, 5 De G. & S. 577.

[8] Hudson *v.* Carmichael, 23 L. J. Ch. 893; Sheidle *v.* Weishlee, 16 Penn.

a loan to the husband in the future: her consent must accompany the act.[1] If a trustee mortgage an estate for the purchase-money at the same time that he takes a legal title in trust, it will be a valid transaction.[2]

§ 668. A married woman has full power to dispose of her separate estate by will, or appointment in the nature of a will, unless restrained by the instrument of trust;[3] and her absolute equitable interests will be disposed of as directed in the will. And she may revoke her will.[4] Where the power to dispose of her estate is given to her by will, she need not refer to such will in her own will.[5] The usual course of administration will be observed in regard to such estates.[6] If she dies without disposing of her separate estate, her husband will take her equitable personal estate, in the same manner as he takes her legal personal estate. If administration is necessary to reach any part of her personal estate, he is entitled to administration, and will take the property to his own use; or if another person is appointed administrator, such administrator must pay over the proceeds to the husband on final settlement.[7]

St. 134; Neimawicz *v.* Gahn, 3 Paige, 614; Knight *v.* Whitehead, 26 Miss. 246.

[1] Child *v.* Child, 20 Beav. 50; Taylor *v.* Taylor, 4 Jur. (N. S.) 1218.

[2] Marrick *v.* Grice, 3 Nev. 52.

[3] Porcher *v.* Daniel, 12 Rich. Eq. 349; Fettiplace *v.* Gorges, 1 Ves. Jr. 46; Rich *v.* Cockell, 9 Ves. 369; Humphrey *v.* Richards, 2 Jur. (N. S.) 432; Moore *v.* Morris, 4 Dr. 38. [Jones *v.* Jones, 96 Va. 749; Patton *v.* Merchants' Bank, 12 W. Va. 587; Kiracofe *v.* Kiracofe, 93 Va. 591.]

[4] Hawksley *v.* Barrow, L. R. 1 P. & D. 147.

[5] Porcher *v.* Daniel, 12 Rich. Eq. 349; *In re* Gratwick's Trusts, L. R. 1 Eq. 177; Att. Gen. *v.* Wilkinson, L. R. 2 Eq. 816.

[6] Norton *v.* Turvill, 2 P. Wms. 144; Tatham *v.* Drummond, 2 Hem. & Mill. 262.

[7] Prandly *v.* Fielder, 2 M. & K. 57; Molony *v.* Kennedy, 10 Sim. 254; Bird *v.* Peagrum, 13 C. B. 639; Johnstone *v.* Lumb, 15 Sim. 308; Drury *v.* Scott, 4 Y. & C. 264; Stead *v.* Clay, 1 Sim. 204; Stewart *v.* Stewart, 7 Johns. Ch. 229; McKennan *v.* Phillips, 6 Whart. 576; Brown *v.* Brown, 6 Humph. 127; Rogers *v.* White, 1 Sneed, 60; Cox *v.* Coleman, 13 B. Mon. 453; Brown *v.* Alden, 14 id. 141; Farie's App. 23 Penn. St. 29; McCosker *v.* Golden, 1 Brad. Sur. 64.

§ 669. Where a married woman procures or induces the trustee to commit a breach of trust, which results in the loss of the fund in which she has an interest to her separate use, the court treats her act as an alienation of the estate, so far as she had power to bind it.[1] (*a*) So where a married woman, as a trustee, had wasted the trust estate, the ordinary right of retainer may be exercised against her separate estate under the *same* instrument.[2] So if she misemploys or misapplies any of the trust property, her own interests under the *same* instrument may be held to make good the loss.[3] But if there is a clause against anticipation in the instrument, no such remedy can be applied.[4]

§ 670. A married woman may be restrained by the terms of the trust from alienating or anticipating the income of her separate estate, during her present or any future coverture. The validity of such restraints is now well established.[5] The courts

[1] Crosby *v.* Church, 3 Beav. 485; Hanchett *v.* Briscoe, 22 Beav. 496. But see Whistler *v.* Newman, 4 Ves. 129, and observations of Lord Eldon on it in Parker *v.* White, 11 Ves. 223; Brewer *v.* Swirley, 2 Sm. & Gif. 219; Hughes *v.* Mills, 9 Hare, 772, 773; Mara *v.* Manning, 2 Jones & Lat. 311. [See Franklin's Appeal, 115 Pa. St. 534.]

[2] Pemberton *v.* McGill, 1 Dr. & Sm. 266.

[3] Clive *v.* Carew, 1 John. & H. 199.

[4] Ibid. [Bolton *v.* Curre, [1895] 1 Ch. 544.]

[5] Jackson *v.* Hobhouse, 2 Mer. 488; Parker *v.* White, 11 Ves. 221; Tullett *v.* Armstrong, 1 Beav. 23; 4 M. & Cr. 393; Jollands *v.* Burdett, 33 L. J. Ch. 471; 2 De G., J. & S. 79. [Bolitho & Co. *v.* Gidley, [1905] A. C. 98; *In re* Grey's Settlements, 34 Ch. Div. 712; *In re* Lumley, [1896] 2 Ch. 690; Brown *v.* Macgill, 87 Md. 161; Monday *v.* Vance, 92 Tex. 428; Gray Restraints on Alienation (2d. ed.), § 125 *et seq.* In Pennsylvania the trust must be for a woman already married, or in contemplation of immediate marriage with some definite person. See § 652, note.] Pickering *v.* Coates, 10 Phila. 65; Snyder's App., 92 Penn. St. 504. A lapse of a year between its execution and her marriage is not sufficient to defeat it. Ash *v.* Bowen, 10 Phila. 96. See § 827 *a*.

(*a*) In England the trustee or those claiming through him are not entitled to indemnity out of her beneficial interest unless it appears that she consented to the breach of trust with full understanding and that she received the benefit of it. Sawyer *v.* Sawyer, 28 Ch. Div. 595; Bolton *v.* Curre, [1895] 1 Ch. 544. See also Bahin *v.* Hughes, 31 Ch. Div. 390.

did not sustain the doctrine until the words of the restriction became so explicit that there was no escape, except in declaring such restrictions illegal.[1] Thus if the limitation is simply to her sole and separate use,[2] or to pay from time to time upon her receipt under her own proper hand,[3] or upon her personal appearance,[4] the wife is left at liberty to sell or anticipate her interest, as such expressions are only the naming of some of the incidents of the gift.[5] There are generally some negative words, as "not by anticipation," inserted in settlements, and it has been said that they are necessary;[6] but it is sufficient if an intention to restrain anticipation can be gathered from the whole instrument,[7] as where the direction is to pay to such person as the wife shall appoint after it shall become due,[8] or for her sole, separate, and *inalienable* use,[9] or where the income is declared to be unassignable,[10] or where it is to remain in her possession, and be for her special use during her natural life, and at her death to go to her children, and no other use whatever.[11] It was at one time held, that "a trust to pay the proceeds to such persons as she should appoint when they became due, but not so as to anticipate the same, and, in default of appointment, into the hands of the wife for her separate use" (but without any other words to restrain her power of anticipation), was to be so construed that if the *feme covert* assigned the life-estate, lim-

[1] Hulme *v.* Tenant, 1 Bro. Ch. 16; Pybus *v.* Smith, 3 Bro. Ch. 340; 1 Ves. Jr. 189.

[2] Ibid.

[3] Ibid.; Ellis *v.* Atkinson, 3 Bro. Ch. 565, 568; Browne *v.* Like, 14 Ves. 302; Acton *v.* White, 1 S. & S. 429; Witts *v.* Dawkins, 12 Ves. 501; Wagstaff *v.* Smith, 9 Ves. 250; Sturgis *v.* Corp, 13 Ves. 190; Scott *v.* Davis, 4 M. & Cr. 87; Hovey *v.* Blakeman, 4 Ves. 524.

[4] Ross's Trusts, 1 Sm. (N. S.) 196.

[5] Parker *v.* White, 11 Ves. 222.

[6] Brown *v.* Bamford, 11 Sim. 131; 2 Rop. Hus. and Wife, 236, 240.

[7] Ross's Trusts, 1 Sim. (N. S.) 199; Doolan *v.* Blake, 3 Ir. Eq. 349.

[8] Field *v.* Evans, 15 Sim. 375; Baker *v.* Bradley, 7 De G., M. & G. 597.

[9] D'Œchsner *v.* Scott, 24 Beav. 239; Spring *v.* Pride, 10 Jur. (N. S.) 876.

[10] Rennie *v.* Ritchie, 12 Cl. & Fin. 204. [*In re* Lavender's Policy, [1898] 1 Ir. R. 175.]

[11] Freeman *v.* Flood, 16 Ga. 528.

ited to her in default of appointment, it destroyed the power of appointment, and the restraint upon anticipation annexed to it became nugatory; that is, the restraint against alienation applied *only to the power*, and not to an anticipation in some other way.[1] But these cases were reversed on appeal, or overruled; and now the construction is, that the payment into her hands, as well as the power to appoint, was not to operate until the income became due.[2]

§ 671. The restraint against alienation or anticipation will apply to both real and personal estate, and whether the estate is in fee or for life;[3] and when it has once attached, a court of equity cannot discharge it, even where alienation would be advantageous for the wife; as, where a large legacy was given to a married woman, on condition that she disposed of a small property, settled upon her without power of alienation, it was held that the condition could not be complied with, and the legacy therefore failed.[4] (*a*) But an estate so settled is subject

[1] Barrymore *v.* Ellis, 8 Sim. 1; Brown *v.* Bamford, 11 id. 127; Medley *v.* Horton, 14 id. 222.

[2] Moore *v.* Moore, 1 Coll. 84; Harrop *v.* Howard, 3 Hare, 624; Harnett *v.* McDougall, 8 Beav. 127; Brown *v.* Bamford, 1 Phil. 620; Gaffee's Trust, 14 Jur. 277; 1 Mac. & G. 541; Field *v.* Evans, 15 Sim. 375; Baker *v.* Bradley, 7 De G., M. & G. 597; Loring *v.* Salisbury Mills, 125 Mass. 138; Kent *v.* Plumb, 57 Ga. 207.

[3] Baggett *v.* Meux, 1 Phil. 627; Gaffee's Trust, 14 Jur. 277; Freeman *v.* Flood, 16 Ga. 528.

[4] Robinson *v.* Wheelwright, 6 De G., M. & G. 535; 21 Beav. 214.

(*a*) In England this is the only exception made to the general rule that attempted restraints upon the alienation of vested interests in either income or the *corpus* of property are invalid. Stogdon *v.* Lee, [1891] 1 Q. B. 661.

Restraints upon the alienation or anticipation of the equitable separate estate of a married woman are valid and are given full effect, even when her interest is not merely in the income but extends to the entire property and is fully vested. *In re* Currey, 32 Ch. Div. 361; *In re* Grey's Settlements, 34 Ch. Div. 712; Bolitho *v.* Gidley, [1905] A. C. 98. See also Barnett *v.* Howard, [1900] 2 Q. B. 784; Brown *v.* Dimbleby, [1904] 1 K. B. 28; *In re* Wheeler's Settlement, [1899] 2 Ch. 717. This is true in the case of real estate even when no trustee has been interposed. *Re*

to paramount equities, as for raising costs of a suit which may enable the court to direct a sale.[1] A widow after her husband's

[1] Fleming *v.* Armstrong, 34 Beav. 109, or in case of a divorce under the English statute. 22 & 23 Vict. c. 61, § 5; Pratt *v.* Jenner, 1 W. N. 265.

Hutchings, 58 L. T. 6. In case of personalty there is an obvious practical difficulty if the beneficiary herself is to have possession and control of the property; but if the property is to be held by a trustee, restraints upon her power to alienate or charge her equitable interest are valid and effectual. See *In re* Bown, 27 Ch. Div. 411; *In re* Ellis' Trusts, 17 Eq. 409; *In re* Benton, 19 Ch. Div. 277; *In re* Clarke's Trusts, 21 Ch. Div. 748; *In re* Croughton's Trusts, 8 Ch. Div. 460; *In re* Currey, 32 Ch. Div. 361.

The restraint will be given effect only during coverture, *In re* Wheeler's Settlement, [1899] 2 Ch. 717; Monroe *v.* Trenholm, 112 N. C. 634, 114 N. C. 590 (*semble*); and in respect to her obligations incurred during coverture. Barnett *v.* Howard, [1900] 2 Q. B. 784; Brown *v.* Dimbleby, [1904], 1 K. B. 28; Braunstein *v.* Lewis, 64 L. T. 265. She cannot lose or get rid of the protection of the restraint by her admissions or by estoppel. Bateman *v.* Faber, [1898] 1 Ch. 144. And she does not lose her right to property settled to her separate use without power of anticipation, by breach of her covenant to bring after acquired property into the settlement. *In re* Vardon's Trusts, 31 Ch. Div. 275.

The American courts seem to give effect to restraints on alienation of the equitable separate property of married women to the same extent as the English courts, although there are not many decisions involving the validity of restraints on their interest in the *corpus* of the property. Fields *v.* Gwynn, 19 App. D. C. 99; Robinson *v.* Randolph, 21 Fla. 629, 645; Monroe *v.* Trenholm, 112 N. C. 634; 114 N. C. 590; Kirby *v.* Boyette, 118 N. C. 244; Holliday *v.* Hively, 198 Pa. St. 335; Lewis *v.* Bryce, 187 Pa. St. 362; Dezendorf *v.* Humphreys, 95 Va. 473; Price *v.* Planters' Nat. Bank, 92 Va. 468. As to the validity of restraints on the alienation of income in other cases in America, see §§ 386 *a*, 386 *b* and notes.

In several cases in this country it has been held that, where the property which has been settled for the benefit of a married woman was her own before the settlement, an attempted restraint upon alienation or anticipation of income will be ineffective as to her creditors. Brown *v.* Macgill, 87 Md. 161; Jackson *v.* Von Zedlitz, 136 Mass. 342; Pacific Nat. Bank *v.* Windram, 133 Mass. 175; Stewart *v.* Madden, 153 Pa. St. 445; Ghormley *v.* Smith, 139 Pa. St. 584. See 12 Harvard Law Rev. 53. Section 19 of the Married Women's Property Act of 1882 seems to have provided for the same result in England. See Birmingham, etc., Soc. *v.* Lane, [1904] 1 K. B. 35.

By statute in England the court of chancery has been given power

death, and a single woman before marriage, may dispose absolutely of gifts to their separate use, although coupled with words restraining their power of anticipation;[1] upon the principle "that any person, *sui juris*, possessing an interest, however remote, may dispose of such interest; and such person cannot be prevented, by any intention of the donor, from exercising the ordinary rights of ownership." Under whatever form of words alienation or anticipation may be restrained, a person who is *sui juris* may dispose of her interest. But if such right of alienation and anticipation is not exercised while the woman is single and *sui juris*, both the separate use and the provision against anticipation will come into operation upon marriage;[2] and it will be carried into effect, though the law of the domicil of the parties forbids such restraint;[3] but such restraints will not be allowed to stand where they fall within the rule against perpetuities.[4] (*a*) The restraint upon anticipation will not pre-

[1] Jones *v.* Salter, 2 R. & M. 208; Woodmeston *v.* Walker, id. 197; Brown *v.* Pocock, id. 210; 2 Myl. & K. 189; Massey *v.* Parker, id. 174; Parker *v.* Converse, 5 Gray, 336. [*In re* Wheeler's Settlement Trusts, [1899] 2 Ch. 717. But see Birmingham, etc., Soc. *v.* Lane, [1904] 1 K. B. 35; Brown *v.* Dimbleby, [1904] 1 K. B. 28; Barnett *v.* Howard, [1900] 2 Q. B. 784; Braunstein *v.* Lewis, 64 L. T. 265.]

[2] Tullett *v.* Armstrong, 1 Beav. 1; 4 M. & Cr. 390, overruling Davies *v.* Thornycroft, 6 Sim. 420; Brown *v.* Pocock, 5 Sim. 663; Johnson *v.* Freeth, 6 Sim. 423; Wells *v.* McCall, 64 Penn. St. 207.

[3] Peillon *v.* Brooking, 25 Beav. 218.

[4] Fry *v.* Capper, Kay, 163.

to break through a restraint on alienation on application of the married woman herself when the court is satisfied that her best interests require that the restraint be broken for the particular purpose presented to it. Conveyancing and Property Act, 1881, § 39. But the court has no power to break the restraint except under the statute. Michell *v.* Michell, [1891] P. 208. And the court exercises its discretion with great caution. See *In re* Blundell, [1901] 2 Ch. 221; *In re* Pollard's Settlement, [1896] 2 Ch. 552; *Re* Wilson-Stewart, 75 L. T. 381; *Re* Little, 40 Ch. Div. 418; Hodges *v.* Hodges, 20 Ch. Div. 749; Bolton *v.* Curre, [1895] 1 Ch. 544. Provisions against alienation of life interests are void in England, except in the case of married women. See Gray's Restraints on Alienation (2d ed.), §§ 140, 269.

(*a*) It has been held in England

vent a husband from receiving his wife's separate income; nor will it render his estate liable for more than one year's income;[1] nor will it prevent his wife's engagements from being enforced against all arrears of income of her separate estate [2] nor does it prevent her giving an order for future income, revocable at pleasure;[3] nor does it prevent her adjustment of the amount with the trustees;[4] but compensation for a breach of trust cannot be enforced against a fund limited by the same instrument to her separate use without power of anticipation;[5] (*a*) nor can interest on bonds or notes, or dividends on stocks, accrued, but not yet payable, be anticipated, if anticipation is restrained.[6]

§ 672. There is another kind of trusts for married women, created by deeds of separation between husband and wife. Such deeds are valid in law, so far that the covenants contained in them may form a good consideration for a promise to pay certain debts and expenses.[7] Courts of equity will not specifically

[1] Rowley *v.* Unwin, 2 K. & J. 138.

[2] Fitzgibbon *v.* Blake, 3 Ir. Eq. 328. [Hood Barrs *v.* Heriot, [1896] A. C. 174; Whiteley *v.* Edwards, [1896] 2 Q. B. 48.]

[3] Moore *v.* Moore, 1 Coll. 57.

[4] Wilton *v.* Hill, 2 L. J. Ch. 156; Derbishire *v.* Home, 5 De G., M. & G. 113; Stroud *v.* Grozer, Lewin on Trusts, 556 (5th ed.).

[5] Clive *v.* Carew, 1 John. & Hem. 199; Sheriff *v.* Butler, 12 Jur. (N. S.) 329; Davies *v.* Dodgson, 25 Beav. 186. [See Bolton *v.* Curre, [1895] 1 Ch. 544.]

[6] *Re* Brettle, 2 De G., J. & Sm. 79; Jollands *v.* Burdett, id.; 10 Jur. (N. S.) 349.

[7] Jones *v.* Waite, 5 Bing. N. C. 341; affirmed in 9 Cl. & F. 101; 4 M. & G. 1104; Calkins *v.* Long, 22 Barb. 97.

that a general clause in a will restraining anticipation of the shares which should go to granddaughters of the testator upon the death of their parents was valid as to granddaughters born before the death of the testator but void as to those born after his death. *In re* Ferneley's Trusts, [1902] 1 Ch. 543; Herbert *v.* Webster, 15 Ch. Div. 610. See *contra*, *In re* Ridley, 11 Ch. Div. 645; *In re* Michael's Trusts, 46 L. J. Ch. 651.

(*a*) But it has been held that a restraint on her power of anticipation will not disable the court from subjecting future income to the payment of costs of an action which she has improperly brought against her trustee. *In re* Andrews, 30 Ch. Div. 159.

enforce agreements of husband and wife to live separate and apart; for that is contrary to the policy of the law.[1] Yet while such agreements have been entered into and executed, courts will enforce the specific performance of the provisions in favor of the wife, and will compel the trustees under such deeds to perform their duty.[2] The jurisdiction of the court is generally confined to agreements concerning property, though it may enjoin the parties from litigation in courts, if they have covenanted not to prosecute a suit for divorce, separation, or restitution of conjugal rights.[3] So if the husband has covenanted not to visit or annoy his wife, he can be enjoined from breaking the

[1] Head *v.* Head, 3 Atk. 550; Wilkes *v.* Wilkes, 2 Dick. 791; Warrall *v.* Warrall, 3 Mer. 268. [Hill *v.* Hill, 74 N. H. 288.]

[2] Guth *v.* Guth, 3 Bro. Ch. 614; St. John *v.* St. John, 11 Ves. 526; Worrall *v.* Jacob, 3 Mer. 256; Westmeath *v.* Westmeath, Jac. 126; Westmeath *v.* Salisbury, 5 Bligh, 375; Hoare *v.* Hoare, 2 Ridg. P. C. 268; Wilson *v.* Wilson, 14 Sim. 405; 1 H. L. Cas. 538; Elworthy *v.* Bird, 2 S. & S. 372; Frampton *v.* Frampton, 4 Beav. 287; Jones *v.* Waite, 5 Bing. N. C. 341; 9 Cl. & F. 10; 4 M. & G. 1104; Cooke *v.* Wiggins, 10 Ves. 191; Seeling *v.* Crawley, 2 Vern. 386; Angier *v.* Angier, Gilb. Eq. 142; Pr. Ch. 496; Fletcher *v.* Fletcher, 2 Cox, 109; Hyde *v.* Price, 3 Ves. Jr. 437; Rodney *v.* Chambers, 2 East, 283; 6 East, 252; 2 B. & C. 551; Durant *v.* Titley, 7 Price, 577; Stephens *v.* Olive, 2 Bro. Ch. 90; Hobbs *v.* Hull, 1 Cox, 445; More *v.* Freeman, Bunb. 205; Bateman *v.* Ross, 1 Dow, 235; Ross *v.* Willoughby, 10 Price, 2; Logan *v.* Birkett, 1 M. & K. 220; Clough *v.* Lambert, 10 Sim. 256; 4 M. & K. 561; Wellesley *v.* Wellesley, 4 M. & C. 561; Wilson *v.* Mushet, 3 B. & Ad. 743. Lord Chancellor Cottenham said that all the older cases might be thrown aside, and that the later cases, especially those in the House of Lords, settled the law. Wilson *v.* Wilson, 1 H. L. Cas. 572. In the United States the same general rule is held. Champlin *v.* Champlin, 1 Hoff. Ch. 55; Rogers *v.* Rogers, 4 Paige, 518; Carson *v.* Murray, 3 id. 483; Mercein *v.* People, 25 Wend. 77; McKenna *v.* Phillips, 6 Whart. 571; Hutton *v.* Duey, 3 Penn. St. 100; Dellinger's App., 35 id. 357; Simpson *v.* Simpson, 4 Dana, 140; McCrocklin *v.* McCrocklin, 2 B. Mon. 370; Mansfield *v.* Mansfield, Wright (Ohio), 284; Reed *v.* Beazley, 1 Blackf. 97; Sterling *v.* Sterling, 12 Ga. 201; Coster *v.* Coster, 14 Sm. & M. 59; Picket *v.* Johns, 1 Dev. Eq. 123; Page *v.* Trufant, 2 Mass. 158; Hollenbeck *v.* Pexley, 3 Gray, 521; Albee *v.* Wyman, 10 Gray, 222; Holbrook *v.* Comstock, 16 Gray, 101; Walker *v.* Walker, 9 Wall. 744; Baker *v.* Barney, 8 Johns. 72; Beach *v.* Beach, 2 Hill, 260; Shelthar *v.* Gregory, 2 Wend. 422; Calkins *v.* Long, 22 Barb. 97; Wells *v.* Stout, 9 Cal. 494.

[3] Wilson *v.* Wilson, 1 H. L. Cas. 571.

covenant.[1] The court may compel the execution of a deed where an agreement has been entered into for a good consideration and acted upon, or it may correct a mistake in such deed.[2] But no agreements for a future separation will be considered by the court.[3] Nor can the payment of an annuity be enforced if granted on condition that a separation should take place in the future.[4] An agreement, however, by a husband, that he will pay back all the advances made to his wife by her father, in case they separate, is valid, and may be enforced if made by deed.[5] Mere deeds of separation are no bar to a divorce, if there is good cause;[6] but if parties live apart by agreement and consent, a divorce cannot be obtained on the ground of desertion. Nor are they any bar to a claim for alimony upon a divorce granted, but the rights secured by such deeds will of course be taken into consideration as to the amount of alimony.[7] (*a*) And a proceeding in the courts for a divorce and for alimony may be an abandonment of the covenants in a deed of separation.[8]

[1] Sanders *v.* Rodway, 16 Beav. 207; Green *v.* Green, 5 Hare, 400, n.; Webster *v.* Webster, 4 De G., M. & G. 437.

[2] Wilson *v.* Wilson, 5 H. L. Cas. 40.

[3] Durant *v.* Titley, 7 Price, 577; Hobbs *v.* Hall, 1 Cox, 445; Westmeath *v.* Westmeath, Jac. 142, controlling Rodney *v.* Chambers, 2 East, 297; Hoare *v.* Hoare, 2 Ridg. P. C. 268; Chambers *v.* Caulfield, 6 East, 244; Hutton *v.* Duey, 3 Penn. St. 106; Dellinger's App., 35 id. 357; Hitner's App., 54 id. 114.

[4] Cocksedge *v.* Cocksedge, 5 Hare, 397; 8 Jur. 659.

[5] Waring *v.* Waring, 10 B. Mon. 331.

[6] Anderson *v.* Anderson, 1 Edw. Ch. 380.

[7] Miller *v.* Miller, Saxt. 386.

[8] Albee *v.* Wyman, 10 Gray, 222.

(*a*) It has been held that such a deed purporting to release rights to alimony will be given effect against the wife if the consideration moving to her was fair and equitable and she signed the agreement with full knowledge of its meaning and of her rights. Sumner *v.* Sumner, 121 Ga. 1; Hiett *v.* Hiett, 74 Neb. 96. The same is true of releases of right to support. Commonwealth *v.* Richards, 131 Pa. St. 209; Bailey *v.* Dillon, 186 Mass. 244; Grime *v.* Borden, 166 Mass. 198. See Effray *v.* Effray, 97 N. Y. S. 286, 110 App. Div. 545. As to releases of dower rights, see Ireland *v.* Ireland, 43 N. J. Eq. 311; Rains *v.* Wheeler, 76 Tex. 390.

§ 673. It may be said generally, that in order to make a valid deed of separation which will save the rights of all parties, there must be trustees interposed to take the property for the use of the wife, and to enter into covenants in her behalf.[1] (*a*) If trustees are interposed, and they covenant, in consideration of the provisions for the wife, to indemnify the husband against her debts, or other claims on his property, it will form a valuable consideration, which will support the transaction against the husband's creditors.[2] The absence of such covenants on the part of the trustees will not invalidate the deed as against the husband;[3] but it would not be good, for want of a consideration, against his creditors.[4] If, however, the provisions for the wife still stand only in agreement, and there are no covenants by trustees or other valuable considerations to support the agreement, it would be a *nudum pactum*, which equity cannot enforce.[5] If there is a suit for divorce, or for nullity of the marriage, and the husband enter into agreements, in consideration of the discontinuance of such suit, the discontinuance of the suit is a

[1] St. John *v.* St. John, 11 Ves. 526; Legard *v.* Johnson, 3 Ves. Jr. 359; Worrall *v.* Jacob, 3 Mer. 268; Carson *v.* Murray, 3 Paige, 483; Simpson *v.* Simpson, 4 Dana, 140; Bettle *v.* Wilson, 14 Ohio, 257; Tourney *v.* Sinclair, 3 How. (Miss.) 324; Carter *v.* Carter, 14 S. & M. 59; Watkins *v.* Watkins, 7 Yerg. 283. But see Dutton *v.* Dutton, 30 Ind. 452.

[2] Stephens *v.* Olive, 2 Bro. Ch. 90; Compton *v.* Collinson, id. 38; Worrall *v.* Jacob, 3 Mer. 256; Elworthy *v.* Bird, 2 S. & S. 381.

[3] Fitzer *v.* Fitzer, 2 Atk. 511; Westmeath *v.* Westmeath, Jacob, 126; Frampton *v.* Frampton, 4 Beav. 287; Reed *v.* Beazley, 1 Blackf. 98; Bowers *v.* Clark, 1 Phila. 561.

[4] Ibid.

[5] Elworthy *v.* Bird, 2 S. & S. 371; Wilson *v.* Wilson, 14 Sim. 405; 1 H. L. Cas. 538.

(*a*) The general rule in American jurisdictions seems now to be that the interposition of a trustee is not necessary to make such covenants effective in equity. Demarest *v.* Terhune, 62 N. J. Eq. 663; Effray *v.* Effray, 97 N. Y. S. 286, 110 App. Div. 545; Hiett *v.* Hiett, 74 Neb. 96; Carey *v.* Mackey, 82 Me. 516; Moayon *v.* Moayon, 114 Ky. 855; Brown *v.* Clark, 80 Conn. 419; Commonwealth *v.* Richards, 131 Pa. St. 209; Rice *v.* Sally, 176 Mo. 107; Tiffany on Persons and Domestic Relations, p. 185. But see Silverman *v.* Silverman, 140 Mass. 560.

sufficient consideration for the agreements.[1] If the trust is actually created and acted upon, it is not necessary that the instrument should be formally executed as a deed.[2] So if an agreement for an immediate separation is entered into by husband and wife, and acted upon without the intervention of trustees, equity will sustain the agreement, and will carry it into effect by treating the husband as a trustee, and by compelling him to complete and carry the trust into effect.[3]

§ 674. Where property is vested by the husband in trustees for the separate use of the wife, under a deed of separation, the wife cannot exercise the same power in regard to it that she can over her ordinary separate estate, but she will take it under all the common-law disabilities of coverture; consequently, she cannot sell or charge it with her debts or contracts.[4] But, of course, her power over the property will depend very much upon the terms of the deed of separation; for the husband may give her the absolute equitable interest in the property, or he may confine her to the reception of the income from year to year, and so he may clothe her with the power of disposing of the property after her death by a will or appointment, or he may limit the property to himself or his heirs after her decease. Thus where a husband put property into the hands of a trustee, for the use of the wife on a separation, and they were afterwards reconciled and lived together, it was held that the property was settled to the separate use of the wife, notwithstanding they lived together.[5] So where the settlement is once made, friendly visits between husband and wife, and expressions of regret at the separation, not accompanied with cohabitation, will not

[1] Elworthy *v.* Bird, 2 S. & S. 371; Wilson *v.* Wilson, 14 Sim. 405; 1 H. L. Cas. 538.

[2] Ibid.; Angier *v.* Angier, Pr. Ch. 496; Head *v.* Head, 3 Atk. 54.

[3] More *v.* Ellis, Bunb. 205; Guth *v.* Guth, 3 Bro. Ch. 614; Frampton *v.* Frampton, 4 Beav. 294; Hutton *v.* Duey, 3 Penn. St. 100; Barron *v.* Barron, 24 Vt. 375; Picket *v.* Johns, 1 Dev. Eq. 123.

[4] Hyde *v.* Price, 3 Ves. Jr. 437.

[5] Huntly *v.* Huntly, 6 Ired. Eq. 514; Ratcliffe *v.* Huntly, 5 Ired. 545.

discharge or annul the settlement.[1] It is the duty of the trustees to carry out all the provisions of the trust for the wife, so long as it subsists; and if there are covenants of the husband or other persons for the benefit of the wife, the trustees must sue for the breach of them, and apply the proceeds to the purposes of the trust. If the trustees neglect or decline to do this, the wife may bring a suit in equity, by her next friend, against both the trustees and the husband, or other persons liable under the settlement.[2] And the husband may also interfere, and maintain a bill for the proper execution of the trusts which he has created for the benefit of his wife.[3]

§ 675. The statutes of many of the United States have very materially affected the rights of married women in regard to their separate property; or rather these statutes have converted nearly all the property that married women may at any time have, into estates settled to their separate use, without the intervention of a trustee. The substance of all these statutes is, that all the property, both real and personal, which a married woman owns, or which comes to her by devise, bequest, gift, or grant; and that which she acquires by her trade, business, labor, or services, carried on or performed on her separate account; and that which she owned at the time of her marriage, and the issues, income, profits, and proceeds of such property, — shall be and remain her sole and separate property, and may be used, collected, and invested in her own name, and shall not be subject to the interference or control of her husband or liable for his debts; and she may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings in the same

[1] Heyer *v.* Burger, 1 Hoff. Ch. 1; Webster *v.* Webster, 1 Sm. & Gif. 489.
[2] Cooke *v.* Wiggins, 10 Ves. 191; Seagrave *v.* Seagrave, 13 Ves. 439.
[3] Cranston *v.* Plumb, 54 Barb. 59.

manner as if she were *sole*. There is generally a provision attached to these statutes, that she shall not convey her real estate except her husband joins in the deed, or assents to the conveyance in writing, and the same provision exists in some States in relation to some kinds of personal property, as stocks or shares in corporations. It is also generally provided, that trustees may be appointed to hold the title of such property for the separate use of the married woman, if she desires it.[1] As the husband takes no present beneficial interest in his wife's property, at the time he assumes the obligations of marriage, the statutes of some States have released him from some of the burdens of marriage by providing that he shall not be liable for any of his wife's antenuptial debts or contracts;[2] and perhaps the statutes, in order to make a perfect system, should go further, and provide that he should not be liable for any torts of his wife, as for slander, libel, and the like.[3]

§ 676. These statutes have not yet been moulded into a consistent whole, nor have they received such judicial construction that any certain general principles can be safely affirmed of them all; but it would appear that they cannot affect any rights

[1] This is the substance of the Massachusetts statute, Gen. Stat. c. 108, §§ 1, 3, 4. It is impossible to cite all the statutes of so many different States. Some go further than the statute of Massachusetts, and some do not go so far. The general principles of the statutes in all the States are essentially the same, but there is great variety in the details.

[2] In Dickson *v.* Miller, 11 Sm. & M. 594, it is said that "in marriage, although a husband runs the hazard of being liable for his wife in an amount greater than the value of the estate he receives by her, he also has the chance of receiving by her an amount far exceeding her debts; but where the whole estate of the wife, notwithstanding coverture, continues separate to her, there is no such recompense to the husband for his obligations for his wife's debts, but, on the contrary, there may be a certainty of his becoming indebted, on behalf of his wife, with no possibility of his receiving an amount even equal to her debts." See Cater *v.* Everleigh, 4 Des. 19. Where statutes have abolished his liability for her debts this criticism is avoided. Bailey *v.* Pearson, 9 Frost. 77; Reunnecker *v.* Scott, 4 Green (Iowa), 185; Callahan *v.* Patterson, 4 Tex. 61; Curry *v.* Shrader, 19 Ala. 831.

[3] Brown *v.* Kemper, 27 Md. 666.

of the husband in his wife's property which became vested before the passage of them, it being contrary to the general principles of law, as well as of the constitution of the United States, and of the several States, to destroy vested interests, or to transfer them from one person to another. Thus a husband, married in any one of the States before the passage of the statute in that State, took the property that his wife then had according to the statute or law in force at the time of the marriage.[1] Therefore if a husband took his wife's money at the time of his marriage, under existing laws, and a statute was afterwards passed conferring upon the wife the right to hold her separate property, and the husband purchased land with the money, and took the deed in his wife's name, the land will nevertheless belong to him, as purchased with his money.[2] But statutes may declare what rights a husband shall take in property that comes to his wife after the passage of the act, and after the marriage.[3] On principle, it would seem that the right to reduce a wife's *choses in action* to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the *choses* to possession; and so it has been ruled in several cases.[4] No prior

[1] Eldredge *v.* Preble, 34 Maine, 148; Peck *v.* Walton, 26 Vt. 82; Jenney *v.* Gray, 5 Ohio St. 45; Snyder *v.* Snyder, 3 Barb. 621; Perkins *v.* Cottrell, 15 Barb. 446; Burson's App., 22 Penn. St. 164; Roby *v.* Boswell, 23 Ga. 51; Tyrson *v.* Mattair, 8 Fla. 107; Maynard *v.* Williams, 17 Ala. 676; Ratcliffe *v.* Dougherty, 24 Miss. 181; Tally *v.* Thompson, 20 Miss. 277; Carter *v.* Carter, 14 Sm. & M. 59; Love *v.* Robertson, 7 Tex. 6; Ryder *v.* Hulse, 33 Barb. 264; 24 N. Y. 372; Savage *v.* O'Neil, 42 Barb. 374; Maclay *v.* Love, 25 Cal. 367; Quigley *v.* Graham, 18 Ohio St. 42.

[2] Sharp *v.* Maxwell, 30 Miss. 442. But it is a question of fact and intention whether the husband reduced the money to possession before paying it over for the deed, so that the equitable as well as the legal title would vest in him. Moulton *v.* Haley, 57 N. H. 184.

[3] Sleight *v.* Read, 18 Barb. 159; Southard *v.* Plummer, 36 Maine, 64.

[4] Ryder *v.* Hulse, 24 N. Y. 372; Westvelt *v.* Gregg, 2 Kern. 202; Stearns *v.* Mathews, 30 Ala. 712; Noble *v.* McFarland, 51 Ill. 226; Coombs *v.* Read, 16 Gray, 271. The opposite rule has been held in Pennsylvania and

debts of the husband can alter the rights of the parties, and affect the interests of a married woman in property coming to her after the enactment of the statute.[1]

§ 677. The passage of these acts does not affect settlements, already made at the time of their passage, to the separate use of married women.[2] (*a*) So they do not affect the right of a woman to a settlement of her estate upon herself, if she chooses to invoke the old equity of a settlement of her *choses in action*, it being held that these statutes are an enlargement and not a diminution of her rights.[3] The statutes of some of the States provide that she may have a trustee to take her separate property, if she prefers that mode of holding it. The jurisdiction of courts of equity over the property and proprietary rights of

New Jersey. Henry *v.* Dilley, 1 Dutch. 302; Millinger *v.* Bausman, 45 Penn. St. 522; Goodyear *v.* Rumbaugh, 13 id. 480.

[1] Sleight *v.* Read, 18 Barb. 159. But see Cunningham *v.* Gray, 20 Mo. 170.

[2] Willis *v.* Cadenhead, 28 Ala. 472; Hardy *v.* Boaz, 29 Ala. 168.

[3] Blevins *v.* Buck, 26 Ala. 292.

(*a*) It has been held in Georgia that statutes have made married women so far *sui juris* that merely passive trusts for their benefit will be executed by the statute of uses vesting the legal title directly in them, Heath *v.* Miller, 117 Ga. 854; City of Rome *v.* Shropshire, 112 Ga. 93; even when the trust is expressly for their sole and separate use. Overstreet *v.* Sullivan, 113 Ga. 891. See also Snell *v.* Payne, 78 S. W. 885 (Ky. 1904); Adams' Trustee *v.* Adams, 56 S. W. 151 (Ky. 1900), where the court decreed a termination of such a trust as unnecessary for her protection.

It has been held in other States that a trust for a married woman, although without active duties in the trustee, will not be executed by the statute of uses during the coverture of the beneficiary. Carpenter *v.* Browning, 98 Ill. 282; Cushing *v.* Spalding, 164 Mass. 287; Moore *v.* Stinson, 144 Mass. 594; Richardson *v.* Stodder, 100 Mass. 528. See *supra*, §§ 310, 310 *a* and notes. But on termination of coverture either by death of the husband or by divorce such a trust will usually either become executed by the statute of uses or be terminated by decree of court. Cary *v.* Slead, 220 Ill. 508; Cushing *v.* Spalding, 164 Mass. 287; Richardson *v.* Stodder, 100 Mass. 528; Sharman *v.* Jackson, 90 N. Y. S. 469, 98 App. Div. 187; Lee's Estate, 207 Pa. St. 218; Bradford *v.* Burgess, 20 R. I. 290.

married women is not taken away by these acts, but the equity powers of the courts may still be invoked, where it is necessary to secure their separate property to their use, according to the intention of the statutes, or the intention of the donors of such property.[1] It may be stated, as a general rule, that the same principles of construction and of practice apply to these statutes as were applied to the old settlements of a wife's separate property upon herself. Thus the presumption still is, as it was at common law, that a married woman's property belongs to her husband; and it is necessary to rebut that presumption by showing that it came to the wife, under such circumstances, and at such times, and by such gifts, grants, or bequests, that it belongs to the wife, and not to him, and that it is not liable for his debts.[2] This is nothing more than the principle that runs through the whole body of jurisprudence. Statutes in derogation of the common law are strictly construed; and if a particular matter is to be taken out of the operation of the common law, it must be shown to be within the letter or spirit of the statute so changing the common law.

§ 678. The husband may constitute his wife his agent to transact his business and to deal with his property. In the same manner the wife may appoint her husband her agent to manage her separate property. And, as at common law, the mere fact that a husband did not reduce his wife's *choses in action* to possession immediately, but allowed her to use and enjoy them, and even to take notes in her own name, could not be used as conclusive proof that he abandoned his right, and gave the *choses* to her;[3] so the mere fact, that a husband is in pos-

[1] Calvin *v.* Currier, 22 Barb. 371; Mitchell *v.* Otey, 23 Miss. 236; Richardson *v.* Stodder, 100 Mass. 528; Lampley *v.* Watson, 43 Ala. 377.

[2] Eldredge *v.* Preble, 34 Maine, 148; Gault *v.* Saffin, 44 Penn. St. 307; Bear *v.* Bear, 33 id. 525; Winter *v.* Walters, 37 id. 157; Gamber *v.* Gamber, 18 id. 363; Goodyear *v.* Rumbaugh, 13 id. 480; Alverson *v.* Jones, 10 Cal. 9; Stanton *v.* Kirsch, 6 Wis. 338; Smith *v.* Hewett, 13 Iowa, 94; Smith *v.* Henry, 35 Miss. 369. Contrary opinions were expressed in Johnson *v.* Runyan, 21 Ind. 115; Stewart *v.* Ball, 3 Mo. 154.

[3] Ryder *v.* Hulse, 33 Barb. 264; 24 N. Y. 372.

session of his wife's property under these statutes, will not destroy her right to the same, if it appears that he acts as her agent. So long as property may be identified as belonging to her, or so long as its income or proceeds can be clearly traced and identified as coming from her property, although managed by her husband as her agent, she is entitled to recover the same.[1] (*a*) The wife may give a power of attorney to her husband to execute a deed of her land in her name;[2] a husband can conduct a suit in the name of the wife for damages to her property;[3] and the husband may employ other agents and attorneys in her name in relation to her separate property under the statute.[4] So the fact, that the husband manages her property, or that she allows him a living from the income, gives his creditors no claim to other parts of her separate estate.[5] So if he lives with her on her land, and cultivates and improves it, and makes betterments, without any agreement with her, it will give neither him not his creditors any interest in the land, buildings, betterments, crops or improvements; but the owner of the land, in the absence of all agreements, will own all these incidents to the land itself.[6] But, as under the law in relation to settlements

[1] Jenning *v.* Davis, 31 Conn. 134; Hutchins *v.* Colby, 43 N. H. 139; Teller *v.* Bishop, 8 Minn. 226; Kirkpatrick *v.* Beauford, 21 Ark. 268; Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277. [Winn *v.* Riley, 151 Mo. 61; Donovan *v.* Griffith, 215 Mo. 149.]

[2] Weisbrod *v.* Chicago, &c. R. R. Co., 18 Wis. 35; Peck *v.* Hendershott, 14 Iowa, 40.

[3] Woodman *v.* Neal, 48 Maine, 266.

[4] Southard *v.* Plummer, 36 Maine, 64.

[5] Buckley *v.* Wells, 33 N. Y. 518; Knapp *v.* Smith, 27 N. Y. 277.

[6] Betts *v.* Betts, 18 Ala. 787; McIntire *v.* Knowlton, 6 Allen, 565; Allen *v.* Hightower, 21 Ark. 316; Welston *v.* Hildreth, 39 Vt. 457; Lewis *v.* Johns, 24 Cal. 98; Chauvete *v.* Mason, 4 Green (Iowa), 231; White *v.* Hildreth, 32 Vt. 465; Colman *v.* Satterfield, 2 Head, 259; Goss *v.* Cahill, 42 Barb. 216; Robinson *v.* Huffman, 15 B. Mon. 80; Jenney *v.* Gray, 5 Ohio St. 45; Wilkinson *v.* Wilkinson, 1 Head, 305; Johnson *v.* Vail, 1 McCart. 423; Hodges *v.* Cobb, 8 Rich. 50; Abby *v.* Dego, 44 N. Y. 343. A wife may lease her land to her husband. Atkin *v.* Lord, 39 N. H. 196.

(*a*) As to resulting and constructive trusts when a husband uses his wife's separate property in the purchase of real estate, with or without her consent, see § 144, note, p. 229.

for the separate use of a married woman, if she allowed her husband to receive her property, and to deal with it as his own in business, or in paying his debts, or in supporting the family, she would be presumed to assent to such use; so if a married woman, owning property under these statutes, allows her husband to receive her separate property, and to use it in business or mix it with his own in such manner that her property cannot be identified or separated from the general mass, she will lose her rights in such property as against her husband's creditors,[1] and she will have no remedy except in equity as a creditor.[2] If a husband, acting as the agent of his wife, signs a note in her name, he will not be held upon the note, although his wife may be insolvent; that is, the same principles apply when husband and wife are principal and agent, as apply to other principals and agents.[3]

§ 679. When a married woman holds property to her separate use under a settlement, or under these statutes, she may give it to her husband, or sell it to him for a valuable consideration;[4] and if she allows him to receive her property, or the income of it, her assent will be presumed. If she gives it to him, she can make no claim upon him or his estate for reimbursement;[5] but if the circumstances do not sustain the presumption of a gift, she will be entitled to compensation from his estate. So the terms upon which a husband is dealing with his wife's property may always be proved, and must generally be deter-

[1] Glover *v.* Alcott, 11 Mich. 470; Kelly *v.* Drew, 12 Allen, 107; Gross *v.* Reddig, 45 Penn. St. 406; Gardner *v.* Gardner, 1 Gif. 126. [Story *v.* Kropsch, 231 Ill. 419; Gray *v.* Crockett, 35 Kan. 66; Hamlen's Adm'r *v.* Bennett, 52 N. J. Eq. 70; Ingals *v.* Ferguson, 59 Mo. App. 299. See Moore *v.* Rawlings, 137 Iowa, 284.]

[2] Glidden *v.* Taylor, 16 Ohio St. 509.

[3] Taylor *v.* Shelton, 30 Conn. 122.

[4] Lyn *v.* Ashton, 1 Russ. & M. 190; Dallam *v.* Wampole, 1 Pet. C. C. 116; 2 Kent, 111; Hinney *v.* Phillips, 50 Penn. St. 382; Johnston *v.* Johnston, 1 Grant, 468; White *v.* Callinan, 19 Ind. 43; Gage *v.* Dauchy, 28 Barb. 622; Roper *v.* Roper, 29 Ala. 247; Fox *v.* Jones, 1 W. Va. 205.

[5] Paulet *v.* Delavel, 2 Ves. 663; Edelen *v.* Edelen, 11 Md. 415.

mined by the evidence. If it appears that the husband acted as the agent of the wife, there is no presumption of a gift.[1] As all transfers from the wife to the husband are somewhat suspicious by reason of the relation, and the danger of some secret influence, gifts of the capital sum are not presumed in the first instance; but there is less suspicion attached to transfers of the income to him than to transfers of the capital sum, for the reason that the income is generally appropriated to, and consumed in, the support of the husband and wife and their family.

§ 680. The rules in relation to the general contracts of married women, and their binding effect upon their separate estates under the old form of settlements, apply substantially in the same manner to their separate estates under these statutes. It will be remembered that the contracts themselves were utterly void, but that equity gave them effect as *quasi* charges upon their separate property.[2] These statutes have legalized contracts of married women. But all contracts made by them are not legalized. They are empowered to make "contracts, and to sue and be sued, only in relation to their separate estates;" and in some States, also, to make contracts and incur liabilities for supplies to the family. (*a*) It was seen that, under the old settlements in England, and in a few of the States, the general engagements of married women were enforced in equity against their separate estates although those engagements had no reference to their separate estates, and were not for the benefit of the estates or of themselves personally.[3] In a majority of the United States a more limited rule was applied, and the contracts of married women were not enforced against their separate estates, unless these contracts were made in relation to their estates, and were for the benefit of their estates, or for their

[1] Elijah *v.* Taylor, 37 Ill. 247; Wales *v.* Newbould, 9 Mich. 45.
[2] *Ante*, §§ 657–663.
[3] *Ante*, § 660.

(*a*) In many States, the capacity of married women to contract has been made general without this limitation *Supra*, § 661, note.

own personal benefit.[1] The same principles are applied in enforcing the contracts of married women under the statutes. A married woman may give her note for her husband's or other person's debt, and make such note a legal charge upon her separate estate by duly executing a mortgage according to law.[2] In such case she will be deemed a mere surety for her husband, and will be entitled to compensation out of her husband's estate, if she pays the debt.[3] But if a married woman executes a note for the debt of her husband, or for the debt of any other person, and such note or contract is not, by mortgage or other deed, made a charge or lien upon her separate estate, and is not for her personal benefit, nor for the benefit of her estate, nor in relation to it, it cannot be enforced against her; that is, it is not within the terms of the statute authorizing her to contract.[4] On this principle, all contracts and notes entered into by a wife in relation to her separate property, as for improvements made upon her separate land, or for materials to

[1] *Ante*, § 661.

[2] Eaton *v.* Wason, 47 Maine, 132; Bartlett *v.* Bartlett, 4 Allen, 440; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Van Horne *v.* Everson, 13 Barb. 526; Vartie *v.* Underwood, 18 Barb. 561; Leavitt *v.* Peel, 25 N. Y. 474; Younge *v.* Graff, 28 Ill. 20; Ellis *v.* Kenyon, 25 Ind. 134; Watson *v.* Thurber, 11 Mich. 457; Wolff *v.* Van Meter, 19 Iowa, 134; Green *v.* Scranage, id. 461; Spear *v.* Ward, 20 Cal. 659; Gardner *v.* Gardner, 7 Paige, 112; Keller *v.* Ruiz, 21 La. An. 283; Kinner *v.* Walsh, 44 Mo. 65; McFerrin *v.* White, 6 Cold. 499. But see Bibb *v.* Pope, 43 Ala. 190; Van Kirk *v.* Skillman, 34 N. J. 109.

[3] State *v.* Hulick, 33 N. J. L. 307; Harford *v.* Baker, 20 N. J. Eq. 101; Kinner *v.* Walsh, 44 Mo. 65.

[4] Yale *v.* Dederer, 18 N. Y. 265; 22 N. Y. 450; White *v.* McNett, 33 N. Y. 371; Ledlie *v.* Vrooman, 41 Barb. 109; White *v.* Story, 43 Barb. 124; Parker *v.* Simonds, 1 Allen, 258; Crane *v.* Kelley, 7 id. 250; Shannon *v.* Canney, 44 N. H. 592; Bailey *v.* Pearson, 9 Fost. 77; Noyes *v.* Blakeman, 3 Sand. 531; 2 Seld. 567; Manchester, *v.* Sahler, 47 Barb. 155; Hutchman *v.* Underwood, 27 Tex. 255; Keaton *v.* Scott, 25 Ga. 652; Sweeney *v.* Smith, 15 B. Mon. 325; Wolff *v.* Van Meter, 19 Iowa, 134; Brunner's App., 47 Penn. St. 67; Patton *v.* Stewart, 19 Ind. 233; Cummings *v.* Miller, 3 Grant, 143; Steinman *v.* Ewing, 43 Penn. St. 63; Ramborger *v.* Ingram, 3 id. 146; Rumfelt *v.* Clemens, 46 id. 455; Lytle's App., 36 id. 131; Parke *v.* Kleeber, 37 id. 251; Peake *v.* Le Bow, 21 N. J. Eq. 269; Kimm *v.* Weippert, 46 Mo. 532; Schafroth *v.* Ambs, 46 Mo. 114; Nunn *v.* Graham, 45 Ala. 370.

be used upon it in building a house, or for labor in cultivating it, may be enforced against her by a direct suit at law; and an execution may issue against her, and be levied upon her separate property.[1] But in an action of law against a married woman living with her husband, the burden is upon the plaintiff to show such facts as will make her liable upon a contract.[2] She may make parol as well as written contracts binding upon her separate estate, but it must appear that she intended to contract in relation to her separate estate;[3] but it is said that it is not so much a question of her intention as to her separate estate, as it is whether she intended to contract a debt of her own.[4]

§ 681. Although a husband has a right to curtesy or a life-estate in his wife's real estate if he survives her, yet he cannot convey that estate or interest during her life, without her consent, so as to give possession to the purchaser; nor can his creditors seize it on execution;[5] nor can the husband in any way incumber the estate, as by a mechanic's lien for building a

[1] Rogers *v.* Ward, 8 Allen, 387; Davenport *v.* Davenport, 5 id. 464; Parker *v.* Kane, 4 id. 346; Heugh *v.* Jones, 32 Penn. St. 432; Major *v.* Symmes, 19 Ind. 117; Conway *v.* Smith, 13 Wis. 125; Marshall *v.* Miller, 3 Met. (Ky.) 333; Butler *v.* Robertson, 11 Tex. 142; Carpenter *v.* Leonard, 5 Minn. 155; McCormick *v.* Holbrook, 22 Iowa, 487; Tucker *v.* Guest, 46 Mo. 339; Lyon *v.* Swayne, 7 Phila. 154; Ainsley *v.* Mead, 3 Lansing, 116; Lindley *v.* Cross, 31 Ind. 106; Marsh *v.* Alford, 5 Bush, 392; Westgate *v.* Monroe, 100 Mass. 227. In Missouri, proceedings to charge a married woman's separate estate can only be taken in a court of chancery. Schafroth *v.* Ambs, 46 Mo. 114. So in Alabama, Pollard *v.* Cleveland, 43 Ala. 102; and in New Jersey, Harford *v.* Baker, 20 N. J. Eq. 101.

[2] Tracy *v.* Keith, 11 Allen, 214; Kimm *v.* Weippert, 46 Mo. 532; Dunbar *v.* Meyer, 43 Miss. 679; Harris *v.* Dole, 5 Bush. 61; Demott *v.* Muller, 8 Abb. (N. Y.) 335.

[3] Miller *v.* Brown, 47 Mo. 504; Morse *v.* Mason, 103 Mass. 560; Guion *v.* Doherty, 43 Miss. 538.

[4] Miller *v.* Brown, 47 Mo. 504; Kantrowitz *v.* Prater, 31 Ind. 92; Smith *v.* Howe, id. 233; Corning *v.* Lewis, 54 Barb. 51.

[5] Jenney *v.* Gray, 5 Ohio St. 45; Coleman *v.* Satterfield, 2 Head, 259.

house upon it;[1] nor by mortgage,[2] — without the agreement, consent, or concurrence of the wife.

§ 682. The statutes of the several States have various provisions enabling a married woman to make a will of her separate property. In some States, the will must be assented to by the husband; in others, it need not be. In some States, she can give the whole estate to persons other than her husband; in others, she can give only a part away from her husband. In the absence of a will by the wife, the husband takes all her personal property at her decease as at common law, and the use of her real estate for life, if there is issue born alive,[3] (*a*) or, in some States, whether there is issue or not, and where there is no issue, a portion of her real estate in fee.[4]

§ 683. By force of the statutes in several States, married women may now be appointed trustees, guardians, executors, and administrators, and may give bonds for the faithful performance of their duties.[5] In many States the wife may sue without her husband for all matters touching her separate estate or contracts; she may submit to arbitration;[6] and in some States she may even sue her husband, like any stranger, in a court of law.[7]

§ 684. A married woman may sell any of her chattel interests, and takes note payable to herself, and the notes remain

[1] Briggs *v.* Titus, 7 R. I. 441; Selph *v.* Howland, 23 Miss. 264; Spinning *v.* Blackburn, 13 Ohio St. 131; Pell *v.* Cole, 2 Met. (Ky.) 252; Hughes *v.* Peters, 1 Cold. 67; Washburn *v.* Burns, 34 N. J. L. 18.

[2] Patterson *v.* Flanagan, 1 Ala. S. C. 427.

[3] Rawsom *v.* Nichols, 22 N. Y. 110; Brown *v.* Brown, 6 Humph. 127; Wilkinson *v.* Wright, 6 B. Mon. 576.

[4] Mass. Stat.

[5] Stat. of Mass. 1869, c. 409 [R. L. (1902), c. 153, § 5]; Springer *v.* Berry, 47 Maine, 330.

[6] Palmer *v.* Davis, 2 N. Y. 242.

[7] Scott *v.* Scott, 13 Ind. 225.

(*a*) This matter has been very generally dealt with by statutes, the provisions of which vary widely. See statutes of the different States.

her personal property;[1] and if a note for the wife's property is taken in the name of the husband, she may, upon proving the fact, claim the proceeds,[2] and she may even hold a mortgage upon her husband's estate.[3]

§ 685. As a general rule, a wife cannot convey her real estate without her husband joining in the deed, or without his concurrence or assent in writing, as he is entitled to curtesy in her real estate. But this depends upon the construction of the statutes in each State;[4] under an early statute in Massachusetts, now repealed, a wife's sole deed of her real estate was held to be valid.[5] A married woman may now be bound by her covenants in the deed of her land, it being a contract in relation to her separate property;[6] and so a married woman may be compelled specifically to perform a contract to convey her land, provided the contract is executed according to the statute; for if a husband's written consent is necessary to a valid conveyance of her land, his written consent is necessary to a valid agreement to convey, and if that is wanting, the contract cannot be enforced.[7]

[1] Nims *v.* Bigelow, 45 N. H. 343; Huff *v.* Wright, 39 Ga. 49; Cheever *v.* Wilson, 9 Wall. 108; Jay *v.* Long Island R. R., 2 Daly, 401.

[2] Conrad *v.* Shomo, 44 Penn. St. 193; Buck *v.* Gibson, 37 Vt. 653; Baker *v.* Gregory, 28 Ala. 544; Mitchell *v.* Mitchell, 20 N. J. Eq. 234; Whitehead *v.* Whitehead, 64 N. C. 538; Lampley *v.* Watson, 43 Ala. 377; Marsh *v.* Marsh, id. 677; Molton *v.* Morton, id. 651.

[3] Power *v.* Lester, 23 N. Y. 527; Nims *v.* Bigelow, 45 N. H. 343; Bemis *v.* Call, 10 Allen, 512.

[4] Wright *v.* Brown, 44 Penn. St. 224; James *v.* Everly, 3 Grant, 150; Murphy *v.* Bright, id. 296; Camden *v.* Vail, 23 Cal. 633; Eaton *v.* George, 42 N. H. 375; Maclay *v.* Love, 25 Cal. 367; Miller *v.* Hine, 13 Ohio St. 565; Alexander *v.* Saulsbury, 1 Ala. 436; Pentz *v.* Simonson, 13 N. J. Eq. 232; Hough *v.* Blythe, 20 Ind. 24; Major *v.* Symmes, 19 Ind. 117; Dodge *v.* Hollinshead, 6 Minn. 25; Miller *v.* Wetherby, 12 Iowa, 415; Stoker *v.* Whitlock, 3 Met. (Ky.) 244; Myetaky *v.* Goery, 2 Brews. 302.

[5] Beal *v.* Warren, 2 Gray, 447. See Mass. Gen. Stat. c. 108, § 3.

[6] Basford *v.* Peirson, 7 Allen, 524.

[7] Baker *v.* Hathaway, 5 Allen, 103; Jewett *v.* Davis, 10 id. 72; Woodward *v.* Seaver, 38 N. H. 29. And see Rumfelt *v.* Clemens, 46 Penn. St. 455.

§ 686. If a married woman has no separate property, she can make no contracts, except as expressly provided by statute. Thus if a married woman, having no separate property, borrows money and gives a note, for the prospective purpose of purchasing land to her separate use, and afterwards purchases the land, and takes a deed in her own name, the note is void, as it is in no sense a contract in relation to her separate property.[1] But it is otherwise, if a direct purchase is made to herself, and a note given to the vendor of the land for the purchase-money; for although, when the negotiation commenced, she had no separate property concerning which she could contract, yet, as soon as there was a conveyance to her separate use, she had title to separate property, and could make a valid contract by note or bond to pay the purchase-money.[2]

[1] Ames *v.* Foster, 42 N. H. 381; Dunning *v.* Pike, 46 Maine, 461; Johnson *v.* Chisson, 14 Ind. 415; Whitworth *v.* Carter, 43 Miss. 61; Dunbar *v.* Meyer, id. 679.

[2] Chapman *v.* Foster, 6 Allen, 136; Bullin *v.* Dillage, 37 N. Y. 35; Darby *v.* Calligan, 16 N. Y. 21; Knapp *v.* Smith, 27 N. Y. 277; Estabrook *v.* Earle, 97 Mass. 302; Stewart *v.* Jenkins, 6 Allen, 303; Pemberton *v.* Johnson, 46 Mo. 342. But see Carpenter *v.* Mitchell, 50 Ill. 470.

CHAPTER XXIII.

TRUSTS FOR CHARITABLE USES.

§ 687. General remarks upon charitable trusts.
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§§ 733, 734. A charitable gift must be accepted and carried into effect as made, and cannot be altered or diverted.
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§ 747. As to costs in charity suits.
§ 748. Charitable trusts in the several States. The cases collected and commented on in a note.

§ 687. TRUSTS for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solution. Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. These trusts are governed in many respects by the same rules that govern trusts for the private benefit of individuals or families. There must be the same proof of the due execution of a written instrument, whether it creates a public charity or a private trust, and in many respects the same rules of construction will apply, in order to determine the intention of the donor;[1] but if it is once determined that the donor intended to create a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private benefit the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins.[2] So if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not

[1] *Ante*, § 88; Olliffe *v.* Wells, 130 Mass. 221.

[2] Fontain *v.* Ravenel, 17 How. 384; Saltonstall *v.* Sanders, 11 Allen, 458.

void, although in some forms it creates a perpetuity.[1] It is said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it. Charitable bequests are said to come within that department of human affairs where the maxim, *ut res magis valeat quam pereat*, has been, and should be applied.[2] The constitution of one State at least strictly enjoins all legislatures and magistrates in future periods to countenance and inculcate the principles of humanity and general benevolence, and public and private charity.[3]

§ 688. The origin of this peculiar form of jurisprudence has been a matter of much curious and learned speculation. It is not the object of this treatise to enter into such investigations, but to state the present condition of the law, for the benefit of those who are called upon to aid in its administration, and who have little time to spend upon collateral matters, however interesting. It may, however, in passing, be proper to suggest, that the same religious spirit and charitable sentiment which led individuals and communities to devote large sums of money to pious uses, religious houses, churches, and educational institutions, to the relief of the old and the poor, and to the general promotion of the public convenience, utility, and good, also led the makers and administrators of public laws to take a favorable and liberal view of such charitable donations.

§ 689. The early history of the law of charitable uses, like the early history of all the leading branches of the English or

[1] Odell *v.* Odell, 10 Allen, 1; Williams *v.* Williams, 4 Selden, 533.
[2] Saltonstall *v.* Sanders, 11 Allen, 455.
[3] Constitution of Mass., c. 5, § 1.

common law, is extremely obscure. That there were great charitable institutions, such as universities, colleges, and schools; and great religious houses, such as abbeys, monasteries, nunneries, and the like; that there were asylums and retreats for the poor and sick; and that almsgiving was common, is known; and that all these institutions were in some way established by the charity of pious men is known: but the beginning of these charitable foundations cannot be traced with certainty; nor is it easy to trace the history of the public laws by which they were encouraged, fostered, protected, and regulated. Among the early indications of the religious or charitable disposition of the people are the statutes of mortmain, so called, to prevent too large a proportion of the property of the realm from being given to religious houses, or to a *dead hand*, where it could not be readily used in the increasing trade and commerce of the kingdom. Notwithstanding these prohibitory statutes, care was taken to enforce the employment of bequests for charitable purposes. An early statute sets forth that many hospitals, founded as well by noble kings of the realm, and lords and ladies, as by divers other estates to the honor of God and his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the said founders had given a great part of their movable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve, and refresh other poor people in the same, were then for the most part decayed, and the goods and profits misemployed. The act, in providing a remedy, directs that, as to those hospitals which were of the patronage and foundation of the king, the ordinaries were to institute inquiries, and certify the inquiries into the king's chancery; and as to all other hospitals they were, after due inquiry, to make the necessary correction and reformation.[1]

§ 690. It is quite certain that the civil or Roman law was construed most indulgently, in favor of legacies and bequests

[1] 2 Hen. V. Stat. 1, c. 1.

for pious, charitable, and public uses, before the empire became Christian;[1] but it must be remembered that Christianity, and the charitable sentiments which it inculcates and begets, had widely spread among the people before the government publicly announced itself as Christian. (a) After the final conversion of the government to the Christian religion, legacies to pious uses, including legacies to works of piety and charity, whether they related to temporal or spiritual concerns, were deemed entitled to peculiar favor as privileged testaments.[2] It is not impossible, nor improbable, that the Christianized maxims of the civil law relating to pious and charitable trusts were transferred into the jurisprudence of England. Lord Thurlow, indeed, said that the doctrine of charities grew up from the civil law.[3] But it must be observed that, as soon as Christianity spread into Britain, the same ideas that modified the Roman law would be at work upon the public mind of England, and would mould and fashion the law and institutions of that country in the same way that they had influenced the civil law. It must also be remembered that for a long time the laws of England went much further than the civil law in devoting the estates of deceased persons to charity. For until the statute of distributions, 22 Car. II. c. 13, was enacted, the ordinary was obliged to apply a portion of the residue of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man.[4] If such was the English method of dealing with intestate estates, a method not derived from the civil law, certainly wills and grants, appointing or authorizing such charitable distributions, would meet with especial favor and indulgence in the courts.

[1] Dig. Lib. 33, tit. 2; De Usu et Usufruc. Legatorum, §§ 16, 17; L'd Ch. J. Wilmot, notes, 53, 54.

[2] Domat, Civil Law, B. 4, tit. 2, § 6.

[3] White *v.* White, 1 Bro. Ch. 12; Moggridge *v.* Thackwell, 7 Ves. 36, 69; Mills *v.* Farmer, 1 Mer. 55, 94, 95; Jackson *v.* Phillips, 14 Allen, 539.

[4] 2 Bl. Com. 494, 495; Perkins, § 486; Tudor, Char. Uses, 210.

(a) As to the extent to which Christianity is a part of the common law, see 29 Am. L. Reg. N. S. 273; 32 Am. Law Rev. 547.

§ 691. So deeply imbedded were these charitable institutions in the minds of the people, that Henry VIII., in his struggle against the supremacy of the pope, felt obliged to strike at all these religious and charitable foundations. It is true that abbeys, monasteries, and other religious houses were the principal sufferers; but some of the acts under which the king proceeded embraced colleges, chapels, chantries, hospitals, and fraternities;[1] and St. Thomas's Hospital in Southwark was actually surrendered.[2] It is further said that the great universities were obliged to petition the king that they might not be included under the general words of colleges and fraternities.[3] In this wide-spread attack upon the religious, educational, and almsgiving institutions of the kingdom, and in the confusion attending upon the transition from Papacy to Episcopacy, it cannot be doubted that all charities were much neglected, and that many of them abused or misemployed their funds. The short reign of Edward VI. and the disturbed reign of Philip and Mary tended rather to increase than to correct these abuses. But as soon as Elizabeth was firmly seated upon the throne, and the Reformation was assured, general attention was turned to the correction and encouragement of charities. In the first year of her reign, the act that restored the first-fruits to the crown exempted schools and hospitals from the payment thereof.[4] In the same act are provisions in favor of the universities, the colleges of Eton and Winchester, and the chapel of St. George. Soon after, statutes were passed, regulating leases of lands belonging to ecclesiastical and eleemosynary institutions. Acts were passed authorizing private individuals to establish and endow hospitals. The Stat. 14 Eliz. c. 14, forcibly illustrates the indulgence and encouragement which was extended to charitable gifts. It recited that certain hospitals had been erected by Henry VIII. and Edward VI., and that lands had been given by other persons, and it was hoped many more would likewise

[1] 1 Burnet Hist. Reform. pp. 346, 347, 404–434; 33 Hen. VIII. c. 27.
[2] Ibid. [3] Ibid.
[4] 1 Eliz. c. 4, §§ 34, 35, 40.

charitably give; and that many such gifts and assurances had been, and were likely to be, made by the last wills of the givers thereof; at which time, for want of counsel or other opportunities, it might happen that the right names of the said corporations should not be truly expressed, whereby some questions might grow of the validity of such grants, gifts, or devises; and it was enacted, that all gifts, grants, legacies, devises, and assurances, made or to be made, of any lands, tenements, and hereditaments, by will, feoffment, or otherwise, to the use or for the relief of the poor in any hospital then remaining, and being *in esse*, and employed to the relief and maintenance of the poor in said hospitals, should be as good and available in law according to the true meaning of any such donor, as if the said corporations had been or were in writing, or deeds of such gifts, grants, devises, or assurances, or in such will or testament, rightly or truly named; saving to all third persons their rights and interests in the land given. The Stat. 31 Eliz. c. 6, remedied the abuses which had grown up in the elections and presentations to churches, colleges, schools, hospitals, societies, and other charitable organizations. The 39 Eliz. c. 6, authorized the queen to appoint a commission to inquire if grants or gifts to hospitals and other charitable uses were misemployed, and if so, to correct the abuses. The statutes 8 Eliz. c. 11, 35 Eliz. c. 3, 39 Eliz. c. 4, 21, and 43 Eliz. c. 2 and 3, relate to a kind of compulsory charity or support of the poor. These statutes, and especially the Stat. 43 Eliz. c. 2, are said to be the foundation of the poor laws, so long in force in England; and to them we may trace the origin of the pauper laws in force in the various States of this country.[1]

§ 692. All this legislation for charity finally culminated in the Stat. 43 Eliz. c. 4 (1601), commonly called the statute of charitable uses. The charitable objects and purposes enumerated in this statute are as follows: "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and

[1] See Boyle, pp. 1–12.

mariners; schools of learning, free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes." [1] Since the passage of this statute, all the objects named

[1] The following abstract of the statute, as given by Boyle, is here inserted, as it is not readily accessible to all: —

"The preamble sets forth that property of every kind had been given, limited, appointed, and assigned by the queen and other well-disposed persons, for some or other of the purposes there specified, of which the following is an enumeration: Relief of aged and impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in universities; houses of correction; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes. It then recites that the lands and effects so appropriated had not been duly employed, and, for redress and remedy of such abuses and breaches of trust, proceeds to enact that it should be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal, and for the Chancellor of the Duchy of Lancaster, within their respective jurisdictions, to award commissions to the bishop of the diocese and chancellor (in case there should be any bishop of that diocese at the time), and to other persons, authorizing them, or any four of them, to inquire as well by the oaths of twelve men, as by all other good and lawful ways and means, of all gifts, limitations, assignments, and appointments, and of the abuses, breaches of trust, misemployments, and misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, theretofore given, limited, appointed, or assigned, or which thereafter should be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And that the commissioners, or any four of them (upon calling the parties interested in any such lands, &c.), should make inquiry by the oaths of twelve men or more of the county (the parties interested being allowed their challenge), and upon such inquiry, hearing and examining thereof, set down such orders, judgments, and decrees as the said lands, &c., might be duly and faithfully employed to and for such of the charitable and godly uses and intents before rehearsed respectively, for which they were given, limited, assigned,

therein are considered charitable. There are also many other uses, not named, and not within the strict letter of the statute, or appointed by the donors and founders thereof, which orders, judgments, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, should, by authority of the then parliament, stand firm and good according to the tenor and purport thereof, and should be executed accordingly, until the same should be undone or altered by the Lord Chancellor, or Lord Keeper, or the Chancellor of the County Palatine of Lancaster respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

"Sect. 2. It is then provided that the act should not extend to the two universities, the colleges of Westminster, Eton, or Winchester, or to any cathedral or collegiate church.

"Sect. 3. Also that it should not extend to any city or town corporate, or to any lands or tenements given to the uses aforesaid within any such city or town corporate, where should be a special governor or governors to govern or direct such lands, tenements, or things disposed of to any the uses aforesaid; nor to any college, hospital, or free school, which should have special visitors or governors or overseers appointed them by their founders.

"Sect. 4. It is further provided that the jurisdiction or power of the ordinary should not be prejudiced.

"Sect. 5. That no person should be appointed or act as commissioner or juror who should have possession of or pretend title to any of the said lands or other property.

"Sect. 6. That *bona fide* purchasers without notice should not be impeached by the decrees or orders of the commissioners for or concerning their estate or interest in any lands, &c., given, limited, or appointed to charitable uses. But that, nevertheless, the commissioners should make decrees and orders for recompense to be made by any person or persons, who, being put in trust or having notice of the charitable use, should break the trust or defraud the use, and also against their heirs, executors, and administrators, having assets in law or equity, so far as the same assets would extend.

"Sect. 7. The act then proceeds to except, out of the authority vested in the commissioners, all lands and hereditaments in any manner assured or come to the queen's majesty, or to Henry VIII., Edward VI., or Queen Mary; but enacts, that, if any such should have been given, appointed, or assigned to charitable uses since the beginning of her majesty's reign, they should be within the scope of the commissioners' inquiry.

"Sect. 8. It then goes on to enact that all orders, judgments, and decrees of the commissioners should be certified under seal into the Court of Chancery, or into the Court of Chancery within the County Palatine of Lancaster, according to the jurisdiction within such convenient time as should be limited in the commissions.

"Sect. 9. And that the Lord Chancellor, or Lord Keeper and the

but which, coming within its spirit, equity, and analogy, are considered charitable.

§ 693. This statute has filled a large space in judicial inquiries; and it was supposed for a time that it was the origin of the jurisdiction of courts of equity over the subject of charities. There are few reports of cases determined in chancery prior to the time of Elizabeth; while there are few cases at law, in the argument and decision of which no reference was made to a jurisdiction in chancery.[1] These facts led Lord Loughborough to observe, that "it does not appear that this court, at that period, had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere (1596), as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (an information to establish a charity); but they made out their case as well as they could at law."[2] The same facts

Chancellor of the Duchy, should within their several jurisdictions take such order for the due execution of all or any of the said judgments, decrees, and orders, as to either of them should seem fit and convenient.

"Sect. 10. The act lastly provides a remedy for persons aggrieved by the orders or decrees so certified by the commissioners, by declaring that complaint might be made to the Lord Chancellor, or Lord Keeper, or the Chancellor of the Duchy of Lancaster, for redress; and that upon such complaint the said Lord Chancellor, or Lord Keeper, or the said Chancellor of the Duchy, might, according to their several jurisdictions, by such course as to their wisdom should seem meetest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; and upon hearing thereof should and might amend, diminish, alter or enlarge the orders, judgments, and decrees of the commissioners, as should be thought to stand with equity and good conscience according to the true intent and meaning of the donors and founders; and should and might tax and award good costs of suit by their discretions against such persons as they should find to complain unto them without just and sufficient cause."

[1] Porter's Case, 1 Rep. 22 a; Gibbons *v.* Maltyard, Poph. 6; Thetford School, 8 Rep. 130; The Skinners' Case, Moore, 120, pl. 277; Annis's Case, Anderson, 43; Perkins, 563; Bruerton's Case, 6 Rep. 2; Partridge *v.* Walker, Duke, 360; Hewett *v.* Wotton, cited 4 Rep. 109 b; Duke, 469; Chibnal *v.* Whitton, 4 Rep. 110 a; Martidall *v.* Martin, Cro. Eliz. 288.

[2] Att. Gen. *v.* Bowyer, 3 Ves. 714, 726; Ludlow *v.* Greenhouse, 1 Bligh

and authorities led the Supreme Court of the United States to come to a similar conclusion.[1] (*a*)

§ 694. On the other hand, it is said that the statute does not purport to take away any authority from the court of chancery, or to give any new jurisdiction, but it only authorizes a commission to inquire into and correct abuses, allowing an appeal to the Lord Chancellor in certain cases. It is further said that the court of chancery, immediately after the statute, entertained original bills in charity cases, and seemed to refer its jurisdiction, not to the statute, but to its original and inherent jurisdiction over all matters of trust and confidence.[2] Still further, Lord Northington, Lord Hardwicke, Lord Eldon, Lord Redesdale, Sir Edward Sugden, as the Lord Chancellor of Ireland, Lord Chief-Justice Wilmot, Sir Joseph Jekyll, and Sir John Leach have expressed the clear opinion that the statute created no new law; that it simply created a new and ancillary jurisdiction by commission to issue out of chancery, to inquire whether funds devoted to charitable purposes had been misapplied.[3] But beyond this is the report of the commissioners

(N. S.), 61; Att. Gen. *v.* Platt, Finch, 221; 1 Ch. Ca. 267; West *v.* Palmer, id. 134; Duke, 379; Collinson's Case, Hob. 136; Rolt's Case, Moore, 888; Mills *v.* Farmer, 1 Mer. 55; Moggridge *v.* Thackwell, 7 Ves. 36.

[1] Baptist Association *v.* Hart's Ex'rs, 4 Wheat. 1.

[2] Payne's Case, Duke, 154; Guiddy's Case, 4 Jac. 1; Blackston *v.* Henworth Hospital, Duke, 644; 11 Jac. 1; Henshaw *v.* Morpeth, Duke, 142; Mayor of London's Case, id. 389; 1 Car. 15; Att. Gen. *v.* Townsend, Duke, 590; 22 Car. II.; Chelmford's Case, Duke, 574.

[3] Att. Gen. *v.* Dublin, 1 Bligh (N. S.), 312, 347; Att. Gen. *v.* Skinners' Co., 2 Russ. 407, 420; Att. Gen. *v.* Brentwood School, 1 Myl. & K. 376; Incorporated Soc. *v.* Richards, 1 Conn. & Laws. 58; 1 Dru. & War. 258; 4 Ir. Eq. 201; Carie *v.* Bertie, 2 Vern. 342; Eyre *v.* Shaftesbury, 2 P. Wms. 119; Att. Gen. *v.* Locke, 3 Atk. 165; Att. Gen. *v.* Brereton, 2 Ves. 425; Att. Gen. *v.* Middleton, id. 327; Att. Gen. *v.* Tancred, 1 Eden, 10; 1 W. Black. 90; Att. Gen. *v.* Downing, Wilmot's notes, 24. For chari-

(*a*) The only cases in which the U. S. Supreme Court has followed Baptist Ass'n *v.* Hart were, like it, from Virginia, where charities, except in certain cases specified by statute, are not upheld to a greater extent than other trusts. Russell *v.* Allen, 107 U. S. 163, 168.

of public records, published in 1827, 1830, and 1832. These records contain about fifty cases before the statute, in which the court of chancery had exercised a jurisdiction in establishing, regulating, and enforcing gifts and grants to charitable uses, very similar to the jurisdiction now exercised by courts in those States where the statute or the principles of the statute are in force.[1] Since the publication of these records, the matter has been again much discussed in the Supreme Court of the United States, and in other courts in America; and it is now conceded as settled, that courts of equity have an original and an inherent jurisdiction over charities, independent of the statute.[2] The consequence of this final determination is important in this respect, that courts of equity, in the various States where they

table cases in chancery prior to the statute, see Messenger *v.* Gloucester, Tothill, 58; Parrott *v.* Pawlett, Carey, 103; Elmer *v.* Scott, Choice Cas. in Chan. 155; Duke, 131, 136, 163, 361; Tothill, 120.

[1] For the convenience of those who desire to see these cases, we insert the pages of the "Proceedings in Chancery," where they may be found: Vol. I., pp. lvi, lvii, lxii, 81, 96, 98, 101, 134, 141, 159, 213, 216, 218, 225, 241, 257, 276, 282, 291, 308, 376, 378, 395–399; Vol. II., pp. xliv, 146, 271, 303, 430; Vol. III., pp. 67, 108, 169, 183, 197, 249, 252, 269, 286, 291, 292, 319. All that is contained in these cases is printed in full in Mr. Binney's argument in the Girard Case, pp. 151–160.

[2] Vidal *v.* Girard's Ex'rs, 2 How. 127; Tappan *v.* Deblois, 45 Maine, 122; Going *v.* Emery, 16 Pick. 107; Jackson *v.* Phillips, 14 Allen, 558; Williams *v.* Williams, 4 Selden, 533; Att. Gen. *v.* Moore, 19 N. J. Eq. 503; Norris *v.* Thompson, id. 307; Walker *v.* Walker, 25 Ga. 420; Williams *v.* Pearson, 38 Ala. 299; State *v.* Prewett, 20 Miss. 165; Paschall *v.* Acklin, 27 Texas, 173; Chambers *v.* St. Louis, 29 Mo. 543; Att. Gen. *v.* Wallace, 7 B. Mon. 611; Franklin *v.* Armfield, 2 Sneed, 305; Urmry's Ex'rs *v.* Wooden, 1 Ohio St. 160; Sweeney *v.* Sampson, 5 Ind. 465; Gillman *v.* Hamilton, 16 Ill. 225; Grimes *v.* Harmon, 35 Ind. 246; Burr's Ex'rs *v.* Smith, 7 Vt. 241; Vidal *v.* Philadelphia, 2 How. 128; Ould *v.* Washington Hospital, 95 U. S. 363. [Clayton *v.* Hallett, 30 Colo. 231; Klumpert *v.* Vrieland, 142 Iowa, 434, 121 N. W. 34; *In re* Nilson's Estate, 81 Neb. 809; St. James Orphan Asylum *v.* Shelby, 60 Neb. 796; Missouri Hist. Soc. *v.* Academy of Science, 94 Mo. 459; Haynes *v.* Carr, 70 N. H. 463; Keith *v.* Scales, 124 N. C. 497; *In re* John's Will, 30 Or. 494, 511; Pennoyer *v.* Wadhams, 20 Or. 274; Dulles's Estate, 218 Pa. St. 162; Pell *v.* Mercer, 14 R. I. 412, 434; *In re* Stewart's Estate, 26 Wash. 32; Kronshage *v.* Varrell, 120 Wis. 161; Harrington *v.* Pier, 105 Wis. 485; Stuart *v.* Easton, 74 Fed. 854.]

are not prohibited by statute, exercise an original, inherent jurisdiction in equity over charities, and apply to them the rules of equity, together with such other rules, applicable to charitable uses, as courts of equity may exercise under the constitutions and laws of the several States; and the courts do this by virtue of their inherent powers, without reference to the question whether the statute has been technically adopted in their States.[1]

§ 695. It was at one time doubted whether the statute had not ousted the court of original jurisdiction, and whether proceedings in relation to charities must not in all cases be commenced by commission; but there were proceedings by original bill from the beginning,[2] and the doubt was soon overruled and has disappeared from the books.[3]

§ 696. From this discussion, it appears that the statute, 43 Eliz. c. 4, accomplished three things in the law of charities: (1) It established an enumeration, or kind of definition, standard, or test, to which all gifts and grants in trust could be brought, in order to determine whether they were charitable. (2) It authorized a commission to inquire into the abuses and misemployment of funds and lands given to charity. But this proceeding by commission soon fell into disuse; and an original bill, or an information by the attorney general, became the only means of redress. (3) It repealed, *pro tanto*, all the statutes of mortmain in force before that time, so that there was no restriction in the laws of England upon gifts or grants for the purposes named in the statute, until the statute of mortmain, 9 Geo. II. c. 36.[4]

[1] Ibid.

[2] See *ante*, § 694.

[3] Att. Gen. *v.* Newman, 1 Ch. Cas. 157; 1 Lev. 284; West *v.* Knight, 1 Ch. Cas. 134; Parish of St. Dunstan *v.* Beauchamp, id. 193; Anon. id. 267; Eyre *v.* Shaftesbury, 2 P. Wms. 119; Att. Gen. *v.* Brereton, 2 Ves. 425, 427.

[4] Magill *v.* Brown, Brightly, N. P. 575; Hobart, 136.

§ 697. It will be seen that the words "charity" and "a charitable use" have a somewhat technical meaning in the law. Mr. Webster, in his argument in the Girard Case, attempted to establish that a charity and a charitable use, in the eye of the law, must involve the idea of Christianity in some or all of its purposes, or at least must not be opposed to the common Christian faith, doctrine, and practice.[1] Mr. Binney, in his argument in the same case, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor in the catholic and universal sense, — given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, and selfish."[2] The word "charity," in its *widest* sense, denotes all the good affections men ought to bear toward each other; in a more restricted sense, it means relief or alms to the poor; but in a court of chancery the signification of the word is derived from the statute of Elizabeth.[3] Hence it has been said that those purposes are considered charitable which are enumerated in the statute, or which by analogy are deemed within its spirit or intendment.[4] Another short but practical definition has described it as "a gift to a general public use, which extends to the poor as well as the rich."[5] But Mr. Justice Gray has given a definition which includes all the facts and circumstances, and all varieties of charity under the law, and leaves nothing to be desired. In his words, "a charity in a legal sense may be more fully defined as a gift to be applied, consistently with existing laws, for

[1] 6 Webster's Works, 133; Bedford Charity, 2 Swanst. 529; 1 Vern. 293; Dane, Abr. Ch. 219; King *v.* Wilson, 2 Strange, 834; Taylor's Case, 3 Mer. 405; Evans *v.* London, 2 Burns' Ecc. L. 95; Att. Gen. *v.* Mansfield, 2 Russ. 501; Att. Gen. *v.* Cullum, 1 Yo. & Col. 411; Updegraff *v.* Com., 11 S. & R. 394; Zeisweiss *v.* James, 63 Penn. St. 465.

[2] Girard Case, Mr. Binney's argument, 41; Price *v.* Maxwell, 28 Penn. St. 35.

[3] Tudor, Char. Uses, 4 (2d ed.).

[4] Morice *v.* Bishop of Durham, 9 Ves. 405; 10 Ves. 541.

[5] Jones *v.* Williams, Amb. 652; Coggeshall *v.* Pelton, 7 Johns. Ch. 294; Mitford *v.* Reynolds, 1 Phil. 191; Perin *v.* Carey, 24 How. 506; Miller *v.* Porter, 53 Penn. St. 300; Everett *v.* Carr, 59 Maine, 335.

the benefit of an indefinite number of persons, — either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." [1]

§ 698. A bequest in trust for the poor inhabitants of a particular place, parish, or town is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers: on the ground that the charity is for the poor, and not for the rich; and if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor.[2] There can be no clear distinction drawn in such cases; for to aid the poor may save them from the parish or town, and thus relieve wealthy tax-payers from burdens that would otherwise fall upon them. Generally, the intention of the donor will guide in the distribution of his bounty, as he may see fit to add some comforts to the meagre support of town or parish, or he may confine his alms to those not receiving public aid.[3] In the absence of all directions, it may be as well to confine the charity to those not in the public almshouse, unless the gift is in aid of the poor-rates.[4] (*a*)

[1] Jackson *v.* Phillips, 14 Allen, 556.

[2] Att. Gen. *v.* Clarke, Amb. 422; Rogers *v.* Rogers, 2 Keen, 8; Att. Gen. *v.* Wilkinson, 1 Beav. 373; Att. Gen. *v.* Bobill, 1 Phil. 768; Att. Gen. *v.* Exeter, 2 Russ. 53, 359; Att. Gen. *v.* Brandreth, 1 Yo. & Col. Ch. 200; Hereford *v.* Adams, 7 Ves. 324; Att. Gen. *v.* Price, 3 Atk. 110; McIntire *v.* Zanesville, 17 Ohio St. 352; Bruce *v.* Presbytery, &c., 1 H. L. Scot. 96; Fisk *v.* Att. Gen., L. R. 4 Eq. 521.

[3] Webb *v.* Neal, 5 Allen, 575; Att. Gen. *v.* Blizard, 21 Beav. 233.

[4] Doe *v.* Howells, 2 B. & Ad. 744.

(*a*) Such a trust is not invalid because it may indirectly work to the benefit of the tax-payers by relieving the public treasury of part of the expense of caring for the poor. Beurhaus *v.* Cole, 94

§ 699. Thus the following gifts for the poor have been held to be charitable within the letter or spirit of the statute, or within the law of charities, as administered in several of the States: a gift to the poor indefinitely;[1] or to a particular parish or place;[2] or workhouse;[3] or hospital;[4] or to the poor emigrating to a particular colony[5] or place;[6] or to the most deserving poor of a city;[7] or to a parish generally;[8] or to the governors of a hospital;[9] or to the widows and orphans of a parish;[10] or to the widows and seamen of a town;[11] (*a*) or for poor and pious persons;[12] or to such poor housekeepers as A. should appoint;[13] or to the indi-

[1] Att. Gen. *v.* Mathews, 2 Lev. 167; Att. Gen. *v.* Peacock, Finch, 245; Amb. 422; Att. Gen. *v.* Rance, id.; Legge *v.* Afgill, Turn. & Russ. 265, n.; Howard *v.* American Peace Soc., 49 Me. 288. [*In re* Darling, [1896] 1 Ch. 50; Darcy *v.* Kelley, 153 Mass. 433; Wood *v.* Paine, 66 Fed. 807.]

[2] Att. Gen. *v.* Blizard, 21 Beav. 233; Bristow *v.* Bristow, 5 Beav. 289; Att. Gen. *v.* Wilkinson, 1 Beav. 370; Woodford *v.* Parkhurst, Duke, 70; Att. Gen. *v.* Clarke, Amb. 422; Att. Gen. *v.* Old South Soc., 13 Allen, 474; State *v.* Gerard, 2 Ired. Eq. 210; Overseers *v.* Tayloe, Gilm. 336; Shotwell *v.* Mott, 2 Sand. Ch. 46; Att. Gen. *v.* Bovill, 1 Phil. 762; *In re* Lambeth Charities, 22 L. J. Ch. 959; Att. Gen. *v.* Trinity Church, 9 Allen, 422; Att. Gen. *v.* Hotham, Turn. & Russ. 209; Att. Gen. *v.* Webster, L. R. 20 Eq. 483; Rogers *v.* Thomas, 2 Keen, 8.

[3] Att. Gen. *v.* Vint, 3 DeG. & Sm. 704.

[4] Corp. of Reading *v.* Lane, Duke, 81; Att. Gen. *v.* Kell, 2 Beav. 575; Helham *v.* Anderson, 2 Eden, 296.

[5] Barclay *v.* Maskelyne, 4 Jur. (N. S.) 1294; Johns. Ch. (Eng.) 124.

[6] Chambers *v.* St. Louis, 29 Mo. 543.

[7] Hesketh *v.* Murphy, 35 N. J. Eq. 23.

[8] West *v.* Knight, 1 Ch. Ca. 134; Champion *v.* Smith, Duke, 81; Att. Gen. *v.* Johnson, Amb. 190, n.

[9] Mayor of London's Case, Duke, 83.

[10] Att. Gen. *v.* Comber, 2 Sim. & S. 93; Att. Gen. *v.* Glegg, Amb. 584, 585, n.; 1 Atk. 356; Att. Gen. *v.* Speed, West, Ch. 491; Cook *v.* Duckenfield, 2 Atk. 562, 567. [Towle *v.* Nesmith, 69 N. H. 212.]

[11] Powell *v.* Att. Gen., 3 Mer. 48; Urmey's Ex'rs *v.* Wooden, 1 Ohio St. 160.

[12] Nash *v.* Morely, 5 Beav. 177.

[13] Att. Gen. *v.* Pearce, 2 Atk. 87; Barnard, Ch. 208.

Wis. 617; Tincher *v.* Arnold, 147 Fed. 665; Green *v.* Blackwell, 35 A. 375 (N. J. Eq. 1896); Gidley *v.* Lovenberg, 35 Tex. Civ. App. 203.

(*a*) Or to establish an orphan's home. Kemmerer *v.* Kemmerer, 233 Ill. 327.

gent residents of certain towns, to be selected by the trustees;[1] or to distribute groceries, clothing, fuel, and alms among the poor;[2] or for the relief of the destitute in such manner as charity is usually distributed by the ministers-at-large in the city of Boston;[3] or to twenty aged widows and spinsters of the parish.[4] Gifts for the poorer classes have been sustained; as, for letting out land at a low rent,[5] or for deserving literary men who have been unsuccessful.[6] So trusts for poor relations have been considered charitable, and will be confined to such poor relations as are next of kin under the statute of distributions; and poor relations becoming rich, and the representatives of poor relations, will be excluded:[7] but where the trust is of a perpetual character, it will extend to all the poor relations of the donor, and will not be confined to those within the statute of distributions.[8] Trusts for releasing poor debtors and for the relief of decayed tradesmen are charitable.[9] So of a bequest to ten worthy men for the purchase of meat and wine fit for the

[1] Shotwell *v.* Mott, 2 Sand. Ch. 46; Hereford *v.* Adams, 7 Ves. 324; Paice *v.* Canterbury, 14 Ves. 364; Waldo *v.* Caley, 16 Ves. 206; Com. of Char. Donations *v.* Sullivan, 1 Dr. & War. 501; 4 Ir. Eq. 280.

[2] Washburn *v.* Sewell, 9 Met. 280; Grandom's Estate, 6 Watts & S. 537.

[3] Derby *v.* Derby, 4 R. I. 414.

[4] Thompson *v.* Corby, 27 Beav. 649; Russell *v.* Kellett, 3 Sm. & Gif. 264.

[5] Crafton *v.* Frith, 15 Jur. 737; 2 L. J. (N. S.) Ch. 198. [See Franklin Sq. House *v.* Boston, 188 Mass. 409; Daly's Estate, 208 Pa. St. 58; Webster *v.* Wiggin, 19 R. I. 73.]

[6] Thompson *v.* Thompson, 1 Col. C. C. 395; Shotwell *v.* Mott, 2 Sand. Ch. 46.

[7] Brunsden *v.* Woolredge, Amb. 507; Green *v.* Howard, 1 Bro. Ch. 31, n.; Harding *v.* Glyn, 1 Atk. 169; Mahon *v.* Savage, 1 Sch. & Lef. 111; Swasey *v.* Amer. Bible Soc., 57 Me. 527; Smith *v.* Harrington, 4 Allen, 566; Gillam *v.* Taylor, L. R. 16 Eq. 581; Att. Gen. *v.* Northumberland, 7 Ch. D. 745.

[8] White *v.* White, 7 Ves. 423; Isaac *v.* De Friez, 17 Ves. 373, n.; Amb. 595; Att. Gen. *v.* Bucknall, 2 Atk. 328; Att. Gen. *v.* Price, 17 Ves. 371; Tudor, Char. 7.

[9] Att. Gen. *v.* Ironmongers' Co., 2 Myl. & K. 576; 10 Cl. & Fin. 908; Att. Gen. *v.* Painters' Co., 2 Cox, 51. [Mayor of Lyons *v.* Advocate Gen., 1 App. Cas. 91.]

service of two nights of the passover;[1] or for poor members of the Friends' Society, and for the relief of Indians.[2] So a bequest in aid of objects or purposes of charity, public or private, was held to be for the general relief of the poor.[3] A gift in "aid of the poor-rates,"[4] or to support schools and the poor of a county, is charitable.[5]

§ 700. Education and schools of learning of all grades are referred to in the statute, and almost all gifts for educational purposes are held to be charitable;[6] as, gifts for the advancement of learning in every part of the world, so far as circumstances will permit;[7] or for the diffusion (a part in Pennsylvania, the residue in the United States) of useful knowledge and instruction among the institutes, clubs, or meetings of the working-classes, or manual laborers by the sweat of their brow;[8] to build or erect a school or free-grammar-school,[9] or a school for the sons of gentlemen;[10] for the education of the scholars of poor people in a particular county;[11] or to maintain a school-

[1] Straus *v.* Goldsmid, 8 Sim. 614.

[2] Magill *v.* Brown, Brightly, 347.

[3] Saltonstall *v.* Sanders, 11 Allen, 446; Dolan *v.* Macdermot, L. R. 3 Ch. 676.

[4] Doe *v.* Howells, 2 B. & Ad. 744.

[5] Heuser *v.* Harris, 42 Ill. 425.

[6] Jackson *v.* Phillips, 14 Allen, 552; Swasey *v.* Amer. Bible Soc., 57 Me. 527; Tainter *v.* Clark, 5 Allen, 66; Andrews *v.* Andrews, 110 Ill. 231; Board of Ed. *v.* Bakewell, 122 Ill. 339. [Quincy *v.* Att. Gen., 160 Mass. 431; Att. Gen. *v.* Briggs, 164 Mass. 561; People *v.* Cogswell, 113 Cal. 129; Bedford *v.* Bedford, 99 Ky. 273; John *v.* Smith, 91 Fed. 827, 102 Fed. 218.]

[7] Whicker *v.* Hume, 1 De G., M. & G. 506; 7 H. L. Cas. 124; 10 Eng. L. & Eq. 73; 14 Beav. 509.

[8] Sweeney *v.* Sampson, 5 Ind. 405.

[9] Hadley *v.* Hopkins Acad., 14 Pick. 241; State *v.* McGowen, 2 Ired. Eq. 9; Rugby School, Duke, 80; Gibbons *v.* Maltyard, Poph. 6; Att. Gen. *v.* Williams, 4 Bro. Ch. 525; Att. Gen. *v.* Bowles, 2 Ves. 547; Wright *v.* Lynn, 9 Penn. St. 433; Griffin *v.* Graham, 1 Hawks, 96.

[10] Att. Gen. *v.* Lonsdale, 1 Sim. 109.

[11] Clement *v.* Hyde, 50 Vt. 716. [Green *v.* Blackwell, 35 A. 375 (N. J. Eq. 1896).]

master;[1] or for the masters and fellows of a college;[2] or for the foundation of a scholarship,[3] fellowship,[4] or lectureship[5] in a college or university;[6] or for the perpetual endowment of two schools;[7] or to establish a college for orphans, although all ministers are forever excluded from its walls;[8] or for the education of young men at Oxford for the Church of England, to be selected;[9] or to maintain a library and reading-room;[10] or for paying premiums for the most important discoveries or useful improvements made public upon light and heat;[11] or for the civilization of Indians;[12] or to assist literary persons in their pursuits, or to publish an essay on science;[13] or to publish and distribute the works of Joanna Southcote;[14] or to promote the moral, intellectual, and physical instruction and education of a city;[15] or to create a "change of sentiment," which means to educate;[16] or a fund to increase the salaries of teachers.[17] (*a*)

[1] Hynshaw *v.* Morpeth, Duke, 69.

[2] Platt *v.* St. John's Coll., Duke, 77.

[3] Rex *v.* Newman, 1 Lev. 244; Att. Gen. *v.* Andrew, 3 Ves. 633. [Dexter *v.* Harvard Coll., 176 Mass. 192.]

[4] Case of Jesus Coll., Duke, 78; Att. Gen. *v.* Bowyer, 3 Ves. 714.

[5] Att. Gen. *v.* Margaret and Regius Professors in Cambridge, 1 Vern. 55.

[6] Porter's Case, 1 Rep. 25, b; Att. Gen. *v.* Wharwood, 1 Ves. 537; Christ's Coll., Cambridge, 1 Eden, 10; Amb. 351; 1 Black. 90.

[7] Kirkbank *v.* Hudson, 7 Price, 213; Att. Gen. *v.* Williams, 4 Bro. Ch. 526.

[8] Vidal *v.* Girard's Ex'rs, 2 How. 127; Miller *v.* Atkinson, 63 N. C. 537.

[9] *In re* Well Beloved Weeks, 7 Eng. L. & Eq. 73.

[10] Drury *v.* Natick, 10 Allen, 169; Jackson *v.* Phillips, 14 Allen, 552; Pickering *v.* Shotwell, 10 Barr, 23; Cottman *v.* Grace, 41 Hun, 345.

[11] American Acad. *v.* Harvard Coll., 12 Gray, 584.

[12] Magill *v.* Brown, Brightly, 347.

[13] Thompson *v.* Thompson, 1 Coll. N. C. C. 395.

[14] Thornton *v.* Howe, 31 Beav. 14.

[15] Lowell's App., 22 Pick. 215; Pickering *v.* Shotwell, 10 Penn. St. 27; Whicher *v.* Hume, 7 H. L. Cas. 124; Marsh *v.* Means, 3 Jur. (N. S.) 790; Hartshorne *v.* Nicholson, 4 Jur. (N. S.) 864; Barclay *v.* Maskelyne, id. 1294; see Briggs *v.* Hartley, 14 Jur. 683.

[16] Jackson *v.* Phillips, 14 Allen, 552.

[17] Price *v.* Maxwell, 28 Penn. St. 23.

(*a*) Other examples of valid gifts for the advancement or encouragement of education are: a gift to provide rewards of merit to

Money in trust to support a school for the use of poor children cannot be applied to a public school where rich and poor are educated together; but it may be used in purchasing food and clothing and books for poor children, to enable them to attend such school.[1]

§ 701. The only reference that the statute makes to religious uses as charitable is to the "repair of churches." Sir Francis Moore says that the omission was intentional, in order to avoid confiscations in case the Reformation went backwards. But, in a Christian community of whatever variety of faith and form

[1] McIntire *v.* Zanesville, 17 Ohio St. 352. [See Tincher *v.* Arnold, 147 Fed. 665.]

poor pupils of a certain school, Coleman *v.* O'Leary, 114 Ky. 388; a gift for the prosecution of research in colonial history of Maryland and District of Columbia, Colbert *v.* Speer, 24 App. D. C. 187; a gift for the education of boys of Illinois between the ages of 12 and 18 years, Tincher *v.* Arnold, 147 Fed. 665; a gift "for the purchase of books upon the Philosophy of Spiritualism. . . . Said books to be placed by my executors where they can be free to all who desire to think for themselves. . . ." Jones *v.* Watford, 64 N. J. Eq. 785.

A gift for educational purposes is still a legal charity although the ultimate beneficiaries are not confined to the poor. The promotion of education is regarded as a benefit to the whole public, even though the direct and immediate benefits are limited to members of a specified class, *e. g.*, a certain religious denomination. Woodroof *v.* Hundley, 147 Ala. 287 (a gift to assist in education of young men preparing for the Protestant ministry); Trustees of Washburn College *v.* O'Hara, 75 Kan. 700; McDonald *v.* Shaw, 81 Ark. 235 (to found a school for the education of Catholic boys); Godfrey *v.* Hutchins, 28 R. I. 517 (for the education and improvement of the colored people of the South). But see Troutman *v.* De Boissiere, etc., Ass'n, 66 Kan. 1.

Gifts for the establishment and maintenance of public libraries are for valid educational purposes. Fordyce *v.* Woman's C. N., etc., Ass'n, 79 Ark. 550; Cary Library *v.* Bliss, 151 Mass. 364; Crerar *v.* Williams, 145 Ill. 625; Beurhaus *v.* Cole, 94 Wis. 617; Duggan *v.* Slocum, 92 Fed. 806; Phillips *v.* Harrow, 93 Iowa, 92. The same is true of a gift for a public art gallery, Mason *v.* Bloomington Library Ass'n, 237 Ill. 442; or to a natural history society for its purposes. Estate of Winchester, 133 Cal. 271.

of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. Therefore, both before and since the statute, gifts for the advancement, spread, and teaching of Christianity,[1] or for the convenience and support of worship, or of the ministry, have been held charitable;[2] as gifts for the good,[3] or reparation, furniture, or ornament of a parish church;[4] or to a minister for preaching;[5] or for a pension to a perpetual curate;[6] or for unbeneficed curates;[7] or for augmentations of ecclesiastical persons to small vicarages and curacies;[8] or to Queen Anne's bounty;[9] or for the advancement of Christianity among infidels;[10] for foreign missions;[11] for the dissemination of the gospel at home and abroad;[12] "for the service of my Lord and Master;"[13] "to be disposed of for the benefit or advancement of such societies, subscriptions, or purposes having regard to the glory of God in the spiritual welfare

[1] Andrews *v.* Andrews, 110 Ill. 228.

[2] Anon., Ander. 43, pl. 108; Pitt *v.* James, Hob. 123; Cheney's Case, Co. Litt. 342; 1 Cox, 316; Gibbons *v.* Maltyard, Poph. 6; Moore, 594; Porter's Case, 1 Rep. 26 a, n.; Bruerton's Case, 6 Rep. 1 b, 2 a; Barrey *v.* Ley, Dwight's Char. Ca. 92; Att. Gen. *v.* Downing, Wilmot, 15; Bridgman's Duke, 125, 154; Magill *v.* Brown, Brightly, 380, 381; Jackson *v.* Phillips, 14 Allen, 552, 553; Baker *v.* Dutton, Keen, 224, 232; Att. Gen. *v.* Jolly, 1 Rich. 99.

[3] Wingfield's Case, Duke, 80; Anon., Carey, 39; Nash's Charity, Dwight's Char. Ca. 114.

[4] *In re* Church of Donington-on-Baine, 6 Jur. (N. S.) 290; Att. Gen. *v.* Vivian, 1 Russ. 226; Att. Gen. *v.* Ruper, 2 P. Wms. 125; Magill *v.* Brown, Brightly 347.

[5] Gibbons *v.* Maltyard, Poph. 6; Pember *v.* Inh. of Knighton, Duke, 82; Poph. 139; Penstred *v.* Payer, Duke, 82; 1 Eq. Ca. 95; Duke, 131, 132.

[6] Att. Gen. *v.* Parker, 1 Ves. 43; 14 Ves. 7.

[7] Pennington *v.* Buckley, 6 Hare, 453.

[8] Att. Gen. *v.* Brereton, 2 Ves. 426.

[9] Widmore *v.* Woodroffe, Amb. 636; 1 Bro. Ch. 13, n.; Middleton *v.* Clithrow, 3 Ves. 734.

[10] Att. Gen. *v.* London, 1 Ves. Jr. 243; 3 Bro. Ch. 171.

[11] Bartlett *v.* King, 12 Mass. 537; Soc. for Propagating the Gospel *v.* Att. Gen., 3 Russ. 142; Fairbanks *v.* Lamson, 99 Mass. 533. See Bridges *v.* Pleasants, 4 Ired. Eq. 26.

[12] Att. Gen. *v.* Wallace, 7 B. Mon. 611; Burr *v.* Smith, 7 Vt. 241; Widmore *v.* Woodroffe, Amb. 636; Middleton *v.* Spicer, 1 Bro. Ch. 201.

[13] Going *v.* Emery, 16 Pick. 107; Powerscourt *v.* Powerscourt, 1 Moll. 616.

of his creatures, as they in their discretion shall see fit;" [1] or for keeping the chimes of a church in repair; [2] or for payment of the singers; [3] or for keeping up an organ and paying the organist; [4] or for distributing Bibles and religious books and tracts; [5] or for "the uses of a Sunday-school and for the diffusion of Christian principles; " [6] or for a Sunday-school library; [7] or for the use of Catholic priests in or near London; [8] or to promote the knowledge of the Catholic religion among the poor and ignorant inhabitants of S.; [9] or for establishing a bishopric in America; [10] or "to a theological seminary for a permanent fund to be applied to the education of pious and indigent youth for the ministry, who adhere to the Westminster Confession of Faith;" [11] or for preaching, in places named, the Gospel, as taught by the people known as Disciples of Christ; [12] or for preaching a sermon on Ascension Day; [13] or to a church, to be laid out in bread for the poor; [14] or for the benefit of ministers of the gospel; [15] or for the support and propagation of religion.[16] (*a*)

[1] Townsend *v.* Carus, 3 Hare, 267; Helan *v.* Russell, 4 Ir. Eq. 701.

[2] Turner *v.* Ogden, 1 Cox, 316.

[3] Ibid.

[4] Att. Gen. *v.* Oakaver, 1 Ves. 535.

[5] Att. Gen. *v.* Stepney, 10 Ves. 22; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* American Bible Society, 2 Allen, 334; Pickering *v.* Shotwell, 10 Barr, 32.

[6] Morville *v.* Fowle, 144 Mass. 109.

[7] Fairbanks *v.* Lamson, 99 Mass. 553.

[8] Att. Gen. *v.* Gladstone, 13 Sim. 7.

[9] West *v.* Shuttleworth, 2 Myl. & K. 684.

[10] Agt. Gen. *v.* Bishop of Chester, 1 Bro. Ch. 444; Habershon *v.* Vardon, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

[11] McCord *v.* Ochiltree, 8 Blackf. 15; Att. Gen. *v.* Lawes, 8 Hare, 32.

[12] Sowers *v.* Cyrenius, 39 Ohio St. 29.

[13] Turner *v.* Ogden, 1 Cox, 316; Durour *v.* Motteaux, 1 Ves. 320.

[14] Whitman *v.* Lex, 17 S. & R. 88.

[15] Att. Gen. *v.* Gladstone, 13 Sim. 7; Thornber *v.* Wilson, 3 Drew. 245; 4 Drew. 350; Att. Gen. *v.* Hickman, 2 Eq. Ca. Ab. 193; Att. Gen. *v.* Cock, 2 Ves. 273; Att. Gen. *v.* Lawes, 8 Hare, 32; Grieves *v.* Case, 4 Bro. Ch. 67; Weller *v.* Child, Amb. 524; Bishop Gore's Charity, 4 Dru. & War. 270.

[16] Beckwith *v.* St. Philip's Parish, 69 Ga. 564.

(*a*) Other examples of valid trusts for religious purposes are: to pay the salary of the rector, Alden *v.* St. Peter's Parish, 158 Ill.

Whether a gift to secure prayers for souls in purgatory is a charity, *quære.*[1] It will vary in the different States. In Minnesota it would seem that a trust for religious purposes will not be sustained under the statutes of that State. If there is one in whom the statute of uses can execute the use the title will pass, otherwise the deed of trust will be void.[2]

§ 702. It is to be observed that gifts to teach or propagate any faith or practice contrary to the established church of the kingdom were for a long time illegal; and such gifts could not be sustained, as charities, for the purposes for which they were given.[3] Even now, gifts to aid in re-establishing the supremacy of the pope are contrary to public policy and void;[4] but gifts to dissenting societies, though their teaching is contrary to that of the established church, are now carried into effect as charitable.[5] At all times, gifts for the relief, comfort, and education

[1] Holland *v.* Alcock, 108 N. Y. 312. [See *infra*, § 715, note *a*, p. 1175.]

[2] Little *v.* Willford, 31 Minn. 173. [See *infra*, § 729, note *a*, p. 1203.]

[3] De Themmines *v.* De Bonneval, 5 Russ. 288; Da Costa *v.* De Pas, Amb. 228; 1 Dick. 258; Att. Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96, pl. 9; Doe *v.* Hawthorn, 2 B. & Ald. 96; West *v.* Shuttleworth, 2 Myl. & K. 684; Briggs *v.* Hartley, 14 Jur. 683; Blundell's Trust, 30 Beav. 360.

[4] De Themmines *v.* De Bonneval, 5 Russ. 288.

[5] Att. Gen. *v.* Pearson, 2 Mer. 353; Att. Gen. *v.* Hickman, 2 Eq. Cas. Ab. 193; Shrewsbury *v.* Hornby, 5 Hare, 406; Att. Gen. *v.* Lawes, 8 Hare 32; Att. Gen. *v.* Cock, 2 Ves. 273.

631; to maintain religious services in a certain church and pay the salary of its pastor, Mack's Appeal, 71 Conn. 122, 135; for the benefit of widows and orphans of future ministers of a certain church, Sears *v.* Att. Gen., 193 Mass. 551; for the benefit of poor churches in a certain locality, McAlister *v.* Burgess, 161 Mass. 269; for the benefit of a certain church, as the trustees deem best for its interests, Biscoe *v.* Thweatt, 74 Ark. 545; for the support and maintenance of superannuated preachers of a certain church. Hood *v.* Dorer, 107 Wis. 149.

But it has been held that a trust to pay the salary of the chaplain of a private chapel, to which the public had no right of admission, is not a valid charitable trust. Hoare *v.* Hoare, 56 L. T. 147.

of dissenters,[1] or Catholics,[2] or Jews,[3] not connected with the propagation of their faith, were considered charitable.[4]

§ 703. It is further to be remarked, that a gift to a priest or minister in his public office, to be used by him for such public, religious, and charitable purposes as he sees fit, will be held to be charitable: but it must be a gift to the donee in his official capacity, to be expended for public charitable purposes; for if it is a gift to the person, or individual in his private capacity, for his individual benefit and relief, it will not be charitable, though the individual is described by his official character.[5]

§ 704. The statute names the repair of bridges, ports, havens, causeways, sea-banks, and highways as charitable, and also the aid and ease of poor people in the payment of taxes; consequently, gifts for the general comfort, ease, and convenience of the people, rich as well as poor, are holden to be charitable; as to establish a bridge or lifeboat for a town;[6] or "for purposes conducing to the good of the county of W., and the parish of L. especially;"[7] for supplying water to the town of C. for the use of the inhabitants;[8] for the improvement of the town of Bolton,[9] and of Bath;[10] for charitable, beneficial, and public works at Decca, in Bengal;[11] for the reduction of the national

[1] Att. Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; Att. Gen. *v.* Lawes, 8 Hare, 32; Weller *v.* Childs, Amb. 524; Bishop Gore's Charity, 4 Dru. & War. 270; Wellbeloved *v.* Jones, 1 Sim. & St. 40.

[2] West *v.* Shuttleworth, 5 Myl. & K. 684; Att. Gen. *v.* Gladstone, 13 Sim. 7.

[3] Straus *v.* Goldsmid, 8 Sim. 614.

[4] Ibid.

[5] Thornton *v.* Wilson, 3 Drew. 245; 4 Drew. 350, 357; Doe *v.* Aldridge, 4 T. R. 264; Doe *v.* Copestake, 6 East, 328; Morice *v.* Durham, 9 Ves. 399; 10 Ves. 522.

[6] Johnston *v.* Swann, 3 Madd. 457; Forbes *v.* Forbes, 23 Eng. L. & Eq. 335; Hampden *v.* Rice, 24 Conn. 350.

[7] Att. Gen. *v.* Lonsdale, 1 Sim. 105.

[8] Jones *v.* Williams, Amb. 651.

[9] Att. Gen. *v.* Heelis, 2 Sim. & St. 67

[10] Howse *v.* Chapman, 4 Ves. 542.

[11] Mitford *v.* Reynolds, 1 Phil. 185.

debt;[1] for erecting a town-house;[2] for planting and renewing shade trees in situations now exposed to the heat of the sun;[3] for the advantage and benefit of Great Britain;[4] for such purposes as the trustees may judge most for the benefit and ornament of the town.[5] Gifts to maintain a preaching minister; to build a sessions house; to rebuild St. Paul's Church; or to pave, light, cleanse, and improve a town, — are charitable;[6] so are gifts to discharge a tax on the commonalty;[7] or for a botanical garden for the public benefit;[8] or for an institution for studying and curing the diseases of beasts and birds useful to man;[9] or to the British Museum for the collection and preservation of objects of science or art for the public improvement;[10] or to promote the public good by the encouragement of science and the useful arts;[11] or to purchase a fire-engine for a town;[12] or hose for a hose company;[13] or a gift to the Royal Geographical Society, or the Royal Humane Society;[14] or a grant of land for a pest-house for plague patients, though the plague had not appeared in England for one hundred and eighty years.[15]

§ 705. There are other and still more indefinite gifts, which have been held to be charitable within the letter and spirit of

[1] Ashton *v.* Langdale, 4 Eng. L. & Eq. 139; Newland *v.* Att. Gen., 3 Mer. 684; British Museum *v.* White, 2 Sim. & St. 596.

[2] Coggshall *v.* Pelton, 7 Johns. Ch. 292.

[3] Cresson's App., 30 Penn. St. 437.

[4] Nightingale *v.* Goulbourn, 5 Hare, 484; 2 Phil. 594.

[5] Feversham *v.* Ryder, 27 Eng. L. & Eq. 369.

[6] Att. Gen. *v.* Heelis, 2 S. & S. 67, 77; Howse *v.* Chapman, 4 Ves. 542; Duke, 109, 136; Eltham Parish *v.* Warreyn, Duke, 67; Collinson's Case, Hob. 136.

[7] Att. Gen. *v.* Bushby, 24 Beav. 290.

[8] Townley *v.* Bedwell, 6 Ves. 194.

[9] University of London *v.* Yarrow, 23 Beav. 159; 1 De G. & J. 72.

[10] British Museum *v.* White, 2 S. & S. 594; Beaumont *v.* Oliveira, L. R. 6 Eq. 534; L. R. 4 Ch. 309.

[11] Gort *v.* Att. Gen., 6 Dow. 136; Att. Gen. *v.* Andrews, 3 Ves. 633; American Academy *v.* Harvard Coll., 12 Gray, 594.

[12] Magill *v.* Brown, Brightly, 411.

[13] Thomas *v.* Ellmaker, 1 Parsons, Eq. 98.

[14] Beaumont *v.* Oliveira, L. R. 6 Eq. 543; L. R. 4 Ch. 309.

[15] Att. Gen. *v.* Craven, 21 Beav. 392; Carne *v.* Long, 4 Jur. (N. S.) 474; 6 Jur. (N. S.) 639; 2 De G., F. & J. 75.

the statute; as gifts to benevolent and charitable purposes with a recommendation to apply them to domestic servants;[1] or "for charitable purposes, masses, &c.,"[2] or for "such charitable purposes as the trustee shall think proper,"[3] or "if there is any money left I desire it to be given in charity;"[4] or "to such charitable purposes as I shall name hereafter" (and none are named);[5] or to public and private charities;[6] or to dispose of the same in such charitable and benevolent purposes as one of the trustees shall direct;[7] or to be applied in aid of institutions for charitable and benevolent purposes, established or to be established in Edinburgh or vicinity;[8] or to be distributed in charity, either to private individuals or public institutions;[9] or for promoting charitable purposes as well of a public as a private nature;[10] or to such charitable purposes as V. shall appoint, V. dying in the testator's lifetime;[11] or "to the furtherance and promotion of the cause of piety and good morals; in aid of objects and purposes of benevolence or charity, public or private; to temperance, and for the education of deserving youth;"[12] or to religious and charitable institutions and purposes;[13] or to such charities as the executor shall deem most useful.[14] Gifts to be appropriated to the benefit of the Friends' Meeting are charitable;[15] or for the use of a lodge of Free-

[1] Miller *v.* Rowan, 5 Cl. & Fin. 99.

[2] Schouler, Petitioner, 134 Mass. 426.

[3] White *v.* Ditson, 140 Mass. 351. [See *infra*, § 729, note.]

[4] Legge *v.* Asgill, Turn. & Russ. 265 n.

[5] Mills *v.* Farmer, 19 Ves. 489; 1 Mer. 55. Where the income was to be applied according to a statement appended, and there was no such statement, the court could not presume that the intent was charitable. Aston *v.* Wood, L. R. 6 Eq. 419.

[6] Johnston *v.* Swan, 3 Madd. 457.

[7] Jemmit *v.* Verrel, Amb. 585, n.

[8] Hill *v.* Burns, 2 Wil. & Shaw, 80.

[9] Horde *v.* Suffolk, 2 My. & K. 59.

[10] Waldo *v.* Caley, 16 Ves. 206.

[11] Moggridge *v.* Thackwell, 7 Ves. 39.

[12] Saltonstall *v.* Sanders, 11 Allen, 454; Dolan *v.* Macdermot, L. R. 5 Eq. 60; Treat's App., 30 Conn. 113.

[13] Baker *v.* Sutton, 1 Keen, 224. [14] Wells *v.* Doane, 3 Gray, 201.

[15] Earle *v.* Wood, 8 Cush. 437; Dexter *v.* Gardner, 7 Allen, 245.

masons;[1] or to the American Peace Society, to be expended in the cause of peace;[2] or for the assistance of respectable Unitarian congregations;[3] or for the Universalist denomination;[4] of "for the preparation and circulation of books, newspapers, the delivery of speeches and lectures, and such other means as in the judgment of the trustees will create a public sentiment that will put an end to slavery in the United States;[5] or to assist fugitive slaves escaping from the slave-holding States;"[6] or to such charities and other public purposes as lawfully might be in the parish of T.;[7] or for the increase and encouragement of good servants;[8] or for the maintenance of a Shaker community.[9] (*a*)

[1] King *v.* Parker, 9 Cush. 71; Vander Volgen *v.* Yates, 3 Barb. 242; Duke *v.* Fuller, 9 N. H. 536; Everett *v.* Carr, 59 Maine, 332; Indianapolis *v.* Grand Master, 25 Ind. 518. See Babb *v.* Reed, 5 Rawle, 151.

[2] Tappan *v.* Deblois, 45 Maine, 122.

[3] Shrewsbury *v.* Hornbury, 5 Hare, 406.

[4] North Adams Univ. Soc. *v.* Fitch, 8 Gray, 421.

[5] Jackson *v.* Phillips, 14 Allen, 558.

[6] Ibid.

[7] Dolan *v.* Macdermot, L. R. 5 Eq. 60.

[8] Loscombe *v.* Winteringham, 13 Beav. 87; 7 Eng. L. & Eq. 164; Reeve *v.* Att. Gen., 3 Hare, 191.

[9] Gass *v.* Wilhite, 2 Dana, 170.

(*a*) Other examples of public uses which have been held to be charitable, although not for the relief of poverty are: for the benefit of a life-saving station, Richardson *v.* Mullery, 200 Mass. 247; for founding or maintaining a public hospital, Ware *v.* Fitchburg, 200 Mass. 61; Webber Hospital Ass'n *v.* McKenzie, 104 Me. 320; for the benefit of disabled soldiers and seamen of the Civil War, Holmes *v.* Coates, 159 Mass. 226; for the benefit of a volunteer corps, *In re* Lord Stratheden and Campbell, [1894] 3 Ch. 265; for the purchase of literature for the officers' mess, *In re* Good, [1905] 2 Ch. 60; for the distribution of annual prizes to art or medical students, Almy *v.* Jones, 17 R. I. 265; Palmer *v.* Union Bank, 17 R. I. 627; but not a gift for prizes in yacht racing, *In re* Nottage, [1895] 2 Ch. 649; for a public park, Bartlett, Petitioner, 163 Mass. 509; Meeker *v.* Puyallup, 5 Wash. 759; for the erection of a court house, Stuart *v.* Easton, 74 Fed. 854; for a public burial ground, Corin *v.* Glenwood Cemetery, (N. J. Eq. 1908) 69 A. 1083; see Hopkins *v.* Grimshaw, 165 U. S. 342; for the erection of working-men's dwellings, Webster

the statute; as gifts for a recommendation "for charitable purposes" there is a gift "to such charitable purposes" none of which decidedly, that a trust to build a home for the donor is not a charitable

In Commissioners *v.* Pemsel, [1891] A. C. 531, 583, it was said, by Lord Macnaghten, "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly." And in *In re* Cranston, [1898] 1 Ir. 431, 444, in which a trust for a vegetarian society was held to be a "charitable" trust, it was said by Lord Ashbourne: "It may be that this idea of vegetarianism has not as yet made its way in the world. It may be showing no growth. The vast majority may be opposed to it. It may be disapproved of by medical men. Possibly no member of the Bench may believe in it. But these considerations cannot be regarded as decisive to exclude it from the wide class of gifts regarded by the law as charitable. The gifts are given to societies which rightly or wrongly set a public purpose before them, and which have been founded and maintained in the belief that their teaching is for the benefit of the community."

If a gift is for a purpose which is charitable in the legal sense, it is not taken out of the rules of law

Franklin St. House v. Boston, 188 Mass. 486; *Dale's Estate*, 208 Pa. St. 58; for the conversion of the heathen to Christianity, *Com'rs v. Pemsel*, [1891] A. C. 531; for disseminating the doctrines of Henry George, *George v. Braddock*, 45 N. J. Eq. 757; *see* 30 Cent. L. J. 334; 22 Am. L. Rev. 620; 24 id. 489; 38 Albany L. J. 369; for the benefit of a vegetarian society, *In re Cranston*, [1898] 1 Ir. 431; but *see New Eng. Theosophical Corp. v. Boston*, 172 Mass. 60; or a society for prevention of cruelty to animals, Mass. Soc., etc., *v.* Boston, 142 Mass. 24; or a society for the prevention of vivisection, *Re Joy*, 60 L. T. 175; *In re* Foveaux, [1895] 2 Ch. 501, 504.

In the last cited case, *In re* Foveaux, it was said in sustaining the trust as a "charity," "Cruelty is degrading to man; and a society for the suppression of cruelty to lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether if they achieved their object, the community would, in fact, be benefited is a question on which I think the court is not required, to express an opinion" *per* Chitty, J.

use;[1] in other cases, it has been held doubtful whether such trusts are charitable;[2] but it is now settled that a trust to build, maintain, and keep in repair tombs, vaults, and burying-grounds of the donors, their families or parishes, are so far charitable that they will be carried into effect.[3] (*a*) A bequest of an annual sum for repairs upon a monument has been held

[1] Mellick *v.* Asylum, Jacob, 180; Doe *v.* Pitcher, 6 Taunt. 359; Hoare *v.* Osborne, L. R. 1 Eq. 585; Fisk *v.* Att. Gen., L. R. 4 Eq. 521; Dawson *v.* Small, L. R. 18 Eq. 114.

[2] Matthews *v.* Masters, 1 P. Wms. 422, 423, n.; Durour *v.* Motteux, 1 Ves. 320; Willis *v.* Brown, 2 Jur. 987; Mitford *v.* Reynolds, 1 Phil. 185, 198; Cole *v.* Adams, 6 Beav. 353; Doe *v.* Pitcher, 3 M. & S. 410.

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for charitable uses and trusts because the immediate benefits are limited to members of a particular religious denomination, Woodroof *v.* Hundley, 147 Ala. 287; or to members of a particular church, *In re* Ross' Charity, [1899] 1 Ch. 21; *In re* Perry Almshouses, [1899] 1 Ch. 21; or even to members or the families of members of a specified association or order. Guilfoil *v.* Arthur, 158 Ill. 600; Estate of Willey, 128 Cal. 1, 12; Green's Adm'rs *v.* Fidelity Trust Co., (Ky. 1909) 120 S. W. 283; Minns *v.* Billings, 183 Mass. 126, 5 L. R. A. (N. S.) 686, note; Carter *v.* Whitcomb, 74 N. H. 482; *In re* Buck, [1896] 2 Ch. 727. See *In re* Good, [1905] 2 Ch. 60. But see *contra*, Troutman *v.* De Boissiere, etc., Ass'n, 66 Kan. 1.

(*a*) In the absence of statute it is usually held that a trust to keep a private burial lot in repair is not within the rule for charitable trusts. Estate of Gay, 138 Cal. 552; Mason *v.* Bloomington Library Ass'n, 237 Ill. 442, 446; Morse *v.* Natick, 176 Mass. 510, 513; Hilliard *v.* Parker, 74 A. 447 (N. J. Prerog. 1909); Van Syckel *v.* Johnson, 70 A. 657 (N. J. Eq. 1908); Hartson *v.* Elden, 50 N. J. Eq. 522; Corle's Case, 61 N. J. Eq. 409; Driscoll *v.* Hewlett, 116 N. Y. S. 466 (App. Div.); Kelly *v.* Nichols, 17 R. I. 306, 318; Sherman *v.* Baker, 20 R. I. 446; McIlvain *v.* Hockaday, 36 Tex. Civ. App. 1. See also Hopkins *v.* Grimshaw, 165 U. S. 342, 353. But see Nauman *v.* Weidman, 182 Pa. St. 263; Ford *v.* Ford, 91 Ky. 572.

Statutes authorizing and regulating such trusts are very common. See Morse *v.* Natick, 176 Mass. 510, 513; Bronson *v.* Strouse, 57 Conn. 147; IV N. Y. Consol. Laws (1909), p. 2842, § 13*a*, p. 3397, § 114 *a*; R. I. Hospital Tr. Co. *v.* Town Council, 29 R. I. 393.

§ 706. It has been held, quite decidedly, that a trust to build a monument, tomb, or vault for the donor is not a charitable

v. Wiggin, 19 R. I. 73; for the erection and maintenance of a home for working girls at moderate cost, Franklin Sq. House *v.* Boston, 188 Mass. 409; Daly's Estate, 208 Pa. St. 58; for the conversion of the heathen to Christianity, Com'rs *v.* Pemsel, [1891] A. C. 531; for disseminating the doctrines of Henry George, George *v.* Braddock, 45 N. J. Eq. 757; see 30 Cent. L. J. 334; 22 Am. L. Rev. 620; 24 id. 489; 38 Albany L. J. 369; for the benefit of a vegetarian society, *In re* Cranston, [1898] 1 Ir. 431; but see New Eng. Theosophical Corp. *v.* Boston, 172 Mass. 60; or a society for prevention of cruelty to animals, Mass. Soc., etc., *v.* Boston, 142 Mass. 24; or a society for the prevention of vivisection, *Re* Joy, 60 L. T. 175; *In re* Foveaux, [1895] 2 Ch. 501, 504.

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good.[1] Such bequests will always be enforced as against the heir.[2]

§ 707. In all these cases it is immaterial from what source the funds that constitute the trust are derived, whether from the bounty of individuals, the crown, the State, or legislature. If a trust is contemplated and endowed with funds from any source, for a general public purpose, it will be regulated and controlled by a court of equity, upon proceedings instituted before it.[3] But if the legislature, by general or special laws, establishes schools, hospitals, roads, harbors, and other public improvements, and appropriates the money therefor, and directs by a public law how such money shall be raised and expended, such works are not charities within the meaning of the law, and courts of equity have no jurisdiction to regulate and control them.[4]

§ 708. The cases thus far enumerated as good charitable uses serve to indicate what trusts come within the letter or equity of the statute. It does not follow, however, that American courts can enforce all bequests which may be called charities. The purpose of the gift may be charitable beyond a question; but the court, in the ordinary exercise of its judicial powers, may be unable to establish and administer it. For example, if a testator bequeaths a sum of money in trust for such charitable purpose as he shall name thereafter, and dies without naming the purpose,[5] it is plain that the testator had a charitable intent; but to establish and administer such a charity requires a power and jurisdiction that American courts do not possess;

[1] Willis *v.* Brown, 2 Jur. 987.

[2] Gravenor *v.* Hallum, Amb. 643.

[3] Thomas *v.* Ellmaker, 1 Par. Eq. Ca. 98; Att. Gen. *v.* Shrewsbury, 6 Beav. 220; Att. Gen. *v.* Eastlake, 11 Hare, 205; Att. Gen. *v.* Heelis, 2 S. & S. 76; Att. Gen. *v.* Brown, 1 Swanst. 297; Hullman *v.* Honcomp, 5 Ohio St. 237.

[4] Att. Gen. *v.* Heelis, 2 S. & S. 77.

[5] Mills *v.* Farmer, 19 Ves. 482; 1 Mer. 55.

to wit, the power of completing the testator's will, and of naming the purposes to which the bequest shall be applied. (*a*) This is a prerogative power which belongs to the sovereign power in the State, and courts of equity do not possess it, unless it is conferred upon them by statute. The same remarks apply to many of the cases hereafter enumerated, which were disallowed and set aside as charitable trusts. Many of the gifts were charitable within all the principles of the statute; but there was some indefiniteness in the application of the fund to the objects named, which the courts decided they had not the rightful power to control.

§ 709. Before proceeding to notice and enumerate the cases in which trusts have been held not to be charitable within the letter and equity of the statute, or which for other reasons have been set aside and disallowed, it is proper again to observe that courts look with favor upon all such donations, and endeavor to carry them into effect, if it can be done consistently with the rules of law. (*b*) If the words of a gift are ambiguous or contradictory, they are so construed as to support the charity if possible. It is an established maxim of interpretation, that the court is bound to carry the gift into effect, if it can see a general charitable intention consistent with the rules of law, even if the particular manner indicated by the donor is illegal

(*a*) In England such a bequest has been held to be a complete gift to charity, and the court will administer the trust. See Pocock *v.* Att. General, 3 Ch. Div. 342 (citing Moggridge *v.* Thackwell, 7 Ves. 36; Mills *v.* Farmer, 1 Mer. 55); *In re* White, [1893] 2 Ch. 41. To the same effect, see Sherman *v.* Cong. Miss. Soc., 176 Mass. 349. For decisions taking the view set forth in the text, see Colbert *v.* Speer, 24 App. Div. D. C. 187; Hadley *v.* Forsee, 203 Mo. 418. See *infra*, § 729, note *a*, p. 1207 *et seq.*

(*b*) Equity favors charities, holds them valid when possible, and does not encourage the defence of laches in suits relating to their administration. Duggan *v.* Slocum, 83 Fed. 244; 92 id. 806; Ingraham *v.* Ingraham, 169 Ill. 432; Willey's Estate, 128 Cal. 1; St. James Orphan Asylum *v.* Shelby, 60 Neb. 796, 804; John *v.* Smith, 102 Fed. 218. In general laches is not a defence to a suit to enforce a charitable trust. Ibid.; Independence Church *v.* Reorganized Church, 71 Fed. 250.

or impracticable;[1] or, as Lord Hardwicke said, "The bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good;" or, in other words, "there is no authority to construe it to be void by law if it can possibly be made good."[2] But no forced construction will be adopted to uphold the gift.[3] If the fair meaning of the words may include a legal as well as an illegal application, the gift will be upheld, and restrained within the bounds of law; or if a word is used which has two meanings, one of which will effect, and the other defeat, the purpose of the gift, the former will be adopted.[4] From the foregoing cases and principles, it will be seen that courts of chancery uphold and administer gifts where they are made to particular purposes which are charitable within the letter and spirit of the statute, or where they are made to charity generally, if there is a trustee with power to make them definite and certain. It will further be seen that the word "charity" has obtained a signification in law; and that courts do not uphold or administer trusts for particular purposes which are not charitable within the meaning of the law, nor trusts expressed in general words which do not come within the legal signification of the word "charity."[7]

§ 710. In order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons to be benefited

[1] Williams *v.* Williams, 4 Selden, 525; Martin *v.* Margham, 14 Sim. 230; Jackson *v.* Phillips, 14 Allen, 556; Bartlett *v.* King, 12 Mass. 543; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 117, 118.

[2] Soresby *v.* Hollins, 9 Mod. 221; Amb. 211; 1 Coll. Jurid. 439; Att. Gen. *v.* Whitechurch, 3 Ves. Jr. 144; Curtis *v.* Hutton, 14 Ves. 539; Dent *v.* Allcroft, 30 Beav. 340; Feversham *v.* Ryder, 5 De G., M. & G. 353; Edwards *v.* Hall, 11 Hare, 12; 6 De G., M. & G. 89; Philpot *v.* St. George Hospital, 6 H. L. Cas. 338.

[3] Att. Gen. *v.* Williams, 2 Cox, 388; Tatham *v.* Drummond, 11 L. T. (N. S.) 325; 10 Jur. (N. S.) 1087.

[4] Whicker *v.* Hume, 14 Beav. 509; 1 De G., M. & G. 506; 7 H. L. Cas. 124; Saltonstall *v.* Sanders, 11 Allen, 455; Jackson *v.* Phillips, 14 Allen, 557; Bruce *v.* Presbytery of Deer, L. R. 1 H. L. Scot, 96.

must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being.[1] Consequently a trust to establish a school which is not free, but the benefits of which are confined to particular individuals who are named in the will, is not a charitable trust, and will not be regulated by the court.[2] (*a*) A common fund created by voluntary subscriptions or contributions, the benefits being restricted to the members of the association, is not a charitable fund, controllable by a court of equity.[3] (*b*) A

[1] Burke *v.* Roper, 79 Ala. 142. See Holland *v.* Alcock, 108 N. Y. 312, 330.

[2] Blandford *v.* Fackerell, 4 Bro. Ch. 394; Att. Gen. *v.* Hewer, 2 Vern. 387. A school of art was said not to be charitable. Duke, 128.

[3] Burke *v.* Roper, 79 Ala. 142.

(*a*) Whether a trust for the benefit of a school or college is a public charity or a private trust depends chiefly upon whether the school is run for the benefit of the public or for profit. State *v.* Ausmus, 35 S. W. 1021 (Tenn. 1895); Alfred University *v.* Hancock, 69 N. J. Eq. 470; Spence *v.* Widney, 46 P. 463 (Cal. 1896). See also Minns *v.* Billings, 183 Mass. 126. The fact that tuition is charged as a help to defray the expenses of a school or college does not make the institution a private enterprise for profit. Parks *v.* N. W. University, 218 Ill. 381; Alfred University *v.* Hancock, 69 N. J. Eq. 470; Abston *v.* Waldon Academy, 118 Tenn. 24.

The same is true of a hospital which charges patients who are able to pay, but which is not run for private gain; McDonald *v.* Mass. Gen. Hospital, 120 Mass. 432, 435; Downes *v.* Harper Hospital, 101 Mich. 555, 560; Noble *v.* Hahnemann Hosp., 98 N. Y. S. 605; 112 App. Div. 663; Cunningham *v.* Sheltering Arms, 115 N. Y. S. 576; Powers *v.* Homeopathic Hospital, 109 Fed. 294; or of an old ladies' home which charges an admission fee, Carter *v.* Whitcomb, 74 N. H. 482; or of a home for working girls at moderate cost. Franklin Square House *v.* Boston, 188 Mass. 409; Daly's Estate, 208 Pa. St. 58. On the other hand the fact that a hospital or similar institution does some charitable work does not necessarily stamp it as a charitable organization. See University of Louisville *v.* Hammock, 127 Ky. 564; Gitshoffen *v.* Sisters, 32 Utah, 46.

(*b*) The reason for this seems to lie, not in the fact that the benefits are restricted to members, but in the fact that the benefits arise from contract and that the legal right to them accrues on the happening of certain contingencies. In other words the benefits are in substance mutual insurance and are not in the nature of gratuities, but are fully paid for. Coe *v.* Washington Mills, 149 Mass. 543; Young Men's Benev-

trust for forming a museum in connection with the trustees of Shakespeare's house in Stratford, and for such other purposes as the executors should think fit,[1] is not charitable, because the benefit is confined to particular individuals, and also because the executor has the power to apply the funds to "other purposes," which may be anything but charitable. A trust for the political restoration of the Jews to Jerusalem is not charitable in its nature;[2] and so a gift to secure the passage of laws granting women the right to vote and hold office, and the rights of men generally, has nothing of the idea of charity in it.[3] In the case from Allen the bequest of Jackson to secure a change in the laws, not being a charity, was void under the rule against perpetuities, but in the later case the daughter of Jackson practically accomplished his purpose by giving the property *absolutely* to S. & A., with a request that they would use the fund to further the "Woman's Rights Cause," adding, "But neither of them is under any legal responsibility to any one or to any court to do

[1] Thompson *v.* Shakespeare, 1 John. 612; 6 Jur. (N. S.) 118, 281; 1 De G., F. & J. 399.

[2] Habershon *v.* Vardon, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

[3] Jackson *v.* Phillips, 14 Allen, 571. See Bacon *v.* Ransom, 139 Mass. 119.

olent Soc. *v.* Fall River, 160 Mass. 409; Phillips *v.* Railroad, 211 Mo. 419; Cunnack *v.* Edwards, [1896] 2 Ch. 679.

On principle and by the weight of an authority, gifts for the benefit of distressed members of certain organizations or of their widows and children are in the class of public charities if the ultimate benefit is in the nature of a gratuity and not arising from contract for value received. Guilfoil *v.* Arthur, 158 Ill. 600; Green's Adm'rs *v.* Fidelity Trust Co., 120 S. W. 283 (Ky. 1909); Carter *v.* Whitcomb, 74 N. H. 482; Minns *v.* Billings, 183 Mass. 126, 5 L. R. A. (N. S.) 686, note; Estate of Willey, 128 Cal.1, 12; *In re* Buck, [1896] 2 Ch. 727. See *In re* Good, [1905] 2 Ch. 60. But in Troutman *v.* De Boissiere, etc., Ass'n, 66 Kan. 1, 5 L. R. A. (N. S.) 692, it was held by a divided court that a gift in trust to provide a home and school for the maintenance and education of children of deceased Odd Fellows, was not a valid public charity.

A hospital supported by a railroad corporation and its employees for the free treatment of the latter, is a charitable institution. Union Pac. Ry. Co. *v.* Artist, 60 Fed. 365.

so." This was upheld, not as a trust, but as an absolute gift. Money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity.[1] There is a distinction between a fund contributed by members of a club, society, association, or lodge, to be employed and disposed of among themselves as the members may at any time agree, and a gift conferred, as matter of bounty, upon such club, society, or lodge, in trust to be distributed in charity. In the latter case it is a charitable use,[2] and cannot be divided among the members in disregard of the purposes for which the funds were contributed.[3] A bequest to a corporation to enable it to keep a larger supply of corn in London for the market is not charitable;[4] and a devise to a corporation to distribute the rents among twenty-four persons named, as they may need assistance, is not charitable; but it gives a vested right to each of the *cestuis que trust* to seek redress in equity.[5] A gift for "the support of those of my children and their descendants who may be destitute," is not a charity.[6](*a*)

§ 711. There are other cases where legacies are given in trust for purposes that are clearly charitable; but these purposes are

[1] Babb *v.* Reed, 5 Rawle, 151; Att. Gen. *v.* Federal St. Meeting-house, 3 Gray, 44; Anon., 3 Atk. 277; Brenon's Estate, Brightly, 345. [See *supra*, note *b*, p. 1161.]

[2] Duke *v.* Fuller, 9 N. H. 538; Vander Volgen *v.* Yates, 3 Barb. Ch. 290; Thomas *v.* Ellmaker, 1 Par. Eq. 108; Penfield *v.* Sumner, 11 Vt. 226; Wright *v.* Lynn, 9 Penn. St. 433; Indianapolis *v.* Grand Master, 25 Ind. 518. [See Minns *v.* Billings, 183 Mass. 126.]

[3] Potts *v.* Philadelphia Association, 1 (Pa.) Leg. Gaz. R. 369.

[4] Att. Gen. *v.* Haberdashers' Co., 1 My. & K. 420.

[5] Liley *v.* Hey, 1 Hare, 580; Philadelphia *v.* Fox, 64 Penn. St. 176.

[6] Kent *v.* Dunham, 142 Mass. 216.

(*a*) A trust for the education of the descendants of two named persons has been held not to be a valid charitable trust. Johnson *v.* De Pauw Univ., 116 Ky. 671. But a provision, in a gift to found a scholarship, that a preference be given to the donor's kin, has been held valid. Dexter *v.* Harvard College, 176 Mass. 192. See also Darcy *v.* Kelley, 153 Mass. 433; Bullard *v.* Chandler, 149 Mass. 532.

joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases courts cannot establish and administer the fund as charitable. For example, a gift for such charitable and *other purposes* as the executors might think fit cannot be sustained as charitable; for the executors have power by the will to apply the whole to purposes *other* than charitable.[1] (*a*) So a gift to executors in trust to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons in such shares as they should think fit, was not sustained for the same reason.[2] (*b*) So gifts in trust for such uses as the trustees see fit,[3] or to such persons as the trustees think fit,[4] have no element of charity in them that courts can administer. A gift in trust for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging works of general utility,[5] was not sustained. So a trust for benevolent purposes was not sustained, as benevolence may or may not be charitable in the law.[6] For the same reason where a bequest

[1] Ellis *v.* Selby, 1 M. & Cr. 286, 299; 7 Sim. 352; Chamberlain *v.* Stearns, 111 Mass. 267. [Mason *v.* Perry, 22 R. I. 475; Hyde's Ex'rs *v.* Hyde, 64 N. J. Eq. 6; *In re* Sutro's Estate, 155 Cal. 727. See also Minot *v.* Att. Gen., 189 Mass. 176.]

[2] Vezey *v.* Jamson, 1 S. & S. 69; Harris *v.* Du Pasquier, 23 L. T. (N. S.) 689; Chamberlain *v.* Stearns, 111 Mass. 267; Nichols *v.* Allen, 130 Mass. 211.

[3] Fowler *v.* Garlike, 1 Russ. & My. 232; Nash *v.* Morley, 5 Beav. 182.

[4] Gibbs *v.* Ramsey, 2 Ves. & B. 295.

[5] Kendall *v.* Granger, 5 Beav. 300.

[6] James *v.* Allen, 3 Mer. 17; Norris *v.* Thompson, 19 N. J. Eq. 311.

(*a*) But the gift will be sustained if it appears that the testator intended the "other purposes" to be limited to legal charities. Staines *v.* Burton, 17 Utah, 331.

(*b*) For a case where the court sustained a trust for charitable purposes although the trustee was given an invalid discretion to apply part of the funds for the benefit of the grantor's descendants, see St. Paul's Church *v.* Att. Gen., 164 Mass. 188, 195. See also Mormon Church *v.* U. S., 140 U. S. 665; Staines *v.* Burton, 17 Utah, 331.

was made to the Bishop of Durham, in trust for such objects of benevolence and liberality as he should approve, the court held that the fund could not be administered as a charity, and ordered it to be paid over to the next of kin.[1] These cases all proceed upon the maxim, that a trust to be valid must be under the control of a court, and the trust must be of such a nature that its administration can be reviewed. A trust for charity must therefore be governed by some principles that are familiar to the court. These principles have grown up in relation to the words "charity" and "charitable use," and to descriptions that come within them; but there are no rules that can be applied to mere benevolence, liberality, or generosity, or to any words that give a discretion and power to the trustees to apply the funds to any purposes within the whole range of human action.

§ 712. In addition to the above cases, which proceed upon clear and intelligible principles, are two cases which have given rise to much criticism and discussion. Ommanney *v.* Butcher[2] decided that a trust for "private charity" could not be administered in a court of equity. Williams *v.* Kershaw[3] determined that a trust for "benevolent, charitable, and religious purposes" was not a good charitable use within the letter or spirit of the statute. The objection to the first case is, that "private charity" refers to private almsgiving, or private relief of the poor; that the objects of such charity are uncertain and indefinite until selected by the trustees; that the distribution of alms and relief to the poor in such manner is no more personal than the relief to the individual poor must always be; that the trustees can be required to account for the distribution of the funds, and that they can be dealt with by the court for any bad faith or breach of the trust; in short, that such a gift has all the ele-

[Chamberlain *v.* Stearns, 111 Mass. 267; Hegeman's Ex'rs *v.* Roome, 70 N. J. Eq. 562. See *infra*, § 712, note *a*, p. 1170.]

[1] Morice *v.* Bishop of Durham, 9 Ves. 399; 10 Ves. 522.

[2] Ommanney *v.* Butcher, 1 Turn. & Russ. 260.

[3] Williams *v.* Kershaw, 5 Law Jour. (N. S.) Ch. 84, cited 1 Keen, 232; 1 My. & Cr. 293.

ments of a good charitable use. The principal objection to the other decision is, that the word "benevolent," in the connection in which it was used, signified "charitable;" that, upon the most approved rules of interpretation applied to charitable bequests, the word should have had its meaning fixed by the context; and that, taking all together, a good charitable use was intended, and not a general, liberal, or benevolent use. Mr. Boyle examines and criticises these cases at great length, and concludes that they are not true expositions of the law.[1] In Massachusetts, a bequest was made in trust "in aid of objects and purposes of benevolence or charity, public or private." Mr. Justice Gray examined these cases with great care, and arrived at the conclusion that they were at least of doubtful authority in England, and that they certainly would not be followed in Massachusetts.[2] In New Jersey, a gift in trust to be

[1] Boyle on Charities, pp. 286–299.

[2] Saltonstall *v.* Sanders, 11 Allen, 462. In this case, Mr. Justice Gray says: "The decision which goes furthest to support the position of the plaintiffs as to the meaning of the words 'private charity' is that of Ommanney *v.* Butcher, Turn. & Russ. 260. There a testator, after legacies to certain individuals, and to various schools, hospitals, and other religious and charitable institutions of which he was a governor or trustee, added, 'In case there is any money remaining, I should wish it to be given in private charity.' Sir Thomas Plumer, M. R., held this last bequest too indefinite to be carried out, either by the sign-manual of the crown, or by the ordinary jurisdiction in chancery. The opinion does not show that degree of thought and research which characterizes most of the judgments of that learned person. His statement that there was no case in which private charity had been acted upon by the court is inconsistent with the long line of authorities above quoted, not one of which is noticed in the opinion, except Legge *v.* Asgill; and no attempt is made to distinguish that case, although the direction there that any money left unemployed might 'be given in charity,' as Mr. Boyle remarks, in his able and discriminating treatise, 'surely must be regarded as pointing quite as much, if not more, to private than to public charity.' Boyle on Charities, 300. Sir Thomas Plumer's expression, that 'the charities recognized by this court are public in their nature, they are such as the court can see to the execution of,' suggests the inference that he thought it necessary to have the funds distributed openly in the public view, or the court could not supervise the distribution. This inference is confirmed by his adding, 'assisting individuals in distress is private charity; but how can such a charity be executed by the court?' To which it may be answered, 'By requiring an account,

distributed "to benevolent, religious, and charitable institutions," at the discretion of the wife of the testator, was declared

as of any other trustee who is charged with neglect or breach of trust.' And the cases already cited show that Lord Hardwicke, Lord Eldon, Sir William Grant, and Sir John Leach upheld and executed charities for privately assisting indefinite numbers of individuals in distress. Sir Thomas Plumer says, 'In all cases the general principle is, that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice.' But general moral duty, carried out in acts beneficial to an indefinite number or class of persons, is of the very essence of a charity: and, in the cases in which trusts have been set aside as too vague, it has been upon the ground that they might be applied to the benefit of particular individuals, to benefit whom was of no general or public advantage. If, as he says, 'private charity is in its nature indefinite,' it has the principal requisite of a public charity. This judgment of Sir Thomas Plumer, although countenanced by *obiter dicta* of Lord Cottenham near the beginning of his career as chancellor, in Williams *v.* Kershaw, 5 Law Jour. (N. S.) Ch. 86, and Ellis *v.* Selby, 1 Myl. & Cr. 293, cannot, in a court not bound by it as a precedent, outweigh all the other authorities.

"There is a species of organization, sometimes called a 'private charity,' which is not a public or general charity in the view of the Stat. of Eliz., or of a court of chancery; and that is an association for the mutual benefit of the contributors, and of no other persons. But such a case wants the essential element of indefiniteness in the immediate objects, if not that of gratuity in the contribution. Anon., 3 Atk. 277; Att. Gen. *v.* Haberdashers' Co., 1 Myl. & K. 420; Carne *v.* Long, 2 De G., F. & J. 75; Att. Gen. *v.* Federal St. Meeting-house, 3 Gray, 44–52. Upon no reasonable construction can a bequest to 'private charity,' still less one to 'charity public or private,' be brought within that class.

"The decisions of Lord Langdale, to which the plaintiffs have referred, were as follows: In one of them he held a bequest to executors to receive the interest half-yearly, 'and divide it among poor pious persons, male or female, old or infirm, as they see fit, not omitting large and sick families, if of good character,' to be a valid charitable bequest for the poor. Nash *v.* Morley, 5 Beav. 177. In the other, of a bequest to trustees to be applied at their discretion, 'for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility,' Lord Langdale said that if the sentence had ended with the word 'individuals,' it would have been a good charitable purpose; but he felt himself bound by the decisions to hold that the words 'general utility' (which do not occur in the will before us) were large enough to include purposes which were not charitable, and that the whole bequest was therefore void. Kendall *v.* Granger, 5 Beav. 300.

"In Ellis *v.* Selby, 7 Sim. 352; s. c. 1 Myl. & Cr. 286, the only point

not to be a good charitable use, and that the word "benevolent," in the collocation in which it was found in that will, did not mean

decided was, that a bequest in trust for 'charitable or other purposes,' as the trustee should think fit, was void. The correctness of that decision cannot be doubted; for the testator could hardly have expressed more clearly an intention to allow the fund to be applied to purposes which were not charitable, as well as to those which were. The decision of Sir John Leach, in Vezey *v.* Jamson, 1 Sim. & Stu. 69, against the validity of a gift in trust for 'such charitable or public purposes as the laws of the land would admit of, or to any person or persons,' and in such shares and manner as the trustees should think fit or as the laws admitted of, is to the same effect; and manifests no intention to overrule or qualify the cases in which he had upheld trusts for 'public or private charities,' or 'to be distributed in charity to private individuals or public institutions,' or for 'charitable and benevolent purposes.' Johnston *v.* Swann, and Horde *v.* Earl of Suffolk, *ut supra;* Jemmit *v.* Verril, *infra*, and the passages quoted from Lord Lyndhurst's opinion in Mitford *v.* Reynolds, 1 Phil. 190, and from Tudor on Charitable Trusts (2d ed.), 223, go no further. Within the same class falls the decision of Vice-Chancellor Knight Bruce, that a direction that part of the testator's property should 'be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works,' part of the profits of which works he gave to members of his family, was void. Thompson *v.* Thompson, 1 Colly. R. 388, 392, 399. Others of the cases cited for the plaintiffs related to bequests in trust to be disposed of in the trustees' discretion, without any mention whatever of charities in the will. Such were Fowler *v.* Garlike, 1 Russ. & Myl. 232, and Stubbs *v.* Sargon, 2 Keen, 255; s. c. 3 Myl. & Cr. 507.

"We are therefore of opinion, that, upon principle and authority, a bequest for 'objects and purposes of charity, public or private,' is a valid charitable gift. The effect of the use of the word 'benevolence' in connection with the word 'charity' remains to be considered.

"The earliest case cited for the plaintiffs upon this point is that in which Sir William Grant and Lord Eldon, on appeal, held that a bequest to the Bishop of Durham in trust, to be applied 'to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, should most approve of,' was too indefinite to be executed. Morice *v.* Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 521. But 'liberality' might include gifts to persons who were neither poor nor deserving, and in no sense legal or moral objects of charity. The word 'charity' was not used; and its absence was much relied on, Sir William Grant saying, 'The use of the word "charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion.' 9 Ves. 404, 405; 10 Ves. 541. Sir William Grant afterwards held, that a bequest to trustees 'to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unanimously agree

"charitable."[1] The word "benevolent" has often been construed by the court to mean the same thing as "charitable" in

on,' fell within the same class. James *v.* Allen, 3 Mer. 17. But in that case again, the word 'charity' was not used. Lord Brougham subsequently defined the distinction upon which those cases turned, thus: 'If the intention be charity, the court will execute it, however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality, without specifying the objects who are to receive, and those objects not being the poor, the court will never attempt to execute.' Att. Gen. *v.* Haberdashers' Co., 1 Myl. & K. 428.

"Vice-Chancellor Leach used 'general benevolence' as equivalent to charity. He held a bequest 'to the widows and orphans of the parish of Lindfield' to be a charitable gift to the poor widows and orphans of that parish, because it 'could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence.' Att. Gen. *v.* Comber, 2 Sim. & Stu. 93. And he upheld a bequest to trustees to be applied and disposed of 'for such charitable and benevolent purposes' as one of them should direct and think proper. Jemmit *v.* Verril, Amb. 585, note.

"By far the strongest case in favor of the plaintiffs is that of Williams *v.* Kershaw, which is not to be found in any of the regular reports, but is reported by Mr. Beavan in 5 Law Jour. (N. S.) Ch. 84, and an abstract of it printed in 5 Clark & Fin. 111. In that case, a testator, after legacies for education, the poor, missionary societies, and dissenting ministers, gave the residue of his personal estate to trustees, to apply the income 'to and for such benevolent, charitable, and religious purposes as they in their discretion shall think most advantageous and beneficial.' Sir Christopher C. Pepys, M. R., considered himself bound by the case of Morice *v.* Bishop of Durham, James *v.* Allen, and Ommanney *v.* Butcher, to hold that this would authorize the application of the income to benevolent purposes which were neither charitable nor religious, and was therefore void; and two months afterwards, having meanwhile become Lord Chancellor Cottenham, he referred to the decision with approval. Ellis *v.* Selby, 1 Myl. & Cr. 298.

"But that decision is directly opposed to the construction given to like words in earlier and later judgments of the House of Lords upon appeals from the courts of Scotland. In Hill *v.* Burns, 2 Wils. & Shaw, 80, a bequest was held valid by which a testatrix appointed the residue of her

[1] Norris *v.* Thompson, 19 N. J. Eq. 308. [See Hegeman's Ex'rs *v.* Roome, 70 N. J. Eq. 562.]

the law, and trusts for benevolent or charitable purposes have been carried into effect.[1] In Massachusetts, the word "benevolence" has been so often used in the constitution of the State, and in so many general and private statutes, as equivalent to, and synonymous with, the word "charity," that it has come to have that meaning in the law.[2] (*a*)

estate 'to be applied by my said trustees in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow or neighborhood thereof; and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to my said trustees shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the judges of the appropriation of the said residue for the purposes aforesaid.' That case was cited as authority by Lord Lyndhurst in Critchton *v.* Grierson, 3 Bligh, N. R. 434; s. c. 3 Wils. & Shaw, 341. In a later case, in which Williams *v.* Kershaw was cited, the House of Lords established a residuary bequest to trustees to be applied 'to such benevolent and charitable purposes as they think proper,' recommending them, if it should amount to £600, to hold the principal, and pay out the income annually 'to faithful domestic servants, settled in Glasgow or the neighborhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' service;' but if less than that amount, the testator authorized his trustees 'to distribute the same to such charitable or benevolent purposes as they may think proper.' Miller *v.* Rowan, 5 Cl. & Fin. 99; s. c. 2 Shaw & Macl. 866.

"It was indeed said, in the two cases last cited, that the law of England as to charitable bequests was more strict than the law of Scotland. But the decision of the English courts since our revolution are of no binding authority in this court; and, upon such a question as the interpretation of the word 'benevolence,' as connected with 'charity,' of no peculiar weight, when opposed to the well-settled meaning of those words in our own law."

[1] Miller *v.* Rowan, 5 Cl. & Fin. 99; Jemmit *v.* Verril, Amb. 585, n.; Hill *v.* Burns, 2 Wils. & Shaw, 80; Saltonstall *v.* Sanders, 11 Allen, 465; Johnston *v.* Swann, 3 Madd. 457; Goodale *v.* Mooney, 60 N. H. 535, where a bequest for relatives and "benevolent" purposes, in such sums as the trustees should deem best, was upheld.

[2] Saltonstall *v.* Sanders, 11 Allen, 468, 470.

(*a*) In Chamberlain *v.* Stearns, 111 Mass. 267, it was held that a devise to trustees to expend income "solely for benevolent purposes in their discretion" was invalid because including purposes not charitable. "The word 'benevolent,' of itself, without anything in the context to qualify or restrict its ordinary meaning clearly includes not only purposes which are deemed charitable by a court of equity; but

§ 713. There is another class of trusts for charities that courts decline to sustain and administer, on the ground that they are *too* general, vague, and indefinite to be applied to any certain charitable use. This class is larger in America than in England, as the Lord Chancellor in the English chancery can exercise the prerogative of the crown in administering an indefinite trust; but American courts can exercise only the ordinary judicial powers of courts of equity. Even in England, Lord Chancellor

also any acts dictated by kindness, good will or a disposition to do good. . . . On the other hand, it has been held by this court and by the House of Lords, that 'benevolent,' when coupled with 'charitable' or any equivalent word, or used in such connection, or applied to such public institutions or corporations, as to manifest an intent to make it synonymous with 'charitable,' might have effect according to that intent," per Gray, J. In Weber *v.* Bryant, 161 Mass. 400, it seems to have been regarded that *prima facie* the expression, "objects and purposes of benevolence or charity," means no more than the one word charity. For other cases where the word "benevolent" was construed not to extend the trustee's field of choice to purposes which are not legal charities, see Dulles's Estate, 218 Pa. St. 162; Murphy's Estate, 184 Pa. St. 310; Fox *v.* Gibbs, 86 Me. 87; Pell *v.* Mercer, 14 R. I. 412.

In New Jersey where the trustee was directed to distribute "among religious, benevolent *or* charitable objects," it has been held that the trust was void, since the coupling of the word benevolent to charitable with the word *or* extended the choice to objects not charitable even in the wide legal sense. Hegeman's Ex'rs *v.* Roome, 70 N. J. Eq. 562. Obviously, if the conjunction *and* had been used, it might have been possible for the court to hold, without any other evidence of an intention to limit the natural meaning of the words, that the only benevolent objects authorized were those that were also charitable. See People *v.* Powers, 147 N. Y. 104.

The English court has declined to sustain a gift for "charitable or philanthropic purposes," on similar grounds. *In re* Macduff, [1896] 2 Ch. 451. To the same effect see Livesey *v.* Jones, 55 N. J. Eq. 204, where the court held invalid a bequest to a trustee "to use and expend the same for the promotion of the religious, moral and social welfare" of persons to be selected by him. The objection was that the trust did not come under the rules for charitable trusts because the will authorized uses which were not exclusively charitable. So also of a testamentary gift in trust for the purpose of hospitality to traveling members of a certain religious society. Kelley *v.* Nichols, 18 R. I. 62.

The New York statute authorizing charitable trusts expressly includes those for benevolence. IV N. Y. Consol. Laws (1909), p. 2840, § 12, p. 3396, § 113.

Thurlow declined to sustain a trust to buy and distribute such books as might have a tendency to promote the interest of virtue and religion and the happiness of mankind.[1] Where a testator directed his executors to pay over certain property for the benefit of the Methodist Episcopal Church in America, to be disposed of by the conference, or the different members composing the same, as they, in their godly wisdom, shall judge will be most expedient or beneficial for the increase or prosperity of the gospel, it was held that the bequest was void for uncertainty.[2] A devise to the annual conference of the Methodist Episcopal Church for the benefit of institutions of learning under the superintendence of said conference, and the missionary society of said church, and to be otherwise disposed of as the Tennessee annual conference may deem best in their wisdom, was held void; and an act of the legislature appointing trustees to receive the fund was held unconstitutional and void.[3] A bequest to be applied to home or foreign missions and poor saints was held void;[4] and so a direction to the trustees to expend any surplus income for the support of indigent pious young men preparing for the ministry in New Haven was held void.[5] A bequest to be expended in the education of colored children, both male and female, in such manner as may be deemed best, the object being to promote the moral and religious improvement of the colored race, was held to be too indefinite,

[1] Brown *v.* Yeall, 7 Ves. 50, n., 76; 9 Ves. 406; 10 Ves. 27, cited. Perhaps the most remarkably comprehensive will of this kind on record is the will of one of the Norton family (Southwick) in 1434, reported in "Curiosities of the Search Room," p. 206, by which the testator undertook to give all he had "to be used unto the end of the world for the benefit of the poor, the hungry, the thirsty, the naked, the sick, and the wounded, and prisoners," and appointed the Houses of Parliament his executors; unfortunately not available as an authority, the testator having been declared insane.

[2] Holland *v.* Peck, 2 Ired. Ch. 255.

[3] Green *v.* Allen, 5 Humph. 170.

[4] Bridges *v.* Pleasants, 4 Ired. Ch. 26. [But see Keith *v.* Scales, 124 N. C. 497.]

[5] White *v.* Fisk, 22 Conn. 31. [But see Hayden *v.* Conn. Hospital, 64 Conn. 320; Conklin *v.* Davis, 63 Conn. 377; Strong's Appeal, 68 Conn. 527.]

and therefore void, there being no trustees with the power of selecting the objects of the charity.[1] If there were trustees in these cases ready and willing to receive the funds, and to execute the powers conferred by the testaments, and to select the objects of the trust and thus make them certain, and apply the funds to such objects, it is difficult to see why the courts could not have carried these trusts into effect without invoking any extraordinary powers. A bequest to "a Catholic church" to secure prayers for souls in purgatory was held too vague.[2] (*a*) A bequest for "charitable purposes" is too indefinite.[3] (*b*)

§ 714. If the sum to be given to a charitable use be left blank or uncertain, the trust will fail; as where £6,000 was given for a hospital, to increase till it amounted to —— for supporting —— boys,[4] it was held to have failed. So if the original sum to be given is not specified;[5] and if a gross sum is given for charitable uses, and for other purposes which fail for illegality or indefiniteness, or for want of certainty in the sum to be applied to the charity,[6] the trust will fail. But where a sum certain was given to a testator's relations, and to a charity, but the proportions were not named, the court applied the maxim that *equality is equity*, and divided the fund equally between the family and the charity.[7] Mr. Boyle contends, that, as the words

[1] Grimes *v.* Harmond, 35 Ind. 198.

[2] Holland *v.* Alcock, 108 N. Y. 312.

[3] Webster *v.* Morris, 66 Wis. 366.

[4] Ewen *v.* Bannerman, 2 Dow. & Cl. 74.

[5] Flint *v.* Warren, 15 Sim. 626; Second Cong. Soc. *v.* First Cong. Soc., 14 N. H. 315; Russell *v.* Jackson, 10 Hare, 204; Coxe *v.* Bassett, 3 Ves. 155; Hartshorne *v.* Nichols, 26 Beav. 58.

[6] 1 Jarman on Wills, pp. 195, 196 (ed. 1861).

[7] Att. Gen. *v.* Doyley, 2 Eq. Ca. Ab. 194; 4 Vin. 485; 7 Ves. 58, n.; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; 7 Ves. 38; Mills *v.* Farmer, 1 Mer. 55; 19 Ves. 483; Att. Gen. *v.* Bradley, 1 Eden, 482; Sauls-

(*a*) In some jurisdictions such a bequest is sustained as a valid charity. *Infra*, § 715, note *a*, p. 1175.

(*b*) This is not so in England, and apparently not in Massachusetts, Rhode Island, New Jersey, and possibly in Maine. See *infra*, § 729, note *a*, p. 1208.

in Williams *v.* Kershaw [1] were "for benevolent, charitable, and religious purposes," the fund should have been divided into three parts, as two of the purposes were good at any rate, even if "benevolent" did not mean "charitable," and two parts of the fund should have been applied to the valid objects, and the other part returned to the next of kin.[2] Where a bequest of £1,000 was made to the Jews' poor, Mile End, and there were two charitable institutions for Jews at that place, as it was uncertain to which the bequest was intended, the court divided it equally.[3] Where a testator bequeathed a fund to trustees for erecting such monument to his memory as they saw fit, and in building an organ gallery to the church, and the trustees expended the whole sum upon the monument, the court held it to be a breach of the trust.[4] In all these cases the intention of the testator, to be gathered from the whole will, should guide in the administration of the fund.[5] Where a testator devised a sum to the school society of the town of S., and directed that the society should annually appoint trustees to hold the fund, and there were two societies of the same name, the court ordered the trustees to be appointed by both societies.[6]

§ 715. If a gift is made for a purpose called charitable, it will not be upheld if it contravenes an express provision of law, or if it is for a purpose forbidden by public policy. In other

bury *v.* Denton, 3 K. & J. 529; Longman *v.* Broom, 7 Ves. 124; Penny *v.* Turner, 2 Phil. 493; Tothill, 92, 95, 96.

[1] 5 L. Jour. (N. S.) Ch. 84; 5 Cl. & Fin. 111.

[2] Boyle on Charities, pp. 290–293; Hoare *v.* Osborne, L. R. 1 Eq. 585.

[3] Bennett *v.* Hayter, 2 Beav. 81; Waller *v.* Child, Amb. 524; Bishop Gore's Charity, 4 Dr. & War. 270; Simon *v.* Barker, 5 Russ. 112; Pieschel *v.* Paris, 2 S. & S. 384; Saulsbury *v.* Denton, 3 K. & J. 529; *In re* Atchin's Trusts, L. R. 14 Eq. 232; *In re* Kilvert's Trusts, L. R. 7 Ch. 170; Bradshaw *v.* Thompson, 2 Y. & C. Ch. 295.

[4] Cole *v.* Adams, 6 Beav. 353. See Down *v.* Worrall, 1 My. & K. 561.

[5] Harding *v.* Glyn, 1 Atk. 469; Cole *v.* Wade, 16 Ves. 44; Down *v.* Worrall, 1 My. & K. 561; Marlborough *v.* Godolphin, 2 Ves. 61; Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

[6] First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 56.

words, courts will not allow, or carry into effect, charitable donations which tend to a breach of the laws of the land. Thus a gift for procuring the discharge of persons confined under sentence for a breach of the criminal laws is void.[1] But a gift to aid fugitive slaves in escaping from slavery was not held illegal, on the ground that there were many ways in which it could be employed that would not be contrary to law.[2] In England, a gift to promote a religious faith, contrary to the statute, was void.[3] So all gifts to superstitious uses, so called, such as praying for the souls of the dead, (*a*) maintaining *obit* lamps, and for other similar objects, in the struggle of the Reformation and afterwards were held to be against public policy and void. But in this country, where all religious denominations, doctrines, and forms of worship are tolerated, or rather protected, so long as the public peace is not disturbed, there can be in the law no

[1] Thrupp *v.* Collett, 26 Beav. 125; Russell *v.* Jackson, 10 Hare, 204.

[2] Jackson *v.* Phillips, 14 Allen, 570.

[3] De Themmines *v.* De Bonneval, 5 Russ. 288; Da Costa *v.* De Pas, Amb. 228; 2 Swanst. 487 n.; 1 Dick. 258; Finley *v.* Hunter, 2 Strob. Eq. 218; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Lusk *v.* Lewis, 32 Miss. 297.

(*a*) The American courts take several different views of gifts to pay for masses for the dead. In some jurisdictions such gifts have been held void because there is no living beneficiary. Festorazzi *v.* St. Joseph's Church, 104 Ala. 327; McHugh *v.* McCole, 97 Wis. 166, 176.

In other States they have been sustained as charitable trusts for the maintenance of public religious services. Hoeffer *v.* Clogan, 171 Ill. 462; Gilmore *v.* Lee, 237 Ill. 402, 414; Coleman *v.* O'Leary's Ex'r, 114 Ky. 388, 402; Schouler, petitioner, 134 Mass. 426; Kerrigan *v.* Tabb, 39 A. 701 (N. J. Ch. 1898); Webster *v.* Sughrow, 69 N. H. 380; Seibert's Appeal, 18 W. N. Cas. 276 (Pa.); Johnston *v.* Hughes, 187 N. Y. 446 (*semble*); *In re* Zimmerman's Will, 50 N. Y. S. 395. See also Reichenbach *v.* Quinn, 21 L. R. Ir. 138.

In still other States they have been sustained as absolute gifts, not affected by a trust. Estate of Lennon, 152 Cal. 327; Harrison *v.* Brophy, 59 Kan. 1; Sherman *v.* Baker, 20 R. I. 446, 40 L. R. A. 717 and note. See also Moran *v.* Moran, 104 Iowa, 216, sustaining such a gift as a valid private trust which the trustee might be compelled to perform.

such thing as a superstitious use.[1] The most common illustration of the rule that courts will not uphold gifts for charitable purposes where such gifts contravene some law, is found in the numerous cases that have arisen under the English statute of mortmain, 9 George II. c. 36, and other similar statutes, which enacted that no lands, hereditaments, or money to be laid out in lands, shall be given for any religious or charitable purpose, except by deed executed in the presence of two witnesses twelve months before the death of the donor, and enrolled as therein directed. Under this statute, an immense number of charitable bequests have been defeated, because they contravened the law.[2] In New York and Pennsylvania there are statutes upon the subject; and in New York a corporation cannot take lands in trust for a charity for purposes other than those for which the corporation was chartered.[3] And so, if a corporation already

[1] Methodist Church *v.* Remington, 1 Watts, 218; Gass *v.* Wilhite, 2 Dana, 170; Magill *v.* Brown, Brightly, 373.

[2] Those who desire to see the learning and the cases upon the English statute of mortmain, may consult 2 Jarman on Wills, pp. 100–224; Tudor on Charities, 93, 101; 2 Redf. on Wills, pp. 508–516 (2d ed.).

[3] In Pennsylvania, Act 1855 provides that no real or personal property shall be given to charitable uses, except by deed or will attested by two credible or disinterested witnesses, at least one calendar month before the decease of the testator or grantor. See McLean *v.* Wade, 41 Penn. St. 266; Taylor *v.* Mitchell, 57 id. 209; Miller *v.* Porter, 53 id. 297. [1 Purdon's Digest (13th ed.) p. 595, § 32. For a statute limiting the amount of property to be held by a religious or charitable corporation, see idem., p. 594, § 27.]

In New York, Act 1848, c. 319, provides that no person, having a wife, child, or parent, shall give more than one-fourth of his estate to charitable corporations, and no gift by will shall be valid unless executed at least two months before his death. Act of 1860 enabled a person to give one-half of his estate in certain cases. [See 1 Consol. Laws (1909), §§ 17–20.] See Levy *v.* Levy, 33 N. Y. 114; Harris *v.* Slaght, 46 Barb. 470; White *v.* Howard, 52 Barb. 294; Harris *v.* American Bib. Soc., 2 N. Y. Dec. 36. In Georgia, a will must be made ninety days before the death of the testator, if there is a wife and child or issue of a child of the testator, or a charitable bequest in such will is void. Reynolds *v.* Bristow, 37 Ga. 283. [Code of Georgia (1895), § 3277. There are provisions of the same nature in other States.]

holds all the property it is authorized to take under its charter, a gift to it for charitable purposes lapses.[1] (a)

§ 716. If the objects and purposes for which a trust is intended to be created is once determined to be charitable within the intent of the law, and if the trust contravenes no law or rule of public policy, courts are bound to give effect to it, if possible, in the exercise of their chancery powers. Of course, in carrying into effect public charities, rules suitable and adequate to the purpose must be applied. Where a testatrix gave £2,000 to a trustee for the purpose of enabling him to give it to either branch of the testatrix's family, as he deemed most prudent, and the trustee died without disposing of the fund, the court said that the trust was too indefinite to be executed in favor of individuals.[2] But if a trust is created for the education of six orphans, to be selected from a certain district by the trustees, and the power can be executed by the trustees or their successors, there certainly is no difficulty in carrying the trust into execution. A trust created for the relief of the poor must, of course, be administered differently from a trust to pay the income to an individual, and the rules applicable to a charitable trust must, in the nature of things, differ from the rules governing a private trust. Both sets of rules are equally within the chancery powers of the American courts. A trust to give a sum of money to an individual named is certain; and so a trust to distribute a sum of money in charity to the poor of a certain district is certain, according to its own nature. To apply the same rules to subjects so diverse would be to subvert the administration of law.

[1] Cronnin *v.* Louisville, &c. Soc., 3 Bush, 365.
[2] Stubbs *v.* Sargon, 2 Keen, 255.

(a) In Farrington *v.* Putnam, 90 Me. 405, it was held that a bequest to a charitable corporation which if accepted would increase its funds beyond the amount authorized by its charter, is not void, but at most only voidable by the State. The next of kin of the testator have no standing to have the bequest declared void.

§ 717. In dealing with the subject of charities, courts, in many cases, seem to suppose that there is need of some extraordinary powers to carry them into effect: they have used expressions which indicate a supposition that their ordinary equity powers were not sufficient to give effect to many charitable bequests. The fact is, that the ordinary judicial powers of courts of equity, applied properly to the subject-matter, are sufficient to carry into effect almost all charitable bequests. The professional mind of America has labored over the doctrine of *cy près* as it is called, and has seemed to suppose that most charitable bequests cannot be carried out without the aid of some arbitrary power. It is proposed to examine the doctrine of *cy près*, and afterwards to state the rules in relation to certainty in the trustees for a charity and in relation to certainty in the objects or beneficiaries of a charity.

§ 718. In studying the cases upon charitable uses, cited in the preceding sections, it is necessary to bear this suggestion constantly in mind: in England the court of chancery, or the Lord Chancellor, exercised a double function, — the one a judicial function, in adjudicating upon the legal questions arising upon charitable gifts; the other a ministerial function, as the keeper of the king's conscience. The general superintendence or administration of all charities was in the king as *parens patriæ*. The judicial part of this administration the king intrusted to the ordinary equity jurisdiction of the court of chancery. That part of the king's jurisdiction over charities which did not come within the ordinary equity jurisdiction of the court, the king exercised as part of his prerogative by his sign-manual. The chancellor often exercised this prerogative power of the king; and thus many charities have been established and administered by the chancellor, and no very clear line has been drawn between those established by him exercising his ordinary judicial power in the court of chancery, and those established by the extraordinary or prerogative power of the crown exercised through the chancellor. Thus, if gifts were made for charitable

uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, the king, as general supervisor of charities, could devote them to such other charitable purposes, *cy près* the original gift, as he pleased. This he did through his prerogative power by his sign-manual, exercised by his chancellor personally, and not judicially. The instances in which such prerogative powers were exercised are reported in the books together with judicial determinations, and thus much misapprehension and confusion have arisen. If gifts were made to establish a Jewish synagogue, to teach Judaism in opposition to Christianity, or to re-establish the supremacy of the pope, or to educate children in the Catholic faith contrary to the statutes, or to promote dissent contrary to the acts of uniformity, or to keep alive superstitious customs and practices, the charities could not, of course, be carried into effect as given, and the king gave effect to them as charities, by his royal prerogative, *cy près* the original purposes.[1] This mode of procedure was founded upon this reasoning: if it appeared that the donor had a general charitable intent, and that the particular form of the charity was not of the substance of the charity, and that the donor did not contemplate that his heir or legal representative should ever have the property, then the gift should not result or revert to the heir, but should be employed in some legal charity, as near to the original purpose as possible.[2] This seems strange to modern ideas; but if a donor has indicated a general charitable purpose, and has disinherited his heir to that extent, it is no greater outrage upon the donor to devote

[1] Att. Gen. *v.* Baxter, 1 Vern. 248; 1 Eq. Ca. Ab. 96, pl. 9; 2 Vern. 105; 7 Ves. 76; Whorwood *v.* University Coll., 1 Ves. 537; De Garcin *v.* Lawson, 4 Ves. 433, n.; Gates *v.* Jones, 2 Vern. 266; Smart *v.* Prujean, 6 Ves. 560; Adams *v.* Lambert, 4 Co. 529; Att. Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Crofts *v.* Evetts, Mod. 784; Att. Gen. *v.* Power, 1 Ball & B. 145; Cary *v.* Abbott, 7 Ves. 490; Att. Gen. *v.* Todd, 1 Keen, 803; Da Themmines *v.* De Bonneval, 5 Russ. 288; Briggs *v.* Hartley, 14 Jur. 683; Da Costa *v.* De Pas, 2 Swanst. 487–490; 1 Amb. 288; 1 Dick. 258; Isaac *v.* Gomperts, 1 Ves. Jr. 44; Rex *v.* Partington, 1 Salk. 162, 334; Att. Gen. *v.* Vint, 3 De G. & Sm. 704.

[2] Cary *v.* Abbott, 7 Ves. 490.

the gift to some similar charitable purpose, than it is to return it to the heir, and not employ it in charity at all; and so, if a gift for an illegal charity is forfeited to the king, it is not a more objectionable exercise of the royal prerogative to devote that gift to some other charity, *cy près* the original purpose, than to expend it in private indulgence. But whether the prerogatives of the British crown were proper or improper, or whether they were wisely exercised or not in the cases named, is no question here. No such power exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature. The cases named are not law in America, and probably nothing like them will ever have a place in its jurisprudence.

§ 719. There is another large class of cases to which the same observations apply. Many of the cases heretofore cited were gifts to *charity* generally, or to *religion*, or to *education* without indicating when, where, or how the gifts were to be applied or used, and without the appointment of a trustee or other person to select the objects, or appropriate and apply the funds. Gifts have been made to such charitable purposes as should be named thereafter, and none were named; or to such uses as should be directed in a codicil or note in writing, and there was no codicil or note in writing; or to such school as should be appointed, and none was appointed.[1] In these and similar cases, it was assumed that the testator had impressed upon the fund a general charitable purpose forever; that the fund should not go to the heir, or next of kin; and that the king should interpose his prerogative, and by his sign-manual appoint the use, charity, or school, and the manner in which the fund should be expended. The chancellor exercised this power of the king, and many instances of its exercise are in the books.[2] It is plain that to divide a fund,

[1] Mills *v.* Farmer, 1 Mer. 55; Moggridge *v.* Thackwell, 7 Ves. 36; Att. Gen. *v.* Syderfin, 1 Vern. 224; 2 Freem. 261; Att. Gen. *v.* Jackson, 11 Ves. 365; White *v.* White, 1 Bro. Ch. 12.

[2] Moggridge *v.* Thackwell, 7 Ves. 75; Att. Gen. *v.* Syderfin, 1 Vern.

left to *charity* generally, among several asylums, hospitals, and alms-giving institutions, is not a judicial act at all: it is a mere ministerial act, to be regulated by no rules of law, but to be governed by the good sense and sound discretion of the person who makes the division or distribution. There is a wide distinction between a gift to *charity*, and a gift to a *trustee* to be by *him* applied to *charity*.[1] In the first case, the court has only to give the fund to charitable institutions, which is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable. In the cases here supposed, if the crown or the chancellor directs a fund given to charity generally, and without the interposition of a trustee, to be divided or distributed to several institutions, there would seem to be no room for the doctrine called *cy près* as a judicial doctrine; for such a distribution is a mere arbitrary act, and can, in the nature of things, be governed by no general rules of law. (*a*) The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity or religion or edu-

224; Att. Gen. *v.* Mathews, 2 Lev. 167; Finch, 245; Paice *v.* Archbishop of Canterbury, 14 Ves. 372; Clifford *v.* Francis, 1 Freem. 330.

[1] In Brown *v.* Yeall, 7 Ves. 50, the gift was for purchasing and distributing such books as may have a tendency to promote the interest of virtue and religion and the happiness of mankind; this charitable purpose to be carried into effect under such persons and according to such regulation as the High Court of Chancery should decree or order. Lord Thurlow armed with the prerogative power of the king, declined to carry out this charity. It will be observed that the chancellor had the duty, by this will, of appointing trustees or other agents to carry out these purposes, and also of designating, by decree, such books as would promote the interest of virtue, religion, and the happiness of mankind. But if Mr. Bradley had given his money to a trustee with direction to him to purchase and distribute such books as are above named, the trustee might have been compelled to execute the trust in good faith, and according to a sound discretion within the meaning of the will.

(*a*) See *infra* § 729, note *a*, p. 1208. Not all the American courts would agree that such an act is extra-judicial if in accord with and in performance of the donor's intention.

cation or public utility, unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons.[1]

§ 720. If a testator makes a bequest to trustees to be employed by them in charity, or to be distributed among such charitable institutions as they shall select, or to educate orphans to be selected by them, or generally to be devoted to such charities or purposes of education, religion, or morality as they in their judgment shall judge best, and the trustees have the funds in their possession, and are willing to act, courts can and will sustain the charities, and direct the trustees to carry out the will of the testator and exercise the powers confided to them.[2] (*a*) Thus in Saltonstall *v.* San-

[1] In 2 Redf. on Wills, p. 518, 2d ed., it is said that "the distinction in England between a class of cases administered in the court of chancery by its ordinary powers, and that where the administration is referred by the king, as *parens patriæ*, to the chancellor, by virtue of the sign-manual, is not important in this country, since both classes of cases are here administered by the courts of chancery, under their ordinary jurisdiction, wherever a jurisdiction for the administration of charitable bequests has been created in equity either by express statute or by the adoption of the principles of the statute of Elizabeth." With due deference to so eminent, learned, and authoritative a jurist and writer, the proposition is respectfully denied. In all the cases the courts have shown a most anxious solicitude to exercise only the ordinary powers of chancery jurisdiction, and not to trench upon any extraordinary or prerogative powers, in order that the governments of the several States may continue in practice, as they are in theory, governments of laws and not of men. It is true that our courts have made mistakes in tracing the line between ordinary jurisdiction and prerogative power, and in some cases they have declined to carry into effect trusts which they might well have administered in the ordinary exercise of judicial powers, for fear of exceeding their jurisdiction; as in White *v.* Fisk, 22 Conn. 31. And again, they have occasionally stepped over the line, as where they have upheld an indefinite charity to the poor, no trustee being interposed. But generally, American courts have erred in not going so far as they might have gone in the exercise of their ordinary judicial powers. See this matter fully and ably discussed by Mr. Justice Gray in Jackson *v.* Phillips, 14 Allen, 576.

[2] Everett *v.* Carr, 59 Me. 334; Miller *v.* Atkinson, 63 N. C. 537; Gibson

(*a*) There are several States where such gifts are not given effect. See *infra*, § 729, note *a*.

ders,[1] where a testator bequeathed the residue of his estate to his executors in trust to hold and invest the same, and to appropriate the whole of the principal or income as they might think proper, in the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths; and gave the trustees, their survivors and successors, full power, discretion, and authority to expend the income or capital in such manner as in their judgment would best promote the objects named; and the trustees were in possession of the property, and were willing to perform the trust, if competent and legal for them to do so, — the court established the trust; and this seems to be the law as established by the authorities. In White *v.* Fisk[2] the bequest was, "Any surplus income I direct my trustees to expend for the support of indigent pious young men, preparing for the ministry in New Haven," and the court declared that they had no power to execute the trust, or to make a selection of the young men to be supported and educated. It does not appear in this case whether the trustees were willing to perform the duties imposed upon them by the will; but if the trustees were willing to accept and execute the trust, there was no extraordinary jurisdiction for the court to exercise, and the trust might well have been upheld. The court was merely required to see that the trustees executed the powers within the true meaning and scope of the will, and if there was a breach of trust, to deal with it as they would with any other breach of trust. It may be said that it would be

v. McCall, 1 Rich. L. 174; Derby *v.* Derby, 4 R. I. 414; Going *v.* Emery, 16 Pick. 107; Wells *v.* Doane, 3 Gray, 201; Att. Gen. *v.* Pearce, 2 Atk. 87; Mitford *v.* Reynolds, 1 Phil. 185; Nightingale *v.* Goulbourn, 5 Hare, 484; 2 Phil. 594; Treat's App., 30 Conn. 113.

[1] Saltonstall *v.* Sanders, 11 Allen, 446.

[2] White *v.* Fisk, 22 Conn. 31. Perhaps this case is modified by Treat's App., 30 Conn. 113, where quite as indefinite a power of selection was given to trustees, and the trust was upheld. And see Norris *v.* Thompson, 4 Green, Ch. 307.

difficult to establish a breach of trust because of its uncertainty; but certainly it would not be difficult to determine whether the money was expended by the trustees in the support and education of young men studying for the ministry in New Haven.[1] If the trustees named had died before the testator, or refused to act, another question would have arisen which was not discussed in the case.

§ 721. If a testator gives an estate to trustees to be applied to charity generally, or to such charitable purposes and institutions as they in their discretion shall judge best, and the trustees die before the testator, or make no selection of the objects or application of the fund, or decline to act, the court will be governed by the intent of the donor, to be gathered from the interpretation of the whole instrument, in determining the question whether they can appoint new trustees to exercise the power and discretion given to the trustees named in the will.[2] (*a*) Thus in Lorings *v.* Marsh,[3] it was held that the discretion and power given to the trustees named in the will did not create a personal trust and confidence in them, because power and discretion were given to them and *their successors*. In Fontain *v.* Ravenel, the court held the power and discretion in the trustees named in the will, to distribute the fund among charitable institutions, as they should think best, to be a personal trust and confidence in them, and, as they had died before the power could be executed, no others could execute it. As the trust was too indefinite to be executed by the court in its judicial capacity, and without calling in the aid of a prerogative power, it failed, and the fund went to the next of kin. This is, without question, the general

[1] Pulpress *v.* African Church, 48 Penn. St. 204.

[2] Att. Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75; Att. Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. Jr. 220; Att. Gen. *v.* Glegg, 1 Atk. 356.

[3] Lorings *v.* Marsh, 2 Clifford, 469; 6 Wallace, 337; Marsh *v.* Renton, 9 Allen, 132; Att. Gen. *v.* Gladstone, 13 Sim. 7; Reeve *v.* Att. Gen., 3 Hare, 191; Att. Gen. *v.* Glegg, 1 Atk. 356.

(*a*) See *infra*, § 731, note *a*, p. 1211.

law in relation to private trusts; and if this construction, applied to bequests for charitable uses, carries out the true intent of the donor, it is the best rule to follow. In applying such a rule to charitable gifts, courts would undoubtedly consider that the testator intended to make an effectual disposition of his property for the general purposes named and that he intended the power to be exercised when the occasion arose, and not before. Thus, in the case of Fontain *v.* Ravenel,[1] the power was not to be exercised until the death of the testator's wife, and it is hardly to be supposed that the testator intended that the charitable purposes of his will should be defeated, if his wife happened to outlive his other trustees, a contingency which the court thought was unprovided for. On the contrary, it is not a violent construction to presume that the testator intended the power to be executed by the trustees in possession of the fund at the time the power could first be exercised, although the power did not in terms extend to them. Again, there are classes of indefinite trusts where the trustees must exercise a continuing power and discretion in the selection of objects of the charity. Successors to the trustees appointed in the will, though not named, would have the right to exercise the power from the clear intent of the testator.[2]

§ 722. If a donor makes a gift in trust for a particular charitable purpose, as to establish a particular school, hospital, asylum, or other charitable institution, and appoints no trustee; or the trustee appointed by him is incapable of taking the gift, and of acting in that behalf; or if the trustee dies before the testator, or declines to act; or if trustees are

[1] Fontain *v.* Ravenel, 17 How. 382; Zeisweiss *v.* James, 63 Penn. St. 425; Att. Gen. *v.* Doyley, 4 Vin. 485; 2 Eq. Cas. Ab. 194; 7 Ves. 58, n.; 16 Ves. 47; Hibbard *v.* Lambe, Amb. 309; Cole *v.* Wade, 16 Ves. 45; Eaton *v.* Smith, 2 Beav. 236; Hill on Trustees, 211.

[2] See Moore *v.* Moore, 4 Dana, 366; Down *v.* Worrall, 1 My. & K. 561; Green *v.* Allen, 5 Humph. 170; Griffin *v.* Graham, 1 Hawks, 96; Williams *v.* Pearson, 38 Ala. 299. [Woodroof *v.* Hundley, 147 Ala. 287; Fay *v.* Howe, 136 Cal. 599; Grant *v.* Saunders, 121 Iowa, 80; Schouler, petitioner, 134 Mass. 426; De Silver's Estate, 211 Pa. St. 459. See *infra*, § 731.]

named or appointed who are not *in esse,* but are to come into existence thereafter, as by an act of incorporation, — courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity; for it is their invariable practice not to allow a legal and valid trust to fail for want of a trustee. Therefore courts will appoint trustees in such cases to take up and carry out the clear purposes of the donor, and they will order the heir or legal representatives to hold the fund upon the declared trust, until trustees can be appointed to execute the trust as contemplated.[1] In exercising this jurisdiction, courts are called upon to exercise no extraordinary or prerogative powers.[2] In the matters thus far discussed in the four preceding sections, there is no room for the *cy près* doctrine, as it is called, as a *judicial* doctrine. So far as courts have sustained charities, as courts, they have sustained them within the strict limits of ordinary chancery jurisdiction. Where illegal or indefinite charities, without trustees with powers to determine the definite purposes, have been sustained and carried into effect *cy près*, it has been done by the sovereign power as an act of prerogative and grace. Lord Eldon expressed the rule when he said: "I have conversed with many persons upon it. I have had great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, then the court will take the administration of the trust."[3] (*a*)

[1] Reeve *v.* Att. Gen., 3 Hare, 191; Inglis *v.* Sailors' Snug Harbor, 3 Peters, 99; Hayter *v.* Trego, 5 Russ. 113; Denyer *v.* Druce, Taml. 32. [Guild *v.* Allen, 28 R. I. 430; Dye *v.* Beaver Creek Church, 48 S. C. 444. See *infra*, § 731, notes.] [2] Williams *v.* Pearson, 38 Ala. 299.

[3] Moggridge *v.* Thackwell, 7 Ves. 36; Paice *v.* Canterbury, 14 Ves. 372; Boyle, 241; Everett *v.* Carr, 59 Maine, 334.

(*a*) In Minot *v.* Baker, 147 Mass. 348, it was pointed out that American courts ought not to regard as conclusive this attempt of Lord

§ 723. But there are cases in which courts, in the strict discharge of their judicial duty, may well apply a fund devoted to a particular charity to a cognate purpose, to prevent a failure of justice, and to protect trustees in applying moneys in their hands to some useful purposes. Thus where there was a bequest to trustees to apply part of a fund to the redemption of British slaves in Turkey and Barbary; and, after a time, there ceased to be British slaves to redeem; and the fund had accumulated for many years; the court directed the trustees to apply the income to kindred charities, as nearly

Eldon to draw the line between the judicial power of the court of chancery and its power under the sign-manual of the crown, since the possession of this latter power by the English court of chancery takes away the need of going to the full extent of the court's judicial power in order to prevent failure of a donor's intention. It may well be that the prerogative power sometimes overlaps the judicial power, and, where the same court exercises both, a clear line of division is not necessary.

The attitude of the Massachusetts court, in upholding and enforcing gifts for charitable uses and in applying the *cy près* doctrine, seems to be that the judicial power of the court is ample to provide a trustee or a scheme for administration in accordance with the general intention of the donor or testator, even when his intention is no more definite than that the uses shall be charitable. See Sherman *v.* Congregational Miss. Soc., 176 Mass. 349; Richardson *v.* Mullery, 200 Mass. 247; Osgood *v.* Rogers, 186 Mass. 238; Att. Gen. *v.* Briggs, 164 Mass. 561; Darcy *v.* Kelley, 153 Mass. 433; Amory *v.* Att. Gen., 179 Mass. 89; Sears *v.* Att. Gen., 193 Mass. 551; Att. Gen. *v.* Goodell, 180 Mass. 538. But the Massachusetts court has never actually decided that a gift or bequest for charity in general, without a provision that the trustee shall select the particular charities, is valid; and occasional doubts have been expressed as to the power of the court to supply the deficiencies in such a trust. See Sears *v.* Chapman, 158 Mass. 400.

The decision, in New Jersey and Rhode Island, and possibly in Maine, upon the *cy près* rule seem to go to the same extent as the Massachusetts cases. Nichols *v.* Newark Hospital, 71 N. J. Eq. 130; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Pell *v.* Mercer, 14 R. I. 412, 434; Doyle *v.* Whalen, 87 Me. 414. But the majority of American courts have taken the view set forth in the text as to the limit of the judicial powers of a court of equity, both in the application of the *cy près* doctrine and in giving effect to gifts for charitable purposes which originally lack some elements of definiteness. See *infra*, § 729, note *a*, p. 1206.

like the original purpose as possible. The court indicated what was the probable *cy près* purpose of the testator in case of the failure of his original purpose.[1] *Cy près*, as applied to judicial acts, is a rule of construction and not of administration. The judgment of the court, in this last case, may be sustained as a judicial act, on the ground that the court construed such an application of the funds, upon the failure of the first purpose, to be within the probable intention of the donor. To say that a donor had no intention, under such circumstances, is to beg the question to be determined by construing the written instrument; for Lord Brougham has very forcibly said, that, if the construction shows that the fund was to be employed in the way pointed out forever, *and in no other way*,[2] then all *cy près* construction must fail. And so it may be said that if the construction of the written instrument bears out the assertion that the donor had no intention, in case of the failure of his first purpose, the charity must fail on the failure of objects to which to apply it. In giving a construction to an instrument under such circumstances, courts consider the whole instrument in the light of all the circumstances, and conclude, from the will and all the facts, what was the probable intention of the testator. As, in construing a deed under doubtful circumstances, it is construed most strongly against the grantor, and most favorably for the grantee, so courts lean to a construction in favor of charity, rather than against it. It may be said with truth, that the presumption of an intention in the donor is very slight; but the presumption on which action is based in many human affairs is very slight; and if the conclusion arrived at is unsatisfactory, it must be remembered that the construction of any written instrument many years after its date, and amid an entirely new order of things, and when many unexpected events have occurred, is always unsatisfactory, and the result arrived at is at best but a prob-

[1] Att. Gen. *v.* Ironmongers' Co., 2 Beav. 313; 1 Cr. & Phil. 508; 10 Cl. & Fin. 908.

[2] Att. Gen. *v.* Ironmongers' Co., 2 My. & K. 576.

able one.[1] In New York the *cy près* power which constitutes the peculiar feature of the English system of dealing with charities, and is exercised in determining gifts where the donor has failed to define them, and in framing schemes of approximation to the donor's design, has no existence.[2] (*a*) In Rhode Island the courts have the same *cy près* power as the English chancery.[3] (*b*)

§ 724. Where bequests were made to trustees to be expended in the circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in the United States, and for the benefit of fugitive slaves escaping from the slave-holding States;[4] and afterwards slavery was abolished, so that there could be no objects as specially designated in the will to which the charity could attach, the court, in construing the whole will, determined that it was the intention of the testator to establish a permanent charity for

[1] See Popkin *v.* Sargent, 10 Cush. 327.

[2] Holland *v.* Alcock, 108 N. Y. 312, 330.

[3] See for R. I. Charity Law, Pell *v.* Mercer, 14 R. I. 412; R. I. Hospital Trust Co. *v.* Olney, id. 449.

[4] Jackson *v.* Phillips, 14 Allen, 539. In this case, the only question (it being established that it was a good charity) was whether, the purpose of the testator being accomplished by the abolition of slavery, he intended that the fund, if any remained, should revert to his heirs. It is quite plain that he did not expect his purpose would be accomplished so soon, or till long after his gift was exhausted, as he provided for other gifts to be added to his own, and so far it is plain that he did not contemplate or intend that his heirs should take any part of his gift.

(*a*) A limited *cy près* power has been given to the New York Supreme Court by statute. IV Consol. Laws (1909), p. 2840, § 12, p. 3396, § 113. In Pennsylvania a statute has provided for the exercise of a prerogative *cy près* power by the legislature. 1 Purdon's Digest (13th ed.), p. 592, § 22, p. 597, § 31. See Daly's Estate, 208 Pa. St. 58.

(*b*) But the courts of Rhode Island do not profess to have any prerogative power. They apparently agree with the Massachusetts court in its conception of the extent of the judicial power of the court in the matter of charitable uses. See Pell *v.* Mercer, 14 R. I. 412, 434; R. I. Gen. Laws (1909), c. 259, § 9.

the benefit of the colored race, and that it was his intention, in case the special purposes named in the will should fail, that the funds should be applied to the nearest similar use. The court, in making this decision, disclaims the exercise of any prerogative power, and it founds its judgment upon the ordinary right and duty of courts to construe written instruments, and to carry the intention of parties to written instruments into effect when such intention can be discovered with reasonable probability. There can be no dispute as to the duty of the court to construe written instruments in order to ascertain the intention of the parties thereto, and there can be no question that it is the duty of courts to carry such intention into effect as near as may be when it can be done consistently with the law of the land. If, therefore, the purposes of a charity named in a will fail, and there are no objects to which to apply the funds, the court must read the whole will in order to determine whether the charitable intention of the testator has come to an end, and the fund must revert to the heir or personal representative; or whether a probable intention can be gathered from the instrument, that, in the event which has happened, the donor intended that his gift should be applied *cy près* the original purpose.[1]

[1] Att. Gen. *v.* Pyle, 1 Atk. 435; Att. Gen. *v.* Vint, 3 De G. & Sm. 705; Att. Gen. *v.* Lawes, 8 Hare, 32; Att. Gen. *v.* Green, 2 Bro. Ch. 492; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; Att. Gen. *v.* Whitchurch, 3 Ves. 143; Att. Gen. *v.* Guise, 2 Vern. 166; Att. Gen. *v.* Baliol Coll., 9 Mod. 407; Att. Gen. *v.* Glasgow, Coll., 2 Coll. 665; 1 H. L. Ca. 800.

The cases, both in England and this country, wherein the doctrine of *cy près*, in its several aspects, is considered and applied, are collected and explained by Mr. Justice Gray, in his very elaborate opinion in Jackson *v.* Phillips, 14 Allen, 574–694, an abstract of which is here given.

In England, there are two distinct powers exercised by the chancellor in charity cases, under this doctrine of *cy près*, — the one derived from the royal prerogative, the other in the exercise of judicial authority. The disposition of a charity under the royal prerogative finds no counterpart in this country. The English cases under this head may be divided into two classes: (1) Bequests to use charitable, but illegal, as to a form of religion not tolerated. Att. Gen. *v.* Baxter, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; 7 Ves. 76; Da Costa *v.* De Pas, Amb. 228; 2 Swanst. 489, note; 1

§ 725. Where a fund was given to found a school for the education of the poor within a certain district, and by an

Dick. 258; Rex *v.* Partington, 2 Salk. 162. See 4 Dane, Ab. 239; Gass *v.* Wilhite, 2 Dana, 176; Methodist Church *v.* Remington, 1 Watts, 226; and comments of Lord Thurlow in Moggridge *v.* Thackwell, 1 Ves. Jr. 469 and of Sir Wm. Grant in Cary *v.* Abbott, 7 Ves. 494. (2) Gifts to charity generally, with no trustee interposed, and no appointment provided for, or the power of appointment delegated to a person who dies without exercising it. Boyle on Char., 238; Att. Gen. *v.* Syderfin, 1 Vern. 224; 1 Eq. Cas. Ab. 96; Att. Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75. See Moggridge *v.* Thackwell, *sup.*; Dwight's Argument in Rose Will Case, 272. This power exercised by the English courts does not exist in any court in this country. 4 Kent, 508, note; Fontain *v.* Ravenel, 17 How. 369, 384; Moore *v.* Moore, 4 Dana, 365; Whitman *v.* Lex, 17 S. & R. 93; Att. Gen. *v.* Jolly, 1 Rich. Eq. 108; Dickson *v.* Montgomery, 1 Swan, 348; Le Page *v.* McNamara, 5 Iowa, 146; Bartlett *v.* King, 12 Mass. 545; Sohier *v.* Mass. Gen. Hosp., 3 Cush. 496.

But the application of the *cy près* doctrine, in the exercise of a general equity jurisdiction, stands upon very different grounds, and is favored in this country, as well as in England. It existed prior to the Stat. of 43 Eliz. Symm's Case, Duke, 163; Reade *v.* Silles, Acta Canc. 559; 1 Spence, Eq. 588, note; Parker *v.* Brown, 1 Col. Pr. Ch. 81; 1 My. & K. 389; Dwight's Cha. Ca. 33; Parrot *v.* Pawlett, Cary, 47; Elmer *v.* Scott, Choice Ca. Ch. 155; Matthew *v.* Marow, and Hensman *v.* Hackney, Dwight's Cha. Ca. 65, 77; Tudor, 102, 103. For authorities on this point in this country, see Vidal *v.* Girard, 2 How. 194–196, and cases cited; Perrin *v.* Carey, 24 How. 501; Magill *v.* Brown, Brightly, 346; 2 Kent, 286–288, and note; Burbank *v.* Whitney, 24 Pick. 152; Preachers' Aid Soc. *v.* Rich, 45 Me. 559; Derby *v.* Derby, 4 R. I. 436; Urmey *v.* Wooden, 1 Ohio St. 160; Chambers *v.* St. Louis, 29 Mo. 543.

The discretion of the chancellor to depart from the express intent of the founder of a charity was not enlarged, but was intended rather to be limited, by Stat. of 43 Eliz. See statute, *ante*, § 692; also Lord Coke, 2 Inst. 712, and Duke, 11, 156, 169, 372, 619; Lord Eldon in Att. Gen. *v.* Brown, 1 Swanst. 291; 1 Wils. Ch. 354; Lord Redesdale in Att. Gen. *v.* Mayor of Dublin, 1 Bligh, N. R. 347; and Corporation of Ludlow *v.* Greenhouse, id. 48, 62; Lord Keeper Bridgman in Att. Gen. *v.* Newman, 1 Ch. Ca. 158; Sir Joseph Jekyll, in Eyre *v.* Shaftesbury, 2 P. Wms. 119; Lord Hardwicke, in Att. Gen. *v.* Middleton, 2 Ves. Sen. 328; Att. Gen. *v.* Carroll, Acta Canc. 729; Dwight's Argument, 259–268; Tudor, 161, 162. In Massachusetts, Going *v.* Emery, 16 Pick. 119; County Attorney *v.* May, 5 Cush. 338; Gen. Stat. c. 14, § 20.

A fund given to trustees for a specified charitable purpose, lawful and valid at the testator's death, if no intention is expressed to limit it to a particular institution or mode of application, and afterwards the scheme

act of Parliament the whole district was taken for a dock, so that all the objects of the charity as specified in the will

becomes impracticable or illegal, having once vested as a charity, is to be applied by a court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular intention — *cy près* — as possible. Att. Gen. *v.* Warrick, Dwight's Cha. Ca. 140; West, Ch. 60, 62; Bloomfield *v.* Stowe Market, Duke, 644; Att. Gen. *v.* Guise, 2 Vern. 166; Att. Gen. *v.* Baliol College, 9 Mod. 407; Att. Gen. *v.* Glasgow Coll., 2 Col. C. C. 665–674; 1 H. L. Cas. 800–826; 2 Vern. 267, note; 3 Ves. 650, note; Att. Gen. *v.* Hicks, Highmore on Mortmain, 336–354; 3 Bro. Ch. 166, note; Att. Gen. *v.* Craven, 21 Beav. 392, 408; Att. Gen. *v.* Pyle, 1 Atk. 435; Att. Gen. *v.* Green, 2 Bro. Ch. 492; Att. Gen. *v.* Bishop of London, 3 Bro. Ch. 171; Moggridge *v.* Thackwell, id. 517; 1 Ves. Jr. 464; Att. Gen. *v.* Glyn, 12 Sim. 84; Att. Gen. *v.* Lawes, 8 Hare, 32; Att. Gen. *v.* Vint, 3 De G. & Sm. 705; Att. Gen. *v.* Boultbee, 2 Ves. Jr. 387; Att. Gen. *v.* Whitchurch, 3 Ves. 143; Att. Gen. *v.* Minshull, 4 Ves. 14. Lord Eldon held a gift to a person, in trust for such charitable purposes as he should appoint, to be good. Moggridge *v.* Thackwell, 7 Ves. 36; 13 Ves. 416; Paice *v.* Archbishop of Canterbury, 14 Ves. 364; Mills *v.* Farmer, 19 Ves. 483; 1 Mer. 55. The American cases on this point are Wells *v.* Doane, 3 Gray, 201; Fontain *v.* Ravenel, 17 How. 387; Moore *v.* Moore, 4 Dana, 336; Lorings *v.* Marsh, 6 Wallace, 337. Where the charitable gift never took effect at all for various reasons, see Jones *v.* Williams, Amb. 651; Att. Gen. *v.* Whitchurch, 3 Ves. 141; Smith *v.* Oliver, 11 Beav. 481; Att. Gen. *v.* Bishop of Oxford, 1 Bro. Ch. 444, note; cited 2 Cox, Ch. 365; 2 Ves. Jr. 388, and 4 Ves. 431; Cherry *v.* Mott, 1 My. & Cr. 123; Marsh *v.* Means, 3 Jur. (N. S.) 790.

Cases upon this subject relating to redemption of captives and slaves, where the captives and slaves intended to be benefited no longer exist: Betton's Charities; Att. Gen. *v.* Ironmongers' Co., 3 My. & K. 576; 2 Beav. 313; Cr. & Ph. 208; 10 Cl. & Fin. 908; Lady Mico's Charity, cited, Att. Gen. *v.* Gibson, 2 Beav. 317, note; also, Cr. & Ph. 226, 228, and Jackson *v.* Phillips, 14 Allen, 539.

There is no adjudication of this question in the Supreme Court of the United States. Bap. Assoc. *v.* Hart's Ex'rs, 4 Wheat. 1, and Wheeler *v.* Smith, 9 How. 79, arose under the law of Virginia. See 2 How. 192; 24 How. 501; 4 Met. 380; 12 Gray, 593; 2 Kent, Com. 287. In Fontain *v.* Ravenel, 17 How. 369, the executor died without appointing the disposition of the charity; and the court held it not to be within the equity jurisdiction of the court, and nothing could reach it but the prerogative power, which did not exist in the court. In Maryland and Virginia, the Stat. of 43 Eliz. has been expressly repealed, and charities are treated as other trusts. Dashiell *v.* Att. Gen., 5 H. & J. 392; Gallego *v.* Att. Gen., 3 Leigh, 450, and so in New York the court has finally decided. Bascom *v.* Albertson, 34 N. Y. 584. In North Carolina there is some conflict; but the view of Maryland and Virginia is now adopted. Griffin *v.* Graham, 1 Hawks. 96;

failed, the court directed the funds to be applied under a scheme *cy près* the original purpose, on the ground that such must

McAuley *v.* Wilson, 1 Dev. Eq. 276; Holland *v.* Peck, 2 Ired. Eq. 255. In Alabama, see Carter *v.* Balfour, 19 Ala. 830. On the other hand, in Kentucky, the courts sustain the distinction between the prerogative power and the equity jurisdiction. Moore *v.* Moore, 4 Dana, 366; Gass *v.* Wilhite, 2 Dana, 177; Curling *v.* Curling, 8 Dana, 38. In Pennsylvania, the power exercised under the sign-manual does not exist. Methodist Church *v.* Remington, 1 Watts, 226, and Whitman *v.* Lex, 17 S. & R. 93; but in Philadelphia *v.* Girard, 45 Penn. St. 27, the court sustains the *cy près* doctrine, when clearly within the equity power of the court. See Stat. in Pa. 1855. So in South Carolina and Illinois. Att. Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 395; Gilman *v.* Hamilton, 16 Ill. 231. In all the New England States, except Connecticut, the doctrine of *cy près* as a judicial power has been countenanced, or left an open question. Burr *v.* Smith, 7 Vt. 287; Sec. Cong. Soc. *v.* First Cong. Soc., 14 N. H. 330; Brown *v.* Concord, 3 N. H. 296; Derby *v.* Derby, 4 R. I. 439; Tappan *v.* Deblois, 45 Me. 131; Howard *v.* Amer. Peace Soc., 49 Me. 302; Treat's App., 30 Conn. 113. See also 2 Red. on Wills, 815, note; McCord *v.* Ochiltree, 8 Black. 15; Beall *v.* Fox, 4 Ga. 427; Chambers *v.* St. Louis, 29 Mo. 592; Lepage *v.* McNamara, 5 Iowa, 146; McIntyre *v.* Zanesville, 18 Ohio St. 352.

In Massachusetts, the Stat. of 43 Eliz. has always been considered part of the common law. 4 Dane, Ab. 6, 238; Earle *v.* Wood, 8 Cush. 445; Anc. Chart. 52; Drury *v.* Natick, 10 Allen, 180; Odell *v.* Odell, id. 1, 6; Dexter *v.* Gardner, 7 Allen, 243; Burbank *v.* Whitney, 24 Pick. 146; Bartlett *v.* Nye, 4 Met. 378; Washburn *v.* Sewall, 9 Met. 280; Univ. Soc. *v.* Fitch, 8 Gray, 421; Wells *v.* Doane, 3 Gray, 201; Saltonstall *v.* Sanders, 11 Allen, 446, and Winslow *v.* Trowbridge, therein cited; Harvard Coll. *v.* Soc. for promoting Theo. Educ., 3 Gray, 280; Baker *v.* Smith, 13 Met. 34; Trustees of Smith's Char. *v.* Northampton, 10 Allen, 498; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Amer. Acad. *v.* Harvard Coll., 12 Gray, 582. In this last case, the decision was by Chief Justice Shaw; and the same principle was recognized or assumed in 4 Dane, Ab. 242, 243, and Sanderson *v.* White, 18 Pick. 333, and cases cited; 13 Met. 41; 3 Gray, 282, 298; 10 Allen, 501, 502.

There is a class of cases where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of *cy près* does not apply. Russell *v.* Kellett, 3 Sm. & Gif. 264; Clark *v.* Taylor, 1 Dr. 642; Incorp. Soc. *v.* Price, 1 Jon. & Lat. 498; 7 Ir. Eq. 260; *In re* Clergy Soc., 2 K. & J. 615; Marsh *v.* Att. Gen., 2 J. & H. 61; Winslow *v.* Cummings, 3 Cush. 358; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Easterbrooks *v.* Tillinghast, 5 Gray, 17; Att. Gen. *v.* Columbine, Boyle, Char. 204, 205; Potter *v.* Thurston, 7 R. I. 25; Dexter *v.* Gardner, 7 Allen, 243. [Teele *v.* Bishop of Derry, 168 Mass. 341; Bowden *v.* Brown, 200 Mass. 269; Brown *v.* Condit, 70 N. J. Eq. 440; *In re* Rymer, [1895] 1 Ch. 19; *In re*

have been the intention of the donor.[1] So where property is given in trust, and sums certain are directed to be paid out of the income to several different charitable purposes, and one of them fails, the circumstance that the donor has named other charities for other parts of the income is a circumstance to be used in the construction of the instrument, to determine whether the donor intended that, in case of the failure of one purpose, the whole fund should be applied to the others; but such circumstance, though of importance, is not always controlling[2] in the construction. So where property is given in trust, and certain sums from the income are devoted to separate charitable purposes, in such manner as to exhaust the whole income at the time when the property was first given to charity, and afterwards the income increases, so that there is a surplus not appropriated to any charity named, the court must resort to a construction of the instrument to determine what use to make of the surplus in accordance with the probable intention of the donor. No general rule can be laid down, but each case must depend upon the particular instrument and the facts, and the discretion of the court.[3] Thus, sometimes the money will be applied to increase the number of charitable objects, sometimes to increase the amount to be paid to the objects named, sometimes to founding new charities *cy près* the others named in the will, and sometimes the whole increase will go to one particular object of the testator's bounty.[4] In some cases the

White's Trusts, 33 Ch. Div. 449; *In re* Ovey, 29 Ch. Div. 560. See *infra*, § 728, note *a*, p. 1198.] But see Venable *v.* Coffman, 2 W. Va. 310.

[1] Att. Gen. *v.* Glyn, 12 Sim. 84; Att. Gen. *v.* London, 3 Bro. Ch. 171, 1 Ves. Jr. 243; Att. Gen. *v.* Craven, 21 Beav. 392; Att. Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. 220; Att. Gen. *v.* Hicks, High. on Mort. 336–354; *In re* St. John's Church, 3 Ir. Eq. 335.

[2] Att. Gen. *v.* Ironmongers' Co., 2 Beav. 313; Cr. & Ph. 308; 3 Bro. Ch. 166, n.; 10 Cl. & Fin. 908; Att. Gen. *v.* Llandaff, 2 My. & K. 586, cited Mills *v.* Farmer, 19 Ves. 483; Martin *v.* Margham, 14 Sim. 230; Loscombe *v.* Winteringham, 13 Beav. 87; Coldwell *v.* Home, 2 Sm. & Gif. 31; Att. Gen. *v.* Lawes, 8 Hare, 32. [Mayor of Lyons *v.* Adv. Gen. of Bengal, 1 App. Cas. 91.]

[3] Att. Gen. *v.* Marchant, L. R. 3 Eq. 424.

[4] Att. Gen. *v.* Minshull, 4 Ves. 11; Att. Gen. *v.* Coopers' Co., 19 Ves.

trustees will take the surplus beneficially.[1] If a fund decreases in value, so that the original purposes of the charity cannot be accomplished, the scheme of the charity may be changed *cy près*.[2]

§ 726. It is further to be observed, that if the object of the testator's bounty is not a public benefit or charity, but some supposed private benefit to himself or his own soul, even the prerogative of the crown will not be interposed to apply such a gift to another purpose; but the bequest will fall into the residue.[3] So if it appears, from the construction of the whole instrument, that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift *cy près* the original purpose. If, therefore, it appears that the testator had but

187; *Ex parte* Jortin, 7 Ves. 340; Att. Gen. *v.* Galway, 1 Beav. 298; 1 Moll. 95; Anon., 2 J. & W. 320, cited Att. Gen. *v.* Rochester, 5 De G., M. & G. 797; Ashton's Char., 27 Beav. 115; Att. Gen. *v.* Ironmongers' Co., 10 Cl. & Fin. 908; Hereford *v.* Adams, 7 Ves. 324; Wilkinson *v.* Malin, 2 Cr. & Jer. 636; Att. Gen. *v.* Bovill, 1 Phil. 762; Att. Gen. *v.* Draper's Co., 2 Beav. 508; Att. Gen. *v.* Coopers' Co., 3 Beav. 29; Thetford School, 8 Rep. 130; Att. Gen. *v.* Skinners' Co., 2 Russ. 407; Mercers' Co. *v.* Att. Gen., 2 Bligh (N. S.), 165; Att. Gen. *v.* Bristol, 2 J. & W. 294; Att. Gen. *v.* South Molton, 14 Beav. 357; 27 Eng. L. & Eq. 17; 5 H. L. Cas. 1; Att. Gen. *v.* Gascoigne, 2 My. & K. 647; Att. Gen. *v.* Cordwainers' Co., 3 My. & K. 534; Att. Gen. *v.* Master of Catherine Hall, Jacob, 381; Att. Gen. *v.* Winson, 6 Jur. (N. S.) 833; Att. Gen. *v.* Christ Church, Jacob, 474; Att. Gen. *v.* Wisbert, 6 Jur. 655; Att. Gen. *v.* Marchant, 12 Jur. 957; L. R. 3 Eq. 424; Att. Gen. *v.* Trinity Church, 9 Allen, 422; Att. Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Att. Gen. *v.* Guise, 2 Vern. 166; Att. Gen. *v.* Baliol Coll., 9 Mod. 407; Att. Gen. *v.* Glasgow Coll., 2 Col. C. C. 665; 1 H. L. Cas. 800; Att. Gen. *v.* Dixie, 2 My. & K. 342; Att. Gen. *v.* Haberdashers' Co., 3 Russ. 530; Merchant Tailors' Co. *v.* Att. Gen., L. R. 11 Eq. 35; Marsh *v.* Renton, 99 Mass. 132; Att. Gen. *v.* Mayor of Beverly, 6 De G., M. & G. 256; 6 H. L. Cas. 310.

[1] Att. Gen. *v.* Wax Chandlers' Co., L. R. 8 Eq. 452; L. R. 5 Ch. 503.

[2] Manchester School Case, L. R. 1 Eq. 55; L. R. 2 Ch. 497; Birkhampstead School Case, L. R. 1 Eq. 102.

[3] Cherry *v.* Mott, 1 My. & Cr. 123; Clark *v.* Taylor, 1 Dr. 642; Att. Gen. *v.* Oxford, 1 Bro. Ch. 444, n.; Russell *v.* Kellett, 3 Sm. & Gif. 264; West *v.* Shuttleworth, 2 My. & K. 684; Att. Gen. *v.* Oxford, 4 Ves. 432; Att. Gen. *v.* Goulding, 2 Bro. Ch. 428.

one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin.[1] And if the gift cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees *cy près*.[2]

§ 727. From this review of the law it appears that the object of all the rules upon this subject is to ascertain and carry out, as nearly as may be, the true intention of the donor. As thus explained, the doctrine of *cy près* is only a liberal rule of construction to ascertain intention. The intention of the donor is the point steadily aimed at by all courts. Any arbitrary rule that substitutes the arbitrary conjectures of a court for the intention of the donor would be an outrage in a country governed by established laws; so, of course, any rule that failed to carry out the intention of a donor, when such intention was consistent with the law, would be a defect in the laws, that would require some remedy. It is proper to say, that the crown, in the exercise of its prerogative, always professes to be governed by the intention of the donor, and where such intention fails, the bequest is allowed to revert to the heir; though it is difficult to understand how an intention to aid a hospital for foundlings could be deduced from a declared intention to build a Jewish synagogue. From a few grotesque cases like this, discredit has been thrown upon the whole doctrine of *cy près*. The difference between the crown and the court is this: the court is governed by known judicial rules of inter-

[1] McAuley *v.* Wilson, 1 Dev. Ch. 276; Att. Gen. *v.* Hurst, 2 Cox, 354; Corbyn *v.* French, 4 Ves. 419; De Garcin *v.* Lawson, id. 433, cited; De Themmines *v.* De Bonneval, 5 Russ. 288; Att. Gen. *v.* Jolly, 2 Strob. 379. [*In re* Rymer, [1895] 1 Ch. 19; *In re* White's Trusts, 33 Ch. Div. 449; *In re* Ovey, 29 Ch. Div. 560; *Re* Taylor, 58 L. T. 538; Brown *v.* Condit, 70 N. J. Eq. 440; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Teele *v.* Bishop of Derry, 168 Mass. 341; Bowden *v.* Brown, 200 Mass. 269.]

[2] Carter *v.* Balfour, 19 Ala. 814; Marsh *v.* Means, 3 Jur. (N. S.) 790; Att. Gen. *v.* Power, 1 Ball & B. 145; Fisk *v.* Att. Gen., L. R. 2 Eq. 521.

pretation; the crown is governed by its own good will and pleasure in deducing or imputing such intentions as it sees fit.

§ 728. When the *cy près* doctrine is reduced to its elements, it becomes a very simple judicial rule of construction; and, as such, courts in all the States can and do apply it without usurping any prerogative powers.[1] (*a*) The same rule may

[1] *Ante*, § 376; Dickson *v.* Montgomery, 1 Swanst. 348; Jackson *v.* Phillips, 14 Allen, 539; Att. Gen. *v.* Wallace, 7 B. Mon. 611; Philadelphia *v.* Girard, 45 Penn. St. 27; Gilman *v.* Hamilton, 16 Ill. 231; Att. Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 395; Moore *v.* Moore, 4 Dana, 366; Gass *v.* Wilhite, 2 Dana, 177; Curling *v.* Curling, 8 Dana, 38. In Pennsylvania the statute of 1855 now confers full power on the court to act in all cases. Curtis *v.* Brown, 29 Ill. 101. [Grand Prairie Seminary *v.* Morgan, 171 Ill. 444; Ga. Civ. Code (1895), § 4007; Ford *v.* Thomas, 111 Ga. 493; Erskine *v.* Whitehead, 84 Ind. 357; Doyle *v.* Whalen, 87 Me. 414; Richardson *v.* Mullery, 200 Mass. 247; Sears *v.* Att. Gen., 193 Mass. 551; Osgood *v.* Rogers, 186 Mass. 238; Amory *v.* Att. Gen., 179 Mass. 89; Att. Gen. *v.* Briggs, 164 Mass. 561; Darcy *v.* Kelly, 153 Mass. 433; Academy *v.* Adams, 65 N. H. 225; City of Keene *v.* Eastman, 72 A. 212 (N. H. 1909); Larkin *v.* Wikoff, 72 A. 98 (N. J. Eq. 1909); MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Nichols *v.* Newark Hospital, 71 N. J. Eq. 130; Pell *v.* Mercer, 14 R. I. 412, 434; Inglish *v.* Johnson, 42 Tex. Civ. App. 118; Harrington *v.* Pier, 105 Wis. 485. See also Universalist Conven. *v.* May, 147 Ala. 455.]

(*a*) In the application of the *cy près* rule by the American courts, the intention of the donor or testator so far as it can be determined is the guide, and whatever difference of authority there is lies in the different conceptions of the extent of the judicial power of courts of equity to supply schemes of administration when that provided by the donors or testator has become impracticable for the successful accomplishment of his charitable purpose, or when the specified charitable purpose has failed and he has not vested in the trustees power to vary the scheme or to select another purpose. In Pell *v.* Mercer, 14 R. I. 412, 435, it is said: "A trust for private or non-charitable purposes cannot be upheld unless the purposes are quite clearly defined. Such a trust is invalid if it violates the rule against perpetuities. A trust for charitable uses is favored in both these respects. Though indefinite it is upheld. If it be designed to be perpetual, it is perpetual. It is a matter of public policy to conserve it from failure. Under this policy a jurisdiction has grown up which has sometimes been condemned as ultra judicial. Thus, if a trust be created for charitable purposes which are too vaguely defined to be executed without further definition, the court itself, if

be, and is, applied in a great variety of cases. If a testator makes a gift to trustees in trust to invest the fund in United

a discretionary power be not lodged elsewhere, will devise a scheme for carrying it into effect. So if a trust be designed for a purpose which is accomplished before it becomes available, or is impracticable, the court will sometimes, though not always, apply it to some other proximate purpose. And again in the case of a trust which has been long in existence if, by change of circumstances, it ceases to be useful according to its original intent, it will be reapplied either wholly or in part to some new purposes, as nearly like to the old as possible. This is what is known as the *cy près* jurisdiction. It is sometimes confounded with the prerogative power which is exercised by the chancellor in England in particular cases under the sign-manual of the sovereign as *parens patriæ*. It is not clear that a resort to this last named power is necessary in more than two classes of cases, to wit: when the bequest is to particular uses charitable in their nature but illegal, and when the bequest is to charity generally without any trust interposed, and no power exists in any person to appoint trustees. . . . We are not aware that any American court has ever claimed the power in so far as it may be regarded as purely a prerogative of *parens patriæ* power."

The Massachusetts court, which has gone as far as any American court, will order a charitable gift to be administered for a cognate purpose whenever the immediate purpose has failed or become impracticable, provided always that it is satisfied the donor had a general charitable intent, including the cognate purpose, and that the failure of the specified object is a failure only of the preferred mode of administration. Richardson *v.* Mullery, 200 Mass. 247; Sears *v.* Att. Gen., 193 Mass. 551; Osgood *v.* Rogers, 186 Mass. 238; Amory *v.* Att. Gen., 179 Mass. 89; Att. Gen. *v.* Briggs, 164 Mass. 561; Darcy *v.* Kelly, 153 Mass. 433; Ely *v.* Att. Gen., 202 Mass. 545. To the same effect see Pell *v.* Mercer, 14 R. I. 412, 434 (*semble*); MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Nichols *v.* Newark Hospital, 71 N. J. Eq. 130; Doyle *v.* Whalen, 87 Me. 414 (*semble*); City of Keene *v.* Eastman, 72 A. 213 (N. H. 1909) (*semble*). The court will itself, whenever necessary, devise a scheme for the administration of a charitable trust *cy près*. Darcy *v.* Kelley, 153 Mass. 433; Richardson *v.* Mullery, 200 Mass. 247.

The court will not apply the *cy près* rule where "the charitable purpose is limited to a particular object or to a particular institution and there is no general charitable intent." The mere fact that the gift is for a specified purpose which is charitable is not sufficient to show a general charitable intent. Teele *v.* Bishop of Derry, 168 Mass. 341; Bowden *v.* Brown, 200 Mass. 269; Stratton *v.* Physio-Medical College, 149 Mass. 505. To the same effect see Brown *v.* Condit, 70 N. J. Eq. 440. But the general charitable intent may be gathered from the

States bonds and pay the income to his wife, and there are no bonds by reason of the payment of the public debt, would the

circumstances under which the gift is made, as where a fund is raised by subscription for the relief of a class of persons, which class later becomes extinct. Sears *v.* Att. Gen., 193 Mass. 551. See Doyle *v.* Whalen, 87 Me. 414; City of Keene *v.* Eastman, 72 A. 213 (N. H. 1909).

In other jurisdictions the courts will apply the *cy près* rule to accomplish the intention of the donor whenever they can do so without passing beyond what they conceive to be the limit of their judicial powers, but they will not pass beyond that limit to prevent a failure of the trust. Grand Prairie Seminary *v.* Morgan, 171 Ill. 444; Kemmerer *v.* Kemmerer, 233 Ill. 327; Harrington *v.* Pier, 105 Wis. 485; Mason *v.* Bloomington Library Ass'n, 237 Ill. 442; Women's Christian Ass'n *v.* Kansas City, 147 Mo. 103; Erskine *v.* Whitehead, 84 Ind. 357; Coleman *v.* O'Leary's Ex'rs, 114 Ky. 388; Spalding *v.* St. Joseph's School, 107 Ky. 382; Inglish *v.* Johnson, 42 Tex. Civ. App. 118. If upon the failure of the particular purpose designated by the donor, the general charitable intent is so indefinite that the trust for such a purpose would have failed in the first instance, the opinion of the majority of the courts seems to be that they have no power to provide for its administration *cy près*. For the rule as to definiteness see *infra*, § 729, note *a*.

But probably all courts consider that they have ample power to authorize a trustee to depart from the donor's scheme of administration when the accomplishment of his primary object seems to require it. Hayden *v.* Conn. Hospital, 64 Conn. 320; Ga. Civ. Code (1895), § 4007; Mason *v.* Bloomington Library Ass'n, 237 Ill. 442; Women's Christian Assoc. *v.* Kansas City, 147 Mo. 103; Mo. Historical Soc. *v.* Academy of Science, 94 Mo. 459; Haynes *v.* Carr, 70 N. H. 463; City of Keene *v.* Eastman, 72 A. 213 (N. H. 1909); Academy *v.* Adams, 65 N. H. 225; Paine *v.* Forney, 128 N. C. 237; Barnard *v.* Adams, 58 Fed. 313; Tincher *v.* Arnold, 147 Fed. 665. In Academy *v.* Adams, 65 N. H. 225, it is said: "The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode, so that the substantial intention shall not depend upon the formal intention. . . . The doctrine of *cy près* adopted to this extent is in harmony with the equitable rule, that a liberal construction is to be given to charitable donations to accomplish the general charitable intent of the donor."

The necessity that will give the court authority to order a deviation from the exact plan of the donor need be "only a reasonable necessity and not an absolute physical impossibility." Woman's Christian Ass'n *v.* Kansas City, 147 Mo. 103.

In jurisdictions where, as in Maryland, the same rule of definiteness of beneficiaries is applied to trusts for charitable purposes as

trust therefore fail and the gift revert to his heirs, or would the court say that the trust for the wife being the principal inten-

is applied to private trusts, the *cy près* rule can have little if any application.

In its application of the *cy près* doctrine under its judicial power the English court is not hampered by any rule against indefiniteness in the donor's scheme. *In re* White, [1893] 2 Ch. 41; Biscoe *v.* Jackson, 35 Ch. Div. 460; Pocock *v.* Att. Gen., 3 Ch. Div. 342. See *In re* Piercy, [1898] 1 Ch. 565; Warren *v.* Clancy, [1898] 1 Ir. 127.

Under the recent cases in England as in Massachusetts a legacy to a specified charity which cannot take effect according to its precise terms will not be administered to a cognate purpose under the *cy près* rule except in accordance with what is construed to be the intention of the testator. Thus in case of a legacy in trust for the education of priests in a certain seminary, which went out of existence shortly before the testator's death, it was held that the legacy lapsed and could not be applied to a cognate purpose because there did not appear to be a general charitable intent. It was said by Lord Lindley that, "you have to consider whether the mode of obtaining the object is only machinery or whether the mode is not the substance of the gift." *In re* Rymer, [1895] 1 Ch. 19. See also *In re* White's Trusts, 33 Ch. Div. 449; *In re* Ovey, 29 Ch. Div. 560; *Re* Taylor, 58 L. T. 538; Brown *v.* Condit, 70 N. J. Eq. 440; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Teele *v.* Bishop of Derry, 168 Mass. 341; Bowden *v.* Brown, 200 Mass. 269. In *Re* Taylor, 58 L. T. 538, the rule is stated to be that, "if upon the whole scope and intent of the will you discern the paramount object of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the primary paramount intention chiefly, and if the particular mode for any reason fails, the court, if it sees a sufficient expression of a general intention of charity, will, to use the phrase familiar to us, execute that *cy près*, that is, carry out the general paramount intention in some way as nearly as possible the same as that which the testator has particularly indicated without which his intention itself cannot be effectuated," per Kay, J.

When a legacy or gift for a charitable purpose has fully vested before the particular purpose becomes impossible of accomplishment, the English court will upon occasion go much further than any American court in applying the *cy près* rule. Whenever under these circumstances it is possible to find any intention of the donor with regard to what should be done with the property in case of failure of the specified purpose, the court will give effect to that intention, and it always seeks to find the donor's intention. See *In re* Slevin, [1891] 2 Ch. 236.

In most cases of this kind it is

tion of the bequest, the particular manner of the investment of the funds is incidental, and that, the particular direction of the will having failed, an investment will be ordered *cy près* the original direction of the will?[1] So if a fund is given in trust for a charity, with a direction to accumulate beyond the legal period, or with any other illegal or impossible direction as to the incidental management of the fund, the court will direct a management that is legal and possible, *cy près* the original direction; and this on the ground that the donor did not intend his charity to fail because one of the incidental directions could not be carried out.[2]

§ 729. With these views in mind, it may now be said that a bequest for charity, generally; or to such persons in trust as shall be named thereafter, and none are named;[3] or if a

[1] Chamberlain *v.* Brackett, L. R. 8 Ch. 206, and cases cited.

[2] Where the courts have said that the *cy près* doctrine will not prevail in this country, the cases have generally been of such a character that probably the prerogative power rather than the judicial power of construction was intended to be denied. Methodist Church *v.* Remington, 1 Watts, 226; Whitman *v.* Lex, 17 S. & R. 93; Henry County *v.* Winnebago, &c., 52 Ill. 454; Grimes *v.* Harmon, 35 Ind. 237; Moore *v.* Moore, 4 Dana, 366; Williams *v.* Williams, 4 Selden, 525.

[3] Mills *v.* Farmer, 1 Mer. 55, 96; Moggridge *v.* Thackwell, 7 Ves. 36.

possible to find a general charitable intent and a basis therefore, for the application of the *cy près* rule under the strictly judicial power of the court. Mayor of Lyons *v.* Advocate Gen. of Bengal, 1 App. Div. 91; *Re* Bradford School of Industry, [1893] W. N. 60; *In re* Buck, [1896] 2 Ch. 727. But there are occasional cases where there is no indication of the donor's intention in the event that the specified charity should come to an end. In such cases the English court treats the property as *bona vacantia* and belonging to the crown, and under its prerogative power will apply the property to some other charitable purpose analogous to the original purpose. *In re* Slevin, [1891] 2 Ch. 236, 64 L. T. 311; *In re* Campden Charities, 24 Ch. Div. 213, 218; Cunnack *v.* Edwards, [1896] 2 Ch. 679. For a discussion as to where this prerogative power resides in this country, see Mormon Church *v.* U. S., 136 U. S. 1, 140 U. S. 665, where under authority from Congress the court devoted to educational purposes certain forfeited property of the Mormon Church. For an article on the origin of the *cy près* doctrine, see 8 Har. L. Rev. 69.

fund is given for such charitable uses as shall be directed by a codicil or note in writing, and there are no such papers to be found;[1] or if a trust is created in a will for a school to be thereafter named, and none is named;[2] or to the poor generally; or to charity generally with no trustees appointed;[3] or to the advancement of religion;[4] or to such uses as the executor shall appoint, and the executor's appointment is revoked, or the executor renounces probate,[5] or refuses to appoint;[6] or if a gift is made for an object which has no existence,[7] or which is void in law,[8] or is impossible before the administration of the charity begins;[9] or giving to an uncertain charity; or to trustees who refuse to accept and exercise the discretion, and there is no authority in the successors to exercise the power;[10] or to a particular charity by a description so uncertain that it is wholly uncertain what charity is intended;[11] or where the sums or the charities are wholly uncertain,[12] — in

[1] Ibid.; Att. Gen. *v.* Syderfin, 1 Vern. 224; 2 Freem. 261; Cook *v.* Dunkenfield, 2 Atk. 56, 567; Commissioners *v.* Sullivan, 1 Dru. & War. 501. [Colbert *v.* Speer, 24 App. D. C. 187; Hadley *v.* Forsee, 203 Mo. 418. But see *contra*, *In re* White, [1893] 2 Ch. 41; Pocock *v.* Att. Gen., 3 Ch. Div. 342; Sherman *v.* Cong. Miss. Soc., 176 Mass. 349.]

[2] See cases cited in last note.

[3] Att. Gen. *v.* Mathews, 2 Lev. 167; Finch, 245; Att. Gen. *v.* Rance, Amb. 422; Clifford *v.* Francis, Freem. 330; Att. Gen. *v.* Herrick, Amb. 712.

[4] Powerscourt *v.* Powerscourt, 1 Mol. 616.

[5] White *v.* White, 1 Bro. Ch. 12; Att. Gen. *v.* Fletcher, 5 L. J. (N. S.) Ch. 75.

[6] Att. Gen. *v.* Boultbee, 2 Ves. Jr. 380; 3 Ves. 220.

[7] Att. Gen. *v.* London, 3 Bro. Ch. 171; 1 Ves. Jr. 143; Loscombe *v.* Winteringham, 13 Beav. 87; Att. Gen. *v.* Oglander, 1 Bro. Ch. 166.

[8] Att. Gen. *v.* Whorwood, 1 Ves. 534; Da Costa *v.* De Pas, Amb. 228; Att. Gen. *v.* Vint, 3 De G. & Sm. 704; Cary *v.* Abbott, 7 Ves. 490; Att. Gen. *v.* Goulding, 2 Bro. Ch. 428.

[9] Att. Gen. *v.* Guise, 2 Vern. 266; Heyter *v.* Trego, 5 Russ. 113; Att. Gen. *v.* Ironmongers' Co., Cr. & Ph. 208; 10 Cl. & Fin. 908; Att. Gen. *v.* Glyn, 12 Sim. 84; Martin *v.* Margham, 14 Sim. 230; Incorporated Soc. *v.* Price, 1 J. & Lat. 498.

[10] Att. Gen. *v.* Andrew, 3 Ves. Jr. 633; Denyer *v.* Druce, Taml. 32; Reeve *v.* Att. Gen., 3 Hare, 191; Fontain *v.* Ravenel, 17 How. 382; Att. Gen. *v.* Jackson, 11 Ves. 365.

[11] Simon *v.* Barker, 5 Russ. 112; Bennet *v.* Hayter, 2 Beav. 81.

[12] Pieschel *v.* Paris, 2 S. & S. 384; Hartshorne *v.* Nicholson, 26 Beav. 58.

all these cases, courts in America could not interfere to establish the charities, appoint trustees, or decree a scheme by which the funds should be expended. Some prerogative power is necessary to give effect to such inchoate, imperfect, or illegal bequests. Courts in England do not profess to administer them in their judicial capacity,[1] and the courts in America, with a few exceptions, have declined to act in such cases.[2] (*a*)

[1] 1 Jarman on Wills, p. 224 (ed. 1861).
[2] Grimes *v.* Harmon, 35 Ind. 198.

(*a*) In this country there is much conflict of authority as to what is sufficient definiteness in the case of a trust for charitable purposes, and although the law for each State seems to be fairly well settled, it varies throughout the country between the rule for private trust and the rule established in England, that courts of equity have inherent jurisdiction to provide for the proper execution of charitable trusts in all cases where the intent of the donor to devote the property to some form of charity is clear. In many of the decisions the question has been treated as a question of the extent of the judicial authority of a court of equity as distinguished from the prerogative power of the crown sometimes exercised by the English court, and of which the *cy près* jurisdiction has been taken to be an example.

In a few States the same rules as to definiteness of beneficiaries are applied to charitable trusts as are applied to private trusts, and a trust for a charitable purpose is void even when there is a competent trustee who has been given power to select the ultimate beneficiaries. It is said in such cases that the court has no means of control over the trustee when there is no *cestui* who has such an interest that he can come into court and compel the trustee to execute the trust. Trinity M. E. Church *v.* Baker, 91 Md. 539; Trustees *v.* Jackson Sq. Church, 84 Md. 173; Wheelock *v.* Am. Tract Soc., 109 Mich. 141; M. E. Church *v.* Clark, 41 Mich. 730; Shanahan *v.* Kelly, 88 Minn. 202; Watkins *v.* Bigelow, 93 Minn. 210; Little *v.* Willford, 31 Minn. 173; Lane *v.* Eaton, 69 Minn. 141; Fifield *v.* Van Wyck, 94 Va. 557; Pack *v.* Shanklin, 43 W. Va. 304; Mong *v.* Roush, 29 W. Va. 119; Weaver *v.* Spurr, 56 W. Va. 95. See Morris' Ex'r *v.* Morris' Devisees, 48 W. Va. 430; Succession of McCloskey, 52 La. Ann. 1122.

Thus a gift to trustees for the worthy poor of a certain city has been held to be void for indefiniteness. Watkins *v.* Bigelow, 93 Minn. 210. Likewise of a gift to an unincorporated association for the charitable uses in which the association is engaged. Lane *v.* Eaton, 69 Minn. 141.

Prior to 1893 this was the rule followed by the New York courts. People *v.* Powers, 147 N. Y. 104; Tilden *v.* Green, 130 N. Y. 29, 64; Fairchild *v.* Edson, 154 N. Y.

§ 730. It is well settled, that a devise for a charitable use to church-wardens, although not a corporation capable

199. But by Chapter 701 of 1893 the New York law was changed and "gifts, grants, bequests or devises to religious, educational, charitable or benevolent uses" are not invalid by reason of the indefiniteness or uncertainty of persons designated as beneficiaries. If no trustee is named the title vests in the Supreme Court. IV N. Y. Consol. Laws (1909), p. 2840, § 12, p. 3396, § 113.

In States which take this view, a gift to a charitable corporation with directions to apply to a definite charitable purpose which is within the scope of its corporate purposes is valid, even though stated to be in trust. Ege *v.* Hering, 108 Md. 391; Domestic & Foreign Miss. Soc. *v.* Gaither, 62 Fed. 422; Trinity M. E. Church *v.* Baker, 91 Md. 539; Jordan *v.* Universalist Trustees, 107 Va. 79; Jordan *v.* Richmond Home, 106 Va. 710; Pack *v.* Shanklin, 43 W. Va. 304; Hanson *v.* Little Sisters of the Poor, 79 Md. 434; Erhardt *v.* Baltimore Mo. Meeting, 93 Md. 669. The same is true when the gift is to a corporation not in existence at the time, but which the executors are directed to organize for the purpose of administering the trust. Watkins *v.* Bigelow, 93 Minn. 210. See Lane *v.* Eaton, 69 Minn. 141.

The great majority of American courts have adopted a much more liberal rule in regard to gifts or bequests for charitable purposes, finding inherent in courts of equity ample judicial power to enforce and provide for the proper execution of such trusts, if the donor or testator has provided some method or means of selecting the ultimate beneficiaries. It is not considered necessary that the class to be benefited shall be so clearly defined or the members so definitely pointed out that any one of them shall be able to go into court and compel the execution of the trust for his benefit. Although the courts are not in full accord as to the extent to which they can properly go when the donor has not provided some method by which the ultimate objects of the gift may be determined, probably all American courts, except the few which take the extreme view adopted in Maryland, agree that where the donor or testator has designated a class by naming the kind of charity, as distinguished from charity in general, and also has given to a competent trustee the power to select the individuals from the designated class, the trust is valid. Woodroof *v.* Hundley, 147 Ala. 287; Huntsville *v.* Smith, 137 Ala. 382; McDonald *v.* Shaw, 81 Ark. 235; Grant *v.* Saunders, 121 Iowa, 80; Trustees of Washburn College *v.* O'Hara, 75 Kan. 700; Keith *v.* Scales, 124 N. C. 497; *In re* Murray's Will, 141 N. C. 588; *In re* John's Will, 30 Or. 494; Selleck *v.* Thompson, 28 R. I. 350; Guild *v.* Allen, 28 R. I. 430; Staines *v.* Burton, 17 Utah, 331; Sheldon *v.* Stockbridge, 67 Vt. 299; Ex'rs of Burr *v.* Smith, 7 Vt. 241, 276; Rader *v.* Stubblefield, 43 Wash. 334. See also cases cited *infra*, this note. And where he has specified the particular charitable object with sufficient definiteness to enable the trustee to desig-

in law of holding and transmitting property, will be sustained;[1] so to an institution neither established nor incorporated in the

[1] Att. Gen. *v.* Oglander, 3 Bro. Ch. 166; Att. Gen. *v.* Green, 2 Bro. Ch. 492; Att. Gen. *v.* Boultbee, 2 Ves. Jr. 380; Frier *v.* Peacock, Finch, 245; Duke, 355; Att. Gen. *v.* Wansay, 15 Ves. 232; Burrill *v.* Boardman, 43 N. Y. 254. [*Re* Dudgeon, 74 L. T. 613.]

nate it, but has failed to name a trustee or to provide for the appointment of one, the court will appoint a competent trustee. Clayton *v.* Hallett, 30 Colo. 231; Klumpert *v.* Vrieland, 121 N. W. 34, 142 Iowa, 434; Sears *v.* Chapman, 158 Mass. 400; Hood *v.* Dorer, 107 Wis. 149. See *infra*, § 731 and notes.

In a few of the States it seems to be established that, even where the donor has named a competent trustee and given him ample power of selecting the ultimate beneficiaries, the trust is too indefinite if the only limitation upon the trustee is that the property be used for a charitable purpose, leaving the selection of the particular charity to the trustee's uncontrolled discretion. The rule is stated as follows in Harrington *v.* Pier, 105 Wis. 485, 503 (50 L. R. A. 307): "It is sufficient if there be a trust and a particular charitable purpose, as distinguished from a gift for charity generally. The court may supply the trustee to administer the trust; the trustee may select the beneficiaries from within the general class named by the donor, and when necessary may work out the details of the declared purpose within its general stated limits. Certainty of beneficiaries who can invoke judicial power to enforce the trust is not only unnecessary, but is inconsistent with the very nature of a trust for charitable uses, in that the beneficiaries, in a general sense, are the members of the public at large." And later in the same opinion, at page 514, it is said, "Given a trust, with or without a trustee, a particular purpose, — as education, or relief of the poor, as distinguished from a bequest to charity generally — and a class great or small, and without regard to location, necessarily, ... and we have a good trust for charitable uses." See also McHugh *v.* McCole, 97 Wis. 166; Sawtelle *v.* Witham, 94 Wis. 412; Fuller's Will, 75 Wis. 431; Kronshage *v.* Varrell, 120 Wis. 161.

The Kentucky court has laid down a similar rule, viz., that charitable trusts, including trusts for education, religion and public purposes, "are sufficiently certain and determinate if the class of beneficiaries be named in general language or general outline, leaving to the trustee the discretion to select the immediate objects of the class named to be the actual beneficiaries of the bounty of the settlor of the trust." Kasey *v.* Fidelity Trust Co., 131 Ky. 609, 115 S. W. 739. A designation of the class to be benefited as "the destitute of the earth" or "the poor in his [the trustee's] discretion" has been held sufficiently definite. Thompson's Ex'r *v.* Brown, 116 Ky. 102. Likewise a trust for the "advance-

life of the donor;[1] and so a devise to certain officers or their successors in office, or, if they are incapable of executing the

[1] Russell *v.* Allen, 107 U. S. 163.

ment of the principles of primitive Christianity as taught by the Christian Church." Crawford's Heirs *v.* Thomas, 114 Ky. 484. See also Leak's Heirs *v.* Leak's Ex'r, 78 S. W. 471 (Ky.); Tichenor *v.* Brewer's Ex'r, 98 Ky. 349; Bedford *v.* Bedford's Adm'r, 99 Ky. 273. But a trust for charitable objects at the discretion of the trustee has been held to be too indefinite. Coleman *v.* O'Leary's Ex'rs, 114 Ky. 388; Spalding *v.* St. Joseph's School, 107 Ky. 382. In Coleman *v.* O'Leary's Ex'rs, *ubi supra*, it was said, "The donor must select his charity. He may delegate power to select the individual recipients of his bounty, but a gift to charity in general is too vague to be enforced." To the same effect see Johnson *v.* Johnson, 92 Tenn. 559 (compare with Heiskell *v.* Chickasaw Lodge, 87 Tenn. 668); Jones *v.* Green, 36 S. W. 729 (Tenn. 1895); Bridges *v.* Pleasants, 4 Ired. Eq. 26, 44 Am. Dec. 94; Colbert *v.* Speer, 24 App. D. C. 187.

A similar rule seems to have been adopted in Connecticut. Thus in Adye *v.* Smith, 44 Conn. 60, 70, it is said, "Our law is more strict than the English law in this respect, that it requires certainty in the persons to be benefited, or at least a certain and definite class of persons with an ascertained mode of selecting them." See Conn. Gen. Stat. (1902), § 4026; Conklin *v.* Davis, 63 Conn. 377; Strong's Appeal, 68 Conn. 527.

The judicial interpretation of the New York statute of 1893 seems to make the law as to definiteness in that State similar to that in Kentucky and Wisconsin. Allen *v.* Stevens, 161 N. Y. 122; Rothschild *v.* Schiff, 188 N. Y. 327; Matter of Shattuck, 193 N. Y. 446; Spencer *v.* Hay Library Ass'n, 73 N. Y. S. 712; Johnston *v.* Hughes, 187 N. Y. 446. See Fralick *v.* Lyford, 95 N. Y. S. 433, 107 App. Div. 543 (affirmed 187 N. Y. 524); Pratt *v.* Roman Catholic Orphan Asy., 20 App. Div. 352 (affirmed 166 N. Y. 593); Catt *v.* Catt, 103 N. Y. S. 740, 118 App. Div. 742.

The tendency of the American courts seems to be to go somewhat further, and to uphold the trust even when the donor has not specified the particular charitable use, if he has vested in a trustee ample power of selecting the charitable object or objects, limiting the latter's choice only to objects which come within the class recognized by law as charitable, *e. g.*, to such objects of charity as the trustee may select. Kemmerer *v.* Kemmerer, 233 Ill. 327; Welch *v.* Caldwell, 226 Ill. 488; Trafton *v.* Black, 187 Ill. 36; Board of Com'rs *v.* Dinwiddie, 139 Ind. 128; Erskine *v.* Whitehead, 84 Ind. 357; Sappington *v.* School Fund Trustees, 123 Mo. 32; St. James Orphan Asylum *v.* Shelby, 60 Neb. 796; Haynes *v.* Carr, 70 N. H. 463; Trim's Estate, 168 Pa. St. 395; *In re* Stewart's Estate, 26 Wash. 32; Dye *v.* Beaver Creek Church, 48 S. C. 444 (*semble*). See also Fay *v.* Howe, 136

trust, then to a corporation to be formed for the purpose, was held by the Supreme Court of the United States, to be a good

Cal. 599; Clayton *v.* Hallett, 30 Colo. 231.

The courts of Massachusetts, Maine, New Jersey, and Rhode Island go at least as far as this and seem to go somewhat further in upholding and enforcing charitable trusts. Weber *v.* Bryant, 161 Mass. 400; Minot *v.* Baker, 147 Mass. 348; Att. Gen. *v.* Goodell, 180 Mass. 538; Gill *v.* Att. Gen., 197 Mass. 232; Selleck *v.* Thompson, 28 R. I. 350; Pell *v.* Mercer, 14 R. I. 412, 434. See *infra*, this note.

When the donor has neither appointed a trustee nor provided for his appointment, the test of definiteness adopted by the majority of the American courts seems to be whether or not the donor has himself provided a method of selecting the ultimate beneficiaries. If he has provided a method of selection the courts have ample power to supply the original lack of a trustee, or to fill vacancies in the office and to compel the trustee to perform the trust. But if the donor has merely indicated an intention that the gift shall be for charitable uses without vesting in a trustee the power to select the ultimate beneficiaries and without indicating any method by which they can be determined, these courts hold that there is no power in the court to determine the beneficiaries or to formulate a scheme by which they can be determined, and that the gift fails for indefiniteness. The English cases where the chancery court has provided a scheme for the proper execution of such charitable trusts are considered to be examples of an exercise of the prerogative power of the crown as *parens patriæ*. Welch *v.* Caldwell, 226 Ill. 488; Kemmerer *v.* Kemmerer, 233 Ill. 327; Board of Com'rs *v.* Dinwiddie, 139 Ind. 128; Erskine *v.* Whitehead, 84 Ind. 357; Nilson's Estate, 81 Neb. 809; Kronshage *v.* Varrell, 120 Wis. 161; Dye *v.* Beaver Creek Ch., 48 S. C. 444. See also Haynes *v.* Carr, 70 N. H. 463; Dulles's Estate, 218 Pa. St. 162; Estate of Hoffen, 70 Wis. 522; Nolte *v.* Meyer, 79 Tex. 351.

These courts are of opinion that, except so far as the creator of the trust has conferred additional power upon the court, its powers are limited to compelling the trustees to perform their duties, relieving against breaches of trust, interpreting the intention of the creator of the trust, removing trustees for adequate cause and appointing substituted trustees to fill vacancies. To these powers most jurisdictions add the power to authorize a departure from the precise mode of execution provided by the creator of the trust when the accomplishment of his main purpose seems to require it. See *supra*, § 728. Thus in Welch *v.* Caldwell, 226 Ill. 488, it is said, "If a trustee is required, in the administration of the charity, to fix the beneficiaries, and no trustee is appointed and no power given to the court to appoint one, the gift will be so imperfect that it cannot be administered, but if a trustee is appointed or the appointment is referred to the court, the

devise and capable of being carried into effect.[1] A gift to a corporation by a misnomer is good for a charitable purpose, if the corporation can be identified;[2] gifts in trust to voluntary associations for charitable purposes have been upheld;[3] (*a*)

[1] Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; White *v.* White, 1 Bro. Ch. 12; Att. Gen. *v.* Downing, Amb. 550; Att. Gen. *v.* Bowyer, 3 Ves. 714.

[2] Tucker *v.* Seamen's Aid Soc., 7 Met. 188; Winslow *v.* Cummings, 3 Cush. 359; Minot *v.* Boston Asylum, 7 Met. 417; Anon., 1 Ch. Cas. 267; Att. Gen. *v.* Platt, Finch, 221; Hornbeck *v.* American Bible Soc., 2 Sandf. Ch. 183; Chapin *v.* School Dis., 35 N. H. 445; Tappan *v.* Deblois, 45 Me. 122. [Bowman *v.* Miss. Soc., 90 N. Y. S. 898, 100 App. Div. 29 (affirmed, 182 N. Y. 494); Cook *v.* Universalist Convention, 138 Mich. 157; Kerrigan *v.* Conelly, 46 A. 227 (N. J. Ch. 1900).]

[3] Duke *v.* Fuller, 9 N. H. 535; Vander Volgen *v.* Yates, 3 Barb. Ch. 290; Burr *v.* Smith, 7 Vt. 241; Antones *v.* Eslava, 9 Porter, 527; Washburn *v.* Sewell, 9 Met. 280; Zeisweiss *v.* James, 63 Penn. St. 465; Roshi's App., 69

trust will be valid. If the subject and object of the trust are definitely declared the trust will not be allowed to fail for want of a trustee." And later in the same opinion, p. 498, "It is conceded that a charitable gift cannot be sustained where no beneficiary is indicated and no person is appointed to select the beneficiary; but that will be regarded as certain which may be rendered certain, and certainty is secured where a power of selection or appointment is vested in some person."

The Massachusetts court in some of its decisions has apparently gone further than the great majority of the American courts, in carrying out the general charitable intention of a donor or testator when he has provided no trustee. The decisions seem to go to the extent that where a donor or testator clearly intended to make a gift for purposes which are charitable within the legal meaning of the word, the court of equity has ample judicial power to supply everything else, viz., a trustee and a scheme by means of which he may select the ultimate beneficiaries or the particular charitable object or objects. Minot *v.* Baker, 147 Mass. 348; Sherman *v.* Congregational Miss. Soc., 176 Mass. 349; Osgood *v.* Rogers, 186 Mass. 238; Att. Gen. *v.* Briggs, 164 Mass. 561; Darcy *v.* Kelley, 153 Mass. 433. But see Sears *v.* Chapman, 158 Mass. 400; Jackson *v.* Phillips, 14 Allen, 539, 576. This is particularly apparent in the Massachusetts decisions in regard to the application of the *cy près* rule.

This view as to the extent of the judicial powers of a court of equity seems to have been taken also in Rhode Island, New Jersey, and possibly in Maine. Pell *v.* Mercer, 14 R. I. 412, 434; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Nichols *v.* Newark Hospital, 71 N. J. Eq. 130; Doyle *v.* Whalen, 87 Me. 414.

(*a*) If the association itself is incompetent to act as trustee, the

and so have gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations.[1] These bodies, or *quasi* corporations, have been con-

Penn. St. 462. But see White *v.* Hale, 2 Cold. 77; German, &c. Association, 10 Minn. 337; and Grimes *v.* Harmon, 35 Ind. 198. [Am. Bible Soc. *v.* Am. Tract Soc., 62 N. J. Eq. 219; Bruere *v.* Cook, 63 N. J. Eq. 624; Estate of Winchester, 133 Cal. 271; Lilly *v.* Tobbein, 103 Mo. 477; Keith *v.* Scales, 124 N. C. 497, 510; St. Peter's Church *v.* Brown, 21 R. I. 367; Wood *v.* Fourth Baptist Church, 26 R. I. 594; Dye *v.* Beaver Creek Church, 48 S. C. 444.]

[1] Magill *v.* Brown, Brightly, 347; Shotwell *v.* Mott, 2 Sandf. Ch. 46; Pickering *v.* Shotwell, 10 Penn. St. 23; Wright *v.* Linn, 9 id. 433; Beaver *v.* Filsom, 8 id. 327; Wright *v.* Methodist Church, 1 Hoff. Ch. 202; Hendrickson *v.* Decow, Saxt. 577; Att. Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. Eq. 379; White *v.* Att. Gen., 4 Ired. Eq. 19; Banks *v.* Phelan, 4 Barb. 80; courts of most of the States will appoint a competent trustee to receive the property and to be responsible for the proper administration of the trust. Wood *v.* Fourth Baptist Church, 26 R. I. 594; St. Peter's Church *v.* Brown, 21 R. I. 367; Bruere *v.* Cook, 63 N. J. Eq. 624. Or if the association sees fit to incorporate within a reasonable time or before the funds are available, it will be allowed to act as trustee if competent to do so under its charter. Estate of Winchester, 133 Cal. 271; Keith *v.* Scales, 124 N. C. 497, 510.

In States which apply to charitable gifts the same rule of definiteness as to private trusts, a gift or legacy to an unincorporated society in trust for charitable purposes is invalid, unless the society incorporates. Lane *v.* Eaton, 69 Minn. 141; Watkins *v.* Bigelow, 93 Minn. 210. See Pratt *v.* Roman Cath. Orphan Asylum, 46 N. Y. S. 1035, 20 App. Div. 352 (affirmed 166 N. Y. 593); Fralick *v.* Lyford, 95 N. Y. S. 433, 107 App. Div. 543 (affirmed, 187 N. Y. 524); Catt *v.* Catt, 103 N. Y. S. 740, 118 App. Div. 742.

A gift or bequest to an incorporated or to an unincorporated association which exists solely for charitable work will usually be construed to be upon trust for that purpose. Estate *v.* Merchant, 143 Cal. 537; Carter *v.* Balfour's Adm'r, 19 Ala. 814, 824; Estate of Winchester, 133 Cal. 271; Missouri Hist. Soc. *v.* Academy of Science, 94 Mo. 459; Am. Bible Soc. *v.* Am. Tract Soc., 62 N. J. Eq. 219; Hubbard *v.* Worcester Art Museum, 194 Mass. 280, 289; Cone *v.* Wold, 85 Minn. 302; Mills *v.* Davison, 54 N. J. Eq. 659; *In re* Brown, [1898] 1 Ir. 423. In Stratton *v.* Physio-Medical College, 149 Mass. 505, it was said that, "in case of a simple gift to an institution, if the institution is in its nature, and by its name appears to be, a mere trustee or conduit for the application of its funds to charitable purposes, the gift will not fail upon failure of the donee." See Cone *v.* Wold, 85 Minn. 302; Watkins *v.* Bigelow, 93 Minn. 210.

sidered so far under the control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach.[1] But a gift to a corporation that may not be incorporated within the time limited for the vesting of estates, or to a corporation to come into existence that cannot be incorporated under the laws of a State, will fail.[2] (*a*) Property given to trustees for voluntary religious societies does not vest in new trustees who may be elected from time to time, but remains in the old trustees until they make a conveyance.[3]

§ 731. If a testator creates a trust for a particular charitable purpose, as for a school, hospital, almshouse, church, or other institution, and points out all the details, so that there is certainty in the purposes and objects of the charity, and appoints no trustees, or if the trustees fail for any reason, courts will appoint other trustees, for such is the plain intention of the donor; and it is a maxim of courts never to allow a certain and valid trust to fail for want of a trustee.[4] (*b*) In

Williams *v.* Pearson, 38 Ala. 299; Missionary Soc.'s Appeal, 30 Penn. St. 425; Price *v.* Maxwell, 28 id. 23; Evangelical Assoc.'s Appeal, 35 id. 316; Preachers' Aid Soc. *v.* Rich, 45 Maine, 552; Gass *v.* Wilhite, 2 Dana, 170. [*In re* Brown, [1898] 1 Ir. R. 423.]

[1] Hubbard *v.* German Cath. Cong., 34 Iowa, 31; Worrell *v.* Presbyterian Church, 23 N. J. Eq. 96.

[2] Zeisweiss *v.* James, 63 Penn. St. 465.

[3] Peabody *v.* Eastern Meth. Soc., 5 Allen, 540.

[4] Sections 38, 45, 240, 248, 427; Treat's App., 30 Conn. 113; White *v.* Hampton, 13 Iowa, 259.

(*a*) But if the gift was intended to be upon a trust which another trustee can execute, the courts will usually appoint a competent trustee. See § 731, note *b*.

(*b*) This is true whether the lack of a trustee is due to failure of the donor to appoint one; Klumpert *v.* Vrieland, 142 Iowa, 434, 121 N. W. 34; Sears *v.* Chapman, 158 Mass. 400; Hood *v.* Dorer, 107 Wis. 149; or to the legal incapacity of the named trustee; Lilly *v.* Tobbein, 103 Mo. 477; Keith *v.* Scales, 124 N. C. 497, 510; Estate of Winchester, 133 Cal. 271; St. Peter's Church *v.* Brown, 21 R. I. 367; Wood *v.* Fourth Baptist Church, 26 R. I. 594; or to the refusal of the named trustee to accept; Mack's Appeal, 71 Conn. 135;

such cases, the courts say that there is no ground to suppose that the discretion of any particular trustee has anything to do with the essence of the gift.[1] Again, if a testator makes a bequest for a charitable use in the most general and indefinite terms, and appoints trustees to exercise their discretion in selecting the objects and in reducing the general intent to a particular and practical application, and such trustees fail for any reason, without having exercised their discretion or power of appointment in reducing the general and indefinite charity to a practical certainty of administration, courts will be governed by the intention of the donor, in determining whether they will appoint other trustees to exercise the power given to the first trustees named in the will. If the power given to the first trustees is a personal trust and confidence, the court should not appoint other trustees to exercise that power contrary to the intention of the donor; but the court ought to act upon liberal principles of construction in finding such intention.[2] (*a*) If a testator

[1] Inglis *v.* Sailors' Snug Harbor, 3 Peters, 99; Reeve *v.* Att. Gen., 3 Hare, 191; Hayter *v.* Trego, 5 Russ. 113; Denyer *v.* Druce, Taml. 32; Soc. for the Prop. of Gos. *v.* Att. Gen., 3 Russ. 142; Walsh *v.* Gladstone, 1 Phil. Ch. 290. Where a testator directed his trustees to pay the income of a fund to the committee of a certain school society (that being a kind of school district) for the benefit of poor children, and the legislature having abolished school societies, it was held, that the charity still remained to be administered in some other form. Berchard *v.* Scott, 39 Conn. 68.

[2] *Ante*, § 721; Lorings *v.* Marsh, 6 Wall. 337; Att. Gen. *v.* Gladstone, 13 Sim. 7; Fontain *v.* Ravenel, 17 How. 382; Down *v.* Warrall, 1 My. & K. 561; Green *v.* Allen, 5 Humph. 170; Griffin *v.* Graham, 1 Hawks, 96.

Towle *v.* Nesmith, 69 N. H. 212; or to the death of the original trustee; Schouler, petitioner, 134 Mass. 426; Grant *v.* Saunders, 121 Iowa, 80; De Silver's Estate, 211 Pa. St. 459; Thompson *v.* Hale, 123 Ga. 305; or to his resignation or removal. Inglis *v.* Johnson, 42 Tex. Civ. App. 118; Stevens's Estate, 200 Pa. St. 318. See also Fay *v.* Howe, 136 Cal. 599; Clayton *v.* Hallett, 30 Colo. 231; Jones *v.* Watford, 64 N. J. Eq. 785; Bruere *v.* Cook, 63 N. J. Eq. 624; Young *v.* Lutheran Church, 200 Pa. St. 332; John *v.* Smith, 102 Fed. 218; Green *v.* Blackwell, 35 A. 375 (N. J. Ch.).

(*a*) When there is no clear indication in the trust instrument that the donor or testator intended the charitable trust to end with the death of the original trustee, the courts seem strongly inclined to find by implication an intention that the

makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee, according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint, there is no power in the American courts to administer such an inchoate and imperfect gift.[1] (*a*)

[1] In 2 Redf. on Wills, pp. 517, 518, 535 (2d ed.), it is asserted that the American courts exercise the ordinary chancery jurisdiction of the court of chancery in England, and also the prerogative power of the crown; that they carry into effect trusts where there is great indefiniteness in the objects, and that "the want of a trustee in such cases is never any obstacle in the way of a court carrying into effect any trust, and more especially one of a charitable character." In support of these assertions, Whitman *v.* Lex, 17 S. & R. 88; Moore *v.* Moore, 4 Dana, 354; McGirr *v.* Aaron, 1 Pa. 49; Methodist Church *v.* Remington, 1 Watts, 218; Morrison *v.* Beirer, 2 Watts & S. 81; Zimmerman *v.* Anders, 6 Watts & S. 218; Pickering *v.* Shotwell, 10 Penn. St. 23; State *v.* Girard, 2 Ired. Eq. 210; Antones *v.* Eslava, 9 Porter, 527; Dickson *v.* Montgomery, 1 Swanst. 348; Zanesville C. & M. Co. *v.* Zanesville, 20 Ohio, 483; Att. Gen. *v.* Jolly, 1 Rich. Eq. 99, are cited. It may be said, in regard to these statements and these authorities, that no court in America has ever supposed that it was exercising anything more than its ordinary equity power, or that it possessed, or could exercise, any arbitrary or prerogative power of the crown of England, unless such power had been expressly conferred upon it by the legislature. It may be further said, that, if courts have appointed trustees to carry into effect trusts that were indefinite and vague, they have done so in pursuance of what they supposed to be the intention of the donors, arrived at by a liberal construction of the wills or deeds. If any cases are not within this proposition, they probably would not be followed by courts that have no power to exercise any jurisdiction not of a judicial character. In 1855

discretion should vest in his successor. Schouler, petitioner, 134 Mass. 426; Grant *v.* Saunders, 121 Iowa, 80; De Silver's Estate, 211 Pa. St. 459. See also Fay *v.* Howe, 136 Cal. 599. In Woodroof *v.* Hundley, 147 Ala. 287, it was said, "The selection of the particular objects of the designated class to be benefited is a mere administrative detail, not involving the essence of the charity, and belongs to the office of trustee, unless specially otherwise provided, and, when not specially otherwise provided, will be exercised by the court or attached to the office of trustee on failure of the particular plan."

(*a*) See *supra*, § 729, note *a*, p. 1207.

§ 732. The rule of certainty applying to trusts in general [1] does not affect gifts for charity, which will be upheld though expressed with much vagueness. But, in order to bring the case within this exception, the language employed must require the fund to be expended in some charity; it must not be left in the discretion of the trustee to spend the money for a charitable or a non-charitable purpose. The devotion of the fund to charity must be clear and certain.[2] It is immaterial how uncertain, indefinite, and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words, it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be.[3] Uncertainty as to the individual beneficiaries is characteristic of a charitable use.[4] (*a*) If the class from which the selection is to be made is limited so that the court can distribute or enforce the trust in case the trustee refuses to act, that is the most that is ever required. For example, a library gift for the benefit of the people of any city in the State is good.[5] A gift

the legislature of Pennsylvania conferred upon their courts the *cy près* power of the English chancery, so that thereafter no property given to religious, charitable, literary, or scientific uses should ever revert to the heir. Purd. Dig. 145; Miller *v.* Porter, 53 Penn. St. 297. [See 1 Purdon's Digest (13th ed.), p. 592, § 22; p. 597, § 31; Daly's Estate, 208 Pa. St. 58.]

[1] § 83.

[2] Taylor *v.* Keep, 2 Brad. (Ill.) 368; see Mills *v.* Newbury, 11 Ill. 123. [Mason *v.* Perry, 22 R. I. 475.]

[3] McLain *v.* School Directors, 51 Penn. St. 196; Zeisweiss *v.* James, 63 id. 465; Miller *v.* Atkinson, 63 N. C. 537; Beckwith *v.* St. Philip's Parish, 69 Ga. 564. [See *supra*, § 729, note.]

[4] State *v.* Griffith, 2 Del. Ch. 392.

[5] Cottman *v.* Grace, 41 Hun, 345; Ireland *v.* Geraghty, 11 Biss. (U. S.) 465.

(*a*) A gift for the aid or benefit of defined persons is a private trust and not a charity. Bullard *v.* Chandler, 149 Mass. 532, 540.

to trustees to educate six orphan boys, to be selected and put to school by them, is uncertain, as the boys are uncertain until they are selected. To say that such a trust should not be executed, but that the heir should take the fund, because there is no orphan boy in the world that can come into court and claim the bequest, would be to subvert the foundation of all public charity. In all such cases, the heir or other person interested may bring his bill to test the legality of the charity, or the trustees may bring their bill for instruction, or the attorney general may bring a bill or information to establish the trust; and the court, on such bills, can pass upon the validity of the bequest as a charitable use.[1] If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the attorney general, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses.[2] But where a gift is not a public charity, but is to a school that is not free and open to the general public, the attorney general cannot maintain an information or bill.[3] (a) So if there is a

[1] Burrill *v.* Boardman, 43 N. Y. 254. [See Newberry *v.* Blatchford, 106 Ill. 584.]

[2] Att. Gen. *v.* Garrison, 101 Mass. 223; Wellbeloved *v.* Jones, 1 S. & S. 40; Ludlow *v.* Greenhouse, 1 Bligh (N. S.), 17; Lewin on Trusts, 665–674; Parker *v.* May, 5 Cush. 341.

[3] Att. Gen. *v.* Heiner, 2 Vern. 387; Liley *v.* Hey, 1 Hare, 150; Wellbeloved *v.* Jones, 1 S. & S. 40; Att. Gen. *v.* Smart, 1 Ves. 72; Att. Gen. *v.* Jeanes, 1 Atk. 355; Att. Gen. *v.* Whiteley, 11 Ves. 241; Att. Gen. *v.* Parker, 1 Ves. 43; 2 Atk. 576; Att. Gen. *v.* Whorwood, 1 Ves. 534; Att. Gen. *v.* Brereton, 2 Ves. 426; Att. Gen. *v.* Middleton, id. 328; Mayor *v.* Nixon, 2 Y. & Jer. 60.

(a) A proceeding by the attorney general is usually in the form of an information upon relation. The relator is not a party to the proceeding and is not entitled to be heard either by attorney or in person, but is required only that there may be somebody liable for the costs in case the proceeding is without proper foundation. Att. Gen. *v.* Butler, 123 Mass. 304; Att. Gen. *v.* Parker, 126 Mass. 216.

The position of the attorney general is as the representative of

gift or dedication of land for a church or meeting-house, to be owned by the church, parish, society, or by pew-holders who have vested rights and can sue, the attorney general cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporations have the right to come into court for redress. Suits to regulate such trusts must be brought by the parties interested.[1] The church edifices

[1] Att. Gen. *v.* Merrimack Manufacturing Co., 14 Gray, 586; Att. Gen. *v.* Federal St. Meeting-House, 3 Gray, 1. [See Att. Gen. *v.* Clark, 167 Mass. 201; First Baptist Church *v.* Harper, 191 Mass. 196.]

the beneficial interests where the beneficiaries are the public at large or an indefinite class of persons "who, because they constitute an indefinite class, cannot themselves appear in person or constitute an attorney." Att. Gen. *v.* Clark, 167 Mass. 201; Newberry *v.* Blatchford, 106 Ill. 584; Strickland *v.* Weldon, 28 Ch. Div. 426. See Jenkins *v.* Berry, 119 Ky. 350.

When the trust, although charitable in its nature, is for a defined class the members of which have such an interest that the court will entertain their proceedings, the attorney general is not a necessary or proper party. Att. Gen. *v.* Clark, 167 Mass. 201. See also Wilson *v.* Shively, 10 Or. 267; Att. Gen. *v.* Evart Booming Co., 34 Mich. 462.

So too of a proceeding with regard to the trust property when there are competent trustees who fully represent the interests of the beneficiaries, even when the trust is a public charity. Thus it has been held that the attorney general is not a necessary party to a suit to construe a will which created the trust, the appointed trustees sufficiently representing the beneficial interests. Newberry *v.* Blatchford, 106 Ill. 584.

When a property has become fully vested in trustees for a valid charitable purpose, neither the donor nor his heirs have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. Women's Christian Ass'n *v.* Kansas City, 147 Mo. 103, 126; Strickland *v.* Weldon, 26 Ch. Div. 426; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Petition of Burnham, 74 N. H. 492; Clark *v.* Oliver, 91 Va. 421. See Mills *v.* Davison, 54 N. J. Eq. 659.

The fact that a person is qualified to be selected by the trustees as an object of the charity gives him no standing to proceed in court for the enforcement of the trust. Boenhardt *v.* Loch, 113 N. Y. S. 747, 129 App. Div. 355. Members of the part of the public for whose benefit the trust was created have no such interest in the trust as to give them any standing in court to object to a compromise with respect to the will creating the trust. Burbank *v.* Burbank, 152 Mass. 254.

of this country stand in a peculiar position. They are not free, open churches, as those words are used in describing a public charity. They are owned by societies, parishes, churches, trustees, or pew-holders, and can be controlled by these bodies as corporations or *quasi* corporations, and directed to such uses as they see fit; for these reasons the funds given or contributed to build these edifices and keep them in repair are not funds given for public charitable uses in the legal sense; consequently the attorney general can seldom maintain an information for any alleged misuse or pretended perversion of these church edifices.[1] But if property is in the hands of trustees of a church or religious society, in such manner that it is a charitable trust or otherwise, the trustees must manage the property according to the usages of the society, and courts of equity can interfere to prevent abuses and to preserve the use of the property in the accustomed channel.[2]

§ 733. As a charitable use cannot be changed from the purposes declared by the donor, so long as there are any objects of such charity, or so long as it can be applied to the purposes named, and the courts, where the objects fail, construe the instrument creating the trust, to discover the charitable purpose of the donor, *cy près* the original purpose;[3] so a charitable gift must be accepted upon the same terms upon which it is given;[4] and the trustees, whether individuals or corporations, cannot convert the fund to other uses, so long as the uses declared by the donor are capable of execution.[5] Nor can any

[1] Ibid.; Dublin Case, 38 N. H. 459.

[2] Brunnenmayer *v.* Buhre, 32 Ill. 183; German, &c. Congregation *v.* Repler, 17 La. An. 127.

[3] See §§ 724–728.

[4] Gilman *v.* Hamilton, 16 Ill. 225; Silcox *v.* Harper, 32 Ga. 639.

[5] Att. Gen. *v.* Rochester, 5 De G., M. & G. 797; Att. Gen. *v.* Sherborne School, 18 Beav. 256; Att. Gen. *v.* Gould, 28 Beav. 485; Ward *v.* Hipwell, 3 Gif. 547; Att. Gen. *v.* Calvert, 23 Beav. 248; *In re* Stafford Charities, 25 Beav. 28; Att. Gen. *v.* Bourcherett, id. 116; Att. Gen. *v.* Platt, Finch, 221; Margaret *v.* Regius Professors in Cambridge, 1 Vern. 55; Mann *v.* Ballott, id. 43; 1 Eq. Cas. Ab. 99; Att. Gen. *v.* Gleg, 1 Atk. 356; Amb. 373.

agreement or concurrence among the beneficiaries avail to divert a fund given for a particular and possible purpose.[1] Thus if the gift is to provide a preacher in Dale, it would be a breach of trust to provide one in Sale; or if it is to provide a preacher, it cannot be given to the poor;[2] or if it is for the poor of one parish, it cannot be extended to other parishes;[3] or if to repair a chapel, it cannot be mixed up with parochial funds or the poor-rates;[4] or if for erecting a hospital, it cannot be used for municipal purposes;[5] or if it is to support the preaching of a particular religious doctrine, it is a breach of trust to support the preaching of any other doctrine, though the difference is very slight.[6] And generally a charitable donation for religious purposes must be applied to sustain the purposes and doctrines of the donor, as indicated by him; and if the donor has not clearly stated the doctrines he intends to favor, courts will inquire into the doctrines held by him, and, when ascertained, will presume them to be the doctrines intended to be taught under the trust.[7] If there occurs a schism in the church or body to which the trust is given, the funds generally follow the old organization, unless it has made a

[1] McRoberts *v.* Moudy, 19 Mo. App. 26.

[2] Att. Gen. *v.* Newbury Cor., C. P. Cooper (1837, 1838), 72; Att. Gen. *v.* Goldsmiths' Co., id. 292; Duke, 94, 116.

[3] Att. Gen. *v.* Brandreth, 1 Yo. & Col. Ch. 200.

[4] Att. Gen. *v.* Vivian, 1 Russ. 226–337; Att. Gen. *v.* Mansfield, 2 Russ. 501; *Ex parte* Greenhouse, 1 Madd. 92; 1 Bligh (N. S.), 17.

[5] Att. Gen. *v.* Kell, 2 Beav. 575; Att. Gen. *v.* Exeter, 2 Russ. 45; 3 Russ. 395; Att. Gen. *v.* Wilkinson, 1 Beav. 372; Att. Gen. *v.* Bovill, 1 Phil. 762; Att. Gen. *v.* Blizard, 2 Beav. 233.

[6] Combe *v.* Brazier, 2 Des. 431.

[7] Shore *v.* Wilson, 9 Cl. & Fin. 355; Att. Gen. *v.* Shore, 11 Sim. 592; Att. Gen. *v.* Pearson, 3 Mer. 353; Earle *v.* Wood, 8 Cush. 430; Dublin Case, 38 N. H. 459; Combe *v.* Brazier, 2 Des. 431; App *v.* Lutheran Congregation, 6 Penn. St. 201; Robertson *v.* Bullions, 1 Kern. 243; Att. Gen. *v.* Drummond, 1 Dr. & War. 353; Winebrenner *v.* Colder, 43 Penn. St. 244; Kniskern *v.* Lutheran Churches, 1 Sand. Ch. 439; Miller *v.* Gable, 2 Denio, 492; Princeton *v.* Adams, 10 Cush. 129; Att. Gen. *v.* Moore, 19 N. J. Eq. 503; Att. Gen. *v.* Bunce, L. R. 6 Eq. 563; Att. Gen. *v.* Glasgow Coll., 2 Coll. Ch. 665; Potter *v.* Thornton, 7 R. I. 252; Att. Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86.

material departure from the faith of the original founder.[1] If the charter or organization of a church defines its relations and purposes, and determines the rules and regulations under which it must act, or, in other words, establishes a constitution to regulate and limit its action, that body which acts according to its constitution will be the regular church, and entitled to the church property, whether it may be a majority or minority of the whole number of the whole church.[2] Equity will not interfere unless there is a susbtantial abuse or misuser of the funds, which amounts to a perversion of the charity.[3] A mere change of ecclesiastical relations is not necessarily a perversion of the trust.[4] But trustees to hold church property for a church according to the usages of a church may be enjoined from letting it for school purposes.[5] A gift to a religious society, or to a charitable or educational institution, will be presumed to be a charitable gift, though no purposes are named, and such societies will be presumed to hold such gifts in trust for those religious and charitable purposes for which they exist.[6] Where there are numerous contributors to a charitable fund, the declaration of one of the contributors, long acted upon, will

[1] Ibid.; Hendrickson *v.* Decow, Saxton, 577; Earle *v.* Wood, 8 Cush. 430; Roshi's App., 69 Penn. St. 462; Godfrey *v.* Walker, 42 Ga. 562; Bouldin *v.* Alexander, 14 Wall. 132; McBride *v.* Porter, 17 Iowa, 203. But see Ferraria *v.* Vasconcellos, 31 Ill. 25; First Constitutional Presbyterian Church *v.* Congregational Soc., 23 Iowa, 567.

[2] Swarr's App., 67 Penn. St. 146. [Christian Church *v.* Church of Christ, 219 Ill. 503; Lamb *v.* Cain, 129 Ind. 486.]

[3] Happy *v.* Morton, 33 Ill. 398. [Lamb *v.* Cain, 129 Ind. 486.]

[4] Swedesborough Church *v.* Shivers, 1 Green, Ch. 453; Lutheran Cong. *v.* St. Michael's Church, 48 Penn. St. 20.

[5] Perry *v.* McEwen, 12 Ind. 440.

[6] Incorporated Soc. *v.* Richards, 1 Dru. & W. 294; Evangelical Assoc. App., 35 Penn. St. 316; Att. Gen. *v.* Pearson, 7 Sim. 290; 3 Mer. 409; *Re* Ilminster School, 2 De G. & M. 535; 8 H. L. Cas. 495; *Re* Stafford Char., 25 Beav. 28; Att. Gen. *v.* Clifton, 32 Beav. 596; Everett *v.* Carr, 59 Maine, 333. [*In re* Brown, [1898] 1 Ir. 423; Estate of Winchester, 133 Cal. 271; Am. Bible Soc. *v.* Am. Tract Soc., 62 N. J. Eq. 219; Mo. Hist. Soc. *v.* Academy of Science, 94 Mo. 459; Estate of Merchant, 143 Cal. 537; Stratton *v.* Physio-Medical College, 149 Mass. 505; Hubbard *v.* Worcester Art Museum, 194 Mass. 280, 289.]

be taken *prima facie* as a declaration of the purposes of the trust.[1] In such case the contributors to the fund cannot maintain a bill to correct an abuse of the fund by the trustees, unless they are also the *cestuis que trust*.[2]

§ 734. The proposition that charities must be accepted upon the terms upon which they are given, and that they cannot be altered by any new agreement between the heir of the donor, the trustees, beneficiaries, or any other parties thereto, is confined to charities established by the gift and bounty of some donor for a particular faith;[3] for if a religious society is endowed with funds by a donor for its general purposes, or if such society creates a fund by contribution thereto by its individual members, although such funds are charitable, yet such society may by agreement alter its faith and practice, and still retain its funds with which to teach its new faith.[4] So it has been held that a use for forty years will establish the right to appropriate the funds to an altered faith.[5] So where it cannot be discovered from documents what particular form of worship was intended to be established by the charity, long-continued usage by the congregation will be received as evidence of the original intent.[6] But if the original purpose of the donor is perfectly clear, the court cannot change the trust, although the congregation may

[1] Att. Gen. *v.* Clapham, 4 De G., M. & G. 626; Newmyer's App., 72 Penn St. 121.

[2] Ludlam *v.* High, 3 Stockt. 342.

[3] Att. Gen. *v.* Munro, 2 De G. & Sm. 163; Field *v.* Field, 9 Wend. 394; Miller *v.* Gable, 2 Denio, 525; People *v.* Steele, 2 Barb. 397; Craigdallie *v.* Aikman, 1 Dow, 1; 2 Bligh, 529; Milligan *v.* Mitchell, 3 My. & Cr. 72.

[4] Att. Gen. *v.* Prop. Federal St. Meeting-House, 3 Gray, 61; Dublin Case, 38 N. H. 459; Brendle *v.* German Ref. Cong., 33 Pa. St. 418; Att. Gen. *v.* Clergy Soc., 8 Rich. Eq. 190; Brent *v.* Sandwich, 9 Mass. 289; Avery *v.* Tyringham, 3 Mass. 182; Sheldon *v.* Easton, 24 Pick. 287; Hollis St. Meeting-House *v.* Pierpont, 7 Met. 499; Brown *v.* Lutheran Church, 23 Pa. St. 498.

[5] Att. Gen. *v.* Federal St. Meeting-House, 3 Gray, 64.

[6] Att. Gen. *v.* Hutton, 1 Dru. 530; Stat. 7 and 8 Vict. c. 45, § 2, fixes twenty-five years.

have followed a different practice: the majority cannot say we have changed our opinions, and the fund shall hereafter be for the benefit of people of our faith and form of worship.[1] If the trustee is a corporation, having power to make *by-laws*, this franchise will not extend so far as to enable it to pervert the charity.[2] If the deed of investment contains a clause, authorizing a majority of trustees to make rules and orders from time to time when they think proper, such clause will not authorize the trustees to change the objects of the charity, or the doctrines to be promulgated.[3]

§ 735. Nor can the trustees, whether persons or corporations, appointed to administer a charity, be changed by the agreement of the parties, nor for mere convenience; as where funds were given to Harvard College by various donors for the purpose of promoting education at the college, by a school to be a branch of the university, the court held that the funds could not be withdrawn from the corporation of Harvard College, and intrusted to an independent board of trustees, to be applied to the support of a divinity school not connected with the college, although such separation would be convenient for all parties, and would produce greater vigor and efficiency in the administration of the funds. The court decided that the funds had been given to Harvard College as a known institution, and upon a personal trust and confidence; that the constitution of a charity could not be changed for reasons of mere expediency; and that a court of equity cannot remove trustees and appoint others, except for incapacity, unfaithfulness, or

[1] Att. Gen. *v.* Munro, 2 De G. & Sm. 122; Milligan *v.* Mitchell, 3 M. & C. 73; Foley *v.* Wontner, 2 J. & W. 247; Craigdallie *v.* Aikman, 1 Dow, P. C. 1; Broom *v.* Summers, 11 Sim. 357; Att. Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86; Att. Gen. *v.* Rochester, 5 De G., M. & G. 797; Meeting Street Bap. Soc. *v.* Hail, 8 R. I. 241; Howe *v.* School District, 43 Vt. 282.

[2] Eden *v.* Foster, 2 P. Wms. 327; Field *v.* Girard College, 54 Penn. St. 233.

[3] Att. Gen. *v.* Pearson, 3 Mer. 411.

failure to perform their duties.[1] If a trustee is known to hold such opinions in relation to the trust as it is ordered to be administered by the court, that he cannot be expected cordially and faithfully to execute it, he may be removed and a proper person appointed.[2] If trustees who are to administer a trust cease, for any reason, to be subject to the jurisdiction of the court having jurisdiction over the charity, such trustees may be removed.[3] If the trustees, by a mistake, select or appoint the objects of a charity, courts will not remove the persons so appointed, if the trustees made the choice in good faith and without fraud or corruption.[4]

§ 735 *a*. Although the statute of uses as declared in 27 Hen. VIII. was clearly intended to destroy uses and trusts altogether, the courts have refused to carry out that intention on various grounds, and one of the exceptions made relates to charitable uses. In the case of a deed to A. for the use of the Protestant Episcopal church of X., the statute does not execute the use. One reason given is that in charitable uses the beneficiaries are uncertain, and there is no one in whom the use can be executed.[5]

§ 736. Another particular in which charitable gifts are favored by the law is that such gifts are not obnoxious to the common rule against perpetuities.[6] For public convenience,

[1] Harvard College *v.* Soc. for Prom. Theo. Education, 3 Gray, 280; Att. Gen. *v.* Hartley, 2 J. & W. 382; Att. Gen. *v.* Mansfield, 2 Russ. 520; Stone *v.* Framingham, 109 Mass. 303.

[2] Att. Gen. *v.* Garrison, 101 Mass. 223.

[3] Att. Gen. *v.* City of London, 1 Ves. Jr. 243. And see Provost of Edinburgh *v.* Aubery, Amb. 236.

[4] *Re* Story's University Gift, 2 De G., F. & J. 529, 531, 540. But see *In re* Nettle's Charity, L. R. 14 Eq. 434.

[5] Beckwith *v.* St. Philip's Parish, 69 Ga. 564. See § 300.

[6] Andrews *v.* Andrews, 110 Ill. 230; Richmond *v.* Davis, 103 Ind. 449; Webster *v.* Morris, 66 Wis. 366. [Abend *v.* End. Fund Commission, 174 Ill. 96; Alden *v.* St. Peter's Parish, 158 Ill. 631; Mills *v.* Davison, 54 N. J. Eq. 659; Young *v.* Lutheran Church, 200 Pa. St. 332; Staines *v.* Burton, 17 Utah, 331.]

the ownership of property cannot be suspended for a long time, nor will public policy allow property to be inalienable beyond a certain period. Thus if a testator gives land to his heir upon condition that he shall not alienate the same, the condition is void as against public policy: but a testator, by certain forms of gift, may tie up his property for a life or lives in being, and twenty-one years and nine months; as, if he gives land to be enjoyed by a certain person during such person's life, and then to some other person or purpose for twenty-one years and nine months, and then in fee to some person or persons who will at that time answer a particular description. In reference to the last form of gift, it will be seen that such land cannot be sold and a title given for a life and twenty-one years and nine months, because until that time has elapsed it cannot be told with certainty who will come within the description of the last taker; consequently, though all the world joins in the conveyance, no title can be given until the final event is known. A testator is allowed to go thus far and no farther. If he makes his gift depend upon conditions, limitations, or events that may require more than a life or lives in being and twenty-one years and nine months for their accomplishment, he has created what the law calls a perpetuity, which is void, and the first taker takes a fee discharged of all attempted limitations.[1] So if a testator ties up his property for a term, by possibility, longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to the charity is void, because of the perpetuity in the first taker.[2] (*a*) But a gift may be made to a charity not *in*

[1] Church in Brattle St. *v.* Grant, 3 Gray, 143. [Russell *v.* Girard Trust Co., 171 Fed. 161; Rong *v.* Haller, 109 Minn. 191.]

[2] Company of Pewterers *v.* Christ's Hosp., 1 Vern. 161; Att. Gen. *v.* Gill, 2 P. Wms. 369; Wells *v.* Heath, 10 Gray, 25; Com'rs of Donations *v.* De Clifford, 1 Dru. & War. 254; Att. Gen. *v.* Hall, W. Kel. 13.

(*a*) If the first estate is to an individual or upon a trust which is not charitable, the rule against perpetuities applies. Merritt *v.* Bucknam, 77 Me. 253; Merrill *v.* Am. Baptist Union, 73 N. H. 414; Palmer *v.* Union Bank, 17 R. I. 627, 632; *In re* Swain, [1905] 1 Ch. 669; *In re* Lord

esse at the time, to come into existence at some uncertain time in the future, provided there is no gift of the property in the

Stratheden, [1894] 3 Ch. 265. See also *In re* John's Will, 30 Or. 494, 512; *In re* Bowen, [1893] 2 Ch. 491.

The rule against perpetuities applies also to a gift over to an individual or for a purpose which is not charitable after a prior estate for a charitable use. First Universalist Soc. *v.* Boland, 155 Mass. 171; Asylum *v.* Lefebre, 69 N. H. 238; *In re* Bowen, [1893] 2 Ch. 491. As where there is a provision in the gift that upon failure of the trustee to perform certain conditions the property shall pass to individuals. Asylum *v.* Lefebre, *ubi supra*. But the rule does not prevent a reversion to the donor or his heirs upon failure of the conditions or upon complete failure of the trust. First Universalist Soc. *v.* Boland, 155 Mass. 171; Palmer *v.* Union Bank, 17 R. I. 627, 632; Hopkins *v.* Grimshaw, 165 U. S. 342.

Where the gift to charitable uses is to take effect within the period allowed by the rule for the vesting of estates, a subsequent gift over to another charity is not affected by the rule, Clayton *v.* Hallett, 30 Colo. 231; Christ Church *v.* Trustees, 67 Conn. 554, except in jurisdiction whose statutes against perpetuities include charities, or which subject charitable trusts to the same rules applied to private trusts. Missionary Soc. *v.* Humphreys, 91 Md. 131; Trinity M. E. Church *v.* Baker, 91 Md. 539, 573. Thus it has been held in England that a gift to a charity with a limitation over to another charity in case the first named did not keep in repair a certain tomb, did not offend against the rule as to perpetuities. *In re* Tyler, [1891] 3 Ch. 252.

In the case of *In re* John's Will, 30 Or. 494, 512, after a statement that the rule against perpetuities does not apply to a gift over from one charity to another, it is said: "The exception has even broader significance. A gift may be made in trust for a charity not in *esse*, but to come into being at a time uncertain in the future, or which is to take effect upon some contingency that may possibly not happen within a life or lives in being and twenty-one years and nine months afterwards, and it does not contravene the rule, provided there is no gift in the meanwhile to or for the benefit of any private corporation or person. The doctrine finds support upon the ground that the intention in favor of charity is absolute, the gift and the constitution of the trust is immediate, takes effect in *præsenti*, and the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode which the donor would have applied to the execution of the charity."

In New York the statute of 1893, authorizing charitable uses and trusts, has been held to have also taken them out of the statute rule against perpetuities. Allen *v.* Stevens, 161 N. Y. 122; Matter of Shattuck, 193 N. Y. 446. Before the enactment of this statute charitable uses and trusts were subject to the same rule as private trusts. Cottman *v.* Grace, 112 N. Y. 299.

first instance, or perpetuity in a prior taker.[1] So where property was given to one charity, to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in another.[2]

§ 737. As it is forbidden to create perpetuities by common-law conveyances, so it is equally illegal to attempt to create perpetuities through the creation of trusts. A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in a conveyance of the legal estate.[3] Thus a trust cannot be created that will suspend the absolute ownership of the property for a time longer than that allowed at law. A perpetual trust cannot be created for an individual and his heirs in succession forever;[4] and herein a charity differs, for a trust may be established which contemplates the payment of the income of a certain fund to some charitable purpose forever.[5] Indeed, it is always hoped, where funds are given in trust, the income to be applied to some church, almshouse, hospital, or school, that such institution will exist indefinitely, and that the donor's bounty will be a perennial spring for generations.[6] At the same time, it is to be observed

[1] Att. Gen. *v.* Downing, Wilmot, 1; Dick. 14; Amb. 550; Att. Gen. *v.* Bowyer, 3 Ves. 714; 5 Ves. 300; 8 Ves. 256; Att. Gen. *v.* Chester, 1 Bro. Ch. 464; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99; Sanderson *v.* White, 18 Pick. 336. [*In re* John's Will, 30 Or. 494, 512; Crerar *v.* Williams, 145 Ill. 625; Ingraham *v.* Ingraham, 169 Ill. 432.]

[2] Christ's Hosp. *v.* Granger, 16 Sim. 83; 1 Mac. & Gor. 533; 1 Hall & Twells, 539; Soc. for Prop. of the Gospel *v.* Att. Gen., 3 Russ. 142; McDonough *v.* McDonough, 15 How. 367; Potter *v.* Thornton, 7 R. I. 252.

[3] Norfolk's Case, 3 Ch. Ca. 20–28, 35–48; 1 Vern. 164.

[4] *Ante*, §§ 377, 400; Thellusson *v.* Woodford, 4 Ves. 227; 11 Ves. 112; Hooper *v.* Hooper, 9 Cush. 122; Thorndike *v.* Loring, 15 Gray, 391; Hawley *v.* James, 5 Paige, 445; White *v.* Hale, 2 Cold. 77.

[5] Trusts for perpetual charitable uses are not prohibited by common law, nor are they in conflict with the Constitution or the Code of California. Estate of Hinckley, 58 Cal. 457.

[6] Franklin *v.* Armfield, 2 Sneed, 305; Grissom *v.* Hill, 17 Ark. 483; Bristol *v.* Whitton, Dwight, Ch. Ca. 171; Magdalen Coll. *v.* Att. Gen., 6 H. L. Ca. 205; Perrin *v.* Carey, 24 How. 465; Williams *v.* Williams, 4 Seld. 533;

that this rule, applied to charities, does not render any particular property inalienable; for the court can decree the sale of any trust property when an exigency arises; and even the soil upon which a church, hospital, almshouse, or schoolhouse is built, can be sold by a decree in equity, when it is desirable to remove from that particular place to another.[1]

§ 738. Analogous to the rule against perpetuities is the rule against accumulation, which does not permit a testator to give his estate to trustees to be accumulated by them for a time longer than a life or lives in being and twenty-one years and nine months. Public policy is said to be the foundation of this rule. Even accumulations for such a limited time have been found inconvenient, and statutes have been passed in England and in several of the United States establishing a still shorter period during which trust estates may accumulate. In all those States where there are statutes limiting the time of accumulation, charities will be governed by the statute, unless they are specially excepted from its operation.[2] But where there are no statute provisions, a trust to accumulate for charitable purposes will not be held to be within the rule.

King *v.* Parker, 9 Cush. 82; Dexter *v.* Gardner, 7 Allen, 246; Odell *v.* Odell, 10 Allen, 1; Dartmouth Coll. *v.* Woodward, 4 Wheat. 641; Paschal *v.* Acklin, 27 Texas, 173; Yard's App., 64 Penn. St. 95.

[1] Wells *v.* Heath, 10 Gray, 17; Shotwell *v.* Mott, 2 Sandf. Ch. 55; Tudor on Char. 298; Franklin *v.* Armfield, 2 Sneed, 305; Brown *v.* Meeting Street Baptist Society, 9 R. I. 184; Att. Gen. *v.* Warren, 2 Swanst. 291; Att. Gen. *v.* Newark, 1 Hare, 395, 400; Att. Gen. *v.* Kerr, 2 Beav. 420; Att. Gen. *v.* Hungerford, 8 Bligh, 437, 463; Att. Gen. *v.* Brettingham, 3 Beav. 91; *In re* Suir Island Charity School, 3 Jo. & La. 171; *In re* Parke's Charity, 12 Sim. 329; *Ex parte* Overseers of the Poor, Ecclesalt Bierlow, 13 Eng. L. & Eq. 145, 16 Beav. 297; Att. Gen. *v.* Biddulph, 39 Eng. L. & Eq. 512; Stanley *v.* Colt, 5 Wall. 119; Sohier *v.* Trinity Church, 109 Mass. 1; Yard's App., 64 Penn. St. 95; Burton's App., 57 id. 203; Gram *v.* Prussia, &c., Soc., 36 N. Y. 161; Pine St. Soc. *v.* Weld, 12 Gray, 170; Chamberlayne *v.* Brackett, L. R. 8 Ch. 210. See Thorp *v.* Fleming, 1 Houst. 580. [See *infra*, § 764, note *a*, p. 1265 *et seq.*]

[2] *Ante*, §§ 392–400; Martin *v.* Margham, 14 Sim. 230; Kilpatrick *v.* Johnson, 15 N. Y. 322. [St. John *v.* Andrews Institute, 191 N. Y. 254.]

There is no limit named beyond which such accumulations cannot go; but a bequest of a hundred dollars to be paid into a savings-bank yearly for fifty years from the income of real estate, to be accumulated during the fifty years by adding interest to principal semi-annually, and at the expiration of the term to be appropriated to a home for indigent old people, was held to be a good *devise*, and not within the rule against accumulations.[1] (*a*) But if an estate given to trustees for charity is once vested in them for a lawful purpose, all unlawful conditions, limitations, powers, trusts, or restraints annexed thereto, as directions for the management of the fund, and not of the essence of the gift, will fall away and be simply void, leaving the estate still vested in the trustees to be managed in a legal manner for the purposes of the charity.[2] As where a testator gave a fund to a town in its corporate capacity to establish a school, on condition that the children of nine families named were excluded for one hundred years, the court held

[1] Odell *v.* Odell, 10 Allen, 1; Philadelphia *v.* Girard, 45 Penn. St. 1; Williams *v.* Williams, 4 Seld. 537; State *v.* Girard, 2 Ired. Ch. 210. A different rule was held in Hillyard *v.* Miller, 10 Penn. St. 326; but the case was overruled in the case of Philadelphia *v.* Girard. See Odell *v.* Odell, *sup.*, for a full and able discussion of the cases. University *v.* Yarrow, 1 De G. & J. 79.

[2] Philadelphia *v.* Girard, 45 Penn. St. 1; Williams *v.* Williams, 4 Seld. 538. Since the case of Williams *v.* Williams, the courts of New York have subjected charities to all the rules and the statute against perpetuities. Levy *v.* Levy, 33 N. Y. 97; Bascomb *v.* Albertson, 34 N. Y. 504; Wilson *v.* Lynt, 30 Barb. 124; 6 How. (N. Y.) 348; University *v.* Yarrow, 1 De G. & J. 79; Wetmore *v.* Parker, 7 Lansing, 121. [But see *supra*, § 736, note (*a*), p. 1223, as to the effect of the statute of 1893.]

(*a*) It has been held in Massachusetts that a direction to accumulate income for a charitable purpose for a period of twenty-five years did not affect the validity of the trust. Codman *v.* Brigham, 187 Mass. 309; Brigham *v.* Brigham Hospital, 134 Fed. 513. See also Duggan *v.* Slocum, 92 Fed. 806; Russell *v.* Girard Trust Co., 171 Fed. 161; Ingraham *v.* Ingraham, 169 Ill. 432. But the limit of time during which accumulation will be allowed for the benefit of a charity is subject to the order of a court of equity. Ibid.; St. Paul's Church *v.* Att. Gen., 164 Mass. 188. To a similar effect, see *In re* Swain, [1905] 1 Ch. 669.

the bequest a good charitable bequest for a school, and that it vested in the town in its corporate capacity; but that, as a town could not make distinctions between its citizens in administering any public property which it had a right to hold, the limitations and conditions upon the gift fell away from it as illegal and repugnant.[1]

§ 739. Another particular in which courts have favored charities was to supply all defects in conveyances or bequests to charitable uses; as, where the will of a married woman, utterly void at law, was held good as an appointment to charitable uses; and a will, utterly void before the statute, was held to be made good by the passage of the statute; and though the statute of Hen. VIII. forbids devises of land to corporations, yet such wills were held good, as appointments.[2] This doctrine has not of late received the cordial assent of the English courts;[3] and, as it never prevailed in America, it is not necessary to state it in detail.[4] Courts will supply defects in conveyances to charitable purposes only so far as relates to uncertainty in the trustees or in the *cestuis que trust*, as before stated. For example, where a will provided that the income of certain property should be used to support meritorious indigent theological students while resident at C., in sums not exceeding $100 to $150 a year for three years, and there were not a sufficient number of such students to exhaust the income, which had largely increased, the court held that the object

[1] Nourse *v.* Merriam, 8 Cush. 11; University *v.* Yarrow, 1 De G. & J. 79.

[2] Duke, 84, 85; Bridgman's Duke, 355; Damon's Case, Moore, 822; Smith *v.* Stowell, 1 Ch. Cas. 195; Collinson's Case, Hob. 136; Att. Gen. *v.* Combe, 2 Ch. Cas. 18; Griffith Flood's Case, Hob. 136; Christ's College, 1 W. Black, 90; Att. Gen. *v.* Bowyer, 3 Ves. Jr. 714; 1 Dru. & War. 308; Mills *v.* Farmer, 1 Mer. 55; Att. Gen. *v.* Rye, 2 Vern. 453; Rivett's Case, Moore, 890; Att. Gen. *v.* Burdett, 2 Vern. 755; Christ's Hospital *v.* Hames, Bridgman's Duke, 371; Tuffnell *v.* Page, 2 Atk. 37; Fay *v.* Slaughter, Pr. Ch. 16; Kenson's Case, Hob. 136.

[3] *Ante*, § 88; Moggridge *v.* Thackwell, 7 Ves. 87; Jenner *v.* Hooper, Pr. Ch. 389; Att. Gen. *v.* Bain, id. 271; Adlington *v.* Cann, 3 Atk. 141.

[4] Harvard Coll. *v.* Soc. for Promoting Education, 3 Gray, 283.

of the trust could be best carried out by increasing the amount to be paid to each beneficiary.[1]

§ 740. There are many English cases upon marshalling the assets of a testator for the payment of debts, legacies, and charitable bequests. The statute of mortmain has been construed to forbid the payment of charitable legacies from the proceeds of the sale of real estate, if the will was made within a year of the death of the testator. This circumstance, with other peculiarities in the English law, has given rise to much litigation, and to many nice distinctions and rules which are inapplicable to the jurisprudence of America. Here the debts of a deceased person must first be paid; and the entire estate, real and personal, is held for that purpose. Legacies are then paid out of the personal assets, or out of the real estate, if the personal fails; and they are charged upon the personalty. If the fund is not sufficient for the payment of all in full, they must all abate in proportion, whether they are charitable legacies or otherwise.[2]

§ 741. Bequests to be paid over to trustees in a foreign country, for the establishment in such country of a charitable institution, will be paid over to such trustees, by order of court, to be administered by them under the jurisdiction of the courts of their own country.[3] But if the bequest is con-

[1] Theological Education Society *v.* Att. Gen., 135 Mass. 285.

[2] It is not necessary to pursue this subject further. The reader will find the cases carefully collected and discussed in 2 Story, Eq. Jur. §§ 1180, 1180 a, 1 Jarm. on Wills, 213 (3d Eng. ed.).

[3] Washburn *v.* Sewell, 9 Met. 280; Provost of Edinburgh *v.* Aubrey, Amb. 336; Collyer *v.* Burnett, Taml. 79; Att. Gen. *v.* Lepine, 2 Swanst. 181; 19 Ves. 309; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Silcox *v.* Harper, 32 Ga. 639; Mitford *v.* Reynolds, 1 Phil. 185; Emery *v.* Hill, 1 Russ. 112; Mayor of Lyons *v.* East Indian Co., 1 Moore, P. C. 273; Minet *v.* Vulliamy, 1 Russ. 113, n.; Att. Gen. *v.* London, 3 Bro. Ch. 171; 1 Ves. Jr. 243; Oliphant *v.* Hendrie, 1 Bro. Ch. 571, n.; Soc. for Prop. Gospel *v.* Att. Gen., 3 Russ. 142; Campbell *v.* Radnor, 1 Bro. Ch. 171; Att. Gen. *v.* Chester, id. 444; Curtis *v.* Hutton, 14 Ves. 537; Mackintosh *v.* Townshend,

trary to law in the country where it is made, or contrary to public policy, as a bequest in England to found nunneries in a foreign country, it is void, and the court will not order it to be paid over.[1] (*a*) A trust for charity, so created by a testator in his will as to be void in the State where it is created, will be void, although it is a legal trust in the State where the charity is to be established.[2] So if the trustees in the foreign country refuse to receive the funds, the trust will be void, and the money will go to the next of kin; as, where a devise was made in England to the President and Vice-President of the United States and the Governor of Pennsylvania, for establishing a college in Pennsylvania, for the purpose, among others, of vindicating the rights of the colored people to an equality with whites, the trustees named refusing to receive the funds and execute the trust, it was held to have failed, the court having no power to enforce its performance in a foreign jurisdiction.[3] Mr. Smithson, an Englishman, gave the funds

16 Ves. 330. [Klumpert *v.* Vrieland, 142 Iowa, 434, 121 N. W. 34; Teele *v.* Bishop of Derry, 168 Mass. 341; *In re* Nilson's Estate, 81 Neb. 809. See *Re* Davis's Trusts, 61 L. T. 430; Green's Adm'rs *v.* Fidelity Tr. Co., 134 Ky. 311.]

[1] De Garcin *v.* Lamson, 4 Ves. 433, n.; De Themmines *v.* De Bonneval, 5 Russ. 292. But see Chamberlain *v.* Chamberlain, 43 N. Y. 424.

[2] Bascomb *v.* Albertson, 34 N. Y. 584.

[3] New *v.* Bonaker, L. R. 4 Eq. 654; Levy *v.* Levy, 33 N. Y. 97.

(*a*) But if the invalidity of the trust under the law of the testator's domicile is caused by difficulties of administration there, as where the beneficiaries are not pointed out with sufficient definiteness to enable the courts to enforce the performance of the trust, its validity will be determined by the law of the locality where it is to be administered. Sickles *v.* New Orleans, 80 Fed. 868; Hope *v.* Brewer, 136 N. Y. 136. See Jones *v.* Habersham, 107 U. S. 174; Duggan *v.* Slocum, 83 Fed. 245.

It has also been held that if the attempted trust is invalid by the law of the State where the trust is to be administered, it cannot be sustained, although it would have been valid in the State where the testator was domiciled. But this would not be so if all that the trustee is required to do in the foreign state is to pay over money to the beneficiaries. Mount *v.* Tuttle, 183 N. Y. 358. See Dammert *v.* Osborn, 140 N. Y. 30, 141 N. Y. 564; Cross *v.* U. S. Trust Co., 131 N. Y. 330.

for the Smithsonian Institution at Washington by his last will, and they were paid over upon the suit of the President of the United States *v.* Drummond, executor.[1] If there is sufficient reason arising out of the terms of the will or otherwise, the court can order the principal fund to be invested within their jurisdiction, and the income only to be paid over to the foreign trustees.[2]

§ 742. The trustees of a charity frequently procure an act of incorporation, in order to carry out the intention of their donor with more convenience. Care should be taken in such cases that the act of incorporation does not alter or change the true objects of the donor. These charitable corporations are called eleemosynary corporations; and the trustees of such a corporation have such vested rights under the gift of the donor and the act of incorporation that they cannot be controlled by subsequent legislation made to affect that particular case.[3] But the corporation may be enlarged and still retain its authority over the original charity.[4] On the institution of such a charity, a visitatorial jurisdiction arises of common right to the founder and his heirs, or to those whom the founder has substituted in the place of himself and his heirs.[5] The duty of the visitor is to hear and determine all differences of the members of the company among themselves, and generally to superintend the internal govern-

[1] Cited in Whicker *v.* Hume, 7 H. L. Ca. 124.

[2] Att. Gen. *v.* Lepine, 2 Swanst. 181; Att. Gen. *v.* Sturge, 19 Beav. 597.

[3] Dartmouth College *v.* Woodward, 4 Wheat. 518; see Webster's speech, 5 Webster's Works, 462, and cases cited; St. John's College *v.* State, 15 Md. 330; Brown *v.* Hummel, 6 Pa. St. 86; State *v.* Adams, 4 Mo. 570. As an illustration of an act incorporating the trustees of a charity, see c. 119 of the Acts of Massachusetts, 1868.

[4] Girard, &c. *v.* Philadelphia, 7 Wall. 1; McIntire *v.* Zanesville, 17 Ohio St. 352.

[5] Eden *v.* Foster, 2 P. Wms. 326; Att. Gen. *v.* Gaunt, 3 Swanst. 148. [Murdock, Appellant, 7 Pick. 303; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227 and note; Mills *v.* Davison, 54 N. J. Eq. 659.]

ment of the body, and to see that all rules and orders of the corporation are observed.[1] The visitor must take, as his guide, the regulations or statutes originally propounded by the founder;[2] and so long as he does not exceed his province, his decision is final, and cannot be questioned by way of appeal.[3] With this visitatorial power the court of chancery has nothing to do: it is only as respects the administration of the corporate property that the court has any jurisdiction. Chancery cannot interfere with the elections or any other internal arrangements of such corporations, although they may be irregular;[4] but whenever there is any complaint of a perversion of the funds of the institution, equity will immediately interfere and correct and remedy the abuse in the same manner that it proceeds against individual trustees.[5] (*a*)

[1] Phillips *v.* Bury, Skin. 478; Att. Gen. *v.* Crook, 1 Keen, 126; Att. Gen. *v.* York, 2 R. & M. 468; *In re* Birmingham School, Gilb. Eq. R. 180. [See Smyth *v.* Phillips Andover Academy, 154 Mass. 551.]

[2] St. John's College *v.* Toddington, 1 Burr. 200; Att. Gen. *v.* Locke, 3 Atk. 165; Att. Gen. *v.* Master of Catharine Hall, Jac. 392.

[3] Att. Gen. *v.* Moore, 4 Green, Ch. 503; *In re* Christ's Church, L. R. 1 Ch. 126; Att. Gen. *v.* Foundling Hosp., 2 Ves. Jr. 47; *In re* Chertsey Market, 6 Price, 272; Att. Gen. *v.* Locke, 3 Atk. 165; *Ex parte* Berkhampstead School, 2 Ves. & B. 138; Poor of Chelmsford *v.* Mildmay, Duke, 83; Att. Gen. *v.* Clarendon, 17 Ves. 499; Eden *v.* Foster, 2 P. Wms. 326; Att. Gen. *v.* Dixie, 13 Ves. 533; Att. Gen. *v.* Bedford, 2 Ves. 505; 5 Sim. 578; Att. Gen. *v.* Browne's Hosp., 17 Sim. 137; Att. Gen. *v.* Dedham School, 23 Beav. 350; Daugars *v.* Rivaz, 28 Beav. 233; Att. Gen. *v.* Dulwich College, 4 Beav. 255.

[4] Att. Gen. *v.* Clarendon, 17 Ves. 498; Whiston *v.* Rochester, 7 Hare, 532; Att. Gen. *v.* Dixie, 13 Ves. 519; Att. Gen. *v.* Middleton, 2 Ves. 327; Att. Gen. *v.* Dulwich College, 4 Beav. 255; Att. Gen. *v.* Magdalen College, 10 Beav. 402; Att. Gen. *v.* Bedford, id. 505; *In re* Bedford Charity, 5 Sim. 578.

[5] Van Houten *v.* First Reformed Dutch Church, 2 Green, Ch. 137; Brunnenmeyer *v.* Buhre, 32 Ill. 183; Att. Gen. *v.* St. Cross Hosp., 17 Beav. 435; Att. Gen. *v.* Foundling Hosp., 2 Ves. Jr. 48; Att. Gen. *v.* Clarendon, 17 Ves. 499. [Att. Gen. *v.* Clark, 167 Mass. 201; Jenkins *v.* Berry, 119 Ky. 350. See Burbank *v.* Burbank, 152 Mass. 254; Boenhardt *v.* Loch, 113 N. Y. S. 747, 129 App. Div. 355; Strickland *v.* Weldon, 28 Ch. Div. 426.]

(*a*) For a note on the subject of visitation of eleemosynary institutions, see 3 L. R. A. (N. S.) 227; MacKenzie *v.* Trustees of Presbytery,

§ 743. If an estate is given to an old corporation, it is not regarded in the same light as the property with which the charity was originally endowed, and the new gift will not be subject to the old visitatorial power, unless such is the plain or implied intention of the donor.[1] If the property is given generally, and no *special* purpose is named, the donor will be presumed to intend that the property shall be regulated by the general rules of the corporation;[2] but if a particular trust is annexed to the gift in the hands of the corporation, the visitatorial power of the original founder will be excluded, and the court will treat the corporation in respect to this fund as an ordinary trustee, or as an individual intrusted with the fund for a particular purpose.[3] If a private person founds a charity, and the crown grants a charter, the presumption is that the crown intended to carry out the intentions of the donor, and the jurisdiction of the court of chancery will be continued.[4] If a church has funds, a part of which was contributed for the poor, and the balance for religious purposes, and the funds have become mingled, the whole fund will not be devoted to the public charity; but as accurate a separation as possible will be made.[5] If the legislature makes a grant of land to a charitable corporation, for a school or college or for a religious or charitable pur-

[1] Green *v.* Rutherforth, 1 Ves. 472; Corp. of Sons of Clergy *v.* Mose, 9 Sim. 610; Phillips *v.* Bury, 1 Ld. Raym. 5; Comb. 265; Holt, 715; 1 Show. 360, 4 Mod. 106; Skin. 447.

[2] Ibid.; *Ex parte* Inge, 2 R. & M. 596; Att. Gen. *v.* Clare Hall, 3 Atk. 675; Hadley *v.* Hopkins, 14 Pick. 240.

[3] Green *v.* Rutherforth, 1 Ves. 462; Corp. Sons of Clergy *v.* Mose, 9 Sim. 610.

[4] Att. Gen. *v.* Dedham School, 23 Beav. 350. See, also, *Ex parte* Wrangham, 2 Ves. Jr. 609; Att. Gen. *v.* Clarendon, 17 Ves. 498; Att. Gen. *v.* Black, 11 Ves. 191; Case of Queen's College, Jac. 1; King *v.* St. Catharine's Hall, 4 T. R. 233–244; *Re* Queen's College, 5 Russ. 64; *Re* University College, 2 Phil. 521.

[5] Att. Gen. *v.* Old South Soc., 13 Allen, 474. Such a case differs widely from the mingling of two funds by the fault of the owner of one of them. Here the equities equally favor each fund.

67 N. J. Eq. 652; Murdoch, Appellant, 7 Pick. 303; Smyth *v.* Phillips Andover Academy, 154 Mass. 551; Att. Gen. *v.* Parker, 126 Mass. 216.

pose, such grant cannot be repealed.[1] But the legislature may change the trustees of a charity conferred upon a municipal corporation.[2]

§ 744. If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor, unless there is an express condition of the gift that it shall revert to the donor or his heirs, in case the trust is abused;[3] but the redress is by bill or information by the attorney general or other person having the right to sue. If a good public charity is created by gifts upon condition or with limitations, or by gifts for particular purposes, or to a certain end, the heir cannot defeat the charity by reason of a breach of the trust or perversion of the charity; but the courts upon proper proceeding will correct all abuses, and restore the charitable gift to its original purpose. Heirs and personal representatives of a donor have no beneficial interest reverting or accruing to themselves from the breach or non-execution of a trust for a charitable use.[4]

[1] University *v.* Fay, 2 Hayw. 310; Terrett *v.* Taylor, 9 Cranch, 43; Pawlett *v.* Clark, id. 292.

[2] Philadelphia *v.* Fox, 64 Penn. St. 169; Stone *v.* Framingham, 109 Mass. 303. [Ware *v.* Fitchburg, 200 Mass. 61.]

[3] Brown *v.* Meeting St. Bap. Soc., 9 R. I. 177. [Carroll County Academy *v.* Gallatin Academy, 104 Ky. 621; MacKenzie *v.* Trustees of Presbytery, 67 N. J. Eq. 652; Associate Alumni *v.* Theological Seminary, 163 N. Y. 417; Sickles *v.* New Orleans, 80 Fed. 868; Mills *v.* Davison, 54 N. J. Eq. 659. See *supra*, § 731 and notes.]

[4] Sanderson *v.* White, 18 Pick. 328; Dublin Case, 38 N. H. 459; Chapin *v.* School District, 35 N. H. 445; Hadley *v.* Hopkins, 14 Pick. 241; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 507; 5 Bell, App. Cas. 37; Pierson *v.* Thompson, 1 Edw. Ch. 212; Benett *v.* Wyndham, 4 De G., F. & J. 259; Duncan *v.* Findlater, 6 Cl. & Fin. 894; Mersey Docks, etc. *v.* Gibbs, 11 H. L. Cas. 686; L. R. 1 H. L. Cas. 93; Reformed Dutch Church *v.* Mott, 7 Paige, 77; Good *v.* McPherson, 5 Mo. 126. See also Att. Gen. *v.* Wax Chandlers' Co., L. R. 6 H. L. Cas. 1, where it was said that very little stress could be laid upon the word "condition" in a bequest to a charity, as it may mean simply "intent and purpose," and may be employed to create a trust and nothing more. But see Henderson *v.* Hunter, 59 Pa. St. 335.

§ 745. Ordinary private trusts are not subject to the statute of limitations like other interests; for, so long as the relation of trustee and *cestui que trust* continues, no length of time can bar the rights of the beneficiary as the rights of a creditor may be barred. But where the relation is denied, and circumstances have occurred that render it impossible to do equity between the parties, lapse of time may be a bar.[1] Still less will the statute of limitations apply to a charitable trust, there being "no limitation against God and religion."[2] Where a corporation held the property of a charity for one hundred and fifty years adversely under a deed of purchase, but with notice of the charitable use, it was decreed that the property should be reconveyed upon the original trusts;[3] nor will lapse of time be allowed to establish any perversion or abuse of a charitable trust, if the original purpose can be clearly determined.[4] But great lapse of time is frequently a controlling element in disposing of charity suits; for if a charity has been administered for a long time without question, the court will not interfere to change it without conclusive evidence that the charity has been perverted.[5] A continued use, with the assent of all parties, for a great length of time, must have an influence in the construction of all written instruments, especially if there is any doubt as to their true meaning.[6] If such use was contempo-

[1] Prevost *v.* Gratz, 6 Wheat. 481; Wedderburn *v.* Wedderburn, 4 My. & Cr. 41; Portlocke *v.* Gardner, 1 Hare, 594; Bridgman *v.* Gill, 24 Beav. 302; Michoud *v.* Girod, 4 How. 561; Att. Gen. *v.* Fishmongers' Co., 5 My. & Cr. 16; Knight *v.* Bowyer, 2 De G. & J. 421; Watson *v.* Saul, 5 Jur. (N. S.) 404; Att. Gen. *v.* Bristol, 2 J. & W. 321; Shelford, 498.

[2] Att. Gen. *v.* Coventry, 2 Vern. 399; Att. Gen. *v.* Bristol, 2 J. & W. 321; Att. Gen. *v.* Exeter, Jac. 448; Att. Gen. *v.* Brewers' Co., 1 Mer. 498; Incorp. Soc. *v.* Richards, 1 Con. & Law. 58; 1 Dru. & War. 258.

[3] Att. Gen. *v.* Christ's Hosp., 3 My. & K. 344.

[4] Att. Gen. *v.* Munro, 2 De G. & Sm. 122; Mulligan *v.* Mitchell, 3 M. & Cr. 73; Att. Gen. *v.* Beverly, 6 De G., M. & G. 256.

[5] Att. Gen. *v.* Rochester, 5 De G., M. & G. 822; Att. Gen. *v.* Ref. Prot. Dutch Church, 33 Barb. 303; Att. Gen. *v.* St. John's Hosp., 11 Jur. (N. S.) 629; Att. Gen. *v.* Old South Soc., 13 Allen, 474.

[6] Att. Gen. *v.* Rochester, 5 De G., M. & G. 822; Att. Gen. *v.* Beverly, 6 De G., M. & G. 268; Att. Gen. *v.* Bristol, 2 J. & W. 321; *In re* Chertsey Market, 6 Price, 261–285; 6 H. L. Cas. 189.

raneous with the foundation, and has continued uninterrupted and uncorrected for a great length of time, where there was opportunity for complaint and correction, the arrangement will not be disturbed.[1] A statute now bars the attorney general from interfering, after an acquiescence of twenty years.[2] On the same principle, long-continued use in applying the funds of a religious society to the teaching of a particular form of doctrine will have great weight in giving a construction to the instrument under which the funds were settled.[3] It was held, in Attorney General *v.* Federal Street Meeting-House, that a trust to maintain public worship in the Presbyterian form, in a particular meeting-house, might be terminated by the unanimous consent of all the worshippers and pew-holders of that house, and that where there had been a use of the funds for forty years under a claim of right, adversely to the first use, it was too late to attempt to restore the funds to the original use.[4]

§ 746. In a private suit in equity, whether to enforce or regulate a trust, or to obtain any other private redress, the pleadings must be so framed that a decree can be made upon the statement in the bill or answer, and upon the prayer for relief, if the plaintiff prevails; but in suits for establishing, regulating, controlling, or correcting charitable trusts, courts disregard all technicalities. If the case is brought before the court by bill or information, it takes jurisdiction over the administration of the charity, and makes the proper orders and decrees for the right administration of the fund, whether

[1] Att. Gen. *v.* Skinners' Co., 5 Sim. 596; Att. Gen. *v.* Brazenose College, 2 Cl. & Fin. 295; Att. Gen. *v.* Winsor, 6 Jur. (N. S.) 833; Att. Gen. *v.* Catharine Hall, Jac. 381; Mayor of South Molton *v.* Att. Gen., 27 Eng. L. & Eq. 17; Att. Gen. *v.* Coventry, 2 Vern. 397; Att. Gen. *v.* Scott, 1 Ves. 413.

[2] 3 and 4 Wm. IV. c. 27; Att. Gen. *v.* Payne, 27 Beav. 168.

[3] Dublin Case, 38 N. H. 459. [Church of Christ *v.* Reorganized Church, 71 Fed. 250.]

[4] Att. Gen. *v.* Federal Street Meeting-House, 3 Gray, 1.

the pleadings are formal or informal, and whether the proper relief is prayed for or not.[1] In charity cases, the most expeditious and least expensive methods should be adopted;[2] and a proper decree for relief will be made, although relief of an entirely different character is prayed for.[3] Courts are not bound by the strict rules of practice in granting injunctions or stay of proceedings at law in such cases.[4] It cannot be objected to a proceeding by the attorney general in equity, in the matter of a charity, that there is an adequate remedy at law.[5] But if there are any such informalities in the record as will be prejudicial to the defendants, the court will not proceed until such informalities are corrected.[6] The only manner in which courts can administer charities is to give directions to the trustees; but courts will not retain an information in order to make decrees from time to time.[7] The proper method is to apply anew. But in one case where an information charged a state of facts inconsistent with the true state of the case as set forth in the answer, and the relators set the case down for hearing without amendment, with a prayer for relief founded upon an untrue statement of the case, and without having applied to the trustees to correct the alleged abuse, the information was dismissed with costs, although some relief might have been granted upon a proper statement of the case, and upon fair conduct towards the trustees.[8] The parties to be bound by the decree should be

[1] Att. Gen. *v.* Hartley, 2 J. & W. 370; Att. Gen. *v.* Jackson, 11 Ves. 372; Att. Gen. *v.* Whitely, id. 241; Att. Gen. *v.* Stamford, 2 Swanst. 591; Att. Gen. *v.* Jeans, 1 Atk. 355; Att. Gen. *v.* Brooks, 13 Ves. 318; Att. Gen. *v.* Smart, 1 Ves. 72; Att. Gen. *v.* Oglander, 1 Ves. Jr. 246; Att. Gen. *v.* Bucknall, 2 Atk. 328; Att. Gen. *v.* Middleton, 2 Ves. 327; Att. Gen. *v.* Brereton, 2 Ves. 425; Att. Gen. *v.* Parker, 1 Ves. 43; Att. Gen. *v.* Vivian, 1 Russ. 226.

[2] Rochester *v.* Att. Gen., 4 Bro. P. C. 643.

[3] Att. Gen. *v.* Whitely, 11 Ves. 241.

[4] Att. Gen. *v.* Pearson, 3 Mer. 396.

[5] Att. Gen. *v.* Galway, 1 Moll. 95.

[6] Att. Gen. *v.* Warren, 2 Swanst. 310.

[7] Att. Gen. *v.* Haberdashers' Co., 1 Ves. Jr. 295.

[8] Att. Gen. *v.* Grocers' Co., 1 Keen, 506.

made parties to the suit at the time the decree is made. This is a formality that will not be dispensed with; as, where during the pendency of a suit new trustees in part had been chosen, but had not been made parties at the time the decree was entered, upon a new information brought to enforce the decree, the new trustees, though a minority of the number, were adjudged not to be bound by the decree; and they were allowed to plead other facts to show that the decree ought not to be carried into effect against any of the trustees.[1]

§ 747. Courts of equity have entire control over the matter of costs between the parties to a private suit. Costs in all cases in equity are within the sound discretion of the court, though they are usually allowed to the prevailing party.[2] If a suit arises between the trustees of a charity fund and strangers, the ordinary rules as to costs will be applied, and if there is a decree against the trustees they may be ordered to pay taxable costs as between parties;[3] but if it was a proper suit for the trustees to prosecute or defend, they will be allowed the costs so paid by them together with reasonable counsel fees, in their accounts.[4] Where a suit arises between the heir and the trustees whether there is a proper bequest to a charitable use, and whether the charity can be established; or where a suit arises between the trustees and the *cestuis que trust*, if there are any that can come into court, or the attorney general and the trustees as to the establishing and administering of the charity, — costs will be allowed to all parties, together with reasonable counsel fees or costs as between solicitor and client, out of the charity fund or estate.[5] But the allowance

[1] Att. Gen. *v.* Foster, 13 Sim. 262; 2 Hare, 81.

[2] Twisleton *v.* Thelwell, Hard. 165; Uvedale *v.* Uvedale, 3 Atk. 119; Bartlett *v.* Johnson, 9 Allen, 537.

[3] Burgess *v.* Wheate, 1 Eden, 251; Edwards *v.* Harvey, G. Cooper, 40; Hill *v.* Morgan, 2 Moll. 460; Elsey *v.* Lutyens, 8 Hare, 164; Rashley *v.* Master, 1 Ves. Jr. 201; Brodie *v.* St. Paul, id. 326; Mohun *v.* Mohun, 1 Swanst. 201.

[4] Hill on Trustees, 551.

[5] Currie *v.* Pye, 17 Ves. 462; Bliss *v.* Amer. Bible Soc.; 2 Allen, 334;

of costs will depend upon the question, whether the issues raised were fit and proper to be raised and determined by the court. If the issues are immaterial or trifling, or if the conduct of a party is vexatious and litigious, or if he raises improper points, or in any way creates unnecessary delay or expense, the court will not only refuse him costs, but will order him to pay costs.[1] (*a*) Although proper relief may be granted upon very defective pleadings, yet the court will consider the state of the record upon the question of costs.[2] Where one fund is apportioned among several charities, and a suit arises in relation to one charity, the costs, as a general rule, will come out of the fund apportioned to that charity;[3] but in some cases they may come out of the whole fund. The courts use this absolute power over costs as a means of checking improper suits or defences.[4] (*b*)

Att. Gen. *v.* Moor's Ex'rs, 19 N. J. Eq. 509, where it is said that it is the right of the trustees to come into court for instructions and directions, and that it is the practice to allow the costs and expenses of all parties as between attorney and client. 3 Dan. Ch. Prac. 1554. But no such rule prevails in New York. In such cases the prevailing party will be allowed his legal costs, but no allowance out of the estate for counsel fees will be made to either party. Rose *v.* Rose, 28 N. Y. 184.

[1] East *v.* Ryall, 2 P. Wms. 284; Att. Gen. *v.* Munro, 2 De G. & Sm. 122; Att. Gen. *v.* Grocers' Co., 1 Keen, 506; Att. Gen. *v.* Cullum, id. 104; Att. Gen. *v.* Mercers' Co., 2 My. & K. 654; Att. Gen. *v.* Vivian, 1 Russ. 226.

[2] Att. Gen. *v.* Hartley, 2 J. & W. 370.

[3] Att. Gen. *v.* Kerr, 4 Beav. 297.

[4] Att. Gen. *v.* Merchant Tailors' Co., 5 L. J. (N. S.) Ch. 62.

(*a*) For a case where the relator was ordered to pay the costs, see Att. Gen. *v.* Butler, 123 Mass. 304.

(*b*) There has been much debate upon the question of the liability of trustees for funds devoted to charity and of charitable corporations for the torts of employees or agents. It is almost universally held that those who are receiving the benefits of the charity, for example, patients at a charitable hospital or pupils at a school or college which is a public charity, cannot recover from the corporation or from the trustees for injuries due to the negligence of an employee where it does not appear that there was negligence in selecting the employee. Downes *v.* Harper Hospital, 101 Mich. 555; Pepke *v.* Grace Hospital, 130 Mich. 493; cases cited *infra*. But see

§ 748. The distinctive principles of equity, which courts apply to the enforcement and regulation of trusts for chari-

Glavin *v.* R. I. Hospital, 12 R. I. 411.

The fact that the patient pays a fixed charge or that the pupil pays tuition as a help to defray the expenses of the institution does not change the rule, if the institution is in fact a public charity. Parks *v.* N. W. University, 218 Ill. 381; Abston *v.* Waldon Academy, 118 Tenn. 24; Powers *v.* Mass. Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; Downes *v.* Harper Hospital, 101 Mich. 555.

Although the courts generally agree upon this result, they do not agree as to the reasons. In some of the decisions the reason given is that the use of charitable funds for the payment of damages would be a diversion of the funds to an unauthorized purpose. Parks *v.* N. W. University, 218 Ill. 381; Fire Patrol *v.* Boyd, 120 Pa. St. 624; Waldon Academy *v.* Abston, 118 Tenn. 24; Perry *v.* House of Refuge, 63 Md. 20. See Whittaker *v.* St. Luke's Hospital, 117 S. W. 1189 (St. Louis Ct. of App., 1909). Other decisions have been based upon the reasoning that the principle of *respondeat superior* entirely fails of application in cases of charitable trusts of a public nature, since the trustees or the corporations are not conducting the charities for profit to themselves or to the portion of the public which they serve. Hearns *v.* Waterbury Hospital, 66 Conn. 98; Farrigan *v.* Pevear, 193 Mass. 147. See Cunningham *v.* Sheltering Arms, 115 N. Y. S. 576. Those courts which proceed upon this principle exempt the charitable corporation, or the trustees of an unincorporated charity, from liability for torts of agents or employees committed upon those who are not recipients of the charity. Ibid.

In a well considered opinion, Judge Lowell, in Powers *v.* Mass. Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372, after a review of the authorities, bases the exemption from liability upon the relation between the hospital and the patient. The true principle is stated to be that, "One who accepts the benefit either of a public or a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate if the benefactor has used due care in selecting those servants." If this is the true reason for the exemption from liability, it is obvious that the corporation or the trustees may be liable, on the principle of *respondeat superior*, to outsiders or to employees; and two recent cases have so held. Bruce *v.* Central M. E. Church, 147 Mich. 230; Kellogg *v.* Church Charity Foundation, 112 N. Y. S. 566, 128 App. Div. 214. See also Adams *v.* University Hospital, 122 Mo. App. 675. It has also been held that a charitable corporation must respond in damages to an adjoining land owner for polluting a stream. Trevett *v.* Prison Ass'n, 98 Va. 332.

Many of the cases where it has been sought to hold charities liable in tort for the acts of employees or

table uses, are confined to those States which have adopted the Statute 43 Eliz. c. 4, or the principles of the common law in regard to trusts, as they existed prior to the statute. In some States, the statute is expressly repealed; and such repeal has been held to carry with it all the distinctive doctrines of public charities, as they are held in England. In other States, the statute is said to have been adopted, or to be in force. The law of other States is founded upon what is supposed to have been the common law, or the ordinary jurisdiction and practice of the court of chancery prior to the statute. It is not very material whether courts of equity, in the several States, trace their jurisdiction to the statute itself as in force in their State, or whether they exercise the jurisdiction as original and inherent in courts of equity by common law, anterior to the statute. Substantially the same principles are applied, and the same results are reached, in either case.[1]

[1] In Alabama, the general principles of the statute of 43 Eliz. are acted upon by courts of equity, as a part of their inherent jurisdiction. The cases in which the doctrines are discussed are Antones *v.* Eslava, 9 Porter, 527; Carter *v.* Balfour, 19 Ala. 814; Williams *v.* Pearson, 38 Ala. 299; Johnson *v.* Longmire, 39 Ala. 143. From the principles announced by the court, there is no reason why they should not exercise all the equity powers of the English court of chancery. [See Woodroof *v.* Hundley, 147 Ala. 287; Huntsville *v.* Smith, 137 Ala. 382.]

In Arkansas, the court has determined that public charity is not controlled by the rules against perpetuities. Grissom *v.* Hill, 17 Ark. 433. [McDonald *v.* Shaw, 81 Ark. 235.]

In Connecticut the statute was substantially re-enacted in 1702. Greene *v.* Dennis, 6 Conn. 293; Bull *v.* Bull, 8 Conn. 47; Chatham *v.* Brainard, 11 Conn. 60; Amer. Bible Soc. *v.* Wetmore, 17 Conn. 188; Hampden *v.* Rice, 24 Conn. 350. In Fiske *v.* White, 22 Conn. 32, the court declined

agents have been disposed of without the necessity of considering the application of the rule of *respondeat superior* to charities, because on the facts it was clear that the charity was acting as a governmental agency. Leavell *v.* Western Ky. Asylum, 122 Ky. 213; Williamson *v.* Louisville Industrial School, 95 Ky. 251; Perry *v.* House of Refuge, 63 Md. 20; Benton *v.* Boston City Hospital, 140 Mass. 13; Noble *v.* Hahnemann Hospital, 98 N. Y. S. 605, 112 App. Div. 663; Maia *v.* Eastern Hospital, 97 Va. 507. Moreover, the surgeons and physicians of a charitable hospital are not usually employees or agents of the hospital. McDonald *v.* Mass. Gen. Hospital, 120 Mass. 432.

to establish a trust in which the trustees were to expend the gift in educating young men studying for the ministry at New Haven, on account of the uncertainty of the beneficiaries. But in Treat's App., 30 Conn. 113, a very indefinite and vague trust was established. The later case will be more likely to be followed in the great majority of States. See also Brewster *v.* McCall, 15 Conn. 274. [See Conn. Gen. Stat. (1902), § 4026; Adye *v.* Smith, 44 Conn. 60, 70; Conklin *v.* Davis, 63 Conn. 377; Strong's Appeal, 68 Conn. 527.]

In Georgia, the courts exercise an original and inherent jurisdiction over public charities upon the principles of the statute, and apply liberal rules of construction to carry out the intention of the donor. Beal *v.* Fox, 4 Ga. 404; Walker *v.* Walker, 25 Ga. 420.

In Illinois, the statute is said to be in force, and courts will carry out the intention of the donor in establishing a charity. They disclaim the power to change the object, *cy près*, and decide that a charity must be accepted as given. All of which is undoubted law; but from the principles of interpretation laid down there is no reason why they should not carry out the intention of the donor *cy près*, if there fail to be any objects of his charity, as originally given and administered. And this doctrine has been applied to a certain extent. Gilman *v.* Hamilton, 16 Ill. 225; Heuser *v.* Harris, 42 Ill. 425. [Crerar *v.* Williams, 145 Ill. 625; Kemmerer *v.* Kemmerer, 233 Ill. 327; Welch *v.* Caldwell, 226 Ill. 488; Trafton *v.* Black, 187 Ill. 36.]

In Indiana, courts act upon the statute, and enforce general and indefinite charities, according to the intention of the donors and upon the principles of courts of equity. McCord *v.* Ochiltree, 8 Blackf. 15; Sweeney *v.* Sampson, 5 Ind. 465; Indianapolis *v.* Grand Master, 25 Ind. 518; *Ex parte* Lindley, 32 Ind. 367. See Richmond *v.* State, 5 Ind. 334. In Grimes *v.* Harmon, 35 Ind. 198, the law is very fully discussed, and several propositions are stated as the law of Indiana. The case of White *v.* Fish, and a few New York cases, are relied upon. [See Board of Com'rs *v.* Dinwiddie, 139 Ind. 128; Erskine *v.* Whitehead, 84 Ind. 357.]

In Iowa, the courts act on an original and inherent jurisdiction over charitable bequests, and lay down the rule that courts are acting judicially as long as they effectuate the intention of a donor. Miller *v.* Chittenden, 4 Iowa, 252. They also hold that if the object of a trust is certain, but there is no trustee, the court will appoint one. Johnson *v.* Mayne, 4 Iowa, 180. But if the objects are uncertain, and no trustee is appointed, the trust will fail. Le Page *v.* McNamara, 5 Iowa, 146. [See Klumpert *v.* Vrieland, 142 Iowa, 434, 121 N. W. 34; Grant *v.* Saunders, 121 Iowa, 80.]

In Kentucky the statute of Eliz. is in full force by adoption, and the courts have carried their equity jurisdiction to the extreme verge of the law in establishing charities. Church *v.* Church, 18 B. Mon. 635; Hadden *v.* Chorn, 8 B. Mon. 78; Gass *v.* Wilhite, 2 Dana, 170, discuss special cases. In Moore *v.* Moore, 4 Dana, 354, a charity was established by which the judges of the county courts were to select the objects. In Cronin *v.* Louisville, &c., Soc., 3 Bush, 365, a bequest to a corporation already holding the amount of property which it was allowed to take, was held to lapse.

In Att. Gen. *v.* Wallace, 7 B. Mon. 611, a general gift to charitable and religious purposes, without trustees and without any machinery pointed out or referred to by which trustees were to be appointed, was sustained. This case goes further than any other case observed in the United States. Other cases have been sustained where the appointment of trustees was in terms referred to the court. And cases have been sustained where trustees, incapable of taking, were nominated in the will, whereby it appeared that the donor intended that his trustees should reduce his general and indefinite intent to a practical certainty. Att. Gen. *v.* Wallace is an exception to the general rule that courts in England and America act upon when they do not profess to exercise any extraordinary or prerogative powers. [The recent decisions in Kentucky do not go to this extent and seem to stop short of the majority opinion in the United States in regard to definiteness of the object when the donor has provided a trustee. See *supra*, § 729, note; Kasey *v.* Fidelity Trust Co., 131 Ky. 609, 115 S. W. 739; Thompson's Ex'r *v.* Brown, 116 Ky. 102; Coleman *v.* O'Leary's Ex'r, 141 Ky. 388; Spalding *v.* St. Joseph's School, 107 Ky. 382; Crawford's Heirs *v.* Thomas, 114 Ky. 484. See also Bedford *v.* Bedford's Adm'r, 99 Ky. 273; Tichenor *v.* Brewer's Ex'r, 98 Ky. 349; Leak's Heirs *v.* Leak's Ex'r, 78 S. W. 471.]

Louisiana has a liberal system of charitable trusts under its code, which was derived from the civil law. The statute of Eliz. was never in force in the State, as its laws were derived from France and Spain. See Soc. of Orphan Boys *v.* New Orleans, &c., 12 La. An. 62; New Orleans *v.* McDonogh, id. 240; Fink *v.* Fink, id. 201. [See Succession of McCloskey, 52 La. Ann. 1122.]

In Maine, the statute is in force, or rather the courts act upon the doctrine that the equity jurisdiction of chancery over charities was original and inherent in courts of equity before the statute. Their courts carry out the intentions of donors by establishing charitable gifts made to voluntary societies for indefinite purposes. Shapleigh *v.* Pilsbury, 1 Maine, 271; Tappan *v.* Deblois, 45 id. 222; Preachers' Aid Soc. *v.* Rich, id. 55; Howard *v.* Amer. Peace Soc., 49 id. 228; Swasey *v.* Amer. Bible Soc., 57 id. 526; Kimball *v.* Universalist Soc. in Sweden, 34 id. 434. [Doyle *v.* Whalen, 87 Me. 414.]

In Maryland, neither the statute nor the principles of the statute have ever had any recognition in its courts. No trust for charity can be established, unless the beneficiaries are so certain that they can maintain an action in court in their own names for the benefit of the fund. Of course, under such a rule, no trust for the poor of a city, or of the wards of a city, to be relieved according to the discretion of the trustees, can be maintained, and such are the decisions. Wilderman *v.* Baltimore, 8 Md. 550; Methodist Church *v.* Warren, 28 Md. 338; Dashiel *v.* Att. Gen., 5 Harr. & J. 392; 6 Harr. & J. 1; Murphy *v.* Dallam, 1 Bland, 529; Beaty *v.* Kurtz, 2 Pet. 566; Needles *v.* Martin, 33 Md. 609. [See Erhardt *v.* Baltimore Monthly-Meeting, 93 Md. 669; Trinity M. E. Church *v.* Baker, 91 Md. 539; Trustees *v.* Jackson Sq. Church, 84 Md. 173; Ege *v.* Hering, 108 Md. 391.]

In Massachusetts, the statute is in full force, and the courts have established a great variety of charitable bequests. A very liberal rule of

interpretation has been adopted to ascertain the intention of donors, and such intention has been carried into effect as near as may be. Bartlett *v.* King, 12 Mass. 536; Going *v.* Emery, 16 Pick. 107; Sanderson *v.* White, 18 Pick. 328; Burbank *v.* Whitney, 24 Pick. 146; Washburn *v.* Sewall, 9 Met. 280; Bartlett *v.* Nye, 4 Met. 378; Brown *v.* Kelsey, 2 Cush. 243; Winslow *v.* Cummings, 3 Cush. 358; Tucker *v.* Seamen's Aid Soc., 7 Met. 188; Sohier *v.* St. Peter's Church, 12 Met. 250; North Adams *v.* Fitch, 8 Gray, 241; Wells *v.* Doane, 3 Gray, 201; Easterbrooks *v.* Tillinghast, 15 Gray, 17; Nourse *v.* Merriam, 8 Cush. 11; Earle *v.* Wood, id. 445; Dexter *v.* Gardner, 7 Allen, 246; Wells *v.* Heath, 10 Gray, 17; Att. Gen. *v.* Old South Soc., 13 Allen, 477; Fairbanks *v.* Sampson, 99 Mass. 533; Hadley *v.* Hopkins's Acad., 14 Pick. 240; Tainter *v.* Clark, 5 Allen, 66; Att. Gen. *v.* Trinity Church, 9 Allen, 422; Baker *v.* Smith, 13 Met. 41; Parker *v.* May, 5 Cush. 336; Bliss *v.* Amer. Bible Soc., 2 Allen, 334; Drury *v.* Natick, 10 Allen, 169; Hosea *v.* Jacobs, 98 Mass. 65; Barker *v.* Wood, 9 Mass. 419. In Odell *v.* Odell, 10 Allen, 1, it was determined that the common-law rule against perpetuities and accumulations did not apply to trusts for public charities. In Saltonstall *v.* Sanders, 11 Allen, 447, it was determined that the word "benevolent" meant "charitable," and in Amer. Acad. *v.* Harvard College, 12 Gray, 582, and in Jackson *v.* Phillips, 14 Allen, 540, it was determined that the intention of the donor, to be ascertained by liberal rules of construction, would be carried into effect, *cy près*, if the original objects of the charity failed. In Harvard Coll. *v.* Soc. Prom. Theol. Educ., 3 Gray, 281, it was determined that the court could not transfer the funds of a charity from one board to another, or remove trustees for the mere convenience of parties; and in Att. Gen. *v.* Garrison, 101 Mass. 223, it was determined that the court would remove a trustee, when he did not sympathize with the scheme of administering the charity, as settled by the court upon a reference to a master, and there was danger that he would not carry out the scheme with proper energy and efficiency. It will be seen that the court has dealt with a great variety of cases. It professes to adhere to the strict chancery jurisdiction of courts of equity, without invoking any of the extraordinary powers of the chancellor as keeper of the king's conscience. Some of the cases that enforce gifts in trust to voluntary and defunct associations reach the extreme verge of the law; but it is probable that the English chancery would have enforced every one of these trusts without calling in the extraordinary aid of prerogative power. It is proper to say that unincorporated religious societies are clothed with very considerable legal power. See Public Stat., 1882. [R. L., [1902] Ch. 36. For the rule in Massachusetts as to the requisite definiteness when no trustee is appointed, see *supra*, § 729, note *a;* and as to the *cy près* doctrine, see *supra*, § 728, note.]

In Michigan, the statute was repealed, and trusts for charitable uses are not distinguished from others, and their validity depends upon the same rules. Newark Meth. Epis. Ch. *v.* Clark, 41 Mich. 730. [Wheelock *v.* Am. Tract Soc., 109 Mich. 141.]

[The same is true in Minnesota. Watkins *v.* Bigelow, 93 Minn. 210;

Shanahan *v.* Kelly, 88 Minn. 202; Lane *v.* Eaton, 69 Minn. 141; Little *v.* Willford, 31 Minn. 173.]

In Mississippi, courts exercise the inherent jurisdiction of equity over public trusts for charity. Wade *v.* Amer. Colonization Soc., 7 Sm. & M. 663; State *v.* Prewett, 20 Miss. 165.

In Missouri, the court administers trusts for public charities upon the general principles of the statute, and with a liberal interpretation of its powers. Chambers *v.* St. Louis, 29 Mo. 543. [Sappington *v.* School Fund Trustees, 123 Mo. 32; Mo. Historical Soc. *v.* Academy of Science, 94 Mo. 459.]

In New Hampshire, the courts have recognized the general principles of charitable trusts; but there are no direct decisions indicating how far the court will go in enforcing trusts for vague and indefinite purposes. Duke *v.* Fuller, 9 N. H. 538; Chapin *v.* School Dist., 35 N. H. 454; Sec. Cong. Soc. *v.* First Cong. Soc., 14 N. H. 315; Brown *v.* Concord, 33 N. H. 285; Dublin Case, 38 N. H. 459; New Market *v.* Smart, 4 Amer. Law Reg. (N. S.) 390. [Haynes *v.* Carr, 70 N. H. 463; Petition of Burnham, 74 N. H. 492.]

In New Jersey, the statute was never in force; but the court of chancery exercises an inherent and extensive jurisdiction over charities, on principles acted upon in England and many of the States. In Morris *v.* Thompson, 19 N. J. Eq. 307, an interpretation was given to the word "benevolence," used in connection with the words "religious" and "charitable," following the cases of Ommanney *v.* Butcher, and Williams *v.* Kershaw, and differing from the case of Saltonstall *v.* Sanders, in Massachusetts. [See Hegeman's Ex'rs *v.* Roome, 70 N. J. Eq. 562; Livesey *v.* Jones, 55 N. J. Eq. 204.] In Att. Gen. *v.* Moore, 19 N. J. Eq. 503, the court speaks of the ordinary powers of the court, which are exercised in the ordinary equity jurisdiction in chancery, and the extraordinary power or jurisdiction which the court is called upon to exercise, and will exercise in establishing and regulating public charitable trusts. It is somewhat difficult to understand what is meant when an extraordinary power and jurisdiction is referred to, which will be exercised in establishing charitable trusts for public and vague purposes. If these words mean that any prerogative or sovereign function can be exercised in performing judicial duties, it is certainly a mistake, unless the legislature has clothed the court with this part of the sovereign power which belongs to the *parens patriæ*, whether king, crown, people, or legislature. If it is simply intended that an ordinary equity jurisdiction will be exercised in applying rules of interpretation and of law adapted to the subject-matter, — that is, to charitable trusts of a public nature, and therefore, of necessity, vague, indefinite, and uncertain at times, — there is no occasion to find fault; for it is a mere use of words to describe the rules that will be applied. If it is meant that the rules to be applied to the judicial construction and administration of public charitable trust are different from the rules applied to private trusts for individuals, and are in that sense extraordinary, there is no objection to the language. But if it is meant that any function, not strictly judicial within the ordinary and inherent jurisdiction of courts of equity over charities, can be exer-

cised, the power is misapprehended. It must be a fundamental rule in America, that no public trust for charity can be established, unless the judges can establish it by strictly judicial determinations. If the gift is too imperfect or too indefinite to be established by the courts acting judicially, the legislature alone can establish it by special act, or the legislature may clothe the courts with such powers as it sees fit to confer. [For recent decisions showing the position of the courts in regard to definiteness and the *cy près* doctrine, see, *supra*, § 729, note, and § 728, note.]

In New York, many of the earlier cases decided that the courts had full jurisdiction over charitable bequests, to enforce them according to judicial rules. In one case, it was held that the jurisdiction of the chancellor was as extensive as the commission under the privy seal in England. Wright *v.* Trustees of Meth. Epis. Church, 1 Hoff. Ch. 202. This was carrying their power too far, and it was denied in Ayres *v.* Trustees of Meth. Epis. Church, 3 Sandf. S. C. 351. In King *v.* Woodhull, 3 Edw. Ch. 79, the common English judicial principles were applied; and cases have been sustained where gifts were made to unincorporated societies for charitable purposes. Shotwell *v.* Mott, 2 Sandf. Ch. 46; Potter *v.* Chapin, 6 Paige, 639; Banks *v.* Phelan, 4 Barb. 80; Coggeshall *v.* Pelton, 7 Johns. Ch. 292; Newcomb *v.* St. Peter's Church, 2 Sandf. 636; 2 Kent, 286; 4 Kent, 408; People *v.* Steele, 2 Barb. 397; Miller *v.* Gable, 2 Denio, 492; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439. Inglis *v.* Sailors' Snug Harbor, 3 Pet. 112, in the Supreme Court of the United States, decided, upon the law, as it was understood to exist in New York, that a devise to the chancellor, mayor, and recorder of New York, and several other persons by their official description for the time being, and their successors in office, adding, "if this cannot be done without an act of incorporation they should apply for one," was a good devise for a charitable use. Williams *v.* Williams, 4 Seld. 525, proceeded upon a very moderate and cautious rule, but there was very considerable dissent. Trustees of Theo. Sem. *v.* Kellogg, 16 N. Y. 83, was decided the same way. But the later cases have decided that no charitable trust can be established in that State, where the trustee named cannot take the legal title to all intents and purposes. There is a statute in New York forbidding a corporation to take lands for any purpose not germane to the purposes for which it was incorporated. So if a gift is made to a corporation for a charitable purpose other than that for which the corporation exists, the gift fails, for the reason that the court will appoint no other trustee. McCarter *v.* Orphan Asylum Soc., 9 Cow. 437; Robertson *v.* Bullions, 9 Barb. 64; 11 N. Y. 243. So if a bequest is made to a voluntary association in trust for a charity, the gift fails because the voluntary association is not capable of taking the property. Owens *v.* Mission Soc., 14 N. Y. 380; White *v.* Howard, 52 Barb. 294; Harris *v.* Amer. Bib. Soc., 2 N. Y. Dec. 316. The reasoning is, that the jurisdiction of the court attaches only where there is a trust, and there is a trust only where there is a trustee capable of taking. The general rule in private trusts is, that where a clear trust is created, but the trustee is not named, the court will not allow the clear intention to create a trust to fail for want of a trustee.

And so it would appear that the clear intention of the testator that trustees should carry out his purpose might be carried into effect by the courts. A bequest to such five persons as the judges of the Supreme Court of Vermont should appoint to establish a school was held void. Bascom *v.* Albertson, 34 N. Y. 584. In this case, the ground is taken that the statute of Elizabeth was repealed by the New York statute of 1788; and that if the jurisdiction over charities existed before the statute of Elizabeth, still in 1788 it was universally supposed that the jurisdiction in England depended upon the statute; therefore, when the assembly repealed the statute in 1788, it must have intended to repeal the whole system of charitable uses; that since that time a new system, peculiar to the institutions of the State, has grown up, and the courts of New York will not now enforce charitable trusts not in harmony with the New York system, unless they are as definite as private trusts. Athough trustees are certain and capable of taking the legal estate, the trust cannot be established, if there is any uncertainty in respect to the beneficiaries or any discretion in the trustees; thus where a fund was given to executors to be applied by them, according to their judgment, in founding a college in Liberia, it was held that the gift was void for uncertainty in the application of it. Phelps *v.* Phelps, 28 Barb. 121; Beekman *v.* People, 27 Barb. 260; Beekman *v.* Bonsor, 23 N. Y. 290; Owens *v.* Mission Soc., 14 N. Y. 380; Yates *v.* Yates, 9 Barb. 324; King *v.* Rundle, 15 Barb. 139; Wilson *v.* Lynt, 16 How. (N. Y.) Prac. R. 348; 30 Barb. 124; Dodge *v.* Pond, 23 N. Y. 69; Goddard *v.* Pomeroy, 36 Barb. 546; Levy *v.* Levy, 33 N. Y. 97; Sherwood *v.* Amer. Bible Soc., 1 Keyes, 566. It is further considered by the court that the Revised Statutes abolish all express trusts except for the purposes specially named, which are four in number, and are active trusts in the interests of private individuals for temporary purposes, and do not include permanent trusts for charitable uses, or for the benefit of classes of persons, or for corporations. Holmes *v.* Mead, 52 N. Y. 339; Burrill *v.* Boardman, 43 N. Y. 263; Adams *v.* Perry, id. 487; Chamberlain *v.* Chamberlain, id. 424; Leonard *v.* Bell, 1 N. Y. Sup. Ct. 608; Donaldson *v.* American Tract Soc., 1 N. Y. Sup. Ct. Add. 15; Leferve *v.* Leferve, 2 N. Y. Sup. Ct. 330. It is now conceded that the law of charitable uses was not founded upon the statute of Elizabeth; and neither the courts nor the bar of New York understood, for more than half a century, that the statute of 1788 repealed the statute of Elizabeth. And it might well have been assumed, after such a length of time, that the repeal did not extend further than the statute of 1788 itself went, and that if the statute of 1788 repealed the statute of Elizabeth, the system which was independent of it still remained. It would not be becoming to criticise the jurisprudence of a great State upon so important a subject; but the question arises in every mind conversant with this branch of the law, whether the new system, that has taken the place of the old, is more certain in its application and more satisfactory, and better adapted to the wants of a great and growing people. Does the new system carry out the intention of charitable donors with more efficiency than did the old and tried system, which had grown up with time, and had been modified by the wisdom of

so many judges, and still satisfies the wants of so many States? Another observation may be made. The cases thus far decided evince great learning, research, and ability; but there seems to be want of confidence in the stability of the system, and a want of agreement among both the lawyers and the judges: so that the whole matter is yet in a transition state. If certainty is an element of safety and security in the law, the attempt to substitute one system for another has as yet only reached the point of rendering both systems uncertain. Consistory *v.* Brandon, 52 Barb. 228; Chamberlain *v.* Chamberlain, 43 N. Y. 424. [In 1893 the law of New York was radically changed by a statute which provided that gifts for "religious, educational, charitable, or benevolent uses," should not be deemed invalid by reason of indefiniteness or uncertainty of beneficiaries. IV Consol. Laws (1909), p. 2840, § 12, p. 3396, § 113; see Allen *v.* Stevens, 161 N. Y. 122; Rothschild *v.* Schiff, 188 N. Y. 327; Matter of Shattuck, 193 N. Y. 446; Fralick *v.* Lyford, 95 N. Y. S. 433, 107 App. Div. 543 (affirmed, 187 N. Y. 524); Catt *v.* Catt, 103 N. Y. S. 740, 118 App. Div. 742. This statute is not retroactive. Fairchild *v.* Edson, 154 N. Y. 199; Murray *v.* Miller, 178 N. Y. 316. See Tilden *v.* Green, 130 N. Y. 29, 64; People *v.* Powers, 147 N. Y. 104.]

In North Carolina, the statute was declared to be in force in its general principles, and courts applied very liberal rules in dealing with this kind of trusts. Griffin *v.* Graham, 1 Hawks, 96; State *v.* McGowen, 2 Ired. Eq. 9; State *v.* Gerard, id. 210. But, since those cases, the courts have declined to apply the rules applicable to public trusts, and have confined themselves to the rules applicable to trusts for private individuals. Wilson *v.* McAuley, 1 Dev. Eq. 276; Trustees *v.* Chambers, 3 Jones, Eq. 253; Holland *v.* Peck, 2 Ired. Eq. 255; Haywood *v.* Craven, 2 Car. L. R. 557; White *v.* Att. Gen., 4 Ired. Eq. 19. Perhaps some of these trusts were too uncertain to be established by the most liberal judicial rules, and certainly it would be hard to convict a trustee of breach of trust in applying a fund for the good of "poor saints." There might be so great a difficulty in determining who were "saints" and "poor," and what should be done for them, in other States as well as North Carolina, that the trust might well fail, although there was a trustee to exercise his discretion in selecting them. Bridges *v.* Pleasants, 4 Ired. Eq. 26; White *v.* University, id. 19. See Miller *v.* Atkinson, 63 N. C. 537. [Under recent cases the principles of the Statute of Elizabeth seem to be in force in North Carolina. Keith *v.* Scales, 124 N. C. 497; *In re* Murray's Will, 141 N. C. 588.]

In Ohio, the statute is in full force, and the general rules of equity applicable to public trusts are applied by the courts. Perin *v.* Carey, 24 How. 465; Hullman *v.* Honcomp, 5 Ohio St. 237; Zanesville Canal *v.* Zanesville, 2 Ohio, 483; M'Intire's School *v.* Zanesville, 9 Ohio, 203; Amer. Bible Soc. *v.* Marshall, 15 Ohio St. 537; Urmey's Ex'rs *v.* Wooden, 1 Ohio St. 160.

In Pennsylvania, the statute is not directly in force, and the courts are not confined to the statute for an enumeration of charitable uses; but in other respects the principles of the statute are a part of the common law

of the State. In 1855, an act was passed declaring that when gifts are made to religious, charitable, educational, literary, or scientific purposes, in no event whatever shall they revert to the heir, but the courts are to apply them to the purposes for which they were intended. Previous to this statute, the courts had applied most liberal judicial rules to the establishment and regulation of public charities. Whitman *v.* Lex, 17 S. & R. 88; Wright *v.* Linn, 9 Penn. St. 435; Soohan *v.* Philadelphia, 33 id. 9; Price *v.* Maxwell, 28 id. 23; Pickering *v.* Shotwell, 10 id. 23; Griffiths *v.* Cope, 17 id. 96; Girard *v.* Philadelphia, 7 Wall. 1; McLain *v.* School Directors, 51 Penn. St. 196; Evangelical Asso. App., 35 id. 316; Mission Soc. App., 30 id. 425; Cresson's App., id. 437; Meth. Church *v.* Remmington, 1 Watts, 218; Gregg *v.* Irish, 9 S. & R. 211; Browers *v.* Fromm, Add. 365; McGirr *v.* Aaron, 1 Penn. St. 49; Martin *v.* McCord, 5 Watts, 494; Barr *v.* Weld, 24 Pa. St. 84; Brender *v.* German Ref. Cong., 33 id. 418; Philadelphia *v.* Wills, 3 Rawle, 170; Cassell's App., 3 Watts, 440; Morrison *v.* Beirer, 2 W. & S. 81; Zimmerman *v.* Anders, 6 W. & S. 218; Magill *v.* Brown, Brightly, 347; Blenon's Estate, id. 345; Vidal *v.* Girard's Ex'rs, 2 How. 128. [Stuart *v.* Easton, 74 Fed. 854; Dulles's Estate, 218 Pa. St. 162; Trim's Estate, 168 Pa. St. 395. For the statute provisions in regard to charitable trusts, see 1 Purdon's Digest (13th ed.) p. 592 *et seq.*] In Hillyard *v.* Miller, 10 Penn. St. 326, it was determined that accumulations for charity could not be allowed beyond the legal period; but in Philadelphia *v.* Girard, 45 Penn. St. 9, this point was substantially overruled. McLean *v.* Wade, 41 Penn. St. 266; Miller *v.* Porter, 53 id. 292; Henderson *v.* Hunter, 59 id. 335; Philadelphia *v.* Fox, 6 id. 170. In Zeisweiss *v.* James, 63 id. 465, it was determined that uncertainty in the objects of a trust is no objection, if there are trustees who can select the objects and render them certain; but if there are no trustees to select the objects, the court cannot appoint trustees and clothe them with the power of selection. It was further determined, that an unincorporated society may take under a charitable devise; but that a gift to a corporation to be incorporated, but which might not be incorporated within the time for limiting estates, is void. And so if the gift is to a corporation to be created, but which cannot exist according to the laws of the State, it must fail. It was further determined, that the laws and institutions of Pennsylvania are built on the foundation of reverence for Christianity, and that the religion revealed in the Bible is not to be openly reviled, ridiculed, or blasphemed to the annoyance of sincere believers; and that trusts attempted to be created, tending to that end, are illegal and void.

In Rhode Island, the jurisdiction of the courts is founded upon an old statute very similar to the statute of Eliz., and rules appropriate to charitable trusts where the statute is in force, are applied by the court to such cases. Derby *v.* Derby, 4 R. I. 414; Potter *v.* Thornton, 7 R. I. 252; Meeting Street Bap. Soc. *v.* Hail, 8 R. I. 240. [Pell *v.* Mercer, 14 R. I. 412, 434; Guild *v.* Allen, 28 R. I. 430; Selleck *v.* Thompson, 28 R. I. 350.]

In South Carolina, the courts exercise an original jurisdiction over charitable trusts, whether the statute is in force in the State or not, and

rules proper for such trusts are applied as in other States. Att. Gen. *v.* Jolly, 1 Rich. Eq. 99; 2 Strob. 379; Combe *v.* Brazier, 2 Des. 431; Att. Gen. *v.* Clergy Soc., 8 Rich. Eq. 190; Gibson *v.* McCall, 1 Rich. L. 174. [Dye *v.* Beaver Creek Church, 48 S. C. 444.]

In Tennessee, the court exercises an original jurisdiction over charitable trusts, and the common rules applicable to public charities are approved; but there is a slight uncertainty in their application. Green *v.* Allen, 5 Humph. 170. The later cases, Franklin *v.* Armfield, 2 Sneed, 305, and Dickson *v.* Montgomery, 1 Swan, 348, proceed with more confidence and firmness. The court refers to an extraordinary jurisdiction and power which it may exercise in charity cases. See remarks upon this matter under New Jersey in this note. See also White *v.* Hale, 2 Cold. 77; Gass *v.* Ross, 3 Sneed, 211. [Johnson *v.* Johnson, 92 Tenn. 559; Heiskell *v.* Chickasaw Lodge, 87 Tenn. 668; Jones *v.* Green, 36 S. W. 729 (Tenn. 1895).]

In Texas, the court exercises an original and inherent jurisdiction over charities upon the principles of the statute. Hopkins *v.* Upshur, 20 Tex. 89; Ball *v.* Alexander, 22 Tex. 355; Paschal *v.* Acklin, 27 Tex. 173. [Nolte *v.* Meyer, 79 Tex. 351; Inglish *v.* Johnson, 42 Tex. Civ. App. 118,]

In Vermont, the statute is substantially the law of the State in relation to charitable trusts. Stone *v.* Griffin, 3 Vt. 400; Burr *v.* Smith, 7 Vt. 241; Penfield *v.* Skinner, 11 Vt. 296. [Sheldon *v.* Stockbridge, 67 Vt. 299.]

In Virginia, the statute was repealed; and the courts will establish no public trust for a charitable use except it comes within the strict rules of private trusts. This, of course, destroys all trusts in which a trustee has any discretion in selecting the objects of the charity. Gallego *v.* Att. Gen., 3 Leigh, 451; Seaburn *v.* Seaburn, 15 Grat. 243; Baptist Association *v.* Hart, 4 Wheat. 1; Wheeler *v.* Smith, 9 How. 55; Carter *v.* Wolf, 13 Grat. 301; Richmond *v.* Tayloe, Gil. 336. And see Venable *v.* Coffman, 2 West Va. 310; Janey *v.* Latane, 4 Leigh, 327; Carpenter *v.* Miller, 3 W. Va. 174. See also Levy *v.* Com'th, 23 Grat. 21. [Fifield *v.* Van Wyck, 94 Va. 557; Jordan *v.* Universalist Trustees, 107 Va. 79; Jordan *v.* Richmond Home, 106 Va. 710.]

[The same is true in West Virginia. Pack *v.* Shanklin, 43 W. Va. 304; Mong *v.* Roush, 29 W. Va. 119; Weaver *v.* Spurr, 56 W. Va. 95; Morris' Ex'r *v.* Morris' Devisees, 48 W. Va. 430.] (*a*)

(*a*) For decisions in other States which apply the principles which were incorporated in the Statute of Elizabeth, see People *v.* Cogswell, 113 Cal. 129; Fay *v.* Howe, 136 Cal. 599; Clayton *v.* Hallett, 30 Colo. 231; Colbert *v.* Speer, 24 App. D. C. 187; Trustees of Washburn College *v.* O'Hara, 75 Kan. 700; St. James Orphan Asylum *v.* Shelby, 60 Neb. 796; Nilson's Estate, 81 Neb. 809; *In re* John's Will, 30 Or. 494; Pennoyer *v.* Wadhams, 20 Or. 274; Staines *v.* Burton, 17 Utah, 331; *In re* Stewart's Estate, 26 Wash. 32; Rader *v.* Stubblefield, 43 Wash. 334; Harrington *v.* Pier, 105 Wis. 485, 50 L. R. A. 307; Kronshage *v.* Varrell, 120 Wis. 161; Hood *v.* Dorer, 107 Wis. 149.

CHAPTER XXIV.

TRUSTEES FOR BONDHOLDERS OF RAILWAYS AND OTHER CORPORATIONS.

§ 749. Nature of such trusts.
§ 750. Character of such trusts in England.
§ 751. Character of the mortgages at common law.
§ 752. Where an act of parliament confers the only power of borrowing.
§ 753. Where a person to whom a mortgage is made assigns a part of the mortgage debt.
§§ 754, 755. Power of corporations to mortgage their general property.
§ 756. The franchise of being a corporation cannot be alienated or mortgaged.
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§ 761. How they may foreclose the mortgage.
§§ 762, 763. Duties and responsibilities when possession is taken of the mortgaged property.

§ 749. WITHIN the last few years it has become common in this country to create trusts for bondholders. The development of railways has been rapid, and to operate and extend them often requires large sums of money in excess of their capital stock, or their ordinary floating debt. As it is impossible to obtain these large sums in the ordinary course of business from one source and without security, the bonds of the corporation are issued, under authority of the legislature, and sold in the market, and the franchise and property of the corporation conveyed in mortgage to one or more persons in trust to secure the purchasers and holders of the bonds. The bonds may amount to millions of dollars, and be scattered through the country, and even in foreign lands; but the trustees hold the conveyance of

the property in trust for all who have the bonds described or referred to in the mortgage. The corporation itself issues the bonds, and promises to pay the principal and interest at a time named. So long as the corporation pays the interest or the principal of the bonds, as agreed, the trustees have little or nothing to do. The general principles of the law of trusts apply to them.[1] They hold the security in trust for the bondholders, as *cestuis que trust;* and they must act in good faith, and for the best interests of all. They must take care that the property is not wasted, or depreciated, or rendered worthless as security. They should not acquire interests, or put themselves in positions or relations which are antagonistic or hostile to the interests of the bondholders. Doubtless they can purchase the bonds for which the mortgage stands as security in the open market: but they could not go among the bondholders and solicit the purchase of the bonds; for, holding the security for the bonds in their own hands, their position and influence would be such, and the danger of fraud so great, that a court of equity would not allow the bargain to stand. Their duty in all such respects would be governed by the general rules that affect all trustees, modified to meet the exigencies of the case. (*a*) It is only where there is a default made by the corporations in the payment of the bonds or the interest, and it is necessary for the bondholders to have recourse to the mortgage security, that their peculiar duties begin.[2]

§ 750. The usual practice in England is to mortgage only the tolls, accruing profits, or future calls of the corporation.[3] If the act of parliament only authorizes such a mortgage, or if the deed itself extends only to the tolls, profits, and future calls, receivers may be appointed to receive the tolls, profits, or

[1] Sturges *v.* Knapp, 31 Vt. 1.
[2] Ibid. [Commonwealth *v.* Susq. & Del. R. Co., 122 Pa. St. 306.]
[3] 8 and 9 Vict. c. 16.

(*a*) See Jones on Corporate Bonds and Mortgages, ch. 10; First Nat. Ins. Co. *v.* Salisbury, 130 Mass. 303, 310.

other income of the corporation; but an action of ejectment cannot be maintained for the possession against the corporation.[1] But, of course, there may be a mortgage authorized and made which will give the mortgagee a right to the possession of the property; in such case the mortgagee entitled to the possession may maintain an action against the mortgagor, or subsequent mortgagees.[2]

§ 751. If a mortgagee of the tolls and income is in possession of the property of the corporation, receiving the tolls and income, he will hold the receipts in trust for the holders of the bonds, claims, or debts for which the mortgage was made as security; and upon payment of all such claims or debts he will hold the income in trust for subsequent incumbrancers.[3] So where the mortgage is of an aliquot part of the income, the trustees will receive the toll or income for those entitled; but no action at law can be maintained against them for such moneys. They can be called to an account only in equity.[4] It sometimes happens that a mortgage of the tolls and income contains a power of sale of the whole undertaking. If a sale is made under such power in a first mortgage, it is a bar to all subsequent mortgages; and subsequent mortgagees can claim only the surplus in the hands of the first mortgagee after paying off all the claims for which the first mortgage stands as security.[5]

§ 752. Where the act of parliament confers upon corporations their only power of borrowing, they can borrow in no other manner;[6] and if the act of parliament authorizes a mortgage of

[1] Fairtitle *v.* Gilbert, 2 T. R. 169; Banks *v.* Booth, 2 B. & P. 219; Myatt *v.* St. Helen's and Runcorn Gap Railw., 2 Q. B. 364; 2 Railw. C. 756. See comments of Lord Chelmsford, in Wickham *v.* New B. & Canada Railw., 12 Jur. (N. S.) 34.

[2] Thompson *v.* Lediard, 4 B. & Ad. 137; Watton *v.* Penfold, 3 Q. B. 757; Levy *v.* Horne, id. 757.

[3] Ibid.

[4] Pardoe *v.* Price, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451.

[5] South-Eastern Ry. Co. *v.* Jortin, 31 Law Times, 44.

[6] Chambers *v.* Manchester & Milford Ry., 10 Jur. (N. S.) 700; Lowndes *v.* Garnett & Mosely Co., 33 L. J. Ch. 418.

the tolls or income, or of the corporate property, and a mortgage is executed in conformity with the act, no power is given to enter into personal covenants; therefore no action lies against the company upon the deed to recover the money loaned, but proceedings are confined to remedies against the property or tolls mortgaged.[1] But if there is no restriction in the act of parliament upon the power of borrowing, and the company has the usual power of borrowing money, and of securing payment by personal covenants, actions will lie against the corporation to recover the money,[2] and bondholders may maintain actions upon the covenants in the bonds.[3]

§ 753. If a mortgage is made to one person to secure several notes or bonds made to him, and the mortgagee assigns the notes or bonds to different persons, but continues to hold the mortgage security in his own name, he will hold it in trust for the several persons to whom he has assigned the mortgage notes, bonds, or other evidences of the debt due to him. So if a mortgage of a railway is made to a person to secure a large number of bonds given to him, and he assigns or sells the bonds to various persons, he becomes a trustee, by equitable construction, of the mortgage security for the several holders of the bonds, and such constructive trust is governed by the common rules that apply to such transactions. But such mortgages are not within the statutes in force in many States in relation to mortgages of railways in trust, as security for bonds to be issued by the corporation. In the case first stated, the bondholders cannot appoint a new trustee, nor have they any statute powers over such trust; but they must apply to the courts, and take such action, for

[1] Furness *v.* Caterham Ry., 25 Beav. 614; 27 Beav. 358; Pontet *v.* Basingstoke Canal Co., 3 Bing. N. C. 433; Long *v.* Mathieson, 2 Gif. 71.

[2] Hill *v.* Manchester Water Works, 2 B. & Ad. 544; Balckow *v.* Herne Bay Pier Co., 16 Eng. L. & Eq. 159; 1 El. & Bl. 74; Hart *v.* Eastern Union Ry., 8 Eng. L. & Eq. 544; 14 Eng. L. &. Eq. 535; 7 Exch. 246; Perkins *v.* Pritchard, 3 Ry. Cas. 95; Bryon *v.* Metropolitan Saloon Omnibus Co., 3 De G. & J. 123.

[3] Price *v.* Great Western Railw., 16 M. & W. 244; White *v.* Carmarthen, &c. Ry., 1 H. & M. 786.

the enforcement of it, as is necessary in the ordinary case of a private trust.[1]

§ 754. In the United States, the power of corporations to mortgage their property has been much considered. The discussions in courts have been prolonged upon the question, What can trustees take under a mortgage by a corporation? It seems to be well established, that corporations have a general right and power to mortgage their real and personal property to secure the payment of the purchase-money of such property,[2] or to secure their general debts.[3] And even if the charter of a railway or other corporation provides that the money to construct the road or other works of the corporation shall be raised by subscription or by the sale of a determined number of shares, or that new shares may be issued for additional funds, or that the shares shall not be assessed beyond one hundred dollars per share, the power of mortgaging is not excluded, but the corporations may raise money by a mortgage to trustees or otherwise.[4] The mortgage in such cases must be executed according to the rules and by-laws of the corporation, if there are any, or it will be void.[5]

§ 755. Upon general principles, as before stated, a corporation, being the absolute owner of its property, may sell, convey,

[1] *In re* Bondholders of the York and Cumberland R. R. Co., 50 Maine, 565.

[2] Susquehanna Bridge Co. *v.* General Ins. Co., 3 Md. 30; Lucas *v.* Pitney, 3 Dutch. 221; White *v.* Carmarthen and Cardigan Ry., 33 L. J. Ch. 93; Mobile & Cedar Point Ry. *v.* Tolman, 15 Ala. 472; Joy *v.* J. & M. Plank R. Co., 11 Mich. 155; Australian Auxil. S. Clipper Co. *v.* Mounsay, 4 K. & J. 733; Scott *v.* Colburn, 26 Beav. 276.

[3] Gordon *v.* Preston, 1 Watts, 385; *In re* Magdalena Steam Nav. Co., 1 John. (Eng.) 690; Coe *v.* Columbus &c. Railw., 10 Ohio St., 372, 412; Coe *v.* Peacock, 14 id. 187; 23 How. 117; Bardstown & Louisville Ry. *v.* Metcalfe, 4 Met. (Ky.) 199; Jackson *v.* Brown, 5 Wend. 590; De Ruyter *v.* St. Peter's Church, 2 Comst. 238; Central Bridge *v.* Bailey, 8 Cush. 319; Jowitt *v.* Lewis, 4 Lit. 160; Enders *v.* Board of Public Works, 1 Grat. 364.

[4] Union Bank *v.* Jacobs, 6 Humph. 515; Junction Railw. *v.* Ruggles, 7 Ohio St. 1.

[5] Gordon *v.* Preston, 1 Watts, 385; Richards *v.* Merrimack, &c. R. Co., 44 N. H. 135.

and mortgage it. Such rights are among the essential incidents to property, and they are inherent in property whether owned by corporations or private individuals. But when the legislature of a State charters corporations for public purposes, and authorizes them to take lands and build roads, to run trains of cars and receive tolls, such corporations undertake, in return for the privileges granted, to perform the duties for which they are chartered. The general right and ownership of property carries with it the right to sell it, or to convey it in mortgage, which may become an absolute sale by foreclosure. If the corporation makes a mortgage of all its property simply, without naming its franchise, can the mortgagee by foreclosure remove the property to another place, and prevent the corporation from performing its duties, or can the mortgagee use the property as the corporation used it? It is apparent that the removal of the property to another place would destroy the larger part of its value, as well as deprive the corporation of the power of exercising its franchise.

§ 756. It is said that the franchise of a corporation consists of two parts, or rather of two franchises distinct and independent of each other in their nature: the one is the franchise to be a corporation, to have a legal entity, a corporate name, and the right and power of suing and being sued, and of performing other acts requiring a legal existence as an independent being; the other is the franchise or privilege of doing a particular business in a certain manner, and of collecting or receiving tolls, fees, or compensation for doing such acts. It is conceded by all, that the right, privilege, or franchise to be a corporation cannot be sold, mortgaged, or assigned to any other person or body of persons. The State having granted this privilege to a particular body, it cannot be transferred to another body without the sanction of the power that granted it.[1]

[1] Bowman *v.* Walker, 2 McLean, 393; Bardstown, &c. Railw. *v.* Metcalfe, 4 Met. (Ky.) 200; 2 Redf. on Railw. 514 (3d ed.) n.; Coe *v.* Columbus, &c. Ry., 10 Ohio St. 372; State *v.* Boston, &c. Ry. Co., 25 Vt. 433; Hall *v.*

§ 757. It is well established that a corporation, like an individual, may mortgage its real and personal property, and the mortgagees acquire by foreclosure the absolute ownership of such property. If such property is disconnected from the general purposes of the corporation, no questions can arise. The mortgagees or trustees can enter upon and occupy and improve the property in the same manner that other property is improved. But if the property is essential to the business of the corporation, can the mortgagees or trustees enter and take such property and remove it, so far as it is personal, and sell the real estate? Or can they remove the rails and superstructure of the road-bed, and take away the power of the corporation to perform its duties to the public? If the mortgagees cannot do these things, can they use the property in the position in which it is placed? Can they operate the railway? Can they run trains of cars, carry passengers and freight, and receive fares or tolls? If the legislature has expressly authorized the corporation to execute a mortgage of all its property, including the franchise of operating the railway and receiving tolls, there can be little or no trouble in a legal point of view; but if the mortgage is executed without the special authority of the legislature, can the corporation mortgage its franchise to operate its road or receive

Sullivan Railw. Co., 21 Law Rep. 138; 2 Redf. on Railw. 517; Com'th *v.* Smith, 10 Allen, 456. Mr. Justice Curtis in Hall *v.* Sullivan Ry. Co., *ubi supra*, said: "Among the franchises of the company is that of being a body politic with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and, when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own, and manage a railway, and to take tolls thereon, are not necessarily corporate rights: they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable: Peter *v.* Kendall, 6 B. & C. 703; Com. Dig. Grant, C."

tolls, and what are the rights and powers of trustees under such mortgages? On the one side, the opinion has been expressed that a railway corporation may mortgage all its property, including its road-bed and the superstructure and the franchise of operating or using it as a railway, although the legislature granted no such power to the corporation in terms.[1] On the other hand, the opinion has been very largely entertained that a corporation cannot transfer the franchise of operating its road to another person or corporation, and thus escape the burden assumed by it towards the public.[2] The preponderance of au-

[1] Allen *v.* Montgomery Ry., 11 Ala. 437; Mobile & Cedar Point R. Co. *v.* Tolman, 15 Ala. 472; Pollard *v.* Maddox, 22 Ala. 321; Dunham *v.* Isett, 15 Iowa, 284; Hall *v.* Sullivan R. Co., 21 Law Rep. 138; Pierce *v.* Emery, 32 N. H. 484; Miller *v.* Rutland, &c. Railw. 36 Vt. 452; Bowman *v.* Walker, 2 McLean, 393; Dinsmore *v.* Racine, &c. Railw., 12 Wis. 649; Platt *v.* New York Railw., 26 Conn. 544; Union Bank *v.* Jacobs, 6 Humph. 515; Macon, &c. R. Co. *v.* Parker, 9 Ga. 377; Briggs *v.* Terrell, 12 Ired. 1; Watertown *v.* White, 13 Mass. 477; Fay, Petitioner, 15 Pick. 243; Felton *v.* Deal, 22 Vt. 170; McCauly *v.* Givens, 1 Dana, 261; 1 Greene (Iowa), 498; Clark *v.* Washington, 12 Wheat. 40; Bingham *v.* Weiderwax, 1 Comst. 509; 2 Kent, 305, 307; 1 Redf. Railw. 588; Enfield Toll Bridge *v.* Hartford, &c. Railw., 17 Conn. 40.

[2] Com'th *v.* Smith, 10 Allen, 456; Opinion of Justices, 9 Cush. 611; Salem Mill Dam *v.* Ropes, 6 Pick. 32; Treadwell *v.* Salisbury Mills, 7 Gray, 404; Whittenton Mills *v.* Upton, 10 Gray, 582; Arthur *v.* Commercial, &c. Bank, 9 Sm. & M. 394; State *v.* Commercial Bank, 13 Sm. & M. 569; Richards *v.* Merrimack, &c. Railw., 44 N. H. 127; Atkinson *v.* Marietta, &c. R. Co., 15 Ohio St. 21; State *v.* Mexican Gulf Railw., 3 Rob. (La.) 513; Hall *v.* Sullivan R. Co., 21 Law Rep. 138; Pierce *v.* Emery, 32 N. H. 484; Tippetts *v.* Walker, 4 Mass. 495; Worcester *v.* Western Railw., 4 Met. 564; Troy, &c. R. Co. *v.* Kerr, 17 Barb. 581; States *v.* Rives, 5 Ired. 297; Winch *v.* R. Co., 13 Eng. L. & Eq. 506; 5 De G. & Sm. 562; 7 Railw. Cas. 384; South Yorkshire, &c. R. Co. *v.* Great Northern Ry., 19 Eng. L. & Eq. 513; 3 De G., M. & G. 576; Beman *v.* Rafford, 6 Eng. L. & Eq. 106; 1 Sim. (N. S.) 550; Wheelock *v.* Moulton, 15 Vt. 519; Bennington Iron Co. *v.* Isham, 19 Vt. 230; Shrewsbury, &c. Railw. *v.* London & N. W. Ry., 21 Eng. L. & Eq. 319; 4 De G., M. & G. 115; 6 H. L. Ca. 113. It has been determined in a great number of cases, that the franchise of a corporation cannot be seized, sold, and transferred on execution against the corporation. Com'th *v.* Smith, 10 Allen, 456; States *v.* Rives, 5 Ired. 267; Seymour *v.* Milford, &c. Railw., 10 Ohio, 476; Winchester, &c. Turnpike Co., 5 B. Mon. 1; Ammont *v.* New Alexandria, &c. Turnpike Co., 13 S. & R. 212; Leedom *v.* Plymouth R. Co., 5 W. & S. 266; Susquehanna Canal Co. *v.* Bonham, 9

thority would seem to be against the power of a corporation to convey its franchise in mortgage, unless specially authorized to do so by the legislature. It is, however, worthy of observation that there is no case where the franchise of a corporation has been decreed to pass to trustees by mortgage of its franchise, not authorized by the legislature either in terms or by implication; and, on the other hand, there is no case where a mortgage of the franchise to trustees has been held invalid by reason of a want of power in the corporation to convey its franchise.

§ 758. The grant of power or authority to a corporation to mortgage its franchise need not be contained in its charter, as a subsequent act of the legislature will confer full power. And such grant of power is not required to be made in express terms. It is sufficient if the sovereign power assents to such mortgage. If, therefore, the mortgage is recognized by the legislature in any way as an existing and valid mortgage, it will be sufficient.[1] So a right of way may be mortgaged, and, upon default of payment, may be sold and transferred; but the original purpose for which such right of way was granted cannot be defeated.[2]

§ 759. When a mortgage to trustees is made by a railway corporation of its franchise and all its property, it frequently becomes an interesting question to determine what is embraced in the mortgage. In some cases, it has been determined that the rolling-stock of a railway, such as cars and locomotives, is accessory to the road-bed, station-houses, and franchise, and belongs to the real estate or road-bed of the corporation as fixtures, and cannot be seized, on execution against the company,

W. & S. 27; Tippetts *v.* Walker, 4 Mass. 596. But a statute may authorize an execution to be levied on such franchise. Mass. Gen. Stat. c. 68, §§ 26–34 [R. L. (1902), c. 109, §§ 41–51]; Com'th *v.* Tenth Mass. Turn., 5 Mass. 509.

[1] Shaw *v.* Norfolk County R. Co., 5 Gray, 179; Hall *v.* Sullivan, &c. R. Co., 21 Law Reporter, 138; Pierce *v.* Emery, 32 N. H. 484; Richards *v.* Merrimack River Railw., 44 N. H. 127; Chapin *v.* Vermont, &c. Ry., 8 Gray, 575.

[2] Junction R. Co. *v.* Ruggles, 7 Ohio St. 1.

and sold or removed.[1] In other cases, it has been held that where a mortgage of the franchise and property of a railway was authorized, and the deed in terms included all the property then owned by the company, or thereafter to be acquired, a creditor could not levy an execution upon property acquired after the execution of the mortgage, if such property was necessary to the use and enjoyment of the road and the other property accessory to it; and it was referred to a master to hear and report whether the property seized was necessary to the operation of the road.[2] In other cases, the personal property of a railway corporation, although necessary for the operation of the road, is held to be mere personal property, in no way attached or accessory to the road-bed or to the franchise, and that such personal property can be seized on execution, and sold like any other personal property, or like the personal property of any other owner.[3] But, however this may be finally determined, there seems to be no reason, upon principle, why a mortgage to trustees may not embrace all property subsequently acquired, if such property is absolutely essential to the operation of the road. The rule at law, that property not at the time owned by a mortgagor cannot be mortgaged by him, is a technical rule; and there is no reason why a railway mortgage to trustees for bondholders should not cover and embrace all the property necessary for the business of the corporation, although such property may have been acquired by the corporation after the date of the mortgage. Consequently it has been held, whenever the question has arisen,

[1] Farmer's Loan & Trust Co. *v.* Hendrickson, 25 Barb. 484; Palmer *v.* Forbes, 2 Ill. 300; Hunt *v.* Bullock, 23 Ill. 320; Pennock *v.* Coe, 23 How. 117; State *v.* Northern R. Co., 18 Md. 193; Farmers' Loan, &c. Co. *v.* Commercial Bank. 11 Wis. 207.

[2] Ludlow *v.* Hurd (Superior Court, Cincinnati), 2 Redf. on Railw. 542–545; Willink *v.* Morris Canal, &c. Co., 3 Green, Ch. 377; Pierce *v.* Emery, 32 N. H. 484; Coe *v.* Pennock, 6 Am. Law Reg. 27; 23 How. 117; Ammont *v.* New Alexandria, &c. Turnp. Co., 13 S. & R. 212; Phillips *v.* Winslow, 18 B. Mon. 431; Londenschlager *v.* Benton, 3 Grant's Cas. 384.

[3] Stevens *v.* Buffalo & N. Y. R. Co., 31 Barb. 590; Beardsley *v.* Ontario Bank, id. 619.

that, if the deed embraced subsequently acquired property, such property passed to the trustees.[1]

§ 760. Trustees for bondholders are governed by the general rules that govern trustees in the ordinary performance of the duties of a trust. They must consult the wishes and interests of the *cestuis que trust* or bondholders, and they may be removed, or enjoined, or ordered to proceed in the performance of their duties, as the exigencies of the case may require. (*a*) Thus, if they refuse to take steps to foreclose the mortgage after the bonds have matured, they may be removed, and others appointed in their place.[2] But courts of equity may refuse to give the railway and its property into the hands of the trustees for the bondholders, or to appoint receivers, although there is a breach of the terms of the mortgage, and a default in paying the interest upon the bonds. If there has been such a course of dealing between the bondholders and trustees on the one side, and the railway company on the other, or if there are any other circumstances which render a sale or possession by the trustees inequitable or improper, or hazardous to the best interests of all

[1] Phillips *v.* Winslow, 18 B. Mon. 431; Howe *v.* Freeman, 14 Gray, 566; as to the point of after-acquired property. Coe *v.* Peacock, 14 Ohio St. 187; Coe *v.* Columbus, &c. Railw., 10 id. 372; Coe *v.* Knox Co. Bank, id. 412; Coe *v.* McBrown, 22 Ind. 252; Pierce *v.* Emery, 32 N. H. 484; State *v.* Northern Ry. Co., 18 Md. 193; First Mortgage Bondholders *v.* Maysville, &c. Ry., 9 Am. Railw. Times, No. 31; Smith *v.* Atkins, 18 Vt. 461. A somewhat different doctrine was held in Beardsley *v.* Ontario Bank, 31 Barb. 619; Stevens *v.* Buffalo & N. Y. R. Co., id. 590. And see State *v.* Somerville, &c. R. Co., 4 Dutch. 21; State *v.* Mexican Gulf R. Co., 3 Rob. (La.) 513; Buffalo R. R. Co. *v.* Lampson, 47 Barb. 533; Williamson *v.* New Albany, &c. R. Co., 1 Bissell, 207.

[2] In Matter of Mechanics' Bank, 2 Barb. S. C. 446.

(*a*) Commonwealth *v.* Susq. & Del. R. Co., 122 Pa. St. 306; O'Beirne *v.* Allegheny, etc. R. Co., 151 N. Y. 372; Seibert *v.* Minneapolis, etc. Ry. Co., 52 Minn. 148; Manhattan Tr. Co. *v.* Seattle Coal Co., 19 Wash. 493; *In re* Chickering, 56 Vt. 82; Rhinelander *v.* Farmers' L. & Tr. Co., 172 N. Y. 519; Dillaway *v.* Boston Gas Light Co., 174 Mass. 80, 98; First Nat. Ins. Co. *v.* Salisbury, 130 Mass. 303; Citizens' Bank *v.* Los Angeles, etc. Co., 131 Cal. 187.

parties, the court will refuse to interfere, but will make such orders as will protect the equitable rights of the parties.[1] (a)

§ 761. If the deed to the trustees is a mere trust for sale in case the bonds are not paid according to their terms, the trustees can do nothing but sell the property at public or private sale as the provisions of the trust-deed direct;[2] but if the trust-deed is a mortgage of the road-bed franchise and other property, the trustees may take possession of the property and foreclose the mortgage by strict foreclosure, according to the rules of law, although the mortgage contains a power of sale and full directions as to the manner in which the trustees shall proceed in the sale. In this respect, the mortgage of a railway with its franchise and other property does not differ from mortgages of real estate. The power to sell contained in the deed does not exclude other modes of foreclosure provided by law, but is in addition to them; and trustees may proceed to foreclose in the manner in which they may judge to be most beneficial to the interests committed to their charge. So, if the deed provides that they shall sell in a certain manner, they may apply to the court for a decree of sale.[3] If the deed gives possession to the mortgagor until default, and provides that on default the trustees might enter and manage, dispose of the lands, etc., then until

[1] Williamson *v.* New Albany, &c. R. Co., 1 Bissell, 207.

[2] Jenkins *v.* Row, 11 Eng. L. & Eq. 297; 5 De G. & S. 107; 16 Jur. 1131.

[3] Hall *v.* Sullivan R. Co., 21 Law Rep. 138; Shaw *v.* Norfolk Co. R. Co., 5 Gray, 162; Chapin *v.* Vermont & Mass. R. Co., 8 Gray, 575; Balfe *v.* Lord, 2 D. & W. 480; Slade *v.* Rigg, 3 Hare, 35; Wayne *v.* Hanham, 4 Eng. L. & Eq. 147; 9 Hare, 62; 15 Jur. 506; Croton, &c. Co. *v.* Ryder, 1 Johns. Ch. 611; Newberg, &c. Co. *v.* Miller, 5 Johns. Ch. 111; Boston, &c. Co. *v.* Boston, &c. Co. R., 16 Pick. 625.

(a) A person who bids at a foreclosure sale, under an agreement with bondholders to hold the property in trust on being paid the amount of his bid, holds his title in trust for all the bondholders. Cushman *v.* Bonfield, 139 Ill. 219. In New York, trustees under a mortgage for bondholders have been allowed compensation for their services at the rate usually awarded to executors and administrators. Woodruff *v.* New York, &c. R. Co., 129 N. Y. 27.

default and entry the trustees cannot make a contract to sell the property.[1]

§ 762. It sometimes becomes the duty of trustees to take possession of the mortgaged property and franchise of a railway, and to operate and use the same for the accommodation of the public, and for the benefit of the bondholders, until a sale can be effected to another corporation authorized to take the property; or until the bondholders can be organized into a body capable of managing such an interest. (*a*) In such cases, the trustees will be subject to all the liabilities of carriers of passengers and freight, and in case of loss or damage by accidents, they will be in the same situation as any other owners and managers of a railroad. This rule is carried to the extent of making receivers appointed by the court liable for such losses as other managers of railways are responsible for. There can be no other rule, since persons having no control can be guilty of no negligence. If, therefore, redress must be had anywhere, it must be had against those who have the management and direction of the business, and who may be guilty of neglect or carelessness.[2]

§ 763. Notwithstanding the liabilities thus assumed by trustees for bondholders, if they accept the office they must perform the duties of the trust. When they consent to accept a conveyance or mortgage in trust, they take the office with the possibility of being called upon to perform such duties. They must take care that the security is not depreciated or destroyed by a stopping of the operations of the corporation; and courts of

[1] Foster *v.* Boston, 133 Mass. 143, 150.

[2] Barter *v.* Wheeler, 49 N. H. 32; Rogers *v.* Wheeler, 2 Lansing, 486; 43 N. Y. 598; Lamphear *v.* Buckingham, 3 Conn. 237; Sprague *v.* Smith, 29 Vt. 421; Paige *v.* Smith, 99 Mass. 395; Blumenthal *v.* Brainard, 38 Vt. 408; 1 Chitty, Plead. 38; Jones *v.* Seligman, 81 N. Y. 149.

(*a*) After taking possession upon default they are trustees for the corporation as well as for the bondholders and will not be allowed to traffic in the bonds for their own profit. Railroad *v.* Elliott, 57 N. H. 397, 435.

equity will compel them to take such steps as the safety of the bondholders requires. On the other hand, the court will sustain any reasonable arrangement that they make for continuing the operations of the corporation, and for the security of the bondholders; as, where they make a lease to a connecting road, or to other persons experienced in such matters, and capable of running a railroad.[1]

[1] Bruges *v.* Knapp, 25 Vt. 1.

CHAPTER XXV.

TRUSTEES FOR SALE.

§ 764. Trustees may not sell without an express or implied power.
§ 765. Character of powers to sell.
§ 766. Form of such powers.
§ 767. A power of sale is not a "usual" power.
§§ 768, 769. The extent of such powers.
§ 770. How such powers are to be executed.
§§ 771–773. Within what time such powers may be executed.
§ 774. In what manner trustees may sell.
§ 775. Tenant for life as agent of the trustees.
§ 776. Rights of the tenant for life.
§§ 777, 778. Where they are to sell with the consent of the *cestui que trust* or tenant for life.
§ 779. Cannot delegate the power of sale.
§§ 780, 781. Whether they may sell at private sale or at auction.
§ 782. What notice must be given.
§§ 783–785. The power must be exercised as given.
§ 786. As to conditions of the sale.
§ 786 *a*. Whether sale may be on credit.
§ 787. Who may make a good title.

§ 764. A TRUSTEE is seldom justified in selling the trust estate without an express or implied authority conferred upon him by the instrument of trust. (*a*) If no power of sale is con-

(*a*) Bremer *v.* Hadley, 196 Mass. 217; Huntington *v.* Spear, 131 Ala. 414; Murray *v.* Rodman, 76 S. W. 854 (Ky. 1903); Roe *v.* Vingut, 117 N. Y. 204; Goad *v.* Montgomery, 119 Cal. 552; Potter *v.* Ranlett, 116 Mich. 454. The same is true of mortgaging or pledging. Byron Reed Co. *v.* Klabunde, 76 Neb. 801; Tuttle *v.* First Nat. Bank, 187 Mass. 533. As to the effect on the legal title, where a trustee without express or implied authority to sell makes a sale, see Amberson *v.* Johnson, 127 Ala. 490. As to sales and conveyances by trustees, see the extended and valuable note to Tyler *v.* Herring (Miss.), 19 Am. St. Rep. 263, 266. By statute in Rhode Island trustees are given power to change all trust investments unless a contrary intention appears in the trust instrument. R. I. Gen. Laws (1909), c. 259, § 12. See also Ky. Stats. (1909), § 4169, as to stocks, bonds and other securities.

tained in the instrument, courts of equity, upon cause shown, may decree a sale. (*a*) In such case all parties in interest should

(*a*) Under their general supervisory power over trusts, courts of equity undoubtedly have power to authorize or direct sales or other dispositions of trust property, when no express or implied power to sell has been given to the trustee and even when a sale has been expressly forbidden. Asylum *v.* Lefebre, 69 N. H. 238; Johnson *v.* Buck, 220 Ill. 226; Shirkey *v.* Kirby, 66 S. E. 40 (Va. 1909). See also cases cited *infra*, this note. But in general this power will be exercised only where a sale is necessary to preserve the *corpus* of the trust property or where unforeseen circumstances have made a sale necessary for the carrying out of the scheme of the trust. Smith *v.* Smith, 118 N. C. 735; Johnson *v.* Buck, 220 Ill. 226. See Pennington *v.* Metropolitan Museum, 65 N. J. Eq. 11. See also *infra*, this note. The rule is stated as follows in Ruggles *v.* Tyson, 104 Wis. 500: "Rather than that the scheme of the creator of such estate shall entirely fail by reason of some circumstances not foreseen by him, and provided for, the court may intervene, but only for the purpose of preserving, and so far as necessary to preserve, the property. If it cannot be preserved in the form intended, it may be preserved in its equivalent. It is not the interests in remainder, as such interests may appear to the court, that are to be considered and conserved, but their interests as the creator of the estate in remainder provided for them." In this case the court directed a sale where the life tenant had so incumbered the life estate with mortgages that there was no income left to pay taxes.

In Mayall *v.* Mayall, 63 Minn. 511, where the court ordered a sale of city property not producing enough income to pay taxes, it was said, "The inherent power of a court of equity to do these things in such a case rests upon the paramount consideration of necessity and 'high expediency.' Neither statutory authority nor express authority in the deed or other instrument of trust, is necessary. . . . The distinction must be kept in mind between a power to sell or mortgage merely for the benefit of the *cestui que trust*, and the power to sell or mortgage to preserve the trust from complete destruction. The court will always exercise the power for the latter purpose, while it might not, and usually would not, for the former."

In Johns *v.* Johns, 172 Ill. 472, 485, in refusing to order a sale the court said, "The mere fact that a sale of the land might benefit the beneficiaries more than compliance with the terms of the trust does not furnish a reason for a decree ordering the title of the land to be disposed of in opposition to the manifest wish of the donor. The duty of the court in dealing with such a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject matter of the trust, or some other like necessity, demands interference with his will and intention."

Under this power the court of Illi-

have notice, and parties not *sui juris* should have guardians *ad litem* appointed.[1] Any form of instrument which imposes duties on the trustee which he cannot perform without a sale will necessarily create a power of sale in the trustee, as when land is given to a trustee to pay the debts of the grantor.[2] If the instrument of trust contains an express or implied power, the trustee may enter into contracts of sale without the sanction of the court;[3] (*a*) and if the trustee is authorized to convey the

[1] Bush *v.* Bush, 2 Duv. 269.

[2] Cherry *v.* Greene, 115 Ill. 591. [See *infra*, § 766.]

[3] Bath *v.* Bradford, 2 Ves. 590; Low *v.* Brinnan, 19 Iowa, 193.

nois has authorized a lease for 99 years of city property which needed to be rebuilt in order to make it pay. Denegre *v.* Walker, 214 Ill. 113; Marsh *v.* Reed, 184 Ill. 263. See also Gomez *v.* Gomez, 147 N. Y. 185.

In Johns *v.* Herbert, 2 App. D. C. 485, in reference to an investment which the trustee had been given no power to change, it was said that he had the duty to watch the investment with reasonable care and diligence and to apply to the court promptly for leave to change it whenever his judgment, as a prudent business man, should have prompted thereto."

In many jurisdictions the power of the court to decree sales of trust property when clearly for the benefit of all parties beneficially interested, has been greatly enlarged by statute. See Gen. Statutes Conn. § 253; Townsend *v.* Wilson, 77 Conn. 411; Burge *v.* Fidelity Trust, etc. Co., 112 Ky. 683; Lenow *v.* Arrington, 111 Tenn. 720; Va. Code (1904), § 2616.

A sale ordered by the court does not confer upon the trustee power to sell the property in which he reinvests the proceeds; that is held by him upon the terms of the original trust unless the court otherwise directs. Bremer *v.* Hadley, 196 Mass. 217. But when the power to sell for reinvestment is derived from the trust instrument, either expressly or by implication, it is not usually exhausted by one sale of the property but continues as to the reinvested proceeds. Owsley *v.* Eads' Trustee, 57 S. W. 225 (Ky. 1900); Sweet *v.* Schliemann, 88 N. Y. S. 916, 95 App. Div. 266.

(*a*) Specific performance of a trustee's executory contract of sale will sometimes be decreed when he has express or implied power to make the sale. Judge *v.* Pfaff, 171 Mass. 195; Connely *v.* Haggerty, 65 N. J. Eq. 596. See also Shannon *v.* Bradstreet, 1 Sch. & Lef. 52; Clarke *v.* Moore, 1 Jon. & Lat. 723; Lowe *v.* Swift, 2 B. & B. 529, 535. But specific performance of such a contract has been refused to a *bona fide* purchaser when the trustee, who had the discretionary power of sale, refused to convey on the ground that the sale would be prejudicial to the interests of the beneficiaries. Givens *v.* Clem, 107 Va. 435. To

estate to the *cestui que trust*, such conveyance will be valid, although there is a gift over in case the *cestui que trust* dies before the termination of the trust;[1] but if the trust is before the court by a bill filed for its execution, the whole matter of the trust is within its jurisdiction, and the trustee cannot sell without the sanction of the court, even if the instrument of trust gives him an express power.[2] But if the cause is before the court for the single purpose of determining the validity of a previous sale, and such sale is set aside, the trustees may make a new sale without a special order.[3] It is always the duty of the trustee to sell no more of the trust property than is necessary to satisfy the trust. He may sell when the owner so requests, or when his interests require it, if discretionary power of sale has been given by him to the trustee, but he must not go beyond these sanctions.[4]

§ 765. The power of sale given to trustees is either appendant to the legal estate, and takes effect out of it; or it is a mere collateral authority, unaccompanied with any interest in the property.[5] (*a*) As, where a testator devises lands to his execu-

[1] Sellew's App., 36 Conn. 186, 196.

[2] Walker *v.* Smallwood, Amb. 676; Raymond *v.* Webb, Lofft, 66; Drayson *v.* Pocock, 4 Sim. 283; Culpepper *v.* Aston, 2 Ch. Cas. 116.

[3] Reeside *v.* Peter, 35 Md. 221.

[4] Curry *v.* Hill, 18 W. Va. 370.

[5] Stafford *v.* Buckley, 2 Ves. 179; Warneford *v.* Thompson, 3 Ves. Jr.

the same effect see Jones *v.* Holladay, 2 App. D. C. 279; Moeller *v.* Poland, 80 Ohio St. 418.

An option to purchase given by a trustee to a lessee, to be exercised at any time before the end of a lease for twenty-one years, has been held not to be binding on the trust property. *In re* Armory Board, 60 N. Y. S. 882.

As to the effect of a trustee's deed not delivered until after his legal estate had terminated by termination of his trusteeship, see Anderson *v.* Messinger, 146 Fed. 929, 77 C. C. A. 179. The court held that the deed could not pass the legal title, and that under the circumstances of the case the equities of the grantee in the deed were not such that the court would compel a conveyance of the legal title by the remainder-men.

(*a*) A trustee who has not power to convey in fee simple cannot create a permanent easement in

tors or trustees to sell, the lands pass to them coupled with the power to sell; but if he directs that his *executors shall* sell the land they take a mere naked power to sell, and the freehold descends to the heir to be divested by the execution of the power.[1] So if there is no direct gift of the land to the executors or trustees, vesting the title in them, but a simple devise of the land to be sold by the executors, the land descends to the heir, and the executors have but a naked power. In all such cases, the heirs are entitled to the rents and profits until the power is executed and their title divested.[2] The same rule applies where a trustee is the devisee.[3] If the power to sell or appoint is in gross, or

513; Forbes *v.* Peacock, 11 Sim. 152; Bolton *v.* Jenks, 6 Rob. (N. Y.) 166; Reid *v.* Gordon, 35 Md. 184; Prather *v.* McDowell, 8 Bush, 46. [Headen *v.* Quillian, 92 Ga. 220; Henderson *v.* Williams, 97 Ga. 709.]

[1] Year Book, 9 Hen. VI. 13 b; 24 b; Litt. § 169; Co. Litt. 113 a; 181 b; Howell *v.* Barnes, Cro. Car. 382; Yates *v.* Compton, 2 P. Wms. 308; Bergen *v.* Rennall, 1 Caines Cas. 16; Jackson *v.* Schauber, 7 Cow. 187; Peck *v.* Henderson, 7 Yerg. 18; Peter *v.* Beverly, 10 Pet. 532; 1 How. 132; Ferebere *v.* Proctor, 2 Dev. & Bat. 439; 1 Ired. Eq. 143; Jackson *v.* Burr, 9 Johns. 104; Tainter *v.* Clark. 13 Met. 220; Haskell *v.* House, 3 Brevard, 242; Zebach *v.* Smith, 3 Bin. 69; White *v.* Howard, 52 Barb. 294. [Bradt *v.* Hodgdon, 94 Me. 559.]

[2] Thompson *v.* Gaillord, 3 Rich. 418; Allen *v.* Dewitt, 3 Comst. 276; Bradshaw *v.* Ellis, 2 Dev. & B. Eq. 20; Lindenberger *v.* Matlock, 4 Wash. C. C. 278; Marsh *v.* Wheeler, 2 Edw. Ch. 156; Taylor *v.* Benham, 5 How. 269; Braman *v.* Stiles, 2 Pick. 474; McKnight *v.* Winsor, 38 Mo. 132; White *v.* Howard, 52 Barb. 294; Chamberlain *v.* Taylor, 105 N. Y. 185. A trust to executors merely to mortgage is good in New York only when for the benefit of legatees or to discharge a burden from the land (1 R. S. 728, § 55), and such trusts even when valid are only powers, and do not pass the estate to the trustees, or suspend the right of alienation, or prevent the vesting of the property in the heirs or devisees. Weeks *v.* Cornwall, 104 N. Y. 325.

[3] Schwartz's Estate, 14 Penn. St. 49; Guyer *v.* Maynard, 6 Gill & J. 420. In Pennsylvania, the rule is changed by statute 1834: Purdon's Dig. 283 [1 Purdon's Dig. (13th ed.), p. 1099, § 93]; and a power of sale vests the title in the trustee or executor, and he may collect the rents. Carpenter *v.* Cameron, 7 Watts, 51; Cobb *v.* Biddle, 14 Penn. St. 444; Blight *v.* Ewing, 26 id. 135. In New York, the rule is established the other way,

the trust estate, as by a voluntary grant to a railroad. Narron *v.* Wilmington & W. R. Co., 122 N. C. 856.

belongs to a person having an interest in the estate, such person may relinquish it; but if it is collateral simply, the donee of the power cannot extinguish it.[1]

§ 766. No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee.[2] Thus an assignment in trust to pay debts will necessarily imply a power of sale, though none is given in words.[3] A devise and direction to divide and pay over the shares to legatees, where a division is impracunless they are specially authorized to take the rents and profits. Rev. Stat. pt. ii, c. 1, tit. 2, art. 2, § 56 [IV Consol. Laws (1909), p. 3391, § 97]; White *v.* Howard, 52 Barb. 294; Ford *v.* Belmont, 7 Rob. 97; Bolton *v.* Jenks, 6 Rob. 166; Pennoyer *v.* Shelden, 4 Blatch. 316. In all the United States, there are provisions for sale of real estate by administrators and executors for payment of debts and legacies by application to courts of probate; and so guardians may sell by decree of probate courts. In all these cases, the heirs, devisees, or wards hold the lands until the decree of the court is executed by a sale. Mr. Kent seems to think that the distinction between a devise of land to a trustee to sell, and a devise of a power to a trustee to sell land, is shadowy. 4 Kent, 321, n.

[1] Norris *v.* Thompson, 4 Green, Ch. 314; Smith *v.* Death, 5 Madd. 317; Hillyard *v.* Miller, 10 Penn. St. 326; Albany's Case, 1 Rep. 111; West *v.* Berry, 1 R. & M. 436; Miles *v.* Knight, 12 Jur. 666; Bickley *v.* Guest, 1 R. & M. 440; Horner *v.* Swann, 1 T. & R. 430.

[2] Going *v.* Emery, 16 Pick. 11; Williamson *v.* Suydam, 6 Wall. 723; Rankin *v.* Rankin, 36 Ill. 293; Hamilton *v.* Buckminster, L. R. 3 Eq. 323; State *v.* Cincinnati, 16 Ohio St. 169; Fluke *v.* Fluke, 1 Green, Ch. 478; Macomb *v.* Kearney, id. 189. [McDonald *v.* Shaw, 81 Ark. 235; Flinn *v.* Frank, 8 Del. Ch. 186; Cherry *v.* Greene, 115 Ill. 591; Steinke *v.* Yetzer, 108 Iowa, 512; First Nat. Bank *v.* Lee, 66 S. W. 413 (Ky. 1902); Robinson *v.* Robinson, 105 Me. 68, 72 A. 882; Smith *v.* Haynes, 202 Mass. 531; Varick *v.* Smith, 69 N. J. Eq. 505; Casselman *v.* McCooley, 73 N. J. Eq. 253; Wood *v.* Lembcke, 72 N. J. Eq. 651; Browning *v.* Stiles, 65 A. 457 (N. J. Eq. 1906); Salisbury *v.* Slade, 160 N. Y. 278; Corse *v.* Chapman, 153 N. Y. 466, 473; Burnham *v.* White, 102 N. Y. S. 717, 117 App. Div. 515; Crawford *v.* Wearn, 115 N. C. 540; Foil *v.* Newsome, 138 N. C. 115; *In re* Curtis, 26 R. I. 580; Weld *v.* Weld, 23 R. I. 311; Mimms *v.* Delk, 42 S. C. 195. See Green *v.* Bissell, 79 Conn. 547.]

[3] Wood *v.* White, 4 M. & Cr. 481. [Cherry *v.* Greene, 115 Ill. 591.]

ticable, implies a power to sell. (*a*) A mere direction to divide is not enough: there must be some further active duty to perform.[1] So any form of trust from which a power to convey can be inferred will authorize a sale:[2] as where a direction is given to sell personal estate, and invest the proceeds in land which is to remain personalty for the purposes of the trust, the trustees have a power of sale over the land purchased;[3] or where a will contained these words, "I sell to A. B. a parcel of land described, for six thousand dollars, if my executor is satisfied with the payment," it was held that a power of sale by the executor was implied;[4] but a power of sale given in a will does not apply to lands which the testator has already made a written contract to sell,[5] though it may apply to lands received in place of those to which the original power applied.[6] If a trustee is required to hold the capital for remainder-men, he has implied power to sell transient securities, as, for example, a note maturing within a year,[7] in order to make a permanent investment. (*b*) The

[1] Winston *v.* Jones, 6 Ala. 550; Craig *v.* Craig, 3 Barb. Ch. 76; Moore *v.* Lockett, 2 Penn. St. 69; Clark *v.* Riddle, 11 S. & R. 311; Scott *v.* Steward, 27 Beav. 369; Mapps *v.* Tyler, 43 Barb. 421; Rankin *v.* Rankin, 36 Ill. 293. [Moll *v.* Gardner, 214 Ill. 248.]

[2] South Scituate Savings Bank *v.* Ross, 11 Allen, 443.

[3] Tait *v.* Lathbury, L. R. 1 Eq. 174; Stockbridge *v.* Stockbridge, 11 Allen, 244.

[4] Jones *v.* Jones, 2 Beas. 236.

[5] Roome *v.* Phillips, 27 N. Y. 357.

[6] Price *v.* Huey, 22 Ind. 18.

[7] Mason *v.* Bank of Commerce, 90 Mo. 452.

(*a*) See Heard *v.* Reed, 169 Mass. 216; Parker *v.* Seeley, 56 N. J. Eq. 110, 115.

(*b*) Power to sell may be implied as to certain kinds of property included in the trust estate when it will not be implied as to other kinds included in the same estate, *e. g.* power to sell personalty or certain kinds of personalty only, or power to sell unproductive real estate when the main purpose of the trust is for maintenance. Jones *v.* Atchison, Topeka, etc. R. Co., 150 Mass. 304. The decisions show a strong inclination of the courts to imply a power of sale whenever a sale would be in aid of the purposes of the trust, unless there is clear indication of an intention not to give a power of sale. See Robinson *v.* Robinson, 105 Me. 68, 72 A. 882, and cases cited *infra*. In Robinson *v.* Robinson, 105 Me. 68, 72 A. 882, the court

trustees of a local M. E. church in the United States have power under its book of discipline to mortgage or sell the church premises to pay a debt incurred in building the church.[1] If a widow waives the provisions made for her in a will, a power of sale in the will is not thereby invalidated;[2] and if a trustee for sale dies before the execution of his trust, a successor may be appointed to carry the trust or sale into execution.[3]

§ 767. If a will directs an estate to be settled "to uses in strict settlement," a power of sale cannot be introduced into the settlement, even with the consent of the tenant for life. If the will gives direction for the insertion of all proper powers and authorities for *making leases*, and doing other acts according to circumstances, a power of sale cannot be inserted.[4] But where marriage articles contained a provision for a settlement "with all the usual and proper powers," it was held that powers of sale and exchange were properly introduced.[5] In such articles, if there is no positive direction for the insertion of powers of sale, or at least no direction for the insertion of all usual and proper powers, powers of sale cannot be introduced.

§ 768. A trust with a power of sale "out and out" or to reinvest will not authorize a mortgage;[6] and a trust for sale, with nothing to negative the settlor's intention to convert the estate

[1] Bushong *v.* Taylor, 82 Mo. 660.

[2] Huyler *v.* Kingsland, 3 Stockt. 406.

[3] Buchanan *v.* Hart, 31 Tex. 647.

[4] Brewster *v.* Angell, 1 J. & W. 625; Horn *v.* Barton, Jac. 437.

[5] Peake *v.* Penlington, 2 V. & B. 311; Hill *v.* Hill, 6 Sim. 136; Williams *v.* Carter, 2 Sugd. Pow. App. 23; 2 Sugd. Pow. 484.

[6] Stroughill *v.* Anstey, 1 De G., M. & G. 645; Page *v.* Cooper, 16 Beav. 400; Green *v.* Claiborne, 83 Va. 386. [Butler *v.* Gazzam, 81 Ala. 491; If, however, a power of sale has been expressly withheld or cannot be implied, mere desirability of a sale will not give the trustee power. Johns *v.* Johns, 172 Ill. 472.

was of opinion "that the words 'invest and manage' properly impart and imply a power of sale (of real estate), unless a contrary intention on the part of the testator can be found in the will taken as a whole."

absolutely, will not authorize the trustees to execute a mortgage.[1] (a) If the trustee and *cestui que trust* unite in mortgaging the property in breach of the trust, they cannot set up the breach of the trust as a defence to the mortgage.[2] But where an estate is devised to trustees, charged with debts, and subject thereto upon trust for certain parties, so that a sale, though it may be authorized and required, is not the testator's sole object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell.[3] A power to "sell and dispose" gives the power

Townsend *v.* Wilson, 77 Conn. 411; Kent *v.* Morrison, 153 Mass. 137; Price *v.* Courtney, 87 Mo. 387; Griswold *v.* Caldwell, 73 N. Y. S. 2, 65 App. Div. 371; Willis *v.* Smith, 66 Tex. 31; Norris *v.* Woods, 89 Va. 873.]

[1] Ibid.; Haldenby *v.* Spofforth, 1 Beav. 390; 1 Eng. Jur. (Am. ed.) 198; Devaynes *v.* Robinson, 24 Beav. 86; Eland *v.* Baker, 29 Beav. 137; Davey *v.* Durant, 1 De G. & J. 535; Hubbard *v.* German Cath. Cong., 34 Iowa, 31; Bloomer *v.* Waldron, 3 Hill, 361; Waldron *v.* McComb, 1 Hill, 111; Wood *v.* Goodridge, 6 Cush. 117; Russell *v.* Russell, 36 N. Y. 581; Albany Ins. Co. *v.* Bay, 4 Comst. 9; Coutant *v.* Servoss, 3 Barb. 133; 4 Kent, 345; Cummings *v.* Williamson, 1 Sandf. Ch. 17; Williams *v.* Woodard, 2 Wend. 492; Tyson *v.* Latrobe, 42 Md. 325; Stokes *v.* Payne, 58 Miss. 614; Paine *v.* Barnes, 100 Mass. 470; Mills *v.* Banks, 3 P. Wms. 9; Butler *v.* Duncomb, 1 id. 448; Lowry *v.* Tiernan, 2 H. & G. 74; Dolan *v.* Mayor of Balt., 4 Gill, 394; Hault *v.* Townshend, 31 Md. 338; Stroughill *v.* Anstey, 1 De G., M. & G. 665; Ferry *v.* Laible, 31 N. J. Eq. 567. [Potter *v.* Hodgman, 80 N. Y. S. 1056, 81 App. Div. 233 (affirmed 178 N. Y. 580).] In Pennsylvaina, a different rule prevails, founded upon the old case of Lancaster *v.* Dolan, 1 Rawle, 231, as a rule of property. See the rule discussed in the late case of Zane *v.* Kennedy, 73 Penn. St. 183; and see Pa. Ins. Co. *v.* Austen, 42 id. 24; Watson *v.* James, 15 La. An. 386; Goehring's App., 81 Pa. St. 284.

[2] Rider *v.* Sisson, 7 R. I. 341; Colesbury *v.* Dart, 61 Ga. 620. [See Sprague *v.* Betz, 44 Wash. 650.]

[3] Ball *v.* Harris, 4 M. & Cr. 264; 8 Sim. 485; Holme *v.* Williams, id. 557; Lancaster *v.* Dolan, 1 Rawle, 231; Williams *v.* Woodard, 2 Wend. 492; Bootle *v.* Blundell, 1 Mer. 193, 212; Britton *v.* Lewis, 8 Rich. Eq. 271; Bogert *v.* Hertill, 4 Hill, 492; Duval's App., 38 Penn. St. 112; Earl of Oxford *v.* Abemarle, 15 Jur. 811. [See also *In re* Bellinger [1898], 2 Ch. 534; Roberts *v.* Hale, 124 Iowa, 296; Gilbert *v.* Penfield, 124 Cal. 234.]

(a) Or a pledge. First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459; Tuttle *v.* First Nat. Bank, 187 Mass. 533. But it has been held that a trustee with authority to invest in real estate but with no general authority to mortgage may execute a valid mortgage back for an unpaid portion of the purchase price. Hannah *v.* Carnahan, 65 Mich. 601.

to mortgage,[1] (*a*) but otherwise if the power is to sell in order to reinvest;[2] the *cestui sui juris* may, however, confirm and ratify a mortgage made by the trustee without authority.[3] Where the sale is for the purpose of raising a particular charge, and the estate is settled subject to that charge, it may be proper to raise the money by mortgage, and the court will support a mortgage as a *conditional* sale within the power, and as a proper mode of raising the money.[4] Where an estate is devised to apply the rents for a term of years, in discharging incumbrances, and if, for any reason whatever, in the opinion of the trustees a sale was necessary, "they were authorized to sell;" a purchaser cannot object that the amount of the incumbrances did not justify a sale of the whole; for the necessity depended upon the opinion of the trustees, and the conveyance is evidence that they thought it necessary.[5] On the other hand, a trust to raise money by mortgage will not authorize a sale, though it would be more

[1] Waterman *v.* Baldwin, 68 Iowa, 255. [Kent *v.* Morrison, 153 Mass. 137; Jackson *v.* Everett, 58 S. W. 340 (Tenn. 1894); Lueft *v.* Lueft, 129 Wis. 534. But see O'Brien *v.* Flint, 74 Conn. 502.]

[2] Wilson *v.* Md. Life Ins. Co., 60 Md. 150. [Price *v.* Courtney, 87 Mo. 387; Norris *v.* Woods, 89 Va. 873; Willis *v.* Smith, 66 Tex. 31; Butler *v.* Gazzam, 81 Ala. 491.]

[3] Ibid.

[4] Stroughill *v.* Anstey, 1 De G., M. & G. 645; Page *v.* Cooper, 16 Beav. 400; Leavitt *v.* Pell, 25 N. Y. 474.

[5] Rendlesham *v.* Meux, 14 Sim. 249.

(*a*) In Rutherford Land & Imp. Co. *v.* Sanntrock, 60 N. J. Eq. 471, it was said: "To 'dispose of,' imports finality, and only where a power of sale would include a power to mortgage would those words, unmodified or undefined, imply such a power. In this state a general power of sale does not authorize a mortgage. . . . A power to sell *may* include a power to mortgage, but only because of some exceptional reasons, generally where there is a particular charge to which the devise is subject and it is proper to raise money to meet it." See also Dubois *v.* Van Valen, 61 N. J. Eq. 331 (*semble*). In a recent case in Wisconsin, Lueft *v.* Lueft, 129 Wis. 534, 7 L. R. A. (N. S.) 263, it was held that language granting power to sell, convey and dispose of real estate, does not negative an intention to give power to mortgage, and that a power to mortgage may be implied from such language if it appears that the purposes of the trust can be best accomplished by mortgaging.

beneficial to the estate; nor can the court substitute the one for the other.[1] In the absence of any direction, a power to mortgage will not authorize a mortgage with a power of sale, since a trustee cannot authorize another to do what he cannot do himself.[2] (*a*) But a power to raise money *by sale or mortgage* has been held to authorize a mortgage with a power of sale. The want of power in the trustee to delegate his authority to sell is an objection to this; for if it is assumed that the power of sale is an incident to the mortgage, it follows that a power to mortgage alone authorizes a power of sale mortgage.[3] In all cases where the court may order money to be raised out of an estate for the payment of debts, legacies, or portions, it may direct a sale or a mortgage with a power of sale.[4] But where trustees have power to sell an equity of redemption, and are directed to apply the proceeds to the discharge of the mortgage and pay the balance to the settlor, they may sell subject to the mortgage, notwithstanding the direction.[5]

§ 769. A power to sell does not authorize an exchange;[6] nor does a power to trustees to sell authorize a parti-

[1] Drake *v.* Whitmore, 5 De G. & Sm. 619.

[2] Clarke *v.* Royal Panopticon, 4 Drew. 26; Russell *v.* Plaice, 18 Beav. 21; Leigh *v.* Lloyd, 2 De G., J. & S. 330. See to the contrary *In re* Chawner's Will, L. R. 8 Eq. 469.

[3] Bridges *v.* Longman, 24 Beav. 27. But it is said that a sale of part of the land, or a mortgage, does not exhaust the power of sale. Asay *v.* Hoover, 5 Penn. St. 21; Piatt *v.* Oliver, 2 McLean, 309.

[4] Selby *v.* Cooling, 23 Beav. 418; Williamson *v.* Field, 2 Sandf. Ch. 533. Query as to a lease. Treat *v.* Peck, 5 Conn. 280.

[5] Manser *v.* Dix, 8 De G., M. & G. 703; Fluke *v.* Fluke, 1 Green, Ch. 478.

[6] Ringgold *v.* Ringgold, 1 H. & Gill, 11; Taylor *v.* Galloway, 1 Hem.

(*a*) It seems to be settled in England that a power given to a trustee to mortgage includes by implication authority to insert a power of sale in the mortgage. Bridges *v.* Longman, 24 Beav. 27; Cook *v.* Dawson, 29 Beav. 123, 128; Cruikshank *v.* Duffin, 13 Eq. 555, 559; *In re* Chawner's Will, 8 Eq. 569. Doubtless this rule would be generally followed in the United States since a power of sale is practically a necessary incident of a mortgage. Wilson *v.* Troup, 2 Cow. (N. Y.) 195, 227.

tion,[1] and whether a power to sell and exchange will do so is as yet doubtful.[2](a) Where an estate was to be divided if the trustees thought fit, it was held that the trustees had no power to divide, they could only determine whether it ought to be divided.[3] An exchange or partition may be effected circuitously, under a power of sale only, by using the form of a sale instead of a partition or exchange; nor can the transaction be impeached as an improper execution of the power if made *bona fide*.[4] Trustees, with a power of sale and exchange, may pay money as owelty of exchange without any express authority for the purpose.[5] But a power to sell does not authorize a conveyance to a legatee in payment of a legacy,[6] nor to a *cestui que trust* to secure a debt.[7] Leases cannot be granted by trustees under mere powers of sale.[8] (b) And so executors, as *quasi* trustees for sale, would be

232; King *v.* Whiton, 15 Wis. 684; Cleveland *v.* State Bank, 16 Ohio St. 236; School *v.* McCully, 11 Rich. 424. [Hampton *v.* Moorhead, 62 Iowa, 91; C. I. & B. Co. *v.* Humphries, 64 Miss. 258; Woodward *v.* Jewell, 140 U. S. 247. Unless the exchange is in substance a sale and an authorized reinvestment, or a step towards conversion into cash. See C. I. & B. Co. *v.* Humphries, *ubi supra*.]

[1] McQueen *v.* Farquhar, 11 Ves. 467. Although it is an undivided share. Brassey *v.* Chalmers, 4 De G., M. & G. 528; 16 Beav. 223; Bradshaw *v.* Fane, 3 Drew. 536; Borel *v.* Rollins, 30 Cal. 408; Woodhull *v.* Longstreet, 3 Harr. 419.

[2] Abel *v.* Heathcote, 4 Bro. Ch. 278; 3 Ves. Jr. 98; Att. Gen. *v.* Hamilton, 1 Madd. 214; 2 Sugd. Pow. 506. [See *supra*, § 511 *b*, n.]

[3] Naglee's Estate, 52 Penn. St. 154.

[4] Ibid.; Marshall *v.* Sladden, 7 Hare, 438; Leigh *v.* Ashburton, 11 Beav. 478; Phelps *v.* Harris, 51 Miss. 789.

[5] Bartram *v.* Whichcote, 6 Sim. 86; 2 Sugd. Pow. 507.

[6] Russell *v.* Russell, 36 N. Y. 581.

[7] Goode *v.* Comfort, 39 Mo. 313.

[8] Evans *v.* Jackson, 8 Sim. 217; Mitchells *v.* Corbett, 34 Beav. 376;

(a) A power to sell even for reinvestment does not give power to convey to a corporation formed for the purpose of improving and disposing of the property, taking in payment shares of stock. Garesche *v.* Levering Investment Co., 146 Mo. 436; Randolph *v.* E. Birmingham Land Co., 104 Ala. 355; Moody *v.* Flagg, 125 Fed. 819. But it is otherwise in Rhode Island, under the wide power given by statute to trustees who have power of sale. Sprague, Petitioner, 22 R. I. 413; R. I. Gen. Laws, (1909) c. 259, § 14.

(b) See Freeman's Estate, 181 Penn. St. 405.

justified in granting a lease only under special circumstances. Such an act is not within their duties, and it would be incumbent on the parties taking the lease to show that it was for the interest of the parties entitled to the property.[1] Where property is given to trustees with a power to sell, and an implied or express power of management in the mean time, they have the power to lease and to rent houses until the sale is made;[2] but where the land descends to the heir or is devised, and a naked power of sale is given to a trustee or executor, the heir or devisee is entitled to the profits and possession until the sale, and the trustees can neither enter upon the land nor grant leases.[3] A power to rent or sell lands of course gives no power over lands specifically devised.[4]

§ 770. Trustees for sale may enter into contracts without the previous sanction of the court;[5] (*a*) but if the administration of the trust is already before the court, the trustees cannot proceed without the sanction of the court.[6] The trustees are bound

Bonney *v.* Rigdard, Cox, Ch. Cas. 145; Hubbard *v.* Elmer, 7 Wend. 446.

[1] Hachett *v.* McNamara, Ll. & Goo. t. Plunk. 283; Keating *v.* Keating, Ll. & Goo. t. Sugd. 133; Hedges *v.* Riker, 5 Johns. Ch. 163; Williams *v.* Woodward, 2 Wend. 487; Blake *v.* Sanderson, 1 Gray, 333.

[2] Hedges *v.* Riker, 5 Johns. Ch. 163; Burr *v.* Sim, 1 Whart. 266. [*Supra*, § 484.]

[3] Seymour *v.* Bull, 3 Day, 389.

[4] Young *v.* Swiggs, 27 Md. 620.

[5] Bath *v.* Bradford, 2 Ves. 590; Reeside *v.* Peter, 35 Md. 222; Iles *v.* Martin, 69 Ind. 114.

[6] Walker *v.* Smallwood, Amb. 676; Raymond *v.* Webb, Lofft, 66; Dray-

(*a*) If the executory contract is a proper one for the trustee to make, the court will decree its specific performance. Connely *v.* Haggarty, 65 N. J. Eq. 596. But the court has refused to compel specific performance of such a contract when the sale would be prejudicial to the interests of the beneficiaries. Givens *v.* Clem, 107 Va. 435.

It has been held that a power to lease and a power to sell taken together do not authorize a trustee to give to a lessee an option to purchase at a named price at any time before the end of a lease for twenty-one years. *In re* Armory Board, 60 N. Y. S. 882.

by their office to sell the estate under every possible advantage for the beneficiaries,[1] (*a*) and if there are different *cestuis que trust*, they must act with a fair and impartial attention to the interest of all.[2] In case of a trust to secure a loan and power to sell, the power is for the benefit of the lender, and the trustee is not bound to sell until he deems best for the payment of the loan, or is directed by a court of equity to do so.[3] If the trustees or their agents fail in reasonable diligence in inviting competition,[4] or in their management in relation to the sale: as, if they contract under circumstances of haste and improvidence; or if they contrive to advance the interest of one party at the expense of another, — they will be personally responsible to the injured party for the loss;[5] and the court will refuse to decree a specific performance, though the purchaser was without fault,[6] or set the sale aside.[7] But if a contract is once fairly made, a court of equity would not invalidate it, because another person came for-

son *v.* Pocock, 4 Sim. 283; Culpepper *v.* Aston, 2 Ch. Cas. 116, 223; Reeside *v.* Peter, 35 Md. 222. [Bertron *v.* Polk, 101 Md. 686; Gottschalk *v.* Mercantile Trust Co., 102 Md. 521. See Kenady *v.* Edwards, 134 U. S. 117.]

[1] Downs *v.* Grazebrook, 3 Mer. 208; Matthie *v.* Edwards, 2 Coll. 480; Chesley *v.* Chesley, 49 Mo. 540; Gould *v.* Choppel, 42 Md. 466. [Callaway *v.* Hubner, 99 Md. 529.]

[2] Ord *v.* Noel, 5 Madd. 440; Anon., 6 id. 11; Pechel *v.* Fowler, 2 Anst. 590.

[3] Walker *v.* Teal, 7 Sawy. 39.

[4] Ord *v.* Noel, 5 Madd. 440; Anon., 6 Madd. 11; Pechel *v.* Fowler, 2 Anst. 590; Harper *v.* Hayes, 2 Gif. 216. No particular form of advertisement is required; but it should be sufficient to identify the land. Reeside *v.* Peter, 33 Md. 120; 35 Md. 221.

[5] Pechel *v.* Fowler, 2 Anst, 550; Quackenbush *v.* Leonard, 9 Paige, 347; Ringgold *v.* Ringgold, 1 H. & Gil. 11; Osgood *v.* Franklin, 2 Johns. Ch. 27; 14 Johns. 527; Chesley *v.* Chesley, 45 Mo. 540.

[6] Ord *v.* Noel, 5 Madd. 440; Turner *v.* Harvey, Jac. 178; Bridger *v.* Rice, 1 J. & W. 74; Mortlock *v.* Buller, 10 Ves. 292; Hill *v.* Buckley, 17 Ves. 394; White *v.* Cuddon, 8 Cl. & Fin. 766. [Givens *v.* Clem, 107 Va. 435; Moeller *v.* Poland, 80 Ohio St. 418.]

[7] Clarkson *v.* Creely, 35 Mo. 45; Hoppes *v.* Check, 21 Ark. 585.

(*a*) They are required to exercise the reasonable diligence of an ordinarily prudent man. Winder *v.* Nock, 104 Va. 759.

ward and offered a larger price.[1] Mere inadequacy of price, unless it is so gross as to be evidence of fraud,[2] is not sufficient to invalidate a sale, if the transaction is in good faith, and due diligence was used in getting the best possible price for the property.[3] If there are two offers equally advantageous, and one is preferred by the *cestui que trust*, the trustee is not bound for that reason to accept that offer, but he may act upon his own opinion.[4] The *cestui que trust* usually obtains the best offer he can, and communicates it to the trustee, who, when satisfied, ought to make a sale which is advantageous to the beneficiary.[5] The trustee should inform himself of the value of the property, if necessary, by the estimate of some experienced person;[6] and if he sells at a grossly inadequate price, it is a breach of trust which affects the title in the hands of the purchaser.[7] But as to the purchaser, no duty rests on the trustee to ferret out the state of liens and mortgages, etc., to ascertain the real value of the interest to be sold. *Caveat emptor* applies; but if he makes any statement at the sale in regard to the matter he must take care that it is accurate and not such as to mislead the bidders.[8] In no case will the court enforce the specific performance of a contract which amounts to a breach of trust.[9] A trustee who takes no active part in the sale is equally responsible, for he can-

[1] Harper *v.* Hayes, 2 De G., F. & J. 542, reversing 2 Gif. 210.

[2] *Ante*, §§ 187, 602 *z*; Booker *v.* Anderson, 35 Ill. 66; Lallance *v.* Fisher, 29 W. Va. 513; Dryden Ad. *v.* Stephens, 19 W. Va. 1. [See *infra*, § 800, note *a*, p. 1315.]

[3] Abshire *v.* Carter, 48 Mo. 300; Bochlert *v.* McBride, 48 Mo. 505. [Holdsworth *v.* Shannon, 113 Mo. 508; Lathrop *v.* Tracy, 24 Colo. 382; Shirk *v.* Trundle, 96 Md. 177.]

[4] Selby *v.* Bowie, 4 Gif. 300.

[5] Palairet *v.* Carew, 32 Beav. 568.

[6] Oliver *v.* Court, 8 Price, 165; Campbell *v.* Walker, 5 Ves. 680; Connolly *v.* Parsons, 3 Ves. 628; Sugd. V. & P. (8th Am. ed.) 216, §§ 43, 44, and notes.

[7] Stevens *v.* Austen, 7 Jur. (N. S.) 873; Wormeley *v.* Wormeley, 1 Brock. 330; 8 Wheat. 421. [See *infra*, § 800, note *a*, p. 1315.]

[8] Wicks *v.* Westcott, 59 Md. 270.

[9] Wood *v.* Richardson, 4 Beav. 176; Fuller *v.* Knight, 6 Beav. 205; Thompson *v.* Blackstone, id. 470; Sneesby *v.* Thorne, 7 De G., M. & G. 399; Mulholland *v.* Belfast, 9 Ir. Ch. 204. [Givens *v.* Clem, 107 Va. 435.]

not delegate his power to a cotrustee; and where a trust is confided to several, they are all equally responsible, and cannot excuse themselves for neglecting any of their duties,[1] and they must all join in the deed.[2] A mortgagee with power of sale is a trustee, first, to control the property and apply the proceeds to the debt; second, to account for any surplus to the grantor, and he will be held to a strict account.[3] If it is sought to set the sale aside on the ground that it was not properly advertised, the burden is on the person seeking to invalidate the sale.[4] (*a*)

§ 771. Trustees will be allowed a reasonable time for disposing of the estate even when directed to sell with all convenient speed; for such direction is implied by law, and does not render a sale imperative.[5] (*b*) On the other hand, where there is no immediate emergency, it would be a breach of trust to force on the sale at a manifestly disadvantageous time.[6] If the power is "to sell at such times and in such manner as they shall think

[1] Berger *v.* Duff, 4 Johns. Ch. 368; Oliver *v.* Court, 8 Price, 166; *In re* Chertsey Market, 6 Price, 285.

[2] *Ante*, §§ 412, 413. [Winslow *v.* B. & O. R. Co., 188 U. S. 646; Fritz *v.* City Trust Co., 76 N. Y. S. 625, 72 App. Div. 532 (affirmed 173 N. Y. 622).]

[3] Gooch *v.* Vaughan, 92 N. C. 610. [*Supra*, § 602 *o*.]

[4] Fulton *v.* Johnson, 24 W. Va. 96; Burke *v.* Adair, 23 id. 139.

[5] Buxton *v.* Buxton, 1 M. & C. 80; Garrett *v.* Noble, 6 Sim. 504; Fry *v.* Fry, 27 Beav. 144; Fitzgerald *v.* Jervoise, 5 Madd. 25; Vickers *v.* Scott, 3 M. & K. 500.

[6] Hunt *v.* Bass, 2 Dev. Eq. 297; Johnston *v.* Eason, 3 Ired. Eq. 330; Quarles *v.* Lacy, 4 Munf. 251. If necessary, on good cause shown, the court will give the trustee leave to postpone a sale. Morris *v.* Morris, 4 Jur. (N. S.) 802–804.

(*a*) There is usually no reason why a *cestui* should not be the purchaser, if a sale is authorized and an adequate price is obtained. Albany Exchange Bank *v.* Brass, 69 N. Y. S. 391, 59 App. Div. 370 (affirmed, 171 N. Y. 693); Mills *v.* Mills, 63 N. Y. S. 771, 50 App. Div. 221.

(*b*) As to equitable conversion of the beneficial interests in case of an imperative direction to convert, see *supra*, § 448, note *b*, p. 717 *et seq.*

fit," they are not authorized, as affecting the *cestuis que trust*, to postpone the sale arbitrarily for an indefinite period.[1] Such postponement might vary the rights of the tenant for life and remainder-men, and so interfere with the settlor's intention. (*a*) If therefore they neglect to sell without sufficient reason, they would be answerable for any depreciation, and would be decreed to account for interest instead of rents.[2] A trust "to sell with all convenient speed and within five years" is directory only and the trustees can sell and make a good title after five years.[3] But if the time of sale is so fixed as to be of the essence of the power, as by express directions, it must be executed as given and at the time appointed,[4] and if trustees for sale after a particular date or event anticipate the time, they will be responsible for all loss.[5]

§ 772. But a power of sale or mortgage to raise portions should not be exercised until the money is wanted; as, a power to raise a specific sum for A., payable at twenty-one or at her marriage, cannot be exercised until the interest is vested; for should the money be lost or the investment prove deficient, A. might call upon the estate again for her portion.[6] So where there was a trust of a term to raise £3,000 for children, payable at their respective ages of twenty-one or marriage, it was held that the money could not all be raised when the eldest arrived

[1] Walker v. Shore, 19 Ves. 371; Hawkins v. Chappell, 1 Atk. 623.

[2] Fry v. Fry, 27 Beav. 144; Pattenden v. Hobson, 1 Eq. R. 28. In Wightwick v. Lord, 6 H. L. Cas. 217, the trustees were made answerable for the value of the property of a mine, as they should have sold a year after the testator's death.

[3] *Ante*, § 490; Pearce v. Gardner, 10 Hare, 287; Cuff v. Hall, 1 Jur. (N. S.) 973; Smith v. Kenney, 33 Tex. 283; Shatter's App., 4 Penn. St. 83. [See also Shirk v. Trundle, 96 Md. 177.]

[4] Boorsem v. Wells, 4 Green, Ch. 87.

[5] Isham v. Delaware, &c. R. R. Co., 3 Stockt. 227.

[6] Dickenson v. Dickenson, 3 Bro. Ch. 19.

(*a*) As to the adjustment of the rights of life-beneficiaries and those entitled in remainder in cases of delayed conversion, see *supra*, § 548, notes.

at twenty-one, as the younger children could not be deprived of the security of the estate for their portions.[1] But from the inconvenience of several sales or mortgages, the court will lean to such construction of the instrument, if possible, that there shall be but one exercise of the power; as, where the trustees of a marriage settlement were directed after the husband's death to raise by sale or mortgage, if there should be more than three children, the sum of £10,000 for their portions, the shares to be payable at twenty-one or marriage, and "no mortgage was to be made until some one of the portions should become payable," the Lord Chancellor said, that, on the whole instrument, the whole sum of £10,000 was to be raised at once.[2] (*a*)

§ 773. If an estate is vested in trustees for A. for life, and then to sell, they cannot sell during the life of A., however beneficial it may be for all parties interested.[3] But if the devise is to A. for life, and after her decease to trustees to "sell as soon as conveniently may be after the testator's decease," the trustees, joining with A., can convey a good title.[4] So if a marriage settlement gives a power of sale to the trustees, and power of appointment to the *cestui que trust*, the exercise of the power of appointment does not destroy the power of sale.[5] If the tenant for life and the trustees of the remainder join in a sale for a gross sum, the purchaser takes a good title, and the tenant for life and the trustees may apportion the purchase-money; if they cannot agree, the court may do it.[6] Generally, trustees for the sale of an aliquot part of an estate may join in a sale of the whole for an entire sum, and the purchase-money may be apportioned

[1] Wynter *v.* Bold, 1 S. & S. 507.
[2] Gillibrand *v.* Goold, 5 Sim. 149.
[3] Johnstone *v.* Baber, 8 Beav. 233.
[4] Mills *v.* Dugmore, 30 Beav. 104. [Armour *v.* Murray, 74 N. J. Law, 351.]
[5] *In re* Brown, L. R. 10 Eq. 349.
[6] Clark *v.* Seymour, 7 Sim. 67.

(*a*) As to trusts to raise portions, see *supra*, §§ 578 *et seq.*

by the parties or the court.[1] But a purchaser cannot be compelled to take such a title, if the interest of the *cestui que trust* has not been sold under the most advantageous circumstances or if the nature of the case is such that the purchase-money cannot be apportioned upon an intelligible principle.[2] (*a*)

§ 774. A trustee, like any other vendor, must make a good title to the purchaser;[3] therefore the most prudent course is to provide for the title before selling, either by an examination or stipulation, as the court in a suit for specific performance might order the trustee to pay costs if the title is defective.[4] Trustees under a power of sale have no power to split up the estate into land, timber, and mines; and therefore they cannot sell the timber separate from the land, nor the land, reserving the timber; and this although there is a tenant for life without impeachment of waste, who might cut the timber;[5] and there is no distinction between timber and minerals;[6] or they may sell several parcels in one lot where they compose a single farm.[7] But the trustees may divide the surface into lots, and sell part at one time, and part at another.[8] (*b*)

[1] McCarogher *v.* Whieldon, 34 Beav. 107.

[2] Rede *v.* Oakes, 32 Beav. 555.

[3] White *v.* Foljambe, 11 Ves. 343; McDonald *v.* Hanson, 12 Ves. 277.

[4] Edwards *v.* Harvey, G. Coop. 40.

[5] Cholmeley *v.* Paxton, 3 Bing. 207; 5 Bing. 48; 10 B. & Cr. 564; 3 Russ. 565; 1 Russ. & My. 418; 1 Cl. & Fin. 60.

[6] Buckley *v.* Howell, 29 Beav. 546; *Re* Malins, 3 Gif. 126; Cadwalader's App., 64 Penn. St. 293.

[7] Kellogg *v.* Carrico, 47 Mo. 157.

[8] Ord *v.* Noel, 5 Madd. 438; *Ex parte* Lewis, 1 Gl. & J. 69; State *v.* Macalester, 9 Ohio, 19; Gray *v.* Shaw, 14 Mo. 341; Delaplaine *v.* Law-

(*a*) Where a power to sell was given to trustees with the consent of the tenant for life, who incumbered his life estate and became bankrupt, it was held that his power of consenting was not exhausted, but must be exercised to give a good title, for which the concurrence of his trustee in bankruptcy and of the incumbrancers was also necessary. *In re* Bedingfeld and Herring's Contract, [1893] 2 Ch. 332.

(*b*) Where an executor was given power to sell real estate for the purpose of changing investments,

§ 775. Though trustees may employ the tenant for life, or *cestui que trust*, as agent to effect a sale, yet they should remember that they are interposed to protect the estate from the tenant for life; if, therefore, the tenant for life, by consent of the trustees, sells the estate, receives the purchase-money, and invests it in another estate in his own name, he would be held to act throughout as the agent of the trustees, and the purchased estate would be subject to the original trusts,[1] and at the same time the trustees would be guilty of a breach of trust.[2]

§ 776. If the trust is for a tenant for life without impeachment of waste, it would be a breach of trust for the trustee to sell the land without the timber, and allow the tenants for life to take it, or the money for which it was sold; for although the tenant might have cut the timber, yet the land and the timber constitute the whole estate, and it is the duty of the trustee to sell all together and to reinvest the purchase-money upon the trusts of the settlement.[3] So if trustees may sell for payment of debts, and the lands subject to that charge are given over to a tenant for life without impeachment of waste, the trustees ought not to raise the money for the debts by a fall of the timber, for that is a hardship upon the tenant for life; and if they resort to the timber, the tenant would in equity have a charge

rence, 3 Comst. 301; Ewing *v.* Higby, 7 Ohio, 98; Thomas *v.* Townsend, 16 Jur. 736; Bloomer *v.* Waldron, 3 Hill, 372; Gillespie *v.* Smith, 29 Ill. 472; Miller *v.* Evans, 35 Mo. 45; Carter *v.* Abshire, 48 Mo. 300; Sumrall *v.* Chaffin, id. 402.

[1] Price *v.* Blakemore, 6 Beav. 507.

[2] Mortlock *v.* Buller, 10 Ves. 313.

[3] Cholmeley *v.* Paxton, 3 Bing. 207; 5 Bing. 48; 3 Russ. 565; 2 Moore & P. 127; 10 B. & Cr. 564; Cockerell *v.* Cholmeley, 1 Russ. & M. 418; 1 Cl. & Fin. 60; Waldo *v.* Waldo, 12 Sim. 107; Doran *v.* Wiltshire, 3 Swanst. 699; Wolf *v.* Hill, 1 Swanst. 149, n.

but was not given the legal title, it was held that he had no power in selling one parcel of land to give the grantee an easement to construct and maintain a sewer over another parcel. Atwater *v.* Perkins, 51 Conn. 188.

upon the lands for the proceeds.[1] Nor should a sum, to be invested in lands for a tenant for life without impeachment of waste, with remainders over, be invested by the trustees in the purchase of wood or timber lands; for the tenant might fell the timber and get possession of the greater part of the estate; but the trustees would be justified in purchasing an ordinary wooded estate, as it is not to be supposed that it was intended they should purchase lands with no trees upon it.[2]

§ 777. Where trustees had a power of sale, to be exercised with the consent of the tenant for life, with a direction to invest the proceeds in another purchase with all convenient speed, and in the mean time to invest them upon some proper security, Lord Eldon said: "The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this court would expect some strong purpose of family convenience, justifying the conversion, if it is likely to continue money."[3] So the trustees would not be justified in selling, as between themselves and the *cestuis que trust*, to gratify caprice, or to promote the exclusive interest of the tenant for life. Particular circumstances might happen which would call for an immediate sale, as an extremely advantageous offer, or a prospect of great depreciation or deterioration; but generally the trustees ought not to convert the estate into money without having another specific purchase in view, and then not for the purpose of conversion, but in the honest exercise of their discretion for the benefit of all parties claiming under the settlement.[4] The power of in-

[1] Davies *v.* Wescomb, 2 Sim. 425.

[2] Burgess *v.* Lamb, 16 Ves. 174.

[3] Mortlock *v.* Buller, 10 Ves. 308; Mahon *v.* Stanhope, cited 2 Sugd. Pow. 512.

[4] Cowgill *v.* Oxmantown, 3 Y. & Col. 369; Watts *v.* Girdlestone, 6 Beav. 188; Marshall *v.* Sladden, 4 De G. & Sm. 468; Wormeley *v.* Wormeley, 1 Brock. 330; 8 Wheat. 421.

vesting the proceeds in some security, in the mean time, was not intended to authorize the continuance of the property in money, but only to meet some contingency, as where the trustees were disappointed in a contemplated purchase, or there was some necessary delay in completing the title to it. The sale will be void, if the trustees appear to have been influenced by private or selfish purposes.[1]

§ 778. Where trustees have a power of sale at the written request and direction of another party, they cannot obtain a decree for specific performance of a sale contracted by them without showing such writing; nor will proof of a part performance of the contract by the parties, so as to take the sale out of the statute of frauds, be sufficient.[2]

§ 779. A trustee cannot delegate the trust or power of sale to a third person,[3] unless the trust-deed permits delegation,[4] especially if it is a naked power, coupled with no interest.[5] A sale executed by such delegated agent is void.[6] Nor can one trustee delegate his power to a cotrustee.[7] But such trustees for sale may employ a solicitor or agent, according to the usage of business, if they use proper prudence; [8] the agent's authority

[1] Ibid.

[2] Adams *v.* Broke, 1 Y. & Col. Ch. 627; Sykes *v.* Sheard, 33 Beav. 114; Blackwood *v.* Burrowes, 2 Con. & Law. 459; Phillips *v.* Edwards, 33 Beav. 440.

[3] Hardwick *v.* Mynd, 1 Anst. 109; Newton *v.* Bronson, 3 Kern. 587; Hawley *v.* James, 5 Paige, 487; St. Louis *v.* Priest, 88 Mo. 612; Fuller *v.* O'Neil, 69 Tex. 349. [No. Am. Trust Co. *v.* Chappell, 70 Ark. 507; Spengler *v.* Kuhn, 212 Ill. 186; Grover *v.* Hale, 107 Ill. 638; Cramton *v.* Rutledge, 157 Ala. 141.]

[4] Hess *v.* Dean, 66 Tex. 666.

[5] Black *v.* Erwin, Harp. L. 411.

[6] Pearson *v.* Jamison, 1 McLean, 197.

[7] Berger *v.* Duff, 4 Johns. Ch. 368. [Whitlock *v.* Washburn, 62 Hun, 369; Bohlen's Estate, 75 Penn. St. 304; Winslow *v.* B. & O. R. Co., 188 U. S. 646; Fritz *v.* City Trust Co., 76 N. Y. S. 625, 72 App. Div. 532.]

[8] *Ex parte* Belchier, Amb. 218; Ord *v.* Noel, 5 Madd. 438; Rossiter *v.* Trafalgar Life Ass. Co., 27 Beav. 377; Sinclair *v.* Jackson, 8 Cow. 582; Hawley *v.* James, 5 Paige, 487; Gillespie *v.* Smith, 29 Ill. 473. [Tyler *v.*

should be in writing, in order to make a binding contract,[1] or it should be ratified in writing,[2] and all the trustees should join in the appointment or ratification.[3] The proper proceeding is for the trustees to keep the business in their own hands; to employ agents, if necessary, to negotiate the details of the sale, subject to the approval of the trustees; and the deeds should be executed by them, and not by attorney.[4] (*a*) If the donee of the power is a married woman, her husband need not join in the deed.[5] (*b*) If, however, the *fee* is in the trustees, so that they have an estate coupled with a power, they may act by attorney duly appointed in writing.[6] And it has been said that trustees for creditors may convey by attorney.[7] A public officer cannot, however, be appointed to convey in the absence, or upon the death of the trustee.[8]

§ 780. In the absence of express directions in the power, trustees may sell at public auction or private sale, as circum-

Herring, 67 Miss. 169; Keim *v.* Lindley, 30 A. 1063, 1074; 54 N. J. Eq. 418; Smith *v.* Swan, 2 Tex. Civ. App. 563.]

[1] Mortlock *v.* Buller, 10 Ves. 311.

[2] Newton *v.* Bronson, 3 Kern. 587.

[3] Mortlock *v.* Buller, 10 Ves. 311; Sinclair *v.* Jackson, 8 Cow. 582.

[4] Hawley *v.* James, 5 Paige, 487; Cranston *v.* Crane, 97 Mass. 459; Gillespie *v.* Smith, 29 Ill. 473.

[5] Cranston *v.* Crane, 97 Mass. 459. [Young *v.* Sheldon, 139 Ala. 444; Antonini *v.* Straub, 130 Ky. 10.]

[6] May's Heirs *v.* Fraser, 4 Lit. 391; Telford *v.* Barney, 1 Iowa, 591.

[7] Blight *v.* Schenck, 10 Penn. St. 285. The power of trustees, executors, and others, acting in a fiduciary capacity, to contract and execute their powers by attorney, is regulated by statute in some of the States. The reader will examine the statutes of his own State. Johns *v.* Sergeant, 45 Miss. 332.

[8] Miller *v.* Evans, 35 Mo. 45.

(*a*) The trustee is presumed *prima facie* to have done those acts which were conditions precedent to a valid exercise of the power of sale; and mere ministerial acts of posting the notices and making the sale may be performed by agents selected by the trustee. Johns *v.* Sergeant, 45 Miss. 332; Graham *v.* Fitts, 53 id. 307; Tyler *v.* Herring, 67 Miss. 169, 19 Am. St. Rep. 263, and note.

(*b*) And the wife of a trustee need not join to release dower. Holly St. Land Co. *v.* Beyer, 48 Wash. 422.

stances may render it most for the advantage of the trust estate.[1] In Massachusetts the court may license the trustee to sell either at public or private sale, as seems expedient.[2] Even when assignees for creditors were required to sell at public auction, it was held that, after an ineffectual attempt to sell at auction, they might sell by private contract.[3] If the power directs a sale at public auction, it must be followed;[4] but where trustees, directed to sell at auction, were not able to effect a sale after unusual efforts, it was held that a private sale, made in good faith, though for less than a public offer, was valid.[5] And it has been held, that a power to sell at auction or otherwise, in whole or in parcels, on giving three weeks' notice, authorized a private sale, without any notice.[6] Under a power to sell at auction, and where there is an advertisement and an auction, the highest bid, sent by letter and accepted, is valid.[7] And the trustees may waive a bid and a sale, and resell the property at another time, upon a new notice.[8] If a bid is made under a misapprehension, it may be waived, and the land sold at a

[1] *Ex parte* Dunman, 2 Rose, 66; *Ex parte* Hurley, 1 D. & Ch. 631; *Ex parte* Ladbroke, 1 Mont. & A. 384; *Ex parte* Goding, 1 D. & Ch. 323; Davey *v.* Durant, 1 De G. & J. 535; Huger *v.* Huger, 9 Rich. Eq. 217; Harper *v.* Hayes, 2 Gif. 210; 2 De G. & J. 542; Noble *v.* Edwardes, L. R. 5 Ch. D. 378; Jackson *v.* Williams, 50 Ga. 553. In Pennsylvania, a private sale, under a power, was held void. McCreery *v.* Hamlin, 7 Penn. St. 87; Ellet *v.* Paxson, 2 W. & S. 418. But it is now altered by statute. See Ashhurst *v.* Ashhurst, 13 Ala. 781; Burr *v.* McEwen, Bald. C. C. 154; Mattox *v.* Eberhart, 38 Ga. 581; Crane *v.* Reeder, 22 Mich. 339.

[2] Boston Safe Deposit & Trust Co. *v.* Mixter, 146 Mass. 100, 105.

[3] Mathers *v.* Prestman, 9 Sim. 352.

[4] Greenleaf *v.* Queen, 1 Pet. 145.

[5] Tyson *v.* Mickle, 2 Gill, 383; Gibbs *v.* Cunningham, 1 Md. Ch. 44; Gibson's Case, 1 Bland, 138; Beebe *v.* De Baun, 3 Eng. (Ark.) 567. And the court may grant leave to sell at the reserved price fixed at the auction, and allow one of the trustees to become purchaser. Farmer *v.* Dean, 32 Beav. 327; Bousfield *v.* Hodges, 33 id. 90.

[6] Minuse *v.* Cox, 5 Johns. Ch. 441.

[7] Tyree *v.* Williams, 3 Bibb, 367.

[8] Dover *v.* Kennedy, 38 Mo. 469. But he ought not to sell on the same day. He should appoint another day, and give new notices. Judge *v.* Booze, 47 Mo. 544. See Barnard *v.* Duncan, 38 Mo. 170.

lower bid.[1] So if the acceptance of a bid would prejudice or defeat the purpose of the sale, it should be refused.[2]

§ 781. A sale at auction is always the safest, as it is the usual form of sale; for a sale at a regularly advertised and properly conducted auction cannot be questioned, and no question can be raised as to the adequacy of the price,[3] especially if the property is in the hands of a *bona fide* purchaser.[4] But in case of a private sale, if the price procured is less than the estimated value, the trustee incurs great responsibility and some danger.[5] Courts scrutinize such sales with great jealousy, and if there is any fraud, oppression, unfairness, or irregularity, or even a suspicion of them, the sale will be set aside.[6]

§ 782. If the trustees sell at auction, they must see that proper advertisements are made and due notice given to all parties;[7] and the court will enjoin the sale, if there is any want of diligence in this respect.[8] No particular form of notice or advertisement is required; it must state the time and place of the sale correctly,[9] and be sufficient to identify the land, and to invite competition.[10] If by the power or license of sale a notice is to be given at a particular place, a sale upon notice given at another place will be void.[11] If the manner of the sale is in ex-

[1] Waterman *v.* Spaulding, 51 Ill. 425.

[2] Gray *v.* Viers, 33 Md. 18.

[3] Waterman *v.* Spaulding, 51 Ill. 425.

[4] Shine *v.* Hill, 23 Iowa, 264.

[5] Ord *v.* Noel, 5 Madd. 440; Taylor *v.* Tabrum, 6 Sim. 281; Connolly *v.* Parsons, 3 Ves. 628, n.; Mortlock *v.* Buller, 10 Ves. 292, 309; Johnson *v.* Dorsey, 7 Gill, 269; Hintze *v.* Stingel, 1 Md. Ch. Dec. 283.

[6] Penny *v.* Cook, 19 Iowa, 538.

[7] Anon., 6 Madd. 10; Blennerhassett *v.* Day, 2 B. & B. 133. See Boston Safe Deposit & Trust Co. *v.* Mixter, 146 Mass. 100, 105, as to what is sufficient notice under the Mass. Stats.

[8] Ibid.; *ante*, §§ 602 *q*–602 *u*; Matthie *v.* Edwards, 2 Col. C. C. 465; 11 Jur. 504; Jenkins *v.* Jones, 2 Gif. 99; Pechel *v.* Fowler, 2 Anst. 549, has not been followed.

[9] Stephenson *v.* January, 49 Mo. 465.

[10] Newman *v.* Jackson, 12 Wheat. 570; Reeside *v.* Peter, 33 Md. 120.

[11] Sears *v.* Livermore, 17 Iowa, 297.

press terms left to the discretion of the trustee, no advertisement is necessary:[1] but if the power or a statute requires a certain number of days' notice before the sale, the advertisement must be made every day;[2] and if a certain number of weeks are required, the advertisement must be made that number of weeks successively. The trustees may adjourn a duly advertised sale from time to time, and the notice of the adjournments need not be as formal as the first notices appointing the time of sale.[3] If notice is required by the power, those persons relying upon the validity of the sale must show that the power was complied with;[4] but a clerical mistake in the statement of the notice in the deed will not vitiate the sale, if the proper notice was in fact given.[5] Chancellor Kent was of opinion that want of notice would not affect the title, but that the trustee would be personally responsible; and so it is said that a purchaser cannot raise this objection to avoid fulfilling his contract.[6] Whatever may be the rule as to notice of sales under a power in wills, it is certain that trustees, executors, and guardians, who sell under statute powers, and under decrees and licenses of the courts in which they are administering estates, must strictly comply with all the statutes as to notice, oath, and bonds, or their acts will be void; and a purchaser is not compelled to complete the contract, if there is any irregularity in the proceedings. A stranger or wrong-doer cannot object to any irregularity in the proceedings of the sale;[7] nor can such sale be attacked collater-

[1] McDermot *v.* Lorillard, 1 Edw. Ch. 273.

[2] Stine *v.* Wilkson, 10 Mo. 75. A publication in a weekly newspaper operates as a constructive daily notice until the next issue. Campbell *v.* Tagge, 30 Iowa, 305; Sears *v.* Livermore, 17 Iowa, 300; Lefler *v.* Armstrong, 4 Iowa, 482.

[3] Richards *v.* Holmes, 18 How. 143; Burnet *v.* Brundage, 8 Minn. 432. Otherwise in Illinois. Thornton *v.* Boyden, 31 Ill. 200; Griffin *v.* Marine Co., 52 Ill. 130.

[4] Gibson *v.* Jones, 5 Leigh, 370; Hahn *v.* Pindell, 1 Bush. 358.

[5] O'Neil *v.* Vanderburg, 25 Iowa, 104.

[6] Minuse *v.* Cox, 5 Johns. Ch. 447; Greenleaf *v.* Queen, 1 Pet. 145; Beebe *v.* De Baun, 3 Eng. 567; Johnson *v.* Dorsey, 7 Gill, 269; Gibbs *v.* Cunningham, 1 Md. Ch. Dec. 44; Cassell *v.* Ross, 33 Ill. 244.

[7] Hilleglass *v.* Hilleglass, 5 Barr, 97; Gary *v.* Colgin, 11 Ala. 514; Wight-

ally;[1] nor can a purchaser or other person make any objection to the completion of the contract, where the *cestuis que trust*, being competent to act for themselves, waive all irregularities.[2] In the first instance, there is always a general presumption in favor of meritorious parties, as purchasers for value, that the power has been properly exercised.[3]

§ 783. A power of sale, like all other powers, can be exercised only in the mode, and upon the exact conditions, terms, and occasions prescribed in the instrument of trust;[4] (*a*) as, where the power is to sell for a certain price, the trustee cannot sell for less,[5] and where the direction is to sell for cash, a sale upon credit is bad.[6] Whether a trustee can sell on credit or not where no directions are given, is perhaps an open question;[7] (*b*) where a trust is to sell after the death of the tenant for life,[8] or

man *v.* Doe, 24 Miss. 675; Herbert *v.* Hanrick, 16 Ala. 518; Larco *v.* Casaneuava, 30 Cal. 560.

[1] Reed *v.* Mullins, 48 Mo. 344; Williams *v.* Munroe, 67 N. C. 164.

[2] Greenleaf *v.* Queen, 1 Pet. 145; Schenck *v.* Ellenwood, 3 Edw. Ch. 175.

[3] Marshall *v.* Stephens, 8 Humph. 159.

[4] Wright *v.* Wakeford, 17 Ves. 459; Rodman *v.* Munson, 13 Barb. 63; Sweigart *v.* Berk, 8 S. & R. 304; *In re* Vandervoot, 1 Redfield, N. Y. Sur. 270; Alley *v.* Lawrence, 12 Gray, 373; Hunt *v.* Townshend, 31 Md. 336; Booraem *v.* Wells, 4 Green, Ch. 87; Bakewell *v.* Ogden, 2 Bush. 265; Mills *v.* Taylor, 30 Tex. 7; Young *v.* Benthuysen, id. 762; Palmer *v.* Williams, 24 Mich. 328; Berrien *v.* Thomas, 65 Ga. 61.

[5] Caldwell *v.* Brown, 36 Ill. 103.

[6] Waterman *v.* Spaulding, 51 Ill. 425; Cassell *v.* Ross, 33 Ill. 244; Palmer *v.* Williams, 24 Mich. 328.

[7] Carnes *v.* Polk, 4 Coldw. 87; Drusadow *v.* Wilde, 63 Penn. St. 170.

[8] Blacklow *v.* Laws, 2 Hare, 40; Styer *v.* Freas, 15 Penn. St. 339; Davis *v.* Howcote, 1 Dev. & Bat. Ch. 460; Jackson *v.* Lignon, 3 Leigh, 161.

(*a*) Where the power of sale is only for reinvestment, a sale known by the purchaser to be for a different purpose may be set aside. Rabb *v.* Flenniken, 29 S. C. 278. As to the right of a purchaser to assume that the sale is for an authorized purpose and as to his duty to inquire into the authority of the trustee, see *infra*, § 800, note *a*.

(*b*) A trustee with power to sell for reinvestment may take back a mortgage for part of the purchase price, if the mortgage would be a proper investment of trust funds. McLenegan *v.* Yeiser, 115 Wis. 304.

when the *cestui que trust* arrives at his majority,[1] a sale before the time is bad, although made by decree of court,[2] or act of the legislature.[3] But the execution of the power of sale may be accelerated by the tenant for life surrendering the life-estate to the remainder-man, if capable of acting;[4] or by joining with the trustees in effecting the conveyance; for, the postponement of the sale being for the benefit of the tenant for life, such tenant may, by executing the deed of conveyance, waive such benefit.[5] If, however, the postponement of the sale is not for the benefit of the tenant for life, but for the benefit of the remaindermen, as by preserving real security for them, or with the expectation of securing a rise in value for them, the sale of the estate cannot be accelerated, even with the concurrence of the tenant for life.[6] Where the direction was to sell as soon as convenient, and within five years, it was held to be monitory, and a sale after five years was held good.[7] Where trustees were authorized to postpone sales, but not beyond ten years, it was held, that on proof that a sale within that time would have been mischievous to the estate, the trustees might be ordered after that time to sell.[8] A power to sell, if the income of the real and personal estate is not sufficient to support the testator's wife comfortably, can only be exercised in that event.[9] A power to sell, after redeeming from a sale for taxes, cannot be exercised before such redemption;[10] and a power to sell, to discharge the instalment

[1] Loomis *v.* McClintock, 10 Watts, 274.

[2] Blacklow *v.* Laws, 2 Hare, 40.

[3] Ervin's App., 16 Penn. St. 256.

[4] Truell *v.* Tysson, 21 Beav. 439. But if a widow is made tenant for life, and waives the provisions of the will and claims dower, the sale cannot be accelerated. Jackson *v.* Lignon, 3 Leigh, 161.

[5] Styer *v.* Freas, 15 Penn. St. 339; Gast *v.* Porter, 13 id. 533; Davis *v.* Howcote, 1 Dev. & Bat. Ch. 460, is the other way.

[6] Gast *v.* Porter, 13 Penn. St. 535; Pearce *v.* Gardner, 10 Hare, 290; Cuff *v.* Hall, 19 Jur. 973.

[7] Pearce *v.* Gardner, 10 Hare, 287; Smith *v.* Kinney, 33 Tex. 283. [See Shirk *v.* Trundle, 96 Md. 177.]

[8] Cuff *v.* Hall, 1 Jur. (N. S.) 973.

[9] Minot *v.* Prescott, 14 Mass. 495.

[10] Devinney *v.* Reynolds, 1 W. & S. 332.

of a debt then due, cannot be exercised by selling to pay that instalment, and also another not due.[1] Where the power is to sell before a certain period expires, a sale within the period is good, though the deed is dated afterwards, and the actual time of the contract of sale may be shown by parol.[2] (*a*) Where the trustee may exercise his own discretion as to the time and manner of sale, his discretion cannot generally be questioned, except in the absence of good faith.[3] But even a discretionary power cannot be exercised after all the purposes of the power and of the trust have been satisfied; as where all the persons for whom the trust was created are dead, and the property *in specie* goes to the remainder-men.[4] (*b*) But if any of the trusts remain to be executed, the trustees may exercise the power of sale.[5] So a power to executors to sell *virtute officii* ceases when all the purposes of the power are accomplished; as when the estate is fully administered, or the debts are all paid, or barred by lapse of time, or the purpose of the power has become impossible of accomplishment.[6] (*c*) If a trustee sells after the debt is paid, for

[1] Ormsby *v.* Tarascon, 3 Litt. 411.

[2] Harlan *v.* Brown, 2 Gill, 475.

[3] Bunner *v.* Storm, 1 Sand. Ch. 357; Champlin *v.* Champlin, 3 Edw. Ch. 571; 7 Hill, 245; Greer *v.* McBeth, 12 Rich. Eq. 254. [Dickson *v.* N. Y. Biscuit Co., 211 Ill. 468; *supra*, § 511.]

[4] Slocum *v.* Slocum, 4 Edw. Ch. 613. [Heard *v.* Read, 171 Mass. 374.]

[5] Cresson *v.* Ferree, 70 Penn. St. 446. [Parker *v.* Seeley, 56 N. J. Eq. 110, 115.]

[6] Jackson *v.* Jansen, 6 Johns. 73; Sharpsteen *v.* Tillon, 3 Cow. 651; Ward *v.* Barrows, 22 Ohio, 241; Stroughill *v.* Anstey, 1 De G., M. & G. 635. [Trask *v.* Sturges, 170 N. Y. 482; Goad *v.* Montgomery, 119 Cal. 552; Tucker *v.* Baldwin, 73 N. J. Eq. 224.]

(*a*) Where a power was given to postpone the sale of a residue devised on trust to sell, and also to sell a particular business speedily, the trustee was not enabled to carry on the business indefinitely, but the court authorized him to carry it on for two years. *In re* Smith, [1896] 1 Ch. 171.

(*b*) Or where the equitable life tenant has conveyed her entire interest to those entitled to the fee upon her death, they being of full age. Rosier *v.* Nichols, 123 Ga. 20.

(*c*) Thus a power to sell or mortgage for the purpose of paying the testator's debts does not authorize a sale or mortgage after the debts

the payment of which the power of sale was given to him, or after payment is tendered, the purchaser will take no title;[1] but if the sale is simply for more than there is due on the debt, the purchaser will take a good title.[2] The court may enjoin a sale when the purposes of the trust are satisfied.[3]

§ 784. If the sale is directed to be made with the consent of the tenant for life, or any other person, such consent is indispensable to a valid exercise of the power.[4] Where the sale is to be made with the consent of the tenant for life, his consent to a decree of sale is sufficient;[5] and if the tenant for life sells and conveys his life-estate to a third person, he must consent to a sale by the trustees.[6] If the tenant for life becomes bankrupt or insolvent, his power to consent or dissent is not taken away; but his assignees must join with him in assenting to the sale.[7] Where the trust for sale is upon condition that the grantor

[1] Welch *v.* Greenalge, 2 Heisk. 210. [But see *In re* Tanqueray-Willaume, 20 Ch. Div. 465.]

[2] Waterman *v.* Spaulding, 51 Ill. 432.

[3] Neely *v.* Steele, 1 Barb. Eq. 240; Murdock *v.* Johnson, 7 Coldw. 605.

[4] Mortlock *v.* Buller, 10 Ves. 308; Bateman *v.* Davis, 3 Madd. 98; Wright *v.* Wakeford, 17 Ves. 459; Rickett's Trusts, 1 John. & H. 70. [See Fisher *v.* Fairbank, 188 Ill. 187.]

[5] Tyson *v.* Mickle, 3 Gill, 376.

[6] Warburton *v.* Farn, 16 Sim. 625; Vincent *v.* Ennys, 3 Vin. Ab. 433; Ren *v.* Bulkeley, Doug. 292; Long *v.* Rankin, 2 Sugd. Pow. 539; Tyrrell *v.* Marsh, 3 Bing. 31; Davies *v.* Bush, McClel. & Y. 58. But see Alexander *v.* Mills, 39 L. J. Ch. 407; 18 W. R. 635; 22 L. T. (N. S.) 396. [*In re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.]

[7] Holdsworth *v.* Goose, 29 Beav. 111; Eisdell *v.* Hammersley, 31 Beav. 255; Jones *v.* Winwood, 10 Sim. 150; 3 M. & W. 653, overruling Badham *v.* Mee, 1 My. & K. 32; 1 Sugd. Pow. 80; Alexander *v.* Mills, 39 L. J. Ch. 407; 18 W. R. 635; 22 L. T. (N. S.) 396. [*In re* Bedingfeld & Herring's Contract, [1893] 2 Ch. 332.]

have been paid. Sweeney *v.* Warren, 127 N. Y. 426. A purchaser in good faith is protected if he has no notice that the debts have been paid, and he has no duty of inquiry. *In re* Tanqueray-Willaume, 20 Ch. Div. 465. Authority to mortgage for the purpose of raising money to improve the trust property does not include authority to mortgage for the purpose of raising money due to the beneficiaries. Townsend *v.* Wilson, 77 Conn. 411.

or donor shall consent in writing to the sale, no sale can be made without such consent, and the death of the grantor will destroy the power.[1] Where there was a trust for sale, but no sale was to be made without the consent "of my sons and daughters," and a daughter had died, leaving a husband absolutely entitled to her share, and all the surviving children and the husband consented to the sale, it was held to be too doubtful a title to force upon a purchaser.[2] But where there was a power to sell with the consent of a majority of the testator's children, the consent of the majority of children *living* at the time of the sale was held sufficient, although one had died;[3] and the same doctrine was held where all had died.[4] Where a testator gave his "executor" power to sell with the consent of his wife, and then appointed his wife executrix, it was held that she could sell without any concurrence from anybody.[5] If the power to sell depends upon the consent of any person or persons, their death, or the death of one of them, generally defeats the power.[6] (*a*) But where the power depends upon the consent of persons filling a particular office or bearing a particular character, the consent of such persons will be sufficient, though they may have been appointed in the place of those who have died or resigned.[7]

[1] Kissam *v.* Dierkes, 49 N. Y. 602.

[2] Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Co. Litt. 113 *a*; Dame *v.* Annas, Dyer, 219; Atwaters *v.* Burt, 2 Cro. Eliz. 856; Mansell *v.* Mansell, Wilm. 36; Green *v.* Green, 2 Jo. & Lat. 529; Sugd. Pow. 126, 128, 152.

[3] Sohier *v.* Williams, 1 Curtis, 479.

[4] Leeds *v.* Wakefield, 10 Gray, 514.

[5] Williams *v.* Williams, 1 Duv. Ky. 221; Griswold *v.* Perry, 7 Lansing, 98.

[6] Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Alley *v.* Lawrence, 12 Gray, 373.

[7] Barber *v.* Cary, 1 Kern. 397.

(*a*) The power is usually extinguished by the death of all of those whose consent is a condition precedent, but not usually by the death of less than all. Peirsol *v.* Roop, 56 N. J. Eq. 739; Gulick *v.* Griswold, 160 N. Y. 399; Wells *v.* Brooklyn, etc. R. Co., 106 N. Y. S. 77, 121 App. Div. 491. See IV N. Y. Consol. Laws (1909), p. 3407, § 174. It seems to be wholly a question of the intention of the donor of the power; the purpose of the power and of the limitation upon it would usually be an important factor in determining this intention.

The persons whose consent is necessary will not be allowed to withhold it for improper and selfish purposes.[1] Where the required consent must be in writing, any writing signed by the party implying his consent will be sufficient, whether it is a deed, mortgage, or other paper, by which his consent is given or implied.[2]

§ 785. Upon the same principles, where the power is to be exercised only upon some condition or contingent event, such as the deficiency of another estate to pay certain charges,[3] or to pay debts, or upon the purchase and settlement of another estate to the same uses,[4] the power cannot be executed except upon the performance of the conditions.[5] If it is a power to sell to pay debts upon a "deficiency of personal assets," there must be a deficiency to justify the exercise of the power.[6] Such conditions are precedent to the right to exercise the power, and may be traversed; therefore the right to exercise the power must be shown.[7] If the executors have power to sell, if "in *their opinion* a sale is necessary to pay debts and legacies," the sale is conclusive proof of their opinion that it was necessary, if they act in good faith.[8] So, if the personal estate is insufficient,

[1] Norcum *v.* D'Oench, 2 Ben. (Mo.) 98. [Freeman's Estate, 181 Pa. St. 405.]

[2] Montefiore *v.* Browne, 7 H. L. Cas. 241.

[3] Dike *v.* Ricks, Cro. Car. 335; Culpepper *v.* Ashton, 2 Ch. Ca. 221; 2 Sugd. Pow. 497; 2 Sugd. V. & B. 48.

[4] Doe *v.* Martin, 4 T. & R. 39; Cox *v.* Chamberlain, 4 Ves. 631; Burgoigne *v.* Fox, 1 Atk. 575; Hougham *v.* Sandys, 2 Sim. 95, 145.

[5] 2 Sugd. Pow. 497.

[6] Roseboom *v.* Mosher, 2 Denio, 61, per Bronson, Ch. J.; Graham *v.* Little, 5 Ired. Eq. 407; Bloodgood *v.* Bruen, 2 Brad. Sur. 8.

[7] Ibid.; Minit *v.* Prescott, 14 Mass. 495; Griswold *v.* Perry, 7 Lansing, 103. After sale and deed passed, the presumption is, that trustee did those things *in pais* which were conditions precedent, and the burden is on those who question the validity of the sale. Graham *v.* Fittz, 55 Miss. 307; Wilson *v.* South Park Com'rs, 70 Ill. 46.

[8] Roseboom *v.* Mosher, 2 Denio, 61; Rendlesham *v.* Meux, 14 Sim. 249. See Penniman *v.* Sanderson, 13 Allen, 193. It is said in Silverthorn *v.* McKinster, 2 Pa. St. 67, and Coleman *v.* McKinney, 3 J. J. Marsh. 251, that a deficiency of the personal estate need not be shown, and that the

the executors with such powers *must* sell, whether they deem it expedient or not.[1] If the debts are all paid or barred, the trustee will no longer be justified in exercising the power of sale.[2] Where a sale, under such a power, is made after a great length of time, and the heirs and devisees are in the occupation of the land, a purchaser will be held to inquire into the necessity of the sale, and to see to the application of the purchase-money.[3] There is a material difference between conditions precedent and subsequent annexed to powers. If it is a condition precedent, no sale can be sustained under the power unless the condition is performed. Thus in the case of a deed with power of sale for the payment of any balance that might be due, the trustees to make oath before a justice of the peace, or, in case of the death of one, the survivor to make oath as to the amount due, the provision was held to be a condition precedent, to be strictly complied with, and the oath of one, the other being alive, was held to be insufficient to justify a sale.[4] So if the deficiency of the personal estate or any other property is the condition upon which the power of sale is to be exercised, it is a *condition precedent* upon which the power is to arise; and the purchaser must ascertain the right to exercise it.[5] (*a*) But where the condition

conveyance under the power raises the presumption that it existed. The cases hardly seem consistent with principle. But see Hamilton *v.* Crosby, 32 Conn. 342. [Appeal of Gardner, 81 Conn. 171.]

[1] Coleman *v.* McKinney, 3 J. J. Marsh. 246.

[2] Jackson *v.* Jansen, 6 Johns. 73; Sharpsteen *v.* Tillon, 3 Cow. 651; Ward *v.* Barrows, 22 Ohio, 241; Stroughill *v.* Anstey, 1 De G., M. & G. 635; Penny *v.* Cook, 19 Iowa, 538. [Sweeney *v.* Warren, 127 N. Y. 426.]

[3] Stroughill *v.* Anstey, 1 De G., M. & G. 635. This would seem to be the reasonable rule; but in Sabin *v.* Heape, 27 Beav. 553, a sale after twenty-seven years was held not to impose such precautions upon the purchaser. [See *In re* Tanqueray-Willaume, 20 Ch. Div. 465.]

[4] Mason *v.* Martin, 4 Md. 125.

[5] 2 Sugd. V. & P. 48; Hill on Trustees, 478.

(*a*) As to a possible difference between a case where the donee of a power has the legal title and a case where he has no legal title so that his capacity to convey is dependent on the happening of the condition precedent, see *infra*, § 798. As to the effect of conditions precedent upon purchasers in cases of the former kind, see *infra*, § 800, note *a*.

is *subsequent*, the power of sale will attach independently of the performance of the condition. As, where the purchase-money is to be reinvested, it being a condition subsequent, a *bona fide* purchaser will not be affected by its non-performance, if the trustees had power to give receipts for the money.[1]

§ 786. Trustees may propose any reasonable conditions of sale;[2] but they must not dampen the sale by clogging it with unnecessary conditions and restrictions.[3] If they do any act, or make any declarations, or impose any conditions, which prevent competition and cause a sacrifice of the property, the sale will be set aside.[4] But a sale is not void merely for inadequacy of price (even though the property is sold for less than one half its value), unless so gross as to raise the presumption of fraud.[5] They may do all reasonable acts which are necessary for clearing and perfecting the title and completing the sale.[6] The word *grant* was formerly supposed to imply a covenant, for that reason it was left out of trustees' deeds, and they merely *bargained* and *sold;* but it was an unnecessary caution.[7] Still they are not justified in covenanting against anything but their own acts;[8] but if they have any beneficial interest in the trust estate they may enter into full covenants.[9] If the purchaser abandons the

[1] Roper *v.* Halifax, Sugd. Pow. App. No. 3; Hill on Trustees, 478. [See *infra*, § 800, note *a*.]

[2] Hobson *v.* Bell, 2 Beav. 17.

[3] Downs *v.* Grazebrook, 3 Mer. 208; Wilkins *v.* Frye, 2 Rose, 375; 1 Mer. 268; Rede *v.* Oakes, 10 Jur. (N. S.) 1246; Falkner *v.* Equitable Soc., 4 Drew. 352.

[4] Goodwin *v.* Mix, 38 Ill. 115; Barnard *v.* Duncan, 38 Mo. 170. And the court will in such case interfere by injunction to prevent a sale likely to be a disadvantageous one. Dance *v.* Goldingham, L. R. 8 Ch. 902.

[5] Lallance *v.* Fisher, 29 W. Va. 513.

[6] Forshaw *v.* Higginson, 8 De G., M. & G. 827.

[7] Co. Litt. 384 *a*, note 1.

[8] White *v.* Foljambe, 11 Ves. 345; Onslow *v.* Londesborough, 10 Hare, 74; Worley *v.* Frampton, 5 Hare, 560; Stephens *v.* Hotham, 1 K. & J. 571; Page *v.* Broom, 3 Beav. 36; Copper Mining Co. *v.* Beach, 13 Beav. 478; Hodges *v.* Blagrave, 18 Beav. 405; Phillips *v.* Everard, 5 Sim. 102; Sugd. V. & P. 61; Barnard *v.* Duncan, 38 Mo. 170.

[9] Staines *v.* Morris, 1 V. & B. 12; Stephens *v.* Hotham, 1 K. & J. 580.

bargain, and forfeits his deposit, the trustees must account for the forfeit money to the *cestui que trust;* [1] and they are accountable for any unnecessary delay in recovering the deposit money from the auctioneer.[2]

§ 786 *a.* So trustees for sale must conform to their powers in other respects. If they are authorized by the power to sell on credit, they may sell upon such credit as they are authorized to give; but if the power is silent upon the subject of credit, they cannot sell upon a credit.[3] This rests upon the general principle, that trustees are not authorized to invest the trust funds in promissory notes, nor other mere personal securities; [4] nor are they justified in converting the trust property into mere personal promises of anybody.[5] Sales must be generally made for some particular purposes. If they are made for the purpose of distributing the property, the trustee cannot make the distribution until he has obtained the money, and it is his duty not to endanger the fund by leaving it upon personal security. So if the sale is made as a change of securities, or for the purpose of investment or reinvestment, there can be no excuse for leaving the fund, for any length of time, dependent upon the personal responsibility of any one, especially as the change should not be made until he has his new investment in view.[6] It is *laches* for a trustee not to use all due diligence in collecting all debts due to his estate, and converting them into money; [7] and it is greater negligence and maladministration of the trust to convert substantial and tangible property into personal credits. This does not prevent a trustee from making proper terms of sale, and from giving a proper time to the purchaser to examine

[1] Campbell *v.* Johnston, 1 Sand. Ch. 148.

[2] Edmunds *v.* Peake, 7 Beav. 239.

[3] Waldron *v.* McComb, 1 Hill, 111; 7 Hill, 335; Ives *v.* Davenport, 3 Hill, 373; Swoyer's App., 5 Penn. St. 377; Hunt *v.* Fisher. 1 Harr. & Gill, 88; Waring *v.* Darnall, 10 Gill & J. 126; Davis's App., 14 Penn. St. 372.

[4] *Ante,* § 453, and cases cited.

[5] Ibid.

[6] *Ante,* § 466, and cases cited.

[7] *Ante,* § 441, and cases cited.

the title and complete the contract; but the trustee ought not to part with the title before he has received the purchase money. If, however, the sale is made for a change of investment, the trustee may take a mortgage upon the property sold, if it is real estate; for investments in mortgages of real estate, in the absence of any provision in the instrument of trust to the contrary, are permitted by law.[1] And where property was sold for a particular purpose, it was permitted to invest the money in exchequer bills, awaiting the accomplishment of the purpose; but exchequer bills are a kind of government security, and are not a mere personal credit.[2] But where a sale is for the purpose of obtaining money for a particular purpose, the sale must be for money, and a sale on credit cannot be authorized or justified.[3]

§ 787. Where the trustees have the legal title and a power of sale, they alone are competent to contract and make a good title to the purchaser.[4] So if they take a mere power which operates under the statute of uses, by revoking the old uses and appointing new ones, they alone can make a good title to the purchaser.[5] So if executors have a power of sale by implication,[6] they may compel the purchaser to a specific performance of the contract without joining the *cestuis que trust* as parties of the suit,[7] and courts will enforce the specific performance of a proper contract

[1] Swoyer's App., 5 Barr, 277; Waring *v.* Barnall, 10 Gill & J. 126. [McLenegan *v.* Yeiser, 115 Wis. 304.]

[2] Matthews *v.* Brise, 6 Beav. 239.

[3] Davis's Appeal, 14 Penn. St. 372. A sale on credit is said to be the usual and authorized course in North Carolina. Stone *v.* Hinton, 1 Ired. Eq. 15; and see Carnes *v.* Polk, 4 Coldw. 187.

[4] Sowarsby *v.* Lacy, 4 Madd. 142; Keon *v.* Magawly, 1 Dr. & War. 401.

[5] Titcomb *v.* Currier, 4 Cush. 591; Sugd. Pow. *passim*.

[6] Tylden *v.* Hyde, 2 S. & S. 238; Forbes *v.* Peacock, 11 Sim. 152. But the heir may be directed to join in the conveyance. Blatch *v.* Wilder, 1 Atk. 420.

[7] Binks *v.* Rokely, 2 Madd. 227; Keon *v.* Magawly, 1 Dr. & War. 401; Drayson *v.* Pocock, 4 Sim. 283; *In re* London Bridge, 13 Sim. 176; Wakeman *v.* Rutland, 3 Ves. Jr. 233, 504; 8 Bro. P. C. 145; *Re* Williams's Estate, 5 De G. & Sm. 515; Cottrell *v.* Cottrell, L. R. 2 Eq. 330; Lloyd *v.* Griffiths, 3 Atk. 264; Duffy *v.* Calvert, 6 Gill, 487.

of sale,[1] even if the power was ended before the conveyance, if the trustees had the power to make the contract;[2] but any contract that is a breach of the trust will not be enforced, although the purchaser was without fault; he will be left to his remedy at law.[3] If the trustees sell with an agreement that the purchaser may retain a private debt due from them, the court will not enforce the sale.[4] Trustees themselves cannot purchase the estate;[5] (*a*) but the tenant for life may,[6] and trustees of other estates may purchase.[7] If the contract turns out to be one of great hardship against the trustees, from any misapprehension of all the circumstances of the estate, the court will not enforce its specific performance against them, but will leave the purchaser to his suit at law.[8]

[1] Mortlock *v.* Buller, 10 Ves. 315; 2 Sugd. Pow. 511.

[2] Mortlock *v.* Buller, 10 Ves. 315.

[3] Ord *v.* Noel, 5 Madd. 438; Wood *v.* Richardson, 4 Beav. 174; Mortlock *v.* Buller, 10 Ves. 315; Thompson *v.* Blackstone, 6 Beav. 470; Dawes *v.* Betts, 12 Jur. 709; Johnston *v.* Eason, 3 Ired. Eq. 334.

[4] Thompson *v.* Blackstone, 6 Beav. 470; Miltenberger *v.* Morrison, 46 Mo. 251.

[5] *Ante*, §§ 195–199. [But see Warren *v.* Pazolt, 203 Mass. 328.]

[6] Howard *v.* Ducane, T. & R. 81; Diconson *v.* Talbot, 19 W. R. 138; Miltenberger *v.* Morrison, 46 Mo. 251. [Albany Exch. Bank *v.* Brass, 69 N. Y. S. 391, 59 App. Div. 370 (171 N. Y. 693); Mills *v.* Mills, 63 N. Y. S. 771, 50 App. Div. 221.]

[7] Ibid.

[8] Wedgewood *v.* Adams, 6 Beav. 600; 8 Beav. 103. [Givens *v.* Clem, 107 Va. 435.]

(*a*) A trustee, who without fraud, bids in trust property at a foreclosure sale in his own name, acts on the *cestui's* behalf; he still holds the property in trust and is only accountable therefor as a continuing trustee. Mareck *v.* Minneapolis Trust Co., 74 Minn. 538.

CHAPTER XXVI.

RIGHTS AND DUTIES OF THIRD PERSONS IN RELATION TO THE TRUST, AND THEIR DUTY OF SEEING TO THE APPLICATION OF THE PURCHASE-MONEY.

§ 788. State of the question in relation to sale.
§ 789. The different powers of trustees.
§ 790. General rule respecting the person to whom money or property must be passed.
§ 791. How the general rule may be controlled. By express words.
§ 792. By powers of attorney.
§ 793. By implication.
§ 794. Where the funds are to be held and invested by the trust.
§ 795. Where the trust is to pay debts and legacies.
§ 796. Where a particular debt to be paid.
§ 797. Discussion of the rule.
§ 798. Rule in the United States.
§ 799. Where trustees have the right to vary the securities.
§ 800. The effect of collusion or fraud.
§ 801. The intention of the testator must be sought at the time the will was made, and is not affected by a change of circumstances.
§§ 802–805. Who has power to sell where testator makes charges upon his estate, and gives no power of sale.
Receipts.
§ 806. Trust for sale a joint office, receipts must be joint.
§ 807. Substituted trustees may give receipts.
§ 808. Power to sign receipts after a breach of trust.
§ 809. Rules as to executors in respect to personal estate.
§ 810. Cannot collusively dispose of personal estate.
§ 811. Where the executor has an interest as legatee.
§ 812. Rules in the United States where bonds are required.
§ 813. Rules as to agents.
§ 813 *a*. Rule where debt is paid before it is due.
§ 814. Rule as to those standing in fiduciary relations.
§ 815. Within what time courts will give relief.
§ 815 *a*. Right of creditors of *cestui* to reach the income, etc.
§ 815 *b*. Right of creditors to reach the legal estate.
§ 815. *c*. *Bona fide* purchasers without notice are protected.

§ 788. IMMEDIATELY connected with the power of trustees to sell the trust property and receive the money is the inquiry,

what are the rights and duties of third persons in dealing with the trustees and purchasing the property? This inquiry embraces two heads: (1) How far the trustees are authorized to sell; and (2) if authorized to sell, how far are the purchasers required to see that the purchase-money is applied to the purposes of the trust?

§ 789. There is a wide difference between the gift of an estate to trustees with a power to sell, and the gift of a power over an estate as a power to sell upon a certain event happening. Thus if a testator gives an estate to trustees for the payment of debts, if the personal assets prove insufficient, the trustees should not sell the estate until it appears that the personal assets are insufficient, or until the estate is wanted for the purposes for which it was given. But a purchaser has no means of investigating the accounts, and determining the amount of the debts due, the amount of the personal assets, or the disposition that has been made of them. All that he can do is to inquire of the executor, and if the executor and trustee are the same person, he would make no progress in the investigation beyond the representations of the trustee. In this case the legal title being in the trustees, they can sell and transfer it, and the title of the purchaser cannot be impeached, if he has acted without fraud or collusion, even though the personal assets prove sufficient to pay the debts.[1] But if the estate itself is not given to the trustees, but a mere power is conferred upon them to sell in case the personal assets are insufficient, the purchaser must act at his peril, and ascertain whether such facts exist that the power to make the sale is complete, or that the events have happened which justify the exercise of the power.[2] In all cases, if the trust is in course of administration in court, the purchaser must con-

[1] Culpepper *v.* Aston, 2 Ch. Cas. 115; Greetham *v.* Colton, 1 Jur. (N. S.) 848; Shaw *v.* Borrer, 1 Keen, 159; Keene *v.* Robarts, 4 Madd. 356; Co. Litt. 290 b; Butl. n. 14. [*In re* Tanqueray-Willaume, 20 Ch. Div. 465.]

[2] Culpepper *v.* Aston, 2 Ch. Cas. 116, 221; Dike *v.* Ricks, Cro. Car. 335; W. Jones, 327. [See *infra*, § 800, note *a*, p. 1314.]

sult the proceedings and decrees of the court.[1] But in no case is the purchaser bound to ascertain whether the trustees are not offering *more* of the estate for sale than is necessary; for the purchaser cannot know the exact sum wanted, together with all the incidental costs, charges, and expenses.[2] If, however, the sale is delayed for a great number of years, and there are circumstances naturally leading to a suspicion that there are no debts after such a length of time, the purchaser will be affected by such suspicious circmustances, and put upon his inquiry.[3]

§ 790. If a person holds money or other property in his hands belonging to another, he cannot discharge himself from liability, except by transferring the property or money to the true owner. At *law* the trustee is the true owner of property that is vested in him, but in *equity* the *cestui que trust* is the true owner. Hence the complications and doubts that have arisen concerning trustees' receipts, and the duty of purchasers to look to the application of the purchase-money. Thus if an estate is vested in trustees to sell and divide the purchase-money between B. and C., a court of law treats the trustees as the true owners, and their receipts for the purchase-money as valid discharges; but courts of equity treat B. and C., the *cestuis que trust*, as the true owners, and the trustees as mere instruments. Courts of equity, therefore, require that the receipts for the purchase-money shall be signed by the rightful owners, or the purchase-money must be properly applied to their use, according to the terms of the trust, or there can be no such conveyance of the estate as to bar their beneficial interest.[4] (*a*) If with the assent of the trustee the

[1] Culpepper *v.* Aston, 2 Ch. Cas. 116, 223; Walker *v.* Smallwood, Amb. 676.

[2] Spalding *v.* Shalmer, 1 Vern. 301.

[3] Pierce *v.* Scott, 1 Y. & Col. 257. [But see *In re* Tanqueray-Willaume, 20 Ch. Div. 465, 476.]

[4] Weatherby *v.* St. Giorgio, 2 Hare, 624.

(*a*) The common-law rule stated in the text has been abolished by statute in England and in many of the States. Trustee Act, 1893 (56 & 57 Vict. c. 53), § 20; 22 & 23 Vict., c. 35, § 23; Ala. Civ. Code (1907),

money actually goes into the hands of part of the *cestuis* of full age who are handling the trust property or a portion of it, the

§ 3411; Cal. Civ. Code (1907), § 2244; Burns' Ind. Stat. (1908), § 4020; Kan. Gen. Stat. (1909), § 9702; Stat. of Ky. (1909), § 3960; Mich. Comp. Laws. (1897), § 8850; Minn. Rev. Laws (1905), § 3260; Mo. Annot. Stat. (1906), § 4588; IV N. Y. Consol. Laws (1909), p. 3394, § 108; No. Dak. Rev. Code (1905), § 5725; So. Dak. Code (1908), § 1630; Wis. Stat. (1898), § 2092. See Orr *v.* Rode, 101 Mo. 387; Curd *v.* Field, 103 Ky. 293; Miller *v.* Stagner, 76 S. W. 160 (Ky. 1903); Robinson *v.* Pence, 76 S. W. 368 (Ky. 1903); Johnson *v.* Dumeyer, 66 S. W. 1025 (Ky. 1902).

Where the rule has not been entirely abolished, the exceptions stated in succeeding sections are so numerous and include such a large proportion of purchases from trustees that it is the exception, rather than the rule, to impose upon a *bona fide* purchaser any duty of seeing that the trustee properly applies the purchase-money. The rule has never been regarded with favor in the United States, and wherever it is reasonable to find in the terms of the trust an intention that the trustee is to receive the purchase-money in case of a sale, either for the purpose of reinvestment or for distribution among those entitled, a purchaser who has no notice of an intention to misapply the proceeds will be held to have no duty of seeing to the proper application of the purchase-money, nor will the property transferred to him be charged with the trust because of a subsequent misapplication by the trustee. Seaverns *v.* Presbyterian Hospital, 173 Ill. 414, 424; Dickson *v.* N. Y. Biscuit Co., 211 Ill. 468, 487; National Bank of Commerce *v.* Smith, 17 R. I. 244, 262; Harris *v.* Smith, 98 Tenn. 286; Young *v.* Mutual Life Ins. Co., 101 Tenn. 311; Guarantee & Trust Co. *v.* Jones, 103 Tenn. 245; Whatley *v.* Oglesby, 44 S. W. 44 (Tex. Civ. App. 1898); Claiborne *v.* Holland, 88 Va. 1046; Redford *v.* Clarke, 100 Va. 115; Hughes *v.* Tabb, 78 Va. 313, 325; Lining *v.* Peyton, 2 Desaus. 375; Keister *v.* Scott, 61 Md. 507; Reese *v.* Ivey (Ala. 1909), 50 So. 223. See 1 Ames' Cases on Trusts (2d ed.), 269, note; note to Elliot *v.* Merryman, 1 White & Tudor's Leading Cases in Equity (6th Am. ed.), 78–113.

There are, however, occasional statements in the decisions bearing upon the point, to the effect that where the trust is for a particular and definite purpose, calling for the payment of a specified sum to a named person at a time certain, the purchaser must at his peril see to the proper application of the purchase-money. See National Bank of Commerce *v.* Smith, 17 R. I. 244, 262; Grotenkemper *v.* Bryson, 79 Ky. 353, 357; St. Mary's Church *v.* Stockton, 8 N. J. Eq. 520. But the actual decisions to this effect in the United States seem to be confined to cases of conveyances or devises subject to a charge to pay legacies or specified debts. See Curd *v.* Field, 103 Ky. 293; Amherst College *v.* Smith, 134 Mass. 543; Bugbee *v.* Sargent, 23 Me. 269; McPherson *v.* Rollins, 107 N. Y. 316. See *infra*, § 796.

mortgagee and lender has been held not obliged to see to a more strict application of the fund to the purposes of the trust.[1] But the clear general rule is that the purchaser must hold the estates subject to their equities, although he may have paid the money to the trustee. Thus the application of the purchase-money, or the power of the trustees to sign receipts for it, becomes, in equity, *a question of title*,[2] or rather a question of the equitable title, which is the principal thing; for the legal title, without the beneficial use, is of little consequence. Thus the general rule is, that *prima facie* the *cestuis que trust* must sign receipts for the purchase-money, or the purchaser must look to its application. But this rule may be controlled by a great number of circumstances and considerations. The essence of the matter being, that if there is a discretion in the trustee what to do with the funds received from the purchaser, or their application is general and uncertain, or they are to go to persons unborn, or to be reinvested, or for any reason it would be unreasonable and burdensome to require the purchaser to look after the matter and would really amount to constituting him a trustee, he will be free from the control of the general rule.[3] (*a*)

§ 791. First, it may be controlled by the *express* terms of the trust or by statute. For if the settlor expressly provides that the receipts of the trustees shall be sufficient discharges of the purchase-money,[4] the *cestuis que trust* cannot claim in opposition to the instrument that confers upon them all their

[1] Colesbury *v.* Dart, 61 Ga. 625.
[2] Forbes *v.* Peacock, 12 Sim. 521.
[3] Hughes *v.* Tabb, 78 Va. 313.
[4] Duffy *v.* Calvert, 6 Gill, 487.

Where land is devised subject to a charge to pay debts generally, it has been held that a purchaser is not bound to look to the application of the purchase-money. Goodrich *v.* Proctor, 1 Gray, 567; Marsh *v.* French, 159 Mass. 469, 472; Grotenkemper *v.* Bryson, 79 Ky. 353. See *infra*, § 795.

(*a*) In practice most of the modern cases of purchase from trustees come within this principle. See note *a*, *supra*.

rights; in other words, they cannot claim under one part of the instrument, and reject the other parts, and if the law of the State which controls the contract releases the purchaser from the duty of watching the application of the purchase-money, of course that also is sufficient. This is the case in New York, where it is provided that no person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall be responsible for the proper application of such money according to the trust.[1] But this does not protect one dealing with a trustee who exceeds his powers in receiving the money.[2]

§ 792. Words in a power of attorney or other instrument, authorizing the attorney or trustee "to sign discharges in the name of the assignor or *otherwise*, and to do all other acts, as the *principal might have done*," have been held to make receipts signed in pursuance thereof valid;[3] unless such words are controlled by some other part of the instrument.[4] Where, however, trustees were entitled to receive a sum of *stock*, and had power to vary the securities, a receipt signed by them for *cash* was held to be no discharge; though the court intimated, that if there had been any indication that the receiving of cash was intended as a part of the power to vary the securities, the decision might have been the other way.[5] This seems to be a harsh and unnecessary application of the rule. If the receiving of cash, in the process of varying the securities, was no breach of the trust, the receipts of the trustees ought to have been sufficient.[6]

§ 793. In the second place, the rule may be controlled by an implied intention that the trustee shall have the power to give

[1] 1 R. S. 730, § 66. [IV Consol. Laws (1909), p. 3394, § 108. See note *a*, *supra*, pp. 1303-1304, for similar statutes in other States.]

[2] Waterman *v.* Webster, 108 N. Y. 157.

[3] Binks *v.* Rokeby, 2 Madd. 527; Desborough *v.* Harris, 5 De G., M. & G. 439; Ottley *v.* Gray, 16 L. J. Ch. 512; Curton *v.* Jellicoe, 14 Ir. Ch. 180.

[4] Brasier *v.* Hudson, 9 Sim. 1.

[5] Pell *v.* De Winton, 2 De G. & J. 13.

[6] Lewin on Trusts, 333 (5th ed.).

valid receipts for the purchase-money. Thus if a settlor creates a trust for an *immediate* sale, it is clearly implied that a legal and equitable receipt for the purchase-money shall be *signed by some one*, at the time of the sale. There can be no conveyance without payment of the purchase-money, and there can be no payment without a complete discharge. If, therefore, a sale is directed when the *cestuis que trust*, or some of them, are not in existence, or *sui juris*, or of age, or of sufficient capacity to act, there must be an implied intention that the receipts of the trustees shall be valid releases of the purchase-money. It has been held, where an immediate sale was contemplated, and some of the *cestuis que trust* were infants, that the trustees had an implied power of giving valid discharges for the purchase-money.[1] If a trustee is empowered to sell for cash or on credit and pay the money to an infant *cestui* when he comes of age, the purchaser is not bound to see to the application of the purchase-money whether the sale be made before or after the *cestui* arrives at maturity.[2] But the mere fact that the *cestuis que trust* are out of the jurisdiction raises no presumption that the settlor intended that the trustees should sign receipts.

§ 794. Again, the general rule is controlled, if a sale is directed, but the proceeds are not to be paid over to the *cestuis que trust*, but are to be held by the trustees upon some special trusts. In such case the implication is plain, that the settlor intended to confide the execution of the trust to the trustees, and that they have power and authority to receive the trust fund and to give receipts.[3] Power of sale and reinvestment re-

[1] Sowarsby *v.* Lacy, 4 Madd. 142; Lavender *v.* Stanton, 6 Madd. 46; Breedon *v.* Breedon, 1 R. & M. 413; Balfour *v.* Welland, 16 Ves. 151; Groom *v.* Booth, 1 Drew. 548, 566; Cuthbert *v.* Baker, Sugd. V. & P. 842 (11th ed.).

[2] Woodwine *v.* Woodrum, 19 W. Va. 67.

[3] Doran *v.* Wiltshire, 3 Swanst. 699; Balfour *v.* Welland, 16 Ves. 157; Wood *v.* Harman, 5 Mod. 368; Locke *v.* Lomas, 5 De G. & Sm. 329; Glynn *v.* Locke, 3 Dr. & W. 11; Ford *v.* Ryan, 4 Ir. Ch. 342. See Cox *v.* Cox, 1 K. & J. 251; Wormeley *v.* Wormeley, 8 Wheat. 421, 423; Lining *v.* Peyton,

lieves the purchaser of any burden of looking after the application of the money.[1] The earlier English lawyers were of opinion that, in such cases, the purchasers were only required to see to the investment of the trust fund or purchase-money, and that they could not be responsible for any subsequent misapplication.[2]

§ 795. If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the application of the purchase-money;[3] or if the trust is to pay debts and leg-

2 Des. 375; Redheimer *v.* Pyson, 1 Speer's Eq. 135; Nichols *v.* Peak, 1 Beasl. Ch. 69; Coonrod *v.* Coonrod, 6 Ham. 114; Sims *v.* Lively, 14 B. Mon. 433; Steele *v.* Levisay, 11 Grat. 454; Potter *v.* Gardner, 12 Wheat. 499; Clyde *v.* Simpson, 4 Ohio St. 445; Hauser *v.* Shore, 5 Ired. Eq. 357; Dalzell *v.* Crawford, 1 Pars. Eq. 37; Garnett *v.* Macon, 6 Call, 308; 2 Brock. 185; Williamson *v.* Morton, 2 Md. Ch. 91.

[1] Guill *v.* Northern *et al.*, 67 Ga. 345; Van Bokkelen *v.* Tinges, 58 Md. 53; Keister *v.* Scott, 61 Md. 507; Turner *v.* Hoyle, 95 Mo. 337; Mason *v.* Bank of Commerce, 90 Mo. 452; Hughes *v.* Tabb, 78 Va. 313. [Claiborne *v.* Holland, 88 Va. 1046; Whatley *v.* Oglesby, 44 S. W. 44 (Tex. Civ. App. 1898); Young *v.* Mutual Life Ins. Co., 101 Tenn. 311; Guarantee & Trust Co. *v.* Jones, 113 Tenn. 245.]

[2] Booth's Cas. & Opin. 114.

[3] Forbes *v.* Peacock, 11 Sim. 152; 12 Sim. 528; 1 Phil. 717; Stroughill *v.* Anstey, 1 De G., M. & G. 635; Dowling *v.* Hudson, 17 Beav. 248; Culpepper *v.* Aston, 2 Ch. Cas. 223; Watkins *v.* Cheek, 2 S. & S. 205; Hardwick *v.* Mynd, 1 Anst. 109; Anon., Moseley, 96; Johnson *v.* Kennett, 3 My. & K. 630; Rogers *v.* Skillicorne, Amb. 189; Walker *v.* Smallwood, id. 677; Barker *v.* Devonshire, 3 Mer. 310; Abbot *v.* Gibbs, 1 Eq. Cas. Ab. 358; Binks *v.* Rokeby, 2 Madd. 238; Dunch *v.* Kent, 1 Vern. 260; Elliott *v.* Merryman, Barn. 78; 1 Lead. Cas. Eq. 40, Eng. and Amer. notes; Garnett *v.* Macon, 2 Brock. 185, 186; 6 Call. 308; Bruch *v.* Lantz, 2 Rawle, 392; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Smith *v.* Guyon, 1 Bro. Ch. 186; Ithell *v.* Beane, 1 Ves. 215; Lloyd *v.* Baldwin, 1 Ves. 215; Dalton *v.* Hewen, 6 Madd. 9; *Ex parte* Turner, 9 Mod. 418; Gosling *v.* Carter, 1 Coll. 644; Eland *v.* Eland, 1 Beav. 235; 4 M. & Cr. 420; Jones *v.* Price, 11 Sim. 557; Currer *v.* Walkley, 2 Dick. 649; 3 Sugd. V. & P. 168 (10th ed.); Gardner *v.* Gardner, 3 Mason, 178; Potter *v.* Gardner, 12 Wheat. 198; Laurens *v.* Lucas, 6 Rich. Eq. 217; Williams *v.* Otey, 8 Humph. 568; Hauser *v.* Shore, 5 Ired. Eq. 357; Goodrich *v.* Proctor, 1 Gray, 570; Langmead's Trusts, 7 De G., M. & G. 353; Conover *v.* Stothoff, 38 N. J. Eq. 55; Learned *v.* Tritch, 6 Col. 442; White *v.* Cook, 73 Ga. 176. [Grotenkemper *v.* Bryson, 79 Ky. 353, 357.] The same rule holds, whatever is to be done with the balance after the debts are paid. Cherry *v.* Greene, 115 Ill. 591.

acies,[1] or to pay a *particular* debt and all other debts,[2] or to pay legacies,[3] or to pay debts and apply the balance to the support of some one,[4] there can be no obligation to see to the payment of debts and legacies. The law is the same in regard to a mortgagee, when the trustee has power to mortgage to satisfy debts.[5] Such a trust must necessarily require time, and the investigation of long accounts and vouchers: the purchaser could know neither the creditors nor the amounts. Where debts and legacies are to be paid, the debts must first be paid, and as the purchaser can be under no obligation to examine into the debts, so he cannot be required to take any action in regard to the legacies; and if one debt is named, but is coupled with others not named, the same considerations apply. In such trusts the testator must be presumed to have intended that his trustees should have the full power to give receipts for the purchase-money, in order to apply it to the purposes pointed out. This must, however, always be subject to the qualification, that the purchaser can in no wise be party or privy to a breach of the trust in the application of the purchase-money.[6]

§ 796. But where the trust is to pay from the proceeds of a sale a particular debt, or scheduled debts only, or to pay certain legacies named, the purchaser must see that the money finds its way into the hands of those to whom it belongs. In such case there is no trust that requires time or discretion. The purchase-money is simply to be distributed to certain known persons in sums easily ascertained, and there is no reason to

[1] Ibid.; Co. Litt. 29 b.; Butl. n.; Williamson *v.* Curtis, 3 Bro. Ch. 96; Johnson *v.* Kennett, 3 My. & K. 630; 6 Ves. 654, note a; Page *v.* Adam, 4 Beav. 629; Grant *v.* Hook, 13 S. & R. 259; Cadbury *v.* Duval, 10 Barr, 265; Andrews *v.* Sparhawk, 13 Pick. 393; Sims *v.* Lively, 14 B. Mon. 435; Dewey's Ex'rs *v.* Ruggles, 25 N. J. Eq. 35.

[2] Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272.

[3] Grant *v.* Hook, 13 S. & R. 259; Hannum *v.* Spear, 1 Yeates, 553; 2 Dall. 291; Cryder's App., 1 Jones, 72.

[4] State *v.* Cincinnati, 16 Ohio St. 169.

[5] Pike *v.* Baldwin, 68 Iowa, 264.

[6] Dewey's Ex'rs *v.* Ruggles, 25 N. J. Eq. 35.

presume that the settlor intended that the general rule should not apply.[1]

§ 797. In Stroughill *v.* Anstey, Lord St. Leonards said that, "If a trust is created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarass courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this court."[2] This rule, thus stated, proceeds upon the ground that, in all cases where a testator has given his trustees a power to sell to pay debts generally, or to pay particular debts, or to pay legacies only, he has reposed a special confidence in the trustees for those purposes, and has declared that they shall execute these trusts; and that purchasers have nothing to do with their execution, and therefore need not look to the application of the purchase-money, whether it is to pay debts generally,

[1] Doran *v.* Wiltshire, 3 Swanst. 701; Smith *v.* Guyon, 1 Bro. Ch. 186; Rogers *v.* Skillicorne, Amb. 189; Humble *v.* Bill, 1 Eq. Cas. Ab. 359; Abbot *v.* Gibbs, id. 358; Anon., Moseley, 96; Spalding *v.* Shalmer, 1 Vern. 303; Elliott *v.* Merryman, Barn. 81; Binks *v.* Rokeby, 2 Madd. 238; Ithell *v.* Beane, 1 Ves. 215; Lloyd *v.* Baldwin, id. 173; Mather *v.* Norton, 21 L. J. Ch. 15; Dunch *v.* Kent, 1 Vern. 260; Culpepper *v.* Aston, 2 Ch. Ca. 223; Johnson *v.* Kennett, 3 My. & K. 930; Horn *v.* Horn, 2 S. & S. 448; Dowman *v.* Rust, 6 Rand. 587; Bugbee *v.* Sargent, 23 Maine, 269; Leavitt *v.* Wooster, 14 N. H. 550; Swasey *v.* Little, 7 Pick. 296; Lupton *v.* Lupton, 2 Johns. Ch. 614; Kemp *v.*McPherson, 7 H. & J. 320; Long *v.* Long, 1 Watts, 267; Hoover *v.* Hoover, 5 Barr, 351; Dalzell *v.* Crawford, 1 Pars. Eq. 57; Duffy *v.* Calvert, 6 Gill, 487. [See Curd *v.* Field, 103 Ky. 293; Amherst College *v.* Smith, 134 Mass. 543; McPherson *v.* Rollins, 107 N. Y. 316. See *supra*, § 790, note *a*, p. 1303 *et seq.*]

[2] Stroughill *v.* Anstey, 1 De G., M. & G. 635; See this case for an admirable discussion of principles and of the prior cases. But see 17 Jurist, pt. ii. 251, where the case is criticised, and the assertion is made, that prior to that case and Forbes *v.* Peacock, 1 Phil. 717, the purchaser was relieved from seeing to the application of the purchase-money in the case of a trust for the payment of debts generally, not from an intention in the settlor, but from the impossibility of the case.

or debts and legacies, or particular debts named, or legacies only. Mr. Redfield asserts that this is the true principle, and that the old rule that a purchaser need not look to the application of the purchase-money where the trust is to pay debts generally, or debts and legacies, but must see to its application, where the trust is to pay particular debts or legacies only, rests upon no sound distinction.[1] He admits, however, that the distinction is established and acted upon in the American cases.[2] But a purchaser under a decree of the court need not look to the application of the purchase-money, whatever may be the purpose for which it is to be employed.[3]

§ 798. In the United States, where lands are holden for the payment of the testator's debts, a devise of lands for the payment of particular debts or legacies only, can impose upon the purchaser no obligation to see to the application of the purchase money; for the reason that the lands being holden to pay all the debts, the purchaser would be compelled to investigate all the testator's business to ascertain whether the purchase-money should be paid to a particular debt or not, or whether it could be applied to the payment of legacies. In all cases where land is sold, by a decree or license of the probate or other court, to pay debts or legacies, the purchaser is exonerated from all responsibility.[4] It may be stated that the strict English rule is not favored by the American courts, although they apply the doctrine in cases where it cannot be avoided.[5]

[1] 3 Redf. on Wills, 235. Mr. Lewin, p. 352, thinks this would be the better rule. See also Sugd. V. & P. 844, 848 (11th ed.).

[2] 3 Redf. on Wills, 236; Andrews *v.* Sparhawk, 13 Pick. 393; Hauser *v.* Shore, 5 Ired. Eq. 357; Cadbury *v.* Duval, 10 Pa. St. 265; Gardner *v.* Gardner, 3 Mason, 178; St. Mary's Church *v.* Stockton, 4 Halst. Ch. 520; Duffy *v.* Calvert, 6 Gill, 487.

[3] Coombs *v.* Jordan, 3 Bland, 284, 329; Wilson *v.* Davisson, 2 Rob. (Va.) 385, 412. [See Ball *v.* Safe Deposit Co., 92 Md. 503; Dickel *v.* Smith, 38 W. Va. 635.]

[4] Grant *v.* Hook, 13 S. & R. 259; Cryder's App., 1 Jones, 72; Coombs *v.* Jordan, 3 Bland, 284, 329; Wilson *v.* Davisson, 2 Rob. (Va.) 385, 412.

[5] Dalzell *v.* Crawford, 1 Pars. Eq. 57; Rutledge *v.* Smith, 1 Busb. Eq.

§ 799. Where trustees have authority to invest and vary the securities, power to sign receipts is implied from the nature of the trust.[1] If they are authorized to invest on security, the borrower has a right to pay, and the trustee must receive the money and give a receipt, though there is no express power given to sign receipts.[2] Where the trustee was directed to invest on security, but real security was not mentioned, and he loaned on mortgage, the court thought it doubtful whether he had power to sign the receipt, and declined to compel a vendee to perform a contract specifically, and take the title.[3] It is said that the authority to sign the receipt in such cases depends upon the *intention*, and that there could be no intention where there was no authority to lend on mortgage. This is a refinement that probably would not be recognized in our courts, mortgages being among recognized investments in this country. But a power of sale and exchange would not imply a power to sign receipts.[4]

§ 800. But whatever power and authority the trustee may have to receive the purchase-money and give valid receipts and discharges, the purchaser will not be protected by the receipt if there was any collusion between them;[5] or if he had notice, from the intrinsic nature and character of the transaction, that the trustee intended to misapply the purchase-money;[6] (*a*) or

283; Redheimer *v.* Pyron, 1 Spears, Eq. 141; Elliott *v.* Merryman, 1 Lead. Ca. Eq. 40, Amer. notes 6th Am. ed. 78–113. [1 Ames' Cases on Trusts (2d ed.) 269, note.]

[1] Locke *v.* Lomas, 5 De G. & Sm. 329.

[2] Wood *v.* Harman, 5 Madd. 368.

[3] Hanson *v.* Beverley, Sugd. V. & P. 848 (11th ed.).

[4] Cox *v.* Cox, 1 K. & J. 251. Nor a trust to raise money by sale or mortgage. Locke *v.* Lomas, 5 De G. & Sm. 329.

[5] Rogers *v.* Skillicorne, Amb. 189; Eland *v.* Eland, 4 M. & Cr. 427; Potter *v.* Gardner, 12 Wheat. 498; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308.

[6] Watkins *v.* Cheek, 2 S. & S. 199; Colyer *v.* Finch, 5 H. L. Cas. 923; Stroughill *v.* Anstey, 1 De G., M. & G. 648; Burt *v.* Trueman, 6 Jur. (N. S.)

(*a*) A purchaser who has notice that he is purchasing trust property, is bound to inquire as to the authority of the trustee to make the sale. If

if a suit was pending for the administration of the trust, or to take it out of the hands of the trustees.[1] If the purchaser deals

721; Eland *v.* Eland, 4 M. & Cr. 427; Williams *v.* Morton, 2 Md. Ch. 94; Clyde *v.* Simpson, 4 Ohio St. 445; Garnett *v.* Macon, 2 Brock. 185; 6 Call, 308; Shaw *v.* Spencer, 100 Mass. 388.

[1] Lloyd *v.* Baldwin, 1 Ves. 173.

it turns out that the sale was without apparent authority, he runs the risk of having it set aside or of being charged with the loss to the trust estate, even though he pays full value to the trustee and acts in good faith. Jones *v.* Holladay, 2 App. D. C. 279; Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616; Stark *v.* Olsen, 44 Neb. 646; McPherson *v.* Rollins, 107 N. Y. 316; Suarez *v.* De Montigny, 37 N. Y. S. 503, 1 App. Div. 494; Ludington *v.* Mercantile Nat. Bank, 92 N. Y. S. 454, 102 App. Div. 251; Bank *v.* Looney, 99 Tenn. 278; Mansfield *v.* Wardlow, 91 S. W. 859 (Tex. Civ. App. 1906); Hazeltine *v.* Keenan, 54 W. Va. 600; Sternfels *v.* Watson, 139 Fed. 505; Harmon *v.* Smith, 38 Fed. 482; O'Herron *v.* Gray, 168 Mass. 573; Gibney *v.* Allen, 156 Mich. 301. If there is a recorded trust deed in the chain of title he is affected with notice of its contents and of limitations upon the authority of the trustee. Stark *v.* Olsen, 44 Neb. 646. See Claiborne *v.* Holland, 88 Va. 1046. Where he knows or has notice that the trust is testamentary or that the trustee owes his appointment to a decree of court, he is charged with notice of the contents of the will and the terms of the decree in so far as they affect the authority of the trustee. Ludington *v.* Mercantile National Bank, 92 N. Y. S. 454, 102 App. Div. 251; Marbury *v.* Ehlen, 72 Md. 206.

If the trust instrument is not a will or deed of which the purchaser has notice, he must take all reasonable steps to ascertain the powers given to the trustee, and he is chargeable with notice of such terms of the trust as he would have learned upon reasonable inquiry. First National Bank *v.* Broadway Bank, 156 N. Y. 459; Sturtevant *v.* Jaques, 14 Allen, 523. See Davidson *v.* Mantor, 45 Wash. 660; Grafflin *v.* Robb, 84 Md. 451.

The same rule applies to other dealings of the trustee with the trust property, *e. g.* to a pledge or a mortgage, First Nat. Bank *v.* Broadway Bank, 156 N. Y. 459; Shaw *v.* Spencer, 100 Mass. 382; O'Herron *v.* Gray, 168 Mass. 573; or to a discharge of a mortgage held in trust, Kirsch *v.* Tozier, 143 N. Y. 390, and to those acting under powers. Harmon *v.* Smith, 38 Fed. 482.

As the trustee's authority to deal with the trust property is restricted to dealing for the benefit of the trust and frequently for very limited purposes, a purchaser, mortgagee or pledgee for value runs the same risk, if before the completion of the transaction he has notice that the trustee is not acting for the authorized purposes. Thus where the trustee has power of sale only for the purpose of reinvestment, a purchaser who has notice that reinvestment is not the purpose of the sale is liable to have the sale set aside or to be held as a

with the trustee long after the trust should have been executed, he is bound to satisfy himself that the trustee is acting in the proper discharge of his duty.[1]

[1] Stroughill *v.* Anstey, 1 De G., M. & G. 654; Forbes *v.* Peacock, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; Devaynes *v.* Robinson, 24 Beav. 93; McNeille *v.* Acton, 2 Eq. R. 21. See Sabin *v.* Heape, 27 Beav. 553; Redheimer *v.* Pyron, 1 Spears, Eq. 134.

participant in the breach of trust. Rabb *v.* Flenniken, 29 S. C. 278. See also Leake *v.* Watson, 58 Conn. 332. This is true where he knows that the trustee intends to misapply the proceeds, Redford *v.* Clarke, 100 Va. 115; Clemens *v.* Heckscher, 185 Pa. St. 476; Dickel *v.* Smith, 38 W. Va. 635; or where the transaction shows on its face that it is not for the authorized purposes of the trust. Farmers' & Traders' Bank *v.* Fidelity Trust, etc., Co., 108 Ky. 384; Jeffray *v.* Towar, 63 N. J. Eq. 530; Cohnfeld *v.* Tanenbaum, 176 N. Y. 126; Shelton *v.* Laird, 68 Miss. 175; Shaw *v.* Spencer, 100 Mass. 382; Bashor Co. *v.* Carrington, 104 Md. 606.

In the absence of notice of an intended misuse of the proceeds or of an unauthorized purpose, he has a right to assume that the proceeds will be properly applied and that the purpose is one for which the transaction is authorized, and he will not be affected by a misapplication by the trustee in which he takes no part. Claiborne *v.* Holland, 88 Va. 1046; Bank *v.* Looney, 99 Tenn. 278; Batchelder *v.* Central Nat. Bank, 188 Mass. 25; Ashton *v.* Atlantic Bank, 3 Allen, 217; Price *v.* Krasnoff, 60 S. C. 172; Reese *v.* Ivey, 50 So. 223 (Ala. 1909). The rule is stated as follows in Kirsch *v.* Tozier, 143 N. Y. 390: "Persons dealing with a trustee must take notice of the scope of his authority. An act within his authority will bind the trust estate or the beneficiaries as to third persons, acting in good faith and without notice although the trustee intended to defraud the estate, and actually did accomplish his purpose by means of the act in question. It has frequently been held that a person dealing with an executor or trustee, who, from the nature of his office and the terms of the trust, has power to satisfy or transfer the securities of the estate or to vary the investments from time to time, is not bound to go further and ascertain whether in fact the act of the executor or trustee is justified, and that no breach of trust was intended. It is sufficient for his protection that he acts in good faith, and, if the act of the executor or trustee is justified by the terms of the power the party dealing with him will be protected."

On this principle, where the trustee has power to sell when in his discretion the purposes of the trust require a sale, the purchaser is not bound to ascertain that the trustee has properly exercised his discretion. Dickson *v.* N. Y. Biscuit Co., 211 Ill. 468; Matthews *v.* Capshaw, 109 Tenn. 480; Guarantee & Trust Co. *v.* Jones, 103 Tenn. 245; Spencer *v.* Weber, 49 N. Y. S. 687.

But "where the condition upon

§ 801. The exemption of the purchaser from seeing to the application of the purchase-money depends upon the intention of the settlor at the date of the instrument; such exemption is not affected by circumstances that transpire subsequently; therefore the intention must be obtained from the construction of the instrument under the circumstances existing when it was made, and such construction cannot be changed by a change of circumstances. Thus if a trust is created to pay debts generally,

which the power is to be exercised is upon the happening of a certain event or independent fact, such as majority or marriage of some one named, which may be ascertained with equal certainty," a purchaser "must, at his peril, ascertain whether the contingency upon which the sale is authorized exists." Matthews *v.* Capshaw, 109 Tenn. 480. The same is true when the power is to be exercised only with the written consent of a named person. Suarez *v.* De Montigny, 37 N. Y. S. 503, 1 App. Div. 494. The fact that no reference is made to the power under which the sale is made is not notice to a purchaser of any intended breach of trust. Young *v.* Mutual Life Ins. Co., 101 Tenn. 311; Guarantee & Trust Co. *v.* Jones, 103 Tenn. 245; Matthews *v.* Capshaw, 109 Tenn. 480; Whatley *v.* Oglesby, 44 S. W. 44 (Tex. Civ. App. 1898).

If a purchase of trust property has been completed in good faith, the fact that the purchaser subsequently aids the trustee to misapply the proceeds will not invalidate the purchaser's title, although it would usually be strong evidence of lack of good faith at the time of the purchase and would subject the purchaser to liability for participating in the breach of trust. Tapley *v.* Tapley, 115 Ga. 109; Murphy *v.* Farmers', etc. Bank, 131 Cal. 115.

Gross inadequacy of price is usually notice to a purchaser of a breach of trust. Beall *v.* Dingman, 227 Ill. 294. See Browning *v.* Stiles, 65 A. 457 (N. J. Ch. 1906); Austin *v.* Hatch, 159 Mass. 198.

When a sale or other transfer by the trustee to a third person is set aside because of the trustee's lack of authority or because made for an improper purpose of which the third person had notice, the consideration must be returned in so far as it has gone to the benefit of the trust estate, since the *cestui's* equitable rights are only to be made whole. Freeman *v.* Bristol Sav. Bank, 76 Conn. 212; Marx *v.* Clisby, 130 Ala. 502. But if the trustee has misapplied the entire proceeds, the consideration need not be returned. Suarez *v.* De Montigny, 37 N. Y. S. 503, 1 App. Div. 494.

The actual or constructive fraud of the trustee will not prevent his maintaining suit against the purchaser, since he acts in a representative capacity. Mansfield *v.* Wardlow, 91 S. W. 859 (Tex. Civ. App. 1906); Chaves *v.* Lucero, 13 New Mex. 368.

As to what constitutes sufficient notice to put a purchaser on inquiry, see *supra*, §§ 223, 225, and notes.

and then to pay legacies and apply the surplus to certain purposes, and the purchaser knows that all debts have been paid, he will not be compelled to see to the application of the purchase-money to the payment of the legacies, or to the other determined purposes, for the reason that, when the instrument was made the testator could not have intended that the purchaser should see to the application of the purchase-money to the payment of the debts generally, and the other purposes named, and no change of circumstances can change this intention.[1]

§ 802. The question has been raised, Who has the power to sell and give a discharge for the purchase-money, in case a testator *charges* his real estate with certain payments, and then *devises* it to *trustees upon trusts*, which do not require a sale? Can the executor sell? A few cases seem to intimate that he can.[2] But it is said that a mere charge cannot give executors a legal power.[3] On the other hand, it is said that there is no difference between a charge and a trust for the payments to be made, and therefore trustees take the legal estate subject to all the trusts, and, among others, the trust of making the payments charged.[4] This seems to have been the opinion of Lord Hardwicke.[5] Mr. Justice Wilde said that there was no differ-

[1] Johnson *v.* Kennett, 3 My. & K. 624, reversing s. c. 6 Sim. 384; Eland *v.* Eland, 4 My. & Cr. 420; Page *v.* Adam, 4 Beav. 269; Forbes *v.* Peacock, 1 Phill. 717, reversing same case, 11 Sim. 152; 12 Sim. 528; Sabin *v.* Heape, 27 Beav. 553; Stroughill *v.* Anstey, 1 De G., M. & G. 653; Mather *v.* Norton, 16 Jur. 309; Garnett *v.* Macon, 2 Brock. 238; 6 Call, 308; Gosling *v.* Carter, 1 Coll. Ch. 648.

[2] Shaw *v.* Borrer, 1 Keen, 559; Ball *v.* Harris, 8 Sim. 485; 4 My. & Cr. 264; Gosling *v.* Carter, 1 Coll. 649; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; Eidsforth *v.* Armstead, 2 K. & J. 333; Wrigley *v.* Sykes, 21 Beav. 337; Storry *v.* Walsh, 18 Beav. 568; Colyer *v.* Finch, 5 H. L Cas. 905; Hodkinson *v.* Quinn, 1 J. & H. 310; Greetham *v.* Colton, 34 Beav. 615.

[3] Doe *v.* Hughes, 6 Exch. 231.

[4] Elliott *v.* Merryman, Barn. 81; 1 Lead Cas. Eq. 40; *Ex parte* Turner, 9 Mod. 418; Jenkyns *v.* Hiles, 6 Ves. 654, n.; Bailey *v.* Ekins, 7 Ves. 323; Wood *v.* White, 4 M. & C. 482; Commissioners, &c. *v.* Wybrants, 2 Jon. & L. 197; Forbes *v.* Peacock, 12 Sim. 527.

[5] *Ex parte* Turner, 9 Mod. 418; and see Colyer *v.* Finch, 5 H. L.

ence between a devise of an estate to be sold, and a devise of an estate charged in the trustees' hands with certain payments; that there was no ground for the distinction, either in principle or upon authority.[1] In such case, the money to make the payments charged could not be allowed to go into the hands of the executor, as he has nothing to do with the real estate.[2] There seems to be no doubt that the trustee, with the concurrence of the executor, can make a good title;[3] but it may happen that such concurrence cannot be had. If a testator charges certain payments upon real estate, and then devises the real estate to a devisee to hold absolutely, the devisee can sell the estate, and give valid receipts and discharges for the purchase-money.[4] (*a*)

§ 803. If a testator charges payments to be made upon his real estate, but does not devise it, and it descends to his heirs, can they sell it and give valid receipts and discharges for the purchase-money? It is clear that they cannot, for they take

Cas. 922; Mr. Lewin is of the same opinion. Lewin on Trusts, 342, 343.

[1] Andrews *v.* Sparhawk, 13 Pick. 401.

[2] Gosling *v.* Carter, 1 Coll. 650.

[3] Hodkinson *v.* Quinn, 1 John. & H. 303; Cook *v.* Dawson, 29 Beav. 126; 3 De G., F. & J. 127; Shaw *v.* Borrer, 1 Keen, 559; Ball *v.* Harris, 8 Sim. 485; 4 My. & C. 264; Page *v.* Adam, 4 Beav. 269; Forbes *v.* Peacock, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Phill. 717; Sabin *v.* Heape, 27 Beav. 553.

[4] Bailey *v.* Ekins, 7 Ves. 323; Commissioners, &c. *v.* Wybrants, 2 Jon. & L. 198; Elton *v.* Harrison, 2 Swanst. 276, n.; Elliott *v.* Merryman, Barn. 78; Doe *v.* Hughes, 6 Exch. 231; Eland *v.* Eland, 1 Beav. 234; Dalton *v.* Young, 6 Madd. 9; Johnson *v.* Kennett, 6 Sim. 384; 3 My. & K. 624; Page *v.* Adam, 4 Beav. 269; Colyer *v.* Finch, 5 H. L. Cas. 905; Jenkyns *v.* Hiles, 6 Ves. 654; Ball *v.* Harris, 4 My. & C. 267; Wood *v.* White, id. 482; *Ex parte* Turner, 9 Mod. 418; Andrews *v.* Sparhawk, 13 Pick. 393.

(*a*) A devisee who accepts the devise of land subject to a charge, like an annuity, becomes personally responsible therefor, even when there is sufficient personal estate to pay the annuity. Wyckoff *v.* Wyckoff, 48 N. J. Eq. 113; Redfield *v.* Redfield, 126 N. Y. 466; Cunningham *v.* Parker, 146 N. Y. 29; Spangler *v.* Newman, 239 Ill. 616; Merchants' Nat. Bank *v.* Crist, 140 Iowa, 308; Stringer *v.* Gamble, 155 Mich. 295. See *supra*, § 576, note *a*.

nothing under the will; and the testator has not espressly, nor by implication, appointed them trustees to make the payments.[1] They may sell the estate and pass the legal title, and if they make the payments no questions can be raised; but if they misapply the money, the land would still be holden for the payments; that is, the purchaser in such cases would be bound to see to the application of the purchase-money. If the heirs are under disabilities, as infants or married women, can the executor sell the estate for the payment of the charges upon it? In Doe *v.* Hughes, the court held that a *charge* had no operation in law, but must be enforced in equity, from which it follows that the executors could not sell without a license or decree of the court.[2] This case has been much criticised on the ground that where a direction to sell and make payments is given, but no person is named, the executors have the power to sell by implication; and so it is thought that where there are charges upon real estate, there is an implied power of sale in the executors.[3] Mr. Lewin thinks that Doe *v.* Hughes was a sound decision upon the *legal* question, but that the executors have an equitable power of sale, and the holders of the legal title are trustees for them.[4] Even upon this statement of the rights and powers of the parties, it is clear that there must be a decree or license for sale from some court having jurisdiction, if the holders of the legal title are under liabilities.

§ 804. If a testator charges payments to be made upon his real estate, and then devises it subject to the charges, and the

[1] Gosling *v.* Carter, 1 Coll. 650; Robson *v.* Flight, 34 Beav. 110; 5 N. R. 344; Forbes *v.* Peacock, 11 M. & W. 638; Doe *v.* Hughes, 6 Exch. 231.

[2] Doe *v.* Hughes, 6 Exch. 231.

[3] Robinson *v.* Lowater, 17 Beav. 601; Wrigley *v.* Sykes, 21 Beav. 337; Storry *v.* Walsh, 18 Beav. 568; Sabin *v.* Heape, 27 Beav. 553; Hodkinson *v.* Quinn, 1 John. & H. 309; Cook *v.* Dawson, 29 Beav. 123; 3 De G., F. & J. 127; Greetham *v.* Colton, 34 Beav. 615; Forbes *v.* Peacock, 11 M. & W. 630; Tylden *v.* Hyde, 2 S. & S. 238; Bentham *v.* Wiltshire, 4 Madd. 44; *Re* Wise, 5 De G. & Sm. 415; Eidsforth *v.* Armstead, 2 K. & J. 333; Sugd. Pow. 129 (8th ed.); Colyer *v.* Finch, 5 H. L. Cas. 922.

[4] Lewin, 346.

devisee dies in the testator's lifetime, can the heirs sell and give valid discharges for the purchase-money? The case stands as if no devisee had been named, but the estate had been allowed to descend to the heir.[1] There is no doubt that the executor cannot sell, as the testator has expressly appointed a devisee who might have sold as trustee for the payment of the charges: the heir may sell and pass the legal title; but if he misapplies the purchase-money, the land would still be holden for the charges.[2]

§ 805. If a testator charges payments to be made upon his real estate, and devises the same to A. for life with *contingent remainders* or *other limitations* which render it impossible that the *devisees* can sell under an implied power,[3] the court will, if possible, imply a power of sale in the executors, on the ground that where there are charges that require a sale, and it is impossible for the devisees to sell, and no person is named to sell, there must be an implied power to sell in the executors. Courts in England give this construction to such bequests to avoid a suit in chancery for a sale;[4] but in the United States the proper course would be for the executors to apply to the court of probate for a license to sell and make the payments ordered. Mr. Lewin says that the true principle which ought to govern in these cases is this, that where a testator devises an estate to trustees or to a beneficiary, and charges payments to be made, then the trustees or the beneficiary should have a power of sale and of signing receipts; but where a testator charges payments, and does not devise the estate, or devises it in such manner that there is no one who can execute the trust, then the executors should have an equitable power of sale and of signing receipts,

[1] See *ante*, § 803. But see Hardwick *v.* Mynd, 1 Anst. 109; Austin *v.* Martin, 29 Beav. 523.

[2] See *ante*, § 803. But see Hardwick *v.* Mynd, 1 Anst. 109; Austin *v.* Martin, 29 Beav. 523.

[3] Gosling *v.* Carter, 1 Coll. 644; Eidsforth *v.* Armstead, 2 K. & J. 333; Wrigley *v.* Sykes, 21 Beav. 337; Bolton *v.* Stannard, 4 Jur. (N. S.) 576; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; Sabin *v.* Heape, 27 Beav. 553. But see Doe *v.* Hughes, 6 Exch. 223.

[4] Lewin, 348.

and that the depositaries of the legal title should be trustees for them, and bound to convey as they direct; but where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, then, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the court.[1] By Lord St. Leonards's act, as it is called, executors in all the cases before named, when the wills shall come into operation after August 13, 1859, may make sales and give valid receipts for the purchase-money.[2] In the United States it is conceived that executors would have the power of selling by applying to the Court of Probate for a license or decree to sell so much of the estate as is necessary to discharge the payments to be made; and, as before stated, whenever executors or trustees sell under a license or decree of court, the purchaser need not look to the application of the purchase-money.[3] Where there is a devise of an estate, subject to the payment of charges, the devisee, with the concurrence of the executors, declaring that all *charges have been paid*, may sell for his own private purposes, and give a good and valid title to the purchaser, without any obligation on the purchaser to make further investigations as to the application of the purchase-money.[4]

§ 806. A trust for sale is a joint office, and the receipt must be signed by all the trustees who act; but it need not be signed by one who disclaims.[5] Where a power is given to trustees to sign receipts and exonerate the purchaser from seeing to the application of the purchase-money, the receipt must be signed by all the trustees, even if one of them has conveyed his interest in the trust estate to his cotrustees; for the power to sign the

[1] Lewin, 348, 349.

[2] 22 & 23 Vict. c. 35.

[3] *Ante*, § 798.

[4] Storry *v.* Walsh, 18 Beav. 559; Howard *v.* Chaffers, 2 Dr. & Sm. 236.

[5] Adams *v.* Taunton, 5 Madd. 435; Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Vent. 128. [See Coleman *v.* Connolly, 242 Ill. 574.]

receipt was a personal confidence that did not pass with the estate.[1] So the trustees cannot delegate their power of signing receipts to exonerate the purchaser; as, if they convey the estate to another upon the same trusts upon which they held, a purchaser could not safely pay the purchase-money to such grantee without seeing to its application. The case of Hardwick *v.* Mynd seems to uphold a different rule; but it would not be safe to act upon it.[2] But if the trustees sign the receipt, the purchaser need not pay the money to them personally; he may pay to any person properly authorized by them to receive it; or he may pay it as the trustees direct it to be paid into a bank, or to any other person;[3] yet it is safer to pay to the trustees personally.[4] If, in such case, the person authorized to receive the money upon the receipts of the trustees misapplies it, the trustees will be responsible to the *cestui que trust* for the loss.[5] (*a*)

§ 807. If trustees for sale, with a power to sign receipts for the purchase-money, die, and new trustees are appointed by the court to execute the power of sale, such new trustees may also give valid receipts. But this is an exception to the ordinary rule, that trustees appointed by court do not take the special powers conferred upon the trustees appointed by the settlor. The exception is made in cases of sales, for the reason that the power of giving receipts is so connected with the power of sale that it may be presumed to be the intention of the settlor.[6]

[1] Crewe *v.* Dicken, 4 Ves. 97.

[2] Hardwick *v.* Mynd, 1 Anst. 109; Braybroke *v.* Inskip, 8 Ves. 432.

[3] Hope *v.* Liddell, 21 Beav. 202; Miller *v.* Priddon, 1 De G., M. & G. 335; Lock *v.* Lomas, 5 De G. & Sm. 326; McCarogher *v.* Whieldon, 34 Beav. 107.

[4] Pell *v.* De Winton, 2 De G. & J. 13; *In re* Fishbourne, 9 Ir. Eq. 340.

[5] Ghost *v.* Waller, 9 Beav. 497. Solicitors who were employed by two trustees to collect trust funds, having paid over to one without receipt of the other, were held liable for a loss by breach of trust by the trustee to whom they paid. Lee *v.* Sankey, L. R. 15 Eq. 204.

[6] Drayson *v.* Pocock, 4 Sim. 283; Byam *v.* Byam, 19 Beav. 58; Bartley *v.* Bartley, 5 Drew. 385; Lord *v.* Bunn, 2 Y. & Col. Ch. 98.

(*a*) Unless business necessity required intrusting the matter to an agent. See *supra*, § 441, note *a*, p. 711 *et seq.*

§ 808. A perplexing question has arisen, whether trustees, who have a clear authority given them to sign receipts, have the same power remaining after a breach of the trust. Thus, if trustees suffer the property to pass to A. by a breach of trust, and A. afterwards passes the property back to the trustees, would the receipt of the trustees be a valid discharge of A., so that he could not be called upon to account for the property if the trustees again misapplied it? If the property comes back to the trustees *in specie*, so that it is exactly as if it had never passed out of their hands, it would seem that their grantee should not be further responsible. But if the property has been converted, and comes back in the form of payment, it would seem that the receipt of the trustees would not indemnify the person who has knowingly dealt with the property by aiding in committing a breach of trust.[1] Mere irregularity of appointment, however, will not vitiate a receipt; as, where one of two trustees was irregularly appointed, the receipt of both was held a good discharge.[2] If the trust property is mortgaged, the trustees may give receipts for the difference between the amount of the mortgage and the purchase-money. If there is no surplus, the trustees can convey without giving a receipt. In the United States, the forms of conveyance contain a receipt of the purchase-money or consideration; and as deeds must be signed by all the trustees to whom the power is intrusted, the receipt is signed in the same instrument. But if the deed or conveyance does

[1] Lander *v.* Weston, 3 Drew. 389; Hanson *v.* Beverley, Sugd. V. & P. 848 (11th ed.); Carver *v.* Richards, Lewin, 350. In Sheridan *v.* Joyce, 7 Ir. Eq. 118, the defendant borrowed the trust fund in breach of the trust, not knowing that it was trust-money. He afterwards discovered that fact, and repaid the money to the trustee and took his receipt. The court held that when defendant discovered that he held the trust money in breach of the trust, he became *quasi trustee* and responsible to the *cestui que trust* for the money, and that he could not discharge himself from his liability by paying the original trustee and taking his receipt alone. [In reaching this result the court was much influenced by the fact that the *cestuis* had requested the borrower not to repay to the trustee but to hold for their benefit and he had agreed to do so.]

[2] Miller *v.* Priddon, 1 De G., M. & G. 335. But see Gosling *v.* Carter, 1 Col. C. C. 650.

not contain a receipt, or if the full amount of the purchase-money is not named in the deed as the consideration of the purchase, a separate receipt should be given, signed by all the trustees; otherwise the purchaser would have no sufficient discharge, and he might be called upon to account.

§ 809. On the death of a testator, the personal estate vests wholly in the executor, and in order that he may execute his office, the law permits him, with or without the concurrence of any coexecutor,[1] to sell or mortgage,[2] by actual assignment or equitable deposit,[3] with or without a power of sale,[4] all or any part of the personal assets, legal or equitable.[5] He must render an account to the court; but no creditor, legatee, or heir can make any claim to any of the personal assets. The creditor can only pursue his legal claim against the executor personally.[6] The pecuniary or specific legatee is not entitled to the legacy until it is assented to by the executor;[7] and the residuary legatee has no claim or lien until the estate has been liquidated, and all liabilities under the will have been settled.[8] Therefore, upon the sale of a chattel, the purchaser has no concern as to the purchase-money, and the conveyance need not state that the sale is necessary to pay debts or other liabilities.[9] The pur-

[1] Scott *v.* Tyler, 2 Dick. 725; Smith *v.* Everett, 27 Beav. 446; Sneesby *v.* Thorn, 7 De G., M. & G. 399; Fellows *v.* Mitchell, 2 Vern. 515; Doe *v.* Stace, 15 M. & W. 623; Murrell *v.* Cox, 2 Vern. 570; Shep. Touch. 484; Dyer, 23 *a*.

[2] Ibid.; Bonney *v.* Ridgard, 1 Cox, 145, 148; Miles *v.* Durnford, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; Mead *v.* Orrery, 3 Atk. 340; Andrew *v.* Wrigley, 4 Bro. Ch. 138; Keane *v.* Robarts, 4 Madd. 357; Humble *v.* Bill, 2 Vern. 446; Sandars *v.* Richards, 2 Coll. 568; McLeod *v.* Drummond, 17 Ves. 154; Haynes *v.* Forshaw, 11 Hare, 93; Field *v.* Schieffelin, 7 Johns. Ch. 150; Petrie *v.* Clark, 11 S. & R. 377; Tyrrell *v.* Morris, 1 Dev. & Bat. Eq. 559.

[3] Ibid.; Ball *v.* Harris, 8 Sim. 485.

[4] Russell *v.* Plaice, 18 Beav. 21.

[5] Shaw *v.* Spencer, 100 Mass. 392; McLeod *v.* Drummond, 14 Ves. 360; Nugent *v.* Gifford, 1 Atk. 463.

[6] Ibid.; Mead *v.* Orrery, 3 Atk. 238.

[7] Ibid. [8] Ibid.

[9] Bonney *v.* Ridgard, 1 Cox, 148.

chaser may rely upon the person appointed by the testator to liquidate his estate.[1] If the executor misapplies the purchase-money, those defrauded must seek their remedy against him, and not against the purchaser.[2] The purchaser need not inquire into the necessity of the sale.[3] Even express notice of the entire contents of a will cannot affect the purchaser of a chattel; for a purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase-money. And as all personal property is bound for the payment of debts, a purchaser is not bound to know whether there are debts or not, nor to see to the application of the purchase-money.[4] Thus an executor can sell the personal assets of his testator, and even chattels specifically devised; and the purchaser has no concern with the purchase-money.[5]

§ 810. While this is the general rule, executors and purchasers cannot collude and commit frauds, for fraud and collusion vitiate every transaction; therefore, if there is fraud, a purchaser cannot protect himself under the absolute power of the executor to sell.[6] Thus the sale of a chattel cannot stand, if it is sold for a nominal price only, or at a fraudulent undervalue,

[1] Ibid.

[2] Humble *v.* Bill, 2 Vern. 445; Ewer *v.* Corbet, 2 P. Wms. 149; Watts *v.* Kancie, Toth. 77; Nurton *v.* Nurton, id.; Ward *v.* Ward, 4 Ir. Ch. 215; Pa. Ins. Co. *v.* Austen, 42 Penn. St. 257.

[3] Nugent *v.* Gifford, 1 Atk. 464; Mead *v.* Orrery, 3 Atk. 242.

[4] Keane *v.* Robarts, 4 Madd. 356; Burting *v.* Stonard, 2 P. Wms. 150.

[5] Watts *v.* Kancie, Toth. 77, 161; Ewer *v.* Corbet, 2 P. Wms. 148; Humble *v.* Bill, 2 Vern. 444; 1 Bro. P. C. 71; Andrew *v.* Wrigley, 4 Bro. Ch. 137; McLeod *v.* Drummond, 17 Ves. 160; Bonney *v.* Ridgard, 1 Cox, 147.

[6] Scott *v.* Tyler, 2 Dick. 725; Watkins *v.* Cheek, 2 S. & S. 205; McLeod *v.* Drummond, 17 Ves. 154; Hill *v.* Simpson, 7 Ves. 166; Taner *v.* Ivie, 2 Ves. 469; Keane *v.* Robarts, 4 Madd. 357; Crane *v.* Drake, 2 Vern. 616; Nugent *v.* Gifford, 1 Atk. 463; Mead *v.* Orrery, 3 Atk. 240; Bonney *v.* Ridgard, 1 Cox. 147; Whale *v.* Booth, 4 T. R. 625; Elliott *v.* Merryman, Barn. 81; 1 Lead. Cas. Eq. 77, notes; Williams *v.* Branch Bank, 7 Ala. 906; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Morton, 2 Md. Ch. 94; Wilson *v.* Doster, 7 Ired. Eq. 231; Miller *v.* Williamson, 5 Md. 219.

or for any collusive purpose;[1] or if the purchaser receives the chattel in payment of the executor's own debt to him;[2] or if the purchaser knows that the executor intends to misapply the money, and the sale is made for that purpose.[3] Nor can a purchaser buy from an executor a chattel specifically bequeathed, if he has notice or knowledge that all debts have been paid, and that such chattel is not required for the payment of debts.[4] Nor can the executor apply the chattels with knowledge of the purchaser to the payment of a debt wrongfully contracted by him in behalf of the estate.[5] Nor can an executor sell or pledge the assets to raise money to carry on the testator's business, though such business is carried on in pursuance of directions contained in his will; for such debts are the executor's own debts and not the debts of the estate. The executor can only apply the special property devoted to the purposes of the business he is directed to carry on.[6]

§ 811. If the executor is the specific or residuary legatee, he may sell the testator's chattels to pay his own debt, for as soon as the testator's debts are paid, the chattels belong to the exec-

[1] Scott *v.* Tyler, 2 Dick. 725; Ewer *v.* Corbet, 2 P. Wms. 149; McMullen *v.* O'Reilly, 15 Ir. Ch. 251; Drohan *v.* Drohan, 1 B. & B. 185; Joyner *v.* Conyers, 6 Jones, Eq. 78.

[2] Shaw *v.* Spencer, 100 Mass. 392; Andrew *v.* Wrigley, 4 Bro. Ch. 187; Eland *v.* Eland, 4 M. & Cr. 127; Miles *v.* Durnford, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; Anon., Pr. Ch. 434; Williams *v.* Branch Bank, 7 Ala. 906; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Morton, 2 Md. Ch. 94; Wilson *v.* Doster, 7 Ired. Eq. 231; Miller *v.* Williamson, 5 Md. 219; Scott *v.* Tyler, 2 Dick. 712; Hill *v.* Simpson, 7 Ves. 152; Watkins *v.* Cheek, 2 S. & S. 205; Keane *v.* Robarts, 4 Madd. 357; Crane *v.* Drake, 2 Vern. 616; Austin *v.* Wilson, 21 Ind. 252; Pendleton *v.* Fay, 2 Paige, 202.

[3] Watkins *v.* Cheek, 2 S. & S. 199; Eland *v.* Eland, 4 M. & Cr. 427; Stroughill *v.* Anstey, 1 De G., M. & G. 648; Sacia *v.* Berthoud, 17 Barb. 15; Miller *v.* Williamson, 5 Md. 219; Williamson *v.* Morton, 2 Md. Ch. 94; Garrard *v.* Railroad Co., 5 Casey, 154; Railway Co. *v.* Barber, id. 160; Champlin *v.* Haight, 10 Paige, 274; Shaw *v.* Spencer, 100 Mass. 387.

[4] Ewer *v.* Corbet, 2 P. Wms. 149; McMullen *v.* O'Reilly, 15 Ir. Ch. 251.

[5] Collinson *v.* Lister, 20 Beav. 356; 7 De G., M. & G. 634; Hill *v.* Simpson, 7 Ves. 169.

[6] McNeille *v.* Acton, 2 Eq. R. 21.

utor as legatee, and a purchaser is not bound to know whether the testator's debts are paid;[1] but if the creditor of the executor has actual knowledge that the testator's debts or any one of them are unpaid, he cannot receive such assets in payment of his own debts, although the executor is residuary legatee.[2] If the executor is joint residuary legatee, his creditor cannot take any of the assets in payment of debts; he cannot take them from the executor, *qua* executor, because the executor cannot pay his own debts from the assets of the estate, and the creditor cannot receive the assets from him, *qua* legatee, for the reason that others own the assets with him after the testator's debts are paid;[3] the purchaser in such case must not rely upon the representations of the executor, but he is bound to examine the will.[4] Where a creditor receives assets from an executor in payment, knowing that such assets belong to the executor only as executor, a suspicion of fraud at once arises; but if an executor applies for a loan, and the party applied to parts with his money on security of the assets, there is no presumption of fraud. Therefore, if an executor sells or mortgages personal assets for ready money, or money to be advanced, the dealing *prima facie* is in due course of administration, but *prima facie* only; for if there is affirmative evidence that the purchaser or mortgagee had notice that the money was to be used for some purpose other than in the settlement of the estate, the court will regard the transaction as fraudulent, and will not allow it to stand.[5]

§ 812. In the United States, bonds are required of both executors and administrators, for the protection of the estate and

[1] Taylor *v.* Hawkins, 8 Ves. 209; Nugent *v.* Gifford, 1 Atk. 463; 4 Bro. Ch. 136; Storry *v.* Walsh, 18 Beav. 559; Mead *v.* Orrery, 3 Atk. 235; McLeod *v.* Drummond, 17 Ves. 163; Whale *v.* Booth, 4 T. R. 625, note (*a*); Bedford *v.* Woodham, 4 Ves. 40, n.

[2] Ibid.

[3] Bonney *v.* Ridgard, 1 Cox, 145; Hill *v.* Simpson, 7 Ves. 152, 170; Haynes *v.* Forshaw, 11 Hare, 93.

[4] Hill *v.* Simpson, 7 Ves. 152, 170.

[5] *Ante*, § 224; McLeod *v.* Drummond, 14 Ves. 362; 17 Ves. 155; Miles

the parties interested; but neither such bonds nor a judgment upon them vest the assets in the executor or administrator in his own right.[1] But it is conceived, where there are no statutes to the contrary, that executors and administrators may sell the personal assets, acting in good faith, and receive the purchase-money, and length of time will not affect their right. As personal assets go to the personal representatives, if the executor or administrator cannot sell and receive the purchase-money, who can?[2] An executor has no power until he has proved the will and given bonds; until then he can neither sell the assets, nor make a valid contract binding upon the estate, nor receive the purchase-money.[3]

§ 813. An agent of an executor or administrator or of a trustee is accountable only to his principal: therefore a broker or other agent employed by an executor cannot refuse to pay over money to his principal, because it may be misapplied; but if such agent receives any benefit from the breach of the trust he will be responsible for the property to the party entitled to the beneficial interest.[4] (*a*)

v. Durnford, 2 De G., M. & G. 641; Scott *v.* Tyler, 2 Dick. 172; Keane *v.* Robarts, 4 Madd. 358; Pendleton *v.* Fay, 2 Paige, 202.

[1] Atkinson *v.* Atkinson, 8 Allen, 15; Barker *v.* Barker, 14 Wis. 131.

[2] Stroughill *v.* Anstey, 1 De G., M. & G. 654; Ewer *v.* Corbet, 2 P. Wms. 148; Court *v.* Jeffrey, 1 S. & S. 105; Orrock *v.* Binney, Jac. 523; Pierce *v.* Scott, 1 Y. & Col. 257; Forbes *v.* Peacock, 11 Sim. 152; Williams *v.* Massey, 15 Ir. Ch. 68; Lay *v.* Duckett, 1 Cr. & Ph. 305; Field *v.* Schieffelin, 7 Johns. Ch. 150; Petrie *v.* Clark. 1 S. & R. 377.

[3] Newton *v.* Metropolitan Rail. Co., 1 Dr. & Sm. 583; Luscomb *v.* Ballard, 5 Gray, 403.

[4] Pannel *v.* Hurley, 2 Coll. C. C. 241; Bodenham *v.* Hoskyns, 2 De G., M. & G. 241; Bennett *v.* Merritt, 6 Jones, Eq. 263.

(*a*) An agent employed by the trustee is not liable as a participant in a breach of trust committed by order of the trustee unless he has notice that a breach of trust is being committed through him. Thus solicitors who act as agents in paying over trust money upon an investment arranged by the trustee and who merely superintend the transfer without knowledge that the investment is unauthorized are not liable. Brinsden *v.* Williams, [1894] 3 Ch. 185. But where, having temporary

§ 813 *a*. A debtor may pay a debt before it is due in good faith and be under no liability though the trustee does not pay over the money; for example, the case of county officers.[1]

§ 814. A trustee may generally sell the personal property belonging to his trust estate, especially if he have authority to change the securities, or vary the investments; and if he sells the personal property and receives the purchase-money in good faith, the purchaser will take a good title, and will be protected from loss, although the trustee afterwards misapplies the money. If it appears to the purchaser that he is purchasing trust property, he will be put upon no inquiry, except to ascertain whether the trustee has power to change or vary the securities.[2] If the instrument of trust is silent upon the power of varying the securities, it is to be determined upon the whole scope and purpose of the trust, whether the trustee has, in fact, the power to dispose of the property. If it appears to the purchaser in any way, either from words upon the face of the securities or by any other form of notice, either actual or constructive, that the sale is made in breach of the trust, or for the purpose of misapplying the money, or to secure a private debt of the trustee, the purchaser will be accountable to the *cestui que trust*, or other person entitled to call for the property, and he must account for all the damages which have arisen from his concurrence in the breach of the trust and the misapplication of the money.[3] Where trust

[1] Jacks *v.* State, 44 Ark. 73.

[2] *Ante*, § 225. [Spencer *v.* Weber, 163 N. Y. 493.]

[3] *Ante*, §§ 800 [note *a*], 809–813; *post*, §§ 828–843; Sturtevant *v.* Jaques, 14 Allen, 523; Bancroft *v.* Cousen, 13 Allen, 50; Trull *v.* Trull, id. 407; Bingham *v.* Stewart, 13 Minn. 106; Pratt *v.* Beaupre, id. 187. See Leitch *v.* Wells, 48 Barb. 637; 48 N. Y. 597; Ashton *v.* Atlantic Bank, 3 Allen, 219. In Shaw *v.* Spencer, 100 Mass. 382, stock standing in the name of a

custody of trust funds, they paid them over on an investment which they had notice was unauthorized, they were held to be liable. Blyth *v.* Fladgate, [1891] 1 Ch. 337. As to the rights and liability of banks in which trust funds have been deposited, see *supra*, § 122, note *a*, p. 177 *et seq.*

funds are misapplied by a trustee, and the person dealing with him is aware of the character of the funds, the latter can claim

person as "trustee" was pledged to secure the payment of a private debt. A bill in equity was brought by a person beneficially interested in the stock. The case was most elaborately argued by able counsel, and as the law was very fully discussed and stated by the court, Foster, J., the opinion is given here in place of a more full discussion in the text: —

"Under the circumstances disclosed in the evidence, it was a flagrant breach of trust and a criminal fraud to transfer the certificates of stock to Spencer, Vila, & Co. They were the property of the plaintiff, who is entitled to reclaim them from any one but a *bona fide* holder for value without notice. Charles Mellen, a member of the firm of Mellen, Ward, & Co., as collateral security for a debt due from that firm to Spencer, Vila, & Co., handed to them two certificates of stock in the Calumet Mining Company for one thousand shares each, standing in the name of another member of that firm, namely, 'E. Carter, trustee,' and by him transferred in blank. Spencer, Vila, & Co. received the certificates thus indorsed in blank with the name of E. Carter, trustee, for a valuable and adequate consideration, without other or any defect in title than such as the law may impute from the word 'trustee' in the body of the certificates and after the signature of Carter upon the blank transfers.

"It is clear that a certificate of stock transferred in blank is not a negotiable instrument. Sewall *v.* Boston Water Power Co., 4 Allen, 282. Each of these certificates is expressed on its face to be 'transferable only on the books of the company by the holder hereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate.' No commercial usage can give to such an instrument the attributes of negotiability. However many intermediate hands it may pass through whoever would obtain a new certificate in his own name must fill out the blanks as they were filled in the present instance, so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares.

"It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word 'trustee' may be regarded as mere *descriptio personæ* and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty or *choses in action* need not be expressed in writing, but may be established by parol. And that the mere use of the word 'trustee' in the assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court. Sturtevant *v.* Jaques, 14 Allen, 523. See also Bancroft *v.* Cousen, 13 Allen, 50, and Trull *v.* Trull, ibid. 407. It is insisted, on behalf of the defendants, that, even if there was actual notice of the existence of a trust, there was no notice of its character, and that the trust might have been such as to authorize the

no rights under the transaction as against the *cestuis*.[1] Of course, if there are no indications of fraud, and no circumstances

transfer which was made by Carter. But, in our opinion, the simple answer to this position is, that, where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security, for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority and out of the common course of business as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.' But the effect of the word 'trustee' alone is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee' alone has no meaning or legal effect.

"Inasmuch as such an act of pledging property is *prima facie* unlawful there would be little hardship in imposing on the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts, at his peril. Where a partner assumes to give, for his own private debt, the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners; because it is an apparent misuse of the name of the firm and *prima facie* evidence of fraud. Eastman *v.* Cooper, 15 Pick. 290. But we need not go to that length in deciding the present case. Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary prudence upon inquiry, is constructive notice of everything to which that inquiry might have led. The objection that in the present case the only persons of whom inquiry could have been made were Mellen and Carter, who committed the breach of trust, is sufficiently answered by the words of Sir John Romilly, Master of the Rolls, in a recent and leading case: 'With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results,' he says, 'I think it impossible to admit the validity of this excuse. I concur in the doctrine of Jones *v.* Smith, 1 Hare, 55, that a false answer, or a reasonable answer, given to an inquiry made, may dispense with the necessity of further inquiry; but

[1] Milhous *v.* Dunham, 78 Ala. 48.

that lead to a suspicion that the purchaser is dealing with trust property, he is put upon no inquiry.[1] The same rules apply to

I think it impossible beforehand to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry; namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say.' Jones *v.* Williams, 24 Beav. 62. These remarks also explain the cases, cited by the defendants, of Buttrick *v.* Holden, 13 Met. 355, and Calais Steamboat Co. *v.* Van Pelt, 2 Black. 377. In each of these cases the party did make inquiry, and relied upon the answers received, which were of a character calculated to put him off his guard.

. . . . . .

"The case of Ashton *v.* Atlantic Bank, 3 Allen, 217, is not in conflict with these views. It does not proceed on the ground that there was no duty to inquire, but that upon inquiry and examination of the will creating the trust it would have appeared that the trustee might have the right to use the trust funds as he did. He raised money upon the stocks by a discount of his own note with them as collateral; and the court said that it might have been incident to his duties 'to discount the trust funds for the sake of making a permanent investment,' or 'the purchaser might reasonably assume that the money was wanted to discharge a liability incurred under the will. Such a case was well warranted by the will creating the trust.' In short, the court came to the conclusion that the act of the trustee was in itself lawful in that particular case, and that his fraud consisted only in the misuse of the money when obtained. If this was true, of course the purchaser was not bound to see to the application of the purchase-money.

"Hutchins *v.* State Bank, 12 Met. 421, was the case of a sale of shares of bank stock by an executrix. It is the established rule of equity that 'purchases from executors of the personal property of their testator are ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside.' Smith on Eq., tit. 1, c. iv. 10. 'Where an executor disposes of or pledges his testator's assets, in payment of, or as security for, a debt of his own, the person to whom they are disposed of or pledged will take them subject to the claims of creditors and legatees.' Elliott *v.* Merryman, 1 Lead. Cas. in Eq. 89; Hill *v.* Simpson, 7 Ves. 152. The same doctrine was held by Chan-

[1] Leach *v.* Ausbacker, 55 Penn. St. 85.

all persons holding fiduciary relations to others, or holding property for the use and benefit of others; thus creditors of a partner-

cellor Kent, in 1823, in Field *v.* Schieffelin, 7 Johns. Ch. 150, who upon a review of all the cases down to the time of that decision, thus sums up the result: 'The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and the better doctrine is, that in such a case he does buy at his peril.' Chief Justice Gibson, in Petrie *v.* Clark, 11 S. & R. 377, expressly announces the doctrine, 'that an executor's applying the assets in payment of his own debt is of itself a circumstance of suspicion, which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction.'

"The rule was thus laid down, in 1861, in the House of Lords: 'Where an executor parts with any portion of the assets of the testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own profit, the result is, that the purchaser holds the assets as if he were himself, in respect of those assets, the executor.' Walker *v.* Taylor, 21 Law Times (N. S.), 845. See also 2 Redfield on Wills, c. viii, § 32.

"The power of disposition over a testator's assets which an executor has, is as extensive as that of a trustee, and the conversion of the testator's personal estate into money is within the ordinary line of an executor's duty. Consequently the authorities which have been cited as to the liability of those dealing with executors are fully applicable to the case of one who takes trust property from a trustee as security for his private indebtedness.

. . . . . .

"The fact that it is usual for dealers in stock to take certificates with blank transfers upon them, and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable, and the purchaser whose name is written into the transfer must always derive his title immediately and solely from the stockholder of record. The point is not made by the plaintiff, that a transfer in blank is out of the usual course of business, or a suspicious circumstance; so that evidence of usage was not requisite to repel such an inference.

"The fact that it is common to issue certificates of stock in the name of one as trustee, when no trust actually exists, has no legal bearing on the decision of the present case. The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice, and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole

ship cannot receive partnership assets in payment of the private debts of one of the partners.[1]

force of this offer of evidence is addressed to the question whether the word 'trustee' alone has any significance, and does not amount to notice of the existence of a trust. But this has been heretofore decided, and is no longer an open question in this Commonwealth. Sturtevant *v.* Jaques, 14 Allen, 523.

"The circumstance that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.

"It is to be borne in mind that the question under discussion is not whether one holding as trustee may sell it in the market, and pass a good title to the purchaser. We do not intimate that this cannot be done. The distinction between a sale and a pledge of trust property is palpable and manifest. Nor is the present question whether a trustee may borrow money on the pledge of stock held in trust. We do not decide that such a transaction may not, under some circumstances, be sustained. These questions are left to be adjudged when they arise. The point now decided is, that one holding stock as trustee has *prima facie* no right to pledge it to secure his own debt growing out of an independent transaction; and that whoever takes it as security for such a debt, without inquiry, does so at his peril. All the proffers of evidence, taken together, fall short of showing any usage to do this; and no evidence of usage could legalize such conduct. Because Spencer, Vila, & Co. took these certificates of stock to secure an antecedent debt from Mellen, Ward, & Co. to them, with notice that they were held in trust, and made no inquiry as to Carter's authority to use trust property for such a purpose, they cannot retain the security against the equitable owner of the stock, when it appears that Carter in making the pledge was guilty of a fraudulent breach of trust."

In Jaudon *v.* National City Bank, 8 Blatch. 431, it appeared that a trustee borrowed money for his own private purposes, and pledged stock, which the lender knew that he held in trust as collateral. The *cestui que trust* afterwards called upon the lender for the stock. The court held that he was entitled to reclaim it, as the lender of the money knew that the trustee was borrowing the money for his own private purposes, and that the sale of the stock was not made in the regular course of business. And the court cited McLeod *v.* Drummond, 17 Ves. 152; Field *v.* Schieffelin,

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[1] Hoxie *v.* Carr, 1 Sumn. 193; Tillinghast *v.* Champlin, 4 R. I. 173, 213; Pipkin *v.* Casey, 13 Mo. 347; Dyer *v.* Clark, 5 Met. 580; Topley *v.* Butterfield, 1 Met. 515; Hertell *v.* Bogert, 9 Paige, 59; Polk *v.* Robinson, 7 Ir. Eq. 231; Bond *v.* Zeigler, 1 Kelly, 324.

§ 815. Wherever in the preceding cases there is fraud or suspicion of fraud, the transaction may be investigated and impeached by creditors,[1] or by specific,[2] residuary,[3] and pecuniary legatees, if they are injured in their rights. But the court will not reopen transactions that have been allowed to sleep for twenty years or more.[4]

§ 815 *a*. As a rule creditors or persons who have rendered service to the *cestui* may reach the beneficial interest by proceedings in equity.[5] (*a*) Equity will apply the income of a life

7 Johns. Ch. 150; Lowry *v.* Commercial and Farmers' Bank, Taney, 310; Pendleton *v.* Fay, 2 Paige, 202; Bayard *v.* Farmers' and Mechanics' Bank, 52 Penn. St. 222; Baker *v.* Bliss, 39 N. Y. 70, 76; Carr *v.* Hilton, 1 Curtis C. C. 390; and the above case of Shaw *v.* Spencer. The cause was carried to the Supreme Court at Washington, where the decision of the court was affirmed. Duncan *v.* Jaudon, 15 Wall. 115.

[1] Crane *v.* Drake, 2 Vern. 616; Mead *v.* Orrery, 3 Atk. 238; Nugent *v.* Gifford, 1 Atk. 463; Anon., cited Pr. Ch. 434.

[2] Scott *v.* Tyler, 2 Dick. 712; Humble *v.* Bill, 2 Vern. 444.

[3] McLeod *v.* Drummond, 17 Ves. 161; Mead *v.* Orrery, 3 Atk. 235; Burting *v.* Stonard, 2 P. Wms. 150.

[4] Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 17 Ves. 169.

[5] Forbes *v.* Lothrop, 137 Mass. 523, — a case under the Pub. Stats.; see § 827 *a*. Munden *v.* Bailey, 70 Ala. 63; Tolles *v.* Wood, 99 N. Y. 616, the surplus of income above what is needed for the support of the *cestui* can be reached. The plaintiff must prove that there is a surplus, the habits and ability of the *cestui* being considered in deciding what is to be allowed for his maintenance. Kilroy *v.* Wood, 42 Hun, 636.

(*a*) In most jurisdictions the creditor of a *cestui* can by some process reach the latter's equitable interest, including his right to future income unless there is a valid restraint upon alienation or anticipation. Huntington *v.* Jones, 72 Conn. 45; Ives *v.* Beecher, 75 Conn. 564; Loomer *v.* Loomer, 76 Conn. 522; Cecil's Trustee *v.* Robertson, 105 S. W. 926 (Ky. 1907); Ratliff's Ex'rs *v.* Commonwealth, 101 S. W. 978 (Ky. 1907); Chase *v.* York Bank, 89 Tex. 316; Honaker Sons *v.* Duff, 101 Va. 675; Hutchinson *v.* Maxwell, 100 Va. 169; Bergmann *v.* Lord, 194 N. Y. 70.

The remedy is usually provided by statute, and several States have exempted so much of the income as is necessary for the support and education of the beneficiary except where he himself was the settlor. See *supra*, § 386 *a* and note *a*, p. 628 *et seq.*

In Illinois and New Jersey the statutes have been interpreted to exclude creditors of the beneficiary

trust to debts of the life *cestui*. Those who live on capital clothed with a trust must be content to consume the net income; they cannot have the gross receipts and leave honest debtors unpaid.[1] In the absence of special circumstances the creditors of the *cestui* can attach the beneficial interest in the hands of the trustee, as rents, profits, etc., payable to the *cestui*.[2] Where one creates a trust, retaining the beneficial interest in himself, he cannot prevent his creditors from coming at the income by a provision against anticipation.[3] Nor will a conveyance on secret trust for the grantor be good against creditors, prior or subsequent.[4] But where the *cestui* is not the donor or creator of the trust, and there are provisions against anticipation or making the application of the income discretionary with the trustee, the creditors cannot reach it.[5] When the trust is not enforceable by the *cestui* his creditors cannot reach it. A remote, uncertain, contingent, beneficial interest

[1] Hatcher *v.* Massey, 71 Ga. 797; Kupferman *v.* McGhee, 63 Ga. 257; Wingfield *v.* Rhea, 73 Ga. 477. As to the allegations, see Greenfield *v.* Vason, 74 Ga. 126.

[2] Knefler *v.* Shreve, 78 Ky. 297.

[3] Pacific Nat'l Bk. *v.* Windram, 133 Mass. 175. [Jackson *v.* Von Zedlitz, 136 Mass. 342; Brown *v.* Macgill, 87 Md. 161; Schenck *v.* Barnes, 156 N. Y. 316; Raymond *v.* Harris, 82 N. Y. S. 689, 84 App. Div. 546; Kene *v.* Hill, 92 N. Y. S. 805, 102 App. Div. 370; Newton *v.* Jay, 95 N. Y. S. 413, 107 App. Div. 457; Egbert *v.* De Solms, 218 Pa. St. 207; *infra*, § 827 *a*. See Birmingham, &c. Soc. *v.* Lane, [1904] 1 K. B. 35.]

[4] Winsmith *v.* Winsmith, 15 S. C. 611. [See Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *In re* Johnson Johnson, [1904] 1 K. B. 134; *supra*, § 555, note *a*, p. 920.]

[5] Davidson's Ex'r *v.* Kemper, 79 Ky. 5; Foster *v.* Foster, 133 Mass. 180; Spindle *v.* Shreve, 9 Biss. 199. See §§ 386 *a*, 387, 670, 671, 827 *a*.

from reaching any of his interest in either the income or corpus of the trust property if the trust was created by or proceeded from another than himself. Hurd's Ill. Rev. Stat. (1908), c. 22, § 49; Binns *v.* LaForge, 191 Ill. 598; Potter *v.* Couch, 141 U. S. 296; 1 N. J. Gen. Stat. (1895), p. 390, § 91; Hardenburgh *v.* Blair, 30 N. J. Eq. 645; Stout *v.* Apgar, 69 N. J. Eq. 337; Linn *v.* Davis, 58 N. J. Law, 29; Castree *v.* Shotwell, 73 N. J. Eq. 590.

As to the validity and effect of restraints upon alienation or anticipation, see *supra*, §§ 386 *a*, 670, 671 and notes.

cannot be reached.[1] A gift to A. with the request to support B. does not create any interest in B. that can be reached by his creditors. "There is no provision for the payment of any money to him at all."[2] Where a gift of land was made to trustees to keep in repair, rent, collect profits, etc., and pay all incomes to the grantor's daughter "*in person*, and not upon any verbal order, nor upon any assignment or transfer by" the daughter, it was held that the intention was to place the net income beyond the control of the daughter or her creditors so long as it remained in the hands of the trustee, and that the court would enforce this intention; wherefore the trustee could not be garnished.[3] And where a will left property to A. for the use of B., and provided that no part of the property should be sold by B. or be liable to process on account of his debts, it was held that such a provision was not against public policy and was valid.[4] An execution only operates on an estate in which the legal title is coupled with the beneficial interest, or in which the legal and equitable titles are merged by law in the same person, or so combine in him that he has a right to call for an immediate conveyance of the legal estate; but there can be no merger or call, where the legal and equitable estates are not commensurate, or where their union would be contrary to the intent of the grantor.[5] In Alabama, however, the judges used very strong language, "No one can have a legal or equitable right to property, which is not subject to the payment of his debts" at law or in equity.[6] "Whatever a debtor can himself claim to enjoy as a general use, benefit, or interest, in property capable of separation and division, may be reached by his creditors."[7] "Ingenuity cannot devise a plan by which one can have the use and benefit of property (with the exception of a joint use incapable

[1] Russell *v.* Milton, 133 Mass. 181, 182.
[2] Baker *v.* Brown, 146 Mass. 369, 372.
[3] Steib *v.* Whitehead, 111 Ill. 247.
[4] Jourolmon *v.* Massengill, 86 Tenn. 82, 83.
[5] Henderson *v.* Hill, 9 Lea (Tenn.), 25.
[6] Rugeley *v.* Robinson, 10 Ala. 731.
[7] Ibid.

of severance) in defiance of his creditors. Whether it is in shape of a maintenance in the discretion of trustees, or is openly avowed to be for his use and benefit, in every conceivable case it can be reached."[1] But an absolute power in the trustee to withhold entirely, or to apply, will probably place the funds beyond reach of *cestui*, creditor, or court,[2] except where the conduct of the trustee is an abuse of the discretion reposed in him, under the principles of §§ 510, 511. A trustee who has prior to service of garnishment brought the fund into court is not subject to the garnishment; the creditors must intervene in that court, setting up their claim.[3]

§ 815 *b*. If goods are supplied to a trustee, by one ignorant of the trust, and the goods benefit the trust property, the vendor may recover of the trust estate in case the trustee becomes insolvent.[4] (*a*) Where a trustee, with consent of the *cestui*, takes

[1] Ibid.; and see Robertson *v*. Johnson, 36 Ala. 197; Smith *v*. Moore, 37 Ala. 329.

[2] Taylor *v*. Harwell, 65 Ala. 14.

[3] State *v*. Netherton, 26 Mo. App. 414.

[4] Moore, &c. *v*. Lampkin, 63 Ga. 748.

(*a*) A creditor of the trustee cannot attach at law or levy upon trust property, even when the contract from which his claim arose was for the benefit of the trust, or when the tort was not due to the personal fault of the trustee; and the fact, that the trustee has the right to reimburse himself from the trust property, does not create any exception to the general rule so far as regards the creditor's remedy at law. School District *v*. Peterson, 74 Minn. 122; Wright *v*. Franklin Bank, 59 Ohio St. 80; Hussey *v*. Arnold, 185 Mass. 202; Hudson *v*. Wright, 204 Mo. 412.

In England it has been held in several cases, where the trustee had properly continued the testator's business, that a creditor with respect to the business has the equitable right to collect from the trade assets of the trust estate by way of substitution to the trustee's right to use the assets for the payment of such debts. But the equity does not arise unless the trustee is insolvent, and then only when the trustee himself has the right to use the assets for the purpose. If he has lost the right because he is a defaulter, or never had it because the debts were such as he had no authority to contract on account of the trust, the creditor has no such equity. *In re* Frith, [1902] 1 Ch. 342; *In re* Morris, 23 L. R. Ir. 333; *In re* Blundell, 44 Ch.

a loan to improve the trust estate, and does so improve it, the lender can hold the estate even though the order of court

Div. 1, 11; *In re* Johnson, 15 Ch. Div. 548. See also *In re* Raybould, [1900] 1 Ch. 199. The English courts have never accepted or regarded with favor the theory that the equity of such creditors rests upon their giving credit on the faith of the trust estate. *In re* Morris, 23 L. R. Ir. 333, 335; Staniar *v.* Evans, 34 Ch. Div. 470; Francis *v.* Francis, 5 De G., M. & G. 108, 120. See also Feoffees of Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 507. The fact that one of three trustees is a defaulter and has lost his right of indemnity from the trust estate, will not prevent a creditor from having this equitable remedy, since he can work out his equity through the other two. *In re* Frith, [1902] 1 Ch. 342. It has been said that in England creditors of a trustee do not have this right to resort to the trust estate except in cases where a trade has been properly carried on for the benefit of the trust. Strickland *v.* Symons, 26 Ch. Div. 245, 248; Lewin (11th ed.), p. 776. But see Staniar *v.* Evans, 34 Ch. Div. 470; Francis *v.* Francis, 5 De G., M. & G. 108, 120.

As to the right of a creditor of the trustee, with respect to trust matters, to retain trust money paid to him by the trustee when the latter had no right to use trust funds for the purpose because he was indebted to the estate, see *In re* Blundell, 40 Ch. Div. 370; 44 Ch. Div. 1. It is there held that he may retain such payments when he received them with notice that they were trust funds, provided he has no notice that the trustee had no right of reimbursement, and that knowledge that the trustee had committed a breach of trust is not necessarily notice that he has lost his right of reimbursement.

In several States statutes have provided that creditors of trustees, executors or administrators on account of property or services for which the latter have properly contracted for the benefit of the trust estate may collect their claims from the trust estate, usually by means of a proceeding against the trustee, executor or administrator in his representative capacity. Conn. Gen. Stats. (1902), § 739; Code of Ala. (1907), §§ 6085–6089; N. C. Code (1905), §§ 627, 629; Cannon *v.* Robinson, 67 N. C. 53; Ga. Code (1895), §§ 3202–3207; Sanders *v.* Houston Guano Co., 107 Ga. 49, 55. In Alabama it is provided that the creditor cannot recover from the trust estate unless the trustee is insolvent; and the statute does not impair the personal liability of the trustee. Taylor *v.* Crook, 136 Ala. 354, 375; Mosely *v.* Norman, 74 Ala. 422, 425; Askew *v.* Myrick, 54 Ala. 30; Dantzler *v.* McInnis, 151 Ala. 293.

In the absence of statute, probably all American jurisdictions would go at least as far as the English decisions in giving creditors an equitable remedy against the trust property where the trustee is insolvent or the creditor's remedy against him is inadequate for other similar reason. 15 Am. L. Rev. 449; 1 Ames' Cases on Trusts (2d

authorizing the mortgage may be invalid.[1] But if a trustee, without being authorized, makes a contract, even though it is bene-

[1] Harvey *v.* Cubbedge, 75 Ga. 794.

ed.), 423, 432; cases *infra*, this note. And American courts would probably not limit the remedy to cases where the trustee has properly engaged in trade. Neal *v.* Bleckley, 51 S. C. 506; Norton *v.* Phelps, 54 Miss. 467; Owens *v.* Mitchell, 38 Tex. 588; Woddrop *v.* Weed, 154 Pa. St. 307; Manderson's Appeal, 113 Pa. St. 631; Hussey *v.* Arnold, 185 Mass. 202; Bushong *v.* Taylor, 82 Mo. 660; O'Brien *v.* Jackson, 167 N. Y. 31; Campbell *v.* Barber, 93 N. Y. S. 182. But see Johnson *v.* Leman, 131 Ill. 609; Truesdale *v.* Philadelphia Trust, etc. Co., 63 Minn. 49.

Most of the American decisions have followed the theory of the English cases, basing the remedy of the creditors upon substitution to the trustee's right to use the trust property for the purpose of paying their claims. A consequent limitation upon a creditor's right to recover is that the trustee be not in the position of owing money to the estate at the time recovery is sought. 15 Am. L. Rev. 449; 1 Ames' Cases on Trusts (2d ed.), 423, 432; Norton *v.* Phelps, 54 Miss. 467; Owens *v.* Mitchell, 38 Tex. 588; Hussey *v.* Arnold, 185 Mass. 202; Bushong *v.* Taylor, 82 Mo. 660; O'Brien *v.* Jackson, 167 N. Y. 31; Mason *v.* Pomeroy, 151 Mass. 164, 167. But a few decisions have allowed the creditor to recover, irrespective of the trustee's right to indemnity, on the theory that the trust estate should pay for the benefit which the creditor has conferred upon it and that he should not be made to suffer for the trustee's misconduct or misappropriation of trust property. Manderson's Appeal, 113 Pa. St. 631; Woddrop *v.* Weed, 154 Pa. St. 307; Young *v.* Weed, 154 Pa. St. 316; Mathews *v.* Stephenson, 6 Pa. St. 496; Wylly *v.* Collins, 9 Ga. 223; Wadsworth *v.* Arnold, 24 R. I. 32 (*semble*). See also 15 Am. L. Rev. 449; Yerkes *v.* Richards, 170 Pa. St. 346; Ferrier *v.* Trépannier, 24 Can. Sup. 86; Prinz *v.* Lucas, 210 Pa. St. 620; Scheibeler *v.* Albee, 99 N. Y. S. 706, 114 App. Div. 146; Courier-Journal Co. *v.* Columbia Fire Ins. Co., 54 S. W. 966 (Ky. 1900).

In Pennsylvania, when the trustee has properly continued the testator's business, it has been held that creditors of the business should be taken as having given credit on the faith of the trust estate, so that when it becomes insolvent the trustee has no right to give a preference to any one of them. The trade assets seem to be regarded as a trust fund primarily for the creditors of the business. Woddrop *v.* Weed, 154 Pa. St. 307; Mathews *v.* Stephenson, 6 Pa. St. 496. See also Prinz *v.* Lucas, 210 Pa. St. 620, as to damages due to negligence of an agent employed in the conduct of the business.

As to the conflicting rights of trade creditors and creditors of the testator when the executor properly continues the business of the

ficial to the estate, the person with whom he contracts cannot charge the estate unless the trustee is insolvent and the estate is in debt to him;[1] and this is so although the contract was made in performance of the trust.[2] The bill should show the existence of the trust, the power of the trustee to bind the trust estate, and the specific facts rendering it liable.[3] A creditor seeking to set aside the trust-deed as a fraud on him, may proceed against the trustee without joining the *cestui*.[4] One who sells goods to a trustee on his individual credit may afterwards become a creditor of the trust estate, if the goods are adapted to trust use, are actually so used, and the trustee as such gives a note for the balance due on them.[5] The private creditors of the trustee have no claim on trust property where the trust has been created by, or the fund has proceeded from some person other than the debtor,[6] and their attachment of it will not hold, though the title stands in the name of the trustee as an individual, and

[1] Blackshear *v.* Burke, 74 Ala. 239. [But see note *a*, *supra*.]

[2] Mosely & Eley *v.* Norman, id. 422. [See note *a*, *supra*.]

[3] Jackson *v.* Pool, 73 Ga. 801. See Brightwell *v.* Jordan, 74 Ga. 486.

[4] Tucker *v.* Zimmerman, 61 Ga. 599.

[5] Kupferman *v.* McGhee, 63 Ga. 250.

[6] Lippincott *v.* Evens, 35 N. J. Eq. 553.

testator and the estate becomes insolvent, see *In re* Gorton, 40 Ch. Div. 536; Willis *v.* Sharp, 115 N. Y. 396; Young *v.* Weed, 154 Pa. St. 316.

It seems to be possible in some jurisdictions for the trustee to contract is such a way that he may make the estate primarily liable in equity to the creditor without creating any liability against himself, and this without pledging the trust property. But the decisions are not very clear upon this point. O'Brien *v.* Jackson, 167 N. Y. 31; Mulrein *v.* Smillie, 48 N. Y. S. 994, 25 App. Div. 135; Keating *v.* Stevenson, 47 N. Y. S. 847; New *v.* Nicoll, 73 N. Y. 127; Fowler *v.* Mutual Life Ins. Co., 28 Hun, 195; Mannix *v.* Purcell, 46 Ohio St. 102; Fowler *v.* Gowing, 152 Fed. 801.

The trustee is in no sense an agent for the *cestuis que trust*, and he cannot render them personally liable on his contracts without their consent. Everett *v.* Drew, 129 Mass. 150; Dantzler *v.* McInnis, 151 Ala. 293; Hall *v.* Jameson, 151 Cal. 606; Wells-Stone Mercantile Co. *v.* Grover, 7 N. D. 460. See Poland *v.* Beal, 192 Mass. 559. But see Wright *v.* Caney River Ry. Co., 66 S. E. 588 (N. C. 1909).

the creditor has no notice of the trust;[1] (*a*) and where a debtor receives the title to property for the specific purpose of conveying it to another, his creditors cannot complain on account of his executing the trust, whether so constituted as to be legally binding or not.[2] But if one purchases lands partly with trust funds and partly with his own funds or credit, he has an interest in the property which can be reached by his creditors.[3] In Minnesota, a creditor after exhausting his remedies at law may bring an action to enforce a statutory trust in favor of creditors, where the judgment debtor has paid the consideration for land the legal title to which has been granted to another.[4] Where a general guardian placed his ward at plaintiff's school, it was held that an action would lie against the guardian, the infant, and the trustee, to compel the latter to apply funds belonging to the infant to the plaintiff's claim.[5] One who, with the knowledge and approval of the court, and the acquiescence of all parties, makes improvements on trust property, may perfect a lien upon it.[6] An attorney retained by the trustee to protect the estate from illegal claims may recover for his services from the estate.[7]

[1] Houghton *v.* Davenport, 74 Maine, 590. [Waterman *v.* Buckingham, 79 Conn. 286; Murphy *v.* Plankinton Bank, 13 S. D. 501; Lewis *v.* Taylor, 96 Ky. 556; Cobb *v.* Trammell, 9 Tex. Civ. App. 527; Henderson *v.* Rushing, 105 S. W. 840 (Tex. Civ. App. 1907).] But the recording statutes of the State may make exceptions.

[2] First Nat'l Bank of Lewiston *v.* Dwelley, 72 Maine, 223; Wherry *v.* Hale, 77 Mo. 20. [Stratton *v.* Edwards, 174 Mass. 374; *supra*, § 76, note *b*, § 82. But see Pruitt *v.* Pruitt, 57 S. C. 155.]

[3] Martin *v.* Baldwin, 30 Minn. 537.

[4] Moffatt *v.* Tuttle, 35 Minn. 301; Wadsworth *v.* Schisselbauer, 32 Minn. 84.

[5] Bulkley *v.* Staats, 31 Hun, 137.

[6] Carey *v.* Kemper, 40 Ohio St. 79.

[7] Manderson's App., 113 Penn. St. 631. [See Courier-Journal Co. *v.* Columbia Fire Ins. Co., 54 S. W. 966 (Ky. 1900). But see note *a*, *supra*, p. 1337 *et seq.*]

(*a*) In the absence of statute provisions the apparent ownership of a trustee, although it may give him a fictitious credit, does not give his creditors rights in the trust property superior to the equities of the *cestuis*. Byrne *v.* McGrath, 130 Cal. 316.

§ 815 c. No parol or resulting or other trust affects *bona fide* purchasers or takers for value without notice.[1] (a) Nor will a

[1] McCaskill v. Lathrop & Co., 63 Ga. 96; Roberts v. Robinson, id. 666; Johnson v. Sirmans, 69 Ga. 617; Erwin v. Hall, 18 Brad. (Ill.) 345; Branch v. Griffin, 99 N. C. 173; Bailey v. Colton, 25 S. C. 436; McKamey v. Thorp, 61 Tex. 648; Conover v. Beckett, 38 N. J. Eq. 384.

(a) When a trustee uses funds of the estate to pay a pre-existing debt, the creditor who has no notice of their trust character is not charged with the trust. He is under no obligation to inquire where the money came from and would be entitled to retain it, even if it should later appear that the debtor had stolen it. Spaulding v. Kendrick, 172 Mass. 71; Stephens v. Board of Education, 79 N. Y. 183; Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Holly v. Missionary Soc., 180 U. S. 284; Perry v. Oerman, 63 W. Va. 566. But see Joslyn v. Downing, 150 Fed. 317; Central Stock, etc. Exchange v. Bendinger, 109 Fed. 926, 48 C. C. A. 726. As to the rights of a bank where the trustee has deposited trust funds see *supra*, § 122, note *a*, p. 177 *et seq.*

There is a disposition, especially since the wide adoption of the Negotiable Instruments Law, to apply the same doctrine to negotiable paper given either in payment of or as security for a pre-existing debt. Spaulding v. Kendrick, 172 Mass. 71; National Revere Bank v. Morse, 163 Mass. 383; Goodwin v. Mass. Loan, etc. Co., 152 Mass. 189, 199; Rockville Bank v. Citizens' Gas Light Co., 72 Conn. 576, 581; Birket v. Elward, 68 Kan. 295; Swift v. Tyson, 16 Pet. 1; Schloss v. Feltus, 103 Mich. 525. See *contra*, Thompson v. Maddux, 117 Ala. 468; Sutherland v. Mead, 80 N. Y. App. Div. 103; Roseman v. Mahony, 86 N. Y. App. Div. 377; Bank of Am. v. Waydell, 103 App. Div. 25, 187 N. Y. 115. See Daniel, Negotiable Instruments (5th ed.), § 827 *et seq.*

In regard to other forms of property, there is a wide difference of authority as to whether a pre-existing debt is such a sufficient consideration for a transfer or mortgage of property of which the debtor has the legal title, that it will shut out equitable rights of a third party of which the creditor had no notice. In some States it is held that the discharge of a pre-existing debt is a sufficient consideration to give the creditor the protection given to *bona fide* purchasers for value. See Saffold v. Wade's Ex'r, 51 Ala. 214; Soule v. Shotwell, 52 Miss. 236; State Bank v. Frame, 112 Mo. 502; Chapman v. Hughes, 134 Cal. 641, 658; Conn. Life Ins. Co. v. McCormick, 45 Cal. 580; Frey v. Clifford, 44 Cal. 335; Uhler v. Semple, 20 N. J. Eq. 288; Clements v. Doerner, 40 Ohio St. 632; Chapman v. Chapman, 91 Va. 397. But in other States the rule is settled the other way, the courts taking the ground that, as the debt may be revived if the conveyance is set aside, the creditor has suffered no substantial loss by the transaction. See Orb v. Coapstick, 136 Ind. 313; Tarkington v. Purvis, 128 Ind. 182; Lilli-

breach of trust affect an innocent purchaser.[1] Knowledge that the vendor had mingled the trust funds with his own will not be sufficient to charge the vendee if he did not know that any trust funds went into the property he bought, and he has a right to rely on the vendor's assurances on that point if he acts prudently.[2] To charge a stranger to the trust as a trustee, by reason of participation in a misapplication of the fund, it is necessary to show that such person was aware of the character of the fund, and that the purpose to which it was applied was

[1] Carey *v.* Brown, 62 Cal. 373.

[2] Hathorn *v.* Maynard, 65 Ga. 168.

bridge *v.* Allen, 100 Iowa, 582; Anderson *v.* Buck, 66 Iowa, 490; Schloss *v.* Feltus, 103 Mich. 523, 535; Marsh *v.* Ramsay, 57 S. C. 121; Jarman *v.* Farley, 7 Lea, 141; Bonner *v.* Grigsby, 84 Tex. 330; Steffian *v.* Milmo Bank, 69 Tex. 513; Long *v.* Fields, 31 Tex. Civ. App. 241, 244; Howells *v.* Hettrick, 160 N. Y. 308. In these States the creditor will be protected if he has given up any security. See Grand Rapids Nat. Bank *v.* Ford, 143 Mich. 402; Douglas *v.* Miller, 92 N. Y. S. 514, 102 App. Div. 94; Howells *v.* Hettrick, 160 N. Y. 308.

By the weight of authority a pre-existing debt as consideration for a mortgage or pledge of property is not sufficient to entitle a creditor without notice to hold free from equities where his legal rights with respect to collection of the debt are unchanged. Thompson *v.* Maddux, 117 Ala. 468; Collins *v.* Moore, 115 Ga. 327; McGraw *v.* Solomon, 83 Mich. 442; Schumpert *v.* Dillard, 55 Miss. 348, 361; Reeves *v.* Evans, 34 A. 477 (N. J. Ch. 1896); Hiscock *v.* Phelps, 49 N. Y. 97; Wood *v.* Robinson, 22 N. Y. 564; Breed *v.* National Bank of Auburn, 68 N. Y. S. 68, 57 App. Div. 468; Small *v.* Small, 74 N. C. 16; Adamson *v.* Souder, 205 Pa. St. 498; People's Sav. Bank *v.* Bates, 120 U. S. 556; Marsh *v.* Ramsay, 57 S. C. 121; Steffian *v.* Milmo Bank, 69 Tex. 513; Hicks *v.* Nat. Surety Co., 50 Wash. 16. See *contra*, Clements *v.* Doerner, 40 Ohio St. 632; Chapman *v.* Chapman, 91 Va. 397. See Jones on Mortgages (6th ed.), § 460; Jones on Chattel Mortgages (4th ed.), § 81. But if he has given a valid extension of time for payment of the debt or has given up other security, the consideration is sufficient. O'Brien *v.* Fleckenstein, 180 N. Y. 350; Grand Rapids Nat. Bank *v.* Ford, 143 Mich. 402.

That the assignee of a voluntary assignment for the benefit of creditors is not a purchaser for value, see Smith *v.* Equitable Trust Co., 215 Pa. St. 418; Stainback *v.* Junk Bros., etc. Co., 98 Tenn. 306; Chace *v.* Chapin, 130 Mass. 128, 131. See *contra*, Chapman *v.* Chapman, 91 Va. 397; Gilbert Bros. *v.* Lawrence Bros., 56 W. Va. 281, 290.

not a proper one for its use.[1] Whoever receives property, knowing that it is transferred to him in violation of a trust, takes it subject to the right not only of the *cestui*, but also of the trustee, to reclaim possession.[2] Judgment creditors and purchasers are protected by the provisions of the Code in Alabama.[3] A purchaser under an order of the chancellor having jurisdiction stands on the same footing as one without notice of the trust.[4]

[1] Fifth Nat'l Bank *v.* Hyde Park, 101 Ill. 595. [See *supra*, §§ 223, 800 and notes.]

[2] Zimmerman *v.* Kinkle, 108 N. Y. 282; Wetmore *v.* Porter, 92 N. Y. 76. [Clemens *v.* Heckscher, 185 Pa. St. 476; First Nat'l Bank *v.* Broadway Bank, 156 N. Y. 459, 467; Ludington *v.* Mercantile Bank, 92 N. Y. S. 454, 102 App. Div. 251; Safe Dep. & Trust Co. *v.* Cahn, 102 Md. 530; Leake *v.* Watson, 58 Conn. 332. See also Wagnon *v.* Pease, 104 Ga. 417.]

[3] § 2200 [Civ. Code (1907), § 3413]; Carter Bros. *v.* Challen, 83 Ala. 135; Dickerson *v.* Carrol, 76 Ala. 377.

[4] Iverson *v.* Saulsbury, 65 Ga. 724.

CHAPTER XXVII.

RIGHTS AND REMEDIES OF THE CESTUIS QUE TRUST IN RELATION TO THE TRUST PROPERTY.

§ 816. Right of *cestuis que trust* to an injunction.
§ 816 *a*. Right to a conveyance.
§ 816 *b*. Right to force a discretionary trustee to act, see § 510.
§ 817. Right to the removal of the trustees.
§ 818. Where a receiver may be appointed.
§ 819. Where a receiver will not be appointed.
§ 820. Where a receiver will be discharged.
§ 820 *a*. A sale may be decreed.
§ 821. Trustees must furnish clear accounts to the *cestuis que trust*.
§§ 822, 823. *Cestuis que trust* have the right to the production of books of accounts and documents.
§ 824. The fund may be paid into court upon suit of *cestuis que trust*.
§ 825. Within what time it must be paid in.
§ 826. Upon what state of facts it will be ordered to be paid in.
§ 827. A case for payment into court must be clearly stated in plaintiff's bill, and not denied in the answer.
§ 827 *a*. Right of *cestui* to alienate his estate or charge his income by anticipation.
§ 827 *b*. Rights of *cestui's* administrator.
Following trust property.
§ 828. *Cestuis que trust* may follow the trust fund into the hands of third persons.
§§ 829, 830. When a purchaser is protected and when not.
§ 831. *Choses in action* may be followed.
§ 832. Where a borrower of the trust fund has notice.
§§ 833, 834. Notice of doubtful equities.
§§ 835, 836. *Cestuis que trust* may follow the trust fund into other property in the hands of the trustees, or of third persons.
§§ 837, 838. Where trust property is mixed with a trustee's own property.
§ 839. Parol evidence admissible to trace and identify the fund.
§ 840. Statute of limitations does not apply.
§ 841. Evidence of the identity of the fund.
§ 842. Lien in case the trust fund is a part only of an estate.
Remedies against trustee.
§ 843. Personal liability of the trustee for a breach of trust and the remedy.

§ 844. *Cestuis que trust* may compel trustee to replace the property.
§ 845. Trustee must make up all losses from his neglect.
§ 846. Third persons who benefit by or advise a breach of trust may be made responsible.
§ 847. Not material that trustees have not benefited by a breach of the trust.
Destruction of remedy against trustee by acquiescence, waiver, or release.
§ 848. Liability of cotrustees and *cestuis que trust* concurring in a breach of trust.
§ 849. *Cestuis que trust* concurring in breach of trust are estopped.
§ 850. *Cestuis que trust* can have no relief if they acquiesce in a breach of trust.
§ 851. *Cestuis que trust* may release or waive a breach of trust. Conditions of a valid release.
§ 852. Other ways in which a breach of trust may be discharged.
§ 853. Parties interested alone can release a breach of trust.

§ 816. THE *cestui que trust* may compel the trustee to the observance and performance of his duty; and if there is reason to suppose, or the court is satisfied, that the trustee is about to proceed in an unauthorized manner, an injunction will be granted to restrain the improper exercise of the legal power in the trustee,[1] and such other orders may be made as will best secure the proper administration of the trusts.[2] It is well established, that the *cestui que trust* is entitled to an injunction, where the intended act, if done by the trustee, will be irremediable;[3] and so any person interested in the estate in common with others may, in behalf of himself and the others, procure proper orders for the security of the property.[4] A person whose interest is a contingent remainder may have a bill against the

[1] Balls *v.* Strutt, 1 Hare, 146; Corporation of Ludlow *v.* Greenhouse, 1 Bl. N. R. 57; *In re* Chertsey Market, 6 Price, 279, 281; Att. Gen. *v.* Foundling Hosp., 2 Ves. Jr. 42. [Coleman *v.* McGrew, 71 Neb. 801. See Birmingham, etc. Co. *v.* Louisville, etc. R. Co., 152 Ala. 422.]

[2] Toppan *v.* Ricomio, 1 Green, Ch. 89.

[3] Anon., 6 Madd. 10; Webb *v.* Shaftesbury, 7 Ves. 487; Reeve *v.* Parkins, J. & W. 390; Milligan *v.* Mitchell, 1 M. & K. 446; Att. Gen. *v.* Liverpool, 1 M. & C. 210; Vann *v.* Barnett, 2 Bro. Ch. 157; Davis *v.* Browne, 2 Del. Ch. 188. The contrary opinion, expressed in Pechel *v.* Fowler, 2 Anst. 549, has not been followed.

[4] Scott *v.* Becher, 4 Price, 346.

trustee, tenant for life, for the protection of the estate.[1] So a mortgagor in a power-of-sale mortgage, or other person interested in the equity of redemption, may procure an injunction restraining a sale by the mortgagee after a tender to him of the principal and interest due; and a purchaser with notice is not protected, although there is a clause exempting him from seeing to the validity of the sale.[2] A purchaser with notice of the trust from a trustee would be subject to the same liabilities as the trustee. An injunction may be had against the disposition of the fund by an insolvent trustee,[3] or against a bankrupt trustee;[4] but if the trustee or executor is merely poor, the court will not interfere.[5] An injunction has been granted against the administration of a trust by an executor of bad character, drunken habits, and great poverty.[6] Stockholders in banks or other corporations may have injunctions against the directors of the corporation, to prevent breaches of the trust.[7] But the inhabitants of a town or city cannot have an injunction against the town or its officers, in the absence of an enabling statute.

§ 816 *a*. The equitable owner is entitled to a conveyance from the one holding the legal title or the *prima facie* legal title,[8] but he cannot compel a conveyance of the property before the prior purposes named in the trust are accomplished, at least without showing maladministration by the trustee.[9] A trustee cannot assert title in himself or deny the right of the *cestui* in

[1] Clarke *v.* Devereaux, 1 S. C. 172.

[2] Jenkins *v.* Jones, 2 Gif. 99.

[3] Mansfield *v.* Shaw, 3 Madd. 100; Taylor *v.* Allen, 2 Atk. 213; Scott *v.* Becher, 4 Price, 346.

[4] Gladdon *v.* Stoneman, 1 Madd. 143, n.

[5] Howard *v.* Papera, 1 Madd. 143; Hathornthwaite *v.* Russell, 2 Atk. 126; Barn. 334.

[6] Everett *v.* Prythergch, 12 Sim. 365.

[7] *Ante*, § 207; Dodge *v.* Woolsey, 18 How. 331; Mechanics' Bank *v.* De Bolt, id. 330; McDowell *v.* Brantley, 80 Ala. 173.

[8] Winona & St. Paul R. Co. *v.* St. Paul & S. C. R. Co., 26 Minn. 181; Cobb *v.* Knight, 74 Maine, 253; Dodge *v.* Stevens, 94 N. Y. 209.

[9] Seamans *v.* Gibbs, 132 Mass. 239. [See *infra*, § 920.]

a suit for conveyance, on the ground of an outstanding superior title.[1]

§ 816 *b*. If a trustee, having discretion as to the time and amount of payments to be made to the *cestui* or for her benefit, refuses to make any payment at all, he commits a breach of trust against which the courts will give relief.[2] (*a*)

§ 817. The *cestuis que trust* may bring a bill or petition for removal, and the court may remove the trustees from office, and appoint others in their place, when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of trust or any danger to the trust fund;[3] but if the conduct of the trustee proceeds from a misunderstanding of his duty, or from mistake, or a long-continued practice by himself and other trustees, and not from any dishonest, selfish, or improper motives, and the safety of the property is not imperilled, the court generally will not remove him.[4]

§ 818. Proceedings for the removal of trustees and the appointment of others require some little time, as trustees have the right to file answers to the charges against them, and to a regular and full hearing; and as the *cestuis que trust* are entitled to have the fund properly protected and managed in the mean time, the court may appoint receivers.[5] Thus, if it can be shown that the trustees have been guilty of misconduct, waste, or an improper disposition of the estate;[6] or that they have an undue

[1] Neyland *v.* Bendy, 69 Tex. 711.

[2] Collins *v.* Severson, 2 Del. Ch. 324.

[3] *Ante*, § 275, and cases cited; Parsons *v.* Winslow, 6 Mass. 169; Dixon *v.* Smith, 2 Rich. Eq. 131; Johnson's App., 9 Penn. St. 416; Losley *v.* Losley, 1 Duv. 117.

[4] *Ante*, § 276, and cases cited; 2 Story, Eq. Jur. § 1289.

[5] Beverley *v.* Brooke, 4 Grat. 208; Calhoun *v.* King, 5 Ala. 523; Jones *v.* Dougherty, 10 Ga. 273; Edie *v.* Applegate, 14 Iowa, 273.

[6] Anon., 12 Ves. 5; Middleton *v.* Dodswell, 13 Ves. 266; Howard *v.* Papera,

(*a*) Or if the trustee is unreasonable in his requirements of proof that the *cestui* is entitled to a payment. *In re* Chapman, 72 L. T. 66.

leaning towards one of two conflicting interests;[1] or that the fund is in danger from their insolvency or bankruptcy;[2] or that one of the trustees has been guilty of misconduct, and the other trustees desire a receiver;[3] or that they are incapacitated from acting;[4] or that they are of bad character, drunken habits, and great poverty;[5] or that the trustees are out of the jurisdiction;[6] or that they so disagree among themselves that the estate cannot be properly administered,[7] — receivers will be appointed; and so where the trustee was a married woman, and her husband was out of the jurisdiction.[8] In all cases, the court will appoint a receiver if the trustees and *cestuis que trust* agree or concur in the appointment.[9] But the court will require security.[10]

§ 819. The court will not appoint a receiver, and take the administration of the trust out of the hands of the trustees upon slight grounds.[11] It is not a sufficient ground of itself for a receiver, that one trustee has disclaimed, another is inactive, and another has gone abroad, if there is still a trustee capable

1 Madd. 142; Richards *v.* Perkins, 3 Y. & Col. 299; Evans *v.* Coventry, 5 De G., M. & G. 911; Att. Gen. *v.* Bowyer, 3 Ves. 714.

[1] Talbot *v.* Scott, 4 K. & J. 139.

[2] Scott *v.* Becher, 4 Price, 346; Gladdon *v.* Stoneman, 1 Madd. 143, n.; Langley *v.* Hawk, 5 Madd. 46; Mansfield *v.* Shaw, 3 Madd. 100; Havers *v.* Havers, Barn. 23; Middleton *v.* Dodswell, 13 Ves. 266; Anon., 12 Ves. 4: Steele *v.* Cobham, L. R. 1 Ch. 325.

[3] Middleton *v.* Dodswell, 13 Ves. 266; Tidd *v.* Lister, 5 Madd. 429.

[4] Bainbrigge *v.* Blair, 3 Beav. 481.

[5] Everett *v.* Prythergch, 12 Sim. 367.

[6] Noad *v.* Backhouse, 2 Y. & Col. Ch. 529; Smith *v.* Smith, 10 Hare, App. 71; Tidd *v.* Lister, 5 Madd. 429.

[7] Day *v.* Croft, Lewin on Trusts, 731; Swale *v.* Swale, 22 Beav. 584.

[8] Taylor *v.* Allen, 2 Atk. 213.

[9] Brodie *v.* Barry, 3 Mer. 695, and case cited; Browell *v.* Reid, 1 Hare, 435.

[10] Manners *v.* Furze, 11 Beav. 30; Tylee *v.* Tylee, 17 Beav. 583.

[11] Barkley *v.* Reay, 2 Hare, 306; Middleton *v.* Dodswell, 13 Ves. 268; Ogden *v.* Kip, 6 Johns. Ch. 160. [Pollard *v.* Southern Fertilizer Co., 122 Ala. 409; Dozier *v.* Logan, 101 Ga. 173; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565.]

and willing to execute the trust;[1] nor that the trustees are poor, if they are not insolvent;[2] nor that trustees for sale have let the purchaser into possession before the purchase-money is paid.[3] There must be good reason to fear that the property will not be forthcoming at the end of the litigation, or the court will not appoint a receiver.[4]

§ 820. A receiver is appointed for the benefit of all parties interested, and therefore he will not be discharged upon the application of one party, although he is the party that applied for the appointment.[5] But the expenses of the receivership, together with the commissions of the receivers, must be paid out of the income of the tenant for life.[6] (*a*) For this reason the court will appoint new trustees and discharge the receiver as soon as it can be done in the regular progress of the suit, to relieve the tenant for life from all extraordinary or unnecessary burdens.[7]

§ 820 *a*. Courts in equity also have jurisdiction to decree a sale of the trust property, if the trust fund can thereby be administered more beneficially, and in accordance with the intention of the donor.[8] For example, if the particular property should become unavailable for the purposes of the trust.[9] And

[1] Browell *v*. Reid, 1 Hare, 434; Tait *v*. Jenkins, 1 Y. & Col. Ch. 492.

[2] Anon., 12 Ves. 4; Howard *v*. Papera, 6 Madd. 142; Hathornthwaite *v*. Russell, 2 Atk. 126; Havers *v*. Havers, Barn. 23.

[3] Browell *v*. Reid, 1 Hare, 434.

[4] Poythress *v*. Poythress, 16 Ga. 406; Ogden *v*. Kip, 6 Johns. Ch. 160.

[5] Bainbrigge *v*. Blair, 3 Beav. 423.

[6] Shore *v*. Shore, 4 Drew. 510.

[7] Bainbrigge *v*. Blair, 3 Beav. 421; Poole *v*. Franks, 1 Moll. 80.

[8] Alemany *v*. Wensinger, 40 Cal. 288; Overby *v*. Hart, 68 Ga. 493; Iverson *v*. Saulsbury, 68 Ga. 790. [See *supra*, § 764 and notes.]

[9] Ryan *v*. Porter, 61 Tex. 106.

(*a*) A trustee will not usually be appointed receiver except on the terms of his receiving no remuneration; but the rule is not inflexible. *In re* Bignell, [1892] 1 Ch. 59.

the birth of a child, who may have an interest in the trust, will not invalidate a previous order of sale.[1] In Georgia it has been decided that the chancellor may on notice to all parties allow a trustee to sell in term time or at chambers, yet an order to *mortgage* cannot be given unless in term time.[2] But on the last point the later cases hold that on a petition by all the parties the chancellor in chambers may authorize a mortgage.[3] The trust estate will be held for money loaned to improve the estate with consent of the *cestui*, even if the order of court authorizing a mortgage should prove invalid.[4] If the court has jurisdiction, the sale extinguishes the trust quality in the property sold, and transfers it to the fund received for the property.[5] Where a power of sale has been given to a trustee in his discretion, the court cannot force him to act, nor after his death can a trustee appointed by it exercise the power.[6] (*a*) A sale of a trust for lives with contingent remainder under order of the chancellor and with consent of those holding vested interests is good; the contingent remainder-men are not necessary parties.[7]

§ 821. A trustee or executor is bound to keep clear, distinct, and accurate accounts.[8] If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him.[9] If he enters these accounts in his private books,

[1] Ansley *v.* Pace, 68 Ga. 403.

[2] Iverson *v.* Saulsbury, 68 Ga. 790.

[3] Weems *v.* Coker, 70 Ga. 746; Weems *v.* Harrold, 75 Id. 866. [Wagnon *v.* Pease, 104 Ga. 417, 431.]

[4] Harvey *v.* Cubbedge, 75 Ga. 795.

[5] Cowman *v.* Colquhoun, 60 Md. 127.

[6] Young *v.* Young, 97 N. C. 132. [Tempest *v.* Camoys, 21 Ch. Div. 571.]

[7] Schley *v.* Brown, 70 Ga. 64.

[8] Gaston's Trust, 35 N. J. Eq. 60; if he loses his accounts he must bear any resulting damage.

[9] Blauvelt *v.* Ackerman, 23 N. J. Eq. 493.

(*a*) It is otherwise where the discretion given a trustee is merely as to time and terms of sale. French *v.* Westgate, 70 N. H. 229. See *supra*, § 248 and notes.

he is bound to produce the books, although such books contain his private accounts;[1] and even if he enters the accounts of the trust in the books of the firm of which he is a partner, the books must be produced.[2] The *cestuis que trust* may enforce these rights against all persons acting for, or claiming by, through, or under the trustee with notice, or taking without value.[3] But where an agent was employed to manage an estate, and he entered the accounts in the same books in which he kept the accounts of other estates which he managed for other persons, the court declined to order the production of the books in the absence of such persons.[4]

§ 822. Where the relation of trustees and *cestuis que trust* is admitted or clearly established,[5] the *cestuis que trust*, as the true owners of the fund, have the right to the production and inspection of all the documents and papers relating to it. Where the trustee has taken the opinion of counsel for his guidance as trustee, the *cestuis que trust* have the right to see it, as it must be paid for out of their income.[6] As all the *cestuis que trust* have an interest in the documents, they must all be represented, directly or indirectly, in court, before a final disposition can be

[1] Freeman *v.* Fairlee, 3 Mer. 43; Hopkinson *v.* Burghly, L. R. 2 Ch. 447. The *cestui que trust* has a right to call upon the trustee for accurate information. Springett *v.* Dashwood, 2 Gif. 521; Walker *v.* Symonds, 3 Swanst. 58; Newton *v.* Askew, 11 Beav. 152; Gray *v.* Haig, 20 Beav. 219, n.; Burrows *v.* Wells, 5 De G., M. & G. 253; Clare *v.* Ormond, Jac. 120; Pearse *v.* Green, 1 J. & W. 140; Hardwick *v.* Vernon, 14 Ves. 510; White *v.* Lincoln, 8 Ves. 363; Turner *v.* Corney, 5 Beav. 515; Anon., 4 Madd. 473; Kemp *v.* Burr, 4 Gif. 348; Wrae *v.* Seed, id. 425. If a trustee stand by and see his cotrustee render improper accounts, he will make himself guilty of misrepresentation. Horton *v.* Brocklehurst, 29 Beav. 504. And so legatees have a right to proper explanations of the condition of the estate of a testator. Ottley *v.* Gibby, 8 Beav. 602.

[2] Ibid.

[3] Smith *v.* Barnes, L. R. 1 Eq. 65.

[4] Airy *v.* Hall, 12 Jur. 1043.

[5] Wynne *v.* Humberstone, 27 Beav. 421.

[6] Ibid.; Devaynes *v.* Robinson, 20 Beav. 42; Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

made of the papers;[1] but parties to bills, notes, bonds, or mortgages due to the trust estate need not be before the court, if they are not *cestuis que trust*.[2] So trustees have the right to see the books and papers relating to the trust in the hands of their cotrustees.[3]

§ 823. But so long as the relation of trustee and *cestuis que trust* is not admitted, or is not established, the *cestuis que trust* are strangers, and are not entitled to inspect the documents;[4] and where litigation is pending or contemplated between the trustee and *cestuis que trust*, and the trustee takes the opinion of counsel in relation to his rights against them, they have no right to see the opinion.[5]

§ 824. An order to pay the fund into court may be made at the final hearing, although it was not made upon an interlocutory application;[6] and such order may be made at the final hearing without notice or motion,[7] and it may be made, although a *distringas* or injunction has been previously obtained.[8]

§ 825. If the fund in the hands of the trustee consists of money, he will be ordered to pay it into court forthwith; if it consists of stocks, an immediate transfer will be ordered; if of mortgages or other property, a reasonable time, according to the circumstances, will be allowed in the order for the payment into court.[9] If a trustee should dispose of the fund during the

[1] Bugden *v.* Tylee, 21 Beav. 545.
[2] Gough *v.* Offley, 5 De G. & Sm. 653.
[3] Sloo *v.* Law, 3 Blatch. 459.
[4] Wynne *v.* Humberstone, 27 Beav. 421.
[5] Talbot *v.* Marshfield, 2 Dr. & Sm. 285; Brown *v.* Oakshott, 12 Beav. 252; Devaynes *v.* Robinson, 20 Beav. 42.
[6] Governesses' Institution *v.* Rushbridger, 18 Beav. 467.
[7] Isaacs *v.* Weatherstone, 10 Hare, App. 30.
[8] Lewin on Trusts, 730.
[9] Vigrass *v.* Binfield, 3 Madd. 62; Hinde *v.* Blake, 4 Beav. 597; Roy *v.* Gibbon, 4 Hare, 65; Wyatt *v.* Sherratt, 3 Beav. 498; Score *v.* Ford, 7 Beav. 333.

pendency of proceedings for payment of the fund into court, he would be punished as for contempt of court.[1]

§ 826. If a plaintiff is clearly entitled to a fund;[2] or if he has a certain partial interest in a fund, and all the other parties are before the court;[3] or if the other parties interested are not necessary parties to the suit;[4] or if he has a contingent interest, and there is no doubt that the defendant is trustee for some one,[5] an order will be entered that the money be paid into court, if any misconduct is shown on the part of the trustee.[6] And so where the plaintiff is entitled to a share of a fund which is clearly divisible into proportions.[7] Such orders were at one time entered as a matter of course upon the facts appearing in the answer, and Vice-Chancellor Kindersley said that he adhered to that practice.[8] But Lord Langdale said that the order would not be made, unless the misconduct of the trustee endangered the safety of the trust fund.[9] So trustees who have a discre-

[1] Wartram *v.* Wartram, Taney, 362.

[2] Freeman *v.* Fairlee, 3 Mer. 29; Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 77.

[3] Ross *v.* Ross, 12 Beav. 89; Whitmarsh *v.* Robertson, 4 Beav. 26; Bartlett *v.* Bartlett, 4 Hare, 631.

[4] Wilton *v.* Hill, 2 De G., M. & G. 807; Hammond *v.* Walker, 3 Jur. (N. S.) 686; Marryatt *v.* Marryatt, 23 L. J. (N. S.) Ch. 876; Lewellin *v.* Cobbold, 1 Sim. & Gif. 572.

[5] Dolder *v.* Bank of England, 10 Ves. 355; Whitmore *v.* Turquand, 1 John. & H. 296; Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 73.

[6] Ross *v.* Ross, 12 Beav. 89; Rothwell *v.* Rothwell, 2 S. & S. 217; Richardson *v.* Bank of England, 4 M. & C. 184; Meyer *v.* Montriou, 4 Beav. 343; Hinde *v.* Blake, id. 597; Johnson *v.* Aston, 1 S. & S. 73; Freeman *v.* Fairlee, 3 Mer. 39; Vigrass *v.* Binfield, 3 Madd. 62; Collis *v.* Collis, 2 Sim. 366; Wyatt *v.* Sherratt, 3 Beav. 499; Widdowson *v.* Duck, 3 Mer. 494; Contee *v.* Dawson, 2 Bland, 264; Hosack *v.* Rogers, 9 Paige, 468; Bartlett *v.* Bartlett, 4 Hare, 631; Nokes *v.* Seppings, 2 Phil. 19; Boschetti *v.* Power, 8 Beav. 98; Marryatt *v.* Marryatt, 23 L. J. Ch. 876; Clogett *v.* Hill, 9 G. & J. 81; Bourne *v.* Mole, 8 Beav. 177; Futter *v.* Jackson, 6 Beav. 424. [See *In re* Wright, [1895] 2 Ch. 747.]

[7] Rogers *v.* Rogers, 1 Anst. 174; Hammond *v.* Walker, 3 Jur. (N. S.) 686; Score *v.* Ford, 7 Beav. 336.

[8] Robertson *v.* Scott, 1 W. N. 114.

[9] Ross *v.* Ross, 12 Beav. 89.

tionary power over the fund will not be ordered to pay it into court, if it appear that they intend to exercise their discretion in good faith.[1]

§ 827. An order for payment into court will not be made, except upon an equity clearly stated in the plaintiff's bill, although some other equity may appear from defendant's answer;[2] and the merits upon which the prayer or motion is made must substantially appear in defendant's answer, as no evidence *aliunde* can be introduced upon the merits;[3] and so the plaintiff's interest or title should appear in the answer.[4] So it should appear in defendant's answer that he has received the trust fund;[5] but it need not appear that the trustees actually have the money in their hands; for if they state that they have received the fund, and have applied it, or invested it in a manner not authorized, they will be ordered to bring it into court.[6] Where an executor admits funds to have come to his hands, he may be allowed to show by affidavit what debts he has paid, and he will be ordered to pay in the balance only.[7] Payment into court is ordered where the trustees admit the receipts of funds, and do not show any legal discharge;[8] but it is

[1] Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

[2] Proudfoot *v.* Humme, 4 Beav. 476.

[3] Beaumont *v.* Meredith, 3 V. & B. 181; Richardson *v.* England, 4 M. & C. 171; Dubless *v.* Flint, id. 502; Black *v.* Creighton, 2 Moll. 554; Green *v.* Pledger, 3 Hare, 171; Boschetti *v.* Power, 8 Beav. 98; McTighe *v.* Dean, 22 N. J. Eq. 81.

[4] Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 73; Bank of Turkey *v.* Ottoman Co., L. R. 2 Eq. 366.

[5] See cases cited in last note.

[6] Ingle *v.* Partridge, 32 Beav. 661; Phillipo *v.* Munnings, 2 M. & C. 309; Meyer *v.* Montriou, 4 Beav. 346; Futter *v.* Jackson, 6 Beav. 424; Scott *v.* Becher, 4 Price, 350; Nokes *v.* Seppings, 2 Phil. 19; Vigrass *v.* Binfield, 3 Madd. 62; Collis *v.* Collis, 2 Sim. 365; Roy *v.* Gibbon, 4 Hare, 65; Wyatt *v.* Sherratt, 3 Beav. 498; Costeker *v.* Horrox, 3 Y. & Col. 530; Hinde *v.* Blake, 4 Beav. 597; Bourne *v.* Mole, 8 Beav. 177; Rothwell *v.* Rothwell, 2 S. & S. 217; Hagell *v.* Currie, L. R. 2 Ch. 449.

[7] Anon., 4 Sim. 359; Proudfoot *v.* Hume, 4 Beav. 476; Roy *v.* Gibbon, 4 Hare, 65.

[8] Peacham *v.* Daw, 6 Madd. 98; Richardson *v.* England, 4 M. & C. 174; Rothwell *v.* Rothwell, 2 S. & S. 217.

not ordered where the trustees admit facts only from which a liability may be inferred;[1] thus if they admit funds in their hands in such manner that it may be inferred that they ought to pay interest, they will not be ordered to pay the interest into court until the final hearing;[2] but if they admit that they have received interest, they may be ordered to pay it into court with the fund.[3] And so if the trustees admit that they owe a debt to the trust estate, they may be ordered to pay it into court at once, as the persons to receive and pay the debt are the same.[4] The court can compel the performance of its decrees by process against the parties as for contempts.[5]

§ 827 *a*. At common law a man cannot attach to a grant of property or estate, otherwise absolute, the condition that it shall not be alienated, and in England, Rhode Island, South Carolina, and North Carolina, the same rule is adopted as to equitable estates for life; (*a*) but in Pennsylvania, Vermont and Massachusetts, the founder may provide that the income shall not be alienable by anticipation, nor subject to be taken for debts until paid over to the *cestui*.[6] (*b*) It is not possible, however, for a man to create a trust to pay the income to *himself*

[1] Ibid.

[2] Woods *v*. Downes, 1 V. & B. 50.

[3] Ibid.; Freeman *v*. Fairlee, 3 Mer. 43; Rothwell *v*. Rothwell, 2 S. & S. 217.

[4] Richardson *v*. Bank of England, 4 M. & C. 174; White *v*. Barton, 19 Beav. 192.

[5] Chew's App., 4 Penn. St. 247.

[6] Broadway Nat'l Bank *v*. Adams, 133 Mass. 170, and cases there cited. See §§ 386, 670, 671.

(*a*) So also in Alabama, Kentucky, Virginia, probably in Georgia and by statute in Connecticut. See *supra*, § 386 *a* and notes.

(*b*) Income may be made inalienable also in Maine, Maryland, Mississippi, Missouri, Tennessee, Texas and probably in Illinois, Iowa and New Jersey; by statute in North Dakota, South Dakota, California and to a limited extent in North Carolina and Arizona. It is inalienable by statute, without a provision by the founder of the trust, in Indiana, Kansas, Minnesota, New York and Wisconsin. See *supra*, § 386 *a* and notes.

for life, with a provision against alienation by anticipation, so as to prevent his creditors from coming at the income by a bill in equity.[1] A *cestui* having a vested equitable interest though contingent may convey it subject to the contingency.[2] Upon application of all the *cestuis*, money coming from the condemnation of a portion of the trust property to railroad purposes may be devoted to the erection of needed buildings.[3] Purchase of land for the use of another creates a resulting trust, and the *cestui* may mortgage or sell the land subject to the right of the trustee to have the land paid for out of its proceeds.[4] A life *cestui* cannot mortgage the estate.[5] (*a*)

§ 827 *b*. The administrator of a *cestui que trust* is entitled only to that portion of the income which accrued between the last payment and the death of the *cestui*.[6]

§ 828. Trust property or property substituted for it may be recovered from the trustee and all persons having notice of the trust.[7] So long as the fund can be distinctly traced the chancellor will follow it and fasten the purpose of the trust upon it, unless the rights of innocent third parties have intervened.[8] (*b*)

[1] Pacific Nat'l Bank *v.* Windram, 133 Mass. 175; Jackson *v.* Von Zedlitz, 136 Mass. 342. [Brown *v.* Macgill, 87 Md. 161; Hackley *v.* Littell, 150 Mich. 106 (*semble*); Schenk *v.* Barnes, 156 N. Y. 316; Raymond *v.* Harris, 82 N. Y. S. 689, 84 App. Div. 546; Kene *v.* Hill, 92 N. Y. S. 805, 102 App. Div. 370; Newton *v.* Jay, 95 N. Y. S. 413; 107 App. Div. 457; Egbert *v.* De Solms, 218 Pa. St. 207; *supra*, § 386 *a*, notes. See also Crawford *v.* Langmaid, 171 Mass. 309.]

[2] Whipple *v.* Fairchild, 139 Mass. 262.

[3] Matthews *v.* Dellicker, 39 N. J. Eq. 90.

[4] Witte *v.* Wolfe, 16 S. C. 257.

[5] Barnes *v.* Dow, 59 Vt. 530.

[6] White *v.* Stanfield, 146 Mass. 424. [*Supra*, § 556, notes.]

[7] Bundy *v.* Monticello, 84 Ind. 119, see § 128.

[8] Third Nat'l Bank *v.* Stillwater Gas Co., 36 Minn. 75; Allen *v.* Rus-

(*a*) Where the trust fund is held by the trustees in mortgage investments with the power to reinvest, the *cestui* who has an assignable interest, has no right to record his assignment in the margin of the record of the mortgages. Cheyney *v.* Geary, 194 Pa. St. 427.

(*b*) "As a principle of equity jurisprudence nothing is better set-

But if the identity of the fund is lost, as by mixture with private funds, and the whole deposited to a private account, the *cestui* will stand on no better footing than other creditors of the trus-

sell, 78 Ky. 112; St. Louis Union Society *v.* Mitchell, 26 Mo. App. 206; Coggswell *v.* Griffith, 23 Neb. 334; Vance *v.* Kirk, 29 W. Va. 344; McLaughlin *v.* Fulton, 104 Penn. St. 161. [Hutchinson *v.* Nat. Bank of Commerce, 145 Ala. 196; Culver *v.* Guyer, 129 Ala. 602; Griswold *v.* Griswold, 111 Ala. 572; Moore *v.* McClure, 124 Ala. 120; Title Ins. & Tr. Co. *v.* Ingersoll, 153 Cal. 1; Byrne *v.* McGrath, 130 Cal. 316; Dolliver *v.* Dolliver, 94 Cal. 642; First Nat. Bank *v.* Leech, 207 Ill. 215; Hill *v.* Flemming, 128 Ky. 201; Englar *v.* Offutt, 70 Md. 78, 85; Portland S. Co. *v.* Dana, 172 Mass. 447; Twohy Mercantile Co. *v.* Melbye, 83 Minn. 394; Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75; Dorrah *v.* Hill, 73 Miss. 787; Lamb *v.* Rooney, 72 Neb. 322; James *v.* Aller, 66 N. J. Eq. 69; Welch *v.* Polley, 177 N. Y. 117; Am. Sugar Ref. Co. *v.* Francher, 145 N. Y. 552; Hyland *v.* Roe, 111 Wis. 361; Hill *v.* True, 104 Wis. 294; Bank of British No. Am. *v.* Freights, 127 Fed. 859; Hutchinson *v.* Le Roy, 113 Fed. 202; Montagu *v.* Pacific Bank, 81 Fed. 602. See cases cited in notes (*a*) and (*b*), *infra*. See also Darragh *v.* Rowe, 96 N. Y. S. 666, 109 App. Div. 560, holding that proceeds of an attempted transfer by a forged deed cannot be impressed with a trust for the owner of the property.]

tled than that, as between the *cestui que trust* and trustee, and all persons claiming under the trustee, otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however it may be changed or altered in its character, and all the fruits of such property, whether in its original or altered state, continues to be subject to and affected by the trust." Van Fleet, V. C., in Standish *v.* Babcock, 52 N. J. Eq. 628, 630. "The sole question, therefore, in every case where trust property is attempted to be traced is whether it can be identified either in its original or altered form." Italian Fruit, etc. Co. *v.* Penniman, 100 Md. 698.

It has been held that tracing trust funds into payment of a mortgage incumbrance upon identified property of the trustee will entitle the *cestui* to a lien upon the property to the extent that his money has gone into it. Patten *v.* Bond, 60 L. T. 583; Hanna *v.* McLaughlin, 158 Ind. 292; Standish *v.* Babcock, 52 N. J. Eq. 628. See also Moore *v.* McLure, 124 Ala. 120; Sargent *v.* Wood, 196 Mass. 1.

The case of Holmes *v.* Gilman, 138 N. Y. 369, goes the length of holding that policies of insurance issued to a wife upon the life of her husband, who paid *all* the premiums thereon out of his misappropriations from the funds of a partnership of which he was a member, are impressed with a trust in favor of the firm. See also Dayton *v.* Claflin Co., 41 N. Y. S. 839.

tee.[1] (a) As against the trustee himself, however, the mere mingling of the trust funds in a private deposit will not neces-

[1] Portland, &c. Steamboat Co. *v.* Locke, 73 Maine, 370. See Fowler *v.* True, 76 Maine, 43.

(a) It is well established law that trust money mingled with funds belonging to the trustee as an individual do not lose their trust character by reason of the mere fact that it is impossible to pick out the actual dollars which were trust money. The trust funds are treated as constituting a separable part of the entire fund. Peters *v.* Bain, 133 U. S. 670; Burnham *v.* Barth, 89 Wis. 362; Roca *v.* Byrne, 145 N. Y. 182; City of Lincoln *v.* Morrison, 64 Neb. 822; Bircher *v.* Walther, 163 Mo. 461; Cushman *v.* Goodwin, 95 Me. 353; Wulbern *v.* Timmons, 55 S. C. 456; Shute *v.* Hinman, 34 Or. 578; Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75; Fire & Water Com'rs *v.* Wilkinson, 119 Mich. 655; *In re* Mulligan, 116 Fed. 715, 717; Standish *v.* Babcock, 52 N. J. Eq. 628; *In re* Hallett's Estate, 13 Ch. Div. 696.

Withdrawals by the trustee from the fund for his own purposes are presumed to be from the part which belongs to him as an individual, leaving the part which belongs to the trust intact as long as sufficient of the entire fund remains. Woodhouse *v.* Crandall, 197 Ill. 104; Drovers' Bank *v.* Roller, 85 Md. 495; City of Lincoln *v.* Morrison, 64 Neb. 822; Morrison *v.* Lincoln Sav. Bank, 57 Neb. 225; Standish *v.* Babcock, 52 N. J. Eq. 628; Blair *v.* Hill, 63 N. Y. S. 670, 50 App. Div. 33 (affirmed 165 N. Y. 672); Matter of Holmes, 37 App. Div. (N. Y.) 15; Wulbern *v.* Timmons, 55 S. C. 456; Burnham *v.* Barth, 89 Wis. 362; Bromley *v.* Cleveland, etc. R. Co., 103 Wis. 562; Emigh *v.* Earling, 134 Wis. 565; Board of Com'rs *v.* Strawn, 157 Fed. 49; Weiss *v.* Haight & Freese Co., 152 Fed. 479; *In re* Mulligan, 116 Fed. 715, 717; *In re* Hallett's Estate, 13 Ch. Div. 696; Hancock *v.* Smith, 41 Ch. Div. 456.

To the extent that the total fund is reduced below the amount of trust funds put into it, there is a misappropriation of trust funds, and subsequent additions of his own money by the trustee will not be presumed to be restorations of the trust funds. Board of Commissioners *v.* Strawn, 157 Fed. 49; Cole *v.* Cole, 66 N. Y. S. 314, 54 App. Div. 37. It seems, however, that an actual intention that the subsequent additions should be by way of restoration ought to be effective.

If the mingled fund is in the form of a bank deposit which is nominally a trust account, or if the trustee has treated it as primarily a trust account, it has been held that the mere deposit of his own funds, after having drawn out trust money for his own use, will be treated as a restoration, a declaration of trust as to such deposits being implied from the circumstances. United National Bank *v.* Weatherby, 75 N. Y. S. 3, 70 App. Div. 279; Jeffray *v.* Towar, 63 N. J. Eq. 530.

The result in the ordinary case is that no trust can attach to the

sarily prevent their identification. If equity can follow the fund into the deposit and it is still there, that is sufficient. And in

mingled fund in excess of the smallest balance to which it has been reduced after the trust funds were put into it. Board of Commissioners *v.* Strawn, 157 Fed. 49; Mercantile Trust Co. *v.* St. Louis, etc. Ry. Co., 99 Fed. 485; Burnham *v.* Barth, 89 Wis. 362; *In re* Mulligan, 116 Fed. 715, 717; *In re* Ulster Building Co., 25 L. R. Ir. 24.

It was stated in the English case of *In re* Oatway, [1903] 2 Ch. 356, that where the trustee has first invested part of the mingled fund in shares of stock, leaving sufficient of the fund to cover the entire amount of the trust funds, and has afterwards dissipated the balance of the account, the *cestui* has the right to follow his funds into the shares of stock and to treat them as purchased with his share of the mingled fund. . . . "In order to determine to whom any remaining balance or any investment that may have been paid for out of the account ought to be deemed to belong, the trustee must be debited with all sums that have been withdrawn and applied to his own use so as to be no longer recoverable, and the trust money in like manner debited with any sums taken out and duly invested in the names of the proper trustees. The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial." The theory of the decision seems to be that the right of the beneficial owner of the trust moneys which went into the mingled fund is not a right to a lien upon the whole fund, but a right to a specific portion of the fund and a right to elect to treat any purchase made by the trustee with money from the mingled fund as made from the part that belongs to the trust. The presumption that withdrawals from the mingled fund are from the part which belongs to the trustee is applied only when withdrawals are dissipated so that they cannot be followed.

City of Lincoln *v.* Morrison, 64 Neb. 822, is based upon similar grounds. In that case a bank wrongfully mingled a deposit of public money with its general cash, and used the whole fund in its general business. At the time the bank went into the hands of a receiver there were practically no cash assets, but it held certain securities purchased for $1,750 and paid for out of its general cash after the public funds had been deposited. The receiver had realized $3,300 on these securities. It was held that the whole $3,300, which was less than the total trust fund, should be treated as proceeds of trust funds, although only $1,750 of the trust funds was used in making the purchase. See also Putnam *v.* Lincoln Safe Dep. Co., 104 N. Y. S. 4, 118 App. Div. 468; Bromley *v.* Cleveland, etc. R. Co., 103 Wis. 562.

The rule has frequent application to cases where a trustee deposits trust funds, or funds equitably belonging to another, to the credit of his personal bank account. As between the bank and the depositor in such a case the relation is that of debtor and creditor, and the bank

the absence of facts showing the contrary, the presumption is that money drawn out of a mixed deposit by the trustee for his

is not usually cognizant of facts which would require it to keep the trust funds apart from its general cash. This, however, does not affect the question as between the trustee and the beneficial owner, since his right of withdrawal, which is technically but a *chose in action*, puts him in practically the same position as if he had the funds in his own hands. Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75; *In re* Oatway, [1903] 2 Ch. 356; Paul *v.* Draper, 158 Mo. 197.

The rule is also applied to cases where a bank mingles with its general cash funds of a depositor which it ought to have kept separate as a special deposit. The funds which are thus improperly mingled with the general cash are treated as constituting a separable part of the entire fund. Payments out of this entire fund which cannot be traced into other property and made subject to the trust, will be presumed to have been made from other than the part improperly put into the general mass. Woodhouse *v.* Crandall, 197 Ill. 104; City of Lincoln *v.* Morrison, 64 Neb. 822; Morrison *v.* Lincoln Sav. Bank, etc. Co., 57 Neb. 225; State *v.* Bank of Commerce, 54 Neb. 725; Mercantile Trust Co. *v.* St. Louis, etc. Ry. Co., 99 Fed. 485; Fogg *v.* Bank, 80 Miss. 750; City of Lincoln *v.* Morrison, 64 Neb. 822; Board of Com'rs *v.* Strawn, 157 Fed. 49; Emigh *v.* Earling, 134 Wis. 565.

When funds of several different trusts are mingled in one deposit or fund, it has been held that withdrawals by the trustee for his own purposes reducing the fund below the total of all the trust funds will be presumed to be withdrawals of the earliest deposits in point of time in so far as they encroach upon trust funds. The rule of Clayton's Case applies. *In re* Stenning, [1895] 2 Ch. 433. See also Cole *v.* Cole, 66 N. Y. S. 314, 54 App. Div. 37.

It is well settled that the mere misappropriation of trust funds or funds of another does not give the beneficial owner any rights against the general estate of the misappropriating trustee in preference to the latter's general creditors. In the absence of ability to trace the misapplied funds into property of the insolvent trustee, the beneficial owner is only a creditor to the extent of his claim. Ellison *v.* Moses, 95 Ala. 221; Orcutt *v.* Gould, 117 Cal. 315; McClure *v.* La Plata County, 19 Colo. 122; Mathewson *v.* Wakelee, 75 A. 93 (Conn., 1910); Lowe *v.* Jones, 192 Mass. 94; Little *v.* Chadwick, 151 Mass. 109; Shields *v.* Thomas, 71 Miss. 260; Lincoln *v.* Morrison, 64 Neb. 822; Harrison *v.* Fleischman, 70 N. J. Eq. 301; Collins *v.* Steuart, 58 N. J. Eq. 392; Pope *v.* Prince, 105 Va. 209; Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237; Met. Nat. Bank *v.* Campbell Com. Co., 77 Fed. 705; *In re* Hallett, [1894] 2 Q. B. 237.

But there is much conflict of authority on the question of what is sufficient identification of the misapplied trust funds which have gone into assets of an insolvent trustee. One line of decisions is to the effect

own uses is taken from the portion of the fund that is his own, whatever were the relative dates of the deposits.[1] But if the

[1] Hall *v.* Otis, 77 Maine, 122. [See note *a*.]

that there will be no trust or lien in favor of the beneficial owner of the misapplied funds unless the trust property or its proceeds can be traced into some specific fund or property: the fund or account of which the trust funds form a part, or the identical property into which they have gone must be pointed out. Hill *v.* Miles, 83 Ark. 486; Hauk *v.* Van Ingen, 196 Ill. 20, 39; Union Nat. Bank *v.* Goetz, 138 Ill. 127; Wetherell *v.* O'Brien, 140 Ill. 146; Mutual Accident Assoc. *v.* Jacobs, 141 Ill. 261; Cushman *v.* Goodwin, 95 Me. 353; Italian Fruit, etc. Co. *v.* Penniman, 100 Md. 698 (*semble*); Lowe *v.* Jones, 192 Mass. 94; Little *v.* Chadwick, 151 Mass. 109; City of Lincoln *v.* Morrison, 64 Neb. 822 (*semble*); Harrison *v.* Fleischman, 70 N. J. Eq. 301; Texas Moline Plow Co. *v.* Kingman, etc. Co. (Tex. Civ. App. 1904) 80 S. W. 1042; Watts *v.* Newberry, 107 Va. 233; Boyle *v.* Northwestern Bank, 125 Wis. 498; Gianella *v.* Momsen, 90 Wis. 476; Burnham *v.* Barth, 89 Wis. 362; Peters *v.* Bain, 133 U. S. 670 (*semble*); Mercantile Trust Co. *v.* St. Louis, etc. Ry. Co., 99 Fed. 485.

Other cases have impressed a preferential lien upon the assets of the trustee, in favor of the beneficial owner if it is shown that the trust funds or their proceeds are somewhere in the assets, although they cannot be traced into specific articles or parcels of property or into any definite fund. Elizalde *v.* Elizalde, 137 Cal. 634; Bircher *v.* Walther, 163 Mo. 461; Tierman's Ex'r *v.* Security B'ld'g & Loan Assoc., 152 Mo. 135; Evangelical Synod *v.* Schoenich, 143 Mo. 652; Pundman *v.* Schoenich, 144 Mo. 149; Pearson *v.* Haydel, 90 Mo. App. 253; McClure *v.* La Plata County, 19 Colo. 122 (*semble*); Hopkins *v.* Burr, 24 Colo. 502; Shute *v.* Hinman, 34 Or. 578; Smith *v.* Combs, 49 N. J. Eq. 420 (*semble*). See McLeod *v.* Evans, 66 Wis. 401 (overruled by later decisions).

Some decisions have gone to the extent of holding that a preferential lien will be impressed upon the assets of the trustee if it appears that his assets have been increased by the misappropriated funds, although it is not possible to show that the fund itself went into the assets, and, in the absence of evidence to the contrary, will presume that such an increase has resulted. The result of these decisions is that merely showing that the trustee has received trust funds will impress a lien upon his assets unless it is shown that his assets were not increased by the misappropriation. Jones *v.* Chesebrough, 105 Iowa, 303; Bradley *v.* Chesebrough, 111 Iowa, 126; Davenport Plow Co. *v.* Lamp, 80 Iowa, 722; Brooke *v.* King, 104 Iowa, 713; Reeves *v.* Pierce, 64 Kan. 502; Kansas State Bank *v.* First State Bank, 62 Kan. 788; Myers *v.* Board of Education, 51 Kan. 87; Carley *v.* Graves, 85 Mich. 483. See 2 Harv. Law Rev. 28, by Samuel Williston; 19 Harv. Law Rev. 511–522, by J. B. Ames.

But the great weight of authority

trustee, after the mixture, takes out a proper portion of the funds as the property of the *cestui*, and buys land with it in his own name, the trust will attach to the land. A trustee need

is against this view. Ellison *v.* Moses, 95 Ala. 221; Hill *v.* Miles, 83 Ark. 486; Orcutt *v.* Gould, 117 Cal. 315; Roach *v.* Caraffa, 85 Cal. 436; McClure *v.* La Plata County, 19 Colo. 122; Ober Co. *v.* Cochran, 118 Ga. 396; Woodhouse *v.* Crandall, 197 Ill. 104; Shields *v.* Thomas, 71 Miss. 260; Fogg *v.* Bank, 80 Miss. 750; Pearson *v.* Haydel, 90 Mo. App. 253; Morrison *v.* Lincoln Sav. Bank, 57 Neb. 225; State *v.* Bank of Commerce, 54 Neb. 725 (overruling State *v.* Midland Bank, 52 Neb. 1); Farewell *v.* Kloman, 45 Neb. 424; Rockwood *v.* School District, 70 N. H. 388; Heinisch *v.* Pennington, 73 N. J. Eq. 456; Collins *v.* Steuart, 58 N. J. Eq. 392; Matter of Hicks, 170 N. Y. 195; No. Dakota Elev. Co. *v.* Clark, 3 N. D. 26; Shute *v.* Hinman, 34 Or. 578; Arbuckle Bros. *v.* Kirkpatrick, 98 Tenn. 221, 229; *In re* Mulligan, 116 Fed. 715; *In re* Hallett & Co., [1894] 2 Q. B. 237.

If it is affirmatively shown that the misappropriated trust funds have been dissipated without directly or indirectly augmenting the estate which has come into the hands of the trustee's assignee, probably no court would impress a trust or a lien upon the assets in favor of the beneficial owner of the misappropriated property. Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237; Ferchen *v.* Arndt, 26 Or. 121. This would usually be the case where it is shown that the trust funds were used to pay debts of the trustee. Drovers' Bank *v.* Roller, 85 Md. 495; Matter of Cavin *v.* Gleason, 105 N. Y. 256; Slater *v.* Oriental Mills, 18 R. I. 352; Met. Nat. Bank *v.* Campbell Com. Co., 77 Fed. 705; Bradley *v.* Chesebrough, 111 Iowa, 126 (limiting Davenport Plow Co. *v.* Lamp, 80 Iowa, 722); Jones *v.* Chesebrough, 105 Iowa, 303. But it has been held in Idaho that such a use of trust funds will give the *cestui* a preferred lien. State *v.* Bruce, 102 P. 831 (Idaho, 1909). See, *contra*, Spokane County *v.* First Nat. Bank, 68 Fed. 979, 982.

For a discussion as to whether the *cestui* should have a lien on property purchased with funds in which trust funds have been mingled, or should have an equitable interest in the property itself, see an article by J. B. Ames in 19 Harvard Law Rev. 511–522.

When the receiver or trustee in bankruptcy of the insolvent trustee has by mistake paid out the trust funds to general creditors, he must replace them from other assets of the estate in his possession. Standard Oil Co. *v.* Hawkins, 74 Fed. 395.

In a recent case it has been held that upon bankruptcy of a stock broker shares of stock in his possession and name, although unmarked in any way as belonging to any customer, should be presumed to be held in trust for customers entitled to delivery of that particular kind of shares. In case there should be insufficient of any stock to satisfy all entitled to shares of that stock, they should share in proportion to their claims. *In re* Brown & Co., 171 Fed. 254.

not have bought the property with the very dollars received by him in trust; if he uses or loses the trust dollars and substitutes others, the latter become impressed with the trust.[1] And the better opinion on authority now is that, even as to creditors, the mixing of trust funds with private in a general deposit does not obliterate the trust. The trustee, or those claiming through him, can have only so much as they can distinguish as theirs.[2] But to entitle the trust creditor to preference it must at least appear that the fund remaining for distribution contains the proceeds of the trust.[3] A proper deposit of trust money with consent of the *cestui*, with a banking firm of which the trustee is a partner, ceases to be trust money in the hands of the bank, and the *cestui* cannot be preferred to other creditors [of the bank].[4] (*a*) If the trustees convey the estate by a breach of the

[1] Houghton *v.* Davenport, 74 Maine, 590.

[2] Harrison *v.* Smith, 83 Mo. 216; Mills *v.* Post, 76 Mo. 426, not being followed. [See note *a*, *supra*.]

[3] *In re* Cavin *v.* Gleason, 105 N. Y. 256. [See note *a*, *supra*.]

[4] Mills *v.* Swearingen, 67 Tex. 270. [Paul *v.* Draper, 158 Mo. 197; Boyle *v.* Northwestern Bank, 125 Wis. 498. See *supra*, § 122, note *a*, p. 178.]

(*a*) A bank in which trust funds have been deposited cannot refuse to honor the check of the depositor, although it has notice of the trust character of the funds. The bank is bound to presume that the check is drawn in proper performance of the trust. A payment of the trustee's check does not constitute a participation by the bank in any actual or intended misappropriation by the trustee, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such notice will not even justify the bank in refusing to honor the trustee's check. Munnerlyn *v.* Augusta Bank, 88 Ga. 333; First Nat. Bank *v.* Valley State Bank, 60 Kan. 621; Duckett *v.* Mechanics' Bank, 86 Md. 400; Penn. Title Co. *v.* Meyer, 201 Pa. St. 299; Interstate Nat. Bank *v.* Claxton, 97 Tex. 569; Boyle *v.* Northwestern Bank, 125 Wis. 498; Gray *v.* Johnston, 3 Eng. & Ir. App. Cas. 1; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243. See *supra*, § 122, note. See also Cunningham *v.* Bank of Nampa, 13 Idaho, 167, 10 L. R. A. (N. S.) 706.

But the bank with notice of the trust attaching to the deposit acquires no lien upon the funds for the payment of the depositor's personal indebtedness. Jeffray *v.* Towar, 63 N. J. Eq. 530; Interstate

trust, the *cestui que trust*[1] may follow[2] the estate into the hands of a volunteer,[3] whether he had notice of the trust or not;[4] and into the hands of one who takes by descent from any other than a *bona fide* purchaser without notice;[5] and into the hands of a purchaser for value, if he has notice of the trust.[6] (*a*) Equity

[1] The State as well as an individual may follow a fund wrongfully converted. State *v.* Bevers, 86 N. C. 588.

[2] On the subject of following trust property, see Parsons' Edition of Morse on Banks and Banking, § 565, note 1.

[3] Clear evidence is required where want of consideration is relied on. Dalton *v.* Dalton, 14 Nev. 427. A conveyance for one dollar is a violation of the trust, and amounts only to a gift. Everett *v.* Texas M. Ry. Co., 67 Tex. 430.

[4] See *ante*, §§ 217, 223; Mansell *v.* Mansell, 2 P. Wms. 679; Saunders *v.* Dehew, 2 Vern. 271; 2 Freem. 123; Langton *v.* Astrey, 2 Ch. R. 30; Nels. 126; Bell *v.* Bell, Ll. & G. t. Plunk. 50; Pye *v.* George, 2 Salk. 680; 1 Rep. 122 *b*; Burgess *v.* Wheate, 1 Ed. 219; Spurgeon *v.* Collier, id. 55; Cole *v.* Moore, Mose. 806; Bourset *v.* Savage, L. R. 2 Eq. 134; Hazeltine *v.* Fourney, 120 Ill. 493; Cobb *v.* Knight, 74 Maine, 253; Kennedy *v.* Baker, 59 Tex. 151. But third parties cannot require a *cestui que trust* to follow the trust property into the hands of purchasers for their protection. Barr *v.* Cubbage, 52 Mo. 404; Smith *v.* Bowen, 35 N. Y. 83; Lyford *v.* Thurston, 16 N. H. 399.

[5] Derry *v.* Derry, 74 Ind. 560. [Hill *v.* True, 104 Wis. 294.]

[6] Ibid.; McLeod *v.* First Nat. Bank, 42 Miss. 99; Joor *v.* Williams, 38 Miss. 546; Jones *v.* Shaddock, 41 Ala. 262; Lathrop *v.* Bampton, 31 Cal. 17; Aynesworth *v.* Halderman, 2 Duv. 655; Parker *v.* Jones, Adm'r, 67 Ala. 234; Bates *v.* Kelley, 80 Ala. 142; Hill, Fontaine & Co. *v.* Coolidge, 33 Ark. 626. One taking with notice of the facts acquires no better estate than his vendor. Eversdon *v.* Mayhew, 65 Cal. 163; Gilbert *v.* Sleeper, 71 Cal. 293; Minton *v.* Pickens, 24 S. C. 592; Barwick *v.* White, 2 Del. Ch. 284; Planters' Bank *v.* Prater, 64 Ga. 609; Willis *v.* Foster, 65 id. 82; Carmichael *v.* Foster, 69 Ga. 372; Union Mut. Life Ins. Co. *v.* Spaids, 99 Ill. 249. One who takes a mortgagee's title holds it in trust for the owner of the debt which the mortgage was intended to secure. Jordan *v.* Cheney, 74 Maine, 359; Hobson *v.* Whitlow, 80 Va. 784; Covington *v.* Anderson, 84 Tenn. 310. [Schneider *v.* Sellers, 98 Tex. 380, 390; Chapman *v.* Hughes, 134 Cal. 641.]

Nat. Bank *v.* Claxton, 97 Tex. 569; Boyle *v.* Northwestern Bank, 125 Wis. 498; State Bank *v.* McCabe, 135 Mich. 479. As to the bank's lien when it has no notice of the nature of the funds, see *supra*, § 122, note *a*, p. 177 *et seq.*

(*a*) As every purchaser or taker from the trustee with notice of the breach of trust holds subject to the

will follow trust funds into the hands of any one with notice.[1] But the vendee in such cases will be charged as trustee only to the extent of the interest which the vendor trustee had at the time of the sale.[2] Taking bonds or other negotiable paper as security for a pre-existent debt will not in some States constitute the taker a purchaser for value so as to protect him from the true owner.[3] Even the statute of limitations does not apply to a purchaser taking the property with full notice of the trust, and therefore by fraud.[4] The purchaser under such circumstances becomes a trustee, and liable in the same manner as the person from whom he purchased; for, knowing another's rights to the property, he throws away his money.[5] Any collusion between the trustee and purchaser will render the sale voidable.[6] Even trover may be maintained against a purchaser

[1] Knight *v.* Knight, 75 Ga. 386. [Hill *v.* Flemming, 128 Ky. 201; First Nat. Bank. *v.* Leech, 207 Ill. 215.]

[2] Rogers *v.* Marshall, 3 McCrary (U. S.), 76.

[3] Reid *v.* Bank of Mobile, 70 Ala. 210. [Thompson *v.* Maddux, 117 Ala. 468; Bank of Am. *v.* Waydell, 103 App. Div. (N. Y.) 25; 187 N. Y. 115; Roseman *v.* Mahoney, 86 App. Div. (N. Y.) 377; Sutherland *v.* Mead, 80 App. Div. (N. Y.) 103. But the increasing weight of authority under the Negotiable Instruments Law is *contra*. See *supra*, § 815 c and note.]

[4] Rolfe *v.* Gregory, 11 Jur. (N. S.) 98. [For a consideration of this point see *infra*, § 860, note *a*.]

[5] *Ante*, § 217, and cases cited; Bovey *v.* Smith, 1 Vern. 149; Phayre *v.* Peree, 3 Dow. 129; Willoughby *v.* Willoughby, 1 T. R. 771; Verney *v.* Carding, cited Joy *v.* Campbell, 1 Sch. & Lef. 345; Flemming *v.* Page, Finch, 320; Backhouse *v.* Middleton, 1 Ch. Cas. 173, 208; Powell *v.* Price, 2 P. Wms. 539; Walley *v.* Walley. 1 Vern. 484; Pearce *v.* Newlyn, 3 Madd. 186.

[6] Scott *v.* Sierra Lumber Co., 67 Cal. 71.

trust, the *cestui* or those who represent the *cestui* can elect to hold the purchaser for the value or proceeds of the property after he has transferred it, even when he has acted as a representative for others and without intentional fraud has turned over the property to those for whom he acted. Woodard *v.* Bird, 105 Tenn. 671; Anderson *v.* Foster, 112 Ga. 270. On the rights, liabilities and duties of purchasers from trustees, see *supra*, §§ 217–225 and ch. 26.

As to whether a creditor of the trustee has the rights of a *bona fide* purchaser for value, see *supra*, § 815 *c*, notes.

in breach of the trust with full knowledge of the trust.[1] And the rule applies not only to direct or express trusts, but also to all constructive trusts,[2] equitable incumbrances,[3] and liens for resulting trusts [4] and for the purchase-money.[5] But the trust following property purchased with trust funds does not arise absolutely; it is optional with the *cestui* to claim the property as subject to the trust, or to repudiate the trust as to the property, and rely on a personal claim against the trustee, and when he becomes aware of his right to elect, he must exercise it within a reasonable time.[6] And a *bona fide* purchaser [7] for a valuable consideration without notice, express or implied, is entitled to full protection.[8] (*a*) And a *cestui* cannot keep the proceeds of a

[1] Kitchen *v.* Bradford, 13 Wall. 416.

[2] *Ante*, § 217, p. 361. [Am. Sugar Ref. Co. *v.* Francher, 145 N. Y. 552 (applying the rule to proceeds of property acquired by fraudulent representations). Neb. Nat. Bank *v.* Johnson, 51 Neb. 546 (property purchased with stolen money); Dolliver *v.* Dolliver, 94 Cal. 642.]

[3] Daniels *v.* Davison, 16 Ves. 249; Brooke *v.* Bulkely, 2 Ves. 498; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Winged *v.* Lefebury, 2 Eq. Cas. Ab. 32; Ferrars *v.* Cherry, 2 Vern. 384; Jackson's Case, Lane, 60; Crofton *v.* Ormsby, 2 Sch. & Lef. 583; Kennedy *v.* Daly, 1 id. 355.

[4] Ferrin *v.* Errol, 59 N. H. 234, and possession of land is constructive notice of a claim of title, legal or equitable.

[5] *Ante*, § 239, and cases cited; Kator *v.* Pembroke, 1 Bro. Ch. 202; Grant *v.* Mills, 2 V. & B. 306; Dunbar *v.* Tredennick, 2 B. & B. 320.

[6] Breit *v.* Yeaton, 101 Ill. 242. [Indiana, etc. R. Co. *v.* Swannell, 157 Ill. 616; Libby *v.* Frost, 98 Me. 288; Prewitt *v.* Prewitt, 188 Mo. 675; Valentine *v.* Richardt, 126 N. Y. 272; *In re* Champion, [1893] 1 Ch. 101. See also Sargent *v.* Wood, 196 Mass. 1; Am. Sugar Ref. Co. *v.* Francher, 145 N. Y. 552; Converse *v.* Sickles, 44 N. Y. S. 1080; Anderson *v.* Foster, 112 Ga. 270; Marr *v.* Marr, 73 N. J. Eq. 643; *supra*, § 217 and note *a*, p. 362.]

[7] Whether at sheriff's sale or private sale. Milner *v.* Hyland, 77 Ind. 458.

[8] *Ante*, §§ 218, 815 *c*, and cases cited; Burgess *v.* Wheate, 1 Ed. 195; Millard's Case, 2 Freem. 43; Mansell *v.* Mansell, 2 P. Wms. 681; Trevor *v.* Trevor, 1 id. 633; Harding *v.* Hardrett, Finch, 9; Cole *v.* Moore, Mose. 806; Payne *v.* Compton, 2 Y. & Col. 457; Thorndike *v.* Hunt, 3 De G. & J. 563; Taylor *v.* Blakelock, 32 Ch. D. 560; Mobile Life Ins. Co. *v.* Randall, 71 Ala. 220; McCall *v.* Rogers, 77 Ala. 352; Rogers *v.* Adams, 66 Ala. 600;

(*a*) See also of a *bona fide* borrower of trust funds, Wilson *v.* Stevens, 129 Ala. 630.

sale and also recover the property from one who gave value for it.[1] The right of a *cestui* to follow misapplied funds and his right to hold the trustee as a debtor are not concurrent, but alternative. He may elect which right he will stand upon, but having exercised his option and got a judgment or settlement he cannot be allowed to insist on repugnant rights,[2] at least as against other creditors of the trustee. A person will not be compelled to follow a difficult and expensive remedy against land or other property that might be held by her as under a trust, instead of claiming satisfaction out of estate in the hands of the debtor. Even the equity of marshalling the securities to save junior creditors will not force her to such pursuit.[3] It may seem that if junior creditors are willing to stand the costs of litigation to subject the land to the trust, it would be proper to order such suit in order to secure all parties so far as possible, or at least that the claim upon the land should be made over for the benefit of the junior creditors displaced by the seniors' choice. The manner of remedy may turn on the question of possession, as, where one who held as trustee of a resulting trust sold the land to an innocent purchaser for value without notice, in an action by the purchaser for a deed it was held that the purchaser and the *cestui* had equal equities, and the one in possession would not be disturbed.[4] Always the bill must specify the property which it identifies with the trust fund.[5]

§ 829. If a purchaser has no notice of the trust at the time, but afterwards discovers the trust, and obtains a conveyance

Goldstein *v.* Goldstein, 11 Brad. (Ill.) 534; Gifford *v.* Bennett, 75 Ind. 528; Rooker *v.* Rooker, id. 571; Paulus *v.* Latta, 93 Ind. 34. The immediate purchaser under a trust-deed containing power of sale is chargeable with notice, but a subsequent purchaser, if there is nothing upon the face of the deed and no notice in fact, will be protected. Gunnell *v.* Cockerill, 79 Ill. 79.

[1] Bonner *v.* Holland, 68 Ga. 718; Harris *v.* Collins, 75 Ga. 97.

[2] Hodges *v.* Bullock, 15 R. I. 595. [Libby *v.* Frost, 98 Me. 288; Carter *v.* Gibson, 61 Neb. 207.]

[3] Clark *v.* Wright, 24 S. C. 534.

[4] St. Johnsbury *v.* Morrill, 55 Vt. 165.

[5] Howard *v.* Fay, 138 Mass. 104.

from the trustee, he cannot protect himself by getting in the legal estate; for this is not like getting in a first mortgage, which the mortgagees have a right to transfer to anybody. But notice of the trust, before the conveyance, converts the purchaser into a trustee, and he cannot protect himself by another breach of the trust.[1] (*a*) But a conveyance may be recorded after notice of the trust.[2]

§ 830. A purchaser without notice from a purchaser with notice is protected; for his own *good faith* is a defence, and the *bad faith* of the vendor, like the *bad faith* of the original trustee in making the sale, cannot injure an innocent party.[3] So a purchaser with notice from a purchaser without notice is protected, not on his own merit, but on the merit of the innocent purchaser; for if such purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property; [4] but if the property comes back to the defaulting trustee, the trust will reattach to it,[5] and a similar principle prevails at law.[6] But in

[1] *Ante*, § 218, and cases cited; Bates *v.* Johnson, 1 John. (Eng.) 304; Langton *v.* Astrey, 2 Ch. R. 30; Nels. 126; Carter *v.* Carter, 3 K. & J. 617; Sharples *v.* Adams, 32 Beav. 213; Collier *v.* McBean, 34 Beav. 426; Justin *v.* Wynne, 10 Ir. Eq. 489; 12 Ir. Eq. 289.

[2] Dodds *v.* Hills, 2 Hem. & Mil. 426.

[3] Martin *v.* Joliffe, Amb. 313; Ferrars *v.* Cherry, 2 Vern. 384; Pitts *v.* Edelph, Toth. 164; Salsbury *v.* Bagott, 2 Swanst. 608. [Schneider *v.* Sellers, 98 Tex. 380.]

[4] *Ante*, § 222, and cases cited; Bradwell *v.* Catchpole, cited Walker *v.* Symonds, 3 Swanst. 78; Martin *v.* Joliffe, Amb. 313; McQueen *v.* Farquar, 11 Ves. 478; Andrew *v.* Wrigley, 4 Bro. Ch. 136; Salsbury *v.* Bagott, 2 Swanst. 608. [English *v.* Lindley, 194 Ill. 181; Arnett's Committee *v.* Owens, 65 S. W. 151 (Ky. 1901) Ford *v.* Axelson, 74 Neb. 92; Long *v.* Fields, 31 Tex. Civ. App. 241; 1 Ames' Cases on Trusts, (2d ed.) 286.]

[5] *Ante*, § 222, and cases cited; Bovey *v.* Smith, 2 Ch. Cas. 124; 1 Vern. 60, 81, 144; Kennedy *v.* Daly, 1 Sch. & Lef. 379. [Bourquin *v.* Bourquin, 120 Ga. 115; Williams *v.* Williams, 118 Mich. 477; 1 Ames' Cases on Trusts, (2d ed.) 287.]

[6] Bovey *v.* Smith, 2 Ch. Cas. 126.

(*a*) A *bona fide* purchaser will not be protected if he pays after notice. Condit *v.* Bigalow, 64 N. J. Eq. 504, 511; *supra*, §§ 219, 221.

case a trustee sells an estate vested in him for a charitable use, the purchaser will be bound by the trust, though he has no notice; and so of an innocent purchaser from the first purchaser;[1] (*a*) in other respects purchasers of estates devoted to charitable uses are subject to the same rules that govern the purchase of other trust estates.[2]

§ 831. It is a rule of law, that the purchaser of *choses in action*, or personal property not transferable at law, cannot take any other or different title than that held by the vendor; therefore, if a trustee sells *choses in action* and other personal property not transferable, the *cestuis que trust* may follow such *choses* and property into the hands of the purchaser, and charge him with the same equities and trusts that the property was subject to in the hands of the trustee.[3] (*b*) Persons dealing with trus-

[1] East Greenstead's Case, Duke, 65; Sutton Colefield's Case, id. 68, 94, 173; Comm'rs of Char. Dona. *v.* Wybrants, 2 Jon. & Lat. 194.

[2] See Sugd. V. & P. 722 (14th ed.).

[3] Cook *v.* Tullis, 18 Wall. 332; Ord *v.* White, 3 Beav. 357; Cockell *v.* Taylor, 15 Beav. 105; Clack *v.* Holland, 19 Beav. 262; Barnard *v.* Hunter, 2 Jur. (N. S.) 1213; Mangles *v.* Dixon, 1 McN. & G. 437; 3 H. L. Cas. 702; Athenæum, &c. Soc. *v.* Pooley, 3 De G. & J. 294; Gray *v.* Ulrich, 8 Kans. 112.

(*a*) The rule as laid down in the cases cited is that if the first purchaser has notice of the charitable use, the use attaches to the property in the hands of subsequent purchasers for value without notice; but if the first purchaser for value has no notice, he and subsequent purchasers from him are not affected with the use. Mr. Lewin treats this as law, citing as authority the three cases cited *supra*. Lewin, 11th ed. 1076. But in Tudor on Charities (4th ed.) 244, it is doubted if these cases would be followed in so far as they discriminate against a purchaser without notice from one with notice.

(*b*) In the United States the decisions show a conflict as to the protection against latent equities of third persons accorded to *bona fide* assignees of non-negotiable *choses in action* who have given value for the assignment without notice of the equities. In some States they are protected against latent equities of persons other than the debtor, but not against equities of the debtor. Goldthwaite *v.* Nat. Bank, 67 Ala. 549, 554; Tison *v.* People's Sav. & L. Ass'n, 57 Ala. 323, 331; First Nat. Bank *v.* Perris Ir. Dist., 107 Cal. 55, 62; Duke *v.* Clark, 58 Miss. 465, 474; Williams *v.* Donnelly, 54 Neb. 193; Starr *v.* Haskins, 26 N. J. Eq.

tees and trust property must take notice at their peril of the scope of the authority of the trustee.[1]

§ 832. So if a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee; and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands.[2] (*a*)

[1] Owen *v.* Reed, 27 Ark. 122; Vernon *v.* Board, &c., 47 Miss. 181. [See *supra*, § 800, note *a*.]

[2] Ernest *v.* Croysdill, 2 De G., F. & J. 198; Sheridan *v.* Joyce, 7 Ir. Eq. 118; McLaurin *v.* Fairly, 6 Jones, Eq. 118; Abbott *v.* Reeves, 49 Penn. St. 494.

414; Tate *v.* Security Co., 63 N. J. Eq. 559, 561; Kountz *v.* Kirkpatrick, 72 Pa. St. 376, 385; Appeal of Mifflin County Bank, 98 Pa. St. 150; Ga. Code (1895), § 3077. But see Hart's Estate, 203 Pa. St. 503.

But in other States it is held that the assignee takes subject to all equities except where the equitable owner is estopped, and that the rules as to *bona fide* purchasers for value have no application since the assignee of a non-negotiable *chose in action* gets no legal title. Central Trust Co. *v.* West India Imp. Co., 169 N. Y. 314, 323; Stevenson Brewing Co. *v.* Iba, 155 N. Y. 224; Owen *v.* Evans, 134 N. Y. 514, 519; Fairbanks *v.* Sargent, 104 N. Y. 108, 116; Patterson *v.* Rabb, 38 S. C. 138; Downer *v.* So. Royalton Bank, 39 Vt. 25; Combs *v.* Hodge, 21 How. (U. S.) 397, 405; Baker *v.* Wood, 157 U. S. 212 (*semble*); Washington *v.* First Nat. Bank, 147 Mich. 571 (*semble*); Sutherland *v.* Reeve, 151 Ill. 384 (compare Himrod *v.* Gilman, 147 Ill. 293; Silverman *v.* Bullock, 98 Ill. 11); 2 Pomeroy Eq. Jurisprudence (3d ed.), §§ 714, 715.

This result seems to follow from the rule, established in some States, that the assignee of a *chose in action* does not need to give notice to the debtor in order to have priority over subsequent assignees of the same *chose in action* who have had no notice of the prior assignment. Columbia Finance & Tr. Co. *v.* First Nat. Bank, 116 Ky. 364, 375; Whittredge *v.* Sweetzer, 189 Mass. 45; Thayer *v.* Daniels, 113 Mass. 129; Putnam *v.* Story, 132 Mass. 205, 210; Tingle *v.* Fisher, 20 W. Va. 497; Quigley *v.* Welter, 95 Minn. 383 (*semble*). But the converse does not necessarily follow from the rule that the assignee who first gives notice has priority even over a prior assignee for value. As to *bona fide* purchasers of negotiable *choses in action*, see *supra*, § 815 *c* and notes.

(*a*) But see *infra*, § 860, note *a*.

§ 833. Notice of *doubtful* equities has been the subject of much discussion. In Cordwell *v.* Mackrill, Lord Northington said: "A man must take notice of a deed on which an equity supported by precedents, the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends upon their locality." [1] Sir W. Grant said: "There may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision, and that is all Lord Cameron means; but in this case the equity is clear." [2] Lord St. Leonards observed, that Cordwell *v.* Mackrill was of no great authority, though decided by a great judge; and conceived the true rule to be, that where, upon the whole articles, it is plain what construction the court will put upon them had it been called upon to execute them at the time they were made, they should be enforced, however difficult the construction might be, even as against a purchaser with notice; but not after a lapse of time, when there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.[3]

§ 834. Thus the rule, that "heirs of the body" in articles shall be construed "first and other sons," was not established till about 1720. Lord Hardwicke, therefore, said that notice of *ancient* articles, or articles before the doctrine was established, should not bind a *bona fide purchaser*.[4] But notice of modern articles will affect the purchaser; [5] but even then the articles must be produced, that the court may judge of their character from the whole instrument, and the clearness or doubtfulness of the notice.[6] Where a residuary legatee had enjoyed an estate

[1] Cordwell *v.* Mackrill, 2 Ed. 347; Amb. 516.

[2] Parker *v.* Brooke, 9 Ves. 588.

[3] Thompson *v.* Simpson, 1 Dr. & War. 491.

[4] Trevor *v.* Trevor, 1 P. Wms. 622; Senhouse *v.* Earle, Amb. 288; West *v.* Errissey, 2 P. Wms. 349; Warwick *v.* Warwick, 3 Atk. 291; Davies *v.* Davies, 4 Beav. 54; Parker *v.* Brooke, 9 Ves. 587.

[5] See cases cited in last note.

[6] Cordwell *v.* Mackrill, Amb. 515; 2 Ed. 344.

for nineteen years, which had been mortgaged to the testator in fee, and the heir of the testator recovered the land by ejectment, and mortgaged it, and the residuary legatee neglected to assert his title to the possession for nine years, and then filed a bill and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee, for it was not that "clear and broad equity" which affects a purchaser.[1] But where lands were given to the sole and separate use of a married woman, and the husband in possession made conveyances in mortgage, it was held that the grantees or mortgagees were bound to notice the equitable construction of the will, as a doctrine well understood;[2] and the same rule applies to leases.[3]

§ 835. Not only can the *cestuis que trust* follow the trust property into the hands of third persons, as herein stated, but they can follow the proceeds of it, if it is wrongfully sold, so long as the proceeds can be traced and identified. It has been urged, that, where the conversion is in *pursuance* of the trust, the newly acquired property is bound by the original equity; but where the conversion is wrongful, the acquired property not being in a form consistent with the trust, the *cestuis que trust* are under no obligations to accept it in place of the original property, and therefore they must come in as creditors of the trustee, and cannot assert a specific lien upon the substituted property.[4] But this reasoning has been rejected.[5] Lord Ellenborough said, that "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him."[6] And it may be added, that an abuse of trust can deprive

[1] Hardy *v.* Reeves, 4 Ves. 466; 5 Ves. 426.

[2] Parker *v.* Brooke, 9 Ves. 583.

[3] Coppin *v.* Fernyhough, 2 Bro. Ch. 291.

[4] Argument in Taylor *v.* Plumer, 3 M. & S. 562.

[5] Burdett *v.* Willett, 2 Vern. 638; Ryall *v.* Rolle, 1 Atk. 17; *Ex parte* Chion, 3 P. Wms. 187; Waite *v.* Whorwood, 2 Atk. 159; *Ex parte* Sayers, 5 Ves. 169; Anon. Case, Sel. Ca. Ch. 57.

[6] Taylor *v.* Plumer, 3 M. & S. 574.

the *cestuis que trust* of no rights, so long as the property or its proceeds can be traced and identified, in the hands of those who have full knowledge of all the equities.[1]

§ 836. Thus if the trustee invests the trust fund or its proceeds in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase, as made with the trust property or its proceeds, although the trustee has taken the title in his own name, or in the name of any other person with notice of the facts,[2] or has transferred the substituted property to a volunteer,[3] or to a purchaser for value, though in the latter case there must be notice;[4] and surplus income mingled with the corpus of the trust estate and invested makes the life annuitant equitable owner in fee of such a pro-

[1] Whitcomb *v.* Jacob, 1 Salk. 160; Lane *v.* Dighton, Amb. 409; Ryall *v.* Ryall, id. 413; Balguey *v.* Hamilton, id. 414; Lench *v.* Lench, 10 Ves. 519; Chedworth *v.* Edwards, 8 Ves. 46; Greatly *v.* Noble, 3 Madd. 79; Buckeridge *v.* Glasse, Cr. & Phil. 126; Murray *v.* Pinkett, 12 Cl. & Fin. 784; Sheridan *v.* Joyce, 1 Jon. & Lat. 401; 7 Ir. Eq. 115; French *v.* Harrison, 17 Sim. 111; Harford *v.* Lloyd, 20 Beav. 310; Frith *v.* Cartland, 2 Hem. & Mil. 417; Lathrop *v.* Bampton, 31 Cal. 17.

[2] Oliver *v.* Piatt, 3 How. 333; *Ex parte* Montefiore, De G. Bank R. 171; Pierce *v.* McKeehan, 3 W. & S. 280; Bonsall's App., 1 Rawle, 274; Kaufman *v.* Crawford, 9 W. & S. 234; Blaisdell *v.* Stevens, 16 Vt. 179; Turner *v.* Pettigrew, 9 Humph. 438; Moffatt *v.* McDonald, 11 Humph. 457; Sollee *v.* Croft, 7 Rich. Eq. 84; Bomar *v.* Mullins, 4 Rich. Eq. 80; Martin *v.* Greer, 1 Ga. Dec. 109; Garrett *v.* Garrett, 1 Strob. Eq. 96; Cheshire *v.* Cheshire, 3 Ired. Eq. 569; Brothers *v.* Porter, 6 B. Mon. 106; Murray *v.* Lylburn, 2 Johns. Ch. 441; Yerger *v.* Jones, 16 How. 36; Georges *v.* Pye, 7 Bro. P. C. 221; 1 P. Wms. 128; Bush *v.* Bush, 1 Strob. Eq. 377; Bailey *v.* Inglee, 2 Paige, 278; Heth *v.* Richmond R. R. Co., 4 Gratt. 482; Barksdale *v.* Finney, id. 338; McLeod *v.* First Nat. Bank, 42 Miss. 99; Walker *v.* Elledge, 63 Ala. 51; Dyer *v.* Jacoway, 42 Ark. 186. [Moore *v.* McLure, 124 Ala. 120; Hanna *v.* McLaughlin, 158 Ind. 292; Camden Land Co. *v.* Lewis, 101 Me. 78; Sargent *v.* Wood, 196 Mass. 1; Prewitt *v.* Prewitt, 188 Mo. 675; Standish *v.* Babcock, 52 N. J. Eq. 628; Valentine *v.* Richardt, 126 N. Y. 272; Holmes *v.* Gilman, 138 N. Y. 369; Schwartz *v.* Gerhardt, 44 Or. 425. See *supra*, § 828 and notes, as to tracing and identifying the converted trust property.]

[3] Perkins *v.* Perkins, 134 Mass. 441, 445. [Hanna *v.* McLaughlin, 158 Ind. 292.]

[4] Walker *v.* Elledge, 65 Ala. 51.

portion of the land as the amount of income invested bears to the whole cost.[1]

§ 837. Lord King remarked, that "*money* had no ear-mark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate and afterwards die insolvent, a court of equity could not charge or follow the land;"[2] and bank-notes and negotiable bills have been represented as possessing the same quality.[3] In reply to this, Lord Mansfield observes: "It has been quaintly said, that the reason why money cannot be followed is because it has no ear-mark, but this is not true. The true reason is upon account of the currency of it: it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note: an action may lie against the finder, it is true, but not after it has been paid away in currency."[4] And Lord Ellenborough observed, "the *dictum* that money has no ear-mark must be understood as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, — guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, — are so far ear-marked as to fall within the rule which applies to every other description of personal property whilst it remains in the hands of the factor or his general legal representatives."[5] The only distinction between money, notes, bills, and other chattels appears to be this, that the former, for the protection of commerce, cannot be pursued

[1] Bazemore *v.* Davis, 55 Ga. 504.

[2] Deg *v.* Deg, 2 P. Wms. 414.

[3] Cox *v.* Bateman, 2 Ves. 19; Whitcomb *v.* Jacob, 1 Salk. 160; White *v.* Whorwood, 2 Atk. 159.

[4] Miller *v.* Race, 1 Burr. 457.

[5] Taylor *v.* Plumer, 3 M. & S. 575.

into the hands of a *bona fide* holder, to whom they have passed in circulation, while other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money,[1] notes,[2] and bills[3] may be followed by the rightful owner when they have not been circulated or negotiated, or the person to whom they so passed had express notice of the trust.[4] The only difference between *money* and *notes* or *bills* is, that money is not ear-marked, and therefore cannot be traced except under particular circumstances; but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty.[5] Thus if trust money is mixed in the same parcel with the trustee's own money, it may be said that the trust money has run into the general mass and has become absorbed, and that the *cestui que trust* has no lien; but such cannot be the case.[6] If a trustee purchases an estate partly with his own money and partly with trust money, it cannot be predicated that any particular part of the estate was purchased with money of the *cestui que trust*, but he will have a lien on the whole estate for the amount of the trust fund that was misemployed.[7] (*a*) It follows from this, that,

[1] Taylor *v.* Plumer, 3 M. & S. 575; Miller *v.* Race, I Burr. 457; Howard *v.* Jemmet, 3 Burr. 1369; King *v.* Eggington, 1 T. R. 370; Ryall *v.* Rolle, 1 Atk. 172.

[2] Ibid.; Anon., 1 Salk. 126; 1 Raym. 738.

[3] Bennett *v.* Mayhew, cited 1 Bro. Ch. 232; Caton *v.* Pembroke, 2 Bro. Ch. 287; Frith *v.* Cartland, 2 Hem. & Mil. 417; *Ex parte* Sayers, 5 Ves. 169; Chedworth *v.* Edwards, 8 Ves. 46; Ryall *v.* Rolle, 1 Atk. 172; Raphael *v.* Bank of England, 17 C. B. 161.

[4] Verney *v.* Carding, cited Joy *v.* Campbell, 1 Sch. & L. 345.

[5] Ford *v.* Hopkins, 1 Salk. 282.

[6] See § 122. [§ 828, note *a*, p. 1359 *et seq.*]

[7] Lane *v.* Dighton, Amb. 409; Lewis *v.* Madocks, 17 Ves. 57; Price *v.* Blakemore, 6 Beav. 507; Hopper *v.* Conyers, 12 Jur. (N. S.) 328. [Camden Land Co. *v.* Lewis, 101 Me. 78, 102; Griswold *v.* Griswold, 111 Ala. 572; Thum *v.* Wolstenholme, 21 Utah, 446. See § 828, notes.]

(*a*) So also where the trustee has used trust funds to improve his own property or to pay off an incumbrance. Lehman *v.* Lewis, 62 Ala. 129; Standish *v.* Babcock, 52 N. J. Eq. 628; Mayer *v.* Kane, 69 N. J. Eq. 733; Webb *v.* Bailey, 41 W. Va. 463; Myers *v.* Myers, 47 W.

although every identical piece of coin cannot be ascertained in a given mass, yet there being so much trust money in the parcel the *cestui que trust* is entitled to so much of it.[1]

§ 838. Upon the same principle, if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without authority in the business, and changes the property many times over, the court follows the trust fund through all these changes, and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed.[2] So if a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the court will disentangle the accounts, and give the *cestuis que trust* what belongs to them.[3] And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice; but the bill must specify the property which it identifies with the trust fund.[4]

§ 839. Parol evidence is admissible to identify and follow trust money, laid out and invested in land, notwithstanding the statute of frauds; for in such case the trust created is a resulting

[1] Pennell *v.* Deffell, 4 De G., M. & G. 382; *Ex parte* Sayers, 5 Ves. 169; Ernest *v.* Croysdill, 2 De G., F. & J. 175; Frith *v.* Cartland, 2 Hem. & Mil. 417. [*Supra*, § 828, note *a*, p. 1359 *et seq.*]

[2] *Ante*, § 430, and cases cited. [§ 429, note *b*.]

[3] *Ante*, § 463, and cases cited. [See § 828, note *a*, p. 1359 *et seq.*]

[4] Howard *v.* Fay, 138 Mass. 104.

Va. 487; Aiken *v.* Taylor, 62 S. W. 200 (Tenn. Ch. App. 1900); Clark *v.* Timmons, 39 S. W. 534 (Tenn. 1897). See also Leary *v.* Corvin, 181 N. Y. 222; Barger *v.* Barger, 30 Or. 268; Green *v.* Green, 56 S. C. 193.

In Bohle *v.* Hasselbroch, 64 N. J. Eq. 334, where a trustee purchased property for himself partly with trust funds and partly with funds of his own, it was held that the *cestui* had the choice of claiming a lien on the property for the amount of trust funds invested therein or of claiming the land subject to the right of the trustee to be reimbursed his own money. See 19 Harvard Law Rev. 511–522.

or constructive trust, which is not within the letter or spirit of the statute.[1]

§ 840. So where the trust money is followed into the hands of a person who receives it by collusion, or with express notice of the trust, he cannot plead the statute of limitations, for the reason that he becomes himself a trustee.[2] (*a*)

§ 841. There may be some difficulty, as a *matter of fact*, in tracing the trust property into purchases made by trustees. Thus if a trustee having money in his hands misappropriates the funds, and afterwards purchases lands in his own name, it may be difficult to show that the land was purchased with the trust money; and if the trust money or its proceeds cannot be traced into the lands, the *cestui que trust* cannot have a lien upon them.[3] But if the money can be traced through all its transformations, the law is plain; and the *cestui que trust* can claim the land. Parol evidence is admissible to show all the transactions made with the trust money.[4] Thus the fact that the purchase-money nearly corresponds with the trust fund to be invested is important.[5] So if by a check or other means it can be shown that the trust money was drawn to pay the purchase-money, there can be no doubt.[6] If a trustee makes a sale of one estate and purchases another at the same time, or shortly afterwards, it will be presumed to be one transaction, although

[1] See *ante*, § 137; Ryall *v.* Ryall, Amb. 413; Anon., Sel. Ch. Cas. 57; Lane *v.* Dighton, Amb. 409; Lench *v.* Lench, 10 Ves. 517; Hopper *v.* Conyers, L. R. 2 Eq. 549.

[2] Ernest *v.* Croysdill, 6 Jur. (N. S.) 740; 2 De G., F. & J. 175; Rolfe *v.* Gregory, 11 Jur. (N. S.) 97; McLaurin *v.* Fairly, 6 Jones, 375.

[3] Kirk *v.* Webb, Pr. Ch. 84; Perry *v.* Phelips, 4 Ves. 108; Roberts *v.* Broom, 1 Harring. 57; Pharis *v.* Leachman, 20 Ala. 663. [See *supra*, § 828, note.]

[4] Lowden *v.* Lowden, 2 Bro. Ch. 583.

[5] Ibid.; Small *v.* Attwood, Younge, 507.

[6] Price *v.* Blackmore, 6 Beav. 507.

(*a*) As to the statute of limitations in such a case after notice to a *cestui* who is *sui juris*, see *infra*, § 860, note *a*.

the purchase-money of the estate purchased was larger than of the estate sold, and the *cestui que trust* will have a lien on the estate for the amount of the trust fund paid towards the purchase.[1] So if a trustee is under obligation to lay out a sum of money in land, and he purchases an estate at a price corresponding with the sum to be invested, the court will presume that the purchase was made with trust money.[2] So where a settlor covenanted in marriage articles to settle all his personal estate, a subsequent purchase of real estate was presumed, without evidence, to be made upon the same trusts.[3] But no such presumption can arise when it appears that the trustee was mistaken in the nature of the trust, or acted under any different impression.[4] So where a tenant for life, with power to sell and purchase other estates, purchased other estates with borrowed money, and many years afterwards sold the settled estates, and applied part of the proceeds of them to the payment of the borrowed money, it was held that the purchased estates were not subject to the trusts of the settled estates.[5] So if a trustee sells the whole inheritance where he only had an estate in trust for the life of his wife, and purchases other estates with the money, those in remainder cannot set up a claim to the purchased estates. Their rights are wholly confined to the original estate, and that alone is affected by the sale.[6]

§ 842. Where the trust fund constitutes a part only of the purchase-money of an estate the court usually gives a lien on the land only for the amount of the trust fund invested and interest; [7] but where the entire land is the fruit of the trust fund,

[1] Yerger *v.* Jones, 16 How. 36.

[2] Ibid.; Mathias *v.* Mathias, 3 Sm. & Gif. 252; Anon., Sel. Ch. Ca. 57. [See Smith *v.* Combs, 49 N. J. Eq. 420; Roach *v.* Caraffa, 85 Cal. 436.]

[3] Lewis *v.* Madocks, 8 Ves. 150; 17 Ves. 48.

[4] Perry *v.* Phelips, 4 Ves. 108, 116.

[5] Denton *v.* Davies, 18 Ves. 499.

[6] Noble *v.* Andrews, 37 Conn. 346.

[7] Lane *v.* Dighton, Amb. 409; Lewis *v.* Madocks, 8 Ves. 150; 17 Ves. 48; Price *v.* Blackmore, 6 Beav. 107; Scales *v.* Baker, 28 Beav. 91; Hopper

the *cestui que trust* has an election to take the land, or the trust fund and interest.[1] In such case, if a part of the purchase-money remain unpaid, the *cestui que trust* would be required to pay it.[2] But if the trust fund has been used by the trustee to pay his debts, the *cestui que trust* cannot be subrogated to the claims and securities of the creditors whose debts have been paid.[3]

§ 843. If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into the hands of third persons, other than *bona fide* holders for value or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally.[4] If the trust property or its proceeds cannot be identified, the *cestui que trust* may proceed against the trustee as against an ordinary creditor,[5] and it is said, that if he elects to proceed against the trustee personally, he cannot also proceed against the trust fund.[6] Where an express promise comes within the statute of frauds, and cannot be enforced simply because the statute stands in the way, or a trust, or a trust which the law would enforce has been

v. Conyers, L. R. 2 Eq. 545. [James *v.* Aller, 66 N. J. Eq. 69. But see Bohle *v.* Hasselbroch, 64 N. J. Eq. 334; *supra*, § 837, note *a*, p. 1376.]

[1] Trench *v.* Harrison, 17 Sim. 111; Taylor *v.* Plumer, 3 M. & S. 575. The decision in Savage *v.* Carroll, 1 B. & B. 265, 284, has not been followed in this respect. Murray *v.* Lylburn, 2 Johns. Ch. 441; Sollee *v.* Croft, 7 Rich. Eq. 34; Bonsall's App., 1 Rawle, 274; Kaufman *v.* Crawford, 9 W. & S. 134; Oliver *v.* Piatt, 3 How. 333; Thornton *v.* Stokill, 19 Jur. 751.

[2] Yerger *v.* Jones, 16 How. 36.

[3] Winder *v.* Diffenderffer, 1 Bland. 198. [See *supra*, § 828, note *a*, p. 1363.]

[4] Oliver *v.* Piatt, 3 How. 333; Flagg *v.* Mann, 3 Sumn. 486; Hawkins *v.* Hawkins, 1 Dr. & Sm. 75; Freeman *v.* Cook, 6 Ired. Eq. 379; Norman *v.* Cunningham, 5 Grat. 72; Roberts *v.* Mansfield, 38 Ga. 452; Lathrop *v.* Bampton, 31 Cal. 17; Calhoun *v.* Burnett, 40 Miss. 59; Bradley *v.* Luce, 99 Ill. 234; Long *v.* Fox, 100 Ill. 171.

[5] Lathrop *v.* Bampton, 31 Cal. 17. [Snyder *v.* Parmalee, 80 Vt. 496; Spencer *v.* Clarke, 25 R. I. 163; Holderman *v.* Hood, 70 Kan. 267.]

[6] Barker *v.* Barker, 14 Wis. 131. [See Sargent *v.* Wood, 196 Mass. 1.] And if he elects to proceed against the fund, the whole period during which the trust fund has been held is to be considered. He cannot claim profits of the actual investments for a part and the original fund and interest for the rest. Baker *v.* Disbrow, 25 Hun (N. Y.), 29.

undertaken, and the statute which cuts off resulting trusts prevents a recovery of the subject purchased with the trust funds, the law raises a promise to pay or return the consideration of the contract or trust.[1] Unless some *legal* debt has been created between the parties, or some engagement the non-performance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress.[2] An action at law for money had and received will not lie against a trustee while the trust is still open; but if a final account is settled, and a balance struck, an action may be maintained.[3] It has been said, however, that an action on the case at law will lie against a trustee, for negligence in the performance of his duty, whereby a loss happens to the *cestui que trust*.[4] So if a sum is set apart as income due to the *cestui que trust*, and the trustee makes an express promise to pay it, an action at law may be maintained.[5] So if a deposit made with a trustee for others is wrongfully obtained from the trustee, an action at law may be maintained for a return of the deposit.[6] In Pennsylvania, however, equitable relief can be given in an action for money had and received,[7] and the same practice prevailed in Massachusetts

[1] Mannen *v.* Bradberry, 81 Ky. 157; Montague *v.* Garnett, 3 Bush, 298; Martin *v.* Martin, 5 Bush, 56.

[2] Hearne *v.* Hearne, 55 Me. 445; Brooks *v.* Brooks, 11 Cush. 18; White *v.* Sheldon, 4 Nev. 280; State *v.* Digges, 21 Md. 240; Dorsey *v.* Garey, 30 Md. 489; Curtis *v.* Smith, 6 Blatch. 537; Hukill *v.* Page, 6 Bissell, 183; Norton *v.* Ray, 139 Mass. 230. [Herrick *v.* Snow, 94 Me. 310.]

[3] Chase *v.* Roberts, Holt, N. P. C. 501; Edwards *v.* Bates, 13 L. J. (N. S.) 156; 7 M. & G. 590; Dias *v.* Brunell, 24 Wend. 9; McCrea *v.* Purmont, 16 Wend. 460; New York Ins. Co. *v.* Roulet, 24 Wend. 505; Beaches *v.* Dorwin, 12 Vt. 139; Brown *v.* Wright, 4 Yerg. 57; Hall *v.* Harris, 12 Ired. Eq. 289; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 457; Artcher *v.* McDuffie, 5 Barb. 147; Duval *v.* Covenhoven, 4 Wend. 561; Sotone *v.* Scott, 6 Lansing, 274. [Husted *v.* Thomson, 39 N. Y. S. 971.] A mere breach of confidence between parties, there being no subsisting trust or fiduciary relation, will not entitle a party to relief in equity. Ashley *v.* Denton, 1 Lit. 86; Prescott *v.* Ward, 10 Allen, 203; Underhill *v.* Morgan, 33 Conn. 105.

[4] Bennett *v.* Preston, 17 Ind. 291. [See Holderman *v.* Hood, 70 Kan. 267.]

[5] Weston *v.* Barker, 12 Johns. 276; Dias *v.* Brunell, 24 Wend. 9.

[6] Penobscot R. R. Co. *v.* Mayo, 60 Maine, 306.

[7] Martzell *v.* Stauffer, 3 Pen. & W. 398; Aycinena *v.* Peries, 6 W. & S. 243.

before full equity jurisdiction was given to the court.[1] But where the trust is fully executed, and the amounts settled, and there remains nothing to be done but for the trustee to pay over the amount to the *cestui que trust*, an action at law may be maintained in all the States for the payment of the amount found due.[2] (*a*) This is in analogy to the rule in relation to suits between partners. If the partnership is wound up and the accounts stated, and a balance is found due from one partner to another, it may be sued for in an action of assumpsit; but while the partnership is still in existence no action at law can be maintained for any balances supposed to be due growing out of partnership matters not fully settled up. The remedies in courts of equity are so much more satisfactory that it would be much more convenient to sue in them, even though courts of common law had full jurisdiction. Trustees may at all reasonable times be called to account in a court of equity.[3] (*b*) Trustees in possession are in general held only for actual receipts unless guilty of gross neglect or fraud in diminishing or concealing the receipts. Dealing with the property as their own will not alone make them liable beyond the actual receipts.[4]

[1] Newhall *v.* Wheeler, 7 Mass. 198.

[2] Baker *v.* Biddle, Baldw. 66, 142; Jordan *v.* Jordan, 2 Car. L. R. 409; Rogers *v.* Daniel, 8 Allen, 343; Prescott *v.* Ward, 10 Allen, 203; Farrelly *v.* Ladd, id. 127; Cotter *v.* Birchard, 13 Mich. 110; Derome *v.* Vose, 140 Mass. 575, 578, citing Gould *v.* Emerson, 99 Mass. 154, 157. [Underwood *v.* Boston Five Cents S. Bank, 141 Mass. 305; Gannon *v.* Ruffin, 151 Mass. 204; Henchey *v.* Henchey, 167 Mass. 77; Snyder *v.* Parmalee, 80 Vt. 496; Spencer *v.* Clark, 25 R. I. 163; Estate of Devries *v.* Hawkins, 70 Neb. 656.]

[3] Dill *v.* McGehee, 34 Ga. 438.

[4] Hoile *v.* Bailey, 58 Wis. 434.

(*a*) As to promises made by third persons, the tendency is to maintain the common-law rule that one cannot sue upon a contract to which he is not a party, though made for his benefit. See 8 Harv. L. Rev. 93; 9 id. 233; 10 id. 180.

(*b*) As to a trustee's right to set off what is due him from the *cestui* with respect to other matters, see Loder *v.* Allen, 50 N. J. Eq. 631; Harris *v.* Elliott, 48 N. Y. S. 1020.

Where a trustee who is also a beneficiary is a defaulter, the amount of the default is a first claim on his beneficial interest, even when he has assigned his beneficial interest before the default. Doering *v.* Doering, 42 Ch. D. 203; Hart's Estate, 203 Pa. St. 503.

§ 844. If a trustee disposes of the trust estate to a purchaser for a valuable consideration without notice, the *cestui que trust* may compel the trustee to purchase other lands of equal value;[1] or the *cestui que trust* may elect to take the proceeds of the sale with interest.[2] If a trustee whose duty it is to hold certain shares of stock until demanded sells the shares in violation of the trust, the *cestui* can in equity hold other shares of the same company belonging to the trustee to replace the trust stock, and this even when the trustee's estate is insolvent.[3] (*a*) Where trustees are directed to invest in a particular stock or fund and to accumulate the income, they will be directed to purchase so much of the same stock as the fund if regularly invested and accumulated would have produced.[4]

§ 845. If a trustee neglects to transfer stock,[5] or if he neglects to sell, whereby there is a loss,[6] the *cestui que trust* can recover compensation. (*b*) So if he neglects to pay the premium upon a policy of insurance, whereby it is forfeited,[7] if he had the means of paying the premium;[8] if he has no means to keep it

[1] Powlet *v.* Herbert, 1 Ves. Jr. 297; Pocock *v.* Reddington, 5 Ves. 794; Flagg *v.* Mann, 2 Sumn. 486; Oliver *v.* Piatt, 3 How. 333; Mansell *v.* Mansell, 2 P. Wms. 681; Vernon *v.* Vaudry, Barn. 303; Byrchall *v.* Bradford, 6 Madd. 235; Freeman *v.* Cook, 6 Ired. Eq. 375; Norman *v.* Cunningham, 5 Grat. 72.

[2] Att. Gen. *v.* East Retford, 2 M. & K. 35; Denton *v.* Davies, 18 Ves. 504.

[3] Draper *v.* Stone, 71 Me. 177.

[4] Pride *v.* Fooks, 2 Beav. 430; Byrchall *v.* Bradford, 6 Madd. 13, 235; *ante*, §§ 469, 472.

[5] Fenwick *v.* Greenwell, 10 Beav. 412. Thus where a trustee sold at an improper time, he was held for the highest value of the estate. Melick *v.* Voorhees, 2 N. J. Eq. 305.

[6] Devaynes *v.* Robinson, 24 Beav. 86.

[7] Marriott *v.* Kinnersley, Tam. 470.

[8] Hobday *v.* Peters, 28 Beav. 603.

(*a*) Upon a presumption that the trustee intended to substitute the other shares for those improperly disposed of. See *In re* Brown & Co., 171 Fed. 254.

(*b*) Or where he neglects to interpose a proper defence when he is sued in his representative capacity. Clark *v.* Flannery, 99 Ga. 239.

up, the court will order it to be sold;[1] if he pay the money himself, he will have a lien on the policy.[2] If trustees neglect to give notice of the assignment to them of a *chose in action*, whereby a loss happens to the estate, they will be responsible.[3] So if a trustee is charged with an imperative power, he will be responsible for any loss arising from a neglect to exercise it.[4] If a trustee neglects his duty and abandons the *interests* of the *cestui que trust*, the court may not only compel the trustee to perform his duty, but it may give the *cestui que trust* relief against a third person; as where the trustee refused or neglected to renew a lease, the *cestui que trust* may, upon a proper bill, have a decree for renewal against the lessor, alleging the misconduct of the trustee.[5] A trustee cannot in general protect himself by showing that the *cestui* by due diligence could have prevented the loss following a breach of trust, but where the fault of the trustee consisted in not bringing a suit, and the *cestui* has actually had the trustee removed, and there is still time to bring suit, such proof is admissible, for it shows that the neglect of the trustee did not really lose any claim to the estate.[6] A fraudulent appropriation of trust funds to his own uses will make both the trustee and his bondsmen liable.[7]

§ 846. If a person assumes to act as trustee, and becomes possessed of the trust fund and misapplies it, he cannot protect himself by showing that he was not legally a trustee.[8] So if

[1] Hill *v.* Trenery, 23 Beav. 16; Beresford *v.* Beresford, 23 Beav. 292.

[2] Clack *v.* Holland, 19 Beav. 273; Johnson *v.* Swire, 3 Gif. 194. [See *In re* Earl of Winchilsea's Policy Trusts, 39 Ch. Div. 168, holding that a trustee's right to indemnify himself for a voluntary payment made to protect the trust property, is confined to the trust funds.]

[3] Lewin, 652.

[4] Luther *v.* Bianconi, 10 Ir. Eq. 194.

[5] Malone *v.* Geraghty, 5 Ir. Eq. 563.

[6] Cornell, *In re*, 110 N. Y. 351.

[7] McKim *v.* Blake, 139 Mass. 593.

[8] Rackham *v.* Siddall, 16 Sim. 297; 1 McN. G. 607; Pearce *v.* Pearce, 22 Beav. 248; Derbishire *v.* Home, 3 De G., M. & G. 80; Hope *v.* Liddell, 21 Beav. 183; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 58; Hen-

the trustee is a member of a firm, and the trust fund is invested in the business of the partnership, the firm must account; [1](a)

nessey *v.* Bray, 33 Beav. 96. A *de facto* trustee is liable just as if he were trustee *de jure* at the time of the breach of trust. Brown *v.* Lambert's Adm'r, 74 Va. 256. In this case a trustee *de facto* wrongfully selling property was held liable for the proceeds to the *cestuis*, although the value of the property (slaves) had been destroyed by their emancipation before the rights of the claimants vested. [See *supra*, § 245 and notes.]

[1] Eager *v.* Barnes, 31 Beav. 579.

(*a*) When a trustee improperly uses trust funds in the business of a partnership of which he is a member, it is clear that copartners who have acquiesced in this use with notice of the nature of the funds are liable, as participants in the breach of trust, to make good the principal sum and interest at the legal rate, even though the funds were put into the firm for the purpose of paying a debt of the trustee partner or his contribution of capital. Wharton *v.* Clements, 3 Del. Ch. 209, 217; Houser *v.* Riley, 45 Ga. 126; Penn *v.* Fogler, 182 Ill. 76; Hutchinson *v.* Smith, 7 Paige, 26, 33; Guillou *v.* Peterson, 89 Pa. St. 163; Townsend *v.* Hagar, 72 Fed. 949; *In re* Ketchum, 1 Fed. 815; Stone *v.* Marsh, 6 B. & C. 551; Marsh *v.* Keating, 2 Cl. & Fin. 250.

Where his copartners have had no notice of the trust, the liability of the firm to replace the trust funds is not so clear. Where a partner turned over to the firm a negotiable bond held by him as trustee, his copartners supposing it to be his own property, and it was used as an asset of the firm, it has been held that his guilty knowledge affected the other partners with notice, so that the firm could not be regarded as a purchaser for value. Cunningham *v.* Woodbridge, 76 Ga. 302. And where a partner mingled trust money with that of the firm and used it in the firm business, it has been held that the firm is liable to account for it as money in justice and equity belonging to another, although the other partners had no notice of the trust. Palmer *v.* Scott, 68 Ala. 380; St. Louis, etc. Co. *v.* McPeters, 124 Ala. 451, 457.

But the weight of authority seems to be to the effect that when a partner turns over to the firm money which is apparently his own or uses it to pay firm debts without notice to his copartners of any trust attaching to it and he is given credit for it as his own money, the firm is given the protection of a *bona fide* taker for value without notice. Gilruth *v.* Decell, 72 Miss. 232; Pickels *v.* McPherson, 59 Miss. 216; Englar *v.* Offutt, 70 Md. 78; Shaffer *v.* Martin, 25 App. Div. (N. Y.) 501; Jaques *v.* Marquand, 6 Cow. 497; Dounce *v.* Parsons, 45 N. Y. 180 (*semble*); Denton *v.* Merrill, 43 Hun, 224; *Ex parte* Apsey, 3 Bro. C. C. 265. Lindley on Partnership (7th ed.), 192–197. This question, however, has never been worked out very satisfactorily.

In general the liability of a firm for a breach of trust by one of their

and corporations are liable if the trust fund finds its way into their hands.[1] A solicitor who is a trustee will be liable to make good all losses that occur from a breach of the trust; and he may be struck from the rolls of the court for a wilful breach.[2] A solicitor who wilfully advises a breach of trust may be struck from the rolls.[3] A purchaser who knew that the sale was oppressive cannot hold the trust property nor claim for improvements when the sale is set aside, unless the owner demand the rents.[4] If a trustee embezzles the trust funds that come to his hands, he may be indicted on the criminal side of the court.[5] Executors and administrators of a trustee will be answerable for a breach of trust, though they may have distributed the assets without notice of the claim; (a) but if the distribution is made by order of the court, they will not be liable;[6] nor if the time limited for suits against them has expired; though they cannot plead the general statute of limitations to a breach of trust by the testator.

§ 847. In awarding compensation to the *cestui que trust* for a breach of trust by the trustee, the court does not regard it as material that the trustee has made no profit or advantage out of the estate.[7] If there is a breach of the trust, and an inevita-

[1] Att. Gen. *v.* Leicester, 9 Beav. 546.

[2] *In re* Chandler, 22 Beav. 253; *In re* Hall, 2 Jur. (N. S.) 633.

[3] Goodwin *v.* Gosnell, 2 Coll. 457. See Barnes *v.* Addy, L. R. 9 Ch. 251.

[4] Littell *v.* Grady, 38 Ark. 584.

[5] Regina *v.* Fletcher, Leigh & Cave C. C. 180; 9 Cox C. C. 189; 31 L. J. M. C. 206; Shaw *v.* Spencer, 100 Mass. 388.

[6] Knatchbull *v.* Fearnhead, 3 M. & C. 122; March *v.* Russell, id. 31; Low *v.* Carter, 1 Beav. 423; Hill *v.* Gomme, id. 540; Underwood *v.* Hatton, 5 Beav. 39; Waller *v.* Barrett, 24 Beav. 413.

[7] Dornford *v.* Dornford, 12 Ves. 129; Raphael *v.* Boehm, 13 Ves. 411,

number or for his participation in a breach of trust must depend upon whether he represented the firm in the transaction. See Mara *v.* Browne, [1896] 1 Ch. 199.

(a) But see *Re* Frewen, 60 L. T. 953; Andrew *v.* Cooper, 45 Ch. Div. 444.

ble calamity destroys the property, the trustee must account for it.[1] If he acts strictly within the line of his duty, he will be responsible for no loss; but if he varies from his duty, he must account for the property in all events.[2] So if a loss happens through a breach of the trust as to one part of the estate, the trustee cannot set off against the loss a gain that he has made to another part of the estate, through another distinct and wholly disconnected breach of trust.[3] (*a*) But a trustee will not be charged with imaginary or speculative values,[4] except in very gross cases of wilful default.[5] Where lands were sold in breach of trust, it was held in one case that their value at the time of filing the bill should be accounted for;[6] in other cases, their value at the time of the sale has been fixed upon as the sum to be accounted for.[7] (*b*) But in no case will a trustee be held

490; Moons *v.* De Bernales, 1 Russ. 305; Adair *v.* Shaw, 1 Sch. & Lef. 272; Montford *v.* Cadogan, 17 Ves. 489; Scurfield *v.* Howes, 3 Bro. Ch. 90; Att. Gen. *v.* Greenhouse, 1 Bligh, N. R. 57.

[1] Caffrey *v.* Darby, 6 Ves. 496; Cocker *v.* Quayle, 1 R. & M. 535; Fyler *v.* Fyler, 3 Beav. 568; Kellaway *v.* Johnson, 5 Beav. 324; Munch *v.* Cockerell, 5 M. & C. 212; Gibbons *v.* Taylor, 22 Beav. 344; State *v.* Fay, 65 N. C. 265; Dunn *v.* Dunn, 1 S. C. 350; Womack *v.* Austin, id. 421; Sanders *v.* Rogers, id. 452.

[2] Clough *v.* Bond, 3 M. & C. 496.

[3] Wiles *v.* Gresham, 2 Dr. 258; Dimes *v.* Scott, 4 Russ. 195; Fletcher *v.* Green, 33 Beav. 426; Palmer *v.* Jones, 1 Vern. 144. Nor can a defaulting trustee claim any part of the estate in his hands by demise or descent or otherwise, until he has made good all breaches of trust. Jacobs *v.* Ryland, L. R. 17 Eq. 341.

[4] Harnard *v.* Webster, Sel. Cas. Ch. 53.

[5] Pybus *v.* Smith, 1 Ves. Jr. 193; Palmer *v.* Jones, 1 Vern. 144.

[6] Hart *v.* Ten Eyck, 2 Johns. Ch. 62.

[7] Norman *v.* Cunningham, 5 Grat. 64; Ames *v.* Downing, 1 Bradf. 325; Heth *v.* Richmond R. R. Co., 4 Grat. 482; Johnson *v.* Lewis, 2 Strob. Eq.

(*a*) Thus where a trustee was induced by payment of a bonus to himself to invest trust funds improperly and a loss subsequently resulted upon the investment, he has been required both to make good the loss and to turn over the bonus to the trust. *In re* Smith, 44 W. R. 270. Doubtless the bonus would have been set off against the loss if the trustee had not attempted to appropriate it to himself. See English *v.* McIntyre, 51 N. Y. S. 697; *In re* Porter's Estate, 25 N. Y. S. 822.

(*b*) It has been held that where

for more than he receives, if he is in no fault, and has committed no breach of the trust.[1]

§ 848. If cotrustees are jointly implicated in a breach of trust, the *cestui que trust* may have a *decree* against them jointly, but he may take an execution against any one of them separately,[2] or he may levy an execution on the property of one, as each one is liable for the whole amount;[3] (*a*) but where a trus-

157; and see Johnson *v.* Richey, 4 How. (Miss.) 233; Rainsford *v.* Rainsford, Rice Eq. 369.

[1] Staats *v.* Bingen, 1 Vroom, 181.

[2] *Ex parte* Shakeshaft, 3 Bro. Ch. 197; Walker *v.* Symonds, 3 Swanst. 74; Att. Gen. *v.* Wilson, Cr. & Phil. 28; Taylor *v.* Tabrum, 6 Sim. 281; Fletcher *v.* Green, 33 Beav. 426; *Ex parte* Angle, Barn. 425; *In re* Chertsey Market, 6 Price, 278.

[3] Wilson *v.* Moore, 1 M. & K. 146; Lyse *v.* Kingdom, 1 Coll. 188; Richardson *v.* Jenkins, 1 Dr. 477; Alleyne *v.* Darcy, 4 Ir. Eq. 206; Jenkins *v.* Robertson, 1 Eq. R. 123; Rehden *v.* Wesley, 29 Beav. 215.

a trustee sells a proper investment *for the purpose* of putting the proceeds into an unauthorized investment, the *cestui* has the option of requiring him to replace the proceeds received upon the sale of the original investment or of requiring him to replace the original investment together with the income which it would have produced if it had been retained in its original form. *Re* Walker, 62 L. T. 449; *Re* Massingberd's Settlement, 60 L. T. 620. See *supra*, § 466, note.

(*a*) In other words they are jointly and severally liable to the *cestui*, irrespective of their rights to contribution or indemnity *inter se*. Bermingham *v.* Wilcox, 120 Cal. 467; Edwards *v.* Hood-Barrs, [1905] 1 Ch. 20; Fellrath *v.* Peoria German School Ass'n, 66 Ill. App. 77. But where all the parties are in court, in order to avoid multiplicity of suits the court may adjust the recovery of the *cestui* according to the burden which each trustee will ultimately have to bear, provided the *cestui's* recovery of the whole amount is not thereby jeopardized. McCartin *v.* Traphagen, 43 N. J. Eq. 323, 334. It seems that the best course of procedure for a *cestui* who is seeking to recover a loss caused by a breach of trust is to make all the trustees parties so that their rights *inter se* can be adjusted in the same suit. Sherman *v.* Parish, 53 N. Y. 483; Andrews *v.* Tuttle-Smith Co., 191 Mass. 461; *infra*, § 876.

If parties who are not trustees have made themselves liable by participation in the breach, they are properly joined with the trustees. So far as the rights of the *cestui* are concerned, such third parties are liable equally with the trustees, although as between themselves and

tee accepted the trust on the condition that he should not be liable for more than he received, he was not held liable for a loss by his cotrustee.[1] Although each one may be compelled to pay the whole, yet if he pays the whole he may have contribution from the others who are implicated in the breach of trust;[2] and if the one paying the whole has a legacy in his hands belonging to his cotrustee, he may hold the legacy by force of a lien upon it.[3] So if third persons have obtained all the benefit of a breach of the trust the trustees may recover from them the loss which has occurred to the trust property.[4] (*a*) The decree

[1] Birls *v.* Betty, 6 Madd. 90.

[2] Lockhart *v.* Reilly, 1 De G. & J. 464; Priestman *v.* Tindall, 24 Beav. 244; Lingard *v.* Bromley, 1 V. & B. 114; Tarleton *v.* Hornby, 1 Y. & Col. 336; Att. Gen. *v.* Wilson, Cr. & Phil. 28; Fletcher *v.* Green, 33 Beav. 513; Wilson *v.* Goodman, 4 Hare, 54; *Ex parte* Shakeshift, 3 Bro. Ch. 198; Perry *v.* Knott, 4 Beav. 180; Att. Gen. *v.* Daugars, 33 Beav. 624; Coppard *v.* Allen, 2 De G., J. & S. 177; Knatchbull *v.* Fearnhead, 3 M. & C. 122; Pitt *v.* Bonner, 1 Y. & Col. Ch. 670; *Ex parte* Burton, 3 Mont. D. & De G. 373; Baynard *v.* Wolley, 20 Beav. 583. [Robinson *v.* Harkin, [1896] 2 Ch. 415; Chillingsworth *v.* Chambers, [1896] 1 Ch. 685, 698.]

[3] Birks *v.* Micklethwait, 33 Beav. 409. [Chillingsworth *v.* Chambers, [1896] 1 Ch. 685.]

[4] Trafford *v.* Boehm, 3 Atk. 440; Montford *v.* Cadogan, 17 Ves. 485; 19 Ves. 640; Birks *v.* Micklethwait, 33 Beav. 409; Greenwood *v.* Wakeford, 1 Beav. 580; Booth *v.* Booth, id. 125; Howe *v.* Dartmouth, 7 Ves.

the trustees they may be entitled to indemnity. Cowper *v.* Stoneham, 68 L. T. 18; Holderman *v.* Hood, 70 Kan. 267; Heath *v.* Erie Ry. Co., 8 Blatch. 347, 411; Andrews *v.* Tuttle-Smith Co., 191 Mass. 461. See also Furman *v.* Rapelje, 67 Ill. App. 31.

As to the right of trustees to indemnity *inter se* in cases where they are jointly liable to the *cestui*, see *supra*, § 420 *a* and note *a*, p. 680.

In England under the Judicial Trustees Act of 1896 (59 & 60 Vict., c. 35), a trustee may be relieved from personal liability for breaches of trust in the discretion of the court, if it is satisfied that the trustee acted reasonably and honestly. Perrins *v.* Bellamy, [1899] 1 Ch. 797. Under this statute it has been held that a trustee does not act reasonably in not making proper inquiry as to the value of security in which he invests, *In re* Turner, [1897] 1 Ch. 536, or in relying upon a valuation by a person in the employ of the mortgagor, *In re* Stuart, [1897] 2 Ch. 583, or in not seeing for himself that his cotrustee had properly deposited a large sum received by him. Wynne *v.* Tempest, [1897] W. N. 43.

(*a*) In England under the Trustee

for costs against cotrustees for breach of the trust is always joint,[1] and if one pays the entire cost, he may have an order in the same cause for contribution.[2]

150; Jacob *v.* Lucas, 1 Beav. 436; Lincoln *v.* Wright, 4 Beav. 432; Vaughn *v.* Vanderstegen, 2 Drew. 165, 363; Hobday *v.* Peters, 28 Beav. 354.

[1] Lawrence *v.* Bowle, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241.

[2] Pitt *v.* Bonner, 1 Y. & Col. Ch. 670.

Act of 1888, § 6, re-enacted in the Trustee Act of 1893 (56 & 57 Vict. c. 53), § 45, it is provided that "where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary," the court may in its discretion make such order as it deems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him. See Griffith *v.* Hughes, [1892] 3 Ch. 105; Fletcher *v.* Collis, [1905] 2 Ch. 24. It has been held that under this provision the court will not impound the interest of a married woman who has consented in writing, unless it is clear that she was fully aware that what she was consenting to was a breach of trust and that she received the benefit of it. Bolton *v.* Curre, [1895] 1 Ch. 544. Under authority of this statute the English court, working through the trustee's right to indemnity from a *cestui* who has become a party to the breach of trust, may compel the *cestui* to bear the loss to the extent of his beneficial interest, but the matter has been left to the discretion of the court, and in the exercise of its discretion the court apparently is guided by the same considerations as before the act was passed. See Sawyer *v.* Sawyer, 28 Ch. Div. 595; Raby *v.* Ridehalgh, 7 De G., M. & G. 104.

It has been held that where one trustee who was also a beneficiary of the trust participated with his cotrustee in making an investment in breach of the trust for the purpose of increasing the income, the cotrustee getting no benefit from the breach of trust, the former must indemnify the latter to the extent of his beneficial interest, not merely to the extent of the benefit which he has received. The result was that the whole loss fell upon the trustee who had a beneficial interest, and he had no right to compel his cotrustee to contribute, since in his capacity of *cestui* he had assented to the breach of trust. Chillingsworth *v.* Chambers, [1896] 1 Ch. 685, 707. In a somewhat similar case in New York, Matter of Niles, 113 N. Y. 547, an administratrix, who was also the chief beneficiary, having negligently permitted her co-administrator to make bad investments, was held to have no remedy against him to make good the loss.

It has been held in New York that one of several beneficiaries who assents to or acquiesces in or ratifies a breach of trust without otherwise participating in it or receiving the benefit of it, is not liable to his co-beneficiaries. Blair *v.* Hampton, 98

§ 849. If the *cestui que trust* concur in the breach of the trust, he is estopped from proceeding against the trustee;[1] a deed from a trustee with consent of a sole beneficiary *sui juris* carries title;[2] but he must know that the acts in which he concurs are a breach of the trust,[3] (*a*) and he must be capable of acting for himself; as neither a *feme covert*[4] nor an infant[5] can concur in

[1] Brice *v.* Stokes, 11 Ves. 319; Walker *v.* Symonds, 3 Swanst. 64; Wilkinson *v.* Parry, 4 Russ. 272; Cocker *v.* Quayle, 1 R. & M. 534; Nail *v.* Punter, 5 Sim. 555; Newman *v.* Jones, Finch, 58; Fellows *v.* Mitchell, 1 P. Wms. 81; Booth *v.* Booth, 1 Beav. 125; Langford *v.* Gascoyne, 11 Ves. 336; White *v.* White, 5 Ves. 555; *In re* Chertsey Market, 6 Price, 280; Baker *v.* Carter, 1 Y. & Col. 255; Byrchall *v.* Bradford, 6 Madd. 13; Morley *v.* Hawke, cited Small *v.* Attwood, 2 Y. & J. 520; Fyler *v.* Fyler, 3 Beav. 550; Griffiths *v.* Porter, 25 Beav. 236; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 74; Smith *v.* French, 2 Atk. 243; Mayer *v.* Gould, 1 Atk. 615; Ryder *v.* Bickerton, 3 Swanst. 80, n. [Matter of Hall, 164 N. Y. 196; Blair *v.* Hampton, 98 N. Y. S. 109, 111, App. Div. 853; Pope *v.* Farnsworth, 146 Mass. 339; Woodbridge *v.* Bockes, 69 N. Y. S. 417, 59 App. Div. 503, 170 N. Y. 596; Preble *v.* Greenleaf, 180 Mass, 79; Phillips *v.* Burton, 52 S. W. 1064 (Ky. 1899); Matter of Niles, 113 N. Y. 547.]

[2] Dykes *v.* McVay, 67 Ga. 502. [Richards *v.* Keyes, 195 Mass. 184; White *v.* Sherman, 168 Ill. 589.]

[3] Buckeridge *v.* Glasse, Cr. & Phil. 135; Cope *v.* Clark, 18 W. R. 279.

[4] Walker *v.* Symonds, 3 Swanst. 80, and cases cited; Underwood *v.*

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[5] *Ante*, §§ 52–54. [Ehlen *v.* Mayor of Baltimore, 76 Md. 576.]

N. Y. S. 109, 111 App. Div. 853. But see Ehlen *v.* Mayor of Baltimore, 76 Md. 576, where the interests of the *cestuis* who assented were impounded for the benefit of an infant beneficiary. Doubtless a beneficiary would be liable jointly and severally with the trustee if he actually participated in the breach of trust.

A beneficiary who has expressly agreed to indemnify a trustee for liability upon a breach of trust in paying over the trust funds to persons who were not entitled, cannot be sued by the trustee for a loss to him as beneficiary. Evans *v.* Benyon, 37 Ch. Div. 329.

(*a*) It must appear that the *cestui* knew he was requesting a breach of trust or knew the facts which rendered what he was requesting a breach of trust. Thus a request to the trustees to invest in a certain mortgage which, in fact but unknown to the *cestui*, was insufficient security does not relieve the trustees from responsibility for failure to investigate as to value. *In re* Somerset, [1894] 1 Ch. 231, 263. See Galard *v.* Winans, 111 Md. 434; Glover, Appellant, 167 Mass. 280.

a breach of trust, they having no authority to contract. If, however, a married woman or an infant, by a fraud, procure the breach of the trust, they will be estopped to proceed for such breach; for they have no privilege to commit frauds.[1] If a *cestui* fraudulently receives and converts trust property, a subsequently appointed trustee may retain out of the income afterward coming to the *cestui* the amount so converted.[2] A married woman may concur in a breach of trust in respect to estates settled to her separate use.[3] (*a*) Where, however, her power of anticipation is restrained, she cannot concur in a breach of the trust.[4] And her concurrence will not operate beyond the interest settled to her separate use, although she may have a power of appointment.[5] The same observations apply to more formal acts by married women, such as releases, confirmations and waivers of breaches of trust.[6] And a married woman cannot

Stevens, 1 Mer. 717; Parker *v.* White, 11 Ves. 221; Needler's Case, Hob. 225; Bateman *v.* Davis, 3 Madd. 98; Smith *v.* French, 2 Atk. 243; Montford *v.* Cadogan, 19 Ves. 639; Creswell *v.* Dewell, 4 Gif. 460; Vreeland *v.* Van Horn, 2 Green, 137; Smith *v.* French, 2 Atk. 243; Thayer *v.* Gould, 1 Atk. 615; Ryder *v.* French, 3 Swanst. 80, n. [See *contra*, Sawyer *v.* Sawyer, 28 Ch. Div. 595; Bolton *v.* Curre, [1895] 1 Ch. 544; Sherman *v.* Parish, 53 N. Y. 483.]

[1] *Ante*, § 53; Davis *v.* Tingle, 8 B. Mon. 359; Hall *v.* Timmons, 2 Rich. Eq. 120; Stoolfoos *v.* Jenkins, 12 S. & R. 399; Wright *v.* Snowe, 2 De G. & Sm. 320; Wright *v.* Arnold, 14 B. Mon. 643.

[2] Crocker *v.* Dillon, 133 Mass. 91, 102.

[3] *Ante*, § 669. [Sherman *v.* Parish, 53 N. Y. 483; Sawyer *v.* Sawyer, 28 Ch. Div. 595.]

[4] *Ante*, §§ 669, 671. [See Bolton *v.* Curre, [1895] 1 Ch. 544.]

[5] Kellaway *v.* Johnson, 5 Beav. 319; Vaughn *v.* Vanderstegen, 2 Dr. 165; Blatchford *v.* Woolley, 2 Dr. & Sm. 204; Hobday *v.* Peters, 28 Beav. 354; Shattock *v.* Shattock, L. R. 2 Eq. 182; Brewer *v.* Swirley, 2 Sm. & Gif. 219; Fletcher *v.* Green, 33 Beav. 426.

[6] Jones *v.* Higgins, L. R. 2 Eq. 598; Smith *v.* French, 2 Atk. 245; Davies *v.* Hodgson, 25 Beav. 187; Derbishire *v.* Home, 3 De G., M. & G. 80; Wilton *v.* Hill, 25 L. J. (N. S.) Ch. 156; Clive *v.* Carew, 1 John. & Hem. 205; Rowley *v.* Unwin, 2 Kay & John. 138.

(*a*) The courts will not as readily assume that a married woman knew that she was consenting to or ratifying a breach of trust as they will in case of consent or ratification by a man. Sawyer *v.* Sawyer, 28 Ch. Div. 595.

concur in a breach of trust before her interest falls into enjoyment, but a trustee will be liable for the whole fund, though it was lost by her procurement, before her interest fell into possession.[1]

§ 850. So a *cestui que trust* may be debarred from relief by long acquiescence in a breach of the trust, though he did not originally concur in it.[2] (*a*) Beneficiaries who without objection have for years seen purchasers erecting valuable improvements on the trust property, are estopped from setting up title thereto.[3] If the *cestui que trust* neglects to sue for twenty years, it will be such *laches* that it will bar relief;[4] but a mere neglect to sue for a few years, without other acquiescence, is not a bar;[5] nor can a party sue until his interest falls into possession;[6] nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach, for the reason that it is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make any inquiries.[7] So if the *cestui que trust* gets what he can from the wreck after a breach

[1] Mora *v.* Manning, 8 Ir. Eq. 218.

[2] Harden *v.* Parsons, 1 Ed. 145; Villines *v.* Norfleet, 2 Dev. Eq. 167. See *post*, Chap. XXVIII. *passim*. [Woodbridge *v.* Bockes, 170 N. Y. 596, 59 App. Div. 503.]

[3] Iverson *v.* Saulsbury, 65 Ga. 724.

[4] Bright *v.* Legerton, 29 Beav. 60; 2 De G., F. & J. 606; Hodgson *v.* Bibby, 32 Beav. 221; Browne *v.* Cross, 14 Beav. 105; *Re* McKenna, 13 Ir. Eq. 239; Clanricarde *v.* Henning, 30 Beav. 175; Scott *v.* Haddock, 11 Ga. 258; Obee *v.* Bishop, 1 De G., F. & J. 137. [As to *laches*, see Chapter XXVIII.]

[5] Hanchett *v.* Briscoe, 22 Beav. 496.

[6] Knight *v.* Bower, 2 De G. & J. 421, 443; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 72, 74, 77.

[7] Thompson *v.* Finch, 22 Beav. 325; 8 De G., M. & G. 560; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 73; Prevost *v.* Gratz, Pet. C. C. 367; 6 Wheat. 487; Mellish's Est., 1 Pars. Eq. 486; Beeson *v.* Beeson, 9 Barr, 300. [See Chapter XXVIII.]

(*a*) Acts of a *cestui* in approval or acquiescence of a breach of trust when induced by the trustee's false representations will not avail the trustee. McKim *v.* Glover, 161 Mass. 418; Nichols, Appellant, 157 Mass. 20.

of the trust, and receives a part of what he is entitled to, he does not thereby waive his right to sue for the whole, when he can obtain it.[1]

§ 851. A *cestui que trust* may release a breach of trust by giving to the trustee a formal release, or a formal confirmation of the transaction.[2] A release of the principal in a breach of the trust is a release of all parties who would be liable secondarily, or as sureties.[3] (*a*) So it is said that the *cestui que trust* may for a good consideration waive a breach of the trust.[4] But all agreements or contracts between trustee and *cestui que trust* are looked upon with suspicion by the court, and are closely scrutinized; therefore in order that the release, confirmation, waiver, or acquiescence may have any effect, the *cestui que trust* must have full knowledge of all the facts and circumstances of the case;[5]

[1] Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560.

[2] Blackwood *v.* Borrowes, 2 Con. & Laws. 459; French *v.* Hobson, 9 Ves. 103; Wilkinson *v.* Parry, 4 Russ. 272; Small *v.* Atwood, 2 Y. & J. 517, and cases cited; Cresswell *v.* Dewell, 4 Gif. 465; Pope *v.* Farnsworth, 146 Mass. 339, 344.

[3] Thompson *v.* Harrison, 2 Bro. Ch. 164; Blackwood *v.* Borrowes, 2 Con. & Laws. 478.

[4] Stackhouse *v.* Barnston, 10 Ves. 446.

[5] Adams *v.* Clifton, 1 Russ, 297; Walker *v.* Symonds, 3 Swanst. 1; Randall *v.* Errington, 10 Ves. 423; Buckeridge *v.* Glasse, Cr. & Phil. 126; Bennett *v.* Colley, 2 M. & K. 232; Vyvyan *v.* Vyvyan, 30 Beav. 65; Eaves *v.* Hickson, id. 142; Farrant *v.* Blanchford, 1 De G., J. & S. 119; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 74; Strange *v.* Fooks, 4 Gif. 408;

(*a*) On the same principle, where, in order to shield from prosecution a trustee who had forged the signatures of his cotrustees to the satisfaction of a mortgage debt before it was due and had misappropriated the proceeds, two of four *cestuis* executed releases to all the trustees and allowed the fraudulent trustee to leave the country, it has been held that the innocent cotrustees could not have the mortgage re-established and foreclosed except as to the interest of the *cestuis* who had not released, the mortgagee having acted in good faith. Vohmann *v.* Michel, 185 N. Y. 420.

A *cestui's* consent to an investment in breach of trust does not estop him from later withdrawing his consent and requiring the trustee to change the fund into an authorized form of investment. Sherman *v.* Parish, 53 N. Y. 483.

he must also know the law, and what his rights are, and how they would be dealt with by the court.[1] (*a*) He must not execute the release, or do the acts relied on as a waiver, confirmation, or acquiescence, under undue influence or fear of the trustee.[2] The *cestui que trust* must be *sui juris*, as an infant cannot be bound by a release or other act;[3] and if the *cestui que trust* has just come of age he ought to have proper legal advice.[4]

§ 852. So a breach of trust may be discharged by the will of the *cestui que trust* entitled to the fund; and a legacy may be a satisfaction of the breach. So the acceptance of a part of the

Chesterfield *v.* Janssen, 2 Ves. 146, 149, 152, 158; Roche *v.* O'Brien, 1 B. & B. 339, and cases cited; Bowes *v.* East London Water Works Co., 3 Madd. 375; McCarthy *v.* Decaix, 2 R. & M. 615; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & C. 41; Munch *v.* Cockerell, 9 Sim. 339; 5 M. & C. 179; Broadhurst *v.* Balguy, 1 Y. & Col. Ch. 16; Downes *v.* Bullock, 25 Beav. 62; Lloyd *v.* Attwood, 3 De G. & J. 650; Berryhill's App., 35 Pa. St. 245; Ringgold *v.* Ringgold, 1 Har. & Gill, 11; Briers *v.* Hackney, 6 Ga. 419; Persch *v.* Quiggle, 57 Penn. St. 247; Shortel's App., 64 id. 25; Diller *v.* Brabaker, 52 id. 498; Campbell *v.* McLain, 51 id. 200; Maul *v.* Rider, id. 377; Jones *v.* Lloyd, 117 Ill. 597.

[1] Cockerell *v.* Cholmeley, 1 R. & M. 425; McCarthy *v.* Decaix, 2 R. & M. 615; Marker *v.* Marker, 9 Hare, 16; Burrows *v.* Walls, 5 De G., M. & G. 254; *Re* Saxon Life Ins. Co., 2 Johns. & Hem. 412; Strange *v.* Fooks, 4 Gif. 408; Stafford *v.* Stafford, 1 De G. & J. 202.

[2] Bowles *v.* Stewart, 1 Sch. & Lef. 209; Chesterfield *v.* Janssen, 2 Ves. 149, 158. [White *v.* Sherman, 168 Ill. 589.]

[3] Walker *v.* Symonds, 3 Swanst. 69; Hicks *v.* Hicks, 3 Atk. 274; Osmond *v.* Fitzroy, 3 P. Wms. 131; Hylton *v.* Hylton, 2 Ves. 547; Kilby *v.* Sneyd, 2 Moll. 233; March *v.* Russell, 3 M. & C. 42, 44; Bateman *v.* Davis, 3 Madd. 98; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & C. 41; Kay *v.* Smith, 21 Beav. 522; Aveline *v.* Melhuish, 2 De G., J. & Sm. 288; Chambers *v.* Crabbe, 34 Beav. 457.

[4] Lloyd *v.* Attwood, 3 De G. & J. 615; Elliott *v.* Elliott, 5 Benn. 8; Say *v.* Barnes, 4 S. & R. 14; Luken's App., 7 W. & S. 48; Stanley's App., 8 Penn. St. 431; Williams *v.* Powell, 1 Ired. Eq. 460; Johnson *v.* Johnson, 2 Hill, Eq. 277; Brewer *v.* Vanarsdale, 6 Dana, 204; Fish *v.* Miller, 1 Hoff. 267; Waller *v.* Armistead, 2 Leigh, 11; Kirby *v.* Taylor, 6 Johns. Ch. 242. [See Drake *v.* Wilde, 65 Vt. 611; Willis *v.* Rice, 157 Ala. 252.]

(*a*) This is especially true when the trustee has derived a benefit from the breach of trust. Williams *v.* Scott, [1900] A. C. 499.

purchase-money by the *cestui que trust* may be a confirmation of a sale made in breach of the trust.[1]

§ 853. Of course, no one not interested as a beneficiary can release or waive a breach of the trust.[2] When creditors have a right to come in and claim an account, or to have conveyances set aside, it is on the ground that the law gives them a right and interest to secure the property to pay the debts due to them.[3]

[1] Stump *v.* Gaby, 2 De G., M. & G. 623; Bensusan *v.* Nehemias, 20 L. J. Ch. 536; 4 De G. & Sm. 381; Rosenberger's App., 26 Penn. St. 67; *ante*, § 202.

[2] Wilson *v.* Troup, 2 Cow. 195; Beeson *v.* Beeson, 9 Penn. St. 279. A breach of trust by a trustee for a sinking fund of a corporation in investing funds cannot be condoned by the board of directors. North Carolina R. R. Co. *v.* Wilson, 81 N. C. 223.

[3] Bruch *v.* Lantz, 2 Rawle, 392; Iddings *v.* Bruen, 4 Sand. Ch. 223.

CHAPTER XXVIII.

THE STATUTE OF LIMITATIONS, LAPSE OF TIME, AND PUBLIC POLICY AS AFFECTING TRUSTS.

§ 854. Three bars in equity.
§ 855. The statute bar at law and in equity the same.
§ 856. When the statute begins to run.
§ 857. The statute an absolute bar where it applies.
§§ 858, 859. Whether the *cestui que trust* is barred by the neglect of the trustee.
§ 859 *a*. Whether the act of the trustee prevents the running of the statute in favor of the *cestui*.
§ 860. Where the trustee conveys to a third person in breach of the trust.
§ 861. Where there is fraud.
§ 862. How the statute bar may be taken advantage of.
§ 863. The statute bar as between trustee and *cestui que trust*.
§ 864. When the statute will begin to run as between trustee and *cestui que trust*.
§ 865. Whether the statute applies to constructive trusts.
§ 866. What acts will be presumed to have been done after a great length of time.
§ 867. When a person is ignorant of his rights.
§ 868. How lapse of time may be taken advantage of.
§ 869. Where public policy is a bar to the litigation of old and stale claims.
§ 870. Where acquiescence may bar a right or claim.
§§ 871, 872. How far back accounts for *mesne* profits will be ordered.

§ 854. THERE are three bars to claims or suits in equity arising from lapse of time: I. The statute of limitations; II. The presumption of something done, which, if done, is an answer to the plaintiff's suit; III. Public policy, which forbids the litigation of old and stale demands. These matters may be examined: (1) As between the trustee and *cestui que trust* on the one side, and a stranger on the other; and (2) as between the trustee and *cestui que trust*.

§ 855. Where there is a statute bar at *law*, the same period, in analogy or obedience to the statute, is adopted in equity as a bar to equitable claims. (*a*) Lord Camden said: "A court

(*a*) In some jurisdictions statutes of limitation are by their terms expressly applicable to suits in equity. Teall *v.* Slaven, 14 Sawyer, 364; Hargis *v.* Sewell, 87 Ky. 63; Gilmore *v.* Ham, 142 N. Y. 1; Code of Miss. (1906), §§ 3091, 3125; Minn. Rev. Laws (1905), §§ 4071, 4076; No. Dak. Rev. Codes (1905), §§ 6767, 6770; So. Dak. Code of Civ. Pro. (1908), §§ 36, 57, 58; Burns' Ind. Stat. (1908), §§ 249, 296. See Ga. Code (1895), § 3772. See also statutes of other States.

Even where this is not so, long continued delay in proceeding to establish equitable interests, after notice of the denial or repudiation, and in enforcing equitable remedies for injury to property, after notice of the injury, will usually serve as a bar to the suit when an action at law would be barred under similar circumstances. It has been said in some cases that equity acts in obedience to the statute of limitations, and in others that equity applies the statute by analogy merely, *i. e.*, in recognition of the general principle that a delay for the statutory period ought, in justice to all parties and to the courts, to shut out relief. Reynolds *v.* Sumner, 126 Ill. 58; Blue *v.* Everett, 56 N. J. Eq. 455; Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657; Heinisch *v.* Pennington, 73 N. J. Eq. 456; Carter *v.* Uhlein, 36 A. 956 (N. J. Ch. 1897); Kelley *v.* Boettcher, 85 Fed. 55.

In Riddle *v.* Whitehill, 135 U. S. 621, it was said that, "Courts of equity sometimes act in obedience to the Statute, and sometimes apply it by way of analogy. Where the cause of action is legal and the Statute has barred the remedy at law the defence is as complete in equity as at law, but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the Statute is not necessarily applied." See also Abraham *v.* Ordway, 158 U. S. 416. It has also been said that where the remedies at law and at equity are concurrent equity will apply the statute of limitations in the absence of special circumstances. Smith *v.* Wood, 42 N. J. Eq. 563. See also Patrick *v.* Stark, 62 W. Va. 602; McCarty *v.* Ball, 82 Va. 872; Patten *v.* Warner, 11 App. D. C. 149.

Whether the court acts in obedience to the statute or applies it by analogy is usually of little importance, for courts of equity have their own rule of *laches* which is much more flexible than the statutes of limitations and is usually applied to bar equitable rights and remedies when the unexcused delay has been equal to or even much less than the statutory period of limitations. Woodruff *v.* Williams, 35 Colo. 28; Sanchez *v.* Dow, 23 Fla. 445; Long *v.* Valleau, 87 Iowa, 675; Preston *v.* Horwitz, 85 Md. 164; Le Gendre *v.* Byrnes, 44 N. J. Eq. 372; Gibboney *v.* Kent, 82 Va. 383; Patterson *v.* Hewitt, 195 U. S. 309; Hammond *v.* Hopkins, 143 U. S. 224; Whitney *v.* Fox, 166 U. S. 637; Felix *v.* Patrick, 145 U. S. 317; Sullivan *v.* Portland,

of equity has no legislative authority, and it cannot properly define the time of bar by a positive rule, to an hour, minute, or year: it is governed by circumstances. But as often as Parliament has limited the time of actions and remedies to a certain period in legal proceedings, chancery has adopted that rule and applied it to similar cases in equity; for when the legislature has fixed a time at law, it would be preposterous for equity, which by its proper authority always maintained a limitation, to countenance *laches* beyond the period allowed by law. Therefore, in all cases, where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the

etc. R. Co., 94 U. S. 806; Bailey *v.* Calfee, 49 W. Va. 630; Sawyer *v.* Cook, 188 Mass. 163; Redford *v.* Clarke, 100 Va. 115; Church *v.* Winton, 196 Pa. St. 107; Benson *v.* Dempster, 183 Ill. 297. Even in jurisdictions where the statutes of limitations expressly apply to actions in equity, it has usually been held that courts of equity still have discretion to allow the defence of *laches* in case of delay of less than the statutory period of limitations. Patterson *v.* Hewitt, 195 U. S. 309.

What length of delay will constitute *laches* depends upon the circumstances of each case. Patterson *v.* Hewitt, 195 U. S. 309; Long *v.* Valleau, 87 Iowa, 675; Sanchez *v.* Dow, 23 Fla. 445; Sullivan *v.* Portland, etc. R., 94 U. S. 806; Hubbard *v.* Manhattan Trust Co., 87 Fed. 51; Brown *v.* Kemmerer, 214 Pa. St. 521; Pearson *v.* Treadwell, 179 Mass. 462. Whenever the delay is mere neglect to seek a known remedy or to assert a known right which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury will otherwise be done to the defendant by reason of the plaintiff's delay. Thus where the property has greatly increased in value, expecially if through the efforts of the defendant, unexplained delay of a very short time may be *laches*. Irish *v.* Antioch College, 126 Ill. 474; Harrigan *v.* Smith, 57 N. J. Eq. 635; Curtis *v.* Lakin, 94 Fed. 251.

The same is true where the defendant's means of proving his side of the case have been materially weakened by the lapse of time. Le Gendre *v.* Byrnes, 44 N. J. Eq. 372; Hammond *v.* Hopkins, 143 U. S. 224. In Hammond *v.* Hopkins, 143 U. S. 224, it was said that: "Where there has been no change of circumstances between the parties and no change with reference to the condition and value of the property, a court of chancery will run very nearly if not quite up to the measure of the Statute of Limitations as applied in analogous cases in courts of law."

same bar."[1] Lord Redesdale was of opinion, "that the statute virtually included courts of equity, and that it was a mistake to say that equity acts in *analogy* to the statute: it acts in *obedience* to it. Equity follows the law."[2] The same opinion has been held by other great judges in England[3] and America.[4]

§ 856. Upon these principles, an equitable claim to lands cannot be enforced after the lapse of twenty years; for although writs of *right* may be brought after a longer period, yet this has always been looked upon as an exception to the general rule.[5] At *law*, the statute time does not begin to run against a remainder-man

[1] Smith *v.* Clay, cited in Deloraine *v.* Brown, 3 Bro. Ch. 639. See Love *v.* Love, 65 Ala. 555.

[2] Hovenden *v.* Annesley, 2 Sch. & Lef. 630.

[3] Cholmondeley *v.* Clinton, 2 J. & W. 192; Bond *v.* Hopkins, 1 Sch. & Lef. 429; Medlicott *v.* O'Donel, 1 B. & B. 166; Foley *v.* Hill, 1 Phil. 405; *Ex parte* Dewdney, 15 Ves. 496; Clanricarde *v.* Henning, 30 Beav. 175; Att. Gen. *v.* Exeter, Jac. 448; Knowles *v.* Spence, 1 Eq. Cas. Ab. 315; Hamilton *v.* Grant, 3 Dow. 44; Townshend *v.* Townshend, 1 Bro. Ch. 554; Salter *v.* Cavanagh, 1 Dr. & W. 668; Bonney *v.* Ridgard, 1 Cox, 149; Pearson *v.* Pulley, 1 Ch. Cas. 102; Beckford *v.* Wade, 17 Ves. 97; White *v.* Ewer, 2 Vent. 340; Kingston *v.* Lorton, 2 Hog. 166; Johnson *v.* Smith, 2 Burr. 961; Aggas *v.* Pickerell, 3 Atk. 225; Belch *v.* Harvey, App. to Sugd. V. & P. (13th ed.).

[4] Bowman *v.* Wathen, 2 McLean, 376; 1 How. 189; Chapman *v.* Butler, 22 Mo. 19; Phillips *v.* Rogers, 12 Met. 405; Bank of U. S. *v.* Daniel, 12 Pet. 56; Dodge *v.* Essex Ins. Co., 12 Gray, 71; Farnam *v.* Brooks, 9 Pick. 212; Kane *v.* Bloodgood, 7 Johns. Ch. 90; Robinson *v.* Hook, 4 Mason, 139; Miller *v.* McIntire, 6 Pet. 61; Baker *v.* Biddle, Baldw. 419; Hawkins *v.* Barney, 5 Pet. 457; Coulson *v.* Walton, 9 id. 62; Boone *v.* Chiles, 10 id. 177; Elsmendorf *v.* Taylor, 10 Wheat. 152; Piatt *v.* Vattier, 1 McLean, 16; 9 Pet. 416; People *v.* Everest, 4 Hill, 71; Michoud *v.* Girod, 4 How. 591; Taylor *v.* Benham, 5 How. 233; Lawrence *v.* Trustees, &c., 2 Denio, 577; Bruen *v.* Hone, 2 Barb. 586; McCarter *v.* Cornel, 1 Barb. Ch. 233; Perkins *v.* Cartwell, 4 Har. (Del.) 270; Manchester *v.* Mathewson, 3 R. I. 237; Dean *v.* Dean, 1 Stockt. 425; McCrea *v.* Piermont, 16 Wend. 460; Humbert *v.* Trinity Church, 24 Wend. 587; 7 Paige, 195; Hayden *v.* Bucklin, 9 Paige, 512; Saunders *v.* Collin, 1 Dev. & Bat. 95; Ridley *v.* Hetman, 10 Ohio, 524; Long *v.* White, 5 J. J. Marsh. 231; Reeves *v.* Dougherty, 7 Yerg. 222; Tiernan *v.* Rescaniere, 10 Gill. & J. 218; Paff *v.* Kinney, 1 Bradf. 1; Lorman *v.* Clarke, 2 McLean, 273; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Barnes *v.* Taylor, 27 N. J. Eq. 265.

[5] Cholmondeley *v.* Clinton, 2 J. & W. 192.

until the determination of the particular estate,[1] (*a*) except in the case of a mortgage. If a mortgagee enters to foreclose, the time will run against the remainder-man, although the tenant for life is in possession, on the ground that the remainder-man, though out of possession, may have a bill to redeem.[2] But if the mortgagee is also tenant for life, the time does not begin to run until his death;[3] and so if the mortgagee is tenant in common with others of the equity of redemption.[4]

§ 857. The statute bar is absolute where it applies, and no allegations of poverty, ignorance, hardship, or mistake can avoid it. If courts allowed the rules of law, or periods of time, to be controlled by such considerations, there would be no end to litigation, and no certain rules of property.[5]

§ 858. It was said in one case, that "forbearance of the trustees, in not doing what it was their office to have done, should in no sort prejudice the *cestui que trust;*" [6] that is, that if the trustee does not bring an action to recover the estate within the statutory period, the *cestui que trust* is not barred. But this is not the rule of law. Lord Hardwicke said: "The rule that the

[1] Gen. Stat. of Mass. c. 154, § 3. [Rev. Laws (1902), c. 202, §§ 20, 22.] Wells *v.* Prince, 9 Mass. 508; Wallingford *v.* Heard, 15 Mass. 471; Bacon *v.* McIntire, 8 Met. 89. [Bagley *v.* Kennedy, 81 Ga. 721; Allen *v.* Hughes, 106 Ga. 775; Lamar *v.* Pearre, 82 Ga. 354; Chambers *v.* Chambers, 139 Ind. 111; Ogden *v.* Ogden, 60 Ark. 70. See Mara *v.* Browne, [1895] 2 Ch. 69, 96.]

[2] Gifford *v.* Hort, 1 Sch. & Lef. 407; Blake *v.* Foster, 4 Bligh (N. S.), 407; Corbett *v.* Barker, 1 Anstr. 138; 3 Anstr. 755; Harrison *v.* Hollins, 1 S. & S. 491; 2 Phil. 121.

[3] Raffety *v.* King, 1 Keen, 601; Burrell *v.* Egremont, 7 Beav. 205.

[4] Wynne *v.* Styan, 2 Phil. 205.

[5] Cholmondeley *v.* Clinton, 2 J. & W. 139; Brooksbank *v.* Smith, 2 Y. & Col. 58; Byrne *v.* Frere, 2 Moll. 171; Hovenden *v.* Annesley, 2 Sch. & Lef. 640.

[6] Lechmere *v.* Carlisle, 3 P. Wms. 215.

(*a*) But it has been held otherwise in Kentucky in a case where the remainder-man had notice of a sale by the life tenant. Yeager *v.* Bank of Ky., 127 Ky. 751.

statute of limitations does not bar a trust estate holds only between *cestui que trust* and trustee, not as between *cestui que trust* and *trustee* on 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. Therefore, where the *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." [1] Lord Redesdale and Lord Manners made similar observations and decisions.[2] But it would seem, that, if the *cestui que trust* is entitled to an interest in remainder only, the statutory bar ought not to begin to run against him until his interest falls into a right to the possession of the beneficial or equitable interest.[3] Where the trustee is barred so is the *cestui*.[4] (*a*)

[1] Llewellin *v.* Mackworth, 3 Eq. Cas. Ab. 579; Barn. 446; Crowther *v.* Crowther, 23 Beav. 305; Herndon *v.* Pratt, 6 Jones, Eq. 327; Fleming *v.* Gilmer, 35 Ala. 62; Mason *v.* Mason, 33 Ga. 435; Watkins *v.* Specht, 7 Coldw. 585; Crook *v.* Glen, 30 Md. 55; Love *v.* Love, 65 Ala. 555.

[2] Hovenden *v.* Annesley, 2 Sch. & Lef. 629; Pentland *v.* Stokes, 2 B. & B. 75; Allen *v.* Sayer, 2 Vern. 368; Lewin, 625; Wych *v.* East India Co., 3 P. Wms. 309; Earl *v.* Huntingdon, id.; Thomas *v.* Thomas, 2 K. & J. 79; Goss *v.* Singleton, 2 Head, 67; Belote *v.* White, id. 703; Maddox *v.* Allen, 1 Met. (Ky.) 495.

[3] Parker *v.* Hall, 2 Head, 641.

[4] Smith *v.* Gillam, 80 Ala. 296; Varner *v.* Gunn, 61 Ga. 54; Ford *v.* Cook, 73 Ga. 215; Knorr *v.* Raymond, id. 749; Clayton *v.* Cagle, 97 N. C. 300; Waring *v.* C. & D. R. Co., 16 S. C. 417. [Ga. Code (1895), § 3773.]

(*a*) 1 Ames' Cases on Trusts (2d ed.), 271. This rule applies though the beneficiary is under disability of infancy or coverture. Ewing *v.* Shannahan, 113 Mo. 188; Collins *v.* McCarty, 68 Tex. 150; Willson *v.* Louisville Trust Co., 102 Ky. 522; Barclay *v.* Goodloe, 83 Ky. 493; Crawley *v.* Richardson, 78 Ga. 213; Stillwell *v.* Leavy, 84 Ky. 379; Brown *v.* Doherty, 93 App. Div. (N. Y.) 190 (see 185 N. Y. 383, 390); Miss. Code (1906), § 3123; Perry *v.* Ellis, 62 Miss. 711; Jenkins *v.* Jensen, 24 Utah, 108.

Where the whole legal title is in the trustee there seems to be no reason for an exception in favor of an equitable remainder-man unless the adverse holder has been guilty of intentional participation in the fraud of the trustee. McCrary *v.* Clements, 95 Ga. 778; Waterman *v.* Waterman Hall, 220 Ill. 569; Ewing *v.* Shannahan, 113 Mo. 188; Willson *v.* Louisville Trust Co., 102 Ky. 522;

§ 859. If the subject-matter of the trust is a debt due the trustee for his *cestui que trust*, the statute runs against it. In such case there is no right to sue in equity. The *cestui que trust* has the right to use the name of the trustee in an action at law to recover the debt. But the legal limitation cannot be avoided by changing the tribunal.[1] It is said, however, that, if the debtor borrowed the money, knowing it to be trust money, especially if he borrowed it in breach of the trust, he becomes so far affected by the equities of the trust that he holds it as a trustee, and he cannot set up the statute as a bar against the rights of the *cestui que trust*.[2] (*a*)

§ 859 *a*. A part payment by a trustee, who has authority to sell certain property and apply the proceeds to the settlement of debts, will not take the residue of the debt out of the statute as against the *cestui*.[3] This can only be done by one having authority to make a new promise for the debtor.

[1] Hammond *v*. Messenger, 9 Sim. 327; Bolton *v*. Powell, 14 Beav. 275; Wych *v*. East India Co., 3 P. Wms. 309; Mason *v*. Mason, 33 Ga. 435.

[2] Spickernell *v*. Hotham, Kay, 669; Bridgman *v*. Gill, 24 Beav. 302; Ernest *v*. Croysdill, 6 Jur. (N. S.) 740; Upham *v*. Wyman, 7 Allen, 499; Sheridan *v*. Joyce, 7 Ir. Eq. 115. [Marshall's Estate, 138 Pa. St. 285. See Rolfe *v*. Gregory, 4 De G., J. & Sm. 576.]

[3] Leach *v*. Asher, 20 Mo. App. 659.

Robinson *v*. Pierce, 118 Ala. 273. In the latter case it may well be that the fraud of the adverse holder will prevent the running of the statute of limitations against an equitable remainder-man until he becomes entitled to the possession or enjoyment of his equitable interest. See *infra*, § 860, note *a*.

In a case where the trustee had the entire legal estate but the statute of uses operated to vest it in the *cestui* as soon as he became of age, it has been held that the statutory time of adverse possession should be reckoned during the period when the legal title was in the trustee as well as after it vested in the *cestui*. McCrary *v*. Clements, 95 Ga. 778.

As between the trustee and *cestui* it has been held that time does not run against an equitable remainder-man even if he has notice of the breach of the trust. Mara *v*. Browne, [1895] 2 Ch. 69, 96.

(*a*) But if the *cestui* has knowledge of such a use of trust property he cannot safely remain passive since his failure to act may be taken to be acquiescence in the misuse of the trust property, or *laches*. *Infra*, § 860, note *a*.

§ 860. If a trustee, in breach of his trust, conveys the land to a third person, such third person, if he is an innocent purchaser for value without notice, will hold the estate discharged of the trust. But if he received the conveyance with notice, or without paying any consideration, he will be holden as a trustee; for the *cestui que trust* may enforce the trust against him by proceeding in equity. Whether the *cestui que trust* can bring such bill after the lapse of twenty years without claim, or after the trustee is barred from maintaining a real action, is a serious question. It may be said, that the relation between such holder of the legal title and the *cestui que trust* is that of trustee and *cestui que trust*, and that the same principles apply, respecting the application of the statute, as apply between the *trustee* and *cestui que trust* in an express trust. But on the other hand, such holder of the legal title is not a trustee, except by construction of law, and until a decree of the court is had; and if he has denied the trust for more than twenty years and held adversely, there would seem to be no reason why equitable as well as legal rights should not be barred.[1] (*a*) But, in these cases, the rights of the *cestui*

[1] Merriam *v.* Hassam, 14 Allen, 520; Milling *v.* Leak, 32 Eng. L. & Eq. 442; Att. Gen. *v.* Federal St. Meeting-house, 3 Gray, 1; Williams *v.* First Presby. Soc., 1 Ohio St. 478; Johnson *v.* Prairie, 91 N. C. 163.

(*a*) To obtain a satisfactory solution of this point, it is necessary to have in mind constantly that such a purchaser, though chargeable with the trust, is purely a constructive trustee *ex maleficio*, who holds adversely to the trust, and that a right of action against him exists from the moment he acquires the property. As he stands in no worse position than an express trustee who has claimed the property as his own, denying the interest of the *cestui*, it seems clear on principle that the period of limitations should run against a *cestui* who is *sui juris* and who has notice of the sale. Nougues *v.* Newlands, 118 Cal. 102; Newman *v.* Newman, 60 W. Va. 371, 7 L. R. A. (N. S.) 370 and note; Lammer *v.* Stoddard, 103 N. Y. 672; McCrary *v.* Clements, 95 Ga. 778; Neal *v.* Bleckley, 51 S. C. 506 (*semble*).

It has been held that limitations should not run to bar the assertion of an equitable interest of a *cestui* who had no notice of the unauthorized transfer or who was not *sui juris*. Jones *v.* Godwin, 10 Rich. Eq. 226; see also note to Miles *v.* Thorne, (38 Cal. 335) 99 Am. Dec. 384, 389. And the same has been held true where the trustee

que trust cannot be barred until his rights fall into possession. If, therefore, the *cestui que trust* holds only [1] in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate. So if the *cestui que trust* is under disability, the statute will not begin to run until the disability is removed.[2]

[1] McCoy *v.* Poor, 56 Md. 197. [See *contra*, Robinson *v.* Pierce, 118 Ala. 273; McCrary *v.* Clements, 95 Ga. 778; Waterman *v.* Waterman Hall, 220 Ill. 569; Willson *v.* Louisville Trust Co., 102 Ky. 522; Ewing *v.* Shannahan, 113 Mo. 188; *supra*, § 859, note *a*.]

[2] Thompson *v.* Simpson, 1 Dr. & War. 489; Att. Gen. *v.* Magdalen College, 18 Beav. 239; 6 H. L. Cas. 215; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 58; Price's App., 54 Penn. St. 472.

has transferred trust property in payment of or as security for his personal debt. Marshall's Estate, 138 Pa. St. 285; Neal *v.* Bleckley, 51 S. C. 506; Rolfe *v.* Gregory, 4 De G., J. & Sm. 576; Ernest *v.* Croysdill, 2 De G., F. & J. 175, 198.

In other cases it has been held that upon an unauthorized transfer for value to one who had notice of the lack of authority, the statute of limitations began to run at once even against a *cestui* who was not *sui juris;* McCrary *v.* Clements, 95 Ga. 778; Willson *v.* Louisville Trust Co., 102 Ky. 522; Barclay *v.* Goodloe, 83 Ky. 493; Crawley *v.* Richardson, 78 Ga. 213; Ewing *v.* Shannahan, 113 Mo. 188; or who had no notice of the transfer. Stillwell *v.* Leavy, 84 Ky. 379; Lammer *v.* Stoddard, 103 N. Y. 672; Robinson *v.* Pierce, 118 Ala. 273; Redford *v.* Clarke, 100 Va. 115 (*semble*). To a similar effect see Wilmerding *v.* Russ, 33 Conn. 67; Beecher *v.* Foster, 51 W. Va. 605. See Yeager *v.* Bank of Ky., 127 Ky. 751; Sullivan *v.* Latimer, 35 S. C. 422. But in none of these cases was the purchaser guilty of more than constructive fraud upon the *cestui*.

Whenever a purchaser from a trustee has such actual knowledge of the latter's breach of trust that his conduct amounts to intentional participation in the fraud upon the rights of the *cestuis*, the case seems to come within the rule, that when the foundation of the cause of action is the fraud of the defendant or the existence of the cause of action has been fraudulently concealed by the defendant, the statute of limitations does not run in his favor, until notice has been brought home to the party defrauded. See Am. National Bank *v.* Fidelity Co., 131 Ga. 854; Duckett *v.* Mechanics' Bank, 86 Md. 400; *infra*, § 861.

It seems possible to reconcile the two sets of cases in regard to purchasers with notice from a trustee, by adopting the view that mere constructive notice of the trustee's lack of authority and consequent breach of trust is not such fraud on the part of a purchaser for value as to to make this principle applicable. See Wilmerding *v.* Russ, 33 Conn. 67.

§ 861. No time will protect a fraud so long as it is concealed; therefore, until a fraud is discovered, or could have been discovered by ordinary diligence,[1] the statute does not begin to run; for no cause of action exists within the knowledge of the party entitled to the action.[2] (*a*) But as soon as the fraud is

[1] McCoy *v.* Poor, 56 Md. 197.

[2] Blair *v.* Bromley, 2 Phil. 354; Booth *v.* Warrington, 4 Bro. P. C. 163; Alden *v.* Gregory, 2 Ed. 280; Cotterell *v.* Purchase, Cas. t. Talb. 63; Arran *v.* Tyrawley, cited 1 B. & B. 106; Rolf *v.* Gregory, 11 Jur. (N. S.) 97; 4 De G., J. & S. 576; Medlicott *v.* O'Donel, 1 B. & B. 166; Morse *v.* Royal, 12 Ves. 374; Bicknell *v.* Gouch, 3 Atk. 558; South Sea Co. *v.* Wymondsell, 3 P. Wms. 143; Hovenden *v.* Annesley, 2 Sch. & Lef. 634; Pickering *v.* Stamford, 2 Ves. Jr. 280; Robertson *v.* Norris, 1 Gif. 421; Western *v.* Cartwright, Sel. Cas. Ch. 34; Blennerhassett *v.* Day, 2 B. & B. 118; Roche *v.* O'Brien, 1 id. 330; Watson *v.* Toone, 5 Madd. 54; Whalley *v.* Whalley, 1 Mer. 436; Pilcher *v.* Flinn, 30 Ind. 202; Carr *v.* Hilton, 1 Curtis, C. C. 390; Martin *v.* Smith, 1 Dillon, 95. [Tillison *v.* Ewing, 91 Ala. 467; Am. National Bank *v.* Fidelity Co., 131 Ga. 854; Jackson *v.* Jackson, 149 Ind. 238; Wolcott *v.* Wilsey, 141 Mo. 200; Reynolds *v.* Hennessy, 17 R. I. 169, 176; Chicago, etc. R. Co. *v.* Titterington, 84 Tex. 218; Boon *v.* Root, 137 Wis. 451; McIntire *v.* Pryor, 173 U. S. 38; Norris *v.* Haggin, 136 U. S. 386; Kilbourn *v.* Sunderland, 130 U. S. 505; Bates *v.* Preble, 151 U. S. 149; Huntington Bank *v.* Distilling Co., 152 F. 240; Thorne *v.* Heard, [1894] 1 Ch. 599, [1895] A. C. 495; Willis *v.* Earl Howe, [1893] 2 Ch. 545; Hinze *v.* Hinze, 76 Kan. 169; Brainard *v.* Buck, 184 U. S. 99.]

(*a*) On this principle where a trustee has purchased the trust property for himself or has reaped a profit from his dealings with the trust property the statute of limitations does not begin to run in his favor until the *cestui* has notice and is *sui juris*. Long *v.* King, 117 Ala. 423; McMurray *v.* McMurray, 180 Mo. 526; Prewitt *v.* Prewitt, 188 Mo. 675. In many States the principle has been expressly incorporated into the statutes of limitations. But in some States there is a statutory limit even in cases of concealed fraud. See Hudson *v.* Cahoon, 193 Mo. 547, 560; Mo. Annot. Stat. (1906), § 4273.

Equity will not usually lend its aid to establish or enforce a stale trust; and when there has been great delay in bringing suit, even though the trustee has fraudulently concealed the facts from the beneficiary, the latter must definitely set forth in his bill the cause of his ignorance, the impediments to an earlier prosecution of his claim, the means used by the trustee to mislead him, and how and when he acquired a knowledge of his rights. Badger *v.* Badger, 2 Wall, 87; McMonagle *v.* McGlinn, 85 Fed. 88, 92; Teall *v.* Slaven, 14 Sawyer, 364; Martin *v.* Martin, 74 A. 864 (Del. Ch. 1900).

known, the statute begins to run, and the defendant has a right to say that the matter cannot be brought under discussion at so late a period; that it is the plaintiff's own fault if he delays for more than twenty years after the fraud is known.[1] In one case it was said that the statute would run from the date of the fraud, provided the party had notice of it within a reasonable time during which to bring his action before the expiration of the twenty years.[2] But the general rule is, that the time does not begin to run until the fraud is known.[3] (*a*)

§ 862. The statute is so clear a defence, that the defendant may demur[4] whenever the facts appear upon the face of the bill; if they do not, he may set them forth in a plea,[5] or in his answer, and pray the same benefit as if he had demurred, or pleaded the statute.[6] If the defendant does not do one of these

[1] Hovenden *v.* Annesley, 2 Sch. & Lef. 634; Western *v.* Cartwright, Sel. Cas. Ch. 34; Mulcahy *v.* Kennedy, 1 Ridg. 337.

[2] Byrne *v.* Frere, 2 Moll. 137; Relf *v.* Eberly, 23 Iowa, 467.

[3] Hieronymous *v.* Mayhall, 1 Bush. 508; Townsend *v.* Townsend, 4 Cold. 70; Relf *v.* Eberly, 23 Iowa, 467; Baldwin *v.* Tuttle, id. 66; McCarthy *v.* Kyle, 4 Cold. 348; Hoyle *v.* Jones, 35 Ga. 40; Boyd *v.* Boyd, 27 Ind. 429; Curry *v.* Allen, 36 Cal. 254.

[4] Foster *v.* Hodgson, 19 Ves. 180; Bampton *v.* Birchall, 5 Beav. 67; Hoare *v.* Peck, 6 Sim. 51; Hovenden *v.* Annesley, 2 Sch. & Lef. 637; Aggas *v.* Pickerell, 3 Atk. 225; Hodle *v.* Healey, 1 V. & B. 539; Beckford *v.* Close, cited 6 Sim. 184; Hardy *v.* Reeves, 4 Ves. 479; Pearson *v.* Pulley, 1 Ch. Ca. 102; Frazer *v.* Moor, Bunb. 54; Prance *v.* Sympson, Kay, 680; Ferguson *v.* Livingston, 9 Ir. Eq. 202; Fyson *v.* Pole, 3 Y. & Col. 266; Cook *v.* Arnham, 3 P. Wms. 287, and cases cited. [Kleinclaus *v.* Dutard, 147 Cal. 245; Poston *v.* Ingraham, 76 S. C. 167, 171; Martin *v.* Martin, 74 A. 864 (Del. Ch. 1900).] Deloraine *v.* Browne, 3 Bro. Ch. 635, is inconsistent. And see O'Kelly *v.* Glenny, 9 Ir. Eq. 25.

[5] Aggas *v.* Pickerell, 3 Atk. 225; Blewitt *v.* Thomas, 2 Ves. Jr. 669; Wych *v.* East India Co., 3 P. Wms. 309; Walford *v.* Liddel, 2 Ves. 400; Lacon *v.* Lacon, 2 Atk. 395.

[6] Barber *v.* Barber, 18 Ves. 286.

(*a*) Although the statute of limitations will not run in cases of fraud or concealment in relation to a resulting or constructive trust, yet it must be the fraud of, or in some way imputable to, the person who pleads the statute. Thorne *v.* Heard, [1895] A. C. 495.

things, he can have no benefit from the statute at the hearing;[1] though it is said that the court may in its discretion refuse relief after the limited period.[2] (*a*) If the bill contains charges of fraud, the defendant may demur[3] or plead,[4] according as the facts and circumstances appear upon the face of the bill. But if the plaintiff alleges that he did not discover the fraud within the period limited by the statute, the defendant must in his plea or answer either deny the fraud or allege that the plaintiff had knowledge.[5]

§ 863. As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar.[6] (*b*) Against an express and con-

[1] Prince *v.* Heylin, 1 Atk. 494; Harrison *v.* Boswell, 10 Sim. 382; Roch *v.* Callen, 6 Hare, 535; Sleight *v.* Lawson, 3 K. & J. 296.

[2] Prince *v.* Heylin, 1 Atk. 494.

[3] Hovenden *v.* Annesley, 2 Sch. & Lef. 637, in which Deloraine *v.* Browne, 3 Bro. Ch. 633, is commented upon; Hoare *v.* Peck, 6 Sim. 51.

[4] South Sea Co. *v.* Wymondsell, 3 P. Wms. 143.

[5] Mitford on Plead., 269; Story, Eq. Plead., §§ 503–506.

[6] Chalmer *v.* Bradley, 1 J. & W. 27; Harston *v.* Tenison, 20 Ch. D. 109; Llewellin *v.* Mackworth, Barn. 449; Townshend *v.* Townshend, 1 Bro. Ch. 554; Hollis's Case, 2 Ventr. 345; Hargreaves *v.* Michell, 6 Madd. 326; Massey *v.* O'Dell, 10 Ir. Eq. 22; Shields *v.* Atkins, 3 Atk. 563; Heath *v.* Henly, 1 Ch. Cas. 26; Wedderburn *v.* Wedderburn, 2 Keen, 749; 2 My. & C. 41; 22 Beav. 84; Pomfret *v.* Winsor, 2 Ves. 484; Bennett *v.* Colley, 2 My. & K. 232; Wilson *v.* Moore, 1 My. & K. 146; Hammond *v.* Hicks, 1 Vern. 432; Smith *v.* Acton, 26 Beav. 210; Bell *v.* Bell, Ll. & G. t. Plunk. 66; Butler *v.* Carter, L. R. 5 Eq. 276; Brittlebank *v.* Goodwin, id. 545; Blair *v.* Nugent, 9 Ir. Eq. 400; Lawton *v.* Ford, L. R. 2 Eq. 97; Phillipo *v.* Munnings, 2 My. & C. 309; Gough *v.* Bult, 16 Sim. 323; Norton *v.* Turville, 2 P. Wms. 144; Att. Gen. *v.* Exeter, Jac. 448; Navarre *v.* Rutton, 1 Vin. Ab. 185; Ward *v.* Arch, 12 Sim. 472; Young *v.* Waterpark, 13 Sim. 204; Sheldon *v.* Wildman, 2 Ch. Ca. 26; Hardwick *v.* Vernon, 4 Ves. 411; 14 Ves. 504; Ormond *v.* Hutchinson, 13 Ves. 47; Chedworth *v.* Edwards, 8

(*a*) In the Federal courts, when long and unexplained acquiescence appears upon the face of the bill, the court may decline to consider the case, though there is no demurrer or formal plea of *laches* or limitation. Sullivan *v.* Portland R. Co., 94 U. S. 806. See also Poston *v.* Ingraham, 76 S. C. 167, 171.

(*b*) "If there is created in expressed terms, whether written or verbal, a trust, and a person is in

tinuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of

Ves. 46; McDonald *v.* McDonald, 1 Bligh, 315; Makepeace *v.* Rogers, 11 Jur. (N. S.) 215; Leed *v.* Beene, 23 L. T. Rep. 26; Beckford *v.* Wade, 17 Ves. 97; Decouche *v.* Savetier, 3 Johns. Ch. 190; Baker *v.* Whiting, 3 Sumn. 486; Kane *v.* Bloodgood, 7 Johns. Ch. 90; Shibla *v.* Ely, 2 Halst. Ch. 181; Prevost *v.* Gratz, 6 Wheat. 481; Lyon *v.* Maclay, 1 Watts, 275; Zacharias *v.* Zacharias, 23 Penn. St. 425; Glass *v.* Gilbert, 58 id. 266; McCandless's Est., 61 id. 9; Fox *v.* Cook, 11 id. 211; White *v.* White, 1 Md. Ch. 53; Weaver *v.* Leiman, 52 Md. 710; Thomas *v.* Brinsfield, 7 Ga. 154; Tinnen *v.* McCane, 10 Tex. 248; Hopkins *v.* Hopkins, 4 Strob. Eq. 207; Buckner *v.* Calcott, 28 Miss. 575; Callis *v.* Folsom, 6 Gill & J. 80; Brinkley *v.* Willis, 22 Ark. 1; Goodrich *v.* Pendleton, 3 Johns. Ch. 387; Coster *v.* Murray, 5 id. 522; 20 Johns. 52; Allen *v.* Wooley, 1 Green, Ch. 209; Manton *v.* Titsworth, 18 B. Mon. 582; Finney *v.* Cochran, 1 W. & S. 118; Walker *v.* Walker, 16 S. & R. 379; McDowell *v.* Goldsmith, 6 Md. 319; Alexander *v.* Williams, 1 Hill (S. C.), 522; Mussey *v.* Mussey, 2 Hill, Ch. 496; Burham *v.* James, 1 Speer, Eq. 375; Tucker *v.* Tucker, 1 McCord, Ch. 176; Presley *v.* Davis, 7 Rich. Eq. 105; Prewett *v.* Buckingham, 28 Miss. 92; Soggens *v.* Heard, 31 Miss. 426; Payne *v.* Ballard, 23 Miss. 88; Gay *v.* Edwards, 30 Miss. 218; Carter *v.* Bennett, 6 Fla. 214; Paff *v.* Kenney, 1 Bradf. 1; Howard *v.* Aiken, 3 McCord, 467; Wickliffe *v.* Lexington, 11 B. Mon. 161; Smith *v.* Calloway, 7 Blackf. 86; McDonald *v.* Sims, 3 Kelly, 383; Murdock *v.* Hughes, 7 Sm. & Mar. 219; Farnum *v.* Brooks, 9 Pick. 212; Johnson *v.* Humphrey, 14 S. & R. 394; Flemming *v.* Culbert, 46 Penn. St. 496; Pinston *v.* Ivey, 1 Yerg. 296; Williams *v.* Cook, 1 Green, Ch. 209; Foscue *v.* Foscue, 2 Ired. Eq. 321; Young *v.* Mackall, 3 Md. Ch. 56; Armstrong *v.* Campbell, 3 Yerg. 201; Overstreet *v.* Bates, 1 J. J. Marsh. 370; Thompson *v.* Blair, 3 Murph. 583; Jones *v.* Parsons, 2 Hawkes, 269; Martin *v.* Jackson, 27 Penn. St. 506;

terms nominated to be the trustee of that trust, a court of equity, upon proof of such facts, will not allow him to vouch a statute of limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a court of equity, the defendant a trustee for the plaintiff, the court of equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the court of equity allows statutes of limitation to be vouched." Per Lord Esher, M. R., in Soar *v.* Ashwell, [1893] 2 Q. B. 390, 393.

the *cestui*.[1] Such a trust is only barred on the doctrine of prescription by the lapse of twenty years,[2] and so long as the relation of trustee and *cestui* continues unbroken, the possession of the

North *v.* Barnum, 12 Vt. 206; Goodhue *v.* Barnwell, Rice, Eq. 198; Redwood *v.* Riddick, 4 Munf. 222; Wamburzee *v.* Kennedy, 4 Des. 479; Anstice *v.* Brown, 6 Paige, 488; Bohannon *v.* Streapley, 2 B. Mon. 438; Pinkston *v.* Brewster, 14 Ala. 315; Boone *v.* Chiles, 10 Pet. 177; Oliver *v.* Piatt, 3 How. 333; Zeller *v.* Eckert, 4 How. 289; Seymour *v.* Freer, 8 Wall. 203; Creigh *v.* Henson, 10 Grat. 231; Starke *v.* Starke, 3 Rich. 438; Perkins *v.* Cartwell, 4 Harring. 270; Varick *v.* Edwards, 11 Paige, 289; Blount *v.* Robeson, 3 Jones, Eq. 73; Fish *v.* Wilson, 15 Tex. 430; Cunningham *v.* McKindley, 22 Md. 149; Kutz's App., 40 Penn. St. 90; Norton *v.* Ladd, 22 Conn. 203; Long *v.* Casson, 4 Rich. Eq. 60; Parris *v.* Cobb, 5 Rich. Eq. 432; Keaton *v.* Greenwood, 8 Ga. 97; Simmes *v.* Smith, 11 Ga. 195; Kimball *v.* Ives, 17 Vt. 430; Rix *v.* Smith, 8 Vt. 55; Evarts *v.* Nason, 11 Vt. 122; Mather *v.* Bennett, 21 N. H. 204; Cartmell *v.* Perkins, 2 Del. Ch. 102. [Kennedy *v.* Winn, 80 Ala. 165; Miller *v.* Batz, 142 Cal. 447; Hovey *v.* Bradbury, 112 Cal. 620; Luco *v.* De Toro, 91 Cal. 405; Fox *v.* Tay, 89 Cal. 339; Butler *v.* Hyland, 89 Cal. 575; Roach *v.* Caraffa, 85 Cal. 436; Ballard *v.* Golob, 34 Colo. 417, 427; Reynolds *v.* Sumner, 126 Ill. 58; Jones *v.* Henderson, 149 Ind. 458; Carr *v.* Craig, 138 Iowa, 526; Long *v.* Valleau, 87 Iowa, 675; Hargis *v.* Sewell, 87 Ky. 63; McGuire *v.* Devlin, 158 Mass. 63; Throne *v.* Foley, 137 Mich. 649; Smith *v.* Glover, 44 Minn. 260; Stanton *v.* Helm, 87 Miss. 287; Condit *v.* Bigalow, 64 N. J. Eq. 504; Carter *v.* Uhlein, 36 A. 956 (N. J. Ch. 1897); Smith *v.* Combs, 49 N. J. Eq. 420; Anderson *v.* Fry, 102 N. Y. S. 112, 116 App. Div. 740; Greenleaf *v.* Land & Lumber Co., 146 N. C. 505; Maxwell *v.* Barringer, 110 N. C. 76; Davis *v.* Boyden, 123 N. C. 283; Thomas *v.* Glendinning, 13 Utah, 47; Felkner *v.* Dooley, 27 Utah, 350; Drake *v.* Wild, 65 Vt. 611; Gapen *v.* Gapen, 41 W. Va. 422; Ruckman *v.* Cox, 63 W. Va. 74; Weltner *v.* Thurmond, 17 Wy. 268; Gisborn *v.* Charter Oak Co., 142 U. S. 326; Speidel *v.* Henrici, 120 U. S. 377, 386.]

[1] Hastie & Silver *v.* Aiken, 67 Ala. 316; Whetstone *v.* Whetstone's Ex'rs, 75 Ala. 496; Janes *v.* Throckmorton, 57 Cal. 368; Pace *v.* Payne, 73 Ga. 670; McCallam *v.* Carswell, 75 id. 25; Russell *v.* Peyton, 4 Brad. (Ill.) 473; Walden *v.* Karr, 88 Ill. 49; Helm's Ex'r *v.* Rogers, 81 Ky. 568; Haskell *v.* Hervey, 74 Maine, 192; Price *v.* Mulford, 36 Hun, 247; University *v.* Bank, 96 N. C. 280; Carpenter *v.* Canal Co., 53 Ohio St. 317; Bostwick *v.* Estate of Dickson, 65 Wis. 593; Bacon *v.* Rives, 106 U. S. 99.

[2] McCarthy *v.* McCarthy, 74 Ala. 546. [Darlington *v.* Turner, 24 App. D. C. 573, 594; Maher *v.* Aldrich, 205 Ill. 242; Stanley's Estate *v.* Pence, 160 Ind. 636; Pierce *v.* Perry, 189 Mass. 332; Wilson *v.* Welles, 79 Minn. 53; Bender *v.* Zimmerman, 80 Mo. App. 138; Merritt *v.* Merritt, 53 N. Y. S. 127, 32 App. Div. 442; Boyd *v.* Mutual Fire Ass'n, 116 Wis. 155, 173; No. Am. Land, &c. Co. *v.* Watkins, [1904] 1 Ch. 242, [1904] 2 Ch. 233.]

trustee is that of the *cestui*, and there can be no adverse possession for time to run upon.[1] The trustee must clearly repudiate the trust and assume an adverse position, with notice to the *cestui*, before the statute can begin to run.[2] When these facts exist for twenty years an action to recover the land is barred;[3] (*a*) and when the relation of trust is denied, or time and acquiescence have obscured its nature, or the acts of the parties raise a presumption unfavorable to its continuance, the lapse of time may be a ground for refusing relief.[4] The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands does not change the nature of the debt, it continues to be a trust debt,[5] upon which neither bankruptcy of the trustee nor the statute of limitations can take effect. Accounts have been decreed against trustees, extending over periods of thirty, forty, and even fifty years.[6] The relations and privity between trustee and *cestui que trust* are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.[7] Lord Justice Knight Bruce said, that where one entered into possession as

[1] Russell *v.* Peyton, 4 Brad. (Ill.) 473.

[2] Ibid.; Hubbard *v.* U. S. Mortgage Co., 14 Brad. (Ill.) 40; Chicago & Eastern Ill. R. Co. *v.* Hay, 119 Ill. 493; Thomas *v.* Merry, 113 Ind. 83; Speidel *v.* Henrici, 120 U. S. 377.

[3] Ward *v.* Harvey, 111 Ind. 471; Otto *v.* Schlapkahl, 57 Iowa, 226.

[4] Helm's Ex'r *v.* Rogers, 81 Ky. 568.

[5] Crisfield *v.* State, 55 Md. 192. [Pence *v.* Force, 46 N. J. Eq. 348; Stewart's Estate, 140 Pa. St. 124; Matter of Farmers' L. & Tr. Co. 62 N. Y. S. 359, 47 App. Div. 448; Jones *v.* Home Sav. Bank, 118 Mich. 155; Johnston *v.* Johnston, 107 Minn. 109.]

[6] Beaumont *v.* Boultbee, 5 Ves. 485; Townshend *v.* Townshend, 1 Cox, 28; Chalmer *v.* Bradley, 1 J. & W. 51; Att. Gen. *v.* Brewers' Co., 1 Mer. 495; Burrowes *v.* Gore, 6 H. L. Cas. 907; Wood *v.* Arch, 12 Sim. 472; Man *v.* Ricketts, 13 L. J. (N. S.) Ch. 194; Snow *v.* Booth, 8 De G., M. & G. 69; Cox *v.* Dolman, 2 De G., M. & G. 592; West *v.* Sloan, 3 Jones, Eq. 102. [Anderson *v.* Fry, 102 N. Y. S. 112, 116 App. Div. 740.]

[7] Ibid.

(*a*) The statutory period of limitations for actions to recover land is frequently much less than twenty years. See statutes of the different States.

trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que trust*.[1] It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee.[2] He will then be in a position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence, should be allowed to set up an adverse title.[3] (*a*) This rule applies to all acting as trustees, whether regularly appointed or not.[4] It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians, or agents.[5] (*b*) A *cestui*

[1] Stone *v.* Godfrey, 5 De G., M. & G. 86.

[2] Ibid.; Att. Gen. *v.* Munro, 2 De G. & Sm. 163; *Ex parte* Andrews, 2 Rose, 412; Kennedy *v.* Daly, 1 Sch. & Lef. 381; Shields *v.* Atkins, 3 Atk. 560; Pomfret *v.* Winsor, 2 Ves. 476; Conry *v.* Caulfield, 2 B. & B. 272; Langley *v.* Fisher, 9 Beav. 90; Reece *v.* Trye, 1 De G. & Sm. 279; Newsome *v.* Flowers, 30 Beav. 461; Frith *v.* Curtland, 2 Hem. & M. 417; Huntly *v.* Huntly, 8 Ired. Eq. 250.

[3] See cases cited in last note.

[4] Lyon *v.* Maclay, 1 Watts, 275; Life Ass'n *v.* Siddall, 3 De G., F. & J. 58; 7 Jur. (N. S) 785; Johnson *v.* Smith, 27 Mo. 591, is to the contrary; Hayden *v.* Stone, 1 Duvall, 396.

[5] Pelley *v.* Bascombe, 33 L. J. Ch. 100; 34 L. J. Ch. 233; Thomas *v.* Thomas, 2 K. & J. 79; Lindsay *v.* Lindsay, 1 Des. 150; Carr *v.* Bob, 7 Dana, 417; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 457; Bird *v.* Graham, 1 Ired. Eq. 196; Nelson *v.* Cornwall, 1 Grat. 174; Lafferty *v.* Farley, 3 Sneed, 157; Jacobs *v.* Pou, 18 Ga. 346; Marsh *v.* Oliver, 1 McCart. 259; Brittlebank *v.* Goodwin, L. R. 5 Eq. 545; Hart's App., 32 Conn. 520; Butler *v.* Carter, L. R. 5 Eq. 276; Moore *v.* Sheppard, 2 Duv. 125. Some States have statues that bar claims against executors and administrators after a certain time, and in nearly all the States a presumption of payment of debts, legacies, and other charges, will arise after a great length of time. Angell on Limitations, §§ 166, 178; Wilkinson's Est., 1 Pars. Eq. 170; Graham *v.* Torrance, 1 Ired. Eq. 210; Shearin *v.* Eaton, 2 id. 282; Hudson *v.* Hudson, 3 Rand.

(*a*) Where a person enters into possession without other title than that conferred upon him by the trust instrument, the presumption is that he took possession as trustee and continues to hold in that capacity. Houghton *v.* Pierce, 203 Mo. 723. Every presumption is against a trustee who aims to show that trust funds in his possession have been converted into an ordinary debt from him. Stewart's Estate, 140 Pa. St. 124; Pence *v.* Force, 46 N. J. Eq. 348.

(*b*) There is some conflict of authority as to just when the statute

que trust cannot set up the statute against his *co-cestuis que trust*,[1] nor against his trustee.[2] If one holds the title to land as security for money, and the money is paid to him and received, he cannot plead the statute as a bar to a bill for a reconveyance.[3] These rules apply to all cases of express trusts.[4] After the termination of a trust a reasonable time is allowed for settlement, and then the statute begins to run.[5] The statute does not run in favor of a trustee against his *cestui* while the *latter* is in possession.[6] (*a*) After the statute begins to run in favor of the *cestui*, the death of the trustee will not suspend it.[7]

117; Skinner *v.* Skinner, 1 J. J. Marsh. 594; Graham *v.* Davidson, 2 Dev. & B. 155; Hayes *v.* Goode, 7 Leigh, 452; Tate *v.* Connor, 2 Dev. Eq. 244.

[1] Foscue *v.* Foscue, 2 Ired. 321; Hastie & Silver *v.* Aiken, 67 Ala. 317.

[2] Spickernell *v.* Hotham, 1 Kay, 669; Knight *v.* Bowyer, 4 De G. & J. 421.

[3] Millard *v.* Hathaway, 27 Cal. 119. [Potter *v.* Kimball, 186 Mass. 120.]

[4] Manby *v.* Bewicke, 3 K. & J. 342; Dickenson *v.* Teasdale, 1 De G., J. & Sm. 52; Sturgis *v.* Morse, 3 De G. & J. 1; Watson *v.* Saul, 1 Gif. 188; Webster *v.* Newbold, 41 Penn. St. 482.

[5] Miller *v.* Morrison, 22 S. C. 590.

[6] Gilbert *v.* Sleeper, 71 Cal. 294; Clark *v.* Clark, 21 Neb. 402. [Fleishman *v.* Woods, 135 Cal. 256.]

[7] Clark *v.* Clark, 21 Neb. 402.

of limitations will begin to run against an attorney at law or other agent with respect to sums of money collected for his principal. Some courts have held that the statute does not begin to run until the principal has notice that the collection has been made. See Wood on Limitations (3d ed.), § 122; McDowell *v.* Potter, 8 Pa. St. 189; Roberts *v.* Armstrong, 1 Bush. 263; Ewers *v.* White's Estate, 114 Mich. 266; Jewell *v.* Jewell's Estate, 139 Mich. 578. Other courts have held that the statute runs from the time of collection unless the agent has concealed the fact of collection. Douglas *v.* Corry, 46 Ohio St. 349; Campbell *v.* Boggs, 48 Pa. St. 524; Schofield *v.* Woolley, 98 Ga. 548 (*semble*); Hasher *v.* Hasher, 96 Va. 584. The agent's concealment of his collection will certainly prevent the running of the statute. Wilder *v.* Secor, 72 Iowa, 161. And the statute does not run when the agent has the further duty of investing the funds for his principal. McCain *v.* Peart, 145 Pa. St. 516; Caldwell's Adm'r *v.* Hampton, 53 S. W. 14 (Ky. 1899).

With respect to a trustee's right of contribution from cotrustees the statute of limitations does not begin to run until the claim of the beneficiaries has been established against him. Robinson *v.* Harkin, [1896] 2 Ch. 415. See, as to cosureties, Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; Martin *v.* Frantz, 127 Pa. St. 389.

(*a*) Miller *v.* Baker, 160 Penn.

§ 864. It has been held, however, that if a trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*, and he will be completely barred at the end of twenty years, (*a*) if he has been *sui juris*, or under no disability, and is capable of bringing an action to maintain his right.[1] To enable a trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear and unmistakable, and such adverse claim

[1] Merriam *v.* Hassam, 14 Allen, 522; Baker *v.* Whiting, 3 Sumn. 486; Kane *v.* Bloodgood, 7 Johns. Ch. 90; Att. Gen. *v.* Federal St. Meeting-house, 3 Gray, 1; Bright *v.* Egerton, 2 De G., F. & J. 606; Wedderburn *v.* Wedderburn, 2 Keen, 749; 4 M. & Cr. 52; Portlock *v.* Gardner, 1 Hare, 594; Wickliffe *v.* Lexington, 11 B. Mon. 161; Turner *v.* Smith, 11 Tex. 629; Grumbles *v.* Grumbles, 17 Tex. 472; Williams *v.* First Presby. Soc., 1 Ohio St. 478; Robertson *v.* Wood, 15 Tex. 1; Halsey *v.* Tate, 52 Penn. St. 311; Hunter *v.* Hubbard, 26 Tex. 537; Curtis *v.* Daniel, 23 Ark. 363; Neel *v.* McElhenny, 69 Pa. St. 300; Hubbell *v.* Medbury, 53 N. Y. 98; Davis *v.* Coburn, 128 Mass. 377. [Bland *v.* Fleeman, 58 Ark. 84; Broder *v.* Conklin, 121 Cal. 282; Woodruff *v.* Williams, 35 Colo. 28; Stanton *v.* Helm, 87 Miss. 287; Lamberton *v.* Youmans, 84 Minn. 109; Kahn *v.* Chapin, 152 N. Y. 305; Matter of Smith, 66 App. Div. (N. Y.) 340 (affirmed, 179 N. Y. 563); Hayes *v.* Walker, 70 S. C. 41; Montague *v.* Priester, 82 S. C. 492; Fennell *v.* Loague, 107 Tenn. 239; Felkner *v.* Dooly, 28 Utah, 236; Drake *v.* Wild, 65 Vt. 611; Buttles *v.* De Baun, 116 Wis. 323; Swift *v.* Smith, 79 Fed. 709.]

St. 172; Boyd *v.* Boyd, 163 Ill. 611; Norton *v.* McDevit, 122 N. C. 755; Stonehouse *v.* Stonehouse, 156 Mich. 43. So the statute does not run against an intending vendee of land in possession under a contract to purchase. Gilbert *v.* Sleeper, 71 Cal. 290. The donee of a power to sell may acquire title to the property by adverse possession. Teall *v.* Schroder, 158 U. S. 172.

(*a*) Frequently the period of limitations established by statute is less than twenty years even in the case of land held in trust. See statutes. And delay of less than the statutory period may constitute *laches* under some circumstances. Woodruff *v.* Williams, 35 Colo. 28.

must be brought home to the *cestui que trust* beyond question or doubt. The attitude of the trustee must be hostile, and continuously so; and there must be no mistake or misapprehension as to the character of his holding, by either party.[1] Where the trustee makes a conveyance of the trust property in breach of the trust, and his grantee continues to hold adversely, the statute applies;[2] and so where the relation of trustee and *cestui que trust* is absolutely ended, whether by breach of the trust or otherwise.[3] But in such case the statute will not begin to run so long as the *cestui que trust* is under the control or influence of the trustee.[4] Where a trustee paid over the trust fund to a married woman, the statute began to run as soon as she became discovert.[5] So where the trustee paid over the trust fund to a minor *cestui que trust*, and denied all further liability, the statute began to run as soon as the minor became of age.[6] After the lapse of twenty years, no claim or complaint having been made, the court will presume that a trustee performed his duty.[7] (*a*)

[1] Ibid.; Zeller *v.* Eckert, 4 How. 295; Whithead *v.* Lord, 11 Eng. L. & Eq. 587; Scott *v.* Haddock, 11 Ga. 258; Moffatt *v.* Bingham, 11 Humph. 369; Lister *v.* Pickford, 34 L. J. Ch. 582; Cunningham *v.* McKindley, 22 Md. 149; Andrews *v.* Smithwick, 20 Tex. 111; White *v.* Leavitt, id. 703; Lewis *v.* Castleman, 27 Tex. 407.

[2] Williams *v.* First Presby. Soc., 1 Ohio St. 478; White *v.* White, 1 Md. Ch. 56. [See *supra*, § 860, n.]

[3] Wickliffe *v.* Lexington, 11 B. Mon. 161.

[4] Welborn *v.* Rogers, 24 Ga. 558; Keaton *v.* McGwier, id. 217. [Drake *v.* Wild, 65 Vt. 611, *semble*.]

[5] Harrison *v.* Brolaskey, 20 Pa. St. 299.

[6] Sollee *v.* Croft, 7 Rich. Eq. 34.

[7] Syester *v.* Brewer, 27 Md. 288.

(*a*) In cases of trusts which are or have become passive so that the *cestui* is entitled to call for a transfer of the title and possession, allowing the trustee to remain in possession for a long period of time without any active recognition of the interest of the *cestui* may be so inconsistent with a claim of an equitable interest and a recognition thereof by the trustee during that time that the *cestui's* claim will be barred by his long unexplained delay, even though he has no other notice of a repudiation by the trustee. Cone *v.* Dunham, 59 Conn. 145; Parks *v.* Satterthwaite, 132 Ind. 411; Dunn *v.* Dunn, 137 N. C. 533. See Robin-

§ 865. It has been urged that the statute cannot apply in favor of persons who become trustees by construction of law;

son's Committee *v.* Elam, 90 Ky. 300, 303; Sawyer *v.* Cook, 188 Mass. 163; Person *v.* Fort, 64 S. C. 502; Starkey *v.* Fox, 52 N. J. Eq. 758; Benson *v.* Dempster, 183 Ill. 297.

An unexplained failure by a trustee to pay the *cestui* income for a long series of years has been held to be notice of a repudiation of the trust. Woodruff *v.* Williams, 35 Colo. 28. See Kleinclaus *v.* Dutard, 147 Cal. 245.

But so long as the trustee apparently recognizes the interest of the *cestui* in property thus retained after the time when the *cestui* had the right to its possession, time will not bar the *cestui's* right to recover it. Jones *v.* Home Savings Bank, 118 Mich. 155; Johnston *v.* Johnston, 107 Minn. 109. And mere neglect of duties by the trustee, if not inconsistent with a recognition of an interest in the *cestui*, is not usually repudiation or notice of a denial of such an interest. Hovey *v.* Bradbury, 112 Cal. 620; Carter *v.* Uhlein, 36 A. 956 (N. J. Eq. 1897); Allen *v.* Bartlett, 52 Kan. 387.

It has been held that the statute of limitations begins to run in favor of an assignee for the benefit of creditors after the lapse of a reasonable time for settling up the estate. Richardson *v.* Chanslor's Trustee, 103 Ky. 425, 440. See Hargis *v.* Sewell, 87 Ky. 63; Willis *v.* Roberts, 27 S. W. 976 (Ky. 1894); Irwin *v.* Lloyd, 20 Ohio Cir. Ct. R. 339; IV N. Y. Consol. Laws (1909), p. 3349, § 109. And the same has been held true of a surviving or liquidating partner, in the absence of special circumstances to show a recognition by him of the interests of those equitably entitled. Riddle *v.* Whitehill, 135 U. S. 621; Gilmore *v.* Ham, 142 N. Y. 1. See Baker *v.* Brown, 151 N. C. 12.

The guiding principle is that no amount of delay by a *cestui* in enforcing his equitable interests will serve to bar him where the trustee has clearly recognized his interest and continues to recognize it. While the trust by its terms is continuing the *cestui* has a right to assume that the trustee recognizes his interest until he learns that his interest is denied or until he receives notice, through the conduct of the trustee or otherwise, that ought to put him on inquiry. Gutch *v.* Fosdick, 48 N. J. Eq. 353, 358.

When the *cestui* himself is in possession as the equitable owner of land, his delay in seeking a conveyance of the legal title will not ordinarily bar his rights as against the trustee. Stonehouse *v.* Stonehouse, 156 Mich. 43; Fleishman *v.* Woods, 135 Cal. 256.

While the *cestui* is ignorant that certain funds have come into the hands of his trustee, limitations do not run in favor of the trustee. Russel *v.* Huntington Bank, 162 Fed. 868; Eastman *v.* Davis, 68 Vt. 225. And where the trustee of an express trust has concealed its existence from the heirs of a deceased *cestui*, time cannot run against them in his favor. Middaugh *v.* Fox, 135 Ill. 344. Where the *cestui* was absolutely ignorant of any trust for his benefit and was not guilty of neg-

as, where a person is construed into a trustee of property which he has fraudulently obtained, or where a trust estate is traced

ligence in not knowing of it, it has been held that a lapse of more than twenty years without recognition of the trust did not bar the *cestui's* remedy for breaches of trust or his rights in the property. Mullen *v.* Walton, 142 Ala. 166.

In England by the Trustee Act of 1888, § 8, trustees were given the protection of the statutory period of limitations in cases of innocent breaches of trust except where the action is to recover trust property or its proceeds received by the trustee and converted to his use. See *In re* Page, [1893] 1 Ch. 304; *In re* Gurney, [1893] 1 Ch. 590; Thorne *v.* Heard, [1895] A. C. 495; How *v.* Winterton, [1896] 2 Ch. 626; *In re* Swain, [1891] 3 Ch. 233; *In re* Bowden, 45 Ch. Div. 444.

In the absence of statute provision to the contrary, equity will not apply the statute of limitations to relieve a trustee of a continuing trust from accountability for breaches of trust of which the *cestui* has no notice. Andrews *v.* Tuttle-Smith Co., 191 Mass. 461; McRoberts *v.* Carneal, 44 S. W. 442 (Ky. 1898); Lindsley *v.* Dodd, 53 N. J. Eq. 69. But it has been held in New York that the ten-year statute of limitations applies to proceedings to compel an administrator to account. *In re* Longbotham's Estate, 57 N. Y. S. 118, 38 App. Div. 607.

The termination of the trust relation sets the statute of limitations running in favor of the trustee as to all rights against him of which the *cestui* had knowledge or ought to have had knowledge if he had exercised reasonable diligence. Hayes *v.* Walker, 70 S. C. 41; Rist's Estate, 192 Pa. St. 24. But the statute of limitations does not run against the beneficiary, even after a final account allowed or assented to, as to property received by the fiduciary but not included in his account and not known of by the beneficiary. As to such property the express trust continues and any repudiation of the trust must be made known to the beneficiary. Davis *v.* Eastman, 66 Vt. 651; 68 Vt. 225. See Edwards *v.* Williams, 39 S. C. 86; Matter of Long Island L. & T. Co., 87 N. Y. S. 65, 92 App. Div. 1.

The mere fact that the *cestui* permits a trustee to retain trust property in his hands after the time when by the terms of the trust the *cestui* is entitled to have it turned over to him, does not set the statute of limitations running, since the trust as to such property continues. Every presumption is against a trustee who aims to show that trust funds in his possession have been converted into an ordinary debt from him. Stewart's Estate, 140 Pa. St. 124; Pence *v.* Force, 46 N. J. Eq. 348. It has even been held that the assent of the *cestui* that the trustee use trust funds in his business does not set the statute of limitations running. Matter of Farmers' Loan & Tr. Co., 62 N. Y. S. 359, 47 App. Div. 448. But see Treadwell *v.* Treadwell, 176 Mass. 554.

into his hands, or where a resulting[1] trust arises; and that the *cestui que trust* is not precluded, in such cases, from his remedy by lapse of time. But the later authorities establish the doctrine that the statute applies in such cases.[2] (*a*) Lord Redesdale,

[1] Dow *v.* Jewell, 18 N. H. 340; Cole *v.* Noble, 63 Tex. 434, the court saying that with *constructive* trusts the statute will run from the time the *cestui* could have indicated his right by action or otherwise; but in case of *resulting trusts where there is no adverse holding*, the statute does not run. In a prior case (Kennedy *v.* Baker, 59 Tex. 151), it was held that the statute does not apply to resulting trusts, and it may be difficult for some people to conceive of a resulting trust in which there is not an adverse holding. If the trust is not evidenced in such a way as to create a valid express trust, then the holding is on its face adverse.

[2] McClane *v.* Shepherd, 21 N. J. Eq. 76; Strimfler *v.* Roberts, 18 Penn. St. 300; Prevost *v.* Gratz, 6 Wheat. 480; Sheppards *v.* Turpin, 3 Grat. 373; Murdoch *v.* Hughes, 7 Sm. & M. 219; Cuyler *v.* Bradt, 2 Caines's Cas. 326; Davis *v.* Cotton, 2 Jones, Eq. 430; Cunningham *v.* McKindley, 22 Md. 149; Weaver *v.* Leiman, 52 Md. 710; Marrion *v.* Titsworth, 18 B. Mon. 582; Howell *v.* Howell, 15 Wis. 55; Townshend *v.* Townshend, 1 Bro. Ch. 550; Bonney *v.* Ridgard, 1 Cox, 143; Andrew *v.* Wrigley, 4 Bro. Ch. 125; Collard *v.* Hare, 2 R. & M. 675; Cholmondeley *v.* Clinton, 2 J. & W. 190; 4 Bligh, 4; Bell *v.* Bell, t. Plunk. 661; Portlock *v.* Gardner, 1 Hare, 594; *Ex parte* Hasell, 3 Y. & Col. 622; Wedderburn *v.* Wedderburn, 4 My. & C. 53; Att. Gen. *v.* Christ Hospital, 3 My. & K. 344; Rolfe *v.* Gregory, 11 Jur. (N. S.) 98; 4 De G., J. & S. 576; Hecht *v.* Slaney, 72 Cal. 363; Kennedy *v.* Kennedy, 25 Kans. 151; Price *v.* Mulford, 107 N. Y. 303; University *v.* Bank, 96 N. C. 280; Beard *v.* Stanton, 15 S. C. 164; Speidel *v.* Henrici, 120 U. S. 377.

(*a*) There are many cases of resulting and constructive trusts where the equitable owner who is *sui juris* has a valid excuse for not asserting his equitable interest, and where in consequence the statute of limitations will not run against him and his delay will not constitute *laches*. This is so where a trust results by reason of the payment of the purchase price by another than the grantee with the understanding that the latter shall hold for the benefit of the former. The fact that the beneficial owner has an immediate right of action does not set in motion the statute of limitations so long as his interest is apparently recognized by the title holder. Grayson *v.* Bowlin, 70 Ark. 145; Haney *v.* Legg, 129 Ala. 619; White *v.* Costigan, 138 Cal. 564; Faylor *v.* Faylor, 136 Cal. 92, 96; Morton *v.* Bassett, 154 Cal. 411; Plass *v.* Plass, 122 Cal. 3, 15; Warren *v.* Adams, 19 Colo. 515; Corr's Appeal, 62 Conn. 403; Reynolds *v.* Sumner, 126 Ill. 58; Dorman *v.* Dorman, 187 Ill. 154; Madison *v.* Madison, 206 Ill. 534; Zunkel *v.* Colson, 109

after stating the ground upon which a direct trust was not within the statute, said: "But the question of fraud is of a very differ-

Iowa, 695; Smith *v.* Smith, 132 Iowa, 700; Currier *v.* Studley, 159 Mass. 17, 20; Church *v.* Attorney Gen., 164 Mass. 188; Lufkin *v.* Jakeman, 188 Mass. 528; Condit *v.* Maxwell, 142 Mo. 266; Hanson *v.* Hanson, 78 Neb. 584; Crowley *v.* Crowley, 72 N. H. 241; Dixon *v.* Dixon, 145 N. C. 46; Miller *v.* Baker, 160 Pa. St. 172; Miller *v.* Saxton, 75 S. C. 237; Fawcett *v.* Fawcett, 85 Wis. 332. See Smith *v.* Smith, 201 Mo. 533; Morton *v.* McDevit, 122 N. C. 755 (*contra*); Robinson's Committee *v.* Elam, 90 Ky. 300, 303 (*contra*); Blake *v.* Wolfe, 105 Ky. 380, 383 (*contra*).

In Lufkin *v.* Jakeman, 188 Mass. 528, a case of this kind, it is said, "The late decisions generally hold that, if nothing appears to the contrary, the transaction itself implies a recognition of the rights of the equitable owner, and in this respect, until repudiation, a resulting trust is like an express trust."

When the circumstances from which a resulting trust arises do not show an apparent recognition of the beneficial interest, the statute of limitations begins to run at once, Reed *v.* Painter, 145 Mo. 341; Woods *v.* Stevenson, 43 W. Va. 149; Cox *v.* Menzing, 30 So. 41 (Miss. 1901); Quairoli *v.* Italian Beneficial Soc., 64 N. J. Eq. 205, as where a resulting trust is imposed by statute for the benefit of creditors of a person paying the purchase-money. Dole *v.* Wilson, 39 Minn. 330. It has been held that time begins to run at once in favor of the heir of one who holds the title on a resulting trust, in the absence of apparent recognition of the *cestui's* interest. Norton *v.* Bassett, 154 Cal. 411.

In Pennsylvania a statute expressly provides that no action to enforce a resulting trust can be brought after a lapse of five years from the time the trust accrued unless it has been acknowledged in writing. In case of fraud the period of limitations begins to run from the time of discovery or from the time the defrauded party ought to have discovered the fraud. 2 Purdon's Digest Pa. Stat. (13th ed.), p. 2278, § 16; Frost *v.* Bush, 195 Pa. St. 544.

A trustee *de son tort* who holds in apparent recognition of the interest of the beneficial owner is also in a similar position to that of an express trustee. Soar *v.* Ashwell, [1893] 2 Q. B. 390; Lyell *v.* Kennedy, 14 A. C. 437; Wassell *v.* Leggatt, [1896] 1 Ch. 554.

The same rule applies even to a constructive trustee, when his possession was originally assumed apparently for the benefit of another and the beneficial owner has never received notice of an assertion of an interest or title which is adverse to his. Odell *v.* Moss, 130 Cal. 352; Teasley *v.* Bradley, 110 Ga. 497; Carr *v.* Craig, 138 Iowa, 526; Markley *v.* Camden Safe Dep. &c. Co. (N. J. Eq. 1908), 69 A. 1100; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. See Cromwell *v.* Norton, 193 Mass. 291. See *contra* Stubbins' Adm'r *v.* Briggs, 68 S. W. 392 (Ky.

ent description; that is a case where a person, who is in possession by virtue of a fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity founded on the fraud; and his possession in the mean time is adverse to the title of the person who impeaches

1902). Thus where a mother conveyed real estate to her father upon his oral agreement to hold it in trust for her children and he subsequently refused to be bound by his oral agreement, it was held that the statute of limitations did not begin to run in his favor until the time of his open repudiation of the parol trust. Newis *v.* Topfer, 121 Iowa, 433. In Soar *v.* Ashwell, [1893] 2 Q. B. 390, 393, it was said by Lord Esher: "The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as trustee of other's money, *i. e.*, to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has exercised command or control over such money or property, a Court of Equity will impose upon him all the liabilities of an express trustee, and will class him with and call him an express trustee of an express trust." In this case it was held that where an agent employed by a trustee to invest trust funds misappropriated them, the statute of limitations did not run against the *cestui's* equitable right to recover from the agent.

Cases of constructive trusts arising from fraud of the person chargeable as trustee are further affected by the principle that until the time when the beneficial owner discovers the fraud or ought to have discovered it, he has a valid excuse which will prevent the operation of the statute of limitations. Crowley *v.* Crowley, 72 N. H. 241; Heinisch *v.* Pennington, 73 N. J. Eq. 456. See *supra*, § 861.

In trusts of this kind repudiation and notice thereof may be inferred from conduct inconsistent with a recognition of the trust more readily than in the case of express trusts of a continuing nature. Thus failure to actively recognize an interest in the *cestui* for a long period of time may be taken as practically a denial of the latter's interest. See Kleinclaus *v.* Dutard, 147 Cal. 245.

In constructive trusts where as between the parties the holding of the trustee is clearly adverse and the equitable owner knew it or ought have known it from circumstances of which he had notice, the statute of limitations and the rule of *laches* apply. Buttles *v.* De Baun, 116 Wis. 323; Barker *v.* Hurley, 132 Cal. 21. And the same is true where the trust does not arise out of any confidence reposed in the trustee or out of his fraudulent conduct. Bateman *v.* Ward, 93 S. W. 508 (Tex. Civ. App. 1906); Landis *v.* Saxton, 105 Mo. 486; Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657; Merton *v.* O'Brien, 117 Wis. 437; Buttles *v.* De Baun, 116 Wis. 323; Boyd *v.* Mutual Fire Ins. Assoc., 116 Wis. 155, 177. See Patten *v.* Warner, 11 App. D. C. 149.

the transaction on the ground of fraud."[1] Sir William Grant made similar observations.[2] All trusts arising by operation of law, whether implied, resulting, or constructive, are subject to the statute. Where persons claiming in their own right are turned into trustees by implication, the bar will be effective.[3] Equity will refuse to interfere in case of implied trusts after long acquiescence (twenty years in this case) not only where time has dimmed the facts, but even where it is perfectly clear that relief would originally have been given.[4] But where one purchases land partly with the money of another, he cannot set up the *laches* of the latter during the time he admitted the *cestui's* rights. The statute will begin to run in such case only from the time he set up an adverse claim.[5] But if the injured parties are minors or persons under disability, time will not run against them,[6] nor if they are under the influence or control of a former guardian or trustee.[7]

§ 866. Courts, in many cases, presume acts to have been done after a great length of time, as, that payments have been made, releases and conveyances executed, or rights abandoned.[8] As a general rule, they adopt the statute bar at law as the period at the end of which they will give effect to such presumptions.[9] The presumptions are made, in the absence of evidence, for the

[1] Hovenden *v.* Annesley, 2 Sch. & Lef. 633; Wilmerding *v.* Russ, 33 Conn. 67; Best *v.* Campbell, 62 Penn. St. 476; Ashurst's App., 60 id. 290; German Am. Sem. *v.* Keifer, 43 Mich. 105.

[2] Beckford *v.* Wade, 17 Ves. 97. But see Sturgis *v.* Morse, 3 De G. & J. 1; Taylor *v.* Gooche, 4 Jones, L. 436. See *ante*, §§ 141, 228, 229, 230, and cases cited.

[3] School Directors *v.* School Directors, 16 Brad. (Ill.) 653.

[4] Hendrickson *v.* Hendrickson, 42 N. J. Eq. 657.

[5] Springer *v.* Springer, 114 Ill. 550. [Note a, *supra*.]

[6] Miles *v.* Wheeler, 43 Ill. 123.

[7] Hayden *v.* Stone, 1 Duv. 396.

[8] Pattison *v.* Hawkesworth, 10 Beav. 375; Att. Gen. *v.* Moor, 20 Beav. 119; Clemenston *v.* Williams, 8 Cranch, 72; Jackson *v.* Sackett, 7 Wend. 94; Bass *v.* Williams, 8 Pick. 187; Ashurst's App., 60 Penn. St. 290; Scott *v.* Knox, 4 Ir. Eq. 411.

[9] Eldridge *v.* Knott, Cowp. 214.

purpose of quieting titles,[1] and because there is no better ground to go upon.[2] If positive evidence is produced, the fact may be found or presumed after a much shorter period. On the other hand, if there is positive evidence which negatives the fact the presumption cannot be made after a much longer period; for the rule is, *stabit præsumptio donec probetur in contrarium*. Recognition by the trustee of the trust as continuing repels the presumption of payment that would otherwise arise after twenty years.[3] Presumptions, after a long time, are favored in law; and courts will not allow them to be controlled or rebutted by slight evidence or doubtful circumstances.[4] In cases where a possession may be lawful and rightful, it cannot be presumed to be adverse. Thus one tenant in common cannot be presumed to hold adversely to the other, unless something more is shown than mere lapse of time. (*a*) A trustee cannot be presumed to hold adversely to his *cestui que trust*: on the contrary, he is presumed to hold for his *cestui que trust* until the contrary appears.[5]

§ 867. It is clear that a person, in ignorance of his right, cannot be presumed to have abandoned it,[6] especially if there

[1] Ibid.; Grenfell *v.* Girdestone, 2 Y. & Col. 682; Magdalen College *v.* Att. Gen., 3 Jur. (N. S.) 675.

[2] Ibid.; Hillary *v.* Waller, 12 Ves. 266; Hawkins *v.* Chapman, 36 Md. 100.

[3] Werborn *v.* Austin, 82 Ala. 498.

[4] Jones *v.* Turberville, 2 Ves. Jr. 13; Grenfell *v.* Girdlestone, 2 Y. & Col. 682.

[5] Harmood *v.* Oglander, 6 Ves. 199; 8 Ves. 106; Doe *v.* Phillips, 10 Q. B. 130; Young *v.* Waterpłank, 13 Sim. 204; Garrard *v.* Tuck, 8 C. B. 248; Melling *v.* Leak, 16 C. B. 652; Creigh *v.* Henson, 10 Grat. 231; Colvin *v.* Menefee, 11 id. 92; Whiting *v.* Whiting, 4 Gray, 237. [Houghton *v.* Pierce, 203 Mo. 723.]

[6] Cholmondeley *v.* Clinton, 2 Mer. 362; Randall *v.* Errington, 10 Ves. 427; Roche *v.* O'Brien, 1 B. & B. 330; Pickering *v.* Stamford, 2 Ves. Jr. 280, 285; Chalmer *v.* Bradley, 1 J. & W. 65; Bennett *v.* Colley, 2 My. &

(*a*) See Watson *v.* Sutro, 86 Cal. 500, 529; Mansfield *v.* McGinness, 86 Maine, 118; Day *v.* Davis, 64 Miss. 253; King *v.* Carmichael, 136 Ind. 20.

is a fraudulent concealment of the cause of action by the guilty party.[1] One under disability cannot be presumed to have released a right.[2] If persons are in poverty or distress, the force of the presumption is weakened.[3] So a release from a large number of persons cannot be presumed with the same force; for where interests are divided, they are not prosecuted with the same diligence.[4]

§ 868. When a defendant relies upon lapse of time, or upon presumptions arising therefrom, but not upon the absolute bar of the statute, he must plead or answer the facts. He cannot protect himself by demurrer.[5]

§ 869. Courts of equity will sometimes refuse to grant relief, although the statute of limitations cannot be pleaded in bar, and although presumptions cannot arise from lapse of time, or may be conclusively rebutted. In such cases, courts proceed upon the ground that the public *convenience* will not allow old and stale claims to be investigated, when many of the parties and witnesses are dead, or their memories impaired, and vouchers are lost. *Expedit reipublicæ ut sit finis litium.*[6] Thus, where a

K. 232; Stone *v.* Godfrey, 5 De G., M. & G. 76; Blennerhassett *v.* Day, 2 B. & B. 118; Stackpole *v.* Daveron, 1 Bro. P. C. 1.

[1] Pilcher *v.* Flinn, 30 Ind. 202.

[2] March *v.* Russell, 3 M. & Cr. 31; Bennett *v.* Colley, 5 Sim. 181; 2 My. & K. 225; Thompson *v.* Simpson, 1 Dr. & W. 489.

[3] Roche *v.* O'Brien, 1 B. & B. 342; Hillary *v.* Waller, 12 Ves. 266; Gowland *v.* De Faria, 17 Ves. 25; Byrne *v.* Frere, 2 Moll. 171.

[4] Whichote *v.* Lawrence, 3 Ves. 740; 6 Ves. 632; York *v.* Mackenzie, 3 Bro. P. C. 42; Att. Gen. *v.* Duley, Coop. 146; Pinkston *v.* Brewster, 14 Ala. 320; Kidney *v.* Coussmaker, 12 Ves. 158; Hardwick *v.* Mynd, 1 Anst. 109; Elliott *v.* Merryman, 2 Atk. 42; Hercy *v.* Dinwoody, 2 Ves. Jr. 87. See chapter on Charitable Trusts.

[5] Deloraine *v.* Browne, 3 Bro. Ch. 633; Mitf. on Plead. 212. See Story's Eq. Plead. §§ 503, 751, 814. [See *contra*, Sullivan *v.* Portland, etc. R. Co., 94 U. S. 806; Poston *v.* Ingraham, 76 S. C. 167, 171.]

[6] Att. Gen. *v.* Exeter, Jac. 448; Pickering *v.* Stamford, 2 Ves. Jr. 272, 582; Parker *v.* White, 11 Ves. 226; Morse *v.* Royal, 12 Ves. 374; Price *v.* Byrn, cited in Campbell *v.* Walker, 5 Ves. 681; Barwell *v.* Barwell, 34

bill was brought against an executor for an account, there being no statute protection, and the presumption of a final settlement being rebutted, the court refused to open the accounts after a great lapse of time, when it was probable that most of the parties were dead, and the vouchers and receipts were lost.[1] Mere *lapse* of time or delay in suing is such *laches* in the plaintiff, in a certain class of cases, that he is not entitled to relief, unless he can explain the delay. Thus, if a *cestui que trust* attempts to impeach a purchase of the trust estate by the trustee, a delay for much less than twenty years will bar his relief.[2] In a bill to set aside a purchase made by a solicitor of the party,[3] or to set aside the sale of a reversion by an heir expectant,[4] or to impose a constructive trust upon a fraudulent purchaser,[5] or to call a tenant to an account for waste,[6] or to enforce the specific performance of a contract,[7] or where fraud is alleged to avoid the statute of limitations,[8] or where an account is sought by a surviving partner,[9] and in a large number of other cases, courts refuse to interfere actively after a considerable lapse

Beav. 371; McKnight *v.* Taylor, 1 How. 161; Piatt *v.* Vattier, 9 Pet. 466; Thompson *v.* McGaw, 2 Watts, 161; Price's App., 54 Penn. St. 472.

[1] Hunton *v.* Davies, 2 Ch. R. 44; Huet *v.* Fletcher, 1 Atk. 457; Pearson *v.* Belchier, 4 Ves. 627; Hercy *v.* Dinwoody, 2 Ves. Jr. 87; St. John *v.* Turner, 2 Vern. 418; Campbell *v.* Graham, 1 R. & M. 453; Pomfret *v.* Winsor, 2 Ves. 483; Anderson *v.* Burwell, 6 Grat. 405; Smith *v.* Calloway, 7 Black. 86.

[2] Parker *v.* White, 11 Ves. 226; Barwell *v.* Barwell, 34 Beav. 371; Morse *v.* Royal, 12 Ves. 374; Price *v.* Byrn, cited in Campbell *v.* Walker, 5 Ves. 681. [Connolly *v.* Hammond, 51 Tex. 635; Kahn *v.* Chapin, 152 N. Y. 305.]

[3] Gresley *v.* Mansley, 4 De G. & J. 78; Lyddon *v.* Moss, 4 De G. & J. 104.

[4] Roberts *v.* Tunstall, 4 Hare, 257.

[5] Glegg *v.* Edmondson, 3 Jur. (N. S.) 299; Norris *v.* Le Neve, 3 Atk. 38; Pennell *v.* Home, 3 Drew. 337; Jackson *v.* Welsh, Ll. & G. t. Plunk. 346. See Amb. 735, 737.

[6] Harcourt *v.* White, 28 Bev. 303.

[7] Southcomb *v.* Exeter, 6 Hare, 214; Alloway *v.* Braine, 26 Beav. 575; Sharp *v.* Wright, 28 Beav. 150; Hope *v.* Gloucester, 1 Jur. (N. S.) 320.

[8] Blair *v.* Ormond, 1 De G. & Sm. 428.

[9] Tatam *v.* Williams, 3 Hare, 347; Harcourt *v.* White, 28 Beav. 303.

of time, if the delay is unexplained by the party seeking relief.[1] But in cases of mere dry equitable demands, falling within the purview of some of the provisions of the statute of limitations, general *laches* short of the statutory period ought not to bar a plaintiff, for the reason that the legislature has prescribed a period which it deems sufficiently short for private and public convenience, and courts ought not to assume the power of abridging that period.[2]

§ 870. But acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done.[3] So if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and it estops him.[4]

§ 871. Questions sometimes arise as to how far back courts of equity will order an account of the mesne rents and profits

[1] Gresley *v.* Mansley, 4 De G. & J. 95; Roberts *v.* Tunstall, 4 Hare, 266; Browne *v.* Crosse, 14 Beav. 105; Life Assoc. *v.* Siddall, 3 De G., F. & J. 73; Hawkins *v.* Chapman, 36 Md. 100; Hanson *v.* Worthington, 12 Md. 441; Glenn *v.* Hill, 17 Md. 281; Nelson *v.* Hagerstown Bank, 27 Md. 51; Badger *v.* Badger, 2 Wall. 87.

[2] Rochdale Canal Co. *v.* King, 2 Sim. (N. S.) 89; Penny *v.* Allen, 7 De G., M. & G. 426; Mehrtens *v.* Andrews, 3 Beav. 76; Leeds *v.* Amherst, 2 Phil. 117; Clarke *v.* Hart, 6 H. L. Cas. 633; Beaudry *v.* Montreal, 11 Moore, P. C. C. 399; Story *v.* Gape, 2 Jur. (N. S.) 706.

[3] Kent *v.* Jackson, 14 Beav. 384; Styles *v.* Guy, 1 H. & Tw. 523; *Ex parte* Morgan, id. 328; Graham *v.* Birkenhead Railw. Co., 2 Mac. & Gor. 146.

[4] Leeds *v.* Amherst, 2 Phil. 123; Phillipson *v.* Gatly, 7 Hare, 523; Stafford *v.* Stafford, 1 De G. & J. 202; Jorden *v.* Money, 5 H. L. Cas. 185; Rennie *v.* Young, 2 De G. & J. 142; McGivney *v.* McGivney, 142 Mass. 156, 160 (20 years' silence).

to be taken. Where the *cestui que trust* seeks an account of rents and profits from an *express* trustee, there is no limitation of time, as the statute of limitations does not apply.[1] If the claim to rents and profits rests upon a *legal* title, the remedy is at law, and the legal limitation must be applied.[2] If, however, in such case, the accounts are complicated, a court of equity may entertain jurisdiction to take the accounts; but the legal limitation of time will be adhered to.[3] Accounts may be taken in equity upon a legal title respecting *mines* and timber when an injunction is prayed for, but the legal limitation will be applied.[4] An infant may have a bill for an account upon a legal title, as every person entering upon an infant's lands is regarded in the light of a receiver for him, and this jurisdiction remains, though the bill is not filed until after his majority.[5] If, however, the infant has never had the possession, but it has always been held adversely to him, the remedy is at law.[6] So, after the death of a receiver of the rents and profits, a party entitled, although he had a remedy at law, may have a bill for an account of the assets.[7] The legal limitation in these cases is six years, or such

[1] Att. Gen. *v.* Brewers' Co., 1 Mer. 498; Mathew *v.* Brise, 14 Beav. 341.

[2] Jesus College *v.* Bloom, 3 Atk. 262; Dinwiddie *v.* Bailey, 6 Ves. 136; Taylor *v.* Crompton, Bunb. 95; Landsdowne *v.* Landsdowne, 1 Madd. 137.

[3] O'Connor *v.* Spaight, 1 Sch. & Lef. 309; Corp. of Carlisle *v.* Wilson, 13 Ves. 276.

[4] Winchester *v.* Knight, 1 P. Wms. 406; Pulteney *v.* Warren, 6 Ves. 89; Landsdowne *v.* Landsdowne, 1 Madd. 116; Parrott *v.* Palmer, 3 My. & K. 632; Jesus College *v.* Bloom, 3 Atk. 262; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 701; Grierson *v.* Eyre, 9 Ves. 346; Garth *v.* Cotton, 1 Dick. 211; Lee *v.* Alston, 1 Bro. Ch. 194.

[5] Gardner *v.* Fell, 1 J. & W. 22; Roberdean *v.* Rouse, 1 Atk. 543; Yallop *v.* Halworthy, 1 Eq. Cas. Ab. 7; Newburgh *v.* Bickerstaffe, 1 Vern. 295; Curtis *v.* Curtis, 2 Bro. Ch. 631; Dormer *v.* Fortescue, 3 Atk. 130; Pulteney *v.* Warren, 6 Ves. 89; Morgan *v.* Morgan, 1 Atk. 489; Falkland *v.* Bertie, 2 Vern. 342; Doe *v.* Keen, 7 T. R. 390; Hicks *v.* Sallitt, 3 De G., M. & G. 782; Pascoe *v.* Swan, 27 Beav. 508; Blomfield *v.* Eyre, 8 Beav. 250. But he must bring his bill within six years after his majority. Lockey *v.* Lockey, Pr. Ch. 518.

[6] Crowther *v.* Crowther, 23 Beav. 305.

[7] Monypenny *v.* Bristow, 2 R. & M. 117; Gardner *v.* Fell, 1 J. & W. 22; Thomas *v.* Oakley, 18 Ves. 186; Landsdowne *v.* Landsdowne, 1 Madd. 116.

other period as the statutes in the several States have established.[1] But if a party has simply lost his plain remedy at law by some other event, he cannot invoke the aid of a court of equity.[2] If, however, a party loses his remedy at law by mistake, he may have an account in equity; for mistake is one of the heads of equity jurisdiction.[3] So if the remedy at law was lost by the fraud of the defendant,[4] or by other fault of his,[5] equity can give relief, and an account; but the legal limitations must be observed.[6]

§ 872. Where a party is rightfully seeking the possession of property, the court, if the plaintiff prevails, will order an account of the rents and profits, as incident to the relief. If the plaintiff is a *cestui que trust*, following the trust estate into the hands of a person claiming through the trustee, under such circumstances that the defendant himself is to be regarded as a trustee, the plaintiff will be entitled to an account of the rents and profits from the commencement of his title, or from the withholding of his rights by the defendant.[7] The case will be much stronger if the plaintiff is an infant, or there has been any fraud or concealment.[8] But if the plaintiff is not a *cestui que trust*, but is an

[1] Monypenny *v.* Bristow, 2 R. & M. 125.

[2] Barnwall *v.* Barnwall, 3 Ridg. P. C. 71; Hutton *v.* Simpson, 2 Vern. 722; Norton *v.* Frecker, 1 Atk. 525; Pulteney *v.* Warren, 6 Ves. 88.

[3] Bolton *v.* Deane, Pr. Ch. 516; Dormer *v.* Fortescue, Ridg. t. Hardw. 183; Barnwall *v.* Barnwall, 3 Ridg. P. C. 68.

[4] Ibid.; Bennett *v.* Whitehead, 3 P. Wms. 644.

[5] Pulteney *v.* Warren, 6 Ves. 73. See Dormer *v.* Fortescue, 3 Atk. 124; Reade *v.* Reade, 5 Ves. 744; 3 Atk. 336; Edwards *v.* Morgan, McClel. 541; Reynolds *v.* Jones, 2 S. & S. 206; Thomas *v.* Thomas, 2 K. & J. 85; Agar *v.* Fairfax, 17 Ves. 552; Moor *v.* Black, t. Talb. 126; Mundy *v.* Mundy, 2 Ves. Jr. 122; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Wild *v.* Wells, 1 Dick. 3; Meggott *v.* Meggott, id. 794; Goodenough *v.* Goodenough, 2 Dick. 798; Tilly *v.* Bridges, Pr. Ch. 252; Owen *v.* Aprice, 1 Ch. R. 32.

[6] Ibid.

[7] Barnwall *v.* Barnwall, 3 Ridg. P. C. 66; Sturgis *v.* Morse, 3 De G. & J. 1; 24 Beav. 54; Wright *v.* Chard, 4 Drew. 673; Kidney *v.* Coussmaker, 12 Ves. 158.

[8] Hicks *v.* Sallitt, 3 De G., M. & G. 782; Schroder *v.* Schroder, Kay, 591; Pascoe *v.* Swan, 27 Beav. 508; *ante*, § 871.

equitable owner merely, seeking to recover the estate against a *bona fide* adverse holder of the possession, the account will not, unless there are special circumstances, be carried back of six years, where that is the statute limitation, or to the inception of the title within that time.[1] This was the rule in the earlier cases; but the later cases determine that where there is no trust, infancy, fraud, nor concealment, the accounts will not be carried back beyond the filing of the bill,[2] unless there was a previous demand for the possession, in which case they may be carried back to the time of the demand.[3] In one case, where the plaintiff was an infant, and the defendant a trustee in fact, but ignorant of his character, the court refused to carry the accounts further back than the filing of the bill.[4] If the plaintiff, as *cestui que trust* or equitable owner, is guilty of *laches*, courts will not carry the accounts further back than the filing of the bill;[5] and if the *laches* are very gross, the accounts will not be carried further back than the decree.[6] Nor will the decree for an account embrace the rents and profits "which the defendant might have received without neglect or default;" and all just allowances will be ordered in taking the account,[7] unless the defendant is guilty of gross fraud;[8] so interest may be disallowed.[9] An assignee who receives the rents and profits will be accountable in the first

[1] Dormer *v.* Fortescue, Ridg. t. Hardw. 183; 3 Atk. 130; Hobson *v.* Trevor, 2 P. Wms. 191; Coventry *v.* Hall, 2 Ch. Cas. 134; Reade *v.* Reade, 5 Ves. 749; Harmood *v.* Oglander, 6 Ves. 215; Drummond *v.* St. Albans, 5 Ves. 439; Stackhouse *v.* Barnston, 10 Ves. 470.

[2] Pulteney *v.* Warren, 6 Ves. 93; Edwards *v.* Morgan, McClel. 541, 554; Hicks *v.* Sallitt, 3 De G., M. & G. 813; Thomas *v.* Thomas, 2 K. & J. 79.

[3] Ibid.; Penny *v.* Allen, 7 De G., M. & G. 409.

[4] Drummond *v.* St. Albans, 5 Ves. 433. But the case is of doubtful authority. See Hicks *v.* Sallitt, 3 De G. & J. 811, 815.

[5] Dormer *v.* Fortescue, Ridg. t. Hardw. 183; 3 Atk. 130; Cook *v.* Arnham, 2 Eq. Cas. Ab. 245; Pettiward *v.* Prescott, 7 Ves. 541; Bowes *v.* East London Water Co., 3 Madd. 375; Pickett *v.* Loggon, 14 Ves. 215; Schroder *v.* Schroder, Kay, 591; Kidney *v.* Coussmaker, 12 Ves. 158.

[6] Acherley *v.* Roe, 5 Ves. 565.

[7] Howell *v.* Howell, 2 M. & C. 478.

[8] Stackpole *v.* Davoren, 1 Bro. P. C. 9.

[9] Brinkley *v.* Willis, 22 Ark. 1.

instance, but he will not be chargeable with interest.[1] In case the assignee is insolvent, the trustee who assigned the estate in breach of the trust may be called upon, and he must pay interest.[2] Separate bills for the recovery of the estate, and for an account of the mesne profits, may be filed.[3]

[1] Macartney *v.* Blackwood, Ridg., Lapp & Sch. 602.
[2] Vandebende *v.* Livingstone, 3 Swanst. 625.
[3] Hall *v.* Coventry, 2 Ch. Cas. 134; Wright *v.* Chard, 4 Drew. 673.

CHAPTER XXIX.

ACTIONS IN RESPECT TO TRUST PROPERTY — PARTIES — PLEADING — PRACTICE.

§§ 873, 874. Both the *cestuis que trust* and the trustees are required to be joined when the action is between strangers and the trust estate.
§ 875. Where the suit is between the *cestuis que trust* and the trustees.
§ 876. Where the *cestuis que trust* bring an action against the trustees, all the trustees ought to be joined as defendants.
§ 877. Where third persons ought to be joined with the trustees.
§ 878. Where courts will allow a suit to go on, though all the trustees are not joined.
§ 879. Where the trustees are guilty of a *tort*.
§ 880. Where a wife commits a breach of trust, her husband must be joined.
§ 881. *Cestuis que trust* ought all to be joined as plaintiffs when they bring an action against trustees.
§ 882. Where they need not all be joined.
§ 883. Where the court will allow the suit to go on, although the *cestuis que trust* are not all joined.
§ 884. Where suits are brought between cotrustees.
§ 885. Where the parties are numerous.
§§ 886, 887. All the parties in the same interest ought to be joined on the same side.
§ 888. Trustees ought to join in their answer.
§ 889. Married woman ought to join her husband in her answer, but may answer separately.
§ 890. Necessary allegations.
§ 890 *a*. Form of action, *quo warranto*, ejectment, &c.

§ 873. TRUSTEES and *cestuis que trust* are the owners of the whole interest in the trust estate; and therefore, in suits in equity in relation to the estate by or against strangers, both the trustees and *cestuis que trust* must be parties representing that interest.[1] (*a*) It is however held by the United States Supreme

[1] Bifield *v.* Taylor, 1 Moll. 198; Adams *v.* St. Leger, 1 B. & B. 184; Dunn *v.* Seymour, 3 Stockt. 220; Sprague *v.* Tyson, 44 Ala. 338; White

(*a*) There are many cases which state the general rule in accord with the text. Tyson *v.* Applegate, 40 N. J. Eq. 305; Davis *v.* Hemingway,

Court that in a suit by a stranger against a trustee to defeat the trust altogether, the *cestui* is not a necessary party, if the

v. Haynes, 33 Ind. 540; Harris *v.* McBane, 66 N. C. 334; 1 Daniel, Chan. Prac. 220, 221, 256 (4th Am. ed.); Lauriat *v.* Stratton, 6 Sawy. (U. S.) 339.

29 Vt. 438; Day *v.* Wetherby, 29 Wis. 363; Clark *v.* Manning, 95 Ill. 580; McArthur *v.* Scott, 113 U. S. 340; Pyle *v.* Henderson, 55 W. Va. 122; Beckwith *v.* Laing, 66 S. E. 354 (W. Va. 1909); Milmo Nat. Bank *v.* Cobbs, 115 S. W. 345 (Tex. Civ. App. 1909); 1 Daniel Ch. Pl. & Pr. (6th Am. ed.) §§ 220, 224 and n. But the tendency of the courts is to modify the rule by an exception to the effect that the beneficiaries are not necessary parties when they are adequately represented by the trustees. Jewett *v.* Tucker, 139 Mass. 566; McGraw *v.* Bayard, 96 Ill. 147; Miller *v.* Butler, 121 Ga. 758; 1 Ames' Cases on Trusts (2d ed.), 261.

This is usually the case where the trustee who has the right of custody sues a stranger to the trust to recover trust property or to collect the proceeds of property which he had authority to sell; Matter of Straut, 126 N. Y. 201; Ashton *v.* Atlantic Bank, 3 Allen, 217; Hickson *v.* Elliott, 10 Sawyer, 415; Warren *v.* Howard, 99 N. C. 190; Van Bokkelen *v.* Tinges, 58 Md. 53; see *contra*, Pyle *v.* Henderson, 55 W. Va. 122; or to restrain an encroachment upon his rights as legal owner; Smith *v.* Portland, 30 Fed. 734; or to obtain damages from a street railway company for injuries to the trust property; Roberts *v.* N. Y. Elevated R. Co., 155 N. Y. 31; or to redeem trust property from a mortgage. Boyden *v.* Partridge, 2 Gray, 190.

In Kerrison *v.* Stewart, 93 U. S. 155 (a creditor's suit), it was held that when a trustee is invested with such powers, and is under such obligations, that the beneficiaries are bound by what is done by him or against him, they are not necessary parties to a stranger's suit to defeat the trust. Waite, C. J., here said: "It cannot be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him as well as what is done for him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust: Shaw *v.* Norfolk County R. Co., 5 Gray, 171; Bifield *v.* Taylor, 1 Beat. 91; Campbell *v.* Railroad Co., 1 Woods, 376; Ashton *v.* Atlantic Bank, 3 Allen, 220; or to one by a stranger against him to defeat it in whole or in part. Rogers *v.* Rogers, 3 Paige, 379; Wakefield *v.* Grover, 4 Paige, 34; Winslow *v.* Minnesota R. Co., 4 Minn. 313; Campbell *v.* Watson, 8 Ohio, 500.

powers and duties of the trustee are such that those for whom he acts will be bound by what is done against him as well as

In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

But when there is a possibility that the *cestuis* may not be bound by a decree rendered in the suit, then they should be made parties for the protection of the defendant, *e. g.*, where there is a doubt, as to the validity of the trustee's appointment or right to represent the *cestuis;* Appeal of Lehigh Coal, etc., Co., 88 Pa. St. 499; or a doubt as to his power under the trust to sell, when he sues to recover the proceeds or for specific performance. See Zehnbar *v.* Spillman, 25 Fla. 591; Trustees *v.* Gleason, 15 Fla. 384. This question of authority is likely to arise whenever the action grows out of a contract or conveyance of the trust property by the trustee or a predecessor.

It has been held that trustees under a mortgage given to secure bondholders may sue to foreclose without making the bondholders or any of them parties, because the purpose of the bill is to secure and protect the rights of the *cestuis*, and for this purpose trustees who have no adverse interests fully represent the bondholders. Shaw *v.* Norfolk County R. Co., 5 Gray, 162. But the contrary view has also been taken. Tyson *v.* Applegate, 40 N. J. Eq. 305; Davis *v.* Hemingway, 29 Vt. 438; Day *v.* Wetherby, 29 Wis. 363.

Where a creditor of the testator seeks payment of his claim out of the trust property, it has been held that the *cestuis* are not necessary parties, since the trustees fully represent them. McDevitt *v.* Bryant, 104 Md. 187. Similarly where a creditor of the grantor sought to set aside a trust deed as fraudulent. Tucker *v.* Zimmerman, 61 Ga. 599. But if in a case of this sort the relations existing between the trustee and the *cestui* are material, the latter is a necessary party. Northampton Nat. Bank *v.* Crafts, 145 Mass. 444.

Where the claim against the property has arisen through the act of the trustee or his predecessor and there is involved any question of the power of the trustee to bind the property as claimed, the *cestuis* seem to be necessary parties. Hill *v.* Durand, 50 Wis. 354; Trustees *v.* Gleason, 15 Fla. 384; Zehnbar *v.* Spillman, 25 Fla. 591; Tucker *v.* Curtin, 153 Fed. 91. See Snelling *v.* Am., etc. Mort. Co., 107 Ga. 852; Sanders *v.* Houston Guano Co., 107 Ga. 49; Miller *v.* Butler, 121 Ga. 758. But where the rights of the claimant cannot be affected by any question as to the power of the trustee to create the incumbrance the *cestuis* are usually not necessary parties. Price *v.* Krasnoff, 60 S. C. 172.

The whole question of the necessity of making *cestuis* parties to actions in equity by or against trustees respecting the trust property is largely a matter within the discretion tion of the courts. Thus in England it has been held in several cases that in suits to foreclose mort-

by what is done by him.[1] Where a mortgage is made to A. in trust for B., the *cestui que trust* B. cannot file a bill for foreclosure without joining A., for the reason that A. is the only person who, on payment, can discharge the mortgage;[2] and where a contract was made to convey land to A. in trust for B., A. must join in a bill for a specific performance, as the legal estate must be conveyed to him.[3] So one of several *cestuis que trust* cannot bring a bill for foreclosure or for redemption without joining all the *cestuis que trust* interested in the mortgage or equity of redemption.[4] A mortgagee cannot foreclose without joining all his *cestuis que trust;* and a mortgagor in a bill to redeem must join all the *cestuis que trust* as defendants,[5] unless the mortgagee had created the trust for the purpose of perplexing the mort-

[1] Vetterlein *v.* Barnes, 124 U. S. 169. [See McDevitt *v.* Bryant, 104 Md. 187; Tucker *v.* Zimmerman, 61 Ga. 599.]

[2] Woods *v.* Williams, 4 Madd. 186; Scott *v.* Nicoll, 3 Russ. 476; Hichens *v.* Kelly, 2 Sm. & Gif. 264.

[3] Cope *v.* Parry, 2 J. & W. 588; Hobson *v.* Staneer, 9 Mod. 83.

[4] Palmer *v.* Carlisle, 1 S. & S. 423; Lowe *v.* Morgan, 1 Bro. Ch. 368; Henley *v.* Stone, 3 Beav. 355; Martin *v.* Reed, 30 Ind. 218. The decree in Montgomerie *v.* Bath, 3 Ves. 560, was made by consent.

[5] Caverly *v.* Philp, 6 Madd. 229; Osbourn *v.* Fallows, 1 R. & M. 741; Wetherell *v.* Collins, 3 Madd. 255; Thomas *v.* Dunning, 5 De G. & Sm. 618; Whistler *v.* Webb, Bunb. 53; Anderson *v.* Stather, 2 Coll. 209; Coles *v.* Forest, 10 Beav. 557; Yates *v.* Hambly, 2 Atk. 237; Wilton *v.* Jones, 2 Y. & Col. Ch. 244; Drew *v.* Harman, 5 Price, 319. [Tyson *v.* Applegate, 40 N. J. Eq. 305; Davis *v.* Hemingway, 29 Vt. 438; Day *v.* Wetherby, 29 Wis. 363. See *contra*, Boyden *v.* Partridge, 2 Gray, 190; Shaw *v.* Norfolk County R. Co., 5 Gray, 162; Price *v.* Krasnoff, 60 S. C. 172; Dodge *v.* Tulleys, 144 U. S. 451; Richter *v.* Jerome, 123 U. S. 233. For the rule in England see note *a*, *supra*.]

gages on property in which the trust estate is interested, the trustee does not adequately represent the *cestuis* and that they should be made parties in order to give them an opportunity to redeem with their own funds. Francis *v.* Harrison, 43 Ch. Div. 183; Goldsmid *v.* Stonehewer, 9 Hare, Appen. xxxviii; Wavell *v.* Mitchell, 64 L. T. 560. But it has been held that infant beneficiaries are not necessary parties since they are powerless to redeem. *Re* Booth, 67 L. T. 550. And adult beneficiaries are sufficiently represented by their trustees at the taking of accounts against the foreclosing mortgagees. Wavell *v.* Mitchell, 65 L. T. 851.

gagor.[1] So if A. grants an annuity to B., and conveys an estate to C. to secure it, he must join both B. and C. in a suit to set it aside.[2] So in suits by or against trustees for the payment of debts or for the payment of legacies, all the *cestuis que trust* must be joined and made parties, plaintiffs or defendants,[3] (*a*) although a contrary rule has been laid down by high authority.[4] If the trusteeship is vacant, and the property and all the *cestuis que trust* are before the court, a valid decree binding the property can be made; [5] but in no case can a stranger to a trust maintain a suit for the administration of it.[6]

§ 874. If trustees enter into a contract without any reference to their *cestuis que trust*, as if they contract in their own names to purchase an estate, they may maintain or defend a suit in relation to it in their own names, although they in fact intended the contract for the benefit of the trust. If it does not appear on the face of the contract or otherwise that the trustees acted as agents or in a fiduciary character, it is unnecessary to go beyond the terms of the contract; and in many cases it would be improper to do so.[7] But where trustees enter into

[1] Yates *v.* Hambly, 2 Atk. 237; Osbourn *v.* Fallows, 1 R. & M. 743.

[2] Bromley *v.* Holland, 7 Ves. 3; Butler *v.* Prendergast, 2 Bro. P. C. 170.

[3] Harrison *v.* Stewardson, 2 Hare, 530; Holland *v.* Baker, 3 Hare, 68; Thomas *v.* Dunning, 5 De G. & Sm. 618. Bondholders under a second mortgage holden by the same trustees are not necessarily parties to a bill in equity by the bondholders under the first mortgage, to require the trustees to take possession of the property. First Nat. Ins. Co. *v.* Salisbury, 130 Mass. 305. Trustees or directors of corporations represent the stockholders in all litigation, and the court will not dismiss an action commenced by the trustees on application made by parties who have become owners of a majority of the shares. Railway Co. *v.* Alling, 99 U. S. 463.

[4] Mitf. Eq. Plead., 174, 176 (4th ed.).

[5] White *v.* Sprague, 44 Ala. 338. [Hughes *v.* Brown, 88 Tenn. 578.]

[6] White *v.* Haynes, 33 Ind. 540.

[7] White *v.* White, 4 M. & C. 460; Keon *v.* Magawley, 1 Dr. & W. 401;

(*a*) The modern tendency is to make an exception where the duties and powers of the trustee make him a suitable representative of the *cestuis* and the suit involves no questions as to such representation. See McDevitt *v.* Bryant, 104 Md. 187; Tucker *v.* Zimmerman, 61 Ga. 599; notes *supra*, this section.

contracts in their character as trustees, and in behalf of the trust estate, and for the benefit of the *cestuis que trust*, the *cestuis que trust*, for whose benefit the contract was made, ought to be parties to the suit.[1] A sale even by order of court will not bind children *in esse* not made parties.[2] (*a*) In marriage articles and settlements, the husband and wife and all the issue are purchasers for a valuable consideration, and are parties to the contract; therefore they must be joined with the trustees in all suits in relation to the property.[3] A person may be appointed the agent or representative of others in such manner that he may sue and be sued alone, and without joining such other persons; but the intention to constitute such an absolute representative must very clearly appear.[4] Trustees are not such agents or representatives: they do not own the property beneficially, though the legal title is in them; they are in some sense the agents and representatives of the *cestuis que trust;* but they are not agents for the purpose of defending the property against the adverse claims of third persons without the knowledge and behind the backs of the real owners.[5] (*b*) If trustees can sue in their own names, surviving trustees may generally maintain the actions in their names.[6]

Tasker *v.* Small, 3 M. & C. 63; Humphreys *v.* Hollis, Jac. 73; Wakeman *v.* Rutland, 3 Ves. 233, 504; Linch *v.* Thomas, 27 Ill. 457; Brown *v.* Cherry, 56 Barb. 635; Dix *v.* Akers, 30 Ind. 431; Rawlings *v.* Fuller, 31 Ind. 234; 1 Dan. Ch. Prac. 230, 231 (4th Am. ed.).

[1] Douglass *v.* Horsefall, 2 S. & S. 184; Hook *v.* Kinnear, 2 Swanst. 417; Small *v.* Atwood, Younge, 457. [See § 873 and notes.]

[2] Covar *v.* Cantelon, 25 S. C. 35.

[3] Kirk *v.* Clark, Pr. Ch. 275.

[4] Vernon *v.* Blackerly, 2 Atk. 145; Bifield *v.* Taylor, 1 Moll. 193; Beat. 91.

[5] Holland *v.* Baker, 3 Hare, 72.

[6] Crocker *v.* Peals, 1 Lowell, 416. [Maffet *v.* Or. & C. R. Co., 46 Or. 443.]

(*a*) This is true if the trustee's only authority to sell was the order of the court. Miller *v.* Butler, 121 Ga. 758; Sampson *v.* Mitchell, 125 Mo. 217; Moseley *v.* Hankinson, 22 S. C. 323; Smith *v.* Gaines, 39 N. J. Eq. 545. See *supra*, § 610.

(*b*) The tendency of many courts seems to be to take a different view in cases of active trusts. See § 873 and notes.

§ 875. Where the suits are between the trustees and the *cestuis que trust* in relation to the property, the general rule is that all the trustees and all the *cestuis que trust* must be before the court, either as plaintiffs or defendants. (*a*)

§ 876. Thus if the *cestuis que trust* bring a suit against the trustees, praying for relief, all the trustees ought to be made parties,[1] in order that, as each cotrustee is liable to the *cestuis que trust*, the court may do complete justice, so far as possible, by taking the accounts once for all, and by adjusting the liabilities of the codefendants, and thus obviate the necessity of ulterior proceedings and a multiplicity of suits.[2] The cotrustees

[1] Munch *v.* Cockerell, 8 Sim. 219; Att. Gen. *v.* Wilson, Cr. & Phil. 28; Att. Gen. *v.* Newbury Corp., C. P. Coop. 77 (1837, 1838); Walker *v.* Symonds, 3 Swanst. 75; *In re* Chertsey Market, 6 Price, 278; Humberstone *v.* Chase, 2 Y. & Col. 213; Perry *v.* Knott, 4 Beav. 179; Tarleton *v.* Hornby, 1 Y. & Col. 336; Wilson *v.* Moore, 1 M. & K. 127; Fowler *v.* Reynal, 2 De G. & Sm. 749; Willie *v.* Ellice, 6 Hare, 505; Heath *v.* Erie R. R. Co., 8 Blatch. 347.

[2] Jones *v.* Jones, 3 Atk. 112; Shipton *v.* Rawlins, 4 Hare, 623; Latouche *v.* Dunsany, 1 Sch. & Lef. 137; 2 id. 690; Walker *v.* Preswick, 2 Ves. 622; Conry *v.* Caulfield, 2 B. & B. 255; Farquharson *v.* Seton, 5 Russ. 45; *Ex parte* Shakeshaft, 3 Bro. Ch. 197; Taylor *v.* Tabrum, 6 Sim. 281; Fletcher *v.* Green, 33 Beav. 426; *Ex parte* Angle, Barn. 425; Wilson *v.* Moore, 1 M. & K. 146; Lyse *v.* Kingdom, 1 Col. C. C. 188; Richardson *v.* Jenkins, 1 Drew. 477; Alleyne *v.* Darcy, 4 Ir. Eq. 206; Jenkins *v.* Robinson, 1 Eq. R. 123; Rehden *v.* Wesley, 29 Beav. 215; Birls *v.* Betty, 6 Madd. 90; Lawrence *v.* Bowle, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241; Pitt *v.* Bonner, 1 Y. & Col. Ch. 670; Lockhart *v.* Reilly, 1 De G. & J. 464; Priestman *v.* Tyndall, 24 Beav. 244; Lingard *v.* Bromley, 1 Ves. & B. 114; Coppard *v.* Allen, 2 De G., J. & S. 173. [Sherman *v.* Parish, 53 N. Y. 483; *supra*, § 848, note *a*, p. 1388.]

(*a*) In proceedings to appoint trustees all the *cestuis* who are in *esse* are necessary parties. Butler *v.* Butler, 164 Ill. 171; Elias *v.* Schweyer, 43 N. Y. S. 55, 13 App. Div. 336. See *supra*, § 282 and notes. And it has been held that an appointment of a new trustee is invalid as to beneficiaries who were not made parties and that a surrender of the trust funds to such an appointee was a wrongful diversion. Butler *v.* Butler, 164 Ill. 171.

The creator of the trust is not a necessary party to a proceeding for removal of the trustee appointed by him. De Peyster *v.* Beekman, 55 How. Pr. 90.

ought to be made parties (although the equities between themselves cannot be adjusted), for the reason that the decree of relief to the *cestuis que trust* is the foundation of the relief to the cotrustees *inter sese;* and if any of the trustees are not parties to the first suit by the *cestuis que trust,* they will not be bound by the decree, and the whole subject-matter will of course come under litigation for the second time.[1] But a person named as trustee need not be joined if he has disclaimed the office,[2] or has been discharged. So if the breach of trust is in the nature of a tort, for which there could be no contribution as between the defaulting trustees, they need not all be joined as defendants in a bill for the breach.[3] (*a*)

§ 877. If the trustees commit a breach of trust, and third persons obtain the benefit of it, they must be joined as defendants in a suit by the *cestuis que trust.*[4] (*b*) If the trustees convey

[1] Perry *v.* Knott, 4 Beav. 180; Eccleston *v.* Skelmersdale, 1 Beav. 396; Cottingham *v.* Shrewsbury, 3 Hare, 627; Lennard *v.* Curzon, 1 De G. & Sm. 350; Payne *v.* Parker, L. R. 1 Ch. 327.

[2] Wilkinson *v.* Parry, 4 Russ. 274; Creed *v.* Creed, 2 Hog. 215; Richardson *v.* Hulbert, 1 Anst. 65; Hubbell *v.* Hubbell, 22 Ohio St. 208.

[3] Heath *v.* Erie R. R. Co., 8 Blatch. 347; Cunningham *v.* Pell, 5 Paige, 607.

[4] Burt *v.* Bennett, 2 Bro. Ch. 225; Cousett *v.* Bell, 1 Y. & Col. Ch. 569; Perry *v.* Knott, 4 Beav. 179; 5 Beav. 297; Williams *v.* Allen, 29 Beav.

(*a*) The matter of contribution among the cotrustees who are liable for a breach of trust is really a separate matter with which the *cestui* ordinarily has no concern, since each is liable to him for the full amount. See Edwards *v.* Hood-Barrs, [1905] 1 Ch. 20; Bermingham *v.* Wilcox, 120 Cal. 467; Fellrath *v.* Peoria German School Ass'n, 66 Ill. App. 77; Land Credit Co. *v.* Fermoy, 8 Eq. 7; Boyd *v.* Gill, 21 Blatch. 543; *supra,* § 848 and notes. See Stockton *v.* Anderson, 40 N. J. Eq. 486. But it has been held that if all the trustees are before the court as parties, the matter of liability *inter se* may be adjusted. McCartin *v.* Traphagen, 43 N. J. Eq. 323, 334. And for this reason, if for no other, the courts usually favor the joining of all the trustees in such a case. Sherman *v.* Parish, 53 N. Y. 483.

When an accounting is sought or is necessarily involved in the proceedings by the *cestui* all the trustees are necessary parties. Howth *v.* Owens, 29 Fed. 722; Conolly *v.* Wells, 33 Fed. 205.

(*b*) As a stranger to the trust who knowingly participates with the

the property to a third person with notice of the trust, or without consideration, such third person may be sued by the *cestuis que trust*, and must be joined with the trustees in a suit for relief by the *cestuis que trust*.[1] But if such third person has received a conveyance without notice, and has conveyed away the estate for a valuable consideration not paid to himself, he need not be joined in the suit; for, having no notice of the trust, he cannot be made personally liable, and having none of the trust property or its proceeds in his hands, it cannot be attached or reached through him.[2] So if a third person purchases the trust property for a valuable consideration, and without notice expressed or implied, he need not be made a party, for the reason that no relief can be had against him.[3] If a cotrustee has deceased, his representatives need not be joined

292. But see Pearse *v.* Hewitt, 7 Sim. 471; Vanderhende *v.* Livingston, 3 Swanst. 625; Trafford *v.* Boehm, 3 Atk. 440; Fuller *v.* Knight, 6 Beav. 205; Heath *v.* Erie R. R. Co., 8 Blatch. 347.

[1] Ibid.; Montford *v.* Cadogan, 17 Ves. 485; Salomans *v.* Laing, 12 Beav. 377; Hanson *v.* Worthington, 12 Md. 418; Abbott *v.* Reeves, 49 Pa. St. 494; Hutchinson *v.* Reid, Hoff. Ch. 317; Bailey *v.* Inglee, 2 Paige, 278; Bush *v.* Bush, 3 Strob. Eq. 377; Lund *v.* Blanshard, 4 Hare, 28, and n.; Meyer *v.* Montriou, 9 Beav. 521.

[2] Knye *v.* Moore, 1 S. & S. 61; Harrison *v.* Pryse, Barn. 324.

[3] Ibid.

trustee in a breach of trust is a joint *tort feasor*, the *cestui* may properly join him with the trustee in a suit for damages. Cowper *v.* Stoneham, 68 L. T. 18; Heath *v.* Erie Ry. Co., 8 Blatch. 347, 411; Holderman *v.* Hood, 70 Kan. 267. But he does not seem to be a necessary party to such a suit, unless the purpose is to recover the trust property or its proceeds in his hands. See Andrews *v.* Tuttle-Smith Co., 191 Mass. 461; Mann *v.* Benedict, 62 N. Y. S. 257, 47 App. Div. 173.

A person who holds the fund in dispute as a stakeholder should be made a party to a suit relating to its disposition. Perrin *v.* Lepper, 26 Fed. 545. An auctioneer who as agent of both parties holds a deposit on account of the purchase-money comes within this class when the suit is by the vendor to enforce specific performance, and he is a proper party where the amount of the deposit is large. Egmont *v.* Smith, 6 Ch. Div. 469. But the English court has expressed disapproval of joining him as a party when the amount of the deposit is small and he has not refused to pay it into court. Ibid.

if they have had nothing to do with the trust;[1] and so if the plaintiff waives all relief that he might have by joining them.[2] If the suit does not seek to charge the trustees personally, and one of them dies during its progress, his representatives need not be brought before the court, as the trusteeship survives in the remaining trustees.[3] So the representatives of a deceased trustee, who was not a party to a breach of trust, need not be made parties to a suit to remedy the breach.[4] But the representatives of a deceased cotrustee are liable to the extent of assets received by them, for a breach of trust committed in his lifetime, and they may all be joined that their relative rights may be ascertained in the suit.[5]

§ 878. If a trustee is out of the jurisdiction, or if he cannot be served with process after diligent search, or if for any reason he cannot be compelled to appear, the court will allow the suit to proceed so far as it can in the absence of such trustee.[6] (*a*)

[1] Glass *v.* Oxenham, 2 Atk. 121; Slater *v.* Wheeler, 9 Sim. 156; Routh *v.* Kinder, 3 Swanst. 144, n.; Beattie *v.* Johnstone, 8 Hare, 169; Simes *v.* Eyre, 6 Hare, 137.

[2] Selyard *v.* Harris, 1 Eq. Cas. Ab. 74; Moore *v.* Blake, 1 Moll. 284.

[3] London Gas Light Co. *v.* Spottiswood, 14 Beav. 271.

[4] Simes *v.* Eyre, 6 Hare, 137.

[5] Lyse *v.* Kingdom, 1 Col. C. C. 184; Knatchbull *v.* Fearnhead, 3 M. & Cr. 122; Pharis *v.* Leachman, 20 Ala. 683; Kirkman *v.* Booth, 11 Beav. 273; White *v.* Commonwealth, 39 Penn. St. 167; Beattie *v.* Johnstone, 8 Hare, 177; Hall *v.* Austin, 10 Jur. 452; 2 Col. C. C. 570; Penny *v.* Penny, 9 Hare, 39; Haldenby *v.* Spofforth, 9 Beav. 195; Richardson *v.* Jenkins, 1 Drew. 477. [Sherman *v.* Parish, 53 N. Y. 483; Evans *v.* Evans, 57 A. 872 (N. J. Eq. 1904).]

[6] Morrill *v.* Lawson, 2 Eq. Cas. Ab. 167; Whalley *v.* Whalley, 1 Vern. 487; Cowstad *v.* Cely, Pr. Ch. 83; Butler *v.* Prendergast, 2 Bro. P. C. 170; Moore *v.* Vinten, 12 Sim. 161; Heath *v.* Percival, 2 Eq. Cas. Ab. 167; 1 P. Wms. 683.

(*a*) As a trustee suing a third person with respect to the trust property or to collect a sum due him as trustee, sues, not as a representative of the *cestuis*, but as legal owner, the fact that he was appointed trustee by the court of another State does not necessitate an appointment by a court in the State where he sues. In this respect he differs from an administrator or a receiver. Toronto Gen. Tr. Co. *v.* C. B. & Q.

In a suit to adjudicate the rights of parties to an estate, the trustee of an outstanding term need not be a party,[1] and where a trustee has died insolvent, his representatives need not be made parties.[2] But if an insolvent trustee is living, he must be brought before the court.[3] An intermediate trustee of a mere equity need not be made a party unless there are some peculiar circumstances.[4] So where a trustee has properly conveyed all his interest to a third person upon the same trusts.[5] So where a mortgagor conveyed his equity of redemption to trustees by a voluntary and revocable instrument, it was held that the mortgagor so far represented the estate that the trustees need not be made parties to a foreclosure suit.[6] So suits have been allowed to be maintained, though the trustees were not joined, where they had no interest, and the *cestuis que trust* undertook for the trustee that the decree should be final and effectual. But these are anomalous cases.[7] If a *cestui que trust* makes a new settlement of the trust fund upon new trustees, and they commit a breach of trust, the *cestuis que trust* under the new settlement may have relief against the new trustees without joining the old ones, although they are implicated in the wrong.[8]

[1] Brooke *v.* Burt, 1 Beav. 106.

[2] Seddon *v.* Connel, 10 Sim. 85; Madox *v.* Jackson, 3 Atk. 406; Devaynes *v.* Robinson, 24 Beav. 98. But see Hayward *v.* Ovey, 6 Madd. 113.

[3] Hayward *v.* Ovey, 6 Madd. 113; Thorpe *v.* Jackson, 2 Y. & Col. 560.

[4] Scully *v.* Scully, 3 Ir. Eq. 494; Head *v.* Teynham, 1 Cox, 57; Munch *v.* Cockerell, 8 Sim. 219; Malone *v.* Geraghty, 2 Conn. & Laws. 249; Whittle *v.* Halliday, id. 430; Horrocks *v.* Ledsam, 2 Col. C. C. 208; Nelson *v.* Seaman, 6 Jur. (N. S.) 258.

[5] Bromley *v.* Holland, 7 Ves. 11; Knye *v.* Moore, 1 S. & S. 65; Reed *v.* O'Brien, 7 Beav. 32.

[6] Slade *v.* Rigg, 3 Hare, 35.

[7] Kirk *v.* Clark, Pr. Ch. 275.

[8] Dew *v.* McGachen, 15 Beav. 84.

R. Co., 123 N. Y. 37; Pennington *v.* Smith, 69 Fed. 188; Iowa & Cal. Land Co. *v.* Hoag, 132 Cal. 627; Bradford *v.* King, 18 R. I. 743; Peach Orchard Coal Co. *v.* Woodward, 105 Ky. 790. The contrary has been held in Iowa. Bangs *v.* Berg, 82 Iowa, 350. But see Hale *v.* Harris, 112 Iowa, 372.

§ 879. If a person holding a fiduciary relation is guilty of something more than a mere breach of trust or of civil obligation, as if he commits a *tort* or *delictum*, or a fraudulent or criminal act, he may be pursued alone, and his cotrustees need not be joined, nor even his confederates in the wrong.[1]

§ 880. The husband of a *feme covert* trustee is responsible, in the absence of statute exemptions, for breaches of trust committed by his wife before marriage as well as after, and he should be joined in the suit.[2]

§ 881. As a general rule, all the *cestuis que trust* must be before the court, in order that the rights of all parties in interest may be ascertained, and future litigation avoided; and this rule should be followed in all cases except when there has been a breach of trust with fraudulent intent. The trustees ought not to be twice vexed where it is possible to determine all the rights of the parties in one suit.[3] (*a*) But a bill by a part of

[1] Lingard *v.* Bromley, 1 V. & B. 117; Seddon *v.* Connel, 10 Sim. 86; Att. Gen. *v.* Wilson, 1 Cr. & Ph. 28; Walburn *v.* Ingilby, 1 M. & K. 77; Charity Corp. *v.* Sutton, 2 Atk. 406; Att. Gen. *v.* Brown, 1 Swanst. 265; Cunningham *v.* Pell, 5 Paige, 612; Gilchrist *v.* Stevenson, 9 Barb. 9; Miller *v.* Fenton, 11 Paige, 18.

[2] Palmer *v.* Wakeford, 3 Beav. 227; Moon *v.* Henderson, 4 Des. 459; Carroll *v.* Connet, 2 J. J. Marsh, 195; Elliott *v.* Lewis, 3 Edw. Ch. 40; Redwood *v.* Riddick, 4 Munf. 222.

[3] Pyncent *v.* Pyncent, 3 Atk. 571; Morrill *v.* Lawson, 2 Eq. Cas. Ab. 167; Manning *v.* Thesiger, 1 S. & S. 107; Adams *v.* St. Leger, 1 B. & B. 181; Hanne *v.* Stevens, 1 Vern. 110; Court *v.* Jeffrey, 1 S. & S. 105; Phillipson *v.* Gatty, 6 Hare, 26; Josling *v.* Karr, 3 Beav. 495; Piatt *v.* Oliver, McLean, 307; McKinley *v.* Irvine, 13 Ala .682; Cassiday *v.* McDaniel, 8 B. Mon. 519; Munch *v.* Cockerell, 8 Sim. 219, 231; Cunningham *v.* Pell, 5 Paige, 612. [Barrett *v.* Brown, 86 N. C. 556; Brokaw *v.* Brokaw, 41 N. J. Eq. 215; Speakem *v.* Tatem, 45 N. J. Eq. 388; Wier *v.* Simmons, 55 Wis. 637; Biron *v.* Scott, 80 Wis. 206; Alison *v.* Goldtree, 117 Cal. 545.]

(*a*) As the main object of the rule is to protect the trustee from a multiplicity of suits involving the same transactions in which the interests of the *cestuis* are similar, the mere omission of a *cestui* not called to the attention of the court will not render a decree void as to the trustee and the *cestuis* who were made parties. Alison *v.* Goldtree, 117 Cal. 545.

the *cestuis que trust* ought not to be dismissed, but it should stand for amendment and for summoning in of other parties.[1] *Cestuis* who will not join as plaintiffs should be made defendants.[2]

§ 882. But if a *cestui que trust* has assigned all his interest to a third person, so that he has nothing, he need not be made a party;[3] or if a *cestui que trust* is entitled to a distinct and aliquot share of an ascertained fund, he may maintain a bill against the trustees for that share without joining the *cestuis que trust* of the remaining fund.[4] This practice, however, is not encouraged,[5] and if the fund is not certain, but is to be ascertained by an account, all the *cestuis que trust* interested in it must be made parties.[6]

§ 883. If a *cestui que trust* is absent, and all the means of compelling him to appear have been exhausted, the suit may proceed in his absence.[7] So if he is a merely passive party, and the disposition of the property is within the power of those before the court.[8] But if the primary object of the bill is to affect the right of the absent *cestui que trust*, or to charge it with debts or liens, the court will not make a decree in his absence, although the *legal* title is in the parties before the court.[9] In such cases decrees have been made, reserving the right of the

[1] Howard *v.* Gilbert, 39 Ala. 726.

[2] Martin *v.* Parnell, 4 Del. Ch. 249.

[3] Goodson *v.* Ellison, 3 Russ. 583.

[4] Smith *v.* Snow, 3 Madd. 10; Perry *v.* Knott, 5 Beav. 293; Hughson *v.* Cookson, 3 Y. & Col. 378; Hutchinson *v.* Townsend, 2 Keen, 675; Hunt *v.* Peacock, 11 Jur. 555; Sandford *v.* Jodrell, 2 Sim. & Gif. 176; Montgomerie *v.* Bath, 3 Ves. Jr. 560; Piatt *v.* Oliver, 2 McLean, 307.

[5] Ibid.

[6] Lenaghan *v.* Smith, 2 Phil. 301; Alexander *v.* Mullins, 2 R. & M. 568; Eldridge *v.* Putnam, 46 Wis. 205. [Howth *v.* Owens, 29 Fed. 722; Conolly *v.* Wells, 33 Fed. 205.]

[7] Downs *v.* Thomas, 7 Ves. 206; Phillips *v.* Buckingham, 1 Vern. 228.

[8] Rogers *v.* Linton, Bunb. 200; Willats *v.* Busby, 5 Beav. 193.

[9] Brown *v.* Blount, 2 R. & M. 83; Holmes *v.* Bell, 2 Beav. 298; Pell *v.* Brown, 2 Bro. Ch. 276; Willats *v.* Busby, 5 Beav. 193.

absent *cestui que trust* to apply to have it amended,[1] or conveyances have been ordered without prejudice to the rights of *cestuis que trust* who could not be found.[2]

§ 884. Where some of the trustees have committed a breach of trust, a suit may be maintained against them by their *co-trustees* for restoration of the property, without joining the *cestuis que trust*, except upon a final accounting, although they also may have a suit for the breach of trust. This rule has been established and acted upon by reason of its great convenience;[3] but where some of the *cestuis que trust* have procured or concurred in a breach of the trust by some of the trustees, such *cestuis que trust* must be joined in a suit for the correction of the wrong.[4]

§ 885. Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and the others;[5] so a small number may be made defendants

[1] Att. Gen. *v.* Baliol Coll., 9 Mod. 407.

[2] Willats *v.* Busby, 5 Beav. 193.

[3] Franco *v.* Franco, 3 Ves. 75; Bridgman *v.* Gill, 24 Beav. 302; Peake *v.* Ledger, 4 De G. & Sm. 137; Wood *v.* Brown, 34 N. Y. 337; McGregor *v.* McGregor, 35 N. Y. 218; Hughes *v.* Key, 20 Beav. 395; Groom *v.* Booth, 1 Dr. 657; May *v.* Selby, 1 Y. & Col. Ch. 235; Baynard *v.* Woolley, 20 Beav. 583; Noble *v.* Meymott, 14 Beav. 471; Horsely *v.* Fawcett, 11 Beav. 565; Bridget *v.* Himes, 1 Coll. 72; Meyer *v.* Montriou, 9 Beav. 521.

[4] Jesse *v.* Bennett, 6 De G., M. & G. 609. But see Meyer *v.* Montriou, 9 Beav. 521; Greenwood *v.* Wakeford, 1 Beav. 376; Payne *v.* Collier, 1 Ves. Jr. 170; Fuller *v.* Knight, 6 Beav. 205; Dew *v.* McGachen, 15 Beav. 84; Shook *v.* Shook, 19 Barb. 653; Abbott *v.* Reeves, 49 Penn. St. 494; Jacob *v.* Lucas, 1 Beav. 436; Griffith *v.* Vanheythuysen, 9 Hare, 85; Hall *v.* Lock, 2 Y. & C. Ch. 631.

[5] Bromley *v.* Smith, 1 Sim. 8; Weld *v.* Bonham, 2 S. & S. 91; Lloyd *v.* Loaring, 6 Ves. 773; Taylor *v.* Salmon, 4 M. & C. 134; Walworth *v.* Holt, id. 619; Cockburn *v.* Thompson, 16 Ves. 321; Preston *v.* Grand, &c. Dock Co., 11 Sim. 327; Att. Gen. *v.* Heelis, 2 S. & S. 67; Chaney *v.* May, Pr. Ch. 529; Manning *v.* Thesiger, 1 S. & S. 106; Harvey *v.* Harvey, 4 Beav. 215; Hickens *v.* Congreve, 4 Russ. 562; William *v.* Salmond, 2 K. & J. 463; 1 Dan. Ch. Prac. 256 (4th Am. ed.). [See 1 Dan. Ch. Prac. (6th Am. ed.),

as representatives of all the others for the purpose of determining their rights;[1] but in such cases all the trustees must be joined.[2] If all the *cestuis que trust* must join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but in the absence of any, the court will proceed to bind the rights of all if possible.[3] In order that a few may sue, or be sued, in behalf of a large number, it must appear that all have the same beneficial interest; for if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted.[4] How large the number must be in order to dispense with calling them all before the court has never been determined. Where there were twenty-one *cestuis que trust*, the court required them all to be joined;[5] but in one case where the *cestuis que trust* were twenty-six in number, and in another twenty-seven, and bills were filed nearly twenty years after the institution of the trusts, a few were allowed to maintain bills in behalf of the whole for the execution of the trusts.[6]

§ 886. If a *cestui que trust* desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as coplaintiff, and the trustee is bound to comply, on being indemnified against the costs. If the trustee refuses im-

243, n. (*a*); Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 68 Ill. App. 666; First Nat. Ins. Co. *v.* Salisbury, 130 Mass. 303.]

[1] Adair *v.* New River Co., 11 Ves. 429, 443–445; City of London *v.* Richmond, 2 Vern. 421; Meux *v.* Maltby, 2 Swanst. 277; Milbank *v.* Collier, 1 Coll. 237; Harvey *v.* Harvey, 4 Beav. 215; 5 Beav. 134; Bunnett *v.* Foster, 7 Beav. 540.

[2] Holland *v.* Baker, 3 Hare, 68.

[3] Meux *v.* Maltby, 2 Swanst. 285; Powell *v.* Wright, 7 Beav. 449.

[4] Att. Gen. *v.* Heelis, 2 S. & S. 76; and cases cited; T. & R. 297; Gray *v.* Chaplin, 2 S. & S. 267; Bainbrigge *v.* Burton, 2 Beav. 539; Long *v.* Yonge, 2 Sim. 385; Richardson *v.* Larpent, 2 Y. & Col. Ch. 507; Newton *v.* Egmont, 4 Sim. 574; 5 Sim. 130, 137; Evans *v.* Stokes, 1 Keen, 24; 1 Dan. Ch. Prac. 242 (4th Am. ed.).

[5] Harrison *v.* Stewardson, 2 Hare, 533.

[6] Smart *v.* Bradstock, 7 Beav. 500; Bateman *v.* Margerison, 6 Hare, 496.

properly, he may be made a defendant, (*a*) and will be deprived of his costs, or he may be ordered to pay costs.[1] If the trustee is in no default, he may have his costs. If the trustees and *cestuis que trust* are sued by a stranger, they ought to join in their answer and defence. The court has no means of compelling them to join; but if they split in their defence, only one set of costs will be allowed against the plaintiff, and they may have to bear their own costs.[2]

§ 887. In suits between *cestuis que trust inter se*, or *cestuis que trust* and trustees, all the parties in the same interest, whether

[1] Reade *v.* Sparkes, 1 Moll. 8; Hughes *v.* Key, 20 Beav. 395. Browne *v.* Lockhart, 10 Sim. 426, seems to be contrary, but is doubted.

[2] Reade *v.* Sparkes, 1 Moll. 10; Woods *v.* Woods, 5 Hare, 229; Farr *v.* Sherriffe, 4 Hare, 528; Van Sandau *v.* Moore, 1 Russ. 441, reversing 2 S. & S. 509; Cuddy *v.* Waldron, 1 Moll. 14; Homan *v.* Hague, id.; Galway *v.* Butler, id. 13.

(*a*) See Sharpe *v.* San Paulo Brazilian Ry. Co., 8 Ch. 597; Yeatman *v.* Yeatman, 7 Ch. Div. 210; Meldrum *v.* Scorer, 56 L. T. 471; Gandy *v.* Gandy, 30 Ch. Div. 57; Bailey *v.* Selden, 112 Ala. 593; First Nat. Ins. Co. *v.* Salisbury, 130 Mass. 303; Robinson *v.* Adams, 81 App. Div. (N. Y.) 20, 179 N. Y. 558; Butler *v.* Butler, 58 N. Y. S. 1094; Webb *v.* Vermont Cen. R. Co., 9 Fed. 793; Plow Co. *v.* Bank, 59 Kan. 38; West *v.* Gribben, 62 S. W. 869 (Ky. 1901).

If the trustee is not a plaintiff he must be joined as defendant even though he has no active duties. Tavenner *v.* Barrett, 21 W. Va. 656, 673; Harlow *v.* Mister, 64 Miss. 25; Moyse *v.* Cohn, 76 Miss. 590. See also Caylor *v.* Cooper, 165 Fed. 757. Thus the trustee is a necessary party to a proceeding by bondholders to foreclose the mortgage which he holds in trust or to protect the mortgaged property from waste. Barry *v.* Mo., &c. Ry. Co., 22 Fed. 631. But as the trustee is not a party to the contract between the bondholders and the obligor, he is not a necessary party to a proceeding which does not affect the security. Spies *v.* Chicago, &c. R. Co., 30 Fed. 397.

Where the resignation of a sole trustee has been accepted and no new trustee has been appointed or the appointee has declined to accept, it has been held that, the legal title being in abeyance, the *cestuis* could bring suit in equity to protect the trust property. Zimmerman *v.* Makepeace, 152 Ind. 199. And in a similar case it has been held that a creditor who was entitled to collect his claim out of the trust property might maintain his bill for that purpose against all the *cestuis*. Hughes *v.* Brown, 88 Tenn. 578.

cestuis que trust or trustees, should join, either as plaintiffs or defendants.[1]

§ 888. Trustees ought always to join in their answer; if they separate in their defence, only one set of costs will be given,[2] which will be divided equally if both trustees are in fault,[3] but if only one trustee is in fault the costs will be given to the trustee who is without fault.[4] But if there is good reason for severing in their defence, as where one trustee has a separate or personal interest independent of the others, or where they reside at such a distance that it is impossible for them to act together, or where any proper reasonable ground exists, the trustees will be allowed to answer severally, and each one may be allowed his costs.[5] If some of the trustees are properly made plaintiffs and others defendants, in order to settle the rights of the parties, each may have costs; but if one is made defendant by reason of his misconduct, costs will not be allowed to him.[6]

§ 889. A *feme covert*, entitled to sue for her separate estate, cannot join with her husband, if he sets up any adverse claim or interest. In such case, she must sue by her next friend, and make her husband a defendant, and he will be entitled to his costs.[7] The same rule applies in relation to the execution of a

[1] Hosking *v.* Nicholls, 1 Y. & Col. Ch. 478.

[2] Nicholson *v.* Falkiner, 1 Moll. 559; Gaunt *v.* Taylor, 2 Beav. 347; Shovelton *v.* Shovelton, 32 Beav. 143.

[3] Course *v.* Humphrey, 26 Beav. 402; Att. Gen. *v.* Wyville, 28 Beav. 464.

[4] Young *v.* Scott, 1 Jones, Ir. Exch. 71; Att. Gen. *v.* Cuming, 2 Y. & Col. Ch. 156; Webb *v.* Webb, 16 Sim. 55; Cummins *v.* Bromfield, 3 Jur. (N. S.) 657.

[5] Gaunt *v.* Taylor, 2 Beav. 346; Aldridge *v.* Westbrook, 4 Beav. 212; Cummins *v.* Bromfield, 3 Jur. (N. S.) 657; Dudgeon *v.* Cormley, 2 Conn. & Laws. 422; Nicholson *v.* Falkiner, 1 Moll. 560; Wiles *v.* Cooper, 9 Beav. 294; Farr *v.* Sherriffe, 4 Hare, 528; Barry *v.* Woodham, 1 Y. & Col. 538, and cases cited; Reade *v.* Sparkes, 1 Moll. 10; Kempf *v.* James, C. P. Coop. 13, 1837, 1838; Walsh *v.* Dillon, 1 Moll. 13.

[6] Hughes *v.* Key, 20 Beav. 395. [*Infra*, § 902.]

[7] Thorby *v.* Yates, 1 Y. & Col. Ch. 438; 1 Dan. Ch. Prac. 89, 90, 178–189 (4th Am. ed.).

power by a married woman.[1] But if the husband has no separate or adverse interest, he may be joined with the wife as coplaintiff.[2] If a married woman is sued in respect to her separate estate, she may obtain an order to answer separately;[3] but the mere fact that a woman is living apart from her husband does not entitle her to answer separately.[4]

§ 890. If a bill is filed for an account, and the plaintiff seeks relief against wilful default of the trustees, he must allege in his bill some specific act of wilful misconduct,[5] and pray consequential relief; and at the hearing he must prove the act alleged, or at least establish a case for inquiry.[6] (*a*) If, at the hearing, the common accounts only are directed, it is too late to ask relief, on a hearing for further directions, against any wilful act that may appear accidentally from other inquiries;[7] and a trustee cannot be declared liable for wilful default upon a common order made at chambers for the administration of the trust estate.[8] But if a bill prays for an account with *interest*, and at the original hearing an account is directed, and in the course of taking the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing for further directions.[9] And if relief against a breach

[1] Hope *v.* Fox, 1 John. & H. 456.

[2] Beadmore *v.* Gregory, 2 Hem. & Mil. 491.

[3] Norris *v.* Wright, 14 Beav. 303.

[4] Garey *v.* Whittingham, 5 Beav. 270; Barry *v.* Woodham, 1 Y. & Col. 538.

[5] Bond *v.* McWatty, 14 Ir. Eq. 74.

[6] Sleight *v.* Johnson, 3 K. & J. 292.

[7] Coope *v.* Carter, 2 De G., M. & G. 292.

[8] *Re* Fryer, 3 K. & J. 317; Partington *v.* Reynolds, 4 Drew. 253; *Re* Delavante, 6 Jur. (N. S.) 118; Brooker *v.* Brooker, 3 Sim. & Gif. 475.

[9] Shaw *v.* Turbett, 13 Ir. Eq. 476.

(*a*) "A trustee is obviously under an obligation to account with his *cestui que trust* for the trust property or its income; but this obligation is merely equitable, and therefore a bill by the *cestui que trust* against his trustee is never a bill for an account in point of jurisdiction." Dean C. C. Langdell, in 2 Harv. L. Rev. 266.

of trust is prayed for, and at the original hearing the usual accounts only are directed, but with an inquiry as to who are the parties interested, it is not too late to ask relief against the breach of trust on the hearing for further directions, as before that time the court cannot deal with the question.[1] In a redemption suit it is not necessary that the plaintiff should charge wilful default; nor is the case altered if the deed, though in substance a security, is in form a deed of trust.[2] The general rule is, that a plaintiff who seeks to charge a trustee with a breach of trust is bound to state a clear case upon his bill. Therefore acts of a trustee which may, or may not, be breaches of trust must be so alleged that they necessarily appear to be breaches, or a demurrer will be sustained.[3] The presumption is in favor of the performance of his duty by the trustee; the plaintiff must therefore allege and prove affirmatively a breach of the trust.[4]. The trustee will not be liable for breaches of trust not alleged in the bill.[5] But if the trustee commits breaches of trust of the same nature as those alleged in the bill, relief may be given against them without an amendment to the bill.[6] A bill brought by creditors of A. to hold an income which might be used for the support of A.'s son, so far as reasonably needful for that purpose, and which does not show the amount of the income, nor what is needed for said purpose, is insufficient. The facts must be stated on which a judgment can be formed as to existence of a surplus.[7]

§ 890 *a*. In a contest between two sets of trustees, if no damage to beneficiaries is alleged, equity will not grant an injunc-

[1] Pattenden *v.* Hobson, 1 Eq. R. 28.

[2] O'Connel *v.* O'Callagan, 15 Ir. Eq. 31.

[3] Att. Gen. *v.* Norwich, 2 M. & Cr. 406, 422; Maccubbin *v.* Cromwell, 7 G. & J. 157; McGinn *v.* Shaeffer, 7 Watts, 412; Dial *v.* Dial, 21 Tex. 529.

[4] Ibid.

[5] Smith *v.* Smith, 4 Johns. Ch. 45; Cooper *v.* Cooper, 1 Halst. Ch. 9.

[6] Harrison *v.* Mock, 10 Ala. 196; Coope *v.* Carter, 2 De G., M. & G. 292; Sleight *v.* Johnson, 3 K. & J. 292.

[7] Phelps *v.* Phelps, 145 Mass. 416, 419.

tion but will leave the parties to a *quo warranto*.[1] Ejectment should be brought by the trustee where there is one in being holding the title in remainder;[2] but if the trustee is dead, a *cestui* entitled to the possession may bring ejectment against a stranger without title, and where a *cestui* is wrongfully kept out of possession by the trustee, he may bring ejectment even against the trustee; this is Georgia law.[3] But the general rule is that only the person holding the legal title can bring ejectment;[4] and when necessary for the *cestui* to sue at law to protect the trust property he should bring the action in the name of the trustee.[5] The trustee cannot in general bring ejectment against the *cestui* in possession,[6] nor in any case where the facts raise a presumption that he has surrendered the legal title to the *cestui*. Whether he can bring this action against the grantor in a deed of trust in the nature of a mortgage, *quære*.[7]

[1] Harris *v.* Pounds, 64 Ga. 121.
[2] Ford *v.* Cook, 73 Ga. 215.
[3] Glover *v.* Stamps, 73 Ga. 209.
[4] Siemers *v.* Schrader, 88 Mo. 23.
[5] Com'rs of Somerville *v.* Johnson, 36 N. J. Eq. 211.
[6] Id.; Douthitt *v.* Stinson, 73 Mo. 199.
[7] Davis *v.* Bessehl, 88 Mo. 439.

CHAPTER XXX.

COSTS.

§ 891. Costs as between strangers and trustees.
§ 892. Costs are under the control of courts of equity.
§ 893. Therefore no general rule can be stated.
§ 894. Trustees who faithfully perform their duty may generally have their costs as between solicitor and client.
§ 895. If the trustee is a solicitor he can make no charge for professional services; but the court will order costs to be taxed in the usual manner and leave the proper officer to apply them.
§ 896. Where suits are brought to create a trust fund, the trustees may be ordered to pay costs, or they will be allowed costs only as between party and party.
§ 897. Where a trustee neglects to appear or to ask for his costs.
§ 898. Where a trustee may have his costs, although the decree is against him.
§ 899. Trustees may have their costs, whether plaintiffs or defendants.
§§ 900, 901. Where the trustees are in fault, they cannot have costs.
§ 902. If trustees commit a breach of trust, they must pay the costs of correcting it.
§ 903. If trustees are refused their costs, or are ordered to pay costs, they cannot have an allowance for them in their accounts.
§ 903 *a*. Out of what fund costs will be decreed.

§ 891. THE general rule is, that if trustees bring suits against strangers, or strangers bring suits against trustees respecting the trust fund, costs will be awarded against the losing party, as in other suits.[1] The rule, however, is slightly varied in some cases. Thus in England, if an executor sues upon a cause of action accruing during his testator's lifetime, he is not liable for costs if he fails; but if he is sued, and judgment is awarded

[1] Westley *v.* Williamson, 2 Moll. 458; Burgess *v.* Wheate, 1 Ed. 251; Edwards *v.* Harvey, G. Coop. 40; Hill *v.* Magan, 2 Moll. 46; Elsey *v.* Lutyens, 8 Hare, 164; Dunlop *v.* Hubbard, 19 Ves. 205; Edenborough *v.* Canterbury, 2 Russ. 94; Brodie *v.* St. Paul, 1 Ves. Jr. 326.

against him, he must pay costs like any other defendant.[1] And this rule has been followed in some of the United States.[2] But even where a modified rule prevails, courts may impose costs for bringing any improper suits by executors or others suing in a fiduciary capacity.[3] If executors or trustees are compelled to pay costs, the amount paid may be allowed to them in their accounts, if the litigation was just and proper;[4] but if the litigation was improper and vexatious, courts may refuse to allow such charges.[5] It is the duty of an executor to present the will of his testator to the court of probate for allowance. If an issue of *devisavit vel non* is raised upon the will, it is the duty of the

[1] 2 Wms. Ex'rs, 1718, 1792.

[2] Justices *v.* Haygood, 20 Ga. 847; Knox *v.* Bigelow, 15 Wis. 415; Jamison *v.* Lindsay, 1 Bail. 79; Buckels *v.* Carter, 6 Rich. 106; Wright *v.* Wright, 2 McCord, Ch. 185; Farrier *v.* Cairns, 5 Ohio, 45; Knowles *v.* Knowles, 86 Ill. 1; Harrison *v.* Warner, 1 Blackf. 385; Caperton *v.* Callson, 1 J. J. Marsh. 396; Hanson *v.* Jacks, 22 Ala. 549; Callender *v.* Keystone, M. Ins. Co., 23 Penn. St. 471; overruling Ewing *v.* Furness, 13 id. 532; Shaw *v.* Conway, 7 id. 136; Muntorff *v.* Muntorff, 2 Rawle, 180. In New York, trustees and executors must pay costs if they fail. Finley *v.* Jones, 6 Bard. 229; Rose *v.* Rose, 28 N. Y. 184; 2 R. S. 615, § 17. The law, as stated in Ketchum *v.* Ketchum, 4 Cow. 87, is changed. In Virginia, executors pay costs like other parties. 2 Lomax Ex'rs, 38.

[3] 2 Wms. Ex'rs, 1718, 1792; Hanson *v.* Jacks, 22 Ala. 549; Alexander *v.* Alexander, 5 Ala. 517; Savage *v.* Dickson, 16 Ala. 260; Roosevelt *v.* Ellithorp, 10 Paige, 415; Waterman *v.* Cochran, 2 Vt. 699.

[4] Hardy *v.* Call, 16 Mass. 530; Williams *v.* Mattocks, 3 Vt. 189; Connally *v.* Pardon, 1 Paige, 291; Long *v.* Israel, 9 Leigh, 596; Garner *v.* Strode, 5 Lit. 314; Moses *v.* Murgatroyd, 1 Johns. Ch. 473; Dyer *v.* Potter, 2 id. 152; Roosevelt *v.* Ellithorp, 10 Paige, 415; Arnoux *v.* Steinbrenner, 1 id. 82; Delafield *v.* Caldew, id. 139; Collins *v.* Hoxie, 9 id. 81; *Ex parte* Croxton, 5 De G. & Sm. 432; Gage *v.* Rogers, 1 Strobh. Eq. 370; Capehart *v.* Huey, 1 Hill, Eq. 405; Knox *v.* Picket, 4 Des. 92; Mumper's App., 3 W. & S. 413; Gouverneur *v.* Titus, 1 Edw. Ch. 477; Carow *v.* Mowatt, 2 Edw. Ch. 57; Day *v.* Day, 2 Green, Ch. 549; Morton *v.* Barrett, 22 Maine, 257; Miles *v.* Bacon, 4 J. J. Marsh. 468; Peyton *v.* McDowell, 3 Dana, 314; Hill *v.* Morgan, 2 Moll. 460; Lowrie's App., 1 Grant Cas. 373; Graver's App., 58 Penn. St. 189; Casey's Est., 47 id. 424; McElhenny's App., 46 id. 347. [Weil *v.* Lehmayer, 74 Md. 81.]

[5] Armstrong's Est., 6 Watts, 236; Callighan *v.* Hall, 1 S. & R. 211; Getman *v.* Beardsley, 2 Johns. Ch. 274; Davis *v.* Davis, 2 Hill, Eq. 377. [Vaccaro *v.* Cicalla, 89 Tenn. 63; *In re* Morton's Estate, 70 A. 680 (N. J. Eq. 1908); *In re* Beddoe, [1893] 1 Ch. 547.]

executor to take care that the issue is properly tried, and he will be allowed his costs out of the estate even though he may fail.[1] And so it is within the discretion of the court in some States to allow the opposite party costs out of the fund. Thus the executor must present the will for probate, and he should be allowed his reasonable costs for vindicating the action of the testator in making a will. So the heirs are not to be disinherited except upon clear proof of a will. If there is any doubt upon that question or issue, they are entitled to a fair trial; and the court may in its discretion allow them the costs of trial out of the estate. And costs as between solicitor and client may be allowed in such cases to both parties out of the fund;[2] but if there is any misconduct on the part of the executor, he may be compelled to pay costs; and so, if there is no reasonable ground to dispute the will, the heirs, as contestants, may be ordered to pay costs.[3] In all cases where trustees are compelled to pay costs in suits with strangers, the costs are taxed as between party and party, and not as between attorney and client.[4] If trustees are brought before the court as necessary parties by strangers, they are entitled to their costs if they disclaim all interest, or yield;[5] but if they contest the suit they must upon failure pay costs like other parties.[6] Though if they make a

[1] Drew *v.* Wakefield, 54 Maine, 291; Abbott *v.* Bradstreet, 3 Allen, 587; Perrine *v.* Applegate, 1 N. J. Eq. 531; Collins *v.* Townley, 21 id. 353.

[2] Ibid. [For a case where heirs who were adjudged not to be interested beneficially were allowed their costs and expenses out of the trust fund, see Barnard *v.* Adams, 58 Fed. 313.]

[3] Woodbury *v.* Obear, 7 Gray, 472; Nickerson *v.* Buck, 12 Cush. 343; Day *v.* Day, 2 Green, Ch. 549; Townshend *v.* Brooke, 9 Gill, 90; Scott's Est., 9 Watts & S. 98; Perrin *v.* Applegate, 1 McCarter, 531; Collins *v.* Townley, 21 N. J. Eq. 353. But a different rule prevails in some States. See Mumper's App., 3 W. & S. 443; Royer's App., 13 Penn. St. 569; Verner's Est., 6 Watts, 250.

[4] Mohun *v.* Mohun, 1 Swanst. 201; Saunders *v.* Saunders, 3 Jur. (N. S.) 727; McKern *v.* Handy, 4 Md. Ch. 234; Ralston *v.* Telfair, 2 Dev. & Bat. 414.

[5] Bartle *v.* Wilkin, 8 Sim. 238; Brown *v.* Lockhart, 10 id. 416.

[6] Rashley *v.* Masters, 1 Ves. Jr. 201.

claim, by way of submission to the court whether they have any, they may have their costs.[1]

§ 892. Courts of equity have a discretion in respect to the costs of proceedings before them. And this discretion cannot be reviewed.[2] No party is entitled to costs except by a special order.[3] A stranger may fail in a suit against a trustee, and yet the court may not order costs; and the fact that the defendant was a trustee will not control the discretion of the court.[4] So a party may have a decree in his favor, and yet be ordered to pay the costs.[5] In England, a mortgagee is entitled to his costs, whether the suit is to foreclose or redeem the mortgage. So, where trustees are necessary parties, as mortgagees, to such suits, whether they were original parties to the mortgage, or some interest has been subsequently assigned to them, they are entitled to their costs.[6] If a creditor files a bill against an executor for an account and payment of a debt, the executor will not be decreed to pay costs personally, if the assets are insufficient to pay both debts and costs,[7] unless he had misconducted himself and misapplied the assets.[8] He may even retain his own costs out of the assets,[9] though formerly the practice was different.[10]

[1] Ibid.; Wood *v.* Vanderburg, 6 Paige, 278; Morrell *v.* Dickey, 1 Johns. Ch. 153.

[2] Taylor *v.* Root, 48 N. Y. 687.

[3] Kreits *v.* Frost, 55 Barb. 474.

[4] Brodie *v.* St Paul, 1 Ves. Jr. 326; State *v.* Tolan, 33 N. J. L. 195; Kreits *v.* Frost, 55 Barb. 474.

[5] Armstrong *v.* Zane, 12 Ohio, 287; Coleman *v.* Ross, 46 Penn. St. 180; Gray *v.* Dougherty, 25 Cal. 266.

[6] Brown *v.* Lockhart, 10 Sim. 426; Wetherill *v.* Collins, 3 Madd. 255; Bartle *v.* Wilkin, 8 Sim. 238. But see Horrocks *v.* Ledsam, 2 Col. C. C. 208.

[7] Twistleton *v.* Thelwell, Hard. 165; Uvedale *v.* Uvedale, 3 Atk. 119; Davy *v.* Seys, Mose. 204; Morony *v.* Vincent, 2 Moll. 461.

[8] Jefferies *v.* Harrison, 1 Atk. 468; Bennett *v.* Atkins, 1 Y. & Col. 247; Wilkins *v.* Hunt, 2 Atk. 151.

[9] Bennett *v.* Going, 1 Moll. 529; Tipping *v.* Power, 1 Hare, 405; Ottley *v.* Gilby, 8 Beav. 603; Tanner *v.* Dancey, 9 Beav. 339.

[10] Humph *v.* Morse, 2 Atk. 408; Sandys *v.* Watson, id. 80; Adair *v.* Shaw, 1 Sch. & Lef. 280.

§ 893. It is difficult to state, as a general proposition, any rule as to costs in suits between *cestuis que trust* and trustees in relation to the trust fund. Courts of equity, having almost exclusive jurisdiction over such suits, have at the same time an unlimited discretion over the costs of them; and decrees as to the costs are made in a great variety of forms, to meet every degree of fidelity or neglect. The cases are ranged under four principal heads: (1) Where trustees are allowed their costs; (2) Where they are not allowed their costs; (3) Where costs are imposed upon them; and (4) Where they are allowed costs on one part of the case, and are refused their costs or are ordered to pay the costs, upon some other part of the case.

§ 894. The general rule is, that trustees shall have their costs either out of the trust fund, or from the *cestuis que trust* personally.[1] (*a*) If there is a fund within the control of the court, they

[1] Amand *v.* Bradbourne, 2 Ch. Cas. 138; Mohun *v.* Mohun, 1 Swanst. 201; Pride *v.* Fooks, 2 Beav. 437; Whitmarsh *v.* Robertson, 1 Y. & Col. Ch. 717; Hall *v.* Hallett, 1 Cox, 141; Att. Gen. *v.* London, 3 Bro. Ch. 171; Coventry *v.* Coventry, 1 Keen, 758; Curteis *v.* Candler, 6 Madd. 123; Taylor *v.* Glanville, 3 id. 176; Rashley *v.* Masters, 1 Ves. Jr. 201; Sammes *v.* Rickman, 2 Ves. Jr. 38; Massett *v.* Pocock, t. Finch. 136; Rocke *v.* Hart, 11 Ves. 58; Landen *v.* Green, Barn. 389; Norris *v.* Norris, 1 Cox, 183; 1 Eq. Cas. Ab. 125; Hosack *v.* Rogers, 9 Paige, 463; Irving *v.* De Kay, id. 533; Minuse *v.* Cox, 5 Johns. Ch. 451; Graver's App., 50 Penn. St. 189; 2 Dan. Ch. Prac. 1411 (4th Am. ed.). And the same general rules apply to executors or administrators brought into court. Jewett *v.* Woodward, 1 Edw. 200; Day *v.* Day, 2 Green, Ch. 549; Morton *v.* Barrett, 22 Maine, 257; McKim *v.* Handy, 4 Md. Ch. 234; Townshend *v.* Brooke, 9 Gill, 90; Glass *v.* Ramsey, id. 459; Capehart *v.* Huey, 1 Hill, Eq. 405; Hester *v.* Hester, 3 Ired. Eq. 9; Scott's Est., 9 W. & S. 98; Burr *v.* McEwen, 1 Baldw. C. C. 154; Bendall *v.* Bendall, 24 Ala. 295; Atcheson *v.* Robertson, 4 Rich. Eq. 39; Keeler *v.* Keeler, 3 Green (N. J.) 267. Reasonable costs of parties properly before the court to litigate a question as to the parties entitled to receive a legacy for charitable purposes, when the right was doubtful, will be allowed out of the fund. Bliss *v.* Am. Bible Soc., 3 Allen, 334. [Barnard *v.* Adams, 58 Fed. 313.]

(*a*) In the allowance or disallowance of costs and counsel fees to a trustee out of the trust estate and in ordering a trustee individually to pay costs, the courts proceed upon principle that he should be reim-

may have their costs as between solicitor and client.[1] Where there is no fund within control of the court, if the *cestuis que trust* bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the *cestuis que trust* personally, to be taxed as between solicitor and client.[2] The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client for this purpose. So, if it appears to the court by the pleadings or otherwise that they have sustained charges and expenses beyond the costs of the suit, as between solicitor and client, the court will order such further expenses properly incurred to be paid to them; but such order will not embrace the costs and expenses of other suits, unless specially mentioned.[3]

[1] Mohun *v.* Mohun, 1 Swanst. 201; Moore *v.* Frowd, 3 M. & C. 49. [Andrews *v.* Barnes, 39 Ch. D. 133.]

[2] Att. Gen. *v.* Cuming, 2 Y. & Col. Ch. 155; Edenborough *v.* Canterbury, 2 Russ. 112; Downing *v.* Marshall, 37 N. Y. 380. [*In re* Bosworth, 58 L. J. Ch. 432.]

[3] Payne *v.* Little, 27 Beav. 83; Hall *v.* Laver, 1 Hare, 577; Amand *v.* bursed all the expense to which he has been put without his own fault by reason of his being a trustee, Estate of Cole, 102 Wis. 1, 12; Mitau *v.* Roddan, 149 Cal. 1; Chisolm *v.* Hamersley, 100 N. Y. S. 38, 114 App. Div. 563; Steinway *v.* Steinway, 98 N. Y. S. 99, 112 App. Div. 18; Thome *v.* Allen, 70 S. W. 410 (Ky. 1902); but should not be allowed to throw upon the trust estate or the *cestuis* costs of proceedings instituted or carried on for his individual purposes or caused by his misconduct as trustee or which he ought to have avoided in the proper performance of his duty. See cases cited *infra*. The whole matter is largely within the discretion of the courts, which are guided by the circumstances of each case.

§ 895. If the trustee, or one of the trustees, is a solicitor, he can make no professional charge against the trust fund although he may have conducted the defence;[1] but the court will nevertheless order costs as between solicitor and client, and leave them to be taxed by the proper officer, according to the rules of law, upon the proper vouchers presented to him.[2]

§ 896. But where plaintiffs bring a bill against defendants for the purpose of *creating a trust fund*, — as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands in trust for the plaintiffs,[3] — the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.[4]

§ 897. Where a trustee neglected to appear at the hearing, and a decree *nisi* was made against him, but a rehearing was obtained upon paying the costs of the day, the court ordered costs for the trustee, saying that the payment of the costs of the day makes the trustee *rectum in curia*, and as he would have been entitled to his costs on the first hearing, he now stands in the same situation.[5] But if a trustee neglects to ask for his costs, and a final decree is passed, he cannot have a rehearing upon the question of costs alone, nor can he obtain an order for costs upon a simple petition in the case.[6]

Bradbourne, 2 Ch. Cas. 138; Worrall *v.* Harford, 8 Ves. 8; 2 Dan. Ch. Prac. 1411 (4th Am. ed.); Downing *v.* Marshall, 37 N. Y. 380.

[1] *Ante*, § 432, and cases cited; Meyer *v.* Galluchat, 6 Rich. 1; Moore *v.* Frowd, 3 M. & Cr. 45; Lincoln *v.* Winsor, 9 Hare, 158; Broughton *v.* Broughton, 5 De G., M. & G. 160. [But see *infra*, § 919, note, as to allowances for extraordinary services.]

[2] York *v.* Brown, 1 Col. C. C. 260. And see *Re* Taylor, 23 L. J. Ch. 857; Bainbrigge *v.* Blair, 8 Beav. 588; Cradock *v.* Piper, 1 Mac. & G. 688.

[3] See *ante*, Chap. VI.

[4] Mohun *v.* Mohun, 1 Swanst. 201; Saunders *v.* Saunders, 3 Jur. (N. S.) 728; Gaylords *v.* Kelshaw, 1 Wall. 81.

[5] Norris *v.* Norris, 1 Cox, 183.

[6] Colman *v.* Lord, 2 Cox, 206.

§ 898. Courts always scrutinize transactions between parent and children, and where a trustee refused to convey to a child or parent until the transaction could be examined, he was allowed his costs,[1] and so if the breach of trust is very trivial, he may be allowed his costs.[2] If a person named as trustee is made defendant in a suit, and by his answer disclaims, he will be allowed his costs as a party, but not as between solicitor and client; for, not being a trustee, he must be an ordinary party:[3] but if his answer is unreasonably long, he will have only the costs of a disclaimer.[4] But the plaintiff may limit the extent of an answer required from a defendant; and if he does not limit it, but requires an answer to the whole bill, costs of the whole answer will be allowed.[5]

§ 899. The general rule, that trustees are to have their costs, applies whether they are plaintiffs or defendants;[6] and so all persons whom it is necessary for the trustees to bring before the court as parties, in order to obtain a valid decree to protect them in the discharge of their duties in disposing of the trust fund, will be entitled to their costs.[7] But this rule is under the control of the court, and the conduct of the parties will be carefully scrutinized; and if trustees appear in a suit when it is unnecessary, they will not be allowed their costs.[8] So if they in-

[1] King *v.* King, 1 De G. & J. 663, 671.

[2] Fitzgerald *v.* Pringle, 2 Moll. 534; Bailey *v.* Gould, 4 Y. & Col. 221; Knott *v.* Cottee, 16 Beav. 77; Cotton *v.* Clark, id. 134.

[3] Hickson *v.* Fitzgerald, 1 Moll. 14; Norway *v.* Norway, 2 M. & K. 278, overruling Sherratt *v.* Bentley, 1 R. & M. 655.

[4] Martin *v.* Persse, 1 Moll. 146.

[5] Aldridge *v.* Westbrooke, 4 Beav. 213.

[6] Curteis *v.* Candler, 6 Madd. 123; Coventry *v.* Coventry, 1 Keen, 758; Bowditch *v.* Soltyk, 99 Mass. 136; Towle *v.* Swasey, 106 Mass. 108; Sargent *v.* Sargent, 103 Mass. 297; Hepburn's App., 65 Penn. St. 472; Price's App., 54 id. 492.

[7] Hicks *v.* Wrench, 6 Madd. 93; Drew *v.* Wakefield, 54 Maine, 291; Abbott *v.* Bradstreet, 3 Allen, 587; 2 Dan. Chan. Prac. 1412 (4th Am. ed.).

[8] Bennett *v.* Biddles, 10 Jur. 534; Beer *v.* Tapp, 31 L. J. Ch. 513. [*In re* Beddoe, [1893] 1 Ch. 547.]

stitute a suit when one is already pending in which all their rights can be determined, they will not have costs.[1]

§ 900. If the misconduct or failure of the trustee to perform his duty,[2] or his mere caprice or obstinacy[3] (*a*) renders a suit necessary, he must pay the costs. So if he refuses to account,[4] or

[1] Packwood *v.* Maddison, 2 S. & S. 232; 2 Dan. Chan. Prac. 1412, 1413 (4th Am. ed.).

[2] Springett *v.* Dashwood, 2 Gif. 521; Caffrey *v.* Darby, 6 Ves. 488; Hide *v.* Haywood, 2 Atk. 126; Sheppard *v.* Smith, 2 Bro. P. C. 372; Stackpoole *v.* Stackpoole, 1 Dow. 209; Lyse *v.* Kingdom, 1 Col. C. C. 184; Powlett *v.* Herbert, 1 Ves. Jr. 297; Byrne *v.* Norcott, 13 Beav. 346; Fell *v.* Lutwidge, Barn. 319; Brown *v.* How, id. 354; Littleholes *v.* Gascoyne, 3 Bro. Ch. 373; Att. Gen. *v.* Hobart, Ca. t. Finch, 259; Ashburnham *v.* Thompson, 13 Ves. 402; Mosley *v.* Ward, 11 Ves. 581; Haberdashers' Company *v.* Att. Gen., 2 Bro. P. C. 370; Crackett *v.* Bethune, 1 J. & W. 586; Att. Gen. *v.* Wilson, 1 Cr. & Phil. 1; Baker *v.* Carter, 1 Y. & Col. 252; Wilson *v.* Wilson, 2 Keen, 249; Franklin *v.* Frith, 3 Bro. Ch. 433; Piety *v.* Stace, 4 Ves. 620; Whistler *v.* Newman, id. 129; Seers *v.* Hind, 1 Ves. Jr. 294; Adams *v.* Clifton, 1 Russ. 297; Egerton *v.* Egerton, 2 Green (N. J.), 419; Att. Gen. *v.* Drapers' Co., 4 Beav. 67; Att. Gen. *v.* Caius Coll., 2 Keen, 169; Att. Gen. *v.* East Retford, 2 M. & K. 35; Kent *v.* Hutchins, 50 N. H. 92; Jefferys *v.* Marshall, 19 W. R. 94; Ellis *v.* Barker, L. R. 7 Ch. 104; Lathrop *v.* Smalley, 23 N. J. Eq. 192. [Easton *v.* Landor, 67 L. T. 833; Bell *v.* Turner, 47 L. J. Ch. 75; *In re* Weall, 42 Ch. Div. 674; Haines *v.* Hay, 169 Ill. 93; Aydelott *v.* Breeding, 111 Ky. 847.]

[3] Smith *v.* Bolden, 33 Beav. 266; Scarborough *v.* Parker, 1 Ves. Jr. 267; Burrows *v.* Greenwood, 4 Y. & Col. 251; Kirby *v.* Mash, 3 id. 295; Penfold *v.* Bouch, 4 Hare, 271; Jones *v.* Lewis, 1 Cox, 199; Taylor *v.* Glanville, 3 Madd. 178; Thorby *v.* Yeates, 1 Y. & Col. Ch. 438; May *v.* Armstrong, 1 W. N. 233; Hampshire *v.* Bradley, 2 Col. 34; Jones *v.* Lewis, 1 Cox, 199; Moore *v.* Prance, 9 Hare, 299; Firmin *v.* Pulham, 2 De G. & Sm. 99; Brinton's Est., 10 Penn. St. 408; Goodson *v.* Ellisson, 3 Russ. 583; Lyse *v.* Kingdom, 1 Col. C. C. 184; Lathrop *v.* Smalley, 23 N. J. Eq. 192. [Iasigi *v.* Chicago, &c. R. Co., 129 Mass. 46; *In re* Knox's Trusts, [1895] 1 Ch. 538; 2 id. 483; *In re* Chapman, 72 L. T. 66.]

[4] Boynton *v.* Richardson, 31 Beav. 340; Wroe *v.* Seed, 4 Gif. 425; Kemp *v.* Burn, id. 348; Burnham *v.* Dalling, 7 Green (N. J.), 310; Sheppard *v.* Smith, 2 Bro. P. C. 372; Avery *v.* Osborne, Barn. 349.

(*a*) Or his unjustifiable denial of the interest of the *cestui*, Royal *v.* Royal, 30 Or. 448, 455; Powell *v.* Powell, 114 Ill. 329; Hanna *v.* Clark, 204 Pa. St. 145; or improper charges in his account. Noble *v.* Jackson, 132 Ala. 230.

wilfully misstates the accounts,[1] or by any chicanery in his answer keeps the *cestui que trust* from a correct knowledge of the accounts,[2] or if he has kept the accounts in a careless and confused manner,[3] or has mingled the trust fund with his own money and not accounted,[4] the court will charge him with the costs. If an executor denies that there are assets, contrary to the fact, he will be charged with the costs.[5] So if a trustee alleges in his answer that the *cestui que trust* is largely indebted to him, and after a long investigation it turns out that the trustee is greatly in arrears, he will be decreed to pay costs.[6] Or even if the amount due the trustee is much less than he claimed, he will be ordered to pay the costs.[7] So if a trustee sets up a claim of his own to the trust property, and fails in his claim, he must pay all the costs.[8] So if a trustee refuses the use of his name in the prosecution of a suit for the interests of the trust estate and the *cestui que trust*, whereby the *cestui que trust* is obliged to institute the suit in his own name, and join the trustee as a defendant, the court will order the trustee to pay the costs.[9] So if a trustee has some private interest of his own, separate from and independent of the trust, and he compels the *cestui que trust* to come into a court of equity, merely for the purpose of procuring a decision, at the expense of the estate, upon some point relating to his own private interest, the court will decree

[1] Flannagan *v.* Nolan, 1 Moll. 86; Sheppard *v.* Smith, 2 Bro. P. C. 372.

[2] Reech *v.* Kennegal, 1 Ves. 123; Avery *v.* Osborne, 1 Barn. 349.

[3] Norbury *v.* Calbeck, 2 Moll. 461. [4] Bogle *v.* Bogle, 3 Allen, 158.

[5] Sandys *v.* Watson, 2 Atk. 80; Vaughan *v.* Thurston, Colles, P. C. 175; Mallabar *v.* Mallabar, t. Talb. 71; Sheppard *v.* Smith, 2 Bro. & C. 372.

[6] Parrott *v.* Treby, Pr. Ch. 254; Eglin *v.* Sanderson, 3 Gif. 434.

[7] Fozier *v.* Andrews, 2 Jo. & La. 199; Att. Gen. *v.* Brewers' Co., 1 P. Wms. 376.

[8] Lloyd *v.* Spillett, 3 P. Wms. 344; Bayly *v.* Powell, Pr. Ch. 92; Willis *v.* Hiscox, 4 M. & C. 179; Att. Gen. *v.* Drapers' Co., 4 Beav. 67; Att. Gen. *v.* Christ's Hospital, id. 73; Irwin *v.* Rogers, 12 Ir. Eq. 159; Lawson *v.* Copeland, 2 Bro. Ch. 156; Baggot *v.* Baggot, 10 L. J. Ch. (N. S.) 116; Lemmond *v.* Peoples, 6 Ir. Eq. 137; Waterman *v.* Cochran, 2 Vt. 699. [Royal *v.* Royal, 30 Or. 448; Powell *v.* Powell, 114 Ill. 329.]

[9] Guyton *v.* Shane, 7 Dana, 498; Reade *v.* Sparkes, 1 Moll. 8; Blount *v.* Burrow, 2 Bro. Ch. 90. But see Brown *v.* Lockhart, 10 Sim. 426.

him to pay the whole costs.[1] The trust estate is not chargeable with the costs of defending one of the trustees upon inquisition of lunacy.[2] So where trustees in their answer pleaded ignorance of the trust, but the court inferred, from the papers annexed to the answer, an intention to defeat the ends of justice, costs were imposed upon the trustees;[3] and where the court ordered the production of papers, and very material ones were suppressed, costs were imposed upon the trustees;[4] and where an executor puts the plaintiffs unnecessarily to proof of their relationship, costs are imposed.[5] So if the trustees set up any unfounded or inequitable defence.[6] It was said by Lord Thurlow, that, where the court is obliged to give interest as a remedy for a breach of trust, costs will follow of course;[7] that is to say, that, where a suit is occasioned by the misconduct of trustees, the charging them with interest is such an indication of misconduct that costs follow: and the same principle was acted upon in Frey *v.* Frey;[8] but Sir William Grant denied that there was any such rule, and said that there might be cases when a trustee could be charged with interest, but not with costs.[9]

[1] Henley *v.* Phillips, 2 Atk. 48; Manning *v.* Manning, 1 Johns. Ch. 535; Ralston *v.* Telfair, 2 Dev. & Bat. 414; Ingram *v.* Kirkpatrick, 8 Ired. Eq. 62. But trustees have a right to the aid of a court in accounting, and to their costs; therefore trustees may have their costs for accounts, although they claim an interest in the trust fund or its proceeds as one of the *cestuis que trust*. Atcheson *v.* Robertson, 4 Rich. Eq. 44; Pell *v.* Ball, Speers, Eq. 48; Hartzell *v.* Brown, 5 Binn. 138; Royer's App., 13 Penn. St. 569; Raybold *v.* Raybold, 20 id. 308; Worrell's App., 23 id. 44; Halmon's App., 24 id. 172; Carpenter's App., 3 Grant's Cas. 381; Wham *v.* Love, Rice, Eq. 51. [*In re* Morton's Estate, 70 A. 680 (N. J. Ch. 1908).]

[2] Bickham *v.* Smith, 55 Penn. St. 335. [See Lape's Adm'r *v.* Taylor's Trustee, 23 S. W. 960 (Ky. 1893).]

[3] Att. Gen. *v.* East Retford, 2 M. & K. 35.

[4] Borough of Hertford *v.* Poor of Hertford, 2 Bro. P. C. 377.

[5] Lawson *v.* Copeland, 2 Bro. Ch. 156.

[6] Burnham *v.* Dalling, 1 Green, Ch. 310.

[7] Seers *v.* Hind, 1 Ves. Jr. 294. And see Franklin *v.* Frith, 3 Bro. Ch. 433; Mosley *v.* Ward, 11 Ves. 581; Piety *v.* Stace, 4 Ves. 620.

[8] Frey *v.* Frey, 17 N. J. Eq. 71; Warbass *v.* Armstrong, 2 Stockt. 266; Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508.

[9] Ashburnham *v.* Thompson, 13 Ves. 404; Tebbs *v.* Carpenter, 1 Madd.

§ 901. Where a trustee is guilty of some misconduct which does not amount to a wilful breach of the trust, or of some omission of duty which is of some inconvenience to the trust, he will not be allowed his costs.[1] Thus, if he files an improper answer, he will not be allowed the costs of the answer.[2] So an innocent *mistake* by the trustee may deprive him of his costs,[3] or the court may decree him to pay part of the costs,[4] or even give him his whole costs.[5] So, where an executor was entitled to have his accounts taken under the direction of the court, he was not allowed his costs, because of his conduct in obstructing the settlement of the accounts;[6] but costs were not imposed upon him. So, if a trustee makes a claim in his account which is very much reduced by the court, costs will not be allowed him.[7] The court will give no costs to a defaulting trustee; as, if a balance is found due from a trustee, he can have no costs

308; Woodhead *v.* Marriott, C. P. Cooper, 62, 1837, 1838; Holgate *v.* Hayworth, 17 Beav. 259; Fletcher *v.* Walker, 3 Madd. 73; Mousley *v.* Carr, 4 Beav. 49; MacKenzie *v.* Taylor, 7 Beav. 467; Fozier *v.* Andrews, 2 J. & Lat. 199; Cotton *v.* Clark, 16 Jur. 879.

[1] O'Callagan *v.* Cooper, 5 Ves. 129; Massey *v.* Banner, 4 Madd. 113; Newton *v.* Bennett, 1 Bro. Ch. 362; Mousley *v.* Carr, 4 Beav. 49; England *v.* Downs, 6 Beav. 279; Dawson *v.* Parrot, 3 Bro. Ch. 236; Spencer *v.* Spencer, 11 Paige, 159.

[2] Eddowes *v.* Eddowes, 30 Beav. 603.

[3] Fitzgerald *v.* Fitzgerald, 6 Ir. Eq. 145; O'Callagan *v.* Cooper, 5 Ves. 117; Mousley *v.* Carr, 4 Beav. 49; Att. Gen. *v.* Drapers' Co., id. 71; Devey *v.* Thornton, 9 Hare, 222; Bennett *v.* Going, 1 Moll. 529; Robertson *v.* Wendell, 6 Paige, 322.

[4] East *v.* Ryall, 2 P. Wms. 284.

[5] Taylor *v.* Tabrum, 6 Sim. 281; Flanagan *v.* Nolan, 1 Moll. 84; Travers *v.* Townsend, id. 496; Att. Gen. *v.* Caius College, 2 Keen, 150, 170; Bennett *v.* Atkins, 1 Y. & Col. 247, 249; Fitzgerald *v.* O'Flaherty, 1 Moll. 347; Att. Gen. *v.* Drummond, 2 Conn. & Laws. 98; Royds *v.* Royds, 14 Beav. 54; Fitzgerald *v.* Pringle, 2 Moll. 534.

[6] *Re* King, 11 Jur. (N. S.) 899; Raphael *v.* Boehm, 13 Ves. 592. All such matters are very much within the discretion of the court, and costs of the audit of the accounts may be allowed, although there has been a breach of the trust. Norris's App., 71 Penn. St. 115, 126.

[7] Att. Gen. *v.* Brewers' Co., 1 P. Wms. 376; Fozier *v.* Andrews, 2 Jo. & Lat. 199; Dawson *v.* Parrot, 3 Bro. Ch. 236; Ball *v.* Montgomery, 2 Ves. Jr. 191.

until he pays it.[1] So if a trustee renders it necessary to institute a suit for the appointment of a new trustee, where it might have been done by agreement of the parties, he will not be allowed his costs.[2] But if the trustee has a good reason for his discharge, as the misconduct of the *cestui que trust*, or his own age and infirmities, he may have the costs of a proceeding in equity for his discharge.[3] (*a*) Where a trustee refuses to convey, or insists upon making an improper conveyance, and to improper persons, he may be refused his costs;[4] or he may even be made to pay costs,[5] although he acts under the advice of counsel.[6] But a trustee may properly refuse to convey, where there is any doubt as to the person to whom the conveyance should be made, or as to the property to be conveyed, or as to

[1] Birks *v.* Micklethwait, 33 Beav. 409.

[2] Howard *v.* Rhodes, 1 Keen, 581; Greenwood *v.* Wakeford, 1 Beav. 580; Benbow *v.* Davies, 11 Beav. 369; *Re* Tryon, 7 Beav. 496; Gabril *v.* Sturgis, 5 Hare, 97; Jones *v.* Stockett, 2 Bland, 409; *Re* Molony, 2 J. & Lat. 391; Porter *v.* Watts, 21 L. J. Ch. 211; Cruger *v.* Halliday, 11 Paige, 314.

[3] Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576. [Richmond *v.* Arnold, 68 A. 427 (R. I. 1907). But see Wilson *v.* Clayburgh, 215 Ill. 506.]

[4] Ellis *v.* Ellis, 1 Russ. 368; Knight *v.* Martin, 1 R. & M. 70; Campbell *v.* Horne, 1 N. C. C. 664; Angier *v.* Stannard, 3 M. & K. 566; Poole *v.* Pass, 1 Beav. 600.

[5] Jones *v.* Lewis, 1 Cox, 199; Willis *v.* Hiscox, 4 M. & Cr. 197; Thorby *v.* Yeates, 1 Y. & C. Ch. 438.

[6] Angier *v.* Stannard, 3 M. & K. 566; Devey *v.* Thornton, 9 Hare, 233. But Poole *v.* Pass, 1 Beav. 600, is contrary, and the better opinion is that Angier *v.* Stannard is not good law. Vez *v.* Emery, 5 Ves. 144; Hampson *v.* Bramwood, 1 Madd. 392; Bush's App., 33 Penn. St. 85; Harper *v.* Munday, 7 De G., M. & G. 369. But see Boulton *v.* Beard, 27 Eng. L. & Eq. 421.

(*a*) A reasonable attorney's fee may be allowed from the estate when an application for a trustee's removal is unsuccessful. *Re* Cadwell's Bank, 89 Iowa, 533; Lycan *v.* Miller, 56 Mo. App. 79. Upon an application by a *cestui* for the removal of a trustee for ill-health, the trustee has been allowed the expenses of a settlement of his accounts, but has been charged with the costs of an unsuccessful resistance to his removal. Lape's Adm'r *v.* Taylor's Trustee, 23 S. W. 960 (Ky. 1893).

the form of the conveyance, and he may take the advice of the court and have the costs of the suit.[1] (*a*)

§ 902. Where a trustee commits a breach of trust the general rule is, that he must pay the costs of the suit to rectify the wrong; but if there are other matters involved in the suit, in which the trustee is found to be without fault, he may have his costs in such other matters.[2] Thus where a bill charged a trustee with breach of trust in respect to both the real and personal property, and he was found to be wrongfully charged in relation to the real estate, he was ordered to pay costs for only one part of the bill.[3] So where there was a bill to set aside a purchase by the trustees of part of the trust property, and also for an account, the trustees were allowed the costs of the account, and ordered to pay the costs of the other part of the bill.[4] So where the suit did not originate in the misconduct of the trustee, but in the course of its progress a breach of trust appeared, the court ordered the trustee to pay so much of the costs as were caused by the breach of the trust, and allowed him the costs of the other part of the suit.[5] (*b*) So where a trustee ought

[1] Goodson *v.* Ellison, 5 Russ. 593; Poole *v.* Pass, 1 Beav. 600; Whitmarsh *v.* Robinson, 1 Y. & C. Ch. 715; Thorby *v.* Yeates, id. 438; Holford *v.* Phipps, 3 Beav. 434; 4 Beav. 475; Taylor *v.* Glanville, 1 Madd. 176; Dustan *v.* Dustan, 1 Paige, 509; Armstrong *v.* Zane, 12 Ohio, 287.

[2] Pocock *v.* Reddington, 5 Ves. 800; Hewett *v.* Foster, 7 Beav. 348; Bate *v.* Hooper, 5 De G., M. & G. 345; *Re* King, 11 Jur. (N. S.) 899.

[3] Ibid.

[4] Sanderson *v.* Walker, 13 Ves. 601.

[5] Tebbs *v.* Carpenter, 1 Madd. 290; Heighton *v.* Grant, 1 Phil. 600; Pride *v.* Fooks, 2 Beav. 430.

(*a*) As to the costs of a proceeding to establish a resulting trust upon failure or invalidity of a declared trust, compare Hopkins *v.* Grimshaw, 17 App. D. C. 1; Barnard *v.* Adams, 58 Fed. 313.

(*b*) Where a trustee unnecessarily prolongs litigation he may be required to pay a portion of the costs and other expenses. Waterman *v.* Alden, 144 Ill. 90; *In re* Morton's Estate, 70 A. 680 (N. J. Ch. 1908). And where the litigation is due to the misconduct of the trustee, he may be charged with the entire costs, Easton *v.* Landor, 67 L. T. 833; Bell *v.* Turner, 47 L. J. Ch. 75, as where he has failed

to have had his costs on one part of a suit, and to have paid costs on another, the court allowed no costs on either side.[1] If the breach of trust is very trifling, the court may overlook it, and give the trustee his whole costs.[2] So where grave charges of fraud were made against trustees, which failed, but they were removed on another ground, they were allowed their costs.[3]

§ 903. Where trustees are decreed to pay the costs of a suit occasioned by their misconduct, or where they are refused their costs for the same reason, they cannot charge the expenses of the suit to the trust fund in their hands; as their misconduct and breach of duty were personal, so the costs are personal, and must be borne by them personally.[4]

§ 903 *a*. It is sometimes important to determine out of what fund in the hands of executors or trustees the costs of a suit are to be paid. The general rule is, that when a testator or settlor has expressed himself so ambiguously in relation to the disposition of his estate, or of any part of it, that it is necessary

[1] Newton *v*. Bennett, 1 Bro. Ch. 362.

[2] Fitzgerald *v*. Pringle, 2 Moll. 534; Bailey *v*. Gould, 4 Y. & Col. 221; Knott *v*. Cottee, 16 Beav. 77; Cotton *v*. Clark, id. 134.

[3] Stanes *v*. Parker, 9 Beav. 385.

[4] Att. Gen. *v*. Daugers, 33 Beav. 621; Lathrop *v*. Smalley, 23 N. J. Eq. 192. [*In re* Hodgkinson, [1895] 2 Ch. 190.] Where there has been a breach of trust, the *cestui que trust* is entitled to the double security which a decree for costs against all the trustees will give him, and no inquiry will be made as to whether one of the trustees has been more culpable than the other. Lawrence *v*. Bowle, 2 Ph. 140; Littlehales *v*. Gascoyne, 3 Bro. C. C. 73.

to keep accurate accounts, Stocker *v*. Hutter, 134 Pa. St. 19, or has made improper charges in his accounts, *In re* Weall, 42 Ch. Div. 674; Noble *v*. Jackson, 132 Ala. 230, or has claimed the trust property as his own, Powell *v*. Powell, 114 Ill. 329; Royal *v*. Royal, 30 Or. 448; Hanna *v*. Clark, 204 Pa. St. 145, or has assumed an attitude hostile to the trust, Billings *v*. Warren, 216 Ill. 281, or where the litigation is brought about by his failure to perform the trust. Haines *v*. Hay, 169 Ill. 93.

A trustee has been made to pay the entire costs of a bill for instructions "improvidently brought by" him. Vaccaro *v*. Cicalla, 89 Tenn. 63.

for the executors or trustees to apply to a court of equity for the construction of the instrument of trust, and for instructions and directions, the costs of all necessary parties shall be paid out of the general assets; and these are generally the residuary assets; for the costs of executing the will and of administering the trust are among the general expenses of settling an estate, and must be paid before anything can be distributed to residuary legatees. One reason of the rule is, that in the case of specific legacies, the legatee is entitled to the amount given if the estate is sufficient for the purpose; and to charge any cost upon the portion of any one legatee, or of any class of legatees, would be to change the proportion fixed by the testator. And further, if the testator or settlor has himself created the difficulty by the form of his expressions, it is equitable that his general estate should pay for clearing up the doubts raised by his own language.[1] But where a legacy has been severed from the gen-

[1] Studholme *v.* Hodgson, 3 P. Wms. 300; Joliffe *v.* East, 3 Bro. Ch. 25, 27; Baugh *v.* Reed, id. 193; 1 Ves. Jr. 257; Att. Gen. *v.* Hurst, 2 Cox, 364; 3 Bro. Ch. 375, 381; Bagshaw *v.* Newton, 9 Mod. 283; Handley *v.* Davies, 5 Jur. 190; Barrington *v.* Tristram, 6 Ves. 345, 349; Howse *v.* Chapman, 4 Ves. 542; Anon., Mos. 5; Nisbett *v.* Murray, 5 Ves. 149, 158; Pearson *v.* Pearson, 1 Sch. & L. 12; Wilson *v.* Brownsmith, 9 Ves. 180, 182; Wilson *v.* Squire, 13 Sim. 212; Smith *v.* Smith, 4 Paige, 271; Bowditch *v.* Soltyk, 99 Mass. 136, 141; Sawyer *v.* Baldwin, 20 Pick. 378, 388; King *v.* Strong, 9 Paige, 94; Irving *v.* De Kay, id. 521; Moggridge *v.* Thackwell, 7 Ves. 87; Wilkinson *v.* Lindgren, L. R. 5 Ch. 570; Tann *v.* Tann, L. R. 7 Eq. 436; Monks *v.* Monks, 7 Allen, 401, 406; Abbott *v.* Bradstreet, 3 Allen, 587; Bigelow *v.* Morang, 103 Mass. 287; Bliss *v.* Amer. Tract Soc., 2 Allen, 334; Deane *v.* Home for Aged Colored Women, 111 Mass. 132. But it is said that this rule applies only to cases arising out of wills, and not to questions that arise upon deeds of trust, though it is hard to point out a distinction in cases where a trustee brings a bill for instructions in the nature of a bill of interpleader; and it would seem that the general rule, that where a trustee finds it necessary to seek for the direction of a court of equity, all parties whom it is necessary to bring before the court for his protection are entitled to their costs out of the fund, should prevail. See *ante*, § 899. See also Hampson *v.* Broadwood, 1 Madd. 381, 396; Orford *v.* Churchill, 3 Ves. & B. 59, 71; Collett *v.* Collett, 14 W. R. 446. In suits to rectify settlements under a deed where no blame was imputable to any of the parties, costs were allowed out of the fund. Stock *v.* Vining, 25 Beav. 235; 2 Dan. Ch. Pr. 1427.

eral estate, and after it is so severed it becomes the subject of a suit, by the result of which the general estate will not be at all affected, the costs of the suit must be borne by the particular fund concerning which the suit arose.[1] If a party entitled to a legacy or a share of an estate incumbers it, and renders a suit necessary for the proper administration of that share, such particular fund must bear the expense of the suit.[2] If the suit concerns several separate funds, but has no relation to the general estate, the several funds must bear the costs *pro rata*.[3] Sometimes the costs are paid not out of the fund in controversy, but out of the testators' residuary estate.[4]

[1] Jenour *v.* Jenour, 10 Ves. 562, 573; Shaw *v.* Pickthall, Dan. 92; Manchester *v.* Bonham, 3 Ves. 61, 64; King *v.* Taylor, 5 Ves. 806, 810; Wilson *v.* Squire, 13 Sim. 212; Dugdale *v.* Dugdale, 12 Beav. 247, 251; Governesses' Institution *v.* Rusbridger, 18 Beav. 467; Richardson *v.* Rusbridger, 20 Beav. 136; Att. Gen. *v.* Lawes, 8 Hare, 32, 43; Pennington *v.* Buckley, 6 Hare, 451, 455; Cotton *v.* Penrose, 13 Jur. 761; Birdsall *v.* Hewlett, 1 Paige, 32.

[2] Greedy *v.* Lavender, 11 Beav. 417; Remnant *v.* Hood, 27 Beav. 613; Ward *v.* Yates, 1 Dr. & Sm. 80; Brace *v.* Ormond, 2 J. & W. 435; Garey *v.* Whittingham, 5 Beav. 268, 270; Farr *v.* Sheriffe, 4 Hare, 528; 2 Dan. Ch. Pr. 1451.

[3] Heighington *v.* Grant, 1 Beav. 228; Johnston *v.* Todd, 8 Beav. 489, 492; Hopkinson *v.* Ellis, 10 Beav. 169, 176; Sanders *v.* Miller, 25 Beav. 154; Elhorne *v.* Goode, 14 Sim. 165, 179; Christian *v.* Foster, 2 Phil. 161, 166; Att. Gen. *v.* Lawes, 8 Hare, 32; 2 Dan. Ch. Pr. 1432 (4th Am. ed.). [Evans's Estate, 155 Pa. St. 646; Robinson *v.* Bonaparte, 102 Md. 63.]

[4] Fidelity Ins. Co.'s App., 99 Penn. St. 443.

CHAPTER XXXI.

ALLOWANCES AND COMPENSATION TO TRUSTEES.

In England, compensation.
§ 904. Trustees can have no compensation for time, trouble, and services.
§ 905. Exception as to estates abroad.
§ 906. Nor when they carry on business as trustees.
Disbursements.
§ 907. A trustee may have a lien on the trust estate for his expenses.
§ 908. From what fund the expenses are to be paid.
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§ 904. NOTHING is better established in England than that a trustee can have no allowance or compensation for his time and trouble in the execution of a trust.[1] The principle on which the rule is founded is, that a trustee can "make no profit out of

[1] Robinson *v.* Pett, 3 P. Wms. 251; 2 Lead. Cas. Eq. 206; Brocksopp *v.* Barnes, Cas. t. Finch, 361; Ayliffe *v.* Murray, 2 Atk. 58; *In re* Ormsby, 1 B. & B. 189; Charity Corpo. *v.* Sutton, 2 Atk. 406; Bonithon *v.* Hockmore, 1 Vern. 316.

his office;" and the reason of the principle is, that a trustee shall be placed in no position where his interest may be opposed to his duty.[1] The rule applies not only to trustees strictly so called, but also to all who hold a fiduciary relation, as executors and administrators, mortgagees, receivers, guardians, and officers, directors and trustees of corporations.[2] If trustees render services to the trust estate in their professional characters, as solicitors, factors, brokers, bankers, or in any other capacity, they can receive no compensation or commissions for such services.[3] And if a bonus has been allowed them by the *cestui que trust* in the settlement of their accounts, the settlement may be set aside.[4]

§ 905. An exception to this rule has been established in the cases of trustees for absent owners of estates in the West Indies,

[1] New *v.* Jones, cited in Moore *v.* Frowd, 3 M. & Cr. 50; Burton *v.* Wookey, 6 Madd. 368; Hamilton *v.* Wright, 9 Cl. & Fin. 111.

[2] Scattergood *v.* Harrison, Mose. 128; How *v.* Godfrey, Cas. t. Finch, 361; Sheriff *v.* Axe, 4 Russ. 33; Bonithon *v.* Hockmore, 1 Vern. 316; Langstaffe *v.* Fenwick, 10 Ves. 405; French *v.* Barron, 2 Atk. 120; Carew *v.* Johnston, 2 Sch. & Lef. 301; Arnold *v.* Garner, 2 Phil. 231; Matthison *v.* Clarke, 3 Drew. 3; Barrett *v.* Hartley, 12 Jur. 426; L. R. 2 Eq. 789; *In re* Ormsby, 1 B. & B. 189; Anon., 10 Ves. 103; *Re* Walker, 2 Phil. 630; *Re* Westbrooke, id. 631; York, &c. Railw. *v.* Hudson, 16 Beav. 485; Burden *v.* Burden, 1 V. & B. 170; Stocken *v.* Dawson, 6 Beav. 371; Kirkman *v.* Booth, 11 Beav. 273.

[3] Ibid.; New *v.* Jones, 1 Hall & Tw. 632; Broughton *v.* Broughton, 2 Sm. & G. 422; 5 De G., M. & G. 160; Gomley *v.* Wood, 3 J. & Lat. 702; 9 Ir. Eq. 418; Lincoln *v.* Winsor, 9 Hare, 158; Bainbrigge *v.* Blair, 8 Beav. 588; Todd *v.* Wilson, 9 Beav. 486; Lyon *v.* Baker, 5 De G. & Sm. 622; Collins *v.* Carey, 2 Beav. 129; Christophers *v.* White, 10 Beav. 523; Selatter *v.* Cottam, 3 Jur. (N. S.) 630; Matthison *v.* Clarke, 3 Drew. 3; *In re* Taylor, 18 Beav. 165. [See Clarkson *v.* Robinson, [1900] 2 Ch. 722; *In re* Chalinder and Herington, [1907] 1 Ch. 58. As to the rule in the United States, see *infra*, § 916 *et seq.*]

[4] Barrett *v.* Hartley, L. R. 2 Eq. 789. Where provision is made by the settlement for the payment of a professional service by the trustee, the usual charges may be made and allowed for such service. Willis *v.* Kibble, 1 Beav. 559; Moore *v.* Frowd, 3 M. & Cr. 45; Douglass *v.* Archbutt, 2 De G. & J. 148; Frazer *v.* Palmer, 4 Y. & C. Ex. 515. Liberty to charge for professional services includes only services *strictly* professional. Harbin *v.* Darby, 28 Beav. 325.

of administrators of estates in the East Indies, and of mortgagees in possession of estates in Jamaica. Courts of chancery in England have allowed commissions as compensation for time and trouble in these instances.[1]

§ 906. Even where trustees are directed to carry on the testator's business, they can have no compensation for their time and trouble, unless there is a special provision in the will for their payment. The reason is that trustees can make no profit.[2] But a trustee under a constructive trust, who carries on business with another's property in such manner that he is compelled to account for the profits, may be allowed a compensation for his time and trouble, and for his skill in conducting the business.[3]

§ 907. The general rule is that the expenses of a trustee in the execution of the trust are a lien upon the estate, and he will not be compelled to part with the property until his disbursements are repaid.[4] But although this is the rule in regard to secular trusts where there is a *cestui* who ought to in equity reimburse the trustee, yet it is held that in case of a charitable trust, no lien can be allowed for advances made by the trustee even to pay off claims which would have been enforced as mechanics' liens against the building; at any rate where it appears

[1] Chambers *v.* Goldwin, 5 Ves. 834; 9 Ves. 254, 257, 267, 273; Forrest *v.* Elwes, 2 Mer. 68; Denton *v.* Davy, 1 Moore, P. C. 15; Hinchel *v.* Daly, id. 51; Grant *v.* Campbell, id. 43; Leith *v.* Irwin, 1 M. & K. 277; Chetham *v.* Audly, 4 Ves. 72; Matthews *v.* Bagshaw, 14 Beav. 123; Campbell *v.* Campbell, 13 Sim. 168; 2 Y. & Col. Ch. 607; Freeman *v.* Fairlee, 3 Mer. 24, 28.

[2] Stocken *v.* Dawson, 6 Beav. 371; Burden *v.* Burden, 1 V. & B. 170; Brocksopp *v.* Barnes, 5 Madd. 90; Marshall *v.* Holloway, 2 Swanst. 432; Forster *v.* Ridley, 4 N. R. 417. [Clarkson *v.* Robinson, [1900] 2 Ch. 722.]

[3] Brown *v.* De Tastet, Jac. 284; Crawshay *v.* Collins, 15 Ves. 225; Wedderburn *v.* Wedderburn, 22 Beav. 84; Brown *v.* Litton, 1 P. Wms. 140; 10 Mod. 20. [See Olson *v.* Lamb, 56 Neb. 104.]

[4] *Ex parte* James, 1 D. & C. 272; Hill *v.* Magan, 2 Moll. 460; Norwich Yarn Co., 22 Beav. 143; *Ex parte* Chippendale, 4 De G., M. & G. 19; Trott *v.* Dawson, 1 P. Wms. 780; Bro. P. C. 266; Morison *v.* Morison, 7 De G., M. & G. 266. [Innis *v.* Flint, 106 Minn. 343; Johnson *v.* Leman, 131 Ill. 609; Perrine *v.* Newell, 49 N. J. Eq. 57.]

that to allow the lien would defeat the object of the trust, and *the lien was not claimed by the trustee in his lifetime.*[1] The agent of the trustee is accountable to his principal only, and not to the *cestui que trust;*[2] therefore an agent has no lien upon the trust estate.[3] But an attorney who has collected trust funds for a trustee may set off his costs;[4] and where there is a particular direction to the trustees to employ a particular person in a particular capacity, such person will have a lien on the fund.[5] But a mere recommendation to the trustees to employ some person will not give the person employed a lien on the estate.[6] The trustee of a *void* deed cannot claim a lien upon the estate for his expenses against those who establish the fraudulent or invalid character of the deed,[7] though he may be allowed for improvements;[8] (*a*) nor can a trustee have a lien for expenses incurred beyond the scope of his authority.[9] The trustee's lien cannot

[1] French *v.* Griswold College, 60 Iowa, 482.

[2] Myler *v.* Fitzpatrick, 6 Madd. 360; Att. Gen. *v.* Chesterfield, 18 Beav. 596; Langford *v.* Mahoney, 2 Conn. & Laws. 317; Lockwood *v.* Abdy, 14 Sim. 441; Kean *v.* Robarts, 4 Madd. 350.

[3] Worrall *v.* Harford, 8 Ves. 4; Hall *v.* Laver, 1 Hare, 571; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 507; Francis *v.* Francis, 5 De G., M. & G. 108; *Re* Sadd, 34 Beav. 650. [Johnson *v.* Leman, 131 Ill. 609; Steele *v.* Steele, 64 Ala. 438.]

[4] *Re* Sadd, 34 Beav. 650. [Courier-Journal Co. *v.* Columbia Fire Ins. Co., 54 S. W. 966 (Ky. 1900). But see Staniar *v.* Evans, 34 Ch. Div. 470.]

[5] Williams *v.* Corbett, 8 Sim. 349; Hibbert *v.* Hibbert, 3 Mer. 681; Cousett *v.* Bell, 1 Y. & Col. Ch. 569.

[6] Shaw *v.* Lawless, 1 Ll. & G. t. Sugd. 154; 1 Dr. & W. 512; 5 Cl. & Fin. 129; Ll. & G. t. Plunk. 559; Finden *v.* Stephens, 2 Phil. 142; Knott *v.* Cottee, id. 192.

[7] Smith *v.* Dresser, L. R. 1 Eq. 651.

[8] Woods *v.* Axton, W. N. 207.

[9] Leedham *v.* Chawner, 1 K. & J. 458.

(*a*) Thus it has been held where an assignment in trust for creditors became void from the beginning because of the bankruptcy of the assignor within four months, the assignee should be allowed from the estate his necessary disbursements and compensation for his services to the extent that the estate has been benefited by his services and disbursements. Randolph *v.* Scruggs, 190 U. S. 533. See also Louisville Trust Co. *v.* Columbia Finance & Tr. Co., 59 S. W. 867 (Ky. 1900); Clark *v.* Sawyer, 151 Mass. 64.

be allowed to control the estate in such manner as to destroy the trust; but no conveyance will be ordered or allowed until he is repaid.[1] Although agents of trustees have no lien upon the trust estate, and are not responsible to the *cestui que trust* as before stated, yet if they mix themselves up with a breach of trust, and by an abuse of their powers as simple agents obtain possession of the trust property, the *cestui que trust* may proceed against them as trustees *de son tort* or constructive trustees.[2] If several estates are subject to the same trusts, the proceeds of any one of the estates may be applied by the trustee to the payment of his expenses; but if several estates are subject to different trusts, in the hands of the same trustee, each estate must bear its own expenses.[3]

§ 908. Where a fund was created for the payment of *debts* and *funeral* and *testamentary expenses*, it was held that *administration* expenses were not embraced, and could *not be* paid from that fund.[4] There is, however, one case to the contrary.[5] But where the trusts were for the payment of "debts, testamentary, and *other* expenses and legacies;" [6] or to pay "funeral, testamentary, and *legal* expenses;" [7] or for the payment of "debts, funeral expenses, and the costs and charges of proving and attending the execution of the will and the several trusts therein named," [8] it was held that the words were broad enough to embrace the

[1] Darke *v.* Williamson, 25 Beav. 622.

[2] Myler *v.* Fitzpatrick, 6 Madd. 360; Pollard *v.* Downes, 1 Eq. Cas. Ab. 6; Fyler *v.* Fyler, 3 Beav. 550; Hardy *v.* Caley, 33 Beav. 365; *Ex parte* Woodin, 3 Mont. D. & D. 399; Alleyne *v.* Darcey, 4 Ir. Eq. 199; Pannell *v.* Hurley, 2 Coll. C. C. 241; Portlock *v.* Gardner, 1 Hare, 166; Bodenham *v.* Hoskyns, 2 De G., M. & G. 903; Att. Gen. *v.* Leicester, 7 Beav. 176; Morgan *v.* Stephens, 3 Gif. 226. [See *supra*, § 245, note *a*, p. 418; § 813, note *a*.]

[3] Price *v.* Loaden, 21 Beav. 508.

[4] Brown *v.* Groombridge, 4 Madd. 495; Stringer *v.* Harper, 26 Beav. 585; Linley *v.* Taylor, 1 Gif. 69; Webb *v.* De Beauvoisin, 31 Beav. 573; Gilbertson *v.* Gilbertson, 34 Beav. 354.

[5] Wilson *v.* Heaton, 11 Beav. 492.

[6] Webb *v.* De Beauvoisin, 31 Beav. 573.

[7] Coventry *v.* Coventry, 2 Dr. & Sm. 470.

[8] Alsop *v.* Bell, 24 Beav. 451, 469.

payment of the costs of the administration of the trusts, and that such charges must be paid out of the fund so created. Where a testator bequeathed a leasehold estate and all his personal property to his wife, and devised his real estate to be sold, and the proceeds applied to the payment of his funeral and testamentary expenses and debts, and the residue invested, it was held that the funeral and testamentary expenses were thrown upon the real estate in exoneration of the personal, but that the costs of taking the opinion of the court upon a special case were not testamentary expenses within the meaning of the will, but fell upon the personalty, which was specifically devised to the wife.[1] So a trust created by will in both real and personal estate, to pay out of the personal the expenses of probate and the execution of the trusts, does not authorize the trustees to pay out of the personal any other expenses than *executors* would be authorized to pay in that character, and the trustees cannot discharge the expenses of the trust of the real estate out of the personal.[2]

§ 909. If the trust fund is insufficient for the reimbursement of the trustee, he may call upon the *cestui que trust* in whose behalf and at whose request he acted, and recover of him personally reasonable compensation for the time and trouble and money expended.[3] (*a*) So trustees may call upon the *cestui*

[1] Gilbertson *v.* Gilbertson, 34 Beav. 354.

[2] Brougham *v.* Poulett, 19 Beav. 119; Sanders *v.* Miller, 25 Beav. 154.

[3] Balsh *v.* Hyham, 2 P. Wms. 453; *Ex parte* Chippendale, 4 De G., M. & G. 19, 54; Phené *v.* Gillam, 5 Hare, 1.

(*a*) In Hardoon *v.* Belilios, [1901] A. C. 118, it was held that a *cestui* who is *sui juris* is liable to reimburse the trustee his necessary disbursements even when there has been no request from the *cestui* to the trustee to make the disbursements or to act as trustee. The acceptance of the beneficial interest by the *cestui* seems, under this decision, to be sufficient to render him liable to indemnify the trustee if the trust property proves insufficient for the purpose. The doctrine is stated as follows by Lord Lindley: "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 shew some good reason why his trustee

que trust for indemnity, before proceeding to incur expenses and liabilities.[1] But to enable trustees to enforce their claim for expenses against a *cestui que trust*, they must have proceeded strictly within the limits of their power, unless they have the express or implied promise of the *cestui que trust* to indemnify them.[2]

§ 910. Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty.[3] And for losses

[1] Ibid. [*In re* Bosworth, 58 L. J. Ch. 432; Falmouth Bank *v.* Cape Cod Canal Co., 166 Mass. 550.]

[2] Leedham *v.* Chawner, 4 K. & J. 458; Collinson *v.* Lister, 20 Beav. 368.

[3] Worrall *v.* Harford, 8 Ves. 8; Att. Gen. *v.* Norwich, 2 M. & Cr. 406, 424; Rex *v.* Inhab. of Essex, 4 T. R. 591; Rex *v.* Com'rs, 1 B. & Ad. 232; Brocksopp *v.* Barnes, 5 Madd. 90; How *v.* Godfrey, t. Finch, 361; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 512; Caffrey *v.* Darby, 6 Ves. 497; *Re* Ormsby, 1 B. & B. 190; Godfrey *v.* Watson, 3 Atk. 518; Hyde *v.* Heywood, 2 Atk. 126; Dowson *v.* Clarke, 18 Ves. 254; Morison *v.* Morison, 7 De G., M. & G. 214; Morton *v.* Barrett, 22 Me. 257; Pennell's App., 2 Barr, 216; Morton *v.* Adams, 1 Strob. Eq. 76; Miller *v.* Beverleys, 4 Hen. & M. 415; Ames *v.* Downing, 1 Bradf. Sur. 331; Meyers *v.* Meyers, 2 McCord, Ch. 214; Miles *v.* Bacon, 4 J. J. Marsh. 457; Jones *v.* Dawson, 19 Ala. 672; Hatton *v.* Weems, 12 Gill & J. 83; Perkins *v.* Kershaw, 1 Hill, Eq. 350; Egbert *v.* Brooks, 3 Harring. 110; Love *v.* Morris, 13 Ga. 165; R. & S. R. R. Co. *v.* Miller, 47 Vt. 146. [Marks *v.* Semple, 111 Ala. 637; Dantzler *v.* McInnis, 151 Ala. 293; More *v.* Calkins, 95 Cal. 435; Cook *v.* Gilmore, 133 Ill. 139; Anderson *v.* Kemper, 116 Ky. 339; Winslow *v.* Young, 94 Me. 145; Niolon *v.* McDonald, 71 Miss. 337; Perrine *v.* Newell, 49 N. J. Eq. 57; Woodruff *v.*

should bear them himself. The obligation is equitable, 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." For a criticism of this decision see 14 Harvard Law Rev. 539. See also Fraser *v.* Murdoch, 6 A. C. 855; *In re* Earl of Winchilsea's Policy Trusts, 39 Ch. Div. 168; Coffman *v.* Gates, 85 S. W. 657 (Mo. App.); Hazard *v.* Coyle, 26 R. I. 361; Wells-Stone Co. *v.* Aultman, 9 N. D. 520.

that may accrue to himself in the proper administration of the trust.[1] (*a*) Thus a trustee will be reimbursed all his necessary travelling expenses,[2] and all reasonable fees paid for legal advice in the discharge of his duties.[3] (*b*) And this rule will be applied, although the trust may subsequently be declared void,[4] if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the pro-

N. Y., &c. R. Co., 129 N. Y. 27; *In re* Nesmith, 140 N. Y. 609; So. Ry. Co. *v.* Glenn, 98 Va. 309; Cochran *v.* Richmond & A. R. Co., 91 Va. 339; Western Union Tel. Co. *v.* Boston Safe Dep. & Tr. Co., 104 Fed. 580.]

[1] Jervis *v.* Wolferstan, L. R. 18 Eq. 18. A trustee for support of *cestui* is entitled to a lien upon the interest of his *cestui que trust*, for advances to him before the estate can be sold. Haydel *v.* Hurck, 72 Mo. 253.

[2] *Ex parte* Lovegrove, 3 D. & C. 763; Malcolm *v.* O'Callaghan, 3 M. & C. 62; Bridge *v.* Brown, 2 Y. & Col. Ch. 181; *Ex parte* Bray, 1 Rose, 144; *Ex parte* Elsee, 1 Mont. 1; Burr *v.* McEwen, Baldw. C. C. 154; Towle *v.* Mack, 2 Vt. 19.

[3] Cary, 14; McElhenny's App., 46 Penn. St. 347; Wilson's App., 41 id. 94; Brady *v.* Dilley, 27 Md. 570; McNamara *v.* Jones, Dick. 587; Fearns *v.* Young, 10 Ves. 184; Burge *v.* Brutton, 2 Hare, 373; Johnson *v.* Telford, 3 Russ. 447; Poole *v.* Pass, 1 Beav. 604. [Mitau *v.* Roddan, 149 Cal. 1; Thome *v.* Allen, 70 S. W. 410 (Ky. 1902); Woodruff *v.* N. Y., &c. R. Co., 129 N. Y. 27, 36; Steinway *v.* Steinway, 98 N. Y. S. 99, 112 App. Div. 18; Burney *v.* Atkinson, 54 S. W. 998 (Tenn. Ch. App. 1899); Estate of Cole, 102 Wis. 1, 12.] But he cannot incur unnecessary counsel fees. Holcomb *v.* Holcomb, 2 Beav. 415; Beatty *v.* Clark, 20 Cal. 11.

[4] Stewart *v.* McMinn, 5 W. & S. 100; *Re* Wilson, 4 Penn. St. 430; Hawley *v.* James, 16 Wend. 61. [Beck *v.* Kinealy, 89 Mo. App. 418. See *supra*, § 907, note *a*.]

(*a*) A trustee, though not appointed by a court but only by the owner of the property, is not liable personally under the U. S. Rev. Stats., § 5152, for the assessment collectible from the stockholders of an insolvent national bank. Pauly *v.* State Loan & T. Co., 165 U. S. 606; Lucas *v.* Coe, 86 Fed. 972.

(*b*) It has been held that a trustee should be reimbursed the reasonable fees of a solicitor properly employed by him in the business of the trust, even when he has paid them after the statute of limitations had run as between him and the solicitor. Budgett *v.* Budgett, [1895] 1 Ch. 202.

tection of the estate;[1] but if a trustee is deprived of his costs, or ordered to pay costs by reason of his own misconduct, or if the suit was improperly instituted by him, he cannot be allowed for such disbursements, but he must bear them personally as a penalty for his misconduct.[2] Nor can a trustee be allowed his expenses in defending himself upon an inquisition of insanity.[3] Allowances for legal expenses and costs are always within the discretion of the court; and such claims can be modified and reduced, if in the judgment of the court they are unreasonable.[4] Interest upon such payments will not be allowed to a trustee, although he had no trust money in his hands at the time of the payment.[5] A trustee can receive pay only for such services and expenses as are within the line of the duties imposed on him by the instrument creating the trust.[6]

§ 911. A trustee ought to keep a regular account of his expenses, and if he does not do so, every intendment of fact will be made against him,[7] and the lowest estimate put upon his charges for expenses.[8] Thus in Hethersell *v.* Hales, the trustee made a charge of £2,500 for expenses, having kept no account; the court upon inquiry found that he had expended large sums,

[1] See chapter on Costs. [Weil *v.* Lehmayer, 74 Md. 81; Nevitt *v.* Woodburn, 190 Ill. 283.]

[2] Caffrey *v.* Darby, 6 Ves. 497; Peers *v.* Ceeley, 15 Beav. 209; Leedham *v.* Chawner, 4 K. & J. 458. [Vaccaro *v.* Cicalla, 89 Tenn. 63; *In re* Beddoe, [1893] 1 Ch. 547; Aydelott *v.* Breeding, 111 Ky. 847. See Somerset Ry. *v.* Pierce, 98 Me. 528; Hopkins *v.* Grimshaw, 17 App. D. C. 1.]

[3] Buckham *v.* Smith, 55 Penn. St. 335. [But see *Re* Caldwell's Bank, 89 Iowa, 533; Lycan *v.* Miller, 56 Mo. App. 79; Lape's Adm'r *v.* Taylor's Trustee, 23 S. W. 960 (Ky. 1893); *supra*, § 901, note *a*, p. 1462.]

[4] Johnson *v.* Telford, 3 Russ. 477; Langford *v.* Mahoney, 5 Ir. Eq. 576. He may be allowed for fees paid counsel employed to represent the trust estate, even though the *cestui* employed counsel to represent the same interest. Clark *v.* Anderson, 13 Bush (Ky.), 111. And for fees paid counsel to defend suit by *cestui que trust*, to have his accounts surcharged and corrected, although the account is to some extent successfully attacked. Ibid.

[5] Gordon *v.* Trail, 8 Price, 416.

[6] Tracy *v.* Gravois R. Co., 84 Mo. 210.

[7] *Ex parte* Cassell, 5 Watts, 442; Green *v.* Winter, 1 Johns. Ch. 27.

[8] McDowell *v.* Caldwell, 2 McCord, Ch. 42.

which might well amount to £2,500, but, as there was no regular account, it allowed only £2,000.[1] The court may reject the whole sum claimed as expenses where no account has been kept, and allow only such sums as are clearly proved by competent evidence,[2] and appear reasonable.

§ 912. A trustee may employ necessary assistants in executing the trust and pay them; thus he may employ agents, collectors, accountants, and other persons properly employed in similar affairs.[3] (*a*) Even where a sum of money was given to trustees for their care and trouble, it was held that they might employ necessary collectors and agents, and pay for their services from the trust fund, and that the gift in the will was for their own care and trouble in overseeing and conducting the trust.[4] So the ordinary brokerage fees will be allowed for transferring stocks,[5] where a transfer is proper.[6] The concurrence of a cotrustee is not necessary for the incurring of expenses if the expenses are proper in themselves; [7] but if they are unnecessary,

[1] 2 Ch. R. 158.

[2] Miller *v.* Whittier, 36 Maine, 577; Wistar's App., 54 Penn. St. 54.

[3] Wilkinson *v.* Wilkinson, 2 S. & S. 237; Henderson *v.* McIver, 3 Madd. 275; Davis *v.* Dendy, id. 170; Hopkinson *v.* Roe, 1 Beav. 180; Turner *v.* Corney, 5 Beav. 515; Weiss *v.* Dill, 3 M. & K. 26; Kennedy's App., 4 Penn. St. 150; Parker *v.* Johnson, 37 N. J. Eq. 368. In England the court will not allow more than two and one-half per cent to be paid to a collector. Weiss *v.* Dill, 3 M. & K. 26; Stackpole *v.* Stackpole, 4 Dow, 226. Trustees incur personal liabilities toward third persons for services upon the trust estate, and actions at law may be maintained against them for such services; but third persons cannot maintain bills in equity against the trustee nor against the trust estate for such services. Wade *v.* Pope, 44 Ala. 690.

[4] Wilkinson *v.* Wilkinson, 2 S. & S. 237; Webb *v.* Shaftesbury, 7 Ves. 480; Fountaine *v.* Pellett, 1 Ves. Jr. 337. [Wilder *v.* Hast, 96 S. W. 1106 (Ky. 1906).]

[5] Jones *v.* Powell, 6 Beav. 485.

[6] Weiss *v.* Dill, 3 M. & K. 27. See Hopkinson *v.* Roe, 1 Beav. 183.

[7] Miller *v.* Beverleys, 4 Hen. & Munf. 415. [Disbrow *v.* Disbrow, 61 N. Y. S. 614, 46 App. Div. 111.]

(*a*) But he will not be reimbursed sums paid to others for services which he ought to have performed himself, such as keeping simple accounts. Noble *v.* Jackson, 132 Ala. 230.

and are incurred against the protest of the *cestui que trust*, they will not be allowed by the court.[1]

§ 913. The disbursements that will be allowed to a trustee will depend very much upon the character of the trust and the directions given in the instrument of trust. If he has a power of sale he will be allowed all the expenses of a sale.[2] If he has power of managing the estate, he will be entitled to all the expenses of keeping up the estate, such as hire of servants, salaries, taxes, cost of repairing, rebuilding farm-houses, manuring, draining, fencing, and other expenses of that kind.[3] If, however, there is a tenant for life entitled to the possession of the estate, the trustee can expend no part of the general fund upon the estate unless he is specially directed to do so.[4] But if the trustee is to reside upon the estate, he will be allowed all the ordinary expenses of living.[5] He cannot, however, be allowed for a park-keeper, or for keeping up a mere pleasure establishment, nor for pulling down and rebuilding houses.[6]

§ 914. If a trustee uses proper care in the custody of the trust property, and it is stolen from him, he will not be responsible; but the amount so lost may be allowed in his accounts.[7] So if the funds are properly deposited in a bank or with a banker, and the money is lost by the failure of the bank, the trustee may

[1] Berryhill's App., 3 Penn. St. 245.

[2] Crump *v.* Baker, 18 Ves. 285.

[3] Fountaine *v.* Pellett, 1 Ves. Jr. 337; Bridge *v.* Brown, 2 Y. & C. Ch. 181; Webb *v.* Shaftesbury, 7 Ves. 480; Bowes *v.* Strathmore, 8 Jur. 92.

[4] Ibid.; Bostock *v.* Blakeney, 2 Bro. Ch. 653; Hibbert *v.* Cook, 1 S. & S. 552; Nairn *v.* Majoribanks, 3 Russ. 582; Caldicott *v.* Brown, 2 Hare, 144; Jones *v.* Dawson, 19 Ala. 673.

[5] Fountaine *v.* Pellett, 1 Ves. Jr. 337.

[6] Ibid.; Webb *v.* Shaftesbury, 7 Ves. 480; Bridge *v.* Brown, 2 N. C. C. 191. [See Warren *v.* Pazolt, 203 Mass. 328.]

[7] Morley *v.* Morley, 2 Ch. Cas. 2; Knight *v.* Plymouth, 3 Atk. 480; 1 Dick. 120; Jones *v.* Lewis, 2 Ves. 240; *ante*, § 441; Neff's App., 57 Penn. St. 91; Campbell *v.* Miller, 38 Ga. 304. [Stevens *v.* Gage, 55 N. H. 175; Carpenter *v.* Carpenter, 12 R. I. 544.]

be allowed such loss in his accounts.[1] If the settlor directs the employment of a particular person, and any part of the trust fund is lost by him without the fault of the trustee, such sum will be allowed.[2] So if investments are made according to the directions of the donor or settlor, or according to law in good faith, trustees will be allowed for any loss which may happen from such investments if they use due diligence in protecting such investments from danger.[3] In some cases it has been held that a trustee receiving a stipulated commission or compensation is liable, upon the same principles that a bailee for hire is liable.[4] But the more common rule is, that trustees are liable only for *good faith* and common prudence, and that if a loss happens to the trust fund in relation to which they have exhibited this care and prudence, they may be allowed for the loss in their accounts.[5] A loss that happens through the negligence of the trustee must be borne by him.[6] But where a trustee properly employed a servant to fell trees upon the trust estate, and the servant carelessly felled a tree upon a third person, who recovered a judgment against the trustee for the injury, the amount was allowed to the trustee in his account.[7] The loss may be proved by the affidavit of the trustee.[8]

[1] Ibid.; Routh *v.* Howell, 3 Ves. 564; Adams *v.* Claxton, 6 Ves. 626; Freeme *v.* Woods, 1 Taml. 172; Massey *v.* Banner, 4 Madd. 416; Belcher *v.* Parsons, Amb. 219; Clough *v.* Bond, 3 M. & Cr. 290. [*Supra*, § 443.]

[2] Kilbee *v.* Sneyd, 2 Moll. 199; Doyle *v.* Blake, 2 Sch. & Lef. 239.

[3] Watson *v.* Stone, 40 Ala. 451; Dockey *v.* McDonald, id. 476; Neilson *v.* Cook, id. 498. [*Supra*, § 460, note *a*.]

[4] *Ex parte* Cassell, 3 Watts, 442.

[5] Chaplin *v.* Givens, Rice, Eq. 132; Mikel *v.* Mikel, 5 Rich. Eq. 442; Bryant *v.* Russell, 23 Pick. 546; Nyce's Est., 5 W. & S. 254; Twaddell's App., 5 Barr, 15; Sollee *v.* Croft, 7 Rice, Eq. 46; Gray *v.* Lynch, 8 Gill, 403; Neff's App., 57 Penn. St. 91; King *v.* King, 37 Ga. 205; Campbell *v.* Miller, 3 Ga. 304. [See *supra*, § 409, note; § 441.]

[6] Litchfield *v.* White, 3 Seld. 444.

[7] Bennett *v.* Wyndham, 4 De G., F. & J. 259; Duncan *v.* Findlater, 6 Cl. & Fin. 894; Heriot's Hosp. *v.* Ross, 12 Cl. & Fin. 517; Mersey Docks Trustee *v.* Gibbs, 11 H. L. Cas. 686; L. R. 1 H. L. 93. [See Prins *v.* Lucas, 210 Pa. St. 620; *In re* Raybould, [1900] 1 Ch. 199.]

[8] Morley *v.* Morley, 2 Ch. Cas. 2; Furman *v.* Coe, 1 Caines' Cas. in Er. 96.

§ 915. What the court will allow upon suit may be done by the trustee without suit.[1] Thus any disbursements which the court would order the trustee to make will be allowed to the trustee, if he makes them without an order; and expenditures for the good of the estate may be allowed to him: (*a*) as, where he buys in a burdensome lease;[2] or pays off an incumbrance,[3] or buys in an outstanding title for the benefit of the estate,[4] or defends the title at law or secures it against a tax title[5] (but not when he defends a suit he should have avoided),[6] or makes any other advances, for the benefit of the trust estate.[7] So trustees may expend moneys for the support of an infant, if the court shall subsequently approve of the expenditure;[8] and he may disburse money for the protection of an adult *cestui que trust*, where he is insane or otherwise incompetent to take care of himself;[9] and in some cases he is bound to do so.[10] Advances

[1] Balsh *v.* Higham, 2 P. Wms. 453; Gray *v.* Lynch, 8 Gill, 403; Hutton *v.* Weems, 12 G. & J. 83; Gibson *v.* Bott, 7 Ves. 150; Lee *v.* Brown, 4 Ves. 369; Bath *v.* Bradford, 2 Ves. 590; Cooks *v.* Parsons, Pr. Ch. 185; Inwood *v.* Twyne, 2 Eden, 153; Hutcheson *v.* Hammond, 3 Bro. Ch. 145; Terry *v.* Terry, Gilb. 11; Shaw *v.* Borrer, 1 Keen, 576; Co. Litt. 171 a.

[2] Fountaine *v.* Pellett, 1 Ves. Jr. 343.

[3] Murray *v.* De Rottenham, 6 Johns. Ch. 62; Freeman *v.* Tompkins, 1 Strob. 53; Pennell's App., 2 Penn. St. 216; Mathews *v.* Dragaud, 3 Des. 25. [Innis *v.* Flint, 106 Minn. 343.]

[4] King *v.* Cushman, 41 Ill. 31; Fischbeck *v.* Gross, 112 Ill. 288.

[5] Wagenseller *v.* Prettyman, 7 Brad. (Ill.) 192.

[6] Page *v.* Boynton, 63 N. H. 190. [*In re* Beddoe, [1893] 1 Ch. 547.]

[7] Altimus *v.* Elliott, 2 Penn. St. 62.

[8] Barlow *v.* Grant, 1 Vern. 255; Franklin *v.* Greene, 2 Vern. 137; Sisson *v.* Shaw, 9 Ves. 285; Prince *v.* Hine, 26 Beav. 634. See Lewin, 419. [*Supra*, § 615 and note *b*.]

[9] Nelson *v.* Duncombe, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798; Leonard *v.* Powell, 41 Ga. 598. [10] Leonard *v.* Powell, 41 Ga. 598.

(*a*) In Gisborn *v.* Charter Oak Life Ins. Co., 142 U. S. 326, 337, Mr. Justice Brewer, in delivering the opinion of the court, said that, in mining, it is not a trustee's duty to stop work the moment a vein is lost, and that, though it could not be foretold in advance how great had been the displacement, it was a reasonable exercise of the power vested in the trustee to make some limited exploration to see if the lost vein could not be recovered, and that reasonable expenses thus incurred are chargeable upon the trust estate.

to the *cestui que trust* on the faith of the estate may be allowed to the trustee as against creditors.[1] But the trustee must show that articles furnished were of the value charged, and that he made no profit from the transactions.[2]

§ 916. The English rule as stated in Robinson *v.* Pett,[3] that trustees can have no compensation for time and trouble, was cited with approbation by Chancellor Kent in two early cases, and enforced with his usual clearness and vigor;[4] and in the State of Delaware that rule is applied in all cases.[5] And perhaps the same rule prevails in Ohio and Illinois. (*a*)

§ 917. But this is the extent of the application of the rule in the United States. It has been said, that "the state of our country and the habits of our people are so different as to have induced the legislatures of nearly all the States to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them, beside reimbursing their expenses; . . . and the equity of the statute is by construction generally extended to conventional trustees where the agreement is silent."[6] Mr. Story said, that "the policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office, and to

[1] Iredell *v.* Langston, 1 Dev. Eq. 392; Balsh *v.* Higham, 2 P. Wms. 455; Att. Gen. *v.* Norwich, 2 M. & C. 424; Att. Gen. *v.* Pearson, 2 Col. C. C. 581; Quarrell *v.* Beckford, 1 Madd. 282; Sandon *v.* Hooper, 6 Beav. 246; Bright *v.* North, 2 Phil. 216.

[2] Cleveland *v.* Pollard, 37 Ala. 556; 1 Ala. (S. C.) 481.

[3] Robinson *v.* Pett, 3 P. Wms. 132; 2 Eq. Cas. Ab. 454.

[4] Green *v.* Winter, 1 Johns. Ch. 37; Manning *v.* Manning, id. 534.

[5] Egbert *v.* Brooks, 3 Harring. 112; State *v.* Platt, 4 Harring. 154.

[6] Boyd *v.* Hawkins, 2 Dev. Eq. 334.

(*a*) There is now a statute in Ohio authorising reasonable compensation for trustees, and in Delaware and Illinois, statutes have authorised compensation for testamentary trustees. See *infra*, § 917, notes.

take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character." [1] These views have received the sanction of the courts and the legislatures of nearly all the States; and trustees are now entitled to compensation for their time and trouble, either in the form of a commission upon the property under their care, or of a gross sum allowed to them as compensation for their services,[2] but they must never speculate on the *cestui*.[3]

§ 918. The general principle prevails in all the States that trustees are to have a reasonable compensation for their time, trouble, and skill in managing the fund and in executing the trust, although there is some diversity in the manner of determining the amount.[4] In the larger number of States, the com-

[1] 2 Story, Eq. Jur. § 1268, n.

[2] Barney *v.* Saunders, 16 How. 542; Shirley *v.* Shattuck, 6 Cush. (Miss.) 26; Robinson *v.* Pett, 2 Lead. Cas. Eq. 436, 473 (Amer. notes); Clark *v.* Platt, 30 Conn. 282.

[3] Sutton *v.* Myrick, 39 Ark. 431.

[4] In Maine, there is allowed one dollar for every ten miles' travel to and from court, and one dollar for each day's attendance, and a commission at the discretion of the court, not exceeding five per cent on the amount of the personal assets, together with reasonable sums paid for professional aid, regard being had to the nature and difficulty of the trust. Rev. Stat. 1857, c. 116, § 16. [Rev. Stat. (1903), c. 65, § 37.]

In New Hampshire, compensation is within the discretion of the court, and it is usually made up from the expenses of attending court, a *per diem* allowance at court, and commissions varying from two to five per cent. Wendell *v.* French, 19 N. H. 210; Tuttle *v.* Robinson, 33 N. H. 118. The court has declined to allow a commission upon the value of specific articles delivered to a specific legatee. Gordon *v.* West, 8 N. H. 444. But an executor who, being an attorney at law, has rendered valuable services to the estate in that capacity, has been held to be entitled to adequate compensation for such services. Wendell *v.* French, 19 N. H. 210. If the damage to the trust by fault of the trustee is greater than the benefit derived from his services, he is entitled to no compensation. Judge of Probate *v.* Jackson, 58 N. H. 458. [As to guardians, see Pub. Stats. (1901) c. 177, § 5.]

In Vermont, all expenses will be allowed, and such fees for services as the law provides. Rev. Stat. c. 53, § 12; Hubbard *v.* Fisher, 25 Vt. 542. A gross sum in addition to expenses has been allowed. Evarts *v.* Nason, 11 Vt. 122. [The statutes provide that executors, administrators, and

pensation is determined by a percentage or commission upon the trust fund, and this commission varies somewhat in the

guardians shall be allowed reasonable compensation. Vt. Pub. Stat. (1906), §§ 2800, 3198.]

In Massachusetts, trustees are allowed their reasonable expenses, and such compensation as the courts may order. Gen. Stat. c. 98, § 10. [R. L. (1902), c. 150, § 14.] In Burrell *v.* Joy, 16 Mass. 229, five per cent upon the gross amount of property coming into their hands was allowed. Denny *v.* Allen, 1 Pick. 147; Jenkins *v.* Eldridge, 3 Story, 225; Longley *v.* Hall, 11 Pick. 124; Ellis *v.* Ellis, 12 Pick. 183; Gibson *v.* Crehore, 5 Pick. 161. The amount is within the discretion of the court, and may be varied to meet the requirements of each case. Scudder *v.* Crocker, 1 Cush. 382; Dixon *v.* Homer, 2 Met. 422; Blake *v.* Pegram, 101 Mass. 592. And the agreement made with the *cestui que trust* in relation to compensation, if no undue advantage is taken, will be considered in determining the amount of compensation. Pierce *v.* Bowker, 130 Mass. 262. A trustee under an assignment for creditors cannot charge a commission for selling the property, etc., not provided for in the agreement. Moors *v.* Wyman, 146 Mass. 60, 64. The commission charged by brokers for the change of investments must be paid out of the income. Heard *v.* Eldredge, 109 Mass. 258. [Such commissions are now chargeable to capital by statute. Acts of 1907, c. 371. In Parker *v.* Hill, 185 Mass. 14, the court declined to fix any definite rate of compensation applicable to all cases or fix any invariable method of determining the proper amount of compensation to a trustee.]

In Connecticut, the matter of compensation is wholly within the discretion of the court. Cantfield *v.* Bostwick, 21 Conn. 555; Kendall *v.* New Eng. Carpet Co., 13 Conn. 392; and a fair compensation will be allowed. Clark *v.* Platt, 30 Conn. 282.

In New York, the compensation of executors and guardians is established by statute at five per cent upon the first one thousand dollars, two and one-half per cent upon the next nine thousand dollars, and one per cent upon all above those amounts. 2 Rev. Stat. 93; see vol. 6, Gen. Stat. N. Y.; c. 362, § 8, Acts of 1863; and c. 115, Acts of 1866; Matter of Roberts, *In re*, 3 Johns. Ch. 43; and see id. 630. They are to be allowed all their reasonable expenses in addition. 3 Rev. Sts. 180 (ed. 1859); Dakin *v.* Demming, 6 Paige, 95. These provisions are extended to trustees. *In re* Roberts, 3 Johns. Ch. 43; Meacham *v.* Sterns, 9 Paige, 403; Livingston's Case, id. 442; Jewett *v.* Woodward, 1 Edw. Ch. 199. [By Code of Civ. Pro. § 3320, as amended by Laws of 1904, § 755, trustees of express trusts are allowed, for receiving and paying out all sums of principal, five per cent on the first one thousand dollars, two and one-half per cent on the next ten thousand dollars, and one per cent on all above eleven thousand dollars, and the same rates of commission are allowed upon each year's income. 4 Stover & Bliss' Code, Supplement, § 3320. See Robertson *v.* De Brulatour, 188 N. Y. 301; Matter of Johnson, 170 N. Y. 139; Matter of Wilcox, 109

different States. In some States, a gross sum is allowed for time and trouble; and in others a *per diem* compensation is

N. Y. S. 564, 125 App. Div. 152; McAlpine *v.* Potter, 126 N. Y. 285.] Compensation to trustees is to be computed upon the whole property, real and personal. De Peyster's Case, 4 Sandf. Ch. 514; Waggstaffe *v.* Lowerre, 23 Barb. 224. These commissions to trustees include all allowances for expenses. Stevenson *v.* Maxwell, 2 Sandf. Ch. 284; Griffin *v.* Barney, 2 Comst. 372; Nichols *v.* McEwen, 21 Barb. 66. If a deed of trust [by an insolvent for the benefit of creditors] should make a larger provision for compensation, it will not be allowed. Griffin *v.* Barney, 2 Comst. 372. And an assignment in trust for creditors was held to be void, for the reason that it provided for the expenses of the trustees in addition to their commissions. Nichols *v.* McEwen, 21 Barb. 66. But if a trustee undertakes a trust from motives of friendship and kindness, no commissions can be allowed. Mason *v.* Rosevelt, 5 Johns. Ch. 534; Wetmore *v.* Brown, 37 Barb. 133. The compensation is confined to commissions, and it cannot be allowed as a gross sum, or as a *per diem* charge. M'Whorter *v.* Benson, Hopk. 28; Vanderheyden *v.* Vanderheyden, 2 Paige, 288; Valentine *v.* Valentine, 3 Barb. Ch. 438. But see Jewett *v.* Woodward, 1 Edw. Ch. 199. This compensation is a matter of right under the statutes, and not of discretion. Vanderheyden *v.* Vanderheyden, 2 Paige, 288; Rapalje *v.* Hall, 1 Sandf. Ch. 406; Meacham *v.* Sterns, 9 Paige, 405; Cairns *v.* Chaubert, id. 161; Morgan *v.* Hannas, 49 N. Y. 667. But care will be taken not to allow double commissions when the estate is transferred from one trustee to another. Jones's Case, 4 Sandf. Ch. 616; Kellogg's Case, 7 Paige, 267; Hosack *v.* Rogers, 9 Paige, 468; Valentine *v.* Valentine, 3 Barb. Ch. 438; White *v.* Bullock, 20 Barb. 99. [Matter of Todd, 72 N. Y. S. 277, 64 App. Div. 435.] As to commissions in cases of constructive trust, see Cowing *v.* Howard, 46 Barb. 579; Duffy *v.* Duncan, 32 Barb. 587; Slocomb *v.* Barry, 38 N. Y. 46; Ogden *v.* Murray, 39 N. Y. 202. The compensation of receivers appointed by the courts is not governed by these rules, but the courts may determine such compensation in their own discretion. Gardiner *v.* Tyler, 2 N. Y. Dec. 247. Nor are trusts created by instruments between the parties within these rules. In such case the court will determine the compensation judicially. *In re* Schell, 53 N. Y. 263. Persons who are trustees and also executors will be allowed commissions in each capacity: Phœnix *v.* Livingston, 101 N. Y. 451; *In re* Mason, 98 N. Y. 527; Laytin *v.* Davidson, 29 Hun, 622, where the offices are distinguishable. Hurlburt *v.* Durant, 88 N. Y. 121; *In re* Jackson, 32 Hun, 202; Blake *v.* Blake, 30 Hun, 471. [Olcott *v.* Baldwin, 190 N. Y. 99; Matter of Union Trust Co., 75 N. Y. S. 68, 70 App. Div. 5.] If, however, the two functions are inseparable, double commissions will not be allowed. Johnson *v.* Lawrence, 95 N. Y. 154. [Matter of Hunt, 105 N. Y. S. 696, 121 App. Div. 96; Matter of Slocum, 169 N. Y. 153; McAlpine *v.* Potter, 126 N. Y. 285. See also Spencer *v.* Spencer, 56 N. Y. S. 460.] Statutory fees are due trustees with-

made for time, travel, and labor. In many States, the percentage or commissions are established by statutes; in others, the

out regard to the amount of labor they have done; but if a trustee resigns, his compensation may be determined by the court as a part of the terms of his release. *In re* Allen, 96 N. Y. 327; 29 Hun, 7. Commissions of a trustee removed. See *In re* Baker, 35 Hun, 272.

In New Jersey, previous to 1855, there was great confusion as to the compensation of executors, trustees, and other fiduciary officers. See Voorhees *v.* Stoothorf, 6 Hals. 149; Jackson *v.* Jackson, 2 Green, Ch. 113; Worbass *v.* Armstrong, 2 Stockt. Ch. 263; State Bank *v.* Marsh, Saxt. 296; Mathis *v.* Mathis, 3 Harrison, 67; Stevenson *v.* Phillips, 1 Zabr. 71; Lloyd *v.* Rowe, Spencer, 685. The statute of that year provided that the commissions of trustees, over and above their necessary expenses, should not exceed seven per cent upon the first thousand dollars, four per cent on the next four thousand dollars, three per cent on the next five thousand dollars, and two per cent upon all sums above ten thousand dollars, provided that all allowances shall not exceed one-fifth of the estate. Nixon's Dig. 562, Act of 1855, §§ 9, 10. [The present statute is substantially the same. N. J. Gen. Stats. (1895), p. 2380, §§ 109, 110, 111, p. 2402, § 204.] One who is executor and trustee will be allowed reasonable compensation in each capacity. Pitney *v.* Everson, 42 N. J. Eq. 361; and Everson *v.* Pitney, 40 id. 539. For various considerations relating to this subject, see Gilmore *v.* Tuttle, 34 N. J. Eq. 45. [Babbitt *v.* Fidelity Trust Co., 72 N. J. Eq. 745.] The trustee may forfeit his compensation by misconduct, but in such case he may be allowed compensation for the value to the estate of any services performed by him. Blauvelt *v.* Ackerman, 23 N. J. Eq. 495; McKnight *v.* Walsh, id. 136; Lathrop *v.* Smalley, id. 192; Moore *v.* Zabriskie, 3 Green, 51. [Welsh *v.* Brown, 50 N. J. Eq. 387; Dufford *v.* Smith, 46 N. J. Eq. 216; Babbitt *v.* Fidelity Trust Co., 72 N. J. Eq. 745.]

In Delaware, a voluntary trustee was formerly not entitled to compensation, but was allowed expenses and saved from loss. Brooks *v.* Egbert, 2 Del. Ch. 83. [But by statute, enacted in 1887, testamentary trustees are now allowed commissions, the amount to be determined by the chancellor. Laws of Del. (1893), p. 712.]

In Pennsylvania, by a statute June 14, 1836, it was made lawful for the court to allow such compensation to trustees as shall be just and reasonable. [4 Purdon's Digest (13th ed.), p. 4918, § 101.] The courts had always allowed compensation under an act passed in 1713. Wilson *v.* Wilson, 3 Binn. 560; Anderson *v.* Neff, 11 S. & R. 218; Heckert's App., 24 Penn. St. 486; Prevost *v.* Gratz, 3 Wash. C. C. 434. The courts of Pennsylvania hold, however, that compensation is a matter of judicial and equitable discretion, and that they may withhold it if there is any misconduct on the part of the trustee. Walker *v.* Walker, 9 Wall. 743; *Ex parte* Cassel, 3 Watts, 443; Swartswalter's Acct., 4 Watts, 79; Hermstead's App., 60 Penn. St. 423; Berryhill's App., 35 id. 245; Robenett's App., 38 id. 112; Witman's

rates are adjusted upon equitable principles. These statutes generally refer to the fees or compensation of executors, admin-

App., 28 id. 378; Raybold *v.* Raybold, 20 id. 308; Stehman's App., 5 Barr, 414; Dyott's Est., 2 W. & S. 566; Say *v.* Barnes, 4 S. & R. 116; Aston's Est., 4 Whart. 240; Fournier *v.* Ingraham, 7 W. & S. 31; Bell's Est., 2 Pars. Eq. 200; Drysdale's App., 14 Penn. St. 537; McCahan's App., 7 id. 59; Norris's App., 71 id. 106; Carrier's App., 79 id. 230. This rule was applied to deprive an attorney of his commissions where he withheld for a long time money collected. Bredin *v.* Kingland, 4 Watts, 420. But a trustee will not be deprived of his commission for a mistake in judgment. Meyer's App., 62 Penn. St. 109. The general practice is to allow compensation by commissions, and five per cent is the ordinary rule. Pusey *v.* Clemson, 9 S. & R. 209; Hemphill's Est., 1 Pars. Eq. 31; Bird's Est., 2 Pars. Eq. 171; Pennell's App., 2 Penn. St. 216; Wood's App., 86 id. 346. But the amount is under the control and discretion of the court, and it may give more or less as circumstances require. Pusey *v.* Clemson, 9 S. & R. 209; Marsteller's App., 4 Watts, 268; Harland's App., 5 Rawle, 331; Stephenson's Est., 4 Whart. 104; Walker's Est., 9 S. & R. 225; Miller's Est., 1 Ash. 335; Green's Est., id. 317; Nathans *v.* Morris, 4 Whart. 389; Shunk's App., 2 Penn. St. 307; Perkin's App., 108 id. 314. [Dorrance's Estate, 186 Pa. St. 64.] Double commissions will not be allowed. Aston's Est., 4 Whart. 241; Stevenson's Est., 1 Pars. Eq. 19. [1 Purdon's Digest (13th ed.), p. 1127, § 186.] Nor commissions on reinvestments. Barton's Est., 1 Pars. Eq. 29; Trustees of Hemphill, id. 31; Hemphill's App., 18 Penn. St. 303. Nor interest on commissions. Armstrong's Est., 6 Watts, 286; Callaghan *v.* Hall, 1 S. & R. 241; Say *v.* Barnes, 4 S. & R. 116. There can be but one compensation, however numerous the trustees. Stevenson's Est., 1 Pars. Eq. 19. Where a testator directed his trustees to pay the interest upon a fund set apart to his widow, it was held that the trustees could not withhold a part of the income of such fund as commissions. Solliday *v.* Bisset, 2 Jones, 347; but the late case, Spangler's App., 21 Penn. St. 33, is inconsistent with the first case. Professional and extra services of a trustee may be compensated: Lowrie's App., 1 Grant, Ca. 373; but not services rendered necessary by the trustee's own wrong. Stearley's App., 38 Penn. St. 525. If an investment remains as it was left by the testator, the trustee can have commissions only on the income. McCauseland's App., 88 Penn. St. 466; Luken's App., 47 id. 356; Myer's App., 62 id. 104. The reckoning by a percentage is, however, used only for its convenience; the question is not one of percentage, but compensation for responsibility incurred and labor expended. Montgomery's App., 86 Penn. St. 230. [Vastine's Estate, 190 Pa. St. 443; Harrison's Estate, 217 Pa. St. 207; Ashman's Estate, 218 Pa. St. 509; Dorrance's Estate, 186 Pa. St. 64.] The fact that the trustee has rendered informal semi-annual accounts to the *cestui que trust* without deducting commissions will not estop him from claiming them in his final account. Wistar's App., 86 Penn. St. 160. For

istrators, and guardians; but the courts by equitable construction have extended their provisions to trustees and others per-

sales of real estate two and a half per cent. Carrier's App., 79 Penn. St. 230. And three per cent for special service about the sale. Snyder's App., 54 Penn. St. 69; Robb's App., 41 id. 49. [It seems to be customary in Pennsylvania to allow a commission on income as compensation for management, payable from income, and a commission on principal for care and preservation, payable from principal. Bosler's Estate, 161 Pa. St. 457; Penn-Gaskell's Estate, 208 Pa. St. 342; Brennan's Estate, 215 Pa. St. 272; Thouron's Estate, 182 Pa. St. 126. Usually a commission on principal will not be allowed until the termination of the trust or of the trustee's relation to the property, but there are exceptions. Ibid.]

In Maryland, the court had power, by the act of 1798, to vary executors' commissions from five to ten per cent on the amount of the inventory. Scott *v.* Dorsey, 1 Har. & J. 232. And he must pay a tax of ten per cent to the State upon such commissions. Act of 1844, c. 187; William *v.* Mosher, 6 Gill, 454. The right to this compensation is absolute: McKim *v.* Duncan, 4 Gill, 72, and extends to trustees. Ringgold *v.* Ringgold, 1 Har. & G. 27; Nicholls *v.* Hodges, 1 Pet. 565; West *v.* Smith, 8 How. 411; Abbott *v.* Baltimore, &c. Packet Co., 4 Md. Ch. 315; Mitchell *v.* Holmes, 1 Md. Ch. 287. Commissions for the sale of lands by order of the court are established by rules of court at seven per cent on the first hundred dollars, six per cent on the second, five on the third, four on the fourth, three and a half on the fifth and sixth, three on the seventh and eighth, two and one-half on the ninth and tenth, and three per cent on all above $3,000, in addition to all expenses not strictly personal. Gibson's Case, 1 Bland, 147. A *per diem* allowance is not favored, but the courts are liberal in allowing for expenses. Ringgold *v.* Ringgold, 1 Har. & G. 27; Diffenderfer *v.* Winter, 3 G. & J. 347; Jones *v.* Stockett, 2 Bland, 417; Chace *v.* Lockerman, 11 G. & J. 185; Compton *v.* Barnes, 4 Gill, 57; Green *v.* Putney, 1 Md. Ch. 267; Dorsey *v.* Dorsey, 10 Md. 471; 6 Md. 460; *Ex parte* Young, 8 Gill, 287; Northern C. R. Co. *v.* Keighler, 29 Md. 572. Reasonable commissions are allowed to the estate of a trustee deceased before the completion of the trust. Trustees appointed by the court will receive only the statute commissions, notwithstanding a provision in the deed creating the trust, that the original trustees shall receive a larger compensation. Widener *v.* Fay, 61 Md. 273. By analogy to the statute allowing commissions to executors, &c., allowances of commissions are made to conventional trustees, although not provided in the instrument. Sanderson *v.* Pearson, 45 Md. 483. [Abell *v.* Brady, 79 Md. 94; Kennedy *v.* Dickey, 99 Md. 295; National Bank *v.* Dulaney, 96 Md. 159.] Commissions are charged on the gross income. Willson *v.* Tyson, 61 Md. 575; see Md. decisions, Jenkins *v.* Whyte, 62 Md. 427.

In Virginia, the courts allow a commission of five per cent upon the receipts. Granberry *v.* Granberry, 1 Wash. 246; Taliaferro *v.* Minor, 2 Call, 197; Miller *v.* Beverleys, 4 Hen. & Munf. 420; Triplett *v.* Jameson, 2

forming fiduciary duties. But if it appears, from the instrument of trust or otherwise, that it was the intention that no compensation should be charged, none will be allowed.[1]

Munf. 242; Hipkins *v.* Bernard, 4 Munf. 83; Kee *v.* Kee, 2 Grat. 132; Waddy *v.* Hawkins, 4 Leigh, 458. [The code allows "reasonable compensation in the form of a commission (on receipts) or otherwise." Va. Code (1904), § 2695 and note. What is reasonable rests in the discretion of the court. Whitehead *v.* Whitehead, 85 Va. 870.] Trustees to sell real estate may have the same commission. Lyons *v.* Byrd, 2 Hen. & Munf. 22; Deanes *v.* Scriba, 2 Call, 416. But in cases where the duties of the trustees have been long and arduous, and the care and responsibility great, a larger sum has been allowed. Fitzgerald *v.* Jones, 1 Munf. 156; McCall *v.* Peachey, 3 Munf. 306; Hipkins *v.* Bernard, 4 Munf. 93; Farneyhough *v.* Dickerson, 2 Rob. 589; Cavendish *v.* Fleming, 3 Munf. 201. [The statute provisions in West Virginia are the same as those in Virginia. W. Va. Code (1906), § 3309.]

In North Carolina, trustees may be allowed a sum not exceeding five per cent, together with their necessary disbursements. This sum is under the control of the court, and may be reduced, but not enlarged. Hodge *v.* Hawkins, 1 Dev. & Bat. 567; Bond *v.* Turner, 2 Taylor, 125; Peyton *v.* Smith, 2 Dev. & Bat. 349. Walton *v.* Avery, id. 405; Turnage *v.* Green, 2 Jones, Eq. 66. [Weisel *v.* Cobb, 118 N. C. 11.] And commissions are allowed, although trustees are so much at fault that they are charged with compound interest. Peyton *v.* Smith, 2 Dev. & Bat. 325; Thompson *v.* McDonald, id. 471. And although the trustees have legacies, unless the legacies are given in place of commissions. Oden *v.* Windley, 2 Jones, Eq. 445. But Arnold *v.* Byard, 2 Dev. Eq. 4, seems to imply that commissions would not be paid to a trustee who misconducts himself, nor where regular accounts are not kept. Finch *v.* Raynad, 2 Dev. Eq. 141. These rules apply to trustees, as well as to executors and guardians. Boyd *v.* Hawkins, 2 Dev. Eq. 211, 334; Sheril *v.* Shuford, 6 Ired. Eq. 228; Raiford *v.* Raiford, id. 495; Ingram *v.* Kirkpatrick, 8 Ired. Eq. 62. A trustee *de son tort* will not be allowed commissions. Hagler *v.* McCombs, 66 N. C. 345. A provision in the trust-deed for compensation gives the trustee no lien on the property. Trust Co. *v.* Railroad, 99 N. C. 139. [For commissions to executors and administrators see N. C. Code Revisal of 1908, § 149, and to guardians, § 1809.]

In South Carolina, a commission of two and one-half per cent is allowed as compensation by statute, and the courts disclaim any discretionary power over it. But if the rate of compensation is named in the instrument of trust, the statute has no application. College of Charleston *v.* Wellington, 13 Rich. Eq. 195; 1 Rev. Dig. 392. Ten per cent is allowed upon the

[1] Northern Central R. R. Co. *v.* Keighton, 29 Md. 572; Mason *v.* Rosevelt, 5 Johns. Ch. 534.

§ 919. The usual practice in relation to trusts is to allow trustees a commission upon the amount of the yearly income

income of all sums at interest. These sums embrace all personal expenses, so that all charges for travel are disallowed. Act of 1789; [S. C.Code (1902), §§ 2590, 2560; Cobb *v.* Fant, 36 S. C. 1; Reese *v.* Meetze, 51 S. C. 333; Cunningham *v.* Cunningham, 81 S. C. 506]; *Ex parte* Witherspoon, 3 Rich. Eq. 14; Norton *v.* Gillison, 4 Rich. Eq. 219; Logan *v.* Logan, 1 McCord, Ch. 5; Snow *v.* Callum, 1 Des. 542. Though where executors were obliged to travel to Cuba to settle an estate, the gift of $1,000 by the legatee was upheld. Erwing *v.* Seigling, Riley, Eq. 202; Ruff *v.* Summers, 4 Dev. 529. Annual accounts must be filed, and any omission to file them is a forfeiture of all commissions. Benson *v.* Bruce, 4 Dev. 464; Edmonds *v.* Crenshaw, Harp. 233; Frazier *v.* Vaux, 1 Hill, Ch. 203; Wright *v.* Wright, 2 McCord, Ch. 196. So if vouchers are not filed with the accounts. Black *v.* Blakely, 2 McCord, Ch. 8; McDowell *v.* Caldwell, id. 59. Trustees are subject to the same rules, except they are not required to file annual accounts. Bonn *v.* Davant, Riley, Ch. 44; Muckenfoss *v.* Heath, 1 Hill, Ch. 184; Tanaux *v.* Ball, 1 McCord, Eq. 458. But if they agree to serve without compensation, they are not entitled to commissions, McCaw *v.* Blunt, 2 McCord, Eq. 90; Vestry, &c. *v.* Barksdale, 1 Strob. 197. In Sollee *v.* Croft, 9 Rich. Eq. 474, a trustee was allowed for his personal services in going to Alabama to secure the trust property. A trustee is entitled to commissions upon sums paid to the *cestui* in his presence, on their joint receipt and upon a judgment in favor of the *cestui* in an action brought by herself and trustee. Lanier *v.* Brunson, 21 S. C. 41.

The statutes of Georgia are very similar to those of South Carolina. An executor forfeits all compensation if he neglects to make annual returns. Fall *v.* Simons, 6 Ga. 274; Kenan *v.* Paul, 8 Ga. 417. By act of Feb. 1850, 2 Cobb, Dig. 540, trustees are entitled to a commission: Lowe *v.* Morris, 13 Ga. 169; but not to encroach upon the *corpus* of the estate. Burney *v.* Spear, 17 Ga. 225. See Price *v.* Cutts, 29 Ga. 142. [Under provisions of Georgia Code (1895), trustees are allowed the same compensation as guardians and administrators, viz. two and one-half per cent on sums received and the same commission on sums paid out, three per cent on the appraised value of the property distributed in kind, ten per cent on receipts of interest upon money loaned by them or by the decedent. §§ 3193, 3484, 3485, 3487.]

In Alabama, compensation is allowed to trustees. Spence *v.* Whitaker, 3 Porter, 327; Phillips *v.* Thompson, 9 Porter, 669; Bothen *v.* McColl, 5 Ala. 314; Carrol *v.* Moore, 7 Ala. 617; Benford *v.* Daniels, 13 Ala. 613. No statute has determined the rate, and each case is left to depend upon the labor and trouble, and the amount of the estate. Harris *v.* Martin, 9 Ala. 899; Gould *v.* Hayes, 25 Ala. 432. [Marks *v.* Semple, 111 Ala. 637.] Though five per cent commission is the ordinary allowance. Bendell *v.* Bendell, 24 Ala. 306; Woodruff *v.* Snedecor, 68 Ala. 442. But a *per diem* allowance may be made: Marshall *v.* Halloway, 2 Stewart, 453; Magee *v.*

received and paid out by them. This commission varies according to the rules in the various States. In some States,

Cowperthwaite, 10 Ala. 968; or a gross sum. O'Neil *v.* Donnell, 9 Ala. 738. Expenses are also allowed. Hearns *v.* Savage, 16 Ala. 291. Compensation, however, is a matter of discretion, and may be withheld for misconduct. O'Neil *v.* Donnell, 9 Ala. 738; Powell *v.* Powell, 10 Ala. 914; Gould *v.* Hayes, 25 Ala. 432; Hall *v.* Wilson, 14 Ala. 295; Doneldson *v.* Pusey, 13 Ala. 752; Lyon *v.* Foscue, 60 Ala. 468. The special success of an investment is no reason for increase of pay. A reasonable allowance may be made for extra labor and counsel fees in instituting and prosecuting a suit for instructions; but services rendered by the counsel to any of the rival claimants cannot be charged to the trust funds. Grimball *v.* Cruse, 70 Ala. 534. [As to executors and administrators, see Ala. Code (1907), §§ 2690, 2691.]

In Mississippi, an allowance of from five to ten per cent upon the amount of an estate upon final settlement is made. Hutch. & How. Dig. 414, § 96; Merrill *v.* Moore, 7 How. (Miss.) 292; Cherry *v.* Jarratt, 3 Cush. (Miss.) 221; Shurtleff *v.* Witherspoon, 1 Sm. & M. 622. [Niolon *v.* McDonald, 71 Miss. 337.] These commissions are intended to embrace all the expenses of settling an estate. Satterwhite *v.* Littlefield, 13 Sm. & M. 306. There may be cases where an extra allowance will be made for legal expenses. Cherry *v.* Jarratt, 3 Cush. (Miss.) 221; Shirley *v.* Shattuck, 6 Cush. (Miss.) 26. [See Miss. Code (1906), § 2160, as to executors and administrators, and § 2444 as to guardians.]

In Florida, see Merritt *v.* Jenkins, 17 Fla. 593; Muscogee Lumber Co. *v.* Hyer, 18 id. 698. [As to executors and administrators, see Gen. Stat. (1906), § 2354.]

In Tennessee, previous to 1822, no compensation to trustees for time and trouble or travelling was allowed, but reasonable costs for prosecuting and defending suits were allowed: Stephenson *v.* Stephenson, 3 Hayw. 123; Bryant *v.* Pickett, id. 225; Stephenson *v.* Yandle, 5 Hayw. 261; but since 1822, reasonable compensation is allowed. See act January 27, 1838. Five per cent on amount received and disbursed is a customary allowance to a receiver. Stretch *v.* Gowdy, 3 Tenn. Ch. 565. A trustee guilty of maladministration is not entitled to compensation: Loveman *v.* Taylor, 85 Tenn. 2; nor to attorney's fees in the case of litigation brought on by his own fault. Solinsky *v.* Lincoln Sav. Bk., 85 Tenn. 369. [See Tenn. Code (1896), §§ 3525, 6388.]

In Kentucky, the English rule of not allowing compensation for time and trouble was adhered to for a considerable time. Hite *v.* Hite, 1 B. Mon. 179; Breckenridge *v.* Brooks, 2 A. K. Marsh. 339; McMullen *v.* Scott, 2 Mon. 151. But it was altered by statute. 1 Morehead *v.* Brown, Dig. 668. Five per cent is allowed in some cases. Logan *v.* Troutman, 3 A. K. Marsh. 67; Ramsey *v.* Ramsey, 4 Mon. 152; Wood *v.* Lee, 5 Mon. 66; McCraken *v.* McCraken, 6 Mon. 342; Webb *v.* Webb, id. 167. In other

commissions are allowed for receiving and investing the principal fund, and another commission allowed at the close of the

cases, seven and one-half per cent, and in others ten per cent, has been allowed. Wood *v.* Lee, 5 Mon. 66; Bowling *v.* Cobb, 6 B. Mon. 358; Floyd *v.* Floyd, 7 id. 292. No sum is fixed as proper compensation for trustees, but a reasonable sum will be allowed. Philips *v.* Bustard, 1 B. Mon. 350; Lane *v.* Coleman, 8 id. 571; Bank of United States *v.* Hirst, 4 id. 439; Greening *v.* Fox, 12 id. 190. [Wilder *v.* Hast, 96 S. W. 1106 (Ky. 1906); Central Trust Co. *v.* Johnson, 74 S. W. 663 (Ky. 1903); Doom *v.* Howard, 64 S. W. 469 (Ky. 1901); Patrick *v.* Patrick, 122 S. W. 159 (Ky. 1909). See Whittingham *v.* Schofield, 68 S. W. 116 (Ky. 1902).] In Fleming *v.* Wilson, 6 Bush, 610, it was held that if a trustee had been faithful and skilful, and had been subjected to unnecessary litigation by the *cestui que trust*, a liberal compensation should be allowed him, and all his costs and expenses out of the trust fund. [As to executors and administrators, see Stat. of Ky. (1909), § 3914, and as to guardians, § 4154.]

In Ohio, under Act 1840, c. 208, § 175, Kerwin, Dig. 607, executors may receive commissions at the rate of six per cent upon the first thousand dollars, four per cent upon the next four thousand dollars, and upon all sums above five thousand dollars two per cent; and the court may make such further allowance for expenses and extra services as may seem reasonable. It has been thought that trustees do not come within the provisions of the act, and that they were not entitled to compensation in the absence of an agreement to that effect. Gilbert *v.* Sutliff, 3 Ohio St. 149. They shall be allowed their expenses; but if they refuse to account or misconduct themselves, their expenses may be disallowed. [Bates' Annot. Stat. (1906), § 6333, authorizes the probate court to allow trustees just compensation for services, not exceeding that allowed to guardians for like services. By § 6288, guardians are to be allowed reasonable compensation.]

In Illinois, executors may receive a commission not exceeding six per cent on the personal estate, and three per cent upon the money arising from the sales of land, and such further allowances for expenses as are reasonable. 2 Rev. Stat. 1219, March 3, 1845, § 36. But trustees receive no compensation except under a special stipulation. Constant *v.* Matteson, 22 Ill. 546. [See Cook *v.* Gilmore, 133 Ill. 139.] But under this statute no allowance can be made for extra service in making journeys, etc., to collect claims, nor for service in organizing and working up a defence to a suit against the estate, nor for professional service in defending suit. Hough *v.* Harvey, 71 Ill. 72. A trustee has no vested interest in or lien on the trust property for his compensation which entitles him to retain the fund after breach of his bond. Lee *v.* Pennington, 7 Brad. (Ill.) 247. [By statute enacted in 1891, testamentary trustees, except of charitable or educational trusts shall be allowed reasonable compensation. Ill. Rev. Stat. (1905), c. 4, § 136. See Rackemann *v.* Tilton, 236 Ill. 49.]

In Missouri, executors are allowed commissions not exceeding six per

trust for the care of the fund and for paying it over or distributing it to the persons entitled.[1] Care is taken that double

cent on the personal estate and the sales of land. A gross sum may be allowed. Fisher *v.* Smart, 7 Mo. 581. [This is not necessarily the same as that allowed to executors. Berry *v.* Stigall, 125 Mo. App. 264. Mo. Annot. Stat. (1906), § 223, allows executors and administrators five per cent on personalty and the proceeds of real estate. As to guardians, see § 3534.]

In Iowa, see First National Bank *v.* Owen, 23 Iowa, 185. [By Code of Iowa (1907), § 3415, the commissions of executors and administrators are fixed at five per cent on the first thousand dollars, two and one-half per cent on the next four thousand dollars, and one per cent on all over five thousand dollars, with authority in the court to make reasonable allowance for extraordinary services. Compensation of guardians is left to the discretion of the court. § 3205.]

In California, professional services of the trustee must be paid for out of the income of the property. Elling *v.* Naglee, 9 Cal. 683. [By the Code, when the declaration of trust is silent as to compensation, trustees receive the same compensation as executors: viz., seven per cent on the first one thousand dollars, four per cent on the next nine thousand dollars, three per cent on the next ten thousand dollars, one per cent on the next fifty thousand dollars, and one-half per cent on all above one hundred thousand dollars. Cal. Civ. Code (1907), § 2274, Code of Civ. Pro. (1907), § 1618. See More *v.* Calkins, 95 Cal. 435; Bemmerly *v.* Woodard, 136 Cal. 326; *In re* Thompson, 101 Cal. 349, 355.]

In Oregon, trustees of an insolvent estate are entitled to reasonable compensation, but an agreement by said trustees with one of their number to conduct the business and to pay him a commission is void. Kinney *v.* Heatley, 13 Or. 35. [For commissions of executors and administrators, see Bellinger & Cotton's Codes, and Stat. (1902), § 1209. For compensation of guardians, see § 5288.]

In Arkansas, see Briscoe *v.* State, 23 Ark. 592. [Guardians and curators receive just and reasonable compensation to be determined by the court. Ark. Stat. (1904), § 3828.] (*a*)

[1] In Pennsylvania, one and one-half per cent was allowed. Luken's App., 47 Pa. St. 356.

(*a*) By Colorado Rev. Stat. (1908), § 7243, executors, administrators, guardians, and conservators are allowed compensation not exceeding six per cent on personalty, and not exceeding three per cent on the proceeds of sale, mortgage or letting of real estate. By Idaho Code of Civ. Pro. (1908), § 5618, trustees are allowed "such compensation as the court may adjudge to be just and reasonable," not necessarily in the form of commissions. By Kansas Gen. Stat. (1909), executors, administrators, and guardians are allowed reasonable com-

commissions are not allowed. In many States the commissions and compensation of the trustees depend upon their fidelity in

pensation to be determined by court. §§ 3599, 3989. By Michigan Comp. Laws (1897), § 695, testamentary trustees appointed by court receive the same compensation as executors and administrators: viz., commissions upon personalty collected and accounted for and upon the proceeds of real estate sold under order of court, at the rate of five per cent on the first thousand dollars, two and one-half per cent on the next four thousand dollars, and one per cent on all above five thousand dollars. The court is authorized to make an additional reasonable allowance for extraordinary services. § 9438. By Minnesota Rev. Laws (1905), § 3707, executors, administrators, and guardians are allowed for services such fees as are fixed by court. By Montana Code of Civ. Pro. (1907), § 7699, testamentary trustees are allowed reasonable compensation for services. By § 7633 executors and administrators are allowed seven per cent on the first thousand dollars, five per cent on the next nine thousand dollars, four per cent on the next ten thousand dollars, and two per cent on all above twenty thousand dollars. The court is authorized to allow them reasonable compensation in addition for extraordinary services. In Nebraska, by Corbey's Stat. (1907), § 5149, executors and administrators are allowed commissions upon personalty and the proceeds of real estate sold for the payment of debts, at the rate of five per cent on the first one thousand dollars, two and one-half per cent on the next four thousand dollars, and one per cent on all above five thousand dollars. The court may make a further allowance of reasonable compensation for extraordinary services. By North Dakota Code (1905), § 5741, trustees are entitled to the same compensation as executors when the declaration of trust is silent on the subject or does not specify the amount or rate. The rate for executors is five per cent on the first thousand dollars, four per cent on the next four thousand dollars, and two and one-half per cent on all above five thousand dollars. The statute authorizes a further allowance for extraordinary services, not to exceed the total of the statutory commissions. §§ 8183–8184. By Oklahoma Gen. Stat. (1908), § 190, executors and administrators are allowed the same compensation as that given them in North Dakota. Guardians are allowed reasonable compensation in the discretion of the court. § 3199. In Rhode Island the statutes provide for reasonable compensation to executors, administrators, and guardians. Gen. Laws (1909), c. 319, § 8; c. 321, § 28. In South Dakota the statute provisions for trustees are the same as in North Dakota. S. D. Civ. Code (1908), § 1646; Prob. Code, § 271. In Texas guardians are entitled to five per cent on cash received and paid out, not including money on hand at the commencement of the guardianship. Sayles' Civil Stat. (1897), § 2780. By Utah Comp. Laws (1907), § 3978, testamentary trustees are

the administration of the trust. If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold all compensation, or they can allow such compensation as will pay for the value of their services so far as they have been beneficial to the estates.[1] In some instances, compensation has been allowed and retained towards making good a breach of the trust.[2] In other States, it has been held that the trustees have a vested right to the commissions or compensation given by the statutes. But if the rate is named in the instrument of trust, it cannot be increased.[3] (*a*)

[1] Singleton *v.* Lowndes, 9 S. C. 465.

[2] Belknap *v.* Belknap, 5 Allen, 472.

[3] Briscoe *v.* State, 23 Ark. 592; College of Charleston *v.* Wellington, 13 Rich. Eq. 195.

allowed reasonable compensation to be fixed by the court. In Washington commissions are allowed to executors and administrators on the whole estate accounted for at the rate of seven per cent on the first one thousand dollars, five per cent on the second one thousand dollars and four per cent on all above two thousand dollars, provided the will makes no provision for compensation. Ballinger's Codes & Statutes (1897), § 6314. Guardians are allowed reasonable compensation. § 6418. In Wisconsin executors and administrators are allowed five per cent on the first one thousand dollars, two and one-half per cent on the next four thousand dollars, and one per cent on all above five thousand dollars, provided the will makes no provision for compensation. Further sums may be allowed for extraordinary services. Wis. Stat. (1897), §§ 3928–3929. Guardians are allowed reasonable compensation. § 3993. In Wyoming there are similar provisions as to guardians and executors, except that the commissions allowed executors are ten per cent on the first ten thousand dollars, five per cent on the next fifteen thousand dollars, three per cent on the next twenty-five thousand dollars, and two per cent on all above fifty thousand dollars. In allowing for extraordinary services the court must not exceed one-half the statutory commissions.

(*a*) In States where there is no fixed statutory rate of compensation for trustees, it is usual to allow commissions for the ordinary services of trustees, and the tendency is for the rate of commissions to become customary, but this method of reckoning compensation is only for convenience; and where exceptional circumstances show that the compensation reckoned in this way is too large or too small, the rate will be varied or another method of reckoning may be employed. The elements which determine proper compensation are the amount of risk and responsibility and the time

and labor required of the trustee and actually spent in the performance of his duties. The guiding principle is to give the trustee a reasonable recompense only, not a profit. See Parker *v.* Hill, 185 Mass. 14; National Bank *v.* Dulaney, 96 Md. 159; Harrison's Estate, 217 Pa. St. 207.

Many of the statutes which provide compensation for trustees provide also that they shall be allowed reasonable extra compensation for services of a character not usually performed by trustees and for which they might properly have employed others. See *supra*. And in the absence of such statute provisions it is usual in the United States to allow extra compensation, but not a share of profits. Jarrett *v.* Johnson, 216 Ill. 212; Turnbull *v.* Pomeroy, 140 Mass. 117, 118; Willis *v.* Clymer, 66 N. J. Eq. 284; Perkins's Appeal, 108 Pa. St. 314; Morris *v.* Ellis, 62 S. W. 250 (Tenn. Ch. App. 1901); *supra*, § 432 and note. See also Matter of Froelich, 107 N. Y. S. 173, 122 App. Div. 440; Thayer *v.* Badger, 171 Mass. 279; Starr *v.* Case, 59 Iowa, 491, 503; Vanduzer *v.* McMillan, 37 Ga. 299.

In States where commissions allowed trustees and executors are fixed by statute, a person serving successively in both capacities may be allowed double commissions upon the same property, as where after administering upon the estate as executor he turns over the property to himself as trustee. Matter of Union Trust Co., 75 N. Y. S. 68, 70 App. Div. 5; Olcott *v.* Baldwin, 190 N. Y. 99. But double commissions are allowed only when the two offices are distinct, and only after he has ceased to be executor and has become trustee with respect to the property on which he claims double commissions. An executor will not be allowed the commissions of a trustee merely because while executor he has trust duties to perform. Bemmerly *v.* Woodard, 136 Cal. 326; Matter of Hunt, 105 N. Y. S. 696, 121 App. Div. 96; Matter of Slocum, 169 N. Y. 153; McAlpine *v.* Potter, 126 N. Y. 285. See also Abell *v.* Brady, 79 Md. 94; Kennedy *v.* Dickey, 99 Md. 295; Jenkins *v.* Whyte, 62 Md. 427.

In States where the court has any discretion in the allowance of compensation for services, misconduct of a trustee resulting in a loss to the trust or to the *cestuis*, or causing expensive litigation, is treated as an adequate cause for refusing to allow compensation or for reducing it. *In re* Thompson, 101 Cal. 349, 355; Lehman *v.* Rothbarth, 159 Ill. 270; French *v.* Commercial Bank, 97 Ill. App. 533, 543; Comingor *v.* Louisville Trust Co., 128 Ky. 697; Potter *v.* Porter, 109 S. W. 344 (Ky. 1908); Ward *v.* Shire, 65 S. W. 8 (Ky. 1901); Warren *v.* Pazolt, 203 Mass. 328, 351; Folk *v.* Wind, 124 Mo. App. 577, 584; Welsh *v.* Brown, 50 N. J. Eq. 387; Dufford *v.* Smith, 46 N. J. Eq. 216; Stevens *v.* Melcher, 152 N. Y. 551, 583; Matter of Welling, 64 N. Y. S. 1025, 51 App. Div. 355; Abbott *v.* Summers, 116 Fed. 687. But the matter is within the discretion of the court. Rowland *v.* Maddock, 183 Mass. 360, 364; Brooks *v.* Jackson, 125 Mass. 307; Babbitt

v. Fidelity Trust Co., 72 N. J. Eq. 745.

The same is true where the trustee has denied the trust and claimed the property as his own. McCulloch *v.* Tompkins, 62 N. J. Eq. 262; Stone *v.* Farnham. 22 R. I. 227; Fuller *v.* Abbe, 105 Wis. 235. But a constructive trustee will in some cases be allowed compensation for his services in preserving and managing the property where it is clear that the trust property has been benefited more than the beneficial owner has suffered from the conduct of the trustee. Olson *v.* Lamb, 56 Neb. 104. See Randolph *v.* Scruggs, 190 U. S. 533; Clark *v.* Sawyer, 151 Mass. 64; Louisville Tr. Co. *v.* Columbia Finance & Tr. Co., 59 S. W. 867 (Ky. 1900).

It has been held in New York that where a trustee who was entitled to commissions on income, voluntarily paid the entire net income to those entitled for a long series of years without deducting his commissions, he must be taken to have waived his commissions on the sums paid over. Olcott *v.* Baldwin, 190 N. Y. 99; Conger *v.* Conger, 105 App. Div. (N. Y.) 589 (185 N. Y. 554); Matter of Haight, 64 N. Y. S. 1029, 51 App. Div. 310; Spencer *v.* Spencer, 38 App. Div. (N. Y.) 403. But see Albro *v.* Robinson, 93 Ky. 195; Phillips *v.* Burton, 52 S. W. 1064 (Ky. 1899). But the rule is not to be carried so far as to exclude the possibility of any unintentional error resulting in an overpayment in one year being corrected in the next. Olcott *v.* Baldwin, 190 N. Y. 99. And it has been held that where the trustee has filed no accounts during the period in which he has paid over the income, there is no waiver of his right to his commissions reckoned on the entire amount. Conger *v.* Conger, 105 App. Div. (N. Y.) 589 (affirmed 185 N. Y. 554); Matter of Haskin, 97 N. Y. S. 827, 111 App. Div. 754.

Where one of many parties having a common interest in trust property at his own expense takes proper proceedings to save it from destruction or to restore it to the purposes of the trust he is entitled to be reimbursed his costs and expenses out of the property or by contribution from those who accept the benefit of his efforts. Seibert *v.* Minneapolis & St. L. Ry. Co., 58 Minn. 58; Davis *v.* Bay State League, 158 Mass. 434; Weed's Estate, 163 Pa. St. 595; Woodruff *v.* N. Y., &c. R. Co., 129 N. Y. 27, 36; Trustees *v.* Greenough, 105 U. S. 527, 537. But only if he succeeds and only to the extent of the benefits gained, unless he had authority to act as agent of the others. Hobbs *v.* McLean, 117 U. S. 567, 582. And where he is neither trustee nor agent, he will not be allowed compensation for his services. Trustees *v.* Greenough, 105 U. S. 527, 537.

CHAPTER XXXII.

DETERMINATION OF THE TRUST AND DISTRIBUTION OF THE TRUST FUND.

Determination of trust.
§ 920. Trusts may be terminated by decree upon the consent of all parties.
§ 921. How the responsibility of a trustee may be terminated.
Distribution of funds and release of trustee.
§ 922. Whether trustees are entitled to a release and discharge.
§ 923. Effect of a release or discharge.
§ 924. Where the fund is distributed under a decree.
§ 925. If trustees pay to new trustees, they may insist upon a release.
§ 926. Trustees must see that the fund reaches the proper persons.
§ 927. Trustees are responsible for any mistake in that respect.
§ 928. Right of the trustees to a decree of the court.
§ 929. Trustees may pay the fund to agents and attorneys, but they must see to the validity of their authority to receive it.
§ 930. To what persons they may pay.
§§ 931, 932. Remedies in case they pay to the wrong parties.
§ 933. The cost of distributing the trust property must be paid out of the fund.

§ 920. THERE are two modes in which a trust may be terminated. (1) It may terminate upon the accomplishment of the purposes for which it was created. When the time expires during which a trust is to exist, or when the event happens upon which a trust is to cease, and the trustees have performed all their duties and distributed the fund as directed, the trust is at an end. It has been previously stated, that when the purposes of a trust are accomplished, conveyances from the trustees will be presumed after a sufficient lapse of time.[1] If a trust ceases by expiration of time, and trustees are to divide real es-

[1] Manice *v.* Manice, 43 N. Y. 203; Deering *v.* Tucker, 55 Maine, 284. [Miller *v.* Cramer, 48 S. C. 282. As to the operation of the statute of uses see *supra*, § 299 *et seq.*]

tate equally among the *cestuis que trust* entitled to the same, a conveyance to them as tenants in common is a performance of their duties and powers, and ends the responsibility of the trustees.[1] Sometimes the question of duration is somewhat doubtful, and it becomes very proper for the trustee to ask the opinion of the court upon the construction of the trust instrument.[2] (2) Although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet if all the parties who are or may be interested in the trust property are in existence, and *sui juris*, and if they all consent and agree thereto, courts of equity may decree the determination of a trust and the distribution of the trust fund among those entitled.[3] (*a*) A trust will not be continued merely that the trustee may continue to receive compensation from it. If the *cestuis* desire its termination it will not be maintained for the benefit of the trustee.[4] When the purposes named in the trust which are inconsistent with the full beneficial ownership and control of the *cestui* are fulfilled, so that the trustee holds the property on a simple trust, the *cestui* having the *absolute* equitable ownership of the fund, he is entitled to have the trust

[1] How *v.* Waldron, 98 Mass. 281; Emerson *v.* Cutler, 14 Pick. 114; Fisher *v.* Wigg, 1 P. Wms. 14; Cook *v.* Gardner, 130 Mass. 313.

[2] Hyde *v.* Wason, 131 Mass. 450.

[3] Stone, Petitioner, 138 Mass. 476, 479.

[4] Slater *v.* Hurlebut, 146 Mass. 308, 315. [Eakle *v.* Ingram, 142 Cal. 15; Armistead's Ex'rs *v.* Hartt, 97 Va. 316.]

(*a*) In rare cases a trust may also come to an end by the death of the trustee before the full accomplishment of the purposes for which it was created. This can be only when an essential part of the trust scheme lies in the exercise of powers and duties which are personal to the named trustees and which do not vest in a substituted trustee. Baker *v.* McAden, 118 N. C. 740; Young *v.* Young, 97 N. C. 132; Security Co. *v.* Snow, 70 Conn. 288; Gambell *v.* Trippe, 75 Md. 252; Benedict *v.* Dunning, 97 N. Y. S. 259, 110 App. Div. 303. See Dillingham *v.* Martin, 61 N. J. Eq. 276; French *v.* Northern Trust Co., 197 Ill. 30; *supra*, § 503 and notes. See Barbour *v.* Weld, 201 Mass. 513, where the sole trustee of a personal trust was removed for misconduct.

terminated.[1] (a) The same rule applies if it become impossible to carry out the trust.[2] It was for some time doubtful whether

[1] Sears *v.* Choate, 146 Mass. 395, 397; Whall *v.* Converse, id. 345. [Eakle *v.* Ingram, 142 Cal. 15; Donaldson *v.* Allen, 182 Mo. 626; Tilton *v.* Davidson, 98 Me. 55; Armistead's Ex'rs *v.* Hartt, 97 Va. 316; Blake *v.* O'Neal, 63 W. Va. 483; McKiernan *v.* McKiernan, 74 A. 289 (N. J. Ch. 1909).]

[2] Hawthorn *v.* Root, 6 Bush, 501.

(a) But if it appears that the creator of the trust had in view a valid purpose which may be defeated by a termination of the trust before the time set by him the courts will not decree a termination so long as the purpose is capable of being accomplished. And the courts are inclined to respect the express provisions as to duration of the trust, unless it is clearly shown that the purpose of them has been fully accomplished or rendered impossible of accomplishment. Young *v.* Snow, 167 Mass. 287; Kendall *v.* Gleason, 152 Mass. 457; Hoffman *v.* N. E. Trust Co., 187 Mass. 205; Kimball *v.* Blanchard, 101 Me. 383. While the courts will not decree a termination of the trust when some of the beneficiaries are not *sui juris*, the fact that all of them are *sui juris* and wish the trust terminated is not enough. Ibid.

If the continuance of the trust suspends the *cestuis'* power of alienating their interests in either the income or the principal, this is usually a good reason for its continuance. Cuthbert *v.* Chauvet, 136 N. Y. 326; Lent *v.* Howard, 89 N. Y. 169; Douglas *v.* Cruger, 80 N. Y. 15; Danahy *v.* Noonan, 176 Mass. 467; Moore's Estate, 198 Pa. St. 611. The same is true if it appears that a substantial part of the trust scheme was to withhold from the beneficiaries the management of the property, Carney *v.* Kain, 40 W. Va. 758; Olsen *v.* Youngerman, 136 Iowa, 404; Robbins *v.* Smith, 72 Ohio St. 1; but see Rector *v.* Dalby, 98 Mo. App. 189; or the power of converting it into other forms of property. See Harris *v.* Harris, 205 Pa. St. 460; Donaldson *v.* Allen, 182 Mo. 626.

In Kimball *v.* Blanchard, 101 Me. 383, it is said: "While courts will sometimes decree the termination of a passive trust, before the expiration of the time named, or one in which the purposes of the trust have been accomplished, or where no good reason is shown why the trust should continue, and where all the persons interested in it are *sui juris* and desire that the trust be terminated; . . . we are not aware of any case where such a termination has been decreed where these conditions do not exist."

A court of equity may upon occasion terminate a trust in part where it has become practically passive as to that part and no injustice will thereby be done to those interested in the other part. Williams *v.* Thacher, 186 Mass. 293; Welch *v.* Episcopal Theol. School, 189 Mass. 108.

Where the sole beneficiary has assigned his entire interest to a

a trust could be thus determined prior to the time contemplated by a testator; but it is now well settled that where all the parties are capable of acting, and desire to terminate the trust, courts can decree its determination.[1] There can be no doubt upon principle, that, when all those who have the entire legal and beneficial interest in property agree to dispose of it in a particular manner, courts will give effect to their agreements. And so in case of a marriage settlement of a woman's property in trust for herself and her issue and her husband, and there were issue, and the marriage had been dissolved upon the libel of the wife, the court decreed the termination of the trust and the payment of the trust fund to the wife.[2] (*a*) But in settlements where

[1] *Ante*, §§ 304, 520; Bowditch *v.* Andrew, 8 Allen, 339; Smith *v.* Harrington, 4 Allen, 566, 568; Norris *v.* Thompson, 4 Green, Ch. 314; Inches *v.* Hill, 106 Mass. 577; Taylor *v.* Huber, 13 Ohio St. 288; Short *v.* Wilson, 13 Johns. 53. But see Walker *v.* Sharp, 68 N. C. 363.

[2] Fussell *v.* Dowding, L. R. 14 Eq. 423; Wells *v.* Malbon, 31 Beav. 48; Wilkinson *v.* Gibson, L. R. 4 Eq. 162; Swift *v.* ——, L. R. 10 Eq. 15.

stranger to the trust, the purpose of the trust becomes impossible of accomplishment and the court will decree a termination. Brillhart *v.* Mish, 99 Md. 447; Thompson *v.* Ballard, 70 Md. 10; Bronson *v.* Thompson, 77 Conn. 214; McFall *v.* Kirkpatrick, 236 Ill. 281. But an assignment by one of several beneficiaries will not lead to this result. Young *v.* Snow, 167 Mass. 287. As to merger of the equitable in the legal title, see *supra*, § 347 and notes.

(*a*) The courts seem inclined to treat a trust for the separate use of a married woman as designed solely to protect the property from her husband, and it has been held that, no other purpose appearing, termination of the marriage relation by death of the husband or by divorce will induce the court to decree a termination of the trust on the application of the *cestui*. Sharman *v.* Jackson, 90 N. Y. S. 469, 98 App. Div. 187; Lee's Estate, 207 Pa. St. 218; Bradford *v.* Burgess, 20 R. I. 290; Cary *v.* Slead, 220 Ill. 508; Cushing *v.* Spalding, 164 Mass. 287.

In Kentucky it has been held that the same result has been accomplished by the enactment of a statute removing the disabilities of a married woman and rendering a trust for her separate use unnecessary. Adams' Trustee *v.* Adams, 56 S. W. 151 (Ky. 1900); Snell *v.* Payne, 78 S. W. 885 (Ky. 1904). And in Georgia it has been held that passive trusts for the benefit of married women will be executed by the statute of uses, Heath *v.* Miller, 117 Ga. 854; City of Rome *v.* Shropshire, 112 Ga. 93, even

there are cross remainders or contingent interests which cannot be determined and adjusted until the happening of certain events, the trusts cannot be terminated, nor can the share of either one of the *cestuis que trust* be paid over to him.[1] If a trust is created for the life of one, it cannot be terminated before his death, although there are other words that imply that it may be terminated earlier.[2] If it is clear, however, that part of the principal of a fund is to be paid over to one of the *cestuis que trust* upon his arriving at the age of twenty-one, or upon any other event, the trust will terminate as to that part and continue as to others.[3] But a part of the *cestuis que trust* cannot terminate the trust.[4] Nor can it be determined by consent while it is still uncertain who will take under the bequest relating to the final distribution.[5] (*a*) One *cestui* cannot demand a conveyance to himself in contravention of the agreement under which the trust was created.[6]

§ 921. The trustee may be discharged from the office and from future liability in several different ways. (1) The expira-

[1] Prentice *v.* Hall, 106 Mass. 597.

[2] Schaffer *v.* Wadsworth, 106 Mass. 19.

[3] Walker *v.* Beal, 106 Mass. 110.

[4] Bancroft *v.* Lepieur, 48 Mo. 418. [Wirth *v.* Wirth, 183 Mass. 527.]

[5] Brandenburg *v.* Thorndike, 139 Mass. 102, 104. [Godfrey *v.* Roberts, 65 N. J. Eq. 323; Ray *v.* Kelley, 82 Miss. 597; Olsen *v.* Youngerman, 136 Iowa, 404; Robbins *v.* Smith, 72 Ohio St. 1; Henson *v.* Wright, 88 Tenn. 501.]

[6] Nichols *v.* Rogers, 139 Mass. 146, 149.

when the trusts are expressly for their sole and separate use. Overstreet *v.* Sullivan, 113 Ga. 891. But in other States it is held that the statute of uses will not operate during the coverture of the married woman *cestui*, if it is clear that the intention was that the trust should continue during her coverture. Carpenter *v.* Browning, 98 Ill. 282; Cushing *v.* Spalding, 164 Mass. 287; Moore *v.* Stinson, 144 Mass. 594; Richardson *v.* Stodder, 100 Mass. 528.

(*a*) One who has only a life interest in a trust fund coupled with a power of testamentary disposition cannot maintain a bill in equity to compel an absolute transfer to him of the fund held for him by a trustee under the will. Sise *v.* Willard, 164 Mass. 48. But see Raffel *v.* Safe Dep. & Tr. Co., 100 Md. 141.

tion or full performance of all the trusts, and a conveyance or transfer of the trust property according to the terms of the trust, is a discharge of the trustee.[1] (2) The trustee may be discharged by a decree of the court declaring, with the assent of all parties in interest, the trust at an end, and that the trustee shall distribute the fund.[2] (3) Although the trust is not determined, the trustee may be discharged from his office with the concurrence of all the *cestuis que trust*, if *sui juris;* and the appointment of a new trustee is not absolutely necessary to give validity to the discharge.[3] (4) A trustee may be discharged, and a new one appointed, by virtue of a power to that effect contained in the instrument of trust.[4] (5) The death of a trustee operates to discharge his estate from all responsibility for acts done by his cotrustees or others after his decease.[5] (6) A trustee may be charged by a decree of court, appointing another trustee, or giving such other directions to the trust as it sees fit.[6] (7) The sale of the trust estate under a prior incumbrance, or taking it from the trustee under a title paramount, puts an end to his duties and responsibility.[7] (*a*) So a release by the trustee to the assignor, in an assignment for creditors, puts an end to the trust; [8] and a purchase of the trust estate by the trustee ends the trust, if the trustee is duly authorized to make the purchase.[9] A conveyance by the trustee to the *cestui que trust* merges the

[1] Goodson *v.* Ellison, 3 Russ. 593; Holford *v.* Phipps, 3 Beav. 434; Tavenner *v.* Robinson, 2 Rob. (Va.) 280.

[2] See *ante*, § 920. Or by an award of referees provided for in the deed of trust. Cook *v.* Gardner, 130 Mass. 313.

[3] *Ante*, §§ 274, 285. [Anderson *v.* Simms, 29 S. C. 247.]

[4] *Ante*, §§ 288, 297. [5] *Ante*, § 426. [6] *Ante*, §§ 282, 283.

[7] De Bevoise *v.* Sandford, 1 Hoff. Ch. 195.

[8] Huckabee *v.* Billingsly, 16 Ala. 414.

[9] Johnson *v.* Johnson, 5 Ala. 90.

(*a*) A conveyance of the trust property with the concurrence of the *cestui* who is *sui juris*, practically terminates the trust as to that property since the concurrence of the *cestui* has the effect of passing the equitable title. Lemen *v.* McComas, 63 Md. 153. But it may be otherwise in those jurisdictions where by statute such an unauthorized conveyance by the trustee would not pass the legal title.

titles and determines the trust, where it is proper that such conveyance should be made; but if the *cestui que trust* is a minor, the trustee will [1] be holden, notwithstanding such conveyance.[2] So if the *cestui que trust* is a married woman, a conveyance to her by the trustee will not discharge him; but after the death of her husband such conveyance will discharge him.[3] A mere relinquishment of the trust, or of the property, which does not purport to convey the property to some person authorized to receive it, does not discharge the trustee.[4] But payment by the trustee to a person entitled to receive the money is a discharge of the trustee.[5] Mere neglect for a long time to administer a trust does not terminate it.[6] (*a*)

§ 922. The discharge of a trustee, upon the determination of the trust, or upon the appointment of another trustee, does not of itself release the trustee from responsibility for his past conduct, and the *cestui que trust* may still inquire into his administration prior to his discharge; [7] and may require him to account for all his transactions.[8] Therefore it is usual, upon the final settlement and transfer of the trust property to the parties entitled, to discharge the trustee by a formal release of all claims, executed by all the *cestuis que trust* who are *sui juris*. It seems to be a reasonable requirement, on the part of the trustee, when he parts with the fund and the muniments of title, and, in some sort, with the means of defence, that he should

[1] Waugh *v.* Wyche, 23 L. J. Ch. 823.

[2] *Ante*, § 624.

[3] *Ante*, § 652; Parker *v.* Converse, 5 Gray, 336.

[4] Dick *v.* Pitchford, 1 Dev. & Bat. Eq. 480; Richardson *v.* Cole, 2 Swan, 100; Diefendorf *v.* Spraker, 10 N. Y. 246; Waugh *v.* Wyche, 23 L. J. Ch. 833; Thatcher *v.* Candee, 3 Keyes, 157; Webster *v.* Vanderventer, 6 Gray, 429; Gilchrist *v.* Stevenson, 9 Barb. 9.

[5] Hayes *v.* Otelly, L. R. 14 Eq. 4.

[6] Tainter *v.* Clark, 5 Allen, 66.

[7] Wright's Trusts, 3 K. & J. 419; Anon. *v.* Osborne, 6 Ves. 455.

[8] Clark *v.* Devereaux, 1 S. C. 172.

(*a*) As to *laches* of the *cestui* in case of neglect which amounts to repudiation, see *supra*, § 864.

be secured against future litigation; for although the *cestuis que trust* may impeach such a receipt and discharge on the ground of fraud, accident, or mistake, yet it is *prima facie* evidence, and throws the burden upon those seeking to impeach it.[1] It has been determined, however, that where a *cestui que trust* has a clear right to a conveyance or transfer of the property, the trustee cannot demand a release, and refuse to make the transfer until it is given.[2] It has also been said, that, where trustees transfer the property in accordance with the terms of the instrument of trust, they are not entitled to a receipt or discharge, as a debtor, making à tender of payment of a debt owed by him, cannot demand a receipt;[3] but if they transfer the trust property to the *cestuis que trust* in a manner or at a time not contemplated by the instrument, they may require a receipt and discharge.[4] Mr. Lewin criticises this distinction made by Vice-Chancellor Kindersley;[5] but it is obvious that the trustees cannot be compelled to transfer the property, except in the exact manner and upon the terms and at the time pointed out in the instrument of trust; if, therefore, the *cestuis que trust* agree that the trustees may depart from the terms of the instrument, they may require a release under seal, or even a bond of indemnity, and they may refuse to part with the fund until such security is given. It has been held, however, that an executor, in winding up and distributing an estate, is entitled to a release.[6] So where the title of the *cestui que trust* is not perfectly clear, or there is a possibility that there may be other claimants, or that the propriety of the conveyance or payment may be called in question at some future time, the trustees may

[1] Fowler *v.* Wyatt, 24 Beav. 232; Walker *v.* Symonds, 3 Swanst. 73.

[2] Fulton *v.* Gilmour, 8 Beav. 154; Hill on Trustees, 580; Chadwick *v.* Heatley, 2 Coll. 137; Wright's Trusts, 3 K. & J. 421; Warter *v.* Anderson, 11 Hare, 303.

[3] King *v.* Mullins, 1 Drew. 308.

[4] Ibid.; *Re* Cater's Trust, 25; Beav. 366; Wright's Trusts, 3 K. & J. 421.

[5] Lewin on Trusts, 289 (5th ed.).

[6] King *v.* Mullins, 1 Drew. 311; Chadwick *v.* Heatley, 2 Coll. 137.

require an indemnity against such future claims, or may refuse to convey without a decree of the court.[1]

§ 923. Of course, a person not *sui juris*, as an infant, cannot bind himself by a receipt, release, or bond of indemnity.[2] If a release is executed to a trustee by a *cestui que trust* just after coming of age, the courts will investigate the transaction, and require evidence that the trustee took no advantage of his position and influence.[3] A release by the *cestuis que trust* will not be binding, unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee.[4] Any concealment, misrepresentation, or other fraudulent conduct will vitiate such a release.[5] There should, therefore, be a full statement and detailed explanation of the accounts, which should be referred to in the receipt, release, or discharge, especially if there is anything in the nature of a breach of trust.[6] Even if the accounts are clearly stated, the release will be set aside, if there is any misapprehension as to the basis upon which they are made up.[7] As before stated, a release executed under proper advice, with ample time for mature deliberation, and upon full information, is *prima facie* valid; and the burden is upon the party disputing it to impeach it.[8]

[1] Goodson *v.* Ellison, 3 Russ. 583; *Re* Primrose, 23 Beav. 590; Talbot *v.* Radnor, 3 M. & K. 252; Curteis *v.* Candler, 6 Madd. 123; Knight *v.* Martin, 1 R. & M. 70; Taml. 237; Taylor *v.* Glanville, 3 Madd. 176; Angier *v.* Stannard, 3 M. & K. 566; Campbell *v.* Horne, 1 Y. & Col. Ch. 664; Gardiner *v.* Downes, 22 Beav. 397; Merlin *v.* Blagrave, 25 Beav. 137.

[2] Overton *v.* Banister, 3 Hare, 503. [Anderson *v.* Simms, 29 S. C. 247.]

[3] Walker *v.* Symonds, 2 Swanst. 69; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 M. & Cr. 41. [See Willis *v.* Rice, 157 Ala. 252; Drake *v.* Wilde, 65 Vt. 611.]

[4] Ibid.; Carter *v.* Trevelyan, 8 Jur. 1015; 11 Cl. & Fin. 714; Munch *v.* Cockerell, 5 Myl. & Cr. 179. [*Supra*, § 861.]

[5] Ibid.; Penobscot R. R. Co. *v.* Mayer, 60 Maine, 306.

[6] Ibid. [7] Ibid.

[8] *Re* Sherwood, 3 Beav. 338; Portlock *v.* Gardner, 1 Hare, 594; Millar *v.* Craig, 6 Beav. 433; Fowler *v.* Wyatt, 24 Beav. 232.

§ 924. Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court. It is, however, his duty to inform the court fully of all material facts within his knowledge; for a decree procured by any concealment or other management would be opened, and the trustee might be held responsible.[1]

§ 925. If the *cestuis que trust* create by agreement a new trust, and desire the trustees of the old trust to convey the property to new trustees under a new settlement, the old trustees may insist upon a receipt for the property; but whether they can insist upon a discharge from all past liabilities, or upon a general indemnity, is doubtful. Mr. Lewin says, that this requisition of the trustees is generally complied with, though it could not be enforced.[2]

§ 926. Trustees, and all other persons having money in their hands to distribute and pay over to other persons, must see that the money reaches the hands of the persons entitled to receive it; for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person. If a person borrows money of a trustee, and subsequently discovers that it is trust money, loaned in breach of the trust, he cannot safely pay it back, unless the trustee has the power of signing receipts.[3] If the trustee has notice of

[1] Waller *v.* Barrett, 24 Beav. 466; Farrell *v.* Smith, 2 B. & B. 337; Williams *v.* Headland, 4 Gif. 495; Fletcher *v.* Stevenson, 3 Hare, 370; Gillespie *v.* Alexander, 3 Russ. 137; Sawyer *v.* Birchmore, 1 Keen, 401; David *v.* Frowd, 1 M. & K. 209; Smith *v.* Smith, 1 Dr. & Sm. 384; Knatchbull *v.* Fearnhead, 3 M. & Cr. 126; Underwood *v.* Hatton, 5 Beav. 39; Bennett *v.* Lytton, 2 John. & Hem. 155; Low *v.* Carter, 1 Beav. 426; Moor's App., 10 Barr, 435; Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576.

[2] Lewin, 289; Hill, 581; *Re* Cater's Trusts, 25 Beav. 356; Chadwick *v.* Heatley, 2 Col. C. C. 137; *Re* Wright, 3 K. & J. 419.

[3] Sheridan *v.* Joyce, 7 Ir. Eq. 115; Abbott *v.* Reeves, 49 Penn. St. 494.

an assignment by the *cestui que trust*, he cannot safely pay to the assignor either principal or interest, although the assignment is in the nature of a mortgage only;[1] for notice to the trustee of the assignment is equivalent to taking possession by the assignee under a mortgage.[2](*a*) Even if the deed is fraudulent and voidable, the trustee cannot pay the assignor until it is avoided. On the other hand, it is said that the trustee may safely pay to the assignee, until the deed is impeached, especially if the assignee has the power of signing receipts.[3] (*b*)

[1] Cresswell *v.* Dewell, 4 Gif. 460.
[2] Loveridge *v.* Cooper, 3 Russ. 58.
[3] Beddoes *v.* Pugh, 26 Beav. 407.

(*a*) In England and some of the States it is settled that as between *bona fide* assignees of a non-negotiable chose in action who have paid value without notice of a prior assignment, the one who first gives notice to the debtor or the trustee has priority though his assignment may be subsequent in point of time. Low *v.* Bouverie, [1891] 3 Ch. 82; *In re* Wyatt, [1892] 1 Ch. 188; Stephens *v.* Green, [1895] 2 Ch. 148; Lambert *v.* Morgan, 110 Md. 1; Graham Paper Co. *v.* Pembroke, 124 Cal. 117, 120; Houser *v.* Richardson, 90 Mo. App. 134; Jack *v.* National Bank, 17 Okla. 430; Phillips's Estate, 205 Pa. St. 525; Dillingham *v.* Traders' Ins. Co., 120 Tenn. 302. See also Goldthwaite *v.* Nat. Bank, 67 Ala. 549, 554; Tison *v.* People's Sav. & L. Ass'n, 57 Ala. 323, 331; Duke *v.* Clark, 58 Miss. 465, 474; Williams *v.* Donnelly, 54 Neb. 193; Starr *v.* Haskins, 26 N. J. Eq. 414; Tate *v.* Security Co., 63 N. J. Eq. 559, 561; Ga. Code (1895), § 3077.

But in some of the States, notably Massachusetts and New York, the giving of notice to the debtor or trustee gives a subsequent assignee no priority over a prior one when the equities are equal. Putnam *v.* Story, 132 Mass. 205, 211; Whittredge *v.* Sweetzer, 189 Mass. 45; Thayer *v.* Daniels, 113 Mass. 129; Central Trust Co. *v.* West India Imp. Co., 169 N. Y. 314, 323; Fairbanks *v.* Sargent, 104 N. Y. 108, 116; Niles *v.* Mathusa, 162 N. Y. 546, 552; Columbia Finance & Trust Co. *v.* First Nat. Bank, 116 Ky. 364, 375; Downer *v.* So. Royalton Bank, 39 Vt. 25; Tingle *v.* Fisher, 20 W. Va. 497; Quigley *v.* Welter, 95 Minn. 383 (*semble*). See *supra*, § 438.

(*b*) Where a judgment creditor of the *cestui* was attempting to reach the latter's beneficial interest, it has been held that the trustee might contest the validity of the judgment. Roberts *v.* Yancey, 94 Ky. 243. It has been held that a trustee has no duty of informing a *cestui's* assignee as to prior assignments or incumbrances, but if he gives information he must not intentionally mislead. Low *v.* Bouverie, [1891] 3 Ch. 82.

If the *cestui que trust* is dead, payment is to be made to his personal representatives; and if the trustee refuses to make such payment, and involves himself in disputes over the *cestui que trust's* estate, he will be ordered to pay the costs of a suit for the recovery of the fund.[1] If the *cestui que trust* is a married woman, the property, if settled to her separate use, may be paid over to her; or if she is divorced, it may be paid to her as if her husband was dead.[2]

§ 927. If through any misapprehension on the part of a trustee, he makes a payment to a person not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication,[3] to the persons who can establish a better right; and the advice of counsel will not protect him in making a wrong payment.[4] There is a *dictum* to the contrary in Vez *v.* Emery;[5] but this general rule prevails in England. But if trustees act in *good faith* in such case, and under the advice of counsel, the court will not impose costs.[6] In the United States the rule is not uniformly followed, and trustees who have acted in good faith and under the advice of counsel have not been held responsible for errors of judgment or mistakes of law.[7] If the payment is to be made according to the laws of the domicil of the trustees, they must be taken to know the law, and, if they mistake the law, they are personally

[1] Smith *v.* Bolden, 33 Beav. 262.

[2] Welles *v.* Malbon, 31 Beav. 48.

[3] Dodd *v.* Winship, 133 Mass. 359.

[4] Doyle *v.* Blake, 3 Sch. & Lef. 243; Peers *v.* Ceeley, 15 Beav. 209; Urch *v.* Walker, 3 M. & C. 705; Boulton *v.* Beard, 3 De G., M. & G. 608; Turner *v.* Maule, 3 De G. & Sm. 497; *Re* Knight's Trusts, 27 Beav. 49.

[5] 5 Ves. 141.

[6] Angier *v.* Stannard, 3 My. & K. 566; Dewey *v.* Thornton, 9 Hare, 232; Field *v.* Donoughmore, 1 Dru. & W. 234; Wade *v.* Dick, 1 Ired. 313; Freeman *v.* Cook, 3 Ired. 373.

[7] King *v.* Morrison, 1 P. & W. 188; Savings Fund's App., 76 Penn. St. 203; Neff's App., 57 id. 91; Bradley's App., 89 id. 514; Miller *v.* Proctor, 20 Ohio St. 444. During, King and Miller's App., 1 Harris, 224, in which Ch. J. Gibson says such a rule "would throw the execution of trusts into the hands of knaves and fools." But see Gilbert's App., 78 Penn. St. 270.

responsible;[1] but they are not bound to know the laws of foreign countries, unless called to their notice; if, therefore, they proceed in the ordinary manner, according to the *prima facie* line of their duty, they will be excused if they mistake the laws of foreign lands.[2] But as personal property is regulated by the law of the domicil of the owner, it is always safer for the trustee to inquire as to the law, if the *cestui que trust* is domiciled abroad; although he may not be liable for a mistake, if the difference between the laws of the two countries is not brought to his notice.[3]

§ 928. A trustee cannot be expected to incur the least risk in the distribution of the trust fund. Therefore, where there is a mere shadow of doubt as to the rights of the parties, he may require a bond of indemnity. Such a bond, however, is not very satisfactory, as the obligors may decease and their property be divided long before there is a call upon them to indemnify the trustee; and if it appears that trustees have committed a breach of trust under cover of such a defence, the court shows no mercy.[4] Therefore, if a third person makes a claim, or if he refuses to state whether he has a claim, where the trustee has a right to know, the trustee may bring such person before the court by bill; and if he claims improperly, or has improperly refused to answer, he will be charged with the costs.[5] So where the equities are not perfectly clear, the trustee may decline to act without the sanction of the court; and his costs and proper expenses will be allowed.[6] (*a*) The

[1] Miller *v.* Proctor, 20 Ohio St. 444.

[2] Leslie *v.* Baillie, 2 Y. & Col. Ch. 91.

[3] Chrichton's Trusts, 24 L. T. 267; *In re* Blithman, L. R. 2 Eq. 23; *Re* Hellman's Will, id. 363.

[4] Lewin, 253 (5th ed.).

[5] *Re* Primrose, 23 Beav. 590.

[6] *Ante*, § 476 *a*; Petition of Baptist Church, 51 N. H. 424; Wheeler *v.* Berry, 18 N. H. 307; Goodhue *v.* Clark, 37 N. H. 531; Att. Gen. *v.* Moore, 19 N. J. Eq. 503; Vanness *v.* Jacobs, 2 Green, 153; Woodruff *v.* Cook,

(*a*) As to bills for instruction see *supra*, § 476 *a* and note *a*, p. 780.

trustee himself will be protected by the decree of any court having jurisdiction, and exercising the jurisdiction regularly upon proper notice given;[1] but if he appeals from such decree to a higher court, he may be compelled to pay costs.[2] If other parties appeal, he must follow the case wherever it is carried, and he will be allowed his costs and expenses. The suit in such cases may be instituted by the trustee himself asking for the direction of the court; or parties claiming to be the *cestuis que trust* may institute the suit against the trustee, and others claiming to be the *cestuis que trust*. If, at the hearing, it appears that the question was doubtful, and required the interposition of the court, all parties may have their costs out of the trust fund, although the decree may be against some of them.[3] But if parties receive the money who are not entitled, they are not protected, although the trustee paid the money to them under a decree of the court, and is protected personally by the decree. In such cases the party really entitled, if he was not a party to the previous suit, and bound by the decree, may have his suit against the person to whom the money was paid, and he will be held as a *quasi* trustee in favor of the person who shows an absolute right to receive the money.[4]

§ 929. A trustee may pay the money to the parties entitled, or to an agent authorized to receive it; and such authority

47 Barb. 304; Crosby *v.* Mann, 32 Conn. 482; Tillinghast *v.* Coggeshall, 7 R. I. 383; Wiswell *v.* First Cong. Church, 14 Ohio St. 928; Talbot *v.* Radnor, 3 My. & K. 252; Goodson *v.* Ellison, 3 Russ. 583; Knight *v.* Martin, 1 R. & M. 70; Taml. 237; Angier *v.* Stannard, 3 M. & K. 566; Curteis *v.* Candler, 6 Madd. 123; Campbell *v.* Horne, 1 Y. & Col. Ch. 664; Gardiner *v.* Downes, 22 Beav. 397; Merlin *v.* Blagrave, 25 Beav. 137; Taylor *v.* Glanville, 3 Madd. 176; Loring *v.* Steineman, 1 Met. 207.

[1] Loring *v.* Steineman, 1 Met. 207; Tucker *v.* Horneman, 4 De G., M. & G. 395; Rowland *v.* Morgan, 13 Jur. 23.

[2] Ibid. [*In re* Morton's Estate, 70 A. 680 (N. J. Ch. 1908).]

[3] Westcott *v.* Culliford, 3 Hare, 274; Turner *v.* Frampton, 2 Coll. 336; Merlin *v.* Blagrave, 25 Beav. 134; Boreham *v.* Bignall, 8 Hare, 134; Lee *v.* Delane, 1 De G. & Sm. 1. [See Bailey *v.* Worster, 103 Me. 170; Stephenson *v.* Norris, 128 Wis. 242.]

[4] Kettleby *v.* Lamb, 2 Ch. R. 404; O'Brien *v.* Grierson, 2 B. & B. 328; Farrell *v.* Smith, id. 337; Foster *v.* McMahon, 11 Ir. Eq. 308.

need not be shown by a power of attorney, nor by a deed, nor even by an order in writing: but a trustee should not pay over money without some proof in writing, signed by the parties, of the authority of the agent to receive it. So the trustee must see to the genuineness of the authority of the agent to whom he pays or transfers the property; for if there is forgery or fraud, or want of authority in the person to whom the property is transferred, the trustee will be responsible.[1] If the *cestui que trust* is abroad, payments are generally made by the trustee to an agent under a power of attorney; the death of the *cestui que trust* is a revocation of such agency or power, and the trustee is personally responsible for payments made afterwards, although without notice of the death. The *cestui que trust* may, however, direct the trustee to pay to a particular person until further orders; and such payments will be good, against the representatives of the *cestui que trust*, until notice of the death is given to the trustee:[2] but if the *cestui que trust* is a tenant for life only, such payments, made after his death, would not be good as against the remainder-man.[3] Mr. Lewin suggests that the safe course, where the *cestui que trust* is abroad, is for the trustee to remit the money to some reliable bank, to be drawn out on the personal checks or receipts of the *cestui que trust*.[4] The difficulty is remedied in England by Lord St. Leonards's act, which makes all payments by the trustee to a properly

[1] Bostock *v.* Floyer, L. R. 1 Ch. 26; Ashby *v.* Blackwell, 2 Ed. 299; Eaves *v.* Hickson, 30 Beav. 136; Sloman *v.* Bank of England, 14 Sim. 475; Harrison *v.* Pryse, Barn. 324; *Ex parte* Jolliffe, 8 Beav. 168.

[2] Vance *v.* Vance, 1 Beav. 605; Harrison *v.* Asher, 2 De G. & Sm. 436; Kiddill *v.* Farnelt, 3 Sim. & Gif. 428.

[3] *Re* Jones, 3 Drew. 679. As to the presumption of death from seven years' absence unheard of, see Doe *v.* Nepean, 5 B. & Ad. 86; 2 M. & W. 894; *Re* Phené, L. R. 5 Ch. 139; *Re* Lewes, L. R. 6 Ch. 356; Hickman *v.* Upsall, L. R. 20 Eq. 136; 2 Ch. D. 617; In the Goods of Nicholls, L. R. 2 P. & D. 461; Montgomery *v.* Beavan, 1 Sawyer (Civ. Ct), 653; Burns *v.* Ford, 1 Bailey (S. C.), 507; Moore *v.* Smith, 11 Rich. L. (S. C.) 569; Jochumson *v.* Suff. Sav. Bank, 3 Allen, 87; Adams *v.* Jones, 39 Ga. 479; S. D. Lajoye *v.* Primm, 3 Mo. 529.

[4] Lewin on Trusts, 285.

authorized person good and valid, in the absence of any notice of the death of the *cestui que trust*.[1]

§ 930. Where a trustee was to pay a small sum to a wife who had deceased, the court ordered it to be paid to the husband without administration;[2] and so where the trustee was to pay a small sum to a husband, the court ordered it to be paid to his widow, although there was no administration.[3] When the sum is considerable, the court will not hold the trustee justified in paying it over without administration, in case the person is deceased to whom it was to be paid.[4] So if the trustee is to pay to an infant, a guardian must be appointed to receive it; but if an infant fraudulently represents himself of age, and procures the money, the trustee will not be held liable to pay it again when the infant becomes of age.[5] (*a*) If the trustee is to pay over to a firm or partnership, he may pay to the surviving partner or partners without the concurrence of the legal representatives of a deceased partner, although it is better to have such concurrence.[6] So a trustee may pay over to a single surviving trustee, although the court in the exercise of its discretion does not order such payments to be made.[7]

§ 931. If a trustee by mistake pays the wrong person, and is compelled to pay again to the proper person, the court will not impose interest.[8] If he has overpaid a particular sum to a

[1] 22 & 23 Vict. c. 35, § 26.
[2] Hinnings *v.* Hinnings, 2 Hem. & Mil. 32.
[3] Lewin on Trusts, 286.
[4] Ibid.
[5] Overton *v.* Bannister, 3 Hare, 503; Wright *v.* Snowe, 2 De G. & Sm. 321; Nelson *v.* Stocker, 4 De G. & J. 458.
[6] Phillips *v.* Phillips, 3 Hare, 289.
[7] *Re* Dickinson's Trust, 1 Jur. (N. S.) 724.
[8] Saltmarsh *v.* Barrett, 31 Beav. 349.

(*a*) On this point there is some conflict of authority. See *supra*, § 624, note *a*.

cestui que trust, he may recoup himself out of any other interest of that cestui *que trust* in the trust funds in his hands.[1] Where a trustee had paid wrong parties upon certificates forged by one of the *cestuis que trust*, the court ordered the wrong parties to repay what each had received, and also ordered the fraudulent *cestui que trust* to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid.[2] In a suit against a trustee for breach of trust, the court ordered a tenant for life, who was overpaid by the breach of trust, to pay back the money to the trustee, without the institution of another suit for that purpose.[3] A *cestui que trust* may, notwithstanding the statute of limitations, if there has been no improper *laches*, recover from another *cestui que trust* an overpayment, erroneously made to him by the trustee.[4]

§ 932. But if an executor overpays a legatee, the court will not generally order him to refund, but will leave the parties to their legal rights;[5] especially if the executor pays voluntarily, and in spite of doubts expressed by the legatee.[6] Nor can the court order a purchaser from the legatee to refund to an executor, although the executor may be liable to creditors.[7] But an executor who has been made to pay a creditor, and has under his control a legacy appropriated by him as such, and not actually paid over, may be allowed to recoup the debt from such legacy;[8] but he is not entitled to his costs for obtaining such relief.[9] A creditor who is not barred by the statute of limitations, or to whose suit the statute is

[1] Livesay *v.* Livesay, 3 Russ. 287; Dibbs *v.* Goren, 11 Beav. 483.

[2] Eaves *v.* Hickson, 30 Beav. 136.

[3] Hood *v.* Clapham, 19 Beav. 90; Baynard *v.* Woolley, 20 Beav. 583; Davies *v.* Hodgson, 25 Beav. 177; Griffiths *v.* Porter, id. 236; Moore *v.* Moore, 1 Coll. 54.

[4] Harris *v.* Harris, 29 Beav. 110.

[5] Downes *v.* Bullock, 25 Beav. 54; Neal *v.* Maxwell, 40 Miss. 726.

[6] Bate *v.* Hooper, 5 De G., M. & G. 338.

[7] Noble *v.* Brett, 24 Beav. 499.

[8] Ibid.

[9] Noble *v.* Brett, 26 Beav. 233.

not pleaded, may recover assets from a legatee to whom they have been improperly paid by an executor;[1] although such legatee holds in trust,[2] but he cannot recover them from purchasers for value, as from persons claiming under a marriage settlement.[3]

§ 933. The costs of winding up a trust and distributing the money, and all expenses for documents, deeds, and other papers, must be paid from the trust fund.

[1] Fordham *v.* Wallis, 10 Hare, 217.
[2] Jervis *v.* Wolferstan, L. R. 18 Eq. 18.
[3] Dilkes *v.* Broadmead, 2 Gif. 113; 2 De G., F. & J. 566.

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