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mere request or recommendation is not sufficient.[1] The solicitor of trustees may set off payments which have properly been made by him in the performance of the trust against his receipts in the same matter.[2]

Interest on advances.

A trustee who pays money out of his own pocket in respect of debts is in no worse position than a stranger who makes advances, and is entitled to interest on his debt.[3]

Advances in respect of different trusts.

"If a person be trustee of different estates for the same *cestui que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is presumed that he may apply to their discharge any money which has come to his hands from any other of the estates; but he would not be justified in mixing up claims under one instrument of trust with those under another."[4]

Personal liability of *cestui que trust* to reimburse.

If the trust-fund fails, and the trustees, acting in good faith and within their powers, have expended money for the benefit of the trust-estate, they may call upon the *cestuis que trustent* personally to reimburse them. "I think," said Turner, L. J.,[5] "that where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position." The money must have been properly expended.[6]

Indemnity.

A trustee who has incurred a liability in respect of the trust-estate, may call upon the *cestuis que trustent* to indemnify him against the liability,[7] even before any actual loss has been incurred.[8]

Suit to recover advances.

A trustee who has expended monies on the trust-estate at the request of a *cestui que trust*, may institute proceedings against him, or if he be dead, against his representatives, to recover the amount expended, provided that the expenditure was justifiable.[9]

[1] Shaw *v.* Lawless, 5 C. & F., 129; Finden *v.* Stephens, 2 Phill., 142; Knott *v.* Cottee, *ib.*, 192.

[2] *Re* Sadd, 34 Beav., 652.

[3] *In re* Beulah Park Estate, L. R, 15 Eq., 43; Finch *v.* Pescott, L. R., 17 Eq., 554.

[4] Lewin, 7th Edn., 551, citing Price *v.* Loaden, 21 Beav., 508.

[5] *Ex parte* Chippendale, 4 D. M. G., 54.

[6] Leedham *v.* Chawner, 4 K. & G., 458; Collinson *v.* Lister, 20 Beav., 368.

[7] James *v.* May, L. R., 6 H. L., 333; Hemming *v.* Maddick, L. R., 9 Eq., 175.

[8] Phené *v.* Gillan, 5 Hare, 1. As to the fund out of which expenses are payable, see Lewin, 7th Edn., 551.

[9] Balsh *v.* Hyam, 2 P. Wms., 453; *Ex parte* Watts, 3 DeG. J. & S., 394; Jervis *v.* Wolferstan, L. R, 18 Eq., 18.

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Funds applied by the Government for the public service are not trust-funds in the hands of the persons empowered to disburse them, and the Court has no jurisdiction to take any account of the application of such funds.[1] Public funds.

A person other than a trustee, who has reaped the benefit of a breach of trust, must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary, the trustee has a charge on his interest in the trust-property for such amount.[2] Indemnity from gainer by breach of trust.

"Now," said Lord Langdale,[3] "nothing can be more clear than the rule which is adopted by the Court in these cases, that if one party having a partial interest in the trust-fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, while the trustees are subjected to a serious liability which he has brought upon them. What the Court does in such a case, is to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."[4] But in such a case the Court will not order the *cestui que trust* personally to recoup the trustee.[5]

If there is any reasonable question or doubt as to the persons entitled under the instrument creating the trust, the trustees may institute a suit to have the trusts administered under the direction of the Court, for they cannot be expected to run any risk.[6] Suit to administer trusts.

The decree of the Court of first instance is an indemnity to the trustee, and he cannot be made liable for acting under it. If, therefore, he appeals from the decision, it will be at his own risk.[7] And he will be liable for costs, unless there Appeal. Costs.

[1] Grenville Murray *v.* The Earl of Clarendon, L. R., 9 Eq., 11.

[2] Draft Trust Bill, s. 33, citing Underhill, p. 163; and see Hobday *v.* Peters, 28 Beav., 354; Vaughan *v.* Vanderstegen, 2 Drew., 165, 363; Binks *v.* Micklethwait, 33 Beav., 409; Cooper *v.* Cooper, L. R., 7 H. L., 53.

[3] Lincoln *v.* Wright, 4 Beav., 432.

[4] See the authorities, Lewin, 7th Edn., 477.

[5] Raby *v.* Ridehalgh, 7 D. M. G., 108; Walsham *v.* Stainton, 1 H. and M., 337; Butler *v.* Butler, L. R., 5 Ch. D., 554; 7 Ch. Div., 116.

[6] Taylor *v.* Glanville, 3 Madd., 176; Goodson *v.* Ellison, 3 Russ., 583; Campbell *v.* Home, 1 Y. and C. C. C., 664; Gardiner *v.* Downes, 22 Beav., 397; Merlin *v.* Blagrave, 25 Beav., 139.

[7] Rowland *v.* Morgan, 13 Jur., 23; Tucker *v.* Horneman, 4 D. M. G., 395.

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Application to Court for opinion in management of trust-property.

were very good grounds for the appeal, even though he acts without fraud or malice.[1]

The Trustees' and Mortgagees' Powers Act[2] provides, in cases to which English law is applicable, that "any trustee, executor, or administrator, shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property, or the assets of any testator or intestate. Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient. The trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of such application. Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction: and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made." These provisions are substantially the same as those of Lord St. Leonards's Act.[3] Under that Statute the Court of Chancery in England has advised trustees as to the appropriation of a fund for a legacy; as to advancement, maintenance, and advancement out of capital, change of investments, sale of houses, compromises; and as to taking proceedings.[4] Petitions for the advice of the Court should relate only to the management and investment of trust-property; the Court will not construe an instrument, or make any order affecting the rights of parties.[5] In *In re Mackintosh's Settlement*,[6] the Court sanctioned the compromise by trustees of a claim depending on foreign law and the

[1] *Re* Knight's Trust, 27 Beav., 45; Lowson *v.* Copeland, 2 Bro. C. C., 156.
[2] XXVIII of 1866, s. 43.
[3] 22 and 23 Vict., c. 35, s. 30.
[4] Seton on Decrees, 4th Edn., 493.
[5] *Re* Lorenz's Settlement, 1 Dr. and Sm., 401; and see *Re* Evans, 30 Beav., 232.
[6] 42 L. J., Ch., 208.

accounts of disbursements on an estate in a foreign country, which accounts the trustees had no means of verifying.

No appeal lies in England from an order made by a Judge of first instance on such a petition, but an opinion has been given by the Lords Justices of Appeal at the request of one of the Vice-Chancellors.[1]

An order made under this section will only indemnify the trustees upon the facts stated in the petition.[2] No affidavits can be used.[3] It is not necessary that all the trustees should join in the petition, the words are "any trustee may apply."[4]

Right to settlement of accounts.

After the trust has been completed, the trustee is entitled to have his accounts examined and to have a settlement of them. He is bound to give accounts if demanded, but giving the accounts he is entitled, to use a familiar phrase, to have them wound up. If the party to receive is satisfied upon the account sent in, that nothing more is coming to him, he ought to close the account and give an acknowledgment which will be equivalent to a release; on the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to require to have the accounts taken; he is not at liberty to do neither, and keep an action for an account hanging for an indefinite time over the head of the trustee.[5]

General authority of trustee.

A trustee may do all acts which are reasonable and proper for the realization, protection, or benefit of the trust-property, and for the safety and support of a *cestui que trust* who is not competent to contract, unless his powers in the case of a special trust are limited, when he may not go outside them. "Under particular circumstances," says Mr. Lewin,[6] "the trustee is held capable of exercising the discretionary powers of the *bonâ fide* proprietor; for the trust-estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate decision, while the sanction of the parties who are beneficially interested could not be procured without great inconvenience (as where the *cestuis que trustent* are a numerous class), or perhaps could not be obtained at all (as where

[1] See Seton, 4th Ed., 493. [2] *Re* Mockett's Will, Johns., 628.
[3] *Re* Muggeridge's Trusts, Johns., 625.
[4] *Re* Muggeridge's Trusts, Johns., 625. See further, Lewin, 7th Edn., 534—536.
[5] 2 Spence, 46. [6] 7th Edn., 501.

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the *cestuis que trustent* are under disability, or not yet in existence), the alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the meantime the opportunity might be lost. It is, therefore, evidently in furtherance of the *cestui que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power.[1] But a trustee for adults should not take any proceeding without consulting his *cestuis que trustent*; and if he do, and the proceeding is disavowed by them, he may have to pay the costs himself.[2]

Advice of *cestui que trust.*

If there is a discretion to be exercised under the trust, the trustee may apply to the *cestui que trust* for his advice and assistance in the exercise of it, and if the *cestui que trust* refuses his aid, he will not be entitled afterwards to complain of what the trustee has done in the exercise of his own discretion. So again, where it is doubtful what ought to be done under a trust, the trustee may give notice to the *cestui que trust* of his intention to do a particular act, unless the *cestui que trust* interferes; and if the *cestui que trust* does not interfere, the Court will hold that the trustee is not liable for doing that act. There are cases in which the trust is not definite or precise. If the trust is definite and clear, the trustee is bound to follow it, and will not be excused for a breach of trust, merely because he has given notice to the *cestui que trust* of the act which he intends to commit.[3]

What acts trustee may do.

Trustees are entitled to do any act which they would be compelled to do by the Court at the suit of the *cestuis que trustent*, or which the Court itself would direct to be done.[4] For instance, trustees may cut down decaying timber,[5] or appropriate a legacy when the appropriation would have been directed by the Court.[6] So if they are authorized to

[1] See Angell *v.* Dawson, 3 Y. and C., 317; Darke *v.* Williamson, 25 Beav., 622; Harrison *v.* Randall, 9 Hare, 407; Forshaw *v.* Higginson, 8 D. M. G., 827; Ward *v.* Ward, L. R., 2 H. L., 784.

[2] Lewin, 7th Edn., 502, citing Bradby *v.* Whitchurch, W. N., 1868, p. 81.

[3] Life Association of Scotland *v.* Siddal, 3 DeG. F. and J., 73, *per* Turner, L. J.

[4] Shaw *v.* Borrer, 1 Keen, 576.

[5] Waldo *v.* Waldo, 7 Sim., 261; Gent *v.* Harrison, Johns., 517; Earl Cowley *v.* Wellesley, L. R., 1 Eq., 656.

[6] Hutcheson *v.* Hammond, 3 Bro. C. C., 128.

sell land, they may do such acts as in the *bonâ fide* exercise of their discretion are necessary to carry out the sale.[1] And if a trustee acting in the *bonâ fide* exercise of his discretion, makes a payment which, though not authorized by the trust, is in his opinion necessary to enable him to execute the trust, he will be allowed such payment in passing his accounts, though he does not act prudently in assuming the responsibility of making such a payment without the sanction of the Court.[2] Again, trustees may avoid unnecessary formalities.[3]

Repairs.

Where the *cestui que trust* is incapable of contracting, the trustee may expend money in necessary repairs in improving the estate.[4] But he may not expend money in unnecessary expenses, such as ornamental improvements.[5] So a trustee might be justified in insuring,[6] but where there is a tenant-for-life, he could not be advised to do so out of the income without the tenant-for-life's consent. But if an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income.[7]

Winding up estate.

An executor will be allowed a reasonable time for breaking up his testator's domestic establishment, and discharging his servants, and a period of two months is not an unreasonable delay.[8] An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death;[9] but if the assets are sufficient, he may pay before the expiration of the year.[10]

Maintenance.

A trustee will be allowed credit in his accounts for sums properly expended for the protection and safety or maintenance and support of his *cestui que trust* at a time when he, though adult, was incapable of taking care of himself.[11] As to when maintenance should be made out of interest,

[1] Forshaw *v.* Higginson, 3 Jur., N. S., 478.
[2] *Ibid.* See also Seagram *v.* Knight, L. R., 2 Ch., 630.
[3] Pell *v.* Dewinton, 2 DeG. and J., 20; George *v.* George, 35 Beav., 382.
[4] Bowes *v.* Earl of Strathmore, 8 Jur., 92.
[5] Attorney-General *v.* Geary, 3 Mer., 513; Bridge *v.* Brown, 2 Y. and C. C. C., 181; see further, Lewin, 7th Edn., 504.
[6] Fry *v.* Fry, 27 Beav., 146.
[7] Lewin, 7th Edn., 506, citing D'Arcy *v.* Croft, 9 Ir. Ch., 19.
[8] Field *v.* Peckett, 29 Beav., 576.
[9] Act V of 1881, s. 117.
[10] Augerstein *v.* Martin, 1 T. and R., 241; Pearson *v.* Pearson, 1 Sch. and Lef., 12; Garthshore *v.* Chalie, 10 Ves., 13.
[11] Nelson *v.* Duncombe, 9 Beav., 211; Chester *v.* Rolfe, 4 D. M. G., 798.

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and when out of principal, see Lewin.[1] The general rule is not to break into the capital unless it is very small.[2]

Compounding or releasing debts.

Trustees or executor may, under certain circumstances, compound or release debts where it is clearly for the benefit of the trust-fund that they should do so.[3] If they are unable to show that they have acted for the benefit of the estate, they will be liable for the debt.[4] According to English law, an executor or administrator may pay a debt barred by the Statutes of Limitation,[5] and the same rule obtains in this country,[6] the principle being, that the law of limitation merely bars the remedy but does not extinguish the debt.[7] An executor would not be justified in paying a barred debt after a decree for administration.[8]

"Trustees of an equity of redemption of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure-suit, the costs of which so far as incurred by themselves, would fall upon the trust-estate."[9]

How trust-property may be sold.

Where the instrument of trust authorizes the trustees to sell the trust-property, the trustees may sell either by public auction or private contract, as they may think most beneficial,[10] and it is not necessary that they should, before selling by private contract, have advertised the property for sale by public auction.[11] They should not delegate the general trust for sale. But there are many acts which the trustees must necessarily do through the agency of other persons and which are valid when so done, and the employment of agents to do such acts as an ordinary person acting with common care would employ agents to do, is justifiable.[12]

[1] 7th Edn., 507.
[2] *Ibid.* 508. As to maintenance when the father is alive as to advancement, see Lewin, 7th Edn., 509—511.
[3] Ratcliffe *v.* Winch, 17 Beav., 216; Forshaw *v.* Higginson, 8 D. M. G., 827; *Ex parte* Ogle, L. R., 8 Ch., 715; Act V of 1881, s. 92, ill. (*a*).
[4] Wiles *v.* Gresham, 5 D. M. G., 770.
[5] Coombs *v.* Coombs, L. R., 1 P. and D., 289; Lowis *v.* Rumney, L. R., 4 Eq., 551.
[6] Administrator-General of Madras *v.* Hawkins, I. L. R., 1 Mad., 267.
[7] Mohesh Lal *v.* Busunt Kumaree, I. L. R., 6 Calc., 340, overruling Ram Chunder Ghosaul *v.* Juggut Monmohiney Dabee, I. L. R., 4 Calc., 283.
[8] See Lewin, 7th Edn., 511, 512.
[9] Lewin, 7th Edn., 513: and see further as to the general powers of trustees, 513—518.
[10] Davey *v.* Durrant, 1 DeG. and J., 535. [11] *Ibid.*
[12] *Ex parte* Belchier, Amb., 218; Ord *v.* Noel, 5 Madd., 438; Rossiter *v.* Trafalgar Life Assurance Co., 27 Beav., 377.

Where the trustees sell by public auction, they must take care to have the property properly advertised, and that due notice of the sale is given. If they neglect these precautions, the sale may be stayed by injunction at the suit of the *cestui que trust*, it being the duty of the trustee to sell to the best advantage.[1] The property may be sold in different lots, should that seem to be the course most likely to attract purchasers,[2] unless the instrument of trust provides that the property is to be sold in one lot.

The Trustees' and Mortgagees' Powers Act (XXVIII of 1866) provides, in cases to which English law is applicable (s. 2), that "in all cases where by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times."

Conditions of sale.

The trustees should take care that every necessary and no unnecessary condition is attached to the sale.[3] They must not omit any condition which the state of their title requires, but the employment by them of conditions of such a depreciatory character as to involve the purchaser in a breach of trust, will constitute an objection to the title, besides rendering them liable to their *cestuis que trustent*.[4] "I have always understood it to be the law consistently with authority and principle," said James, L. J.,[5] "that however large may be the power of trustees under their trust-deed to introduce conditions limiting the title and other special conditions which have, or are calculated to have, a depreciatory effect on the sale, they are

[1] Webb *v.* Earl of Shaftesbury, 7 Ves., 487; Attorney-General *v.* Corporation of Liverpool, 1 M. and C., 210; Attorney-General *v.* Aspinall, 2 M. and C., 623; Milligan *v.* Mitchell, 1 M. and K., 446; Dance *v.* Goldingham, L. R., 8 Ch., 902.

[2] Ord *v.* Noel, 5 Madd., 438.

[3] *Ex parte* Lewis, 3 Gl. and J., 173.

[4] Ord *v.* Noel, 5 Madd., 438; Hobson *v.* Bell, 2 Beav., 17; Borrell *v.* Dann, 2 Hare, 440: see 1 Dav. Convey., 441.

[5] Dance *v.* Goldingham, L. R., 8 Ch., 909.

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bound to exercise them in a reasonable manner—that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity." No general rule can be laid down, determining what conditions do, and what do not, fall within this description. Each case must depend mainly on its own circumstances, and a Court of Equity will allow trustees a fair discretion in employing special conditions.[1] They may stipulate that all objections to the title shall be taken within twenty-one days from the delivery of the abstract, or be deemed waived, and that time in that respect is to be deemed of the essence of the contract, and that if a valid objection be taken, they shall be at liberty to rescind the contract on returning the deposit, and to re-sell.[2] Such a condition may, in a certain sense, be depreciatory, yet it is one which a prudent owner selling in his own right would introduce.[3] The trustees must be careful to avoid misdescriptions, since it seems that they cannot enforce a condition for compensation if they make an error in describing the property.[4] Where a sale is made by trustees or mortgagees, or other persons who do not enter into the usual covenants for title, the fact should be mentioned in the conditions.[5]

The condition should be framed so as to entitle the vendor to rescind, not merely on the purchaser insisting upon some objection as to title, but on his insisting on any objection or requisition as to either title or conveyance; and should provide that the right may be exercised notwithstanding any intermediate negotiation in respect of such objection or requisition.[6] A condition that the trustees shall only be called upon to covenant against incumbrances is not unusual.[7] So, where the trustees have no power to give receipts, they may stipulate that their receipts shall be sufficient, and that the concurrence of the *cestuis que trustent* shall not be required.[8]

Buying in.

Trustees may fix a reserved bidding, and if the amount fixed is not reached at the sale, may buy in the property

[1] Sugd., 51.
[2] Hobson *v.* Bell, 2 Beav., 17; Falkner *v.* The Equitable Society, 4 Drew., 352.
[3] Falkner *v.* Equitable Reversionary Co., 4 Drew., 352.
[4] White *v.* Cuddon, 8 C. and F., 766; Hobson *v.* Bell, 2 Beav., 17: but see Hill *v.* Buckley, 17 Ves., 394.
[5] 1 Dav., 441. 442. [6] Dart V. and P., 5th Edn., 157.
[7] Dart V. and P., 5th Edn., 172. [8] Wilkinson *v.* Hartley, 15 Beav., 183.

at that price.[1] They must be careful not to delay in re-selling, otherwise, if there is a loss on the re-sale, they may be held liable.[2]

The Trustees' and Mortgagees' Powers Act[3] provides, in cases to which English law is applicable, that "it shall be lawful for the persons making any sale to insert any such special or other stipulations, either as to title or evidence of title or otherwise, in any conditions of sale, or contract of sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale, and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise." But this section would not warrant trustees in introducing stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale.[4]

Power to convey.

When the trust-property has been sold either by public auction or private contract, the trustees must convey it to the purchaser in such manner as may be necessary. The Trustees' and Mortgagees' Powers Act[5] provides, that, "for the purpose of completing any sale, the persons empowered to sell shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary."

Trustees do not usually enter into covenants for title beyond a covenant against incumbrances,[6] and they cannot be compelled to enter into a covenant for further assurance.[7]

Power to vary investment.

Where the instrument creating the trust does not contain any power to the trustees to alter the mode of investment, the trustees may, nevertheless, sell the property, and invest

[1] *Re* Peyton's Settlement, 8 Jur., N S., 453; 30 Beav., 252; Else *v.* Barnard, 28 Beav., 228; Bousfield *v.* Hodges, 33 Beav., 90.
[2] Taylor *v.* Tabrum, 6 Sim., 281; Fry *v.* Fry, 27 Beav., 144.
[3] XXVIII of 1866, s. 3.
[4] See Lewin, 7th Edn.
[5] XXVIII of 1866, s. 4.
[6] Worley *v.* Frampton, 5 Hare, 560.
[7] *Ibid.*

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the proceeds on any of the securities which would be authorized by the Court, see *ante*, p 160, and vary such investment from time to time, provided that they never buy any redeemable security at a premium.[1]

The Trustees' and Mortgagees' Powers Act[2] 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, at 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 for others of the same nature. Provided always, that no such original 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."

Power to apply property for maintenance.

Where the *cestuis que trustent*, or some of them, are infants, the trustees may apply the trust-fund towards their maintenance,[3] either out of interest or under certain circumstances out of the principal. But the principal should not be touched if it can be helped. The father, if alive, is the proper person to maintain the infants, and the Court will not direct maintenance without inquiring whether the father is able to maintain the infant himself; but no inquiry will be directed in the case of a widow applying for maintenance.[4]

If, however, the father has abandoned his children, or is destitute, the trustees will be allowed sums properly expended,[5] upon the principle that a trustee may do what the Court would direct to be done.[6]

Income which has been accumulated may be resorted to for future maintenance.[7]

The trustees will only be justified in applying the principal towards the maintenance of infant *cestuis que trustent* when it is so small that if invested, the income would be

[1] Waite *v.* Littlewood, 41 L. J., Ch., 636.
[2] XXVIII of 1866, s. 32.
[3] Duncombe *v.* Nelson, 9 Beav., 211; Chester *v.* Rolfe, 4 D. M. G., 798.
[4] Lewin, 7th Edn., 509.
[5] Sisson *v.* Shaw, 9 Ves., 288; Prince *v.* Hine, 26 Beav., 634.
[6] Maberley *v.* Turton, 14 Ves., 499; see *ante*, p. 220.
[7] Edwards *v.* Grove, 2 DeG. F. and J., 210.

wholly insufficient. Thus, where four infants were entitled to a share of £1,538, 3 consols, and their father, a man of improvident habits, living apart from his wife, did not contribute to the support of either wife or children, the trustees were allowed two sums of £200 and £100, applied by them towards the maintenance of the infants.[1]

If the fund is considerable, say Rs. 10,000, the trustees would not be safe in applying the principal without the sanction of the Court.[2]

In certain cases the trustees may expend a portion of the principal of the trust-fund for the advancement of a child, unless there is a limitation over, for then the Court itself could not order the advancement.[3]

The Trustees' and Mortgagees' Powers Act[4] provides, that, "in all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property, whether there be any other fund applicable, for the same purpose, or any other person bound by law to provide for such maintenance or education or not: and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof, from time to time, in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen. Provided always, that it shall be lawful for such trustees at any time, if it shall be appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year."

Minors' Act.

Various Acts regarding the property of minors have been passed from time to time. Act XL of 1858 contains provisions for placing the property of minors not being European

[1] Prince *v.* Hine, 26 Beav., 634: see also *Ex parte* Hays, 3 DeG. and Sm., 485; Bridge *v.* Brown, 2 Y. and C. C. C., 181.

[2] Barlow *v.* Grant, 1 Vern., 255: see further as to maintenance, Tagore Law Lecture, 1877, Trevelyan; Lewin, 7th Edn., 507—511.

[3] See Lewin, 7th Edn., 510.

[4] XXVIII of 1866, s. 33.

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British subjects, and who are not brought under the superintendence of the Court of Wards, under the charge either of a relative of the minor, or of a public curator; and s. 11 gives the Civil Court power to fix such allowance as it may think proper for the maintenance of the minor. Section 25 made it incumbent upon the guardians of minors to provide for their education. That section was repealed by Act IV (B. C.) of 1870, s. 86, which provides, s. 64, that general superintendence and control of every minor ward is thenceforth to be vested in the Court of Wards. This section only applies to minors who are subject to the Court of Wards.

Act XX of 1864, which provides for minors in the Presidency of Bombay, and contains similar provisions to Act XV of 1858 as to placing the property of minors not being European British subjects under the charge of relatives or a public curator, provides (s. 10) that the Civil Court may fix such allowance as it may think fit for the maintenance of the minor; and (s. 25) for his education.

Act XXI of 1855, an Act for making better provision for the education of male minors subject to the superintendence of the Court of Wards in the Presidency of Fort St. George, gives the Collector (ss. 2 and 3) power to make provision for the maintenance and education of minors subject to the Court.

And Act XIII of 1874, the European British Minors' Act, which extends to the Punjab, Oudh, the Central Provinces, British Burma, Coorg, Ajmeer, Mairwara, and Assam, provides that the Court may order that the principal of the ward's property, or any part thereof, shall be applied for his maintenance, education, or advancement.

Liability of purchaser to see to application of purchase-money.

All the trustees must, as we have seen, join in giving receipts for any property transferred to them as trustees. In properly drawn instruments of trusts, whether deeds or settlements, a power is inserted authorizing the trustees to give receipts for trust-moneys or other funds paid or transferred to them. Where there is no such power, it is in general incumbent on the person paying trust-money to see that it is applied as directed by the instrument of trust. The leading case on this point is *Elliot* v. *Merryman*;[1] there it was decided (1) that a purchaser of personal property from an executor will not be liable

[1] Barn, 781; W. and T., L. C., 59.

to see to the application of the purchase-money, except in cases of fraud; (2) that it is a general rule, that, where real estate is devised to trustees upon trust to sell for payment of debts generally, the purchaser is not bound to see to the application of the money, and that the same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment; and (3) that if real estate is devised upon trust to be sold for the payment of certain debts, mentioning to whom in particular the debts are owing, the purchaser is bound to see that the money is applied for the payment of those debts.

The reason for the rule is this, at law the trustees are the owners, and they can, therefore, give a valid discharge. But in equity the *cestuis que trustent* are the owners, and Courts of Equity, therefore, hold, that a purchaser must get a discharge from them unless the instrument of trust authorizes the trustees to give receipts.

Fines and Recoveries Act.

The Fines and Recoveries Act[1] provides (s. 17), that where any property is sold, the proceeds of which are subject to any trust, the *bonâ fide* purchaser of the property shall not in any case be bound to see to the application of the purchase-money to the purposes of the trust.

Trustees' and Mortgagees' Powers Act.

Act XXVIII of 1866, in cases to which English law is applicable, provides (s. 36), that "the receipts of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

To whom purchase-money payable.

The purchase-money should be paid to the vendor personally. An agent or solicitor has no implied authority to receive it, and if the purchaser pays his purchase-money to a person not authorized to receive it, he is liable to pay it over again. The possession of the executed conveyance, with the signed receipt for the consideration-money indorsed, is not of itself an authority to the solicitor of the vendor to receive the purchase-money.[2] Such a receipt is not conclusive evidence of payment.[3]

[1] XXXI of 1854. [2] Viney *v.* Chaplin, 2 DeG. and J., 468.

[3] Winter *v.* Lord Anson, 3 Russ., 488.

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It has been said, that where the vendors sell in a fiduciary character as executors or trustees, they should receive the purchase-money themselves.[1] In *Webb* v. *Ledsam*,[2] however, Wood, V. C., said, that he knew of no authority for holding a man liable to pay over again purchase-money which he had paid to one of several trustees upon a receipt signed by them all.

Charge of debts.

Where there is a charge of debts generally under a will, a purchaser is not bound to see to the application of the purchase-money,[3] nor where there is a charge of debts and legacies;[4] and it is immaterial that there were no debts existing, or that the debts and legacies have been since discharged.[5] "When," said Lord St. Leonards,[6] "a testator, by his will, charges his estate with debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them; it is by implication a declaration by the testator that he intends to intrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means that the trustees are alone to receive the money and apply it."

The purchaser will not be bound to see to the application of the purchase-money, even if he knew that there were no debts, if the other purposes of the trust require a sale.[7] And where real estate is directed by will to be sold generally, the proceeds to form part of the personal estate, and subject to debts to be divided, the purchaser is not bound to see to the application of the

[1] Dart V. and P., 602.
[2] 1 K. and J., 388.
[3] Ball *v.* Harris, 4 M. and C., 264; *In re* Langmeads's Trusts, 7 D. M. G., 353.
[4] Eland *v.* Eland, 4 M. and Cr., 420.
[5] Rogers *v.* Skillicorne, Amb., 188; Johnson *v.* Kennett, 3 M. and K., 624; Robinson *v.* Lowater, 5 D. M. G., 272.
[6] Stroughill *v.* Anstey, 1 D. M. G., 635.
[7] Eland *v.* Eland, 4 M. and C., 420; Stroughill *v.* Anstey, 1 D. M. G., 635; Howard *v.* Chaffer, 9 Jur., N. S., 767.

purchase-money.[1] But where an estate is directed to be sold and is charged generally with the payment of legacies or specified debts, the purchaser must see to the application of the purchase-money.[2]

The trustee is not bound to give the purchaser any information as to the existence of debts.[3]

Notice of breach of trust.

If the nature of the transaction affords intrinsic evidence that the fiduciary vendor is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the vendor to the purchaser, there the purchaser being a party to the breach of trust does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor.[4] And if a purchaser or mortgagee knows that there were no debts existing at the time of the testator's death, or that they have since been paid, leaving only legacies due, and that the money was raised for the private purposes of the parties raising it, he will be postponed to the unpaid legatees.[5]

Where a particular time is fixed for the sale, and the proceeds are divisible among infants or persons then unborn,[6] the purchaser need not see to the application of the purchase-money; nor where it is to be applied upon trusts requiring time for their performance, as where other estates are to be purchased with it,[7] or the trust is for persons not immediately ascertainable, as for instance, creditors coming in after a certain time under a deed.[8] Where there is a charge of debts and power-of-sale in the event of the personal estate proving insufficient, the trustees are not bound to show, nor the purchasers to ascertain, that there is a deficiency.[9]

In the recent case of *Greender Chunder Ghose* v. *Mackintosh*,[10] the question how far lands purchased from a

[1] Smith *v.* Guyon, 1 Bro. C. C., 186.
[2] Smith *v.* Guyon, 1 Bro. C. C., 186; Horn *v.* Horn, 2 S. and S., 448.
[3] Forbes *v.* Peacock 1 Ph., 717; Sabin *v.* Heap, 27 Beav., 553.
[4] Watkins *v.* Cheek, 2 S. and S., 199; Eland *v.* Eland, 4 M. and C., 420; Corser *v.* Cartwright, L. R., 7 H. L., 731.
[5] Howard *v.* Chaffer, 9 Jur., N. S., 767.
[6] Sowarsby *v.* Lacey, 4 Madd., 142; Breedon *v.* Breedon, 1 R. and My., 413.
[7] Doran *v.* Wiltshire, 3 Swanst., 697.
[8] Balfour *v.* Welland, 16 Ves., 151; Groom *v.* Booth, 1 Drew., 548.
[9] Bird *v.* Fox, 11 Hare, 40; Pierce *v.* Scott, 1 Y. and C., Ex., 257.
[10] I. L. R., 4 Calc., 897.

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Hindu devisee are liable in the purchaser's hands for the testator's debts was considered, and Pontifex, J., held, that the question is on the same footing as a similar question would be under the English law.

His Lordship said,[1] that the creditors of the ancestor or testator may "follow his lands into the possession of a purchaser from the heir or devisee if it can be proved that such purchaser knew—(i) that there were debts of the ancestor or testator left unsatisfied; and also (ii) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser, ignorant on either of these points, has a safe title, for no duty is cast upon the purchaser from the heir or devisee to enquire whether there are any debts of the ancestor or testator, or to see to the application of his purchase-money. The decision in *Corser* v. *Cartwright*[2] is an authority for this, even in the far stronger case where there is an express charge of debts by the testator on the devised estate, at least when the devisee is also executor, for the Lord Chancellor cautiously confined his judgment to the case before him, and it is also an authority to show that even where there is an express charge of debts, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money."[3]

Suspension of trustee's powers after decree.

After a suit has been instituted for the purpose of administering the trust, and a decree has been made, the trustees cannot act on their own responsibility, but must come to the Court, whenever they have to do any acts regarding the property.[4] They cannot commence or defend any suit without the leave of the Court;[5] nor can trustees for sale sell.[6] And an executor cannot pay debts, or invest his testator's assets.[8] But it has never been decided that an executor after the institution of a suit

[1] Page 906. [2] L. R., 7 H. L., 731.
[3] See further as to trustee's receipts. Lewin, 7th Edn., 407—438.
[4] Mitchelson *v.* Piper, 8 Sim., 64; Shewen *v.* Vanderhorst, 1 R. and M., 347; S. C., 2 R. and M., 75; Minors *v.* Battison, L. R., 1 App. Cas., 428.
[5] Jones *v.* Powell, 4 Beav., 96.
[6] Walker *v.* Smallwood, Ambl., 676; Annersley *v.* Ashurst, 3 P. Wms., 282.
[7] Mitchelson *v.* Piper, 8 Sim., 64; Irby *v.* Irby, 24 Beav, 525.
[8] Widdowson *v.* Duck, 3 Mer., 494; Bethell *v.* Abraham, L. R., 17 Eq., 24.

cannot sign a valid receipt for any part of the testator's personal estate.[1] A decree must have been made in the suit. The reason of this rule is, that the plaintiff may, at any time before decree, withdraw his suit;[2] and should he do so, the progress of the trust may have been arrested for no purpose. Still it is safer for the trustees, after a suit has been instituted, not to act without the leave of the Court; and if, by acting independently of the Court, expenses be incurred, which might have been avoided had the trustees applied to the Court, they may be made to bear them personally.[3]

[1] Lewin, 7th Ed., 516. [2] See Act X of 1877, s. 373.
[3] Lewin, 7th Ed., 516.

LECTURE IX.

DISABILITIES OF TRUSTEES.

Trustee cannot renounce after acceptance — Trustee cannot delegate — Employment of solicitor to invest — Delegation to co-trustee or co-executor — Necessary delegation — Co-executor — Delegation authorized by author of trust — Representatives of surviving trustee — Fraud by co-trustee — Discretionary trust — Ministerial acts — Liability of agent — Co-trustees cannot act singly — All trustees must join in receipt and conveyance — Proof in insolvency — Exception to rule in case of public trust — Special power — Acknowledgment — Costs of acting independently — Injunction — Remuneration for trouble — Carrying on business — Surviving partner trustee — Solicitor trustee — Extent of charge allowed — Costs — Trustee appointed by Court — Professional charges not allowed — Settled account — Remuneration fixed by author of trust — Contract for remuneration with *cestuis que trustent* — Gift coupled with duty — Expenses of agent — Curators under Act XIX of 1841 and Act XL of 1858 — Official Trustee — Administrator-General — Trustee may not make a profit from his office — Employing trust-funds in trade — Compounding debts or mortgages and purchasing — Purchase for benefit of *cestui que trust* — *Cestui que trust* cannot give to trustee — Rule applies to all fiduciary relations — Partners — Purchasing share of deceased partner — Instances of rule — Trustee retiring for a consideration — Extent of liability — Failure of heirs of *cestui que trust* — Failure of next-of-kin — Trustee for sale cannot purchase — Trustee purchasing from himself — That price fair immaterial — So nature of property, or mode of purchase — Trustee who has never acted — When *cestui que trust* may set aside sale — Trustee may not buy for another — Agent of trustee may not purchase — Trustee taking lease — Time within which sale must be set aside — Confirmation — Purchase from *cestui que trust* — Fiduciary relation dissolved — Burden of proof — Purchase by creditors — Assignee — Leave to bid — Purchase from infants — Legal representatives — Mortgagee — Lending to trustees.

Trustee cannot renounce after acceptance.

AFTER a trustee has once accepted the trust, either expressly or impliedly, he cannot, by any act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee until he has performed his trust;[1] any subsequent renunciation will be void.[2] Thus, the trustee of a temple cannot alienate the trust-property subject to the trusts attaching to it, and so get rid of the

[1] Chalmer *v.* Bradley, 1 Jac. & W., 68.
[2] Read *v.* Truelove, Ambl., 417.

office.[1] The only way in which a trustee can obtain a release from the office is by obtaining his discharge from the Court,[2] or, if all the *cestuis que trustent* are competent to contract, by obtaining their consent to his renunciation; or by retiring under a special power in the instrument of trust. With the subject of appointments of new trustees I shall deal hereafter. Thus, where *A* was named executor in a will, and acted on behalf of particular legatees, disclaiming an intention of interfering generally, and afterwards renounced in favour of *B*, who was named a trustee in the same will, and who thereupon obtained administration with the will annexed; and *B* subsequently died insolvent after having possessed himself of the assets,—it was held, that *A* was liable as executor notwithstanding his renunciation, and was answerable for the acts of *B*. "Executors," said Lord Redesdale, "must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the effects themselves, or by putting the administration into the hands of a Court of Equity."[3] Where a trustee gave a bond to convey trust-property, and the administrator of the *cestui que trust* sued upon the bond and recovered the penalty, it was held, nevertheless, upon a bill to compel a conveyance, that the trustee was liable to carry out the trust upon the penalty being refunded with interest.[4]

Trustee cannot delegate.

As a general rule, a trustee cannot delegate his office. If he does so, he will be liable for any breach of trust committed by the person to whom the office has been entrusted, for trustees cannot divest themselves of their trust at their pleasure.[5] "Trustees," said Lord Langdale,[6] "who take on themselves the management of property for the benefit of others, have no right to shift their duties on other persons; and if they employ an agent, they remain subject to responsibility towards their *cestui que trust*, for whom they have undertaken the duty." In that case the

[1] Rajah of Kovilagom *v.* Kottayath, 7 Mad. H. C. R., 210.
[2] Doyle *v.* Blake, 2 Sch. & Lef., 245.
[3] Doyle *v.* Blake, 2 Sch. & Lef., 231: see also Lowry *v.* Fulton, 9 Sim., 104; Belchior Francisco Ferras *v.* Roque Mariano Dos Angos, 9 S. D. A., 921.
[4] Moorecroft *v.* Dowding, 2 P. Wms., 314.
[5] Bradwell *v.* Catchpole, 3 Swanst., 79 (*a*).
[6] Turner *v.* Corney, 5 Beav., 517.

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trustees were empowered by the trust-deed to employ an agent, and the decree directed an enquiry as to whether it was by the neglect or default of the trustees that they were unable to render a better account. And in a subsequent case[1] Lord Langdale said: "In cases of breach of trust, it is of great importance to the community that trustees, who take on themselves the protection of the property of others, should be made to feel that they will be held liable for trust-property which is lost by their acts of omission or commission, and that such liability will be enforced against them."

Employment of solicitor to invest.

Trustees have been held liable when they have employed their solicitors to invest the trust-fund, and it has been lost through the fraudulent acts of the persons employed. "If," said Lord Eldon,[2] "a trustee trusts an attorney, he must abide by the effect of that confidence." And it is no defence that, in the employment of the solicitor, ordinary care and discretion was exercised.[3] In one case trustees were held liable for lending money on the valuation of the mortgagor's agent without looking into the matter themselves.[4]

Delegation to co-trustee or co-executor.

If trustees or executors delegate the execution of the trust or the distribution of the assets to one of their own number, and a loss ensues through his wrongful act, they will be liable, for it is the duty of each trustee or executor to watch over the trust-property.[5]

But where an executor who had proved, but never acted, received a bill of exchange by post on account of the estate, and immediately sent it to the acting executor, and it was lost,—it was held, that the first executor was not liable, as he had never acted in the trust.[6]

Necessary delegation.

In *Ex parte Belchier*[7] it was sought to make the assignee of a bankrupt liable for the default of a broker, who had been employed to sell some of the bankrupt's property. Lord Hardwicke said: "If the assignee is chargeable

[1] Ghost *v.* Waller, 9 Beav., 497.

[2] Chambers *v.* Minchin, 7 Ves., 196.

[3] Bostock *v.* Floyer, L. R., 1 Eq., 26. See also Griffiths *v.* Porter, 25 Beav., 236; Ingle *v.* Partridge, 32 Beav., 661; Wood *v.* Weightman, L. R., 13 Eq., 434; *In re* Bird, L. R., 16 Eq., 203. As to liability of an assignee in bankruptcy for loss caused by acts of an attorney empowered to recover debt, see Lewin, 7th Edn., 234.

[4] Ingle *v.* Partridge, 34 Beav., 411.

[5] Langford *v.* Gascoyne, 11 Ves., 333; Davis *v.* Spurling, 1 R. & M., 66; Clough *v.* Bond, 3 M. & Cr., 497; Eaves *v.* Hickson, 30 Beav., 136.

[6] Balchen *v.* Scott, 2 Ves. Jr., 678.

[7] Amb., 218.

in this case, no man in his senses would act as assignee under commissions of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. Courts of Law, and Equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses. There are two sorts of necessities: *first*, legal necessity; *secondly*, moral necessity. As to the first, a distinction prevails where two executors join in giving a discharge for money, and one of them only receives it, they are both answerable for it, because there is no necessity for both to join in the discharge, the receipt of either being sufficient; but if trustees join in giving a discharge, and one only receives, the other is not answerable, because his joining in the discharge was necessary.

"Moral necessity, from the usage of mankind. If a trustee acts as prudently for the trust as for himself and according to the usage of business, he will not be liable.

"If a trustee appoints rents to be paid to a banker at that time in credit, and the banker afterwards breaks, the trustee is not answerable. So, in the employment of stewards and agents, the receiver of Lord Plymouth's estate[1] took bills in the country of persons who at the time were reputed of credit and substance, in order to return the rents to London: the bills were protested and the money lost, and yet the steward was excused. None of these cases are on account of necessity, but because the persons acted in the usual method of business."[2]

Co-executor.

Where an executor possessing assets of his testator hands over the assets to a co-executor, and they are misapplied by him, the executor who so hands them over will be answerable for their misapplication, because he had a legal right to retain them, and might have preserved them, and it was his duty to do so; unless, indeed, they were so handed over for the express purpose of a special administration by the co-executor as for the payment of a particular debt.[3]

[1] Knight *v.* The Earl of Plymouth, 1 Dick, 120.

[2] See *ante*, p. 140; and also Wren *v.* Kirton, 11 Ves., 377; Massey *v.* Banner, 1 J. and W., 248; Joy *v.* Campbell, 1 Sch. and Lef., 341.

[3] Davis *v.* Spurling, 1 R. and M., 66: and see Trutch *v.* Lamprell, 20 Beav., 116; Thompson *v.* Finch, 22 Beav., 316; 8 D. M. G., 560; Cowell *v.* Gatcombe, 27 Beav, 568.

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Delegation authorized by author of trust.

But trustees cannot be answerable, if the instrument of trust provides for delegation, and they follow the directions given by it. Thus, a testator by his will recommended his executors to employ *A* (who had been in the testator's own employment) as their clerk or agent. The executors gave *A* a power-of-attorney to receive debts, and *A* subsequently became insolvent. It was contended that the executors were answerable for the default of *A*; but Sir A. Hart said, that if a testator pointed out an agent to be employed by the executor, and such employee received a sum of money, and immediately made default, the executor would clear himself by showing that the testator designated the person, and that he could not by the exercise of reasonable diligence recover the money.[1]

Representatives of surviving trustee.

Again, where property was bequeathed to trustees upon certain trusts, to be executed by them or the survivor of them, or the assigns of such survivor, and one of the trustees died,—it was held, that the survivor might bequeath the trust-property to trustees upon the trusts of the original will.[2] "Where," said Lord Langdale, "a trust-estate is limited to several trustees and the survivor of them, and the heirs of the survivor, and no power of appointing new trustees is given, we observe a personal confidence given, or at least probably given, to every one of the several trustees, as any one may be the survivor; the whole power will eventually come to that one, and he is entrusted with it, and being so, he is not, without a special power to assign it to any other, he cannot of his own authority, during his own life, relieve himself from the duties and responsibilities which he has undertaken.

"But we cannot assume that the author of the trust placed any personal confidence in the heir of the survivor; it cannot be known beforehand which one of the several trustees may be the survivor; and as to the contingent survivor, it cannot be known beforehand whether he may have an heir or not, or whether the heir may be one, or may consist of many persons, trustworthy or not, married women, infants, or bankrupts, within or without the jurisdiction. The reasons, therefore, which

[1] Lewin, 7th Ed., 245, citing Kilbee *v.* Sneyd, 2 Moll., 199; Doyle *v.* Blake, 2 Sch. and Lef., 232, 239.

[2] Titley *v.* Wolstenholme, 7 Beav., 424.

forbid the surviving trustee from making an assignment, *inter vivos*, in such a case, do not seem to apply to an assignment by devise or bequest; which being made to take effect only after the death of the last surviving trustee, and consequently after the expiration of all personal confidence, may perhaps not improperly be considered as made without any violation or breach of trust. It is to take effect only at a time when there must be a substitution or change of trustees,—there must be a devolution or transmission of the estate to some one or more persons not immediately or directly trusted by the author of the trust,—and the estate subject to the trusts must pass either to the *hæres natus* or *hæres factus* of the surviving trustee, and if the heir or heirs-at-law, whatever may be their situation, condition, or number, must be the substituted trustee or trustees, the greatest inconvenience may arise, and there are no means of obviating them other than by an application to the Court. With great respect to those who think otherwise, and quite aware that some inconveniences which can only be obviated in the Court may arise from devising trust-estates to improper persons for improper purposes, I cannot at present see my way to the conclusion, that in the case contemplated, the surviving trustee commits a breach of trust by not permitting the trust-estate to descend, or by devising it to proper persons, on the trusts to which it was subject in the hands of the surviving trustees."

Fraud by co-trustee.

And trustees are not liable to their *cestuis que trustent* for money belonging to the trust which a co-trustee gets into his possession without their consent or knowledge and by a fraud upon them. Thus, where trustees drew a cheque upon a banker, and crossed the cheque with the names of other bankers, and delivered it over to one of their number for the purpose of paying it into the bank of the bankers with whose name the cheque was crossed, it was held, that the co-trustees were not liable for the misapplication of the money by the trustee to whom the cheque was delivered.[1]

Discretionary trust.

If the trust is of a discretionary character, a trustee cannot delegate the execution of it under any circumstances either to a stranger or to a co-trustee, or co-executor, and not only will the trustee so delegating be liable for any

[1] Barnard *v.* Bagshaw, 3 DeG. J. and S., 355.

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loss, but the exercise of the discretion by the substitute will be actually void.[1]

Ministerial acts.

A trustee may carry out the ministerial portion of an act connected with the trust by attorney or proxy; for instance, if he has agreed to sell the trust-property, he may execute the instrument transferring the property by his attorney, for he does not delegate any portion of the confidence reposed in him.[2]

Liability of agent.

The agent of a trustee is not accountable to the *cestuis que trustent*, though a substituted trustee is,[3] and payment to an agent authorized by trustees to receive trust-moneys discharges the person paying the money.[4] An agent who has been party to a breach of trust, will, however, be responsible to the *cestuis que trustent*.[5]

Co-trustees cannot act singly.

The office of co-trustees is joint, they all form as it were one collective trustee, and therefore must execute the duties of their office in their joint capacity.[6] An act done by one may be subsequently approved by the other; but the approval must be strictly proved.[7] It is not uncommon to hear one of several trustees spoken of as the *acting* trustee, but the Court knows of no such distinction; all who accept the office are in the eye of the law acting trustees. During the joint lives of the trustees if one refuse to act, the other cannot act without him; but the trust devolves upon the Court.[8]

All trustees must join in receipt

It follows from this doctrine of unity among co-trustees, that they must all join in giving a receipt; and that, unless the instrument of trust specially provides that the receipt of some or one of the trustees shall be a discharge, a receipt not signed by all will be invalid.[9] So they must

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all join in a conveyance of the trust-estate.[10]

[1] Alexander *v.* Alexander, 2 Ves., 643; Bradford *v.* Belfield, 2 Sim., 264; Hitch *v.* Leworthy, 2 Hare, 200; Crewe *v.* Dicken, 4 Ves., 97; Attorney-General *v.* Glegg, 1 Atk., 356.

[2] Attorney-General *v.* Scott, 1 Ves. Sr., 413; *Ex parte* Rigby, 19 Ves., 463.

[3] Myler *v.* Fitzpatrick, 6 Madd., 360; Maw *v.* Pearson, 28 Beav., 196.

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

[5] Fyler *v.* Fyler, 3 Beav., 550.

[6] Lewin, 7th Edn., citing *Ex parte* Griffin, 2 Gl. and J., 116.

[7] Messeena *v.* Carr, L. R., 9 Eq., 260; Lee *v.* Sankey, L. R., 15 Eq., 204.

[8] Doyly *v.* Sherratt, 2 Eq. Cas. Abr., 742 D.

[9] See *ante*, p. 194; and Walker *v.* Symonds, 3 Swanst., 63; Hall *v.* Franck, 11 Beav., 519; Lee *v.* Sankey, L. R., 15 Eq., 204.

[10] Townley *v.* Sherborne, Bridg., 35.

If there are many trustees, the Court will order that the trust-moneys may be paid to them or any two of them.[1]

Proof in insolvency.

One of several executors may, on the insolvency of a debtor to the estate, prove the debt; but one of several trustees cannot prove without the order of the Court.[2]

Exception to rule in case of public trust.

There is an exception to the general rule that all trustees must join in executing the office, in the case of a trust of a public character. There the act of the majority is to be considered the act of the whole body.[3] The majority of course have no right to deal with the trust-property otherwise than according to the true construction of the deed of trust.[4]

Special power.

Where a special power is given to trustees, it cannot be exercised by the majority only, but all must join; if the settlement, for instance, declares that, on the death or resignation of a trustee, the surviving or continuing trustees shall appoint a successor, it is apprehended that the appointment of the new trustee must be the joint act of all the surviving or continuing trustees.[5]

Acknowledgment.

The Limitation Act[6] provides, that nothing in ss. 19 and 20 renders one of several joint executors or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them. This, corresponds with the English law.[7]

Costs of acting independently.

"As co-trustees are a joint body, the Court requires them, unless under special circumstances, to defend a suit jointly; and if they sever, the extra costs thereby occasioned must be borne by the defaulting party. It is conceived that this rule, so strictly observed in Court, must not be lost sight of in transactions out of Court, and that co-trustees are bound, unless they can show good reason to the contrary, to act by the same solicitor and the same counsel. It would be a strange anomaly if four trustees were allowed only one solicitor and one counsel in Court, and four separate solicitors and four separate counsel out of Court.

[1] Attorney-General *v.* Brickdale, 8 Beav., 223.
[2] *Ex parte* Smith, 1 Deac., 391.
[3] Wilkinson *v.* Malin, 2 Tyr., 544; Younger *v.* Welham, 3 Swanst., 180.
[4] Ward *v.* Hipwell, 3 Giff., 547.
[5] Lewin, 7th Edn., 237, citing *Re* Congregational Church, Smethwick, 1 W. N., 196. As to stock in the name of trustees, see Lewin, 238.
[6] XV of 1877, s. 21.
[7] See Richardson *v.* Younge, L. R., 6 Ch., 478.

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Every trustee should be prepared to act in harmony with his co-trustees, or he should not accept the office. It may be said that as each trustee is responsible for the due administration of the trust, he ought to be at liberty to employ a professional adviser of his own choosing, but this argument would, *à fortiori*, apply to so important a matter as the defence of a suit, and yet there the Court pays no attention to it." [1]

We have seen that the Court will not, as a rule, interfere with a discretionary power reposed in trustees, *ante*, p. 153. But the Court has a controlling power over all trustees,[2] and will interfere when the discretion is mischievously and ruinously exercised, as by leaving the trust-fund outstanding on hazardous securities,[3] or where it is corruptly exercised,[4] or not exercised in good faith,[5] or where the trustees misbehave,[6] or decline to exercise the discretion.[7] In this last case the Court will not, as a matter of course, exercise the discretion with which the trustees are invested, but will follow its own established and known rules, unless the intention of the testator plainly appears to exclude such a mode of proceeding.[8] Where a case has been shown for bringing the trustees before the Court, the Court, though it will not control the discretion of the trustees, will still, to use the words of Lord Hardwicke, "keep a hand over them." [9]

Injunction.

The Court may, if necessary, interfere by injunction.[10] If the act complained of would be irremediable, the Court will interfere as a matter of course.[11]

Remuneration for trouble.

A trustee, as such, has no right to any remuneration for his trouble, skill, or loss of time in executing the trust, for the office, in the absence of any express stipulations between the author of the trust and the trustee, is a purely honor-

[1] Lewin, 7th Edn., 238.
[2] *In re* Hodges, Davey *v.* Ward, L. R., 7 Ch. Div., 761.
[3] De Manneville *v.* Crompton, 1 V. and B., 359.
[4] Potter *v.* Chapman, Ambl., 99; French *v.* Davidson, 3 Madd., 402; Talbot *v.* Marshfield, L. R., 3 Ch., 622; Thacker *v.* Key, L. R., 8 Eq., 408.
[5] Byam *v.* Byam, 19 Beav., 65; *Re* Wilkes's Charity, 3 Mac. and G., 440.
[6] Attorney-General *v.* Glegg, Ambl., 584.
[7] Gude *v.* Worthington, 3 DeG. and Sm., 389; *In re* Sanderson's Trusts, 3 K. and J., 497.
[8] Prendergast *v.* Prendergast, 3 H. L. C., 197.
[9] Attorney-General *v.* Governors of Harrow School, 2 Ves., 551.
[10] Balls *v.* Strutt, 1 Hare, 146; M'Fadden *v.* Jenkyns, 1 Ph., 153.
[11] *In re* Chertsey Market, 6 Price, 279; and see Kerr on Injunctions, 2nd Edn., 461.

ary one. The leading case on this point is *Robinson* v. *Pett*.[1] There Lord Talbot, L. C., said: "It is an established rule, that a trustee, executor, or administrator shall have no allowance for his care and trouble; the reason of which seems to be, for that, on these pretences if allowed, the trust-estate might be loaded and rendered of little value: besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee who may choose whether he will accept the trust or not."

"The reason of the rule," said Lord Cottenham,[2] "is well stated in *Robinson* v. *Pett*. It is not because the trust-estate is in any particular case charged with more than it might otherwise have to bear, but that the principle, if allowed, would lead to such consequences in general."[3] "The true ground, however," says Mr. Lewin,[4] "is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty, and as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position."[5]

The rule extends to all persons who acquire a fiduciary character. Thus, an agent who becomes executor is not entitled to charge commission on business done subsequently to the testator's death,[6] nor if he sells as trustee will he be allowed more than expenses out of pocket.[7] So an auctioneer, who is also mortgagee, cannot charge commission for selling the mortgaged property;[8] and it is a general rule that a mortgagee shall not be allowed to charge for receiving the rents of the mortgaged property personally.[9] A receiver is not entitled to compensation for trouble in doing acts which have not been ordered.[10] Nor is the committee of a lunatic's estate entitled to any remu-

[1] 3 P. Wms., 132.
[2] Moore *v.* Frowd, 3 My. and Cr., 50.
[3] See also Hamilton *v.* Wright, 9 C. and F., 111.
[4] 7th Edn., 537.
[5] And see Burton *v.* Wookey, 6 Madd., 368.
[6] Sheriff *v.* Axe, 4 Russ., 33.
[7] Kirkman *v.* Booth, 11 Beav., 273; Arnold *v.* Garner, 2 Ph., 231.
[8] Matthison *v.* Clarke, 3 Drew., 3.
[9] Bonithon *v.* Hockmore, 1 Vern., 316; Langstaffe *v.* Fenwick, 10 Ves., 405; Nicholson *v.* Tutin, 3 K. and J., 159.
[10] *In re* Ormsby, 1 B. and B., 189.

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neration for his trouble. Where any allowance is made, it is not for his sake, but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance.[1]

Carrying on business.

If a surviving partner carries on the business of the partnership retaining the deceased partner's capital in the concern, he will be considered as a constructive trustee, and will have to account for the profits; but proper allowances will be made for the management of the business,[2] and the amount of the allowances may be fixed by the Court without an enquiry.[3]

Surviving partner trustee.

If, however, the surviving partner is an express trustee or an executor, he will not, as a general rule, in the absence of any direct stipulation, be entitled to an allowance for carrying on the business,[4] or to make any charge for his trouble or loss of time, although great advantages may have accrued to his *cestuis que trustent;* as where he has carried on a trade or business with great personal trouble, and at a great sacrifice of time, he will not be allowed to charge for more than out-of-pocket expenses: and even settled accounts upon the footing of such charges will be set aside.[5]

Solicitor trustee.

A solicitor who sustains the character of trustee will not, unless there be an agreement for the purpose,[6] be permitted to charge for his time, trouble or attendance, but only for his actual disbursements.[7] "It would," said Lord Lyndhurst, "be placing his interest at variance with the duties he has to discharge. It is said, the bill may be taxed, but that would not be a sufficient check: the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee: a trustee placed in the situation of a solicitor

[1] *Re* Walker, 2 Phillips, 630; *Re* Westbrooke, *ib.*, 631; *Anon.*, 10 Ves., 103.

[2] Crawshay *v.* Collins, 15 Ves., 225; Brown *v.* De Tastet, Jac., 284; Wedderburn *v.* Wedderburn, 22 Beav., 117.

[3] Forster *v.* Ridley, 4 DeG. J. and S., 452.

[4] Burden *v.* Burden, 1 V. and B., 170; Brocksopp *v.* Barnes, 5 Madd., 90; Stocken *v.* Dawson, 6 Beav., 371.

[5] Brocksopp *v.* Barnes, 5 Madd., 90; Ayliffe *v.* Murray, 2 Atk., 58; Barrett *v.* Hartley, L. R., 2 Eq., 789.

[6] *In re* Sherwood, 3 Beav., 338.

[7] Gomley *v.* Wood, 3 J. and Lat., 678; Moore *v.* Frowd, 3 M. and Cr., 45; Fraser *v.* Palmer, 4 Y. and C., 515; Broughton *v.* Broughton, 5 D. M. G., 160.

might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person."[1] And the rule is not restricted to cases of express trusts, but applies to the case of an executor or trustee, though there be no express trust.[2]

Extent of charge allowed.

When a solicitor has liberty to charge for his professional services, he can only charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as attendance to pay premiums on policies, attending at the bank to make transfers, attendances on auctioneers, legatees, and creditors.[3] The rule applies even where the business is done by the solicitor's partner, who is not a trustee.[4] If, however, the business is done exclusively by the partner and he alone receives the costs to the exclusion of the trustee-partner, the charge will be allowed;[5] and so will the costs of an agent, also a solicitor, for professional work.[6] In one case it was held, that a solicitor, a trustee, might act for his *cestuis que trustent* or himself, and his co-trustees or *cestuis que trustent*, provided the costs were not increased thereby.[7] But this case has been since disapproved of by the House of Lords in *Manson* v. *Baillie*,[8] where Lord Cranworth, C., said, that "the true principle is, that each trustee should be a check and control on each and all of the co-trustees—a principle which is placed in danger by the allowance of a pecuniary profit."

And in another case,[9] Lord Cranworth said: "The rule applicable to the subject has been treated at the bar, as if it were sufficiently enunciated, by saying, that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The

[1] Lewin, 7th Edn., 540, citing New *v.* Jones, 9 Jarm. Prec., 338.
[2] Pollard *v.* Doyle, 1 Dr. and Sm., 319.
[3] Harbin *v.* Darby, 28 Beav., 325.
[4] Collins *v.* Cary, 2 Beav., 129; Christopher *v.* White, 10 Beav., 523; Lincoln *v.* Windsor, 9 Hare, 158; Lyon *v.* Baker, 5 DeG. and Sm., 622; Cradock *v.* Piper, 1 Mac. and G., 664.
[5] Clacke *v.* Carlon, 7 Jur., N. S., 441; Mackintosh *v.* Nobinmoney Dossee, 2 Ind. Jur., 162.
[6] Burge *v.* Brutton, 2 Hare, 373.
[7] Cradock *v.* Piper, 1 Mac. and G., 664.
[8] 2 Macq., 80. [9] Broughton *v.* Broughton, 5 D. M. G., 164.

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rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says, he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate."

In *In the Matter of the Port Canning Land Co.*,[1] Phear, J., drew a distinction between the case of a trustee and a director of a public company, and allowed the claim of the partner of one of the directors who did work for the company as a solicitor, there being nothing to show that he had not been duly appointed by the directors.

A solicitor, who is also a trustee, who invests trust-money on a mortgage, and is employed as the mortgagor's solicitor, and is paid by him, is not chargeable at the suit of the *cestui que trust* with the profit thus made.[2]

Costs.

A solicitort-rustee, who acts for himself in a suit, will be entitled to his costs against parties who unsuccessfully attempt to set aside the trust-deed.[3]

Securities given to a solicitor-trustee to cover costs to which he would not be entitled, will be set aside even as against a purchaser for value who had notice.[4]

Trustee appointed by Court.

Where a trustee is appointed by the Court, and the nature of the trust is such that he is fairly entitled to compensation, he should take care to arrange for his remuneration before he accepts the office.[5] In *Marshall* v. *Holloway*,[6] the decree, after reciting that the nature and circumstances of the estate of the testator required the application of a great proportion of time by and on the part of the trustees for the due execution of the trusts of his will in regard to his estate, and that they could not

[1] 6 B. L. R., 278.
[2] Whitney *v.* Smith, L. R., 4 Ch., 513.
[3] Pince *v.* Beattie, 9 Jur., N. S., 1119; see York *v.* Brown, 1 Coll., 260.
[4] Gomley *v.* Wood, 3 J. and Lat., 678.
[5] Brocksopp *v.* Barnes. 5 Madd., 90; Morison *v.* Morison, 4 M. and C., 215; Newport *v.* Bury, 23 Beav., 30.
[6] 2 Swanst., 453.

undertake to continue the execution of the trusts without the aid and assistance of *A* as a co-trustee, he having during the life of the testator had the principal and confidential management thereof, and being better acquainted therewith than any other person, and that therefore it would be for the benefit of the said testator's estate that he should continue to be a trustee thereof, and the said *A* alleging that due attention to the affairs and concerns of the said testator would require so much of his time and attention as would be greatly prejudicial to his other pursuits and concerns in business, and therefore that he would not have undertaken to act therein, but under the assurance that an application would be made to the Court to authorize the allowance and payment of a reasonable compensation out of the testator's estate for such his labour and time, and that he could not continue to act therein without such reasonable allowance being made to him, ordered a reference to settle a reasonable allowance to be made to *A* out of the testator's estate for his time, pains, and trouble in the execution of the trusts.

Professional charges not allowed.

The Court will not allow a trustee to make professional charges for professional business done by him for the trust, unless, of course, there is express authority given by the settlor, for, to do so would be to place a person, having a duty conflicting with his interest, in the position of having to make out his own bill against himself, leaving any error which might occur to be settled and set right at some future occasion; but the Court will only allow him a salary.[1]

Settled account.

A *cestui que trust* is not estopped by a settled account with or release to his trustee, a solicitor, if he had no independent legal advice;[2] but otherwise if he had.[3]

Remuneration fixed by author of trust.

The author of the trust himself may, of course, direct a salary or other payment, or costs as between solicitor and client, to be made to the trustee, to which he would not be entitled without such direction;[4] and if the precise amount is not fixed, an enquiry will be directed to ascertain what will be a proper remuneration.[5]

[1] Bainbrigge *v.* Blair, 8 Beav., 595.
[2] Todd *v.* Wilson, 9 Beav., 486.
[3] Stanes *v.* Parker, 9 Beav., 385; *Re* Wyche, 11 Beav., 209.
[4] Robinson *v.* Pett, 1 P. Wms., 132; Webb *v.* Earl of Shaftesbury, 7 Ves., 480; Baker *v.* Martin, 8 Sim., 25; Douglas *v.* Archbutt, 2 DeG. and J., 148.
[5] Ellison *v.* Airey, 1 Ves., 115; Willis *v.* Kibble, 1 Beav., 559; Jackson *v.* Hamilton, 3 J. and Lat., 702.

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Contract for remuneration with *cestuis que trustent.*

And where the instrument of trust does not make any provision for the remuneration of the trustees, they may, nevertheless, contract with the *cestuis que trustent*, if the latter are competent to contract, for an allowance for time and trouble expended in the administration of the trust.[1] In *Ayliffe* v. *Murray*,[2] Lord Hardwicke said: "Whether upon general grounds a trustee may make an agreement with his *cestui que trust* for an extraordinary allowance, over and above what he is allowed by the terms of the trust, I think there may be cases where this Court would establish such agreements, but at the same time would be extremely cautious and wary in doing it. In general, this Court looks upon trusts as honorary, and a burthen upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views; and there is a strong reason too against allowing anything beyond the terms of the trust, because it gives an undue advantage to a trustee to distress a *cestui que trust*, and therefore this Court has always held a strict hand upon trustees in this particular. If a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burthensome office, unless the *cestui que trust* will give him a further compensation, over and above the terms of the trust ,and it is contracted for between them, I will not say this Court will set it aside, though there is no instance where they have confirmed such a bargain."

The contract should in its terms explain the arrangement, and if the trustee is a solicitor, the *cestui que trust* should have independent professional advice.[3]

If the trustee fail from any cause to perform his part of the contract, the charges will not be allowed.[4]

Gift coupled with duty.

If a gift is coupled with a duty, the duty must be performed in order to entitle the donee to claim the gift. Thus, if a bequest is given to an executor as remuneration for his trouble, he will not be entitled to claim it unless he proves the will and acts,[5] even though he is prevented by the act of God, as in the case of severe illness, from taking out probate.[6] So a gift of an annuity to a trustee,

[1] Douglas *v.* Archbutt, 2 DeG. and J., 148.
[2] 2 Atk., 58.
[3] Moore *v.* Frowd, 3 M. and Cr., 46.
[4] Gould *v.* Fleetwood, 3 P. Wms., 251, *n.* (*a*).
[5] Slaney *v.* Watney, L. R., 2 Eq., 418.
[6] Hanbury *v.* Spooner, 5 Beav., 630; *Re* Hawkins Trusts, 33 Beav., 570.

so long as he shall continue in the office of trustee, will determine on the cesser of active trusts by the payment of the whole of the trust-property to a person absolutely entitled, without a devolution of the office of trustee on any other person.[1]

Expenses of agent.

Although a person acting in a fiduciary capacity may not charge anything for his trouble, yet he may, as we have already seen,[2] employ paid agents. So if an executor employs a solicitor to do business for him in the management of the testator's affairs, he will be allowed what he pays the solicitor for such business,[3] unless the business is such as he should have transacted himself.[4]

If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may take up a great deal of his time and attention, the principle of equity is, that he cannot claim compensation; but if he choose to save his own trouble by the employment of an accountant, he is entitled to charge the trust-estate with it under the head of expenses.[5]

Curators under Act XIX of 1841.

Curators appointed under Act XIX of 1841 are allowed to receive remuneration at such rate as the Judge shall think reasonable, but in no case exceeding 5 per cent on the personal property and on the annual profits of the real property of the person whose estate has been taken charge of (s. 7). And the public curator and every other administrator to whom a certificate has been granted under s. 10 of Act XL of 1858 is entitled to commission at a rate not exceeding 5 per cent on the sums received and disbursed by him, or such other allowance to be paid out of the minor's estate as the Civil Court shall think fit (s. 24).

and Act XL of 1858.

Official Trustee.

The Official Trustee is entitled by way of remuneration in respect of all trust-property in his hands to commission on all capital moneys received by him, of one and-a-half per cent on receipt; on all capital moneys invested by him, a commission of one and-a-half per cent on investment; on all sums received by him by way of interest or dividends in respect of moneys invested, a commission of

[1] Hull *v.* Christian, L. R., 17 Eq., 546.
[2] *Ante*, p. 212.
[3] Macnamara *v.* Jones, 2 Dick, 587.
[4] Harbin *v.* Darby, 28 Beav., 325.
[5] Lewin, 7th Edn., 543, citing New *v.* Jones, 9 Jarm. Prec., 333; Henderson *v.* McIver, 3 Mad., 275.

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three quarter per cent, and on all rents collected by him, a commission of two and-a-half per cent. (Act XVII of 1864, s. 11).

Administrator-General.

Formerly, administrators in this country to the estates of persons dying abroad were allowed a commission of 5 per cent upon receipts *or* payments. This practice, however, was abolished in the Presidency of Bengal by Act VII of 1849, and in the Presidencies of Madras and Bombay by Act II of 1850; and now it is provided by the Administrator-Generals' Act[1] that "no person other than the Administrator-General acting officially shall receive or retain any commission or agency charges for anything done as executor or administrator under any probate or letters of administration, or letters *ad colligenda bona* which have been granted by the Supreme Court or High Court at Fort William in Bengal since the passing of Act No. VII of 1849, or by either of the Supreme or High Courts at Madras and Bombay since the passing of Act II of 1850, or which shall have been or shall be granted by any Court of competent jurisdiction within the meaning of ss. 187 and 190 of the Indian Succession Act." It is illegal, therefore, for any person other than the Administrator-General to charge commission for administering estates.[2] Section 52 of the Act provides, that the Administrator-General of Bengal shall be entitled to commission at the rate of 3 per cent, and the Administrators-General of Madras and Bombay respectively at the rate of 5 per cent upon the value of the assets which they respectively collect and distribute in due course of administration. The section does not apply to the property of officers and soldiers dying on service (s. 53). And s. 55 authorizes the Governor-General in Council to alter the rates of commission.

Trustee may not make a profit from his office.

It is an invariable rule that a trustee shall gain no benefit to himself by any act done by him as trustee, but that all his acts shall be for the benefit of his *cestui que trust*. This rule was established in order to keep trustees in the line of their duty.[3] So that wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust-estate for his own behoof, he must account to the *cestui que trust* for all the gain which he has made; as where a profit is made by employing trust-

[1] II of 1874, s. 50. [2] *In re* Cowie, I. L. R., 6 Calc., 77.
[3] O'Herlihy *v.* Hedges, 1 Sch. and Lef., 126, *per* Lord Redesdale.

money in buying and selling land, or stock, or in a commercial adventure, in all these cases the profit made by the transaction will not be allowed to go to the trustee, who has so applied the money, but to the *cestui que trust*, whose money has been so applied. In like manner, where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he will be accountable to the trust-estate. So, if he lay out the trust-money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, he must account for the profits received by the adventure or from the concern.[1] And the rule applies to a mortgagee, who is not allowed to have more out of the mortgage-fund than his principal and interest.[2] It does not matter that the original trust-fund has not been impaired; the rule is based on the principle that a trustee shall not be allowed to do an act which brings his private interests and his duty to the trust in conflict.[3]

Employing trust-funds in trade.

So, if a trustee or executor employs trust-funds in his own business, he must account to his *cestuis que trustent* for all profits made by so employing the trust-funds, and he will be liable for all losses.[4] "If," said Lord Cairns,[5] "a partner in a trading firm dies, and if he constitutes one or more of his copartners his executors, and if there is nothing special in the contract of copartnership, and if the assets of the testator are not withdrawn from the copartnership, but are left in it, and no liquidation is arrived at, no settlement of accounts come to, it is a trite and familiar rule in the Court of Chancery to hold, that the estate of that testator is, to all intents and purposes, entitled to the benefit of a share in the profits which are made in the trade after his death. And if this should happen, which is the principle of another class of cases, that the partnership

[1] Docker *v.* Somes, 2 M. and K., 664; Burgess *v.* Wheate, 1 Eden, 177; Middleton *v.* Spicer, 1 Bro. C. C., 201; *Ex parte* Andrews, 2 Rose, 412.

[2] Gubbins *v.* Creed, 2 Sch. and Lef., 218; see also Baldwin *v.* Bannister, 3 P. Wms., 251 (A); Dobson *v.* Land, 8 Hare, 220; Arnold *v.* Garner, 2 Ph., 231; Matthison *v.* Clarke, 3 Drew., 3.

[3] Hamilton *v.* Wright, 9 C. and F., 111.

[4] Docker *v.* Somes, 2 M. and K., 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; Willett *v.* Blandford, 1 Hare, 253; Parker *v.* Bloxam, 20 Beav., 295; Cummins *v.* Cummins, 8 Ir. Eq., 723; Townend *v.* Townend, 1 Giff., 201.

[5] Vyse *v.* Foster L. R., 7 H. L., 329.

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articles have given the surviving partners an option to take to the interest of the testator on certain terms, at a certain price to be fixed by arrangement after the death of the testator, an option or power which may be accepted or refused, but which, if accepted and acted upon, must be acted upon according to the terms on which it is given—if, I say in a case of that kind, the surviving partners or one or more of them, being also executors of the deceased partner, are found not to have pursued exactly the terms of the power or option which has been given, there again the power or option to become purchasers of the interest of the testator after his death falls to the ground, and the partnership remains an unliquidated partnership, to a due share of the profits of which the estate of the testator will continue to be entitled until liquidation actually takes place. It is a rule without exception, that to authorize executors to carry on a trade with the property of their testator, there must be the most distinct and positive authority and direction given by the will itself for that purpose."[1]

Compounding debts or mortgages and purchasing

Upon these principles, if executors or trustees compound debts or mortgages, and buy them in for less than is due thereon, they will not be allowed to take the benefit of the purchase themselves; but other creditors and legatees will have the advantage of it, and for want of them, the benefit will go to the party entitled to the surplus; whereas if one who acts for himself, and is not in the circumstances of an executor or trustee, buys in a mortgage or debt for less than is due, or for less than it is worth, he will be allowed all that is due thereon.[2]

Purchase for benefit of *cestui que trust*.

But the rule that a trustee cannot purchase applies only where the trustee purchases for his own benefit. If he buys for the benefit of his *cestuis que trustent*, and they repudiate the transaction, and it subsequently turns out to be profitable, they cannot claim the benefit.[3]

Cestui que trust cannot give to trustee.

So strongly do Courts of Equity object to allowing a trustee to make any profit out of the trust-estate, that it has been held that a *cestui que trust* cannot give a benefit to his trustee.[4]

[1] Kirkman *v.* Booth, 11 Beav., 273.

[2] Robinson *v.* Pett, 3 P. Wms., 251 (A); *Anon.*, 1 Salk., 155; Darcy *v.* Hall, 1 Vern, 49; *Ex parte* Lacey, 6 Ves., 625; Fosbrooke *v.* Balguy, 1 M. & K., 226; Pooley *v.* Quilter, 2 DeG. & J., 327; Mackintosh *v.* Nobinmoney Dossee, 2 Ind. Jur., 162.

[3] Barwell *v.* Barwell, 34 Beav., 371.

[4] Vaughton *v.* Noble, 30 Beav., 39.

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The rule that a trustee shall not be allowed to make a profit out of the trust-property, applies not only to cases where there is an express trust, and a certain fund is in the hands of trustees to be applied in a particular manner for the benefit of particular persons, but to all cases in which persons stand in a fiduciary relation to each other.

Rule applies to all fiduciary relations.

Thus, partners are bound to use the joint property for the benefit of all the owners, and one partner will not be allowed to make profit to himself out of the partnership transactions.[1] And if, after a partnership has terminated, whatever the cause of the termination may be, one partner carries on the partnership business and retains the share of the outgoing partner in the business, he must account for the profits which he makes by the money he has retained,[2] subject to "just allowances" for special skill, industry, or other matters, by which profit is gained apart from the use of capital.[3]

Partners.

In *Knox* v. *Gye*[4] a difference of opinion arose as to whether a surviving partner was a trustee for the representatives of a deceased partner. Lord Westbury said: "There is nothing fiduciary between the surviving partner and the dead partner's representatives, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation which is thereby created." Lord Hatherley, on the other hand, said: "I thought it was an elementary principle of law that the partnership, which at law survives to the surviving partner, which carries to him at law the whole interest in the partnership assets, which, treating him as a joint tenant, vests the whole of the partnership estates in him, was always subject to the doctrine of a Court of Equity; that, in equity, the interest of a partner in the partnership is that of a tenancy in common as between the two partners: so that the executors of a deceased partner have an interest in those assets which the surviving

[1] Crawshay *v.* Collins, 15 Ves., 218; Bentley *v.* Craven, 18 Beav., 75; Parsons *v.* Hayward, 31 Beav., 199.

[2] Crawshay *v.* Collins, 15 Ves., 218; Brown *v.* De Tastet, Jac., 284; Wedderburn *v.* Wedderburn, 2 Keen, 722; Flockton *v.* Bunning, L. R., 8 Ch., 323 *n.* (6); Ramlal Thakursidas *v.* Lakhmichand Muniram, 1 Bom., Apx., lx.

[3] Brown *v.* De Tastet, Jac., 284; Willett *v.* Blandford, 1 Hare, 253; Docker *v.* Somes, 2 M. & K., 662.

[4] L. R., 5 H. L., 656.

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partner alone can get at, and that the surviving partner alone having a legal interest in the property, there arises, necessarily, a right, as between the executors of the deceased partner and him, to insist upon his holding those assets, which he so collects, according to the partnership interest, or subject to the share which the executors of the deceased partner, in right of their testator, are entitled to claim, so much so, that it is trite law that a surviving partner cannot make use of the assets of a deceased partner without being accountable for the use he has made of them. The executors of the deceased partner have a right to a sale of every portion of the partnership property. So completely are they held to be in a fiduciary position, so completely are the assets, including the plant or houses, the machinery or stock-in-trade, or whatever the description of property may be that comes into the hands of the surviving partner by right of his survivorship at law, and which are all vested in that surviving partner by right of his survivorship at law, held to be property in all of which, whether they are chattels of the partnership, or estates of the partnership, the executors of a deceased partner have an interest commensurate with the extent of the share of their testator. They have a right, therefore, to have that property so disposed of, that it may be applied under the direction of a Court of Equity according to the equitable rights between the partners."

Purchasing share of deceased partner.

There is nothing, however, which prevents a surviving partner from purchasing the share of a deceased partner from his representatives.[1]

Instances of rule.

The principle that a person holding a fiduciary position shall not obtain for himself a benefit from the trust-funds, extends to an agent becoming a trustee or executor;[2] guardians[3] (who are trustees of such property only as comes to their hands);[4] directors of companies, who cannot be allowed to make a profit out of work done by them for the company beyond their regular salary as directors,[5] unless

[1] Chambers *v.* Howell, 11 Beav., 6. As to the effect of an heir or devisee purchasing an incumbrance, see Lewin, 7th Edn., 256.

[2] Sheriff *v.* Axe, 4 Russ., 38; Morret *v.* Paske, 2 Atk., 54.

[3] Powell *v.* Glover, 3 P. Wms., 251 (*n*).

[4] Sleeman *v.* Wilson, L. R., 13 Eq., 41.

[5] Great Luxembourg Railway Company *v.* Magnay, 25 Beav., 586; Imperial Merchantile Credit Association *v.* Coleman, L. R., 6 Ch., 558; L. R., 6 H. L., 189; Parker *v.* M'Kenna, L. R., 10 Ch., 96; *In re* Imperial Land Co. of Marseilles, *Ex parte* Larking, L. R., 4 Ch. Div., 566.

the articles of association of the company expressly stipulate that they may do work for the company in their private capacity, and receive remuneration for the work so done.[1] And the rule applies to the officers of companies,[2] or promoters,[3] inspectors under creditor's deeds;[4] and it has been held to extend to the mayor of a corporation.[5] So a broker,[6] or auctioneer,[7] who assumes a fiduciary position, cannot charge commission for selling the trust-property unless expressly authorized to do so by the will.[8] In *Morison* v. *Morison*[9] an executor and trustee was appointed a consignee, with the usual profits, by the Court, the appointment being for the benefit of the estate. And trustees who are bankers cannot advance money to the trust at compound interest, although such a course of procedure may be usual; but can only charge simple interest.[10] A trustee will not, as a general rule, be appointed a receiver, the principle being that the person who accepts the office of trustee engages to do the whole duty of a receiver without emolument. And if a receiver is appointed, the Court looks to the trustee to examine with an adverse eye, to see that the receiver does his duty. The consequence is, that a trustee is seldom appointed receiver, and only when he engages to act without emoluments.[11]

Trustee retiring for a consideration.

Where a testator appointed two trustees as executors of his will, but by a codicil he excluded them and appointed two other persons, one of whom retired in consideration of a sum of money paid to him by one of the excluded trustees, and executed a deed appointing the excluded trustee to act as trustee in his room, the Court directed the new trustee to be removed and the deed to be cancelled, declared the conveyance to be void, and directed the purchase-money to form part of the assets.[12]

[1] Imperial Merchantile Credit Association *v.* Coleman, L. R., 6 Ch., 558; see *In re* The Port Canning Co., 6 B. L. R., 278.
[2] *In re* Morvah Mining Co., McKay's Case, L. R., 2 Ch. Div., 1.
[3] New Sombrero Phosphate Co. *v.* Erlanger, L. R., 5 Ch. Div., 73; Bagnall *v.* Carlton, L. R., 6 Ch. Div., 371.
[4] Chaplin *v.* Young (No. 2), 33 Beav., 414.
[5] Bowes *v.* The City of Toronto, 11 Moore's P. C. C., 463.
[6] Arnold *v.* Garner, 2 Phillips, 231.
[7] Matthison *v.* Clarke, 3 Drew., 3; Kirkman *v.* Booth, 11 Beav., 273.
[8] Douglas *v.* Archbutt, 2 DeG. and J., 148.
[9] 4 M. and Cr., 215.
[10] Crosskill *v.* Bower, 32 Beav., 86.
[11] —— *v.* Jolland, 8 Ves., 72; Sykes *v.* Hastings, 11 Ves., 363; Sutton *v.* Jones, 15 Ves., 584.
[12] Sugden *v.* Crossland, 3 Sm. and G., 192.

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Extent of liability.

If the person using the trust-fund is not a trustee, he will be liable to the *cestui que trust* only for the principal and interest, but not for the profits; as for example, where a trustee lends the trust-fund to a trader to be used in his business, in this case there is no fiduciary relationship between the trader and the *cestui que trust*, and the trader is only liable as on an ordinary loan.[1]

Failure of heirs of *cestui que trust.*

If property is vested in a trustee upon trust for a certain person and his heirs, and such person dies without heirs and intestate, the trustee will then be entitled to hold the property for his own purposes. The author of the trust has parted with his interest, and there is no person claiming through the *cestui que trust* who has any right of suit against the trustee. Under these circumstances, the trustee can retain the property, not from any positive right in himself, but because there is no person entitled to oust him from possession.[2]

Failure of next-of-kin.

If a *cestui que trust* of chattels, whether real or personal, dies intestate without leaving any next-of-kin, the beneficial interest will not in this case remain with the trustee, but, like all other *bona vacantia*, will vest in the Crown by the prerogative.[3]

Trustee for sale cannot purchase.

There is another class of cases in which the principle, that a trustee shall not be allowed to do any act which brings his interest and his duty as a trustee in conflict, is applied,—namely, those cases where a trustee for the sale of trust-property himself becomes the purchaser. These cases again may be divided into two classes: (1) where the trustee attempts to purchase directly from himself, (2) where the purchase is effected by contract or agreement between the trustee and his *cestui que trust*.

Trustee purchasing from himself.

In the first class of cases, the rule is absolute that a trustee shall not buy from himself. The principle is, that as the trustee is bound by his duty to acquire all the knowledge possible to enable him to sell to the utmost advantage for the *cestui que trust*, the question what knowledge he has obtained, and whether he has fairly

[1] Stroud *v.* Gwyer, 28 Beav., 130; Townend *v.* Townend, 1 Giff., 210; Simpson *v.* Chapman, 4 DeG. M. and G., 154; Macdonald *v.* Richardson, 1 Giff., 81.

[2] Burgess *v.* Wheate, 1 Eden, 177; Taylor *v.* Haygarth, 14 Sim., 8: see Lewin, 7th Edn., 259.

[3] See Lewin, 7th Edn., 262.

given the benefit of that knowledge to the *cestui que trust*, which he acquires at the expense of the *cestui que trust*, no Court can discuss with competent sufficiency or safety to the parties;[1] the same person cannot be both buyer and seller; "he who undertakes to act for another in any matter, shall not in the same matter act for himself."[2]

The reason why a trustee is not permitted to purchase is, because the Court will not permit a man to have an interest adverse and inconsistent with the duty which he owes to another; and as a trustee for sale is bound to get the best price for property to be sold that he can, the Court will not permit him to have an interest of his own adverse to the discharge of his duty to his principal. If he is the purchaser, he is interested in getting the property at the lowest price he can; but if he is acting *bonâ fide* for the owner of the property, his duty is to sell at the best price he can obtain; and the Court will not permit a party to place himself in a situation in which his interest conflicts with his duty; for taking mankind at large, it is not very safe to allow a man to put his private interest in conflict with the duty which he owes to another.[3]

That price fair immaterial.

It may be that the price given is fair, and that the trustee has not gained any advantage by the transaction, the purchase is nevertheless invalid.[4] "The rule I take to be this," said Lord Eldon,[5] "not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself." "Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void," said Lord Erskine,[6] speaking of the case of a trustee selling to himself.[7] If the trustee has made a profit on the transaction, as by a resale, he will have to account for such profit.[8]

So nature of property

The nature of the property is immaterial; the rule applies whether the property is moveable or immoveable.[9]

[1] *Ex parte* James, 8 Ves., 348.
[2] Whichcote *v.* Lawrence, 3 Ves., 750, *per* Lord Loughborough, L. C.; *Ex parte* Lacey, 6 Ves., 626; *Re* Bloye's Trust, 1 Mac. and G., 495.
[3] *In re* Bloye's Trust, 1 Mac. and G., 495, *per* Lord Cranworth; and see *Ex parte* Bennett, 10 Ves., 394.
[4] *Ex parte* James, 8 Ves., 348; *Ex parte* Bennett, 10 Ves., 393; *Ex parte* Lacey, 6 Ves., 627
[5] *Ex parte* Lacey, 6 Ves., 627. [6] Morse *v.* Royal, 12 Ves., 372.
[7] And see Randall *v.* Errington, 10 Ves., 425.
[8] Fox *v.* Mackreth, 2 Bro. C. C., 400; Whichcote *v.* Lawrence, 3 Ves., 740.
[9] Hall *v.* Hallett, 1 Cox, 134; Crowe *v.* Ballard, 2 Cox, 253; Killick *v.* Flexney, 4 Bro. C. C., 160; Watson *v.* Toone, 6 Mad., 153.

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Or mode of purchase.

So it is immaterial that the purchase is made by the trustee at a public sale by auction.[1] "If persons who are trustees to sell an estate are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present seeing the seller there to bid for the estate to or above its value, do not like to enter into that competition."[2] And it makes no difference that the purchase is in the name of another person as the trustee's agent.[3] And the rule applies to the case of one of several trustees buying for himself.[4]

Purchase by trustee for another.

So a trustee may not purchase for another person. "One of the reasons for setting aside such transactions," said Sir Barnes Peacock,[5] "is, that the purchaser is presumed from his position to have better means than the vendor has of ascertaining the value of the property purchased. Well, then, if a person knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself."

A mortgagee, who sells under a power of sale, cannot, except with the leave of the Court, be allowed to purchase the mortgaged estate.[6]

Trustee who has never acted.

A person who has been named as a trustee for sale in an instrument, but who has never accepted or acted in the trust, is not a trustee; and consequently he will not be disabled from purchasing the trust-property.[7] So a merely nominal trustee may purchase. In this case there is no conflict between duty and interest on the part of the

[1] Campbell *v.* Walker, 5 Ves., 678; 13 Ves., 601; Lister *v.* Lister, 6 Ves., 631; Sanderson *v.* Walker, 13 Ves., 601; Downes *v.* Grazebrook, 3 Mer., 200.

[2] *Ex parte* Lacey, 6 Ves., 629, *per* Lord Eldon.

[3] Whelpdale *v.* Cookson, 1 Ves., 9; Campbell *v.* Walker, 5 Ves., 678; 13 Ves., 601; Downes *v.* Grazebrook, 3 Mer., 200; Randall *v.* Errington, 10 Ves., 423.

[4] Whichcote *v.* Lawrence, 3 Ves., 740; Morse *v.* Royal, 12 Ves., 374.

[5] Dhonender Chunder Mookerjee *v.* Mutty Lall Mookerjee, 14 B. L. R., 283; (S. C.) 23 W. R., 6.

[6] Downes *v.* Grazebrook, 3 Mer., 200; S. M. Kamini Debi *v.* Ramlochan Sirkar, 5 B. L. R., 458.

[7] Chambers *v.* Waters, 3 Sim., 42; Stacey *v.* Elph, 1 M. and K., 195.

trustee, and there is no object in preventing him from becoming a purchaser.[1]

When *cestui que trust* may set aside sale.

However fair, open, and honest the transaction may be, although the trustee may have given as much for the property as it is reasonably worth, and as much as any one else would give; and although no fraud, mismanagement, or negligence appears to the Court, yet the sale is always liable to be set aside at the suit of the *cestui que trust*.[2] It is, as we have seen, immaterial that the trustee has not made any advantage. "If the connection (between the trustee and *cestui que trust*) does not satisfactorily appear to have been dissolved," said Lord Eldon,[3] "it is in the choice of the *cestuis que trustent*, whether they will take back the property or not. It is founded upon this, that though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court—by which I mean in the power of the parties—in ninety-nine cases out of an hundred, whether he has made advantage or not. Suppose a trustee buys any estate, and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast, enters into a contract with the *cestui que trust*, if he chooses, how can the Court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it; and the *cestui que trust* will be effectually defrauded."[4]

"If," said Lord Eldon in another case,[5] "a trustee can buy in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise."

Trustee may not buy for another.

The duties imposed upon trustees prevent their buying for themselves, and it follows from the general rule that they cannot be permitted to buy for a third person; for the Court can, with as little effect, examine whether that was done by making an undue use of the information received in the course of their duty in the one case as in the other.[6]

[1] See Lewin on Trusts, 7th Edn., 439.

[2] Campbell *v.* Walker, 5 Ves., 678; Gibson *v.* Jeyes, 6 Ves., 266; *Ex parte* Lacey, *ib.*, 625; Randall *v.* Errington, 10 Ves., 423; Downes *v.* Grazebrook, 3 Mer., 209.

[3] *Ex parte* Lacey, 6 Ves., 627.

[4] And see *Ex parte* James, 8 Ves., 337.

[5] *Ex parte* Bennett, 10 Ves., 385.

[6] Coles *v.* Trecothick, 9 Ves., 248; *Ex parte* Bennett, 10 Ves., 400.

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Agent of trustee may not purchase.

The agent of a trustee for the sale of an estate employed for the sale of the estate cannot purchase;[1] the reasons which disqualify his principal from purchasing apply equally to him. Practically, he is the person who conducts the sale, and it is on his exertions that the result of the sale depends; and, therefore, to say that the principal is incapacitated, but that the agent is not, would be an absurd distinction, the reason remaining the same and being as applicable to the one as to the other.[2]

An agent not for sale, but for management only, and a receiver appointed by the Court, stand in a confidential relation, and cannot purchase without putting themselves at arm's length and a full disclosure of their knowledge.[3]

Trustee taking lease.

The principle that we are now considering applies to the case of a trustee taking a lease of the trust-property to himself. His duty and his interest may conflict, and therefore, if the lease is advantageous to him, for that is equivalent to a purchase, he must account to the *cestui que trust* for the profits, and must give up the lease; if it is disadvantageous to him, he will be held to his bargain.[4]

Time within which sale must be set aside.

Although the Limitation Act (Act XV of 1877, s. 10) 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; yet a *cestui que trust* who seeks to set aside a purchase must do so within a reasonable time,[5] otherwise if he allows the trustee to remain in possession for a length of time as absolute owner, his right to relief may be affected by his acquiescence.[6] What period of time would operate as an absolute bar to relief cannot be laid down exactly. Relief has been refused after an acquiescence of seventeen years.[7]

[1] Whitcomb *v.* Minchin, 5 Mad., 91.

[2] *Re* Bloye's Trust, 1 Mac. & G., 495.

[3] Lewin on Trusts, 7th Edn., 440, citing King *v.* Anderson, 8 I. R., Eq., 147, 625; Alven *v.* Bond, 1 Flan. & Kelly, 196; White *v.* Tommy, 1 Flan. & Kelly, 224.

[4] *Ex parte* Hughes, 6 Ves., 617; Parker *v.* Brooke, 9 Ves., 583; The Attorney-General *v.* The Earl of Clarendon, 17 Ves., 500.

[5] Campbell *v.* Walker, 5 Ves., 680; Chalmer *v.* Bradley, 1 J. & W., 59; Webb *v.* Rorke, 2 Sch. & Lef., 672.

[6] *Ex parte* James, 8 Ves., 351; Randall *v.* Errington, 10 Ves., 427; Webb *v.* Rorke, 2 Sch. & Lef., 672; Parkes *v.* White, 11 Ves., 226.

[7] Baker *v.* Baker, 18 Beav., 398.

And in *Oliver* v. *Court*,[1] Richards, C. B., seemed to think that twelve years would be sufficient. Much of course would depend upon the nature of the transaction.[2]

Sales have been set aside after acquiescence for ten[3] and eleven years.[4] But if there has been disguise and concealment on the part of the trustee, the purchase may be set aside even after an interval of twenty years;[5] and there can, of course, be no acquiescence on the part of persons who are not competent to contract. Nor can there be acquiescence if the *cestui que trust* was ignorant of the fact that the trustee was the purchaser.[6]

The rule as to acquiescence will not apply with the same force if the *cestui que trust* has been hindered from taking proceedings by poverty,[7] or in the case of creditors.[8] But they may be barred by gross laches, such as delay for thirty-three years.[9]

Confirmation.

If the *cestui que trust* is a person competent to contract, he may confirm the sale, and will be estopped from subsequently disputing it,[10] unless the confirmation has been obtained fraudulently, or he was ignorant of the facts.[11]

The confirmation must not be contemporaneous with the conveyance,[12] and it must be the solemn and deliberate act of the *cestui que trust*.[13]

Purchase from *cestui que trust*.

Although a trustee for sale cannot, so long as he remains a trustee, purchase from himself, yet he may, under certain

[1] 8 Price, 167.

[2] See also Morse *v.* Royal, 12 Ves., 374; Price *v.* Byrn, cited 5 Ves., 681; Barwell *v.* Barwell, 34 Beav., 371; Champion *v.* Rigby, 1 R. & M., 539; Roberts *v.* Tunstall, 4 Hare, 257.

[3] Hall *v.* Noyes, cited in 3 Ves., 749.

[4] Murphy *v.* O'Shea, 2 J. & Lat., 422.

[5] Watson *v.* Toone, 6 Madd., 153.

[6] Randall *v.* Errington, 10 Ves., 423; Chalmer *v.* Bradley, 1 J. & W., 51.

[7] Roberts *v.* Tunstall, 4 Hare, 267.

[8] Whichcote *v.* Lawrence, 3 Ves., 740; *Ex parte* Smith, 1 D. & C., 267; *Anon.*, cited in 6 Ves., 632; Kidney *v.* Cussmaker, 12 Ves., 158; York Buildings Co. *v.* Mackenzie, 8 Bro. P. C., 42.

[9] Hercy *v.* Dinwoody, 2 Ves. Jr., 87; Scott *v.* Nesbitt, 14 Ves., 446.

[10] Morse *v.* Royal, 12 Ves., 355; Clarke *v.* Swaile, 2 Eden, 134; Chesterfield *v.* Janssen, 2 Ves., 125; Scott *v.* Davis, 4 M. & C., 92.

[11] Murray *v.* Palmer, 2 Sch. & Lef., 486; Morse *v.* Royal, 12 Ves., 373; Adams *v.* Clifton, 1 Russ., 297; Cockrell *v.* Cholmeley, 1 R. & M., 425; Chalmer *v.* Bradley, 1 Jac. & W., 51; Dunbar *v.* Tredennick, 2 B. & B., 317.

[12] Wood *v.* Downes, 18 Ves., 128; Morse *v.* Royal, 12 Ves., 373; Scott *v.* Davis, 4 M. & C., 91; Roberts *v.* Tunstall, 4 Hare, 267.

[13] Carpenter *v.* Heriot, 1 Eden, 338; Montmorency *v.* Devereux, 7 C. & F., 188.

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circumstances, purchase from his *cestui que trust*.[1] "If," said Lord Eldon,[2] "a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes off the obligation that attaches upon him as trustee, then he may buy." In *Coles* v. *Trecothick*[3] the same learned Judge said: "Upon the question as to a purchase by a trustee from the *cestui que trust*, I agree the *cestui que trust* may deal with his trustee so, that the trustee may become the purchaser of the estate. But, though permitted, it is a transaction of great delicacy, and which the Court will watch with the utmost diligence; so much, that it is very hazardous for a trustee to engage in such a transaction . . . . A trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, proving that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. I admit it is a difficult case to make out, wherever it is contended, that the exception prevails."[4]

Fiduciary relation dissolved.

If the relation of trustee and *cestui que trust* has been in some way dissolved, or if not, the parties are so much at arm's length that they agree to take the character of purchaser and vendor,[5]—if the *cestui que trust* is well advised of what his rights are,[6] and it is distinctly and fully understood by him that he is selling to the trustee, and the trustee takes no advantage of his situation to produce a beneficial bargain to himself,[7] the trustee may purchase from his *cestui que trust*, for then he purchases not indeed from himself as trustee, but under a specific contract with his *cestui que trust*.[8] The consequence is, that until the trustee has by contract done what all the cases admit he may do,—that is to say, effectually shaken off the character of trustee, and put himself in circumstances in which he shall be no

[1] Ayliffe *v.* Murray, 2 Atk., 59; Whichcote *v.* Lawrence, 3 Ves., 750; Gibson *v.* Jeyes, 6 Ves., 277.
[2] *Ex parte* Lacey, 6 Ves., 626.
[3] 9 Ves., 234.
[4] And see Randall *v.* Errington, 10 Ves., 426; Downes *v.* Grazebrook, 3 Mer., 208; Morse *v.* Royal, 12 Ves., 373.
[5] Gibson *v.* Jeyes, 6 Ves., 277.
[6] Spring *v.* Pride, 4 DeG. J. and S., 405.
[7] Randall *v.* Errington, 10 Ves., 427.
[8] Downes *v.* Grazebrook, 3 Mer., 208.

longer the person entrusted to sell, he shall not buy for himself.[1]

Burden of proof.

The burden of proof to show the *bona fides* of the transaction throughout, that the utmost price that could have been produced was obtained, and that the *cestui que trust* has in no way been defrauded, lies upon the trustee.[2]

A trustee cannot be allowed to act up to the time of sale, to get all the information that may be useful to him, and then to discharge himself from the character of trustee and buy for himself. He must at the time of purchase have fully shaken off the character of trustee by the consent of the *cestui que trust* freely given, after full information and after the right to purchase has been bargained for.[3]

Where the *cestui que trust* has taken upon himself the conduct of all the preliminary proceedings requisite for the sale, such as the surveys, the mode and conditions of sale, the plans, the choice of the auctioneer; and has thus acquired a perfect knowledge of the value of the property, and the trustee has not been in a situation to acquire any exclusive information respecting the property, and a contract has then been made for sale by the *cestui que trust* to the trustee, the Court will deal with the contract as if made between two indifferent persons putting each other at arm's length, and will give effect to the sale, though made for an inadequate price.[4]

So the purchase has been supported where the *cestui que trust* proposed and pressed it upon the trustee.[5]

And where the trustee had exerted himself considerably to sell the trust-estate, but had not been able to meet with a purchaser, and subsequently agreed to purchase the premises for himself, with the consent and approval of the *cestui que trust*, Lord Northington refused to set the transaction aside, though he said that he did not like the circumstance of a trustee dealing with his *cestui que trust*.[6]

The solicitor of the *cestui que trust* cannot, in the absence of express authority from his client, enter into a contract

[1] *Ex parte* Bennett, 10 Ves., 394.
[2] Denton *v.* Donner, 23 Beav., 290; Luff *v.* Lord, 34 Beav., 226.
[3] *Ex parte* James, 8 Ves., 353; Spring *v.* Pride, 4 DeG. J. and S., 395.
[4] Coles *v.* Trecothick, 9 Ves., 248.
[5] Morse *v.* Royal, 12 Ves., 355.
[6] Clarke *v.* Swaile, 2 Eden, 134.

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with the trustee for the purchase by the trustee of the trust-property.[1]

Purchase by creditors.

Where the *cestuis que trustent* are creditors of an insolvent estate, the trustee can only purchase with the consent of all the creditors. In *Whelpdale* v. *Cookson*,[2] Lord Hardwicke confirmed the sale in case the majority of the creditors interested should not dissent. Lord Eldon, however, in *Ex parte Lacey*,[3] differed from Lord Hardwicke, saying "I doubt the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arises from the difficulty of a *cestui que trust* duly informing himself what is most or least for his advantage, I have considerable doubt whether the majority in that article can bind the minority."

Assignee.

Leave has been given to assignees to purchase upon the condition that the consent of the creditors at a meeting called for the purpose shall have been first obtained.[4]

Leave to bid.

The Court will not, where the *cestuis que trustent* are *sui juris*, give the trustee leave to bid at a sale by auction. In the case of infants, as we shall see presently, the rule is different. It is for the *cestui que trust*, the person interested, to decide whether he will sell to the trustee, and not a matter for the Court.[5] The reason why a trustee is not allowed to bid is, because he must have acquired much information, and the Court could feel no security that he would do his duty and communicate this information so as to raise the price if he had a prospect of becoming a purchaser. But if the Court is satisfied that no purchaser, at an adequate price, can be found, then the trustee may be allowed to make proposals and to become the purchaser.[6]

Purchase from infants.

The *cestuis que trustent* must be in such a position that they can act for themselves, and can effectually contract with the trustee. A purchase, therefore, by a trustee from infant *cestuis que trustent* will be void, as the *cestuis que trustent* are persons incapable of entering into a binding contract.[7] It may be that the trustee is willing to give

[1] Downes *v.* Grazebrook, 3 Mer., 208.
[2] Cited in Campbell *v.* Walker, 5 Ves., 682.
[3] 6 Ves., 628.
[4] *Ex parte* Bage, 4 Madd., 459; *Anon.*, 2 Russ., 350.
[5] *Ex parte* James, 8 Ves., 352.
[6] Tennant *v.* Trenchard, L. R., 4 Ch., 547.
[7] Campbell *v.* Walker, 5 Ves., 682; Sanderson *v.* Walker, 13 Ves., 601.

more than any one else for the property; and in such a case the only way by which he can safely purchase is to institute a suit, and apply to the Court by motion to let him be the purchaser, saying that so much is bid and that he will give more. The Court will examine into the circumstances,—ask who had the conduct of the transaction,—whether there is any reason to suppose the premises could be sold better; and upon the result of that inquiry will let another person prepare the particulars of sale, and let the trustee bid.[1]

Legal representatives.

An executor or administrator cannot be permitted, either immediately or by means of a trustee, to be the purchaser of any parts of the assets of his testator or intestate, but will be considered as a trustee for the persons interested, and must account to them for the utmost extent of the profit made by him.[2] And the general rule that a trustee shall not purchase trust-property applies to an executor *de son tort*,[3] or an agent,[4] and to any persons who may stand in a fiduciary position.

Mortgagee.

But the rule does not extend to a purchase by a mortgagee from his mortgagor, for the circumstance that two parties stand to each other in the relation of trustee and *cestui que trust* does not affect any dealing between them unconnected with the subject of the trust.[5] Nor is there any principle in equity that a surviving partner cannot purchase the share of a deceased partner from his representatives.[6] And a creditor taking out execution is not precluded from becoming the purchaser of the property seized under it.[7]

Lending to trustees.

If the instrument creating the trust authorizes the trustees to invest on personal security, it is a breach of trust if the trustees lend to one of themselves. The author of the trust relies upon the united vigilance of all the trustees with respect to the solvency of the borrower, and the

[1] Campbell *v.* Walker, 5 Ves., 681; Farmer *v.* Dean, 32 Beav., 327.
[2] Hall *v.* Hallett, 1 Cox. 134; Killick *v.* Flexney, 1 Bro. C. C., 161; Watson *v.* Toone, 6 Mad., 153.
[3] Mulvany *v.* Dillon, 1 B. and B., 408.
[4] King *v.* Anderson, I. R., 8 Eq., 625; Murphy *v.* O'Shea, 2 J. and Lat., 422.
[5] Knight *v.* Majoribanks, 11 Beav., 322; 2 Mac. and G., 10.
[6] Chambers *v.* Howell, 11 Beav., 6.
[7] Stratford *v.* Twynam, Jac., 418.

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object is defeated by a loan to one of the trustees.[1] "And trustees having a power, with the consent of the tenant-for-life, to lend on personal security, cannot lend on personal security to the tenant-for-life himself. And when the Court has assumed the administration of the estate by the institution of a suit, it will not direct an investment on personal security, though there be a power to lay out on either personal or Government security, but will order all future investments to be made on Government security."[2]

[1] ——— *v.* Walker, 5 Russ., 7; Stickney *v.* Sewell, 1 My. and Cr., 8; Westover *v.* Chapman, 1 Coll., 177.

[2] Lewin, 7th Edn., 291.

LECTURE X.

OF THE RIGHTS AND LIABILITIES OF THE *CESTUI QUE TRUST.*

Right of *cestui que trust* to rents and profits — Tidd *v.* Lister — Right to call for conveyance — Costs — Indemnity — Right of *cestui que trust* to have trust carried out — Right of *cestui que trust* to hold property absolutely — Separate use — Right of *cestui que trust* to inspection — Custody of title-deeds — Right of *cestui que trust* to alienate his interest — Cautions in assignments of equitable interest — Separate use — Method of conveyance — Assignee takes subject to all equities — Set-off — Mutual demands must be in respect of same rights — Notice to trustees — Mortgage — Description of property — What is sufficient notice — To whom notice to be given — Agents — Notice to one of several trustees — Notice before trust-fund received — Bankers — Trustee purchaser — Nonpayment — Mortgagee — Immoveable property — Stop-order — Right to execution of trust — Suit for execution of trust — Intention of author of trust carried out — Right to proper trustees — Suit for appointment of new trustees — Costs — Grounds for removal of trustee — Rules for selecting new trustees — *In re* Tempest — Right to compel trustee to do act of duty — Injunction — Wrongful purchase by trustee — Interest — Allowance for outlay — Re-conveyance — Interest — Costs — Following trust-estate into hands of third persons — Volunteers — Purchasers for value — Purchase from guardian — Notice of trust — Purchaser for valuable consideration without notice — Purchaser without notice from purchaser with notice — Purchaser with notice from purchaser without — Fraud — Doubtful equity — Following converted trust-property — Proof of purchase with trust-money — Money, notes, or negotiable instruments — Trust-fund mixed with trustee's money — Pennell *v.* Deffell — *Re* Hallett's Estate — Lien — Limitation — Accrual of cause of action — Fraud — Purchase from manager of joint Hindu family — Position of shebait — Duty of purchaser — Terms on which sale set aside — Duty of manager — What is sufficient necessity — Sale to pay debts — Hunooman Persaud Panday's case — Purchaser under execution — Purchase from heir of Mahomedan debtor — Acquisition by trustee of trust-property wrongfully converted — Liability of executor or administrator to pay interest — Liability of trustee who leaves property uninvested — When trustee liable to pay interest — Trustee employing trust-funds in trade — Docker *v.* Somes — Apportioning profits — Compound interest — Trust-funds mixed with trustee's money — Partner trustee employing trust-funds in business — Election where trust-property to be sold or invested — Election by one *cestui que trust* to retain property unconverted — Notification of election — Liability of *cestui que trust* joining in breach of trust — Against whom interest of *cestui que trust* applied — Rights and liabilities of transferree from *cestui que trust.*

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Right of *cestui que trust* to rents and profits.

IN the case of a passive trust, the *cestui que trust* has a right to take the rents and profits or income of the trust-property;[1] and where there is only one *cestui que trust*, he may compel the trustee to put him in possession of the estate.[2] The cause of action in such a case accrues upon refusal by the trustee to give up the property upon demand by the *cestui que trust*, and not from the date when the trustee enters into possession.[3] If trustees eject a *cestui que trust*, they will have to account, not only for rents which they receive, but for the whole of the rents which the tenants were bound to pay.[4] But if there are several *cestuis que trustent*, the Court will not, as a rule, take the property out of the hands of the trustees, or if it does do so, it will take care that the transfer shall be accompanied with such conditions and restrictions as the nature of the case may require in order to protect the interests of the *cestuis que trustent* who do not get possession. In *Tidd* v. *Lister*,[5] where successive estates were limited by will, it was argued that it was a matter of course in a Court of Equity to divest trustees of the management of the trust-property and to deliver possession of it to the *cestui que trust*. Sir John Leach, V. C., however, refused to remove the trustees from the management, saying, "My first impressions were strongly against the existence of any such rule. It is perfectly plain from the continuing nature of this trust, that the testator intended that the actual possession of the trust-property should remain with the trustees; and it did appear to me a singular proposition that if a testator, who gives in the first instance a beneficial interest for life only, thinks fit to place the direction of the property in other hands, which is the obvious means of securing the provident management of that property for the advantage of those who are to take in succession, that it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own immediate interest to the fair rights of those who are to take in remainder . . . . There may be cases in which it

Tidd *v.* Lister.

[1] Smith *v.* Wheeler, 1 Mod., 17.
[2] Lewin, 7th Edn., 576; and see Brajnath Baisakh *v.* Matilal Baisakh, 3 B. L. R., O. J., 92.
[3] Rakhaldas Madak *v.* Madhusudun Madak, 3 B. L. R., A. C., 409.
[4] Kaye *v.* Powell, 1 Ves. Jr., 408. [5] 5 Madd., 429.

may be plain from the expressions in the will, that the testator did not intend that the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the nature of the property that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There may be very special cases in which this Court would deliver the possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustees, as where the personal occupation of the trust-property was beneficial to the *cestui que trust*. There the Court, taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator." [1]

Right to call for conveyance.

And where a *cestui que trust* would be entitled to require the trustee to put him in possession of the trust-property, he may call upon the trustee to convey the property to such person as he may require.[2] Should the trustee refuse to convey, the *cestui que trust* may institute a suit to compel him to do so, and if it appears that there was no good ground for the refusal, the trustee will have to pay the costs of the suit,[3] as where a trustee has insisted upon enquiring into matters connected with a distinct trust,[4] or refuses to convey through obstinacy and caprice.[5] But a trustee will not be made to pay costs where he acts in good faith and under competent advice, though the fact that the trustee consulted counsel will not necessarily entitle him to his costs.[6] Nor will he be made to pay costs where information as to the existence of the trusts has been withheld from him,[7] or where he has refused to

Costs.

[1] See also Blake *v.* Bunbury, 1 Ves. Jr., 194; Jenkins *v.* Milford, 1 J. & W., 629; Baylies *v.* Baylies, 1 Coll., 537; Denton *v.* Denton, 7 Beav., 388; Pugh *v.* Vaughan, 12 Beav., 517.

[2] Lewin, 7th Edn., 585, citing Payne *v.* Barker, Sir G. Bridgman's Rep., 24.

[3] Jones *v.* Lewis, 1 Cox, 199; Thorby *v.* Yeats, 1 Y. & C. C. C., 438; Willis *v.* Hiscox, 4 M. & Cr., 202; Campbell *v.* Home, 1 Y. & C. C. C., 664; Hampshire *v.* Bradley, 2 Coll., 34; Penfold *v.* Bouch, 4 Hare, 272; Firmin *v.* Pulham, 2 DeG. & Sm., 99.

[4] Palairet *v.* Carew, 32 Beav., 564.

[5] Taylor *v.* Glanville, 3 Madd., 178.

[6] Devey *v.* Thornton, 9 Hare, 232; Angier *v.* Stannard, 3 My. & K., 566.

[7] Holford *v.* Phipps, 3 Beav., 434.

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convey in pursuance of an opinion expressed by counsel that the concurrence of certain parties was necessary.[1] "I admit," said Lord Gifford,[2] "that it is only in a strong case that costs will be given against trustees: yet where they refuse without a reasonable motive, for their refusal to act without suit, they will be visited with costs." "Trustees," said Sir J. Leach, V.C.,[3] "are entitled to the protection and direction of the Court in the exercise of their trusts, and can never be called upon to pay costs, unless they refuse to act without suit merely from obstinacy and caprice. In the present case, I am of opinion that the suit has been rendered necessary by the caprice and pertinacity of the trustees; and considering the immense expense to which beneficiaries may be exposed, where a trustee who might have satisfied himself out of Court concerning the propriety of what he was called upon to do, as well as by coming into Court, refuses to act unless he is compelled by a decree, the defendant must pay the costs of the suit."

Indemnity.

If there is any real difficulty, the trustees are entitled to require an indemnity.[4]

A trustee is entitled to protect himself from liability. For instance, he may require that all necessary persons are made parties,[5] and he cannot be required to convey any other estate than that conveyed to him.[6] Nor can he be required to accept incorrect recitals.[7] Apparently, a trustee cannot be called upon from time to time to divest himself of different parcels of the trust-estate so as to involve himself as a party to conveyances to a number of different persons. He has a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper."[8] If the trustee has reasonable suspicions that the *cestui que trust* has been induced to enter into the contract by coercion, undue influence, fraud, misrepresentation or mistake, it is his duty to refuse to convey; and he will not be visited with the costs of a suit to compel him to convey, even

[1] Goodson *v.* Ellison, 3 Russ., 583; Poole *v.* Pass, 1 Beav., 600.
[2] Goodson *v.* Ellison, 3 Russ., 589.
[3] Taylor *v.* Glanville, 3 Madd., 178.
[4] Goodson *v.* Ellison, 3 Russ., 583.
[5] Holford *v.* Phipps, 3 Beav., 434.
[6] Saunders *v.* Neville, 2 Vern., 428; Goodson *v.* Ellison, 3 Russ., 583.
[7] Hartley *v.* Burton, L. R., 3 Ch., 365.
[8] Goodson *v.* Ellison, 3 Russ., 594, *per* Lord Eldon.

though it appears that the suspicions were unfounded. But he must take some steps to ascertain whether or not the contract is really of an improper character; mere suspicion is not of itself sufficient to warrant a refusal to convey, for enquiry may show that it is groundless.[1]

If the property is liable to succession duty, the trustee must see that it is paid.[2]

Right of *cestui que trust* to have trust carried out.

The *cestui que trust* has the right to have the intention of the author of the trust specifically enforced to the extent of his particular interest. The Specific Relief Act[3] provides, that the specific performance of any contract may, in the discretion of the Court, be enforced, (*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust, and the following illustration is appended to the section: "*A* holds certain stock in trust for *B*. *A* wrongfully disposes of the stock. The law creates an obligation on *A* to restore the same quantity of stock to *B*, and *B* may enforce specific performance of this obligation."

The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, he may compel the trustees to adhere strictly and literally to the line of duty prescribed to them.[4]

Right of *cestui que trust* to hold property absolutely.

If property is given to trustees to hold for the benefit of any persons until they attain some age over the age of majority, and then to pay it over to such persons absolutely, the Court will allow the *cestuis que trustent*, on attaining majority, to have the property handed over. The *cestuis que trustent*, if they have an absolute and indefeasible interest in the trust-property, are not bound to wait until the time fixed by the author of the trust. If some other person is to have the enjoyment of the property until the time fixed, then the *cestuis que trustent* must wait until the time arrives. Thus, if a fund is given to trustees to accumulate, and hand over to a certain person

[1] See Campbell *v.* Home, 1 Y. & C. C. C., 664; Firmin *v.* Pulham, 2 DeG. & Sm., 99; King *v.* King, 1 DeG. & J., 663; Hannah *v.* Hodgson, 30 Beav., 19. As to what amounts to coercion, undue influence, fraud, misrepresentation, and mistake, see Contract Act, IX of 1872, ss. 15, 16, 17, 18, 20, 21, 22, and *ante*, p. 107.

[2] Buttanshaw *v.* Martin, 1 Johns., 89.

[3] I of 1877, s. 12, cl. (*a*).

[4] Lewin, 7th Edn., 589, s. 2, citing Deeth *v.* Hale, 2 Moll., 317.

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on his attaining twenty-five, he may claim the fund on attaining majority. If, however, the trust is to pay the income to *A* until *B* attains twenty-five, and then to hand over the principal to *B*, *B* must wait until he attains twenty-five before he can claim the fund.[1] If a sum of money is bequeathed to trustees upon trust to purchase an annuity for a certain person who is of age, and there is no gift over, or provision for cesser, he may claim the sum given, instead of the annuity.[2] So a trust for the maintenance of an adult, is a trust for his benefit generally, and the principal will, on his insolvency, pass to his assignee.[3]

Separate use.

There is one exception to the rule that a *cestui que trust*, who has an absolute interest in a trust-fund, may claim the fund on attaining majority,—namely, where property is settled upon a married woman for her separate use, without power of anticipation. In such a case she is not entitled to claim the fund, and cannot by any device evade the restraint upon anticipation.[4] The reason for this is the peculiar nature of this trust. It is intended as a provision for the wife, and the object would be defeated if the wife could obtain possession of the principal.

Right of *cestui que trust* to inspection.

Cestuis que trustent have a right at all reasonable times to inspect the documents relating to the trust, and at their own expense to be furnished with copies of them.[5] And where the relation of trustee and *cestui que trust* has been established, all cases submitted, and opinions taken, by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust*.[6]

Custody of title-deeds.

Trustees do not act negligently in leaving documents of title in the hands of one of their number and allowing him to receive the income. The reason is, that the deeds must be held by some one person, unless they are deposited with bankers or placed in a box secured by a number of

[1] Josselyn *v.* Josselyn, 9 Sim., 63; Saunders *v.* Vautier, 4 Beav., 115; Cr. and Ph., 240; Curtis *v.* Lukin, 5 Beav., 147; Rocke *v.* Rocke, 9 Beav., 66; Gosling *v.* Gosling, Johns., 265; Pearson *v.* Lane, 17 Ves., 101; Magrath *v.* Morehead, L. R., 12 Eq., 491.

[2] Dawson *v.* Hearn, 1 R. & M., 606; *Re* Browne's Will, 27 Beav., 324.

[3] Younghusband *v.* Gisborne, 1 Coll., 400.

[4] Stanley *v.* Stanley, L. R., 7 Ch. Div., 589.

[5] *Ex parte* Holdsworth, 4 Bing., N. C., 386.

[6] Wynne *v.* Humberston, 27 Beav., 421.

different locks, of which each trustee should hold one of the keys, and negligence cannot be imputed to trustees for not taking such precautions as these.[1]

Right of *cestui que trust* to alienate his interest.

A *cestui que trust*, if competent to contract, may alienate or devise his interest in the trust-fund,[2] even if his interest only amounts to a bare possibility.[3] The *cestui que trust* may exercise this right of ownership without the intervention of the trustees, who have no power of interfering,[4] and where the *cestui que trust* conveys his interest in the trust-fund to a purchaser, the purchaser may institute a suit against the trustee for a conveyance of his interest.[5] But a mere right to sue a trustee for the chance of recovering from him interest or profits of part of the trust-funds in respect of which he is alleged to have committed a breach of trust, is not assignable.[6]

Cautions in assignments of equitable interest.

"The purchaser of an equitable interest in *choses-in-action* should, for his security, never dispense with the two following precautions: *First*, he should make inquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance. The purchaser, as the implied agent of the *cestui que trust*, has a right to require all the necessary information; and if the trustee or debtor refuse to answer the inquiry, or be guilty of misrepresentation, or even of misstatement from forgetfulness, the purchaser may charge him personally with the amount of the consequent loss. *Secondly*, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if after such notice he parts with the fund to any person not having a prior claim."[7]

[1] Cottam *v.* Eastern Counties Railway Co., 1 J. and H., 247.
[2] Lord Cornbury *v.* Middleton, 1 Ch. Ca., 211; Burgess *v.* Wheate, 1 Eden, 195.
[3] Goring *v.* Bickerstaff, 1 Ch. Ca., 8. See as to transfer of *choses-in-action*, Mayne's Hindu Law, § 331.
[4] Philips *v.* Brydges, 3 Ves., 127.
[5] Goodson *v.* Ellison, 3 Russ., 583; Jones *v.* Farrell, 1 DeG. and J., 208.
[6] Hill *v.* Boyle, L. R., 4 Eq., 260.
[7] Lewin, 7th Edn., 602.

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Separate use.

If property is settled upon a married woman for her separate use without power of anticipation, she cannot, upon the same principle that prevents her from claiming the trust-fund (see *ante*, p. 272), part with her interest in the trust-fund. But a general restriction against alienation is against the policy of the law, and will not operate to prevent the *cestui que trust* from parting with his interest.[1]

Method of conveyance.

As far as regards persons other than European British subjects, the *cestui que trust* may convey his interest by word of mouth. The 9th section of the Statute of Frauds, which provides that all grants and assignments of any trust or confidence must be in writing, signed by the party granting or assigning the same, otherwise they are utterly void, is still in force, at least in the Presidency-towns, so far as regards European British subjects, and from them a writing is therefore necessary. This section refers to assignments by the *cestui que trust*.[2] Before the Statute, the transfer of an equitable interest might have been made by parol. A writing is all that is now necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates.[3]

Assignee takes subject to all equities.

The assignee of the interest of a *cestui que trust*, as a general rule, takes it subject to all the equities to which it was liable in the hands of the assignor,[4] and he may even be liable to equities subsequently attaching. Thus, if an executor assigns his reversionary legacy, and is subsequently guilty of a *devastavit*, the legacy must make good the loss thereby occasioned.[5]

Set-off.

The assignee takes subject to any right of set-off which may exist. In *Cavendish* v. *Geaves*,[6] the principles were thus stated by Lord Romilly, M. R.: "If a customer borrow money from his banker, and give a bond to secure it, and afterwards, on the balance of his general banking account, a balance is due to the customer from the same

[1] Snowdon *v.* Dales, 6 Sim., 524; Green *v.* Spicer, 1 R. and M., 395; Graves *v.* Dolphin, 1 Sim., 66; Brandon *v.* Robinson, 18 Ves., 429; Rochford *v.* Hackman, 9 Hare, 480; see *ante*, p. 40.

[2] Jerdein *v.* Bright, 2 J. and H., 325.

[3] Lewin on Trusts, 7th Edn., 594.

[4] Priddy *v.* Rose, 3 Mer., 86; Mangles *v.* Dixon, 3 H. L. C., 702; *Re* Natal Investment Co., L. R., 3 Ch., 355; Comp. Dickson *v.* Swansea Railway Co., L. R., 4 Q. B., 48.

[5] Morris *v.* Livie, 1 Y. and C. C. C., 380; Irby *v.* Irby, 25 Beav., 632; Willes *v.* Greenhill, 29 Beav., 376.

[6] 24 Beav., 163.

bankers who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

"If, the firm were altered, and the bond assigned by the original obligees to the new firm, and notice of that assignment given to the debtor, and if after this a balance were due to him from the new firm (the assignees of the bond), then . . . . the customer would be entitled to set off the balance due to him against the bond-debt due from him.

"If, after the bond had been given, it had been assigned to strangers, and no notice of that assignment had been given to the original debtor (the obligor of the bond), then his rights would remain the same . . . and the assignees of the *chose-in-action* would be bound by the equities affecting their assignors.

"But if notice of that assignment had been given to the original debtor, no right of set off would exist for the balance subsequently due by the bankers to the obligor; because the persons entitled to the bond would, as the obligor knew, be different persons from the debtor to him on the general account with whom he had continued to deal.

"If the assignment of the bond had been made to the new firm with notice to the obligor, they would, if debtors on the general account, be liable to the same rights of set-off as if they had been the obligee.

"If after the alteration of the firm, and after the assignment of the bond to the new firm, with notice to the debtor or obligor of that assignment, an assignment had been made of the bond to strangers, and no notice of that second assignment was given to the obligor, then the rights of set-off would still remain to him in equity as against the first assignees of whose assignment he had notice, and the second assignees would be bound by it, because, as I have stated, the assignees of the bond take it subject to all the equities which affect the assignors."[1]

Mutual demands must be in respect of same rights.

Set-off will not be allowed where the mutual demands are between the parties in different rights, as if *A* give a legacy to *B*, and appoint *C* his executor, or executor and residuary legatee, *B* may sue *C* for the legacy, and *C* cannot set off a debt owing by *B* to *C* not as executor, but

[1] As to pleading set-off, see Act X of 1877, chap. viii.

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in *C's* own right.[1] But a defendant may make such admissions in his written statement as to preclude himself from objecting to the set-off at the hearing. However, an admission of assets for payment of the legacy will not have that effect.[2]

Notice to trustees.

When the *cestui que trust* assigns his interest in the trust-fund, the assignee should take care to give notice to the trustees of the assignment. It is not necessary that notice should be given, but it is highly advisable.[3] *First*, in order to prevent a subsequent assignee from gaining priority by giving notice; for notice of the assignment of a *chose-in-action* gives priority, and is equivalent to the possession of personalty capable of actual delivery. The principles upon which the Court acts were thus stated by Sir T. Plumer in *Dearle* v. *Hall*:[4] "Wherever it is intended to complete the transfer of a *chose-in-action*, there is a mode of dealing with it, which a Court of Equity considers tantamount to possession,—namely, notice given to the legal depository of the fund. Where a contract respecting property in the hands of other persons, who have a legal right to the possession, is made behind the back of those in whom the legal estate is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of,—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken there is neglect, and it is fit that it should be understood, that the solicitor who conducts the business for the party advancing the money is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having been made in the equitable

[1] Lewin, 7th Edn., 599; and see Act X of 1877, s. 111, illus. (*a*).
[2] Lewin, 7th Edn., 599; and see *ante*, p. 56.
[3] Lewin, 7th Edn., 600.
[4] 3 Russ., 1.

rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his *cestui que trust*. The original *cestui que trust*, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever, so that he has it in his power to obtain by means of it a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those who may chance to deal with him protect themselves from his fraud? Whatever diligence may be used by a *puisne* incumbrancer or purchaser, whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right, the trustees who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees, and they must be considered as foreseen by those who in transactions of that kind omit to give notice; for they are the consequences which in the experience of mankind usually follow such omissions. To give notice is a matter of no difficulty; and whenever persons, treating for a *chose-in-action*, do not give notice to the trustee or executor, who is the legal holder of the funds, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible in some respects for the easily foreseen consequences of their negligence."[1]

Mortgage.

The assignment may be by way of mortgage, and in the case of mortgages of policies or shares, it would seem that the actual possession of the policy or certificate is immaterial as affecting the priority gained by notice.[2] Where a policy is deposited as security for money advanced, and the intention of the parties was only to give a lien by the

[1] And see Loveridge *v.* Cooper, 3 Russ., 30; Meux *v.* Bell, 1 Hare, 73; *Ex parte* Boulton, 1 DeG. and J., 163; Morris *v.* Cannan, 8 Jur., N. S., 653; *In re* Freshfield's Trust, L. R., 11 Ch. Div., 198; Megji Hansraj *v.* Ramji Joita, 8 Bom H. C. R., O. C., 177.

[2] Foster *v.* Cockerell, 3 C. and F., 456.

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deposit, and not to confer an equitable right on the lender to receive the money, the instrument is not in the order and disposition of the borrower.[1] But if the deposit is made upon an agreement that the depositee shall have conferred upon him a right to the money, then as the debt would pass to the assignee, the instrument which is the title-deed to the debt will pass also.[2] Where a policy was to become void in certain cases, unless it "should have been legally assigned," it was held, that this meant "validly and effectually assigned," that an equitable charge, by mere deposit, came within the exception, and that notice of it to the office was unnecessary.[3]

Secondly.—Notice is necessary to prevent the trustee from paying over the trust-fund to the *cestui que trust*,[4] and in the case of a policy of assurance, to prevent the office from taking a surrender from him.[5]

Thirdly.—Notice is necessary in order to prevent *choses-in-action* in the possession, order, and disposition of an insolvent, or of which he is the reputed owner, from passing to the Official Assignee, for *choses-in-action* are goods and chattels within the reputed-ownership clause of the Insolvent Act.[6] The assignment of a policy of insurance does not take it out of the order and disposition of the assignor, if no notice is given to the insurer.[7] Shares in companies are not things in action within the Act;[8] but debentures of a company by which they undertake to pay a sum of money and interest, and charge the undertaking and property with the payment thereof are within it.[9]

Description of property.

The notice should specify the property charged with reasonable accuracy. A mistake will not vitiate the notice as against a subsequent purchaser, if the fund to be charged is mentioned.[10] Notice by parol is sufficient, but it is better to give it in writing.[11]

[1] Gibson *v.* Overbury, 7 M. & W., 555; Broadbent *v.* Varley, 12 C. B., N. S., 214. [2] Green *v.* Ingham, L. R., 2 C. P., 525.
[3] Dufaur *v.* The Professional Life Assurance Co., 25 Beav., 599.
[4] Jones *v.* Gibbons, 9 Ves., 410.
[5] Fortescue *v.* Barnett, 3 M. & K., 36. [6] 11 & 12 Vict., c. 21, s. 23.
[7] Williams *v.* Thorp, 2 Sim., 257; Green *v.* Ingham, L. R., 2 C. P., 525.
[8] Union Bank of Manchester, *In re* Jackson, L. R., 12 Eq., 354.
[9] *In re* Pryce, L. R., 4 Ch. Div., 685. As to equitable interests in shares, see *Ex parte*, Barry, L. R., 17 Eq., 113; and as to debts, North *v.* Gurney, 1 J. & H., 509.
[10] *Re* Bright's Trusts, 21 Beav., 430; Woodburn *v.* Grant, 22 Beav., 483.
[11] North British Insurance Co. *v.* Hallett, 7 Jur., N. S., 1263; *Ex parte* Agra Bank, *In re* Worcester, L. R., 3 Ch., 555.

What is sufficient notice.

Knowledge of an incumbrance acquired not by notice but *aliunde* is apparently sufficient. In *Lloyd* v. *Banks*,[1] Lord Cairns, L. C., said: "I do not think it would be consistent with the principles upon which this Court has always proceeded, if I were to hold that, under no circumstances, could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee, so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversation, much less by any proof of what would only be constructive notice, but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust. If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate on the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust-fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."[2]

To whom notice to be given.

The person to whom notice is to be given is the person liable.[3] In the case of a company, notice to any officer who represents the company, such as the manager or agent,[4] or a director,[5] or official liquidator,[6] is sufficient. But notice to a shareholder is not.[7] Should the trustee disregard the notice and pay away the money to the *cestui que trust*,

[1] L. R., 3 Ch., 490.
[2] And see *Ex parte* Agra Bank, *In re* Worcester, L. R., 3 Ch., 555.
[3] *Ex parte* M'Turk, 2 Deac., 58.
[4] *Ex parte* Hennessey, 2 Dr. and War., 555; Thompson *v.* Tomkins, 2 Dr. and Sm., 8.
[5] *Ex parte* Stewart, 11 Jur., N. S., 25; *Ex parte* Agra Bank, L. R., 3 Ch., 555.
[6] *Re* Breech Loading Co., L. R., 5 Eq., 284.
[7] Martin *v.* Sedgwick, 9 Beav., 333.

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he will be personally liable.[1] Notice to the solicitor of trustees or of the person liable, is notice to the client.[2] But notice to a solicitor employed in one transaction is not notice to him when employed for another person in a different transaction.[3] The circumstances of a mortgagor being a solicitor and preparing the mortgage-deed, and of the mortgagee employing no other solicitor, are not sufficient to constitute the former the solicitor of the latter, so as to affect him with notice of an incumbrance known to the solicitor.[4]

Agents.

When the agent of a company and the assignor are the same person, notice to the agent is not sufficient.[5]

Notice to one of several trustees.

Notice to one of several trustees is sufficient during his lifetime,[6] but it is better that notice should be given to all.[7] If only one trustee has had notice, and he dies, or ceases to be trustee, a subsequent incumbrancer will gain priority by giving notice to a surviving or other trustee prior to any notice to him by the first incumbrancer.[8]

Notice before trust-fund received.

Notice to persons who are not trustees, though they are likely to be trustees, or before they have actually received the trust-fund, is nugatory.[9]

Bankers.

When funds are in a banker's hands for distribution on a particular day, notice given after business hours on the previous day gives no priority over a notice given on the morning of that day and before the commencement of business.[10]

Trustee purchaser.

A trustee who becomes the purchaser or mortgagee of the interest of his *cestui que trust* should give notice to one of his co-trustees.[11] If a trustee assign to a co-trustee,

[1] Andrews *v.* Bousfield, 10 Beav., 511; Stephens *v.* Venables, 30 Beav., 627.
[2] Rickards *v.* Gledstanes, 4 Giff., 298; Atterbury *v.* Wallis, 8 D. M. G., 454; Sharpe *v.* Foy, L. R. 4 Ch., 35; Rolland *v.* Hart, L. R., 6 Ch., 678.
[3] Lloyd *v.* Attwood, 3 DeG. and J., 614.
[4] Espin *v.* Pemberton, 3 DeG. and J., 547.
[5] *Re* Hennessey, 2 Dr. and War., 555. As to notice to agents or others who have themselves advanced money, see Webster *v.* Webster, 31 Beav., 393; Somerset *v.* Cox, 33 Beav., 634; Megji Hansraj *v.* Ramji Joita, 8 Bom. H. C. R., O. C., 178.
[6] Willes *v.* Greenhill, 4 D. F. J., 147.
[7] Smith *v.* Smith, 2 Cr. and M., 231.
[8] Timson *v.* Ramsbottom, 2 Ke., 35; Meux *v.* Bell, 1 Hare, 73.
[9] Buller *v.* Plunkett, 1 J. and H., 441; Somerset *v.* Cox, 33 Beav., 634; Calisher *v.* Forbes, L. R., 7 Ch., 109; Addison *v.* Cox, L. R., 8 Ch., 76.
[10] Calisher *v.* Forbes, L. R., 7 Ch., 109.
[11] Timson *v.* Ramsbottom, 2 Ke, 35; *Ex parte* Smart, 2 Mon. and A., 60; Commissioners of Public Works *v.* Harby, 23 Beav., 508.

that is sufficient notice,[1] otherwise if he assign to a stranger.[2] When a fund is subject to the trusts of a settlement, and is under the control of the trustees of it, and then is assigned to other trustees of another settlement in trust for a particular person who mortgages, notice should be given to the first trustees who have the fund in their hands.[3] As between the assignor or his representatives and the assignee,[4] or as against a subsequent incumbrancer who has notice of the prior charge, notice is unnecessary.[5]

Non-payment.

It may be observed that the assignee of a debt is not bound to give notice of its nonpayment to the assignor.[6] Where two assignments are contained in one deed, notice of one is not constructive notice of the other.[7]

Mortgagee.

A mortgagee who gives notice has priority over a *cestui que trust* claiming under a declaration of trust, of which no notice has been given.[8]

Immoveable property.

These rules as to notice do not extend to interests in immoveable property as such,[9] neither do they to stock or money directed to be converted, which in equity is immoveable property,[10] though notice is necessary of mortgages of the proceeds of land directed to be sold or mortgaged,[11] or of portions directed to be raised by means of a term, or generally of any charge which can only reach the person entitled in the shape of money.[12]

Stop-order.

Where the subject-matter of the mortgage is a fund in Court, a stop-order, that the fund shall not be transferred without notice to the mortgagee, should be obtained from the officer in charge of the fund. This will be equivalent to notice to the trustees of the fund.[13] Mere notice to the

[1] Browne *v.* Savage, 4 Drew., 635.
[2] *Ibid*; see Willes *v.* Greenhill, 4 D. F. J., 147.
[3] Bridge *v.* Beadon, L. R., 3 Eq., 664; Holt *v.* Dewell, 4 Hare, 447.
[4] *Re* Lowe's Settlement, 30 Beav., 95.
[5] Warburton *v.* Hill, Kay, 470.
[6] Glyn *v* Hood, 1 D. F. J., 334.
[7] *Re* Bright's Trusts, 21 Beav., 430.
[8] Martin *v.* Sedgwick, 9 Beav., 333; Newton *v.* Newton, L. R., 6 Eq., 140. As to the equities between a *cestui que trust* and mortgagee of shares in a company, see Murray *v.* Pinkett, 12 C. and F., 784.
[9] Wiltshire *v.* Rabbits, 14 Sim., 76; Wilmot *v.* Pike, 5 Hare, 14.
[10] *Re* Carew, 16 W. R. (Eng.), 1077.
[11] Foster *v.* Cockrell, 3 C and F., 456; Consol, etc. Co. *v.* Riley, 1 Giff., 371; Lee *v.* Howlett, 2 K. and J., 531.
[12] *Re* Hughes, 2 H. and M., 89; Barnes *v.* Pinkney, 36 L. J., Ch., 815.
[13] Greening *v.* Beckford, 5 Sim., 195; Swayne *v.* Swayne, 11 Beav., 463.

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officers in charge would not be equivalent to a stop-order.[1] Notice to the trustees of a fund before it is paid into Court gives priority over a subsequent incumbrancer of it after it is paid in, though the latter alone obtains a stop-order.[2] A stop-order only operates in respect of a charge existing at the time of the order.[3]

Right to execution of trust.

If a trust has been properly created either by the declaration of the author, or by implication of law, it will not be allowed to fail for want of a trustee.[4] Thus, if property is bequeathed to trustees upon certain trusts, and the trustees die in the lifetime of the testator, the trusts will not be void;[5] or if the trustee disclaims,[6] or is incapable of taking,[7] or if the trustee fail from any other cause, the failure will be supplied by the Court.[8] "I take it," said Wilmot, C. J., "to be a first and fundamental principle in equity, that the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice. A Court of Equity considers devises of trust as distinct substantive devises, standing on their own basis independent of the legal estate, and the legal estate is nothing but the shadow which always follows the trust-estate in the hands of a Court of Equity."[9]

Suit for execution of trust.

If the trustee fails, the *cestui que trust* may institute a suit for the execution of the trust, and the trust will be executed by the Court until trustees can be appointed. "The Court," said Lord Eldon, "will not permit the negligence of the trustee, accident, or other circumstances to disappoint the interests of those for whose benefit the trust is to be executed."[10] "The person who creates a trust," said Wilmot, C. J., "means it should at all events be executed. The individuals named as trustees are only the

[1] Warburton *v.* Hill, Kay, 470.
[2] Livesey *v.* Harding, 23 Beav., 141; see Brearcliffe *v.* Dorrington, 4 DeG. and S., 122.
[3] Macleod *v.* Buchanan, 33 Beav., 234.
[4] White *v.* Baylor, 10 Ir. R., Eq., 53.
[5] Moggridge *v.* Thackwell, 3 Bro. C. C., 528; Attorney-General *v.* Lady Downing, Ambl., 551.
[6] Backhouse *v.* Backhouse, V. C. of England, 20th Decr., 1844, cited Lewin, 7th Edn., 706.
[7] Sonley *v.* The Clockmakers' Co., 1 Bro. C. C., 81
[8] Attorney-General *v.* Stephens, 3 M. and K., 352.
[9] Attorney-General *v.* Lady Downing, Wilm., 21, cited Lewin, 7th Edn., 707.
[10] Brown *v.* Higgs, 8 Ves., 574.

nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office. There is some personalty in every choice of trustees; and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place."[1]

Intention of author of trust carried out.

In executing a trust, the Court acts upon and carries out the intention of the author of the trust, and does not go beyond it, except in cases where the parties have the same common interest, or those who have an adverse interest are consenting. And the Court will, in some cases, act retrospectively, as in directing past maintenance.[2] The difficulty and impracticability of carrying the trust into execution will not prevent the Court from acting. However arduous the trust is, the Court will carry it into execution.[3] However difficult it may be to select the persons intended to be benefited, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merits of the persons who are the objects, yet the Court will execute the trust. If a trust can by any possibility be exercised by the Court, the non-execution by the trustees shall not prejudice the *cestuis que trustent*.[4] If the settlor has laid down a rule for the trusts, or if he has empowered his trustees to act upon a certain state of facts of which the Court can be informed by evidence, and judge as well as the trustees could, the Court can make the judgment as well as the trustees, and when informed by the evidence, can judge what is just and equitable.[5] If no rule has been given by the trustees, the Court will generally act upon the maxim that "equality is equity."[6] If, however, the nature of the trust is such that equal division is impossible, the Court

[1] Attorney-General *v.* Lady Downing, Wilm., 23, cited Lewin, 7th Edn., 708.

[2] Maberly *v.* Turton, 14 Ves., 499; Edwards *v.* Grove, 2 DeG. F. and J., 222.

[3] Pierson *v.* Garnet, 2 Bro. C. C., 46.

[4] Brown *v.* Higgs, 5 Ves., 504.

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

[6] Malim *v.* Keighley, 2 Ves. Jr., 333; Brown *v.* Higgs, 5 Ves., 504; Birch *v.* Wade, 3 V. and B., 198; Burrough *v.* Philcox, 5 My. and Cr., 73; Fordyce *v.* Bridges, 2 Phil., 497; Salusbury *v.* Denton, 3 K. and J., 529; Izod *v.* Izod, 32 Beav., 242

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still acts upon the maxim that if by any possibility the trust can be executed, the Court will do it.[1]

Right to proper trustees.

The *cestui que trust* has a right to have the trust-property administered by proper persons, and by a proper number of persons. If, therefore, a trustee dies,[2] or goes abroad,[3] the *cestui que trust*, even though only in remainder,[4] may sue to have the proper number of trustees filled up.

Suit for appointment of new trustees.

So, if a trustee disclaims the office or refuses to act,[5] or if there is a disability on the part of the trustee to act, as where he takes up his permanent residence abroad,[6] the *cestui que trust* may institute a suit to have him removed and to have a new trustee appointed in his place. The taking up a permanent residence abroad does not *ipso facto* deprive a trustee of his office, but still it is such a disqualification as entitles the *cestui que trust* to have a new trustee appointed.[7] So it is a good ground for the removal of a trustee and the appointment of a new trustee that he has become insolvent,[8] although insolvency, as we have seen (*ante*, p. 131), is not necessarily a disqualification for the office. Again a trustee may be removed if he misapplies the revenues of the trust-property, and grossly misbehaves himself in the execution of the trust,[9] as by renewing a lease for his own benefit,[10] purchasing the trust-property,[11] concurring in a breach of trust,[12] or absconding under a charge of forgery.[13]

"If the trust be under the administration of the Court, and the surviving trustee dies, the appointment of other trustees is not a matter of course, but rests in the discretion of the Court, having regard to the state of the trust at the time."[14]

[1] As to powers, see Lewin, 7th Edn., 708.
[2] Hibbard *v.* Lamb, Ambl., 309.
[3] Buchanan *v.* Hamilton, 5 Ves., 722.
[4] Finlay *v.* Howard, 2 Dru. and War., 490.
[5] Wood *v.* Stane, 8 Price, 613; *Anon.*, 4 Ir. Eq. Rep., 700.
[6] *In re* Ledwich, 4 Ir. Eq. Rep; Commissioners of Charitable Donations *v.* Archbold, 11 Ir. Eq. Rep., 187; O'Reilly *v.* Alderson, 8 Hare, 101.
[7] O'Reilly *v.* Alderson, 8 Hare, 101.
[8] Bainbrigge *v.* Blair, 1 Beav., 495; Commissioners of Charitable Donations *v.* Archbold, 11 Ir. Eq. Rep., 187; Harris *v.* Harris, 29 Beav., 107; *In re* Adam's Trust, L. R., 12 Ch. Div., 634.
[9] *In re* Powell, 6 N. W. P., 54; Mayor of Coventry *v.* The Attorney-General, 7 Bro. P. C., 235; Buckeridge *v.* Glasse, 1 Cr. and Ph., 126.
[10] *Ex parte* Phelps, 9 Mod., 357.
[11] *Ex parte* Reynolds, 5 Ves., 707.
[12] *Ibid.*
[13] Millard *v.* Eyre, 2 Ves. Jr., 94.
[14] Lewin, 7th Edn., 720.

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In a suit filed by the *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, nor to impute to him any corrupt or improper motive in the execution of the trust, nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*, or of some change in his situation; but it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility.[1]

Costs.

If the trustee is removed on the ground of misconduct, he must bear the costs of the suit, as it is an act necessitated by himself.[2]

Grounds for removal of trustee.

The Court will not discharge a trustee merely because, in the exercise of his discretion, he refuses to do some act required by his *cestui que trust*, as where he refuses to consent to a particular investment, even though the trustee is willing to be relieved from the trust.[3] Nor will the Court remove a trustee because he has been under a misunderstanding as to his duty.[4]

Where it appeared that the co-trustees were unwilling to act in the trust with the trustee who was sought to be discharged, and he insisted on being continued, Lord Nottingham said,—"I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it;" and without any reflection on the trustee, declared that he should meddle no further in the trust.[5]

Where the Court appoints new trustees, it will not give them the power of appointing new trustees in their stead.[6]

Rules for selecting new trustees.

In appointing new trustees, the fitness of the proposed new trustee is a matter for consideration. The author of the trust is unfettered in his selection of trustees, but when the Court appoints new trustees, it requires to be satisfied as to their fitness for the office. Near relations of the *cestui que trust*, though they may be appointed by the person creating the trust, will not be appointed by the Court except in cases of absolute necessity.[7]

[1] Earl of Portsmouth *v.* Fellows, 5 Mad., 450.
[2] *Ex parte* Greenhouse, 1 Mad., 92.
[3] Pepper *v.* Tuckey, 2 J and Lat., 95; Lee *v.* Young, 2 Y. and C. C. C., 532.
[4] Attorney-General *v.* The Coopers' Co., 19 Ves., 192; Attorney-General *v.* Caius College, 2 Keen, 150.
[5] Uvedale *v.* Ettrick, 2 Ch. Cas., 130.
[6] Oglander *v.* Oglander, 2 DeG. and Sm., 381; Holder *v.* Durbin, 11 Beav., 594.
[7] Wilding *v.* Bolder, 21 Beav., 222.