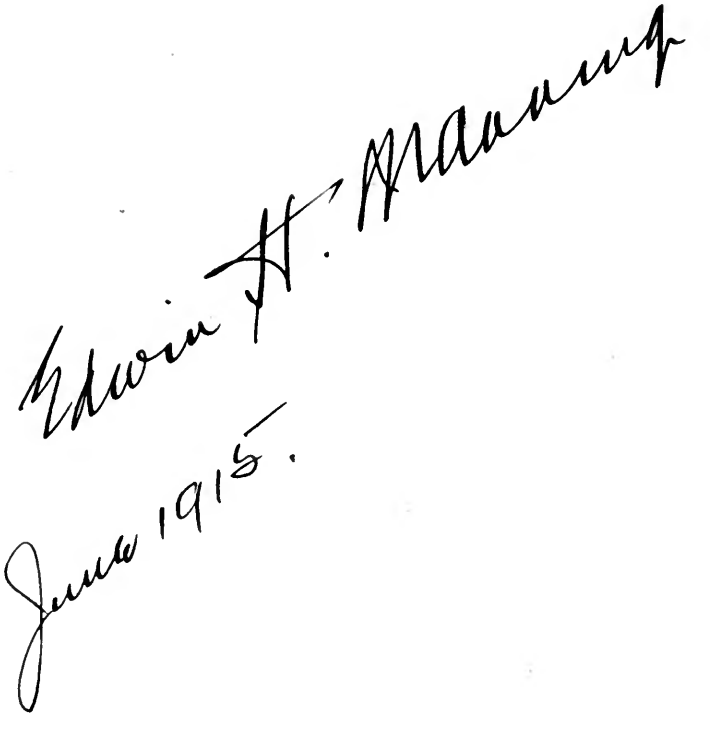

A TRUSTEE'S HANDBOOK.

A

TRUSTEE'S HANDBOOK

BY

AUGUSTUS PEABODY LORING

A.B., LL.B., HARV.

OF THE SUFFOLK BAR

THIRD EDITION

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PREFACE TO THIRD EDITION.

THE numerous decisions concerning the matters covered in this Handbook since the last edition have made it necessary to rewrite and enlarge many parts of it, particularly those parts treating the trustee's liabilities to strangers, extra dividends, and interstate law. It has been found necessary to cite 366 additional cases.

AUGUSTUS P. LORING.

BOSTON, August 12, 1907.

PREFACE TO FIRST EDITION.

THIS little book is meant to state, simply and concisely, the rules which govern the management of trust estates, and the relationship existing between the trustee and beneficiary.

The lack of a Handbook of this kind has led me to complete and publish what were originally notes for personal use merely.

As the book is for general as well as professional readers, the citations are illustrative, with an approach to completeness only where the law is doubtful or conflicting. But pains has been taken to notice the peculiarities of local State law, especially where dependent on statute.

I wish to acknowledge my obligation to the writers of the many admirable text books which bear on my subject, all of which I have used freely, and to which I have referred often for a fuller discussion of principles and a more complete citation of authorities; and I have to thank Mr. Edward A. Howes, Jr., for his valuable assistance in digesting cases and passing this volume through the press.

AUGUSTUS PEABODY LORING.

NOTE.

The citations of the following text books are thus abbreviated: —

Lewin on Trusts, 9th Eng. ed., is cited as "Lewin."

Perry on Trusts, 4th Amer. ed., 2 vols., is cited as "Perry."

Underhill on Trusts and Trustees, Amer. ed. Wislizenus is cited as "Underhill."

Flint, Trusts and Trustees, is cited as "Flint."

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A TRUSTEE'S HANDBOOK.

PART I.

THE TRUSTEE AS AN INDIVIDUAL.

Preliminary.

The class of trusts treated in this handbook are those trusts which are expressly created by deed or will. The maker of the trust can make any provision not contrary to public policy as to the management of the trust property or the duties and liabilities of the trustee; and these provisions, clearly expressed in the trust instrument, will supersede the general provisions of law applicable to trustees and trust estates.

It is, therefore, of primary importance for the trustee to make himself thoroughly familiar with the trust instrument, and to follow its directions carefully and accurately. It is only in those cases where the trust instrument does not make special provisions, or where those provisions are contrary to public policy, that he must be guided by the general law. Probably no settlement was ever drawn expressly covering all a trustee's duties, powers, and liabilities, hence the necessity of a knowledge of the general laws governing trust estates; BUT THE FIRST AND MOST IMPORTANT DUTY OF THE TRUSTEE IS TO STUDY AND BECOME THOROUGHLY FAMILIAR WITH THE PROVISIONS OF THE TRUST INSTRUMENT, AND THEREAFTER TO FOLLOW THEM OUT IMPLICITLY.

I. **Office not always desirable.** — Trusteeship is not mere contract to manage property for another, but it is a relationship, involving many duties and liabilities.

It is not always desirable to be a trustee, and before undertaking any trust the individual should make a careful examination of the trust instrument to ascertain its particular provisions and what his duties and liabilities will be.[1] He should also examine the property to see that his personal interests will not conflict with his duties as trustee.

The duties of a trustee to his beneficiary require not only the highest good faith in their execution, but also the absence of conflicting personal interests, and often the sacrifice of personal convenience and chance of profit.[2]

An individual may be willing to trust the whole or some part of the management of his personal affairs to others; but a trustee must manage the trust affairs himself.[3] The individual might have important employment as broker or counsel for the trust estate, but if he is the trustee such services will be unpaid in some jurisdictions, or at least looked on with suspicion, or he might buy from the estate or sell property to it, but as trustee he is deprived of these privileges. Moreover, he is put in such confidential relationship to his beneficiary that any profitable business dealings which he has with the beneficiary are subject to suspicion, even where the trust property is not in question.[4]

In addition to the complications that may arise from the relationship to the beneficiary, the trustee assumes all the liabilities involved in the ownership of property, and for neglect or errors in judgment in its management.[5] He may be required to give bonds with sureties for the faithful performance of his duties.[6]

To counterbalance these possible disadvantages the

[1] Kekewich, J., in Hallows *v.* Lloyd, 39 Ch. D. 691. *Infra*, p. 98.
[2] *Infra*, pp. 85, 87.
[3] *Infra*, pp. 85, 88.
[4] *Infra*, p. 85.
[5] *Infra*, pp. 29, 151.
[6] *Infra*, p. 12.

trustee is entitled in America to compensation, generally to the same extent as an agent or factor who manages the affairs of others.[1] He is absolutely prohibited from taking any other benefit from the trust.[2] He is not ordinarily protected by statutes of limitations, and with some exceptions remains liable for his mistakes and misdeeds as long as the trust lasts.

II. **Disclaimer.** — No one need be a trustee against his will, since an acceptance of the office is necessary;[3] and the office may be refused or disclaimed at any time before acceptance, even though the trustee were nominated under his promise of acceptance.[4]

It is true that a trust estate may vest in the heir or representatives of a deceased trustee without possibility of disclaimer;[5] but in such case the heir or representative takes only the title to the property, and a limited trust to transfer the estate to the new trustee, when appointed, and if he is the personal representative to settle the accounts of the deceased trustee.

If the office is to be disclaimed, it must be disclaimed at once and unequivocally, as otherwise an acceptance may be implied.[6]

No particular form of disclaimer is necessary; but it should be affirmative and decided. Although a simple verbal refusal to undertake the trust is sufficient, such a disclaimer would be unwise in most cases, and probably difficult of proof after a considerable period had elapsed.

In general the disclaimer should be in writing, and recorded where the settlement is recorded; and if the settlement is not recorded, then addressed and delivered to whomsoever has the custody of the instrument; that person being in most cases one of the beneficiaries.

[1] *Infra*, p. 36.
[2] *Infra*, p. 32.
[3] Ga. Code (1895), § 3190.
[4] Evans *v.* John, 4 Beav. 35.
[5] Co. Litt. 9 *a*. *Infra*, p. 51.
[6] Wise *v.* Wise, 2 Jon. & La. 403.

If the trust instrument is a deed, then the disclaimer should be by deed, but not in the form of a reconveyance which presupposes an acceptance and vesting of the estate; though in practice it would not probably be so construed.[1]

If the trust instrument is a will, a disclaimer filed in the Probate Court is appropriate, although the failure to qualify or give bond in court is usually construed as a disclaimer by statute ;[2] but such a disclaimer cannot be set up by a person other than one for whose security the bond is given until some action is taken by the court.[3]

A trust must be disclaimed wholly, as trusts are not divisible,[4] and if an executor have the management of real estate given him, or the other administration of property in which he acts the part of a trustee as well as executor, he cannot separate his duties and accept part and disclaim the other.[5] If, however, separate trusts are made for the real estate and personal property, he may disclaim one and accept the other.[6]

Where, however, a person is appointed executor and trustee under the same will, he may disclaim either office and accept the other, unless there appears to be an intention on the part of the testator that he should accept both or neither.[7]

It is said that when two trusts are created by the same instrument both must be disclaimed or accepted;[8] but the

[1] Lewin, p. 207.

[2] Gen. Stat. Conn. (Revision of 1902), § 248; Rev. Stat. Me. (1903), ch. 70, § 3; Rev. Stat. Mo. (1899), § 4586; Rev. Laws Vt. (1894), § 2608. But the refusal to give bond is treated as a ground for removal, not as a disclaimer, in some States. Bates' Annotated Revised Statutes Ohio (1906), § 5983; Code Va. (1904), § 3420; Code Ala. (1896), § 4155.

[3] Howe *v.* Ray, 110 Mass. 298.

[4] In New Jersey trusts are divisible. Underhill, p. 420, n.

[5] See Shaw, C. J., in Dorr *v.* Wainwright, 13 Pick. 328, 331; In re Sheets' Estate, 215 Pa. St. 164.

[6] Carruth *v.* Carruth, 148 Mass. 431.

[7] Daggett *v.* White, 128 Mass. 398.

[8] Lewin, p. 214, § 12. Perry, § 264, end.

better view seems to be, that where they are wholly separate trusts, not interdependent, and no intention appears that both or neither shall be accepted, one may be accepted and the other disclaimed.[1]

The effect of a disclaimer is to vest the whole estate in the trustees who accept,[2] and relates back to the time of the gift, and the result is the same as though the individual disclaiming had never been appointed.[3] As to the legal title the exact effect is less clear, but nevertheless it is held to be devested by the disclaimer.[4]

If, however, the trust instrument bestowed a special power on all the trustees nominated, the disclaimer of one will destroy the power,[5] and if a gift or legacy is attached to the office it will be lost by a disclaimer;[6] but a gift which is not attached to the office or conditional on its acceptance will not be affected by a disclaimer of the office.

If the individual were not consulted about the appointment, he may have the expense of consulting counsel and his costs.[7]

III. **Acceptance.** — An acceptance should be made formally according to the provisions of the trust instrument;[8] but if no manner is therein specified, if the settlement be by deed, then by joining in the deed, or if the trust be established by will, then by qualifying in the Probate Court, and by statute a person not so qualifying

[1] In re Cunard's Trusts, 48 L. J. (N. S.) 192; Carruth *v.* Carruth 148 Mass. 431.

[2] Generally and by statute in Maryland. Pub. Gen. Laws (1904), Art., 93, §§ 293, 294.

[3] Ellis *v.* Boston, H. & E. Railroad, 107 Mass. 1.

[4] Lewin, p. 208.

[5] In re Wilkin, 90 App. Div. (N. Y.) 324, remedied by statute in New York, 1903, p. 732, c. 370, *Infra*, p. 55.

[6] Slaney *v.* Watney, L. R. 2 Eq. 418.

[7] In re Tryon, 7 Beav. 496.

[8] Ga. Code (1895), § 3190.

is held to have disclaimed, and a new trustee may be appointed.[1]

If an individual be named both executor and trustee, he will be construed to accept both offices if he presents the will for probate without disclaiming either.[2]

In absence of statute the executor or administrator accepts the decedent's trusts, and cannot disclaim them; but by statute the law is usually the reverse.

It is not unusual for a will to provide that the executors shall manage certain estates, and hold them in trust for certain purposes. In such cases the executors act as and really are trustees to that extent, and not executors, and should be qualified as trustees as well as executors, although in practice they often qualify as executors only.[3] In some jurisdictions the sureties on the executor's bond will not be liable for his acts as trustee, but in other States they will.[4]

An acceptance will be implied if the individual intermeddles with the trust property, or performs any act to carry out the trust.[5] Hence, if a disclaimer is contemplated, care should be taken to avoid any assumption of authority, or voluntary interference with the trust estate, either as volunteer or agent, until the disclaimer has formally been made; since such assumption or interference will readily be construed as an acceptance. And a trustee who has acted as such cannot disclaim, even though the deed needed his signature and he has not

[1] *Supra*, p. 4.

[2] Flint, § 157. *Supra*, p. 4.

[3] In re Sheets' Estate, 215 Pa. St. 164, holds that the office is really that of an executor, the distribution being delayed, and so charged the surety on the bond of the administrator d. b. n. c. t. a. This doctrine is unsupported by authority elsewhere. *Infra*, p. 14. Bentley *v.* Dixon, 60 N. J. Eq. 353; Angus *v.* Noble, 73 Conn. 56; City of Seattle *v.* McDonald, 26 Wash. 98; Philbin *v.* Thurn, 103 Md. 342.

[4] *Infra*, p. 14.

[5] Kilbee *v.* Sneyd, 2 Molloy, 186.

signed.[1] He may, however, prove that the act from which an acceptance would be implied was done as agent, or was merely to protect the property until a trustee could be appointed,[2] or that he acted in some other capacity than that of trustee, and in that case disclaim; but the burden of proving it will be on him.

The estate vests in a transferee subject to disclaimer,[3] therefore if an appointment be known of and not disclaimed within a reasonable time, an acceptance will be implied; and the burden will fall on the appointee to show that he had no reasonable opportunity to disclaim.

IV. **Appointment.** — No trust will be allowed to fail for want of a trustee,[4] and if conveyance is made to one that cannot act, or if those who have been nominated disclaim, or if all the trustees die, the property will be held by whoever may have the title until a proper trustee can be appointed.[5]

In case of need the court will appoint a temporary trustee or a receiver,[6] and may in certain contingencies administer the trust itself, though such a course is very unusual.[7]

The power to make an appointment will arise whenever the circumstances make it necessary, either in the nature of things, as in the case of the death or dis-

[1] Flint *v.* Clinton Co., 12 N, H. 432.

[2] Smith *v.* Knowles, 2 Grant's Cases, 413.

[3] Adams *v.* Adams, 21 Wall. 185.

[4] North Adams Universalist Soc. *v.* Fitch, 8 Gray, 421; Dodkin *v.* Brunt, L. R. 6 Eq. 580; Civil Code Cal. (1903), § 2289; Revised Civil Code So. Dak. (1903), § 1655; Code No. Dak. (1895), § 4302. See to the contrary In re Sturges, 59 N. Y. S. 783.

[5] So, also, the court will appoint trustees from a similar class, where the class of persons specified no longer exist. Boston *v.* Doyle, 184 Mass. 373.

[6] Brightly's Dig. Pa. (1894), p. 2030, § 18.

[7] Rogers *v.* Rogers, 111 N. Y. 228; Royce *v.* Adams, 123 N. Y. 402; Wells, Fargo & Co. *v.* Walsh, 88 Wis. 534. *Infra*, p. 170.

claimer of all the trustees, or whenever the provisions of the trust instrument prescribe it. As when the number of trustees sinks below the prescribed number,[1] or a trustee becomes disqualified by going abroad, or as it may be otherwise provided in the instruments, or when the safety of the fund or the proper administration of the trust requires an additional trustee.

But the power of appointment under the trust instrument will only arise under the exact terms specified therein, and will not arise under similar terms; as, for instance, a provision that a trustee shall be appointed on one of the trustees becoming "incapable," will not give rise to a power to appoint when one becomes bankrupt and therefore "unfit" but still "capable;"[2] or in the case where the power to appoint arose on the refusal and neglect of the original trustee to execute the trusts, and he died without executing them, the power did not arise.[3]

How the Trustee is appointed. — If the trust instrument adequately provides a method to be pursued in making the appointment of a trustee, the court has no jurisdiction in the case, and the method prescribed must be carefully followed; but if it becomes impossible to follow the method prescribed, the power is wholly lost, and the appointment must be made by the court.[4] As a matter of precaution, an appointment made under a power in a settlement should be recorded with the settlement.

In some States the power to appoint the trustee is given by statute to the beneficiary, and in others to the surviving trustee, but usually to the court.

If the trust is under a will, the Probate Court has

[1] Mass. Gen. Hosp. *v.* Amory, 12 Pick. 445.
[2] Turner *v.* Maule, 15 Jur. 761.
[3] Guion *v.* Pickett, 42 Miss. 77; Underhill, p. 400, n. 2.
[4] See statutes. Griswold *v.* Sackett, 21 R. I. 210. *Infra*, p. 58.

jurisdiction of the estate, and the appointment, even if made under the terms of the will, according to the prevailing statutory law, must be confirmed by a decree of the court, and a letter issued, although the trustee's powers in such cases come from the settlement, and not the court.[1]

The same is true if the trust be under the jurisdiction of the court for any reason.[2]

If for any reason, either to fill a vacancy, or for the security of the fund, or convenience of the beneficiaries, the appointment of a trustee is desirable, and the trust instrument does not contain an adequate provision for appointing the trustee, or if the person holding the power to appoint a trustee unreasonably refuses or neglects to act,[3] the court will appoint a trustee upon the application of any person interested in the trust, whether in possession or remainder,[4] though it would not take any notice of the application of a stranger.[5]

All persons in interest must be parties to the suit,[6] but less parties are required in some jurisdictions by statute.[7]

Ordinarily, jurisdiction in these matters is conferred on the Probate Court by statute; but in the ab-

[1] The appointment of any voluntary trustee may be confirmed by court in Maine. Rev. Stat. (1903), ch. 70, § 13.

[2] In Maine a trust may be confirmed by court, and thus come under its jurisdiction. Rev. Stat. Me. (1903), ch. 70, §§ 13–15.

[3] Cone *v.* Cone, 61 S. C. 512.

[4] Statutory provisions in most jurisdictions.

[5] Penn *v.* Brewer, 12 Gill & J. 113; Snyder *v.* Snyder, 1 Md. Ch. 295; Smith *v.* Calloway, 7 Blackf. 86; Gulick *v.* Gulick, 3 Atl. R. (N. J.) 354. Creditors or even transferees of stock may apply to have a trustee appointed. Guarantee Trust Fund, etc. Co. *v.* Scott, 199 Pa. St. 471.

[6] Shaw *v.* Paine, 12 Allen, 293. In New York the proceeding was considered as being *in rem* and valid without any parties. Milbank *v.* Crane, 25 How. Prac. 193; Wood *v.* Travis, 54 N. Y. S. 60.

[7] Pub. Gen. Laws Md. (1904), Art. 16, § 230.

sence of statute any court of chancery or equity will have jurisdiction among its ordinary powers.

The court will have jurisdiction and can appoint a trustee if the person who holds the title to the property is within its jurisdiction, or if the property itself is within its jurisdiction and there is a statute by which the title will vest in the new trustee appointed.[1] In the absence of such statute there is no way of vesting the title, and the court is powerless. The operation of the statute is to confiscate the title of the person out of the jurisdiction, and vest it in the appointee of the court.[2]

The trustee is responsible to the court in which he is appointed, and cannot be controlled by another court, nor can his appointment be attacked collaterally.

It is held that the court having original jurisdiction of a testamentary trust may make a subsequent appointment, although the property and holder of the title are both out of the jurisdiction,[3] but it is hard to see what effect the decree can have unless the trustee be aided by statute or be reappointed in the jurisdiction where the property lies. Statutes exist in some jurisdictions which authorize trustees appointed in other States to recover trust property in the State where the statute exists.[4]

So too by statute, where the sole beneficiary has moved into a State and wishes the property there also, the court may appoint a trustee; but this case seems open to the same criticism as the foregoing.[5]

No attempt will be made to state the rules of procedure in such cases, since the matter is one of prac-

[1] McCann *v.* Randall, 147 Mass. 81. See *infra*, p. 166. Annot. Stat. Col. (1891), § 2535; Gen. Stat. N. J. (1895), p. 394, § 112.

[2] McCann *v.* Randall, 147 Mass. 81.

[3] Curtis *v.* Smith, 6 Blatchf. 537.

[4] Ky. Stat. (1899), §§ 4709, 4711; Gen. Stat. N. J. (1895), p. 3685, § 9; Code Va. (1904), § 2630; Code W. Va. (1906), § 3249.

[5] Code Ala. (1896), § 4200.

tice, though simple, requiring care and professional advice, as the consequences of administering a trust under a defective appointment may be serious, since the outgoing trustee is not relieved and is still liable for the trust, and the incoming trustee is acting wrongfully as trustee, and may incur heavy liabilities without any right to indemnity out of the trust estate, and may be estopped to deny the regularity of the appointment.[1]

Appointment not Complete without Title to Property. — The appointment of a trustee is not complete until the title to the trust property is vested in him. The original trustees under a will get title to the real estate from that instrument itself, but do not get title to the personal estate until it is turned over by the executors, usually after a considerable interval.

The original trustees under a deed will have the property vested in them by the conveyance.

The property ordinarily vests in later appointees by express provisions of the trust instrument, which commonly provides that on the appointment of a new trustee he shall become entitled to and vested with the trust property;[2] but in order that the title shall pass under the terms of the instrument, all the prescribed conditions concerning the appointment must have been accurately fulfilled.[3]

In many jurisdictions the property will vest in the new trustee by statutory provision;[4] but this vesting

[1] Wagnon *v.* Pease, 104 Ga. 417; Cauhape *v.* Barnes, 135 Cal. 107.

[2] Ellis *v.* Boston, H. & Erie Railroad, 107 Mass. 1.

[3] Bumgarner *v.* Cogswell, 49 Mo. 259.

[4] Perry, § 284, n. 6; Mass. Rev. Laws (1902), ch. 147, § 6; Laws Del. (1893), p. 709, ch. 250, and p. 709, ch. 95; Gen. Stat. R. I. (1896), ch. 208, § 4; Brightly's Dig. Pa. (1894), p. 2030, § 26; Rev. Stat. Mo. (1899), § 4581; Gen. Stat. Conn. (1902), § 250; Gen. Stat. N. J. (1895), p. 3684, § 4.

of title is usually confined to appointees of the court;[1] and even where the donee of the power is the judge of probate, the appointment being that of the individual and not of the court, the title will not pass under the statute.[2]

Where there is no adequate provision in the trust instrument and no statute applicable, conveyance must be made by whoever holds the title;[3] and where the court appoints, a well-drawn decree will contain an order for the necessary conveyance.[4]

Trustees' Bonds. — Trustees under wills, and usually trustees appointed by the court, are required to give bond to the court for the faithful performance of their trust,[5] and the court may require an appointee under a power in the instrument to give bond if the circumstances require it.[6]

In testamentary trusts these bonds are required to be with sureties, unless the testator has expressly excused the trustee from furnishing them, or unless all parties in interest join in requesting the exemption. In such cases "all persons beneficially interested" refer only to persons in being and who have a present vested interest in the estate, and not to persons unascertained and not in being.[7]

It is not unusual for a trustee, especially if he be a man of standing, to decline a trust where he is required

[1] Pub. Gen. Laws Md. (1904), Art. 16, § 226; Gen. Stat. Kan. (1899), § 7528; Rev. Laws Minn. (1905), § 3262; Annot. Stat. Wis. (1898), § 2094.

[2] Webster Bank *v.* Eldridge, 115 Mass. 424, amended by Stat. 1878. c. 254, § 1, so as to vest title in appointees under any written instrument.

[3] Loring *v.* Salisbury Mills, 125 Mass. 138, 141.

[4] Rev. Laws Vt. (1894), § 2612; Rev. Stat. Me. (1903), ch. 70, § 5. For further discussion see pp. 191,192, *infra*.

[5] Statutes in nearly all jurisdictions.

[6] Bowditch *v.* Banuelos, 1 Gray, 220.

[7] Dexter *v.* Cotting, 149 Mass. 92.

to furnish security; and the wiser course seems to be to select the trustees with care, and trust to the carefulness of the selection, rather than to take a less desirable individual with security, since continual watchfulness is required to be sure that the security remains sufficient and that no depreciation is occurring, and bondsmen are difficult to collect from.[1]

The amount of the bond required is sufficient to cover with a margin of fifty per cent the personal property in the trustee's hands, and, if there is a power of sale of real estate in the settlement, sufficient to cover the value of the real estate also.

A trustee who has not furnished sureties may be required to do so, if at a later time the court, on application of any one in interest, considers it necessary for the safety of the fund; but the need of security must appear affirmatively.[2]

When the court orders a sale of real estate it will ordinarily order the trustee to file a bond sufficient to cover the price received, if such a bond has not already been given.

V. **Who is Trustee.** — The question of who is the trustee and who is to administer the trusts not unfrequently arises.

Any person who intermeddles with the trust property is a trustee *de son tort*, and is accountable as such to the

[1] The surety on a trustee's bond occupies a particularly disagreeable position. He is not only liable for all the trustee's defaults while he is regularly in office, but even for his failure to account for funds received prior to the date of the bond, McIntire *v.* Linehan, 178 Mass. 263; or for a debt which the trustee owes the estate when he accepts office. Bassett *v.* Fidelity & Deposit Co., 184 Mass. 210. He may be denied the privilege of appearing in a case which may result in charging him on the bond, since he is adequately represented by the trustee, Shaw *v.* Humphrey, 96 Me. 397; and he is not protected by the statutes of limitation any more than the trustee. Blake *v.* Traders' Nat'l Bank, 145 Mass. 13.

[2] Ladd *v.* Ladd, 125 Ala. 135.

same extent as though he were duly appointed.[1] As, for instance, the executor or administrator of a deceased trustee, or an executor or administrator who meddles with the real estate of the deceased.[2]

An executor who has the duties of a trustee conferred on him by the will, as for instance the payment of an annuity out of part of the estate, even though he qualifies as executor only, has in regard to that property the powers he would have if he qualified as trustee.[3] That is to say, though the trustee calls himself an executor, if in fact he acts as trustee he is a trustee, and not an executor, in the eyes of the law.[4] In Alabama, Massachusetts, and Maine the sureties on his bond as executor are liable for his acts as trustee,[5] but the rule is otherwise elsewhere.[6]

Where the same person is appointed executor and trustee under a will, he holds the property as executor until he has settled his account in the Probate Court as executor, crediting himself with any funds which he holds as trustee, or done some other notorious act of transfer.[7]

Where a power of appointment is given by the trust instrument and the donee appoints new trustees, the sec-

[1] Brown *v.* Lambert's Adm'r, 74 Va. 256.

[2] Perry, vol. 1, §§ 245–247, and cases cited. Penn *v.* Folger, 182 Ill. 76.

[3] Wheeler *v.* Perry, 18 N. H. 307; Carson *v.* Carson, 6 Allen, 397; Sheets's Estate, 52 Pa. St. 257; Jewett *v.* Schmidt, 83 App. Div. (N.Y.) 276.

[4] Philbin *v.* Thurn, 103 Md. 342. He should qualify as trustee, Angus *v.* Noble, 73 Conn. 56; City of Seattle *v.* McDonald, 26 Wash. 98; and may be enjoined from performing trustee's duties if he fails to do so. Bentley *v.* Dixon, 60 N. J. Eq. 353. The case of In re Sheets's Estate, 215 Pa. St. 164, which denies the executor's right in such cases to qualify as trustee, is contrary to the general trend of authority.

[5] White *v.* Ditson, 140 Mass. 351; Groton *v.* Ruggles, 17 Me. 137; Hall *v.* Cushing, 9 Pick. 395; Perkins *v.* Moore, 16 Ala. 9.

[6] Drake *v.* Price, 5 N. Y. 430.

[7] Crocker *v.* Dillon, 133 Mass. 91, 98. See *infra*, p. 100.

ond set of trustees in point of time will not necessarily administer the trust;[1] but if the property be given to the second set to convert, or their discretion is relied on, they will take the property,[2] and it is immaterial whether the trusts can be carried out or not.[3]

Where a general power of appointment is exercised by will, the executors of the will, not the trustees, will carry out the trust, and where the power is special the same rule should prevail unless the appointment is directly to the objects of the bounty and was not meant to pass through the executor's hands.[4]

VI. **Who can be a Trustee.** — Any person that has the capacity to hold the title to the property, and the right to exercise the powers, may be a trustee.

A corporation having such capacity and rights among its charter powers is such a person, and may be a trustee,[5] even in a jurisdiction where it has not the right to do business, provided it gives bond with domestic sureties and agrees to submit to the jurisdiction of the court.[6]

An alien enemy or an alien in a jurisdiction where he cannot hold property could not be a trustee.[7]

The sovereign may be trustee, but the beneficiary cannot enforce the trust except by petition,[8] until the property is conveyed to some one amenable to the jurisdiction of the court.[9]

The trust estate may vest in a lunatic or infant, but they will be removable.[10] An infant may be compelled to

[1] Ames, p. 460, n.; Busk *v.* Aldam, L. R. 19 Eq. 16.

[2] Onslow *v.* Wallis, 1 Hall & Twells, 513.

[3] Philbrick's Settlement, 34 L. J. Ch. 368; Olney *v.* Balch, 154 Mass. 318.

[4] Sargent *v.* Sargent, 168 Mass. 420.

[5] Attorney General *v.* Landerfield, 9 Mod. 286; Dublin Case, 38 N. H. 577.

[6] Satterthwaite's Estate, 47 Atl. Rep. 226, 227 (N. J. Eq. 1900).

[7] King *v.* Boys, 3 Dyer, 283.

[8] Briggs *v.* Light Boat, 11 Allen, 157.

[9] Winona Co. *v.* St. Paul Co., 26 Minn. 179.

[10] Irvine *v.* Irvine, 9 Wall. 617; Swartwout *v.* Burr, 1 Barb. 495.

convey by statute,[1] and so long as infants or lunatics hold the property the trust will be administered by the court through them or their guardians.[2] Having no discretion, they cannot act in trust affairs any more than they can in their own affairs,[3] and if one of three trustees is an infant or lunatic, action by the other two is barred.[4]

At common law a wife could not be a trustee for her husband, but she may be now in most jurisdictions under the statutory rules.[5]

A trustee should be "capable," that is to say, a person having the legal and actual capacity to hold the title to the trust property and exercise the powers. Thus the trustee should be a person of full age and sound discretion.

He should be "fit," that is to say, a person in whose hands the property will be safe,[6] and who will be impartial in the administration of his trust. Thus a bankrupt is not a "fit" person, as being unsuccessful in his own affairs he is not likely to be successful in those of others, and a drunkard or person of dishonest or of bad character is unfit, since the property would not be safe in his hands.

So too a beneficiary is an unfit person, whether he be a life tenant or remainderman, since he will naturally be partial to his own interests;[7] and for similar reasons a near relation is objectionable,[8] although in this country they are more often appointed than

[1] Brightly's Dig. Pa. (1894), p. 2033, § 46; Gen. Laws R. I. (1896), ch. 208, § 16; Gen. Stat. N. J. (1895), p. 3683, §§ 2, 3.

[2] Ex parte Sergison, 4 Ves. Jr. 147.

[3] Person *v.* Warren, 14 Barb. 488.

[4] King *v.* Bellord, 1 Hem. & M. 343. *Infra*, p. 55.

[5] Schluter *v.* Bowery Savings Banks, 117 N. Y. 125.

[6] In re Barker's Trusts, 1 Ch. D. 43.

[7] Ex parte Conybeare's Settlement, 1 Weekly Rep. 458.

[8] The court in Pennsylvania refused to appoint a son co-trustee with his father where three trustees were required, as he would naturally be dominated by his father, and thus there would be but two trustees. Lafferty's Estate, 198 Pa St. 433. But the court was divided.

strangers. The fact of near relationship makes the trustee less able to withstand the importunities of the beneficiaries,[1] and moreover such a connection, especially where a parent or older relation is trustee for a child, is too often made an excuse for lax management, and the knowledge that a breach of trust is likely to be condoned not infrequently leads to disregard of strictly legal management, which is the only safeguard of trust estates. Deviation from the rules of strict accountability only too often leads to speculation and the loss of the property.

A court will not appoint a husband trustee for his wife,[2] and there is no resulting trust between husband and wife;[3] but there is nothing in the relationship of husband and wife absolutely preventing the appointment,[4] and the maker of the trust may make such an appointment. But where a husband is trustee for his wife, her equitable estate is supposed to be reduced to possession, and may be attached for his debts.[5]

In this connection it may be said that the trust companies, which have of late years become so numerous, to a considerable extent do away with the element of personal risk attaching to an individual trustee; but they lack the advantages of personal management. These companies sometimes fail from improper management as utterly as individuals do, and as a rule the lack of personal management results in securing the minimum return only on the amount invested, and lacks the great advantages often secured by the able personal oversight of individual trustees.

[1] Wilding *v.* Bolder, 21 Beav. 222; Parker *v.* Moore, 25 N. J. Eq. 228, 240.

[2] Dean *v.* Lanford, 9 Rich. Eq. 423.

[3] Jencks *v.* Alexander, 11 Paige, 619.

[4] Porter *v.* Bank of Rutland, 19 Vt. 410; Livingston *v.* Livingston 2 Johns. Ch. 537.

[5] Shirley *v.* Shirley, 9 Paige, 363.

VII. **Appointment of Trustee.** — The maker of the trust in making his appointment is bound only by the consideration of the legal capacity of the individual, and may appoint a person actually incapable or unfit,[1] and his appointee will be removed for cause only.[2]

The donee of a power to appoint may also use his discretion in determining the fitness and actual capacity of the appointee; but the power is not an arbitrary one, and if the appointment be of an unfit or incapable person the court may review it.[3]

If the holder of the power be himself a trustee, he should consult his beneficiaries and appoint some one agreeable to them;[4] and should the matter of the appointment become a matter of litigation, the power, though discretionary, cannot be exercised without the assent of the court.

Where the court is called upon to appoint a trustee, it will appoint only a person who is actually and legally capable and fit, and within its jurisdiction;[5] but it will have due regard to the wishes of the maker of the trust if they can be discovered.[6]

In some cases the court will appoint a non-resident where the beneficiaries or part of the property is out of its jurisdiction.[7] In some jurisdictions it is forbidden to do so by statute,[8] but the statutes have been held unconstitutional.[9]

[1] Robertson *v.* De Brulatour, 111 App. Div. (N. Y.) 882, 901, 902.

[2] Wetmore *v.* Truslow, 51 N. Y. 338.

[3] Shaw, C. J., in Bowditch *v.* Banuelos, 1 Gray, 220, 231. As a rule he should not appoint himself, but may do so, if he is specially fit. Montefiore *v.* Guedalla, L. R. (1903), 2 Ch. 723.

[4] Perry, § 297.

[5] Rev. Stat. Ind. (1901), § 3410.

[6] In re Tempest, L. R. 1 Ch. 485, 487. See Perry, § 39; Story, Eq. Jur., 11th ed., vol. 2, § 1289 b; Underhill, p. 408.

[7] Ames, 250 n.; Brightly's Dig. Pa. (1894), p. 2039, § 84.

[8] Rev. Stat. Ind. (1901), § 3410.

[9] Glink *v.* La Fayette, 52 Fed. Rep. 857.

If all the beneficiaries agree on a person, the court will nearly always appoint him, even though he be a beneficiary or otherwise unfit.[1]

The laws of some States provide for a public trustee, who will be appointed whenever the beneficiary shows that his trustee is absent from the country or refuses to act.[2]

The regularity of the appointment by the court cannot be questioned in any collateral proceding.[3]

VIII. **Devestment of Office.** — A trustee is discharged (1) by extinction of the trust, (2) by completion of his duties, (3) by such means as the instrument contemplates, (4) by consent of the beneficiaries, (5) by judgment of a competent court.[4]

The trustee's office may come to an end by the extinction of the trust. This may come to pass either by the completion of the purposes of the trust, as,[5] for instance, on the death of the life tenant and the vesting of the estate in the remainderman,[6] or in the case of a trust to enable a widow to support her children, on the remarriage of the widow,[7] or by the legal title and beneficial title merging in one person.[8]

If the trust itself continues and the trustee dies, or is under a natural disability, or one created by the trust instrument, if there be more than one trustee, the office will vest in the surviving or remaining trustees, even though there be a provision in the instrument for keeping up the number of the trustees.[9]

[1] Young *v.* Young, 4 Cranch C. C. 499.

[2] Colorado Laws of 1894, pp. 51–58, §§ 2–17.

[3] McKim *v.* Doane, 137 Mass. 195.

[4] Rev. Civ. Code So. Dak. (1903), § 1651; Rev. Code N. Dak (1895), § 4298; Civ. Code Cal. (1903), § 2282.

[5] Ex parte Stone, 138 Mass. 476.

[6] Morgan *v.* Moore, 3 Gray, 319.

[7] Fox *v.* Storrs, 75 Ala. 265.

[8] Parker *v.* Converse, 5 Gray, 336.

[9] Warburton *v.* Sandys, 14 Sim. 622.

If he is disabled, the title will remain in him until a new trustee is appointed, and the powers will be suspended or vested in the court.

If a sole trustee dies, then in absence of statute his executor or administrator accepts his trusts and at common law cannot disclaim them, though in some States he may disclaim by statutory provision. In many States the statute provides that the executor or administrator does not succeed to the decedent's trusts, and in such cases the office vests in the court,[1] or is in abeyance, and will vest in a successor when appointed; the person in whom the title to the property has vested in the meanwhile, not having the office of trustee in anything but a limited extent, namely, to preserve the property and act in an emergency to prevent a loss, and finally convey to the new trustee when appointed.[2]

It is the duty of the executor or administrator of a deceased trustee to settle the decedent's trust accounts, and his estate is liable for breaches of trust committed in his lifetime.[3]

The guardian of an insane person would stand in the same position as the executor of a deceased trustee.

The trustee cannot abandon his trust, and even if he conveys away the property he will still remain liable as trustee;[4] but he may resign.[5]

Resignation. — The resignation in most jurisdictions may be at pleasure,[6] and in any jurisdiction for good reason.[7]

[1] Milbank *v.* Crane, 25 How. Prac. 193.

[2] Mortimer *v.* Ireland, 11 Jurist, 721; Ames, 510, n. *Infra*, p. 54.

[3] Dodd *v.* Wilkinson, 41 N. J. Eq. 566; Perry, § 344.

[4] Webster *v.* Vandeventer, 6 Gray, 428.

[5] Mass. Rev. Laws (1902), ch. 147, § 12.

[6] Bogle *v.* Bogle, 3 Allen, 158; Ellis *v.* Boston, H. & E. Railroad, 107 Mass. 1; statutes *passim*.

[7] Craig *v.* Craig, 3 Barb. Ch. 76; Dean *v.* Lanford, 9 Rich. Eq. (S. C.) 423.

To be effective, the resignation must be made either according to an express provision of the trust instrument,[1] or with the assent of all the beneficiaries or the court.[2]

The assent of the beneficiaries must be unanimous; hence, if some are under age, unascertained, unborn, or incompetent, a valid assent cannot be given by the beneficiaries, and resort must be had to the court.

The mere resignation and acceptance thereof will not convey the title to the property, but the trustee should then devest himself of the property by suitable conveyances, and complete his duties, and until he does so he will remain liable as trustee.[3]

Even where all persons in interest assent, it has been suggested that the resignation is not complete without the action of the court,[4] but it is, to say the least, doubtful; and especially as all persons who are likely to raise the question are concluded by their assent.

The resignation need not be in writing, and where a trustee has conveyed the trust property to a successor appointed by the court, there being no evidence of any direct resignation, one would be presumed.[5]

Ordinarily courts of probate have jurisdiction in these matters; but where it is not specially given to them, a court of equity will have the power to accept a resignation among its ordinary powers, and generally has concurrent jurisdiction where the Probate Court has the power.[6]

The court will not accept a resignation until the retiring trustee has settled his account,[7] and returned any

[1] Stearns *v.* Fraleigh, 39 Fla. 603.
[2] Cruger *v.* Halliday, 11 Paige, 314.
[3] Ibid.
[4] Matter of Miller, 15 Abb. Pr. 277.
[5] Thomas *v.* Higham, 1 Bail. Eq. 222.
[6] Bowditch *v.* Banuelos, 1 Gray, 220.
[7] Statutes *passim*. In re Olmstead, 24 App. Div. (N. Y.) 190.

benefit connected with the office,[1] and in some jurisdictions they will require a successor to be provided for.[2]

Where there is more than one trust in the same instrument, the rule for resignation is the same as for acceptance; namely, unless the trusts are divisible, all or neither must be resigned.[3]

Removal. — The beneficiaries may remove a trustee if the power is expressly given them by the settlement,[4] but this power is usually only given in railroad mortgages and the like. The court may remove a trustee for good cause;[5] but the application is addressed to the reasonable discretion of the court,[6] and each case, therefore, stands on its own merits.[7] The power is among the ordinary powers of a court of equity,[8] but jurisdiction in such cases is generally given to the Probate Courts by statute, and action should always be taken in the court having original jurisdiction of the trust.[9]

All persons interested in the trust must be made parties in a suit for a removal.[10] But this is not required where the parties are very numerous, as, for instance, in a railroad mortgage.[11]

[1] Craig *v.* Craig, 3 Barb. Ch. 76.

[2] Civ. Code Cal. (1903), § 2260; Rev. Civ. Code So. Dak. (1903), § 1638.

[3] Carruth *v.* Carruth, 118 Mass. 431.

[4] March *v.* Roman, 116 Fed. Rep. 355, Circ. Ct. App.

[5] Statutes exist in most jurisdictions giving courts of probate jurisdiction to act in these matters.

[6] Scott *v.* Rand, 118 Mass. 215.

[7] A number of examples in Underhill, p. 393, n.

[8] Dodkin *v.* Brunt, L. R. 6 Eq. 580. As to who are interested, see *infra*, p. 158.

[9] Howard *v.* Gilbert, 39 Ala. 726. *Supra*, p. 8; *infra*, p. 189.

[10] Shaw *v.* Paine, 12 Allen, 293. All the trustees, and all former trustees who have not been discharged, are interested parties. Hamilton *v.* Faber, 33 Misc. Rep. (N. Y.) 144. As to other parties interested, see *infra*, p. 158.

[11] Farmers' Loan & Trust Co. *v.* Lake Street Elevated Railroad 68 Ill. App. 666.

Ordinarily a trustee will be removed who refuses to give bond,[1] or who has been guilty of a wilful breach of trust, or who wastes or mismanages the trust property, or who refuses to account,[2] or who is a minor, lunatic,[3] drunkard,[4] or a person of such bad habits that the property is in danger in his hands;[5] and the fact that he is the testator's son and has a discretionary power of paying the income will not protect him if he mingles the funds with his own and refuses to account.[6]

So too a trustee will be removed who denies the trust or is unfriendly to it,[7] who unreasonably or corruptly disagrees with his co-trustee,[8] or who, having a discretionary power, exercises it in an arbitrary and capricious manner,[9] or, having a discretionary power over payments to his beneficiary, has an unreasonable prejudice or dislike to him which is likely to defeat the purposes of the settlement,[10] or favors one beneficiary to the prejudice of the others,[11] or whose relations with his co-trustee or the beneficiaries are such as to interfere with the proper management of the estate.[12]

[1] See *supra*, p. 4, note 2.

[2] Stated to be the only causes in Webb *v.* Dietrich, 7 Watts & Sar. 401.

[3] Generally, but in some States expressly by statute. Rev. Stat. N. J. (1895), p. 3684, § 4; Gen. Stat. Conn. (1902), § 371; Rev. Stat. Me. (1903), ch. 70, § 4; Pub. Stat. N. H. (1901) ch. 198, § 8; Vt. Stat. (1894), § 2610; Rev. Laws Mass. (1902), ch. 147, § 11.

[4] Generally, but in some States expressly by statute. Bates's Annot. Ohio Stat. (1905), § 6334; Brightly's Dig. Pa. (1894), p. 2035, §§ 59–61.

[5] The statutes existing in nearly all jurisdictions generally expressly cover one or more of the above cases. They should be referred to in each case.

[6] Sparhawk *v.* Sparhawk, 114 Mass. 356.

[7] Irvine *v.* Dunham, 111 U. S. 327; Quackenboss *v.* Southwick, 41 N. Y. 117; Polk *v.* Linthicum, 100 Md. 615.

[8] *Infra*, p. 55.

[9] *Infra*, p. 60.

[10] McPherson *v.* Cox, 96 U. S. 404; Wilson *v.* Wilson, 145 Mass. 490. *Infra*, p. 61.

[11] Scott *v.* Rand, 118 Mass. 215.

[12] Disbrow *v.* Disbrow, 46 App. Div. (N. Y.) 111; In re Myer's Estate, 205 Pa. St. 413.

The court will sometimes, though not necessarily, remove a trustee who becomes a bankrupt,[1] or goes to reside permanently without its jurisdiction;[2] but it will not remove a trustee simply because he is poor,[3] or to satisfy the caprice of a beneficiary;[4] or because he is prejudiced against or dislikes a beneficiary where he has no discretionary power over the payments to him.[5] Nor will a trustee be removed for the non-exercise of, or the manner in which he exercises, a discretionary power, provided he is honest and reasonable in the use or non-use of his discretion. Nor will a trustee be removed for a technical breach of trust, or one made unintentionally or through mistake.[6]

[1] Paddock *v.* Palmer, 6 How. Pr. 215.

[2] Culp's Estate, 5 Pa. C. C. R. 582; Brightly's Dig. Pa. (1894), p. 2037, § 70; Hughes *v.* Chicago Co., 47 N. Y. Sup. Ct. 531.

[3] Jones *v.* McPhillips, 77 Ala. 314.

[4] McPherson *v.* Cox, 96 U. S. 404.

[5] Nickels *v.* Philips, 18 Fla. 732; Forster *v.* Davies, 4 DeG., F. & J. 133.

[6] Haines *v.* Elliot, 77 Conn. 247; and see Perry, §§ 275 to 287, and Underhill, p. 393, n., for other instances.

PART II.

THE INDIVIDUAL AS TRUSTEE.

1. INCIDENTS OF TRUST ESTATE.

Ownership. — In every trust there are two estates, that of the trustee or the legal estate, and that of the beneficiary or the equitable estate.

These two estates are separate although bound together and travelling on parallel lines, and they will be treated separately in this treatise; the trustee's estate here, and the beneficiary's estate later on.[1]

The trustee's estate consists in the ownership of the property itself,[2] and the beneficiary's in his right in a court of equity to compel the trustee to carry out the provisions of the trust, but not in any estate in the property itself.

The tendency in America is to merge legal and equitable rights,[3] and for courts of law to act on equitable principles. Statutes that reduce the legal estate to a mere power, as in New York and other Code States, and the refusal of a court of law to allow trust property to be sold on execution, are examples of these tendencies that might be largely multiplied.[4]

Nevertheless a trustee in either a court of law or equity is the absolute owner of the trust property as to the whole world, and may eject even the beneficiary from

[1] *Infra*, p. 157.
[2] By statutory enactments in most Code States.
[3] Lowell, Transfer of Stock, § 37.
[4] *Infra*, p. 49.

the premises,[1] and is accountable to no one in the world but the beneficiaries for his use of the ownership.[2] The popular error that the trustee is merely the agent of the beneficiary expresses an entirely erroneous and mischievous conception of the trustee's relationship to the property and his beneficiary.[3] In a case of agency the principal owns the property, and the agent acts in his name and place; in a trust the trustee owns the property, acts in his own name, and the beneficiary has no property rights, but a claim against the trustee only.

In the case of an agency the person with whom the agent contracts may sue his principals on the contract; he has no such rights against the beneficiaries in a trust.[4]

As Owner of the Property, all the Incidents of Ownership fall to the Trustee. — All actions against strangers either at law or in equity for damage to or loss of the property,[5] and all actions to protect or recover it must be brought in the name of the trustee. And the trustee may sue and be sued without any joinder of the beneficiaries,[6] where the relations between the trustee and beneficiary are not in question, and his interests are adequately represented by the trustee.[7] It was held in a foreclosure suit that the beneficiary had the right to raise money and should therefore be joined,[8] but the weight of authority is otherwise.[9] In some jurisdictions, as Alabama, New

[1] Devin *v.* Hendershott, 32 Iowa, 192.

[2] Wetmore *v.* Porter, 92 N. Y. 76.

[3] Beach *v.* Beach, 14 Vt. 28.

[4] Everett *v.* Drew, 129 Mass. 150.

[5] Davis *v.* Charles River Branch Rd., 11 Cush. 506; Morgan *v.* K. P. Rd. Co., 21 Blatch. 134.

[6] Carey *v.* Brown, 92 U. S. 171. Generally, but expressly by statute in many jurisdictions. See *infra*, p. 75.

[7] Vetterlein *v.* Barnes, 124 U. S. 169.

[8] U. S. Trust Co. *v.* Roche, 41 Hun, 549.

[9] Van Vechten *v.* Terry, 2 Johns. Ch. 197; Price *v.* Krasnoff, 60 S. C. 172; Pyle *v.* Henderson, 55 W. Va. 122.

York, and South Carolina, beneficiaries are by statute necessary parties.[1]

If the beneficiary is in the possession of trust property he may sue for an injury to his possession to the same extent as any other bailee of property;[2] but as against all the world other than the beneficiary, the trustee's right to possession is absolute, and cannot be questioned.

If the trustee's right of action is barred by the statute of limitations,[3] or if he lose his right of action in any manner, the right is absolutely lost,[4] and the beneficiary is equally barred and has no other rights which he can enforce against the property or a stranger.[5]

The trustee, and not the beneficiary, is entitled to vote as stockholder in corporations,[6] and the trustee, as an owner of stock, is eligible as a director, and the beneficiary is not.[7]

In the absence of statute to the contrary, the trustee is personally liable as stockholder even beyond the extent of the trust property,[8] but his liability is generally limited by statute to the extent of the trust estate.[9] Whether he himself has a right to be reimbursed by the

[1] Ames, 261, n.

[2] As to his rights, see *infra*, pp. 158, 168.

[3] Wych *v.* East India Co., 3 P. Wms. 309; Walton *v.* Ketchum, 147 Mo. 209; Wiess *v.* Goodhue, 98 Tex. 274.

[4] Meeks *v.* Olpherts, 100 U. S. 564.

[5] Molton *v.* Henderson, 62 Ala. 426.

[6] Barker *v.* Mercantile Ins. Co., 6 Wend. 509; Lowell, Transfer of Stock, § 27; Herron *v.* Marshall, 42 Am. Dec. 444 and note.

[7] By statute in most States.

[8] Ames, 279, n.; Lowell, Transfer of Stock, § 28; Lewin, p. 252.

[9] Pub. Stat. N. H. (1901), ch. 150, § 20; Rev. Stat. Me. (1903) ch. 47, § 84; Gen. Laws R. I. (1896), ch. 180, § 26; Rev. Stat. N. Y. (1901), p. 1422, § 54; Burns's Annot. Ind. Stat. (1901), § 3431; Rev. Stat. Ill. (1905) ch. 32, § 23; Stat. Minn. (1894), § 3419; Wash. Code (1897), § 4268; Mont. Civil Code (1895), § 608; Rev. Stat. Wy. (1899), § 3050; Code S. C. (1902), § 1843, cl. 19; Gen. Stat. Fla. (1906), §§ 2657, 2700; D. C., Cogley's Dig. (1892), p. 162, § 130; Comp. Laws N. M. (1897),

trust estate, or whether the creditor can pursue the trust assets, is immaterial to the action, as the ultimate liability of the trust estate cannot be settled in a suit at law.[1]

The trustee is personally liable on the contracts which he makes in respect to the trust property, and if he is not bound nobody is bound;[2] and this fact emphasizes the difference between a person acting as trustee who binds only himself, and one acting as agent who binds his principal. Even his co-trustee need not be joined in the action, since the contract is the personal contract of the trustee making it.[3] By using appropriate expressions the trustee can exempt himself altogether from personal liability or limit his liability to the extent of the trust estate;[4] but it is erroneous to suppose that he does so by describing himself or signing his name with the word "trustee" or "as trustee" added.[5]

Unless he is expressly exempted from liability by the contract itself he will be personally liable even on a contract made under order of the court.[6] If he has the power to contract for the benefit of the trust, and if he properly describes himself as trustee, the contract will bind the trust effects in his hands and those of his suc-

§ 430; Annot. Stat. Col. (1891), ch. 30, § 495; Pub. Gen. Laws Md. (1904), Art. 23, § 74; unless he voluntarily invested in it, New York.

But not personally on contract in mutual insurance companies, Mass. Rev. Laws (1902), ch. 118, § 40.

[1] Hampton *v.* Foster, 127 Fed. 468.

[2] Taylor *v.* Davis, 110 U. S. 330; Shoe & Leather Nat'l Bank *v.* Dix, 123 Mass. 148; Hussey *v.* Arnold, 185 Mass. 202. *Infra*, p. 158.

[3] Diamond *v.* Wheeler, 80 App. Div. (N. Y.) 58.

[4] Shoe & Leather Nat'l Bank *v.* Dix, 123 Mass. 148; Hussey *v.* Arnold, 185 Mass. 202.

[5] Shoe & Leather Nat'l Bank *v.* Dix, 123 Mass. 148; Taylor *v.* Davis, 110 U. S. 330; Perry, § 437 b.

[6] Gill *v.* Carmine, 55 Md. 339; Glenn *v.* Allison, 58 Md. 527. *Infra*, p. 145.

cessor, although recourse will be had to him in the first instance.[1]

So, too, a trustee will be personally liable on the covenants in a deed or lease, whether he signs as trustee or not; and it is important in this connection to bear in mind that there is an implied covenant for quiet enjoyment on behalf of the lessor in every lease.[2]

Taxation. — The trustee is personally liable for taxation. In the absence of statute, on the personal property where he resides, and on land where the land lies;[3] but statutes are not unusual making the personal tax payable where the beneficiary resides who is entitled to the income.

When both the trustee and beneficiary are non-resident, the personal property is not taxable to any one.[4]

A statute making the property taxable where the beneficiary lives, when neither the trustee nor the property are within the State, is constitutional.[5]

In many jurisdictions it is the trustee's duty to bring in a list of the trust property for taxation, and in others he may do so. A trustee who neglects his duty would be personally liable for the penalty of his neglect; and where he neglects his opportunity to file a list, and the property is over assessed, and owing to his neglect the over assessment cannot be recovered, he would probably not be able to charge the over assessment to the trust.

Personally liable as Owner of Property. — The trustee is personally liable as owner of the trust property in the

[1] Hampton *v.* Foster, 127 Fed. 468. *Infra*, pp. 77, 78.

[2] *Infra*, p. 75.

[3] Richardson *v.* Boston, 148 Mass. 508; Greene et al. *v.* Mumford et al., 4 R. I. 313.

[4] Dorr *v.* Boston, 8 Gray, 131; Anthony *v.* Caswell, 15 R. I. 159; Ames, 279, n.

[5] Hunt *v.* Perry, 165 Mass. 287.

same way and to the same extent as if he owned the property individually. Thus he is personally liable for a nuisance on the trust premises,[1] for a defective coal hole or sidewalk,[2] or for snow falling from the roof of a building belonging to the trust estate.[3] So, too, he is personally liable if through operations on the trust property his neighbor's building is unlawfully let down or his land flooded.[4]

If the trustee employs servants about the trust business he will be personally liable for their torts equally as if he had employed them for his own affairs.[5] His liability as stockholder in a corporation has been already noticed.[6] This liability as owner is entirely irrespective of the trustee's right to be indemnified by the trust estate, which it was consistently held could not be adjudicated in a legal action in a court of law. Hence describing the trustee in the writ "as trustee" was held to be surplusage,[7] judgment was entered against him individually and execution issued against his own goods and not those of the trust.[8]

The tendency of courts of law to adopt equitable principles in dealing with trust estates, which has already been referred to, has modified this doctrine, and it is now pretty generally held that where the trustee has a right of indemnity against the trust estate he may be sued as trustee and execution will issue against the trust property; but if the trust property is insufficient to satisfy the execution the balance can be collected from him personally.[9] In other words, the plaintiff is subrogated to

[1] Schwab *v.* Cleveland, 28 Hun, 458.
[2] O'Malley *v.* Gerth, 67 N. J. Law, 610.
[3] Shepard *v.* Creamer, 160 Mass. 496.
[4] In re Reybould, 1 Ch. (1900), 199.
[5] Prinz *v.* Lucas, 210 Pa. St. 620. [6] *Supra*, p. 27.
[7] Shepard *v.* Creamer, *ut supra;* Baker *v.* Tibbetts, 162 Mass. 468.
[8] Hampton *v.* Foster, 127 Fed. 468; Odd Fellows Hall Ass'n *v.* McAllister, 152 Mass. 292, p. 297.
[9] Wylly *v.* Collins, 9 Ga. 223.

the trustee's right of indemnity,[1] which is convenient for him, as the trust estate is not infrequently larger than the trustee's.

The trustee has no right to indemnity from the trust estate where his neglect causes the accident. The law does not allow the trust estate to be diminished by the trustee's neglect or default.[2] Where, however, the trustee has been conducting the trust business reasonably and carefully, he will have a right to be indemnified for judgments recovered against him. As, for instance, where the plaintiff is injured by a falling limb, although the trustee is using due care in having the wood cut;[3] or where the plaintiff is injured by the careless driving of a servant of a trustee, who is lawfully carrying on the testator's business;[4] or where the plaintiff's buildings are let down by mining operations carefully conducted on the trust property.[5] In all these cases the trustee was held to have a right of indemnity from the trust estate, and the plaintiff was allowed to recover against him as trustee.

Reasoning from the analogy of the trustee's responsibility for debts, even in those jurisdictions that deny his right to hold the trust estate in an action at law, he might go against the trust estate in equity, subrogating himself to the trustee's right to indemnity. This indirect remedy would seem to have the disadvantage of making him subject to all set-offs against the trustee.[6]

The trustee as owner of the property is liable criminally for a nuisance on it,[7] and may be indicted under liquor or gambling laws.

[1] In re Johnson, 15 Ch. Div. 548, p. 552.

[2] Parmenter *v.* Barstow, 22 R. I. 245.

[3] Bennett *v.* Wyndham, 4 DeG., F. & J. 258.

[4] Prinz *v.* Lucas, 210 Pa. St. 620.

[5] In re Reybold, 1 Ch. (1900) 199.

[6] Mason *v.* Pomeroy, 151 Mass. 164; Dowse *v.* Gorton, 40 Ch. D. 536; Mayo *v.* Moritz, 151 Mass. 481. *Infra*, p. 48.

[7] People *v.* Townsend, 3 Hill, 429.

The Trustee's Ownership is not Beneficial. — Although the trustee is the absolute owner of the property, he can take no benefit from his ownership, and he may not deal with the estate for his own profit, or for any purpose unconnected with the trust.[1] All the benefits belong to the beneficiaries, and the trustee has no more right to any of them than he has to the property of a stranger. All his skill and labor must be directed to the advancement of the interests of his beneficiaries.[2] He may take no benefit directly or indirectly from the estate or his office, except the regular compensation allowed by law, and if he take a present or be paid a bonus or commission of any kind in a trust transaction by a stranger, he must account to the trust for it.[3] He cannot set off his own debts in equity against one who sues him as trustee.[4]

He cannot use the real estate or chattels, or pledge any of the property, as security for his debts. Nor can he purchase them directly or indirectly at public or private sale,[5] except by arrangement with all the beneficiaries. In which case he does not get a merchantable title, as the burden is on him to show affirmatively that the beneficiaries were all *sui juris*, informed of all the facts, and dealt at arm's length;[6] but he may purchase under leave of court,[7] or at a judicial sale which he does not control in any manner.[8] Nor can a husband or wife be-

[1] Cal. Civil Code (1903), § 2229; Rev. Civ. Code So. Dak. (1903), § 1618; Code of Ga. (1895), § 3183; Rev. Code N. Dak. (1895), § 4265.

[2] Arnold *v.* Brown, 24 Pick. 89, 96.

[3] *Infra*, p. 35.

[4] *Infra*, p. 49.

[5] Hoyt *v.* Latham, 143 U. S. 553; Morse *v.* Hill, 136 Mass. 60; Amer. & Eng. Encyc. Law, vol. 27, p. 197; Hayes *v.* Hall, 188 Mass. 511 and cases cited. *Infra*, p. 70.

[6] Williams *v.* Scott (1900), Eng. App. Cases, 499.

[7] Morse *v.* Hill, 136 Mass. 60, 67; Colgate *v.* Colgate, 8 C. E. Green, 372, p. 383.

[8] Allen *v.* Gillette, 127 U. S. 589; Starkweather *v.* Jernillo, 27 App. D. C. 348.

ing trustee sell to the other,[1] even though the other be a beneficiary. It is immaterial that the price paid is a fair one. The transaction is a breach of trust, and may be set aside by the beneficiary,[2] but no stranger to the estate can question the transaction.[3]

If, however, the property be honestly sold to a third person, there being no scheme to repurchase, the trustee is not disabled from buying it subsequently.[4] Similarly he cannot sell any property to the trust.[5]

He cannot speculate with the trust funds under the guise of a loan to himself;[6] if he does, all the profit will belong to the trust, and if the profit does not equal interest he must pay interest.[7] If there is a loss he must stand it.[8]

He cannot borrow the trust funds on any security, and he should not lend them to his family or associates on any terms.[9]

He cannot swell his personal credit by keeping a large balance of the trust funds at his banker's.

[1] Scottish Amer. Mortgage Co. *v.* Clowney, 70 S. C. 229; Hayes *v.* Hall, 188 Mass. 510; Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252. In Lingke *v.* Wilkinson, 57 N. Y. 445, it was held that a trustee might sell to his son, but two judges dissented, and the principle is very doubtful.

[2] Denholm *v.* McKay, 148 Mass. 434; Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252; Quirk *v.* Liebert, 12 App. D. C. 394; Smith *v.* Miller, 98 Va. 535. *Infra*, p. 155.

[3] Harrington *v.* Brown, 5 Pick. 519; Bronson *v.* Thompson, 77 Conn. 214.

[4] Creveling *v.* Fritts, 34 N. J. Eq. 134; Dry Goods Co. *v.* Gideon, 80 Mo. App. 609.

[5] Re Long Island Loan & Trust Co., 92 N. Y. App. Div. 1; St. Paul Trust Co. *v.* Strong, 85 Minn. 1.

[6] Brown *v.* Ricketts, 4 Johns. Ch. 303; Townend *v.* Townend, 1 Giff. 201.

[7] Piety *v.* Stace, 4 Ves. Jr. 620.

[8] Docker *v.* Somes, 2 Mylne & Keen, 655.

[9] Kyle *v.* Barnett, 17 Ala. 306. This does not go so far as to prohibit his lending to a corporation in good standing, because he is a stockholder. In re Rowe, 42 Misc. Rep. (N. Y.) 172.

He cannot come in competition with the trust estate, nor make a profit by buying up claims against the estate at a discount, directly or indirectly.[1]

By statute in some jurisdictions he cannot enforce a claim against the estate acquired, nor make a profit out of the trust estate in any other manner.[2]

Where the English rule prevails which refuses compensation to a trustee, he should not employ himself or his partner to render expert services to the estate, or if he does he may receive no compensation therefor.[3] But in most other jurisdictions, if he could have given such employment legitimately to another, he may render it himself and receive reasonable compensation for his services; as, for example, where he acts as counsel, broker, or agent to collect.[4] But the law is not uniform, and in some States he cannot take any compensation.[5]

In practice the matter is a delicate one, and it is a better rule to avoid the difficulty altogether by employing a stranger; but where such employment is allowed, the charge for expert services, together with the regular commission, should not amount to more than reasonable compensation for all the services rendered.[6]

[1] Slade *v.* Van Vechten, 11 Paige, 21; King *v.* Cushman, 41 Ill. 31.

[2] Rev. Civ. Code So Dak. (1903), § 1641; Rev. Code N. Dak. (1895), § 4288; Civ. Code Cal. (1903), § 2263.

[3] In re Corsellis, 34 Ch. Div. 675.

[4] Turnbull *v.* Pomeroy, 140 Mass. 117, 118; Lowrie's Appeal, 1 Grant, 373; Perkins's Appeal, 108 Pa. St. 314. Perry, § 432, *contra.*

[5] He can take none in New York, Missouri, or South Carolina. Collier *v.* Munn, 41 N. Y. 143; Gamble *v.* Gibson, 59 Mo. 585; Mayer *v.* Galluchat, 6 Rich. Eq. 1. The reason assigned in some of the cases is, that a trustee cannot fix his own compensation, because he will have in that case to deal with himself. See Lord Cranworth in Broughton *v.* Broughton, 5 DeG., M. & G. p. 160. But this reason is not wholly satisfactory, as it is conceded that he can collect other expenses, etc.

[6] Turnbull *v.* Pomeroy, 140 Mass. 117, 118; Lowrie's Appeal, 1 Grant, 373; Perkins's Appeal, 108 Pa. St. 314; Perry, § 432, *contra.* *Infra*, p. 36.

He must pay over to the trust estate any bonus he receives in the performance of his duties, or for resigning the trust,[1] but he need not account for the profit which he receives from other business owing to the fact that he is a trustee.[2]

May have Expenses from Trust Fund. — On the other hand, the trusteeship should not be a burden, and the trustee may pay from the estate all the expenses which he incurs as owner, such as taxes, repairs, and insurance, and he may charge the estate irrespective of the provisions of the settlement with all the legitimate expenses of management,[3] as travelling expenses,[4] the cost of justifiable litigation,[5] and expense of consulting counsel when there is reasonable cause,[6] and if he be not at fault judgments recovered against him as owner of the property,[7] or, where the employment is reasonable and usual, the expense of brokers or agents, or the expense of looking after the beneficiary, as for instance having him declared insane and placed under guardianship;[8] and in some States the premium paid a surety company on his official bond may be charged to the estate.[9]

Ordinarily, the expense of accounting, not including court expenses, and clerk hire and office rent, are included in the ordinary allowance made as compensation,[10] and so are not charged to the trust; but where it is neces-

[1] Sugden *v.* Crossland, 3 Sim. & Giff. 192.

[2] Whitney *v.* Smith, L. R. 4 Ch. App. 513.

[3] Perrine *v.* Newell, 49 N. J. Eq. 58; Perry, § 910.

[4] Rev. Stats. Me. (1903), ch. 65, § 37.

[5] For instance, maintaining the validity of the trusts. Steinway *v.* Steinway, 112 App. Div. (N. Y.) 18.

[6] Forward *v.* Forward, 6 Allen, 494, 497; Teague *v.* Corbitt, 57 Ala. 529; Rev. Stat. Me. (1903), ch. 65, § 37.

[7] *Supra*, p. 30.

[8] *Infra*, p. 83.

[9] As to apportionment of charges between income and principal, see *infra*, pp. 137 *et seq.*

[10] Little *v.* Little, 161 Mass. 188.

sary to keep a clerk exclusively for a particular trust, it would be the ground for an extra charge.[1]

He has a lien on the estate for his expenses, and may reimburse himself out of income or hold possession of the corpus of the estate until he is paid,[2] but not if he has exceeded his powers, has been guilty of a breach of trust, or is in default,[3] or has denied the trust and involved the estate in litigation.[4]

Before incurring expense he may require security if there is doubt about his being reimbursed, and he has a right to his costs prior to all charges.[5]

Compensation. — The whole matter of compensation is subject to the provisions of the settlement ;[6] in the absence of these in England and Delaware[7] the trustee cannot charge for services; but in all the other States he is entitled to reasonable compensation. The amount of the compensation is fixed by statute or rule of court, and is usually by way of commission[8] on the gross income collected,[9] and ranges from five to ten per cent. The court usually allows the highest amount paid agents, factors, and the like for performing similar services.[10] The trustee may agree as to amount of commission with the beneficiary, if the beneficiary is competent to act,

[1] Meeker *v.* Crawford, 5 Redf. (N. Y.) 450.

[2] Even though the trust itself is invalid. Merry *v.* Pownall, 67 L. J. Ch. 162; (1898), 1 Ch. 306.

[3] Perrine *v.* Newell, 49 N. J. Eq. 58.

[4] Hanna *v.* Clark, 204 Pa. St. 145.

[5] Woodard *v.* Wright, 82 Cal. 202; Bradbury *v.* Birchmore, 117 Mass. 569; Dodds *v.* Tuke, 25 Ch. Div. 617.

[6] *Infra*, p. 39. In re Pooley, 40 Ch. Div. 1; Evans *v.* Weatherhead, 24 R. I. 394.

[7] State *v.* Platt, 4 Harring. 154.

[8] Hazard *v.* Coyle, 26 R. I. 361. A trustee cannot recover for services on a *quantum meruit*.

[9] Taxes paid by the tenant form part of the gross income on which the trustee is entitled to charge. In re McCallum's Estate, 211 Pa. St. 205.

[10] Barrell *v.* Joy, 16 Mass. 221.

and no undue advantage is taken; and the court should take the agreement into consideration in fixing the amount of compensation.[1] Although the amount to be allowed rests, in the absence of provision by the settlement or statute, in the sound discretion of the court, the judgment is not conclusive on persons not properly parties to the case.[2]

In many cases a commission on income will not amount to reasonable compensation,[3] and in such cases an extra charge will be allowed;[4] and in cases where valuable service has been rendered to the principal fund over and above what is covered by the ordinary commission, a charge on principal will be allowed.[5] The ordinary changing of investments is not usually considered to be such a service,[6] but sometimes a commission is allowed,[7] and even where it is a case of extraordinary trouble entitling the trustee to an extra charge, the court will not allow compensation by way of commission, in these cases, as it is against its policy to encourage frequent changes and excessive expenditure;[8] but the sale and conversion of real estate, or the difficult settlement of a large claim, are usually considered extra services. The court disallowed a commission of five per cent for warranting a title.[9] In some jurisdictions the trustee will be allowed compensation for professional services, but in other jurisdictions he will not.[10]

A cumulative commission is never allowed, as for in-

[1] Bowker *v.* Pierce, 130 Mass. 262. But see Barrett *v.* Hartley 2 L. R. Eq. 789.

[2] *Infra*, p. 94. Jenkins *v.* Whyte, 62 Md. 427.

[3] Dixon *v.* Homer, 2 Met. 420.

[4] Turnbull *v.* Pomeroy, 140 Mass. 117.

[5] Ellis *v.* Ellis, 12 Pick. 178; Pitney *v.* Everson, 15 Stew. (N. J.) 361, 367; Biddle's Appeal, 83 Pa. St. 340.

[6] Jenkins *v.* Whyte, 62 Md. 427.

[7] Rhode Island Hosp. Trust Co. *v.* Waterman, 23 R. I. 342.

[8] Blake *v.* Pegram, 101 Mass. 592; May *v.* May, 109 Mass. 252.

[9] Uraun *v.* Coates, 117 Mass. 41. [10] *Supra*, p. 34.

stance a commission in two capacities, such as guardian and trustee, for the management of the same fund,[1] unless there was a complete separation of duties,[2] or for collecting and disbursing the funds; but the commissions, however and on whatever charged, must not amount in all to more than reasonable compensation for all the services.[3] The commission should be deducted from current payments, and not in a lump on the termination of the trust;[4] but the claim for a commission is barred by limitation from the end, not the beginning, of a trust.[5]

A commission of one to two and one half per cent on the personal property is usually allowed on paying out or distributing the trust estate.[6] No commission is ordinarily allowed on turning over the estate to a successor[7] or on real estate which vests in the remainderman by the force of the original instrument.[8] When, however, a large amount of the personal has been rightly converted into real estate by payment for improvements on it, a commission may be allowed on that amount.[9] No com-

[1] Brightly's Purdon's Dig. Pa. (1894), p. 616, § 239; Meeker *v.* Crawford, 5 Redf. (N. Y.) 452.

[2] Johnson *v.* Lawrence, 95 N. Y. 154; Blake *v.* Pegram, 101 Mass. 592. In Daily *v.* Wright, 94 Md. 269, a trustee who owned a large amount of stock in a corporation took a large salary as treasurer of the company and also charged a commission on dividends, and it was held not to be a double charge.

[3] Blake *v.* Pegram, 101 Mass. 592.

[4] Parker *v.* Ames, 121 Mass. 220; Spencer *v.* Spencer, 38 App. Div. (N. Y.) 403; In re Haskin, 98 N. Y. S. 926; Conger *v.* Conger, 105 App. Div. (N. Y.) 589, aff'd 185 N. Y. 554. But this rule is not invariable. See Lindsay *v.* Kirk, 95 Md. 50.

[5] Reese *v.* Meetze, 51 So. Car. 333.

[6] More *v.* Calkins, 95 Cal. 435, 441; Ga. Code (1895), § 2552, and §§ 3484–3489; Crocker's Notes on Rev. Laws Mass. 483; Gen. Stat. N. J. (1895), p. 2385, § 125; Manual of Wills, Tucker, pp. 120, 121; Biddle's Appeal, 83 Pa. St. 340; Smith *v.* Lansing, 53 N. Y. S. 633; In re Gill, 47 N. Y. S. 706.

[7] In re Todd, 64 App. Div. (N. Y.) 435.

[8] Roosevelt *v.* Van Allen, 31 App. Div. (N. Y.) 1.

[9] Spencer *v.* Spencer, 38 App. Div. (N. Y.) 403.

mission is allowed on assuming the trust.[1] If the trustee has been unfaithful, has denied[2] or mismanaged his trust, compensation may be withheld,[3] or allowed only to the extent that the estate has benefited by his services.[4] But under a statute allowing specified commissions, the court disclaimed power to withhold a commission for unfaithfulness.[5]

Where the matter of commission is regulated by statute, or the court, the rate prescribed by the trust instrument will govern,[6] as the statutes, expressly in many cases, and impliedly in almost all, provide that the provisions of the instrument shall govern; and this, although no exact sum is specified. As, for instance, if the instrument provides for "reasonable compensation," the amount will not be confined to the statutory rate.[7]

The rule in each jurisdiction, so far as it is determined by a reported decision or statute, is given below. Where no authority exists, in the absence of actual knowledge of a definite practice recognized and followed in the lower courts, it is usually safe to follow the rules laid down for executors and administrators, *mutatis mutandis*.[8]

Alabama. — Reasonable compensation. Griffin *v.* Pringle, 56 Ala. 486; 5 per cent allowed in Pinckard's Distributees *v.* Pinckard's Adm'r, 24 Ala. 250.

Alaska. — No authority. Executors, see Code of Civil Procedure (1900), § 869.

Arizona. — No authority; as to executors and administrators, Revised Statutes (1901), § 1853.

[1] Dixon *v.* Homer, 2 Met. 420.

[2] Stone *v.* Farnham, 22 R. I. 227; Hanna *v.* Clark, 204 Pa. St. 145.

[3] Brooks *v.* Jackson, 125 Mass. 307.

[4] Jennison *v.* Hapgood, 10 Pick. 77.

[5] In re Fitzgerald, 57 Wis. 508.

[6] Southern Ry. Co. *v.* Glenn's Ex'or, 98 Va. 309.

[7] E. g., Civ. Code So. Dak. (1903), § 1646, and statutes *passim*; Parker *v.* Ames, 121 Mass. 220.

[8] Abell *v.* Brady, 79 Md. 94. For other authorities on the subject in general, see Perry, § 918, n.

Arkansas. — Rate provided in settlement, and enough to make reasonable compensation, Briscoe *v.* State, 23 Ark. 592; as to executors and administrators, Digest of Statutes (1894), § 134.

California. — See Civil Code (1903), §§ 2273, 2274, and Supplement to Code of Civil Procedure, § 1618, as amended in 1905. On the amount of estate accounted for, 7 per cent up to $1,000; 5 per cent from $1,000 to $10,000, 4 per cent, $10,000 to $20,000; 3 per cent, $20,000 to $50,000; 2 per cent, $50,000 to $100,000. All over $100,000, one half of one per cent, and such further allowance for extra services as court may allow, not exceeding one half amount allowed by statute.

Trustee under a will, see Code of Civil Procedure (1903), § 1700, such compensation as court deems reasonable. And may establish a yearly allowance.

Colorado. — No authority. As to executors, Annotated Statutes (1905), § 4809.

Connecticut. — Reasonable compensation. Clark *v.* Platt, 30 Conn. 282; Babcock *v.* Hubbard, 56 Conn. 284.

Delaware. — Reasonable compensation in discretion of court. Laws of Delaware (1893), p. 712.

Florida. — Reasonable compensation. Muscogee Co. *v.* Hyer, 18 Fla. 698.

Georgia. — Code (1895), § 3168. Same commissions as guardian; § 3484, 2½ per cent on both income and payments; § 3487, 10 per cent on proceeds of land worked; § 3489, extra in discretion of court; § 2552, on paying over, the same as administrator.

Hawaii. — Reasonable compensation. Hart *v.* Kapu, 5 Hawaiian, 196, 200.

Idaho. — No authority. Executors and administrators, Statutes (1887), § 5586.

Illinois. — Reasonable compensation. Revised Stats. (1905), ch. 3, § 136. And this applies to trusts established before the act. Arnold *v.* Alden, 173 Ill. 229.

Indiana. — Reasonable compensation. Premier Steel Co. *v.* Yandes, 139 Ind. 307.

Iowa. — Reasonable commissions. In re Gloyd's Est., 93 Iowa, 303.

Kansas. — No authority.

Kentucky. — Statutes (1894), § 3883, not to exceed 5 per cent on amounts received and distributed, and extra in discretion of court. Fleming *v.* Wilson, 6 Bush, 610, allowed 1½ per cent yearly on amount of principal; Ten Broeck *v.* Fidelity Co., 88 Ky. 242, allowed 5 per cent on income, and 1½ per cent on investments.[1]

Maine. — Revised Statutes (1903), ch. 65, § 37; 5 per cent and expenses.

Maryland. — 5 per cent on income. Abell *v.* Brady, 79 Md. 94.

Massachusetts. — Revised Laws (1902), ch. 150, § 14. Discretion of court; general rule, 5 per cent on income. Barrell *v.* Joy, 16 Mass. 221; May *v.* May, 109 Mass. 252; and extras earned.

Michigan. — Compiled Laws (1897), § 695. Trustees appointed by Probate Court, same compensation as administrators, § 9438. Administrator, on all personal estate and proceeds of real estate sold. First $1,000, 5 per cent; $1,000 to $5,000, 2½ per cent; all above, 1 per cent.

Minnesota. — No authority; but executors, administrators, and guardians are allowed, and presumably trustees, such reasonable compensation as court decrees just. Revised Laws (1905), § 3707.

Mississippi. — Reasonable compensation. Shirley *v.* Shattuck, 28 Miss. 13.

Missouri. — Reasonable compensation. Kemp *v.* Foster, 22 Mo. App. 643.

Montana. — Civil Code (1895), § 3301, reasonable compensation. Code Civil Procedure, § 2776. For first

[1] See also Central Trust Co. *v.* Johnson, 25 Ky. Law Rep. 55.

$1,000, 7 per cent; all between $1,000 and $10,000, 5 per cent; between $10,000 and $20,000, 4 per cent; all above $20,000,2 per cent; extra not to exceed amount allowed by statute.

Nebraska. — Reasonable compensation. Olson *v.* Lamb, 56 Neb. 104, 118.

Nevada. — No authority. For executors, see Compiled Laws (1900), § 2969.

New Hampshire. — Gordon *v.* West, 8 N. H. 444, trustee allowed 1 per cent on principal, rate of income being 6 per cent. Practice is 5 per cent on income. Tuttle *v.* Robinson, 33 N. H. 104, 118.

New Jersey. — General Statutes (1895), p. 2380, §§ 109, 110. Actual value, p. 2402, § 204. Reasonable compensation not exceeding 5 per cent on income.

New Mexico. — No authority. For executors, see Compiled Laws (1897), § 1972.

New York. — Code of Procedure (1902), §§ 2730, 2802, and 3320, as amended by Laws of 1904, p. 1921, ch. 755. Allowed 5 per cent up to $1,000; $1,000 to $10,000, 2½ per cent; for all above $11,000, 1 per cent.[1]

North Carolina. — Reasonable commission not exceeding 5 per cent. Sherrill *v.* Shuford, 6 Ired. Eq. 228.

North Dakota. — Revised Code (1895), § 4293, same as executors. § 6492, for first $1,000, 5 per cent; $1,000 to $5,000, 4 per cent. All above, 2½ per cent.

Ohio. — Revised Statutes (1890), § 6333; reasonable compensation.

Oklahoma. — No authority. Statutes (1903), § 1719, as to executors.

Oregon. — No authority. Executors, Annotated Laws (1901), § 1209.

Pennsylvania. — Brightly's Purdon's Digest (1894), p. 2031, § 29; reasonable compensation; 5 per cent rea-

[1] Trustee who has collected but not paid out is entitled to half commission. In re Todd, 64 App. Div. (N. Y.) 435.

sonable, Pusey *v.* Clemson, 9 Serg. & R. 204; Davis's Appeal, 100 Pa. St. 201.

Rhode Island. — No authority. Executors, General Laws (1896), ch. 219, § 8.

South Carolina. — Code (1902), vol. 1, § 2590, same as executors; § 2560, executors allowed not exceeding 10 per cent. Court has no discretion. Cobb *v.* Fant, 36 So. Car. 1.

South Dakota. — Civil Code (1903), § 1646. Same as executors, if trust instrument silent. If rate not specified in trust instrument, reasonable compensation. Executors, 5 per cent on collections up to $1,000; 4 per cent between $1,000 and $5,000; 2½ per cent on all above $5,000. Judge of probate may make allowance for extraordinary services. Probate Code (1903), § 271.

Tennessee. — Code (1896), § 3525. Same as clerks and masters, not exceeding 5 per cent, § 6388. Clerks and masters' fees defined.

Texas. — Reasonable compensation. Harris *v.* First National Bank, 45 S. W. 311 (1898. Texas Civil Appeals).

Utah. — Reasonable compensation. Revised Statutes (1898), § 3978.

Vermont. — Reasonable compensation. Hubbard *v.* Fisher, 25 Vt. 539.

Virginia. — Code (1904), § 2695. Reasonable commission on receipts or otherwise. Usually 5 per cent. Boyd *v.* Oglesby, 23 Gratt. 674, 688.

Washington. — No authority. Executors, Code (1897), § 6314.

West Virginia. — Code (1906), § 3309. Reasonable compensation. Usual 5 per cent. Hoke *v.* Hoke, 12 W. Va. 427. 10 per cent allowed for extraordinary services. Shepherd *v.* Hammond, 3 W. Va. 484.

Wisconsin. — No authority. Executors, Annotated Statutes (1898), §§ 3992, 3993.

Wyoming. — No authority. Executors, Revised Statutes (1899), § 4712.

The Trustee's Estate. — The trustee takes an absolute estate in personal property;[1] but in real estate he will take a large enough estate to administer the trusts and no larger, entirely irrespective of the use or absence of words of limitation, or the technical phraseology of the trust instrument.[2]

Thus where the estate is granted without words of limitation, but a power of sale is given to the trustee, he will take an estate in fee instead of a mere life estate,[3] since without a fee he could not exercise his power; but no larger estate is given than is absolutely necessary, as, for instance, a life estate being sufficient to support an annuity, no larger estate will be implied.[4]

Although a fee be given to the trustee to support a less estate, as e. g. for the benefit of A until B comes of age, the estate will vest in B when he comes of age irrespective of the trustee's fee;[5] and there is often statutory provision that the estate of the trustee shall terminate on the completion of the purposes of the trust.[6]

In some Code States, namely, New York, Michigan, Wisconsin, Minnesota, and South Dakota,[7] the trusts not ex-

[1] Pace *v.* Pierce, 49 Mo. 393. See *infra*, p. 102.

[2] Cleveland *v.* Hallett, 6 Cush. 403; Packard *v.* Old Colony Railroad Co., 168 Mass. 92, p. 96; Greenwood *v.* Coleman, 34 Ala. 150; King *v.* Parker, 9 Cush. 71; Smith *v.* Proctor, 139 N. C. 314.

[3] Bagshaw *v.* Spencer, 1 Ves. Sen. 142; Welch *v.* Allen, 21 Wend. 147.

[4] Norton *v.* Norton, 2 Sand. 296; Code Ga. (1895), § 3191; Greenwood *v.* Coleman, 34 Ala. 150.

[5] Slevin *v.* Brown, 32 Mo. 176; Nash *v.* Coates, 3 B. & Adol. 839; Ga. Code (1895), § 3191.

[6] N. Y. Rev. Stat. (1901) p. 3030, § 89; Mich., Wisc., Minn., Cal., So. Dak. Rev. Civ. Code.

[7] Rev. Stat. N. Y. (1901), p. 3026, §§ 77, 78; Annot. Stat. Mich. (1882), § 8843; Rev. Laws Minn. (1905), § 3250; Wisc. Statute

pressly established by statute are cut down to a mere power and no title vests in the trustee.

A passive trustee (that is, a trustee who merely holds a naked title to permit another to do something, as, e. g., collect the rents) takes a modified title, about which we need not concern ourselves, as such trusts are not within the scope of this treatise.

Possession. — At law the trustee is entitled to the possession of the real estate,[1] and may eject the beneficiary,[2] nor can the beneficiary deny the trustee's title if he is his landlord.[3] He is equally entitled to the possession of the personal property;[4] but the beneficiary may have an equitable right to possession and will receive it under those circumstances,[5] though even then at law his possession will technically be the possession of the trustee. If he buys in a tax title, he cannot hold it against the trustee.[6]

Trustee's Estate is Joint. — Trustees, where there are more than one, take a joint estate which is not subject to partition.[7] If one trustee conveys his part without joining the others the conveyance is void, and the grantee does not take an undivided estate in the premises; no title passes.[8]

(1899), § 2084; Rev. Civ. Code, So. Dak. (1903), § 310; Seidelbach *v.* Knaggs, 44 App. Div. (N. Y.) 169; Staats *v.* Storm, 76 App. Div. (N. Y.) 627.

[1] Clark *v.* Clark, 8 Paige, 153; Beach *v.* Beach, 14 Vt. 28.

[2] Presley *v.* Stribling, 24 Miss. 527.

[3] White *v.* Albertson, 3 Dev. 241.

[4] Pace *v.* Pierce, 49 Mo. 393; Western Railroad Co. *v.* Nolan, 48 N. Y. 513.

[5] *Infra*, pp. 100, 175.

[6] Frierson *v.* Branch, 30 Ark. 453.

[7] Attorney General *v.* Gleg, 1 Atk. 356; Burns's Annot. Ind. Stat. (1901), § 3342; Rev. Stat. N. J. (1895), p. 3685, § 7.

[8] Chapin *v.* First Univ. Soc., 8 Gray, 580; Learned *v.* Welton, 40 Cal. 349; Sinclair *v.* Jackson, 8 Cow. 543; Morville *v.* Fowle, 144 Mass. 109; but see, *contra*, Perry, § 334, and Boursot *v.* Savage, L. R. 2 Eq. 134.

All the trustees are equally seised, and on the death of one the whole estate vests in the survivors.[1] A provision in the trust instrument for keeping up the number of the trustees will not prevent survivorship;[2] and the statutes in many States providing that joint tenancies shall be construed as tenancies in common do not apply to trustees' estates.[3]

Transmission of the Trustee's Estate. — The trustee, being the legal owner, may make conveyance, and his transferee will stand at law entitled in his place.[4] But if the trustee had no power given him to convey, his transferee would take no larger title than the trustee conveyed, and would be bound by the trusts his grantor was bound by.

In the Code States the trustee having no estate, but a power merely, the conveyance would be simply void, and no estate would pass; and there is a similar statutory provision in Indiana.[5]

Alienation. — If the trustee transfers his estate to a purchaser for value without notice of the trust, the purchaser will acquire the title discharged of the trust.[6] This is universal law, but is often enacted by statute.[7]

[1] Co. Lit. 113; Ames, 346, n.

[2] Shook *v.* Shook, 19 Barb. 653; Dixon *v.* Homer, 12 Cush. 41; Norris *v.* Hall, 124 Mich. 170.

[3] Underhill, 382, n.

[4] Canoy *v.* Troutman, 7 Ired. 155.

[5] Rev. Stat. N. Y. (1901), p. 3028, § 85; Burns's Annot. Ind. Stat. (1901), § 3395; Comp. Laws, Mich. (1897), § 8849; Wisc. Stat. (1899), § 2091; Gen. Stat. Kan. (1897), ch. 113, § 5; N. Dak. Civ. Code (1895), § 3400; Rev. Civ. Code So. Dak. (1903), § 317; Rev. Stat. Okla. (1903), § 4096; Rev. Stat. Minn. (1905), § 3259; Staats *v.* Storm, 76 App. Div. (N. Y.) 627.

[6] Perry, §§ 217 *et seq.*; Ames, 286, n., has a full discussion of authorities. See also *infra*, p. 179.

[7] Rev. Stat. N. Y. (1901), p. 3028, §§ 84, 85; Comp. Laws Mich. (1897), § 8838; Wisc. Stat. (1899), § 2080; Civil Code Calif. (1903), § 856; N. Dak. Code (1895), § 3387; Rev. Stat. Okla. (1903), § 4083;

In some jurisdictions an attaching creditor is on the same footing as a purchaser for value;[1] but if the property were transferred to secure a pre-existing debt, the transferee is not a purchaser for value.

If the purchaser has reason to believe that the property is held in trust, and fails to make proper inquiries, he is not a purchaser without notice; and the word "trustee" occurring on the face of the deed or certificate is sufficient to put him to his inquiry as to the trustee's power to transfer the property.[2]

If a purchaser has once acquired a good title, he may transfer a good title to any one but the person who defrauded the trust in the first place; and even he may hold title if he takes it as trustee in another trust.[3]

If the trustee have the power to transfer, his transferee will take a good title unless he knows that the transfer is a breach of trust; but the fact that the consideration is inadequate, or that it goes elsewhere than to the trust estate, will be sufficient notice of fraud to invalidate the title.[4]

No title to trust property will pass by a general assignment, as the trustee will not be supposed to intend to commit a breach of trust, and the deed will not be so construed as to make him do so.[5]

Where the trustee was one of the beneficiaries as well as trustee, it was said that the legal title would pass sub-

Burns's Annot. Ind. Stat. (1901), § 3392; Gen. Stat. Kan. (1897), ch. 113, § 2; Rev. Stat. Me. (1903), ch. 75, § 15; Ala. Code (1896), § 1042; Rev. Laws Minn. (1905), § 3248.

[1] Mass. Rev. Laws (1902), ch. 147, § 3.

[2] Smith *v.* Burgess, 133 Mass. 511; Shaw *v.* Spencer, 100 Mass. 382; Third Nat. Bk. *v.* Lange, 51 Md. 138; Ford *v.* Brown, 114 Tenn. 467; s. c. 1 L. R. A. N. S. 188 and note. See Rua *v.* Watson, 13 So. Dak. 453, for decision to contrary. *Infra*, p. 150.

[3] Meldon *v.* Devlin, 31 App. Div. (N. Y.) 146.

[4] Wormeley *v.* Wormeley, 1 Brock. U. S. Cir. Ct. 330.

[5] Thomson *v.* Peake, 17 S. E. 45; Rogers *v.* Chase, 56 N. W. 537; Abbott, Adm'r, Pet'r, 55 Me. 580.

ject to the execution of the trusts, but the better opinion seems to be that it will not.[1]

No title will pass to the trustee's assignee in bankruptcy or insolvency;[2] nor can the trust property be taken for the trustee's private debt.[3]

If the creditor levies with notice of the trust, he will take title subject to the trust;[4] but if he attaches in some States without any notice, he will stand in the position of a *bona fide* purchaser.[5]

The trust property may be taken on execution for debts incurred by the trustee in the execution of his trusts, in all jurisdictions to the extent to which the trustee is entitled to reimbursement, and in some without regard to his claim.[6] That is to say, in most jurisdictions the creditor takes only by subrogation through the trustee, and so is liable to all the set-offs which the trustee would be; as, for instance, if the trustee were in default, the creditor would only take the amount due, less the default.[7]

If, however, the trustee were given the powers of a general agent by statute or by the trust instrument,— as, for instance, where he is authorized to carry on the testator's business,— the liability would bind the trust estate

[1] Doe d. Raikes *v.* Anderson, 1 Starkie, 155; Fausset *v.* Carpenter, 2 Dow & Clark, 232; in re Kembles's Estate, 201 Pa. 523.

[2] Ames, 393, n. [3] *Supra*, pp. 16, 17.

[4] Warren *v.* Ireland, 29 Me. 62; Houghton *v.* Davenport, 74 Me. 590.

[5] *Supra*, p. 47. In Beck Lumber Co. *v.* Rupp, 188 Ill. 562, B took conveyance on a secret oral trust, which he executed by giving a deed; before this was recorded his creditors attached, but took nothing.

[6] 15 Amer. Law Rev. 449; Wylly *v.* Collins, 9 Ga. 223; Manderson's Appeal, 113 Pa. 631; Sanders *v.* Houston Guano & Warehouse Co., 107 Ga. 49.

[7] Strickland *v.* Symons, 26 Ch. Div. 245; Dowse *v.* Gorton, 40 Ch. Div. 536; Ames, 423, n.; Mason *v.* Pomeroy, 151 Mass. 164; Mayo *v.* Moritz, 151 Mass. 164; Norton *v.* Phelps, 54 Miss. 467; Ga. Code (1895), § 3185. *Supra*, p. 28.

to the extent of his authority; but even then it is held that the creditor must come against the trustee first.[1]

The court has held in Mississippi,[2] and it is provided by statute in Alabama,[3] that where the trustee is dead, insolvent, or out of the court's jurisdiction, the creditor may proceed against the trust property direct.

A mechanic's lien will attach to a trust estate only where the trustee has the power to contract for the labor for which recovery is sought,[4] and is not forbidden to encumber the estate by the trust instrument.[5]

Set-off. — The trustee's private creditor might set off his debt in a suit at law, unless he knew at the time of its creation that the claim was a trust claim, in which case he will be enjoined from doing so in equity;[6] but if he were ignorant of the trust relationship, he may keep his set-off.[7]

The trustee's private creditor has no set-off in equity, bankruptcy, or insolvency.

A creditor of the beneficiary may set off his debt in equity or in an action at law by the trustee as an equitable bar in most jurisdictions.[8]

The trustee can set off, against third persons, only such debts as his beneficiary could set off, and in equity can set off the debts of the beneficiary.[9]

The trustee has a set-off against the beneficiary for debts due him from the trust estate,[10] or for any amounts

[1] Fairland *v.* Percy, L. R. 3 Prob. & Div. 217.

[2] Norton *v.* Phelps, 54 Miss. 467.

[3] Stat. Ala. (1896), § 4183.

[4] Meyers *v.* Bennett, 7 Daly (N. Y.), 471.

[5] Franklin Savings Bank *v.* Taylor, 131 Ill. 376.

[6] Nat. Bk. *v.* Ins. Co., 104 U. S. 54.

[7] School Dist. *v.* First Bank, 102 Mass. 174.

[8] Ames, 270, n.; but see Walker *v.* Brooks, 125 Mass. 241.

[9] Walker *v.* Brooks, 125 Mass. 241; Rev. Stat. Me. (1903), ch. 84, § 77; Rev. Laws Mass. (1902), ch. 174, §§ 5, 6; Wisc. Stat. (1899) § 4260.

[10] Woodard *v.* Wright, 82 Cal. 202; Bradbury *v.* Birchmore, 117 Mass. 569; Dodds *v.* Tuke, 25 Ch. Div. 617; Merry *v.* Pownall, 1 Ch. (1898) 306. *Infra*, p. 184.

due him from the beneficiary as beneficiary; but he cannot retain the trust property to liquidate a debt due from the beneficiary in another capacity, as, for instance, a professional fee[1] or personal loan.[2]

In equity the defendant may set off a debt due a third person as trustee for the defendant, and is generally entitled to such set-off as an equitable plea.[3]

Title passes to Remainderman though his Estate be only Equitable. — Where the trustee's estate is reduced to a mere power by statute,[4] or where a life estate only was necessary to execute the trusts, the trust estate will pass out of the trustee's hands, and vest in the remainderman, even though he have an equitable estate only, when the purposes of the trust are accomplished, and the intervention of the trustee will not be necessary to perfect the title.[5] But in the absence of statute, where the trustee has taken a fee, a conveyance by the trustee is necessary.[6]

On the resignation or disability of a trustee the title to the property may vest in the successor by conveyance of the outgoing trustee, or where there is a statute authorizing it the court may appoint a person to convey the estates, if he be beyond the jurisdiction. In the absence of such statute there is no way of divesting the outgoing trustee's title save by act of the legislature. Such acts are not unconstitutional, as the estate taken is not beneficial to the trustee.[7]

[1] Harris *v.* Elliot, 24 App. Div. (N. Y.) 133.

[2] Abbott *v.* Foote, 146 Mass. 333; Dodd *v.* Winship, 133 Mass. 359; but the set-off was allowed in Smith *v.* Perry, 197 Mo. 438.

[3] Ames, 270, n.

[4] Stats. in New York, Michigan, Wisconsin, &c. *Supra*, pp. 44, 45.

[5] Morgan *v.* Moore, 3 Gray, 319; Cherry *v.* Richardson, 24 S. Rep. 570 (Ala. 1898); Temple *v.* Ferguson, 110 Tenn. 84.

[6] Packard *v.* Marshall, 138 Mass. 301; Davidson *v.* Janes, 30 Misc. Rep. (N. Y.) 156. *Infra*, p. 119.

[7] *Supra*, pp. 11, 12. Marshall *v.* Kraak, 23 App. D. C. 129.

Transmission. Forfeiture. — Forfeiture of the trustee's property formerly carried with it a forfeiture of the trust property, although the Crown took subject to the trust;[1] but now there is no forfeiture in equity, and it is generally provided by statute that there shall be neither forfeiture nor escheat.

Transmission on Death of Trustee. — When one of several trustees dies, both the office and the title to the estate vest in his co-trustees by survivorship;[2] and when a sole trustee dies, it is generally provided by statute that the property and office shall vest in his successor in the trust, the title in the meanwhile remaining in the court or his heirs and personal representatives.[3]

Aside from statute, on the death of a sole trustee testate the property will pass to his general devisee in the absence of intent to confine the disposition of property to that in which he had a beneficial interest; but it will not pass to a general devisee where such an intention would be negatived by the circumstances; as, for instance, where the general devisee is a class of persons, or where the general devisee is a minor, or otherwise incapable or unfit. In such case the property will descend to the heir as undevised estate.

If the sole trustee dies intestate, the property will descend to his representative;[4] but a widow has no dower,[5] and a husband no curtesy in a trust estate.[6] Or in some jurisdictions the title to real estate vests in the court[7] or

[1] King *v.* Mildmay, 5 Barn. & Ad. 254.

[2] *Supra*, p. 46 : Shook *v.* Shook, 19 Barb. 653.

[3] As to survival of office, see survival of powers, *infra*, p. 54.

[4] Schenck *v.* Schenck, 16 N. J. Eq. 174 ; Talbot *v.* Leatherbury, 92 Md. 166.

[5] Gen. Stat. N. J. (1895), p. 1280, § 25.

[6] Flint, § 125 ; Perry, §§ 321, 322.

[7] New York, Michigan, Wisconsin, Alabama, and Missouri ; Perry § 341.

eldest son by statute.[1] In some jurisdictions they may disclaim.[2]

When the title to an estate vests in the devisee, heir, or personal representative of a trustee, the devisee or personal representative only holds the title until such time as a successor may be appointed;[3] he does not succeed to the office, but to the title only,[4] and he has power to execute the trust only so far as is necessary to preserve it,[5] and to make it over to the new trustee, and make up an account. It is entirely inappropriate for him to attempt to carry on the trust, and in many jurisdictions it is expressly provided that he takes no estate.[6]

II. POWERS.

Of Powers in General. — It does not come within the scope of this treatise to consider the powers which a trustee may have collateral to the trust estate, whether they are to be exercised over the trust property or elsewhere. As, for instance, a power to distribute the trust property among a certain class of persons, and apportion the shares among beneficiaries, such as children or charities.

We need only concern ourselves with those powers which the trustee must, or ordinarily does have, in connection with the management of the trust property.

What Powers a Trustee has. — At common law a trustee, being the absolute legal owner of the property, could

[1] Pub. Gen. Laws Md. (1904), Art. 46, § 24.

[2] Perry, § 344; Mass. Rev. Laws (1902), ch. 147, § 13.

[3] Stevens *v.* Austen, 7 Jur. N. S. 873; Harlow *v.* Cowdrey, 108 Mass. 183.

[4] Mortimer *v.* Ireland, 11 Jurist, 721. *Infra*, p. 54. But otherwise in some States, where personal representatives succeed to trust. West Va. Code (1906), § 4001.

[5] De Peyster *v.* Ferrers, 11 Paige, 13.

[6] Perry, § 344; Code Ala. (1896), § 1044.

exercise all the ordinary powers which an absolute owner might, but in a court of equity the rights of the beneficiary are paramount, and consequently a trustee will be restrained from exercising any power inconsistent with the beneficiary's rights; hence a trustee may be said to have only those powers which he will not be restrained from using.

The trustee retains in equity as incidental to his office certain of the powers which are his at law as owner of the property; he has also those additional powers which are conferred by the legislature or the court, and those powers which are conferred by the trust instrument.

The general powers incidental to the office are limited to and comprise all those that are necessary to the performance of his duties, such as power to demand, receive, and sue for the trust property or any income accruing on it; to invest the funds and lease the real estate; to take proper measures to keep the real estate repaired and insured, and to defend suits against him in respect to the property, or against him as trustee; to disburse and distribute the property; to protect the beneficiary, or maintain him if incapable of maintaining himself.

The powers to sell the trust property, and to change investments, and to convert real into personal estate and *vice versa*, are usually bestowed on the trustee by the legislature or court, but are special, and not general and incidental to the office, since the original conception of a trustee was some one to be trusted with the title to the property, and not a sort of business manager, as the office has more and more become.

The trust instrument itself may, and usually does, confer in express terms the powers which the court or legislature gives; and it usually enlarges the general powers incidental to the office. In addition it frequently gives other powers of a discretionary character, such as a power of revocation of the trust, or a power of appointment as to distribution of income.

Implied powers are also often given by the trust instrument where it places a duty on the trustee, and neglects to give expressly the powers to perform it; and in every such case the trustee will take by implication all the powers necessary to execute his duty.[1] As, for instance, where a trustee is to borrow money on mortgage, he may give a mortgage containing a power of sale,[2] or where he is to keep the estate safely invested he will have implied power to sell hazardous investments left by the maker of the trust.

Vesting of Powers. — There are some cases in which the powers incidental to the office do not vest in the holder of the title. For instance, where the ownership vests in the heir or personal representative of a sole trustee, or in a stranger by a conveyance not properly authorized. In such cases the owner will be a trustee, but will not have the usual incidental powers to manage the estate; but only such powers as are necessary to preserve the property until it can be conveyed to a properly constituted trustee.[3]

The powers will vest in a trustee properly appointed, and, if there is more than one trustee, in all the trustees jointly.

The general powers will pass to the survivors or survivor, and will vest in the successors in the trust;[4] and this notwithstanding a provision for the keeping up of the number of the trustees.[5] Special powers conferred by the trust instrument upon the trustees in that capacity will pass to survivors and successors.[6]

The old law was that special powers limited to " my trustees " or " my trustees A & B " did not pass with the

[1] *Infra*, pp. 65, 66. [2] *Infra*, p. 72. [3] *Supra*, p. 52.

[4] Webster *v.* Vandeventer, 6 Gray, 428; Belmont *v.* O'Brien, 12 N. Y. 394; Nugent *v.* Cloon, 117 Mass. 219. Statutes in many jurisdictions to same effect.

[5] Hammond *v.* Granger, 128 Mass. 272; Bailey, Pet'r, 15 R. I. 60.

[6] Wemyss *v.* White, 159 Mass. 484; Schouler, Pet'r, 134 Mass. 426.

office, because there was an implied intention to trust to the discretion of two or more trustees, but not to that of one, or to trust to A and B but not to A alone.[1] Such phrases are but little regarded now, and the preference for the individual to the exclusion of the trustee for the time being must be clearly expressed.[2] If, however, there is a personal confidence in the individuals who are named trustees, it will not survive, or pass to their successors,[3] except where the power is limited to them and their heirs and assigns. In that case the powers will pass to the trustees' successors but not to their personal representatives.[4]

Execution of Powers. — The essential part of the execution of a power is the exercise of the discretion vested in the trustees. As this discretion vests in them jointly,[5] it can only be executed by the joint action of all the trustees; and an execution by part, even though a majority, is void, unless provided for by the instrument.[6] Hence the insanity or refusal to concur of one trustee can block all action,[7] and where the trustees disagree, the only remedy is to have a trustee removed and a new one appointed,[8] which the court will not do, unless the con-

[1] Hibbard *v.* Lamb, Amb. 309. *Supra*, p. 5.

[2] In re Smith, L. R. (1904), 1 Ch. 139; Mercer *v.* Safe Dep. & Trust Co., 91 Md. 102; Sells *v.* Delgado, 186 Mass. 25; Franklin *v.* Osgood, 14 Johns. 527. But it still remains a question of intention. See Snyder *v.* Safe Dep. & Trust Co., 93 Md. 225; Kennard *v.* Bernard, 98 Md. 513; Dillingham *v.* Martin, 61 N. J. Eq. 276.

[3] Benedict *v.* Dunning, 110 App. Div. (N. Y.) 303.

[4] Warnecke *v.* Lembca, 71 Ill. 91.

[5] Stott *v.* Lord, 31 L. J. Ch. 391; Ray *v.* Doughty, 4 Blackf. 115.

[6] Attorney General *v.* Gleg, 1 Atk. 356; Morville *v.* Fowle, 144 Mass. 109; Vandever's Appeal, 8 Watts & S. 405; In the Matter of Wadsworth, 2 Barb. Ch. 381. A charity differs from an ordinary trust, and a majority of a board may act. City of Boston *v.* Doyle, 184 Mass. 373.

[7] Swale *v.* Swale, 22 Beav. 584. *Supra*, p. 15.

[8] Mannhardt *v.* Ill. Staats Zeitung Co., 90 Ill. App. 315. But the rule is weak. The court, instead of removing the trustee, often com-

duct of the trustee has been factious and unreasonable or promoted by corrupt or selfish motives.[1]

Must be Joint. — Trustees are joint tenants at law, hence one of them may give a debtor a good discharge if he pays his debt into his hand;[2] hence one trustee may collect dividends, rents, interest, or any other income accruing; and he may receive a simple debt or discharge a mortgage.[3] He cannot, however, assign a mortgage, as all the trustees must act in a sale or assignment of the trust property,[4] nor could he collect a judgment, as all the trustees must join in the suit.[5] Nor can one trustee bind all by a compromise.[6] Conversely, as he may collect it alone, so one trustee may pay out income, but in dealing with matters of principal all should join.[7]

In equity a joint receipt is required; hence if the debtor knows that the trustee is committing a breach of trust in receiving the money, or if he has been warned to pay to all the trustees only, he will not be protected by his single receipt.[8]

The liability of one trustee for allowing his co-trustee to receive or have the custody of the property is a different question and is treated below.[9]

Delegation. — The execution of a power in its essential part cannot be delegated either to a stranger or by one of

pels action. *Infra*, pp. 59 *et seq.* Marshall *v.* Caldwell, 125 Mass. 425; Garvey *v.* Garvey, 150 Mass. 185; Barbour *v.* Cummings, 26 R. I. 201; Collister *v.* Fassitt, 163 N. Y. 281.

[1] Norcum *v.* D'Oench, 17 Mo. 98. *Supra*, p. 24.

[2] Bowes *v.* Seeger, 8 Watts & S. 222.

[3] Ochiltree *v.* Wright, 1 Dev. & Bat. Eq. 336. *Supra*, p. 20; *infra*, p. 89.

[4] Mendes *v.* Guedalla, 2 Johns. & Hem. 259; Ridgley *v.* Johnson, 11 Barb. 527.

[5] *Infra*, p. 75.

[6] Stott *v.* Lord, 31 L. J. Ch. 391.

[7] *Infra*, p. 87.

[8] Lee *v.* Sankey, L. R. 15 Eq. 204; Magnus *v.* Queensland N. Bk., 37 Ch. Div. 466; Webb *v.* Ledsam, 1 K. & J. 385.

[9] *Infra*, pp. 104, 105, 148 *et seq.*

the trustees to another.[1] Nor can the trustees divest themselves of their discretion by asking the advice of the court.[2] Thus a trustee cannot appoint an agent to sell the property[3] or to manage the real estate, or hand the funds to a solicitor to invest,[4] because by doing so he delegates the essential part of his power, namely, the exercise of his discretion in determining the selling or letting prices, or the need of repair, or the appropriateness of the security selected for investment.[5]

This does not prevent the trustee from intrusting the unessentials to an agent,[6] such as the delivery or execution of a deed or lease, or any other matter not requiring the exercise of discretion, unless the trust instrument requires his personal execution of these unessential matters. A convenient mode of action in such cases is to authorize the agent to contract subject to the assent of the trustee.[7]

Hence a trustee, having fixed the terms of sale, may give his attorney a special power to carry out the sale and convey the property; or in the case of a sale of stocks may sign a special power of attorney in blank to transfer the stock, and the transferee will not be put on his inquiry, as there is nothing to suggest that the trustee has delegated his discretion. But an attempt to reach the same results under a general power would be otherwise, as the evident implication is that the trustee has not passed on this particular case, and has delegated his discretion to his general attorney.[8]

[1] Pearson *v.* Jamison, 1 McLean (Ky.), 197; Attorney General *v.* Gleg, 1 Atk. 356; Berger *v.* Duff, 4 Johns. Ch. 368. See article in 12 Central L. J. 266–270.

[2] Rutland Trust Co. *v.* Sheldon, 59 Vt. 374.

[3] Berger *v.* Duff, 4 Johns. Ch. 368.

[4] Bostock *v.* Floyer, L. R. 1 Eq. 26.

[5] Woddrop *v.* Weed, 154 Pa. St. 307.

[6] Gillespie *v.* Smith, 29 Ill. 473. *Infra*, pp. 69, 90.

[7] Hawley *v.* James, 5 Paige, 318, 487.

[8] Lowell, Transfer of Stock, § 76; Hawley *v.* James, *ubi supra.*

Partial or Defective Execution. — A power need not be executed at one time, and if it be only partially executed, the execution may be completed at a later date.[1]

If the execution is defective, the court will compel the trustee to complete the execution in favor of a purchaser for value, or one having a meritorious claim, but it will not aid a volunteer.[2]

If the power is substantially executed in essential matters, the execution will be upheld and confirmed by the court,[3] in spite of errors of execution as to non-essentials; but if there has been error in execution as to non-essentials prescribed by the trust instrument the execution is absolutely void, and the court will not interfere. Thus, if the power is to be executed by deed, an execution by parol or by will is ineffective,[4] or if it is to be executed by deed witnessed by two men, a deed witnessed by a man and a woman will not do.[5] Nor could a power to appoint by will be executed, waived, or extinguished in any other way.[6]

If the validity of a special power be dependent on a condition, the condition must be proved and may be traversed, e. g., where a trustee was to sell land to support the beneficiary, where there proved to be plenty of personalty, it was held that no power of sale arose.[7]

If the consent of a beneficiary is a condition precedent, the subsequent ratification will not be sufficient,[8] and if any party die whose consent is necessary, the power will

[1] Sugden on Powers, 3d Amer. ed., i. 79–85.

[2] See p. 69.

[3] Sugden on Powers, 3d Amer. ed., i. 391; Amer. & Eng. Encyc. Law, vol. 18, p. 927. Thus where the same persons were trustees and executors and had a power to sell as trustees but not as executors, a deed signed by them as executors was held to be a sufficient execution of their power as trustees. Philbin *v.* Thurn, 103 Md. 342.

[4] Carpenter *v.* Cook, 60 Pa. 475.

[5] Sugden on Powers, 3d Amer. ed., i. 299, 300.

[6] Ruggles *v.* Tyson, 81 N. W. Rep. 367 (Wisc. 1899).

[7] Minot *v.* Prescott, 14 Mass. 495.

[8] Bateman *v.* Davis, 3 Mad. 98.

be lost;[1] but in a case where the consent of a class of beneficiaries was required to protect their own interests, and they all died, it was held that, as there were no interests to be protected, the power had become unconditional, and the assent was no longer necessary to its execution.[2] And in some jurisdictions it is provided by statute that where the person has died whose consent was necessary to the execution of the power, the court may act in his place.

So too a decree of the court acting by statute authority is invalid which does not conform to the statute authorizing it; since the court can only execute the power given it by statute, and is not itself the party creating the right, as it is where it acts on its own equitable jurisdiction.[3]

Only those interested can object to the execution of the power.

Control of the Court over Powers that it is the Trustee's Duty to Exercise. — Where a trustee has a duty to perform he is held to perform it with sound discretion, and is liable if he fails to do so. It follows that the court will control the trustee's powers where they are ancillary to his duties,[4] and he must exercise them according to the court's standard of a sound discretion.[5]

The discretion given the trustee by the trust instrument as to time or manner of performing these duties,

[1] Alley *v.* Lawrence, 12 Gray, 373.

[2] Leeds, Ex'r *v.* Wakefield, 10 Gray, 514.

[3] *Infra*, p. 66.

[4] Read *v.* Patterson, 44 N. J. Eq. 211; Nickerson *v.* Cockhill, 3 DeG. J. & S. 622; Re Courtier, 34 Ch. Div. 136. Such powers are sometimes called "powers coupled with a trust."

[5] What is a sound discretion is not always easily determined. Lord Blackburn says, "Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash." Speight *v.* Gaunt, 9 App. Cas. 1.

does not convert the corresponding powers into "discretionary powers" properly so called, or oust the court of its control over the trustee's action.[1] Thus, trustees being given a discretion as to time of conversion can be compelled to sell vacant land if they fail to do so within a reasonable time,[2] or they may be restrained from changing an investment where there is no good reason for doing so.[3] As noted hereafter, discretion as to the amount of a payment is usually treated otherwise. If the trustee has not used his discretion in such a way as to meet the court's approval but has acted in good faith, honestly and without selfish motive, he will be treated with indulgence, especially if he has acted under advice of counsel,[4] which shows that he was acting carefully. Yet if the action amounts to a gross breach of trust, such as investing in a second mortgage, the court will not excuse him even under these circumstances.[5]

It is said that the court will ratify anything which it would order done,[6] but this is not quite true, since a court will not ratify an unauthorized conversion, and it is not quite safe to rely on it since a court may not look at the matter just as the trustee does; hence if a trustee has any doubt as to his duty, his best course is to ask the instruction of the court before he acts.[7]

Control of Court over Discretionary Powers. — Purely discretionary powers are special powers given the trustee

[1] Bethel *v.* Abraham, L. R. 17 Eq. 24; Keeler *v.* Lauer, 85 Pac. 541, Kansas (1906); Walker *v.* Shore, 19 Ves. Jr. 387 and note; Prendegast *v.* Prendegast, 3 H. L. Cases, 195, p. 218; Eldredge *v.* Heard, 106 Mass. 579; Marshall *v.* Caldwell, 125 Mass. 435; Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190, p. 195.

[2] Marshall *v.* Caldwell, 125 Mass. 435; Arnold *v.* Gilbert, 5 Barb. (N. Y.) 190, p. 195.

[3] Bertron *v.* Polk, 101 Md. 686.

[4] Ellig *v.* Naglee, 7 Cal. 683; Crabb *v.* Young, 92 N. Y. 56; Milner *v.* Proctor, 20 Ohio St. 442.

[5] Owings *v.* Rhodes, 65 Md. 408; Gilmore *v.* Tuttle, 32 N. J. Eq. 641.

[6] Perry, § 476.

[7] *Infra*, p. 96.

by the maker of the trust not coupled with a duty, but resting on the trustee's discretion as to whether they shall be executed or not.[1] The court cannot control the trustee's action, since it is a matter of choice whether he will or will not act, and he is under no legal obligation to do either.[2] The maker of the trust meant to trust to the conscience and discretion of the trustee, and not to the court.[3] Nor can the court inquire into the trustee's reasons for acting or not acting, since he and not the court is the tribunal;[4] but if he gives his reasons, which he cannot be compelled to do, the court may review them, and if it finds them insufficient may reverse his action.[5] It also follows that the trustee cannot divest himself of his discretion by consulting the court.[6]

If, however, the execution of the power becomes a matter of litigation or is brought into court for execution the holder can only exercise it with the court's approval;[7] nor will the court permit the trustee to act arbitrarily from mere whim or caprice,[8] or from fraud or prejudice.[9] What amounts to fraud is treated in the next section.

Where a trustee is given discretion as to the amount of income or principal to be paid to the beneficiary or ap-

[1] Lewin, 690.

[2] Sellew's Appeal, 36 Conn. 186; Bacon *v.* Bacon, 55 Vt. 243; Costabadie *v.* Costabadie, 6 Hare, 410; Mannhardt *v.* Ill. Staats Zeitung Co., 90 Ill. App. 315.

[3] Pink *v.* De Thuisey, 2 Madd. 157; Portsmouth *v.* Shackford, 46 N. H. 423; Haydel *v.* Hurck, 72 Mo. 253; Blythe *v.* Green, 38 Atl. 743 (N. J. Ch.).

[4] Re Vanderbilt, 20 Hun (N. Y.), 520.

[5] Re Beloved Wilkes' Charity, 3 McN. & G. 440, 448.

[6] Rutland Trust Co. *v.* Sheldon, 59 Vt. 374; Proctor *v.* Heyer, 122 Mass. 525.

[7] Bethell *v.* Abraham, L. R. 17 Eq. 24; Bull *v.* Bull, 8 Conn. 47. Perry, § 511. By paying into court the trustee renounces his discretion. Re Nettlefold, 59 L. T. 315.

[8] Stephenson *v.* Norris, 107 N. W. 343 (Wisc. 1906); Tabor *v.* Brooks, 10 Ch. Div. 273; Bacon *v.* Bacon, 55 Vt. 243.

[9] Garvey *v.* Garvey, 150 Mass. 185. *Supra*, p. 23.

plied to his support,[1] or has discretion as to the apportionment of a fund among a class, the general rule is to construe his power as a purely discretionary power, and while the court will insist on his making some payment,[2] it will not interfere with the trustee's determination as to the amount unless there is bad faith.[3] It has been held that where no express discretion has been given the trustee he is bound to exercise a sound discretion in paying over the income to a beneficiary who is not a proper person to receive money.[4]

On the other hand, the court has sometimes held the discretion as to the amount of the payment to be ancillary to the duty to make some payment, and has accordingly assumed the control of the whole matter.[5]

The rules governing the court's control over the trustee's powers, have been stated above as they appear on the whole to be established by weight of authority and principle; but unfortunately the authorities are conflicting, and the reasoning in the decisions confused and perplexing. Some legislatures and courts assert the right to control the exercise of all powers, whether purely discretionary or not,[6] regardless of the fact that they

[1] As to infant's support, see *infra*.

[2] Colton *v.* Colton, 127 U. S. 300; Osborne *v.* Gordon, 86 Wisc. 92; Aldrich *v.* Aldrich, 12 R. I. 141; Bacon *v.* Bacon, 55 Vt. 243; Collister *v.* Fassitt, 163 N. Y. 281.

[3] Gisborne *v.* Gisborne, 2 App. Cas. 300; Eldredge *v.* Heard, 106 Mass. 579; National Exchange Bank *v.* Sutton, 147 Mass. 131; Catherwood's Appeal, 52 Pa. St. 154; Kimball *v.* Blanchard, 64 A. 645; Merritt *v.* Corlies, 71 Hun, 612; Bacon *v.* Bacon, 55 Vt. 243.

[4] Mason *v.* Jones, 2 Barb. 229; Gott *v.* Cook, 7 Paige, 338.

[5] Feltham *v.* Turner, 23 L. T. (N. S.) 345; Stephenson *v.* Norris 107 N. W. 343 (Wisc. 1906); Chase *v.* Chase, 2 Allen, 101; Ireland *v.* Ireland, 84 N. Y. 321; Osborne *v.* Gordon, 86 Wisc. 92; Collister *v.* Fassitt, 163 N. Y. 281; Barbour *v.* Cummings, 26 R. I. 201.

[6] Clark *v.* Clark, 21 Misc. Rep. (N. Y.) 272; Stephenson *v.* Norris, 107 N. W. 343 (Wisc. 1906); Curtis *v.* Smith, 6 Blatch. 537, p. 543; In re Hodges, 7 Ch. Div. 754, p. 761; Cromie *v.* Bull, 81 Ky. 646; Feltham *v.* Turner, 23 L. T. (N. S.) 345; Rev. Civ. Code So. Dak. (1903), § 1644; Cal. Civ. Code (1903), § 2629.

thus set aside the provisions of the settlement vesting the discretion in the trustee; and thus exercise a power, the constitutionality of which may well be doubted.

Practically, if the trustee uses his discretion in any case honestly and reasonably the court will not interfere with him;[1] but if he acts unreasonably he will probably be overruled by the court for one reason or another, no matter how clearly the testator may have stipulated that he relied on the judgment of the trustee, and not that of the court.[2]

What amounts to Fraud in the Execution of a Power. — If the trustee exercises his power in such a manner as to amount to a fraud, the court can on that ground set it aside, having the usual jurisdiction to remedy a fraud, and not because it has jurisdiction to review the exercise of the power. And accordingly the person attacking the exercise of a power on the ground of fraud must prove his case affirmatively.[3]

If the trustee exercise an unlimited power for his own gain, or to get an advantage for himself or his family, it will be a fraud, though not injurious to others.[4]

If he exercise a power in such a way as to defeat the purposes of the trust, as, for instance, if under a power to use the principal for the support of the beneficiary, he pays the whole amount over at one time for the purpose of revoking the trust, it will be a fraud.[5]

[1] Eldredge *v.* Hurd, 106 Mass. 579; Cromie *v.* Bull, *ubi supra;* In re Hodges, *ubi supra.*

[2] Prendegast *v.* Prendegast, 3 H. L. Cases, 195; Barbour *v.* Cummings, 26 R. I. 201; Collister *v.* Fassit, 163 N. Y. 281. Davis, Appellant, 183 Mass., 499.

[3] Re Brittlebank, 30 W. R. 99.

[4] Bostick *v.* Winton, 1 Sneed (Tenn.), 524.

[5] Lovett *v.* Farnham, 169 Mass. 1; Reade *v.* Continental Trust Co. 48 App. Div. (N. Y.) 632. See *infra,* p. 82.

If he exercise a power for corrupt motives[1], or out of spite or revenge, the execution will be set aside.[2]

Thus where a trustee appointed a double portion to his son to avoid a lawsuit, the execution was set aside.[3]

Extinction of Powers. — A power may become extinct by the death or disclaimer of one of those to whom it is given;[4] but it cannot be waived or extinguished as against a donee who is not a party to the waiver.[5]

A power cannot be exercised after the trust has expired,[6] or the purposes for which it was given have been fulfilled or become impossible; as, for instance, where a power was given to sell and convert into cash for A, and A had died.[7]

A power will not be exhausted by an exercise of part; but where the court gives the power it may be otherwise. As, for instance, a power to sell real estate is not exhausted by the sale of the original property; but extends to real property bought with the proceeds, and if part of a tract of land be sold under power of sale at one time, the balance may be sold at a later date; or if a power of appointment fail, it may be exercised again.[8]

III. PARTICULAR POWERS.

Sale. — Power of Sale. — Although a power to sell is one of the most important powers a trustee may have, it

[1] As to "Whim and Caprice," see the preceding section. The real ground for setting aside the execution in such cases is fraud.

[2] Garvey *v.* Garvey, 150 Mass. 185.

[3] Holt *v.* Hogan, 5 Jones Eq. (N. C.) 82.

[4] *Supra*, pp. 5, 54, 55.

[5] Frazer *v.* Western, 1 Barb. Ch. 220, 240; Moll *v.* Gardner, 214 Ill. 248.

[6] Ruggles *v.* Tyson, 81 N. W. 367 (Wisc. 1899).

[7] Slocum *v.* Slocum, 4 Edw. Ch. 613; Lessee of Ward *v.* Barrows, 2 Ohio St. 241. See *supra*, p. 19.

[8] *Supra*, p. 58; Sugden on Powers, 8d Amer. ed. 391.

is not a general power incidental to his office,[1] since the original theory of a trust did not contemplate a trustee's doing anything but holding and taking care of the property, the object of a trust then being to avoid feudal dues and forfeitures.[2] At the present day the usual object of a trust is to settle property in the hands of persons of good business ability to manage it for the benefit of others not possessed of such ability; or to settle property so that it may form a family fund to descend in the family as long as it can be tied up, and so that the property may not be dissipated by the improvidence or bad management of the persons to be benefited; who usually are, in part at least, persons unfitted for business and the care of large estates.

The policy of the modern trust is to give the trustees the fullest power to manage the estate to the best advantage, and hence a power of sale is a feature of all well drawn trust instruments.

In some jurisdictions there is a statutory provision that every will shall be construed to give the trustees power to change all trust investments.[3]

In many cases where the power is not expressly given, it will be implied from the fact that the trustee is given a duty which cannot be performed without a power of sale.[4] As, for instance,[5] where the trust was to pay the settlor's debts, and then the income to B,[6] or where the

[1] Wheate *v.* Hall, 17 Ves. Jr. 80; Jones *v.* Atch., Top. & S. Fé Rd., 150 Mass. 304; Code Ga. (1895), § 3172; Ky. Stat. (1894), § 2356.

[2] Lowell, Transfer of Stock, § 62.

[3] R. I. Gen. Laws (1896), ch. 208, § 12; Ky. Stat. (1894), § 4707. In New York, Michigan, West Virginia, and Wyoming, power of sale to pay collateral inheritance tax, Rev. Stat. N. Y. (1901), p. 3594, § 220; Pub. Acts, Mich. (1903), ch. 195, § 5; Code W. Va. (1906), § 1073; Session Laws of Wyoming, (1903), ch. 80, § 5.

[4] *Supra*, p. 54; Jones *v.* Atch., Top. & S. Fé Rd., 150 Mass. 304.

[5] To distribute the property, Casey *v.* Canavan, 93 Ill. App. 538; Dodson *v.* Ashley, 101 Md. 513.

[6] Goodrich *v.* Proctor, 1 Gray, 567.

trustees were to invest or reinvest in safe securities,[1] or where they were given the power to manage and invest,[2] or to invest as seems prudent.[3] So, too, where the maker of the trust leaves illegal and improper investments, the trustees have an implied power to sell.[4] But the power cannot be engrafted on to the trust by inserting it in the deed of a property purchased by the trustee.[5]

Sale under Statutes. — In most jurisdictions power is given to the probate court by statute to give the trustees a license to sell,[6] and such statutes are held to be constitutional.[7] In such cases the power given the court is subject to the same general rules as other powers, and the decree of the court must conform to the statute, and not exceed it.[8]

The statutes generally provide that the court, on the application of any one interested, may order a sale if the court thinks it necessary or expedient, and provide for notice to all persons in interest, and the appointment of guardians for all minors or persons unascertained or not in being.

Such statutes do not give the court power to act in disregard of the testator's wishes,[9] and the fact that the in-

[1] Purdie *v.* Whitney, 20 Pick. 25. To invest and pay income, Foil *v.* Newsome, 138 N. C. 115.

[2] Harvard College *v.* Weld, 159 Mass. 114.

[3] Boston Safe Deposit Co. *v.* Mixter, 146 Mass. 100. Exercise all requisite power and authority, Dickinson *v.* N. Y. Biscuit Co., 211 Ill. 468.

[4] Bohlen's Est., 75 Pa. St. 304.

[5] Stone *v.* Kahle, 54 S. W. 375 (Texas, 1899), but see s. c. 95 Texas, 106.

[6] Mass Rev. Laws (1902), ch. 147, §§ 15, 17; Gen. Stat. Conn. (1902), §§ 253, 1035; Laws of Del. (1893), p. 721; Code Ga. (1895), § 3172; Rev. Stat. Me. (1903), ch. 70, § 9; Pub. Stat. N. H. (1901), ch. 198, § 10; Stat. Vt. (1894), § 2617; Code Va. (1887), §§ 2616–2622; Annot. Stat. Wisc. (1899), §§ 2100 a, 4030; Rev. Stat. N. Y. (1901), p. 3028, § 85; Rev. Stat. Ind. (1894) §§ 3411, 3415.

[7] Norris *v.* Clymer, 2 Pa. St. 277.

[8] Williamson *v.* Berry, 8 How. 495, 531.

[9] Johnstone *v.* Baber, 8 Beav. 233; Ball *v.* Safe Deposit and Trust

come will be increased is not a sufficient reason to decree a sale.[1]

Where there is no general statute, the legislature may authorize a sale by special act, and often does so,[2] but even a sale under special act of the legislature in direct controversion of the settlement has been held void in Pennsylvania;[3] but elsewhere a special act for a sale, though contrary to the testator's intentions, has been held constitutional, as a change of investment, where adequate provision is made to protect the interests of all persons interested in the trust.[4]

Moreover, where it is impossible to use the property so as to carry out the testator's wishes, the court without an act of the legislature may order a sale on the *cy près* doctrine,[5] and if all parties in interest were parties to the suit, or represented by guardian, it is difficult to see what remedy they would possess at a later time,[6] and the trust passes from the property sold to the fund received in its place.[7]

There are statutes authorizing the court to order such sales, and sales of estates which are subject to contingent remainders or executory devises in some jurisdictions,[8] and providing for the appointment of guardians to represent persons who are unascertained or not in being.

If such persons are not represented, the sale is of no

Co., 92 Md. 503; 52 L. R. A. 403; but in Weld *v.* Weld, 23 R. I. 311, the court directed a sale of bonds which were falling contrary to testator's expectations.

[1] Davis, Pet'r, 14 Allen, 24.

[2] Stanley *v.* Colt, 5 Wall, 119.

[3] Ervine's Appeal, 16 Pa. St. 256.

[4] Clark *v.* Hayes, 9 Gray, 426; Leggett *v.* Hunter, 19 N. Y. 445; Norris *v.* Clymer, 2 Pa. St. 778.

[5] Weeks *v.* Hobson, 150 Mass. 377; Ryan *v.* Porter, 61 Tex. 106; Attorney General *v.* Briggs, 164 Mass. 561.

[6] Baker *v.* Lorillard, 4 Comst. 257; Ansley *v.* Pace, 68 Ga. 403.

[7] Cowman *v.* Colquhoun, 60 Md. 127.

[8] Mass. Rev. Laws (1902), ch. 127, § 28; Gen. Laws R. I. (1896), ch. 201, § 18.

effect, so far as they are concerned, should they afterwards become entitled.[1]

Power of Court of Equity to decree a Sale. — Where there is no statute giving any court power to decree a sale, a court of equity or any court having the power to regulate trusts may do so as one of its ordinary powers;[2] but where such a statute exists, the court would only act under and to the extent of the statute.

Where there is no statute, a court of equity will decree a sale only where the trust cannot otherwise be carried out, or where a sale is necessary to preserve the property;[3] that such a sale would be beneficial to all concerned is not sufficient ground of action, and a minor or person unascertained might object on becoming *sui juris* or vested with the estate.[4]

It is said that a court will not confirm an unauthorized sale even though it would have authorized it had it been consulted; but if there was no time to get leave of court, and the sale was necessary to preserve the property, the court would undoubtedly ratify it as the trustee had power to make it *ex necessitate*.

The court will not confirm a sale where the trustee had the power to make it. It is unnecessary.[5]

Execution of the Power. — The management of the sale requires discretion, and hence cannot be delegated. Where the trustee sells at private sale he must arrange the terms himself, or his agent may arrange them subject to his approval.

[1] Baker *v.* Lorillard, 4 Comst. 257. But see, *contra*, Schley *v.* Brown, 70 Ga. 64, where it was decided that persons unascertained and not in being are not necessary parties; but in this case a special power was given by the will to the court, and so the parties were immaterial. See *infra*, p. 82.

[2] Old South Soc. *v.* Crocker, 119 Mass. 1.

[3] Blacklow *v.* Laws, 2 Hare, 40; Ruggles *v.* Tyson, 79 N. W. 766; (Wisc. 1899.) See Weld *v.* Weld, cited in note 1, on preceding page.

[4] Baker *v.* Lorillard, *ubi supra*; Ansley *v.* Pace, 68 Ga. 403; Johns *v.* Johns, 172 Ill., 472. But see Denegre *v.* Walker, 214 Ill. 113.

[5] Murphy *v.* Union Trust Co., 89 Pacific R. 988.

It is settled law in Missouri that, even though the sale is at auction, he should attend in person to decide any question arising on the spot, such as an adjournment or the acceptance of a bid,[1] but the usual practice is not so strict in most jurisdictions. Once having successfully attended to the details, he need not deliver the deed in person if he takes proper precautions to secure the purchase money.

The sale must be carried out in the manner prescribed in the trust instrument or decree from which the authority is derived; and any error or omission will vitiate the sale, and it may be disaffirmed.[2] For instance, if the power be to sell for cash, a sale for credit cannot be made,[3] nor will a power to sell, exchange, or dispose of justify a trustee in organizing a corporation and transferring the property to it, taking payment in shares.[4] If the power be to sell the whole estate, a partial interest such as a life interest, or a right to mine or cut timber could not be sold; but an authority to sell the whole estate will not prevent a sale by lots.[5]

If every essential requisite has been substantially fulfilled, the court will affirm the sale, even though there may have been some irregularity, such as an immaterial error in the description or advertisement,[6] or appearance of a party.[7] And in some jurisdictions there are statutory provisions providing that the title of a purchaser from a licensee of a competent court, who has given bond and due notice of the sale, shall not be set aside for irregularity in the proceedings.[8]

[1] Graham *v.* King, 50 Mo. 22. [2] Knox *v.* Jenks, 7 Mass. 488.

[3] Waterman *v.* Spaulding, 51 Ill. 425.

[4] Garesche *v.* Levering Investment Co., 146 Mo. 436; Mitchell *v.* Carrolton Bank, 97 S. W. 45. But see, *contra*, In re Sprague, 22 R. I. 413. But the decision seems to rest somewhat on peculiarities of the will and statute law.

[5] Ord *v.* Noel, 5 Madd. 438. [6] Knox *v.* Jenks, 7 Mass. 488.

[7] Mercier *v.* West Kansas Land Co., 72 Mo. 473.

[8] Mass. Rev. Laws (1902), ch. 148, § 19.

The trustee cannot purchase directly or indirectly either for himself or another at the sale, but if he himself becomes the purchaser the sale may be disaffirmed,[1] but in that case the purchase money must be refunded.[2] There is no objection to a purchase by the beneficiary unless such a sale negatives the testator's intention.[3]

If there is any fraud, such as inadequate notice, or if the selling price is wholly inadequate, so that it amounts to a fraud, the sale may be disaffirmed.[4]

The purchaser must ascertain at his peril that the power of sale arose,[5] and that it has been properly carried out,[6] and if conditions are attached to the power he must see that they are properly performed. But if the trustee has a general power of sale he need not inquire farther.[7] He will be liable if he have notice that the trustee has not exercised a personal discretion, but has delegated his duty to an agent, as, for instance, if he purchase from an agent under a general power of attorney;[8] but the determination of the court that a sale is proper will protect him. Where the sale is a breach of trust, the purchaser will be liable not only for the purchase price, but also for damages; and he cannot compel the trustee to carry out a contract that is a breach of trust, since equity would not compel the trustee to do wrong,[9] but he may get damages at law from the trustee individually for the breach of the contract.[10]

Application of the Purchase Money. — The general rule is, that where the settlor or court has intrusted the

[1] See *supra*, p. 32. As to acquiescence, see *infra*, p. 176.

[2] French *v.* Westgate, 71 N. H., 510; McLenegan *v.* Yeiser, 115 Wisc. 304.

[3] *Infra*, p. 142.

[4] Oliver *v.* Court, 8 Price, 127, 165.

[5] Cassell *v.* Ross, 33 Ill. 244; Ord *v.* Noel, 5 Madd. 438; Third Nat. Bank *v.* Lange, 51 Md. 138.

[6] Fritz *v.* City Trust Co. 72 App. Div. (N. Y.) 532.

[7] Dickinson *v.* N. Y. Biscuit Co., 211 Ill. 46.

[8] *Supra*, p. 57.

[9] White *v.* Cuddon, 8 Cl. & Fin. 766.

[10] Mortlock *v.* Buller, 10 Ves. Jr. 292.

funds to the trustee, as for instance where the investment requires time and discretion,[1] or if he has a general power of sale,[2] the purchaser need not see to the application of the purchase money. If the sale is by order of court, he need not see to the application of the purchase money unless required to do so by the decree;[3] but if the funds are to be applied in a particular manner at a definite time, or if he knows that the trustee intends to misapply them, he will be liable if he neglects seeing that they are properly applied, as, for instance, where the trustee took a note and discounted it for his own benefit.[4]

If the purchaser has paid in such manner that the funds might be properly invested,[5] he is not liable; but where the sale is irregular two trustees, for instance, acting where there are three[6] or if he pays in an improper manner, so that he has notice of the contemplated breach of trust, he is liable for it.[7]

In England, and many of our States, he is exempted by statute from seeing to the application of the funds.[8]

Pledge or Mortgage. — The trustee has no power to pledge or mortgage the trust property incidental to his

[1] Wormeley *v.* Wormeley, 8 Wheat. 421.

[2] Lowell, Transfer of Stock, § 77.

[3] Coombs *v.* Jordan, 3 Bland, 284; Wilson *v.* Davisson, 2 Rob. (Va.). 384, 412; Perry, § 798.

[4] Third Nat. Bank *v.* Lange, 51 Md. 138.

[5] Keane *v.* Robarts, 4 Madd. 332, 356.

[6] Fritz *v.* City Trust Co., 72 App. Div. (N. Y.) 532.

[7] Pell *v.* De Winton, 2 De G. & J. 13; Wormeley *v.* Wormeley, 1 Brock, U. S. C. C. 330; S. C., 8 Wheat. 421. Whole subject treated in Underhill, 356, n. Barroll *v.* Forman, 88 Md. 188.

[8] Code Ala. (1896), § 1039; Civ. Code Cal. (1903), § 2244; Rev. Stat. Ind. (1894), § 3399; Gen. Stat. Kan. (1897), ch. 113, § 9; Ky. Stat. (1903) §§ 4707, 4846; Comp. Laws Mich. (1897), § 8850; Rev. Stat. Mo. (1899), § 4588; Rev. Laws Minn. (1894), § 3260; Code N. Dak. (1895), § 4227; Wisc. Stat. (1898), § 2092; Rev. Stat. N. Y. (1901), pp. 3028–9, §§ 84, 88.

office,[1] and the power has not been usually given him by the settlement or by the legislature; but of late years this power has been more frequently given to enable the trustee to improve the real estate.[2]

In the absence of statute, the court will not order a pledge or mortgage unless it is essential to carry out the purposes of the trust,[3] and in such cases the authority is really an implied one given by the instrument.[4]

If the trustee has power to "sell and dispose of" the property, he will have an implied power of mortgage,[5] and it is said that where a trustee has a power of sale, he will also have the power to pledge;[6] but the better opinion seems to be that a mere power of sale does not confer the power to pledge.[7] The law cannot be evaded by selling to a man of straw and allowing him to mortgage and then repurchasing.[8]

The same remarks that apply to the execution of a power of sale apply to this power, except that, as this power is more unusual, the pledgee will be holden to more care than a purchaser.[9]

If the trustee have a power to mortgage, he may give a power of sale mortgage, although he has no power to sell;[10] since without such a power of sale the mortgage would be unmerchantable, and he will take by implication

[1] Potter *v.* Hodgman, 81 App. Div. (N. Y.) 233; Tuttle *v.* First Nat. Bk. 187 Mass. 533.

[2] Mass. Rev. Laws (1902), ch. 147, § 18; Rev. Stat. N. Y. (1901), p. 3028, § 85.

[3] U. S. Trust Co. *v.* Roche, 41 Hun (N. Y.), 549; Boon *v.* Hall, 76 App. Div. (N. Y.) 520.

[4] Miller *v.* Redwine, 75 Ga. 130; Roberts *v.* Hale, 124 Ia. 296.

[5] Waterman *v.* Baldwin, 68 Iowa, 255; "Manage and Control," Ely *v.* Pike, 115 Ill. App. 284.

[6] Lowell, Transfer of Stock, § 75.

[7] Loring *v.* Brodie, 134 Mass. 453; Mansfield *v* Wardlow, 91 S. W. 859 (Texas 1906).

[8] Griswold *v.* Caldwell, 65 App. Div. (N. Y.) 371.

[9] Lowell, Transfer of Stock, § 75.

[10] Bridges *v.* Longman, 24 Beav. 27; Re Chawner's Will, 8 L. R. Eq. 569.

the power to give a merchantable mortgage, or one in the usual form.[1]

Partition and Exchange. — A partition or exchange can be made by express authority in the instrument, or they may be indirectly effected under an ordinary power of sale and reinvestment,[2] although a power of sale and a power to sell and exchange do not include a partition.[3]

If, however, the power of sale is restricted to sales for cash,[4] or the reinvestment is restricted, the partition or exchange could not be made in this way.[5]

Leasing. — The trustee has the power to lease the real estate as a general power incidental to his office, for such terms as are customary, since it is his duty to get the customary return from the property.[6]

These leases are binding on the estate for their whole term, even though the trust may terminate during the term of the lease, and the remainderman is bound by them;[7] but if the trust must terminate at a given time, as, for instance, on A's becoming of age, the trustee has no power to make a lease extending beyond that time, and any lease made by a trustee beyond his power will terminate with his estate, and will not bind the remainderman.

A trustee has no power to make a lease to begin at a future day,[8] nor to bind the estate by a covenant of re-

[1] Lewin, p. 472.

[2] McQueen *v.* Farquhar, 11 Ves. Jr. 467.

[3] Bradshaw *v.* Fane, 3 Drew. 534.

[4] Borel *v.* Rollins, 30 Cal. 408.

[5] Cleveland *v.* State Bank, 16 Ohio St. 236.

[6] Greason *v.* Keteltas, 17 N. Y. 491.

[7] Greason *v.* Keteltas, *ubi supra*; Kent's Commentaries, vol. iv. pp. 106–108. The statute law was at one time otherwise in New York, but now accords with the text. Weir *v.* Barker, 104 App. Div. (N. Y.) 112.

[8] Sinclair *v.* Jackson, 8 Cow. 543, 581.

newal which will extend the whole term beyond the term for which he has power to lease, but may make reasonable covenants of renewal to the same extent as he might lease.[1]

It is often difficult to determine what is a customary term, and it is a question of fact in each case to be ascertained by careful inquiry, and must necessarily differ somewhat according to the location and the character of the property let.[2]

Twenty years has been considered a reasonable term for business property, and farming property is often let on even a longer term. There is one case where a lease of ninety-nine years was approved, but the circumstances were peculiar.[3]

A trustee may not make a building lease, because, although such leases may be in one sense of the word customary, they do not fall within the class of leases which are covered by the power incidental to the office.

In a building lease, part of the rent is the consideration of the tenant's improving the property, and these improvements, which do not benefit the lessor until the end of the term, accrue entirely to the remainderman, but are paid for by the life tenant by the use of the property at a less rent during his life.

All these rules may be modified by the provisions of the trust instrument, giving the trustee a special power to lease which supersedes the general power he has by virtue of his office; as the trustee will then be acting under a special power he must conform exactly to its terms.[4] If the trustee be given a power to lease for a specified number of years, any term less will be a good

[1] Newcomb *v.* Keteltas, 19 Barb. 608; Bergengren *v.* Aldrich, 139 Mass. 259.

[2] Newcomb *v.* Keteltas, 19 Barb. 608.

[3] Black *v.* Ligon, Harp. Eq. 205.

[4] The court allowed a longer lease than the will *ex necessitate.* Marsh *v.* Read, 184 Ill. 263.

execution of the power,[1] and if he exceeds that term the lease will be good to the extent of the authority.[2]

If the beneficiaries have acquiesced in an improper lease, and received the rents for a long time, they will not be heard to object; but this is merely a matter of remedy against them, and does not make the lease valid if invalid, as the beneficiary has no right to make or unmake leases.[3]

The trustee will be personally liable on the covenants in a lease unless there be an express provision to the contrary, and as a covenant of quiet enjoyment is implied in every lease, the matter of what risks he assumes should be carefully considered.[4]

To Sue and Defend. — The trustee has the duty of gathering in and protecting the trust property; hence he has power to sue for it or for any damage to it, and to defend suits in which it is involved, or in which he is involved as trustee,[5] and to employ counsel and incur all necessary expenses at the expense of the trust fund, whether successful or not in the litigation, unless he has been improvident or unwise. These expenses are allowed, not only in cases directly affecting the property, but also where the trustee has acted with reasonably good faith in attempting to protect the beneficiary himself; as, e. g., where he has attempted though unsuccessfully to have him adjudged insane.[6]

If the trust fund is insufficient, he may require indemnity.

All the trustees must join or be joined in equitable suits, or in actions at law growing out of ownership of the trust property, but contracts being personal liabilities of

[1] Isherwood *v.* Oldknow, 3 M. & S. 382.
[2] Powcey *v.* Bowen, 1 Ch. Ca. 23.
[3] Kent Com 107; Black *v.* Ligon, Harp. Eq. 205.
[4] *Supra*, p. 29.
[5] *Supra*, p. 28.
[6] Chester *v.* Rolfe, 4 DeG., M. & G. 798; *supra*, p. 35; Nelson *v.* Duncombe, 9 Beav. 211.

the several trustees, the individual trustee who made the contract may be sued alone.[1] The beneficiaries need not be joined,[2] unless they are not adequately represented by the trustees; but they should be notified of a suit hostile to their title.[3]

The demand of one trustee is sufficient, and notice to one trustee is sufficient, but neither the admissions of one of several trustees,[4] nor the erroneous representations of one of several trustees, will bind his co-trustees or the estate.[5] A compromise of one of several trustees will not bind the estate.[6]

The admissions of the beneficiary will not defeat the trustee's title.[7]

The trustee may compromise or submit doubtful cases to arbitration,[8] and in some jurisdictions trustees are empowered by statute to compromise or submit to arbitration with the approval of the court.[9] A court of equity would have the same power where there is no statute.

The trustee should never compromise a suit unless it is decidedly for the benefit of the trust estate,[10] and unless his right is doubtful, and the result of litigation dubious, and in compromising a claim he should show a strong probability that it could not be recovered in full.[11]

[1] Diamond *v.* Wheeler, 80 App. Div. (N. Y.) 58.

[2] Generally, but expressly by statute in many jurisdictions. *Supra*, p. 28.

[3] Mackey's Adm'r *v.* Coates, 70 Pa. St. 350.

[4] Vandever's Appeal, 8 Watts & S. 405.

[5] Low *v.* Bouverie, 3 Ch. D. (1891), 82.

[6] Stott *v.* Lord, 31 L. J. Ch. 391; Boston *v.* Robbins, 126 Mass. 384.

[7] Pope *v.* Devereux, 5 Gray, 409.

[8] Chadbourn *v.* Chadbourn, 9 Allen, 173.

[9] Mass. Rev. Laws (1902) ch. 148, § 13; Gen. Stat. Conn. (1902), § 348; Code Ga. (1895) §§ 3429, 3430; Gen. Laws R. I. (1896), ch. 208, §§ 13, 18; Rev. Stat. Me. (1903) ch. 70, § 8. Such statutes held constitutional. Clarke *v.* Cordis, 4 Allen, 466.

[10] Ellig *v.* Naglee, 9 Cal. 683.

[11] Ames, 494, n. *Infra*, p. 102, as to duties in such matters.

To Contract. — If the trustee has the power to do the act which he contracts to do, he may bind the trust estate in his hands, and in those of his successor by his express contract.[1]

He cannot bind the beneficiary.[2]

The trustee is bound personally unless he expressly provides that he shall not be bound,[3] and if he is not bound, no one is bound by the contract,[4] although the trust property given as security may be held as *e. g.*, where the trustee mortgages the trust property, but exempts himself from liability on the note.[5]

If the trustee having the power to contract expressly provides that the trust estate shall be liable,[6] or the contract is such a one as would be implied by law, such as a contract to pay for repairs, or beneficial improvement to the trust property, the trust estate will be held and an action at law will lie against the survivor or successor.[7] Thus a trustee with power of sale can make a contract for a sale which can be specifically enforced,[8] but he has no power to give an option for sale at a distant date, since he cannot decide in advance that the circumstances will justify the sale when the time comes.[9] So, also, where the trustee is authorized to continue the testator's business,[10] or in those States where he is given the powers of

[1] Bushong *v.* Taylor, 82 Mo. 660; Poindexter *v.* Buswell, 82 Va. 507; Durkin *v.* Langley, 167 Mass. 577; Wylly *v.* Collins, 9 Ga. 223.

[2] Everett *v.* Drew, 129 Mass. 150.

[3] Taylor *v.* Davis, 110 U. S. 330; Hadlock *v.* Brooks, 178 Mass. 425, p. 438; Mayo *v.* Moritz, 151 Mass. 481. *Supra*, p. 28.

[4] Hussey *v.* Arnold, 185 Mass. 202.

[5] Shoe & Leather Nat. Bank *v.* Dix, 123 Mass. 148.

[6] Mulrein *v.* Smillie, 25 App. Div. (N. Y.) 135; New *v.* Nicoll, 73 N. Y. 127; Underhill, 346, n.

[7] Whittier *v.* Child, 174 Mass. 36; Chatham *v.* Rowland, 92 N. C. 340; Mannix *v.* Purcell, 46 Ohio St. 102, pp. 117, 147.

[8] Yerkes *v.* Richards, 170 Pa. St. 347.

[9] In re Armory Board, 60 N. Y. S. 882.

[10] Mason *v.* Pomeroy, 151 Mass. 164; Packard *v.* Kingman, 109 Mich. 497; North American Coal Co. *v.* Dyett, 7 Paige, 9; Wadsworth *v* Arnold, 24 R. I. 32; Roberts *v.* Hale, 124 Ia. 296.

a general agent[1] he may bind the funds invested in the business,[2] and if the authority is broad enough even the general assets of the estate.[3]

Describing himself "as trustee" is not in itself such an express provision as will ordinarily exempt the trustee from personal liability under the contract, or bind the trust estate.[4]

The general rule under which the creditor reaches the assets of the trust estate is that he succeeds to the trustee's right of indemnity from it.[5] Therefore his remedy is in equity.[6] The ultimate liability cannot be settled in a suit at law[7] nor could execution issue against the trust effects on a judgment against the trustee.[8]

The theory on which recourse to the trust assets is allowed makes a material difference. If the creditor must reach the trust assets through the trustee's right to indemnity, he is then subject to all equities or counter claims which the trust estate has against the trustee,[9] and he would then be obliged to make good any default of the trustee or pay his debt to the trust before receiving payment. The law seems to be settled thus in England.[10]

[1] Civ. Code S. Dak. § 1642; Rev. Code N. Dak. (1895) § 4289; Civ. Code Cal. (1903) § 2267.

[2] Burwell *v.* Mandeville's Ex'or, 2 How. 560; Smith *v.* Ayer, 103 U. S. 320, p. 330; Janes *v.* Walker, 103 U. S. 444.

[3] Packard *v.* Kingman, 109 Mich. 497; North American Coal Co. *v.* Dyett, 7 Paige, 9; Wadsworth *v.* Arnold, 24 R. I. 32; Roberts *v.* Hale, 124 Ia. 296; Mason *v.* Pomeroy, 151 Mass. 164.

[4] Shoe & Leather Nat. Bank *v.* Dix, 123 Mass. 148; Taylor *v.* Davis, 110 U. S. 330. *Supra*, p. 28.

[5] In re Johnson, 15 Ch. Div. 548; Dowse *v.* Gorton, 40 Ch. Div. 536; Connally *v.* Lyons, 82 Texas, 664; Mitchell *v.* Whitlock, 121 N. C. 166; Mulrein *v.* Smillie, 25 App. Div. (N. Y.) 135.

[6] Mason *v.* Pomeroy, 151 Mass. 164.

[7] Hampton *v.* Foster, 127 Fed. 468; Diamond *v.* Wheeler, 80 App. Div. (N. Y.) 58; Foote *v.* Cotting, 80 N. E., 600 (Mass. 1907).

[8] Odd Fellows Hall Assn. *v.* McAllister, 153 Mass. 292, p. 297.

[9] Cases cited in notes 4 and 5.

[10] In re Johnson, 15 Ch. Div. 548; Dowse *v.* Gorton, 40 Ch. Div. 536.

In this country the law seems to be still unsettled.[1] In Georgia, the creditor was allowed to go directly against the trust assets in a suit in equity,[2] and in Vermont, in a similar suit which seems to go to the extreme limit:[3] the trustees being out of the jurisdiction, the creditor was allowed a lien on the trust effects for repairs.[4]

Maintenance and Support. — The trustee has a general power incidental to his office to maintain and support his beneficiary. The power is coextensive with the duty, which is treated elsewhere.[5]

He very commonly also has a special power given him to apply the income of the property to the maintenance and support of the beneficiary, instead of paying it to him directly, the object being to enable the beneficiary to enjoy the property in spite of his creditors. The extent to which a valid power of this kind can be granted is treated later.[6]

This special power is usually discretionary to the fullest extent, the trustees being given the power to select the persons to whom the income is to be paid or to accumulate it in their discretion.

In such a case none of the possible recipients is entitled to anything, or has any real interest in the trust;[7] and so long as the trustee applies the income within the limits assigned, the court will not inquire into his motives or revise his acts.[8]

If, however, he is prejudiced and cannot fairly exercise the power, he may be removed from his office of trustee, and this is the only remedy the beneficiary will have, and he is interested to that extent.[9]

[1] Mason *v.* Pomeroy, 151 Mass. 164, p. 167.
[2] Wylly *v.* Collins, 9 Ga. 223.
[3] Underhill, 346, 347, n.
[4] Field *v.* Wilbur, 49 Vt. 157.
[5] *Infra*, p. 79; *supra*, pp. 61, 62.
[6] *Infra*, pp. 136 *et seq.*
[7] But see below.
[8] *Supra*, pp. 61, 62.
[9] Wilson *v.* Wilson, 145 Mass. 490. But it has been held that the court can compel the trustee to act or execute the trust itself. Blythe *v.* Green, 38 Atl. Rep. 743 (N. J. Ch.). Discussed *supra*, pp. 61, 62.

In such trusts the court considers that the power should be exercised primarily for the support of the beneficiary,[1] but it will only interfere to remove a trustee who acts from caprice or mere whim, or from improper and selfish motives, instead of discretion and judgment, and not to revise his acts.[2]

So, too, a power is often expressly given to apply such part of the principal as either the trustee, or in many cases as the beneficiary, may deem necessary for his comfort and support.[3] The amount spent by whoever has the power of deciding what is needed "must be founded on a reasonable judgment, dealing with existing facts and reasonable anticipations of the future, and having a due regard for the purposes for which the power was given, and also for the rights of those whose interests are injuriously affected by its exercise";[4] and an exercise of such a power to draw all the funds out of the trust so as to effect a revocation is not a good exercise of the power, and void.[5]

The general power to support a beneficiary incapable of acting for himself is also in a large measure discretionary in its execution, and where exercised reasonably will not be reviewed by the court,[6] although in some jurisdictions the court claims the power to review the

[1] May *v.* May, 109 Mass. 252.

[2] Wilson *v.* Wilson, 145 Mass. 490, 492. This rule is weakened. *Supra*, p. 55.

[3] Brown *v.* Berry, 71 N. H. 241.

[4] Barker, J., in Lovett *v.* Farnham, 169 Mass. 1, 6; Brown *v.* Berry, *ut supra*. *Supra*, pp. 62, 63.

[5] Same case, and cases cited; Reade *v.* Continental Trust Co. 48 App. Div. (N. Y.) 632. *Supra*, p. 63.

[6] Bradlee *v.* Andrews, 137 Mass. 50; Hills *v.* Putnam, 152 Mass. 123; Collister *v.* Fassitt, 163 N. Y. 281; Greene *v.* Smith, 17 R. I. 28. In this last case income was payable to a woman "for her use" as support, and the court held that the trustees must exercise a sound discretion in paying her such reasonable amounts as she could spend for that purpose.

trustee's action,[1] and it will interfere where the trustee makes no payments at all.[2]

In the case of an infant, where the question arises as to spending any part of the principal, it is more prudent to take the direction of the court; as although it may authorize an expenditure of principal it is said that it will not ratify one;[3] but in those jurisdictions where the courts give the trustee a large discretion it would probably ratify any expense it would have authorized.[4]

The interest of the beneficiary, and not the accumulation of income for the benefit of the remainderman is the chief consideration,[5] and the trustee may provide such comforts and luxuries as are suitable to the condition in life of the beneficiary, and he is capable of enjoying; as, for instance, making a home for his father or mother;[6] keeping a horse;[7] or providing expensive farm buildings or gifts to charity where the fortune is ample.[8] Where the insane life tenant is represented by a guardian, he is entitled to the whole income, not merely to what is needed.[9]

If there are more beneficiaries than one entitled to support, the question whether they are entitled to equal support, or whether the trustee may apportion among them according to their needs, is to be determined by the intention of the maker of the trust as gathered from the instrument.

If the income is settled on a class of persons whose circumstances are the same[10] or if an equal division of

[1] Owens *v.* Walker, 2 Strob. Eq. 289; McKnight *v.* Walsh, 23 N. J. Eq. 136. *Supra*, pp. 62, 63.

[2] Collins *v.* Serverson, 2 Del. Ch. 324; Aldrich *v.* Aldrich, 12 R. I. 141. *Supra*, p. 62.

[3] Ga. Code (1895), § 3185.

[4] Williams *v.* Smith, 10 R. I. 280, 283.

[5] May *v.* May, 109 Mass. 252.

[6] McKnight *v.* Walsh, 23 N. J. Eq. 136.

[7] Owens *v.* Walker, 2 Strob. Eq. 289.

[8] Langton *v.* Brackenbury, 2 Colly. 446.

[9] Gasquet *v.* Pollock, 1 App. Div. (N. Y.) 512.

[10] Stephenson *v.* Norris, 107 N. W. Rep. 343 (Wisc. 1906). *Supra*, p. 62.

property in general was intended,[1] the amount expended must be equal.

If there is sufficient income, and one beneficiary needs a larger expenditure than the others, the trustee should take the largest amount actually expended and make up to those whose needs are not so great, by setting aside for those individuals a sufficient sum to bring the amount distributed to them up to the largest amount expended, and only the balance will be added to principal.

If, however, there is an express or implied intention to give the trustee the power to expend the income according to the needs of the several beneficiaries, he must ascertain those needs, expend accordingly, and accumulate the whole balance.[2]

Miscellaneous. — Besides the general powers, and common special powers above treated, trust instruments often contain other special powers too numerous to treat, especially as the mode of execution is generally carefully provided for by the instrument, and also because they are governed by the general principles set forth above.

In England a power of revocation will be inserted in a voluntary settlement, and its absence is ground to set it aside; but such is not the law in America,[3] even where the special motive for creating the trust has disappeared.[4] A power of drawing the principal as needed for support will not authorize the drawing of all the principal, so as to effect a revocation of the trust.[5]

Powers to appoint a successor in office or to terminate the trust are not infrequent.

[1] Williams *v.* Bradley, 3 Allen, 270; Jones *v.* Foote, 137 Mass. 543; Jackman *v.* Nelson, 147 Mass. 300; Harte *v.* Tribe, 18 Beav. 215.

[2] In re Coleman, 39 Ch. D. 443.

[3] Taylor *v.* Buttrick, 165 Mass. 547; Lawrence *v.* Lawrence, 181 Ill. 248.

[4] Keyes *v.* Carleton, 141 Mass. 45; Brown *v.* Mercantile Trust Co., 87 Md. 377. See, *contra*, Chestnut Nat'l Bank *v.* Fidelity Ins. & Trust Co., 186 Pa. St. 333 (disapproved in preceding case).

[5] *Supra*, p. 80.

IV. DUTIES.

The trustee's duty is to carry out the provisions of the trust instrument, hence he must make himself thoroughly familiar with its provisions and follow them out accurately.

As we have already seen, the trustee is the absolute owner of the property, except in so far as his ownership is modified by his duties to the beneficiaries. These duties are not limited to the disposition of the property for his benefit, but an individual in assuming the character of a fiduciary or trustee for another immediately enters into a status with respect to that other which modifies their relationship as individuals, and places on the trustee a large number of duties to his beneficiary outside of and beyond the questions affecting the trust property.

His duties are to all the beneficiaries collectively, and he is bound to treat them all with equal justice.

First, we will treat of the duties which a trustee owes his beneficiary aside from the management of the property.

Support. — If the beneficiary is under a disability, it is the trustee's duty to see that he has proper care and support. If insane, it is his duty to have him declared so; [1] and if incapable for any reason, to maintain and support him out of the funds which he would otherwise pay over to him, and accumulate any balance not needed.[2] He cannot use funds the person would not be entitled to otherwise,[3] and an act of the legislature authorizing him to use the principal for the support of the life tenant is unconstitutional and void.[4]

[1] Nelson *v.* Duncombe, 9 Beav. 211. *Supra*, p. 75.

[2] As to discretion in deciding amount of support, see pp. 61, 62 *supra*.

[3] Lee *v.* Brown, 5 Ves. Jr. 362, but now in England by statute may advance support to an infant contingently interested (Re George, 5 Ch. D. 837) where an estate becoming vested he would be entitled to the accumulations.

[4] Ervine's Appeal, 16 Pa. St. 256.

The support is to be taken wholly from income except in a case where the property is absolutely vested in the beneficiary, in which case the court may make an allowance from principal;[1] but the trustee should not do so without an order from the court.[2]

The matter of support is often complicated by the fact that others may have a duty to support the beneficiary, in which case the trustee is excused.

Thus, if the parent be alive and able to furnish support adequate to the minor's condition and fortune, the trustee should not contribute except under order of court;[3] if the parent cannot furnish sufficient support, the trustee should contribute sufficient to make reasonable support, taking all sources together, and if there are two funds to be drawn from they should be taxed ratably. Where, however, a fund is given to trustees to use in their discretion for the support of an insane person, they may take all his support from that fund irrespective of his other means:[4] and if the settlement be on the father as trustee to support his child, the settlement being in a certain sense for the benefit of the father, he may take the whole support from the trust funds irrespective of his own ability;[5] and if the income is to be paid to a father or mother for the support of a child, they are entitled to it so long as they support the child, but the court will see that they do so.[6]

It is the duty of a father, or a mother not under coverture,[7] to support a minor child who is not taken from his

[1] Brown *v.* Berry, 71 N. H. 241.

[2] *Supra*, pp. 79, 80. In re Bostwick, 4 Johns. Ch. 100.

[3] McKnight *v.* Walsh, 23 N. J. Eq. 136; Perry, § 612; Flint, § 190; Lewin, 653; Underhill, 350.

[4] Hills *v.* Putnam, 152 Mass. 123.

[5] Nat'l Valley Bank *v.* Hancock, 100 Va. 101.

[6] Chase *v.* Chase, 2 Allen, 101; Loring *v.* Loring, 100 Mass. 340.

[7] Dedham *v.* Natick, 16 Mass. 135; Gleason *v.* Boston, 144 Mass., 25; Wilkes *v.* Rogers, 6 Johns. 566; Alling *v.* Alling, 52 N. J. Eq. 92; Underhill, 350, n.

or her care; but a stepfather or a mother under coverture has no such duty.[1] A husband must support his wife.

The trustee must handle the funds himself, and not delegate the management of the funds for support to another, as e. g., he must not delegate the duty to the father.[2]

Under the existing statute law married women, except in their relations with their husbands, generally have the same status as other individuals,[3] and the trustee has no peculiar duty to them except in preventing the husband from reducing his wife's property to possession, in which case he should protect her rights.

Contracts with Beneficiary. — Where the beneficiary is of full legal capacity, the trustee may deal with and make binding contracts with him, even concerning the trust property. He cannot, as in dealing with a stranger, take advantage of his peculiar knowledge or position, either for his own profit or for the profit of the other beneficiaries;[4] but if he gains any advantage in the transaction he will be under the burden of showing that the beneficiary was fully informed and thoroughly understood the matter, and that he, the trustee, has taken no advantage of his position or influence, or the transaction may be disaffirmed.[5] In other words, any transaction with a beneficiary in which the trustee receives a benefit is pre-

[1] Alling *v.* Alling, 52 N. J. Eq. 92.

[2] Flint, § 191; but Perry, § 620, says he may exercise sound discretion in paying to parent or guardian, and the same rule applies in payments to the beneficiary himself. See Greene *v.* Smith, 17 R. I. 28. *Supra*, 80, n. 6.

[3] Taylor *v.* Buttrick, 165 Mass. 547; Jackson *v.* Von Zedlitz, 136 Mass. 342.

[4] Lindington *v.* Patton, 111 Wisc. 208.

[5] Bowker *v.* Pierce, 130 Mass. 262; Field *v.* Middlesex Banking Co., 77 Miss. 180; Barrett *v.* Hartley, 2 L. R. Eq. 789. But the beneficiaries' creditors cannot disaffirm. Bresee *v.* Bradfield, 99 Va. 331.

sumed to be fraudulent, and the burden of proving it otherwise falls on him.[1]

The rule is the same whether the transaction concerns the trust proper or property outside of the trust.

If, for instance, a trustee sells to the trust fund a mortgage for more than the property is worth, and afterwards induces his beneficiary, relying on his representations, to allow him to buy in the property on foreclosure to prevent loss, the beneficiary may disaffirm the purchase and require the trustee to take the property and refund the money, if he acts as soon as he discovers the misrepresentations.[2]

The trustee may accept professional employment from the beneficiary, as that of attorney, broker, or counsel in other than trust matters, but if he takes compensation must show that he has not used his position to obtain the employment.[3]

It is said that a trustee may not receive a gift from a beneficiary,[4] but with the limitations specified as to other transactions, there seems to be no reason why a spontaneous present, especially if of small value, should not be given and accepted. Still such transactions, being subject to suspicion, are better wholly omitted.

Duties in Exercise of Office — Good Faith. — A trustee is bound to exercise the utmost good faith in all the concerns of the trust,[5] whether it be in dealing with the trust property itself, or with the beneficiary in matters concerning the trust. His fealty is to the trust, and all his acts must be governed by strict loyalty to it and the

[1] Cal. Civ. Code (1903), § 2235; Rev. Civ. Code, So. Dak. (1903) § 1624; Rev. Code N. Dak. (1895) § 4271. *Supra*, 32.

[2] Nichols, Appellant, 157 Mass. 20.

[3] As to professional employment in trust matters, see *supra*, p. 34.

[4] Vaughton *v.* Noble, 30 Beav. 34.

[5] Cal. Civ. Code (1903), § 2228; Rev. Civ. Code, So. Dak. (1903) § 1617.

interests of the beneficiaries;[1] and any act which is not in the interest of the beneficiaries is a breach of trust.

He cannot make any profit out of the use of the trust property, or get any advantage, direct or indirect, by its purchase or sale.[2] Even where the trustee honestly believes that the intention of the maker of the trust was otherwise, he must do nothing to prejudice the interest of his beneficiaries,[3] and in a suit for a conveyance he cannot set up a superior title.[4] He must not divulge a defect in the title, nor admit the adverse claim of another,[5] nor deny the power of the settlor to create the trust,[6] or set up an adverse claim himself, or accept an adverse employment.[7] He must yield all controversy; if he has an adverse interest when he accepts the trust[8] or if he subsequently buys one he cannot set it up against the trust.[9] If he accidentally acquire an adverse interest which he intends to assert, he must resign the trust, unless the beneficiaries are informed and consent to his retention of the office.[10]

He must not come in competition with the trust estate,[11] and if he has demands both as an individual and trustee[12] against the same person, he must appropriate any sum he collects ratably between the two claims.[13]

His Duty is All to the Trust. — In the management of the fund, the trustee's duty is wholly to his trust; and

[1] Perry, § 434.
[2] Hayes *v.* Hall, 188 Mass. 510. *Supra*, p. 32.
[3] Ellis *v.* Barker, L. R. 7 Ch. 104; Reid *v.* Mullins, 48 Mo. 344.
[4] Neyland *v.* Bendy, 69 Tex. 711.
[5] Thomas *v.* Bowman, 30 Ill. 84.
[6] Sterling *v.* Sterling, 77 Minn. 12.
[7] Benjamin *v.* Gill, 45 Ga. 110; Civ. Code Cal. (1903), § 2230.
[8] His bondsman is liable for money he owes the trust when he accepts it. Bassett *v.* Fidelity & Deposit Co., 180 Mass. 210.
[9] M'Clanahan *v.* Henderson, 2 A. K. Marsh. (Ky.) 388; 12 Am. Dec. 412; Bourquin *v.* Bourqnin, 110 Ga. 440.
[10] Stone *v.* Godfrey, 5 DeG., M. & G. 76. [11] *Supra*, p. 34.
[12] Rev. Civ. Code, So. Dak. (1903) § 1621.
[13] Scott *v.* Ray, 18 Pick. 360.

he must do all that can be honestly done for the furtherance of its interests.

In the case of a demand he must press it by suit, unless it is evident that nothing can be gained.

In defending suits he should take all good ground that he has, and claim all exceptions.[1]

It is not his duty to appeal from an adverse decision, though he may do so in exercise of a sound discretion and under good advice; but if a decision in his favor is appealed from he must maintain his suit,[2] and he should not compromise unless it is clearly for the benefit of the trust;[3] and if he have security, he must not release it, or part of it, without adequate consideration.[4]

Trust cannot be Delegated. — In theory a trust is a personal confidence, that is to say, the beneficiary has a right to compel the individual who is trustee to perform the trusts himself. The trustee cannot turn over the whole trust to another, as is exemplified in the case of Winthrop *v.* Attorney General,[5] where the trustees of a fund for the support of a museum at Harvard College were refused leave to turn the fund over to the general fund of the College, the income to be accounted for to them.[6] Nor can the trustee delegate any part of his duties or powers; his duty is to exercise the powers and discretion himself,[7] and if he permits another to act in his place he does so at his peril,[8] for the law does not recognize a passive trustee.[9] Thus, where two trustees divided the trust and each managed a half, one was held liable

[1] Amer. & Eng. Encyc. Law, vol. 27, pp. 155–157.

[2] Wood *v.* Burnham, 6 Paige, 513.

[3] Lewin, p. 666.

[4] *Supra*, pp. 75, 76, as to conduct of suits.

[5] 128 Mass. 258.

[6] See also Morville *v.* Fowle, 144 Mass. 109.

[7] Graham *v.* King, 50 Mo. 22. *Supra*, pp. 56, 57.

[8] Bostock *v.* Floyer, L. R. 1 Eq. 36; Jones's Appeal, 8 Watts & S 143.

[9] Clark *v.* Clark, 8 Paige, 153.

for the half lost by the other.[1] But where the duties cannot be jointly exercised they may make a reasonable apportionment of them, and neither will be liable for the loss of funds or neglect of the other.[2]

In practice, it is usual for one trustee to assume the active management of the property.[3]

As noted above (p. 56), trustees are joint tenants; accordingly one of them alone may demand and receive interest, rents, dividends, and some other sums of money. In the absence of any knowledge of unfitness, the other trustees may permit one of their number to exercise these powers, and will not be liable if he abuses them.[4]

It would be impossible, and it is generally unreasonably inconvenient for all the trustees to join in the active management of the property; hence, provided that all the trustees exercise a general supervision over the trust affairs,[5] and "fulfil the purposes of the trust with ordinary care and diligence," [6] they may permit one of the number to take the general custody and management of the trust estate.[7] They would not be justified in placing the property wholly beyond their control,[8] or in leaving the funds for an unreasonable time in the hands of their cotrustee [9] or neglecting to exercise a reasonable oversight over his actions.[10]

A distinction should be drawn between the management of income and principal, — it being customary and

[1] Graham *v.* Austin, 2 Gratt. 273.

[2] State *v.* Guilford, 18 Ohio, 500; Kilbee *v.* Sneyd, 2 Molloy, 186.

[3] Jones's Appeal, 8 Watts & S. 143. *Infra*, p. 148.

[4] State *v.* Guilford, 18 Ohio, 500; In re Mallon's Estate, 43 Misc., Rep. (N. Y.) 569. *Infra*. p. 149.

[5] Jones's Appeal, 8 Watts & S. 143.

[6] Dover *v.* Denne, 3 Ont. L. R. 664; Rev. Civ. Code So. Dak. (1903), § 1637; Rev. Code N. Dak. (1895), § 4284.

[7] Colburn *v.* Grant, 181 U. S. 601; Perry, § 409.

[8] Evans Estate, 2 Ashmead, 470. *Infra*, pp. 104, 105, 148.

[9] *Infra*, p. 103.

[10] Jones's Appeal, 8 Watts & S. 143. *Infra*, p. 149.

probably justifiable for one trustee to collect and disburse the former, but not the latter; and a trustee who allowed his cotrustee to collect a large amount of principal and let it lie unmolested in his hands would be liable for its loss.[1]

An agent may be allowed to collect dividends and rents, and keep the books, and in general act for the trustees wherever there is a moral or legal necessity to employ an agent.[2] Such a necessity exists where the ordinarily prudent man of business would employ an agent in his own affairs, as, for example, employing a stockbroker to purchase stocks, and paying for them through him.[3] In such cases the trustee will not be liable for the default of the agent, but only for his care in selecting him;[4] as again, for instance, a trustee who has employed a good conveyancer is not responsible for a flaw in the title which he overlooked.[5]

The employment of one of the trustees or an agent in such cases is not a delegation of the trust, but is the lawful act of the trustees by the hand of another. The difference between a delegation of the trust itself and the performance of a ministerial act by an attorney may be illustrated in the case of a sale of land.

The trustees could not delegate the matter of making the sale — that is, determining the price, terms, and whether it was better or not to sell or adjourn the sale — to one of the trustees,[6] but they might authorize one of the trustees to execute and deliver the deed for them, after they had determined the matter of the sale.

Again, the trustees could not give an agent or one of

[1] *Infra*, pp. 103, 149.

[2] Ex parte Belchier, Amb. 219.

[3] Speight *v.* Gaunt, 22 Ch. D. 727.

[4] Lewin, 268, n.; Speight *v.* Gaunt, 22 Ch. D. 727; Ex parte Belchier, Amb. 219. *Supra*, p. 57.

[5] *Contra*, Hopgood *v.* Parkin, 11 Eq. 74. But see criticism on this case, Underhill, p. 300, § 8.

[6] Graham *v.* King, 50 Mo. 22. *Supra*, p. 55.

their number a general power of attorney to sell stocks; but they might give a special power to transfer a particular stock. In the first instance the trustees are delegating their power to sell, which is a delegation of the trust; in the latter case they are employing an agent to make a transfer, which is a purely ministerial act.[1]

Accounts. — If the trust is a testamentary one, the trustee will be required to file an inventory (by statute in practically all the States) soon after his appointment.

A trustee must keep accurate and separate accounts of the trust, which should be always open to the inspection of the beneficiary, even if kept in a book with other accounts.[2] If the account is inaccurate or obscure, the trustee is the loser, since everything will be taken against him.[3]

A court of equity may compel any trustee to account,[4] but as a general rule the jurisdiction is given to probate courts by statute.

A testamentary trustee is entitled to a periodical settlement of accounts with his beneficiaries, and to a formal discharge or settlement in court, but he is not entitled to a release under seal.[5]

In England, under the trustee's relief act, any trustee can account and pay money into court;[6] but in the absence of statute in America there seems to be no general jurisdiction in the court to compel the beneficiary to come in and settle his account.[7]

[1] *Supra*, p. 57.

[2] Hopkinson *v.* Burghley, L. R. 2 Ch. 447.

[3] Landis *v.* Scott, 32 Pa. St. 495; Blauvelt *v.* Ackermann, 23 N. J. Eq. 495.

[4] Weaver *v.* Fisher, 110 Ill. 146; Mass. Pub. Stat. (1882), ch. 144, § 15; Report of Commissioners to revise Public Statutes (1901), p. 1311, n. 1, and *passim;* Hayes *v.* Hall, 188 Mass. 510, p. 512.

[5] King *v.* Mullins, 1 Drew. 308. *Infra*, p. 142.

[6] In re Wright's Trusts, 3 K & J. 419, 421.

[7] But see Hayes *v.* Hall, *ubi supra*.

All the trustees must join, and if one trustee allows another to render a fraudulent account, he is liable as a party to it.[1]

All the beneficiaries are necessary parties.[2]

If the trustee holds by appointment of the court, he will be required to settle his account in court at stated intervals.[3] In such cases he need not render any other account, and the beneficiary must come into court to settle.

If the trustee does not hold under appointment of court, he should settle his accounts yearly, or as often as the settlement requires.

If a trustee dies, the survivors will settle the account; and if a sole trustee dies, his executor or administrator may do so, although he does not succeed him in the trust.[4]

Form of Account. — The trustee's account is intended to show the condition of the estate, and does not involve the trustee's personal account with the remainderman or with other trusts.[5]

The account must show every transaction in detail, and include a list of property in the hands of the trustee. He must charge himself with each item received, and credit himself with every item lost, expended, or paid out, and ask to be allowed for the same. In accounting to a court he need not include in his account real estate, or the rents from real estate which lies in another jurisdiction,[6] but only the surplus brought into the jurisdiction of the court.[7]

The court in which the account is settled will prescribe the form in which the account will be made; but in every

[1] *Infra*, p. 149.
[2] Leonard *v.* Pierce, 94 App. Div. (N. Y.) 266. *Infra*, p. 94.
[3] Provided for by statute in most States.
[4] Munroe *v.* Holmes, 13 Allen, 109.
[5] Dodd *v.* Winship, 133 Mass. 359.
[6] Morrill *v.* Morrill, 1 Allen, 132.
[7] Clark *v.* Blackington, 110 Mass. 369. *Infra*, p. 192.

trust account there should be at least six schedules, viz.: income received, income paid, additions to principal, deductions from principal, principal on hand, and changes in investments consisting of debtor and creditor sides.

The income received should contain all the sums to which the life beneficiary is entitled, and the income paid all the charges against him.

The changes in investment should contain on the debtor side all the amounts received as principal for the remainderman, beginning with any balance of cash on hand; and on the credit side, all the amounts paid out as principal; and these two accounts should balance.

If there has been any gain to the principal, as by income added, or sale of a security above its cost, or the recovery of an amount not shown in the inventory or previous accounts, it should appear in the schedule of additions to principal.

The schedule of deductions from principal will be made of similar items of loss and of any charges against the remainderman.

The schedule of principal on hand should enumerate each item of the trust property with its cost, either actual or appraised, carried out; and the schedule of the current year will always equal that of the previous year, after adding the schedule of additions and deducting the schedule of deductions.

The form of account given above is that used in the courts of many States, but in some States the schedules of changes and additions and deductions are not put in, but all amounts received as principal are charged, and all amounts paid out of principal are credited, and the difference in amount between these two schedules will be the difference between the schedule of the current and preceding year.

The account should be accompanied by proper vouchers for all payments.[1]

[1] Willis *v.* Klymer, 66 N. J. Eq. 284.

Effect of an Account. — The settlement of trustees' accounts in court is generally governed by the statutory law, which varies with the various jurisdictions; and the statutes of the jurisdiction where the account is settled should be carefully studied. In general an account settled in court is final [1] as to all persons who are parties to the proceedings,[2] but not as to other persons.[3] Minors may be represented by a guardian *ad litem*,[4] and statutes commonly exist by which persons unborn or unascertained can be similarly represented.[5]

Such a settlement can only be set aside to correct a fraud or mistake,[6] and cannot be questioned in a collateral proceding, either at law [7] or in equity.[8]

If an account is corrected, all persons interested will get the benefit of the correction.[9]

Probate courts are peculiar, as they have jurisdiction over the property itself as well as the parties. Hence judgments of a probate court do not depend on the parties to the suit, but are final as to the disposition of the matter in controversy,[10] provided the notice required by the court is given, and that notice is sufficient to cover the constitutional requirements of "due process of law."

In Indiana and Massachusetts, by peculiar statute law, when an account is filed in the probate court all former accounts of the same accountant may be reopened, except

[1] Amory *v.* Lowell, 104 Mass. 265, p. 272; Stetson *v.* Bass, 9 Pick. 26, 29; In re Elting, 93 App. Div. (N. Y.) 516.

[2] Foster *v.* Foster, 134 Mass. 120.

[3] Kendall *v.* DeForest, 101 Fed. R. 167.

[4] Jenkyns *v.* Whyte, 62 Md. 427.

[5] Mass. Rev. Laws (1902), ch. 150, § 22. A statute seems to be necessary. Morse *v.* Hill, 136 Mass. 60, p. 67.

[6] Dodd *v.* Winship, 144 Mass. 461; Aldrich *v.* Barton, 138 Cal. 220.

[7] Parcher *v.* Russell, 11 Cush. 107.

[8] Lever *v.* Russell, 4 Cush. 513.

[9] Bennett *v.* Peirce, 188 Mass. 186. *Infra*, pp. 159–160.

[10] Loring *v.* Steineman, 1 Met. 204; Minot *v.* Purrington, 190 Mass. 336; Harris *v.* Starkey, 176 Mass. 445.

as to matters which have been heard and determined;[1] and as to these matters the accounts may be reopened to correct a fraud or mistake, but not to correct the judgment of the court.[2] Notice is construed to mean "actual notice," and a settlement is only conclusive in the case of a final account.[3]

A successor in a trust is not accountable for the faults of his predecessor, yet as the state of the funds may be affected by his act, the successor's duty may require him to investigate his predecessor's acts, reopen his accounts, and recover from him or his estate.[4]

If a beneficiary had an estate in possession and has assented to the account,[5] or has neglected for a long period to enforce his rights, the court will not help him, although there is no statute of limitations to bar him.[6]

If the account is not settled in court, the settlement is final in so far as the account is assented to by persons interested and able to act for themselves, and may be reopened even by them to correct mistakes of fraud,[7] but in so far as fairly made is binding on all who take part in it, even though it cover a breach of trust.[8]

The Expense of Accounting. — It is the trustee's duty to make up an account; therefore ordinary compensation covers the making up of the account, but any court charges will be borne by the trust estate, unless the trustee was at

[1] Foster *v.* Foster, 134 Mass. 120.

[2] Burns's Annot. Stat. Ind. (1901), § 2559; Mass. Rev. Laws (1902), ch. 150, § 17. But see as to Massachusetts, Acts 1907, ch. 438.

[3] Parker *v.* Boston Safe Deposit & Trust Co., 186 Mass. 393, 396.

[4] Blake *v.* Pegram, 109 Mass. 541; Bennett *v.* Pierce, 188 Mass. 186; Ex parte Geaves, 8 DeG., M. & G. 291; Kendall *v.* DeForest, 101 Fed. R. 167.

[5] Amory *v.* Lowell, 104 Mass. 265.

[6] *Infra*, p. 177.

[7] Bassett *v.* Granger, 140 Mass. 183.

[8] *Infra*, p. 176; Amory *v.* Lowell, *ubi supra*.

fault in not accounting, in which case he may be ordered by the court to pay the costs.[1]

Where the Trustee is in Doubt as to his Duty. — When a trustee is in doubt as to his duty, he may notify the beneficiary of his intended action, and if he does not object he will not be heard to do so at a later date;[2] and where the beneficiaries are of full capacity, although there is no obligation on him to do so, yet it is undoubtedly a prudent plan for the trustee to consult his beneficiaries before taking any important step,[3] but generally this mode of procedure will only protect the trustee against the life beneficiaries, and so is incomplete. If therefore there is a doubt as to what the trustee's duties are, he can and should apply to the court for instructions;[4] but he cannot consult the court simply because he is ignorant and does not know his duty or what the law is. In such case, the court may tell him to take advice,[5] and if he involves the estate in unnecessary litigation he may have to pay costs. But where a question arises as to the proper construction of the settlement, or a determination between conflicting claims[6] is necessary, he may refer the matter

[1] Blake *v.* Pegram, 109 Mass. 541, 558; Chisholm *v.* Hammersley, 100 N. Y. S. 38. *Supra*, p. 35; *infra*, p. 142. In England, and where the trustee acts without compensation, the fund would bear the expense of accounting, but the expense of furnishing an unnecessary account must be borne by the person requiring it. Re Bosworth, 58 L. J. Ch. 432.

[2] Life Association of Scotland *v.* Siddal, 3 DeG., F. & J. 58, 74.

[3] Bradby *v.* Whitchurch, W. N. 1868, p. 81.

[4] Generally, but by statute sometimes. Rev. Stat. Ohio (1904), § 6202; Pub. Stat. N. H. (1891), ch. 198, § 10; Holland Trust Co. *v.* Sutherland, 65 App. Div. (N. Y.) 252. In Pennsylvania the court held that it had no such jurisdiction, but that the result might be reached by a fictitious account. In re Morton's Estate, 201 Pa. 269. In England the trustee can apply to the court for instructions on nearly any question by an order in chambers. Bissell, The Duties and Liabilities of Trustees, 78.

[5] Greene *v.* Mumford, 4 R. I. 313; Underhill, 436, n.

[6] Hills *v.* Putnam, 152 Mass. 124.

to the court and will be protected by its determination. He may ask its instructions as to a compromise,[1] sale or investment of the trust property,[2] or on such a question as the apportionment of a fund between the life tenant and the remainderman,[3] as, for instance, a stock dividend[4] or the apportionment of the expense of certain repairs.[5] In some jurisdictions he should consult the court before investing.[6]

Where, however, he is given a discretionary power in the matter, the court will not interfere since he is the forum and not it.[7] Nor could he use this method of determining a question at law, as, for instance, what is his liability to a creditor or for a tax;[8] or what his powers and duties will be under a contemplated reorganization of a corporation;[9] nor if he contract under order of court will he be protected from personal liability, but will be only assured of indemnity from the trust fund.[10]

No application will be considered until the question is a practical one and must be decided. Hence a question as to who will be entitled in remainder cannot be asked during the existence of the life estate,[11] and the distribution of a fund cannot be decided until the cash is in hand.[12]

The proper way to raise the question is by a bill for instructions, and not by a fictitious account.[13] An account

[1] Mass. Rev. Laws (1902), ch. 148, § 13; Chadbourn *v.* Chadbourn, 9 Allen, 173.

[2] Wheeler *v.* Perry, 18 N. H. 307.

[3] Edwards *v.* Edwards, 183 Mass. 581; De Koven *v.* Alsop, 205 Ill. 309.

[4] Hemenway *v.* Hemenway, 181 Mass. 406.

[5] Sohier *v.* Eldredge, 103 Mass. 345.

[6] Lowe *v.* Convocation of Prot. Ep. Church, 83 Md. 409; Peckham *v.* Newton, 15 R. I. 321.

[7] Rutland Trust Co. *v.* Sheldon, 59 Vt. 374. *Supra*, p. 77.

[8] Greene *v.* Mumford, 4 R. I. 313.

[9] Treadwell *v.* Salisbury Mfg. Co. 7 Gray, 393.

[10] *Infra*, p. 145.

[11] Bullard *v.* Chandler, 149 Mass. 532.

[12] Tuttle *v.* Woolworth, 62 N. J. Eq. 532.

[13] Lincoln *v.* Aldrich, 141 Mass. 342.

is meant to show the state of the estate, and is not for the trial of disputed claims.[1] All persons interested should be made parties ; [2] but when they are very numerous and every possible interest is adequately represented, the court may proceed with less.[3] If the suit is in the probate court it will be conclusive irrespective of the parties joined.[4]

The costs of all parties to the proceedings in ordinary cases will be borne by the principal of the estate,[5] but if the application was unnecessary the court may order the trustee to pay costs, and it may, in its discretion, refuse to allow even the expenses of the guardian *ad litem*, though such a course is unusual.[6]

V. MANAGEMENT OF FUND.

What may be Trust Property. — Any sort of property, real or personal, in possession or reversion, or any interest, whether vested or contingent, which can be assigned, may be the subject of a trust,[7] even though it be real estate outside of the jurisdiction of the court,[8] or something not actually in existence,[9] or trade secret or patent right, but trusts only extend to property, and not to such things as the performance of an act, such as the employment of a particular person as attorney or agent.[10]

Taking Possession. — On accepting a trust, it is the trustee's duty to inquire into the nature of the property

[1] Dodd *v.* Winship, 133 Mass. 359; New Eng. Trust Co. *v.* Eaton 140 Mass. 532.

[2] Wagnon *v.* Pease, 104 Ga. 417.

[3] Hills *v.* Barnard, 152 Mass. 67. [4] *Infra*, p. 143.

[5] Howland *v.* Greene, 108 Mass. 277, p. 285 ; Lowry *v.* Farmers' Loan & Trust Co., 172 N. Y. 137, p. 145.

[6] Stevenson *v.* Norris, 107 N. W. Rep. 343 (Wisc. 1906) ; Libby *v.* Todd, 80 N. E. 584 (Mass. 1907).

[7] Perry, §§ 67, 68. [8] Massie *v.* Watts, 6 Cranch, 148, 160.

[9] Mitchell *v.* Winslow, 2 Story, 630.

[10] Foster *v.* Elsley, 19 Ch. Div. 518.

and trust documents.[1] If he succeeds a former trustee, he must ascertain that he receives all the property that belongs to the estate, which will involve the examination of his predecessor's accounts so far as they are open.[2]

He is not bound to take the securities tendered him if they are improper investments, but may insist on having them converted into cash, or, at any rate, he need only take the securities at their actual value and then should collect the balance from the outgoing trustee.[3] If he takes the securities at their inventory value, he will be responsible for them at that price.

The same rule applies where he takes the estate from an executor. He must take immediate steps to secure the trust property and properly invest it. He will have an equitable action against a transferee of the legal title made before he became trustee.[4]

Real Estate. — If the appointment is an original one, the will or settlement will vest the title of the real estate in the trustee, and he must see that the instrument is recorded in every jurisdiction where there is any land.[5]

If the trustee comes in the place of a former trustee, the estate may vest in him by the terms of the trust instrument or by statute, in which case he must see that he is duly appointed or his appointment recorded in each jurisdiction where the land lies,[6] or if there is no provision in the instrument, and he is not appointed by a decree of court vesting the property in him, then he must take a conveyance and record it in each jurisdiction.

Having acquired title he should at once take possession, actual or constructive. If the real estate is let he

[1] Hallows *v.* Lloyd, 39 Ch. Div. 686, 691; Underhill, p. 219.

[2] *Supra*, p. 95. Ex parte Geaves, 8 DeG., M. & G. 291.

[3] In re Salmon, 42 Ch. Div. 351; Thayer *v.* Kinsey, 162 Mass. 232.

[4] Loring *v.* Salisbury Mills, 125 Mass. 138.

[5] Hext *v.* Porcher, 1 Strobh. Eq. 170.

[6] Cogbill *v.* Boyd, 77 Va. 450.

should take constructive possession by compelling the tenant to attorn, or acknowledge him as his landlord and agree to pay rent to him, or if there is no tenant he should take actual possession of the land.

If the beneficiary is in possession under the terms of the trust he need do nothing, as the beneficiary's possession is constructively the possession of the trustee.

Personal Property. — If the trustee is an original appointee under a deed, the personal property will probably be in the hands of the settlor, and it, or the evidences of it, should be delivered to the trustee when the settlement is made.

If the trustee joins in a deed acknowledging the receipt of the property, and does not as a matter of fact receive it, he will be liable for it as though he had received it, to any person acting on the face of his receipt.[1]

If the trustee is appointed under a will,[2] he may not be entitled to the personal property at once, as until the executors have administered the estate they are entitled to hold it; and where the same persons are trustees and executors, until they terminate the executorship by filing an account crediting themselves as executors with the trust property, and qualify as trustees, or do some other definite act showing a transfer, they will still remain liable as executors and will not hold as trustees.[3] "When a trust fund is to be created by an executor out of the assets of an estate, something more must be done by the the executor in order to impress the trust on particular property than to hold the property with the intention that it shall constitute the trust fund. There must be some act of appropriation which transfers it to the trust fund and gives the beneficiaries the right to have it held for them."[4]

[1] Low *v.* Bouverie, 3 Ch. D. (1891) 82. See *infra*, p. 145.
[2] See *supra*, p. 11.
[3] Crocker *v.* Dillon, 133 Mass. 91. *Supra*, p. 14.
[4] Knowlton, J., in Sheffield *v.* Parker, 158 Mass. 330, 333.

In the case of an incoming trustee it is his duty to examine the executor's accounts and ascertain that he obtains all the estate that he is entitled to.[1]

Although the provisions of the trust instrument or decree of the court may have the force of a written transfer, yet in the case of personal property a delivery of the property itself or of the evidence of it is essential, and in every case it is desirable where the property is such as not to pass by delivery simply, to have a written transfer from the former owner. But where the property is vested in the new trustee by force of statute or provision of the trust instrument, he, and not the former owner, is the proper person to transfer. Where there is no decree of the court, or no provision of the trust instrument vesting title, an assignment by the holder of the title is indispensable.

Registered bonds, notes, and certificates of stock should stand in the names of all the trustees, and should specify the trust under which they are held on their face, so that there can be no question as to its identity. To describe the holders as "trustees" merely is not sufficient, as it is not apparent to what fund the stock belongs, and no well advised purchaser will take a transfer of such a stock without further assurance.

The transfer should be made without delay: on a note by indorsement, and on a stock certificate or registered bond by indorsement and transfer on the books of the company.

If there is a chose in action or equity, the obligor should be notified at once;[2] as for instance a bank account, for although notice is not necessary to complete the title in some jurisdictions,[3] a payment of the claim or other novation of the security to the previous holder before notice will discharge the debtor.[4]

All claims which are due should be called in, unless

[1] *Infra*, pp. 127, 128.
[2] Ames, 327, n.
[3] Thayer *v.* Daniels, 113 Mass. 129.
[4] *Infra*, pp. 161–162.

they are such as constitute a proper trust investment; and if necessary the trustee should sue without delay, unless he can show that more is to be gained by forbearance,[1] not only for these, but for any of the trust property which he cannot obtain on demand, and he will have an equitable suit for property, of which the legal title has passed to a third person by a breach of his predecessor in the trust.[2]

Care and Custody of the Trust Property. — Assuming that the trustees have got title, and the property properly into their hands, their next duty is to take proper care of it.

Real Estate. — The trustee should immediately insure the real estate for a reasonable amount, should fence it if necesssary, and put it in a condition to be let, and thereafter he must keep the property insured,[3] fenced, and in repair, and pay the taxes on it.

If the property is unimproved he may improve it so as to secure a tenant, but, in the absence of special power from the trust instrument or court to do so, he must be careful not to convert the personal property of the estate from personal to real estate without authority in doing so, as by spending any cash that may be on hand or the proceeds of the sale of securities.

Personal Property. — Trust chattels are usually meant to be enjoyed in specie by the beneficiary, and may be

[1] Ames, 494, n. 1.

[2] Loring *v.* Salisbury Mills, 125 Mass. 138.

[3] Burr *v.* McEwen, Baldw. C. C. 154, and Eng. and Am. Encyc. of Law, vol. 27, p. 163, which states that the trustee must insure, although unsupported by the cases cited. But Davis, J., in Insurance Co. *v.* Chase, 5 Wall. 509, 514, and the cases in general and the English statute, Lewin, p. 314, and Perry, § 487, all say that a trustee *may* insure, but under modern conditions, where every prudent man does insure his own risks, it would seem that a trustee must insure, and he is usually required to do so by well drawn trust instruments.

turned over to him, and if he uses them up, lets, or destroys them, the trustee will not be liable; but the trustee should require him to sign an inventory when they are delivered.[1]

Where the use of the chattels is not given to the beneficiary, they should be converted into money,[2] unless they were to be held unconverted, in which case the trustee must keep the actual possession, and as several persons cannot conveniently hold them they may be left in the hands of one trustee.

Money should be deposited in a good bank in the joint names of all the trustees; and if it is deposited in the individual names, the trustees will be liable if it is lost, though without their fault, as by a failure of the bank or otherwise.[3]

All the trustees are responsible if they leave money for more than temporary purpose in the name of one.[4] And while it is customary and probably justifiable to permit one trustee to draw checks alone against an account which consists wholly of income, they should not permit large amounts of principal to lie in the bank subject to the draft of one of their number.[5]

But one trustee may be allowed to draw checks against income, since it is not unreasonable to allow one trustee to collect it.[6]

It was held in a case where there was a dispute, and consequently the funds could not be invested,[7] that the

[1] Dorr *v.* Wainwright, 13 Pick. 328; McDonald *v.* Irvine, 8 C. D. 101, 112.

[2] As to when a conversion is proper, see *infra*, p. 105.

[3] In re Arguello 97 Cal. 196; Ames, 484, n.; Corya *v.* Corya, 119 Ind. 593; Civ. Code Cal. (1903), § 2236, as amended by Acts of 1905, ch. 615; Rev. Civ. Code So. Dak. (1903), § 1625; Rev. Code N. Dak. (1895), § 4272.

[4] Monell *v.* Monell, 5 Johns. Ch. 283; 9 Amer. Dec. 298.

[5] Lewis *v.* Nobbs, L. R. 8 Ch. D. 591; Clough *v.* Dixon, 8 Sim. 594.

[6] Kilbee *v.* Sneyd, 2 Moll. 186. *Supra*, p. 56.

[7] Ames *v.* Scudder, 11 Mo. App. 166.

trustees were entitled each to hold half and pay interest thereon, and one becoming insolvent the other was not held liable, but it is somewhat doubtful whether this rule can be safely followed; it would seem more appropriate to deposit the money in a safe place in the joint names.

Non-negotiable stocks, registered bonds, notes, deeds, &c., may be left in the custody of one trustee,[1] or in case of necessity or propriety in the hands of an agent;[2] as for instance deeds could be left with a solicitor, or stocks with a stockbroker who is negotiating a sale; but if negotiable securities be left in the hands of an agent unnecessarily the trustees would undoubtedly be liable.[3]

Negotiable securities, and partially negotiable securities such as registered coupon bonds, should be deposited in a safe deposit vault, or where none is convenient at a banker's in a separate box, in the joint names of all the trustees. The question of how far the trustees are justified in allowing one of their number to have access to the box alone, cannot be considered as authoritatively determined. The general rule, that the trustee must use reasonable care, only postpones the question, as the question still remains whether allowing one trustee access alone is reasonable care. Mr. Justice Kekewich in a late case[4] expresses his own opinion strongly that negotiable securities should not be got at without the consent of the whole body; but Vice-Chancellor Wood, in a leading earlier case,[5] said that it was too much to say that ordinary prudence requires a box with three keys, and this latter dictum seems to accord more nearly with the general usage in this country.[6]

Where a bond could be registered, as most bonds may be, it would appear to be the trustee's duty to have it

[1] Dyer *v.* Riley, 51 N. J. Eq. 124.
[2] Jones *v.* Lewis, 2 Ves. Sen. 240.
[3] Matthews *v.* Brise, 6 Beav. 239.
[4] Field *v.* Field, L. R. 1894, 1 Ch. 425.
[5] Mendes *v.* Guedalla, 2 Johns. & Hem. 259, 278.
[6] In re Halstead, 44 Misc. Rep. (N. Y.) 176.

registered if he gives his cotrustee separate access to the securities.[1] In that case the coupons only remain negotiable, and as one trustee may collect income alone, he could be reasonably allowed separate control of these.[2]

There is no question that a trustee who should neglect for a long time to examine the securities, as for instance for four years,[3] or who should confide them to his co-trustee in an unusual manner,[4] would be liable.

In any event, it would seem a wise precaution to register bonds where possible, but the trustee is not bound to do so where it is not customary with prudent men to do so in caring for their own securities.[5]

In general a trustee is bound to take the same care of the trust property which any bailee is bound to take of the property put in his charge, or such care as a prudent man would take of his own.[6]

Conversion. — The form in which the property usually exists at the formation of the trust, in part at least, is not adapted to trust purposes; but is generally more adapted to the needs of the individual than to the requisites of successive estates.

An individual may be engaged in business, in a partnership, or in the management of his property for the purposes of gain, and rarely in this country has his property permanently invested without some regard to speculative value.

[1] Lewis *v.* Nobbs, L. R. 8 Ch. D. 591, 594.

[2] *Supra*, p. 56.

[3] Mendes *v.* Guedalla, 2 Johns. & Hem. 259, 277.

[4] Matthews *v.* Brise, 6 Beav. 239.

[5] The principal reason for holding bonds unregistered is to avoid transfer taxes, etc.

[6] In re Pothonier (1900), 2 Ch. 529. In this case the court instructed the trustees that the bonds might be deposited with bankers with authority to them to cut coupons, as such was the custom of prudent business men. There does not seem to be such a custom in this country.

Thus where the maker of a trust transfers a partnership, business risk, speculative or unproductive property, to a trustee, or in fact any property which the trustee would not be authorized to invest in under the terms of the instrument or prevailing law, he must immediately and without delay proceed to convert all such property into investments authorized by the terms of the trust, and will have the implied power to do so.[1]

Vacant land, even if it have a large prospective value, should be converted, since trust property should yield the usual income to the life tenant. All undivided estates should be converted, since the trustee has not the absolute control over them; leaseholds,[2] and all wasting investments, such as stocks in land companies and mines, &c., in which the principal is being consumed in dividends to the life tenant, should be converted into trust investments.

If the trustee delay beyond a reasonable time, he will be liable for any loss of the property.[3] Where the time within which the conversion is to be made is expressly left to his discretion, he will be protected in a reasonable use of his discretion, but must sell within a reasonable time.[4] The only safe rule is to sell promptly.[5]

On the other hand, if the settlor has provided for the continuation of his business, or the holding of his securities, or if he has left his property prudently and permanently invested, not with a view to speculation, the trustee should not convert it, unless the investments are such as he is forbidden to make by the terms of the settlement or by law,[6] since he is entitled to put confidence where the

[1] Kinmonth *v.* Brigham, 5 Allen, 270; Ames, 491, n.; Howe *v.* Lord Dartmouth, 2 White & Tudor, L. C. (5th ed.), 296 and note; Brown *v.* Gallatly, 2 Ch. App. 751. *Supra*, p. 65.

[2] Minot *v.* Thompson, 106 Mass. 583.

[3] Sculthorp *v.* Tupper, 13 L. R. Eq. 232.

[4] Marshall *v.* Caldwell, 125 Mass. 435; In re Smith (1896), 1 Ch. 171; In re Atkins, 81 Law T. (N. S.) 421, Ch. Div.

[5] In re Northington, 13 Ch. Div. 654.

[6] Harvard College *v.* Amory, 9 Pick. 446, 462.

settlor did, and the settlor has impliedly authorized these investments, and in some jurisdictions the trustee must go so far as to get an order of court to change the property from the form in which the testator left it.[1]

Thus, where the testator has left bonds that will sell for a large premium,[2] which therefore yield a very small return on the money invested, the trustee need not sell and reinvest. Nor will he be held responsible for not selling a stock at par, which afterwards became worthless,[3] if he used a reasonable discretion in the matter.

No conversion can be made of property which the settlor meant to be enjoyed in specie; as, for instance, a house for the beneficiary to live in, or property to be sold at the end of the life estate,[4] or household goods and chattels meant for family use,[5] but such intention must be shown affirmatively, as the general rule is that all property is to be converted.[6]

Where specific real estate is left of which the beneficiary is to have the rents for life, the right to use the property in specie is implied;[7] but otherwise where the real estate is not specified. So, also, where the beneficiary is to have the dividends on the property, enjoyment in specie is not implied, unless the property yielding the dividends is specified.[8]

Conversion of Real into Personal Property and Vice Versa. — Unless the power be given by the trust instrument, the trustee may not convert the real property into personal, or *vice versa*, the reason of which seems to

[1] Conn. Gen. Stat. (1902), § 255; but the distinction is doubted. Perry, § 465.

[2] N. Eng. Trust Co. *v.* Eaton, 140 Mass. 532.

[3] Bowker *v.* Pierce, 130 Mass. 262.

[4] Ervine's Appeal, 16 Pa. St. 256; Johns *v.* Johns, 172 Ill. 472.

[5] See pages 125 and 175, 176.

[6] Howe *v.* Lord Dartmouth, 2 White & Tudor L. C., 5th ed., 296; McDonald *v.* Irvine, 8 Ch. D. 101, 112.

[7] Perry, § 451.

[8] Boys *v.* Boys, 28 Beav. 436.

have originally depended on the different way in which real estate and personal property descend or could be disposed of by will.[1]

Thus, the trustee must not sell real estate and invest in bonds, or buy real estate with uninvested funds, unless they are the proceeds of a sale of real estate; for where real estate is sold by an administrator or guardian under order of court, the proceeds will be treated as real estate and not as personal;[2] but where the estate is sold and converted into personalty under order of court by a trustee, it loses its character as real estate.[3] If the sale is under a power in the trust instrument, the intention of the maker will govern as to whether the proceeds shall be considered as real estate or converted into personalty by his authority.[4]

Under the common-law rule the trustee cannot use the personal property of the estate to improve the real estate. Where the testator left an insurance policy on a building which was subsequently burned, rebuilding with the insurance money was held to be a conversion;[5] but buying in land to protect a debt from great loss, although a conversion, is an authorized conversion, and one that will be ratified by the court.[6] This rule is relaxed by statute, or by practice in some jurisdictions.[7]

By statute in many States, and by equity jurisdiction in others, a court may order a conversion,[8] and where it does so, the proceeds of land will not be treated as real

[1] Perry, § 605.

[2] Mass. Rev. Laws (1902), ch. 143, § 9; Fidler *v.* Higgins, 21 N. J. Eq. 138; March *v.* Berrier, 6 Ired. Eq. 524; Shumway *v.* Cooper, 16 Barb. 556.

[3] Snowhill *v.* Snowhill, 2 Green's Ch. 20.

[4] Hovey *v.* Dary, 154 Mass. 7.

[5] Hassard *v.* Rowe, 11 Barb. 22.

[6] Billington's Appeal, 3 Rawle, 48, 55. Perry, § 458, says it is not a conversion. Oeslager *v.* Fisher, 2 Pa. St. 467.

[7] Brightly's Dig. (1894), p. 2034, § 49; Boon *v.* Hall, 76 App. Div. (N. Y.) 520.

[8] Anderson *v.* Mather, 44 N. Y. 249; Ex parte Jewett, 16 Ala. 409.

estate.[1] But the court will not order a conversion where it is contrary to the wishes of the testator;[2] nor will it ratify an unauthorized one.

Where, however, it has become impossible to carry out the testator's wishes, the court will authorize a conversion on the *cy près* doctrine, which amounts to decreeing that the wishes of the testator shall be carried out in the nearest possible way, and seems to rest on his implied authority.[3]

Where, however, the trust is for an infant, the court will not usually authorize a conversion, and it has been denied that the court has the power to do so in the absence of statute, but such statutes exist in nearly all jurisdictions.[4] If an unauthorized conversion be made, the infant may elect to take the property or the proceeds at his majority.[5]

Where a trustee is given the power to invest and reinvest, or to sell and manage the property, a power to convert will be implied, and under the general language used in most modern settlements the power is generally impliedly given, if not expressly so.

Investments. — It is the trustee's duty to keep all the trust funds at all times fully invested, and if he neglects doing so he will be liable for interest for the period of any unreasonable delay.[6] What is an unreasonable delay is a question of fact depending on all the circumstances.[7]

[1] Snowhill *v.* Snowhill, 2 Greene's Ch. 20.

[2] Rogers *v.* Dill, 6 Hill, 415; Johns *v.* Johns, 172 Ill. 472.

[3] Weeks *v.* Hobson, 150 Mass. 377; Pennington *v.* Metropolitan Museum of Art, 65 N. J. Eq. 11. See p. 67, *supra*.

[4] Rogers *v.* Dill, 6 Hill, 415; Williamson *v.* Berry, 8 How. 495, 531; but the better authority seems to be that the court has the power to order a sale. Wood *v.* Mather, 38 Barb. 473; s. c. 44 N. Y. 249, affirmed on appeal; Ex parte Jewett, 16 Ala. 409.

[5] Robinson *v.* Robinson, 22 Iowa, 427; Kaufman *v.* Crawford, 9 Watts & Ser. 131.

[6] Robinson *v.* Robinson, 11 Beav. 371; Cann *v.* Cann, 33 Weekly Rep. 40.

[7] Perry, § 462, gives numerous examples.

Simple interest will be ordinarily computed, but in some cases the trustee will be chargeable with compound interest.[1]

For instance, if the fund is for accumulation he will be charged with compound interest, since it was his duty to have invested the interest as it accrued. So, too, if the property was invested in trade, since the profits will be presumed to have amounted to that;[2] but in this case the trustee may show that the actual profits were less, since the claim of the beneficiary is for actual profits or simple interest.[3]

In some jurisdictions the trustee will be charged compound interest as punishment for fraud, misbehavior, or for disobeying the orders of court;[4] but this doctrine is not general or commendable on principle, or universally followed. The true principle would seem to be "that the trustee is accountable for all interest and profits actually received by him from the trust fund, and for all which he might have obtained by due diligence and reasonable skill."[5]

If he was directed to invest in a particular stock or fund, the beneficiary may elect to take simple interest, or the number of shares the money would have purchased with the dividends.[6]

If the trustee has no express power under the trust instrument to change investments, the court can authorize a change, and will do so for good reason;[7] and where an emergency exists and there is no opportunity to get a decree, will ratify a change made by the trustee without authority.

[1] *Infra*, p. 154.

[2] Eliott *v.* Sparrell, 114 Mass. 404.

[3] Attorney General *v.* Alford, 4 DeG., M. & G. 843, p. 851; Utica Ins. Co. *v.* Lynch, 11 Paige, 520. *Infra*, p. 154.

[4] McKim *v.* Hibbard, 142 Mass. 422; Jennison *v.* Hapgood, 10 Pick. 77.

[5] Perry, § 472, end; Cruce *v.* Cruce, 81 Mo. 676.

[6] Ouseley *v.* Anstruther, 10 Beav. 453, 456.

[7] Murray *v.* Feinour, 2 Md. Ch. 418.

The property being once well invested, the investments should not be changed without a good reason;[1] such as, for instance, that an investment has become insecure and the remainderman is likely to suffer loss, or because it has become unproductive and the life tenant is suffering loss.

The mere fact that the property has increased in value is not a sufficient reason to sell; for "the doctrine can readily be pressed so far as to sanction a practice of trading and trafficking in trust securities, which would be attended with dangerous results to the trust fund;"[2] but if it has acquired a speculative value much above its value as an investment, the investment should be changed so that the life tenant may receive the increase of income he is entitled to.

The trustee's duty in investing the funds is a double one, namely, to invest them securely, so that they shall be preserved intact for the remainderman, and to invest them productively, so that they shall yield the current rate of interest to the life tenant. He must hold the scales evenly, and must not sacrifice the interest of either beneficiary; and the popular idea that security is the only consideration is erroneous, as the trustee is equally bound to get the customary income for the life tenant, and cannot sacrifice his interests to those of the remainderman.[3]

The trust instrument may, and ordinarily does, prescribe the kind or class of property in which the trustee may invest, and where it does so its provisions will supersede those of the court or legislature;[4] but being special powers they must be complied with strictly.

[1] N. Eng. Tr. Co. *v.* Eaton, 140 Mass. 532, 533; Murray *v.* Feinour, 2 Md. Ch. 418; Ward *v.* Kitchen, 30 N. J. Eq. 31.

[2] N. Eng. Tr. Co. *v.* Eaton, 140 Mass. 532, 537.

[3] Kinmonth *v.* Brigham, 5 Allen, 270.

[4] Womack *v.* Austin, 1 S. C. 421; Arnould *v.* Grimstead, 21 Weekly Reporter, 155; Denike *v.* Harris, 84 N. Y. 89; Ovey *v.* Ovey, (1900), 2 Ch. 524; In re Wedderburn, 9 Ch. D. 112, was not followed.

A general authority to the trustee to invest "at discretion" does not specify any kind of property,[1] and does not enlarge his powers; but authority to invest "in such securities as to him seems best," or "to exercise the same control I now have," with other marks of confidence, gives authority to choose illegal investments in those jurisdictions where the class of investments is limited;[2] but the trustee is still required to exercise a sound discretion only. He is given the latitude allowed by the Massachusetts rule, and nothing more, even in Massachusetts.[3]

If the trustee is authorized to invest in real securities or mortgages, the class will not be held to cover a bond secured by a mortgage of a railroad;[4] but a house for the occupation of the beneficiary has been held to be an investment in productive real estate,[5] and a judicious provision of one of the chief requisites of life.[6]

Where a testator provides that his trustees shall continue his business, it is their duty to do so; but if the matter is permissive, they should not continue it against their judgment. A partnership cannot be continued after there is a change in the firm,[7] nor should the amount invested in it be increased.[8] Where it is impossible to comply with the investments required by the trust instrument, recourse must be had to the court for directions.[9]

What classes or kinds of investments are trust investments vary in different jurisdictions, and are determined in some by statute and in others by rule of court. Statutes in some jurisdictions are construed to be for the pro-

[1] King *v.* Talbot, 40 N. Y. 76.
[2] Lawton *v.* Lawton, 35 App. Div. (N. Y.) 390.
[3] In re Hall, 164 N. Y. 196; Davis Appellant, 183 Mass. 499.
[4] Robinson *v.* Robinson, 11 Beav. 371; King *v.* Talbot, 50 Barb. 453; but see Knight *v.* Boston, 159 Mass. 551, and dissenting opinion.
[5] Schaffer *v.* Wadsworth, 106 Mass. 19; Stone *v.* Clay, 103 Ky. 314.
[6] Mulford *v.* Mulford, 53 Atl. Rep. 79, 83 (N. J. Ch. 1902).
[7] Cummins *v.* Cummins, 3 Jo. & Lat. 64.
[8] McNeillie *v.* Acton, 4 DeG, M. & G. 744.
[9] McIntire's Adm'rs *v.* Zanesville, 17 Ohio St. 352.

tection of the trustee merely, and not as forbidding other investments than those specified by law;[1] yet where such a statute exists, a trustee would be imprudent if he invested in other than the specified securities,[2] although he might be justified in not converting unspecified securities, if he took them from the testator.[3]

Where there is no statute or decision of the highest court fixing the class of securities in which a trustee may invest, he can safely follow the rule prescribed for the investment of the funds of savings banks.

In England the only kind of investments formerly allowed were in the government funds;[4] but in America the total absence of such securities in early times, and their relative scarcity in later times, gave rise of necessity to a different rule, called the American rule, which is in general terms that "a trustee must observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."[5]

The courts and legislatures in various jurisdictions have, from this rule, evolved very different results, the court deciding in New York that a prudent man would not invest in the stocks of railroads, banks, manufacturing or insurance companies;[6] saying that "The moment a fund is invested in a bank, or insurance, or railroad stock, it has left the control of the trustees; its safety, and the hazard or risk of loss is no longer dependent upon their skill, care, or discretion in its custody or manage-

[1] Clark *v.* Beers, 61 Conn. 87.

[2] Worrell's Appeal, 23 Pa. St. 44.

[3] *Supra*, p. 106.

[4] Now under the Trustees Relief Acts a large field is opened. Lewin, ch. xiv, § 4.

[5] Putnam, J., Harvard College *v.* Amory, 9 Pick. 446, 461; Mattocks *v.* Moulton, 84 Me. 545; King *v.* Talbot, 40 N. Y. 76.

[6] King *v.* Talbot, 40 N. Y. 76.

ment, and the terms of the investment do not contemplate that it ever will be returned to the trustees;"[1] but that the ideal man would invest in real estate, bonds of individuals secured by first mortgages of real estate, first mortgage bonds of corporations, and municipal securities.

On the other hand, the courts of Massachusetts hold that a prudent man may invest, in addition to the class of securities allowed in New York, in the stocks of good business corporations, such as banks, railroads, manufacturing and insurance companies,[2] and in notes of individuals secured by the stock of such companies, and certificates of deposit of good banks.[3]

Chief Justice Field, in Dickinson's Appeal, 152 Mass. 184, at p. 187, lays down and explains the Massachusetts rule in part as follows: —

"A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are as safe as is possible in the affairs of this world is great; and the amount of such securities is small, when compared with the amount of money to be invested. . . . A trustee, whose duty is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the fund under any temptation to make extraordinary profits. . . .

"Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

[1] Woodruff, J., in King *v.* Talbot, *ubi supra.*

[2] Harvard College *v.* Amory, 9 Pick. 446.

[3] Hunt, Appellant, 141 Mass. 515.

In the hands of a good trustee the Massachusetts rule is undoubtedly superior, since it gives him a larger opportunity to use his skill and ability as a financier for the advantage of his beneficiaries; but undoubtedly the English rule, or the New York rule, is better adapted to inexperienced or ignorant trustees, as much less is left to their discretion, and unfortunately trustees are too often appointed from considerations of friendship, and not from consideration of their discretion or business ability.

The laws of the various States give a preponderance in favor of the Massachusetts rule, and a large majority of carefully drawn trust instruments give the trustees the larger discretion.[1]

The rule prevailing in each of various States is briefly stated at the end of this chapter.

The following kinds of investments are everywhere disapproved, viz.: loans on personal security merely;[2] investment in unincorporated business ventures, partnership, and patent rights;[3] second mortgages[4] and mortgages on leasehold security,[5] however large the margin, since the first mortgage may be foreclosed; unproductive real estate, and all investments of an untried[6] or speculative nature. Investments without the jurisdiction of the court, being under dissimilar laws and beyond the court's control, are not usually approved; but, if they are in conformity with the purposes of the trust, will be sanctioned.[7]

[1] Perry, § 456, opines to the contrary. See note to Nyce's Estate, 40 Amer. Dec. 498.

[2] Holmes *v.* Dring, 2 Cox Eq. c. 1; Hunt *v.* Gontrum, 80 Md. 64.

[3] Trull *v.* Trull, 13 Allen, 407; Ames, 471, n.

[4] Gen. Stat. Conn. (1902), § 254; Mattocks *v.* Moulton, 84 Me. 545; Porter *v.* Woodruff, 36 N. J. Eq. 174; Ames, 485, n. As vendor, a trustee might be justified in taking a second mortgage in part payment. Taft *v.* Smith, 186 Mass. 31.

[5] Slauter *v.* Favorite, 107 Ind. 292, 296.

[6] Kimball *v.* Reding, 31 N. H. 352.

[7] Ames, 486, n.; Amory *v.* Green, 13 Allen, 414; Ormiston *v.* Olcott, 84 N. Y. 339; Thayer *v.* Dewey, 185 Mass. 68. *Infra*, p. 193.

Having ascertained the kind of investments he may make, the trustee must exercise a sound discretion in selecting investments within the authorized class.[1] That is to say, he must exercise the same degree of intelligence and diligence that a man of average ability would exercise in making his own investments;[2] and a provision of the settlement giving him unlimited discretion does not alter his duty to use care, although it may, but will not necessarily, extend the class of investments in which he may invest.[3]

The question of whether there was a sound exercise of discretion[4] will be determined according to the state of facts as they existed when the investment was made, and not in the light of later developments; but as these are sometimes difficult to reproduce, or may be forgotten, any memorandum of the inducements made at the time may be of service in refreshing the recollection.[5]

Where the class of investments allowed is large, it has been held imprudent to invest more than a fifth part of the estate in one investment.[6]

The margin of security required on a mortgage loan is generally fixed either by decision[7] or by statute at one half, but the amount of margin required also depends on the nature of the estate, a less margin, say one third, being required where the values are more stable. In England farming lands were considered the most stable, but in America business property in a city would probably be so considered.

[1] Womack *v.* Austin, 1 S. C. 421; Re Whiteley, 33 Ch. Div. 347, 350; Ormiston *v.* Olcott, 84 N. Y. 339.

[2] In re Salmon, 42 Ch. Div. 351; Harvard College *v.* Amory, 9 Pick. 446.

[3] Tuttle *v.* Gilmore, 36 N. J. Eq. 617; King *v.* Talbot, 40 N. Y. 76.

[4] Brown *v.* French, 125 Mass. 410.

[5] Green *v.* Crapo, 181 Mass. 55; Parker *v.* Boston Safe Dep. & Trust Co., 186 Mass. 393; Davis, Appellant, 183 Mass. 499.

[6] Dickinson's Appeal, 152 Mass. 184.

[7] In re Salmon, 42 Ch. Div. 351.

Where, however, the settlement provided that the trustee should not be liable for loss on account of taking insufficient security, he was not excused for making an unauthorized loan to a person unsecured,[1] since the loss was on account of going outside of the class and not because the investment was poor of its kind.

Investments allowed in Various States. — *Alabama.* — By statute may invest in securities of State or United States. Code (1896), § 4174. Constitution forbids any law authorizing trustees to invest in bonds or stocks of private corporation. See Randolph *v.* E. Birmingham Land Co., 104 Ala. 355. English rule laid down, but statute not alluded to.

Alaska. — No authorities.

Arizona. — No authorities.

Arkansas. — No authorities.

California. — American rule. Civil Code (1903), § 2261; In re Cousins's Estate, 111 Cal. 441.

Colorado. — English rule. Laws of 1903, ch. 181, § 71. Executors, administrators, guardians, and conservators, in bonds of the United States or Colorado, or mortgages approved by the court. No express provision concerning investments by trustees. Investments in stock or bonds of private corporations forbidden. Constitution, § 359. See Alabama.

Connecticut. — Rev. Stat. (1902), §§ 254, 255. First mortgages to fifty per cent of value; United States, State, town, or city bonds, and savings bank securities. Statute not mandatory, but there is a rigid responsibility for other investments. Clark *v.* Beers, 61 Conn. 87.

Delaware. — Massachusetts rule. Massey *v.* Stout, 4 Del. Ch. 274, 288.

Florida. — Gen. Stat. (1906), § 2717. Bank stocks. Gen. Stat. (1906), §§ 2433 and 2612. Mortgages and United States or State securities, which are free of taxa-

[1] Ryder *v.* Bickerton, 3 Swanst. 80, n.

tion, or others ordered by court. These statutes refer to executors and guardians, and not expressly to trustees, but trustees would be safe in following the same rules.

Georgia. — Code (1895), § 3180. In stocks, bonds, or other securities issued by State. Any other investment must be made under order of court. Brown *v.* Wright, 99 Ga. 96; Bull *v.* Walker, 71 Ga. 196; Campbell *v.* Miller, 38 Ga. 304.

Hawaii. — No authority.

Idaho. — No authority.

Illinois. — Masachusetts rule. Sholty *v.* Sholty, 140 Ill. 82; Sherman *v.* White, 62 Ill. App. 271.

Indiana. — Mortgage securities allowed on sale. Burns's Annot. Stat (1901), §§ 3415, 3416. Massachusetts rule approved in Slauter *v.* Favorite, 107 Ind. 292, 296; Shuey *v.* Latta, 90 Ind. 136; but in Tucker *v.* State, 73 Ind. 242, New York rule approved.

Iowa. — Code (1897), § 364. Stocks and bonds of United States and State, and mortgages at fifty per cent of value.

Kansas. — No authorities.

Kentucky. — Stat. (1903), § 4706. Real estate, mortgages, stocks and bonds, or loans secured by same. But not in railroads unless operated ten years without defaulting, or municipal securities that have not defaulted within ten years. Aydelott *v.* Breeding, 111 Ky. 847. Statute not mandatory. Substantially Massachusetts rule. Fidelity Co. *v.* Glover, 90 Ky. 355.

Louisiana. — No authorities.

Maine. — Massachusetts rule. Mattocks *v.* Moulton, 84 Me. 545; Emery *v.* Batchelder, 78 Me. 233.

Maryland. — Hunt *v.* Gontrum, 80 Md. 64 (*semble*). English rule. Trustee appointed by court should get its directions. Lowe *v.* Convention of Prot. Ep. Ch., 83 Md. 409.

Massachusetts. — Massachusetts rule, *ubi supra.*

Michigan. — *Semble* Massachusetts rule. See Caspari *v.* Cutcheon, 110 Mich. 86.

Minnesota. — Under direction of court. Rev. Laws (1905), § 3249.

Mississippi. — Massachusettts rule. Smyth *v.* Burns, 25 Miss. 422; Coffin *v.* Bramlitt, 42 Miss. 194.

Missouri. — Massachusetts rule. Gamble *v.* Gibson, 59 Mo. 585; Taylor *v.* Hite, 61 Mo. 142, 144; Drake *v.* Crane, 127 Mo. 85, 106; Garesché *v.* Priest, 9 Mo. App. 270.

Montana. — Civil Code (1895), § 3013. Reasonable security and interest.

Nebraska. — No authority.

Nevada. — No authority.

New Hampshire. — Pub. Stat. (1901), ch. 198, § 11, ch. 178, § 9. In notes secured by mortgage of real estate worth at least double, in savings banks, or bonds and loans of State, city, town, or county of New Hampshire, or of the United States, and in no other way. Also in stock of leased steam railroads located wholly or in part in New England, whose rental is guaranteed by the Boston & Maine, the New York, New Haven, & Hartford, or the New York Central & Hudson River Railroads. Laws of 1901, ch. 3.

New Jersey. — Laws of 1899, ch. 103. In bonds of the United States, New Jersey, and of certain municipalities. Also in first mortgages on real estate to an amount not exceeding fifty per cent of its value, and bearing interest at not less than three nor over six per cent. Laws of 1903, ch. 146, adds loans or securities in which savings banks may invest.

New Mexico. — No authority.

New York. — New York rule, *ubi supra.* Laws of 1897, ch. 417, § 9, amended by Laws of 1902, ch. 295. Same as savings banks; also in first mortgages on land worth at least fifty per cent more than the amount loaned thereon. In re Avery, 45 Misc. Rep. 529.

North Carolina. — Code (1905), §§ 1792 and 5054. In United States bonds or any bonds guaranteed by

United States, and in State bonds. Statute not mandatory. Massachusetts rule approved. Moore *v.* Eure, 101 N. C. 11.

North Dakota. — Rev. Code N. Dak. (1895), § 4286. Reasonable security and interest. American rule. No authorities.

Ohio. — Bates's Annot. Stat. (1906), § 6413. Certificates of indebtedness of State or United States, or as approved by court.

Oregon. — No authorities.

Pennsylvania. — Const., Art. 3, § 69. No bonds or stocks of business corporation. Stat. Brightly's Purdon's Dig. (1894), p. 594, §§ 121, 122, 123. Court may authorize investments in debt of United States, State, or Philadelphia, and real securities; bonds or certificates of debt of school districts, municipal corporations of State, or by leave of court in ground rents or other real estate. Statute mandatory. Hemphill's Appeal, 18 Pa. St. 303; Baer's Appeal, 127 Pa. St. (1889), 360. *Cf.* Law's Estate, 144 Pa. St. 499, 507.

Rhode Island. — Gen. Laws (1896), ch. 208, § 12, gives trustees full power and discretion. Massachusetts rule followed, but should invest under order of court. Peckham *v.* Newton, 15 R. I. 321; Grinnell *v.* Baker, 17 R. I. 41.

South Carolina. — *Semble*, Massachusetts rule. Should loan on mortgage, if possible; if not, should loan on good security. Nance *v.* Nance, 1 S. C. 209; Singleton *v.* Lowndes, 9 S. C. 465; Nobles *v.* Hogg, 36 S. C. 322.

South Dakota. — Reasonable security and interest. Civil Code (1904), § 1639.

Tennessee. — Code (1896), § 5434. In public stocks and bonds of United States, and report to county court.

Texas. — Massachusetts rule. Finlay *v.* Merriman, 39 Tex. 56.

Utah. — No authority.

Vermont. — Revised Laws (1894), § 2617. In real estate, or such other manner as court directs. *Semble*, Massachusetts rule. Barney *v.* Parsons, 54 Vt. 623 (1882); McCloskey *v.* Gleason, 56 Vt. 264.

Virginia. — *Semble*, Massachusetts rule. Davis *v.* Harman, 21 Gratt. 194, p. 201.

Washington. — Massachusetts rule in practice, no authority.

West Virginia. — *Semble*, English rule. Key *v.* Hughes, 32 W. Va. 184, 189.

Wisconsin. — Governmental and real estate securities; bonds of Wisconsin, and of certain other States and municipalities; bonds and stock of steam railroads owning and operating not less than five hundred miles of track, and which have paid dividends on their entire capital for the last ten years; also notes secured by pledge of such securities. Wisconsin Stat., Supplement of 1906, § 2100 B. Allis's Estate, 123 Wis. 223.

Wyoming. — No authority.

Principal and Income. — *Receipts.* — As different persons are entitled to the principal and income of the trust fund, the determination of whether a receipt or charge shall belong to principal or income is of great importance, and the erroneous determination of the question may make the trustee liable for a large amount; as, for instance, where he has paid the life tenant sums of money which belonged to principal, and should have been invested, and these he has no right to recover back in most cases,[1] and which even if he have the right he may not be able to recover back owing to the beneficiary's want of financial responsibility. In fact, the question will usually arise after the death of the life tenant, when the remainderman comes into possession, and when it is too late to recoup from the income.

[1] Bate *v.* Hooper, 5 DeG., M. & G. 338; Downes *v.* Bullock, 25 Beav. 54, 59, 62. See L. Langdale, Fyler *v.* Fyler, 3 Beav. 550, 563, for striking example, and *infra*, p. 184.

In general, at the time the estate comes into the trustee's hands it is all principal, in whatever condition it may happen to be, and all yearly increase thereafter is income.[1] This would always be the case where the property comes into the trustee's hands without delay and invested in proper trust securities; but if there is a deferred receipt on the conversion of the estate, the rule is different.

Where for any reason property does not come into the hands of the trustee for some time after the beginning of the trust, and in the meanwhile the life tenant has no benefit from it, the fund when realized must be so apportioned that the life tenant will get the usual rate of interest from the beginning of the trust, and the remainder will be the principal fund.[2]

This may be the case where the amount of a legacy or other fund is not immediately received or not received in full,[3] or where the property being an unsuitable investment is sold for conversion at an interval after the trust went into effect. It is immaterial that the trustee be given discretion as to the time when he shall make the conversion, if there must be a conversion at some time;[4] but if the trustee has a discretion to hold the property as a permanent investment, no apportionment will be made if he converts it.[5]

The rule is the same whether the property be converted because it is unproductive, as, for instance, vacant land,[6]

[1] Where the estate was stocks pledged as collateral the creditors retained the dividends on account of the notes, and it was held that they were not income. They never came as such into executor's hands. Skinner *v.* Taft, 140 Mich. 282.

[2] Kinmonth *v.* Brigham, 5 Allen, 270; Hagan *v.* Platt, 48 N. J. Eq. 206; Westcott *v.* Nickerson, 120 Mass. 410; Edwards *v.* Edwards, 183 Mass. 581.

[3] Cox *v.* Cox, L. R. 8 Eq. 343.

[4] Edwards *v.* Edwards, 183 Mass. 581; Mudge *v.* Parker, 139 Mass. 153. It was decided otherwise in Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257, p. 264, but on the ground of testator's intent.

[5] Hemenway *v.* Hemenway, 134 Mass. 446.

[6] In re Neel's Estate, 207 Pa. St. 446; Billings *v.* Warren, 216 Ill. 281.

a bottomry bond or similar security where the principal and income are included in one sum, or a defaulted note or obligation on which the whole amount is not recovered, or where an obligation is in default and the security has been realized on;[1] or whether it be converted because the earnings are greatly in excess of interest, as in the case of a business or partnership, or on a wasting investment such as a land stock where the dividends will ultimately exhaust the security. In either case the rule is the same, namely, that sum is to be found which at the current rate of interest for the period from the beginning of the trust to the time of conversion will yield the amount realized. The sum so ascertained is the principal, and the interest is the income payable to the immediate beneficiary.

For instance, in a case where a trustee who had wasted the estate was removed and only part of the estate was recovered by his successor, the amount of the original estate was $30,000, and the whole amount recovered after one year and two months was $26,000. The tenant for life got $1,742.50, which is the interest at six per cent on $24,257.50, the new capital for one year and two months;[2] but where the return is excessive, if a definite intention on the part of the maker of the trust can be shown that the life beneficiary shall have all the proceeds, i. e. shall enjoy the income in specie, his intention will prevail, and the whole profits will be paid to the life tenant as income.[3]

The amount recovered as damages for an injury or a taking[4] need not be apportioned, as the fund invested will

[1] In re Alston (1901), 2 Ch. 584; Trenton Trust Co. *v.* Donnelly, 65 N. J. Eq. 119.

[2] Parsons *v.* Winslow, 16 Mass. 361; Maclaren *v.* Stainton, L. R. 11 Eq. 382; Meldon *v.* Devlin, 31 App. Div. N. Y. 146; Greene *v.* Greene, 19 R. I. 619.

[3] Howe *v.* Lord Dartmouth, 2 White & Tudor, L. C. Eq., 6th Am. ed., 296; Corle *v.* Monkhouse, 47 N. J. Eq. 73; Westcott *v.* Nickerson, 120 Mass. 410.

[4] Heard *v.* Eldredge, 109 Mass. 258.

yield an income,[1] and the amount recovered will bear interest from the time of the taking.

The converse proposition, i. e. the payment of a betterment or removal of an involuntary incumbrance, falls under the same rule.

Gain and Loss. — The general rule is that any gain other than the usual yearly income, and any loss other than the usual yearly charges, fall to the principal of the fund.

Thus real estate[2] or securities may advance largely in value without any corresponding increase in income, and the whole gain will belong to the principal of the fund,[3] and the life tenant will get no benefit from the increase, unless he be in a position to insist on a sale and reinvestment of the property, so as to yield an adequate return.[4]

Gain or loss in continuing a business temporarily until it is converted is to be apportioned,[5] but where the business is conducted under direction of the trust instrument, ordinarily all the income will go to the life beneficiary,[6] and the loss of one year will be made up out of the profit of the next; but it is wholly a question of intention to be determined by the construction of the trust instrument. If the gain results not from yearly profits of the business,

[1] Van Vronker *v.* Eastman, 7 Met. 157.

[2] The rule as to vacant land is stated on pp. 122-123.

[3] N. Eng. Trust Co. *v.* Eaton, 140 Mass. 532; In re Gerry, 103 N. Y. 445, 450; In re Stevens, 46 Misc. Rep. (N. Y.) 623, aff'd 111 App. Div. (N. Y.) 773. Gain on foreclosure: Parker *v.* Johnson, 37 N. J. Eq. 366; Graham's Estate, 198 Pa. St. 216.

[4] The learned editor of the fourth edition of Perry on Trusts, § 545, n. 1, suggested that some doubt had been thrown on this question by the reasoning in decisions on collateral points in some jurisdictions. See Wiltbank's Appeal, 64 Pa. St. 256; Earp's Appeal, 28 Pa. St. 368; Van Doren *v.* Olden, 19 N. J. Eq. 176. But the matter seems to be now settled in these States in conformity with the law elsewhere. Graham's Estate, 198 Pa. St. 216; In re Neel's Estate, 207 Pa. St. 446.

[5] Underhill, 250. *Supra*, p. 123.

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

but from increase of value of the plant or property, the gain will belong to principal.[1]

If the trust estate consists of country real estate, timber cut for thinning will be income, other timber principal, and it has been held that gravel sold will be income, but probably not to such an extent as to be waste.[2]

If the trust property consists in part of chattels, which are intended to be used and not converted into cash and invested, the life tenant may wear them out in ordinary use, and need not replace them.[3]

If the property consists of farming stock it should be converted,[4] unless intended to be used in specie.

The life tenant cannot sell it, even though it be replaced by other kind of stock; as, for instance,[5] where cows are unprofitable, they cannot be replaced by horses, but the beneficiary for life may use them up, and need not replace them when they die;[6] and the natural increase will belong to him.[7] Where, however, the stock is left with a farm, and there is an intention expressed or implied that the farm shall be kept up, so much of the increase as is necessary to keep up the herd will belong to principal, and only the excess to income.[8]

Implements, furniture, and cattle, in fact all property

[1] First Natl. Bank of Carlisle *v.* Lee, 66 S. W. Rep. 413 (Ky. 1902); In re Stevens, 111 App. Div. (N. Y.) 773; Smith *v.* Hooper, 95 Md. 16.

[2] Earl Cowley *v.* Wellesley, L. R. 1 Eq. 657.

[3] Wootten *v.* Burch, 2 Md. Ch. 190. See *infra*, p. 147; *supra*, p. 107; Woods *v.* Sullivan, 1 Swan (Tenn.), 507.

[4] Burnett *v.* Lester, 53 Ill. 325.

[6] Leonard *v.* Owen, 93 Ga. 678.

[5] Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Braswell *v.* Morehead, 57 Am. Dec. 586, n.; Saunders *v.* Haughton, 57 Am. Dec. 581.

[7] Saunders *v.* Haughton, 8 Ired. Eq. 217; Lewis *v.* Davis, 3 Mo. 133; Major *v.* Herndon, 78 Ky. 124; Hunt *v.* Watkins, 1 Humph. (Tenn.) 498.

[8] Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Robertson *v.* Collier, 1 Hill Eq. 370 (S. C.). But see Flowers *v.* Franklin, 5 Watts (Pa.), 265; life tenant was to keep up farm; increase held to go to remainderman.

that will wear out in use, must be bought out of income. And where it is necessary to replace chattels which are wearing out in use, the trustee may withhold some of the yearly income to make a sinking fund for that purpose.[1]

Any income which is rightfully accumulated and added to the principal, will lose its character as income and become a gain to principal;[2] but if the income be kept in a separate fund, even though invested, it retains its character as income, and may be used as such during the duration of the trust. If not so used it will become principal.[3]

Dividends. — The current dividends on stocks belong wholly to income, even when the stock has been bought at a premium, since the premium is only a part of the price paid for an investment, or a definite share in a property or business, which is presumably worth the price paid, and any gain or loss in price is the gain or loss of the principal.[4]

If, however, the investment is a wasting one, such as a mining or land stock, unless the tenant for life is expressly given the full dividend by the settlement, in which case he will of course take it,[5] he will be entitled to receive only the current rate of interest on the inventory or cost value of the investment, and the balance will be applied to reduce the valuation, and the amount which he is entitled to receive will be calculated each year on the new principal made by the credits of the preceding dividends.[6]

[1] Re Housman, 4 Dem. Sur. 404.

[2] Minot *v.* Tappan, 127 Mass. 333; Blythe *v.* Green, 38 Atl. 743 (N. J. Ch.).

[3] Robinson *v.* Bonaparte, 102 Md. 63.

[4] N. Eng. Trust Co. *v.* Eaton, 140 Mass. 532. See note, p. 124.

[5] Reed *v.* Head, 6 Allen, 174; Balch *v.* Hallett, 10 Gray, 402; Robertson *v.* De Brulatour, 111 App. Div. (N. Y.) 882; Lowry *v.* Farmers' Loan & Trust Co., 172 N. Y. 137.

[6] Paris *v.* Paris, 10 Ves. 185; Mills *v.* Mills, 7 Sim. 909; Brander *v.* Brander, 4 Ves. 800. Such investments should ordinarily be converted. *Supra*, p. 106.

When the excess of the dividends has thus entirely wiped out the cost of the investment, all the dividends will go to principal, and the life tenant, though an apparent loser, is not, because he will receive the dividends on the new investments to the same amount which was originally invested, which is all he is entitled to.

The rule has already been explained as to the receipts from an investment, which is not a proper trust investment, and therefore to be converted.[1]

Extra Dividends. The successful corporation of modern times earns much more than it distributes in regular yearly dividends to its stockholders. To insure continued success the company must continually put more money into its plant and business. This money is drawn from either or both of two sources, viz.: first, the accumulation of surplus profits, that is, the profits which are left after paying the usual annual dividends; and secondly, by subscriptions of new capital, which subscription is usually for a less sum than the market value of the stock given for it. Hence the right to subscribe is a valuable right, either to use or to sell.

Besides the accumulations necessary to renew and extend the plant, and make the necessary additions to working capital to keep up or enlarge the business, well managed corporations usually set aside additional earnings in prosperous times, as reserves to meet future exigencies. From time to time, as these accumulations become considerable, the company distributes stock to represent the capital added to its business; and when it finds that it has more funds than are required as reserves, it pays them out as extra cash dividends.

The settlement of the respective rights of the life beneficiary and remainderman to receive the benefits of these distributions of stock, cash, or valuable rights to subscribe to stock is perplexing, and has given rise to much litigation and conflicting decisions.

[1] *Supra*, p. 123.

A corporation is an artificial person, which owns its property in the same way that a natural person owns his. The stockholders as a whole are the corporation, but separately and individually own none of its property, and are not entitled to any share of it until it has been severed from the general fund and has been made payable to the individual stockholder as a dividend. As between the stockholder and the corporation, the decision of the directors is absolute.[1] They can make dividends or not as they see fit, and may turn earnings into permanent capital or distribute accumulations held in capital as profits.[2] It is when the dividend has come into the hands of the stockholder who is a trustee that the difficulty arises in determining who is entitled to enjoy it. An arbitrary rule has been adopted in the Supreme Court of the United States, and in the States of Massachusetts, Illinois, Maine, Georgia, and Connecticut,[3] and lately, it would seem, in England.[4]

This rule is concisely and clearly stated by Chief Justice Knowlton as follows:[5] "In Minot *v.* Paine, 99 Mass. 101, p. 108, it is said that in such cases 'a simple rule is to regard cash dividends however large as income, and stock dividends however made as capital.' This general rule

[1] Hite's Devisees *v.* Hite's Ex'ors, 93 Ky. 257, p. 265; Pritchett *v.* Nashville Trust Co., 96 Tenn. 472.

[2] Sugden *v.* Ashley, 45 Ch. D. 237; Minot *v.* Paine, 99 Mass. 101; Hemenway *v.* Hemenway, 181 Mass. 406; Smith *v.* Dana, 77 Conn. 543, p. 554. It is probable that the unsatisfactory condition of the law under the early English cases referred to in Minot *v.* Paine resulted in some degree from the fact that the questions arose in respect to joint stock companies, which are not corporations, but partnerships; and ordinary partners are entitled to the profits as such.

[3] Gibbons *v.* Mahon, 136 U. S. 549; Minot *v.* Paine, 99 Mass. 101; De Koven *v.* Alsop, 205 Ill. 309; Millen *v.* Guerrard, 67 Ga. 284; Ga. Code, § 2256; Gilkey *v.* Paine, 80 Me. 319; Richardson *v.* Richardson, 75 Me. 570; Smith *v.* Dana, 77 Conn. 543; Mills *v.* Britton, 64 Conn. 4; Brinley *v.* Grou, 50 Conn. 66.

[4] Bouch *v.* Sproule, 12 App. Cas. 385; Sproule *v.* Bouch, 29 Ch. D. 635; Sugden *v.* Ashley, 45 Ch. D. 237.

[5] Lyman *v.* Pratt, 183 Mass. 58, p. 60.

has been followed by this court ever since." (Cases cited.) "In determining what is a cash dividend and what is a stock dividend, substance and not form is regarded, and often it is difficult to decide to which class a particular dividend belongs. The real question is whether the distribution made by the corporation is of money to be taken and used as income, or of capital to be retained in some form as an investment in the corporation."

This rule rests not only on the assumption that the corporation has the right to determine how much of its earnings should be capitalized or properly set aside to cover depreciation or extensions, but even more on the practical impossibility of the determination of those questions by the court.[1]

Hence the decision of the directors is final as to whether they are distributing profits as such, or are distributing stock as the evidence of profits which have been made capital, and their decision of these questions is to be gathered mainly from the language of the vote by which the dividend is made.[2]

In the application of this rule it has been decided that a dividend cannot be divided, and is either all principal or all income;[3] that a distribution of stock representing accumulated earnings is principal.[4]

So, too, a distribution of bonds which were indefinite as to time of payment, and were in effect a sort of preferred stock, were held to be principal;[5] but where the

[1] Smith *v.* Dana, 77 Conn. 543. The life tenant is not injured, since he profits by the increased efficiency. Granger *v.* Bassett, 98 Mass. 462.

[2] D'Ooge *v.* Leeds, 176 Mass. 558, p. 560.

[3] Minot *v.* Paine, 99 Mass. 101; De Koven *v.* Alsop, 205 Ill. 309; Second Universalist Church *v.* Colgrove, 74 Conn. 79; Gifford *v.* Thompson, 115 Mass. 478.

[4] Minot *v.* Paine. 99 Mass. 101; Gibbons *v.* Mahon, 136 U. S. 549; De Koven *v.* Alsop, 205 Ill. 309.

[5] D'Ooge *v.* Leeds, 176 Mass. 558.

distribution was of stock purchased out of earnings, it was held to be a distribution of earnings, and not a "stock dividend" in any proper sense of the words, and so belonged to income.[1]

On the other hand, a cash dividend, though paid from earnings accumulated before the beginning of the trust, was held to be income.[2] So, too, a cash dividend which was paid simultaneously with and to the same amount as the cost of subscription to new stock was held to be income where the dividend and the subscription were severable and the stockholder might take his dividend but refuse to subscribe to the stock,[3] although the whole transaction was obviously a way of making a free distribution of stock to the stockholders, and making it full paid stock to meet the legal requirements in that respect. Where, however, the right to subscribe to the new stock and the dividend could not be severed, and the stockholder had no option but was obliged to take the stock and use his dividend in payment for it, the dividend was held to be a stock dividend, and therefore principal.[4]

The rule that the determination of the corporation decides the character of the distribution applies to dividends in liquidation. If there is no apportionment made by the corporation, the whole amount distributed will be considered capital;[5] but if the directors distribute part of the funds as accumulated earnings not permanently added to capital, they will be income to the life beneficiary.[6] In this case the company was not actually liquidated, but was absorbed by another company through a banker who

[1] Leland *v.* Hayden, 102 Mass. 542; Green *v.* Bissell, 65 Atl. R. 1056.

[2] De Koven *v.* Alsop, 205 Ill. 309.

[3] Davis *v.* Jackson, 152 Mass. 58; Lyman *v.* Pratt, 183 Mass. 58; Waterman *v.* Alden, 42 Ill. App. 294.

[4] Rand *v.* Hubbell, 115 Mass. 461; Daland *v.* Williams, 101 Mass. 571; Curtis *v.* Osborne, 65 Atl. R. 968.

[5] Gifford *v.* Thompson, 115 Mass. 478; Second Universalist Church *v.* Colgrove, 74 Conn. 79; Mercer *v.* Buchanan, 132 Fed. 501.

[6] Hemenway *v.* Hemenway, 181 Mass. 406.

bought all the stock at a certain price, but left certain quick assets in the hands of the directors, which they decided did not form part of the capital and so distributed as profits. Some stress was laid by the court on the fact that the company was sold as "a going concern;" but it does not seem as though this could really make any difference, for the company was liquidated so far as the stockholders' interest was concerned. On precisely the same facts, both the amount paid for the stock and the dividend were held to be principal by the Connecticut court, though applying the same rule.[1] As is said in a later case in that State, the rule must yield where the result of its application is inequitable;[2] and in Hemenway *v.* Hemenway[3] the court says that equity will look at the substance of the transaction.

The evident injustice often worked by the Massachusetts rule has overweighed the convenience of having a definite working rule for the trustee to go by, and has led to some curious and inconsistent law.

The desirability of making a fair division of extra dividends between life tenant and remainderman has led many courts to deny the right of the corporation to determine, so far as this class of stockholders is concerned, how much of the surplus earnings are profits and how much proper reserves for renewals and additions to capital.[4]

Having ascertained these facts independently of the corporate action, the court will then apportion the dividend according to the equitable rights of the tenant for life and remainderman to the profits in exactly the same manner as though the corporation was a trustee for its stockholders.

[1] Second Universalist Church *v.* Colgrove, 74 Conn. 79.

[2] Smith *v.* Dana, 77 Conn. 543, pp. 551, 556.

[3] 181 Mass. 486, p. 408.

[4] Earp's Appeal, 28 Pa. St. 368; Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Amer. Dec. 650; Lord *v.* Brooks, 52 N. H. 72; Cobb *v.* Fant, 36 S. C. 1; Pritchett *v.* Nashville Trust Co., 96 Tenn. 472.

The courts have never pushed the principle beyond apportioning the dividend between the parties who have a beneficial interest in the stock at the time the dividend is declared. No part of a dividend will be given to the estate of a deceased beneficiary.[1] Nor will the court give any part of the increased market price of the stock on account of accumulated earnings to the life tenant,[2] nor can it force the company to divide its earnings,[3] but recognizes that as between the corporation and the stockholders the directors' decisions are final.[4]

With these equitable considerations as a foundation, but disregarding the anomalies and practical difficulties, the Pennsylvania rule is that all the company's earnings belong to the person who was entitled to the income during the period when the money was earned, whether declared in dividends or not.[5] It follows that the form in which a dividend is declared, whether in stock or cash, is immaterial.[6] If stock is issued to represent accumulated earnings, it can be sold to produce the same amount as though the accumulations had been divided in cash.[7]

The period during which earnings were accumulated is to be gathered from the company's accounts as shown in their published statements,[8] and by the variation of the value of the stock, which is assumed to vary exactly with the amount of accumulated surplus;[9] and a master may be appointed to ascertain the facts.[10] In New Jersey

[1] Bates *v.* McKinlay, 31 Beav. 280.

[2] Connolly's Estate, 198 Pa. St. 137.

[3] Pratt *v.* Pratt, 33 Conn. 446.

[4] Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257–265.

[5] Earp's Appeal, 28 Pa. St. 368.

[6] Vinton's Appeal, 99 Pa. St. 434.

[7] Smith's Estate, 140 Pa. St. 344.

[8] Earp's Appeal, 28 Pa. St. 368; Thomas *v.* Gregg, 78 Md. 545.

[9] Earp's Appeal, 28 Pa. St. 344; Smith's Estate, 140 Pa. St. 344, p. 357. Howes, Income and Principal, p. 29. Common experience indicates that this assumption is contrary to fact. The "value," that is, market price, depends on many other considerations besides accumulated surplus.

[10] Van Doren *v.* Olden, 19 N. J. Eq. 176.

the proportion of time is taken since the last dividend was declared.[1]

The Pennsylvania rule is followed in New Jersey, New Hampshire, and South Carolina.[2] In Maryland this rule was followed in Thomas *v.* Gregg,[3] but in Quinn *v.* Safe Deposit and Trust Co.[4] the action of the directors in determining how much of the accumulated fund was income and how much was principal was approved and followed, although substantially the whole fund was accumulated before the commencement of the trust. Applying this rule, the courts have decided that dividends, whether stock or cash, may be divided and apportioned,[5] and that earnings accumulated during the testator's lifetime or before the beginning of the trust are principal.[6]

In New York a modification of the Pennsylvania rule was established by the case of McLouth *v.* Hunt[7] and confirmed in Lowry *v.* Farmers' Loan & Trust Co.[8] This rule is that the dividend, either stock or cash, will not be apportioned as to the time when it is earned, but if it is based on accumulated earnings or profits it is income, not capital. That the testator's intent must be discovered, and that the action of the corporation, while having great weight, is not conclusive on the court.[9] Each case stands on its own merits.[10]

In a well-considered case in Kentucky,[11] the court recognizes that the directors' action must be final as between

[1] Lang *v.* Lang's Ex'rs, 57 N. J. Eq. 325.

[2] Van Doren *v.* Olden, 19 N. J. Eq. 176, 97 Amer. Dec. 650; Lang's Ex'rs *v.* Lang, 56 N. J. Eq. 603; Lord *v.* Brooks, 52 N. H. 72; Price *v.* Burroughs, 58 N. H. 302; Holbrook *v.* Holbrook, 66 Atl. R. 124; Cobb *v.* Faut, 36 S. C. 1.

[3] 78 Md. 545.

[4] 93 Md. 285.

[5] Earp's Appeal, 28 Pa. St. 278, p. 375.

[6] Thomas *v.* Gregg, 78 Md. 545; Nice's Appeal, 54 Pa. 200; Smith's Estate, 140 Pa. St. 344, p. 352.

[7] 154 N. Y. 179.

[8] 172 N. Y. 137.

[9] Lowry *v.* Farmers' Loan & Trust Co., 172 N. Y. 137; Stewart *v.* Phelps, 173 N. Y. 621.

[10] McLouth *v* Hunt, 154 N. Y. 179, p. 189; Robertson *v.* De Brulatour, 188 N. Y. 301.

[11] Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257.

the stockholder and the corporation, and does not attempt to apportion the dividend, but declines to permit the corporation to decide to whom a dividend shall belong as between the life tenant and remainderman, and finally decides the case on its merits without attempting to lay down any settled rule. In other jurisdictions the question has been similarly treated;[1] and in general, where no rule has been adopted, the trustee should take the direction of the court as to the disposition of the dividend.

The right to subscribe for new stock, whether availed of or sold for cash, is generally held in all jurisdictions, irrespective of rules governing extra dividends, to be principal.[2] The granting of such a right is really not a "dividend," properly speaking, at all, though often called so in discussing these questions.

Many settlements to-day expressly provide that the trustee shall in his uncontrolled discretion pay the dividend to the life tenant or remainderman, or apportion it between them, as equity may require. The New York court affirmed the trustee's action in such a case, where he seemed to have acted faithfully and discreetly.[3]

The Massachusetts rule is too arbitrary and the Pennsylvania rule too impracticable to make them good working rules, while it is too expensive and involves too much delay to apply to the court for instructions in each case; and therefore provision by the settlement or by statute would seem desirable, leaving the matter to the trustee's discretion.

[1] Pritchett *v.* Nashville Trust Co., 96 Tenn. 472; Greene *v.* Smith, 17 R. I. 28; Brown, Pet'r, 14 R. I. 371.

[2] Atkins *v.* Albree, 12 Allen, 359; Eidman *v.* Bowman, 58 Ill. 444; De Koven *v.* Alsop, 205 Ill. 309; Greene *v.* Smith, 17 R. I. 28; Brinley *v.* Grou, 50 Conn. 66; Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257, p. 267; Pierce *v.* Boroughs, 58 N. H. 302. The word "generally" was used advisedly, as in Pennsylvania there are decisions both ways. Biddle's Appeal, 99 Pa. St. 278; In re Kemble's Estate, 201 Pa. St. 523; Wiltbank's Appeal, 64 Pa. St. 256; Eisnew's Appeal, 175 Pa. St. 143. See also Holbrook *v.* Holbrook, 66 Atl. R. 124.

[3] In re Elting, 33 Misc. (N. Y.) 675.

Ordinary Dividends not Apportioned. — No part of a company's property belongs to a stockholder until it is separated and declared as a dividend; hence a dividend is an independent debt payable to the stockholders of a certain day, and remains principal until separated from the other funds and declared payable to the stockholders,[1] and therefore is never apportionable, and is always payable, no matter when paid, to the stockholder entitled at the time specified in the vote;[2] but if the trustee sold a stock just before the dividend day to defraud the life tenant or buy land according to the terms of the trust instrument,[3] the life beneficiary would be entitled to so much of the proceeds as would equal the dividend lost by the sale.

Delayed Dividends. — Where the dividends on stock are cumulative, and not paid when due but paid in full at a later date, it has been held that they should be apportioned among the persons to whom they would have been paid had they been paid when due, even including the estate of a deceased beneficiary;[4] but this decision is so contrary to the principles already discussed that it is doubtful whether it would be followed. It is more ingenious than convincing to argue that a dividend is severed from the corporate funds by being made cumulative in the charter.[5]

Interest sometimes Apportioned. — All rents and generally the whole amount received as interest is in-

[1] Lowell, Transfer of Stock, § 52, n. 3, authorities; Perry, § 545; Granger *v.* Bassett, 98 Mass. 462; Bates *v.* McKinley, 31 Beav. 280; De Koven *v.* Alsop, 205 Ill. 309.

[2] McKeen's Appeal, 42 Pa. St. 479; Johnson *v.* Bridgewater Mfg. Co., 14 Gray, 274; Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257; but see Clive *v.* Clive, Kay, 600, contra, and Lang *v.* Lang's Ex'rs, 57 N. J. Eq. 325, where dividends are apportioned like interest.

[3] Londesborough *v.* Somerville, 19 Beav. 295.

[4] Meldrim *v.* Trustees of Trinity Church, 100 Ga. 479.

[5] See pages 128 *et seq.*, *supra*. Howes, Income and Principal, p. 18.

come, and in England the rule is not subject to any exception.[1]

In some States, if a bond is purchased at a premium, sufficient of the interest must be set aside yearly to wipe out the premium at the maturity of the obligation, since a bond purchased at a premium is a wasting security, which would otherwise, out of justice to the remainderman, be converted;[2] but it follows that no part of the interest on a bond which is part of the property originally settled need be credited to principal, since there is no obligation to convert the bond, even though it be worth more than par.[3]

The practice of buying bonds which sell at a discount, to balance those bought at a premium, is not sound, as the difference of price is not simply a question of interest, but is more often one of security, nor can the loss on one investment be set off against the gain on another.[4]

Interest accrues from day to day, and will therefore be apportioned upon a sale of the security on which it accrues, or upon the termination of the life estate.[5] The interest accruing up to the date of sale or death being income, and the balance belonging to, and being part of, the security turned over. And this is the rule even where the debt is secured by a bond or mortgage.[6] But where the interest is payable by a coupon, which might be detached and sold separately,[7] and would then be a separate bond,

[1] Hemenway *v.* Hemenway, 134 Mass. 446, 450.

[2] Ibid.; In re Allis's Estate, 123 Wis. 223; Curtis *v.* Osborn, 65 Atl. R. 968; In re Hoyt, 27 App. Div. (N. Y.) 285; N. Y. Life Ins. & Trust Co. *v.* Baker, 38 App. Div. (N. Y.) 417. But the rule in New York seems to depend largely on the consideration of each case. N. Y. Life Ins. & Trust Co. *v.* Baker, 165 N. Y. 484; In re Stevens, 111 App. Div. (N. Y.) 773. No sinking fund in Kentucky and Pennsylvania. Hite's Devisees *v.* Hite's Ex'rs, *ubi supra;* Boyer's Estate, 44 W. N. C. 528, Orphans' Ct., Phila., 1899.

[3] Shaw *v.* Cordis, 143 Mass. 443.

[4] *Infra*, p. 154.

[5] Dexter *v.* Phillips, 121 Mass. 178.

[6] Dexter *v.* Phillips, 121 Mass. 178.

[7] Clark *v.* Iowa City, 20 Wall. 583, 589.

the rule, in the absence of statute, is otherwise, and there is no apportionment; but where the statute exists, even coupons are apportioned.[1]

In some jurisdictions there are statutes apportioning rents and coupons and annuities on the termination of a life estate settled by will.[2] This statute does not apply to settlements made by deed, which are governed by the common law.

Payments. — Any loss to the fund by depreciation of the market value of the property belongs to principal, and a loss occasioned by a breach of trust stands on the same footing.[3]

Discharge of Encumbrance. — If there is an encumbrance on the estate, as, for instance, a mortgage, if at once discharged it is paid from the remainder, but if carried[4] the interest is chargeable to income, and the principal to the corpus of the fund, and this is true even when the estate is not charged until a long period — say ten years — after the settlement.[5]

Similarly, where the trustees are compelled to discharge an involuntary encumbrance, such as a betterment assessment[6] or judgment, the cost is apportioned between income and principal. The whole amount is charged to principal and deducted from the estate of the remainderman, and the income is charged interest thereon yearly, or the interest may be funded and charged in a lump; or if the life tenant and remainderman are beneficiaries of the same funds, the principal is paid out of the corpus, and the life tenant loses interest and the remainderman the principal.

[1] Adams *v.* Adams, 139 Mass. 449.

[2] Mass. Rev. Laws (1902), ch. 141, § 25.

[3] Parsons *v.* Winslow, 16 Mass. 361. See p. 124, *supra*.

[4] Van Vronker *v.* Eastman, 7 Met. 157.

[5] Maclaren *v.* Stainton, L. R. 11 Eq. 382.

[6] A betterment assessment is a tax, but not an ordinary one, and as between life tenant and remainderman is treated as an encumbrance. Plympton *v.* Boston Dispensary, 106 Mass. 544.

Alterations and Repairs. — Alterations and additions to real estate whereby the usefulness or rental value is increased are chargeable to principal,[1] but the repairs or expenditures which are necessary to maintain the property in its previous condition are chargeable to income.[2]

It is often a difficult question of fact to decide whether a specified expenditure is an addition to the property or a current repair ; but the rule may be stated that, where repairs improve the property to the extent of their cost, they are chargeable to principal, and are a judicious investment of the trust funds.[3]

For instance, replacing ruinous buildings which have been condemned,[4] or putting in new foundations and adding fire escapes when required by the city,[5] and the addition of an elevator to a building which previously had none will be charged to principal, while putting in a new elevator in the place of an old one will be a repair chargeable to income.[6]

So also an expenditure may be in the nature of both an addition and a repair, and is then chargeable to principal only to the extent to which it benefits the property; and in some States [7] there are statutes allowing an apportion-

[1] Sohier *v.* Eldredge, 103 Mass. 345; Caldecott *v.* Brown, 2 Hare, 144.

[2] Underhill, pp. 250, 251, states that in the absence of express provision in the settlement the equitable life tenant is not bound to repair, and so all repairs should be made under order of court and apportioned by it. The English cases have arisen almost exclusively where the property was in the possession of the equitable life tenant, and not being managed as an investment by the trustees, as is general in America. Lewin, pp. 642, 644. In America the rule is as stated in the text, and a trustee should charge necessary current repairs to income. Parsons *v.* Winslow, 16 Mass. 361; Hepburn *v.* Hepburn, 2 Bradf. (N. Y.) 74; Little *v.* Little, 161 Mass. 188.

[3] Sohier *v.* Eldredge, 103 Mass. 345; In re Parr, 92 N. Y. S. 990.

[4] Smith *v.* Keteltas, 32 Misc. Rep. (N. Y.) 111.

[5] In re Parr, 45 Misc. Rep. (N. Y.) 564; aff'd, 100 N. Y. Supp. 1133.

[6] Little *v.* Little, 161 Mass. 188.

[7] Pennsylvania.

ment in such cases. The decision of the trustee in apportioning the expense, if made with reasonable discretion, will be upheld by the court;[1] but in doubtful cases it is well to get the instructions of the court before undertaking an extensive job, which, if charged wholly to the income, might be very burdensome.[2]

All expenditures on newly acquired property which are necessary to put it in condition to let or to hold, whether they are in the nature of repairs or additions, are chargeable to principal. For instance, fencing in land or repairing a house to obtain a tenant. These expenses, although chargeable to income at other times, on the acquisition of a new estate will be considered as so much additional purchase money, and chargeable to principal.[3]

All ordinary current expenses are charged to income. Shaw, C. J., says income means net income after deducting taxes, repairs, and ordinary current expenses;[4] current expenses are now[5] considered to include insurance, and in some jurisdictions the premiums paid for securities.[6]

Taxes. — All annual taxes, except those assessed on vacant land, are charged to income.[7] The whole tax for the year is chargeable to the tenant enjoying the property at the time when the tax is assessed.[8] Legacy taxes on the life interest are to be deducted from income, although the executor may have turned over the estate in one lump.[9] As vacant land gives no return to the life tenant, but his whole income might be used in preserving the property of

[1] Jordan *v.* Jordan, 192 Mass. 337, p. 343.

[2] Caldecott *v.* Brown, 2 Hare, 144.

[3] Parsons *v.* Winslow, 16 Mass. 361; N. Eng. Trust Co. *v.* Eaton, 140 Mass. 532.

[4] Watts *v.* Howard, 7 Met. 478; Bridge *v.* Bridge, 146 Mass. 373.

[5] Jordan *v.* Jordan, 192 Mass. 337, p. 344.

[6] New York Life Ins. Co. *v.* Sands, 53 N. Y. S. 320. *Supra*, p. 136.

[7] Plympton *v.* Dispensary, 106 Mass. 544; Hildenbrandt *v.* Wolff, 79 Mo. App. 333.

[8] Holmes *v.* Taber, 9 Allen, 246.

[9] Fitzgerald *v.* R. I. Hosp. Trust Co., 24 R. I. 59.

the remainderman,[1] all charges against it, including taxes, are chargeable to principal.[2] The taxes on a dwelling-house given for life are payable by the occupier, and not from the general income, in the absence of the manifestation of a contrary intention.[3]

Special assessments, such as betterment assessments, sewer taxes, etc., are chargeable to principal or are apportioned as specified.[4]

Insurance. — Insurance premiums are expressly chargeable to income by the terms of most carefully drawn trust instruments, and where no express provision is made in the instrument the general practice is to charge them to income.[5]

[1] Stone *v.* Littlefield, 151 Mass. 485; Underhill, p. 246, n.

[2] Pierce *v.* Burroughs, 58 N. H. 302; Stone *v.* Littlefield, 151 Mass. 485; Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257; Trenton Trust Co. *v.* Donelly, 65 N. J. Eq. 119; In re Pitney, 113 App. Div. (N. Y.) 845; Edwards *v.* Edwards, 183 Mass., 581.

[3] Wiggin *v.* Swett, 6 Met. 194; Amory *v.* Lowell, 104 Mass. 265.

[4] Plympton *v.* Dispensary, 106 Mass. 544.

[5] There is singularly little authority on the question. Probably because in early times and in England iusurance was not considered a necessary precaution of an ordinarily cautious man, and because failure to insure by a life tenant is not permissive waste (Harrison *v.* Pepper, 166 Mass. 288), and unfortunately what authority there is is conflicting. In Graham *v.* Roberts, 8 Ired. Eq. 99, the court expresses the opinion, and in the New York case, Re Housman, 4 Dem. Sur. 404, the court decides, on the authority of Peck *v.* Sherwood, 56 N. Y. 615 (in which no reason is stated), that the premiums are apportionable according to the respective interests of the life tenant and remaindermen, and Perry, § 487, says that, there being no obligation to insure, the premium should not be charged to the life tenant without his consent. See also Wiggin *v.* Swett, 6 Met. 194. On the other hand, in Darcy *v.* Croft, 9 Ir. Ch. 19, in a carefully considered opinion, the cost of iusuring the life of the annuitant was held chargeable to income, and this case seems to state the true reason, which is that the income is chargeable with all the ordinary annual expenses of maintaining the property (see Shaw, C. J., Watts *v.* Howard, 7 Met. 478, 482), of which insurance is now like repairs and taxes, one of the ordinary and necessary incidents of maintaining real estate. (See

In case of a partial loss, the funds recovered would be used in repairing.[1] In case of a total loss, the fund should be invested,[2] and could be used in rebuilding if such an investment is authorized, and will retain its character as real estate, although it may be otherwise where the insurance existed at the time of the will, as in such case the policy was a personal asset at the outset.[3]

If the life tenant insures the property, the remainderman has no claim on the fund recovered, the contract of insurance being merely to indemnify the individual for his loss. The fund recovered does not represent or stand in the place of the building destroyed.[4] But where a trustee insures the building, he will insure all his interest which is subject to the claim of both life tenant and remainderman, and in such case the fund recovered would stand in the place of the property destroyed as the property of the remainderman of which the life tenant has the use.[5]

Expenses.[6] — The charges of the trustees for managing the property, which are by the way of a commission on income, are charged to income. Extra charges for services which are beneficial to the fund are charged to principal, or may be apportioned equitably.[7]

Jordan *v.* Jordan, 192 Mass. 337, p. 344, and Bridge *v.* Bridge, 146 Mass. 373.) The ordinary practice of charging the premiums to income is entirely consonant with the theories of law, and with the law as now enacted by statute in England. Trustees Act, 1893, § 18.

[1] Brough *v.* Higgins, 2 Gratt. 408.

[2] Lerow *v.* Wilmarth, 9 Allen, 382.

[3] Haxall's Ex'rs *v.* Shippen, 10 Leigh, 536. In that case, the life tenant gave bond to invest money and pay over on death of life tenant, hence had no right to convert.

[4] Harrison *v.* Pepper, 166 Mass. 288.

[5] Graham *v.* Roberts, 8 Ired. Eq. 99; Haxall's Ex'rs *v.* Shippen, 10 Leigh, 536; Re Housman, 4 Dem. Sur. 404.

[6] As to what expenses are allowed, see *supra*, p. 35.

[7] Hite's Devisees *v.* Hite's Ex'rs, 93 Ky. 257, p. 269; R. I. Hosp. Trust Co. *v.* Watermann, 23 R. I. 342; Gordon *v.* West, 8 N. H. 444. But see Spangler's Estate, 21 Pa. St. 335, where such charges were

Brokers' commissions on change of investment, where it was expressly provided that *all expenses* were to be charged to income, were properly classed as *expenses* and charged to income,[1] but in a purchase or sale of real estate the brokers' commission is in practice considered as part of the price of the property, and so is generally charged to principal, and would probably be allowed so generally;[2] and in the absence of expressed intention, the same reasoning would seem to apply to the purchase of stocks and bonds.

Legal expenses of settling the interpretation of the trust instrument, the cost of obtaining the instructions of the court, or appointment of new trustees are borne by the principal,[3] and so also the expenses of recovering the fund or paying it out, and of the final accounting.[4] So also the legal expenses of protecting the property; but the legal expenses of collecting the income, or of determining the matter of payments chargeable to income, fall naturally to income.

The Distribution of the Trust Fund. — The trustee must distribute the trust fund properly at his peril, and if he distributes the wrong amount, or pays it to the wrong person, must bear the loss.

The fact that he has been diligent or has taken advice will not save him, and his only protection is to obtain a decree of distribution from the court. But he will be protected if, in paying one beneficiary whose share

held to be the ordinary charges of protecting the property, and so charged to income. Underhill, p. 246, n. *Supra*, pp. 98, 99.

[1] Heard *v.* Eldredge, 109 Mass. 258.

[2] Smith *v.* Nones, 28 Ky. Law Reg. 248. On the authority of Heard *v.* Eldredge and the supposed custom of trustees the Massachusetts court has decided that brokers' commissions must be charged to income. Jordan *v.* Jordan, 192 Mass. 337, p. 346. By statute the law is now in accordance with the text. Acts of 1907, ch. 371.

[3] Howland *v.* Green, 108 Mass. 283. *Supra*, pp. 98, 99.

[4] Chisholm *v.* Hammersley, 114 App. Div. (N. Y.) 565.

becomes due before the others, he pays him on a fair valuation of the estate, although the securities depreciate so that the others get less.[1]

In some States the fund itself may be paid into court for distribution;[2] and statutes generally exist giving courts of probate authority to decree distribution in the case of testamentary trusts.

As these courts have the custody of the fund itself, and the decree is against the property, and not merely against the parties to the suit, all persons interested need not be parties in order to give the court jurisdiction,[3] and provided the proper notices have been given, the validity of the decree cannot be questioned by any form of pleading or proof.[4] The notice to be given is generally prescribed by statute, or in the absence of statute by the court. Where an error has been made in the decree as to the persons entitled to distribution, as for instance where the estate has been divided among four persons instead of five, the court may correct its decree so that the excess may be recovered from the persons who have been overpaid, but the original decree will stand in so far as it protects the trustee, and he will not be liable in any event.[5]

Where the proper statutory authority does not exist, or in trusts which are not created by the decree of a probate court, resort may be had to a court of equity for a decree of distribution. In such suits care must be taken to make all parties interested parties to the suit, or they will not

[1] Frere *v.* Winslow, 45 Ch. Div. 249.

[2] Annot. Code, Iowa (1897), § 370, as amended 1902; Mont. Code Civ. Proc. (1895), § 970; Bates's Annot. Ohio Stat. (1906), § 5592; Rev. Stat. Okla. (1903), § 4446; Rev. Stat. Wy. (1899), § 4059.

[3] Minot *v.* Purrington, 190 Mass 336, p. 340.

[4] Loring Adm. *v.* Steineman et al., 1 Met. 204; Lamson *v.* Knowles, 170 Mass. 295; Pierce *v.* Prescott, 128 Mass. 140. See statutes *passim*.

[5] Harris *v.* Starkey, 176 Mass. 445; Minot *v.* Purrington, 190 Mass. 336; Cleaveland *v.* Draper, 80 N. E. 227 (Mass. 1907).

be concluded,[1] and if there be any doubt as to whether all the proper parties have been joined the trustee may require the payees to give security to reimburse against any claims that may arise.

The common practice of getting a final account showing a distribution allowed by the court is objectionable, as although the allowance of the account operates as a decree against all parties to the suit,[2] it is not conclusive on all the world,[3] and a share improperly paid over cannot be recovered back.[4]

The trustee must pay the distributive shares at his peril to the proper distributees. The fact that he pays on a forged order, or an invalid assignment,[5] or on a power of attorney which he supposes to be good, but which has in fact been revoked, will not protect him. Now, by statute in England, a trustee paying in good faith under a revoked order is protected,[6] but the law is not so in America.

He must not pay a minor's share to himself or his parent or guardian without an order of court,[7] or he may be required to pay him again when he comes of age.

He may perpetuate the evidence of his payments by an account filed in court, and allowed after notice to all interested, or under statutory law, by filing the vouchers in court.[8] The former course is preferable, as all parties to

[1] Cathaway *v.* Bowles, 136 Mass. 54; Kendall *v.* DeForest, 101 Fed. R. 167.

[2] Emery *v.* Batchelder, 132 Mass. 452.

[3] Palmer *v.* Whitney, 166 Mass. 306. There are statutes in some States making such an account conclusive. Mass. Rev. Laws, ch. 150, § 21.

[4] Hilliard *v.* Fulford, 4 Ch. Div. 389.

[5] Palmer *v.* Whitney, 166 Mass. 306. The court in a decree of distribution will not pass on the validity of assignments. Lenz *v.* Prescott, 144 Mass. 505.

[6] Underhill, p. 365.

[7] Perry, § 624. But see Sparhawk *v.* Buell, 9 Vt. 41.

[8] Mass. Rev. Laws (1902), ch. 150, § 20.

the suit are forever barred by the suit, and he cannot demand a receipt or discharge where he simply follows out the distribution according to the terms of the trust, and cannot refuse to pay until he gets a receipt.[1]

As a distribution of the fund without a decree of the court or a decree of a court itself is an overt act, the statute of limitations will begin to run from that time.[2]

If the trust was "to convey" or "divide" the real estate, a conveyance is necessary, and a power of sale is implied if a sale is necessary to divide the property,[3] but a conveyance to the remaindermen as tenants in common may be all that is necessary to "equally divide" the estate;[4] otherwise, real estate will usually vest in the distributees by the provisions of the instrument.[5]

As these duties are so onerous, compensation is generally allowed, and is usually two and a half or one per cent on the amount turned over.[6]

In some jurisdictions the amount is regulated by statute.

The trustee may retain the funds in his hands until the account is settled and he has been paid his charges.[7]

VI. LIABILITIES.

To Strangers. — A trustee is personally liable on his contracts, even where he describes himself as a trustee or adds the word "trustee" to his signature.[8] He may, however, expressly limit his liability to the extent of the

[1] Chadwick *v.* Heatley, 2 Coll. 137. *Supra*, p. 91.

[2] Jones *v.* Home Savings Bank, 118 Mich. 155.

[3] Parker *v.* Seeley, 56 N. J. Eq. 110; Davison *v.* Tams, 30 Misc. Rep. (N. Y.) 156.

[4] How *v.* Waldron, 98 Mass. 281.

[5] Temple *v.* Ferguson, 110 Tenn. 84; Morgan *v.* Moore, 3 Gray, 319.

[6] *Supra*, p. 36.

[7] Foster *v.* Bailey, 157 Mass. 160; Baring *v.* Willing, 4 Wash. C. C. 248.

[8] Bowen *v.* Penny, 76 Ga. 743; Taylor *v.* Davis, 110 U. S. 330. *Supra*, pp. 28, 78.

trust estate,[1] but the terms of the contract must show clearly that the contractor relied wholly on the credit of the trust estate and not on the personal credit of the trustee.[2] Without such a provision the trustee will be personally liable even under a contract ordered by the court; since the order of court only insures his right to indemnity from the trust property, and does not affect a stranger.[3] He is also liable on the covenants in a deed or lease, and on the recitals in a deed, if he should have special knowledge of their accuracy.[4]

He is not bound to give information to strangers with whom the beneficiary is negotiating a loan, and if he innocently makes an erroneous representation, is not liable therefor.[5]

He will be personally liable where he assumes to be a trustee, when as a matter of fact, owing to defective appointment he is not a trustee, and in such cases will have no right to indemnity from the trust property.

If he exceeds his powers, as for instance in selling or leasing to a stranger, and the stranger gets no title, he will be liable personally and individually for the price, and also for damages, if any.[6]

He is liable personally as stockholder in a corporation,[7] and for taxes,[8] and in tort as owner of the property to the same extent as though the ownership was individual.[9] In all these cases he has a right of indemnity from the trust fund only so far as he has neglected no duty and has acted strictly within his powers.

He is liable criminally for embezzlement if he misappropriates the trust funds, even though under the pre-

[1] Taylor *v.* Davis, *ut supra;* Packard *v.* Kingman, 109 Mich. 497.

[2] Mitchell *v.* Whitlock, 121 N. C. 166; Connally *v.* Lyons, 82 Texas, 664; Mulrein *v.* Smillie, 25 App. Div. 135 (N. Y.).

[3] Gill *v.* Carmine, 55 Md. 339; Glenn *v.* Allison, 58 Md. 537.

[4] Lewin, p. 211, n.; Story *v.* Gape, 2 Jur. (N. S.) 706. *Supra*, p. 100.

[5] Low *v.* Bouverie, 3 Ch. (1891) 82.

[6] Diamond *v.* Wheeler, 80 App. Div. (N. Y.) 58. *Supra*, p. 29.

[7] *Supra*, p. 27. [8] *Supra*, p. 29. [9] *Supra*, p. 30.

tence of a loan to himself;[1] for he cannot change himself from a trustee of the funds into a debtor without the consent of the beneficiary;[2] and the fact of consent must be established by positive proof.[3]

If a defaulting trustee is a lawyer, his breach of trust is a cause for disbarment.[4]

Liability to Beneficiaries. — The liabilities of trustees to their beneficiaries are joint and several, and a decree may be enforced against either, even if not the one actually at fault, and irrespective of liability among themselves;[5] but this joint liability ends with the trustee's death, and his estate is liable only for the acts during the trustee's lifetime.

Each transaction stands by itself, hence the gain on one cannot set off the loss on another. All the gains belong to the trust estate, and not to the trustee, hence they do not belong to him to set against his liabilities;[6] but in administering a fund as a whole, one transaction cannot be picked apart to show gains and losses, as, for instance, in developing real estate, the loss on a building built to make the rest more readily salable is part of the whole transaction, and not a separate loss.[7]

The trustee is liable to his beneficiary for any loss of the trust property arising from his neglect of duty. As, for instance, where the trust is created, and he neglects

[1] Mass. Rev. Laws (1902), ch. 208, § 48; Rev. Code N. Dak. (1895), § 7464, as amended by Laws 1901, ch. 82; Bates's Ann. Stat. Ohio (1906), § 6842; Annot. Code Oregon (1902), § 1836; Code Tenn. (1896), § 6592.

[2] Marshall *v.* Marshall, 53 Pac. Rep. 617 (Col. 1898); Gunter *v.* Janes, 9 Cal. 643, p. 659.

[3] In re Farmers' Loan & Trust Co., 47 App. Div. (N. Y.) 448.

[4] Thompson *v.* Finch, 8 DeG., M. & G. 560.

[5] McCartin *v.* Traphagen, 43 N. J. Eq. 323; Bermingham *v.* Wilcox, 120 Cal. 467.

[6] Wiles *v.* Gresham, 2 Drew. 258; Blake *v.* Pegram, 109 Mass. 541.

[7] Vyse *v.* Foster, L. R. 7 H. L. 318.

to collect or secure the property,[1] or inexcusably allows rents to fall in arrears.[2]

Thus, if he neglects to insure where it is his duty to do so, he will be liable for the loss,[3] or if he neglects to invest, he will be liable for interest.[4]

He is liable not only for a loss directly due to his neglect, but also where it is only indirectly due to his neglect; as, for instance, if he leaves the property improperly in the hands of his co-trustee or an agent, and it is misappropriated, destroyed, or stolen.[5] Though he will not be liable for the acts and crimes of strangers through which the property is lost, if he has done his duty in taking care of the property, as, for instance, where the property is properly deposited and then stolen,[6] yet if he has been remiss in his duty he will be liable for any loss that may occur in any manner;[7] as, for instance, if he has mingled the trust money with his own funds in the bank, he will be liable for the loss by the failure of the bank; while if the property were deposited in the names of the trustees, they would not be liable unless they were careless in selecting the depositary. The usual exemption clause providing that the trustee shall not be liable for the acts or defaults of his agent will not excuse him if he neglects his duty and intrusts matters to an agent improperly. The exemption clause applies only where the agent is acting properly as such.[8]

Liability for Co-trustee. — As a general rule he is liable for his own acts and neglects only, and is not liable for

[1] Fenwick *v.* Greenwell, 10 Beav. 412. *Supra*, p. 100.

[2] Tebbs *v.* Carpenter, 1 Mad. 291; In re McIntyre, 24 App. Div. (N. Y.) 167.

[3] As to his duty, see *supra*, p. 102, n. 3.

[4] See *supra*, p. 110. White *v.* Ditson, 140 Mass. 351.

[5] Bostock *v.* Floyer, L. R. 1 Eq. 26. *Supra*, p. 103.

[6] Jones *v.* Lewis, 2 Ves. Sen. 240.

[7] Civ. Code Cal. (1903), § 2236, as amended by Acts of 1905, ch. 615; Rev. Civ. Code So. Dak. (1903), § 1625.

[8] Wyman *v.* Patterson (1900), App. Cas. (Eng.) 271.

the act or default of his predecessor in the trust,[1] or of his co-trustee,[2] unless he joins in the breach of trust, or negligently permits it;[3] but he can easily make himself so by giving a joint bond, which he need never do, each trustee having a right to give his separate bond,[4] or joining in a fraudulent account.[5] He will be liable where he has handed the funds to his co-trustee, allowed him to receive them, or looked on at a breach of trust;[6] as, for instance, by joining in a receipt for the money on a sale of securities and afterwards leaving the property with his co-trustee,[7] though in that case, if he can show affirmatively that there was a necessity to join in the receipt and leave the funds in the hands of the co-trustee afterwards, he will escape liability;[8] or by neglecting his duty and allowing his co-trustee to act improperly as his agent,[9] and to do alone what ought to have been done jointly; or by standing by and allowing his co-trustee to commit a breach of trust.[10] A late case well illustrates these rules. The trustees under a will were to be held liable for their own default only. The active management of the estate was intrusted to F., who had been the testator's man of affairs. He collected and embezzled thirty thousand dol-

[1] Blake *v.* Pegram, 109 Mass. 541. See *supra*, pp. 95, 101.

[2] Stowe *v.* Bowen, 99 Mass. 194; Hinson *v.* Williamson, 74 Ala. 180, 195; Townley *v.* Sherburne, 3 White & Tudor, L. C. Eq., 6th Am. ed., Notes, 964.

[3] Rev. Civ. Code So. Dak. (1903), § 1628; Civ. Code Cal. (1903), § 2239 *et seq.*

[4] Ames *v.* Armstrong, 106 Mass. 15.

[5] Horton *v.* Brocklehurst, 29 Beav. 504.

[6] Wilkins *v.* Hogg, 3 Giff. 116.

[7] It is to be noticed that the ordinary form of a deed, which all the trustees must sign, contains a receipt for the consideration.

[8] Monell *v.* Monell, 5 Johns. Ch. 283.

[9] Rev. Civ. Code So. Dak. (1903), § 1628; Cal. Civ. Code (1903), § 2239; Oliver *v.* Court, 8 Price, 127, 166. *Supra*, pp. 89, 90, as to collection of income.

[10] Crane *v.* Hearn, 25 N. J. Eq. 378. See *supra*, pp. 89, 90, for distinction between leaving income and principal in the hands of one trustee.

lars, which H., the inactive trustee, discovered but allowed F. to continue to manage the estate. F. then embezzled thirteen hundred dollars. The inactive trustee was not held liable for the first embezzlement, but he was held liable for the second.[1]

So also the trustee will be liable if he puts or unjustifiably leaves the trust property in the exclusive control of his co-trustee and it is lost.[2] He may not rely on the representations of his co-trustee as to the status of the property, but must ascertain it himself.[3]

Thus, where property was left in trust to the widow and brother of the testator, for the benefit of the widow for life and then for others, and the widow managed the trust and the brother never did anything about it, and the widow wasted the property and died insolvent, the brother was held liable for the whole loss.[4] So, too, where the securities were deposited with a banker without inspection for four years, and one trustee was allowed to draw them out.[5] So, too, where the trustees improperly divide the management of the trust, each will be liable for the other, as, for instance, where each of two trustees took half the property and invested it in his respective business and paid interest on it, and then one failed, the other was held to make up the loss.[6] So, too, if he joins in a fraudulent or unfair account,[7] or in a receipt for money which is afterwards misapplied.

A provision in the trust instrument that one trustee

[1] In re Mallon's Estate, 43 Misc. Rep. (N. Y.) 569.

[2] *Supra*, pp. 104, 105. But see In re Westerfield, 32 App. Div. (N.Y.) 324, where trustee who was excluded from management was not held liable.

[3] Bates *v.* Underhill, 3 Redf. (N. Y.) 365; In re Beatty's Estate, 214 Pa. St. 449.

[4] Clark *v.* Clark, 8 Paige, 153.

[5] *Supra*, p. 104.

[6] Graham *v.* Austin, 2 Gratt. 273. It is not necessary to exhaust the remedy against the defaulting trustee first. Bermingham *v.* Wilcox, 120 Cal. 467.

[7] Blake *v.* Pegram, 109 Mass. 541.

shall not be liable for the acts or defaults of the other does not relieve him of liability in such cases, as he is made liable, not because the other is at fault, but because he neglects his own duties, and so gives the co-trustee the opportunity to waste the estate; but the clause may be drawn so as to exempt him,[1] and he will not be liable if the loss occurred by following out the directions of the trust instrument, as for instance in leaving money in the hands of A, where the instrument says he may do so.[2]

A trustee who has made good a loss occasioned by a breach of trust not amounting to a fraud, is entitled to contribution from his co-trustees; but where there has been a joint fraud the court will not help him against his partner in wrong.[3]

A trustee who has been guilty of no fraud himself, but who has been deceived by his co-trustees [4] as to the state of the funds, or who has made good a loss caused by his co-trustee's fraud, has a right not only to contribution but to full indemnity from his co-trustee, who has had the benefit of the misappropriation.[5] Or he may recover indemnity of the beneficiary who has received the benefit of a breach of trust induced by him.[6]

Liability for Errors. — The trustee is liable for any loss caused by his exceeding his powers; as, for instance, if he sells without having the power to do so,[7] or makes an

[1] Wilkins *v.* Hogg, 3 Giff. 116; White & Tudor, L. C. Eq., 6th Am. ed., note to Brice *v.* Stokes, 1029, 1030.

[2] Kilbee *v.* Sneyd, 2 Moll. 186, 200; Pass *v.* Dundas, 29 W. R. 332.

[3] Underhill, p. 479.

[4] Thompson *v.* Finch, 8 DeG., M. & G. 560.

[5] Bahin *v.* Hughes, 31 Ch. Div. 390; McCartin *v.* Traphagen, 43 N. J. Eq. 323; Sherman *v.* Parish, 53 N. Y. 483.

[6] Raby *v.* Ridehalgh, 7 DeG., M. & G. 104; Griffith *v.* Hughes, 3 Ch. (1892), 105; and under statutes even from a married woman without power of anticipation.

[7] Perrins *v.* Bellamy (1899), 1 Ch. 797.

unauthorized conversion, he may be compelled to replace it in kind or make good its increase in value.[1]

Or where he invests in securities in which he has no power to invest, even though honestly, he will be liable; as, for instance, where the trustee was authorized to invest in real security, and held railroad bonds believing them to be authorized, he was held liable.[2]

So, too, he is liable if he pays the wrong person,[3] as e. g. where he paid a sum due an infant to his father, without order of court, the infant could demand the sum on coming of age.[4] Or where a beneficiary has encumbered his estate, and there is notice among the papers. Or where, under a misapprehension, he has paid sums which should be principal to the life tenant, or *vice versa*.

The trustee is liable for his errors in judgment (unless expressly exempted) in the performance of his duties, but not in the exercise of his discretionary powers.[5]

The trustee is held to perform his duties with reasonable discretion,[6] that is to say, with the same intelligence that a reasonable man would use in the transaction of his own affairs ; the fact that he is incompetent is no excuse. He must be at the pains to learn his duties.[7] For instance, it being the duty of the trustee to invest the trust funds, if he invests too large a proportion in certain securities, or if he uses poor judgment in investing, he will be liable for the loss, irrespective of his honesty. But he is not

[1] *Infra*, pp. 170, 171. [2] Robinson *v.* Robinson, 11 Beav. 371.

[3] See Underhill, p. 290; see as to distribution, *supra*, pp. 142–145.

[4] Dagley *v.* Tolferry, 1 P. Wms. 285; Simpson on Infants, p. 180, 2d Eng. ed.

[5] *Supra*, pp. 59–63 ; Civ. Code Cal. (1903), § 2238; Rev. Civ. Code So. Dak. (1903), § 1627 ; Rev. Code N. Dak. (1895), § 4274.

[6] "Ordinary care and diligence." Rev. Civ. Code So. Dak. (1903), § 1637; Code Ga. (1895), § 3170; Cal. Civ. Code (1903), §§ 2258, 2259.

[7] Hun *v.* Cary, 82 N. Y. 65. In Pierce *v.* Prescott, 128 Mass. 140, a guardian was held liable for not knowing the law of distributions. C. J. Gray cites many other cases in the opinion.

supposed to be infallible, and where he has acted with that amount of discretion which an ordinarily prudent man uses in his own affairs,[1] and honestly, he will be protected; and even where he has acted in good faith only the court will treat him leniently, and give him the benefit of the doubt,[2] especially if he is acting under advice of counsel,[3] since this fact shows that he used due diligence, though it is not in itself an excuse.[4]

This liability may be restricted by the terms of the trust instrument; and a clause making a trustee liable for his wilful and intentional breaches of trust only is a common provision in trust instruments, and will be given effect by the courts.[5] But this clause does not excuse a trustee who knowingly or carelessly hazards the trust funds, and fails in his duty where reasonable inquiry would have made him safe.[6]

He cannot set off the gain on another investment against the loss on any injudicious investment, since all gains belong to the trust fund, and the loss on an improper investment is a personal liability, and the fact that the trust fund has largely profited by the good management of the trustee does not affect his liability to make good any error of judgment.[7]

But if he have a discretionary power to do any act, the court will not inquire whether he has used good judgment or not, provided he has been honest in its exercise; as, for instance, if he have a power of sale, the court will not inquire into the price unless it be so grossly inadequate as to suggest a fraud, or where he has a power to support,

[1] In re Cousins's Estate, 111 Cal. 441. *Supra*, p. 116.

[2] Crabb *v.* Young, 92 N. Y. 56.

[3] Perrine *v.* Vreeland, 33 N. J. Eq. 102.

[4] Stott *v.* Milne, 25 Ch. D. 710; Boulton *v.* Beard, 3 DeG., M. & G. 608; In re Westerfield, 32 App. Div. (N. Y.) 324; Perrins *v.* Bellamy (1899), 1 Ch. 797.

[5] Wilkins *v.* Hogg, 8 Jur. (N. S.) 25.

[6] Tuttle *v.* Gilmore, 36 N. J. Eq. 617.

[7] *Supra*, p. 147; Wiles *v.* Gresham, 2 Drew. 258.

the discretion of the trustee, honestly exercised, as to the amount of support will be final.[1]

Measure of Damages. — A trustee who has caused loss to his trust must make the fund good, and will be charged with interest if any would have been earned.

Interest is simple in most cases,[2] but compound interest is allowed if the trust was for accumulation, or if the funds have been used in trade, as that amount will be supposed to be realized, or as a punishment for disobeying the order of the court, or wilful misconduct in the management of the trust.[3]

If the trustee fails to perform a specified duty, as, for instance, to invest in specified stock, the beneficiary may elect to have the money and interest, or an equivalent amount of stock and the dividends declared in the meanwhile.[4]

Similarly, if he exceeds his powers in selling real estate or stocks, he may be required to replace them by like real estate or stocks;[5] and if he sell trust stock and have shares in the same company in his own estate, they can be held by the beneficiary as against his assignee in insolvency.[6]

Where a trustee had sold the trust property and appropriated the proceeds to his own use, but rendered accounts as though he still held the securities, he was charged with the market value of the securities at the date of the event, and the amount of dividends payable up to that time, but with an allowance for taxes and commissions, since the

[1] *Supra*, p. 81.

[2] McKim *v.* Blake, 139 Mass. 593.

[3] Ames, 498, n.; McKim *v.* Hibbard, 142 Mass. 422; Jennison *v.* Hapgood, 10 Pick. 77; Bemmerly *v.* Woodward, 124 Cal. 568; Kane *v.* Kane's Adm., 146 Mo. 605; St. Paul Trust Co. *v.* Strong, 85 Minn. 1. *Supra*, p. 110.

[4] Perry, § 844; Freeman *v.* Cook, 6 Ired. Eq. 373; Lewin, p. 370. *Infra*, pp. 170, 171.

[5] *Supra*, pp. 151, 152.

[6] Draper *v.* Stone, 71 Me. 175.

settlement was on the theory that the account was made up as though the trust had been properly administered.[1] Had the stock fallen in value, the beneficiary might have claimed the price at which it actually sold and interest.[2] In the absence of evidence of the actual price received, the trustee is chargeable with at least the inventory value.[3]

If a trustee buys the trust property at a sale, he must make good any loss in price incurred at reselling.[4] Or if he sell to a *bona fide* purchaser before the sale is disaffirmed, he must account for any profit.[5] And if the property has depreciated in value, he must make up the difference of the value at the time of purchase, with interest.

If he purchased the property himself, at an inadequate price, the court may confirm the sale, requiring him to pay the difference to make the full market value.[6]

If, however, the trustee, supposing that he has acquired a good title, has laid out money in good faith, and improved the estate, he will be allowed for it.[7]

Liability Terminated. — The liability of the trustee may be ended by his passing through bankruptcy,[8] or getting a release,[9] settling his accounts, or by the statute of limitations.[10]

If his successor in the trust takes over the property without objection at its inventory valuation, and retains it for a considerable time unconverted, he cannot subse-

[1] McKim *v.* Hibbard, 142 Mass. 422.

[2] Ibid. 427.

[3] Ibid. 425.

[4] Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252.

[5] Clark *v.* Blackington, 110 Mass. 369.

[6] Morse *v.* Hill, 136 Mass. 60.

[7] Morse *v.* Hill, 136 Mass. 60; also Davoue *v.* Fanning, 2 Johns. Ch. (N. Y.) 252. *Supra*, p. 147.

[8] Thompson *v.* Finch, 8 DeG., M. & G. 560. This is true of the United States Bankruptcy Act, but not of the Massachusetts Insolvency Act. Tallant *v.* Stedman, 176 Mass. 460, p. 466.

[9] *Infra*, p. 176.

[10] *Supra*, pp. 144, 145; *infra*, p. 178.

quently charge his predecessor with any loss.[1] If, however, the successor seasonably converts the property, he may claim the loss, or he can object to taking the property at more than its real value.[2]

He is not liable for the doings in the trust subsequent to his death, but an action against him for a breach of trust survives in equity.[3]

The ordinary statute limiting the time for the collection of a debt to two years after the death of the debtor does not apply to the collection of trust funds from the estate of a trustee, even though the trustee so mingled the trust funds with his own that they cannot be traced, for he cannot convert himself from a trustee into a debtor without the beneficiaries' consent,[4] and the statute is against debtors only.[5]

[1] Thayer *v.* Kinsey, 162 Mass. 232.
[2] In re Salmon, 42 Ch. Div. 351 ; Thayer *v.* Kinsey, 162 Mass. 232.
[3] Dodd *v.* Wilkinson, 41 N. J. Eq. 566.
[4] *Supra*, pp. 146, 147.
[5] Gunter *v.* Janes, 9 Cal. 643, p. 659 *et seq.*

PART III.

THE BENEFICIARY.

I. **Who may be a Beneficiary.** — Almost any person may be a beneficiary, but a person who could not legally hold property within the jurisdiction cannot be entitled as a beneficiary. As, for instance, a slave,[1] an alien enemy or a corporation[2] that could not hold property in its own name in the jurisdiction, could not hold it through the instrumentality of a trustee.[3]

Parrots, horses, and dogs, and in former times slaves, might be the objects of trusts, but they could not be true beneficiaries, as they are not "persons," and therefore cannot appear in court to enforce the trust. Bequests to unspecified charities stand on another footing, since the Attorney General will appear to enforce them.[4]

Trusts for "things," such as pets, etc., if properly drawn, will not be interfered with by the court, but the carrying of them out must depend on the honor of the trustee. That is to say, the gift may be to a trustee to expend so much as he thinks fit in maintaining certain horses and dogs, the residue to go to the trustee. A further clause might be added, that, if the trustee failed to support the animals properly, the property should go to the next of kin. So, too, the direction to employ a particular person as an at-

[1] Pool *v.* Harrison, 18 Ala. 514.

[2] Coleman *v.* San Rafael Turnpike Road Co., 49 Cal. 517.

[3] For statutes against aliens holding land in sundry States, see Underhill, p. 95, n.

[4] But see Fosdick *v.* Town of Hempstead, 125 N. Y. 581, where the poor of a town was considered too indefinite.

torney or agent by a testator does not create a trust or make the person designated a beneficiary.[1]

Who is the Beneficiary? — Any person who has a claim against the trustee for any of the benefit of the trust property is a beneficiary.

The claim need not be vested, a contingent interest being such a claim.[2]

Persons to whom income is payable at the discretion of the trustee are not beneficiaries under the above definition, since they have no claim they can enforce or assign, although they are interested in the trust and may intervene to have a proper trustee.[3]

In the absence of statute ordering the appointment of a guardian *ad litem*, persons not ascertained or not in being are not parties interested.[4]

Persons having a mere possibility, or a person to whom a beneficiary has given an order on the trustee, are not beneficiaries, although they have property that may be assigned.[5] Nor is the holder of a general power of appointment a beneficiary, although, in some jurisdictions,[6] if he exercise the power his creditors will take the estate.

The claim of the beneficiary is not to any part of the property itself, either at law or in equity; hence he cannot sue to recover, and protect the fund or recover damages for an injury to it.[7] All the property rights are in the trustee, and the claim is against the trustee only.[8]

II. **Estate of the Beneficiary.** — The estate of the beneficiary may be described as his right to force the trustee

[1] Foster *v.* Elsley, 19 Ch. Div. 518.

[2] Clarke *v.* Deveaux, 1 S. C. 172.

[3] Wilson *v.* Wilson, 145 Mass. 490. *Supra*, pp. 22 and 81; *infra*, p. 162.

[4] Bradstreet *v.* Butterfield, 129 Mass. 339; Hartman's Appeal, 90 Pa. St. 203; Dexter *v.* Cotting, 149 Mass. 92.

[5] Hawley *v.* Ross, 7 Paige, 103.

[6] *Infra*, p. 162.

[7] Western Railroad Co. *v.* Nolan, 48 N. Y. 513. Statutes in Code States and several others.

[8] *Supra*, p. 26.

to carry out the terms of the trust.[1] As courts of equity recognize the beneficiary's absolute right in this respect, they regard him as the true owner of the property, and have invested his equitable estate with many of the same incidents and qualities pertaining to legal ownership in a court of law.[2]

As has been hereinbefore pointed out,[3] the beneficiary is not clothed with the privileges and burdens incidental to the ownership of the property, which are attributes of the legal estate and consequently belong to the trustee; but his equitable estate is property, and he may treat it in general much as the legal owner of property may treat his, although it is not such an ownership of things as would, for instance, qualify a voter where a property qualification is required.[4]

Incidents of the Equitable Estate. — The estate of the beneficiaries is not joint, even though there be several beneficiaries entitled to equal and similar interests in the trust.[5] Each beneficiary may act independently of the others, and the admissions of one will not estop the others.[6] A majority has no greater right than a minority, or than even an individual.

Where, however, there has been a breach of trust in the sale of trust property, and the beneficiaries do not agree in desiring a reconveyance, if their interests cannot be separated the court will proceed in the best interests of all the beneficiaries and order an avoidance for all, or damages for all, as it thinks best.[7]

Or where an account is corrected at the instance of

[1] If a valid trust is established the court will enforce it even though the testator provides that the trustee shall not be interfered with by the court. Keeler *v.* Lauer, 85 Pac. R. 541 (Kansas, 1906). *Supra*, p. 62.

[2] Freedman's Co. *v.* Earle, 110 U. S. 710.

[3] *Supra*, p. 26; and see Lewin, p. 640.

[4] Lewin, p. 247; Burgess *v.* Wheate, 1 Eden, 177, 251.

[5] Underhill, p. 34.

[6] Levi *v.* Gardner, 53 S. C. 24.

[7] Morse *v.* Hill, 136 Mass. 60.

one, all will be entitled to participate in the benefit of the correction.[1]

The equitable estate may descend or be devised, and is now usually liable to the incidents of curtesy and dower.[2]

That curtesy may attach, the estate must be in possession, when it will attach although limited to the wife's heirs.[3]

In early times dower was not an incident of a trust estate,[4] but now, by statute, it usually is,[5] although there are some jurisdictions where there is no dower, as Massachusetts and Maine, but the wife is compensated in other ways.[6]

Beneficial estates in lands have been held not liable to forfeiture or escheat,[7] but under the statutes in the United States on failure of heirs the trust property, whether real or personal, would pass to the State.[8]

The beneficial estate is subject to disseisin where a trustee repudiates the trust, and claims the property so that the statute of limitations begins to run.[9]

Alienation. — In the absence of restraint by the terms of the settlement or statute, the beneficial estate may be alienated as freely as any other property.[10]

The beneficiary may convey it away and it will pass to

[1] Little *v.* Little, 161 Mass. 189. Even where they have assented to the account, Bennett *v.* Pierce, 188 Mass. 186, unless the breach of trust has been knowingly released. Vohmann *v.* Michel, 185 N. Y. 420. *Supra*, p. 94.

[2] Code Miss. (1906), § 1652; Laws of Del. (1893), ch. 85, § 1; Rev. Stat. N. Y. (1901), p. 3078, § 280; Bartlett *v.* Bartlett, 137 Mass. 156; Perry, § 323.

[3] Tillinghast *v.* Coggeshall, 7 R. I. 383.

[4] Reed *v.* Whitney, 7 Gray, 533.

[5] See Stimpson, § 3202.

[6] Hamlin *v.* Hamlin, 19 Me. 141; Reed *v.* Whitney, 7 Gray, 533; Simonds *v.* Simonds, 112 Mass. 164.

[7] Burgess *v.* Wheate, 1 W. Bl. 123.

[8] Perry, §§ 327, 436.

[9] *Infra*, p. 178.

[10] In Ga. Code (1895), § 3188, may sell to any person except husband and trustee. In Pennsylvania and South Carolina, a married woman can convey only in the manner provided in the settlement, Quin's Estate, 144 Pa. 444; Dunn *v.* Dunn, 1 S. C. 350; Gray, Restraints on Alienation, 2d ed., § 275 b.

his assignee under a general assignment.[1] He may dispose of it by will, and it may be taken by his creditors for his debts, the manner in which it is reached varying according to local law;[2] but there is some way of reaching it everywhere.

Alienation, What Estate passes. — The beneficiary, unlike the owner, has no property to alien. All he has are his rights, or, as they are called, his equity.[3]

This equity or claim against the trustee is subject to all the counter claims of the trustees.

Thus, if the beneficiary was indebted to the trustee, his equity will pass to his transferee subject to the trustee's counter claim, but not if it be *in autre droit*.[4] Or if the beneficiary, being also a defaulting trustee, assigns, his assignee will take subject to making good the default.[5]

It follows from the nature of the estate, being a claim instead of property, that the assignor can only transfer what rights he has, and the assignees accordingly take in the order of their assignments, and a purchaser for value gets no better title than a volunteer.[6] A trustee could give his own claim priority over an assignee,[7] and if a later assignee acting in good faith fortifies his equity by a legal right, such as payment of the claim,[8] a judgment,[9] or a new obligation from the trustee to him direct, he may hold the property both in law and equity.[10]

[1] Forbes *v.* Lothrop, 137 Mass. 523.

[2] Gray, Restraints on Alienation, 2d ed., §§ 170–174. On execution, Hadden *v.* Spader, 20 Johns. 554. By creditor's bill for equitable execution, Drake *v.* Rice, 130 Mass. 410; Chase *v.* Searls, 45 N. H. 511.

[3] Thus he cannot have his assignment of his interest noted against a trust mortgage in the registry of deeds, as it might cloud the legal title of the trustee. Cheyney *v.* Geary, 194 Pa. St. 427.

[4] *Supra*, p. 49. *Infra*, p. 184. [5] Belknap *v.* Belknap, 5 Allen, 468.

[6] Philips *v.* Philips, 4 DeG., F. & J. 208.

[7] Furniss *v.* Leupp, 67 N. J. Eq. 159.

[8] N. Y., N. H. & H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Bridge *v.* Conn. Life Ins. Co., 152 Mass. 343.

[9] Judson *v.* Corcoran, 17 How. 612. [10] Ames, 328.

In all jurisdictions the assignment of an equity in real estate is complete when assignor and assignee have assented;[1] and the same rule is true of personal property in Massachusetts, New York, Minnesota, Indiana, and West Virginia,[2] but in other jurisdictions notice to the trustee is necessary to complete the assignment of an equity in personal property.[3]

Notice to be good must be given to the trustee after his appointment,[4] and notice to one of several trustees or other joint obligors is notice to all.[5]

Knowledge is notice, if obtained in such a manner as would affect a reasonable man;[6] but if the assignor is the trustee his knowledge is not notice, but if he be assignee knowledge is notice.[7]

Accordingly, in those jurisdictions where notice is necessary to complete the transaction, the person giving notice first will have priority; but if the person giving the notice was aware of the previous assignment, his notice will not help him.

A person who has a general power of appointment and exercises it, in Massachusetts,[8] makes the property assets of his estate for creditors, since he should have appointed to them instead of to volunteers, but in some other States the property is held to pass directly to the appointee under a general power in the same way as if the power were special.[9] If the power of appointment be special, the

[1] Lee *v.* Howlett, 2 K. & J. 531.

[2] Thayer *v.* Daniels, 113 Mass. 129; White *v.* Wiley, 14 Ind. 496; McDonald *v.* Kneeland, 5 Minn. 352; Clarke *v.* Hogeman, 13 W. Va. 718; Fairbanks *v.* Sargent, 104 N. Y. 108.

[3] Foster *v.* Cockrell, 3 Cl. & Fin. 456; Wallston *v.* Braswell, 1 Jones Eq. 137; Copeland *v.* Manton, 22 Ohio St. 398.

[4] Roxburghe *v.* Cox, 17 Ch. D. 520, 527.

[5] Perry, § 438, end.

[6] Seger *v.* Farmers' Loan & Trust Co., 73 App. Div. (N. Y.) 293.

[7] Ames, 328, n.; Lloyd *v.* Banks, 3 Ch. 488.

[8] Clapp *v.* Ingraham, 126 Mass. 200.

[9] Humphrey *v.* Cambell, 59 S. C. 39; In re Dunglison's Estate, 201 Pa. St. 592.

creditors could not take unless the settlor and the donee of the power were the same,[1] in which case *quære?*[2] But a person to whom income is payable at the pleasure of the trustee has no estate that can be assigned or taken for his debts, as his assignees or creditors must take through him and he has no rights that he can enforce.[3] In some States the creditors have lien by statute even where the power is not exercised.[4]

Restraint on Alienation. — One of the ordinary motives for giving property in trust, instead of giving it outright, is the desire of donors to secure to the beneficiaries the enjoyment of its benefits irrespective of their improvidence or extravagance.

In such cases it is usual to insert a limitation in the trust instrument that the beneficiary shall not take his income by way of anticipation, and that it and the principal shall not be assigned, or be liable to be taken for his debts.[5]

As a general rule in America, such a restraint on the alienation of the income is valid, but is invalid as regards the principal fund,[6] while in England and in other States (there being several where the question is not determined) such a restriction is inoperative except in the case of a

[1] Bailey *v.* Lloyd, 5 Russ. 330; Cowx *v.* Foster, 1 Johns. & Hem. 30.

[2] The policy of the law is well set forth by Morton, C. J., in Pacific Bank *v.* Windram, 133 Mass. 175–177. There is a lack of direct decisions.

[3] *Infra*, p. 166.

[4] The assignee's standing in the Probate Court is a matter of some doubt, but the allowance of an account showing a payment to an assignee necessarily involves the determination of the validity of the assignment. Palmer *v.* Whitney, 166 Mass. 306, p. 310. And heirs who have assigned all their interest have no right to call the trustee to account. Stevens *v.* Palmer, 15 Gray, 505. When a decree of distribution has been ordered, the assignees may compel payment to themselves in equity. Lenz *v.* Prescott, 144 Mass. 505.

[5] See *supra*, p. 80. The decisions on this subject, and the policy involved, are thoroughly discussed in Restraints on the Alienation of Property, by John Chipman Gray, LL.D., 2d ed., 1895.

[6] Gray, Restraints on Alienation, 2d ed., § 167 *j*.

beneficiary who is a married woman,[1] who is excepted everywhere except in Massachusetts, Pennsylvania, and Maryland, where she cannot settle property on herself without power of alienation during coverture.[2]

This restraint in the case of a married woman cannot be removed by any one, not even by the court,[3] and cannot be set aside to relieve against her fraud or breach of trust,[4] nor will acquiescence by the married woman excuse a trustee for disregarding it.[5]

In most States the restraint on alienation can be made only by the terms of the trust instrument. There are some States,[6] notably those having codes, where such restraint is provided for by statute.

In Pennsylvania,[7] Massachusetts,[8] Illinois,[9] Maine,[10] Maryland,[11] Mississippi,[12] Missouri,[13] Texas,[14] West Virginia,[15] and probably Tennessee,[16] Delaware,[17] Indiana,[18]

[1] Gray, Restraints on Alienation, 2d ed., §§ 134–213, 268, 268 *b*.

[2] Ibid., §§ 269–277 *a*. See note to Underhill, p. 377; Pacific Bank *v.* Windram, 133 Mass. 175; Jackson *v.* Von Zedlitz, 136 Mass. 342; Brown *v.* Macgill, 87 Md. 161.

[3] Robinson *v.* Wheelwright, 21 Beav. 214.

[4] Stanley *v.* Stanley, 7 Ch. D. 589.

[5] Gray, Restraints on Alienation, 2d ed., § 271; Fletcher *v.* Greene, 33 Beav. 426.

[6] Civ. Code Cal. (1903), § 867; N. Dak. Civ. Code (1895), § 3398.

[7] Overman's Appeal, 88 Pa. 276.

[8] Broadway Bank *v.* Adams, 133 Mass. 170; Nickerson *v.* Van Horn, 181 Mass. 562.

[9] Steib *v.* Whitehead, 111 Ill. 247.

[10] Roberts *v.* Stevens, 84 Me. 325.

[11] Smith *v.* Towers, 69 Md. 77; Brown *v.* Macgill, 87 Md. 161; Jackson Sq. Loan & Savings Ass'n *v.* Bartlett, 95 Md. 661.

[12] Leigh *v.* Harrison, 69 Miss. 923.

[13] Lampert *v.* Haydel, 20 Mo. App. 616.

[14] Monday *v.* Vance, 92 Tex. 428.

[15] Guernsey *v.* Lazear, 51 W. Va. 328.

[16] Tenn. Code (1896), §§ 6091–6093; Jourolman *v.* Massengill, 86 Tenn. 81.

[17] Gray *v.* Corbit, 4 Del. Ch. 135.

[18] Thompson *v.* Murphy, 10 Ind. App. 464.

and in the Federal courts[1] and Vermont,[2] the settlor may settle the life estate without power of alienation on any one but himself as beneficiary, and it cannot be taken for his debts.[3] The provision need not specify that the income may be accumulated, it is only necessary to have a clear intention expressed by the settlor that the income cannot be controlled by the beneficiary until it comes into his actual possession.[4] Such restraints are adjudged bad[5] in Rhode Island,[6] New York (aside from statute[7]), North Carolina,[8] South Carolina,[9] Georgia,[10] Alabama,[11] Ohio,[12] Kentucky,[13] Virginia,[14] and probably in Arkansas;[15] in Connecticut the dicta are conflicting, and there are no decisions.[16]

Under the statutory provisions of New York,[17] New Jersey, Indiana, Michigan, Wisconsin, Minnesota, Kansas, California, and North and South Dakota, the beneficiary may be restrained from alienating the rents and profits, but not the gross sum.[18]

[1] Nichols *v.* Eaton, 91 U. S. 716. [2] Barnes *v.* Dow, 59 Vt. 530.

[3] Gray, Restraints on Alienation, 2d ed., §§ 177 *a*, 240 *h* to 249 *b*; also p. 281.

[4] Nickerson *v.* Van Horn, 181 Mass. 562.

[5] Gray, Restraints on Alienation, 2d ed., § 178.

[6] Tillinghast *v.* Bradford, 5 R. I. 205.

[7] Rome Exch. Bk. *v.* Eames, 4 Abb. Ct. App. 83, but changed by statute. See note 18, *infra*. In voluntary settlement on self income can be reached by creditor in spite of statute. Schenck *v.* Barnes, 156 N. Y. 316.

[8] Pace *v.* Pace, 73 N. C. 119.

[9] Heath *v.* Bishop, 4 Rich. Eq. 46.

[10] Bailie *v.* McWhorter, 56 Ga. 183; Ga. Civ. Code (1895), § 3149.

[11] Robertson *v.* Johnston, 36 Ala. 197.

[12] Hobbs *v.* Smith, 15 Ohio St. 419.

[13] Knefler *v.* Shreve, 78 Ky. 297.

[14] Restraint was allowed in Garland *v.* Garland, 87 Va. 758, but disallowed in Hutchinson *v.* Maxwell, 100 Va. 169; Honaker Sons *v.* Duff, 101 Va. 675.

[15] Lindsay *v.* Harrison, 8 Ark. 302.

[16] Gray, Restraints on Alienation, 2d ed., § 195.

[17] Cochrane *v.* Schell, 140 N. Y. 516. See note 7, *supra*.

[18] Rev. Stat. N. Y. (1901), p. 3027, § 83, as amended by Laws of

In Arizona[1] he may settle on his children without power of alienation, and in North Carolina[2] it may be so settled on a relative, if at the creation of the trust his debts do not exceed five hundred dollars.

Although there are jurisdictions, as appears above, where a restraint on alienation cannot be successfully attached to a settlement where the gift to the beneficiary is unlimited, yet the same result is practically reached by what is commonly known as a spendthrift trust; that is to say, by leaving it to the pleasure of the trustees whether they will use the trust fund for the beneficiary,[3] or as more commonly provided, pay the income to the beneficiary, use a part of it for his support, or accumulate so much as they think fit. Where it is so provided by the settlement, the creditors of the beneficiary cannot take the income, because the beneficiary has no right to any specific income which he can enforce,[4] and therefore nothing that he can alien, or that can be taken for his debts; but in such cases, if the beneficiary is also trustee, the estate vests in him absolutely, and no spendthrift trust is established.[5] In England, and in those States following the English rule, the trustee must account to the creditor for any income which he pays to or expends for the beneficiary after notice of his assignment,[6] although if he pays or expends it for members of the family or other persons

1903, ch. 88; N. J. Gen. Stat. (1895), vol. 1, p. 390, § 91; Comp. Laws Mich. (1897), § 8847; Rev. Laws Minn. (1905), § 3257; Rev. Code N. D. (1895), § 3398; Gen. Stat. Kan. (1897), ch. 113, § 4; Civ. Code Cal. (1903), §§ 857, 859, 867; Rev. Civ. Code So. Dak. (1903), §§ 305, 307, 315; Wis. Stat. (1898), § 2089; Burns's Annot. Ind. Stat. (1901), § 3394; Gray, § 296.

[1] Rev. Stat. Ariz. (1901), § 4232.

[2] N. C. Rev. Code (1905), § 1588.

[3] Huntington *v.* Jones, 72 Conn. 45.

[4] In re Bullock; Good *v.* Lickorish, 60 L. J. Ch. 341; Nickerson *v.* Van Horn, 181 Mass. 562.

[5] Hahn *v.* Hutchinson, 159 Pa. St. 133.

[6] Gray, Restraints on Alienation, 2d ed., § 167 *g*; Re Coleman, 39 Ch. D. 443.

specified by the settlement the creditor has no claim. In jurisdictions not allowing restraints on alienation, if the provision be to pay all the income to him or apply it all to his support, he has an absolute right which he can alien or which can be taken, in spite of a provision to the contrary.

If the provision be to pay him or support his family, in most jurisdictions none of the income can be taken,[1] but in others, notably where the matter is regulated by statute, so much as is left after reasonable support may be taken or alienated,[2] and this amount is sometimes fixed by the statute; but the statutes only protect the creditor, and give no power of voluntary alienation to the beneficiary.[3] A provision for the support of a beneficiary does not cover the support of his wife and family living apart, and for whom he fails to provide. They are like other creditors.[4]

The settlor may attach a condition to the gift of income, that if it be alienated, or if the beneficiary become bankrupt, the income shall pass to others,[5] and this condition will be valid in any case, even though the person to whom the income passes is the wife of the original beneficiary,[6] except only where the income is settled on the settlor himself;[7] but this exception does not apply to a married

[1] Seymour *v.* McAvoy, 121 Cal. 438. A court of equity cannot determine how much income is required for support of beneficiary and family, therefore there is no surplus for a creditor. First National Bank *v.* Mortimer, 28 Misc. (N. Y.) 686.

[2] For the statutes, see Stimpson, Statute Law, p. 237; Gray, Restraints on Alienation, 2d ed., § 296. *Supra*, p. 165, note 18.

[3] Gray, Restraints on Alienation, 2d ed., § 292; Ames, 401, n.; Tolles *v.* Wood, 99 N. Y. 616; Sherman *v.* Skuse, 166 N. Y. 345; Furniss *v.* Leupp, 67 N. J. Eq. 159; but in Illinois the statute curiously cuts out the creditor, and allows the beneficiary to alienate; Potter *v.* Couch, 141 U. S. 296.

[4] Board of Charities *v.* Lockhard, 198 Pa. St. 572.

[5] Re Levy's Trust, 30 Ch. D. 119; Nichols *v.* Eaton, 91 U. S. 716.

[6] Samuel *v.* Samuel, 12 Ch. D. 152; Gray, Restraints on Alienation, 2d ed., § 46.

[7] Jackson *v.* Von Zedlitz, 136 Mass. 342.

woman under coverture,[1] except in Pennsylvania, Maryland, and Massachusetts, where married women have the same status as other individuals.[2]

A similar condition attached to a gift of the principal of the fund is valid so long as the estate remains contingent, but if the estate vests, then the gift over becomes void.[3] A trustee having discretion to spend part of the principal for the beneficiary need not pay his debts,[4] but where the life tenant might call for the principal if he needed it in his business, his creditors could take it. It was his duty to call for it.[5]

A provision attached to a gift that so much as shall not be used or alienated shall go to another is void.[6]

A limitation of the income to the sole and separate use of a married woman is not a restraint on alienation.[7]

III. **Rights against Trustee.** — As the whole estate of the beneficiary consists of his right to compel the trustee to carry out the trust, he is considered to be peculiarly under the care of the court.

Where enforced. — The beneficiary may have a subpœna against the trustee wherever he can find him,[8] irrespective of the situation of the trust property,[9] unless the trust be created by the decree of a court of another State, in which case the trustee can only be sued there, unless ancillary trusteeship be also taken out in the jurisdiction where suit is brought.[10] And where the trust is established by the decree of a court of one State, the courts of that

[1] Clive *v.* Carew, 1 Johns. & Hem. 199. [2] See *supra*, pp. 163, 164.

[3] Mandlebaum *v.* McDonell, 29 Mich. 78.

[4] Huntington *v.* Jones, 72 Conn. 45.

[5] Ullman *v.* Cameron, 105 App. Div. (N. Y.) 159.

[6] Foster *v.* Smith, 156 Mass. 379; Fisher *v.* Wister, 154 Pa. St. 65; Gray, Restraints on Alienation, 2d ed., §§ 57–74.

[7] Forbes *v.* Lothrop, 137 Mass. 523.

[8] Brown *v.* Desmond, 100 Mass. 267; Kildare *v.* Eustace, 1 Vernon, 405; Cooley *v.* Scarlett, 38 Ill. 316.

[9] Massie *v.* Watts, 6 Cranch, 148, 160, Marshall, C. J.

[10] Jenkins *v.* Lester, 131 Mass. 355. *Infra*, p. 189.

State have jurisdiction to regulate the trust, although both the trustee and beneficiary are out of the jurisdiction, since they can remove the trustee and appoint one to act in his place.[1] So also, if the trustee is not within the jurisdiction, but the trust property is within the jurisdiction of the court, and there is a statute vesting the property in a trustee appointed by the court,[2] then the court can appoint a trustee to execute the trusts. If, however, there is no statute to transfer the title to the property, the court is powerless, unless it have jurisdiction over the trustee in whom the title is vested.[3]

If the trust is illegal in the jurisdiction where it is sought to be enforced, the trustees will hold the property on a resulting trust for the heirs.[4]

The beneficiary is entitled to have proper persons and a proper number of trustees, and any person interested in the trust, even though the interest is contingent on the mere possibility of receiving a payment at the discretion of the trustee, may apply to the court in the matter of removing or appointing a trustee.[5]

Can Compel What. — The beneficiary can compel the trustee to perform his duties, and if the trustee refuses to sue or defend, the beneficiary may sue or defend in the trustee's name by getting leave of court to do so;[6] but the trustee must be shown to be in default,[7] and indemnified for costs.[8]

[1] Chase *v.* Chase, 2 Allen, 101; Curtis *v.* Smith, 6 Blatchf. 537.

[2] Felch *v.* Hooper, 119 Mass. 52.

[3] McCann *v.* Randall, 147 Mass. 81. See *supra*, p. 9 and *infra*, p. 191.

[4] Hawley *v.* James, 7 Paige, 213. [5] *Supra*, pp. 7 and 9.

[6] In some recent cases the beneficiary has been allowed to sue in his own name, where he had a right to use the trustee's name. Anderson *v.* Daley, 38 App. Div. (N. Y.) 505; Zimmerman *v.* Makepeace, 152 Ind. 199. In Bourquin *v.* Bourquin, 110 Ga. 440, the beneficiary was allowed to bring ejectment against his trustee, who claimed the trust estate under the purchase of a tax title.

[7] Morgan *v.* Kansas Pacific Railroad, 21 Blatchf. 134; Thompson *v.* Remsen, 27 Misc. (N. Y.) 279.

[8] Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120.

The beneficiary has no right to advise or direct his trustee unless the right be expressly conferred by the trust instrument, and if his advice be asked and followed, he may lose his remedy against the trustee should the action be injudicious; therefore, on the whole, it is better to leave the full responsibility on the trustee, where it belongs.[1]

If an express power be given by the trust instrument, it is governed by the general rules applicable to such powers.

He can have the trustee enjoined from committing a contemplated breach of trust, or voting against his wishes if it would cause him irreparable injury.[2]

He may have a receiver appointed to hold the property if it is imperilled by remaining in the hands of the trustee, and pending his removal and the appointment of a new trustee.[3]

In England and some of the States he may have the estate administered by the court,[4] but such receivership suits are not in vogue in this country in trust estates.[5]

If the trustee commits a breach of trust, the beneficiary may either sue in equity for his damage or loss, or in testamentary trusts may sue on the bond given to the court.

If the trustee has been guilty of a breach of trust in investing or using the funds of the trust, the beneficiary may elect whether he will take the property into which the funds have been converted, or the amount taken with interest.[6] But he must choose, and cannot pursue both remedies;[7] and if he disaffirms a sale, he must return the

[1] Bradby *v.* Whitchurch, W. N. 1868, p. 81; Life Ass'n of Scotland *v.* Siddal, 3 DeG., F. & J. 58, 74.

[2] Ames 276, n. 2.

[3] Jones *v.* Dougherty, 10 Ga. 273.

[4] *Supra*, p. 7.

[5] Underhill, pp. 366 and 440.

[6] *Supra*, p. 154.

[7] Barker *v.* Barker, 14 Wis. 131; Perry, § 470 (3). See trustee's liabilities to beneficiary, *supra*, p. 154; Rev. Civ. Code So. Dak. (1903), § 1626; Code Ga. (1895), §§ 3183, 3184; Rev. Code N. Dak. (1895), § 4273; Civ. Code Cal. (1903), § 2237.

consideration in absence of fraud.[1] If he follows the property and it is insufficient, he may prove his claim for the balance; but if the beneficiaries are not agreed, the court will order whichever remedy it thinks best under the circumstances.[2]

In general, the damage recoverable is the amount of the loss for the remainderman, with simple interest for the life tenant; but compound interest is allowed when the income was to be added to the principal periodically, or where there is a presumption that more was earned, or the breach was wilful.[3]

Right to Information. — The beneficiary has a right to full information about the concerns of the trust at all reasonable times, although only contingently interested.[4]

He can examine the deeds or opinions of counsel consulted by the trustee in respect to the trust affairs,[5] but, as a condition precedent, he must show his interest, and may not examine them to establish an interest. He can examine the books of accounts and securities at all reasonable times, and is entitled to an accounting at reasonable intervals, usually once a year.[6]

But he has no right to demand that the trustee shall assist him in encumbering his interest by answering the inquiries as to how his interest is already encumbered, nor can a stranger acting under his authority require the trustee to answer.[7]

Right to Income.[8] — In a simple trust, as, for instance, where A holds property in trust to permit B to enjoy the income, the income as it accrues belongs to B imme-

[1] Yeackel *v.* Litchfield, 13 Allen, 417; Marx *v.* Clisby, 130 Ala. 502
[2] Morse *v.* Hill, 136 Mass. 60. [3] *Supra*, p. 154.
[4] Sloan's Estate, 7 Pa. Dist. Rep. 363 (1898).
[5] Smith *v.* Barnes, L. R. 1 Eq. 65; Ames, 470, n.
[6] As to accounts, see *supra*, p. 91.
[7] Low *v.* Bouverie, 3 Ch. D. 1891, p. 82.
[8] As to what is income, see *supra*, pp. 121 *et seq.*

diately, and he may require the trustee to give him a power of attorney to collect it for himself; but in the case of an ordinary trust, income means net income after deducting the taxes and repairs and ordinary current expenses attending the estate.[1] So the trusteee is entitled to collect it, and make the necessary deductions before paying it over.

In such cases the net income can only be ascertained yearly, and therefore would seem to be payable only on the settlement of the yearly account; but as the income belongs to the beneficiary, the court would probably not allow a large amount to lie in the hands of the trustee for such a long period if the beneficiary needed it.[2]

Most trust instruments have an express provision that the net income shall be paid quarterly or semiannually, which provision would govern in all cases.

There has been much discussion in England as to the beneficiary's share of the first year's income, and the decisions have been classified by Mr. Lewin.[3]

In Massachusetts, by statute the life beneficiary is entitled to the income, at the rate of interest it would have produced if properly invested,[4] on the fund given for his use from the date of the testator's death; and where the whole or a part of the fund does not produce income, on the conversion of the property the proceeds are divided into income and principal so as to give the life beneficiary the usual rate of income, as explained *supra*, page 123. In other jurisdictions, in the absence of statute the beneficiary only gets the actual income that accrues on the fund,[5] but the intention of the settlement, express or implied, will govern, if it can be discovered.[6]

[1] Watts, Adm. *v.* Howard, Adm., 7 Met. 478. *Supra*, pp. 137 *et seq.*

[2] In re Chesterman, 75 App. Div. (N. Y.) 573.

[3] Lewin, pp. 321 *et seq.*

[4] Loring *v.* Thompson, 184 Mass. 103.

[5] Williamson *v.* Williamson, 6 Paige, 298; Fanning *v.* Main, 77 Conn. 94.

[6] Keith *v.* Copeland, 138 Mass. 303.

The trustee may withhold income to reimburse himself for money erroneously paid to the beneficiary, but cannot reimburse himself in this manner for an individual loan made before he became trustee.[1]

As to what constitutes income, see pages 123 *et seq.*

Right to Support. — The question of the beneficiary's right to support has been treated already.[2] In Georgia there is an unusual statutory provision, that where the trustee fails to support the beneficiary, the latter may contract debts binding the trust property.[3]

Right to a Conveyance. — If the trust is merely a dry trust, that is to say, if A is given property simply to hold in trust for B, or if the purposes of the trust have been accomplished, and there is no reason why it should be continued, and all the beneficiaries, being *sui juris*, desire it, the trust may be terminated or modified in any way.[4] Though by statute in New York the court may in its discretion refuse to order a conveyance.[5]

If, in such case, one of the beneficiaries objects, the court may sever the trust, and order the shares of the others to be conveyed ;[6] but as a general rule, the trustee may say that he will convey all or none.[7] If the property is to be held in trust for children until all agree to a sale, part cannot call for a conveyance.[8]

The English rule, which also prevails in some of the States, is that, the beneficial estate having vested absolutely and entirely in the beneficiary, he may call for a

[1] *Supra*, p. 134; *infra*, p. 184.

[2] *Supra*, pp. 75 and 83.

[3] Code of Ga. (1895), § 3187.

[4] Goodson *v.* Ellisson, 3 Russell, 583; Claflin *v.* Claflin, 149 Mass. 19.

[5] Lent *v.* Howard, 89 N. Y. 169.

[6] Walker *v.* Beal, 106 Mass. 109; Henderson's Estate, 15 Phila. 598.

[7] Goodson *v.* Ellisson, *ubi supra*.

[8] Harris *v.* Harris, 205 Pa. St. 460.

conveyance if he be *sui juris;*[1] but the American rule prevailing in most States is that, although the beneficiary be *sui juris,* and have the whole estate, he cannot call for a conveyance if it would defeat the intention of the settlor, as in such a case the purpose of the trust has not been accomplished.[2] On the other hand, where the purpose of the trust was to protect a married woman against her husband when she got a divorce, the purpose of the trust being accomplished a conveyance was ordered.[3]

Thus, where property is left in trust for A until he reaches the age of thirty years, under the English rule A may call for a conveyance on becoming of age, while under the American rule the trust continues until he becomes thirty years old;[4] though it is not definitely decided that the estate might not be taken by a creditor,[5] still it would seem that he would have no greater right than his debtor through whom he claims.[6] But where the estate is absolute and unqualified in the beneficiary, and can be alienated or taken for his debts, and he desires it, he may have a conveyance.[7]

If, however, all the beneficiaries and the trustee agree to terminate the trusts in such a case, as no one else is

[1] Saunders *v.* Vautier, 4 Beav. 115; Lewin, p. 774; Rector *v.* Dalby, 98 Mo. App. 189. The trust being for a woman and her issue, the fact that she is sixty years old and unmarried does not entitle her to a conveyance. Bailey's Trustee *v.* Bailey, 97 S. W. Rep. (Ky. App. 1906) 810.

[2] Seamans *v.* Gibbs, 132 Mass. 239; Danahy *v.* Noonan, 176 Mass. 467; Zabriskie *v.* Wetmore, 26 N. J. Eq. 18; Hutchison's Appeal, 82 Pa. 509; Ames, 452, n.; Rhoads *v.* Rhoads, 43 Ill. 239; Gunn *v.* Brown, 63 Md. 96; Smith *v.* Smith, 70 Mo. App. 448; Carney *v.* Byron, 19 R. I. 283; Krebs's Estate, 184 Pa. St. 222; In re Moore's Estate, 198 Pa. St. 611; Shower's Estate, 211 Pa. St. 297; Eakle *v.* Ingraham, 142 Cal. 15; Bennett *v.* Bennett, 217 Ill. 434.

[3] Cary *v.* Slead, 220 Ill. 508.

[4] Claflin *v.* Claflin, 149 Mass. 19.

[5] Ibid.; Ullman *v.* Cameron, 92 App. Div. (N. Y.) 91.

[6] Young *v.* Snow, 167, Mass. 287.

[7] Sears *v.* Choate, 146 Mass. 395.

interested, and there is no one who can object even under the American rule, the trust can be determined without a decree,[1] but if the aid of the court is sought it will not be given.[2]

Nothing less than the whole of an absolute estate will entitle the beneficiary to a conveyance, even under the English rule. Therefore, if there are contingent or unascertained interests there can be no agreement.[3] And a beneficiary who has a life estate, with power of disposition by will, has not such an absolute estate as entitles him to a conveyance;[4] nor could he call for one if the trustee has discretion as to the application of the income.[5] If, however, the interest of the beneficiary is vested subject merely to some simple duty, such as the payment of an annuity, the beneficiary may have a conveyance by securing the annuity properly. But obviously the maker of the trust can prevent the beneficiary's calling for a conveyance even under the English rule, by making a small provision for some person unascertained, or for the trustee himself.

The trustee cannot set up superior title in a suit for a conveyance.[6] Nor can the beneficiary deny the trustee's title if he is his landlord, nor can the beneficiary buy in a tax title and hold it against the estate.[7]

Right to Possession. — Ordinarily in America the right to possession of the real estate and chattels belongs to the trustees;[8] but if the instrument intends that the beneficiary is to enjoy them in specie, he will be entitled to possession,

[1] Lemen *v.* McComas, 63 Md. 153.

[2] Young *v.* Snow, *ubi supra.*

[3] Brandenburg *v.* Thorndike, 139 Mass. 102; Walton *v.* Follansbee, 131 Ill. 147; Moore *v.* Sinnott, 117 Ga. 1010.

[4] Sise *v.* Willard, 164 Mass. 48.

[5] Russell *v.* Grinnell, 105 Mass. 425.

[6] Neyland *v.* Bendy, 69 Tex. 711.

[7] *Supra*, p. 45.

[8] Dorr *v.* Wainwright, 13 Pick. 328. *Supra*, pp. 45 and 100.

and by statute in England the right of possession is in the beneficiary.[1] As, for instance, where he is intended to reside in a house and use the furniture. But where the personal property is likely to be injured or lost in his possession, he may be required to give security for it. If he is given the use of personal property he may wear it out, and neither he nor the trustee will be required to replace it; and unless it is heirlooms or the appurtenances of an estate, such as the tools on a farm or the furniture of a furnished house, he may use them wherever he pleases.[2]

Where the instrument has no specific directions, the trustee will be justified in putting the beneficiary in possession of a dwelling-house or farm as a home; but the beneficiary cannot compel him to buy him a residence, though the trustee may do so.[3]

The beneficiary has no right to the possession of the trust securities; but where he is given the dividends on certain specific stocks, or the rents of certain specific estates, he can require the trustee to give him a power of attorney to collect; but where the trustee has the duty to manage the estate and pay over the net income, the beneficiary has no such right.

The Beneficiary may lose his Rights against the Trustee by Release, Acquiescence, and the Running of the Statute of Limitations. — If the beneficiary is *sui juris*,[4] and fully informed, and has a full knowledge and appreciation of the facts, he may make a valid and binding release of any claim he has against the trustee for a breach of trust or otherwise.[5] If, however, the beneficiary

[1] Ames, 467, n. 2.

[2] *Supra*, pp. 107, 125; Lewin, p. 768.

[3] Schaffer *v.* Wadsworth, 106 Mass. 19. *Supra*, p. 111.

[4] A married woman is *sui juris*, and may release as to her separate estate, Walker *v.* Shore, 19 Ves. Jr. 387; but a married woman without power of anticipation cannot release. Fyler *v.* Fyler, 3 Beav. 550, 563.

[5] Pope *v.* Farnsworth, 146 Mass. 339; Brice *v.* Stokes, 11 Ves. Jr. 319, 325.

has come of age lately, he should be advised by counsel, as his inexperience may form a ground to invalidate his action.[1] Nor will a beneficiary be bound by his release if there was fraud, accident, or mistake.[2]

If the beneficiary knew and urged a breach of trust, he not only cannot recover, but is liable to contribution,[3] even though the beneficiary be a married woman without power of anticipation.[4]

If the beneficiary who is *sui juris* assents to a breach of trust, such as an improper sale[5] or investment, he cannot subsequently recover the loss, if he was fully informed; but the assent to one improper investment will not authorize a second of the same character.[6] If he has been misled by the trustee his assent will not conclude, him, and he may disaffirm the transaction on learning the truth,[7] even though the transaction has been set forth in an account settled in court.[8] So, also, if the beneficiary who is *sui juris* knows of a breach of trust, and neglects to make any claim,[9] or does not make it for an unreasonable time,[10] he will be taken to have assented, and so cannot complain; if he had no reason to suspect a breach of trust he is not bound to inquire, though he might have discovered it had he done so,[11] but time will not deprive a beneficiary of his remedy unless he has been guilty of

[1] Wade *v.* Lobdell, 4 Cush. 510; Field *v.* Middlesex Banking Co., 77 Miss. 180. The ordinary statutes of limitations apply in England now. Trustee's Act, 1888 (51 & 52 Vict.), ch. 59, § 8.

[2] Perry, § 922.

[3] Raby *v.* Ridehalgh, 7 DeG., M. & G. 104. See *supra*, p. 151.

[4] Generally, but by statute in England. See Griffith *v.* Hughes, 3 Ch. D. (1892), p. 105.

[5] Fryberger *v.* Turner, 109 N. W. Rep. (Minn. 1906) 229.

[6] Mant *v.* Leith, 15 Beav. 524; Adair *v.* Brimmer, 74 N. Y. 539.

[7] Nichols, Appellant, 157 Mass. 20.

[8] Morse *v.* Hill, 136 Mass, 60.

[9] Badger *v.* Badger, 2 Wall. 87.

[10] Denholm *v.* McKay, 148 Mass. 434, 441; Treadwell *v.* Treadwell, 176 Mass. 554; Quirk *v.* Liebert, 12 App. D. C. 394.

[11] Lamberton *v.* Youmans, 84 Minn. 109.

laches.[1] A remainderman may interfere to protect the estate during the life tenancy, but he is not guilty of laches or acquiescence until the estate comes into his possession.[2] But a minor may cut himself off by inducing the trustee to act by fraud.[3]

What constitutes laches depends on the circumstances of each case, but as a general rule mere lapse of time alone will not bar the beneficiary where the position of others has not been changed.[4] Lapse of time with circumstances indicating an intention to abandon the trust are sufficient to bar a recovery.[5]

A beneficiary who has delayed electing whether or not to confirm a sale, in order to see whether the property will rise or fall, cannot elect at a later time.[6]

Ordinarily the statute of limitations will not run against the beneficiary,[7] since the possession of the trustee is in the interest of the beneficiary; but if the trustee takes an adverse position, repudiates the trust, and brings the matter home to the beneficiary so that he is compelled to take action,[8] he may take the benefit of the statute, and the time will run from the date when he brought his adverse claim distinctly to the beneficiary's notice;[9] but the stat-

[1] Prevost *v.* Gratz, 6 Wheat. 481, 498, Story, J. Transfer of shares after sixty years held barred. Halsey *v.* Tate, 52 Pa. St. 311; Iverson *v.* Saulsbury, 65 Ga. 724; Speidel *v.* Henrici, 120 U. S. 377.

[2] Stewart *v.* Conrad's Adm'r, 100 Va. 128; Bennett *v.* Colley, 5 Sim. 181; s. c. 2 Myl. & K. 225; but see Browne *v.* Cross, 14 Beav. 105.

[3] Preceding page, n. 3.

[4] Morse *v.* Hill, 136 Mass. 60, 65, 66; In re Jones's Estate, 30 Misc. (N. Y.) 354; Blake *v.* Traders' Nat'l Bank, 145 Mass. 13.

[5] Sawyer *v.* Cook, 188 Mass. 164.

[6] Hoyt *v.* Latham, 143 U. S. 553; Curtis *v.* Lakin, 94 Fed. Rep. 251 (C. C. Utah, 1899); Skelding *v.* Dean, 141 Mich. 143.

[7] Speidel *v.* Henrici, 120 U. S. 377; Riddle *v.* Whitehill, 135 U. S. 621.

[8] Philippi *v.* Phillippe, 115 U. S. 151; Davis *v.* Coburn, 128 Mass. 377; Hubbell *v.* Medbury, 53 N. Y. 98; Thorne *v.* Foley, 137 Mich. 649.

[9] Statute runs from time of distribution, Jones *v.* Home Savings Bank, 118 Mich. 155; or from date of decree of distribution, *supra*, p. 145.

ute will not begin to run against the remainderman until his estate vests in possession, nor will it begin to run so long as the beneficiary is under the control of the trustee.

IV. Rights against Strangers. — The beneficiary has no claim to the property itself,[1] but he may constitute any person into whose hands it has come wrongfully a trustee for him.[2] As, for instance, a bank which has received stocks and bonds, which it knows belong to the trust estate as security for a personal loan to the trustee, holds the stocks and bonds in trust for the beneficiaries.[3] Although the beneficiary must sue in the name of the trustee, the defendant cannot set up the defence that the trustee was a joint wrongdoer *in pari delicto*.[4]

A disseisor will not be held a trustee, since he claims the property by a title which supersedes that of the trustee;[5] and a purchaser for value without notice takes the property free of trust, although he claims under the trustee, that is to say, if the transferee bought the estate for value, without notice of the trust, then he in a court of equity is equally meritorious with the beneficiary, and the court will not help the beneficiary against him, and so he may keep his legal title, and will not be compelled to hold it as trustee.[6]

A purchaser with notice from the trustee, if he denies the beneficiary's title, can avail himself of statute, and it will begin to run from the time when the beneficiary is in possession and not under disability; and in case of fraud, from the discovery of the fraud, or when it might have been

[1] Stimpson, Am. Statute Law, p. 237.

[2] Third National Bank *v.* Lange, 51 Md. 138.

[3] Loring *v.* Brodie, 134 Mass. 453; Blake *v.* Traders' Nat'l Bank, 145 Mass. 13; Tuttle *v.* First Nat'l Bank, 187 Mass. 533. If the bondsman has made good the loss, he is subrogated to the beneficiaries' claim.

[4] Wetmore *v.* Porter, 92 N. Y. 76.

[5] *Supra*, p. 27. [6] *Supra*, p. 46.

discovered with reasonable diligence;[1] and the usual period of adverse possession is good against the beneficiary.[2]

Aside from those who claim by a superior or adverse title, the beneficiary may follow the property as long as it can be identified; and if it can be clearly shown that other property has been substituted for the trust property, the substituted property can be followed.[3] Where the trust funds form only part of the consideration of the substituted property, the trust may be enforced to the extent of the trust property.[4]

Money is said to have no earmark,[5] hence if it becomes so mingled with other funds that its identification is impossible, the beneficiary becomes a simple creditor merely.[6] The mere commingling of the trust moneys does not necessarily prevent their identification, but makes it more difficult.[7] "In some States it is held that, while it is not enough to show that trust property went into the general assets, it is enough to charge the whole estate with a trust, if it can be shown that the proceeds remain somewhere unexpended in the estate.[8] But by great weight of authority a trust cannot be established against the proceeds of trust property which has been disposed of, unless the proceeds can be identified and traced into some specific fund or prop-

[1] McCoy *v.* Poor, 56 Md. 197.

[2] Molton *v.* Henderson, 62 Ala. 426; Williams *v.* First Presb. Soc., 1 Ohio St. 478; Ward *v.* Harvey, 111 Ind. 471; Hall *v.* Ditto, 12 S. W. Rep. 941 (Ky.); Merriam *v.* Hassam, 14 Allen, 516, 520; Attorney General *v.* Proprietors, etc., 3 Gray, 1.

[3] For instance, where the trust estate has been wrongfully put into a business, the assets of the business belong to the trust. Byrne *v.* McGrath, 130 Cal. 316; Reeves *v.* Pierce, 64 Kan. 502; Crawford Co. Com'rs *v.* Patterson, 149 Fed. Rep. 229.

[4] Cases on tracing unmingled funds *contra.* Underhill, 458, n.

[5] Deg *v.* Deg, 2 P. Wms. 411, 414.

[6] Pennell *v.* Deffell, 4 DeG., M. & G. 372, 381; Wetherell *v.* O'Brien, 140 Ill. 146, 151; Little *v.* Chadwick, 151 Mass. 109.

[7] Houghton *v.* Davenport, 74 Me. 590.

[8] See Slater *v.* Oriental Mills, 18 R. I 352, 353; Bradley *v.* Chesebrough, 111 Iowa, 126; Hopkins *v.* Burr, 24 Colo. 502; Pearson *v.* Haydel, 90 Mo. App. 253, 264; Lincoln *v.* Morrison, 64 Neb. 822.

erty."[1] The trustee will not be presumed to have used the trust funds for himself;[2] so the beneficiary may claim all the trustee cannot identify, and repayment to him on the eve of bankruptcy is not a fraudulent preference;[3] but a person who receives property from an unfaithful trustee cannot be held to be trustee of property which cannot be connected with the trust fund.[4]

Stock is like money, one share is as good as another; so the beneficiary can take all shares in the company in the trustee's hands irrespective of the name they are registered in.[5]

Where the beneficiary has become a simple creditor, he is preferred in Georgia, Missouri, and Wisconsin[6] next to funeral expenses, but generally a beneficiary has no preference on account of the nature of his claim.[7]

[1] Knowlton, C. J., in an exhaustive opinion reviewing authorities in Lowe *v.* Jones, 192 Mass. 94, p. 101; In re Hallett's Estate, 13 Ch. D. 696; Lebanon Bank's Estate, 166 Pa. St. 622; Marquette Fire Com'rs *v.* Wilkinson, 119 Mich. 655, 670; Hauk *v.* Van Ingen, 196 Ill. 20; Woodhouse *v.* Crandall, 197 Ill. 104; Ellicott *v.* Kuhl, 15 Dick. 333; Burnham *v.* Barth, 89 Wis. 362; Northern Dak. Elevator Co. *v.* Clark, 3 No. Dak. 26; Cushman *v.* Goodwin, 95 Me. 353; Rockwood *v.* School Dist., 70 N. H. 388; Peters *v.* Bain, 133 U. S. 670; Frelinghuysen *v.* Nugent, 36 Fed. 229; In re Hicks, 170 N. Y. 195; Bircher *v.* Walther, 163 Mo. 461; Morrison *v.* Lincoln Savings Bank, 57 Neb. 225; Morse on Banking, 3d ed., § 590.

[2] National Bank *v.* Insurance Co., 104 U. S. 54; In re Holmes, 37 App. Div. (N. Y.) 15 (1899); In re Steinway's Estate, 37 Misc. Rep. (N. Y.) 704.

[3] Lewin, p. 1025; U. S. Nat'l Bk. *v.* Weatherby, 70 App. Div. (N. Y.) 279.

[4] Howard *v.* Fay, 138 Mass. 104; but see Welch *v.* Polley, 177 N. Y. 117.

[5] Marshall *v.* Marshall, 53 Pac. Rep. 617 (Col. 1899); Draper *v.* Stone, 71 Me. 175.

[6] Ga. Code (1895), § 3189; Bircher *v.* St. Louis Sheet Metal Co., 77 Mo. App. 509; Evangelical Synod *v.* Schoeneich, 143 Mo. 652; McLeod *v.* Evans, 66 Wis. 401. See Bowers *v.* Evans, 71 Wis. 133, and Mercantile Trust Co. *v.* St. Louis, &c. Ry. Co., 99 Fed. Rep. 485 (Cir. Ct. Mo. 1900).

[7] Little *v.* Chadwick, 151 Mass. 109; Lowe *v.* Jones, 192 Mass. 94, p. 103; Ellicott *v.* Kuhl, 60 N. J. Eq. 333; Cavin *v.* Gleason, 105 N. Y. 256. See Amer. & Eng. Encyc. Law (1st ed.), vol. 27, p. 257.

The beneficiary is not bound to follow the trust funds if he prefers to hold the trustee or his bondsman;[1] but he may elect which he will pursue; he cannot however hold both remedies, and must elect one of them.[2]

If he elect to follow the property he may choose whether he take the trust property as it is, or have it converted and charge the trustee with loss.[3]

Right against Stranger aiding in Breach of Trust. — The beneficiary has an equitable suit against a person who aids in a breach of trust; as for instance against a person to whom the trustee has made a wrongful payment in distributing the estate, or a tenant for life to whom he has paid or loaned part of the corpus of the estate,[4] and this irrespective of the trustee's right to recover the payment. So too he has a direct claim where a banker delivered up to one trustee the bonds[5] or money[6] which were confided to him by three trustees, or where a corporation transferred stock improperly, that is to say, in a manner which it knew to be a violation of the trust.[7]

In such cases they will have notice of the trust if it is described on the face of the certificate, although the mere occurrence of the word "trustee" has been held not to be notice;[8] but the general rule seems to be that the word "trustee" alone is a sufficient notice of a trust to put the purchaser or corporation on its inquiry as to the trustee's

[1] Evans's Estate, 2 Ashmead, 470; Wayman *v.* Jones, 4 Md. Ch. 500; Clark *v.* Wright, 24 S. C. 526; Blake *v.* Traders' Nat'l Bank, 145 Mass. 13.

[2] Barker *v.* Barker, 14 Wis. 131; Hodges *v.* Bullock, 15 R. I. 592, 595.

[3] *Supra*, pp. 154 and 170, 171.

[4] Cowper *v.* Stoneham, 68 L. T. R. 18; Dixon *v.* Dixon, L. R. 9 Ch. Div. 587. *Infra*, p. 184.

[5] Mendes *v.* Guedella, 2 Johns. & Hem. 259. *Supra*, p. 104.

[6] Magnus *v.* Queensland N. Bk., 37 L. R. Ch. Div. 466.

[7] Lowell, Transfer of Stock, § 66; Loring *v.* Salisbury Mills, 125 Mass. 138; Bayard *v.* Farmers & Mechanics' Bank, 52 Pa. St. 232.

[8] Lowell, Transfer of Stock, § 69; Albert *v.* City of Baltimore, 2 Md. 159; Stockdale *v.* South Sea Co., Barnardiston, 363.

right to transfer;[1] they must ascertain the right of the trustee to make the proposed transfer at their peril. The fact that there is a usage to make transfers[2] is not an excuse; nor can they rely on the power of sale which accompanies the office of executor,[3] but must ascertain if he has it. If they know that the executor is acting in fact as trustee, under the title of executor,[4] they are liable.

As this duty is placed upon the corporation, it may require the trustee making the transfer to supply the documents or other evidence showing his right to make the transfer, but in the absence of a by-law or statute requiring a deposit of the documents, it can only insist on inspection of them, and not on the filing of copies.[5]

If the beneficiary is actually in possession of the trust property,[6] he may maintain any action for the property which any other bailee might maintain; and no one but the trustee, or some one claiming under him, can set up his title against the beneficiary,[7] and in Pennsylvania he might maintain an action for its recovery,[8] where, owing to lack of equity courts, the beneficiary has unusual privileges.[9]

Ordinarily, the possession of the beneficiary is the possession of the trustee, and he must sue in the name of the trustee.[10]

[1] Shaw *v.* Spencer, 100 Mass. 382; Bayard *v.* Farmers & Mechanics' Bank, 52 Pa. St. 232; Stenfelds *v.* Watson, 139 Fed. R. 505. But the deposit of a check in the trustee's individual account made to his order as "trustee" is not notice to the bank of a wrongful use of the money. Batchelder *v.* Central Nat'l Bk., 188 Mass. 25.

[2] Shaw *v.* Spencer, 100 Mass. 382.

[3] Lowell, Transfer of Stock, § 72.

[4] Ibid., § 73.

[5] Bird *v.* Chicago, I., & N. Railroad, 137 Mass. 428.

[6] Newhall *v.* Wheeler, 7 Mass. 189.

[7] Stearns *v.* Palmer, 10 Met. 32.

[8] Bailey *v.* N. Eng. Mut. L. Ins. Co., 114 Mass. 177.

[9] Fernstler *v.* Seibert, 114 Pa. St. 196; Miller *v.* Zufall, 113 Pa. St. 317.

[10] *Supra*, p. 169, note 6, and p. 178, for instances where beneficiary may sue in own name.

He cannot protect the property in equity any more than at law, and could not, for instance, restrain the assessors from taxing the estate,[1] nor sue in tort for an injury to it.[2]

V. **Liabilities.** — The beneficiary incurs no liabilities through his beneficial ownership, unless it be for taxation. He may be liable for taxes where the trustee is a non-resident, and such a tax is constitutional.[3]

He is not liable as an owner, and, for instance, cannot be sued for an accident caused by the blowing over of a fence.[4]

He is not liable to indictment for a nuisance on the trust property,[5] and need not contribute to protect it on foreclosure or otherwise.[6] He does not become liable as a stockholder, nor where a property qualification is needed does he gain a vote by his ownership.[7]

A beneficiary who induces a trustee to commit breach of trust is liable to the other beneficiaries, and may be liable to the trustee, but his liability is not affected by the fact that he is a beneficiary, but he becomes liable by his acts as an individual. If the trustee pays charges from principal which he should have paid from income, or if the beneficiary obtains a wrongful advance of the principal, the trustee may withhold his income to make up the deficit,[8] but the court will not order him personally to refund a payment made by the trustee and disallowed in the trustee's account, and which the beneficiary took innocently. In such cases the trustee's remedy does not go

[1] Western Railroad Co. *v.* Nolan, 48 N. Y. 513.

[2] Loring *v.* Salisbury Mills, 125 Mass. 138, 141.

[3] *Supra*, p. 29.

[4] Norling *v.* Allce, 10 N. Y. Sup. 97.

[5] People *v.* Townsend, 3 Hill, 479.

[6] Winslow *v.* Young, 94 Me. 145; Coffman *v.* Gates, 110 Mo. App. 475.

[7] Lewin, p. 247.

[8] Crocker *v.* Dillon, 133 Mass. 91; Hammond *v.* Hammond, 169 Mass. 83; In re Hurlburt, 51 Misc. R. (N. Y.) 263. *Supra*, p. 173.

farther than the right to recoup out of the income;[1] but his co-beneficiary will have a right to recover from him personally if there was fraud or collusion, or if he took the payment knowing that he had no right to it.[2] The trustee cannot withhold the income as against an assignee of the beneficiary's estate to reimburse himself for money lent the beneficiary before he was appointed trustee.[3]

If he litigates unnecessarily, he may be liable for costs.

[1] Bate *v.* Hooper, 5 DeG., M. & G. 338. *Supra*, p. 121.

[2] *Supra*, p. 182. Blair *v.* Cargill, 111 App. Div. 853.

[3] Abbott *v.* Foote, 146 Mass. 333; Mass. Rev. Laws (1902), ch. 174, § 6; *supra*, pp. 49, 161; but see *contra*, Smith *v.* Perry, 197 Mo. 438.

PART IV.

INTERSTATE LAW.

Construction of the Settlement. — If the trust concerns personal property, the validity of the trust will be determined, and the instrument will be construed, according to the law of the place where the settlement is made, in the absence of a contrary intention on the part of the settlor.[1]

If the settlement is by deed, the grantor's domicile is the place of making.[2] If by will, the place of probate is the place of making.[3]

If the settlor obviously intended the settlement to be governed by the laws of some other jurisdiction, the document will be construed according to this intention.[4] If the trust is to be executed elsewhere, such an intention is manifested;[5] but a settlement made in New Jersey covering real estate both in New Jersey and New York as well

[1] Re Mégret (1901), 1 Ch. 547; In re Price (1900), 1 Ch. 442; Codman *v.* Krell, 152 Mass. 214; Lincoln *v.* Perry, 149 Mass. 368; Townsend *v.* Allen, 13 N. Y. Supp. 73; Aubert's Appeal, 107 Pa. St. 447; Mercer *v.* Buchanan, 132 Fed. R. 501; Merritt *v.* Corties, 71 Hun, 612; Cross *v.* U. S. Trust Co., 131 N. Y. 330.

[2] Mercer *v.* Buchanan, 132 F. 501; Codman *v.* Krell, 152 Mass. 214; Jones *v.* Jones, 8 Misc. (N. Y.) 660.

[3] Merritt *v.* Corties, 24 N. Y. Supp. 561; Sewall *v.* Wilmer, 132 Mass. 131; Proctor *v.* Clark, 154 Mass. 45; Lincoln *v.* Perry, 149 Mass. 368; Thiebaud *v.* Dufour, 54 Ind. 320.

[4] Cross *v.* U. S. Trust Co., 131 N. Y. 330; In re Price (1900), 1 Ch. 442; Merrill *v.* Preston, 135 Mass. 451; Robb *v.* Washington and Jefferson College, 185 N. Y. 485; Story, Conflict of Laws, 8th ed., § 479 a.

[5] Mount *v.* Tuttle, 40 Misc. (N. Y.) 456; Keeney *v.* Morse, 71 App. Div. (N. Y.) 104; Paschal *v.* Acklin, 27 Tex. 173; Robb *v.* Washington and Jefferson College, 185 N. Y. 485, 496.

as other property, does not indicate that the testator had New York law in mind, and will be construed according to New Jersey law.[1]

If the trust concerns real property, its validity will be determined, and the document will be construed according to the law of the jurisdiction where the land lies; and the law of the domicile must yield to the law of the jurisdiction where the land lies.[2]

If the trust is valid according to the law of the place where it is to be executed, it will be upheld everywhere, and the funds will be transmitted to the duly appointed trustee.[3] This does not go so far as to allow an invalid trust to be established in New York, because later it is to be transferred to a jurisdiction where it will be valid.[4]

The construction adopted by the court in the jurisdiction where the settlement was made is conclusive on the courts of all other jurisdictions.[5]

The Execution of the Trust. — A trust must be administered according to the law of the place of execution.[6] Land is naturally subject to the laws of the jurisdiction in which it lies,[7] and no court would enforce incompatible foreign laws as to personal property which happened to be within its jurisdiction.[8] Thus a creditor suing in New

[1] Sullivan *v.* Babcock, 63 How. Pr. 120; Proctor *v.* Clark, 154 Mass. 45; Lincoln *v.* Perry, 149 Mass. 368; Enohin *v.* Wylie, 10 H. L. C. 1; Jones *v.* Jones, 8 Misc. (N. Y.) 660.

[2] Massie *v.* Watts, 6 Cranch, 148; Paschal *v.* Acklin, 27 Tex. 173; Lawrence's Estate, 136 Pa. St. 354; Bingham's Appeal, 64 Pa. St. 345; Penfield *v.* Tower, 1 N. D. 216; Bovey *v.* Smith, 1 Vern. 144; Lincoln *v.* Perry, 149 Mass. 368.

[3] Robb *v.* Washington and Jefferson College, 185 N. Y. 485; Sewall *v.* Wilmer, 132 Mass. 131, p. 137; Lanius *v.* Fletcher, 101 So. W. Rep. 1076.

[4] Wood *v.* Wood, 5 Paige, 596.

[5] English *v.* McIntyre, 29 App. Div. (N. Y.) 439; Laws *v.* Williams, 56 N. J. Eq. 553; Jones *v.* Jones, 8 Misc. (N. Y.) 660, p. 662.

[6] Keeney *v.* Morse, 71 App. Div. (N.Y.) 104; Fay *v.* Haven, 3 Met. 109.

[7] Paschal *v.* Acklin, 27 Tex. 173; Massie *v.* Watts, 6 Cranch, 148.

[8] Sewall *v.* Wilmer, 132 Mass. 131, p. 137.

York, where a Rhode Island trust was being administered, could not reach the income under New York law, although he might do so under Rhode Island law.[1]

Where the Trust Exists. — In the nature of things a trust is ambulatory, and accompanies the trustee wherever he is, since the trust is an obligation on the trustee's conscience to do his duty to the beneficiary.[2]

Hence wherever he goes, except as hereinafter noted, he is invested with his legal office, and may be called to account.[3] The exception is when the office is created by a decree of court. In this case the trustee derives his title from an act of the law, and the effect of the act is confined to the territorial jurisdiction over which the law extends.[4]

The first consideration is, therefore, was the legal title to the property created by the act of the owner of the property, or by a decree of court?

If the trustee is appointed by the settlor, whether the settlement be by deed or by will, his right to enforce the trust will be respected everywhere [5] upon his complying with the observances of local law, such as recording the deed or filing the will.[6]

Thus he may sue for the trust property or transfer it in any jurisdiction.[7]

[1] Keeney *v.* Morse, 71 App. Div. (N. Y.) 104. See First Nat'l Bk. *v.* Nat'l Broadway Bk., 156 N. Y. 459, p. 472.

[2] *Supra*, pp. 25 and 158.

[3] Massie *v.* Watts, 6 Cranch, 148, 160 ; Memphis Savings Bank *v.* Houchens, 115 Fed. 96, p. 108.

[4] Curtis *v.* Smith, 6 Blatchf. 537, pp. 546–549; Jenkins *v.* Lester, 131 Mass. 355; Leland *v.* Smith, 131 Mass. 358. In Jones *v.* Jones, 8 Misc. (N. Y.) 660, an Illinois trust was enforced in New York, the parties being all there.

[5] Schwartz *v.* Gerhardt, 44 Oregon, 425–431 ; Smith *v.* Davis, 90 Cal. 25; Curtis *v.* Smith, 6 Blatchf. 537, p. 549; Bradford *v.* King, 18 R. I. 743; Iowa & Cal. Land Co. *v.* Hoag, 132 Cal. 627.

[6] Curtis *v.* Smith, 6 Blatchf. 537, p. 549.

[7] Pennington *v.* Smith, 69 Fed. R. 188; Toronto Trust Co. *v.* C., B. & Q. R. R., 123 N. Y. 37.

So, too, he may be sued or forced to account wherever he may be found,[1] and the court may commit him for contempt if he fails to obey its decree.[2]

In matters affecting the title to land, and other actions which are local in their character, he would, like other individuals, be answerable in the local court only, and the court can enforce its decree by removing the trustee and appointing one in his place;[3] but if the action is transitory, such as a contract for sale, he would be answerable in any jurisdiction where he was sued, even though the contract or matter in controversy affected land.[4] Thus a trustee of a railroad mortgage, which covered land situated in several States, might be ordered by the court of one State to foreclose the whole mortgage.[5]

When the Trustee is Appointed by Judicial Decree, the title to the trust property is generally vested in him by the decree.[6] This decree has no force beyond the territorial jurisdiction of the court, and to enforce his trust in another jurisdiction he must receive an ancillary appointment.[7] Thus a trustee appointed in Maryland could not transfer real estate in West Virginia.[8]

If the trustee has a legal title to the property he may sue in a foreign jurisdiction to recover the property if the decree of the home State is not necessary to establish that

[1] *Supra*, pp. 168, 169; Brown *v.* Desmond, 100 Mass. 267.

[2] Kildare *v.* Eustace, 1 Vernon, 405; Cooley *v.* Scarlett, 38 Ill, 316; Story, Eq. Juris., 11th ed., § 1291.

[3] Cooley *v.* Scarlett, 38 Ill. 316; Story, Eq. Juris., 11th ed., § 1291.

[4] Massie *v.* Watts, 6 Cranch, 148; Memphis Savings Bank *v.* Houchens, 115 Fed. 96; Bispham's Eq. § 47; Jenkins *v.* Lester, 131 Mass 355.

[5] Muller *v.* Dows, 94 U. S. 444.

[6] *Supra*, p. 11.

[7] Curtis *v.* Smith, 6 Blatchf. 537; Mass. Rev. Laws, 147, § 9; Gen. Stats. Conn. (1902), § 256; Maine Rev. Stats. (1903), ch. 66, § 69, and statutes *passim*.

[8] Wilson *v.* Braden, 48 W. Va. 196; Iowa & California Land Co. *v.* Hoag, 132 Cal. 627; Ayres *v.* Siebel & Co., 82 Iowa, 347.

title. The fact that there is a foreign trust attached to that title by foreign decree will not defeat it.[1]

For the same reason a trustee by judicial act can only be sued, and is accountable only in the jurisdiction where he was appointed.[2] A court in a foreign jurisdiction may appoint a trustee to carry out a foreign will, if it has the trust property in its jurisdiction.[3] It is usually provided by statute that the trustee appointed in the original jurisdiction may take out ancillary administration. If he takes out ancillary administration, he is answerable in the subsidiary jurisdiction for the property which lies in that jurisdiction,[4] and that court may order the property to be distributed under its own decree, or may order it to be transferred to the original jurisdiction.[5] The trustee in the principal jurisdiction is accountable only for the balance transferred after settling his accounts in the subsidiary jurisdiction.[6]

Even though the trustee has removed from the jurisdiction the court will retain control of the trust, and may remove the trustee and appoint one to act in his place.[7]

This exclusive control of a trust vested in the court in which it originates may be divested by the court's making

[1] Fidelity Ins. Co. *v.* Nelson, 30 Wash. 340; Pennington *v.* Smith, 69 Fed. 188; Toronto Gen. Trust Co. *v.* C., B. & Q. R. R., 123 N. Y. 37; Bradford *v.* King, 18 R. I. 743.

[2] Penn *v.* Brewer, 12 Gill & J. 113; Snyder *v.* Snyder, 1 Md. Ch. 295; Fay *v.* Haven, 3 Met. 109; Sewall *v.* Wilmer, 132 Mass. 131, p. 137; Jenkins *v.* Lester, 131 Mass. 555; Pennington *v.* Smith, 69 Fed. R. 188; Smith *v.* Calloway, 7 Blatchf. 86; Gulick *v.* Gulick, 3 Atl. 354. (See Jones *v.* Jones, 8 Misc. R. (N. Y.) 660, and Paget *v.* Stevens, 143 N. Y. 172.)

[3] Rev. Stats. Ohio (1890), § 5993.

[4] Clark *v.* Blackington, 110 Mass. 369.

[5] Welch *v.* Adams, 152 Mass. 74; Emery *v* Batchelder. 132 Mass. 452; Linton *v.* Shaw, 95 Ga. 683.

[6] Clark *v.* Blackington, 110 Mass. 369.

[7] Pennington *v.* Smith, 69 Fed. 188; McCann *v.* Randall, 147 Mass. 81; Chase *v.* Chase, 2 Allen, 101; Curtis *v.* Smith, 6 Blatchf. 537.

a final disposition of the trust,[1] and it has been held that where a trust originated in Massachusetts, and both of the original trustees had died, the New York court might appoint substitute trustees.[2] In this case the original appointment was by the testator, and it was held that the trust was not established by the probate of the will in Massachusetts, and therefore was not a trust established by judicial decree until substituted trustees were appointed in New York.

Non-resident Trustee. — When the trustee removes from the State or remains out of the jurisdiction, he may be removed;[3] or if he dies, the vacancy can be filled although the trust fund has been removed.[4]

If the property is within the jurisdiction and there is a statute vesting the estate in a new trustee, the matter will be terminated; but if there is no personal service on the absent trustee and the property is with him, as in the case of personal property, or if there is no statute vesting the estate in the new appointee, a conveyance must be obtained from the former trustee, and the new trustee can sue him wherever he can find him.[5]

In Pennsylvania, the court may appoint a co-trustee for a non-resident trustee;[6] but, as a rule, it will not appoint a non-resident trustee, and in some jurisdictions it is forbidden to do so;[7] in others, where the beneficiary is a foreigner, it will appoint a foreign trustee. If a non-resident trustee holds land and neglects his duty, the

[1] Schwarz *v.* Gerhardt, 44 Oregon, 425, 431; Linton *v.* Shaw, 95 Ga. 683.

[2] Farmers' Loan & Trust Co. *v.* Pendelton, 37 Misc. (N. Y.) 256.

[3] *Supra*, p. 24. Smith *v.* Davis, 90 Cal. 25.

[4] Curtis *v.* Smith, 6 Blatchf. 537.

[5] See *supra*, pp. 168, 169. Jones *v.* Jones, 8 Misc. (N. Y.) 660, p. 673.

[6] Brightly's Dig. Pa. (1894), p. 2034, § 52. A singular remedy, since joint action of the trustees is indispensable.

[7] *Supra*, p. 19. Non-resident trustees are usually required by statute to appoint an agent within the State.

court can in some States by statute appoint a trustee, and order the land sold.[1]

The court can give a foreign trustee leave to sell land, and remove the proceeds to the jurisdiction of his original appointment.[2] So, too, it can order personal property [3] to be conveyed to a non-resident trustee where the beneficiaries live out of the State,[4] and where it is satisfied that a proper bond has been given.[5]

Where a trustee takes out ancillary trusteeship, he must settle his account in the principal jurisdiction for any surplus funds in his hands after settling his account in the subsidiary jurisdiction.[6] The ancillary jurisdiction may order the trust fund to be transferred to the original jurisdiction, or may order a continuation of the trust under its own orders.[7]

A trustee need not inventory or account for foreign real estate, or the rents of it, in the jurisdiction of his appointment.[8]

In order to control the land, he must be appointed in the jurisdiction where the land lies,[9] and if he sells by order of court it must be by the order of the court where the land lies.

[1] Brightly's Dig. Pa. (1894), p. 2031, § 30. See also Conn. Gen. Stats. (1902), § 256.

[2] Rev. Stat. Me. (1903), ch. 67, § 32; Code of Va. (1904), § 2630; Code W. Va. R. L. (1902), § 3249.

[3] *Supra*, pp. 10, 12. The approval of an account showing payment to a foreign executor is equivalent to a decree. Emery *v.* Batchelder, 132 Mass. 452.

[4] Mass R. L. (1902), ch. 150, § 27; Comp. Laws Mich. (1897), § 9302; Brightly's Dig. Pa. (1894), p. 2032, § 40; Code Va. (1904), § 2632; Gen. Stat. Conn. (1902), § 230; Code Ala. (1896), § 4179; Code W. Va. (1906), §§ 3249–3251.

[5] Ky. Stat. (1899), §§ 4709–4711; Gen. Stat. N. J. (1895), p. 3685, §§ 9, 10.

[6] Clark *v.* Blackington, 110 Mass. 369.

[7] Welch *v.* Adams, 152 Mass. 74. See Emery *v.* Batchelder, 132 Mass. 452.

[8] *Supra*, p. 92.

[9] Generally, and Mass. R. L. (1902), ch. 147, § 9.

Foreign Investments. — As a general rule, a court will not authorize foreign investments beyond its jurisdiction and control; as, for instance, mortgages or real estate out of the jurisdiction.[1] This rule has, however, been more observed in the breach than in the observance by trustees.

There may be good reason why a foreign investment would be authorized, as, for instance, where the beneficiary resides out of the State and needs a home;[2] or where both trustee and beneficiary reside in another jurisdiction, and only come into the jurisdiction of the trust to account.

Taxation.[3] — The trustee will be taxed on real estate where the land lies, and may be compelled to pay a tax on the income in his home State.[4]

The trustee may be liable to taxation on the personal property where he resides, and if the beneficiary resides in another State, the latter may also be liable to an additional tax.[5]

The statutes are too numerous and varied to cite, and the principle only is stated.

[1] *Supra*, p. 116. Ormiston *v.* Olcott, 84 N. Y. 339.
[2] Amory *v.* Greene, 13 Allen, 413.
[3] *Supra*, p. 29.
[4] Such laws are not unconstitutional. Hunt *v.* Perry, 165 Mass. 287.
[5] *Supra*, p. 184.

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