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restraining a tenant-for-life from committing waste, the Courts of this country have, in many instances, restrained a Hindu widow from acts injurious to the property which she has inherited from her husband.[1] "Such acts," says Mr. Mayne,[2] "are of two classes:—*first*, those which diminish the value of the estate; *second*, those which endanger the title of those next in succession. *First*, under this head come all acts which answer to the description of waste,—that is, an improper destruction or deterioration of the property. The right of those next in reversion to bring a suit to restrain such waste, was established apparently for the first time by an elaborate judgment of Sir L. Peel, in 1851, in *Hurrydass Dutt* v. *Rungunmoney*. What will amount to waste has never been discussed. Probably no assistance upon this point could be obtained from an examination of the English cases in regard to tenants-for-life. The female heir is, for all purposes of beneficial enjoyment, full and complete owner. She would, as I conceive, have a full right to cut timber, open mines, and the like, provided she did so for the purpose of enjoying the estate, and not of injuring the reversion. As Sir L. Peel said: 'The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore, a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance, must show a case approaching to spoliation.'" "It is necessary," said the Right Hon. T. Pemberton Leigh,[3] "to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere."[4]

Suit for possession.

If the widow has committed an act involving forfeiture of property, the reversioners will be entitled to immediate possession.[5] A suit will lie for possession with a view to the prevention of waste, either inchoate or threatened, though of course evidence of such a nature must be procured as will convince the Court that, but for its interference,

[1] See Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, p. 351.
[2] Hindu Law and Usage, 2nd Ed., § 555.
[3] Hurry Doss Dutt *v.* S. M. Uppoornah Dossee, 6 Moo. I. A., 446.
[4] See also Bindoo Bassinee Dossee *v.* Boliechand Sett, 1 W. R., 125; Grose *v.* Amirtamayi Dassi, 4 B. L. R., O. C., 1.
[5] M. S. Kishnee *v.* Khealee Ram, 2 N. W. P., 424.

ultimate loss to the heirs by succession will ensue.[1] The ground for removing the widow from the management of the property in these cases is, that she has proved herself to be unworthy of the confidence reposed in her.[2]

Receiver.

When it is shown that ultimate loss to the estate will result from the acts of the widow, the Court will appoint a receiver, who may be the reversionary heir. His appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.[3]

Although the widow may be removed from the management of the property, she will remain entitled to the rents and profits, which must be paid to her by the receiver. It is not competent to the Court to put the reversioner into possession assigning maintenance to the widow.[4]

Where a widow gave up possession of property upon a claim being made to it, and refused to have anything to do with it,—it was held, that the reversioners were entitled to sue the widow and the person to whom she had given up possession for a declaration of their title, and that the proper course for the Court to adopt was, to appoint a manager to collect the assets of the estate, who should account for them to the Court, and the Court should hold them for the benefit of the reversionary heirs.[5]

Alienation by widow.

If a widow has alienated the property, and it is in the hands of a third person, the reversionary heirs may sue the grantee to prevent waste or destruction of the property, whether moveable or immoveable.[6] But they will have no cause of action unless they charge waste or injury to the property which may affect their rights as reversioners.[7]

[1] Goureekanth Dass *v.* Bhogobutty Dassee, S. D. A. of 1858, p. 1103; Goluk Monee Dassee *v.* Kishenpersad Kanoongoe, S. D. A. of 1859, p. 210.

[2] Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, pp. 351, 366.

[3] Goluk Monee Dassee *v.* Kishenpersad Kanoongoe, S. D. A. of 1859, p. 210; M. S. Maharani *v.* Nand Lal Misser, 1 B. L. R., A. C., 27.

[4] Nundlal Baboo *v.* Bolakee Bebee, S. D. A. of 1854, pp. 351, 370; Golukmonee Dassee *v.* Kissenpershad Kanoongoe, S. D. A. of 1859, p. 210; M. S. Lodhoomona Dassee *v.* Gunnesh Chunder Dutt, *ib.*, 436; M. S. Maharani *v.* Nundalal Misser, 1 B. L. R., A. C., 27; Shama Soonduree v. Jumoona Chowdhrain, 24 W. R., 86.

[5] Radha Mohan Dhar *v.* Ram Das Dey, 3 B. L. R., 362.

[6] Gobindmani Dasi *v.* Sham Lal Bysak, B. L. R., F. B. Rul., 48; Kamavadhani Venkata Subbaiya *v.* Joysa Narasingappa, 2 Mad. H. C. R., 116.

[7] M. S. Suraj Bansi Kunwar *v.* Mahipat Sing, 7 B. L. R., 669.

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The proper persons to sue to restrain a widow from committing acts of waste are the immediate reversionary heirs.[1]

Proper parties to sue.

In *Bama Soonduree Dossee* v. *Bama Soonduree Dossee*[2] it was held, that persons whose rights are only inchoate and remote cannot bring such a suit. But, according to the later decisions, it seems that contingent reversioners may sue. In the recent case of *Chotloo Misser* v. *Jemah Misser*,[3] Garth, C. J., said: "It appears to me that this is one of that class of cases which are referred to in the *Shivagunga case*[4] as being exceptions to the general rule, which is there laid down. In page 191 of the judgment their Lordships allude to suits brought against Hindu widows by presumptive reversioners to restrain waste and the like, as being 'suits of a very special class, which have been entertained by the Courts *ex necessitate rei*.' They expressly say that, in such cases, the reversioner cannot get a declaration of his own title as against third persons; but he is permitted to sue as the presumptive heir, because, unless he were allowed to bring such a suit, there would be no means of preventing a widow from doing perhaps irremediable mischief to the estate. And suits like the present, it seems to me, come clearly within the principle of that exception."

Collusion by immediate reversioner.

And if the immediate reversioners are colluding with the widow, the contingent reversioners may sue to protect the estate.[5]

A stranger cannot sue, even with the consent of the heirs, or by making them parties;[6] nor can an assignee of a reversionary heir, even though he is the next reversionary heir to the husband after the assignor.[7]

Conversion of perishable property.

Where a trust is created for several persons in succession, as where there is a devise to one for life with remainder

[1] Raj Lukhee Dabea *v.* Gokool Chunder Chowdhry, 12 Moo. I. A., 209, 224; Kooer Golab Sing *v.* Rao Kurun Sing, 14 Moo. I. A., 176; Jumoona Dassya Chowdhrani *v.* Bama Soonderai Dassya Chowdhrani, L. R., 3 I. A., 72; Gogun Chunder Sein *v.* Joydoorga, S. D. A. of 1859, p. 620.

[2] 10 W. R., 301.

[3] I. L. R., 6 Calc., 198.

[4] Kattama Natchiar *v.* Dorasinga Tever, L. R., 2 I. A., 169.

[5] Naikramlall *v.* Soorujbuns Sahee, S. D. A. of 1859, p. 891; Shama Soonduree Chowdhrain *v.* Jumoona Chowdhrain, 24 W. R., 86; Retoo Raj Pandey *v.* Lalljee Pandey, *ib.*, 399; Kooer Goolab Sing *v.* Rao Kurun Singh, 14 Moo. I. A., 176, 193.

[6] Brojo Kishoree Dassee *v.* Sreenath Bose, 9 W. R., 463.

[7] Raicharan Pal *v.* Pyari Mani Dasi, 3 B. L. R., O. C., 70.

over,[1] and the subject-matter of the trust consists of property of a wasting description, such as leaseholds or long annuities, and no authority is expressly given to the trustees to convert, the Court assumes that it was the intention of the author of the trust that the trust-estate should be converted into property of a permanent character, otherwise the interest of the reversioners will run the risk of being damaged or destroyed; and it becomes the duty of the trustees, unless a contrary intention appears from the instrument creating the trust, to convert the property into property of a permanent nature,[2] and their omission to do so will be a breach of trust.[3] The doctrine will apply, though there are no trustees, but the bequest is made to the tenant-for-life directly.[4] The leading case on this point is *Howe* v. *Earl of Dartmouth*.[5] In that case a testator had bequeathed all his personal estate to his wife for life with remainders over; part of the property consisted of annuities; and it was held, that they ought to be converted, and the proceeds invested in Government securities. Lord Eldon said: "Unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first, and the thing is quite equal, for the bequest might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency perhaps. If in this case it is equitable that long or short annuities should be sold, to give everyone an equal chance, the Court acts equally as in the other case; for those future interests are, for the sake of the tenant-for-life to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant-for-life. As in the one case, that in which the tenant-for-life has too great an interest is melted for the benefit of the rest; in the other, that of which, if it remained in specie, he might never receive anything, is brought in, and he has

Howe *v.* Earl of Dartmouth.

[1] See Lichfield *v.* Baker, 2 Beav., 481; Crawley *v.* Crawley, 7 Sim., 427; Sutherland *v.* Cooke, 1 Coll., 498; Johnson *v.* Johnson, 2 Coll., 441; Fearns *v.* Young, 9 Ves., 549; Benn *v.* Dixon, 10 Sim., 636; Oakes *v.* Strachey, 13 Sim., 414; *Re* Shaw's Trust, L. R., 12 Eq., 124.

[2] See DeSouza *v.* DeSouza, 12 Bom., 189.

[3] Bate *v.* Hooper, 5 D. M. G., 338.

[4] House *v.* Way, 12 Jur., 958.

[5] 7 Ves., 137.

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Pickering v. Pickering.

immediately the interest of its present worth." In *Pickering* v. *Pickering*,[1] where the property consisted of leaseholds, Lord Cottenham said, p. 298: "Very nice distinctions have been taken, and must have been taken, in determining whether the tenant-for-life is to have the income of the property in the state in which it is at the time of the testator's death, or the income of the produce of the conversion of the property. The principle upon which all the cases on the subject turn is clear enough, although its application is not always very easy.

"All that *Howe* v. *Lord Dartmouth*[2] decided—and that was not the first decision to the same effect—is, that, where the residue or bulk of the property is left *en masse*, and it is given to several persons in succession as tenants-for-life and remaindermen, it is the duty of the Court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be, unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that if a person gives certain property specifically to one person for life, with remainder over afterwards, then, although there is a danger that one object of his bounty will be defeated by the tenancy-for-life lasting as long as the property endures, yet there is a manifestation of intention which the Court cannot overlook. If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainderman is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the Court from considering that he might have meant that it should be converted. Those two kinds of cases are free from difficulty, but other cases of very great difficulty may occur in which it may be very doubtful whether the testator has left property specifically,

[1] 4 My. & Cr., 289. [2] 7 Ves., 137.

but in which there are expressions which raise the question whether the property is not to be enjoyed specifically; for, as the Master of the Rolls appears to have observed in the present case, the word 'specific,' when used in speaking of cases of this sort, is not to be taken as used in its strictest sense, but as implying a question whether, upon the whole, the testator intended that the property should be enjoyed in specie. Those are questions of difficulty, because the Court has to find out what was the intention of the testator as to the mode of management and as to the mode of enjoyment."

The rule does not proceed upon the assumption that the testator intended his property to be sold, except so far as a testator may be presumed to intend that which the law will imply from the directions in his will. The rule proceeds upon this, that the testator has intended the enjoyment of perishable property by different persons in succession, and this can only be accomplished by means of a sale.[1]

Exceptions from rule.

The rule will not apply if the property is specifically given to persons in succession,[2] even though a discretionary power of changing the property is given to the trustees,[3] for such a power is given to them with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees, and indeed shows that the property was intended to be converted.[4] So, the rule will not apply if it clearly appears that the author of the trust intended the property to be enjoyed in specie.[5] "The question," said Lord Langdale,[6] "does not depend on the legacy being specific or not, but you are to collect from the will whether the testator intended that the property should at all events be enjoyed by those in remainder after the expiration of the prior interest."[7] If the property is not to be converted until a certain time has expired, the trustees will not be justified in converting it until that time arrives.[8]

If there is no indication in the will that the property

[1] Cafe *v.* Bent, 5 Hare, 34, *per* Wigram, V. C.
[2] DeSouza *v.* DeSouza, 12 Bom., 190.
[3] Lord *v.* Godfrey, 4 Madd., 455; *In re* Sewell's Estate, L. R., 11 Eq., 80.
[4] Morgan *v.* Morgan, 14 Beav., 72; *Re* Llewellyn's Trust, 29 Beav., 173.
[5] Holgate *v.* Jennings, 24 Beav., 623; Mackie *v.* Mackie, 5 Hare, 70.
[6] Hubbard *v.* Young, 10 Beav., 205.
And see Harris *v.* Payne, 1 Drew., 181.
[8] Rowe *v.* Rowe, 24 Beav., 276; Green *v.* Britten, 1 DeG. J. & S., 655. See further as to expressions which negative the effect of the rule, Lewin, 7th Edn., 275.

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is not to be converted, there must be a conversion.[1] The leaning of the Judges of the Court of Chancery has been rather against, than in favour of, the application of the rule, and the effect of the later cases has been to allow small indications of intention to prevent its taking effect.[2]

Where a testator, after giving estates in succession, empowered his trustees to retain all or any portion or portions of his trust-estate in the same state in which it should be at the time of his decease, or to sell or convert the same, or any part thereof, into money in such manner and for such prices and under such terms and conditions as they should, in their absolute and uncontrolled discretion, think fit, it was held the case was taken out of the rule.[3]

Trustee to be impartial.

A trustee is bound to be impartial in executing the trust, and must not benefit one *cestui que trust* at the expense of another. Thus, where a testator by his will desired his trustees to give up his farm to his nephew, the plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming-stock; and the testator also gave some real property to the plaintiff, and gave legacies and annuities to the plaintiff's father, mother, and sisters, and other persons including the trustees, one of whom was steward to the landlord, and there were hardly any assets to pay the legacies and annuities, if the plaintiff took the farming-stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the plaintiff should be accepted as tenant; and they accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities,—it was held, that it was a breach of trust on the part of the trustees to endeavour to induce the landlord to refuse his consent to the plaintiff having the tenancy, and that the deed must be set aside. James, L. J., said: "The trustees honestly believed that the testator had made a mistake. Still they were the trustees of that will, and their duty was to carry its trusts into effect impartially; they had no right to use the power given to them by their position as trustees; or any other power

[1] Pickering *v.* Pickering, 4 My. & Cr., 289; Morgan *v.* Morgan, 14 Beav., 72; Craig *v.* Wheeler, 29 L. J., Ch., 374.

[2] Macdonald *v.* Irvine, L. R., 8 Ch. Div., 121, *per* Thesiger, L. J.

[3] Gray *v.* Siggers, L. R., 15 C. D., 77. As to directions to accumulate and to lay out the income in land, see Lewin, 7th Edn., 276—280.

which they had, as a means of making a new will for the testator; for that is what their proceedings come to. . . . It was a breach of duty on the part of the trustees to endeavour to induce the landlord to refuse his consent on any grounds to what the testator showed by his will that he wished and intended."[1]

Discretion of trustees not interfered with.

If the author of the trust has reposed a discretionary power in the trustees, either to do or to abstain from doing certain things, the Court has no power or jurisdiction to control the trustees in the exercise of their discretion, so long as they act in good faith, and their determination is not influenced by improper motives.[2] "If," said Wigram, V. C.,[3] "the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or authority upon which the Court should deprive the party of that discretionary power where a proper and honest discretion is exercised." And in the recent case of *Gisborne* v. *Gisborne*[4] Lord Cairns said: "No doubt various cases have occurred in the Court of Chancery, in which, either from the trustees submitting to the Court the question of how they ought to exercise a power or a trust reposed in them, or from questions having been raised by the parties interested as to whether a trust for maintenance or a similar trust had actually arisen and ought to be acted upon, decisions have been arrived at by the Court which I should be very unwilling to throw the least doubt upon; but those decisions appear to me not at all to touch the present case, where, as I shall submit to your Lordships, you have the trustees made the absolute masters of the question, where you have them armed with a complete and uncontrolled discretion, and where they come before you stating that they are prepared to exercise that discretion within the limits within which it is confided to them by the will."[5]

Selecting objects of the trust.

Thus the Court will not interfere with the exercise of a discretionary power of selecting particular objects of the trust.[6] For instance, where property was devised to trustees

[1] Ellis *v.* Barker, L. R., 7 Ch., 104.
[2] See the cases collected, Lewin, 7th Edn., 530.
[3] Costabidie *v.* Costabidie, 6 Hare, 414. [4] L. R., 2 App. Cas., 300.
[5] See also Brophy *v.* Bellamy, L. R., 8 Ch., 798; see also Marquis Camden *v.* Murray, L. R., 16 C. D., 161.
[6] Horde *v.* The Earl of Suffolk, 2 M. and K., 59; Holmes *v.* Penney, 3 K. and J., 103; *Re* Wilke's Charity, 3 Mac. and G., 440.

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upon trust for such of the testator's children and grandchildren, or nephews and nieces, as the trustees should think fit, and the trustees gave all to one, the Court refused to interfere.[1] So the Court will not interfere with a power of sale given to trustees,[2] or with a discretionary power to abstain from paying a legacy.[3] So, where a testatrix left £1,000 upon a condition precedent, but "left her executor at liberty to give the said sum if he found the thing proper," the Court refused to interfere, saying: "The executor says he did not think it proper to advance the legacy. Nothing appears in the conduct of the young man which disqualified him from taking, but it would be quite contrary to the provisions of the will to hold, that the power given to the executor at his discretion to advance the legacy, gave the legatee a right to claim it absolutely. If that were so, the condition in the will, and the power given to the executor of dispensing with it, would be frustrated. Is the Court to decide upon the propriety of the executor withholding the legacy? That would be assuming an authority which is confided by the Court to the discretion of the executor. It would be to make a will for the testator instead of expounding it."[4]

Modes of investment.

And the Court will not interfere with the trustees' discretion as to one of several authorized modes of investment,[5] although the result may be to vary the relative rights of the *cestuis que trustent*.[6] If, however, infants are interested, the Court will interfere if the proposed securities are clearly unsafe.[7] Nor will it interfere with the discretion of the trustees as to maintenance of children,[8] unless it thinks that the discretion is not being properly exercised for the benefit of the infants.[9] Where the trustees had "an uncontrolled and irresponsible discretion," the Court refused to interfere, there being no proof of *mala fides*, although the trustees did not appear to be acting judiciously.[10] And

[1] Civil *v.* Rich, 1 Ch. Cas., 309. [2] Thomas *v.* Dering, 1 Kee., 729.
[3] *In re* Coe's Trusts, 4 K. and J., 199.
[4] Pink *v.* DeThuisey, 2 Madd., 157.
[5] Lee *v.* Young, 2 Y. and C. C. C., 532.
[6] Minet *v.* Leman, 20 Beav., 269; 7 D. M. G., 340: see further Lewin, 7th Edn., 531.
[7] Bethell *v.* Abraham, L. R., 17 Eq., 24.
[8] Collins *v.* Vining, C. P. Coop., 472; Brophy *v.* Bellamy, L. R., 8 Ch., 798.
[9] *In re* Hodges Davey *v.* Ward, L. R., 7 Ch. Div., 762.
[10] Tabor *v.* Brookes, L. R., 10 Ch. Div., 273: see also Marquis Camden *v.* Murray, L. R., 16 C. D., 170.

the Court will not interfere with the mode of executing the trust.[1] But where the power is accompanied with a duty and meant to be exercised (as a power of leasing), the Court will compel the execution, or execute it in the place of the trustees. So, where the trustees had a power-of-sale "if they should consider it advisable but not otherwise," it was held, that the power, though discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it.[2] When such a power is conferred upon trustees to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute it until the time appointed; nor can they enter into any anterior contract respecting it.[3]

Exercise of power by will.

Where a trustee had an absolute discretion to apply the trust-funds for certain charitable purposes as he might think fit, and he died without exercising the power *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised.[4]

Trustees to whom discretionary powers are given, are not bound to state their reasons for exercising the powers in a particular way. But if they do state their reasons, and it appears that their premises are wrong, the Court will then set aside the conclusion.[5]

Trustee cannot set up title to trust-property.

A trustee cannot set up a title to the trust-property adverse to that of his *cestui que trust*. In *Lord Portsmouth* v. *Vincent*,[6] tenants-at-will, who came into possession under a letting by a receiver in the Court of Chancery, were, by the neglect of the parties in the cause, allowed to remain in possession for a great number of years, and were not called on for their rent; they levied fines, and insisted on them as a bar: but Lord Hardwicke said: "No, you gained that possession as tenants under

[1] Mahon *v.* Savage, 1 Sch. and Lef., 111.
[2] Lewin, 7th Edn., 530, citing Tempest *v.* Lord Camoys, W. N., 1867, p. 296; Nickisson *v.* Cockell, 2 N. R., 557.
[3] Weller *v.* Ker, L. R., 1 Sc. App., 11.
[4] Lewin, 7th Edn., 532, citing Copinger *v.* Crehane, L. R., 11 Eq., 429.
[5] *Re* Wilke's Charity, 3 Mac. and G., 441; King (The) *v.* The Archbishop of Canterbury, 15 East, 117.
[6] Cited in Lord Pomfret *v.* Lord Windsor, 2 Ves., 476.

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the receiver of the Court; you gained that possession therefore in confidence, and you shall not, by means of that possession, defeat the title of the persons for whom you had the possession," and he would not suffer the fine and non-claim as a bar.[1] "Where," said Knight Bruce, V. C., "a person knowingly and expressly acquires the possession of property as a trustee merely, or being in possession makes himself by contract, expressly and without qualification, a trustee of it, he cannot be allowed effectually to assert against the trust, at least as a defendant in a suit seeking the performance of the trust, any title paramount and adverse to the trust which he may himself have; he must assert it (if at all) without deriving—he must assert it so as not to derive—any advantage for it from the possession which he has as trustee, or had in that character."[2]

Claim by third person.

If, however, the trustees become aware of a title in a third person to the trust-property, and the *cestuis que trustent* are entitled to claim the property absolutely, the trustees may refuse to deliver over the fund until the question is settled.[3] And trustees cannot set up the adverse title of a third person against their *cestuis que trustent*.[4]

Delivery up of moveable property.

A trustee who sets up a title to moveable property may be compelled to deliver it up to his *cestui que trust*. The Specific Relief Act (I of 1877), s. 11, provides, that "any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, when the thing claimed is held by the defendant as the trustee of the claimant;" and the following illustration is given: "*A*, proceeding to Europe, leaves his furniture in charge of *B* as his agent during his absence. *B*, without *A's* authority, pledges the furniture to *C*, and *C* knowing that *B* had no right to pledge the furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A's* trustee."

[1] See Kennedy *v.* Daly, 1 Sch. and Lef., 381; Stone *v.* Godfrey, 5 D. M. G., 76; Conry *v.* Caulfield, 2 Ball and B., 272; Langley *v.* Fisher, 9 Beav., 90; Newsome *v.* Flowers, 30 Beav., 461; Frith *v.* Cartland, 2 H. and M., 417; Suboodra Beebee *v.* Bikromadit Singh, 14 S. D. A., 543.

[2] Attorney-General *v.* Munro, 2 DeG. and Sm., 163.

[3] Neale *v.* Davis, 5 D. M. G., 258.

[4] Newsome *v.* Flowers, 30 Beav., 461.

It may happen that there is no *cestui que trust* to claim the property, and no person to claim it through the settlor. According to English law, there is no escheat of a trust in fee of lands,[1] and the trustee retains the estate;[2] and if a *cestui que trust* of chattels dies intestate without next-of-kin, the trust-property goes to the Crown.[3] I am not aware of any case in which the question has been raised in this country.[4]

Failure of *cestui que trust*.

It is the duty of trustees to afford to their *cestuis que trustent* accurate information of the disposition of the trust-fund—all the information of which they are, or ought to be, in possession;[5] and to keep clear and distinct accounts of the property.[6] "It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for in this respect they all stand in the same position, to be constantly ready with his accounts."[7] And if the trustees destroy books of account, very cogent reasons must be given to satisfy the Court that the destruction was proper or justifiable.[8] In the case of a trust for sale, the *cestuis que trustent* have a right to say to their trustees—"What estates have you sold? What debts have you paid? And those who claim under them have the same right."[9]

Trustee to keep accounts.

If a trustee chooses to mix his accounts with those of his own trading concern, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted.[10]

If a trustee adopts and sanctions improper accounts by his co-trustee, he will be liable for any default.[11]

A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an

[1] Burgess *v.* Wheate, 1 Eden, 176.
[2] Taylor *v.* Haygarth, 14 Sim., 16; Davall *v.* The New River Co., 3 DeG. and Sm., 394; Cox *v.* Parker, 22 Beav., 168.
[3] See Lewin, 7th Edn., 262.
[4] As to escheat, see Mayne's Hindu Law, ss. 504, 505.
[5] Walker *v.* Symmonds, 3 Swanst., 58, *per* Lord Eldon.
[6] Freeman *v.* Fairlie, 3 Mer., 43.
[7] Pearse *v.* Green, 1 Jac. and W., 140, *per* Sir Thomas Plumer, M. R.: see also White *v.* Jackson, 15 Beav., 191; Ganendra Mohan Tagore *v.* Upendra Mohan Tagore, 4 B. L. R., O. C., 207.
[8] Gray *v.* Haig, 20 Beav., 219.
[9] Clarke *v.* The Earl of Ormonde, Jac., 120.
[10] Freeman *v.* Fairlie, 3 Mer., 43.
[11] Horton *v.* Brocklehurst, 29 Beav., 504.

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inspection of the accounts, but he is not entitled to a copy at the expense of the estate.[1]

Vouchers.

When all the matters relating to the trust have been finally settled, the trustees are entitled to the possession of the vouchers, as their discharge to the *cestuis que trust-ent*, who, however, will have a right to inspect them, and to take copies at their own expense.[2]

Costs.

If the inability or refusal of the trustees to account renders a suit necessary, they must pay the costs of it.[3] The matter of costs, however, is within the jurisdiction of the Court; and if there has been no actual misconduct, the Court may limit the payment of costs to the period of bringing the action or of the hearing, or otherwise according to the circumstances of the case.[4]

Good faith.

In taking accounts against a trustee when he is to be fixed with a personal liability, his good faith is to be considered, and every fair allowance is to be made in his favour, especially if the demand against him is one which arose many years previously, and the *cestui que trust* was at the time cognizant of all the matters connected with it.[5]

Managing member of Hindu family.

I may here refer to the question whether the managing member of a joint Hindu family can be sued for an account. The decisions on this point were conflicting; but in the Full Bench case of *Abhaya Chandra Roy Chowdhry* v. *Pyari Mohan Guho*,[6] the question was decided in the affirmative. Couch, C. J., said: — "The members of a joint Hindu family are entitled to the family property, subject to such dispositions of it as the managing member is entitled to make, either by virtue of the power which is given him by law as manager, or of the powers that may be given to him by the consent of the other members of the family. Subject to the exercise of these powers, and to any disposition of any portion of the family property which may have been made by virtue of them, the other members of the family are clearly interested in that property. It appears to me, that the principle upon which the right to call for an account rests, is not, as has been

[1] Ottley *v.* Gilbey, 8 Beav., 602. [2] Clarke *v.* Ormonde, Jac., 120.
[3] Pearse *v.* Green, 1 Jac. and W., 135; Newton *v.* Askew, 11 Beav., 145.
[4] Springett *v.* Dashwood, 2 Giff., 521; Ottley *v.* Gilbey, 8 Beav., 602; Thompson *v.* Clive, 11 Beav., 475; White *v.* Jackson, 15 Beav., 191; Payne *v.* Evens, L. R., 18 Eq., 362.
[5] M'Donell *v.* White, 11 H. L. Cas., 570: and see Payne *v.* Evens, L. R., 18 Eq., 362. [6] 5 B. L. R., 347.

supposed, the existence of a direct agency or of a partnership, where the managing partner may be considered as the agent for his copartners. It depends upon the right which the members of a joint Hindu family have to a share of the property; and where there is a joint interest in the property, and one party receives all the profits, he is bound to account to the other parties, who have an interest in it, for the profits of their respective shares, after making such deductions as he may have the right to make. That appears to me to be the right principle, and it is the principle upon which the English Courts of Equity act in the case of joint tenants, and tenants in common, and not merely in cases of partners." And Phear, J., said:—"Every man, be he *karta* of a joint Hindu family or not, who manages the property of another person, or property in which another person is beneficially interested, upon the foundation of a trust or confidence between the two, is, in a Court of Equity and Good Conscience, accountable to the latter for the mode in which he does manage it, and for the profits which he may have made out of it. The principle upon which I understand the English Courts of Equity to act upon in those matters is simply this,—that a person who has the control of, and management of, another's property upon the footing of anything which amounts to a confidence or trust reposed in him by that other, shall not be allowed to abuse that confidence, and to make a profit out of his management, without the owner's consent; and inasmuch as the question whether or not a profit has been made, or what has been done, lies, under these circumstances, solely within the knowledge of the manager himself, a Court of Equity will make him disclose what he has done, in other words, will make him account for his administration of the property. It is the necessity for discovery, as the English lawyers term it, in order to protect the actual owner's right and interest which founds the jurisdiction of the English Courts of Equity in cases of this sort."

An individual member of a tarawad governed by the Marumakkatayam rule has no right to an account from the karanavan.[1]

Duties of trustee as to investment.

We have now to consider what are the duties of a trustee with respect to the investment of trust-moneys. In a

[1] Kunigaratu *v.* Arranganden, 2 Mad. H. C., 12.

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properly drawn instrument creating a trust, express directions will always be found as to the securities upon which the trustee is to invest the trust-funds, and the trustee is bound to adhere strictly to the modes of investment prescribed. If he does not do so, he commits a breach of trust, and will be liable for any loss that may arise; whereas, if he invests in the manner directed by the instrument of trust, he will not be liable in case of loss. But there are other cases where the instrument creating the trust is of an informal character, and does not contain any directions as to investment. It is the duty of the trustee to make the fund productive for the benefit of the persons interested, and in order to do so he must invest it in some form of security. And a trustee will not be justified in investing upon any but Government securities.[1] The Court will not allow property to be invested in public securities which are not Government securities.[2]

If a fund is properly invested, it is a clear breach of trust for the trustees to convert it into money and invest the proceeds in unauthorized securities.[3]

Personal security.

Trustees may not invest on personal security,[4] even though larger interest may be gained, for such an investment is a species of gaming;[5] and it makes no difference that the loan is on joint security.[6] A promissory note is evidence of a debt; but it cannot be considered as a security for money.[7] The rule, that a trustee may not invest on personal security, is one that "should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and most honest intention, yet no rule in a Court of Equity is so well established as this."[8]

And trustees leaving money outstanding on personal security in which the testator himself had invested, will be liable for any loss, unless they can show that an attempt to recover the money would have been fruitless.[9]

[1] See DeSouza *v.* DeSouza, 12 Bom., 190.
[2] Sampayo *v.* Gould, 12 Sim., 435.
[3] Kellaway *v.* Johnson, 5 Beav., 319.
[4] Walker *v.* Symonds, 3 Swanst., 63; Clough *v.* Bond, 3 M. & Cr., 496; Watts *v.* Girdlestone, 6 Beav., 188; Graves *v.* Strahan, 8 D. M. G., 291.
[5] Adye *v.* Feuilleteau, 1 Cox, 25.
[6] Holmes *v.* Dring, 2 Cox, 1.
[7] Ryder *v.* Bickerton, 3 Swanst., 81 (*n*), *per* Lord Hardwicke.
[8] Holmes *v.* Dring, 2 Cox, 1 *per* Lord Kenyon.
[9] Styles *v.* Guy, 1 Mac. & G., 422.

Investments in the stock or shares of any private company are not justifiable without express authority, and the trustees will be liable for loss if the company fails or the shares become depreciated.[1] Shares in companies.

Trustees do not commit a breach of trust by lending out the trust-fund on personal security, if the instrument creating the trust expressly authorizes such a mode of investment.[2] But a power to place out the trust-fund at the trustees' discretion, will not justify an investment on such security.[3] So a power to invest upon such security as to the trustees seems expedient,[4] or on the "best and most sufficient security,"[5] or "on good private securities,"[6] will not justify investments on personal security. Nor will a trust to place the trust-fund "out to interest or other way of improvement" authorize an investment in trade.[7] And a trust to invest at "the discretion of the trustees" will not justify them in investing in securities of foreign states, even though the testator approved of such investments.[8] Where the trustees of a sum of money for *A* for life, remainder for her children, were authorized by the settlement to lend the trust-fund upon such real or *personal security* as should be thought good and sufficient, and the trustees lent it to a person in *trade* whom *A* had married, and the money was lost, they were made responsible for the amount. Sir W. Grant, M. R., said: "The authority did not extend to an *accommodation*; it was evident the trustees had, upon the marriage, been induced to accommodate the husband with the sum which they had no power to do.[9]" Where personal security allowed.

Where trustees of a marriage settlement were authorized, with the consent of the husband and wife, to invest the funds on such security, "either real or personal," as they, with such consent, should think proper, and at the date of

[1] Trafford *v.* Boehm, 3 Atk., 439: see as to investment on shares, Lewin, 7th Edn., 293—295.
[2] Forbes *v.* Ross, 2 Bro. C. C., 430; Paddon *v.* Richardson, 7 D. M. G., 563.
[3] Pocock *v.* Reddington, 5 Ves., 794; Bethell *v.* Abraham, L. R., 17 Eq., 24.
[4] Attorney-General *v.* Higham, 2 Y & C. C. C., 634.
[5] Mills *v.* Osborne, 7 Sim., 30.
[6] Westover *v.* Chapman, 1 Coll., 177.
[7] Cock *v.* Goodfellow, 10 Mod., 489.
[8] Bethell *v.* Abraham, L. R., 17 Eq., 24.
[9] Lewin, 7th Edn., 291, citing Langston *v.* Ollivant, G. Coop., 33: see also Boss *v.* Godsall, 1 Y. and C. C. C., 617.

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the marriage, part of the trust-funds were outstanding on the security of the husband's note-of-hand, the Court allowed the investment to be continued on the husband executing a bond to the trustees for the amount of the loan.[1]

One *cestui que trust* not to be benefited at expense of others.

Trustees must not invest in such a manner as to benefit one or more of the *cestuis que trustent* without having regard to the interests of the others. If they do so, and any loss results, they will be liable.[2] Even where the written consent of the tenant-for-life is required to a change of investment, the trustees are bound, if the fund is improperly invested, to re-invest it so as to protect the interests of the remainder men, although the tenant-for-life objects to the re-investment.[3]

Consent of *cestuis que trustent* to change.

Where the instrument of trust contains a power of investment, but requires the consent of any of the *cestuis que trustent* or of the trustees, to the investment or to a change of securities, all the conditions of the power must be strictly followed. If, however, the terms of the power have not been complied with, a *cestui que trust*, who is *sui juris*, and who has acquiesced in the investment, cannot afterwards make any complaint.[4]

So if the power authorizes an advance to three on a joint interest, an advance to two is not justifiable.[5]

Continuing investment

In some cases trustees may continue existing investments, but they should be careful to see that the securities are good.[6]

Varying securities.

"Trustees may, as they generally are, be expressly empowered to invest on *real* as well as Government securities, and where this is the case, and there is a power to vary securities, the trustees may safely sell out Government securities, and invest the proceeds on a mortgage; for, in this case, although the tenant-for-life may obtain a higher rate of interest, yet no injury is done to the remainder man, as the capital is a constant quantity, and if the tenant-for-life live long enough, he himself will have the benefit. A notion is sometimes entertained that where the stock

[1] Pickard *v.* Anderson, L. R., 13 Eq., 608.
[2] Raby *v.* Ridehalgh, 7 Beav., 109, *per* Turner, L. J.; Stuart *v.* Stuart, 3 Beav., 430.
[3] Harrison *v.* Thexton, 4 Jur., N. S., 550.
[4] See Lewin, 7th Edn., 292.
[5] Fowler *v.* Reynal, 3 Mac. and G., 500.
[6] Arnould *v.* Grinstead. W. N., 1872, p. 216; Angerstein *v.* Martin, T. and R., 239; Ames *v.* Parkinson, 7 Beav., 379.

has become depreciated since the original purchase of it by the trustees, the trustees cannot sell out the stock and lend the money on mortgage without being answerable for the difference between the bought and the sale price. But there is no ground for this apprehension, for if the trust authorize the purchase of stock at all, the trustees cannot be wrong in dealing with it at the market-price of the day. No doubt if there were a sudden fall under peculiar circumstances, the trustees should not, without good reason, sell out at the very moment of casual depreciation; but if the power be *bonâ fide* exercised, the mere fact of a depreciation below the bought price cannot *per se* constitute a breach of duty."[1]

Investment on mortgage.

Where trustees are empowered to invest on mortgage, they should not, in the case of land, invest more than two-thirds of the actual value of the estate; in the case of houses, not more than one-half. And they should not invest in leaseholds under any circumstances, as these are wasting securities. Nor should they, under any circumstances, invest on the security of a second mortgage.[2]

Trustees may not lend to themselves

Trustees empowered to lend the trust-funds on mortgage may not lend to one of themselves. The reason is, that there is the possibility of a conflict between the trustees' duty and interest, and the *cestuis que trustent* are entitled to have the impartial judgment of all the trustees as to the sufficiency of the security.[3]

Paying over mortgage-money.

Trustees must be careful, when they advance money on mortgage, not to pay over the money to the mortgagor until the security is ready, for in case of loss by fraud they will be personally liable.[4]

Consent of Court to investment.

The Court will not, so long as an estate remains to be administered in it, allow a purchase, or a mortgage, or any other investment to be made, unless the Court is satisfied of its safety. The reason is, that the Court has to protect the property for all claimants, and even where the trustees have an undisputed power to make a purchase, or to make a mortgage, a reference is usually made to ascertain the propriety of the investment in all respects.[5]

[1] Lewin, 7th Ed., 296.

[2] See further as to investment, Lewin, 7th Ed., Ch. XIV.

[3] Stickney *v.* Sewell, 1 M. and Cr. 8; ——— *v.* Walker, 5 Russ., 7; Francis *v.* Francis, 5 D. M. G., 108; Fletcher *v.* Green, 33 Beav., 426.

[4] Rowland *v.* Witherden, 3 Mac. and G., 568; Hanbury *v.* Kirkland, Sim., 265; Broadhurst *v.* Balguy, 1 Y. and C. C. C., 16.

[5] Bethell *v.* Abraham, L. R., 17 Eq., 27, *per* Jessel, M. R.

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Trustee's and Mortgagee's Powers Acts.

In England, the duties of trustees as to investment are defined by various Statutes.[1] In cases "to which English law is applicable"[2] in this country, the Trustee's and Mortgagee's Powers Act[3] provides (s. 5), that where trust-property is sold under a power-of-sale, the money received "shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power-of-sale; and until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid: provided that if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid would have been payable or applicable in case such sale had not been made." And s. 32 provides that, "trustees having trust-money in their hands which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities, and such trustees shall also be at liberty, in their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature. Provided always, that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person."

Official Trustee's Act of 1864, s. 14.

The Official Trustee's Act[4] provides (s. 14) that "the Official Trustee shall cause all capital moneys received by him to be invested in

[1] See Lewin, 7 Ed., 282—288.
[2] As to the meaning of these words, see *ante*, p. 15.
[3] XXVIII of 1866.
[4] XVII of 1864.

Government securities, or otherwise as the Court shall direct: and if in any case the trust-funds or any of them shall, at the time of their vesting in the Official Trustee, be invested otherwise than as provided in the deed or will creating the trust, or than as ordered by the Court, it shall be the duty of the Official Trustee, as soon as he reasonably can, to realize the funds so improperly invested, and to invest the same in Government securities or otherwise as the Court shall direct."

Remedy in case of non-investment.

Where trustees are bound by the terms of their trust to invest the money in the public funds, and instead of doing so, retain the money in their hands, the *cestuis que trustent* may elect to charge them, either with the amount of the money and interest, or with the amount of the stock which they might have purchased with the money.[1] The doctrine of the Court, when it applies this rule, is, that the trustee shall not benefit by his own wrong. If he had done what he was bound to do, a certain amount of Government securities would have been forthcoming for the *cestuis que trusteni*. And therefore, if called upon to have such securities forthcoming, he is bound to do so; just as, in ordinary cases, every wrong-doer is bound to put the party injured, so far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done.[2]

But the grounds on which the right of election in the *cestuis que trustent* rest, wholly fail in a case where a trustee, having an option to invest in Government securities, or on the security of immoveable property, neglects his duty and carelessly leaves the trust-funds in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee—"If you had done your duty, I should now have had a certain sum in Government securities, or the trust-fund would now consist of a certain amount of Government securities." It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued. In such a case the trustee is liable for the principal and interest only. "Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure

[1] Shepherd *v.* Mouls, 4 Hare, 503; Byrchall *v.* Bradford, 6 Madd., 235; Robinson *v.* Robinson, 1 D. M. G., 247.

[2] Robinson *v.* Robinson 1 D. M. G., 256.

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of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee: and the same principle may be applied by analogy to the case of a trustee failing to invest in either of two modes equally lawful by the terms of the trust. . . . The trustee is not called upon to exercise an option retrospectively, but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for his being in such a case chargeable only with the money invested, and not with the Government securities which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of Government securities. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to in whatever mode that duty was performed."[1] In *Raphael* v. *Boehm*[2] Lord Eldon said: "Where there is an express trust to make improvement of the money, if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him as the principal to have lent it to others, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest." The case was re-argued before Lord Erskine, who agreed with Lord Eldon;[3] and Lord Eldon subsequently expressed his opinion that his original judgment was right.[4] Where a trustee who was directed to invest the residue of his testator's estate in consols, and to accumulate the dividends, invested it on mortgage of real estate, he was held liable to make good the amount of stock which would have been purchased in consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.[5]

So an executor who neglects to pay debts, or who, after paying debts and legacies, neglects to account for the surplus, or an assignee who neglects to pay dividends, will be liable to pay interest,[6] and it is no excuse that he

[1] Robinson *v.* Robinson, 1 D. M. G., 257, *per* Lord Cranworth, L. C.
[2] 11 Ves., 107. [3] 13 Ves., 407.
[4] 13 Ves., 590: see also Dornford *v.* Dornford, 12 Ves., 127.
[5] Pride *v.* Fooks, 2 Beav., 430. See also Knott *v.* Cottee, 16 Beav., 77; Wilson *v.* Peake, 3 Jur., N. S., 155. [6] See Lewin, Ch. XIV., s. 5.

himself derived no benefit from the moneys in his hands.[1] Where, however, an executor in good faith retained a balance to which he thought himself entitled, he was not charged with interest.[2]

Remedy in case of wrongful investment.

If trustees having power to invest on certain securities, and to vary such investments from time to time, realize money properly invested, for the purpose of investing it in a security not warranted by the instrument of trust, the *cestui que trust* has two remedies: *First*, he may compel the trustees to restore the trust-fund to its original state. The Court will not treat the sale as lawful, and the investment as unlawful, so as to satisfy the trust by replacing the money, but the whole will be treated as one unjustifiable transaction and the original security must be replaced,—that is to say, if the fund was originally invested in Government securities, it will not be sufficient to refund the money realized by the sale; but an equivalent amount of Government securities must be purchased[3] and the intermediate dividends must be replaced;[4] or, *secondly*, the *cestui que trust* may require the trustees to account for the money received on the sale with interest if that would be most advantageous to him.[5] In England, the rate of interest is 5 per cent.[6] In this country it would be at the rate of 6 per cent., the Court rate of interest. When trustees have committed a breach of trust by an improper sale of the trust-fund, they are not discharged from the consequences of the breach of trust by replacing the fund in some security, not the security the sale of which constituted the breach of trust.[7] In a case where the trustee did not seek to make anything himself, but was honourably unfortunate in having yielded to the importunity of one of the *cestuis que trustent*, it was held that, although the trustee was bound to replace the specific stock, the *cestuis*

[1] See Lewin, Ch. XIV., s. 5. [2] Bruere *v.* Pemberton, 12 Ves., 386.
[3] Phillipson *v.* Gatty, 7 Hare, 516; Norris *v.* Wright, 14 Beav., 304.
[4] Davenport *v.* Stafford, 14 Beav., 335.
[5] Bostock *v.* Blakeney, 2 Bro. C.C., 653; *Ex parte* Shakeshaft, 3 Bro. C.C., 197; Raphael *v.* Boehm, 11 Ves., 108; Harrison *v.* Harrison, 2 Atk., 121; Bate *v.* Scales, 12 Ves., 402; Phillipson *v.* Gatty, 7 Hare, 516; Norris *v.* Wright, 14 Beav., 305; Rowland *v.* Witherden, 3 Mac. and G., 568; Wiglesworth *v.* Wiglesworth, 16 Beav., 269.
[6] Crackelt *v.* Bethune, 1 Jac. and W., 587; Moseley *v.* Ward, 11 Ves., 581; Pocock *v.* Reddington, 5 Ves., 794; Piety *v.* Stace, 4 Ves., 620; Jones *v.* Foxall, 15 Beav., 392.
[7] Lauder *v.* Weston, 3 Drew., 394.

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que trustent should not have the option of taking the proceeds with interest.[1]

Insolvency of trustee.

In the case of the insolvency of a trustee, the *cestui que trust* has the option of proving for the proceeds of the sale with interest, or for the cost of the specific stock at the time of the insolvency with the interim dividends.[2]

Duties of trustees for sale or mortgage.

Where the instrument of trust directs the trustees to raise money by the sale or mortgage of the trust-property, they may act without the leave of the Court.[3] But if a suit respecting the trust has been instituted, the trustees cannot deal with the property without the leave of the Court, for by the suit the execution of the trust is in the hands of the Court.[4] "Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of the purchaser the contract has dropped to the ground, and the representatives of the purchaser have not felt themselves justified in renewing it. The better mode would be, to give liberty to the purchaser at any time after the expiration of a limited period, but before any confirmation by the Court, to determine the contract."[5]

Trustee bound to sell to best advantage.

A trustee for sale is bound to sell the trust-property to the best advantage, and to use all reasonable diligence to obtain a proper price.[6] If he is negligent in conducting the sale, as by not advertising,[7] he will be personally liable for any loss occasioned. All the trustees are equally liable, and cannot escape responsibility, on the ground that the conduct of the sale was delegated to one of their number.[8] If, however, a trustee enters into a contract for the sale of trust-property, he is not bound to break off the contract in

[1] Lewin, Ch. XIV., s. 4, citing O'Brien *v.* O'Brien, 1 Moll., 533.
[2] *Ex parte* Shakeshaft, 3 Bro. C. C., 197.
[3] Earl of Bath *v.* Earl of Bradford, 2 Ves., 590.
[4] Walker *v.* Smallwood, Amb., 676; Drayson *v.* Pocock, 4 Sim., 283.
[5] Lewin, 7th Edn., 383.
[6] Downes *v.* Grazebrook, 3 Mer., 208; Mathie *v.* Edwards, 2 Coll., 480; Ord *v.* Noel, 5 Madd., 438.
[7] Ord *v.* Noel, 5 Madd., 438; Pechel *v.* Fowler, Anst., 549.
[8] *In re* Chertsey Market, 6 Price, 285; Oliver *v.* Court, 8 Price, 166.

order to sell to another person who makes a higher offer;[1] and when there are two offers, and it is not quite clear which is the most advantageous, the trustee will not be liable for refusing to accept the offer preferred by the *cestui que trust*.[2]

Must attend to interest of all parties.

The trustees must pay equal and fair attention to the interests of all persons concerned. If they, or those who act by their authority, fail in reasonable diligence,—if they contract under circumstances of haste and improvidence,—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party—a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been.[3] So, specific performance will not be enforced against trustees, if they have entered into an agreement by mistake to sell at an inadequate consideration;[4] nor, where there has been a substantial misdescription on their part, will specific performance with compensation be enforced against them;[5] and in no case will specific performance be granted if there has been a breach of trust.[6] The sale of property at a grossly inadequate value is a breach of trust which affects the title in the hands of a purchaser.[7]

"The usual course," said Lord Romilly,[8] "is, for *cestuis que trustent*, who are the persons most interested in the matter, and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom he is trustee." This of course is only when the *cestuis que trustent* are persons competent to contract.

Valuation.

The trustee before sanctioning a sale should have a valuation of the property made by some qualified person.[9]

[1] Goodwin *v.* Fielding, 4 D. M. G., 90; Harper *v.* Hayes, 2 DeG. F. and J., 542. [2] Selby *v.* Bowie, 4 Giff., 300.

[3] Ord *v.* Noel, 5 Madd., 440; *Anon.*, 6 Madd., 11; Turner *v.* Harvey, Jac., 178; Mortlock *v.* Buller, 10 Ves., 292; Hill *v.* Buckley, 17 Ves., 394.

[4] Bridger *v.* Rice, 1 Jac. and W., 74.

[5] White *v.* Cuddon, 8 C. and F., 766.

[6] Wood *v.* Richardson, 4 Beav., 176; Fuller *v.* Knight, 6 Beav., 205; Thompson *v.* Blackstone, *ib.*, 470; Sneesby *v.* Thorne, 7 D. M. G., 399; Ramlal Thakursidas *v.* Lakhmichand Muniram, 1 Bom. H. C., Appx., lxii.

[7] Stevens *v.* Austen, 7 Jur., N. S., 873.

[8] Palairet *v.* Carew, 32 Beav., 568.

[9] Oliver *v.* Court, 8 Price, 165; Campbell *v.* Walker, 5 Ves., 630.

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Absolute trust for sale will not authorize mortgage.

An absolute trust for sale, from which it appears that it was the intention of the author of the trust that the property should be converted, will not authorize the trustees in mortgaging.[1] But where the trustees are authorized to sell in order to raise money for a particular purpose, as for instance, to pay debts, and it does not appear that it was the intention of the author of the trust that the property should be converted, the trustees may raise the necessary money by means of a mortgage.[2] "Generally speaking," said Lord St. Leonards,[3] "a power of sale, out-and-out, for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money."

Trust to mortgage will not authorize sale.

Conversely, a trust to raise money by way of mortgage will not authorize a sale, and the Court will not, in such a case, direct a sale, even though it clearly appears that a sale would be more advantageous.[4]

Trust for sale survives.

A trust for sale survives, and it is not necessary, where one trustee has died before a contract has been entered into, to go to the Court in order to carry the sale into effect.[5]

Trustees bound to make good title.

Trustees are bound, like other persons, to make a good title; they may of course protect themselves by express stipulations.[6]

Counsel's opinion.

"It would be prudent before proceeding to the execution of the trust to take the opinion of counsel whether a good title can be deduced. Should the contract for sale be unconditional, and the title prove bad, the purchaser in a suit for specific performance would have his costs against the trustee, though the trustee, where his conduct was excusable, might charge them upon the trust-estate under the head of expenses."[7]

[1] Haldenby *v.* Spofforth, 1 Beav., 390; Stroughill *v.* Anstey, 1 D. M. G., 635; Page *v.* Cooper, 16 Beav., 396; Devaynes *v.* Robinson, 24 Beav., 86.
[2] Ball *v.* Harris, 4 M. & Cr., 264.
[3] Stroughill *v.* Anstey, 1 D. M. G., 645.
[4] Drake *v.* Whitmore, 5 DeG. and Sm., 619. See further as to powers of sale, Lewin, 7th Edn., 392.
[5] Lane *v.* Debenham, 11 Hare, 188.
[6] White *v.* Foljambe, 11 Ves., 343; M'Donald *v.* Hanson, 12 Ves., 277.
[7] Lewin, 7th Ed., 396.

Payment of purchase-money.

After property has been sold under a power of sale, the trustee should not let the purchaser into possession until the whole amount of the purchase-money has been paid.[1] The purchaser is not bound to pay the money to the trustees personally; but payment to an authorized agent of the trustees will bind them, and discharge the purchaser.[2]

Duties of trustees for purchase.

It sometimes happens that trustees are directed to lay out the trust-funds in the purchase of lands. Such a direction is not very common, and I only propose to deal with this branch of the law very shortly.

The general rule is, that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed; and failing to do so are answerable for the consequences, as if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestui que trust* for the consequences.[3] The trustees must take care to have the estate valued on their own behalf, and must not be content with the valuation of the vendor.[4] They must see that a good title is shown, and will be justified in taking legal advice.[5] If the trust-estate is in the hands of the Court, the trustees can only contract subject to the approval of the Court, which will direct an inquiry as to whether the purchase is beneficial, and if so, whether a good title can be made.[6] Trustees having a trust or power to purchase must exercise a joint discretion as to the propriety of the purchase, and therefore, as no man can be a judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly suit for obtaining the sanction of the Court.[7]

The trustees, where the money is not under administration by the Court, need not disclose the trust to the vendor either in the contract or in the conveyance. If they do so, it will embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust.[8]

[1] Oliver *v.* Court, 8 Price, 166; Browell *v.* Reed, 1 Hare, 434. As to the conveyance and covenants, &c., see Lewin, 7th Edn., 401—406.

[2] Hope *v.* Liddell, 21 Beav., 183; Robertson *v.* Armstrong, 28 Beav., 123: and see *In re* Fryer, 3 K. and J., 317; Viney *v.* Chaplin, 2 DeG. and J., 468; West *v.* Jones, 1 Sim., N. S., 205

[3] Lewin, 7th Edn., citing Craven *v.* Craddock, W. N., 1868, p. 229.

[4] Ingle *v.* Partridge, 34 Beav., 412.

[5] Eastern Counties Railway Co. *v.* Hawkes, 5 H. L. Cas., 363.

[6] Bethell *v.* Abraham, L. R., 17 Eq., 27; *Ex parte* The Governors of Christ's Hospital, 2 H and M., 166.

[7] Lewin, 7th Ed., 455.

[8] *Ibid*, 457.

LECTURE VII.

DUTIES AND LIABILITIES OF TRUSTEES.

Time within which sale of trust-property to be made — Discretion to be exercised — Conveyance of trust-property to *cestuis que trustent* — Distribution of the trust-fund — Derivative title — Payment after death of *cestui que trust* — Appointment of trustee to assist in distributing — Presumption of death — Rebuttal of presumption — Release — Liability for payment to wrong persons — Costs — Interest — Bond of indemnity — Authority from *cestui que trust* to receive the money — Payment on written authority — Payment to persons under disability — Partners — Payment to single trustee — Overpayment — Refund to executor — Payment when debt from testator subsisting — Liability of trustee for breach of trust — Trustee liable though he has not benefited — Extent of liability — Trustee about to abscond — Criminal breach of trust — Liability of professional adviser — Partner — Loss by accident — Neglect to obey directions in instrument of trust — To pay premiums — Sale to purchaser for valuable consideration without notice — Agent — Barnes *v.* Addy — Limitation — Wilful default — Concurrence — Fraud by trustees — By *cestui que trust* — Acquiescence — Delay — Release and confirmation — No set-off in respect of breach of trust — Liability for breach of trust by predecessor or co-trustees — Trustee joining in receipt for conformity — Trustees giving receipt bound to see to investment — Walker *v.* Symonds — Trustee joining in act for convenience — Executor joining in receipt for conformity — Executor must ascertain that money required — Executor not liable as such for act of co-executor — Styles *v.* Guy — Liability under decree for common account — Unnecessarily handing over assets — Restraining intended breach of trust — Several liability of co-trustees — Limitation of liability — Contribution — Impounding fund in Court — Costs — Trustee paying under power-of-attorney — Payment without notice of transfer — Indemnity-clause.

Time within which sale of trust-property to be made.

WHERE the instrument creating the trust contains a direction to the trustees to sell and convert the trust-property, the trustees will be allowed a reasonable time within which to effect the sale, even though the direction is to convert "with all convenient speed." "A direction to convert with all convenient speed," said Sir C. C. Pepys, M. R.,[1] "is no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion. If a reasonable discretion were to be denied to an executor, if it were to be laid down as an inflexible

[1] Buxton *v* Buxton, 1 M. and Cr., 80, 93.

rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would of necessity be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious, and it has never been acted upon by the Court, which, in cases of this kind, has always considered what is for the interest of the parties concerned."[1]

Discretion to be exercised.

It is impossible to fix a particular period within which an executor should convert his testator's property, but a reasonable discretion must be allowed to the trustees, and whether they have exercised such a discretion must depend on the facts.[2] "You cannot," said Sir J. Romilly, M. R.,[3] "fix one period for selling every species of property. Thus, suppose the testator possessed a large quantity of horses, it would be culpable to keep them at a great expense, incurring necessarily a great outlay for their maintenance, instead of selling them at once. But with respect to other property, there must be a reasonable time allowed for selling it." The usual time is twelve months.[4] In one case two months were held to be a reasonable time within which to break up a testator's establishment.[5] And where executors sold the stock-in-trade and good-will of a business three weeks after their testator's death, though against the wish of the *cestui que trust*, and though there was evidence that a better price might have been obtained, they were held not responsible, as they had acted honestly.[6] There is no fixed rule that conversion must take place by the end of the year, but that is the *primâ facie* rule, and executors who do not convert by that time, must show some reason why they did not do so.[7]

But if the trustees have acted *bonâ fide*, and according to the best of their judgment, and it appears that a sale within twelve months must have resulted in a loss, they will not be liable.[8] Trustees will, however, be liable for loss

[1] Parry *v.* Warrington, 6 Madd., 155.
[2] Buxton *v.* Buxton, 1 My. and Cr., 93.
[3] Hughes *v.* Empson, 22 Beav., 183.
[4] See DeSouza *v.* DeSouza, 12 Bom., 190; Parry *v.* Warrington, 6 Madd., 155; Vickers *v.* Scott, 3 M. and K., 500; Fitzgerald *v.* Jervoise, 5 Madd., 25. See Act V of 1881, s. 117.
[5] Field *v.* Peckett (No. 2), 29 Beav., 576.
[6] Selby *v.* Bowie, 4 Giff., 300; affd., 9 Jur., N. S., 425.
[7] Grayburn *v.* Clarkson, L. R., 3 Ch., 606.
[8] Garrett *v.* Noble, 6 Sim., 504; Buxton *v.* Buxton, 1 M. and Cr., 80.

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caused by any improper delay.[1] Where trustees delayed selling for twenty-five years, they were held to be liable;[2] and persons who deal with trustees selling at a considerable distance of time, are under an obligation to enquire and see that no breach of trust is being committed.[3] A trust to sell "at such time and in such manner" as the trustees think fit, will not justify the trustees in arbitrarily postponing the sale to an indefinite period, so as to place the tenant-for-life and those in remainder in a totally different relative situation from that in which they would have been had the sale been made with reasonable diligence.[4] Where property was devised to trustees upon trust with all convenient expedition, and within five years after the testator's death absolutely to sell and convey the premises, it was held, that the trustees could make a good title upon a sale after the expiration of that period. "There is nothing," said Turner, V. C., "in the will importing a negative on a sale being effected by the trustees after the expiration of five years. If there had been a provision negativing any sale by the trustees after that period, there might have been a sufficient ground for this Court refusing to interpose to enforce specific performance of the agreement. The question is, whether it is to be collected from the will that the sale, which must at any rate be effected notwithstanding the lapse of the five years, may not after that time be made by the trustees, or whether it must then be made under the direction of the Court of Chancery by the Act of the Court. I cannot impute the latter intention to the testator. . . . I think the expression of the will as to the five years is only directory to the trustees, that they might make the payments out of the trust-funds within that time, if possible."[5] The onus is on the trustees to show that the interests of the *cestuis que trustent* have not been injuriously affected by the delay.[6]

Where a testator left money invested in speculative securities, and the executors waited for twelve months, by which time the market had fallen, and they, hoping the

[1] Pattenden *v.* Hobson, 22 L. J., Ch., 697; Cuff *v.* Hall, 1 Jur., N. S., 972; Devaynes *v.* Robinson, 24 Beav., 86.
[2] Fry *v.* Fry, 27 Beav., 144.
[3] Stroughill *v.* Anstey, 1 D. M. G., 635.
[4] Walker *v.* Shore, 19 Ves., 391: see Wilkinson *v.* Duncan, 23 Beav., 469.
[5] Pearce *v.* Gardner, 10 Hare, 287, 291: and see Cuff *v.* Hall, 1 Jur., N. S., 972; De La Salle *v.* Moorat, L. R., 11 Eq., 8.
[6] Cuff *v.* Hall, 1 Jur., N. S., 972.

market would rise, delayed the sale, and a loss ensued,—it was held, that they ought not to be made liable. "The executors," said James, L. J., "acted with no view of obtaining any benefit to themselves; they appear to have acted honestly with a view to what they thought beneficial to everybody interested. In the honest exercise of their discretion they thought it more prudent to wait for a rise, and we think they ought not to suffer because it turns out that they committed an error of judgment. It would be very hard upon executors, who have been saddled with property of this speculative kind and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it proved by the result, would have been the best course."[1]

If a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of it consists of shares in an unlimited company. And they will not, in the absence of *mala fides*, be liable for loss arising to the estate from non-conversion.[2]

If the instrument creating the trust does not contain any special direction as to sale, it is not usual for the trustees to sell except upon the request of some one or more of their *cestuis que trustent*, or under circumstances which render a sale necessary or expedient, or unless the property is not of a permanent character.[3]

Conveyance of trust-property to *cestuis que trustent*.

When the duties of trustees are at an end, they must convey the trust-property to their *cestuis que trustent* upon its being clearly and satisfactorily proved to them that their duties are at an end, unless they have notice of any disposition or incumbrance made by the *cestuis que trustent* or any of them.[4]

Distribution of the trust-fund.

When a trustee is called upon to distribute the trust-fund, he has a right to know the title of those who claim to be *cestuis que trustent*.[5] And the necessity of seeing that the trust-money reaches the proper hand is obligatory, not only on trustees regularly invested with the

[1] Marsden *v.* Kent, L. R., 5 Ch. Div., 600: and see Sculthorpe *v.* Tipper, L. R., 13 Eq., 232; Turner *v.* Buck, L. R., 18 Eq., 301.
[2] *In re* Norrington Brindley *v.* Partridge, L. R., 13 Ch. Div., 654.
[3] See Dart V. and P., 5th Edn., 59.
[4] Frederick *v.* Hartwell, 1 Cox, 193; Holford *v.* Phipps, 3 Beav., 440.
[5] Hurst *v.* Hurst, L. R., 9 Ch., 762.

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character, but on all persons having notice of the equities, as if *A* lend a sum to *B*, and *B* afterwards discovers that it is trust-money, he cannot pay it back to *A*, unless *A*, as trustee, has a power of signing a receipt for it.[1]

Derivative title.

It occasionally happens that other persons than the original *cestuis que trustent* may come to have an interest in the trust-property, and questions arise as to how far the trustees are liable if they part with the trust-fund without noticing the persons who have subsequently acquired an interest in it. For instance, the instrument creating the trust may give *A* a life-interest, with a power of appointment among his children. Here the trustees must be careful to ascertain whether any appointment has been made, and who are the persons entitled under it. So if they have notice of an incumbrance having been created by a *cestui que trust*, they must ascertain whether it is still subsisting, otherwise they will be liable if they pay to the original *cestui que trust*.[2] New trustees are not bound to make any enquiries of the old trustee as to incumbrances.[3]

Payment after death of *cestui que trust*.

Upon the death of a *cestui que trust*, the trustee must only pay to the person duly authorized by law to give receipts for property belonging to the *cestui que trust*. He has nothing to do with any disputes as to the persons ultimately entitled, and if he mixes himself up with such disputes and refuses to pay over the trust-fund to the person entitled to demand it, he will be liable for the costs of a suit to recover it.[4]

Appointment of trustee to assist in distributing.

If a surviving trustee be placed in an embarrassing situation as regards the distribution or management of the fund, it is said that he has a right to ask for the appointment of a new trustee to assist him by his counsel.[5]

Presumption of death.

According to English law, if a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence, and the *onus* of proving that the death took place at any particular time within the seven years, lies upon the person who claims a

[1] Lewin, 7th Edn., 316, citing Sheridan *v.* Joyce, 7 Ir. Eq. Rep., 115.
[2] Cothay *v.* Sydenham, 2 Bro. C. C., 391; Leslie *v.* Baillie, 2 Y. and C. C. C., 91; Cresswell *v.* Dewell, 1 Giff., 460.
[3] Phipps *v.* Lovegrove, L. R., 16 Eq., 80.
[4] Smith *v.* Bolden, 33 Beav., 262.
[5] Lewin, 7th Edn., 317, citing Livesay *v.* O'Hara, 14 Ir. Ch. Rep., 12.

right, to the establishment of which that fact is essential.[1] According to Hindu law, there must be a lapse of twelve years before death will be presumed.[2]

Rebuttal of presumption.

The presumption does not arise when the probability of intelligence is rebutted by circumstances.[3] Should the person afterwards re-appear in fact, he may assert his right.[4] And therefore, if the trust-fund is in Court and it is paid out to a claimant, he must give security to refund in such a case.[5] A trustee should, therefore, either accumulate the fund until death is proved, or else require an indemnity from the person to whom he pays.

Release.

When a trustee or executor hands over the trust-funds to a *cestui que trust*, it is usual to obtain a receipt or acknowledgment in full discharge of all claims. But such a receipt only discharges in respect of those claims which were actually known, and if given in ignorance of the real facts, will not affect the right of the *cestui que trust*.[6]

Liability for payment to wrong persons.

If a trustee, executor, or administrator pays over the trust-fund to persons who are not properly entitled to it, he will, as a general rule, be liable to those persons who can prove their title to it, even though he has acted honestly and circumspectly, and has been misled by his legal advisers. "I have no doubt," said Lord Redesdale,[7] "that the trustees meant to act fairly and honestly; but they were misadvised; and the Court must proceed, not upon the improper advice under which an executor may have acted, but upon the acts which he has done. If under the best advice he could procure he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer."[8] But ignorance of facts may, under certain circumstances, excuse the trustees.[9]

[1] *In re* Phené's Trusts, L. R., 5 Ch., 139: and see Nepean *v.* *Doe*, 2 M. and W., 894; Dunn *v.* Snowden, 2 Dr. and Sm., 201; Lamb *v.* Orton, 6 Jur., N. S., 61; Sillick *v.* Booth, 1 Y. and C. C. C., 117; Hickman *v.* Upsall, L. R., 20 Eq., 136. Act I of 1872, ss. 107, 108.

[2] Janmajay Mazumdar *v.* Keshab Lal, 2 B. L. R., A. C., 134; Sarada Sundari Debi *v.* Gobind Mani, *ib.*, 137 (*n*).

[3] Bowden *v.* Henderson, 2 Sm. and G., 360.

[4] Lewin, 7th Edn., 319, citing Woodhouselee *v.* Dalrymple, 9 W. R. (Eng.), 475; Monckton *v.* Braddell, L. R., 7 Eq., 30.

[5] Dowley *v.* Winfield, 14 Sim., 277; Cuthbert *v.* Purrier, 2 Phillips, 199.

[6] Eaves *v.* Hickson, 30 Beav., 143: see further Lewin, 7th Edn., 326.

[7] Doyle *v.* Blake, 2 Sch. and Lef., 243.

[8] And see Urch *v.* Walker, 3 M. and C., 705; Turner *v.* Maule, 3 DeG. and Sm., 497; *In re* Knight's Trusts, 27 Beav., 49.

[9] *Ex parte* Norris, L. R., 4 Ch., 287.

LECTURE VII.

Costs.

Where the trustees have acted *bonâ fide* and under legal advice, they will not be made to pay costs.[1] As a rule, costs follow the event, and if a plaintiff fails, he has to pay the costs of the suit. But the Court has jurisdiction to allow an unsuccessful plaintiff his costs. And if it appears upon the construction of the instrument of trust that the rights of parties were so exceedingly doubtful that the fund could not safely be distributed without the opinion of the Court, an unsuccessful claimant may be allowed his costs out of the fund.[2] Where, however, a suit was instituted for the administration of an estate by a person entitled to a contingent reversionary interest, and a decree for an account was obtained, but before the accounts could be taken his interest wholly failed, he was held not to be entitled to his costs either as against the defendants or out of the fund.[3]

But trustees are not justified by remaining passive, in preventing the rightful owners from obtaining possession of their property, and if called upon to do an act involving no risk or responsibility, which is necessary to enable the true owner to obtain his property, they are bound to do it; and if their refusal renders an application to the Court necessary, they will be made to pay the costs.[4]

Interest.

An executor or trustee who in good faith pays over trust-money to persons who are not entitled to it, may be ordered to refund, but he will not have to pay interest.[5] If interest has been paid by mistake, it cannot be recovered back, but such wrongful payment cannot affect the title to the capital.[6]

Bond of indemnity.

"In cases where there exists a mere shadow of doubt as to the rights of parties interested, and it is highly improbable that any adverse claim will, in fact, be ever advanced, the protection of the trustee may be provided for by a substantial bond of indemnity. In general, however, a bond of indemnity is a very unsatisfactory safeguard, for

[1] Angier *v.* Stannard, 3 M. and K., 566; Devey *v.* Thornton, 9 Hare, 232; Field *v.* Donoughmore, 1 Dr. and War., 234.

[2] Lynn *v.* Beaver, T. and R., 63; Westcott *v.* Culliford, 3 Hare, 274; Turner *v.* Frampton, 2 Coll., 336; Wedgwood *v.* Adams, 8 Beav., 103; Boreham *v.* Bignall, 8 Hare, 134; Merlin *v.* Blagrave, 25 Beav., 134.

[3] Hay *v.* Bowen, 5 Beav., 610.

[4] *In re* Primrose, 23 Beav., 590.

[5] Saltmarsh *v.* Barrett, 31 Beav., 349.

[6] Remnant *v.* Hood, 2 DeG. F. and J., 404: see *Ex parte* Ogle, L. R., 8 Ch., 711.

when the danger arises, the obligors are often found insolvent, or their assets have been distributed. And if the bond be to indemnify against a breach of trust, the Court is not disposed to show mercy towards a trustee who admits himself to have *wilfully* erred by having endeavoured to arm himself against the consequences."[1]

Authority from *cestui que trust* to receive the money.

"Where the trustee is satisfied as to the parties rightfully entitled, he may pay the money either to the parties themselves, or to an agent empowered by them to receive it; and the authority need not be by power-of-attorney, or by deed, or even in writing. The trustee is safe if he can prove the authority, however communicated. But a trustee would not be acting prudently if he parted with the fund to an agent without some document producible at any moment by which he could establish the fact of the agency."[2]

Payment on written authority.

If trustees pay on a written authority, they must be careful to see that it is genuine; for if it turns out to be forged, they will be liable for the loss. "Trustees," said Lord Northington,[3] "whether private persons or a body corporate, must see to the reality of the authority empowering them to dispose of the trust-money, for if the transfer is made without the authority of the owner, the act is a nullity, and in consideration of law and equity the rights remain as before." In that case a bank had permitted a transfer of stock under a forged power-of-attorney. "The question is," said Lord Romilly,[4] "where forgery is committed, and a person wrongfully gets trust-money which cannot be recovered from him, on whom is the loss to fall? I am of opinion that it falls on the person who paid the money. Here the loss falls on the trustees, and the persons to whom the fund really belongs are not to be deprived of it. The trustee is bound to pay the trust-fund to the right persons." In this case the trustees had paid over the trust-fund to wrong parties upon a forged authority, and they were held to be liable; but the persons who had wrongfully received the money were ordered to repay the amount they had respectively received in order to relieve the trustees.[5]

[1] Lewin, 7th Edn., 320.
[2] *Ibid*, 322.
[3] Ashby *v.* Blackwell, 2 Eden, 302: and see Sloman *v.* The Bank of England, 14 Sim., 475.
[4] Eaves *v.* Hickson, 30 Beav., 141.
[5] See also Bostock *v.* Floyer, L. R., 1 Ch., 26; Hopgood *v.* Parkin, L. R., 11 Eq., 75; Sutton *v.* Wilders, L. R., 12 Eq., 373.

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If trustees are induced by fraud to pay to an infant, they will not be liable to pay over again to him when he comes of age.[1]

Payment to persons under disability.

Partners.

In the case of the death of a partner, a debt owing to the firm may safely be paid to the surviving partners, who are competent to give receipts in respect of joint debts.[2]

Payment to single trustee.

"The Court will not, in the exercise of its discretion, except under special circumstances, pay out money to a single trustee who has survived his co-trustees, and a *trustee* out of Court would do well to throw all the protection he can about a trust-fund; but it must not be inferred that he would not be *safe* in paying to a single surviving trustee, for payment to a surviving trustee for sale, is of constant occurrence."[3]

Over-payment.

If trustees under an erroneous view of the effect of the instrument of trust have overpaid *cestuis que trustent*, the Court will compel a restitution and repayment, and will give the trustees a lien on other interests of such *cestuis que trustent*, even as against an assignee for valuable consideration.[4] And one *cestui que trust* may sue the *cestui que trust* who has been overpaid, to recover the amount notwithstanding the Limitation Act, if there have been no improper *laches* on his part.[5]

Where in a suit against a trustee for relief in respect of a breach of trust it appears that overpayments have been made, they may be recovered in the suit without instituting fresh proceedings.[6]

Refund to executor.

Legatees will not, generally, be made to refund, at the the suit of other legatees, payments voluntarily made to them by the executors under a mistake, but the repayment will be ordered to be made out of any undistributed funds in which they may be interested,[7] especially they will not be made to refund when they were not willing parties to the payment, and a long period has since

[1] Overton *v.* Banister, 3 Hare, 503; Wright *v.* Snowe, 3 DeG. and Sm., 321; Nelson *v.* Stocker, 4 DeG. and J., 458. As to payments to married women and lunatics, see Lewin, 7th Edn., 323, 324.

[2] Philips *v.* Philips, 3 Hare, 289.

[3] Lewin, 7th Edn., 324.

[4] Dibbs *v.* Goren, 11 Beav., 483; Livesey *v.* Livesey, 3 Russ., 287.

[5] Harris *v.* Harris, 29 Beav., 110; Prowse *v.* Spurgin, L. R., 5 Eq., 99; Jervis *v.* Wolferstan, L. R., 18 Eq., 18.

[6] Hood *v.* Clapham, 19 Beav., 90; Baynard *v.* Woolley, 20 Beav., 583; Davies *v.* Hodgson, 25 Beav., 177; Griffiths *v.* Porter, *ib.*, 236.

[7] Downes *v.* Bullock, 25 Beav., 54.

elapsed.[1] And it appears that a purchaser of a legacy cannot be called upon to refund or pay any portion of a debt subsequently established against the testator's estate.[2]

Where an executor administered an estate and paid over the residue, and ten years after a creditor of the testator brought an action of covenant against the executor, who instituted proceedings to administer the estate, and to make legacies standing in the joint names of the executor and legatees applicable to the payment of the debt,—the Court ordered the debt to be paid out of the legacies, but refused to allow the executor his costs.[3]

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call upon the residuary legatees to refund.[4]

Where one of several residuary legatees or next-of-kin has received his share of the estate of a testator or intestate, the others cannot call upon him to refund if the estate is subsequently wasted; but they can do so if the wasting took place before such share was received. And in the latter case, the burden of proof lies on those who call upon the residuary legatee or next-of-kin to refund, to show that the wasting took place before the share was paid over.[5]

Payment when debt from testator subsisting.

It is a breach of trust on the part of executors or trustees to pay residuary legatees while their testator's debts remain unpaid, and creditors whose debts are not Statute-barred may recover the amount from the legatees,[6] but they cannot recover from a purchaser for value.[7]

Liability of trustee for breach of trust.

If through the acts, or default of the trustees, the trust-property is damaged, the *cestuis que trustent* are entitled to sue the trustees for compensation for the loss which has been sustained, and the trustees will be liable to make good such loss personally.[8]

[1] Bate *v.* Hooper, 5 D. M. G., 345.
[2] Noble *v.* Brett, 24 Beav., 499.
[3] Noble *v.* Brett, 24 Beav., 499; 26 Beav., 233.
[4] Jervis *v.* Wolferstan, L. R., 18 Eq., 18.
[5] Peterson *v.* Peterson, L. R., 3 Eq., 111.
[6] Fordham *v.* Wallis, 10 Hare, 217.
[7] Dilkes *v.* Broadmead, 2 D. F. & J., 566; Ridgway *v.* Newstead, 3 D. F. & J., 474.
[8] Syed Khodabunda Khan *v.* M. S. Oomutul Fatima, 13 S. D. A., 235; Moonshee Buzzul Ruhim *v.* Shumsheroon-nissa Begum, W. R. (F.B.), 60.

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A trustee is liable for a breach of trust, even though there was no consideration and the trustee himself is the author of the trust.[1] And if any person assumes to act as a trustee, and in so doing injures the trust-fund, he will be responsible, though he was never properly appointed.[2]

Trustee liable, though he has not benefited.

The Court does not inquire whether the trustee has gained any particular benefit; but fastens upon him an obligation to make good the situation of the *cestui que trust*.[3] "It has been the constant habit of Courts of Equity," said Lord Redesdale,[4] "to charge persons in the character of trustees with the consequences of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not."[5]

Extent of liability.

A trustee will not be charged, as a mortgagee, for what he has or might have received;[6] he will not be charged with imaginary values,[7] for he is a mere stake-holder.[8] But if there is wilful default,[9] or very supine neglect,[7] he may be charged with more than he received, but the proof must be very strong.[7]

Trustee about to abscond.

If the trustee is about to abscond, the *cestui que trust* may apply under chap. XXXIV of the Code of Civil Procedure that the trustee may give security, and the Court may, if it thinks fit, issue a warrant to arrest the trustee and bring him before the Court to show cause why he should not give security for his appearance. The Court would probably only exercise its jurisdiction under this chapter if the *cestui que trust* had a vested interest, and would not interfere where the *cestui que trust's* interest was contingent. A present vested interest, though capable of being divested, would be sufficient.[9]

Criminal breach of trust.

If a trustee dishonestly misappropriates or converts trust-property to his own use, or dishonestly uses or disposes of that property in violation of any direction of

[1] Drosier *v.* Brereton, 15 Beav., 221.
[2] Rackham *v.* Siddal, 16 Sim., 297; 1 Mac. & G., 607; Life Association of Scotland *v.* Siddal, 3 DeG. F. & J., 58; Aveline *v.* Melhuish, 2 DeG. J. & S., 288; Hennessey *v.* Bray, 33 Beav., 96.
[3] Dornford *v.* Dornford, 12 Ves., 129.
[4] Adair *v.* Shaw, 1 Sch. & Lef., 272.
[5] See also Raphael *v.* Boehm, 13 Ves., 411, 490; Moons *v.* De Bernales, 1 Russ., 305; Lord Montford *v.* Lord Cadogan, 17 Ves., 489.
[6] Harnard *v.* Webster, Sel. Ch. Ca., 53.
[7] Palmer *v.* Jones, 1 Vern., 144.
[8] Pybus *v.* Smith, 1 Ves. J., 193.
[9] See Howkins *v.* Howkins, 1 Dr. & Sm., 75.

law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, he commits criminal breach of trust (Act XLV of 1860, s. 405), and is liable to be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both (s. 406). And the Code contains provisions (ss. 407, 408, 409) regarding criminal breach of trust by a carrier, wharfinger, or warehouse-keeper; clerks or servants, public servants, bankers, merchants, or agents. At one time it was held in England, that a trustee could not be punished for stealing the trust-property, as he is, according to English law, the legal owner, and a man cannot steal his own property. This absurdity has, however, been done away with by 24 and 25 Vict., c. 96, ss. 80, 86; and a trustee in England is now liable criminally as well as civilly.

A refusal to give up land alleged to have been mortgaged, the mortgage having been denied, cannot be treated as a dishonest misappropriation of documents of title amounting to a criminal breach of trust under s. 405.[1]

Liability of professional adviser.

If a professional adviser wilfully advises a breach of trust, he will be liable to be suspended from practice.[2] And a trustee, also a professional man, who commits a breach of trust, is liable to the same penalty.[3] But the breach must be wilful; and a professional man acting under instructions from the trustees, will not, as we have seen, be liable as a constructive trustee, unless he is aware of the intended breach of trust.[4]

Partner.

If a trustee is a member of a firm, and pays trust-moneys into the partnership account, the other partners will be liable for any loss occasioned by the breach of trust;[5] and if one of a firm of solicitors in transacting business with trustees practises a fraud upon the trustees, the co-partners are liable.[6]

Loss by accident.

If trustees neglect to take possession of the trust-property, and to put it in position of security, they have committed

[1] *Reg. v.* Jaffir Naik, 2 Bom. H. C. R., 133.
[2] Goodwin *v.* Gosnell, 2 Coll., 457.
[3] *In re* Chandler, 22 Beav., 253.
[4] Barnes *v.* Addy, L. R., 9 Ch., 244.
[5] Eager *v.* Barnes, 31 Beav., 579.
[6] Lewin, 7th Edn., 770.

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a breach of trust, and will be liable for loss, even by fire, lightning, or any other accident.[1]

Neglect to obey directions in instrument of trust.

If a trustee neglects to follow a direction to accumulate dividends,[2] to enforce a transfer of stock,[3] or to sell, and in consequence the property becomes deteriorated in value, he will be liable for any loss that may happen.[4] So, if he neglects to register or to execute a power which it was his duty to execute, he will be liable for loss.[5]

To pay premiums.

If a trustee suffers a policy of insurance to become forfeited through neglect to pay the premiums, he is bound to make good the loss to the *cestui que trust*.[6] But if a trustee has no funds in hand, he will not be liable.[7] If he advances the premiums himself, he will have a lien on the policy.[8] If there are no means of keeping up the policy, the Court will direct it to be sold.[9]

Sale to purchaser for valuable consideration without notice.

If a trustee has wrongfully sold the trust-estate to a purchaser for valuable consideration without notice, the *cestui que trust* may either compel the trustee to purchase other lands of equal value, which lands will be held upon the trusts originally provided,[10] or he may take the proceeds of the sale with interest, or the present estimated value of the lands sold, after deducting any increase of price caused by subsequent improvements.[11]

Agent.

As a rule, an agent appointed by a trustee cannot be made accountable for any losses incurred by him while acting as agent.[12] If, however, he goes beyond his authority as an agent, and loss ensues, he will be liable as a constructive trustee.[13] The trustees are responsible for the acts of their agents, and must be made parties to a suit to recover moneys lost by the agent.[14]

[1] Caffrey *v.* Darby, 6 Ves., 496: see also Cocker *v.* Quayle, 1 R. & M., 535; Fyler *v.* Fyler, 3 Beav., 568; Kellaway *v.* Johnson, 5 Beav., 324; Munch *v.* Cockerell, 5 M. & Cr., 212; Gibbins *v.* Taylor, 22 Beav., 344.

[2] Pride *v.* Fooks, 2 Beav., 430.

[3] Fenwick *v.* Greenwell, 10 Beav., 412.

[4] Devaynes *v.* Robinson, 24 Beav., 86; Soulthorpe *v.* Tipper., L. R., 13 Eq., 232; *In re* Norrington, L. R., 13 Ch. Div., 664.

[5] Lewin, 7th Edn., 771.

[6] Lewin, 7th Edn., 771, citing Marriott *v.* Kinnersley, Taml., 470.

[7] Hobday *v.* Peters (No 3), 28 Beav., 603: see, however, Kingdon *v.* Castleman, 46 L. J., Ch., 448.

[8] Clack *v.* Holland, 29 Beav., 273.

[9] Hill *v.* Teenery, 23 Beav., 16.

[10] See Lewin, 7th Edn., 770.

[11] *Ibid.*

[12] Morgan *v.* Stephens, 3 Giff., 235; Marshall *v.* Sladden, 7 Hare, 428.

[13] Morgan *v.* Stephens, 3 Giff., 235; Hardy *v.* Caley, 33 Beav., 365.

[14] Robertson *v.* Armstrong, 28 Beav., 123.

A firm of solicitors having been employed by the trustees of a will to receive the proceeds of the testator's real estate which had been taken by a Railway Company, paid over the money to one of such trustees without the receipt or authority of the other. The money having been lost to the estate by the insolvency and death of the trustee to whom it was paid, it was held, that the receipt of one trustee only (though also an executor) was not a sufficient discharge to the solicitors for the money which they had received by the authority of the two, and that they were personally liable to make good the loss which had resulted to the trust-estate from such improper payment.[1] LECTURE VII.

The tendency of recent decisions is to avoid making an agent responsible, unless there has been dishonest knowledge on his part. In *Barnes* v. *Addy*[2] Lord Selborne, L.C., said: "It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make reasonable and inequitable applications of them. Barnes v. Addy.

"Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with a legal power and control over the trust-property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers—transactions, perhaps, of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust-property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which we must bear in mind in dealing with the facts of this case. If those principles were disregarded, I know not how any one

[1] Lee v. Sankey, L. R., 15 Eq., 204. [2] L. R., 9 Ch., 251.

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could, in transactions admitting of doubt as to the view which a Court of Equity might take of them, safely discharge the office of solicitor, of banker, or of agent of any sort to trustees. But on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power for the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through; and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent by reason of the fiduciary relation, upon the trustees."

Limitation.

Limitation cannot be pleaded as a bar to a suit for compensation for breach of trust, where the trust is express. Section 10 of Act XV of 1877 provides, that "no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands, such property shall be barred by any length of time." These words mean, that where a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust (either from such person having been originally named as trustee, or having become so subsequently by operation of law), the person or persons who for the time being may be beneficially interested in that trust, may bring a suit against such trustee to enforce that trust at any distance of time, without being barred by the law of limitation.[1] The words 'in trust for a specific purpose' are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature, such as the law imposes upon executors or others who hold recognized fiduciary positions; they are used in a restrictive sense to limit the character or nature of the trust attaching to the property which is sought to be followed.[2]

In this country, suits between a *cestui que trust* and trustee for an account are governed solely by the Limitation Act; and unless they fall within the exemption of

[1] Kherodemoney Dossee *v.* Doorgamoney Dossee, I. L. R., 4 Calc., 465, *per* Garth, C. J.

[2] Greender Chunder Ghose *v.* Mackintosh, I. L. R., 4 Calc., 897; see Lewin, 7th Edn., 769.

s. 10, are liable to become barred by some one or other of the articles in the second schedule of the Act. To claim the benefit of that section, a suit against a trustee must be for the purpose of following the trust-property in his hands. If the object of the suit is not to recover any property *in specie*, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on the plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years from the time when the plaintiff had first a right to demand it.[1]

In 1860, certain shares in a company then formed were allotted to *S.*, on the understanding, as the plaintiff alleged, that 120 of such shares should, on the amount thereof being paid to *S.*, be transferred to, and registered in the books of, the company in the names of the plaintiffs. In 1862, the plaintiffs completed the payment to *S.* in respect of the shares, and during his lifetime, received dividends in respect of the shares. *S.* died in 1870 leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs, after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs, and register the same in their names, the plaintiffs' case was, that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. It was held, that the transaction between *S.* and the plaintiffs did not amount to "a trust for a specific purpose."[2]

Wilful default.

It is a general rule that a plaintiff cannot have any relief for which no case has been made on the pleadings,[3] and, therefore, if a *cestui que trust* sues his trustee for an account, and the plaintiff seeks relief against wilful default, he must in his pleadings allege some specific act of wilful default and pray for consequential relief,[4] and he must prove at least one act of wilful neglect and default.[5]

[1] Saroda Pershad Chattopadhya *v.* Brojo Nath Bhuttacharjee, I. L. R., 5 Calc., 910.
[2] Ahmed Mahomed Patel *v.* Adjein Dooply, I. L. R., 2 Calc., 323.
[3] Mayer *v.* Murray, 47 L. J., Ch., 606.
[4] Lewin, 7th Edn., 772.
[5] Sleight *v.* Lawson, 3 K. & J., 292.

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If at the hearing no act of wilful default is proved, and on taking the ordinary accounts, documents are discovered which might have shown wilful default, the Court will not direct any further inquiry as to wilful default.[1] But if the plaintiff pray an account with interest, and at the original hearing an account is directed, and in the course of the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing on further directions.[2] And if relief against a breach of trust be prayed, and at the original hearing the usual accounts only are directed, but with an enquiry who are the parties interested, it is not too late to ask relief against the breach of trust on further directions, as before that time the Court was not in a condition to deal with the question.[3]

And in a redemption-suit it is not necessary that the plaintiff should charge wilful default; nor is the case altered, if the deed, though in substance a security, be in the form of a deed of trust.[4] A mortgagor can always have an account of rents and profits which a mortgagee in possession might, but for his wilful default, have received, though no charge of wilful default has been made, the reason being, that the Court looks with less favour on the case of a mortgagee in possession than on that of a mere gratuitous trustee.[5]

Concurrence.

If the *cestuis que trustent* are persons who are competent to contract,[6] and they have assented to the wrongful act on the part of the trustees, the Court will endeavour to deliver the trustees from their liability to make good any loss,[7] and the *cestuis que trustent* will have to bear it. If some of the *cestuis que trustent* are not competent to contract, the loss will be thrown, in the first instance, upon those who were *sui juris* and who consented to the breach of trust, but the trustees will remain liable to make up any deficiency. "The rule of the Court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach of trust, yet if he goes out of the trust with the approbation of the beneficiary, it must first be made good out of the estate of the person who

[1] Coope *v.* Carter, 2 D. M. G., 292: and see *Re* Fryer, 3 K. & J., 317; Partington *v.* Reynolds, 4 Drew., 253; *Re* Delevante, 6 Jur., N. S., 118; Brooker *v.* Brooker, 3 Sm. & Giff., 475.
[2] Lewin, 7th Edn., 772. [3] *Ibid.* [4] *Ibid*, 773.
[5] Mayer *v.* Murray, 47 L. J., Ch., 606. [6] See Lewin, 7th Edn., 783.
[7] See Aganoor *v.* Hogg, Boul., 38; Brice *v.* Stokes, 11 Ves., 324; Thompson *v.* Linch, 22 Beav., 324; 8 D. M. G., 560.

consented to it."[1] And the Court will enquire whether and when the *cestui que trust* had notice of the breach of trust.[2] No man, having a right to require the performance of a duty, who becomes a party to the delay in the performance of it, can complain of any consequences which may arise from such delay. There is a marked distinction between the degree of knowledge and sanction necessary for the purpose of exonerating a trustee from that which was clearly a breach of trust, and that which is necessary to preclude the *cestui que trust* from complaining of that not being done, the omission to do which, with the concurrence of the *cestui que trust*, never constituted a breach of trust. In the first case, it is used to release a right and discharge an obligation already perfected by the breach of trust; in the latter, only to prevent a right from arising from the non-performance of a duty which it was competent for the *cestui que trust* to dispense with.[3] "It is established by all the cases," said Lord Eldon,[4] "that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree, that either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is, on the one hand, to secure the property of the *cestui que trust*, and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude."

Where trustees allowed property settled upon the marriage of a lady to remain uninvested in the hands of one of their co-trustees, the lady being aware of the facts, and the trustee with whom the money was, subsequently became insolvent, it was held, that the co-trustees had been guilty of a breach of trust, but that the lady was debarred by acquiescence from obtaining any relief from them.[5]

[1] Trafford *v.* Boehm, 3 Atk., 444, *per* Lord Hardwicke; Lord Montford *v.* Lord Cadogan, 17 Ves., 485; 19 Ves., 635; Booth *v.* Booth, 1 Beav., 130.
[2] Broadhurst *v.* Balguy, 1 Y. & C. C. C., 16.
[3] Munch *v.* Cockerell, 5 My. & Cr., 207, 218.
[4] Walker *v.* Symonds, 3 Swanst., 1, 64.
[5] Jones *v.* Higgins, L. R., 2 Eq., 538.

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Fraud by trustees.

By *cestui que trust.*

If the trustees have induced the *cestuis que trustent* to assent to the breach of trust by fraud, their liability will, of course, remain unaltered.[1]

If *cestuis que trustent*, who are not competent to contract, fraudulently induce their trustees to commit a breach of trust, they are debarred from afterwards calling upon the trustees to make good any loss.[2]

Acquiescence.

Cestuis que trustent may debar themselves from obtaining relief in respect of a breach of trust either by direct acquiescence in the act,[3] or else by standing by and allowing the wrongful act complained of to be done without objection.[4]

The term acquiescence will have different significations attached to it, according to whether the acquiescence alleged, occurs while the act acquiesced in is in progress, or only after it has been completed. "If," said Thesiger, L. J.,[5] "a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in *The Duke of Leeds* v. *Earl of Amherst*,[6] is the proper sense of the term 'acquiescence,' and in that sense may be defined as quiescence, under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injury for any time short of the period limited by Statute for the enforcement of the right of

[1] Walker *v.* Symonds, 3 Swanst., 1.

[2] See Lewin, 7th Edn., pp. 783—6, and *ante*, p. 128.

[3] Styles *v.* Guy, 1 Mac. and G., 427; Graham *v.* Birkenhead Railway Co., 2 Mac. and G., 156; Kent *v.* Jackson, 14 Beav., 384.

[4] Duke of Leeds *v.* Earl of Amherst, 2 Phillips, 123; Phillipson *v.* Gatty, 7 Hare, 523; Stafford *v.* Stafford, 1 DeG. and J., 202; Jorden *v.* Money, 5 H. L. C., 185; Rennie *v.* Young, 2 DeG. and J., 136.

[5] De Bussche *v.* Alt, L. R., 8 Ch. Div., 314. [6] 2 Phill., 47, 123.

action, cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."[1]

Delay.

In order that acquiescence may be successfully pleaded as a bar to a suit for relief in respect of a breach of trust, there must have been such delay as amounts to laches on the part of the *cestui que trust*. No precise time can be fixed, but delay for twenty years will disentitle the *cestui que trust* to relief.[2] The onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred.[3] It is not the business of a *cestui que trust* to inform a trustee of his duty, and a *cestui que trust* will not, therefore, be barred on the ground of acquiescence, because he has not made enquiries which, if made, would have brought the fact that a breach of trust had been committed to his knowledge.[4] Nor will he be bound by accepting some portion of his claim before suit.[5] A *cestui que trust*, whose interest is reversionary, is apparently not bound to take proceedings to rectify a breach of trust, and will not be barred by acquiescence because he does not promptly act. "Length of time," said Turner, L. J.,[6] "where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and that proposition, when applied to a question of this description, is, that the *cestui que trust* assented to the breach of trust. A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title, does

[1] And see Lewin, 7th Edn., 736.
[2] Thomson *v.* Eastwood, L. R., 2 App. Cas., 236, *per* Lord Cairns.
[3] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 77, *per* Lord Campbell, L. C.
[4] Thompson *v.* Finch, 22 Beav., 325; 8 D. M. G., 560; Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 73.
[5] Thompson *v.* Finch, 22 Beav., 316; 8 D. M. G., 560.
[6] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 72.

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not seem to me to bear upon the question of his assent to a breach of trust. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not, is a question to be determined on the facts of each particular case." . . . "I am not prepared to say that where the trust is definite and clear, a breach of trust can be held to have been sanctioned or concurred in, by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession." It is almost impossible to attribute laches to a person whose interest is reversionary, because he does not sue before it vests in possession.[1] But knowledge of the facts may and ought, in some cases, to be presumed from great lapse of time.[2]

Release and confirmation.

Cestuis que trustent, who are competent to contract, may release their trustees from liability to account for a breach of trust, or they may confirm the transaction, in either of which cases they will be debarred from proceeding against the trustees.[3]

If, however, the transaction in respect of which the release is given is null and void, the release will not bar the *cestui que trust*.[4]

A *cestui que trust* who releases the principal in a fraud cannot go on against the other parties, though they would have been secondarily liable.[5]

In order that *cestuis que trustent* may be debarred from obtaining relief in respect of a breach of trust on any of the grounds which I have mentioned, they must be competent to contract, must have full information of all the facts relating to the breach of trust, must be aware of the relief to which they would be entitled in a Court of Equity, and must not have acted under compulsion. A *cestui que trust* who has lately come of age should have independent legal advice.[6]

No set-off in respect of breach of trust.

A trustee, who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property, cannot set-off against his liability, a gain which has accrued

[1] Taylor *v.* Cartwright, L. R., 14 Eq., 176.
[2] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 77.
[3] French *v.* Hobson, 9 Ves., 103; Wilkinson *v.* Parry, 4 Russ., 272; Aylwin *v.* Bray, 2 Y. and J., 518 (*a*); Cresswell *v.* Dewell, 4 Giff., 465.
[4] Thomson *v.* Eastwood, L. R., 2 App. Cas., 215.
[5] Thomson *v.* Harrison, 2 Bro. C. C., 164.
[6] See Lewin, 7th Ed., pp., 789, 790.

to another portion of the trust-property through another and distinct breach of trust. "When there are two separate funds, subject to trusts," said Kindersley, V. C.,[1] "and the trustees commit a breach of trust as to one, by which it is lost, I think it is impossible to permit the trustees to say 'we have improved the other fund, and that fund is bound to make up the loss on the other.' That I cannot hold. If the trustees have lost one part of the settled funds, they must answer for it, whatever may be the improvement of the other part."[2]

Liability for breach of trust by predecessor or co-trustees.

One trustee is not as such liable for a breach of trust committed by his predecessor,[3] or by his co-trustee. The leading case upon this point is *Townley* v. *Sherborne*,[4] where it was resolved by all the Judges, "that where lands or leases were conveyed to two or more upon trust, and one of them receives all, or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in this Court (the Court of Chancery) to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice their trust; for they being by law joint tenants or tenants-in-common, every one by law may receive either all or as much of the profits as he can come by, and if two executors be, and one of them waste all, or any part of the estate, the devastavit shall, by law, charge him only, and not his co-executor; and in that case, *equitas sequitur legem*, there having been many precedents that one executor shall not answer, nor be charged for the act or default of his companion.

"And it is no breach of trust to permit one of the trustees to receive all or the most part of the profits, it falling out many times that some of the trustees live far from the lands, and one put in trust out of other respects than to be troubled with the receipt of the profits."[5]

And it was further resolved, that "if, upon the proofs or circumstances, the Court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill-intent in him that permitted his companion to receive the whole profits, he may be charged though he receive nothing."

[1] Wiles *v.* Gresham, 2 Drew., 258, p. 271.
[2] See also Dimes *v.* Scott, 4 Russ., 195; Fletcher *v.* Green, 33 Beav., 426.
[3] Tebbs *v* Carpenter, 1 Madd., 290.
[4] Bridgman, 35.
[5] Williams *v.* Nixon, 2 Beav., 472.

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Trustee joining in receipt for conformity.

It is now settled, overruling the earlier cases, that a trustee who joins with his co-trustees in a receipt for trust-money when it is indispensable that he should do so for conformity, will not, from that act alone, be made liable for any misapplication of the trust-property by his co-trustees into whose hands it comes. "It seems," said Lord Cowper,[1] "to be substantial injustice to decree a man to answer for money which he did not receive, at the same time that the charge upon him by his joining in the receipts is but notional."[2] "When the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline."[3] The trustee who seeks to be discharged from liability, on the ground that he only signed the receipt for conformity, must show that the money acknowledged to have been received by all, was in fact received by the co-trustees, and that he only joined for conformity.[4] A joint receipt will charge trustees *in solido* each, if there is no other proof of the receipt of the money. As if a mortgage is devised in trust to three trustees, and the mortgagor, with his witness, meets them to pay it off; the money is laid on the table, and the mortgagor, having obtained a reconveyance and receipt for his money, withdraws, each trustee is answerable *in solido*.[5]

And where it cannot be distinguished how much was received by one trustee, and how much by the other, each will be charged with the whole; for, in such case, the trustees are to blame for not keeping distinct accounts. It is like throwing corn or money into another's heap, where there is no reason that he who made the difficulty should have the whole; on the contrary, because it cannot be distinguished he shall have no part.[6]

Trustee giving receipt bound to see to investment.

But though a trustee joining in a receipt for conformity may, under certain circumstances, escape liability for loss incurred by the acts of his co-trustee, he will remain liable,

[1] Fellows *v.* Mitchell, 1 P. Wms., 82.
[2] See also Brice *v.* Stokes, 11 Ves., 319; *In re* Fryer, 3 K. and J., 317; and Lewin, 7th Ed., 242, where the cases are collected.
[3] Lewin, 7th Edn., 242.
[4] Brice *v.* Stokes, 4 Ves., 324.
[5] Westley *v.* Clark, 1 Eden, 359.
[6] Fellows *v.* Mitchell, 1 P. Wms., 81.

if he allows the money, for which he has given a receipt, to remain uninvested for a long time,[1] or if he sanctions an improper investment.[2] "Though," said Lord Eldon,[3] "a trustee is safe, if he does no more than authorize the receipt and retainer of the money as far as the act is within the due execution of the power, yet, if it is proved that a trustee, under a duty to say, his co-trustee shall not retain the money beyond the time during which the transaction requires retainer, and says, with his knowledge, and therefore with his consent, the co-trustee has not laid it out according to the trust, but has kept it, or lent it, in opposition to the trust, and the other trustee permits that for ten years together, the question turns upon this—not whether the receipt of the money was right, but whether the use of it, subsequent to that receipt, was right after the knowledge of the trustee, that it had got into a course of abuse . . . As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it. It is the duty of a trustee who signs a receipt for conformity and allows the trust-money to get into the hands of his co-trustee, to ascertain for what purposes the money is required, and personally to ascertain that it has been duly invested. It is not enough for him to rely upon a statement by the co-trustee that such is the case."[4]

Walker v. Symonds.

The law on the point now under consideration was discussed at some length in *Walker* v. *Symonds*.[5] There a sum of money secured upon a mortgage was assigned to three trustees, Donnithorne, Griffith, and Symonds, upon certain trusts. The mortgage was paid off in 1791, and the proceeds, with the approbation of Griffith and Symonds, came into the hands of Donnithorne, who invested it in securities of the East India Company, which were paid off in 1795. Donnithorne again received the money. The co-trustees allowed Donnithorne to retain the money, taking a bond from him, he promising to give a mortgage over some landed estates belonging to him. This he never did, and died in 1796 insolvent; a bill by the *cestuis que trustent*

[1] Brice *v.* Stokes, 11 Ves., 319.
[2] Thompson *v.* Finch, 8 D. M. G., 560.
[3] Brice *v.* Stokes, 11 Ves., 319.
[4] Hanbury *v.* Kirkland, 3 Sim., 265; Thompson *v.* Finch, 8 D. M. G., 560.
[5] 1 Swanst., 1.

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against Griffith and Symonds, to set aside a compromise of the breach of trust on the ground that it had been fraudulently obtained, was dismissed, Sir William Grant, M. R., considering that the fraud had not been proved. His Honor said, p. 41: "What are the transactions? The money had been properly laid out; it had been paid in without any act of the trustees; the trustees did no act to call in the money or change its situation; they were obliged to receive it; so far they were blameless. It came to Donnithorne's hands, and the trustees were not to blame in letting it come to his hands; but they might have afterwards made themselves responsible, by merely not doing what was incumbent on them; by permitting the money to remain a considerable time in the hands of their co-trustee, they might, without any positive act on their part, have made themselves liable; that will depend on the degree and extent of their *laches* in suffering the money to remain in the hands of the trustee. *Brice* v. *Stokes*[1] proceeds upon the doctrine, that a trustee may become liable by knowing that his co-trustee had the money, and leaving it there. They being authorized to put the money out on mortgage, it would be rather hard to say they were guilty of laches by giving Donnithorne a little time to find a mortgage, taking his bond in the meantime." On appeal the decision of Sir William Grant was reversed, and an enquiry was directed as to the acts of the trustees as to the receipt and placing out of the trust-moneys up to the date of Donnithorne's death. On the case coming on for further directions, Lord Eldon said:[2] "The case comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented from 1791 to 1793 and from 1793 to 1795. The report states that the money was laid out with the consent of the trustees, in India bills, payable to Donnithorne; a palpable breach of trust, by placing the fund under his control, secured by little more than a promissory note payable to himself. It was probable that in 1793 he would receive the money, and it would be lodged in his hands,—and I repeat, that although the Court in directing an inquiry will proceed as favourably as it can to trustees who have laid out the money on security from which they cannot with activity recover it, yet no Judge can say that they are not guilty of a breach of trust, if they suffer it to lie out on such a security during

[1] 11 Ves., 319. [2] Page 65.

so long a time.[1] . . . The trustees were guilty of a breach of trust in permitting the money to remain on bills payable to Donnithorne alone, and in leaving the state of the funds unascertained for five years.[2] . . . The Master of the Rolls seems to have thought that the only breach of trust was taking the bond; that was a breach of trust; but he says, and I think rightly, that if he had not found other grounds for dismissing the bill, inquiry would have been necessary. I agree with the Master of the Rolls, that inquiry might, on the principles of this Court, have discharged the trustees in given circumstances from breach of trust. If, without further participation, they, in 1795, had found that they, being implicated in no breach of trust till that time, had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts, instead of filing a bill in this Court against him, which, perhaps, might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage, instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee; in such circumstances, I should readily agree with the Master of the Rolls. But when they take no steps on the arrival of the period at which the bond becomes payable, and choose to communicate to the *cestui que trust* that they have taken a bond, but not what is the effect of it, that is not a communication which can entitle them, in this stage of the cause, to insist on circumstances of which, if inquiry had been directed, they might possibly have availed themselves for their protection."

Trustee joining in act for convenience.

Where a trustee joins in signing a cheque, or does any other act to place money in the hands of his co-trustee, or a person employed by the trustees in a due course of business, for the purpose of being applied in a due execution of the trust, such act being required for the purposes of convenience, and the money be lost, if no case of negligence in not making inquiry as to the proposed application of the

[1] Page 67. [2] Page 71.

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money, or looking after the application of the money, be made against the trustee,[1] he will not be liable.[2] "It will be found to be the result of all the best authorities upon the subject," said Lord Cottenham,[3] "that though a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result—however little likely to arise from the course adopted—and however free such conduct may have been from any improper motive. Thus, if he omit to sell property when it ought to be sold, and it be afterwards lost without any fault of his, he is liable;[4] or if he leave money due upon personal security, which, though good at the time, afterwards fails.[5] And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable, upon a proper investment in the 3 per cents, for loss occasioned by fluctuations of that fund.[6] But he is for the fluctuations of any unauthorized fund.[7] So, when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been entrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be

[1] Underwood *v.* Stevens, 1 Mer., 713; Hanbury *v.* Kirkland, 3 Sim., 265; Brice *v.* Stokes, 11 Ves., 319; Hewett *v.* Foster, 6 Beav., 261.

[2] Bacon *v.* Bacon, 5 Ves., 331; Terrell *v.* Matthews, 11 L. J., N. S., Ch., 31; Broadhurst *v.* Balguy, 1 Y. and C. C. C., 28.

[3] Clough *v.* Bond, 3 My. and Cr., 496.

[4] Phillips *v.* Phillips, Freem. Ch. Ca., 11.

[5] Powell *v.* Evans, 5 Ves., 839; Tebbs *v.* Carpenter, 1 Madd., 290.

[6] Peat *v.* Crane, 2 Dick, 499.

[7] Hancom *v.* Allen, 2 Dick, 498; Howe *v.* Earl of Dartmouth, 7 Ves., 137.

liable, although the person possessing it be a co-executor or co-administrator." [1]

Executor joining in receipt for conformity.

Formerly it was considered that an executor joining in a receipt for conformity made himself liable; for there is no necessity for him to do so, as the receipt of one executor is a sufficient discharge, whereas the receipt of one trustee is not.[2] But this rule has since been modified. In *Walker* v. *Symonds*[3] Lord Eldon said: "Without going through all the cases, it is obvious that *primâ facie* there is this distinction between executors and trustees, that one executor can, and one trustee cannot, give a discharge: and it may frequently happen, as in *Brice* v. *Stokes*[4] it actually happened, not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking control of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice* v. *Stokes*,[5] that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule, that joining alone does not impose responsibility scarcely two Judges agree." And in *Joy* v. *Campbell*[6] Lord Redesdale said: "The distinction seems to be this, with respect to a mere signing, that if a receipt be given for the mere purpose of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received by both executors, was under the control of both, such a receipt shall charge; and the true question in all these cases seems to have been, whether the money was under the control of both executors. If it was so considered by the person paying the money, then the joining in the receipt by the executor, who did not actually receive it, amounted to a direction to pay his co-executor;

[1] Langford *v.* Gascoyne, 11 Ves., 333; Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves., 252; Underwood *v.* Stevens, 1 Mer., 712; Hanbury *v.* Kirkland, 3 Sim., 265.

[2] See Lewin, 7th Edn., 246; and the notes to Townley *v.* Sherborne, 2 Wh. and Tudor, 3rd Ed., 820, where the earlier cases are collected.

[3] 3 Swanst., 63. [4] 11 Ves., 319. [5] *Ibid.*

[6] 1 Sch. and Lef., 341.

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for it could have no other meaning. He became responsible for the application of the money just as if he had received it." And in *Doyle* v. *Blake*[1] his Lordship said: "The true consideration in a question of this kind is, whether the executor who merely joins in the receipt had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other." The principles, therefore, which govern the case of trustees joining for conformity will apparently be applicable, and an executor will not be responsible for joining, so long as he acts subsequently in a proper manner. Thus an executor indorsing a bill of exchange,[2] or joining in a sale of securities[3] in order to enable the co-executor to receive the money, will not be liable in the absence of negligence.

Executor must ascertain that money required.

Executors joining in a transfer to a co-executor upon his representation that the money is required for the payment of debts, must take care to ascertain that the money is really required for that purpose, and will be liable for negligence if it turns out that it was not wanted, or for the portion not applied to that purpose, but not for any portion properly expended. The person to whom the representation is made, has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true.[4] In *Lord Shipbrook* v. *Lord Hinchinbrook*,[5] which was a case of this nature, Lord Eldon said: "This case depends upon the principle applicable to trustees. The fund being vested in the names of all the executors, it was necessary that all should join in the act which placed the property in the hands of one of them; and my mind had reached this conclusion, that, as these executors could not be held answerable for the balance, for which their co-executor was to account separately, they had a right to contend, at least, that they should be allowed so much of the fund as had been applied to the purpose to which it ought to have been applied, as they might have been compelled so to apply it. . . . . These executors ought at least to have made some inquiry of their co-executor as to what had been doing in the administration. If, making that inquiry, they were misled, that is a distinct case; but,

[1] 2 Sch. and Lef., 242. [2] Hovey *v.* Blakeman, 4 Ves., 608.
[3] Chambers *v.* Minchin, 7 Ves., 197.
[4] Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves., 254; Underwood *v.* Stevens, 1 Mer., 712; Hewett *v.* Foster, 6 Beav., 259.
[5] 16 Ves., 477.

making no inquiry, they are satisfied with the information which proves groundless, that he wants the money for the purpose of paying debts. They ought to have inquired how that could be; and though it is not a consequence that they might not place the remainder of the property in his hands, it must surely be at their risk, if they were aware that he had been not acting according to his trust, but grossly violating it."[1]

Executor not liable as such for act of co-executor.

The rule that a trustee as such is not liable for a breach of trust committed by his co-trustee, extends to co-executors.[2] But it is otherwise if he has concurred in the misapplication of the fund.[3] In *Mucklow* v. *Fuller*[4] a trustee, who as executor had proved the will, was held to be liable to make good a loss incurred by his allowing a debt from his co-executor to remain outstanding, although the will contained the usual indemnity-clause. In *Booth* v. *Booth*,[5] a testator bequeathed his estate to his partner Booth and to one Batkin upon trust to invest it for the benefit of his wife and children. Both Booth and Batkin proved the will, and Booth retained the testator's moneys in the trade, and ultimately they were lost. Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no steps to prevent it. It was held, that he was responsible for the consequences of the breach of trust. "The two executors," said Lord Langdale, "proved the will; they take on themselves the trust and the duty of performing it. From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately, did not consider that by proving the will he had undertaken any duty, or incurred any responsibility; he says he proved the will in consequence of the request of the widow, who informed him that he would not thereby undertake any duty or be responsible for anything. It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which by proving the will he has undertaken. I am of opinion that he became

[1] Underwood *v.* Stevens, 1 Mer., 712; Bick *v.* Motley, 2 M. and K., 312; Williams *v.* Nixon, 2 Beav., 472; Hewett *v.* Foster, 6 Beav., 259.

[2] Hargthorpe *v.* Milforth, Cro. Eliz., 318; Riky *v.* Kemmis, 1 L. and G., t.; Sugd., 122; Cottam *v.* E. C. R., 1 J. and H., 243.

[3] Hovey *v.* Blakeman, 4 Ves., 596; Brice *v.* Stokes, 11 Ves., 319.

[4] Jac., 198. [5] 1 Beav., 125.

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liable for the performance of the trusts, and for any consequences arising from a breach of them. Part of the testator's property was engaged in trade; that trade ought to have been put an end to, and the property invested. Batkin, it appears, went to the place of business from time to time, and it is, therefore, clear that he knew that what ought to have been done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive —no receipt of money which he misapplied to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he has undertaken. He permitted his co-executor to carry on the trade, and consequently must be considered, in this Court, a party to this breach of duty. It is said, in extenuation, that he did this from the best motives; he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the children. All this might have been very right to do, and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment; he could not, however, so act without incurring that responsibility if a loss occurred. I am of opinion, on the authorities and on the established rules of the Court, to which it is not necessary to refer, that a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust."

Styles v. Guy.

The authorities on the question of the liability of an executor who allows his co-executor to retain the assets of the testator's estate were discussed in the case of *Styles* v. *Guy*[1] by Lord Cottenham. His Lordship, after referring to various cases, said: "In the reported cases, the loss appears to have been of property received by the defaulting executor after the testator's death, and not of a debt due from him before that event; but this cannot furnish any distinction against the co-executor: in the latter case, a debt due from an executor constitutes part of the assets; but over which the co-executor could not have had any control; whereas he had the means of watching, and, if

[1] Mac. and G., 422.

necessary, of interfering with the receipt by the defaulting executor of assets after the death. His being passive cannot be an immunity for him in the case of assets received, and not in the case of a debt retained; but how was this immunity consistent with the admitted liability of all executors for losses from negligence, and inactivity in not calling in debts due to the estate? Could passiveness be a protection in the case of property lost in the hands of a co-executor, but an offence in the case of property lost in the hands of other debtors to the estates? The liability in the latter case arises from the soundest principle. If a person named executor does not choose to accept the office, he has only to renounce, or, at least, to abstain from proving; but if he proves, he thereby accepts the office, and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows or has the means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty he has undertaken, to interfere and to take measures, if necessary, for putting such property in a proper state of investment; or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for such a distinction . . . . There cannot be one rule applicable to a portion of the estate given to the executor upon particular trusts, and another rule applicable to another portion of the estate constituting the residue given to the executor for the general purposes of the will. In both cases, the executors are trustees of the funds they are to administer for the purposes specified, and their responsibility with respect to each of such funds must be the same. . . . From what I have already said, it will have been seen that I approve of the principle of the decisions in *Mucklow* v. *Fuller*,[1] *Booth* v. *Booth*,[2] and *Lincoln* v. *Wright*,[3] and that I cannot discover any principle for distinguishing between losses by not calling in debts due from debtors to the estate or balances due from executors. These cases establish, that it is the duty of all

[1] Jac., 198. [2] 1 Beav., 125. [3] 4 Beav., 427.

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executors to watch over, and, if necessary, to correct the conduct of each other, and the moment that is established, all ground of distinction between the two classes of cases ceases. Finding, therefore, a principle adopted and acted upon for many years and in many decisions, of the justice and grounds of which I fully approve, I cannot feel any disposition to shake its authority, because I cannot reconcile it with dicta and doctrines of a much earlier date respecting the security of an executor who is passive. I have discussed this case much more at large than any difficulty would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors, to the doctrine that they cannot safely rely upon what they may find in the earlier cases, laying it down that a devastavit by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it. The later authorities to which I have referred must show them that passiveness will, in many cases, furnish no protection; but that negligence and inattention in not interfering with, and taking proper measures to prevent or correct the improper conduct of their co-executor, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear, in this case, to be free from any moral blame; they derived no benefit, but have suffered much from the breach of trust of their co-executor; but they knew that part of the testator's property remained in his hands, and that it was, therefore, not in a proper state of investment: they knew, therefore, that a breach of trust by him was actually in operation, and, excepting some unprofitable applications for accounts and a settlement, nothing was done by them to secure this property so known by them to be in peril."

Liability under decree for common account.

Under a decree against executors for the common accounts, each is chargeable only with his actual or constructive receipts, and, therefore, in such a suit an executor will escape liability by showing, either that he has been only passive, or that he has only acted so far as it was necessary to enable his co-executor to administer the estate; but it is otherwise where he is sought to be made liable for wilful neglect and default.[1]

[1] Terrell v. Mathews, 1 Mac. and G., 433.

Unnecessarily handing over assets.

The principle by which an executor is made liable if he joins with his co-executor in a receipt, is applicable when he has received any portion of the testator's assets and voluntarily and unnecessarily hands it over to his co-executor.[1] So the executor is liable if he sanctions the property remaining in the hands of his co-executor,[2] or does any act by which the co-executor gets absolute possession of the assets, and which but for that act he could not have obtained possession of, such as handing over securities,[3] drawing or endorsing a bill of exchange.[4]

When it was unnecessary that he should do so, the payment over in order to charge must be unnecessary. Under certain circumstances, it may be necessary that one executor should pay over money to his co-executors, and in such a case no liability will attach; as for instance, if the payment is made to enable the executor who receives the money to discharge debts payable where he resides,[5] or to carry on a trade,[6] or where the executor has no legal right to retain the money.[7]

So, the indorsing a bill of exchange made payable to two agents who, on the death of the principal, became his executors in order to enable one to receive the money, was held not to charge the one who did not receive.[8]

If by agreement between the executors one is appointed to receive and intermeddle with such part of the estate and another with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made betwixt both.[9]

An executor is not liable for any portion of the fund which has been properly applied.[10]

[1] Townsend *v.* Barber, 1 Dick. 356; Langford *v.* Gascoyne, 11 Ves., 333; Clough *v.* Dixon, 3 M. and C., 497.

[2] Doyle *v.* Blake, 2 Sch. and Lef., 231; Lees *v.* Sanderson, 4 Sim., 28; Styles *v.* Guy, 1 Mac. and G., 422.

[3] Candler *v.* Tillett, 22 Beav., 257

[4] Sadler *v.* Hobbs, 2 Bro. C. C., 114; Hovey *v.* Blakeman, 4 Ves., 608.

[5] Bacon *v.* Bacon, 5 Ves., 331; Joy *v.* Campbell, 2 Sch. and Lef., 341.

[6] Toplis *v.* Hurrell, 19 Beav., 423; Home *v.* Pringle, 8 C. and F., 288.

[7] Davis *v.* Spurling, 1 R. and My., 64.

[8] Hovey *v.* Blakeman, 4 Ves., 608.

[9] Gill *v.* The Attorney-General, Hard, 314; Moses *v.* Levi, 3 Y. and C. Ex., 359.

[10] Lord Shipbrook *v.* Lord Hinchinbrook, 11 Ves., 252; (S. C.) 16 Ves., 477; Underwood *v.* Stevens, 1 Mer., 712; Brice *v.* Stokes, 11 Ves., 328; Hewett *v.* Foster, 6 Beav., 259.

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Restraining intended breach of trust.

If a trustee becomes aware that his co-trustee threatens, or intents to commit a breach of trust, it is his duty to take steps to prevent it, and, if necessary, to apply for an injunction under s. 54 of the Specific Relief Act, 1 of 1877. If a breach of trust has been committed, the trustee should institute proceedings against the co-trustee to compel him to restore the property to its proper condition.[2]

If a trustee conceals a breach of trust,[3] or refrains from taking proceedings,[4] he will be liable for loss.

Several liability of co-trustees.

There is no primary liability in respect of a breach of trust, all parties to it being equally liable for the whole of the loss occasioned by the wrongful act or default, and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants against whom no relief is prayed, may have been a party to such breach of trust.[5]

If, however, it appears that one trustee took a more active part in the breach of trust, the loss as between the trustees may be thrown upon the more guilty party, who, or if he be dead, his estate, may be ordered to indemnify the passive trustee.[6]

Limitation of liability.

The joint liability of trustees may be taken away by express contract, as where it is agreed each trustee shall receive, and only be answerable for a certain proportion of the trust-estate, in such a case the trustees will only be liable for the amount in their own custody.[7]

Where several trustees are involved in one common breach of trust, a *cestui que trust*, suffering from that breach and proving that the transaction was neither authorized nor adopted by him, may proceed against either or all of the trustees.[8]

Contribution.

Should there be no distinction between the guilt of the trustees, and one of them has been compelled to bear the

[1] See also *In re* Chertsey Market, 6 Price, 279.
[2] Franco *v.* Franco, 3 Ves., 75; Earl Powlet *v.* Herbert, 1 Ves. J., 297.
[3] Boardman *v.* Mosman, 1 Bro. C. C., 68.
[4] Brice *v.* Stokes, 11 Ves., 319; Walker *v.* Symonds, 3 Sw., 41; Booth *v.* Booth, 1 Beav., 125; Williams *v.* Nixon, 2 Beav., 472.
[5] Wilson *v.* Moore, 1 M. and K., 127; affd. on appeal, *ib.*, 337.
[6] Lockhart *v.* Reily, 1 DeG. and J., 476; Priestman *v.* Tindall, 24 Beav., 244; Butler *v.* Butler, L. R., 5 Ch. Div., 554.
[7] Birls *v.* Betty, 6 Madd, 90.
[8] Walker *v.* Symonds, 3 Swanst., 75; Attorney-General *v.* Wilson, 1 C. and Ph., 28; Fletcher *v.* Green, 33 Beav., 426; *Ex parte* Norris, L. R., 4 Ch., 280.

whole, or a greater portion of the loss, he may institute a suit for contribution against his co-trustees.[1] If any of the *cestuis que trustent* have participated in the breach of trust, they must be made parties.[2] A separate suit must be instituted; contribution cannot be enforced in a suit against the trustee to make good the breach of trust.[3] Where a decree had been passed against several defendants with costs, which had been paid by one of the defendants, the Court, on consent, decreed contribution in respect of the costs.[4] If, however, the trustees have acted fraudulently, the Court will not interfere to enforce contribution, upon the principle that there can be no contribution between wrong-doers upon entire damages for a tort.[5]

Impounding fund in Court.

If there is any fund in Court in the suit, which is payable to the trustee against whom contribution is sought, the Court will impound the fund in order to make good what is due from him. Thus, if a fund in Court is set apart to pay a legacy bequeathed to one of two defaulting trustees who has paid no part of the balance due from him, the other trustee who has paid the whole is entitled to ask the Court to impound the fund, in order to make good the share of the debt which the person who was both trustee and legatee ought to have paid.[6]

Costs.

Where several defendants are involved in a breach of trust, the Court, in decreeing relief in respect of it, decrees the costs of the suit against them all, on the principle of giving the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants.[7]

Trustee paying under power-of-attorney.

A *cestui que trust* is often abroad, and then the trustee cannot be sure, that at the time of payment under a power-of-attorney the *cestui que trust* is alive; and if he were dead, the power-of-attorney would be at an end. If, however, the *cestui que trust* give to the trustee a written

[1] Birks *v.* Micklethwait, 33 Beav., 409; Wilson *v.* Goodman, 4 Hare, 63; Jesse *v.* Bennett, 6 D. M. G., 609; Fletcher *v.* Green, 33 Beav., 513; Attorney-General *v.* Dallgars, *ib.*, 624.

[2] Jesse *v.* Bennett, 6 D. M. G., 609.

[3] Fletcher *v.* Green, 33 Beav., 513.

[4] Pitt *v.* Bonner, 1 Y. and C. C. C., 670.

[5] Lingard *v.* Bromley, 1 V. and B., 114; Tarleton *v.* Hornby, 1 Y. and C. Ex., 336; Attorney-General *v.* Wilson, 7 Cr. and Ph., 28; Suput Singh *v.* Imrit Tewari, I. L. R., 5 Calc., 720.

[6] Birks *v.* Micklethwait, 33 Beav., 409.

[7] Lawrence *v.* Bowle, 2 Phill., 140.

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direction by deed, or otherwise, to pay money to a particular person, any payment made under such written direction, until it be revoked, and the revocation comes to the knowledge of the trustee, would be binding on the *cestui que trust's* executor.[1] A convenient course, in cases of this kind, is to transmit the money to a bank abroad, making it payable to the order of the *cestui que trust*; but where the *cestui que trust* is unable to receive his money in person, his direction should be obtained before any particular mode of remittance is adopted.[2] In cases to which English law is applicable, no trustee, executor, or administrator making any payment, or doing any act *bonâ fide*, under or in pursuance of any power-of-attorney, shall be liable for the money so paid, or the act so done, by reason that the person who gave the power-of-attorney was dead at the time of such payment or act, or had done some act to avoid the power; provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: provided always that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made; but that such person so entitled shall have the same remedy against such person to whom such payment shall be made, as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power-of-attorney.[3]

Payment without notice of transfer.

When any beneficiary's interest in the trust-property becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.[4] For instance, if a *cestui que trust* mortgages his reversionary interest in a trust-fund, the trustee should be informed of the charge by the mortgagee, and if he is not informed, and the trustee remains without notice of the charge and pays

[1] Lewin, 7th Edn., 323, citing Vance *v.* Vance, 1 Beav., 605; Harrison *v.* Asher, 2 DeG. and Sm., 436; Kiddill *v.* Farnell, 3 Sm. & Gift., 428.

[2] Lewin, 7th Edn., 323.

[3] Act XXVIII of 1866, s. 39.

[4] Trust's Bill, s. 29, referring to Underhill, 156.

over the sum charged to the *cestui que trust*, the trustee will not be liable to the mortgagee.[1]

Indemnity-clause.

An instrument of trust drawn according to the English form, whether a will or a deed, usually contains a clause declaring that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrines of the Court, adds nothing to his security against the liabilities of his office.[2] A Court of Equity infuses such a clause into every instrument creating a trust; it comes, therefore, to little more than what a Court of Equity will do without any direction;[3] and a person can have no better right upon the expression of what would, if not expressed, be implied.[4]

Such a clause only protects a trustee from liability for losses when his acts have been justifiable; as for instance, if he invests in a security authorized by the instrument of trust, and the security fails, he will not be liable.[5]

In *Bone* v. *Cook*[6] a testator bequeathed certain property to *B* and *C*, and directed them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* sold the property, and the purchase-money was received by *B* and retained in his hands. After the expiration of two years, *C* called upon *B* to make the investment. He was unable to do so, became insolvent, and the money was lost. *C* was held liable, although there was a provision in the instrument creating the trust that the trustees should not be answerable for any trust-moneys further than each person for what he should actually receive.

In order to exempt a trustee from liability for a breach of trust in respect of any of the acts to which I have referred, by force of an express declaration in the instrument of trust, the declaration must be of the very strongest kind; and no declaration, however strong, can exempt a trustee from liability if he has been guilty of gross misconduct. In *Wilkins* v. *Hogg*,[7] a suit against two of three trustees, to make good trust-moneys, &c., they had allowed their co-trustee to receive, was dismissed with costs, the instrument creating the trust having, besides the usual indemnity-clause, provided "that any trustee who should

[1] See Jones *v.* Gibbons, 9 Ves., 410; Fortescue *v.* Barnett, 3 M. and K., 36.
[2] Lewin, 7th Edn., 252.
[3] Dawson *v.* Clarke, 18 Ves., 254.
[4] Worrall *v.* Harford, 8 Ves., 8.
[5] Rehden *v.* Wesley, 29 Beav., 213.
[6] M'Clel., 168.
[7] 3 Giff., 116.

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pay to his co-trustee, or enable him to receive moneys for the general purposes of the will, shall not be obliged to see to the due application thereof, or be responsible by express or implied notice of the misapplication."

Section 37 of Act XXVIII of 1866 provides, in cases to which English law is applicable, that every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words and to the effect following,—that is to say, "that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such money, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee, for the time being, of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

LECTURE VIII.

RIGHTS AND POWERS OF TRUSTEES.

Custody of title-deeds — Right of trustee to reimbursement — Costs — Expenses of management — Accounts — Advances by trustee — Wrongful act of agent — Repairs — Lien for expenses — Agents have no lien — Interest on advances — Advances in respect of different trusts — Personal liability of *cestui que trust* to reimburse — Indemnity — Suit to recover advances — Public funds — Indemnity from gainer by breach of trust — Suit to administer trusts — Appeal — Costs — Application to Court for opinion in management of trust-property — Right to settlement of accounts — General authority of trustee — Advice of *cestui que trust* — What acts trustee may do — Repairs — Winding up estate — Maintenance — Compounding or releasing debts — How trust-property may be sold — Conditions of sale — Buying in — Power to convey — Power to vary investment — Power to apply property for maintenance — Minors' Act — Liability of purchaser to see to application of purchase-money — Fines and Recoveries Act — Trustees' and Mortgagees' Powers Act — To whom purchase-money payable — Charge of debts — Notice of breach of trust — Suspension of trustee's powers after decree.

Custody of title-deeds.

THE trustees are entitled to have the custody of the instrument creating the trust, and of all muniments of title relating to the trust-estate, and it will be a breach of their duty if, where there is a trust to perform, they willingly suffer the title-deeds or muniments relating to the trust-property to get out of their possession,[1] it being, as we have seen,[2] their duty to maintain and defend all suits necessary for the protection and preservation of the trust-property, as for instance, to sue tenants for rent, and for this purpose they must have the documents relating to the trust.[3] Moreover, if a *cestui que trust* for life were allowed to have the custody of the title-deeds, he might mortgage or convey the trust-property for valuable consideration without notice, and the interests of remaindermen would be injured. In such a case the trustees might, if it appeared that they acted fraudulently or with gross negligence, be made personally responsible not only to the other

[1] Meux *v.* Bell, 1 Hare, 95. [2] *Ante*, p. 137.
[3] Goode *v.* Burton, 11 Jur., 851; Garner *v.* Hannyngton, 22 Beav., 627; Stanford *v.* Roberts, L. R., 6 Ch., 310.

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cestuis que trustent, but to third parties.[1] It being the right of the trustees to have possession of the title-deeds, they may sue to have them delivered up.[2] Trustees are bound to produce all cases and opinions of counsel, not intended for their own defence, to the *cestui que trust*.[3]

Right of trustee to reimbursement.

A trustee, as we shall see hereafter, has no right, in the absence of express stipulation, to charge anything for the trouble he incurs in the management of the trust. But he is entitled to be reimbursed for expenses out of pocket,[4] such as the expenses caused by the employment of a bailiff,[5] an agent to collect rents, especially when the estate is at a distance,[6] and of a legal adviser.[7] So he may be reimbursed for fees to counsel[8] and travelling expenses[9] if properly incurred.[10] And it is not necessary that the instrument creating the trust should contain an express provision allowing the trustees to charge.[11]

"The first principle of law," said Lord Cottenham,[12] "is of course to reimburse the trustees all expenses properly incurred by them in discharge of the duties of the trust." "It is," said Lord Eldon, "in the nature of the office of a trustee, whether expressed in the instrument of trust or not, that the trust-property shall reimburse him all the charges and expenses incurred in the execution of the trust."[13] The expenditure must have been necessary, or must have been incurred at the request of the *cestui que trust*.[14] Trustees of a void deed, however, cannot charge costs and expenses incurred by them as against the persons who get the deed set aside,[15] though they will be allowed

[1] Evans *v.* Bicknell, 6 Ves., 174.
[2] Smith *v.* Willis. Tay., 159: see also Lewin, 7th Edn., 581.
[3] Wynne *v.* Humberston, 27 Beav., 421.
[4] *In re* Ormsby, 1 B. & B., 191.
[5] Bonithron *v.* Hockmore, 1 Vern., 316; Chambers *v.* Goldwin, 9 Ves., 273.
[6] Godfrey *v.* Watson, 3 Atk., 518; Davis *v.* Dendy, 3 Madd., 170; Stewart *v.* Hoare, 2 Bro. C. C., 633; Wilkinson *v.* Wilkinson, 2 S. & S., 237; *Re* Westbrooke, 2 Phillips, 631.
[7] Macnamara *v.* Jones, Dick. 587; Blackford *v.* Davis, L. R., 4 Ch., 304.
[8] Cary, 14; Poole *v.* Pass. 1 Beav., 600.
[9] *Ex parte* Lovegrove, 3 D. & C., 763; *Ex parte* Elsee, 1 Mont., 1; *Ex parte* Bray, 1 Rose, 144.
[10] Malcolm *v.* O'Callaghan, 3 M. & Cr., 62; Bridge *v.* Brown, 2 Y. & C., C. C, 181.
[11] Attorney-General *v.* The Mayor of Norwich, 2 M. & Cr., 424.
[12] Feoffees of Heriot's Hospital *v.* Ross, 12 C & F., 512.
[13] Worrall *v.* Harford, 8 Ves., 8; see Morrison *v.* Morrison, 7 D. M. G., 214.
[14] Collinson *v.* Lister, 20 Beav., 368: Leedham *v.* Chawner, 4 K. & J., 458.
[15] Smith *v.* Dresser, L. R., 1 Eq., 651.

for improvements.[1] If the trustees have been guilty of fraud, they will not be allowed their expenses, even if there is a direction in the instrument of trust directing allowances for expenses.[2] Where trustees were wrongfully appointed, but acted *bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses notwithstanding the defect of title.[3] A trustee who has obtained his costs as between party and party in a suit respecting the trust-fund, will be entitled to charges and expenses reasonably and properly incurred which would not be allowed on taxation.[4] The fact that a trustee has been unsuccessful in litigation either as plaintiff or defendant, will not, in the absence of misconduct, disentitle him to be reimbursed his costs.[5] And a trustee or executor, who is ordered to pay costs to the plaintiff, is entitled, unless he has forfeited his right by some misconduct, to recover from the estate which he has defended, not only the costs which he has incurred to the adversary, but also the costs which he has paid to his own legal adviser.[6] He will not be allowed interest on costs paid by him.[7] If a suit respecting the trust-fund has been caused by the negligence of the trustees, and *à fortiori* through their misconduct, or has been instituted in the face of proper advice,[8] they will not be entitled to costs.[9]

Costs.

A trustee or executor is not entitled to be allowed without question the amount of bills of costs which he has paid *bonâ fide* to the legal adviser to the trust, but such bills may be modified by the Court.[10]

Where two executors, defendants in a suit, gave a joint retainer to a firm of solicitors, and in the course of proceedings it was certified that one executor, who had since died insolvent, was indebted to the testator's estate,—it was held, that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred

[1] Lewin, 7th Edn., 549, citing Woods *v.* Axton, W. N., 1866, p. 207.
[2] Hide *v.* Haywood, 2 Atk., 126; Caffrey *v.* Darby, 6 Ves., 497.
[3] Lewin, 7th Edn., 544, citing Travis *v.* Illingworth, W. N., 1868, p. 206.
[4] Fearns *v.* Young, 10 Ves., 184; Amand *v.* Bradbourne, 2 Ch. Cas., 133.
[5] Lewin, 7th Edn., 546, citing Courtney *v.* Rumley, 6 I. R., Eq., 99.
[6] Lovat *v.* Fraser, L. R., 1 Sc. App., 37.
[7] Gordon *v.* Traill, 8 Price, 416.
[8] Peers *v.* Ceeley, 15 Beav., 209.
[9] Caffrey *v.* Darby, 6 Ves., 497: see Leedham *v.* Chawner, 4 K. & J., 458.
[10] Johnson *v.* Telford, 3 Russ., 477; Allen *v.* Jarvis, L. R., 4 Ch., 616. As to taxation, see Lewin, 7th Edn., 546.

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for the deceased executor in taking the account of his debt must be set off against the sum found due from him.[1]

Where, in a suit to set aside a compromise made on behalf of infants by trustees, personal fraud was charged against one of the trustees, and the suit was dismissed with costs to be paid by the next friend, who could not pay, the trustee was held to be entitled to be paid his costs out of the estate, as he had defended the suit for the benefit of the estate, though at the same time he had defended his own character.[2]

Expenses of management.

A trustee will be allowed to reimburse himself for necessary expenses incurred in the management of the trust-estate, even though the instrument of trust provides a remuneration for trouble. Thus, where a testator, who gave annuities to his trustees as a recompense for their care and trouble in the execution of the will, died possessed of a number of houses let at weekly rents, the trustees were held to be entitled to employ an agent to collect the rents and to pay him out of the trust-funds.[3] The trustee should

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keep a regular account of the expenses incurred. If he does not, the Courts will order a reasonable allowance, taking care that the remissness and negligence of the trustee in not having kept accounts shall not be encouraged.[4]

Advances by trustee.

As it is a rule that the *cestui que trust* ought to save the trustee harmless as to all damages relating to the trust, so within the reason of that rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the *cestui que trust* is discharged from being liable for a loss, or from a plain and great hazard of being so, the trustee ought to be repaid.[5] If he has a right to protect the property from immediate and direct injury, he must have the same right where the injury threatened is indirect but probable.[6] Thus, in several cases it has been held, that conservators of public works and Municipal Commissioners are entitled to use the trust-funds at their disposal in opposing proposed Acts of Parliament which would injure the trust-property.[7]

[1] Watson *v.* Row, L. R., 18 Eq., 680.
[2] Walters *v.* Woodbridge, L. R., 7 Ch. Div., 504.
[3] Wilkinson *v.* Wilkinson, 2 S. & S., 237: see Webb *v.* The Earl of Shaftesbury, 7 Ves., 480.
[4] Balsh *v.* Hyam, 2 P. Wms, 453.
[5] Lewin, 7th Edn., 547.
[6] Bright *v.* North, 2 Phill., 220.
[7] Reg. *v.* Norfolk Commissioners of Sewers, 15 Q. B., 549; Attorney-General *v.* Andrews, 2 Mac. & G., 225; Attorney-General *v.* Eastlake, 11 Hare, 205.

Again, if a trustee employs a proper agent to do an act, the directing which to be done was within the due discharge of his duty, and the agent makes a mistake, the consequences of which subject the trustee to legal liability to a third party, he is entitled to be indemnified out of the trust-estate.[1] Wrongful act of agent.

And trustees have been allowed expenses for acts which were reasonable, though perhaps not strictly according to law.[2] But a trustee, though he will be allowed to reimburse himself for moneys expended in the repair and preservation of the trust-property, will not be allowed to charge for sums laid out in increasing the value of it.[3] Repairs.

A trustee is entitled to a lien upon the trust-estate for his out-of-pocket expenses, so long as it remains trust-estate,[4] but not for the expenses of any act not warranted by the trust.[5] He may retain the trust-deeds,[6] and the *cestui que trust* cannot compel a conveyance until the lien is discharged, and this lien has priority over costs of a suit,[7] or to any charge created by the *cestui que trust*.[8] Lien for expenses.

If a *cestui que trust* advances money for the purpose of paying a sum properly payable out of the *corpus* of the trust-funds, he will be entitled to a lien on the corpus for the amount advanced.[9]

But agents and other persons employed by the trustees, such as solicitors, surveyors, &c., have no lien,[10] and except in the case of fraud are accountable only to the trustees.[11] Agents have no lien.
If the instrument creating the trust expressly directs that a particular individual is to be employed at a salary, there will be a trust in his favour, and he will have a claim for his remuneration, but that can hardly be called a lien.[12] It must appear that it was the intention of the author of the trust that the person named should be employed; a

[1] Benett *v.* Wyndham, 4 DeG. F. & J., 259.
[2] Attorney-General *v.* Pearson, 2 Coll., 581.
[3] Sandon *v.* Hooper, 6 Beav., 248.
[4] Worrall *v.* Harford, 8 Ves., 8; *Ex parte* Chippendale, 4 D. M. G., 19.
[5] Leedham *v.* Chawner, 4 K & J., 458.
[6] Darke *v.* Williamson, 25 Beav., 622.
[7] Morison *v.* Morison, 7 D M. G., 226.
[8] *Re* Exhall Coal Co., 35 Beav., 449.
[9] Todd *v.* Moorhouse, L. R., 19 Eq., 69.
[10] Worrall *v.* Harford, 8 Ves., 8; Hall *v.* Laver, 1 Hare, 571; Francis *v.* Francis, 5 D. M. G., 108.
[11] Myler *v.* Fitzpatrick, 6 Madd., 360; Attorney-General *v.* Earl of Chesterfield, 18 Beav., 596: Lee *v.* Sankey, L. R., 15 Eq., 204.
[12] See Williams *v.* Corbett, 8 Sim., 349; Hibbert *v.* Hibbert, 3 Mer., 681; Consett *v.* Bell, 1 Y. & C. C. C., 569.