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LAW OF TRUSTS

A STATEMENT OF THE RULES
OF LAW AND EQUITY
APPLICABLE TO TRUSTS OF REAL AND
PERSONAL PROPERTY

BY

GEORGE W. KEETON, M.A., LL.D.

OF GRAY'S INN, BARRISTER-AT-LAW
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PREFACE
TO THE THIRD EDITION

THE principal changes in the present edition are that the section on secret trusts has been entirely rewritten, in order to assess the effect of the unsatisfactory decision of the Court of Appeal in *Re Keen*, [1937] 1 Ch. 236; the discussion of the origin and scope of the Rule in *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241, has been extended; and further consideration has been given to the definition of a charitable trust. Once again, it is the pleasant duty of the author to thank Mr. A. Carreras, LL.B., for the assistance he has given in preparing the Index and the Table of Cases.

G. W. KEETON

August, 1939

PREFACE

TO THE FIRST EDITION

THE aim of the present work is to provide a textbook for law students who require a rather more detailed statement of the rules of Law and Equity relating to Trusts than is provided in works dealing with the field of Equity generally. In writing it, the author has wished to fill a gap which exists in students' literature at present. He has also been conscious of the fact that any legal writer dealing with the Law of Trusts since 1925 possesses an exceptional opportunity to restate the earlier law in the light of the legislative changes of that year. Unfortunately, recent decisions, and in particular *Re Vickery*, have tended to emphasise the fact that the exact scope of those changes is not as yet entirely clear, and the author has been content to state the problems that have arisen, and to indicate the difficulties which remain for solution. There can be little question that the conception of the Trust in English law is steadily changing. Illustrations may be found in the *Archer-Shee Cases*, and also in the case of *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.* It would be extremely hazardous, however, to endeavour to predict how far these developments will finally extend; and it may be suggested that they are due, to some degree, to the fact that common law judges are now called upon to make pronouncements upon the Law of Trusts more frequently than at any other period of our legal history.

One aspect of the Law of Trusts has not received extended consideration in the following pages—that aspect which may be described as the conveyancing machinery of a trust. The operation of a strict settlement and of a trust for sale would have required a volume in itself, and in spite of the obvious temptation to enter into a discussion of the nature of the "statutory trusts," references to this rather curious statutory offspring of the Law of Trusts have been confined to a minimum, and have been introduced only where they served to illustrate some proposition affecting the Law of Trusts generally.

In writing a volume of this kind, an author always owes a great deal to his friends, and in the composition of this work the present writer has been helped in very generous measure. Mr. J. M. Lightwood, Mr. E. C. S. Wade, Dr. Potter,

and Professor D. Hughes Parry have each read the whole of the text in proof, and have offered suggestions from which the author has greatly profited, and for which he wishes to express his gratitude. Whatever faults remain must be ascribed solely to himself, and not to them.

Sufficient references to cases have been inserted to lead the author to hope that the volume will be found useful, not only by the student, but also by the practitioner. For this purpose also references to all the reports have been inserted in the table of cases, whilst dates have been added to the references to each case in the text. The arduous labour of verifying references and of compiling the tables of cases and statutes has been discharged by five of the author's students, Miss L. Doukhan, and Messrs. Furtado, Dutton, Waters, and Jacob, to whom the author is glad to express his indebtedness.

It will be obvious to all who use this volume that the author is also under an obligation to the standard works of Lewin, Godefroi, and Sir A. Underhill, and he would also like to express his thanks to the proprietors of the *Law Journal* for permission to make use of several articles that he has contributed to that periodical.

G. W. KEETON

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Atk..	Atkyns	1736–55
B. & B.	Ball & Beatty (Ir.)	1807–14
B. & C.	Barnewall & Cresswell	1822–1830
B. & P.	Bosanquet & Puller	1796–1804
Barn. C.	Barnardiston Chancery	1740–46
Beav.	Beavan	1838–66
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Bro. C.C.	Brown's Chancery Cases	1778–94
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Cl. & Fin.	Clark & Finelly	1572–1616
Co. Rep.	Coke's Reports	1844–45
Coll.	Collyer	1695–1740
Com.	Comyns' Reports	1815
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Coop. *temp* Cott.	Cooper *temp.* Cottenham	1774–78
Cowp.	Cowper's Reports, Kings Bench	1754–97
Cox	Cox, Cases in Chancery	1840–41
Cr. & Ph.	Craig & Phillips	1625–1641
Cro. Car.	Croke's Reports *temp.* Charles I	1832–1835
Deac. & Ch.	Deacon & Chitty	1859–62
De G. F. & J.	De Gex, Fisher, & Jones	1857–59
De G. & J.	De Gex & Jones	1862–66
De G. J. & S.	De Gex, Jones & Smith	1851–57
De G. M. & G.	De Gex, Macnaghten & Gordon	1846–52
De G. & S.	De Gex & Smale	1559–1798
Dick.	Dickens	1836–37
Donn. Eq.	Donnelly's Reports, Chancery	1812–1816
Dow	Dow's Reports, House of Lords	1827–1832
Dow & Cl.	Dow & Clark	1837–1840
Dr. & Wal.	Drury & Walsh	1841–43
Dr. & War.	Drury & Warren	1852–59
Drew	Drewry	1860–65
Drew & Sm.	Drewry & Smale	1676
Duke	Duke's Law of Charitable Uses	1513–1581
Dyer.	Dyer's Reports, King's Bench	1800–12
East	East's Reports, King's Bench	1757–66
Eden	Eden	1858–1860
El. & Bl.	Ellis & Blackburn	1667–1744
Eq. Ca. Abr.	Equity Cases Abridgment	1853–55
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Exch.	Exchequer Reports	1660–1706
Freem. Ch.	Freeman Chancery	1857–1865
Giff.	Giffard	1705–27
Gilb. Rep.	Gilbert's	

H. & M.	Hemming & Miller	1862–65
H. & N.	Hurlstone & Norman	1856–62
H. & Tw.	Hall & Twells	1849–50
H.L.C.	Clark's Reports, House of Lords	1847–1866
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Ir. R.	Irish Law Reports	1878–current
Jac.	Jacob	1821–22
Jac. & W.	Jacob & Walker	1819–21
J. & H.	Johnson & Hemming	1860–62
Jo. & La T.	Jones & La Touche	1844–1846
Johns.	Johnson	1859
Jur.	Jurist	1837–54
Jur. N. S.	Jurist, New Series	1855–67
Kay	Kay	1853–54
K. & J.	Kay & Johnson	1854–58
Keen	Keen's Reports, Rolls Court	1836–1838
Kel. J.	Sir John Kelyng's Reports	1662–69
Kel. W.	W. Kelynge	1730–32
L.J. Bk.	Law Journal, Bankruptcy	1832–80
L.J. Ch.	Law Journal, Chancery	1831–current
L.J.C.P.	Law Journal, Common Pleas	1831–75
L.J.Ex.	Law Journal, Exchequer	1831–75
L.J.Q.(or K.) B.	Law Journal, Queen's (or King's) Bench	1831–current
Ll. & G. *temp.* Plunk.	Lloyd & Goold *temp.* Plunket	1834–1836
Ll. & G. *temp.* Sugd.	Lloyd & Goold *temp.* Sugden	1845
Lofft	Lofft's Reports, King's Bench	1772–1774
L.T.	Law Times Reports	1843–current
M. & S.	Maule & Selwyn's Reports	1813–1817
M. & W.	Meeson and Welsby Reports, Exchequer	1836–47
Macl. & R.	Maclean & Robinson	1839
Mac. & G.	Macnaghten & Gordon	1849–51
Macq.	Macqueen (Scottish)	1851–65
Madd.	Maddock	1815–22
Mans.	Manson's Bankruptcy and Company Cases	1893–1914
Mer.	Merivale	1815–17
Mod.	Modern	1669–1737
Mol.	Molloy's Reports, Chancery (Ireland)	1808–1831
Mont. & A.	Montague & Ayrton, Bankruptcy Reports	1832–38
Moo. & S.	Moor and Scott Common Pleas Reports	1831–34
Moo. P.C.	Moore's Privy Council Cases	1836–62
Moo. P.C.N.S.	Moore's Privy Council Cases (New Series)	1862–73
Mos.	Mosely	1726–31
My. & Cr.	Mylne & Craig	1835–40
My. & K.	Mylne & Keen	1832–35
Nels.	Nelson	1625–93
New Rep.	New Reports	1862–65
P. Wms.	Peere Williams	1695–1735
Ph.	Phillips	1841–49
Prec. Ch.	Precedents in Chancery	1689–1722
Q.B.	Queen's Bench Reports	1841–52
Rep. Ch.	Reports in Chancery	1615–1710
Ridg. P.C.	Ridgway's Parliamentary Cases, Ireland	1784–1790
Ridg. *temp.* H.	Ridgeway *temp.* Hardwicke	1744–46
Russ.	Russell	1823–29
Russ. & M.	Russell & Mylne	1829–31
S. & S.	Simons & Stuart	1822–26
Salk.	Salkeld's Reports, King's Bench	1689–1715
Saund.	Saunders' Reports, King's Bench	1666–1673
Sch. & Lef.	Schoales and Lefroy's Reports	1802–1806
Sel. Cas. Ch.	Select Cases in Chancery	1685–91
Sel. Cas. *temp.* King	Select Cases *temp.* King	1724–34

Sim.. . .	Simons	1826–49
Skin. . .	Skinner's Reports, K.B. . . .	1681–1697
Sm. & Giff. .	Smale & Giffard	1852–57
Sol. J. . .	Solicitor's Journal	1856–current
Swanst. . .	Swanston	1818–19
Taml. . .	Tamlyn	1829–30
T.C. . .	Reports of Tax Cases . . .	1875–current
T.L.R. . .	Times Law Reports	1884–current
T.R. . .	Term Reports (Durnford & East). .	1785–1800
Toth. . .	Tothill	1559–1647
Turn. & R. .	Turner & Russell	1822–24
V. & B. . .	Vesey & Beames	1812–14
Vent. . .	Ventris' Reports	1668–91
Vern. . .	Vernon	1681–1719
Ves. or Ves. Jun.	Vesey Junior	1789–1817
Ves. Sen. . .	Vesey Senior	1746–56
Vin. Ab. . .	Viner's Abridgment of Law and Equity	
W.N. [preceded by date] .	Weekly Notes	1866–current
W.R. . .	Weekly Reporter	1852–1906
West *temp.* Hard.	West, *temp.* Hardwicke . . .	1736–39
Wilm. . .	Wilmot's Notes of Opinions and Judgments	1757–70
Wils. Ch. . .	Wilson, Chancery	1818–19
Y. & C. Ch. Cas.	Younge & Collyer's Chancery Cases .	1841–43
Y. & C. Exch	Younge & Collyer's Reports, Exchequer in Equity	1833–1841
Y. & J. . .	Younge & Jervis	1826–30

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L.R.C.P. . .	Common Pleas	1865–75
L.R. Eq. . .	Equity	
L.R. Ex. . .	Exchequer	
L.R. Q.B. .	Queen's Bench	
L.R. H.L. .	House of Lords	
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Ch. App. . .	Chancery Appeals	
C.P.D. . .	Common Pleas Division	1876–90
Ex.D. . .	Exchequer Division .	
Q.B.D. . .	Queen's Bench Division	
Ch. D. . .	Chancery Division	
P.D. . .	Probate Division	
App. Cas. .	House of Lords	
A.C. . . [preceded by date]	House of Lords	1891–current
Ch. . . . [preceded by date]	Chancery Division	
P. . . . [preceded by date]	Probate Division	
Q.B. or K.B. . [preceded by date]	Queen's Bench Division or King's Bench Division	

THE LAW OF TRUSTS

CHAPTER I

THE NATURE OF A TRUST

A. THE DEFINITION OF A TRUST

THE exact definition of a trust has always offered special difficulties to legal writers. As Maitland observes at the beginning of his Third Lecture, "of all the exploits of Equity the largest and most important is the invention and development of the Trust,"[1] and, therefore, it is almost impossible to explain the nature of a trust without discussing the nature of equitable intervention, and the historical reasons for the extension of what was in essence an obligation depending upon personal confidence into a wide interest in property which, however, has always stopped short of turning into a right *in rem*, at all events until the Legislature intervened in 1925.

Coke's definition.

Coke[2] defines a use or trust of lands as "a confidence reposed in some other, not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in the Chancery." What Coke means when he speaks of a trust as not issuing out of the land, but as a thing collateral to it, is that it differs from such a thing as a legal interest, such as a rent, which, inasmuch as it issues out of the land itself, binds every person who takes the land; whereas a trust is regarded by Coke as an incident accompanying the land only so long as certain conditions continue to exist. Coke's definition has been accepted by some eminent authorities, and notably by Lewin,[3] as the model for a general definition of a trust. Maitland, however, objects to it on two grounds: (1) that to call a trust a confidence does not materially assist in elucidating its meaning, and (2) he doubts if it is true that wherever a trust exists there is, in fact, some reliance reposed by one person in another. Although this may be true of most trusts, it is not true of all. Where the *cestui que trust* is unborn, or is ignorant of the existence of the trust, he places no confidence in the trustee, in the ordinary

[1] *Equity*, p. 43.
[2] Co. Lit. 272*b*.
[3] *Law of Trusts* (Thirteenth Edition), p. 11.

sense of the word, at any rate.[1] Nor would it seem that either the creator of the trust or the beneficiaries repose confidence where the trust arises by implication of law. Underhill[2] objects to Coke's definition on other grounds. Where a trust of choses in action exists, the equities attaching to it are generally not merely collateral. Further, the use of the phrase "some other" implies that the trustee must be a person distinct either from the creator of the trust or from the beneficiary; but the trustee may be either of these. Finally, since the Judicature Acts, any division of the High Court may take cognisance of equitable rights.[3]

Spence's definition.

Another type of definition is furnished by Spence. In his view, a trust is "a beneficial interest in, or beneficial ownership of real or personal property, unattended with the possessory or legal ownership thereof." On this, it may be observed that the tenant for life under a settlement of land may[4] enjoy possessory ownership. Mr. Justice Story's definition is very similar—

> A trust may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.

The definitions contained in Judge Josiah Smith's *Equity* and in early editions of Snell's *Equity* were almost identical, and other definitions of Mr. Justice Story appear in *Wilson* v. *Lord Bury*[5]—

> A trust in the most enlarged sense in which that term is used by English jurisprudence may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.

And again—

> A trustee is a person holding the legal title to property under an express or implied agreement to apply it and the income arising from it to the use and for the benefit of another person who is called the *cestui que trust*.

Sir A. Underhill's definition.

Underhill objects, however, that this class of definition does not define a trust at all, but merely the beneficial interest arising under it. His own definition of a trust is—

> An equitable obligation imposing upon a person (who is called a trustee) the duty of dealing with property over which

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[1] Lecture IV.

[2] *Law of Trusts and Trustees* (Eighth Edition), p. 4.

[3] *Law of Trusts and Trustees*, Art. 1.

[4] But not necessarily (Settled Land Act, 1925, Sect. 20 (1) (viii); *Re Jones* (1884), 26 Ch.D. 736, 738.)

[5] (1880), 5 Q.B.D. 518, at p. 530; see also *Re Williams*, [1897] 2 Ch.12, at p. 19.

> he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.

The only objections to this definition are that it will not include charitable trusts, nor again trusts which, though good, are unenforceable, e.g. a trust for the maintenance of a tomb in a churchyard or for the support of dogs and horses, provided it is limited to the period permitted by the perpetuity rule.[1]

There may be a trust of an equitable interest.

It should also be observed that it is incorrect to speak of a trust as the relationship which arises when the legal ownership of property is vested in one person, and the beneficial ownership in another, for there may be a trust of an equitable interest, e.g. where a beneficiary under a settlement gives his beneficial interest on trust for another; and, moreover, in the case of settlements of land, the Settled Land Act, 1925, vests the legal estate in the tenant for life, and the trustees of the settlement do not necessarily hold any property at all. In such a case the tenant for life is constituted an express trustee of the legal estate.[2] All that can be said of a trust, therefore, is that it is the relationship which arises wherever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.

The American Law Institute, in its "Restatement of the Law of Trusts," adopts a substantially similar definition. It states—

> A trust . . ., when not qualified by the word "charitable," "resulting" or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.[3]

It will be noticed that three important types of trust are excluded from this definition, whilst the definition given above attempted to include them. In the United States,

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[1] See *Re Dean* (1889), 41 Ch.D. 552, at p. 557; *Mitford* v. *Reynolds* (1848), 16 Sim. 105.

[2] Settled Land Act, 1925, Sect. 16 (1).

[3] P. 6, para. 2.

however, the conception of a constructive trust has been developed much further than it has been in England, and in consequence it requires separate treatment. Charitable trusts also are treated separately by the American Law Institute, although there seems to be no reason why a charitable trust should not be included within the definition offered by them.

Lepaulle's view of a trust.

Maitland's observation that Gierke was not familiar with the implications of an English trust[1] is probably no longer true of eminent Continental lawyers, some of whom have recently devoted considerable attention to this institution of English law, and M. Pierre Lepaulle has recently done much to explain the trust to Continental critics.[2] He observes that it is impossible to regard the characteristic of a trust as a right *in personam* of the *cestui que trust* against the trustee, or as a division of rights of property between them. If the essential element of a trust is discoverable, it is something which is common to all trusts, express, implied, constructive, public, and private. There is, he maintains, no single essential right or duty common to all trusts. The only necessity is that property (in its widest sense, *res*) should exist, and that it should be appropriated to the fulfilment of some object. A trustee is not an absolute necessity for a trust ("A trust shall never fail for want of a trustee"), though he is for its proper execution. Accordingly, "the rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the *res* be properly appropriated to the aim to which it has been devoted, either by the settlor, by the Court, or by operation of law. The rights that the trustee will have in each particular case depend on his obligations; they are tools given to him for the fulfilment of his duties, and such duties are determined by the appropriation to which the *res* has been devoted. Hence, it is apparent that trustee, *cestui*, rights and obligations of either of them, are only means for reaching an end, and . . . . .; that the essence of such legal institution can only be found in the *res* and its appropriation to some aim. Trusts appear to us, then, as a segregation of assets from the *patrimonium* of individuals, and a devotion of such assets to a certain function, a certain end."[3]

[1] *Equity*, p. 23.

[2] *Traité Théorique et Pratique des Trusts*. See also *Trusts and the Civil Law* in *Journal of Comparative Legislation*, February, 1933, p. 18.

[3] "An Outsider's View-point of the Nature of Trusts," 14 *Cornell Law Quarterly*, p. 52.

B. THE DISTINCTION BETWEEN A TRUST AND CERTAIN OTHER LEGAL INSTITUTIONS

The distinction between a trust and a contract.

It is essential to distinguish a trust from certain other relations which in some respects it may resemble. A trust has some of the characteristics of a contract, especially where it is the result of the act of the parties themselves. Sir Frederick Pollock,[1] indeed, suggests that in origin a trust is a form of contract, though it was treated distinctively in Equity, and now possesses characteristics incompatible with the English theory of contracts. Thus, a trust, if executed, may be enforced by a beneficiary who is not a party to it, whilst only the actual parties to a contract can, as a rule, sue upon it. Further, an executed voluntary trust is fully enforceable, whilst a contract not under seal, and lacking consideration, is not.

That there is a distinction between trust and contract will be evident from the existence of differing legal consequences attached to the two relations, as indicated in the preceding paragraph. It is also clear, however, that the determination of the question whether a given set of facts gives rise to a trust or a contract simply is not easy to determine. This point, as Professor Winfield justly observes,[2] has not hitherto received adequate attention from English textbook writers, notwithstanding the fact that difficulties arising out of it have been considered on several occasions by the Court, and notwithstanding also that American writers have paid considerable attention to it.[3] Thus, in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford, Ltd.*,[4] a charter-party provided that "a commission of 3 per cent on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." The House of Lords, following the decision in *Robertson* v. *Wait*,[5] held that the broker could join the charterers to sue under the charter as trustees for the broker. Again, in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*,[6] the Lord Strathcona Company bought a ship from X, with notice of a charter party made between X and the Dominion Coal Company. The Dominion Coal Company asked for a

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[1] *Principles of Contract* (Tenth Edition), p. 204.
[2] *The Province of the Law of Tort*, pp. 104–8.
[3] E.g. Professor A. L. Corbin in 46 *Law Quarterly Review*, pp. 33–36, and Professor Z. Chafee in 41 *Harvard Law Review*, pp. 945–1013.
[4] [1919] A.C. 801.
[5] (1853), 8 Ex. 299.
[6] [1926] A.C. 108.

declaration that the Lord Strathcona Company were bound to carry out the charter party, and also for an injunction against using the ship in a manner inconsistent with the charter party. The Judicial Committee of the Privy Council upheld this claim of the Dominion Company, holding that as the Lord Strathcona Company had acquired the ship with notice of the fact that the ship was to be used for a particular purpose, they were in the position of constructive trustees, and were compelled to give effect to the charter party. In reaching this decision, they purported to follow a dictum of Knight-Bruce, L.J., in *De Mattos* v. *Gibson*,[1] but as Professor Winfield emphasises, there must necessarily be limits to this doctrine, otherwise the further doctrine of privity in contract has been demolished. The limits, he observes, " are that it applies only to *uses* of the article transferred and that an interest in it must remain with the person who seeks to enforce the injunction."

It is suggested that the key to the difficulty may probably be found in an observation of Jessel, M.R., in *Re Empress Engineering Company*.[2] He says—

> So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract.

That looks like another way of saying that the whole question is one of intention of the parties, inasmuch as Equity looks to the intent and not to the form, and further, as no technical words are required to constitute either a trust or a contract. Where the conduct of the parties leads the Court to conclude that a trust was intended, a Court of Equity will give effect to that intention. Where the parties did not possess such an intention, then normally a contract will result from the agreement. It may be, however, that in a particular case, the parties had no clear intention one way or the other. In such a case the Court may have recourse to the doctrine of constructive trusts which, it has been shown, was successfully invoked in the *Strathcona* case. It is at this point that M. Lepaulle's view of trusts becomes valuable. The first requirement of a trust,

[1] (1859), 4 De G. & J. 276.
[2] (1880), 16 Ch.D. 125, at p. 129.

he says,[1] is a segregation of assets and their devotion to a function; an Equity lawyer reaches the same conclusion by saying that the property must be ascertained with reasonable certainty and appropriated to some object for a definite end. One indication of intention will therefore be a definite appropriation of property to an end. This is something more than a mere obligation to pay a third party a sum in the future, and the whole transaction must be scrutinised carefully to see whether, in fact, such an appropriation has been made. If it has, then a trust has been created.

The difficulties attending the determination of the question whether a given set of facts will lead the Court to conclude that a trust or a contract only was intended to be created may be perceived from a consideration of the decisions of the Court of Appeal in *Aschkenasy* v. *Midland Bank Ltd.*[2] and in *Harmer* v. *Armstrong.*[3] In the former case Aschkenasy had a large credit at a Swiss bank, and he instructed them to transfer to the Midland Bank £18,044, to be held by them to the credit of the Moscow Industrial Bank. This occurred in 1918, and as the Russian bank was being liquidated in consequence of the Revolution, it never received the notice sent by the Midland Bank, and Aschkenasy therefore claimed it. Roche, J., however, declined to see a resulting trust for Aschkenasy on these facts, and held further that since there was no privity of contract between Aschkenasy and the Midland Bank, the claim failed. The Court of Appeal was of the same opinion, On the other hand, in *Harmer* v. *Armstrong* [3] A agreed to purchase the copyright in certain periodicals from V, H, and L. The plaintiff, X, alleged that this agreement was entered into by A as agent and trustee of X, and although A denied it, this circumstance was proved to the satisfaction of the Court. Eventually, the agreement between A and V, H, and L was rescinded, and the copyrights were sold, with notice of X's claim, to S. The plaintiff, X, thereupon brought an action against A, V, H, L, and S claiming a declaration that the defendant A had entered into the contract as agent and trustee for X, and claiming also specific performance of that agreement. The Court of Appeal accepted both these contentions, and granted X specific performance of the contract against S, the assignee of the contract with notice of the trust.

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[1] *Traité Théorique et Pratique des Trusts*, pp. 23 *et seq.*
[2] (1934), 50 T.L.R. 209.
[3] [1934] 1 Ch. 65.

and between a trust and a bailment.

Further, a trust must be distinguished from a bailment. This is not made any easier by the fact that the treatment of bailments in English law has been somewhat uncertain. Thus, Blackstone[1] defines a bailment as "a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee." Is a bailment, therefore, a trust or a contract? On the second point, it should be noticed that, although bailments are usually considered with contracts, and although many bailments are unquestionably contracts (e.g. carriage), yet not all bailments are contracts. Thus, an infant can make a valid bailment, whilst his capacity to enter into contracts is very restricted. Further, the use of the word "trust" is misleading, for, in English law, that term has been appropriated to denote a relation which is only recognised and enforced in Equity, whilst a bailment creates a binding legal obligation, enforceable at Common Law. It is submitted, therefore, that a better definition of a bailment would be: A delivery of goods to another for a limited purpose, *upon a condition*, express or implied, that they shall be redelivered to the bailor, or delivered to another at his order, when the limited purpose is co etely fulfilled. In a bailment, the bailor does not divest himself of ownership. He merely curtails his rights of enjoyment of the thing bailed in favour of the bailee. Further, the rights which the bailee acquires in virtue of the bailment may be enjoyed by him without reference to the bailor. He is in no sense given those rights simply to carry out some further purpose of the bailor's. This should not be misunderstood. In carriage, the bailee receives goods in order to transport them at the order of the bailor, but his rights as bailee do not arise in consequence of that purpose. They arise because of the bailment. The agreement to carry is a collateral undertaking which distinguishes this bailment from others. Under a trust, however, the trustee becomes full legal owner of the property subject to it, and therefore the creator as such of the trust ceases to have any rights in the property at all, yet, at the same time, the trustee becomes owner only because he has undertaken to carry out the purpose of the trust, and the fulfilment of that purpose conditions his ownership. Lastly it should be noticed (although the distinction is hardly fundamental) that whilst there may be a trust of all kinds of property, bailment extends only to chattels.

[1] 2 *Commentaries*, Ch. 30, s. 2.

A trust is not identical with the office of personal representative.

Again, the relationship of an executor or administrator to the beneficiaries under a will or towards those benefiting on intestacy is not necessarily that of trustee and *cestui que trust*. As Maitland points out,[1] the legatee's action for his legacy is older than the doctrine of trusts, and has never been brought entirely within it. Yet an executor or administrator may very easily be a trustee, either as a consequence of the terms of the will,[2] or by operation of law, or some special circumstance. Thus, under the Administration of Estates Act, 1925, Sect. 33, the personal representatives of a deceased intestate hold his real and personal estate upon trust for sale and conversion. Furthermore, most of the powers of trustees under Trustee Act, 1925, may also be exercised by personal representatives. Indeed a trust for the purposes of that Act is defined to include the duties incident to the office of a personal representative.[3] Nevertheless, the two offices still remain distinct. It will be shown later that different periods of limitation are applicable to them,[4] and the personal representative still possesses one or two powers not possessed by a trustee, e.g. a power to appropriate part of the estate in satisfaction of a beneficiary's interest.

The distinction between a trust and a power.

A trust must also be distinguished from a power, more especially from a power of appointment. A power is defined by the learned authors of Goodeve and Potter's *Law of Real Property*[5] as "an authority to dispose of some interest in the land, but confers no right to enjoyment of the land. A power is the right to dispose of an estate or interest in property rather than ownership of an estate or interest." [5] A power is discretionary, whereas a trust is imperative; the trustee, if he accepts, must necessarily do as the settlor directs.[6] Furthermore, under a power, the persons amongst whom the appointment is to be made have no action against the appointor, in the absence of fraud, if he does not appoint, whilst if property is left on trust to divide, the Court will compel its division. In the last resort, the Court will itself divide. There are also certain powers which are termed "powers in the nature of trusts," and it may be that if the instrument purports to give a power, a trust is really

[1] *Equity*, p. 48.
[2] *Re Davis*, [1891] 3 Ch. 119; *Re Swain*, [1891] 3 Ch. 233; *Re Mackay*, [1906] 1 Ch. 25.
[3] Sect. 68 (17).
[4] *Post*, p. 370.
[5] P. 344.
[6] By Sect. 25 (4) of the Law of Property Act, 1925, a trust to retain or sell is now a trust to sell with power to postpone.

intended, but the distinction rests upon the settlor's true intention. Thus, in *Burrough* v. *Philcox*[1] a testator gave property to trustees on trust for his two children for their lives, remainder to their issue, and, in default of issue, the survivor of them was to have power to dispose of the property by will "amongst my nephews and nieces, either all to one, or to as many as my surviving child shall think proper." The testator's children, having died without issue, and without any appointment having been made by the survivor, it was held that a trust in favour of the testator's nephews and nieces and their children had been created subject to a power of selection and distribution. Lord Cottenham observed in that case: "When there appears a general intention in favour of individuals in a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class."

In the important case of *Brown* v. *Higgs*,[2] twice decided by Lord Alvanley, and then affirmed successively by Lord Eldon and by the House of Lords, Lord Eldon said, on the same point—

> If the power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.[3]

Where there is a power, with a gift over to other persons in default of appointment, however, this is sufficient to negative the presumption that there is a trust in favour of the persons who are the objects of the power. Even if there is no gift over, it does not necessarily follow that the Court will execute the power as a trust. The test is whether the settlor has demonstrated an intention to benefit the class in any event. This was clearly emphasised in *Re Weekes*.[4] There a woman gave property by will to her husband for life, with power by deed or will to dispose of it amongst their children. The Court held that there was

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[1] (1840), 5 My. & Cr. 72. See also *Re Llewellyn's Settlement*, [1921] 1 Ch. 281.
[2] (1799), 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192.
[3] (1801–3), 8 Ves. 574.
[4] [1897] 1 Ch. 289.

no gift to such of the class as the husband might appoint (thus confining the husband's duties to a selection within the class), but a power to appoint with no general intention to benefit the class in any event. It is obvious from this decision that the actual intention of the testator finally governs the matter. This point is also well illustrated by *Re Coombe*.[1] A testator devised and bequeathed residuary realty and personalty on certain trusts and then in trust for his only son for life, and from and after his death "in trust for such person or persons as my said son . . . shall by will appoint, but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." There was no gift over in default of appointment. Tomlin, J., observed—

> Am I to approach this will governed by an inflexible and artificial rule of construction to the effect that where I find a power of appointment to a class not followed by any gift in default of appointment, I am bound to imply a gift to that class in default of the exercise of that power? Or ought I to approach this will for the purpose of construction in the same spirit as I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied?

Tomlin, J., held the latter was the correct principle, and decided that in this case a trust had not been intended, and had not been created.

Trust and agency.

A trust must also be distinguished from agency. A trustee has full title to the trust property in law; an agent to whom has been transferred his principal's property does not have title to it, although he may have special statutory powers of disposition. Moreover, an agent acts on behalf of his principal and subject to his control. A trustee is not subject to the control of a beneficiary, beyond his obligation to deal with the trust property in accordance with the terms of the trust. Again, agency is based on agreement between principal and agent, but there is not necessarily any agreement between trustee and beneficiary. The American "Restatement of the Law of Trusts" further notices that an agent can subject his principal to liabilities towards third persons, whilst a trustee cannot involve his beneficiary in such liabilities; further, agency arises as a result of consent between principal and agent, whilst a trust can arise without the consent of trustee or of beneficiary and, finally, agency may be terminated on the death or at the will of either party, whilst

[1] [1925] Ch. 210. See also *Tempest* v. *Lord Camoys* (1882), 21 Ch.D. 571.

a trust may not. Nevertheless, it must be added that trust and agency sometimes coincide. This is considered later.[1]

C. THE PROPERTY THAT MAY BE HELD IN TRUST

In general, any property may be held in trust.

Generally speaking, all property, whether real or personal, legal or equitable, may be held in trust, unless some special rule of law prevents it, although in practice, it will be found that the property most frequently held on trust includes land, stocks, and shares. Thus, in *Gilbert* v. *Overton*,[2] A held an agreement for a lease, and assigned all his interest in it to trustees upon certain trusts. It was held that, though this was a settlement of an equitable interest only, it was perfectly good. The settlement of a reversion is entirely valid.[3] The position of expectancies, however, is a little different. There may be what purports to be an assignment in Equity, which is construed as an agreement to assign when the expectancy becomes a certainty. From that date only is the assignment complete, so that if in the interval the assignee becomes bankrupt, the assignment of the expectancy fails.[4]

Lord Shaw observed in *Lord Strathcona S.S. Co.* v. *Dominion S.S. Co.*—[5]

> The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a *chose in action*, or of a right or obligation under an ordinary legal contract, just as much as a trust of land. A shipowner might declare himself a trustee of his obligations under a charter party, and if there were such a trust an assignee, although he could not enforce specific performance of the obligation, would fail to do so only on the broad ground that the Court of Equity had no machinery by means of which to enforce the contract. Subject to this an assignee of the charterer could enforce his title to the *chose in action* in equity, even though he could not have done so at law.

Certain statutory exceptions.

Some types of property are made inalienable by statute. In this class are pensions to officers in the Crown's forces, or to the widow of an officer. The position of officers on half-pay is considered in *Grenfell* v. *Dean and Canons of Windsor*,[6]

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[1] *Post*, p. 208. On the general position of the agent as trustee, see (1898), 14 *Law Quarterly Review* 272.

[2] (1864), 2 H. & M. 110.

[3] *Shafto* v. *Adams* (1864), 4 Giff. 492.

[4] *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523. Cf. *Re Lind*, [1915] 2 Ch. 345, where an assignee of an expectancy failed to prove in the assignor's bankruptcy. The bankrupt received his discharge, and the Court of Appeal held that the assignment remained in force. See also *Re Gillott's Settlement*, [1934] 1 Ch. 97.

[5] [1926] A.C. 108 at p. 124.

[6] (1840), 2 Beav. 544. See also *Davis* v. *Duke of Marlborough* (1818), 1 Swanst. 74.

where it was held that half-pay is "a sort of retainer . . . the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties." In *Davis* v. *Duke of Marlborough*,[1] the duke's estate, having been granted as a reward, was held to be alienable, but his pension to support the object was not.

In *Nelson* v. *Bridport*[2] it was held that there could not be a trust of real estate, when the tenure under which it was held was inconsistent with the trust to be created.

Trusts of foreign property.

The position of trusts of foreign property calls for special consideration. The rule of private international law is that moveables follow the person. Thus, if a person is within the jurisdiction, so is all his moveable estate, and accordingly an enforceable trust of it may be created. The trust may, however, create an obligation to be performed abroad. The conditions under which an order will be made for the performance of that obligation abroad were considered in *Re Liddell's Settlement Trusts.*[3] Mr. and Mrs. L, British subjects, were domiciled and resident in England with their four infant children. In 1935, Mrs. L went to the United States, taking the four children without the consent and against the will of her husband. Subsequently the husband covenanted with trustees to pay them a sum of money to pay and apply for the benefit of the children, and proceedings were begun in the Chancery Division for the execution of the trusts of the settlement, the children becoming thereby wards of Court, and an application was made for an injunction requiring Mrs. L to bring back the children to England. Greaves—Lord J., made the order asked for, and the Court of Appeal upheld it, on the ground that Mrs. L, being ordinarily resident within the jurisdiction, was in the same position as if she were in this country.

As regards foreign lands, a long succession of cases has established the rule that the Court will enforce natural equities, and compel the specific performance of contracts if: (1) the parties are within the jurisdiction, and (2) there is no insuperable obstacle to the execution of the decree. The meaning of the phrase "natural equities" will be sufficiently gathered from the observations of Parker, J., in *Deschamps* v. *Miller*[4]—

In my opinion the general rule is that the Court will not

[1] See note [6], p. 12, *ante*.
[2] (1846), 8 Beav. 547. See also *Allen* v. *Bewsey* (1877) 7 Ch.D. 543.
[3] [1936] 1 Ch. 365.
[4] [1908] 1 Ch., 863.

> adjudicate on questions relating to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. . . . Where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation, and the whole question is whether or not according to the law of the *locus* the claim of title set up by one party would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction.

The great early illustration of this rule is *Penn* v. *Lord Baltimore*,[1] wherein specific performance of articles for ascertaining the boundaries of land in North America was decreed; whilst a good modern example is *Rochefoucauld* v. *Boustead*,[2] in which an account was decreed between trustee and beneficiary, and a trust enforced, relating to the purchase of estates in Ceylon. These are illustrations of natural equities, usually arising out of contracts between parties, both of whom are within the jurisdiction. It is exceedingly doubtful, however, whether a trust as such, and not depending upon natural equities or a contract, can be attached in England to foreign land. Lewin is of the opinion that such trusts cannot be created.[3] In *Re Piercy*,[4] foreign land was devised by an English testator on trust for sale, and until sale the rents and profits were to be divided amongst a class for life with remainders over. By the foreign law applicable, such a limitation under a trust was prohibited, on account of the remainders over, and, by the foreign law, the class who took for life would receive absolute interests. The Court held that until sale the foreign law applied, and the rents and profits therefore belonged to the life-tenants absolutely.

No English Court will hear an action concerning the title to foreign land, notwithstanding that both parties are within the jurisdiction,[5] nor will it hear an action for damages for trespass to foreign land.[6]

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[1] (1750), 1 Ves. Sen. 444.

[2] [1897] 1 Ch. 196. For many other examples, see Lewin, *op. cit.* p. 41.

[3] *Trusts*, p. 42 citing *Glover* v. *Strothoff* (1786), 2 Bro C.C. 33; *Nelson* v. *Bridport* (1846), 8 Beav. 547; *Godfrey* v. *Godfrey* (1863), 8 L.T. 200.

[4] [1895] 1 Ch. 83.

[5] *Re Hawthorne* (1883), 23 Ch.D. 743.

[6] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602.

CHAPTER II

THE DEVELOPMENT OF THE LAW OF TRUSTS

The origin of uses.

THE modern trust grew out of the mediaeval custom of putting land and other forms of property to use. It should be observed, however, that the ultimate origin of the conception of the use is still one of the controversial topics of jurisprudence. The view current in the early part of the nineteenth century, before the rise of the modern school of legal historians, was that the English use was the counterpart of the Roman *usus usufructus* or of the *fidei commissum*, but this theory may now be regarded as finally exploded, more especially since Maitland has demonstrated that the term itself is derived, not from *ad usus*, but from *ad opus*. Maitland himself held the view that the use arose out of the Common Law rules of agency, and was an informal agency applied originally to chattels, the relationship crystallising only when the practice was applied to *land*.[1] Mr. Justice Holmes holds another view,[2] which at one time received very considerable support, and some of the implications of which have been accepted by Sir William Holdsworth. Holmes finds the forerunner of the feoffee to uses in the *treuhand* or *salman* of early Teutonic law. The *salman* was the primitive executor, to whom property was transferred for certain purposes, and who administered the personal property of the deceased. The property was transferred to the *salman* in the lifetime of the owner of the land, to be applied for specified purposes after the owner's death. In this custom some may perhaps discern the origin of the English will to uses. Holmes also suggests that since jurisdiction with regard to the administration of the goods of a deceased passed to the Ecclesiastical Courts after the Conquest, the origin of the use in English law may therefore be ascribed in some measure to them. Holdsworth[3] carries this view a step further and regards the old Teutonic institution as a characteristic of English land law shortly after the Conquest, but during the latter part of the fourteenth century the Common Law finally rejected the use as applicable to land, having by that time developed its own more rigid rules; although in respect of chattels the use received a

[1] See Maitland: *Collected Papers*, Vol. III, pp. 321–404.
[2] *Select Essays in Anglo-American Legal History*, Vol. II, p. 705.
[3] *History of English Law*, Vol. IV, pp. 410–417.

species of recognition in the actions of detinue and account. The Chancellor, therefore, in protecting the beneficiary, was in reality giving effect to a relationship which was common, ancient, and well-understood.

Ames's theory.

Another view has been advanced by Professor Ames,[1] who held that the use was a product of the English legal system, and a logical consequence of the maxim that Equity acts on the conscience. Furthermore, he was of the opinion that the Chancellor, in enforcing uses, was to some extent guided by the existence of the actions of account and detinue, applicable to the situation arising where chattels had been given for the use of third persons. This view has encountered considerable criticism, and Sir William Holdsworth stresses the point that the Common Law could never have evolved a satisfactory protection for the beneficiary from assumpsit.

The use as a product of necessity.

All these theories, except in so far as they correct a false interpretation of the facts of legal history, are somewhat beside the point. Modern English law has very closely assimilated the position of the executor and the administrator to that of the trustee, but it would be as false to derive the modern office of personal representative from trusteeship as it is unnecessary to derive the office of trustee from that of the primitive executor. It is submitted that the basic conception of a use is fundamental, and appears in several systems of law, though the working out of its legal incidents eventually exhibits considerable differences. Where certain persons cannot hold the more important forms of property at all, and others can only hold it with difficulty or disadvantageously, then the lawyer must find a way out. The Roman lawyer in the time of Augustus evolved the *fidei commissum*, the mediaeval landowner, or his legal adviser, evolved the use, and then looked to some official to protect him. Holdsworth has shown that the Common Law judges only finally turned their backs on the use with regret. Their loss was the Chancery's gain, and Dr. Potter rightly emphasises the fact that the Ecclesiastical Chancellor of the Middle Ages was the proper person to prevent a serious breach of faith such as was involved in undertaking the execution of a use.[2]

Growth of the practice of putting lands to use.

Once the use obtained recognition in Equity, its employment became exceedingly common. The mediaeval property-owner put his lands to use for one of several purposes—either

[1] *Essays in Anglo-American Legal History*, Vol. II, p. 737 *et seq.*
[2] *Historical Introduction to English Law*, p. 542.

for a lawful object, which for its fulfilment required the interposition of someone other than the donor and the beneficiary, or for fraudulent purposes. In the first class of objects may be included the practice of making a will by way of use, since the mediaeval land law, regarding feudal tenure as a personal relationship, declined to permit alienation by will, and the position at Common Law remained unaltered until the Statute of Wills, 1540; again, since at Common Law a man could not convey either to himself or his wife, he made a settlement of land by enfeoffing others, with the intent that they should re-enfeoff the feoffor and his wife to hold to them and the heirs of their bodies. Among fraudulent practices may be mentioned the granting of lands to uses to defraud creditors, and to delay actions for the recovery of the lands granted. Both these objects were from time to time prohibited by statutes,[1] which were nevertheless evaded. A third class of objects occupied an intermediate position. It became possible to evade the prohibition imposed by the Statutes of Mortmain upon the gifts of land to ecclesiastical foundations, some of whom, and especially the Franciscans, were bound to poverty, and so declined the legal ownership of land, but not its beneficial enjoyment. This evasion was attacked by the Statute 15 Ric. II, c. 5, but not completely abolished, for the statute did not prevent the grant of land by way of use to unincorporated bodies, such as a parish.

Finally, from the time of Edward I onwards, landowners adopted the practice of enfeoffing, not one person, but several, more especially where the object was to create a will by way of use. The advantages of this practice were two. In the first place, the beneficiary relied upon the faith, not of one person, but of several, and therefore when the use was enforced in the Chancery, he had recourse against all the feoffees; and, furthermore, it was possible to postpone, and ultimately to evade, many of the incidents of feudal tenure, for as between the feoffees the rule of survivorship applied, and if the feoffees or the beneficiaries had the power of appointing new feoffees in place of those who died, relief, wardship, marriage, forfeiture for treason or felony, and the wife's right to dower might all be successfully avoided. This was naturally disliked by the great feudal overlords, and more particularly by the King, who lost by the practice and secured no compensating gains. It is therefore not surprising to find that,

[1] E.g. 50 Edw. III, c. 6; 1 Ric. II, c. 9; 2 Ric. II, st. 2, c. 3.

by a statute of 1489, it is provided that where the *cestui que use* of lands held in knight service died intestate, his heir was liable to wardship and relief. A much more comprehensive statute was, however, about to be passed.

The Chancellor protected *cestui que use.*

The Common Law (it has been observed) declined to enforce the use in favour of the beneficiary, and therefore for some time the beneficiary had no real remedy. It seems, however, that there was a practice whereby persons, enfeoffed for a special purpose, plighted their faith to do the feoffor's will. As a result of this, if the feoffee failed to discharge his trust, a suit *laesio fidei* lay in the Ecclesiastical Courts. From the time of Henry II onwards, such suits, where they concerned a lay fee or involved chattels or debts other than those involved in a testamentary or matrimonial action, were prohibited. The creators of uses then attempted to secure the fulfilment of their wishes by means of conditions and covenants, but these only afforded an imperfect protection. At length, in the reign of Richard II, the Chancellor interfered to protect the beneficiary, either because, being ecclesiastics, the Chancellors were accustomed to regard breach of a solemnly undertaken obligation as actionable, or simply on the general equitable ground that the conscience of a dishonest feoffee ought to be purged.

Extension of the Chancellor's protection.

Although the Chancery eventually gave the widest possible orbit to the use, the view of the Common Law Courts was that the feoffee was the unencumbered owner of the property, and the beneficiary was simply a tenant at will. Accordingly, the beneficiary was deemed to have no *estate* in the land, and since, as Maitland has put it, Equity comes not to destroy but to fulfil, this was a position which the Chancellor could not upset.[1] The beneficiary's remedy was therefore a personal one against the feoffee; but to allow the remedy to prevail against the feoffee alone was obviously only to open the door to fraud, and therefore the remedy was rapidly made available against the feoffee's heir, and even against a

[1] This point is brought out very clearly in a case in Y.B. 15 Henry VII, Mich., pl. 1, for a reference to which I am indebted to Mr. A. S. Gilbert—

Le premier cas que Thomas Frowike argue apres que il fuit fait Chief Justice fuit; si le feffor sur confidence prend bestes damages fesantes in la terre les feofees, que tiennent a son use, et que il doit occupier a lour sufferance; s'il peut avower le prisel de ceux in son nom demesne, ou non. Et Touts les Justices del dit Banc, disoyent, que il ne peut avower le prise pur damages fesance in la terre in son droit demesne, mes il foit faire conusance sans un droit les feoffees, come servant a eux; et la cause est, parce que il n'ad rien en la terre, ni interest in la terre, mes solement un confidence demurt entre eux; mes les feoffees peuvent punir luy pur sa occupation per cours del'Comon Ley; que prove que il n'ad interest. Et s'il poit prendre eux damage fesants, et aver amendes pur ceo, donque cesty que owes les bestes sera deux foit puni, car les feffees pur luy punir.

person to whom the feoffee sold the land, provided that the purchaser took the land with notice of the trust.[1] On the other hand, if the purchaser of the legal estate took in good faith and for value, without notice of the trust, the purchaser could retain the land as against the beneficiary, who was restricted to his personal action for breach of trust against the feoffee. These extensions of the beneficiary's rights were only conceded over a lengthy period, but at the close of the Middle Ages there had been developed the most striking characteristic of the equitable estate. It should be observed that, unlike the modern trust, a use of land could only arise out of a fee simple, and not out of a fee tail or a life estate. It would seem that there was no objection to a use of a term of years, which was regarded primarily as a chattel, and not as an estate in the land.

Relation of feoffee to uses to *cestui que use*.

The relationship between feoffee and *cestui que use* was also subject to equitable regulation, for the Chancellor required feoffees to discharge the obligations they had undertaken. In this way some of the cardinal rules applying to modern trusts were anticipated. The feoffee was compelled to establish in the land those interests that the grantor declared. Furthermore, he was obliged to permit the *cestui que use* to take the profits of the land, and to maintain actions for the recovery of the land at the request of the beneficiary; and, again, he must dispose of the land in accordance with his beneficiary's instructions. The feoffee could, however, recover his out-of-pocket expenses from the estate.

In equity the interest of *cestui que use* was regarded as an interest in the land.

It has been shown that the interest of the *cestui que use* was in origin a personal remedy against his feoffee. This was greatly extended when the interest became enforceable against all except a limited class of persons—*bona fide* purchasers for value of the legal estate, taking with no notice of the trust. It was therefore natural that in Equity the beneficiary's interest should be treated as an estate in the land; and the Chancellor allowed similar interests to be carved out of it as existed at Common Law. The Common Law system was not applied in its entirety, however, and a number of the technical rules relating to seisin (for example, that the seisin must never be in abeyance) were not introduced into Equity. Notwithstanding this limitation, the beneficiary's interest came to be regarded more and more, in the view of Equity, as an estate in the land. From the standpoint of alienation, the estate of the *cestui que use*

[1] Y.B., 5 Edw. IV, 7, pl. 16.

was much easier to handle than the legal estate, for it could be disposed of without any of the formalities necessary for a Common Law conveyance. The *cestui que use* declared his will to his feoffee, and the feoffee was bound to fulfil it.

Implied uses.

Apart from uses which were expressly declared, the Chancellor also recognised certain implied uses. Where, for example, A enfeoffed B, and B gave consideration, no matter how small, B was deemed to have the use of the land also; but if A enfeoffed B and there was no consideration, then it was held that B was enfeoffed to the use of A. Furthermore, where A bargained and sold land to B, then B was considered to have the use (or equitable estate) in the land as soon as the contract was completed, and before conveyance. Out of these rules eventually developed the modern law relating to implied and constructive trusts, although with important modifications.

The Statute of Uses.

It will be remembered that the Crown was the chief loser, where lands were put to use, through loss of the feudal dues; and the statute of 1489 only slightly modified the position. Henry VIII, however, considered that the time had arrived for a much more comprehensive statute, and conceived the possibility of drastically curtailing the employment of uses, if not of abolishing them altogether. A bill with the latter object was, indeed, drafted, but proved so unpopular that a more modified proposal was substituted, and was enacted as the Statute of Uses (1535).[1] The objects of the statute are set forth in an elaborate preamble, which emphasises the fact that, through the establishment of the use, feudal dues have been largely evaded, for it runs—

Preamble.

> Where by the common law of the realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bona fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts; and also by wills and testaments sometime made by nude parol and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such times as they have scantly had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly

[1] 27 Hen. VIII, c. 10.

and unadvisedly their lands and inheritances; by reason whereof, and by reason of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disinherited, the Lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur fair fils chivalier et pur fair fil marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties, also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed, the King's highness hath lost the profits and advantages of the lands of persons attainted and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; and also, for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness or any other of his subjects of this realm shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt by reason of such trusts, uses or confidences.

Scope of the statute.

The statute therefore provided that where any person or persons stood *seised* of lands or other hereditaments to the *use, confidence* or *trust* of any other person, persons, or body politic, then such person, persons, or body politic should be deemed to have lawful seisin and possession of such lands for such estate as they have in the use; and the estate of the feoffee should be deemed to be executed in the beneficiaries. Section 2 also provided that a like result should follow where (as was then common) several persons were seised to the use of one of them.

Operation of the statute.

It is apparent that the statute was very curiously worded, and that it did not completely abolish uses, nor was it intended to do so. For the statute to operate, it was necessary that one person should be "seised" to the use of another. There was therefore no difficulty in holding that it did not apply to uses of leaseholds and chattels. Furthermore, whilst a grant of land to A to the use of a corporation was within the statute, a grant of land to a corporation to the use of A was outside it. More important, however, was the principle that the statute did not apply to active uses, i.e. those where the feoffee had some positive duty to perform,

such as the collection of rents and profits. Lastly, the statute did not apply where A was seised to the use of himself; it was essential that he should be seised to the use of another. On this point Denman, J. (citing a note of Butler's to Co. Litt., 272*a*), observed in *Orme's Case*[1]—

> With respect to the mode by which conveyances to uses operate, it is to be observed that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the *cestui que use*; as the statute requires that the person seised to the use and the person to whom the use is limited should be different persons; so that, if the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee-simple, that is not an use executed by the statute, but the party is in by the common law: for the statute of uses mentions those cases only where "any person or persons stand seised to the use of any other person or persons."[2]

The fact that for nearly a century after the statute uses were comparatively rare may serve as an indication that the great majority of uses before the statute were passive, and served as a means of evading obsolescent feudal burdens upon land-tenure and the technicalities of Common Law conveyancing. The vast majority of modern trusts are, of course, active. This distinction between the mediaeval use and the modern trust (which has been sometimes ignored) was present in the minds of Tudor lawyers, for in *Chudleigh's Case*,[3] it is observed[4]—

> For the better apprehension of the mischiefs which were before this act, certain former statutes made against the abuses of uses in particular cases (for the treatise shall only be of uses) are to be considered. And thereby the abuses of such uses will fully appear, and that fraud was the principal cause of the invention of them in subversion of law and justice.

After reciting various early statutes, passed with the intention of suppressing particular classes of fraudulent uses, the report continues—

> The statute of 1 R. 3, c. 1, which is more general than the other statutes, intends to remedy four great mischiefs by reason of secret feoffments to uses: (1) Danger to purchasers and other King's subjects; (2) trouble; (3) costs; (4) grievous vexations; so that it was not only danger, but danger with trouble, and not danger with trouble only, but danger with

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[1] (1872), L.R. 8 C.P. 281.

[2] At p. 290. See also *Jenkins* v. *Young* (1631), Cro. Car. 230; *Meredith* v. *Joans* (1631), Cro. Car. 244; *Doe* v. *Prestwidge* (1815), 4 M. & S. 178; *Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523.

[3] (1589), Co. Rep., 113*a*.

[4] At p. 123.

> trouble and costs, and not danger with trouble and costs only, but with great vexation. Also, examples thereof are expressed in the preamble of the Act, no purchaser of lands in perfect surety, no wife of dower, no lessee of his lease, no servant of any annuity granted to him for his service, etc., by reason of these privy and unknown uses; this statute intended to provide for these mischiefs in establishing all feoffments, grants, etc., made by *cestuy que use*, etc. But so mischievous and sinister is the invention and continuance of uses, that they also overreached the policy and providence of the makers of this act also: for, for example, the purchaser was not in a better case than he was before, for if the feoffor limit to himself but an estate for life or in tail, or to his wife, or to his son, etc., or if the feoffees made secret leases or estates the purchaser could not have a sure estate, by any estate that *cestuy que use* could make, so that danger, trouble, costs, and great vexation remained in the realm by these covenous and fraudulent uses, notwithstanding the said statute of 1 R.3. For the remedy of which and many other mischiefs was the statute of 27 H.8, c. 10 made.

The estate of feoffee to uses was entirely destroyed by the statute.

It must be emphasised that where the statute operated, the estate of the feoffee was entirely destroyed and the *cestui que use* obtained a legal estate exactly corresponding to that which he would have enjoyed in Equity under the use before the statute. At law the erstwhile *cestui que use* was, after 1535, deemed to be in possession of the land, and this even though he had never entered upon it. This gave rise to some difficulty. It was held, for example, that the possession conferred by the statute was not sufficient for the *cestui que trust* on whom the legal estate had been conferred by the statute to maintain an action of trespass, as this is founded upon a disturbance of actual possession. The nature of the statutory possession was considered in *Heelis* v. *Blain*[1] and again in *Hadfield's Case*.[2] In the latter case Hadfield was seised in possession of a rent charge in consequence of a conveyance operating under the statute. It was held, following *Heelis* v. *Blain*,[1] that Hadfield enjoyed "actual possession" so as to entitle him to be placed upon the register of votes for 1872. Bovill, C.J., said—

> If we were to go through and attempt to reconcile the subtleties of this branch of the law, we should be embarking on a task which is manifestly hopeless. For some purposes the statute does, and for others it does not, give the actual possession. No case has been found which shows distinctly what is the effect of the statute for conveyancing purposes

[1] (1864), 18 C.B. N.S. 90; 34 L.J. C.P. 88.
[2] (1873), L.R. 8 C.P. 306.

or the vesting of estates. Under these circumstances, the question arises whether we can clearly arrive at the conclusion that the Court in *Heelis* v. *Blain*[1] were wrong in holding that the Statute of Uses did give the grantee the "actual possession" of the rent-charge within the meaning of Sect. 26 of the Reform Act of 1832. Probably, if the matter had been *res nova*, I should have held that actual possession meant what the words import. But, under the circumstances, I do not find sufficient reasons for saying that a decision which has been acted upon and has regulated the franchise for so many years, and which has not been interfered with by the legislature who have had the subject before them, and have legislated upon it since the decision, ought now to be departed from.[2]

The statute extended to implied uses.

The operation of the statute was not confined to uses which were expressly declared. It applied also to implied uses. Therefore, if a feoffment was made without consideration, Equity implied a resulting use to the feoffor, which the statute executed, and the attempted conveyance thus became a nullity. Hence, where it was desired to make a voluntary feoffment between 1535 and 1925, it was essential to insert the phrase "to the use of" in order to negative the possibility of a resulting use. Now, by the Law of Property Act, 1925, Sect. 60 (3), it is provided that "in a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee." A further point of considerable importance (but lying outside the scope of this work) is that by virtue of the statute secret conveyances of land became possible, and, further, it became possible to create a number of new forms of future interests in land in consequence of the operation of the statute upon what had formerly been equitable future interests created by way of use.

For a period, the extent of which would appear to be very uncertain, the primary object of the statute was fulfilled, and wherever a use was declared to exist, under the conditions prescribed in the statute, the legal estate was executed in the beneficiary. Twenty-two years after the statute, however, an old question received reconsideration, in the light of the statute, in *Jane Tyrrel's Case.*[3]

Jane Tyrrel's case.

The point at issue was this. If before the Statute of Uses A bargained and sold land to B to the use of A, or of some third person, then two uses arose. There was the *declared*

[1] (1864). 18 C.B. N.S. 90; 34 L.J. C.P. 88.
[2] At p. 317. Cf. *Orme's Case* (1872), L.R. 8 C.P. 281; *Savill Brothers* v. *Bethell*, [1902] 2 Ch. 523.
[3] (1557), 2 Dyer, 155*a*.

use in favour of A or of the third person, and there was also the use in favour of B implied from the bargain and sale; and in such a situation the Court of Chancery held the declared use void, as repugnant, and enforced that which was implied. After the statute, the question arose in a new form, for the Courts had to decide to which use the legal estate should now be attached. In *Tyrrel's Case*, the old rule was followed to the extent that the legal estate was declared to be executed in B, and the declared use, which was void for repugnancy before 1535, was also inoperative to pass any legal estate under the statute, for, as Dyer's report puts it, "an use cannot be ingendered of an use." It was also decided that where there was a conflict between two expressly declared uses, the second use is also void for repugnancy and was destitute of all legal effect at law.

After a time, however, it began to be questioned whether the limitation of a second use after a use to which the legal estate was annexed might not have some effect in Equity, and in *Sambach* v. *Dalston*,[1] it was held that the second use was enforceable in Equity. Whether this case is to be regarded as the starting point of the modern law of trusts or not remains uncertain. Professor Ames, in a celebrated essay, has advanced the view (which has met with very general acceptance) that until approximately this period the Court of Chancery did not intervene to enforce the second use or trust. Some doubt has, however, been cast upon the accuracy of this view,[2] and, of course, there were active trusts which escaped the statute, and which showed some development between 1535 and 1660.[3] Notwithstanding this, the fact remains that the trust remained comparatively an exceptional instrument until after the Restoration. Lord Mansfield observed in *Burgess* v. *Wheate*[4] that "in my opinion trusts were not a true foundation till Lord Nottingham held the Great Seal," whilst the judgment in *Daw* v. *Newborough*[5] seems to indicate that at this date equitable relief where a use was limited on a use was still regarded as novel. Moreover, until the beginning of the nineteenth century, some little doubt lingered concerning the position of the legal estate, where land was limited unto and to the use of A, in trust for B, for it will be remembered that here the legal estate was vested in A by virtue of the Common Law.

[1] (1634), Toth. pl. 168.
[2] See Potter: *Historical Introduction to English Law*, p. 549.
[3] See Holdsworth: *History of English Law*, Vol. V, pp. 305–337.
[4] (1759), 1 Eden, p. 223.
[5] (1715), 1 Com. 242.

Might it not therefore be contended that, since the Statute of Uses had not operated to pass the legal estate of A, it ought to operate to divest A of the legal estate, and pass it to B?

In *Doe dem. Lloyd* v. *Passingham*,[1] lands were conveyed to Sir Watkin Williams Wynne and Edward Lloyd, to have and to hold the lands unto themselves, their heirs and assigns, to the use of themselves, their heirs and assigns, upon certain trusts. It was held that the legal estate vested in Sir Watkin Williams Wynne and Edward Lloyd by virtue of the Common Law, and not in pursuance of the Statute of Uses, yet nevertheless the statute would not operate to pass the legal estate to those in whose favour the trusts had been declared. Littledale, J., observed—

> I never entertained a doubt, that a second series of uses could not be executed. It is true that certain cases show these trustees to have taken the estate by the Common Law, but they took it coupled with a use. The cases cited upon this point are perfectly clear, and they were well collected in a note, by Sergt. Williams, to *Jeffreson* v. *Morton*.[2]

To this, Bayley, J., added—

> Ever since I have belonged to the profession of the law, I have invariably understood that an use cannot be limited upon an use. That is admitted to be so in general, but a distinction has been taken where the limitation is to A, to the use of A in trust for B, and it is said that A is in by the Common Law. That is true; but he is in of the estate clothed with the use, which is not extinguished, but remains in him. In the case of *Meredith* v. *Joans*,[3] cited in argument to show that where an estate is limited to A, to the use of A, he is in by the Common Law, it is said, "for it is not an use divided from the estate, as where it is limited to a stranger, but the use and the estate go together." That case therefore shows, that although the trustees in this case might be in by the Common Law, yet they were in both of the estate and the use. There are two cases expressly in point. *Lady Whetstone* v. *Bury*[4] is a very clear case, and the words used were precisely the same as those found in the deed in question, and it was there decided and also in *The Attorney General* v. *Scott*,[5] by Lord Talbot, one of the greatest property lawyers that ever filled the office of Lord Chancellor, that the legal estate vests in him to whom by the words of the instrument the use is limited. Upon the authority of these two cases, I am of opinion that the use of the estate in question was executed in the trustees.

In *Cooper* v. *Kynock*,[6] where land was granted to B. Smith, his heirs and assigns, to the use of B. Smith, his heirs and

[1] (1827), 6 B. & C., 305.
[2] (1641), 2 Saund. 11, n. (17).
[3] (1631), Cro. Car. 244.
[4] (1723), 2 P. Wms. 146.
[5] (1735), Cas. *temp.* Talb. 138.
[6] (1872), 7 Ch. App. 398.

assigns, with a comprehensive set of limitations in trust thereafter, Sir W. M. James, L.J., said—

> To say that anything but equitable estates are given in this deed after the limitation to "the use of B. Smith, his heirs and assigns," would be in effect to overrule all the decisions on the Statute of Uses, that where you have a limitation to a trustee, his heirs and assigns, the first use is executed, and the subsequent limitations only operate to give equitable estates.

After the Restoration the foundation of the modern law of trusts was laid in a succession of comprehensive leading cases, beginning with *Cook* v. *Fountain*,[1] wherein Lord Nottingham attempted a classification of trusts as follows—

> All trusts are either, first, express trusts which are raised or created by act of the parties, or implied trusts, which are raised or created by act or construction of law, or again, express trusts are declared either by word or writing; and these declarations appear either by direct or manifest proof, or violent and necessary presumption.

Accordingly, it came about, as Lord Hardwicke observed in *Willet* v. *Sandford*,[2] that—

> Interests in land thus became of three kinds: first, the estate in the land itself, the ancient common-law fee; secondly, the use, which was originally a creature of Equity, but since the Statute of Uses it drew the estate in the land to it, so that they were joined and made one legal estate; and thirdly, the trust, of which the Common Law takes no notice, but which carries the beneficial interest and profits in a Court of Equity, and is still a creature of that Court, as the use was before the statute.

The relation of uses to trusts.

One problem which yet required elucidation was the extent to which the new law of trusts was derived from the mediaeval rules relating to uses. This relationship was considered at length in the leading case of *Burgess* v. *Wheate*,[3] where the question to be decided was the destination of the beneficiary's interest on failure of his heirs. The Crown claimed by escheat, but it was held that the escheat did not apply to equitable interests, and that the trustees took free of the trust. This rule was altered by the Intestates' Estates Act, 1884. Two views of the nature of trusts, in relation to uses, were advanced in *Burgess* v. *Wheate*. Lord Mansfield's view[4] was that whilst the use and the trust were in essence similar, yet, through change in social conditions, the rules relating to trusts exhibited considerable variations from

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[1] (1676), 3 Swanst. 592.
[2] (1748), 1 Ves. Sen. 186.
[3] (1759), 1 Eden 177.
[4] At p. 217.

those applying to the older institutions, and, in fact, he concludes: "Twenty years ago I imbibed this principle, that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation." Lord Keeper Henley took a more cautious view, and, whilst admitting great extensions of the rules relating to trusts as compared with the period before the Statute of Uses, he emphasised the continuity of Equity's activities, and was not prepared to accept Lord Mansfield's sweeping assertion that in Equity *cestui que trust* was regarded as the owner of the land. The opinion of the Lord Keeper has been generally accepted by later Chancery judges, and may therefore be taken as representing a view more closely in consonance with equitable principles than Lord Mansfield's, suggestive though the latter undoubtedly is.

CHAPTER III

THE CLASSIFICATION OF TRUSTS

NUMEROUS methods of classification of trusts exists, some of which do not require extended discussion. A very common mode of classification is into *simple* and *special* trusts. The simple trust is nothing more or less than the old passive use, for the abolition of which the Statute of Uses was designed. This, it has been seen, became possible again in the seventeenth century, and now, since the Statute of Uses was repealed by the Law of Property Act, 1925, it may be created directly, without circumlocution. Where a simple trust exists, the beneficiary, provided that he is *sui juris* and absolutely entitled, has a right to be put into actual possession of the property (*jus habendi*), and he enjoys the further right of compelling the trustees to dispose of the legal estate in accordance with his (the beneficiary's) instructions (*jus disponendi*). It will be evident, therefore, that in a special trust, the trustee has some, and it may be many, duties to perform, the most common of which are the collection of the rents and profits of the property, and the transfer of them to the beneficiary; or, again, it may be that the trustees are directed by the settlor to sell the property and pay his debts out of the proceeds. Special trusts, again, are divided into *ministerial*, or *instrumental*, trusts, and *discretionary* trusts, the point of distinction being that whilst in both the trustee has positive duties to perform, in a ministerial trust the duties are such that any person of normal competence could satisfactorily discharge (as the distribution of an estate among named persons in specified shares), whilst in a discretionary trust the trustee is called upon to exercise his own prudence, and for that purpose is given a greater freedom in the control of the property. An example of a discretionary trust would thus be one where the trustee is directed to distribute a fund amongst such charities as he shall consider most suitable.

Simple and special trusts.

Ministerial and discretionary.

The distinction between lawful and unlawful trusts only requires passing mention, since it is perfectly clear that a trust, just as much as a contract, which contravenes the law, is not enforceable. This is particularly important in considering trusts to defraud creditors, although these have now, for the most part, been made the subject of special statutes.

The main division is between trusts which arise as a result of the act of parties, and trusts arising by operation of law.

In *Cook* v. *Fountain*,[1] Lord Nottingham attempted a classification of trusts in the following terms—

> All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances, presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant. In the case in question there is no pretence of any proof that there was a trust declared either by word or in writing; so the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that goes to both these kinds of trusts; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this: the law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason for this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in Court will become *casus pro amico*.

Trusts arising from act of parties and trusts arising by operation of law.

The distinction between trusts arising by act of parties and trusts arising by operation of law is not by any means the same distinction as between express trusts and others, and it is therefore more than a little unfortunate that the Courts, and following them, several writers, have grouped together all trusts, other than express trusts, and have termed them Constructive, Implied, or Resulting trusts, as if these terms were synonymous. Lewin adverts to this difficulty when he writes—

> The terms Implied Trusts, Trusts by Operation of Law, and Constructive Trusts appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate, will be observed: An implied trust is one declared by a party not directly, but only by implication; as where a testator devises an estate to A and his heirs, *not doubting* that he will thereout pay an annuity of £20 per annum to B for his life, in which case A is a trustee for B to the extent of the annuity. Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly,

[1] (1676), 3 Swanst. 585, 592.

but result from the effect of a rule of equity, and are either: (1) Resulting trusts, as when an estate is devised to A and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or (2) constructive trusts, which the Court elicits by a construction put upon certain *acts* of the parties, as where a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease.[1]

Difficulty of determining the boundaries.

Commenting on the division of trusts into those arising by act of parties and those arising by operation of law, Maitland observes of the former—

> Lewin and other text writers divide trusts thus created into express and implied. It is difficult to draw the line, for since no formal words are necessary for the creation of a trust and since whenever the trust is created by the act of a party there almost of necessity will be some words used—even if a deaf mute created a trust by talking on his fingers there would be words used—the distinction comes to be one between clear and less clear words, and clearness is a matter of degree. Thus Lewin, under the head of "Implied Trust," treats of cases in which a testator creates a trust by such words as "I desire," "I request," "I hope." No firm line can be drawn—"I desire" is nearly as strong as "I trust," and "I trust that he will do this" is almost the same as "Upon trust that he will do this." I do not therefore think that the distinction is an important one.[2]

Express and implied trusts.

An express trust is one which has been intentionally created by the settlor himself. It may be created by deed or will, or by unsealed writing *inter vivos*, or even by word of mouth. It will be apparent from Lewin's observations that an implied trust is one which the Court deduces from the conduct of the parties, and the circumstances of the transaction. It is important to notice that here the function of the Court is to discover what the presumed intention of the parties was, and to give effect to it. A good example arises where a person for valuable consideration agrees to settle property for the benefit of another. Here he immediately becomes a trustee of it. This is quite a different type of trust from the constructive trust, which arises where a person who is the legal owner of property, but has some fiduciary position as regards another person in respect of that property, obtains some personal advantage from that position. Equity compels him to hold that advantage for the benefit of the person for whom the fiduciary character

Constructive trusts.

[1] *Law of Trusts* (Thirteenth Edition), p. 74.
[2] *Equity*, pp. 75–76.

is sustained.[1] Another type of constructive trust arises where a person, with notice of the existence of an express trust, intermeddles with trust property. In respect of it he becomes a constructive trustee for the beneficiary under the express trust. It is obvious here that the trust is imposed by law altogether apart from the will of the parties, actually manifested or presumed, and that it may even be imposed in spite of the fact that the will of the parties is directed to the end that a trust shall not be created. Thus, in the leading case upon constructive trusts, *Keech* v. *Sandford*,[2] a trustee sought to secure the renewal of the lease of a market on behalf of his *cestui que trust*. The owner of the market declined to renew it for the beneficiary, and the trustee, having done all he could for the beneficiary, asked for it to be renewed for himself personally, and to this the owner agreed. Lord King held, nevertheless, that the trustee held the renewed lease on trust for his beneficiary.

Resulting trusts.

The distinction between implied and constructive trusts is thus a tangible one, but it is more difficult to classify resulting trusts. One example of a resulting trust is where a settlor gives property to trustees for objects which fail. Here the trustees hold for the settlor. Another example is where the settlor allocates specific annual interests to beneficiaries under the trust, and in some years the income from the property increases so that the interests do not exhaust it. Here the surplus is held also for the settlor. This latter type of resulting trust was considered by Astbury, J., in *Re Llanover Settled Estates*,[3] wherein he observes—

> It is quite true, as contended by counsel for the trustees, that a resulting trust in ordinary circumstances is not really a trust at all in one sense. Property settled or devised upon trusts which do not exhaust it leave, with regard to the unexhausted part, a resulting trust, to the settlor or devisor, but where, as in the present case, property is devised as a whole to trustees, and the trusts declared do not exhaust the income during some particular period, although there is a resulting trust for the settlor, or her heir-at-law, there is a trust construed by the Court in the trustees of the income which they so hold, and which they cannot apply in accordance with any expressed trust in the settlement, and which, in the present case, they hold in trust to pay to the person entitled thereto by reason of this so-called resulting trust. That, I think, is within the general meaning of an implied or constructive trust.[4]

[1] *Williams* v. *Barton*, [1927] 2 Ch. 9.
[2] (1726), Cas. *temp.* King 61; 2 Eq. Ca. Ab. 741.
[3] [1926] Ch. 626.
[4] At p. 637.

In other words, though a resulting trust which arises from the fact that the dispositions expressly declared do not exhaust the whole of the property is not in strictness a trust at all, yet, where the declared trusts do not, during some period, exhaust the whole of the income, and the income is held by the trustees on a resulting trust for the settlor, that is really a resulting trust of income, which cannot be applied in conformity with any express trust, and is within the general meaning of an implied or constructive trust. It is submitted that the antithesis of the terms "implied" and "constructive" in the last sentence is undesirable logically; but it is exceedingly difficult to see whether the Court, in directing that the property should be held for the settlor, is to be considered as fulfilling his presumed intention, in which case the resulting trust would be properly grouped with implied trusts, or whether it is giving further effect to the maxim that a trustee shall not profit by his trust, and directs that the property should revert to the settlor as he has the best claim to it when the objects of the trust are fulfilled or have failed. If this is so, then the resulting trust of this type is more correctly classed as constructive.

Executed and executory trusts.

Express trusts may be divided into executed and executory trusts. The importance of this distinction will be considered later; but an executed trust may be defined as one in which the intentions of the settlor (whether by deed, will, or other document) have been completely set forth, so that the trustee's primary duty is to act in accordance with the terms of the instrument. In an executory trust, some further act or instrument is necessary before the beneficial interests are accurately delimited, but the estate or interest of the trustee is nevertheless completely vested. This division of express trusts is quite distinct from that between completely and incompletely constituted trusts, which will be considered later. Thus, a testator may by his will direct that his property shall be held upon trust for sale, the proceeds to be held upon such trusts for his children as the trustees shall in their discretion determine. Here a valid trust arises immediately, but it is executory, in that a further instrument is necessary to complete the dispositions under it. In an executed trust, no further instrument is required. It is important to notice that the two terms most clearly relate to the manner in which the trust is created, and not to its duration, since in the second sense all trusts are executory until they are ended.

One final division should be noticed, and that is the division

Public and private trusts.

between public and private trusts. A public trust is one which benefits the public at large, or some considerable portion of it. The terms public and charitable are in this connexion practically synonymous.[1] A public trust is normally permanent, or at least indefinite, in duration, and its beneficiaries may be a fluctuating and uncertain body. A private trust is one for the benefit of specific individuals (even though these are not *immediately* ascertainable) and the interests therein delimited must vest finally within the period of a life or lives in being, or within twenty-one years afterwards. Private trusts are enforceable at the suit of any of the beneficiaries, whilst a public trust may be enforced by any of the beneficiaries (the Attorney-General being made a party to the proceedings) or by the Attorney-General.

[1] Lewin, *Law of Trusts* (Thirteenth Edition), p. 16.

CHAPTER IV

PARTIES TO A TRUST

A. AS SETTLOR

In general, any person who is competent to deal with either the legal estate or the equitable interest of property may create a trust; but the capacity of one or two persons requires special consideration.

The Crown.

1. **The Crown.** The King may, by letters patent, declare a trust of his private property.[1] The grant by letters patent, if unrestricted by words indicating a trust, purports to be an act of bounty, and, therefore, it is not open to a third person to attempt to prove a parol trust operating upon property conveyed by letters patent. The trust must be expressed in the letters patent.[2] The Crown may also by will dispose of its private personal property to one person in trust for another. The will must be in writing and under the sign manual.[3]

Corporations.

2. **Corporations.** In general, any corporation, unless expressly restrained by law, can create a trust for purposes within the objects for which it is incorporated. In view of their general importance, however, the two following types of corporation require special consideration—

(*a*) **Municipal.** These could, before the Municipal Corporations Act, 1835, alienate their property, either directly or by way of trust. Since 1835, however, municipal corporations included in the Act of 1835[4] have been constituted trustees of their property, and may not now alienate it without the consent of the Minister of Health.[5]

(*b*) **Companies.** Trading companies, incorporated under the Companies Acts, have implied power to borrow for the purposes of the company's business.[6] Very commonly, this power of borrowing is exercised by the issue of debentures, and for the purpose of supporting the issue the company has power (which is frequently exercised) of executing a trust deed, by which the company, after covenanting to repay the loan, with interest until payment, assigns to

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[1] Lewin, *Law of Trusts*, Ch. II; and see Bacon on *Uses*, p. 66.
[2] *Fordyce* v. *Willis* (1791), 3 Bro. C.C. 577.
[3] 39 & 40 Geo. III, c. 88, Sect. 10.
[4] 5 & 6 Will. IV, c. 76 (see now Local Government Act, 1933).
[5] Local Government Act, 1933, s. 172.
[6] *General Auction Estate Co.* v. *Smith*, [1891] 3 Ch. 432.

trustees real property or leaseholds belonging to the company, to constitute security for the repayment of the loan, and the trustees undertake to hold the property upon certain trusts in favour of the debenture holders.

Married women.

3. **Married Women.** Any married woman, married since 31st December, 1882, may create a trust of property held by her separately without the concurrence of her husband. So also can a married woman married before 31st December, 1882, with respect to property acquired after that date.

The progressive emancipation of the married woman from the restrictions imposed by the Common Law upon her capacity to hold and to deal with real and personal property was, until the second part of the nineteenth century, almost exclusively the result of equitable intervention. At Common Law a wife's chattels became the absolute property of the husband. He possessed also the power to reduce her choses in action into possession; whilst upon the birth of issue, he enjoyed the seisin for life of such present estates of inheritance as his wife might have possessed, as "tenant by the curtesy." From the reign of Elizabeth onwards,[1] however, the Court of Chancery steadily evolved the doctrine of the separate estate of the married woman, although it does not seem that this doctrine was applied to real property before the Restoration. In pursuance of this object, the Court of Chancery established that wherever property was given to trustees for the separate use of a married woman, she could hold and dispose of it in Equity free from her husband's interference, and such property was protected effectually against the husband's debts or other obligations. Eventually it was decided that wherever the donor had expressed a plain intention that the property was for the separate use of the married woman, this should be effective whether trustees had been appointed or not, the trust being, in the last resort, imposed on the husband himself. As a further development, Lord Thurlow, at the end of the eighteenth century, evolved the "restraint on anticipation" clause, the object of which was to protect the wife against the solicitations of her husband (or her natural inclination) to surrender her beneficial enjoyment of the property to him. Such a clause makes either the capital or the income of property (or both) incapable of alienation or anticipation, so long as she is subject to coverture, and the effectiveness

[1] *Sanky* v. *Golding* (1579), Cary 86; *Gorge* v. *Chansey* (1639), 1 Rep. Ch. 125; *Darcy* v. *Chute* (1663), 1 Cas. in Ch. 21; *Cotton* v. *Cotton* (1690), 2 Vern. 290.

of the clause was finally established before Lord Eldon in *Jackson* v. *Hobhouse*.[1] Nineteenth century statutes, whose purpose has been carried a stage further in the property legislation of 1925, have now permitted the enjoyment of full proprietary rights by a married woman at law, and have therefore greatly minimised the importance of a very characteristic product of Equity, which only became possible through the evolution of the modern Law of Trusts. Under modern social conditions, however, the necessity for protecting a married woman against the designs of her husband has practically disappeared, and in spite of statutory provision for lifting the restraint on anticipation on various occasions, it nevertheless remained a serious obstacle to the enforcement of the claims of the married woman's creditors. The Law Reform (Married Women and Tortfeasors) Act, 1935, has therefore abolished the "separate property" of a married woman, putting her in the position of *feme sole* and has provided that whilst restraints under any Act prior to 2nd August, 1935, or under any instrument executed before 1st January, 1936, shall remain in force, no restraint may be imposed by an instrument executed after 1st January, 1936, which could not have been attached to the enjoyment of the property by a man. There is also a special provision that wills executed before 1st January, 1936, shall be deemed to be executed after that date if the testator dies after the 31st December, 1945. After that date, therefore, no fresh restraint may arise, and existing restraints will gradually disappear.

4. **Infants.** An infant cannot now hold a legal estate in land, so that no settlement on trust of a legal estate by him is now possible. He may settle an equitable interest or personalty, but the settlement is voidable by him within a reasonable time after attaining full age; and it has been suggested that a voluntary conveyance, necessarily for the infant's prejudice, is void, not voidable.[2] Where the settlement is voidable, it is binding if it has been observed during infancy, and is affirmed on attaining the age of twenty-one. Under the Infants Settlement Act, 1855,[3] a male infant if over twenty, and a female infant if over seventeen, may, upon marriage or afterwards, with the approbation of the Court, make binding settlements of property belonging to them in possession, reversion, remainder, or expectancy. Infants.

[1] (1817), 2 Mer. 483.
[2] See Goodeve and Potter, *Modern Law of Real Property*, p. 473, n. (*g*).
[3] 18 & 19 Vict., c. 43, as explained by 23 & 24 Vict., c. 83.

The effect of this Act is simply to remove the disability of infancy, leaving others untouched.

Lunatics.

5. **Lunatics.** The deed of a lunatic or idiot is not on that account necessarily void. It depends on the circumstances.[1] In particular if the deed conveys a legal estate in trust, the Court may set it aside, but it will not do so against a purchaser for valuable consideration without notice of the lunacy; yet, as against *volunteers*, a lunatic cannot create a trust, either *inter vivos* or by will, unless he is sufficiently intelligent to know the nature and the extent of his property, and the identity of the persons to receive the benefits, and has a judgment sufficiently free from disease and external control to be able to judge those claims.[2]

Under the Law of Property Act, 1925, Sect. 171, however, either the judge in Lunacy or the High Court may direct a settlement, or a variation of a settlement, of the property of a lunatic or mental defective of full age—irrespective of any will made by him—and including property acquired by the lunatic under a settlement, a will, or an intestacy. Lewin is of the opinion that "besides the express power of the Court to direct a committee or receiver to execute the deeds specified in Subsection (2), the Court can, under Sect. 171, give effect to the legitimate expectations of the family of the lunatic or defective."[3]

Convicts.

6. **Convicts.** A convict may not alienate or charge his property, and therefore he cannot declare a trust of it. By Sect. 6 of the Forfeiture Act, 1870, a convict is defined to be "any person against whom, after the passing of the Act, judgment of death or penal servitude shall have been pronounced upon a charge of treason or felony." By Sect. 9 the Crown may appoint an administrator of the convict's property, who may let, mortgage, sell, or convey it. By Sect. 30, the convict's incapacity is suspended whilst he is at large under ticket of leave.

B. AS TRUSTEE

"A trustee," observes Lewin, "should be a person capable of taking and holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and

[1] *Molton* v. *Camroux* (1848), 2 Exch. 487; 4 Exch. 17.

[2] *Niell* v. *Morley* (1804), 9 Ves. 478; *Price* v. *Berrington* (1851), 3 Mac. & G. 486; *Greenslade* v. *Dare* (1855), 20 Beav. 284; *Banks* v. *Goodfellow* (1870), L.R. 5 Q.B. 549; *Boughton* v. *Knight* (1873), L.R. 3 P. & D. 64.; *Roe* v. *Nix*, [1893] P. 55.

[3] *Law of Trusts* (Thirteenth Edition), p. 23. See Wolstenholme & Cherry, *Conveyancing Statutes* (Twelfth Edition), p. 532; *Re Freeman*, [1927] 1 Ch. 479; *Re Greene*, [1928] Ch. 528, 547.

domiciled within the jurisdiction of a Court of Equity."[1] The capacity of the following, therefore, requires special consideration, as deviating from the normal—

The Crown.

1. **The Crown** unquestionably has the capacity to hold the legal estate in land, but it is doubtful whether the obligations of a trustee can be fully enforced against it. As was pointed out by counsel in *Pawlett* v. *Attorney-General*,[2] a Court of Equity has no jurisdiction over the King's conscience, since the Chancellor's jurisdiction is simply the result of a delegation by the King of the power to exercise the Crown's equitable jurisdiction between subject and subject. In *Rustomjee* v. *The Queen*[3] the Court of Appeal held that in the discharge of sovereign acts, such as the making or performing of a treaty with another sovereign, the Crown could not be a trustee for a subject. Again, in *Kinloch* v. *Secretary of State for India*,[4] the Queen, by royal warrant, granted booty of war to the Secretary of State for India in trust to distribute it amongst the persons declared by the Court of Admiralty to share it. It was held that this did not operate as a declaration of trust in favour of those persons, but that it merely constituted the Secretary of State the agent of the Crown for purposes of distribution.

The point has recently arisen again for consideration—

In *Civilian War Claimants Association* v. *The King*[5] the suppliants, by petition of right, claimed compensation on behalf of civilians who had suffered loss as a result of German aggression during the war, alleging that the Crown had invited them to submit their losses to the Reparation Claims Department, which had included them in the sum total of reparations which Germany had agreed to pay under Article 232 of the Treaty of Versailles. The House of Lords held that the Crown, in so acting, had not constituted itself an agent or trustee for the claimants in respect of any money received by it from Germany on account of reparations. The facts of the case were very similar to those of *Rustomjee* v. *The Queen*,[6] and Lord Buckmaster, in accepting the reasons upon which that decision was based, observed—

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[1] *Law of Trusts* (Thirteenth Edition), p. 25.

[2] (1667), Hard. 465, 468. See also the discussion of this point in *Burgess* v. *Wheate* (1759), 1 Eden, 255; *Kildare* v. *Eustace* (1686), 1 Vern. 437.

[3] (1876), 2 Q.B.D. 69.

[4] (1879), 15 Ch.D. 1; 7 App. Cas. 619.

[5] [1932] A.C. 14. Followed in *Administrator of German Property* v. *Knoop*, [1933] 1 Ch. 439.

[6] (1876), 2 Q.B.D. 69.

In the first place, to establish that anyone was a trustee of that fund under the circumstances I have mentioned is, to my mind, to attempt an impossible task. I can see no evidence whatever of an acceptance of trusteeship on the part of the Government, or assertion of trusteeship on the part of the people who suffered damage, nor anything up to the time when the money was received to show that the conception of trusteeship was in the minds of anyone in any form whatever. Indeed, the original statements that were made were made of the readiness to compensate out of the national funds at home, and nobody suggests that the Government were trustees of those funds for that purpose. Finally, when the moneys were received, it is said that from and after that moment the Crown became a trustee. I have pointed out in the course of the argument, and I repeat, that if that were the case, unless you are going to limit the rights which the beneficiaries enjoy, those rights must include, among other things, a claim for an account of the moneys that were received, of the expenses incurred and the way in which the moneys have been distributed. Such a claim presented against the Crown in circumstances such as these would certainly have no precedent, and would, as it appears to me, invade an area which is properly that belonging to the House of Commons.

That the money was received by the Crown as agent seems to me can no more be established than that the money was received by it as trustee. In fact, the trusteeship is the agency stated in other words. If the Crown was not a trustee, neither was it an agent; nor can I see that in any sense the Crown received these moneys as money had and received to the use of the people whose claims were made. The people whose claims were made were not considered by Germany on making the payment at all.

It is therefore abundantly clear that the subject cannot raise a trust against the Crown where the Crown is performing a sovereign act, such as the negotiation of a treaty. Apart from this, however, there seems to be no reason why the Crown should not be a trustee, if it has assented to the trust.[1] The question then arises, what remedies has the subject against the Crown as trustee?

The subject's remedy is by petition of right.

It was at one time thought that, although the subject might have no remedy against the Crown as trustee in the Court of Chancery, there might be a remedy in the Court of Exchequer, which had a special superintendence over the royal property. Thus, in *Penn* v. *Lord Baltimore*,[2] Lord Hardwicke said: "I will not decree a trust against the

[1] The Courts, however, are reluctant to impose a constructive trust upon the Crown. *Re Mason*, [1929] 1 Ch. 1; *Re Blake*, [1932] 1 Ch. 54.

[2] (1750), 1 Ves. Sen. 444. And see *Reeve* v. *Attorney-General* (1741), 2 Atk. 223.

Crown in this Court, but it is a notion established in courts of revenue by modern decisions that the King may be a royal trustee." Lord Northington (Lord Keeper Henley) was doubtful about this in *Burgess* v. *Wheate*,[1] however. Professor Holdsworth points out[2] that whilst in the fifteenth century it was settled that the King could not be a feoffee to uses, and whilst also it had been held at the beginning of the seventeenth that he could not be a trustee, in the eighteenth century the attitude of the Courts had changed. The King could be a trustee, but the question still remained unsettled how his obligations as a trustee could be enforced against him. In the eighteenth century the Chancery might give relief against the Crown on a petition of right, whilst the Court of Exchequer might grant redress on a bill filed against the Attorney-General. These two remedies survived into the nineteenth century, and it is now settled that any court with equitable jurisdiction can grant relief by way of a bill filed against the Attorney-General. Which method should be adopted in a particular case, however, is by no means clear.[3]

Corporations.

2. **Corporations.** A corporation always has capacity to be a trustee of personalty, and it may also be a trustee of land if it has authority by statute or by a licence in mortmain to hold land. By the Municipal Corporations Act, 1835, all municipal corporations named in the schedules are constituted trustees of their property, and can only dispose of it with the sanction of the Minister of Health, being otherwise bound to apply it to the purposes named in the Act. If there is a misapplication, there is a remedy by information.[4]

By the Bodies Corporate (Joint Tenancy) Act, 1899, a body corporate is capable of acquiring and holding real or personal property in joint tenancy with an individual or another body corporate in the same way as an individual; but this statute does not remove any of the restrictions otherwise regulating the holding of property by corporate bodies.

By Sect. 14 of the Companies Act, 1929, trading companies incorporated under the Companies Acts have power to hold land without licence in mortmain, but "a company formed for the purpose of promoting art, science, religion, charity, or any other like object not involving the acquisition of

[1] (1759), 1 Eden 177.
[2] *History of English Law*, Vol. IX, p. 31.
[3] See further, Holdsworth, *History of English Law*, Vol. IX, pp. 31–32; *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410.
[4] E.g., *A.-G.* v. *Borough of Poole* (1838), 4 My. & Cr. 17.

gain by the company or by its individual members, shall not, without the licence of the Board of Trade, hold more than two acres of land, but the Board may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as the Board think fit."

Trust corporations.

3. **Trust Corporations.** Various types of companies (including banks and insurance companies) now undertake the duties of trustees and executors for a remuneration varying with the size of the estate involved. The advantages of appointing such an institution are many, but possibly the chief are continuity of administration and that the resources of the corporation are available to make good any breach of trust. In addition, the Public Trustee, under the Public Trustee Act, 1906, is authorised to undertake this type of business, and the beneficiary has the security of the State for the proper discharge of his duties by the Public Trustee. The special position of trust corporations has now been recognised by statute, for whilst, in general, in the legislation of 1925 two trustees are required to perform many acts where the legal estate in real property is involved, the Acts permit a sole trustee *who is a trust corporation* to discharge these functions. The appointment of a sole trustee, even for a trust of personalty, apart from a trust corporation, is in the highest degree inadvisable. The term "trust corporation" is defined in the Law of Property Act, 1925, Sect. 205 (1) (xxviii), as the Public Trustee or a corporation either appointed by the Court in any particular case to be a trustee, or entitled by Rule 30 of the Public Trustee (Custodian Trustee) Rules, 1926, to act as a custodian trustee. This Rule provides that—

> (1) Any corporation constituted under the law of the United Kingdom or of any part thereof and having a place of business there and empowered by its constitution to undertake trust business, and being either—
>
> (*a*) A company incorporated by special Act or Royal Charter; or
>
> (*b*) A company registered (whether with or without limited liability) under the Companies (Consolidation) Act, 1908, having a capital (in stocks and shares) for the time being issued of not less than £250,000, of which not less than £100,000 shall have been paid up in cash; or
>
> (*c*) A company registered without limited liability under the Companies (Consolidation) Act, 1908, whereof one of the members is a company within any of the classes herein before defined
>
> shall be entitled to act as a custodian trustee:

(2) Any corporation constituted under the law of the United Kingdom or of any part thereof and having its place of business there, and being either—

(*a*) A company established for the purpose of undertaking trust business for the benefit of His Majesty's Navy, Army, Air Force, or Civil Service, or of any unit department member or association of members of any one or more of those services and having among its directors or members any persons appointed or nominated by the Board of Admiralty, the Army Council, the Air Council, or any Department of State or any one or more of those Departments; or

(*b*) A company authorised by the Lord Chancellor to act in relation to any charitable, ecclesiastical or public trusts as a trust corporation

is entitled to act in relation to such business or trusts as a custodian trustee.

For the purposes of this rule, "United Kingdom" means "Great Britain and Northern Ireland."

By the Law of Property (Amendment) Act, 1926, Sect. 3, the term "trust corporation" includes—

The treasury solicitor, the official solicitor and any person holding any other official position prescribed by the Lord Chancellor, and, in relation to the property of a bankrupt and property subject to a deed of arrangement, includes the trustee in bankruptcy and the trustee under the deed respectively, and in relation to charitable, ecclesiastical and public trusts, also includes any local or public authority so prescribed, and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation.

The Bank of England.

4. **The Bank of England** cannot be made directly or indirectly a trustee of stock. The Bank manages the accounts of public funds, and in this capacity pays dividends to the registered legal owners of stock, and to them alone. It cannot take notice of any trust of stock; nor may it enter notice of an instrument *inter vivos* affecting stock upon its books.

Married women.

5. **Married Women.** Before 1907 a married woman might be a trustee, but she required the concurrence of her husband to pass the legal estate of real property subject to the trust,

and certain expensive formalities were also necessary. Now, however, the Law of Property Act, 1925, Sect. 170, provides—

> (1) A married woman is able to acquire as well from her husband as from any other person, and hold any interest in property real or personal either solely or jointly with any other person (whether or not including her husband) as a trustee or personal representative, in like manner as if she were a *feme sole*; and no interest in such property shall vest or be deemed to have vested in the husband by reason only of the acquisition by his wife.
>
> (2) A married woman is able, without her husband, to dispose of or to join in disposing of any interest in real or personal property held by her solely or jointly with any other person (whether or not including her husband) as trustee or personal representative, in like manner as if she were a *feme sole*.

Infants.

6. **Infants**. It has been judicially held on several occasions that, as regards judgment and discretion, an infant lacks capacity.[1] Before 1926, therefore, the appointment of an infant as trustee was possible, but the effect of it varied, and was not by any means free from doubt.[2] Now, however, the Law of Property Act, 1925, Sect. 20, provides that "the appointment of an infant to be a trustee in relation to any settlement or trust shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy." This would seem to relate to express trusts only, for an infant has been held capable of taking under an implied trust.[3] By Sect. 19 (4) (5) a conveyance of a legal estate to an infant alone or to two or more persons jointly, both or all of whom are infants, on any trust, operates as declaration of trust, and does not pass any legal estate;[4] but if the conveyance of legal estate is to an infant jointly with one or more persons of full age on trust, it operates as if the infant had not been named, so that the estate vests in the other person alone, but without prejudice to any beneficial interest in the land intended to be thereby provided for the infant. Moreover, the Trustee Act, 1925, Sect. 36 (1), states that where a person who is named as a trustee is an infant, then, subject to the restrictions on the number of trustees contained in the Act, one or more other persons may be appointed a trustee or trustees in his place. The point of this subsection is that,

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[1] E.g. per Lord Hardwicke in *Hearle* v. *Greenbank* (1749), 3 Atk. 695; 1 Ves. 305.

[2] See Lewin on *Trusts* (Thirteenth Edition), pp. 32–34.

[3] *Re Vinogradoff, Allen* v. *Jackson*, [1935] W.N. 68.

[4] The effect is that there is an agreement for valuable consideration to execute a settlement. (Settled Land Act, 1925, Sect. 27.) On conveyances to infants, see further Dr. H. Potter in *The Conveyancer*, vol. 19, p. 1.

under the Trustee Act, 1893 (which Sect. 36 (1) of the Trustee Act of 1925 replaced), an infant trustee could not be displaced, so that even if the Court appointed another trustee in his place, the infant could be restored when he came of age.[1] It would appear to be exceedingly doubtful whether this right of an infant under the earlier Acts has survived the Act of 1925.

Aliens.

7. **Aliens.** Before 1870, an alien could not be a trustee of freeholds or of chattels real. By the Naturalisation Act, 1870, Sect. 1,[2] however, an alien may hold and dispose of all kinds of real and personal property, and may therefore be a trustee. If the alien is domiciled abroad, objection to his fitness may be lodged, since he is not within the jurisdiction of the Court.[3]

Bankrupts.

8. **Bankrupts.** A bankrupt may be appointed a trustee, and if a trustee becomes bankrupt, the trust estate does not vest in his trustee in bankruptcy.[4]

Cestuis que trustent.

9. **Cestuis que trustent** are not legally incapable of being trustees, but it has been pointed out, in *Forster* v. *Abraham*,[5] that such appointments are in general undesirable, since there may be a conflict between the beneficiary's interest and the trustee's duty. In *Re Paine*,[6] it was held that the Court would not appoint a remainderman as trustee where there was an infant tenant for life. In practice, however, it is frequently found convenient to appoint beneficiaries, and also difficult to find non-beneficiaries who are willing to act, and it is clear that there is nothing legally improper in this; whilst even the Court has upon occasion, been reluctantly compelled to appoint beneficiaries.[7]

Solicitors to the trust.

10. **Solicitors to the Trust.** Such an appointment is also not legally invalid, but the Court would not make, nor would it sanction, such an appointment.[8]

This is the rule of practice, but it does not mean that appointments of solicitors to the trust by the persons properly qualified to make the appointment, are invalid, and they are often made in practice, whilst even the Court has, upon occasion, departed from the rule,[9] although only,

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[1] *Re Shelmerdine* (1864), 33 L.J.Ch. 474.

[2] Re-enacted in the British Nationality and Status of Aliens Act, 1914, s. 17.

[3] *Meinertzhagen* v. *Davis* (1844), 1 Coll. 335; *Re Harrison's Trusts* (1852), 22 L.J. Ch. 69.

[4] Bankruptcy Act, 1914, Sect. 38.

[5] (1874), L.R. 17 Eq. 351. [6] (1885), 28 Ch.D. 725.

[7] In the statutory trusts created by the Law of Property Act, 1925, S cts. 34–36, the beneficiaries have been created statutory trustees.

[8] *Re Norris* (1884), 27 Ch.D. 333; *Re Earl of Stamford*, [1896] 1 Ch. 288.

[9] *Re Marquis of Ailesbury*, [1893] 2 Ch. 345, 360.

as Stirling, J., pointed out in *Re Earl of Stamford*,[1] when it is assured "not only that no disadvantage is likely to occur from the appointment, but that advantages are to be gained by reason of the appointment."

As regards appointments by the donee of the power of appointment, Pearson, J., said in *Re Norris*[2]—

> I am very far from saying, and I must not be understood to say, that, if there was a trust which was not being administered by the Court, and the person who had the power of appointing new trustees had *bona fide* appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the Court would be invalid. If such a case came before me, and I found that the appointment had been made *bona fide* outside the Court, I should certainly hold that the trustees were validly appointed.

On the question of the Court's practice with regard to such appointments, he observed, however—

> It is admitted that, according to the ordinary practice, the Court would not appoint as trustee the solicitor of the existing trustee, and I think that the Court would certainly not appoint as a co-trustee with that solicitor his partner, whether he is his son or some other person. The Court does not look at the competency of the particular person; it looks at the position which he fills, and, according to the ordinary rule of the Court, the solicitor of a trustee is not a person who should be appointed a trustee. I think it is of the greatest importance that the Court should adhere to the general rule, and for this, if for no other, reason, that it prevents the necessity of considering in any particular case whether the solicitor is or is not a person of respectability and trustworthy. The Court always declines to go into any question of that kind, and says, assuming that you are the very person who would be most fit to be a trustee, we object to you simply on the ground of the position which you hold.

In *Re Earl of Stamford* the[3] solicitor of the tenant for life of a settlement had been appointed trustee by the person nominated to appoint, and the Court held that, although it would not itself have appointed him, yet since the beneficiaries had not objected, and the appointment was otherwise unexceptionable, it would not interfere.[4]

Relatives of beneficiaries

11. **Relatives of Beneficiaries.** In *Wilding* v. *Bolder*,[5] Sir John Romilly, M.R., held that he would not appoint as a trustee any relative, since frequent breaches of trust in

[1] [1896] 1 Ch. 288 at p. 299.
[2] (1884), 27 Ch.D. 333 at p. 341.
[3] [1896] 1 Ch. 288.
[4] See also *Re Kemp's Settled Estates* (1883), 24 Ch.D. 485.
[5] (1855), 21 Beav. 222.

practice resulted, at the instance of the beneficiaries related to the trustees. To avoid appointing a relative, or even a beneficiary himself, is often very difficult, and there is nothing which legally invalidates such an appointment. Indeed, in several instances, the Court itself has appointed a relative, who was also himself a beneficiary,[1] whilst in *Re Lightbody's Trusts*,[2] Kay, J., appointed two persons, one of whom was a beneficiary, and the other the husband of a beneficiary, upon an understanding by both of them that if either was left as sole trustee, that person would endeavour to obtain the appointment of a new trustee.

C. AS CESTUI QUE TRUST

The general rule is that persons who are capable of holding the legal estate of property, may also take an equitable interest under a trust. One or two persons, however, require a word of additional explanation—

1. **The Crown** may be a beneficiary. The Crown.

2. **An Infant** can be a beneficiary, and can, moreover, hold an equitable interest in land, although debarred from holding a legal estate. Infants.

3. **Corporations.** It has already been noticed that uses originally owed some of their popularity to the fact that it was possible to leave land to religious corporations by way of use. It was also observed that before long, the Statutes of Mortmain were extended to prohibit grants of land to religious corporations in this way, and the old restrictions, dating from earlier times, have survived in principle. For a corporation to be a beneficiary of real property, *prima facie* it requires a licence from the Crown, or alternatively must be permitted to hold land by its charter or by statute.[3] A trading company incorporated under the Companies Act, 1929, may be the beneficiary of a trust of land, held for the purposes for which it was incorporated. Corporations.

4. **Aliens.** Before 1870, a trust of lands might have been declared in favour of an alien, but the Crown might at any time have declared his interest forfeit.[4] In *Calvin's Case*,[5] however, it was decided that an alien could take neither a legal nor an equitable estate by operation of law, e.g. by Aliens.

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[1] E.g. *Ex parte Clutton* (1853), 17 Jur. 988.
[2] (1885), 52 L.T. 40.
[3] Mortmain and Charitable Uses Act, 1888, Part I, Sect. 1. See also the Education Act, 1921, and the Settled Land Act, 1925, Sect. 29.
[4] Per Lord Hale in *A.-G.* v. *Sands* (1669), Hard. 495.
[5] (1609), 7 Co. Rep. 1a.

descent. These disabilities were removed by the Naturalisation Act of 1870.[1] An alien was never disqualified from holding either a legal or an equitable interest in chattels, except that he could not, and still cannot, either directly or through the intervention of a trustee, be the owner of a British ship.

Married women.

5. **A Married Woman,** expressly restrained from anticipation, may not dispose of her interest in the corpus without an order of the Court obtained on summons under the Law of Property Act, 1925, Sect. 169. By the Settled Land Act, 1925, Sect. 1 (1) (iv), any deed, will, or other instrument under which any land stands limited to or in trust for a married woman of full age, in possession, for an estate in fee simple or a term of years absolute, with a restraint on anticipation, creates a settlement, and the married woman has the powers of a tenant for life under the Settled Land Act, 1925. This applies to instruments made before or after 1925. It has already been pointed out [2] that the Law Reform (Married Women and Tortfeasors) Act, 1935, has provided for the eventual abolition of restraints on anticipation.

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[1] Now the British Nationality and Status of Aliens Act, 1914, Sect. 17.
[2] *Supra*, p. 37.

CHAPTER V

THE CREATION OF AN EXPRESS TRUST

A. UNDER THE STATUTE OF FRAUDS, 1677, AND THE LAW OF PROPERTY ACT, 1925

Writing is required as evidence of the creation of trusts of land.

AT Common Law, no special form was required for the creation of the trust, and therefore a trust of any kind might be created by word of mouth, or even, according to the preamble of the Statute of Uses, by signs. By the Statute of Frauds, 1677, Sect. 4, a contract to create a trust in consideration of marriage must be evidenced by a memorandum in writing signed by the party to be charged or by his agent. Sect. 7 of the same statute also dealt with declarations of trust. This is now replaced by the Law of Property Act, 1925, Sect. 53 (1) (*b*), which provides—

> A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.

"Land" in the Law of Property Act, 1925,[1] means land of any tenure, mines and minerals and other corporeal hereditaments, also all incorporeal hereditaments and any easements, rights, or privileges derived from the land. The effect of the section of the Act of 1925 is to make verbal changes in the earlier enactment only. The substance of the law is unaltered.

The meaning of the phrase "land or any interest therein" has provoked very extensive litigation. Leasehold interests, even before 1926, were clearly within the statute.[2] Chattels personal were just as clearly outside the statute, and thus, in *M'Fadden* v. *Jenkyn*,[3] a creditor desired his debtor to hold the debt in trust for A. The debtor did so, and eventually paid over part of it to A. It was held that a good trust had been created, with the debtor as trustee.

The statute applies to charitable trusts.

At one time it was thought the statute did not extend to charitable trusts, but Lord Talbot, Lord Hardwicke, and Lord Northington successively declared that the asserted exception did not exist.[4] It is not entirely clear whether the

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[1] Sect. 205 (1) (ix).

[2] *Skett* v. *Whitmore* (1705), Freem. Ch. 280; *Forster* v. *Hale* (1798), 3 Ves. 696.

[3] (1842), 1 Ph. 153; 1 Hare, 458.

[4] *Lloyd* v. *Spillet* (1734), 3 P. Wms. 344; 2 Atk. 148; *Boson* v. *Statham* (1760), 1 Eden 509.

Crown is bound by the statute. In *R.* v. *Portington*,[1] the Court of Queen's Bench held that the Crown was bound by the statute, whilst the contrary was held in the Court of Exchequer.

In *Forster* v. *Hale*,[2] Lord Alvanley said—

> It is not required by the statute that a trust should be created by a writing . . . but that it should be manifested and proved by writing; plainly meaning that there should be evidence in writing, proving that there was such a trust.

Assignments of trusts must be in writing.

The terms of this section should be carefully distinguished from those of Sect. 53 (1) (*c*) of the Law of Property Act, 1925, which provides that "a disposition of an equitable interest or trust subsisting at the time of the disposition, *must be in writing*, signed by the person disposing of the same or by his agent thereunto lawfully authorised in writing or by will." Like Sect. 4, Sect. 7[3] is a rule of evidence, and therefore it is sufficient if the necessary writing comes into existence at any time before action is brought upon the trust. Furthermore, a defendant relying upon these sections as a defence must expressly plead them, or the benefit of them will be forfeited.[4] Another consequence of the nature of the section is that a defendant may rely on the statute as a defence to proceedings here, even if they relate to the enforcement of a trust having as its object land situated abroad.[5]

The Statute may not be used to commit a fraud.

The application of the statute is subject to one very important equitable rule. It may not be used as an instrument of fraud. This is illustrated by the leading case of *Rochefoucauld* v. *Boustead*.[6]

A acquired the legal title to certain estates in Ceylon, and worked them for several years, during which time he conducted correspondence with B, which acknowledged certain beneficial rights of B in the property. B then claimed that A held the estates as trustee for her, and whilst admitting that the correspondence was probably insufficient to satisfy Sect. 7 of the Statute of Frauds, offered to bring forward further evidence that would conclusively prove A's fraud in attempting to withhold the estates from her.

The *ratio decidendi* of the judgment may be found in the following observations—

> The defence, based on the Statute of Frauds, is met by

[1] (1693), 1 Salk. 162. [2] *Supra*.

[3] Now Law of Property Act, 1925, Sect. 53 (1) (*b*).

[4] R.S.C. Order XIX r. 15. The same rule applies to other sections of the Statute.

[5] *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 207. [6] [1897] 1 Ch. 196.

the plaintiff in two ways. First, she says that the documents signed by the defendant prove the existence of the trust alleged; secondly, she says that if those documents do not prove what the trust is with sufficient fullness and precision, the case is one of fraud, which lets in other evidence, and that with the aid of other evidence the plaintiff's case is established. In our opinion the plaintiff is correct in this contention. We are by no means satisfied that the letters signed by the defendant do not contain enough to satisfy the Statute of Frauds. Whether this is so or not, the other evidence is admissible in order to prevent the statute from being used in order to commit a fraud; and such other evidence proves the plaintiff's case completely.

Another example is *Booth* v. *Turle*.[1] The plaintiff purported to assign to the defendant an agreement for a lease absolutely, but there was a collateral parol understanding that the defendant should hold part of the premises in trust for the plaintiff. It was held that the trust could be proved by parol evidence, since the effect of excluding it would be to facilitate a fraud.

What constitutes a sufficient writing.

It remains only to consider the nature of the writing required. This need not take any particular form. It may be by memorandum or letter, and a recital of the trust in a defence to a Chancery suit has been held to be sufficient.[2] Where the trust is evidenced by correspondence, it must be shown that the letters relate to the subject-matter of the trust, which must be identified with reasonable precision. Parol evidence may not be introduced to supplement the correspondence, but it may be used to show the position of the writer, the circumstances surrounding the transaction, and the degree of weight which ought to be attached to the correspondence.[3] Again, whilst all the terms of the trust must be validated by the signature, the rules of construction applicable to Sect. 4 of the Statute of Frauds are also applicable to Sect. 7, and now to Sect. 53 (1) (*b*) of the Law of Property Act, 1925, so that documents unsigned, if clearly referable to documents which are signed, may be connected to form one complete memorandum.[4]

B. THE CREATION OF TRUSTS BY WILL: SECRET TRUSTS

The Wills Act, 1837.

By virtue of the Wills Act, 1837, Sect. 9, together with Sect. 53 (1) (*c*) of the Law of Property Act, 1925 (formerly the

[1] (1873), 16 Eq. 182. See also *Lincoln* v. *Wright* (1859), 4 De G. & J. 16; *Re Duke of Marlborough*, [1894] 2 Ch. 133

[2] *Hampton* v. *Spencer* (1693), 2 Vern. 288.

[3] *Morton* v. *Tewart* (1842), 2 Y. & C. Ch. Cas. 67.

[4] *Forster* v. *Hale* (1798), 3 Ves. 696.

Statute of Frauds, 1677, Sects. 5 and 9), all trusts created by testamentary disposition must be executed and attested in accordance with the formalities therein prescribed. These are (1) that the will shall be in writing; (2) that it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; (3) that the signature be acknowledged by the testator in the presence of two or more witnesses, present at the same time, the witnesses attesting in the presence of the testator. Furthermore, it must not be overlooked that, before 1926, a will was revoked by the subsequent marriage of the testator, but now, by the Law of Property Act, 1925, Sect. 177, if a will is expressed to be made in contemplation of a marriage, it is not revoked by the solemnisation of *that contemplated marriage.*[1]

Secret trusts are based on the rule that a person may not profit from his fraud.

Exactly as Equity will not permit the Statute of Frauds to be used as an instrument of fraud, so also it will not permit the Wills Act to be used for such a purpose; and this has been responsible for the growth of the equitable principles relating to secret trusts. These principles seem to date from the second half of the seventeenth century, for the earliest decided case upon the doctrine seems to be *Crook* v. *Brooking*,[2] decided by Lord Chancellor Jeffreys in 1688. There the testator devised £1,500 to Simon and Joseph Snow to be disposed of by them on a secret trust which he communicated to Simon. After the testator's death, Simon revealed the secret trust to Joseph, the object of the trust being that if the testator's daughter died in the lifetime of her husband, the £1,500 should go to the children of another daughter, as the first daughter should direct. The first daughter died in her husband's lifetime, and the children of the other daughter claimed as beneficiaries under the verbal secret trust. It was held that, since the testator had declared the terms of the trust to Simon in his lifetime, there was a good secret trust, although the actual method of distribution among the beneficiaries was uncertain. This decision was upheld by the Lords Commissioners.

This rule was followed in *Pring* v. *Pring* in 1689,[3] wherein a man gave property to his executors, and directed that it should be held in trust, and the testator's wife brought a bill declaring that the trust was in her favour. The Court held that as the will had declared that the executors only held in

[1] See *Pilot* v. *Gainfort*, [1931] P. 103, and *Sallis* v. *Jones*, [1936] P. 43.
[2] (1688), 2 Vern. 50.
[3] (1689), 2 Vern. 99. And see *Thynn* v. *Thynn* (1684), 1 Vern. 296.

trust, with no declaration for whom, it was open to the wife to prove that the testator communicated, by words or conduct in his lifetime, his intention to benefit the wife to his executors, and the claim was therefore admitted.

The doctrine so established was applied in *Smith* v. *Attersoll*,[1] where the gift was to executors in trust for purposes previously communicated; and in *Podmore* v. *Gunning*,[2] although in this case the trust was not proved. These cases turned on the provision of the Statute of Frauds which required writing, although in the case of wills of personalty, no attested signature of the testator was then necessary. After the Wills Act, 1837, the cases upon the requirements of that Act were similarly decided.

Basis of the rule enforcing secret trusts.

It will be seen that the essence of a secret trust is an equitable obligation engrafted upon a gift in a will and communicated to the intended trustee in the testator's lifetime. In permitting such obligations to be regarded as binding, it would seem at first sight that Equity is interfering very directly with statutory requirements, and it therefore becomes necessary to appreciate the nature of equitable intervention in these cases. Equity cannot nullify the requirements of a statute; it can merely ensure that a statute is not permitted to operate in an inequitable manner. If the trust were regarded as part of the will, then Equity could not permit the trust to be effective unless it were created in accordance with the requirements of the Wills Act. Equity, however, regards the trust as something outside the testamentary dispositions. In the words of Lord Sumner in *Blackwell v. Blackwell*[3]—

> In itself the doctrine of Equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition. A Court of Conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his

[1] (1826), 1 Russ. 266. [2] (1836), 7 Sim. 644. [3] [1929] A.C. 318, 334.

> absolute gift to be employed as he, and not as the donee, desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out. The special circumstance that the gift is by bequest only makes this rule a special case of the exercise of a general jurisdiction, but in its application to a bequest the doctrine must in principle rest on the assumption that the will has first operated according to its terms. It is because there is no one to whom the law can give relief in the premises, that relief, if any, must be sought in Equity. So far, and in the bare case of a legacy absolute on the face of it, I do not see how the statute-law relating to the form of a valid will is concerned at all, and the expressions, in which the doctrine has been habitually described, seem to bear this out. For the prevention of fraud, Equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with, it lets him take what the will gives him and then makes him apply it, as the Court of Conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual.

The same point of view is also adopted by Lord Cairns in *Jones* v. *Badley*,[1] where he observes that when a devisee seeks to apply what has been devised to him otherwise than in accordance with the testator's intentions, communicated by him and accepted by the devisee—

> It is, in effect, a case of trust, and in such case the Court will not allow the devisee to set up the Statute of Frauds, or rather, the Statute of Wills. . . . But in this the Court does not violate the spirit of the statutes; but for the . . . prevention of fraud, it engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a devisee from applying property to a purpose foreign to that for which he undertook to hold it.

Another test, which has been founded on the same principles, and which has sometimes been applied, is to consider the case as unaffected by the Statutes of Frauds or Wills, and then to inquire whether a trust has been imposed by the testator, and accepted by the devisee in such a way that a Court of Equity would enforce it as binding on the conscience of the devisee.

In discussing the cases which have been decided upon the doctrine, it is necessary to distinguish carefully between those cases in which the person intended to act as trustee takes the property under the will apparently beneficially,

[1] (1868), 3 Ch. App. 362, 364.

and those cases in which he is designated in the will as trustee.

1. Cases in which the Trustee takes Beneficially upon the Face of the Will. If the person designated is given the property apparently beneficially, and then subsequently to the testator's death some document is found purporting to be a direction of the testator to him to hold on certain trusts, the legatee is not bound by the document and he takes beneficially. In such a case, his conscience is not affected by any trust, and Equity will not interfere.

Where the trusts are communicated in the testator's lifetime they are binding.

If, however, the trusts are communicated in the testator's lifetime to a person who on the face of the will takes beneficially, another rule becomes operative. Equity will never allow a man to profit by his own fraud, and the Court says that since the person to whom the trusts have been communicated before death and to whom the property has been bequeathed by will, or to which he has succeeded on intestacy has, in effect, induced the testator to retain his will in that form, or has induced him not to make a will at all, the person so benefiting will be bound by the trusts, and this notwithstanding that they are not expressed in writing. As Lord Westbury observed in *McCormick* v. *Grogan*[1]—

> The Court has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and that equity will fasten upon the individual who gets a title under that Act, and impose upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way a Court of Equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills. And if an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or next of kin to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends upon the disponee to carry into effect, and the disponee assents to it (either expressly or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request) then undoubtedly the heir-at-law in one case, and the disponee in the other, will be converted into trustees; simply on the principle that an individual shall not be benefited by his own personal fraud.

The trustee may then disclaim.

There is an additional point which should be mentioned. of the testator communicates the trust to the legatee or

[1] (1869), L.R.4 H.L. 82.

devisee in the testator's lifetime, the latter has an opportunity to disclaim. If he does not, he deprives the testator of the chance of selecting other trustees.

In *Strickland* v. *Aldridge*,[1] it was pointed out that if a father devised his property to his youngest son, who promised the father in his lifetime that he would pay £10,000 to the eldest son, the Court would compel the youngest son to declare what had passed between the testator and himself, and then constitute him a trustee for the eldest son for £10,000.

Again, in *Sellack* v. *Harris*,[2] a father was induced by his heir-presumptive not to make a will, on the ground that the heir himself would make a certain provision for the mother, wife, or child of the intending testator, and the Court compelled the heir to make the provision contemplated, for by agreeing to do so, he had induced the owner of the property to refrain from making a will.

Where property is left to two persons and the trusts are communicated to one only.

Some difficulty sometimes arises in applying these principles where a testator leaves property to two or more persons, apparently beneficially, and relies on the promise of one of them to undertake certain trusts. Where the gift is made to *joint-tenants* on the strength of a promise by one of them to execute the trust, the secret trust binds both; but this is not so where a will is simply left unrevoked on the faith of a later promise by one of them, or where the gift is made to them *as tenants in common*. In either of these two last cases, only the person actually promising is bound. This is explained by Farwell, J., in *Re Stead, Witham* v. *Andrew*[3] (remembering that legal tenancy in common of land cannot exist since 1925)—

> If A induces B, either to make, or leave unrevoked, a will leaving property to A and C as *tenants in common*, by expressly promising, or tacitly consenting that he and C will carry out the testator's wishes, and C knows nothing of the matter until after B's death, A is bound, but C is not; the reason stated being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A and C as *joint-tenants*, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A, and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A and C; the reason stated being that no person can claim an interest under a fraud committed by another. In the latter case, A, and not C, is bound; the

[1] (1804), 9 Ves. 517. [2] (1708), 5 Vin. Ab. 521.
[3] [1900] 1 Ch. 237, at p. 240.

reason stated being that the gift is not tainted with any fraud in procuring the execution of the will.[1]

As an illustration of these observations with regard to joint-tenants, a good example is afforded by an Irish case, *Turner* v. *Attorney General.*[2] Property was devised to four persons as joint-tenants, and they took beneficially. In the will of one of them, certain observations were made which pointed to the existence of a secret trust, but it was held that these observations could not affect the right of the survivor of the joint-tenants to take beneficially. Here, obviously, the gift by will preceded the communication of the trust.

2. Cases in which the Trustee Takes as Trustee upon the Face of the Will. The cases in which the trustee takes apparently beneficially upon the face of the will are logical and unambiguous. Unfortunately the same cannot be said about the cases which now fall to be considered.

Where the gift in the will is to a trustee he cannot take beneficially.

Where property is bequeathed to a person *as trustee*, it is perfectly clear that the testator never intended him to take beneficially, and Equity respects this intention. Nevertheless, if, after the will is proved, a document is found in a form other than that prescribed by the Wills Act, directing that the property be held on certain trusts, this is void, as being a document which can only take effect as a testamentary disposition and which must, therefore, conform to the requirements of the Act; but the testator's intention prevails so far as to prevent the intended trustee from taking beneficially, and a resulting trust arises in favour of the testator's residuary legatee or devisee, or if there be no such person, or if the trust is imposed upon the residuary legatee, then in favour of the testator's intestate successors. Any other construction would have the effect of permitting the testator to make testamentary dispositions in a form other than that prescribed by the Wills Act.

Precisely the same principles apply where, although the intended trustee takes apparently beneficially in the will, nevertheless he has accepted the capacity of a trustee in respect of the property in the testator's lifetime, but the testator has omitted to communicate to him the beneficiaries of the trust prior to his death. Thus, in *Re Boyes*, *Boyes* v.

[1] See also *Tee* v. *Ferris* (1856), 2 K. & J. 357; *Russell* v. *Jackson* (1852), 10 Hare 204; *Jones* v. *Badley* (1868), 3 Ch. Ap. 362; *Burney* v. *Macdonald* (1845), 15 Sim. 6; *Moss* v. *Cooper* (1861), 1 J. & H. 352; on which these observations are founded.

[2] (1875), 10 Ir.Rep.Eq. 386.

Carritt,[1] the testator made a will bequeathing all his property to Mr. Carritt, and appointing him sole executor. Mr. Carritt was the testator's solicitor and had drawn the will, and in evidence he stated that the testator had intended him to hold the property as trustee for objects to be subsequently indicated by him. The testator, however, had never indicated these objects during his lifetime, but after his death Mr. Carritt found two letters in which the testator expressed his desire that with the exception of a trinket, valued at £25, all the rest of the testator's property should go to a Mrs. Brown. It was clear from the first that Mr. Carritt could not take beneficially, and the question was whether Mrs. Brown or the next of kin was the beneficiary. Kay, J., held that for the trust in favour of Mrs. Brown to be valid, it was essential that it should be communicated to the legatee-trustee in the testator's lifetime, and that he should accept this trust. As this had not been done, Mr. Carritt was a trustee for the next-of-kin.

It remains to consider the cases in which the testator designates the trustee in the will specifying no beneficiaries, and in his lifetime communicates the objects of the trust to the trustee, who assents. Here it is necessary to distinguish cases in which the communication of the objects is made at or before the making of the will, and cases in which such communication is only made *after* the will has been made, but still in the testator's lifetime.

Where the testator communicates objects at or before the making of a will.

(*a*) Where the communication of the objects takes place at or before the making of the will, it is not questioned that the trust so declared is binding on the trustee.

In *Irvine* v. *Sullivan*,[2] a testator devised and bequeathed all his real and personal estate to trustees to sell, and he directed that all moneys arising from the sale, after payment of funeral, testamentary, and other expenses, should be paid by the trustees to D absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator, shortly before the date of the will, had expressed his wish to D that she should, out of the property he left her, make various gifts to several persons. On leaving the testator, D wrote down the testator's wishes, but the paper was never seen or signed by the testator. James, V.C., held that D took the residue of the estate beneficially, subject to the performance of the testator's communicated wishes, in respect of which D had bound herself.

[1] (1884), 26 Ch.D. 531.

[2] (1869), L.R. 8 Eq. 673.

Again, in *Riordan* v. *Banon*,[1] the testator by will directed that a pecuniary legacy should be disposed of in accordance with instructions in a memorandum which the testator would leave the legatee. It was proved that before the execution of the will, the testator had informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had consented to accept the legacy for this purpose, and had promised the testator that he would carry out his wishes. The residuary legatees claimed the legacy, but the Court held there was a valid secret trust for the person named by the testator. Parol evidence was admissible to prove that a legacy had been bequeathed upon a trust entirely or partially undisclosed upon the face of the will when at or before the execution of the will the trust had been communicated by the testator to the legatee, and had been accepted by the legatee. The learned Vice-Chancellor in that case observed—

> The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by statute, or by parol; but that when at the time of making his will, he had formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him at or before the making of the will, or probably, according to *Moss* v. *Cooper*,[2] subsequently to the making of it, the Court will allow such trust to be proved by admission of the legatee, or other parol evidence, and will, if it be legal, give effect to it. The same principle which led this Court, whether wisely or not, to hold that the Statute of Frauds and the Statute of Wills were not to be used as instruments of fraud, appears to me to apply to cases where the will shows some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud though the result would be to defeat the expressed intention for the benefit of the heir, next-of-kin, or residuary donees.[3]

In another Irish case, *Cullen* v. *Attorney-General for Ireland*,[4] Lord Westbury emphasised the attitude of the

[1] (1875), 10 Ir. Eq. Rep. 469.
[2] (1861), 1 J. & H. 352, 367.
[3] See also *Attorney-General* v. *Dillon* (1862), 13 Ir.Ch.Rep. 127, 133; *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82.
[4] (1866), L.R. 1 H.L. 190, 198.

The title of the person claiming is not testamentary.

Court, which was expounded in *Riordan* v. *Banon*,[1] and which was adopted expressly in the later cases (and particularly in *Blackwell* v. *Blackwell*[2]). He says—

> Where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary.

This line of reasoning is undoubtedly a correct reflection of equitable principle in operation upon the Wills Act, but it must not be pressed too far. In *Re Maddock*[3] the testatrix left her residuary personalty by will to W, whom she appointed one of her executors. By a subsequent memorandum, communicated to W in the lifetime of the testatrix, she directed W to hold a specified part of the residue in trust for other persons. The Court of Appeal held that the residuary estate outside the scope of the memorandum was primarily liable for the payment of the testatrix's debts, and that the position was not, as Kekewich, J., had thought, that the debts were paid out of the residue as a whole, before the trust attached. In other words, as far as payment of debts was concerned, the part of the residue bound by the secret trust must be treated as if it was specifically bequeathed.

The principles established by the earlier authorities were reviewed and restated in *Re Fleetwood*.[4] In that case the testatrix left to a named person all her personalty "to be applied as I have requested him to do." The request was made out, and the named trustee jotted down in the presence of the testatrix the names of the persons and the amounts which the testatrix desired to give and, after this, the codicil was executed, declaring the existence of the trust, but not the person for whom it was established. Hall, V.C., held that parol evidence was admissible to prove communication of the terms of the trust to the trustee. This decision was criticised adversely in *Le Page* v. *Gardom*[5] and again in *Re Gardner*,[6] apparently because the communication to the trustee was verbal and not by memorandum. It is a little difficult to see why such criticisms should have been made, in view of the earlier and similar

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[1] (1875), 10 Ir.Eq.Rep. 469.
[2] [1929] A.C. 318.
[3] [1902] 2 Ch. 220.
[4] (1880), 15 Ch.D. 594.
[5] (1915), 84 L.J.Ch. 749, 752, 753.
[6] [1920] 2 Ch. 523, 532.

decision in *Irvine* v. *Sullivan*.[1] In any event, *Re Fleetwood* was followed in *Re Huxtable*,[2] where a testatrix bequeathed £4,000 to X "for the charitable purposes agreed upon between us." The testatrix verbally communicated to the legatee the fact that it was her intention to provide out of the income of that sum for the relief of sick and necessitous members of the Church of England, whilst the legatee was to dispose of the principal as his own property. Farwell, J., admitted the evidence, including that which conferred on the trustee the power of disposing of the principal on his death. The Court of Appeal held that the evidence was admissible as to the trusts of the £4,000 which, upon the face of the will, was wholly given for charitable purposes, but was not admissible for the purpose of providing for the £4,000 on the trustee's death, since the will purported to give the whole £4,000, and to admit such evidence would be to contradict the will.

The decision in *Re Fleetwood* was formerly regarded as of doubtful authority.

The doctrine embodied in *Re Fleetwood* was regarded as of doubtful authority until the decision of the House of Lords in *Blackwell* v. *Blackwell*.[3] Thus, in *Re Gardner*,[4] a testatrix gave by will all her property to her husband for his use and benefit during his life, "knowing he will carry out my wishes." Four days before making her will, the testatrix had signed an unattested memorandum, in which she desired that all the money she left to her husband should be by him divided among named beneficiaries. Testatrix left only personalty and made no disposition of the corpus. Four days after her death the husband also died, whereupon the will and memorandum of the wife were found in the husband's safe. There was also evidence that, shortly after the execution of the will, the testatrix had said in the presence of her husband that her property after her husband's death was to be divided among the beneficiaries named in the memorandum, and that the husband had assented. It should be noticed that on the wife's death, as there was no disposition of the corpus of the property under the will, the husband took it *jure mariti*. The Court of Appeal held that the words "knowing that he will carry out my wishes" related only to the husband's life interest, and that those wishes did not appear; but that as to the corpus of the estate, the husband, though taking apparently beneficially under the will, in fact took it fettered by a secret

[1] (1869), L.R. 8 Eq. 673.
[2] [1902] 2 Ch. 793.
[3] [1929] A.C. 318.
[4] [1920] 2 Ch. 523.

trust contained in the memorandum communicated in the testatrix's lifetime, and also in the oral conversations to the same effect. Warrington, L.J., said—

> The cases which have been cited, such as *Johnson* v. *Ball*,[1] and *Re Gardom*,[2] appear to me to have no reference to a case such as the present. Those were cases in which the person on whom it was sought to impose the trust did not take under the terms of the will for his own benefit; he took expressly under the terms of the will as trustee. In such a case as that the trust upon which that trustee is to hold the property must be contained in the will itself, or in some document in existence at the date when the will is made, or it may be, if the case of *Re Fleetwood* was properly decided, declared by parol and accepted by the trustee at or before the execution of the will. But that limitation (at or before the execution of the will) has no application, as was pointed out by Lord Davey in *French* v. *French*,[3] to such a case as that with which we have to deal.

It should be added that *Re Gardner* was further elucidated in a second decision,[4] in which it was held that since the beneficiaries were named in the memorandum and not under the will, the trust arose from the date when the memorandum was communicated to the husband and of his assent thereto, so that the interest of a beneficiary who survived the memorandum but died before the testatrix, did not lapse, but passed to the deceased beneficiary's personal representatives.

But approved in *Blackwell* v. *Blackwell*.

In *Blackwell* v. *Blackwell*,[5] a last determined effort was made to shake the effect of *Re Fleetwood*,[6] but Eve, J. (following *Re Fleetwood* and also the view expressed by him in *Re Gardom*[7]), the Court of Appeal and the House of Lords were at one in holding the case rightly decided, and the doctrine of secret trusts, as considered above, is at length finally established. In *Blackwell* v. *Blackwell*,[5] a testator, by a codicil, gave £12,000 to five persons to apply the yearly income "for the purposes indicated by me to them," with power to pay the capital sum of £8,000 to persons indicated to them by the testator, whilst the remaining £4,000 was to fall into the residuary estate. Detailed parol instructions were given by the testator to one of the trustees, C, and the object of the trust was known in outline and accepted by all before the codicil was executed. On the same day that the codicil was executed, C wrote out a memorandum of the

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[1] (1851), 5 De G. & Sm. 85.
[2] (1915), 84 L.J.Ch. 749.
[3] [1902] 1 Ir.R. 172.
[4] [1923] 2 Ch. 230.
[5] [1929] A.C. 318.
[6] (1880), 15 Ch.D. 594.
[7] [1914] 1 Ch. 662.

instructions which the testator had given him. It was held that there was a binding trust for the objects which the testator had indicated. Even so late as 1929, however, the doctrine was accepted by the House of Lords with some hesitation, for Lord Warrington observes—

> I confess to having felt considerable doubt during the argument whether to apply the principle in such a case as the present would not be to give validity to a parol will in spite of the provisions, first, of the Statute of Frauds and, secondly, of the Wills Act. Subsequent reflection, however, and a careful perusal of the judgment of Hall, V.C., in *Re Fleetwood*, wherein the earlier authorities under both statutes are cited and discussed, have satisfied me that that case and, in consequence, the present case in the Courts below were rightly decided. I think the solution is to be found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the faith of which acceptance the will was made or left unrevoked, as the case might be. If the evidence had merely established who were the persons and what were the purposes indicated, it would in my opinion have been inadmissible, as to admit it would be to allow the making of a will by parol. It is the fact of the acceptance of the personal obligation which is the essential feature, and the rest of the evidence is merely for the purpose of ascertaining the nature of that obligation.

In *Re Hawksley's Settlements*,[1] a testatrix appointed by her will her husband and two other persons "to be my executors and residuary legatees to carry out instructions that I may leave in writing or verbally which I have not yet fully completed." The Court held that the residuary legatees took as trustees, and since the purposes intended by the testatrix could not be ascertained, they held as trustees for the next-of-kin.

A further problem affecting this type of secret trust was decided in *Re Colin Cooper*[2]. A testator bequeathed the sum of £5000 to two trustees upon trusts "already communicated to them." Just before his death, he executed a later will, revoking the first, cancelling the bequest of £5000, but giving the same trustees the sum of £10,000, "they knowing my wishes regarding that sum." The testator never told the trustees of the revocation and new bequest, and the Court of Appeal held that whilst the trust operated against the original £5000, the trust failed against the additional sum.

[1] [1939] Ch. 580. [2] [1934] Ch. 384.

(*b*) There remains for consideration that type of case in which the trustee is so designated on the face of the will, but no objects are indicated, but these are communicated to the trustee, either by memorandum or verbally, in the testator's lifetime, but *after* the will is made. It might be objected at first sight that there should be no difference on principle between these cases and those in which the trustee takes apparently beneficially on the face of the will. In each case, communication of the trusts in the testator's lifetime should be sufficient to take them outside the Wills Act. This is indeed the position in the United States, for the *Restatement of the Law of Trusts*[1] states of cases where the trust appears in the will—

> As in the case where the devise or bequest is absolute on its face, it is immaterial whether the agreement of the devisee or legatee was made prior to or at the time of or after the execution of the will, and whether the agreement by the devisee or legatee was made in specific words, whether written or oral, or was shown by his conduct.

In his treatise on *Trusts*, Lewin also expressed a similar opinion, but there exist judicial pronouncements of weight against it. Thus, in *Re Keen*,[2] Lord Wright says—

> In *Blackwell* v. *Blackwell*,[3] *Re Fleetwood*,[4] and *Re Huxtable*,[5] the trusts had been specifically declared to some or all of the trustees at or before the execution of the will, and the language of the will was consistent with that fact. There was in these cases no reservation of a future power to change the trusts, in whole or in part. Such a power would involve a power to change a testamentary disposition by an unexecuted codicil and would violate Sect. 9 of the Wills Act. . . . The trusts referred to, but undefined in the will, must be described in the will as established prior to, or at least contemporaneously with, its execution.

It will be seen that the substance of this view is that the prior declaration of trust in fact completes the trust which is partially declared in the will. If this is in fact so, it is hard to see why, apart from another doctrine to be mentioned in a moment, this type of trust could ever be held to be good, even though the communication is prior to the will, for it seems quite clearly to involve the incorporation into the will of something which is not executed in accordance with the terms of the Wills Act.

The doctrine of incorporation by reference.

There exists, however, in the law of wills, a doctrine known as the doctrine of incorporation by reference, which

[1] P. 165. [2] [1937] 1 Ch. 236. [3] [1929] A.C. 318.
[4] (1880), 15 Ch.D. 594. [5] [1902] 2 Ch. 866.

saves *written* memoranda not executed in accordance with the requirements of the Wills Act, under certain conditions. The conditions are that the memoranda must be written, they must be in existence before the will is made, or at the latest at the time when the will is made, and they must be referred to in the will, as matter to be incorporated in it. This is established by a long line of cases, and is excellently illustrated by the case of *In Bonis Smart*.[1] A will contained the following clause: "I direct my trustees to give such of my friends as I may designate in a book or memorandum that will be found with this will, the different articles specified for such friends in such book or memorandum," and subsequently the testatrix did write up such book or memorandum, and after she had done so, she executed a codicil which did not refer in any way to such book or memorandum, but confirmed the will with various alterations. The Court held that, although the will was republished by the codicil and must be taken to speak from the date of such codicil, the allusion in the will to the "book or memorandum was still to a future, and not to an existing, document," so that it could not be regarded as incorporated into the will. Gorell Barnes, J., said—

> I think it may be taken that it is established that if a testator, in a duly (executed) testamentary paper refers to an existing unattested testamentary paper, the document so referred to becomes part of his will and is incorporated into it. At the same time it is clear that, in order that an informal document should be so incorporated in the will, the latter must refer to the former as a written document then existing —that is to say, at the time of execution—and refer to it in such terms that it may be identified. . . . If the document is not in existence at the time when the will is executed, but only comes into existence afterwards, and after that again there is a codicil confirming the will, the question arises whether that document is incorporated. It appears to me that, following out the principle I have enunciated, the will may be considered by the execution of the codicil as re-executed and as speaking from the date of the codicil, and if the informal document is existing then, and is referred to as existing, so as to indentify it, there will be incorporation. On the other hand, if the will, as being re-executed at the date of the codicil, still speaks in terms which show that it is referring to a future document, then there is, as it seems to me, no incorporation possible.

This doctrine is entirely logical, and the cases on it are free from ambiguity. It is submitted, however, that this doctrine is entirely distinct from the doctrine of secret trusts, although

This doctrine is distinct from that of secret trusts.

[1] [1902] P. 238. See also *Allen* v. *Maddock* (1858), 11 Moo.P.C. 427.

it is quite clear that some of the judgments upon the type of secret trusts we are now considering have confused them. This is the only possible explanation for the curious and ill-founded view that *Re Fleetwood*[1] was wrongly decided because the communication prior to the will was verbal and not by memorandum. Where such prior verbal communication takes place, it quite clearly cannot be identified as a memorandum can; and it seems quite consistent with principle to hold that a communication may fail to be incorporated by reference because it fails to satisfy the conditions set out above, but that it may nevertheless take effect as a secret trust. The two principles have different origins—one is an equitable principle, the other a rule of probate—different orbits, and different effects (for in the one case a trust operates *dehors* the will, and in the other certain matter is added to the will itself).

It remains to consider the cases which have been regarded as relating to this type of secret trust.

In *Johnson* v. *Ball*,[2] a testator gave a policy of assurance to two trustees "to hold upon the uses appointed by letter signed by them and myself." No such letter existed, though it would appear that the trustees had previously agreed to accept the bequest for the benefit of persons mentioned by the testator. Such a communication, however, would be ineffective in this case, as it did not conform to the terms of the will. Some time after making the will, the testator wrote a letter to his executors, saying that he had left the policy in his will to the two trustees for purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum declaring the trusts on which the trustees were to hold the policy. The trustees retained both the letter and the memorandum until after the testator's death, when one of the beneficiaries under the memorandum sought to enforce his claim against the executors and trustees.

Where the testator indicates that he will communicate his intention in some special form.

Parker, V.C., held that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the letter did not operate as a gift *inter vivos*. The trustees accordingly held the proceeds of the policy in trust for the residuary legatee. It would seem that this case was considered purely upon the footing of incorporation by reference—a supposition which is strengthened by the following observations from the learned Vice-Chancellor's judgment—

[1] (1880), 15 Ch.D. 594.

[2] (1851), 5 De G. & Sm. 85.

> Cases in which there is no trust appearing on the will, and where the Court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will.

Nevertheless, both Lord Buckmaster in *Blackwell* v. *Blackwell*[1] and Lord Wright in *Re Keen*[2] appear to have regarded them as authority for the proposition that where a trust is partially declared on the face of the will, it cannot be completed by a communication of objects posterior to the execution of the will, but prior to the testator's death; although, as Sir William Holdsworth points out,[3] of the two authorities relied on by Parker, V.C., in *Johnson* v. *Ball*,[4] the first, *Croker* v. *Marquis of Hertford*,[5] was purely a case of incorporation by reference, and the second, *Briggs* v. *Penny*[6] was a case where the communication of the testator's intention only took place after his death. On the other hand, in *Moss* v. *Cooper*,[7] Page Wood, V.C., was of opinion that in trusts of this type it was immaterial whether communication occurred before or after the making of the will.

Re Keen.

In *Re Keen*,[8] a testator made a will, giving a sum of money to his executors "to be held upon trust and disposed of by them among such person, persons, or charities as may be notified by me to them or either of them during my lifetime." Failing such notification, the money was to fall into residue. At the same time, he told one of his executors that he wished the money to be held for the benefit of an unnamed person, whose name was contained in a sealed envelope which he handed to the executor, to be opened after the testator's death. The Court of Appeal, adopting an opinion of Kay, J., in *Re Boyes*,[9] decided that handing over a sealed envelope was sufficient communication. The Court also held that the words of the will necessarily implied that the communication must be made after the will was made, and as the notification was, in fact, anterior to the will, the terms of the will were unsatisfied, and the gift therefore failed. With this narrow point of construction, issue cannot be joined, and if this be regarded as the *ratio decidendi* of *Re Keen*, the broad question whether communications posterior to the execution of the will in this

[1] [1929] A.C. 318, 331.
[2] [1937] 1 Ch. 236.
[3] 52 *L.Q.R.* 501, 502.
[4] (1851), 5 De G. & Sm. 85.
[5] (1844), 4 Moo.P.C. 339.
[6] (1849), 3 De G. & Sm. 525.
[7] (1861), 1 J. & H. 352, 367.
[8] [1937] 1 Ch. 236.
[9] (1884), 26 Ch.D. 531, 536.

type of case is still open for decision. Lord Wright, however, discussed the problem on a broader basis, and, regarding *Johnson* v. *Ball*[1] as an authority on secret trusts, expressed the view that even if the communication had satisfied the terms of the will, it would still have been ineffective as a reservation of a future power to change the trust. Such an argument, as we have seen, is equally valid as against secret trusts, where the trustee takes apparently beneficially on the face of the will; but in both cases the argument cannot be supported, because the whole basis of the doctrine is the assumption that the trust operates outside the will. If it did not, then unless the secret trust could be brought within the scope of the doctrine of incorporation by reference (and this could never be where the trustee takes apparently beneficially), then it would be a direct contravention of the Wills Act.

C. THE DISTINCTION BETWEEN AN EXECUTED AND AN EXECUTORY TRUST

Importance of the distinction.

The distinction between these two types of trust has already been noticed. In an executed trust, the limitations of the beneficial interest are clear and complete; in an executory trust, though the proposed limitations are unambiguous, something more must be done, or some other document executed, before the settlement is complete. In both cases, the transfer of the legal or other estate to the trustees is complete. At one time it was doubted whether any consequences of importance followed from this distinction,[2] but the distinction has been long established, and Sir George Jessel, M.R., stated it clearly in *Miles* v. *Harford*,[3] when he observed—

> It is called an executory trust, where the testator, instead of expressing exactly what he means—that is, filling up the terms of the trust, tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect: "Now there are my intentions, do your best to carry them out."

As Lord St. Leonards put it, in *Egerton* v. *Brownlow*,[4] the test is whether the settlor has been his own conveyancer, or whether he has left it to the Court to make out from general expressions what his intention is.

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[1] (1851), 5 De G. & Sm. 85.

[2] On this, see Lord Northington's observations in *Austen* v. *Taylor* (1759), 1 Eden 361 at p. 368.

[3] (1879), 12 Ch.D. 691, at p. 699.

[4] (1853), 4 H.L. C. 1.

In an executed trust, technical terms are given their technical meaning.

The first important consequence of the distinction is that, whereas in an executed trust, Equity will follow the law in respect of the terms used, so that if technical terms are used, they are construed according to their technical meaning,[1] in executory trusts, the Court will temper this strict rule, and seek to follow the true intention of the settlor, provided that this can be ascertained. Thus, in *Lord Glenorchy* v. *Bosville*,[2] the settlor devised real estate to trustees upon trust, on the occurrence of the marriage of his granddaughter, to convey the estate to the use of her for life, remainder to the use of her husband for life, remainder to the issue of her body, with remainders over. It was held that though the granddaughter would have taken an estate tail had the trust been an executed trust, yet since the trust was executory, and as the testator's intention was to provide for the children of the marriage, that intention would be best carried out by a conveyance to the granddaughter for life, remainder to her husband for her life, remainder to her first and other sons in tail, with remainder to her daughters.

In executory trusts in marriage articles the primary intention is clear.

It is necessary, however, to draw a still further distinction between executory trusts in marriage articles and executory trusts in wills. In the former the very nature of the contract gives a clear indication of the intention of the settlor, which is wanting in the case of a will.[3] So that in the case of marriage articles the Court is able to carry out the primary purpose of the settlor in providing for the parties and issue of the marriage, whereas in a will the Court usually has no such clue to the testator's primary intention, and is therefore compelled to look elsewhere for it; and thus, as Lord Chelmsford noticed in *Sackville-West* v. *Viscount Holmesdale*[4]—

> There are cases of executory trusts in wills, in which even the words "heirs of a body" have been made to bend to indications of intention that the estate should be strictly settled; and a direction in a will, that a settlement shall be made as counsel shall advise, has been held sufficient to show that the words were not intended to have their strict legal effect.

In the same case Lord Chelmsford also said—

> In considering a question of this description the Court is

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[1] *Re Bostock's Settlement*, [1921] 2 Ch. 469. Cf. *Re Arden Trusts*, [1935] Ch. 326, where the operative clause was not in strict conveyancing language, and a different construction was therefore placed upon the instrument.

[2] *Lord Glenorchy* v. *Bosville* (1733), Cas. temp. Talb. 3.

[3] See the observations of Sir W. Grant in *Blackburn* v. *Stables* (1814), 2 V. & B. 367.

[4] (1870), L.R. 4 H.L. 543.

not confined to the language of the will itself in order to discover the intention of a testator; it may not only refer to the motives which led to the will, and to its general object and purpose, to be collected from other instruments to which the will itself refers, but also to any circumstances which may have influenced the mind of the maker towards the provisions it contains. The best illustration of the object and purpose of an instrument furnishing an indication of intention in the case of executory trusts, is to be found in the instance of marriage articles, where the object of the settlement being to make a provision for the issue of the marriage, no words, however strong, which in the case of an executed trust would place the issue in the power of the father, will be allowed to prevail against the implied intention.

To which Lord Hatherley, L.C., after reviewing the authorities, added—

These examples will suffice to show: (1) That the intent must be so manifested on the face of the instrument directing the settlement to be made that the technical words used cannot be followed in the perfect instrument without defeating the manifest intent of the parties; (2) That in articles made before marriage there will be an assumed intent, assumed from the nature of the case, that the settlement should not be liable to immediate destruction by the act of the settlor, and the Court will alter the words so as to prevent the settlor taking an immediate estate tail; (3) That even in such a case the intent is not sufficiently strong to prevent the very words of the articles being used, though an estate be directed to be given to the husband (the settlor) for life, with a limitation to the heirs of his body, if that limitation is so framed as to prevent his destroying the estate without the concurrence of the intended wife; (4) That in the case of a will, or deed of gift, the intention that the very words mentioned in the instrument as proper for the more complete conveyance are not to be used must be plainly manifested by the first instrument, and will not be assumed merely because the trust is executory.[1]

In *Re Nash*,[2] Kay, J., said—

In the first place I observe that this is an executory trust—a trust to be carried out by the making of a settlement, for which there is, of course, only a general direction; and in framing such a direction, the Court always exercises, if the settlement has to be made under the direction of the Court, and any conveyancer to whom the preparation of the settlement was submitted according to the will would in like manner exercise a certain discretion in modifying the trusts.

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[1] On the construction of informal expressions in instruments since 1925, see Law of Property Act, 1925, Sect. 130 (2).

[2] (1889), 42 Ch.D. 54. See *Re Potter's Will Trusts*, [1944] Ch. 70.

D. COMPLETELY AND INCOMPLETELY CONSTITUTED TRUSTS

In a completely constituted trust the property has been transferred.

The distinction between executed and executory trusts is quite different from that between completely and incompletely constituted trusts. A trust which is completely constituted is one in which the trust property has been finally and completely vested in the trustees; when and so long as this is not done, the trust is incompletely constituted. All trusts arising under wills are completely constituted, though they may be either executed or executory.

The question of consideration.

The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for Equity regards as done that which ought to be done, and will perfect the imperfect conveyance; but Equity will not perfect an imperfect voluntary trust. So Lord Eldon observes in *Ellison* v. *Ellison*[1]—

> I take the distinction to be, that if you want the assistance of the Court to constitute a *cestui que trust*, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this Court.

Similarly, in *Pearson* v. *The Amicable Assurance Office*,[2] Romilly, M.R., said—

> No person can state too strongly to command my assent, the proposition, that if a voluntary assignment of any property is imperfect and incomplete, and the assistance of a Court of Equity is required to give effect to it, this Court will not interfere to perfect the instrument.

The general principle applicable has been enunciated by Turner, L.J., in *Milroy* v. *Lord*,[3] as follows—

> In order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision

[1] (1802), 6 Ves. 656, at p. 662.
[2] (1859), 27 Beav. 229. And see *Meek* v. *Kettlewell* (1842), 1 Hare 464.
[3] (1862), 4 De G. F. & J. 264.

> will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes. . . . But, in order to render the settlement binding, one or other of these modes must (as I understand the law of this Court) be resorted to, for there is no Equity in this Court to perfect an imperfect gift.

On the same point, Romer, L.J., said in *Timpson's Executors* v. *Yerbury*[1]—

> The equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four different ways. The person entitled to it (1) can assign it to the third party; (2) can direct the trustees to hold the property in trust for the third party . . .; (3) can contract for valuable consideration to assign the equitable interest to him; or (4) can declare himself to be a trustee for him of such interest.

The importance of the distinction is clearly emphasised by *Jeffries* v. *Jeffries*[2]—

A father voluntarily conveyed freeholds to trustees upon trusts for the benefit of his daughters; he also covenanted to surrender copyholds to the trustees upon the same trusts. He died without surrendering the copyholds, and by his will he devised parts of both the freeholds and the copyholds to his wife. His daughters sought to enforce the trust, and the Court held that as far as the freeholds were concerned, the trust was completely constituted, and the daughters' title was complete; but as far as the copyholds were concerned, the Court would not decree their surrender, for the trust was incompletely constituted. The settlor had not transferred them to the trustees, nor had he declared himself a trustee of them. He had merely made a voluntary agreement to transfer them, which was *nudum pactum* both at law and in Equity.[3]

From a consideration of this case, it will be obvious that a trust is completely constituted (1) if the property is conveyed to trustees, or (2) if the settlor declares himself a trustee of it. Where either of these things has been done, a beneficiary may enforce the trust, even if he is only a volunteer.

The settlor must take all necessary steps to transfer.

1. WHERE THE SETTLOR CONVEYS TO ANOTHER.

If the settlor is both the legal and the equitable owner of the property, he must take all due steps to do all that it

[1] [1936] 1 K.B. 645, at p. 664.
[2] (1841), Cr. & Ph. 138. See also *Paul* v. *Paul* (1882), 20 Ch.D. 742.
[3] See also *Dillon* v. *Coppin* (1839), 4 My. & Cr. 647.

is his duty to vest the property in the trustee, and if there is anything still to be done, e.g. transfer of shares on the books of a company, the instrument of conveyance must also contain a declaration of trust, if the settlor's intention is to escape defeat. The position is the same where a person intends to make a direct gift to another. The appropriate modes of transfer must always be used. Thus, in *Antrobus* v. *Smith*,[1] the owner of shares in a company endorsed on the certificate a memorandum that he had assigned it to his daughter, but it was held there was no valid gift, as the purported assignment did not pass the legal interest, and did not amount to a declaration of trust.

Where the intending donor or settlor, however, himself only possesses an equitable interest in the property, it is sufficient if he transfers that. It is not necessary that he should procure a conveyance of the legal estate.[2] Thus, in *Kekewich* v. *Manning*,[3] a testator bequeathed residuary personalty to his wife for life, remainder to his daughter absolutely. The daughter assigned the whole of her interest to trustees for the benefit of her nieces. It was held that the trust was good, as the daughter had done all in her power to divest herself of her interest, which was equitable. If she had been legal owner, she would have had to transfer it by the use of the appropriate legal forms.

Again in *Re Bowden*[4] a settlor by a voluntary settlement made in 1868 settled any property to which she might become entitled upon her father's death, and gave the trustees full power to give receipts for the property in her name. Her father died in 1869 and between 1871 and 1874, the executors of the father's will transferred the settlor's share to the trustees of the voluntary settlement. In 1935, the settlor requested that the trustees should transfer the property to her. The Court held that the trustees had received the settlor's share impressed with the trusts of the voluntary settlement, and since the settlement was completely constituted, the settlor was bound by it, and could not revoke it.

2. WHERE THE SETTLOR MAKES A DECLARATION OF TRUST.

An abortive attempt to transfer is not a declaration of trust.

Instead of conveying to trustees, the settlor himself may declare that he holds on trust for others, whether the interest

[1] (1806), 12 Ves. 39. See also *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11; *Re Williams*, [1917] 1 Ch. 1; *Re Swinburne*, [1926] Ch. 38.
[2] *Gilbert* v. *Overton* (1864), 2 H. & M. 110.
[3] (1851), 1 De G.M. & G. 176.
[4] [1936] 1 Ch. 71.

he holds is legal or equitable. If the trust relates to land, it must be evidenced by writing, but otherwise the declaration may be oral, or it may be inferred from conduct. Any words clearly expressing intention are sufficient. However, as has been noticed above, an ineffectual attempt to transfer property to another is not construed as a declaration of trust.[1]

Valuable consideration in the law of trusts.

Since, therefore, an incompletely constituted trust which is also voluntary cannot be enforced, the question of what is a voluntary trust, and what is a trust for valuable consideration must next be considered. Valuable consideration in the law of trusts, as in the law of contract, is some valuable thing assessable in terms of money, with the proviso that marriage, and also a forbearance to sue, is so considered; and therefore, wherever consideration of this type is present, the trust is not voluntary. The phrase "good consideration" is sometimes used, as applied to natural love and affection, but this consideration, though good, is not "valuable," and was only used for the purpose of rebutting a resulting use or trust. It therefore does not make an incompletely constituted settlement enforceable at the instance of a volunteer.

Marriage as consideration.

The question of marriage as consideration must be considered further. If the settlement is made before and in consideration of marriage, it is made for valuable consideration. So it is, also, if made after marriage, but in fulfilment of an ante-nuptial agreement to settle, but if the settlement is made after marriage, and not in pursuance of an ante-nuptial agreement, it is voluntary. By Sect. 4 of the Statute of Frauds, 1677, an agreement in consideration of marriage must be evidenced by writing under the hand of the party to be charged; evidenced, that is, sometime before action is brought, and therefore, if a post-nuptial settlement recites an ante-nuptial agreement to settle, two consequences follow: (1) the requirements of the statute are satisfied; and (2) the settlement is not voluntary.[2]

Who are within the marriage consideration.

In these circumstances, the question, who are within the scope of the marriage consideration, becomes one of great importance, and it has now been settled, after a good deal of uncertainty, that the only persons within the marriage consideration are the actual parties, the husband, the wife, and the issue of that marriage.[3] All other persons, therefore, are volunteers and cannot enforce the provisions of a settlement

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[1] See the observations of Jessel, M.R., in *Richards* v. *Delbridge* (1874), L.R. 18 Eq. 11.

[2] *Re Holland*, [1902] 2 Ch. 360.

[3] *De Mestre* v. *West*, [1891] A.C. 264.

as *against the settlor*, so far as the transfer of the property is still incomplete, e.g. an agreement to settle after-acquired property on them. Thus, in *Re Plumptre's Marriage Settlement*,[1] the husband and wife, on their marriage in 1878, covenanted with their trustees to settle the wife's after-acquired property for the benefit of herself and her husband successively for life, then for the issue of the marriage, and then for the wife's next-of-kin. In 1884, the husband bought certain stock in his wife's name, and the wife afterwards sold it, investing the proceeds in other stock. In 1909 the wife died without issue, leaving her husband her administrator. It was held that the next-of-kin, being volunteers, could not enforce the wife's covenant to settle the stock against her husband as her administrator; nor could the trustees sue for damages for breach of the covenant, for the claim was statute-barred.

The position of volunteers.

Even where the claim under the covenant is not statute-barred, the trustees are under no duty to enforce the covenant at the suit of volunteers only, nor will the court direct them to do so, for to do so would be to give the volunteers indirect relief which they could not obtain by direct procedure.[2]

On the other hand, in *Pullan* v. *Koe*,[3] in 1879, a wife was given a sum of money which was bound by a covenant executed by herself and her husband in their marriage settlement to settle her after-acquired property. The money was paid into the husband's account, on which the wife had power to draw, and shortly afterwards part of it was invested in bonds, which remained at the bank, the interest on them being credited to the account. When the husband died in 1909, the bonds came into the hands of his executors. There were several children of the marriage, and the Court held that since they were within the marriage consideration, they could enforce the transfer of the bonds to the trustees of the marriage settlement.

Another illustration of strangers to the consideration (not necessarily marriage) is *Colyear* v. *Lady Mulgrave*.[4] A father, who had a legitimate son and four illegitimate daughters, covenanted with the son, whereby the father agreed to transfer £20,000 to a trustee for the four daughters, and the son agreed to pay the father's debts. The son paid

[1] [1910] 1 Ch. 609.
[2] *Re Pryce*, [1917] 1 Ch. 234; *Re Kay's Settlement* (1939), 108 L.J.Ch. 156.
[3] [1913] 1 Ch. 9.
[4] (1836), 2 Keen. 81.

some of the debts, but died before his father had discharged his part of the undertaking. The son, by his will, left his father as his sole legatee and executor, and it was held that the daughters could not compel the father to perform the covenant to settle, for although the son had given value, the daughters were strangers to the consideration.

Apparent exceptions to the rule that equity will not assist a volunteer.

It is sometimes said that to the rule that Equity will not assist a volunteer there are certain exceptions. Thus the rule does not apply to a *donatio mortis causa*. If the requisites of a valid *donatio mortis causa* have been fulfilled, the gift will take effect, even though the actual transfer before death is incomplete.[1] Such gifts, however, are on a special footing, they are governed by special rules and cannot properly be considered with ordinary gifts *inter vivos*. Again, the rule that Equity will not assist a volunteer has no application to wills. An executor must carry out the provisions of a will in favour of beneficiaries who are volunteers, but here again, the property vests, by the death of the testator, in the executor on trust to carry out the dispositions of the will. A further case requiring consideration is where a person makes an imperfect gift to A, and subsequently appoints A his executor. Here, on the death of the donor, the property vests fully in A, and the equity of the beneficiary under the will is displaced by A's prior equity, and A may therefore retain the property, notwithstanding the fact that until the donor's death, A's title was imperfect.[2]

In *Re James*[3] the same rule was applied where the donee had not been appointed executor, but had taken out letters of administration to the estate of the donor.

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[1] *Re Wasserberg*, [1915] 1 Ch. 195; *Wilkes* v. *Allington*, [1931] 2 Ch. 104.
[2] *Strong* v. *Bird* (1874), 18 Eq. 315; *Re Innes*, [1910] 1 Ch. 188.
[3] [1935] Ch. 449.

CHAPTER VI

THE CREATION OF AN EXPRESS TRUST—(*continued*)

A. THE CONSTRUCTION OF LANGUAGE USED TO CREATE AN EXPRESS TRUST

The settlor's intention governs the trust.

In *Knight* v. *Knight*,[1] Lord Langdale declared that for a trust to be validly created three things were necessary: (1) The words employed must be so couched that, taken as a whole, they could be deemed to be imperative; (2) the subject matter of the trust must be certain; (3) the objects, or persons intended to be benefited must also be certain. These three requirements have often been termed the "three certainties" of a trust, and although this hard and fast distinction may be a little misleading, for a trustee is always necessary for the execution of a trust, it will be convenient to consider each in turn.

1. CERTAINTY OF WORDS.

The three certainties of a trust.

Since Equity looks at the intent rather than at the form, no special form of words is necessary for the creation of a valid trust, and if an intention to create a trust may unmistakably be construed from the expressions which the settlor has used, the Court will give effect to that intention. The really difficult question in these cases is, what did the settlor really intend? For example, if he uses words *precatory*, *recommendatory*, or *expressing a belief*, did he intend to create a binding trust or not? The Court has not always given the same answer to this question. In the past, the following words have been held to raise a binding trust, though for reasons that will appear below, it is not now considered that all such expressions would now, of themselves, be held to raise a binding trust—

Desire, will, request, will and desire, will and declare, wish and request, wish and desire, entreat, most heartily beseech, order and direct, authorise and empower, recommend, beg, hope, do not doubt, be well assured, confide, have the fullest confidence, trust, trust and confide, have full assurance and confident hope, be under the firm conviction, in full belief, well know, the legatee will give, she will at her death dispose, etc.[2]

[1] (1840), 3 Beav. 148.

[2] Lewin on *Trusts* (Thirteenth Edition), pp. 92–93 and references there given.

The doctrine of precatory trusts was derived from a rule relating to executors.

Formerly, indeed, the Courts regarded practically any intimation of desire on the part of the testator as imperative, and thus binding upon persons benefited by him, and whilst there is no rule of law limiting the rules relating to precatory trusts to trusts arising by will, practically all the cases have turned upon trusts created by will. The rule that the testator's desire was to be construed as a command was an old equitable rule which was applied in the first instance to executors. Thus, in *Brest* v. *Offley*,[1] the testator "desired" that his executor should give the plaintiff £200, and this was held to be binding. Five years later, in *Pary* v. *Juxon*,[2] the executor of Archbishop Juxon was desired by the Archbishop in his lifetime to give the next presentation of the Mastership of St. Cross to Dr. Pary. This was held to be a binding trust on the executor. Accordingly, in *Eales* v. *England*,[3] the general principle was laid down that—

> Words of recommendation and desire in a will are always expounded a devise.

The basis of this rule was declared by Lord Eldon in *Cary* v. *Cary*,[4] to be as follows—

Words of desire alone did not constitute a trust.

> When a testator, having in his power to dispose of property, expresses a desire as to the disposition of the property, and the objects to which he refers are certain, the desire so expressed amounts to a command, and if he shows his desire, he, in fact, expresses his intention, provided the objects to which he refers are so defined, that a Court can act upon the desire so expressed. If he is sufficiently explicit in that respect, words expressing desire, words simply intimating that he has no doubt such and such things will be done, will operate as imperative on the person to whom they are directed. The cases are clear on this subject, that where the property and the objects are certain, any words intimating a wish or desire raise a trust; if the objects be not certain, a trust can no more be raised upon words of desire or request than upon words of actual devise.

The concluding part of that pronouncement should not be ignored. Even at the beginning of the nineteenth century the Courts never construed mere words of desire as a trust. The words of desire had to be coupled with certainty of objects and property. In the eighteenth century, when the rule was first being formulated, that point was perhaps stressed more than in the time of Lord Eldon. Thus, in

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[1] (1664), 1 Rep. Ch. 246.
[2] (1669), 3 Rep. Ch. 38.
[3] (1702), Prec. Ch. 200.
[4] (1804), 2 Sch. & Lef. 173 at p. 189. See also *Richardson* v. *Chapman* (1760), 1 Burn's *Ecclesiastical Law*, 245.

Harding v. *Glyn*,[1] testator gave property to his wife by will "but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as she should think most deserving and approve of." This was held to be a trust, but the Court observed—

> Where the uncertainty is such that it is impossible for the Court to determine what persons are meant, it is very strong for the Court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word *relations* is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the Court.

Uncertainty of property with words of desire.

Thus, if there had been uncertainty of objects, the Court would not have construed the desire as a trust. In *Bland* v. *Bland*,[2] there was uncertainty of property. In that case the Manor of Withington was devised to Sir John Bland, with other real and personal estate, and the testator added: "It is my earnest request to my son, in case of failure of issue of his body, that my son will, in his lifetime, settle the said estate, or so much thereof as he shall stand seised of at his death," on the testator's daughter. Lord Hardwicke held that there was no trust, inasmuch as the words "so much as he shall die seised of" gave the son absolute ownership, the other expressions amounting to nothing more than words of recommendation, leaving it to the discretion of the party whether he would comply with the request or not. Obviously the amount of property which the son might have at his death was in the highest degree uncertain.[3] Following *Bland* v. *Bland*,[2] a succession of eighteenth century cases held words of recommendation inoperative on account of uncertainty of objects or property. Thus, in *Cunliffe* v. *Cunliffe*,[4] the testator recommended his son and heir to give and devise all his property on the son's death to the testator's other son. This was exactly covered by *Bland* v. *Bland*, and it was held that there was no trust. Similarly, no trust arose in *Le Maitre* v. *Bannister*,[5] where a testatrix gave her fortune to Captain Roach, and if he should die without issue, she recommended to him that he should do justice to A and her

Eighteenth-century practice.

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[1] (1739), 1 Atk. 469. [2] (1745), 2 Cox 349.

[3] This view of Lord Hardwicke's decision is adopted in *Pierson* v. *Garnet* (1786), 2 Bro.C.C. 38.

[4] (1770), Amb. 686. [5] (1770), Prec. Ch. 201 n.

children if he should think them worthy. On precisely the same lines were decided *Harland* v. *Trigg*,[1] wherein Philip Harland devised certain leasehold estates to "my brother John Harland for ever, hoping he will continue them in the family"; *Wynne* v. *Hawkins*,[2] which concerned a devise to the testator's wife "not doubting she shall give what shall be left to my grandchildren," and *Sprange* v. *Barnard*.[3] In none of these cases was the property delimited with sufficient clarity to raise a trust.

The line of distinction in these late eighteenth century cases between what was a sufficiently clear delimitation of property and objects to create a trust, and what was not, was obviously a fine one, for in *Nowlan* v. *Nelligan*[4]Ia testator gave all his real estate to his wife, and said: "i make no provision expressly for my dear daughter, knowng that it is my dear wife's happiness as well as mine to see her comfortably provided for; but in case of death happening to my said wife, in that case I hereby request my friends, Stables and Hunter, to take care of and manage to the best advantage, for my lovely daughter Harriet Nowlan, all I may die possessed of." It was held that this raised a binding trust, so that the wife received a life-estate, and subject to that, the "lovely daughter" was entitled to the property absolutely.

Pierson v. *Garnet*,[5] was decided in the same way. Property was left by the testator to P. Pierson, "and it is my dying request to the said P. Pierson that if he shall die without issue living at his death, that the said P. Pierson do dispose of what fortune he shall receive under this my will and among the descendants of Ann Coppinger, in such manner and proportions as he shall think proper." This might seem to be exactly covered by *Cunliffe* v. *Cunliffe*,[6] but the Court gave full consideration to the earlier case, and then refused to follow it. From this point in the history of the Court of Chancery until the fourth decade of the nineteenth century the older rules relating to certainty of property and objects were relaxed, and very few expressions of desire on the part of a testator failed for uncertainty. A good example of the later practice is *Paul* v. *Compton*[7]—

Relaxation of the older rules.

John Woodfield left his property to trustees, to pay the interest to the wife for life, and thereafter to transfer and

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[1] (1782), 1 Bro. C.C. 142.
[2] (1782), 1 Bro. C.C. 179.
[3] (1789), 2 Bro. C.C. 585.
[4] (1785), 1 Bro.C.C. 489.
[5] (1786), 2 Bro.C.C. 38.
[6] *Supra.*
[7] (1803), 8 Ves. 375.

apply the capital to such of my children as my wife by will shall direct, "hereby expressly recommending to my said wife, in case my said daughter shall have any more children, to provide in my will for such child." This was held to create a binding trust, and Lord Eldon observed[1]—

> The cases upon words of recommendation have, I take it, now settled this rule: whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects, with regard to whom such terms are used, are certain, the words are considered imperative and create a trust. But the questions are very different, whether the words of a will create a trust or a power. If the words are imperative, they do not create a power, but they execute themselves by the force of the terms.

It will be apparent that Lord Eldon has here omitted to mention certainty of property, but that he regarded this, too, as an essential is shown by his observations in *Cary* v. *Cary*.[2] At the same time, certainty of property at the turn of the century seems to have meant little more than the possibility of identifying some property (not infrequently the whole of the testator's property) with the trust. In this respect the eighteenth-century test for certainty of property was more precise than Lord Eldon's, and approaches the modern test without being identical with it.

A further change in the nineteenth century.

About midway through the nineteenth century the attitude of the Courts changed. They came to the conclusion that in treating the wish of the testator as a command, they were in danger of defeating his true intention, which in many cases was obviously to leave the donee some discretion to decide whether to give effect to the testator's wish or not. Thus, in *Shaw* v. *Lawless*,[3] there was a positive direction to trustees of a will to employ an individual and to allow him a salary. Lord St. Leonards held that this constituted a trust for the individual, but the House of Lords reversed his decision, being obviously of the opinion that in many of the older cases the Court had probably gone beyond the testator's true intention, and had really supplemented his will. Following this decision, many of the older phrases, such as "will," "wish," "desire," "hope and desire," "in full confidence," and many others received fresh consideration. Thus, in *Mussoorie Bank* v. *Raynor*,[4] the Privy Council held that where a testator left all his property to his widow "feeling confident that she will act justly to our children in dividing the same

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[1] At p. 380.
[2] (1804), 2 Sch. & Lef. 173.
[3] (1838), 5 Cl. & Fin. 129.
[4] (1882), 7 App. Cas. 321.

when no longer required by her," there was no trust for the children (in contrast with the decision in *Nowlan* v. *Nelligan*[1] a century earlier), and Sir A. Hobhouse observed—

The doctrine will not be extended.

> Their Lordships are of opinion that the current of decisions, now prevalent for many years in the Court of Chancery, shows that the doctrine of precatory trusts is not to be extended.

A similar decision was given in *Re Adams and the Kensington Vestry*,[2] where the testator gave his property—

> To the absolute use of his wife, her heirs, executors, administrators and assigns, in full confidence that she would do what was right as to the disposal thereof, between her children, either in the lifetime or by will after her decease.

These decisions have been followed, with slight variations of fact, in *Hill* v. *Hill*,[3] *Re Williams*,[4] *Re Hanbury*,[5] *Re Conolly*,[6] and *Re Hill*.[7]

The question is always one of intent.

In all these cases, if the facts are carefully examined, it will be observed that the testator did not intend finally to bind the donee, but to leave him some freedom of judgment in the ultimate disposition of the property. As Lindley, L.J., observed in *Re Hamilton*[8]—

> You must take the will which you have to construe, and see what it means, and if you come to the conclusion that no trust is intended, you say so, although previous Judges have said the contrary on wills more or less similar to the one which you have to construe.

From these and similar observations it is clear that precatory words may still raise a trust in a proper case. The question is, what is a proper case? Some light is thrown upon this question by *Re Diggles*.[9] In that case the testatrix left all her property to her daughter, adding: "And it is my desire that she allows to Anne Gregory an annuity of £25 during her life." There was also a similar intimation that Anne Gregory ought to have the use of all the testator's furniture that the daughter did not wish to retain. The daughter paid the annuity for several years, and then discontinued it, and the Court of Appeal held that the testator's words raised no trust for Anne Gregory. It might seem that here at any rate it was intended to impose a binding obligation on the daughter, but the learned Lords Justices gave very careful consideration to the words and to the circumstances. Cotton,

[1] (1785), 1 Bro. C.C. 489.
[2] (1884), 27 Ch.D. 394.
[3] [1897] 1 Q.B. 483.
[4] [1897] 2 Ch. 12.
[5] [1904] 1 Ch. 415.
[6] [1910] 1 Ch. 219.
[7] [1923] 2 Ch. 259.
[8] [1895] 2 Ch. 370.
[9] (1888), 39 Ch.D. 253.

L.J., referred to his judgment in *Re Adams and the Kensington Vestry*,[1] and saw no reason for applying a different rule to these facts. Fry, L.J., pointed out that in ordinary parlance "that she allows" would imply some element of discretion to the daughter. The mind reverts naturally to a son's "allowance," although the verb is derived from the French *allouer*, which is less discretionary, and the nearest equivalent to which is "grant." If the statement were therefore paraphrased "I desire that she grant," the element of discretion has practically disappeared. The learned Lord Justice makes what is undoubtedly a stronger point when he observes that the effect of construing the desire as a trust would be to impose a trust upon the entire estate to satisfy an annuity of £25—

> No fund is directed to be set apart, so if there be a trust it is a trust affecting the whole property. If so, the residuary legatee could not sell a bedstead or give away a ring without committing a breach of trust.

The modern rule.

These last observations point the way to what seems to be the modern position. Since no technical words are required to constitute a trust, it is clear that precatory words may constitute one, if intention is sufficiently clearly expressed. The testator's intention is therefore the paramount consideration, and the Court must discover it. It will not presume he intended to create a trust. That must be proved. If any element of discretion is left to the donee, there is no trust. Furthermore, if it is not clear (as it was not in *Re Diggles*)[2] whether a discretion is, in fact, left to the donee, the effect of construing the gift as a trust must be considered. There must always be certainty of property and objects (as was pointed out, even in the day of the older decisions, in *Cary* v. *Cary*);[3] and certainty of property means that the property specifically appropriated to the trust must be clearly indicated. The Court will be reluctant to construe an expression as creating a trust which has the effect of making the whole or the bulk of the property trust property to satisfy a comparatively trifling beneficial interest. If it does so, it is because the expression used eliminates the element of discretion completely. Finally, the object of a trust, where precatory words are used, must also be defined with clarity. Any such expressions as "for the benefit of my children,"[4] or "for division among charities,"[5] or "to do

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[1] *Supra.* [2] (1888), 39 Ch.D. 253. [3] (1804), 2 Sch. & Lef. 173.
[4] *Re Adams and the Kensington Vestry, supra.* [5] *Re Conolly, supra.*

what is right as regards my relations,"[1] do not at the present time constitute any trust unless, in addition to clearly indicated property, the words of grant are unambiguously imperative, and not precatory.[2]

In a later case, *Re Barton*,[3] a testatrix bequeathed her residuary estate to Cardinal Bourne, or the person who for the time being should discharge the administrative duties of Ordinary of the Roman Catholic Diocese of Westminster at the date of her death, adding: "It being my wish that the same should be dealt with in such manner as I shall by a separate memorandum or letter direct." No such memorandum or letter ever existed, so that there could be no question of a valid secret trust. The testator's next-of-kin therefore contended that the words of desire raised a good precatory trust, and, therefore, since Cardinal Bourne held as trustee, with no objects declared, he held in trust for the next-of-kin. Reliance was placed upon the word "direct" as indicating that an enforceable trust was intended. Farwell, J., held, however, that, upon the true construction of the will, there was no trust, but only a wish with no binding legal consequence. In actual fact, Cardinal Bourne wished to employ the whole of the residue for the benefit of the Roman Catholic Diocese of Westminster, and thus the object of an intended secret trust which was never completed was indirectly fulfilled.

In *Re Williams*,[4] there was an example of a precatory trust that was also regarded as having some of the characteristics of a secret trust. A wife gave all her property to her husband absolutely, "knowing that he is fully aware of my intention that at my death all my possessions are to be sold and given to All Souls' Church, Hastings." Testatrix also added: "I am aware of my husband's intention to bestow his possessions at his death on the same All Souls' Church." The wife died, and the husband took the property, following which the husband died intestate. The Parochial Church Council claimed the wife's property, whilst the

[1] *Re Hill*, [1923] 2 Ch. 259.

[2] Where the words of grant are unambiguous, the Court is not deterred by difficulties of construction in giving effect to the gift. In *Re Bridgen*, [1938] Ch. 205, an unmarried testatrix directed: "In case of my immediate decease, I wish E. and H. to take possession of all my possessions to be held in trust after my death, and divided equally amongst all my relations." At her death she had no parents living and no brothers. Her four sisters had predeceased her, but issue of the four sisters survived. The Court held that the estate should be divided in equal shares *per capita* amongst the persons who would have been entitled under the Administration of Estates Act, 1925, if testatrix had died intestate.

[3] (1932), 48 T.L.R. 205.

[4] [1933] 1 Ch. 244.

husband's next-of-kin claimed that he had taken the property absolutely, and free from any trust. Farwell, J., held that the husband knew of the contents of his wife's will, and by his silence had agreed to carry out her wishes. Accordingly, an equitable obligation to carry out the wife's wishes arose, and this obligation the Court, following *McCormick* v. *Grogan*[1] and *Re Gardner*,[2] would enforce.[3] The learned judge observed—

> Mr. Potts (for the next-of-kin) has laid great stress on the fact that the property is given to the husband absolutely, and he says that the mere expression of a belief that the husband will give effect to her wishes is insufficient to impose a trust. That argument would have much force if the latter part of the will had been omitted, but I find in the latter part of the will that the testatrix expresses herself in these most emphatic words: "I charge my dear husband to pay £20 free of legacy duty to my dear friend Mrs. Adelaide Francis Shoesmith." Now, the words "I charge my husband to pay the sum," are wholly inconsistent with the mere expression of a wish. That, in itself, must, in my judgment, create a trust, which could be enforced if the husband failed to pay to the lady her legacy. If that be the true effect of those words, they largely discount the effect of the word "absolutely" in the gift to the husband, because, although the husband is given the property in terms absolutely, he is charged to do something with a portion of it. In my judgment, those words alone are sufficient to indicate that the word "absolutely" cannot be read without some qualification, and this, coupled with the proviso in the last part of the will, that in the event of her husband not being able to carry out her wishes to benefit the defendant council, then someone else is to take up the burden, and to see that the property goes as she desires, seems to me to point very strongly to the conclusion that the true effect of the testator's will is not an absolute gift to her husband subject to a mere expression of desire as to how the property is to go after his death, but that it is a gift to the husband for life, with a trust to dispose of the property after his death in the way she has indicated.

In this part of the judgment the learned judge addresses himself to the interpretation of the precatory words. A little earlier[4] he considers the effect of the husband's acquiescence in his wife's intention, expressed at the time when she made her will—

> If the evidence establishes that there was a promise or an agreement by the husband that the property when he

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[1] (1869), L.R. 4 H.L. 82. [2] [1920] 2 Ch. 523.

[3] See also *French* v. *French*, [1902] 1 I.R. 230. In *Re Falkiner*, [1924] 1 Ch. 88 there was an express direction that no trust should arise.

[4] At p. 252.

> got it should go at his death to the defendant council, then in my judgment he took the property burdened with that obligation, and it is an obligation which the Court will enforce, and since, in my judgment, the evidence does establish the existence of such a promise, it follows that, the husband having died without having taken steps to ensure that his promise should be carried out, this Court will now give effect to that promise by declaring that the property of the wife to which the husband was entitled under the will belongs to the Parochial Council in question.

It would therefore appear that the Court would now recognise and enforce a trust created by precatory words provided that the subject-matter and objects of the trust were indicated with clarity, and also provided that the Court was of opinion, from the general context of the words employed, that these were intended to govern the conduct of the trustee.[1]

2. CERTAINTY OF SUBJECT-MATTER.

Uncertainty of property.

It has already been observed in *Re Diggles*[2] that uncertainty of subject-matter will adversely affect the creation of a trust. Another example is *Curtis* v. *Rippon*,[3] wherein the testator appointed his wife guardian of his children, and then left all his property to her, "trusting that she would, in fear of God, and in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the poor." The Court held that the wife was absolutely entitled to the property, since no specific parts of it had been appropriated for the children, the Church, or the poor. Other examples of trusts held to be invalid for the same reason are: a direction "to remember" certain persons,[4] and a direction "to reward very old servants and tenants according to their deserts,"[5] and a gift to a wife absolutely, followed by a direction that "as to such parts of my estate as she shall not have sold or disposed of," that it should be held in trust for certain persons.[6]

3. CERTAINTY OF OBJECTS.

Uncertainty of objects.

Certainty of objects implies two things: (1) that the recipients should be identifiable with certainty; (2) that the

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[1] As to the effect of the words: "I particularly desire" in a will, see *Re Green*, [1935] W.N. 151.

[2] (1888), 39 Ch.D. 253. [3] (1820), 5 Madd. 434.

[4] *Bardswell* v. *Bardswell* (1838), 9 Sim. 319.

[5] *Knight* v. *Knight* (1840), 3 Beav. 148.

[6] *Re Jones* [1898] 1 Ch. 438 cf. *Re Sanford*, [1901] 1 Ch. 939.

interests they take should be discoverable. It is on this latter ground that gifts for "charitable or philanthropic" purposes fail. So, where personal property was given to A with the hope "that he would continue it in the family," [1] it was held that the objects of the bounty were too uncertain for the trust to be enforced. Again, in *Meredith* v. *Heneage*,[2] real and personal estate were together given to A, in full confidence that she would devise the whole of the estate to "such of the heirs of the testator's father as she might think best deserved a preference." The Court was unable to determine whether heirs, or next-of-kin, or both were intended, and the trust was not enforced; whilst in *Sale* v. *Moore*,[3] A was recommended to "consider the testator's *relations*," and the Court experienced difficulty in discovering how the relations were to be ascertained, so that no binding trust arose.

4. EFFECT OF UNCERTAINTY.

Destination of the property.

It is important to notice that the effects of uncertainty in respect of one of the three essentials of a trust is not always the same. Where the words of a trust are too uncertain, then no intention to create a trust at all has been established, and the donee, therefore, takes the property beneficially. Similarly, the donee takes beneficially where the trust fails for uncertainty of property, since although it may have been clear in this case that there was an intention to create a trust, there is no property to which it can be annexed. In the third case, however, assuming that the other two requisites are fulfilled, the donee holds on trust for the settlor, residuary legatee or devisee, or intestate successor.

B. ILLUSORY TRUSTS

Where there is an intention to benefit creditors.

An existing debt is always a sufficient consideration to make an assurance of property either as satisfaction or as a security irrevocable, and so, where, in *Mackinnon* v. *Stewart*, [4] a debtor, in pursuance of an agreement with three creditors, conveyed, in a deed to which he himself, the three creditors, and also all his other creditors, were parties, all his real and personal property to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to benefit the creditors, as *cestuis que trustent*, and the deed was irrevocable, even though the creditors other than the

[1] *Harland* v. *Trigg* (1782), 1 Bro.C.C. 142. [2] (1824), 1 Sim. 542.
[3] (1827), 1 Sim. 534. [4] (1850). 1 Sim. (N.S.) 76.

three were not in communication with the debtor, nor did they execute the deed, until some time afterwards.

No intention to confer a beneficial interest on creditors, but an intention to adopt a convenient mode of procedure only.

It may be, however, that in dispositions of this type, the intention for entering into the deed is not to benefit the creditors, but simply to adopt some procedure which is convenient to the debtor. If this is established, then it may be that there is no trust, and the creditors therefore cannot sue as beneficiaries. In such a case it is said that an *illusory trust* has been established. The attitude of the Court to this type of transaction is explained as follows by Turner, V.C., in *Smith* v. *Hurst*[1]—

> The motive of the party executing the deed may have been either to benefit his creditors or to promote his own convenience; and the Court has therefore to examine into the circumstances for the purpose of ascertaining what was the true purpose of the deed; and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred, because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself.

Thus, if the debtor has merely entered into the deed because he was going abroad, the trustees are mere mandatories to pay the settlor's debts, and the creditors may not sue on the deed.[2] Further, the debtor may at any time revoke or vary the trusts, or call for a reconveyance of the property. This position, however, is dependent upon the circumstance that the execution of the trust has not been communicated to the creditor, for if it has been so communicated, and the creditor has refrained from proceeding against the debtor, on the faith of the deed, then it becomes irrevocable.

The leading case upon this type of trust is *Garrard* v. *Lauderdale*.[3] The Duke of York, by an indenture between himself of the first part, trustees of the second part, and the creditors of the third part, conveyed property to trustees for the creditors, and when the deed was executed, a circular giving notice of it was sent to all the creditors. It was contended for the creditors that in consequence of the circular, they had forborne to sue, but the Court held that receipt of the circular was not admitted, and, even if received, the creditors had not refrained from suing, as they had proved in an administrative suit against the Duke's estate.

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[1] (1852), 10 Hare. 30.
[2] *Cornthwaite* v. *Frith* (1851), 4 De G. & Sm. 552.
[3] (1830), 3 Sim. 1; 2 Russ. & M. 451.

Accordingly, the creditors could not enforce the trust. This view was upheld on appeal, and Brougham, L.C., observed—

> I take the real nature of the deed to be, not so much a conveyance vesting a trust in A for the benefit of creditors of the grantor, but rather it may be likened to an arrangement made by the debtor for his own personal convenience and accommodation, for the payment of his own debts in an order prescribed by himself, over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it—they waive no right of action and are not executing parties to it.

Whilst the effect of this case has several times been discussed,[1] its authority is unquestioned, although it has been held several times since that where the property is assigned to a trustee, and the trustee communicates the trust to certain creditors, who express their approval of the arrangement, the trust may not be revoked, for the creditors are relying on the deed rather than upon their ordinary rights of recourse against their debtor.[2] Furthermore, the Courts have declared that the doctrine under which trusts of this type may be revocable has been carried far enough, and will not now be extended.[3]

Where the trust is irrevocable.

Certain specific instances of irrevocable trusts in favour of creditors must now be added—

1. Where the settlor provides that the provisions in favour of creditors are to come into operation only after his death, the trust is irrevocable, for revocability belongs to the settlor alone, and the beneficiaries under his will may not claim it.[4]

2. Where a creditor is a party to the deed and executes it, it is now clear that the deed is irrevocable *as regards him*.[5]

3. If the deed is communicated to any creditors, who assent to the deed, and are thereby induced to some forbearance in respect of their claims which they would not otherwise have exercised, the deed cannot be revoked against them.[6] Mere communication alone is not sufficient. The creditors must have placed reliance in the document, and must either have acted on it, or have forborne to sue in consequence of it.

4. If, from the conduct of the settlor and the language of

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[1] *Browne* v. *Cavendish* (1844), 7 Ir. Eq. Rep. 369.
[2] *Harland* v. *Binks* (1850), 15 Q.B.D. 713.
[3] *Wilding* v. *Richards* (1845), 1 Coll. 655.
[4] *Synnot* v. *Simpson* (1854), 5 H.L.C. 121; *Re FitzGerald's Settlement* (1887), 37 Ch.D. 18.
[5] *Mackinnon* v. *Stewart*, *supra*.
[6] *Acton* v. *Woodgate* (1833), 2 My. & K. 493.

the instrument, it appears that the settlor intended to create a true trust, then it is irrevocable, and enforceable by the creditors.[1]

The Deeds of Arrangement Act, 1914.

The importance of the question of revocability of trusts for creditors has been much diminished by the provisions of several recent statutes. By the Deeds of Arrangement Act, 1914, Sects. 1, 2, 4 (amended by the Administration of Justice Act, 1925, Sect. 22), an assignment for the benefit of creditors generally, or (where the debtor is insolvent) in favour of any three or more of them, is void, unless registered within seven days at the Board of Trade; and further, if the assignment is for the benefit of creditors generally, it is also void unless it is agreed to by a majority in number and value of creditors within twenty-one days of registration. If the assignment is not made for the benefit of creditors generally, it may amount to a fraudulent preference.

Assignments of land for the benefit of creditors.

Furthermore, a deed of arrangement affecting *land* for the benefit of creditors must also be registered at the Land Registry under the Land Charges Act, 1925, Sects. 8–9; otherwise it is void against a purchaser for value.

General assignment is an act of bankruptcy.

Further, even if the deed is registered, if it comprises the whole (or substantially the whole) of the debtor's property, and is for the benefit of creditors generally, it constitutes an act of bankruptcy, and may be used to support a bankruptcy petition by a person who has not assented to or acquiesced in it (Bankruptcy Act, 1914, Sect. 1), or it could be so used by an assenting creditor, if the deed became void under the Deeds of Arrangement Act.[2] Finally, if the debtor is adjudicated bankrupt on a petition presented within three months of the execution of the deed, it is void against the trustee in bankruptcy; so that the trustee of the deed cannot safely act upon it before that time, unless all the creditors have assented, or are debarred from presenting a petition.[3]

Where under a trust for creditors, there is a surplus after all debts and expenses are paid, the destination of the surplus is usually the settlor, or his personal representative; but where the property was assigned *absolutely* to the trustees the creditors in this case are entitled to the surplus.[4] The question is exclusively one of the settlor's intention, as demonstrated in the instrument.

[1] *New's Trustee* v. *Hunting*, [1897] 2 Q.B. 19; [1899] A.C. 419.
[2] See Deeds of Arrangement Act, 1914, Sect. 24, and Bankruptcy Act, 1914, Sect. 4.
[3] Bankruptcy Act, 1914, Sect. 45.
[4] *Cooke* v. *Smith*, [1891] A.C. 297.

CHAPTER VII

TRUSTS WHICH ARE VOID, VOIDABLE, OR UNENFORCEABLE

A. ILLEGAL TRUSTS

(a) TRUSTS FOR ILLEGITIMATE CHILDREN.

Trusts in favour of illegitimate children, begotten, but not born, good.

No trust which infringes the law or violates the principles of public policy, including the rules of morality, which the Courts have evolved, is valid. It is absolutely void. Thus, in *Medworth* v. *Pope*,[1] a settlement of property upon illegitimate children to be thereafter born was held void, the beneficial interest resulting to the testator. If, however, the settlor creates a trust in favour of illegitimate children begotten but not then born, the trust is good, for the immorality is past.[2] The whole question was exhaustively reviewed by the Lord Chancellor and the Lords Justices of Appeal in *Occleston* v. *Fullalove*,[3] where a testator, *by his will*, gave property to his trustees for the benefit of three of his illegitimate children, two being born at the date of the will, and the third, at that time *en ventre sa mere*, being born before the testator's death. The Court held (Lord Selborne dissenting) that all three children were entitled to benefit under the will. In the course of his judgment, James, L.J., observed—

> Assume the will to be thus written: "Whereas I am living in a connection unhallowed and illicit with A B, and there have been, and in the course of nature it is probable there may be, offspring born of her body, the fruit of our intercourse, and I do not think it right such offspring should be a burden upon the community, and I desire that, notwithstanding the misfortune of their birth, they should not be left without sufficient means for their maintenance, education, and future welfare. Now therefore I do make the following provision for all children born of her body while she is cohabiting with me." Now what is there against morality, or religion or public policy in such a provision? . . .
>
> I must say that to me it appears a shocking and a perverse thing to say that religion, morality, or public policy compels the law to throw difficulties in the way of a man who is desirous of not committing posthumously a great crime, and who is desirous of making for his misconduct the best reparation he can both to society and to the unfortunate beings of whose existence he is the author. What would be the natural —I would almost say the legitimate—feelings of a wretched

If the trust is by will, it is a reparation to the children and to society.

[1] (1859), 27 Beav. 71. [2] *Ebbern* v. *Fowler*, [1909] 1 Ch. 578.
[3] (1874), 9 Ch. App. 147. And see *Re Bolton* (1886), 31 Ch. D. 542.

being towards the law by which, and towards that religion and morality in the name of which he finds himself deprived of the provision which his sire had carefully tried to make for him, and in consequence made, it may be, the inmate of a Union workhouse, or a pariah outcast infesting the public streets?

If the gift requires or implies the continuance of wrong-doing it is bad. But this does not apply to a will which is an expression of the testator's last intentions.

In considering this question, it is necessary to have accurately in one's mind the distinction in legal effect between motive and consideration or inducement. The law does not pretend to deal with the motive to testamentary bounty, or any other bounty. A testator's bounty is absolute and without control as to motive. . . . But, if there be any inducement to do wrong, the law can and does deal with it. If there be any covenant for a *turpis causa*, the covenant is void. If there be an illicit condition precedent or subsequent to a gift, it either avoids the gift, or becomes itself void. If the gift requires or implies the continuation of wrongdoing, that is in substance a condition of the gift and falls within the rule as to conditions. But how can that apply to an instrument like a will, with reference to gifts taking effect at the death in favour of persons then in existence? The will takes effect because, whenever dated or executed, it is the expression of the testator's last will, of the intentions he has at the last moment of his existence. His keeping and leaving it unrevoked is, in point of law, and generally in fact, a continued adhesion to it. And, if a man could, by an attested signature, made the moment before his death, make validly such a disposition as that now in question before us (of which there can be no doubt), how does any question of public policy intervene to affect the disposition which he has made some days, or months, or years beforehand, to be produced and take effect as his last intention upon, and not until, the moment of his death?

Where the provision is for the illegitimate children of a particular person, only those in existence at the testator's death take.

It is clear, however, that where there is a provision in the will for illegitimate children of a particular person, only those may take who are in existence at the testator's death, otherwise the bequest would operate as an inducement to continue a course of immoral conduct.[1] If the gift is to the illegitimate children of a woman, this will include all her children who are in existence at the testator's death. If they are described as being her children by a particular man, those children will take who have acquired the reputation of being the children of those parents (e.g. through acknowledgment by the father);[2] but the Court, on grounds of public policy, will not itself direct an inquiry into the paternity of a bastard. For this reason, where a testator makes provision for the illegitimate children of a male without reference to the mother (even though that male is

[1] *Occleston* v. *Fullalove*, *supra*; *Crook* v. *Hill* (1876), 3 Ch.D. 773; *Re Harrison*, [1894] 1 Ch. 561.

[2] *Re Hastie's Trusts* (1887), 35 Ch.D. 728; *Re Loveland*, [1906] 1 Ch. 542.

himself) only those illegitimate children can take who are in existence *at the date of the will.* Illegitimate children born subsequently, even though acknowledged by him before his death cannot take.[1]

The meaning of "child" depends upon the testator's intention.

A further point which requires consideration in this connexion is whether a trust by will in favour of "children" includes illegitimate children. *Prima facie,* the words child, son, or issue, when employed in a will mean legitimate child, son, or issue.[2] However, where upon the true construction of a will it appears that the testator used the term, not with its *prima facie* meaning, but to include illegitimate children, the Court will give effect to that intention.[3] The question is always, what was the testator's real intention? Thus, if the testator mentions a child by name, and that child is illegitimate, there being no legitimate child of that name, the child benefits.[4] In *Re Jackson,*[5] the testatrix devised and bequeathed all her property to her trustees on trust for sale for the benefit of her two brothers, two sisters, and "my nephew Arthur Murphy" in equal shares. Actually, the testatrix had three nephews of that name, two of whom were legitimate sons of testatrix's brothers, and the third was an illegitimate son of a sister, who had married a legitimate niece of the testatrix. Farwell, J., held that if there had been only two legitimate nephews it would have been, in the circumstances, impossible to tell which was intended—

> And had the matter ended there I must have found that there was an intestacy on the ground of uncertainty. But the matter does not end there, because the evidence shows that one of the testatrix's sisters had a son born out of wedlock, who was also named Arthur Murphy, and that he was in close relationship with the testatrix, and had married one of her nieces, and therefore in some sense may be called a nephew. Now, in the circumstances what course ought I to adopt? If there had been one legitimate nephew only named Arthur Murphy, that nephew would undoubtedly have been entitled to the legacy, and no evidence at all as to the existence of the illegitimate nephew would have been admissible. . . . But as soon as it appears from the evidence that there is more than one nephew who exactly answers the description in the will, the Court is entitled to have evidence of the state of the family generally, and to be put to some extent in the position of the testatrix in order to ascertain not what the testatrix intended but what the words which she has used were intended to mean. Now, if from that evidence it appears that neither of the legitimate nephews was

[1] *Re Bolton* (1886), 31 Ch.D. 542; *Re Du Bochet,* [1901] 2 Ch. 441.
[2] *Wilkinson* v. *Adam* (1813), 1 V. & B., at p. 462.
[3] *Re Hastie's Trusts* (1887), 35 Ch.D. 728; *Re Horner* (1888), 37 Ch.D. 695.
[4] *Re Fish,* [1894] 2 Ch. 83. [5] [1933] 1 Ch. 237.

intended by the words which the testatrix has used, but that the words were used to describe the illegitimate nephew, I am, I think, bound to give effect to that evidence as a whole. I cannot disregard it, and if it convinces me that the testatrix intended by the words "my nephew Arthur Murphy" her illegitimate nephew, in my judgment I must give effect to it.

Cases in which an illegitimate child takes by implication.

Where the testator excepts an illegitimate child from his bounty, and there are several illegitimate children, the inference is that with this exception the testator intended to benefit both legitimate and illegitimate children.[1] Again, if there is a gift to *children* of a deceased person, and there is only one legitimate child, illegitimate children are held to be included,[2] but this implication does not arise if the gift is to the children of a *living* person, for the testator may have been contemplating the birth of other legitimate children.[3] Furthermore, it follows, from the principles already enunciated, that if it appears that the testator was referring simply to children in existence at the date of the will, and at this time there are illegitimate children only, these will take.[4] At the same time, it must always be remembered that if, upon the construction of the will, it appears that the testator intended to benefit his legitimate children only, the fact that there are no legitimate children who may benefit will not of itself admit illegitimate children.[5]

(*b*) OTHER UNLAWFUL PURPOSES.

When a separation deed is enforceable.

A great many other dispositions by way of trust have been held void as contrary to law or public policy. Amongst them have been a trust with a condition inserted with the object of separating parent or child, or of depriving a father of his parental duties,[6] and trusts subversive of religion and morality.[7] Again, a trust which takes effect upon the separation of husband and wife *in the future* is void,[8] but not one which contemplates an immediate separation which has already been decided upon as inevitable.[9] If no separation in fact occurs, the trust is completely void,

[1] *Re Lowe* (1895), 61 L.J. Ch. 415. [2] *Re Embury*, [1914] W.N. 220.
[3] *Re Yearwood* (1877), 5 Ch.D. 545.
[4] *Re Haseldine* (1886), 31 Ch.D. 511; *Re Deakin*, [1894] 3 Ch. 565.
[5] *Godfrey* v. *Davis* (1801), 6 Ves. 43; *Kenebel* v. *Scrafton* (1802), 2 East 530; *Dorin* v. *Dorin* (1875), L.R. 7 H.L. 568; *Re Brown* (1891), 63 L.T. 159; *Re Pearce*, [1914] 1 Ch. 254.
[6] *Re Sandbrook*, [1912] 2 Ch. 471.
[7] See *De Themmines* v. *De Bonneval* (1828), 5 Russ. 288; *Thornton* v. *Howe* (1862), 31 Beav. 14; and *Bowman* v. *The Secular Society*, [1917] A.C. 406.
[8] *Westmeath* v. *Westmeath* (1830), 1 Dow & Cl. 519; *Re Moore* (1888), 39 Ch.D. 116.
[9] *Wilson* v. *Wilson* (1848), 1 H.L.C. 538; (1854), 5 H.L.C. 40.

the consideration having wholly failed.[1] Furthermore, although it is not a condition precedent to the enjoyment of benefits under a separation deed that the beneficiary should not commit adultery, yet if the deed is, in fact, drawn for the purpose of facilitating adultery it is on that account void.[2] It may be that a separation deed includes some covenants which are good, and others which are illegal. If this is so, and they are separable, the Court will enforce those which are valid and ignore the rest.[3] Finally, a trust for a wife, to last so long as she remains deserted by her husband has been held valid,[4] and in *Re Hope Johnstone*,[5] a trust in favour of a wife to last only so long as she lived with her husband, with a gift over to the husband if she ceased to do so, was held good.

Trusts in total restraint of marriage are void.

Trusts in total restraint of marriage are void, and this is so even where the object of the clause is not apparently to impose a total restraint, if in fact that is the probable result.[6] A prohibition, restricting marriage with a particular person is, however, valid, and so is a restriction preventing a second marriage.[7] Again, if the gift is expressed to last until marriage, this is good, for here the interest is not divested by way of penalty on the happening of the event; it merely reaches its logical conclusion under conditions which are not in any way affected with illegality.[8] Furthermore, a gift with a condition attached requiring the consent of some person to a marriage is also good[9].

Trusts in consideration of immoral relations.

One class of trusts which is void as contrary to public policy is that class which contemplates immoral relations. Where the benefit is given in consideration of future immoral association, the trust is void,[10] but a trust where the parties contemplate future immoral connexion, but this is not the consideration, is valid.[11]

Trusts wherein the beneficiary is restrained from alienating his interest.

A trust to procure a peerage[12] is void, and an unreasonable trust, such as a trust for the purpose of blocking up the

[1] *Bindley* v. *Mulloney* (1869), L.R. 7 Eq. 343.
[2] *Evans* v. *Carrington* (1860), 2 De G.F. & J. 481; *Fearon* v. *Aylesford* (1885), 14 Q.B.D. 792; *Wasteneys* v. *Wasteneys*, [1900] A.C. 446.
[3] *Merryweather* v. *Jones* (1864), 4 Giff. 509; *Hamilton* v. *Hector* (1871), 6 Ch. App. 701.
[4] *Re Charleton*, [1911] W.N. 54. [5] [1904] 1 Ch. 470.
[6] *Lloyd* v. *Lloyd* (1852), 2 Sim. (N.S.) 255.
[7] *Allen* v. *Jackson* (1875), 1 Ch.D. 399.
[8] *Morley* v. *Rennoldson* (1843), 2 Hare 570.
[9] *Re Whiting's Settlement*, [1905] 1 Ch. 96.
[10] *Gray* v. *Mathias* (1800), 5 Ves. 286; *Hall* v. *Palmer* (1844), 3 Har. 532; *Re Vallance* (1884), 26 Ch.D. 353.
[11] *Re Wootton Isaacson* (1904), 21 T.L.R. 89.
[12] *Kingston* v. *Lady E. Pierepont* (1681), 1 Vern. 5. Cf. *Egerton* v. *Brownlow* (1853), 4 H.L. C. 1.

windows of a house for twenty years, has also been held void.[1] Furthermore, trusts having as their object the restraint of the beneficiary from alienating his interest are void, except those in favour of married women in instruments dated prior to 1st January, 1936,[2] and then the restraint is only operative during coverture.[3] Nevertheless, if the restraint in respect of a male would be valid in the country where the trust was created, it will be enforced.[4]

A trust to give a company fictitious credit illegal.

It remains now to consider the effect of creating a trust for an illegal purpose. The first rule is that the Court will not assist anyone who seeks to obtain any benefit under the instrument, nor will it assist the settlor to obtain his property back if it has been transferred, for the maxim is: "*Melior est conditio possidentis.*" Thus, in *Re Great Berlin Steamboat Co.*,[5] X placed money to the credit of a company, for the purpose of giving the company a fictitious credit, with the understanding that the company was to hold the money on trust for him. Some of the money was withdrawn with the consent of X, and then the company was wound up. The Court of Appeal held that they would offer no assistance to X for the purpose of recovering the balance of his money. Cotton, L.J., said—

Money transferred under it cannot be recovered.

> The appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers, if inquiries are made, a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by a private arrangement it was not to be their money. Then it was said that a person who parts with his property for a fraudulent purpose may repudiate the bargain and get his property back. I give no opinion whether in November last the appellant could have done so. He did not attempt to do so, but waited till the event happened which put an end to the purpose for which the money was deposited. He left the money at the bank as long as the possibility of carrying out the illegal purpose continued, and it is now too late for him to reclaim it. Assuming that he had the right to repudiate the bargain he has, in my opinion, lost that right.

The concluding observations in this judgment point to an important qualification to the general rule. It is clear that when the illegal purpose has been fulfilled, the Court will

[1] *Brown* v. *Burdett* (1882), 21 Ch.D. 667.
[2] Law Reform (Married Women and Tortfeasors) Act, 1935, Sect. 2, and see as to wills, Sect. 2 (3) (c).
[3] See *Re Dugdale* (1888), 38 Ch.D. 176.
[4] *Re Fitzgerald*, [1904] 1 Ch. 573. [5] (1884), 26 Ch.D. 616.

not assist the settlor to recover his money,[1] for the parties are *in pari delicto*; but if the illegal purpose is still executory, and the property has been transferred, the Court will assist the settlor to recover it, if the illegal purpose has been abandoned, for the consequences of refusing to aid him might be to ensure that the illegal purpose will be carried out.[2] Further, if the parties are not *in pari delicto*, the Court may assist that person who is not tainted with illegality. Thus, Knight Bruce, L.J., observed in *Reynell* v. *Sprye*[3]—

If the illegal purpose is still executory, the money may be recovered however.

> Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him.[4]

So also if the parties are not *in pari delicto*.

A second exception arises from a distinction noticed by Lord Eldon, and based upon the same fact that the parties are not *in pari delicto*, that if the person who is claiming relief is not the fraudulent party himself, but a person claiming through him, who is no party to the fraud, he may obtain relief, for "there is a great difference between the case of an heir coming to be relieved against the act of his ancestor in fraud of the law, and of a man coming upon his own act under such circumstances."[5]

A person who is no party to the illegality may also recover.

If a person has obtained money as agent or trustee of another, he cannot set up the fact that the money has arisen out of an illegal transaction as an excuse for their retention by him, and the same rule applies to an executor,[6] whose testator has obtained the money illegally.[7]

An agent may not set up illegality of the transaction as an excuse for retention

(*c*) TOTAL FAILURE OF OBJECTS OF SETTLEMENT.

Where there is a total failure of the objects the trust will be cancelled. Thus, in *Essery* v. *Cowlard*,[8] a settlement entered into in consideration of an intended marriage between A and B provided that stock, transferred to the trustees by B, should be held by them on trust for the benefit of A and B, and for the issue of the marriage. The marriage was never celebrated, but the parties cohabited, and there

A trust in contemplation of a marriage which is not celebrated may be set aside.

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[1] *Sykes* v. *Beadon* (1879), 11 Ch.D. 170; *Kearly* v. *Thomson* (1890), 24 Q.B.D. 742; *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496.

[2] *Birch* v. *Blagrave* (1755), 1 Amb. 264; *Ayerst* v. *Jenkins* (1873), 16 Eq. 275, 283.

[3] (1852), 1 De G.M. & G. 660, 679.

[4] See also *Osborne* v. *Williams* (1811), 18 Ves. 379; *Consolidated Exploration Co.* v. *Musgrave*, [1900] 1 Ch. 37.

[5] Per Lord Eldon in *Muckleston* v. *Brown* (1801), 6 Ves. 52, 68.

[6] *Farmer* v. *Russell* (1798), 1 B. & P. 296; *De Mattos* v. *Benjamin* (1894), 70 L.T. 560.

[7] *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328 at p. 339.

[8] (1884), 26 Ch.D. 191.

were three children. In 1883 A and B brought an action for the trust to be set aside, and this was done.[1]

Cases in which a marriage settlement is established, and the marriage actually occurs, but is afterwards declared void, following a decree of nullity require special treatment. Where a father made a settlement upon trusts for himself until his son's intended marriage, and then for the son, and the son married, so that he enjoyed the interest, and afterwards the marriage was declared null on the grounds of the son's impotence, it was held that the settlor continued always to be entitled to the interests in the settlement which were specified to continue until the marriage.[2] In *Re Eaves*[3] testator gave property by his will to his widow during widowhood, and thereafter to his son absolutely. He appointed his widow and his son to be his executors and trustees. The widow remarried, and the property was transferred to the son absolutely. Some years later, the widow's second marriage was pronounced null and void, not having been consummated, and the wife claimed from the son the income of the property. Farwell, J., held that the nullity decree restored the widow's interest from the moment when it had ceased on her remarriage, but he also held that since she had accepted the position for a number of years, during which the marriage could have been avoided, it was too late to claim the property back from the son.

B. TRUSTS VOIDABLE THROUGH MISTAKE, MISREPRESENTATION, DURESS, FRAUD, OR UNDUE INFLUENCE

The remedy is not confined to voluntary settlements.

Where a trust has been established as a result of mistake, fraud, undue influence, misrepresentation, or duress, it may be set aside altogether, or in some cases rectified, provided that the settlor has not acquiesced after the impairment of consent has ceased to exist, or after he was aware of the legal effect of it. Settlements which are cancelled on this ground are usually voluntary, but it would appear that the remedy is not confined to voluntary settlements, although the Court will resort to it more readily in such cases than if valuable consideration has been given. Where the settlor asks for relief on one of these grounds, the onus of proof is on him, except where the settlement itself is so absurd that no sane

[1] See also *Bond* v. *Walford* (1886), 32 Ch.D. 238, where the contract to marry was broken off, and the property was restored.

[2] *Re Wombell's Settlement*, [1922] 2 Ch. 298, following *Chapman* v. *Bradley* (1863), 4 De G.J. & S. 91, and *Re Garnett* (1905), 74 L.J. Ch. 570.

[3] [1939] W.N. 284.

person would knowingly have entered into it, or where the beneficiary occupied a fiduciary position as regards the settlor, in which case there is a presumption of undue influence.[1]

1. DURESS.

There are very few reported cases relating to duress as a ground for avoiding a trust, but in *Ayliffe* v. *Murray*,[2] the Court set aside a deed that had been obtained by two executors and trustees of a will, after the application of pressure upon a beneficiary under it; whilst in *Barrett* v. *Hartley*,[3] Sir J. Stuart, V.C., laid down the general principle—

> In order to render a contract, or an agreement of any kind, binding, there must be the assent of both parties to the agreement under such circumstances as to show that there was no pressure—no influence existing of a kind to make an assent an imperfect assent, or an assent which, under other circumstances, would have been refused. If the assent to the agreement is not an assent given under such circumstances as that both parties are on an equal footing, and the agreement one perfectly free from any influence or pressure, in the eye of this Court, it is not an assent sufficient to constitute an agreement.

The assent must be given under such circumstances that both parties are on an equal footing.

2. MISTAKE.

Mistake vitiates consent, and generally gives rise to a right to have the whole instrument cancelled.

In *Forshaw* v. *Welsby*,[4] a person, apparently at the point of death, executed a voluntary settlement, which was never read to him, of which he understood nothing, and from which the solicitor purposely omitted a power of revocation, since he knew the settlor's changeable character. The settlement was cancelled when the settlor recovered. Similarly, deeds have frequently been set aside when they have been signed without sufficient explanation, so that their purport is misunderstood.[5] In *Baker* v. *Monk*,[6] an infirm and ignorant woman executed a conveyance *for valuable consideration*, without comprehending its nature, and it was set aside, Sir J. Romilly, M.R., observing that the only ground on which such a transaction could be supported would be the fact that the purchaser had given full value.

Rectification where the settlor's attention was not called to an unusual limitation.

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[1] *Allcard* v. *Skinner* (1887), 36 Ch.D. 145.
[2] (1740), 2 Atk. 58.
[3] (1866), L.R. 2 Eq. 789.
[4] (1860), 30 Beav. 243.
[5] *Proctor* v. *Robinson* (1866), 35 Beav. 329; *Price* v. *Price* (1852), 1 De G.M. & G. 308; *Anderson* v. *Elsworth* (1861), 3 Giff. 154.
[6] (1864), 33 Beav. 419.

In the cases mentioned above, the mistake affected the very nature of the transaction undertaken.

In certain circumstances, however, which will be considered together later, relating to voluntary settlements, and to those made in contemplation of marriage, the Court will order the instrument to be rectified. Thus, in *James* v. *Couchman*,[1] a settlor assigned property to his trustees for himself for life, remainder to his wife, remainder to his issue, and in default of issue to his *paternal* next of kin. It was proved that the settlor's attention was not called to the last, rather unusual, limitation, and that he did not understand the effect of it. North, J., declined to cancel the whole settlement, but allowed it to be rectified so as to give the settlor a power of appointment in default of issue.

In *Fowler* v. *Fowler*[2] Lord Chelmsford L.C. said—

> It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written instrument.

A settlement executed on the point of death, and not understood, cancelled.

In *Banks* v. *Ripley*[3] a marriage settlement was rectified, when it appeared that a life interest had been given to the children of the marriage where a gift of the fee simple had been intended.

3. INNOCENT MISREPRESENTATION.

A good illustration of this ground of invalidity is *Re Glubb*[4], wherein a charitable institution innocently represented that it was in a position to obtain a large legacy, if other people would subscribe other sums before a specified date. Actually, the date on which the legacy could have been obtained had passed, and the Court of Appeal held that there was a duty cast upon the committee of the institution to return the sums so obtained.

4. FRAUD.

The fraud is by an intending beneficiary upon the settlor.

The type of fraud here considered as invalidating settlements is that by an intending beneficiary upon the settlor.

[1] (1885), 29 Ch.D. 212.
[2] (1859), 4 De G. & J. 250.
[3] [1940] Ch. 719.
[4] [1900] 1 Ch. 355.

The position where the settlor himself makes a settlement with a fraudulent object has already been considered, whilst trusts in fraud of the settlor's creditors will be considered later, since they have been made the subject of special legislation.

There is considerable difficulty in defining what constitutes fraud in Equity, sufficient to entitle a settlor to claim that the settlement be set aside. It is certainly much wider than fraud at Common Law, and, in fact, in Equity, duress, fraud, and undue influence shade off into one another, whilst it is also clear that some types of fraud may create such a mistake in the mind of the settlor as to give rise to cancellation on that ground. "Fraud," it has been said, "is infinite, and were a Court of Equity once to lay down rules how far they would go, and no farther, in extending their relief against it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." [1] The same point was considered by Lord Haldane in *Nocton* v. *Ashburton*, [2] where the Lord Chancellor observed—

Fraud in Equity is wider than fraud at Common Law.

> When fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that the actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is not moral fraud in the ordinary sense, but breach of that sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of Conscience.

It is plain, therefore, that precise rules regulating the occasions when the Court will set aside a settlement on the ground of fraud cannot be formulated, but the case of *Baker* v. *Monk*, [3] where mistake was induced by fraud, may serve as an illustration. It is clear, however, that the Court will only set aside settlements on the ground of fraud, or on any of the grounds now under consideration, where there can be

[1] Parke: *History of Chancery*, p. 508.
[2] [1914] A.C. 932.
[3] *Supra*, p. 99.

restitutio in integrum. Thus, in *Johnston* v. *Johnston,*[1] a settlor had married a woman who had represented that she had divorced her first husband for adultery and cruelty. In fact, he had divorced her for adultery. When the settlor discovered this, he sought to have the settlement cancelled, but the Court of Appeal held that since the consideration for it was marriage, which the settlor could not return, the settlement could not in consequence be set aside.

Fraudulent misrepresentation inducing marriage.

5. UNDUE INFLUENCE.

The jurisdiction exercised by Courts of Equity, observed Lord Chelmsford in *Tate* v. *Williamson*[2], over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles have been long settled, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

The extent of exercise of equitable jurisdiction in respect of undue influence cannot be exactly defined.

It will be observed later that the application of this principle to the relation of trustee and beneficiary accounts for one great class of constructive trusts. The principle, however, applies to many other relations, and wherever undue influence is established, the party adversely affected by it may, subject to certain conditions, claim to have the settlement set aside. A good illustration of the wide nature of this jurisdiction, which is exercised without reference to the motives of the stronger party, is afforded by *Dutton* v. *Thompson.*[3] There a testator left one twenty-seventh share of his estate to X, with power to his trustees to withhold the shares until X attained the age of twenty-five, which he did in January, 1882. One of the trustees (the uncle of X), persuaded X, after an initial refusal, and in view of the well-known improvident habits of X, to convey his share to A and B on trust for such persons and generally in such manner as X should with the consent of his trustees, A and B, by any deed appoint, the granting of consent to be in the absolute discretion of A and B; and, subject to the power of appointment, in trust to pay the income to the plaintiff

Avoidance of a settlement on the grounds of undue influence does not depend upon a wrongful motive of the stronger party.

[1] (1884), 52 L.T. 76.
[2] (1866), 2 Ch.App. 55.
[3] (1885), 23 Ch.D. 278.

during his life, and after his death to his children and other issue; with other trusts in default of issue. This settlement was executed by X in July, 1881, and in the following year X sought to have it set aside on the ground of undue influence. The Court of Appeal held that X's claim succeeded, and Jessel, M.R., said—

The Court does not set aside settlements solely on the ground that some clauses are not proper.

> The deed cannot stand; on the ground that the plaintiff did not understand it. I emphatically disagree with the ground on which some judges have set aside voluntary settlements, namely, that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a Court of Justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute, on the ground that it contains clauses which are not proper. No doubt if the settlement were shown to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, that is an argument that he did not understand the settlement. But in no other way would it be a reason for setting it aside. In this case I cannot avoid seeing that the defendant acted throughout for what he considered to be for the benefit of the plaintiff. But the question we have before us is not whether the defendant's motives were good or bad, but whether the plaintiff understood the deed. The evidence convinces me that everyone thought the plaintiff was very weak-minded. I do not mean to say that they thought he was sufficiently so to make him a lunatic, but they thought he had not that full enjoyment of his faculties which average persons have. In the whole transaction they treated him as a baby, and not as a man of average intellect. It is clear that having that opinion the defendant ought to have taken unusual precautions to guard the settlement from any suspicion.

But it will set it aside if the settlor does not understand its terms.

> Now, when we look at the evidence given by the plaintiff, it is clear from his answers that there was much that he did not understand, and in particular he did not know the amount of the property to be settled. In my opinion there was a special obligation on the part of the defendant to see that the plaintiff understood the settlement, which obligation he has not discharged. People who prepare settlements for their nephews must show clearly that their nephews understood them when they executed them. In the case of this settlement I am clearly of opinion that the plaintiff did not understand half of it.

Where the confidential relationship has been shown to exist, Equity imposes upon the beneficiary (who is also the stronger party) the task of showing, if the transaction is to stand, that no undue influence in fact existed, that the

settlor had the opportunity of taking outside advice, and that he thoroughly understood the nature and extent of the disposition he was making. In the words of Bowen, L.J., in *Allcard* v. *Skinner*[1]—

> It is plain that equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under or in consequence of such influence, unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his or her worldly position, and exercising an independent will about it. This is not a limitation placed on the action of the donor; it is a fetter placed on the conscience of the recipient of the gift, and one which arises out of public policy and fair play.

Uncle and nephew.

Transactions between various classes of persons, where one is clearly in a dominating position in respect of the other, and that dominating person derives a benefit out of that relation, are said to raise a presumption of undue influence, which the beneficiary must disprove if he can, before he may enjoy the benefit he has gained. It has already been pointed out that uncle and nephew, where the nephew has no nearer relation to look to for guidance and protection, is one instance of such a relation.

Parent and child.

A fortiori, such a presumption exists where a child confers a benefit on his parent. Thus, a daughter, shortly after attaining her majority, made over her property to her father, without consideration; the father was called upon to show that the daughter had acted as a free agent, and had enjoyed independent advice.[2] However, in such cases it may be that the child is genuinely prompted by natural love and affection to make a settlement in favour of the parent, and, if this is so, it may be allowed to stand, even though the child in fact did not have independent advice.[3] The rule just stated does not extend to the ordinary resettlement of family estates when an eldest son attains his majority,[4] unless the father obtains an unduly large advantage thereby.[5]

Step parent and stepchild.

In *Powell* v. *Powell*,[6] a young woman was induced by her stepmother to execute a settlement by which she shared her property with the children of that stepmother. She had enjoyed the advice of a solicitor, who in fact was acting for the other parties, and although he had expressed

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[1] (1887), 36 Ch.D. 145.
[2] *Bainbrigge* v. *Browne* (1881), 18 Ch.D. 188.
[3] *Re Coomber*, [1911] 1 Ch. 174; *Inche, Noriah* v. *Shaik Allie Bin Omar*, [1929] A.C. 127.
[4] *Hoblyn* v. *Hoblyn* (1889), 41 Ch.D. 200.
[5] *Hoghton* v. *Hoghton* (1852), 15 Beav. 278. [6] [1900] 1 Ch. 243.

disapproval, he had gone no further. It was held that the settlement must be set aside.

In *Lancashire Loans Co.* v. *Black* [1] a young married woman, who had separated from her husband, and had then returned home to live with her mother, was induced by the mother to mortgage certain property to a moneylender to secure debts owing by the mother to the moneylender. The Court of Appeal held that whilst there was no presumption of undue influence in such a case, it might be established as a fact, and being established, the transactions must be set aside.

No presumption in the case of husband and wife.

There is no presumption of undue influence where a wife settles her property upon her husband, [2] although it may still be established as a fact, in a particular instance. [3] But it would seem that a presumption exists where a woman makes a gift to her fiancé.[4]

Guardian and ward.

In transactions between guardian and ward, the same presumption arises while the relationship subsists, and, further, if the transaction occurs shortly after the guardianship has ended,[5] but this does not prevent a ward from giving the guardian a reasonable gift. [6] Exactly the same principles apply between an individual and his religious adviser [7] or his medical adviser,[8] "spiritualists" [9] and similar persons. Not all fiduciary relationships give rise to the presumption; the relationship must be of such a kind as suggests undue influence.[10]

Religious, medical, and other advisers.

Solicitor and client

Transactions between solicitor and client, whereby the solicitor himself, or his wife,[11] or some near relation,[12] obtains a benefit are, however, clearly within the rule. In this case it is almost a positive rule that the client cannot make a gift to his solicitor [13] which cannot be set aside by the client, if he chooses. It is certainly essential to show that when the gift was made the client actually enjoyed independent advice, and that the fiduciary relation did not then exist.[14]

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[1] [1934] 1 K.B. 380.
[2] *Howes* v. *Bishop*, [1909] 2 K.B. 390; *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129.
[3] *Bank of Montreal* v. *Stuart*, [1911] A.C. 120; *Chaplin* v. *Brammall*, [1908] 1 K.B. 233.
[4] *Re Lloyds Bank, Bomze* v. *Bomze*, [1931] 1 Ch. 289.
[5] *Pierse* v. *Waring* (1745), 1 P.Wms. 121 n.
[6] *Hatch* v. *Hatch* (1804), 9 Ves. 292.
[7] *Huguenin* v. *Baseley* (1807), 14 Ves. 273; *Allcard* v. *Skinner*, *supra*.
[8] *Dent* v. *Bennett* (1838), 4 My. & Cr. 269; *Radcliffe* v. *Price* (1902), 18 T.L.R. 466.
[9] *Lyon* v. *Home* (1868), L.R. 6 Eq. 655.
[10] *Re Coomber*, [1911] 1 Ch. 723.
[11] *Liles* v. *Terry*, [1895] 2 Q.B. 679. [12] *Willis* v. *Barron*, [1902] A.C. 271.
[13] *Tomson* v. *Judge* (1855), 3 Drew. 306.
[14] *Re Haslam and Hier-Evans*, [1902] 1 Ch. 765; *Wright* v. *Carter*, [1903] 1 Ch. 27.

In *Demerara Bauxite Co.* v. *Hubbard*,[1] a solicitor held an option on his client's property, which he exercised, the client taking no independent advice. The Court held that the transaction could not stand unless the purchaser fully disclosed all the information he possessed concerning the transaction, that it was entirely fair, and as advantageous as if the purchaser had been a stranger. Furthermore, even though in fact the relationship of solicitor and client had terminated, the rule still applied so long as the confidence arising out of that relation could be presumed to exist. This was a sale, and not a gift. The same rule also extends to purchases by a solicitor from his client's trustee in bankruptcy[2] and to sales by a solicitor, either beneficially or as trustee, to his client.[3]

Undue influence may also be proved as a fact.

Besides those relationships in which undue influence is presumed, there are also many cases in which undue influence has been proved, in fact, to have existed. Thus, in *Smith* v. *Kay*,[4] a young man had incurred very extensive debts through association with an older man, who had acquired great influence over him, encouraging him to a course of extravagance. The House of Lords held that the young man was entitled to relief, and Lord Kingsdown observed—

> The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Equity most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies specially to those cases for this reason, and for this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are proved extrinsically, the rules of reason and common sense and the technical rules of a Court of Equity are just as applicable in the one case as the other.

Improvident settlements made by ignorant persons.

For this reason contracts and settlements of an improvident nature made by poor and ignorant persons, acting without independent advice, have frequently been set aside, unless fair and reasonable,[5] and so have catching bargains with persons expecting to benefit under the will of a person still alive.[6] In this connexion it should be noticed that Sect. 174

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[1] [1923] A.C. 673. [2] *Luddy's Trustee* v. *Peard* (1886), 33 Ch.D. 500.
[3] *Moody* v. *Cox & Hatt*, [1917] 2 Ch. 71.
[4] (1859), 7 H.L.C. 749, and see *Lancashire Loans Co.* v. *Black*, [1934] 1 K.B. 380, and p. 100, *ante*.
[5] *How* v. *Weldon* (1754), 2 Ves. Sen. 516. *Re Fry, Fry* v. *Lane* (1888), 40 Ch.D. 312.
[6] *Shelly* v. *Nash* (1818), 3 Madd. 232; *Perfect* v. *Lane* (1861), 3 De G.F. & J. 369.

of the Law of Property Act, 1925 (re-enacting the Sales of Reversions Act, 1867), provides that no acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest, including an expectancy or possibility, in real and personal property, for money or money's worth, shall be set aside merely on the ground of undervalue, but the section does not affect the jurisdiction of the Court to set aside or modify unconscionable bargains.

Neglect to act after knowledge of the whole circumstances exists may be construed as acquiescence.

Where undue influence is presumed, or established, the settlement is voidable. If, however, the settlor, knowing the whole circumstances of the transaction, and enjoying the opportunity for independent advice, does not choose to set it aside promptly, he may be held to have acquiesced in it, if he seeks to set it aside at some later period. Thus, in *Mitchell* v. *Homfray*,[1] a patient made a gift to her medical adviser, and decided to abide by it after that relationship had ceased. It was held by the Court of Appeal that she could not subsequently change her mind and set aside the gift. A similar position arose in *Turner* v. *Collins*,[2] where a son made a settlement in favour of his step-brothers and step-sisters, under his father's influence, and then raised no objection for several years. In *Allcard* v. *Skinner*,[3] the plaintiff sought to recover property which she had transferred to a sisterhood under the undue influence of the mother-superior. She had left the sisterhood in 1879, but she did not seek to recover her property until 1885, and the Court of Appeal held that it was too late for her to recover her property.

Bowen, L.J., said on this point—

> If her delay has been so long as reasonably to induce the recipient to think, and to act upon the belief, that the gift is to lie where it has been laid, then by estoppel, the donor of the gift would be prevented from revoking it. But I do not base my decision here upon the ground of estoppel. During five years she has had the opportunity of reflecting upon what she has done. She was surrounded by persons perfectly competent to give her proper advice. I draw unhesitatingly the inference that she did, in or shortly after 1879, consider this matter and determine not to interfere with her previous disposition. Was she aware of her rights at the time she formed this resolution? I think that she must have been, having regard to the character of the advisers who surrounded

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[1] (1882), 8 Q.B.D. 587. In this case it was not clear that the donor had ever intended to change her mind. She simply elected to abide by the gift after the influence had ceased, and her executors were unable to set it aside after her death.

[2] (1871), 7 Ch. App. 329.

[3] (1887), 36 Ch.D. 145.

> her; but it is enough if she was aware that she might have rights, and deliberately determined not to act upon them.

It is important to notice that there is no presumption of undue influence between testator and legatee whatever their relationship, although in any particular case, it may be established as a fact.

C. TRUSTS WHICH ARE VOID AS CONTRAVENING THE RULES RELATING TO PERPETUITIES OR ACCUMULATIONS

(*a*) PERPETUITIES.

It has always been the policy of English landowners to seek to tie up their land, so as to make it descend inalienably in the family as far as the rules of law permit; whilst the general policy of English law, and of the English Courts, has been in favour of the free disposition of land. In furtherance of this policy, the Common Law judges developed the rule relating to perpetuities, to which the legislature added at a later date the rule relating to accumulations. Equity was always bound by the latter rule, and applied also the former, so that, except where the interest is enjoyed under a trust for charitable purposes, it must not violate the rules relating to perpetuities and accumulations, for as Lord Guildford observed in *The Duke of Norfolk's Case*[1]—

> If in equity you could come nearer to a perpetuity than the rules of Common Law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of the Court, but would be destructive to the Commonwealth.

This rule may be defined as follows: The vesting of real or personal property may not be postponed for a period longer than a life or lives in being, or for twenty-one years after the cesser of such life, with the addition, in necessary cases, of the period of gestation.[2] The remoteness against which the rule operates relates to the vesting of interests in property, and not to their duration or determination, which may occur at any period of time, no matter how remote.[3] At the same time, the Court has to consider possible events, and not those which occurred or were probable, no judicial notice being apparently taken of the period at which a

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[1] (1678), 1 Vern. 164.

[2] *Cadell* v. *Palmer* (1833), 1 Cl. & Fin. 372; *Re Wilmer's Trusts*, [1903] 2 Ch. 411.

[3] *Wainwright* v. *Miller*, [1897] 2 Ch. 255; *Re Chardon*, [1928] Ch. 464.

woman ceases to be capable of child-bearing.[1] Where the settlor does not mention a life or lives which may be taken as a standard of measurement of the vesting period, he is restricted to a period of twenty-one years.

The rule relating to perpetuities was amended by the property legislation of 1925, with a view to clarifying various points in relation to it, and modifying the effect of some of the older decisions. The Law of Property Act, 1925, Sect. 161, provides—

> (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person, is hereby abolished, but without prejudice to any other rule relating to perpetuities.
>
> (2) This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

The rule in *Whitby* v. *Mitchell* is now abolished.

The purpose of this section is to abolish what has been variously termed the rule against double possibilities and the rule in *Whitby* v. *Mitchell*,[2] although as Farwell, J., pointed out in *Re Nash*,[3] the rule is older than that case, and "seems due to Lord Coke's unfortunate predilection for scholastic logic." The rule provided that there could be no possibility limited on a possibility, so that it invalidated gifts to an unborn person followed by a remainder to the unborn child of that unborn person, whether this infringed any other rule against perpetuities or not. The position before 1926 was very concisely stated by Lopes, L.J., in *Whitby* v. *Mitchell*[4]—

> It is said that, although this old rule did once exist, it has been superseded by the rule against perpetuities. No direct authority has been cited for any such contention, nor can any such authority be found. Counsel have referred to certain *dicta* by text-writers of more or less doubtful import; but as early as the year 1789 that old rule was recognised as existing by Lord Kenyon in *Hay* v. *Earl of Coventry*,[5] and again in 1852 it was recognised, in *Monypenny* v. *Dering*,[6] by so great an authority as Lord St. Leonards. Thus, in 1789 and 1852, that rule was recognised—that is to say, at a time when the rule against perpetuities was in existence.
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> I have no doubt, therefore, that these are two independent and co-existing rules. The rule against perpetuities originated and was rendered necessary on account of the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection.

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[1] *Re Wood*, [1894] 3 Ch. 381; *Re Wilmer's Trusts*, *supra*.
[2] (1890), 42 Ch.D. 494; 44 Ch.D. 85.
[3] [1910] 1 Ch. 1.
[4] (1890), 44 Ch.D. 85, 92.
[5] (1789), 3 T.R. 83.
[6] (1852), 2 De G. M. & G. 145, 170.

The *cy près* doctrine is also abolished in respect of estates tail.

The first of these rules no longer exists since 1925; whilst the *cy près* doctrine has been abolished by Sect. 130 (1) of the Law of Property Act, 1925, in relation to estates tail. The effect of the *cy près* doctrine was that where before 1926 real property was devised to an unborn person for life, with remainder to his children in tail, or in tail male, either successively, or as tenants in common with cross remainders, the unborn person took an estate in tail, or in tail male in consequence. Since 1925, however, no entailed interest can be limited by expressions which before 1926 would not have created an entailed interest in a deed not executory, and the doctrine had no application to such deeds.

For the purpose of resolving doubts it is expressly provided by the Law of Property Act, 1925, Sect. 162, that the modern rule against perpetuities does not apply to certain specified rights of entry, etc. But it applies to other rights of entry upon freeholds,[1] though not to a right of re-entry in a lease.[2]

In addition, the rule has never been applied so as to defeat a limitation following on an estate tail, since such limitations have always been liable to destruction upon the barring of the entail.

Moreover, by Sect. 163 (1)—

Where the vesting of an interest is postponed until the beneficiary attains an age exceeding twenty-one, the interest may be saved.

> Where, in a will, settlement, or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument.

Of course, if the vesting is made to depend on some event before the age stated in the instrument, the section does not affect such prior vesting.[3]

What is implied by vesting.

It has been stated that the rule makes it essential that gifts should vest within the perpetuity period. In order

[1] *Re Hollis Hospital and Hague*, [1899] 2 Ch. 540.
[2] *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532.
[3] Law of Property Act, 1925, Sect. 163 (3).

that a gift should vest, three conditions must be satisfied. In the first place the beneficiaries themselves must be ascertained. Secondly, the interests they will take must be determined; and, thirdly, if any conditions are annexed to the vesting of an interest, these also must be satisfied. These points are of special importance in dealing with "class gifts," e.g. "to the children of A." Where there is a gift to a class, the members of the whole class, and the interests they take must be ascertained within the perpetuity period. If they are not, the whole gift fails, even though some of the members have fulfilled the conditions within the period. "A gift is said to be to a 'class' of persons when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is that the vice of remoteness affects the class as a whole if it may affect an unascertained number of its members." [1]

Trusts for sale are within the perpetuity rule.

The Law of Property Act does not affect the position reached in prior decisions that a trust for sale, or a power of sale, must be limited within the period of the perpetuity rule to be valid.[2] Nevertheless, if the trust is invalid, it is regarded as machinery which has become inoperative, and this does not affect the interests of the beneficiaries, provided that these vest within the permitted period,[3] but if any of the beneficiaries have died, the property will pass to their personal representatives, as the trust or power has failed.[4]

Thus in *Re Daveron*[5] there was a trust for sale of freeholds at the end of forty-nine years, and a gift of the proceeds to a class ascertainable within the limits of the rule against perpetuities. Chitty, J., held that the gift was good; but, the trust for sale being void, the beneficiaries took the property as realty.

Any life in being may be selected.

Any life in being may be selected, and it has been the practice to select any of the issue of Queen Victoria, living at the time when the instrument comes into operation. This practice is not now generally followed owing to difficulty of proof. Issue of George V may be taken, since if it is in fact impracticable to discover when the selected life ended,

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[1] Per Lord Selborne in *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, 723

[2] *Goodier* v. *Edmunds* (No. 2), [1893] 3 Ch. 455. *Re Wood*, [1894] 3 Ch. 381; *Re Bewick*, [1911] 1 Ch. 116.

[3] *Re Daveron*, [1893] 3 Ch. 421; *Goodier* v. *Johnson* (1881), 18 Ch.D. 441.

[4] *Goodier* v. *Edmunds* (No. 2), *supra*.

[5] *Supra*.

the trust would be void. Thus, in *Re Moore*,[1] the settlor selected the survivors of all persons then living.[2]

Effect of a limitation contravening the Rule.

Where a limitation infringes the perpetuity rule, not only is the limitation itself void, but all others dependent on it are also void. In such a case, the interests, if created by deed, will revert to the settlor, and in the case of a will, to the residuary legatee or devisee, or if there is no residuary legatee or devisee, or the lapsed interest is itself created in respect of residue, then to the intestate successor. But a limitation otherwise valid is not void merely because it follows a limitation void for perpetuity; it will not fail unless it is *dependent* upon the former limitation.[3]

Position of charitable trusts.

The position of charitable trusts with reference to the rule relating to perpetuities deserves special consideration. It is sometimes stated that the rule does not apply to charitable trusts,[4] but actually this is too wide. In addition to the rule relating to perpetuities, there is another principle of English law that real property shall not be limited in such a way that it becomes inalienable. It has been said that the effect of bestowing real property in fee upon a charitable organisation capable of holding it is that it becomes practically inalienable.[5] Notwithstanding this, however, English law encourages such gifts, although were property given to a private individual with the intention of creating similar consequences the gift would be void. As a further concession, English law also permits dispositions to one charitable body, with a gift over upon the occurrence of a contingency to another charitable body, and the contingency may occur at any time, however remote.[6] On the other hand, a gift to charitable uses by way of executory limitation, if it is one which might by possibility not vest within the perpetuity period, is void, like any other executory limitation.[7]

(*b*) ACCUMULATIONS.

It was discovered that, even within the limits of the perpetuity rule, accumulations of *income* could be directed by

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[1] [1901] 1 Ch. 936. [2] See also *Re Villar*, [1929] 1 Ch. 243.

[3] *Re Canning's Will Trusts*, [1936] 1 Ch. 309; *Re Coleman, Public Trustee v. Coleman*, [1936] 1 Ch. 528.

[4] *Thomson* v. *Shakespear* (1859), 1 De G.F. & J. 399, 407; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381, 394.

[5] *Re Dutton* (1879), 4 Exch. D. 54. But see Settled Land Act, 1925, Sect. 29.

[6] *Christ's Hospital* v. *Grainger* (1849), 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252.

[7] *Chamberlayne* v. *Brockett* (1873), 8 Ch. App. 206, 211.

settlors so as to deprive their children of the enjoyment of property in favour of remoter issue. Thus, in *Thellusson* v. *Woodford*,[1] Mr. Thellusson directed that his property, real and personal, should be accumulated during the lives of all his sons and grandsons born in his lifetime or living at his death, for the benefit of those of his issue who, at the expiration of that period, should be within the class of heirs male of his sons. This postponed the vesting of the property and its income for about seventy or eighty years, but the disposition was within the perpetuity period. This particular will was upheld, but in 1800 the Thellusson Act was passed to prevent such dispositions in the future, by restricting accumulations within a reasonable period.[2]

Accumulations are now dealt with in Sects. 164–6 of the Law of Property Act, 1925, which provide—

> 164—(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:
>
> (*a*) the life of the grantor or settlor; or
>
> (*b*) a term of twenty-one years from the death of the grantor, settlor, or testator; or
>
> (*c*) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor, or testator; or
>
> (*d*) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated.
>
> In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.
>
> (2) This section does not extend to any provision—
>
> (i) for payment of the debts of any grantor, settlor, testator, or other person;
>
> (ii) for raising portions for—
>
> (*a*) any child, children or remoter issue of any grantor, settlor, or testator; or
>
> (*b*) any child, children or remoter issue of a person taking any interest under any settlement or other

[1] (1798), 4 Ves. 227.

[2] Readers of Galsworthy's *Forsyte Saga* will recall Timothy Forsyte's will, and the comments of Soames Forsyte on it.

disposition directing the accumulations or to whom any interest is thereby limited;

(iii) respecting the accumulation of the produce of timber or wood;

and accordingly such provisions may be made as if no statutory restrictions or accumulation of income had been imposed.

(3) The restrictions imposed by this section apply to instruments made on or after the twenty-eighth day of July, eighteen hundred, but in the case of wills only where the testator was living and of testamentary capacity after the end of one year from that date.

165. Where accumulations of surplus income are made during a minority under any statutory power or under the general law, the period for which such accumulations are made is not (whether the trust was created or the accumulations were made before or after the commencement of this Act) to be taken into account in determining the periods for which accumulations are permitted to be made by the last preceding section, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made during such minority.

166—(1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only,[1] for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purposes of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land.

(3) This section applies to settlements and dispositions made after the twenty-seventh day of June, eighteen hundred and ninety-two.

One or two points arising out of these sections require further explanation.

The restrictions apply to implied as well as to express directions.

Subject to any qualification imposed by Sect. 165, the restrictions imposed in Sect. 164 extend to directions which are implied, as well as those which are express.[2] Whether such a direction is implied is one of construction, as for example where the disposition cannot be carried into effect without accumulation.[3]

As regards the periods from which a selection of the

[1] This includes a direction to accumulate for the purchase of "real estate." *Re Clutterbuck*, [1901] 2 Ch. 285.

[2] *Tench* v. *Cheese* (1855), 6 De G. M. & G. 453.

[3] *Mathews* v. *Keble* (1868), 3 Ch. App. 691.

The determination of the appropriate period is a question of construction.

accumulations period may be made, the determination of the appropriate period is a question of construction.[1] The first period is the one which would be *prima facie* adopted where the accumulation is directed by deed, unless some other is expressly indicated; and the second period of twenty-one years from the death is the one *prima facie* applying where the accumulation is directed by will, and no period is indicated.[2] The second period is reckoned from the death of the settlor, even if there is a direction that the accumulation is not to begin until some future time, as for example the death of an annuitant.[3] The distinction between the third and fourth periods is that, whereas under the third period, the person whose minority is selected must be in existence at the death of the settlor, and the period begins from that death, the fourth period contemplates the minorities of persons who need not necessarily be born in the testator's lifetime, and it does not necessarily begin on the death of the testator, for it may obviously extend to successive minorities of persons who, if of full age, would be entitled to the income,[4] but in this case, unless there is another beneficiary, during whose minority an accumulation is directed, there may not be any accumulation before the birth of that person who is unborn at the death of the testator.[5]

Effect of a direction to accumulate longer than the permitted period.

If there is a direction to accumulate for a period longer than is permitted, then if it is within the perpetuity rule, the direction is invalid only as to the excess over the permitted period, and the excess goes to those entitled as if such accumulation had not been directed,[6] but if the accumulation is directed for a period beyond the perpetuity rule it is entirely void.

Where a further accumulation is directed.

The effect of Sect. 165 is that if a testator directs income to be accumulated for twenty-one years from his death, and after this period terminates, it happens that the fund is held in trust for an infant, the accumulations during the twenty-one years' period, and the further accumulations during the minority of the infant (e.g. under the Trustee Act, 1925, Sect. 31) are both valid. This point was considered by Astbury, J., in *Re Maber*,[7] where he observed—

It may be that the section is difficult to construe, but in

[1] *Jagger* v. *Jagger* (1884), 25 Ch.D. 729.
[2] *Griffiths* v. *Vere* (1803), 9 Ves. 127; *Oddie* v. *Brown* (1859), 4 De G. & J. 179.
[3] *Webb* v. *Webb* (1840), 2 Beav. 493. [4] *Re Cattell*, [1914] 1 Ch. 177.
[5] *Ellis* v. *Maxwell* (1841), 3 Beav. 587, 596.
[6] *Griffiths* v. *Vere* (1803), 9 Ves. 127. *Re Jefferies*, [1936] 1 All E.R. 626; and see *Re Watt's Will Trusts*, [1936] 2 All. E.R. 1555.
[7] [1928] Ch. 88.

my view the first portion effects the following result—namely, that if during a minority income is accumulated under a statutory power, e.g. Sect. 43 of the Conveyancing Act, 1881, the period of that minority accumulation is not to be taken into account in ascertaining the allowable Thellusson period in the particular case. In other words, the years of minority accumulation are not to be reckoned in that period.

D. UNENFORCEABLE TRUSTS

Trusts where there are no human beneficiaries.

One important class of trusts of this type has already been considered, viz. trusts of land which lack the necessary evidence in writing. There is, however, another class. Where a settlor establishes a trust, not being a charitable trust, which has no human or corporate beneficiaries, provided that it does not infringe the rules against perpetuities, the trust is good, although there is no *cestui que trust* to enforce it. Thus, a trust by will for the maintenance of the testator's horses or dogs is valid.[1] So also is a direction to an executor to apply a certain sum for the erection of a tombstone in memory of someone already deceased.[2] In trusts of this kind, the direction may be made indirectly enforceable by the addition of a *gift over* on failure to comply with the direction, but the gift over must necessarily take effect within the perpetuity period for the trust to be good. Where in such trusts a surplus remains in the hands of the trustees after the purpose has been fulfilled, there is a resulting trust of it for the settlor, unless it appears that the trustee is to take beneficially.

Since in several other cases relating to non-charitable trusts, valid though unenforceable for lack of human beneficiaries, the question has been raised whether these trusts are not merely unenforceable, but void, it is necessary to consider them a little more closely. In *Pettingall* v. *Pettingall*,[3] the testator bequeathed £50 a year for the maintenance of a favourite black mare, the executor to be bound in honour to fulfil the request. The Court held that £50 a year should be paid to the executor during the life of the mare, on him giving an undertaking to maintain her properly. If there was any surplus, then, on the construction of the will, it was to be enjoyed by the executor beneficially; and if the mare was not properly attended to, any of the residuary legatees was at liberty to apply to the Court. This case will illustrate the

A trust for the maintenance of a horse.

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[1] *Re Dean* (1889), 41 Ch.D. 552.
[2] *Mussett* v. *Bingle*, [1876] W.N.170
[3] (1842), 11 L.J.Ch. 176. *Re Thompson*, [1934] 1 Ch. 342.

methods by which such a trust may become indirectly enforceable.

A trust for the purchase of an advowson.

In *Gott* v. *Nairne*,[1] the testator gave £12,000 to his trustees to invest either wholly or partially in the purchase of an advowson, and until the occurrence of a specified event, they were to present some fit person to the living, but subject thereto, the advowson was to be held in trust for A. Until purchase, the fund was to be accumulated with the income for twenty-one years, following which, if the advowson had not then been purchased, the whole of it was to belong to A. Similarly, if the event contemplated occurred before the advowson was purchased, or if a balance remained after purchase, the whole, or the remainder of the fund was to be given to A. In view of these facts, A claimed the transfer of the fund with accumulations, as a beneficiary absolutely entitled, under the rule in *Saunders* v. *Vautier*,[2] but the Court held that A was not a sole beneficiary absolutely entitled, since the trustees could buy an advowson, and present any person they thought fit. Again, in *D. Alton* v. *Gibbons*,[3] a testator gave his residuary estate to his executors "to dispose of it to my best spiritual advantage, as conscience and sense of duty may direct." When the effectuation of this purpose was opposed, the Court held that the purpose was one which the executors could fulfil, if they chose.

A trust for the maintenance of a grave valid for twenty-one years.

In *Pirbright* v. *Salwey*,[4] the testator gave £800 to the rector and churchwardens of a parish with a direction that the income should be applied, so long as the law permitted, in keeping up his grave, and decorating it with flowers. The Court held that the trust was not charitable, but was valid for twenty-one years. Similarly, in *Re Hooper*,[5] the testator directed that his trustees should hold a certain sum to devote the income "so far as they can legally do so" for the care of certain graves and monuments in certain cemeteries, and a tablet and window in a church, with a gift over to certain other persons. Since some of this was manifestly not charitable, the question was whether the trust was good in whole or in part, and Maugham, J., following *Pirbright* v. *Salwey*,[6] held that, as regards the tablet and window this was a valid charitable trust, and as regards the graves, this was not charitable, but good for a period of twenty-one years.

The decision in *Pirbright* v. *Salwey*,[6] and consequently the

[1] (1876), 3 Ch.D. 278.
[2] (1841), 4 Beav. 115.
[3] (1917), 1 Ir.R. 448
[4] [1896] W.N. 86.
[5] [1932] 1 Ch. 38.
[6] [1896] W.N. 86.

other cases similarly decided, have been criticised[1] on the ground that all trusts which are not charitable must have a *cestui que trust*. In support of this the following observations of Grant, M.R., in *Morice* v. *Bishop of Durham*[2] have been advanced.

> There can be no trust over which this Court will not assume control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance.

It would appear, however, that the Master of the Rolls is here adverting to one of what have been termed "the three certainties of a trust," and is saying no more than that, if the objects are uncertain, the trust fails. In all the cases cited the objects have been sufficiently definite, and, therefore, although the trusts have not been directly enforceable, they have been regarded as valid. One further point, however, that arises out of the cases of *Pirbright* v. *Salwey*[3] and *Re Hooper*[4] is that in them the expressions "so long as the law for the time being permits" and "so far as they legally can do so" were used. It is settled, however, that phrases such as these do not save dispositions which otherwise infringe the rules relating to perpetuities or accumulations where the trust is executed,[5] but if the trust is executory, that is to say if the testator indicates the objects, and leaves to his trustees the task of deciding upon the appropriate scheme for fulfilling them, then the Court will give effect to the testator's wishes so far as the law permits.[6] Apparently, therefore, the trusts in *Pirbright* v. *Salwey*[3] and in *Re Hooper*[7] were regarded as executory.

These trusts are valid, but unenforceable.

The general result of the cases therefore seems to be that trusts for non-human beneficiaries are entirely lawful, but the non-human object may not enjoy the benefit of the trust for

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[1] Gray, *Perpetuities* (Third Edition), Sects. 894–5, 898, 907.
[2] (1804), 9 Ves. 399, 404, 405.
[3] [1896] W.N. 86.
[4] [1932] 2 Ch. 38.
[5] *Re Portman*, [1921] 1 Ch. 187; *sub. nom. Portman* v. *Viscount Portman*, [1922] 2 A.C. 473.
[6] *Re Beresford Hope*, [1917] 1 Ch. 287. [7] [1932] 1 Ch. 38.

a period longer than the perpetuity period. Where a life is selected, it must be a human life, and not the life of an animal which may be the object of the trust. Where the settlor selects no human life, he is confined to the absolute period of twenty-one years.

A rather different kind of unenforceable trust arises where a settlor grants property to trustees to apply money at their absolute discretion for the benefit of a particular person. Here the beneficiary cannot enforce the payment of any part of the money, and the persons interested in the remainder are only entitled to whatever unapplied surplus that exists when the primary purpose has been fulfilled.[1] Such a trust is also only valid for the perpetuity period.[2]

Trusts wherein the trustees apply money at their absolute discretion.

E. TRUSTS VOID AS AGAINST THE SETTLOR'S CREDITORS

1. The Law of Property Act, 1925, Sect. 172 (replacing 13 Eliz., c. 5), provides—

> (1) Save as otherwise provided in this section, every conveyance of property made, whether before or after the commencement of this Act, with intent to defraud creditors is voidable at the instance of any person thereby prejudiced.
>
> (2) This section does not affect the operation of a disentailing assurance (i.e. a disentailing assurance can bar the entail, even though made to defraud creditors), or the law of bankruptcy for the time being in force.
>
> (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith, or upon good consideration and in good faith, to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

"Valuable" and "good" consideration.

The section is not worded in quite the same way as the statute it has replaced, and the position of some of the older cases is therefore doubtful. Thus, the Law of Property Act places persons taking for valuable consideration and those taking for good consideration on the same footing. Under the Act of Elizabeth, only those taking for valuable consideration were protected, if they took in good faith.

Furthermore, in the absence of good faith by the beneficiary, a settlement for valuable consideration was voidable under 13 Eliz., c. 5 if made with intent to defraud creditors.

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[1] *Re Bullock*, [1891] W.N. 62.

[2] *Re Blew*, [1906] 1 Ch. 624; *Re De Sommery*, [1912] 2 Ch. 622. *Re Coleman, Public Trustee* v. *Coleman*, [1936] 1 Ch. 528. See further on discretionary trusts, *post*, p. 124.

This is apparently the position under the Law of Property Act, 1925, although the marginal note mentions "voluntary" settlements. Absence of good faith, however, where the beneficiary gives value, means actual knowledge of the fraud.[1] Where the consideration is marriage, therefore, it is impossible to establish this as far as the children are concerned, though the wife may lose her interest if she knows of the fraud of her husband as settlor.[2]

The section extends to every type of property.

The section extends to every type of property which is regarded as assets for the payment of creditors, including equitable reversionary interests,[3] policies,[4] or proceeds of any action, when recovered[5]; and with the exception of the conveyances specified in subsection (3), it applies to every form of conveyance,[6] but if a voluntary deed contemplates the payment in full of all creditors as its principal object, it is not void because there are other trusts in favour of the settlor's family,[7] and a *bona fide* family arrangement that the beneficiary should pay the settlor's debts has also been upheld.[8]

The section extends to settlements for value.

It has already been pointed out that the fact that the settlement is made for value does not prevent the section from operating, although it may well be that where consideration is given, it is more difficult to prove the intent to defraud creditors,[9] and where consideration is given, the fact that the extravagant habits of the settlor may make it probable that his future creditors will be defeated is not a ground for setting aside the settlement.[10]

Proof of fraud.

The existence of fraud may be proved in various ways, e.g. the fact that the settlor remains in possession;[11] the fact that the settlor retains the deed;[12] the existence of a power of revocation;[13] the secrecy of the transaction;[14] or any

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[1] *Kevan* v. *Crawford* (1877), 6 Ch.D. 29. In *Re Cole*, [1931] 2 Ch. 176, it was held that the *bona fide* compromise of an action constituted valuable consideration.

[2] *Colombine* v. *Penhall* (1853), 1 Sm. & Giff. 228.

[3] *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch. 157.

[4] *Re Mouat*, [1899] 1 Ch. 831.

[5] *Glegg* v. *Bromley*, [1912] 3 K.B. 474.

[6] *Twyne's Case* (1601), 3 Co. Rep. 80*b*.

[7] *Kent* v. *Riley* (1872), 14 Eq. 190; *Godfrey* v. *Poole* (1888), 13 App. Cas. 497, 502.

[8] *Re Johnson* (1881), 20 Ch.D. 389.

[9] *Holmes* v. *Penney* (1856), 3 K. & J. 90, and see *Ex parte Games* (1879), 12 Ch.D. 314.

[10] *Re Tetley* (1896), 75 L.T. 166; *Re Lane-Fox*, [1900] 2 Q.B. 508.

[11] *Twyne's Case*, *supra*.

[12] *Cracknall* v. *Janson* (1879), 11 Ch.D. 1.

[13] *Smith* v. *Hurst* (1852), 10 Hare 30.

[14] *Ex parte Chaplin* (1884), 26 Ch.D. 319.

circumstances indicating collusion with the object of defeating the claims of creditors.[1]

It is not necessary that the settlor should be insolvent when the settlement is made.

It is not a condition of the intent to defraud that the settlor should be insolvent at the time he declares the trust. In *Re Butterworth, Ex parte Russell*,[2] a person who had prospered as a baker, being about to purchase a grocery business which he intended to carry on as well as his bakery, made a voluntary settlement of most of his property for his wife and children. He then bought the grocery business and carried it on for six months, when, because it was not paying, he sold it for as much as he gave for it. He then carried on his bakery business for three years, following which he filed a liquidation petition, as he was insolvent. All the debts he owed at the time of the settlement had been paid; but although the grocery business had not caused his failure, the Court held the settlement void as against his creditors, on the ground that it had been made with the object of putting his property beyond the creditors' reach, in case he should fail in business.[3]

The section protects persons giving good consideration.

Where the settlement was voluntary, 13 Eliz., c. 5 provided that it might be set aside, if made to defraud creditors, even though the beneficiaries were entirely ignorant of the settlor's purpose, but the Law of Property Act, Sect. 172 (3), now protects beneficiaries taking in good faith for "good consideration."

Mere indebtedness does not raise a presumption of fraud.

Mere indebtedness does not give rise to a presumption to defraud creditors; but it is not necessary to prove insolvency at the time when the settlement is made. As Wood, V.C., observed in *Holmes* v. *Penney*—[4]

> The settlor must have been at the time so largely indebted as to induce the Court to believe that the intention of the settlement was to defraud the creditors of the settlor.

Accordingly, in *Re Wise, Ex parte Mercer*[5], Wise broke off his engagement to one person, and married another in Hong Kong on May 31st, 1881. In August, 1881, an action for breach of promise was begun against him. At the same time he was informed that he had been left a legacy of £500, which he immediately settled on his wife and issue, having at the time no debts. In July, 1882, damages for £500 were found

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[1] *Townsend* v. *Windham* (1750), 2 Ves. Sen. 1. *Re Fasey*, [1923] 2 Ch. 1. And see *Re Baker*, [1936] 1 Ch. 61.

[2] (1882), 19 Ch.D. 588.

[3] See also *Mackay* v. *Douglas* (1872), L.R. 14 Eq. 106.

[4] (1856), 3 K. & J. 90, 99.

[5] (1886), 17 Q.B.D. 290. Cf. *Re Holland*, [1902] 2 Ch. 360.

against him in the action, and in November, 1884, he went bankrupt. The successful plaintiff in the action for breach of promise then attempted to upset the post-nuptial settlement, but the Court found that in settling the legacy Wise was not influenced by the forthcoming action, which he did not regard seriously, and it therefore declined to disturb the settlement.

Voluntary settlements of land formerly voidable on a subsequent conveyance for value.

2. By 27 Eliz., c. 4, as interpreted by the Courts, a voluntary settlement of *land* was formerly liable to be upset by a subsequent conveyance by the settlor to a purchaser for value. There was a presumed intention to defraud the purchaser here. The position was modified by the Voluntary Conveyances Act, 1893, but both statutes have now been repealed and replaced by Sect. 173 of the Law of Property Act, 1925, which provides that every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser; but for the purposes of the section, no voluntary disposition, whenever made, is to be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made.

Voluntary settlements may be set aside in bankruptcy

3. The Bankruptcy Act, 1914, Sect. 42 (1), provides that a voluntary settlement[1] of property may, under certain conditions, be avoided by the subsequent bankruptcy of the settlor, although it is not fraudulent. Such a settlement is void as against the trustee in bankruptcy if the settlor becomes bankrupt within two years after the date of the settlement, even though the bankrupt was solvent at the time when the settlement was made. Furthermore, the settlement, if made more than two years before bankruptcy, if made within ten years thereof, is void (which is judicially interpreted as voidable) against the trustee in bankruptcy unless the persons claiming under the settlement can prove (i) that the settlor was, at the date when the settlement was made, able to pay all his debts without the aid of the property settled[2]; and (ii) that his interest in that property passed to the trustee of the settlement.

The section applies only to the settlor's own property.

This subsection does not apply to settlements made before or in consideration of marriage, nor in favour of a purchaser in good faith and for value (neither of which are voluntary), nor to those made on or for the wife or children of the settlor

[1] See *Re Schebsman*, [1943] Ch. 366; [1944] Ch. 83 (C.A.).

[2] This means without the aid of the property which by the settlement passes to other persons. *Re Lowndes* (1887), 15 Q.B.D. 677; *Re Baker*, [1936] 1 Ch. 61.

of property which has accrued to the settlor after marriage in right of his wife. *Re Mathieson*,[1] however, rules that the section applies only to settlements of the settlor's own property, or property in which he has a beneficial interest, and does not apply to settlements made in exercise of a general power of appointment.

The section says the settlements are "void," but actually it has been held that they are voidable, from which it follows—

The settlements are voidable, not void.

1. The trustee in bankruptcy has to make an application to the Court to have the settlement set aside.[2]

2. If a third party has *bona fide* and for value acquired the beneficiary's interest, the settlement cannot be set aside, if he had no notice of the act of bankruptcy.[3]

3. The effect of avoiding the settlement is only to set it aside to the extent necessary for satisfying the settlor's debts and the bankruptcy costs.[4]

Covenants to pay money in the future.

Further, by Sect. 42 (2), where an ante-nuptial settlement includes a covenant to pay money in the future for the benefit of the settlor's wife or husband or children, or for the settlement of future acquired property in which the settlor on marriage had no interest for those purposes (and not being property acquired in right of husband or wife), then if that settlement or covenant has not been executed at the date of bankruptcy, it is void against the trustee in bankruptcy, except that the beneficiaries may prove their claim in the bankruptcy, although these claims will be postponed to those of other creditors for valuable consideration in money. A good illustration of the effect of this subsection is afforded by *Re Cumming and West*.[5] In 1910, A married X, and executed an ante-nuptial settlement which included a covenant to keep up a policy of insurance on his life and to pay premiums. He then entered into business in partnership with B, and in 1927 both partners were adjudicated bankrupt. On their bankruptcy, the trustees of the settlement lodged a proof in A's bankruptcy for a sum which was equivalent to the single payment which would be necessary to convert the policy into a fully-paid policy. The trustee in bankruptcy held that the claim of the settlement trustees must be postponed until not only A's creditors, but also the partnership creditors of A and B, had been paid in full.

Moreover, even where such property had actually been

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[1] [1927] 1 Ch. 283. [2] *Re Brall*, [1893] 2 Q.B. 381.
[3] *Re Carter & Kenderdine's Contract*, [1897] 1 Ch. 776.
[4] *Re Parry*, [1904] 1 K.B. 129.
[5] [1929] 1 Ch. 534.

transferred, the trustee in bankruptcy can avoid the transfer unless the beneficiary can prove: (*a*) it was made more than two years before the commencement of the bankruptcy, or (*b*) that at the date of the transfer, the settlor was able to pay all his debts without the aid of that property; or (*c*) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a specified person, and was made within three months after the money or property came within the settlor's control. If the payment or transfer under this subsection (Sect. 42 (3)) is declared void, the beneficiary can also claim a dividend under the covenant in like manner as if it had not been executed at the commencement of the bankruptcy, i.e. after the other creditors have been paid in full.

The section only extends to property which can be traced.

The term "settlement" as used in Sect. 42 includes any conveyance or transfer of property,[1] but it is not necessary that the property should be transferred by the settlor to a trustee or beneficiary. It is enough if the settlor declares himself a trustee for the beneficiary.[2] However, the term extends only to property in the hands of the beneficiary when bankruptcy supervened, or else which is invested in forms which are traceable, or which has been changed into other identifiable property.[3] The beneficiary is liable to account for any property in its original or changed form which remains under his control, but he is not liable to restore property which he has disposed of before the date of the bankruptcy.[4]

F. DISCRETIONARY, PROTECTIVE, AND OTHER SIMILAR TRUSTS

Trusts with a prohibition on alienation are void.

It is impossible to create a trust with a stipulation that the beneficiary's interest may not be alienated, if the property has been given absolutely.[5] Furthermore, a trust must not contain a stipulation that the beneficiary's interest shall not be subject to the claims of creditors. The fact to be established is whether the beneficiary was intended to take a vested interest. If he was, though the trustees had a discretion with regard to the time and mode of payment, then the interest is available for satisfaction of the beneficiary's creditors. Thus, in *Snowdon* v. *Dales*,[6] the trustees were

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[1] *Ex parte Todd* (1887), 19 Q.B.D. 186.
[2] *Shrager* v. *March*, [1908] A.C. 402.
[3] *Re Plummer*, [1900] 2 Q.B. 790; *Re Player* (1885), 15 Q.B.D. 682.
[4] *Re Plummer, supra*; *Re Tankard*, [1899] 2 Q.B. 57.
[5] *Re Dugdale* (1888), 38 Ch.D. 176. [6] (1834), 6 Sim. 524.

directed to pay the interest of a sum of money to A for life, or during such part thereof as the trustees should think proper, and at their will and pleasure, but not otherwise, and so that A should not have any right, title, claim, or demand, other than the trustees should think proper, after A's death, to pay the interest to his widow for life, and after her death to assign principal and "all savings or accumulations of interest, if any," to the children. The Court held that upon the construction of the whole of the instrument, the trustees had no power to withhold and accumulate any portion of the interest during A's lifetime, and, accordingly, on his bankruptcy, A's creditors became absolutely entitled. (Here the trustees were directed to apply the whole income at their discretion.)

Where the trust is not exclusively for the benefit of the bankrupt.

Where, however, the trust is not exclusively for the benefit of the bankrupt, but is for the benefit of the bankrupt and another, the creditors may only take so much as was intended for the bankrupt. Thus, in *Page* v. *Way*,[1] trustees were directed to apply the annual profits of property "for the maintenance and support of A B, his wife and children, if any, or otherwise, if they thought proper, to permit the same to be received by A B for his life." A B became bankrupt, with a wife, but no children, and the Court held that the wife was entitled to be supported out of the property. Whilst wife and children were maintained by A B the trustees had a discretion to give him the whole interest, but when A B, as a result of bankruptcy, could no longer do that, then the trustees must do so out of the property, and it must be referred to a Master to settle what a proper allowance was.

Again, in *Godden* v. *Crowhurst*,[2] trustees were directed to pay the proceeds of residuary personalty to the testator's son for life, with a direction that if he did any act whereby the interest vested in him would become forfeited to others, the trustees were to apply the annual income "for the maintenance and support of the son, and any wife and child or children he might have, as the trustees should in their discretion think fit." The Court held that nothing was directed to be paid; it was to be applied, and, therefore, the persons named might be maintained without their receiving anything at all. Accordingly, on the son's bankruptcy, nothing passed to the trustee in bankruptcy.

However, it is now clear that a person may settle property on A for life, until alienation or bankruptcy, and when that

[1] (1840), 3 Beav. 20.

[2] (1842), 10 Sim. 642.

Property may be settled upon a person until he alienates or becomes bankrupt, with a gift over to another.

happens, the interest shall pass to B, or with a proviso that when the event happens, the interest shall shift over to B. This is known as a protective trust, and since such clauses have become very common, they are now given statutory recognition in the Trustee Act, Sect. 33, which provides that where *any income* (including an annuity or other periodical income payment) is directed to be held on protective trusts for the benefit of a person (termed the principal beneficiary) for his life or a less period, the income shall, without prejudice to any prior interest, be held on the following trusts—

Protective trusts.

1. Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do anything whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or a part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, the trust of the income shall fail or determine:

2. If the trust does fail or determine during the trust period, then for the residue of that period, the income shall be held upon trust for the maintenance or support, or otherwise for the benefit of all or any one or more of the others of the following persons at the absolute discretion of the trustees—

(*a*) The principal beneficiary, the wife or husband of such, and the issue of them;

(*b*) If there is no wife, husband, or issue, then for the principal beneficiary, and the persons who would, if he were actually dead, be entitled to the trust property, or the income thereof.

The section does not apply to trusts coming into operation before the Act, and takes effect subject to any variation of the above interests which may be contained in the instrument.[1] Furthermore, the section does not make valid any trust otherwise invalid,[2] e.g. a settlement by a person upon himself until bankruptcy.[3]

Where a sequestration of the tenant for life's property occurs, this puts an end to the protected life interest, and the discretionary trust arises.[4] Similarly there is a forfeiture

[1] Sect. 33 (2). [2] Sect. 33 (3).

[3] *Higinbotham* v. *Holme* (1812), 19 Ves. 88; *Re Burroughs-Fowler*, [1916] 2 Ch. 251.

[4] *Re Baring's Settlement Trusts*, [1940] Ch. 737. For a forfeiture of the life interest on settlement of a part of the income, see *Re Dennis' Settlement*, [1942] Ch. 283.

where the principal beneficiary resides in enemy-controlled territory, and so long as the residence continues the income must be paid to the Custodian of Enemy Property under Sect. 7 of the Trading with the Enemy Act, 1939.[1]

Before 1926 it was the custom to insert clauses into personalty settlements, made by husband and wife before marriage, creating such protective and discretionary trusts in respect of the husband. This was achieved as follows: In respect of the *wife's* fortune, it was declared that the wife should enjoy it for life. This was followed by a protective trust, which recited that the income should be held on trust for the husband, if he survive his wife, until his death or until he does something whereby the interest passes from him. This prevents the interest from being lost in the event of the husband's bankruptcy, or if he attempts to alienate it to his creditors; and it was customary to insert a discretionary trust at this point, authorising the trustees to apply such part of the income as they think fit, during the remainder of the husband's life, for the benefit of all or one or more of the members of a class of which the husband was one, as the trustees should think fit. This would permit the trustees, if necessary, to apply the income for the benefit of the children. There is, moreover, nothing to prevent the husband's property from being settled upon an *immediate* discretionary trust. Such clauses are still occasionally inserted in settlements, although they are implied in any settlement to which the income is directed to be held on protective trusts.

Nothing should be paid to the beneficiary after bankruptcy.

It should be observed that where the settlement is for the benefit of a person until his bankruptcy, and it is desired that the interest should not pass to the trustee in bankruptcy, nothing must be paid to the beneficiary, or applied for his benefit, under the discretionary trust which arises after the life interest is forfeited, beyond what is absolutely necessary for his support, nor should it be paid to any other beneficiary with a secret trust for the benefit of the principal beneficiary who has become bankrupt.[2] The result is that the balance beyond this must be paid to or applied for the other objects designated in Sect. 33, or by the instrument varying it.[3]

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[1] *Re Wittke*, [1944] Ch. 166

[2] *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Re Ashby*, [1892] 1 Q.B. 872.

[3] *Re Bullock* (1891), 60 L.J.Ch. 341; *Re Burroughs-Fowler*, [1916] 2 Ch. 251.

CHAPTER VIII

CHARITABLE TRUSTS

A. THE ORIGIN OF CHARITABLE TRUSTS

Early history of charitable institutions.

THE early history of charitable trusts is bound up with the history of mediaeval eleemosynary and religious corporations. For many centuries charitable gifts were devoted chiefly towards the maintenance of monasteries, whose increasing opulence led to the Statutes of Mortmain (which greatly influenced the law of charitable trusts), and ultimately to their disestablishment. Other non-monastic charitable institutions were mostly permanent, incorporated associations, such as the Oxford or Cambridge colleges, for the promotion of education, or, alternatively, hospitals for the maintenance of the sick, indigent, or infirm. Charitable uses and trusts, however, appear from the reign of Henry VI onwards, but their numbers were comparatively few until the separation from Rome and the suppression of the monasteries. Thereafter, they assumed such an importance that the Statute 43 Eliz., c. 4, which may be regarded as the starting point of the modern law, became necessary for their better regulation. One indirect consequence of the Statute of Uses, illustrated by the famous *Sutton's Hospital Case*,[1] in which the great professional rivals, Coke and Bacon, both argued with singular eloquence and erudition, was that questions of charitable uses and trusts now came to be decided for the first time by the Common Law Courts. Previously, this jurisdiction had been exclusively equitable, but afterwards, if A enfeoffed B to a purported charitable use which was void, the resulting use to the feoffor was executed by the Statute, and enlarged into a legal estate.

Origin of the jurisdiction where the charitable objects are impossible, impracticable, or achieved.

The origin of the jurisdiction of the Court in relation to charitable trusts (which is both legal and equitable[2]) has provoked some discussion. Of this jurisdiction there are two aspects; first, in respect of property given upon certain specified, lawful charitable trusts; and here the jurisdiction exactly corresponds with that of the Court in respect of private trusts, and is found being exercised as early as the reigns of Henry VI and Edward IV.[3] The second aspect of

[1] (1613), 10 Co. 1; 10 Co. 23*a*.

[2] *A.-G.* v. *Flood* (1816), Hayes 611.

[3] *Wakeryng* v. *Bayle*, 1 Cal. Proc. Ch. (*c.* 1422–70) 57; *Lyon* v. *Hewe*, 2 Cal. Proc. Ch. (*c.* 1465–83) 44.

jurisdiction, peculiar to the law of charitable trusts, governs the mode of application of the trust funds when the objects to be benefited are either impossible or impracticable, or are already fully achieved. It has been maintained that this aspect of jurisdiction is derived from the Statute 3 Eliz., c. 4, which considers the matter, but the better view would seem to be that it is derived out of the Crown's prerogative, as *parens patriae*, to act as constitutional trustee of funds given to charity, where no trustees or objects have been selected.[1] In the latter event, there obviously falls upon the Crown the duty of deciding how the fund is to be applied, and in course of time this function was exercised by the Lord Chancellor. Thus, Lord Macnaghten observes in *Income Tax Commissioners* v. *Pemsel*[2]—

Charitable trusts favoured by Equity.

> The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rules against perpetuities, while a gift in perpetuity not being a charity is void. Whatever may have been the foundation of the jurisdiction of the Court over this class of trusts, and whatever may have been the origin of the title by which these trusts are still known, no one I think who takes the trouble to investigate the question can doubt that the title was recognised and the jurisdiction established before the Act of 43 Eliz. and quite independently of that Act. The object of that statute was merely to provide a new machinery for the reformation of abuses in regard to charities.

Superstitious uses.

It would appear, however, from the observations of Lord Loughborough, in *A.-G.* v. *Bowyer*,[3] that before the Chancellorship of Lord Ellesmere charitable informations were unknown, and that persons alleging a breach of a charitable trust made out the case as well as they could at law.

Two statutory doctrines—those of supersititious uses and of mortmain—have greatly affected the development of the law relating to charitable trusts. A superstitious use is one which has as its object the maintenance or propagation of religious rites and usages not tolerated by the law of the land. So understood, "superstitious usages" are a product of Renaissance Statutes having as their object the prevention of any reintroduction into this country of the Roman

[1] See Lord Eldon's observations in *A.-G.* v. *Brown* (1818), 1 Swanst. 291.
[2] [1891] A.C. 531, 580.
[3] (1798), 3 Ves. 726.

Catholic faith.[1] Nevertheless, gifts for the maintenance of places of worship or ministers of Protestant Dissenters and Jews were formerly also within this disqualification. Thus, in *De Costa* v. *De Pas*,[2] a bequest for the maintenance of a Jesiba, or assembly for reading the Jewish law and advancing the Jewish religion, was held invalid, whilst a succession of decisions held void gifts for any Roman Catholic purpose, e.g. for maintaining priests, for masses for the dead, or for the maintenance of Roman Catholic children, as being for superstitious uses.[3] Since the decision in *Bourne* v. *Keane*,[4] however, the celebration of masses for the dead is not now regarded as a superstitious use.

The doctrine now of little importance.

Although the doctrine of superstitious uses still exists, its harshness was progressively softened by statutes removing the disqualifications of various sects of Dissenters. Thus, by the Toleration Act, 1688,[5] and other Acts, the disabilities on Protestant Dissenters were removed, and, therefore, trusts in favour of schools, churches, and preachers of Protestant Dissenters not only became valid as charitable trusts but also entitled to the protection and regulation of the Court. By the Roman Catholic Charities Act, 1832,[6] the privileges granted to Protestant Dissenters in the eighteenth century were extended to Roman Catholics, although it preserved the provisions of the Roman Catholic Relief Act of 1829,[7] prohibiting the entry into the kingdom of members of Roman Catholic religious orders, and preventing the establishment in England of Roman Catholic religious societies bound by monastic or religious vows. Finally, by the Religious Disabilities Act, 1846,[8] it was provided that Jews "in respect of their schools, places of religious worship, education, and charitable purposes, and the property held therewith, shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to."

Masses for the dead.

The effect of this legislation has been to make valid trusts for educational, religious, and other charitable purposes connected with these faiths. Thus, a trust for the advancement of the Roman Catholic or the Jewish religion is now valid, but the relieving Acts did not make valid *all* purposes, not falling under the terms of the relieving Acts, which had been held to be superstitious before. Thus, gifts for prayers or

[1] 23 Hen. VIII, c. 10; 1 Edw. VI, c. 14. [2] (1754), 2 Swanst. 487 n.
[3] *A.G.* v. *Todd* (1837), 1 Keen 803; *West* v. *Shuttleworth* (1835), 2 My. & K. 684. *Cary* v. *Abbot* (1802), 7 Ves. 490.
[4] [1919] A.C. 815. [5] 1 Will. & M., c. 18. [6] 2 & 3 Will. IV, c. 115.
[7] 10 Geo. IV, c. 7. [8] 9 & 10 Vict., c. 59.

masses for the souls of the dead were again held to be gifts for superstitious uses after the statute, until, at length, the House of Lords, in *Bourne* v. *Keane*,[1] after an exhaustive review of the authorities, decided to overrule the precedents of several centuries, and held that a bequest of personalty for masses for the dead is not void as a gift to superstitious uses.

The doctrine of mortmain.

Alienation in mortmain, says Blackstone,[2] is the alienation of lands or tenements to a corporation, whether sole or aggregate, lay or ecclesiastical. In the Middle Ages, it was the object of all the temporal rulers of Western Europe to prevent the accumulation of the greater part of their territories in the hands of the great religious orders, since, as Coke observes, the feudal lords were thereby deprived of the more valuable incidents of feudal tenure, such as escheat, wardship, reliefs, and marriage. Accordingly, even so early as Magna Charta, legislation was attempting to put an end to such grants, whilst in the Statute *De Viris Religiosis*,[3] a very general prohibition was undertaken, the earlier right of the overlord to grant licences for alienation in mortmain being removed. No gift, lease, or other conveyance whereby land came into mortmain was valid, but the land thereupon became forfeit to the overlord. If the overlord neglected to enter within the year, his overlord in turn might enter within the next half-year, and so on, the ultimate right devolving upon the Crown. Two other statutes of Edward I[4] attempted to stop evasions of the earlier enactments, whilst *Quia Emptores*, whilst permitting free alienation *inter vivos*, repeated the caution that this was not to be understood as in any way limiting the prohibition upon alienation into mortmain. Notwithstanding these stringent prohibitions, the purpose of these statutes failed to be accomplished, and with the rise of the use, and its protection in the Chancery, a further method of evasion became common, so that another Statute, 15 Ric. II, c. 5, became necessary. In addition to an explanation of the Statute *De Viris*, it contained a prohibition upon the practice of granting the use of lands to religious corporations. Moreover, the same statute extended the existing restrictions for the first time to civil corporations, for the effect of granting lands to guilds, fraternities, and municipal corporations had come to be regarded as equally detrimental to the rights of the overlord.

Evasion of the statutes by way of uses.

By the Statute 23 Hen. VIII, c. 10, previously noticed, all assurances or trusts of land to the use of parish churches,

[1] [1919] A.C. 815; *Re Caus*, [1934] 1 Ch. 162. [2] 2 Comm. 268.
[3] 7 Edw. I. [4] 13 Edw. I, cc. 32–3.

chapels, churchwardens, lay or ecclesiastical corporations, or for the continual service of a priest for ever, or for a period of more than twenty years were forbidden, an exception being made in favour of certain municipal corporations which by ancient custom had power to devise in mortmain. The effect of the prohibition was that the mesne lord or the Crown might enter upon the land, but until that was done the land belonged to the corporation. The result of this enactment was that licences in mortmain again came into existence.

The Crown's power of granting licences.

The power of the Crown to grant such licences, however, was regarded as an exercise of the dispensing power in relation to the Statutes of Mortmain, and, therefore, when the dispensing power was curtailed by the Bill of Rights in 1689 statutory provision for licences became desirable, and by 7 and 8 Will. III, c. 37, the Crown was empowered to grant licences to colleges, schools, and other bodies politic or incorporated for other good and public uses, permitting them to hold and purchase land, free from the liability to forfeiture, either by the Crown or by the mesne lord. Most of this earlier legislation was repealed and re-enacted, with amendments and extensions in the Mortmain and Charitable Uses Acts, 1888 and 1891.[1] It should not be forgotten that many exemptions from the Mortmain Acts are contained not only in licences from the Crown but also in statutes and charters.

B. THE DEFINITION OF CHARITY

Legal and popular meaning of "charity" not identical.

The definition of charity is not a simple task, for the legal meaning does not coincide with the use of the term in its popular sense. There are objects within the legal definition which would probably not be termed "charitable" in popular usage, whilst a number of objects which the ordinary person would regard as charitable are excluded from the legal definition. The first attempt to define "charity" for legal purposes is contained in the Statute 43 Eliz., c. 4, for although the term was used in reference to public foundations before that time, it was used without precision,[2] and the modern definition of charity is still based upon the Statute of 1601. This Statute (repealed by the Mortmain and Charitable Uses Act, 1888, but the list appended below is reproduced in

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[1] 51 & 52 Vict., c. 42; 54 & 55 Vict., c. 73. See *post* p. 152.

[2] *Per* Fry, L.J., in *R.* v. *Commissioners of Income Tax* (1888), 22 Q.B.D. 311; and see also the discussion of the term by the House of Lords in *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 543.

Sect. 13 (2) of the later Act), set out the following objects as charitable.[1]

List of charitable objects in 43 Eliz., c. 4.

The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars of universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief and redemption of prisoners and captives; the aid or ease of any poor inhabitants concerning payment of taxes.

The list not exhaustive.

This list was never regarded as exhaustive, and from the time of Elizabeth onwards the Court of Chancery included objects analogous to those enumerated within the term "charitable."[2]

It is therefore obvious that the legal definition of a charity differs widely from its popular signification, and Lord Macnaghten recognised this in *Income Tax Commissioners* v. *Pemsel*,[3] wherein an effort was made to classify charitable objects. He says—

Lord Macnaghten's classification.

> "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.

This line of demarcation has been generally followed in the later cases,[4] but a good deal of discussion has been provoked by the last class. It is clear that there may be a trust under the fourth head which is not exclusively for the benefit of the poor, for Lord Macnaghten continues—

A charity may incidentally benefit the rich as well as the poor.

> 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.

The last qualification is illustrated by *Goodman* v. *Mayor of Saltash*,[5] in which a trust in favour of the free inhabitants of ancient tenements in the Borough of Saltash, in accordance with a usage whereunder they had the privilege of dredging

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[1] The legal meaning of a "charity" is the same in Ireland as in England, and practically the same in Scotland. *Income Tax Commissioners* v. *Pemsel supra.* In *Grimond* v. *Grimond*, [1905] A.C. 124 the Scottish construction of the term was said to be narrower.

[2] *Morice* v. *Bishop of Durham* (1804), 9 Ves. 405.

[3] [1891] A.C. 531 at p. 583.

[4] *Re Macduff*, [1896] 2 Ch. 451.

[5] (1882), 7 App. Cas. 633.

for oysters, was held to be a valid charitable trust, even though the inhabitants might not be poor. Commenting on this, in *Re Christchurch Inclosure Act*,[1] Lindley, L.J., observed—

> Had it not been for the decision of the House of Lords in *Goodman* v. *Mayor of Saltash*, we should have felt great difficulty in holding this trust to be a charitable trust. For although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not.

In *Re Cranston*,[2] Fitzgibbon, L.J., said—

> The essential attributes of a legal charity are, in my opinion, that it should be unselfish—i.e. for the benefit of other persons than the donor—that it shall be public, i.e. that those to be benefited shall form a class worthy, in numbers or importance, of consideration as a public object of generosity, and that it shall be philanthropic or benevolent—i.e. dictated by a desire to do good.

Commenting on Lord Macnaghten's definition, Russell, J., said in *Re Hummeltenberg*[3]—

> No matter under which of the four classes a gift may *prima facie* fall, it is still, in my opinion, necessary (in order to establish that it is charitable in the legal sense) to show (1) that the gift will or may be operative for the public benefit, and (2) that the trust is one the administration of which the Court itself could if necessary undertake and control.

In *Re Wedgwood*,[4] Lord Cozens-Hardy, M.R., and Kennedy, L.J., were both of opinion that there had been in the previous half-century a tendency towards supporting as good charitable gifts which a hundred and fifty years ago would not have been supported. That tendency is continuing.

Public or philanthropic purposes not necessarily charitable.

It is important to notice, however, that "public" or "philanthropic" purposes are wider than "charitable" purposes, and therefore a gift for either of these objects will fail for uncertainty. Furthermore, if property is left "for charitable or public" or for "charitable or philanthropic" or "for charitable or benevolent"[5] purposes, the gift will still fail for uncertainty, since it is open to the trustees to apply the gift for public or philanthropic or benevolent purposes, which are not in the legal sense charitable[6]. It would be

[1] (1888), 38 Ch.D. 520, 530.
[2] [1898] 1 Ir. R. 431 at p. 452.
[3] [1923] 1 Ch. 237
[4] [1915] 1 Ch. 113.
[5] *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341
[6] Where such a phrase as "charitable or benovolent" is used, the Court will not grant probate with the word "or" omitted, since this would vary the testator's intentions. *Re Horrocks*, [1939] P. 198.

otherwise if the gift were for "charitable and philanthropic" purposes, since in such a case the trustees would only be able to apply the gift to such philanthropic purposes as are charitable. The distinction may seem a little arbitrary, but it is now firmly engrafted upon our law, and it is well illustrated by *Re Tetley*,[1] the facts of which were as follows—

A testator by his will directed his trustees to apply one-fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as they in their absolute discretion should select." The Court of Appeal held that the words of the gift must be read disjunctively and that since the trustees could apply the trust properly for non-charitable purposes under it the trust was void. This view was upheld by the House of Lords.

Lord Sterndale, M.R., observed in the Court of Appeal—

Artificiality of the distinction between charitable and non-charitable purposes.

> I . . . am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down. The whole subject is in an artificial atmosphere altogether. A large number of gifts are held charitable which would not be called charitable in the ordinary acceptation of the term, and when one takes gifts which have been held to be charitable, and compares them with gifts which have been held not to be charitable, it is very difficult to see what the principle is on which the distinction rests. I confess I find considerable difficulty in understanding the exact reason why a gift for the benefit of animals and for the prevention of cruelty to animals generally should be a good charitable gift, while a gift for philanthropic purposes, which, I take it, is for the benefit of mankind generally, should be bad as a charitable gift. The gift for the benefit of animals, apparently, is held to be valid because it is educative of mankind, it being good for mankind that they should be taught not to be cruel, but kind to animals, and one would quite agree with that. But if the benefit of mankind on that particular side makes that a good charitable gift, it is a little difficult to see why any philanthropic purpose to benefit mankind on all sides is a bad one. But it is so; it has been so decided, and therefore the present case is made very difficult, as every case is where there is no governing principle which can be applied.[2]

Somewhat different views were expressed by Lord Haldane in the House of Lords. He says—

> What "charitable" is I should be sorry to have to define with precision without hearing an elaborate argument, but

[1] [1923] 1 Ch. 258; [1924] A.C. 262, *sub. nom. A.-G.* v. *National Provincial Bank.*

[2] [1923] 1 Ch. 258, at p. 266.

what does not come under "charitable" I think is usually fairly plain. Between a patriotic intention and a charitable intention there is a distinction not only in language but in substance. In the case of a gift for charitable purposes there is a desire to profit people who would not be profited without your gift—that is the dominant motive. In the case of patriotism there is a desire to fulfil one dominant purpose, that is, to benefit the cause of the country to which you belong. Those are two different heads of intention, different perhaps not in such a way that they never overlap, but in such a fashion as to distinguish the one class from the other. The two alternatives in the gift in this case are disjointed, they are real alternatives, and if they exclude each other, even to any extent, then the gift must fail; but because a man cannot disinherit his heirs by giving away his property unless he really gives it away; he cannot leave it to someone else to make a will for him, nor can he leave it to his trustees to give it for some purposes which are to be completely at their discretion, unless these purposes are so indicated as in some sense to confer on a class of beneficiary an interest. In this case the testator might have done that. If he had confined himself to charities there would have been a general indication of a class for the benefit of which the Court would administer, even if only *cy près*; but, if the trustees have an alternative in their complete discretion, which is to take a property which is not vested in them beneficially, nor vested in any charitable class exclusively, but given to trustees with a discretion to hand it over to some not prescribed patriotic object, then you have not got that divesting out of the testator of his interest which is essential to constitute a testamentary disposition. The testamentary disposition in this case, therefore, fails because of uncertainty.[1]

It will be observed that both the Court of Appeal and the House of Lords in this case were of opinion that "patriotic purposes" includes purposes other than those strictly charitable. If, however, property is left for the benefit of a parish, county, or country directly, it would seem that that is necessarily a charitable object. Thus, in *West* v. *Knight*,[2] it was decided that a gift to a parish was good as a charity. In *Newland* v. *Attorney-General*,[3] there was a bequest to the Government in exoneration of the National Debt, and Lord Eldon directed that there should be a transfer of the fund to such persons as the King should by his sign-manual appoint; whilst in *Attorney-General* v. *Webster*,[4] Sir George Jessel, M.R., held that where there was a gift to a parish, city, province, or similar unit, that was a valid charitable gift, since it was a gift for charitable purposes in

Direct gifts for a parish, county, or country are charitable.

[1] At p. 267.
[2] (1669), 1 Cas. in Ch. 134.
[3] (1809), 3 Mer. 684.
[4] (1875), L.R. 20 Eq. 483.

the unit mentioned.[1] This view was directly applied in *Nightingale* v. *Goulbourn*,[2] wherein the testator left property "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain." This was held to be good.

A gift "unto my country England" charitable.

The relation of this line of cases to those culminating in the decision of the House of Lords in *Re Tetley*[3] was considered by the Court of Appeal in *Re Smith*.[4] The testator left the whole of his estate "unto my country England to and for own use absolutely." The property was claimed by the next-of-kin on the ground that the object was not a charity, so that the gift was therefore void, and the property devolved as on intestacy. The Attorney-General claimed the gift as a valid gift to charity, being for the general benefit of the community; whilst the Solicitor-General claimed that even if the gift were not good as for a charitable object, yet it was a gift to the Crown, which could be transferred to the Consolidated Fund for the benefit of the nation as a whole. Bennett, J., held that the contentions of the Attorney- and Solicitor-General failed, and the property devolved as on intestacy, but the Court of Appeal reversed this decision, holding that the gift was for a definite purpose, for the use and benefit of England, and was therefore good, but, following *Attorney-General* v. *Webster*,[5] it would have to be applied for charitable purposes, the property being ordered to be transferred to such persons as His Majesty should direct under the sign-manual.

The result of these two decisions last considered seems to be that if the property is given for "patriotic" purposes, this is bad as a charity, as too wide, but if the gift is for the benefit of the country directly, that is good, and the gift will be applied to charitable purposes.

All charitable trusts are public trusts.

Before considering examples of charitable objects under the four heads laid down by Lord Macnaghten, it must be observed that all charitable trusts are also public trusts; that is to say, the trust must have as its object the benefit of the public, or of a section of it.[6] This is the only neat test whereby the objects under Lord Macnaghten's fourth head

[1] See also *A.-G.* v. *Lonsdale* (1827), 1 Sim. 105; *A.-G.* v. *Carlisle Corporation* (1828), 2 Sim. 437; *Mitford* v. *Reynolds* (1842), 1 Ph. 185; *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522.

[2] (1848), 2 Ph. 594.

[3] [1924] A.C. 262, *sub-nom. A.-G.* v. *National Provincial Bank.*

[4] [1932] 1 Ch. 153. [5] *Supra.*

[6] *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 650.

can be pronounced charitable or non-charitable. Thus, if it is the settlor's intention to benefit certain specific individuals, that is not a public purpose, and the gift is therefore not charitable, even though it may be within the four classes specified in Lord Macnaghten's judgment. Accordingly, in *Ommanney* v. *Butcher*,[1] where a testator left money for distribution "in private charity" this was held not to be a charitable trust, for public charities were thereby excluded. This decision has been frequently discussed,[2] but it was pointed out in *Re Sinclair's Trust*,[3] that the testator may be using the term to distinguish charities available to all, and charities available only to a particular class, and if this is so, the term "private charity" may be within the legal signification. The distinction between public and private objects is often a very fine one. Thus, a gift to the incumbent of a church for the time being is charitable, whilst a gift to the particular individual who is then filling that office is not.[4] Furthermore, it does not matter whether the specific persons to be benefited by the donor are named by him, or whether he merely provides machinery for their selection. In both cases the gift is not legally charitable.[5]

But the term "private" may be used to indicate a particular class of public charities.

An institution for the private benefit of members not charitable.

Further, an institution which exists solely for the private benefit of its members and not for the public is not charitable, since if the institution comes to an end, the funds are divisible amongst the members;[6] and if the objects of such an institution are not charitable, the fact that it receives donations and voluntary subscriptions cannot affect it with a charitable character.[7]

(*a*) THE RELIEF OF POVERTY.

The meaning of "poverty."

Besides gifts to the poor generally, gifts to particular classes of poor persons are also charitable, e.g. the poor of a specified place or parish. So in *Bristow* v. *Bristow*,[8] where the testator left money for the relief of the poor "on my little estate in Suffolk" was held to be charitable, although if the gift had been solely for the purpose of benefiting the estate, it would not have been charitable.[9] Gifts to the inmates of

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[1] (1823), Turn. & R. 260. [2] *Ellis* v. *Selby* (1836), 1 My. & Cr. 286.
[3] (1884), L.R. 13 Ir. 150; and see *Re Slevin*, [1891] 2 Ch. 236.
[4] *A.-G.* v. *Sparks* (1753), Amb. 201.
[5] *A.-G.* v. *Hughes* (1689), 2 Vern. 105; *Thomas* v. *Howell* (1874), 18 Eq. 198.
[6] *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399; *Carne* v. *Long* (1860), 2 De G. F. & J. 75.
[7] *Re Clark's Trust* (1875), 1 Ch.D. 497, 500.
[8] (1842), 5 Beav. 289. [9] *Hoare* v. *Hoare* (1886), 56 L.T. 150.

a workhouse,[1] to widows and orphans (whether generally or of a specified class or place),[2] to servants,[3] to poor housekeepers,[4] or reduced gentlewomen,[5] are all charitable. So are gifts to members of particular classes of the community who have been reduced to poverty, such as tradesmen or unsuccessful authors.[6] Trusts to poor relations, whether generally, or of particular classes, such as descendants, have also been regarded as charities,[7] and so also have gifts for the poor, with a preference for the testator's poor relations.[8]

Institutions for the benefit of particular classes of poor persons may be charities.

Further, gifts for the establishment or support of institutions for the benefit of poor persons, or of particular classes of poor persons are obviously charitable, and this includes orphanages for the children of members of particular classes, professions, or trades. A friendly society is charitable where the receipt of relief is conditional on the existence of poverty, but not otherwise.[9] Moreover, whilst the Statute of Elizabeth speaks of "the relief or redemption of prisoners," a bequest for the relief of persons imprisoned for non-payment of fines incurred through a breach of law is void, as contrary to public policy, which conditions the classes of purposes which are to be regarded as charitable.[10]

A gift to a religious community which exists for the relief of the sick or the education of the poor is, of course, charitable.[11] So is a gift for the benefit of poor emigrants, but not one for the promotion of emigration in general;[12] and a bequest for the oldest respectable inhabitants of a village was held to be charitable on proof that the real purpose of the gift was to confer benefits on the aged poor.[13]

(*b*) THE ADVANCEMENT OF EDUCATION.

Whilst the gift of property for the advancement of education or knowledge generally has been repeatedly held charitable, it has been held that a gift for the increase of knowledge without the propagation of it would not be.[14] Gifts for

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[1] *A.-G.* v. *Vint* (1850), 3 De G. & S. 704.
[2] *A.-G.* v. *Comber* (1824), 2 S. & S. 93; *Waldo* v. *Caley* (1809), 16 Ves. 206.
[3] *Reeve* v. *A.-G.* (1843), 3 Hare 191.
[4] *A.-G.* v. *Pearce* (1740), 2 Atk. 87.
[5] *A.-G.* v. *Power* (1809), B. & B. 145.
[6] *A.-G.* v. *Ironmongers Co.* (1833), 2 My. & K. 576; *Thompson* v. *Thompson* (1844), 1 Coll. 381, 395.
[7] *A.-G.* v. *Price* (1810), 17 Ves. 371. [8] *Waldo* v. *Caley*, *supra*.
[9] *Re Clark's Trust* (1875), 1 Ch.D. 497; *Re Buck*, [1896] 2 Ch. 727.
[10] *Thrupp* v. *Collett* (1858), 26 Beav. 125.
[11] *Cocks* v. *Manners* (1871), L.R. 12 Eq. 584.
[12] *Barclay* v. *Maskelyne* (1858), 4 Jur. N.S. 1294; *Re Sidney*, [1908] 1 Ch. 488.
[13] *Re Lucas*, [1922] 2 Ch. 52.
[14] *Whicker* v. *Hume* (1858), 7 H.L.C. 124, 155.

the support of schools, colleges, and other educational establishments, or for their foundation, whether generally or in particular are charitable.[1] So are gifts for the establishment of professorships, lectureships, fellowships, scholarships, prize essays, and other academic rewards.[2] A gift for educational purposes is none the less charitable because it contemplates a particular type of education[3] or the education of a particular class of persons,[4] or the promotion of a particular branch of study.[5] In *Re Dupree's Trusts*[6] a trust for the encouragement of chess-playing among boys and youths in Portsmouth was held to be charitable. Moreover, a gift for the erection and endowment of the Shakespeare Memorial Theatre for the performance of Shakespeare's plays, for the revival of English drama, and for the development of the art of acting is charitable,[7] but in *Re Hummeltenberg*,[8] it was held that the establishment of a college for the training of spiritualist mediums is not a charitable object. In *Re Scrowcroft*,[9] the maintenance of a village club and reading-room "to be used for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing" was held to be charitable. This decision received extended consideration in *Bonar Law Memorial Trust* v. *Commissioners of Inland Revenue*,[10] wherein the objects of the trust were defined as follows—

A particular type of education may be contemplated.

A trust to promote a type of political education not a charity.

(*a*) To honour the memory of a great statesman (Mr. Bonar Law); (*b*) To preserve a great and beautiful historical building from destruction; (*c*) To cause the said mansion house and gardens and park to be used for the purposes of an educational centre or college for educating persons in economics, in political and social science, in political history with special reference to the development of the British Constitution and the growth and expansion of the British Empire and in such other subjects as the governing body may from time to time deem desirable.

Finlay, J., held that inasmuch as the last clause gave the

[1] *Case of Rugby School* (1627), Duke 80; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367.

[2] *Case of Jesus College* (1616), Duke 78; *A.-G.* v. *Margaret and Regius Professors at Cambridge* (1682), 1 Vern. 55. In *Re Gott*, [1944] Ch. 193 a gift to Leeds University for a scholarship for male students of "British and Christian parentage" was held good as a charitable gift. *Cf. Clayton* v. *Ramsden* [1943] A.C. 320.

[3] *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 531.

[4] *A.-G.* v. *Lonsdale* (1827), 1 Sim. 105.

[5] *Royal Society* v. *Thompson* (1881), 17 Ch.D. 407.

[6] [1945] 114 L.J. Ch. 1.

[7] *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 398.

[8] [1923] 1 Ch. 237.

[9] [1898] 2 Ch. 638

[10] (1933), 49 T.L.R. 220.

governing body authority to promote lectures which were simply propaganda for a political party, the purpose could not strictly be termed charitable. It should be added that in *Re Tetley*,[1] Russell, J., had observed—

> Subsidising a newspaper for the promotion of particular political or fiscal opinions would be a patriotic purpose in the eyes of those who considered that the triumph of those opinions would be beneficial to the community. It would not be an application of funds for a charitable purpose.[2]

In view of the decision in the *Bonar Law Memorial Trust* case,[3] it would appear to be open to question whether the decision in *Re Scrowcroft*[4] could now be supported.

(c) THE ADVANCEMENT OF RELIGION.

Examples of gifts for the advancement of religion.

Whilst gifts for the religious instruction of the public generally, or of a section of it are clearly charitable, gifts for the religious benefit of a particular individual or specified number of individuals are not. Thus, gifts in general terms, such as "for the worship of God,"[5] have been consistently upheld, and innumerable bequests for the support of Christian missions abroad have been held to be charitable. Furthermore, gifts for the benefit of ministers of religion in a particular place,[6] or for the establishment of a bishopric,[7] or for the increase of clergymen's stipends, either generally or in a particular place or church,[8] or for the preaching of a particular sermon,[9] or for a minister to preach on some special occasion,[10] are all charitable. So also is a gift for "infirm sick and aged priests."[11] Gifts to provide or maintain places of worship,[12] or for the repair of the fabric or

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[1] [1923] 1 Ch. 258.

[2] See also *Inland Revenue Commissioners* v. *Temperance Council* (1926), 10 Tax Cas. 748; 42 T.L.R. 618; *Re Hood*, [1931] 1 Ch. 240.
It should be noticed that the Indian Income Tax Act 1922 Sect. 4 (3) defines "charitable purpose" as including "relief of the poor, education, medical relief and the advancement of any other object of general public utility. In *Tribune Press, Lahore* v. *Punjab, Lahore, Income Tax Commissioner* (1939), 108 L.J.P.c. 97, the Privy Council held that a newspaper, held by trustees, who were under an obligation to devote all profits to the improvement of the newspaper "keeping up the liberal policy of the newspaper," was within the definition, and so was entitled to exemption from income-tax.

[3] (1933), 49 T.L.R. 620. [4] [1898] 2 Ch. 638.

[5] *A.-G.* v. *Pearson* (1817), 3 Mer. 353, 409. In *Re Ward*, [1941] Ch. 308 "religious purposes" was held to be necessarily charitable.

[6] *Pennington* v. *Buckley* (1848), 6 Hare 453.

[7] *A.-G.* v. *Chester* (1785), 1 Bro. C.C. 444.

[8] *Middleton* v. *Clitherow* (1798), 3 Ves. 734; *A.-G.* v. *Sparks* (1753), Amb. 201. [9] *Re Parker's Charity* (1863), 32 Beav. 654.

[10] *Ibid.* [11] *Re Forster* (1939), 108 L.J. Ch. 18

[12] *Re Parker* (1859), 4 H. & N. 666.

a part of it,[1] or the maintenance of monuments,[2] or the installation of ornaments (including clocks)[3] are charitable also. A gift for the maintenance of the churchyard is charitable,[4] and so is a bequest for the erection or maintenance of vaults or tombs in the church, but a gift for the erection or maintenance of a particular tomb in a churchyard is not a charity,[5] although a bequest for the repair of all headstones on the graves in churchyards of a particular sect is.[6]

Gifts for the erection of tombs in a church charitable.

The fact that bequests for the maintenance of Dissenting, Roman Catholic, or Jewish religious objects are now charitable has already been noticed,[7] and in *Re Lea*,[8] a gift to General Booth, of the Salvation Army, "for the spread of the Gospel," was also held to be charitable, whilst in *Thornton* v. *Howe*,[9] a bequest for distributing the works of Joanna Southcott was held to be charitable. From this case it would appear that the maintenance of those religions will be held to be charitable which are not subversive of morality.[10]

Gifts for the promotion of dissenting churches or non-Christian religions now charitable.

The general attitude of the Court to these gifts is well expressed by Sir John Romilly, M.R., in *Thornton* v. *Howe*,[11] where he says—

> In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another. It may be that the trusts of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void; but the character of the bequest, so far as regards the statute of Mortmain, would not be altered by this circumstance. The general immoral tendency of the bequest would make it void, whether it was paid out of pure personalty or out of real estate. But if the tendency were not immoral, and although the Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not on that account declare it void or take it out of the class of legacies which are included in the general term charitable bequests.

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[1] *Hoare* v. *Osborne* (1866), L.R. 1 Eq. 585. [2] *Ibid.*
[3] *Re Hendry* (1887), 56 L.T. 908.
[4] *Re Vaughan* (1886), 33 Ch.D. 187; *Re Eighmie*, (No. 1) [1935] Ch. 524.
[5] *Hoare* v. *Osborne*, *supra*. [6] *Re Pardoe*, [1906] 2 Ch. 184.
[7] P. 130, *ante*. [8] (1887), 34 Ch.D. 528. [9] (1862), 31 Beav. 14.
[10] But see *Yeap Cheah Neo*. v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381 and *Re Hummeltenberg*, [1923] 1 Ch. 237. In *Re Price*, [1943] Ch. 422. Cohen, J., was of opinion that a gift to the Anthroposophical Society in Great Britain for carrying on the teachings of Rudolf Steiner was a good charitable gift.
[11] (1862), 31 Beav. 14, 19.

Some difficulty has recently arisen with regard to gifts for parish work. In *Re Ashton's Estate, Westminster Bank* v. *Farley*,[1] a testatrix gave her residuary estate on trust in equal shares for two plainly charitable institutions, and also "to the vicar and churchwardens of St. Columba's Church, Hoxton, for parish work"; and to the "vicar and churchwardens of St. Cuthbert's Church, Philbeach Gardens, Kensington, for parish work." The question arose whether "for parish work" necessarily implied a charitable object. If not, the gift would fail for uncertainty. There was a good deal of discussion whether the fact that the two parishes were ecclesiastical and not secular made any difference, and also whether the ecclesiastical character of the trustees could give the bequest a charitable complexion if the words of the gift did not necessarily imply it. Eventually the Court of Appeal by a majority (Clauson, L.J., dissenting), and also the House of Lords reached the conclusion that such gifts were not charitable. On the second point mentioned above, the majority of the Court of Appeal relied on a statement of Lord Macnaghten in *Dunne* v. *Byrne*[2] that "it is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee."

It is a little strange that an authority which goes further than was required for a different decision in this case was not mentioned in the judgments. In *West* v. *Knight*,[3] a testator left a gift to a parish—in this case a secular parish, for the ecclesiastical authorities put in no claim for it—and the Court held the gift good as a charitable gift, being of opinion that it must necessarily be devoted to the relief of the poor. In *Re Garrard*[4] a gift to the vicar and churchwardens of a parish simply was held to be good, on the ground that it could only be applied by them for charitable purposes in the parish. Here the parish was an ecclesiastical parish. Combining the two decisions, we get the result that a gift to the vicar and churchwardens of a parish "for the parish" is necessarily charitable; so that the different decision in *Re Ashton's Estate*[1] was based simply upon the difference between "for the parish" and "for parish work."

It would seem that the majority in *Re Ashton's Estate*[1]

[1] [1938] Ch. 482, affirmed H. of L. *sub. nom. Farley* v. *Westminster Bank Ltd.*, (1939), 108 L.J. Ch. 307
[2] [1912] A.C. 407, 410.
[3] (1669), Cas. in Ch. 134.
[4] [1907] 1 Ch. 382.

were unable to distinguish the words which they were called upon to construe from those used in *Re Stratton, Knapman* v. *A.-G.*,[1] where there was a gift to the vicar and churchwardens of a parish "for parochial institutions or purposes." There the Court of Appeal, after considering the list of parish activities set out in the parish magazine, fell back upon the proposition of Lord Macnaghten in *Dunne* v. *Byrne*,[2] and held that the gift was not necessarily charitable, and therefore failed. In *Re Ashton's Estate*,[3] Clauson, L.J., was of opinion that *Re Stratton* should have been decided differently, but the view of the majority of the Court of Appeal was unanimously upheld by the House of Lords, who thought that the phrase "for parish work" was too wide, and who were unable to distinguish the case from *Dunne* v. *Byrne*,[4] where the words, "I will and bequeath that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese" were held to be too wide.

The decision of Bennett, J., in *Re Thackrah*[5] has emphasised the necessity of the element of advancement of religious doctrine which is implicit in this head of charitable activity. A testatrix gave £500 to the Oxford Group. Inasmuch as this body has no formal legal existence or constitution, the legacy failed as a direct gift to a definite body, and the question then arose whether it could be regarded as a valid charitable bequest. Bennett, J., held that, although the Oxford Group sought to bind people together by religious bonds, that was not what was meant by the promotion of religion, nor did the Group exist purely for the purpose of promoting religion, and the gift therefore failed for uncertainty.

(*d*) OTHER CHARITABLE PURPOSES.

Under the fourth class trusts for the general public good are contemplated.

The residuary class discussed by Lord Macnaghten in *Pemsel's Case*,[6] has always proved the most difficult to delimit satisfactorily, and from the observations of Lord Hanworth in *Re Tetley*,[7] it would appear that the distinctions between charitable and non-charitable under this head have sometimes been rather arbitrary. Roughly speaking, under this head are included a great variety of general purposes,

[1] [1931] 1 Ch. 197.
[2] [1912] A.C. 407.
[3] [1938] Ch. 482.
[4] [1912] A.C. 407.
[5] [1939] W.N. 113.
[6] [1891] A.C. 531.
[7] [1923] 1 Ch. 258.

productive of public good. In *Dolan* v. *Macdermot*,[1] Lord Romilly included among them the mending of roads, supplying water, and making or repairing bridges and culverts. Some of these objects, it has been seen, were specifically mentioned in the Statute 43 Eliz., and the Court has always shown itself ready to consider extensions by way of analogy. On the other hand, as has been pointed out,[2] all public or benevolent or patriotic or philanthropic purposes are not charitable; but gifts for the general benefit of the State are, as was noticed, charitable,[3] and gifts for the relief of financial burdens of people generally resulting from taxation always have been,[4] and so have gifts for the benefit of a particular locality or its inhabitants, except where the intention was to benefit the actual existing inhabitants only.[5] In *Mitford* v. *Reynolds*,[6] a gift of residuary estate to the Government of Bengal, to be by them applied "to charitable, beneficial, and public works, at and in the City of Dacca, in Bengal," for the exclusive benefit of the native inhabitants, was held to be good; and in *Re Hadden*,[7] a gift "for the benefit, in the Cities of Vancouver and (if in the opinion of any trustees there is some equally deserving object of the nature hereinafter indicated) of Nottingham or other places, of the working people, such as playing fields, parks, gymnasiums or other plans, which will give recreation to as many people as possible, but as regards Vancouver I would not exclude some educational purpose being considered," was likewise held to be charitable.

A gift to promote recreation among working people charitable.

Among a vast number of other general purposes which have been held to be charitable, the following may be mentioned—

(*a*) Gifts for specific public purposes in connexion with a particular locality, for example for the repair of highways or bridges,[8] for supplying a town with water,[9] or with a cemetery,[10] or for defending,[11] fortifying, improving, paving, or lighting a town.[12]

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[1] (1868), L.R. 5 Eq. 62; 3 Ch. App. 676. [2] Pp. 133 *et seq. ante.*

[3] *Smith* v. *Kerr*, [1900] 2 Ch. 511; [1902] 1 Ch. 774.

[4] *Thellusson* v. *Woodford* (1799). 4 Ves. 235, 298, 309. *Newland* v. *A.-G.* (1809), 3 Mer. 684.

[5] *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 642; *Rogers* v. *Thomas* (1837), 2 Keen 8.

[6] (1841), 1 Ph. 185. [7] [1932] 1 Ch. 133.

[8] *Eltham Parish* v. *Warreyn* (1635), Duke, 67; *Forbes* v. *Forbes* (1854), 18 Beav. 552.

[9] *Jones* v. *Williams* (1767), Amb. 651; *A.-G.* v. *Mayor of Dublin* (1827) 1 Bli. N.S. 347.

[10] *A.-G.* v. *Blizzard* (1855), 21 Beav. 233.

[11] *A.-G.* v. *Mayor of Carlisle* (1828). 2 Sim. 437.

[12] *A.-G.* v. *Heelis* (1824), 2 S. & S. 77.

Miscellaneous charitable purposes.

(*b*) Gifts for a number of miscellaneous purposes tending towards the improvement materially, morally, or intellectually of mankind, although, as was pointed out in *Re Tetley*,[1] not all objects which can be included under this head can be regarded as charitable. Amongst such objects which have been recognised as charitable are gifts for providing lifeboats,[2] and gifts to the Royal National Lifeboat Institution,[3] gifts to the Royal Humane Society,[4] to the Society for the Prevention of Cruelty to Animals,[5] to veterinary colleges, or homes for animals,[6] to the Society for the Prevention of Cruelty to Children,[7] for the protection of animals against vivisection,[8] for the support of vegetarian societies,[9] for the furtherance of psychological healing[10] for the establishment of a botanical garden,[11] or a public library,[12] or public museum.[13] In *Re Lord Stratheden and Campbell*,[14] a gift to a volunteer corps was held to be charitable, and in *Re Stephens*,[15] a gift to the National Rifle Association to be used for the purpose of teaching shooting at movable objects with the view of preventing as far as possible a repetition of a catastrophe similar to that at Majuba Hill was also held charitable.

In the interesting case of *Re Corelli*,[16] Miss Marie Corelli gave her house and its contents at Stratford-on-Avon to trustees on trust that it should be preserved intact, so that "the land shall be enclosed as a breathing space for the town," and after the expiration of certain interests, the house was to be held in perpetuity "for the benefit and service of distinguished persons visiting Stratford-upon-Avon from far countries who shall be selected and recommended to my trustees by the Council of the Society of Authors and also as a meeting place as and when required by the President of the Royal Institution of Great Britain for the annual or provincial gatherings of scientists connected with that institution." Cohen, J., held that the dominant motive was

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[1] [1933] 1 Ch. 258 [2] *Johnston* v. *Swann* (1818), 3 Mad. 457.
[3] *Thomas* v. *Howell* (1874), 18 Eq. 198.
[4] *Beaumont* v. *Oliveira* (1869), 4 Ch. App 309.
[5] *Re Douglas* (1887), 35 Ch.D. 472.
[6] *University of London* v. *Yarrow* (1857), 1 De G. & J. 72; *Re Douglas* (1887), 35 Ch.D. 472.
[7] *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 572.
[8] *Re Douglas, supra*; *Re Foveaux*, [1895] 2 Ch. 501.
[9] *Re Slatter* (1905), 21 T.L.R. 295.
[10] *Re Osmund*, [1944] Ch. 206.
[11] *Townley* v. *Bedwell* (1801), 6 Ves. 194.
[12] *Abbot* v. *Fraser* (1874), L.R. 6 P.C. 96.
[13] *British Museum* v. *White* (1826), 2 S. & S. 594.
[14] [1894] 3 Ch. 265. [15] (1892), 8 T.L.R. 792.
[16] [1943] Ch. 332.

the establishment in perpetuity of a hostel for the entertainment of distinguished persons. It was therefore not a valid charitable bequest and it failed for remoteness.

No certain test of charitable objects.

It is therefore manifest, even from this selection of illustrations of miscellaneous charitable objects that there is no certain and comprehensive test whereby a charitable can be distinguished from a non-charitable object, although all charitable objects are beneficial to the public, using the expression in its broadest sense. If the objects of the charitable purpose are situated abroad, the Court will not on that account regard the gift as invalid, but it would appear that such gifts must satisfy the following conditions—

Conditions under which a gift for a foreign charity is valid.

1. The purpose designated must, as in other charitable gifts, be *necessarily* charitable.

2. The object must be valid, both according to English law and according to the law of the place where the objects are situated. If the object is invalid according to either, the gift will fail.

3. It is not contrary to public policy to earmark money for an indefinite time for charitable purposes abroad.

The first point is illustrated by *Re Moore*,[1] wherein the testator bequeathed money to the Pope, to be applied by him "in his sole and absolute discretion in the carrying out of his sacred office." It was held that by the terms of the gift it could be applied to purposes not strictly charitable, on account of his claims to temporal independence, and the gift was void. On this ground also turned the decision in *Keren Kayemeth le Jisroel, Ltd.* v. *Inland Revenue Commissioners*.[2] The appellants were an organisation whose primary object was the acquisition in perpetuity of land in Palestine as the inalienable property of the Jewish people, with the object of settling Jews thereon. The House of Lords held that the association was not established for religious purposes, nor for the benefit of the Jewish community, nor for the benefit of poor Jews, and was therefore not "established for charitable purposes only" so as to be exempt from income tax.

A gift for the acquisition of land in Palestine for Jewish settlement.

An illustration of the second point is afforded by *Re Elliott*,[3] where there was a bequest for religious purposes in Victoria, Australia, which was entirely valid by the laws of the State, but which was contrary to the Statute against superstitious uses of Edward VI,[4] and the gift was therefore void.

[1] [1919] 1 Ir. Rep. 316.
[2] [1932] A.C.650.
[3] [1891] W.N.9.
[4] 1 Edw. VI, c. 14.

The third point was raised in *Re Geck*,[1] where a fund had been left on trust for the benefit of the poor of a town in Germany. It was argued that this was contrary to public policy, since the money would be applied for purposes outside England, but the Court of Appeal declined to accept this view, holding the gift to be charitable. Again, in *Re Robinson*,[2] the testator left his residuary estate for the benefit of German ex-soldiers, disabled in the Great War, with a gift over to General Smuts for the benefit of Boer soldiers disabled in the South African War. This was held to be a good charity, and not contrary to public policy. In this case, both the German Government and General Smuts had indicated their readiness to accept; but if there is a trust for charitable objects abroad, imposed on a foreign government, or the head of it, the gift may fail, as in *New* v. *Bonaker*,[3] where stock was given to the President and Vice-President of the United States and the Governor of Pennsylvania upon trust to accumulate for a period, and then establish a college in Pennsylvania in which there should be a professor to advocate the rights of negroes throughout the world, until they should be restored to equality with the white peoples in the United States. The trustees declined to accept, and the Court held that although it was a valid gift for educational purposes, yet, in spite of the rule that a trust shall not fail for want of a trustee, the Court would not force upon the United States a scheme for a purpose which the head of the State had signified his unwillingness to uphold, and the gift therefore failed.

A gift for the disabled ex-soldiers of a former enemy good.

If the foreign purpose of the charitable gift is good, the Court will not normally control the details of its administration. It will direct the property to be transferred to the trustees for administration in accordance with the law of the place where the objects are situated, but where the Court has a discretion in the selection of objects, it will normally attempt to retain the property within its jurisdiction. Thus, in *Re Mirrlees Charity*,[4] the testatrix, a Scottish lady, left money for the benefit of a hospital in England, or for such other medical charities as the trustees should determine. The Court decided that the whole of it should be applied to medical charities in England and Wales.

If the gift to the foreign charity is good, the Court will not control the details of its administration.

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[1] (1932), 69 L.T. 819.
[2] (1931), 100 L.J.Ch. 321; 47 T.L.R. 264.
[3] (1867), 36 L.J.Ch. 846.
[4] [1910] 1 Ch. 163.

C. DIFFERENCES BETWEEN THE LAW RELATING TO CHARITABLE AND TO PRIVATE TRUSTS

(*a*) If the trust shows a general intention to benefit charity only, it will not be allowed to fail, even though the mode in which the fund is to be applied is left uncertain. Thus, if the settlor directs that sums shall be left to such charities as his trustees may select, the gift will not fail, and in the last resort the Court would always give effect to the settlor's intention by ordering the preparation of a scheme.[1] This is done either by the Court itself, or by the Charity Commissioners or, in the case of educational trusts, by the Ministry of Education. Furthermore, although it has been noticed that a direction to apply money for "charitable or philanthropic," or "charitable or benevolent," or "charitable or patriotic" objects will fail as not being *necessarily* charitable, yet if the settlor directs the application of a fund to "charitable *and* benevolent" objects, this is taken to mean those charitable objects which are also benevolent;[2] and, finally, if the trustees are directed to apportion between charitable and non-charitable objects, the trust will not fail, and in default of apportionment by the trustees, the Court will itself undertake the task, and divide the fund equally between the two classes of objects.[3]

A charitable trust will not fail because the mode of application of the fund is uncertain.

The origin of this rule that a charitable trust shall not fail for uncertainty of objects is not clear. Lord Eldon said of it in *Moggridge* v. *Thackwell*[4]—

The origin of the rule is uncertain.

> In what the doctrine originated, whether, as supposed by Lord Thurlow in *White* v. *White*[5] in the principles of the civil law as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period when, in this country, a portion of the residue of every man's estate was applied to charity; and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator. When the Statute[6] compelled a distribution, it is not impossible that the same favour should have been extended to charity in the construction of wills by their own force purporting to authorise such a distribution.

In *Moggridge* v. *Thackwell*[7] Lord Eldon decided, against his inclination,[7] that the authorities made it necessary for

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[1] *Re White*, [1893] 2 Ch. 41.
[2] *Re Best*, [1904] 2 Ch. 354.
[3] *Re Clarke*, [1923] 2 Ch. 407.
[4] (1802), 7 Ves. 69.
[5] (1778), 1 Bro. C.C. 12.
[6] *The Statute of Distributions*, 22 & 23 Car. 2, c. 10.
[7] See *Mills* v. *Farmer* (1815), 19 Ves. 485; 1 Mer. 55.

him to decide in conformity with the rule, which he defined in the later case of *Mills* v. *Farmer*,[1] as follows—

> In all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode, which alone is left deficient.

The rule also applies where a particular type of charity is indicated.

The rule most clearly applies where the intention is expressed to be to benefit charity generally, but it also applies where the intention is expressed to benefit a particular variety of charity, e.g. a religious charity,[2] although here, obviously, the expressed intention as to the type of charity cannot be exceeded in the application of the fund. Similarly, if a testator leaves funds to such charitable purposes as he shall name, and omits to name any,[3] or where he leaves the names of charities blank,[4] the property will be devoted to charitable purposes.

And where the purpose is impossible or has been fully achieved.

Again, if the charitable purposes mentioned are, for some reason, impossible to effectuate, or do not exhaust the whole fund, then the whole or the surplus will also be applied to other charities,[5] the *cy près* doctrine being applied. If the trust is for an institution, a general charitable purpose being expressed, and an institution corresponding with that indicated cannot be discovered, or has never existed, the gift is *prima facie* charitable, since the testator's intention could not have been to benefit such a hypothetical institution only.[6] These cases should be carefully distinguished from those considered in connexion with the *cy près* doctrine, where the particular institution has existed, but has ceased, or has been reorganised before the will takes effect.

The *cy près* doctrine applies to charitable trusts only.

(*b*) The *cy près* doctrine applies to charitable, but has no application to private, trusts. By this doctrine it is implied that if a testator specifies an object the performance of which becomes (in the circumstances considered above) impracticable or impossible, the gift will not fail, but will be devoted to a similar object which, in the opinion of the Court, lies nearest to the testator's true intention, provided that there is clear indication of a general intention to benefit charity. Furthermore, if the *income* of property is devoted

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[1] (1815), 1 Mer. 55, 95.
[2] *Re White*, [1893] 2 Ch. 41. [3] *Re Pyne*, [1903] 1 Ch. 83.
[4] *Pieschel* v. *Paris* (1825), 2 S. & S. 384
[5] *Chamberlayne* v. *Brockett* (1873), 8 Ch. App. 206.
[6] *Loscombe* v. *Wintringham* (1850), 13 Beav. 87; *Bennett* v. *Hayter* (1839), 2 Beav. 81; *Re Kilvert's Trusts* (1871), 7 Ch. App. 170.

to the particular object and it becomes more than sufficient or is at the beginning more than sufficient, to carry out the particular object, the surplus will also be applied *cy près*, provided that a general paramount intention to benefit charity is shown. Thus, in *Re King*,[1] a testatrix set aside a sum for the installation and maintenance of a stained-glass memorial window in the church at Irchester. After the trustees had installed the window and set aside a sufficient sum for its maintenance, it was found there was a substantial surplus, which the Court held could be applied for the installation of similar windows in the church. Similarly, in *Re Royce*,[2] a testator left a sum of money to the vicar and churchwardens of a church "for the benefit of the choir." Simonds, J., held that a general charitable intent had been shown, to improve the musical services of the church, and that the surplus must be applied *cy près*.

An important illustration of the *cy près* application of charitable funds is afforded by *Re Colonial Bishoprics Fund, 1841*.[3] In 1841, money was raised for the endowment of a bishopric at Cape Town, in connexion with the Church of England. Following the grant of self-governemnt to Cape Colony in 1850, it was decided in *Re the Lord Bishop of Natal*[4] that the Crown had no longer powers by prerogative to establish a Metropolitan See whose status the Colony would be compelled to recognize. Accordingly the Church of the Province of South Africa was established as a Church not in connexion with the Established Church of England, and the Archbishopric of Cape Town was constituted within the Church. The question then arose of the disposal of the income of the funds raised in 1841. The Court held that the Archbishop of Cape Town was not a beneficiary under the trust, but since the effectuation of the original object had now become impracticable, and a general charitable intent had been shown, the Court had jurisdiction to order a scheme *cy près*. In this case, the *cy près* application would be the payment of the income to the Archbishop of Cape Town, so long as the South African Church remained, in the opinion of the Archbishop of Canterbury, in communion with the Church of England.

It is important to remember, however, that for the *cy près* doctrine to operate, apart from its application where the sum to be applied exceeds what can reasonably be devoted for that purpose, it must be either impossible, or at any rate

[1] [1923] 1 Ch. 243.
[2] [1940] Ch. 514.
[3] [1935] 1 Ch. 148.
[4] (1864), 3 Moo. P.C. (N.S.) 115.

The objects must be impossible or at least highly undesirable and there must be a paramount intention to benefit charity.

highly undesirable, for the original intention of the settlor to be carried out precisely. Otherwise testators would be discouraged from leaving property to charities on account of uncertainty concerning its application. In the second place, the settlor must have shown a paramount general intention to benefit charity. If it can be shown that he intended to effect or benefit one particular object only, and that cannot be done, then the property passes to the settlor, his residuary legatee or devisee, or the intestate successors.[1] This point is well illustrated by *Re Rymer*.[2] By a will made in 1883, £5,000 was bequeathed to the Rector of St. Thomas's Seminary for the education of priests in the diocese of Westminster. This institution ceased to exist on Lady Day, 1893, when it was closed, and the students were transferred to a similar seminary in Birmingham. The testator died on 5th June, 1893, and it was argued that the gift was for a particular purpose, to an institution which had ceased to exist in the testator's lifetime, and the gift therefore lapsed. This view was accepted by Chitty, J., and upheld by the Court of Appeal. In *Re Faraker*,[3] a testatrix, who died in 1911, bequeathed £200 to "Mrs. Bailey's Charity." This was admitted to be Hannah Bayley's Charity, founded in 1756, and remodelled in 1813. In 1905, however, this charity had been consolidated with thirteen other charities under a scheme approved by the Charity Commissioners. Neville, J., held that the effect of this was that the constitution had been so altered that the charity had ceased to exist, but this was reversed by the Court of Appeal, which accepted the Attorney-General's argument that an endowed charity is indestructible, either by the Court or the Charity Commissioners, although its objects may obviously be changed by them from time to time. Again, in *Re Wedgwood*,[4] a legacy was given to the "St. Mary's Home for Women and Children at 15, Wellington Street, Chelsea." Testatrix died in 1913, and in 1909 the address of the institution was changed to 14, Trafalgar Square, Chelsea, where it was managed by a different association. Joyce, J., held that these facts had not rendered a gift to the home invalid. A further point arose for consideration in *Re Withall*.[5] A testatrix, by a will made in 1924, bequeathed her residuary estate to the Margate Cottage Hospital. She died on 19th October, 1930, and on 31st July, 1930, the hospital had closed, but the work of the hospital had been transferred to a larger

Where the institution is merged in another the gift may be good.

[1] *Re Monk*, [1927] 2 Ch. 197. [2] [1895] 1 Ch. 19.
[3] [1912] 2 Ch. 488. [4] [1914] 2 Ch. 245. [5] [1932] 2 Ch. 236.

institution, which had opened on 1st August, 1930. The trustees of the Cottage Hospital had applied the funds of the Cottage Hospital for the work of the new institution, and Clauson, J., held that it did not follow that the original trusts had failed, even if the funds had been transferred to a new organisation. It was therefore ordered that the residuary estate should be paid to the persons entitled to receive the funds of the Cottage Hospital, under a scheme sealed by the Charity Commissioners. In all these cases, the problem which the Court is called upon to settle is whether the institution may be regarded as having so far survived the changes in constitution or situation, so as to be capable of being identified with the institution named and contemplated by the testator.[1]

In *Re Harwood*,[2] testatrix left legacies to "the Wisbech Peace Society," "the Peace Society of Dublin," and "the Peace Society of Belfast." At her death there were no such societies, but an organization with the exact name of the first had formerly existed. Farwell, J., held that the first legacy lapsed, but that the other two would be applied *cy près*. The learned judge pointed out that where a testator selects a particular charity and takes some care to identify it, it is difficult for the Court to find a general charitable intent, if the named charity ceases to exist before the testator's death.[3] But such a general charitable intent may be inferred where no institution as described in the will has ever existed.[4]

In *Re Knox*,[5] testatrix bequeathed her residue to four institutions in equal shares. Three of them were charitable institutions, and the fourth had never existed. The Court held that in these circumstances a general charitable intent had been shown, so that the share could be applied *cy près*.

If, the institution clearly terminates just after the testator's death, there is no lapse, but the property passes to the Crown, which applies it *cy près*.[6]

(*c*) The extent of the application to charities of the rules relating to perpetuities and alienability has already been considered.[7] The property must vest in the initial charity within the perpetuity rule; but property may be given to a

Charitable gifts are not within the perpetuity rule.

[1] See also *Re Joy* (1888), 60 L.T. 175; *Re Watt* (1931), 101 L.J. Ch. 417.
[2] [1936] 1 Ch. 285.
[3] So in *Re Tharp* (1943), 112 L.J. Ch. 3 the charity had ceased to exist at the testator's death, and the gift lapsed.
[4] An illustration of this latter proposition is afforded by *Re Davis*, [1902] 1 Ch. 876.
[5] [1937] Ch. 107.
[6] *Re Slevin*, [1891] 2 Ch. 236.
[7] *Ante* p. 107.

charity, even though, in effect, it will not be alienable in the future. Furthermore, there may be a gift over from one charity to another, after any interval of time. By taking advantage of this relaxation of the general rule, persons may often indirectly give effect to objects which are not charitable. Thus, if a testator seeks to secure the repair and maintenance of his tomb, standing in a churchyard, he may give property to one charity, with an obligation to maintain the tomb, subject to a gift over to another charity, if the first charity fails to fulfil the obligation;[1] but it is essential to observe that the rule is only relaxed if the gift over is from one charity to another.[2]

The basis of these tomb cases received extended consideration in *Re Dalziel*,[3] where it was emphasised that "the obligation to keep up the tombstones is merely honorary, but the obligation to give all that is not applied for the purposes just mentioned is by no means honorary; it is a trust that must be executed." In *Re Dalziel*, there was a gift of £20,000 to a hospital, subject to the condition that the hospital should use the income so far as was necessary for the upkeep of a mausoleum, with a gift over to other charities. Here the whole income was charged with the legal obligation to keep the tomb in repair, and as this was inconsistent with a purely moral obligation, the bequest failed completely.

A trust to pay the income to a non-charitable object.

Since the decision in *Re Chardon*,[4] it has been possible to achieve the same object in another way. In that case the testator left a capital sum of money to his trustees, on trust to pay the *income* of it to a cemetery company, so long as they maintained his tomb, with a proviso that if they failed to do so at any time, the money should pass to his residuary legatee. After careful consideration, Romer, J., decided that this form of disposition did not violate the rule relating to perpetuities or that relating to inalienability. The better opinion would seem to be that this device can only be adopted where the gift over is to the residuary legatee, inasmuch as the money would then fall into the residue in any case, even if the will did not so direct.[5] In other words, what had been created was a determinable interest in personalty, and when the determinable interest ended in accordance with its natural limitation, then the residuary legatee took, not under the instrument, but by operation of law. In *Re Chardon*[4] the recipient of the determinable interest was not a charity,

[1] *Re Tyler*, [1891] 3 Ch. 252.
[2] *Re Davies*, [1915] 1 Ch. 543.
[3] [1943] Ch. 277.
[4] [1928] Ch. 464.
[5] But see Tudor, *Charities*, Appendix.

but the principle would be exactly the same if a determinable interest in personalty were given to a charity, with a limitation over on its determination to the residuary legatee. Thus, in *Re Randell*,[1] a testatrix bequeathed money on trust to pay the income to the incumbent of Holy Trinity Church, Hawley, *so long as* he should permit the sittings to be occupied free, with a direction that in case an incumbent should receive payment in respect of the sittings, the money should fall into residue. North, J., held that there was a charitable bequest for a specific limited purpose, and that when that purpose was fulfilled the interest determined and the funds necessarily fell into residue. In *Re Blunt's Trusts*[2] there was a similar limitation and Buckley, J., reached the same conclusion as North, J., in both cases the direction that the fund was to fall into residue was only a statement of the way in which the fund would go in the absence of such a direction, and accordingly it was not obnoxious to any rule of law, although, if the gift had to be relied on as a clause of defeasance or a gift over, it would have been void for perpetuity. This last point is illustrated by the decisions in *Re Bowen*[3] and in *Re Peel's Release*.[4] In both cases property was given to the charity *in perpetuity*, but with a proviso that if certain conditions were not fulfilled the property should fall into residue. Here an absolute gift was arbitrarily cut down by a clause of defeasance, so that the residuary legatee took, not by operation of law but under the instrument, and, therefore, since the conditions could operate outside the perpetuity period, the gifts over to the residuary legatee were bad.[5]

Restrictions on conveyances of land to charities.

(*d*) Another important characteristic of the law relating to charitable trusts is that restrictions upon the conveyance of property to them are imposed by various statutes. If made *inter vivos* grants of land must comply with the provisions of the Mortmain and Charitable Uses Act, 1888, and with the Settled Land Act, 1925, Sect. 29 (4), the latter of which provides that all conveyances to a charity of land or of personal property to be laid out in the purchase of land, and being within the Mortmain and Charitable Uses Act, 1888, Sect. 4, shall "be sent to the offices of the Charity Commissioners within six months after the execution thereof or within such extended period as the said Commissioners

[1] (1888), 38 Ch.D. 213.
[2] [1904] 2 Ch. 767.
[3] [1893] 2 Ch. 491.
[4] [1921] 2 Ch. 218.
[5] See also *Re Talbot*, [1933] 1 Ch. 895, and *Re Thompson*, [1934] 1 Ch. 342.

may, either before or after the expiration of the six months, in any particular case allow, for the purpose of being recorded in the books of the said Commissioners."[1] By Sect. 29 (1) of the same Act, "all land vested or to be vested in trustees on or for charitable, ecclesiastical, or public trusts or purposes, shall be deemed to be settled land." This provision, however, applies only "for the purposes of this section," which must therefore be considered separately from the general scheme of the Act, except to the extent that it confers on the trustees of land held on charitable, ecclesiastical, or public trusts the powers which the Act confers on a tenant for life, and the trustees of a settlement. A charity may be exempt, however, from the necessity to comply with the terms of the Mortmain and Charitable Uses Act, 1888, and of the Settled Land Act, 1925, Sect. 29 (4). An important illustration of such an exemption is afforded by Sect. 117 of the Education Act, 1921, which provides that "any assurance, as defined by Sect. 10 of the Mortmain and Charitable Uses Act, 1888, of land or personal estate to be laid out in the purchase of land for educational purposes, shall be exempt from any restrictions of the law relating to mortmain and charitable uses, and the Mortmain and Charitable Uses Acts, 1888 and 1891, and the Mortmain and Charitable Uses Act Amendment Act, 1892, shall not apply with respect to any such assurance." But an assurance of land or personalty to be laid out in the purchase of land must be sent to the Board of Education to be recorded as soon as may be after execution, or, in the case of a will, as soon as may be after the death of the testator.

The Settled Land Act, 1925, Sect. 29, gives the trustees of charity land all the powers of a tenant for life and of the trustees of a settlement, but this does not make it unnecessary to obtain any consent or order required apart from the Act. Furthermore, in *Re Booth and Southend-on-Sea Estates Co.'s Contract*,[2] it was held that the effect of the Act was not to make the charity land settled land for all purposes, so that if the scheme governing a charity allows a sole trustee to receive capital money, the Settled Land Act, which requires payment to two trustees or a trust corporation, does not override this power.

Gifts of real property to charities by will.

Gifts of land or of money for the purchase of land, to charities *by will* were prohibited in general until the Mortmain and Charitable Uses Act, 1891, but by Sect. 5 of this

[1] For other requisites, see Sects. 4–5.

[2] [1927] 1 Ch. 579.

Act, land can be given by will to charitable uses, though generally it should be sold within a year of the testator's death, unless the Court or the Charity Commissioners grant permission to retain it. This is given when the charity requires the land for occupation.[1] If the land is not sold at the end of the year, and no order has been made, the property vests in the Official Trustee of Charity Lands, who ensures that it is sold.[2] It has been held, however, in *Re Sidebottom*,[3] that the Act does not apply where the land is held on trust for sale, so that the charity is only to receive the proceeds of sale. In this case, the land need not be sold within the year, but it must be sold within a reasonable time. Where the testator gives money to a charity to invest in land, the gift is good, but land must not be purchased without an order from the Court or the Charity Commissioners.[4]

Furthermore, there are special rules relating to the alienation of property by a charity. Generally speaking, the trustees of a charity may not dispose of the property, except under the authority of an Act of Parliament, or of a Court of competent jurisdiction, or in accordance with a scheme established or approved by the Charity Commissioners.[5] A number of charities are exempt from this,[6] however. Under the Charitable Trusts Act, 1853, Sect. 62, the principal institutions exempted are the Universities of Oxford, Cambridge, London, and Durham, or any college or hall in the Universities of Oxford, Cambridge, and Durham; any Cathedral or collegiate church, or any registered place of meeting for religious worship; the Commissioners of Queen Anne's Bounty, the British Museum, and a number of other charities. The Act then proceeds to distinguish between endowed charities, charities maintained wholly by voluntary contributions, and "mixed" charities, i.e. charities partly endowed, and partly maintained by voluntary contributions. Those maintained wholly by voluntary contributions are also exempt, "and when any charity is maintained partly by voluntary subscription and partly by income arising from any endowment, the Powers and Provisions of the Act shall, with respect to such charity, extend and apply to the Income from Endowments only, to the Exclusion of voluntary Subscriptions, and the Application thereof; and no

[1] Mortmain and Charitable Uses Act, 1891, Sect. 8.
[2] *Ibid.*, Sect. 6.
[3] [1902] 2 Ch. 389.
[4] Mortmain and Charitable Uses Act, 1891, Sect. 7.
[5] Charitable Trusts Amendment Act, 1855, Sect. 29.
[6] Charitable Trusts Amendment Act, 1855, Sect. 47; Charitable Trusts Act, 1853, Sect. 62.

Donation or Bequest unto or in trust for any such charity as last aforesaid, of which no special Application of Appropriation shall be directed or declared by the Donor or Testator, and which may legally be applied by the governing or managing body of such Charity as Income in aid of the voluntary Subscriptions, shall be subject to the Jurisdiction or Control of the said Board, or the Powers or Provisions of this Act." By Sect. 66 of the same Act, the term "endowment" means "all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." In *Re Clergy Orphan Corporation*,[1] however, it was decided that where land was purchased by a charity entitled to hold land, out of the proceeds of sale of the investment of voluntary contributions applicable as income for the general purposes of the charity, the consent of the Charity Commissioners was not required. In order that a donation or bequest may enjoy the exemption conferred by Sect. 62 upon "mixed" charities, the institution must, at the date of the gift be a "mixed" charity. In *Re Child Villiers' Application*,[2] land was conveyed to a charity which, at the date of the gift had no voluntary contributions. The land was in a compulsory registration area, and after the application for registration, voluntary contributions were received so that the institution became a "mixed" charity. It was held that the land was not exempt from the jurisdiction and control of the Charity Commissioners, and that a caution against disposition without their consent must be entered on the register.

(*e*) A further distinction is that whereas in the administration of a private trust, unanimity is necessary for the decisions of trustees, in a charitable trust, the decision of the majority is sufficient, and it binds the minority so long as the majority are acting within the law and the trust deed.[3] If, however, the majority decide to do something which is a breach of trust, or of the terms of their trust deed, they are acting *ultra vires*, and can no more bind the minority than they can effectively bind themselves. Thus, in *Ward* v. *Hipwell*,[4] by a trust deed of a Baptist chapel the trustees were to

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[1] [1894] 3 Ch. 145. [2] [1922] 1 Ch. 394.
[3] *A.-G.* v. *Cuming* (1843), 2 Y. & C. Ch.Cas. 139. And see *Cooper* v. *Gordon* (1869), 38 L.J. Ch. 489.
[4] (1862), 3 Giff. 547.

allow the Minister the use of a house, but if he did not occupy it, it was to be let, and the rents were to be applied to pay off a mortgage on some of the trust property. The trustees, by a majority, let the house without offering it to the Minister. The minority and the Minister applied for possession, and the Court held that the lease must be set aside.

Thus, if the majority of the trustees decide to commit a breach of trust, the minority can and should apply to the Court to prevent it, and for this they will get their costs from the majority. Whether they are compelled to do this is not clear, but it is submitted that unless the majority kept the minority in ignorance of their conduct (e.g. by omitting to summon them to the meeting or informing them of their decision) they would be liable equally with the majority.

(*f*) Where the income of property is applicable only for charitable purposes, and is so applied, no income tax is payable.[1]

With these exceptions, the rules applicable to charitable trusts follow the rules applicable to private trusts. Thus, the application of the Statutes of Limitations to the liabilities of trustees is the same for charitable as for private trustees.[2] Finally, the rule in *Saunders* v. *Vautier*[3] applies also to a charity. The effect of this rule is that where there is an *absolute* vested gift, with a direction to pay it in the future, and meanwhile to accumulate the interest, and then pay it at the specified date, with the principal to the same person, that person may call at once for the transfer of the gift, provided that he is of full age.[4]

D. THE ADMINISTRATION AND ENFORCEMENT OF A CHARITABLE TRUST

(*a*) SETTLING OF SCHEMES.

It has already been stated that there are numerous occasions when it is necessary to draw up a scheme for the

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[1] Income Tax Act, 1918, Sect. 37; Finance Act, 1921, Sect. 30.

[2] See *post* p. 368.

[3] (1841), 4 Beav. 115. See *post* p. 328.

[4] For charities, see *Wharton* v. *Masterman*, [1895] A.C. 186. Where, however, a testator left his residuary estate to trustees to pay an annuity to M during his life, and thereafter to pay the fund, with the accumulations of income accruing during M's life to such charities as the trustees should select, the Court held that this was not an immediate vested gift to charity generally, postponed as to payment, and accordingly, the direction to accumulate in excess of twenty-one years from the testator's death was void as to the excess, in respect of which there was, therefore, an intestacy (*Re Jefferies*, [1936] 1 All E.R. 626).

administration of a charity; for example, when the *cy près* doctrine is applied. Schemes are settled either by the Court itself, or by the Charity Commissioners, or, where the charity has as its object the promotion of education, by the Board of Education. Where the Commissioners or the Board of Education prepare the scheme, the Court does not interfere, unless it can be demonstrated that they have exceeded their authority, or that the scheme includes something wrong in principle or in law.[1] Where property is left to trustees, and they wish to have a scheme prepared, it is their duty to apply to the Court by originating summons, making the Attorney-General a party.

Position of the Court where the charity is founded by charter.

Something must be said of the principles followed by the Court in directing the preparation of schemes. Where the charity is constituted by charter, the Court cannot interfere in the execution of the trust, for the charity is established by an authority higher than the Court.[2] Nevertheless, if the charity founded by charter becomes extinct, the Court will apply its funds *cy près*, and so also if the revenues become insufficient for the charity to discharge its functions.[3] Similarly, if a charity is constituted by an Act of Parliament, which also regulates its mode of administration of the funds, the Court cannot interfere so far as the activities of the charity are covered by the statute.[4] Again, where a charitable trust is sufficiently defined, and is capable of being executed lawfully, the Court will not interfere with the execution of that object,[5] unless, as is the case with a number of ancient charities, change of circumstances has made a rigid adherence to the terms of the trust incompatible with the founder's main intention. In such a case, the application of the funds may be modified. This is particularly the case where the funds have considerably increased, and their entire appropriation to the original objects is not warranted by the circumstances.[6]

Settling a scheme.

Where the Court undertakes to fulfil the donor's intention, it does not retain the funds under its immediate control, but it gives directions to the trustees or other controlling body, usually in the form of a scheme, which is generally settled

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[1] *Re Campden Charities* (1881), 18 Ch.D. 310; *Re The Weir Hospital*, [1910] 2 Ch. 124.

[2] *Per* Chitty, J., in *A.-G.* v. *Governors of Christ's Hospital*, [1896] 1 Ch. 879, 888.

[3] *Berkhampstead School Case* (1865), 1 Eq. 102.

[4] *Re Shrewsbury Grammar School* (1849), 1 Mac. & G. 324.

[5] *A.-G.* v. *Earl of Mansfield* (1827), 2 Russ. 501.

[6] *A.-G.* v. *Whiteley* (1805), 11 Ves. 241.

in Chambers, although obviously no scheme is necessary where all that has to be done is to decide to which charitable institutions certain gifts shall be distributed. In Chambers, the preparation of the scheme is usually undertaken by the trustees, the Attorney-General raising objections where necessary. Any person may, for good cause,[1] intervene, and may apply by summons to do so.

When a scheme may be modified.

Schemes also may be altered by the Court, but this it will only undertake on substantial grounds, on proof that the existing scheme does not operate beneficially, and that by alteration it can do so, for if schemes were lightly altered, great mischief would ensue.[2] In every case of alteration, the consent of the Attorney-General is required.[3]

Principles followed by the Court in preparing schemes.

In preparing schemes for the application of funds *cy près*, the Court follows two main principles: (1) Where a particular object has been named, which is capable of being executed, the *cy près* application must be limited within that object; (2) The mode of application must conform as nearly as possible to the founder's intention, so far as that can be ascertained.

As an illustration of the first principle, it is clear that if a gift is for the poor of a particular parish, it can only be applied for the poor of that parish, so long as there are poor of that parish, and the provision for their relief is not excessive.[4] On the second principle, Lord Westbury observed in *Clephane* v. *Lord Provost of Edinburgh*—[5]

> You cannot substitute one charity for another. You may substitute for a particular charity which has been defined, and has failed, another charity *ejusdem generis*, or which approaches it in its nature and character; but you cannot take a charity which was intended for one purpose and apply it to a purpose altogether different.

Attitude of the Court where there has been a change in circumstances.

It may be, however, that there has been a complete change in circumstances surrounding the charity since the time when it has been established and then there is no real clue to the settlor's intention. Here the attitude of the Court is well-defined in the further observations of Lord Westbury in the case last cited—

> You look to the charity which is intended to be created, and you distinguish between it and the means which are

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[1] *A.-G.* v. *St. Cross Hospital* (1854), 18 Beav. 475.
[2] *A.-G.* v. *Bishop of Worcester* (1851), 9 Hare. 328, 361.
[3] *Ibid.*
[4] *Re Campden Charities* (1881), 18 Ch.D. 310.
[5] (1869), 1 H.L. Sc. 417, 421.

directed for its accomplishment. Now the means necessarily vary from age to age. Take a charity such as the present, for the relief of the poor. The condition of the country, or the locality, may have dictated what were at the time very convenient means for its proper application. In the progress of society, however, with the greater diffusion of wealth, and the growth of population, the means originally devised may become inadequate to the end, and Courts of Equity have always exercised the power of varying the means of carrying out the charity from time to time, so as to secure more effectually the benefits intended.

An excellent example of this is afforded by *Re Campden Charities*,[1] wherein Jessel, M.R., in a carefully reasoned judgment applied these observations. In that case, the Court came to the conclusion that the application of very considerable surplus revenues of ancient dole and apprenticeship charities for the poor of the parish of Kensington had become impracticable, and directed that they should be applied, as to one-half, for (*a*) the relief of poor deserving inhabitants of the parish in the event of sudden accident, sickness, or distress; (*b*) subscriptions to hospitals and similar institutions in the parish; (*c*) pensions for deserving and necessitous persons who had lived in the parish for seven years; (*d*) encouraging thrift by contributing to the purchase of annuities, either present or deferred; and as to the other half, and so much of the first half as might not be required for the specified purposes, to the advancement of education of children resident in the parish, and in attendance at public elementary schools: (*a*) in paying premiums for apprenticeship or otherwise assisting them in entering upon the duties of life; (*b*) in making payments up to £6 each to encourage the children to remain at elementary schools beyond the age of eleven; (*c*) in giving exhibitions to places of higher education; (*d*) in providing lectures and evening classes.

(*b*) CHARITIES ESTABLISHED BY CHARTER.

The jurisdiction of the visitor

Where a charity is established as an eleemosynary corporation by charter, there is reserved to the founder (whether the Crown or some other person), or to those whom the founder substitutes for himself, a jurisdiction as *visitor*. It is the office of visitor to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to

[1] (1881), 18 Ch.D. 310.

see that all rules and orders of the corporation are observed.[1] In deciding such matters, the visitor is guided by the statutes of the founder, and within the province, the decisions of the visitor are final, and there is no appeal from them.

Jurisdiction in respect of the property of the charity is exercised by the Court.

This jurisdiction primarily relates to the relations of members of the society to one another. As regards the property of a charity established by charter, however, a Court of Equity has assumed a right of supervision.[2] Thus, though the Court would not hear an information for the removal of Governors or other corporators as irregularly appointed, the Court will hear an information against the Governors that their wrongful administration of the property is tending to frustrate the true objects of the institution.[3]

Jurisdiction in respect of a new gift.

Where additional property is given to an already established charity, it is not subject to the visitorial power of the founder or his nominee unless the donor has expressly or impliedly made it so.[4] Thus, as regards the administration of the additional property given, if no special purpose is demonstrated, it is subject to the existing regulations of the charity, and is administered in the same way as the other property; but if the new gift is made the subject of a particular and special trust, the visitorial power of the founder is excluded, and the Court regards the charity as an ordinary trustee, as fully subject to its jurisdiction as any individual to whom the administration of the particular trust might have been committed.

The visitatorial power of the Crown.

The visitatorial power of the Crown is exercised by the Lord Chancellor, and where the founder of a charity and his heirs are visitors, and the heir cannot be found, or is a lunatic, the Crown exercises the right of visitation, since otherwise the charity would not be visited at all.[5]

E. THE DUTIES OF CHARITABLE TRUSTEES

The trustees must exactly fulfil the intentions of the settlor.

The primary duty of a charitable trustee, as of other trustees, is to carry out the trust according to the instructions of the founder, so long as these are capable of fulfilment.

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[1] *Philips* v. *Bury* (1693), Skin. 447; *A.-G.* v. *Crook* (1836), 1 Keen. 121.

[2] See *A.-G.* v. *The Governors of the Foundling Hospital* (1793), 2 Ves. Jun. 42.

[3] Cf. *A.-G.* v. *Earl of Clarendon* (1810), 17 Ves. 491, at pp. 498–9; *A.-G.* v. *The Governors of the Foundling Hospital, supra*

[4] See observations of Lord Hardwicke in *Green* v. *Rutherforth* (1750) 1 Ves. Sen. 462, 472–3.

[5] See observations of Sir W. Grant in *A.-G.* v. *Earl of Clarendon* (1810), 17 Ves. 491, 498 and *A.-G.* v. *Dixie* (1805), 13 Ves. 519, 535.

These intentions are construed exactly, so that in *The Weir Hospital Case*,[1] where property was given for the establishment of a hospital in a particular locality, it was held that it could not be used for the purpose of establishing a hospital in a neighbouring place. An even better example of this rule is *A.-G.* v. *Earl of Mansfield*,[2] wherein a chapel was granted to a school for the use and benefit of the school. For many years, the inhabitants of the adjoining village had been in the habit of attending services in the chapel, but it was held that, since the chapel had been given for the exclusive use of the school, the trustees could not apply the revenues of the charity for the purpose of enlarging the chapel, to provide better accommodation for the villagers. Again, in *Ex parte Greenhouse*,[3] there was a trust for the maintenance of a chapel, and the trustees had pulled down the building, carried the bell to the market place, had installed the pews in the parish church, and had used the stones for the public for repairing a bridge. Sir T. Plumer observed of this conduct that "it was an enormous breach of trust, and such as could not have been expected in a Christian country." He accordingly ordered an inquiry into the emoluments which the trustees had received through their breach of trust, and into the cost of re-erecting the chapel as it had stood before the trustees had demolished it.

A donor frequently establishes a fund for the benefit of "the poor of a parish." For many years considerable uncertainty prevailed concerning the objects of such a gift. Lord Eldon's view was[4] that the fund should be administered without reference to the administration of poor relief, but it has now been settled that such a trust must be confined to those persons who are not in receipt of parochial relief.[5]

Effect of a change in mode of worship, where there is a trust for promoting a particular form.

Where the charity has been established for the purpose of promoting religious worship, and there is not in the instrument any expression of the form or species of religious worship which the settlor intends to promote, the Court will enquire into the usage of the congregation, and if that does not contravene public policy, it will regard that as evidence, and by 7 & 8 Vict., c. 45, Sect. 2, if there is no reference in the instrument of trust to the religious doctrines to be followed, twenty-five years' usage of the congregation immediately preceding the action is conclusive evidence; but

[1] [1910] 2 Ch. 124.
[2] (1827), 2 Russ. 501.
[3] (1815), 1 Mad. 92; 1 Bli. (N.S.) 17.
[4] *A.-G.* v. *Corporation of Exeter* (1826), 2 Russ. 45, 51–54.
[5] *A.-G.* v. *Corporation of Exeter, supra*; *A.-G.* v. *Wilkinson* (1839), 1 Beav. 370.

the usage of the congregation does not prevail against the settlor's declared intention.[1] As a corollary of this, it follows that although a charitable corporation possesses the power of making by-laws for the regulation of its members, this does not give the members any power of making rules which would tend to frustrate the expressed intentions of the founder or the objects of the charity.[2] Accordingly a clause in a deed which gives the trustees, or a majority of them, the power of making orders upon matters relating to the meeting-house gives no power to change the meeting-house to one of a different type and for the propagation of doctrines different from those of the founders. The rule was expressed as follows by Lord Eldon in *A.-G.* v. *Pearson*[3]—

> Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question, than through the medium of an inquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon inquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage, considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out—(and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland)—that the institution was established for the express purpose of such forms of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members, "We have changed our opinions—and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship, prescribed by the founder, shall no lónger enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions." In such a case, therefore, I apprehend —considering it as settled by the authority of that I have already referred to—that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the Court,—and that, to refer to any other criterion as to the sense of the existing majority—would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court.

[1] *A.-G.* v. *Pearson* (1817), 3 Mer. 400.
[2] *Eden* v. *Foster* (1725), 2 P. Wms. 325.
[3] (1817), 3 Mer. 353, 400.

The Scottish case to which Lord Eldon here refers is that of *Craigdallie* v. *Aikman*,[1] in which the House of Lords had acted upon similar principles. The whole question arose again and was reconsidered by the House of Lords in *Free Church of Scotland* v. *Lord Overtoun*.[2] In that case, the Free Church of Scotland, founded in 1843 with certain distinctive doctrines, wished to unite with another Scottish Church, the United Presbyterian Church. Large majorities of both churches were in favour of the union, but the House of Lords held that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the church, or to unite with another church which did not profess the same doctrines. The dissentient minority, preserving the original doctrines, were therefore held entitled to the enjoyment of the whole of the endowments of the church. The principle applicable was plainly stated by Lord Alverstone, C.J., as follows—

> The law applicable to funds which have been given for the purpose of a voluntary association such as the Free Church is well settled, and it is not necessary for me to do more than refer to the decision of your Lordships' House in *Craigdallie* v. *Aikman*,[1] to show that such funds, in the absence of express provision, must be applied for the benefit of those who adhere to the original principles of the founders. If the terms of the foundation of the trust provide for the case of schism the Courts will give effect to them, but if there be no such provision, the *cestuis que trust* are those who adhere to the fundamental principles upon which the association was founded.

The true intention of the founder must be followed.

It has been observed that the primary duty of the trustee is to fulfil the founder's *intention*, and the authorities show that provided the true intention is being followed, it is permissible for the trustees to contravene the strict letter of the instrument. Both Lord Eldon and Sir T. Plumer formerly held[3] that where a founder established a fund for the maintenance of a free grammar school, the Court must apply the fund for that purpose, even though it were convinced that a free grammar school would be of little or no use, and a school for teaching English, writing, and arithmetic would. A succession of eminent Equity judges, however, have since held that in such circumstances the Court may order the inclusion of writing and arithmetic into a scheme for the better regulation of a free grammar school, or of a free school.

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[1] (1813) 1 Dow. 1. [2] [1904] A.C. 515.

[3] *A.-G.* v. *Whiteley* (1805), 11 Ves. 241; *A.-G.* v. *Earl of Mansfield* (1827), 2 Russ. 501; *A.-G.* v. *Dean of Christchurch* (1822), Jac. 474.

The Grammar School Act, 1840,[1] now provides that other branches of useful knowledge may be included in a grammar school curriculum in addition to or in lieu of Greek and Latin or such instruction as may be required by the terms of the foundation. By virtue of the Endowed Schools Act, 1869,[2] Commissioners appointed to enquire into schools, were authorised, in such manner as might render any educational endowment most conducive to the advancement of education, to alter and add to any existing, and to make any new trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions. By virtue of the Endowed Schools Act, 1874,[3] and the Board of Education Act, 1899,[4] the powers of the Commissioners are now exercised by the Ministry of Education.

Another illustration of the rule that the founder's true intention is followed in preference to the letter of the instrument is afforded by *A.-G.* v. *Mayor of Stamford.*[5] Trustees were instructed to apply the rents of property "towards the necessary finding a master, and for the pains of such master." The trustees devoted part of the revenue to rebuilding and repairing the school-room and school-house, and the Court held this to be a proper execution of the trust, since both the school-room and the school-house were necessary, and if the trustees did not provide them in proper repair, the master himself would have to do so. Thus, in effect, the money was actually applied for the pains of the master. Furthermore, an instruction to apply money for the repair and ornamentation of a building is construed very widely. Amongst other things, it has been held to extend to the provision of a spire for a new parish church.[6]

F. THE ENFORCEMENT OF A CHARITABLE TRUST

The Crown is directly interested in the enforcement of charitable trusts.

The Crown, as *parens patriae,* is directly interested in the proper execution of all charitable trusts, and the duty of enforcing them accordingly falls upon the first Law Officer of the Crown, the Attorney-General, by way of information, or by an action in the nature of an information. Relators, who are not necessarily personally interested in the enforce-

[1] 3 & 4 Vict., c. 77.
[2] 32 & 33 Vict., c. 59, Sect. 9.
[3] 37 & 38 Vict., c. 87.
[4] 62 & 63 Vict., c. 33, Sect. 2.
[5] (1747), 2 Swans. 591.
[6] *Re Palatine Estate Charity* (1888), 39 Ch.D. 54.

ment of the trust, are joined as co-plaintiffs, primarily, it would seem, because the Crown was not liable for costs.[1]

Procedure: (a) Commissions.

By the Statute of Charitable Uses, 1601,[2] the Court of Chancery was empowered to issue commissions to the bishop of the diocese where the property was situate, together with certain other persons, to summon a jury to inquire into abuses of charitable trusts, but the statute proved unsatisfactory, and such commissions gradually fell into disuse. Again, by the Charities Procedure Act, 1812,[3] procedure by petition in respect of supposed breaches of charitable trusts

(b) Petitions.

was instituted. Petitions were presented to the Court of Chancery by any two or more persons, and were heard, summarily upon affidavits, and such other evidence as should be produced. All petitions required signature by the persons presenting them, attestation by the solicitor for the petitioners, and certification by the Attorney- or (if there is no such officer appointed) Solicitor-General before presentation. The Act has been subjected to considerable adverse criticism,[4] as well as extensive judicial interpretation. Thus, it has been ruled that the petitioners must have an interest, and, furthermore, that interest is the one which must be alleged in the petition.[1] Furthermore, it was observed in *Corporation of Ludlow* v. *Greenhouse*[5] that petitions may not be brought for any other purpose than to seek relief against a breach of trust, but this view has now been overruled, since the Act itself specifies that petitions may also be brought "whenever the direction or order of a Court of Equity shall be deemed necessary for the administration of

Only plain and simple cases may be decided by petition.

any trust for charitable purposes."[6] Furthermore, only plain and simple cases may be decided by petitions under this Act. Thus, where any third person is interested, the question cannot be settled by petition; but the settlement or alteration of a scheme may be so disposed of, as well as the appointment of new trustees.[7] Furthermore, the Attorney-General is just as much a party to proceedings by petition as he is to proceedings by way of information, and, in acting, he must see that justice is done to all parties, so that he may,

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[1] Per Lord Redesdale in *Corporation of Ludlow* v. *Greenhouse* (1827), 1 Bli. (N.S.) 17 at p. 48. As to the Crown's liability for costs, see now the Administration of Justice (Miscellaneous Provisions) Act, 1933.

[2] 43 Eliz., c. 4 (Repealed by the Mortmain and Charitable Uses Act, 1888).

[3] 52 Geo. III, c. 101.

[4] *Corporation of Ludlow* v. *Greenhouse* (1827), 1 Bli. (N.S.) 17

[5] At p. 48.

[6] See *Re Clarke's Charity* (1836), 8 Sim. 34.

[7] *Bignold* v. *Springfield* (1839), 7 Cl. & Fin. 71.

at his discretion, support or oppose the contentions of the petitioners as he thinks fit.[1]

(c) Commissions of inquiry.

In the reign of George III certain statutory commissioners of inquiry were appointed[2] to inquire into and report to the Attorney-General any neglect, breach of trust, fraud, abuse or misconduct in the execution of a charitable trust. The powers of these commissioners expired in 1837, but by the Charitable Trusts Act, 1853,[3] commissioners with similar powers were appointed. By Sect. 17 no suit, petition, or other proceeding may be instituted without the previously obtained authority of the Charity Commissioners. Further, by the Charitable Trusts Act, 1860,[4] the Charity Commissioners are empowered to make such orders as may be made by any Judge of the Court of Chancery sitting at Chambers, or by any County Court or District Court of Bankruptcy, for the appointment or removal of any schoolmaster or schoolmistress or other officer of a charity, or relating to the assurance, transfer, or payment of any real or personal estate by a charity, or for the establishment of any scheme. No order may be made where the income of the charity exceeds £50, except on the application of the majority of the trustees (Sect. 4). By Sect. 5, the Commissioners must reserve for the Courts any case which is contentious or otherwise unsuitable for them to determine. Like the Court, the Charity Commissioners in settling a scheme must seek to carry out the founder's intentions, so long as they are not contrary to public policy. It is not open to them to consider whether a more beneficial application of the founder's property is expedient.[5]

Jurisdiction of the Charity Commissioners.

Where a trustee of a charity commits a breach of trust and is still in possession of the trust property, the Statutes of Limitations do not confine an account of mesne rents and profits to any specified period, for the claim is by a *cestui que trust* against an express trustee, and this is one of the classes of cases excepted from the protection of Sect. 8 of the Trustee Act, 1888. The only limitation which is imposed is set by the Court itself on the ground of convenience. Thus, in *A.-G.* v. *The Mayor of Exeter*,[6] the defendants admitted possession of the charity estate for 200 years, stating also that they had always been ready and willing to account for the rents. Sir W. Grant ordered an account for

The Statutes of Limitations.

[1] *Corporation of Ludlow* v. *Greenhouse, supra.*
[2] Under 58 Geo. III. c. 91 and 59 Geo. III, c. 81.
[3] 16 & 17 Vict., c. 137. [4] 23 & 24 Vict., c.
[5] Cf. *Re Weir Hospital*, [1910] 2 Ch. 124.
[6] (1827), Jac. 443; 2 Russ. 362.

the entire period, and this was confirmed by Sir T. Plumer, and by Lord Eldon on appeal. In other cases where the defendant is strictly accountable for a long period, but the exercise of the entire right would cause great hardship, the Attorney-General, on behalf of the charity, has certified that the charity may accept a less sum.[1] Where a charity is misapplied by a parish, no account earlier than the commencement of the action will be ordered, since the ratepayers are a fluctuating body, and the present ones ought not to be compelled to pay for the past defaults of others.[2] Finally, where the misapplication of charitable funds by the trustees is due to honest mistake only, the trustees will not be compelled to refund payments made wrongfully before action was brought or before the date when the trustees received notice that the attitude of their conduct was open to question.[3] To hold otherwise, it has been said, would ruin half the corporations in the Kingdom, and would also operate as a serious discouragement to those contemplating undertaking the office of a charitable trustee.

Liability for honest mistake.

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[1] (1827), Jac. 443; 2 Russ. 362.
[2] *Ex parte Fowlser* (1819), 1 Jac. & W. 70.
[3] *A.-G.* v. *Burgesses of East Retford* (1833), 2 My. & K.35, 37-38

CHAPTER IX

IMPLIED AND RESULTING TRUSTS

Implied and resulting trusts depend upon presumed intention.

THE function of the Court in enforcing implied and resulting trusts is to carry out the presumed intention of the settlor, whereas in a constructive trust the Court imposes a trust upon the parties irrespective of their intentions, actual or presumed, and sometimes even in opposition to those intentions, as in *Keech* v. *Sandford*.[1]

The distinction between an implied trust and an express trust is one of degree.

The distinction between an implied trust and an express trust is one of degree. As Maitland said, it is hard to draw a strict line of demarcation between them, and in any event the division is not usually of importance. The important dividing line is between trusts arising by act of parties and trusts arising by operation of law. Lewin regards a precatory trust as an implied trust, but inasmuch as the Court does not consider that the trust is enforceable at all unless, after a consideration of the whole facts, it comes to the conclusion that the words were used imperatively, and since no particular form of words is required to create an express trust, it would rather seem that precatory trusts are examples of express trusts. On the other hand, in both an implied trust and a resulting trust, the Court is seeking to give effect to the presumed intention of the settlor, and therefore no really useful purpose is served by attempting to distinguish between them. An infant, it has been decided, may be an implied trustee.[2]

A. PURCHASE IN THE NAME OF ANOTHER

The best example of a trust implied by law is where property is purchased by A in the name of B; that is to say, A supplies the purchase-money, and B takes the conveyance. Here, in the absence of any explanatory facts, such as an intention to give the property to B, Equity presumes that A intended B to hold the property in trust for him. This point was incidentally elucidated in *Rochefoucauld* v. *Boustead*.[3] Eyre, L.C.B., stated the general rule as long ago as 1788 in the leading case of *Dyer* v. *Dyer*,[4] as follows—

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in name of others without that of the

This is a resulting trust for the person who advances the purchase-money.

[1] (1726), Cas. *temp.* King 61.
[2] *Re Vinogradoff Allen* v. *Jackson*, [1935] W.N. 68.
[3] [1897] 1 Ch. 196.
[4] (1788), 2 Cox 92.

purchaser; whether in one name, or several, whether jointly, or successive, results to the man who advances the purchase-money; and it goes on a strict analogy to the rule of the Common Law, that where a feoffment is made without consideration, the use results to the feoffor.

The rule applies where two or more advance the money and the purchase is taken in the name of a third.

Although the Lord Chief Baron only refers here expressly to trusts of real property, the principle has been consistently applied to personalty,[1] and it applies also where two or more persons advance purchase-money jointly and the conveyance is taken in the name of a third.[2] In such a case the third person holds in trust for the purchasers to an extent proportionate to the amount of the purchase-money which each has advanced. The same rule applies where the conveyance is taken in the name of one of the purchasers only. Thus, in *Gravesend Corporation* v. *Kent County Council*,[3] the Gravesend Corporation, being in 1893 the local authority for higher education, borrowed money to build a technical school. The money was to be repaid by instalments, terminating in 1931. By the Education Act, 1902, the Kent County Council became the higher education authority, and since the county council had agreed to pay a fraction of the annual instalments, the Gravesend Corporation, after 1902, let the technical school to the county council at a nominal rent. When in 1931 the instalments were paid off, the Gravesend Corporation claimed the right to let the school to the county council for an economic rent. The Court decided that the corporation was entitled to do this, but that in doing so, it must have regard to the fact that in Equity the county council and the corporation were entitled to the school in proportion to the purchase-money supplied by each. The position where the conveyance is taken in the name of all the purchasers is treated differently, but it does not fall under the present rule, and is therefore considered separately below.

Payment may be proved by parol.

Neither the Statute of Frauds nor the Law of Property Act, 1925, applies to the creation of or operation of implied, resulting, or constructive trusts, and therefore it is not necessary that there should be any evidence in writing of the intention of the persons supplying the purchase-money, so that they may prove the fact of their payment by parol, even though the deed states that the purchase-money is supplied by the person in whose name the conveyance is

[1] *Ebrand* v. *Dancer* (1680), 2 Ch. Cas. 26; *Ex parte Houghton* (1810), 17 Ves. 253; *Re Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282.

[2] *Wray* v. *Steele* (1814), 2 V. & B. 390. (The point had been doubted by Lord Hardwicke in *Crop* v. *Norton* (1740), 9 Mod. 233.)

[3] [1935] 1 K.B. 339.

taken, the Court holding, where the latter is stated, that the apparent purchaser was really the agent of the true purchaser.[1] The parol evidence, however, must clearly prove the fact of payment by the person for whom it is attempted to establish the trust, although circumstantial evidence (e.g. that the means of the nominal purchaser was so small that he would have been unable to supply the money himself) will be accepted as sufficient.[2] Furthermore, the evidence must show that the purported beneficiary, claiming as the real purchaser, advanced the money *as purchaser*, for if the money was intended to be advanced by way of loan to the person in whose name the conveyance was taken, there is no implied trust, and the legal owner will merely be the debtor of the other.[3] Again, if it can be proved that at the time of the purchase it was the intention that the person who took the conveyance should have the beneficial interest, the person who advanced the purchase-money cannot subsequently change his mind and seek to establish a trust.[4]

The money must be advanced by a person as purchaser.

In cases of this type, the true purchaser should seek to establish the trust as soon as possible, for the presumption is weakened by lapse of time, more especially if the legal owner is in actual possession of the property. It has been suggested, indeed, that after the death of the legal owner, the presumption can never be established, at any rate by parol evidence only, but it would appear that this is not correct, although in such a case the parol evidence would have to be of the clearest for the claim to succeed.[5]

The presumption is weakened by lapse of time.

Furthermore, the presumption of a trust does not operate where the consequence would be contrary to public policy, e.g. where it would enable the purchaser to defeat his creditors,[6] or where it would give the nominal purchaser a vote at a Parliamentary election.[7] In such cases, the legal owner holds beneficially.

The presumption does not operate to permit the purchaser to commit a fraud.

It has been observed that this presumption of a trust only arises where there are no other circumstances to explain the transaction and remove the presumption. One example of such explanatory circumstances arises where the real and apparent purchasers are nearly related, for here another

The transaction may be explained by other circumstances.

[1] *Bartlett* v. *Pickersgill* (1759), 1 Eden 515; *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548.
[2] *Willis* v. *Willis* (1740), 2 Atk. 71.
[3] *Bartlett* v. *Pickersgill* (1759), 1 Eden 515.
[4] *Groves* v. *Groves* (1829), 3 Y. & J. 163, 172.
[5] Lewin on *Trusts* (Thirteenth Edition), p. 181.
[6] *Gascoigne* v. *Gascoigne*, [1918] 1 K.B. 223.
[7] *Groves* v. *Groves*, *supra*.

presumption of Equity, the presumption of advancement, may operate. The typical example of the operation of this second presumption, defeating the first, is where a *father* purchases in the name of his child or children. Thus, Eyre, L.C.B., observes in *Dyer* v. *Dyer*[1]—

Purchase by a father in the name of a child.

> The circumstance of one or more of the nominees being a child or children of the purchaser, is held to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that it would be disturbing landmarks if we suffered either of these propositions to be called into question—namely, that such circumstance should rebut the resulting trust; and, that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for valuable consideration. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea without very certain guides.

The question is one of intent.

In view of the older case-law, much of which is now of historical importance only, the Lord Chief Baron's observations are no overstatement, but it is submitted that the question of an implied or resulting trust in the circumstances now under consideration is purely one of intent, and it is therefore difficult to see how any other procedure could have been adopted. The difficulties are no greater than those in discovering the true intent of a testator, and from these the Court of Chancery, from the time when it first assumed testamentary jurisdiction, has never had any possibility of escape.

Some of the earlier distinctions have now been abandoned.

As examples of some of the earlier distinctions, based upon conflicting evidence, and which have now been abandoned, it may be noticed that at one time it was considered that, if the child were an infant, the father would have the beneficial interest. The modern view, however, is that infancy is a factor which peculiarly supposes an intention to benefit the child.[2] Conversely, it has been suggested that, where the son is an adult, and the conveyance is taken in his name, but the father enjoys the possession of the property, the presumption of advancement would be rebutted, but, as

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[1] (1788), 2 Cox 92. [2] *Lamplugh* v. *Lamplugh* (1709), 1 P.Wms. 111.

Lord Nottingham pointed out in *Grey* v. *Grey*,[1] this was insufficient, unless the father had in fact previously and amply made provision for his son, for example, by making a settlement upon him on his marriage. In *Grey* v. *Grey*,[1] the father had advanced the money, and after the conveyance had received the profits for twenty years, made leases, taken fines, enclosed part of a park on the estate, embarked upon building, and had entered into negotiations for the sale of the land, yet notwithstanding this the son was deemed to hold beneficially. Further, where the father had previously settled a reversionary estate upon the son, this was not considered to be such a provision as would negative the presumption of advancement, since, as the Court observed, the son might starve before his reversionary estate fell into possession.[2]

Purchase in the joint names of father and child.

Where a conveyance was taken in the joint names of son and father, Lord Hardwicke thought this did not fulfil the purpose of an advancement (in respect of the son's share of the joint tenancy), since if the son died his beneficial share passed to his father by survivorship, and if he was an infant he would not be able to effect a severance.[3] This, however, is at variance with the weight of authority.[4]

Purchase by a husband in the name of a wife.

The presumption of advancement also exists where a husband supplies the purchase-money and the conveyance is taken in the name of the wife. If the conveyance is taken in the names of himself and his wife, the wife is still entitled to a half-share.[5] There is, however, no such presumption in favour of a reputed wife, who is, in fact, the sister of a former wife, and therefore, at the time, could not contract a valid marriage with the reputed husband.[6] On the other hand, if the parties are in fact married, and the marriage is subsequently declared null in consequence of a canonical disability which makes the marriage not void *ab initio*, but voidable only, the presumption exists.[7] There is no such presumption, however, where the parties cohabit without being married at all.[8] Furthermore, the presumption does not operate when a wife buys property in the name of her

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[1] (1677), 2 Swans. 594.
[2] *Lamplugh* v. *Lamplugh*, *supra*.
[3] *Stileman* v. *Ashdown* (1742), 2 Atk. 477.
[4] *Back* v. *Andrews* (1690), 2 Vern. 120; and cases cited in *Grey* v. *Grey*, *supra*.
[5] *Kingdon* v. *Bridges* (1688), 2 Vern. 67; *Re Condrin*, [1914] Ir. R. 89.
[6] *Soar v. Foster* (1858), 4 K. & J. 152.
[7] *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639.
[8] *Rider* v. *Kidder* (1806). 12 Ves. 202.

No presumption of advancement in a purchase by a mother in the name of a child.

husband,[1] and it should also be observed that when a mother buys property in the name of her child, then, whether the father is alive or not, there is no presumption of advancement, since Equity does not impose upon the mother an obligation to provide for the child. In *Sayre* v. *Hughes*[2] and *Garrett* v. *Wilkinson*,[3] it was held that such a presumption did exist, but the point has now been settled in a contrary sense.[4] However, since the Married Women's Property Act, 1882, and the Poor Law Act, 1930, Sect. 14, impose on a married woman with separate property an obligation to maintain her children, it may be that to-day the point would be decided differently.

Purchases by persons *in loco parentis* to the nominal purchaser.

Besides the instances just considered, the presumption of advancement will also be regarded as existing in certain cases where the true purchaser stands *in loco parentis* to the nominal purchaser. Thus, the presumption has been held to exist where a grandfather, being *in loco parentis* through the death of the father, purchased in the name of the grandson;[5] and again where a nephew had been adopted as a son.[6] Furthermore, it has been held that, since there is a moral obligation upon the father to provide for his illegitimate child, the presumption will here exist,[7] but it will not operate in favour of the illegitimate son of a legitimate daughter, to whom the grandfather has placed himself *in loco parentis*.[8] It may be, however, that in this case, the Court was not satisfied that the grandfather really had put himself *in loco parentis*. He had taken care of the boy, and had sent him to school, and Page Wood, V.C., observed—

> I cannot put the doctrine so high as to hold that if a person educate a child to whom he is under no obligation either morally or legally, the child is therefore to be provided for at his expense.

Furthermore, it would seem that there is no such presumption in favour of a distant relation or of a stranger towards whom the person who pays the purchase-money stands *in loco parentis*.[9]

The operation of the presumption is, as was pointed out

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[1] *Mercier* v. *Mercier*, [1903] 2 Ch. 98.
[2] (1868), L R. 5 Eq. 376. [3] (1848), 2 De G. & Sm. 244.
[4] *Re De Visme* (1863), 2 De G. J. & S. 17; *Bennet* v. *Bennet* (1879), 10 Ch.D. 474.
[5] *Ebrand* v. *Dancer* (1680), 2 Ch. Cas. 26.
[6] *Currant* v. *Jago* (1844), 1 Coll. 261.
[7] *Beckford* v. *Beckford* (1773), Lofft. 490.
[8] *Tucker* v. *Burrow* (1865), 2 H. & M. 515.
[9] *Tucker* v. *Burrow*, *supra*; *Re Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282.

in *Grey* v. *Grey*,[1] evidential, and since the presumption is rebuttable, it can be rebutted by evidence of the real purchaser's actual intention. The best evidence is, of course, a declaration by the person who supplies the purchase-money at the time of the purchase, and it has been noticed that subsequent declarations cannot rebut the intention to advance if it really was present at the time of the purchase. Moreover, it was also established in *Grey* v. *Grey*,[1] that, even if the father subsequently remains in control of the property, that will not rebut the presumption, although the father still remains in control when the son comes of age. Where the son is also the father's solicitor, this is sufficient to rebut the presumption, unless it can be shown from the remaining evidence that the father really did intend to provide for the son.[2]

The presumption may be rebutted by evidence of actual intention.

The effect of the declaration by the person supplying the purchase-money, at the time of the purchase, should be noticed. This is not a declaration of trust. If it were, and it were made simply by parol, it would be subject to the requirement of the Statute of Frauds, that to be enforceable it should be in writing. The effect of the declaration is evidential. It furnishes material from which the Court may conclude that the presumption was not intended to operate.[3]

A declaration at the time of purchase is evidence of intention.

Again, although the subsequent acts and statements of the father may not be used by him to negative the presumption and prove a trust, they may be used against him by the son to support the presumption.[4] On the other hand, if the son was a party to the transaction, the son's subsequent acts and statements may be used against him by the father, as an indication, through the son's view of the transaction, what the father's intention at the time of the transaction really was. This point is illustrated by *Pole* v. *Pole*,[5] wherein a father, on his son's marriage, gave him a large advancement, there being several younger children not provided for. Later he sold property, and received only £500 of the purchase price, taking a mortgage for the remainder jointly in the names of himself and his son. The interest, however, was always paid, together with the principal that was repaid, to the father alone, although the son joined in the receipts. It was held that the presumption of advancement

[1] (1677), 2 Swans. 594.
[2] *Garrett* v. *Wilkinson* (1848), 2 De G. & Sm. 244.
[3] *Williams* v. *Williams* (1863), 32 Beav. 370.
[4] *Redington* v. *Redington* (1794), 3 Ridg. P.C. 106.
[5] (1748), 1 Ves. Sen. 76.

was here rebutted, and Lord Chancellor Loughborough observed—

> When a father takes an estate in the name of his son, it is to be considered as an advancement; but that is liable to be rebutted by subsequent acts. So, if the estate be taken jointly, so that the son may be entitled by survivorship, that is weaker than the former case, and still depends on circumstances. The son knew here that his name was used in the mortgage, and must have known whether it was for his own interest or only as a trustee for the father; and instead of making any claim his acts are very strong evidence of the latter; nor is there any colour why the father should make him any further advancement when he had so many children unprovided for.

It should be observed that when Lord Loughborough is talking of the subsequent acts, he must necessarily refer to the son's subsequent acts, for the father's are only admissible against him. The Court, therefore, is here using the son's subsequent acts (e.g. his acquiescence in the father's control and sole receipt of interest and principal) as evidence that the son knew that his father, at the time of the transaction, had not intended to confer any benefit on him.

B. MUTUAL WILLS

Another example of an implied or resulting trust arises where two persons (the examples are nearly all of husband and wife, but the relationship does not seem essential) make an agreement for the disposal of their property, and execute mutual wills in pursuance of that agreement, to regulate the devolution of the property after their deaths, so that the survivor will have a life interest in the other's property, whilst a third person will take the property of both testators on the death of the survivor. It has been held that where mutual wills are made in pursuance of an independent antecedent agreement, then if the survivor takes the benefit given by the other will, and then alters his own, his personal representative holds on trust for the person who would have taken under the mutual arrangement. There is not a great deal of authority upon the topic. The first reported case is *Dufour* v. *Pereira.*[1] In that case, a husband and a wife who had power to bequeath some personal property secured to her separate use, made mutual wills of 21st November, 1745. The residuary estate of each was pooled into one common fund and bequeathed to the survivor for life with

The survivor cannot benefit and repudiate the agreement.

[1] (1769), 1 Dick. 419; 2 Hargr.-Jurid. Arg. 304.

limitations over. The wife survived, and, having enjoyed the property for her life, died, leaving a will which disregarded the trusts of the mutual will. The beneficiaries under the mutual will filed a bill, and Lord Camden made a decree declaring that the surviving wife had bound herself to make good all the bequests in the mutual will, and made an order based on that declaration. The judgment was founded on the fact that the two parties had agreed to pool their estates and, in consideration of the agreed benefits that the survivor was to take, to give effect to the agreement which Lord Camden held they made with regard to the disposition of the capital. Lord Camden observed—

The rule is based on Equity's jurisdiction in respect of fraud.

> The instrument itself is the evidence of the agreement and he that dies first does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of fraud, can never unbind himself, and becomes a trustee, of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.

The agreement must be certain.

In *Lord Walpole* v. *Lord Orford*,[1] Lord Loughborough came to the conclusion that an agreement had been made, but he was unable to ascertain its terms with certainty and precision. He therefore did not enforce the agreement as a trust, as too uncertain, although he assented to Lord Camden's decision above. The effect of Lord Loughborough's decision has been discussed several times in the later cases, but this view of the case is taken by Sir Robert Collier in *Denyssen* v. *Mostert*,[2] Astbury, J., in *Re Oldham*, *Hadwen* v. *Myles*,[3] and in Williams on *Executors*.[4] *Dufour* v. *Pereira*[5] was followed in *Stone* v. *Hoskins*.[6] In that case there was a prior arrangement, and mutual wills made in pursuance of that arrangement. It was held that the arrangement must be proved to the satisfaction of the Court, and the terms must be certain, unequivocal, and such as the Court can enforce, if the trust was to be enforced. in *Re Oldham*,[3] the earlier authorities were reviewed. As in the other cases, a husband and wife made mutual wills, but there was no proof that these were made in pursuance of a prior agreement. Moreover, each gave the other an absolute interest in the whole of the property if he or she survived, but if either of the parties did not survive the

The rule does not operate in the absence of a prior agreement.

[1] (1797), 3 Ves. 402.
[2] (1872), L.R. 4 P.C. 236, 253.
[3] [1925] Ch. 75, at p. 85.
[4] Twelfth Edition, p. 78.
[5] *Supra*.
[6] [1905] P. 194.

other, then the property of the survivor was to pass to third parties. The husband died first, and the wife married again, making a fresh will, ignoring the provisions of her mutual will. Astbury, J., held there was no implied trust preventing the wife from disposing of her property as she pleased, observing—

> A very great difference between *Dufour* v. *Pereira*[1] and the present case is that in *Dufour* v. *Pereira*[1] the capital of the trust property was secured in fact by the life interest only being given to the survivor, whereas in the present case the survivor is given the whole estate absolutely, and could, if so minded, dispose of the whole property *inter vivos*.

In *Gray* v. *Perpetual Trustee Co., Ltd.*,[2] the decision in *Re Oldham*[3] was approved by the Privy Council, who held that the fact that a husband and wife have simultaneously made mutual wills, giving each other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke; and in the absence of a definite agreement to that effect, there is no implied trust preventing the wife from making a fresh will, inconsistent with the earlier one, even though the husband has died and the wife has benefited under his will. Lord Haldane explained the earlier decisions as follows—

Mere simultaneity of the wills and similarity of terms do not imply an agreement.

> In *Dufour* v. *Pereira*[1] the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was at least treated as a relevant circumstance, to be taken into account in determining whether there was such an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in Equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at. It was upon this ground that Lord Loughborough, in the later case of *Lord Walpole* v. *Lord Orford*,[4] dismissed the claim founded on the principle of Lord Camden's judgment, holding that no sufficiently definite agreement had been proved.
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> The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of Astbury, J., in *Re Oldham*.[3] That learned judge subjected the authorities to a careful examination, and came to the conclusion that the mere fact that two

[1] *Supra*. [2] [1928] A.C. 391. [3] [1925] Ch. 75, at p. 85. [4] *Supra*

wills were made in identical terms does not of necessity imply any agreement beyond that so to make them. In the case before him he found that there was not sufficient evidence of any further agreement, and that there was nothing in the authorities referred to in the argument that constrained him to decide otherwise.

Their Lordships agree with the view taken by Astbury, J. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in Equity than a right to damages at law.

Thus, the prior agreement is an essential condition of the trust, and it will not be implied from the fact that mutual wills are in fact made. In *Re Hagger*,[1] such an agreement was satisfactorily proved. Husband and wife executed a joint will by which they gave everything they possessed at the death of the first dying to the survivor for life, with remainders over. They also agreed that the will should not be altered or revoked except by mutual agreement. The wife died first, and the husband received the income of the whole estate till his death. Three of the beneficiaries of the joint will survived the wife, but predeceased the husband. The Court held that from the death of the wife the property of which the husband was then possessed was subject to a trust under which the beneficiaries took vested interests in remainder, and accordingly the death of the three beneficiaries before the husband's death did not cause a lapse of their shares.

C. JOINT PURCHASE AND JOINT MORTGAGE

Where two or more advance the purchase-money in unequal shares, and the conveyance is taken in all their names.

A third case of an implied trust arises where two or more persons advance the purchase price of property, or jointly lend money on mortgage, and the conveyance is taken in all their names (thus distinguishing the case of sale here considered from the first example of an implied trust discussed in this chapter). *Prima facie* the Common Law rule of survivorship applies in both cases, so that the survivor may claim the whole interest, but since "Equality is Equity," Equity leans against joint tenancies, and may attach a different consequence to the transaction from that which

[1] [1930] 2 Ch. 190. As to the exercise of a power of appointment by a joint-will, see *Re Duddell*, [1932] 1 Ch. 585.

follows at law. Here, however, it is necessary to distinguish carefully between joint purchases and joint mortgages. In a joint purchase, if the two purchasers supply the purchase money in *unequal* shares, and they then take the purchase jointly, the Courts of Equity have held that, although on the death of one the survivor or survivors hold the entirety of the legal estate, yet, in Equity, the survivor or survivors will be considered as trustees for the personal representatives of the deceased purchaser, to the extent of his share of the purchase money. If, on the other hand, the purchase-money was advanced in equal shares, Equity considers there is no justification for the presumption of a resulting or implied trust in favour of the deceased's personal representatives, holding that persons making equal contributions of the purchase money might very consistently wish to take an estate in joint tenancy, since each before 1926 had power to *compel a partition in his lifetime*, or *by conveyance* could pass a moiety of the estate.[1] By the Law of Property Act 1925, Sect. 36, however, such land would always be held by the joint purchasers on trust for sale, for the benefit of themselves as joint-tenants in equity. Nevertheless, it is open to the personal representatives of the deceased purchaser to prove circumstances collateral to the purchase, from which the Court may infer that a tenancy in common, now necessarily equitable, and held under a trust for sale [2] was really intended,[3] and so wherever the purchasers are partners there is a trust for the deceased, since the rule of survivorship has no place in mercantile law.

Joint-tenancy arises where the purchase-money is advanced in equal shares.

Where money is jointly advanced on mortgage, however, it makes no difference whether the money is advanced in equal or in unequal shares. In both cases the survivor holds as trustee for the deceased mortgagee to the extent of his share of the loan, for Equity holds that in such a transaction it could not have been the intention of the lenders that there should be survivorship, but rather that each should receive back his own money, though for convenience a joint security was taken.[4] Moreover, the insertion of a joint-account clause is not conclusive evidence of an intention that the rule of survivorship should operate, for such a clause was usually inserted in a joint mortgage before the Conveyancing Act, 1881, Sect. 61 of which (now replaced by the Law of

Advance of mortgage-money in equal or unequal shares results in a trust upon the survivor in respect of the deceased's share.

[1] *Robinson* v. *Preston* (1858), 4 K. & J. 505; *Lake* v. *Gibson* (1729), 1 Eq. Ca. Abr. 294, and (*sub. nom. Lake* v. *Craddock*) (1732), 3 P.W. 158.
[2] Law of Property Act, 1925, Sects. 34–35.
[3] *Robinson* v. *Preston*, *supra*.
[4] *Morley* v. *Bird* (1798), 3 Ves., at p. 631.

Property Act, 1925, Sect. 111) permitted the surviving mortgagee to give the mortgagor a receipt for the whole of the mortgage-money. This, however, is simply a conveyancing device, and does not prevent a further investigation into the question whether he was really intended to take the whole of the money beneficially, or whether it was intended that he should hold a part of it for the personal representatives of the deceased joint-mortgagee.[1]

D. WHERE THE BENEFICIAL INTEREST IS NOT COMPLETELY DISPOSED OF

Where the trusts do not exhaust the beneficial interest

A clear case of a resulting trust arises where the settlor gives property to trustees on certain trusts which do not exhaust the whole beneficial interest, or where the beneficial interests wholly or partially fail. In such a case there is a resulting trust for the settlor, or if he is dead for his residuary legatee or devisee, or his intestate successor. A special kind of resulting trust also arises where trusts of income are declared which in ordinary years are sufficient to exhaust the whole of the income, but in certain years there is a surplus which is unprovided for. Here again there is a resulting trust of the surplus in favour of the settlor.[2]

there may be resulting trust for the settlor;

A common case of a resulting trust of the type now under consideration arises where the settlor gives property to A, with an instruction to pay the income to B for life, with no direction what is to happen on B's death. In such a case the fact that the resulting trust is based upon the settlor's presumed intention is most clearly demonstrated, for, apart from the fact that the settlor may have expressed an intention that A should not take beneficially (which would, of course, be conclusive), it may be either that the settlor wished the beneficial interest to result to himself on B's death, or it may be that he then wished A to take beneficially. What was his true intention may be gathered from a consideration of the whole document, and if this is a will it may be possible to gather the true intention from it. In such a case the fact that the grant is made "upon trust," or that the donee is designated as "trustee" is not conclusive. The function of the Court is to discover the settlor's true intention, and it is open to the donee to prove, if he can, from the instrument that the settlor really intended him to take beneficially at the expiration of the specified interest. Furthermore, the absence of the words "trust" and "trustee" does

or the trustee may be intended to take beneficially.

The use of the word "trustee" is not conclusive.

[1] *Re Jackson* (1887), 34 Ch.D. 732. [2] *Re Llanover S.E.*, [1926] Ch. 626.

not imply that the donee then takes beneficially. But, where a testator gave the whole of his property to his sister *absolutely* on trust to pay his wife an annuity, and the income was more than sufficient for this, it was held that the sister was entitled to the surplus.[1] In such cases it should be noticed that the true intention of the settlor is ultimately gathered from the written instrument itself, and, accordingly, parol evidence is not admissible to prove an intention contrary to that which the Court has established.[2]

Resulting trust where there is a direct gift without consideration

It is in this last respect that the resulting trusts just considered differ from a very similar class which will now be mentioned. It has been seen that where A purchases property in the name of B, or in the names of himself and B, there is a presumption of law that the beneficial interest should result to A, unless the contrary presumption of advancement replaces it. The Courts have also had to consider what the intention of the donor really was where property was given directly *inter vivos* without consideration, or for nominal consideration, and without any reference to the beneficial interest. It was mentioned when discussing the effect of the Statute of Uses that before 1535, where A enfeoffed B, simply without consideration and without any reference to the beneficial interest, the Court of Chancery held that there was a resulting *use* to the grantor. This could be negatived by a declaration of a use, either to a third person or to the feoffee himself. After 1535, where A enfeoffed B without consideration, and without declaring a use, the use resulted to the grantor and the Statute of Uses annexed the legal estate to it, and the conveyance became a nullity. As the Statute of Uses was repealed by the Law of Property Act, 1925, Sect. 1 (10), this particular conveyancing consequence no longer follows, so that it is no longer necessary for the grantor to use the formula "unto and to the use of B" in order to pass the legal estate. However, with the rise of the modern trust, the Court of Equity once more had to solve the problem created by a voluntary grant *inter vivos*, but here the answer has been rather uncertain. Where the grantor transfers property to himself and another, it would appear that in all cases there is a presumption that the whole beneficial interest is to be enjoyed by the grantor. Thus, in *Standing* v. *Bowring*,[3] a widow placed £6,000 Consols in the joint names of herself

[1] *Re Foord*, [1922] 2 Ch. 519.

[2] *Langham* v. *Sanford* (1811), 17 Ves. 435; 19 Ves. 641; *Irvine* v. *Sullivan* (1869), L.R. 8 Eq. 673.

[3] (1886), 31 Ch.D. 282.

and her godson. She did it with the express intention that she should have the whole of the dividends for her life; and her godson was to take them at her death. Cotton, L.J., observed—

> The rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child, or his adopted child, then there is *prima facie* a resulting trust for the transferor. But that is a presumption capable of being rebutted, by showing that, at the time, the transferor intended a benefit to the transferee; and in the present case there is ample evidence that at the time of the transfer, or for some time previously, the plaintiff intended to confer a benefit, by this transfer, on her late husband's godson.[1]

In *Lloyd* v. *Spillet*,[2] it was said that, although this presumption might exist in respect of pure personalty, it had no application where a transfer of interests in land was made in similar circumstances, since the Statute of Frauds, 1677, Sect. 7, required trusts of land to be manifested and proved by writing. Such reasoning, however, would seem to be fallacious, for, altogether apart from the fact that Equity has never allowed the Statute to be used to effect a fraud, Sect. 8 excepts all trusts arising by implication of law from the requirements of Sect. 7. Moreover, the presumption has been frequently applied to transfers of land to strangers, where no intention of giving the beneficial interest appears.[3] This is illustrated by a consideration of the three cases *Leman* v. *Whitley*,[4] *Haigh* v. *Kaye*,[5] and *Rochefoucauld* v. *Boustead*.[6] In the first case, a son conveyed a valuable estate to his father for £400. Later, he brought an action against the devisees of his father for its reconveyance, arguing that he never intended to part with the beneficial interest in the property, his true intention being to facilitate the raising of money by means of mortgage. Sir John Leach held that because of the requirement of Sect. 7 of the Statute of Frauds, parol evidence could not be admitted to prove the trust, the true intention then being that the father should have the beneficial ownership. No implied trust was therefore raised in this case. In *Haigh* v. *Kaye*,[5] however, it was held, on similar facts, that since the Statute could not be used to facilitate fraud, parol evidence could be admitted, and a trust raised, whilst in *Re Duke of Marlborough*,[7]

The Statute of Frauds does not apply to trusts arising by implication of law.

[1] See also *Fowkes* v. *Pascoe* (1875), 10 Ch. App. 343 and *Re Vinogradoff*, *Allen* v. *Jackson*, [1935] W.N. 68.
[2] (1740), Barn. C. 384.
[3] *Duke of Norfolk* v. *Browne* (1697), Prec. Ch. 80; *Elliot* v. *Elliot* (1677), 2 Ch. Cas. 232 (per Lord Nottingham); *A.-G.* v. *Wilson* (1840), Cr. & Ph. 1.
[4] (1828), 4 Russ. 423.
[5] (1872), L.R. 7 Ch. 469.
[6] [1897] 1 Ch. 196
[7] [1894] 2 Ch. 133.

Stirling, J., said that *Leman* v. *Whitley*[1] had virtually been overruled by *Haigh* v. *Kaye*,[2] the principle of which was admitted in most general terms in *Rochefoucauld* v. *Boustead*,[3] where A granted estates in Ceylon to B, and B subsequently sought to deny A's beneficial interest in them.

A presumption of advancement may arise if near relationship exists.

It may be, however, that if property is transferred directly to another, a presumption of advancement will arise if there is near relationship and a duty on the part of the grantor to provide for the grantee, this presumption replacing that of a resulting trust. In *Crabb* v. *Crabb*,[4] a father transferred stock from his own name to the joint names of the son and a brother, telling the latter to place the dividends to his son's account. By a codicil to his will, executed after the transfer, he gave the stock to another. It was held that the son took absolutely, an advancement being plainly intended.

Father and daughter.

Again, in *O'Brien* v. *Sheil*,[5] A lodged securities at the bank in the names of himself and his daughter jointly. After his death, a memorandum dated fifteen months later was discovered in which he directed that the securities should be applied for other purposes. It was held that the memorandum was not admissible to rebut the presumption of advancement.

A gift to a wife.

The same presumption exists in favour of a wife[6] and is not destroyed by the fact that the marriage is subsequently avoided by a decree of nullity.[7]

Where a beneficiary dies without successors, and the settlor has finally parted with his interest, the Crown takes as *bona vacantia*.

Sometimes it happens that property is held upon trust absolutely for a person who is living when the trust instrument comes into operation, but who has died intestate without any successors subsequently. Here, if it is clear that the settlor intended to part with his whole beneficial interest, the trustee is not allowed to take beneficially, but will hold the equitable interest for the Crown as *bona vacantia*.[8] The same rule applies where the beneficiary was a corporation which has been dissolved without the equitable interest being assigned.[9] This rule, which now applies to all kinds

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[1] (1828), 4 Russ. 423.
[2] (1872), L.R. 7 Ch. 469.
[3] [1897] 1 Ch. 196.
[4] (1834), 1 My. & K. 511.
[5] (1873), Ir. R. 7 Eq. 255. See also *Williams* v. *Williams* (1863), 32 Beav. 370.
[6] *Christ's Hospital* v. *Budgin* (1712), 2 Vern. 683.
[7] *Dunbar* v. *Dunbar*, [1909] 2 Ch. 639.
[8] *Middleton* v. *Spicer* (1873), 1 Bro. C.C. 201. *Panes* v. *A.-G.*, [1901] 1 Ch. 15.
[9] *Re Higginson and Dean*, [1899] 1 Q.B. 325. For a consideration of some of Wright, J.'s, observations in this case, see *Re Sir Thomas Spencer Wells, Swinburne-Hanham* v. *Howard*, [1933] 1 Ch. 29.

of property, previously applied only to personalty, for in *Burgess* v. *Wheate*,[1] it was decided that where a beneficiary under a trust of land died intestate, without leaving anyone who could claim through him, his interest did not escheat to the overlord, escheat being a feudal doctrine, and inapplicable to estates created by Equity. It was formerly held that in such a case, the trustee could claim beneficially, although in *Re Sir Thomas Spencer Wells*[2] it was suggested that if the Crown, in *Burgess* v. *Wheate*,[1] had claimed the estate as *bona vacantia*, the claim would have been successful. However, by the Intestates' Estates Act, 1884, the law of escheat was extended to equitable interests in real property. Thus, in *Re Wood*,[3] a testator devised real property on trust for sale, and the objects of the trust failed. As the testator had no heirs, it was held that the property escheated to the Crown. By the Administration of Estates Act, 1925, Sect. 45, all existing modes and canons of descent (except so far as relates to the descent of an entailed interest) and escheat are abolished, and now, where there are no intestate successors, the interest passes to the Crown (or to the Duchy of Lancaster or Duke of Cornwall), as *bona vacantia*.

The position of an executor who was not also a trustee was formerly rather different. Prior to the Executors Act, 1830, where there was an undisposed of surplus after full administration, the executor could claim it, so far as it was personalty (including leaseholds) unless it appeared to have been the testator's intention to exclude him. In such a case the executor would hold on trust for the next-of-kin. By the Executors Act, 1830, it was provided that the executor should hold on trust for such persons, unless it appeared from the testator's disposition that he intended the executor to take beneficially. By the Administration of Estates Act, 1925, Sect. 49, the present position is that where there is any property undisposed of after administration is complete, it is to be distributed or held in trust for the intestate successors specified in Sect. 46, unless it appears from the will that the personal representative was intended to take the property beneficially. The persons who take the residue, if issue of the testator, but not otherwise, must bring into account any beneficial interest taken by them under the will. If there are no intestate successors, or if there is none within the degrees specified in Sect. 46, the property passes to the Crown as *bona vacantia*. The result

The Crown also takes where there are undisposed of assets in the hands of the personal representative and there are no next-of-kin.

[1] (1759), 1 Eden. 177. [2] *Supra*. [3] [1896] 2 Ch. 596.

is that in spite of the repeal of the Executors Act, 1830, by the Administration of Estates Act, 1925, the executor can never take beneficially unless an intention that he should do so is shown.[1]

Effect of the doctrine of conversion on resulting trusts.

Before 1926 the equitable doctrine of conversion had an important influence upon the ultimate destination of the beneficial interest under many resulting trusts. Thus, if real estate had been devised on trust for sale, the proceeds to be applied to purposes which had wholly or partially failed, or which had proved insufficient to exhaust the beneficial interest, the property resulted to the testator's heir, and not to his next-of-kin, whether the property had been sold or not.[2] On the other hand, if the testator directed that personalty should be appropriated to the purchase of land, and the declared beneficial interests did not exhaust the trusts, the residue resulted to the testator's next-of-kin. The point in issue was that, whilst in the eye of Equity, where a conversion is directed in the future, the property is considered to be changed in character from the moment when conversion is ordered (or where no date is specified, then from the moment when the instrument comes into operation), this is subject to the qualification defined in the leading case of *Ackroyd* v. *Smithson*,[3] that where the conversion is directed in a will, conversion is for the purposes of the will only, and, so far as those purposes fail, Equity implies no intention to convert. As Jessel, M.R., observed in *Curteis* v. *Wormald*—[4]

> According to the doctrine of the Court of Equity, this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate; that is, the persons who take under the Statute of Distributions as next-of-kin. Their right to the residue of the personal estate is a statutory right independent of the will.

Since 1925 descent to the heir (except in connection with

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[1] *Re Skeats, Thain* v. *Gibbs*, [1936] Ch. 683.

[2] E.g. *Davenport* v. *Coltman* (1842), 12 Sim. 610; *Burnett* v. *Foster* (1884), 7 Beav. 540.

[3] (1780), 1 Bro. C.C. 503.

[4] (1879), 10 Ch.D. 172.

an entailed interest) has been abolished, and there is now a common mode of devolution for both real and personal property on intestacy. As this has robbed the doctrine of conversion of much of its importance in connection with resulting trusts, it is unnecessary to consider some of the subtler refinements of the doctrine.[1]

The doctrine is now of diminished importance.

[1] But see *Re Carrington, Ralphs* v. *Swithenbank*, [1932] 1 Ch. 1.

CHAPTER X

CONSTRUCTIVE TRUSTS

There are many kinds of constructive trust.

THE term *constructive trust* covers a variety of different relationships, having very few features in common. Moreover, the rights and liabilities of constructive trustees vary widely, so that it is necessary to consider each relationship separately in order to discover exactly what is implied in it. Generally, it may be said that a constructive trust is a relationship created by Equity in the interests of good conscience and without reference to any express or implied intention of the parties. Wherever a person clothed with a fiduciary character avails himself of it to obtain some personal advantage, such a person becomes a constructive trustee of all profits for the person at whose expense the profit has been made. A number of the more common instances will be considered in turn.

There is also another type of constructive trust defined as follows by Bowen, L.J., in *Soar* v. *Ashwell*[1]—

Where a stranger intermeddles with the trust.

> A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust. A constructive trust is therefore, as has been said, "a trust to be made out by the circumstances."

Of this type of constructive trustee Lord Selborne said in *Barnes* v. *Addy*[2]—

> Strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions perhaps of which a Court of Equity may disapprove—unless those agents receive or become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design on the part of the trustees.

A. THE VENDOR AS CONSTRUCTIVE TRUSTEE

Where a binding contract for the sale of land exists, it is frequently stated that the vendor is, until completion, a constructive trustee of the property for the purchaser. This is an expression which should only be used with caution.

[1] [1893] 2 Q.B. 390, 396. [2] (1874), L.R. 9 Ch. 244.

Without qualification, it may very well lead to misleading results. It is certainly true that, from the date of the contract, the purchaser takes the benefits and bears the losses.[1] This, however, does not necessarily make the vendor a constructive trustee The general proposition was enunciated and fully discussed by Jessel, M.R., in *Lysaght* v. *Edwards*,[2] wherein the Master of the Rolls observes that the doctrine was settled before Lord Hardwicke's time—

From the date of the contract, the purchaser takes the benefits and bears the losses.

> What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in Equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in Equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz. possession of the estate and a charge upon the estate for his purchase-money. . . . If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burned down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way, there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money, and his right to enforce his security against the estate. With these exceptions, and his right to rents till the day for completion he appears to me to have no other rights.

To avoid loss, the purchaser should insure.

The vendor must take reasonable care.

The same view was expressed by Lord Westbury in *Holroyd* v. *Marshall*,[3] where he points out that the doctrine is also applicable to those contracts for the sale of personal property which will be specifically performed.

The doctrine that the vendor, as constructive trustee, must use reasonable care in respect of the property is

Sale of a business as a going concern.

[1] *Paine* v. *Meller* (1801), 6 Ves. 349.
[2] (1876), 2 Ch.D. 499; 45 L.J.Ch. 534.
[3] (1862), 10 H.L.C. at p. 209 and see Atkin, L.J.'s judgment in *Re Wait*, [1927] 1 Ch. 606.

illustrated by *Phillips* v. *Sylvester*,[1] in which a vendor allowed property to deteriorate after the contract of sale had been signed, and the purchase-money was proportionately reduced. Again, in *Royal Bristol Permanent Building Society* v. *Bomash*,[2] and in *Earl of Egmont* v. *Smith*,[3] it was held that where the vendors sold businesses as going concerns, they must carry them on to prevent the destruction of the goodwill or the purchaser would be entitled to repudiate. The business so carried on is at the purchaser's risk. In an old case, *Dakin* v. *Cope*,[4] where a contract existed for the sale of a public-house, the purchaser declined to complete, and the vendors remained in possession and carried on the business. In this case, although the vendors could not have discontinued business without materially diminishing the goodwill, yet Lord Eldon held that since they carried on the business for their own benefit, it was therefore continued at their risk. This is not necessarily in conflict with the cases mentioned above, for no notice had been given to the purchaser that the business was being carried on at his risk.

> Lord Eldon therefore did not think it just to impose on the purchaser the loss sustained by the vendor. . . . It stands on its own facts and does not go to the extent of deciding that, when the goodwill of a business has been sold, the vendor is not entitled to throw on the purchaser losses incurred by him in carrying on the business after the date fixed for completion, when he has acted reasonably and told the purchaser of the loss that is being incurred and given him an opportunity of saying what course should be pursued.

The vendor must consider his own position.

This, however, does not mean that if the purchaser tells the vendor to close down, the vendor must comply with it, for he has his own position to consider.[5]

It should be noticed also that when the title has been accepted, and the purchase-money has been paid, the vendor *then* becomes a trustee for the purchaser without qualification. The cases considered below contemplate the position prior to those events occurring.

Loss of the property through fire; effect of L.P.A., 1925, Sect. 47 (1).

The position of the parties was discussed at length in *Rayner* v. *Preston*.[6] In that case, the vendor agreed to sell a house, which he had insured against fire. The contract contained no reference to the insurance, and the house was damaged by fire, after the conclusion of the contract, but

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[1] (1872), L.R. 8 Ch. 173.
[2] (1887), 35 Ch.D. 390.
[3] (1877), 6 Ch.D. 469, 475.
[4] (1827), 2 Russ. 170.
[5] Per Sargant, J., in *Golden Bread Co.* v. *Hemmings*, [1922] 1 Ch. 162. in which the purchaser was held liable to bear the loss incurred, the general principle enunciated above being applied.
[6] (1881), 18 Ch.D. 1; 50 L.J.Ch. 472.

before completion, and the vendor received payment from the insurance company. The Court of Appeal (Brett and Cotton, L.JJ.; James, L.J., dissenting) upheld the decision of Jessel, M.R., that the purchaser was not entitled to claim the proceeds from the vendor. It should be observed that the position is now otherwise, for the Law of Property Act, 1925, Sect. 47 (1), provides that where, after a contract of sale, money becomes payable under the policy of insurance maintained by the vendor in respect of the property, such money, on completion of the contract, is to be paid by the vendor to the purchaser. The subsection applies only to contracts made after the Act, however, and is subject to any stipulation to the contrary in the contract, any requisite consents of insurers, and the payment by the purchaser of the proportionate part of the premium from the date of the contract.[1]

This, however, does not affect the general position of the parties, and the observations of the Court of Appeal in 1881 still hold good. Cotton, L.J., observed—

Differing views of the extent to which the vendor is a trustee.

> It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchasers, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion and here the fire occurred and the right to recover the money accrued before the day fixed for completion. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious.

This may be described as the middle view. Brett, L.J., was of opinion that the relation between the parties is not that of trustee and *cestui que trust* at all. He says—

> It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property

[1] Sect. 47 (2)

for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee.

What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready, and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of making the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other.

Still a third view was advanced in the dissenting judgment by James, L.J.—

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal acts of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

These, therefore, are the three differing views. Which of them is in accordance with earlier and later authority? It is suggested that the view of James, L.J., is more closely in consonance with the weight of authority. It may first of all be noted that the view of James, L.J., seems to be founded upon the observation of Sir Thomas Plumer in *Wall* v. *Bright*,[1] that—

> The vendor, therefore, is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey.

In *Shaw* v. *Foster*,[2] Lord Hatherley substantially anticipated the view of James, L.J., adding (by way of citation from his own earlier decision)—

> It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser; that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed, but not before.

Farwell, J., followed Lord Hatherley and Lord Justice James in *Ridout* v. *Fowler*.[3] In that case the contract never was completed, and therefore the learned judge observed that—

The relationship does not exist where the contract is not complete.

> It is quite clear that the relationship of trustee and *cestui que trust* never was created by completion of the contract.

Equally clear is the opinion of Lord Cairns in *Shaw* v. *Foster*.[2] He says—

> Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property subject only to this observation that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.

In the same case Lord Chelmsford and Lord O'Hagan expressed themselves in similar terms.

The contract should be one of which specific performance will be awarded.

This view of Lord Cairns is clearly based on the assumption that the contract is ultimately completed. Lord Parker,

[1] (1820), 1 Jac. & W. 494, 503.
[2] (1872), L.R. 5 H.L. 321, 356; 42 L.J. Ch. 49.
[3] [1904] 1 Ch. 658; affirmed by the Court of Appeal, [1904] 2 Ch. 93; 73 L.J.Ch. 325, 579.

in *Howard* v. *Miller*,[1] and again in *Central Trust and Safe Deposit Co.* v. *Snider*,[2] bases the trust between vendor and purchaser upon the fact that the contract is one which the Court of Equity will implement by specific performance.

Limitations of the rule.

The limitations of the rule that the vendor is a constructive trustee are apparent from the observations of Kekewich, J., in *Plews* v. *Samuel*,[3] in which it is pointed out that if the contract is not performed, even though the vendor was for months or years the trustee of the purchaser, until the contract was finally discharged the vendor could obviously not be proceeded against for neglect or even for malfeasance. As Knight Bruce, L.J., observed in *Sherwin* v. *Shakspear*,[4] if there is an analogy between the vendor and a trustee it is "a very imperfect analogy." This is illustrated by the case of *Re Colling*,[5] in which persons authorised to sell property on behalf of A C, a lunatic, sold it in May, 1885, completion to follow in November. A C died in June, and the persons selling sought to establish that after the contract had been concluded, A C was a trustee for the purchaser within the meaning of the Trustee Acts. This was not accepted by the Court of Appeal, following *Re Carpenter*.[6]

In *Re Carnarvon's Settled Estates*,[7] the matter again arose, and though it did not receive extended consideration it illustrates the importance of defining exactly what is implied in the relationship of vendor and purchaser. By an agreement of 10th August, 1925, the Earl of Carnarvon agreed to sell his life interest in the estates to a company. In argument it was assumed that this agreement constituted the Earl a trustee for the company. This was impliedly accepted by Romer, J., but nothing was said as to whether the title was accepted by the company, or whether the Earl had received any part of the purchase-price, since it has already been observed that the nature of the trust subsisting differs upon this point. If the consideration had not passed, the nature of the company's interest in the estate would have been merely the limited beneficial interest, dependent upon completion, which has been described. Romer, J., regarded it, however, as the full trust estate, and, therefore, it would seem that the only thing remaining to be done in respect of the Earl's contract was the formal conveyance.

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[1] [1915] A.C. 318, 326.
[2] [1916] 1 A.C. 266, 272.
[3] [1904] 1 Ch. 464; 73 L.J.Ch. 279.
[4] (1854), 5 De G.M. & G., at p. 531.
[5] (1886), 32 Ch.D. 333.
[6] (1854), Kay 418.
[7] [1927] 1 Ch. 138; 96 L.J.Ch. 49. See also *Kimbers and Co.* v. *Inland Revenue Commissioners*, [1936] 1 K.B. 132.

The vendor is not a dormant trustee. He has his own interest to protect, and has a lien for that purpose.

It will be remembered that in the course of his judgment in *Shaw* v. *Foster*,[1] Lord Cairns observed that the vendor is not a dormant trustee, but one who has a personal and substantial interest of his own in the property to protect. This interest of the vendor is his right to the purchase-money, and in many cases that interest is protected by a lien, which may be exercised not only before the vendor has conveyed, but afterwards, although in this last case the relationship of the parties will be reversed as a result of the transfer of the legal estate, so that the purchaser will now become a trustee *pro tanto* for the vendor for what is unpaid, unless the vendor by his words or conduct plainly shows an intention to renounce his lien, and intends to rely upon some other security, or upon the personal credit of the purchaser.[2] The mere taking of a collateral security is not, in itself, however, sufficient evidence that the vendor has renounced his lien.[3]

The lien extends to all kinds of property.

Where the vendor's lien for the unpaid purchase-money exists, the vendor is entitled to retain the property until the money has been paid (whether there has been an agreement to this effect or not), and the lien operates not only in the sale of freeholds, but also in sales of leaseholds[4] and in sales of personalty[5]; and the vendor is not prevented from exercising it by the circumstance that a receipt for the purchase-money is embodied in the deed, or has been endorsed upon it.

The lien may be renounced.

It has been observed that merely taking collateral security does not destroy the lien; but it may be that the vendor has accepted such consideration with the object of renouncing the lien, and where this is so the lien is clearly lost. As Lord Eldon observed in *Mackreth* v. *Symmons*,[2] the question whether the lien has or has not been reserved depends upon the circumstances of each case. A lien is a charge upon the property, and it is therefore enforced by the issue of a writ, claiming a declaration that the vendor is entitled to it, and when such a declaration has been made, the vendor, in default of payment, is entitled to all the remedies he would have enjoyed under an express mortgage.[5] The lien is also enforceable, not only against the purchaser himself, but against his personal representatives, and all persons claiming through the purchaser as volunteers. It is also enforceable against the purchaser's trustee in bankruptcy.[6] Before 1926, also, a lien was enforceable against a purchaser for

The lien may be enforced against the purchaser and all persons claiming through him.

[1] *Ante* p. 195. [2] *Mackreth* v. *Symmons* (1808), 15 Ves. 329.
[3] *Collins* v. *Collins* (1862), 31 Beav. 346.
[4] *Davies* v. *Thomas*, [1900] 2 Ch. 462.
[5] *Re Stucley*, [1906] 1 Ch. 67. [6] *Ex parte Hanson* (1806), 12 Ves. 349.

value from the purchaser, unless the second purchaser took without notice of it. Thus, in *Rice* v. *Rice*,[1] an equitable mortgagee from the purchaser was held to take the property free from the lien, since the original vendor had endorsed a receipt for the purchase-money on the conveyance and had also delivered the title-deeds to the first purchaser, who thereupon deposited them with the mortgagee. Although vendor and equitable mortgagee had both equitable titles only, and the vendor's was earlier in point of time, he was postponed, since he had been negligent in endorsing the receipt upon the conveyance whilst the purchase-money remained unpaid. It should be noticed, however, that where the lien exists in respect of land, it is a general equitable charge which, since 1925, should be registered under the Land Charges Act, 1925, Sect. 10. Such registration constitutes actual notice to all claiming through the purchaser, but in the absence of registration, the lien is void against a subsequent purchaser for value, even though in fact he has notice of the existence of the lien. Apart from renunciation of the lien by the vendor, or from the alienation of the property by the purchaser to a person who has no notice of it (actual or constructive in the case of personalty, or by registration, where land is the subject of the contract), the lien may also in some cases become barred by lapse of time, for a constructive trustee may plead the Statutes of Limitation. Where the lien exists in respect of pure personalty, however, lapse of time is no bar, for an equitable lien on pure personalty is not within the scope of the Statutes.[2]

Liens in respect of land should be registered.

The purchaser's lien.

In the relationship of vendor and purchaser, that person is constructive trustee for the other who possesses the legal estate in the property, whilst he still owes duties to the other in respect of it. Accordingly, if the purchaser pays his purchase-money or a part of it before obtaining conveyance, the vendor is still a constructive trustee for him, and the purchaser will in this case have a lienon it for the return of his purchase-money. This lien seem to have exactly the same characteristics as the vendor's lien, and will operate against the same persons under the same conditions relating to notice,[3] and therefore, where it relates to land, it should now be registered as a land charge.

The lessee's lien.

A lessee has also a lien for money spent where his lessor has contracted to grant him a lease, and the lessee has

[1] (1853), 2 Drew. 73. [2] *Re Stucley*, [1906] 1 Ch. 67.
[3] *Rose* v. *Watson* (1864), 10 H.L.C. 672.

entered and has expended money upon the property, and the lessor then declines to grant the lease.[1]

B. THE MORTGAGEE AS CONSTRUCTIVE TRUSTEE

The mortgagee is not a trustee of his power of sale; but of the proceeds of sale.

A constructive trust sometimes arises out of the relationship of mortgagor and mortgagee. A mortgagee is not a trustee of his power of sale, so that, in the absence of fraud, if he sells under depreciatory conditions, he is not accountable to the mortgagor for the loss, if the power has been properly exercised.[2] After sale, however, the mortgagee is a trustee for the mortgagor of any surplus which remains after principal, interest, and costs have been deducted; and if the mortgagee pays the money to his solicitor, the latter is equally subject to the trust.[3]

The mortgagee in possession is a trustee.

A mortgagee who enters into possession is a constructive trustee of the rents and profits, and this relationship continues even after he has abandoned possession.[4] It has also been held that the mortgagee remains accountable even after he has transferred the mortgage, unless the transfer is made by order of the Court.[5] In *Venables* v. *Foyle*,[6] a mortgagee who had been in possession was held to be accountable even after he had transferred with the consent of the mortgagor. The general applicability of this decision has been doubted,[7] but it would seem, from the observations of Cotton and Lopes, L.JJ., in *Hall* v. *Heward*,[5] that the liability of the mortgagee remains after transfer, wherever this occurs voluntarily.

The position of the mortgagee in respect of the legal estate.

It would also seem, from the observations of Lawrence, L.J., in *Re Sir Thomas Spencer Wells*,[8] that the mortgagee may be a trustee of the legal estate for the mortgagor whether he has entered into possession or not. In that case, a company holding an equity of redemption before the Companies Act, 1929 (and before 1926), was dissolved and the liquidator made no disposition of the equity of redemption. The Crown claimed it as *bona vacantia*, but Farwell, J., held that after the company was dissolved the mortgagee held the property free from the equity, there being no person entitled to redeem. This decision was reversed on appeal, Lawrence, L.J., observing—

> The position of a mortgagee of land whether freehold or leasehold is well established. In Equity the right of the

[1] *Middleton* v. *Magnay* (1864). 2 H. & M. 233.
[2] *Warner* v. *Jacob* (1882), 20 Ch. D. 220; 51 L.J.Ch. 642.
[3] *Re Bell* (1886), 34 Ch.D. 462. [4] *Re Prytherch* (1889), 42 Ch.D. 590.
[5] *Hall* v. *Heward* (1886), 32 Ch.D. 430. [6] (1660). 1 Ch. Cas. 3.
[7] Lewin on *Trusts* (Thirteenth Edition), p. 203 n.
[8] [1933] 1 Ch. 29.

mortgagee is limited to the money secured and he holds the land only as security for his money, therefore although he has the legal estate in the land, yet in Equity he has a mere charge for the amount due to him. In Equity the mortgagor is regarded as the owner of the mortgaged land subject only to the mortgagee's charge, and the mortgagor's equity of redemption is treated as an equitable estate in the land of the same nature as other equitable estates. Moreover, no agreement between the parties that the mortgage should not be redeemable has any effect in Equity, and any attempt to fetter the equity of redemption with any other condition than the payment of the money secured is null and void.

It follows from this relationship between mortgagor and mortgagee that it would be just as unconscionable for a mortgagee to set up a claim to hold the land comprised in his mortgage free from the equity of redemption as it would be for a trustee to set up a claim to retain the trust property in his hands for his own use. Consequently, the reasoning which has induced the Court to hold that a trustee cannot on failure of the trusts set up his legal title so as to defeat the Crown's claim to *bona vacantia* applies with equal force to a mortgage of leaseholds where the mortgagor, being an individual, has died intestate without next-of-kin or, being a company, has been dissolved; in neither case will the mortgagee be permitted to set up his legal estate in the term so as to defeat the Crown's equity of redemption any more than he would have been permitted to set up that title to defeat the mortgagor's equity of redemption had the mortgagor still been in existence.

From this it would seem that Lawrence, L.J., regarded a mortgagee as being so far in the position of a trustee that he could never, in any circumstances, claim more than his security permitted him to claim, and that as regards anything which he might obtain beyond that, he occupied a fiduciary character. It would appear, however, that the hypotheses do not account for the fact that if a mortgagee remains in possession for twelve years without disturbance or acknowledgment of the mortgagor's title, he may acquire the estate.

In an equitable mortgage by deposit, the mortgagor is a trustee of the legal estate for the mortgagee.

Finally, where an equitable mortgage is effected by deposit of title-deeds, the mortgagor is a trustee of the legal estate for the mortgagee, for the deposit of the title-deeds is evidence of an agreement to mortgage of which Equity will give specific performance. Since 1925, the mortgagor, if the mortgage is of freeholds, will hold on trust to create a term or a legal charge and where the mortgage is of leaseholds, on trust to create an underlease.

C. THE ACQUISITION OF PROPERTY BY FRAUD

Where one person has acquired property in consequence of his fraud upon another, Equity converts him into a constructive trustee, for the benefit of the person who has been injured by the fraud. This is not always the person upon whom the fraud has operated. Thus, where a person is induced not to make a will because the person entitled on intestacy promises the intending testator that he will benefit X as the testator desires, this is a secret trust which Equity will impose as a constructive trust upon the intestate successor.[1] The attitude of Equity in cases of constructive trusts resulting from fraud was explained as follows by Lord Westbury in *McCormick* v. *Grogan* [2]—

Secret trusts are constructive trusts.

> The jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on a personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetuating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud.[3]

Fraudulent intent must be proved by clear evidence.

D. AN EXPRESS TRUSTEE AS A CONSTRUCTIVE TRUSTEE

A cardinal rule of Equity is that a trustee shall not make a profit from his trust, nor even use his position as trustee to secure a personal advantage at the expense of his beneficiary. Certain exceptions to this rule now exist, and will be discussed later. For the present, it must be stated that if a

Where an express trustee derives a profit from his trust, he becomes a constructive trustee of the profit.

[1] *Russel* v. *Russel* (1873), 1 Bro. C.C. 269.
[2] (1869), L.R. 4 H.L. 82, 97.
[3] For further discussion of these constructive trusts, see pp. 49 *et. seq.*, *ante*.

trustee does secure such an unauthorised advantage or profit, he holds it as a constructive trustee for his beneficiary. The leading case upon this type of constructive trust is *Keech* v. *Sandford*.[1] A trustee held a lease of Romford Market upon trust for an infant. The lease expired, and the trustee sought to renew it on behalf of his beneficiary. This the lessor refused to do, but intimated that he had no objection to a renewal by the trustee on his own behalf; whereupon the trustee took a renewal for himself. Lord King, L.C., held that the lease must be held on trust for the infant, adding—

> I very well see, if a trustee, on the refusal to renew, might have a lease for himself, few trust estates would be renewed to *cestuis que use*.

This is a principle which has received the very widest application, for it has been extended to all who occupy a fiduciary position, including executors and administrators,[2] an executor *de son tort*[3] (i.e. a person who interferes with the estate of a deceased, without possessing the necessary authority), and also agents of these persons[4] and to the husband or wife of a person in a fiduciary position,[5] whilst it applies equally where a person purchases the right to renew from the trustee, executor, or tenant for life, and in this case the trust attached to the purchase-money and not to the renewed lease.[6]

Where the trustee purchases the reversion.

A distinction must be drawn between the right to renew the lease, where a constructive trust arises, and the purchase of the reversion, which in the absence of fraud, or unless the lease is renewable, does not enure for the benefit of the person for whom the trustee or other person clothed with a fiduciary character holds.[7]

Extension of the rule to other classes of persons.

Further extensions of the rule have imposed a constructive trust, where a lease is renewed for himself by a tenant for life,[8] a partner,[9] a mortgagor or mortgagee,[10] joint-tenants (but not tenants in common[11]), even though some of these

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[1] (1726), Sel. Cas. Ch. 61.
[2] *Walley* v. *Walley* (1687), 1 Vern. 484.
[3] *Mulvany* v. *Dillon* (1810), 1 B. & B. 409.
[4] *Griffin* v. *Griffin* (1775), 1 Sch. & Lef. 353; *Mulvany* v. *Dillon*, *supra*.
[5] *Ex parte Grace* (1799), 1 B. & P. 376; *Re Biss*, [1903] 2 Ch. 40, 58.
[6] *Owen* v. *Williams* (1773), Amb. 734.
[7] *Bevan* v. *Webb*, [1905] 1 Ch. 620.
[8] *Randall* v. *Russell* (1817), 3 Mer. 190; *Lloyd-Jones* v. *Clark-Lloyd*, [1919] 1 Ch. 424.
[9] *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298.
[10] *Rushworth's Case* (1676), Freem. Ch. 13; *Rakestraw* v. *Brewer* (1728), 2 P. Wms. 511.
[11] *Palmer* v. *Young* (1684), 1 Vern. 276 *Kennedy* v. *De Trafford*, [1897] A.C. 180.

persons do not necessarily occupy a fiduciary position towards the other persons interested. In *Holmes* v. *Williams*,[1] it was held that where a lease held by trustees for several beneficiaries was forfeited, and one of the beneficiaries secured its renewal, the rule did not apply, and he was not a constructive trustee for his co-beneficiaries.

It is important to notice, however, that the rule does not apply in as full a form to the persons just considered as to the first class. The constructive trust may, in the second class of cases, be rebutted by proof that the position occupied has not been in any way abused, but the difficulty of rebutting it varies, so that the clearest evidence would be required to free a partner, or mortgagor, or a mortgagee from the trust. In *Re Biss*,[2] the whole question was fully discussed. A shopkeeper holding under a yearly tenancy died intestate, leaving a widow and three children. The widow was appointed administratrix, and she continued the business with the assistance of one of the sons. Her application for a renewal of the lease was refused, whereupon the son applied and secured it. The Court of Appeal held that he could keep the lease for himself, and he did not stand in a fiduciary position to the other persons entitled on intestacy, whilst the position he had occupied in the business had not been abused.

Difference in the position of members of the two classes. In respect of members of the first class the presumption is irrebuttable.

Romer, L.J., in the course of a comprehensive judgment said—

> The cases show that, with regard to a person obtaining a renewal who occupies a fiduciary position, it is contrary to public policy to allow him to rebut the presumption that in obtaining a renewal he acted in the interests of all persons interested in the old lease. I may also add that some of the decided cases, where persons not in a fiduciary position obtaining renewals have been held to be constructive trustees, depend upon the fact that those persons acted fraudulently in the matter; as, for instance, by representing to the lessors, or by inducing or allowing the lessors to believe, that they were acting in the interest of those entitled to the old lease. And, of course, if a person has obtained a new lease by reason and in consideration of a surrender or attempted surrender of an old lease or rights belonging to third parties, he cannot as against those third parties, pretend to hold the new lease as his own absolute property. But cases falling within the two last-mentioned classes stand apart, and need no further examination by me. . . .
>
> The cases which really demand full consideration are those where the person renewing the lease does not clearly occupy a fiduciary position. On inquiry into those cases it appears

[1] [1895] W.N. 116. [2] [1903] 2 Ch. 40.

to me, as a result, that a person renewing is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position and owed, by virtue of that position, a duty towards the other persons interested. Take, for example, the case of a tenant for life under a settlement of leaseholds. Although not a trustee for the remainderman,[1] yet his position is not that of a stranger as regards them. He owes, by virtue of his position, certain duties towards them in respect of the settled property; and if, by virtue of his position, he is enabled to obtain a a renewal of the lease, Equity clearly demands that the new right obtained in virtue of the old should be regarded as a graft on the old, and be treated accordingly as settled property.

Position of a tenant for life of leaseholds.

Position of a partner;

Take next the case of a partner obtaining a renewal of a partnership lease; here, apart from the fact that in ordinary cases concerning the carrying on of the partnership business he is an agent for the partners, he clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position. And, therefore, as a rule, even if a partnership lease has come to an end, yet if that partner, by virtue of his position, obtains a renewed lease, he will be held to have acquired it on behalf of all the partners. . . .

and of a mortgagee.

I will deal next with the cases decided as between mortgagor and mortgagee. Each of these owes a duty to the other in respect of the mortgaged property; and in case of one being able, by virtue of his position, to obtain a renewal of a mortgaged lease, there are obvious grounds why it should be held against him, at any rate as a rule, that the renewed lease should be treated as engrafted on the old and as forming part of the mortgage security.

The trustee must be indemnified for expenses incurred.

Where a trustee, executor, or other person has incurred expense in renewing the lease, or has expended money in permanent improvements on the strength of it, he has a lien upon the property for his costs, with interest,[2] and he is also entitled to be indemnified for all personal covenants he may have entered into in renewing the lease,[3] whilst on his side, the trustee must account to his *cestui que trust* for all mesne rents and profits,[4] and he must free the property from all encumbrances which he has created, except underleases at a rack-rent.[5]

Where the trustee permits a prejudicial act in respect of the property in return for valuable consideration.

Another illustration of the misuse of a fiduciary capacity is afforded by a trustee, tenant for life, or executor, permitting a prejudicial act in relation to the trust property in return for valuable consideration. Here the consideration received is subject to a constructive trust. Thus, in *Pole* v.

[1] But note that a tenant for life in whom the leasehold is vested under the Settled Land Act, 1925, is made a trustee by Sect. 16 (1).

[2] *Holt* v. *Holt* (1670), 1 Ch. Cas. 190; *Rowley* v. *Ginnever*, [1897] 2 Ch. 503.

[3] *Keech* v. *Sandford*, *supra*.

[4] *Keech* v. *Sandford*, *supra*; *Giddings* v. *Giddings* (1826), 3 Russ. 241.

[5] *Bowles* v. *Stewart* (1803), 1 Sch. & Lef. 226.

Pole,[1] a tenant for life for valuable consideration permitted an Act of Parliament sanctioning a railway affecting his property to pass unopposed by him, and it was held that the money received was subject to a trust. In *Aberdeen Town Council* v. *Aberdeen University*,[2] yet another aspect of the doctrine was emphasised. The Town Council of Aberdeen held certain lands adjacent to the sea in trust for Aberdeen University and its professors. The Council then obtained a grant of salmon-fishings in the sea opposite the land which they held in trust, and the House of Lords held that the grant must be held in trust for the University and its professors.

Where the tenant for life commits waste, being impeachable for waste.

Again, if a tenant for life commits waste by felling timber, and he is impeachable for waste, the persons entitled to the first estate of inheritance under the settlement may claim the timber, or damages at law, and in Equity the tenant for life is a constructive trustee, accountable for the proceeds, with interest at 4 per cent.[3] It may happen, however, that, at the time when the waste is committed, the tenant for life is himself entitled to the first estate of inheritance, and if that is so, he is a constructive trustee for all the persons interested according to their estates, since no one may take advantage of his own wrong.[4] Further, if the tenant for life and the person with the first vested estate of inheritance agree together to cut timber and share the proceeds, they are both constructive trustees for all the other persons interested in the estate.[5]

E. A STRANGER INTERMEDDLING WITH THE TRUST

Where a person receives trust property knowingly.

Where a stranger to the trust receives trust property from the trustee, knowing it to be part of the trust estate, and knowing also that it is handed to him in breach of trust, he becomes a constructive trustee for the persons beneficially entitled.[6] His liability as a constructive trustee is unaltered even though he may have given value, or if he knowingly assists the trustee to commit a breach of trust without actually receiving the trust property. Again, where a volunteer receives trust property, whether with or without notice he becomes a constructive trustee of it.[6] A stranger to the

[1] (1865), 2 Drew. & Sm. 420. [2] (1877), 2 App. Cas. 544.

[3] *Garth* v. *Cotton* (1753), 3 Atk. 751. Certain acts committed by the tenant for life are now dealt with in the Settled Land Act, 1925, but except where such statutory provision has been made, it is conceived that the law relating to waste remains in force.

[4] *Williams* v. *Bolton* (1784), 1 Cox. 72.

[5] *Garth* v. *Cotton*, *supra*. [6] *Barnes* v. *Addy* (1874), 9 Ch. App. 244.

[6] *Re Eyre Williams*. [1923] 2 Ch. 533.

trust, however, does not become a constructive trustee simply because he acts as agent of the trustee in transactions within the legal powers of the trustees unless the agent receives and becomes chargeable with some part of the trust property, or unless he knowingly assists in a fraudulent purpose of the trustee.[1] Furthermore, the Partnership Act, 1890, Sect. 13, provides that a partner of a trustee who has improperly employed trust property in the partnership business does not become a constructive trustee unless he has notice of the breach of trust committed by the other; and the trust money may be recovered if still under the control of the partnership.

In *Bridgman* v. *Gill*,[2] a trust fund stood in the names of two trustees at a bank, the manager of which knew it was a trust fund. The bankers, at the request of the tenant for life only, paid the fund into the account of the tenant for life, who thereby repaid the bank a debt. It was held that the bankers were constructive trustees for the beneficiaries, and that the Statute of Limitations did not apply to protect the bank.

Application of this principle to charter-parties.

An application of this principle occurs in the decision of the Privy Council in *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*[3] There, by a charter-party of 24th July, 1914, a steamship was chartered by the owners to the respondents for ten consecutive St. Lawrence seasons. The owners sold the vessel to X, X sold to Y, Y to Z, and Z to A. In each case the purchasers bought with notice of the existence of the charter-party, requiring the ship to be used for a particular purpose, and, accordingly, A was a constructive trustee bound by the restrictions on user imposed by the charter-party. In the words of Lord Shaw—

> If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of Equity will not permit him to violate.[4]

F. OTHER CONSTRUCTIVE TRUSTS

Besides the groups of constructive trusts already discussed, a constructive trust may be an incident of many

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[1] Per Lord Selborne in *Barnes* v. *Addy*, (1874), 9 Ch. App. 244, at p. 251. *Ashman* v. *Price & Williams*, [1942] Ch. 219.

[2] (1857), 24 Beav. 302. See also *Rolfe* v. *Gregory* (1865), 4 De G. J. & S. 576, and *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E.R. 367.

[3] [1926] A.C. 108.

[4] For a discussion of this case, see E. C. S. Wade: *Restrictions on User*, 44 L.Q.R., p. 51 and *ante* p. 5.

miscellaneous relationships. There may be a constructive trust of sums of money recovered under a promissory note. Thus, in *Hirachand Punamchand* v. *Temple*,[1] a son owed a large sum to a moneylender under a promissory note, and his father wrote to the moneylender, offering an amount less than that owing under the promissory note, and enclosing a draft for the smaller amount. The draft was cashed, and the moneylender then sued the son for the the balance. The Court of Appeal held that he could not recover, and Farwell, L.J., observed—

A trust of a promissory note.

> I have no hesitation in saying that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.

This was amplified by Vaughan Williams, L.J., who, after considering whether the promissory note had in the circumstances ceased to be a negotiable instrument, added—

> Alternatively, assuming that this was not so, and that the instrument did not cease to be a negotiable instrument, then, in my judgment, from the moment when the draft sent by Sir Richard Temple was cashed by the plaintiffs a trust was created as between Sir Richard Temple and the moneylenders in favour of the former, so that any money which the latter might receive upon the promissory note, if they did receive any, would be held by them in trust for him. . . . In my judgment, if I am right in saying that any monies received on the note by the plaintiffs would be held by them in trust for Sir Richard Temple, then, without any question of a resort to a Court of Equity, there might have been a defence in a Court of Law on the ground that any money recoverable on the note by the plaintiffs was recoverable by them merely as trustees for Sir Richard Temple, and that, under the circumstances disclosed by the correspondence, the relations between the father and son were such that it was impossible to suppose that the father wished to insist on payment of the note by the son.

Directors.

Again, a director of a company is so far a constructive trustee that he cannot enter into profitable contracts with the company,[2] nor can he buy property and sell it to the company for a profit, nor receive commissions from persons buying from the company, but directors are not trustees for the creditors of the company,[3] nor are they trustees for individual shareholders, and therefore they may purchase shares from shareholders without disclosing existing negotiations for the sale of the company's business.[4] Promoters of

Company promoters.

[1] [1911] 2 K.B. 330.
[2] *Great Luxembourg Railway Company* v. *Magnay* (1858), 25 Beav. 586.
[3] *Re Wood's Ships Woodite Co.* (1890), 62 L.T. 760.
[4] *Percival* v. *Wright*, [1902] 2 Ch. 421.

a company also occupy a fiduciary position to the company, so that they may not retain secret commissions from persons who are selling property to the company which is being formed.[1] The secretary of a company is subject to a similar incapacity.[2] A solicitor who purchases property from a client must show not only that he gave full value for it, but that the client benefited from the sale. Thus, in *Spencer* v. *Topham*,[3] a client desired to sell property, but had been unable to find a purchaser. Ultimately the solicitor bought it, and on its being proved that the sale was entirely fair, that the client fully understood the transaction, and that the price exceeded what could have been obtained elsewhere, the sale was held to be good; but such sales should normally be conducted through a second solicitor;[4] and if the solicitor, after buying from a client, subsequently sells to a person who has notice of the voidability of the sale, the second sale is also liable to be impeached.[5]

Solicitors.

Whether an agent is a constructive trustee.

The question whether an agent is a trustee for his principal has provoked considerable discussion. It is certainly clear that an agent cannot make a profit out of his position as agent, and if he does, he is accountable for that profit to his employer as a constructive trustee of it.[6] On the other hand, until some judgment or decree has been obtained, the money cannot be regarded as that of the principal.[7] It has been suggested also that an agent is a constructive trustee of property of the principal, committed to his charge, but the better view would seem to be that he is only a trustee where there is some special, confidential relationship, e.g. where the principal gives the agent property for safe custody, sale, or investment,[8] but where there is no such specially confidential relationship, there is no relationship of trustee and beneficiary, and the principal's remedy is at Common Law for money had and received.[9] Thus, a solicitor to whom money is handed for investment,[10] a stockbroker,[11] and a land agent are all constructive trustees of property committed to their charge, but an agent who collects rents on commission is not.

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[1] *Gluckstein* v. *Barnes*, [1900] A.C. 240.
[2] *Re M'Kay's Case* (1876), 2 Ch.D. 1.
[3] (1856), 22 Beav. 573; 2 Jur. (N.S.) 865.
[4] *Cockburn* v. *Edwards* (1881), 18 Ch.D. 449. [5] *Spencer* v. *Topham*, *supra*.
[6] *Fawcett* v. *Whitehouse* (1829), 1 Russ. & M. 132; *Gillett* v. *Peppercorn* (1840), 3 Beav. 78.
[7] *Lister* v. *Stubbs* (1890), 45 Ch.D. 1, 13.
[8] *North American Co.* v. *Watkins*, [1904] 1 Ch. 242.
[9] *Piddocke* v. *Burt*, [1894] 1 Ch. 343.
[10] *Burdick* v. *Garrick* (1870), 5 Ch. App. 233.
[11] *Re Strachan* (1877), 4 Ch.D. 123.

CHAPTER XI

THE APPOINTMENT AND REMOVAL OF TRUSTEES

Two trustees desirable.

THE capacity of a person to fill the office of trustee has already been considered. It remains to add that the appointment of two trustees is desirable to protect the beneficiaries and it is normally required in the case of trusts relating to land, unless the trustee appointed is a trust corporation, for a sole trustee (not being a trust corporation) cannot give a valid receipt for the proceeds of sale or other capital money arising out of a trust for sale of land,[1] nor for capital money arising out of a settlement governed by the Settled Land Act.[2] At the same time, the Trustee Act, 1925, Sect. 34, provides—

But not more than four for land.

> (1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.
>
> (2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act—
>
> (*a*) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
>
> (*b*) the number of trustees shall not be increased beyond four.

This section only applies to trusts for sale and settlements of land, and it does not apply to—

(*a*) Land vested in trustees for charitable, ecclesiastical, or public purposes; or

(*b*) Where the net proceeds of the sale of land are held for those purposes; or

(*c*) To the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

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[1] Trustee Act, 1925, Sect. 14 (2). [2] Sect. 94 (1).

Furthermore, Sect. 42 of the Administration of Estates Act, 1925, provides—

> (1) Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue, or share for the infant, and to be trustees of any lands devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.
>
> On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.

The section does not apply if there is a surviving husband or wife who takes a life interest, or the infants are contingently entitled.[1]

Disclaimer of office by a trustee.

Since the duties and obligations of trustees are many, no one may be compelled to undertake a trust.[2] This means that the office may be renounced before acceptance. Afterwards the trustee will only be released in the ways specified below. A trustee who does not propose to act, however, should disclaim as soon as possible, and in any case before he has interfered with the trust property. Neglect to disclaim may be treated as acquiescence, although it may not be too late to disclaim even after a number of years, provided that a satisfactory explanation of the delay may be furnished to rebut the presumption of acceptance by acquiescence.[3] Disclaimer of the office of trustee of necessity involves also disclaimer of the estate of trustee,[4] and the entirety of the estate then devolves upon the acting trustees.

How disclaimer is effected.

Disclaimer may be by deed or conduct, but it is desirable

[1] *Re Yerburgh*, [1928] W.N. 208.
[2] Per Lord Talbot in *Robinson* v. *Pett* (1734), 3 P. Wms. 251.
[3] *Doe d. Chidgey* v. *Harris* (1846), 16 M. & W. 517.
[4] *Re Birchall* (1889), 40 Ch.D. 436. *Re Clout & Frewer*, [1924] 2 Ch. 230.

to disclaim by deed since this affords clear and unambiguous evidence of the act.[1] There may not be a partial disclaimer of the office, and so, if a trustee purports to disclaim the trust with relation to some part of the trust property, this is ineffectual to disclaim any part of the trust.[2] Where the trust property comprises pure personalty only, disclaimer may be by parol declaration.[3]

The position of a married woman who wishes to disclaim requires special consideration. By the Real Property Act, 1845, Sect. 7, a married woman could disclaim an estate in land by deed, but the concurrence of her husband was necessary. How far a woman could disclaim under the Married Women's Property Acts was not clear, but now the Law of Property Act, 1925, Sects. 167–8, provides that a married woman may disclaim a trust without the concurrence of her husband.[4]

Acceptance of office by the trustee.

A trustee may accept office by becoming a party to the settlement and executing it,[5] or by making an express declaration of assent.[6] More frequently, however, if the trustee is not a party to the settlement, acceptance is presumed from the subsequent conduct of the trustee in relation to the trust. Acceptance will be presumed where the trustee performs acts in execution of the trust, and there is no difference whatever in the effects of an acceptance by deed and one by parol, or which is implied from conduct.[7] Comparatively slight acts in relation to the trust may be construed as acceptance. Thus, in *James* v. *Frearson*,[8] a person was named in a will as executor and trustee for sale, and when the property was sold by direction of the trustees he was present, and gave orders respecting the sale, and subsequently called on a co-executor to give him information concerning the testator's accounts. These acts were held to constitute acceptance.[9] Nevertheless, merely interfering with the trust property will not of itself necessarily constitute acceptance, for it may be explainable on some other ground,[10] but if the acts of the trustee are ambiguous, he cannot subsequently take advantage of that ambiguity

Interference with the trust property only is not necessarily acceptance.

[1] *Stacey* v. *Elph.* (1833), 1 My. & K. 195.
[2] *Re Lord and Fullerton*, [1896] 1 Ch. 228.
[3] *Doe d. Chidgey* v. *Harris*, *supra*, *per* Parke B.
[4] See also Sect. 170.
[5] *Buckeridge* v. *Glasse* (1841), 1 Cr. & Ph. 126.
[6] *Doe d. Chidgey* v. *Harris* (1847), 16 M. & W. 517.
[7] *Lord Montfort* v. *Lord Cadogan* (1816), 19 Ves. 635.
[8] (1842), 1 Y. & C.C.C. 370.
[9] Cf. *Orr* v. *Newton* (1791). 2 Cox. 274; and see *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 231.
[10] *Stacey* v. *Elph* (1833), 1 My. & K. 195.

and claim that he has not accepted. Thus, in *Conyngham* v. *Conyngham*,[1] X was appointed trustee of a will, but never expressly accepted the trust, which related *inter alia* to the rents of a plantation leased to the son and heir-at-law of the testator. X acted as the son's agent, and received from him the rent of the plantation, and it was held that after receipt of the rents he could not repudiate the trust, for if he wished to refrain from acceptance, he ought to have disclaimed before.

These rules relating to the acceptance of a trust extend also to the acceptance of the office of executor, but one or two special rules applying to executors should be noticed.

Special rules applicable to acceptance of office by executors.

1. An executor of a sole or last surviving executor is also the executor of the original testator, and if the second executor accepts office with regard to the estate of the first, he cannot renounce office in relation to the estate of the original testator;[2] but this substitution of an executor of a first executor does not apply where the first executor has not proved the will, or where the original testator has appointed another executor, who afterwards proves. Wherever an administrator is appointed, the chain of representation is broken, so that neither an executor of an administrator nor an administrator of an executor can administer the estate of the original testator.[3]

2. Where the testator appoints X as executor and trustee of his will, and X either renounces probate or disclaims the trust, then if Y is appointed administrator *cum testamento annexo*, Y does not also become trustee of the will[4]; but under the Trustee Act, 1925, Sect. 36 (5), where a sole or last surviving executor intends to renounce, or where all the executors intend to renounce, he or they may, before renouncing probate, and without thereby accepting the office of executor, appoint one or more persons to act as trustees.

3. Where a person is appointed trustee of two distinct trusts by the same instrument, he cannot accept one and disclaim the other;[5] but this is an equitable doctrine, and, therefore, an executor may accept office and at the same time disclaim a devise of real estate under the will.[6] On the other

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[1] (1750), 1 Ves. Sen. 522. And see *Re Sharman*, [1942] Ch. 311.
[2] *Brooke* v. *Haymes* (1868), L.R. 6 Eq. 25.
[3] Administration of Estates Act, 1925, Sect. 7.
[4] *Wyman* v. *Carter* (1871), L.R. 12 Eq. 309.
[5] *Re Lord and Fullerton*, [1896] 1 Ch. 228.
[6] *Lord Wellesley* v. *Withers* (1855), 4 El. & Bl. 750.

hand, if a person is appointed executor and trustee of a will, by accepting the office of executor, he accepts also that of trustee.[1]

4. Under the Administration of Estates Act, 1925, Sects. 46–7, certain statutory trusts now arise on intestacy. It was held in *Re Yerburgh*,[2] that the statutory trusts only arise when the administration is complete.

A trust shall not fail for want of a trustee.

A cardinal principle of Equity in relation to trusts is that "a trust shall not fail for want of a trustee." Accordingly, if a clear intention to create a trust is shown, "the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice" of the trust.[3] Therefore, if a testator establishes a trust for specified purposes, the trust devolves upon the personal representatives. Again, if a settlor declares a trust without conveying the property to anyone, he himself holds as trustee; and if he appoints a sole trustee who disclaims, the property reverts to the settlor or his personal representatives, who are bound by the trust.[4] Moreover, on the death of a sole or last surviving trustee, the property passes to the personal representatives of that person,[5] who have the power of appointing new trustees in the absence of anyone else entitled under the settlement to appoint,[6] and "until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust."[7]

Extent of the application of this doctrine to powers.

The principle just enunciated is of importance also in relation to powers. The distinction between bare powers and powers coupled with a trust (or powers imperative) has already been noticed.[8] Where the power is coupled with a trust, it partakes so far of the attributes of a trust that if the donee dies without executing it, or refuses to act, the Court ensures its execution.

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[1] *Ward* v. *Butler* (1824), 2 Mol. 533.
[2] [1928] W.N. 208.
[3] *Per* Wilmot, L.C.J., in *A.-G.* v. *Lady Downing* (1767), Wilm. 21, 22.
[4] *Mallot* v. *Wilson*, [1903] 2 Ch. 494.
[5] Administration of Estates Act, 1925, Sects. 1 and 3.
[6] Trustee Act, 1925, Sect. 36 (1).
[7] Trustee Act, 1925, Sect. 18 (2).
[8] P. 9, *ante*.

The distinction and the attitude of the Court towards it were clearly expressed by Lord Eldon in *Brown* v. *Higgs*[1]—

The Court will not execute a mere power.

> It is perfectly clear that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear that wherever a trust is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to this Court a power which the party to whom it is given is entrusted with and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it the Court will, to a certain extent, discharge the duty in his room and place. . . .

But it compels the execution of powers in the nature of trusts.

> If the power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it.[2]

Thus, a power coupled with a trust does not fail through the death of the donee in the testator's lifetime, or by disclaimer, disagreement of the donees, failure to execute it by them, or other such circumstances, the Court will take upon itself the duty to execute the power, and will do so, so long as it is possible, no matter what difficulties attend the execution of it.[3] How the Court will execute the power depends upon the circumstances. Where the settlor has directly made some special provision for its exercise, the Court will attempt to put itself in the place of the appointors, and be governed by the conditions which would have governed them. Thus, in *Gower* v. *Mainwaring*,[4] trustees were directed to divide residuary estate amongst the settlor's relations "where they should see most necessity, and as they should think most equitable and just." The Court directed a division amongst those entitled under the Statute of Distributions according to their necessities. Where no rule is laid down by the testator, however, the Court follows the maxim that "Equality is Equity."[5] In the application of this rule, two important points must be noticed.

How the Court executes such powers.

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[1] (1799), 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 18 Ves. 192.
[2] (1803), 8 Ves. 561, at p. 570. [3] *Pierson* v. *Garnet* (1766), 2 Bro. C.C. 38.
[4] (1750), 2 Ves. Sen. 87. [5] *Doyley* v. *A.-G.* (1735), 2 Eq. Ca. Abr. 195.

1. Where the intention was to annex a trust to the power of appointment, and the donee was given power to select among members of a class, then, in the absence of special circumstances (considered in 2, below), the Court will not attempt any selection, but will divide equally among the class from which selection was to have been made. Thus, in *Harding* v. *Glyn*,[1] where the principle was first discussed, the donee of the power was desired to distribute property "among such of the testator's relations as she should think most deserving and approve of." The Court divided the property equally amongst all the testator's relations living at the time of the appointor's death.[2]

Where the property is to be appointed to one only, the Court will select, in default of appointment.

2. It may be that the testator has expressly stated that the whole of the property shall be given to that member of the class whom the trustees shall select. Here, notwithstanding the difficulty of selection, the Court will attempt it. Thus, in *Moseley* v. *Moseley*,[3] a testator left an estate to his trustees to settle upon such (one) of the sons of N as they should think fit. The trustees failed to select, and the Court directed the trustees, within a fortnight of the order, to nominate such a son of N as they should think fit, failing which, the Court would undertake the task of selection.[4]

Who may appoint trustees.

The appointment of trustees is usually provided for in the trust instrument, but the following persons have power to appoint them—

1. The settlor, when the trust is created.

2. The beneficiaries, if all of them are *sui juris* and collectively entitled to the whole beneficial interest.

3. Some person nominated for the purpose in the trust instrument.[5]

4. Failing some person so nominated, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee.[6]

Furthermore—

Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or

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[1] (1739), 1 Atk. 469.

[2] See also *Brown* v. *Higgs*, *supra*; *Burrough* v. *Philcox* (1840), 5 My. & Cr. 72.

[3] (1673), Rep. *t.* Finch. 53.

[4] See further on powers and trusts, *ante*, p. 9.

[5] Trustee Act, 1925, Sect. 36 (1) (*a*).

[6] Trustee Act, 1925, Sect. 36 (1) (*b*).

substituted and whether appointed by the court or otherwise, then and in any such case—

(*a*) The person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) If there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.[1]

Conditions subject to which the power to appoint may be exercised.

Generally, the trust instrument gives a power to appoint new trustees to some person without specifying the events in which he can exercise it. Where this is the case that person is the "person nominated for the purpose" within the meaning of Sect. 36.[2] If, however, the power is limited, and some only of the occasions mentioned in the section are contemplated, then, as far as the other cases not specified in the trust instrument are concerned, the person to whom the power is given is not "the person nominated for the purpose" and the appointment must be made by the other persons specified in Sect. 36, e.g. the surviving or continuing trustee.[3] Where the person to whom the power is given also takes an interest under the settlement, and he alienates that interest, his power to appoint new trustees remains in him,[4] and where the power is given to two or more to be exercised by them jointly, it cannot usually be exercised by the survivor or survivors in the absence of express provision.[5] If two or more persons nominated to appoint jointly fail to agree, an appointment may be made by the person who is entitled to do so when there is no person "able and willing to appoint."[6] In *Montefiore* v. *Guedalla*,[7] the donee of the power of appointment appointed himself, and the Court held it to be good in the special circumstances, but in earlier decisions such appointments were held invalid[8] since the Trustee Act, 1893, provided for

[1] Trustee Act, 1925, Sect. 36 (6). See also notes to this section in Wolstenholme & Cherry's *Conveyancing Statutes*, Twelfth Edition.

[2] *Re Walker and Hughes* (1884), 24 Ch.D. 698.

[3] *Cecil* v. *Langdon* (1884), 28 Ch.D. 1; *Re Sichel's Settlement*, [1916] 1 Ch. 358.

[4] *Hardaker* v. *Moorhouse* (1884), 26 Ch.D. 417; *Re Spencer* (1917), 33 T.L.R. 16.

[5] *Re Harding*, [1923] 1 Ch. 182.

[6] *Re Sheppard*, [1888] W.N. 234.

[7] [1903] 2 Ch. 723.

[8] *Re Skeat* (1889), 42 Ch.D. 522; *Re Newen*, [1894] 2 Ch. 297.

the appointment of "another person," whilst under the Act of 1925 the donee may appoint himself.

The question is largely one of construction of the power of appointment. Thus it may be a power to appoint another person trustee or one to appoint any person (including the appointor) or one to appoint "any person." All except the former include power to appoint oneself.

Where an infant beneficiary is given a power to appoint new trustees, he is not bound by any act which is either imprudent or prejudicial to his interests, e.g. the appointment of the beneficiary's mother as sole trustee.[1]

The Court may appoint, in the absence of any person entitled to do so.

Trustees appointed under Sect. 36 of the Trustee Act have exactly the same powers, authorities, and discretions as if appointed under the original instrument.[2] If for any reason there is no person capable of appointing trustees under Sect. 36, the Court may appoint,[3] whenever it is found difficult, inexpedient, or impracticable to appoint without the assistance of the Court, and the Court's order may have the effect of appointing either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved. The Court will also appoint a new trustee under Sect. 41 in place of an existing trustee, where there is friction between the trustees.[4] The Court's order, and any consequential vesting order, do not operate further as a discharge to a former or a continuing trustee than an appointment of new trustees under any power given by the instrument would have done. Application for the appointment of a trustee may be made by any beneficiary or trustee[5] by originating summons.

The Court, however, will not appoint where there is a person able and willing to do so.[6]

Although the occasions when it will be necessary to apply to the Court under Sect. 41 of the Trustee Act, 1925, will be greatly reduced in number, owing to the wide powers of appointment conferred in Sect. 36, situations still do arise

[1] *Re Parsons*, [1940] Ch. 973.
[2] Trustee Act, 1925, Sect. 36 (7).
[3] *Ibid.*, Sects. 41 and 43. Under the Trustee Act, 1925, Sects. 44–56, the Court has a wide power to make vesting orders *not only* when a new trustee is appointed, but on many other occasions.
[4] *Re Henderson*, [1940] Ch. 764.
[5] Trustee Act, 1925, Sect. 58. [6] *Re Higginbottom*, [1892] 3 Ch. 132.

In what circumstances the Court will replace a trustee.

where it is necessary to make application, and it will therefore be profitable to consider in what circumstances the Court has, under similar powers conferred by older Acts, replaced a trustee. In *Re Dawson's Trusts*,[1] the Court appointed new trustees in place of a trustee whose ill-health was so extreme that he was unable to undertake the exertion of signing the necessary papers; whilst in *Re Lemann's Trusts*,[2] the Court replaced a trustee 69 years of age, who, through failure of memory and decay of intellect, was unable to attend to the trust business. In that case, Chitty, J., observed—

> It appears to me that if a trustee is in such a condition that he cannot act properly in his trust, he is, in fact, incapable of acting.

A similar case to *Re Lemann's Trusts* was *Re Phelps Settlement Trust*,[3] where the Court of Appeal replaced a trustee of 85 years of age, who was very deaf, and whose intellectual powers had decayed to such an extent that he was incapable of transacting the trust business. Lastly, in *Re Martin's Trusts*,[4] the Court appointed a new trustee in place of one who suffered from softening of the brain, though he was neither a lunatic nor a person of unsound mind.

In addition to its powers of appointing trustees under the Trustee Act, 1925, the Court also possesses powers under two other statutes.

The Court's power under the Judicial Trustees Act, 1896.

By virtue of Sect. 1 of the Judicial Trustees Act, 1896, and the Judicial Trustees Rules, 1897, the Court may, on the application of the settlor, a trustee, or a beneficiary, appoint any fit and proper person nominated in the application, or an official of the Court, to be a judicial trustee, to act either alone or jointly with another, or, on proof of sufficient cause, in place of all or any existing trustees. The Official Solicitor is often appointed, and a bank may also be selected by the Court to undertake the trust as a judicial trustee. Under the Act also, the Court may appoint a judicial trustee to administer the estate of a deceased person instead of the executor or administrator. Such appointments, however, are entirely discretionary,[5] and the judicial trustee so appointed is an officer of the Court, subject to its control and supervision. He may, therefore, at any time obtain the Court's direction as to the way in which he is to act, without a formal application by summons. His accounts are

[1] (1864), 3 New Rep. 397.
[2] (1883), 22 Ch.D. 633; 52 L.J.Ch. 560.
[3] (1885), 55 L.J.Ch. 465.
[4] (1886), 56 L.J.Ch. 229.
[5] *Re Ratcliff*, [1898] 2 Ch. 352.

audited annually, and he is entitled to such remuneration as the Court allows.

The office of judicial trustee, as so established, corresponds with that of the "Judicial Factor" under Scottish law, but the Court has not made extended use of its powers under this section. Thus, in *Re Ratcliff*,[1] a testator appointed his wife sole executrix, giving her sole control of the property, of which she was tenant for life, and the Court declined to appoint a judicial trustee at the instance of a reversioner, no allegation of misconduct having been made. In *Re Chisholm*,[2] the Court declined to appoint a judicial trustee where the person having the power of appointing under the instrument had appointed persons willing to act, and in *Re Martin*,[3] the Court expressed its disinclination to appoint a judicial trustee to act with one privately appointed.

When the power will be exercised.

By the Public Trustee Act, 1906, Sect. 5, the Court has power to appoint the Public Trustee to be a new or additional trustee, on the application by originating summons of any trustee or beneficiary, notwithstanding the fact that the instrument directs that he shall not be appointed. The Public Trustee is a corporation sole and therefore never dies. Furthermore, the State makes good to the beneficiaries any loss incurred through his activities.[4] The Act provides that the Public Trustee may, if he thinks fit, (*a*) act in the administration of estates of small value; (*b*) act as custodian trustee; (*c*) act as an ordinary trustee; (*d*) be appointed a judicial trustee; or (*e*) be appointed to be the administrator of the property of a convict. In fulfilment of any of these functions, he may act alone, or jointly with others, and may have the same powers, duties, and rights as a private trustee. He may decline absolutely, or, except on prescribed conditions, to accept any trust, but not on the ground that the trust property is of small value. The Public Trustee, however, is not under a statutory obligation to accept the trusteeship of a foreign settlement;[5] and he may not accept a purely religious or charitable trust.[6]

The Court's power under the Public Trustee Act, 1906.

Functions of the Public Trustee.

Where the Public Trustee acts as an ordinary trustee, he may be appointed by will, settlement, or other instrument, or as a new or additional trustee, in the same manner as if he were a private trustee, except that the Public Trustee may

Appointment of the Public Trustee.

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[1] [1898] 2 Ch. 352. The judicial trustee, for some time obsolescent (see 76 L.J., p. 332), has been revived in *Re Jones*, [1934] W.N. 77.

[2] (1898), 43 Sol. Jo. 43.

[3] [1900] W.N. 129.

[4] Public Trustee Act, 1906, Sect. 7.

[5] *Re Hewitt's Settlement*, [1915] 1 Ch. 228.

[6] *Re Hampton* (1919), 88 L.J.Ch. 13.

be appointed sole trustee; and furthermore, where the Public Trustee has been appointed, a co-trustee may retire under the Trustee Act, 1925, Sect. 39, notwithstanding the fact that there are not more than two trustees, and without the consents therein required.

Wherever practicable, notice of the appointment of the Public Trustee must be given to the beneficiaries (or if they are infants, to their guardians), and a person to whom notice has been given may apply within twenty-one days for an order prohibiting the appointment. Failure to give notice does not affect the appointment.[1] In considering whether the desired order shall be made, the Court must have regard to the interests of all the beneficiaries. The question whether the expense involved in the appointment would be a good reason for granting an order prohibiting the appointment was considered in *Re Firth*,[2] when Eve, J., said—

> The legislature cannot have intended that in ordinary cases not involving any exceptional or disproportionate expenditure, the mere fact that the appointment would involve expense should be treated as a material element in determining the question whether it is expedient or not to make an order prohibiting the appointment.

Sect. 6 of the Public Trustee Act authorises the Public Trustee to act as administrator or executor, and any executor who has proved or any administrator, notwithstanding he has acted, may, with the sanction of the Court, and after notice to such beneficiaries as the Court may direct, transfer the estate to the Public Trustee to administer either alone or with any other personal representative. After transfer the retiring personal representative is in no way liable for any acts done in relation to the estate after the date of the order, except acts done by himself or his agents.

The Public Trustee may not normally carry on a business.

Unless specially authorised, the Public Trustee may not accept a trust which involves carrying on a business, except for winding up within eighteen months (although he may act as custodian trustee of such business on certain conditions),[3] nor any trust under a deed of arrangement, nor the administration of an estate known or believed to be insolvent.[4]

The Public Trustee as custodian trustee.

The Public Trustee may be appointed a custodian trustee (1) by order of the Court, on the application of any person who has the right to apply to the Court for the appointment of a new trustee; (2) by the creator of the trust; (3) by the

[1] Public Trustee Act, 1906, Sect. 5 (4). [2] [1912] 1 Ch. 806.
[3] Public Trustee Rules, 1912, R.7 (1) and (2).
[4] Public Trustee Act, 1906, Sect. 6 (4).

person having power to appoint new trustees. The trust property must be transferred to the custodian trustee as if he were sole trustee, and vesting orders for that purpose may be made where necessary, but the management of the property remains in the other trustees, although the custodian trustee has custody of securities and documents of title.[1] Where necessary, the custodian trustee may concur, but unless he does so, he is not liable for the acts or defaults of the managing trustee. All payments must be made to the custodian trustee, although he may allow dividends or income to be paid to the managing trustees, who have the power of appointing new trustees. A custodian trustee, however, may apply to the Court for the appointment of a new trustee. It should be remembered that trust corporations may also be appointed custodian trustees, and unlike the Public Trustee they may accept office in connexion with a charitable trust.

Application to the Court for the appointment of the Public Trustee.

Sect. 3 of the Act gives power to persons who would be entitled to apply for administration, to apply to the Court for the appointment of the Public Trustee, where the estate is proved to be less than £1,000 in value, and the persons beneficially entitled are of small means. On the Public Trustee undertaking by deed to administer, the trust property other than stock vests in him, as well as the right to call for the transfer of the stock, and the person otherwise entitled to administer is discharged from all future liability.

Audit of accounts of Public Trustee.

Sect. 13 provides that the accounts of a trust administered by the Public Trustee shall be audited annually, if required by a trustee or a beneficiary, whilst by Sect. 10 it is provided that a person aggrieved by any act or omission or decision of the Public Trustee in relation to any trust may apply to the Court, and the Court may make such order as it thinks fit.

The welfare of the beneficiaries is the Court's primary consideration.

Finally, it must be added, that altogether apart from its power under these three statutes, the Court has a jurisdiction to remove trustees and to appoint newcomers in their place, wherever it considers the interests of the beneficiaries require it. Thus, it may do so in any administration, not withstanding that the removal of the trustee has not been asked for in the pleadings.[2] Moreover, in exercising its statutory powers of removal, the welfare of the beneficiaries is the paramount consideration, as in the case where a trustee becomes bankrupt, and, from the fact that he has to deal

[1] Public Trustee Act, 1906, Sect. 4. [2] *Re Wrightson*, [1908] 1 Ch. 789.

with trust funds, there is a possibility that he might misappropriate them.[1]

A. THE MODE OF APPOINTMENT OF TRUSTEES OUT OF COURT

The persons who can appoint new trustees have already been considered. It remains now to state the occasions when new trustees may be appointed. These are contained in Sect. 36 of the Trustee Act, 1925, which enacts—

When a trustee may be appointed.

(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees—

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of the section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section, and of any enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.[2]

Mode of appointment.

Appointments of new trustees are made in writing. A deed is usual, but not essential. Where the appointment is made

[1] *Re Barker's Trusts* (1875), 1 Ch.D. 43; *Re Adam's Trusts* (1879), 12 Ch.D. 634.

[2] Appointment of trustees under the Settled Land Act, 1925, is considered in Sects. 30 and 34 of that Act.

by the personal representatives, the concurrence of an executor who has renounced or has not proved is not required,[1] but as was stated before, a sole or last executor who intends to renounce (or all the executors if they propose to renounce) may appoint new trustees without thereby accepting the executorship.[2] Where the appointment is made to replace a lunatic or defective trustee who is also entitled to some beneficial interest under the trust, leave of the Judge or of the Master in lunacy is required.[3]

It is to be observed that although Sect. 36 (1) of the Trustee Act, 1925, gives a power to appoint in place of a trustee who remains abroad for more than twelve months, merely going abroad does not make the trustee "incapable of acting."[4] Thus, Turner, V.C., observed in *Re Watts*—[5]

> I think the term "become incapable" . . . (has) reference to personal incapacity, and that the absence of (the trustee) and his situation with regard to his bankruptcy do not constitute personal incapacity.

At the same time, it must be remembered that when a trustee becomes bankrupt he is usually "unfit to act,"[6] and the same is true if a trustee absconds.[7]

A lunatic is incapable of acting, even if not so found by inquisition,[8] and a trustee who was suffering from a serious illness, so that he was unfit to transact any business for a lengthy period, would also appear to be incapable of acting, within the section.[9]

It should also be noticed that whilst there may not be partial disclaimer of the trust, yet under Sect. 36 a trustee may be relieved of part only of the trusts. Previously, it had been doubted whether this could be done without the intervention of the Court.[10]

The phrase "more than twelve months" is strictly construed. The absence must have been continuous for the twelve months, and it has been held that a return for a week is sufficient to prevent the power coming into operation.[11]

The number of trustees to be appointed.

Where new trustees are appointed, the number may be increased, but not beyond four (unless the trust is for a

[1] Trustee Act, 1925, Sect. 36 (4). [2] Sect. 36 (5).
[3] Trustee Act, 1925, Sect. 36 (9).
[4] *Withington* v. *Withington* (1848), 16 Sim. 104; *Re Harrison's Trusts* (1852), 22 L.J.Ch. 69.
[5] (1851), 20 L.J.Ch. 337. [6] *Re Roche* (1842), 2 Dr. & War. 287.
[7] *Re Wheeler and De Rochow*, [1896] 1 Ch. 315, 322.
[8] *Re East* (1873), 8 Ch.App. 735; *Re Elizabeth Blake*, [1887] W.N. 173.
[9] *Re Weston*, [1898] W.N. 151.
[10] *Savile* v. *Couper* (1887), 36 Ch.D. 520; *Re Moss* (1888), 37 Ch.D. 513, 516.
[11] *Re Walker*, [1901] 1 Ch. 259.

charitable object), except that a separate set of trustees (not exceeding four) may be appointed for any part of the trust property which is subject to distinct trusts. It is not obligatory (except as mentioned below) to appoint more than one trustee where one only was originally appointed, nor is it obligatory to fill up the original number where more than two were originally appointed. But, except in the case where only one trustee was originally appointed, and the sole trustee so appointed has power to give valid receipts for all capital money, a trustee is not to be discharged unless there are two trustees or a trust corporation left to perform the trust.[1] The exception made relates only to trusts of pure personalty, for a sole trustee cannot give a receipt for capital money arising under a trust for sale or settlement of land. Even if the instrument purported to give a sole trustee such power, it would be ineffective.[2] Where new trustees of a trust for sale of land are appointed, the same persons must also be appointed as are for the time being trustees of the settlement of the proceeds of sale.[3]

Appointment of new trustee when there is no vacancy.

Formerly, unless the instrument otherwise provided, an additional trustee could only be appointed when there was a vacancy in the trust. It is now provided, however, that an additional trustee may be appointed, but only if a sole trustee, other than a trust corporation has been originally appointed, or where there are not more than three trustees, none of whom is a trust corporation.[4] The position of a purchaser in relation to the appointment of new trustees is provided for in Sect. 38 which enacts—

Position of the purchaser in relation to the appointment.

> (1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with the land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of the legal estate, be conclusive evidence of the matter stated.
>
> (2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

Express vesting declarations.

Formerly, when a new trustee was appointed, it was necessary to vest the property in him by special conveyance or assignment. Now, however, the position is greatly simplified by Sect. 40 of the Trustee Act, 1925 (replacing Sect. 12

[1] Trustee Act, 1925, Sect. 37 (1) (c). [2] Trustee Act, 1925, Sect. 14.
[3] Trustee Act, 1925, Sect. 35 (1). [4] Trustee Act, 1925, Sect. 36 (6).

of the Trustee Act, 1893), which provides that an express vesting declaration may be included in the instrument of appointment, or, in all appointments after 1925, a vesting declaration is implied (unless the contrary is expressed). *Appointments containing express or implied vesting declarations must be by deed*, and the section does not cover— Such a declaration now implied.

(*a*) Land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock. This exception contemplates the position where, a trust having been created, trust money is invested in the mortgage of land, and a new trustee is appointed of the trust money, and the mortgage term has to be vested in the new trustee.[1] Exceptions to this rule.

(*b*) Land held under a lease (or an underlease) which contains a covenant not to assign without consent, unless before the execution of the deed the requisite consent had been obtained, or unless by virtue of any statute or rule of law the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture. But for this exception, the assignment under the vesting declaration, being without licence, might give rise to a forfeiture.

(*c*) Any share, stock, annuity, or property which is only transferable in books kept by a company or other body or in manner directed by or under an Act of Parliament.

It should be observed that (*a*) and (*c*) cover a considerable proportion of trust investments.

If it is difficult or impossible to obtain a transfer of a legal interest in trust property, application must be made to the Court for a vesting order.[2]

As far as registered land is concerned, the Land Registration Act, 1925, Sect. 47, provides that on application, entries will be made on the register to give effect to vesting declarations.

B. THE DEATH, RETIREMENT, AND REMOVAL OF TRUSTEES

The rule of survivorship applies to trustees, and therefore, where there are two or more, and one dies, both the office and the estate devolve upon the survivor or survivors. Where a sole surviving trustee had died without making any The rule of survivorship applies to trustees.

[1] *London and County Bank* v. *Goddard*, [1897] 1 Ch. 642, 649.

[2] Trustee Act, 1925, Sects. 44–56; *Re Harrison*, [1883] W.N. 31; *Re Keeley* (1885), 53 L.T. 487.

new appointment, his personal representatives, as was stated above,[1] are capable of exercising or performing any power that could have been exercised by the sole surviving trustee, or other the trustees or trustee for the time being of the trust.[2]

Retirement of a trustee.

Where a trustee wishes to retire from the trust, he must normally adopt one of the following courses—

(1) He must obtain the consent of all the beneficiaries, being *sui juris* and absolutely interested.

(2) If there is a special power conferred upon the trustee in the instrument, he may retire by taking advantage of it.

(3) He may take advantage of the power contained in the Trustee Act, 1925.

(4) He may apply to the Court.

(1) The limitations on the first mode of retirement are obvious. If there are infants, or unborn persons as beneficiaries then, since these cannot consent, no effective discharge may be obtained in this way. For this purpose, a married woman who is a beneficiary is considered to be *sui juris* unless her interest is subject to a restraint upon anticipation.

Special power to permit retirement now of little importance.

(2) The provisions of the Trustee Act, 1925, have made the insertion of a special power to permit the retirement of a trustee of little importance, but formerly, it was customary to insert a power, in terms resembling Sect. 36 of the Trustee Act, 1925, that if any or all the trustees should die, be abroad for a year, desired to be discharged from the trust, or refused it or became incapable of acting, it should be lawful for the surviving or continuing trustee or a beneficiary, by deed or in writing, to nominate some other person to be a trustee, and such a newly-appointed trustee was to be deemed capable of discharging all the functions of an original trustee. Such a clause is now unnecessary in view of the very wide terms of Sect. 36 of the Trustee Act, 1925.

When a trustee may retire without a new appointment.

(3) Before the Conveyancing Act, 1881, unless the instrument permitted it, a trustee could not retire without ensuring that a new trustee was appointed in his place. Sect. 39 of the Trustee Act, 1925, however, now provides that—

> Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the

[1] P. 213, *ante*.

[2] Trustee Act, 1925, Sect. 18 (2).

> trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

If the trustee who retires does so in circumstances not contemplated in this section, he has not been effectively discharged, and will be liable for losses incurred by the beneficiaries.

Application to the Court for a discharge.

(4) If the trustee is unable to obtain his discharge in any of the above ways, he may apply to the Court. Although in such a case, if the trustee who wishes to retire is a sole trustee, and no suitable new trustee can be found, the Court would not discharge the trustee, yet "the Court will, however, take care that the trustee shall not suffer thereby in the meantime."[1] Where the trustee applies to the Court, he will have to pay the costs unless he can show that circumstances have arisen, altering the nature of his duties.

Retirement under the Public Trustee Act, 1906, and under the Judicial Trustee Act, 1896.

Two special cases of retirement require mention. Under Sect. 5 of the Public Trustee Act, 1906, a trustee may retire, on or after the appointment of the Public Trustee as an ordinary trustee, without leaving two trustees, and without the consents required by Sect. 39 of the Trustee Act, 1925. Secondly, under the Judicial Trustees Act, 1896, Sect. 4, and the Judicial Trustees Rules, 1897, Rule 3, a judicial trustee may retire on giving notice of his desire to the Court.

Removal of trustees.

Trustees may be removed in the following ways—

(1) Under a power contained in the trust instrument.

(2) Under a statutory power.

(3) By the Court.

(1) Under a power in the instrument.

(1) An example of such a power occurs where, in a mortgage, the mortgagor declares himself trustee of the property for the mortgagee, and then confers on the mortgagee power to remove the mortgagor from the trust, and to appoint new trustees. Such a power is frequently included in mortgages to a bank by deposit of title-deeds, together with a power enabling the mortgagee to vest the property in purchaser free from the right of redemption.[2]

(2) Under the statutory power.

(2) The statutory power to remove trustees is contained in Sect. 36 of the Trustee Act, 1925, and has already been discussed.

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[1] *Courtenay* v. *Courtenay* (1846). 3 Jo. &. La.T. 533; *Forshaw* v. *Higginson* (1857), 8 De G.M. & G. 827; *Re Chetwynd's Settlement*, [1902] 1 Ch. 692.

[2] *Encyclopedia of Forms and Precedents*, 2nd Ed., Vol. X, p. 431.

(3) By the Court.

(3) The Court has an inherent jurisdiction to control the activities of the trustee, and to ensure the proper execution of the trust, and for this purpose it may go to the length of removing a trustee on the application of a beneficiary. In discharging this function, the Court does not follow any fixed principle, beyond that of ensuring the welfare of the beneficiaries.[1] Not every mistake of the trustee will be regarded by the Court as a ground for removal, but where there is positive misconduct, the Court will not hesitate to interpose. Moreover, a trustee will not be removed at the caprice of a beneficiary. Reasonable cause must be shown, and this must be more than an allegation that the trustee has declined to exercise a power at the request of a beneficiary or tenant for life.[2] The Court formerly exercised its power of removal where the trustee refused to act, or became incapable of acting, but these grounds of removal have now become statutory, and the power of appointing new trustees in the place of such persons has been given to the appointor under the settlement, or a continuing trustee.

C. THE BANKRUPTCY OF A TRUSTEE

Bankruptcy of a trustee usually necessitates his removal.

Bankruptcy does not inevitably involve a trustee's removal from the trust. Sir G. Jessel enunciated the general principle in *Re Barker's Trusts*,[3] when he observed—

> It is the duty of the Court to remove a bankrupt who has trust-money to receive or deal with, so that he cannot misappropriate it. There may be exceptions under special circumstances to that general rule. And it also may be, that where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt, but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate than one who is wealthy; and besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.

An exception to this.

An illustration of one of the exceptions is afforded by *Re Bridgman*,[4] where a trustee whose bankruptcy was due solely to misfortune, and was entirely free from any moral stigma, was permitted to retain his office.

Trust property is not available for division

By the Bankruptcy Act, 1914, Sect. 38, the property which a bankrupt holds as trustee for any other person does not pass to his trustee in bankruptcy for division amongst

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[1] *Letterstedt* v. *Broers* (1884), 9 App. Cas. 371, 386, *per* Lord Blackburn.
[2] *Lee* v. *Young* (1843), 2 Y. & C.C.C. 532. [3] (1875), 1 Ch.D. 43.
[4] (1860) 1 Drew. & Sm. 164.

his creditors, unless the trustee has a beneficial interest.[1] This applies not only to what is immediately identifiable as trust property, but to any property or money into which the trust property has been converted, so long as the money remains identifiable.[2] The principle is well illustrated by *Taylor* v. *Plumer*,[3] wherein A handed money to a stock-broker for the purchase of stock. The broker purchased unauthorised stock and absconded. It was held that the stock purchased belonged to A and not to the broker's trustee in bankruptcy, for a broker is a constructive trustee for his principal; and, as Lord Ellenborough observed—

among the trustee's own creditors.

> The property of a principal, entrusted by him to his factor for any special purpose, belongs to the principal, notwithstanding any change which that property may have undergone in form, so long as such property is capable of being identified and distinguished from all other property.

The beneficiary can recover his property so long as it remains identifiable.

It makes no difference that the trustee was committing a breach of trust in converting the property, for a trustee can confer no right upon those claiming through him in respect of an abuse of his trust. Accordingly, if money which represents the proceeds of a sale of trust property has been placed by the bankrupt in bags,[4] or has been changed into notes or negotiable instruments,[5] or has been placed in the bankrupt's account at the bank,[6] in all these cases the beneficiary may claim the money against the trustee in bankruptcy. If, however, the trust money has become so merged in the general property of the bankrupt trustee that it can no longer be identified, the beneficiary has no other course than to prove with the other creditors in bankruptcy,[5] but if it has been merged in a mixed fund, which can be traced, the beneficiaries have an equitable charge upon the mixed fund.[7]

It must also be noticed that there passes to the trustee in bankruptcy for division among the bankrupt's creditors (under Sect. 38 of the Bankruptcy Act, 1914) all goods which at the commencement of the bankruptcy were "in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owners under such circumstances that the bankrupt is the reputed

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[1] *Morgan* v. *Swansea Urban Sanitary Authority* (1878), 9 Ch.D. 582; *St. Thomas's Hospital* v. *Richardson*, [1910] 1 K.B. 271.
[2] *Harris* v. *Truman* (1882), 9 Q.B.D. 264. [3] (1815), 3 M. & S. 562.
[4] *Tooke* v. *Hollingworth* (1795), 5 T.R. 215.
[5] *Ex parte Dumas* (1754), 2 Ves. Sen. 582
[6] *Re Hallett's Estate* (1880), 13 Ch.D. 696. See also *post* p. 349.
[7] *Re Hallett, supra.* See further on, following trust funds, pp. 349 *et. seq.*

owner of them." It was decided under the earlier Bankruptcy Acts (which did not confine the operation of this rule to property in the order and disposition of the bankrupt in his trade or business) that there did not pass to the bankrupt's trustee in bankruptcy under this section property in the control of the bankrupt in such circumstances that the bankrupt was holding it as trustee, as where A was in possession of goods, in virtue of a life interest given to him by will, with a limitation on his death to B absolutely, and A became bankrupt.[1]

[1] *Ex parte Martin* (1815), 19 Ves. 491.

CHAPTER XII

THE TRUSTEE'S POWER TO DELEGATE HIS OFFICE

Delegatus non potest delegare.

THE office of trustee is one of personal confidence, and can, therefore, only be delegated in consequence of an express power contained in the trust instrument or of the statutory power contained in the Trustee Act, 1925, or in other Acts, and will have the consequences therein specified. Apart from these provisions, if a trustee delegates his office, or any duty or right in connexion with it, he will be liable exactly as if he had performed the acts himself,[1] and the rule applies equally if the persons to whom the discharge of the duties is committed is a co-trustee or a co-executor. Nevertheless, if the delegation occurs in consequence of the testator's directions, they will not be responsible if they do no more than was directed. So, in *Kilbee* v. *Sneyd*,[2] Hart, L.C., observed that if a testator pointed out an agent to be employed by his executor, and the agent received money in consequence and defaulted, the executor would be free from liability if he could show that the testator had indicated that person, and that the executor could not recover the money by the exercise of reasonable care.

Certain exceptions recognised by Equity.

Even before statutory recognition it had been decided that a trustee could appoint agents to whom to delegate some of his duties where there was a legal or a physical necessity to do so. The test, as was pointed out in *Speight* v. *Gaunt*,[3] was always the reasonableness of the employment. As Lord Redesdale observed in *Joy* v. *Campbell*[4]—

> He could not transact business without trusting some person, and it would be impossible for him to discharge his duty, if he is made responsible where he remitted money to a person to whom he would himself have given credit, and would in his own business have remitted money in the same way.

The matter was very fairly put by Kekewich, J., in *Re Weall*[5]—

> A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance

[1] Per Lord Langdale in *Turner* v. *Corney* (1841), 5 Beav. 517.
[2] (1828), 2 Mol. 199.
[3] (1883), 9 App. Cas. 1. See also *Re Weall* (1889), 42 Ch.D. 674.
[4] (1804), 1 Sch. & Lef. 328 at p. 341. [5] (1889), 42 Ch.D. 674.

of their duties. It does not, however, follow that he can entrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which they see fit to demand. The trustee must consider these matters for himself, and the Court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence guided by such rules and arguments as generally guide such a man in his own affairs.

These have now received statutory recognition.

The Trustee Act, 1925, has expressly recognised this doctrine, and has provided for various cases of delegation. Thus, Sect. 25 provides that a trustee (including a tenant for life and a statutory owner) who intends to remain out of the United Kingdom for a period exceeding one month may, by power of attorney, delegate to any person (including a trust corporation) the execution during his absence of all or any trusts, powers and discretions vested in him, but a person who is the only other co-trustee, and who is not a trust corporation, may not be appointed to be an attorney in this way. The donor of the power, however, remains liable for the acts or defaults of the donee in the same manner as if they were his own, and the power does not come into operation until the trustee leaves the United Kingdom, and it is automatically revoked by his return. The power must be attested by at least one witness, and must be filed at the Central Office within ten days of its receipt in the United Kingdom, with a statutory declaration by the donor that he intends to remain out of the United Kingdom for a period exceeding one month from the date of the declaration, or from a date therein mentioned; and if the power of attorney confers any power to dispose of, or deal with, land or a charge registered under the Land Registration Act, 1925, an office copy must be filed at the land registry. The donor's statutory declaration, together with a statutory declaration by the donee that it has come into operation, and has not been revoked by the return of the donor together form conclusive evidence of the facts stated in favour of any person dealing with the donee. Furthermore, in favour of any person dealing with the donee, any act done or instrument executed by the donee shall (notwithstanding that the power has never come into operation or has become revoked by the act of the donor, or by his death or otherwise) be as valid as if the donor was alive and of full capacity, and had himself done such acts or executed such instrument, unless such person had actual

(1) Trustee Act, 1925, Sect. 25.

notice that the power had never come into operation or of the revocation of the power before the act was done or the instrument executed. For the purpose of executing the trusts and powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee, either by statute or by the instrument, with the reservation that except for the purpose of transferring any inscribed stock, the attorney himself may not delegate any of his powers nder this section. Where the attorney deals with stock under a power of attorney given under this section, neither the power itself, nor any evidence required in connexion therewith, is deemed to affect any person in whose books the stock is inscribed with notice that the donee of the power is acting in the execution of a trust.

Sect. 25 is a new provision, although it was anticipated by the Execution of Trusts (War Facilities) Acts, 1914 and 1915, which allowed a trustee or personal representative engaged on war service to appoint an attorney to act for him. A trustee under these Acts also could not appoint his co-trustee,[1] although an executor or administrator could appoint his co-executor or co-administrator.

The other sections in the Trustee Act, 1925, reproduce and extend similar sections in the Act of 1893 or of the Settled Land Act, 1882. Sect. 23 provides—

(2) Trustee Act, 1925 Sect. 23.

(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person to transact any business, or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, movable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

[1] *Re Wells and Hopkinson*, [1916] 2 Ch. 289.

(3) Without prejudice to such general power of appointing agents as aforesaid—

(*a*) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration.

(*b*) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment, and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee.

(*c*) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment; Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

If the trustee knew or ought to have known of the receipt of such money by the agent, and fails to show reasonable diligence, he will be liable for any loss.[1] In their selection of agents, trustees must exercise common prudence, and so also in their subsequent supervision of those agents.[2] In particular, they should not employ agents outside their proper sphere, e.g. a solicitor as valuer. Thus, where a trustee permitted a solicitor to appoint a valuer, it was held that the trustee had not used normal prudence in the selection of the agent,[3] although by this it is not intended to imply that a trustee may not consult a solicitor on these and other topics, provided that, after the receipt of such advice, he then exercises his own discretion in the matter. If money is

The trustee must exercise prudence in selection and supervision.

[1] *Wyman* v. *Paterson*, [1900] A.C. 276; *Re Sheppard*, [1911] 1 Ch. 50.
[2] *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; *Re Weall* (1889), 42 Ch.D. 674.
[3] *Fry* v. *Tapson* (1884), 28 Ch.D. 268.

allowed to remain in the hands of an agent for an unnecessarily long period, the trustee will usually be liable for any resulting loss.[1]

It was pointed out in *Re Vickery*,[2] however, that where, under the Trustee Act, 1925, Sect. 23, the trustee is allowed to appoint professional agents, it was no longer expected that he act personally in matters so delegated, so that a solicitor may be employed to do acts within the usual scope of his business, and a trustee so employing him will not be liable for loss resulting from the solicitor's misconduct, unless the trustee has been guilty of wilful default.

The exact scope of the decision in *Re Vickery*[2] would seem to be a matter of some uncertainty. In the course of his judgment, Maugham, J., said—

> It is hardly too much to say that Sect. 23 (1) revolutionises the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not. No doubt he should use his discretion in selecting an agent and should employ him only to do acts within the scope of the usual business of the agent, but, as will be seen, a question arises whether even in these respects he is personally liable for a loss due to the employment of the agent, unless he has been guilty of wilful default.

It has been thought that these observations are too wide, inasmuch as they would render unnecessary Sect. 23 (3) and perhaps Sect. 25 of the Trustee Act.[3] If, however, they are to be regarded as the true interpretation of Sect. 23 (1), it has been suggested by an eminent critic[4] that they confer too great an immunity upon the trustee, and leave the beneficiary insufficiently protected. It is suggested that the object of Sect. 23 (1) was primarily declaratory, since it is only by such an interpretation that any real significance can be attached to Sect. 23 (3) and Sect. 25.

The term wilful default is an exceedingly difficult one to define, and many judges have grappled with it. The most frequently quoted definition is that of Lord Alverstone in *Forder* v. *Great Western Railway*,[5] which in turn adopted and

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[1] *Robinson* v. *Harkin*, [1896] 2 Ch. 415.
[2] [1931] 1 Ch. 572.
[3] See 47 *Law Quarterly Review*, pp. 330–332.
[4] See 47 *Law Quarterly Review*, pp. 463–468.
[5] [1905] 2 K.B. 532.

slightly modified the definition given in an Irish case.[1] Lord Alverstone says—

> "Wilful misconduct in such a special condition means misconduct to which the will is a party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences." The addition which I suggest is, "or acts with reckless carelessness, not caring what the results of his carelessness may be."

Sir E. Pollock, M.R., also approved of this definition in *Re City Equitable Fire Insurance Co.*[2] (where a number of other definitions are also considered).

It cannot be too strongly emphasised that whereas under Sect. 25 the trustee remains liable for his attorney, under Sect. 23 the trustee's liability is limited to the extent stated above.

Trustee Act, 1925, Sect. 8.

Sect. 8 (1) of the Trustee Act gives a further power to employ agents. It provides—

> A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court—
>
> (*a*) That in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere;
>
> (*b*) That the amount of the loan does not exceed two-thirds of the value of the property as stated in the report; and
>
> (*c*) That the loan was made under the advice of the surveyor or valuer expressed in the report.[3]

Law of Property Act, 1925, Sect. 29.

Finally, under Sect. 29 of the Law of Property Act, 1925, trustees for the sale of land may, until sale, revocably delegate by writing their powers of leasing, accepting surrenders of leases and management, to any person of full age (not being merely an annuitant) for the time being beneficially

[1] *Graham* v. *Belfast and Northern Counties Railway*, [1901] 2 Ir.R. at p. 19.

[2] [1925] Ch. 407.

[3] The effect of this section is considered *infra* pp. 251–255.

entitled in possession to the net rents and profits during his life or for any less period. Where such delegation occurs, the trustees are not liable for the acts or defaults of the tenant for life.[1]

The fact that a trustee may not delegate his office except where permitted by Equity or Statute, and also the fact that trustees of statutory trusts for sale are in this respect in the position of ordinary trustees, are well illustrated by *Green* v. *Whitehead*.[2]

The rules relating to delegation apply to statutory trustees for sale.

In 1925, two partners, A and B, purchased Blackacre in fee simple. In virtue of Sect. 36 of the Law of Property Act, 1925, they held this on and after 1st January, 1926, as statutory trustees for sale. During 1926 they entered into a contract to sell part of the freehold, but no steps were taken towards completion for two years. In 1928, A gave a general power of attorney to R, authorising him to sell and convey any property belonging to A, whether solely or jointly, and this power included a power to sell Blackacre. The vendors tendered a conveyance executed by B and R, which the purchasers declined to accept. Eve, J., held that the power of attorney amounted to a complete delegation of the trust, and as the vendors had contracted to sell as statutory trustees, the purported delegation of the power to convey was invalid. He observed[3]—

> Assuming in favour of the plaintiffs that the power of attorney . . . extends to the property held by the grantor as one of two trustees for sale, its operation is to commit to the sole and absolute discretion of the grantee all those matters in which the trustee is bound to exercise his own judgment and to use his own discretion and to authorise the grantee to receive purchase and other monies representing the trust estate in the name of the grantor or otherwise. It is hardly possible to conceive a more complete delegation of the duties, powers, and discretions of the trustee.
>
> Is such a delegation permissible? I think not. Sect. 23 of the Trustee Act, 1925, no doubt gives to the trustees enlarged and somewhat wide powers of employing agents, including (subsection 2) an agent for the purpose of selling, converting, collecting, getting in and executing and perfecting . . . assurances of or managing or cultivating or otherwise administering any property real or personal, movable or immovable, subject to the trust in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property with such ancillary powers and with and subject to

[1] It should also be noticed that the Settled Land Act, 1925, Sect. 102 (2), clearly implies the employment of agents by the trustees.

[2] [1930] 1 Ch. 38.

[3] At pp. 44–5.

> such provisions as they may think fit, including a power to appoint substitutes, but giving the section the liberal construction which it was doubtless intended to bear I do not think it is possible to extract from it any corresponding authority to depute similar powers to an agent or attorney in respect of trust property within the United Kingdom. It follows that in my opinion the plaintiffs cannot compel the defendant to accept the conveyance they have tendered, and their action fails.

This decision was upheld by the Court of Appeal on other grounds, but Lawrence, L.J., was of opinion that the execution of a conveyance, being simply a "ministerial act," might properly be delegated to an attorney under Sect. 23 (1).[1]

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[1] See further, 46 *Law Quarterly Review*, pp. 145 and 275. It should be added that the learned author of the second note takes the view of the scope of Sect. 23 (1), which has been stated in the text at p. 235.

CHAPTER XIII

THE TRUSTEE'S POWERS AND DUTIES IN THE ADMINISTRATION OF A TRUST

A. THE REDUCTION OF THE TRUST PROPERTY INTO POSSESSION

The trustee must get in the trust property.

THE first duty of a trustee on appointment is to ascertain what the trust property is, what are the directions of the trust instrument in regard to it, and then to discover whether the trust property has been properly and safely invested. Where the property is already in authorised securities, the trustee's duty is satisfied by their retention. He must also secure the transfer to him of any property which did not pass to him in virtue of the deed whereby he was appointed, as well as the transfer of all documents affecting the trust property, such as title-deeds and share certificates. As Kekewich, J., observed in *Hallows* v. *Lloyd*[1]—

> When persons are asked to become new trustees, they are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers, to ascertain what notices appear among them of incumbrances and other matters affecting the trust.

Duty to give notice in respect of an equitable interest.

Thus, where the trust fund includes an equitable interest, and the legal estate cannot be got in, it is the duty of the trustees to give notice as soon as possible to the persons in whom the legal estate is vested, so that the trustees shall obtain priority over any subsequent incumbrance.[2] Similarly, if the trust estate includes a *chose in action*, the trustee must get it in at the earliest moment which is expedient, for failure to do so will involve the trustee in liability.[3] The Trustee Act, 1925, Sect. 22 (1), now provides also—

The trustee may value property not got in, and accept other property in exchange for it.

> Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same falling into possession, or being payable or transferable may—
>
> (*a*) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;
>
> (*b*) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate

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[1] (1889). 39 Ch.D. at p. 691.
[2] *Jacob* v. *Lucas* (1839), 1 Beav. 436.
[3] *Re Stevens*, [1898] 1 Ch. 162; *Re Brogden* (1888), 38 Ch.D. 546.

of value which they may think fit, any authorised investments;

(*c*) allow any deductions for duties, costs, charges, and expenses which they may think proper or reasonable;

(*e*) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release;

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

The trustees are not liable for breach of trust simply because they omitted to take proceedings against those who possessed the trust property.

By Sect. 22 (2) it is provided that the trustees shall not be chargeable with any breach of trust because they have omitted to place any distringas notice or to apply for any stop order on any securities or other property out of which the share or interest is derived; nor are they liable because they have omitted to take any proceedings on account of any act or default of the persons in whom such securities or other property are for the time being vested, unless and until required to take such steps by any person beneficially interested under the trust, and unless due provision is made for the trustee's costs. But nothing in this sub-section relieves "the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession." In illustration of Sect. 22 (2), if the trustees genuinely believe that the institution of proceedings would be fruitless, they are excused from the necessity of taking such proceedings to enforce payment.[1]

An inventory of chattels should be made.

If the trust property includes chattels, the trustee should have a proper inventory made. Similarly, if a beneficiary under either a will or a trust is entitled to chattels for life, remainder to some third persons, he should sign an inventory, thus evidencing the nature and value of the property.[2] As a further illustration of this rule, if there is a covenant in a marriage settlement by a wife to settle after-acquired property, it is the duty of the trustees of the settlement, if they know, or have reasonable ground to believe that, property has come to her which should be settled, to ensure that it is so settled.[3]

There is no absolute rule specifying the time

The position of executors is in this respect very similar to that of trustees. It was pointed out in *Re Chapman*,[4] that

[1] *Clack* v. *Holland* (1854), 19 Beav. 262, 271; *Re Brogden* (1888), 38 Ch.D. 546.

[2] *Temple* v. *Thring* (1887), 56 L.J.Ch. 767. It is not customary now to require security from the tenant for life, unless there is reason to anticipate loss.

[3] *Re Strahan* (1856), 8 De G. M. & G. 291. [4] [1896] 2 Ch. 763, 782.

there is no absolute rule specifying a particular time within which a trustee or an executor must realise assets. The trustee or executor must use his own discretion, and the test of the trustee's liability is whether he has acted prudently and honestly, and in the belief that he was acting in the best interests of all the beneficiaries; and so, where the executors honestly exercised their discretion, and postponed the sale of foreign railway bonds, which declined in value, they were not made responsible, although there had been an error of judgment, for, as James, L.J., observed— for reducing trust property into possession.

> It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it was proved by the result, would have been the best course.

Generally speaking, unless the executor has good reason to suppose that the property will materially appreciate, he should realise it within the executor's year, and if he fails to do so, the *onus* is on the executor to show some valid reason for the delay.[1] However, if the testator gives the executor an absolute discretion to postpone the sale and conversion of the estate, he is not compelled to convert within the year, and in the absence of bad faith he is not responsible for loss resulting from failure to convert.[2] The executor's year.

Where a trust investment has depreciated, so that the trust fund becomes jeopardised in consequence, the trustees ought to consider whether the time has not arrived to realise it. In *Re Medland*,[3] money was lent on the security of freehold mortgages, the proper margin being allowed, but the property subsequently depreciated so that the margin of safety was overstepped, and the trustees failed to call in the mortgage. North, J., held, however, that there is no absolute duty upon the trustee in these circumstances to call in the mortgage at once, but there was a discretion, which they must exercise with due regard to all the circumstances, including the solvency of the mortgagor; and furthermore, the Trustee Act, 1925, Sect. 4, now provides that— The trustee's duty where trust investments depreciate.

> A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the instrument of trust or by the general law.

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[1] Per Wood, L.J., in *Grayburn* v. *Clarkson* (1867), L.R. 3 Ch. App. 606.
[2] *Re Norrington* (1879), 13 Ch.D. 654.
[3] (1889), 41 Ch.D. 476.

It is scarcely necessary to add that this section in no way relieves from liability a trustee who, in such circumstances, fails to exercise his discretion.

A trustee should never lend on personal security.

A trustee or executor ought never to allow trust money to remain outstanding simply on the personal security of the debtor, even though the money had been lent by the testator himself, for the quality of the debtor may change from day to day; and if the executor or trustee fails to get in the debt within reasonable time, he becomes himself the debtor's surety.[1] In *Re Laing's Settlement*,[2] Kekewich, J., was of opinion that trustees might lend money on personal security, if they were satisfied that there was a good prospect of repayment, even if not so directed in the settlement, but it is submitted that this cannot be supported,[3] although if the trustee is expressly empowered to lend on personal security, he may do so.[4]

The Trustee Act, 1925, Sect. 24, provides—

> Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

Trust property should be placed under the control of all the trustees.

Where there are two or more trustees the trust property should be placed within the control of all the trustees, and not left in the sole control of one beyond what is reasonable in respect of time and circumstances.[5] Thus, in *Lewis* v. *Nobbs*,[6] trustees invested trust-money in bearer bonds, which one trustee allowed to remain in the custody of the other, who misappropriated them. The other trustee was held liable for his negligence in permitting them to remain with the other, so that they could be so misappropriated. The position is now regulated by Sect. 7 of the Trustee Act, 1925, which provides that securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) shall, until

[1] *Lowson* v. *Copeland* (1787), 2 Bro.C.C. 156; *Powell* v. *Evans* (1801), 5 Ves. 839; *Re Tucker*, [1894] 1 Ch. 724, 734; *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh* [1934] A.C. 529.

[2] [1899] 1 Ch. 593.

[3] See *Holmes* v. *Dring* (1788), 2 Cox 1; *Styles* v. *Guy* (1849), 1 Mc. & G. 422.

[4] *Pickard* v. *Anderson* (1872), L.R. 13 Eq. 608.

[5] See *post*, p. 339.

[6] (1878), 8 Ch.D. 591.

sold, be deposited by him for safe custody and collection of income with a bank, and a trustee is not responsible for any loss incurred by reason of such deposit, and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property.

Employment of an agent to receive trust money.

It has already been noticed that Sect. 23 (3) of the Trustee Act, apart from the general powers of delegation in Sect. 23 (1), permits a trustee to employ a solicitor as his agent to receive and give a discharge for property under the trust, without being responsible for the defaults of the solicitor, if the trustee acts in good faith; but the trustee must then ensure that the money or other property does not remain under the control of the solicitor longer than is reasonably necessary. The same rule also applies where, under the same section, the trustee appoints a banker or a solicitor to be his agent to receive and give a discharge for any money payable to the trustee under a policy of insurance.

Receipts given by trustees.

As regards the position of a person who owes money to the trust, Sect. 14 of the Trustee Act, 1925, provides—

> (1) The receipt in writing of a trustee for any money securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.
>
> (2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for—
>
> (*a*) The proceeds of sale or other capital money arising under a disposition or trust for sale of land.
>
> (*b*) Capital money arising under the Settled Land Act, 1925.

Power to enter into arrangements relating to trust property.

An important power in respect of trust property is also given to the trustee by the next section (Sect. 15)—

> A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—
>
> (*a*) accept any property, real or personal, before the time at which it is made transferable or payable; or
>
> (*b*) sever and apportion any blended trust funds or property; or
>
> (*c*) pay or allow any debt or claim on any evidence that he or they may think sufficient; or
>
> (*d*) accept any composition or any security, real or

personal, for any debt or for any property, real or personal, claimed; or

(*e*) allow any time of payment of any debt; or

(*f*) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments or composition or arrangement, releases, and other things as to him or them seem expedient without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.[1]

The trustee is regarded as the legal owner of the trust property.

In pursuance of these powers, since the trustee, when he is legal owner, bears all the burdens incident to ownership,[2] he may bring any action with regard to the trust property (in fact, in a Court of Law, he is the only person to bring such actions, for only Equity regarded the beneficiary as possessing an interest entitling him to sue), and, in particular, where a debtor to the trust becomes bankrupt, it is the trustee's duty to prove in bankruptcy, and for this he does not need the concurrence of the beneficiary, unless the latter is *sui juris* and absolutely entitled, in which case the Court may require the concurrence of the *cestui que trust*.[3] Also, in consequence of his position as legal owner, the trustee is liable to be rated in respect of the trust property,[4] although the beneficiary, and not the trustee, is the person who may exercise a vote in respect of it.[5] The trustee is also entitled to the custody of title-deeds, but the beneficiaries are entitled to inspect them at all reasonable times.[6]

If a trustee, in the execution of his trust, carries on a business on behalf of the beneficiaries, he is personally liable to the creditors and may be made bankrupt in respect of the debts.[7] Furthermore, if trustees hold shares in a company, yet even though the trust is noticed in the company's books, they are liable in full as if they were beneficial owners, and it is fruitless for them to allege that they are only liable to the extent of the trust estate.[8]

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[1] For an example of a compromise, see *National Provincial Bank Ltd.* v. *Hyam*, [1942] Ch. 230.

[2] *Per* Lord Northington in *Burgess* v. *Wheate* (1759), 1 Eden 251.

[3] *Ex parte Green* (1832), 2 Deac. & Ch. 113; *Ex parte Gray* (1835), 4 Deac. & Ch. 778.

[4] *R.* v. *Stapleton* (1836), 4 B. & S. 629.

[5] 6 & 7 Vict., c. 18, Sect. 74. *Wallis* v. *Birks* (1870), L.R. 5 C.P. 222.

[6] *Wynne* v. *Humberston* (1858), 27 Beav. 421.

[7] *Farhall* v. *Farhall* (1871), 7 Ch. App. 123; *Ex parte Garland* (1803), 10 Ves. 110, 119.

[8] *Re Phoenix Life Assurance Co.* (1862), 2 John & H. 229; *Re Cheshire Banking Co.* (1885), 32 Ch.D. 301, 309.

In *Schalit* v. *Nadler, Ltd.*,[1] Nadler was trustee of a lease for Messrs. Nadler, Ltd., Schalit being the lessee. The company levied a distress for arrears of rent, and the plaintiff contended it was wrongful. The County Court Judge held that only the trustee as legal owner, and not the beneficiary, could recover arrears of rent of trust property, and the Divisional Court upheld this decision, pointing out that a beneficiary is not entitled to the actual rent of trust property, but only to an account from the trustee of the profits received from the demise.[2]

B. THE POWER OF INVESTMENT

The trustee's powers of investment before the modern Acts.

Before the modern Trustee Acts, the powers of trustees to invest trust-money, apart from special powers in the instrument, or under orders of the Court, were very limited. It has already been observed that trustees ought not to lend on personal security; and it was also consistently held that they ought not to invest in the stock of any private company. Before the Law of Property Amendment Act, 1859, trustees could not invest in Bank of England stock apart from express permission. Even the power to invest in mortgages with wide margins, was doubted by Lord Thurlow,[3] though admitted by Lord Hardwicke[4] and Lord Alvanley.[5]

Modern statutory powers.

Wide powers of investment are now conferred by the Trustee Act, 1925, which applies, unless otherwise expressly provided, to trusts, executorships and administratorships arising either before or after the Act.[6] The powers are additional to those conferred in the instrument, but apply only in so far as no contrary intention appears in the instrument, and are subject to the provisions therein contained. The Trustee Act, 1925, provides—

> 1. (1) A trustee may invest any trust funds in his hands whether at the time in a state of investment or not, in manner following, that is to say:
>
> (*a*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom;
>
> (*b*) On real or heritable securities[7] in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under Section Thirty-three of the Finance Act, 1896.[8]

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[1] [1933] 2 K.B. 79.

[2] Cf. *Baker* v. *Archer-Shee*, [1927] A.C. 844 and *Archer-Shee* v. *Garland*, [1931] A.C. 212, *post* p. 308.

[3] *Ex parte Calthorpe* (1785), 1 Cox. 182.

[4] *Knight* v. *Earl of Plymouth* (1747), 1 Dick. 126.

[5] *Pocock* v. *Reddington* (1801). 5 Ves. 800.

[6] Sect. 69.

[7] "Real securities" includes freehold ground rents (*Vickery* v. *Evans* (1863), 33 Beav. 376).

[8] This is a charge given to an owner who redeems land tax.

(*c*) In the stock of the Bank of England or the Bank of Ireland;

(*d*) In India, Seven, Five and a half, Four and a half, Three and a half, Three, and Two and a half per cent stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament;

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or, in debenture stock created by the Receiver for the Metropolitan Police District, or in metropolitan water stock.

(*g*) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in the United Kingdom incorporated by special Act of Parliament and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than 3 per centum on its ordinary stock;

(*h*) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in paragraph (*g*) of this subsection, either alone or jointly with any other railway company;

(*i*) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council in India;

(*j*) In the "B" annuities of the Eastern Bengal, the East Indian, the Scinde Punjaub and Delhi, Great Indian Peninsula and Madras Railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India; and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company;

(*k*) In the stock of any company owning or operating a railway in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

(*l*) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during

each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock;

(*m*) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or by any county council in the United Kingdom;

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded eighty per centum of the amount authorised by law to be levied;

(*o*) In any stocks, funds, or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restrictions thereby imposed;[1]

(*p*) In any local bonds issued under the Housing (Additional Powers) Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act;

(*q*) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland.

(*r*) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the Court;[2]

and may also from time to time vary any such investment.

(2) For the purposes of this section—

(*a*) The London and North Eastern Railway Company, the Southern Railway Company, the London Midland and Scottish Railway Company, and the Great Western Railway Company shall each be treated as if it were a railway company in Great Britain incorporated by a special Act of Parliament which had in each of the ten years immediately before the date of amalgamation paid a dividend at a rate of not less than three per centum on its ordinary stock, and, for the purposes of this provision the date of amalgamation means—

(i) as respects the London and North Eastern Railway Company and the Southern Railway Company the first day of January, nineteen hundred and twenty-three; and

(ii) as respects the London Midland and Scottish

[1] Certain problems arose with regard to Dominion Stocks following the Statute of Westminster, 1931. See Appendix III, p. 376 *post.*

[2] On this, see *Ex parte St. John's College, Oxford* (1882), 28 Ch.D. 93; *Re Gaselee*, [1901] 1 Ch. 923. For a list of these, see the *Annual Practice.* "The Court" is the High Court. (Trustee Act, 1925, Sect. 67 (1).)

Railway Company and the Great Western Railway Company the first day of July, nineteen hundred and twenty-three;

(*b*) a railway or canal company in Northern Ireland whose system is situate partly in Northern Ireland and partly in the Irish Free State shall not be deemed to be a railway or canal company in Northern Ireland.

2. (1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

Provided that, in the case of any stock mentioned or referred to in paragraphs (*g*), (*i*), (*k*), (*l*), (*m*), (*o*), (*p*), and (*q*) of subsection (1) of section one of this Act, which is liable to be redeemed at par or at some other fixed rate, a trustee shall not be entitled to purchase the stock—

(*a*) at a price exceeding fifteen per centum above par or such other fixed rate; nor

(*b*) if the stock is liable to be so redeemed as aforesaid within fifteen years of the date of purchase, at a price exceeding its redemption value.

(2) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act, or any statute replaced by this Act.

3. Every power conferred by the preceding sections shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument, if any, creating the trust or by statute with respect of the investment of the trust funds.

Retention of an investment which has ceased to be authorised.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law.

5. (1) A trustee having power to invest in real securities may invest and shall be deemed always to have had power to invest—

Real securities.

(*a*) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) on any charge, or upon mortgage of any charge made under the Improvement of Land Act, 1864.

(2) A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may, in exercise of the statutory power, convert an existing mortgage into a charge by way of legal mortgage.

(3) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may invest in the debenture stock of a railway company or such other company as aforesaid.

(4) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(5) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(6) A trustee having a general power to invest trust money in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

7. (1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer which, if not so payable, would have been authorised investments:

Provided that securities to bearer retained or taken as an investment by a trustee (not being a trust corporation) shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company.

A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of this section, be deemed to be such an express prohibition as aforesaid.

(2) A trustee shall not be responsible for any loss incurred by reason of such deposit and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property.

The settlor may, of course, exclude some of the investments specified in Sect. 1, and if he does, the range of choice of the trustees is thereby limited. A direction to invest in certain specified types of securities is not, however, an implied exclusion of Sect. 1.[1] Moreover, the Court will not invest trust funds in securities prohibited by the settlor.[2] On the other hand, a direction by the settlor to invest in a prescribed investment does not prevent the trustees from placing trust money in other trustee investments if they choose,[3] and where a testator specifically bequeaths shares in a company to trustees upon trust to pay the income to beneficiaries, the trustees have power, under Sect 1. of the Trustee Act, 1925, to sell those shares.[4]

The range of securities varies.

[1] *Re Warren* (1939), 108 L.J. Ch. 311.

[2] *Ovey* v. *Ovey*, [1900] 2 Ch. 524, not following *Re Wedderburn* (1878), 9 Ch.D. 112.

[3] *Re Burke*, [1908] 2 Ch. 248.

[4] *Re Pratt's Will Trusts*, [1943] Ch. 326.

The trustee may vary trustee investments.

Where the trustee is given power to vary investments "as he thinks fit," that does not permit him to go outside the range of trustee investments and those additional investments permitted by the instrument.[1]

In *Re Wragg*[2] the trustees were given a power to invest in securities "of whatever nature and wheresoever." P.O. Lawrence, J., held that this clause was sufficiently wide to permit the trustees to go outside the range of trustee investment and to purchase real estate. In *Re McEacharn*[3] trustees were given power to invest in "such stocks, funds and securities" as they thought fit. This was held to cover investment in fully paid shares of a limited company.

The diligence required of a trustee.

In selecting securities for investment, the trustee must remember that the range of securities changes from time to time; more particularly if a railway company fails to satisfy the statutory requirements by paying a dividend on its ordinary shares, it may cease to be a trustee investment, unless it is saved under Sect. 1 (1) (*r*) above. Moreover, the statute does not confer an absolute authority upon the trustee to invest money in the specified securities. He must still exercise his discretion, although if a trustee invests in an authorised security, the *onus* is on the beneficiary to prove that the investment was imprudent.[4] Furthermore, the powers of investment relate to all trust funds, and therefore, as was held by the House of Lords in *Hume* v. *Lopes*,[5] and is now provided by Sect. 1 (1) of the Trustee Act, 1925, this includes a power of varying trust investments, by selling some authorised securities and purchasing others; and furthermore, where the instrument expressly authorises the trustees to invest in real securities, it entitles them to sell authorised investments for the purpose of laying out money on mortgage, notwithstanding the fact that the investments have depreciated, and the trustees sell out at a loss.

The general duty of the trustee in relation to investments was exhaustively considered, both by the Court of Appeal and by the House of Lords in *Re Whiteley*,[6] wherein it was pointed out that whilst Equity generally required from a trustee the same diligence as he showed in his own private affairs, yet he is not allowed the same discretion in regard to investment as he enjoys in his private affairs; for he may be prepared to take a hazard for his personal benefit to secure

[1] *Re Hazeldine*, [1918] 1 Ch. 433.
[2] [1919] 2 Ch. 58.
[3] [1939] Ch. 858.
[4] *Per* Parker, J., *Shaw* v. *Cates*, [1909] 1 Ch. 389, 395.
[5] [1892] A.C. 112.
[6] (1886), 33 Ch.D. 347; 12 App. Cas. 727, *sub. nom. Learoyd* v. *Whiteley*.

a greater immediate return. As a trustee, however, it is his duty to preserve the trust fund for the benefit of persons entitled in succession, and he must therefore avoid all hazardous enterprises, even though included within the list of trustee investments.—

> The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.[1]

Conditions of investment on real security.

With regard to investments by trustees in mortgages, the Trustee Act, Sect. 8, provides—

> (1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the Court—
>
> (*a*) that in making the loan the trustee was acting upon a report of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carries on business in the locality where the property is situate or elsewhere; and
>
> (*b*) that the amount of the loan does not exceed two third parts of the value of the property as stated in the report; and
>
> (*c*) that the loan was made under the advice of the surveyor or valuer expressed in the report.
>
> (2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.
>
> (3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the Court the title accepted be such as a person acting with prudence and caution would have accepted.
>
> (4) This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act.

Selection of the surveyor or valuer.

A number of points in this section (which replaces Sect. 8 of the Trustee Act, 1893) require comment. In the first place, it was decided in *Re Somerset*,[2] with reference to subsection 1 (*a*), that the trustee must believe the surveyor or

[1] *Per* Lindley, L.J., (1886), 33 Ch.D. at p. 385.
[2] [1894] 1 Ch. 231 and see *Re Dive*, [1909] 1 Ch. 328.

valuer to be able, whilst he must in fact be employed independently of the owner of the property. In selecting the surveyor or valuer, the trustee should use his own judgment, and that does not mean that he may leave the selection to his solicitor.[1] Whilst it is no longer necessary to select the valuer or surveyor from the locality where the property is, the possession of such knowledge may, nevertheless, be very material in determining his ability.[2]

A further point is that the report must be of such a nature that the loan can be regarded as having been made "under the advice of the surveyor or valuer." In consideration of the statutory requirements, therefore, Lewin suggests[3] that the following points should be borne in mind by the trustee—

Report of surveyor or valuer.

(1) The instructions to the valuer should be in writing. (2) It should appear how the trustees became acquainted with the property. (3) The valuer should be informed that the loan is one of trust money; and (4) generally of all material circumstances known to the trustees or their adviser in reference to the property and neighbourhood. (5) The report should be in writing. (6) It should particularly describe the character of the property, and should not extend to any property other than that on which the loan is to be made. (7) All matters connected with the property tending to decrease its value in reference to repairs, outgoings, and the like should be stated. (8) The means of knowledge and capacity of the valuer should be clearly made to appear, especially his experience, if any, in the locality, and his information as to actual recent sales in the district. (9) The valuer should expressly state what amount may be safely advanced, and advise such advance being made; and if any supplementary letter is written by him he should therein repeat or confirm such advice. (10) The report should be expressed in plain businesslike language, and not in inflated phraseology.

It should be emphasised that the object of the surveyor's report is to supply the trustees with adequate information concerning the property, and with the assistance of the report the trustees must exercise their judgment in deciding whether the investment is in fact a proper one.

The trustee should avoid real securities of a wasting nature.

Not more than two-thirds of the value of the property may be advanced on mortgage, and the money may be advanced not only on the security of land, but also on that of houses. Care must be exercised, however, to ascertain whether the value of the premises is increased in consequence of a business being carried on there, for if this is so, the amount of the advance ought to be less. In general, if the trustee is lending

[1] *Re Walker* (1890), 59 L.J. Ch. 386, 391; *Fry* v. *Tapson* (1884), 28 Ch.D. 268.

[2] See *Fry* v. *Tapson, supra.* [3] *Trusts* (Thirteenth Edition), pp. 428–9.

on the security of business premises, he ought to disregard the value of the business in making the advance.[1] Moreover, the trustee should also be careful to avoid investment in a wasting security, such as a freehold brickfield.[2] He is not debarred, however, from lending money on the security of property which is let on weekly tenancies,[3] although he should not lend money on the security of unlet houses, more particularly if the mortgagor is a builder,[4] and cottage property in a town should be regarded with caution, since its value is subject to considerable fluctuation with the circumstances.[5]

Where the trustee makes an excessive advance on real security.

It is provided by Sect. 9 (1) of the Trustee Act, 1925, that where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. Thus, in *Shaw* v. *Cates*[6] the sum advanced was £4,440, and the security was held to have been a proper one for an advance of £3,400. But it is important to notice that this relief may only be claimed by the trustee where the security is otherwise unobjectionable.[7]

Investment on the security of leasehold property.

The Trustee Act, 1925, Sect. 5, has provided that trustees may invest money on the security of leasehold property held for an unexpired term of not less than 200 years at a rent not greater than a shilling a year. It would seem that here, nevertheless, the trustee should have regard to the rules laid down in some of the older cases, that he should avoid leaseholds which contain onerous covenants, for he would have to furnish the most ample evidence before the Court would be satisfied that the investment was a proper one.[8] Moreover there must be no proviso for re-entry except for non-payment of rent.

Second mortgages should be avoided.

The disadvantages attaching to the loan of money by trustees on a second mortgage are so substantial, that a trustee would only rarely be justified in adopting this form of investment, for a first mortgagee might sell under disadvantageous conditions, whilst the trustees might not have

[1] See *Palmer* v. *Emerson*, [1911] 1 Ch. 758; *Re Olive* (1886), 34 Ch.D. 70.
[2] *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727; and see *Re Turner*, [1897] 1 Ch. 536.
[3] *Re Solomon*, [1913] 1 Ch. 200.
[4] *Fry* v. *Tapson*, *supra*.
[5] *Re Salmon* (1889), 42 Ch.D. 351, 368.
[6] [1909] 1 Ch. 389.
[7] *Re Somerset*, [1894] 1 Ch. 231; *Re Turner*, [1897] 1 Ch. 536.
[8] *Townend* v. *Townend* (1859), 1 Giff. 201; *Re Chennell* (1877), 8 Ch.D. 507.

the funds available to redeem him and prevent the sale. Formerly, too, there was the added peril that a third mortgagee might tack the first mortgage against the trustee as second mortgagee, and although the dangers of this kind of tacking have been abolished since 1925, it is still possible for a first mortgagee to tack further advances.[1] Should the mortgagee, for any reason, decide to adopt this form of investment, he should in no circumstances fail to register, as there would otherwise be an obvious example of negligence.

So also equitable mortgages and contributory mortgages.

Again, since an equitable mortgagee by deposit of title-deeds runs the risk of being postponed to a purchaser for value of the legal estate without notice (which would be the case where the mortgagor could satisfactorily account for the absence of his title-deeds), Courts of Equity have usually regarded this also as an unsuitable investment for a trustee who has power to invest in real securities.[2] Trustees should also avoid joining in a contributory mortgage, for this would place the power to realize the security beyond their exclusive control.[3] There is, however, nothing to prevent trustees lending by way of sub-mortgage, since the trustees get a legal estate and the title-deeds, together with a covenant from the original mortgagor in addition.[4]

But a sub-mortgage may be taken.

Certain powers supplementary to the trustee's power of investment are given by Sect. 10 of the Trustee Act, as follows—

Trustees may covenant that the mortgage shall not be called in.

> (1) Trustees lending money on the security of any property on which they can lawfully lend may contract that such money shall not be called in during any period not exceeding seven years from the time when the loan was made, provided interest be paid within a specified time not exceeding thirty days after every half-yearly or other day on which it becomes due, and provided there be no breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.

They may also leave two thirds of the purchase-money on land sold on mortgage.

Subsect. (2) provides that where the trustees or the tenant for life sell land, either in fee simple or for a term having at least five hundred years to run, two-thirds of the purchase price may be left on mortgage, either with or without a charge on other property, and the mortgagor must covenant to keep the property, if it includes buildings, insured against fire. In such a case, the trustees shall not be bound to obtain any report as to the value of the land or other property to

[1] See Law of Property Act, 1925, Sect. 94.

[2] *Norris* v. *Wright* (1851), 14 Beav. 308; *Swaffield* v. *Nelson*, [1876] W.N. 255.

[3] *Webb* v. *Jonas* (1888), 39 Ch.D. 660; *Re Massingberd's Settlement* (1890), 63 L.T. 296; *Stokes* v. *Prance*, [1898] 1 Ch. 212.

[4] *Smethurst* v. *Hastings* (1886), 30 Ch.D. 490.

be comprised in such a charge or mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the charge or mortgage, and the trustees of the settlement shall be bound to give effect to such contract made by the tenant for life or statutory owner.

They may also concur in the reconstruction of companies.

By subsection (3), where the securities of a company are the subject of a trust, the trustees have power to concur in any scheme (*a*) for the reconstruction of the company; (*b*) for the sale of all or any part of the property of the company to another company; (*c*) for the amalgamation of the company with another company; (*d*) for the release, modification or variation of any rights, privileges or liabilities attached to the securities or any of them, exactly as if the trustees were beneficially entitled, and the trustees have power to accept securities of any kind in the reconstructed new or purchasing company in exchange for the original securities. The trustee is not responsible for any ensuing loss if he has acted in good faith. If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in such company, they may, as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such right or the title thereto to any person, including any beneficiary under the trust, without being responsible for any loss occasioned by any act or thing so done by them in good faith.[1] The powers exercised under Sect. 10 are subject to any consents which the instrument may require[2]; and if a loan under Sect. 10 (1) or a sale under Sect. 10 (2) is made under the order of the Court, the powers conferred apply only so far as the Court may direct.

By Sect. 11, trustees may deposit money at a bank whilst a mortgage is being prepared or an investment sought. Any interest that may be payable is regarded as income. Furthermore, trustees may apply capital money of the trust towards paying calls on the shares subject to the trust.

Former difficulties resulting from the reconstruction of companies.

The increased powers conferred by Sect. 10 (3) provide for some of the difficulties experienced under the older Acts. Thus, in *Re Morrison*,[3] the Court refused to sanction an agreement whereby the trustees concurred in reorganising a business in which the testator had been a partner into a

[1] Trustee Act, 1925, Sect. 10 (4). [2] *Ibid.*, Sect. 10 (5).
[3] [1901] 1 Ch. 701.

limited liability company. The effect of doing so would have been to have exchanged the testator's share for shares and debentures in the new company, and these were not authorised by the will. On the other hand, in *West of England Bank* v. *Murch*,[1] such an agreement had been approved. The whole question was examined by the Court of Appeal in *Re New*,[2] where the Court permitted the trustees of three trusts to concur in a scheme for the reconstruction of a company wherein the trustees held shares which the testator had authorised them to retain. By the terms of the agreement these shares were to be exchanged for shares in the new company, which were not authorised investments; but the Court of Appeal directed that the trustees must apply for leave if they wished to retain the shares beyond a year. Romer, J., in the course of his judgment, pointed out that the sanction given by the Court was given only because the case was one which the author of the trust could not have been reasonably supposed to foresee, and furthermore, the acts of the trustees were in the circumstances entirely proper. This case, which as Cozens-Hardy, L.J., declared in *Re Tollemache*,[3] "constitutes the high water mark of the exercise by the Court of its extraordinary jurisdiction in relation to trusts," furnishes an admirable illustration of the exercise of that jurisdiction in the interests of the beneficiaries in cases of emergency. It will not be successfully invoked to enable the beneficiaries to take a greater profit than they would otherwise receive. In the words of Romer, L.J.—

> It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at Chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances. As a rule, these circumstances are better investigated and dealt with in Chambers. Very often they involve matters of a delicate and private nature, the publication of which

[1] (1883), 23 Ch.D. 138. [2] [1901] 2 Ch. 534. [3] [1903] 1 Ch. 955.

is not requisite on any good ground, and might cause great injury to the trust estate.

In spite of the wider powers conferred by the Trustee Act, 1925, the importance of this jurisdiction is in no sense diminished, though there will not be the need to resort to its exercise as much as there formerly was having regard to the new provisions of Sect. 57.

Before 1926, the authorisation by the Court of acts such as those contemplated in *Re New* depended upon salvage principles, but now, apart from the special powers conferred by the Trustee Act, 1925, Sect. 10 (3), Sect. 57 (1) of the Act provides—

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the Court may think fit and may direct in what manner any money authorised to be expended, and the cost of any transaction, are to be paid or borne, as between capital and income.[1]

Similarly, the Settled Land Act, 1925, Sect. 64 (1), provides—

> Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the Court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the Court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

It will be observed that these two sections now render an application of salvage principles infrequent if not unnecessary. The test is whether the Court considers the transaction expedient, or for the benefit of the settled land or persons interested.

It was expected that the wide powers conferred by Sect. 10 (3) would solve the difficulties experienced before 1926, but this has not proved to be the case. In *Re Walker's Settlement*[2] trustees were authorized to hold as trustee investments a number of shares in an electricity supply

[1] As to the effect of an authorisation by the Court under this section upon forfeiture clauses, see *Re Mair*, [1935] Ch. 562.

[2] [1935] Ch. 567.

company. It was proposed to transfer to a "holding company" all the shares of a number of electricity supply companies, including the one in which the trustees held shares, the shareholders receiving in exchange equivalent stock in the holding company. The Court of Appeal held that this was not a reconstruction, amalgamation, or sale of the property within Sect. 10 (3) of the Trustee Act, 1925, and therefore refused its consent. It is a little strange that no reference was made in the case to the powers of the Court under Sect. 57 (1).

The trust instrument may modify the field of trust investments.

It has been pointed out that the trust instrument may narrow or broaden the field of trustee investments permitted by the Trustee Act, 1925, and one or two examples of such variations must be considered. Where the trust instrument authorises the trustees to lend money at their discretion, or "on such good security as the trustees can obtain," this does not permit them to lend money on personal security,[1] nor in any ordinary trading concern.[2] Where the consents of various persons are required for an investment, the trustees must ensure that the consents are all obtained, and in the proper form. Furthermore, the persons whose consent is required must have knowledge of the nature of the intended investment.[3] This is simply an illustration of the general rule that all investment clauses, varying the statutory range of investment are construed strictly. As a further illustration of this rule it may be mentioned that where a will gave power to trustees to invest "upon security of the funds of any company incorporated by Act of Parliament," and the trustees invested in the shares of a railway company incorporated by Act of Parliament, this was held to be a deviation from the investment clause, since the trustees had not secured their money upon the assets of the company, but had participated in the commercial adventure itself.[4] Where there is a clause permitting investment in the securities of any "railway or other public company," this permits the trustees to invest in the securities of any public company incorporated under the Companies Acts,[5] but only in securities of public companies in the United Kingdom.[6] Where the expression "companies in the United Kingdom" is used,

Special powers of investment must be strictly followed.

[1] *Pocock* v. *Reddington* (1801), 5 Ves. 794; *Bethell* v. *Abraham* (1873), L.R. 17 Eq. 24; *Styles* v. *Guy* (1849), 1 Mac. & G. 422.
[2] *Cock* v. *Goodfellow* (1722). 10 Mod. 489.
[3] *Re Massingberd's Settlement* (1890), 63 L.T. 296.
[4] *Harris* v. *Harris* (No. 1) (1861), 29 Beav. 107.
[5] *Re Sharp* (1890), 45 Ch.D. 286.
[6] *Re Castlehow*, [1903] 1 Ch. 352.

this includes companies registered in the United Kingdom, but prosecuting their business abroad.[1] Even where the power given to invest in companies is very wide, the trustees must still exercise their discretion in investing, and they should consider the constitution of the company, more particularly in respect of rights of recourse against the shareholders.[2] If this discretion has in fact been exercised honestly, the fact that the shares are not fully paid up will not make them an improper investment.[3] An investment clause which gave the trustees power to invest in "stocks, funds, and securities" was held to give the trustees power to invest in the fully paid-up shares in a limited company.[4]

Direction to retain specific investments.

If the trustees are directly authorised to invest in, or to retain, certain specific types of security, the trustees are not liable if they do so,[5] and the same rule applies where they are directed to allow purchase-money to remain outstanding on an unsatisfactory security for the purpose of accommodating a purchaser.[6] If a testator leaves unauthorised and wasting securities with an express trust for conversion, and confers a power on the trustees to retain them, then until conversion the tenant for life only receives 4 per cent on the value of the securities at the death of the testator, whether the securities are of a wasting nature or not. Any surplus is treated as capital.[7] This rule, which applies only where there is an *express* trust for conversion and a power to retain, must be carefully distinguished from the Rule in *Howe* v. *Lord Dartmouth*,[8] which will be considered later, and which has similar consequences.

Degree of diligence required of the trustee in his custody of trust property.

There remains now for consideration the custody of the trust property by the trustee. In his care of the trust property, the trustee must exercise the same care and control as he would do if the property were his own.[9] Thus, a trustee is not liable if trust property is stolen, either from himself or his solicitor, always providing that his own conduct has

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[1] *Re Hilton*, [1909] 2 Ch. 548.
[2] *New London and Brazilian Bank* v. *Brocklebank* (1882), 21 Ch.D. 302.
[3] *Re Johnson*, [1886] W.N. 71.
[4] *Re McEacharn's Settlement Trusts* (1939), 108, L.J. Ch. 326.
[5] *Cadogan* v. *Earl of Essex* (1854), 2 Drew 227; *Re Wedderburn's Trusts* (1878), 9 Ch.D. 112.
[6] *Re Hurst* (1891), 63 L.T. 665.
[7] *Re Clayton*, [1905] 1 Ch. 233.
[8] (1802), 7 Ves. 137.
[9] *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727. On the question of his duty of care where the property is in the hands of an agent, see p. 231 *ante*. In *Fairclough & Sons* v. *Berliner*, [1931] 1 Ch. 60, the fact that joint-lessees were trustees holding under a statutory trust for the benefit of themselves as joint-tenants in equity does not seem to have been regarded as possibly affecting their duties under a covenant to repair.

not been negligent.[1] Again, although trustees are allowed to deposit money with a bank,[2] and they are not *prima facie* liable for the defaults of the bank, nevertheless, a trustee may be liable to a beneficiary for the loss, if he allows the money to remain in the private account of a co-trustee, or if the trustee placed the money in the bank when it was his plain duty to do something else with it, e.g. to invest it, or pay it into Court.[3]

Custody of title-deeds.

Title-deeds of trust property of all kinds should be retained by trustees under their joint control, and if they are not frequently in use, the best place for their custody is a bank or safe deposit. In the ordinary course of trust administration, however, it is sometimes necessary for the trustees to leave the title-deeds of real property with their solicitor, and if the occasion is a proper one, the trustees will not be liable for their loss whilst in the solicitor's possession. The Trustee Act, 1925, Sect. 21, now provides—

> Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

Sect. 30 provides that a trustee is not liable for the defaults of a person with whom documents are deposited under Sect. 21, unless the loss was occasioned by the trustee's own wilful default.

The Trustee Act, 1925, Sect. 19 states—

Power to insure.

> (1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three-fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.
>
> (2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

The effect of this section is not to impose upon the trustees a duty to insure. It enables the trustees to insure if they think fit. If, after deliberation, they reach the conclusion

[1] *Morley* v. *Morley* (1678), 2 Ch. Cas. 2; *Jones* v. *Lewis* (1750), 2 Ves. 240.

[2] Trustee Act, 1925, Sect. 11 (1).

[3] *Moyle* v. *Moyle* (1831), 2 Russ. & M. 710; *Wilkinson* v. *Bewick* (1858), 4 Jur. (N.S.) 1010.

that they should not insure, they are not liable if the property is destroyed by fire.[1] Sect. 20 of the Trustee Act, 1925, governs the application of insurance-monies received in respect of trust property—

Application of insurance money.

(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or settlement within the meaning of the Settled Land Act, 1925, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf, or under any power statutory or otherwise, or in performance of any covenant or of any obligation, statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement as the case may be.

(2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into Court.

(3) Any such money—

(*a*) if it was receivable in respect of settled land within the meaning of the Settled Land Act, 1925, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in Court, under the direction of the Court, accordingly;

(*b*) if it was receivable in respect of personal chattels settled as heirlooms within the meaning of the Settled Land Act, 1925, shall be deemed to be capital money arising under that Act, and shall be applicable by the trustees, or, if in Court, under the direction of the Court, in like manner as provided by that Act with respect to money arising by a sale of chattels settled as heirlooms as aforesaid;

(*c*) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;

(*d*) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

Subsect. (4) of Sect. 20 provides also that the money so received may be applied by the trustees in rebuilding, reinstating, replacing, or repairing the lost or damaged property, subject to any consents which may be required by the instrument, and in the case of capital money arising under the Settled Land Act, subject to the provisions of that Act in respect to the application of capital money.

[1] *Re McEacharn* (1911), 103 L.T. 900.

CHAPTER XIV

THE TRUSTEE'S POWERS AND DUTIES IN THE ADMINISTRATION OF A TRUST—(*continued*)

A. THE RULE IN HOWE *v.* LORD DARTMOUTH

The trustee must convert all hazardous and wasting property where residuary personalty is settled by will for persons in succession.

A TRUSTEE must never favour one beneficiary at the expense of another. It is his duty to act impartially and to hold the scales evenly between all beneficiaries. This has led to the elaboration of the principle which is generally known as the *Rule in Howe* v. *Lord Dartmouth*,[1] and which may also be regarded as an illustration of the principle that it is the trustee's duty, unless otherwise directed, to convert all hazardous property into property of a secure and non-wasting character. This rule may be expressed as follows—

> Where residuary personalty is settled *by will* for the benefit of persons in succession, then it is the duty of the trustees to convert all property of a wasting, hazardous or reversionary character, into authorised securities which will produce income immediately, unless the will expressly or by necessary implication directs otherwise, or unless the will confers on the trustee a power to postpone the conversion, and the trustee, after due deliberation, exercises it.

Wasting securities, such as terminable annuities are converted in the interests of the remainderman, whilst reversionary property is converted in the interests of the tenant for life.

The sale of the property, and the investment of the proceeds ought to be effected at the earliest moment at which a reasonable price may be obtained. In the normal case, this means within a year of the testator's death. Thereafter, the burden of showing that the retention of the unauthorised property was justifiable rests on the executors or trustees, but, of course, a bad market or other such circumstance may be a sufficient justification.

This rule, which incorporates an obvious principle of Equity, that "Equality is Equity" as between beneficiaries, was explained by Lord Eldon in *Howe* v. *Lord Dartmouth*[1] as follows—

Where residuary personalty is left by will—

> It is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless

[1] (1802), 7 Ves. 137.

> the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first; and the thing is quite equal; for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If, in this case, it is equitable that long or short annuities should be sold, to give everyone an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant for life. As in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that, of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth.

Before discussing the scope of the rule, however, it is necessary to observe that the cases have gradually established two rules which are logical corollaries of the one first stated, and which apply to the position pending conversion by the trustees. In some instances, a considerable interval will elapse between the date when the trust comes into operation and the time when conversion actually happens. These rules are—

Until conversion the tenant for life is entitled to the income of real property, but only to 4 per cent on the other property.

(*A*) Where property ought to be converted by the trustees, then unless the testator has expressly or impliedly given the whole of the income to the tenant for life until conversion, the tenant for life is entitled: (1) to the whole of the income of the real property, including leaseholds,[1] and upon all authorised investments; (2) if there is an express trust for conversion in the will, or the property ought to be converted under the *Rule in Howe* v. *Lord Dartmouth*, the tenant for life is entitled from the date of the testator's death to 4 per cent[2] interest on the value of unauthorised, wasting and reversionary property.

(*B*) As regards unauthorised securities and wasting property, which will generally yield more, the balance of income accrues to the capital. As regards reversionary interests of all kinds, the amount which the property realises when it falls into possession must be apportioned between capital and income, and the income belongs to the tenant for life. The apportionment is made by determining what sum, at 4 per cent interest, accumulating at compound interest with

[1] *Re Brooker*, [1926] W.N. 93 (but see *post*).
[2] *Re Baker*, [1924] 2 Ch. 271.

yearly rests, and put out on the day of the testator's death would, after deduction of income-tax, have amounted to the sum so received. The amount so ascertained is treated as capital, and the rest as income.[1]

As an illustration of this last rule, in *Re Hollebone*,[2] A sold his business for a price which was to be paid by ten half-yearly instalments. By his will A bequeathed his residuary estate upon trust for conversion with power to postpone. A's widow was tenant for life of the residue, and the Court held that each instalment ought as from the testator's death to be apportioned between capital and income by ascertaining what sums, paid out at 4 per cent interest at the day of the testator's death, and accumulating at compound interest with yearly rests and deducting income tax would, with the accumulated interest, amount on the day when the instalment should be paid or be due. The sum so ascertained was to be treated as capital, the rest as income. Exactly the same principle would have applied had there been no trust for sale, and no other direction relating to the instalments had appeared in the will.[3]

In *Re Fawcett*,[4] Farwell, J., said—

> The rule in *Howe* v. *Lord Dartmouth*, in my judgment, was based upon the equitable idea of treating that which ought to be done as having been done, and accordingly in the early cases the general rule was that the tenant for life was entitled to whatever the investments, if they were sold and re-invested in Consols, would produce. To that extent, and to that extent only, he was entitled to payment on account of income. In the more recent years the practice has generally been to give to the tenant for life interest at 4 per cent upon the capital value of the unauthorised investments. The reason for the alteration in the rule was, I think, due to the fact that the range of authorised investments has been very greatly extended in comparatively recent years, and accordingly the Court took the view that a rate of interest which might be higher than that which was produced by Consols would be a reasonable rate to allow to tenants for life, since there was, at any rate, some possibility that trust funds could be invested in trust funds returning that income. The general, although not the universal rule is now to allow 4 per cent . . . . .
>
> In order to give effect to the rule it appears to me that in a case of this kind it is the duty of the trustees to have the unauthorised investments valued as at the end of the first year after the testatrix's death. During that year the executors are given time to deal with the estate as a whole. At the end of it comes the time when, in my judgment, any

[1] *Re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643.
[2] [1919] 2 Ch. 93.
[3] See note 2 on p. 266.
[4] [1940] Ch. 402.

unauthorised investments which they still retain should be valued and the tenant for life becomes entitled to be paid 4 per cent on the valuation of the whole of the unauthorised investments; that is to say, the trustees will receive the whole of the dividends which the unauthorised investments pay and there will be no apportionment. Those dividends will be applied in the first instance in paying, so far as they go, 4 per cent on the capital value of the unauthorised investments.

If the income received on the unauthorised investments is more than sufficient to pay the 4 per cent, then the balance will be added to the capital and it will form part of the whole fund in the hands of the trustees. If, on the other hand, the income actually received from the unauthorised investments is not sufficient to pay 4 per cent in each year to the tenants for life, they will not be entitled to immediate recoupment out of the capital, but, when the unauthorised investments are sold, the trustees will then have in their hands a fund representing the proceeds of sale of the unauthorised investments together with any surplus income which may have accrued in the earlier years; out of these proceeds of sale the tenants for life will be entitled to be recouped, so as to provide them with the full 4 per cent during the whole period, and they will be entitled to be refunded the deficit calculated at 4 per cent with simple interest but less tax. In that way the rule can be worked out satisfactorily as between capital and income, and the balance will be held as evenly as possible between two opposing interests. No doubt the duty of the trustees is to realise the unauthorised securities as soon as conveniently may be, but until that has been done, that, in my view, is the right way of dealing with the matter. The fact that there may be some investments which are of little or no value and which produce no income does not affect the position, if the whole of the unauthorised investments are treated as one whole and the value of the whole of these investments is ascertained and the income received from the whole of those investments is received by the trustees and applied in the way which I have stated.

The rule, it has been observed, applies only to residuary personalty left by will, where the testator has not otherwise expressly or impliedly directed.[1]

The rule apparently does not apply to leaseholds.

Before 1926, the term "residuary personalty" included leaseholds, but in *Re Brooker*,[2] it was decided that having regard to the Law of Property Act, 1925, Sect. 28 (2), and to the definition of land in Sect. 205 (1) (ix) of that Act, the rule no longer applied to leaseholds, of which, in such circumstances, the tenant for life would henceforth be entitled to the whole of the income, whether the interest was enjoyed under a settlement or under a trust for sale. Some doubt

[1] *Re Van Straubenzee*, [1901] 3 Ch. 779. Thus, the tenant for life can claim no benefit for reversionary realty under the *Rule in the Earl of Chesterfield's Trusts*. *Re Woodhouse*, [1941] Ch. 332.

[2] [1926] W.N. 93

has been expressed with respect to the effect of this decision, in view of the fact that in *Re Brooker*[1] there was an express trust for sale,[2] so that the *Rule in Howe* v. *Lord Dartmouth* was not in strictness under consideration in this decision at all, but in *Re Trollope's Will Trusts*,[3] the Court was of opinion that whilst the *Rule in Howe* v. *Lord Dartmouth* was otherwise unaffected by the legislation of 1925, the decision in *Re Brooker*[1] proved that it had been modified in so far as leaseholds held on trust for sale were concerned.

In view of the uncertainty which may still be said to exist, it is worth noticing that Lawrence, J., in *Re Brooker*,[1] is reported as having said that "the principle laid down in *Howe* v. *Earl of Dartmouth* hitherto applied by Courts of Equity during the period of the postponement of the sale of leaseholds held on trust for sale, was no longer applicable to a case like the present." As the case under consideration was a case of an express trust for sale, it seems clear that Lawrence, J.'s, observations did not extend to cases where residuary personalty is left by will for persons in succession, and Equity directs a conversion. In *Re Trollope's Will Trusts*,[4] Tomlin, J., was considering an express trust for conversion under a will, and although he accepts the argument of Lawrence, J., he does not extend the principle embodied in *Re Brooker*,[1] and concludes: "I therefore hold that the rule laid down in *Howe* v. *Lord Dartmouth* is applicable in regard to retained unauthorised investments whether in or after the executor's year." It is submitted, therefore, that the position of leaseholds under a bequest of residuary personalty for persons in succession may still be regarded as an open one, although it is in the highest degree doubtful whether the commonly-understood effect of *Re Brooker*[1] would now be departed from. In *Re Berton, Vandyk* v. *Berton*[5], Clauson, L.J., held that the decisions in *Re Brooker* and *Re Trollope's Will Trusts* ought to be followed where a statutory trust for sale was imported into a will for beneficiaries who took as tenants in common.

The rule only applies to residuary bequests. If property

[1] [1926] W.N. 93.

[2] *Semble* the rule mentioned was the rule in *Re Earl of Chesterfield's Trusts*, *supra*, and not the rule in *Howe* v. *Lord Dartmouth*. The rule in *Re Chesterfield's Trusts* ("the four per cent rule") applies also where there is an express trust for sale, with a power to postpone, which the trustees exercise. See *Re Owen*, [1912] 1 Ch. 519, and *Re Beech*, [1920] 1 Ch. 40; but if it appears that the power to postpone is in fact intended to authorise a permanent retention of the securities as they are found by the trustees, the tenant for life is entitled to the whole of the income (*Re Inman*, [1915] 1 Ch. 187).

[3] [1927] 1 Ch. 596

[4] *Supra*.

[5] [1939] 1 Ch. 200.

is specifically given, the Court understands that the intention of the testator was that the successive beneficiaries should enjoy the actual income of the property and will not direct a conversion, or an apportionment, even though, in consequence, an ultimate remainderman may receive nothing at all by reason of the wasting security having terminated.[1] Even if, in such a case, the trustee is given power to vary the securities, this is not held to give him power to invest in authorised securities, so reducing the income, for the power (in the absence of intention) was not given with the intention of varying the rights of the legatees.[2] So carefully does the Court construe this rule, that in *Askew* v. *Woodhead*,[3] where there were leaseholds in respect of which the tenant for life was entitled to the whole of the income, and the leaseholds were compulsorily acquired under the Lands Clauses Consolidation Act, the Court of Appeal directed that the purchase money should be invested in an annuity to last as long as the lease would have done, to be paid to the person who would have received the rents and profits of the leaseholds.[4]

The rule does not apply where property is given specifically.

Furthermore, if an intention can be gathered from the will that the property shall be enjoyed *in specie*, even though it is not in strictness given specifically, then it should not be converted;[5] and if various kinds of property are given, including some being given specifically, this raises the implication that the other property given was also intended to be enjoyed *in specie*.[6] The terms of each will must be considered carefully to discover what the true intention was. Thus, in *Re Game*[7] the residuary estate included freeholds and leaseholds, and the testator directed his trustees to pay the rents and profits to his wife for life. It was argued that this direction implied that the wife was entitled to the whole of the rents of the leaseholds, but Stirling, J., held that the word "rents" might be satisfied if applied to the freeholds only, and conversion was therefore directed. The position is, of course, different where the term "rents" is used, and there are leaseholds only. If trustees are directed to retain or sell part of the trust estate, this is construed as an expression of intention that in the meantime the tenant for life shall enjoy the whole of the income of that part,[8] and this rule

Nor where an intention can be gathered from the will that the property is to be enjoyed *in specie*.

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[1] *Re Beaufoy* (1850), 1 Sm. & Giff. 20.
[2] *Lord* v. *Godfrey* (1819), 4 Madd. 455.
[3] (1879), 14 Ch.D. 27. [4] See also *Re Lingard*, [1908] W.N. 107.
[5] *Bethamley* v. *Sherson* (1875), 20 Eq. 304; *Re Ovey, Broadbent* v. *Barrow* (1885), 29 Ch.D. 8, affirmed *sub nom. Robertson* v. *Broadbent* (1883), 8 App. Cas. 812.
[6] *Bethune* v. *Kennedy* (1835), 1 My. & C. 114. [7] [1897] 1 Ch. 881.
[8] *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394.

extends the postponement of the sale of the testator's business.[1] In *Macdonald* v. *Irvine*,[2] the testator bequeathed the income of his "entire estate" to the tenant for life. The Court was of the opinion that if this meant "the whole estate" this was not a direction that the tenant for life should enjoy the whole of the income.

The rule does not apply where conversion is directed at a later date.

This rule has no application to settlements *inter vivos*, for as Cozens-Hardy, J., pointed out in *Re Van Straubenzee*,[3] such instruments must be observed strictly in accordance with their terms. Hence, the inference is that the property must be enjoyed as settled. Furthermore, even in settlements by will, the rule directing conversion does not apply where the testator indicates that conversion should occur at some later date.[4] Moreover, comparatively slight indications of a contrary intention have been held sufficient to take the case out of the general rule, as where the will gave the trustees a direction that they should give the tenant for life a power of attorney to receive the income,[5] or where the testator directed his estate to be divided into certain portions on the death of the tenant for life.[6] The rule, however, must be applied unless there is a sufficiently clear intention to exclude it, and the burden of proof is upon that person who seeks to exclude it.[7]

The tenant for life's 4 per cent is based on the rule that Equity regards as done that which ought to be done.

That aspect of the rule which restricts the right of the tenant for life to the receipt of 4 per cent on the present value of the property is based upon the maxim that Equity regards as done that which ought to be done. In other words, from the standpoint of Equity, conversion has already occurred. From this it follows that if the trustees have a discretion to postpone, there is no conversion in Equity, and, therefore, in such a case the tenant for life is entitled to the whole of the income, unless the power to postpone is inserted simply with the object of permitting the trustees to sell to the best advantage, for here there is no intention to benefit the tenant for life. It should be observed, however, that the rule may operate both for and against the tenant for life, for if there are substantial reversionary interests or other property which is at the time producing no income, the tenant for life may not derive any interest therefrom if there is no occasion to convert.[8]

[1] *Re Crowther*, [1895] 2 Ch. 60; *Re Elford*, [1910] 1 Ch. 814.
[2] (1878), 8 Ch.D. 101.
[3] [1901] 2 Ch. 779.
[4] *Re Pitcairn*, [1896] 2 Ch. 199.
[5] *Nevill* v. *Fortescue* (1848), 16 Sim. 333.
[6] *Re Barratt*, [1925] Ch. 550.
[7] *Macdonald* v. *Irvine* (1878), 8 Ch.D. 101.
[8] *Mackie* v. *Mackie* (1845), 5 Hare 70; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

Freeholds are always outside the rule.

The apportionment does not apply to the income of freehold real property, for here the tenant for life is entitled to the whole of the income irrespective of any *implied* intention on the part of the testator,[1] although it is always open to the testator expressly to direct otherwise.

Mode of apportionment.

The mode in which the apportionment operates may be considered from *Re Goolden.*[2] There the residuary estate included a colliery, of which the testator was mortgagee in possession, and the Court decided that the profits which had accumulated must be regarded as capital and income, which had arisen from a sum which, if put out at 4 per cent at the testator's death, would have amounted to the sum then in the hands of the trustees. On that sum so ascertained, the teniant for life received 4 per cent. The balance of annual revenue from the colliery must be regarded as capital, on which again the tenant was entitled to 4 per cent. An illustration of the rule operating on reversionary interests or other property which produced no immediate interest is furnished by *Re Duke of Cleveland's Estate,*[3] where a debt which bore no interest was recovered by the trustees and was directed to be apportioned between capital and income.[4]

The rule of apportionment has a limited application where a trustee invests in unauthorised securities.

The rule of apportionment between tenant for life and remainderman has also a limited application where the trustees invest in unauthorised securities. Here, if the capital has not been diminished in consequence of the investment, the tenant for life is entitled to retain the whole of the income, for here the capital value of the investment has already been determined, and since it has not been prejudicially affected by the unauthorised investment, the remainderman is not entitled to have it increased,[5] although this was doubted in *Re Hill.*[6] On the other hand, if the capital has been diminished by the unauthorised investment, the position is that although the tenant for life cannot be compelled to refund any income which he has actually received, nevertheless he will not obtain any arrears which may be due to him, unless he brings into account all income he has received from the unauthorised investment.[7]

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[1] *Hope* v. *Hédouville,* [1893] 2 Ch. 361 *Re Searle,* [1900] 2 Ch. 829; *Re Oliver,* [1908] 2 Ch. 74.

[2] [1893] 1 Ch. 292; see also *Brown* v. *Gellatly* (1867), 2 Ch. App. 751.

[3] [1895] 2 Ch. 542.

[4] See also *Re Earl of Chesterfield's Trusts* (1883), 24 Ch.D. 643; *Re Morley,* [1895] 2 Ch. 738.

[5] *Re Appleby,* [1903] 1 Ch. 565; *Stroud* v. *Gwyer* (1860), 28 Beav. 130.

[6] (1881), 50 L.J.Ch. 551.

[7] *Re Bird,* [1901] 1 Ch. 916.

B. OTHER APPORTIONMENTS BETWEEN CAPITAL AND INCOME

A special power of investment must be exercised on behalf of all the beneficiaries.

The rule that the trustee must act impartially between beneficiaries is a very general one, and has many applications other than that which is known as the *Rule in Howe* v. *Lord Dartmouth*. Thus, it was held in *Raby* v. *Ridehalgh*,[1] that if the settlement confers on the trustees a special power of investment, this is still a power for the benefit of all the persons entitled in succession, and therefore they must not, in response to the solicitations of the tenant for life, exercise it exclusively in his interests, as for example by investing in a permitted, but not entirely secure property, producing a high return, as by so doing they would be jeopardising the interests of the remainderman to whom, in consequence, they would become liable.

Another illustration of the general scope of the rule is afforded by *Cox* v. *Cox*.[2] C gave to the trustees of his marriage settlement a bond to secure the payment, three months after his death, of a sum to be held in trust for his widow for life, remainder to his children. C died, and his estate was insufficient to pay the principal sum due; whilst there was also a considerable amount unpaid in respect of interest. The Court held that there must be a calculation of what sum, received and invested when the principal debt secured by the bond became due, would, together with interest thereon, have equalled the amount recovered from C's estate at the time that sum was paid, and that an apportionment must be made between tenant for life and remainderman on that basis.

Apportionment between capital and income in respect of company shares.

Difficult questions sometimes arise when the trust-money is invested in company shares, and the profits are not allocated as dividends, but are declared as bonuses or converted into extra capital. Where the intention is to increase the company's capital, such increases accrue to the capital fund of the trust. Where the intention is simply to confer an extra dividend or bonus, the tenant for life is entitled to retain them. The whole question is, what was the company's real intention, for this determines the application of the sums paid, since it is binding on all persons interested in the shares under the testator or settlor.

> When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends or of converting them into capital, and the company

[1] (1855), 7 De G. M. & G. 104.

[2] (1869), 38 L.J. Ch. 569.

validly exercises this power, such exercise of its power is binding on all persons interested under him in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital.[1]

The basis of the rule was re-examined and upheld by the House of Lords in *Inland Revenue Commissioners* v. *Blott*,[2] and again in *Inland Revenue Commissioners* v. *Fisher's Executors*,[3] whilst in *Inland Revenue Commissioners* v. *Coke*,[4] Rowlatt, J., pointed out that the use of the word "capitalize" by the company is not in itself conclusive. In that case there had been resolutions approving of the withdrawal of a sum from the reserve fund for capitalization, so that it might be available for distribution among the shareholders free of income tax—

> The company simply take the cash out of the reserve fund and pay it to the shareholders. How can it be said that by doing so they are capitalizing the money? The capital is not increased. When the fund has gone to the shareholders there is no increase of capital in respect of it. The suggestion that there is can only be made on the strength of the circumstance that the company have used the word "capitalize," and I cannot believe that the mere use of that word can have such an effect.

Profit on a reconstruction accrues to capital.

It is clear, however, that if a company is reconstructed and a profit is realised, which is returned to the shareholders of the original company as surplus capital, this accrues to the capital fund of the trust, and not to the tenant for life.[5] Exactly the same principle applies where the trustees change the trust investments, and realise a profit. Conversely, where trustees held cumulative preference shares in a company, upon which there were several years' arrears of dividend, and the ordinary shareholders surrendered a block of ordinary shares in exchange for the renunciation by the preference shareholders of their arrears of dividends, the ordinary shares were held to accrue to the trustees holding preference shares as income accruing to the tenant for life.[6] Where income on cumulative preference shares has fallen in arrears, and the tenant for life dies, his personal representatives have no claim against the shares for arrears if

[1] *Re Bouch, Bouch* v. *Sproule* (1887), 12 App. Cas. 385, 397; *Re Speir*, [1924] 1 Ch. 359; *Re Taylor*, [1926] 1 Ch. 923. [2] [1921] 2 A.C. 171.
[3] [1926] A.C. 395. [4] [1926] 2 K.B. 246. [5] *Re Armitage*, [1893] 3 Ch. 337.
[6] *Re MacIver's Settlement*, [1936] 1 Ch. 198. On the general question of apportionments between capital and income, see *Capital and Income (Lifeowner and Remainderman)* in 28 L.Q.R. 175.

the dividends are subsequently paid up.[1] In *Re Walker's Settlement Trusts*[2] a light railway was promoted to serve an estate forming part of a settled estate. The railway was incorporated, and debenture stock was issued to the trustees of the settlement. The interest upon the stock fell into arrears, and when the railway company was wound up, the assets were insufficient to pay off the debenture stock and the arrears of interest. The Court held, following *Re Atkinson*,[3] that the sum recovered from the company must be apportioned between capital and income.

Calls on shares are paid out of capital.

On the other hand, where there are calls on shares forming part of the trust estate, these are payable out of the capital of the trust fund.[4] This is simply an illustration of the general rule that all capital charges are payable out of the corpus, whilst any interest on such charges is payable out of income, and if the current income is insufficient to discharge it, it may be paid out of subsequent income.[5] An annuity, or a sum payable by instalments constitutes for this purpose a capital charge.

All annual charges are defrayed out of income.

All annual charges, however, are defrayed out of income. In this class of charges are included rates and taxes, and if the property is leasehold, anything incidental to the performance of the covenants; but the tenant for life is not liable for repairs necessary when his interest begins, nor for breaches of covenant arising before that time.[6] Where the trustees of a settlement were directed to continue a business for the benefit of persons in succession, and there was a loss during the lifetime of the first tenant for life, it was held that, ordinarily, this should be made good out of subsequent profits.[7] The exact mode of apportionment depends upon the construction of the particular will, so that if it were the custom of a partnership to write off losses sustained from each partner's share of the capital, that custom would govern the respective rights of tenant for life and remainderman where one of the partners bequeathed his share in trust for persons in succession.[8] Furthermore, the rule does not apply where losses are sustained whilst the business is being carried on simply as a prelude to sale, for in such a case any losses sustained are apportioned between capital and income,[9]

[1] *Re Sale*, [1913] 2 Ch. 697. [2] [1936] Ch. 280.
[3] [1904] 2 Ch. 160. [4] *Todd* v. *Moorhouse* (1894), L.R. 19 Eq. 69.
[5] *Marshall* v. *Crowther* (1874), 2 Ch.D. 199; *Honeywood* v. *Honeywood*, [1902] 1 Ch. 347.
[6] *Re Betty*, [1899] 1 Ch. 821; *Re Gjers*, [1899] 2 Ch. 54.
[7] *Upton* v. *Brown* (1885), 26 Ch.D. 588.
[8] *Gow* v. *Forster* (1884), 26 Ch.D. 672.
[9] *Re Hengler*, [1893] 1 Ch. 586.

according to the rule laid down in *Re Earl of Chesterfield's Trusts*.[1]

No apportionment is made on sales of trustee stocks

There is one important class of cases in which no apportionment is made, although it might naturally have been thought that this should be done. If a trustee, in changing trustee investments, sells stocks or shares just before dividend day, then a price will be paid which necessarily includes some allowance for accrued interest. Nevertheless the sum received is placed exclusively to capital. Exactly the same rule applies where the trustee buys stocks or shares just before dividend-day; here again the purchase-money is drawn exclusively from capital, although the trustees have in fact bought a right to a dividend which will very shortly be payable. The rule, which seems an unsatisfactory one, is now of general application,[2] and it applies even though the contract note separately specifies how much is paid or received on account of accrued interest.[3] Of course, if the trustees embarked upon a policy of manipulating investments in favour of tenant for life or remainderman, they would become liable to the injured party.

An early decision upon the point is *Bostock* v. *Blakeney*,[4] but this is not very helpful, for the rule is categorically stated without any reasons at all, and is quite clearly a well-established one, even at that early date. Possibly it was regularly applied in Chambers, and the Courts accepted it without question in ordinary cases, though there was an idea that special circumstances might call for special treatment. Thus, in *Lord Londesborough* v. *Somerville*,[5] a large sum of Consols was, for convenience, sold just before the transfer books closed, and the Master of the Rolls directed an apportionment. This was clearly regarded as exceptional, for in *Scholefield* v. *Redfern*[6] an apportionment was refused, Kindersley, V.C., basing his action on the ground of convenience.

> It is obvious (he said) that the reason why such an Equity on either side has never been administered habitually by this Court is that you can hardly conceive a more serious and grievous burden imposed upon people's estates than having in every case such a complicated investigation as all that would lead to. The gain to one party or the loss to the other

[1] (1883), 24 Ch.D. 643.

[2] *Bostock* v. *Blakeney* (1789), 2 Bro.C.C. 654; *Scholefield* v. *Redfern* (1863), 2 Dr. & Sm. 173; *Freman* v. *Whitbread* (1865), L.R. 1 Eq. 266; *Re Clarke* (1881), 18 Ch.D. 160; *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241; *Re Sir Robert Peel's Estate*, [1910] 1 Ch. 389. In Scotland, an apportionment is always made in these circumstances.

[3] *Re Walker*, [1934] W.N. 104.

[4] (1789), 2 Bro. C.C. 654.

[5] (1854), 19 Beav. 295.

[6] (1863), 2 Dr. & Sm. 173.

> would be far more than compensated by a tenth part of the expense which might be incurred in a complex and difficult case in ascertaining it all; and for that reason, no doubt, the thing has never been done. I will not be the first to introduce a practice which, I believe, would be a terrible scourge upon persons interested in a testator's estate.

It is impossible to resist the conclusion that the learned Vice-Chancellor was exaggerating the difficulties in this case. Complicated investigations are not unknown in Trust Accounts, and in any case, the amount that the purchaser pays for accrued dividend is not difficult to ascertain, even where it is not expressly stated in the contract note. Two years later, however, in *Freman* v. *Whitbread*,[1] the same Vice-Chancellor reiterated his view, for the same reasons, notwithstanding that in the first case of *Bulkeley* v. *Stephens*,[2] decided just after *Scholefield* v. *Redfern*, a colleague had given relief to the tenant for life, on the ground that the sale of stock had been made at a particular time for the benefit of the estate.

In *Re Clarke*,[3] the trustees purchased stock with accrued dividend, and the Court held that the tenant for life was entitled to the whole of the dividend. The Court also pointed out that in these cases the Apportionment Act, 1870, had nothing to do with the case.

The whole of the earlier authorities were considered by Stirling, J., in the second decision in *Bulkeley* v. *Stephens*, and the learned judge came to the conclusion that whilst in general no apportionment could be directed, yet the special circumstances of the case might give rise to a good claim for relief. As to the general rule, Stirling, J., like his predecessors, based it upon the ground of difficulty in making the apportionment. The special circumstances in which the judge allowed an apportionment, however, were that the sale that had occurred was not strictly necessary for the execution of the trust, and had taken place under an order made in the absence of the legal representative of the tenant for life. For these reasons, therefore, Stirling, J., held that it would not be equitable to deprive him of his dividend.

It will be seen, therefore, that as the rule stood at the end of the nineteenth century, it was based simply upon the difficulty of apportionment, and the Court would grant relief where special circumstances warranted it. These principles were directly applied in *Re Peel's Estate*.[4] Stock was purchased when a dividend had been earned and declared,

[1] (1865), L.R. 1 Eq. 266.
[2] (1863), 3 New Rep. 105.
[3] (1881), 18 Ch.D. 160.
[4] [1910] 1 Ch. 389.

but was not yet paid. Warrington, J., held that the dividend accrued to capital. There was no difficulty, and the circumstances warranted a deviation from the general rule.

In *Re Walker*,[1] India 5½ per cent stock was sold by trustees, and the contract now stated that £34,397 8s. 10d. was paid for the stock, and £616 5s. was paid in respect of accrued interest. Clauson, J., held, however, that no apportionment could be made in favour of the tenant for life, basing his decision upon the absence of any special circumstances. This would seem to ignore the reason for the existence of the rule stated in *Scholefield* v. *Redfern*, and leaves open the very awkward question, what special circumstances are sufficient to justify a departure from the usual practice?

The learned judge himself attempted to answer this question in a later case.

In *Re Winterstoke's Will Trusts*,[2] the trustees sold securities *cum dividend* after the death of the tenant for life. The amount involved was a very large one, and Clauson, J., directed the trustees to apportion that sum which represented the value of the accrued dividend in the purchase price between the personal representatives of the deceased tenant for life and the remainderman. The learned judge said—

> In small cases, I dare say even in large cases, it has no doubt been the practice, a practice possibly justified by certain *dicta* of Stirling, J., in *Bulkeley* v. *Stephens*, not to make this special reservation for the tenant for life or to account to his executors for the apportioned dividend; but it appears to me that when the question has been raised and there is no difficulty in ascertaining the figure which would be payable to the executors of the tenant for life, the trustees may properly deal and ought to deal with the matter in the way I have indicated, that is to say, by accounting to the executors of the tenant for life for the apportioned dividend.

This attempt to relax the rigidity of the rule was immediately challenged in *Re Firth's Estate, Sykes and Lacey* v. *Hall*,[3] where Farwell, J., distinguished *Re Winterstoke's Will Trusts*, and after observing that he did not think Clauson, J., meant to do more than say that there may be cases in which the Court will depart from the general practice, he added—

> I would point out that there is to my mind a serious difficulty in appreciating exactly what the learned judge meant in this case, because he says this: "but it appears to me that when the question has been raised and there is no difficulty in ascertaining the figure which would be payable

[1] [1934] W.N. 104. [2] [1938] Ch. 158. [3] [1938] 1 Ch. 517.

to the executors of the tenant for life, the trustees may properly deal and ought to deal with the matter" in a particular way. For myself, I am wholly unable to see what difference it can make, whether the calculation is an easy or a difficult one. If the tenant for life has an Equity which he has a right to assert in this Court, his right cannot depend on whether the sum which has to be done is one which can be done easily, or which requires care and consideration. But however that may be, in my judgment nothing has altered the practice which has obtained for many years.

In *Re Firth*, therefore, apportionment was refused.

Repairs and improvements.

The question whether the cost of repairs or improvements to land and buildings held on trust are regarded as charges upon capital or upon income is now governed principally by the Settled Land Act, 1925, Part IV, together with Schedule III and the decisions relevant thereto. This is a technical question, of which only brief consideration can be given here.

The Settled Land Act, Sect. 83, authorises the expenditure of capital money for the execution of improvements authorised by the Act, and for any operation necessary for the carrying out of such purposes; and Sect. 84 (1) provides that it is no longer necessary (as it was before 1926) to obtain the approval of the Court or of the trustees of the settlement to a scheme before the tenant for life undertakes such improvements. Where the capital money is in the hands of the trustees, then unless they are otherwise authorised by the Court, they must not apply it in payment for improvements, unless they have obtained a certificate from a competent surveyor, employed independently of the tenant for life, certifying that the work done has been properly executed, and what sum may be properly paid in respect of it. A certificate so given is conclusive in favour of the trustees as a discharge for any payment they may have made in pursuance of it.[1] The subsection contains two provisos—

(*a*) In the case of improvements not authorised by Part I of the Third Schedule to this Act or by the settlement, the trustees may, if they think fit, and shall if so directed by the Court, before they make any such application of capital money require that that money, or any part thereof, shall be repaid to them out of the income of the settled land by not more than fifty half-yearly instalments, the first of such instalments to be paid or to be deemed to have become payable at the expiration of six months from the date when the work or operation, in payment for which the money is to be applied, was completed;

(*b*) No capital money shall be applied by the trustees in payment for improvements not authorised by Parts I and II

[1] Settled Land Act, 1925, Sect. 84 (2) (i).

of the Third Schedule to this Act, or by the settlement, except subject to provision for the repayment thereof being made in manner mentioned in the preceding paragraph of this proviso.

The Third Schedule, mentioned in these provisos, sets out in detail a list of improvements, and is divided into three parts. Part I includes only those improvements which permanently increase the capital value of the land, and for which accordingly payment may be made out of capital money with no provision for replacement out of income. Part II comprises improvements, the cost of which either the trustees or the Court *may*, but need not, require to be defrayed out of income by instalments, unless these are permitted to be paid for out of capital by the settlement itself. Part III includes those improvements which may not be paid for out of capital, unless the settlement expressly provides for it.

When the capital money is in Court, the Court may, if it thinks fit, on the report or certificate of the Minister of Agriculture and Fisheries, or of a competent engineer or an able practical surveyor, approved by the Court, or on such other evidence as the Court may think sufficient, make such order as it thinks fit, for the application of the money towards payment for the improvement.[1]

Moreover, Subsect. (4) provides—

> When the Court authorises capital money to be applied in payment for any improvement or intended improvement not authorised by Part I of the Third Schedule to this Act or by the settlement, the Court, as a condition of making the order, may in any case require that the capital money or any part thereof, and shall as respects an improvement mentioned in Part III of that Schedule (unless the improvement is authorised by the settlement), require that the whole of the capital money shall be repaid to the trustees of the settlement out of the income of the settled land by a fixed number of periodical instalments to be paid at the times appointed by the Court, and may require that any incumbrancer of the estate or interest of the tenant for life shall be served with notice of the proceedings.

There have been, since 1925, a number of decisions upon the question of improvements and Sects. 83–84, and permanent or structural repairs, and the allocation of the costs of them. In the first of these, *Re Gray*,[2] repairs of a substantial nature were effected in respect of a block of freehold flats comprised in a settlement. The Court held that such repairs were authorised by Sect. 102 (2) of the Settled

[1] Settled Land Act, 1925, Sect. 84 (3). [2] [1927] 1 Ch. 242.

Land Act, 1925, and were properly payable out of income. It should be noticed that, in this case, the repairs were undertaken at the instance of trustees for sale, acting under the Law of Property Act, 1925, Sect. 28 (1). In *Re Conquest*,[1] permanent structural repairs were effected, and the Court held: (1) that the effect of the Law of Property Act, 1925, Sect. 28 (1), was not only to confer on trustees for sale during a minority the powers of management specified in the Settled Land Act, 1925, Sect. 102, but also the powers exercisable by the tenant for life under Sect. 84 of that Act of making improvements and paying for them out of capital. In this case the Court took the view that the work done fell within Part I of Schedule III, and that it should therefore be paid for out of capital. It appears from this decision that the powers conferred on trustees for sale under the Law of Property Act, 1925, Sect. 28 (1), may overlap. Where they do so, and the trustees have a choice of powers, they are guided by the equitable principles enunciated in *Re Hotchkys*.[2] These principles were stated by Lindley, L.J., in that case to be—

> If it is shown that it is judicious to make repairs, and the trustees come to the Court for authority to make them, that authority will be given, but it will be given on equitable terms as to the mode of paying the expenses (i.e. as between income and capital).[3]

The Rule in *Allhusen* v. *Whittell*.

There exists also another important rule relating to equitable apportionments of which brief mention must be made, although it is a rule applicable to the duties of personal representatives. The rule, which is known as the Rule in *Allhusen* v. *Whittell*[4] applies to the payment of the debts of a testator out of his estate, and has regard to the fact that where the debts are not paid immediately, the residue will be producing income, which is also applicable for the payment of debts. Now, in taking capital and income of residue for the payment of debts, the personal representatives must act impartially between tenant for life and remainderman, and therefore—

> The true principle is, that in the book-keeping which the Court enters upon for the purpose of adjusting the rights between the parties, you must ascertain what part, together with the income of such part for a year, will be wanted for the payment of debts and legacies and other charges during

[1] [1929] 2 Ch. 353. [2] (1886), 32 Ch.D. 408.

[3] See also *Re Robins*, [1928] Ch. 721; *Re Whitaker*, [1929] 1 Ch. 662; *Re Smith*, [1930] 1 Ch. 88; *Re Sherborne*, [1929] 1 Ch. 345; *Re Jacques*, [1930] 2 Ch. 418; *Re Borough Court*, [1932] 2 Ch. 39.

[4] (1867), L.R. 4 Eq. 295; *Lambert* v. *Lambert* (1873), L.R. 16 Eq. 320.

the year—you must ascertain the proper and necessary fund by including the income for one year which may arise upon the fund which may be so wanted.

To take a simple example, suppose the testator leaves £50,000, and debts of £4000, and suppose that the sum of £50,000 produces £1500 income. The apportionment is made by adding £1500 to £50,000, and subtracting the debts of £4000, leaving £47,500, which represents capital plus one year's interest at 3 per cent. Accordingly £46,116 12s. is placed to capital, and the tenant for life receives £1383 8s. interest. The rule, however, will not be applied where the testator shows a contrary intention, or where circumstances would make it inequitable to apply it.[1]

Quite apart from these equitable rules of apportionment, there exist the provisions of the Apportionment Act, 1870, that "all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."[2] Sect. 5 provides that the word "dividends" includes "all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital." This Act more particularly concerns executors and administrators, but it also affects the duties of trustees, especially on the death of a tenant for life, and it is not excluded by a power to postpone a trust for sale coupled with a direction that, pending sale, "the whole income of property actually producing income" shall be applied as from the testator's death as income.[3]

Administration costs.

Where costs are incurred in the administration of a trust, these will normally be defrayed out of capital, unless the settlor has directed otherwise. Examples of such costs are

[1] *Re McEuen*, [1913] 2 Ch. 704; *Re Wills*, [1915] 1 Ch. 769. For a criticism of the rule, see 30 *L.Q.R.* 481. [2] Sect. 2.

[3] *Re Edwards*, [1918] 1 Ch. 142. See also *Re Marjoribanks*, [1923] 2 Ch. 307; *Re Wakley*, [1920] 2 Ch. 205; *Re Sandbach*, [1933] 1 Ch. 505.

the appointment of new trustees, legal expenses, and the cost of bringing and defending actions on behalf of the trust. If, however, expense is incurred in the determination of a matter, which relates solely to the income of a trust, such expense will usually be a charge upon the income, except as to any costs incurred in paying the money in question into Court. This is an expense borne by the capital.[1] Income fees charged by a trust corporation in respect of settled legacies are payable out of the income of each legacy.[2]

Where the trustee delays in investment he is chargeable with interest.

It must also be noticed that if a trustee delays for an unreasonably lengthy period before investing trust money or handing it over to the persons entitled, he is chargeable with interest on the money, and this may be granted even where it has not been specially asked for.[3] The same rule is also applicable to personal representatives who are guilty of undue delay in distributing the estate after all outstanding claims have been satisfied, and it is no excuse for either an executor or a trustee to declare that he made no use of the money, which remained at the bank.[4] As far as the executor is concerned, this is a deviation from the earlier and laxer practice which permitted him to employ surplus assets for his own purposes without being called to account, but this was finally overruled by Lord North in *Ratcliff* v. *Graves*.[5] It may be, however, that if the trustee employs the money in business, he makes a substantial profit. If this is so, the beneficiary may choose whether he will take the profits or charge interest for the use of his money.[6] Where the money has been used for purposes of trade, the rate of interest has frequently been 5 per cent compound interest.[7] In other cases, it has usually been 4 per cent, unless the trustee ought to have received more (e.g. where he improperly called in mortgages yielding more) or where he actually received more.[8] Whether simple or compound interest is levied seems to depend entirely upon the facts of the particular case, but if there is an express direction to accumulate, Lord Eldon observed that compound interest ought to be decreed.[9]

Where he employs trust-money in his business he is chargeable with 5 per cent interest.

[1] *Re Marner's Trusts* (1866), L.R. 3 Eq. 432; *Re Evans's Trusts* (1872), 7 Ch. App. 609.

[2] *Re Roberts' Will Trusts, Younger* v. *Lewins*, [1937] 1 Ch. 274 distinguishing *Re Hulton, Midland Bank* v. *Thompson*, [1936] Ch. 536, and *Re Riddell, Public Trustee* v. *Riddell*, [1936] Ch. 747; and see *Re Godwin*, [1938] Ch. 341.

[3] *Turner* v. *Turner* (1819), 1 Jac. & W. 39.

[4] *Younge* v. *Combe* (1798), 4 Ves. 101.

[5] (1683), 1 Vern. 196. [6] *Docker* v. *Somes* (1834), 2 Myl. & K. 655.

[7] *Burdick* v. *Garrick* (1870), 5 Ch. App. 233.

[8] *Jones* v. *Foxall* (1852), 15 Beav. 392; *Burdick* v. *Garrick*, *supra*.

[9] *Raphael* v. *Boehm* (1803), 11 Ves. 92; 13 Ves. 407, 593.

It should be noticed, however, that an executor is not usually chargeable with interest during the first year which follows the testator's death, for the fund is not regarded as being distributable until the expiration of the executor's year.

C. THE RIGHTS AND DUTIES OF TRUSTEES IN RELATION TO THE DISTRIBUTION OF THE TRUST PROPERTY

The trustee must pay the proper persons.

The obvious duty of the trustee in relation to the distribution of the trust property is to pay the proper persons, and therefore, the trustee must ensure who are the persons to whom he must pay, either as creditors or beneficiaries. The Trustee Act, 1925, Sect. 27 [1] (replacing the Law of Property Amendment Act, 1859, which applied to personal representatives only) provides—

Advertisement for claims.

(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the *Gazette*, and in a daily London newspaper, and also, if the property includes land not situated in London, in a daily or weekly newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of the claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees, or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution, but nothing in this section—

(*a*) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or

(*b*) frees the trustees or personal representatives from

[1] As amended by the Law of Property (Amendment) Act, 1926.

any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

By Sect. 28, it is provided that a trustee or personal representative who is acting for more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

Protection of the trustee.

The advertisement should be made as soon as possible after the death,[1] and a trustee or executor who has done what is required by the section enjoys the same protection as if he had administered the estate under an order of the Court.[2]

If, however, the trustee has notice of a claim by a creditor, this is not barred simply because the creditor neglects to claim immediately in response to the advertisement.[3] On the other hand, a mere reply to the advertisement by a creditor does not preserve that claim from the operation of the Statutes of Limitation.[4]

The trustees may call on beneficiaries to refund in respect of a claim of which they had no notice.

If the trustees distribute among the persons entitled to the property, and then a claim of which they had no previous notice is presented, they are entitled to call upon the beneficiaries to refund the property to the extent necessary to satisfy the debt,[5] but if the trustees had notice of the claim, but nevertheless distributed, although they must pay the claim (unless statute-barred), they may not call upon the beneficiaries to refund, unless the liability was a bare possibility, such as a call in respect of shares, not contemplated at the time of distribution.[6]

Furthermore, the right of any person to follow the property into the hands of a person other than a purchaser is preserved. This is also referred to in Sect. 26 (2), which operates notwithstanding anything in the will or settlement to the contrary.

Assignment of a beneficiary's interest.

It is to be observed that Sect. 27 only protects the trustee in respect of claims of which he has no notice. Obviously, he has notice of all interests directly arising out

[1] *Re Kay*, [1897] 2 Ch. 518.
[2] *Re Frewen* (1889), 60 L.T. 953; *Hunter* v. *Young* (1879), 4 Ex.D. 256.
[3] *Scottish Equitable Life Assurance Co.* v. *Beatty* (1893), 29 L.R. Ir. 296.
[4] *Re Stephens* (1889), 43 Ch.D. 39.
[5] *Jervis* v. *Wolferston* (1874), L.R. 18 Eq. 18.
[6] *Whitaker* v. *Kershaw* (1890), 45 Ch.D. 320, 325.

of the will or other trust instrument. It may be, however, that a beneficiary assigns his interest in a trust fund, and here Sect. 137 of the Law of Property Act, extending the rule in *Dearle* v. *Hall*,[1] provides that the assignee of an equitable interest must give notice in writing to the trustees or estate owners, and the priorities of the encumbrances are determined according to the dates when they gave notice. There may still be occasions, however, when a trustee is affected with constructive notice of an assignment, and in such a case he would not be protected if he paid to the assignor.

Duty of the trustees where the beneficiary has gone abroad and has not been heard of.

If a beneficiary has gone abroad, and has not been heard of for seven years, there is a presumption that he is dead.[2] This, however, does not free the trustee from liability, for if the beneficiary reappear, the trustee will have to pay him,[3] and, therefore, the usual practice of the Court in paying out is to require security, if it should become necessary to recall it. Accordingly, the proper course for the trustee to adopt is to obtain a proper indemnity, or to accumulate the fund, or to seek the direction of the Court; and now, by Sect. 63 of the Trustee Act, 1925, it is provided—

(1) Trustees,[4] or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.

(4) Where any such money or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.

(5) Every transfer payment or delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

The desirability of taking advantage of this provision becomes evident from what has been said above concerning

[1] (1823), 3 Russ. 1.
[2] *Re Benjamin*, [1902] 1 Ch. 723; *Re Aldersey*, [1905] 2 Ch. 181.
[3] *Woodhouselee* v. *Dalrymple* (1861), 9 W.R. 475, 564.
[4] Including personal representatives (Trustee Act, 1925, Sect. 68 (17)).

the presumption of death with regard to a missing beneficiary, more particularly when it is remembered that there is no presumption of death without issue; and, therefore, when A and his issue are entitled, either under a settlement *inter vivos*, or under a will or on intestacy, the fact that A has died without issue must be proved by proper evidence before distribution of B's share can safely be made.[1] A trustee should not, however, pay money into Court without reasonable cause, or he may be made liable for costs.[2]

Payment into Court where there is reasonable doubt of identity.

Where there is a reasonable doubt concerning the identity of a beneficiary under a trust, the trustee will usually be allowed the costs of payment into and out of Court, [3] but in other cases he will have to pay the costs of the applicant. [4] In *Re Schnapper*,[5] a beneficiary under a trust, who was of German nationality and domicile, was ordered to be paid her legacy out of funds in Court, on attaining the age of eighteen, which, by the law of the place of her domicile, was the age at which she became competent to receive it and to give receipts therefor.[6]

Overpayment by a trustee.

The position of a trustee who overpays some of his beneficiaries and underpays others has occasioned some discussion. In general, in the absence of fraud or other fault, he is entitled to have the mistake rectified with the assistance of the Court, but the extent to which this general principle is modified by *Re Horne* [7] sometimes promotes uncertainty.

Where the trustee is also a beneficiary: (1) Underpayment of himself.

The facts of *Re Horne*,[7] though simple, differed in one important essential from those in respect of which the rule just enunciated has been developed. In that case the trustee was himself one of the beneficiaries, and he inadvertently overpaid the other beneficiaries and underpaid himself. Before any rectification could be made, the trustee-beneficiary died, and it was held that his executors could neither recover the overpayments from the beneficiaries nor have them deducted from future income to be paid to the other beneficiaries. The reason for Warrington, J.'s, judgment seems to be that to alter the position "would be very inconvenient, and a great hardship on the other legatees." This may be true, but it is scarcely a conclusive reason for refusing to ensure that a trust is carried out according to the intentions of the settlor, and the learned judge himself admitted that—

> If Richard Horne had not been himself a trustee, but only one of the beneficiaries, the case would be plainly covered

[1] *Re Jackson*, [1907] 2 Ch. 354. [2] *Re Giles* (1886), 34 W.R. 712.
[3] *Re Jones* (1857), 3 Drew 679; *Re Headington* (1858), 27 L.J.Ch. 175.
[4] *Re Woodburn* (1857), 1 De G. & J. 333; *Re Elliot* (1873), L.R. 15 Eq. 194.
[5] [1928] Ch. 420.
[6] Following *Re Hellman's Will* (1866), L.R.2 Eq. 363; and *Donohoe* v. *Donohoe* (1887), 19 L.R. Ir. 349. [7] [1905] 1 Ch. 76.

by authority, and it would now have been the duty of the plaintiff, as the surviving trustee of this will, in administering the trusts of it for the future, to equalise the payments which have been made out of income.

That is the general rule, and *Re Horne*[1] must, therefore, be regarded as an exception to it, the trustee-beneficiary's position being altered for the worse because—

> Any equity that he might have had in his character of beneficiary is displaced by the fact that he is himself responsible for the mistake which has been made.

(2) Where the trustee is also trustee of another fund.

Re Horne[1] has received consideration, and some criticism, in later cases, however. In *Re Ainsworth*,[2] the executors of a will wrongly and by mistake paid the legacy duty on a life interest in a settled legacy out of the capital of the legacy, instead of out of the income during the first four years of the life tenancy, as provided by the Legacy Duty Act, 1796. The legacy had been bequeathed (on the termination of the life estate) to two special trustees, one of whom was one of the executors authorising the wrong payment, and the executor-trustee was held to be entitled, after a lapse of seven years, to set the mistake right by reducing the payments of future income to the tenant for life in order to make up the capital of the settled legacy, which had been diminished by the payment of legacy duty. There would have been little difficulty in reaching this decision but for *Re Horne.*[1] Joyce, J., commenting on that case, observed that it—

> is said to have established for the first time some general rule that prevents the error being set right in such circumstances as those of the present case. I am unable to accept this argument. Moreover, in these days innocent trustees are not treated with the severity of former days, and the case of in *Re Horne*[1] was a totally different one from the present.

The essential point, of course, was that *Re Horne*[1] dealt with a trustee-beneficiary, who impoverished himself by his own mistake. *Re Ainsworth*[2] dealt with a trustee who was not a beneficiary, who had impoverished others by his mistake, and those persons naturally had a right to have the mistake rectified in their favour.

Re Musgrave[3] was decided on similar facts to *Re Ainsworth.*[2] A testator had directed that certain annuities should be paid "without deduction." The trustees paid the annuities for some years without deducting income-tax, which is not covered by "without deduction." The trustees

[1] [1905] 1 Ch. 76. [2] [1915] 2 Ch. 96.
[3] [1916] 2 Ch. 417; 85 L.J.Ch. 639.

were not beneficiaries, and it was held that the trustees were entitled to deduct the tax, which should have been deducted, from future payments of the annuities. Neville, J., laid down the general principle concerning overpayment by a trustee, and then observed that a mistake as to the payment of income-tax was a mistake of law, and not of fact, adding that—

> In my opinion the mere fact that a mistake is an honest mistake of law, as long as it is not a mistake of public law, which everyone is bound to know, has not prevented the Courts from giving relief to one party as against the other.

Re Horne[1] was again commented on, and the learned judge observed that—

> It was said that that lays down the general principle that where a mistake has been made by the trustee he cannot get this adjustment against the *cestui que trust*. I do not think the learned judge put it so high as that. It has nothing to do with the decision of the case before me; clearly it can be supported on other grounds.

The learned judge was correct. *Re Horne*[1] was never intended to lay down a general principle on the relation of trustee and beneficiary. Warrington, J., expressly disclaimed any such intention.

(3) Where a trustee-beneficiary overpays himself.

Finally, in *Re Reading*,[2] Mrs. S., executrix of the last surviving executor of the testator, secured sole control of the distribution of the income arising out of the trusts of the will, purporting to appoint herself as trustee. The appointment was bad, but she nevertheless became a constructive trustee, and made distributions of income whereby she overpaid herself and another. This was clearly the converse case to *Re Horne*,[1] and an attempt to make that case apply failed, so that a redistribution was ordered. It is clear that there could be no ground for applying *Re Horne*,[1] since (1) the beneficiary who lost by the transaction was in no way responsible for the error; and (2) the duties which a trustee must observe towards his beneficiary have no counterpart in the relation of beneficiary to trustee. Furthermore, Mrs. S.'s overpayment of herself was a violation of the elementary rule that a trustee must not profit from his trust.

The rule to be derived from these decisions may, therefore, be stated as follows—Where a trustee is also a beneficiary, he is still bound by his mistake, where it results in an underpayment to himself. Where the trustee is not a beneficiary or where the trustee-beneficiary overpays himself, the mistake will be rectified.

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[1] [1905] 1 Ch. 76. [2] [1916] W.N. 262.

Overpayment by an executor.

As regards executors, the Court will not generally order a legatee to refund personally to an executor;[1] nor will it order the legatee to refund where the executor has voluntarily overpaid the legatee, in spite of the latter's doubts whether so much was, in fact, payable.[2] However, an executor who distributes with notice of liabilities which may become due, but are not certain to materialise (e.g. future calls on shares) may, if he is compelled to pay them, recover them from the legatees,[3] but an executor will not generally be able to recover if the legatee has sold to a purchaser for value,[4] but on the other hand, if an executor still retains property that he has appropriated to satisfy a legacy, he may, if compelled to pay a creditor for whom he has made no other provision, recover the debt from the appropriated property.[4]

In *Re Musgrave*,[5] it was noticed that the Court would relieve against an overpayment due to a mistake of law, not being a mistake of public law, and in *Ex parte James*,[6] where money was paid to a trustee in bankruptcy under a mistake of law, the Court ordered it to be refunded, on the principle that the Court of Bankruptcy ought to act in the way in which any high-minded man would act.

If the trustees are holding property on behalf of a beneficiary who is of full age and absolutely entitled, they must at his request transfer to him the entire trust fund. This is well illustrated by *Re Selot's Trusts*,[7] where a French subject, who by French law had been declared a "prodigal," and was therefore subject to some restraint, claimed the fund, and it was held that since this status was unknown in English law, the trustees were not justified in withholding the property, and, furthermore, that they were liable for the costs of the action which the beneficiary had brought to enforce his right.

Protection of the trustee in respect of rents and covenants.

By the Trustee Act, 1925, Sect. 26, trustees and personal representatives who transfer real property are given protection with respect to rents, covenants, and other obligations which may exist in respect of the property. The section reads—

> (1) Where a personal representative or trustee liable as such for—
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> (*a*) any rent, covenant, or agreement reserved by or contained in any lease; or
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> (*b*) any rent, covenant, or agreement payable under or

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[1] *Downes* v. *Bullock* (1858), 25 Beav.
[2] *Bate* v. *Hooper* (1855), 5 De G.M. & G. 338.
[3] *Whitaker* v. *Kershaw* (1890), 45 Ch.D. 320.
[4] *Noble* v. *Brett* (1858), 24 Beav. 499.
[5] [1916] 2 Ch. 417. [6] (1874), 9 Ch. App. 609. [7] [1902] 1 Ch. 488.

contained in any grant made in consideration of a rent-charge; or

(c) any indemnity given in respect of any rent, covenant, or agreement referred to in either of the foregoing paragraphs;

satisfies all liabilities under the lease or grant which may have accrued or been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee, or other person entitled to call for a conveyance thereof and thereafter—

(i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid), to or amongst the persons entitled thereto without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

(2) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

Under Sect. 26, the term "lease" includes both an underlease and an agreement for a lease or underlease, "grant" includes a grant whether the rent is created by limitation, grant, reservation or otherwise, and also an agreement for a grant, whilst "lessee" and "grantee" include persons claiming under them.

The trustee is not excused for a mistake of English law.

It is important to remember in considering distributions by trustees that they must not only ascertain what are the proper distributions under the instrument, but also what is the effect of English law upon them, for a trustee is not excused for a mistake of English law, even if he has taken counsel's opinion upon the matter.[1] On the other hand, he is not deemed to know foreign law. Thus, in *Leslie* v. *Baillie*,[2] a testator died and his will was proved in England.

[1] *Doyle* v. *Blake* (1804), 2 Sch. & Lef. 243; *Re Knight's Trusts* (1859), 27 Beav. 49.

[2] (1843), 2 Y. & C. Ch. Cas. 91.

By his will, the testator left a legacy to a married woman, who was domiciled in Scotland. Before payment, the woman's husband died, and the testator's executors paid the legacy to the wife, being unaware of the fact that by Scottish law, the legacy should have been paid to the husband's personal representatives, who therefore proceeded to sue the testator's executors. It was held that they were not to be deemed to know the law of Scotland, and that as they had not had express notice of this rule of Scottish law before they paid, and had discharged what had appeared to be their duty, they were not liable.

If a dispute exists between two persons with regard to a right to the trust fund, the trustee is entitled to retain the fund until the issue has been determined,[1] and a person who has made an improper claim to the fund may be made liable for costs.[2]

Discretionary payments by trustees in respect of a beneficiary.

A trustee will usually pay a share of the trust fund to the person directly entitled thereto. The Trustee Act, 1925, however, now provides for several occasions where payment may be made to other persons than the one who is primarily entitled—

(1) Under the Trustee Act, 1925, Sect. 33.

1. Under Sect. 33, where a protective trust exists, and the act or thing contemplated occurs, so that the interest of the principal beneficiary determines, the trustees may at their absolute discretion, and without being liable to account, apply the income for all or any one or more of the others of the following persons—

(*a*) The principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(*b*) If there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof.

It would appear that where the principal beneficiary under a discretionary protective trust becomes bankrupt, the trustees should not pay him or apply for his benefit more than is necessary for his bare support, or the trustee in bankruptcy will be able to claim it,[3] and if the trustees pay the income to a third person on a secret trust for the principal beneficiary, that arrangement may be set aside.[4]

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[1] *Hockey* v. *Western*, [1898] 1 Ch. 350.
[2] *Re Primrose* (1857), 23 Beav. 590.
[3] *Holmes* v. *Penney* (1856), 3 K. & J. 90; *Re Coleman* (1888), 39 Ch.D. 443.
[4] *Holmes* v. *Penney*, *supra*.

(2) Under the Trustee Act, 1925, Sect. 31.

2. Under Sect. 31, the trustees have a wide power to apply income for the maintenance of a beneficiary during his minority. The section reads—

(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

(i) during the infancy of any such person, if his interest so long continue, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(*a*) any other fund applicable to the same purpose; or

(*b*) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property, and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments and shall hold those accumulations as follows—

(i) If any such person—

(*a*) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(*b*) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and

so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital to the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may at any time during the infancy of such person if the interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in *loco parentis* to the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

The section applies only where the infant's interest carries the intermediate income of the property, but unlike Sects. 42-3 of the Conveyancing Act of 1881, which it has replaced, it extends also to annuities. It should also be noticed that the trustees have power under Sect. 31 to apply the income of contingent gifts for the maintenance of the infant, a provision which is repeated from the earlier Act, and which was described by Kay, L.J., in *Re Holford* [1] as "very arbitrary legislation," inasmuch as it allows the application for maintenance of income to which, if the infant never satisfies the contingency, he may never become entitled at all. Again, if a person for whose benefit the trustees have the power to apply income for maintenance does not acquire a vested interest at twenty-one, it is provided by Sect. 31(1)(ii), a subsection which did not appear in the Conveyancing Act of 1881, that the beneficiary shall be entitled to the whole of the income, and of accretions thereto until the interest either fails, or becomes vested, or until the beneficiary dies. A

[1] [1894] 3 Ch. 30.

further addition to Sect. 31 is the proviso which directs trustees to have regard to the age of the infant, his general circumstances, and especially to what other income may be available for maintenance; and more particularly, if there are other trust funds available, the trustees should pay only a proportionate amount of the cost of maintenance. Whilst it should be remembered that payments are at the sole discretion of the trustee, that discretion must nevertheless be exercised, and in *Wilson* v. *Turner*,[1] the trustees, without exercising any discretion, paid the whole of the income to the infant's father, and the Court of Appeal held the father's estate liable to account for the income so received. So long as the trustee exercises his discretion in good faith, the Court will not interfere with him in the exercise of this power.[2]

The question whether a gift carries intermediate income is not free from difficulty. The Law of Property Act, 1925, Sect. 175, provides that in respect of wills coming into operation after 1925, a contingent or future specific devise or bequest of property, real or personal, and a contingent residuary devise of freehold land to trustees on trust for persons whose interests are contingent or executory, carries the intermediate income, except so far as such income is otherwise expressly disposed of. It must be noticed that under this section a contingent or future pecuniary legacy does not (in the absence of indication to the contrary) carry intermediate income. There exists, however, one exception to this rule, where in a will a father gives a pecuniary legacy to his son, or other person to whom he stands *in loco parentis*, upon a contingency which is either attaining an age not greater than twenty-one, or marrying under that age, and no other sum is set aside in the will for the maintenance of the legatee, then in the absence of a contrary intention, that pecuniary legacy will be deemed to carry intermediate income.[3] This is the principle referred to in Sect. 31 (3). The testator, however, may by his will as a whole, demonstrate the intention that a child should be maintained out of the intermediate income of a pecuniary legacy, even when payment is postponed to some date after the child has attained twenty-one.[4]

It should be observed that the trustee's power to grant income for maintenance is made subject to "any prior interests or charges," so that a remainderman cannot be

[1] (1883) 22 Ch.D. 521.
[2] *Re Lofthouse* (1885), 29 Ch.D. 921; *Re Bryant*, [1894] 1 Ch. 324.
[3] *Re Abrahams*, [1911] 1 Ch. 108. [4] *Re Jones*, [1932] 1 Ch. 642.

maintained out of the income of the tenant for life, without the latter's consent.[1]

The receipt of the parent or guardian is a sufficient discharge of the trustee,[2] and the Law of Property Act, 1925, Sect. 21, now provides that a *married* infant can give receipts for income.

In *Lowther* v. *Bentinck*,[3] where however, the beneficiary was a man of thirty who had been married three years, it was held that payments of the beneficiary's debts was for his "benefit," within the meaning of the clause. Normally, however, this would not be a proper exercise of the power.[4]

In *Re Spencer*,[5] J. S. was entitled to a life interest in a two-thirds share of the residue of an estate, settled during the lifetime of J. S. on protective trusts, and after the death of J. S. upon trust for J. S.'s children, and in default of children for P. and her children, except that (*a*) whilst J. S. was living and under the age of thirty, the trustees were to accumulate the income and add it to capital, and (*b*) if J. S. attained the age of thirty-five years, and his life interest had not ended under the protective trust, the trustees were to pay one-half of J. S.'s share to him for his absolute use and benefit. When the testator died, J. S. was over twenty-one, but had not attained the age of thirty-five. The question was whether, under Sect. 31, J. S. was entitled to the income arising after the testator's death, but before J. S. had attained the age of thirty in respect of the moiety of his settled share in the residue, until the happening of any event which would defeat his contingent right to a transfer on attaining thirty-five, or whether the said income must be accumulated until the moiety should be transferable to him. The Court held that the direction in Sect. 31 (1) (ii) to pay the income of the moiety to which J. S. was contingently entitled on attaining the age of thirty-five did not apply, because, since under the protective trust there was the possibility that the income be forfeited altogether, the gift did not carry intermediate income as required by Sect. 31 (3). But for this possibility, however, the Court was of opinion that where a will directs an accumulation to an age exceeding twenty-one, then after the age of twenty-one has been attained, the trustees *must* pay the income under Sect. 31 (1) (ii), which overrides any directions in the will to the contrary. This

[1] *Re Alford* (1886), 32 Ch.D. 383; *Re Reade-Revell*, [1930] 1 Ch. 52, considered and distinguished in *Re Leng* (1938), 108 L.J. Ch. 65.
[2] *Sowarsby* v. *Lacy* (1819), 4 Mad. 142. [3] (1874), L.R. 19 Eq. 166.
[4] *Luard* v. *Pease* (1850), 22 L.J. Ch. 1069; *Re Price* (1887), 34 Ch.D. 603.
[5] [1935] 1 Ch. 533.

latter point was expressly decided in *Re Ricarde-Seaver's Will Trusts* [1] in which it was pointed out that until the beneficiary attains the age of twenty-one years the trustees have a discretionary power to utilize the income for his maintenance, and the Trustee Act, 1925, Sect. 69 (2) provides that the statutory powers only apply in so far as a contrary intention is not expressed in the instrument. But after the beneficiary attains twenty-one they are under a *duty* to pay him the income and nothing in the trust instrument can affect this duty unless, as in *Re Spencer* [2] the gift is in such terms that it does not carry the intermediate income.

The same point also arose for decision in *Re Turner's Will Trusts*.[3] In this case, Bennett, J., reached the same opinion upon the construction of the section that Luxmoore, J., had done in *Re Spencer* [2] and that Clauson, J., had done in *Re Ricarde-Seaver's Will Trusts*.[1] On appeal, however, the Court of Appeal reached a different conclusion, Romer, L.J., pointing out that the Trustee Act, 1925, is a consolidating Act, and the presumption therefore is that it did not make any substantial change in the existing law. In the opinion of the Court of Appeal, therefore, the statutory direction contained in Sect. 31 (1) (ii) applies only if and so far as a contrary intention is not expressed in the instrument creating the trust, and it takes effect subject to the terms of that instrument.

Vesting Orders in relation to infants' beneficial interests.

There is also another section of the Trustee Act, 1925, of which advantage may be taken to provide money for the maintenance of an infant. Sect. 53 states that where an infant is beneficially entitled to any property, the Court may, with a view to the application of the capital or income thereof for the maintenance, education or benefit of the infant, make an order appointing a person to convey such property. In *Re Gower's Settlement*,[4] Clauson, J., decided that advantage may be taken of the section to authorise the mortgage of an infant's entailed interest in remainder for the purpose of providing money for the maintenance of the infant, so as to bar the infant tenant in tail's issue and subsequent remaindermen as effectively as if the infant had been of full age, and had executed the required disentailing assurance.

Two general points on this section should be noticed—

1. Sect. 31 of the Trustee Act relates only to the

[1] (1936), 154 L.T. 598. [2] [1935] 1 Ch. 533.
[3] [1937] 1 Ch. 15. Followed in *Re Watt's Will Trust*, [1936] 2 All E.R. 1555. [4] [1934] 1 Ch. 365.

employment of income for maintenance, whilst Sect. 53 permits capital to be used for that purpose in circumstances where there is no intermediate income.

2. Sect. 31 can be utilised by the trustees entirely of their own discretion. Under Sect. 53, an application to the Court is necessary.

The existence of Sect. 53 prompts the inquiry whether, apart from this section, capital can be applied for maintenance. Where the infant's interest is small, the Court has frequently made such an order,[1] provided that the interest is in personalty. A similar order was made in respect of an infant's freehold estate in *Re Howarth*,[2] but in *Re Hambrough*,[3] it was held that the Court could not direct the execution of a disentailing assurance to effect a mortgage of the equitable interest of an infant tenant in tail. In this respect, therefore, the position is now altered by Sect. 53 of the Trustee Act, 1925, under which the Court acted in *Re Gower's Settlement*.[4]

Whether the trustee or executor can himself make provision for maintenance out of capital without recourse to the Court would appear to be very doubtful.

In *Lee* v. *Brown*,[5] Lord Alvanley said—

> The principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application.

This was a decision on a power of advancement, but it is an observation which must clearly be confined within limits, otherwise it might be construed as authorising an executor or trustee to purchase the trust property. In a note to *Barlow* v. *Grant*,[6] it is stated that "the Court will not permit executors and trustees to break in upon the capital of infants' legacies without the sanction of the Court, and the Court itself though it will break in upon the capital for the purpose of advancement will rarely do so for maintenance." A number of authorities illustrating the proposition are there cited, and the same opinion was given by Sir W. Grant in *Walker* v. *Wetherell*.[7] On this decision, Lewin comments[8] that "the case of *Barlow* v. *Grant*,[6] which is clearly to the contrary, must have escaped his Honour's recollection." It

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[1] *Ex parte Green* (1820), 1 Jac. & W253; *Ex parte Chambers* (1829), 1 Russ. & M. 577; *Ex parte Swift* (1828), 1 Russ. & M. 575.
[2] (1873), L.R. 8 Ch. App. 415. [3] [1909] 2 Ch. 620.
[4] [1934] 1 Ch. 365. [5] (1798), 4 Ves. 362.
[6] (1684), 1 Vern. 255. [7] (1801), 6 Ves. 473. [8] At p. 365.

would appear, however, that Sir W. Grant definitely remembered the notes of the reporter of that case, and the authorities there cited. It is therefore submitted that the utilisation of capital by trustees for maintenance without the sanction of the Court is a distinctly hazardous proceeding, which has very little authority in the decisions to justify it. How far such applications of capital could properly be regarded as advancements is not altogether clear.

(3) Under the Trustee Act, 1925, Sect. 32.

3. An entirely new statutory power of advancement is conferred on trustees by Sect. 32. Before 1926, it was customary to include an express power in the settlement, and even in the absence of such a power, the Court would sanction an advance in a proper case. Now, however, a wide power has been conferred *in respect of personalty settlements* as follows—

(1) Trustees may at any time or times pay or apply capital money subject to a trust, for the advancement or benefit, in such manner as they may in their absolute discretion think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that—

(*a*) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(*b*) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property, the money so paid or applied shall be brought into account as part of such share; and

(*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

The effect of this section has therefore been to make the insertion of a power of advancement unnecessary in trusts of personalty, except where it is desired to vary the powers conferred by the section, but the power should be retained in settlements of land. What constitutes an advancement necessarily depends upon the circumstances of the transaction. In *Taylor* v. *Taylor*,[1] it was said that an advancement by way of portion was something given by a parent to establish the child in life, as distinct from a casual payment,[2] and sums given on marriage, or on entry into a profession, or to purchase a business, or to supply further capital for a business have at various times been considered to be advancements. Small sums or temporary assistance are, however, outside the scope of the provision. In *Taylor* v. *Taylor*,[1] it was held that a father's discharge of his son's debts did not constitute an advancement; but in *Re Blockley*[3] Pearson, J., was of opinion that a sum given by a father to his son to pay his debts could be so considered. It is submitted that there is no real conflict here, as the circumstances of one transaction might easily preclude it from being so considered, although in the other case, the nature of the debts and their amount might point to the fact that a discharge of them amounted to an advancement of the son.

What constitutes an advancement.

In *Re Stimpson's Trusts*,[4] it was held that this section applied to land held on trust for sale, or the proceeds of sale, and in the same case it was pointed out that where the settlement provides that the interest of the tenant for life is given over on assignment, the giving of his consent to the advancement may occasion a forfeiture of his interest.[5]

In *Re Garrett*[6] Clauson, J., decided that where the life tenant is a married woman restrained from anticipation, she can validly consent to the advancement, notwithstanding the fact that this involves the alienation of part of the capital, and, therefore, of part of the income. In the same case it was also decided that the statutory power of advancement can be exercised in favour of an infant, although his interest is contingent upon the double event of attaining the age of twenty-one, and of surviving a previous life tenant.

In *Re Craven, Lloyds Bank Ltd.* v. *Cockburn* (*No.* 2),[7] there was an express power of advancement contained in a

[1] (1875), L.R. 20 Eq. 155.
[2] See also *Boyd* v. *Boyd* (1863), L.R. 4 Eq. 305; *Roper Curzon* v. *Roper Curzon* (1871), L.R. 11 Eq. 452; *Re Mead* (1918), 88 L.J. Ch. 86.
[3] (1885), 29 Ch.D. 250.
[4] [1931] 2 Ch. 77.
[5] See, however, *Re Hodgson*, [1913] 1 Ch. 34.
[6] [1934] Ch. 477.
[7] [1937] Ch. 431.

will, but limited by a proviso permitting advancement only for one or more of the following purposes: (*a*) the purchase of a dwelling-house; (*b*) the purchase of a business or share in a business; (*c*) the purchase of an annuity; (*d*) the payment of the expenses of an illness or serious operation. The Court held that this power would not cover the application of a sum of money by way of a deposit to permit the beneficiary to become a Lloyd's underwriter; and it was also held that the Court could not sanction the transaction under Sect. 57. For transactions to be approved under this section, they must be for the benefit of the trust as a whole, and not for a particular beneficiary alone.[1]

(4) Payment to an agent of the beneficiary.

4. Instead of receiving trust money in person, it is clear that a beneficiary may appoint an agent or attorney to receive it on his behalf, and the authority of the agent need not necessarily arise from a deed or writing. Nevertheless, the trustee must ensure in such cases that the purported authority is genuine, for if the trustee pays on the strength of it, and the beneficiary in fact gave no such authority, the trustee is liable to the beneficiary.[2] Furthermore, some relief has been given by Sect. 29 of the Trustee Act, 1925, which provides—

> A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying:
>
> Provided that—
>
> (*a*) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;
>
> (*b*) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

No protection against a forged power of attorney.

It will be seen that the section does not protect the trustee against a forged power of attorney, but it does protect him against one given by the beneficiary, but subsequently invalidated by some disabling act of the beneficiary himself.

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[1] In *Re Forster's Settlement*, [1942] Ch. 199, the settlement contained a special power of advancement with the consent of the tenent for life, who was an enemy alien. The Court held that the Court could not direct the exercise of the power, without the consent of the tenant for life, which could not be given.

[2] *Ashby* v. *Blackwell* (1765), 2 Eden 299.

Release of the trustee after distribution.

When the whole estate has been distributed, it is customary for the trustees to be released from all future claims. The release is usually by deed (at the expense of the trust fund) following an examination and settlement of the trust accounts, but it would seem that in strictness, in the absence of special circumstances, the trustee is not entitled to a release under seal. Thus, Kindersley, V.C., said in *King* v. *Mullins* [1]—

> In the case of an express trust, when the trust is apparent on the face of the deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of the fund, if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of executors, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore, he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release; but such a claim on the part of a trustee would, in strictness, be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release.

Before the trustees receive their discharge, they must allow the beneficiaries sufficient time to investigate the accounts [2] and any breaches of trust must be fully disclosed.[3]

Power of the trustees to pay money into Court.

Where there is any doubt as to the proper persons to whom to pay trust money, the trustee, as an alternative to payment of the sum into Court under Sect. 63, or in cases where this would not be appropriate, may proceed to the determination of the question by way of originating summons, under Order LV, Rule 3. This enables trustees, executors, administrators, or their beneficiaries to procure the determination, without administration by the Court of the estate or trust, of a number of questions arising out of or affecting trusts or persons interested in trusts, or to obtain an order for the administration of the estate without the formalities of an action. This mode of procedure is not applicable to questions of breach of trust, however, except by consent [4]; nor does the procedure apply where a person is claiming against the settlement. The procedure was formerly regarded as

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[1] (1852), 1 Drew. 311. And see *Chadwick* v. *Heatley* (1845), 2 Coll. 137.
[2] *Wedderburn* v. *Wedderburn* (1838), 4 My. & Cr. 50.
[3] *Cole* v. *Gibson* (1750), 1 Ves. Sen. 507; *Walker* v. *Symonds* (1818), 3 Swanst. 1, 58.
[4] *Per* Lord Macnaghten in *Dowse* v. *Gorton*, [1891] A.C. 202.

applicable only for the determination of simple questions,[1] but the present test is whether there is a conflict of evidence.

The "hotchpot" clause.

It remains to mention the "hotchpot clause," which is very frequently inserted in settlements for the purpose of producing an equality of distribution among beneficiaries, usually children or other issue. The chief question which arises for consideration in applying this clause is whether those beneficiaries who have been advanced must be charged with interest in bringing the sums they have already received into account. In *Re Rees*[2] and *Re Dallmeyer*,[3] the rule laid down was that where the testator makes an ordinary direction as to hotchpot, the interest is only chargeable on advances from the date of distribution (which, if there is a prior life interest, may obviously be postponed for a considerable period after the testator's death), and not from the date of advancement, whether the advancement was made by trustees in pursuance of the testator's directions, or by the testator himself in his lifetime. Furthermore, if the testator directs accumulation for a period after his death, the end of the period of accumulation is the period of distribution, and the estate for division is the amount of the estate at the expiration of the period of accumulation, not at the testator's death. Furthermore,

Valuation of advances.

for valuing the advance which has been made, the amount of the advance is calculated at the time when it was made, and not at the time of the testator's death or the date of distribution, so that if an encumbrance has been paid off by the child advanced, this must obviously be deducted.[4]

Valuation of life interests and reversions.

Sometimes life interests and reversionary interests have to be brought into hotchpot. The computation of these is frequently difficult, and there seems to be no uniform rule. If the actual value of the life interest is for any reason (e.g. death of the life tenant) precisely ascertainable, this is taken, otherwise the actuarial value must be accepted.[5]

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[1] *Re Giles* (1889), 43 Ch.D. 391; *Re Hargreaves* (1889), 43 Ch.D. 401.
[2] (1881), 17 Ch.D. 701. [3] [1896] 1 Ch. 372.
[4] *Re Beddington*, [1900] 1 Ch. 771; *Re Crocker*, [1916] 1 Ch. 25.
[5] *Eales* v. *Drake* (1876), 1 Ch.D. 217; *Wheeler* v. *Humphreys*, [1898] A.C. 506; *Re Metcalf*, [1903] 2 Ch. 424; *Re West*, [1921] 1 Ch. 533. In the valuation of advances for the purposes of the Administration of Estates Act, 1925, different rules are applied.

CHAPTER XV

THE TRUSTEE'S POWERS AND DUTIES IN THE ADMINISTRATION OF A TRUST—(*continued*)

"A TRUSTEE MAY NOT PROFIT FROM HIS TRUST"

Scope of the rule.

THE general rule that a trustee may not profit from his trust, and the corollary that if he does, he holds any profit so derived as a constructive trustee for his beneficiaries, has already been considered in discussing constructive trusts. Accordingly, it remains only to consider here the scope of the rule, which is very wide. Three main aspects of the rule require separate treatment—

1. Derivation of a direct profit by the trustee from handling the trust property.

2. Sale of trust property by a trustee to himself or to a co-trustee; with a consideration of the circumstances in which a trustee may purchase a beneficiary's interest.

3. Payment of trustees for services rendered.

A. DERIVATION OF A DIRECT PROFIT

What is a direct profit?

This would obviously be a violation of the fiduciary relation which exists for the benefit of the *cestui que trust*, and not for the benefit of the trustee. A good illustration is furnished by *Williams* v. *Barton*,[1] wherein a stockbroker's clerk, whose salary consisted of half the commission earned on business introduced by him, was held liable to account to a trust estate, of which he was a trustee, for half the commission paid to him in respect of the business of the trust estate which he had introduced to the firm. This case should be carefully distinguished from *Re Dover Coalfield Extension, Ltd.*,[2] in which a trustee whose qualification as director of a company was certain trust shares was held to be under no obligation to account to the trust estate for his salary as director, since the salary was paid to him for personal services and qualities, and was not a profit from the handling of the shares. In this case, the Court of Appeal do not seem to have taken into account the decision of Kekewich J. in *Re Francis*,[3] which was not cited. In that case, trustees held shares in a company, by virtue of which holding they became directors of the company. The learned judge held that they must account for their directors' fees to the trust estate, and that the sums so received must be treated as

[1] [1927] 2 Ch. 9. [2] [1908] 1 Ch. 65. [3] (1905), 74 L.J.Ch. 198.

capital. The ground of the distinction between the two cases seems to be that in *Re Francis* the holding of the shares automatically entitled the trustees to directorships, whilst in the later case, it gave them the qualification, but they were elected to the office.

A trustee may not enter into competition with his trust.

Furthermore, a trustee may not enter into competition with his trust, for he is placing himself in a position where his interest and his duty conflict. In *Re Thomson*,[1] the defendant was one of the executors and trustees of a will, in which a yachtbroker's business was bequeathed with instructions to the trustees to continue it. The defendant claimed the right to carry on a similar business in competition with the testator's, but the Court restrained him. It should be noticed (1) that the nature of the business was such as to render competition within the same town inevitable; and (2) the trustee opened the business after accepting the trust. Had the testator appointed the defendant his trustee knowing that the trustee conducted a business in competition with his own, the attitude of the Court might have been different.

Again, in *Webb* v. *Earl of Shaftesbury*,[2] where valuable sporting rights were attached to a trust estate, Lord Eldon directed an inquiry whether these could be let for the profit of the beneficiaries. If they could not, the rights could not be enjoyed by the trustees. They should be held for the benefit of the heir. There was no discussion in the decision whether the trustees could have hired the sporting rights in default of other tenants, but on general principles it would seem that they could not. In *Pooley* v. *Quilter*,[3] it was held that if trustees or executors bought up debts or encumbrances to which the trust estate was subject for less than was actually due, they held the profit for the appropriate beneficiaries. The same rule also applies to dealings by a solicitor in respect of the property of his client.[4]

Purchase of debts.

Advowsons.

If an advowson forms part of a trust estate, and the next presentation cannot be made profitable to the trust estate, it belongs to the beneficiaries or (formerly) the heir-at-law.[5] In *Johnstone* v. *Baber*,[6] the beneficiaries were tenants-in-common, and it was held they must cast lots for the right to present.

Payment of a sum to a trustee on retirement.

In *Sugden* v. *Crossland*,[7] an incoming trustee paid his predecessor a sum of money in consideration of his retirement,

[1] [1930] 1 Ch. 203.
[2] (1802), 7 Ves. 480.
[3] (1858), 2 De G. & J. 327.
[4] *Macleod* v. *Jones* (1883), 24 Ch.D. 289.
[5] *Hawkins* v. *Chappel* (1739), 1 Atk. 621.
[6] (1856), 6 De G.M. & G. 439.
[7] (1856), 3 Sm. & G. 192.

and it was held that this sum must also be treated as trust property. It is abundantly clear that a trustee cannot employ trust funds for commercial ventures of his own. If he does, he must account for the profits, or pay 5 per cent interest.[1]

The rule is not confined to express trustees.

The rule preventing a trustee obtaining a profit from the trust estate, like the rule preventing his purchase of trust property, is not confined to express trustees. It applies to all who occupy a fiduciary position, including agents, company directors, secretaries, and promoters, solicitors, and a number of others. Even if the beneficiaries under a trust die intestate without leaving any person who can take their interests by succession, or where the beneficiary is a corporation, which is dissolved and no disposition of the beneficial interest is made, the trustee still cannot take the benefit of it. It belongs to the Crown as *bona vacantia*.[2]

B. SALES OF TRUST PROPERTY BY A TRUSTEE TO HIMSELF OR TO A CO-TRUSTEE

This rule is absolute.

A trustee (other than a tenant for life under the Settled Land Act[3]) and also many other persons[4] who occupy fiduciary positions are absolutely prohibited from purchasing the trust property. This is an inflexible rule of most general application, and it is not founded upon any question of fraud on the part of the trustee. It is the logical consequence of the position which he occupies. This is illustrated by *Wright* v. *Morgan*,[5] wherein the trustee had acquired an option to purchase trust-property at a valuation to be given by another trustee. It might have been thought that the independent valuation would have ensured a fair sale, but the Privy Council was of opinion that the disability still existed, and moreover, the interests of the trustee as vendor and purchaser still conflicted in respect of selecting the moment of sale, which might obviously affect the price.

The rule finally established by Lord Eldon.

The foundations of this rule were laid in *Fox* v. *Mackreth*,[6] but it was exhaustively examined and developed by Lord Eldon during his lengthy tenure of office as Lord Chancellor, and he may be regarded as having placed it beyond the

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[1] See further *post*, p. 334.

[2] *Cave* v. *Roberts* (1836), 8 Sim. 214; *Re Higginson and Dean*, [1899] 1 Q.B. 325 (explained in *Re Sir Thomas Spencer-Wells*, [1933] 1 Ch. 29); Companies Act, 1929, Sect. 296.

[3] Settled Land Act, 1925, Sect. 68. [4] *Post* p. 307. [5] [1926] A.C. 788.

[6] (1789), 2 Bro. C.C. 400; see *Whelpdale* v. *Cookson* (1767), 1 Ves. Sen. 8, and also the notes to this case in White and Tudor's *Leading Cases in Equity*.

possibility of serious limitation. Thus, in *Ex parte Lacey*,[1] he observes—

> I disavow that interpretation of Lord Rosslyn's doctrine, that the trustee must make advantage. I say, whether he makes advantage or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *cestuis que trusts*, whether they will take back the property, or not; if the trustee has made no advantage. It is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of a hundred, whether he has made advantage, or not. Suppose a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the Court try against that denial?

In the very next case in the reports, *Lister* v. *Lister*, Sir[2] W. Grant, M.R., had to consider the case of trustees who had purchased trust property at an auction, and he held that it must be offered by auction again, the Master of the Rolls saying—

> The rule is a rule of general policy, to prevent the possibility of fraud and abuse; for it may not always be possible to know whether the property was undersold. I was not aware that the Lord Chancellor had laid down a general rule as to the terms; that the property should be set up again at the risk of the trustee. It is a very important consideration, whether that is to be taken as a general rule. If it is, I must adhere to it; but if it turns upon special circumstances, I see no special circumstances in this case. These lots must be resold at all events. The only question is, whether they shall be put up at the price at which the trustees purchased.

The report then continues—

> February 24th. The cause having stood over, the Master of the Rolls said he had mentioned it to the Lord Chancellor; and his Lordship said he meant to lay down a general rule, and understood it had been so established in Lord Thurlow's time.

In *Ex parte James*,[3] Lord Eldon again returned to a consideration of the rule, and extended it to a purchase of a bankrupt's estate by the solicitor to the bankruptcy commission, observing—

> This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more

[1] (1802), 6 Ves. 625, at p. 626*a*. [2] (1802), 6 Ves. 631.
[3] (1803), 8 Ves. 337.

upon general principle than upon the circumstances of any individual case. It rests upon this: that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Aberdeen Railway Co.* v. *Blakie Brothers*,[1] the House of Lords fully affirmed the breadth of the principle enunciated by Lord Eldon, and applied it to dealings between a director and his company. Lord Cranworth, L.C., there states—

A corporate body can only act by agents and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still so inflexible is the rule that no inquiry on the subject is permitted. The English authorities on this head are numerous and uniform. . . .

It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland. It so happens that one of the leading authorities on the subject is a decision of this House on an appeal from Scotland—I refer to the case of *The York Buildings Company* v. *Mackenzie*,[2] decided by your Lordships in 1795. There the respondent, Mackenzie, while he filled the office of "Common Agent" in the sale of the estate of the appellants, who had become insolvent, purchased a portion of them at a judicial auction; and though he had remained in possession for above eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this House held that filling as he did an office which made it his duty both to the insolvents and their creditors to obtain the highest price, he could not put himself in the

[1] (1854), 1 Macqueen 461; and see *York Buildings Co.* v. *Mackenzie* (1795), 8 Bro. P. C. 42.
[2] (1795), 8 Bro. P.C. 42.

position of purchaser, and so make it his interest that the price paid should be as low as possible. This was a very strong case, because there had been acquiescence for above eleven years; the charges of fraud were not supported, and the purchase was made at a sale by auction. Lord Eldon and Sir William Grant were counsel for the respondent, and no doubt everything was urged which their learning and experience could suggest in favour of the respondent. But this House considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session, and set aside the sale.

The principle, it may be added, is found in, if not adopted from, the Civil Law. In the Digest is the following passage: *Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores et qui negotia aliena gerunt.*[1]

The rule applies to property of all kinds; and to circuitous purchases.

The rule applies to property of all kinds, whether real or personal, whether in possession or in reversion. Moreover, the trustee may not sell to a person who is, in fact, a trustee for himself[2]; and all other circuitous arrangements to achieve the same result are equally invalid.[3] In particular, where the trustee has contracted to sell to a third person, he cannot re-purchase from that third person, so long as the contract remains executory.[4] On the other hand, a *bona fide* sale to a third person in the hope of subsequently acquiring the property from him is valid, provided that no agreement existed between trustee and purchaser at the time of the sale.

The trustee may not purchase as agent for a third party.

Since one of the reasons for the rule is the presumption of the trustee's superior knowledge of the value of the trust property, two further consequences follow. Whilst a trustee cannot purchase the trust property through an agent, neither can he purchase it as agent for a third party, for, as Lord Eldon observed in *Ex parte Bennett*,[5] "the Court can with as little effect examine whether that was done by making an undue use of the information, received in the course of their duty, in the one case as in the other." Secondly, a trustee, for the same reason, may not retire from the trust in order to purchase trust property. In *Re Boles and the British Land Company's Contract*,[6] Buckley, J., held that a trustee

Nor may he retire with a view to purchase.

[1] *Digest* XVIII, 1, xxxiv. 17. As far as the position of company directors *vis à vis* their company is concerned, this now depends upon the Companies Acts, and especially the Companies Act, 1929, and the decisions thereon which have seemed to deviate somewhat from the principle enunciated above. See further *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (1915), 84 L.J. Ch. 94 where the authorities are discussed.

[2] *Campbell* v. *Walker* (1800), 5 Ves. 678; 13 Ves. 601.

[3] *Whitcomb* v. *Minchin* (1820), 5 Madd. 91; *Re Bloye's Trust* (1849), 1 Mac. & G. 488, 495.

[4] *Williams* v. *Scott*, [1900] A.C. 499.

[5] (1805), 10 Ves. 381, 400.

[6] [1902] 1 Ch. 244.

who had retired from the trust twelve years before was entitled to purchase trust property, there being no evidence that he was taking advantage of knowledge gained whilst a trustee. Similarly, a trustee who has disclaimed a trust without ever having acted may purchase.[1]

Again, a trustee for sale cannot lease to himself since this is, in effect, a partial sale, and when the lease is set aside, he may be made to account for all profits.[2]

The sale is void against the trustee, and against all subsequent purchasers with notice of the flaw in title.

It has been stated that the beneficiary can set aside the sale without proof of loss, and this he may do, not only as against the trustee himself, but also against all subsequent purchasers who have notice of the flaw in the title.[3] In fact, the only safe course for a trustee who wishes to purchase trust property from his co-trustees is to apply to the Court for leave to purchase. This will only be given where the sale is clearly to the advantage of the beneficiaries.[4] If this appears, the fact that the beneficiary is an infant will not prevent the Court from giving permission, if it is necessary for the property to be sold.[5]

The rule even goes so far as to provide that a trustee cannot purchase in the name of his children,[6] although the mere fact that the purchaser is related to the trustee is not of itself a ground for setting the transaction aside;[7] and it should be observed that a trustee may sell to a company of which he is a shareholder,[8] although even here the beneficiary may attack it. Thus, in *Farrar* v. *Farrars, Ltd.*,[9] three mortgagees sold the mortgaged property to a company of which one of them was a shareholder, and also the promoter and solicitor. Although the sale was upheld, since the mortgagees had obtained the best price possible in the circumstances, the Court held that the mortgagees must undertake the task of showing that the transaction was a proper one. It is noteworthy that a mortgagee is not a trustee of his power of sale, and it would, therefore, seem an irresistible conclusion that where the vendor is a trustee, the duty is at least as high as that of an encumbrancer who is exercising his power of sale.

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[1] *Stacey* v. *Elph* (1833), 1 My. & K. 195; and see *Clark* v. *Clark* (1884), 9 App. Cas. 733.

[2] *Ex parte Hughes* (1802), 6 Ves. 617.

[3] *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544.

[4] *Farmer* v. *Dean* (1863), 32 Beav. 327.

[5] *Campbell* v. *Walker* (1800), 5 Ves. 678; 13 Ves. 601.

[6] *Gregory* v. *Gregory* (1815), Jac. 631.

[7] *Coles* v. *Trecothick* (1804), 9 Ves. 234.

[8] *Silkstone Coal Co.* v. *Edey*, [1900] 1 Ch. 167

[9] (1889), 40 Ch.D. 395, cf. *Belton* v. *Bass, Ratcliffe and Gretton, Ltd.*, [1922] 2 Ch. 449.

The rule applies to all in a fiduciary position.

The general rule here enunciated applies also to all persons who occupy a fiduciary position, although perhaps not with the same rigidity as to trustees. Thus, an executor or administrator should not normally purchase the assets of the deceased,[1] although it would appear that if he acts entirely openly, and with the assent of all interested parties, and the best price was obtained, the sale may be allowed to stand, if the beneficiaries at the time of the sale knew the whole of the relevant facts.[2] In substance, this amounts to a purchase from beneficiaries.[3] In *John* v. *Jones*,[4] a sale by an administratrix to her son was held invalid on the grounds of relationship. Where a personal representative has not proved, however, he may purchase.[5]

And to the trustee in bankruptcy.

It has already been noticed that under the old bankruptcy laws an assignee in bankruptcy was entirely prohibited from purchasing the bankrupt's property,[6] and this is now expressly provided for in the Bankruptcy Rules,[7] and the incapacity has been extended to the partner of the trustee in bankruptcy.[8]

The position of agents who acquire special knowledge as a result of employment.

Agents whose employment is such that they acquire special knowledge of the circumstances affecting the property of their principal are also debarred from purchasing it, unless they can show that they have acted in perfect fairness, have given full value, and have put their principals in possession of all the knowledge relating to the property which they possess.[9] Similarly, if an agent has an interest in a sale to a third party, he must disclose it in full.[10] It is, of course, a cardinal rule of agency that the agent should account to his principal for any commission or profit made by the agent on the transaction.[11] This last rule extends to partners, since each partner is an agent for the others in respect of partnership business.[12] There is, however, nothing to prevent a

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[1] *Hall* v. *Hallet* (1784), 1 Cox 134; *Watson* v. *Toone* (1820), 6 Madd. 153; *Re Harvey* (1888), 58 L.T. 449; *Beningfield* v. *Baxter* (1886), 12 App. Cas. 167.

[2] *Watson* v. *Toone*, *supra*; *Champion* v. *Rigby* (1830), 1 R. & M. 539; *Baker* v. *Read* (1854), 18 Beav. 398; *Smedley* v. *Varley* (1857), 23 Beav. 358.

[3] See *post* p. 310.

[4] (1876), 34 L.T. 570.

[5] *Clark* v. *Clark* (1884), 9 App. Cas. 733.

[6] *Ex parte Bennett* (1805), 10 Ves. 380.

[7] Rule 316.

[8] *Ex parte Forder*, [1881] W.N. 117; *Re Moore* (1881), 30 W.R. 123.

[9] *Lowther* v. *Lowther* (1806), 13 Ves. 103; *Charter* v. *Trevelyan* (1866), 11 Cl. & F. 714.

[10] *Imperial Mercantile Assn.* v. *Coleman* (1873), L.R. 6 H.L. 189.

[11] *De Bussche* v. *Alt* (1878), 8 Ch.D. 286.

[12] *Featherstonhaugh* v. *Fenwick* (1810), 17 Ves. 298; *Beningfield* v. *Baxter* (1886), 12 App. Cas. 167.

surviving partner from purchasing the share of a deceased partner, provided that the transaction is an entirely fair one;[1] and where a partner himself sells his share to a co-partner, he must put the co-partner into possession of all the material facts.[2]

Solicitor and client.

The relationship of solicitor and client has been the subject of particular scrutiny in regard to the question: In what circumstances, if at all, may the solicitor purchase the property of his client, or sell his own property to a client? The general rule was stated by Wigram, V.C., in *Edwards* v. *Meyrick*,[3] as follows—

> The rule of equity which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should stand. . . . In the case of *Gibson* v. *Jeyes*[4] there was evidence that the client was of advanced age, and of much infirmity, both in mind and body, that the consideration was inadequate—and of various other circumstances. Lord Eldon there shows that each of these circumstances gave rise to its appropriate duty on the part of the attorney. In other cases where an attorney has been employed to manage an estate he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his advantage.[5] But, as the communication of such knowledge by the attorney will place the parties upon an equality, when it is proved that the communication was made, the difficulty of supporting the transaction is *quoad hoc* removed. If, on the other hand, the attorney has not had any concern with the estate respecting which the question arises, the particular duties to which any given situation of confidence might give rise cannot of course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult—and without the clearest evidence that no advantage was taken by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible—to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendancy, placing the client in circumstances of disadvantage; as where

[1] *Chambers* v. *Howell* (1847), 11 Beav. 6.
[2] *Law* v. *Law*, [1905] 1 Ch. 140.
[3] (1842), 2 Hare 60. See also *Spencer* v. *Topham* (1856), 22 Beav. 573.
[4] (1801), 6 Ves. 266.
[5] *Cane* v. *Lord Allen* (1814), 2 Dow. 289.

he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties in such a case must at least impose upon the attorney the duty of giving the full value for the estate, and the *onus* of proving that he did so. If he proves the full value to have been given the ground for any unfavourable inference is removed. The case may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exists in one transaction, and therefore, personal influence or ascendancy may operate in another, yet the relation not existing *in hac re*, the rule of equity to which I am now adverting may no longer apply.

The nature of the proof, therefore, which the Court requires must depend upon the circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence or ascendancy or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length and on an equal footing.[1]

Conditions under which the solicitor may purchase.

It will be seen that the equitable rule really rests upon the supposition that the solicitor may obtain some unwarranted advantage as a result of undue influence, and under the head of "Undue Influence" it has, therefore, been considered already. The law on this topic was reviewed in *Wright* v. *Carter*,[2] where it was held that a solicitor may purchase, under the conditions stated by Wigram, V.C., if the price is fair, the client was fully informed, and the client had competent independent advice from another solicitor, who does all that is necessary to protect his client's interests.

Purchase of a Beneficiary's Interests by a Trustee.

In sales by beneficiary to trustee, the trustee must take no advantage of his position.

The purchase of a beneficiary's interest by a trustee stands on rather a different footing from a purchase of trust property by a trustee from himself or a co-trustee. Here there is no absolute prohibition, but the trustee must take no advantage whatever of his position. He must give the beneficiary the fullest information relating to his interest, and furthermore, it would seem that the sale will always be voidable if the consideration is in the opinion of the Court inadequate.[3]

[1] *Gibson* v. *Jeyes*, *supra*; *Hatch* v. *Hatch* (1804), 9 Ves. 292; *Wells* v. *Middleton* (1784), 1 Cox. 112; 18 Ves. 127; *Wood* v. *Downes* (1811), 18 Ves. 120; *Bellew* v. *Russell* (1809), 1 B. & B. 96; *Montesquieu* v. *Sandys* (1811), 18 Ves. 302; *Hunter* v. *Atkins* (1832), 3 My. & K. 113; *Re Haslam & Hier-Evans*, [1902] 1 Ch. 765; *Wright* v. *Carter*, [1903] 1 Ch. 27; *O'Brien* v. *Lewis* (1865), 32 L.J.Ch. 569; *Holman* v. *Loynes* (1854), 4 De G.M. & G. 270.

[2] [1903] 1 Ch. 27.

[3] *Ex parte Lacey* (1802), 6 Ves. 626; *Coles* v. *Trecothick* (1804), 9 Ves. 234; *Luff* v. *Lord* (1864), 34 Beav. 220; *Williams* v. *Scott*, [1900] A.C. 499; *Dougan* v. *MacPherson*, [1902] A.C. 197.

Before the transaction takes place, either the relation of trustee and beneficiary should have been terminated,[1] or alternatively the parties should be at arm's length, and the *cestui que trust* should clearly understand the nature of the transaction, and agree to waive all objections.[2] Each case will obviously depend upon its own merits, but probably the best illustration of the circumstances in which such a sale was held to be valid is furnished by *Coles* v. *Trecothick*,[3] wherein the beneficiary took complete charge of the sale (which was by auction), approving the auctioneer, the plan of sale and the price, and the sale was held good.

On the other hand, in *Dougan* v. *MacPherson*,[4] two brothers, A and B, were beneficiaries under a trust. A was also a trustee, but B was not, and A purchased B's interest without showing him a valuation of the trust estate made for the purpose of obtaining a loan on A's share. If the valuation was correct, B's share was worth considerably more than A paid for it. When B subsequently went bankrupt, B's trustee in bankruptcy succeeded in setting aside the sale.

Remedies of the Beneficiary.

The relief granted to a beneficiary, where the trustee purchases from the beneficiary is, of course, equitable, and therefore the beneficiary should seek it with reasonable promptitude after becoming acquainted with the real nature of the transaction. If, however, the beneficiary is subject to a disability, he cannot be considered as in a position effectively to prosecute his rights until that disability has ended.[5] Moreover, whilst the beneficiary remains in ignorance of the fact that the trustee was the purchaser, it is clear that *laches* will not bar the beneficiary's remedy.[6]

The beneficiary must seek relief with promptitude.

If the beneficiary does not prosecute his rights within a reasonable time after becoming aware of the true facts, and not being subject to any disability, he is treated as acquiescing in the transaction and that it was in all respects fair.[7] No exact period has been prescribed by the Court, since there is no statute of limitations applicable, but in general the Court will not reopen a transaction which has stood for twenty

Acquiescence by the beneficiary.

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[1] *Downes* v. *Glazebrook* (1817), 3 Mer. 208.
[2] *Randall* v. *Errington* (1805), 10 Ves. 427.
[3] (1804), 9 Ves. 234. See also *Morse* v. *Royal* (1806), 12 Ves. 355; *Clarke* v. *Swaile* (1762), 2 Eden 134.
[4] [1902] A.C. 197.
[5] *Campbell* v. *Walker* (1800), 5 Ves. 678; (1807), 13 Ves. 601.
[6] *Chalmer* v. *Bradley* (1819), 1 Jac. & W. 51.
[7] *Morse* v. *Royal*, *supra*.

years,[1] although in some cases relief has not been granted when a lesser period has supervened.[2]

Reconveyance to the beneficiary.

In general, the beneficiary is entitled to have the property reconveyed to him, either by the trustee,[3] or by a person who has purchased from the trustee with notice of the voidability of the original sale.[4] The trustee is entitled to an allowance for repairs and improvements which are permanent,[5] but the interests of lessees and others who have dealt with the trustee before the sale (except the purchasers with notice) are not prejudiced by the beneficiary's action.[5]

In some cases, more especially where an assignee in bankruptcy has purchased, it has been held that the property should be put up for auction again, at the price at which the trustee purchased; if there is no bidding, the trustee should be held to his bargain.[6]

A sale by a trustee to a purchaser without notice cannot be impeached, but the trustee must account or make good any loss.

If the trustee has resold to a *bona fide* purchaser for value without notice of the invalidity, the sale cannot then be impeached, but the trustee will be compelled to account for the difference between the price he gave and the price he received,[7] or alternatively for the difference between the price paid and the true value, with interest at 4 per cent.[8]

C. PAYMENT TO A TRUSTEE FOR HIS SERVICES

Basis of the rule that a trustee acts gratuitously.

It is a general rule of Equity that a trustee must administer his trust gratuitously, and this is the case, notwithstanding the fact that the completion of his undertaking involves considerable loss of time and much personal inconvenience.[9] The reason for this rule, according to Lord Talbot, is that otherwise the estate would be rendered of little value in consequence of administration costs; and furthermore, it is exceedingly difficult to estimate the value of one man's time and trouble, as compared with another's.[10] Another reason for the rule was expressed by Chitty, J., in *Re Barber*[11] (wherein it was declared to extend also to executors) as follows—

> Now, undoubtedly a solicitor who is a trustee is not allowed

[1] *Barwell* v. *Barwell* (1865), 34 Beav. 371.
[2] *Gregory* v. *Gregory* (1815), Jac. 631; *Baker* v. *Read* (1854), 18 Beav. 398.
[3] *Aberdeen Town Council* v. *Aberdeen University* (1877), 2 App. Cas. 544.
[4] *Dunbar* v. *Tredennick* (1813), 2 B. & B. 304.
[5] *York Buildings Company* v. *Mackenzie* (1795), 8 Bro. P.C. 42.
[6] See *Lister* v. *Lister*, (1802), 6 Ves. 631.
[7] *Fox* v. *Mackreth* (1788). 2 Br.C.C. 400.
[8] *Lord Hardwicke* v. *Vernon* (1800), 4 Ves. 411; *Hall* v. *Hallet* (1784), 1 Cox. 134.
[9] *Re Thorpe*, [1891], 2 Ch. 360; *Barrett* v. *Hartley* (1866), L.R. 2 Eq. 789.
[10] *Robinson* v. *Pett* (1734), 3 P.Wms. 249.
[11] (1886), 34 Ch.D. 77, 80–1.

to make a profit out of his trusteeship, and the same rule applies to him in regard to executorship. He stands, in respect of this general principle, in the same position as a broker, commission agent, or the like, who may be appointed trustee or executor, and who may transact some of the business relating to the estate which requires the assistance of either broker, commission agent, or the like, and if the executor or trustee transacts business of that kind for the estate, he is allowed, of course, his costs out of pocket, that is to say the expenditure, but not anything for his time or trouble. That principle is based upon this consideration, that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict. If it were not the rule, a trust estate might be heavily burdened by reason of business being done by a trustee or executor employing himself as commission agent for the estate. The difficulty would be in saying in each particular case that the business was not required to be done.[1]

Furthermore, it may be noticed that a trustee will not, in general, be appointed receiver of the trust estate at a salary,[2] whilst if a trustee is a banker, and is not authorised to charge, he cannot, as trustee, borrow money from himself as banker, at compound interest, even although this is the normal usage of banker and customer.[3]

Employment of a partner by a solicitor-trustee.

It may be that the solicitor-trustee, instead of undertaking the work himself, employs a partner to perform it. This was considered in *Re Doody*,[4] where Stirling, J., observed[5]—

As a general rule, neither a solicitor-trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust. To this general rule there are some exceptions, to one of which I may refer at once. It was decided by Lord Hatherley when Vice-Chancellor, in *Clack* v. *Carlon*,[6] that a solicitor-trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient. In particular it was decided in *Christophers* v. *White*[7] that the general rule applies, although all the business has been transacted by the partners of the solicitor-trustee, and not by the trustee himself.

[1] See also *New* v. *Jones* (1833), 1 Mac. & G. 668, and *Barrett* v. *Hartley* (1866), L.R. 2 Eq. 789.
[2] *Re Bignell*, [1892] 1 Ch. 59.
[3] *Crosskill* v. *Bower* (1863), 32 Beav. 86.
[4] [1893] 1 Ch. 129. [5] At p. 134.
[6] (1861), 30 L.J.Ch. 639.
[7] (1847), 10 Beav. 523. And see *Re Corsellis* (1887), 34 Ch.D. 675.

In *Re Gates*,[1] a solicitor-trustee employed his firm (including himself) to act as solicitors to the trust, and Clauson, J., held that as the trust instrument contained no power to charge, the firm could not charge profit costs, even though there was an agreement that the solicitor-trustee should have no share of them. In *Re Hill*,[2] the Court of Appeal were of the same opinion.

To the general rule stated above, the following exceptions have in course of time been established—

(1) By Agreement with the Beneficiaries.

Exception (1) By agreement.

A trustee is entitled to contract with his beneficiaries, provided they are all *sui juris* and absolutely entitled to the entire trust estate, that he shall be paid. This is a contract which must be concluded without any pressure whatever by the trustee upon the beneficiary, and it is regarded with suspicion by the Court. Furthermore, it must be concluded before the trustee has entered into the administration of the trust.[3] There would seem to be nothing to prevent a single adult beneficiary agreeing to pay, but that would affect his interest only.

(2) By Authority of the Court.

(2) By authority of the Court.

The Court may, in very special circumstances, and where the trustee is put to exceptional trouble, direct that the trustee shall be paid, but it will only do this where the trustee's services are exceptionally beneficial to the estate.[4] Thus, in *Re Freeman's Settlement Trust*,[5] two of the three trustees were in Canada, and the third was the agent of the estate. He declined to be appointed unless he was paid, and the Court allowed him 5 per cent on the rents he collected.

(3) The Public Trustee, Judicial Trustees, and Trust Corporations.

(3) The Public Trustee, judicial trustees, and trust corporations.

The Public Trustee and judicial trustees are entitled to charge for their services,[6] whether or not there is any power contained in the trust instrument to charge. When a trust corporation (other than the Public Trustee) is appointed, a power to charge is invariably given, but apart from it there is no statutory power to charge, and therefore they are not

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[1] [1933] 1 Ch. 913. [2] [1934] Ch. 623.

[3] *Ayliffe* v. *Murray* (1740), 2 Atk. 58; *Re Sherwood* (1840), 3 Beav. 338; *Douglas* v. *Archbutt* (1858), 2 De G. & J. 148.

[4] *Marshall* v. *Holloway* (1818), 2 Swanst. 432; *Re Freeman's Settlement Trust* (1887), 37 Ch.D. 148.

[5] *Supra.*

[6] Public Trustee Act, 1906, Sect. 9; Public Trustees (Fees) Order, 1925; Judicial Trustee Act, 1896, Sect. 1.

privately appointed subsequently, unless all the beneficiaries are of full age, and consent. If the Court appoints a trust corporation, however, it may authorize it to charge what remuneration the Court thinks fit.[1]

The difficulties arising from the absence of a power to charge if the trustee is a trust corporation are emphasised by the decision of the Court of Appeal in *Forster* v. *Deacon's Bank*.[2] In that case, under a trust in which the trustees had no power to charge for their services, a sole trustee wished to retire in favour of Deacon's Bank. He therefore executed a deed by which he purported to appoint the bank as (*a*) managing trustee, and (*b*) custodian trustee. Under the Public Trustee Act, 1906, a custodian trustee may always charge for its services. The Court of Appeal held, however, that the bank could not split its functions in this way. If the deed operated at all, it operated to create the bank sole trustee, in which case the inability to charge remained. This case was followed in *Arning* v. *James*[3] in which it was decided that the purported appointment was a complete nullity.

(4) The Rule in Cradock *v.* Piper.[4]

(4) The rule in *Cradock* v. *Piper*.

It has been observed that a solicitor is in the same position as any other person as regards his inability to charge for his services. There exists, however, a curious limitation upon this exception, known as the *Rule in Cradock* v. *Piper*,[3] which may be stated as follows—

> Where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense; that is to say, if the trustee himself has not added to the expense which would have been incurred if he or his firm had appeared only for his co-trustee.[5]

The reason for this rule is stated by Cotton, L.J., to be—

> For that there is an obvious reason—that it is not the business of a trustee, although he is a solicitor, to act as solicitor for his co-trustee. But the exception in *Cradock* v. *Piper* is limited expressly to the costs incurred in respect of business done in an action or a suit, and it may be an anomaly that exception should apply to such a case, and should not apply to business done out of Court by the solicitor for himself as trustee and his co-trustee. But there may be

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[1] Trustee Act, 1925, Sect. 42.
[2] [1935] Ch. 359.
[3] [1936] 1 Ch. 158.
[4] (1849), 1 Mac. & G. 664.
[5] *Per* Cotton, L.J., in *Re Corsellis*, (1887), 34 Ch.D. 675 at p. 681.

this reason for it, that in an action, although costs are not always hostilely taxed, yet there may be a taxation where parties other than the trustee-solicitor may appear and test the propriety of the costs, and the Court can disallow altogether the costs of any proceedings which may appear to be vexatious or improperly taken.[1]

Although the rule (which extends to litigation only) has been subjected to some criticism, it is now firmly established,[2] but it is regarded as anomalous, and though its consequences will not be unduly circumscribed, the principle will not be extended.[3] It does not apply to a liquidator who is a solicitor, and who conducts legal proceedings on behalf of himself and his co-liquidator.[4]

(5) Possibly where the Trust Property is Abroad and the Law of the Foreign Country Allows Payment

(5) Possibly where the trust property is abroad, and payment is allowed by the local law.

By an Act of the Jamaica Assembly of 1740, trustees and agents, amongst others, were permitted to charge a commission for their services. In *Chambers* v. *Goldwin*,[5] a Jamaican trustee delegated the management of the trust property in Jamaica to an agent and returned to England. Lord Eldon held that he could not have his commission whilst he remained in England, leaving open the question whether he would have been entitled to recover the commission for the time when he was resident in Jamaica and in entire management of the estates.

(6) Where the Trustee is permitted by the Trust Instrument to Charge for his Services.

(6) Where payment is authorised in the trust instrument.

If the settlement permits the trustee to charge for his services, he may of course be paid; and if the settlement is by will, it is regarded as a legacy to the trustee, and as such is subject to legacy duty.[6] From this, it follows that if the solicitor attests the will, he loses his right to charge,[7] and he cannot charge profit costs if the estate is insolvent.[8]

Charging clauses are construed strictly, so that if a solicitor or other agent is entitled to charge for "professional

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[1] *Re Corsellis* (1887), 34 Ch.D. 675 at p. 682.

[2] *Broughton* v. *Broughton* (1854), 5 De G.M. & G. 160; *Lincoln* v. *Windsor* (1851), 9 Hare 160; *Re Barber*, (1886), 34 Ch.D. 77.

[3] *Per* Lindley, L.J., in *Re Corsellis, supra*, at pp. 687–8.

[4] *Re Gertzenstein Ltd.*, [1937] Ch. 115.

[5] (1802–4), 9 Ves. 271.

[6] *Ellison* v. *Airey* (1748), 1 Ves. Sen. 111, 114; *Re Thorley*, [1891] 2 Ch. 613. But it is not the practice of the Estate Duty Office to claim legacy duty on such legacies.

[7] *Re Barber, supra*; *Re Pooley* (1888), 40 Ch.D. 1.

[8] *Re White*, [1898] 2 Ch. 217.

services" only those services which are strictly within the term may be charged for.[1] Wider clauses are scrutinised carefully, although if drawn sufficiently widely, the taxing master has power to allow costs for services not strictly professional.[2] In *Re Chalinder and Herrington*,[3] the clause stated that the solicitor should be allowed "all professional and other charges for his time and trouble, notwithstanding his being such executor and trustee." The Court held that this did not entitle the solicitor to charge for work not professional, which could have been done personally by a trustee who was not a solicitor. In *Re Chapple*,[4] Kay, J., commenting on the form which includes the words "including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed in person by a trustee not being a solicitor," said that a clause of this description should not be inserted by a solicitor in a will unless the testator has expressly instructed him to insert those very words.

D. THE TRUSTEE'S RIGHT TO INDEMNITY

The right to indemnity is now statutory.

Although not entitled to payment for his services, a trustee is entitled to reimburse himself for his expenses, incurred in the administration of the trust, and the Trustee Act, 1925, Sect. 30 (2), now expressly provides that "a trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers." This has rendered unnecessary any indemnity clause, which used to provide that a trustee should not be liable for the acts and defaults of a co-trustee,[5] and should have a right to recover his necessary expenses from the estate.[6] Thus, if the trustee is under an obligation to pay calls on trust shares, the trustee can recover the amount from the estate.[7] So also, where a testator has directed his executors or trustees to continue his business (but not otherwise), they have a right of indemnity against the estate. If the creditors of the deceased have assented to the continuance of the business, the trustees' right of indemnity takes precedence of their claims also.[8]

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[1] *Clarkson* v. *Robinson*, [1900] 2 Ch. 722; *Re Chalinder and Herrington*, [1907] 1 Ch. 58.
[2] *Re Ames* (1883), 25 Ch.D. 72. [3] *Supra*.
[4] (1884), 27 Ch.D. 584.
[5] Now included in Trustee Act, 1925, Sect. 30 (1), *post*, p. 339.
[6] See *Westley* v. *Clarke* (1759), 1 Eden 357.
[7] *James* v. *May* (1873), L.R. 6 H.L. 328; *Hobbs* v. *Wayet* (1887), 36 Ch.D. 256.
[8] *Dowse* v. *Gorton*, [1891] A.C. 190.

The right is a first charge upon corpus and income of the trust property.

The right of indemnity is a first charge on the trust estate, both of corpus and income, taking precedence of the beneficiaries' interests; and the trustee has a lien to enforce it.[1] The fact that the beneficiary is subject to a disability, as for example where the beneficiary is a married woman subject to a restraint on anticipation, makes no difference to the right.[2]

The right is normally confined to the trust property; but it is against the beneficiary personally if he is *sui juris* and absolutely entitled.

The right of the trustee to indemnity is normally proprietary and not personal; that is to say, it is limited to the amount of the trust property, but where the beneficiary is *sui juris* and absolutely entitled, "the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the *cestui que trust* a personal obligation enforceable in Equity to indemnify his trustee."[3] This is obviously because the trustee in such a case is no more than an agent, to fulfil the orders of his beneficiary. It should be observed, however, that trustees of members' clubs are not within this principle, inasmuch as it is a condition of membership that members shall not be liable beyond the amount of their subscriptions.[4]

The right of indemnity in respect of actions brought by him.

The trustee's right to indemnity in respect of litigation prosecuted by him as trustee requires special consideration. Wherever he has obtained leave of the Court to sue or defend as a trustee, he will be entitled to an indemnity in respect of costs; and leave will always be given where the litigation is in the interests of the trust estate.[5] Even where leave of the Court has not been obtained before the action is brought, the trustee will still be entitled to his costs where the action was properly brought for or on behalf of the trust estate, although in such a case, the onus of proving this will be upon the trustee.[6] Thus, in *Walters* v. *Woodbridge*,[7] beneficiaries sought to set aside a decree for a compromise, alleging fraud on the part of one of the trustees in obtaining the decree, but when the charge failed to receive the support of the Court, the bill was dismissed, and costs were awarded against the beneficiary. As he could not pay, the Court ordered them to be paid out of the trust estate, since the trustee had been defending his character in the capacity of a trustee. In *Turner* v. *Hancock*,[8] Jessel, M.R., pointed out that it is not

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[1] *Stott* v. *Milne* (1884), 25 Ch.D. 710.
[2] *Re Andrews* (1885), 30 Ch.D. 159.
[3] *Per* Lord Lindley in *Hardoon* v. *Belilios*, [1901] A.C. 118.
[4] *Wise* v. *Perpetual Trustee Co., Ltd.*, [1903] A.C. 139.
[5] *Stott* v. *Milne*, *supra*.
[6] *Re Beddoe*, [1893] 1 Ch. 547.
[7] (1878), 7 Ch.D. 504.
[8] (1882), 20 Ch.D. 303.

the function of the Court to discourage persons from becoming trustees by inflicting costs upon them if they have performed their duties properly, or even if they have committed an innocent breach of trust. On the other hand, if the trustee has brought an action as a trustee, which is of a distinctly speculative nature, and which is unsuccessful, he will not usually be allowed his costs, even though he has acted in good faith, and under legal advice.[1]

What is included in "expenses."

What may properly be regarded as expenses of the trustee lies ultimately within the discretion of the taxing master, but it should be remembered that trustees now possess under Sects. 23 and 25 of the Trustee Act, 1925, wide powers to appoint agents, where a prudent man would do so on his own behalf and the expenses incurred in employing these persons are out of pocket expenses of the trustee.[2] In *Re Raybould*,[3] a trustee continued the colliery business of his testator, and in doing so let down the surface, so that heavy damages were awarded against him. These were held to be expenses which could be recovered out of the trust estate. This case also illustrates the application of the doctrine of subrogation to third persons to whom trustees are indebted. This doctrine allows a creditor of a trustee to stand in the trustee's place, and recover directly from the trust estate, and this is what happened in *Re Raybould*.[3] Equity, however, will not allow a trustee to be indemnified out of the trust estate if he is himself in default to the estate, from which it follows that in such a case the creditor himself would be unable to recover from the estate by virtue of the doctrine, although he would still have his remedy against the trustee. But if there are several trustees, some of whom are in default, and some are not, the creditor is entitled to be subrogated to those trustees who are not in default.[4]

The doctrine of subrogation.

In *Re Ormrod's Settled Estates*,[5] a trustee was allowed his costs incurred in opposing in Parliament a bill affecting the trust estate, whilst in *How* v. *Winterton*,[6] a subscription to a voluntary school, made to avoid the increased expense of a school-board was allowed; and in *Hamilton* v. *Tighe*,[7] the Court allowed costs incurred in establishing a right to a several fishery which formed part of the trust estate.

When a trustee will be ordered to pay costs;

It would appear that in general a trustee will not be ordered to pay costs, unless he has acted dishonestly,

[1] *Re England*, [1918] 1 Ch. 24.
[2] *Re Bennett*, [1896] 1 Ch. 778.
[3] [1900] 1 Ch. 199.
[4] *Re Frith*, [1902] 1 Ch. 342.
[5] [1892] 2 Ch. 318.
[6] [1896] 2 Ch. 626.
[7] [1898] 1 Ir.R. 123

or will be deprived of them.

vexatiously, or unreasonably, or where he refuses or neglects to perform his duty, and this is the direct cause of the proceedings which are instituted.[1] On the other hand, the trustee may be deprived of his costs, or of part of them, for much less serious reasons, as where he defends an action without obtaining leave, and the Court considers that it should not have been defended.[2]

Where the trustee incurs expense at the request of a beneficiary.

It has been stated that, except where there is a sole beneficiary, *sui juris*, the trustee's right to indemnity is against the trust estate only. It should be added, however, that if a trustee incurs expense at the request of a beneficiary, and the trust estate proves insufficient to indemnify him, the trustee may then recover against the beneficiary personally, provided that the latter is not subject to a disability.[3]

The trustee should keep a strict account of his expenses, although failure to do so will not necessarily be fatal. In the old case of *Hethersell* v. *Hales*,[4] the trustee failed to do so, but put in a general claim for £2,500. The Court, after full consideration, allowed the trustee £2,000.

Finally, it may be stated as a general principle that a trustee has no claim for indemnity for expenses incurred not in fulfilment of his duties as a trustee,[5] and he may not exercise his right if he has committed a breach of trust before he has made reparation to the trust estate in respect of it.

E. THE TRUSTEE'S DUTY TO ACCOUNT AND FURNISH INFORMATION

Every accounting party, including trustees, personal representatives and agents, must be ready with his accounts when properly called upon. It is also the duty of a trustee to furnish the beneficiary with all reasonable information concerning the manner in which the trust property is being handled. If the trustee declines to do so when called upon, the beneficiary may apply to the Court, and the trustee will then be ordered to pay the costs of the application personally.[6] The beneficiary's right to inspect the accounts may be exercised by himself or by his solicitor,[7] but if he

The trustee must be ready with his accounts.

[1] *Lloyd* v. *Spillet* (1740), 3 P.Wms. 346; *Taylor* v. *Glanville* (1818), 3 Madd. 176; *Re Chapman* (1896), 72 L.T. 66; *Moore* v. *Prance* (1851), 9 Hare 299; *Hardwicke* v. *Vernon* (1807), 14 Ves. 504; *Marshall* v. *Sladden* (1849), 4 De G. & S. 468.

[2] *Re Beddoe*, *supra*.

[3] *Balsh* v. *Hyham* (1728), 2 P.Wms. 453; *Jervis* v. *Wolferston* (1876), L.R. 18 Eq. 18; *Frazer* v. *Murdoch* (1881), 6 App. Cas. 855; *Whitaker* v. *Kershaw* (1890), 45 Ch.D. 320.

[4] (1680), 2 Cas. in Ch. 158. [5] *Leedham* v. *Chawner* (1858), 4 K. & J. 458.

[6] *Re Skinner*, [1904] 1 Ch. 289; *Re Linsley*, [1904] 2 Ch. 785.

[7] *Kemp* v. *Burn* (1863), 4 Giff. 348.

requires a copy, that will be supplied at his expense,[1] and the employment of a solicitor by the beneficiary will also be at the beneficiary's expense. If the beneficiary is not in possession he is only entitled to a capital account, and in this connection the question of apportionment should be watched. Similarly, if the beneficiary requires information of such a nature that it does not require to have been incorporated in the account, the procuring of which involves expense, the beneficiary must again defray it.

Any person who has an interest in the trust property may demand information, whether his interest is vested or contingent.[2] However, in *Low* v. *Bouverie*,[3] it was pointed out that it is no part of the trustee's duty to inform an assignee of the beneficiary's interest of the manner in which the beneficiary has dealt with his interest, in order to facilitate the squandering of the beneficiary's interest, but now the Law of Property Act, 1925, Sect. 137 (8), provides that a trustee may be required to produce notices of dealings with equitable interests to any person interested in such property.

Any person with an interest in the trust property may demand information.

If the beneficiary is about to assign his interest, it has been suggested that the intending assignee is not a person interested in the trust property.[4]

In *Horton* v. *Brocklehurst*,[5] a trustee who was aware of the manner in which his co-trustee was keeping the accounts, and who permitted a beneficiary to act on the assumption that he sanctioned his co-trustee's keeping of the accounts, was held liable to make good the defalcations of his co-trustee, who had incorrectly kept the accounts.

Acquiescence by a beneficiary implies complete knowledge of the circumstances by him.

Again, where a beneficiary required information from a trustee, and the trustee gave only partial information, concealing other information, so that the beneficiary in consequence acquiesced in an act of the trustee, it was held that the beneficiary was not bound, because he had acquiesced as a result of imperfect knowledge.[6] Moreover, when a beneficiary attains his majority, it is the trustee's duty to inform him of his rights, and acquiescence by him does not

[1] *Ottley* v. *Gilbey* (1845), 8 Beav. 602.

[2] *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Re Tillott*, [1892] 1 Ch. 86. As to the information which the Public Trustee must give when acting as an ordinary, judicial, or custodian trustee, see Public Trustee Rules, 1912, Rule 29; and on trust accounts generally, see Chandler's *Trust Accounts* (Fifth Edition).

[3] *Supra*.

[4] See further on this section, L. C. B. Gower, *The Conveyancer*, Vol. 20, pp. 137–153.

[5] (1858), 29 Beav. 504.

[6] *Ryder* v. *Bickerton* (1743), 3 Swanst. 80*n*.; *Walker* v. *Symonds* (1818), 3 Swanst. 1.

bind him until he is fully informed after attaining full age.

Audit of accounts.

The Trustee Act, 1925, Sect. 22 (4), provides that trustees may, at their absolute discretion, but not more than once in three years, unless the nature of the trust makes another practice desirable, have their accounts audited at the cost of the trust estate, either out of capital or income. The trustee is, of course, entitled to employ an agent to keep the trust accounts. Furthermore, the Public Trustee Act, 1906, Sect. 13, provides—

> Subject to rules under this Act, and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees, or, in default of agreement, by the Public Trustee, or some person appointed by him. Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit.[1]

[1] The procedure to be followed by an applicant under this section is set out in the Public Trustee Rules, 1912, Rules 31–4. If an applicant improperly insists upon an investigation under the section, the Court may order him to pay the costs (*Re Eddy*, [1911] 1 Ch. 536).

CHAPTER XVI

THE BENEFICIARY IN RELATION TO THE TRUST

A. THE NATURE OF THE BENEFICIARY'S INTEREST

A difference now exists between English and American law on this question.

In *Baker* v. *Archer-Shee*,[1] the House of Lords gave careful consideration to the nature of the beneficiary's interest under a trust. Lady Archer-Shee was the tenant for life of a trust fund of foreign stocks and shares and other property, of which the trustee was a trust company incorporated in the State of New York. The tenant for life was assessed to income-tax, under Case IV of Schedule D of the Income Tax Act of 1918, in respect of the specific stocks, shares and other property forming the trust fund, whilst for the tenant for life it was contended that she was only assessable in respect of her interest, which was so much of the annual produce of the property forming the fund as the trustees should remit, after paying their costs, charges and expenses. The House of Lords held by a majority of three to two, reversing the decision of the Court of Appeal, that, assuming American law to be the same as English law in this particular, the tenant for life's right was an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she was the tenant for life, subject to the deductions stated. Her right, therefore, was in respect of "property" from which the income was derived, and therefore she was rightly assessed under Case IV of Schedule D.

The differing views of the learned judges before whom the case was heard form an instructive commentary upon this modern conception of the beneficiary's interest. Rowlatt, J., in the King's Bench Division, observed—

> What this lady enjoys is not stocks, shares, and rents or other property subject to the will, but what she does enjoy and has got is the right to call upon the trustees and to force the trustees if necessary to administer this property during her life so as to give her the interest of it, and so on, according to the trust. Her interest is that of Equity, and it is not an interest in the specific things at all.

These observations were cited with approval by Sargant, L.J., in the Court of Appeal, and were used by that Court as the foundation of their view that the trustees did not

[1] [1927] A.C. 844.

remit the dividends "in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. They do not remit the whole of the income from the profits, but they remit a sum which has lost its origin or parentage; it has lost the shape of dividends, share warrants, or the like; it is merely a sum of money which represents the balances after payment of the sums which would properly fall upon the trust."

In the view of the Court of Appeal, it was merely the final sum which was assessable, as identifiably the interest of the life-tenant, but the majority of the House of Lords took a different view. Lord Atkinson observed—

> The trustees do not, I think, properly speaking, consider what is to be the income the beneficiary is entitled to receive. They lodge the whole income, less what they consider it is necessary to retain to discharge lawful claims upon the fund. I am unable to follow the reasoning that leads to the con clusion that, by the deduction of these sums, the character of the balance lodged changes, and acquires a character different from what the entire income would have borne if it had been lodged.

To this may be added the opinion of Lord Wrenbury—

> The question is not what the trustees have thought proper to hand over and have handed over (which is a question of fact), but what under the will Lady Archer-Shee is entitled to (which is a question of law). The trustees, of course, have a first charge upon the trust funds for their costs, charges, and expenses, and American income-tax will be a tax which they would have to bear and which would fall upon the beneficiary. But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these. If an owner of shares deposits them with his banker by way of security for a loan, he is not reduced to being the owner of a balance sum being the difference between the dividends on the shares and the interest on the loan. He is the owner of the equity of redemption of the whole fund. If a landowner employs an agent to collect his rents and authorises him to deduct a commission he does not cease to be owner of the rents. Under Mr. Pell's will Lady Archer-Shee (if American law is the same as English law) is, in my opinion, as a matter of construction of the will, entitled in Equity specifically during her life to the dividends upon the stocks. If, say, in January £100, after deduction of American income-tax, was received for a dividend, and there was nothing owing to the trustees which they were entitled to deduct, Lady Archer-Shee could, in my opinion, call upon them to pay her that £100. If such a property is not taxable, it results that a person residing here, whether a British subject or not, can, by creating a foreign trust of stocks and shares

and accumulating or spending the income abroad, escape taxation upon that income.

It will be obvious, from the foregoing opinions, that the conception of the beneficiary's interest is something a good deal more than a *jus in personam*; that it, in fact, approximates very closely to a *jus in rem*, and the opinions of the two learned Law Lords recall strongly Lord Mansfield's observations in *Burgess* v. *Wheate*,[1] which at length seem to be winning deferred acceptance. It is submitted, however, that the opinions of the two dissentient Lords, Lords Sumner and Blanesburgh, are more closely in consonance with the traditional view of a Court of Equity. It would be an exaggeration to state that they were in conflict with those of the majority. It would appear that they emphasised another aspect of the beneficiary's interest. Thus, Lord Sumner observes—

> The position of the equitable tenant for life and of the investments which form the trust fund is so clear both in law and Equity, that apart from any special prescriptions, express or implied, of the law relating to income-tax, there can, I think, be no doubt about them. The trustee has the full legal property in the whole of the trust fund and the beneficiary has not. Apart from special provisions in particular settlements, which do not affect the general principle, the trustee is not the agent of the beneficiary, who can neither appoint nor dismiss him. She cannot require him to change or forbid him to change the particular investments of the fund. There is no liability on the beneficiary for the trustee's acts on the principle of *respondeat superior*, and, unless the trust deed otherwise provides, the trustee must act without remuneration to himself and cannot in any case sue the beneficiary on any implied promise to pay. It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them, in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of a Court of Equity to enforce the trust and to compel the trustee to discharge it. This right is quite as good and often is better than any legal right, but it is not in any case one which for all purposes makes the trust fund "belong" to the beneficiary or makes the income of it accrue to him *eo instanti* and directly as it leaves the hands of the party who pays it.

To this, Lord Blanesburgh added that if the will were an English will, and its residuary funds vested in English trustees, Lady Archer-Shee's only specific interest in the income of the residuary estate would be an interest in the

[1] See Appendix II, p. 412, *post*.

income cleared of all proper administrative or other payments ranking in priority to any beneficial interest of her own—

> The right of the trustees to retain moneys to answer these payments *in praesenti*, or even, in a proper case, *in futuro* is undoubted.[1] Their duty, themselves to execute their trust, is equally undoubted. No receiver of the gross residuary income could be obtained against them except on proof of misconduct, actual or contemplated, and then only in a suit for the execution of the trusts of the will. In other words, the interest in the eye of a Court of Equity of Lady Archer-Shee in the gross income of the estate is not that of a mortgagor in the property charged, but is exactly analogous to the interest of a residuary legatee of corpus before that residue has been actually ascertained.

The American view.

It would appear from *Archer-Shee* v. *Garland*[2] that English law and the law of the State of New York, though derived from the same root, now differ materially with respect to their conception of the nature of a beneficiary's interest under a trust. The earlier case, *Baker* v. *Archer-Shee*,[3] was decided upon the assumption that in this respect English and New York law were identical. In *Archer-Shee* v. *Garland*,[4] the case was argued again in respect of three further years' tax and expert evidence was admitted to declare the New York law upon the point. Professor R. Powell of Columbia, stated the law of the State of New York in these terms—

> Every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees in law, and in equity, subject only to the execution of the trust period. The persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in Equity.

Although this relates expressly only to trusts of land, it would seem that it applies also to trusts of personal property, so that in this case Lady Archer-Shee had no right to any specific dividends or interest at all. According to Professor Powell, her rights under New York law were as follows—

> While it was true that under the trust in question (there being no provision for accumulation) the whole of the net income (including in the event of death any income accrued but not paid over) must ultimately be either paid over to or applied for the benefit of Lady Archer-Shee, the manner and times of doing so were within the discretion of the trustees subject to judicial supervision; that if the trustees exercised

[1] *Stott* v. *Milne* (1884), 25 Ch.D. 710, 715.
[2] [1931] A.C. 212. [3] [1927] A.C. 844.
[4]]1931] A.C. 212. See also *Perry* v. *Astor*, [1935] A.C. 398, and *Timpson's Executors* v. *Yerbury*, [1936] 1 K.B. 645.

their discretion unconscientiously, Lady Archer-Shee had the right to ask the Court to supervise their behaviour in the matter both of the management of the income and of the capital of the trust.

In the words of Lord Buckmaster[1]—

> The difference between the two systems of law cannot be better explained than by contrasting the judgments of Lords Sumner and Blanesburgh in the House of Lords, and that of Sargant, L.J., in the Court of Appeal with that of Lords Wrenbury, Carson, and Atkinson which there prevailed. These former learned judges were held to have imperfectly enunciated the English law, but they have expressed with perfect clearness what we now know is the American law, which is the law we are bound to apply.

By such narrow majorities are important differences between English and American law established.

Commenting on the first of these decisions of the House of Lords, Mr. H. G. Hanbury observes—

> The view of the majority of the House seems to be based almost entirely on the interpretation of the Income Tax Act, 1918. There is certainly no intentional confusion between law and equity. If the case is to be an authority merely on income-tax law, no great harm may be done; the equity text-book of the future will be able to refer to the case as a derogation from general equitable principle induced by a widening interpretation of the Income Tax Act, but examples are not wanting to show that precedents in equity tend to be widely interpreted also. . . . It is to be fervently hoped that the decision in *Baker* v. *Archer-Shee* will be confined within narrow limits, and not allowed to upset well-established principles of equity.[2]

The present writer entirely concurs in the view that it is extremely undesirable to regard these decisions as of general application in respect of a beneficiary's interest under a trust, but experiences difficulty in dismissing the general observations of the learned law lords as bearing a narrow construction only. It is relevant to observe that income-tax decisions upon share dividends are already a source of authority in respect of apportionments between tenant for life and remainderman, and also in the definition of a charity, and it is not difficult to see the dangers which may result from interpretation of these decisions by lower Courts. Except in income-tax cases, the law of trusts is only rarely before the House of Lords at the present time, and it may be necessary to wait for some years before the House of Lords considers the problem apart from questions of

[1] [1931] A.C. at p. 219.

[2] "A Menace to Equitable Principles," 44 *Law Quarterly Review*, pp. 471–2.

revenue—by which time practice in lower tribunals may have hardened.

In *Schalit* v. *Nadler*,[1] it is important to observe that the Divisional Court stressed the continued importance of the distinction between the legal ownership of the trustee, with its attendant rights and obligations, and the equitable interest of the beneficiary. It is difficult to see how the basis of the law of trusts can remain if the beneficiary's interest is to be regarded as equivalent to actual ownership of the trust property.

B. THE POSITION OF A BENEFICIARY IN RELATION TO THE TRUST

The trustee is the servant of all the beneficiaries but not of any one of them.

The general rule that a trustee must not take heed of one beneficiary to the detriment of others has already been discussed. Put in another way, the rule implies that although a trustee may be the servant of all the beneficiaries, he is not the servant of any one of them, but an arbitrator, who must hold the scales evenly. Equity, however, has always recognised the principle that if there is only a single beneficiary, who is *sui juris* and absolutely entitled, he may vary or terminate the trust at his pleasure, and furthermore, if the trustee incurs liabilities in carrying out his beneficiary's instructions, he can recover, not only out of the trust property, but against the beneficiary personally. The same position follows where all the beneficiaries, being *sui juris* and absolutely entitled, unite to instruct the trustee to deviate from the terms of his trust. Moreover, it makes no difference in the latter case whether the beneficiaries are entitled as joint tenants, as tenants in common, or in succession.[2]

The rule in *Saunders* v. *Vautier*.

Again, the rule applies, not only to simple trusts, where the trustee has become, in the circumstances, a mere repository of the legal title, but also to special trusts, where the settlor may have intended that the trustee should fulfil certain duties, provided always that there is no person other than the sole beneficiary interested in the maintenance of the trust. This is illustrated by the well-known case of *Saunders* v. *Vautier*,[3] where a trustee was directed to accumulate the income upon a legacy until a specified date. The Court held that as soon as the beneficiary became of age, then since he was ultimately entitled to the income, he could call at once for the transfer to him of the capital sum. Similarly, in *Re*

[1] [1933] 2 K.B. 79.

[2] *Palairet* v. *Carew* (1863), 32 Beav. 564; *Re White, White* v. *Edmond*, [1901] 1 Ch. 570.

[3] (1841), Cr. & Ph. 240.

Browne's Will,[1] personal representatives were directed to employ Consols in the purchase of a life annuity for a woman, to be held to her separate use without power of anticipation. The Court held that as the woman was unmarried at the time when the will took effect, the restraint being at that time of no effect, she was entitled to the transfer to her of the Consols, with no fetter on their disposal. It is necessary to distinguish these cases, however, from others, in which some other person will benefit by an intermediate gift of income, or in which the interests remain contingent until the occurrence of a future event, e.g. a gift to such members of a class of persons who shall be living when the youngest attains the age of 21, in equal shares. Here, obviously, no member of the class can claim the absolute control of his share until the last member has attained the age of 21.

Application of the rule to discretionary trusts.

A further illustration is afforded in some discretionary trusts. In *Re Smith*,[2] trustees of a will were directed to apply at their absolute discretion the whole or any part of a fund for the benefit of A, and the rest of the fund, so far as it was not so applied, for the benefit of B. Romer, J., held that A and B were together to be regarded as the sole objects of the discretionary trust, and were together entitled to have the whole fund applied for their benefit, and therefore, if A and B are both *sui juris* they can together claim the transfer of the property. In the course of his judgment, Romer, J., emphasised the following points—

(1) Where there is a trust to apply the whole or such part of a fund as trustees think fit to or for the benefit of A, and A has assigned his interest under the trust, or become bankrupt, although his assignee or his trustee in bankruptcy stand in no better position than he does and cannot demand that the fund shall be handed to them, yet they are in a position to say to A: "Any money which the trustees do in the exercise of their discretion pay to you, passes by the assignment or under the bankruptcy." But they cannot say that in respect of any money which the trustees have not paid to A or invested in purchasing goods or other things for A, but which they apply for the benefit of A in such a way that the money or goods never gets into the hands of A.

(2) Where there is a trust under which trustees have a discretion as to applying the whole or part of a fund to or for the benefit of a particular person, that particular person cannot come to the trustees, and demand the fund, for the whole fund has not been given to him but only so much as the trustees think fit to let him have. But when the trustees

[1] (1859), 27 Beav. 324.

[2] [1928] Ch. 915. See also *Green* v. *Spicer* (1830), 1 Russ. & My. 395; *Younghusband* v. *Gisborne* (1844), 1 Coll.C.C. 400; *Re Nelson*. [1925] Ch. 917.

have no discretion as to the amount of the fund to be applied, the fact that the trustees have a discretion as to the method in which the whole of the fund shall be applied for the benefit of a particular person does not prevent that particular person from coming and saying: "Hand over the fund to me."

(3) What is to happen where the trustees have a discretion whether they will apply the whole or only a portion of the fund for the benefit of one person, but are obliged to apply the rest of the fund, so far as not applied for the benefit of the first-named person, to or for the benefit of a second named person? There, two people together are the sole objects of the discretionary trust and, between them, are entitled to have the whole fund applied to them or for their benefit. It has been laid down by the Court of Appeal in the case to which I have referred[1] that, in such a case as that you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund.

The position where a sole beneficiary mortgages his interest.

Where a beneficiary who is *sui juris* and absolutely entitled mortgages his interest or several beneficiaries collectively absolutely entitled mortgage their shares to one mortgagee, the question arises whether the mortgagee can terminate the trust, and call for the transfer of the legal estate to himself. The view taken by the Court is that, so long as the equity of redemption subsists (that is to say until the mortgagee forecloses, or exercises his power of sale), the mortgagor may also be regarded as retaining an interest in the trust, and therefore the mortgagee cannot require the transfer; but if he sold the entire interest of the beneficiaries under his power of sale, the purchaser obviously could.[2]

When a statutory trust for sale exists, or where the instrument so provides, the trustees are under an obligation to consult the wishes of the beneficiaries of full age in the exercise of their powers.[3]

C. THE BENEFICIARY'S RIGHT TO POSSESSION

The trustee's right to the title deeds.

It has been stated in an earlier chapter that the nature of the trustee's estate is such that he is entitled to the custody of the title deeds. It was assumed in such a case that the legal estate was vested in the trustees; that is to say, since 1925, that the land is not settled land, for in such a case, the legal estate is now generally vested in the tenant for life, and an incident of that estate will be possession of the title deeds. Where the title deeds are in the hands of the trustees,

[1] *Re Nelson*, [1925] Ch. 917.

[2] See *Cooper & Allen* (1877), 4 Ch.D. 802; *Re Bell*, [1896] 1 Ch. 1; *Hockey* v. *Western*, [1898] 1 Ch. 350.

[3] *Re Howse*, [1929] 2 Ch. 166. Law of Property Act, 1925, Sect. 26 (3).

however, the beneficiary is entitled to their production for inspection, even although he has an interest only in the proceeds of sale.[1]

The beneficiary's right to possession.

As far as possession of land subject to a trust is concerned, the position has changed somewhat since 1925 owing to the fact that nearly all trusts of land are now either trusts for sale or settlements under the Settled Land Act. Before 1926, if there was a passive trust, the beneficiary could compel the trustee to give him possession,[2] and if the trustee ejected him, the Court could compel the trustee to account for the whole of the rents which he could have recovered from the tenants.[3] Where, however, the trust was not for one beneficiary only, but there were other interests besides those of the tenant for life, the Court had absolute discretion before 1926 to order whether the trustee or the tenant for life should have actual possession, and if the latter, then upon what terms.[4] Thisposition was not altered by the Settled Land Act of 1882, although after that date the Court exercised its discretion with increased freedom in favour of the tenant for life.[5]

Now, by virtue of Sect. 29 of the Law of Property Act, 1925, trustees for sale may delegate their powers of leasing and management to a *cestui que trust* for the time being beneficially entitled in possession to the net rents and profits of the land during his life or for any less period, and in Sect. 30 it is provided that if the trustees do not so delegate their powers, the beneficiary may apply to the Court. It would appear that in delegating these powers, the trustees also give possession. The power of leasing is exercised by the beneficiary only in the names and on behalf of the trustees. The trustees are not liable for the acts or defaults of the *cestui que trust*, but in respect of the exercise of the power of leasing by the beneficiary the latter is deemed to be in the position of a trustee.

As far as the tenant for life under the Settled Land Act, 1925, is concerned, he will be automatically entitled to possession when his interest vests in possession.[6]

Possession of trust chattels.

Where the trust estate includes chattels, settled for the benefit of persons in succession, the tenant for life is also

[1] *Davis* v. *Dysart* (1855), 20 Beav. 414; *Re Cowin* (1886), 33 Ch.D. 179; *Gough* v. *Offley* (1852), 5 De G. & S. 653.

[2] *Brown* v. *How* (1741), Barn. 354.

[3] *Kaye* v. *Powel* (1791), 1 Ves. Jun. 408.

[4] *Jenkins* v. *Milford* (1820), 1 J. & W. 629; *Taylor* v. *Taylor*, *Ex parte Taylor* (1875), L.R. 20 Eq. 297.

[5] *Re Bagot's Settlement*, [1894] 1 Ch. 177; *Re Wythes*, [1893] 2 Ch. 369; *Re Newen*, [1894] 2 Ch. 297.

[6] See Settled Land Act, 1925, Sect. 19, and notes thereto in Wolstenholme and Cherry's *Conveyancing Statutes*.

entitled to the use and possession of them for the period of his interest; and such chattels do not vest in the trustee in bankruptcy of the tenant for life.[1] Use and possession, without qualification by the terms of the settlement, would include enjoyment by the tenant for life in his own or any other person's house, and also letting them out on hire;[2] but if heirlooms are annexed to a mansion house, the heirlooms can only be hired out with the house.[3]

D. THE BENEFICIARY'S RIGHT TO COMPEL TRANSFER BY THE TRUSTEES

Termination of the trust by transfer to a sole beneficiary *sui juris*.

A sole beneficiary who is *sui juris* and absolutely entitled may compel the trustee to convey the legal estate as he directs. If the trustee refuses, the beneficiary may apply to the Court, and the trustee will have to pay the costs of the application unless there are reasonable grounds for his refusal.[4] Furthermore, if the beneficiary in such a case has sold his equitable interest the purchaser may also call for a conveyance from the trustee, on the same terms.[5] In such cases, however, the trustee must always satisfy himself that the beneficiary or the purchaser is the only person interested, and he cannot be compelled to give conveyance of parts of the trust estate at various times.[6] Furthermore, the trustee cannot be compelled to transfer the estate by any other description than that by which the conveyance was made to him.[7] Again, in *Hannah* v. *Hodgson*,[8] under a trust, a father, the tenant for life, had a power of appointment among his children, and in default of appointment the children took. He appointed to some, but not to others, and then, with the appointees he called upon the trustees to convey. The trustees had reason to suppose that there had been fraud on the power, resulting from an unfair bargain between the appointor and the appointees, and they refused to convey. The Court supported their attitude, and held, further, that they were entitled to their costs. There must, however, be reason for the suspicion. The mere possibility of fraud does not entitle the trustees to refuse to convey.[9]

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[1] *Re Penton*, [1924] 2 Ch. 192.
[2] *Marshall* v. *Blew* (1741), 2 Atk. 217.
[3] *Cadogan* v. *Kennet* (1776), Cowp. 432.
[4] *Re Ruddock* (1910), 102 L.T. 89.
[5] *Angier* v. *Stannard* (1834), 3 My. & K. 566
[6] *Goodson* v. *Ellisson* (1824), 3 Russ. 583; *Holford* v. *Phipps* (1841), 3 Beav. 434.
[7] *Goodson* v. *Ellisson*, *supra*.
[8] (1861), 30 Beav. 19; and see *King* v. *King* (1857), 1 De G. & J. 663.
[9] Settled Land Act, 1925, Sect. 17.

CHAPTER XVII

THE EXTENT OF THE TRUSTEE'S LIABILITY FOR BREACH OF TRUST

A. BREACH OF TRUST AND THE MEASURE OF LIABILITY

The nature of a breach of trust.

A BREACH of trust consists in some improper act, neglect, default, or omission of a trustee in respect of the trust property or of a beneficiary's interest in it. There are, therefore, very many kinds of breaches of trust, resulting either from direct intermeddling with the trust property for improper purposes, or from a failure to exercise proper prudence in discharging a duty, or from the *mala fide* exercise of a discretion. In all these cases the trustee must make good the loss to the trust fund. Thus, if the trustee makes an improper investment, or pays the wrong person in mistake for a beneficiary, he must replace the amount lost, with interest, which is fixed at the discretion of the Court, but which has recently been 4 per cent.[1]

The terms of the settlement must be fully complied with.

A number of illustrations of this rule have already been given, in considering the duties of trustees, which, whether imposed by law or by the settlement, must be exactly discharged. Thus, in *Re Massingberd*,[2] trust money was invested in Consols, and the trustees were empowered to vary the investments, *with the consent of the tenant for life*. The trustees sold the Consols and then, with consent of the life-tenant invested in an unauthorised security. Later, they realised the unauthorised security, and reinvested in an authorised security, but without the consent of the tenant for life. Meanwhile, the Consols had risen in price, and the Court held that since in both transactions the trustees had deviated from the terms of the settlement, they must place the beneficiaries in the same position as if no such deviation had occurred, and replace the Consols, paying the increase in price out of their own pockets. Again, it has been noticed that it is the duty of the trustee to invest trust money in authorised securities as soon as possible, and if he allows it to remain uninvested in his hands, he will nevertheless be liable for the loss in interest,[3] at the rate of 4 per cent simple

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[1] *Re Beech*, [1920] 1 Ch. 40; *Re Baker*, [1924] 2 Ch. 271.
[2] (1890), 63 L.T. 296.
[3] *Stafford* v. *Fiddon* (1857), 23 Beav. 386; *Re Goodenough*, [1895] 2 Ch. 537; *Re Barclay*, [1899] 1 Ch. 674.

interest. If, on the other hand, the trustees, either at law or under the settlement, had a duty to accumulate, they will be liable for compound interest.[1] Again, if a trustee has improperly called in trust money on a mortgage yielding 5 per cent, he is liable for loss in interest,[2] and the same rate is charged where he unnecessarily sells stock.[3]

There may be a breach of trust, in respect of which no loss is sustained.

In all the cases so far considered, it will be observed that the measure of damages is based on the loss to the trust fund. In some instances of breach of trust, however, there may have been no loss at all. Here, the trustee is under a duty to account to the beneficiaries for all the profit he has made. Thus, if the trustee invests in unauthorised securities at a higher rate than 4 per cent, and sells out without loss, he cannot retain the difference between 4 per cent and the higher yield for himself. It is an accretion to the trust fund, notwithstanding the fact that if there had been a deficiency in the income, or a loss on realisation of the securities, the trustee would have had to make it good.[1] Further, the trustee is not able to set off the profit of one transaction in breach of trust against the loss on another.[4]

Where the trustee invests trust money in his business.

The liability of a trustee who invests trust money in his trade or business has been noticed in an earlier chapter,[5] and it was there indicated that the trustee was chargeable with 5 per cent interest upon the money so employed, or alternatively, the beneficiaries can, at their choice, call upon the trustee to account for all the profits he has actually received, if they have reason to suppose that he has made more.[6] If the money has been employed by the trustee in trade, compound interest may be obtained,[7] but in *Burdick* v. *Garrick*, where a solicitor-trustee employed trust-money in his business, putting them to the firm's credit at the bank, the Court of Appeal only allowed simple interest. Lord Hatherley pointed out that in trade it may be presumed that compound interest has been earned, whilst capital used in a solicitor's business not infrequently yields no interest at all. It should be added that where a trustee improperly lends trust money to a tradesman who knows that it is trust money, although the capital can of course be recovered, the beneficiary cannot claim the profits from the trader.[8]

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[1] *Re Emmet* (1881), 17 Ch.D. 142.
[2] *Jones* v. *Foxall* (1852), 15 Beav. 388.
[3] *Pocock* v. *Reddington* (1801), 5 Ves. 794.
[4] See *post*, p. 336. [5] See *ante*, p. 280.
[6] *Jones* v. *Foxall*, *supra*; *Burdick* v. *Garrick*, (1870), 5 Ch. App. 233.
[7] *Vyse* v. *Foster* (1872), 8 Ch. App. 309; *Re Davis*, [1902] 2 Ch. 314.
[8] *Stroud* v. *Gwyer* (1860), 28 Beav. 130.

Where the trustee has been guilty of fraud.

Finally, if the trustee has been guilty of actual fraud or other grave misconduct in relation to the trust property, thereby depriving the beneficiary of the income, the Court may order him to pay 5 per cent compound interest with yearly rests. Half-yearly rests have exceptionally been directed, but the Court is reluctant to do this.[1] The principle, as expressed by Lord Cranworth in *Attorney-General* v. *Alford*,[2] is that—

> The Court would be justified in dealing in point of interest very hardly with an executor (or trustee); because it might fairly infer that he used the money in speculation, by which he either did make 5 per cent, or ought to be estopped from saying that he did not.

The Court will consider the whole of the facts in assessing liability.

It is sometimes extremely difficult to discover whether the acts of the trustees resulting in a breach of trust were merely negligent, or were actually corrupt and dishonest. Nevertheless, the Court will examine the whole of the facts, and if extenuating circumstances, such as the fact that the breach was caused simply by want of judgment, or the absence of personal advantage, can be discovered, the lower rate of interest will usually be charged.[3]

Interest, whether simple or compound, may be awarded against the trustees even though it is not asked for in the pleadings.[4]

B. THE PERIOD IN RESPECT OF WHICH A TRUSTEE'S LIABILITY MAY EXIST

Appointment of a new trustee.

When a new trustee is appointed, he is entitled to assume, unless there are suspicious circumstances putting him upon an inquiry, that the existing trustees have properly performed their functions.[5] Should he discover, however, that a breach of trust has been committed, he must secure satisfaction from the former trustees, and also get in any part of the trust estate that is still outstanding.[6] Apparently the only circumstance that will justify a failure to do this is the fact that it will be futile to institute proceedings against the former trustees.[7]

Retirement of a trustee.

When a trustee retires, he does not in this way escape liability for breaches of trust committed whilst he was a

[1] *Per* Lord Hatherley in *Burdick* v. *Garrick*, *supra*.
[2] (1855), 4 De G. M. & G. 843.
[3] *Tebbs* v. *Carpenter* (1816), 1 Madd. 290; *Crackelt* v. *Bethune* (1820), 1 J. & W. 588.
[4] *Johnson* v. *Prendergast* (1860), 28 Beav. 480; *Re Barclay*, [1899] 1 Ch. 674.
[5] *Re Strahan, ex parte Geaves* (1856), 8 De G.M. & G. 291.
[6] *Hobday* v. *Peters* (1860), 28 Beav. 603.
[7] *Re Forest of Dean Coal Co.* (1879), 10 Ch.D. 450.

trustee, unless his colleagues, by releasing him from such liability choose to shift his responsibility to themselves; and further, if a co-trustee contemplates a breach of trust, and the trustee retires in order to avoid liability, he will still be regarded as liable, for it was his duty to do all he could to prevent the breach.[1] In such a case, however, it is necessary to prove that the trustee contemplated the breach of trust which his co-trustee subsequently committed, and that he retired on account of it. It is not sufficient that the breach was facilitated by his retirement.[2] Apart from these special circumstances, a trustee is not liable for breaches of trust committed after he retired from the trust.

Where the trustee commits two distinct breaches of trust.

It must also be noticed in considering the extent of the trustee's liability, that if the trustee commits two distinct breaches of trust, one of which results in a loss to the trust estate, whilst there is a gain on the other, he cannot set off the gain on the one against the loss on the other.[3] On the other hand, if in a single transaction which is a breach of trust, the trustee first sustains a loss, and then realises a profit, he is only liable in respect of the final result of the transaction, and not for the loss in respect of a particular part of it. Thus, in *Fletcher* v. *Green*,[4] trustees, in breach of trust, lent money on a mortgage. The property was sold and the money paid into Court and invested in Consols, which then rose in value. The trustees were allowed to set off the rise in the value of the Consols against the loss resulting from the sale of the mortgaged property. Here, gain and loss obviously resulted from different stages of the same transaction.

Repairing a breach of trust on the eve of bankruptcy is not a fraudulent preference.

Repairing a breach of trust on the eve of bankruptcy is not necessarily a fraudulent preference within Sect. 44 (1) of the Bankruptcy Act, 1914. In *Re Lake*,[5] a solicitor-trustee of a settlement misappropriated trust-money, and then, immediately before his bankruptcy, he deposited in the trust box, voluntarily, and without the knowledge of his beneficiaries, certain debentures of his own, together with a memorandum which admitted the breach of trust, and then expressed the trustee's gratitude to the beneficiaries for their forbearance during his financial difficulties, stating that the deposit was made with the intention of repairing the breach of trust. It was held that the bankrupt had not made a

[1] *Webster* v. *Le Hunt* (1861), 9 W.R. 918; *Palairet* v. *Carew* (1863), 32 Beav. 567; *Clark* v. *Hoskins* (1867), 37 L.J.Ch. 561.
[2] *Head* v. *Gould*, [1898] 2 Ch. 250.
[3] *Wiles* v. *Gresham* (1854), 2 Drew. 258; *Dimes* v. *Scott* (1824), 4 Russ. 195; *Re Barker* (1898), 77 L.T. 712.
[4] (1864), 33 Beav. 426.
[5] [1901] 1 Q.B. 710.

fraudulent preference, his dominating motive being the intention to repair the wrong he had committed.

The same rule applies to the agent of a trustee. Thus, in *Re Goldsmid*,[1] a broker employed by trustees of a marriage settlement to sell securities and reinvest the proceeds, forged certain transfers for his own purposes, and instead of reinvesting, appropriated the proceeds. The trustees pressed him to complete, whereupon he informed them of the forgery. The trustees told him that unless he immediately handed over the proceeds of sale, they would prosecute him for embezzlement. This was done, and the Court held that this reparation for a wrong did not amount to a fraudulent preference.

C. THE EFFECT OF THE TRUSTEE'S BANKRUPTCY ON LIABILITY FOR BREACH OF TRUST

Rights of the beneficiaries in respect of the trustee's bankruptcy.

Where a trustee who has been guilty of a breach of trust becomes bankrupt, the loss may be proved against his estate,[2] and if interest would have been awarded against him, this also may be proved.[3] If the bankrupt was one of several trustees, who were jointly implicated in the breach of trust, the beneficiaries may prove against the bankrupt's estate for the entire loss, even though the bankrupt did not benefit by the breach of trust.[4] In such a case, however, the trustee in bankruptcy may compel contribution from the other trustees, even where the bankrupt could not himself have done so, being prevented by his own fraud.[5] If two trustees are bankrupt, the beneficiaries may prove in the bankruptcy of each for the whole of the loss, but not so as to receive more than the amount of the loss itself.[6] Again, if a trustee improperly lends money on the mortgage of certain securities, and then becomes bankrupt, the beneficiary may prove for the whole of the debt, and retain the securities also, not being put to his election between abandoning either the mortgage or the debt.[7]

The Partnership Act, 1890, Sect. 13, provides—

> If a partner, being a trustee, improperly employs trust property in the business or on account of the partnership,

[1] (1887), 18 Q.B.D. 295.
[2] *Keble* v. *Thompson* (1790), 3 Bro.C.C. 112; *Dornford* v. *Dornford* (1806), 12 Ves. 127; Bankruptcy Act, 1914, Sect. 30.
[3] *Dornford* v. *Dornford, supra.*
[4] *Ex parte Shakeshaft* (1791), 3 Bro.C.C. 197.
[5] *Muckleston* v. *Brown* (1801), 6 Ves. 68.
[6] *Keble* v. *Thompson, supra.*
[7] *Re Strahan, ex parte Geaves* (1856), 8 De G.M. & G. 291.

no other partner is liable for the trust property to the persons beneficially interested therein.

Provided as follows—

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm, if still in its possession or under its control.

Where the trustee is a partner, and employs trust money in the firm.

It will be seen that this section only protects the other partners where they have no notice. Accordingly, where a trustee is a partner, and lends trust money to his firm, if he becomes insolvent, the beneficiaries can prove either against the joint property of the firm, or against the estate of the bankrupt trustee, *and* against the estate of any other partner who has participated in the breach of trust; but the beneficiaries may not usually prove against the firm estate as well as against the separate estates of trustee and partners participating in the breach.[1]

If a trustee lends trust money to a firm of which he is not a member, and then becomes bankrupt, the beneficiaries may prove against the partnership estate for this; but if the trustee lent it to one of the partners, and the others had no notice that it was trust money, proof is against the separate estate of that partner only.[2]

Liability of the trustee is terminated on his discharge, except for fraud.

By virtue of Sect. 28 of the Bankruptcy Act, 1914, the liability of a trustee in respect of breaches of trust is terminated by his discharge, except in respect of those breaches of trust which are fraudulent. Where a trustee is compelled to pay costs in a suit wherein he is found guilty of a fraudulent breach of trust, these costs are outside the scope of Sect. 28, and the trustee's discharge frees him from liability in respect of these.[3] The negligence of a trustee, as a result of which a co-trustee appropriates trust money, is not a fraudulent breach of trust.[4]

Apportionment of bankruptcy dividends.

Where money is recovered for a breach of trust in the bankruptcy of a trustee, the question of apportionment between capital and interest has occasioned some variation in practice, but in *Cox* v. *Cox*,[5] it was pointed out that the true principle was that neither the tenant for life nor the remainderman should gain an advantage at the expense of

[1] *Ex parte Watson* (1814), 2 V. & B. 414; *Ex parte Barnewall* (1855), 6 De G.M. & G. 801.

[2] *Ex parte Apsey* (1791), 3 Bro.C.C. 265.

[3] *Re Greer*, [1895] 2 Ch. 217.

[4] *Re Smith, Hands* v. *Andrews*, [1893] 2 Ch.1.

[5] (1869), L.R. 8 Eq. 343. (Not following Lord Romilly's rule in *Stroud* v. *Gwyer* (1860), 28 Beav. 130.)

the other, and, therefore, their respective interests must be calculated as follows—

> What principal, if invested on the day of the obligor's death (the date from which the interest was to run) at 4 per cent would amount with interest to the sum so recovered? Interest at 4 per cent on this principal, or in other words, the difference between the principal and the amount, will then go to the tenant for life, and the rest must be treated as principal.

D. LIABILITY OF THE ESTATE OF A DECEASED TRUSTEE

The trustee's estate is liable for his breach of trust.

Where a trustee commits a breach of trust, and dies before he has repaired it, his personal representatives are liable to the extent of the assets they have received.[1] Furthermore, the beneficiaries under the trust may follow the assets into the hands of the legatees of the deceased trustee to the extent necessary to make good the breach of trust.

E. A TRUSTEE'S LIABILITY FOR THE ACTS OF HIS CO-TRUSTEE

In general, a trustee is liable only for his own acts or defaults.

In general, a trustee is liable only for his own acts or defaults, and in actual fact there are no real exceptions to this rule.[2] If a trustee is made liable for the wrongful acts of a co-trustee, the reason is because he himself has in some way been at fault. This is reflected in Lord Westbury's observations in *Wilkins* v. *Hogg*,[3] where he observes—

> There are three modes in which a trustee would become liable according to the ordinary rules of law—first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress.

This was always the rule of Equity,[4] and it has now been embodied in Statute, for the Trustee Act, 1925, Sect. 30 (1), provides—

> A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money

[1] *Devaynes* v. *Robinson* (1856), 24 Beav. 86.
[2] Except possibly where a trustee delegates on going abroad.
[3] (1861), 30 L.J.Ch. 492; 31 L.J.Ch. 41.
[4] *Westley* v. *Clarke* (1759), 1 Eden. 357.

or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

A liquidator of a company, however, is not a trustee within Sect. 30.[1]

In *Re City Equitable Fire Insurance Co.*,[2] Warrington, L.J., approved the observations of Romer, J., to the effect that—

> A person is not guilty of "wilful neglect or default" unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, and also, as he said, recklessly careless whether it is a breach of duty or not.

The point becomes clearer by contrasting *Hanbury* v. *Kirkland*[3] with *Re Munton*.[4] In the former case, one of three trustees informed his co-trustees that he had an opportunity of investing the trust property in a 5 per cent mortgage, and he requested his co-trustees to execute a power of attorney to himself to enable him to transfer the trust stock on the mortgage security being completed. The co-trustees complied, without making any inquiry. The trustee sold the stock and absconded, and it was held that the trustees who signed the power of attorney were responsible, Shadwell, V.C., observing—

> The trustees, without further inquiry, without exercising a single act of discretion, execute the power of attorney.

On the other hand, in *Re Munton*,[4] a retiring trustee, acting on the advice of his own independent solicitors, joined with two co-trustees, one of whom was a solicitor acting for the trust, in executing a joint power of attorney authorizing certain brokers to sell and transfer all or any part of some stock, and to receive the purchase money. They then handed the power to the solicitor-trustee, who gave it to the brokers. These sold the fund and handed to him alone the whole of the proceeds, which he misappropriated. The Court of Appeal, upholding the decision of Astbury, J., held that as the power contained no authority to pay the solicitor-trustee alone, the retiring trustee was not liable for the solicitor-trustee's default.

The effect of signing for conformity.

The effect of signing for conformity is now specifically considered in the section. All trustees must normally join in the performance of a trust, and in general are deemed to have done so.[5] In particular, all trustees must join in giving

[1] *Re Flower & Metropolitan Board of Works* (1884), 27 Ch.D. 592.
[2] [1925] Ch. 407, 434, 525 and see *ante*, pp. 235, 236.
[3] (1829), 3 Sim. 265. [4] [1927] 1 Ch. 262.
[5] *Re Windsor Steam Coal Co.*, [1928] Ch. 609.

receipts, and in receiving capital money. It has been recognised, however, that trustees may appoint one of themselves to receive rents, for joint-collection would in many cases be impossible. Accordingly, in *Townley* v. *Sherborne*,[1] where one of the trustees had received the rents and had then become impoverished, it was pointed out that his co-trustee was not liable simply because he had joined in giving receipts; but inasmuch as the co-trustee had subsequently allowed the trust-money to remain for a long period in the hands of his colleague, he was on this account held liable. This is exactly the position under the Trustee Act, 1925, Sect. 30, of a trustee who signs for conformity.[2] The trustee who seeks to evade liability must show, however, that he never received the money.[3]

The position of executors is in this respect a little different from that of trustees. Each executor has full authority to handle the property of the testator alone, and to give a good discharge.[4] Accordingly, if a co-executor signs a receipt, this is stronger evidence that he actually handled the money than it would be in the case of a trustee, and he will be held liable if he allowed the money to remain for an undue length of time in the hands of his colleague even though he never actually received it.[5]

The position of an executor who signs receipts.

F. THE TRUSTEE'S RIGHT OF INDEMNITY OR CONTRIBUTION FROM A CO-TRUSTEE

The duty of trustees to act jointly has already been mentioned, and in order that the trust estate shall be bound, the agreement of the trustees must be unanimous, for there is no power in the majority to bind a minority, unless the trust instrument so declares or unless the trust is charitable. All investments and mortgages should therefore be in their joint-names,[6] unless this is impossible, as where shares formed part of the trust property, and these by the regulations of the company could only be registered in the name of a single person.[7] It follows from this, therefore, that the liability of trustees for joint acts or defaults is joint and

The liability of trustees for joint acts is joint and several

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[1] (1634), Cro. Car. 312.

[2] *Brice* v. *Stokes* (1805), 11 Ves. 319; *Walker* v. *Symonds* (1818), 3 Swanst. 1; *Consterdine* v. *Consterdine* (1862), 31 Beav. 330; *Lewis* v. *Nobbs* (1878), 8 Ch.D. 591; *Carruthers* v. *Carruthers*, [1896] A.C. 659.

[3] *Brice* v. *Stokes*, *supra*.

[4] Administration of Estates Act, 1925, Sect. 27 (2).

[5] *Joy* v. *Campbell* (1804), 1 Sch. & Lef. 328 at p. 341; *Re Gasquoine*, [1894] 1 Ch. 470.

[6] *Lewis* v. *Nobbs* (1878), 8 Ch.D. 591.

[7] *Consterdine* v. *Consterdine* (1862), 31 Beav. 330.

several; that is to say, the beneficiaries may proceed against one or more of the trustees for the whole amount, or against all; whilst if judgment is obtained against all, it may be enforced against one or more. Accordingly, if a judgment against two trustees has been partially satisfied by one, and the other then becomes bankrupt, the beneficiaries may prove in his bankruptcy for the whole amount, and not for the balance, although obviously not more than the balance can be recovered.[1] This rule of joint and several liability extends not only to express trustees, but also to all who meddle with the trust-property. Thus, in *Cowper* v. *Stoneham*,[2] trustees committed the execution of their trust to solicitors, who received trust money and invested it in their business. It was held that both the trustees and the solicitors were equally liable, and that the beneficiaries could recover against the solicitors alone.

The trustee's right of contribution.

As between the trustees themselves, however, the general rule is that there is a right of contribution,[3] unless they have been guilty of fraud.[4] It seems doubtful, however, whether there is a right of contribution in respect of the costs of the action, although obviously where a breach of trust has been made out, the Court may make an order in respect of costs.[5] Where one of the trustees has died, the right of contribution may be exercised against his personal representatives.[6]

Three cases where there is a right of indemnity: (1) Where a solicitor-trustee has instigated the breach.

In three cases, a trustee who has committed a breach of trust, will have to go further, and indemnify his co-trustees against the whole of the consequences of the breach. The first of these is where the trustee through whose activity the loss is sustained is a solicitor, who is acting as solicitor to the trust for himself and his co-trustees, so that the breach of trust is committed on his advice.[7] It is essential in such cases that the breach of trust should have been committed solely in consequence of the advice of the solicitor-trustee; thus, in *Head* v. *Gould*,[8] the co-trustee, a woman, urged the solicitor-trustee to enable her to commit a breach of trust for the benefit of her brother, and here the Court declined to give her an indemnity.

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[1] *Edwards* v. *Hood-Barrs*, [1905] 1 Ch. 20. [2] (1893), 68 L.T. 18.
[3] *Lingard* v. *Bromley* (1812), 1 V. & B. 114; *Birks* v. *Micklethwait* (1864), 33 Beav. 409.
[4] *Bahin* v. *Hughes* (1886), 31 Ch.D. 390; *Jackson* v. *Dickinson*, [1903] 1 Ch. 947.
[5] *Re Linsley*, [1904] 2 Ch. 785.
[6] *Jackson* v. *Dickinson*, [1903] 1 Ch. 947.
[7] *Lockhart* v. *Reilly* (1856), 25 L.J.Ch. 697; *Re Turner*, [1897] 1 Ch. 536; *Re Linsley*, *supra*.
[8] [1898] 2 Ch. 250.

(2) Where a trustee has benefited by the breach.

The second case of an indemnity arises in respect of a trustee who, in the words of Cotton, L.J., in *Bahin* v. *Hughes*,[1] "has himself got the benefit of the breach of trust, or between whom and his co-trustees there has existed a relation, which will justify the Court in treating him as solely liable for breach of trust." Such cases obviously cannot be defined with complete precision.

(3) Where a trustee is also a beneficiary.

Thirdly, if one of the trustees is also a beneficiary under the trust, the breach will, as far as possible, be satisfied out of his interest. This is illustrated by *Chillingworth* v. *Chambers*,[2] where two trustees invested on insufficient security, and thus became jointly and severally liable to the beneficiaries for the loss. One trustee having made good the loss, he sought to recover contribution from his co-trustee, but this was refused, as he had become entitled to a share in the trust estate as his wife's successor. The principle is that a trustee beneficiary who has assented to and profited by the breach of trust must bear the loss to the extent of his share. However, after his interest has been exhausted, it seems that the right of contribution arises again *pro tanto*.

In *Robinson* v. *Harkin*[3] it was pointed out that a trustee's right to indemnity or contribution is like a surety's right to sue a co-surety for contribution, so that the Statute of Limitations only begins to run when a judgment for the breach has been obtained.

G. CRIMINAL PROCEEDINGS AGAINST A TRUSTEE FOR BREACH OF TRUST

Criminal proceedings do not affect any civil remedies.

By virtue of the Larceny Act, 1916, Sect. 21, if a trustee of any property for the benefit of another person, or for any public or charitable purpose, appropriates the property with intent to defraud, to his own uses or for any other purpose than the legitimate one, he is guilty of a misdemeanour, punishable with penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for a term not exceeding two years, with or without solitary confinement.[4] No prosecution may be instituted without the permission of the Attorney-General or (if that office is vacant) of the Solicitor-General; nor, where civil proceedings have been taken, without the sanction of the Civil Court before which the proceedings are pending. No civil remedy at law or equity is affected, nor is any agreement entered into by the trustee with the object of restoring

[1] (1886), 31 Ch.D. 390, 394-5.
[2] [1896] 1 Ch. 685; and see *Moxham* v. *Grant*, [1900] 1 Q.B. 88.
[3] [1896] 2 Ch. 415.
[4] See also Larceny Act, 1916, Sect. 20.

the trust property invalidated. The effect of this last provision is to relieve the beneficiary of any obligation which the Act might have been deemed to impose of prosecuting the defaulting trustee; and it would seem that an agreement to surrender the trust-property by the trustee on condition that the criminal proceedings are dropped is not invalid.[1]

The trustees liable to prosecution under the Larceny Act, 1916, are express trustees, created by deed, will, or instrument in writing, and also any personal representative upon whom such an express trust devolves, as well as liquidators and trustees in bankruptcy.[2]

Where a solicitor-trustee misappropriates trust money, the Court has jurisdiction to order him to be struck off the rolls.[3]

Trustees may be attached for their defaults.

It must also be observed that whilst the Debtors Act, 1869, has abolished arrest and imprisonment for debt, certain classes of persons are excepted from the benefit of this provision. Among them are trustees or persons acting in a fiduciary capacity in respect of defaults; and the Act provides that a Court of Equity may order such a person to pay any sum in his possession or under his control. By Sect. 4 it is provided that no person so excepted can be imprisoned for more than one year. This period runs from the date of imprisonment, notwithstanding release during the period and subsequent rearrest. An order for attachment on a default is in the nature of a punishment for that offence, and therefore, a second order cannot be made in respect of the same default, inasmuch as the offence has been purged.[4]

The term "person acting in a fiduciary capacity" is wide. It does not mean "acting in a fiduciary capacity to the plaintiff," but so acting towards anyone.[5] It includes an auctioneer in respect of the proceeds of sale of property,[6] and also the London agent of a country solicitor, where the agent fails to pay money into Court as ordered; but a partner does not occupy a fiduciary position in respect of money received by him on behalf of the partnership.[7]

A trustee who has once possessed the money but has spent it may be attached.

A trustee who has once been in possession of the money but has spent it, is liable to attachment. He may not avoid liability by alleging that it is no longer in his possession or

[1] *Keir* v. *Leeman* (1844), 9 Q.B. 371; *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200; *Windhill Local Board* v. *Vint* (1890), 45 Ch.D. 351; *Jones* v. *Merionethshire Building Society*, [1892] 1 Ch. 173.

[2] Sect. 46.

[3] *Thompson* v. *Finch* (1856), 25 L.J.Ch. 681.

[4] *Church's Trustees* v. *Hibbard*, [1902] 2 Ch. 784.

[5] *Marris* v. *Ingram* (1879), 13 Ch.D. 338.

[6] *Crowther* v. *Elwood* (1887), 34 Ch.D. 691.

[7] *Piddocke* v. *Burt*, [1894] 1 Ch. 343.

under his control.[1] Accordingly, in *Re Bourne*,[2] an executor who was also a debtor to the estate was regarded as having paid money to himself as executor, and as holding the debt in a fiduciary capacity, so rendering him liable to attachment, but the Court held that it would not make an order therefor if his conduct was free from all moral blame. Similarly, an order will not be made where the trustee has merely made default in getting in the trust money.[3]

Attachment is not merely a civil proceeding. It is of a punitive nature,[4] and therefore it may be ordered, notwithstanding the fact that the trustee has become bankrupt, and that the Bankruptcy Act, 1883, provides that after the making of a receiving order, no creditor shall have any remedy against the person or property of the defendant.[5]

A fraudulent trustee may be attached although he has no means.

The Debtors Act, 1878, provides that a Court may inquire into the case of a defaulting trustee, and grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process. In several cases after that Act, attachment was refused for various reasons, as for example that the trustee had no means to pay, but Kay, J., In *Re Knowles*,[6] made an order where the trustee had been fraudulent, notwithstanding the fact that he appeared to be without means, thus adopting the view of Jessel, M.R., in *Marris* v. *Ingram*.[7] Where, however, there has been no fraud, but merely erroneous application of trust funds, the order will not usually be granted.[8]

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[1] *Re Smith, Hands* v. *Andrews*, [1893] 2 Ch. 1. [2] [1906] 1 Ch. 697.
[3] *Ferguson* v. *Ferguson* (1875), L.R. 10 Ch. 663.
[4] *Per* Jessel, M.R., in *Marris* v. *Ingram* (1879), 13 Ch.D. 338.
[5] *Re Wray* (1887), 36 Ch.D. 138; *Re Edge* (1891), 63 L.T. 762; *Re Smith, supra.*
[6] (1883), 52 L.J.Ch. 685.
[7] *Supra.*
[8] *Holroyde* v. *Garnet* (1882), 20 Ch.D. 532; *Earl of Aylesford* v. *Earl Poulett*, [1892] 2 Ch. 60.

CHAPTER XVIII

SPECIAL RIGHTS OF A BENEFICIARY IN DEFENCE OF HIS INTEREST

A. THE RIGHT TO COMPEL PERFORMANCE OF THE TRUST, OR TO PREVENT A THREATENED BREACH

The beneficiary may compel the trustee to lend his name to protect the trust property.

If the trustee fails to take all due steps in defence of the trust estate, a beneficiary may intervene, and compel the trustee to lend his name for the purpose of bringing any actions that will be necessary.[1] Again, if a trustee fails to renew leaseholds, the Court will compel him to do so on the suit of a beneficiary.[2] Further, if the trustees are about to sell at an undervalue, the Court will restrain the sale by injunction;[3] and the Court will also grant an injunction and appoint a receiver where the character of the trustee is such as to imperil the trust fund,[4] or where, as in *Earl Talbot* v. *Scott*,[5] the acceptance by the trustees of a second trust, inconsistent with the first, threatened the proper fulfilment by them of the first trust.

If the number of trustees has been reduced by the death or retirement of trustees, and the failure to appoint new ones, a beneficiary, whether tenant for life or remainderman, may require new trustees to be appointed.[6]

In *Kneeling* v. *Child*,[7] where the beneficiary offered substantial reasons for his allegation that the trustee would not properly perform his trust, the Court compelled the trustee to give security therefor.

Any beneficiary may intervene to protect his interest.

Any beneficiary may intervene to have his interest properly protected, whether he has a vested or a contingent interest,[8] although it would seem that a person who has an interest which arises following a possibility on a possibility cannot exercise this right.[9] The value of this wide right inherent in the beneficiary is emphasised by the fact that a beneficiary can only sue a debtor to the trust estate in exceptional

[1] *Foley* v. *Burnell* (1783), 1 Bro. C.C. 274. But in *Fairclough & Sons* v. *Berliner*, [1931] 1 Ch. 60, this was not done, See 47 *Law Quarterly Review*, 173.

[2] *Bennett* v. *Colley* (1832), 5 Sim.192.

[3] Anon. (1821), 6 Madd. 10; *Milligan* v. *Mitchell* (1883), 1 My. & K. 446.

[4] *Everitt* v. *Prythergch* (1841), 12 Sim. 363.

[5] (1858), 4 K. & J. 139; But see *Berry* v. *Keen* (1883), 51 L.J.Ch. 912.

[6] *Buchanan* v. *Hamilton* (1801), 5 Ves. 722; *Hibbard* v. *Lamb* (1756), Amb. 309; *Finlay* v. *Howard* (1842), 2 Dr. & War. 490.

[7] (1673), Cas. *temp.* Finch 360.

[8] *Re Sheppard's Trusts* (1862), 10 W.R. 704; reversed (1862), 4 De G.F. & J. 423.

[9] *Davis* v. *Angel* (1862), 31 Beav. 223.

circumstances. Failing such special circumstances, the beneficiary's course is to sue the trustee for the execution of the trusts, and then to apply for leave to sue in his own name.[1]

When an injunction will be granted.

Certain characteristic equitable remedies may also be asked for by a beneficiary against his trustee. In the first place, the Court may grant an injunction wherever the trustee contemplates a breach of trust, even though the act may not be irremediable in its consequences.[2] Again, an injunction will be granted against a bankrupt trustee who seeks to obtain possession of trust property.[3]

Appointment of a receiver.

Secondly, it is within the discretion of the Court to appoint a receiver, on the application of a beneficiary, whenever it is "just or convenient" to do so.[4] An order for a receiver will be made wherever there is evident actual or prospective violation of the duties of the trustee, resulting in serious danger to the trust property.[5] Thus, loss of part of the trust estate, through failure to get it in affords good grounds[6]; so does the failure of the trustees to agree, so that the trust cannot be properly administered,[7] or refusal of all the trustees to act,[8] or denial of the trust.[9] Mere poverty of the trustee is not a ground for appointing a receiver,[10] but if it is associated with bad character, misconduct, or acts of waste, it will be a relevant factor.[11]

Payment into Court.

Finally, whenever trust property is endangered, as for example where it is invested in unauthorised and hazardous securities, the Court may, upon the admission of the trustee that the fund is in his hands, order it to be paid into Court.[12] Application may be made by any person interested in the fund,[13] even though only contingently[14]; but the plaintiff's title must be beyond any real dispute.[15]

The money must be

It will be observed that the trustee must admit that the

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[1] *Sharpe* v. *San Paulo Railway Co.* (1873), L.R. 8 Ch. 597.
[2] *Milligan* v. *Mitchell* (1883), 1 My. & K. 446; *Balls* v. *Strutt* (1841), 1 Hare 146.
[3] *Bowen* v. *Phillips*, [1897] 1 Ch. 174.
[4] Supreme Court of Judicature (Consolidation) Act, 1925, Sect. 45 (1).
[5] *Middleton* v. *Dodswell* (1806), 13 Ves. 266; *Barkley* v. *Reay* (1842), 2 Hare 308.
[6] *Richards* v. *Perkins* (1838), 3 Y. & C. Ex. 299.
[7] *Bagot* v. *Bagot* (1863), 33 L.J.Ch. 123; *Swale* v. *Swale* (1856), 22 Beav. 584.
[8] *Tait* v. *Jenkins* (1842), 1 Y. & C.C.C. 492.
[9] *Sheppard* v. *Oxenford* (1855), 1 K. & J. 491.
[10] *Howard* v. *Papera* (1815), 1 Madd. 142.
[11] *Everitt* v. *Prythergch* (1841), 12 Sim. 363.
[12] *Wiglesworth* v. *Wiglesworth* (1852), 16 Beav. 269.
[13] *Freeman* v. *Fairlie* (1812), 3 Mer. 29.
[14] *Bartlett* v. *Bartlett* (1845), 4 Hare 631; *Marryat* v. *Marryat* (1854), 23 L.J.Ch. 876.
[15] *Hollis* v. *Burton*, [1892] 3 Ch. 226.

In the trustee's hands.

fund is in his hands. If he admits receipt of the money, but states that he has made payments out, this may be verified, and payment in of the balance ordered,[1] although the admission may justify an order for payment in of the whole sum.[2] In *Freeman* v. *Cox*[3] an unsworn affidavit made by the plaintiff was held to constitute a sufficient admission, but in *Neville* v. *Matthewman*,[4] Lord Herschell said that this principle would not be extended. Letters written by the trustee before the action and containing the admission, are, however, quite sufficient,[5] and a verbal admission has been accepted.[6]

A solicitor of a trustee, if he receives money with notice of the trust, may also be ordered to pay it into Court, since his title is no better than the trustee's.[7]

B. IF THE TRUSTEE IS ALSO A BENEFICIARY, HIS INTEREST MAY BE IMPOUNDED

Impounding the beneficial interest of the trustee.

The liability of the beneficial interest of a trustee to indemnify a co-trustee where there has been a breach of trust has already been considered.[8] It remains to notice that the liability of the trustee's interest to forfeiture is rather wider than was there stated. If there has been a breach of trust, the trustee will not be able to receive any part of his interest under the trust until the breach has been made good, and this applies, not only to interests to which the trustee was directly entitled, but to interests he may have acquired by purchase or succession,[9] and furthermore, an assignee of a beneficial interest from a trustee is subject to the same disability, even though the breach has occurred after assignment of the interest.[10]

If a trustee of two separate trusts commits a breach of trust in respect of the first, and is a beneficiary under the second, but not under the first, his interest in the second fund will not be impounded to make good the breach of trust in respect of the first.[11]

C. FOLLOWING THE TRUST PROPERTY

The principle has three aspects.

That the beneficiary has always a personal remedy against the trustee for breaches of trust has already been noticed.

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[1] *Roy* v. *Gibbon* (1844), 4 Hare 65.
[2] *Re Benson*, [1899] 1 Ch. 39.
[3] (1878), 8 Ch.D. 148.
[4] [1894] 3 Ch. 345.
[5] *Hampden* v. *Wallis* (1884), 27 Ch.D. 251.
[6] *Re Beeney*, [1894] 1 Ch. 499.
[7] *Staniar* v. *Evans* (1887), 34 Ch.D. 470; *Re Carroll*, [1902] 2 Ch. 175.
[8] P. 343, *ante*.
[9] *Jacobs* v *Rylance* (1874), L.R. 17 Eq. 341; *Doering* v. *Doering* (1889), 42 Ch.D. 203; *Re Dacre*, [1916] 1Ch. 344.
[10] *Doering* v. *Doering*, *supra*.
[11] *Re Towndrow*, [1911] 1 Ch. 662.

The beneficiary, however, possesses a more powerful remedy. He may follow the trust property. This equitable principle has three aspects. In the first place, it implies that even though the trustee has parted with the actual trust property, yet so long as the proceeds of the disposition of that property are identifiable, the beneficiary can recover them from the hands of the trustee. In the second aspect, the doctrine implies that the beneficiary may, subject to conditions, follow the trust property into the hands of third persons. Thirdly, he may follow trust property into the hands of another beneficiary.

(1) Following the Trust Property in a Changed Form in the Hands of the Trustee

The beneficiary can always recover the proceeds of sale so long as they are identifiable.

As regards the first aspect of the rule, it makes no difference what form the proceeds of sale assume, the beneficiary can always recover them so long as they are identifiable, and furthermore, any gain which accrues in the process belongs to the beneficiary, whilst any loss is debited to the trustee. It was at one time thought that if the trustee sold the trust property, and paid the proceeds into his account at the bank, the beneficiary could not recover them, since "money has no earmark," but this doctrine is now entirely discredited.[1]

The position of mixed funds.

The position is simple where the proceeds of sale remain distinct from any other property.[2] More difficult questions arise, however, when (as is often the case) the trustee mixes trust moneys with his own, and then employs them in some enterprise in breach of trust. The situation was exhaustively examined by Jessel, M.R., in *Re Hallett's Estate*,[3] where he observed[4]—

> The modern doctrine of Equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position, in a purchase. He may have bought

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[1] *Re Hallett's Estate* (1880), 13 Ch.D. 696.
[2] *Taylor* v. *Plumer* (1815), 3 M. & S. 562; *Ex parte Dumas* (1754), 2 Ves. Sen. 582; *Re Patten and Edmonton Union* (1883), 31 W.R. 785.
[3] *Supra.* [4] At p. 708.

land with it, for instance, or he may have bought chattels with it. Now, what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of Equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the purchase money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the *cestui que trust*, or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the fact of the amounts laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word "trustee" in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of Equity.

There is a presumption against breach of trust.

In *Re Hallett's Estate*,[1] it was decided that where a trustee or other person with a fiduciary character, pays trust moneys into his own account, thereby mixing the moneys with his own, and subsequently withdraws money for his own purposes, he must be deemed to be drawing out his own money, so that the beneficiaries can claim the balance as trust money, as against the trustee's other creditors. In other words, there is a presumption against an intention on the part of the trustee that he is about to commit a breach of trust. Thus, in *Re Oatway*,[2] a trustee paid trust moneys into his current account, and then drew out to purchase an investment. He subsequently spent the balance for his own purposes. The Court held that the trustee's personal representatives could not argue that the investment had been made out of the trustee's own money, and that the money subsequently spent was trust money. This presumption applied, and the investment represented trust money. As regards beneficiary and trustee of the same trust, therefore, the *Rule in Clayton's Case*[3] has no application. This rule was evolved, as Maitland observes,[4] "for the purpose of settling the liabilities of partners in banking firms," though

[1] *Supra*. [2] [1903] 2 Ch. 356. [3] (1816), 1 Mer. 572. [4] *Equity*, p. 174.

it has since been extended to several other types of commercial transaction. In *Clayton's Case*, X, a customer of a bank, had a balance of £1,713 in his favour, on the death of C, a partner in the bank. After C's death, X drew out more than £1,713, and then paid in sums to a larger amount still. The surviving partners of the bank then became insolvent, and X sought to recover from C's estate. The Court held, however, that the sums paid out to X after C's death must be appropriated to the £1,713 due to X, and therefore C's estate was free from liability, for the £1,713 due at his death had been discharged, whilst the sums which X subsequently paid in constituted a new debt, for which the surviving partners alone were liable.

It must be noticed however—

There is no presumption of an intention to repair a breach of trust.

1. That the *Rule in Clayton's Case* applies to the account of a trustee, as between beneficiaries under two separate trusts.[1]

2. Although there is a presumption against a breach of trust by a trustee, there is no similar presumption that a trustee intends to repair a breach of trust.

Thus, in *Roscoe* v. *Winder*,[2] a trustee mixed trust moneys with his own, and then withdrew, so that at length the trust account was diminished. Later still, he paid in further sums of his own money, and the Court held that the beneficiaries could not claim these unless they could prove that the sums had been paid in with the intention of replacing the trust money.

Successive changes of form of the property.

The trust property can be followed, not only into the hands of the trustee himself, but also into the hands of his trustee in bankruptcy, even although the trustee only acquired it on the eve of bankruptcy, for the purpose of absconding with it.[3] Where a succession of transactions have occurred, whereby the trust property has changed its form several times the onus is on the beneficiary of proving the transactions whereby the successive conversions took place.[4] An interesting example of the application of this doctrine is furnished by *Robertson* v. *Morrice*,[5] where a trustee held stock in trust, and also similar stock of his own, and confused them. He sold stock from the mixed fund from time to time, and at his death the amount of stock left was less than the amount which should have been subject to the trust. The

[1] *Re Hallett's Estate* (1880), 13 Ch.D. 696, at p. 726 *et seq.*; *Hancock* v. *Smith* (1889), 41 Ch.D. 456.
[2] [1915] 1 Ch. 62.
[3] *Frith* v. *Cartland* (1865), 2 H. & M. 417.
[4] *Harford* v. *Lloyd* (1855), 20 Beav. 310.
[5] (1845), 9 Jur. 122.

Court held that the whole of the remaining stock must be appropriated to the trust.

The beneficiary can follow trust funds if converted into land.

It was at one time doubted whether beneficiaries could follow trust funds into the form of real estate, since the purchase could usually only be proved by parol evidence, but it is now settled that the relief afforded by Equity is on the ground of fraud, a constructive trust arising, and these are not within the Statute of Frauds.[1] It is always open to the beneficiary to claim the land (or other investment) and then to claim the loss, if any, from the trustee. Whether trust-money has actually been invested in the purchase of land or not is often a little difficult to determine. Where, however, the amount of the trust fund is nearly identical with the purchase price, there is a presumption that the fund has been so used,[2] and also where the trustee's means are clearly insufficient for the purchase, unaided by trust money[3] (although the possibility of a purchase with a mixed fund should not be excluded). The mere fact that a trustee has trust money under his control, however, is not sufficient to stamp any purchase made by him with the trust.[4]

The principle applies to trustees of all kinds.

It is clear from the opening words of Jessel, M.R.'s, observations in *Re Hallett's Estate*, cited above, that the rule of following trust property, in this aspect, extends not only to express trustees, but also to all persons in a fiduciary capacity, including factors, and many types of agents. In the absence of special circumstances,[5] however, a fiduciary relationship does not exist between banker and customer.[6]

Limits of the doctrine.

The limiting factor in this doctrine is illustrated by *Re Hallett & Co.*,[7] where a transaction was completed by a set-off in the accounts, the money not being actually received in any form. Here, the doctrine of identification could not be applied; it depends upon a defined subject-matter, which can be followed.

It will be noticed that this rule governing the following of trust property in the hands of a trustee is important only where the trustee is insolvent, since in all other cases the beneficiary's remedy against the trustee himself is sufficient.

(2) Following the Trust Property Itself into the Hands of Third Parties

Position of third parties

The right of the beneficiary to follow trust property with

[1] *Lane* v. *Dighton* (1762), Amb. 409; *Lench* v. *Lench* (1805), 10 Ves. 517.
[2] *Perry* v. *Phelips* (1798), 4 Ves. 108; 17 Ves. 173.
[3] *Ryall* v. *Ryall* (1739), 1 Atk. 59. [4] *Sealy* v. *Stawell* (1874), Ir.R. 7 Eq. 347.
[5] *Ex parte Plitt* (1889), 60 L.T. 397. [6] *Foley* v. *Hill* (1848), 2 H.L.C. 28.
[7] [1894] 2 Q.B. 237.

acquiring from the trustee in breach of trust.

which the trustee has parted depends upon the nature of an equitable interest in property, as recognised and protected by a Court of Equity, and the position is that where a trustee parts with trust property *in breach of trust*, the recipient of that property will be bound by the trust unless he can show (1) that he has obtained the legal title; (2) that he was a *bona fide* purchaser for valuable consideration; and (3) that he received no notice that the transaction was a breach of trust before the transfer was complete. Thus, James, L.J., observed in *Pilcher* v. *Rawlins*[1]—

> I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained. In such a case the purchaser is entitled to hold that which, without breach of duty he has had conveyed to him.[2]

Where the equities are equal, the law prevails.

This proposition is a direct consequence of the application of the maxim "Where the equities are equal, the law prevails," for the purchaser has obtained the legal estate without any privity to the breach of trust, and Equity will not, therefore, curtail his enjoyment of it in favour of the beneficiary. This is the limiting factor in relation to the enjoyment of equitable interests in property.

The extent of the application of the doctrine of notice to chattels is still a matter of some uncertainty. Maitland observed of this aspect of the rule[3]—

Application of the doctrine to chattels.

> Finally, as regards equitable rights in movable goods, corporeal chattels, we hear very much less. Doubtless, if I bought a piece of plate from a trustee knowing that he held it on trust for E, E might enforce his right against me, and this would be so even though I purchased in market overt. But a purchaser of movable goods is not expected to investigate his vendor's title. Of course, if he buys from one who is

[1] (1872), L.R. 7 Ch. App. 259, 268.
[2] See also *Cave* v. *Cave* (1880), 15 Ch.D. 639.
[3] *Equity*, p. 149.

not owner, and the sale does not take place in market overt or fall within the rules introduced by the Factors' Acts he gets a bad title. But, though this be so, Equity has not been able to say of corporeal chattels as it has said of land and of trust funds that the prudent purchaser makes an investigation of title. Corporeal chattels are outside the realm of constructive notice. In *Joseph* v. *Lyons*,[1] an attempt was made to apply that doctrine to goods, but the Court of Appeal would not hear of it. Cotton, L.J., said: "I think that the doctrine as to constructive notice has gone too far and I shall not extend it"—and Lindley, L.J.: "It seems to me that the modern doctrine as to constructive notice has been pushed too far, and I do not feel inclined to extend it."

The doctrine of constructive notice does not apply to chattels.

In *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*,[2] the Privy Council held that a purchaser of a ship with actual notice of a charter-party was bound by it; and the position seems to be, as Maitland put it, that actual notice of a trust of chattels will bind a purchaser of them, but the doctrine of constructive notice does not apply to chattels. The difficulty, of course, is in determining upon what facts the Court will imply a trust of chattels.

The purchaser, to be protected, must obtain the legal estate.

A good illustration of the operation of the doctrine of notice in regard to trust estates is furnished by *Cave* v. *Cave*.[3] There a sole trustee of a marriage-settlement, who was a solicitor, appropriated trust moneys, and used them, in breach of trust, to buy land, the conveyance being taken in the name of his brother. The brother then mortgaged the property by way of legal mortgage to A, and later to B by way of equitable mortgage. Neither A nor B had notice of the trust; and the Court held that A's legal mortgage had priority to the interests of the beneficiaries, but that these had priority over B's equitable mortgage, in accordance with the rule that as between holders of conflicting equitable interests, the equities being equal, the equitable interest which is first in time prevails. This case, therefore, affords a striking illustration of the importance of the legal estate.[4] A further example of the rule is afforded by *Frith* v. *Cartland*.[5] There a trustee had wrongfully applied trust money in the purchase of land which he then sold to another person who bought without notice of the trust. Before the estate had been conveyed, however, the beneficiaries claimed the

[1] (1883), 15 Q.B.D. 280.
[2] [1926] A.C. 1.
[3] (1880), 15 Ch.D. 639.
[4] If this problem had arisen since 1925, B's mortgage would have been a legal term not protected by deposit of the deeds. Whether in such circumstances he would still have been postponed to the beneficiaries is not clear.
[5] (1865), 2 H. & M. 417.

property, and the Court held that their prior equity must be preferred to the purchaser's.[1]

There is no presumption that a vendor is necessarily a beneficial owner.

The same point is also considered by Farwell, L.J., in *Burgis* v. *Constantine*,[2] where he observes—

> As has been pointed out by Lord Cairns in *Shropshire Union Railways and Canal Co.* v. *The Queen*,[3] the mere fact that a person has transferred the legal ownership of stock or shares or other property, real or personal, to a trustee, and given him the title deeds, or the securities, or other *indicia* by title, does not justify any one in assuming that the person to whom such transfer is made is the beneficial owner. If the trustee does, in fact, deal with the property, and convey the legal ownership to a *bona fide* purchaser or mortgagee for value without notice, the *cestui que trust* has to bear the loss.[4] If such a subsequent purchaser or mortgagee does not get the legal estate, it is because he has not taken those precautions which the law allows him in order to protect himself from all risks; and he cannot set up the apparent ownership of the trustee as evidence of any misconduct or negligence on the part of the beneficial owner, because it is in accordance with the usages of mankind that the legal estate in property should be conveyed to and the *indicia* of title deposited with trustees and no other member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him, from which a duty towards him can be inferred.

The doctrine of notice as regards trusts of land has been modified by the machinery of the property legislation of 1925.[5]

Maitland[6] suggested that if the trustee recovered the property in his capacity of trustee for another trust, he might hold free from notice, as a stranger who purchased would, and this would seem to be provided for by the Trustee Act. 1925, Sect. 28, which states—

Notice acquired through acting for another trust does not bind.

> A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

The importance of this section in respect of a trust corporation handling the affairs of many trusts is obvious.

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[1] See also *Joyce* v. *De Moleyns* (1845), 2 J. & L. 374; *Newton* v. *Newton* (1869), 4 Ch. App. 143; *Re Morgan* (1881), 18 Ch.D. 93.

[2] [1908] 2 K.B. 484, 501–503.

[3] (1875), L.R. 7 H.L. 496, 505.

[4] I.e. of the property. He still has his personal remedy against the trustee.

[5] For details of this, see Goodeve and Potter, *Real Property*, Chapter II.

[6] *Equity*, p. 123.

A purchaser without notice from a purchaser with notice takes free of the beneficial interests.

Moreover, a purchaser without notice from a purchaser with notice takes the legal estate free from the beneficiary's interests, for his own good faith shelters him.[1] It would appear, however, that an exception exists in favour of a charitable trust, for in respect of those trusts a purchaser without notice from a purchaser with notice is bound by the trust.[2]

If the purchaser has no notice of the trust at the time of the purchase, but receives notice before conveyance, he is nevertheless bound by the trust.[3] It should be noticed that this rule is confined strictly to land. Thus, when a purchaser received shares of a company from a trustee with no notice, but received notice of the trust before the shares were registered, it was held that the purchaser took free from the trust, for the transfer was like the conveyance of a legal estate to become vested on the performance of a condition.[4]

What constitutes notice.

What constitutes notice is now considered in the Law of Property Act, 1925, Sect. 199, which states that a purchaser shall not be prejudicially affected by notice of any instrument, matter, fact, or thing unless (1) if it is an instrument registrable under the Land Charges Act, 1925, it is so registered. If it is not registered, it is void as against the purchaser; or (2) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (3) in the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, solicitor, or other agent acting as such, or would have come to the knowledge of his solicitor or agent, if such inquiries and inspections had been made as ought reasonably to have been made. There are, therefore, several kinds of notice—

1. Where the purchaser actually has knowledge of the equitable interest. This is actual notice.

2. Where the agent of the purchaser acquires knowledge in the course of the transaction. This is usually termed imputed notice.

3. Where the purchaser or his agent did not have knowledge, but would have had if they had made proper inquiries. This is constructive notice.

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[1] *Mertins* v. *Joliffe* (1756), Amb. 313; *Salsbury* v. *Bagot* (1677), 2 Swanst. 608.

[2] *East Greenstead's Case* (1633), Duke 65; *Sutton Coldfield Case* (1635), Duke 68; and see *Commissioners of Charity Donations* v. *Wybrants* (1844), 2 Jo. & La T. 194, and *Re Alms Corn Charity, Charity Commissioners* v. *Bode*, [1901] 2 Ch. 750.

[3] *Taylor* v. *Russell*, [1892] A.C. 244.

[4] *Dodds* v. *Hills*(1865), 2 H. & M. 424.

Actual notice.

Concerning actual notice some diversity of opinion has existed. It has been said that the notice must proceed from a party interested in the transaction or his agent,[1] but whilst a purchaser would probably be safe in disregarding mere gossip, the position seems to be that if he had such information as should have affected the judgment of a prudent man he will be deemed to have had actual notice,[2] no matter from what source the information proceeds.

Constructive notice.

As regards constructive notice, Wigram, V.C., in *Jones* v. *Smith*,[3] divided the cases which might arise into the two following classes—

(1) Cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the incumbrance, or other circumstances affecting the property, of which he had actual notice.

(2) Cases in which the Court has been satisfied from the evidence before it that the party charged had designedly abstained from inquiry for the purpose of avoiding notice—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a wilful determination not to learn it.

To this second class must now be added cases wherein the purchaser is culpably negligent in failing to make the usual inquiries.[4]

In illustration of the first class of case, in *Davis* v. *Hutchings*,[5] trustees distributed a beneficiary's share to their solicitor, who had informed them that the beneficiary had assigned his share to him. The trustees did not require the solicitor to produce the assignment, in which it was stated that the assignment was subject to a prior charge, of which the trustees received no other notice. It was held that the trustees had constructive notice of the prior charge.

Notice of the existence of an instrument is not necessarily notice of its contents.

It is necessary to observe that notice of the existence of an instrument is not always notice of its contents. Thus, as Jessel, M.R., observes in *Patman* v. *Harland*[6]—

> There is also the class of cases, of which I think *Jones* v. *Smith*[3] is the most notorious, where a purchaser is told of

[1] See *Barnhart* v. *Greenshields* (1853), 9 Mo.P.C. 18; *Reeves* v. *Pope*, [1914] 2 K.B. 284.

[2] *Lloyd* v. *Banks* (1867), 3 Ch. App. 448.

[3] (1841), 1 Hare 43, 55.

[4] *West* v. *Reid* (1843), 2 Hare 249, 257; *Hudston* v. *Viney*, [1921] 1 Ch. 98.

[5] [1907] 1 Ch. 356.

[6] (1881), 17 Ch.D. 353. The particular point decided in this case has been overruled by the Law of Property Act, 1925, Sect. 44 (5). See further on this subsect. *Shean* v. *Wells*, [1936] 1 All E.R. 832.

a settlement which may or may not affect the title, and is told at the same time that it does not affect it, and in such cases there is no constructive notice. Supposing, as in *Jones* v. *Smith*, you are buying land of a married man, and you are told at the same time that there is a marriage settlement but that it does not embrace the land in question, you have no constructive notice of its contents. Because, although you know there is a settlement, you are told that it does not affect the land at all. If every marriage settlement necessarily affected all a man's land, then you would have constructive notice; but as a settlement may not relate to his land at all, or only to some other portions of it, the mere fact of your having heard of a settlement does not give you constructive notice of its contents if you are told at the same time that it does not affect the land.

Duty of the purchaser to investigate title for thirty years.

The second class of cases arises out of the duty of the purchaser to investigate the vendor's title for the statutory period of thirty years, and to require production, not only of the abstract, but of the title deeds. If he fails to do this, he is nevertheless affected with notice of the contents thereof, unless, having required production, the purchaser receives from the vendor an adequate reason for non-production.[1]

As regards imputed notice, the important rule of Sect. 199 of the Law of Property Act, 1925, is that the agent must have received notice whilst employed in that transaction.

Absence of notice does not protect a volunteer.

It should be observed that absence of notice only protects the purchaser for value. A volunteer is bound by the trust whether he has notice of it or not.[2]

Absence of the legal estate will not postpone an encumbrancer to a beneficiary, if the beneficiary has committed fraud.

It has been stated that absence of notice will not protect a *bona fide* purchaser for value who fails to obtain the legal estate; that is to say, that in relation to an equitable incumbrancer, the *cestui que trust* will normally be preferred. It need scarcely be added, however, that this rule will not be applied so as to enable the *cestui que trust* to commit what amounts to a fraud upon the incumbrancer. Thus, in *Re King's Settlement*,[3] X, in order to keep the trusts of a settlement off the title, conveyed property to A and B by deed of gift in consideration of his love and affection for them. A and B simultaneously executed a deed poll, declaring trusts in favour of X and others. The conveyance and title deeds were then handed to A and B, whilst the deed poll was retained by X's solicitor. Later, A and B, purporting to act as absolute owners, created equitable incumbrances in

[1] *Plumb* v. *Fluitt* (1791), 2 Anst. 432; *Agra Bank* v. *Barry* (1874), L.R. 7 H.L. 135.

[2] *Mansell* v. *Mansell* (1732), 2 P.Wms. 678; *Spurgeon* v. *Collier* (1758), 1 Eden 65.

[3] [1931] 2 Ch. 294.

favour of M and N, who gave value and had no notice of the trust. Farwell, J., held that inasmuch as X's conveyance to A and B contained a direct representation which necessarily implied that the grantees were absolute owners, both X and the other beneficiaries claiming under him were estopped from denying that statement, and their interests under the trust were accordingly postponed to those of M and N.[1]

Notice of doubtful equity.

A further question which has occasioned some difficulty is the extent to which a purchaser is bound by notice of a doubtful equity. Where the equity is clear, the purchaser is bound by notice of it, but there may be, in the words of Lord Northington, in *Cordwell* v. *Mackrill*,[2] an equity which depends upon "the mere construction of words which are uncertain in themselves, and the meaning of which often depends on their locality." How far this doctrine goes is not altogether clear, for in *Thompson* v. *Simpson*,[3] Lord St. Leonards regarded the decision in *Cordwell* v. *Mackrill*[2] as of no great authority, and said, in effect, that where the construction which a Court of Equity would put upon the words was not really in doubt, the equity resulting would be enforced, no matter how difficult the construction might be, but not after lapse of time if there was anything equivocal or ambiguous. Lord Northington's observations are clearly not intended as a loophole for any maxim that although a man is deemed to know the law, he may not necessarily be taken as understanding the operation of Equity, for in *Parker* v. *Brooke*[4] a testator gave leasehold property to his daughter to her separate use, but without the interposition of a trustee. The husband entered into possession and mortgaged it, and the purchaser was bound by the wife's equitable interest, being deemed to know the effect of the will in Equity. On the other hand, in *Hardy* v. *Reeves*,[5] a residuary legatee remained undisturbed in possession of a copyhold estate for nineteen years. Actually, the estate had been mortgaged to the testator in fee, and at the end of this period, the heir recovered the land and mortgaged it. The residuary legatee omitted to assert his title for nine years, and then, when he instituted a suit, and proved his claim, it

[1] The decision in this case seems to have been reached on the assumption that the legal estate was in the trustees, but the transactions were affected by the passing of the Property Acts. See 48 *Law Quarterly Review*, p. 11.
[2] (1765), 2 Eden 344.
[3] (1841), 1 Dru. & War. 491.
[4] (1804), 9 Ves. 583.
[5] (1800), 4 Ves. 466; 5 Ves. 426.

was held that the mortgagee from the heir took without notice of the right of the residuary legatee, for it was not a clear equity. It is only to cases of this sort that Lord Northington's observations can refer, and they are to-day of very infrequent occurrence.

(3) Following Trust Property into the Hands of Another Beneficiary

Recovery of an overpayment by one beneficiary from another.

The circumstances in which a trustee who has overpaid a beneficiary will be allowed to have the mistake put right have already been considered. Under certain conditions, however, the beneficiary who has suffered by the overpayment is allowed to follow the trust fund into the hands of the beneficiary who has profited by it. These circumstances were considered by Warrington, J., in *Re Robinson*,[1] where he divided the cases into three classes—

> I think cases of this kind where mistakes have been made by trustees in payment of trust funds fall under three heads. Where the Court is administering the funds and adjusting the rights of the parties between themselves in the ordinary course, if there are funds belonging to the person who has been overpaid, the Court may so adjust the rights as to rectify the overpayment. Then, again, there are cases where trust money actually remaining in the hands of the person in whose hands it has been wrongly placed may be followed. In such a case there is no difficulty at all; a person has received a trust fund, and it is still in his hands, and still impressed with a trust, and of course he holds it as trustee and is bound to transfer it to the proper person. The third class of cases is where the trust funds or the proceeds of the trust funds have been received by a person with knowledge that they are wrongly paid to him; there, even though the funds do not remain in his hands, he must at all events be treated as a constructive trustee and liable to repay the value of the trust funds wrongly paid to him.

An illustration of the first type of case is *Dibbs* v. *Goren*.[2] There a trustee made certain payments under an erroneous view of the effect of the will, and the Court, which was administering the trusts of the will, held that the persons to whom the payments had been made were compelled to make restitution out of the other interests to which they were entitled.

Brooksbank v. *Smith*[3] furnishes an example of the second class of case. Trustees wrongly transferred a sum of Consols

[1] [1911] 1 Ch. 502; and see also *Re Mason*, [1928] Ch. 385.
[2] (1847), 11 Beav. 483, 484; see also *Livesey* v. *Livesey* (1827), 3 Russ. 287.
[3] (1836), 2 Y. & C. Ex. 58.

to a *cestui que trust* who was not entitled to them, and as the stock still remained in his hands he was compelled to re-transfer them.

The third class is illustrated by *Harris* v. *Harris* (No. 2).[1] Under a marriage settlement, the husband, Harris, was entitled to have part of his wife's property, to the extent of £5,000 Consols, transferred to him. The trustees in 1848, misunderstanding a clause in the settlement, paid £5,000 sterling to him, selling £6,117 Consols for the purpose, so that he wrongly received the proceeds of £1,117 Consols. In 1860 a suit was instituted for various purposes connected with the trust, including the execution of the trusts of the settlement and the appointment of new trustees, and in the decree, Romilly, M.R., declared that Harris was liable to refund the £1,117 Consols, and that further, the Statute of Limitations did not bar the claim.

In the three classes of cases considered the Statute of Limitations does not bar.

It should be observed that in the three classes of case mentioned by Warrington, J., in *Re Robinson,*[2] the Court may order the restoration of the trust property at a greater distance of time than that permitted by the Statute of Limitations. Where a *cestui que trust* brings an action to recover trust money from another *cestui que trust* who has been overpaid as a result of a mistake of fact, the claim must be brought within the limitations period. In *Re Robinson*[2]—

> A B, who ought to have paid money to the plaintiff, has by mistake paid it to the defendant. A B, who has paid it, could, if the mistake was a mistake of fact, recover it in an action for money had and received to his use, and that action would be barred by a lapse of six years. The present claim is not by the person who paid it, but by the person whose money was paid away. Whether in strictness the latter could maintain an action for money had and received may be a matter of some doubt, but he could have at all events maintained a suit in Equity for it, making the trustee a party. In this case he has sued without making the trustee a party. But, whether the action is treated as a strict claim in law for money had and received, or whether it is brought as a claim in Equity through the medium of the trustee—in whichever way it is regarded—at first sight, inasmuch as the Court has always acted by analogy to the Statute, one can see no reason why the period fixed by the Statute should not bar the right of the plaintiff to recover.

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[1] (1861), 29 Beav. 110. [2] [1911] 1 Ch. 502.

CHAPTER XIX

LIMITATIONS ON THE LIABILITY OF A TRUSTEE

A. PROTECTION WHERE THE TRUSTEE HAS ACTED REASONABLY AND HONESTLY

The Court can relieve a trustee who has acted reasonably and honestly.

THE Court has power to relieve a trustee or executor who has committed a breach of trust, in certain circumstances. The Trustee Act, 1925, Sect. 61, provides—

> If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

The Court will not fetter its discretion.

The Court will not lay down any general rules governing the exercise of its discretion[1] but the onus of proof that he has acted reasonably and honestly is on the trustee. It should also be noticed that Sect. 372 of the Companies Act, 1929, gives the Court power to grant relief to a company director in similar circumstances.

Some illustrations of the circumstances in which the Court has given or refused relief under Sect. 3 of the Judicial Trustees Act, 1896 (which Sect. 61 of the Trustee Act, 1925, has replaced), will serve to explain the manner in which the Court utilises its powers of relief. In *Re Kay*,[2] an executor whose testator had left an estate of £22,000 with apparent liabilities amounting only to about £100, paid immediately to the testator's widow a legacy of £300, and permitted her to receive a portion of the income of the estate in accordance with the terms of the will. This was done before the executor advertised for claims, and it appeared that the testator was liable in respect of a claim for fraudulent misappropriation which, when satisfied, rendered the estate insolvent. The Court held that the appropriation of the legacy, and the payment of the income until service of the writ were reasonable and excusable, but that payment of income after that date was not.

[1] *Re Allsop*, [1914] 1 Ch. 7; *Re Kay*, [1897] 2 Ch. 518; *Re Stuart*, [1897] 2 Ch. 583; *Perrins* v. *Bellamy*, [1899] 1 Ch. 797; *Re Turner*, [1897] 1 Ch. 536; *Re Mackay*, [1911] 1 Ch. 300; *Re Windsor Steam Coal Co.*, [1929] 1 Ch. 151.

[2] *Supra*. See also *Re Brookes*, [1914] 1 Ch. 558.

The trustee must act reasonably as well as honestly, and the burden of showing this is on the trustee.[1] In dealings with the trust property reference will be made to the conduct of a prudent man of business, so that where a debt was owing to the estate which was small, and the debtor was of good standing, the trustee was held to be excused for not taking prompt steps to sue him,[2] and the same view was taken where the trustee failed to sue because he thought the proceedings would have been unsuccessful.[3] On the other hand, a trustee who makes an investment without obtaining certain necessary consents does not act reasonably,[4] nor does he if he allows a co-trustee who is a solicitor to persuade him to make an unauthorised investment (though he will usually have a right of indemnity),[5] and a trustee will not be excused if he fails to obtain the valuation prescribed by the Trustee Act, 1925, Sect. 8, when investing on real securities.[6]

The burden of showing that he has acted reasonably and honestly is on the trustee.

In *Perrins* v. *Bellamy*,[7] trustees, under a mistake of law, believed they possessed a power of sale, and sold settled leaseholds, thereby diminishing the income of the tenant for life, but it was held that in the circumstances they were entitled to relief. Again, in *Re Allsop*,[8] a trustee, acting upon a mistaken construction of the will, distributed to the wrong persons and was relieved. On the other hand, in *National Trustees Company of Australasia* v. *General Finance Company of Australasia*,[9] trustees who were remunerated as such were wrongly advised by their solicitors to make a distribution which, in fact, they had no power to make. The Court pointed out that a trustee does not automatically become entitled to relief on showing that he has acted reasonably and honestly. Each case depends on its own facts, and relief is always within the discretion of the Court. On the other hand, the Court has no power under this section to condone a breach of trust *in advance*, no matter how reasonable and honest the proposed course of conduct may be.[10]

Every case depends upon its own facts.

A good illustration of what is meant by the words "reasonably and honestly" is afforded by the decision of the Privy Council in *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh*[11]

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[1] *Re Stuart*, [1897] 2 Ch. 583.
[2] *Re Grindey*, [1898] 2 Ch. 593.
[3] *Re Roberts* (1897), 76 L.T. 479.
[4] *Chapman* v. *Browne*, [1902] 1 Ch. 785.
[5] *Re Turner*, [1897] 1 Ch. 536.
[6] *Re Stuart*, *supra*.
[7] [1899] 1 Ch. 797.
[8] [1914] 1 Ch. 1.
[9] [1905] A.C. 373.
[10] *Re Tollemache*, [1903] 1 Ch. 955.
[11] [1934] A.C. 529.

which was decided upon Sect. 60 of Ordinance No. 14 of 1929 of the Straits Settlements, a section in terms identical with those of Sect. 61 of the Trustee Act, 1925. By the terms of the will under which the trust arose, the trustees were given power to invest trust moneys in such investments as they in their absolute discretion thought fit. The sole surviving trustee lent money at interest on the security of deposited jewellery without independent valuations, and made other loans without security. The Privy Council held that the loans upon the security of the jewellery were not breaches of trust in the absence of proof that the security was insufficient when the loans were made, but that the unsecured loans were made in breach of trust; and they further held that the trustee was not entitled to relief, because, although he had acted honestly, he had not acted reasonably, for he had not considered whether the unsecured loans were dispositions which it was prudent for him to make as a trustee, but had satisfied himself with the knowledge that the testator himself had made such loans in his lifetime.

It is not necessary specially to plead the section in defence to an action for breach of trust; the benefit of it may be claimed at the trial.[1]

B. CONCURRENCE OF THE BENEFICIARY IN THE BREACH OF TRUST

A beneficiary who is *sui juris* may concur in or ratify a breach of trust.

If the beneficiary was *sui juris*, and had full knowledge of the circumstances, and yet concurred in the breach of trust, he cannot proceed against the trustee in respect of the breach.[2] Again, if having no contemporary knowledge of the breach, yet on subsequently learning of it, he adopts it, with full knowledge of the facts, and takes the profits, here again the beneficiary may not proceed against the trustee.[3] In both cases it is assumed that the beneficiary is an entirely free agent, no pressure having been put upon him by the trustee.[4] It is essential that the beneficiary should be *sui juris* for the concurrence to be effective. An infant can proceed against a trustee for breach of trust even though he has concurred in it,[5] unless he has been guilty of fraud. This last exception is well illustrated by *Overton* v. *Banister*.[6] An

[1] *Singlehurst* v. *Tapscott S.S. Co.*, [1899] W.N. 133.

[2] *Fletcher* v. *Collis*, [1905] 2 Ch. 24; *Life Assn. of Scotland* v. *Siddal* (1861), 3 De G.F. & J. 58; *Re Deane* (1888), 42 Ch.D. 9.

[3] *Crichton* v. *Crichton*, [1895] 2 Ch. 853.

[4] *Bowles* v. *Stewart* (1803), 1 Sch. & Lef. 209.

[5] *Wilkinson* v. *Parry* (1826), 4 Russ. at p. 276. [6] (1844), 3 Hare 503.

infant beneficiary obtained a sum of stock to which she was entitled on attaining her majority, from the trustees by fraudulently representing she was of full age. Later, having come of age, she sued the trustees to compel them to pay over the stock again. The Court held that she could not enforce the second payment for, although the receipt of an infant is not a good discharge, yet the infant, having misrepresented her age, could not set up the invalidity of the receipt.

Indemnification of a trustee out of the interest of a concurring beneficiary.

It need hardly be stated that where one beneficiary has acquiesced in the breach of trust, another may proceed against the trustee in respect of it, and the Court may in such a case order that the trustee be indemnified out of the interest of the concurring beneficiary, unless the latter is subject to a disability.[1] The matter is now governed by Sect. 62 of the Trustee Act, 1925, which states—

> (1) 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, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the court seems 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 persons claiming through him.

Subsection (2) provides that the section applies to breaches of trust committed before, as well as after 1st January, 1926.

Only the consent need be in writing.

In *Griffith* v. *Hughes*,[2] it was decided that neither the instigation nor the request need be in writing, but only the consent, to be within the section. The Court will not impound the beneficiary's interest, unless the beneficiary clearly realised that the action contemplated amounted to a breach of trust,[3] and the order, when made, takes priority of the interest of a mortgagee, whose charge was created after the breach of trust had been committed.[4] The object of the section is to enlarge the power of the Court as to indemnifying trustees.[5]

The beneficiary need not profit by the breach he instigates.

Moreover, it is not necessary that a beneficiary should reap benefit from the breach of trust which he instigates, or to which he consents. Thus, if a remainderman induces the trustee to commit a breach of trust for the benefit of the tenant for life, the remainderman's interest may be impounded.[6]

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[1] *Raby* v. *Ridehalgh* (1855), 7 De G.M. & G. 104; *Sawyer* v. *Sawyer* (1885), 28 Ch.D. 595.
[2] [1892] 3 Ch. 105.
[3] *Re Somerset*, [1894] 1 Ch. 231.
[4] *Bolton* v. *Curre*, [1895] 1 Ch. 544.
[5] *Ibid.*, p. 549.
[6] *Per* Lindley, L.J., in *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, 700.

If a married woman subject to a restraint instigates a breach, the Court may indemnify the trustee out of her interest.

The position of a married woman beneficiary who is restrained from anticipation requires special comment. Before the insertion of provisions in the Trustee Acts, permitting her interest to be impounded if she instigated a breach of trust, her position was practically identical with that of the infant; that is to say, the trustee could not indemnify himself out of her interest.[1] Now the Court may order it, but it would seem that some fuller evidence of her knowledge that the transaction was a breach of trust will be required than where an ordinary beneficiary's interest is being impounded (and the same rule would also seem to apply to a married woman whose interest is not restrained from anticipation). In *Sawyer* v. *Sawyer*,[2] Fry, L.J., said—

> All the cases in which the separate estate of a married woman has been held to be affected by a breach of trust are, as far as we are aware, cases in which she has been an actual actor in the transaction herself[3] . . . In no case so far as we know, has her separate estate been charged on the mere ground of her having acquiesced in or approved of the breach of trust.

In *Griffith* v. *Hughes*,[4] a married woman beneficiary, restrained from anticipation, was being pressed by creditors. She verbally persuaded the trustees to advance her £80 of trust money on a promissory note signed by her, her husband, and his brother. Kekewich, J., held that the trustee was entitled to be indemnified out of her interest. It will be seen that here the married woman was still the real author of the breach of trust, and in several other cases, the Court has declined to impound a married woman's interest on the ground that her participation was not sufficiently active.[5]

C. THE TRUSTEES AND THE STATUTES OF LIMITATION

1. *The Position of Trustees before* 1940

Mere lapse of time, in Equity, did not bar proceedings against the trustee.

The old rule of Equity was that mere lapse of time would never free an express trustee from liability for breach of trust,[6] and this rule was reproduced in the Judicature Act, 1873, Sect. 25 (2). Moreover, it would appear that this rule applied also to some constructive trustees, and particularly to persons who received trust property knowingly.[7] On the

[1] See *Stanley* v. *Stanley* (1878), 7 Ch.D. 589.
[2] (1885), 28 Ch.D. 595.
[3] See *Crosby* v. *Church* (1841), 3 Beav. 485; *Clive* v. *Carew* (1859), 1 J. & H. 199; *Pemberton* v. *M'Gill* (1860), 1 Drew. & Sm. 266.
[4] [1892], 3 Ch. 105.
[5] See *Ricketts* v. *Ricketts* (1891), 64 L.T. 263; *Bolton* v. *Curre*, *supra*; *Mara* v. *Browne*, [1895] 2 Ch. 69.
[6] *Hovenden* v. *Lord Annesley* (1805), 2 Sch. & Lef. 633.
[7] See *Soar* v. *Ashwell*, [1893] 2 Q.B. 390.

other hand, some constructive trustees could take advantage of the statute. Thus, it was held in *Knox* v. *Gye*[1] that a surviving partner, as a trustee for the share of a deceased partner, could plead the benefit of the Statute of Limitations. Nevertheless, the rule of concealed fraud applied to them.

Furthermore, a beneficiary might find that his remedy was lost in consequence of his laches or acquiescence,[2] and it would also seem that the Court of Chancery would decline to reopen transactions after a considerable period of time, more particularly where most of the parties were dead and the receipts lost.[3]

The Real Property Limitation Act of 1833. Sect. 25, provided, however, that— The Real Property Limitation Act, 1833, Sect. 25.

> When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* or any person claiming through him to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

The effect of this section is to preserve the right of the *cestui que trust* under an express trust to follow trust property into the hands of his trustee and persons claiming through him after any interval of time, except that when a trustee conveyed property to a purchaser for valuable consideration, the title of that purchaser, and subsequent purchasers from him could only be invalidated within twenty years (reduced by the Limitations Act of 1874[4] to twelve years) from the date of the first purchase (if indeed, it could be invalidated at all, for a *bona fide* purchaser for value *without notice* would have a good title). Moreover, it should be noticed that even where the purchaser's title thus became good after twelve years, the personal right of the beneficiary against the trustee in respect of the breach of trust survived.[5] It should also be observed that this section only applied to express trusts of lands and rents. A lease for value is a conveyance within the Act.[6] Those constructive trusts which are

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[1] (1871), L.R. 5 H.L.C. 656, 675.

[2] *Rolfe* v. *Gregory* (1864), 4 De G.J. & S. 576.

[3] *Bright* v. *Legerton* (1860), 2 *De* G.F. & J. 606. *St. John* v. *Turner* (1700), 2 Vern. 418

[4] Now the Limitation Act, 1939.

[5] *A.-G.* v. *Flint* (1844), 4 Hare 147; *East Stonehouse U.D.C.* v. *Willoughby Bros.*, [1902] 2 K.B. 318, 335.

[6] *A.-G.* v. *Davey* (1854), 4 De G. & J. 136.

Some constructive trustees are within this section.

within the terms of the decision in *Soar* v. *Ashwell*[1] are within Sect. 25, but not other constructive trusts, as for example that which arises where a trustee renews a lease in his own name.[2] Such a trustee could plead lapse of time as a general bar, since in most cases the constructive trustee is claiming adversely to the *cestui que trust*.[3] On the other hand, a person who is not an express trustee, but enters into possession and assumes the character of a trustee under an express trust is within the section,[4] and in *Barnes* v. *Addy*,[5] a stranger to the trust who actively and knowingly participated in the trustee's breach of trust was dealt with as an express trustee.

There are several *dicta* which suggest that the twelve year period after which the purchaser from the trustee obtains a good title is prolonged where the beneficiary is under a disability, or his interest is reversionary.[6]

The Trustee Act, 1888, Sect. 8.

In 1888, however, a new departure was taken in the Trustee Act of that year, and Sect. 8 of that Act reads—

> (1) In any action or other proceeding against a trustee or any person claiming through him,[7] except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:
>
> (*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:
>
> (*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a

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[1] [1893] 2 Q.B. 390.

[2] *Re Dane* (1870), Ir.R. 5 Eq. 498.

[3] *Beckford* v. *Wade* (1811), 17 Ves. at p. 97; *Re Lacey*, [1899] 2 Ch. 149.

[4] *Life Assn. of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 58, cited in *Soar* v. *Ashwell*, *supra*, at p. 396.

[5] (1874), L.R. 9 Ch. 244.

[6] *Thompson* v. *Simpson* (1841), 1 Dr. & War. 459; and see *Re Earl of Devon's S.E.*, [1896] 2 Ch. 562.

[7] The residuary legatee does not claim through the trustee of a will. *Leary* v. *Des Moleyns*, [1896] 1 I.R. 206; and *R. Richardson*, [1920] 1 Ch. 423.

restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary as against whom there would be a good defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

What trustees are within Sect. 8.

The construction of this section provoked a good deal of difficulty and uncertainty. The first question to be answered was. To what kinds of trustees did the benefit of the statute extend? In Sect. 1 of the Act of 1888 it is stated that the term includes an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable lands. Later decisions extended the statute's provisions to the director of a company,[1] and a mortgagee as far as any balance of the proceeds of sale of the mortgaged property is concerned,[2] but it did not apply to the trustee in bankruptcy[3] nor to the liquidator of a company in voluntary liquidation.[4] The relation of this section to the old equitable rule that an express trustee may not plead the benefit of the Statutes of Limitation must not be lost sight of. A constructive trustee might plead the benefit of the period of limitation, even though he had enriched himself at the expense of the trust estate; an express trustee and certain others classed with him could not, but might plead the benefit of Sect. 8 of the Trustee Act, 1888, in certain classes of case where they had not enriched themselves through the breach of trust. Some constructive trustees, however, fell within the Trustee Act, 1888, and not within the old equitable rule. This is illustrated by *Soar* v. *Ashwell*.[5] Trustees handed trust money to a solicitor for investment, and he misappropriated it. The Court of Appeal held that he was not entitled to the protection accorded by the equitable rule, and obviously this was not a case to which the Trustee Act, 1888, applied. Bowen, L.J., said—

> It has been established beyond doubt that a person occupying a fiduciary relation who has property deposited with him on the strength of such relation is to be dealt with as an express

[1] *Re Lands Allotment Company*, [1894] 1 Ch. 616.
[2] *Thorne* v. *Heard*, [1895] A.C. 495.
[3] *Re Cornish*, [1896] 1 Q.B. 99.
[4] *Re Windsor Steam Coal Co.*, [1928] Ch. 609; affirmed, [1929] 1 Ch. 151.
[5] [1893] 2 Q.B. 390; see *Re Timmis*, [1902] 1 Ch. 176.

trustee and not merely a constructive trustee of such property.[1]

The old equitable rule relating to constructive trustees who have enriched themselves at the expense of the trust estate was preserved by Sect. 25 (2) of the Judicature Act, 1873, but this has been repealed by the Limitation Act, 1939, with the result that Sect. 19 in its reference to "trustees" simply now puts express and constructive trustees of all kinds on the same basis, so that all trustees who have enriched themselves at the expense of the trust estate are now unable to plead any period of limitation.

It will be observed that Sect. 8 (1) of the Act of 1888, deprived the trustee of the benefit of lapse of time wherever he has committed fraud, or wherever he retains the trust property or its proceeds in his hands. In *Re Landi*[2] the personal representatives of a tenant in common who died in 1923 claimed against the other tenant in common who had received the entire profits of the land fron 1923 to 1935, and the Court held that as the Law of Property Act, 1925 made tenants in common trustees, no Statute of Limitations ran in favour of one of them who retained the rents and profits of the land.

The object of Sect. 8 (1) (*a*) is not clear.

The object of Subsect. (1) (*a*) of Sect. 8 has also been the subject of some conjecture. It could hardly be applicable to negligent breaches of trust, since these are not within the Statute of Limitations of 1623 at all, that statute applying only to actions arising out of contract and tort, and in any case negligent breaches of trust are within Subsect. 1 (*b*). In *Re Bowden*,[3] newly appointed trustees brought an action against trustees who had retired in respect of losses arising out of investments on insufficient security made more than six years before. Fry, L.J., observed that this was not a case within Subsect. 1 (*a*) since "If a person had not been a trustee, he could not be sued for a breach of trust," and further, there was no right conferred by any statute of limitations (other than Sect. 8 itself) in respect of breaches of trust. In *How* v. *Earl Winterton*,[4] however, Lindley, L.J., in order to attach some meaning to the subsection, said that there might possibly be claims (such as those for an account) where some statute of limitation might be applicable, had not the claim been against a trustee.[5]

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[1] At p. 397; and see *North American Co.* v. *Watkins*, [1904] 1 Ch. 242; [1904] 2 Ch. 233.

[2] (1939), 108 L.J. Ch. 401.

[3] (1890), 45 Ch.D. 444.

[4] [1896] 2 Ch. 626.

[5] See also *Robinson* v. *Harkin*, [1896] 2 Ch. 415.

A further explanation of the curious phraseology of Subsect. 8 (1) (*a*) is offered by Warrington, L.J., in *Re Richardson*.[1] He points out that in *Burdick* v. *Garrick* [2] an agent was prevented from pleading the Statute of Limitations because he was also a trustee. The subsection, says Warrington, L.J., was drafted to remove that disability.

The position of an executor, in relation to Sect. 8 (1).

It will be observed that the right of the trustee under Subsect. 1 (*b*) did not in any way alter the position where an existing statute of limitations was applicable. Now an executor was within the scope of Sect. 8, but there are other statutes which protect him, and Sect. 8 (1) (*b*) will therefore only operate where he acts as trustee. This is illustrated by *Re Swain*.[3] Executors and trustees of a will were under an obligation to sell the estate, including the testator's business. They delayed for some years, until the youngest child attained twenty-one. Eight years after this date an action was brought in respect of the delay in selling the business, and the resulting loss. Actions in respect of legacies may, under Sect. 8 of the Real Property Limitation Act, 1874, (now Sect. 20 of the Limitation Act, 1939) be brought within twelve years, but the Court held that this was not an action in respect of a legacy, but an action in respect of a breach of trust within the Trustee Act, 1888, Sect. 8 (1) (*b*), and therefore the beneficiaries had delayed too long.

In *Re Richardson*[4] a testator died in 1909, leaving as his executors his widow and X. Under the will, the widow was entitled absolutely to the whole estate, and the functions of the executors ceased in 1910. No formal accounts were delivered by X to the widow, but he told her of what had been done, and at the end of 1910 gave her a book containing all the particulars of her property. She died in 1917, and in 1918 the beneficiaries under her will (of which X was also an executor) brought an action against him for the administration of the husband's estate, and for an account. They did not allege, however, that any part of it had been misapplied. The defendant relied on the Trustee Act, 1888, Sect. 8, but the Court of Appeal decided that the action was one to recover a legacy under Sect. 8 of the Real Property Limitation Act, 1874, and so as there was an existing Statute of Limitation applicable, Sect. 8 (1) (*b*) of the Trustee Act, 1888 did not apply (nor any other Section of that Act), and further that the twelve years under the

[1] [1920] 1 Ch. 423.
[2] (1870), L.R. 5 Ch. 233.
[3] [1891] 3 Ch. 233; see also *Re Timmis*, [1902] 1 Ch. 176.
[4] [1920] 1 Ch. 423.

Act of 1874 not having expired, the plaintiffs were entitled to an account. Lord Sterndale, M.R., commenting on Sect. 8 (1) (*a*) of the Trustee Act, 1888, said—

> I take that to mean this: If a person has committed what Rigby, L.J., in *How* v. *Earl Winterton*[1] calls a breach of duty, which, whether he were a trustee or not, would give rise to an action against him, and there is in existence a statute which would be in those circumstances an answer to that action, then the person against whom the action is brought shall not be debarred from that defence because he is a trustee or executor, executor being included in the word "trustee," but he shall be able, so to speak, to put off the character of trustee altogether and avail himself of the defence just as though he were not a trustee and were only an ordinary person who had committed that breach of duty.

On Sect. 8 (1) (*b*) the Master of the Rolls observed—

> That is the other branch, if I may call it so, of the protecting legislation. The first (*a*) is the case where there is a breach of duty which would give rise to an action whether the man were a trustee or not and for which there is an existing Statute of Limitations. The second (*b*) is where there is no Statute of Limitations applying at all to the action when it is brought. If this be an action to recover a legacy it does not come within (*a*) and for this reason, that this action for a legacy would not lie against the defendant except as executor. It therefore is not a case which comes within (*a*). No doubt where executors have received a legacy and have admitted that they held that legacy for legatees, an action might lie against them at common law for money had and received, but that is not an action to recover a legacy generally, and such an action could only lie against the defendant because he was an executor, and, therefore, a trustee within the meaning of subsection (*a*).
>
> Now, if this be an action to recover a legacy and does not come within (*a*) can it come within (*b*)? It seems to me it cannot, because it is then an action to recover money or other property, but it is not an action to which no existing Statute of Limitations applies, because the Real Property Limitation Act of 1874 does apply, and, therefore, if this be an action to recover a legacy, in my opinion the Trustee Act, 1888, does not apply at all.

The trustee, if innocent, can plead the Statute although his agent has committed fraud.

The trustee may claim the benefit of the statute, notwithstanding the fact that the trustee's agent has committed fraud, provided that the trustee himself is innocent of it. In *Thorne* v. *Heard*,[2] the solicitor of a trustee embezzled trust funds, through the negligence of the trustee. This was held by the House of Lords to be insufficient to make the trustee "party or privy" to the fraud.

The type of transaction contemplated by Subsect. (1) (*b*)

[1] *Supra.*

[2] [1895] A.C. 495.

is illustrated by *Re Somerset.*[1] In 1878 trustees committed a non-fraudulent breach of trust, by investing in real securities in excess of the permitted margin. In 1892 the tenant for life and the remainderman brought an action to make good the amount invested, and it was held that although the remainderman had a good cause of action, that of the tenant for life was barred, as his right had accrued at the date when the breach of trust was committed, unless he was then subject to a disability. Where the trustee thus replaces money for the benefit of the remainderman, the trustee is entitled to receive the interest until the death of the tenant for life.[2] Thus, it appears that with regard to innocent breaches of trust, time runs in favour of the trustee unless the trustee has concealed the true facts from the knowledge of the beneficiary. Furthermore, time begins to run against the remainderman only when his interest falls into possession.

The right to sue accrues from the date of breach, and time runs from that moment, as regards a tenant for life.

In an action by a trustee for contribution from a co-trustee, time only begins to run when the claim of the *cestui que trust* in respect of the breach has been finally established.[3]

In *Mara* v. *Browne*,[4] a married woman was tenant for life under a settlement during the joint lives of herself and her husband, and also was entitled to a reversionary life interest on the death of her husband, by a resulting trust. When she sued the trustee the Court held that although she had been in possession more than six years without suing, under her first title, she could nevertheless sue in respect of her second title, the statutory six years not having elapsed since she acquired it.

Where a beneficiary claims under two titles.

2. *The Limitation Act* 1939

The Limitation Act, 1939 (which came into force on 1st July, 1940) represents a courageous attempt to simplify the complexities of the law relating to limitation of actions. Sect. 19 of the Act of 1939 replaces, with verbal alterations, Sect. 8 of the Trustee Act, 1888, and Sect. 20 replaces Sect. 8 of the Real Property Limitation Act, 1874. The two sections read as follows—

> 19.—(1) No period of limitations prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the

[1] [1894] 1 Ch. 231. [2] *Re Fountaine*, [1909] 2 Ch. 382.
[3] *Robinson* v. *Harkin*, [1896] 2 Ch. 415.
[4] [1895] 2 Ch. 69; [1896] 1 Ch. 199.

proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

(2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgement or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

20.—Subject to the provisions of Subsect. (1) of the last foregoing section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date in which the interest became due.

It will be seen that the language of Sect. 19 of the Act of 1939 is simpler than that of Sect. 8 of the Act of 1888, and the section was presumably drafted with many of the problems arising under the Act of 1888 in mind. The following observations on the new section may be offered—

(1) Sect. 19 of the Act of 1939 applies to the same classes of trustee as Sect. 8 of the Act of 1888, with the reservation already noticed.

(2) Sect. 19 (3) of the Act of 1939 is identical in effect with Sect. 8 (2) of the Act of 1888.

(3) Problems such as those which arose in *Re Swain*,[1] *Re Timmis*,[2] and *Re Richardson*[3] will be solved in the same way under Sects. 19 and 20 of the Act of 1939 as they were under Sect. 8 of the Act of 1888 and Sect. 8 of the Real Property Limitation Act of 1874.

(4) The intention of the phrase "not being an action for which a period of limitation is prescribed by any other provision of this Act" in Sect. 19 (2) of the Act of 1939 is to remove the disability upon a trustee which was established in *Burdick* v. *Garrick*.[4]

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[1] [1891] 3 Ch. 233.
[2] [1902] 1 Ch. 176.
[3] [1920] 1 Ch. 423.
[4] (1870), L.R. 5 Ch. 233.

APPENDIX I

TRUSTEE ACT, 1925

[15 GEO. 5 CH. 19]

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TRUSTEE ACT, 1925

[15 GEO. 5. CH. 19]

AN Act to consolidate certain enactments relating to trustees in England and Wales.

[9th April 1925]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows—

PART I

INVESTMENTS

1. Authorised investments—(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—

(*a*) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom;

(*b*) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896;

(*c*) In the stock of the Bank of England or the Bank of Ireland;

(*d*) In India Seven, Five and a half, Four and a Half, Three and a half, Three and Two and a half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament;

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District, or in metropolitan water stock;

(*g*) In the debenture or rentcharge, or guaranteed or preference, stock of any railway company in the United Kingdom incorporated by

special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum on its ordinary stock;

(*h*) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in paragraph (*g*) of this subsection, either alone or jointly with any other railway company;

(*i*) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council of India;

(*j*) In the "B" annuities of the Eastern Bengal, the East Indian, the Scinde Punjaub and Delhi, Great Indian Peninsula and Madras Railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company;

(*k*) In the stock of any company owning or operating a railway in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

(*l*) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five per centum on its ordinary stock;

(*m*) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council in the United Kingdom;

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded eighty per centum of the amount authorised by law to be levied;

(*o*) In any stocks, funds, or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restirctions thereby imposed;

(*p*) In any local bonds issued under the Housing (Additional Powers) Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act;

(*q*) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland;

(*r*) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the court;

and may also from time to time vary any such investment.

(2) For the purposes of this section—

(*a*) the London and North Eastern Railway Company, the Southern Railway Company, the London Midland and Scottish Railway Company, and the Great Western Railway Company shall each be treated as if it were a railway company in Great Britain incorporated by a special Act of Parliament which had in each of the ten years immediately before the date of amalgamation paid a dividend at a rate of not less than three per centum on its ordinary stock, and, for the purposes of this provision the date of amalgamation means—

(i) as respects the London and North Eastern Railway Company and the Southern Railway Company the first day of January, nineteen hundred and twenty-three; and

(ii) as respects the London Midland and Scottish Railway Company and the Great Western Railway Company the first day of July, nineteen hundred and twenty-three;

(*b*) a railway or canal company in Northern Ireland whose system is situate partly in Northern Ireland and partly in the Irish Free State shall not be deemed to be a railway or canal company in Northern Ireland.

2. **Purchase at a premium of redeemable stocks; change of character of investment.**—(1) A trustee may under the powers of this Act invest in any of the securities mentioned or referred to in section one of this Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value.

Provided that, in the case of any stock mentioned or referred to in paragraphs (*g*), (*i*), (*k*), (*l*), (*m*), (*o*), (*p*), and (*q*) of subsection (1) of section one of this Act, which is liable to be redeemed at par or at some other fixed rate, a trustee shall not be entitled to purchase the stock—

(*a*) at a price exceeding fifteen per centum above par or such other fixed rate; nor

(*b*) if the stock is liable to be so redeemed as aforesaid within fifteen years of the date of purchase, at a price exceeding its redemption value.

(2) A trustee may retain until redemptiom any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this Act, or any statute replaced by this Act.

3. **Discretion of trustees.** Every power conferred by the preceding sections

shall be exercised according to the discretion of the trustee, but subject to any consent or direction required by the instrument, if any, creating the trust or by statute with respect to the investment of the trust funds.

4. **Power to retain investment which has ceased to be authorised.** A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law.

5. **Enlargement of powers of investment.**—(1) A trustee having power to invest in real securities may invest and shall be deemed always to have had power to invest—

(*a*) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(*b*) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

(2) A trustee having power to invest in real securities may accept the security in the form of a charge by way of legal mortgage, and may, in exercise of the statutory power, convert an existing mortgage into a charge by way of legal mortgage.

(3) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may invest in the debenture stock of a railway company or such other company as aforesaid.

(4) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

(5) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may invest in any securities of the Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

(6) A trustee having a general power to invest trust money in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

6. **Power to invest in land subject to drainage charges.** A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase or on mortgage of any land notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

7. **Investment in bearer securities.**—(1) A trustee may, unless expressly prohibited by the instrument creating the trust, retain or invest in securities payable to bearer which, if not so payable, would have been authorised investments—

Provided that securities to bearer retained or taken as an investment by a

trustee (not being a trust corporation) shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company.

A direction that investments shall be retained or made in the name of a trustee shall not, for the purposes of this subsection, be deemed to be such an express prohibition as aforesaid.

(2) A trustee shall not be responsible for any loss incurred by reason of such deposit, and any sum payable in respect of such deposit and collection shall be paid out of the income of the trust property.

8. **Loans and investments by trustees not chargeable as breaches of trust.**—(1) A trustee lending money on the security of any property on which he can properly lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, it if appears to the court—

(*a*) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and

(*b*) that the amount of the loan does not exceed two third parts of the value of the property as stated in the report; and

(*c*) that the loan was made under the advice of the surveyor or valuer expressed in the report.

(2) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such a loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase, or in lending money upon the security, of any property he has accepted a shorter title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

(4) This section applies to transfers of existing securities as well as to new securities and to investments made before as well as after the commencement of this Act.

9. **Liability for loss by reason of improper investment.**—(1) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This section applies to investments made before as well as after the commencement of this Act.

10. **Powers supplementary to powers of investment.**—(1) Trustees lending money on the security of any property on which they can lawfully lend may contract that such money shall not be called in during any period not exceeding seven years from the time when the loan was made, provided interest be paid within a specified time not exceeding thirty days after every half-yearly or other day on which it becomes due, and provided there be no

breach of any covenant by the mortgagor contained in the instrument of mortgage or charge for the maintenance and protection of the property.

(2) On a sale of land for an estate in fee simple or for a term having at least five hundred years to run by trustees or by a tenant for life or statutory owner, the trustees, or the tenant for life or statutory owner on behalf of the trustees of the settlement, may, where the proceeds are liable to be invested, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a charge by way of legal mortgage or a mortgage by demise or sub-demise for a term of at least five hundred years (less a nominal reversion when by sub-demise), of the land sold, with or without the security of any other property, such charge or mortgage, if any buildings are comprised in the mortgage, to contain a covenant by the mortgagor to keep them insured against loss or damage by fire to the full value thereof.

The trustees shall not be bound to obtain any report as to the value of the land or other property to be comprised in such charge or mortgage, or any advice as to the making of the loan, and shall not be liable for any loss which may be incurred by reason only of the security being insufficient at the date of the charge or mortgage; and the trustees of the settlement shall be bound to give effect to such contract made by the tenant for life or statutory owner.

(3) Where any securities of a company are subject to a trust, the trustees, may concur in any scheme or arrangement—

(*a*) for the reconstruction of the company;

(*b*) for the sale of all or any part of the property and undertaking of the company to another company;

(*c*) for the amalgamation of the company with another company;

(*d*) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them;

in like manner as if they were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities; and the trustees shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may retain any securities so accepted as aforesaid for any period for which they could have properly retained the original securities.

(4) If any conditional or preferential right to subscribe for any securities in any company is offered to trustees in respect of any holding in such company, they may as to all or any of such securities, either exercise such right and apply capital money subject to the trust in payment of the consideration, or renounce such right, or assign for the best consideration that can be reasonably obtained the benefit of such right or the title thereto to any person including any beneficiary under the trust, without being responsible for any loss occassioned by any act or thing so done by them in good faith:

Provided that the consideration for any such assignment shall be held as capital money of the trust.

(5) The powers conferred by this section shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust.

(6) Where the loan referred to in subsection (1), or the sale referred to in subsection (2), of this section is made under the order of the court, the powers conferred by those subsections respectively shall apply only if and as far as the court may by order direct.

11. **Power to deposit money at bank and to pay calls.**—(1) Trustees may, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought for, pay any trust money into a bank to a deposit or other account, and all interest, if any, payable in respect thereof shall be applied as income.

(2) Trustees may apply capital money subject to a trust in payment of the calls on any shares subject to the same trust.

PART II

GENERAL POWERS OF TRUSTEES AND PERSONAL REPRESENTATIVES

General Powers

12. **Power of trustees for sale to sell by auction, &c.**—(1) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.

(2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical or made in any other way.

(3) This section does not enable an express power to sell settled land to be exercised where the power is not vested in the tenant for life or statutory owner.

13. **Power to sell subject to depreciatory conditions.**—(1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.

(4) This section applies to sales made before or after the commencement of this Act.

14. **Power of trustees to give receipts.**—(1) The receipt in writing of a trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him from seeing to the application or being answerable for any loss or misapplication thereof.

(2) This section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for—

(*a*) the proceeds of sale or other capital money arising under a disposition on trust for sale of land;

(*b*) capital money arising under the Settled Land Act, 1925.

(3) This section applies notwithstanding anything to the contrary in the instrument, if any, creating the trust.

15. **Power to compound liabilities.** A personal representative, or two or more trustees acting together, or, subject to the restrictions imposed in regard to receipts by a sole trustee not being a trust corporation, a sole acting trustee where by the instrument, if any, creating the trust, or by statute, a sole trustee is authorised to execute the trusts and powers reposed in him, may, if and as he or they think fit—

(*a*) accept any property, real or personal, before the time at which it is made transferable or payable; or

(*b*) sever and apportion any blended trust funds or property; or

(*c*) pay or allow any debt or claim on any evidence that he or they think sufficient; or

(*d*) accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

(*e*) allow any time of payment of any debt; or

(*f*) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

16. **Power to raise money by sale, mortgage, &c.**—(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being also the statutory owners.

17. **Protection to purchasers and mortgagees dealing with trustees.** No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

18. **Devolution of powers or trusts.**—(1) Where a power or trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

(2) Until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or, where there were two or more trustees, of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee, or other the trustees or trustee for the time being of the trust.

(3) This section takes effect subject to the restrictions imposed in regard to receipts by a sole trustee, not being a trust corporation.

(4) In this section "personal representative" does not include an executor who has renounced or has not proved.

19. **Power to insure.**—(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

20. **Application of insurance money where policy kept up under any trust, power or obligation.**—(1) Money receivable by trustees or any beneficiary under a policy of insurance against the loss or damage of any property subject to a trust or to a settlement within the meaning of the Settled Land Act, 1925, whether by fire or otherwise, shall, where the policy has been kept up under any trust in that behalf or under any power statutory or otherwise, or in performance of any covenant or of any obligation statutory or otherwise, or by a tenant for life impeachable for waste, be capital money for the purposes of the trust or settlement, as the case may be.

(2) If any such money is receivable by any person, other than the trustees of the trust or settlement, that person shall use his best endeavours to recover and receive the money, and shall pay the net residue thereof, after discharging any costs of recovering and receiving it, to the trustees of the trust or settlement, or, if there are no trustees capable of giving a discharge therefor, into court.

(3) Any such money—

(*a*) if it was receivable in respect of settled land within the meaning of the Settled Land Act, 1925, or any building or works thereon, shall be deemed to be capital money arising under that Act from the settled land, and shall be invested or applied by the trustees, or, if in court, under the direction of the court, accordingly;

(*b*) if it was receivable in respect of personal chattels settled as heirlooms within the meaning of the Settled Land Act, 1925, shall be deemed to be capital money arising under that Act, and shall be applicable by the trustees, or, if in court, under the direction of the court, in like manner as provided by that Act with respect to money arising by a sale of chattels settled as heirlooms as aforesaid;

(*c*) if it was receivable in respect of property held upon trust for sale, shall be held upon the trusts and subject to the powers and provisions applicable to money arising by a sale under such trust;

(*d*) in any other case, shall be held upon trusts corresponding as nearly as may be with the trusts affecting the property in respect of which it was payable.

(4) Such money, or any part thereof, may also be applied by the trustees, or, if in court, under the direction of the court, in rebuilding, reinstating, replacing, or repairing the property lost or damaged, but any such application by the trustees shall be subject to the consent of any person whose consent is required by the instrument, if any, creating the trust to the investment of

money subject to the trust, and, in the case of money which is deemed to be capital money arising under the Settled Land Act, 1925, be subject to the provisions of that Act with respect to the application of capital money by the trustees of the settlement.

(5) Nothing contained in this section prejudices or affects the right of any person to require any such money or any part thereof to be applied in rebuilding, reinstating, or repairing the property lost or damaged, or the rights of any mortgagee, lessor, or lessee, whether under any statute or otherwise.

(6) This section applies to policies effected either before or after the commencement of this Act, but only to money received after such commencement.

21. **Deposit of documents for safe custody.** Trustees may deposit any documents held by them relating to the trust, or to the trust property, with any banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, and any sum payable in respect of such deposit shall be paid out of the income of the trust property.

22. **Reversionary interests, valuations, and audit.**—(1) Where trust property includes any share or interest in property not vested in the trustees, or the proceeds of the sale of any such property, or any other thing in action, the trustees on the same falling into possession, or becoming payable or transferable may—

(*a*) agree or ascertain the amount or value thereof or any part thereof in such manner as they may think fit;

(*b*) accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which they may think fit, any authorised investments;

(*c*) allow any deductions for duties, costs, charges and expenses which they may think proper or reasonable;

(*d*) execute any release in respect of the premises so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release;

without being responsible in any such case for any loss occasioned by any act or thing so done by them in good faith.

(2) The trustees shall not be under any obligation and shall not be chargeable with any breach of trust by reason of any omission—

(*a*) to place any distringas notice or apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action as aforesaid is derived, payable or charged; or

(*b*) to take any proceedings on account of any act, default, or neglect on the part of the persons in whom such securities or other property or any of them or any part thereof are for the time being, or had at any time been, vested;

unless and until required in writing so to do by some person, or the guardian of some person, beneficially interested under the trust, and unless also due provision is made to their satisfaction for payment of the costs of any proceedings required to be taken:

Provided that nothing in this subsection shall relieve the trustees of the obligation to get in and obtain payment or transfer of such share or interest or other thing in action on the same falling into possession.

(3) Trustees may, for the purpose of giving effect to the trust, or any of the provisions of the instrument, if any, creating the trust or of any statute, from time to time (by duly qualified agents) ascertain and fix the value of any trust property in such manner as they think proper, and any valuation so made in good faith shall be binding upon all persons interested under the trust.

(4) Trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to him as he may require; and the cost of such examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other, as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.

23. **Power to employ agents.**—(1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

(2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immoveable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

(3) Without prejudice to such general power of appointing agents as aforesaid—

(*a*) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

(*b*) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(*c*) A trustee may appoint a banker or solicitor to be his agent to receive

and to give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act.

24. **Power to concur with others.** Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

25. **Power to delegate trusts during absence abroad.**—(1) A trustee intending to remain out of the United Kingdom for a period exceeding one month may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to any person (including a trust corporation) the execution or exercise during his absence from the United Kingdom of all or any trusts, powers and discretions vested in him as such trustee, either alone or jointly with any other person or persons:

Provided that a person being the only other co-trustee and not being a trust corporation shall not be appointed to be an attorney under this subsection.

(2) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

(3) The power of attorney shall not come into operation unless and until the donor is out of the United Kingdom, and shall be revoked by his return.

(4) The power of attorney shall be attested by at least one witness, and shall be filed at the Central Office within ten days after the execution thereof with a statutory declaration by the donor that he intends to remain out of the United Kingdom for a period exceeding one month from the date of such declaration, or from a date therein mentioned.

(5) The execution of any such instrument and statutory declaration shall be verified in such manner as is required by statute in the case of powers of attorney filed at the Central Office.

(6) If the power of attorney confers a power to dispose of or deal with land or a charge registered under the Land Registration Act, 1925, an office copy shall be filed at the land registry.

(7) The statutory declaration aforesaid and a statutory declaration by the donee of the power of attorney that the power has come into operation and has not been revoked by the return of the donor shall be conclusive evidence of the facts stated in favour of any person dealing with the donee.

(8) In favour of any person dealing with the donee, any act done or instrument executed by the donee shall, notwithstanding that the power has never come into operation or has become revoked by the act of the donor or by his death or otherwise, be as valid and effectual as if the donor were alive and of full capacity, and had himself done such act or executed such instrument, unless such person had actual notice that the power had never come into operation or of the revocation of the power before such act was done or instrument executed.

(9) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

(10) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

(11) In this section "trustee" includes a tenant for life and a statutory owner.

Indemnities

26. **Protection against liability in respect of rents and covenants.**—(1) Where a personal representative or trustee liable as such for—

(*a*) any rent, covenant, or agreement reserved by or contained in any lease; or

(*b*) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rentcharge; or

(*c*) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs;

satisfies all liabilities under the lease or grant which may have accrued, or been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee, or other person entitled to call for a conveyance and thereafter—

(i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

(2) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

(3) In this section "lease" includes an underlease and an agreement for a lease or underlease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; "grant" applies to a grant whether the rent is created by limitation, grant, reservation, or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; "lessee" and "grantee" include persons respectively deriving title under them.

27. **Protection by means of advertisements.**—(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the Gazette, and in a daily London newspaper, and also, if the property includes land not situated in London in a daily or weekly newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section—

(*a*) prejudices the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who may have received it; or

(*b*) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

28. **Protection in regard to notice.** A trustee or personal representative acting for the purposes of more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or

thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

29. **Exoneration of trustees in respect of certain powers of attorney.** A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the act or payment the person who gave the power of attorney was subject to any disability or bankrupt or dead, or had done or suffered some act or thing to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying:

Provided that—

(*a*) nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made;

(*b*) the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

30. **Implied indemnity of trustees.**—(1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

Maintenance, Advancement and Protective Trusts

31. **Power to apply income for maintenance and to accumulate surplus income during a minority.**—(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(*a*) any other fund applicable to the same purpose; or

(*b*) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his

requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows—

(i) If any such person—

(*a*) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(*b*) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing *in loco parentis* to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

32. **Power of advancement.**—(1) Trustees may at any time or times pay

or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that—

(*a*) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(*b*) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.

33. **Protective trusts.**—(1) Where any income, including an annuity or other periodical payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary") for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely—

(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(*a*) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(*b*) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.

PART III

APPOINTMENT AND DISCHARGE OF TRUSTEES

34. **Limitation of the number of trustees.**—(1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.

(2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act—

(*a*) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(*b*) the number of the trustees shall not be increased beyond four.

(3) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply—

(*a*) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or

(*b*) where the net proceeds of the sale of the land are held for like purposes; or

(*c*) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land.

35. **Appointments of trustees of settlements and dispositions on trust for sale of land.**—(1) Appointments of new trustees and of conveyances on trust for sale on the one hand and of the settlement of the proceeds of sale on the other hand, shall, subject to any order of the court, be effected by separate instruments, but in such manner as to secure that the same persons shall become the trustees of the conveyance on trust for sale as become the trustees of the settlement of the proceeds of sale.

(2) Where new trustees of a settlement are appointed, a memorandum of the names and addresses of the persons who are for the time being the trustees thereof for the purposes of the Settled Land Act, 1925, shall be endorsed on or annexed to the last or only principal vesting instrument by

or on behalf of the trustees of the settlement, and such vesting instrument shall, for the purpose, be produced by the person having the possession thereof to the trustees of the settlement when so required.

(3) Where new trustees of a conveyance on trust for sale relating to a legal estate are appointed, a memorandum of the persons who are for the time being the trustees for sale shall be endorsed on or annexed thereto by or on behalf of the trustees of the settlement of the proceeds of sale, and the conveyance shall, for that purpose, be produced by the person having the possession thereof to the last-mentioned trustees when so required.

(4) This section applies only to settlements and dispositions of land.

36. **Power of appointing new or additional trustees.**—(1) Where a trustee either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees—

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees.

(3) Where a corporation being a trustee is or has been dissolved, either before or after the commencement of this Act, then, for the purposes of this section and of an enactment replaced thereby, the corporation shall be deemed to be and to have been from the date of the dissolution incapable of acting in the trusts or powers reposed in or conferred on the corporation.

(4) The power of appointment given by subsection (1) of this section or any similar previous enactment to the personal representatives of a last surviving or continuing trustee shall be and shall be deemed always to have been exercisable by the executors for the time being (whether original or by representation) of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee without the concurrence of any executor who has renounced or has not proved.

(5) But a sole or last surviving executor intending to renounce, or all the executors where they all intend to renounce, shall have and shall be deemed always to have had power, at any time before renouncing probate, to exercise the power of appointment given by this section, or by any similar previous

enactment, if willing to act for that purpose and without thereby accepting the office of executor.

(6) Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, of any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment.

(7) Every new trustee appointed under this section as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(8) The provisions of this section relating to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(9) Where a lunatic or defective, being a trustee, is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee in his place shall be made by the continuing trustees or trustee, under this section, unless leave has been given by the Judge or Master in Lunacy to make the appointment.

37. **Supplemental provisions as to appointment of trustees.**—(1) On the appointment of a trustee for the whole or any part of trust property—

(*a*) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and

(*b*) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed; and

(*c*) it shall not be obligatory, save as hereinafter provided, to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed, and a sole trustee when appointed will be able to give valid receipts for all capital money, a trustee shall not be discharged from his trust unless there will be either a trust corporation or at least two individuals to act as trustees to perform the trust; and

(*d*) any assurance or thing requisite for vesting the trust property, or

any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done.

(2) Nothing in this Act shall authorise the appointment of a sole trustee, not being a trust corporation, where the trustee, when appointed, would not be able to give valid receipts for all capital money arising under the trust.

38. **Evidence as to a vacancy in a trust.**—(1) A statement, contained in any instrument coming into operation after the commencement of this Act by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

(2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

39. **Retirement of trustee without a new appointment.**—(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

40. **Vesting of trust property in new or continuing trustees.**—(1) Where by a deed a new trustee is appointed to perform any trust, then—

(*a*) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, to the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

(*b*) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made.

(2) Where by a deed a retiring trustee is discharged under the statutory power without a new trustee being appointed, then—

(*a*) if the deed contains such a declaration as aforesaid by the retiring and continuing trustees, and by the other person, if any, empowered

to appoint trustees, the deed shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates; and

(*b*) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by such persons as aforesaid extending to all the estates, interests and rights with respect to which a declaration could have been made.

(3) An express vesting declaration, whether made before or after the commencement of this Act, shall, notwithstanding that the estate, interest or right to be vested is not expressly referred to, and provided that the other statutory requirements were or are complied with, operate and be deemed always to have operated (but without prejudice to any express provision to the contrary contained in the deed of appointment or discharge) to vest in the persons respectively referred to in subsections (1) and (2) of this section, as the case may require, such estates, interests and rights as are capable of being and ought to be vested in those persons.

(4) This section does not extend—

(*a*) to land conveyed by way of mortgage for securing money subject to the trust, except land conveyed on trust for securing debentures or debenture stock;

(*b*) to land held under a lease which contains any covenant, condition or agreement against assignment or disposing of the land without licence or consent, unless, prior to the execution of the deed containing expressly or impliedly the vesting declaration, the requisite licence or consent has been obtained, or unless, by virtue of any statute or rule of law, the vesting declaration, express or implied, would not operate as a breach of covenant or give rise to a forfeiture;

(*c*) to any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament.

In this subsection "lease" includes an underlease and an agreement for a lease or underlease.

(5) For purposes of registration of the deed in any registry, the person or persons making the declaration expressly or impliedly, shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.

(6) This section applies to deeds of appointment or discharge executed on or after the first day of January, eighteen hundred and eighty-two.

PART IV

POWERS OF THE COURT

Appointment of new Trustees

41. **Power of court to appoint new trustees.**—(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a lunatic or a defective, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.

(2) The power conferred by this section may, in the case of a deed of arrangement within the meaning of the Deeds of Arrangement Act, 1914, be exercised either by the High Court or by the court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed.

(3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(4) Nothing in this section gives power to appoint an executor or administrator.

42. **Power to authorise remuneration.** Where the court appoints a corporation, other than the Public Trustee, to be a trustee either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as trustee as the court may think fit.

43. **Powers of new trustee appointed by the court.** Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

Vesting Orders

44. **Vesting orders of land.** In any of the following cases, namely—

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(ii) Where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person—

(*a*) is under disability; or

(*b*) is out of the jurisdiction of the High Court; or

(*c*) cannot be found, or, being a corporation, had been dissolved;

(iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any interest in land;

(iv) Where it is uncertain whether the last trustee known to have been entitled to or possessed of any interest in land is living or dead;

(v) Where there is no personal representative of a deceased trustee who was entitled to or possessed of any interest in land, or where it is uncertain who is the personal representative of a deceased trustee who was entitled to or possessed of any interest in land;

(vi) Where a trustee jointly or solely entitled to or possessed of any interest in land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or interest or a release of the right, to convey the

land or interest or to release the right, and has wilfully refused or neglected to convey the land or interest or release the right for twenty-eight days after the date of the requirement;

(vii) Where land or any interest therein is vested in a trustee whether by way of mortgage or otherwise, and it appears to the court to be expedient;

the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

(*a*) Where the order is consequential on the appointment of a trustee the land or interest therein shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and

(*b*) Where the order relates to a trustee entitled or formerly entitled jointly with another person, and such trustee is under disability or out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved, the land interest or right shall be vested in such other person who remains entitled, either alone or with any other person the court may appoint.

45. **Orders as to contingent rights of unborn persons.** Where any interest in land subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of that interest on any trust, the court may make an order releasing the land or interest therein from the contingent right, or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

46. **Vesting order in place of conveyance by infant mortgagee.** Where any person entitled to or possessed of any interest in land, or entitled to a contingent right in land, by way of security for money, is an infant, the court may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability.

47. **Vesting order consequential on order for sale or mortgage of land.** Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent right therein, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee for the purposes of this Act, and the court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate or interest as that court thinks fit in the purchaser or mortgagee or in any other person:

Provided that, in the case of a legal mortgage, the estate to be vested in the mortgagee shall be a term of years absolute.

48. **Vesting order consequential on judgment for specific performance, &c.** Where a judgment is given for the specific performance of a contract concerning any interest in land, or for sale or exchange of any interest in land, or generally where any judgment is given for the conveyance of any interest

in land either in cases arising out of the doctrine of election or otherwise, the court may declare—

(*a*) that any of the parties to the action are trustees of any interest in the land or any part thereof within the meaning of this Act; or

(*b*) that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any deceased person who was during his lifetime a party to the contract or transaction concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this Act;

and thereupon the court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

49. **Effect of vesting order.** A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a trustee, have the same effect—

(*a*) as if the persons who before the appointment were the trustees, if any, had duly executed all proper conveyances of the land for such estate or interest as the court directs; or

(*b*) if there is no such person, or no such person of full capacity, as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate or interest as the court directs;

and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

50. **Power to appoint person to convey.** In all cases where a vesting order can be made under any of the foregoing provisions, the court may, if it is more convenient, appoint a person to convey the land or any interest therein or release the contingent right, and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

51. **Vesting orders as to stock and things in action.**—(1) In any of the following cases, namely—

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(ii) Where a trustee entitled, whether by way of mortgage or otherwise, alone or jointly with another person to stock or to a thing in action—

(*a*) is under disability; or

(*b*) is out of the jurisdiction of the High Court; or

(*c*) cannot be found, or, being a corporation, has been dissolved; or

(*d*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled; or

(*e*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a thing in action for twenty-eight days next after an order of the court for that purpose has been served on him;

(iii) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a thing in action is alive or dead;

(iv) Where the stock is standing in the name of a deceased person whose personal representative is under disability;

(v) Where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient;

the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:

Provided that—

(*a*) Where the order is consequential on the appointment of a trustee, the right shall be vested in the persons who, on the appointment, are the trustees; and

(*b*) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer:

Provided that the person appointed to make or join in making a transfer of stock shall be some proper officer of the bank, or the company or society whose stock is to be transferred.

(3) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this Act, may transfer the stock to himself or any other person, according to the order, and the Bank of England and all other companies shall obey every order under this section according to its tenor.

(4) After notice in writing of an order under this section it shall not be lawful for the Bank of England or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5) The court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Act is to be exercised.

(6) The provisions of this Act as to vesting orders shall apply to shares in ships registered under the Acts relating to merchant shipping as if they were stock.

52. **Vesting orders of charity property.** The powers conferred by this Act as to vesting orders may be exercised for vesting any interest in land, stock, or thing in action in any trustee of a charity or society over which the court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the court under its general or statutory jurisdiction.

53. **Vesting orders in relation to infant's beneficial interests.** Where an infant is beneficially entitled to any property the court may, with a view to

the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—

(*a*) appointing a person to convey such property; or

(*b*) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive the dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit.

54. **Jurisdiction of the High Court in regard to lunatics.** Where the High Court has power under this Part of this Act to make orders in relation to lunatics and defectives who are trustees, the Judge or Master in Lunacy shall, save as provided in this section, have no power to make such an order:

Provided that where—

(*a*) a lunatic or defective has become a trustee of mortgaged property merely by reason of the mortgage having been paid off;

(*b*) an order in lunacy is made authorising the exercise of a power to appoint a trustee;

(*c*) an order in lunacy is made for giving effect to a contract made before the lunatic or defective was under disability;

(*d*) a lunatic or defective is beneficially entitled to some interest in the property but holds the property or some interest therein under an express, implied or constructive trust;

the High Court and the Judge or Master in Lunacy shall, in accordance with rules to be made by the Lord Chancellor, have concurrent jurisdiction.

55. **Orders made upon certain allegations to be conclusive evidence.** Where a vesting order is made as to any land under this Act or under the Lunacy Act, 1890, as amended by any subsequent enactment, or under any Act relating to lunacy in Northern Ireland, founded on an allegation of any of the following matters namely—

(*a*) the personal incapacity of a trustee or mortgagee; or

(*b*) that a trustee or mortgagee or the personal representative of or other person deriving title under a trustee or mortgagee is out of the jurisdiction of the High Court or cannot be found, or being a corporation has been dissolved; or

(*c*) that it is uncertain which of two or more trustees, or which of two or more persons interested in a mortgage, was the survivor; or

(*d*) that it is uncertain whether the last trustee or the personal representative of or other person deriving title under a trustee or mortgagee, or the last surviving person interested in a mortgage is living or dead; or

(*e*) that any trustee or mortgagee has died intestate without leaving a person beneficially interested under the intestacy or has died and it is not known who is his personal representative or the person interested;

the fact that the order had been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section does not prevent the court from directing a reconveyance or surrender or the payment of costs occasioned by any such order if improperly obtained.

56. **Application of vesting order to property out of England.** The powers of the court to make vesting orders under this Act shall extend to all property in any part of His Majesty's dominions except Scotland.

Jurisdiction to make other Orders

57. **Power of court to authorise dealings with trust property.**—(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transactions, are to be paid or borne as between capital and income.

(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.

58. **Persons entitled to apply for orders.**—(1) An order under this Act for the appointment of a new trustee or concerning any interest in land, stock, or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2) An order under this Act concerning any interest in land, stock, or thing in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

59. **Power to give judgment in absence of a trustee.** Where in any action the court is satisfied that diligent search has been made for any person who, in the character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action and give judgment therein against that person in his character of a trustee as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

60. **Power to charge costs on trust estate.** The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

61. **Power to relieve trustee from personal liability.** If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may

be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

62. **Power to make beneficiary indemnify for breach of trust.**—(1) 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, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the court seems 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 persons claiming through him.

(2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

Payment into Court

63. **Payment into court by trustees.**—(1) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.

(2) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.

(4) Where any such money or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.

(5) Every transfer payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered.

PART V

GENERAL PROVISIONS

64. **Application of Act to Settled Land Act Trustees.**—(1) All the powers and provisions contained in this Act with reference to the appointment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act, 1925, and trustees for the purpose of the management of land during a minority, whether such trustees are appointed by the court or by the settlement, or under provisions contained in any instrument.

(2) Where, either before or after the commencement of this Act, trustees of a settlement have been appointed by the court for the purposes of the Settled Land Acts, 1882 to 1890, or of the Settled Land Act, 1925, then, after the commencement of this Act—

(*a*) the person or persons nominated for the purpose of appointing new

trustees by the instrument, if any, creating the settlement, though no trustees for the purposes of the said Acts were thereby appointed; or

(*b*) if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being for the purposes of the said Acts or the personal representatives of the last surviving or continuing trustee for those purposes,

shall have the powers conferred by this Act to appoint new or additional trustees of the settlement for the purposes of the said Acts.

(3) Appointments of new trustees for the purposes of the said Acts made or expressed to be made before the commencement of this Act by the trustees or trustee or personal representatives referred to in paragraph (*b*) of the last preceding subsection or by the persons referred to in paragraph (*a*) of that subsection are, without prejudice to any order of the court made before such commencement, hereby confirmed.

65. **Trust estates not affected by trustee becoming a convict.** Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or pass to his co-trustee in right of survivorship or devolve on his personal representative as if he had not become a convict:

Provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

66. **Indemnity to banks, &c.** This Act, and every order purporting to be made under this Act, shall be a complete indemnity to the Bank of England, and to all persons for any acts done pursuant thereto, and it shall not be necessary for the Bank or for any person to inquire concerning the propriety of the order, or whether the court by which the order was made had jurisdiction to make it.

67. **Jurisdiction of the "court."**—(1) In this Act "the court" means the High Court, and also the Court of Chancery of the County Palatine of Lancaster or the Court of Chancery of the County Palatine of Durham, or the county court, where those courts respectively have jurisdiction.

(2) The procedure under this Act in palatine courts and county courts shall be in accordance with the Acts and rules regulating the procedure of those courts.

68. **Definitions.** In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say—

(1) "Authorised investments" mean investments authorised by the instrument, if any, creating the trust for the investment of money subject to the trust, or by law;

(2) "Contingent right" as applied to land includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent;

(3) "Convey" and "conveyance" as applied to any person include the execution by that person of every necessary or suitable assurance

(including an assent) for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law for the validity of the conveyance; "sale" includes an exchange;

(4) "Gazette" means the London Gazette;

(5) "Instrument" includes Act of Parliament;

(6) "Land" includes land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land; and in this definition "mines and minerals" include any strata or seam of minerals or substances in or under any land, and powers or working and getting the same, but not an undivided share thereof; and "hereditaments" mean real property which under an intestacy occuring before the commencement of this Act might have devolved on an heir;

(7) "Mortgage" and "mortgagee" include a charge or chargee by way of legal mortgage, and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee;

(8) "Pay" and "payment" as applied in relation to stocks and securities and in connection with the expression "into court" include the deposit or transfer of the same in or into court;

(9) "Personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person;

(10) "Possession" includes receipt of rents and profits or the right to receive the same, if any; "income" includes rents and profits; and "possessed" applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land;

(11) "Property" includes real and personal property, and any estate share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

(12) "Rights" include estates and interests;

(13) "Securities" include stocks, funds, and shares; and so far as relates to payments into court has the same meaning as in the enactments relating to funds in the Supreme Court and "securities payable to bearer" include securities transferable by delivery and endorsement;

(14) "Stock" includes fully paid up shares, and so far as relates to vesting orders made by the court under this Act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein;

(15) "Tenant for life," "statutory owner," "settled land," "settlement," "trust instrument," "trustees of the settlement," "lunatic,"

"defective," "term of years absolute" and "vesting instrument" have the same meanings as in the Settled Land Act, 1925, and "entailed interest" has the same meaning as in the Law of Property Act, 1925;

(16) "Transfer" in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

(17) "Trust" does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expressions "trust" and "trustee" extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and "trustee" where the context admits, includes a personal representative, and "new trustee" includes an additional trustee;

(18) "Trust corporation" means the Public Trustee or a corporation either appointed by the court in any particular case to be a trustee, or entitled by rules made under subsection (3) of section four of the Public Trustee Act, 1906, to act as custodian trustee;

(19) "Trust for sale" in relation to land means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale;

(20) "United Kingdom" means Great Britain and Northern Ireland.

69. **Application of Act.**—(1) This Act, except where otherwise expressly provided, applies to trusts including, so far as this Act applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Act.

(2) The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have the effect subject to the terms of that instrument.

(3) This Act does not affect the legality or validity of anything done before the commencement of this Act, except as otherwise hereinbefore expressly provided, and except that the enactments mentioned in the First Schedule to this Act shall be deemed always to have had effect subject to the provisions set forth in that Schedule.

70. **Enactments repealed.** The Acts mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that, without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889:

(*a*) Nothing in this repeal shall affect any vesting order or appointment made or other thing done under any enactment so repealed, and any order or appointment so made may be revoked or varied in like manner as if it had been made under this Act;

(*b*) References in any document to any enactment repealed by this Act

shall be construed as references to this Act or to the corresponding enactments in this Act.

71. **Short title, commencement, extent.**—(1) This Act may be cited as the Trustee Act, 1925.

(2) This Act shall come into operation on the first day of January, nineteen hundred and twenty-six.

(3) This Act, except where otherwise expressly provided, extends to England and Wales only.

(4) The provisions of this Act bind the Crown.

FIRST SCHEDULE

Retrospective Amendments

(1) The investments mentioned in paragraphs (*d*), (*i*) and (*k*) of section one of the Trustee Act, 1893, and in the corresponding provisions of any enactment replaced by that Act, shall be deemed always to have included investments mentioned in paragraphs (*d*), (*i*) and (*k*) of subsection (1) of section one of this Act.

(2) In subsection (3) of section twelve of the Trustee Act, 1893, and in the enactment which it replaced, the expression "customary land" shall be deemed never to have included land in regard to which a tenant had power to dispose of the legal estate by deed, and the expression "land conveyed by way of mortgage" shall be deemed never to have included land conveyed in trust for securing debentures or debenture stock.

(3) Section forty-seven of the Trustee Act, 1893, shall be deemed always to have had effect as if after the words "Settled Land Acts, 1882 to 1890," there had been inserted the words "and trustees for the purposes of section forty-two of the Conveyancing Act, 1881."

(4) Subsection (1) of section eight of the Conveyancing Act, 1911, shall be deemed always to have had effect as if at the end thereof there had been inserted the words "or other the trustees or trustee for the time being of the trust."

SECOND SCHEDULE

ENACTMENTS REPEALED

Session and Chapter	Short Title	Extent of Repeal
22 & 23 Vict. c. 35.	The Law of Property Amendent Act, 1859.	Sections twenty - three, twenty-seven, twenty-eight and twenty-nine.
44 & 45 Vict. c. 41.	The Conveyancing Act, 1881.	Subsections (4) and (5) of section forty-two.
48 & 49 Vict. c. 25.	The East India Unclaimed Stock Act, 1885.	Subsection (3) of section twenty-three.
53 Vict. c. 5.	The Lunacy Act, 1890.	Sections one hundred and thirty-five to one hundred and thirty-eight, so far as they relate to lunatic trustees, except where the Judge or Master in Lunacy is given concurrent jurisdiction with the High Court.
56 & 57 Vict. c. 53.	The Trustee Act, 1893.	The whole Act.
57 Vict. c. 10.	The Trustee Act, 1893, Amendment Act, 1894.	Sections one and four.
59 & 60 Vict. c. 35.	The Judicial Trustees Act, 1896.	Section three.
1 & 2 Geo. 5. c. 37.	The Conveyancing Act, 1911.	Section eight.
1 & 2 Geo. 5. c. 40.	The Lunacy Act, 1911.	Section one.
4 & 5 Geo. 5. c. 47.	The Deeds of Arrangement Act, 1914.	Section eighteen.
9 & 10 Geo. 5. c. 99.	The Housing (Additional Powers) Act, 1919.	Section nine.
11 & 12 Geo. 5. c. 55.	The Railways Act, 1921.	The words "the Trustee Act, 1893, and" in section fifteen.
12 & 13 Geo. 5. c. 16.	The Law of Property Act, 1922.	Subsection (4) of section eighty-three, section eighty-eight; Part IV., except subsection (7) of section one hundred and ten, subsection (3) of section one hundred and thirteen, and subsection (5) of section one hundred and twenty-three.
12 & 13 Geo. 5. c. 60.	The Lunacy Act, 1922.	Subsections (3) (4) and (5) of section two.
15 Geo. 5. c. 5.	The Law of Property (Amendment) Act, 1924.	Section five and the Fifth Schedule.

APPENDIX II

The Colonial Stock Act, 1900, and the Statute of Westminster, 1931

The Statute of Westminster, 1931, which placed the Dominions upon a footing of legislative equality with this country, produced an unexpected problem with relation to the Colonial Stock Act, 1900. After the Statute had been put into force in South Africa, the Union Government in 1933 introduced a Bill into the South African Parliament with the object of repealing Sect. 65 of the South Africa Act, 1909, providing for the exercise of the power of disallowance in respect of Union legislation. The effect of this upon the Colonial Stock Act, and the measures taken to meet the difficulty were explained by a written reply given on 4th July, 1934, by the Chancellor of the Exchequer (Mr. Neville Chamberlain) to a question asking for information concerning the Colonial Stock Act, 1900, Declaration Bill, introduced into the Union Parliament in 1934. The reply was as follows—

The Bill in question is the result of an agreement between his Majesty's Governments in the United Kingdom and in the Union of South Africa and will be followed by legislation in this country. Last autumn the Union Government informed us that they proposed to repeal Sect. 65 of the South Africa Act, 1909, which provides for the exercise of the power of disallowance in respect of Union legislation. The action they proposed to take was in accordance with the constitutional developments of the last few years. But one of the conditions prescribed by the Treasury under the Colonial Stock Act, 1900, with which every Dominion or Colonial Government must comply in order to obtain trustee status in the United Kingdom for their securities, is concerned with this power of disallowance. The third Treasury condition stipulates that the right of disallowance shall be expressly recognised by the borrowing Government in respect of any legislation which appears to the United Kingdom Government to alter any of the provisions affecting the stock to the injury of the stockholder or to involve a departure from the original contract in regard to the stock.

The Union Government, therefore, realising that when the power of disallowance ceased these conditions would in the absence of express stipulation become nugatory, and desiring to maintain in the fullest possible degree the rights of holders of their stocks, approached his Majesty's Government in the United Kingdom with a view to devising an alternative form of safeguard.

As a result of discussion between the two Governments, it was agreed that the Union Government should enter into an undertaking with the United Kingdom Government which should be accepted by the Treasury, subject to the approval of Parliament, as an alternative to the third of the existing conditions to which I have just referred.

The Union Government have already passed an Act to confirm this undertaking; that is the Bill referred to. The following is the new form of undertaking—

"His Majesty's Government in the Dominion has undertaken that legislation which appears to his Majesty's Government in the United Kingdom to alter any of the provisions affecting the stock to the injury of stockholders or to involve a departure from the original contract in regard to the stock shall not be submitted for the Royal Assent except after agreement with his Majesty's Government in the United Kingdom, and that, if attention is drawn to any such legislation as aforesaid after the passing thereof by the Parliament of the Dominion, his Majesty's Government in the Dominion will take the necessary steps to ensure such amendment as may be requested by his Majesty's Government in the United Kingdom."

A Bill is being presented authorising the Treasury to accept an undertaking in the agreed form from any Dominion Government which prefers to adopt this as an alternative to the existing condition. On the other hand, any Dominion Government which prefers to borrow under the existing Treasury condition, as many of these Governments do, is at liberty to continue its existing practice. I am entirely satisfied that the existing rights of stockholders will be safeguarded equally under either condition; there is no difference of substance between the two alternatives. No present or future stockholder need be under any apprehension on this account.

There has been no difference of opinion between the two Governments on any of the points discussed; and the United Kingdom Government are entirely satisfied with the terms of the new form of undertaking. Other Dominions which have already complied with the third of the old Treasury conditions are under no obligation to depart from that system. They have expressed a decided preference for the retention, so far as they are concerned, of the present system.

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