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TO THE HONORABLE

HORACE GRAY, JR.,

ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS,

THIS WORK IS INSCRIBED IN ACKNOWLEDGMENT OF THE ASSISTANCE RECEIVED
FROM HIS JUDICIAL OPINIONS, AND FROM HIS PERSONAL INTEREST
IN THE PROGRESS OF ITS CONSTRUCTION,

BY THE AUTHOR.

PREFACE

TO THE SIXTH EDITION.

FOR nearly forty years Mr. Perry's treatise on the Law of Trusts and Trustees has been used and referred to as an authority by judges and lawyers, and has often been quoted in the opinions of courts. Although during that period there have been an unusually large number of occasions for new application of the principles expounded in the book, it has more than held its own with the newer books on trusts. The editor of the Sixth Edition has felt that the text which has stood the severe tests that have been imposed upon it ought not to be materially changed.

Accordingly the new citations and the new notes of the Sixth Edition have been added to the book in such a way as to be readily distinguished from the original text and notes as changed by the previous editions. Citations of new cases in support of the text have been enclosed in brackets and usually made part of the numbered notes. The changes in the text, or additions that have seemed advisable, have also been enclosed in brackets. Fortunately these have been very few. Wherever the development of the law by reason of new decisions has made the text inadequate, lettered notes have been added.

As the citations added by the editor of the Fifth Edition were in the form of lettered notes, and as three sets of notes were not advisable, it has been necessary to incorporate the citations and notes added by him into the additions made by the present editor. This has made necessary an examination of all the citations added in the Fifth Edition. Most of these have been retained and used in the new notes and other additions. The new notes are therefore based chiefly upon the decisions reported since 1899, the date of the Fifth Edition, and upon the citations added in the Fifth Edition, covering, altogether, a period of twenty years. In some instances the editor has found it necessary to examine and cite decisions of an earlier period. Every case cited in brackets and in the lettered notes has been read by the editor, with the exception of those cited in a lettered note to § 21 on the topic of business combinations, sometimes called trusts. This topic seemed so far outside the scope of the book that the present editor has not attempted to deal with it, but has left the note as it appeared in the Fifth Edition.

Citations of statutes have been brought down to date, and new ones have been added where it seemed advisable to do so. Many cross references have been added to aid the reader and to avoid the unnecessary repetition of notes. The index has been revised and enlarged to cover the new notes.

The book has been increased in size by about two hundred pages by reason of the additions, and about twenty-seven hundred new cases have been cited.

EDWIN A. HOWES, JR.

BOSTON, July, 1910.

PREFACE

TO THE SECOND EDITION.

THE rapid absorption of the first edition of this work into the hands of the profession has not left to the Author so much time as could have been desired for the preparation of a second edition; nor could the necessary work have been done at all, unless it had been constantly in his hands. Even before the first edition had been sent forth, work was done, and materials accumulated, to improve the second, if it should ever be called for. At no time has there been a relaxation of thought and study upon the subject. The new cases have been assimilated as the Reports came along, and old cases have been added as they fell under notice in business or study. The Author owes a debt of gratitude to his professional brethren in every part of the country, for many valuable criticisms, suggestions, and references to authorities. Thirty-three new sections upon the trusts that arise under power of sale mortgages, and deeds of trust in the nature of mortgages, have been added; and many new sections upon important questions are scattered through the work. The numbers of the sections of the first edition

are preserved, that there may be no confusion in the citations of the two editions.

The Author has been reluctant to swell the book into two volumes, but it was found impossible to compress the materials into a single volume of a form and size reasonably convenient for use. In sending forth this edition the Author hopes that it may do something to lighten the toils of a laborious profession, and that it may meet with the same kind indulgence which was so liberally bestowed upon the first.

SALEM, MASS., Sept. 15, 1874.

PREFACE

TO THE FIRST EDITION.

AN American book upon the subject of Trusts has long been needed by the profession. At the solicitation of too partial friends, the writer was induced to undertake its preparation. The result is now given to the public.

The writer of a law-book would be inexcusable if he failed to use all the materials at his command, which could in any way enable him to state and illustrate the law. The treatises and opinions of eminent writers, as well as the reports of the decisions and opinions of judges, must all be studied and mastered. And where the book is intended for the daily use of the lawyer in busy practice, it must contain a notice and citation of the latest cases and authorities. To this end all the treatises and essays, as well as the reported decisions, upon the subject, have been used.

In addition to the original opinions of judges contained in the Reports, the excellent treatise on the Law of Trustees, by Mr. Hill, and the notes and commentaries of the learned American editors, have been carefully considered upon all the subjects treated by them.

The most complete work upon the Law of Trusts is the fifth edition of Mr. Lewin's Treatise. This work, first printed more than thirty years ago, has received

in its various editions the most careful emendations, corrections, and additions by its author, until in the last edition it has grown into a remarkably full and clear exposition of the Law of Trusts, as administered in England.

It has been the constant object of the writer to cover all the ground embraced by the treatises of Mr. Lewin and Mr. Hill, so far as the same is important to the American lawyer; and, in addition, to include such other subjects and matters, relating to the Law of Trusts, not treated fully in those works, as are useful and necessary in American practice.

Perhaps the accumulation of authorities upon the many topics discussed may call for some explanation. A large and increasing number of States and courts are yearly sending out a great number of volumes of Reports. Few lawyers can have access to the whole number, but all desire to see the cases in their own State Reports bearing upon each proposition of the text. It has therefore been the aim of the writer to cite the cases in all the States, although the citation of a few leading cases is always sufficient to sustain an elementary proposition. He cannot hope that he has cited all the cases upon the many matters treated; but it has been his purpose to do so, and this has caused an accumulation of cases which to some may seem unnecessary.

Conscious of defects in the execution of his work, he trusts that a liberal profession will rather consider how much of a difficult task has been accomplished, than how much has been omitted or imperfectly done.

The writer cannot send this book forth to the public without acknowledging the constant kindness and encouragement which he has received from his friends during the labor of its composition; and it is his espe-

cial duty and pleasure to acknowledge his obligations to his friend and associate in business for nearly twenty years, WILLIAM CROWNINSHIELD ENDICOTT, Esquire, whose sound learning and clear judgment have been a never-failing resource in matters of doubt and difficulty, and whose refined and severe taste has been freely employed in pruning redundancies and softening asperities of manner and style.

SALEM, MASS., Nov., 1871.

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LAW OF TRUSTS.

CHAPTER I.

INTRODUCTION.

ORIGIN, HISTORY, DEFINITION, AND DIVISION OR CLASSIFICATION OF TRUSTS.

§ 1. The general nature of trusts.
§ 2. The technical nature of trusts, and their origin in the *fidei commissa* of the Roman law.
§ 3. The origin of uses.
§ 4. The inconveniences that arose from the prevalence of uses.
§ 5. The statute of uses.
§§ 6, 7. The effect of the statute of uses, and the origin of trusts.
§§ 8, 9, 10. Developments of trusts in England and America.
§ 11. Advantages of the late adoption of trusts in America.
§ 12. Object of this treatise.
§§ 13–17. Definition of trusts.
Classification of trusts.
§ 18. Simple and special trusts.
§ 19. Ministerial and discretionary trusts.
§ 20. A mixed trust and power, and a power annexed to a trust.
§ 21. Legal and illegal trusts.
§ 22. Public and private trusts.
§ 23. Duration of a private trust and of a public trust.
§§ 24–27. Express trusts, implied trusts, resulting trusts, and constructive trusts.

§ 1. In the earlier states of society the rules that govern the ownership, disposition, and use of property are simple and of easy application. But as States increase, as property accumulates, and the business and relations of life become more complex, the rules of law which the new complications demand become themselves complicated, and sometimes difficult to understand and apply. The law, doctrine, and learning of trusts thus had a late origin and a slow and gradual

development. The word "trust," in its popular and broadest sense, embraces a multitude of relations, duties, and responsibilities. Thus, executors and administrators, guardians of infants and lunatics, assignees in insolvency and bankruptcy, bailees, factors, agents, commission merchants, and common carriers, as well as the officers of public and private corporations, all exercise a kind of trust. Indeed, one definition of a trustee is "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." This definition embraces all the trusts and offices above named, but the law in relation to many, if not all of them, is or may be administered in the common-law courts. It is not of the law of such trusts that this treatise concerns itself.

§ 2. The trusts here treated are defined to be "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence."[1] Another author says that "a trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party."[2] Such trusts originated, and were first defined and reduced to practice, under the jurisdiction of courts by the civil law. It was a rule of that law that a testator could not name a devisee to succeed the first devisee of property, but the first devisee took the absolute legal and beneficial ownership of the property; that is, a testator could not direct and control the use of his property after his death. This rule was modified so far that a testator might name an heir to succeed, if the first heir died too young to make a will, but in all other cases the testator could only rely upon the good faith of the first taker of his property, to bestow the use according to his directions. This trust or confidence was called *fidei commissum*, but there were no means whereby the

[1] Stair's Institutions of the Laws of Scotland, B. IV. tit. 6, § 2, p. 591; § 3, pp. 592–594.

[2] Erskine's Institutes of the Laws of Scotland, B. III. p. 454.

performance of the commission could be compelled. It was called *infirmum* or *precarium*, because it depended upon the personal inclination, integrity, and good faith of the person trusted. There were many of these *imperfect* trusts, where in conscience the first taker was bound to give the beneficial use, or to transfer the property itself, to a third person. Such third persons had an equitable, moral claim or right, but no legal remedy. Under these circumstances, application was made to the Emperor Augustus, and he directed the consuls to interpose their authority, and compel the execution of such trusts. Finally a prætor was appointed, called *fidei commissarius*, who had jurisdiction over all *fidei commissa*, and full power to give adequate relief in all proper cases.[1]

§ 3. It is supposed that these *fidei commissa* were the models of uses which were afterwards introduced into England by the clergy to elude and avoid the operation of the statutes of mortmain. After the passing of those statutes, which were intended to forbid and prevent the accumulation of the lands of the kingdom in the hands of religious houses and corporations, it became the practice to convey lands to one person for the use of another, or for the use of a corporation. Thus the legal title was in one individual, but the beneficial use was in another. At this time the writ of subpœna was contrived, which issued out of chancery, and compelled a person who held a legal title to another's use to answer in chancery, and to perform and execute the use. Thus uses were introduced in England to circumvent the public policy of the kingdom and to avoid the statutes of mortmain, and the writ of subpœna was introduced after the model of the jurisdiction of the *prætor commissarius* to prevent those persons who were trusted to execute a use, from committing a fraud in refusing to perform it.[2] These contrivances, originating in evasions

[1] Ulpianus, tit. 25; Inst. Lib. II. tit. 23, § 2; 2 Fonb. Eq. p. 2; 1 Cruise, Dig. p. 398; and see Willis on Trustees, pp. 1–8, and notes; Bacon, Readings upon the Stat. of Uses, Vol. XIV. pp. 301, 302, Boston ed. 1861.

[2] Att. Gen. v. Sands, Hard. 491. "The parents of trusts were *fraud and fear*, and a court of conscience was the *nurse*."

of the law, were laid hold of during the civil wars of York and Lancaster to facilitate family settlements, and to prevent the forfeiture of estates for treason during those unhappy strifes. Thus conveyances to uses became the common form of transferring land.(*a*)

§ 4. Under this practice a very refined system grew up. The legal estate was in one person, and the use and enjoyment was in another. There were two titles and estates in the same land, — that of the feoffee, who was the legal owner, and yet had nothing, and that of the *cestui que use*, who had the whole beneficial right and interest, and yet had no legal right or title. He had nevertheless a substantial interest and estate which he could convey, devise, and otherwise deal with, as with tangible property. Great inconveniences arose from this double system. Bacon's Abridgment, Uses and Trusts, sums them up as follows: "By this course of putting lands into uses there were many inconveniences, as this use, which grew first from a reasonable cause, namely, to give men the power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights, as, namely, a

(*a*) In Pollock & Maitland's recent History of the English Law, Vol. II., p. 226, 227, it is said: "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust or confidence.' In tracing its embryonic history, we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*. True that the two words are in course of time confused, so that . . . the scribe of the charter will write *ad opus* (*Johannis*) or *ad usum* (*Johannis*) indifferently, or the fuller formula *ad opus et ad usum;* nevertheless, the earliest history of 'the use' is the early history of the phrase *ad opus*. Now this, both in France and in England, we may find in very ancient days. . . . In the thirteenth century we commonly find that where there is what to our eyes is an informal agency, this term *ad opus* is used to describe it. Outside the ecclesiastical sphere, there is but little talk of 'procuration;' there is no current word that is equivalent to our *agent*." See also Mr. Maitland's article on the Origin of Uses in 8 Harv. L. Rev. 127.

man that had cause to sue for his land knew not against whom to bring his action nor who was the owner of it. The wife was defrauded of her thirds, the husband of being tenant by curtesy, the lord of his wardship, relief, heriot, and escheat, the creditor of his extent for debt, the poor tenant of his lease; for these rights and duties were given by law from him that was owner of the land, and none other, which was now the feoffee of the trust."

§ 5. Many statutes were passed during a series of years to cure or to prevent these mischiefs or hardships. At last the statute of uses, 27 Hen. VIII. c. 10, was enacted, which converted the beneficial use into the legal ownership; that is to say, if lands were conveyed to A. to the use of B., the statute executed or converted the use into a legal estate in B., and divested all title out of A. By the operation of this statute the Court of Chancery lost for a time much of its business; for after the statute the legal title as well as the beneficial use was in the *cestui que use*, and he could deal with his estate as his own in every respect; he was no longer compelled to appeal to the conscience of the feoffee to uses, nor to the equity powers of the court.

§ 6. But there were certain gifts, grants, or estates to uses which the statute did not touch, and which remained as before the statute. Thus, if A. enfeoffed B. to the use of C., in trust for D., the statute immediately transferred the legal estate to C., and extinguished all interest in B., but it did not touch or affect the use or trust for D. It had been settled before the statute, as a rule of property, that a use could not be raised upon a use. At law such use raised upon a use was simply void. And at law it was held that the statute extended only to execute the first use by transferring the legal estate from B. to C., and that all its powers were exhausted in that act, and thus C. held a legal title in trust or for the use of D., which the statute did not execute.[1] And although C. was

[1] Reid *v.* Gordon, 35 Md. 183; Croxall *v.* Shererd, 5 Wall. 268; Matthews *v.* Ward, 10 G. & J. 443.

bound in equity and good conscience to give to D. the use and enjoyment of the estate, there was no remedy for D. at law, and he could only proceed as before the statute by subpœna in chancery to compel C. to perform the trust. Again, if A. conveyed land to B. for a term of years for the use of C., the statute did not execute the legal title in C., for it was held, under the words of the statute, that it only executed the legal titles of estates of which the first taker was *seized*, and that according to the use of the words in the law no one could be said to be *seized* of a term of years. Thus in this last case C. could have relief only by subpœna in chancery. And, again, the statute did not execute the legal title to the *cestui que use*, if the first taker was to perform any active duties in regard to the estate; as if he was to hold the same for a certain time, or if he was to improve or lease the same and pay over the rents and profits to the use of C., the statute left the estate where it was before, and C. had no redress for any abuse of the trust or use except by subpœna in chancery. And, further, the statute did not apply at all to personal chattels given to one for the use and benefit of another. In these four cases the parties beneficially interested in the property, and equitably owning the whole of it, had no remedy at law for any withholding of their rights. The Court of Chancery laid hold of these four instances of a want of redress at law, and by its writ of subpœna compelled the performance of these four *uses* under the name of *trusts*. The legislation of our States now recognizes trusts, and provisions and rules are made for their creation, regulation, and duration, and in some States for their administration; but they are still left to the exclusive cognizance and jurisdiction of courts of equity, or to the equity powers of the common-law courts.

§ 7. Thus interests in land became of three kinds: first, the estate in the land itself, the *old common-law fee;* secondly, the *use*, which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and use were joined and made but one legal estate, not differing from the old common-law fee except in the man-

ner of its creation; and, thirdly, the trust of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court, as the use was before the statute.[1] The statute of uses has never been repealed, and is still in force in many of the United States, so that if a trust should now be created in such form that the statute would have executed it if it had been a use, the statute will now execute the trust by giving the *cestui que trust* the legal title as well as the equitable without any action on the part of the trustee.[2]

§ 8. It is thus seen that our present trusts are almost identical with the old uses.[3] Of course the growth of this system of jurisprudence has been slow and gradual, and it has sometimes fallen into inconsistencies and absurdities; but the abilities of upright and wise chancellors, aided by a learned and watchful profession, have finally given a regular and simple form to the administration of trusts. Lord Chief Justice Mansfield observed that in his opinion "trusts were not on a true foundation until Lord Nottingham held the great seal. By steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised. Trusts are made to answer the exigencies of families, and all other purposes, without producing one of the inconveniences, frauds, or private mischiefs which the statute of Henry VIII. c. 10, was intended to avoid. The forum where they are adjudged is the only difference between trusts and legal estates."[4] During the development of this system a vast number of distinctions and subtleties have been established and exploded. It is not necessary to follow them, as many of them never obtained a foothold in America.[5]

[1] Per Lord Hardwicke, in Willet *v.* Sandford, 1 Ves. 186; Coryton *v.* Helyar, 2 Cox, 342.

[2] Shep. Touch. 508; *post*, § 296.

[3] Penny *v.* Allen, 7 De G. M. & G. 422.

[4] Burgess *v.* Wheate, 1 Eden, 223; Philips *v.* Brydges, 3 Ves. 127; Kemp *v.* Kemp, 5 Ves. 858.

[5] See them stated in Lewin on Trusts, pp. 2-17.

§ 9. Lord Nottingham became chancellor in 1673; consequently, when America was first settled, the doctrine of trusts had not been reduced to a system. Nor was there occasion for many years to apply the doctrine to the affairs of the colonists. Lands were abundant and cheap, and could be had by the taking; personal property had not accumulated; habits of life were simple and industrious; and there was little occasion for family or other settlements that rendered the intervention of a trustee either convenient or necessary. The statute of uses was passed before the colonists left England, and it became a part of the law of many, if not all the colonies. The system of trusts which grew upon the statute of uses was adopted in America much later. Even in England the development of the equitable jurisdiction of chancery met with great opposition, upon the ground, among others, that it subjected the laws of the realm to the arbitrary discretion of one man, or "made the rights of the subject depend upon the length of the chancellor's foot." Considering this opposition to the equity jurisdiction of the Court of Chancery in England, considering that trusts were not established upon a reasonable foundation when the colonists left England, and considering the pecuniary condition of America, it is not surprising that it was long before the system received any countenance here.

§ 10. Mr. Story says that there was no equity jurisdiction in any State prior to the Revolution, or at least a very imperfect and irregular administration of it.[1] There was an attempt to create such a jurisdiction in the province of New York in the governor and council; but it was so unpopular[2] that it did little or no business. A court was established in Massachusetts in 1692, with full equity powers; but the act failed to receive the approval of the king in council.[3] In 1720 a Court of Chancery was established in Pennsylvania, and con-

[1] 1 Story, Eq. Jur. § 56; 1 Dane, Ab. c. 1, art. 7, § 51; 7 id. c. 225, arts. 1, 2; 2 Swift's Dig. 15; 3 Tuck. Black. App. 7.

[2] 1 John. Ch., Preface.

[3] Ancient Char. c. 222; 1 Story, Eq. Jur. § 56.

tinued to administer a jurisdiction in equity in a separate court until 1736. And it is probable that some of the principles of equity were administered in the common-law courts of all the colonies, in order to relieve suitors from hardships which the stricter rules of the common law were unable to effect. In New York, New Jersey, Virginia, Pennsylvania, and South Carolina, the governor of the province was clothed with the power and duty of the chancellor.[1] Since the Revolution, equity jurisdiction as a system has been of slow growth, and it is only since the beginning of this century that it has received its present development in America. As property has increased, and pecuniary affairs have become complex, and it has become necessary or convenient to make marriage settlements, or settlements upon families, children, relations, or dependants, and upon charities, the English system of trusts, fully grown, has been introduced into most of the States, and they have conferred full equity powers either upon their common-law courts, or they have established separate courts with an equity jurisdiction very similar to the jurisdiction of the Lord Chancellor in the High Court of Chancery in England.[2]

§ 11. Mr. Story further observes that it is a favorable circumstance that jurisdiction in equity was conferred upon the courts in America at so late a period, and therefore they did not become acquainted with the system until it had been settled upon a broad and rational foundation;[3] thus they were saved from crude and unintelligent opinions and judgments, which must have been given in the then condition of the law in England, and of the profession in America. These judgments must of necessity have formed a body of precedents which would have continued to plague the profession and the courts, and would have marred the symmetry of the system. As now established, the doctrine of equity and of trusts in

[1] See Equity in Pennsylvania, a Lecture by William H. Rawle, Esq., McKay & Brother, Philadelphia, 1869.

[2] 1 Story, Eq. Jur. § 56, and notes.

[3] 1 Story, Eq. Jur. § 58.

the United States is a well-formed system; and Mr. Story thinks it even more symmetrical than the original system in England.

§ 12. It is not the purpose of this treatise to trace the rise and growth of the law of trusts in each one of the States. It is, on the other hand, its purpose to state the general principles which prevail in all the States. It is not possible to know or to state the legislation of so many States upon the various matters connected with the administration of trusts. The intelligent lawyer must do this for himself, when the questions before him depend upon the statutes of his State rather than upon the general principles common to all the States.[1]

§ 13. Sir Edward Coke's definition of a *use* has been adopted as an accurate legal description and definition of a *trust*. In his words applied to a use, "a trust is a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpœna in chancery."[2] The *confidence* here spoken of need not be *expressly* reposed by one party in another, for the law frequently *implies* or *construes* it to arise out of transactions between parties, when neither party supposed at the time that a trust was created between them. The trust or confidence is a thing distinguished from *legal* property, or legal *right* to property. It is neither *jus in re* nor *jus ad rem*,[3] and so the confidence may not always be reposed by a person other than the trustee, for any person may convert himself into a trustee, and give from his own acts an

[1] See 4 Kent, Com. 163, and notes. See Preface to Campbell and Cambreleng's Amer. Chan. Dig. (1828); 1 Fonb. Eq. 11-20, by Laussat, 1831; 1 Amer. Jurist, 314.

[2] Co. Litt. 272 b. A trust exists where the legal interest is in one person, and the equitable interest in another. Wallace *v.* Wainwright, 87 Penn. St. 263.

[3] Wainewright *v.* Elwell, 1 Mad. 336, Bac. Uses, 5.

equitable right to another person, as *cestui que trust*. But no person can be both trustee and *cestui que trust* at the same time, for no person can sue a subpœna against himself. Therefore, if an equitable estate and a legal estate meet in the same person, the trust or confidence is extinguished, for the equitable estate merges in the legal estate. As when a father holds the legal title to land in trust for an only child, and the father dies, such legal title descends to the child as only heir, and thus both estates meet in the same person.[1] But both estates must be commensurate with each other, otherwise there can be no merger.[2]

§ 14. Again, a trust or confidence is something collateral to the land, and not part or parcel of it. Thus a charge, an incumbrance, or a term of years is a legal title in, or issuing out of, the land itself, and binds every person, however he may come into possession of the estate. The trust or confidence is an incident to the land, and so far collateral that it does not go inseparably with it. Thus it only charges those who are privy in the estate. If the trustee is disseized, or if he is turned out of the possession by a person holding a paramount title, the disseizor is not bound by the trust or confidence, because there is no privity of estate between a disseizor and disseizee. And so there must be privity between the persons to be bound by the trust; as, if a trustee dies, the legal estate will descend to his heir, who will be bound by the trust, because there is both privity of estate and of person in such

[1] Goodright *v.* Wells, Doug. 771; Selby *v.* Alston, 3 Ves. 339; Harwood *v.* Oglander, 8 Ves. 127; Philips *v.* Brydges, 3 Ves. 126; Wade *v.* Paget, 1 Bro. Ch. 363; 1 Cox, 76; Finch's Case, 4 Inst. 85, 3d Res.; Creagh *v.* Blood, 3 Jo. & La. 133. So where one of the beneficiaries is also trustee, to the extent of such trustee's personal interest. Bolles *v.* State Trust Co., 27 N. J. Eq. 308.

[2] Philips *v.* Brydges, 3 Ves. 125; Robinson *v.* Cuming, T. Talb. 164, 1 Atk. 473; Boteler *v.* Allington, 1 Bro. Ch. 72; Kendal *v.* Micfeild, Barn. 47; Buchanan *v.* Harrison, 1 John. & Hem. 662; Habergham *v.* Vincent, 2 Ves. Jr. 204; Merest *v.* James, 6 Mad. 116; Canning *v.* Hicks, 2 Ch. Cas. 187, 1 Vern. 412; Tabor *v.* Grover, 2 Vern. 367, 1 Eq. Cas. Ab. 328; Clerkson *v.* Bowyer, 2 Vern. 66, 193.

a case. And so if the trustee sell the estate to a purchaser with full notice of the trust or confidence, or if he transfer the estate to a volunteer without consideration, the estate and the persons to whom it comes in such manner will be bound by the trust, because there is both privity of estate and of persons. But if the trustee sells the estate to a third person for a valuable consideration, without notice of the trust, neither the estate nor the purchaser for value and without notice will be bound by the trust, for there is in such case no privity between the persons.[1]

§ 15. All those persons who take under the trustee by operation of law are privies, both in estate and in person, to the trustee. Thus those who take as heirs under the trustee, or as tenants in dower or curtesy, or by extent of an execution,[2] or by an assignment in insolvency or bankruptcy, are bound by the trust. It has been thought that a lord, who takes by an escheat or by a title paramount, would not be bound by the trust; but the point has not been adjudged.[3]

§ 16. The doctrines of trusts are equally applicable to real and personal estate, and the same rules will govern trusts in both kinds of property.

§ 17. The *cestui que trust* has *no remedy except by subpœna in chancery;* that is, in some court with an equity jurisdiction, adequate to decree relief.[4] The *cestui que trust* cannot maintain a real action upon his equitable title, but such action

[1] Finch's Case, 4 Inst. 85, 1st Res.; Gilbert on Uses, 429.

[2] Leake *v.* Leake, 5 Ir. Eq. 366.

[3] Burgess *v.* Wheate, 1 Eden, 203.

[4] Stuart *v.* Mellish, 2 Atk. 612; Allen *v.* Imlett, Holt, 641; Holland's Case, Styl. 41; Queen *v.* Orton, 14 Q. B. 139; Vanderstegen *v.* Witham, 6 M. & W. 457; Bond *v.* Nurse, 10 Q. B. 244; Edwards *v.* Lowndes, 1 El. & Bl. 81; Drake *v.* Pywall, 1 H. & C. 78; Miller's Case, Freem. 283; Witter *v.* Witter, 3 P. Wms. 102; King *v.* Jenkins, 3 Dow. & R. 41; Edwards *v.* Graves, Hob. 265; Farrington *v.* Knightly, 1 P. Wms. 549; McCartney *v.* Bostwick, 32 N. Y. 33; Dorsey *v.* Garcey, 30 Md. 489.

must be brought in the name of the trustee.[1] There is, however, this exception, the *cestui que trust* may maintain a real action upon his equitable title against a stranger who shows no title, or no title under the trustee.[2] But the trustee may successfully defend the legal title against a suit at common law by the *cestui que trust* unless the trust has ceased, or the trustee is enjoined by a court of equity.[3] And so the grantee of the trustee can defend such action, even though the grant may be a breach of trust.[4] At one time the common-law courts attempted to punish trustees for a breach of trust in damages, as upon an implied contract,[5] but the exercise of such an authority was soon abandoned.[6] And the rule of confining the administration of trusts to the courts of equity has been carried so far that the Court of King's Bench may issue prohibitions, forbidding spiritual courts from intermeddling with a trust.[7] But a bill in equity cannot be maintained simply to establish the fact of a trust, no other relief being sought, even where its existence is denied; if, however, the supposed trustee is about to leave the jurisdiction, so that no relief could be obtained, the court will entertain the bill,

[1] Davis *v.* Charles River R. Co., 11 Cush. 506; Raymond *v.* Holden, 2 Cush. 268; Chapin *v.* Universalist Soc., 8 Gray, 581; Crane *v.* Crane, 4 Gray, 323; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Baptist Soc. *v.* Hazen, 100 Mass. 322; Mordecai *v.* Parker, 3 Dev. 425; Cox *v.* Walker, 26 Maine, 504; Matthews *v.* Ward, 10 G. & J. 443; Beach *v.* Beach, 14 Vt. 28; Wright *v.* Douglass, 3 Barb. 559; Moore *v.* Burnet, 11 Ohio, 334; Hopkins *v.* Ward, 6 Munf. 38; Daggett *v.* Hart, 5 Fla. 215; Goodtitle *v.* Jones, 7 T. R. 47.

[2] Stearns *v.* Palmer, 10 Met. 35; Queen *v.* Abrahams, 4 Q. B. 157; Roper *v.* Holland, 3 Ad. & El. 99; Sloper *v.* Cottrell, 2 Jur. N. S. 1046.

[3] Obert *v.* Bordine, 1 Spencer, 394; Nicoll *v.* Walworth, 4 Denio, 385; Stearns *v.* Palmer, 10 Met. 35.

[4] Stearns *v.* Palmer, 10 Met. 35; Canoy *v.* Troutman, 7 Ired. 155; Taylor *v.* King, 6 Munf. 358; Reece *v.* Allen, 5 Gilm. 241.

[5] Megod's Case, Godb. 64; Jevon *v.* Bush, 1 Vern. 344; Smith *v.* Jameson, 5 T. R. 603, 1 Eq. Cas. Ab. 384, D. A.

[6] Barnadiston *v.* Soame, 7 St. Trials, 443; Sturt *v.* Mellish, 2 Atk. 612; Holland's Case, Styl. 41; Allen *v.* Imlett, Holt, 14; Burnett *v.* Preston, 17 Ind. 291.

[7] Petit *v.* Smith, 1 P. Wms. 7; Edwards *v.* Freeman, 2 P. Wms. 441; Barker *v.* May, 4 M. & R. 386; *Ex parte* Jenkins, 1 B. & C. 655.

and declare the trust if proved, and retain the bill for further action.[1] In Pennsylvania, ejectment is an equitable action, and may be maintained by the *cestui que trust*, even against the trustee, when the former is entitled to the possession.[2]

§ 18. Trusts are divided into *simple* and *special* trusts. A *simple* trust is a simple conveyance of property to one upon trust for another, without further specifications or directions. In such case the law regulates the trust, and the *cestui que trust* has the right of possession and of disposing of the property, and he may call upon the trustee to execute such conveyances of the legal estate as are necessary. A *special* trust is where special and particular duties are pointed out to be performed by the trustee. In such cases he is not a mere passive agent, but he has active duties to perform, as when an estate is given to a person to sell, and from the proceeds to pay the debts of the settlor.

§ 19. Trusts have been further divided into *ministerial* and *discretionary* trusts. A trust to do a simple act, as to convey to the *cestui que trust*, at his request, is a ministerial trust, as it is a mere ministerial or instrumental act requiring the exercise of no judgment or discretion; but if a choice of time, manner, or place is given to the trustee, or if he must use his best judgment in the execution of the trust, it is a *discretionary* trust.[3] Mr. Fearne contends that a trust to sell is a ministerial trust, for the price is not arbitrary, nor at the trustee's discretion, but is to be the best that can be obtained;[4] but Mr. Lewin insists that it is a discretionary trust, as there is much room for judgment in the proceeding,[5] and it

[1] Baylies *v.* Payson, 5 Allen, 473; Price *v.* Minot, 107 Mass. 62.

[2] Kennedy *v.* Fury, 1 Dall. 76; Presbyterian Cong. *v.* Johnston, 1 W. & S. 56; School, &c. *v.* Dunkleberger, 6 Barr, 29.

[3] Att. Gen. *v.* Gleg, 1 Atk. 356; Cole *v.* Wade, 16 Ves. 27; Gower *v.* Mainwaring, 2 Ves. 87; Hibbard *v.* Lamb, Amb. 309; Potter *v.* Chapman, Amb. 98; Att. Gen. *v.* Scott, 1 Ves. 413, 4 Kent, Com. 304, 305.

[4] Fearne's P. W. 313.

[5] Lewin on Trusts, 19; King *v.* Bellord, 1 Hem. & Mil. 343; Robson

may be added that there is room for skill in procuring the best possible price. But the distinction is not very important, as the duties of a trustee for sale are the same, whether the trust is called ministerial or discretionary.

§ 20. There is a mixed *trust and power*, as where the settlor sketches the outline of a trust and leaves the details to be settled and carried into effect, according to the best judgment of his trustees. The power joined to the trust in such case is *imperative* and must be exercised; but the mode of its execution is a matter of judgment and *discretionary*. But this kind of trust and power is not to be confounded *with a trust to which a power is annexed*. In this case the trust is complete in itself, and the power is a simple addition, which may or may not be exercised, as the trustee shall choose, as where lands are given to trustees for a particular purpose, and a power of sale, or of changing the securities, is added; the power is no part of the trust, but it is something collateral, which the court cannot compel the trustee to perform. But a trust to distribute the trust fund according to the discretion of the trustee is an imperative trust and power.[1]

§ 21. Trusts are also said to be *legal* or *illegal*. Trusts are legal when they are for some honest purpose, as to pay debts or make a provision for families. They are illegal when they are for purposes of immorality, or vice, or of defrauding creditors, or contravene some statute, or are contrary to public policy. In such case a court of equity will not give its aid in carrying them into execution.[2] (*a*)

v. Flight, 5 N. R. 344; 4 De G., J. & S. 608; Clarke *v.* Royal Panopticon, 4 Drew. 29.

[1] Cole *v.* Wade, 16 Ves. 43; Gower *v.* Mainwaring, 2 Ves. 89; Steere *v.* Steere, 5 John. Ch. 1.

[2] Bacon on Uses, 9; Lewis *v.* Nelson, 14 N. J. Eq. 94.

(*a*) Thus, a bill in equity for an account cannot be maintained by a partner against his co-partners as to transactions with inhabitants of the seceding States during the Civil War. Snell *v.* Dwight, 120 Mass. 9; Dunham *v.* Presby, id. 285. The combinations or "trusts"

§ 22. Again, trusts are either *public* or *private*. Private trusts concern only individuals or families, for private convenience and support. *Public trusts* are for public charities or for the general public good. They concern the general and indefinite public.

§ 23. Private trusts which concern individuals are limited in their duration. Being for individuals, they must be certain, and the individual or individuals must be identified within a limited period. They can endure only for a life or lives[1] in

[1] It is immaterial whether the designated lives are those of the beneficiaries or others. Crooke *v.* King's County, 97 N. Y. 421.

that have sprung up in recent years, for the purpose of controlling prices by uniting all those engaged in any great industry, are in strictness illegal as amounting to monopolies. See *e. g.*, People *v.* Chicago Gas Trust Co., 130 Ill. 268; More *v.* Bennett, 140 Ill. 69; Bishop *v.* American Preservers' Co., 157 Ill. 284; People *v.* North River Sugar Ref. Co., 121 N. Y. 582; Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24, 43; State *v.* Standard Oil Co., 49 Ohio St. 137; United States *v.* Addyston Co., 78 F. R. 712; 24 Am. Law Rev. 143; 29 id. 293; 33 id. 63, 142; 30 Am. Law Reg. N. S. 751; 7 Harv. L. Rev. 338; 11 id. 80. The holder of certificates of such a "trust," which bind him to the terms of its formation, so far participates in its illegality that he cannot maintain a bill in equity against its trustees for an accounting. Unckles *v.* Colgate, 148 N. Y. 529. But forfeiture of a corporate charter for this cause can be enforced only by the State. Coquard *v.* National Linseed Oil Co., 171 Ill. 480; Blindell *v.* Hagan, 54 F. R. 40; Greer *v.* Stoller, 77 id. 1.

The Act of Congress of July 2, 1890, ch. 647 (26 Stat. at Large, 209), known as "The Sherman Anti-Trust Act," and entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," has been held by the United States Supreme Court not to apply to a combination of corporations whose primary business is that of manufacturing rather than of selling, such a combination being regarded as within the police power of the States, and not as infringing upon interstate commerce. United States *v.* E. C. Knight Co., 156 U. S. 1; s. c. 60 F. R. 306, 934; Lowenstein *v.* Evans, 69 F. R. 908. The act is constitutional, United States *v.* Joint Traffic Ass'n, 171 U. S. 505; and applies to all contracts in restraint of interstate commerce, irrespective of their reasonableness. United States *v.* Trans-Missouri Freight Ass'n, 162 U. S. 290. The remedy of a private citizen injured by a violation of this statute is by action at law for damages, and not by a bill in equity. Southern Indiana Express Co. *v.* U. S. Express Co., 88 F. R. 659.

being, and twenty-one years and the period of gestation in addition.[1] On the other hand, public trusts or charities, existing for the general and indefinite public, may continue for an indefinite period.[2] It must be kept in mind, however, that this rule against perpetuities only applies to cases in which the power of alienation is suspended, and that the creation of a trust does not necessarily result in such suspension, for the trustee may have the right to alienate,[3] and that the terms of the law are not everywhere the same. For example, in New York the ownership of *personal* property cannot be suspended for more than two lives, while the alienation of real estate may be suspended for two lives and a minority.[4]

§ 24. Trusts are divided in reference to their creation into express trusts, implied trusts, resulting trusts, and constructive trusts.[5] Express trusts are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, persons, and purposes of the trust; hence they are called direct or express trusts in contradistinction from those trusts that are implied, presumed, or construed by law to arise out of the transactions of parties. They may be discretionary or imperative, absolute or on condition.[6] As express trusts are directly declared by the parties, there can never be a controversy whether they exist or not. In such trusts these questions arise: Are they legal or illegal, and what is the construction of the various terms and provisions which they contain?

§ 25. Implied trusts are trusts that the courts imply from the words of an instrument, where no express trust is de-

[1] Rice *v.* Barrett, 102 N. Y. 161.

[2] Christ's Hospital *v.* Grainger, 1 Mac. & G. 460; Att. Gen. *v.* Aspinall, 2 M. & Cr. 622; Att. Gen. *v.* Heelis, 2 S. & S. 76; Att. Gen. *v.* Shrewsbury, 6 Beav. 220; Walker *v.* Richardson, 2 M. & W. 892. See Att. Gen. *v.* Forster, 10 Ves. 344; Att. Gen. *v.* Newcombe, 14 Ves. 1; Fearon *v.* Webb, 14 Ves. 19.

[3] Robert *v.* Corning, 89 N. Y. 225.

[4] Cook *v.* Lowry, 29 Hun, 28.

[5] See the definitions in Russell *v.* Peyton, 4 Brad. (Ill.) 473.

[6] Little *v.* Wilcox, 119 Penn. St. 439.

clared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.

§ 26. Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase-money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money.

§ 27. A constructive trust is one that arises when a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the *cestui que trust* or a constructive trust.

CHAPTER II.

PARTIES TO TRUSTS; AND WHAT PROPERTY MAY BE THE SUBJECT OF A TRUST.

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I. *Who may create a Trust.*

§ 28. It may be stated, as a general proposition, that every one competent to enter into a contract, or to make a will, or to deal with the legal title to property, may make such disposition of it as he pleases; and he may annex such conditions and limitations to the enjoyment of it as he sees fit; and he may vest it in trustees for the purpose of carrying out his intention. All persons, *sui juris*, have the same power to create trusts that they have to make a disposition of their property. A conveyance or disposition of property by persons not *sui juris* is valid to the extent of their legal capacity.

§ 29. The king may, by charter, grant his private property to one person upon trust for another.[1] But the trust must appear upon the face of the patent, and cannot be proved by parol.[2] He can also by will in writing under the sign-manual bequeath his private personal property to trustees for the use of another.[3] He may by warrant grant prizes taken in war to trustees, to be distributed among the captors,[4] and by statute he is authorized to convey trust property which has escheated to the Crown to trustees to execute the trust.[5]

§ 30. In the United States the sovereignty resides in the organized people; and all public officers are subjects and

[1] Bacon on Uses, 66.

[2] Fordyce *v.* Willis, 3 Bro. Ch. 577.

[3] 39 & 40 Geo. III. c. 88. But it is said that probate of his will can not be granted. Williams's Ex'rs, 13.

[4] Alexander *v.* Duke of Wellington, 2 R. & M. 35; Stevens *v.* Bagwell, 15 Ves. 140. But it is said that the *cestui que trust* cannot maintain a suit against the trustees in such cases.

[5] 39 & 40 Geo. III. c. 88.

citizens, and they can convey their private property to trustees in the same manner as private individuals. The State itself by its legislation, or by its public officers duly authorized, can create a trust, convey property, and appoint trustees;[1] and such trustees are equally amenable to the jurisdiction of chancery.[2] But a State cannot remove the trustees of a private corporation and appoint others in their stead.[3]

§ 31. All corporations, subject to the terms of the charters and laws under which they exist, may alienate their property; and their power to appoint trustees and to declare in what manner the property shall be enjoyed, is coextensive with the right of alienation.[4]

§ 32. By the civil law married women could alienate their property and dispose of it by will. By the common law they were almost wholly incapacitated from dealing with their estates. The tendency of modern legislation is to remove these disabilities, and to enable them to make contracts and wills, as if they were sole, in relation to property held by them in their own right. By joining their husbands in fines and recoveries in England,[5] and in deeds in America executed according to the prescribed formalities, they can, as a general rule, convey their property to trustees.[6] In those

[1] Commissioners *v.* Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

[2] Cotterel *v.* Hampson, 2 Vern. 5; Buchanan *v.* Hamilton, 5 Ves. 722.

[3] State *v.* Bryce, 7 Ohio, 414; Dart. College *v.* Woodward, 4 Wheat. 518.

[4] Colchester *v.* Lowten, 1 V. & B. 226; Att. Gen. *v.* Aspinall, 2 M. & Cr. 613; Att. Gen. *v.* Wilson, 1 Cr. & Ph. 1; Catlin *v.* Eagle Bank, 6 Conn. 233; State of Maryland *v.* Bank of Maryland, 6 Gill & J. 205; Dana *v.* Bank of United States, 5 W. & S. 224; Arthur *v.* Comm. Bank, 9 S. & M. 394; Barry *v.* Merchants' Exch. Co., 1 Sand. Ch. 280; Hopkins *v.* Turnpike Co., 4 Humph. 403; Reynolds *v.* Stark County, 5 Ham. 204; Angell on Corp. § 191; Barings *v.* Dabney, 19 Wall. 1. In England, municipal corporations are declared by statute to be trustees of their real and personal estate, and they are debarred from alienating it without the consent of the Lords of the Treasury. 5 & 6 Wm. IV. c. 76, § 94.

[5] 3 & 4 Wm. IV. c. 74.

[6] Durant *v.* Ritchie, 4 Mason, 45. And they can make mortgages of their property with powers of sale. Young *v.* Graff, 28 Ill. 20.

States where a married woman can convey her real and personal property without joining her husband, she can convey it to trustees to such uses as she may appoint; and where statutes have given her a testamentary capacity, she can create trusts and appoint trustees by her will.[1] A married woman is considered in all respects as a *feme sole* in regard to property settled to her separate use;[2] as if real estate is conveyed to a trustee and his heirs, or if personal estate is assigned to a trustee and his executors, for her sole and separate use, the absolute interest to be at her sole disposal, she has the entire control, and may exercise her ownership or implied power of appointment by creating a trust extending even beyond her coverture.[3] If she is tenant for life, to her sole use, she can make a settlement of her life-estate. But if the power of anticipation is restrained, she can make no disposition except of the annual produce which has actually accrued or become due. A married woman will be treated as a *feme sole* only in regard to property *settled* upon her; and her power of disposing of property thus *settled* will be governed by a strict interpretation of the instrument of settlement. If the deed of settlement points out the manner in which she may dispose of her interest, she must follow that particular manner; as if the power is given her to convey or appoint by deed, she cannot convey or appoint by will; and if by will, she cannot convey by deed. If the instrument is silent as to her power to convey, she may devise the property by will.[4] Savings by a wife out of an allowance made by her husband for her separate maintenance are treated in equity as her separate estate, which she may dispose of;[5] and so are the accumulations

[1] 1 Redfield on Wills, pp. 21-28.

[2] Lewin on Trusts, p. 23 (11th London ed.); Hill on Trustees, p. 421 (4th Amer. ed.).

[3] The English rule is stated in the text. The courts in some of the United States follow the same rule; in others a different rule is established. All the distinctions are stated, and the authorities collected in the chapter upon Trusts for Married Women.

[4] Mory *v.* Michael, 18 Md. 227.

[5] Brooke *v.* Brooke, 25 Beav. 342.

and savings from the income of a trust for her sole benefit.[1] But savings from pin-money allowed by the husband for the personal expenses, clothing, and adornment of the wife, revert to the husband, and the wife cannot dispose of them.[2] (*a*)

§ 33. Infants can create trusts which are good until they are avoided.[3] The tendency of modern decisions is to hold that the acts and contracts of infants are voidable only, and subject to their election when of age either to avoid or confirm them.[4] Mr. Greenleaf says that "it may be safely stated as the result of the American authorities, that the act or contract of an infant is in no case to be held purely void, unless from its nature and solemnity, as well as from the operation of the instrument, it was manifestly and necessarily prejudicial to him. Wherever it *may be* for his benefit, it is at most but voidable; and if it be an act which it was either his duty[5] to do, or was manifestly for his benefit, it shall bind him."[6] But a court of equity would not allow an equitable interest to be enforced against an infant to his prejudice, and would give him the same power of avoidance over the equitable, as over the legal estate. And if the infant died without having avoided the trust, the court

[1] Story, Eq. Jur. § 1375; Frazier *v.* Center, 1 McCord, Eq. 270; Picquet *v.* Swan, 4 Mason, 455.

[2] Jodrell *v.* Jodrell, 9 Beav. 45; Story, Eq. Jur. § 1375 a.

[3] Co. Litt. 248 a; Hearle *v.* Greenbank, 1 Ves. 304; Ownes *v.* Ownes, 8 C. E. Green, 60; Zouch *v.* Parsons, 3 Burr. 1794; Bool *v.* Mix, 17 Wend. 119; Eagle F. Ins. Co. *v.* Lent, 6 Paige, 635; Tucker *v.* Moreland, 10 Pet. 71, 2 Kent, 234; Gillett *v.* Stanley, 1 Hill, 121.

[4] 2 Kent, 235; Tucker *v.* Moreland, 10 Pet. 58, 71; Irvine *v.* Irvine, 9 Wall. 617.

[5] Zouch *v.* Parsons, 3 Burr. 1794, 2 Kent, 234–236; People *v.* Moores, 4 Denio, 518; McCall *v.* Parker, 13 Met. 372.

[6] 4 Cruise, Dig. by Greenleaf, p. 15, note, and authorities cited; Eagle Fire Co. *v.* Lent, 1 Edw. Ch. 301; 6 Paige, 635.

(*a*) The English Married Women's Property Act of 1882 did not have the effect of abolishing the common-law rule as to gifts of paraphernalia. Tasker *v.* Tasker, [1895] P. 1. See 30 Am. Law Rev. 557.

will still investigate the transaction and see that no unfair advantage was taken.[1] But if the infant is still alive, no one but himself can object to his deed.[2]

§ 34. The effect of a marriage settlement by a female infant, by which her real and personal estate is conveyed to trustees, has been frequently mooted in courts. It has been decided that as infants may contract marriage, a settlement made by the consent of their parents and guardians in consideration of a marriage to be afterwards solemnized, should be binding, inasmuch as if the marriage afterwards takes place, the situation of the parties is altered, and the interests of third persons, or children born of the marriage, may be affected. Lord Macclesfield and Lord Hardwicke upon these considerations refused to disturb such settlements.[3] But Lord Thurlow dissented from these opinions;[4] and the law is now settled, that a deed, executed by a female infant in consideration of marriage, does not bind her real estate, unless, having come of age, she assents to it after the death of her husband.[5] There is no reason why the marriage settlement of a male infant should not be governed by the same rule, except that he could confirm the same after he became of age, and before the death of his wife. The settlement will bind the husband if he is of full age.[6] It has been

[1] Lewin on Trusts, p. 25; 4 Cruise, Dig. p. 130; Starr *v.* Wright, 20 Ohio St. 97.

[2] Ingraham *v.* Baldwin, 12 Barb. 9, 19.

[3] Cannel *v.* Buckle, 2 P. Wms. 243; Harvey *v.* Ashley, 3 Atk. 607; Tabb *v.* Archer, 3 Hen. & M. 399; Healy *v.* Rowan, 5 Gratt. 414; Lester *v.* Frazer, Riley, Ch. 76; 2 Hill, Ch. 529.

[4] Durnford *v.* Lane, 1 Bro. Ch. 106.

[5] Milner *v.* Lord Harewood, 18 Ves. 259; Trollope *v.* Linton, 1 Sim. & Stu. 477; Simson *v.* Jones, 2 Russ. & My. 365; Temple *v.* Hawley, 1 Sand. Ch. 153; Dominick *v.* Michael, 4 Sand. 374; Levering *v.* Levering, 3 Md. Ch. 365; Shaw *v.* Boyd, 5 S. & R. 312; Wilson *v.* McCullogh, 19 Pa. St. 77; Healy *v.* Rowan, 5 Gratt. 414; *In re* Waring, 12 Eng. L. & Eq. 351; Cave *v.* Cave, 15 Beav. 227, 19 Eng. L. & Eq. 280; Field *v.* Moore, 7 De G., M. & G. 691; 35 Eng. L. & Eq. 498; Lee *v.* Stuart, 2 Leigh, 76.

[6] Whichcote *v.* Lyle's Ex'rs, 28 Pa. St. 73; Levering *v.* Heighe, 2 Md. Ch. 81.

settled, however, after considerable conflict, that a female infant may bar herself of dower and of a distributive share in her husband's estate, by accepting a jointure before marriage.[1] And she may, before marriage, make a binding settlement of her personal estate, for such a settlement will be for her benefit, otherwise it would vest in the husband, and it would in effect be his settlement and not hers;[2] but such settlement is not good of chattels that would not go to the husband. It is now settled in England by statute that a male infant over twenty years of age and a female over seventeen may make a valid marriage settlement of their real and personal estates, under the sanction of the Court of Chancery.[3]

§ 35. It was a maxim of the common law, that no man of full age could be allowed to stultify himself; hence the acts, deeds, and feoffments of idiots and lunatics were held to be binding, and not voidable by the party himself, though they could be avoided by his heirs, executors, or administrators.[4] This maxim never prevailed in the United States, and is not now the law of England. The conveyance of a lunatic is not, however, absolutely void, but only voidable by himself as well as by his friends and representatives.[5] But after inquisition declaring him incompetent, all contracts made

[1] Drury *v.* Drury, 2 Eden, 39; Buckinghamshire *v.* Drury, 2 Eden, 60–75; McCartee *v.* Teller, 2 Paige, 511.

[2] Durnford *v.* Lane, 1 Bro. Ch. 111; Levering *v.* Levering, 3 Md. Ch. 365; Field *v.* Moore, 7 De G., M. & G. 691; Ainslie *v.* Medycott, 9 Ves. 19; Stamper *v.* Barker, 5 Mad. 134; Williams *v.* Chitty, 3 Ves. 551; Johnson *v.* Smith, 1 Ves. 315; Simson *v.* Jones, 2 Russ. & My. 365; Succession of Wilder, 22 La. An. 219.

[3] 18 & 19 Vict. c. 43. 1855. See Edwards *v.* Carter, [1893] A. C. 360.

[4] Co. Litt. 247 b.

[5] Allis *v.* Billings, 6 Met. 415; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 239; Price *v.* Barrington, 3 Mac. & G. 486; Moulton *v.* Camroux, 2 Exch. 487; 4 Exch. 17; Milner *v.* Turner, 4 Monr. 245; Ballew *v.* Clark, 2 Ired. 23; Owing's Case, 1 Bland. 370; Elliot *v.* Ince, 7 De G., M. & G. 488; Campbell *v.* Hooper, 3 Sm. & Giff. 153; Wait *v.* Maxwell, 5 Pick. 217; Mitchell *v.* Kingman, id. 431; Snowden *v.* Dunlavey, 11 Penn. St. 522.

by him, until restored to the control of his property, are void.[1] It follows that a conveyance by a lunatic upon a trust will be good until it is avoided, and a court of equity would not set it aside, if it was fair and reasonable,[2] and if the parties could not be restored to their original condition; nor would the court interfere against *bona fide* purchasers without notice of the lunacy.[3]

§ 36. An alien may take real estate by devise or purchase, though he cannot take by operation of law, as by descent, or as tenant by curtesy. If an alien takes land by purchase, he may hold it until office found; and if he conveys it in trust or otherwise, his grantee will hold it until office found. An alien can therefore create a trust of real estate only until the State interposes. An alien may exercise all rights of ownership over personal property, consequently he can create a valid trust in it.[4]

§ 37. By the bankrupt law of England all the property which the bankrupt is entitled to up to the date of the certificate of his discharge vests in his assignees;[5] and he can create no trust in it, except in the surplus that may remain after the payment of all his debts.[6] Under the bankrupt laws of the United States and the insolvent laws of the various States, only the interests of the bankrupt existing at the date of the assignments vest in his assignees;[7] he may, therefore, create a valid trust in property acquired after the assignment and before the certificate.

[1] L'Amoureux *v.* Crosby, 2 Paige, 422; Pearl *v.* McDowell, 3 J. J. Marsh. 658.

[2] Niell *v.* Morley, 9 Ves. 478; Story, Eq. Jur. § 228.

[3] Carr *v.* Halliday, 1 Dev. & Batt. 344; Price *v.* Berrington, 3 Mac. & G. 486; Greenslade *v.* Dare, 20 Beav. 285.

[4] 2 Kent, pp. 1–36; Lewin on Trusts, p. 25; Hill on Trustees, p. 47.

[5] 12 & 13 Vict. c. 106, §§ 141, 142.

[6] Lewin on Trusts, p. 26; Hill on Trustees, p. 47.

[7] In Matter of Grant, 2 Story, 312; Mosby *v.* Steele, 7 Ala. 299; *Ex parte* Newhall, 2 Story, 360.

II. *Who may be a Trustee.*

§ 38. It is a rule that admits of no exception, that equity never wants a trustee, or, in other words, that if a trust is once properly created, the incompetency, disability, death, or non-appointment of a trustee shall not defeat it.[1] Thus, if property has been bequeathed in trust, and no trustee, or a trustee disabled from taking, or one who is dead, or refuses to take, is appointed, the court will decree the execution of the trust by the personal representatives, if it is personal property, and by the heirs or devisees, if it is real estate.[2] (*a*) Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser for value, and without notice.[3] The holder of the legal title and the absolute interest in property may convert himself into a trustee by

[1] Co. Litt. 290 b, 113 a, Butler's note (1); Story, Eq. Jur. §§ 98, 976; McCartee *v.* Orph. Asy. Soc., 9 Cow. 437; Crocheron *v.* Jaques, 3 Edw. 207; Bundy *v.* Bundy, 28 N. Y. 410; Dodkin *v.* Brunt, L. R. 6 Eq. 580. [*Infra*, §§ 259, 276 *a*, 731.]

[2] Piatt *v.* Vattier, 9 Pet. 405; Gibbs *v.* Marsh, 2 Met. 243; Withers *v.* Yeadon, 1 Rich. Eq. 325; King *v.* Donnelly, 5 Paige, 46; Dawson *v.* Dawson, Rice, Eq. 243; Cushney *v.* Henry, 4 Paige, 345; De Barante *v.* Gott, 6 Barb. 492; Malin *v.* Malin, 1 Wend. 625; McIntire *v.* Zanesville C. & M. Co., 9 Ham. 203; Kerr *v.* Day, 14 Pa. St. 114; Att. Gen. *v.* Downing, Amb. 550; Bennet *v.* Davis, 2 P. Wms. 316; Sonley *v.* Clockmakers' Co., 1 Bro. Ch. 81; Treat's App., 30 Conn. 43; White *v.* Hampton, 13 Iowa, 259.

[3] Ibid.; Shepherd *v.* McEvers, 4 John. Ch. 136.

(*a*) It is usual for the court to appoint a substituted trustee in such cases on application of one or more of the *cestuis*, and the title will pass to him on his acceptance and qualification. Pending such new appointment, the legal title, subject to the trust, is in the heirs or personal representatives of the testator, but they are not justified, even if they have the power, in executing discretionary duties of trustees, except possibly in cases of emergency requiring immediate action to preserve the property from serious loss. *Infra*, § 259, note; § 276 *a*, § 284.

The matter is largely regulated by statute, especially in regard to testamentary trusts.

making a valid declaration of trust upon good consideration;[1] or if he conveyed the property by some conveyance which was inoperative in law, equity would hold him to be a trustee;[2] as if a man convey property directly to his wife, a transaction inoperative in most of the States, equity would uphold the act, and decree the husband to be a trustee.[3]

§ 39. It may be stated, in general terms, that whoever is capable of taking the legal title or beneficial interest in property, may take the same in trust for others.[4] Whatever persons or corporations are capable of having the legal title or beneficial interest cast upon them by gift, grant, bequest, descent, or operation of law, may take the same subject to a trust, and they will become trustees. But it does not follow that whoever is capable of taking in trust, is capable of performing or executing it. The inquiry, then, is not so much who may take in trust, as it is who may execute and perform a trust. Sometimes the law provides against the appointment of non-residents as trustees.[5] If a trust is cast upon a person incapable of taking and executing it, courts of equity will execute the trust by decree, or they will appoint some person capable of performing the requirements of the trust. Mr Lewin says that "in general terms, a person to be appointed trustee should be a person capable of taking and holding the legal estate, and

[1] See notes to Woollam *v.* Hearne, 2 Lead. Cas. Eq. 404; Mackreth *v.* Simmons, 1 Lead. Cas. Eq. 235; Adams *v.* Adams, 21 Wall. 186.

[2] McKay *v.* Carrington, 1 McLean, 50; Kerr *v.* Day, 14 Penn. St. 114; Crawford *v.* Bertholf, Saxt. Ch. 458; Malin *v.* Malin, 1 Wend. 625; Tyson *v.* Passmore, 2 Barr, 122; Ten Eick *v.* Simpson, 1 Sand. Ch. 244; Waddington *v.* Banks, 1 Brock. 97; Atcherley *v.* Vernon, 10 Mod. 518; Davie *v.* Beardsham, 1 Ch. Cas. 39; Green *v.* Smith, 1 Atk. 572; Pollexfen *v.* Moore, 3 Atk. 272; Wall *v.* Bright, 1 J. & W. 474.

[3] Huntly *v.* Huntly, 8 Ired. Eq. 250; Livingston *v.* Livingston, 2 John. Ch. 537; Garner *v.* Garner, 1 Busb. Eq. 1. [Stark *v.* Kirchgraber, 186 Mo. 633; Carter *v.* McNeal, 86 Ark. 150; Barnum *v.* Le Master, 110 Tenn. 638.]

[4] Fonb. Eq. 139, n.; Hill on Trustees, 48; Commissioners *v.* Walker, 6 How. (Miss.) 146.

[5] Rinker *v.* Bissell, 90 Ind. 375; Meikel *v.* Greene, 94 Ind. 344. [But see Roby *v.* Smith, 131 Ind. 342; Shirk *v.* La Fayette, 52 Fed. 857.]

possessed of natural capacity and legal ability to execute the trust and domiciled within the jurisdiction of the court." [1] Sir George J. Turner, L. J., laid down the general rules which govern courts in making appointments of trustees as follows: —

"First, the court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument creating the trust or clearly to be collected from it. I think this rule may be safely laid down, because if the author of the trust has in terms declared that a particular person, or a person filling a particular character, should not be trustee of the instrument, there cannot, as I apprehend, be the least doubt that the court would not appoint to the office a person whose appointment was so prohibited; and I do not think that upon a question of this description any distinction can be drawn between express declaration and demonstrated intention. The analogy of the course which the court pursues in the appointment of guardians affords, I think, some support to this rule. The court in those cases attends to the wishes of the parents, however informally they may be expressed.

"Another rule which may, I think, safely be laid down, is this, — that the court will not appoint a person to be trustee with a view to the interest of some of the persons interested under the trust, in opposition either to the wishes of the testator, or to the interests of other of the *cestuis que trust*. I think so for this reason, that it is of the essence of the duty of every trustee to hold an even hand between the parties interested in the trust. Every trustee is in duty bound to look after the interests of all, and not of any particular member or class of members of his *cestuis que trust*.

"A third rule which may be safely laid down is that the court, in appointing a trustee, will have regard to the question whether his appointment will promote or impede the execution of the trust; for the very purpose of the appointment is that the trust may be better carried into execution." [2]

[1] Lewin on Trusts, 27.

[2] *In re* Tempest, L. R. 1 Ch. 487. [See *infra*, § 283 *et seq.*]

§ 40. The sovereign may sustain the character of a trustee. He has a legal capacity to take and hold the estate, and to execute the trust;[1] but there is a difficulty in every country in executing the judgments and decrees of a court against the sovereign power of the country. In England, it is said that the Court of Chancery has no jurisdiction over the king's conscience, for the Lord Chancellor only exercises the equitable authority of the king himself in judging between his subjects. But the greater difficulty is in enforcing the decrees of a court against the sovereign power; for "the arms of equity are very short against the prerogative."[2] The subject may have a clear right, but no remedy either at law or equity against the Crown; in such case his only resource is an appeal to the king by a petition of right, and it cannot be supposed that he would be refused. The question is now of less importance; for by statute, if trust property vests in the Crown by escheat, the king is enabled to grant it to trustees for the purpose of executing the trust.[3] And by an amendment it is further provided that property held in trust shall not escheat or be forfeited to the Crown by the failure or forfeiture of the trustee;[4] and it is still further provided that in such cases trust property shall be under the control of the Court of Chancery for the use of the parties beneficially interested, and that new trustees shall be appointed.[5] Under these statutes it is said that an equity will be enforced against the Crown.[6] The only cases where the question is still open, whether a trust can be enforced against the Crown, is where the person of the sovereign takes by descent as heir, or

[1] Lewin on Trusts, 27.

[2] Pawlett *v.* Att. Gen., Hard. 467; Burgess *v.* Wheate, 1 Eden, 255; Kildare *v.* Eustace, 1 Vern. 439; Wike's Case, Lane, 54; Penn. *v.* Lord Baltimore, 1 Ves. 453; Reeve *v.* Att. Gen., 2 Atk. 224; Hovenden *v.* Lord Annesley, 2 Sch. & L. 617; Hodge *v.* Att. Gen., 3 Yo. & Col. 342; Briggs *v.* Light-boats, 11 Allen (Mass.), 157, where all the authorities are commented on.

[3] 39 & 40 Geo. III. c. 88.

[4] 4 & 5 Wm. IV. 23.

[5] 13 & 14 Vict. c. 60, §§ 15, 46, 47.

[6] Hughes *v.* Wells, 9 Hare, 749; 13 Eng. L. & Eq. 389.

by representation, or where he may have held as trustee previously to his acquiring the crown, or where a grant or bequest is made to him as a trustee.[1]

§ 41. The United States, and each one of the separate States, may sustain the character of trustee. They have legal capacities to take and execute trusts for every purpose.[2] (*a*) But a court cannot execute its judgments and decrees against a sovereign State with any more effect than the courts of England can enforce their orders against the king. The arms of equity in America are as short against the sovereign power as they are in England against the prerogative. Mr. Justice Gray has clearly shown that a State cannot be sued in law or equity against its consent, or unless there is some general or special statute authorizing the suit.[3] A subject may have a clear right, but no remedy; in such case he must petition the legislative power, and there is no reason to suppose that his right would be refused. If a State accepts a trust by grant or bequest, it must act through its legislative powers in administering the trust, or in creating and appointing agents or officers to perform the duties which it assumes; as the United States acted in relation to the bequest of James Smithson in trust for the establishment of the Smithsonian Institution for

[1] Hill on Trustees, 50.

[2] See Mitford *v.* Reynolds, 1 Phill. 185; Nightingale *v.* Goulbourn, 2 Phill. 594; 5 Hare, 484. It was denied, however, that the United States could take in trust in Levy *v.* Levy, 33 N. Y. 97; Shoemaker *v.* Comm'rs, 36 Ind. 176.

[3] Briggs *v.* Light-boats, 11 Allen, 157.

(*a*) A public corporation may be a trustee. A State is a trustee of the rights of its people to dig shell-fish in navigable waters. Allen *v.* Allen, 19 R. I. 114. Tide lands in a Territory are held in trust by the general government for the future State, but the United States may grant them to individuals for appropriate purposes, such as the erection of wharves or other aids to commerce. Shively *v.* Bowlby, 152 U. S. 1.

Public officers, such as State commissioners, authorized to superintend the building of a Statehouse, are not properly trustees, but State agents. *In re* Statehouse Construction Loan, 20 R. I. 704.

the increase and diffusion of knowledge among men.[1] A limitation over of a charitable devise to the States of Maryland and Louisiana in case of forfeiture by the first takers was held not to vitiate the bequest.[2]

§ 42. It was formerly laid down that corporations could not be seized of lands to the use of another, and could not be trustees.[3] The reason assigned for this rule was that no trust or confidence could be reposed in them; that they could not be compelled to execute a use or perform a trust, for courts of equity, in decreeing the execution of a trust, lay hold upon the conscience;[4] and it is impossible to attach any demand upon the conscience of a body so artificially created that it cannot in the nature of things have a conscience. Again, it was said that they could not be imprisoned if they refuse to obey the decrees of the court. But the technical rules upon which it was held that corporations could not be trustees have ceased to operate; and at the present day corporations of every description may take and hold estates, as trustees, for purposes not foreign to the purposes of their own existence; and they may be compelled by courts of equity to carry the trusts into execution.[5] If they misapply the trust fund, or refuse to obey the

[1] U. S. Stat. 1836, c. 252, Vol. V. p. 64 (L. & Bro. ed.); also, Stat. 1846, c. 178, Vol. IX. p. 102.

[2] McDonogh's Ex'rs *v.* Murdoch, 15 How. 367.

[3] Bacon on Uses, 57; 1 Cruise, Dig. p. 340.

[4] Sugd. V. & P. p. 417.

[5] Att. Gen. *v.* St. John's Hosp., 2 De G., J. & Sm. 621; Att. Gen. *v.* Landerfield, 9 Mod. 286; Dummer *v.* Chippenham, 14 Ves. 252; Green *v.* Rutherforth, 1 Ves. 468; Att. Gen. *v.* Whorwood, 1 Ves. 536; Att. Gen. *v.* Stafford, Barn. 33; Att. Gen. *v.* Found. Hosp. 2 Ves. Jr. 46; Att. Gen. *v.* Clarendon, 17 Ves. 499; Att. Gen. *v.* Caius College, 2 Keen, 165; Att. Gen. *v.* Ironmongers' Co., 2 Beav. 313; Jackson *v.* Hartwell, 8 Johns. 422; Trustees Phillips Academy *v.* King, 12 Mass. 546; Att. Gen. *v.* Utica Ins. Co., 2 Johns. Ch. 384; Vidal *v.* Girard, 2 How. 187; Miller *v.* Lerch, 1 Wall. Jr. 210; Columbia Bridge Co. *v.* Kline, Bright, N. P. 320; Greenville Acad., 7 Rich. Eq. 476; McDonogh *v.* Murdoch, 15 How. 367; Green *v.* Dennis, 6 Cow. 304; Dublin Case, 38 N. H. 577. [Jones *v.* Habersham, 107 U. S. 174; Johnston *v.* Hughes, 187 N. Y. 446; Stearns *v.* New-

decrees of the court, the proper remedy is by distringas, sequestration, or injunction, or by removal and appointment of new trustees.[1]

§ 43. It must be understood, however, that corporations are the creatures of the law, and that as a general rule they cannot exercise powers not given to them by their charters or acts of incorporation.[2] (*a*) For this reason they cannot act as trustees in a matter in which they have no interest, or in a matter that is inconsistent with, or repugnant to, the purposes for which they were created.[3] Nor can they act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property. But if the trusts are within the general scope of the purposes of the institution of the corporation, or if they are collateral to its general purposes, but germane to them, as if the trusts relate to matters which will promote and aid the general purposes of the corporation, it may take and hold, and be compelled to execute them,[4] if it accepts them. Thus towns, cities, and parishes may take and hold property in trust for the establishment of colleges,[5] for the purpose of educating the poor,[6] for the relief of the poor, though not paupers, by furnish-

port Hospital, 27 R. I. 309; School Trustees *v.* Hoboken, 70 N. J. Eq. 630; Estate of Willey, 128 Cal. 1, 12; Clayton *v.* Hallett, 30 Colo. 231.]

[1] Mayor of Coventry *v.* Att. Gen., 7 Bro. P. C. 235; 3 Mad. Ch. 77, 209.

[2] In Matter of Howe, 1 Paige, 214.

[3] In Matter of Howe, 1 Paige, 214; Jackson *v.* Hartwell, 8 Johns. 422.

[4] Story, J., Vidal *v.* Girard, 2 How. 188–190; McDonogh *v.* Murdoch, 15 How. 367; First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 34; Wetmore *v.* Parker, 7 Lans. 121. [Hickory *v.* Railroad, 137 N. C. 189; Ayer *v.* Bangor, 85 Me. 511.]

[5] Vidal *v.* Girard, *ut supra*. But see Perin *v.* McMicken, 15 La. An. 154.

[6] McDonogh *v.* Murdoch, *ut supra*.

(*a*) If the purposes of the trust are in accord with or tend to promote the purposes for which the corporation exists, it is not incapacitated from acting as trustee by the fact that its charter gives it no power to use its own funds for the same purpose. Stearns *v.* Newport Hospital, 27 R. I. 309.

ing them fuel at a low price,[1] and for the support of schools,[2] or for any educational or charitable purposes within the scope of its charter.[3] So also overseers of the poor, supervisors of a county,[4] commissioners of roads in South Carolina,[5] trustees of the poor in Mississippi, and also trustees of the school fund,[6] are corporations *sub modo;* and they may take and execute trusts within the scope of their official duties (*a*).

[1] Webb *v.* Neal, 5 Allen, 575; McIntire Poor School *v.* Zanesville Canal Co., 9 Ohio, 217.

[2] First Parish in Sutton *v.* Cole, 3 Pick. 232.

[3] Barnum *v.* Baltimore, 62 Md. 275. [Handley *v.* Palmer, 91 Fed. 948; Higginson *v.* Turner, 171 Mass. 586; 2 Dillon Municipal Corporations (4th ed.) § 568. But see Dailey *v.* New Haven, 60 Conn. 314.]

[4] North Hempstead *v.* Hempstead, 2 Wend. 109; Jansen *v.* Ostrander, 1 Cow. 670.

[5] Com. Roads *v.* McPherson, 1 Spear, 218.

[6] Governor *v.* Gridley, Walk. 328; Carmichael *v.* Trustees, &c., 3 How. (Miss.) 84.

(*a*) Thus a municipal corporation may be a trustee of charities of a public nature for the benefit of its own inhabitants if the public purposes are germane to its own objects. Philadelphia *v.* Fox, 64 Pa. St. 169, 181; Peynado's Devisees *v.* Peynado's Ex'r, 82 Ky. 5. Thus a municipal corporation may be a trustee for the erection and maintenance of a hospital, Mayor and Corporation of Philadelphia *v.* Elliott, 3 Rawle (Pa.), 170; or of a fund for the benefit of the public schools, Stone *v.* Perkins, 85 Fed. 616; or for the support of a public library, Ayer *v.* Bangor, 85 Me. 511; or for planting and maintaining shade trees, Cresson's Appeal, 30 Pa. St. 437; or for maintaining United States flags in public places, Sargent *v.* Cornish, 54 N. H. 18.

In Vidal *v.* Girard, 2 How. (U. S.) 189, the general principle is stated to be that, "if the purposes of the trust be germane to the objects of the incorporation, if they relate to matters which will promote, aid, and perfect those objects, if they tend (as the charter of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a state where the statutes of mortmain do not exist, the corporation itself having a legal capacity to take the estate as well by devise as otherwise?"

But it would usually be *ultra vires* for a municipal corporation to act as trustee for specified individuals. Franklin's Estate, 150 Pa. St. 437; Philadelphia *v.* Fox, 64 Pa. St. 169, 181.

§ 44. A bank may receive a deed, and hold land in trust to receive a debt due to it.[1] (a) One corporation may take and hold in trust for another, or for a stranger,[2] or for an individual; as where one gave a legacy to a church corporation in trust to pay the income to his housekeeper for life, and after her death to apply it to church purposes, it was held that the corporation might well execute the trust, on the principle that when property is given to a corporation partly for its own use and partly for the use of another, the power of the corporation to take and hold for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.[3] The supervisors of a county cannot take in trust for a town or village or for individuals, but only for the body which they represent.[4] Whether a particular corporation can hold as trustee for any specific purpose must generally be determined by the construction of its charter and of the laws of the State in which it acts.[5]

§ 45. If a corporation takes land by grant or bequest in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the State only can interfere.[6] (b) A corporation cannot be compelled to

[1] Morris *v.* Way, 16 Ohio, 478.

[2] Phillips Academy *v.* King, 12 Mass. 546.

[3] In Matter of Howe, 1 Paige, 214.

[4] Jackson *v.* Hartwell, 8 Johns. 422.

[5] Dartmouth Coll. *v.* Woodward, 4 Wheat. 636; Head *v.* Providence Ins. Co., 2 Cranch, 127; State *v.* Stebbins, 1 Stew. 299; Beaty *v.* Knowler, 4 Pet. 152; Beaty *v.* Marine Ins. Co., 2 Johns. 109; People *v.* Utica Ins. Co., 15 Johns. 358; New York Fire Ins. Co. *v.* Ely, 2 Cow. 678; State *v.* Mayor of Mobile, 5 Porter. 279.

[6] Runyan *v.* Coster's Lessee, 14 Pet. 122; Miller *v.* Lerch, 1 Wall. Jr. 210; Leazure *v.* Hillegas, 7 S. & R. 321; Perin *v.* Cary, 24 How. 465; Chapin *v.* School Dist., 35 N. H. 445; Troy *v.* Haskell, 33 N. H. 533; Philadelphia *v.* Girard, 45 Penn. St. 9; Humbert *v.* Trinity Church, 24 Wend. 587; Harpending *v.* Dutch Church, 16 Pet. 492; Bogardus *v.* Trinity Church, 4 Sand. Ch. 758; Angell & Ames, Corp. §§ 151-155.

(a) As to the relation of a bank to its depositors, see § 122, note.

(b) The same has been held true of a bequest to a charitable corpora-

execute a trust in property, the legal title to which it has no power to take and hold;[1] but the trust, if otherwise valid, is not for that reason void, and the court will appoint a competent trustee, and direct a conveyance of the property to him; as where a testator gave land to a corporation that could not take by reason of the statute of mortmain, in trust to sell and apply the proceeds to persons competent to take, it was held that though the devise was void at law, yet in equity it was a valid trust, and that the heir was a trustee to the uses declared in the will.[2]

§ 46. Grants or gifts to an unincorporated association in trust for a charitable purpose are sustained in equity, as a legacy to the Seamen's Aid Society, to go to their treasurer for the time being for the purposes of such society;[3] a bequest over to several unincorporated societies, some of them not in the State, was held good,[4] and if the members are too numerous to administer the trust, the court will appoint a trustee.[5] So a bequest to "The Marine Bible Society," for certain purposes, was held to establish a charitable trust, al-

[1] Sonley *v.* Clockmaker's Co., 1 Bro. Ch. 81; Vidal *v.* Girard, 2 How. 188.

[2] Ibid.; Winslow *v.* Cummings, 3 Cush. 358. This is denied to be the law in the courts of New York, in relation to charitable bequests. See Ayres *v.* Methodist Church, 3 Sand. 351; Andrew *v.* Bible Soc., 4 Sand. 156; Levy *v.* Levy, 40 Barb. 585; 33 N. Y. 97. These cases are governed by a statute, as is said, and would not probably be followed outside of that State; nor are they fully concurred in by their own courts, as there was a strong dissent in the Court of Appeals, the court of last resort.

[3] Tucker *v.* Seamen's Aid Soc., 7 Met. 188; First Cong. Soc. of Southington *v.* Atwater, 23 Conn. 56.

[4] Burbank *v.* Whitney, 42 Pick. 146; Washburn *v.* Sewall, 9 Met. 280. But see Methodist Church *v.* Remington, 1 Watts, 218.

[5] Burbank *v.* Whitney, 24 Pick. 146; Washburn *v.* Sewall, 9 Met. 280; But see Methodist Church *v.* Remington, 1 Watts, 218. [Guild *v.* Allen, 28 R. I. 430; Wood *v.* Fourth Baptist Church, 26 R. I. 594; St. Peter's Church *v.* Brown, 21 R. I. 367; Bruere *v.* Cook, 63 N. J. Eq. 624. See also Estate of Winchester, 133 Cal. 271; Keith *v.* Scales, 124 N. C. 497, 510.]

tion the acceptance of which would increase its funds beyond the limit authorized by its charter. Farrington *v.* Putnam, 90 Me. 405.

though the society was a voluntary association, and had been disbanded, and the court appointed a trustee to carry the trust into effect.[1] In Pennsylvania, substantially the same doctrine has been held.[2] A different doctrine was held in the Supreme Court of the United States;[3] but the case was decided upon the law of Virginia, and may be considered as settling a local rather than a general question.[4] The later cases in the same court hold the general rule to be otherwise.[5] (*a*)

§ 47. A trust to a board of officers in their official capacity for purposes within the scope of their official duties may be executed by them.[6] Where a bequest was to the chancellor of the State of New York, the mayor and recorder of the city of New York, and several other persons by their official description only, and their successors in office, to build and maintain a hospital, and if this could not be done legally, they were to apply for an act of incorporation, and at all events the estate should be held by an heir charged with the trusts, it was held that the designation of the trustees by their official character was equivalent to naming them by their proper names; that the trust was not to be executed by them in their official character, but in their private and individual capacity; and that if the trust had been to the officers named and their successors to execute, and no other provisions had been made, it would have fallen within the case of Baptist Association *v.* Hart's Executors, and would have been void. It was further held that it was a good executory devise to a corporation to

[1] Winslow *v.* Cummings, 3 Cush. 358.

[2] Pickering *v.* Shotwell, 10 Barr. 27; and see the able opinion of Baldwin, J., in Magill *v.* Brown, Bright, N. P. 350. See also Methodist Church *v.* Remington, 1 Watts, 218.

[3] Baptist Asso. *v.* Hart, 4 Wheat. 1; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 114.

[4] Baldwin, J., in Magill *v.* Brown, Bright, N. P. 354.

[5] Vidal *v.* Girard, 2 How. 187. See chapter on Charitable Trusts, *post*.

[6] *Ante*, § 43.

(*a*) There are several States where such gifts are invalid because of indefiniteness of beneficiaries. See *infra*, § 729, note a.

be created *in futuro*, and in the mean time that the estates in the hands of the heir would be held charged with the trusts.[1] A bequest to the chancellor of the Exchequer for the time being for the benefit of Great Britain was held good;[2] and the Governor-General of India may take in trust for the benefit of the city of Decca.[3] Where a British subject bequeathed funds to the President and Vice-President of the United States and the Governor of Pennsylvania for the time being, to establish a college in the State of Pennsylvania, and directed that moral philosophy should be taught, and that a professor should inculcate the rights of the black people of every clime, until they were restored to an equality of rights throughout the Union, the Court of Chancery directed an inquiry to be made whether the President, Vice-President, and Governor would accept the trust, and it appearing that they declined to act, it was held that the trust failed; and as it could not be carried into effect, *cy près*, in a foreign country, that the gift fell into the residue.[4] A bank comptroller is a trustee of the various securities held by him for the several banks; but the State itself is not liable as a trustee for his acts.[5]

§ 48. Married women may become trustees by deed, gift, bequest, appointment, or by operation of law.[6] If an estate comes to a married woman in any way, charged with a trust, her coverture cannot be pleaded in bar of the trust;[7] and a court of equity will enforce its execution; as when the legal

[1] Inglis *v.* Trustees of the Sailors' Snug Harbor, 3 Pet. 99.

[2] Nightingale *v.* Goulbourn, 2 Phill. 594; 5 Hare, 484.

[3] Mitford *v.* Reynolds, 1 Phill. 185.

[4] New *v.* Bonaker, L. R. 4 Eq. 655.

[5] State *v.* Bush, 20 Wis. 212.

[6] Lake *v.* De Lambert, 4 Ves. 595; Compton *v.* Collinson, 2 Bro. Ch. 377; Hearle *v.* Greenbank, 1 Ves. 305; Bell *v.* Hyde, Pr. Ch. 350; Moore *v.* Hussey, Hob. 95; Needles *v.* Bish. of Winchester, Hob. 225; Clarke *v.* Saxon, 1 Hill, Ch. 69; Bradish *v.* Gibbs, 3 Johns. Ch. 523; Livingston *v.* Livingston, 2 id. 541; Dundas *v.* Biddle, 2 Barr, 160; Claussen *v.* La Franz, 1 Clarke (Ia.), 226; Harden *v.* Darwin & Pulley, 66 Ala. 55.

[7] Clarke *v.* Saxon, 1 Hill, Ch. 69; Berry *v.* Norris, 1 Duv. 302. [Insurance Co. *v.* Waller, 116 Tenn. 1.]

title to land in trust was cast by descent upon a married woman, and the law required that a deed executed by her should be acknowledged, as executed voluntarily, and she refused so to acknowledge it, the court compelled her by decree.[1] But specific performance will not be enforced against a *feme covert* trustee for sale upon her contract as trustee to convey.[2] There is no less judgment and discretion in a woman after marriage than before. Sir John Trevor thought she rather improved by her husband's teaching.[3] The reasons for her disabilities are founded upon her own interests, or her husband's, or both;[4] or rather upon the broader policy of the law which, for the purpose of domestic peace and happiness, merges the proprietary interests of the wife during coverture in her husband, and will not permit her to hold interests separate from, and independent of, and possibly antagonistic to him. The policy of the law has, however, been very much modified by legislation in later years. But where such interests are not concerned, she possesses the same legal capacity as if she were *sui juris*. Thus, she may execute any kind of power, whether simply collateral, appendant, or in gross; and it is immaterial whether it is given to her while sole or married.[5]

§ 49. In equity, the absolute interest in the trust fund is vested in the *cestui que trust*, the trustee is a mere instrument, and any power or authority in the trustee must have the character of a power simply collateral;[6] therefore there is nothing,

[1] Dundas *v.* Biddle, 2 Barr, 160.

[2] Berry *v.* Norris, 1 Duv. 302; Avery *v.* Griffin, L. R. 6 Eq. 606. [But see Insurance Co. *v.* Waller, 116 Tenn. 1.]

[3] Bell *v.* Hyde, Pr. Ch. 350.

[4] Compton *v.* Collinson, 2 Bro. Ch. 377.

[5] Co. Litt. 112 a, 187 b; Lord Antrim *v.* Buckingham, 2 Freeman, 168; Blithe's Case, id. 91; Godolphin *v.* Godolphin, 1 Ves. 23; Sugden on Powers, 144-155; 4 Kent, 324; Thompson *v.* Murray, 2 Hill, Ch. 214; Bradish *v.* Gibbs, 3 Johns. Ch. 523. [Married Women's Property Act, 1907, 7 Edw. VII, c. 18; Armstrong *v.* Kerns, 61 Md. 364; Antonini *v.* Straub, 130 Ky. 10; Young *v.* Sheldon, 139 Ala. 444.]

[6] Smith *v.* Smith, 21 Beav. 385; Drummond *v.* Tracy, 1 Johns. 608; Kingham *v.* Lee, 15 Sim. 401; People *v.* Webster, 10 Wend. 554.

as respects legal capacity, to prevent a married woman from administering a discretionary trust.[1] But she cannot create a trust in her absolute property except by joining her husband in conveying it, or in executing a declaration of trust.[2]

§ 50. At the same time a husband must always have a large influence over a *feme covert* trustee; indeed, as he would be answerable for her acts, and liable for her breaches of trust, he must, for his own protection, look to the manner in which she administers the fund; and she must join her husband in suits in relation to the trust property.[3] (*a*) Again, if land is conveyed to a married woman upon a declared trust without powers of sale, and it becomes necessary to sell and convey the land, is the husband to join or not in the conveyance; and to whom is the purchase-money to be paid, and upon whose receipt?[4] Mr. Lewin thinks that the joint receipt of the husband and wife should be taken; but that the safest way would be to pay the money into some bank upon their joint receipt, to remain until wanted for the purposes of the trust, and that if the husband took it out for any other purpose, he would be liable as for a breach of trust.[5] Another inconvenience arises in probate and other trusts, where the trustee may be required to give bonds for the faithful administration of the trust. A court of equity may require the trustee to give security for the property, even though the trust arises by operation of law.[6]

[1] Ibid. [2] Graham *v.* Long, 65 Penn. St. 383.

[3] Still *v.* Ruby, 35 Penn. St. 373.

[4] See Daniel *v.* Uhley, Wm. Jones, 137; Co. Litt. 112 a, Hargrave's note (6); 1 Fonb. Eq. 92; McNeille *v.* Acton, 2 Eq. R. 25.

[5] Lewin on Trusts, 24, 25; Drummond *v.* Tracy, 1 Johns. 611; 4 Cruise, Dig. 143; Co. Litt. 112 a, Hargrave's note (6).

[6] Clarke *v.* Saxon, 1 Hill, Ch. 69.

(*a*) This is no longer true in England. Married Women's Property Act of 1882, § 18 (45 & 46 Vict. c. 75); Lewin (11th ed.), 33.

And in general, the statutes enlarging the property rights of married women have done away with this objection and other objections to her acting as trustee. See statutes of the different States.

A married woman can enter into contracts only in relation to her sole and separate estate; and how far she can bind herself, or her estate, by a bond to execute a trust in property, the beneficial interests in which belong to another, would always be a perplexing question, although the sureties in such a bond might be liable.

§ 51. Subject to these inconveniences, a married woman can always be a trustee; and she may even be a trustee for her husband,[1] as well as her husband for her,[2] and courts will find means to enforce the trusts; but they will not appoint married women to such offices, nor will they appoint them to be guardians of minors;[3] (*a*) a woman, on the contrary, will be removed from the office if she is appointed while sole and afterwards marries.[4] For the same reason it is undesirable to appoint a *feme sole* trustee; for should she marry, her husband, being liable for her breaches of trust, ought to have control of her acts, and the character of the trust is changed. On these grounds the courts at one time refused to appoint a *feme sole* trustee;[5] but it is a matter of sound discretion in the court, and in a more recent case a *feme sole* was appointed.[6]

[1] Livingston *v.* Livingston, 2 Johns. Ch. 541. [Insurance Co. *v.* Waller, 116 Tenn. 1.]

[2] Bennet *v.* Davis, 2 P. Wms. 316; Shirley *v.* Shirley, 9 Paige, 363; Jamison *v.* Brady, 6 S. & R. 467; Boykin *v.* Ciples, 2 Hill Ch. 200; Picquet *v.* Swan, 4 Mason, 455; Griffith *v.* Griffith, 5 B. Monr. 113.

[3] *Re* Kaye, L. R. 1 Ch. 387. In Massachusetts, by statute, a married woman may be executrix, administratrix, guardian, or trustee, and may bind herself and the estate, without her husband joining, with the same effect as if she were sole; and a woman may continue to hold the trust to which she has been appointed, notwithstanding her subsequent marriage.

[4] Lake *v.* De Lambert, 4 Ves. 595. The trustee in this case had married a foreigner, but Lord Chancellor Loughborough simply remarked "that it was very inconvenient for a married woman to be trustee."

[5] Brooks *v.* Brooks, 1 Beav. 531.

[6] *Re* Campbell's Trusts, 31 Beav. 176.

(*a*) In most if not all jurisdictions the removal of the disabilities of married women has made them as competent legally to execute trusts as are other persons who are *sui juris*. See Schluter *v.* Bowery Sav. Bank, 117 N. Y. 125.

§ 52. Infants labor under still greater disabilities than married women, for a married woman has judgment, discretion, and capacity, though she cannot in all cases freely exercise them; but an infant wants judgment and capacity.[1] From this want of judgment and capacity an infant can do nothing that requires the exercise of discretion. It is true that his acts are voidable only and not void;[2] but every act, not simply ministerial, is at least voidable; but where he signs an acquittance without receipt of the money, it is an exercise of discretion, and is actually void.[3] An infant is capable of executing a naked power unaccompanied with any interest, or not requiring any discretion.[4] If a power is given to an infant relating to his own estate, it must be inserted in the deed that he may execute it during his infancy, or his execution of it will have no effect.[5] As was shown before, trustees generally exercise powers over the trust fund simply collateral;[6] but if the exercise of these powers requires the application of any prudence or discretion, an infant is incapable of executing them.[7] (*a*)

[1] Hearle *v.* Greenbank, 3 Atk. 712; 1 Ves. 305; Grange *v.* Tiving, Bridg. O. 108; Compton *v.* Collinson, 2 Bro. Ch. 377; Sockett v. Wray, 4 Bro. Ch. 486. See Co. Litt. 3 b, 128 a, 88 b, 172 a, 264 b, Hargrave's note (4); 1 Watk. on Copyh. 24; Eddleston *v.* Collins, 3 De G., M. & G. 1; Toller's Ex'rs, 31; Halliburton *v.* Leslie, 2 Hog. 252.

[2] *Ante*, § 33; Lewin on Trusts, 32.

[3] Russell's Case, 5 Rep. 27 a; Co. Litt. 172 a, 264 b; 1 Roll. Ab. 730, F. 2; Cropster *v.* Griffith, 2 Bland, 5.

[4] 4 Kent, 324.

[5] Coventry *v.* Coventry, 2 P. Wms. 229; 1 Sug. on Powers, 213-220 (6th ed.).

[6] *Ante*, § 14.

[7] King *v.* Bellord, 1 Hem. & M. 343; Hearle *v.* Greenbank, 3 Atk. 695; 1 Ves. 298; Grange *v.* Tiving, Bridg. O. 109.

(*a*) In *In re* D'Angibau, 15 Ch. Div. 228, it was held after a careful examination of the authorities that an infant may exercise a power of appointment, since in so doing he acts as an agent, unless he has an interest of his own in the property which will be affected or disposed of by this exercise of the power.

To the rule that equity would not make a decree divesting an infant of the title to his lands without reserving to him a day in court to show cause why the decree should

§ 53. From these inconveniences and incapacities attending the administration of a trust by an infant, he never would be appointed by a court to such an office. He could not give a valid security or bond for the safety of the trust fund, nor could a court decree him to make satisfaction for a breach of the trust.[1] But an infant has no privilege to cheat,[2] and he will not be protected in cunning and contrived frauds.[3] (*a*)

§ 54. But an infant may still be a trustee; he may be actually named as trustee in any instrument, and the estate will pass to him; and if such an appointment is made, he cannot set up any claim to the beneficial interest in the estate;[4] but a court of equity would direct the execution of the trust by himself or guardian,[5] or would remove him and appoint some one competent to act. So an estate charged with a trust may be

[1] Whitmore *v.* Weld, 1 Vern. 328; Russell's Case, 5 Rep. 27 a; Hindmarsh *v.* Southgate, 3 Russ. 324.

[2] Evroy *v.* Nicholas, 2 Eq. Cas. Ab. 489.

[3] Cory *v.* Gertcken, 2 Mad. 40; Buckingham *v.* Drury, 2 Eden, 71, 72; Clare *v.* Bedford, 13 Vin. 536; Watts *v.* Cresswell, 9 Vin. 415; Beckett *v.* Cordley, 1 Bro. Ch. 358; Savage *v.* Foster, 9 Mod. 37; Overton *v.* Banister, 3 Hare, 503; Stikeman *v.* Dawson, 1 De G. & Sm. 503; Wright *v.* Snowe, 2 De G. & Sm. 321; Davis *v.* Hodgson, 25 Beav. 177; Hillyer *v.* Bennett, 3 Edw. Ch. 544; Hill *v.* Anderson, 5 S. & M. 216.

[4] King *v.* Denison, I Ves. & B. 275; Jevon *v.* Bush, 1 Vern. 343; Lake *v.* De Lambert, 4 Ves. 596, n.

[5] *Ex parte* Sergison, 2 Ves. 149, and n.; In Matter of Fallen, 1 McCarter, 147.

be set aside (Mellor *v.* Porter, 25 Ch. Div. 158; Gray *v.* Bell, 46 L. T. 521. See Younge *v.* Cocker, 32 W. R. 359), there has always been an exception when he holds the title as trustee for others. Walsh *v.* Walsh, 116 Mass. 377; McClellan *v.* McClellan, 65 Me. 500. This exception has been held under the Massachusetts statute to apply even when the infant holds the title upon a resulting trust. Walsh *v.* Walsh, 116 Mass. 377. But the contrary view has been taken in Maine. Perry *v.* Perry, 65 Me. 399.

It has also been held in Maine that a "day in court" must be reserved to an infant trustee if he has a beneficial interest in the property. McClellan *v.* McClellan, 65 Me. 500.

(*a*) And he has no privilege to deny the trust or to refuse to execute it. Levin *v.* Ritz, 41 N. Y. S. 405.

cast upon an infant by descent, or by operation of law; as where a father bought and paid for land, but took the conveyance in the name of a son five years old, the court held that the land in the hands of the son was charged with a resulting trust for the father.[1] In another case, where the father had purchased land in the name of an infant son, it was presumed to have been an advancement, rather than to make the infant a trustee.[2] From the great inconvenience attending the appointment of an infant as trustee, a strong presumption arises that property conveyed to an infant is intended for his benefit, as an advancement or otherwise, and the court will not infer an intention that he is to take it in trust, unless it distinctly appears.[3]

§ 55. Aliens can take and hold real estate by grant in trust to the same extent as they can take and hold the legal title;[4] that is, until office found; though it is said that they cannot take by act of law as by descent.[5] There is a conflict of decisions, whether they can take by devise or not.[6] But an alien cannot plead his alienage to defeat any trust that may be charged upon the lands that come to him, nor in bar of any

[1] Binion *v.* Stone, 2 Freem. 169. See Bowra *v.* Wright, 4 De G. & Sm. 265.

[2] Lamplugh *v.* Lamplugh, 1 P.Wms. 112; Matter of Rindle, 2 Edw. 585.

[3] Ibid.; Blinkhorne *v.* Feast, 2 Ves. 30; Mumma *v.* Mumma, 2 Vern. 19; Taylor *v.* Taylor, 1 Atk. 386; Smith *v.* King, 16 East, 283. See also Grey *v.* Grey, Finch, 338; 1 Ch. Cas. 296; Elliott *v.* Elliott, 2 id. 231; Ebrand *v.* Dancer, id. 26; Scroope *v.* Scroope, 1 Ch. Cas. 27; Stileman *v.* Ashdown, 2 Atk. 480; Pole *v.* Pole, 1 Ves. 76.

[4] *Ante*, § 36; Marshall *v.* Lovelass, Cam. & Nor. 217.

[5] Orr *v.* Hodgson, 4 Wheat. 453; Wright *v.* Trust Meth. Ep. Church, 1 Hoff. Ch. 202; Buchanan *v.* Deshon, 1 Har. & G. 280; *Ex parte* Dupont, 1 Harp. Ch. 5; Trembles *v.* Harrison, 1 B. Monr. 140; Montgomery *v.* Dorion, 7 N. H. 475; Foss *v.* Crisp, 20 Pick. 121; Smith *v.* Zaner, 4 Ala. 99.

[6] In Craig *v.* Radford. 3 Wheat. 594; Atkins *v.* Kron, 2 Ired. Ch. 58, it was held that a devise to an alien would not vest the title in him; but in Vaux *v.* Nesbitt, 1 McCord, Ch. 352; Clifton *v.* Haig, 4 Des. 330; Stephen *v.* Swann, 9 Leigh, 404, it was held that a devise would vest the title in him subject to escheat on office found.

contract made by him in relation to the purchase of lands.[1] If lands in the hands of an alien charged with a trust escheat to the State, the State as a general rule takes only the title that the alien had; and there are statutes in many States that provide for carrying the trust into execution. It has been held that an alien may be a corporator and trustee for a corporation;[2] and that if an alien trustee sold and conveyed the trust estate, equity would not set the sale aside.[3] As to personal property aliens have the same rights and privileges as citizens, and they can execute trusts of personal chattels to the same extent as citizens. An alien may take a mortgage of land as security for debt, and he may have a decree of foreclosure or sale of the land for the payment of the debt.[4] But if the alien is domiciled abroad, it is an objection to his fitness for the office, as he is not within the jurisdiction of the court.[5] (*a*)

§ 56. Lunatics can take a legal title by descent or by devise, and they can take by purchase or grant, although they have not mind enough to accept the conveyance. A valid acceptance will be presumed after long acquiescence by all parties, or if the *cestui que trust* accept the deed, it will be sufficient.[6] But lunatics cannot execute a trust that requires judgment and discretion, as they are incapable of giving a valid assent that

[1] Dunlop *v.* Hepburn, 1 Wheat. 179; 3 id. 231; Scott *v.* Thorpe, 1 Edw. Ch. 512; Waugh *v.* Riley, 8 Met. 290.

[2] Commeyer *v.* United German Churches, 2 Sand. Ch. 186.

[3] Ferguson *v.* Franklin, 6 Munf. 305; Escheator *v.* Smith, 4 McCord, 452.

[4] Hughes *v.* Edwards, 9 Wheat. 489.

[5] Meinertzhager *v.* Davis, 1 Coll. C. C. 335; *In re* Tempest, L. R. 1 Ch. 485.

[6] Eyrick *v.* Eetrick, 13 Penn. St. 494; *Re* Bloomar, 2 De G. & Jon. 88.

(*a*) In Indiana, a State statute providing that a trustee under a written instrument shall be a *bona fide* resident of the State, has been held invalid under that clause of the Federal Constitution which accords to the citizens of each State all the privileges and immunities of the citizens in the several States. Roby *v.* Smith, 131 Ind. 342; Shirk *v.* La Fayette, 52 F. R. 857. See 1 Ames on Trusts (2d ed.), 250.

will bind themselves, the estate, or the *cestui que trust*.[1] Whenever a trust estate is vested in a lunatic, it must be administered by his guardian, or by the court, or he will be removed and a competent person appointed.(*a*) An habitual or common drunkard may be a trustee, but he may be removed.[2]

§ 57. A religious person, who by vows has renounced the world, as a nun or monk, may be a trustee or guardian. It is a matter for their own consciences, whether they will take such an office, and courts cannot regard their religious associations.[3]

§ 58. A bankrupt or insolvent is competent to take, hold, and execute a trust. The trust estate does not pass to his assignees, nor does his certificate discharge him from any fiduciary debts or obligations. (*b*) As he holds only for the

[1] Loomis *v.* Spencer, 2 Paige, 153; Swartwout *v.* Burr, 1 Barb. 495; Person *v.* Warren, 14 Barb. 488.

[2] Webb *v.* Dietrich, 7 W. & S. 401.

[3] Smith *v.* Young, 5 Gill, 197. See also Rine *v.* Wagner, 135 Iowa, 626.

(*a*) In England under the Trustee Act of 1852 the chancery court has power to vest the title of an insane trustee in a substituted trustee if the lunacy of the former has been found by the proper tribunal. Plomley *v.* Richardson, [1894] A. C. 632; *In re* Leon, [1892] 1 Ch. 348; *In re* Batho, 39 Ch. Div. 189. And under the Trustee Act of 1893 the court of chancery may remove from office a trustee when it is satisfied of his unsoundness of mind, but cannot make a vesting order until a formal adjudication of lunacy has been obtained. *In re* M. [1899] 1 Ch. 79.

In the United States the power to remove and appoint usually carries with it the power to vest the title of the removed trustee in the substituted trustee. See *infra*, § 275. The lunacy of a trustee, however, does not *ipso facto* terminate his trusteeship and legal title, even when there are competent co-trustees. Bascom *v.* Weed, 105 N. Y. S. 459.

(*b*) A person who receives personal property in trust, is bound to repay the proceeds thereof, if sold, even after he has been discharged in insolvency. Raphael *v.* Mullen, 171 Mass. 111.

Under the Bankruptcy Act of 1867, a debt was not created by a person while acting in a "fiduciary character," merely because it was created under circumstances in which trust or confidence was reposed in the debtor, in the popular sense of these terms. Upshur *v.* Briscoe, 138 U. S. 365, 375. As to

cestui que trust, he cannot charge or incumber the estate otherwise than for the beneficiary.[1] A witness to a will who is incapable of taking a legacy to himself may yet take a legacy in trust in which he has no interest.[2]

§ 59. *Cestuis que trust* are not incapable of taking in trust for themselves and others (*a*), but they are not altogether fit persons to be appointed, by reason of a possible conflict between their duty and interest. Near relatives and connections, like husband and wife, are also objectionable as trustees, as by reason of affection and influence frequent breaches of trust may happen, and other irregular proceedings are always to be feared; but there is no absolute rule of law that forbids such appointments, and they are sometimes inevitable[3] or necessary.

III. *Who may be Cestuis que trust.*

§ 60. As a general rule, equity follows the law, and all persons who are capable of taking the legal title to property

[1] Scott *v.* Surnam, Willes, 402; Carpenter *v.* Marnell, 3 B. &. P. 41; Gladstone *v.* Hadwen, 1 M. &. S. 526; *Ex parte* Glanys, 1 Mont. & Mac. 258; *Ex parte* Painter, 2 Deac. & Ch. 584; Butler *v.* Merchants Ins. Co., 14 Ala. 798; Shryock *v.* Waggoner, 28 Penn. St. 431; Harris *v.* Harris, 29 Beav. 107; Copeman *v.* Gallant, 1 P. Wms. 314; Gardner *v.* Rowe, 2 Sim. & St. 346; Lounsbury *v.* Purdy, 11 Barb. 490; Ludwig *v.* Highley, 5 Barr, 132; Welhelm *v.* Falmer, 6 Barr, 296; Kep *v.* Bank of N. Y., 10 Johns. 63; Bliss *v.* Pierce, 20 Vt. 25; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596.

[2] Hogan *v.* Wyman, 2 Oregon, 302.

[3] Wilding *v.* Bolder, 21 Beav. 222; *Ex parte* Clutton, 17 Jur. 988. See also *In re* Tempest, L. R. 1 Ch. 485. [Stearns *v.* Fraleigh, 39 Fla. 603. See Parker's Ex'rs *v.* Moore, 25 N. J. Eq. 228.]

bankruptcy as a cause for removal from the office of trustee see *infra*, § 279, note.

(*a*) Burbach *v.* Burbach, 217 Ill. 547; Nellis *v.* Rickard, 133 Cal. 617; People *v.* Donohue, 70 Hun, 317; Story *v.* Palmer, 46 N. J. Eq. 1; Rogers *v.* Rogers, 111 N. Y. 228; Robertson *v.* De Brulatour, 188 N. Y. 301; Doscher *v.* Wyckoff, 113 N. Y. S. 655. See, *contra*, Craig *v.* Hone, 2 Edw. Ch. (N. Y.), 554, 564. See the subject of merger, *infra*, § 347.

may take the equitable title as *cestuis que trust*, through the medium of a trustee.[1] (*a*)

§ 61. A trust may be declared in favor of the Crown. By the old law the king could take the use of real estate only by matter found of record;[2] but Mr. Hill says that it has never been decided that a court of chancery would refuse to execute a trust in land in favor of the Crown, if found otherwise than by matter of record.[3] The king can take personal property as *cestui que trust*, in the same manner as a private person.[4]

§ 62. The State may be a *cestui que trust*, and when there are no statutes to forbid it, property may be given to trustees for the use of the State or the United States in the same manner as for the use of individuals. A deed to a trustee and his heirs in trust for the State of South Carolina was held to vest, by the statute of uses, the whole legal title in the State.[5] And a deed to trustees in trust to sell and apply the proceeds to pay a debt due to the United States from the grantor is valid, notwithstanding the statute which forbids the purchase of any land on account of the United States, unless authorized by act of Congress.[6]

§ 63. If there are statutes, like the statutes of mortmain, which prevent corporations from taking the legal title to lands,

[1] Sand on Uses, 370; Lewin on Trusts, 35; Hill on Trustees, 52; Trotter *v.* Blocker, Porter, 269.

[2] Bacon on Uses, 60; Gilbert on Uses, 44, 204.

[3] Hill on Trustees, 52; Rogers *v.* Rogers, 18 Hun (N. Y.), 409; Moke *v.* Norrie, 21 id. 128.

[4] Middleton *v.* Spicer, 1 Bro. Ch. 201; Brummel *v.* McPherson, 5 Russ. 264; Nightingale *v.* Goulbourne, 5 Hare, 484; 2 Phill. 594; Mitford *v.* Reynolds, 1 Phill, 185; Ashton *v.* Langdale, 4 Eng. L. & Eq. 80.

[5] Lamar *v.* Simpson, 1 Rich. Ch. 71.

[6] Neilson *v.* Lagow, 12 How. 107; 3 Stat. at Large, 568, May 1, 1820.

(*a*) A tribal Indian, who cannot sue in the Federal courts, but can sue in the courts of the State, may be a *cestui que trust*. Felix *v.* Patrick, 145 U. S. 317. A tribe of Indians may be *cestuis*. Ruddick *v.* Albertson, 154 Cal. 640.

they cannot evade the statutes by taking the legal title to trustees and the beneficial interest to themselves; thus they cannot be *cestuis que trust* in lands the legal title to which they are not licensed or enabled to take.[1] They can be the *cestuis que trust* of personal property, to the same extent as individuals.[2] So voluntary associations may be *cestuis que trust* of personal property, and if such associations have an authorized agent, treasurer, or secretary, the trustees may act under his directions in performing the trust.[3] (*a*)

§ 64. If an alien is made the *cestui que trust* of land he may enjoy it as against all but the State; but the State can at any time claim the equitable interest.[4] This rule applies where a mere naked trust is created in a trustee for the benefit of an alien. But if the trustee is to do anything with the land, that is, if the trust is executory, the court will do nothing to transfer the right of the alien to the State. As where a testator directed lands to be sold and the proceeds divided among certain persons, some of whom were aliens, the court considered that as done at the time of the death which was ordered to be done, and that it was a devise of mere personalty, and it refused to allow the Crown to elect to keep the funds in land in order to work a forfeiture.[5] So where an agent to collect a

[1] Hill on Trustees, 52; Lewin on Trusts, 36.

[2] Ibid.

[3] Sangston *v.* Gordon, 22 Gratt. 755. [White *v.* Rice, 112 Mich. 403, 409; *In re* Clarke, (1901) 2 Ch. 110.]

[4] Dumoncel *v.* Dumoncel, 13 Ir. Eq. 92; Vin. Ab. Alien, A. 8; Godfrey *v.* Dixon, Godb. 275; Barrow *v.* Wadkin, 24 Beav. 1; King *v.* Holland, Al. 16; Styl. 21; Burney *v.* MacDonald, 15 Sim. 6; Rittson *v.* Stordy, 3 Sm. & Gif. 230; Att.-Gen. *v.* Sands, Hard. 495; Fourdrin *v.* Gowdy, 3 M. & K. 383; Burgess *v.* Wheate, 1 Eden, 188; Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 My. & Cr. 525; Master *v.* De Croismar, 11 Beav. 184.

[5] Burney *v* MacDonald, 15 Sim. 14; Rittson *v.* Stordy, 3 Sm. & Gif. 240; Du Hourmelin *v.* Sheldon, 1 Beav. 79; 4 My. & Cr. 525. And see Master *v.* De Croismar, 11 Beav. 184; Barrow *v.* Wadkin, 24 Beav. 1;

(*a*) As to gifts for the benefit of unincorporated charitable associations, see *infra*, § 730, note.

debt for an alien took a deed of real estate in trust to sell and pay the proceeds to the alien creditor, the heirs of the agent were ordered, having sold the land, to pay the proceeds to the principal.[1] But where an alien paid the money for lands, and took the deed in the name of a citizen as trustee, the trustee was adjudged to hold the land in trust for the commonwealth.[2] Equity will not raise a resulting trust in favor of an alien.[3] (*a*) Nor will it allow a legacy given to an alien to be charged upon real estate,[4] nor lands liable to escheat to be sold for the payment of debts in order that aliens may take their legacies out of the personalty.[5] Aliens may be the *cestuis que trust* of personal property without objection;[6] and trustees for aliens, and alien *cestuis que trust* may maintain actions in our courts to maintain their rights in the trust property.[7]

§ 65. There is another class of cases that illustrates the principle that the beneficial donee of property cannot take as *cestuis que trust*, if he is prohibited from taking the legal title to that property; as where a slave is prohibited from holding

Craig *v.* Leslie, 3 Wheat. 563; Austin *v.* Brown, 6 Paige, 448; Neilson *v.* Lagow, 12 How. 107; Com'th *v.* Martin, 5 Munf. 117; Meakings *v.* Cromwell, 1 Selden, 136.

[1] Austin *v.* Brown, 6 Paige, 448; McCaw *v.* Galbrath, 7 Rich. Law, 74.

[2] Hubbard *v.* Goodwin, 3 Leigh, 492.

[3] Leggett *v.* Dubois, 5 Paige, Ch. 114; Phillips *v.* Crammond, 2 Wash. C. C. 441. See Taylor *v.* Benham, 5 How. 270, and Farley *v.* Shippen, Wythe, 254.

[4] Atkins *v.* Kron, 2 Ired. Eq. 423.

[5] Trezavant *v.* Howard, 5 Des. 87.

[6] Bradwell *v.* Weeks, 1 Johns. Ch. 206.

[7] Hamersley *v.* Lambert, 2 Johns. Ch. 508.

(*a*) The two cases cited in support of this proposition are in jurisdictions where at the time it was against the policy of the law to permit aliens to own real estate, and the decisions were based upon the principle that equity would not imply a trust which would have the effect of defeating this policy. Since the general change in the policy of the law in regard to ownership of real estate by aliens, there seems no good reason why trusts may not result in their favor as in favor of other persons.

property, he cannot be made a *cestui que trust* of property.[1] In Virginia, a free negro was prohibited from holding slaves, and it was held that he could not be a *cestui que trust* of slaves.[2] So where emancipation was forbidden, a slave could not be the *cestui que trust* of his own freedom.[3] But in Mississippi it was held that land purchased with money furnished by a slave with the acquiescence of her master, and the title taken in the name of a freeman, was held in trust for the slave after her actual emancipation by living in Ohio, and that the trust could be enforced against all persons who took the land with notice of the facts.[4] So where an individual took stock in trust for a corporation that had no right to hold shares in another corporation, it was held that such shares did not go to the assignees upon the bankruptcy of the individual, but that they must be disposed of as the corporation, as *cestui que trust*, should direct.[5]

§ 66. But in charitable trusts the *cestuis que trust* are not, and need not be, capable of taking the legal title, as when property is given in trust for the poor of a parish, or for the education of youth, or for pious uses, or for any charitable purpose, the beneficiaries are generally unknown, uncertain, changing, and incapable of taking or dealing with the legal title; but such trusts are valid in equity, and courts of equity will administer them and protect the rights of the *cestuis que trust*.[6] And in trusts not charitable it is not always necessary that the *cestui que trust* should be in existence at the time of the creation of the trust; as a devise to a father in trust for accumulation for his children lawfully begotten at the time of his death was held to be good, although the father had no children at the time of

[1] Skrine *v.* Walker, 3 Rich. Eq. 262; Pool *v.* Harrison, 18 Ala. 514. [1 Ames, Cases on Trusts (2d. ed.) 214.]

[2] Dunlap *v.* Harrison, 14 Gratt. 251.

[3] Trotter *v.* Blocker, Porter, 269; Graves *v.* Allen, 13 B. Monr. 190.

[4] Leiper *v.* Hoffman, 26 Miss. 615; and see Frazier *v.* Frazier, 2 Hill, Ch. 305; Ross *v.* Duncan, Freem. Ch. 603; Osterman *v.* Baldwin, 6 Wall. 116.

[5] Great Eastern Ry. Co. *v.* Turner, L. R. 8 Ch. 149; *Ex parte* Watkins, 2 Mont. & A. 348.

[6] *Post*, chapter on Charitable Trusts.

the vesting of the funds in him as trustee.[1] So an illegitimate child born, or in *ventre sa mère*, may be a *cestui que trust* (*a*);[2] but a trust for illegitimate children to be thereafter begotten will not be enforced, as being against good morals.[3] Nor will a court of equity establish or execute a trust that is founded upon a consideration that is fraudulent, or *malum in se*, or *malum prohibitum*, or immoral, or corrupt, or contrary to public policy.[4] But a trust not charitable created *in præsenti* for *cestuis que trust* does not take effect until the *cestuis que trust* are identified; as where land was conveyed under articles of agreement in trust for the subscribers thereto, the title of the grantor was not divested until there were subscribers.[5] In some cases a person is capable of taking an equitable interest, in a manner in which the legal interest could not be limited. Thus at law no property can be so limited to a married woman

[1] Ashurst *v.* Given, 5 Watts & S. 329; Carson *v.* Carson, 1 Wins. (N. C.) 24.

[2] Gabb *v.* Prendergast, 3 Eq. R. 648; Pratt *v.* Flamer, 7 Har. & J. 10; Gardner *v.* Heyer, 2 Paige, 11; Collins *v.* Hoxie, 9 Paige, 81; *In re* Connor, 2 Jones & Lat. 456; Evans *v.* Davies, 7 Hare, 498; Owen *v* Bryant, 21 L. J. Ch. 860. [Cooper *v.* Heatherton, 73 N. Y. S. 14, 65 App. Div. 561.]

[3] Medworth *v.* Pope, 27 Beav. 21; Wilkinson *v.* Wilkinson, 1 Younge & C. Ch. 657; Pratt *v.* Mathew, 22 Beav. 528; Howarth *v.* Mills, L. R. 2 Eq. 389. [Thompson *v.* Thomas, 27 L. R. Ir. 457.]

[4] Ownes *v.* Ownes, 23 N. J. Eq. 60; Battinger *v.* Budenbecker, 63 Barb. 404; 69 Barb. 395.

[5] Urkett *v.* Coryell, 5 W. & S. 61.

(*a*) As the law fixes no limit to the age of child-bearing, a trust for a woman's "children now living, or that may hereafter be born," continues through the woman's life. Bearden *v.* White (Tenn. Ch. 1897), 42 S. W. 476. See *In re* Hocking, [1898] 2 Ch. 567; *In re* Ricards' Trust Estate, 97 Md. 608; White *v.* Allen, 76 Conn. 185; *In re* Dawson, 39 Ch. Div. 155. But see 1 Ames on Trusts (2d ed.), 455, n.

Children born after their parents' marriage are presumed legitimate, but the presumption of legitimacy is now held rebuttable. See Orthwein *v.* Thomas, 127 Ill. 554; Shuman *v.* Shuman, 83 Wis. 250; 2 Kent Com. (14th ed.), 209 n.

A deed of the father for his illegitimate child's benefit has a good consideration. Conley *v.* Nailor, 118 U. S. 127.

as to exclude the legal rights of the husband; but, by way of trust, property can be so given to her use as to place it entirely beyond the right of enjoyment by the husband.[1] A trust for the heirs of A. is valid as a trust for the children of A.[2]

IV. *What Property may be the Subject of a Trust.*

§ 67. Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust, as a receipt for a medicine,[3] the copyright of a book,[4] a patent right,[5] (*a*) a trade secret,[6] or growing crops.[7]

§ 68. At common law no possibility, right, title, nor *chose in action* could be granted or assigned to strangers.[8] But in equity the rule is different, and *choses in action*,[9] expectancies,[10] contingent interests,[11] and even possibilities[12] may be as-

[1] Lewin on Trusts, 37.
[2] Flint *v.* Steadman, 36 Vt. 210.
[3] Green *v.* Folgham, 1 Sim. & St. 398.
[4] Sims *v.* Marryal, 17 Q. B. 281.
[5] Russell's Patent, 2 De G. & Jon. 130.
[6] Morrison *v.* Moat, 6 Eng. L. & Eq. 14; 9 Hare, 241.
[7] Robinson *v.* Maulden, 11 Ala. 908; Grantham *v.* Hawley, Hob. 132; Petch *v.* Tutin, 15 M. & W. 110; McCarty *v.* Blevins, 5 Yerg. 195.
[8] Lampet's Case, 10 Coke, 48; Thallhimer *v.* Brinckerhoff, 3 Cow. 623.
[9] Row *v.* Dawson, 1 Ves. 322; Ryall *v.* Rolles, 1 Ves. 348; Townsend *v.* Windham, 2 Ves. 6; *Ex parte* Alderson, 1 Mad. 53; Burn *v.* Carvalho, 4 My. & Cr. 690; Yeates *v.* Grover, 1 Ves. Jr. 280; *Ex parte* South, 3 Swans. 393; Morton *v.* Naylor, 1 Hill, 583; Clemson *v.* Davidson, 5 Binn. 392.
[10] Fitzgerald *v.* Vestal, 4 Sneed, 258; Hobson *v.* Trevor, 2 P. Wms. 191; Beckley *v.* Newland, id. 182; Wetherhed *v.* Wetherhed, 2 Sim. 183; Douglass *v.* Russell, 4 Sim. 184; Langton *v.* Horton, 1 Hare, 549.
[11] Ibid.; Varish *v.* Edwards, 1 Hoff. Ch. 382.
[12] Ibid.

(*a*) See 1 Ames on Trust (2d ed.), 194. In England, there could be no implied trust in a registered British ship; but the Merchant Shipping Acts now distinguish between legal and beneficial interests therein. See Chasteauneuf *v.* Capeyron, 7 A. C. 127.

signed, and a valid trust created in them. Equitable reversionary interests stand upon the same ground.[1] Property not owned by the assignor at the time, and not even *in esse*, may be assigned in equity;[2] and a valid trust may be created in a naked power or authority.[3]

§ 69. But there are some *choses in action*, rights, claims, and interests that cannot be assigned in equity; either because some statute prohibits, or because it is against public policy to allow assignments of them to strangers. Thus an officer in the army cannot assign or pledge his commission,[4] nor his full or half pay.[5] A judge cannot assign his salary;[6] nor can a pension given for the honorable support of the dignity of a title be assigned.[7] The principle seems to be that when a salary, annuity, or pension is given by the State for the support of its own dignity and the administration of its affairs, it is not becoming that its officers should deprive themselves of the

[1] Voyle *v.* Hughes, 2 Sm. & Gif. 18; Kekewich *v.* Manning, 1 De G., M. & G. 187; and cases *supra*.

[2] Pennock *v.* Coe, 23 How. 117; Mitchell *v.* Winslow, 2 Story, 630; 6 Law Rep. 347; Holroyd *v.* Marshall, 2 Gif. 382; 2 De G., F. & J. 596; 9 Jur. N. S. 213; 33 L. J. Ch. 193; Hope *v.* Hayley, 5 El. & Bl. 845; Calkins *v.* Lockwood, 17 Conn. 154; Langton *v.* Horton, 1 Hare, 549; Brooks *v.* Hatch, 6 Leigh, 534; Leslie *v.* Guthrie, 1 Bing. N. C. 697; Field *v.* Mayor of N. Y., 2 Selden, 179; Robinson *v.* Macdonald, 5 M. & S. 228; *In re* Ship Warre, 8 Price, 269; Stewart *v.* Kirkland, 19 Ala. 162; Hinkle *v.* Wanzer, 17 How. 353; McWilliams *v.* Nisby, 2 S. & R. 509; Wilson's Estate, 2 Barr, 325.

[3] Brown *v.* Higgs, 8 Ves. 570.

[4] Collier *v.* Fallon, 1 Turn. & Rus. 459; and see L'Estrange *v.* L'Estrange, 1 Eng. L. & Eq. 153.

[5] Stone *v.* Lidderdale, 2 Anst. 533; Priddy *v.* Rose, 3 Mer. 102; Tunstall *v.* Boothby, 10 Sim. 540; Flarty *v.* Odlum, 3 Tr. 681; Lidderdale *v.* Montrose, 4 T. R. 248.

[6] Arbuthnot *v.* Norton, 5 Moore, P. C. C. 219; Cooper *v.* Reilley, 2 Sim. 560; Palmer *v.* Bate, 6 Moore, 28; 2 Brod. & Bing. 673; Hill *v.* Paul, 8 Cl. & Fin. 295. But in State Bank *v.* Hastings, 15 Wis. 75, it was held that a judge could assign his salary.

[7] Davis *v.* Marlborough, 1 Swanst. 79; McCarthy *v.* Gould, 1 Ball & Beatt. 387; Price *v.* Lovett, 4 Eng. L. & Eq. 110; Grenfell *v.* Dean, &c., 2 Beav. 550. See also Wells *v.* Foster, 8 M. & W. 149; Spooner *v.* Payne, 10 Eng. L. & Eq. 207.

means of support which it gives to them; but a pension or annuity for past services may be assigned.[1] The mere right to file a bill in equity for a fraud committed upon the assignor, or to sue for a tort, cannot be assigned and a trust created in such rights.[2] A mere naked expectancy arising from a peculiar position, such a position as that a person expects to make a favorable bargain and purchase (and he employs an agent to negotiate the purchase, and such agent purchases for another), is not such property that a trust can be created in it.[3]

§ 70. The question has been frequently mooted in courts, how far a trust could be engrafted and enforced upon foreign property, or property beyond the limits of the jurisdiction of the court where the suit is pending. In regard to personal property there is no difficulty, for it follows the person; and if the court has jurisdiction over the parties, it has jurisdiction over the subject-matter, and can enforce a trust or any other equity.[4] If the personal property is, however, in fact beyond the jurisdiction of the court, there may arise some practical obstructions to the execution of the decrees of the court.[5] Where the trust is created by a judicial decree in another State, as by probate of a will in New York State, the trustee is accountable in the courts of that State; and where the will has not been proved or recorded in the State of the former, nor any letters testamentary or of administration or trusteeship have been

[1] Alexander *v.* Wellington, 2 Russ. & My. 35; Tunstall *v.* Boothby, 10 Sim. 452; Feistal *v.* King's College, 10 Beav. 491; and see Berkley *v.* King's College, 10 Beav. 499, and Butcher *v.* Musgrove, 2 Beav. 550; Stevens *v.* Bagwell, 15 Ves. 139.

[2] Prosser *v.* Edmonds, 1 Yo. & Col. 481; Gardner *v.* Adams, 12 Wend. 297; Dunklin *v.* Wilkins, 5 Ala. 199; McKee *v.* Judd, 2 Ker. 622. It is not intended to enter into all the niceties of the law of assignments. An exhaustive statement of the law and a collection of all the cases will be found in Story's Eq. Jur. §§ 1040-1055, and 3 Lead. Cas. in Eq. pp. 279-380 (3d Am. ed.).

[3] Garrow *v.* Davis, 15 How. 277.

[4] Hill *v.* Reardon, 2 Russ. 608; Hill on Trustees, 44; Lewin on Trusts, 39; Chase *v.* Chase, 2 Allen, 101; Mason *v.* Chambers, 4 J. J. Marsh, 401.

[5] Booth *v.* Clark, 17 How. 327.

issued there, the trustee cannot be compelled to execute the trust, though residing in the State of the former; such is the settled law of Massachusetts.[1] (*a*) Such a case differs entirely from one in which the trust is created by instrument *inter partes* without judicial decree.[2]

§ 71. As to lands lying in a foreign jurisdiction, the court will enforce natural equities and compel the specific performance of contracts, if the parties are within its jurisdiction. Thus Lord Eldon allowed a lien to a consignor for advances upon estates in the West Indies;[3] and a specific performance of articles between parties for the settlement of their boundaries was enforced;[4] effect was given to an equitable mortgage by deposit of the title-deeds to land in Scotland, though by the law of Scotland such deposit created no lien;[5] an account was ordered of the rents and profits of lands abroad;[6] and an absolute sale[7] or a foreclosure of a mortgage[8] decreed; a fraudulent conveyance was relieved against,[9] and injunction granted

[1] Jenkins *v.* Lester, 131 Mass. 357, and cases there cited. [See also Chase *v.* Chase, 2 Allen, 101; Jones *v.* Downs, 72 A. 589, (Conn. 1909); Marsh *v.* Marsh's Ex'rs, 73 N. J. Eq. 99; Schwartz *v.* Gerhardt, 44 Or. 425.]

[2] Massie *v.* Watts, 6 Cranch, 148, 160. [Johns *v.* Herbert, 2 App. D. C. 485. See also Peynado's Devises *v.* Peynado's Ex'r, 82 Ky. 5.]

[3] Scott *v.* Nesbitt, 14 Ves. 438.

[4] Penn *v.* Lord Baltimore, 1 Ves. 444 and Belt's Sup.; Roberdeau *v.* Rous, 1 Atk. 543, West, 23; Tullock *v.* Hartley, 1 Yo. & Col. 114; Cood *v.* Cood, 33 Beav. 314; Portarlington *v.* Soulby, 3 My. & K. 104; Athol *v.* Derby, 1 Ch. Cas. 221.

[5] *Ex parte* Pollard, 3 Mont. & Ayr. 340; Mont. & Chit. 239; Norris *v.* Chambers, 29 Beav. 246; Martin *v.* Martin, 2 R. & M. 507.

[6] Roberdeau *v.* Rous, 1 Atk. 543.

[7] Ibid.

[8] Toller *v.* Carteret, 2 Vern. 494.

[9] Arglasse *v.* Muschamp, 1 Vern. 75; Archer *v.* Preston, 1 Vern. 77; 1 Eq. Abr. 133.

(*a*) But the trustee's legal ownership of trust property will be recognized without any new appointment. Iowa & Cal. Land Co. *v.* Hoag, 132 Cal. 627; Peach Orchard Coal Co. *v.* Woodward, 105 Ky. 790; Toronto Gen. Tr. Co. *v.* C. B. & Q. R. Co., 123 N. Y. 37; Bradford *v.* King, 18 R. I. 743; Pennington *v.* Smith, 69 Fed. 188.

against taking possession.[1] Chief-Justice Marshall said: "Upon the authority of these cases and others which are to be found in the books, as well as upon general principles, this court is of opinion that in case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." [2] But if the person is not within the jurisdiction of the court, and the land is, the court cannot decree a specific performance of an agreement for a sale.[3] If a trust is created by the will of a citizen of a particular State, and his will is allowed by the Probate Court of that State, and a trustee is appointed by the Probate Court, courts of equity will have jurisdiction over the trust, although both the trustee and the property are beyond the jurisdiction of the court. Chief-Justice Bigelow, in determining this point, said: "The residence of the trustee and *cestui que trust* out of the commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills of citizens of this State, and which have been proved and established by the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the Probate Court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him in concurrence with this court on the application of those beneficially inter-

[1] Cranstown *v.* Johnston, 5 Ves. 278; Bunbury *v.* Bunbury, 1 Beav. 318; Hope *v.* Carnegie, L. R. 1 Ch. 320.

[2] Massie *v.* Watts, 6 Cranch, 160; Farley *v.* Shippen, Wythe, 135; Kildare *v.* Eustace, 1 Vern. 419; Ward *v.* Arredondo, Hopk. 213; DeKlyn *v.* Watkins, 3 Sand. Ch. 185; Guerrant *v.* Fowler, 1 Hen. & M. 4; Shattuck *v.* Cassidy, 3 Edw. Ch. 152; Newton *v.* Bronson, 3 Ker. 587; Sutphen *v.* Fowler, 9 Paige, 280; Epis. Church *v.* Wiley, 2 Hill. Ch. 584; Dickinson *v.* Hoomes, 8 Gratt. 353; Hughes *v.* Hall, 5 Munf. 431; Vaughn *v.* Barclay, 6 Whar. 392; Watkins *v.* Holman, 16 Pet. 25; Guild *v.* Guild, 16 Ala. 121; White *v.* White, 7 Gill. & J. 208. But see Lewis *v.* Nelson, 1 McCarter, 94. [Donaldson *v.* Allen, 182 Mo. 626.]

[3] Spurr *v.* Scoville, 3 Cush. 578; Meux *v.* Maltby, 2 Swanst. 277; Fell *v.* Brown, 2 Bro. Ch. 276.

ested in the estate."[1] And where A. had fraudulently obtained a deed of land, in a foreign State, from B., and had conveyed it to C. without consideration, it was held that although the courts of other States would not declare such deeds to be nullities, yet they would order reconveyances from the parties before the court; and if such parties went beyond the jurisdiction, the court could appoint special commissioners to execute such reconveyances.[2] And so trustees to whom property has been conveyed by the owner by a direct conveyance can sue in any and all courts which have jurisdiction over the parties or the subject-matter of the suit; (*a*) but if the trustee depends upon some court to clothe him with the office and title of trustee, he, like an administrator or executor, can only sue within the country or State over which the jurisdiction of the court appointing him extends.[3]

§ 72. The foundation of this doctrine is the jurisdiction of the court over the person, which was originally the only jurisdiction of courts of equity.[4] They cannot, when the property is in a foreign jurisdiction, make a decree *in rem*, binding upon the land; but they can enter a decree *in personam* and compel its performance by process in contempt;[5] hence if the parties are not before the court, or the court has no jurisdic-

[1] Chase *v.* Chase, 2 Allen, 101; Curtis *v.* Smith, 60 Barb. 9.
[2] Cooley *v.* Scarlett, 38 Ill. 316.
[3] Curtis *v.* Smith, 6 Blatch. 537.
[4] Penn *v.* Baltimore, 1 Ves. 444; Massie *v.* Watts, 6 Cranch, 160.
[5] Ibid.; White *v.* White, 7 Gill & J. 208; Mead *v.* Merritt, 2 Paige, 404. [Cloud *v.* Greasley, 125 Ill. 313.]

(*a*) Peach Orchard Coal Co. *v.* Woodward, 105 Ky. 790; Iowa & Cal. Land Co. *v.* Hoag, 132 Cal. 627; Toronto Gen. Tr. Co. *v.* C. B. & Q. R. Co., 123 N. Y. 37; Bradford *v.* King, 18 R. I. 743; Pennington *v.* Smith, 69 Fed. 188.

In suits between trustees and third parties respecting trust property where the citizenship of the parties is involved, the citizenship of the *cestuis* would usually, if not always, be immaterial. Johnson *v.* City of St. Louis, 172 Fed. 31, 40.

tion over them, the specific performance of a contract cannot be decreed;[1] and if the court cannot give relief by a decree against the person, but must go further and make a decree to be executed by its own officers against the land, it must, of course, if the land is beyond its jurisdiction, refuse to act.[2] (*a*) It is not necessary that the person to be bound by a decree should be domiciled within the jurisdiction of the court. It will be sufficient if the person is found and served with process within the jurisdiction, and a *ne exeat* may be obtained to prevent his departing until the decree of the court is performed;[3] or if a person is prosecuting a suit at law within a jurisdiction, a suit in equity may be maintained, and an injunction may be decreed against him, and service on his attorney in the suit at law would be a good service to bring him within the jurisdiction.[4] So if courts of equity have jurisdiction over the parties to a controversy, they can enjoin them from proceeding in the courts of foreign States or countries. (*b*) This power does not

[1] Spurr *v.* Scoville, 3 Cush. 578; Meux *v.* Maltby, 2 Swanst. 277; Fell *v.* Brown, 2 Bro. Ch. 276.

[2] Morris *v.* Remington, 1 Pars. Eq. 387; Bank of Virginia *v.* Adams, 1 Pars. Eq. 547; Blunt *v.* Blunt, 1 Hawks, 365; White *v.* White, 7 Gill & J. 208; Cartwright *v.* Pettus, 2 Ch. Cas. 214; 2 Swanst. 323 n.; Waterhouse *v.* Stansfield, 9 Hare, 234, 10 Hare, 254; Martin *v.* Martin, 2 R. & My. 507; Nelson *v.* Bridport, 8 Beav. 547; Walker *v.* Ogden, 1 Dana, 252; Williams *v.* Mans, 6 Watts, 278; Booth *v.* Clark, 17 How. 322; Hawley *v.* James, 7 Paige, 213; White *v.* White, 7 Gill & J. 208. [Gibson *v.* Burgess, 82 Va. 650.]

[3] Mitchell *v.* Bunch, 2 Paige, 606; Baker *v.* Dumaresque, 2 Atk. 66; Howden *v.* Rogers, 1 Ves. & B. 129; Flack *v.* Holm, 1 Jac. & W. 406; Grant *v.* Grant, 3 Russ. 598; Woodward *v.* Schatzell, 3 Johns Ch. 412; Gilbert *v.* Colt, 1 Hopk. 496.

[4] Chalmers *v.* Hack, 19 Maine, 124.

(*a*) Suit does not lie in England to recover land in a colony or foreign country. *Re* Holmes, 2 J. & H. 527; Jenney *v.* Mackintosh, 33 Ch. D. 595. In British South Africa Co. *v.* Companhia de Moçambique, [1893] A. C. 602, the Supreme Court of Judicature was held to have no jurisdiction of an action to recover damages for trespass to land abroad. See 19 Law Mag. & Rev. 115; 49 Alb. L. J. 125.

(*b*) Cole *v.* Cunningham, 133 U. S. 107.

If the trust property is within the territorial jurisdiction of the

depend upon any superintending power of the courts of one country over those of another, which does not exist; but it is founded wholly upon the power which courts of equity have over all litigants within its actual jurisdiction. This jurisdiction is *in personam*, and the decrees are directed against the persons or parties. If the decree should be disregarded, and a litigant should prosecute a suit in a foreign tribunal, no action could be taken against the agents, officers, or judges of such foreign tribunal, but the remedy would be confined to proceeding against the party who has proceeded in contempt of the injunction.[1] There is, however, an exception to this practice in the case of the courts of the several States and of the courts of the United States. These courts have concurrent jurisdiction over many causes; and to prevent unpleasant conflicts of jurisdiction, it has been held, upon grounds of public policy, that they have no power to restrain or enjoin suitors

[1] Story Eq. Jur. §§ 899, 900; Dehon *v.* Foster, 4 Allen, 545; Great Falls *v.* Worster, 23 N. H. 470; Bank *v.* Rutland, 28 Vt. 740; Hays *v.* Ward, 4 Johns. Ch. 123; Vail *v.* Knapp, 49 Barb. 299; Massie *v.* Watts, 6 Cranch, 158, 166; Angus *v.* Angus, West Ch. 23; Moody *v.* Gay, 15 Gray, 457; Sutphen *v.* Fowler, 9 Paige, 282; Mitchell *v.* Bunch, 2 Paige, 615; Mackintosh *v.* Ogilvie, 4 T. R. 193 n., 3 Swanst. 365 n.; Cranstown *v.* Johnston, 3 Ves. 179, 5 Ves. 277; Bunbury *v.* Bunbury, 1 Beav. 318; Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416; Beckford *v.* Kemble, 1 S. & S. 7; Harrison *v.* Gurney, 2 Jac. & W. 563; Bowles *v.* Orr, 1 Y. & C. 464; Portarlington *v.* Soulby, 3 My. & K. 104; Duncan *v.* McCalmont, 3 Beav. 409; Graham *v.* Maxwell, 1 Mac. & Gord. 71; Briggs *v.* French, 1 Sumn. 504; Dobson *v.* Pearce, 1 Duer, 142, 2 Kern. 156; Pearce *v.* Olney, 20 Conn. 544; Cage *v.* Cassidy, 23 How. 109, 117; Marsh *v.* Putnam, 3 Gray, 566; Brigham *v.* Henderson, 1 Cush. 430 ; Beal *v.* Burchstead, 10 Cush. 523; Maclaren *v.* Stainton, 16 Beav. 286. The case of Carroll *v.* Farmers' Bank, Harrington, 197, is not followed.

court, it may be dealt with in enforcement of the trust regardless of residence of the trustee. Du Puy *v.* Standard Mineral Co., 88 Me. 202; Gassert *v.* Strong, 38 Mont. 18. But where a trustee who did not owe his appointment to the court of Massachusetts had removed himself and the trust property out of the State, it has been held that a court of that State had no jurisdiction to remove him without personal service upon him. Parker *v.* Kelley, 166 Fed. 968.

from pursuing their rights in the courts of their choice, whether of the State or of the United States.[1] (*a*)

[1] Diggs *v.* Walcott, 4 Cranch, 179; McKim *v.* Voorhies, 7 Cranch, 279; Sumner *v.* Marcy, 3 W. & M. 119; Coster *v.* Griswold, 4 Edw. Ch. 377; English *v.* Miller, 3 Rich, Eq. 320; See also Mead *v.* Merritt, 2 Paige, 402; Bicknell *v.* Field. 8 Paige, 440; Burgess *v.* Smith, 2 Barb. Ch. 276; Grant *v.* Quick, 2 Sandf. 612; Croft *v.* Lathrop, 2 Wall. Jr. 103; Cruikshanks *v.* Roberts, 6 Madd. 104; Bushby *v.* Munday, 5 Madd. 307; Jones *v.* Geddes, 1 Phillips Ch. 725.

(*a*) The general rule, that the validity of an attempted trust is to be determined by the law where the property is situated if land, and by the law of the domicile of the donor or testator if the property consists of personalty, is subject to considerable qualification; and the policy of the law which would render the trust invalid is frequently an important consideration.

Thus the definiteness or indefiniteness of a trust for charitable purposes is usually determined by the law of the locality where the trust is to be executed, since the courts of that locality have ample power to control and enforce the proper execution of the trust. Hope *v.* Brewer, 136 N. Y. 126; Sickles *v.* New Orleans, 80 Fed. 868. See Congregation Unit. Soc. *v.* Hale, 51 N. Y. S. 704.

In Hope *v.* Brewer, 136 N. Y. 126, it was said: "Our law with respect to the creation of trusts, the suspension of the power of alienation of real estate, and the absolute ownership of personal, was designed only to regulate the holding of property under our laws and in our State, and a trust intended to take effect in another State, or in a foreign country, would not seem to be within either its letter or its spirit. When a citizen of this State, or a person domiciled here, makes a gift of personal estate to foreign trustees for the purpose of a foreign charity, our courts will not interpose our local laws with respect to trusts and accumulations to arrest the disposition made by the owner of his property, but will inquire as to two things. First, whether all the forms and requisites necessary to constitute a valid testamentary instrument, under our law, have been complied with; and second, whether the foreign trustees are competent to take the gift, for the purposes expressed, and to administer the trust under the law of the country where the gift was to take effect. . . ." And, conversely, it has been held that if the attempted trust is invalid in the State where it is to be administered the courts of the testator's domicile cannot sustain it, although the trust would have been valid under the law of his domicile. Mount *v.* Tuttle, 183 N. Y. 358. See Cross *v.* U. S. Trust Co., 131 N. Y. 330; Dammert *v.* Osborn, 140 N. Y. 30; 141 N. Y. 564.

The law of the domicile of the testator or donor is usually applied to determine whether or not an attempted gift or trust of personalty contravenes the rule against per-

petuities. Cross *v.* U. S. Trust Co., 131 N. Y. 330; Dammert *v.* Osborn, 140 N. Y. 30; 141 N. Y. 564; Penfield *v.* Tower, 1 N. D. 216. But because of conflicts of law in regard to alienability of a *cestui's* interest the statutory modification of the rule sometimes yields to the law of the locality where the trust is to be administered. Thus in Robb *v.* Washington and Jefferson College, 185 N. Y. 485, a bequest of personalty by a resident of New York to a Pennsylvania corporation in trust to pay life annuities to seven persons was held valid since under the law of Pennsylvania the interests of the annuitants were alienable.

The validity of attempted restraints on alienation, being a matter which concerns the administration of the trust, rather than its creation or the vesting of interests, is to be determined by the law of the locality where the alienation if valid will take effect; viz., in case of land, where the land is situated, and in case of personalty, where the trust is to be administered. Spindle *v.* Shreve, 111 U. S. 542; *In re* Fitzgerald, [1903] 1 Ch. 933. See Keeney *v.* Morse, 75 N. Y. S. 728, 71 App. Div. 104.

As to conflict of laws in cases involving the exercise of powers of appointment, see *infra*, § 511 *b*, note.

It has been held by a New Jersey court that where a resident of Pennsylvania, by will made within a month before death, bequeathed a legacy to a charitable corporation of that State, the Pennsylvania statute rendered the legacy void, although the entire property from which the legacy was to be paid was real estate situated in New Jersey. Jenkins *v.* Guarantee Trust, etc., Co., 53 N. J. Eq. 194. See *In re* Piercy, [1895] 1 Ch. 83.

The intention of the testator with regard to personalty is to be interpreted in the light of the law of his domicile with respect to the interests which he intended to give to the *cestuis* and the powers he intended to confer on the trustees. Rosenbaum *v.* Garrett, 57 N. J. Eq. 186; First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459. See Minor, Conflict of Laws, § 142 *et seq.*

CHAPTER III.

EXPRESS TRUSTS, AND HOW EXPRESS TRUSTS ARE CREATED AT COMMON LAW, SINCE THE STATUTE OF FRAUDS, AND IN PERSONAL PROPERTY, AND HEREIN OF VOLUNTARY CONVEYANCES OR SETTLEMENTS IN TRUSTS.

§ 73. Division of trusts, according to the manner of their creation.
§§ 74–77. Trusts at common law.
§ 74. At common law, a writing not necessary to convey land.
§ 75. Uses might also be created without writing, and so may trusts, in States where the statute of frauds is not in force.
§ 76. Parol cannot control a written trust nor engraft an express trust on an absolute conveyance.
§ 77. Same rule as to trusts created by parol.
§ 78. The statute of frauds, and its form in various States.
§ 79. Effect of the statute upon the creation of express trusts.
§§ 80, 81. Effect of the different forms of the words of the statutes in the several States.
§ 82. How express trusts may be proved or manifested under the statute.
§ 83. Certainty of the terms of the trust, and the person by whom it is to be declared.
§§ 84, 85. Trusts declared or proved by answers in chancery.
§ 86. Trust in personal property may be created by parol.
§§ 87, 88. Trusts arising from gifts *mortis causa* and for charitable uses.
§ 89. Statute of wills, and the execution of wills.
§ 90. Trust cannot be *created in* a will, unless it is properly executed, to pass the property.
§§ 91, 92. But might be manifested by a recital in a will not properly executed.
§ 93. The effect of the necessity of probate of wills.
§ 94. Parol evidence cannot convert a bequest in a will into a trust. An executor is a trustee of the surplus.
§ 95. When a trust is completely created.
An agreement upon a valuable and legal consideration will be carried into effect as a trust or a contract.
§§ 96–98. If a complete trust is created without consideration, it will be carried into effect.
§ 97. But if anything remains to be done to complete the trust, it will not be carried into effect, if without consideration.

§ 99. Whether a lawful trust is completely created or not a question of fact in each case.
§ 100. Trust for a stranger without consideration not completed without transfer of the legal title.
§ 101. But if the legal title cannot be transferred, a different rule will apply.
§ 102. If the subject of the proposed trust is an equitable interest, the legal title need not be transferred.
§ 103. The instrument of trust need not be delivered.
§ 104. If once perfected cannot be destroyed, though voluntary.
§ 105. Notice not necessary to trustee of *cestui que trust*.
§ 106, 107. Voluntary settlements upon wife and children.
§ 108. When they will not be enforced.
§ 109. Tendency of the rule in the United States.
§ 110. Marriage a valuable as well as meritorious consideration.
§ 111. Effect of a seal.
§ 111 *a*. New York Statute Law.

§ 73. HAVING considered who may be the parties to a trust, and what may be the subject-matter of it, it is now to be considered in what manner a trust may be created, or how it may arise. Trusts are divided in this respect into direct or express trusts, implied, resulting, and constructive trusts. Direct or express trusts are created by the direct or express words of a grantor or settlor. Implied, resulting, and constructive trusts arise by operation of law upon the transactions of the parties, and they will be hereafter discussed. This chapter will treat of the creation of direct or express trusts. In this connection it will be necessary to inquire: (1) how trusts were created in lands at common law prior to the statutes of frauds and of wills; (2) how trusts are created in lands since the statutes; (3) how trusts may be created in personal property; and (4) the effect of a voluntary conveyance or declaration of trust.

§ 74. At common law a deed in writing was not necessary to transfer land. What was called a feoffment was the common and earliest mode of conveyance. The feoffment was a short and simple charter, and was accompanied by livery of seizin; the feoffor went upon the land in the presence of the freeholders of the neighborhood with the charter, and made a

manual delivery to the feoffee of some symbolical thing in the name of delivering seizin, or ownership and possession of all the lands named in the charter. But not even this deed or charter was necessary. The land could be conveyed by mere livery of seizin in the presence of the freeholders of the neighborhood, who might be called upon to witness the act. The feoffment and livery of seizin operated upon and transferred the possession, and it barred the feoffor from all future right or possibility of right in the land, and vested an estate in freehold in the feoffee.[1]

§ 75. It has been a mooted question whether at common law uses could be raised by parol, or even by deed without seal, upon a conveyance of lands.[2] But there seems to be no good reason for the doubt. As the estate itself could be transferred without writing, it would seem to follow that uses declared at the time in the presence of witnesses might be effectually established. Mr. Sanders says that in their commencement uses were of a secret nature, and were usually created by a parol declaration.[3] Mr. Lewin says that trusts like uses are in their own nature *averrable*, i. e., may be declared by word of mouth without writing, in the absence of a statute requiring it; as if an estate had been conveyed unto and to the use of A. and his heirs, a trust might have been raised by parol in favor of B.[4] Lord Chief-Baron Gilbert reconciled most of the conflicting cases by stating the law thus: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, then it seems a deed declaratory of the use was necessary; for as a feoffment might be made at

[1] 4 Kent, 490, 481; 2 Sand. Uses and Trusts, 1-8.

[2] 2 Story, Eq. Jur. § 971; Hill on Trustees, 55.

[3] 1 Sand. on Uses, 14, 218 (2d Am. ed.).

[4] Lewin on Trusts, 41. See Fordyce *v.* Willis, 2 Bro. Ch. 587; Benbow *v.* Townsend, 1 My. & K. 506; Bayley *v.* Boulcott, 4 Russ. 347; Crabb *v.* Crabb, 1 My. & K. 511; Kilpin *v.* Kilpin, id. 520; Bellasis *v.* Compton, 2 Vern. 294; Thruxton *v.* Att.-Gen., 1 Vern. 341.

common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seized to uses without a deed; but a bargain and sale by parol has raised a use without." [1] Lord Thurlow observed that "he had been accustomed to consider uses as averrable; but perhaps when looked into, the cases may relate to feoffment, and not to conveyances by bargain and sale or lease and release." [2] And Duke says expressly, "that when the things given may pass without deed, then a charitable use may be averred by witnesses; but where the things cannot pass without deed, there charitable uses cannot be averred without a deed proving the uses." [3] This question is almost purely speculative in the United States, where the statute of frauds is perhaps universally adopted, and all conveyances of land and of interests in land must be by deed acknowledged and recorded; but it may arise when questions arise upon transactions prior to the passage of the statute, as it arose in Ohio upon a conveyance before 1810, the time when the statute of frauds was adopted in that State; and it was determined that a trust in land could be created, at common law, by parol,[4] and as the seventh, eighth, and ninth sections were omitted from the Ohio statute, a trust in real estate may still be created by parol.[5] The same question arose in Connecticut, and it was denied that at common law a trust in lands could be raised by parol. The court said that the rules of evidence as well as the statute prevented it.[6] In some other States the statute, or at least the seventh section of the statute, has not been adopted; and in those States it has been determined that

[1] Gilbert on Uses, 270; Adlington *v.* Cann, 3 Atk. 141.

[2] Fordyce *v.* Willis, 3 Bro. Ch. 587.

[3] Duke on Char. 141; Adlington *v.* Cann, 3 Atk. 141.

[4] Fleming *v.* Donohoe, 5 Ohio, 250; but see Starr *v.* Starr, 1 Ohio, 321; Ready *v.* Kearsley, 14 Mich. 215; McIntire *v.* Skinner, 4 Greene, 89.

[5] Harvey *v.* Gardner, 41 Ohio St. 646; [Russell *v.* Bruer, 64 Ohio St. 1, 5.]

[6] Dean *v.* Dean, 6 Conn. 287. *Contra*, Ready *v.* Kearsley, 14 Mich. 215.

trusts in land can be proved by parol, as in Texas,[1] North Carolina,[2] Tennessee,[3] and Virginia[4] [and West Virginia] (*a*). In Pennsylvania, under the act of 1799, it was determined that trusts in land might be created by parol.[5] The statute was amended, however, in 1851.[6] In Kentucky, the seventh section was omitted; but the courts treat all parol agreements that would create a trust as agreements for the sale or purchase of some interest in land, and therefore void as within the fourth section of the statute.[7] (*b*) In nearly all the other States the

[1] Miller *v.* Thatcher, 9 Tex. 482: Hale *v.* Layton, 16 Tex. 262; Bailey *v.* Harris, 19 Tex. 102; Osterman *v.* Baldwin, 6 Wall. 116; Leakey *v.* Gunter, 25 Tex. 400; Grooves *v.* Rush, 27 Tex. 231; Dunham *v.* Chatham, 21 Tex. 231; Creney *v.* Dupree, 21 Tex. 20; Pierce *v.* Fort, 60 Tex. 464, and cases cited; [Brotherton *v.* Weathersby, 73 Tex. 471; Gardner *v.* Rundell, 70 Tex. 453; Reed *v.* Howard, 71 Tex. 204; Allen *v.* Allen, 107 S. W. 528 (Tex. 1908).]

[2] Fay *v.* Fay, 2 Hayw. 131; Shelton *v.* Shelton, 5 Jones, Eq. 292; Riggs *v.* Swann, 6 id. 118; McLaurin *v.* Fairly, id. 375; Wright *v.* Cain, 93 N. C. 301; Link *v.* Link, 90 N. C. 235. [Owens *v.* Williams, 130 N. C. 165; Blackburn *v.* Blackburn, 109 N. C. 488. See Pittman *v.* Pittman, 107 N. C. 159; Gaylord *v.* Gaylord, 150 N. C. 222.]

[3] Thompson *v.* Thompson, 1 Yerg. 100; McLanahan *v.* McLanahan, 6 Humph. 99; Haywood *v.* Ensley, 8 Humph. 460; Wilburn *v.* Spofford, 4 Sneed, 705; [Thompson *v.* Thompson, 54 S. W. 145 (Tenn. Ch. App. 1899); Mee *v.* Mee, 113 Tenn. 454; Woodfin *v.* Marks, 104 Tenn. 512.]

[4] Bank of United States *v.* Carrington, 7 Leigh, 576; Walraven *v.* Lock, 2 P. & H. 549; [See Garrett *v.* Rutherford, 108 Va. 478.]

[5] German *v.* Gabbald, 3 Binn. 302; Wallace *v.* Duffield, 2 S. & R. 521; Slaymaker *v.* St. Johns, 5 Watts, 27; Murphy *v.* Hubert, 7 Barr, 420; Tritt *v.* Crotzer, 13 Penn. St. 452; Wetherell *v.* Hamilton, 15 id. 195; Money *v.* Herrick, 18 id. 128; Blyholder *v.* Gilson, id. 134. See Freeman *v.* Freeman, 2 Pars. Eq. 81.

[6] Shoofstall *v.* Adams, 2 Grant's Cas. 209; Barnett *v.* Dougherty, 32 Pa. St. 371.

[7] Parker *v.* Bodley, 4 Bibb, 102; Childs *v.* Woodson, 2 Bibb, 72; [Hocker *v.* Gentry, 3 Met. (Ky.) 463. See Garth *v.* Davis, 120 Ky. 106.]

(*a*) Currence *v.* Ward, 43 W. Va. 367; Hamilton *v.* McKinney, 52 W. Va. 317; Crawford *v.* Workman, 64 W. Va. 19.

(*b*) In States where the seventh section of the Statute of Frauds is not in force it has been held that a parol agreement by the owner of land to hold it in trust falls within other provisions of the statute which have been adopted. It is treated as an attempted conveyance without writing. Accordingly in several, if not all of these States, an express trust in land cannot be created by parol except contemporaneously

statute of frauds was substantially re-enacted at an early day in its full extent, and in those States it has not since been an open question whether parol trusts could be created.[1]

§ 76. It must also be observed that if a trust is declared in writing, courts never permit parol proof of a trust to contradict an intention expressed upon the face of the instrument

[1] See Browne's Statute of Frauds, §§ 79-82; Anding *v.* Davis, 38 Miss. 574; Harper *v.* Harper, 5 Bush, 177; Wolf *v.* Corley, 30 Md. 356; Eaton *v.* Eaton, 35 N. J. L. 290; Knox *v.* McFarren, 4 Col. 586; Thomas *v.* Merry, 113 Ind. 83; McGinness *v.* Barton, 71 Iowa, 644; Hain *v.* Robinson, 72 Iowa, 735; Ingham *v.* Burnell, 31 Kansas, 333; Lawrence *v.* Lawrence, 14 Oregon, 77. [Sheehan *v.* Sullivan, 126 Cal. 189; Doran *v.* Doran, 99 Cal. 311; Von Trotha *v.* Bamberger, 15 Col. 1; McIntosh *v.* Green, 25 App. D. C. 456; Smith *v.* Peacock, 114 Ga. 691, 697; Benson *v.* Dempster, 183 Ill. 297; Hays *v.* Marsh, 123 Iowa, 81; Gregory *v.* Bowlsby, 115 Iowa, 327; Gee *v.* Thrailkill, 45 Kan. 173; Rapley *v.* McKinney's Estate, 143 Mich. 508; Thompson *v.* Marley, 102 Mich. 476; Dougan *v.* Bemis, 95 Minn. 220; Ryan *v.* Williams, 92 Minn. 506; Horne *v.* Higgins, 76 Miss. 813; Crawley *v.* Crafton, 193 Mo. 421; Marvel *v.* Marvel, 70 Neb. 498; Pruitt *v.* Pruitt, 57 S. C. 155; Rogers *v.* Rogers, 52 S. C. 388; Fillingham *v.* Nichols, 108 Wis. 49.]

with a valid transfer of the legal title. Kelly *v.* McNeill, 118 N. C. 349; Hamilton *v.* Buchanan, 112 N. C. 463, 471; Thompson *v.* Thompson, 54 S. W. 145 (Tenn. Ch. App. 1899); Mee *v.* Mee, 113 Tenn. 454; Woodfin *v.* Marks, 104 Tenn. 512; Allen *v.* Allen, 107 S. W. 528 (Tex. 1908); Currence *v.* Ward, 43 W. Va. 367; Hamilton *v.* McKinney, 52 W. Va. 317; Crawford *v.* Workman, 64 W. Va. 19. See also Pittman *v.* Pittman, 107 N. C. 159; Smiley *v.* Pearce, 98 N. C. 185. It has also been held in these States that even a contemporaneous parol agreement will not be admitted in evidence to establish a trust in contradiction to the terms of the deed. Mee *v.* Mee, 113 Tenn. 454; Gaylord *v.* Gaylord, 150 N. C. 222. See also Troll *v.* Carter, 15 W. Va. 567; Poling *v.* Williams, 55 W. Va. 69.

But the ordinary words of *habendum* in fee to the named grantee of the legal title have been held not to exclude parol evidence of a trust in favor of a third party or evidence that the deed was in fact given only as security. It was said, "There is a well-recognized distinction between contradicting a deed or impairing its legal operation and the arising out of the transaction of an equity *dehors* the deed binding the grantee's conscience to hold the land for the real purposes of the conveyance. . . ." Mee *v.* Mee, 113 Tenn. 454.

itself,[1] for that would be to allow parol evidence to vary, contradict, or annul a written instrument; nor is it necessary, in order to exclude evidence, that the beneficial estate should be expressly conferred upon the grantee of the legal estate, for a trust cannot be raised by parol if, from the nature of the instrument or from any circumstance of evidence appearing upon the face of it, an intention can be clearly implied of making the holder of the legal estate also the holder of the beneficial estate.[2] Thus a trust cannot be proved by parol where a valuable consideration was paid from the grantee's own money.[3] Oral proof cannot be heard, to engraft an *express* trust on a conveyance absolute in its terms.[4] (*a*) Nor will *subsequent* declarations of

[1] Lewis *v.* Lewis, 2 Ch. R. 77; Finch's Cas. 4 Inst. 86; Childers *v.* Childers, 3 K. & J. 310; 1 De G. & J. 482; Fordyce *v.* Willis, 3 Bro. Ch. 587; Leman *v.* Whitley, 4 Russ. 423; Lloyd *v.* Inglis, 1 Des. 333; Sims *v.* Smith, 11 Ga. 198; Harris *v.* Barnett, 3 Grat. 339; Dickenson *v.* Dickenson, 2 Murph. 279; Steere *v.* Steere, 5 Johns. Ch. 1; Gainus *v.* Cannon, 42 Ark. 503; [McDermith *v.* Voorhees, 16 Colo. 402; Nevius *v.* Nevius, 117 N. Y. App. Div. 236, 101 N. Y. S. 1091.]

[2] Ibid.; Lewin 42, 5th ed.; Gilbert on Uses, 56, 57; Pilkington *v.* Bailey, 7 Bro. P. C. 526; Dean *v.* Dean, 6 Conn. 285; Hutchinson *v.* Tindall, 2 Green, Ch. 257; Starr *v.* Starr, 1 Ohio, 321; Movan *v.* Hays, 1 Johns. Ch. 343; Philbrooke *v.* Delano, 29 Maine, 410; Clagett *v.* Hall, 9 Gill & J. 80. See notes to Woollam *v.* Hearn, 2 Lead. Cas. Eq. 404; Irnham *v.* Child, 1 Bro. Ch. 92; Bartlett *v.* Pickersgill, 1 Ed. 515.

[3] Ibid.

[4] Kelly *v.* Karsner, 72 Ala. 110; Lawson *v.* Lawson, 117 Ill. 98; Green *v.* Cates, 73 Mo. 122; Hansen *v.* Berthelson, 19 Neb. 433; Cain *v.* Cox, 23 W. Va. 594; Pavey *v.* American Ins. Co., 56 Wis. 221.

(*a*) The better opinion is that a conveyance of personal property by a bill of sale, absolute in form, may be shown by parol evidence to have been made in trust, even for the assignor, or by way of security. Martin *v.* Martin, 43 Or. 119; Raphael *v.* Mullen, 171 Mass. 111; Minchin *v.* Minchin, 157 Mass. 265; Riley *v.* Hampshire County Bank, 164 Mass., 482, 486. But see Nevius *v.* Nevius, 101 N. Y. S. 1091, 117 App. Div. 236. But in Georgia the Code provides that all express trusts must be "created or declared in writing." Ga. Code (1895) § 3153; Smith *v.* Peacock, 114 Ga. 691, 697. Evidence of a trust or a pledge is considered not to contradict or be inconsistent with the instrument of transfer, since such evidence seeks, not to limit the conveyance of the legal title, but only to show the purpose for which the legal title was conveyed.

The better opinion in regard to

the grantor, oral or written, avail for this purpose.[1] To establish by parol that the grantee in an absolute deed is a trustee, it must be shown that the whole or a part of the purchase-money was not his, or that fraud, artifice, solicitation, or persuasion entered into the inducements for executing the deed. A mere breach of a parol agreement is not enough to create a

[1] Phillips *v.* South Park Com'rs, 119 Ill. 626. [Russell *v.* Bruer, 64 Ohio St. 1, 5.]

proof of a trust or mortgage when real estate is conveyed by absolute deed is that the same rule should hold, except where the statute of frauds prevents the establishment of a trust in land by parol. See Mee *v.* Mee, 113 Tenn. 454; Kelly *v.* McNeill, 118 N. C. 349; Stafford *v.* Stafford, 29 Tex. Civ. App. 73. But see Crawford *v.* Workman, 64 W. Va. 19. In Minchin *v.* Minchin, 157 Mass. 265, 267, it is said: "In the view of equity the evidence does not contradict the writing, but tends to establish an equitable title consistent with the legal title which was conveyed to the defendant by the writing and by the delivery. In a grant of land with full covenants but in trust for the grantor, whether the trust is declared in the deed of grant or in a writing signed by the grantee, the trust is not regarded as inconsistent with the grant or the covenants, and when the statute of frauds does not require the trust to be created or proved by a written instrument, the oral declaration of such a trust is not in equity regarded as inconsistent with a similar grant of personal property."

In most States the statute of frauds is sufficient to exclude oral evidence of express trusts in cases of absolute conveyances of land, and the rule that a trust will not result to the grantor in such a case rests upon other grounds. See *infra*, § 162. But it has often been held that such a conveyance of land may be shown by parol evidence to be in fact a mortgage. Potter *v.* Kimball, 186 Mass. 120; Campbell *v.* Dearborn, 109 Mass. 130; Weiseham *v.* Hocker, 7 Okla. 250; Troll *v.* Carter, 15 W. Va. 567; Stafford *v.* Stafford, 29 Tex. Civ. App. 73. See *infra*, § 226, note.

In the absence of fraud, accident or mistake, parol evidence will not be admitted to vary the terms of an established trust or to establish a trust which is inconsistent with the terms of the conveyance, Mee *v.* Mee, 113 Tenn. 454; Walton *v.* Follansbee, 165 Ill. 480, or to disprove the trust declared or recited in the deed. McDermith *v.* Voorhees, 16 Colo. 402. But a mere description of the grantee in a deed as trustee without naming a beneficiary or setting out the terms of any trust is not conclusive and will not shut out parol evidence that no trust was in fact intended. Andrews *v.* Atlanta R. E. Co., 92 Ga. 260; Trammel *v.* Inman, 115 Ga. 874; Te Teira *v.* Te Roera Tareha, [1902] A. C. 56.

trust.[1] A parol trust is not, however, an absolute nullity in any case, but rests in the election of the trustee in those cases where the *cestui* cannot enforce it. The courts will protect the trustee in the execution of the trust if he chooses so to do, and as far as possible will protect the beneficiaries in the enjoyment of the fruits of its execution.[2] (*b*) But where A. agreed to purchase land for B., and purchased it and took an absolute title to himself, it was held that B., not being privy to the deed, was not bound by it, and might prove a trust by parol.[3] And where one holds lands in secret trust to defraud creditors, a subsequent parol agreement by which the land is to be held in trust *for* the creditors, &c., will be good.[4]

§ 77. If a trust is once effectually created by parol, it cannot subsequently be revoked or altered by the party creating it, for it is governed by the same rules that govern trusts created by writing.[5] And if a parol trust has been executed it cannot be revoked, and if money has been paid upon it, it cannot be recovered back.[6] The declarations of the grantor, to create a

[1] Hollinshead's App. 103 Penn. St. 158. [Von Trotha *v.* Bamberger, 15 Colo. 1.]

[2] Karr *v.* Washburn, 56 Wis. 303.

[3] Strong *v.* Glasgow, 2 Murph. 289; Squire's App. 70 Penn. St. 266.

[4] Langsdale *v.* Woollen, 99 Ind. 575.

[5] Kilpin *v.* Kilpin, 1 M. & K. 531; Adlington *v.* Cann, 3 Atk. 151; Freeman *v.* Freeman, 2 Pars. Eq. 81; Crabb *v.* Crabb, 1 M. & K. 511; Walgrave *v.* Tibbs, 2 K. &. J. 313; Lee *v.* Ferris, 2 K. & J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; *In re* Dunbar, 2 Jon. & La. 120; Brown *v.* Brown, 12 Md. 87; Greenfield's Est., 14 Penn. St. 489; Kirkpatrick *v.* McDonald, 11 id. 387; Tritt *v.* Crotzer, 13 id. 451.

[6] Eaton *v.* Eaton, 35 N. J. L. 290.

(*b*) Thus it has been held that creditors of the trustee cannot set aside a conveyance by him in execution of the parol trust. McCormick Co. *v.* Griffin, 116 Iowa, 397; Gottstein *v.* Wist, 22 Wash. 581; Columbia Bank *v.* Baldwin, 64 Neb. 732; Silvers *v.* Potter, 48 N. J. Eq. 539; Martin *v.* Remington, 100 Wis. 540; Blaha *v.* Borgman, 124 N. W. 1047 (Wis. 1910); Bicocchi *v.* Casey-Swasey Co., 91 Tex. 259. But see Pruitt *v.* Pruitt, 57 S. C. 155; Pierce *v.* Hower, 142 Ind. 626.

trust, must be prior to, or contemporaneous with, the conveyance, for it would be against reason and the rules of evidence to allow a man who has parted with all interest in an estate to charge it with any trust or incumbrance after such conveyance;[1] nor can the *cestui que trust* give his own declarations in evidence to create a trust in his favor; but where parties may be witnesses, he can testify to the facts like any other witness; and if the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right at any time to declare the trust.[2] The declarations of a trustee can be given in evidence to show how he held the estate;[3] that is, in those States where the trust may be proved by parol. But these declarations must be clear and explicit, and point out with certainty both the subject-matter of the trust and the person who is to take the beneficial interest. Casual and indefinite expressions of mere inchoate intentions, not carried into effect, are insufficient to raise a trust.[4] If a pension from the government is granted to A., a trust cannot be raised by parol in favor of B., for a pension is conferred as an honor, and is founded upon the personal services and merits of the annuitant.[5]

[1] Adlington *v.* Cann, 3 Atk. 145; Walgrave *v.* Tibbs, 2 K. & J. 313; Lee *v.* Ferris, 2 K. & J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87; *In re* Dunbar, 2 Jon. & La. 120; Tritt *v.* Crotzer, 13 Penn. St. 451; Ivory *v.* Burns, 56 id. 303; Bennett *v.* Fulmer, 49 Penn. St. 155; Knox *v.* McFarren, 4 Col. 586. See Chapman *v.* Wilbur, 3 Oregon, 326, for a particular case. [Russell *v.* Bruer, 64 Ohio St. 1; Phillips *v.* Sherman, 39 S. W. 187 (Tex. Civ. App.).]

[2] Bellasis *v.* Compton, 2 Vern. 294; Lee *v.* Huntoon, 1 Hoff. Ch. 447; Harris *v.* Barnett, 3 Grat. 339; Reid *v.* Reid, 12 Rich. Eq. 213.

[3] Ambrose *v.* Ambrose, 1 P. Wms. 322; Gardner *v.* Rowe, 2 S. & S. 346; 5 Russ. 258; Wilson *v.* Dent, 3 Sim. 385; Willard *v.* Willard, 56 Penn. St. 119; Dollinger's App. 71 id. 425.

[4] Kilpin *v.* Kilpin, 1 M. & K. 520; Benbow *v.* Townsend, 1 id. 506; Bayley *v.* Boulcott, 4 Russ. 345; Harrison *v.* McMennomy, 2 Edw. Ch. 251; Slocum *v.* Marshall, 2 Wash. C. C. 398; Sidle *v.* Walters, 5 Watts, 389; Mercer *v.* Stock, 1 S. & M. Ch. 479; Hurst *v.* McNeil, 1 Wash. C. C. 70; Smith *v.* Patton, 12 W. Va. 541; Childs *v.* Wesleyan Cemetery Ass., 4 Mo. App. 74.

[5] Fordyce *v.* Willis, 3 Bro. Ch. 587.

§ 78. The seventh section of the statute of frauds enacted that all declarations or creations of trusts or confidences in any lands, tenements, or hereditaments, "shall be manifested and proved by some writing signed by the party who is by law to declare such trust, or by his last will in writing," or else they shall be utterly void and of none effect.

SEC. 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of like force as the same would have been if this statute had not been made, anything hereinbefore to the contrary notwithstanding.

SEC. 9. All grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.[1]

[1] 29 Car. II. c. 3, §§ 7, 8, 9.

In Arkansas, Florida, Georgia, Illinois, Maryland, Missouri, New Jersey, and South Carolina, the statute of Charles is re-enacted, almost in words, and the trust or confidence must be "manifested or proved by some writing signed by the party."

In Alabama, California, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, Rhode Island, Vermont, and Wisconsin, "the trust must be created or declared by instrument in writing signed by the party creating or declaring the same."

In New York, the seventh section was re-enacted; but in the revised statutes it was enacted "that the trust should be created or declared by deed or conveyance in writing," signed, etc.; but in 1860 it was enacted "that any writing signed by the parties" should be sufficient.

In Pennsylvania, the seventh section was not enacted, and trusts could be created and proved by parol; but in 1856 the seventh section was substantially enacted.

In Texas, North Carolina, Tennessee, Virginia, West Virginia, Connecticut, Delaware, Kentucky, and Ohio, the seventh section does not seem to be re-enacted. See *ante*, § 75.

In Iowa, declarations and creations of trust or powers in relation to real

§ 79. Wherever this statute or the substance of the statute is in force, express trusts in realty cannot be *proved* by parol.[1] (*a*)

estate must be executed in the same manner as deeds of conveyance. [Code of Iowa (1897) § 2918.]

The ninth section seems to be in force in all the States.

[1] Gerry *v.* Stimson, 60 Maine, 186; Stevenson *v.* Crapnell, 114 Ill. 19; [Brock *v.* Brock, 90 Ala. 86; Von Trotha *v.* Bamberger, 15 Colo. 1; Farrand *v.* Beshoar, 9 Colo. 291; Simons *v.* Bedell, 122 Cal. 341; Dick *v.* Dick, 172 Ill. 578; Ellis *v.* Hill, 162 Ill. 557; McDearmon *v.* Burnham, 158 Ill. 55; Moore *v.* Horsley, 156 Ill. 36; Pearson *v.* Pearson, 125 Ind. 341; Keller *v.* Strong, 104 Iowa, 585; Sherley *v.* Sherley, 97 Ky. 512; Wentworth *v.* Shibles, 89 Me. 167; Rogers *v.* Ramey, 137 Mo. 598; Cameron *v.* Nelson, 57 Neb. 381; Thomas *v.* Churchill, 48 Neb. 266; Taft *v.* Dimond, 16 R. I. 584; Bickford *v.* Bickford, 68 Vt. 525; Levis *v.* Kengla, 8 App. D. C. 230, 169 U. S. 234; Ducie *v.* Ford, 138 U. S. 587.]

(*a*) A trust in personal property may be created and proved by parol except in Georgia. Chase *v.* Perley, 148 Mass. 289; Taft *v.* Stow, 167 Mass. 363; Bath Savings Inst'n *v.* Hathorn, 88 Maine, 122; Hirsh *v.* Auer, 146 N. Y. 13; Pitney *v.* Bolton, 45 N. J. Eq. 639; Eipper *v.* Benner, 113 Mich. 75; Bedell *v.* Scoggins (Cal.), 40 Pac. 954; Ray *v.* Simmons, 11 R. I. 266; Gadsden *v.* Whaley, 14 S. C. 210. And land subseqently bought with the proceeds of personalty held upon a parol trust will be impressed with the same trust without writing. Maher *v.* Aldrich, 205 Ill. 242; Cobb *v.* Knight, 74 Me. 253. The same is true of land acquired by the trustee on foreclosure of a mortgage held upon a parol trust. Berry *v.* Evendon, 14 No. Dak. 1.

Although an express trust in land cannot be established by parol, a parol agreement to hold the proceeds of a sale of land in trust for another if based upon a sufficient consideration has frequently been held to establish a trust in the proceeds. Worley *v.* Sipe, 111 Ind. 238; Thomas *v.* Merry, 113 Ind. 83; Talbott *v.* Barber, 11 Ind. App. 1, 7; Bork *v.* Martin, 132 N. Y. 280; Spencer *v.* Richmond, 46 N. Y. App. Div. 481, 61 N. Y. S. 397; Bechtel *v.* Ammon, 199 Pa. St. 81.

It has been said in such cases that the parol trust is not in the land but in the proceeds of the land; and, although the agreement to sell cannot be enforced, if that part of the trust has been executed by the trustee, the case stands as a trust in personalty. On this view the trust does not come into existence at the time of the parol agreement, but only when the conversion is made, and some cases have held that the parol trust cannot attach to the proceeds unless the trustee makes a new promise. Collar *v.* Collar, 75 Mich. 414, and 86 Mich. 507, 13 L. R. A. 621; Rapley *v.* McKinney's Estate, 143 Mich. 508; Calder *v.* Moran, 49 Mich. 14; Marvel *v* Marvel, 70 Neb. 498; Dexter *v* MacDonald, 196 Mo. 373 (*semble*); Gee *v.* Thrailkill, 45 Kan. 173 (*semble*). Bork *v.* Martin, 132 N. Y. 280, *ubi supra*, seems to hold that no

In suits to establish or enforce trusts in real estate parol proof is insufficient.[1] They must be *manifested* or *proved* by some writing, signed by the party to be charged with the trust. They need not *be created and declared in writing*, but only manifested or proved by writing; for if there be written evidence of the existence of the trust, the danger of parol evidence, against which the statute was directed, is effectually removed.[2] It may be questioned whether it was not the intention of the statute that the creation or declaration itself should be in writing; for the ninth section enacts that "all grants and assignments of any trust or confidence *shall likewise* be in writing, signed by the party granting or assigning the same, or by his

[1] Todd *v.* Munson, 53 Conn. 579. It is to be remembered, however, that in suits to enforce contracts, correct mistakes, and punish or prevent frauds, it may be necessary to show incidentally an express trust by parol. Id. 592. And so a parol trust may be proved in order to show that the apparent owner has no interest in the land which equity will subject to the lien of a judgment. Hays *v.* Reger, 102 Ind. 524.

[2] Forster *v.* Hale, 3 Ves. Jr. 707; 5 Ves. 315; Smith *v.* Mathews, 3 De G., F. & J. 139; Randall *v.* Morgan, 12 Ves. 74; Unitarian Society *v.* Woodbury, 14 Me. 281; Steere *v.* Steere, 5 Johns. Ch. 1; Movan *v.* Hays, 1 id. 339; McCubbin *v.* Cromwell, 7 Gill & J. 157; Barrell *v.* Joy, 16 Mass. 221; Pinney *v.* Fellows, 15 Vt. 525; Rutledge *v.* Smith, 1 McCord, Ch. 119; Johnson *v.* Ronald, 4 Munf. 77; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Lane *v.* Ewing, 31 Mo. 75; Safford *v.* Rantoul, 12 Pick. 233; Gibson *v.* Foote, 40 Miss. 788; Reid *v.* Reid, 12 Rich. Eq. 213. Numerous other cases might be cited; but the rule is so well established that it is not necessary.

such new promise is necessary, but that the trust will attach to the proceeds even though at the time of the sale the trustee has indicated an intention not to hold them upon a trust. This is an extreme view, for it is hard to find any basis for the express trust in the proceeds unless the sale by the trustee was at least intended to be in execution of his unenforceable agreement. See Benson *v.* Dempster, 183 Ill. 297.

The statute of frauds does not apply when a trust results by operation of law. Valentine *v.* Richardt, 126 N. Y. 272; Sanford *v.* Sanford, 139 U. S. 642; Hudson *v.* White, 17 R. I. 519; Von Trotha *v.* Bamberger, 15 Colo. 1; Roby *v.* Colehour, 135 Ill. 300; Myers *v.* Myers, 167 Ill. 52; Ryan *v.* O'Connor, 41 Ohio St. 368; Davis *v.* Whitehead [1894], 2 Ch. 133; or when equity imposes a trust from the parties' acts and relations not dependent merely upon oral evidence. McCahill *v.* McCahill 32 N. Y. S. 836; Sherley *v.* Sherley, 97 Ky. 512.

last will or devise;" but whatever may have been the actual intention of the legislature, the construction put upon the clause is now firmly established.[1] A mere admission in writing that parol promises to hold the land in trust were made at the time of the conveyance is not enough to give life to the trust.[2] It is well established that the interest of the *cestui que trust* in land cannot be conveyed by parol.[3] (*a*)

§ 80. In many of the United States the words of the seventh section are replaced by words to the effect that "the trust must be created or declared by an instrument in writing signed by the party;"[4] (*b*) and the question has arisen whether this is a change of the law as established under the words of the original statute of frauds.

§ 81. The question has not been directly adjudged in a reported case raising the exact point; but it has arisen incidentally before the courts, and the intimations are that these words do not change the law, and that "created and declared" are equivalent to "manifested and proved." In practice, the great majority of trusts are not created by a deed or conveyance of land, but they arise from the transactions and agreements of parties; and if these transactions or agreements are evidenced in writing, the trust is sufficiently created, declared, manifested, or proved. Thus Mr. Justice Bennett, in Vermont, where the words are "created and declared by instrument," said, that "our statute is the same in effect as the English statute."[5]

[1] Lewin on Trusts, 45; Black *v.* Black, 4 Pick. 236.

[2] Scott *v.* Harris, 113 Ill. 447.

[3] Richards *v.* Richards, 9 Gray, 313; Smith *v.* Burnham, 3 Sumn. 435. [Even in States where the seventh section is not in force. Dover *v.* Rhea, 108 N. C. 88.]

[4] See *ante*, § 78, note. Bibb *v.* Hunter, 79 Ala. 351.

[5] Pinnock *v.* Clough, 17 Vt. 508.

(*a*) But it is important to note that the interest of the *cestui* is not always real estate when the trust property consists temporarily of realty. As to equitable conversion, see *infra*, § 448, note.

(*b*) See 1 Ames on Trusts (2d ed.) 176, n.

And Mr. Justice Story said, that "in his opinion, there was no substantial difference between the Massachusetts statute of frauds" (which is in substance the same as the statute of Vermont) "and the statute of 29 Car. II. c. 3; and such is the conclusion to which I have arrived upon an examination of these statutes."[1] And in Wisconsin, where the statute is the same as the statutes of Massachusetts and Vermont, it was held that an express trust need not be declared in express terms; that it is sufficiently declared or created if shown by any proper written evidence, such as an answer to a bill in equity, note, letter, or memorandum, disclosing facts which create a fiduciary relation.[2] In New York, the words of the statute were that "the trust should be created or declared by deed or conveyance in writing." In relation to this Mr. Justice Strong said, that "the definition of the term conveyance given in the Revised Statutes[3] comprehends a declaration of trust, although not under seal, as it is an instrument by which the title to such estate may be affected in law or equity."[4] In another case, Chief-Justice Ruggles said: "The statute prescribes no particular form by which the trust is to be created or declared. Under our former statute, in relation to this subject, it was only necessary that the trust should be manifested in writing, and therefore letters from the trustee disclosing the trust were sufficient; such is the law of England.[5] Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust;[6] but it need not be done in the form of a grant. A declaration of trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and the *cestui que trust* are parties

[1] Jenkins *v.* Eldredge, 3 Story, 294.
[2] Pratt *v.* Ayer, 2 Chand. 265
[3] 1 R. S. 762, § 38.
[4] Corse *v.* Leggett, 25 Barb. 394.
[5] Stat. 29 Car. II, c. 3, § 7; Forster *v.* Hale, 3 Ves. Jr. 696.
[6] The act of 1860 now makes the statute of New York conform in words to the statutes of other States. Cook *v.* Barr, 44 N. Y. 158.

to the conveyance, the trust is as well and effectually declared in that form as in any other." [1] Upon sound reason, then, and upon the decided cases, it would seem that the peculiar form of words in some of the statutes of the American States has not altered the general rule, as established under the English statute; and that the same evidence would be generally received in the United States to establish a trust, as in England.[2]

§ 82. There is no particular formality required or necessary in the creation of a trust.[3] (*a*) All that is required is written evidence supplying every essential detail of the trust.[4] In New York, a trust is valid if the intention is clear to create a trust to accomplish one of the purposes named in the statute,[5] whether it is stated in the precise words of the statute or not.[6] But

[1] Wright *v.* Douglass, 3 Seld. 569; Cook *v.* Barr, 44 N. Y. 158. [But see Pittman *v.* Pittman, 107 N. C. 159.]

[2] Sheet's Estate, 52 Penn. St. 527; Blodgett *v.* Hildreth, 103 Mass. 486. Mr. Browne, in his able treatise upon the Statute of Frauds, cites the case of Jaques *v.* Hall, where the Supreme Judicial Court of Massachusetts, notwithstanding the words of the Massachusetts statute, considered an entry in a private memorandum book of the trustee, setting forth clearly a previous transaction by which he had become trustee, as a satisfactory declaration of trust. There was other evidence; and, as the case is not put upon this ground, in the printed report, 3 Gray, 194, the court probably chose to rest the decision upon other grounds. In Titcomb *v.* Morrill, 10 Allen, 15, Mr. Justice Chapman said it was not necessary to decide the question. See Browne on Statute of Frauds, § 104, 1st ed.

[3] Tyler *v.* Tyler, 25 Brad. (Ill.) 339, quoting the text. In a will it is sufficient if the intent is clear. Quinn *v.* Shields, 62 Iowa, 129; [Gisborn *v.* Charter Oak L. Ins. Co., 142 U. S. 326; O'Rourke *v.* Beard, 151 Mass. 9; Mullins *v.* Mullins, 79 Hun, 421; People *v.* Powers, 83 id. 449; Steinhardt *v.* Cunningham, 130 N. Y. 292; Cathcart *v.* Nelson's Adm'r, 70 Vt. 317.]

[4] Dyer's App., 107 Penn. St. 446.

[5] 1 R. S. 728, § 55. [IV Consol Laws (1909), p. 3390, § 96.]

[6] Morse *v.* Morse, 85 N. Y. 53.

(*a*) An express trust by grant can be created only by conveying some estate or interest to the intended trustee. Nichols *v.* Emery, 109 Cal. 323. Such a trust is necessarily exclusive of any implied trust. Mayfield *v.* Forsyth, 164 Ill. 32; Coleman *v.* Parran, 43 W. Va. 737.

trusts not authorized by the statute are void.[1] A sealed paper, delivered with the deed and mentioned in the deed as part of it, *is* a part of it, even though the instructions were that the sealed document should not be opened until after the death of the grantor.[2] Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property or a certain fund shall be held or dealt with in a particular manner for the benefit of another, in a court of equity raises a trust in favor of such other person against the person making such agreement, or any other person claiming under him voluntarily or with notice;[3] and the statute of frauds will be satisfied if the trust can be manifested or proved by any subsequent acknowledgment by the trustee, as by an express declaration,[4] or any memorandum to that effect,[5] or by a letter

[1] Syracuse S. Bank *v.* Porter, 36 Hun, 168; Follett *v.* Badeau, 26 id. 253.

[2] Van Cott *v.* Prentice, 35 Hun, 322.

[3] See § 122 and cases cited; 2 Spence, Eq. 860; Legard *v.* Hodges, 1 Ves. Jr. 478; Baylies *v.* Peyton, 5 Allen, 488; Taylor *v.* Pownal, 10 Leigh, 183; Currie *v.* White, 45 N. Y. 822; Pingre *v.* Coffin, 12 Gray, 288; Cressman's App., 42 Penn. St. 147; Reed *v.* Lukens, 44 id. 200; Conway *v.* Kensworthy, 21 Ark. 9; Rahun *v.* Rahun, 15 La. An. 471; Rees *v.* Livingston, 41 Penn. St. 113; Paul *v.* Fulton, 32 Miss. 110; Seymour *v.* Freer, 8 Wall. 202; Price *v.* Reeves, 38 Cal. 457; Waddingham *v.* Loker, 44 Mo. 132; Giddings *v.* Palmer, 107 Mass. 270; Homer *v.* Homer, 107 id. 82; Price *v.* Minot, 107 id. 61. But see Kelley *v.* Babcock, 49 N. Y. 32; Ogden *v.* Larrabee, 57 Ill. 389; Lake *v.* Freer, 11 Brad. (Ill.) 576; Freer *v.* Lake, 115 Ill. 662; Jones *v.* Lloyd, 117 id. 597; Tichenell *v.* Jackson, 26 W. Va. 460; Whitcomb *v.* Cardell, 45 Vt. 24; Pinson *v.* McGehee, 44 Miss. 229; Conway *v.* Cutting, 51 N. H. 408; Jones *v.* Wilson, 60 Ala. 332. [Carter *v.* Gibson, 29 Neb. 324; McCreary *v.* Gewinner, 103 Ga. 528, 535; Smith's Estate, 144 Pa. St. 428; Cathcart *v.* Nelson's Adm'r, 70 Vt. 317; Christian *v.* Highlands, 32 Ind. App. 104.] An agreement to support the grantor as a substantial part of the consideration of the conveyance creates a secret trust void against existing creditors not otherwise having a sufficient remedy. Funk *v.* Lawson, 12 Brad. (Ill.) 229.

[4] Lewin on Trusts, 62; Ambrose *v.* Ambrose, 1 P. Wms. 321; Crop *v.* Norton, 10 Mod. 233; Willard *v.* Willard, 56 Penn. St. 119; Knox *v.* McFarren, 4 Col. 586; Phillips *v.* South Park Com'rs, 119 Ill. 640, quoting the text. [Knowlton *v.* Atkins, 134 N. Y. 313; Carter *v.* Gibson, 29 Neb. 324; McAuley's Estate, 184 Pa. St. 124.]

[5] Bellamy *v.* Burrow, Cas. tem. Talb. 97; Fisher *v.* Fields, 10 Johns.

under his hand,[1] or by his answer in chancery,[2] or by his affidavit,[3] or by a recital in a bond [4] or deed,[5] or by a pamphlet [6] written by the trustees, or by an entry in a bank-deposit book; [7] in short, by any writing in which the fiduciary relation between the parties and its terms can be clearly read.[8] And if there is

495; Urann *v.* Coates, 109 Mass. 581; Brooke's App. 109 Penn. St. 188. [Ranney *v.* Byers, 219 Pa. St. 332.]

[1] Johnson *v.* Deloney, 35 Tex. 42; Phelps *v.* Seeley, 22 Grat. 573; Montague *v.* Hayes, 10 Gray, 609; Kingsbury *v.* Burnside, 58 Ill. 310; Forster *v.* Hale, 3 Ves. Jr. 696; 5 Ves. 308; Morton *v.* Tewart, 2 Yo. & Col. Ch. 67; Bentley *v.* Mackay, 15 Beav. 12; Childers *v.* Childers, 1 De G. & J. 482; Smith *v.* Wilkinson, 3 Ves. 705; O'Hara *v.* O'Neill, 7 Bro. P. C. 227; Gardner *v.* Rowe, 2 S. & S. 346; Crook *v.* Booking, 2 Vern. 106; Steere *v.* Steere, 5 Johns. Ch. 1. But this case was before the statute. It is not necessary that the trust and its terms should be found in *one* letter; it is sufficient if they appear from any number of letters or writings. McCandless *v.* Warner, 26 W. Va. 754; Loring *v.* Palmer, 118 U. S. 321, construing Michigan law. [Wiggs *v.* Winn, 127 Ala. 621; Gates *v.* Paul, 117 Wis. 170; Ransdel *v.* Moore, 153 Ind. 393; Copeland *v.* Summers, 138 Ind. 219; Stratton *v.* Edwards, 174 Mass. 374.]

[2] Hampton *v.* Spencer, 2 Vern. 288; Nab *v.* Nab, 10 Mod. 404; 1 Eq. Cas. Ab. 464; Gil. Eq. 146; Cottington *v.* Fletcher, 2 Atk. 155; Ryall *v.* Ryall, 1 Atk. 59; Wilson *v.* Dent, 3 Sim. 385; Butler *v.* Portarlington, 1 Conn. & Laws. 1; 1 Dr. & W. 20; McCubbin *v.* Cromwell, 7 Gill & J. 175; Jones *v.* Slubey, 5 Har. & S. 372. [Garnsey *v.* Gothard, 90 Cal. 603; Schumacher *v.* Draeger, 137 Wis. 618.]

[3] Barkworth *v.* Young, 4 Drew. 1; Pinney *v.* Fellows, 15 Vt. 525. [Kellogg *v.* Peddicord, 181 Ill. 22 (deposition).]

[4] Moorcroft *v.* Dowding, 2 P. Wms. 314; Wright *v.* Douglass, 3 Seld. 564; Gomez *v.* Traders' Bank, 4 Sandf. 102.

[5] Deg *v.* Deg, 2 P. Wms. 412; Selden's App. 31 Conn. 548; Wright *v.* Douglass, 3 Seld. 564, reversing s. c. 10 Barb. 97.

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

[7] Barker *v.* Frye, 75 Maine, 29.

[8] Baylies *v.* Payson, 5 Allen, 473 ; Plymouth *v.* Hickman, 2 Vern. 167; Blake *v.* Blake, 2 Bro. P. C. 250; Dale *v.* Hamilton, 2 Phill. 266; Orleans *v.* Chatham, 2 Pick. 29; Hardin *v.* Baird, 6 Litt. 346; Graham *v.* Lambert, 5 Humph. 595; Gome *v.* Tradesman's Bank, 4 Sand. 106; Bragg *v.* Paulk, 42 Maine, 502; Unitarian Society *v.* Woodbury, 14 id. 281; McCubbin *v.* Cromwell, 7 Gill & J. 157; Podmore *v.* Gunning, 7 Sim. 655; Fisher *v.* Fields, 10 Johns. Ch. 505; Murray *v.* Glass, 23 L. J. Ch. 126; Paterson *v.* Murphy, 17 Jur. 298; Raybold *v.* Raybold, 20 Penn. St. 308; Barron *v.* Barron, 24 Vt. 375; Steere *v.* Steere, 5 id. 1; Cuyler *v.* Bradt, Caines' Cas. 326; Packard *v.* Putnam, 57 N. H. 43. [Patton *v.* Chamberlain, 44 Mich. 5; Eipper *v.* Benner, 113 id. 75; Hutchins *v.* Van Vechten, 140 N. Y. 115;

any competent written evidence that the person holding the legal title is only a trustee, that will open the door for the admission of parol evidence to explain the position of the parties,[1] as where there are entries in the books of the grantee of payments made by him to or on account of the grantor, which payments were consistent only with the fact that the grantee took in trust, he was decreed to be a trustee.[2] (*a*) Nor is it necessary that the letters, memoranda, or recitals should be addressed to the *cestui que trust*, or should have been intended when made to be evidence of the trust.[3] (*b*) A deed of gift to the husband,

Tusch *v.* German S. Bank, 46 N. Y. S. 422; Cathcart *v.* Nelson, 70 Vt. 317; McAuley's Estate, 184 Pa. St. 124; Hiss *v.* Hiss, 228 Ill. 414.]

[1] Cripps *v.* Lee, 4 Bro. Ch. 472; Hollinshed *v.* Allen, 17 Penn. St. 275; Prevost *v.* Gratz, 1 Pet. C. C. 366; Morton *v.* Tewart, 2 Yo. & Coll. Ch. 67–77; Hutchins *v.* Lee, 1 Atk. 447; Corse *v.* Leggett, 25 Barb. 389. But see Homer *v.* Homer, 107 Mass. 82.

[2] Ibid.

[3] Forster *v.* Hale, 5 Ves. 308; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Barrell *v.* Joy, 16 Mass. 221; Welford *v.* Beazeley, 3 Atk. 503; Browne on Statute of Frauds, § 99; Furman *v.* Fisher, 4 Cold. 626; Urann *v.* Coates, 109 Mass. 581. [Stratton *v.* Edwards, 174 Mass. 374; Aller *v.* Crouter, 64 N. J. Eq. 381; Whetsler *v.* Sprague, 224 Ill. 461, 466.] In Steere *v.* Steere, 5 Johns. Ch. 1, Mr. Chancellor Kent recognized and approved the general proposition that trusts could be proved by letters signed by the party; but in showing that the letters in that particular case were insufficient to prove a trust, he took notice of the fact that they were not addressed to the *cestui que trust*, and seemed to intimate that it was necessary that letters should be so addressed in order to manifest the trust. If the eminent chancellor

(*a*) The trustee cannot change the terms of a trust by a subsequent declaration. Burling *v.* Newlands, 112 Cal. 476. Thus where a trust results by operation of law the holder of the legal title cannot by a written declaration that he holds the land upon a trust created by parol, engraft limitations upon the resulting trust without the consent of the beneficial owner. Adams *v.* Carey, 53 N. J. Eq. 334. See also Griffith *v.* Eisenberg, 215 Pa. St. 182.

If the writing relied upon has been destroyed or lost or the person having the custody of it refuses to produce it, its terms may be proved by parol evidence, but the oral evidence must go to the extent of reproducing the essential terms of the trust as they were expressed in the writing. Hiss *v.* Hiss, 228 Ill. 414. (A case where the terms of the trust were recited in a will which was afterwards revoked and destroyed.) See also McCarty *v.* Kyle, 4 Coldw. (Tenn.) 348.

(*b*) Under circumstances similar

as "an advancement" to the wife, will create a trust for the wife. It is not necessary that the word "trust" or "trustee" should be used.[1] (*a*) The trust thus proved, however late the

intended to lay down such a rule, it would seem to be effectually overthrown by the well-considered cases cited above.

[1] Cresswell's Adm'r *v.* Jones, 68 Ala. 420. [Packard *v.* O. C. R. Co., 168 Mass. 92; Chadwick *v.* Chadwick, 59 Mich. 87; Mersereau *v.* Bennet, 108 N. Y. S. 868 (App. Div.); Ranney *v.* Byers, 219 Pa. St. 332; *infra*, § 225, n.]

to those where a court of equity will decree specific performance of an oral contract to convey land, a parol trust in land will sometimes be enforced although there is no writing creating or manifesting it. Thus where the beneficiary has been let into possession and has made valuable improvements of a permanent nature, the trust may be enforced on the theory that the owner of the land has estopped himself from making use of the statute of frauds. Guynn *v.* McCauley, 32 Ark. 97; Haines *v.* Haines, 4 Md. Ch. 133; Wylie *v.* Charlton, 43 Neb. 840; Dunn *v.* Berkshire, 175 Ill. 243. But see Pillsbury-Washburn Co. *v.* Kistler, 53 Minn. 123.

But the mere payment of a money consideration is not usually sufficient, and the improvements must be of a substantial and lasting nature, such as would not have been made except in reliance on the parol trust or agreement to convey, Cooley *v.* Lobdell, 153 N. Y. 596; Caldwell *v.* Williams, 1 Bailey's Eq. (S. C.) 175. See Bodwell *v.* Nutter, 63 N. H. 446; and they must appear to have been made in reliance upon the parol trust or parol agreement to convey. Chilvers *v.* Race, 196 Ill. 71. In other words the circumstances must be such that to allow a plea of the statute of frauds to be successful would be to allow that statute to be used as a means of committing a fraud.

(*a*) Thus a trust has been held to have been established where the owner of personal property delivered possession to another with power to sell, to receive and invest the proceeds and to exercise the usual acts of ownership, with specific directions how the property and its income were to be disposed of, although the trustee was described as an attorney. Mersereau *v.* Bennet, 108 N. Y. S. 868 (App. Div). See Offutt *v.* Divine's Ex'r, 49 S. W. 1065 (Ky. 1899), to the same effect; Boreing *v.* Faris, 127 Ky. 67 (where a bequest was made to certain persons, described as a "committee"). When no trust is declared or beneficiary named, and the conveyance is for a valuable consideration, it has been held that description of the grantees as "trustees" therein is a surplusage, and does not show a trust. Andrews *v.* Atlanta R. E. Co., 92 Ga. 260; Trammell *v.* Inman, 115 Ga. 874; Rua *v.* Watson, 13 S. D. 453. But the description of a grantee as trustee is notice of any trust properly declared in another instrument. Sternfels *v.* Watson, 139 Fed. 505; Snyder *v.* Collier, 123 N. W. 1023 (Neb. 1909). And merely describing an agent or man-

proof, will relate back to its creation; as where a lease was granted to A., who afterwards became a bankrupt, and *then* executed a declaration of trust in favor of B., the jury having found upon an issue out of chancery that A.'s name was used in good faith in the lease as the trustee of B., it was held that the assignees of A. took nothing in the property.[1] (*a*) But it must clearly appear that the parties intended a trust by the transaction, and parol evidence is competent to explain receipts and other papers connected with the case which may be explained by parol in other cases.[2] A mere declaration of *motive*, as a grant to A. in order that he may maintain his children, will not create a trust;[3] nor will a mere *request* of an owner to his heirs to convey land to a person named in the letter expressing his wish.[4] In case of a deposit in bank in trust for another there must be an intent to pass the beneficial interest during the life of the donor, and not merely a testamentary intent that the person named as *cestui* shall have the money at the decease of the donor, who retains complete control of the fund during his

[1] Gardner *v.* Rowe, 2 S. & S. 346; 5 Russ. 258; Plymouth *v.* Hickman, 2 Vern. 167; Ambrose *v.* Ambrose, 1 P. Wms. 322; Wilson *v.* Dent, 3 Sim. 385; Smith *v.* Howell, 3 Stockt. 349; Ownes *v.* Ownes, 23 N. J. Ch. 60; McGovern *v.* Knox, 21 Ohio St. 547; Malin *v.* Malin, 1 Wend. 625; Steere *v.* Steere, 5 Johns. Ch. 1; Jackson *v.* Moore, 6 Cow. 706; Reid *v.* Fitch, 11 Barb. 399; Reggs *v.* Swann, 6 Jones Eq. 115; Noble *v.* Morris, 24 Ind. 478; Sime *v.* Howard, 4 Nev. 473; Reid *v.* Reid, 12 Rich. Eq. 213; McLaurie *v.* Partlow, 53 Ill. 340. [See also Stratton *v.* Edwards, 174 Mass. 374; Blaha *v.* Borgman, 124 N. W. 1047 (Wis. 1910).]

[2] Smith *v.* Tome, 59 Penn. St. 158; Hays *v.* Quay, id. 263.

[3] Bryan *v.* Howland, 98 Ill. 625. [Randall *v.* Randall, 135 Ill. 398; Seamonds *v.* Hodge, 36 W. Va. 304. See St. James *v.* Bagley, 138 N. C. 384; Adams *v.* Lopdell, 25 L. R. Ir. 311; Matter of Crane, 12 App. Div. (N. Y.) 271. On this point see more especially § 117 and note.]

[4] Preston *v.* Casner, 104 Ill. 262.

ager as trustee does not make him one. Bank of Visalia *v.* Dillonwood Co., 148 Cal. 18, 25.

(*a*) But in Pruitt *v.* Pruitt, 57 S. C. 155, it was held that a subsequent declaration in writing, made by the trustee after he had become seized of the property, did not shut out his wife's right of dower. See Bartlett *v.* Tinsley, 175 Mo. 319. See *contra*, Oldham *v.* Sale, 1 B. Mon. 76; Johnston *v.* Jickling, 141 Iowa, 444.

life.[1] The general rule is that a deposit of money in the name of the depositor, in trust for another, transfers the title to the latter.[2] (*a*) Where a savings-bank depositor "in trust" kept

[1] Nutt *v.* Morse, 142 Mass. 1, 3; Waynesburg College's App., 111 Penn. St. 130; Smith *v.* Speer, 34 N. J. Eq. 336.

[2] Scott *v.* Harbeck, 49 Hun, 292.

(*a*) Since the text was written there have been many decisions involving the legal effect of such deposits, and the courts of different jurisdictions have differed widely upon some of the questions involved. The conflict of authority hinges chiefly, first upon the weight which should be given to the mere form of deposit in showing the depositor's intention to create a trust; and, second, upon the sufficiency of the deposit in this form as a declaration of trust when it has not been communicated to the person named as beneficiary.

It is necessary to bear in mind, in considering these cases, that the question is not whether the bank is trustee but whether the depositor is trustee of the chose in action of which the bank book or other certificate of deposit is the evidence. The trust *res* is this chose in action, and in practice the depositor who retains possession of the bank book has control of the deposit. Sherman *v.* New Bedford Sav. Bank, 138 Mass. 581; Ide *v.* Pierce, 134 Mass. 260.

In all jurisdictions it is law, that a deposit in a savings bank in the name of the depositor as trustee for another is a sufficient voluntary declaration of trust if the depositor actually intended to make himself trustee and has communicated the declaration to the beneficiary or somebody representing him. Cases cited *infra* this note. It is not inconsistent with the trust that the depositor retains the bank book and the control of the deposit. Sayre *v.* Weil, 94 Ala. 466; Booth *v.* Oakland Bank, 122 Cal. 19. Gardner *v.* Merritt, 32 Md. 78; Milholland *v.* Whalen, 89 Md. 212; Harris Banking Co. *v.* Miller, 190 Mo. 640; 1 L. R. A. (N. S.) 790; Smith *v.* Sav. Bank, 64 N. H. 228; Farleigh *v.* Cadman, 159 N. Y. 169; Merigan *v.* McGonigle 205 Pa. St. 321; Ray *v.* Simmons, 11 R. I. 266; Atkinson, Petitioner, 16 R.I. 413; Conn. River Sav. Bank *v.* Adm'r of Albee, 64 Vt. 571. It is not fatal to the validity and completeness of the trust, that the depositor has reserved to himself the absolute right to the interest during his life. Savings Inst. *v.* Titcomb, 96 Me. 62; Smith *v.* Sav. Bank, 64 N. H. 231. The reservation of the right to use all or part of the principal for his own benefit is not in itself fatal to a complete and valid trust if the intention is clearly established. Booth *v.* Oakland Sav. Bank, 122 Cal. 19; Hoboken Bank *v.* Schwoon, 62 N. J. Eq. 503 (*semble*). But this circumstance usually has a strong tendency to show that a testamentary gift to take effect on the depositor's death, rather than a complete trust, was intended. The same seems to be true, even to a greater extent, when

the book, but before his death told the beneficiary in substance, "That money I put in the savings bank for you, is yours," a

the intention is found to have been to reserve a power of complete revocation. See Bartlett *v.* Remington, 59 N. H. 364; Fellows *v.* Fellows, 69 N. H. 339.

In all jurisdictions it is well established that a voluntary deposit of one's own money nominally in trust for another is not conclusive upon the depositor. Since the trust, if there is one, is wholly voluntary, it will not be declared created against the actual intention of the depositor, and it is open to him or his legal representatives to show that in fact he had no intention of creating a trust or of parting with his ownership of the deposit. The courts recognize that the modern practice of making deposits in this form for the purpose of evading regulations limiting the size of any one account has rendered words of trust in a deposit book equivocal in meaning. The form of the account, therefore, is never more than evidence of an intention to create a trust, and may be controlled by other declarations or by circumstances which show that there was no such intention. Burton *v.* Bridgeport Sav. Bank, 52 Conn. 398; Bath Sav. Inst. *v.* Fogg, 101 Me. 188; Taylor *v.* Henry, 48 Md. 550; Milholland *v.* Whalen, 89 Md. 212; Gerrish *v.* New Bedford Inst. for Sav., 128 Mass. 159; Parkman *v.* Suffolk Sav. Bank, 151 Mass. 218; Scrivens *v.* North Easton Sav. Bank, 166 Mass. 255; Bartlett *v.* Remington, 59 N. H. 364; Fellows *v.* Fellows, 69 N. H. 339; Smith *v.* Speer, 34 N. J. Eq. 336; Matter of Totten, 179 N. Y. 112; Cunningham *v.* Davenport, 147 N. Y. 43; Garvey *v.* Clifford, 99 N. Y. S. 555, 114 App. Div. 193; Lattan *v.* Van Ness, 107 App. Div. (N. Y.) 393; Lee *v.* Kennedy, 54 N. Y. S. 155; Gaffney's Estate, 146 Pa. St. 49; Merigan *v.* McGonigle, 205 Pa. St. 321; People's Sav. Bank *v.* Webb, 21 R. I. 218; Conn. River Sav. Bank *v.* Adm'r of Albee, 64 Vt. 571. As to the effect of subsequent declarations by the depositor, see Tierney *v.* Fitzpatrick, 195 N. Y. 433.

The decisions of Massachusetts and New York, which States seem to have had most frequent occasion to deal with this question, show a conflict of authority as to the importance of giving notice of the deposit to the beneficiary. In Massachusetts, notice to the beneficiary, or to somebody who may be said to represent him, is not only important as evidence of the depositor's intention to create a trust, but is an essential part of the declaration of trust. It seems to be well settled in Massachusetts, that, however clear the intention of the depositor to make himself a voluntary trustee, having himself described as trustee in the deposit book, and on the books of the bank is not a declaration of trust, unless communicated by him, or with his consent, to the beneficiary or somebody who can be said to represent him. The fact of the deposit in form of a trust shows no more than an inchoate purpose which he may afterwards conclude not to carry out. As was stated by Holmes, C. J., in Cleveland *v.* Hampden Sav. Bank, 182 Mass. 110, "An owner of property does not lose it by using words

finding that there was a perfected gift was justified.[1] The question is, Do the facts show an intent to create a present

[1] Alger *v.* North End Savings Bank, 146 Mass. 418. See Mabie *v.* Bailey, 95 N. Y. 206, and Boone *v.* Citizens Bank, 84 N. Y. 83. At the death of the trustee the trust goes to her executor or administrator, and in the absence of notice from the beneficiary to the contrary, he may pay the money to said representative. [See note *a*.]

of gift or trust concerning it in solitude, or with the knowledge of another not assuming to represent an adverse interest." Noyes *v.* Inst. for Sav., 164 Mass. 583; Welch *v.* Henshaw, 170 Mass. 409; Scrivens *v.* North Easton Sav. Bank, 166 Mass. 255; Alger *v.* North End Sav. Bank, 146 Mass. 418; Sherman *v.* New Bedford Sav. Bank, 138 Mass. 581. See also Boynton *v.* Gale, 194 Mass. 320; Henchey *v.* Henchey, 167 Mass. 77; Miller *v.* Clark, 40 Fed. 15. But see Gerrish *v.* New Bedford Inst. for Sav., 128 Mass. 159.

In New York such a deposit without notice to the beneficiary seems not to create a complete trust without other evidence of intention, but the courts take as sufficient additional evidence of intention, the fact that the depositor allows the deposit to remain in this form until his death. In Matter of Totten, 179 N. Y. 112, it is laid down as law in New York, that such a deposit created "a tentative trust merely, revocable at will, until the depositor dies or completes the gift by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." In later decisions by the Appellate Division of the Supreme Court it has been held that, if the person named as beneficiary dies before the depositor, the incomplete or "tentative" trust comes to an end if there is no additional evidence to keep it alive, so that the subsequent death of the depositor without having made a change in the form of the account does not vest any interest in the fund in the representatives of the beneficiary. Matter of U. S. Trust Co., 102 N. Y. S. 271, 117 App. Div. 178; Garvey *v.* Clifford, 99 N. Y. S. 555, 114 App. Div. 193; *In re* Duffy, 111 N. Y. S. 77. The effect of these decisions seems to be that the so-called tentative trust is no trust at all until some further act or until death of the depositor. If the trust does not become complete before the death of the depositor and then includes only what is left of the fund, it seems to be no more than a testamentary disposition. For a different interpretation of the word "tentative" as used in Matter of Totten, see dissenting opinion of Ingraham, J., n Matter of U. S. Trust Co., 102 N. Y. S. 271, 117 App. Div. 178. In New York a delivery of the pass book to the beneficiary completes the gift of the beneficial interest and makes the trust irrevocable unless a contrary intention is shown. Matter of Davis, 119 App. Div. 35. And notifying the beneficiary of the

trust? And the facts that the grantor drew interest on the deposit, or offered to loan the money after the deposit was made,

deposit is evidence of an intention to create a trust, but is not conclusive. Tierney *v.* Fitzpatrick, 107 N. Y. S. 527.

Before the decision in Matter of Totten there was a conflict among the different Appellate Divisions as to the effect of the mere form of deposit "in trust" for another; the majority of the decisions held that a deposit in this form created an irrevocable trust in the absence of evidence to show a contrary intention. Bishop *v.* Seaman's Bank, 33 App. Div. 181; Jenkins *v.* Baker, 77 App. Div. 509; Robertson *v.* McCarty, 54 App. Div. 103; Marsh *v.* Keogh, 82 App. Div. 503. Matter of Totten has settled the law of New York to the contrary, and more in accord with the probable intention of the depositor, for usually a person depositing in this way, even if intending a trust or gift of the deposit, means to retain the right to the interest and so much of the principal as he sees fit to draw out.

The majority of decisions in other jurisdictions have followed the New York rule in holding that notice to the beneficiary is not essential to the sufficiency of the declaration. Sayre *v.* Weil, 94 Ala. 466; Milholland *v.* Whalen, 89 Md. 212; Littig *v.* Mt. Calvary Church, 101 Md. 494; Merigan *v.* McGonigle, 205 Pa. St. 321; Gaffney's Estate, 146 Pa. St. 49; Conn. River Sav. Bank *v.* Adm'r of Albee, 64 Vt. 571. See also Savings Inst. *v.* Hathorn, 88 Me. 122. Their tendency seems to go even beyond the present New York rule as laid down in the more recent case of Matter of Totten, and to hold that words of trust in the deposit book unexplained by evidence of a contrary intention create an irrevocable trust of the deposit.

The decisions in Connecticut, Iowa, New Hampshire and Rhode Island seem to favor the Massachusetts view, but they antedate Matter of Totten. Burton *v.* Bridgeport Sav. Bank, 52 Conn. 398; Casteel *v.* Flint, 112 Iowa, 92; Bartlett *v.* Remington, 59 N. H. 364; Marcy *v.* Amazeen, 61 N. H. 131; People's Sav. Bank *v.* Webb, 21 R. I. 218; *Re* Atkinson, 16 R. I. 413; Providence Inst. *v.* Carpenter, 18 R. I. 287. See also Bath Sav. Inst. *v.* Fogg, 101 Me. 188; Norway Sav. Bank *v.* Merriam, 88 Me. 146. (Compare Savings Inst. *v.* Hathorn, 88 Me. 122.)

If a trust of a savings-bank deposit has been properly declared so that it has become a complete trust, it is as binding on the depositor as any other form of trust, and he has no implied power to revoke it. Sayre *v.* Weil, 94 Ala. 466; Kerrigan *v.* Rautigan, 43 Conn. 17; Minor *v.* Rogers, 40 Conn. 512; Gardner *v.* Merritt, 32 Md. 78; *Re* Atkinson, 16 R. I. 413.

In cases of this kind it is frequently a close question of fact whether the intention of the depositor was to make a present gift of a beneficial interest in the fund or a gift to take effect at his death upon whatever of the deposit then remains. If the latter was his intention, it would seem to be an invalid attempt at a testamentary disposition. Main's Appeal, 73

are not conclusive against a trust.[1] But where A. deposits money in the name of B., "sub. to A.," and A. receives the

[1] Willis *v.* Smyth, 91 N. Y. 297. [See note *a*, p. 84.]

Conn. 638; Towle *v.* Wood, 60 N. H. 434; Smith *v.* Speer, 34 N. J. Eq. 336. But Matter of Totten, as interpreted by subsequent cases, seems to give effect to such tentative gifts.

If the depositor's intention was to pass the beneficial interest at once, the fact that the control and enjoyment are postponed until after his death and even the fact that he intended to retain the right to use the principal for his own benefit do not render the transfer of the beneficial interest invalid. Scrivens *v.* North Easton Sav. Bank, 166 Mass. 255; Hoboken Bank *v.* Schwoon, 62 N. J. Eq. 503.

Deposits which are in form "in trust" for another must be distinguished from deposits in the name of another or in the joint names of the depositor and another. In cases of the latter kind there may be a trust, although words of trust are not used. If the intention of the depositor is to make a complete present gift of the deposit or of so much of it as may remain after his death, the intended gift may be given effect without delivery of the bank book, by construing the depositor as a trustee of the deposit. Booth *v.* Oakland Bank, 122 Cal. 19; Sav. Inst. *v.* Titcomb, 96 Me. 62; Gardner *v.* Merritt, 32 Md. 78; Harris Banking Co. *v.* Miller, 190 Mo. 640; Smith *v.* Savings Bank, 64 N. H. 231; Hoboken Bank *v.* Schwoon, 62 N. J. Eq. 503. But the courts are generally agreed that where words of trust are not used, the transfer of a beneficial interest in the account is not complete, and therefore the trust is not established, unless the depositor gives notice of the gift to the beneficiary or to somebody who can be said to represent him. Main's Appeal, 73 Conn. 638; Telford *v.* Patton, 144 Ill. 611; Bath Sav. Inst. *v.* Fogg, 101 Me. 188; Norway Sav. Bank *v.* Merriam, 88 Me. 146; Fairfield Sav. Bank *v.* Small, 90 Me. 546; Taylor *v.* Henry, 48 Md. 550; Sherman *v.* New Bedford Sav. Bank, 138 Mass. 581; Cogswell *v.* Newburyport Sav. Inst., 165 Mass. 524; Noyes *v.* Newburyport Sav. Inst., 164 Mass. 583; Scott *v.* Berkshire Co. Bank, 140 Mass. 157; Towle *v.* Wood, 60 N. H. 434; Marcy *v.* Amazeen, 61 N. H. 131; Smith *v.* Speer, 34 N. J. Eq. 336; *In re* Bolin, 136 N. Y. 177; Sullivan *v.* Sullivan, 161 N. Y. 554; Beaver *v.* Beaver, 117 N. Y. 421; Schwind *v.* Ibert, 69 N. Y. S. 921, 60 App. Div. 378. And the form of the deposit is not sufficient evidence of an intention to make a present gift. Cooney *v.* Ryter, 46 La. An. 883; Booth *v.* Bristol County Bank, 162 Mass. 455; Beaver *v.* Beaver, 117 N. Y. 421; Providence Inst. for Sav. *v.* Carpenter, 18 R. I. 287; Telford *v.* Patton, 144 Ill. 611; *In re* Bolin, 136 N. Y. 177; Fairfield Sav. Bank *v.* Small, 90 Me. 546; Peninsular Sav. Bank *v.* Wineman, 123 Mich. 257. See *In re* Howes. Howes *v.* Platt, 21 Times L. R. 501; O'Flaherty *v.* Browne, (1907) 2 Ir. R. 416. See also cases cited *supra*.

When one seeks by a bill in equity

dividends and keeps the pass-book and draws such portions of the principal for her own use as she chooses, there is no gift to nor trust for B. If there is any trust, it is B. who is trustee for A.[1]

§ 83. The same principles of construction apply to trusts proved by this description of evidence as in other cases; and the objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust.[2] Indeed, courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestuis que trust*, and the proportions in which they are to take, cannot be ascertained.[3] When all these particulars properly appear from writings signed by the party, the trust will be executed; but if the terms of the

[1] Northrop *v.* Hale, 73 Maine, 71. See Marcy *v.* Amazeen, 61 N. H. 131, retaining control and giving *cestui* no notice, no trust; and Bartlett *v.* Remington, 59 N. H. 364, a similar case, an executory trust without consideration, is not enforceable; and Pope *v.* Burlington Savings Bank, 57 N. Y. 126, where the *cestui* had no knowledge of the deposit, and the depositor withdrew part of the fund.

[2] Forster *v.* Hale, 3 Ves. 708; Steere *v.* Steere, 5 Johns. Ch. 1; Abel *v.* Radcliff, 13 Johns. 297; Rutledge *v.* Smith, 1 McC. Ch. 119; Freeport *v.* Bartol, 3 Greenl. 340; Arms *v.* Ashley, 4 Pick. 71; Hill on Trustees, 61. [Braun *v.* First German E. L. Church, 198 Pa. St. 152; Taft *v.* Dimond, 16 R. I. 584; Christian *v.* Highlands, 32 Ind. App. 104.]

[3] Smith *v.* Mathews, 3 De G., F. & J. 139; Morton *v.* Tewart, 2 Yo. & Col. Ch. 80; Lewin on Trusts, 46; Leman *v.* Whitley, 4 Russ. 423; Whelan *v.* Whelan, 3 Cow. 537; Jackson *v.* Moore, id. 706; Reid *v.* Fitch, 11 Barb. 399; Jones *v.* Wilson, 6 Ala. 332; Taylor *v.* Keep, 2 Brad. (Ill.) 368; [Filkins *v.* Severn, 127 Iowa, 738; Myers *v.* Myers, 167 Ill. 52, 65; Renz *v.* Stoll, 94 Mich. 377; Yerkes *v.* Perrin, 71 Mich. 567; Atwater *v.* Russell, 49 Minn. 57.]

to establish a trust in a deposit in a bank, and to set up a title adverse to the depositor, the depositor is a necessary party to the suit, Gregory *v.* Merchants' National Bank, 171 Mass. 67; but the bank is not. Oppenheimer *v.* First Nat. Bank, 20 Mont. 192.

As to gifts of insurance policies, choses in action, etc., see 1 Ames on Trusts (2d ed.), 139, 145, 155, 163.

trust are collected from several papers, it is not necessary that all of them should be signed, provided they are so referred to and connected with the paper that is signed that they may be identified and read as genuine papers, and a part of the transaction.[1] Nor need there be an actual subscription of the party's name, if the paper is authenticated by the party as his writing for the purpose of declaring the trust by writing his initials.[2] The party whose signature is essential is the party who by law is enabled to declare the trust; and it has been decided, that, whether the property is real or personal, the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over the property, the holder of the legal estate being a mere instrument or conduit pipe for him.[3] But if there is an absolute conveyance of the legal title to a supposed trustee, and there is no declaration of a trust prior to or at the time of the conveyance by the grantor, and the *cestui que trust* attempts to charge the grantee with a trust in respect to the land, he must produce some writing signed by the grantee of the legal title in order to charge him with the trust.[4] It is only when there is no dispute concerning the existence of a trust, or when the trust arises by operation of law as a resulting or implied trust, that the *cestui que trust* himself can declare its terms.[5]

§ 84. It remains to consider when and how far trusts may be declared or proved by the answers of parties in chancery.

[1] Denton *v.* Davis, 18 Ves. 503; Lewin on Trusts, 47; Browne on the Statute of Frauds, §§ 105, 350-355. [Ransdel *v.* Moore, 153 Ind. 393.]

[2] Smith *v.* Howell, 3 Stockt. 349.

[3] Tierney *v.* Wood, 19 Beav. 330; Donahoe *v.* Conrahy, 2 Jon. & La. 688; Lewin on Trusts, 47.

[4] Browne on Statute of Frauds, § 106; Adlington *v.* Cann, 3 Atk. 145; Wallgrave *v.* Tebbs, 2 K. & J. 313; Lee *v.* Ferris, ib. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87; Tritt *v.* Crotzer, 13 Penn. St. 451; *In re* Dunbar, 2 Jon. & La. 120. [Myers *v.* Myers, 167 Ill. 52.]

[5] Bellasis *v.* Compton, 2 Vern. 294; Lee *v.* Huntoon, 1 Hoff. Ch. 447; Harris *v.* Barnet, 3 Grat. 339; and cases in preceding note.

It has been decided that a defendant is bound to answer to a bill suggesting a parol trust, and that a general demurrer[1] would be overruled; but perhaps this doctrine is confined to parol trusts that arise from fraud, accident, or mistake; for in the case of express trusts, if it can be gathered from the bill that the plaintiff relies upon parol evidence alone, with no circumstances to take it out of the statute, it has been held that the defendant may demur.[2] But the general rule is that if a trust is alleged in a bill it will be presumed to be legally created, *i. e.*, in writing, unless the contrary appears; therefore it must clearly appear from the bill that the alleged trust rests in parol only, or the demurrer will be overruled.[3] It has also been decided, that if the bill simply omits to state that the trust is in writing, a demurrer will be overruled; for, as the statute only requires that it should be proved, not created, by writing, the writing is no part of the trust, but only evidence of the trust to be adduced at the hearing.[4] (*a*) In all cases, however, the defendant *may* answer, and if in his answer he confess the trust without insisting upon the statute of frauds, he will be held to have waived the benefit of the statute, and his answer

[1] Muckleston *v.* Brown, 6 Ves. 52; Stickland *v.* Aldridge, 9 Ves. 516; Chamberlain *v.* Agar, 2 V. & B. 259; Newton *v.* Pelham, 1 Ed. 514; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Peralta *v.* Castro, 6 Cal. 354; Cottington *v.* Fletcher, 2 Atk. 155; Childers *v.* Childers, 3 K. & J. 310; 1 De G. & J. 485.

[2] Walker *v.* Locke, 5 Cush. 91; Wood *v.* Midgeley, 27 Eng. L. & Eq. 206; 5 De G., M. & G. 41; Ridgway *v.* Wharton, 3 id. 677; Barkworth *v.* Young 4 Dr. 1. See Skinner *v.* McDonall, 2 De G. & Sm. 265. [Dicken *v.* McKinley, 163 Ill. 318, 327.]

[3] Cozine *v.* Graham, 2 Paige, 177. [Randall *v.* Constans, 33 Minn. 329.]

[4] Davis *v.* Otty, 33 Beav. 540. [Throckmorton *v.* O'Reilly, 55 A. 56 (N. J. Ch. 1903) *semble;* Whiting *v.* Dyer, 21 R. I. 85; Logan *v.* Brown, 20 Okla. 334; Hanson *v.* Svarverud, 120 N. W. 550 (N. D. 1909). See *contra*, Monson *v.* Hutchin, 194 Ill. 431.]

(*a*) It has been held that an admission by counsel in argument, that the alleged trust was created by parol, will cause the court to dismiss the bill, although the bill itself does not show that the declaration was not in writing. Thompson *v.* Marley, 102 Mich. 476; Randall *v.* Constans, 33 Minn. 329, 334 (*semble*).

may be used as a written declaration and proof of the trust,[1] on the ground that the plaintiff is not called upon to introduce evidence, and the trust appears upon the written answer before the court. (*a*)

§ 85. Resulting and implied trusts that arise from fraud can be proved by parol, although the defendant in his answer denies the trusts and sets up the statute in bar; for such trusts are not within the statute. In cases of express trusts, if the defendant denies them, or if he denies them and at the same time sets up the statute, or if he do not answer at all, only legal evidence or evidence in writing can be given in proof.[2] And if the defendant confesses the parol trusts in his answer, and at the same time sets up the statute in bar, he will have the benefit

[1] Hampton *v.* Spencer, 2 Vern. 288; Nab *v.* Nab, 10 Mod. 404; 1 Eq. Cas. Ab. 404; Gil. Eq. 146; Dean *v.* Dean. 1 Stockt. 425; Whiting *v.* Gould 2 Wis. 552; Woods *v.* Dille, 11 Ohio, 455; Newton *v.* Swazey, 8 N. H. 9; Rowton *v.* Rowton, 1 Hen. & Munf. 91; Lingan *v.* Henderson, 1 Bland. 236; Tarleton *v.* Vietes, 1 Gilm. 470; Stearnes *v.* Hubbard, 8 Greenl. 320; Thornton *v.* Henry, 2 Scam. 219; School Trustees *v.* Wright, 12 Ill. 432; McCubbin *v.* Cromwell, 7 Gill & J. 157; Kinzie *v.* Penrose, 2 Scam. 250; Talbot *v.* Bowen, 1 A. K. Marsh. 436; Albert *v.* Ware, 2 Md. Ch. 169, 6 Md. Ch. 66; Chitwood *v.* Brittain, 1 Green Ch. 450; Baker *v.* Hollabaugh, 12 Ark. 322; Cozine *v.* Graham, 2 Paige, 177; Tilton *v.* Tilton, 9 N. H. 386; Switzer *v.* Skiles, 1 Gilm. 529; Allen *v.* Chambers, 4 Ired. Eq. 125; Hall *v.* Hall, 1 Gill, 383; McLaurie *v.* Partlow, 53 Ill. 340. [Myers *v.* Myers, 167 Ill. 52.]

[2] Trapnal *v.* Brown, 19 Ark. 39; Wynn *v.* Garland, id. 23; Smith *v.* Howell, Stockt. 349; Whyte *v.* Arthur, 2 Green, Ch. 521; Broadness *v.* Woodman, 27 Ohio St. 353; Matthews *v.* Denman, 24 id. 615.

(*a*) Where the suit was to set aside a deed for undue influence, the verified answer of the grantee that the land had been conveyed to her in trust for certain specified persons, has been held to satisfy the statute of frauds and render the trust enforceable against her. Schumacher *v.* Draeger, 137 Wis. 618.

As the character of the trust, as an express or implied one, depends on the nature of the facts which brought it into being, and not on the manner in which its existence is proved after its creation, the fact that it is fully set forth by the trustee in his answer in chancery does not change a resulting trust into an express trust. Warren *v.* Tynan, 54 N. J. Eq. 402; Adams *v.* Carey, 53 N. J. Eq. 334.

of the statute, and the court will not use the answer as a written declaration and proof of the trust.[1] In one case it was held that a trust appearing from defendant's answer would be executed by the court although it was entirely different from the trust alleged in the bill;[2] but this case has not been followed. In a late case where a bill was filed setting forth a fraud and asking to have a resulting trust declared and a deed set aside, and the defendant confessed an express trust by parol, and offered to execute it, Chancellor Vroom said, "I am inclined to believe that if the present complainant had filed a bill claiming this deed to be a deed of trust, and praying that it might be so decreed according to the original intention of the parties, the answer of the defendant admitting the trust would have been good evidence of it. It would have amounted to a sufficient declaration of trust. But it would seem to be different when a complainant seeks on the ground of fraud to set aside a deed absolute on its face, and confessedly without any consideration paid; for, to suffer a defendant in such case to come

[1] Dean *v.* Dean, 1 Stockt. 425; Whiting *v.* Gould, 2 Wis. 552. [Davis *v.* Stambaugh, 163 Ill. 557 (case of a deposition signed under conditions showing no waiver of the defense of the statute).] The proposition in the text was long a disputed point. It was apparently held that, as the defendant by his answer had admitted the trust, the plaintiff was not called upon to introduce any evidence. There was no danger of fraud and perjury; as the court had the defendant's statement of a trust in writing under oath, and as equity takes hold of a party's conscience, he ought to be held to execute the trust which he confesses, notwithstanding the statute. On the other hand, in bills for the specific performance of a parol contract for the sale of lands, the defendant was held not bound to execute the contract if he set up the statute, although he confessed the contract in his answer. There would seem to be no reason for a different rule in the two cases; and since it is now established that a defendant may demur to a bill that on its face alleges a mere parol trust, it would seem to follow that the confession of a defendant should not be used to override a positive rule of law. The two cases cited establish the proposition of the text, and it is presumed that the same rule would be held in all the United States. It is a question of pleading and practice, and it is considered here only incidentally in considering how trusts may be created under the statute of frauds. The reader will find a full discussion of the question in Story's Eq. Pleading, §§ 765–768.

[2] Hampton *v.* Spencer, 2 Vern. 288.

in and avoid the claim by setting up a trust would be to permit him to create a trust according to his own views, and thereby prevent the consequences of a fraud."[1] It must be observed, that if the answer of the trustee is used to prove the trust, the terms of the trust must be gathered from the whole answer as it stands, for one part of the answer cannot be read and another part rejected. If, therefore, the plaintiff read the answer in proof of the trust, he must at the same time read the particular terms of the trust as therein stated.[2] (*a*) In States where the statute of frauds is not in force, trusts may be proved by parol, in opposition to the defendant's answer denying them.

§ 86. Personal chattels are not within the terms of the statute, and trusts in personal property may be declared and proved by parol, though Mr. Eden said that "he had not been able to find an instance of a declaration of trust of personal property, evidenced only by parol, having been carried into execution."[3] And certainly the English cases usually referred to do not establish the proposition in express terms.[4] There

[1] Hutchinson *v.* Tindall, 2 Green, Ch. 357; and see Jones *v.* Slubey, 5 Harr. & J. 372; McCubbin *v.* Cromwell, 7 Gill & J. 157; Haigh *v.* Kay, L. R. 7 Ch. 469. [See also Warren *v.* Tynan, 54 N. J. Eq. 402; Adams *v.* Carey, 53 N. J. Eq. 334.]

[2] Hampton *v.* Spencer, 2 Vern. 288; Nab *v.* Nab, 10 Mod. 404; Freeman *v.* Tatham, 5 Hare, 329; Stearnes *v.* Hubbard, 8 Greenl. 320; Lewin on Trusts, 46.

[3] Fordyce *v.* Willis, 3 Bro. Ch. (n.).

[4] Nab *v.* Nab, 10 Mod. 404, 1 Eq. Cas. Ch. 404, and Jones *v.* Nabbe, Gil. Eq., are usually cited to sustain the proposition, but they do not. In Crook *v.* Booking, 2 Vern. 50, 106; Inchiquin *v.* French, 1 Cox, 1; Metham *v.* Devon, 1 P. Wms. 529, and Smith *v.* Attersoll, 1 Russ. 274, there were written declarations of trust, and the question was as to the effect of the writings, though it was remarked in these cases that trusts of personalty could be evidenced by parol. The case of Benbow *v.* Townsend, 1 My. & K. 506, was this: A. had loaned £2,000, and taken a mortgage in the name of B., his brother, declaring that he intended it for the benefit of B.

(*a*) The answer must be complete as a declaration of trust, and fully show a trust. White *v.* Ross, 160 Ill. 56; Warren *v.* Tynan, 54 N. J. Eq. 402.

does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner in the absence of a statute has entire control of it; he can sell and transfer it without writing and by parol, and if he can transfer it by parol, there is no reason why he may not by parol transfer it upon such lawful terms, and to such uses and trusts, as he may desire. It has been so ruled in express decisions in the United States.[1] (*a*) When a person *sui juris* orally or in

After the death of A. his executor brought a bill against B. to obtain the mortgage, and the question was whether the representatives of A. were entitled to the mortgage. It was held that B. was entitled to hold the mortgage, and it was remarked that a trust of personal property was not within the statute of frauds. It will be observed that the mortgage was in writing in the name of B., and that the parol evidence was not used to establish a trust in B., but to rebut a trust resulting to A. from his having paid the purchase-money. If A. had taken the mortgage in his own name, but had declared that it was in trust for B., the question would have fairly arisen, whether a parol declaration could create a trust in a mortgage of real estate. Bayley *v.* Boulcott, 4 Russ. 346, only establishes the proposition that a paper prepared under the direction of the owner, but which she refused to execute, will not create a trust. But in McFadden *v.* Jenkyns, 1 Phill. 153, 1 Hare, 458, it was directly held that a parol declaration was sufficient to create a trust in personal property. If there are doubts and difficulty upon the supposed words, the court will give weight to the fact that they were not written to infer that they may not be the deliberate sentiments of the party. Dipple *v.* Corles, 11 Hare, 183; Paterson *v.* Murphy, id. 91, 92.

[1] Hooper *v.* Holmes, 3 Stockt. 122; Day *v.* Roth, 18 N. Y. 448; Robson *v.* Harwell, 6 Ga. 589; Higgenbottom *v.* Peyton, 3 Rich. Eq. 398; Kirkpatrick *v.* Davidson, 2 Kelley, 297; Gordon *v.* Green, 10 Ga. 534; Kimball *v.* Morton, 1 Halst. Ch. 31. See McFadden *v.* Jenkyns, 1 Hare, 461; 1 Phill. 157; Thorpe *v.* Owens, 5 Beav. 224; George *v.* Bank of England, 7 Price, 646; Hawkins *v.* Gordon, 2 Sm. & Gif. 451; Peckham *v.* Taylor, 3 Beav. 250; Hunnewell *v.* Lane, 11 Met. 163; Simms *v.* Smith, 11 Ga. 195; Crissman *v.* Crissman, 23 Mich. 218; Berry *v.* Norris, 1 Drew, 302; Maffitt *v.* Rynd, 69 Penn. St. 30; Thatcher *v.* Churchill, 118 Mass. 108; Gerrish *v.* New Bedford Inst. for Savings, 128 Mass. 159; Chase *v.* Chapin, 130 Mass. 128; Davis *v.* Coburn, 128 Mass. 377; Hellman *v.* McWilliams, 70 Cal. 449; Hon *v.* Hon, 70 Ind. 135; Hunt *v.* Elliott, 80 Ind. 245; Patterson *v.* Mills, 69 Iowa, 755; Cobb *v.* Knight, 74 Maine, 253; Danser *v.* Warwick, 33 N. J. Eq. 133; Gilman *v.* McArdle, 99 N. Y. 451;

(*a*) But in Georgia, by statute, created or declared only in writing. express trusts in personalty can be Smith *v.* Peacock, 114 Ga. 691, 697.

writing explicitly or impliedly declares that he holds personal property *in presenti* for another, he thereby constitutes himself an express trustee.[1] Under these decisions trusts may be created by parol in any mere personal property, as in the shares of corporations, although the corporations themselves own real estate.[2] If one receives notes of another in trust to pay such person's debt, and agrees with creditor to turn over the notes or their proceeds to him, a trust arises.[3] So where a fund is received and held to invest for another.[4] Money or a debt secured by mortgage of real estate is a personal chattel, and a trust in the money or mortgage debt, and in the mortgage itself, may be created by parol;[5] (*a*) and although a parol declaration of trust will not affect land, yet if the land is to be converted into money, and is converted, a parol declaration will bind the proceeds or the money.[6] And this will hold though

Gadsden *v.* Whaley, 14 S. C. 211; Dickerson's App. 115 Penn. St. 198; [Harris Banking Co. *v.* Miller, 190 Mo. 640, 1 L. R. A. (N. S.) 790; Martin *v.* Martin, 43 Or. 119; Maher *v.* Aldrich, 205 Ill. 242; Austin *v.* Wilcoxson, 149 Cal. 24.]

[1] Tyler *v.* Tyler, 25 Brad. (Ill.) 339.

[2] Porter *v.* Bank of Rutland, 19 Vt. 410; Forster *v.* Hale, 3 Ves. Jr. 696; 5 Ves. 308; Ashton *v.* Langdale, 4 De G. & Sm. 402; 4 Eng. L. & Eq. 80; Myers *v.* Perigal, 16 Sim. 533; 14 Eng. L. & Eq. 229; Hilton *v.* Giraud, 1 De G. & Sm. 183; Kilpin *v.* Kilpin, 1 M. & K. 520; Wheatley *v.* Purr, 1 Keen, 551.

[3] Walden *v.* Karr, 88 Ill. 49. [See Byers *v.* McEniry, 117 Iowa, 499; Koch *v.* Streuter, 232 Ill. 594; Coyne *v.* Supreme Conclave, 106 Md. 54.]

[4] Clapp *v.* Emery, 98 Ill. 523.

[5] Bellasis *v.* Compton, 2 Vern. 294; Benbow *v.* Townsend, 1 M. & K. 510; Childs *v.* Jordon, 106 Mass. 322; Hackney *v.* Brooman, 62 Barb. 650. [Berry *v.* Evendon, 14 No. Dak. 1; Danser *v.* Warwick, 33 N. J. Eq. 133.]

[6] Maffitt *v.* Rynd, 69 Penn. St. 30; Mohn *v.* Mohn, 112 Ind. 285; Wiseman *v.* Baylor, 69 Tex. 63. [On this point see also Worley *v.* Sipe, 111 Ind. 238; Talbott *v.* Barber, 11 Ind. App. 1, 7; Bork *v.* Martin, 132 N. Y. 280; Spencer *v.* Richmond, 46 N. Y. App. Div. 481, 61 N. Y. S. 397; Bechtel *v.* Ammon, 199 Pa. St. 81; Collar *v.* Collar, 75 Mich. 414; and 86 Mich. 507, 13 L. R. A. 621; Rapley *v.* McKinney's Estate, 143 Mich. 508; Calder *v.*

(*a*) And the trust may be proved by parol even after the mortgage has been foreclosed and title to the land has been taken by the trustee. Berry *v.* Evendon, 14 No. Dak. 1.

the parol agreement to hold the money in trust is subsequent to the parol trust respecting the land, no sale by the parol trustee having been contemplated.[1] Mr. Hill says that "it would seem to follow that legacies and annuities, and other sums of money charged on land, do not come within the operation of the statute respecting parol declarations of trusts in land."[2] But all chattels real are within the statute, and trusts in them must be evidenced in writing, as in case of freehold or leasehold interests.[3] The same remarks are to be made in relation to parol trusts of personal property that were made in relation to parol trusts of real estate where such trusts are possible.[4] The subject-matter of the trust must be *clearly* ascertained, as well as the purposes of the trust and the persons who are to take the beneficial interests. (*a*) Loose, vague, and indefinite expressions are insufficient to create the trust.[5] A mere declaration of a purpose to create a trust is of no value unless carried into effect. A simple promise of a future donation without consideration good or valuable creates no trust that equity can enforce.[6] If the trust is once created in writing it cannot be varied by parol, and if it is once created by parol it cannot be altered or varied by other declarations of the trustee; as where a daughter delivered to her father $7000 upon the parol trust that he would secure the money in trust for her and invest it for her sole benefit, and the father made his will giving said notes to two trustees to receive and pay over the

Moran, 49 Mich. 14; Marvel *v.* Marvel, 70 Neb. 498; Dexter *v.* MacDonald, 196 Mo. 373; and note (*a*) to § 79.]

[1] Thomas *v.* Merry, 113 Ind. 83.

[2] Hill on Trustees, 58 (n.); see note 1, p. 74.

[3] Skett *v.* Whitmore, Freem. 280; Forster *v.* Hale, 3 Ves. Jr. 696; Riddle *v.* Emerson, 1 Vern. 108; Hutchins *v.* Lee, 1 Atk. 447; Bellasis *v.* Compton 2 Vern. 294; Gardner *v.* Rowe, 5 Russ. 258; Otis *v.* Sill, 8 Barb. 102.

[4] *Ante*, § 77; Crissman *v.* Crissman, 23 Mich. 218.

[5] Bailey *v.* Irwin, 72 Ala. 505; a parol trust must be clear, and the evidence of it convincing. [Austin *v.* Wilcoxson, 149 Cal. 24, 84.]

[6] Allen *v.* Withrow, 110 U. S. 119. [Fisher *v.* Hampton Transportation Co., 136 Mich. 218.]

(*a*) Atwater *v.* Russell, 49 Minn. 57.

income and interest to the daughter during her life, and at her decease to pay the principal to such persons as she by her last will should direct and appoint, and in default of such appointment, to her heirs-at-law: the father died, and his estate turning out insolvent, she brought a bill praying that the notes might be delivered to some person to be appointed by the court as trustee for her. Mr. Justice Wilde, in delivering the opinion of the court, said, "It is very clear that the father, his executor, and his heirs and creditors, are bound by the trust. It was not in the power of the trustee to divest or defeat the trust without the consent of the *cestui que trust*, except by a sale of the trust property to a *bona fide* purchaser, for a valuable consideration, and without notice of the trust. Nor could the trustee vary the terms of the trust, or declare any new trust, to the prejudice of the *cestui que trust*, unless with her consent." [1]

§ 87. Under the statutes relating to the execution of last wills and testaments, no parol declaration can take effect as a nuncupative will, except in the case of soldiers in actual service, and mariners at sea. These persons may, according to the statutes of nearly all the States, make nuncupative wills of their wages and other personal property. It would seem to follow that they can create valid trusts in their wages and other personal property by nuncupative wills so made as to be proved and allowed in the courts of probate, or other courts having jurisdiction in such matters. Personal property may be so given and delivered to one in trust for another for a particular purpose that it will be good as a *donatio causa mortis*, and the trust will be executed by courts of equity; [2] but courts do

[1] Hunnewell *v.* Lane, 11 Met. 163.

[2] Blunt *v.* Burrow, 4 Bro. Ch. 75, and Perkins's notes, 1 Ves. Jr. 546, and Sumner's notes; Moore *v.* Darton, 4 De G. & Sm. 517, 7 Eng. L. & Eq. 134; Borneman *v.* Sedlinger, 3 Shep. 429; 8 Shep. 185; Constant *v.* Schuyler, 1 Paige, 316. And see Tate *v.* Leithhead, 1 Kay, 658; Hambrooke *v.* Simmons, 4 Russ. 25; Hill *v.* Hill, 8 M. & W. 401; Drury *v.* Smith, 1 P. Wms. 404; 1 Story, Eq. Jur. § 607.

not favor donations *mortis causa*. (*a*) It has been held that a gift, *mortis causa*, of a fund in trust to be disposed of for benevolent purposes, at the absolute and unlimited discretion of the donee, could not be sustained.[1]

§ 88. An attempt was made at one time to hold gifts to charitable uses as excepted from the statute; but Lord Talbot decided,[2] and Lord Hardwicke affirmed the decision,[3] and Lord Northington said every man of sense must subscribe to it, that a gift to a charity must be treated on the same footing with any other disposition.[4]

§ 89. In addition to the statute of frauds, which forbids the creation of express trusts in lands unless the trust is evidenced by some writing signed by the party, there are statutes in every State that regulate the execution of wills. By the original statute of frauds, all wills to pass real estate were required to be in writing, signed by the testator, and attested in his presence by three or four witnesses.[5] This statute has been substantially adopted in all the States, though there is some diversity in the

[1] Dole *v.* Lincoln, 31 Me. 422. But the court decided the case on the ground: (1) that there was not a sufficient delivery to constitute a good gift *mortis causa*, and (2) that if the gift had been good in form, the trust for the charity could not be executed on account of its vagueness and uncertainty. [See also *infra*, § 159, note.]

[2] Lloyd *v.* Spillett, 3 P. Wms. 344; Lewin on Trusts, 61.

[3] Lloyd *v.* Spillett, 2 Atk. 150, Barn. 384; Adlington *v.* Cann, 3 Atk. 150.

[4] Boson *v.* Statham, 1 Eden, 513; Thayer *v.* Wellington, 9 Allen, 283.

[5] 29 Car. II. c. 3, § 5.

(*a*) Upon the question whether a check drawn upon a bank may be an equitable assignment *pro tanto*, see Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634; *Re* Griffin, [1899] 1 Ch. 408; McIntyre *v.* Farmers' Bank, 115 Mich. 255; Niblack *v.* Park Nat. Bank, 169 Ill. 517; Dickinson *v.* Coates, 79 Mo. 250; House *v.* Kountze, 17 Tex. Civ. App. 402. In an article in 36 Am. L. Reg. N. S. 246, 289, Mr. Luther E. Hewitt maintains, upon a review of the authorities, that a *donatio mortis causa* may be well executed in equity upon the giving of a check by the donor, even though the check is not paid or presented before his death.

number of witnesses required. By this statute nuncupative wills of personal chattels were not prohibited, but they were placed under such regulations that they ceased to be in common use. Written wills of personal property were not required to be attested by witnesses. But in England at the present time, and in most of the United States, a will to pass personal property must be executed with the same formalities, and attested by the same number of witnesses, that are required to wills affecting real estate.[1]

§ 90. It follows from these statutes, that no trusts in real or personal estate can be created by any declaration of trust in a will, unless the will is executed in such form that it can be allowed in the court of probate having jurisdiction, and in such form that it will pass the estate that it is intended to operate upon. Mr. Hill lays down the proposition, that if an instrument containing a declaration of trust by reason of some informality cannot be supported as a will, it may, nevertheless, if signed by the party, be a sufficient evidence of the creation of the trust to take it out of the statute.[2] And Lord Northing-

[1] It is not within the general purposes of this treatise to enter into a discussion of the manner of executing wills in England and the several States of the Union. The reader will find the laws of the various States fully and accurately stated in the learned notes of the Hon. J. C. Perkins to 1 Jarman on Wills, pp. 113-135 (4th. Am. ed.), as to real estate, and pp. 135-144 as to personal property.

[2] Hill on Trustees, 61. Mr. Hill cites Nab *v.* Nab, 10 Mod. 404, 1 Eq. Ca. Ab. 404, Gil. Eq. 146. The case was this: "A daughter put into her mother's hands £180, and afterwards made a will, which was duly executed, and appointed her mother executrix, but made no mention of the £180. After making the will she desired her mother to give the money to a third person. After the death of the daughter, this third person brought a bill in chancery, alleging that the mother held this money in trust. The mother admitted the trust in her answer, and set up that she was not to give the money except at her option. The court held that the trust was admitted by the answer, and that the trust should be executed. It will be observed that the question as to a will informally executed did not arise. The question was wholly upon the effect of the defendant's answer in chancery. And the court, as reported in 1 Eq. Cas. Ab. 404, said that if the mother had set up the statute of frauds the trust could not have been carried into effect.

ton declared his opinion generally, "that a writing signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses according to the solemnities of the statute of frauds." [1] But these propositions, in the broad form in which they are stated, are clearly not law. The dictum of Lord Northington stands alone, and the highest authorities are in opposition to it.[2]

§ 91. There is one state of facts in which the above proposition of Mr. Hill may be good law. If a testator in making his will should declare by way of recital that a certain parcel of land, or sum of money, was held by him upon trusts therein stated, and the will should be so informally executed that it could not be proved in a court of probate, still, if it was signed by him, it would seem to be as good proof of the trust as letters and other memoranda signed by the party and found after his death. (*a*) In such case the will could have no effect in creating the trust, it would be simply proof in writing of a trust already created and existing at the date of the will. But if the validity of the trust in any way depended upon the effect of the will in transferring the title to the property, the will could not be used in evidence, unless it was itself so executed as to be valid as a will.[3] In all cases where trusts originate in

[1] Boson *v.* Statham, 1 Eden, 514.

[2] Adlington *v.* Cann. 3 Atk. 151; Muckleston *v.* Brown, 6 Ves. 67; Stickland *v.* Aldridge, 9 Ves. 519; Puleston *v.* Puleston, Finch, 312; Thayer *v.* Wellington, 9 Allen, 283; Burlington University *v.* Barrett, 22 Iowa, 60. [*Re* Smith; Champ *v.* Marshallsay, 64 L. T. 13; Leslie *v.* Leslie, 53 N. J. Eq. 275.]

[3] Anding *v.* Davis, 38 Miss. 574.

(*a*) Leslie *v.* Leslie, 53 N. J. Eq. 275, 281; McAuley's Estate, 184 Pa. St. 124; Keith *v.* Miller, 174 Ill. 64. Thus a recital in a will that the testator holds certain property upon trust has been held to be sufficient writing to satisfy the statute of frauds; and the revocation of the will and its destruction did not prevent its contents being proved by parol evidence for this purpose. Hiss *v.* Hiss, 228 Ill. 414.

a will, the will must be executed according to the statute, or it cannot be used as a declaration and proof of the trusts. (*a*)

§ 92. Mr. Lewin clearly states the law and gives the reasons, as follows: "We must bear in mind that the absolute owner of property combines in himself both the legal and equitable interest, and when the legislature enacts that no devise or bequest of property shall be valid without certain ceremonies, a testator cannot by an informal instrument affect the equitable any more than the legal estate, for the one is a constituent part of the ownership as much as the other. Thus a person cannot, but by will duly signed and attested, give a sum of *money* originally and primarily out of land; for the charge is part of the land and to be raised out of it by sale or mortgage.[1] And if a testator by will duly signed and attested give lands to A. and his heirs 'upon trust,' but without specifying the particular trust intended and then by a paper not duly signed and attested, as a will or codicil, declare a trust in favor of B., the beneficial interest under the will is a part of the original ownership, and cannot be passed by the informal paper, but will descend to the heir-at-law.[2] Again, if a legacy be bequeathed by a will in writing to A. 'upon trust,' and the testator by parol express an intention that it shall be held by A. upon trust for B., such a direction is

[1] Brudenell *v.* Boughton, 2 Atk. 272.
[2] Adlington *v.* Cann, 3 Atk. 151.

(*a*) Thus a revoked will cannot be used as written evidence of a trust in property conveyed to another by deed absolute in form and not referring to the will. Davis *v.* Stambaugh, 163 Ill. 557. But where a declaration of trust refers for its terms to a certain existing will of the grantor, the trust rests upon the declaration not upon the will, and revocation of the will can have no effect upon the trust. Kopp *v.* Gunther, 95 Cal. 63.

A recital in a will that the testator has by another instrument conveyed certain land to his daughter as an advancement, does not enable her to claim the land or an equitable interest in it when she has reconveyed the land to him without reference to the will. Stodder *v.* Hoffman, 158 Ill. 486. And an erroneous recital in a will that the testator has executed a deed of trust of certain property, can have no effect. Hunt *v.* Evans, 134 Ill. 496.

in fact a testamentary disposition of the equitable interest in the chattel, and therefore void by the statute, which imposes the necessity of a written will. If it be said that such expression of intention, though void as a devise or bequest, may yet be good as a declaration of trust, and, therefore, that where the legal estate of a freehold is well devised a trust may be engrafted upon it by a single note in writing; and where a personal chattel is well bequeathed, a trust of it, as excepted from the seventh section of the statute of frauds, may be raised by a mere parol declaration, — the answer is, that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. 'The deed,' observed Lord Loughborough, in a similar case, 'is built on the will; if the will is destroyed, the deed I should consider absolutely gone; the will without the deed is incomplete, and the deed without the will is a nullity.' [1] And Mr. Justice Buller observed, 'A deed must take place upon its execution or not at all; it is not necessary for a deed to convey an immediate interest in possession, but it must take place as passing an interest to be conveyed at the execution: but a will is quite the reverse, and can only operate after death.' [2] We may therefore safely assume, as an established rule, that if the intended disposition be of a testamentary character and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative, unless it be declared in writing in strict conformity with the statutory enactments regulating devises and bequests." [3]

§ 93. There is an additional reason in the United States why a will or testamentary paper informally executed cannot be used as an original declaration of trust. In nearly all the United States no will can be used to prove the transfer of any

[1] Habergham *v.* Vincent, 2 Ves. Jr. 209.
[2] Ibid.
[3] Lewin on Trusts, 66 (2d Am. ed.).

interest, legal or equitable in property of the testator, unless such will has been duly proved, allowed, and recorded, in a court of probate having jurisdiction over it;[1] and if such will is to be used to affect the title to property in any State other than the one where it is originally proved, it must be recorded in such other State;[2] so a court in equity has no jurisdiction over trusts created by the will of a foreigner, a certified copy of which is not filed in the probate court of the jurisdiction where the remedy is sought.[3] But no will can be proved and allowed in a probate court unless it is duly executed under the statutes in force where it is made. This rule does not interfere with the doctrine that a testator may by his last will refer to and incorporate therein any document or paper which is in actual existence at the time, and is thus made a part of his will.[4] In such cases, all such papers must be clearly identified and probated and recorded with the will as a part thereof, and such papers must be in actual existence at the time of making the will. If they are made afterwards, they must be so executed that they may be probated as a revocation of the will, or as a codicil thereto, or they will have no effect;[5] (*a*) as where a testator made an absolute devise

[1] Rex *v.* Netherseal, 4 T. R. 258; 1 Wms. Ex'rs, 172; Strong *v.* Perkins, 3 N. H. 517; Kittredge *v.* Fulsome, 8 N. H. 98; 2 Redf. on Wills, 10; Metham *v.* Devon, 1 P. Wms. 529; Inchiquin *v.* French, 1 Cox, 1. And see Mr. Lewin's remarks upon this last case, Lewin on Trusts, p. 49.

[2] Wilson *v.* Tappan, 6 Ohio, 172; Bailey *v.* Bailey, 8 Ohio, 239; Ives *v.* Allyn, 12 Vt. 589; Campbell *v.* Sheldon, 13 Pick. 8; Campbell *v.* Wallace, 10 Gray, 162; 2 Redf. on Wills, 10.

[3] Campbell *v.* Wallace, 2 Gray, 162.

[4] 1 Wms. Ex'rs, 289, 290, and notes; Willington *v.* Adams, 1 V. & B. 445; Habergham *v.* Vincent, 2 Ves. Jr. 228; Smart *v.* Prujean, 6 Ves. 560; Goods of Lady Truro, L. R. 1 P. and D. 201; Doe *v.* Walker, 12 M. & W. 591, 600; *In re* Earle's Trusts, 4 K. & J. 673; Allen *v.* Maddock, 11 Moore, P. C. 201; Croker *v.* Hertford, 4 Moore, P. C. 339, 363; Thayer *v.* Willington, 9 Allen, 283. [Locke *v.* Farmers' L. & T. Co., 140 N. Y. 135. See also Sullivan *v.* Sullivan, (1903) 1 Ir. R. 193.]

[5] Adlington *v.* Cann, 3 Atk. 141-152; Briggs *v.* Penny, 3 De G. & Sm. 547, 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; Johnson *v.* Ball, 5 De G. &

(*a*) Where a will devised property to the testator's brother in trust "to be disposed of by him as I have heretofore or may hereafter direct

of an estate, and left a declaration of trust not referred to in the will, and not duly attested, and not communicated to the devisee nor assented to by him in the testator's lifetime, the devisee is entitled to both the legal and beneficial interest, because it is a good devise on the face of the will, and the informal declaration of trust cannot be probated or admitted in evidence.[1] So, if a testator should devise real or personal

Sm. 85; Dawson *v.* Dawson, 1 Chev. 148; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Thayer *v.* Willington, 9 Allen, 283. How far papers referred to in a will become part thereof may be a very troublesome question. Statutes require last wills to be solemnly attested or witnessed by a certain number of witnesses. Whether papers referred to in the will as in actual existence but not attested by the witnesses can be probated, and if they cannot be probated whether they can have any effect upon the disposition made by the will, or of the construction of it, has not been determined.

[1] Adlington *v.* Cann, 3 Atk. 141; Stickland *v.* Aldridge, 9 Ves. 519; Briggs *v.* Penny, 3 De G. & Sm. 547; 3 Mac. & G. 546; 8 Eng. L. & Eq. 231; Wallgrave *v.* Tebbs, 2 K. & J. 313; Lee *v.* Ferris, 2 K. & J. 357; Russell *v.* Jackson, 10 Hare, 204; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Brown *v.* Brown, 12 Md. 87; Thayer *v.* Willington, 9 Allen, 283; Habergham *v.* Vincent, 5 T. R. 92, 2 Ves. Jr. 204; Rose *v.* Cunningham, 12 Ves. 29; Johnson *v.* Ball, 5 De G. & Sm. 85; Langdon *v.* Astor, 3 Duer, 477; Thompson *v.* Quimby, 2 Brad. 449; Tucker *v.* Seaman's Aid Soc., 7 Met. 404; *In re*

him to do," the trust is not sufficiently declared, and a memorandum in writing signed by the testator will not be available to cure the defects. Heidenheimer *v.* Bauman, 84 Tex. 174. The same is true of a bequest in trust for purposes set forth in a sealed letter "which will be found with this will," since the letter was not incorporated in the will and the ownership of the property was not intended to be passed until the death of the testator. Bryan *v.* Bigelow, 77 Conn. 604. To the same effect see Payton *v.* Almy, 17 R. I. 605; Chase *v.* Stockett, 72 Md. 235, 243.

In McAuley's Estate, 184 Pa. St. 124, property had been devised to a sister of the testator with no words of trust or limitation in the will, but after the death of the devisee a paper signed by her was found among her effects, reading as follows: "By request of my dear brother my house on Duquesne Way is to be sold at my death, and the proceeds to be divided between the Home of the Friendless and the Home for Protestant Destitute Women." This was held to be an acknowledgment in writing of an oral trust which had been imposed upon the property by the brother, and the trust was held to be established by this evidence, although the paper seems not to have been delivered or communicated to anybody prior to the sister's death.

property to A. in trust and state no trusts upon which A. is to hold, no paper not referred to in the will, and not duly executed, could be received in evidence to prove the trusts, nor could A. hold the beneficial interest, because he is stamped with the character of a trustee; but he would hold only the legal title, while the beneficial interest would descend or result to the testator's heirs-at-law.[1] (*a*) But if any words in the will itself *clearly* qualify an absolute devise in the will, and show the testator's intent that others should share the property, the devisee holds in trust.[2]

§ 94. Even at common law parol evidence could not be received to convert a devisee under a will in writing into a trustee. In Vernon's Case it was resolved that a devise implies a consideration, and therefore that it cannot be averred or proved by parol to be for the use of another;[3] "for that," said Lord Ch. R. Gilbert, "were an averment contrary to the design of the will appearing in the words;"[4] and in Lady Portington's Case, the court refused to receive parol evidence, not only because of the statute of frauds, but also *from the nature of the thing*.[5] For the same reason, at common law parol evidence

Sothron, 2 Curteis, 831; Ferraris *v.* Hertford, 3 Curteis, 468; Waggstaff *v.* Waggstaff, 2 P. Wms. 258; Marlborough *v.* Godolphin, 2 Ves. Sr. 76.

[1] Muckleston *v.* Brown, 6 Ves. 52; Boson *v.* Statham, 1 Ed. 513. [Chase *v.* Stockett, 72 Md. 235; 243; Bryan *v.* Bigelow, 77 Conn. 604; Heidenheimer *v.* Bauman, 84 Tex. 174; See also Payton *v.* Almy, 17 R. I. 605; Kelly *v.* Nichols, 17 R. I. 306, 18 R. I. 62.]

[2] Major *v.* Herndon, 78 Ky. 128.

[3] Vernon's Case, 4 Coke, R. 4 a.

[4] Gilbert on Uses, 162.

[5] Lady Portington's Case, 1 Salk. 162. It is stated by Jenkins that at common law parol proof might be received to engraft a trust upon a written will. Jenk. 3 Cent. Cas. 26. But by comparing the case cited by Jenkins with the same case in Fitzherb. Ch. Devise, 22, it will be seen

(*a*) In this respect a devise or bequest differs from a deed. In the latter a mere description of the grantee as trustee without other declaration of the trust will not prevent him from taking the absolute title since no trust will usually result for the grantor. Hart *v.* Seymour, 147 Ill. 598.

of a trust was always inadmissible against a legatee under a written will.[1] Until a late statute[2] in England a person appointed executor had the title to all the personal property, and was entitled to take the surplus, after paying debts and legacies, beneficially to himself, and no parol evidence was admissible to convert him into a trustee for the heirs or next of kin.[3] But the authorities seem to establish that if there was any circumstance appearing on the face of the will, as the gift of a legacy to the executor, the *law presumed* that it was not intended that he should take the surplus beneficially; the executor might rebut that presumption by parol evidence,[4] when, of course, the next of kin might fortify the presumption by opposing parol evidence in contradiction. Where, however, the will itself invested the executor with the character of trustee, as by giving him a legacy "for his trouble," or by styling him a "trustee" expressly, the *prima facie* title to the surplus was then in the next of kin, and parol evidence was not admissible to disprove the express intention.[5] By the act referred to in England, and by statutes in all the United States, an executor is made *prima facie* a trustee for the next of kin.[6]

§ 95. Where an agreement is entered into for a *valuable and legal consideration*, and a trust is intended, the mere form of

that Jenkins was mistaken in the point decided. And see Lewin on Trusts, 58 (2d. Am. ed.).

[1] Porey *v.* Juxon, Nels. 135; Fane *v.* Fane, 1 Vern. 30.

[2] 11 Geo. IV. and I W. IV. c. 40.

[3] Langham *v.* Sandford, 19 Ves. 641; White *v.* Williams, 3 Ves. & B. 72; Coop. 58.

[4] Walton *v.* Walton, 14 Ves. 322; Clennell *v.* Lewthwaite, 2 Ves. Jr. 477; Langham *v.* Sandford, 17 Ves. 442; Lynn *v.* Beaver, 1 T. & R. 66.

[5] Rachfield *v.* Careless, *v.* P. Wms. 158; Langham *v.* Sandford, 17 Ves. 435; 19 Ves. 641; Gladding *v.* Yapp, 5 Mad. 42; White *v.* Evans, 14 Ves. 21; Walton *v.* Walton, id. 322; Read *v.* Steadman, 26 Beav. 495. [See *In re* West, [1900] 1 Ch. 84.]

[6] Love *v.* Gaze, 8 Beav. 472; Juler *v.* Juler, 29 Beav. 34; Harrison *v.* Harrison, 2 Hem. & Mill. 237; Read *v.* Steadman, 26 Beav. 495; Hill *v.* Hill, 2 Hayw. 298; Paup *v.* Mingo, 4 Leigh, 163; Hays *v.* Jackson, 6 Mass. 153; Wilson *v.* Wilson, 3 Bin. 559; Darrah *v.* McNair, 1 Ash. 240; 2 Story's Eq. Jur. §§ 1208–1210, and notes; Lewin on Trusts, 50.

the instrument is not very material; for if the trust is not perfectly created or executed by the instrument, a court of equity can enforce it as a contract.[1] Where a husband had treated his wife with extreme cruelty, so that she left him and instituted proceedings for a divorce, and he gave a note to a trustee for his wife, in consideration of her giving up the said suit and resuming cohabitation with him, it was held that the consideration was illegal; but the dissent by Holmes is far weightier than the majority opinion.[2] If a deed is given by B. to A. on condition that A. will support B. and C., a trust is created that equity will enforce.[3] (*a*) Wherever a *valuable consideration* is paid, the contract will be executed as near to the intention of the parties as possible; as where for a valuable consideration a man executed a deed of land purporting to be under his hand and seal, but no seal was affixed, by reason of which defect the legal title did not pass, the court held that the defective deed might be used as a declaration of trust, and that the holder of the legal title should hold it in trust for the grantee in the deed, and that he should be ordered to convey;[4] and where a husband for a meritorious consideration conveyed pesonal property directly to his wife by deed, which could not operate, because a husband

[1] Baldwin *v.* Humphrey, 44 N. Y. 609; Taylor *v.* Pownal, 10 Leigh, 183. [See Williamson *v.* Yager, 91 Ky. 282; Whitehouse *v.* Whitehouse, 90 Me. 468; Collins *v.* Steuart, 58 N. J. Eq. 392; Lee *v.* Hamilton, 218 Pa. St. 468; Landon *v.* Hutton, 50 N. J. Eq. 500; Norway Sav. Bank *v.* Merriam, 88 Me. 146.]

[2] Merrill *v.* Peaselee, 146 Mass. 460. [See Whitehouse *v.* Whitehouse, 90 Maine, 468.]

[3] Benscotter *v.* Green, 60 Md. 327. [Koch *v.* Streuter, 232 Ill. 594; See Grote *v.* Grote, 106 N. Y. S. 986, 121 App. Div. 841.]

[4] Wadsworth *v.* Wendell, 5 Johns. Ch. 224; Haskill *v.* Freeman, 1 Wins. Eq. (N. C.) 34.

(*a*) But an agreement to support the grantor or others, or to pay money in consideration of the conveyance does not create a trust, unless it is apparent that the grantor intended to charge the property with the payments or unless words of condition are used. Maxwell *v.* Wood, 133 Iowa, 721; Riddle *v.* Beattie, 77 Iowa, 168; Faust *v.* Faust, 144 N. C. 383; Fellows *v.* Fellows, 69 N. H. 339; Hanks *v.* Hanks, 75 Vt. 273.

cannot convey directly to his wife, the court ordered the deed to stand as a declaration of trust for the wife, and the husband's representatives to hold the legal title in trust for her.[1] (*a*) The authorities establish this proposition, that where there is a valuable consideration the court will enforce the trust, though it is not perfectly created, and though the instruments do not pass the title to the property, if from the documents the court can clearly perceive the terms and conditions of the trust, and the parties to be benefited. In such cases, effect is given to the *consideration* to carry out the intentions of the parties, though informally expressed. But if no *cestui que trust* is named, or so designated that he can be identified, the court cannot carry a trust into effect, however clearly it may be created in other respects.[2] Even if a purchaser of land direct a declaration of trust to be inserted in the deed to him, he will be bound by it, though it is voluntary on his part.[3] And if no trustee's name is inserted in the deed, it may be reformed, and a suitable trustee may be appointed and inserted.[4] (*b*)

[1] Huntley *v.* Huntley, 8 Ired. Eq. 250; Livingston *v.* Livingston, 2 Johns. Ch. 537; Garner *v.* Garner, 1 Busb. Eq. 1; Jones *v.* Obinchain, 10 Grat. 259; Fellows *v.* Heermans, 4 Lans. 230. [Keffer *v.* Grayson, 76 Va. 523; Sayers *v.* Wall, 26 Grat. 354; Sims *v.* Ricketts, 35 Ind. 181; Carter *v.* McNeal, 86 Ark. 150; But see *contra*, Moore *v.* Moore, 18 Eq. 474, 43 L. J. Ch. 617; See also §§ 108, 109.]

[2] Dillage *v.* Greenough, 45 N. Y. 438; Ownes *v.* Ownes, 23 N. J. Eq. 60. [Kelly *v.* Nichols, 17 R. I. 306; 18 R. I. 62; Atwater *v.* Russell, 49 Minn. 57; Filkins *v.* Severn, 127 Iowa, 738.]

[3] Reilly *v.* Whipple, 2 S. C. 277.

[4] Burnside *v.* Wayman, 49 Mo. 356.

(*a*) In Stark *v.* Kirchgraber, 186 Mo. 633, the same was held true where a husband executed and delivered a warranty deed of land directly to his wife; and it was further held that on the death of the wife the trust became executed by the statute of uses and the legal title vested in her heirs.

(*b*) A trust deed to secure creditors of the grantor in which the trustee's name has been omitted has been treated as an equitable mortgage on the application of a *cestui que trust*. Dulaney *v.* Willis, 95 Va. 606. See also Dunn *v.* Raley, 58 Mo. 134.

§ 96. And where there is *no valuable consideration*, yet if the settlor, by a clear and explicit declaration duly executed and intended to be final and binding upon him, makes himself a trustee, courts of equity will enforce the trust, whether the nature of the property be legal or equitable, and whether it be capable or incapable of transfer.[1] If it is a mere agreement, without consideration, to execute a declaration of trusts, courts will not act upon it; but if a party has declared himself to be a trustee, the beneficial interest in the property becomes vested in the *cestui que trust* without further action, and the *cestui que trust* can enforce his rights.[2] (*a*)

[1] *Ex parte* Pye, 18 Ves. 140; Thorpe *v.* Owen, 5 Beav. 224; Wilcocks *v.* Hannyngton, 5 Ir. Ch. 38; Draiser *v.* Brereton, 15 Beav. 221; Gray *v.* Gray, 2 Sim. (N. S.) 273; Vandenburg *v.* Palmer, 4 Kay & J. 204; Stapleton *v.* Stapleton, 14 Sim. 186; Searle *v.* Law, 15 Sim. 99; Bridge *v.* Bridge, 16 Beav. 315; Steele *v.* Waller, 28 Beav. 466; Paterson *v.* Murphy, 11 Hare, 88; Bentley *v.* MacKay, 15 Beav. 12; Ownes *v.* Ownes, 23 N. J. Eq. 60; Crawford's App. 61 Penn. St. 52; Morgan *v.* Malleson, L. R. 10 Eq. 475; McFadden *v.* Jenkyns, 1 Hare, 471. In the last case, Sir J. Wigram said "If the owner of property executes an instrument by which he declared himself a trustee, and had disclosed that instrument to the *cestui que trust*, and afterwards acted upon it, that might perhaps be sufficient, and a court of equity might not be bound to inquire further into an equitable title so established." Mr Lewin says that this is "expressed with *unnecessary caution*." Lewin on Trusts, 57. The contrary was held in Bowering *v.* King, 37 Ala. 606; Walker *v.* Crews, 73 Ala. 412, 417.

[2] *Ex parte* Pye, 18 Ves. 149; Gee *v.* Liddell, 35 Beav. 621. To create a trust, a man must express an intention to become a trustee; and words that express a present gift show an intention to give property over to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise. Heartley *v.* Nicholson, L. R. 19 Eq. 244; Richards *v.* Delbridge, L. R. 18 Eq. 11; Ellison *v.* Ellison, 6 Ves. 656. If one mode of transfer is indicated, the court will not give effect to it by applying another. Milroy *v.* Lord, 2 De G., F. & J. 264; Warriner *v.* Rogers, L. R. 10 Eq. 340.

(*a*) A voluntary settlement in trust may be created either by transferring the property to another to hold in trust or by a declaration of the settlor himself that he holds the property in trust for named beneficiaries. Milroy *v.* Lord, 4 De G., F. & J. 264; Welch *v.* Henshaw, 170 Mass. 409, 415; Smith's Estate, 144 Pa. St. 428: O'Neil *v.* Greenwood, 106 Mich. 572. In the former case the legal title passes to the trustee and the beneficial interest vests in the *cestuis*. In the latter case

§ 97. If the donor or settlor does not propose to make himself a trustee, the trust is not *perfectly* created. As where there

only the beneficial interest passes. As the transfer is without consideration equity will not lend its aid in either case to complete it if any essential is omitted, however clear may be the intention of the donor. An incomplete gift will not be given effect as a trust unless a trust in substance was intended by the donor. Ashman's Estate, 223 Pa. St. 543. Thus where the donor intends to pass title to the donee by way of gift, but fails to do so, even inadvertently, by failure to deliver, he will not be construed to be a trustee in order to carry out his intention. Stokes *v.* Sprague, 110 Iowa, 89; Young *v.* Young, 80 N. Y. 422. As where a husband attempted to make a gift to his wife by delivery, Moore *v.* Moore, 18 Eq. 474, 43 L. J. Ch. 617. *In re* Breton's Estate, 17 Ch. Div. 416 and Ames' Cases, p. 175, note. See also Wells *v.* German Ins. Co., 128 Iowa, 649. (But see *contra*, authorities cited in note 1 on page 109), or where the donor delivers to his own agent to deliver to the donee after the donor's death, retaining meanwhile the right to recall the gift. *Re* Smith. Champ *v.* Marshallsay, 64 L. T. 13; Godard *v.* Conrad, 125 Mo. App. 165; Gannon *v.* McGuire, 47 N. Y. S. 870, 22 App. Div. 43. Compare Bump *v.* Pratt, 84 Hun, 201.

A written instrument of transfer or assignment which is not effective as such because not delivered will not be construed to be a declaration of trust. Wadd *v.* Hazelton, 137 N. Y. 215; Starbuck *v.* Farmers' L. & T. Co., 51 N. Y. S. 58, 28 App. Div. 272; Clay *v.* Layton, 134 Mich. 317, (Compare with O'Neil *v.* Greenwood, 106 Mich. 572 and Ellis *v.* Secor, 31 Mich. 185); Norway Sav. Bank *v.* Merriam, 88 Me. 146. An attempted gift of the donor's own promissory note will not be construed to be a declaration of trust as to the amount of the note; Sanborn *v.* Sanborn, 65 N. H. 172; Graves *v.* Safford, 41 Ill. App. 659; and the same has been held true of an unaccepted check. Pennell *v.* Ennis, 126 Mo. App. 355.

A voluntary deed of transfer in trust signed, sealed and recorded but not delivered has been held to be ineffectual to create a trust either by grant or as a declaration to stand seized. Loring *v.* Hildreth, 170 Mass. 328. But it has been held in Tarbox *v.* Grant, 56 N. J. Eq. 199, that the mere failure to deliver such a deed will not prevent it from operating in case of a family settlement. And it has been held in a recent English case that a voluntary deed of transfer to another to hold upon trusts by way of settlement, unsigned by the grantee, undelivered and expressly disclaimed by him, creates an irrevocable trust, the settlor himself being the trustee after the disclaimer. Mallott *v.* Wilson [1903], 2 Ch. 494. See also Jones *v.* Jones, W. N. (1874) 190. Delivery will ordinarily be presumed as against the settlor if the deed has been duly executed and recorded, but the presumption may be rebutted. Chilvers *v.* Race, 196 Ill. 71; Walker *v.* Crews, 73 Ala. 412, 417.

The general rule has been well

is a mere *intention* of creating a trust, or a mere voluntary agreement to do so, and the donor or settlor contemplates some

stated in Milroy *v.* Lord, 4 De G., F. & J. 264. It was there said that a settlor may create a voluntary settlement "by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement or declares that he holds it in trust for those purposes; . . . but in order to render the settlement binding one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give it effect by implying another of those modes." See also Welch *v.* Henshaw, 170 Mass. 409, 415, where the above extract is quoted with approval as a correct statement of the law.

In Pittman *v.* Pittman, 107 N. C. 159, it was held that a written but unsealed declaration by the owner of land to the effect that she held the title for the benefit of the person who had previously conveyed it to her and promising to reconvey it upon request, did not create a trust which equity would enforce in the absence of a consideration and the declaration not being contemporaneous with the conveyance to her. The common law rule was stated to be that "no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession, the character of the conveyance alone being sufficient to raise the use, and to dispense with the necessity of a consideration."

In cases of voluntary parol declarations of trust as to personalty wherein a donor attempts to make himself trustee for another without delivery of the property, the decisions show some difference of opinion as to the necessity of giving notice to the beneficiary. In Massachusetts it seems to be settled law that such a declaration of trust is not effectual to pass any beneficial interest if it is not communicated to the beneficiary or to somebody in his behalf. Welch *v.* Henshaw, 170 Mass. 409, 415; Boynton *v.* Gale, 194 Mass. 320. Thus it has been held in savings bank cases that the communication of the declaration of trust to the bank is not enough, even when it is shown by other evidence that a gift of the beneficial interest was intended. Scrivens *v.* No. Easton Sav. Bank, 166 Mass. 255; Noyes *v.* Inst. for Savings, 164 Mass. 583; Cleveland *v.* Hampden Sav. Bank, 182 Mass. 110. The position taken by the court is that a person cannot make a gift of any interest in property without delivery unless he informs the donee or at least somebody whose interest is opposed to that of the donor. For opinions in other States which seem to favor the view of the Massachusetts court, see Burton *v.* Bridgeport Sav. Bank, 52 Conn. 398;

further act to be done by him to give it effect, the trust is not completely instituted; and if it is voluntary, the settlor cannot

Casteel *v.* Flint, 112 Iowa, 92; Marcy *v.* Amazeen, 61 N. H. 131; Bartlett *v.* Remington, 59 N. H. 364; People's Sav. Bank *v.* Webb, 21 R. I. 218.

The courts of New York differ from the Massachusetts courts in respect to savings bank deposits, holding that the communication to the officers of the bank is sufficient. Matter of Totten, 179 N. Y. 112; Matter of U. S. Trust Co., 117 App. Div. 178, 102 N. Y. S. 271; Garvey *v.* Clifford, 114 App. Div. 193, 99 N. Y. S. 555; Martin *v.* Funk, 75 N. Y. 134; Mabie *v.* Bailey, 95 N. Y. 207; Willis *v.* Smyth, 91 N. Y. 297. And the majority of decisions in other States are in accord with this view. Sayre *v.* Weil, 94 Ala. 466; Sav. Inst. *v.* Hathorn, 88 Me. 122; Milholland *v.* Whalen, 89 Md. 212; Littig *v.* Mt. Calvary Church, 101 Md. 494; Merigan *v.* McGonigle, 205 Pa. St. 321; Gaffney's Estate, 146 Pa. St. 49; Conn. River Bank *v.* Adm'r of Albee, 64 Vt. 571. *Supra*, § 82, note. But the New York courts seem to agree with the Massachusetts court to the extent that the declaration which purports to create the trust must be communicated to *somebody*. Thus in Govin *v.* De Miranda, 76 Hun, 414, it was said: "In no case has it ever been held as yet that a party may, by transferring his property from one pocket to another, make himself a trustee. In every case where a trust has been established the party creating it has placed the evidence thereof in the custody of another, and has thereby shown that it was intended to be a completed act." In this case there was an undelivered instrument under seal purporting to transfer to D. certain bonds, the bonds to remain in the custody of the signer as trustee for D. This instrument was found among the papers of the signer after his death. The opinion discusses a previous case of Govin *v.* De Miranda, 140 N. Y. 476, involving different facts. In the last cited case another writing was found among the papers of the deceased stating that certain property in his possession belonged to certain persons. Although this writing had not been delivered it was held to be good evidence of what it stated; it did not purport to create a trust or to make a transfer, but was merely an acknowledgment of an already existing interest in somebody else.

Cases of this sort are distinguishable from cases of undelivered declarations referred to in a will subsequently made, and incorporated in the will by reference. Such declarations take effect as part of the will. Locke *v.* Farmers' L. & T. Co., 140 N. Y. 135.

Doubtless it would be generally held, where a settlor has by a formal instrument declared himself a trustee, the form of the instrument not requiring delivery, that neither delivery to the beneficiary nor notice to him is necessary in order to perfect the trust. Thus in Smith's Estate, 144 Pa. St. 428, full effect was given to a voluntary declaration of trust found after the settlor's death among his papers in an

be compelled to complete it.[1] (a) So if the paper executed by the settlor is in the nature of a testamentary disposition which

[1] Lloyd *v.* Brooks, 34 Md. 33; Swan *v.* Frick, id. 139; Cotteen *v.* Missing, 1 Mad. 176; Bayley *v.* Boulcott, 4 Russ. 345; Dipple *v.* Corles, 11 Hare, 183; Jones *v.* Lock, L. R. 1 Ch. 25; Caldwell *v.* Williams, 1 Bailey, Eq. 175; Crompton *v.* Vasser, 19 Ala. 259; Hayes *v.* Kershaw, 1 Sand. Ch. 258; Reid *v.* Vanarsdale, 2 Leigh, 560; Evans *v.* Battle, 19 Ala. 378; Pinkard *v.* Pinkard, 2 Ala. 649; Minturn *v.* Seymour, 4 Johns. Ch. 498. Acker *v.* Phœnix, 4 Paige, 305; Dawson *v.* Dawson, 1 Dev. Eq. 93; Banks *v.* May, 3 A. K. Marsh, 435; Bibb *v.* Smith, 1 Dana, 580; Darlington *v.* McCoole, 1 Leigh, 36; Tiernan *v.* Poor, 1 Gill & J. 217; Forward *v.* Armstead, 12 Ala. 124; Lawry *v.* McGee, 3 Head, 269; Lister *v.* Hodgson, L. R. 4 Eq. 30; Dillinger *v.* Llewelyn, 4 De G., F. & J. 517; Gardner *v.* Merritt, 32 Md. 78; Lanterman *v.* Abernathy, 47 Ill. 437; Shaw *v.* Burney, 1 Ired. Eq. 148; Clarke *v.* Lott, 11 Ill. 105; Read *v.* Robinson, 6 W. & S. 338; Yarborough *v.* West, 10 Ga. 471; Colman *v.* Sarel, 3 Bro. Ch. 12; Antrobus *v.* Smith, 12 Ves. 39; Edwards *v.* Jones, 1 M. & Cr. 226; Dillon *v.* Coppin, 4 id. 647; Jefferys *v.* Jefferys, 1 Cr. & Phil. 138; Penfold *v.* Mould, L. R. 4 Eq. 562; Disher *v.* Disher, 1 P. Wms. 204. [Gwynn *v.* Gwynn, 11 App. D. C. 564.]

envelope with the property described, the intention of the settlor to create a trust and his belief that he had done so being shown by other evidence. The court sums up its discussion as follows: "The question in such case is not so much whether in the lifetime of the decedent the declaration was actually exhibited to the inspection of others, as whether under all the circumstances of the case, it would appear to have been written and preserved for the inspection of others." See also Johnson *v.* Amberson, 140 Ala. 342; Eshbach's Estate, 197 Pa. St. 153; Fowler *v.* Gowing, 152 Fed. 801 (N. Y.); Collins *v.* Steuart, 58 N. J. Eq. 392; Janes *v.* Falk, 50 N. J. Eq. 468. See also § 103 and note 2. It is said in Landon *v.* Hutton, 50 N. J. Eq. 500, p. 508: "It is to be observed that there exists a distinction between the cases in which the donor or settlor holding the legal title unequivocally declares himself to be the trustee, and the cases in which, otherwise than by will, he makes a stranger the trustee. In the first class of cases a distinct declaration of the trust in himself without more, appears to be sufficient, while in the latter class it is held that the question, whether or not a trust has been created, must be determined upon principles of strict law governing the perfect transfer of a legal title

(a) The declaration must go far enough to vest in the beneficiary "an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of trust." Fisher *v.* Hampton Transportation Co., 136 Mich. 218, 98 N. W. 1012.

requires to be proved in a court of probate, but is so imperfectly executed that it cannot be proved as a last will and testament, no trust will be created.[1] (a)

[1] *Ante*, §§ 92-94; Warriner *v.* Rogers, L. R. 16 Eq. 340; Richardson *v.* Richardson, L. R. 3 Eq. 686; Morgan *v.* Malleson, L. R. 10 Eq. 475. [Fisher *v.* Hampton Transportation Co., 136 Mich. 218; Bryan *v.* Bigelow, 77 Conn. 604; Payton *v.* Almy, 17 R. I. 605; Dougherty *v.* Shillingsburg, 175 Pa. St. 56.]

under which the most distinct evidence of intention to pass an interest may not be conclusive."

Voluntary conveyances or declarations of trust are subject to the general rules as to fraud upon creditors. If they are made with actual intent to hinder, delay or defraud either prior or subsequent creditors of the settlor, they are voidable by such creditors. Brundage *v.* Cheneworth, 101 Iowa, 256; Scott *v.* Keane, 87 Md. 709. See Williams *v.* Williams, 43 S. W. 198 (Ky.). A gift of this sort by an insolvent or which renders the donor insolvent is fraudulent *per se* as to existing creditors. Flaherty *v.* Stephenson, 56 W. Va. 192; *infra*, § 149.

As to subsequent creditors the fraudulent intent must be shown. The mere fact that there is a benefit for the settlor is not conclusive of fraudulent intent, Crawford *v.* Langmaid, 171 Mass. 309; *infra*, § 585, even when the trust for the settlor is secret. Brown *v.* Bradford, 103 Iowa, 378. But the existence of a secret trust for the settlor usually requires explanation. See Scott *v.* Keane, 87 Md. 709; Coolidge *v.* Melvin, 42 N. H. 510. A power of revocation in the settlor does not necessarily render the trust fraudulent, and creditors of the settlor cannot compel its exercise for their benefit. Jones *v.* Clifton 101 U. S. 225; Brandies *v.* Cochrane, 112 U. S. 344, 353; Hill *v.* Cornwall's Assignee, 95 Ky. 512.

Where one voluntarily deeded all her property in trust for her own use for life with power of appointment by will and on failure to appoint to convey to her heirs and representatives, it has been held that the trust was not in fraud of subsequent creditors, there being in fact no fraudulent intent, and that the settlor's creditors could not reach the corpus of the property, although they could reach the income. Crawford *v.* Langmaid, 171 Mass. 309. The courts will usually find fraud in a transaction, the effect of which would be to put the settlor's property out of reach of his creditors while reserving to himself the beneficial use.

Even in a case like Crawford *v.* Langmaid, where there was no fraudulent intent, a provision by the settlor restraining his power to alienate or anticipate income is void as to his creditors. Brown *v.* Macgill, 87 Md. 161; Jackson *v.* Von Zedlitz,

(a) There have been many cases of valid trusts which in practical effect were intended to be hardly more than dispositions of the prop-

§ 98. But if the trust is *perfectly created*, so that the donor or settlor has nothing more to do, and the person seeking to enforce

136 Mass. 342; Pacific Bank *v.* Windram, 133 Mass. 175; Schenck *v.* Barnes, 156 N. Y. 316; Newton *v.* Jay, 95 N. Y. S. 413, 107 App. Div. 457; Egbert *v.* De Solms, 218 Pa. St. 207. See *infra*, § 386 *a*, note. A provision by the settlor that his right to income shall cease upon his becoming bankrupt has been held fraudulent *per se* as to creditors, although the same provision made with reference to the beneficial interest of another is valid. Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *In re* Johnson, [1904] 1 K. B. 134; Higginbottam *v.* Holme, 19 Ves. 88; Murphy *v.* Abraham, 15 Ir. Ch. 371; *infra*, § 555, note.

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erty after the settlor's death. Thus cases are frequent where the owner of property has, without consideration, conveyed it to another to hold as trustee for the benefit and enjoyment of the settlor during his life, and on his death upon further trust for other beneficiaries or to pay over to designated persons. Nichols *v.* Emery, 109 Cal. 323; Lewis *v.* Curnutt, 130 Iowa, 423; Brown *v.* Mercantile Trust Co., 87 Md. 377; Bromley *v.* Mitchell, 155 Mass. 509; Kelley *v.* Snow, 185 Mass. 288; N. Y. Life Ins. & Tr. Co. *v.* Livingston, 133 N. Y. 125; Rynd *v.* Baker, 193 Pa. St. 486; Wilson *v.* Anderson, 186 Pa. St. 531; Kraft *v.* Neuffer, 202 Pa. St. 558; Fry *v.* Mercantile Trust Co., 207 Pa. St. 640; Brace *v.* Van Eps, 12 S. D. 191; 13 S. D. 452. See also Durand *v.* Higgins, 67 Kan. 110.

The essential difference between such a trust instrument and a will is that the former acts at once to vest the interests of the beneficiaries, although their enjoyment is postponed until after the death of the settlor, but a will does not take effect until the death of the testator and until that time vests no interests in the beneficiaries. The distinction between a valid trust of this nature and an invalid testamentary disposition is well stated in Nichols *v.* Emery, 109 Cal. 323, 329. It is there said: "The essential characteristic of an instrument testamentary in its nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and *per contra* no rights have accrued to and no estate has vested in any other person. The death of the maker establishes for the first time the character of the instrument. . . . Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. . . . But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the *cestui* may be made to commence in the future and to depend for its commencement upon the termination of an

it has need of no further conveyances from the settlor, and nothing is required of the court but to give effect to the trust as an existing life or lives or of an intermediate estate."

A reservation by the settlor of large powers of control over the trust property and even of a power to change the beneficiaries, thus rendering the trust nearly as ambulatory as a will, does not necessarily render it invalid. Seaman *v.* Harmon, 192 Mass. 5; Kelley *v.* Snow, 185 Mass. 288; Stone *v.* Hackett, 12 Gray, 227; Kelly *v.* Parker, 181 Ill. 49; Brown *v.* Spohr, 84 N. Y. S. 995, 87 App. Div. 522; Schreyer *v.* Schreyer, 101 App. Div. (N. Y.) 456, affirmed, 182 N. Y. 555. But provisions which enable the settlor to revoke the trust or to change the beneficiaries at will are looked upon with considerable suspicion by the courts, and, if convinced that the only object of the settlor was to make a revocable disposition to take effect after his death, the courts will not sustain the trust. McEvoy *v.* Boston Five Cents Sav. Bank, 201 Mass. 50; Brown *v.* Crafts, 98 Me. 40.

In Kelley *v.* Snow, 185 Mass. 288, the trust was sustained where a married woman made a deed of trust of all her personal property described in a schedule attached, she to retain possession during her life and to collect the income for her own benefit, and on her death the trustee to take possession and divide among certain named beneficiaries. It was provided in the deed that the settlor should have the power to change any of the dispositions after her death by a written notice to the trustee. But in McEvoy *v.* Boston Five Cents Sav. Bank, 201 Mass. 50, 87 N. E. 465, the same court refused to sustain an attempted testamentary disposition by way of trust where the grantor retained all the rights of absolute beneficial owner and the absolute right to revoke the trust, the assignment in trust providing that the trustee "shall pay to me such moneys as I may demand of him at any time during my life, until I have used the amount conveyed to him by this deed," and the revocable testamentary disposition applying only to so much of the property as should be left at the assignor's death.

In Kelley *v.* Parker, 181 Ill. 49, it was held that a valid trust was created when the owner of land conveyed it by voluntary deed to two persons to hold as trustees and to allow the grantor to use, occupy, manage, control, improve and lease, and to have all the rents and profits in the same manner as if he were the owner, and after his death to distribute among certain named persons. Power was reserved to the grantor to let, demise, mortgage, sell and convey, and to revoke the trust by writing under seal; and it was provided that the trust deed should not be placed on record until after the grantor's death and until then should be held by an agent of the trustees. In Rynd *v.* Baker, 193 Pa. St. 486, a valid irrevocable trust was created by a voluntary deed of conveyance by a settlor of all his property in trust to manage and invest, to pay him and his family

executed trust, it will be carried into effect at the suit of a party interested, although it was without consideration, and the pos-

out of the income sums sufficient for their liberal and comfortable support, to accumulate surplus income, and on the settlor's death to convey the whole estate as he should direct by will or in default of appointment to his wife and children. See also Wilson *v.* Anderson, 186 Pa. St. 531; Kraft *v.* Neuffer, 202 Pa. St. 558; Fry *v.* Mercantile Trust Co., 207 Pa. St. 640. In Brown *v.* Spohr, 87 App. Div. 522, 84 N. Y. S. 995, a partner in a mercantile firm had a credit of $20,000 in his favor on the firm books transferred to two trustees to hold in trust. They were to demand payment at his death or sooner at their discretion. Interest on the loan was to be paid to settlor's niece for life and after her death for certain other purposes. The settlor was to have full power to revoke the trust or change its terms, and did later modify it, making the income payable to himself for life. This was held to be a valid trust. See also N. Y. Life Ins. & Trust Co., *v.* Livingston, 133 N. Y. 125. In Brace *v.* Van Eps, 12 S. D. 191 (reaffirmed in 13 S. D. 452), a valid trust was created by a deed of conveyance to trustees to hold, manage, control, transfer, sell, lease or otherwise dispose of as may be for the best interests of the grantor's family, and, after the grantor's death, to distribute among those entitled to share in his estate under the law for distribution of estates of intestates. See also Lewis *v.* Curnutt, 130 Iowa, 423. For a decision holding void a deed of transfer "having the semblance of a gift but the substance of a will," see Brown *v.* Crafts, 98 Me. 40.

Trusts of the same general nature have been held to be valid and binding on the settlor, not only during his life but after his death, when he has made himself the trustee. Thus in Robb *v.* Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359, a settlor executed a voluntary declaration of trust, setting forth that he had set aside certain enumerated securities to the value of about $129,000, to hold the same, upon trust for certain uses, viz., to pay to Washington & Jefferson College during his life $1800 annually out of the net income for the support of a certain professorship; to apply the balance of the income to his own use. He appointed the college to be trustee from and after his decease, to pay (to named persons) certain sums aggregating $32,000, and certain annuities, the balance of the net income, and after the death of the annuitants all the net income to be devoted to the professorship. The settlor reserved to himself the right to modify provisions as to legacies and annuities provided he did not increase their aggregate. It was held that both the trust before his death and the trust after his death were valid. "Doubtless the second trust created by the declaration was not to take effect in possession or enjoyment till the death of the founder. But this was by reason of the terms of the instrument itself, not because the instrument was testamentary.

session of the property was not changed.[1] And this will be true although the person who is intended to be benefited has no

[1] Stone *v.* Hackett, 12 Gray, 227; Ellison *v.* Ellison, 6 Ves. 662; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; Sloan *v.* Cadogan, Sugd. Ven. & Pur. App. 26; Edwards *v.* Jones, 1 M. & Cr. 226; Wheatley *v.* Purr, 1 Keen, 551; Garrard *v.* Lauderdale, 3 Sim. 1; Collinson *v.* Patrick, 2 Keen, 123; Dillon *v.* Coppin, 4 M. & Cr. 647; Meek *v.* Kettlewell, 1 Hare, 464; Fletcher *v.* Fletcher, 4 Hare, 74; Price *v.* Price, 4 Beav. 598; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285; Donaldson *v.* Donaldson, 1 Kay, 711; Scales *v.* Maude, 6 De G., M. & G. 43; Airey *v.* Hall, 3 Sm. & Gif. 315; Wright *v.* Miller, 4 Seld. 9; Andrews *v.* Hobson, 23 Ala. 219; Lechmere *v.* Carlisle, 3 P. Wms. 222; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Minturn *v.* Seymour, 4 id. 498; Dennison *v.* Goehring, 7 Barr, 175; Tolar *v.* Tolar, 1 Dev. Eq. 456; Dawson *v.* Dawson, id. 93, 396; Hardin *v.* Baird, 6 Litt. 340; Hayes *v.* Kershaw, 1 Sand. Ch. 261; Fogg *v.* Middleton, Riley, Ch. 193; Greenfield's Estate, 2 Harr. 489; Kirkpatrick *v.* McDonald, 1 Jones, 387; Graham *v.* Lambert, 5 Humph. 595; Henson *v.* Kinard, 3 Strob. Eq. 371; Dupre *v.* Thompson, 4 Barb. 280; Cox *v.* Sprigg, 6 Md. 274; Lane *v.* Ewing, 31 Mo. 75; Ownes *v.* Ownes, 23 N. J. Eq. 60; Baker *v.* Evans, 1 Wins. Eq. (N. C.), 109; Massey *v.* Huntington, 118 Ill. 80; Richardson *v.* Richardson, L. R. 3 Eq. 686; Toker *v.* Toker, 3 De G., J. & S. 487; Howard *v.* Savings Bank, 40 Vt. 597; Tanner *v.* Skinner, 11 Bush (Ky.), 120. Except against creditors and *bona fide* purchasers without notice. Padfield *v.* Padfield, 68 Ill. 25; Borum *v.* King, Ala. Sel. Cas. 534, is *contra*. [See 1 Ames' Cases on Trusts (2d ed.), 125 note.]

In Stone *v.* Hackett, 12 Gray, 227, the settlor had purchased stocks in various corporations in the name of H. P. K., and took from H. P. K. a declaration that she held the stocks upon certain trusts therein particularly specified. Afterwards the settlor caused H. P. K. to indorse and sign upon the backs of the certificates a transfer to the plaintiff and a power of attorney to the plaintiff to complete the transfer, and took from her a declaration of trust, stating the purposes for which she held the stock. The settlor died, and a question arose as to the title to the stock. Chief-Justice Bigelow said: "The key to the solution of the question raised in

Under the declaration the rights of the beneficiaries accrued at the time of its execution and delivery, and except as the instrument itself contained a power of revocation either in whole or in part, those rights could not be affected or modified by the subsequent acts of the founder."

Frequent cases of this kind have been trusts of savings banks deposits, where a depositor has had his account placed in his name as trustee for another, or where he has deposited in the name of another retaining control of the bank book. Recent cases concerning the creation of a trust in such cases have been dealt with in a separate note. *Supra*, § 82.

knowledge of the act at the time it is done, provided he accepts and ratifies it when he is notified.[1] But if there is any fraud,

this case is to be found in the equitable principle now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions enforced and carried into effect against all persons except creditors and *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of the title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery. The leading case in which the principle is declared and acted upon is Ellison *v.* Ellison, 6 Ves. 656, in which Lord Eldon decreed the enforcement of a trust which in its creation was wholly voluntary and without consideration. This has been followed by many other cases in which the same principle was recognized. Pulvertoft *v.* Pulvertoft, 18 Ves. 84; *Ex parte* Pye, id. 140; Sloan *v.* Cadogan, Sugd. Ven. & Pur. (11th ed.) 1119; Fortescue *v.* Barnett, 3 My. & K. 36; Wheatley *v.* Purr, 1 Keen, 551; Blakely *v.* Brady, 2 Dru. & Wal. 311; Browne *v.* Cavendish, 1 Jon. & La. 637; Kekewich *v.* Manning, 1 De G., M. & G. 176. The last named case contains a full discussion of all the authorities, and a clear and accurate statement of the law upon the subject.

"The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity of trustee was full and complete, and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title, as between the parties the delivery of the certificates of stock, with the assignments of some of them and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares. Nor is it at all material to the validity of the plaintiff's title that transfers of the shares had not been recorded in the books of the different corporations and new certificates of stock taken

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[1] Neilson *v.* Blight, 1 Johns. Cas. 205; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; Weston *v.* Barker, 12 Johns. 276; Cumberland *v.* Codrington, 3 Johns. Ch. 261. And see Shepherd *v.* McEvers, 4 Johns. Ch. 136; Hosford *v.* Merwin, 5 Barb. 51; Wetzel *v.* Chaplin, 3 Bradf. 396; Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 231. [Libby *v.* Frost, 98 Me. 288; City of Marquette *v.* Wilkinson, 119 Mich. 413; Martin *v.* Funk, 75 N. Y. 134.]

accident, or mistake in the transaction, courts will not carry a voluntary trust into execution.[1]

§ 99. The trust must be for a lawful purpose and perfectly created. If a will creates several trusts, some of which are legal and others not, the lawful ones will be upheld if they can be separated from the others.[2] (*a*) Whether the trust is *perfectly*

out by her. That was not necessary to the conveyance of the legal title as between the donor and the plaintiff. This is well settled by the authorities in this State. Quinn *v.* Marblehead Social Ins. Co., 10 Mass. 476; Ellis *v.* Essex Merrimack Bridge, 2 Pick. 248; Sargent *v.* Franklin Ins. Co., 8 Pick. 96; Eames *v.* Wheeler, 19 Pick. 444. Such, too, is the plain import of the statute. . . . Nothing therefore was left *in fieri*. The transaction was a completely executed transfer of property, and fully created a trust which, according to the principles already stated, a court of equity is bound to recognize and enforce." Penfield *v.* Public Adm'r, 2 E. D. Smith, 505; Millspaugh *v.* Putnam, 16 Abb. 380; Hunter *v.* Hunter, 19 Barb. 631; Grangiar *v.* Arden, 10 Johns. 293; Benlow *v.* Townsend, 1 My. & K. 506; Mendon *v.* Merrill, 2 Edw. Ch. 333; Howard *v.* Windham County Savings Bank, 40 Vt. 597; Sherwood *v.* Andrews, 2 Allen, 79; Warriner *v.* Rogers, L. R. 16 Eq. 341; Blasdel *v.* Locke, 62 N. H. 238.

[1] Lister *v.* Hodgson, L. R. 4 Eq. 30.

[2] Kennedy *v.* Hoy, 105 N. Y. 134. [Nellis *v.* Rickard, 133 Cal. 617; Sacramento Bank *v.* Montgomery, 146 Cal. 745; Estate of Pichoir, 139 Cal. 682; McCurdy *v.* Otto, 140 Cal. 48; White *v.* Allen, 76 Conn. 185; Landram *v.* Jordan, 25 App. D. C. 291, 302; Keyes *v.* Northern Tr. Co., 227 Ill. 354; Matter of Mount, 185 N. Y. 162; Smith *v.* Chesebrough, 176 N. Y. 317; Kalish *v.* Kalish, 166 N. Y. 368; Hascall *v.* King, 162 N. Y. 134; Culross *v.* Gibbons, 130 N. Y. 447; Endress *v.* Willey, 106 N. Y. S. 726; Matter of Hoyt, 101 N. Y. S. 557, 116 App. Div. 217; *In re* Wilcox, 109 N. Y. S. 564; Denis's Estate, 201 Pa. St. 616.]

(*a*) But if the lawful purposes cannot be separated from the unlawful purposes the whole trust must fail. Estate of Fair, 136 Cal. 79 (reaffirming 132 Cal. 532); Carpenter *v.* Cook, 132 Cal. 621; Estate of Dixon, 143 Cal. 511; Hofsas *v.* Cummings, 141 Cal. 525; Matter of Will of Butterfield, 133 N. Y. 473; Dresser *v.* Travis, 79 N. Y. S. 924; Central Trust Co. *v.* Egleston, 185 N. Y. 23; Reid *v.* Voorhees, 216 Ill. 236, 247. The decisions cited above have considered the valid trusts inseparable from the invalid ones if the separation would defeat the general scheme of the testator or if the valid trust was intended to be merely incidental to the invalid one, as for example, a valid trust for remainder-men after an invalid trust for life tenants, the creation

created or not, is a question of fact in each case; and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settlor had in view in making the disposition.[1] A vast number of cases have been decided in-

[1] See Brabrook *v.* Savings Bank, 104 Mass. 228, where deposits in savings banks are fully discussed. Jones *v.* Lock, L. R. 1 Ch. 25. In this case a father put a check for £900 into the hands of his child, nine months old, with the strongest expression of an intent to give the check to the child. He afterwards took the check and locked it up, saying he should keep it for the child, and died the same day. A bill was brought in behalf of the child against his father's representatives to enforce his interest in the check as a trust. Lord Cranworth said: "No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of real estate or by delivery of chattels; and there is no doubt also that by some decisions, unfortunate I must think them, a parol declaration of a trust of personalty may be perfectly valid even when voluntary. If I give any chattel, that of course passes by delivery, and if I say expressly, or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me. *They all turn upon the question whether what has been said was a declaration of trust or an imperfect gift.* In the latter the parties would receive no aid from a court of equity, if they claimed as volunteers; but if there has been a declaration of trust, then it will be enforced whether there has been a consideration or not. *Therefore the question in each case is one of fact,* has there been a gift or not, or has there been a declaration of trust or not? This case turns on the very short question whether the father intended to make a declaration that he held the property in trust for the child, and I cannot come to any other conclusion than that he did not." His Lordship then comments upon the evidence, and says "that it was all very natural, but that the father would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it; and that the child, by his next friend, could have brought an action of trover for the

of the latter being the primary purpose of the testator.

In Kalish *v.* Kalish, 166 N. Y. 368, it is said that the rule is firmly established in New York "that when the several parts of a will are so intermingled or interdependent that the bad cannot be separated from the good, the will must fail altogether; but when it is possible to cut out the invalid provisions, so as to leave intact the parts that are valid, and to preserve the general plan of the testator, such a construction will be adopted as will prevent intestacy, either partial or total as the case may be."

volving the last three propositions. There is much seeming conflict in the decisions, and it would be an endless, perhaps useless, task to attempt to reconcile them. The proposition laid down by Lord Cranworth, that it is a question of fact in each case whether a perfect trust is created or not, goes far to reconcile the differences. Some judges give greater prominence to one element of fact in the case than other judges, and thus different judges might decide the same question upon the facts in a different manner; but so long as it is a question of fact in each case, the rule of law is the same, however the fact may be found. When a deed fully declaring the trust is executed and delivered, and nothing further remains to be done by the grantor, the trust is created.[1] Failing to name the beneficiary will not be fatal, if the title is properly conveyed and the trustee *admits* that he holds for the plaintiff.[2] In New York, however, it is held that the absence of a defined beneficiary capable of enforcing the trust is in general fatal, and that giving power to the trustee to select the beneficiary is not sufficient, unless the persons among whom the choice is to be made are so defined and limited that a court of equity could in default of selection by the trustee enforce the trust by a distribution among all the beneficiaries.[3] (*a*) In this case the trust was to have prayers offered in a

check." See Scales *v.* Maude, 6 De G., M. & G. 51; Hackney *v.* Vrooman, 62 Barb. 650; Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228; Richards *v.* Delbridge, L. R. 18 Eq. 11; Martin *v.* Funk, 75 N. Y. 134; Gerrish *v.* New Bedford Inst. for Savings, 128 Mass. 159; Taylor *v.* Henry, 48 Md. 550; Stone *v.* Bishop, 4 Cliff. 593; Ray *v.* Simmons, 11 R. I. 266; O'Brien, Pet'r, id. R. I. 419; Blaisdell *v.* Locke, 52 N. H. 238. The decisions are not uniform as to the effect of a deposit in Savings Bank and entry in the books for the benefit of, or in trust for a child or other beneficiary; in some cases it is held sufficient declaration of a trust, and in others something further is required, as notice, or delivery of the book. [See § 82, note *a*, p. 84 *et seq.*]

[1] Massey *v.* Huntington, 118 Ill. 80.

[2] Sleeper *v.* Iselin, 62 Iowa, 585; Boardman *v.* Willard, 73 Iowa, 20.

[3] Holland *v.* Alcock, 108 N. Y. 312. [Tilden *v.* Green, 130 N. Y. 29.]

(*a*) But this rule so far as it applies to trusts for charitable purposes has been changed by statute. See *infra*, § 729, note.

Roman church for the repose of the souls of the grantor, his family, and all others in purgatory. A deed saying, "The following notes I leave in trust with E. C. to be divided among A., B., and C. at my death," was held to create a perfect present trust.[1] A conveyance may be made upon trusts to be subsequently declared, and when the subsequent declaration occurs, the trust is treated in the same way as if declared at the time of the deed.[2] The consent or even knowledge of the *cestui* is not a necessary element in the creation of a valid trust. A transfer of stock, for instance, in proper form vests the title in the transferee subject to his repudiation when informed of the transaction.[3]

§ 100. If the donor or settlor propose to make a stranger the trustee of his property, and the property is a legal estate capable of legal transfer and delivery, the trust is not perfectly created, unless the legal interest is actually transferred to or vested in the trustee. It is not enough that the settlor executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the settlor to divest himself of the legal title must be consummated and executed, or the court will not enforce the trust. (*a*) As, for instance, if a settlor execute a deed in trust of scrip, stock, or shares in corporations, which scrip, stock, or shares can be transferred only by assignment upon the backs of the certificates, and upon the company's books, the deed, if voluntary, will not create a trust which the court will execute, unless the stocks are actually transferred in fact.[4] And so of mortgages, mortgage debts, and

[1] Egerton *v.* Carr, 94 N. C. 648.

[2] Ireland *v.* Geraghty, 11 Biss. (U. S.) 465.

[3] Standing *v.* Bowring, 31 Ch. D. 282.

[4] Garrard *v.* Lauderdale, 2 R. & M. 451; 3 Sim. 1; Meek *v.* Kettlewell, 1 Hare, 464; Dillon *v.* Coppin, 4 M. & Cr. 647; Coningham *v.* Plunkett,

(*a*) Loring *v.* Hildreth, 170 Mass. 328 (Compare Tarbox *v.* Grant, 56 N. J. Eq. 199); Peck *v.* Scofield, 186 Mass. 108. See Mallott *v.* Wilson, [1903] 2 Ch. 494 (as to effect of disclaimer by grantee); Wells *v.* German Ins. Co., 128 Iowa, 649.

other securities. If anything remains for the donor to do to vest the legal title in the donee, the court cannot execute the trust, if it is voluntary. Lord Eldon stated the principle thus: "I take the distinction to be, that if you want the assistance of the court to constitute a *cestui que trust*, and the instrument is *voluntary*, you shall not have the assistance for the purpose of constituting a *cestui que trust*, as upon a covenant to transfer stock, &c.; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being actually made, the equitable interest will be enforced by this court.[1]

§ 101. But if the subject of the trust is a legal interest that cannot be transferred or assigned at law, as a bond or any other *chose in action*, what then is the rule? On the one hand it has been argued that in equity the universal rule is, that a court will not enforce a voluntary agreement in favor of a volunteer, and as by the supposition the legal interest remains in the settlor (who, therefore, at law retains the full control and benefit of it), a court of equity will not, in the absence of a valuable or good consideration, deprive him of that interest, with which he has not actually parted. And this reasoning has been sustained by numerous cases.[2] On the other hand, as the settlor cannot

2 Y. & Col. Ch. 245; Searle *v.* Law, 15 Sim. 95; Price *v.* Price, 14 Beav. 859; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285; Totham *v.* Vernon, 29 Beav. 604; Dillon *v.* Bone, 3 Gif. 238; Milroy *v.* Lord, 8 Jur. (N. S.) 806; 4 De G., F. & J. 264; Parnell *v.* Hingston, 3 Sm. & Gif. 337; Kiddill *v.* Farnell, ib. 428; Weale *v.* Ollive, 17 Beav. 252; Denning *v.* Ware, 22 Beav. 184; Roberts *v.* Roberts, 11 Jur. (N. S.) 992; Forest *v.* Forest, 34 L. J. Ch. 428; Peckham *v.* Taylor. 31 Beav. 250; Lonsdale's Estate, 29 Penn. St. 407; Cressman's App. 42 id. 147; Jones *v.* Obinchain, 10 Grat. 259; Henderson *v.* Henderson, 21 Mo. 379; Lane *v.* Ewing, 31 Mo. 75; Gilchrist *v.* Stevenson, 9 Barb. 9; Doty *v.* Wilson, 5 Lans. 7. [See Curtis *v.* Crossley, 59 N. J. Eq. 358, where a trust was created by a deed of assignment of shares of stock and delivery of the certificates, but without indorsement by the settlor.]

[1] Ellison *v.* Ellison, 6 Ves. 662; Antrobus *v.* Smith, 12 Ves. 39; Colman *v.* Sarel, 1 Ves. Jr. 50; 3 Bro. Ch. 12; Dening *v.* Ware, 22 Beav. 184; Airey *v.* Hall, 3 Sm. & Gif. 315; Kiddill *v.* Farnell, id. 428; Pulvertoft *v.* Pulvertoft, 18 Ves. 89; Brabrook *v.* Savings Bank, 104 Mass. 228.

[2] Edwards *v.* Jones, 1 My. & Cr. 226; Ward *v.* Audland, 8 Sim. 571; C.

divest himself of the legal interest, to say that he shall not constitute another as trustee without passing the legal interest, would be to debar him from the creation of a trust at all in the hands of another, and that the rule, therefore, should be, that if the settlor make all the assignment of the property in his power, and perfect the transaction as far as the law permits, the court should recognize the act and support the validity of the trust. And this reasoning has also been supported by many decided cases.[1] In a leading case, Lord Justice K. Bruce made a thorough examination of all the authorities, and established this proposition: "It is upon legal and equitable principles, we apprehend, clear that a person *sui juris*, acting freely and fairly, and with sufficient knowledge, ought to have, and *has it in his power to make* in a binding and effectual manner a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary, or howsoever circumstanced.*"[2] Mr. Lewin says, "that it is conceived that this principle will, for the future, prevail,"[3] and it has been followed in the later cases.[4] But if part of the property be capable of delivery and transfer, and part of it incapable of delivery, and that which might have been legally assigned and delivered is not so assigned and delivered, no trust is created.[5]

P. Coop. Cas. (1846), 146; 8 Beav. 201; Meek *v.* Kettlewell, 1 Hare, 464; Scales *v.* Maude, 6 De G., M. & G. 43; Sewell *v.* Moxsy, 2 Sim. (N. S.) 189; Bridge *v.* Bridge, 16 Beav. 315; Beech *v.* Keep, 18 Beav. 285.

[1] Fortescue *v.* Barnett, 3 My. & K. 36; Roberts *v.* Lloyd, 2 Beav. 376; Blakely *v.* Brady, 2 Dru. & Wal. 311; Airey *v.* Hall, 3 Sm. & Gif. 315; Parnell *v.* Hingston, id. 337; Pearson *v.* Amicable Office, 27 Beav. 229; Sloan *v.* Cadogan, Sugd. Vend. & Pur. App.

[2] Kekewich *v.* Manning, 1 De G., M. & G. 187.

[3] Lewin on Trusts, 58.

[4] Wilcocks *v.* Hannyngton, 5 Ir. Ch. 45; Voyle *v.* Hughes, 2 Sm. & Gif. 18; Gilbert *v.* Overton, 33 L. J. Ch. 683; Way's Settlement, 10 Jur. (N. S.) 1166; 34 L. J. Ch. 49; Lambe *v.* Orton, 1 Dr. & Sm. 125; Donaldson *v.* Donaldson, Kay, 711; Appeal of Elliott's Ex'rs, 50 Penn. St. 75. And see Hill on Trustees, 140, 141 (4th Am. ed.); Morgan *v.* Malleson, L. R. 10 Eq. 475.

[5] Woodford *v.* Charnley, 28 Beav. 96. In Richardson *v.* Richardson, L. R. 3 Eq. 686, there was a voluntary assignment of all the personal prop-

§ 102. It is well established that if the subject of the trust is an equitable interest, the *cestui que trust* may create a valid trust by executing an assignment of his interest to a new trustee, for the equitable interest can be transferred from one to another, and as the relation of trustee and *cestui que trust* already exists, the original settlor need not be called upon to do any act.[1] Lord Justice K. Bruce said: "Suppose stock or money to be legally vested in A. as a trustee for B. for life, and subject to B.'s life-interest for C. absolutely, surely it must be competent for C., in the lifetime of B., with or without the consent of A., to make an effectual gift of his interest to D. by way of pure bounty, leaving the legal interest and legal title untouched. If so, can C. do this better or more effectually than by executing an assignment to D?"[2] So the *cestui que trust* can assign voluntarily his equitable interest to a stranger in trust for himself.[3] Or by a new declaration of trust the *cestui que trust* can direct the old trustees to hold his interest thereafter upon new trusts.[4] But it has been decided that a voluntary assignment of a *mere expectancy* in an equitable interest did not perfectly create a trust that the court would enforce; that any dealing with what a person only expects to have must in some sense be *in fieri*.[5] And if a settlor intend to make a voluntary settlement in a par-

erty, whatsoever and wheresoever, of the assignor. There were promissory notes not indorsed by the assignor, but it was held to be a complete assignment of them in trust.

[1] Sloan *v.* Cadogan, Sugd. Vend. & Pur. App. This case was questioned in Beatson *v.* Beatson, 12 Sim. 281, but it has since been acted on. Voyle *v.* Hughes, 2 Sm. & Gif. 18; Lambe *v.* Orton, 1 Dr. & Sm. 125; Gilbert *v.* Overton, 2 Hem. & M. 110; Woodford *v.* Charnley, 28 Beav. 99; Way's Settlement, 2 De G., J. & Sm. 365, reversing 4 New R. 453. And see Reed *v.* O'Brien, 7 Beav. 32; Bridge *v.* Bridge, 16 Beav. 315; Gannon *v.* White, 2 Ir. Ch. 207; Donaldson *v.* Donaldson, 1 Kay, 711.

[2] Kekewich *v.* Manning, 1 De G., M. & G. 188.

[3] Sloan *v.* Cadogan, *ut supra*; Cotteen *v.* Missing, 1 Mad. 176; Godsall *v.* Webb, 2 Keen, 99; Collins *v.* Patrick, id. 123; Wilcocks *v.* Hannyngton, 5 Ir. Ch. 38.

[4] Rycroft *v.* Christy, 3 Beav. 238; McFadden *v.* Jenkyns, 1 Hare, 458; 1 Phill. 153.

[5] Meek *v.* Kettlewell, 1 Hare, 464, by Sir J. Wigram, affirmed by Lord Lyndhurst in 1 Phill. 342.

ticular mode, as by conveying the legal title, and he fails to convey the title, the court will not lend its aid to give effect to the settlement in another and different mode as by converting the attempted conveyance into a declaration of trust, for that would be to convert every imperfect voluntary instrument into a perfect trust.[1]

§ 103. In case of a sale of real estate for a valuable consideration, nothing passes by the deed, although it is signed and sealed, until the purchase-money is paid and the deed delivered to the vendee, or until so much is done that the law will construe the deed to be for the use, or under the control, of the vendee; but if a party execute a voluntary settlement and the deed recites that it is sealed and delivered, it will be binding upon the settlor although he never parts with it, but keeps it in his possession until his death.[2] (*a*) Still, if there are circum-

[1] Milroy *v.* Lord, 8 Jur. (N. S.) 809; [4 De G., F. & J. 264]; Lister *v.* Hodgson, L. R. 4 Eq. 30. [See *supra*, § 96, note.]

[2] *In re* Way's Trust, 2 De G., J. & Sm. 365; Fletcher *v.* Fletcher, 4 Hare, 67; Hope *v.* Harman, 11 Jur. 1097; Jones *v.* Obinchain, 10 Grat. 259; Urann *v.* Coates, 109 Mass. 581; Sear *v.* Ashwell, 3 Swanst. 411; Barlow *v.* Heneage, Pr. Ch. 211; Clavering *v.* Clavering, 2 Vern. 474; Cecil *v.* Butcher, 2 J. & W. 573; Garnons *v.* Knight, 5 B. & C. 671; Exton *v.* Scott, 6 Sim. 31; Hall *v.* Palmer, 3 Hare, 532; Souverbye *v.* Arden, 1 Johns. Ch. 240; Bunn *v.* Winthrop, id. 329; Boughton *v.* Boughton, 1 Atk. 625; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Roberts *v.* Roberts, Daniel, 143. And see Cecil *v.* Butcher, 2 J. & W. 565.

(*a*) It has been held in a recent Massachusetts case that a voluntary deed of transfer in trust signed, sealed, acknowledged and recorded, but not delivered, is ineffectual to create a trust either by grant or as a declaration to stand seized. Loring *v.* Hildreth, 170 Mass. 328. In Govin *v.* De Miranda, 76 Hun, 414, an instrument under seal without consideration, purporting to transfer and deliver certain bonds to the donee, the bonds to remain in the custody of the assignor as trustee for the assignee, but never delivered, both the bonds and the instrument remaining in the possession of the assignor until after his death, was held ineffective to create a trust. The case was distinguished from a previous decision of Govin *v.* De Miranda, 140 N. Y. 476, where the same person signed, but did not deliver, a paper stating that certain property in his possession belonged to certain persons. The ground of

stances that show that the settlor never intended the deed, though executed, to operate, the court will consider them; and if the deed was never delivered it will be one circumstance, and it may be a controlling circumstance, to show that the trust was never perfectly created or that it was revocable.[1]

§ 104. A completed trust without reservation of power of revocation can only be revoked by consent of all the *cestuis*.[2]

[1] Uniacke *v.* Giles, 2 Moll. 257; Antrobus *v.* Smith, 12 Ves. 39; Birch *v.* Blagrave, Amb. 262; Dillon *v.* Coppin, 2 M. & Cr. 647; Platmone *v.* Staple, Coop. 250; Naldred *v.* Gilham, 1 P. Wms. 577; Cotton *v.* King, 2 P. Wms. 358, 674; Alexander *v.* Brame, 7 De G., M. & G. 525; Otis *v.* Beckwith, 49 Ill. 121.

[2] Sargent *v.* Baldwin, 60 Vt. 17. [Thurston, petitioner, 154 Mass. 596; distinction was that the paper in the last cited case did not purport to convey anything but was an acknowledgment of an existing trust. These cases, however, can be distinguished from cases where the settlor has executed a formal instrument declaring himself trustee. There seems to be no necessity of delivering such a paper to the beneficiary, since there is no intention of transferring the legal title of the property. As was stated in the pertinent case of Smith's Estate, 144 Pa. St. 428, "The question in such case is not so much whether in the lifetime of the decedent the declaration was actually exhibited to the inspection of others, as whether under all the circumstances of the case, it would appear to have been written and preserved for the inspection of others." See also Johnson *v.* Amberson, 140 Ala. 342; Collins *v.* Steuart, 58 N. J. Eq. 392; Janes *v.* Falk, 50 N. J. Eq. 468; Eshback's Estate, 197 Pa. St. 153; Fowler *v.* Gowing, 152 Fed. 801 (N. Y.).

When the deed is in the form of a conveyance to another as trustee, delivery will be presumed, though not conclusively, when the settlor has had the deed recorded. Walker *v.* Crews, 73 Ala. 412, 417. The trustee's written acceptance on the deed conclusively shows delivery. New South Ass'n *v.* Gann, 101 Ga. 678; Chilvers *v.* Race, 196 Ill. 71. It has been held that the mere failure to deliver the deed to the trustee in case of a family settlement will not prevent it from operating. Tarbox *v.* Grant, 56 N. J. Eq. 199. In a recent English case of a voluntary indenture of trust by way of settlement, where the deed was signed by the settlor but not by the trustee, and the latter never accepted but disclaimed the trust and the conveyance, it was held that the trust was nevertheless fully established, the settlor himself becoming trustee upon the disclaimer. The disclaimer was held to throw the legal title back into the settlor *ab initio*, but not to destroy the effect of the deed in creating the trust. Mallot *v.* Wilson, [1903] 2 Ch. 494. See also Jones *v.* Jones, W. N. [1874] 190.

If a voluntary trust for the benefit, wholly or partly, of some person or persons other than the grantor [1] is once perfectly created, and the relation of trustee and *cestui que trust* is once established, it will be enforced, though the settlor has destroyed the deed,[2] or has attempted to *revoke* it by making a second voluntary settlement of the same property or otherwise,[3] or if the

Keyes *v.* Carleton, 141 Mass. 45; Crue *v.* Caldwell, 52 N. J. L. 215, 220; Dickerson's Appeal, 115 Pa. St. 198, 210; Haxton *v.* McClaren, 132 Ind. 235; Lines *v.* Lines, 142 Pa. St. 149; Stockett *v.* Ryan, 176 Pa. St. 71; Beekman *v.* Hendrickson, 21 A. 567 (N. J.).]

[1] Light *v.* Scott, 88 Ill. 239.

[2] Tolar *v.* Tolar, 1 Dev. Eq. 456; Dawson *v.* Dawson, id. 93, 396; *In re* Way's Trust, 10 Jur. 837; 2 De G., J. & Sm. 365; Ritter's App. 59 Penn. St. 9.

[3] Newton *v.* Askew, 11 Beav. 145; Rycroft *v.* Christy, 3 Beav. 238; Boughton *v.* Boughton, 1 Atk. 625; Brackenbury *v.* Brackenbury, 2 J. & W. 391; Clavering *v.* Clavering, 2 Vern. 473; Roberts *v.* Roberts, Daniel, 143; Cook *v.* Fountain, 3 Swans. 565; Young *v.* Peachy, 2 Atk. 254; Cecil *v.* Butcher, 2 J. & W. 565; Kekewich *v.* Manning, 1 De G., M. & G. 176; *In re* Way's Trust, 2 De G., J. & S. 365; Hildreth *v.* Eliot, 8 Pick. 293; Stone *v.* Hackett, 12 Gray, 227; Falk *v.* Turner, 101 Mass. 494; Souverbye *v.* Arden, 1 Johns. Ch. 240; Bunn *v.* Winthrop, id. 329; Dennison *v.* Goehring, 7 Barr, 175; Viney *v.* Abbott, 109 Mass. 302; Sewall *v.* Roberts, 115 Mass. 272; Cobb *v.* Knight, 74 Maine, 253; Gulick *v.* Gulick, 39 N. J. Eq. 401; Williams *v.* Vreeland, 32 id. 135; McPherson *v.* Rollins, 107 N. Y. 316; Nearpass *v.* Newman, 106 N. Y. 47; Meigs *v.* Meigs, 22 Hun (N. Y.), 453. As where A. had a policy of insurance issued on his life "in trust" for his children, and notified the *cestuis* and paid the premiums for several years, it was held that he could not revoke the interest of his children, and a second policy issued substantially as a continuation of the first, but made payable to A.'s widow, was held for the children. Garner *v.* Ger. L. Ins. Co., 110 N. Y. 266. It must be observed, however, that the absence of a power to revoke a voluntary settlement or trust is viewed by courts of equity as a circumstance of suspicion, and very slight evidence of mistake, misapprehension, or misunderstanding on the part of the settlor will be laid hold of to set aside the deed. The following opinion by the Chancellor (Runyon) in a late case in New Jersey, Garnsey *v.* Mundy, 24 N. J. Eq. 243, reprinted in 13 Am. Law Reg. (N. S.) 345; with a learned note by Mr. Bispham, gives a very clear view of the law applicable to voluntary settlements without a power of revocation made under circumstances which may lead to the conclusion that the settlor did not intend to put the property entirely beyond his control or that he acted unadvisedly or improvidently: —

"On the 4th of July, 1861, the complainant, Sarah M. Garnsey, who was then a single woman (her maiden name being Sarah M. Mundy), and

estate, by some accident, afterwards becomes revested in the settlor.[1] In all these cases the first perfectly created trust will

of the age of about twenty-one years, was seized in her own right, in fee in possession, through inheritance from her father, James Mundy, deceased, of a parcel of unimproved farming land of about seven acres in Middlesex County in this State, and was also the owner of an undivided third of the remainder, in fee, of two other lots there, — one a wood-lot of about two acres, and the other the house-lot, containing about nine and a half acres, which had been set off to her mother, Elizabeth Mundy, in dower. She had no other property, real or personal. By a deed of that date she conveyed in fee to her mother, for the expressed consideration of natural love and affection to the grantor's daughter, Elmina May, and of fifty cents to her paid by her mother, the whole of said property on the following trust: 'That the said Elizabeth Mundy shall and will hold, use, occupy, and rent the same, and receive the rents, issues, and profits thereof to and for the maintenance of said Elmina May Mundy until she shall arrive at the age of twenty-one years, or in case of her death, the said Elizabeth Mundy, her heirs or assigns, shall pay the rents or profits arising as above to the said Sarah M. Mundy, and in further trust to convey the land and premises with the appurtenances herein before mentioned, in fee-simple, to the said Elmina May Mundy, or in equal shares to her and any other children of said Sarah M. Mundy (should there be any other), when the youngest of said children shall have attained the age of twenty-one years; and in the event that no issue of the said Sarah M. Mundy shall survive to inherit the same, that the estate herein named shall be conveyed according to the direction of the executor of the will of the said Sarah M. Mundy heretofore made.'

"In 1864 Sarah M. Mundy was married to Silas Garnsey. The bill is filed by her and her husband against her two children and her mother, the trustee, to set aside the deed. The property at the time of making the conveyance in question was and still is of but little value as farming land. The buildings upon the house-lot, which alone was improved, were old and dilapidated and have gone to decay, and even the fences on the premises are down. The trustee, who is a woman of advanced age, was and is wholly without means, except her dower. The deed is voluntary. It was made at the suggestion and on the advice of the grantor's mother, and of

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[1] Ellison *v.* Ellison, 6 Ves. 656; Smith *v.* Lyne, 2 Y. & Col. 345; Paterson *v.* Murphy, 11 Hare, 88; Gilchrist *v.* Stevenson, 9 Barb. 9; Uzzle *v.* Wood, 1 Jones, Eq. 226; Browne *v.* Cavendish, 1 J. & L. 637. See also Aylsworth *v.* Whitcomb, 13 R. I. 298, where it is said, if deliberate intent to make it irrevocable does not appear, the absence of power of revocation will be *prima facie* evidence of mistake. Estes *v.* Tillinghast, 4 R. I. 276; Russell's App., 75 Penn. St. 269.

be upheld, with all its consequences, and the settlor will be declared to be a trustee.[1] A trust once created and accepted with-

her uncle, Dr. Jacob Martin, her mother's brother. The grantor neither proposed nor suggested it. Indeed, it appears she knew nothing of it until it was presented to her for her signature, and she was urged by her mother and her uncle to execute it, 'for her good.' Their motive, they say, was to save the property for her, to prevent her from improvidently disposing of it. No professional advice whatever was taken. The deed was drawn by a son of Dr. Martin, at the latter's direction; and its execution was witnessed by Dr. Martin, who, being a commissioner of deeds, took the grantor's acknowledgment. The grantor had no advice whatever, except that which her mother and uncle gave her. Not only was she not consulted in regard to the matter in any way. but it was clear that she did not understand the provisions of the deed, nor their effect. She did not suppose that the effect of the conveyance would be to place the property beyond her reach and control. Nay, her mother and uncle both supposed that the trust was revocable, and that the grantor under it retained full power to sell the property, with the trustee's consent. The conveyance not only deprived the grantor of all her property, without reserving a power of revocation to enable her to meet the exigencies of life, but the arrangement which it made was in other respects injudicious, disadvantageous, and improvident. The motives and intentions of the mother and uncle were most praiseworthy. Their design manifestly was simply to put the property in such a position that the grantor could not dispose of it without her mother's consent and concurrence. They in good faith urged her to make the deed. She and they were alike under an erroneous impression as to the effect of it. From the operation of such a conveyance, made under such circumstances, equity will relieve the complainants. The rigidity of the ancient doctrine, that a voluntary settlement, not obtained by fraud, is binding on the settlor, and will not be set aside in equity, although the settlor has not reserved a power of revocation (Villers *v.* Beaumont, 1 Vern. 100; Petre *v.* Espinasse, 2 M. & K. 496; Bill *v.* Cureton, 2 M. & K. 503), has been relaxed by modern decisions. In the case first cited, Villers *v.* Beaumont, decided in 1682, the Lord Chancellor said: 'If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put on himself, but he must lie down under his own folly.' Recent cases, however, have narrowed the doctrine, and have held, not only that the absence of a power of revocation throws on the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that in the absence of such proof, the settlement may be set aside, but that equity

[1] Ellison *v.* Ellison, 6 Ves. 656; Smith *v.* Lyne, 2 Y. & Col. 345; Paterson *v.* Murphy, 11 Hare, 88; Gilchrist *v.* Stevenson, 9 Barb. 9.

out reservation of power can only be revoked by the full consent of all parties in interest;[1] if any of the parties are not in

will set aside the settlement on the application of the settlor, when it appears that he did not intend to make it irrevocable, or when the settlement would be unreasonable or improvident, for the lack of a provision for revocation.(a) In Everitt *v.* Everitt (1870), L. R. 10 Eq. 405, — a case

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[1] Helman *v.* McWilliams, 70 Cal. 449. [Ewing *v.* Warner, 47 Minn. 446; Nelson *v.* Ratliff, 72 Miss. 656; Strong *v.* Weir, 47 S. C. 307, 323; Riggan's Adm'r *v.* Riggan, 93 Va. 78.]

(a) Several decisions in Pennsylvania seem to hold that a voluntary trust settlement which is testamentary in its nature is revocable by the settlor, although no power of revocation has been inserted in the settlement. Frederick's Appeal, 52 Pa. St. 338; Rick's Appeal, 105 Pa. St. 528; Rife's Appeal, 110 Pa. St. 232; Chestnut St. Bank *v.* Fidelity Insurance Co., 186 Pa. St. 333. But later decisions have restricted the apparent scope of these decisions, and it now seems to be law in Pennsylvania that power to revoke such a settlement will not be implied, and, if the settlement itself is a valid trust, it is revocable only in accordance with its express terms. Kraft *v.* Neuffer, 202 Pa. St. 558; Fry *v.* Mercantile Trust Co., 207 Pa. St. 640; Rynd *v.* Baker, 193 Pa. St. 486; Wilson *v.* Anderson, 186 Pa. St. 531; Potter *v.* Fidelity Ins. Tr. etc. Co., 199 Pa. St. 360.

It is a general rule in the United States that a power of revocation is not a necessary incident of a voluntary settlement for the benefit of the settlor for life and will not be implied merely from the absence of an express provision against revocation. Crumlish *v.* S. T. & S. D. Co., 8 Del. Ch. 375; Bunten *v.* Am. Security & Tr. Co., 25 App. D. C. 226; Lawrence *v.* Lawrence, 181 Ill. 248; Richards *v.* Reeves, 149 Ind. 427; Anderson *v.* Kemper, 116 Ky. 339; Krankel's Ex'x *v.* Krankel, 104 Ky. 745; Coleman *v.* Fidelity Tr. Co., 91 S. W. 716 (Ky. 1906); Dayton *v.* Stewart, 99 Md. 643; Carroll *v.* Smith, 99 Md. 653; Rogers *v.* Rogers, 97 Md. 573; Brown *v.* Mercantile Tr. Co., 87 Md. 377; Lovett *v.* Farnham, 169 Mass. 1; Taylor *v.* Buttrick, 165 Mass. 547; Sands *v.* Old Colony Tr. Co., 195 Mass. 575; Thurston, Petitioner, 154 Mass. 596; Keyes *v.* Carleton, 141 Mass. 45: Hackley *v.* Littell, 150 Mich. 106; Crue *v.* Caldwell, 52 N. J. Law, 215; Smith *v.* Boyd, 61 N. J. Eq. 175; Stockett *v.* Ryan, 176 Pa. St. 71; Neisler *v.* Pearsall, 22 R. I. 367; Wallace *v.* Industrial Tr. Co., 73 A. 25 (R. I. 1909); Monday *v.* Vance, 92 Tex. 428; Wade *v.* Button, 72 Vt. 136.

Where, however, it appears from all the circumstances that undue influence was exerted upon the settlor or that the omission of a power of revocation was due to fraud, accident or mistake, or that the settlement would be unreasonable or improvident for lack of a provision for revocation, equity will

being, or are not *sui juris*, it cannot be revoked at all.[1] It is perfectly clear that where the settlor did not misapprehend the

almost precisely similar in its facts to that under consideration, — a voluntary settlement was set aside on the application of the donor. The court said: 'It is very difficult indeed for any voluntary settlement, made by a young lady so soon after she attained twenty-one, to stand, if she afterwards changes her mind and wishes to get rid of the fetters which she has been advised to put upon herself.'

"In Wollaston *v.* Tribe (1869), L. R. 9 Eq. 44, a voluntary gift which was not subject to a power of revocation, but was meant to be irrevocable, was held to be invalid, and was set aside on the donor's application. In pronouncing the decree, the court said: 'Of course a voluntary gift is perfectly good if the person who makes it knows what it is, and intended to carry it into execution.' In Coutts *v.* Acworth, L. R. 8 Eq. 558, it was held that 'Where the circumstances are such that the donor in a voluntary settlement of gift ought to be advised to retain a power of revocation, it is the duty of the solicitor to insist on the insertion of such power, and the want of it will in general be fatal to the deed.' In Prideaux *v.* Lonsdale (1863), 1 De G., J. & S. 433, a voluntary settlement, which the settlor was advised to execute by persons under whose influence, as regarded

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[1] Shaw *v.* Delaware, &c. R. R. Co., 3 Stockt. 229.

set the settlement aside. Smith *v.* Boyd, 61 N. J. Eq. 175, 47 A. 816; Lawrence *v.* Lawrence, 181 Ill. 248, 54 N. E. 918; Richards *v.* Reeves, 149 Ind. 427, 49 N. E. 348; Brown *v.* Mercantile Trust Co., 87 Md. 377, 40 A. 256. The decision of Brown *v.* Mercantile Trust Co. *ubi supra*, adopts the rule as stated in Toker *v.* Toker. 3 De G., J. & S. 491: "That the absence of a power of revocation may be evidence that the party did not understand the transaction and so of undue influence But whether it would be so or not, would depend upon all the circumstances of the case. . . . What the court has to be satisfied of in these cases, I apprehend, is that the settlement whether containing or not containing a power of revocation, is the free determined act of the party making it; and the absence of advice as to the insertion of a power of revocation, is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances of the case."

If express power of revocation has been reserved by the settlor it can be effectively exercised only in the manner prescribed by the trust instrument. Thus if the trust deed provides that the trust may be revoked by an indenture signed by both the trustee and the settlor, who is the life beneficiary, it cannot be terminated by a simple written notice sent by the settlor to the trustee. Lippincott *v.* Williams, 63 N. J. Eq. 130, 51 A. 467.

contents of the deed, and there was no fraud or undue influence, and no power of revocation was reserved, the settlor is bound,

money matters, she was, and which subjected her property to trusts and contained provisions which the court thought it was impossible to suppose she understood, and against which she ought to have been advised and cautioned, was set aside. In Hall *v.* Hall, L. R. 14 Eq. 365, it was held that a voluntary settlement should contain a power of revocation; and if it does not, the parties who rely on it must prove that the settlor was properly advised when he executed it, and that he thoroughly understood the effect of omitting the power, and that he intended to be excluded from the settlement, and further, if that is not established, and the court sees from the surrounding circumstances that the settlor believed the instrument to be revocable, it will, even after the lapse of twenty years, and the death of the settlor, interfere and give relief against it. The decree in that case was reversed. (1873, L. R. 8 Ch. App. 430.) In his opinion, Selborne, L. C., said: 'The absence of a power of revocation in a voluntary deed, not impeached on the ground of any undue influence, is of course material where it appears that the settlor did not intend to make an irrevocable settlement, or where the settlement itself is of such a nature or was made under such circumstances as to be unreasonable and improvident, unless guarded by a power of revocation.' Forshaw *v.* Welsby, 30 Beav. 243, was a case where a voluntary settlement was made by one, *in extremis*, on his family. It contained no power of revocation in case of the settlor's recovery. On his recovery it was set aside on his application, on the ground that it was not executed with the intention that it should be operative in case of his recovery from his illness. See also Huguenin *v.* Baseley, Lead. Cas. in Eq. 406; Cook *v.* Lamotte, 15 Beav. 241; Sharp *v.* Leach, 31 Beav. 491; Phillipson *v.* Kerry, 32 Beav. 628. It is not necessary, however, to rest a decision of this case adverse to the deed on so narrow a foundation as the mere absence of a power of revocation. The circumstances under which a voluntary deed was executed may be shown, with a view of impeaching its validity, and if it appears that it was fraudulent or improperly obtained, equity will decree that it be given up and cancelled. In the present case there is no room for doubt that the grantor was induced, by those in whom she very justly placed confidence, and by whose better judgment she was willing to be guided, to execute a voluntary deed whose effect she and they not only did not understand, but, on the other hand, misapprehended; and which, so far from being according to their intentions, was in two very important respects, at least, admittedly precisely the reverse. It was irrevocable; but they all supposed it was revocable, and intended that it should be so. It deprived the grantor of the power of sale; but they all supposed that she would have that power, and intended that she should have it, clogged only by the necessity of obtaining her mother's consent and concurrence in any bargain or conveyance she might make. The deed contains no power of sale whatever. The testimony of all the parties to the transac-

though some contingency was forgotten and unprovided for.[1] A policy of insurance on the life of A., payable to his mother, who furnished a portion of the money, is a trust which cannot be revoked by a surrender of the policy, without the mother's consent, and the issue of a new one in favor of A.'s wife.[2] The effect of the delivery of the deed of trust cannot be impaired by any mental reservation of the grantor, or oral condition repugnant to the terms of the deed.[3] But where the trust deed was never delivered to the trustee except for safe keeping, and on the understanding that it should be returned for cancellation on demand, and with the consent of the *cestui* it was so returned and cancelled, no trust arose.[4] If the voluntary settlement be subject to a life estate in the settlor, and also subject to such debts as he contracts during his life, he can defeat the trust by contracting debts to the full amount of the estate, even if the debts are contracted by giving voluntary bonds for the purpose of defeating the settlement.[5] If, however, the settlor has not reserved the right to revoke the settlement, or to charge it with his debts, he can do nothing to impair the rights of those in remainder.[6]

tion — the grantor, her mother and uncle — has been taken in the cause. It satisfies me that the deed was not 'the pure, voluntary, well-understood act of the grantor's mind' (Lord Eldon in Huguenin *v.* Baseley), but was unadvised and improvident, and contrary to the intention of all of them. The fact that the infant children of the grantor are beneficiaries under the deed will not prevent the court from setting it aside. Huguenin *v.* Baseley, Everitt *v.* Everitt, *ubi sup.* There will be a decree that the deed be delivered up to be cancelled." See also Rhodes *v.* Bates, L. R. 1 Ch. 252; Leach *v.* Farr, 13 Am. Law Reg. 350 (N. S.); Villers *v.* Beaumont, 1 Vern. 99; Bridgman *v.* Greene, 2 Ves. 627; Petre *v.* Espinasse, 2 M. & K. 496; Bill *v.* Cureton, id. 511; Hastings *v.* Ord. 11 Sim. 205; Coutts *v.* Acworth, L. R. 8 Eq. 538; Phillips *v.* Mullings, L. R. 7 Ch. 244; Hall *v.* Hall, L. R. 8 Ch. 430; Toker *v.* Toker, 3 De G., J. & S. 487; Evans *v.* Russell, 31 Leg. Int. 125.

[1] Keyes *v.* Carleton, 141 Mass. 45, 50.

[2] Pingrey *v.* Nat'l Ins. Co., 144 Mass. 374, 382.

[3] Wallace *v.* Berdell, 97 N. Y. 13.

[4] Burroughs *v.* De Couts, 70 Cal. 361

[5] Markwell *v.* Markwell, 34 Beav. 12.

[6] Aubuchon *v.* Bender, 44 Mo. 560; Dean *v.* Adler, 30 Md. 147; Hall *v.* Hall, L. R. 14 Eq. 365; Beal *v.* Warren, 2 Gray, 447.

Although the power of revocation is reserved, the trust is as good and effectual as if irrevocable, until the power is exercised.[1] (*a*) Where the trust does not break the natural course of descent of the property, and is not needed for the protection of the life *cestui*, who is the grantor, equity will, on application of the *cestui*, terminate the trust and decree a conveyance.[2] In this case the trust was made by a woman before marriage for herself for life, remainder to her appointees by will, or her heirs-at-law, if she died intestate. After marriage she applied for a conveyance and discharge of the trust, and as the natural descent was not broken, and the laws of the State sufficiently protected married women, the request was granted.

§ 105. Nor is notice to the *cestui que trust* or to the trustee, and acceptance by him, essential to the validity of a voluntary trust as against the settlor, if it is otherwise perfectly created.[3] But the absence of notice may become a fact of more or less importance in determining whether the trust is perfectly created or not.[4]

[1] Van Cott *v.* Prentice, 104 N. Y. 45. [Von Hesse *v.* MacKaye, 136 N. Y. 114; Hiserodt *v.* Hamlett, 74 Miss. 37, 47; Charles *v.* Burke, 60 L. T. 380, 43 Ch. Div. 223, note; Lines *v.* Lines, 142 Pa. St. 149; Witherington *v.* Herring, 140 N. C. 495; Seaman *v.* Harmon, 192 Mass. 5; Kelley *v.* Snow, 185 Mass. 288; Kelly *v.* Parker, 181 Ill. 49; Schreyer *v.* Schreyer, 101 N. Y. App. Div. 456 (aff'd 182 N. Y. 555); Brown *v.* Spohr, 87 N. Y. App. Div. 522, 84 N. Y. S. 995; Nichols *v.* Emery, 109 Cal. 323.]

[2] Nightingale *v.* Nightingale, 13 R. I. 116.

[3] Tate *v.* Leithhead, Kay, 658; Donaldson *v.* Donaldson, id. 711; Roberts *v.* Lloyd, 2 Beav. 376; Burn *v.* Carvalho, 4 M. & Cr. 690; Sloper *v.* Cottrell, 6 El. & Bl. 504; Gilbert *v.* Overton, 2 Hem. & Mill. 110; Kekewich *v.* Manning, 1 De G., M. & G. 176; Tierney *v.* Wood, 19 Beav. 330; Lamb *v.* Orton, 1 Dr. & Sm. 125; Meux *v.* Bell, 1 Hare, 73; Otis *v.* Beckwith, 49 Ill. 121. [See City of Marquette *v.* Wilkinson, 119 Mich. 413; Libby *v.* Frost, 98 Me. 288.]

[4] Beatson *v.* Beatson, 12 Sim. 281; Meek *v.* Kettlewell, 1 Hare, 476;

(*a*) Such power to revoke, even when coupled with a power of appointment, is not such an interest in the property as can be transferred to another, sold under execution or devised by will, or passed to an assignee. Jones *v.* Clifton, 101 U. S. 225; Brandies *v.* Cochrane, 112 U. S. 344; Hill *v.* Cornwall, 95 Ky. 512. But see *In re* Morgan's Estate, 223 Pa. St. 228; Ullman *v.* Cameron, 92 App. Div. (N. Y.) 91.

As between purchasers for value, notice or no notice may have important effects; but a voluntary trust, as between the settlor, the trustee, and the *cestui que trust*, can be perfectly created without it.

§ 106. Under the statute of uses, uses could be raised either upon a valuable or pecuniary consideration, or upon what was called a good or meritorious consideration; that is, a consideration arising out of blood, marriage, or family affection, and the moral obligation that every one is under to provide for his family or relations. Thus, a covenant to stand seized to the uses of a stranger, founded upon a valuable consideration, operated under the statute as a deed of bargain and sale to be enrolled, and conveyed the land to the stranger. But a covenant in consideration of blood or marriage, to stand seized to the use of a wife or child or other relation, created a use only in the *cestui que trust*, and the deed need not be enrolled. In all cases the *consideration of this conveyance was the foundation of it.* Therefore, a covenant to stand seized to the use of a stranger in consideration of love or affection for him was inoperative for want of a consideration; and a covenant in consideration of blood or marriage, to stand seized to the use of a relative and a stranger, vested the whole use in the relative, and was inoperative as to the stranger. From this brief statement can be seen the effect and meaning of what was called a good or meritorious consideration under the statute of uses.[1]

§ 107. In analogy to this doctrine, under the statute of uses it has been urged that a voluntary post-nuptial settlement in favor of a wife or child, executory in all its aspects, would be enforced in favor of such wife or child on the ground of a good or meritorious consideration for such settlement.[2] And in Ellis

1 Phill. 342; Bycroft *v.* Christy, 3 Beav. 238; Godsall *v.* Webb, 2 Keen, 99; McFadden *v.* Jenkyns, 1 Phill. 153; Bridge *v.* Bridge, 16 Beav. 315; Cecil *v.* Butcher, 2 J. & W. 573. [*Supra* §§ 82, 96 and notes.]

[1] Sand. Uses, 96-101; 2 Black. Com. 338.

[2] Bonham *v.* Newcomb, 2 Vent. 365; Leech *v.* Leech, 1 Ch. Cas. 249;

v. Nimmo, Sugden, Lord Chancellor of Ireland, after a most exhaustive examination of the authorities, decided that the meritorious consideration of providing for a child was sufficient to lead a court of equity to enforce an executory contract against the settlor.[1] This case met with considerable criticism, and several cases were decided, more or less in opposition to it.[2] In Moore *v.* Crofton, he allowed it to be overruled, declaring, however, at the same time, that he still thought it decided upon sound principles of equity,[3] so that now it may be considered as settled in England, that an executory agreement founded on a meritorious consideration only will not be executed against the settlor himself.[4]

§ 108. As to other parties claiming under the settlor, if he had sold the estate, or become indebted, the equity of a wife or child claiming as *cestui que trust*, on the ground of a meritorious consideration, would not be enforced against a purchaser or creditor.[5] But if the settlor subsequently made a voluntary settlement, or died without disposing of the estate by some act *inter vivos*, there were authorities that the voluntary *cestui que trust* could enforce his equity as against other volunteers under another settlement,[6] or against devisees or legatees,[7] or

Fothergill *v.* Fothergill, Freem. 256; Sear *v.* Ashwell, and Gordon *v.* Gordon, 3 Swanst. 411; Watts *v.* Bullas, 1 P. Wms. 60; Bolton *v.* Bolton, 3 Sev. 414; Goring *v.* Nash, 3 Atk. 186; Darley *v.* Darley, id. 399; Hale *v.* Lamb, 2 Eden, 292; Evelyn *v.* Templar, 2 Bro. Ch. 148; Colman *v.* Sarel, 1 Ves. Jr. 50; 3 Bro. Ch. 12; Antrobus *v.* Smith, 12 Ves. 39; Rodgers *v.* Marshall, 17 Ves. 294: Ellison *v.* Ellison, 6 Ves. 656.

[1] Ellis *v.* Nimmo, Lloyd & Goold, 333.

[2] Holloway *v.* Headington, 8 Sim. 324; Dillon *v.* Coppin, 4 My. & Cr. 646; Jefferys *v.* Jefferys, 1 Cr. & Ph. 138.

[3] Moore *v.* Crofton, 3 Jon. & La. 442.

[4] Antrobus *v.* Smith, 12 Ves. 46; Holloway *v.* Headington, 8 Sim. 325; Walrond *v.* Walrond, 1 Johns. 25. And see Phillips *v.* Frye, 14 Allen, 36; White *v.* White, 52 N. Y. 368. [Price *v.* Price, 14 Beav. 598.]

[5] Bolton *v.* Bolton, 3 Swanst. 414, note; Goring *v.* Nash, 3 Atk. 186; Finch *v.* Winchelsea, 1 P. Wms. 277; Garrard *v.* Lauderdale, 2 R. & M. 154, 453. But see Mackay *v.* Douglass, L. R. 14 Eq. 106; Perry Herrick *v.* Attwood, 2 De G., & J. 39; Beal *v.* Warren, 2 Gray, 447.

[6] Bolton *v.* Bolton, 3 Swanst. 414. [7] Ibid.

against the heir-at-law or next of kin.[1] There was, however, this condition, that the persons against whom the settlement was sought to be enforced could not also plead a meritorious consideration; for if they also were children of the settlor, the considerations would be equal. In such cases the court referred it to a master to report whether they had an adequate provision independent of the estate.[2] But at the present day in England it would appear that even as against volunteers claiming under the settlor, with or without an adequate provision, a voluntary executory agreement, whether under seal or not, cannot be enforced on the mere ground of a meritorious consideration.[3]

[1] Watts *v.* Bullas, 1 P. Wms. 60; Goring *v.* Nash, 3 Atk. 186; Rodgers *v.* Marshall, 17 Ves. 294.

[2] Goring *v.* Nash, 3 Atk. 186; Rodgers *v.* Marshall, 17 Ves. 294.

[3] Price *v.* Price, 14 Beav. 598; Colman *v.* Sarel, 1 Ves. Jr. 50; Jefferys *v.* Jefferys, 1 Cr. & Ph. 138; Antrobus *v.* Smith, 12 Ves. 39; Evelyn *v.* Templar, 2 Bro. Ch. 148; Holloway *v.* Headington, 8 Sm. 334; Joyce *v.* Hutton, 11 Ir. Ch. 123; Moore *v.* Crofton, 3 Jon. & La. 442.

Mr. Lewin (p. 95 of his 3d ed.) has discussed this whole matter with a fulness that leaves little to be said. He says: "It has also been supposed that where the trust is imperfectly created, the court, without proof of valuable consideration, will act upon a meritorious consideration, as the payment of debts or provision for wife or child. The covenant to stand seized to uses, and the jurisdiction of the court in supplying surrenders and aiding the defective execution of powers, have generally been referred to as establishing or at least countenancing this doctrine.

"As regards the covenant to stand seized to uses, it is evident that mere meritorious consideration was not a sufficient ground to attract the jurisdiction of the court; for no use would have arisen in favor of a wife or child unless there had been a covenant. 'There are several ways in the law,' said Lord Justice Holt, 'for declaring uses, whether upon transmutation of the possession or not. If a use be declared upon a transmutation of the possession, as in a fine of feoffment, it is sufficient for the party on the transmutation to declare that the use shall be to such a party of such an estate; but if the use arise without transmutation of the possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery without transmutation of possession, or an agreement founded on a consideration; and therefore if bargain and sale were made of a man's

§ 109. The tendency in the United States is to sustain and carry into effect an executory trust in favor of a wife or child

lands, on the payment of the money, the use could have arisen without deed by parol; *but if the use was in consideration of blood, then it could not arise by parol agreement without a deed, because that agreement was not an obliging agreement: it wanted a consideration, and therefore to make it an obliging agreement, there was necessity of a deed.*' Jones *v.* Morley, 12 Mod. 161.

"Thus, if equity be governed by the strict analogy of uses, the court cannot act upon meritorious consideration where the contract is by parol; and though, where the agreement is under seal, the argument of analogy applies, yet it follows not that equity will now raise a trust because formerly it would have created a use. A bargain and sale for 5*s*. consideration still operates by way of conveyance to transfer the estate; but should the bargain and sale be void, as such for want of an indenture or an indenture duly enrolled, it could not be argued that the agreement at the present day would be specifically executed upon the basis of a trust. It may further be remarked that if the covenant to stand seized to uses were now to regulate the administration of trusts, there would still be no ground for extending the relief to *creditors*, who, however, it is admitted on all hands, are equally entitled to the benefit of meritorious consideration. And the covenant to stand seized to uses extended, we must remember, not only to wife and child, but also to brothers, nephews, and cousins; but no one at the present day would think of admitting the same latitude in the execution of a trust.

"With respect to the jurisdiction of the court in supplying surrenders of copyholds, the principle upon which the relief is founded appears to be this, that as the heir was never meant by the law to take otherwise than in default of the ancestor's will, if the ancestor manifests any intention in favor af a meritorious object, the court will not suffer the mere want of form to carry a benefit to the representative. 'I have looked,' said Lord Alvanley, 'at all the cases I can find upon what principle this court goes in supplying the defect. It is this: whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligation, shows an intention to execute such power, the court will operate upon the conscience of the *heir* to make him perfect this intention. This is not to be confounded with the case of the heirs being disinherited by a will of freeholds not duly executed: there is no will at all. The court cannot see that there is such an instrument; but whenever there is such a power, it has been executed.' Chapman *v.* Gibson, 3 Bro. Ch, 230. And see Ellis *v.* Nimmo, Lloyd & Goold, 341.

"The ground upon which the courts aid the *defective execution of powers* will be found upon examination to be precisely that upon which it supplies the surrender of copyholds. The power to the extent to which it may be exercised is regarded in equity as part of the dominion — as a

founded upon a meritorious consideration, if the instrument is under seal,[1] (a) though the rule is not fully established, and

portion of the actual estate; and the donee of it is *pro tanto* the *bona fide* owner of the property, and the person taking in default of the donee's disposition is a *quasi* heir. Holmes *v.* Coghill, 12 Ves. 213; Coventry *v.* Coventry, at the end of Francis's Maxims in Equity. The only distinction between an actual heir and the person taking in default of the power is this; that the former is so constituted by course of law, while the latter is a *quasi* heir specially appointed by the settlor. Thus in aiding the defective execution of powers the court says, as in supplying surrenders, the donee of the power, who is the owner of the property to the extent of that power, has indicated an intention of providing for a meritorious object, and the person taking in default of the power, who is a kind of heir, shall not, through want of form, run away with the estate from those who are much better entitled.

"It is clear that an agreement founded on meritorious consideration will not be executed as against the settlor himself. Antrobus *v.* Smith, 12 Ves. 39. Indeed, relief in such a case would offend against the security of property; for if a man improvidently bind himself by a complete alienation, the court will not unloose the fetters he hath put upon himself, but he must lie down under his own folly. Villers *v.* Beaumont, 1 Vern. 101; but if the court interpose where the act is left incomplete, what is it but to wrest property from a person who has not legally parted with it? Another observation that suggests itself is, that during the life of the settlor the ground of the meritorious consideration scarcely seems to apply; for can it be thought to be the duty of a husband to endow his wife, during the coverture with a separate and independent provision? or is a parent bound by any natural or moral obligation to impoverish himself (for such a case may be supposed) for the purpose of enriching a child? or has a court of equity the jurisdiction to appropriate a specific fund to creditors, when the debtor is still living? the presumption of law is that the creditor can obtain satisfaction of his debt by the usual legal process. It is after the *decease* of the settlor that meritorious consideration becomes such a powerful plea in a court of equity. The wife and children have then lost the personal support of the husband and parent, and who can have a juster claim to the inheritance of the property? The creditor is then barred, by Act of God, of his remedy against the debtor; and should the assets prove insufficient, how but by the assistance of equity can he hope to be satisfied

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[1] Stone *v.* Stone, L. R. 5 Ch. 74; Shepherd *v.* Bevin, 4 Md. Ch. 133; 9 Gill, 32; Harris *v.* Haines, 6 Md. 435; McIntire *v.* Hughes, 4 Bibb, 186;

(a) In Kentucky and New Jersey the cases seem to support the doctrine that equity will complete an incomplete gift or trust as against

perhaps, upon thorough consideration, would not be acted upon. But the rule would be strictly confined to a wife and child, and

in his demand? Another objection to the execution of a voluntary contract against the settlor himself, at least in respect of land, is the principle expressed by Lord Cowper, that equity, like nature, will do nothing in vain. Seeley *v.* Jago, 1 P. Wms. 369; Billingham *v.* Lawthen, 1 Ch. Cas. 243; Pulvertoft *v.* Pulvertoft, 18 Ves. 99; as if money be directed to be converted into land, or land into money, the devisee or legatee may elect to take the property in the original state, for should the court direct an actual conversion, the devisee or legatee might immediately annul the order by resorting to a reconversion; and so, should the court decree a specific performance of a contract regarding realty for meritorious consideration, the property the next moment might be disposed of to a *bona fide* purchaser, and the settlement become nugatory. Again, if the imperfect gift can be enforced against the settlor himself, then the equitable right must form a *lien* upon the property; and upon the death of the settlor his heir would, *in all events*, be bound to convey: but even in aiding the defective execution of powers and supplying surrenders of copyholds, a previous inquiry by the master is invariably directed whether the heir of the settlor has any other adequate provision."

Mahan *v.* Mahan, 7 B. Mon. 579; Bright *v.* Bright, 8 id. 194; [Ford *v.* Ellingwood, 3 Met. (Ky.) 359]; Dennison *v.* Goehring, 7 Barr, 175; Hayes *v.* Kershaw, 1 Sand. 258; Taylor *v.* James, 4 Des. 5; Caldwell *v.* Williams, 1 Bailey Eq. 175; Garner *v.* Garner, 1 Busb. Eq. 1; Jones *v.* Obenchain, 10 Grat. 259; Harvey *v.* Alexander, 1 Rand. 219; Blackley *v.* Holton, 5 Dana, 520; 2 Spence, Eq. Jur. 58: Pennington *v.* Gitting, 2 Gill & J. 208; Tolar *v.* Tolar, Dev. Ch. 451; Thompson *v.* Thompson, 2 How. (Miss.) 737; Woodson *v.* McClelland, 4 Mo. 495. But see Taylor *v.* Taylor, 2 Humph. 597; Martin *v.* Ramsey, 5 Humph. 349; Campbell's Estate, 7 Barr, 101; Kennedy *v.* Ware, 1 Barr, 445; Cressman's App. 42 Penn. St. 155; Bunn *v.* Winthrop, 1 Johns. Ch. 329. The above cases of McIntire *v.* Hughes, Mahan *v.* Mahan, and Bright *v.* Bright, are direct decisions upon the point, and fully establish the rule for the State of Kentucky, while the cases of Bunn *v.* Winthrop, Dennison *v.* Goehring, Jones *v.* Obenchain, and most of the other cases, presented a completely executed trust for enforcement, and the court was not called upon to decide whether a meritorious consideration alone would support an executory trust. In Hayes *v.* Kershaw, the settlement was for a collateral relative, and the Vice-Chancellor declined to support it, but intimated in strong language that an executory trust for a wife or child would be supported upon meritorious consideration merely. The cases are very fully commented upon by the learned editors to 1 Lead. Cas. in

the executor or collateral heirs of the donor in favor of a wife or child, upon the ground of meritorious consideration. Ky. cases cited *su-*

would not be extended to brothers, sisters, nephews, or parents,[1] and probably not to grandchildren,[2] nor to illegitimate children.[3]

§ 110. Marriage is a valuable consideration, therefore executory agreements, made in contemplation of marriage, will be enforced if the marriage actually takes place.[4]

Eq. 330-333, with a strong leaning to the opinion that voluntary executory trusts for a wife or child would be supported. The learned editors also express strong doubts whether the case of Ellis *v.* Nimmo, 1 Lloyd & Goold, 333, is overruled by the cases which are usually thought to overrule it; and their criticism is ingenious and acute. They do not, however, advert to the case of Moore *v.* Crofton, 3 Jon. & La. 442. See Cox *v.* Sprigg, 6 Md. 274.

[1] Downing *v.* Townsend, Amb. 592; Buford's Heirs *v.* M'Kee, 1 Dana, 107; Hayes *v.* Kershaw, 1 Sand. Ch. 258. [Cotton *v.* Graham, 84 Ky. 672; Landon *v.* Hutton, 50 N. J. Eq. 500.]

[2] Buford's Heirs *v.* M'Kee, 1 Dana, 107.

[3] Fursaker *v.* Robinson, Pr. Ch. 475; but see Bunn *v.* Winthrop, 1 Johns. Ch. 329.

[4] Duval *v.* Getting, Gill, 38; Gough *v.* Crane, 3 Md. Ch. 119; Crane *pra;* Conover *v.* Brown, 49 N. J. Eq. 156, 172. See also M. E. Church *v.* Town, 47 N. J. Eq. 400, 406. And in several other States it seems to be established that equity will in some cases give effect to a deed of a husband directly to his wife without valuable consideration, when the only objection to it is the technical rule of law that a husband cannot convey directly to his wife. Garner *v.* Garner, 1 Busb. Eq. (N. C.) 1; Jones *v.* Obenchain, 10 Gratt. (Va.) 259; Sayers *v.* Wall, 26 Gratt. (Va.) 354; Sims *v.* Rickets, 35 Ind. 181; Stark *v.* Kirchgraber, 186 Mo. 633; Carter *v.* McNeal, 86 Ark. 150. See Keffer *v.* Grayson, 76 Va. 517, 523. Apart from these cases there is little, if any, real authority in the United States for the doctrine that equity will enforce against a donor or his heirs or personal representatives an executory contract or a trust imperfectly created, or give effect to an incomplete gift, where the only consideration is meritorious. On the other hand there is considerable authority directly against the proposition. Matter of James, 146 N. Y. 78, 92; Whitaker *v.* Whitaker, 52 N. Y. 368; Matter of Wilbur *v.* Warren, 104 N. Y. 192, 196; Young *v.* Young, 80 N. Y. 422, 437. See also Phillips *v.* Frye, 14 Allen, 36; Henderson's Adm'r *v.* Henderson, 21 Mo. 379; Gwynn *v.* Gwynn, 11 App. D. C. 564, 574. Note to Ellison *v.* Ellison, 1 White & Tudor's Leading Cases in Equity (6th Am. ed.), 327.

For cases of attempted but ineffectual gifts of the donor's note, check or other promise to pay, see Sanborn *v.* Sanborn, 65 N. H. 172; Graves *v.* Safford, 41 Ill. App. 659; Pennell *v.* Ennis, 126 Mo. App. 355.

§ 111. A contract under seal imports a consideration, and an action at law can be maintained upon such a contract. And it has sometimes been supposed that a court of equity would enforce a contract in favor of a volunteer whenever an action of law could be sustained upon the instrument.[1] But equity never enforced a voluntary covenant, though under seal, to stand seized to the uses of a stranger; and it is now settled, in England, that equity will not enforce a voluntary contract, although under seal.[2] Equity will not decree the specific performance of a contract, where a court of law would give only nominal damages. In the United States, however, considerable stress is laid upon the solemnity of a seal. The courts say that they will not execute a voluntary executory agreement unless it is under seal,[3] thereby implying that an executory contract under seal will be enforced, though voluntary. And in Kentucky, where the distinction between sealed and unsealed instruments is now abolished, a voluntary executory contract not under seal has been upheld.[4] But there is the same uncertainty whether a seal would render a voluntary executory contract binding in equity, as there is whether a mere meritorious consideration will enable the court to enforce the settlement. Generally, in America, very little regard is paid to mere formalities, and a seal is regarded in most States as a mere formality. A mere scratch

v. Gough, 4 id. 316; Hale *v.* Lamb, 2 Eden, 271; Stone *v.* Stone, L. R. 5 Ch. 74. [Ransdel *v.* Moore, 153 Ind. 393, 404; Whitehouse *v.* Whitehouse, 90 Me. 468; Gevers *v.* Wright's Ex'rs, 18 N. J. Eq. 330. As to the enforcement of antenuptial settlements, see *infra* § 122, note.]

[1] Beard *v.* Nutthall, 1 Vern. 427; Williamson *v.* Coddrington, 1 Ves. 511; Hervey *v.* Audland, 14 Sim. 531; Husband *v.* Pollard and Randal *v.* Randal, 2 P. Wms. 467; Vernon *v.* Vernon, id. 594; Goring *v.* Nash, 3 Atk. 186; Stephens *v.* Trueman, 1 Ves. 73; Wiseman *v.* Roper, 1 Ch. R. 158.

[2] Hale *v.* Lamb, 2 Eden, 294; Fursaker *v.* Robinson, Pr. Ch. 475; Evelyn *v.* Templar, 2 Bro. Ch. 148; Colman *v.* Sarel, 3 id. 12; Jefferys *v.* Jefferys, 1 Cr. & Ph. 138; Meek *v.* Kettlewell, 1 Hare, 464; Fletcher *v.* Fletcher, 4 id. 74; Newton *v.* Askew, 11 Beav. 145; Dillon *v.* Coppin, 4 M. & Cr. 647; Kekewich *v.* Manning, 1 De G., M. & G. 188; Dening *v.* Ware, 22 Beav. 184.

[3] Kennedy *v.* Ware, 1 Barr, 445; Caldwell *v.* Williams, 1 Bailey, Eq. 175; Dennison *v.* Goehring, 7 Barr, 175; McIntire *v.* Hughes, 4 Bibb, 186.

[4] Mahan *v.* Mahan, 7 B. Mon. 579.

or scroll of the pen passes for a seal, and in some States seals are abolished altogether. Why any effect should be given to a form that has ceased to be a solemnity would be hard to explain on principle, and is equally uncertain upon the authorities.

111 *a*. By the construction given to the New York statutes a trust to sell land for the benefit of creditors and legatees must be absolute and imperative without discretion in the trustee; and a trust to receive rents and profits is not valid if there is no direction to apply them to the use of any person or for any period.[1]

[1] Cooke *v*. Platt, 98 N. Y. 38, 39.

CHAPTER IV.

IMPLIED TRUSTS.

§ 112. The manner in which trusts are implied, and the words from which they are implied.
§ 113. Words from which a trust will not be implied.
§§ 114-116. Rules by which trusts will or will not be implied.
§§ 117-118. Implied trusts from directions as to the maintenance of children or others.
§ 119. When trusts for maintenance are not implied.
§ 120. Rules that govern implied trusts.
§ 121. Trusts arising by implication from the provisions of a will.
§ 122. Implied trusts arising from contracts.
§ 123. A direction to employ certain persons does not raise an implied trust.

§ 112. IMPLIED trusts are those that arise when trusts are not directly or expressly declared in terms, but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust.[1] (*a*) Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the in-

[1] Lane *v.* Lane, 8 Allen, 350.

(*a*) In Gorrell *v.* Alspaugh, 120 N. C. 362, 366, Douglass, J., said: "Implied trusts are either resulting or constructive. In this State all implied trusts are generally denominated parol trusts, referring to their origin and nature of proof rather than their incidents and results. Some eminent authorities, as Lewin and Perry, make a separate division of implied trusts as distinguished both from resulting and constructive trusts; but this distinction does not seem to be recognized in this State, nor, indeed, in the Statute of Frauds (29 Charles II., ch. 3, § 8), which refers to a trust 'arising or resulting by implication or construction of law.'" See also Verzier *v.* Convard, 75 Conn. 1.

tention will be executed through the medium of a trust. Implied trusts may arise out of agreements and settlements *inter vivos* [1] where there is a sufficient consideration; but they more frequently arise from the construction of wills where a consideration is implied. In Pennsylvania, such words as "my wish is," "my further request is," or others merely expressive of a desire, recommendation, or confidence, are not sufficient to convert a devise or bequest into a trust.[2] But the general rule is that if a testator make an absolute gift to one person in his will, and accompany the gift with words expressing a "belief," [3] "desire," [4] "will," [5] "request," [6] "will and desire;" [7] or, if he "will and declare," [8] "wish and request," [9] "wish and desire," [10] "entreat," [11] "most heartily beseech," [12] "order and direct," [13](*a*)

[1] Liddard *v.* Liddard, 28 Beav. 266.

[2] Hopkins *v.* Glunt, 111 Penn. St. 287; Bowlby *v.* Thunder, 105 id. 178; Colton *v.* Colton, 10 Sawyer, 325.

[3] Cary *v.* Cary, 2 Sch. & Le. 189; Paul *v.* Compton, 8 Ves. 380.

[4] Harding *v.* Glyn, 1 Atk. 469; Mason *v.* Limbury, and Vernon *v.* Vernon, Amb. 4; Trot *v.* Vernon, 8 Vin. Abr. 72; Pushman *v.* Filliter, 3 Ves. 7; Brest *v.* Offley, 1 Ch. R. 246; Bonser *v.* Kinnear, 2 Gif. 195; Cruwys *v.* Colman, 9 Ves. 319; Shaw *v.* Lawless, Lloyd & Goold, 154; 5 Cl. & Fin. 129; Lloyd & Goold, Tem. Plunket, 559.

[5] Eales *v.* England, Pr. Ch. 200; Clowdsley *v.* Pelham, 1 Vern. 411.

[6] Pierson *v.* Garnet, 2 Bro. Ch. 38, 226; Eade *v.* Eade, 5 Mad. 118; Moriarty *v.* Martin, 3 Ir. Ch. 26; Bernard *v.* Minshull, 1 Johns. 276; Knox *v.* Knox, 59 Wis. 172.

[7] Birch *v.* Wade, 3 Ves. & B. 198; Forbes *v.* Ball, 3 Mer. 437.

[8] Gray *v.* Gray, 11 Ir. Ch. 218.

[9] Foley *v.* Parry, 5 Sim. 139; 2 M. & K. 138; Cook *v.* Ellington, 6 Jones, Eq. 371.

[10] Liddard *v.* Liddard, 28 Beav. 266; Cockrill *v.* Armstrong, 31 Ark. 580.

[11] Prevost *v.* Clark, 2 Mad. 458; Meredith *v.* Heneage, 1 Sim. 543; Taylor *v.* George, 2 Ves. & B. 378.

[12] Meredith *v.* Heneage, 1 Sim. 553.

[13] Cary *v.* Cary, 2 Sch. & Le. 189; White *v.* Briggs, 2 Phill. 583.

(*a*) Such words as "order" and "direct" are now treated as *prima facie* mandatory; they are imperative words, even when a discretion is given, as to the mode of execution, by a later clause in a will which contains them. See Collister *v.* Fassitt, 163 N. Y. 281. But see Boyle *v.* Boyle, 152 Pa. St. 108; Good *v.* Fichthorn, 144 Pa. St. 287.

"authorize and empower," [1] "recommend," [2] "hope," [3] "do not doubt," [4] "be well assured," [5] "confide," [6] "have the fullest confidence," [7] "trust and confide," [8] "have full assurance and confident hope;" [9] or, if he make the gift "under the firm conviction," [10] or "well knowing;" [11] or, if he use the expression, "of course the legatee will give," [12] or, "in consideration that the legatee has promised to give," [13] — in these and similar cases courts will consider the intention of the testator as manifestly implied, and they will carry the intention into effect by declaring the donee or first taker to be a trustee for those whom the donor intended to benefit.[14] (*a*) And so the words, "it is

[1] Brown *v.* Higgs, 4 Ves. 708; 5 id. 495; 8 id. 561; 18 id. 192.

[2] Tibbits *v.* Tibbits, Jac. 317; 19 Ves. 656; Horwood *v.* West, 1 Sim. & St. 387; Paul *v.* Compton, 8 Ves. 380; Malim *v.* Keighley, 2 Ves. Jr. 333, 529; Malim *v.* Barker, 3 Ves. 150; Meredith *v.* Heneage, 1 Sim. 543; Kingston *v.* Lorton, 2 Hog. 166; Cholmondeley *v.* Cholmondeley, 14 Sim. 590; Hart *v.* Tribe, 18 Beav. 215; Meggison *v.* Moore, 2 Ves. Jr. 630; Sale *v.* Moore, 1 Sim. 534; *Ex parte* Payne, 2 Y. & Coll. 636; Randal *v.* Hearle, 1 Anst. 124; Lefroy *v.* Flood, 4 Ir. Ch. 1; Cunliffe *v.* Cunliffe, Amb. 686; distinguished in Pierson *v.* Garnet, 2 Bro. Ch. 46; Malim *v.* Keighley, 2 Ves. Jr. 333; Pushman *v.* Filliter, 3 Ves. 7; Webster *v.* Morris, 66 Wis. 366.

[3] Harland *v.* Trigg, 1 Bro. Ch. 142; Paul *v.* Compton, 8 Ves. 380.

[4] Parsons *v.* Baker, 18 Ves. 476; Taylor *v.* George, 2 Ves. & B. 378; Malone *v.* O'Connor, Lloyd & Goold, 465; Sale *v.* Moore, 1 Sim. 534.

[5] Macey *v.* Shurmer, 1 Atk. 389; Anst. 520; Ray *v.* Adams, 3 M. & K. 237.

[6] Griffiths *v.* Evans, 5 Beav. 241; Shepherd *v.* Nottidge, 2 J. & H. 766.

[7] Shovelton *v.* Shovelton, 32 Beav. 143; Wright *v.* Atkyns, 17 Ves. 255; 19 id. 299; G. Cooper, 111; T. & R. 143; Webb *v.* Wools, 2 Sim. (N. S.) 267; Palmer *v.* Simmonds, 2 Dr. 225; Warner *v.* Bates, 98 Mass. 274.

[8] Wood *v.* Cox, 1 Keen, 317; 2 My. & Cr. 684; Pilkington *v.* Boughey, 12 Sim. 114.

[9] McNab *v.* Whitbread, 17 Beav. 299.

[10] Barnes *v.* Grant, 2 Jur. (N. S.) 1127; 26 L. J. Ch. 92.

[11] Bardswell *v.* Bardswell, 9 Sim. 319; Nowland *v.* Nelligan, 1 Bro. Ch. 489; Briggs *v.* Penny, 3 Mac. & G. 546; 3 De G. & Sm. 525.

[12] Robinson *v.* Smith, 6 Madd. 124; Lechmere *v.* Lavie, 2 M. &. K. 197.

[13] Clifton *v.* Lombe, Amb. 519.

[14] Warner *v.* Bates, 98 Mass. 276; Lambe *v.* Eames, L. R. 10 Eq. 267.

(*a*) The tendency shown in the more recent decisions is to give much less force than formerly to words of request or recommendation addressed to a legatee or devisee. Sale *v.* Thornberry, 86 Ky. 266;

my wish," [1] "it is my wish and will," [2] "having confidence," [3] "I desire that the donee should appropriate $50 per year," [4]

[1] Brunson *v.* Hunter, 2 Hill Ch. 490.

[2] McRee's Adm'r *v.* Means, 34 Ala. 349. [Summers *v.* Higley, 191 Ill. 193.]

[3] Dresser *v.* Dresser, 46 Maine, 48; Reid's Adm'r *v.* Blackstone, 14 Grat. 363.

[4] Erickson *v.* Willard, 1 N. H. 217.

Eberhardt *v.* Perolin, 49 N. J. Eq. 570; Street *v.* Gordon, 58 N. Y. S. 860, 41 App. Div. 439; Colton *v.* Colton, 127 U. S. 300, 312; *In re* Oldfield, [1904] 1 Ch. 549; Mussoorie Bank *v.* Raynor, 7 App. Cas. 321, 330; Williams *v.* Williams, [1897] 2 Ch. 12; *In re* Hamilton, [1895] 2 Ch. 370; *In re* Diggles, 39 Ch. Div. 253; *In re* Adams & Kensington Vestry, 27 Ch. Div. 394, 406.

The whole question in every case is what the testator intended. It never was law that such words necessarily imposed a trust, if he intended them to express merely his wishes, hopes or recommendations, however clearly, and did not himself intend that they should be mandatory. The only ground on which precatory words could ever have been construed to create a trust is that the testator actually intended them to be mandatory upon the devisee or legatee, that he used the words to express something different from their natural and ordinary meaning: *i. e.*, as polite forms of command rather than requests. Lumpkin *v.* Rodgers 155 Ind. 285; Major *v.* Herndon, 78 Ky. 123; Pratt *v.* Sheppard, etc., Hospital, 88 Md. 610; Poor *v.* Bradbury, 196 Mass. 207; Holmes *v.* Dalley, 192 Mass. 451; Aldrich *v.* Aldrich, 172 Mass. 101; Trustees of Hillsdale College *v.* Wood, 145 Mich. 257, 263; Courtenay *v.* Courtenay, 90 Miss. 181; Rector *v.* Alcorn, 88 Miss. 788; Murphy *v.* Carlin, 113 Mo. 112; Post *v.* Moore, 181 N. Y. 15, 106 Am. St. 495 and note; Arnold *v.* Arnold, 41 S. C. 291; Hill *v.* Page, 36 S. W. 735 (Tenn. 1895); McDuffie *v.* Montgomery, 128 Fed. 105; *In re* Williams, [1897] 2 Ch. 12.

As was stated in Pratt *v.* Sheppard, etc., Hospital, 88 Md. 610, "The whole question is one of the interpretation of each particular will." Mitchell *v.* Mitchell, 143 Ind. 113; Clay *v.* Wood, 153 N. Y. 134.

If a trust was intended by the testator, the precatory words are sufficient to create it. Hughes *v.* Fitzgerald, 78 Conn. 4; Dexter *v.* Evans, 63 Conn. 58; Bohon *v.* Barrett, 79 Ky. 378; Major *v.* Herndon, 78 Ky. 123; McCurdy *v.* McCallum, 186 Mass. 464; Murphy *v.* Carlin, 113 Mo. 112; Foster *v.* Willson, 68 N. H. 241; Phillips *v.* Phillips, 112 N. Y. 197; Wolbert *v.* Beard, 128 Wis. 391, 397; *In re* Burley, [1910] 1 Ch. 215.

But there is no rule of construction which requires a court to interpret precatory words occurring in a will as different in meaning from such words as ordinarily used. The fact that the person using them has the right to have his wishes

"to be disposed of and divided among my children,"[1] "with full confidence that they will dispose of such residue among our

[1] Collins *v.* Carlisle, 7 B. Mon. 14.

carried out if he sees fit to so direct has influenced the courts, in many cases doubtless unduly, in the interpretation of words which in form merely state his wishes. The modern tendency, however, is to give to such words only their natural meaning, unless it appears from other parts of the will, or from any evidence that is proper, that the testator intended them to be mandatory. Kauffman *v.* Gries, 141 Cal. 295; Estate of Marti, 132 Cal. 666; Hughes *v.* Fitzgerald, 78 Conn. 4; Giles *v.* Anslow, 128 Ill. 187; Mitchell *v.* Mitchell, 143 Ind. 113; Bills *v.* Bills, 80 Iowa, 269; Wood *v.* Wood, 127 Ky. 514; White *v.* Irvine, 74 S. W. 247 (Ky. 1903); Igo *v.* Irvine, 70 S. W. 836 (Ky. 1902); Aldrich *v.* Aldrich, 172 Mass. 101; Poor *v.* Bradbury, 196 Mass. 207; Post *v.* Moore, 181 N. Y. 15, 106 Am. St. 495, note; Clay *v.* Wood, 153 N. Y. 134; Matter of Gardner, 140 N. Y. 122; Foose *v.* Whitmore, 82 N. Y. 405; Boyle *v.* Boyle, 152 Pa. St. 108; Ogden, Petitioner, 25 R. I. 373; Russell *v.* U. S. Trust Co. 136 Fed. 758; Burnes *v.* Burnes, 137 Fed. 781, 791; *In re* Oldfield, [1904] 1 Ch. 549; *In re* Hanbury, [1904] 1 Ch. 415; Hill *v.* Hill, [1897] 1 Q. B. 483, 486; *In re* Conolly, [1910] 1 Ch. 219. See also Good *v.* Fichthorn, 144 Pa. St. 287; 1 Ames' Cases on Trusts (2d ed.) 97.

In Colton *v.* Colton, 127 U. S. 300, 312, Mr. J. Matthews said: "If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary." In the case of *In re* Williams, [1897] 2 Ch. 12, 18, Lindley, L. J., said: "In each case the whole will must be looked at; and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist. . . . The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its real meaning although couched in

brothers and sisters according to their best discretion," [1] "intrusting to her the education and maintenance of his

[1] Bull *v.* Bull, 8 Conn. 47.

language which is not imperative in form. A request is often a polite form of command. . . . A condition of this kind is enforceable in equity, and need not amount to a common-law condition involving a forfeiture." In Hill *v.* Hill, [1897] 1 Q. B. 483, 486, Lord Esher, M. R., said: "I have the strongest conviction that, when the court is called upon to place a construction upon words spoken or written for the purpose of adjudicating upon them, the same rule applies in courts of equity as in courts of law, namely, that the words must have their ordinary signification, unless in the particular case there is something which obliges the court to give them a meaning other than their ordinary meaning. The words which we have to consider in this case are words of request. Words of request in their ordinary meaning convey a mere request and do not convey a legal obligation of any kind either at law or in equity. But in any particular case there may be circumstances which would oblige the court to say that such words have a meaning beyond their ordinary meaning, and import a legal obligation." Lord St. Leonards in his Law of Property, p. 375, says: "It is not an unwholesome rule, that if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle."

The definiteness or indefiniteness of the subject and the object of the alleged trust is an important consideration in determining the effect of the precatory words relied upon as creating the trust; because if the testator has not pointed out definitely, or made definite provisions for ascertaining the *cestui* or the property which is to be the subject of the trust, this fact is strong evidence that he did not intend to create a trust, but intended merely to state his hopes, wishes, or recommendations, leaving the legatee or devisee free to carry them out or not at his own discretion. Mussoorie Bank *v.* Raynor, 7 App. Cas. 321, 330; Pratt *v.* Sheppard, etc., Hospital, 88 Md. 610; Burnes *v.* Burnes, 137 Fed. 781; 791; McDuffie *v.* Montgomery, 128 Fed. 105; Wood *v.* Wood, 127 Ky. 514; Hill *v.* Page, 36 S. W. 735. (Tenn. 1895); Nunn *v.* O'Brien, 83 Md. 198. See 2 Redfield on Wills (3d ed.), 415. 1 Jarman on Wills (6th ed.), 366; 1 Ames' Cases on Trusts (2d ed.), 93-95. The effect of uncertainty is stated as follows in Mussoorie Bank *v.* Raynor, 7 App. Cas. 321, 331: "If there is uncertainty as to the amount or nature to the property that is given over, two difficulties at once arise. There is not only difficulty in the execution of the trust because the Court does not know upon what property to lay its hands, but the uncertainty in the subject of the gift has a reflex

children out of the profits of the estate,"[1] "I also *allow* my son to give her a support off my plantation during her

[1] Lucas *v.* Lockhart, 10 Sm. & Mar. 466.

action upon the previous words, and throws doubt upon the intention of the testator, and seems to show that he could not possibly have intended his words of confidence, hope, or whatever they may be, — his appeal to the conscience of the first taker, — to be imperative words."

If an uncertainty has the effect of showing that no trust was intended the property of course remains in the legatee or devisee named in the will, but where the uncertainty has the effect of rendering void an intended trust, a trust results for the next of kin or heirs of the testator. Pratt *v.* Sheppard, etc., Hospital, 88 Md. 610, 622; 1 Ames' Cases on Trusts (2d ed.), 94.

A wide discretion in the legatee, both as to the amount of property to be used in fulfilling the wishes of the testator and as to the persons who are to receive it, is not conclusive against a trust even when precatory words are used to create it. Collister *v.* Fassitt, 163 N. Y. 281; Carroll *v.* Adams, 105 N. Y. S. 967. See 1 Ames' Cases on Trusts (2d ed.), 99. But if the court is convinced from all the evidence that the testator intended to give the devisee or legatee discretion whether or not to carry out his expressed wishes there can be no trust. Giles *v.* Anslow, 128 Ill. 187; Wood *v.* Wood, 127 Ky. 514; Holmes *v.* Dalley, 192 Mass. 451.

Words expressing the "confidence" or the "fullest confidence" or the "belief" of the testator that the legatee will make certain disposition of part or all of the property for the benefit of others, are ordinarily not as strongly indicative of an intention to create a trust as are words expressing a wish or desire. In their natural meaning they have a tendency to negative an intention of imposing any binding obligation upon the legatee. Cheston *v.* Cheston, 89 Md. 465; Poor *v.* Bradbury, 196 Mass. 207; Rector *v.* Alcord, 88 Miss. 788; *In re* Hanbury, [1904] 1 Ch. 415; *In re* Williams, [1897] 2 Ch. 12; *In re* Adams & Kensington Vestry, 27 Ch. Div. 394, 406. On the other hand, "I direct" or "It is my will" or "I strictly enjoin" or "I require" are *prima facie* mandatory unless shown to have been intended in a different sense. Collister *v.* Fassitt, 163 N. Y. 281; Summers *v.* Higley, 191 Ill. 193; Whittingham *v.* Schofield's Trustee, 67 S. W. 846 (Ky. 1902); Curd *v.* Field, 103 Ky. 293.

The words "admonish and charge" have been held not to be mandatory. Arnold *v.* Arnold, 41 S. C. 291. But this interpretation of the words was based upon a consideration of the whole will; and the case can be of but little value as a guide to the interpretation of similar words in other wills. This must be true of nearly all the decisions interpreting precatory words or words of recommendation or confidence, for no two wills are exactly alike in all respects and the attending circum-

life," [1] were held to create trusts in favor of the parties to be benefited. And so, where a testator gave a sum of money to trustees "to pay the income yearly to his son for the support of himself and family, and the education of his children," it was held that the income was taken in trust by the son, and that the wife and children could enforce its appropriation in part for their support.[2] "To my daughter A. I give [naming certain

[1] Hunter *v.* Stembridge, 12 Ga. 192. In this case the court construed the word *allow* as expressive of an *intention* — the testator being an illiterate man — that the son should support his mother out of the property given him, and that an absolute charge or trust was implied.

[2] Cole *v.* Littlefield, 35 Maine, 439: Wright *v.* Miller, 8 N. Y. 9; 1 Sandf. 103; Whiting *v.* Whiting, 4 Gray, 240; Chase *v.* Chase, 2 Allen, 101; Hadow *v.* Hadow, 9 Sim. 438; Jubber *v.* Jubber, id. 503; Longmore *v.* Elcum, 2 Y. & C. Ch. 363; Leach *v.* Leach, 13 Sim. 304; Hart *v.* Tribe, 19 Beav. 149; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phill. 555. Technical language is not necessary to create a trust. It is enough if such intention is apparent. Thus words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for those persons in favor of whom such expressions are used; provided that, from the construction of the whole will, such is the apparent intention of the testator, and provided that he has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust. Thus, in Massey *v.* Sherman, Amb. 520, a testator devised property to his wife, not doubting that she would dispose of the same to and among his children as she should please, it was held to be a trust for the children. See also Macey *v.* Shurmer, 1 Atk. 389; Wynne *v.* Hawkins, 1 Bro. Ch. 179; Parsons *v.* Baker, 18 Ves. 476; Malone *v.* O'Connor, 2 Lloyd & Goold, 465. And in Pierson *v.* Garnet, 2 Bro. Ch. 38, 226, a testator gave a residue to A. with his dying *request*

stances which help to show the intention of the testator must inevitably be different. For this reason it is of doubtful value to cite the rulings of different courts upon particular words.

Where the doubtful words relate entirely to the disposition of the property after the death of the devisee or legatee and do not purport to restrict his use or his full power of disposition during his life, the natural presumption is strongly against an intention to use the words in a mandatory sense. See Mussoorie Bank *v.* Raynor, 7 App. Cas. 321; *In re* Hanbury, [1904] 1 Ch. 415; Bills *v.* Bills, 80 Iowa, 269; Durant *v.* Smith, 159 Mass. 229; Matter of Gardner, 140 N. Y. 122; Street *v.* Gordon, 58 N. Y. S. 860, 41 App. Div. 439; Boyle *v.* Boyle, 152 Pa. St. 108; Wood *v.* Fichthorn, 144 Pa. St. 287; Russell *v.* U. S. Trust Co., 136 Fed. 758; Nunn *v.* O'Brien, 83 Md. 198.

property] for the support of my daughter C." creates a trust.[1]

that if A. died without issue he would dispose of it in a certain manner pointed out; but Lord Kenyon and Lord Thurlow held that, in the event a trust was implied and created. And see *Re* O'Bierne, 1 Jon. & La. 352. And so in Malim *v.* Keighley, 2 Ves. Jr. 333, 359, a testator recommended a daughter to whom he made a bequest, to dispose of it at her death in a certain manner, and it was held to create a trust. See also Paul *v.* Compton, 8 Ves. 380; Ford *v.* Fowler, 3 Beav. 146; Knott *v.* Cottee, 16 Beav. 77; Cholmondeley *v.* Cholmondeley, 14 Sim. 590. But in Meggison *v.* Moore, 2 Ves. Jr. 630, the word "recommend," under the peculiar circumstances of the case, was held not to create a trust; but the case throws no particular light upon the principle. In Bird *v.* Wade, 3 Ves. & B. 198, 2 Ves. 467, the testator added to his bequest of a part of his property that it was his will and desire that the bequest be left entirely to her disposal among such of her relations as she may think proper. The devisee having died without disposing of the property, it was held to be a trust for her next of kin. See also Brest *v.* Offley, 1 Ch. R. 246; Harding *v.* Glyn, 1 Atk. 469; Earl of Bute *v.* Stuart, 2 Eden, 87; 1 Bro. P. C. Taml. 476; Wright *v.* Atkyns, 19 Ves. 299; Cooper, 111; Cary *v.* Cary, 2 Sch. & Lef. 173, 189; Forbes *v.* Bale, 3 Mer. 441; Horwood *v.* West, 1 Sim. & St. 387.

In Prevost *v.* Clarke, 2 Madd. 458, a testatrix gave property to her daughter, and "entreated" her son-in-law, husband of the daughter, if he should not have children by her daughter, and should survive her, that he would leave any part of the property that came to him to her other children and grandchildren at his decease. These words were held to create a contingent trust for her other children and grandchildren. So in Pilkington *v.* Boughey, 12 Sim. 114, where a testator recited in his will that he had purchased an estate for a particular purpose, and then devised it to certain individuals in trust, and "trusted" that they would apply it to such purposes as they knew he would most approve of, it was held to be a trust. In Foley *v.* Parry, 2 My. & K. 138, a testator gave property to his wife for life, the remainder to his nephew for life, and then declared it to be his particular wish and request that his wife, or a third person, should superintend and take care of the education of his nephew; and it was determined that there was a trust in the life-estate given to the widow to maintain and educate the nephew until he was twenty-one. See also same case in 5 Sim. 138. So more doubtful expressions have been held to create trusts; as "I desire him to give," Mason *v.* Limbury, cited Vernon *v.* Vernon, Amb. 4; "I hereby request," Nowlan *v.* Nelligan, 1 Bro. Ch. 489; "I empower and authorize her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my family," Griffiths *v.* Evans, 5 Beav. 241: see also Brook

[1] Buffington *v.* Maxam, 140 Mass. 557.

§ 113. On the other hand, it has been held that no trust was implied when property was given to a donee connected with

v. Brook, 3 Sm. & Gif. 280; Alexander *v.* Alexander, 2 Jur. (N. S.) 898; "I advise him to settle," Parker *v.* Bolton, 5 L. J. (N. S.) Ch. 98; "My last wish, my dear daughter, is that you do give my granddaughter £1000," Hinxman *v.* Poynder, 5 Sim. 546; "require and entreat," Taylor *v.* George, 2 Ves. & B. 378; "trusting that he will preserve the same, so that, after his decease, it will go and be divided," etc., Baker *v.* Moseley, 12 Jur. 740; "under the conviction that he will dispose," etc., Barnes *v.* Grant, 26 L. J. Ch. 92, 2 Jur. (N. S.) 1127; "to apply the same," Saulsbury *v.* Denton, 3 K. & J. 392; "the other children may be allowed to participate," etc., Liddard *v.* Liddard, 6 Jur. (N. S.) 459, 28 Beav. 266. As before said, however, such expressions will not create a trust if by the context no trust is intended to arise; as if a trust is at one time created, but by a codicil is revoked on account of the inconvenience, and there is a direction that the "property be disposed of for the good of the family." Alexander *v.* Alexander, 2 Jur. (N. S.) 898. The question in all cases is, is the devisee or legatee a beneficiary or a trustee of the gift bestowed upon him; and that depends upon the intention of the testator. But parol evidence of the intention of the testator cannot be introduced, Irvine *v.* Sullivan, L. R. 8 Eq. 673. If there is a direct trust, there is no doubt; if there are precatory words, then it remains to determine whether there is an imperative trust, or whether the words are merely suggestions to guide the discretion of the devisee in disposing of the property, the testator having implicit confidence and reliance in him, and leaving him the sole judge whether he will follow the suggestions or not. If the testator supposed that he was creating an imperative trust, whether express or imperative from precatory words, a trust will be raised because such is the intention; and if such trust fails because the purposes of the trust are uncertain, or the amount of the property of the trust is uncertain, or for any other reason, it will still be a trust; but it will result to the heirs at law, next of kin, or residuary legatees. See *post*, §§ 153-161. But such uncertainty in the objects of the trust, or in the persons to be benefited, or in the amount of the property to be subjected to the trust, or in the manner of applying it, are facts and circumstances, if they exist, in the will itself, which are to be taken into consideration in construing it. See *post*, § 116; Barnard *v.* Minshull, 1 Johns. 287, 1 Jarm. on Wills, 359 (3d Lond. ed.). There is also another consideration. If there is an absolute gift in the first instance to the donee, mere precatory words will not in general annex a trust to the gift; as in Meredith *v.* Heneage, 1 Sim. 542, 10 Price, 306, the bequest was to the donee, "unfettered and unlimited," followed by precatory words, and they were held not to create a trust. In Bonser *v.* Kinnear, 2 Gif. 195, there was a gift to the wife "*for her sole use and benefit, she maintaining the children*"; it was held to be a trust, the words implying the trust being a part of the gift. But in Wood *v.* Cox, 1 Keen, 317, there was a gift to the devisee "for his own use and benefit," trusting and

expression of kindness and good-will towards other persons, as with a hope that "he would continue it in the family;" [1] or,

wholly confiding in his honor to act in strict conformity to the testator's wishes. There were some other circumstances, and Lord Langdale held it to be an implied trust; but Lord Cottenham said that to make the devisee a trustee, the words "for his own use and benefit" must be expunged from the will: 2 My. & Cr. 686; and see the judgment in the case of Irvine *v.* Sullivan, L. R. 8 Eq. 673. In Winch *v.* Brutton, 14 Sim. 379, and in Bardswell *v.* Bardswell, 9 id. 319, there were gifts to the use, benefit, and disposal, absolutely, of the devisees, "nevertheless earnestly *conjuring them* to dispose of them in a certain manner; and it was held that, under the form of the gifts there, there were no trusts. See also White *v.* Briggs, 15 Sim. 33; Fox *v.* Fox, 27 Beav. 301. So in Johnson *v.* Rowlands, 2 De G. & S. a gift to be disposed of as she shall think proper, followed by a recommendation, was held not to create a trust. The case of Williams *v.* *v.* Williams, 1 Sim. (N. S.) 358, is nearly to the same effect; and see Green *v.* Marsden, 1 Drew. 646. In some of these cases the element of uncertainty enters into the construction: see Bardswell *v.* Bardswell, 14 Sim. 379; Williams *v.* Williams, 1 Sim. (N. S.) 358; Webb *v.* Wools, 2 Sim. (N. S.) 267, was a strong case in this respect. The gift was to the wife, her executors, administrators, and assigns, "to and for her and their sole use and benefit, upon the fullest trust and confidence that she will dispose of the same," &c. It was said that to allow the latter words to create a trust would be to counteract the former words. In other cases where the gift was in nearly the same words but "in full confidence that she will bestow it, *on her decease*, to my children," &c. Le Marchant *v.* Le Marchant, L. R. 18 Eq. 414; Curnick *v.* Tucker, L. R. 17 Eq. 320; it was held that the widow took a life-estate, with a power to appoint among the children: Ware *v.* Mallard, 21 L. J. Ch. 355; 16 Jur. 492; Gulley *v.* Cregoe, 24 Beav. 185. If the words of gift to the wife may be construed as making the gift to her sole and separate use, independent of her husband, the trust may be sustained: Cholmondeley *v.* Cholmondeley, 14 Sim. 590. See also Stubbs *v.* Sargon, 2 Keen, 255, 3 My. & Cr. 513; but see Green *v.* Marsden, 1 Drew. 646. If the expressions are mere statements of good-will towards other persons, a trust will not be implied: Buggins *v.* Yeats, 8 Vin. Ab. 72, Pl. 27; Sale *v.* Moore, 1 Sim. 534; Hoy *v.* Master, 6 Sim. 568; Reeves *v.* Baker, 18 Beav. 372; Lechmere *v.* Lavie, 2 My. & K. 197; Abraham *v.* Almon, 1 Russ. 509; Harland *v.* Trigg, 1 Bro, Ch. 142; Curtis *v.* Rippon, 5 Madd. 434. But where a testator gave property to his son, and ordered him to take care and provide for his daughter, it was held that she was entitled to a provision: Broad *v.* Bevan,

[1] Harland *v.* Trigg, 1 Bro. Ch. 142; Wright *v.* Atkyns, 19 Ves. 279; G. Coop. 121; Woods *v.* Woods, 1 M. & Cr. 401; Parkinson's Trust, 1 Sim. (N. S.) 242; Williams *v.* Williams,. id. 358. See also White *v.* Briggs, 2 Phill. 583; Liley *v.* Hey, 1 Hare, 580.

with a request, "to distribute it among such members of the donee's family" as he should deem most deserving;[1] or, "in full confidence that the donee would devise it to such heirs of the testator's father as she might think best deserved a preference;"[2] or with a recommendation that the donee "would consider the testator's relations;"[3] or, where the recommendation was "to consider certain persons,"[4] "to be kind to them,"[5] "to remember them,"[6] "to do justice to them,"[7] "to make ample provision for them,"[8] "to use the property for herself and her children, and to remember the church of God and the poor,"[9] "to give what should remain at his death, or what he should die seized

1 Russ. 511, n. It must be repeated, that in many cases the element of uncertainty as to the property to be affected by the words of recommendation has entered largely into the construction given to wills by courts; and in that, as in most other circumstances attending the construction of a will, each case must depend upon the particular words of the will and the context in which they are found. See Lefroy *v.* Flood, 4 Ir. Ch. 1, 12; Gynne *v.* Hawkins, 1 Bro. Ch. 179; Horwood *v.* West, 1 Sim. & St. 387; Huskisson *v.* Bridge, 15 Jur. 738: Young *v.* Martin, 2 Y. & C. Ch. 582, *Ex parte* Payne, id. 636; Knight *v.* Knight, 3 Beav. 148; Knight *v.* Boughton, 11 Cl. & Fin. 513; 12 Beav. 312; Bonser *v.* Kinnear, 2 Gif. 195; Quayle *v.* Davidson, 12 Moore, P. C. 268; Maud *v.* Maud, 27 Beav. 615. But see Malone *v.* O'Connor, 2 Lloyd & Goold, 465. Of course, if no trust is implied from the words of recommendation used in the will, the donee takes the absolute beneficial as well as legal interest to the extent to which it is limited. Stubbs *v.* Sargon, 2 Keen, 255; 3 My. & Cr. 507; Gloucester *v.* Wood, 3 Hare, 131; 1 H. L. Cas. 272; Briggs *v.* Penny, 3 De G. & S. 547; 3 Mac. & G. 546; Fowler *v.* Garlike, 1 R. & My. 232. But if a trust is intended, but it is so uncertain that it cannot be executed, it will result to the heirs or next of kin, or residuary legatee or devisee, according to the circumstances.

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[1] Green *v.* Marsden, 1 Drew. 646.

[2] Meredith *v.* Heneage, 1 Sim. 542; and see Wright *v.* Atkyns, G. Coop. 119; Curnick *v.* Tucker, L. R. 17 Eq. 320.

[3] Sale *v.* Moore, 1 Sim. 534; Macnab *v.* Whitbread, 17 Beav. 299; Wright *v.* Atkyns, G. Coop. 119.

[4] Ibid.; Hoy *v.* Master, 6 Sim. 568.

[5] Buggins *v.* Yates, 9 Mod. 122.

[6] Bardswell *v.* Bardswell, 9 Sim. 319.

[7] Le Maitre *v.* Bannister, Pr. Ch. 200, and note; Pope *v.* Pope, 10 Sim. 1.

[8] Winch *v.* Brutton, 14 Sim. 379; Fox *v.* Fox, 27 Beav. 301.

[9] Curtis *v.* Rippon, 5 Madd. 434.

or possessed of,"[1] or, "to finally appropriate as he pleases;" with a recommendation "to divide among certain persons,"[2] or, "to divide and dispose of the savings,[3] or the bulk of the property;"[4] or, where the testator "recommends, but does not absolutely enjoin;"[5] or, where a testator gave all his property to his wife absolutely, and by a codicil, in the form of a letter to her, said it was his wish "that she should have everything, using her judgment when to dispose of it among the children, but that he should be unhappy if he thought that any one not of her family should be the better for what he felt confidence she would so well dispose of;"[6] or, where everything was given to a "wife in the fullest trust and confidence reposed in her that she will dispose of the same for the joint benefit of herself and my children,"[7] or where an estate was given to a wife, "being fully satisfied that she will dispose of the same, by will or otherwise, in a fair and equitable manner to our united relatives, bearing in mind that my relatives are in better circumstances than hers;"[8] or, where all the testator's estate was given to his wife, recommending her "to give the same to his children, at such time and in such manner as she should think best;"[9] or, where a bequest of a house and an annuity was made to a niece, for the support of herself and her nephews and nieces whom she then had under her care, "and of such other persons as she from time to time might wish and request to be members

[1] Sprange *v.* Barnard, 2 Bro. Ch. 585; Green *v.* Marsden, 1 Drew. 646; Pushman *v.* Filliter, 3 Ves. 7; Wilson *v.* Major, 11 Ves. 205; Eade *v.* Eade, 5 Madd. 118; Wynne *v.* Hawkins, 1 Bro. Ch. 179; Lechmere *v.* Lavie, 2 M. & K. 197; Bland *v.* Bland, 2 Cox, 349; Att. Gen. *v.* Hall, Fitzg. 314; and see Meredith *v.* Heneage, 1 Sim. 542; Tibbits *v.* Tibbits, 19 Ves. 655; Pope *v.* Pope, 10 Sim. 1.

[2] White *v.* Briggs, 15 Sim. 33.

[3] Cowman *v.* Harrison, 10 Hare, 234.

[4] Palmer *v.* Simmonds, 2 Drew. 221.

[5] Young *v.* Martin, 2 Y. & C. Ch. 852.

[6] Williams *v.* Williams, 1 Sim. (N. S.) 358.

[7] Webb *v.* Wools, 2 Sim. (N. S.) 267; Byne *v.* Blackburn, 26 Beav. 41.

[8] Reeves *v.* Baker, 18 Beav. 372.

[9] Gilbert *v.* Chapin, 19 Conn. 351.

of her family;" [1] or, where property was given to a daughter, "to be hers forever, to be disposed of as she may think proper among her children and grandchildren, by will or otherwise;" [2] or a devise to a wife of all a testator's property, recommending her "to make some small allowance, at her convenience, to each of his brothers and sisters: say, $1000 to each;" [3] or, a devise "of the use, benefit, and profits, to a wife absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among her children;" [4] or, where the testator, expressed an "earnest hope" and "particular request" that "the donee would give the property to some one bearing the family name." [5] In a case where A. gave property to B. and directed that his daughter should reside with and be maintained by B. and she resided of her own accord in another place, it was held that there was no implied trust for her if she resided in another place.[6]

§ 114. It is an easy task to enumerate cases where trusts have been implied and where they have not been implied; but it is difficult to reconcile all the decisions. The words "will," "wish," "request," "hope," "desire," "trust," "have confidence," "recommend," "not doubting," and other similar words found so often in wills, express a state of mind in the testator, and they generally operate as a direct gift, devise, or bequest; but they are frequently so used that it is doubtful whether they are absolute directions, or mere suggestions to be acted on or not according to the discretion of the donee. Every case must depend upon the construction of the particular will under consideration.[7] The point really to be determined in all

[1] Harper *v.* Phelps, 21 Conn. 257.

[2] Thompson *v.* McKisick, 3 Humph. 631.

[3] Ellis *v.* Ellis, 15 Ala. 296.

[4] Pennock's Estate, 20 Pa. St. 268; reversing Coate's Appeal, 2 Barr, 129, and McKonkey's Appeal, 1 Harris, 253.

[5] Hood *v.* Oglander, 34 Beav. 513.

[6] Wilson *v.* Ball, L. R. 4 Ch. 581.

[7] Negroes *v.* Palmer, 18 Md. 165; Meggison *v.* Moore, 2 Ves. Jr. 633. [See *supra*, § 112, note *a*, page 150.]

these cases is whether, looking at the whole context of the will, the testator intended to impose an obligation on his legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act on them or not at his discretion. It is doubtful if there exist any formula for bringing to a direct test the question, whether words of "request," "hope," or "recommendation," are or are not to be considered obligatory.[1] The most that can be done is to state a

[1] Warner *v.* Bates, 98 Mass. 276; Williams *v.* Williams, 1 Sim. (N. S.) 358; by Sir Knight Bruce. In Wright *v.* Atkyns, 1 T. & R. 157, Lord Eldon said that in order to determine whether the words create a trust or not, it is matter of observation, — first, that the words should be imperative; secondly, that the subject must be certain; and thirdly, that the object must be as certain as the subject. See Wood *v.* Cox, 2 My. & Cr. 684; Pope *v.* Pope, 10 Sim. 1. In Knight *v.* Knight, 3 Beav. 148, Lord Langdale said, "It is not every wish or expectation which a testator may express, nor every act that he may wish his successors to do, that can or ought to be executed and enforced as a trust; and in the infinite variety of expressions employed and of cases which arise, there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust. In the construction of wills it is the duty of the court to give effect to the intention of the testator, whenever it can be ascertained." Then, after stating that in decreeing trusts wills have been made rather than executed, and that caution is necessary, his lordship goes on to say, "that as a general rule it has been laid down that when property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended or entreated or wished to dispose of the property in favor of another, the recommendation or entreaty or wish shall be held to create a trust; first, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain." Same case under the name of Knight *v.* Boughton, 11 Cl. & Fin. 548.

The learned editors to Hill on Trustees, p. 73 (4th Am. ed.), have examined the American and English cases, and state the following rules, which seem to be fairly deducible from the adjudged cases: —

1. Precatory words in a will, equally with direct fiduciary expressions, will create a trust; the wish of a testator, like the request of a sovereign, is equivalent to a command.

2. Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching; but a mere discretion in regard to the method of application of the

few general rules that lead to the construction of particular wills.

§ 115. However strong the language of recommendation or request may be, a trust will not be implied if the testator declare that such is not his intention, as if he declares that the gift shall be "unfettered or unlimited," or if he "recommends but does not enjoin." [1] And so a trust will not be implied if such a construction of the precatory words should render them repugnant to, or inconsistent with, other parts of the same instrument.[2] If construing a recommendation or the expression of a wish into a trust would contradict in terms the preceding bequest, a trust will not be implied.[3] As if the gift is absolute, and of all the testator's property, and of both the legal and equitable interest in it, words of recommendation will not cut it down into a trust; or, in the words of Kindersley, V. C., "where the later words of a sentence in a will go to cut down an absolute gift contained in the first part of a sentence, and are inconsistent with such gift, the court will, if it can, give effect to the absolute gift." [4] The same rule was stated by Lord Cottenham thus: "Though 'recommendation' may in some cases amount to a direction and create a trust, yet that being a *flexible* term, if

subject, or the selection of the object, will not be inconsistent with a trust.

3. Precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise.

4. But failure or uncertainty will be an element to guide the court in construing words of doubtful significancy adversely to a trust.

[1] Meredith *v.* Heneage, 1 Sim. 543; 10 Price, 230; Hoy *v.* Master, 6 Sim. 568; Young *v.* Martin, 2 Y. & C. Ch. 582; Huskisson *v.* Bridge, 4 De G. & Sm. 245; Warner *v.* Bates, 98 Mass. 277; Whipple *v.* Adam, 1 Met. 444; Eaton *v.* Witts, L. R. 4 Eq. 151; Barrett *v.* Marsh, 126 Mass. 213. [Ender's Ex'r *v.* Tasco, 89 Ky. 17; Sale *v.* Thornberry, 86 Ky. 266; Eberhardt *v.* Perolin, 49 N. J. Eq. 570; Burnes *v.* Burnes, 137 Fed. 781.]

[2] Brunson *v.* Hunter, 2 Hill, Ch. 490; Knott *v.* Cottee, 2 Phill. 192. [Mitchell *v.* Mitchell, 143 Ind. 113; *In re* Oldfield, (1904) 1 Ch. 549.]

[3] Webb *v.* Wools, 2 Sim. (N. S.) 267; Bardswell *v.* Bardswell, 9 Sim. 319.

[4] Webb *v.* Wools, 2 Sim. (N. S.) 267; Van Duyne *v.* Van Duyne, 1 McCarter, 397.

such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more." [1] The flexible term must give way to the inflexible, if the two cannot stand together as they are expressed.

§ 116. Again, a trust will not be implied from precatory words where it would be impracticable for a court to deal with and execute it; as if a testator should devise a house to his wife, and express a wish that his sister should live with her, for the sister takes no interest in the house, and a court cannot decree two persons to live together.[2] So where a testator devised a dwelling-house and an annuity to a niece, for the support of herself and her nephews and nieces then living with her, and of such other persons as she from time to time might request to be members of her family.[3] Nor will a trust be implied if there is uncertainty as to the property to be subjected to the trust,[4] or as to the persons to be benefited by the trust,[5] or as to the manner in which the property is to be applied. Lord Alvanley stated the rule to be "that a trust would be implied only where the testator points

[1] Knott *v.* Cottee, 2 Phill. 192; Second, etc. Church *v.* Desbrow, 52 Penn. St. 219.

[2] Graves *v.* Graves, 13 Ir. Ch. 182; Hood *v.* Oglander, 34 Beav. 513.

[3] Harper *v.* Phelps, 21 Conn. 257.

[4] Lechmere *v.* Lavie, 2 M. & K. 197; Knight *v.* Knight, 3 Beav. 148; Meredith *v.* Heneage, 1 Sim. 556; Buggins *v.* Yates, 9 Mod. 122; Sale *v.* Moore, 1 Sim. 534; Anon. 8 Vin. 72; Tibbits *v.* Tibbits, 19 Ves. 655; Wynne *v.* Hawkins, 1 Bro. Ch. 179; Pierson *v.* Garnet, 2 id. 45, 230; Sprange *v.* Barnard, id. 585; Bland *v.* Bland, 2 Cox, 349; Le Maitre *v.* Bannister, and Eales *v.* England, Pr. Ch. 200; Pushman *v.* Filliter, 3 Ves. 7; Att. Gen. *v.* Hall, Fitzg. 314; Wilson *v.* Major, 11 Ves. 205; Eade *v.* Eade, 5 Madd. 118; Curtis *v.* Rippon, id. 434; Russell *v.* Jackson, 10 Hare, 213; Knight *v.* Boughton, 11 Cl. & Fin. 513; Flint *v.* Hughes, 6 Beav. 342; Lines *v.* Darden, 5 Fla. 51. [See § 112, note.]

[5] Harland *v.* Trigg, 1 Bro. Ch. 142; Wynne *v.* Hawkins, id. 179; Tibbits *v.* Tibbits, 19 Ves. 655; Richardson *v.* Chapman, 1 Burns, Ecc. L. 245; Pierson *v.* Garnet, 2 Bro. Ch. 45, 230; Knight *v.* Knight, 3 Beav. 148; Sale *v.* Moore, 1 Sim. 534; Cary *v.* Cary, 2 Sch. & Lef. 189; Meredith *v.* Heneage, 1 Sim. 542; *Ex parte* Payne, 2 Y. & C. Ch. 636; Knight *v.* Boughton, 11 Cl. & Fin. 513; Lines *v.* Darden, 5 Fla. 51. [See § 112, note.]

out the objects, the property, and the way in which it shall go." [1] If the subjects and objects of the supposed trust are left uncertain by a testator, the court will infer that no obligation was intended to be imposed upon the donee, but that the whole disposition was left to his discretion.[2] So if a mere *power* to appoint is given to the first taker, to be exercised or not at his discretion, no trust will be implied.[3] And no trust will be implied, if, taking the whole instrument and all the circumstances together, it is more probable than otherwise that the testator intended to communicate a discretion and not an obligation.[4]

§ 117. There is another variety of cases, where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent or other person standing in the relation of parent, and some directions or expressions are used in regard to the maintenance of his family or children. The question to be decided in this class of cases is, as in the others, did the settlor intend to create a trust and impose an obligation, or did he merely state incidentally the motive which led to an absolute gift? [5] (*a*) In the follow-

[1] Malim *v.* Keighley, 2 Ves. Jr. 335; Knight *v.* Boughton, 11 Cl. & Fin. 548; Warner *v.* Bates, 98 Mass. 277; Whipple *v.* Adams, 1 Met. 444.

[2] Morice *v.* Bishop of Durham, 10 Ves. 536.

[3] Brook *v.* Brook, 3 Sm. & Gif. 280; Paul *v.* Compton, 8 Ves. 380; Howorth *v.* Dewell, 29 Beav. 18; Lines *v.* Darden, 5 Fla. 51.

[4] Bull *v.* Hardy, 1 Ves. Jr. 270; Knott *v.* Cottee, 2 Phill. 192; Knight *v.* Knight, 3 Beav. 174; 11 Cl. & Fin. 513; Meggison *v.* Moore, 2 Ves. Jr. 630; Hill *v.* Bishop, &c., 1 Atk. 618; Paul *v.* Compton, 8 Ves. 380; Lefroy *v.* Flood, 4 Ir. Ch. 1; Shepherd *v.* Nottidge, 2 Johns. & Hem. 766.

[5] Paisley's App., 70 Penn. St. 158.

(*a*) Whether the language used by the testator is intended to be an imperative direction as to the use of the property or merely a statement of his motive in making an absolute gift is frequently a close question which can be determined only from an examination of the whole will. Each case must stand upon its own facts. Thus a bequest of income to the testator's wife "for her use and benefit and for the maintenance and education of my children" has been held to charge the income with a trust for the maintenance and education of the testator's children. *In re* Booth, [1894] 2 Ch. 282. See

ing cases a trust was clearly implied by the court; where property was given, that "he may dispose thereof for the benefit of himself and children,"[1] or, "for his own use and benefit, and the maintenance and education of his children,"[2] "for the maintenance of himself and family,"[3] "for the purpose of raising,

[1] Raikes *v.* Ward, 1 Hare, 445; Whiting *v.* Whiting, 4 Gray, 240.

[2] Longman *v.* Elcum, 2 Y. & C. Ch. 369; Carr *v.* Living, 28 Beav. 644; Berry *v.* Briant, 2 Dr. & Sm. 1; Bird *v.* Maybury, 33 Beav. 351; Andrews *v.* Bank of Cape Ann, 3 Allen, 313.

[3] *In re* Robertson's Trust, 6 W. R. 405; Whelan *v.* Reilly, 3 W. Va. 597; Smith *v.* Wildman, 37 Conn. 387.

also *In re* G., [1899] 1 Ch. 719. The same has been held true of the following language: "To use and dispose of as she may think proper for herself and my children." Elliott *v.* Elliott, 117 Ind. 380. To the same effect see Allen *v.* McGee, 158 Ind. 465; Hunter *v.* Hunter, 58 S. C. 382; Kidder's Ex'rs *v.* Kidder, 56 A. 154 (N. J. Ch. 1903); Atkinson *v.* Atkinson, 62 L. T. 735; Summers *v.* Higley, 191 Ill. 193.

On the other hand, "I give and bequeath to my wife . . . all my estate . . . for the purpose of raising her children, to have and to hold for her and her heirs forever," has been held not to impose any obligation upon the legatee to provide for the support of her children. Seamonds *v.* Hodge, 36 W. Va. 304. See also Bain *v.* Buff, 76 Va. 371; Tyack *v.* Berkeley, 100 Va. 296. It has also been held that a statement in a will that a bequest, absolute in form, was made to enable the legatee to provide for the maintenance and education of her children, will not create a trust for the children, being merely the statement of a motive for making the gift. Randall *v.* Randall, 135 Ill. 398. A bequest of £2500 to a son "to assist him" in paying off a certain mortgage encumbrance on land devised to him, has been held to be an absolute bequest. Adams *v.* Lopdell, 25 L. R. Ir. 311. See also Matter of Crane, 12 N. Y. App. Div. 271 (affirmed 159 N. Y. 557); Matter of Bogart, 60 N. Y. S. 496, 43 App. Div. 582.

A voluntary deed to a religious corporation, stated to be "for the porpose of aiding in the establishment of a House for Indigent Widows or Orphans or in the promotion of any other charitable or religious objects," has been construed to impose upon the corporation no trusts except those upon which all religious corporations hold property. St. James *v.* Bagley, 138 N. C. 384.

A voluntary deed to trustees of a church, "on condition" that the property be devoted to certain uses has been construed to create a trust, there being no words of forfeiture or limitation over on failure to perform the "condition." MacKenzie *v.* Trustees, 67 N. J. Eq. 652.

clothing, and educating" the children of the legatee,[1] "at the disposal of the legatee for herself and her children,"[2] or "all overplus towards her support and her family,"[3] or to "A. for the education and advancing in life of her children."[4] In Byne *v.* Blackburn, it was held that the fact that the property was given to a trustee instead of to the parent was sufficient to show that no sub-trust was intended;[5] but this case is in conflict with other cases;[6] and in Chase *v.* Chase, where property was given to trustees "to pay the income yearly to a son for the support of himself and family and the education of his children," it was held that the income was taken in trust by the son as sub-trustee, and that the wife and children could in equity enforce its appropriation in part for their support.[7] Where a testator gave his

[1] Rittgers *v.* Rittgers, 56 Iowa, 218.

[2] Crockett *v.* Crockett, 1 Hare, 451; 2 Phill. 461; Bibby *v.* Thompson, 32 Beav. 646.

[3] Woods *v.* Woods, 1 M. & Cr. 401.

[4] Gilbert *v.* Bennett, 10 Sim. 371.

[5] Byne *v.* Blackburn, 26 Beav. 41.

[6] Gilbert *v.* Bennett, 10 Sim. 371; Longman *v.* Elcum, 2 Y. & C. Ch. 363; Carr *v.* Living, 28 Beav. 644.

[7] Cole *v.* Littlefield, 35 Maine, 435; Loring *v.* Loring, 100 Mass. 340; Wilson *v.* Bell, L. R. 4 Ch. 581; Whiting *v.* Whiting, 4 Gray, 240; Chase *v.* Chase, 2 Allen, 101. In this case Chief-Justice Bigelow said: "The intent of the testator to give the benefit of the income of the trust fund created by his will to the wife and children of his son Philip, as well as to his son, is clear and unequivocal. It was intended for their joint support, and for the education of the children. The only question arising on the construction of the will is, whether the income of the trust fund, when received by the son, is held absolutely by him to be disposed of at his discretion, or whether he takes it in trust so that the wife and children can seek to enforce its due appropriation, in part for their benefit, in a court of equity. We cannot doubt that the latter is the true construction; otherwise it would be in the power of the son to defeat the purpose of the testator, by depriving his family of the support and education which was expressly provided for by the will. The adjudicated cases recognize the rule that where income arising from property is left to a person for the maintenance of children, he will be entitled to receive it for that purpose only so long as he continues properly to maintain them. It can make no difference in the application of the principle, that the person who is to receive the income also takes a beneficial interest in it for his own support. He is not thereby authorized to appropriate the whole

wife the entire profit of his estate for life, "intrusting to her the education and maintenance of his children," and also providing for the education and maintenance of the children "out of the profits" of the estate, it was held that the widow was charged with the trust of educating and supporting the children;[1] and where a legacy was given to a wife to be applied to the maintenance of certain persons in such proportions and at such times as she should think proper, it was held to be an imperative trust.[2] Where a testator gave to his wife all his personal property for her benefit and support and the benefit of his son, it was held to be a trust in the widow, the income of one-half for her own benefit and of the other half for the support of the son.[3]

of it to his own use, and deprive the other beneficiaries of the share to which they are entitled. Hadow *v.* Hadow, 9 Sim. 438; Jubber *v.* Jubber, id. 503; Longmore *v.* Elcum, 2 Y. & C. Ch. 363; Leach *v.* Leach, 13 Sim. 301; Hart *v.* Tribe, 19 Beav. 149; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, 2 Phill. 553." See Babbitt *v.* Babbitt, 26 N. J. Eq. 44.

[1] Lucas *v.* Lockhart, 10 Sim. & Mar. 468. See also Hunter *v.* Stembridge, 12 Ga. 192; Withers *v.* Yeadon, 1 Rich. Eq. 324. [*In re* G., [1899] 1 Ch. 719].

[2] Hawley *v.* James, 5 Paige, 318

[3] Loring *v.* Loring, 100 Mass. 340; Jubber *v.* Jubber, 9 Sim. 503. When a testator has stated the motive which leads to the gift, the inquiry arises is the motive or purpose of the gift so stated that the donee is under an obligation to apply the gift, or any part of it, to the benefit of another person? There are three classes of cases: (1) When a complete and obligatory trust is created in the first donee; as a gift to A. "to dispose of among her children," or for bringing up her children, gives no interest to A., but creates a complete trust. Blakeney *v.* Blakeney, 6 Sim. 52; Pilcher *v.* Randall, 9 Week. R. 251; Taylor *v.* Bacon, 8 Sim. 100; Chambers *v.* Atkins, 1 Sim. & St. 382; Fowler *v.* Hunter, 3 Y. & Jer. 506; *In re* Comac's Trust, 12 Jur. 470; Barnes *v.* Grant, 26 L. J. Ch. 92; Jubber *v.* Jubber, 9 Sim. 503; Wetherell *v.* Wilson, 1 Keen, 80; Wilson *v.* Maddison, 2 Y. & C. Ch. 372; *Re* Harris, 7 Exch. 344; Whiting *v.* Whiting, 4 Gray, 420; Chase *v.* Chase, 2 Allen, 101; Cole *v.* Littlefield, 35 Maine, 439; Wright *v.* Miller, 8 N. Y. 9. (2) There is a large class of cases where the first donee has a discretion to apply a part or the whole of the gift to a third person. This discretion, if exercised in good faith, will not be interfered with by the court, and the property unapplied by the donee will belong beneficially to him. Thus in Hornby *v.* Gilbert, Jac. 354, where a gift was made to A to be laid out and expended by her at her discretion, for or towards the education of her son, and that she should not be liable to account to her

A trust for support is not void for uncertainty, as the amount required to furnish maintenance suitable to the station of the *cestui* can be ascertained with reasonable certainty.[1]

son or any other person, it was held that the property belonged to her beneficially, subject to a trust to apply a part to the education of the son during his minority. And so where income is given for life, to be applied to the education and maintenance of children in the discretion of the donee, the income must be paid to the person named, and the part unexpended belongs to such person beneficially. Gilbert *v.* Bennett, 10 Sim. 371; Hadow *v.* Hadow, 9 Sim. 438; Leach *v.* Leach, 13 Sim. 304; Brown *v.* Paul. 1 Sim. (N.S.) 92; Bowden *v.* Laing, 14 Sim. 113; Longmore *v.* Elcum, 2 Y. & C. Ch. 363. And if the interest or income of legacies to the children is given to a parent, to be applied to the maintenance and education of the children, the parent will take the surplus beneficially if he performs his duty, unless a contrary intention is expressed: and providing for other trustees in case of the parent's death does not indicate a contrary intention. Brown *v.* Paul, 1 Sim. (N. S.) 103. Sometimes the gifts to a parent are so expressed that the parent takes the property in trust, subject to a large discretion; and sometimes the parent takes the property for life, subject to a power of appointment for the children. The latter construction is the more favored by the courts. See Crockett *v.* Crockett, 2 Phill. 553; Gully *v.* Cregoe, 24 Beav. 185; Hart *v.* Tribe, 18 Beav. 215; Ware *v.* Mallard, 21 L. J. Ch. 355, 16 Jur. 492. In Raikes *v.* Ward, 1 Hare, 445, a gift was made to a wife "to the intent she may dispose of the same for the benefit of herself and our children as she may deem most advantageous," and the court determined that the children had no absolute interest, but that their interests were subject to her honest discretion. Connolly *v.* Farrell, 8 Beav. 347; Woods *v.* Woods, 1 My. & Cr. 401; Costababie *v.* Costababie, 6 Hare, 410; Cowman *v.* Harrison, 10 Hare, 234; Smith *v.* Smith, 2 Jur. (N. S.) 967; Cooper *v.* Thornton, 3 Bro. Ch. 96; Robinson *v.* Tickell, 8 Ves. 142; Wood *v.* Richardson, 4 Beav. 174; Pratt *v.* Church, id. 177. (3) The third class of cases contains those in which it is held that the primary donee is absolutely entitled to the whole interest given, without any rights in third persons, as in Brown *v.* Casamajor, 4 Ves. 498, where a legacy was given to a father "the better to enable him to provide for his children." These and similar words merely express the motive of the gift, but import or imply no obligation or discretion which courts can enforce or control. Hammond *v.* Neame, 1 Swanst. 35; Benson *v.* Whittam, 5 Sim. 22; Thorp *v.* Owen, 2 Hare, 607; Andrews *v.* Partington, 3 Bro. Ch. 60. See also Biddles *v.* Biddles, 16 Sim. 1; Berkley *v.* Swinbourne, 6 Sim. 613; Oakes *v.* Strachy, 13 Sim. 414; Leigh *v.* Leigh, 12 Jur. 907; Jones *v.* Greatwood, 16 Beav. 528; Hart *v.* Tribe,

[1] Johnson *v.* Billups, 23 W. Va. 685.

§ 118. In cases where a trust for the maintenance of children is implied, the person bound by the trust is regarded in the same light as the guardian of a lunatic or of a minor;[1] he is entitled to receive the fund, and can give a valid receipt for it;[2] and, so long as he discharges the trust imposed upon him, he is entitled to the surplus for his own benefit, nor is he obliged to account for the past application of the fund.[3] And the future application is very much according to his discretion, provided he educates and supports the children reasonably, according to their position in the world and the intention of the testator.[4] The court, in cases where a question is raised, will order payment to be made to him, with liberty to the wife and children to apply for further orders;[5] if he becomes unfit to educate the children, the court can apportion the fund, and prevent him from receiving the portion necessary for the children and family;[6] and if he assigns his interest in the fund the court can apportion it, and set apart what is needed for the support and education of the children, and give the remainder to his assignee.[7] Of course, if there are no children, or if they die, the person bound by the trust takes the whole benefit of the fund.[8] But if the de-

18 Beav. 215; Wheeler *v.* Smith, 1 Giff. 300. It may be said that latterly courts are not so astute to discover and enforce trusts from precatory words, and are more inclined to find in the words the mere statement of a motive, or the vesting of a discretion in the donee.

[1] Jodrell *v.* Jodrell, 14 Beav. 411.

[2] Woods *v.* Woods, 1 M. & Cr. 409; Raikes *v.* Ward, 1 Hare, 449; Cooper *v.* Thornton, 3 Bro. Ch. 186; Robinson *v.* Tickell, 8 Ves. 142; Crockett *v.* Crockett, 1 Hare, 451; 2 Phill. 553; Webb *v.* Wools, 2 Sim. (N. S.) 272.

[3] Leach *v.* Leach, 13 Sim. 304; Brown *v.* Paul. 1 Sim. (N. S.) 92; Carr *v.* Living, 28 Beav. 644; Hora *v.* Hora, 33 Beav. 88; Smith *v.* Smith, 11 Allen, 423; Berkley *v.* Swinbourne, 6 Sim. 613; Hadow *v.* Hadow, 9 Sim. 438.

[4] Raikes *v.* Ward, 1 Hare, 450.

[5] Hadow *v.* Hadow, 9 Sim. 438; Crockett *v.* Crockett, 1 Hare, 451.

[6] Chase *v.* Chase, 2 Allen, 101; Castle *v.* Castle, 1 De G. & Jon. 352. [*In re* G. [1899] 1 Ch. 719.]

[7] Chase *v.* Chase, 2 Allen, 101; Carr. *v.* Living, 2 Beav. 644.

[8] Hammond *v.* Neame, 1 Swanst. 35; Cape *v.* Cape, 2 Y. & C. Ex. 543; Bushnell *v.* Parsons, Pr. Ch. 219; Bowditch *v.* Andrew, 8 Allen, 339; Smith *v.* Smith, 11 Allen, 423.

visee die before the children, the trust remains for them.[1] The trust also ceases as to children who become *forisfamiliated*, or cease to be members of the trustee's family, and, by marriage or otherwise, become members of another home or establishment; for it would not generally be implied that a testator intended[2] an income for the support and education of his family to be divided up into as many families as he left children.[3] Whether a child's right to maintenance under such a will ceases by the fact of his attaining twenty-one years of age is in many cases an open question.[4] On the one side it may be said that the trust ought not to continue after the child is of age, and is educated and prepared to acquire a livelihood for himself.[5] On the other hand, if the child is willing to remain at home, and there is no reasonable objection to his so remaining, or if it is a female with no other protection and means of support, it would seem that the trust ought not to cease on the mere ground that the child has attained twenty-one.[6] The great majority of cases will, of course, depend upon the particular words used in the particular will, and they will be so construed by the court as to carry out the intentions of the testator.[7] If a trust is to a widow for life for the support of herself and the support and education of her children, and the property is to go to them absolutely upon her death, one of them, on coming of age, cannot call for his proportion, even with the concurrence of the widow, if such transfer

[1] Andrews *v.* Cape Ann Bank, 3 Allen, 313.

[2] Bowdoin *v.* Laing, 14 Sim. 113; Carr. *v.* Living, 28 Beav. 644; 33 Beav. 464; Thorp *v.* Owen, 2 Hare, 612; Longmore *v.* Elcum, 2 Y. & C. Ch. 370; Manning *v.* Wopp, 2 Dev. & Bat. Ch. 11; Smith *v.* Wildman, 37 Conn. 387; Gardner *v.* Barker, 2 Eq. R. 888, overruling Soames *v.* Martin, 10 Sim. 287; Bayne *v.* Crowther, 20 Beav. 400; Brocklebank *v.* Johnson, 29 Beav. 211; Badham *v.* Mee, 1 R. & M. 631.

[3] Ibid.; Baker *v.* Reel, 4 Dana, 158; Conolly *v.* Farrell, 8 Beav. 350; citing Camden *v.* Benson, Crockett *v.* Crockett, 1 Hare, 457; 5 Hare, 326.

[4] Ibid.

[5] McDonnell *v.* Black, Riley, Ch. 152.

[6] Ibid.; Cloud *v.* Martin, 2 Dev. & Bat. Ch. 274; Carr *v.* Living, 33 Beav. 464.

[7] Gardner *v.* Barker, 18 Jur. 508; Bowditch *v.* Andrew, 8 Allen, 339; Sargent *v.* Bourne, 6 Met. 32.

would so diminish the fund as to endanger the rights of the other children to support and education during the life of the widow. In such case the court has ordered a part of such child's share to be paid over on his undertaking to account for the income if needed, and on the footing that the residue should be retained for security, that the income should be paid over if required.[1] The children have such an interest in the fund given for their maintenance that it cannot be reached by a creditor's bill or trustee process against the parent or other person charged with the obligation of maintaining the children or family; that is, if the fund is given to a person for a particular purpose, it cannot be diverted from that purpose by creditors of the donee.[2]

§ 119. But no trust is implied where the words simply state the motive leading to the gift, as where the gift is to a person "to enable him to maintain the children," [3] or an absolute gift is made, and the motive stated "that he may support himself and children," [4] or a gift is made absolutely for her own use and benefit, "having full confidence in her sufficient and judicious provision for the children." [5] When a testator gave to his wife "the use, benefit, and profits of his real estate for life, and all his personal estate, absolutely, having full confidence that she will leave the surplus to be divided justly among my children," it was held that the widow took the personal estate absolutely, subject to no trust, and that the word "surplus" meant what was left unconsumed or undisposed of by her.[6] And it may be added

[1] Berry *v.* Briant, 2 Dr. & Sm. 1.

[2] Bramhall *v.* Ferris, 14 N. Y. 44; White *v.* White, 30 Vt. 342; Rife *v.* Geyer, 59 Pa. St. 393; Wells *v.* McCall, 64 Penn. St. 207; Clute *v.* Pool, 8 Paige, 83; Doswell *v.* Anderson, 1 P. & H. (Va.) 185. [To a similar effect see Talley *v.* Ferguson, 64 W. Va. 328 Brooks *v.* Raynolds, 59 Fed. 923.]

[3] Benson *v.* Whittam, 5 Sim. 22; Leach *v.* Leach, 13 Sim. 304; Burt *v.* Herron, 66 Penn. St. 400; Rhett *v.* Mason, 18 Grat. 541; Burke *v.* Valentine, 52 Barb. 412. [Randall *v.* Randall, 135 Ill. 398; Bain *v.* Buff, 76 Va. 371; Seamonds *v.* Hodge, 36 W. Va. 304. See *supra*, § 117, note *a*.]

[4] Thorp *v.* Owen, 2 Hare, 607.

[5] Fox *v.* Fox, 27 Beav. 301; Sears *v.* Cunningham, 122 Mass. 538; Barrett *v.* Marsh, 126 Mass. 213. [Cheston *v.* Cheston, 89 Md. 465.]

[6] Pennock's Estate, 20 Penn. St. 268, overruling the opinions in Coate's

that the mere expression of a purpose for which a gift is made does not render the purpose obligatory. Even if the purpose of the gift was to benefit the donee solely, he can claim the gift without applying it to the purpose named, whether the expression be obligatory in form or not. Thus if a gift be made to a person to purchase a ring,[1] or an annuity,[2] or a house,[3] or to set him up in business,[4] or for his maintenance and education,[5] or to bind him apprentice,[6] or towards the printing of a book, the profits of which to be for his benefit,[7] the legatee may claim the money without applying, or binding himself to apply, it to the purpose specified, even although there is an express declaration that he shall not otherwise receive the money.[8] These cases go upon the principle that a court of equity will not compel a legatee or other party to do what he may undo the next moment; for as soon as such party has received his ring, or house, or annuity, he may sell it or give up his business.[9] And where money is given to trustees, and a discretion is given to them how much and in what manner they shall apply it, the *cestui que trust* has no right to more than the trustees see fit to apply.[10]

Appeal, 2 Barr, 129, and in McKonkey's Appeal, 1 Harris, 253; cases upon the same will under other names. And see Paisley's App., 70 Penn. St. 158, where the cases are discussed; Willard's App., 15 P. F. Smith, 265.

[1] Apreece *v.* Apreece, 1 Ves. & B. 364.

[2] Dawson *v.* Hearne, 1 R. & My. 606; Ford *v.* Battey, 17 Beav. 303; *Re* Brown's Will, 27 Beav. 324; Yates *v.* Compton, 2 P. Wms. 38.

[3] Knox *v.* Hotham, 15 Sim. 82. [See Adams *v.* Lopdell, 25 L. R. Ir. 311; Matter of Bogart, 60 N. Y. S. 496, 43 App. Div. 582; Matter of Crane, 12 App. Div. (N. Y.) 271, affirmed 159 N. Y. 557.]

[4] Gough *v.* Bult, 16 Sim. 45.

[5] Webb *v.* Kelley, 9 Sim. 472; Young Husband *v.* Gisborne, 1 Gall. 400; Presant *v.* Goodwin, 1 Sm. & Tr. 544; Boyne *v.* Crowther, 20 Beav. 400; Twopenny *v.* Peyton, 10 Sim. 487.

[6] Barlow *v.* Grant, 1 Vern. 255; Nevill *v.* Nevill, 2 Vern. 231; Wooldredge *v.* Stone, 4 L. J. (o. s.) Ch. 56; Burton *v.* Cook, 5 Ves. 461; Luke *v.* Kelmorey, T. & R. 207; Att. Gen. *v.* Haberdashers' Co., 1 My. & Keen, 420; Lewes *v.* Lewes, 16 Sim. 266; Noel *v.* Jones, 16 Sim. 309; Lockhart *v.* Hardy, 9 Beav. 379; Lonsdale *v.* Berchtoldt, 3 K. & J. 185.

[7] *Re* Skinner's Trusts, 1 J. & H. 102.

[8] Stokes *v.* Cheek, 29 L. J. Ch. 922.

[9] 1 Jarm. on Wills, 368 (3d Lond. ed.).

[10] *In re* Sanderson's Trusts, 3 Kay & J. 497; Beevor *v.* Partridge, 11

§ 120. If a trust is implied, it is governed in some respects by rules entirely different from the rules that govern a direct trust. Generally in a direct trust the trustee takes no beneficial interest in himself, but in an implied trust the trustee may take the whole beneficial interest for life, with a right even to expend some part of the principal fund. Thus, where an estate was devised to A. and her heirs in the fullest confidence that at her decease she would devise the property to the heirs of the testator, Lord Eldon held that A. had all the rights in the estate of a tenant for life, and so it was also held in the House of Lords.[1] But where a testator devised an estate to his wife and her heirs, under the firm conviction that she would dispose of and manage the same for the benefit of her children, it was held that the widow was not entitled to a beneficial interest as tenant for life.[2]

§ 121. Trusts sometimes arise by implication from the provisions of a will, in order to carry out the testator's intention. As where a testator leaves property to A. with the request that he shall leave it to B., a trust in favor of B. is created, which is not affected by the death of A. before the testator.[3] A direction to continue the testator's business creates a trust.[4] So where a testator gave his wife an annuity of $1000 a year, to be paid her by a trustee named, to enable her to live comfortably and to support and educate her children, and if in any year said sum were insufficient, the trustee was to pay her an additional sum not exceeding $1000. The testator gave a few legacies, and then gave the remainder of his estate to his daughters, and gave nothing to the trustee in words, but he authorized the trustee to sell certain of his real estate, and also to sell the personal

Sim. 229; Rudland *v.* Crozier, 2 De G. & J. 143; Cowper *v.* Mantell, 22 Beav. 231.

[1] Wright *v.* Atkyns, T. & R. 157; Lawless *v.* Shaw, Lloyd & Goold, Sugden, 154; Shovelton *v.* Shovelton, 32 Beav. 143.

[2] Barnes *v.* Grant, 2 Jur. (N. S.) 1127.

[3] Eddy *v.* Hartshore, 34 N. J. Eq. 409.

[4] Ferry *v.* Laible, 31 N. J. Eq. 566.

property not specifically devised. The personal property was only sufficient to pay the debts of the testator, and the trustee had no funds from which to pay the annuity to the wife. It was held by the court that the trustee took the real estate in trust by implication, that the daughters took the remainder after the trusts were executed, and that the widow could enforce the payment of the annuity by bill in equity against the trustee.[1] So if a testator direct his real estate to be sold, or if he charge it with the payment of debts or legacies, it may descend to an heir, or pass to a devisee, but the court will consider the direction as an implied declaration of trust, and enforce its execution in the hands of those to whom it has come.[2] So a condition annexed to a devise which, being broken, might work a forfeiture of the estate, has in equity been construed into an implied trust, and enforced as such; as where a house was devised to A. for life, "he keeping the same in repair," or where an estate is given to one in fee, "he paying the testator's debts within a year."[3] Sometimes it is very difficult to determine whether or no a trust ought to arise by implication, as where there is an absolute devise to C. and conjoined therewith expressions indicating a trust in E.[4] Where a testator gave his wife a life estate and then left it to her discretion to give such aid to his relations as she might deem proper and just of her own will, it was held that there was no sufficient expression of desire to create a trust.[5] So where a

[1] Walker *v.* Whiting, 23 Pick. 313; Braman *v.* Stiles, 2 Pick 460; Fay *v.* Taft, 12 Cush. 448; Watson *v.* Mayrant, 1 Rich. Ch. 449; Baker *v.* Reel, 4 Dana, 158.

[2] Pitt *v.* Pelham, 2 Freem. 134; 1 Ch. R. 283; Locton *v.* Locton, 2 Freem. 136; Auby *v.* Doyl, 1 Ch. Cas. 180; Tennant *v.* Brown, id. 180; Garfoot *v.* Garfoot, id. 35; 2 Freem. 176; Gwilliams *v.* Rowell, Hard. 204; Blatch *v.* Wilder, 1 Atk. 420; Carvill *v.* Carvill, 2 Ch. R. 301; Cook *v.* Fountain, 3 Swanst. 529; Bennett *v.* Davis, 2 P. Wms. 318; Wigg *v.* Wigg, 1 Atk. 382; Hoxie *v.* Hoxie, 7 Paige, 187; Withers *v.* Yeadon, 1 Rich. Ch. 324; McIntire Poor School *v.* Zan. Canal Co., 9 Ham. 203.

[3] Wright *v.* Wilkin, 2 B. & Sm. 232; Stanley *v.* Colt, 5 Wall. 119; Sohier *v.* Trinity Church, 109 Mass. 1; *Re* Skingley, 3 M. & Gor. 221; Gregg *v.* Coates, 23 Beav. 33. And see Kingham *v.* Lee, 15 Sim. 396.

[4] Slater *v.* Hurlebut, 146 Mass. 308, 314.

[5] Corby *v.* Corby, 85 Mo. 371.

testator gave his estate to his daughter, saying, "I enjoin upon her to make such provision for my grandchild . . . in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate," it was held that there was no trust.[1] A gift "relying" on the donee to do so and so creates no trust.[2] Giving the wife the use or proceeds of property after expenses are paid, and providing for sale and distribution after her death, creates a trust, and gives the wife merely a life right to the rents and profits.[3] An executor is always a trustee of the personalty, and the jurisdiction of equity courts over trusts gives them a right to construe wills whenever necessary to guide a trustee.[4] Whenever the duties imposed on the executors are active, and render possession of the estate reasonably necessary, they will be deemed trustees.[5] But merely calling an executor "trustee" in a will which creates no trust estate or duties will not make him a testamentary trustee.[6]

§ 122. Again, courts of equity will imply a trust from the contracts of parties, although there are no words of trust in the instrument;[7] as if a person for a valuable consideration agrees to settle a particular estate upon another,[8] or if he agrees to sell an estate to another,[9] the settlor or vendor becomes a trus-

[1] Lawrence *v.* Cooke, 104 N. Y. 632; overruling same case in 32 Hun, 126.

[2] Willets *v.* Willets, 35 Hun, 401.

[3] Hathaway *v.* Hathaway, 37 Hun, 265.

[4] Wager *v.* Wager, 89 N. Y. 161. [See infra, § 476 *a*, note.]

[5] Ward *v.* Ward, 105 N. Y. 68.

[6] *In re* Hawley, 104 N. Y. 250.

[7] Taylor *v.* Pownal, 10 Leigh, 183.

[8] Finch *v.* Winchelsea, 1 P. Wms. 277; Freemoult *v.* Dedire, id. 429; Kennedy *v.* Daley, 1 Sch. & Le. 355; Legard *v.* Hodges, 1 Ves. Jr. 477; 3 Bro. Ch. 531; 4 Bro. Ch. 421; Ravenshaw *v.* Hollier, 7 Sim. 3; Wellesley *v.* Wellesley, 4 M. & C. 561; Mornington *v.* Keane, 2 De G. & J. 293; Lyster *v.* Burroughs, 1 Dr. & W. 149; Stock *v.* Moyse, 12 Ir. Ch. 246; Lewis *v.* Madocks, 8 Ves. 150; 17 id. 48; Rowan *v.* Chute, 13 Ir. Ch. 169; *Re* McKenna, 13 Ir. Ch. 239.

[9] Ackland *v.* Gaisford, 3 Madd. 32; Wilson *v.* Clapham, 1 J. & W. 38;

tee of the fee for the purposes of the settlement, or for the purchaser. Ante-nuptial contracts in regulation of the interest that each shall have in the property of the other then owned or subsequently to be acquired are favored, and will be enforced by imposing a trust on the property.[1] (*a*) A note given by one to

Ferguson *v.* Tadman, 1 Sim. 530; Foster *v.* Deacon, 3 Madd. 394; Paine *v.* Meller, 6 Ves. 349; Harford *v.* Purrier, 1 Madd. 539; Stent *v.* Bailis, 2 P. Wms. 220; Minchin *v.* Nance, 4 Beav. 332; Robertson *v.* Skelton, 12 Beav. 260; Paramore *v.* Greenslade, 1 Sm. & Gif. 541; Revell *v.* Hussey, 2 B. & B. 287; Spurrier *v.* Hancock, 4 Ves. 667; White *v.* Nutts, 1 P. Wms. 61; Wall. *v.* Bright, 1 J. & W. 494; Tasker *v.* Small, 3 M. & Cr. 70; Pingree *v.* Coffin, 12 Gray, 288; Reed *v.* Lukens, 44 Penn. St. 200; Canning *v.* Kensworthy. 21 Ark. 9; Currie *v.* White, 45 N. Y. 822; Wimbish *v.* Montgomery Mut. Bldg. & Loan Assoc., 69 Ala. 578; Ricker *v.* Moore, 77 Maine, 292; Goodwin *v.* Rice, 26 Minn. 20; Randall *v.* Constans, 33 Minn. 329.

[1] Johnston *v.* Spicer, 107 N. Y. 185. [Colbert *v.* Rings, 231 Ill. 404; Unger *v.* Mellinger, 43 Ind. App. 524; Collins *v.* Bauman, 125 Ky. 846; Bright *v.* Chapman, 105 Me. 62; Appleby *v.* Appleby, 100 Minn. 408; Rieger *v.* Schaible, 81 Neb. 33; Cole *v.* Society, 64 N. H. 445; Birkbeck's Estate, 215 Pa. St. 323; *In re* Dellar's Estate, 124 N. W. 278 (Wis. 1910). See also Finlay *v.* Darling, [1897] 1 Ch. 719.]

(*a*) If a written proposal, in consideration of marriage, to leave certain defined real estate by will is accepted, and the marriage takes place on the faith thereof, a conveyance of that property may be decreed after the death of the person making such proposal, against all who claim under him as volunteers. Synge *v.* Synge, [1894] 1 Q. B. 466. See Thompson *v.* Tucker-Osborn, 111 Mich. 470. If the marriage is void because the woman's first husband proves to be still living, the heirs of the second husband, who lived with the woman as his wife until his death, cannot in equity obtain a reconveyance of property which she received under his ante-nuptial contract. Ogden *v.* McHugh, 167 Mass. 276. A husband who seeks to enforce against the wife an ante-nuptial agreement in his favor will be required to prove complete good faith in the making of the contract. Graham *v.* Graham, 143 N. Y. 573; Colbert *v.* Rings, 231 Ill. 404; Rieger *v.* Schaible, 81 Neb. 33; Maze's Ex'rs *v.* Maze, 99 S. W. 336 (Ky. 1907); Birkbeck's Estate, 215 Pa. St. 323; *In re* Dellar's Estate, 124 N. W. 278 (Wis. 1910).

In Colbert *v.* Rings, 231 Ill. 404, it was said that "if no provision is made for the wife, or if the provision made for her is disproportionate to the property of the intended husband, taking into consideration the rights given her by the law in the property of her husband in the event of his death prior to her death, then a presumption exists that the execution of the instrument was brought by a designed concealment on the part of the husband of the amount of

his wife during coverture will be enforced as a trust, except as against creditors.[1] In case of a savings bank, where, after payment of expenses, the entire fund and its accumulations go to the depositors, the deposits are held in trust for the depositors.[2] Where money is deposited in a commercial bank, no trust in general arises, but only a relation of debtor and creditor; when, however, the money is paid into the bank for a specified purpose other than that of a loan to the bank, a fiduciary relation is created, and some cases go so far as to hold that after the bank has gone into insolvency, money so paid may be recovered from the assignee in preference to the general creditors.[3](a) Where

[1] Templeton *v.* Brown, 86 Tenn. 50.

[2] Johnson *v.* Ward, 2 Brad. (Ill.) 261. [Cogswell *v.* Bank, 59 N. H. 43; Abbott *v.* Bank, 68 N. H. 290, 292; Osborn *v.* Byrne, 43 Conn. 155; Bunnell *v.* Sav. Society, 38 Conn. 203; *In re* Newark Sav. Inst., 28 N. J. Eq. 552; 2 Morse, Banks & Banking, § 617.]

[3] See Parsons's edition of Morse on Banks & Banking, §§ 215, 565 c.

property owned by him. In that event those claiming adversely to the wife have the burden of showing by the proof that at the time she executed the agreement she had full knowledge of the nature, character, and value of the intended husband's property, or that the circumstances were such that she reasonably ought to have had such knowledge."

In Nance *v.* Nance, 84 Ala. 375, an ante-nuptial settlement was held not voidable by creditors, even though the husband was then insolvent and intended to defraud them, it not being shown that the wife knew of his insolvency and fraudulent intention. But see Flory *v.* Houck, 186 Penn. St. 263; Keady *v.* White, 168 Ill. 76. Actual fraud is necessary to avoid such a settlement. Clark *v.* McMahon, 170 Mass. 91; Hussey *v.* Castle, 41 Cal. 239.

In an article upon Irrevocable Trusts, in 11 Jurid. Rev. 55, 65, A. M. Hamilton, Esq., says of the law of Scotland: "Of the obligatory and irrevocable nature of an ante-nuptial contract there is no room for doubt; but a post-nuptial settlement admittedly is less onerous, and in certain aspects is no substitute for an ante-nuptial contract. On this account it has been attempted to treat such contracts as equivalent in a question of revocability to a voluntary trust. But it may now be considered settled that while in a question with creditors it may be right to do so, *intra familiam* they have all the force of ante-nuptial contracts. A unilateral deed may be so referred to in a marriage contract as to become a part of it."

(a) The relation between a commercial bank and a depositor is usually that of debtor and creditor. Unless by a special arrangement

the plaintiff placed certain money in the hands of the intestate to be repaid to him on her death, only the relation of debtor and creditor was created, and the plaintiff could not be preferred to other creditors.[1]

§ 123. A direction to trustees that a certain person shall be employed as agent and manager for the trustees if there should

See Peak *v.* Ellicott, 30 Kans. 156; Ellicott *v.* Barnes, 31 Kans. 170. And see also on this general subject Nat'l Bank *v.* Ellicott, 31 Kans. 173. [See *infra*, § 828, notes.]

[1] Kershaw *v.* Snowden, 36 Ohio St. 183.

the bank agrees to hold intact the funds deposited, it has the right to mix them with other funds and to use them in its business in all respects as its own property. Its obligation is merely to return a like amount to the depositor. Citations, *infra*, this note.

The fact that the depositor is known to be a trustee and deposits as such or in some other representative capacity does not effect a change in this relation unless the bank has notice that a general deposit is in breach of the trust. Officer *v.* Officer, 120 Iowa 389; Paul *v.* Draper, 158 Mo. 197.

In some States an official having the custody of public funds is forbidden by law to make a general deposit even as trustee. A bank receiving such funds with knowledge that they are public funds, and mixing them with its general funds or paying them out in its business, becomes liable as for a breach of trust. Fogg *v.* Bank, 80 Miss. 750; Board or Com'rs *v.* Strawn, 157 Fed. 49; City of Lincoln *v.* Morrison, 64 Neb. 822; Hill *v.* Miles, 83 Ark. 486. The same would doubtless be true if the terms of a trust forbade the trustee to make general deposits in banks, provided the bank receiving the funds on general deposit was informed of this limitation upon the trustee's power. Mere knowledge that he is a trustee would not be sufficient notice of such a limitation, and description of the depositor as trustee does not make his claim against the bank any different from that of any other general depositor. Officer *v.* Officer, 120 Iowa, 389; Paul *v.* Draper, 158 Mo. 197; citations, *infra*.

The bank owes no duty to the *cestui* except the negative one of not participating in a breach of trust. It must honor all checks drawn by the trustee in proper form and is not required to inquire into the application of the funds. American Trust & Banking Co. *v.* Boone, 102 Ga. 202; National Bank *v.* Ins. Co. 104 U. S. 54; Boyle *v.* No. Western Bank, 125 Wis. 498; Interstate Nat. Bank *v.* Claxton, 97 Tex. 569; Manhattan Bank *v.* Walker, 130 U. S. 267; Duckett *v.* Mechanics Bank, 86 Md. 400, 412; Gray *v.* Johnson, 3 Eng. & Ir. App. Cas. 1; Penn. Title, etc. Co.

be occasion for such services gives no interest in the estate to such person, nor will any kind of trust be implied which equity

v. Meyer, 201 Pa. St. 299; First Nat. Bank *v.* Valley State Bank, 60 Kan. 621; Nehawka Bank *v.* Ingersoll, 2 Neb. unofficial, 617, 89 N. W. 618. See also Cunningham *v.* Bank of Nampa, 13 Idaho, 167, 10 L. R. A. (N. S.) 706.

"The mere payment of the money to or upon the check of the depositor does not constitute a participation in an actual or intended misappropriation by the fiduciary, although his conduct or course of dealing may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Such circumstances do not impose upon the bank the duty or give it the right to institute any inquiry into the conduct of its customer, in order to protect those for whom the customer may hold the fund, but between whom and the bank there is no privity." Interstate Nat. Bank *v.* Claxton, 97 Tex. 569.

But the bank cannot accept from the depositor, or appropriate without his consent, part of the trust account in settlement or payment of the depositor's private indebtedness to the bank. Such conduct would be participation in the breach of trust, and would give the *cestui* the right to treat the bank as trustee for the amount of funds thus misappropriated. Knowledge of the nature of the funds is sufficient notice that the trustee has no right to use them for the payment of his private debts. National Bank *v.* Ins. Co., 104 U. S. 54; Am. Trust & Banking Co. *v.* Boone, 102 Ga. 202; Farmers' & Traders' Bank *v.* Fidelity & Dep. Co., 108 Ky. 384; Jeffray *v.* Towar, 63 N. J. Eq. 530; Murphy *v.* Farmers', etc. Bank, 131 Cal. 115; State Bank *v.* McCabe, 135 Mich. 479; First Nat. Bank *v.* Wakefield, 148 Cal. 558; Globe Sav. Bank *v.* Nat. Bank of Commerce, 64 Neb. 413.

Where the bank, though not directly receiving the trust funds or applying them on an account owed by the trustee in a different capacity, derives a benefit from a misuse of the trust funds by transferring them on the order or check of the trustee to the credit of another depositor whose account at the time was overdrawn, whether or not the bank is a participant in the breach of trust depends upon whether or not the bank knew that this use of the funds was a breach of trust. This must necessarily be so if the bank knew that the purpose of the transfer was to reduce the amount of the overdraft. The bare fact that this benefit to the bank is a result of the misuse of the funds is not enough. Gray *v.* Johnson, L. R. 3 H. L. 1; Manhattan Bank *v.* Walker, 130 U. S. 267. See also Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243. If the bank participates in a misappropriation of the trust funds, the *cestui* has a remedy directly against the bank. Munnerlyn *v.* Augusta S. Bank, 88 Ga. 333; 94 Ga. 356. The trustee also may recover the funds, notwithstanding his own fraud. Mansfield *v.* Wardlow (Tex. Civ. App. [1906]),

can enforce;[1] and so when the trustees were recommended to employ a receiver.[2]

[1] Finden *v.* Stephens, 2 Phill. 142.

[2] Shaw *v.* Lawless, Ll. & Goo., Sugden, 154; 5 Cl. & Fin. 129; Ll. & Goo., Plunket, 559. In Tibbits *v.* Tibbits, 19 Ves. 656, a testator made a devise to his son, recommending him to continue A. & B. in the occupation of their respective farms so long as they managed them well; and it was held to create a trust for them. And see Quayle *v.* Davidson, 12 Moore P. C. 268. In Hibbert *v.* Hibbert, 3 Mer. 681, a testator directed that H. should be appointed receiver of his estates in Jamaica, adding that he intended the appointment to benefit H. in a pecuniary point of view; and it was held that H. was entitled to be appointed agent, receiver, and consignee of said estates without giving security. And so when a testator appointed an auditor with a remuneration, it was held that the trustees could not remove him, there being no imputation upon his conduct. Williams *v.* Corbet, 8 Sim. 349. The case of Shaw *v.* Lawless was a very severely contested case. Mr. Sugden, Chancellor for Ireland, was of opinion that the agent was entitled to the place; but he was overruled, and the conclusion arrived at stated in the text. From the cases cited in this note it would appear that the question is not entirely settled; or it may be that every such provision must depend upon the words and intention of each particular will.

91 S. W. 859; Chaves *v.* Lucero, 13 N. M. 368.

It has been held in several cases that a bank is not liable to the beneficial owner of trust funds from the mere fact that it places to the credit of the trustee's personal account, funds which it knows belong to him as trustee, where the depositor had no separate account as trustee. Such a deposit gives the bank no reason to believe that the trustee is acting or intends to act dishonestly. Batchelder *v.* Central Nat. Bank, 188 Mass. 25; Safe Dep. & Tr. Co. *v.* Bank, 194 Pa. St. 334; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243. But see Duckett *v.* Mechanics' Bank, 86 Md. 400; Barroll *v.* Forman, 88 Md. 188, 201. But it would usually be otherwise if he has an account as trustee. Am. Bonding Co. *v.* Mechanics' Bank, 97 Md. 598; Batchelder *v.* Central Nat. Bank. 188 Mass. 25 (*semble*); Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243 (*semble*); Havana Cent. R. Co. *v.* Knickerbocker Tr. Co., 119 N. Y. S. 1035 (App. Div.).

When funds held in trust are deposited to the individual account of the trustee and the bank has no notice of the trust nature of the funds, the weight of authority holds that the lien of the bank attaches to them and that the bank has the right to appropriate the funds to the payment of any debt owed to it by the depositor. Thomson *v.* Clydesdale Bank, [1893] A. C. 282, 69 L. T. 156; Union Bank *v.* Murray-Aynsley, [1898] A. C. 693; London, etc.

Bank *v.* Hanover Bank, 36 N. Y. App. Div. 487; Meyers *v.* N. Y. County Bank, 36 N. Y. App. Div. 482; Smith *v.* Des Moines Nat. Bank, 107 Iowa, 620; Spaulding *v.* Kendrick, 172 Mass. 71; School District *v.* First Nat. Bank, 102 Mass. 174; 1 Morse, Banks & Banking (4th ed.) § 326 (16); see also Reynes *v.* Dumont, 130 U. S. 354. But see Knight *v.* Fisher, 58 Fed. 991; Boyle *v.* No. Western Bank, 125 Wis. 498; Hatch *v.* National Bank, 147 N. Y. 184.

When a note or draft is sent to a bank for collection, the paper itself is held in trust by the bank; but the best opinion is that the moment the bank receives the proceeds of the note or draft, the relation of trust is changed to that of debtor and creditor if the bank is then solvent, for the reason that the presumed understanding of the parties is that the bank shall be allowed to mix the proceeds with its other funds. Freeman's Bank *v.* Nat. Tube Co., 151 Mass. 413, 418; Hallam *v.* Tillinghast, 19 Wash. 20, 27; Bruner *v.* Bank, 97 Tenn. 540; Akin *v.* Jones, 93 Tenn. 353; Morse, Banks & Banking (4th ed.) § 185; 9 Harvard Law Rev. 428; 12 Harv. Law Rev. 572. See *contra*, State *v.* Bank of Commerce, 54 Neb. 725; McLeod *v.* Evans, 66 Wis. 401 (overruled on another point).

The relation of safe-deposit companies to those who hire boxes and have keys thereto is not one of trustee and *cestui*. Roberts *v.* Stuyvesant Safety Dep. Co., 123 N. Y. 57. Property so deposited cannot be reached by trustee process, but equity will give the necessary assistance to enable a creditor to reach it by direct attachment. See 9 Harvard Law Rev. 131, 135.

CHAPTER V.

RESULTING TRUSTS.

§ 124. Creation and character of a resulting trust.
§ 125. Divisions of this kind of trust.
§ 126. Resulting trust where the purchase-money is paid by one, and deed is taken to another. See § 142.
§ 127. Resulting trust where trust funds are used to purchase property, and title taken in the name of another.
§ 128. In what cases a trust results, and when a trust does not result. See §§ 143, 156, 160.
§ 129. When a person uses his fiduciary relation to obtain an interest in, or affecting the trust property.
§ 130. Same rules apply to personal property unless it is of a perishable nature.
§ 131. Where a resulting trust will not be permitted as against law.
§ 132. Rules as to a resulting trust.
§§ 133, 134. Time and circumstances in the creation of a resulting trust.
§ 135. Parol evidence as to a purchase by an agent not admissible.
§ 136. No resulting trust in a joint purchase.
§§ 137, 138. Resulting trusts may be established by parol.
§ 139. May be disproved by parol — the burden of proof.
§ 140. Cannot be changed by parol after they arise.
§ 141. Will not be enforced after a great lapse of time.
§ 142. Resulting trusts under the statutes of New York and other States.
§ 143. A resulting trust does not arise if the title is taken in the name of wife or child.
§ 144. What persons it embraces.
§ 145. Doubts and overruled cases.
§ 146. When it will be presumed to be an advancement.
§ 147. The presumption may be rebutted.
§ 148. Is rebutted by fraud in the wife or child.
§ 149. Creditors may avoid such advancements. When and how.
§ 150. A resulting trust from the conveyance of the legal title without the beneficial interest.
§ 151. Every case must depend upon its particular writing and circumstances.
§ 152. Instances and illustrations.
§§ 153, 154. If there is an intention to benefit the donee, there is no resulting trust.

§ 155. Gifts to executors may create resulting trusts.
§ 156. Resulting trusts do not arise upon gifts to charitable uses.
§ 157. A gift *upon* trust or to a *trustee* and no trust declared.
§ 158. Always a matter of intention to be gathered from the whole instrument.
§ 159. Where a special trust fails it will result.
§ 160. Where a special trust fails from illegality or lapses, it results.
§ 160 *a*. To whom it results.
§§ 161, 162. Whether a trust results from a voluntary conveyance without consideration.
§ 163. Equity does not favor such conveyances; they may be void for fraud, but no trust results.
§ 164. Voluntary conveyances to wife or child.
§ 165. No trust results from a fraudulent transaction.
§ 165 *a*. How a resulting trust is executed.

§ 124. It has been seen from the preceding chapters that trusts are created by the express dispositions of parties, or they are implied by courts from the words used in such express dispositions. There is another class of trusts *which result in law* from the acts of parties, whether they intended to create a trust or not, and they are aptly designated as resulting trusts. They are sometimes called presumptive trusts, because the law presumes them to be intended by the parties from the nature and character of their transactions with each other, although the general foundation of this kind of trusts is the natural equity that arises when parties do certain things. Thus, if one pays the purchase-money of an estate, and takes the title-deed in the name of another, in the absence of all evidence of intention, the law presumes a trust, from the natural equity that he who pays the money for property ought to enjoy the beneficial interest. The statute of frauds does not affect the creation of these trusts, for the reason that, where there is no evidence of intention, it could not be expected that a declaration of intention in writing, properly signed, would be made or could be produced. (*a*)

(*a*) Nor will proof of a parol trust which is unenforceable because of the statute of frauds and which the title holder declines to recognize prevent a trust from resulting unless the agreement has the effect of showing that the intention of the purchaser was that the bene-

§ 125. Lord Chancellor Hardwicke said that a resulting trust arising by operation of law existed: (1) when an estate was purchased in the name of one person and the consideration came from another; (2) when a trust was declared only as to part and nothing was said as to the residue, that residue remaining undisposed of, remained to the heir-at-law; and he observed that he did not know of any other instances, unless in case of fraud.[1] In this chapter resulting trusts will be examined under five heads; (1) when the purchaser of an estate pays the purchase money and takes the title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name; (3) where an estate is conveyed upon trusts, which fail, or are not declared, or are illegal; (4) when the legal title to property is conveyed, and there is no reason to infer that it was the

[1] Lloyd *v.* Spillett, 2 Atk. 150. In 2 Lomax, Dig. 200, resulting trusts are considered under the name of implied trusts, as arising: (1) out of the equitable conversion of land into money or money into land; (2) where an estate is purchased in the name of one person and the consideration is paid by another; (3) where there is a conveyance of land without any consideration or declaration of uses; (4) where a conveyance of land is made in trust as to part and the conveyance is silent as to the residue; (5) where a conveyance is made upon such trusts as shall be appointed, and there is default of appointment; (6) where a conveyance is made upon particular trusts which fail of taking effect; (7) where a purchase is made by a trustee with trust-money; (8) where a purchase of real estate is made by a partner in his own name with partnership funds; (9) where a renewal of a lease is obtained by a trustee or other person standing in a fiduciary relation; (10) where purchases are made of outstanding claims upon an estate by trustees or some of the tenants thereof connected by privity of estate with others having an interest therein; (11) where fraud has been committed in obtaining the conveyance; (12) where a purchase has been made without a satisfaction of the purchase-money to the vendor; (13) where a joint purchase has been made by several, and payments of the purchase-money to the vendor have been made beyond their proportion.

ficial interest should pass to the grantee of the legal title; and the fact that the enforcement of a resulting trust amounts to substantially the same thing as enforcing the express parol trust which is void under the statute of frauds is no objection. Long *v.* Mechem, 142 Ala. 405; Linnel *v.* Hudson, 59 S. C. 283.

intention to convey the beneficial interest; and (5) where voluntary conveyances are made, or conveyances without consideration.

§ 126. Where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration or a part of it is given or paid by another, not in the way of a loan to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction (unless it would be enforcing a fraud to raise a resulting trust [1]), and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds.[2] (*a*) In a

[1] Almond *v.* Wilson, 75 Va. 626. [See Keely *v.* Gregg, 33 Mont. 216, 225; Derry *v.* Fielder, 216 Mo. 177.]

[2] Willis *v.* Willis, 2 Atk. 71; Lloyd *v.* Spillett, 2 Atk. 150; Rider *v.* Kidder, 10 Ves. 360; *Ex parte* Houghton, 17 Ves. 253; Trench *v.* Harrison, 17 Sim. 111; Redington *v.* Redington, 3 Ridg. 177; Crop *v.* Norton, 9 Mod. 235; Barn. 184; 2 Atk. 75; Hungate *v.* Hungate, Toth. 120; *Ex parte* Vernon, 2 P. Wms. 549; Ambrose *v.* Ambrose, 1 id. 321; Woodman *v.* Morrel, 2 Freem. 33, 123; Murless *v.* Franklin, 1 Swanst. 17; Finch *v.* Finch, 15 Ves. 50; Grey *v.* Grey, 2 Swanst. 597; Finch, 340; Groves *v.* Groves, 3 Y. & J. 170; Lade *v.* Lade, 1 Wils. 21; May *v.* Steele, 2 V. & B. 390; Lever *v.* Andrews, 7 Bro. P. C. 288; Pelly *v.* Maddin, 21 Vin. Ab. 498; Smith *v.* Camelford, 2 Ves. Jr. 712; Anon. 2 Vent. 361; Withers *v.* Withers, Amb. 151; Prankerd *v.* Prankerd, 1 S. & S. 1; Howe *v.* Howe, 1 Vern. 415; Clarke *v.* Danvers, 1 Ch. Cas. 310; Goodright *v.* Hodges, 1 Watk. Cop. 227; Lofft, 230; Smith *v.* Baker, 1 Atk. 385; Bartlett *v.* Pickersgill, 1 Eden, 515; Rothwell *v.* Dewees, 2 Black. 613; Buck *v.* Pike, 11 Maine, 9; Baker *v.* Vining, 30 id. 126; Kelley *v.* Jenness, 50 id. 455; Page *v.* Page, 8 N. H. 187; Hall *v.* Young, 37 id. 134; Pembroke *v.* Allenstown, 21 id. 107; Tebbetts *v.* Tilton, 31 id 283; Dow *v.* Jewell, 18 id. 340; Tyford *v.* Thurston, 16 id. 399; Hopkinson *v.* Dumas, 42 id. 296; Hall *v.* Congdon, 56 id. 270; Pinney

(*a*) Where upon purchase by a trustee by way of investment title was by mistake conveyed to the *cestui* it was held that a trust resulted in favor of the trustee, who in turn held in trust for the *cestui*. The express trust was not terminated by the conveyance of the legal title to the *cestui*, since it happened by mistake. *In re* Spencer, 128 Fed. 654. Where one furnishes the entire consideration and takes title in the names of himself and another, a trust will result as to the moiety of the legal title held by the other unless a different intention is shown. Ward *v.* Ward, 59 Conn. 188.

Minnesota case the court said that no resulting trust arose where land was bought by A. in the name of B., and B. sold the prop-

v. Fellows, 15 Vt. 525; Dewey *v.* Long, 25 id. 564; Clark *v.* Clark, 43 id. 685; Peabody *v.* Tarbell, 2 Cush. 232; Livermore *v.* Aldrich, 5 id. 435; Root *v.* Blake, 14 Pick. 271; McGowan *v.* McGowan, 14 Gray, 121; Kendall *v.* Mann, 11 Allen, 15; Powell *v.* Monson & Brimfield Manuf. Co., 3 Mason, 362; Hoxie *v.* Carr, 1 Sumn. 187; Dean *v.* Dean, 6 Conn. 285; Jackson *v.* Sternberg, 1 Johns. Cas. 153; 1 Johns. 45; Jackson *v.* Matsdorf, 11 id. 91; Boyd *v.* McLean, 1 Johns. Ch. 582; Botsford *v.* Burr, id. 408; Steere *v.* Steere, 5 id. 1; White *v.* Carpenter, 2 Paige, 218; Kellogg *v.* Wood, 4 id. 579; Foote *v.* Colvin, 3 Johns. 218; Jackson *v.* Morse, 16 id. 197; Guthrie *v.* Gardner, 19 Wend. 414; Forsyth *v.* Clark, 3 id. 638; Partridge *v.* Havens, 10 Paige, 618; Jackson *v.* Mills, 13 Johns. 463; Lounsbury *v.* Purdy, 16 Barb. 376; Jackson *v.* Woods, 1 Johns. Cas. 163; Gomez *v.* Tradesman's Bank, 4 Sandf. S. C. 106; Hempstead *v.* Hempstead, 2 Wend. 109; Hopk. 288; Harder *v.* Harder, 2 Sand. Ch. 17; Brown *v.* Cheney, 59 Barb. 628; Union College *v.* Wheeler, 59 Barb. 585; McCartney *v.* Bostwick, 32 N. Y. 53; Depeyster *v.* Gould, 2 Green, Ch. 480; Howell *v.* Howell, 15 N. J. Eq. 75; Stratton *v.* Dialogue, 16 id. 70; Johnson *v.* Dougherty, 18 id. 406; Stevens *v.* Wilson, 18 id. 447; Cutler *v.* Tuttle, 19 id. 558; Stewart *v.* Brown, 2 Ser. & R. 461; Jackman *v.* Ringland, 4 Watts & S. 149; Strimpfler *v.* Roberts, 18 Penn. St. 283; Edwards *v.* Edwards, 39 id. 369; Harrold *v.* Lane, 55 id. 268; Nixon's App., 63 id. 279; Wallace *v.* Duffield, 2 Serg. & R. 521; Lloyd *v.* Carter, 5 Harris, 216; Beck *v.* Graybill, 4 Casey, 66; Kisler *v.* Kisler, 2 Watts, 323; Lynch *v.* Cox, 11 Harris, 265; Newells *v.* Morgan, 2 Harr. 225; Hollis *v.* Hollis, 1 Md. Ch. 479; Dorsey *v.* Clarke, 4 Har. & J. 551; Glenn *v.* Randall, 2 Md. Ch. 221; Farringer *v.* Ramsey, 2 Md. 365; Cecil Bank *v.* Snively, 23 Md. 253; Neal *v.* Haythrop, 3 Bland, 551; Bank of U. S. *v.* Carrington, 7 Leigh, 566; Henderson *v.* Hoke, 1 Dev. & Bat. Eq. 119; McGuire *v.* McGowen, 4 Des. 491; Dillard *v.* Crocker, Speers's Eq. 20; Williams *v.* Hollingsworth, 1 Strob. Eq. 103; Garrett *v.* Garrett, 1 Strob. Eq. 96; Kirkpatrick *v.* Davidson, 2 Kelly, 297; Taliaferro *v.* Taliaferro, 6 Ala. 404; Foster *v.* Trustees of the Athenæum, 3 Ala. 302; Caple *v.* McCollum, 27 Ala. 461; Anderson *v.* Jones, 10 Ala. 401; Mahorner *v.* Harrison, 13 Sm. & M. 65; Walker *v.* Burngood, id. 764; Powell *v.* Powell, 1 Freem. Ch. 134; Leiper *v.* Hoffman, 26 Miss. 615; Runnells *v.* Jackson, 1 How. (Miss.) 358; Harvey *v.* Ledbetter, 48 Miss. 95; McCarroll *v.* Alexander, 48 Miss. 128; Hall *v.* Sprigg, 7 Mar. (La.) 243; Gaines *v.* Chew, 2 How. 619; McDonough Ex'rs *v.* Murdock, 15 How. 367; Tarpley *v.* Poaze, 2 Tex. 139; Long *v.* Steiger, 8 Tex. 460; Oberthier *v.* Strand, 33 Tex. 522; McGuire *v.* Ramsey, 4 Eng. 519; Ensley *v.* Ballentine, 4 Humph. 233; Thomas *v.* Walker, 5 Humph. 93; Smitheal *v.* Gray, 1 Humph. 491; Click *v.* Click, 1 Heisk. 607; Gass *v.* Gass, id. 613; Harris *v.* Union Bank, 1 Cold. 152; Perry *v.* Head, 1 A. K. Marsh 47; Chaplin *v.* McAfee, 3 J. J. Marsh. 513; Letcher *v.* Letcher, 4 id. 592; Doyle *v.* Sleeper, 1 Dana, 536; Stark *v.*

erty in violation of his verbal promise to transfer to A., remarking that a resulting trust could arise only on a conveyance of land, not on a promise to convey. This is clearly too narrow a meaning to give the law, and the decision on the facts did not require it, as the court allowed A. to recover from B. the pur-

Canady, 3 Litt. 399; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Williams *v.* Van Tuyl, 2 id. 336; McGovern *v.* Knox, 21 id. 551; Elliott *v.* Armstrong, 2 Blackf. 198; Jennison *v.* Graves, id. 444; Rhodes *v.* Green, 36 Ind. 11; Milliken *v.* Ham, id. 166; Church *v.* Cole, id. 35; Hampson *v.* Fall, 64 id. 382; Smith *v.* Sackett, 5 Gilm. 534; Prevo *v.* Walters, 4 Scam. 33; Bruce *v.* Roney, 18 Ill. 67; Seaman *v.* Cook, 14 id. 501; Williams *v.* Brown, id. 200; Nickols *v.* Thornton, 16 id. 113; Latham *v.* Henderson, 47 id. 185; Rankin *v.* Harper, 23 Mo. 579; Paul *v.* Chouteau, 14 Mo. 580; Kelly *v.* Johnson, 28 id. 249; Baumgartner *v.* Guessfeld, 38 id. 36; Johnson *v.* Quarles, 46 id. 423; Russell *v.* Lode, 1 Iowa, 566; McLennan *v.* Sullivan, 13 id. 521; Tinsley *v.* Tinsley, 52 id. 14; Ragan *v.* Walker, 1 Wis. 527; Irvine *v.* Marshall, 7 Minn. 286; Millard *v.* Hathaway, 27 Cal. 119; Bayles *v.* Baxter, 22 Cal. 575; Case *v.* Codding, 38 id. 191; Wilson *v.* Castro, 31 id. 420; Jenkins *v.* Frink, 30 id. 586; Settembre *v.* Putnam, 30 id. 490; Frederick *v.* Haas, 5 Nev. 386; Philips *v.* Crammond, 2 Wash. C. C. 441; Harden *v.* Darwin & Pulley, 66 Ala. 55; Lewis *v.* Building & Loan Assoc., 70 id. 276; Rose *v.* Gibson, 71 id. 35; Shelby *v.* Tardy, 84 id. 327; Shelton *v.* A. & T. Co., 82 id. 315; Barroilhet *v.* Anspacher, 68 Cal. 116; Murphy *v.* Peabody, 63 Ga. 522; Cottle *v.* Harrold, 72 id. 830; McNamara *v.* Garrity, 106 Ill. 384; Springer *v.* Springer, 114 id. 550; Harris *v.* McIntyre, 118 id. 275; Donlin *v.* Bradley, 119 id. 420; Bush *v.* Stanley, 122 id. 406; Cooper *v.* Cockrum, 87 Ind. 443; Boyer *v.* Libey, 88 id. 235; Witts *v.* Horney, 59 Md. 584; Forrester *v.* Moore, 77 Mo. 651; Bear *v.* Koenigstein, 16 Neb. 65; Gogherty *v.* Bennett, 37 N. J. Eq. 87; Syckle *v.* Kline, 34 id. 332; Ramage *v.* Ramage, 27 S. C. 39; Sexton *v.* Hollis, 26 S. C. 231; Richardson *v.* Mounce, 19 id. 477; *Ex parte* Trenholm, id. 126, — an interesting case because of the decision that money drawn from a fund belonging to A. and B. together was to be considered as taken from the part that belonged to A., and no trust should result to B. in the land bought by the check, it appearing that on settlement of all the accounts B. was indebted to A.; Laws *v.* Law, 76 Va. 527; see also Murray *v.* Sell, 23 W. Va. 473; Heiskell *v.* Powell, 23 W. Va. 717. The rule applies where money is advanced to enable a former owner to *redeem* from a tax sale. Eames *v.* Hardin, 111 Ill. 645. [Champlin *v.* Champlin, 136 Ill. 309; Summers *v.* Moore, 113 N. C. 394; Taylor *v.* Miles, 19 Or. 550, 553; Barger *v.* Barger, 30 Or. 268; Walston *v.* Smith, 70 Vt. 19; Beloate *v.* Hennessee, 81 Ark. 478; Long *v.* Mechem, 142 Ala. 405; C. B. & Q. R. Co. *v.* First Nat. Bank, 58 Neb. 548; Hickson *v.* Culbert, 19 S. D. 207. See Marie M. E. Church *v.* Trinity Church, 205 Ill. 601.]

chase-money as benefit received by B. voluntarily from A.[1] The burden is of course upon the one claiming the existence of the trust to establish the facts upon which it rests by clear and satisfactory evidence.[2] In New York and Wisconsin there are statute provisions that an absolute deed made with consent of the one who pays the purchase-money shall vest the title in the grantee[3] against the person paying the money;[4] (*a*) but with

[1] Johnson *v.* Krassin, 25 Minn. 118, see § 226.

[2] Bibb *v.* Hunter, 79 Ala. 351; Carter Bros. *v.* Challen, 83 id. 135; Reynolds *v.* Caldwell, 80 Ala. 232.

[3] Schultze *v.* New York City, 103 N. Y. 111; [Real Property Law, § 94, IV Consol. Stat. (1909) p. 3390.] Campbell *v.* Campbell, 70 Wis. 311; R. S. § 2077; Skinner *v.* James, 69 id. 605. And the burden is on the person claiming the trust to disprove assent. Knight *v.* Leary, 54 Wis. 459. Even though the grantee subsequently acknowledges the trust in writing, it will not avail against one who has taken the land from the grantee for value, or even against his assignees in insolvency. Stebbins *v.* Morris, 23 Blatch. (U. S.) 181, — a case construing the New York statutes, the object of which is to prevent secret trusts; and for this purpose they destroy trusts resulting from the payment of purchase-money when the deed is made to another with consent of the payor, except that every such conveyance is deemed fraudulent as against the creditors of the person paying the purchase-money until fraudulent intent is disproved.

[4] As against his creditors the transaction is presumed fraudulent until fraudulent intent is disproved, and a trust results in their favor. Niver *v.* Crane, 98 N. Y. 40. [See also the statutes cited above and in note *a*.]

(*a*) There are similar provisions also in the statutes of Kentucky, Michigan and Minnesota, and in Indiana and Kansas, with the exception in the last two States that a trust may result where it affirmatively appears that there was an agreement without fraudulent intent, that the grantee was to hold the land or some interest therein in trust for the party paying the consideration. Ky. Statutes, (1909) §§ 2050-2051; Mich. Compiled Laws, (1897) §§ 8835–8837; Minn. Rev. Laws, (1905) §§ 3245–3247; Indiana Statutes, (Burns, 1908) §§ 4017–4019; Kan. Gen. Statutes, (1909) §§ 9699–9701. For decisions interpreting these statutes see Hanrion *v.* Hanrion, 73 Kan. 25 (holding that the statute does not apply to mortgages); Chantland *v.* Bank, 66 Kan. 549; Holliday *v.* Perry, 38 Ind. App. 588; Julius Locheim & Co. *v.* Eversole, 93 S. W. 52 (Ky. 1906); McConnell *v.* Gentry, 99 S. W. 278 (Ky. 1907); Hamilton *v.* Wickson, 131 Mich. 71; Minneapolis, etc. R. Co. *v.* Lund, 91 Minn. 45, 49 (holding that the statute does not apply to executory contracts for purchase of land); Anderson *v.* Anderson, 81 Minn. 329; Stitt *v.* Rat Portage Co., 96 Minn. 27;

this exception the clear result of all the cases is, that a trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the name of others, without that of the purchaser, whether in one or several, whether jointly or successively, results to the person who advanced the purchase-money,[1] or on whose behalf it is advanced; as where the money is advanced by way of loan to the purchaser, and the title is taken in the name of the lender as security, a trust results to the purchaser.[2] If only part of the purchase-money is paid by a third person, a trust may result *pro tanto*[3] (*a*). This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase-money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes,[4] and this rule is vindicated by the experience of mankind.[5] Where the purchase-money is not already a trust fund it must be paid *at the time* the purchase is made in order to create a resulting trust proper (that is, the trust must arise at the time of the transfer of the title, and cannot be raised by the subsequent application

[1] By Lord Ch. B. Eyre in Dyer *v.* Dyer, 2 Cox, 92.

[2] Bates *v.* Kelly, 80 Ala. 142. [Towle *v.* Wadsworth, 147 Ill. 80; Miller *v.* Miller, 101 Md. 600; Borrow *v.* Borrow, 34 Wash. 684; Hirshfield *v.* Howard, 59 S. W. 55 (Tex. Civ. App. 1900); Stitt *v.* Rat Portage Co., 96 Minn. 27; Herlihy *v.* Coney, 99 Me. 469; Holliday *v.* Perry, 38 Ind. App. 588; Pittock *v.* Pittock, 15 Idaho, 426.]

[3] Somers *v.* Overhulser, 67 Cal. 237; Lipscomb *v.* Nichols, 6 Col. 290.

[4] 2 Story's Eq. Jur. § 1201; Glidewell *v.* Shaugh, 26 Ind. 319; Bostleman *v.* Bostleman, 24 N. J. Eq. 103.

[5] Edwards *v.* Edwards, 39 Penn. St. 369. [Smithsonian Institution *v.* Meech, 169 U. S. 398, 407.]

Leary *v.* Corvin, 181 N. Y. 222; Fagan *v.* McDonnell, 100 N. Y. S. 641, 115 App. Div. 89; Meier *v.* Bell, 119 Wis. 482; Scott *v.* Holman, 117 Wis. 206.

(*a*) That a general contribution towards the purchase-money, without an understanding that it shall be represented by an "aliquot" or definite interest in the property, will not raise a resulting trust *pro tanto*, see *infra*, § 132 and note.

of money of another to the satisfaction of the unpaid purchase-money [1]); and it must also be borne in mind that if one person advance the money by way of *loan* to the vendee, no trust results.[2] Analogous to these cases where the money is paid to the vendor by or on behalf of some one other than the vendee of the legal title, are cases in which the deed is executed without intent of a gift or sale on time, and the purchase-money is not paid. In effect, the vendor himself pays the purchase-money in such cases and a trust results to him.[3] These resulting trusts cannot affect a *bona fide* purchaser without notice.[4] (*a*)

§ 127. If a person having a fiduciary character purchase property with the fiduciary funds in his hands, and take the title in his own name, a trust in the property will result to the *cestui que trust*, or other person entitled to the beneficial interest in the fund with which the property was paid for.[5] (*b*)

[1] Milner *v.* Freeman, 40 Ark. 62; see § 133.

[2] Whaley *v.* Whaley, 71 Ala. 162; see § 133.

[3] Bennet *v.* Hutson, 33 Ark. 762.

[4] Gray *v.* Corbit, 4 Del. Ch. 135.

[5] Schlaeper *v.* Corson, 32 Barb. 510; Rice *v.* Rice, 108 Ill. 199; Merket *v.* Smith, 33 Kans. 66, whether the title taken is absolute or only qualified or contingent; Weaver *v.* Fisher, 101 Ill. 146. In St. Patrick's Church *v.* Daly, 116 Ill. 79, the rule is not correctly stated, though the decision is right on the facts. Palmetto Co. *v.* Risley, 25 S. C. 309; Salinas *v.* Pear-

(*a*) As to the position of attaching creditors of the title holder, see *infra*, § 815 *b* and notes. As to whether the consideration of a pre-existing debt will give a purchaser the protection accorded to *bona fide* purchasers for value without notice, see *infra*, § 815 *c* and note.

In Pennsylvania when a conveyance of real estate to copartners does not show on its face that the property is to belong to the partnership, individual creditors of a partner who holds the legal title or a moiety of it may levy upon the property to the extent of their debtor's moiety, although in equity the property may belong to the partnership. Gunnison *v.* Erie Dime Sav. Co., 157 Pa. St. 303; Collner *v.* Greig, 137 Pa. St. 606; Warriner *v.* Mitchell, 128 Pa. St. 153. This seems contrary to the general rule elsewhere. McMillan *v.* Hadley, 78 Ind. 590; Crooker *v.* Crooker, 46 Me. 250; Harney *v.* First Nat. Bank, 52 N. J. Eq. 697; Page *v.* Thomas, 43 Ohio St. 38. But see Union Bank *v.* Mechanics' Bank, 80 Md. 371.

(*b*) Many of the cases, where a

As if a trustee purchase with the trust fund and take the title in his own name or in the name of another with notice of the

sall, 24 S. C. 179; Kennedy *v.* Baker, 59 Tex. 151. An agent of an illiterate man, loaning his principal's money on note and mortgage payable to himself, who bids in the property at foreclosure sale, holds the title in trust for his principal. Cookson *v.* Richardson, 69 Ill. 137. [Dwyer *v.* O'Connor, 200 Ill. 52.]

fiduciary purchases with funds or other property which in law or equity belong to another, are cases of constructive rather than resulting trusts. Since the incidents of a resulting trust are the same as those of a constructive trust in such cases, the distinction is of little practical importance and the courts have not always considered it necessary to distinguish between the two. There is, however, a distinct difference at the foundation. A resulting trust is based upon the intention of the party who directs the transaction; a constructive trust is imposed upon him by equity, usually directly contrary to his intention, a relation created or constructed by equity for the purpose of doing justice to the persons whose funds have been misused. Where the fiduciary has made the purchase in repudiation of the *cestui's* or principal's rights, the trust which arises is constructive rather than resulting. If his intention at the time of the purchase was to invest and hold for the benefit of his *cestui* or principal the trust arising from the use of the latter's funds is a resulting trust. Thus in Barger *v.* Barger, 30 Or. 268, where a husband used his wife's property to purchase land, taking title in his own name, it was pointed out that if he did it secretly in violation of a fiduciary duty, the trust was constructive rather than resulting. See also Farmers' & Traders' Bank *v.* Kimball Milling Co., 1 S. D. 388, 393; Gashe *v.* Young, 51 Ohio St. 376; Boswell *v.* Cunningham, 32 Fla. 277; Lee *v.* Patten, 34 Fla. 149; Moultrie *v.* Wright, 154 Cal. 520; Fulton *v.* Jansen, 99 Cal. 591; Merrill *v.* Hussey, 101 Me. 439; McLaughlin *v.* Fulton, 104 Pa. St. 161; Hanson *v.* Hanson, 78 Neb. 584.

In Hanson *v.* Hanson, 78 Neb. 584, the distinction between these two kinds of trusts is stated as follows: — "Implied trusts are of two species; one, denominated a 'resulting trust' and the other a 'constructive trust.' In the first class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the benefit of both trustee and *cestui que trust*. This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing. The other species of implied trust, which is called 'constructive trust,' is one imposed by a court of equity for the purpose of enforcing an equitable right as against the fraudulent intent of the trustee *ex maleficio*."

An important difference between

trust, the trust results to the *cestui que trust;*[1] if a guardian purchase with the money of his ward, a trust will result to the ward;[2] and if an executor or administrator purchase property in his own name with money belonging to the estate, a trust in the property will result to the heirs, legatees, or other persons entitled to the beneficial interest in the estate.[3] A purchase with trust funds is virtually a purchase for the *cestui.*[4] If the trustees of a corporation purchase lands in their own names, with the corporate funds, a trust will result to the corporation;[5] or if a committee, guardians, or trustees of an insane person pur-

[1] Freeman *v.* Kelly, 1 Hoff. 90; Harrisburgh Bank *v.* Tyler, 3 Watts & S. 373; Martin *v.* Greer, 1 Ga. Dec. 109; Moffitt *v.* McDonald, 11 Humph. 457; Kirkpatrick *v.* McDonald, 11 Penn. St. 387; Wilhelm *v.* Folmer, 6 id. 296; Thompson's App. 22 id. 16; Day *v.* Roth, 18 N. Y. 448; Lathrop *v.* Gilbert, 2 Stockt. 344; McLarren *v.* Brewer, 51 Me. 402; Pugh *v.* Pugh, 9 Ind. 132; Valle *v.* Bryan, 19 Mo. 423; Neill *v.* Keese, 13 Tex. 187; Hancock *v.* Titus, 33 Miss. 224; Whaley *v.* Whaley, 71 Ala. 161; Preston *v.* McMillan, 58 Ala. 84; Buck *v.* Paine, 75 Maine, 347; Bank *v.* Simonton, 86 N. C. 189.

[2] Caplinger *v.* Stokes, Meigs, 175; Lee *v.* Fox, 6 Dana, 171; Pugh *v.* Pugh, 9 Ind. 132; Johnson *v.* Dougherty, 3 Green, Ch. 406; Bancroft *v.* Cousen, 13 Allen, 50. But if the guardian buy for the ward, but use his own money in payment, the ward cannot claim a trust in the land, for it is within the statute of frauds. Kisler *v.* Kisler, 2 Watts, 323; Johnson *v.* Dougherty, 18 N. J. Ch. 406; Snell *v.* Elam, 2 Heisk. 82. If a guardian receive a note in his own name in payment of a debt due the ward, the note is held by him in trust. Dorr *v.* Davis, 76 Maine, 301. [Hill *v.* True, 104 Wis. 294; Hows *v.* Butterworth, 62 S. W. 1114 (Tenn. Ch. App. 1899).]

[3] Wallace *v.* Duffield, 2 Ser. & R. 521; Buck *v.* Uhrich, 16 Penn. St. 499; Claussen *v.* LeFranz, 1 Clarke, 226; McCrory *v.* Foster, 1 Clarke, Iowa, 271; Harper *v.* Archer, 28 Miss. 212; Schaffner *v.* Grutzmacher, 6 Clarke, 137; Seaman *v.* Cook, 14 Ill. 501; Garrett *v.* Garrett, 1 Stro. Eq. 96; Williams *v.* Hollingsworth, 1 Strob. Eq. 103; White *v.* Drew, 42 Mo. 561; Stow *v.* Kimball, 28 Ill. 93; Dodge *v.* Cole, 97 Ill. 338; Barker *v.* Barker, 14 Wis. 131.

[4] Gale *v.* Harby, 20 Fla. 171.

[5] Church *v.* Sterling, 16 Conn. 388; Church *v.* Wood, 5 Ham. 283.

those two kinds of trusts arising from the use of another's money is that a constructive trust may arise from the use of the money after the property has been conveyed to the trustee, but a resulting trust must arise, if at all, at the time the title is transferred. See Long *v.* King, 117 Ala. 423.

chase property in their own names with the lunatic's money, a trust results to the lunatic; [1] or if a trustee erect buildings on his own land with the trust funds,[2] (*a*) or if an agent with the money of his principal purchase lands and take the deeds to himself, a trust will result to the principal; [3] or if a partner purchase lands with partnership funds, and take the title to himself, a trust will result to the partnership; [4] or if land is bought by a firm for firm purposes, with firm money and the title is taken in their individual names, it is held in trust for the firm; [5] or if

[1] Reid *v.* Fitch, 11 Barb. 399; Turner *v.* Pettigrew, 6 Humph. 438; Stratton *v.* Dialogue, 1 Green, Ch. 70; Buffalo R. R. Co. *v.* Lampson, 47 Barb. 533; Hamnett's App., 72 Penn. St. 337.

[2] Brazel *v.* Fair, 26 S. C. 370.

[3] Robb's App., 41 Penn. St. 45; Eshleman *v.* Lewis, 49 id. 410; Farmers', etc. Bank *v.* King, 57 id. 202; Church *v.* Sterling, 16 Conn. 388; Bank of America *v.* Pollock, 4 Edw. 215; Day *v.* Roth, 18 N. Y. 448; Bridenbecker *v.* Lowell, 32 Barb. 10; Moffitt *v.* McDonald, 11 Humph. 457; Hutchinson *v.* Hutchinson, 4 Des. 77; Follansbe *v.* Kilbreth, 17 Ill. 522; Chastain *v.* Smith, 30 Ga. 96; Wynn *v.* Sharer, 23 Ind. 253. [Long *v.* King, 117 Ala. 423.]

[4] Philips *v.* Crammond, 2 Wash. C. C. 441; Baldwin *v.* Johnston, Saxt. 411; Freeman *v.* Kelly, Hoff. 90; Turner *v.* Pettigrew, 6 Humph. 438, 441; Edgar *v.* Donnally, 2 Munf. 387; Smith *v.* Burnham, 3 Sumner, 435; Piatt *v.* Oliver, 2 McLean, 267; Coder *v.* Haling, 27 Penn. St. 84; Smith *v.* Ramsey, 1 Gil. Ill. 373; Barkley *v.* Tapp, 87 Ind. 25; Pugh *v.* Currie, 5 Ala. 446; Oliver *v.* Piatt, 3 How. 401; Evans *v.* Gibson, 29 Mo. 223; Mallory *v.* Mallory, 5 Bush, 564; Settembre *v.* Putnam, 30 Cal. 490; Jenkins *v.* Frink, 30 Cal. 586; Homer *v.* Homer, 107 Mass. 85; Richards *v.* Manson, 101 Mass. 480; Ebberts's App. 70 Penn. St. 79; Winkfield *v.* Brinkman, 21 Kans. 682; Trephagen *v.* Burt, 67 N. Y. 30; Boyd *v.* McClure, 1 Johns. Ch. 582. [Deaner *v.* O'Hara, 36 Colo. 476; Riddle *v.* Whitehill, 135 U. S. 621].

[5] Paige *v.* Paige, 71 Iowa, 318.

(*a*) In such a case there would be an equitable lien upon the property as security for the trust funds, rather than a trust. See Aiken *v.* Taylor, 62 S. W. 200 (Tenn. Ch. App. 1900); Clark *v.* Timmons, 39 S. W. 534 (Tenn. Ch. 1897); Moore *v.* McLure, 124 Ala. 120. *Infra*, § 827.

Thus a trust cannot result in favor of a person whose funds have been wrongfully used by another in paying some of the premiums on a policy of life insurance, although there would usually be an equitable lien upon the policy and its proceeds. Thum *v.* Wolstenholme, 21 Utah, 446.

one take an estate for services rendered jointly by himself and another, the latter may elect to regard the first as a trustee;[1] or if a husband purchase lands with the separate estate of his wife in his hands, or with the proceeds or accumulations from it, or money put into his hands to invest for his wife, and take the title in his own name, a trust results to the wife[2] (but not if the property used is such as the husband has a right to reduce to possession and make his own, and his conduct evinces an intent to do this[3]); or if a man purchase an estate with the money of a woman with whom he cohabits, a trust results to her.[4] If a widow purchase an estate in her own name with funds of her deceased husband, a trust results to his children;[5] and so if a

[1] Robarts *v.* Haley, 65 Cal. 402.

[2] Church *v.* Jaques, 1 Johns. Ch. 450; 3 id. 77; Brooks *v.* Dent, 1 Johns. Md. Ch. 523; Dickinson *v.* Codwise, 1 Sandf. Ch. 214; Pinney *v.* Fellows, 15 Vt. 525; Barron *v.* Barron, 24 Vt. 375; Lathrop *v.* Gilbert, 2 Stockt. 344; Kline's App., 39 Penn. St. 463; Davis *v.* Davis, 46 id. 342; Bigley *v.* Jones, 114 id. 510; Rupp's App., 100 id. 531; Raybold *v.* Raybold, 20 id. 308; Fillman *v.* Divers, 31 id. 429; Darkin *v.* Darkin, 23 L. J. Ch. 890; Wallace *v.* McCullough, 1 Rich. Eq. 426; Pritchard *v.* Wallace, 4 Sneed, 405; Resor *v.* Resor, 9 Ind. 347; Lench *v.* Lench, 10 Ves. 511; Woodford *v.* Stephens, 51 Mo. 443; Tilford *v.* Torrey, 53 Ala. 120; Gainus *v.* Cannon, 42 Ark. 503; Slocum *v.* Slocum, 9 Brad. (Ill.) 142; Loften *v.* Witboard, 92 Ill. 461; Radcliff *v.* Radford, 96 Ind. 482; Derry *v.* Derry, 98 Ind. 324; Lord *v.* Bishop, 101 Ind. 334; Mitchell *v.* Colglazier, 106 Ind. 466; Broughton *v.* Brand, 94 Mo. 169; Bowen *v.* McKean, 82 Mo. 594, *pro tanto;* City Nat. Bank *v.* Hamilton, 34 N. J. Eq. 158; Price *v.* Brown, 98 N. Y. 388; Cade *v.* Davis, 96 N. C. 139; McKamey *v.* Thorp, 61 Tex. 648; Parker *v.* Coop, 60 Tex. 111, and cases cited; John *v.* Battle, 58 Tex. 591; Heath *v.* Slocum, 115 Pa. St. 549; Holgate *v.* Eaton, 116 U. S. 33. [Haney *v.* Legg, 129 Ala. 619; Leslie *v.* Bell, 73 Ark. 338; Waterman *v.* Buckingham, 79 Conn. 286; Smith *v.* Smith, 132 Iowa, 700; Hudson *v.* Wright, 204 Mo. 412; Crawford *v.* Jones, 163 Mo. 577; McLeod *v.* Venable, 163 Mo. 536; Jones *v.* Elkins, 143 Mo. 647; Mayer *v.* Kane, 69 N. J. Eq. 733; Barger *v.* Barger, 30 Or. 268; Byers *v.* Ferner, 216 Pa. St. 233. See *infra*, § 132, note *a*, as to payment of part of the purchase-money].

[3] Cummings *v.* Cummings, 143 Mass. 340-342. [Jones *v.* Jones, 80 Ark. 379; Hogue *v.* Steel, 207 Ill. 340; Jesser *v.* Armentrout, 100 Va. 666. See Leslie *v.* Bell, 73 Ark. 338.]

[4] James *v.* Holmes, 4 De G., F. & J. 470.

[5] Fox *v.* Doherty, 30 Iowa, 334; Roberts *v.* Opp, 56 Ill. 34; Musham *v.* Musham, 87 Ill. 80.

father purchase in his own name or the name of a third person with funds of his children;[1] and the rule is the same if purchases are made out of the savings of the wife's separate property; but if the purchase is made from savings out of an allowance made by the husband, or out of the wife's earnings, no trust will result.[2] Even where the entry of land in the name of one for the use of another is contrary to statute, the person with whose money the land was bought, if innocent of the wrongful entry, may claim a resulting trust.[3]

§ 128. In all these cases the transaction is looked upon as a purchase paid for by the *cestui que trust*, as the beneficial interest in the money paid belonged to him;[4] and the identity of the money does not consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made, and the fund may be followed so long as its general character can be identified.[5] But when the means of identification fail, as when an executor converts an estate into money and mixes it with the general mass of his own money, and there is no identifying the particular money of the trust, the distributees or legatees have no preferences over his other creditors, but they must prove their claims.[6] If, however, a trustee purchase an estate with trust funds, and add funds of his own to the purchase-money, a trust will result to the *cestui que trust;*

[1] Robinson *v.* Robinson, 22 Iowa, 427; Eastham *v.* Roundtree, 56 Tex. 110.

[2] Raybold *v.* Raybold, 20 Penn. St. 308; Merrill *v.* Smith, 37 Maine, 394; Henderson *v.* Warmack, 27 Miss. 830; Farley *v.* Blood, 10 Foster, 354.

[3] Buren *v.* Buren, 79 Mo. 538.

[4] Lench *v.* Lench, 10 Ves. 517; Trench *v.* Harrison, 17 Sim. 111.

[5] United States *v.* Waterborough, Davies, 154; Goepp's App., 15 Penn. St. 428; Thompson's App., 22 id. 16; McLarren *v.* Brewer, 51 Maine, 402; De Bevoise *v.* Sandford, Hoff. 194; Campbell *v.* Walker, 5 Ves. 678; Downes *v.* Grazebrook, 3 Mer. 200; Sanderson *v.* Walker, 13 Ves. 601; Overseers of the Poor *v.* Bank of Virginia, 2 Gratt. 544. [See *infra*, § 828, note.]

[6] Thompson's App., 22 Penn. St. 16; McComas *v.* Long, 85 Ind. 552.

and the burden will be on the trustee to show the amount of his own funds in the purchase, otherwise the *cestui que trust* will take the whole.[1] If the purchase is partly with trust funds and partly not, the *cestui* has a lien on the whole property for the amount of the fund misapplied.[2] It has been said in some cases that the *cestui que trust* has no interests in the property purchased with the trust fund in the name of the trustee, but *only a lien* on the property in the nature of a vendor's lien for the purchase-money, with a right to a decree for a sale to reimburse the trust fund.[3] (*a*) This is certainly one of the rights of the *cestui que trust*, if he elects to proceed in that manner, and he may hold the trustee responsible, if there is a loss on such sale. On the other hand, the trustee can make no profit to himself by dealing with the trust fund;[4] and, if he makes a purchase with it, the *cestui que trust* can elect to treat the property as a part of the trust property, and he is entitled to all the advantages of the speculation or investment thus made with the property in the name of the trustee.[5] No trust results to the holder of property (H.) from the fact that money has been given to B. by C. in order that B. may purchase the said property. H. cannot offer a deed and demand the money.[6] (*b*) So where A. sells land in which he (A.) has an interest as well as E., A. giving a bond for the making of a future good title to the whole, and then investing the money received in other property, there is no trust for E. in this prop-

[1] Russell *v.* Jackson, 10 Hare, 209; McLarren *v.* Brewer, 51 Maine, 402; Seaman *v.* Cook, 14 Ill. 505; Farmers', &c. Bank *v.* King, 57 Penn. St. 202; Persch *v.* Quiggle, id. 247.

[2] Munroe *v.* Collins, 95 Mo. 42.

[3] Wallace *v.* Duffield, 2 Ser. & R. 529; Wallace *v.* McCullough, 1 Rich. Ch. 426.

[4] Landis *v.* Saxton, 89 Mo. 375; Ward *v.* Davidson, id. 445.

[5] Hill on Trustees, 534; Lewin on Trusts, 227 (5th Lond. ed); Lench *v.* Lench, 10 Ves. 511; 19 Ves. 58; Weaver *v.* Fisher, 110 Ill. 146; Bent *v.* Priest, 86 Mo. 475.

[6] Rogers *v.* Rogers, 63 Iowa, 92.

(*a*) On this point see *infra*, § 429, note.

(*b*) As to constructive trusts in such cases see *infra*, § 207 and note.

erty; the purchase-money was obtained by A., not in consideration for E.'s interest in the land, but in consideration for the promise made by A. in his bond.[1] And if trust-money is expended not in the purchase of land but in improvements upon it, no trust results to the owner of the money.[2] If one who stands in no fiduciary relation to another appropriates the other's money, and invests it in real estate or other property, no trust results to the owner of the money.[3] (*a*) There is no doubt of this principle upon all the cases, but there is some question in the books as to what is a fiduciary relation, as where a clerk pilfered money from the store of his employer and invested it in real estate, it was held that there was no such resulting trust, that the employer could compel a conveyance of the land.[4] But where a clerk in a bank embezzled money, and invested it in stocks in the names of his sisters as mere volunteers, it was held that a trust resulted to the owners of the money, and that equity would execute it by compelling a conveyance;[5] and this would seem to be the better opinion, as a clerk certainly holds a confidential relation to his employer. In Newton *v.* Porter, it was held that the holders of the proceeds of stolen property might be charged as trustees for the owner, and there would seem to be no principle to the contrary.[6] It may depend, however, upon the extent

[1] Hadley *v.* Stuart, 62 Iowa, 271.

[2] Bodwell *v.* Nutter, 63 N. H. 446. [Clark *v.* Timmons, 39 S. W. 534 (Tenn. 1897).]

[3] Hawthorne *v.* Brown, 3 Sneed, 462; Ensley *v.* Ballentine, 4 Humph. 233.

[4] Campbell *v.* Drake, 4 Ired. 94; Pascoag Bank *v.* Hunt, 3 Edw. 583.

[5] Bank of America *v.* Pollock, 4 Edw. 215; *post*, § 135.

[6] Newton *v.* Porter, 5 Lansing, 417; Thompson *v.* Parker, 3 Mason, 332; Hoffman *v.* Canow, 22 Wend. 285; Bassett *v.* Spofford, 45 N. Y. 387; Silsbury *v.* McCoon, 3 Comst. 579.

(*a*) But a constructive trust will be declared as to property purchased with the stolen money or the proceeds of stolen property, Lamb *v.* Rooney, 72 Neb. 322; Farmers' & Traders' Bank *v.* Kimball Milling Co., 1 S. D. 388; or an equitable lien upon the property into which the money can be traced, which lien gives the owner of the stolen money rights in the property prior to those of general creditors. See chapter on constructive trusts.

to which the clerk is trusted. In Lehmann *v.* Rothbarth [1] the husband of a trustee taking upon himself the management of the estate was held to account as trustee to the *cestui* for funds coming to him as self-constituted agent for the true trustee. (*a*)

§ 129. If a person standing in a fiduciary relation make use of his position to purchase an interest in the trust property with his own funds, as a reversion, a junior or senior mortgage, or other interest from a third person; or if he purchase other property so immediately connected with the trust estate, that it must be used with the trust estate, and the independent ownership of which would seriously affect the use and value of the trust property, he cannot retain the same for his own benefit, but he must hold it upon a resulting trust for his beneficiary.[2] (*b*) The prohibition of the purchase of trust property by the trustee does not depend on any question of fraud, but is made absolute to avoid the possibility of fraud.[3] The temptation of self-interest is too powerful and insinuating to be trusted. A trustee must not put himself in a position where his private profit will oppose

[1] 111 Ill. 185.

[2] Holt *v.* Holt, 1 Ch. Cas. 190; Nesbitt *v.* Tredennick, 1 Ball & B. 46; Greenlaw *v.* King, 3 Beav. 9; 10 L. J. (N. S.) Ch. 129; Van Epps *v.* Van Epps, 9 Paige, 237; Torrey *v.* Bank of Orleans, 9 Paige, 649; Tanner *v.* Elworthy, 4 Beav. 487; Waters *v.* Bailey, 2 Y. & C. (N. C.) Ch. 219; Geddings *v.* Geddings, 3 Russ. 241; Dickinson *v.* Codwise, 1 Sandf. Ch. 226; Settembre *v.* Putnam, 30 Cal. 490; Jenkins *v.* Frink, 30 Cal. 586; Hall *v.* Vanness, 49 Penn. St. 457; Harrold *v.* Lane, 53 id. 269; Heath *v.* Page, 63 id. 108; Campbell *v.* Campbell, 21 Mich. 459; King *v.* Cushman, 43 Ill. 31; Clark *v.* Cantwell, 3 Head, 202; Holmes *v.* Campbell, 10 Minn. 40; Wells *v.* Francis, 7 Col. 396; Shaw *v.* Shaw, 86 Mo. 594.

[3] Downs *v.* Richards, 4 Del. Ch. 416; Munson *v.* S. G. & C. R. R. Co., 103 N. Y. 58.

(*a*) Fraud, as the foundation of a trust, may be waived by the grantor's subsequent act of conveyance, and his equitable interest be thereby extinguished. Thompson *v.* Marley, 102 Mich. 476.

(*b*) A trust arising under such circumstances is constructive rather than resulting, since it cannot be said to be based upon the intention of the person paying the consideration. See *infra*, § 194 *et seq.* and notes.

the interests of the estate.[1] If a trustee buys an outstanding claim against the trust property, the transaction will be treated as a payment only, and he will be allowed only what he gave.[2] Railway directors cannot deal with the property for their individual benefit, and a sale of it to any one of the board would be voidable in equity at the instance of any one interested in the road.[3] A trustee may not buy for himself an outstanding title to the estate.[4] (*a*) One in a fiduciary position must not so conduct himself as to bring his private interests in conflict with the duties of his office. If an administrator buys land sold to pay a debt due his intestate, the heirs and distributees can elect to take the land and allow him his bid.[5] A purchaser from a trustee who has acquired the trust property stands in no better position than the trustee, if said purchaser has notice of the facts.[6] A mere agent, who purchases a reversion in the lands of his principal at a public sale from third persons with his own money, will not be held as a trustee, unless he purchase under some agreement to that effect;[7] and the same rule applies to a tenant in common.[8]

[1] Russell *v.* Peyton, 4 Brad. (Ill.) 481.

[2] Rankin *v.* Bancroft & Co., 114 Ill. 441; Gilman *v.* Healey, 49 Hun, 274.

[3] Little Rock & F. S. Ry. Co. *v.* Page, 35 Ark. 304; Duncomb *v.* N. Y. H. & No. R. R. Co., 84 N. Y. 190.

[4] Baker *v.* S. & W. Mo. R. Co., 86 Mo. 75. [See *infra*, § 195, note.]

[5] Jones *v.* Graham, 36 Ark. 383.

[6] Cavagnaro *v.* Don, 63 Cal. 231.

[7] Kennedy *v.* Keating, 34 Mo. 25.

[8] Keller *v.* Auble, 58 Penn. St. 410; Mandeville *v.* Solomon, 33 Cal. 38.

(*a*) Nor will one cotenant be allowed to buy in and hold for his own benefit an outstanding incumbrance upon the joint estate. Brundy *v.* Mayfield, 15 Mont. 201; Barbour *v.* Johnson, 21 D. C. 40; Allen *v.* Arkenburgh, 37 N. Y. S. 1032; Virginia Coal Co. *v.* Kelly, 93 Va. 332; Turner *v.* Sawyer, 150 U. S. 578: Rector *v.* Gibbon, 111 U. S. 276, 296; Parker *v.* Brast, 45 W. Va. 399. But strictly speaking, the trust which will be decreed is a constructive, not a resulting, trust. The same rule applies to executors. Merrick *v.* Waters, 51 N. Y. App. Div. 83; 64 N. Y. S. 542. See also Eisert *v.* Bowen, 117 N. Y. App. Div. 488; 102 N. Y. S. 707; Frohlich *v.* Seacord, 180 Ill. 85.

§ 130. The rule embraces personal property as well as real estate; and if a man purchase a bond,[1] annuity,[2], stock,[3] mortgage, or other personal interest,[4] in the name of a third person, the equitable ownership results to the person from whom the consideration moves; but it is said that a resulting trust cannot be set up in personal property perishable in its nature.[5]

§ 131. Nor can a resulting trust be set up if it would break in upon the policy of the law, or a public statute;[6] as if an alien forbidden to hold land should pay the purchase-money and take the deed to a stranger, a resulting trust in his favor would not be enforced by the courts.[7] (a) But a slave, who could not acquire property, purchased land in the name of a free person with the assent of his master, and afterwards be-

[1] Ebrand *v.* Dancer, 2 Ch. Cas. 26; 1 Eq. Ab. 382.

[2] Rider *v.* Rider, 10 Ves. 363, and cases cited; 2 Mad. Ch. Pr. 101.

[3] Ibid.; Lloyd *v.* Read, 1 P. Wms. 607; Sidmouth *v.* Sidmouth, 2 Beav. 447; Garrick *v.* Taylor, 29 Beav. 79; 4 De G., F. & J. 159; Beecher *v.* Major, 2 Dr. & Sm. 431; *Ex parte* Houghton, 17 Ves. 253; Creed *v.* Lancaster Bank, 1 Ohio St. 1. [McClung *v.* Colwell, 107 Tenn. 592.]

[4] Ibid.; Kelley *v.* Jenness, 50 Maine, 455.

[5] Union Bank *v.* Baker, 8 Humph. 447.

[6] *Ex parte* Yallop, 15 Ves. 67; *Ex parte* Houghton, 17 Ves. 251; Redington *v.* Redington, 3 Ridg. 181; Groves *v.* Groves, 3 Y. & J. 163; Camden *v.* Anderson, 5 T. R. 709; Proseus *v.* McIntyre, 5 Barb. 425; Ford *v.* Lewis, 10 B. Mon. 127; Baldwin *v.* Campfield, 4 Halst. Ch. 891; Cutler *v.* Tuttle, 19 N. J. Eq. 562. [Keely *v.* Gregg, 33 Mont. 216, 225. But see Lufkin *v.* Jakeman, 188 Mass. 528.]

[7] Leggett *v.* Dubois, 5 Paige, 114; Hubbard *v.* Goodwin, 3 Leigh, 492; Philips *v.* Crammond, 2 Wash. C. C. 441; Taylor *v.* Benham, 5 How. U. S. 270; Farley *v.* Shippen, Wythe, 135; Alsworth *v.* Cordby, 3 Miss. 42; Childers *v.* Childers, 1 De G. & J. 482; Phillpotts *v.* Phillpotts, 10 C. B. 85. But if such conveyance is not intended as a fraud upon the law, but is taken by an agent or attorney of the alien in his own name without authority, equity will protect the rights of the alien. Austin *v.* Brown, 6 Paige, 448; McCow *v.* Galbrath, 7 Rich. Law, 74.

(a) In Texas, it seems that a resulting trust does not arise for an alien whose money another invests in land, although he may recover a judgment for the money itself by suit, and such judgment may be a lien upon the land. Zundell *v.* Gess, 73 Tex. 144.

coming free, the resulting trust was enforced in his favor;[1] and so if the disability of the alien is removed by naturalization or otherwise, he may enforce a trust created while he was under disability.[2]

§ 132. Lord Hardwicke doubted whether the application of the rule was not confined to a single purchaser;[3] but it has been expressly decided and long acted upon, that if several make the purchase, pay the consideration, but take the title in the name of a stranger, the trust will result to them jointly.[4] The same rule applies if several pay the consideration, and take the title to one of their number. If the parties contribute unequally to the payment of the consideration, the trust results to each of them in proportion to the amount paid by each.[5] (*a*) In these

[1] Leiper *v.* Hoffman, 26 Miss. 615.

[2] Osterman *v.* Baldwin, 6 Wall. 116.

[3] Crop *v.* Norton, Barn. 179; 9 Mod. 233; 2 Atk. 74.

[4] Baumgartner *v.* Guessfeld, 38 Mo. 36; Wray *v.* Steele, 2 V. & B. 388; Ross *v.* Hegeman, 2 Edw. 373; Larkins *v.* Rhoades, 5 Porter, 196; Powell *v.* Monson and Brim. Manuf. Co., 3 Mason, 347; Letcher *v.* Letcher, 4 J. J. Marsh. 590; Keaton *v.* Cobb, 1 Dev. Ch. 439.

[5] Rigden *v.* Walker, 3 Atk. 735; Lake *v.* Gibson, 1 Eq. Cas. Ab. 291; Botsford *v.* Burr, 2 Johns. Ch. 405; Quackenbush *v.* Leonard, 9 Paige, 334; Jackson *v.* Moore, 6 Cow. 706; Stewart *v.* Brown, 2 Serg. & R. 461; Morey *v.* Herrick, 18 Penn. St. 129; Buck *v.* Swazy, 35 Maine, 41; Kelley *v.* Jenness, 50 id. 455; Powell *v.* Monson & Brim. Manuf. Co., 3 Mason, 347; Pierce *v.* Pierce, 7 B. Mon. 433; Letcher *v.* Letcher, 4 J. J. Marsh. 590; Shoemaker *v.* Smith, 11 Humph. 81; Bernard *v.* Bongard, Harr. Ch. 130; Purdy *v.* Purdy, 3 Md. Ch. 547; Seaman *v.* Cook, 14 Ill. 505; Dow *v.* Jewell, 18 N. H. 340; Hall *v.* Young, 37 N. H. 134; Pinney *v.* Fellows, 15 Vt. 525; Brothers *v.* Porter, 6 B. Mon. 106; Bogert *v.* Perry, 17 Johns. 351; Jackson *v.* Bateman, 2 Wend. 570; Cloud *v.* Ivie, 28 Mo. 578; Baumgartner *v.* Guessfeld, 38 Mo. 36; Union College *v.* Wheeler, 5 Lans. 160; McDonald *v.* McDonald, 24 Ind. 68; Frederick *v.* Haas, 5 Nev. 389; Case *v.* Codding, 38 Cal. 191; Clark *v.* Clark, 43 Vt. 685.

(*a*) It is undoubted law that when part of the purchase price or other consideration for the conveyance is shown to have been paid or furnished by a person other than the grantee, a trust may result as to an undivided interest in the property if it is apparent that the property of the other was used for the purchase of a definite part of the whole title, provided, of course, the intention of the parties is not shown to

cases it is settled that a general contribution towards a purchase is not sufficient; but the person claiming a resulting trust must

have been inconsistent with a resulting trust. Sanders *v.* Steele, 124 Ala. 415; Moultrie *v.* Wright, 154 Cal. 520; Faylor *v.* Faylor, 136 Cal. 92; Costa *v.* Silva, 127 Cal. 351; Towle *v.* Wadsworth, 147 Ill. 80; Skehill *v.* Abbott, 184 Mass. 145; Stevenson *v.* Smith, 189 Mo. 447; Beringer *v.* Lutz, 188 Pa. St. 364; Gaynor *v.* Quinn, 212 Pa. St. 362; Speer *v.* Burns, 173 Pa. St. 77; Bible *v.* Marshall, 103 Tenn. 324; Baylor *v.* Hopf, 81 Tex. 637; Reese *v.* Murnan, 5 Wash. 373; Currence *v.* Ward, 43 W. Va. 367; Rogers *v.* Donnellan, 11 Utah, 108; Barton *v.* Magruder, 69 Miss. 462; Sweet *v.* Stevens, 63 S. W. 41 (Ky. 1901). See also Waterman *v.* Buckingham, 79 Conn. 286 (a constructive trust); Mayer *v.* Kane, 69 N. J. Eq. 733. See *infra*, § 133. But there are frequent decisions to the effect that a general contribution to the purchase-money, or the contribution of an undetermined amount, or a contribution without any express or implied understanding that it is to be represented in a definite part of the property, will not raise a resulting trust. Los Angeles etc. Co. *v.* Occidental Oil Co., 144 Cal. 528; Long *v.* Scott, 24 App. D. C. 1; Ouasch *v.* Zinkel, 213 Ill. 119; Devine *v.* Devine, 180 Ill. 447; Jackson *v.* Kraft, 186 Ill. 623; Rotter *v.* Scott, 111 Iowa, 31; Andrew *v.* Andrew, 114 Iowa, 524; Dudley *v.* Dudley, 176 Mass. 34 (compare with Skehill *v.* Abbott, 184 Mass. 145); Bailey *v.* Hemenway, 147 Mass. 326; Schierloh *v.* Schierloh, 148 N. Y. 103; McCormick *v.* Cooke, 199 Pa. St. 631; McGowan *v.* McGowan, 14 Gray, 119. See also Storm *v.* McGrover, 70 N. Y. App. Div. 33; 74 N. Y. S. 1032. Thus no trust will result for the benefit of a husband where the wife purchases with a fund to which both contributed in undetermined proportion. Devine *v.* Devine, 180 Ill. 447; Andrew *v.* Andrew, 114 Iowa, 524. No trust results from the circumstance that a wife furnished $1175 of the total purchase price, $13,500, the husband taking title in his name. Schierloh *v.* Schierloh, 148 N. Y. 103. See also McCormick *v.* Cooke, 199 Pa. St. 631; Leary *v.* Corvin, 181 N. Y. 222.

The rule is stated as follows in McGowan *v.* McGowan, 14 Gray, 119, 121: "There is no doubt of the correctness of the doctrine, that where the purchase-money is paid by one person, and the conveyance taken by another, there is a resulting trust created by implication of law in favor of the former. And where a part of the purchase-money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* may in like manner, under some circumstances, be created. But in the latter case we believe it to be well settled that the part of the purchase-money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part, or distinct interest in the estate; for some aliquot part, as it is sometimes expressed; that is for a specific share, as a

show that he paid some specific sum, for some distinct interest in, or aliquot part of, the estate, as for a specific share, as one-half tenancy in common or joint tenancy of one-half, one-fourth, or other particular fraction of the whole; or for a particular interest as a life estate, or tenancy for years, or remainder in the whole; and that a general contribution of a sum of money toward the entire purchase is not sufficient."

The theory of resulting trusts when, for example, a conveyance of land is made to one person for a money consideration furnished by another, is that the latter's money has become transformed into land without change in the beneficial ownership. Equity regards the land as his property in its changed form, since that was the intention of the parties. Accordingly, when a person other than the grantee furnishes only a part of the consideration, a trust cannot attach by implication on this theory, unless it is shown that the part paid by him went into or was paid for a definite part of the land with the intention that the beneficial ownership in that part should be in him. Barger *v.* Barger, 30 Or. 268. Although equity will sometimes *construct* a trust when there is no such intention, and such constructive trust does not differ in substance from a resulting trust, it seems better for the sake of clearness to reserve the term "resulting trusts" for those which arise from presumed, or implied, intention, which in no case can be contrary to the actual intention as proved by proper evidence.

The beneficial interest resulting to one who furnishes only part of the consideration cannot bear a larger proportion to the whole property than the share of the purchase-money paid by him bears to the whole consideration. Thus a trust as to three-fourths of the property cannot be established by showing by parol that the parties intended one-fourth of the purchase price to pay for three-fourths of the title. Under such circumstances the resulting trust cannot exceed one-fourth. Collins *v.* Corson, 30 A. 862 (N. J. Ch. 1894); McGee *v.* Wells, 52 S. C. 472, 479; O'Donnell *v.* White, 18 R. I. 659. But there seems no reason why the intention of the parties might not be used to cut down the beneficial interest below the *cestui's pro tanto* share.

The expression "aliquot part" is interpreted to mean merely a definite part, not an exact factor of the whole. Skehill *v.* Abbott, 184 Mass. 145; Currence *v.* Ward, 43 W. Va. 367.

The understanding of the parties that a trust shall result *pro tanto* when one furnishes part of the consideration need not be expressed, but may frequently be gathered from the mere circumstance that one has furnished a definite part of the whole. Skehill *v.* Abbott, 184 Mass. 145. This seems to be the usual presumption when there is nothing in the relationship of the parties or in the other circumstances which can adequately account for such use of another's property. Sanders *v.* Steele, 124 Ala. 415; Camden *v.* Bennett, 64 Ark. 155; Costa *v.* Silva, 127 Cal. 351; Stevenson *v.* Smith,

or one-quarter, or other particular fraction of the whole; or for a particular interest, as for an estate for life or years, or in remainder in the whole estate.[1] Where two contribute funds and the proportions do not appear, the presumption is that the proportions are equal.[2]

§ 133. The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements, and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the

[1] McGowan *v.* McGowan, 14 Gray, 119; Buck *v.* Warren, id. 122, n.; Baker *v.* Vining, 30 Maine, 121; Sayre *v.* Townsends, 15 Wend. 647; White *v.* Carpenter, 2 Paige, 217; Perry *v.* McHenry, 13 Ill. 227; Crop *v.* Norton, 2 Atk. 74; Reynolds *v.* Morris, 17 Ohio St. 510; Cutler *v.* Tuttle, 19 N. J. Ch. 561; 1 Lead. Ca. Eq. 276; Billings *v.* Clinton, 6 Rich. (S. C.) 90; Olcott *v.* Bynum, 17 Wall. 44.

[2] Shoemaker *v.* Smith, 11 Humph. 81.

189 Mo. 447; Baylor *v.* Hopf, 81 Tex. 637; Obermiller *v.* Wylie, 36 Fed. 641. See also Heiskell *v.* Trout, 31 W. Va. 810.

There have been several cases where the court would not imply a trust *pro tanto* when it was clearly shown that a husband had used part of his wife's money in the purchase with her consent, but without any expressed understanding that she should bave an interest in the property. Rotter *v.* Scott, 111 Iowa, 31; Jackson *v.* Kraft, 186 Ill. 623; Schierloh *v.* Schierloh, 148 N. Y. 103; McCormick *v.* Cooke, 199 Pa. St. 631. See also Dudley *v.* Dudley, 176 Mass. 34. But in Missouri, where a husband cannot become owner of his wife's separate property or use it for his own benefit without her written consent, a trust *pro tanto* has been implied under similar circumstances. McLeod *v.* Venable, 163 Mo. 536; Crawford *v.* Jones, 163 Mo. 577; Winn *v.* Riley, 151 Mo. 61; Jones *v.* Elkins, 143 Mo. 647. See also Haney *v.* Legg, 129 Ala. 619.

When the purchase price is paid with funds owned by two or more as tenants in common or as joint tenants or as copartners, and the title is taken by one of them a trust results for the others so that the equitable interests in the property will be the same as were the legal interests before the conversion. Speer *v.* Burns, 173 Pa. St. 77; Fay *v.* Fay, 50 N. J. Eq. 260.

When the money of another is used without right in the purchase of property, a *constructive* trust may be decreed as to all or part of the property according as justice requires. Farmers' & Traders' Bank *v.* Kimball Milling Co., 1 S. D. 388, 393. See *infra* under constructive trusts.

moment the title passes that a trust will result from the transaction itself.[1] (a) But if the transaction creates a trust, a sub-

[1] See § 126; Frickett *v.* Durham, 109 Mass. 422; Rogers *v.* Murray, 3 Paige, 390; Dudley *v.* Batchelder, 53 Me. 403; Connor *v.* Lewis, 16 Maine, 275; Buck *v.* Swazey, 35 id. 51; Pinnoch *v.* Clough, 16 Vt. 500; Taliaferro *v.* Taliaferro, 6 Ala. 404; McGowan *v.* McGowan, 14 Gray, 119; Barnard *v.* Jewett, 97 Mass. 87; Freeman *v.* Kelly, 1 Hoff. 90; Foster *v.* Trustees, &c., 3 Ala. 302; Forsyth *v.* Clark, 3 Wend. 637; Steere *v.* Steere, 5 Johns. Ch. 1; Botsford *v.* Burr, 2 Johns. Ch. 408; Jackson *v.* Moore, 6 Cow. 706; White *v.* Carpenter, 2 Paige, 218; Niver *v.* Crane, 98 N. Y. 40; Page *v.* Page, 8 N. H. 187; Buck *v.* Pike, 2 Fairf. 9; Graves *v.* Dugan, 6 Dana, 331; Wallace *v.* Marshall, 9 B. Mon. 148; Gee *v.* Gee, 2 Sneed, 395; Kelly *v.* Johnson, 28 Mo. 249; Williard *v.* Williard, 56 Penn. St. 119; Nixon's App., 63 id. 279; Cutler *v.* Tuttle, 19 N. J. Eq. 561; Wheeler *v.* Kirtland, 23 id. 13; Tunnard *v.* Littell, id. 264; Sheldon *v.* Harding, 44 Ill. 68; Westerfield *v.* Kimmer, 82 Ind. 369; Kendall *v.* Mann, 11 Allen, 15; Gerry *v.* Stimson, 60 Me. 186; Forsyth *v.* Clark, 3 Wend. 657; Davis *v.* Wetherell, 11 Allen, 19, n.; Miller *v.* Blose, 30 Grat. (Va. 744; Billings *v.* Clinton, 6 Rich. (S. C.) 90; Boozer *v.* Teague, 27 S. C. 349; Richardson *v.* Day, 20 S. C. 412; Parker *v.* Coop, 60 Tex. 111; Du Val *v.* Marshall, 3 Ark. 230; Rhea *v.* Tucker, 56 Ala. 450; McClure *v.* Doak, 6 Baxter (Tenn.), 364; Sullivan *v.* Sullivan, 86 Tenn. 376. A subsequent agreement will not raise such a trust. Knox *v.* McFarran, 4 Col. 586. [Lynch *v.* Herrig, 32 Mont. 267; Pickler *v.* Pickler, 180 Ill. 168; Bank *v.* Gilmer, 117 N. C. 416; Ostheimer *v.* Single, 73 N. J. Eq. 539; Jones *v.* Hughey, 46 S. C. 193; Gilbert *v.* Lawrence, 56 W. Va. 281, 292; Bright *v.* Knight, 35 W. Va. 40; Whitley *v.* Ogle, 47 N. J. Eq. 67; Byers *v.* Ferner, 216 Pa. St. 233.]

(a) Paying off an incumbrance upon the property after the title has passed, even though the incumbrance is security for part or all of the purchase price, will not raise a resulting trust as to any part of the property, and parol agreements of trust entered into by the title holder subsequently to the conveyance to him will not serve the purpose. Merrill *v.* Hussey, 101 Me. 439, 445; Gilbert *v.* Lawrence, 56 W. Va. 281, 292; Pickler *v.* Pickler, 180 Ill. 168; Ostheimer *v.* Single, 73 N. J. Eq. 539. Thus where a father conveyed a farm to his married daughter upon consideration of a note and mortgage on the property for $2000, signed by both the wife and her husband, no trust results for the benefit of the husband upon his paying the mortgage note. Wilder's Ex'r *v.* Wilder, 75 Vt. 178. In Crowley *v.* Crowley, 72 N. H. 241, a farm was purchased for $850, and title was taken in the name of a father. The consideration was paid by $300 in cash belonging to a minor son and the father's mortgage note for $550. Later the son paid the note. It was held that the circumstances raised a resulting trust as to six-seventeenths of the property but that there could be no resulting

sequent act may enlarge its effect, as by removing a mortgage to which the trust was subject.[1] And where an administrator

[1] Leonard *v.* Green, 34 Minn. 141.

trust for the son as to the balance unless he had induced the father to give the mortgage to enable him to make the purchase in the father's name, and had promised to pay it, so that the mortgage note was in substance the son's debt as between the two.

But in Gray *v.* Jordan, 87 Me. 140, where a husband purchased in the name of his wife paying no money down, but giving mortgage notes of the wife indorsed by him with the understanding between him and his wife that he should pay the mortgage notes, which he subsequently did, a trust was held to result for the husband. In Gilchrist *v.* Brown, 165 Pa. St. 275, the court in a dictum expressed the opinion that a trust would result for the wife from her payment of instalments of the purchase price after the conveyance to her husband, "provided such payments are made in pursuance of the contract under which the title was acquired and upon the agreement that she is to recover the title to so much as she pays for in exchange for her money." See also Levy *v.* Mitchell, 114 S. W. 172 (Tex. Civ. App. 1908).

The effect of these decisions is that although the actual payments may be subsequent to the passing of the title, the effect of the understanding existing at the time title was taken is that the person paying has entered into an obligation to pay, which in substance makes the title holder only a surety as to the subsequent payments.

Merely showing a subsequent payment of purchase money by the person for whose benefit the purchase was intended will not be enough. There must be at least a real understanding or a liability to pay which dates back to the time when the legal title passed. Ostheimer *v.* Single, 73 N. J. Eq. 539.

The assumption of an incumbrance debt by the grantee as part of the consideration of the transfer will not prevent the whole beneficial interest from passing to another on a resulting trust if it was understood that the latter should pay the encumbrance and he subsequently does so. Skahen *v.* Irving, 206 Ill. 597. See also Crowley *v.* Crowley, 72 N. H. 241.

In case of an executory contract of sale, title to pass at the time of the last payment, a trust may result from any one of the payments made prior to the passing of the title. Lynch *v.* Herrig, 32 Mont. 267. The same is true of payments made for a bond for title. Scranton *v.* Campbell, 45 Tex. Civ. App. 388; Miller *v.* Saxton, 75 S. C. 237.

Use of funds of another than the owner to improve the property will not raise a resulting trust; Clark *v.* Timmons, 39 S. W. 534 (Tenn. 1897); although equity may under some circumstances declare an equitable lien upon the property for the amount expended, as where a fiduciary uses funds of another to improve the property or to pay an incumbrance. Lehman *v.* Lewis, 62 Ala. 129; Webb. *v.* Bailey, 41

out of the assets in his hands pays the balance due on land bought by the deceased, and takes title to himself, the heirs can hold him as a trustee.[1] And where the money of another in the hands of the purchaser is his only reliance for procuring the title, he cannot escape from a resulting trust by paying a little of his own money at the time, and the remainder in trust-money afterward.[2] If two agree to purchase, and one furnishes all the money and takes the title to himself, no trust results to the other.[3] And so if two agree to purchase, and one pays the whole consideration-money, and the title is taken to the two, no trust results to the one who paid the whole; he can only enforce repayment of one-half the consideration-money.[4] There must be an actual payment from a man's own money, or what is equivalent to payment from his own money, to create a resulting trust.[5] (*a*) And the money must be advanced and paid in the

[1] Jones *v.* Slaughter, 96 N. C. 541. [Julius Locheim & Co. *v.* Eversole, 93 S. W. 52 (Ky.) 1906.]

[2] McLaughlin *v.* Fulton, 104 Penn. St. 161.

[3] Brooks *v.* Fowle, 24 N. H. 248; Tebbetts *v.* Tilton, 31 N. H. 273; Edwards *v.* Edwards, 39 Penn. St. 369; Coppage *v.* Barnett, 34 Miss. 621; Cook *v.* Bronaugh, 8 Eng. 183; Fowke *v.* Slaughter, 3 A. K. Marsh. 56. [As to constructive trusts in such cases, see *infra*, § 206, note.]

[4] 2 Sugd. V. & P. 575 (13th ed.); but see Butler *v.* Rutledge, 2 Cold. 4.

[5] Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Tunnard *v.* Littell, id.; Roberts *v.* Ware, 40 Cal. 634; Page *v.* Page, 8 N. H. 187; Gomez *v.* Tradesman's Bank, 4 Sandf. S. C. 106; Coates *v.* Woodworth, 13 Ill. 634; Beck *v.* Graybill, 4 Casey, 66; Reeve *v.* Strawn, 14 Ill. 94; Ferguson *v.* Sutphen, 3 Gil. 547; Lounsbury *v.* Purdy, 16 Barb. 380; Runnells *v.* Jackson, 1 How. (Miss.) 358; Harrisburg Bank *v.* Tyler, 3 Watts & S. 373; Morey *v.* Herrick, 18 Penn. W. Va. 463; Mayer *v.* Kane, 69 N. J. Eq. 733; Aiken *v.* Taylor, 62 S. W. 200 (Tenn. Ch. App. 1900); Myers *v.* Myers, 47 W. Va. 487. See also Green *v.* Green, 56 S. C. 193; Barger *v.* Barger, 30 Or. 268; Leary *v.* Corvin, 181 N. Y. 222. See, *infra*, § 837.

No trust can result unless there is an actual conveyance of the property paid for by the alleged *cestui*. Thus where in Massachusetts upon a sheriff's sale of the husband's property on execution, a deed was executed to the wife for a consideration paid by her, not only was the deed void, but the wife's payment did not impress the land with a trust, since the title was not conveyed out of the husband. Livingstone *v.* Murphy, 187 Mass. 315.

(*a*) The payment need not be in money, but the resulting trust may

character of a purchaser; for if one pay the purchase-money by way of *loan* for another, and the conveyance is taken to the other, no trust will result to the one who thus pays the purchase-money;[1] on the other hand, if one should advance the purchase-money and take the title to himself, but should do this wholly upon the account and credit of the other, he would hold the estate upon a resulting trust for the other.[2] And if *partly* on the

St. 123; Smith *v.* Sackett, 5 Gilm. 534; Kelly *v.* Johnson, 28 Mo. 249; Botsford *v.* Burr, 2 Johns. Ch. 405; Getman *v.* Getman, 1 Barb. Ch. 499; Wright *v.* King, Harr. Ch. 12; Bernard *v.* Bongard, Harr. Ch. 130; Dudley *v.* Batchelder, 53 Me. 403; Russell *v.* Allen, 10 Paige, 249; Kirkpatrick *v.* McDonald, 1 Jones, 393; Smith *v.* Burnham, 3 Sumner, 435; White *v.* Sheldon, 4 Nev. 280; Kendall *v.* Mann, 11 Allen, 15.

[1] Bartlett *v.* Pickersgill, 1 Eden, 516; Crop *v.* Norton, 9 Mod. 235; White *v.* Carpenter, 2 Paige, 217; Henderson *v.* Hoke, 1 Dev. & Bat. Ch. 119; Dudley *v.* Batchelder, 53 Maine, 403; Gibson *v.* Toole, 40 Miss. 788; Whaley *v.* Whaley, 71 Ala. 162; Harvey *v.* Pennypacker, 4 Del. Ch. 445; Boehl *v.* Wadgymar, 54 Tex. 589.

[2] Aveling *v.* Knipe, 19 Ves. 441; Page *v.* Page, 8 N. H. 187; Runnells *v.* Jackson, 1 How. (Miss.) 358; Lounsbury *v.* Purdy, 18 N. Y. 515; 16 Barb. 380; Buck *v.* Pike, 2 Fairf. 9; Morey *v.* Herrick, 18 Penn. St. 123; Stucky *v.* Stucky, 30 id. 546; Kelly *v.* Johnson, 28 Mo. 249; Cutler *v.* Tuttle, 19 N. J. Eq. 562; Dryden *v.* Hanaway, 3 Md. 254; Fleming *v.* McHale, 47 Ill. 282; Honore *v.* Hutchins, 8 Bush, 687; Bates *v.* Kelley, 80 Ala. 142; Ward *v.* Matthews, 73 Cal. 13; Caruthers *v.* Williams, 21 Fla. 485; Green *v.* Dietrich, 114 Ill. 636; Bradley *v.* Luce, 99 Ill. 234. As where the lender

be based upon anything of value furnished by the *cestui* as part or all of the consideration for the purchase. Garten *v.* Trobridge, 80 Kan. 720; Gaynor *v.* Quinn, 212 Pa. St. 362; McCormick *v.* Cooke, 199 Pa. St. 631 (cases where the consideration was a debt due from the grantor to the *cestui*); Dana *v.* Dana, 154 Mass. 491 (bricks owned by the *cestui*); Fay *v.* Fay, 50 N. J. Eq. 260; Light *v.* Zeller, 144 Pa. St. 570, 582; Butler *v.* Carpenter, 163 Mo. 597 (the release of a previous interest in the same property). See also Condit *v.* Bigelow, 64 N. J. Eq. 504 (where a husband took a conveyance of property to which his wife was entitled under her father's will.) Hayes *v.* Carroll, 74 Minn. 134, and Barlow *v.* Barlow, 47 Kan. 676, (where the wife was equitably entitled to the conveyance under the homestead law); Reinhart *v.* Bradshaw, 19 Nev. 255 (where one of two jointly entitled to the property under the homestead law procured a conveyance to himself). See also Sweesey *v.* Sparling, 81 Iowa, 433; Brundy *v.* Mayfield, 15 Mont. 201; Moultrie *v.* Wright, 154 Cal. 520; Hendrichs *v.* Morgan, 167 Fed. 106.

account and credit of another, he would hold as trustee *pro tanto*.[1] (*a*)

takes the title merely as security for his advance. Wright *v.* Gay, 101 Ill. 233; Powell *v.* Powell, 114 Ill. 329. See also Weekly *v.* Ellis, 30 Kans. 507; Tenny *v.* Simpson, 37 Kans. 353; Wiggin *v.* Wiggin, 58 N. H. 235.

[1] Marvin *v.* Brooks, 94 N. Y. 71; Leggett *v.* Leggett, 88 N. C. 108; Brown *v.* Cave, 23 S. C. 251; Mims *v.* Chandler, 21 S. C. 480; Cook *v.* Sherman, 4 McCrary, 20.

(*a*) A loan to the title taker for the purpose of buying the property cannot be the basis of a resulting trust as to any interest in the property, even though the borrower has agreed by parol that the property shall be security for the repayment of the loan. Pain *v.* Farson, 179 Ill. 185; Fike *v.* Ott, 76 Neb. 439; Cornman's Estate, 197 Pa. St. 125; Harris *v.* Elliott, 45 W. Va. 245; Crawford *v.* Crawford, 77 S. C. 205; Stokes *v.* Clark, 131 Ga. 583. See also Butterfield *v.* Butterfield, 79 Ark. 164. And the fact that payment of the purchase-money comes directly from the lender is not material when it is established that the transaction was in substance a loan to the title taker. Milner *v.* Stanford, 102 Ala. 277.

Where the lender takes the title in himself, the fact that the entire purchase-money has come directly from him does not exclude parol proof that all or part of it was lent to another; and if this fact is established there is sufficient basis for a resulting trust, if the parties intended that the property or a definite interest in it should be held for the borrower. Thus where A. lends the purchase-money to B. and conveyance is made directly to A. to hold merely as security for payment of the loan, a trust results for the benefit of B. Miller *v.* Miller, 101 Md. 600; Hirshfeld *v.* Howard, 59 S. W. 55 (Tex. Civ. App. 1900); Dooly *v.* Pinson, 39 So. 664 (Ala.); Martin *v.* N. Y., etc. Co., 165 Fed. 398; Pittock *v.* Pittock, 15 Idaho, 426; Payne *v.* McClure Lodge, 115 S. W. 764 (Ky. 1909); Schrager *v.* Cool, 221 Pa. St. 622. Where A. and B. agree orally that land shall be purchased on joint account, and A. advances the entire purchase-money, and takes the title in his own name, but upon an understanding that one-half the amount shall be a loan to B., he holds an undivided one-half interest upon a resulting trust for B., since equity regards that portion of the consideration as paid by B. Towle *v.* Wadsworth, 147 Ill. 80; Holliday *v.* Perry, 38 Ind. App. 588; Herlihy *v.* Coney, 99 Me. 469; Stitt *v.* Rat Portage Co., 96 Minn. 27. See also Jones *v.* Beckman, 47 A. 71 (N. J. Ch. 1900).

In Herlihy *v.* Coney, 99 Me. 469, the principle is well stated as follows: "A resulting trust arises by implication of law when the purchase-money is paid by one person out of his own money, and the land is conveyed to another. It may be paid by the *cestui que trust* himself. It may be paid by another

§ 134. A trust results from the acts, and not from the agreements, of the parties, or rather from the acts accompanied by the agreements; but no trust can be set up by mere parol agreements, or, as has been said, no trust results merely from the breach of a parol contract; as if one agrees to purchase land and give another an interest in it, and he purchases and pays his own money, and takes the title in his own name, no trust can result.[1] And so if a party makes no payment, and none is made on his account, either actually or constructively, he cannot claim a resulting trust.[2] As where a father made a deed to a son-in-law,

[1] Kisler *v.* Kisler, 2 Watts, 323; Williard *v.* Williard, 56 Pa. St. 119; Loomis *v.* Loomis, 60 Barb. 22; Stover *v.* Flack, 41 Barb. 162; Thorner *v.* Thorner, 18 Ind. 462; Rogers *v.* Simmons, 55 Ill. 66; Loomis *v.* Loomis, 28 Ill. 454; Green *v.* Cook, 2 Ill. 196; Duffy *v.* Masterson, 44 N. Y. 557; Whetham *v.* Clyde, 1 Pa. Leg. Gaz. R. 55. But see Hidden *v.* Jordan, 21 Cal. 92; Green *v.* Drummond, 3 Md. 71; Meason *v.* Kaine, 63 Penn. St. 335; Smith *v.* Hollenback, 53 Ill. 223; Lantry *v.* Lantry, 51 Ill. 451; Robinson *v.* Robinson, 45 Ark. 481; Hunt *v.* Freedman, 63 Cal. 510; see § 209. Ward *v.* Spivey, 18 Fla. 847; Follett *v.* Badeau, 26 Mun, 253; Lawrence *v.* Lawrence, 14 Oregon, 77. [Butts *v.* Cooper, 152 Ala. 375; Banes *v.* Morgan, 204 Pa. St. 185; Withnell *v.* Withnell, 69 Neb. 605.] A trust resulting from the acts of the parties will not be converted into an express trust by the agreement of the parties; that is, it will not be any the less a resulting trust, and it will not be within the statute of frauds. Cotton *v.* Wood, 25 Iowa, 43.

[2] Jackson *v.* Ringland, 4 Watts & S. 149; Botsford *v.* Burr, 2 Johns. Ch. 408; Lathrop *v.* Hoyt, 7 Barb. 60; Dorsey *v.* Clark, 4 Har. & J. 551; Smith *v.* Smith, 3 Casey, 180; Fischili *v.* Dumaresly, 3 Marsh. 23; Sharp *v.* Long,

for him. It may be paid for him by the trustee. But the money must belong to the *cestui que trust* in specie, or by its payment by the hands of another he must incur an obligation to repay, so that the consideration actually moves from him at the time. He may take money from his purse, or he may borrow it, and he may borrow it from the trustee. And if the lender pays the money borrowed for the borrower, the borrower pays it. The test is whose money pays the consideration for the purchase."

The burden of proving that all or part of the purchase-money was advanced as a loan in such a case is upon the person claiming an interest in the property. It will not be inferred from the bare fact of a parol agreement to purchase and hold an interest in the property for him. There must be other evidence of a definite understanding that the transaction shall raise a debt between the two. Crawford *v.* Crawford, 77 S. C. 205; Bourke *v.* Callanan, 160 Mass. 195. See also Norton *v.* Brink, 75 Neb. 566.

in consideration of love and affection for his daughter, no trust resulted.[1] (a) And so a mere parol declaration by one that he is buying land for another is not sufficient to establish a resulting trust; there must be some proof of an actual or constructive payment by the person claiming such a trust.[2] The rule is otherwise if the promise led the plaintiff to take action he would not otherwise have taken. Then the breach of the promise becomes a *fraud*, and a trust may exist.[3]

§ 135. Again, parol proof cannot be received to establish a resulting trust in lands purchased by an agent and paid for by his own funds, no money of the principal being used for the payment; for the relation of principal and agent depends upon the agreement existing between them, and the trust in such a case must arise from the agreement, and not from the transaction, and where a trust arises from an agreement, it is within the

4 Casey, 434; Thompson *v.* Branch, Meigs, 390; Walker *v.* Brungard, 13 S. & M. 723; Ensley *v.* Ballentine, 4 Humph. 233; Lynn *v.* Lynn, 5 Gil. 602; Sample *v.* Coulson, 9 Watts & S. 62; Peebles *v.* Reading, 8 Ser. & R. 484. [McIntosh *v.* Green, 25 App. D. C. 456; Byers & Co. *v.* McEniry, 117 Iowa, 499 (where a debtor conveyed to one of his creditors upon the latter's parol agreement to apply the surplus to the claims of other creditors); Monson *v.* Hutchin, 194 Ill. 431; Bourke *v.* Callanan, 160 Mass. 195.]

[1] Thompson *v.* Thompson, 18 Ohio St. 73. [Acker *v.* Priest, 92 Iowa, 610; Noe *v.* Roll, 134 Ind. 115; Higbee *v.* Higbee, 123 Mo. 287; Lewis *v.* Stanley, 148 Ind. 351.]

[2] Ibid.; Kisler *v.* Kisler, 2 Watts, 323; Williard *v.* Williard, 56 Penn. St. 119.

[3] See § 171 *et seq.*

(a) Or where a husband makes a voluntary conveyance to his wife through the medium of a third person. Apart from the question of intention no trust for the husband can result from the conveyance by the third person to the wife, since no consideration is paid. Moore *v.* Horsley, 156 Ill. 36; Crawley *v.* Crafton, 193 Mo. 421; Handlan *v.* Handlan, 42 W. Va. 309; Taylor *v.* Miles, 19 Or. 550; Lane *v.* Lane, 80 Me. 570. Likewise, where a mother and father convey to a daughter upon a parol trust as to one-half for an infant son no trust results. Peterson *v.* Boswell, 137 Ind. 211. As to constructive trusts in such a case, see *infra*, § 181, note.

statute of frauds, and must be in writing.[1] (*a*) This rule is so inflexible, that though the agent may be indicted, and convicted of perjury in denying his character as agent in his answer under oath, the court cannot decree and establish the trust.[2] But if an agent invest his principal's money in real estate without his knowledge, or if, investing the money with his knowledge, he take the deed in his own name without his consent, or take a deed in a form contrary to the understanding, there will be a resulting trust.[3] But if one standing in no fiduciary relation obtains another's property wrongfully, and invests it in land in his own name, or if a clerk appropriates his master's money and buys real estate in his own name, there is no resulting trust.[4] (*b*)

[1] Kennedy *v.* Keating, 34 Mo. 25; Woodhull *v.* Osborne, 2 Edw. Ch. 615; Lathrop *v.* Hoyt, 7 Barb. 60; 2 Story, Eq. Jur. § 1201 a; Bartlett *v.* Pickersgill, 1 Eden, 515; 4 Burr. 22; 1 Cox, 15; 4 East, 577; Rastel *v.* Hutchinson, 1 Dick. 44; Lamas *v.* Bayley, 2 Vern. 627; Atkins *v.* Rowe, Mose. 39; O'Hara *v.* O'Neil, 2 Bro. P. C. 39; Jackman *v.* Ringland, 4 Watts & S. 149; Peebles *v.* Reading, 8 Ser. & R. 492; Pinnock *v.* Clough, 16 Vt. 507; Flagg *v.* Mann, 2 Sum. 546; Walker *v.* Brungard, 13 Sm. & M. 765; Taliaferro *v.* Taliaferro, 6 Ala. 406; Moore *v.* Green, 3 B. Mon. 407; Fowke *v.* Slaughter, 3 A. K. Marsh. 57; Dorsey *v.* Clarke, 4 Har. & J. 551; Pearson *v.* East, 36 Ind. 28; Minot *v.* Mitchell, 30 Ind. 228; Arnold *v.* Cord, 16 Ind. 177; Graves *v.* Ward, 2 Duv. 301; Heacock *v.* Coatesworth, Clarke, 84; Burden *v.* Sheridan, 36 Iowa, 125; Nestal *v.* Schmid, 29 N. J. Eq. 460. But where an attorney purchased property sold upon an execution in favor of his client at a grossly inadequate price, it was held that he was a trustee for his principal. Howell *v.*Baker, 4 Johns. Ch. 118. See Wade *v.* Pettibone, 11 Ohio, 57; 14 Ohio, 557.

[2] Bartlett *v.* Pickersgill, 1 Eden, 515; King *v.* Boston 4 East, 572.

[3] Day *v.* Roth, 18 N. Y. 448; Bridenbecker *v.* Lowell, 32 Barb. 9; Pugh *v.* Pugh, 9 Ind. 132; Rothwell *v.* Dewees, 2 Black, 613; Bruce *v.* Ronly, 18 Ill. 67; Follansbe *v.* Kilbreth, 17 Ill. 522; Squire's App. 70 Penn. St. 268; Seichrist's App. 66 id. 237. So if he take the deed in his wife's name, a knowledge by the principal that the deed is so made will not affect the trust. Bostleman *v.* Bostleman and Wife, 24 N. J. Eq. 103.

[4] Ensley *v.* Ballentine, 4 Humph. 233; Campbell *v.* Drake, 4 Ired. Eq. 94. But where A. embezzled B.'s money and invested it in stock in the name of C., a mere volunteer, a resulting trust was enforced against C. in

(*a*) But see *infra*, § 206 and notes, as to constructive trusts in such cases.

(*b*) But in such a case equity will construct a trust for the benefit of the person whose money has been

§ 136. In England, if two persons join in a purchase and contribute equally, and take the title in their own names, there is no reason to presume a resulting trust, and the two are joint tenants, the survivor taking the whole *jure accrescendi*.[1] And so if two contract for a purchase to them and their heirs, paying equal proportions, and one dies, the court will order a specific performance by a conveyance to the survivor alone.[2] But the court lays hold of every circumstance to defeat the joint tenancy and convert it into a tenancy in common.[3] Thus, where two tenants in common of a joint mortgage term purchase the equity of redemption,[4] or several engage in a joint undertaking, or partnership, or trade, or speculation,[5] or several purchase an estate and pay equally, but one improves the estate at his own

favor of B. Bank of America *v.* Pollock, 4 Edw. Ch. 415; and see Pascoag Bank *v.* Hunt, 3 Edw. 215; *ante*, § 128. See also Newton *v.* Porter, 5 Lans. 417.

[1] Robinson *v.* Preston, 4 K. & J. 505; Bone *v.* Pollard, 24 Beav. 288; Moyse *v.* Gyles, 2 Vern. 385; Hayes *v.* Kingdome, 1 Vern. 33; York *v.* Eaton, 2 Freem. 23; Aveling *v.* Knipe, 19 Ves. 441; Rigden *v.* Vallier, 3 Atk. 735; Lake *v.* Gibson, 1 Eq. Cas. Ab. 291; Anon., Carth. 15; Rea *v.* Williams, Sugd. V. & P. (14th ed.) p. [697]; Thicknesse *v.* Vernon, 2 Freem. 84.

[2] Aveling *v.* Knipe, 19 Ves. 441.

[3] Robinson *v.* Preston, 4 K. & J. 505; Tompkins *v.* Mitchell, 2 Rand. 428; Brothers *v.* Porter, 6 B. Mon. 106; Barribeau *v.* Brant, 17 How. 43.

[4] Edwards *v.* Fashion, Pr. Ch. 332; Morly *v.* Bird, 3 Ves. 631; Rigden *v.* Vallier, 3 Atk. 734; Vickers *v.* Cowell, 1 Beav. 629; Partridge *v.* Pawlett, 1 Atk. 467; Anon., Carth. 16; Petty *v.* Styward, 1 Ch. R. 57; Randall *v.* Phillips, 3 Mason, 378.

[5] Lake *v.* Gibson, 1 Eq. Cas. Ab. 290; 3 P. Wms. 158; York *v.* Eaton, 2 Freem. 23; Jackson *v.* Jackson, 9 Ves. 597 n.; Lyster *v.* Dolland, 1 Ves. Jr. 434; Jeffreys *v.* Small, 1 Vern. 217; Caines *v.* Grant, 5 Binn. 119; Duncan *v.* Forrer, 6 Binn. 193; Sigourney *v.* Munn, 7 Conn. 11; Overton *v.* Lacy, 6 Monroe, 13; Deloney *v.* Hutcheson, 2 Rand. 183; Cuyler *v.* Bradt, 2 Caines' Cas. 326; Pugh *v.* Currie, 5 Ala. 446; McAllister *v.* Montgomery, 3 Hayw. 94; Farley *v.* Shippen, Wythe, 135. See Appleton *v.* Boyd, 7 Mass. 131; Kinsley *v.* Abbott, 19 Maine, 430.

wrongfully used, if the money can be traced. *Supra*, § 128, note. In the case of an agent wrongfully using his principal's money, rightfully in his possession, to pay for property which he has purchased for himself, the trust is constructive rather than resulting. *Supra*, § 127, note; *infra*, § 206, note *a*.

cost,[1] equity will construe them to be tenants in common and not joint tenants. In this country, title by joint tenancy is very much reduced in extent, and the incident of survivorship is almost entirely destroyed by statutes, except in the case of trustees, executors, and others, in whom such a tenancy is necessary for the execution of their trusts.[2]

§ 137. The transaction out of which a trust results may be proved by parol.[3] The statute of frauds extends to and embraces only trusts created or declared by the parties, and does not affect trusts arising by operation of law.[4] (a) Indeed, such trusts are specially excepted in the statute of frauds of most States. The exception, however, was omitted in the statute of Rhode Island; but Mr. Justice Story held that the omission was immaterial, as such trusts were excepted in the nature of things.[5]

[1] Lake *v.* Gibson, 1 Eq. Cas. 291.

[2] See 4 Kent Com. 396 (11th ed.).

[3] Livermore *v.* Aldrich, 5 Cush. 435; Boyd *v.* McLean, 1 Johns. Ch. 582; Verplank *v.* Caines, id. 57; Botsford *v.* Burr, 2 id. 405; Ch. 57; Page *v.* Page, 8 N. H. 187; Scoby *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 397; Gardner Bank *v.* Wheaton, 8 Greenl. 373; Powell *v.* Monson & Brim. Manuf. Co., 3 Mason, 347; Elliott *v.* Armstrong, 3 Blackf. 199; Jennison *v.* Graves, id. 441; Blair *v.* Bass, 4 id. 550; Snelling *v.* Utterback, 1 Bibb, 609; Foote *v.* Bryant, 47 N. Y. 544; McGinity *v.* McGinity, 6 Penn. St. 38; Peiffer *v.* Lytle, 58 id. 386; Nixon's App., 63 id. 277; Byers *v.* Wackman, 16 Ohio, 80, 440; Faris *v.* Dunn, 7 Bush, 276; Caldwell *v.* Caldwell, 7 Bush, 515; Morgan *v.* Clayton, 61 Ill. 35; Knox *v.* McFarren, 4 Col. 586; Learned *v.* Tritch, 6 Col. 432. See Barbin *v.* Gasford, 15 La. An. 539. [Schrager *v.* Cool, 221 Pa. St. 622; Smithsonian Institution *v.* Meech, 169 U. S. 398; Sutton *v.* Whetstone, 21 S. D. 341. But see Barrow *v.* Grant's Estate, 116 La. 952.]

[4] Ross *v.* Hegeman, 2 Edw. Ch. 373; Larkin *v.* Rhodes, 5 Porter, 196; Enos *v.* Hunter, 4 Gil. 211; Smith *v.* Sackett, 5 Gilm. 544; Foote *v.* Bryant, 47 N. Y. 544; Black *v.* Black, 4 Pick. 238; Bryant *v.* Hendricks, 5 Iowa, 256; Judd *v.* Haseley, 22 Iowa, 428; Ward *v.* Armstrong, 84 Ill. 151; Gale *v.* Harby, 20 Fla. 171.

[5] Hoxie *v.* Carr, 1 Sum. 187.

(a) This applies to that clause of the statute which prohibits suits upon unwritten agreements not to be performed within a year. Rayl *v.* Rayl, 58 Kansas, 585.

It follows that a party setting up a resulting trust may prove by parol the agreements under which the estate was purchased, and he may prove by parol the actual payment of the purchase-money by himself, or in his behalf, although the deed states it to have been paid by the grantee in the conveyance.[1] (a) And although the holder of the legal title has fraudulently or by mistake made a declaration that he holds the property for some other person,[2] or states it to be for the use of the grantor,[3] and although the trust, and all the circumstances out of which it arises, may be denied under oath in the answer, yet the facts may all be proved by parol in opposition to the answer.[4] In such

[1] DePeyster *v.* Gould, 2 Green, Ch. 474; Dismukes *v.* Terry, Walk. 197; Peabody *v.* Tarbell, 2 Cush. 232; Barron *v.* Barron, 24 Vt. 375; Smith *v.* Burnham, 3 Sum. 438; Malin *v.* Malin, 1 Wend. 626; Harder *v.* Harder, 2 Sandf. Ch. 17; Peirce *v.* McKeehan, 3 Barr, 136; Lloyd *v.* Carter, 17 Pa. St. 216; Peebles *v.* Reading, 8 Serg. & R. 484; Millard *v.* Hathaway, 27 Cal. 119; Lyford *v.* Thurston, 16 N. H. 399; Bayles *v.* Baxter, 22 Cal. 575; Cooper *v.* Skeele, 14 Iowa, 578. [Lynch *v.* Herrig, 32 Mont. 267; Long *v.* Mechem, 142 Ala. 405; McMurray *v.* McMurray, 180 Mo. 526; Howard *v.* Howard, 52 Kan. 469; Snider *v.* Johnson, 25 Or. 328; Boyd *v.* Boyd, 163 Ill. 611; C. B. & Q. R. Co. *v.* First Nat. Bank, 58 Neb. 548; Withnell *v.* Withnell, 69 Neb. 605.] In Kirk *v.* Webb, Pr. Ch. 84, the court refused to admit parol evidence to control the recitals of the deed as to the payment of the consideration, and this decision was followed in Heron *v.* Heron, Pr. Ch. 163; Freem. 248; Skitt *v.* Whitmore, Freem. 280; Kinder *v.* Miller, Pr. Ch. 172; Newton *v.* Preston, id. 103; Hooper *v.* Eyles, 2 Vern. 480; Cox *v.* Bateman, 2 Ves. 19; Ambrose *v.* Ambrose, 1 P. Wms. 321; Deg *v.* Deg, 2 id. 414; but the rule has been changed, and the doctrine stated in the text is now established beyond controversy. Bartlett *v.* Pickersgill, 1 Eden, 515; Lench *v.* Lench, 10 Ves. 517; Groves *v.* Groves, 3 Y. & J. 163; See 2 Story, Eq. Jur. § 1201, and notes; Livermore *v.* Aldrich, 5 Cush. 435; Connor *v.* Follansbee, 59 N. H. 125. [Brooks *v.* Union Trust, etc. Co., 146 Cal. 134.]

[2] Hanson *v.* First Presbyterian Church, 1 Stock. 441.

[3] Cotton *v.* Wood, 25 Iowa, 43.

[4] Cooth *v.* Jackson, 6 Ves. 39; Buck *v.* Pike, 2 Fairf. 24; Baker *v.* Vining, 30 Me. 121; Page *v.* Page, 8 N. H. 187; Moore *v.* Moore, 38 N. H. 382; Boyd *v.* McLean, 1 Johns. Ch. 582; Botsford *v.* Burr, 2 id. 405; Swinburne *v.* Swinburne, 28 N. Y. 568; Snelling *v.* Utterback, 1 Bibb, 609; Lloyd *v.* Lynch,

(a) And he may prove by parol that a purchase-money note signed by the grantee was intended and treated as between the grantee and the *cestui* as the debt of the latter. Small *v.* Hatch, 151 Mo. 300. See Levy *v.* Mitchell, 114 S. W. 172 (Tex. Civ. App. 1908.).

case the trust must be clearly alleged in the bill, not only in terms, but all the facts must be set out from which the trust is claimed to result.[1] (a) General vague statements of a testator that the land he owned was the "security or property held in trust by him for the payment of the trust fund," will not be sufficient to impress a trust on the property in the absence of clear evidence that trust funds were used in the purchase of the land.[2] The facts in all cases must be proved with great clearness and certainty,[3] especially when the claim depends upon

28 Pa. St. 419; Letcher *v.* Letcher, 4 J. J. Marsh. 590; Miller *v.* Stokely, 5 Ohio St. 194; Elliott *v.* Armstrong, 2 Blackf. 198; Jenison *v.* Graves, id. 440; Blair *v.* Bass, 4 id. 540; Larkins *v.* Rhodes, 5 Porter, 196; Farringer *v.* Ramsey, 2 Md. 365; Greer *v.* Baughman, 13 Md. 257; Ensley *v.* Ballentine, 4 Humph. 233; Paine *v.* Wilcox, 16 Wis. 202; Olive *v.* Dougherty, 3 Iowa, 371; Vandever *v.* Freeman, 20 Tex. 333; Pugh *v.* Bell, 1 J. J. Marsh. 399.

[1] Rowell *v.* Freese, 23 Maine, 182; Hickey *v.* Young, 1 J. J. Marsh. 1; Gascoigne *v.* Thwing, 1 Vern. 366; Rider *v.* Kidder, 20 Ves. 364; Groves *v.* Groves, 3 Y. & J. 163; Halcott *v.* Morkant, Pr. Ch. 168; Goodright *v.* Hodges, 1 Watk. Corp. 229; Willis *v.* Willis, 2 Atk. 71. [Byers *v.* Ferner, 216 Pa. St. 233.]

[2] Cuming *v.* Robins, 39 N. J. Eq. 46.

[3] Cuming *v.* Robins, 39 N. J. Eq. 46; Slocumb *v.* Marshall, 2 Wash. C. C. 397; Newton *v.* Preston, Pr. Ch. 103; Wright *v.* King, Harr. Ch. 12; Enos *v.* Hunter, 4 Gilm. 211; Carey *v.* Callan, 6 B. Mon. 44; O'Hara *v.* O'Neil, 2 Eq. Cas. Ab. 475; Cottington *v.* Fletcher, 2 Atk. 155; Ambrose *v.* Ambrose, 1 P. Wms. 321; Hyden *v.* Hyden, 6 Baxter (Tenn.), 406; Thomas *v.* Sandford, 49 Md. 181; Johnson *v.* Richardson, 44 Ark. 365; Harvey *v.* Pennybacker, 4 Del. Ch. 445; Green *v.* Dietrich, 114 Ill. 636; Witts *v.* Horney, 59 Md. 584; Philpot *v.* Penn., 91 Mo. 38; Rogers *v.* Rogers, 87 Mo. 257; Shaw *v.* Shaw, 86 Mo. 594; Modrell *v.* Riddle, 82 Mo. 31; Parker *v.* Snyder, 31 N. J. Eq. 164; Brickell *v.* Earley, 115 Penn. St. 473. As to what facts are competent and necessary to be proved, see Hunter *v.* Marlboro', 2 Wood. & M. 168; Morey *v.* Herrick, 18 Penn. St. 128; Blyholder *v.* Gibson, 18 Pa. St. 134; Farringer *v.* Ramsey, 4 Md. Ch. 33; Malin *v.* Malin, 1 Wend. 626; Harder *v.* Harder, 1 Sandf. 17; Snelling *v.* Utterback, 1 Bibb, 609; Freeman *v* Kelly, 1 Hoff. 90; Baker *v.* Vining, 30 Me. 128; Clarke *v.* Quackenboss, 27 Ill. 260; Nelson *v.* Warrall, 20 Iowa, 409; White *v.* Weldon, 4 Nev. 280; Stall *v.* Cincinnati, 16 Ohio St. 169; Browne *v.* Stamp, 21 Md. 328; Holder

(a) Thus where the petition alleged that the land was purchased by a father in the name of his son, the circumstances relied on to rebut the presumption of gift must be averred. Hoon *v.* Hoon, 126 Iowa, 391; Long *v.* King, 117 Ala. 423.

mere statements;[1] and facts that only base a *conjecture* that the conditions of a resulting trust existed, are insufficient.[2] (*a*) The certainty required, however, is only such as is sufficient to satisfy the jury of the existence of the trust; and it is error to charge that the "clearest and most positive proof" must be given.[3] (*b*) For this purpose all competent evidence is admissible, as the admissions of the nominal purchaser and grantee in the deed, recitals in the deed and other proper documents, and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay

v. Nunnelly, 2 Cold. 288; Childs *v.* Gramold, 19 Iowa, 362; Cutler *v.* Tuttle, 19 N. J. Eq. 560; Parmlee *v.* Sloan, 37 Ind. 469; Phelps *v.* Seeley, 22 Grat. 573; Shepard *v.* Pratt, 32 Iowa, 296. [Holloway *v.* Wilkerson, 150 Ala. 297; Dooley *v.* Pinson, 39 So. 664 (Ala. 1905); Woodside *v.* Hewel, 109 Cal. 481; Marshall *v.* Fleming, 11 Colo. App. 515; Keith *v.* Miller, 174 Ill. 64; Francis *v.* Roades, 146 Ill. 635; McGinnis *v.* Jacobs, 147 Ill. 24; Jacksonville Bank *v.* Beesley, 159 Ill. 120; Pillars *v.* McConnell, 141 Ind. 670; Cunningham *v.* Cunningham, 125 Iowa, 681, 687; Malley *v.* Malley, 121 Iowa, 237; Logan *v.* Johnson, 72 Miss. 185; Reed *v.* Painter, 129 Mo. 674; Smith *v.* Smith, 201 Mo. 533; Carter *v.* Carter, 14 N. D. 66; Snider *v.* Johnson, 25 Or. 328; Cornman's Estate, 197 Pa. St. 125; Olinger *v.* Shultz, 183 Pa. St. 469; Fowler *v.* Webster, 180 Pa. St. 610; Brickell *v.* Earley, 115 Pa. St. 473; Reynolds *v.* Blaisdell, 23 R. I. 16; Gaines *v.* Drakeford, 51 S. C. 37; Chambers *v.* Emery, 13 Utah, 374; Parker *v.* Logan, 82 Va. 376; Spencer *v.* Terrel, 17 Wash. 514; Gilbert *v.* Lawrence, 56 W. Va. 281, 292.]

[1] Heneke *v.* Floring, 114 Ill. 554; McKeown *v.* McKeown, 33 N. J. Eq. 384.

[2] Railsback *v.* Williamson, 88 Ill. 497. [Holloway *v.* Wilkerson, 150 Ala. 297; Malley *v.* Malley, 121 Iowa, 237; Crawford *v.* Crawford, 77 S. C. 205.]

[3] Neyland *v.* Bendy, 69 Tex. 711.

(*a*) A mere statement of the title holder that he had used funds of his ward in the purchase of land is not sufficient evidence on which to base a resulting trust since it does not identify what land he had purchased with such funds. Garrett *v.* Garrett, 171 Mo. 155.

(*b*) It has been stated that a bare preponderance of the evidence is not sufficient, Cunningham *v.* Cunningham, 125 Iowa, 681; Chambers *v.* Emery, 13 Utah, 374; and even that the necessary facts must be established beyond a reasonable doubt. Reed *v.* Painter, 129 Mo. 674; Reed *v.* Sperry, 193 Mo. 167. But these statements seem to go too far. See Doane *v.* Dunham, 64 Neb. 135; Burnett *v.* Campbell Co., 1 Tenn. Ch. App. 18.

the purchase-money.[1] But loose and equivocal facts ought not to control the evidence of deeds; and two witnesses, or one witness with corroborating circumstances, are required to control an answer under oath. And proof of mere admissions of one that he purchased for another, without proof of some previous arrangement or advance of money by such other, is insufficient to create a resulting trust.[2] (*a*)

§ 138. It has been stated by some writers that *after the death of the supposed nominal* purchaser, parol proof alone could not be admitted to control the express declaration of the deed;[3] but the cases relied upon are the cases before cited to the point that parol proof is inadmissible, both before and after the death of the supposed nominal purchaser. These cases are overruled and it would seem upon principle that the death of the nominal purchaser cannot affect the admissibility of parol testimony, whatever effect it may have upon its weight.[4] Analogous to

[1] Willis *v.* Willis, 2 Atk. 71; Wilkins *v.* Stevens, 1 Y. & C. Ch. 431; Lench *v.* Lench, 10 Ves. 518; Benger *v.* Drew, 1 P. Wms. 780; Strimpfler *v.* Roberts, 18 Penn. St. 283; Farrell *v.* Lloyd, 69 id. 239; Baumgartner *v.* Guessfeld, 38 Mo. 36; Brown *v.* Petney, 3 Ill. 468; Sayre *v.* Frederick, 16 N. J. Eq. 205; Gascoigne *v.* Thwing, 30 N. J. L. 366; Groves *v.* Groves, 3 Y. & J. 170; Mitchell *v.* O'Neil, 4 Nev. 504. [Salisbury *v.* Clarke, 61 Vt. 453. See also Byers *v.* Ferner, 216 Pa. St. 233.]

[2] Sidle *v.* Walter, 5 Watts, 389; and see Sample *v.* Coulson, 9 W. & S. 62. The admission of a trustee that he purchased certain property with the trust fund is competent evidence to raise a resulting trust for the *cestui que trust* in that property. Harrisburg Bank *v.* Tyler, 3 Watts & S. 373.

[3] Sanders on Uses and Trusts, 259; note to Lloyd *v.* Spillett, 2 Atk. 150; Roberts on Statute of Frauds, 99.

[4] Lewin on Trusts, 138 (5th Lond. ed.), 2 Mad. Ch. Pr. 141; Sugd. V. & P. 136 (9th ed.); Lench *v.* Lench, 10 Ves. 517; 2 Story, Eq. Jur. § 1201, n.; Livermore *v.* Aldrich, 5 Cush. 435; Unitarian So. *v.* Woodbury, 14 Me. 281; De Peyster *v.* Gould, 2 Green, Ch. 474; Harrisburg Bank *v.*

(*a*) A mere statement of the grantee that he holds in trust for another is not sufficient. Acker *v.* Priest, 92 Iowa, 610. But a resulting trust may be proved by admission of the title holder that another's money paid for the land. Springer *v.* Kroeschell, 161 Ill. 358; Van Buskirk *v.* Van Buskirk, 148 Ill. 9; Whitley *v.* Ogle, 47 N. J. Eq. 67, 72.

this matter is the question whether *trust-money* can be followed into land by parol evidence; and it is clearly established that it may, on the ground that a purchase with trust-money is virtually a purchase paid for by the *cestui que trust*, and such a purchase is a trust by operation of law, and not within the statute of frauds.[1] And if a trustee pay for property out of the trust fund, and take the deed in the name of another, the trust results to the *cestui que trust*, and not to the trustee.[2]

§ 139. It follows that as a resulting trust may be shown by parol proof, as a presumption of law arising out of the transaction, so the presumption may be rebutted by parol proof showing that no trust was intended by the parties at the time of the transaction,[3] and that it was the intention to confer the beneficial interest upon the supposed nominal purchaser. (*a*) As the resulting trust is mere matter of equitable presumption, it may be rebutted by facts that negative the presumption; and whatever facts appear tending to prove that it was intended that the nominal purchaser should take the beneficial interest as well as the legal title, negatives the presumption.[4] The presumption

Tyler, 3 W. & S. 373; Harder *v.* Harder, 2 Sand. Ch. 17; McCammon *v.* Petitt, 3 Sneed, 242; Faulser *v.* Jones, 7 Ind. 277; Neill *v.* Keese, 5 Tex. 23; Freeman *v.* Kelly, 1 Hoff. 90; Richardson *v.* Taylor, 45 Ark. 472.

[1] Lench *v.* Lench, 10 Ves. 517; Trench *v.* Harrison, 17 Sim. 111; *ante*, §§ 127, 128.

[2] Russell *v.* Allen, 10 Paige, 249; Wynn *v.* Sharer, 23 Ind. 573. [See *In re* Spencer, 128 Fed. 654.]

[3] Warren *v.* Steer, 112 Penn. St. 635; declarations made afterwards and not bearing on the intent at the time of purchase cannot affect the title. [Zimmerman *v.* Barber, 176 Pa. St. 1; Morris *v.* Clare, 132 Mo. 232, 236; Phillips *v.* Swenson, 16 S. D. 357; De Hihns *v.* Free, 70 S. C. 344.]

[4] Rider *v.* Kidder, 10 Ves. 364; Benbow *v.* Townsend, 1 M. & K. 508; Goodright *v.* Hodges, 1 Watk. Cop. 227; Lofft. 230; Rundle *v.* Rundle, 2

(*a*) Parol agreements of the parties are admissible as evidence of intention, as is also the *modus vivendi* after the purchase, but only as showing the intention *at the time of the purchase;* Ward *v.* Ward, 59 Conn. 188, 196; and the same is true of subsequent declarations. Deck *v.* Tabler, 41 W. Va. 332.

may be negatived as to part of the estate, and prevail in part.[1] The presumption, however, is in favor of the trust resulting to the party paying the consideration, and the burden of proof is upon the mere nominal purchaser to show that he was intended to have some beneficial interest.[2] (*a*) The burden of proof on the whole case, however, rests on the one who seeks to establish a resulting trust, to show by clear evidence the necessary facts.[3]

§ 140. And when a clear understanding is had at the time the purchase is made, the money paid, and the deed taken, by which understanding the nominal purchaser was to have both the legal and the beneficial interest, it is incompetent for the person who paid the purchase-money to put a different construction upon the transaction at a subsequent time, and claim a resulting trust in the estate contrary to the understanding and intention at the

Vern. 252; Taylor *v.* Taylor, 1 Atk. 386; Redington *v.* Redington, 3 Ridg. 106; Beecher *v.* Major, 2 Drew. & Sm. 431; Garrick *v.* Taylor, 29 Beav. 79; 4 De G., F. & J. 159; Bellasis *v.* Compton, 2 Vern. 294; Madison *v.* Andrew, 1 Ves. 58; Bake *v.* Vining, 30 Maine, 126; Page *v.* Page, 8 N. H. 189; Botsford *v.* Burr, 2 Johns. Ch. 405; Steere *v.* Steere, 5 id. 18; White *v.* Carpenter, 2 Paige, 217; Jackson *v.* Feller, 2 Wend. 465; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Sewell *v.* Baxter, 2 Md. Ch. 448; Hays *v.* Hollis, 8 Gill, 369; McGuire *v.* McGowan, 4 Des. 487; Elliott *v.* Armstrong, 2 Blackf. 199; Philips *v.* Crammond, 2 Wash. C. C. 441; Myers *v.* Myers, 1 Casey, 100; Squire *v.* Harder, 1 Paige, 494; Ledge *v.* Morse, 16 Johns. 199; Smith *v.* Howell, 3 Stockt. 122; Bayles *v.* Baxter, 22 Cal. 375; McCue *v.* Gallagher, 23 Cal. 51; Byers *v.* Danley, 27 Ark. 77; Hays *v.* Quay, 68 Penn. St. 263; Murphy *v.* Peabody, 63 Ga. 522; Kelsey *v.* Snyder, 118 Ill. 544.

[1] Benbow *v.* Townsend, 1 M. & K. 506; Rider *v.* Kidder, 10 Ves. 360; Lane *v.* Dighton, Amb. 409; Pinney *v.* Fellows, 15 Vt. 525.

[2] Dudley *v.* Bosworth, 10 Humph. 12; 2 Sugd. V. & P. 139 (9th ed.).

[3] Philpot *v.* Penn. 91 Mo. 44; Jackson *v.* Wood, 88 Mo. 76; Johnson *v.* Quarles, 46 Mo. 423. [Joerger *v.* Joerger, 193 Mo. 133.]

(*a*) But where for a consideration furnished by W. a conveyance was made to him as trustee for M., and no legal interest passed to W. because the trust was a naked one which the statute of uses executes by vesting the legal title in M., no trust results for the benefit of W., since the intention was clear that M. should have the entire beneficial interest. Wolters *v.* Shraft, 69 N. J. Eq. 215.

time.[1] And if the nominal purchaser, under such circumstances, should afterwards agree to hold in trust for, or to execute a conveyance to the person who paid the money, courts would not enforce the agreement, if it was without a new consideration or voluntary.[2] So if the trust is declared in writing at the time of the transaction there can be no resulting trust, as the one precludes the other;[3] or if the nominal purchaser stipulates for something out of the transaction inconsistent with the trust.[4] (*a*)

§ 141. Courts will not enforce a resulting trust after a great lapse of time,[5] or laches on the part of the supposed *cestui que trust*, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate.[6] (*b*) But if the

[1] Groves *v.* Groves, 3 Y. & J. 172; Hunt *v.* Moore, 6 Cush. 1; White *v.* Sheldon, 4 Nev. 280; Robles *v.* Clarke, 25 Cal. 317.

[2] Ibid.

[3] Clark *v.* Burnham, 2 Story, 1; Anstice *v.* Brown, 6 Paige, 448; Leggett *v.* Dubois, 5 Paige, 114; Alexander *v.* Warrance, 17 Mo. 230; Mercer *v.* Stark, 1 Sm. & M. 479; Dennison *v.* Goehring, 7 Barr, 175.

[4] Dow *v.* Jewell, 21 N. H. 470.

[5] James *v.* James, 41 Ark. 303 (more than 20 years). [Brackin *v.* Newman, 121 Ala. 311.]

[6] Delane *v.* Delane, 7 Bro. P. C. 279; Clegg *v.* Edmonson, 8 De G., M. & G. 787; Groves *v.* Groves, 3 Y. & J. 172; Peebles *v.* Reading, 8 Ser. & R. 484; Graham *v.* Donaldson, 5 Watts, 471; Haines *v.* O'Connor, 10 Watts, 315; Lewis *v.* Robinson, id. 338; Buckford *v.* Wade, 17 Ves. 97; Robertson *v.* Macklin, 3 Hayw. 70; Strimpfler *v.* Roberts, 18 Penn. St. 283; Best *v.* Campbell, 62 id. 478; Douglass *v.* Lucas, 63 id. 11; Sunderland *v.* Sunderland, 19 Iowa, 325; Brown *v.* Guthrie, 27 Texas, 610; Hall *v.* Doran, 13 Iowa, 368; Trafford *v.* Wilkinson, 3 Tenn. Ch. 701; Newman *v.* Early, id. 714. And see Miller *v.* Blose, 30 Grat. 744; Jennings *v.* Shacklett, id. 765; King *v.* Purdee,

(*a*) The trustee of a resulting trust is powerless to change the terms either by a subsequent written declaration of trust or by a conveyance to another as trustee for the beneficiary. Adams *v.* Carey, 53 N. J. Eq. 334. Thus where a husband conveyed land to a third person in trust for the sole and separate use of his wife, reciting that he had purchased the land with his wife's money, the attempted variance from the terms of the resulting trust was held to be of no effect, the wife being no party to it. Griffith *v.* Eisenberg, 215 Pa. St. 182.

(*b*) For a more complete state-

trust is admitted, and there has been no adverse holding, lapse of time is no bar,[1] (*a*) and laches will not be allowed to avail as a defence, where fraud has been practised on the *cestui* to keep her in ignorance of her rights until just before filing the bill. Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar is sufficient.[2] (*b*)

§ 142. The legislature of New York has abolished trusts resulting from the payment of the consideration by one and the taking the title in the name of another, except in cases where the nominal grantee has taken the deed without the knowledge and consent of the party paying the money, or except the purchase is made with another's money in violation of some duty or trust.[3] But the statute saves the rights of creditors of the party paying the purchase-money and taking the title in the name of another.[4] If such a purchase is a fraud upon creditors,

96 U. S. 90; Midmer *v.* Midmer, 26 N. J. Eq. 299; Smith *v.* Patton, 12 W. Va. 541; McGivney *v.* McGivney, 142 Mass. 156, 160.

[1] Dow *v.* Jewell, 18 N. H. 340. [Lufkin *v.* Jakeman, 188 Mass. 528; Madison *v.* Madison, 206 Ill. 534; Smith *v.* Smith, 132 Iowa, 700; Flanner *v.* Butler, 131 N. C. 155; Pearce *v.* Dyess, 101 S. W. 549 (Tex. Civ. App. 1907); Shackleford *v.* Elliott, 209 Ill. 333; Miller *v.* Baker, 160 Pa. St. 172; 166 Pa. St. 414; Condit *v.* Maxwell, 142 Mo. 266; Cooksey *v.* Bryan, 2 App. D. C. 557.]

[2] Harris *v.* McIntyre, 118 Ill. 275.

[3] Linsley *v.* Sinclair, 24 Mich. 380. [Leary *v.* Corvin, 181 N. Y. 222.]

[4] Rev. Stat. 1859, Part II. (Vol. III. p. 15), c. 1, art. 6, §§ 52, 53, 57; [IV Consol. Laws (1909), p. 3390, § 94]; Bodine *v.* Edwards, 10 Paige, 504; Brewster *v.* Power, 10 Paige, 562; Willink *v.* Vanderveer, 1 Barb. 599; Norton *v.* Storer, 8 Paige, 222; Reid *v.* Fitch, 11 Barb. 399; Lounsbury *v.* Purdy,

ment as to the rule of laches and the application of statutes of limitations in case of resulting trusts, see *infra*, § 865, note.

(*a*) Joint occupation by husband and wife is not ordinarily adverse to either's claim of a resulting trust. Miller *v.* Baker, 160 Pa. St. 172, 166 Pa. St. 414; Berry *v.* Wiedman, 40 W. Va. 36; Fawcett *v.* Fawcett, 85 Wis. 332.

(*b*) But long delay in asserting the trust is always a circumstance of weight in determining whether or not there ever was a trust. Byers *v.* Ferner, 216 Pa. St. 233.

they may enforce the trust in equity, though the original purchaser and payer of the money would have no remedy;[1] but if the debt is barred by a discharge in bankruptcy, the creditor's lien is gone.[2] In Kentucky, trusts resulting from the payment of the money and the purchase in the name of another are abolished, but an action is given for the recovery of the money paid.[3] In Massachusetts, the creditors of such a purchaser, taking the title in the name of a third person, may levy their execution upon the land, in the same manner as if the purchaser had taken the title directly to himself.[4] And so in New Hampshire.[5] The statute of New York has been strictly construed, and therefore if A. makes a purchase, and pays the money, and takes the title in the name of B., upon a parol trust for C., it is not within the statute; and C. may enforce the trust as against B.[6] (*a*) Statutes

16 Barb. 376; 18 N. Y. 515; Jencks *v.* Alexander, 11 Paige, 619; Watson *v.* Le Row, 6 Barb. 481; Russell *v.* Allen, 10 Paige, 250; Siemon *v.* Schurck, 29 N. Y. 598; Swinburne *v.* Swinburne, 28 N. Y. 568; Stover *v.* Flock, 21 Barb. 162; Safford *v.* Hind, 39 Barb. 625; Buffalo R. R. Co. v. Lampson, 47 Barb. 533; Gilbert *v.* Gilbert, 1 Keyes (N. Y.), 159. See the comments of Church, Ch. J., upon this last case, in Foote *v.* Bryant, 47 N. Y. 561; and see Gilbert *v.* Gilbert, 2 N. Y. Dec. 256; Farrell *v.* Lloyd, 69 Penn. St. 239.

[1] Ibid.; Jackson *v.* Forrest, 2 Barb. Ch. 576; McCartney *v.* Bostwick, 32 N. Y. 53.

[2] Ocean Nat. Bank *v.* Alcott, 46 N. Y. 12.

[3] Martin *v.* Martin, 5 Bush, 47. [Ky. Statutes (1909), §§ 2050–2051; McConnell *v.* Gentry, 99 S. W. 278 (Ky. 1907).]

[4] Gen. Stat. 1860, c. 103, § 1; Stat. 1844, c. 107; Foster *v.* Durant, 2 Gray, 538; amending the law as ruled in How *v.* Bishop, 3 Met. 26; Clark *v.* Chamberlain, 12 Allen, 257. [Mass. Rev. Laws (1902) Ch. 178, §§ 1, 47.]

[5] Hutchins *v.* Heywood, 50 N. H. 591.

[6] Siemon *v.* Austin, 33 Barb. 9; Siemon *v.* Schurck, 29 N. Y. 598; Foote *v.* Bryant, 44 N. Y 544. [Gage *v.* Gage, 43 N. Y. S. 810, 13 App. Div. 565.]

(*a*) A similar interpretation has been given to the Michigan statute. Connolly *v.* Keating, 102 Mich. 1. But it has also been held that breach of the oral agreement of the grantee to take the deed in the name of one who furnishes only part of the consideration, in this case one-tenth, will not cause a resulting trust to arise. Schierloh *v.* Schierloh, 148 N. Y. 103.

The statute has no application to an express parol trust evidenced by a subsequent declaration or acknowledgment in writing. Woerz *v.* Rademacher, 120 N. Y. 62.

similar to the statute of New York have been passed in Michigan,[1] Wisconsin,[2] [Minnesota,[3] Kansas,[4] and Indiana.[5]] In Louisiana, express trusts have been abolished; but trusts arising from the nature of transactions, or by implication of law, are still enforced by the courts.[6]

§ 143. As before stated, if a purchaser of an estate pays the consideration-money, and takes the title in the name of a stranger, the presumption is that he intended some benefit for himself, and a resulting trust arises for him;[7] but if the purchaser take the conveyance in the name of a wife or child or other person, for whom he is under some natural, moral, or legal obligation to provide, the presumption of a resulting trust is rebutted, and the contrary presumption arises, that the purchase and conveyance were intended to be an advancement for the nominal purchaser.[8] The transaction will be regarded *prima facie* as a

[1] R. S. 1846, c. 63, § 4; Fisher *v.* Fobes, 22 Mich. 454. [Compiled Laws (1897), §§ 8835–8837; Hamilton *v.* Wickson, 131 Mich. 71; Connolly *v.* Keating, 102 Mich. 1.]

[2] R. S. 1858, c. 84, §§ 7-9. [Wis. Statutes (1898), §§ 2077, 2079; Meier *v.* Bell, 119 Wis. 482; Scott *v.* Holman, 117 Wis. 206.]

[3] [Minn. Rev. Laws (1905), §§ 3245–3247; Anderson *v.* Anderson, 81 Minn. 329; Minneapolis, etc. R. Co. *v.* Lund, 91 Minn. 45, 49; Stitt *v.* Rat Portage Co., 96 Minn. 27; Haaven *v.* Hoaas, 60 Minn. 313.]

[4] [Kan. Gen. Stat. (1909), §§ 9699–9701; Chantland *v.* Bank, 66 Kan. 549; Hanrion *v.* Hanrion, 73 Kan. 25.]

[5] [Ind. Stats. (Burns, 1908), §§ 4017–4019; Holliday *v.* Perry, 38 Ind. App. 588.]

[6] Gaines *v.* Chow, 2 How. 619; McDonough's Ex'rs *v.* Murdock, 15 How. 367.

[7] *Ante*, § 126.

[8] Murless *v.* Franklin, 1 Swanst. 17; Grey *v.* Grey, 2 Swanst. 597; Finch, 340; Dyer *v.* Dyer, 2 Cox, 93; 1 Watk. Cop. 219; Redington *v.* Redington, 2 Ridg. 176; Elliot *v.* Elliot, 2 Ch. Cas. 231; Sidmouth *v.* Sidmouth, 2 Beav. 454; Thomas *v.* Chicago, 55 Ill. 403; Graff *v.* Rohrer, 35 Md. 327; Christy *v.* Courtenay, 13 Beav. 96; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Goodright *v.* Hodges, 1 Watk. Cop. 228; Pole *v.* Pole, 1 Ves. 76; Woodman *v.* Morrell, 2 Freem. 33; Finch *v.* Finch, 15 Ves. 50; Mumma *v.* Mumma, 2 Vern. 19; Skeats *v.* Skeats, 2 Younge & C. Ch. 9; Wait *v.* Day, 4 Denio, 439; Wilton *v.* Devine, 20 Barb. 9; Jackson *v.* Matsdorf, 11 Johns. 91; Proseus *v.* McIntire, 5 Barb. 424; Partridge *v.* Havens, 10 Paige, 678; Guthrie *v.*

settlement upon the nominal grantee; and if the payer of the money claims a resulting trust he must rebut this presumption by proper evidence.[1] (*a*) Lord Ch. B. Eyre stated the doctrine thus: "The circumstance of one or more of the nominees being a child or children of the purchaser is held to operate by *rebutting the resulting trust;* and it has been determined in so many cases that the nominee being a child shall have such operation, as a *circumstance of evidence,* that it would be disturbing landmarks if we suffered either of these propositions to be called into question; viz., that such circumstance shall rebut the resulting trust and that it shall do so as a circumstance of evidence. It would have been a more simple doctrine if children had been considered as *purchasers for valuable consideration.* That way of considering it would have shut out all the circumstances of evidence which have found their way into the cases, and would have prevented some very nice distinctions, not very easily understood. Considering it as a circumstance of evidence, there must, of course, be evidence admitted on the other side. *Thus the question is resolved into one of intent,* which was getting into

Gardner, 19 Wend. 414; Reid *v.* Fitch, 11 Barb. 399; Page *v.* Page, 8 N. H. 187; Astreen *v.* Flanagan, 3 Edw. Ch. 279; Bodine *v.* Edwards, id. 504; Dennison *v.* Goehring, 7 Barr, 182, n.; Knouff *v.* Thompson, 16 Penn. St. 357; Shaw *v.* Read, 47 id. 96; Fleming *v.* Donahoe, 5 Ohio, 255; Tremper *v.* Burton, 18 Ohio, 418; Stanley *v.* Brannon, 6 Blackf. 193; Whitten *v.* Whitten, 3 Cush. 194; Fatheree *v.* Fletcher, 31 Miss. 265; Welton *v.* Devine, 20 Barb. 9; Butler *v.* Ins. Co., 14 Ala. 777; Douglass *v.* Price, 4 Rich. Eq. 322; Taylor *v.* James, 4 Des. 9; Thompson *v.* Thompson, 1 Yerg. 97; Dudley *v.* Bosworth, 10 Humph. 12; Alexander *v.* Warrance, 2 Bennett, 230; Cartwright *v.* Wise, 14 Ill. 417; Shepherd *v.* White, 10 Tex. 72; Baker *v.* Leathers, 3 Ind. 557; Hill *v.* Pine River Bank, 45 N. H. 300; Dickenson *v.* Davis, 44 N. H. 647; Miller *v.* Blose, 30 Grat. 744; Kelly *v.* Karsner, 72 Ala. 106; Schuster *v.* Schuster, 93 Mo. 438; Seibold *v.* Chrisman, 75 Mo. 308; Read *v.* Huff, 40 N. J. Eq. 229; Newman *v.* Early, 3 Tenn. Ch. 716. [Kreps *v.* Kreps, 91 Md. 692.]

[1] Jackson *v.* Matsdorf, 11 Johns. 91; Shepherd *v.* White, 10 Texas, 72; Proseus *v.* McIntire, 5 Barb. 425; Butler *v.* Ins. Co., 14 Ala. 777; Hill *v.* Pine River Bank, 45 N. H. 300.

(*a*) See Walston *v.* Smith, 70 Vt. 19.

a very wide sea without very certain guides."[1] And Lord Nottingham pointed out that the law of resulting trusts, in this respect, was analogous to uses before the statute, "for the feoffment of a stranger before the statute, without consideration, raised a use in the feoffor; but a feoffment by a father to a son, without other consideration, raised no use by implication in the father, for the consideration of blood settled the use in the son, and made it an advancement."[2] Where the husband purchases land for his wife with his own funds, taking the obligation of the vendor to execute a deed to the wife, the latter, or after her death her children, can enforce a conveyance of the legal title, although the said obligation had been pledged to the vendor by the husband as a security for a loan to himself.[3]

§ 144. This rule embraces all persons for whom the purchaser is under any obligation, legal or moral, to provide. It embraces daughters as well as sons,[4] although a distinction was once attempted, on the ground that it is not so common to settle lands upon daughters as upon sons.[5] It embraces estates bought in the name of a wife,[6] and in the joint names of the wife and the

[1] Dyer *v.* Dyer, 2 Cox, 94. Where land is purchased with money of the wife and the deed taken in the name of the husband, it is a question of fact and intention whether the husband reduced the money to possession before paying it over for the deed. Moulton *v.* Haley, 57 N. H. 184.

[2] Grey *v.* Grey, 2 Swanst. 598.

[3] Morris *v.* Hanson, 78 Ala. 230.

[4] Lady Gorge's Case, Cro. Car. 550; 2 Swanst. 600; Clarke *v.* Danvers, 1 Ch. Cas. 310; Woodman *v.* Morrell, 2 Freem. 33; Jennings *v.* Selleck, 1 Vern. 467; Bedwell *v.* Froome, 2 Cox, 97; Back *v.* Andrew, 2 Vern. 120; Baker *v.* Leathers, 3 Ind. 558; Murphy *v.* Nathans, 46 Penn. St. 508; Astreen *v.* Flanagan, 3 Edw. Ch. 279, was the case of an adopted daughter. [Hoon *v.* Hoon, 126 Iowa, 391 (son); Long *v.* King, 117 Ala. 423.]

[5] Gilb. Lex. Præt. 272.

[6] Glaister *v.* Hewer, 8 Ves. 199; Dummer *v.* Pitcher, 2 M. & K. 262; Kingdom *v.* Bridges, 2 Vern. 67; Christ's Hospital *v.* Budgin, id. 683; Back *v.* Andrew, id. 120; Benger *v.* Drew, 1 P. Wms. 780; Wallace *v.* Bowens, 28 Vt. 138; Guthrie *v.* Gardner, 19 Wend. 414; Welton *v.* Devine, 20 Barb. 9; Garfield *v.* Hatmaker, 15 N. Y. 475; Jencks *v.* Alexander, 11 Paige, 619; Astreen *v.* Flanagan, 3 Edw. Ch. 279; Kline's App. 39 Penn. St. 463; Alexander *v.* Warrance, 2 Bennett, 230; Drew *v.* Martin, 32 L. J. Ch. 367; Graff

purchaser;[1] (*a*) also, in the names of the wife and children.[2] So, in the names of a son and a stranger, in which case the moiety to the son will be an advancement,[3] but the moiety in the name of the stranger will be presumed to be in trust for the purchaser.[4] And if a grandparent purchase in the name of a grandchild, whether the father is or is not dead, it will be presumed to be an advancement, and not a trust;[5] and so a purchase by a person who has placed himself *in loco parentis* to the nominal grantee will be presumed to be a settlement, and not a trust, for the purchaser.[6] And if the nominal grantee is an illegitimate child

v. Rohrer, 35 Md. 327; Johnson *v.* Johnson, 16 Minn. 512; Thomas *v.* Chicago, 55 Ill. 403. But if there is no legal marriage the conveyance will be presumed to be a trust, and not an advancement. Soar *v.* Foster, 4 K. & J. 152. [Long *v.* King, 117 Ala. 423, 431; Hamby *v.* Brooks, 86 Ark. 448; Jentzsch *v.* Jentzsch, 84 Ark. 322; Chambers *v.* Michael, 71 Ark. 373; Foster *v.* Berrier, 39 Colo. 398; Rowe *v.* Johnson, 33 Colo. 469; McCartney *v.* Fletcher, 11 App. D. C. 1, 10; Deuter *v.* Deuter, 214 Ill. 308; Fry *v.* Morrison, 159 Ill. 244; Goelz *v.* Goelz, 157 Ill. 33; Andrew *v.* Andrew, 114 Iowa, 524; Danforth *v.* Briggs, 89 Me. 316; Johnson *v.* Johnson, 96 Md. 144; Siling *v.* Hendrickson, 193 Mo. 365; Viers *v.* Viers, 175 Mo. 444; Gilliland *v.* Gilliland, 96 Mo. 522; Van Etten *v.* Passumpsic B'k, 79 Neb. 632; Bailey *v.* Dobbins, 67 Neb. 548; Kobarg *v.* Greeder, 51 Neb. 365; Klamp *v.* Klamp, 51 Neb. 17; Selover *v.* Selover, 62 N. J. Eq. 761; Bacon *v.* Devinney, 55 N. J. Eq. 449; Whitley *v.* Ogle, 47 N. J. Eq. 67; Lipp *v.* Fielder, 72 N. J. Eq. 439; Schellinger *v.* Selover, 46 A. 1058 (N. J. Ch. 1900), Reynolds *v.* Blaisdell, 23 R. I. 16; Elrod *v.* Cochran, 59 S. C. 467; Walston *v.* Smith, 70 Vt. 19; Simpson *v.* Belcher, 61 W. Va. 157; Johnson *v.* Ludwick, 58 W. Va. 464; Deck *v.* Tabler, 41 W. Va. 332; Smithsonian Inst. *v.* Meech, 169 U. S. 398; *In re* Foss, 147 Fed. 790.]

[1] Ibid. [Hayes *v.* Horton, 46 Or. 597.]

[2] Dummer *v.* Pitcher, 2 M. & K. 262; 5 Sim. 35; Kingdom *v.* Bridges, 2 Vern. 67; Back *v.* Andrew, id. 120; Stevens *v.* Stevens, 78 Maine, 92.

[3] Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Kingdom *v.* Bridges, 2 Vern. 67; Rumboll *v.* Rumboll, 1 Eden, 17.

[4] Ibid.

[5] Ebrand *v.* Dancer, 2 Ch. Cas. 26; Lloyd *v.* Read, 1 P. Wms. 607; Currant *v.* Jago, 1 Coll. 265; n. (c); Tucker *v.* Burrow, 2 Hem. & M. 525; Kilpin *v.* Kilpin, 1 M. & K. 520.

[6] Ibid. But it is said that such purchase will not be presumed to be an

(*a*) But a purchase in the name of the woman whom the purchaser has agreed to marry when he gets a divorce from his wife is not presumed to be a gift. Lufkin *v.* Jakeman, 188 Mass. 528.

of the purchaser, the same presumption will arise;[1] or if the nominal grantee be an idiot,[2] or a son-in-law.[3] But if the nominal grantee be a brother of the purchaser, the law will presume a trust and not an advancement, on the ground that there is no such obligation on one brother to support or provide for another, that the purchase can be presumed to be made for such a purpose;[4] so if one sister pay the money, and take the conveyance in the name of another sister.[5] And where the nominal grantee stands in the relation of *mother* or *nephew* to the real purchaser, no presumption of an advancement or settlement will arise, but it will be presumed to be a trust unless the purchaser stands *in loco parentis* to the nominal grantee.[6] And if the son stands in the relation of solicitor to his mother, a purchase made by her, in his name, will be presumed to be a trust, as the relation of solicitor and client rebuts the presumption of an advancement,[7] and so, it is said, the rule does not apply to any purchase made by a mother in the name of a child.[8] A purchase by a wife in the name of her husband may be shown to

advancement if the conveyance is taken to a remote relative, or to a stranger, although the real purchaser may have placed himself *in loco parentis*. Tucker *v.* Burrow, 2 Hem. & M. 515; Powys *v.* Mansfield, 3 My. & Cr. 359; Miller *v.* Blose, 30 Grat. 744.

[1] Beckford *v.* Beckford, Lofft. 490; Kilpin *v.* Kilpin, 1 M. & K. 556; Anon., 1 Wal. Jr. 107; Kimmel *v.* McWright, 2 Barr, 38; Soar *v.* Foster, 4 K. & J. 160. But it is said that this rule will not apply to the illegitimate child of a legitimate child. Tucker *v.* Burrow, 2 Hem. & M. 525.

[2] Cartwright *v.* Wise, 14 Ill. 417.

[3] Baker *v.* Leathers, 3 Porter, 558.

[4] Maddison *v.* Andrew, 1 Ves. 58; Edwards *v.* Edwards, 39 Penn. St. 369; Foster *v.* Foster, 34 L. J. Ch. 428. [Camden *v.* Bennett, 64 Ark. 155.]

[5] Keaton *v.* Cobb, 1 Dev. Ch. 439; Field *v.* Lonsdale, 14 Jur. 995; 13 Beav. 78.

[6] Currant *v.* Jago, 1 Coll. C. C. 263; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Taylor *v.* Alston, 2 Cox, 97; Edwards *v.* Field, 3 Mad. 237; Jackson *v.* Feller, 2 Wend. 465. [Roberts *v.* Remy, 56 Ohio St. 249 (money of children used for purchase in name of mother).]

[7] Garrett *v.* Wilkinson, 2 De G. & Sm. 244.

[8] *In re* De Visme, 2 De G., J. & Sm. 17. [See *contra* Hallenback *v.* Rogers, 57 N. J. Eq. 199, 221; Brennaman *v.* Schell, 212 Ill. 356; *In re* Peabody, 118 Fed. 266, 55 C. C. A. 360; Adley *v.* Pletcher, 104 P. 167 (Wash. 1909).]

be a trust.[1] The rule applies to personal as well as real property.[2] (*a*)

[1] McGovern *v.* Knox, 21 Ohio, St. 552.

[2] Devoy *v.* Devoy, 3 Sm. & Gif. 403; Dummer *v.* Pitcher, 2 M. & K. 262; Bone *v.* Pollard, 24 Beav. 283; Sidmouth *v.* Sidmouth, 2 Beav. 447; Fox *v.* Fox, 15 Ir. Ch. 89.

(*a*) The use of a wife's separate property with her consent in paying the purchase price for property conveyed to her husband may be the basis of a resulting trust if her understanding was that the property or an interest in it should be hers or should be held for her benefit. Shelby *v.* Tardy, 84 Ala. 327; Booth *v.* Lenox, 45 Fla. 191, 199; Hill *v.* Meinhard, 39 Fla. 111, 117; Bell *v.* Stewart, 98 Ga. 669; Smith *v.* Smith, 132 Iowa, 700; Howard *v.* Howard, 52 Kan. 469; Black *v.* Black, 64 Kan. 689; McMurray *v.* McMurray, 180 Mo. 526; Donovan *v.* Griffith, 215 Mo. 149; Cleghorn *v.* Cleghorn, 53 Neb. 687; Irick *v.* Clement, 49 N. J. Eq. 590; Ray *v.* Long, 128 N. C. 90; Beam *v.* Bridgers, 108 N. C. 276; Barger *v.* Barger, 30 Or. 268; Miller *v.* Baker, 160 Pa. St. 172; 166 Pa. St. 414; Olinger *v.* Shultz, 183 Pa. St. 469; Grantham *v.* Grantham, 34 S. C. 504; Bible *v.* Marshall, 103 Tenn. 324; Cresap *v.* Cresap, 54 W. Va. 581; Standard Mercantile Co. *v.* Ellis, 48 W. Va. 309; Fawcett *v.* Fawcett, 85 Wis. 332.

It is not essential that the husband should have intended a trust for her if the property which was used was her separate property which he could not make his without her consent. Howard *v.* Howard, 52 Kan. 469; Siling *v.* Hendrickson, 193 Mo. 365

In most jurisdictions statutes have deprived the husband of the common-law right to appropriate to himself the personal property of his wife. See Hudson *v.* Wright, 204 Mo. 412; Reed *v.* Sperry, 193 Mo. 167. But where the common-law rule still holds, such a use of a wife's personal property, with or without her consent, would be presumed to be a reduction to possession by the husband in the exercise of his marital rights. Jones *v.* Jones, 80 Ark. 379; Hogue *v.* Steel, 207 Ill. 340; Benbow *v.* Moore, 114 N. C. 263; Jesser *v.* Armentrout, 100 Va. 666. An oral declaration by the husband that he was purchasing for the benefit of the wife is sufficient to rebut the presumption that he was exercising his marital right, and will cause a trust to result for her. Leslie *v.* Bell, 73 Ark. 338. But the presumption will not be rebutted by showing merely that he allowed his wife to think the land was hers. Jesser *v.* Armentrout, 100 Va. 666.

If the wife's money or property used in the purchase had ceased to be her property at the time of the purchase, as by a gift or loan to the husband, there can be no resulting trust, irrespective of the intention of the parties. Clark *v.* Patterson, 158 Mass. 388; Bennett *v.* Bennett, 37 W. Va. 396; Kegerreis *v.* Lutz, 187 Pa. St. 252. Thus where there was an understanding that the husband should repay the wife's money there could be no resulting trust for the wife,

§ 145. The general principle is, that a purchase by the parent, in the name of a child, is presumed to be an advancement, and not a trust. This presumption is one of fact, and may be rebutted by evidence or circumstances; and some courts have been astute in finding circumstances and subtile distinctions to rebut this presumption. Thus, if the child was an infant, it was thought that a parent would not confer upon it an absolute property, which it was incapable of managing,[1] and so, if the interest was reversionary, and not capable of present enjoyment, it was said that the father could not have intended it as a provision and settlement, or advancement.[2] Again, if a father took the conveyance in his own name jointly with his son, it was supposed that the presumption of an advancement was rebutted, on the ground that the father had some interest in one-half, and might have the whole by survivorship, while the son could not sever the joint tenancy till he arrived at age.[3] And if a

[1] Binion *v.* Stone, 2 Freem. 169; Nels. 68; 2 Freem. 128, c. 151.

[2] Rumboll *v.* Rumboll, 2 Eden, 17; Finch *v.* Finch, 15 Ves. 43; Murless *v.* Franklin, 1 Swanst. 13.

[3] Stileman *v.* Ashdown, 2 Atk. 480; Pole *v.* Pole, 1 Ves. 76.

although there was a parol agreement to hold it in trust for her benefit until the money should be repaid. Loftis *v.* Loftis, 94 Tenn. 232.

When a wife turns over her separate property to her husband for use in his business or for use, together with property of his own, in the purchase of other property, without any distinct understanding, a gift will be presumed, but the presumption is not a strong one. Clark *v.* Patterson, 158 Mass. 388; Bennett *v.* Bennett, 37 W. Va. 396; Pickens *v.* Wood, 57 W. Va. 480; Throckmorton *v.* Throckmorton, 91 Va. 42; Shupe *v.* Bartlett, 106 Iowa, 654; Nashville Trust Co. *v.* Lannom, 36 S. W. 977 (Tenn.); Beecher *v.* Wilson, 84 Va. 813; Rotter *v.* Scott, 111 Iowa, 31. Probably there is no such presumption of gift when a wife turns over property to her husband to be used by him in purchasing a definite piece of property. The natural presumption in such a case would usually be that she intended that he should act as her agent in acquiring the property, and a trust would result if he took title in his own name. Berry *v.* Wiedman, 40 W. Va. 36; Besson *v.* Eveland, 26 N. J. Eq. 468.

When a wife furnishes part of the purchase-money with the understanding that she shall be interested in the property *pro rata*, a trust results as to the portion of the property paid for with her money. Bell *v.* Stewart, 98 Ga. 669; Light *v.* Zeller, 144 Pa. St. 570, 582; Sparks *v.* Taylor, 99 Tex. 411.

father took a grant to himself and sons upon *successive* lives, it was thought that, as the father must use some names beside his own, those of his sons, being used from prudential and family reasons, rebutted the presumption of an advancement and raised the presumption of a trust;[1] and so the circumstance that a child was already provided for was held to rebut the presumption of a further advancement.[2] Again, if a father purchased in the name of an adult son, and kept the actual possession of the estate, and received the rents and profits, the presumption of an advance was supposed to be rebutted, and the presumption of a trust created.[3]

§ 146. But these objections have all been overruled, and from the manner these distinctions are disposed of, a general principle applicable to every case may be stated, "that reasons which partake of too great a degree of refinement should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout,"[4] and Lord Eldon added, that this principle of law, that a purchase is presumed *prima facie* to be an advancement, is not to be frittered away by mere refinements.[5] Therefore it is now established that a purchase in the name of an infant child is *prima facie* an advancement,[6] and the purchase of a reversionary interest in the name of a child falls within the same rule;[7] so a purchase by a father, in the joint names of

[1] Dyer *v.* Dyer, 2 Cox, 95; 1 Watk. Cop. 221; Dickinson *v.* Shaw, 2 Cox, 95.

[2] Elliot *v.* Elliot, 2 Ch. Cas. 231; Pole *v.* Pole, 1 Ves. 76; Grey *v.* Grey, 2 Swanst. 600; Finch, 341; Lloyd *v.* Read, 1 P. Wms. 608; Redington *v.* Redington, 3 Ridg. 190.

[3] Gilb. Lex Præt. 271.

[4] By Ch. B. Eyre, Dyer *v.* Dyer, 2 Cox, 98.

[5] Finch *v.* Finch, 15 Ves. 50.

[6] Ibid.; Mumma *v.* Mumma, 2 Vern. 19; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; La y Gorge's Case, 2 Swanst. 600; Collinson *v.* Collinson, 3 De G., M. & G. 403; Skeats *v.* Skeats, 2 Y. & C. Ch. 9; Christy *v.* Courtenay, 13 Beav. 19.

[7] Rumboll *v.* Rumboll, 2 Eden, 17; Murless *v.* Franklin, 1 Swanst. 13; Finch *v.* Finch, 15 Ves. 43.

himself and son,[1] or in the joint names of a son and a stranger,[2] and so if a father take an estate for successive lives, as his own and his sons'.[3] If a child in whose name the purchase is made is already provided for, it will be a circumstance to be considered with other evidence; but it will not of itself rebut the presumption of an advancement. Lord Loughborough said, "that a purchase under such circumstances by a father in the name of a son *was not*, but *might* be, a trust for the father."[4] If a father purchase in the name of a son, whether an infant or an adult, and keep the actual possession of the estate, and receive the profits, it will be presumed that the purchase was an advancement;[5] for if the son was an infant, the father would be its natural guardian, or *quasi* guardian, and protector, and thus receive the rents of the estate.[6] And if the son was an adult, the natural reverence and submission due from children to their parents would account for the circumstances.[7] But any contemporaneous acts wholly inconsistent with the intention of an advancement to the child will make him a trustee for the father. Thus, if there is any circumstance accompanying the purchase

[1] Dummer *v.* Pitcher, 2 M. & K. 272; Grey *v.* Grey, 2 Swanst. 599; Back *v.* Andrew, 2 Vern. 120; Scroope *v.* Scroope, 1 Ch. Cas. 27; Thompson *v.* Thompson, 1 Yerg. 97.

[2] Hayes *v.* Kingdom, 1 Vern. 34; Kingdom *v.* Bridges, 2 id. 67; Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

[3] Dyer *v.* Dyer, 2 Cox, 95.

[4] Ibid. 93; Redington *v.* Redington, 3 Ridg. 190; Sidmouth *v.* Sidmouth, 3 Beav. 456; Kilpin *v.* Kilpin, 1 M. & K. 542.

[5] Grey *v.* Grey, 2 Swanst. 600; Redington *v.* Redington, 3 Ridg. 190; Lamplugh *v.* Lamplugh, 1 P. Wms. 111.

[6] Mumma *v.* Mumma, 2 Vern. 19; Fox *v.* Fox, 15 Ir. Ch. 89; Taylor *v.* Taylor, 1 Atk. 386; Lamplugh *v.* Lamplugh, 1 P. Wms. 111; Lloyd *v.* Read, id. 608; Lady Gorge's Case, Cro. Car. 550; 2 Swanst. 600; Stileman *v.* Ashdown, 2 Atk. 480; Christy *v.* Courtenay, 13 Beav. 96; Paschall *v.* Hinderer, 28 Ohio St. 568.

[7] Grey *v.* Grey, 2 Swanst. 600; Dyer *v.* Dyer, 2 Cox, 95; Woodman *v.* Morrell, 2 Freem. 32; note by Hovenden; Shales *v.* Shales, id. 252; Scawen *v.* Scawen, 1 Y. & C. Ch. 65; Murless *v.* Franklin, 1 Swanst. 17; Redington *v.* Redington, 3 Ridg. 190; Sidmouth *v.* Sidmouth, 2 Beav. 447; Elliot *v.* Elliot, 2 Ch. Cas. 231; Williams *v.* Williams, 32 Beav. 370; Lloyd *v.* Read, 1 P. Wms. 607.

which explains why it was taken in the wife's or child's name, and shows that it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted, and the inference of a trust will be established.[1]

§ 147. Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption,[2] and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose.[3] (*a*) And so the declarations of the real pur-

[1] Prankerd *v.* Prankerd, 1 S. & S. 1; Baylis *v.* Newton, 1 Vern. 28; Birch *v.* Blagrave, Amb. 264; Farr *v.* Davis, 8 East, 354; Perkins *v.* Nichols, 11 Allen, 542; Balford *v.* Crane, 1 Greene, Ch. 265; Skillman *v.* Skillman, 2 McCarter, 478; Gibson *v.* Foote, 40 Miss. 788; Cook *v.* Bremond, 27 Tex. 457; Sunderland *v.* Sunderland, 19 Iowa, 325; Clark *v.* Clark, 43 Vt. 685.

[2] Christy *v.* Courtenay, 13 Beav. 96; Baylis *v.* Newton, 2 Vern. 28; Shales *v.* Shales, 2 Freem. 252; Tucker *v.* Burrow, 2 Hem. & M. 524; Collinson *v.* Collinson, 3 De G., M. & G. 409; Murless *v.* Franklin, 1 Swanst. 19; Lloyd *v.* Read, 1 P. Wms. 607; Taylor *v.* Alston, cited 2 Cox, 96; Grey *v.* Grey, 2 Swanst. 600; Williams *v.* Williams, 32 Beav. 370; Redington *v.* Redington, 3 Ridg. 177; Rawleigh's Case, cited Hard. 497; Prankerd *v.* Prankerd, 1 S. & S. 1; Swift *v.* Davis, 8 East, 354, n. (*a*); Hall *v.* Hall, 1 Connor & Law, 120; Taylor *v.* Taylor, 4 Gilm. 303; Slack *v.* Slack, 26 Miss. 290; Johnson *v.* Matsdorf, 11 Johns. 91; Butler *v.* M. Ins. Co., 14 Ala. 777; Dudley *v.* Bosworth, 10 Humph. 12; Hayes *v.* Kindersley, 2 Sm. & Gif. 194; Peer *v.* Peer, 3 Stockt. 432; Persons *v.* Persons, 25 N. J. Eq. 250; Milner *v.* Freeman, 40 Ark. 62. [Skahen *v.* Irving, 206 Ill. 597; Brennaman *v.* Schell, 212 Ill. 356; Dorman *v.* Dorman, 187 Ill. 154; Dana *v.* Dana, 154 Mass. 491; Viers *v.* Viers, 175 Mo. 444; Bailey *v.* Dobbins, 67 Neb. 548; Lahey *v.* Broderick, 72 N. H. 180; Flanner *v.* Butler, 131 N. C. 151; Currie *v.* Look, 14 N. D. 482; Moore *v.* Moore, 165 Pa. St. 464; Elrod *v.* Cochran, 59 S. C. 467; Hickson *v.* Culbert, 19 S. D. 207; Smithsonian Inst. *v.* Meech, 169 U. S. 398.]

[3] Jeans *v.* Cooke, 24 Beav. 521; Redington *v.* Redington, 3 Ridg. 196;

(*a*) A description of the grantee in the deed as "trustee" without otherwise declaring the trust is sufficient to rebut the presumption

chaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust.[1] Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. They are parts of the transaction, or words accompanying an act.[2] The real purchaser, if otherwise competent, may be a witness to state what his objects, purposes, and intentions were in making the purchase and in taking the title in the name of his wife or child.[3] Of course, declarations made by the husband or father after the purchase are incompetent to control the effect of the prior transaction.[4] But such declarations may be used by the wife or child against the purchaser to show that it was a settlement and not a trust.[5] And the after declarations of the nominal grantee may be used against him, but not in his favor.[6] But the declarations must be

Prankerd *v.* Prankerd, 1 S. & S. 1; Murless *v.* Franklin, 1 Swanst. 17; Swift *v.* Davis, 8 East, 354, n. (*a*), Robinson *v.* Robinson, 45 Ark. 481.

[1] Devoy *v.* Devoy, 3 Sm. & Gif. 403; Grey *v.* Grey, 2 Swanst. 594; Kilpin *v.* Kilpin, 1 M. & K. 520; Sidmouth *v.* Sidmouth, 2 Beav. 455; Scawen *v.* Scawen, 1 Y. & C. Ch. 65.

[2] Ibid.; Baker *v.* Leathers, 3 Ind. 558. [See Ward *v.* Ward, 59 Conn. 188, 196; Deck *v.* Tabler, 41 W. Va. 332.]

[3] Devoy *v.* Devoy, 3 Sm. & Gif. 403; Stone *v.* Stone, 3 Jur. (N. S.) 708.

[4] Tremper *v.* Burton, 18 Ohio, 418; Christy *v.* Courtenay, 13 Beav. 96; Williams *v.* Williams, 32 Beav. 32; Sidmouth *v.* Sidmouth, 2 Beav. 456; Elliot *v.* Elliot, 2 Ch. Cas. 231; Woodman *v.* Morrell, 2 Freem. 33; Finch *v.* Finch, 15 Ves. 51; Birch *v.* Blagrave, Amb. 266; Skeats *v.* Skeats, 2 Y. & C. Ch. 9; Gilb. Lex Prætor. 271; Murless *v.* Franklin, 1 Swanst. 13; Crabb *v.* Crabb, 1 M. & K. 519; Prankerd *v.* Prankerd, 1 S. & S. 1; Hubble *v.* Osborne, 31 Ind. 249.

[5] Redington *v.* Redington, 3 Ridg. 106; Sidmouth *v.* Sidmouth, 2 Beav. 455.

[6] Scawen *v.* Scawen, 1 N. C. C. 65; Jeans *v.* Cook, 24 Beav. 521; Sidmouth *v.* Sidmouth, 2 Beav. 455; Pole *v.* Pole, 1 Ves. 76; Murless *v.* Franklin, 1 Swanst. 20; Willard *v.* Willard, 56 Penn. St. 119.

of gift or advancement when the father paid the purchase-money. Paddock *v.* Adams, 56 Ohio St. 242. The fact that practically all the father's savings are invested in property in the name of his daughter has a strong tendency to rebut the usual presumption of a gift or advancement. Skahen *v.* Irving, 206 Ill. 597. The same is true when the investment is in the name of the wife. Pool *v.* Phillips, 167 Ill. 432.

direct and certain, and where possible should be corroborated by other facts and circumstances; for courts will not act upon mere declarations, if they are conflicting, vague, or inconsistent with themselves.[1]

§ 148. If a father pays the purchase-money, and the wife or child, by fraud, or any wrongful act, and against the intention of the real purchaser, obtains the conveyance in her or its name, the presumption of an advancement would be rebutted, and the presumption of a trust would arise for the father.[2] So if a son pay the purchase-money and the deed is made to his father by mistake, a trust results to the son.[3] (*a*)

§ 149. If a purchaser and payer of the money take the conveyance in the name of a wife or child, for the purpose of delaying, hindering, or defrauding his creditors, the conveyance is void, or a trust results which creditors can enforce to the extent of their debts.[4] It makes no difference by the better opin-

[1] Grey *v.* Grey, 2 Swanst. 597; Scawen *v.* Scawen, 1 N. C. C. 65; Cartwright *v.* Wise, 14 Ill. 417; Cairns *v.* Colburn, 104 Mass. 247.

[2] Peer *v.* Peer, 3 Stockt. 432; Hall *v.* Doran, 13 Iowa, 368; Perkins *v.* Nichols, 11 Allen, 542; Persons *v.* Persons, 25 N. J. Eq. 250.

[3] Fairhurst *v.* Lewis, 23 Ark. 435. [See also *In re* Peabody, 118 Fed. 266, 55 C. C. A. 360.]

[4] Christ's Hospital *v.* Budgin, 2 Vern. 684; Lush *v.* Wilkinson, 5 Ves. 384; Townshend *v.* Westacott, 2 Beav. 340; Stileman *v.* Ashdown, 2 Atk. 477; Guthrie *v.* Gardner, 19 Wend. 414; Jencks *v.* Alexander, 11 Paige, 619; Watson *v.* Le Row, 6 Barb. 487; Newell *v.* Morgan, 2 Harr. 225; Bell *v.* Hallenback, Wright, 751; Edgington *v.* Williams, id. 439; Parrish *v.* Rhodes, id. 339; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Demaree *v.* Driskill, 3 Blackf. 115; Doyle *v.* Sleeper, 1 Dana, 531; Rucker *v.* Abell, 8 B. Mon. 566; Crozier *v.* Young, 3 Mon. 158; Gowing *v.* Rich, 1 Ired. 553; Croft *v.* Arthur, 3 Des. 223; Elliott *v.* Hart, 10 Ala. 348; Abney *v.* Kingsland, id. 355; Cutter *v.* Griswold, Walk. Ch. 437; Kimmel *v.* McRight, 2 Barr, 38; McCartney *v.* Bostwick, 32 N. Y. 53; Bartlett *v.* Bartlett, 13 Neb. 460, quoting the text.

(*a*) Likewise if the person furnishing the purchase-money is insane or otherwise incompetent to make a gift. Couch *v.* Harp, 201 Mo. 457.

ion that the *intent* was not fraudulent. A man must be just before he is generous; and if the property given to the wife was bought with funds that ought to have gone to pay creditors, the property is liable to them.[1] A parallel decision was reached where a wife bought land with her own money, had it deeded to her husband, and the latter contracted debts on the faith of being the owner of the land.[2] If the parent or husband was not indebted at the time, subsequent creditors could not defeat the title nor enforce the trust,[3] unless the settlement or conveyance was made for the purpose of afterwards running in debt and defrauding creditors. In some States, as in Pennsylvania and Massachusetts, an execution against the debtor can be levied directly upon the land in the hands of the trustee; in other States the land can only be reached in equity. In Minnesota, a purchase by a husband and a deed to the wife creates no trust as to him, but the wife holds in trust for creditors unless fraudulent intent is disproved.[4]

§ 150. A very common case of a resulting trust is where the owner of both the legal and equitable estate conveys the legal title only, without conveying the equitable interest.[5] The general rule in such case is, that wherever it appears, upon a conveyance, devise, or bequest, that it was intended that the grantee, devisee, or legatee should take the legal estate only, the equitable interest, or so much of it as is left undisposed of,

[1] Bridgers *v.* Howell, 27 S. C. 431.

[2] Roy *v.* McPherson, 11 Neb. 197. [Laing *v.* Evans, 64 Neb. 454; Smith *v.* Willard, 174 Ill. 538; McCormick Mach. Co. *v.* Perkins, 135 Iowa, 64. See also Hamlen's Adm'r *v.* Bennett, 52 N. J. Eq. 70; Ingals *v.* Ferguson, 59 Mo. App. 299; Moore *v.* Rawlings, 137 Iowa, 284; Hews *v.* Kenny, 43 Neb. 815.]

[3] Creed *v.* Lancaster Bank, 1 Ohio St. 1; Knouff *v.* Thompson, 16 Penn. St. 357; Dillard *v.* Dillard, 3 Humph. 41; Cutler *v.* Tuttle, 19 N. J. Ch. 556. [Adams *v.* Collier, 122 U. S. 382, 391; Metropolitan Nat. B'k *v.* Rogers, 47 Fed. 148, 151.]

[4] Leonard *v.* Green, 30 Minn. 496.

[5] Morice *v.* Bishop of Durham, 10 Ves. 537; Paice *v.* Canterbury, 14 Ves. 370.

will result, if arising out of the settlor's realty, to himself or his heirs; if out of his personal estate, to himself, his executors, or administrators.[1] (*a*) Whether the conveyance was intended to convey the beneficial as well as the legal estate is sometimes a matter of presumption by the court from all the circumstances of the case, and sometimes it is expressed upon the instrument itself in such manner that no doubts can arise. When it is matter of presumption, parol evidence may be received to rebut or sustain the presumption.[2] But where the trust results by force of the written instrument, it cannot be controlled, rebutted, or defeated by parol evidence of any kind.[3] (*b*)

[1] Lewin on Trusts, 115 (5th Lond. ed.); Levet *v.* Needham, 2 Vern. 138; Wych *v.* Packington, 3 Bro. Ch. 44; Sewell *v.* Denny, 10 Beav. 315; Halford *v.* Stains, 16 Sim. 488; Barrett *v.* Buck, 12 Jur. 771; Cooke *v.* Dealy, 22 Beav. 196; Fletcher *v.* Ashburner, 1 Bro. Ch. 501; *Re* Cross's Estate, 1 Sim. (N. S.) 260; Hogan *v.* Staghorn, 65 N. C. 279. [Bacon's Estate, 202 Pa. St. 535; *In re* Trusts of The Abbott Fund (1900), 2 Ch. 326.]

[2] Cook *v.* Hutchinson, 1 Keen, 50; Docksey *v.* Docksey, 2 Eq. Cas. Ab. 506; 3 Bro. P. C. 39; North *v.* Crompton, 1 Ch. Cas. 196; 2 Vern. 253; Mallabar *v.* Mallabar, Cas. t. Talb. 78; Petit *v.* Smith, 1 P. Wms. 7; Nourse *v.* Finch, 1 Ves. Jr. 344; Walton *v.* Walton, 14 Ves. 318; Langham *v.* Sanford, 17 Ves. 435; Gladding *v.* Yapp, 5 Mod. 56; Lake *v.* Lake, 1 Wils. 313; Amb. 126; Trimmer *v.* Bayne, 7 Ves. 520; Williams *v.* Jones, 10 Ves. 77; Barnes *v.* Taylor, 27 N. J. Eq. 265.

[3] Langham *v.* Sanford, 17 Ves. 435, 442; 19 Ves. 643; Rachfield *v.* Careless, 2 P. Wms. 158; Gladding *v.* Yapp, 5 Mod. 59; White *v.* Evans, 4 Ves. 21; Walton *v.* Walton, 14 Ves. 322; Petit *v.* Smith, 1 P. Wms. 7; Nourse *v.* Finch, 1 Ves. Jr. 344; Ralston *v.* Telfair, 2 Dev. Eq. 255; Hughes *v.* Evans, 13 Sim. 496; White *v.* Williams, 3 V. & B. 72; Love *v.* Gaze, 8 Beav. 472.

(*a*) See Western Union Tel. Co. *v.* Manhattan Ry. Co., 57 N. Y. S. 357, where a deed of conveyance of land expressly reserved to the grantor the right to collect damages which had been incurred by the erection of an elevated structure in front of the premises, and the purchase price was adjusted with view to the reservation; it was held that although the attempted reservation was legally inoperative and the right of action passed to the grantee, he held it upon a resulting trust for the grantor.

(*b*) See Woodruff *v.* Marsh, 63 Conn. 125, where it is said in a dictum that resulting trusts which can be rebutted by extrinsic evidence are those claimed by a mere implication of law, not those arising upon failure of an express trust for imperfection or illegality. The court evidently intended to distinguish between

§ 151. No general rule can be stated, that will determine when a conveyance will carry with it a beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument.[1] A conveyance to a wife or child will be presumed to carry a beneficial interest,[2] but such consideration is only a circumstance of evidence.[3] It has been said, that if a man transfer property to another, it must be presumed that it proceeded from an intention to benefit the other by making the gift and conferring the beneficial interest;[4] but if such intention cannot be inferred consistently with all the circumstances attending the transaction, a trust will result.[5] The heir is not to be excluded from a resulting trust upon bare conjecture;[6] there must be positive evidence of a benefit intended to the devisee, and not merely negative evidence that none was intended for the heir; for the beneficial interest results to the heir, not from the intention of the ancestor, but because he has expressed no

[1] Hill *v.* Bishop of London, 1 Atk. 620; Walton *v.* Walton, 14 Ves. 322; Starkey *v.* Brooks, 1 P. Wms. 391; King *v.* Dennison, 1 Ves. & B. 279; Ellis *v.* Selby, 1 M. & K. 298.

[2] Christ's Hospital *v.* Budgin, 2 Vern. 683; Jennings *v.* Selleck, 1 Vern. 467; Grey *v.* Grey, 2 Swanst. 598; Elliot *v.* Elliot, 2 Ch. Cas. 232; Hayes *v.* Kingdom, 1 Vern. 33; Baylis *v.* Newton, 2 Vern. 28; Cook *v.* Hutchinson, 1 Keen, 42; Cripps *v.* Jee, 4 Bro. Ch. 472; Rogers *v.* Rogers, 3 P. Wms. 193; Lloyd *v.* Spillett, 2 Atk. 566; Robinson *v.* Taylor, 2 Bro. Ch. 594; Smith *v.* King, 16 East, 283; Coningham *v.* Mellish, Pr. Ch. 31.

[3] Huggins *v.* Yates, 9 Mod. 122; Wych *v.* Packington, 2 Eq. Cas. Ab. 507; King *v.* Dennison, 1 Ves. & B. 474.

[4] George *v.* Howard, 7 Price, 651.

[5] Custance *v.* Cunningham, 13 Beav. 363.

[6] Halliday *v.* Hudson, 3 Ves. 211; Kellett *v.* Kellett, 3 Dow, 248; Amphlett *v.* Parke, 2 R. & M. 227; Phillips *v.* Phillips, 1 M. & K. 661; Salter *v.* Cavanagh, 1 Dru. & Walsh, 668.

cases where there was no attempt to dispose of all the beneficial interest and cases where the attempted disposition failed against the expressed intent of the settlor. Where the latter is the case, it seems reasonable to admit no extrinsic evidence of an intent of the grantor in case the express trust should fail, because the strong probability is that such a contingency did not occur to him.

intention.[1] Thus, a trust may result upon a legacy given to the heir;[2] but the circumstance of being heir, with other circumstances, will be strong evidence that no trust was intended.[3] But in no case will the court permit the grantee to retain the beneficial interest, if there was any mistake on the part of the grantor,[4] or any fraud on the part of the grantee.[5] If the grantor intended a fraud upon the law, there can be no resulting trust;[6] however, even in this case, if the grantee admits the trust, the court will enforce it.[7] If a conveyance has been made upon a valuable consideration, there can be no resulting trust to the grantor, as the payment of a valuable consideration imports an intention to benefit the grantee in case the trusts declared fail, or are imperfectly declared, or do not take effect for any other reason.[8] (*a*)

[1] Hopkins *v.* Hopkins, Cas. t. Talb. 44; Tregonwell *v.* Sydenham, 3 Dow, 211; Lloyd *v.* Spillett, 2 Atk. 151; Habergham *v.* Vincent, 2 Ves. Jr. 225.

[2] Randall *v.* Bookey, 2 Vern. 425; Pr. Ch. 162; Starkey *v.* Brooks, 1 P. Wms. 390, overruling North *v.* Crompton, 1 Ch. Cas. 196; Killett *v.* Killett, 1 Ball & B. 543; 3 Dow, P. C. 248.

[3] Rogers *v.* Rogers, 5 P. Wms. 193; Sel. Ch. Ca. 81; Mallabar *v.* Mallabar, Cas. t. Talb. 78; and other cases above cited.

[4] Birch *v.* Blagrave, Amb. 264; Woodman *v.* Morrell, 2 Freem. 33; Childers *v.* Childers, 1 De G. & Jon. 482; Att. Gen. *v.* Poulden, 8 Sim. 472.

[5] Lloyd *v.* Spillett, 2 Atk. 150; Barn. 388; Hutchins *v.* Lee, 1 Atk. 488; Young *v.* Peachy, 2 Atk. 254–257; 2 Vern. 307; Tipton *v.* Powell, 2 Cold. 119.

[6] Cottington *v.* Fletcher, 2 Atk. 156; Chaplin *v.* Chaplin, 3 P. Wms. 233; Muckleston *v.* Brown 6, Ves. 68. [Sell *v.* West, 125 Mo. 621; Snider *v.* Udell Woodenware Co., 74 Miss. 354; Derry *v.* Fielder, 216 Mo. 177.]

[7] Ibid.

[8] Kerlin *v.* Campbell, 15 Penn. St. 500; Gibson *v.* Armstrong, 7 B. Mon. 841; Brown *v.* Jones, 1 Atk. 158; Ridout *v.* Dowding, 1 Atk. 419.

(*a*) Thus, when the deed to the trustee is upon a consideration, no trust can result to the grantor upon failure of a declared trust for uncertainty. Trustees *v.* Jackson Sq. Church, 84 Md. 173; Davis *v.* Jernigan, 71 Ark. 494. But a trust in such a case may result for the person or persons furnishing the consideration. Thus, where S. furnished the consideration for a conveyance to D. to hold upon an imperfectly declared trust for S.'s grandchildren, a trust results for the benefit of S. upon failure of the express trust, and the facts rebut the presumption of gift to D., who was S.'s daughter. *In re* Davis, 112 Fed. 129. Where several have contributed the purchase-money for a

§ 152. Thus, if upon a conveyance, devise, or bequest, a trust is declared of a part of the estate only, or the purposes of the trust do not exhaust the whole beneficial interest, the trust in the remaining part or interest will result to the settlor or his heirs;[1] for the reason that a declaration of trust as to part is considered sufficient evidence that the settlor did not intend the donee to take the beneficial interest in the whole, and that the creation of the trust was the sole object of the transaction. But a distinction must be observed between a devise to a person for a particular purpose, with no intention of conferring upon him any beneficial interest, and a devise with a view of conferring the beneficial interest, but subject to a particular charge, wish, or desire. Thus, if a gift be made to one and his heirs, charged with the payment of debts, it is a gift for a particular purpose, but not for that purpose only; and if it is the intention to confer upon the donee of the legal estate a beneficial interest after the particular purpose is satisfied without exhausting the whole estate, the surplus goes to the donee and does not result.[2] But if the gift is *upon a trust to pay debts*, that is a

[1] Northen *v.* Carnegie, 4 Drew. 587; Lloyd *v.* Spillett, 2 Atk. 150; Barn. 388; Cottington *v.* Fletcher, id. 155; Culpepper *v.* Aston, 2 Ch. Cas. 115; Cook *v.* Gwavas, cited Roper *v.* Radcliffe, 9 Mod. 187; Sherrard *v.* Harborough, Amb. 165; Hobart *v.* Suffolk, 2 Vern. 644; Bristol *v.* Hungerford, id. 645; Halliday *v.* Hudson, 3 Ves. 210 a; Killett *v.* Killett, 3 Dowl. P. C. 248; Davidson *v.* Foley, 2 Bro. Ch. 203; Levet *v.* Needham, 2 Vern. 138; Kiricke *v.* Bransbey, 2 Eq. Cas. Ab. 508; Robinson *v.* Taylor, 2 Bro. Ch. 589; Mapp *v.* Elcock, 2 Phill. 793; 3 H. L. Cas. 492; Read *v.* Stedman, 26 Beav. 495; Dawson *v.* Clarke, 18 Ves. 254; Wych *v.* Packington, 3 Bro. Ch. 44; Hill *v.* Cook, 1 V. & B. 173; Mullen *v.* Bowman, 1 Coll. N. C. 197; Loring *v.* Elliott, 16 Gray, 568. [Buffington *v.* Maxam, 152 Mass. 477; Meyer *v.* Holle, 83 Tex. 623; Cagwin *v.* Buerkle, 55 Ark. 5; Smith *v.* Cooke, [1891] A. C. 297; *Re* Tilt, 74 L. T. 163.]

[2] Hill *v.* London, 1 Atk. 619; King *v.* Dennison, 1 V. & B. 260; Southouse *v.* Bate, 2 V. & B. 396; Mullen *v.* Bowman, 1 Coll. C. C. 197; Dawson *v.* Clarke, 18 Ves. 247; Walton *v.* Walton, 14 Ves. 318; Wood *v.* Cox, 1 Keen,

parsonage conveyed to a trustee upon a trust which is later declared invalid, a trust results for the contributors. Heiskell *v.* Trout, 31 W. Va. 810.

gift for a particular purpose and nothing more. If the whole estate is given for that one purpose, and that purpose does not exhaust the whole estate, the remainder results to the donor or his heirs.[1] (*a*) Or, as Vice-Chancellor Wood stated the rule: (1) where there is a gift to one to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; (2) where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus after satisfying a trust for his own benefit; (3) where a charge is created by the will, the devisee takes the surplus for his own benefit, and no trust is implied.[2]

§ 153. If from the whole instrument there can be gathered an intention to benefit the donee, no trust in the remainder will result, as where a man made *his dearly beloved wife his sole heiress and executrix* to pay his debts and legacies, and there was a

317; 2 M. & Cr. 684; Downer *v.* Church, 44 N. Y. 647; Clarke *v.* Hilton, L. R. 2 Eq. 810; Irvine *v.* Sullivan, L. R. 8 Eq. 673.

[1] King *v.* Dennison, 1 V. & B. 272; McElroy *v.* McElroy, 113 Mass. 509.

[2] Barrs *v.* Fewke, 2 Hem. & M. 60; 11 Jur. (N. S.) 669; Sanderson's Trust, 3 K. & J. 497; Saltmarsh *v.* Barrett, 29 Beav. 474; 3 De G., F. & J. 279; Pollard's Trusts, 32 L. J. Ch. 657; Henderson *v.* Cross, 17 Jur. (N. S.) 177; Hale *v.* Horne, 21 Grat. 112. In Cooke *v.* Stationers' Co., 3 My. & K. 262, Sir John Leach said: "If the devise to a particular, or for a particular purpose, be intended by the testator to be an exception from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a charge only upon the estate devised, and not an exception from the gift, the devisee will be intitled to the benefit of the failure." Thus if lands be devised to A. charged with a legacy to B. if he attain the age of twenty-one, the devise will become absolute in A. if B. dies before he becomes twenty-one. And the will is to read as if B. was not named in it. Tregonwell *v.* Sydenham, 3 Dow, 210; Sprigg *v.* Sprigg, 2 Vern. 394; Cruse *v.* Barley, 3 P. Wms. 20; Att. Gen. *v.* Milner, 3 Atk. 112; Croft *v.* Slee, 4 Ves. 60; Sutcliffe *v.* Cole, 3 Drew. 185; Jackson *v.* Hurlack, 2 Eden, 263; Tucker *v.* Kayess, 4 K. & J. 339.

(*a*) See Smith *v.* Cooke, [1891] A. C. 297, where the general principle was affirmed but the instrument of assignment was construed as a bargain with the creditors, so that no trust resulted as to the surplus.

residue after paying debts and legacies, there was no resulting trust, for the expressions in the will indicated an intention to benefit the donee.[1] So any other expressions that indicate an intention that the donee shall be benefited after the particular purposes are satisfied, will prevent a trust from resulting.[2] So expressions of affection or relationship will be evidence upon the question whether a trust was intended to result after the particular trusts are satisfied.[3] If the donee is an infant incapable of executing a trust, or a married woman, it will be evidence upon the same question.[4] But if from the whole will it is apparent that the donee shall not take a beneficial interest, all such circumstances go for nothing.[5]

§ 154. If the donee, to whom an estate is given upon a trust declared as to part, is also the heir, or other person to whom the trust for the remainder would result, or if he is one of a class, such gift to him will not prevent him from taking by the resulting trust the part that may come to him.[6] So a legacy or other beneficial gift to him will not exclude him from the resulting interest,[7] even if the interest given him is to arise out of the declared trust.[8]

§ 155. The doctrine of resulting trusts, where a trust is declared as to part only, was formerly much discussed in cases of gifts to executors for the payment of debts and legacies. In such cases at common law the appointment of the executor enti-

[1] Rogers *v.* Rogers, 3 P. Wms. 193; Cook *v.* Hutchinson, 1 Keen, 42.

[2] Meredith *v.* Heneage, 1 Sim. 555; Wood *v.* Cox. 2 M. & Cr. 692; Cook *v.* Hutchinson, 1 Keen, 42.

[3] Rogers *v.* Rogers, 3 P. Wms. 193; Coningham *v.* Mellish, Pr. Ch. 31; King *v.* Dennison, 1 V. & B. 274; Hobart *v.* Suffolk, 2 Vern. 644.

[4] Williams *v.* Jones, 10 Ves. 77; Blinkhorn *v.* Feast, 2 Ves. Sr. 27.

[5] King *v.* Mitchell, 8 Pet. 349; King *v.* Dennison, 1 V. & B. 275.

[6] Hennershotz's Estate, 16 Pa. St. 435.

[7] Farrington *v.* Knightly, 1 P. Wms. 545; Rutland *v.* Rutland, 2 P. Wms. 213; Andrews *v.* Clark, 2 Ves. Sr. 162; North *v.* Pardon, 2 Ves. Sr. 495.

[8] Starkey *v.* Brooks, 1 P. Wms. 390; Randal *v.* Bookey, 2 Vern. 425; Pr. Ch. 162; Killett *v.* Killett, 1 B. & B. 543; 3 Dowl. P. C. 248.

tled him, both at law and equity, to all the remainder of the personal property after the payment of debts and legacies, unless it was specially disposed of by the testator in the will. Courts were always astute to find circumstances to repel the beneficial interest in the executor and to raise a resulting trust for the next of kin, or heir-at-law; and it was finally enacted, 1 Will. IV., c. 40, that such executors, should be trustees of any residue, unless it plainly appeared by the will that they were intended to take the residue beneficially.[1] In the United States the rule never prevailed, but executors always took as trustees for those entitled to the distribution of the personal estate, unless it was expressly disposed of to some other persons, or unless it was expressly given to the executor beneficially.[2]

§ 156. In this connection an important exception to the general doctrine of resulting trusts should be stated. If property is given to trustees by grant or devise for charitable uses *generally*, and the particular purpose is not declared at all, or, if declared, does not exhaust the whole estate, there will be no resulting trust for the donor, his heirs, or next of kin, in either case; nor will the donees take any beneficial interest, but the court will direct the trustees to administer the whole estate under some scheme for charitable purposes.[3] (*a*)

[1] See 2 Story, Eq. Jur. § 1208, and the elaborate note cited from Fon. Eq. B. 2, c. 5, § 3, note (*k*).

[2] Hill on Trustees, 1234 (Am. ed.); 2 Story Eq. Jur. §§ 1208, 1209; as the doctrine has never prevailed in America, it is not worth while to state all the learning and nice distinctions of the courts. They will be found in Hill, Story, and Fonblanque as above cited.

[3] Cook *v.* Dunkenfield, 2 Atk. 567; Metford School, 8 Co. 130; Moggridge *v.* Thackwell, 7 Ves. 73; Att. Gen. *v.* Bristol, 2 J. & W. 308; Mills *v.* Farmer, 1 Mer. 55; Att. Gen. *v.* Haberdasher's Co., 4 Bro. Ch. 103; see *post*, chapter upon Charitable Trusts, where this matter is stated at large.

(*a*) As will appear in the chapter on charitable trusts there is an important difference of authority as to the power of a court of equity to enforce a trust for charity in *general*, and as to the validity of such a trust.

§ 157. If a gift is made by deed or will upon *trust*, and no trust is declared,[1] or a bequest is made to one named, as executor, "to enable him to carry into effect the trusts of the will," and none are declared,[2] or a gift is made upon *trusts* thereafter to be declared, and no declaration is ever made,[3] the legal title only will pass to the grantee or devisee, while a trust in the equitable interest will result to the settlor, his heirs, or legal representatives, according to the nature of the property, whether real or personal; for it appears upon the instrument itself that the legal title alone was intended for the first taker, and that the equitable interest was intended to go to some other person, and as such other person cannot take the equitable interest for want of a declaration of the trust, it results to the settlor or his heirs.[4] So if a testator says that he gives the residue, and stops there,[5] or if he cancels a residuary bequest by drawing a line through it.[6] But if it should plainly appear from the whole instrument that the donee is to take beneficially in case the trusts are not declared, no trust will result to the owner or heir.[7]

[1] Att. Gen. *v.* Windsor, 8 H. L. Ca. 369; 24 Beav. 679; Gloucester *v.* Wood, 1 H. L. Cas. 272; 3 Hare, 131; Dawson *v.* Clark, 18 Ves. 254; Dunnage *v.* White, 1 J. & W. 583; Morice *v.* Durham, 10 Ves. 537; Woollett *v.* Harris, 5 Madd. 452; Southouse *v.* Bate, 2 Ves. & B. 396; Goodere *v.* Lloyd, 3 Sim. 538; Pratt *v.* Sladden, 14 Ves. 198; Anon., 1 Com. 345; Penfold *v.* Bouch, 4 Hare, 271; Brown *v.* Jones, 1 Atk. 101; Sidney *v.* Shelley, 19 Ves. 359; Emblyn *v.* Freeman, Pr. Ch. 542; Coard *v.* Holderness, 20 Beav. 147; Longley *v.* Longley, L. R. 13 Eq. 137.

[2] Barrs *v.* Fewke, 2 Hem. & M. 60.

[3] London *v.* Garway, 2 Vern. 571; Collins *v.* Wakeman, 2 Ves. Jr. 683; Emblyn *v.* Freeman, Pr. Ch. 541; Fitch *v.* Weber, 6 Hare, 145; Brookman *v.* Hales, 2 V. & B. 45; Brown *v.* Jones, 1 Atk. 188; Sidney *v.* Shelley, 19 Ves. 352; Taylor *v.* Haygarth, 14 Sim. 8; Flint *v.* Warren, 16 Sim. 124; Onslow *v.* Wallis, 1 H. & Tw. 513; 1 McN. & G. 506; Jones *v.* Goodchild, 3 P. Wms. 33; Sturtevant *v.* Jaques, 14 Allen, 526; Shaw *v.* Spencer, 100 Mass. 388.

[4] Aston *v.* Wood, L. R. 6 Eq. 419; Jones *v.* Bradley, L. R. 3 Eq. 635.

[5] Cloyne *v.* Young, 2 Ves. Sr. 91; Langham *v.* Sandford, 17 Ves. 435; Mapp *v.* Elcock, 2 Phill. 793.

[6] Mence *v.* Mence, 18 Ves. 348; Skrymsher *v.* Northcote, 1 Swanst. 566.

[7] Sidney *v.* Shelley, 19 Ves. 352. Whether a trust results to a debtor in an unclaimed dividend. Dillaye *v.* Greenough, 45 N. Y. 438.

§ 158. It is to be observed, however, that the intention of the instrument is to be gathered from its general scope; hence, although the words *upon trust* are very strong evidence of the donor's intention not to confer the beneficial interest upon the donee,[1] yet it may be negatived by the context, and the general interpretation of the whole paper;[2] so, if the donee is called a *trustee*, the term may be shown to apply to one of two funds, and the donee may take a beneficial interest in the other,[3] or it may be so used as to be a mere *descripto personæ*, and although no beneficiary is named, a trust does not necessarily result to the grantor.[4] On the other hand it may appear, from the whole instrument, that the donee is not to take the beneficial interest, although the words *upon trust*, or *trustee*, are not used; as where there is a direction that the donee shall be allowed his costs and expenses out of the fund given him, which would be without meaning if he took the whole beneficial interest in the fund.[5] But if the conveyance is by deed for a valuable consideration, the grantee will take the beneficial interest if the trusts fail to be declared, or fail in any way; for there can be no resulting trusts where the grantee pays a valuable consideration for the estate.[6] Where a will contained in substance this clause, "I give to my executor, P., $800 to have and to hold the same to the use of S. as follows: I desire in case S. should at any time need assistance or come to want, that my executor should expend such part of said $800 as will make her comfortable and keep her so during

[1] Hill *v.* London, 1 Atk. 618; Woollett *v.* Harris, 5 Md. 452; Sturtevant *v.* Jaques, 14 Allen, 526; Shaw *v.* Spencer, 100 Mass. 526.

[2] Coningham *v.* Mellish, Pr. Ch. 31; Dawson *v.* Clark, 15 Ves. 409; 18 Ves. 247; Hughes *v.* Evans, 13 Sim. 496; Cook *v.* Hutchinson, 1 Keen, 42; Dillaye *v.* Greenough, 45 N. Y. 438.

[3] Gibbs *v.* Rumsey, 2 V. & B. 294; Pratt *v.* Sladden, 14 Ves. 193; Battely *v.* Windle, 2 Bro. Ch. 31; Bingham *v.* Stewart, 13 Minn. 106; Pratt *v.* Beaupre, 13 Minn. 187; Dillaye *v.* Greenough, 45 N. Y. 438.

[4] Dillaye *v.* Greenough, 45 N. Y. 438.

[5] Saltmarsh *v.* Barrett, 3 De G., F. & J. 279; 29 Beav. 474.

[6] Brown *v.* Jones, 1 Atk. 158; Ridout *v.* Dowding, id. 419; Kerlin *v.* Campbell, 15 Penn. St. 500. [Davis *v.* Jernigan, 71 Ark. 494, holding that the recital of payment of a consideration by the grantee is conclusive upon the grantor.]

her life. The remainder, if any, of said $800, at the decease of S. I give to the said P. and his heirs," it was held that P. held the money to the use of S. during her life, and whether she was in need or no must pay the *income* to her, and *if in need* must expend for her such part of the *principal* as might be requisite to make her comfortable.[1]

§ 159. If a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs.[2] If the gift is made upon a trust, and the trust is insufficiently or ineffectually declared, as, if it is too indefinite, vague, and uncertain to be carried into effect, it will result to the settlor, his heirs, or representatives.[3] Whether a trust is insufficiently declared or not, depends of course upon the particular construction to be given to each individual deed or will;[4] and so, whether a trust is too vague to be executed or not, depends upon the interpretation given to each instrument.[5] If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which fails, the donee will take in trust for the donor or his heirs; (*a*) but if it appear,

[1] Coburn *v.* Anderson, 131 Mass. 513.

[2] Gumbert's App., 110 Penn. St. 496. [Jenkins *v.* Jenkins' Univ., 17 Wash. 160.]

[3] Williams *v.* Kershaw, 5 Cl. & Fin. 111; Ellis *v.* Selby, 7 Sim. 352; 1 M. & C. 286; Fowler *v.* Garlike, 1 R. & M. 232; Morice *v.* Durham, 9 Ves. 399; 10 Ves. 522; Kendall *v.* Granger, 5 Beav. 300; Vesey *v.* Jamson, 1 S. & S. 69; Stubbs *v.* Sargon, 3 M. & C. 500; 2 K. 255; Leslie *v.* Devonshire, 2 Bro. Ch. 187; James *v.* Allen, 3 Mer. 17; Sturtevant *v.* Jaques, 14 Allen, 526; Shaw *v.* Spencer, 100 Mass. 388. [Minot *v.* Att. Gen., 189 Mass. 176; *Re* Wilcock, Wilcock *v.* Johnson, 62 L. T. 317; Cagwin *v.* Buerkle, 55 Ark. 5; Columbian University *v.* Taylor, 25 App. D. C. 124; Woodruff *v.* Marsh, 63 Conn. 125; Johnson *v.* Johnson, 92 Tenn. 559.]

[4] Ellis *v.* Selby, 1 M & K. 298.

[5] Ibid.

(*a*) Thus where a bequest is made in trust for a purpose to be set forth in a letter which is not part of the will, the attempted express trust

from the whole instrument, that some beneficial interest was intended for the donee, or that he was intended to take bene-

failing because not sufficiently declared and the facts not raising a trust *ex maleficio*, a trust for the next of kin of the testator will result, since it is clear that the testator did not intend the legatee to take beneficially. Bryan *v.* Bigelow, 77 Conn. 604; Chase *v.* Stockett, 72 Md. 235, 243; Heidenheimer *v.* Bauman, 84 Tex. 174. See also Payton *v.* Almy, 17 R. I. 605; Kelly *v.* Nichols, 17 R. I. 306; 18 R. I. 62.

Where a bequest or devise appears on the face of the will to be absolute, but the legatee or devisee has agreed, or has an understanding, with the testator to take the property upon a trust which would have been illegal if set forth in the will, a trust will result for the heirs or next of kin of the testator, just as would have been the case if the illegal trust had been set forth in the will. Edson *v.* Bartow, 154 N. Y. 215; Amherst College *v.* Ritch, 151 N. Y. 282; O'Hara *v.* Dudley, 95 N. Y. 403; Gore *v.* Clarke, 37 S. C. 537, 20 L. R. A. 465. But where the legatee or devisee has been merely requested or advised to use the property for a purpose to which the testator could not have devoted it by will, and such request or recommendation is not intended to impose an obligation upon him, and he has not entered into any agreement or understanding with the testator to carry out the latter's wishes, no trust will result, even though the legatee or devisee chooses to treat the request as a command and to devote the property to the purposes to which the testator himself could not have devoted it. Sale *v.* Thornberry, 86 Ky. 266; Olliffe *v.* Wells, 130 Mass. 221; Fairchild *v.* Edson, 154 N. Y. 199; Hodnett's Appeal, 154 Pa. St. 485; Shultz's Appeal, 80 Pa. St. 396. In such a case the property having become absolutely the property of the devisee or legatee, his disposition of it is entirely his own act, not the act of the testator, although the latter's wishes are carried out and the provisions of a statute regarding disposition by will are thereby substantially evaded.

If, however, it is shown that the testator and the legatee or devisee have entered into a previous understanding that the latter will carry out the former's wishes, the gift will not be treated as an absolute one, but a trust will result for the heirs or next of kin of the testator. (See cases cited *supra*, this note.) When the disposition agreed upon between the legatee or devisee and the testator is one which the latter could legally have made by will and the legatee or devisee is willing to carry out the agreement, he will usually be permitted to do so. Such an agreement is not illegal in itself, although it may be secret. Gilpatrick *v.* Glidden, 81 Me. 137; Olliffe *v.* Wells, 130 Mass. 221; Powell *v.* Yearance, 73 N. J. Eq. 117; *In re* Washington's Estate, 220 Pa. St. 204. But see Moran *v.* Moran, 104 Iowa, 216. When he refuses to carry out his agreement the decisions are in conflict. Many cases have raised a constructive trust *ex maleficio*, which in effect

ficially in case the particular purpose fails, no trust will result, but he will take the estate discharged of all burdens.[1]

§ 160. Where a gift is made upon trusts that are void, in whole or in part, for illegality,[2] or that fail by lapse, or otherwise, during the life of the donee,[3] a trust will result to the donor, his heirs, or legal representatives, if the property is not otherwise disposed of. (*a*) Thus, where the gift or trust is void by statute, as a disposition in favor of persons or objects prohibited from taking,[4] or given at a time and in a manner forbidden, as in violation of the statutes of mortmain, or similar statutes,[5] or where the gift contravenes some policy of the law, as tending to a perpetuity,[6] or where it fails by the death of some bene-

[1] Gibbs *v.* Rumsey, 2 Ves. & B. 294; Cawood *v.* Thompson, 1 Sm. & Gif. 409; Lomax *v.* Ripley, 3 Sm. & Gif. 48; Hughes *v.* Evans, 13 Sim. 496; Ralston *v.* Telfair, 2 Dev. Eq. 255.

[2] Turner *v.* Russell, 10 Hare, 204; Cook *v.* Stationers' Co., 3 M. & K. 262; Carrick *v.* Errington, 2 P. Wms. 361; Tregonwell *v.* Sydenham, 3 Dow, 194; Arnold *v.* Chapman, 7 Ves. 108; Jones *v.* Mitchell, 1 S. & S. 290; Page *v.* Leapingwell, 18 Ves. 463; Pilkington *v.* Boughey, 12 Sim. 114; Gibbs *v.* Rumsey, 2 Ves. & B. 294; Stevens *v.* Ely, 1 Dev. Eq. 493; Dashiel *v.* Att. Gen., 6 Har. & J. 1; Lemmond *v.* People, 6 Ired. Eq. 137.

[3] Williams *v.* Coade, 10 Ves. 300; Ackroyd *v.* Smithson, 1 Bro. Ch. 503; Spink *v.* Lewis 3 id. 335; Hutcheson *v.* Hammond, id. 128; Muckleston *v.* Brown, 6 Ues. 63; Davenport *v.* Coltman, 12 Sim. 610; Cruse *v.* Barley, 3 P. Mms. 22; Hawley *v.* James, 5 Paige, 318; Gwynn *v.* Gwynn, 27 S. C. 526. [See *Re* Tilt, 74 L. T. 163.]

[4] Carrick *v.* Errington, 2 P. Wms. 361; Davers *v.* Dewes, 3 id. 43.

[5] Att. Gen. *v.* Weymouth, Amb. 20; Jones *v.* Mitchell, 1 S. & S. 294; West *v.* Shuttleworth, 2 M. & K. 684; Acts 39 & 40 Geo. IV. c. 98; Eyre *v.* Marsden, 2 Keen, 564; McDonald *v.* Bryce, id. 276; Lemmond *v.* People, 6 Ired. Eq. 137.

[6] Tregonwell *v.* Sydenham, 3 Dow, 194; Leake *v.* Robinson, 2 Mer.

is the same as the parol but unenforceable express trust. For an examination of the cases on this point see *infra* under constructive trusts, § 181, note. If a constructive trust is not raised it would seem that a trust for the heirs or next of kin of the testator ought to result.

(*a*) See Edson *v.* Bartow, 154 N. Y. 199, 768; 10 Harv. L. Rev. 445; McDermith *v.* Voorhees, 16 Colo. 402; note to Neill *v.* Keese, (Texas), 51 Am. Dec. 746. Or where an attempted express trust fails because not properly declared. Woodruff *v.* Marsh, 63 Conn. 125; Johnson *v.* Johnson, 92 Tenn. 559; *Re* Wilcock, 62 L. T. 317.

ficial donee or *cestui que trust*,[1] a trust, to the extent of the estate given, will result to the donor, or his heirs, or legal representatives, if it is not otherwise disposed of. If the purposes of a trust fail or are completely performed, the trustees hold the estate for the heirs at law as a resulting trust.[2] So if a trust for a particular purpose fail, by the dissolution of a corporation, or other organized body, a trust created for their particular benefit will result to the donor's heirs.[3] All that the donor has not given out of himself remains in him, and if he has not provided to whom the property shall belong on failure or determination of the trust, that right is still his, and he may convey the property subject to the trust.[4] In all cases, if the trust arises or results by presumption of law, it may be rebutted as to instruments *inter vivos* by parol evidence that it was the intention of the settlor that the donee should take the surplus beneficially, or the whole estate if the trust failed *in toto*;[5] but where the trust results, not by presumption of law nor from the facts and circumstances, but from the construction and force of a written instrument, no parol evidence can be introduced to control such construction and force.[6]

§ 160 *a*. In England, the heir and the next of kin or legal representatives are not the same persons, or they have not the same rights and interests; consequently questions of some difficulty arise as to whether a trust in property results to the heir, or to the next of kin, or the legal representatives. The general

363; Marshall *v.* Holloway, 2 Swanst. 432; Southampton *v.* Hertford, 2 V. & B. 54; Curtis *v.* Lukin, 5 Beav. 147; Boughton *v.* James, 1 Call, 26; 1 H. L. Cas. 406; Brown *v.* Stoughton, 14 Sim. 369; Scarisbrick *v.* Skelmersdale, 17 Sim. 187; Furrin *v.* Newcomb, 3 K. & J. 16.

[1] Ackroyd *v.* Smithson, 1 Bro. Ch. 503; Cox *v.* Parker, 22 Beav. 188; Harker *v.* Reilly, 4 Del. Ch. 72; Bond *v.* Moore, 90 N. C. 239.

[2] Packard *v.* Marshall, 138 Mass. 383. [Hopkins *v.* Grimshaw, 165 U. S. 342, 352.]

[3] Esterbrooks *v.* Tillinghast, 5 Gray, 17.

[4] Schlessinger *v.* Mallard, 70 Cal. 326.

[5] *Ante*, §§ 139, 140, 145, 147; Cook *v.* Hutchinson, 1 Keen, 50.

[6] *Ante*, § 150; Langham *v.* Sanford, 17 Ves. 442.

rule is, if the property is real estate, that the trust results to the heir; if personal property, to the next of kin under the statutes of distribution, or to the legal representatives. But suppose a testator has devised real estate in trust and directed it to be sold and the proceeds applied to purposes named, and the real estate is converted into money, and the trust fails in whole or in part; or suppose money is given in trust, and there is a direction to invest it in lands, which is done, and the trust fails, to whom does the trust result, to the heir as real estate, or to the next of kin as personal property? Such questions are not important in the United States, for the reason that in most if not all the States the same persons take both the real and personal estate of an ancestor in the same proportion and with the same rights, and it is comparatively unimportant whether the trust results as real or personal property.[1] There is, however, one question still important in the United States, and that is, does the trust result to the heirs-at-law, or to the residuary devisees or legatees? The donor, settlor, or testator still retains such an interest in property given by him in trust, that the interest which results upon the failure of the trusts created by him may be devised by him, and the question in each case is whether the resulting interest becomes a part of the residue and passes to the residuary legatee, if there is one, or whether it passes to the heirs. The question may be stated in another form, thus: has the testator died intestate as to the interests which result to him upon a failure of the trusts, or do the provisions of the will embrace such interests and convey them to some person or persons, or class of persons named? The distinction between the heirs and the residuary legatees is that the residuary legatees claim *under* the will, and the heirs claim *dehors* the will. All the cases that can arise must depend upon the intention of the donor or settlors, and upon the construction of each particular will. If the subject-matter of the bequest that fails is personal estate, the residuary legatee will take all that results; for a general residuary

[1] See all the English cases cited and the nice distinctions drawn, Lewin on Trusts, 121–132 (5th ed.); Hill on Trustees, 127–143.

bequest is always held to carry every interest, whether undisposed of in the will, or undisposed of in any event.[1] Therefore it is only where the will contains no residuary clause that the next of kin (or heirs in the United States) can assert any claim. There is, however, this obvious remark to be made: that if the *residuum* is itself given upon a trust that fails, it of course results to the next of kin or heirs.[2] But a different rule is applied at common law to gifts of real estate. If real estate was bequeathed upon trusts that were void, or that failed, the real estate did not pass to the residuary devisee, but resulted to the heir-at-law, for the reason that nothing passed by the gift of the residue except what was intended to pass, and a bequest of real estate for a particular purpose indicated a plain intention not to embrace it in the residuary bequest, and although it might be void or fail, yet it was so far operative as to indicate the intention of the donor not to allow it to pass under the residuary clause of the will. The common law was altered by 1 Vict. Ch. 26, and real estate is governed by the same rule as personal estate.[3]

[1] Dawson *v.* Clarke, 15 Ves. 417; Brown *v.* Higgs, 4 Ves. 708; 8 Ves. 570; Shanley *v.* Baker, 4 Ves. 732; Oke *v.* Heath, 1 Ves. 141; Cambridge *v.* Rous, 8 Ves. 25; Cooke *v.* Stationers' Co., 3 M. & K. 264; Bland *v.* Bland, 2 J. & W. 406; Jones *v.* Mitchell, 1 S. & S. 298. Sir William Grant said that it must be a very peculiar case indeed in which there can be at once a residuary clause and a partial intestacy unless some part of the residue be ill given. Leake *v.* Robinson, 2 Mer. 392; King *v.* Woodhull, 3 Edw. Ch. 79; Swinton *v.* Egleston, 3 Rich. Eq. 201; Hamberlin *v.* Terry, 1 Sm. & M. Ch. 589; Johnson *v.* Johnson, 3 Ired. Eq. 427; Marsh *v.* Wheeler, 2 Edw. Ch. 156; Com. *v.* Nase, 1 Ashm. 242; Woolmer's Est., 3 Whart. 879; Taylor *v.* Lucas, 4 Hawks, 215; Pool *v.* Harrison, 18 Ala. 515; Vick *v.* McDaniel, 3 How. (Miss.) 337; Bryson *v.* Nichols, 2 Hill, Ch. 113.

[2] Skrymsher *v.* Northcote, 1 Swanst. 566: McDonald *v.* Bryce, 2 Keen, 276; Eyre *v.* Marsden, 2 Keen, 564; Woolmer's Est., 3 Whart. 477: Johnson *v.* Clarkson, 3 Rich. Eq. 305; Salt *v.* Chattaway, 3 Beav. 576; Floyd *v.* Barker, 1 Paige, 480; Frazier *v.* Frazier, 2 Leigh, 642; Trippe *v.* Frazier, 4 H. & J. 446.

[3] In the United States there is considerable variety in the decisions of the courts, if not some uncertainty in the law, where it is not determined by statute. See a very learned discussion of the law in New York in Van Kluck *v.* Dutch Reformed Church, 6 Paige, 600; 20 Wend. 458. In Massa-

§ 161. It was formerly said that if a man conveyed his estate to a stranger without consideration, or for a mere nominal one, a trust resulted to the owner, on the ground that the law would not presume a man to part with his property without some inducement thereto.[1] This was in strict analogy to the common law, whereby, if a feoffment was made without consideration, the legal title *only* passed to the feoffee, and a use resulted to the feoffor.[2] In conformity with this rule, Mr. Cruise lays it down, that if the legal estate in lands is conveyed to a stranger without any consideration, there arises a resulting trust to the original owner;[3] for where there is neither consideration, nor declaration of use, to show the intention of the parties, it cannot be supposed that the estate was intended to be given away.[4] And the burden was put upon the grantee to show the consideration, and upon failure of proof, a use was presumed to the grantor, for the reason, as stated by Sir Francis Bacon, that when feoffments were made, it grew doubtful whether estates were in use or purchase; and as purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration than the feoffor to prove his trust, and so made intendment toward the use, and put the purchaser to the proof of his purchase.[5] To the same effect are Coke on Littleton and many of the older, and some of the more modern, authorities.[6]

chusetts, Hayden *v.* Stoughton, 5 Pick. 528; Brigham *v.* Shattuck, 10 Pick. 306; Clapp *v.* Stoughton, id. 463; 4 Kent Com. 541.

[1] Lewin on Trusts, 116 (5th Lond. ed.), and cases cited; Tolar *v.* Tolar, 1 Dev. Eq. 456; 2 Story, Eq. Jur. § 1199; Cecil *v.* Butcher, 2 J. & W. 573; Souerbye *v.* Arden, 1 Johns. Ch. 246.

[2] Dyer *v.* Dyer, 2 Cox, 92; Pinney *v.* Fellows, 15 Vt. 538; Botsford *v.* Burr, 2 Johns. Ch. 405.

[3] Cruise, Dig. tit. 12, c. 1, § 52, tit. 11, c. 4, § 16.

[4] Cruise, Dig. tit. 11, c. 4, § 16, *et seq.* [5] Bacon on Uses, 317.

[6] 1 Inst. 23 *a*, 271 *a*; Dyer, 166 *a*, 186 *b*; 11 Mod. 182; Cleve's Case, 6 Rep. 17*b*; Woodliffe *v.* Drury, Cro. Eliz. 439; Duke of Norfolk *v.* Brown, Pr. Ch. 80; Warman *v.* Seaman, 2 Freem. 308; Hayes *v.* Kingdome, 1 Vern. 33; Grey *v.* Grey, 2 Swanst. 598; Elliot *v.* Elliot, 2 Ch. Cas. 232; Att. Gen. *v.* Wilson, 1 Cr. & Ph. 1; Sculthorpe *v.* Burgess, 1 Ves. Jr. 92; Tyrrell's Case, 2 Freem. 304; Ward *v.* Lant, Pr. Ch. 182.

§ 162. But the rule that a trust resulted to the grantor upon a voluntary conveyance was confined to common-law conveyances or assurances, such as feoffments, grants, fines, recoveries, and releases which operated without consideration, and vested the estate in the alienee by the act itself, as by livery of seisin;[1] although it was always doubtful whether a use could result from a conveyance by lease and release, even though it was voluntary, and no uses were declared; for the extinguishment of the estate of the lessee was a good consideration, yet such a conveyance was a strict common-law conveyance.[2] This rule does not apply to modern conveyances, and no trust is now held to result to a grantor although he conveys his estate without consideration.[3] (*a*) At the present day almost all conveyances

[1] Cruise, Dig. tit. 11, c. 4, § 16.

[2] Cruise, Dig. tit. 32, c. 11, § 17.

[3] Hutchins *v.* Lee, 1 Atk. 447; Lloyd *v.* Spillett, 2 Atk. 150; Young *v.* Peachy, id. 257; Burn *v.* Winthrop, 1 Johns. Ch. 329; Graff *v.* Rohrer, 35 Md. 327; Hogan *v.* Jaques, 19 N. J. Eq. 123; Bust *v.* Wilson, 28 Cal. 632; Jackson *v.* Cleveland, 15 Mich. 94; Ownes *v.* Ownes, 23 N. J. Eq. 60. But see McKenney *v.* Burns, 31 Ga. 295, and Haigh *v.* Kaye, L. R. 7 Ch. 469; Blodgett *v.* Hildreth, 103 Mass. 486; Stevenson *v.* Crapnell, 114 Ill. 19. [Campbell *v.* Noble, 145 Ala. 233; Brooks *v.* Union Trust Co., 146 Cal. 134; Tillaux *v.* Tillaux, 115 Cal. 663; Lancaster *v.* Springer, 239 Ill. 472; Monson *v.* Hutchin, 194 Ill. 431; Williams *v.* Williams, 180 Ill. 361; Mayfield *v.* Forsyth, 164 Ill. 32; Moore *v.* Horsley, 156 Ill. 36; Ostenson *v.* Severson, 126 Iowa, 197; Willis *v.* Robertson, 121 Iowa, 380, 382; Luckhart *v.* Luckhart, 120 Iowa, 248; Gregory *v.* Bowlsby, 115 Iowa, 327; Crawley *v.* Crafton, 193 Mo. 421; Weiss *v.* Heitkamp, 127 Mo. 23; Bobb *v.* Bobb, 89 Mo. 411; Aller *v.* Crouter, 64 N. J. Eq. 381, 390; Coffey *v.* Sullivan, 63 N. J. Eq. 296, 303; Lovett *v.* Taylor, 54 N. J. Eq. 311; Baker *v.* Baker, 72 A. 1000 (N. J. Ch. 1909); Salisbury *v.* Clarke, 61 Vt. 453.]

(*a*) It has occasionally been stated that a trust "results" to the grantor where the grantee standing in a confidential relation has induced the transfer by a parol agreement to hold upon trust for the grantor or to reconvey. Myers *v.* Jackson, 135 Ind. 136; Giffen *v.* Taylor, 139 Ind. 573. But the trust, if there is one, in such a case seems not to be a resulting trust, properly speaking, but either an express trust which equity will not allow the grantee to defeat by pleading the statute of frauds, or a constructive trust arising *ex maleficio*. It seems better to deal with this point under constructive trusts. See § 181, note.

are in form deeds of bargain and sale, and operate to pass the estate by virtue of the statute of uses, or of statutes in the several States prescribing the formalities necessary to convey lands. Under the statute of uses, the bargain between the bargainor and the bargainee, and the consideration, raised a use in the bargainee; the statute immediately stepped in and vested the legal title in the same person for whom a beneficial use had been raised by the bargain. In conveyances that are in form deeds of bargain and sale, parol evidence cannot be received to control or contradict the statement of the consideration. Such a statement is a solemn and essential part of the deed, and its *existence* cannot be disproved by parol,[1] although it is allowed so far to control the statement as to the payment of it, as to show that it still exists as a debt due from the grantee to the grantor.[2] (*a*) And so in States where it is declared by statute, as in Massachusetts,[3] that deeds duly executed, acknowledged, and recorded shall be effectual to pass the estate without other ceremony, it is not competent to control the effects of such deeds by parol, or to engraft uses, trusts, or other limitations upon them not contained in the instruments themselves, or in some other instrument executed before or at the same time with them, in

[1] Leman *v.* Whitley, 4 Russ. 423; Philbrook *v.* Delano, 29 Maine, 410; Graves *v.* Graves, 29 N. H. 129; Randall *v.* Phillips, 3 Mason, 388; Hutchinson *v.* Tindall, 2 Green, Ch. 357; Alison *v.* Kurtz, 2 Watts, 187; Wilkinson *v.* Wilkinson, 2 Dev. Eq. 376; Morris *v.* Morris, 2 Bibb. 311; Movan *v.* Hayes, 1 Johns. Ch. 339; Rathbun *v.* Rathbun, 6 Barb. 98; Balbeck *v.* Donaldson, 6 Am. Law. Reg. 148; Graff *v.* Rohrer, 35 Md. 327. [McConnell *v.* Gentry, 99 S. W. 278 (Ky. 1907.)]

[2] Leman *v.* Whitley, 4 Russ. 423; Graves *v.* Graves, 29 N. H. 129; Philbrook *v.* Delano, 21 Maine, 420; Randall *v.* Phillips, 3 Mason, 388; Thomas *v.* McCormack, 9 Dana, 188; Radsall *v.* Radsall, 9 Wis. 379; Farrington *v.* Barr, 36 N. H. 86.

[3] Gen. Stat. c. 89, § 1. [R. L. (1902), c. 127, § 1.]

(*a*) The consideration expressed in a deed is open to parol explanation for most purposes, but a want of consideration cannot be shown against the recital of the deed to establish a resulting trust in the grantor. Bobb *v.* Bobb, 89 Mo. 411; Weiss *v.* Heitkamp, 127 Mo. 23.

such manner as to become a part of them.[1] To allow parol evidence to raise a resulting trust upon such deeds would be to break in upon the express provisions of the statute of frauds. Mr. Hill states the modern rule correctly when he says,[2] "that it is the clear result of the authorities that where a person, a stranger in blood to the donor, and *a fortiori* if connected with him in blood, is in possession of an estate under a voluntary conveyance duly executed, the mere fact of his being a volunteer will not of itself create any presumption that he is a trustee for the grantor; but he will be considered entitled to the enjoyment of the beneficial interest unless that title is displaced by sufficient evidence of an intention on the part of the donor to create a trust, and he need not bring proofs to keep his estate, but the plaintiff must bring proofs to take it from him."[3] And where the deed contains a clause, as most deeds do, that the estate is had and held to the grantee, his heirs and assigns, *to his and their use and behoof*, no trust can result, as it is a rule that when a use is declared, no other use can be shown to result.[4] (*a*) *A fortiori* a trust deed cannot be turned into a resulting trust for the grantor by proof that it was without consideration.[5] And

[1] Gerry *v.* Stimson, 60 Maine, 186; Philbrook *v.* Delano, 29 id. 410; Titcomb *v.* Morrill, 10 Allen, 15; Bartlett *v.* Bartlett, 14 Gray, 278; Walker *v.* Locke, 5 Cush. 90; Blodgett *v.* Hildreth, 103 Mass. 484; Carnes *v.* Colburn, 104 Mass. 274; Whitton *v.* Whitton, 3 Cush. 191; Graves *v.* Graves, 29 N. H. 129; Rathbun *v.* Rathbun, 6 Barb. 105; Bank of U. S. *v.* Housman, 6 Paige, 526; Miller *v.* Wilson, 15 Ohio, 108; Parnell *v.* Hingston, 3 Sm. & Gif. 337; Taylor *v.* Taylor, 1 Atk. 386; Dyer *v.* Dyer, 2 Cox, 93; Fordyce *v.* Wallis, 3 Bro. Ch. 576; Squire *v.* Harder, 1 Paige, 494; Balbeck *v.* Donaldson, 6 Am. Law. Reg. 148; Jackson *v.* Garnsey, 16 Johns. 189; Jackson *v.* Caldwell, 1 Cow. 622; Farrington *v.* Barr, 36 N. H. 431.

[2] Hill on Trustees, 170 (4th Am. ed.).

[3] Cook *v.* Fountain, 3 Swanst. 590; Clavering *v.* Clavering, 2 Vern. 473; Boughton *v.* Boughton, 1 Atk. 625; Cecil *v.* Butcher, 2 Jac. & W. 573; Jeffreys *v.* Jeffreys, 1 Cr. & Ph. 138; Dummer *v.* Pitcher, 2 M. & K. 262; Leman *v.* Whitley, 4 Russ. 423; Graff *v.* Rohrer, 35 Md. 327.

[4] Graves *v.* Graves, 29 N. H. 129; Sprague *v.* Woods, 4 Watts & S. 192; Vandervolgen *v.* Yates, 5 Seld. 219; Gove *v.* Learoyd, 140 Mass. 524.

[5] Bobb *v.* Bobb, 89 Mo. 419.

(*a*) Lovett *v.* Taylor, 54 N. J. Eq. 311.

when a deed contains covenants of warranty, no use can result to the grantor, for such covenants estop him from claiming any legal or beneficial interest in the estate.[1]

§ 163. It may be stated that courts do not favor voluntary conveyances, and will not lend their aid to enforce them if they are imperfectly executed, and their decrees are necessary to give them validity and force. In such cases equity will not interfere, but will leave the parties to their rights at law.[2] And, further, equity will always look upon such conveyances with suspicion, especially if made to strangers for no particular purpose. If any fraud or misrepresentation is practised upon a grantor, equity will fasten a trust upon the conscience of the fraudulent grantee.[3] If fraud upon the grantor is alleged, the fact that the conveyance was without consideration is always considered as pertinent evidence, and will be considered as one badge of fraud, if there are other facts and circumstances pointing in that direction.[4] A disposition by will, however, is not subject to these rules, as a gift by will imports a consideration, and no averments by parol can be received to fasten a use or trust upon such gift; but the donee will take both the legal and beneficial estate, unless it clearly appears from the whole will that such was not the intention of the donor.[5]

§ 164. It is further to be observed that voluntary conveyances to a wife or child were never within the rule that such gifts raised a resulting trust for the donor. In conveyances of this kind to the donor's family the analogy of the common law was followed, whereby, if a feoffment was made to a stranger without consideration, a use resulted to the feoffor; but if a feoffment was made to a wife or child, no use resulted, for the consideration of blood was held a good consideration, and an advance or settlement was presumed. So marriage was not only a good but a valuable consideration, and no trusts could

[1] Philbrook *v.* Delano, 29 Maine, 410.
[2] Lane *v.* Ewing, 31 Mo. 75. [*Supra*, § 95 *et seq.*]
[3] *Post*, Chap. VI. [4] *Post*, § 187. [5] *Ante*, § 94.

result from conveyances made in consideration of marriage, either of the grantor or of any member of his family. But if voluntary conveyances to wife or children were made by a man deeply indebted, or with an intention to delay his creditors, while he could not raise a trust in his own favor, yet his creditors could avoid the conveyances or raise a trust upon them in their own favor to the extent of their claims.[1]

§ 165. If the voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common-law or a modern conveyance, no trust will result to the grantor; as, if the voluntary conveyance is made to delay, hinder, and defeat creditors,[2] or to give a man a colorable qualification to vote, or to sit in parliament,[3] or to kill game,[4] or to disqualify the grantor for an office,[5] or to commit any other fraud,[6] for the reason that the rules of law cannot be used, controlled, or avoided by parties with a fraudulent intent to do that indirectly which they cannot do directly.[7] (*a*)

[1] Dunnica *v.* Coy, 28 Mo. 525; Spirett *v.* Willows, 3 De G., J. & S. 293; Robinson *v.* Robinson, 17 Ohio, St. 430; Baldwin *v.* Campfield, 4 Halst. Ch. 891; Spicer *v.* Ayers, 2 N. Y. Sup. Ct. 626. [*Supra*, § 149.]

[2] Cottington *v.* Fletcher, 2 Atk. 156; Chaplin *v.* Chaplin, 3 P. Wms. 233; Muckleston *v.* Brown, 6 Ves. 68; Stewart *v.* Iglehart, 7 Gill & J. 132; Bryant *v.* Mansfield, 22 Maine, 310; Randall *v.* Philips, 3 Mason, 378; Wilson *v.* Cheshire, 1 McCord, 233; Mason *v.* Baker, 1 A. K. Marsh. 208; Chamberlayne *v.* Temple, 2 Rand. 384; Stewart *v.* Dailey, 6 Litt. 212; Jackson *v.* Dutton, 3 Har. 98; McClure *v.* Purcel, 3 A. K. Marsh. 61; Steele *v.* Worthington, 2 Ham. 82. [See Ownes *v.* Ownes, 23 N. J. Eq. 60.]

[3] Pitt's Case, cited Amb. 266; Curtis *v.* Perry, 6 Ves. 747; Cutler *v.* Tuttle, 19 N. J. Ch. 553, 562.

[4] Roberts *v.* Roberts, Daniel, 143; Brackenbury *v.* Brackenbury, 2 Jac. & W. 391; Cecil *v.* Butcher, id. 565.

[5] Birch *v.* Blagrave, Amb. 264; Gaskell *v.* Gaskell, 2 Y. & J. 502; Vandenberg *v.* Palmer, 4 K. & J. 204; Childers *v.* Childers, 1 De G., & J. 482; Field *v.* Lonsdale, 13 Beav. 78; Doe *v.* Rutledge, Cowp. 705.

[6] Tipton *v.* Powell, 2 Cold. 19; Haigh *v.* Kaye, L. R. 7 Ch. 473; Ownes *v.* Ownes, 23 N. J. Eq. 60; Miller *v.* Davis, 50 Mo. 572.

[7] Scobie *v.* Blanchard, 3 N. H. 170; Pritchard *v.* Brown, 4 N. H. 401; Hutchins *v.* Heywood, 50 N. H. 488; Sugd. V. & P. 416.

(*a*) But in Monahan *v.* Monahan, 77 Vt. 133, it was held that a trust resulted where a father took securities in the name of the son and in

§ 165 *a*. A resulting trust is to be performed or executed by the trustee by transferring the title to the *cestui que trust* at his request;[1] but if the trustee has incurred any expenses upon the estate by paying taxes or making improvements, or advancing part of the purchase-money, he will be allowed to hold the estate until his advances are repaid.[2]

[1] Millard *v.* Hathaway, 27 Cal. 119.
[2] Malroy *v.* Sloans, 44 Vt. 311.

order to rebut the presumption of gift alleged the fraudulent purpose of escaping taxation. For a criticism of this case see 18 Harvard Law Rev. 547. In Derry *v.* Fielder, 216 Mo. 177, the court declined to declare a resulting trust where a purchaser in the name of his grandchild, in order to rebut the presumption of gift, set up that the purpose of taking title in this was to prevent his wife from acquiring dower rights. Most courts, however, would not consider this purpose fraudulent *per se*. Seaman *v.* Harmon, 192 Mass. 5; Phelps *v.* Phelps, 143 N. Y. 197; Nichols *v.* Park, 79 N. Y. S. 547, 78 App. Div. 95.

CHAPTER VI.

CONSTRUCTIVE TRUSTS.

§ 166. General nature of constructive trusts. They arise from fraud.
§ 167. Jurisdiction of equity over them, and the relief given by converting the offending party into a trustee.
§ 168. Classification of constructive trusts.
§ 169. General definition of a fraud in equity.
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§ 172. Illustrations of actual fraud.
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§ 209. Other fiduciary relations.
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§ 214. Illegal and immoral contracts.
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§ 216. Devises or conveyances upon secret illegal trusts.
§ 217. Purchases from trustees with knowledge of the trusts.
§ 218. Purchases without notice of the trust.
§ 219. The safeguards thrown around such purchases.
§ 220. The consideration in such cases.
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§ 222. Notice of the trust — to whom it may be.
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§ 224. Purchase of property from executors or administrators — real estate.
§ 225. Personal property.
§ 226. Constructive trusts may be proved by parol — statute of frauds does not apply.
§ 227. The right to set aside a conveyance for fraud is an equitable estate that may be conveyed and devised.
§§ 228–230. Statute of frauds and the time within which steps must be taken to avoid a fraudulent conveyance.

§ 166. THE trusts thus far considered arise from the *express* agreements and intentions of the parties, or from their intentions *implied* from their agreements, or *result* from their express or implied agreements. These trusts arise, result, or are implied from the contracts and relations of the parties. The intention of the parties as manifested in contracts made in good faith is the foundation of them. There is another large class of trusts

which arise from frauds committed by one party upon another. Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party and will convert him into a trustee of the legal title, and order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society.[1] Such trusts are called *constructive* trusts. They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent. The reason is that courts of equity have a large jurisdiction over all matters of trust and confidence. They control and direct their administration, and in certain cases they annul and put an end to them by directing the trustee to convey the trust property to the person beneficially interested. They can also remove the trustees and appoint new ones. Therefore, courts of equity by raising a trust by construc-

[1] Thompson *v.* Thompson, 16 Wis. 91; McLane *v.* Johnson, 43 Vt. 48; Pillow *v.* Brown, 26 Ark. 240; Collins *v.* Collins, 6 Lans. 368; Hollingshed *v.* Simms, 51 Cal. 158; Hendrix *v.* Nunn, 46 Tex. 141; Kayser *v.* Maugham, 8 Col. 232; Johnson *v.* Giles, 69 Ga. 652.

tion in cases of fraud can do equal and complete justice between the parties. By this fiction of a constructive trust courts of equity have great powers. They can order the constructive trustee to hold the legal title for the original owner upon just and proper terms. If he has paid any value for the legal estate, they can order the estate to stand as security for it; they can order accounts to be taken and settled;[1] they can decree a reconveyance of the property, or they can put an end to the trust by declaring the conveyances to the constructive trustee to be null and void, and order that they be surrendered up and cancelled. In all such cases the relief is really founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property, or who has defrauded another of his estate by misrepresentation, concealment, or other fraudulent practices, is converted by the court into a trustee and ordered to account for or reconvey the property, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties defrauded or beneficially entitled have the same rights and remedies against him as they would be entitled to against an express trustee who had fraudulently committed a breach of the trust. Generally speaking, the *constructive trusts* described in this chapter are not trusts at all in the strict and proper signification of the word "trusts;" but as courts are agreed in administering the same remedy in a certain class of frauds as are administered in fraudulent breaches of trusts, and as courts and the profession have concurred in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology, while a change might lead to confusion and misunderstanding.[2] (*a*)

[1] Tompson *v.* Thompson, 16 Wis. 91; McLane *v.* Johnson, 43 Vt. 48; Collins *v.* Collins, 6 Lans. (N. Y.) 368.

[2] See Westbury, Lord Chancellor, in Rolfe *v.* Gregory, 4 De G., J. & S. 679.

(*a*) A constructive trust arising from a wrongful purchase in one's own name with another's funds "is not merely a right or cause of action

§ 167. Courts of common law have an extensive jurisdiction in cases of fraud, but it is readily seen that the remedy in equity is more easily moulded to the varying circumstances of different cases. As between the immediate parties, fraud makes all things void which are done under its direct influence. Thus, *non est factum* can be pleaded to a suit upon a deed or bond, procured by fraud or duress, on the ground that whatever is done under the influence of fraud is not done at all.[1] The same

[1] 1 Chitty, Plead. 483. Courts of chancery in England and the courts of the United States, and of many of the several States, have a jurisdiction in equity to set aside deeds and contracts procured by misrepresentation, concealment, collusion, or fraud. In Massachusetts, the Supreme Judicial Court has jurisdiction in equity in cases of fraud, accident, and mistake, according to the usage and practice of courts of equity where there is not a plain, adequate, and complete remedy at law. Gen. Stat. ch. 113, § 2. It was supposed by the profession that this statute conferred upon the court a jurisdiction in equity in accordance with the general usages of the courts of equity in England and the United States. But the court by a strict construction of the words, "where there is not a plain, adequate and complete remedy at law," denied their jurisdiction in cases of fraud, where an action at law might be maintained by the injured party. Thus, if a deed is procured from a person by fraud, he cannot maintain a suit

personal to the beneficiary, authorizing him to sue for, and thereby acquire an estate in the land, but, like a resulting trust proper, or the equity of redemption of a mortgagor, after forfeiture, it is, in and of itself, an equitable estate, vendible and descendible as any other interest in lands, and capable of being executed into a legal estate by the decree of a court of equity, at the suit of the beneficiary, or any one in privity with him, in blood or estate." Sanford *v.* Hamner, 115 Ala. 406, 416.

When the object of a bill in equity is single, the subject-matter the same, and the appropriate prayers for relief not inconsistent, a bill is not necessarily multifarious, which in one aspect shows an express trust arising from the contract, in another a purely resulting trust, and in another the use of the assets of a *cestui que trust* by a trustee in payment of property to which he took title in his own name, although the rights of the party whose money was used are not subject in all respects to the same principles of law. Kelly *v.* Browning, 113 Ala. 420, 444.

As to the distinction between constructive and resulting trusts, see Barger *v.* Barger, 30 Or. 268; Farmers' and Traders' Bank *v.* Kimball Milling Co., 1 S. D. 388, 393; Moultrie *v.* Wright, 154 Cal. 520; Fulton *v.* Jansen, 99 Cal. 591; § 127, note b, p. 191.

evidence is admissible in both courts. Probably the same evidence that would convince a court of equity that a deed was procured by fraud, and that the grantee ought to hold as a constructive trustee for the grantor, would also persuade a jury to return a verdict against such deed. In some States the parties have a right to trial by jury of all questions of fact, as of fraud or no fraud, arising upon the pleadings in equity. In other States the court may in its discretion send such issues of fact to trial by a jury.[1] Thus, the remedy in equity in cases of fraud is sought, not so much from the mode of proof and the rules of evidence, as it is from the complete character of the relief given. It is true, that in some cases courts of equity will act upon circumstances and presumptions of fraud which courts of law would not deem satisfactory proofs.[2] As if a guardian purchases an estate from a ward, equity will presume fraud from the exist-

in equity to set it aside, if it is possible to maintain a real action for the recovery of the land; and as such deeds are void or at least voidable, such action may be maintained at law, and the court has no jurisdiction in equity. Bassett *v.* Brown, 10 Mass. 355. This decision goes upon the strict meaning of the words, "where there is not a plain, adequate, and complete remedy at law," words which were formerly found in every bill in equity, in order to give the court jurisdiction. But they did not exclude the jurisdiction in equity, if the court had a jurisdiction, concurrent or otherwise, according to the usage and practice of courts of equity. The court in Massachusetts still has jurisdiction in equity in cases of fraud, where there is a peculiar complication of circumstances or of parties. Pratt *v.* Pond, 5 Allen, 59; Glass *v.* Hulbert, 102 Mass. 26; Martin *v.* Graves, 5 Allen, 601; Whittemore *v.* Cowell, 7 Allen, 446; Pool *v.* Lloyd, 5 Met. 528. But the practitioner must determine at his peril whether a particular case comes within such jurisdiction. It would have been more simple and certain for the administration of justice, to have given to the words of exclusion the meaning attached to them in bills of equity, and to have made the jurisdiction of the court to depend upon the known usage and practice of courts of equity. Thus, both the court and the bar would have had some known ground to go upon. Of course these remarks apply only to those cases of fraud where there is a jurisdiction in equity to set aside conveyances procured by fraud, and for other relief according to the known usage and practice of courts of equity, and not to mere cases of cheating and fraud in many of the affairs of life. See Miller *v.* Scammon, 52 N. H. 609.

[1] 1 Story's Eq. Jur. § 190 a.

[2] Warner *v.* Daniels, 1 Wood. & M. 103; Denton *v.* McKenzie, 1 Des. 289.

ence of the relation of guardian and ward, — a rule that courts of law would not always act upon. Lord Eldon said, that courts of equity in many cases would order an instrument to be delivered up as unduly obtained, which a jury would not be justified in impeaching by the rules of law.[1] However, fraud must be proved in both courts, and is not to be imputed from mere circumstances of suspicion. It is not, however, the rule that the court will not presume or construe a trust to arise except in cases of absolute necessity;[2] for courts of equity will act upon the just preponderance of all the facts and circumstances of proof in the case.[3]

§ 168. Constructive trusts may be divided into three classes, to be determined according to the circumstances under which they arise. First, trusts that arise from actual fraud practised by one man upon another. Second, trusts that arise from constructive fraud.[4] In this second class the conduct may not be actually tainted with moral fraud or evil intention, but it may be contrary to some rule established by public policy for the protection of society. Thus, a purchase made by a guardian of his ward, or by a trustee of his *cestui que trust*, or by an attorney of his client, may be in good faith, and as beneficial to all parties as any other transaction in life; and yet the inconvenience and danger of allowing contracts to be entered into by parties holding such relations to each other are so great that courts of equity construe such contracts *prima facie* to be fraudulent, and they construe a trust to arise from them. Third, trusts that arise from some equitable principle independent of the existence of any fraud; as where an estate has been purchased, and the consideration-money paid, but the deed is not taken, equity will raise a trust by construction for the purchaser. (*a*)

[1] Fullager *v.* Clark, 18 Ves. 483; Chesterfield *v.* Janssen, 2 Ves. 155.
[2] Cook *v.* Fountain, 3 Swanst. 555.
[3] 2 Story's Eq. Jur. § 1195; Steele *v.* Kinkle, 3 Ala. 352.
[4] *Post*, § 194.

(*a*) Scadden Flat Gold Mining Co. *v.* Scadden, 121 Cal. 33; Cutler *v.* Meeker, 71 Neb. 732; Marvin *v.* Bernheimer, 77 N. Y. S. 915;

§ 169. No certain and accurate definition or description of actual fraud can be given. Courts have never laid down, in a general proposition, what does and what does not constitute fraud, nor any general rule by which they are controlled in giving relief,[1] lest other means of committing fraud should be resorted to. As Lord Hardwicke said, "fraud is infinite, and were courts of equity once to lay down rules how far they would go and no further, in extending the relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."[2] Although it is difficult to give a definition of it, yet Mr. Story said,[3] that "fraud in the sense of a court of equity properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[4] And courts of equity will not only interfere, in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done.[5] (*a*)

[1] Mortlock *v.* Buller, 10 Ves. 306.

[2] Parke's Hist. of Chan. 508; Lawley *v.* Hooper, 3 Atk. 279; 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

[3] 1 Story's Eq. Jur. § 187.

[4] Chesterfield *v.* Janssen, 2 Ves. Sr. 155; Gale *v.* Gale, 19 Barb. 251; 1 Fonb. Eq. B. 1. c. 2, § 3, note (r).

[5] Middleton *v.* Middleton, 1 Jac. & W. 96; Waltham's Case, cited 11 Ves. 638, 14 Ves. 290; Devenish *v.* Baines, Pr. Ch. 4.

Wittingham *v.* Lighthipe, 46 N. J. Eq. 429.

(*a*) In Huxley *v.* Rice, 40 Mich. 73, 82, approved in Moore *v.* Crawford, 130 U. S. 122, 128, the court said: "It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party deriving title under it will be converted into a trustee in case that construction is needful for the purpose of administering adequate relief; and the setting up of the statute of frauds by a party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects."

§ 170. Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic, that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. The leading principle of this remedial justice is by way of equitable construction to convert the fraudulent holder of property into a trustee, and to preserve the property itself as a fund for the purpose of recompense. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit. Thus at law married women or infants are not liable upon their contracts, nor are they bound by their deeds, receipts, or releases, whether made *bona fide* or fraudulently;[1] but in equity if a married woman has obtained property by fraud, the court disregards the technical rules of common law in regard to married women, and converts her by construction into a trustee, and compels her to do justice by executing the trust.[2] The same principles apply to infants, although they cannot be sued at common law, save in a few exceptionable cases. So if an infant fraudulently misrepresents his age and gives deeds or releases, upon which others act, equity will not allow him to impeach such deeds on account of his minority.[3] (*a*) This is on the ground that infants and mar-

[1] People *v.* Kendall, 25 Wend. 399; Burley *v.* Russell, 10 N. H. 184; West *v.* Moore, 14 Vt. 447; Conroe *v.* Birdsall, 1 Johns. Cas. 127; Price *v.* Hewitt, 8 Exch. 145.

[2] Vaughan *v.* Vanderslegen, 2 Dr. 363; Jones *v.* Kearney, 1 Dr. & W. 167.

[3] Stoolfoos *v.* Jenkins, 12 S. & R. 399; Wright *v.* Snow, 2 De G. & S. 321.

(*a*) The courts of different jurisdictions have not agreed upon this point. See *infra*, § 624, note.

ried women shall not take advantage of the rules made for their protection to perpetrate frauds upon innocent persons, but that they shall be bound by their own fraudulent representations, or by equitable estoppels, like other persons.[1]

§ 171. Fraud, arising from facts and circumstances of imposition, presents the plainest case for relief,[2] for it comes within what is called the *suggestio falsi*.[3] Wherever by misrepresentation, combination, conspiracy, oppression, intimidation, surprise, or any other practice at variance with honest, fair dealing, one is deceived, entrapped, or surprised into a conveyance of the legal title to his property, by deed or by will, courts of equity will not allow the fraudulent grantee to avail himself of the transaction to enjoy the beneficial interest, but will construe him to be a trustee, and will order him to account upon equitable principles, and to make a reconveyance of the property.[4] Thus, where one buys land at an execution sale, or sale under a trust deed, under an agreement with the debtor that the latter may redeem, the

[1] Davis *v.* Fingle, 8 B. Monr. 539; Wright *v.* Arnold, 4 id. 643; Hall *v.* Timmons, 2 Rich. Eq. 120.

[2] Chesterfield *v.* Janssen, 2 Ves. 155; Beegle *v.* Wentz, 55 Penn. St. 369.

[3] Evans *v.* Bicknell, 6 Ves. 173; Jarvis *v.* Duke, 1 Vern. 20; Broderick *v.* Broderick, 1 P. Wms. 240; Nevitt *v.* Gibson, 1 Freem. Ch. 438; Bulkley *v.* Wilford, 2 Cl. & Fin. 102.

[4] Tyler *v.* Black, 13 How. 231; Boyce *v.* Grundy, 2 Pet. 210; Smith *v.* Richards, 13 Pet. 26; McAllister *v.* Barry, 2 Hayw. 290; Walker *v.* Dunlop, 5 Hayw. 271; Harris *v.* Williamson, 4 id. 124; Stephenson *v.* Taylor, 1 A. K. Marsh. 235; Pitts *v.* Cottingham, 9 Porter, 675; Lewis *v.* McLemore, 10 Yerg. 206; Spence *v.* Duren, 2 Ala. 251; Harris *v.* Carter, 3 Stew. 233; How *v.* Weldon, 2 Ves. 517; Neville *v.* Wilkinson, 1 Bro. Ch. 596; Earl of Bath's Case, 3 Ch. Ca. 56; Willan *v.* Willan, 16 Ves. 82; Say *v.* Barwich, 1 V. & B. 195; Barnsley *v.* Powell, 1 Ves. 289; Mathew *v.* Hanbury, 2 Vern. 187; Bridgman *v.* Green, 2 Ves. 627; Evans *v.* Llewellyn, 1 Cox, 340; Bennet *v.* Vade, 2 Atk. 324; Mad. Ch. Pr. 342; Clermont *v.* Tasburgh, 1 J. & W. 112; Dowd *v.* Tucker, 41 Conn. 198; Williams *v.* Vreeland, 29 N. J. Eq. 417; Church *v.* Ruland, 64 Penn. St. 432; Rick's App., 105 id. 528; Beach *v.* Dyer, 93 Ill. 295; Long *v.* Fox. 100 id. 43; Brophy *v.* Lawler, 107 id. 284; Henschel *v.* Mamero, 120 id. 660; Ludlow *v.* Flournoy, 34 Ark. 451. A trust sale may be set aside when oppressive to the knowledge of the purchaser. Littell *v.* Grady, 38 Ark. 584.

purchaser holds in trust; it would be a fraud to allow him to repudiate the contract.[1] (*a*) Mere declarations and admissions of the party to be charged accompanying the transfer of title have been held sufficient to raise a trust.[2] It must be remembered, in connection with these cases, that although they are placed on the ground of fraud, the doctrine of North Carolina, that trusts in land may be created by parol, probably has had an influence in nearly all the decisions.[3] In Pennsylvania, an agreement to allow redemption is held to be within the statute of frauds, and will not be enforced as creating a constructive trust.[4] Equity will enforce a parol promise to a testator by a

[1] Mulholland *v.* York, 82 N. C. 510; Tankard *v.* Tankard, 84 id. 286; McNair *v.* Pope, 100 id. 408. See also Turner *v.* King, 2 Ired. Eq. 132; Vannoy *v.* Martin, id. 169; Vestal *v.* Sloan, 76 N. C. 127; McLeod *v.* Bullard, 84 id. 515; Cheek *v.* Watson, 85 id. 195; Gidney *v.* Moore, 86 id. 484; McKee *v.* Vail, 79 id. 194, declares such a contract void when not in writing; but in 82 N. C. 510, *supra*, this case was distinguished on the ground that there was no relation of confidence or equitable element in the agreement in that case. [Waller *v.* Jones, 107 Ala. 331; Collins *v.* Williamson, 94 Ga. 635; Holmes *v.* Holmes, 106 Ga. 858; Pope *v.* Dapray, 176 Ill. 478; Hughes *v.* Willson, 128 Ind. 491; Parker *v.* Catron, 120 Ky. 145; Vanbever *v.* Vanbever, 97 Ky. 344; Griffin *v.* Schlenk, 102 S. W. 837 (Ky. 1907); Carter *v.* Dotson, 92 S. W. 600 (Ky. 1906); Phillips *v.* Hardenburg, 181 Mo. 463; Dickson *v.* Stewart, 71 Neb. 424; Davis *v.* Kerr, 141 N. C. 11; Hinton *v.* Pritchard, 107 N. C. 128; Coleman *v.* McKee, 24 R. I. 596; Chadwick *v.* Arnold, 34 Utah, 48; Frost *v.* Perfield, 44 Wash. 185; Cutler *v.* Babcock, 81 Wis. 195; Rochefoucauld *v.* Boustead, (1897) 1 Ch. 196; See Lancaster Trust Co. *v.* Long, 220 Pa. St. 499; Aborn *v.* Padelford, 17 R. I. 143; Boyd *v.* Hankinson, 92 Fed. 49; Carr *v.* Craig, 138 Iowa, 526. See *contra*, Bourke *v.* Callanan, 160 Mass. 195.]

[2] Smiley *v.* Pearce, 98 N. C. 185.

[3] See § 75.

[4] Salsbury *v.* Black, 119 Penn. St. 200; Kimmel *v.* Smith, 117 id. 183,

(*a*) It has been pointed out that a person purchasing at a sale on execution or on foreclosure of mortgage with such an agreement with the owner of the property is in substantially the same position as one taking an absolute conveyance directly from the owner of the property with an oral defeasance, since the sheriff or the mortgagee at such a sale acts as a sort of agent of the debtor or mortgagor and conveys the latter's title. Dickson *v.* Stewart, 71 Neb. 424; Stafford *v.* Stafford, 29 Tex. Civ. App. 73. See also Livingstone *v.* Murphy, 187 Mass. 315.

legatee to hold the legacy for the benefit partly or wholly of another, in consideration of which promise the testator for the benefit of such third person makes the bequest to the promissor. It would be a fraud for the legatee to retain the property for his own benefit.[1] Even silent acquiescence encouraging a testator to make a will with a declared expectation that he will apply it for the benefit of others, has been held to have the force of an express promise.[2] A parol promise on consideration of which a deed was made will be enforced in equity.[3] Where the devisee, under a will defectively executed, obtained a conveyance of the estate from the heir-at-law by representing that the will was duly executed,[4] or where an executor obtained a release of a legacy by representing that there was no legacy given by the will,[5]

and cases cited. [Grove *v.* Kase, 195 Pa. St. 325; 1 Purdon's Dig. (13th ed.) p. 1180, § 154, Acts of 1881, P. L. 84. See Goodwin *v.* McMinn, 193 Pa. St. 646.]

[1] Vreeland *v.* Williams, 32 N. J. Eq. 734. See Socher's App., 104 Penn. St. 609. [Jerome *v.* Bohm, 21 Colo. 322; Bohm *v.* Bohm, 9 Colo. 100; Buckingham *v.* Clark, 61 Conn. 204; Dowd *v.* Tucker, 41 Conn. 197; Gilpatrick *v.* Glidden, 81 Me. 137; Laird *v.* Vila, 93 Minn. 45; Smullin *v.* Wharton, 73 Neb. 667; Powell *v.* Yearance, 73 N. J. Eq. 117; O'Hara *v.* Dudley, 95 N. Y. 403; Amherst College *v.* Ritch, 151 N. Y. 282; McCloskey *v.* McCloskey, 205 Pa. St. 491; Hoge *v.* Hoge, 1 Watts (Pa.) 163, 214. See § 181 and note.]

[2] Laytin *v.* Davidson, 95 N. Y. 263. [Becker *v.* Schwerdtle, 141 Cal. 386; Curdy *v.* Berton, 79 Cal. 420; Gilpatrick *v.* Glidden, 81 Me. 137; O'Hara *v.* Dudley, 95 N. Y. 403; Amherst College *v.* Ritch, 151 N. Y. 282; Brook *v.* Chappell, 34 Wis. 405. See *contra*, Moran *v.* Moran, 104 Iowa, 216; Moore *v.* Campbell, 102 Ala. 445, 113 Ala. 587.]

[3] Clark *v.* Haney, 62 Tex. 511; Lott *v.* Kaiser, 61 id. 665. [Ammonette *v.* Black, 73 Ark. 310; Crabtree *v.* Potter, 150 Cal. 710; Loomis *v.* Loomis, 148 Cal. 149; Becker *v.* Schwerdtle, 141 Cal. 386; Jones *v.* Jones, 140 Cal. 587; Odell *v.* Moss, 137 Cal. 542; Kimball *v.* Tripp, 136 Cal. 631; Gallagher *v.* Northrup, 215 Ill. 563; Larmon *v.* Knight, 140 Ill. 232; Giffen *v.* Taylor, 139 Ind. 573; Gregory *v.* Bowlsby, 126 Iowa, 588; Pendleton *v.* Patrick, 57 S. W. 464 (Ky. 1900); Collins *v.* Collins, 98 Md. 473 (*semble*); Lewis *v.* Lindley, 19 Mont. 423; Pollard *v.* McKenney, 69 Neb. 742; Koefoed *v.* Thompson, 73 Neb. 128; Fox *v.* Fox, 77 Neb. 601; Ahrens *v.* Jones, 169 N. Y. 555; Goldsmith *v.* Goldsmith, 145 N. Y. 313; Richardson *v.* McConaughey, 55 W. Va. 546 (*semble*).]

[4] Broderick *v.* Broderick, 1 P. Wms. 239.

[5] Jarvis *v.* Duke, 1 Vern. 19; Murray *v.* Palmer, 18 Sch. & L. 474; James *v.* Greaves, 2 P. Wms. 270; Horseley *v.* Chaloner, 2 Ves. 83.

or where a purchaser misrepresented the quantity and quality of the land he was about to purchase,[1] or where the vendor misrepresented the quantity of land in a tract sold, as twenty acres overflowed by a river, when in fact it was more than a hundred acres,[2] or where a husband and wife conveyed land to A. on no consideration but his promise to reconvey it to the wife, and A.'s prior creditors attached the land,[3] the court gave relief. In Smith *v.* Richards,[4] the Supreme Court of the United States cited the following proposition[5] with approval: "Where a party intentionally or by design misrepresents a material fact, or produces a false impression[6] in order to mislead another,[7] or to entrap or cheat him, or to obtain an undue advantage of him, — in every such case there is positive fraud in the truest sense of the term;[8] there is an evil act, with an evil intent; *dolum malum, ad circumveniendum.* And the misrepresentation may as well be by acts as words, by artifices that mislead[9] as by positive assertions."[10] Lord Thurlow said, "it would be ridiculous for the court to make a distinction between the two cases."[11] "Whether the party thus representing a fact knew it to be false or made the assertion without knowing whether it

[1] Tyler *v.* Black, 13 How. 231.

[2] Boyce *v.* Grundy, 3 Pet. 210. See Prescott *v.* Wright, 4 Gray, 461. But see Bartlett *v.* Salmon, 6 De G., M. & G. 40.

[3] Cox *v.* Arnsmann, 76 Ind. 210.

[4] 13 Pet. 36.

[5] 1 Story's Eq. Jur. §§ 192, 193.

[6] Laidlaw *v.* Organ, 2 Wheat. 195; Pidcock *v.* Bishop, 3 B. & Cr. 605; Smith *v.* Bank of Scotland, 1 Dow, 72; Evans *v.* Bicknell, 6 Ves. 173.

[7] State *v.* Holloway, 8 Blackf. 45.

[8] Atwood *v.* Small, 6 Cl. & Fin. 232; 1 Younge, 407; Taylor *v.* Ashton, 11 Mee. & W. 401; Warner *v.* Daniel, 1 Wood. & M. 103; Torrey *v.* Buck, 1 Green, Ch. 366; Jarvis *v.* Duke, 1 Vern. 19; Broderick *v.* Broderick, 1 P. Wms. 239.

[9] Chisholm *v.* Gadsden, 1 Strobh. 220; Huguenin *v.* Baseley, 14 Ves. 273; State *v.* Holloway, 8 Blackf. 45.

[10] Ibid.; Laidlaw *v.* Organ, 2 Wheat. 195; Smith *v.* Bank of Scotland, 1 Dow, 272; 2 Kent, 484; Chesterfield *v.* Janssen, 2 Ves. 155; Neville *v.* Wilkinson, 1 Bro. Ch. 546.

[11] Neville *v.* Wilkinson, 1 Bro. Ch. 546.

was true or false is wholly immaterial;[1] for the affirmation of what one does not know or believe to be true is, equally in morals and law, as unjustifiable as the affirmation of what is known to be positively false.[2] And even if a party innocently misrepresent a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party.[3] Or, as Lord Thurlow expresses it, it misleads the parties contracting on the subject-matter."[4] There may also be fraud upon a third person not a party to the immediate conveyance that will raise a trust; for example, a purchaser knowing of a prior deed to A. holds in trust for A.[5] There is a distinction between cases of fraud in which equity will set aside the sale altogether, and those cases in which it will allow the sale to stand, and hold the purchaser as a trustee. A trust will not be declared, if thereby in effect the beneficiary would receive the benefit of the fraud at the expense of a third person equally innocent.[6]

§ 172. If a person purchasing an estate falsely pretends and represents that he is purchasing or acting as agent for another, when in fact he is purchasing for himself, and such misrepresentation misleads and throws the vendor off his guard, and the

[1] Wright *v.* Snow, 2 De G. & Sm. 321. [See § 177, note.]

[2] Ainslie *v.* Medlycott, 9 Ves. 21; Graves *v.* White, Freem. 57; Pearson *v.* Morgan, 2 Bro. Ch. 389; Foster *v.* Charles, 6 Bing. 396; 7 Bing. 105; Taylor *v.* Ashton, 11 Mee. & W. 401; Smith *v.* Mitchell, 6 Ga. 458; Hazard *v.* Irwin, 18 Pick. 85; Doggett *v.* Emerson, 3 Story, 733; Hough *v.* Richardson, id. 691; Mason *v.* Crosby, 1 Wood. & M. 352; Smith *v.* Babcock, 2 id. 246; Hammatt *v.* Emerson, 27 Maine, 308.

[3] Ibid., Pearson *v.* Morgan, 2 Bro. Ch. 389; Burrows *v.* Locke, 10 Ves. 475; De Manville *v.* Compton, 1 Ves. & B. 355; *Ex parte* Carr, 3 Ves. & B. 111; Carpenter *v.* Am. Ins. Co., 1 Story, 57; Tayman *v.* Mitchell, 1 Md. Ch. Dec. 496; Pratt *v.* Philbrook, 33 Maine, 17; Harding *v.* Randall, 15 id. 332; Rosevelt *v.* Fulton, 2 Cow. 129; Champlin *v.* Laytin, 6 Paige, 189; Reese *v.* Wyman, 9 Ga. 439; Reynell *v.* Sprye, 8 Hare, 222; Lewis *v.* McLemore, 11 Yerg. 206; Thomas *v.* McCann, 4 B. Mon. 601; Hunt *v.* Moore, 2 Barr, 105; Joice *v.* Taylor, 6 G. & J. 54; Lockridge *v.* Foster, 4 Scam. 570; Turnbull *v.* Gadsden, 2 Strobh. Eq. 14.

[4] Neville *v.* Wilkinson, 1 Bro. Ch. 546.

[5] Cannon *v.* Handley, 72 Cal. 133; see § 212.

[6] Hudson *v.* Morris, 55 Tex. 605.

purchaser makes a better bargain than he otherwise could, or the representation is in any way material, equity will not enforce the agreement, or, if it is already executed, will convert the purchaser into a trustee.[1] And so if a purchaser at auction or otherwise represents that he is purchasing or bidding for some other person, as for the debtor in a sale under an execution,[2] or for the mortgagor in a sale under a foreclosure, (*a*) or for the family under an executor's or administrator's sale, (*b*) and competition is thus prevented and the purchase is made on his own terms, equity will decree that such person shall be a trustee for the person for whom he represented that he was acting. So if a purchaser by fraud prevents other purchasers from attending a sale,[3] or if a purchaser fraudulently agrees that he will purchase an estate in his own behalf and that of another, in order to prevent competition, and gets the property into his own name, at a less price, he will be a trustee for the person defrauded.[4] On the other hand, where an agent makes a fraudulent representation, or does a fraudulent act, in a purchase or sale, with or

[1] Phillips *v.* Bucks, 1 Vern. 227 and notes; Fellowes *v.* Gwydyr, 1 Sim. 63, 1 R. & M. 83. But a mere mistake of parties will not avoid a lease. Stiner *v.* Stiner, 58 Barb. 643. [Rollins *v.* Mitchell, 52 Minn. 41; Gates *v.* Kelley, 15 N. D. 639; Johnston *v.* Reilly, 66 N. J. Eq. 451. See Sykes *v.* Boone, 132 N. C. 199.]

[2] Peebles *v.* Reading, 8 Ser. & R. 484; Gilmore *v.* Johnson, 29 Ga. 67; Belcher *v.* Saunders, 34 Ala. 9; Roller *v.* Spilmore, 13 Wis. 26; Arnold *v.* Cord, 16 Ind. 176; Northcote *v.* Martin, 28 Miss. 469; Soggins *v.* Heard, 31 Miss. 426; Pearson *v.* East, 36 Md. 28; Minot *v.* Mitchell, 30 Ind. 228. [Griffen *v.* Schlenk, 102 S. W. 837 (Ky. 1907); Carter *v.* Dotson, 92 S. W. 600 (Ky. 1906); Phillips *v.* Hardenburg, 181 Mo. 463; Davis *v.* Kerr, 141 N. C. 11; Coleman *v.* McKee, 24 R. I. 596.]

[3] Martin *v.* Blight, 4 J. J. Marsh. 491; Rives *v.* Lawrence, 4 Ga. 283; Beegle *v.* Wentz, 55 Penn. St. 369; Boynton *v.* Housler, 73 id. 453; Wolford *v.* Herrington, 74 id. 311.

[4] McCulloch *v.* Cowher, 5 Watts & S. 427; Ferguson *v.* Williamson, 20 Ark. 272; Owson *v.* Cown, 22 Miss. 329. [See *contra*, Bourke *v.* Callanan, 160 Mass. 195; Carr *v.* Graham, 128 Ga. 622. See *infra*, § 206, note.]

(*a*) Holmes *v.* Holmes, 106 Ga. 858.

(*b*) Woodfin *v.* Marks, 104 Tenn. 512. See also Vanbever *v.* Vanbever, 97 Ky. 344.

without the privity or knowledge or consent of his principal, and the principal adopts the bargain and attempts to reap an advantage from it so tainted by the fraud of the agent, he will be held bound by the fraud of the agent, and relief will be given.[1] Indeed, the doctrine has been thus broadly stated: "That where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning."[2] And the same rule applies with more force to misrepresentations made by one of several partners.[3] But if the agreement is a fair one between the parties, it will not be affected because brought about by the fraud of some third person for his collateral benefit.[4] And if the agreement is not a fair one, it will not be invalidated by the fraudulent representations of a third person in no way connected with either party,[5] unless the circumstances are such that the bargain may be said to have been entered into by mistake.[6]

§ 173. However repugnant to entire good faith and sound morals any misrepresentation upon any subject, however made,

[1] Ferson *v.* Sanger, 1 Wood. & M. 147; Warner *v.* Daniels, id. 90; Kibbe *v.* Hamilton Ins. Co., 11 Gray, 163; Brooke *v.* Berry, 2 Gill, 83; Fitzsimmons *v.* Joslin, 21 Vt. 129; Fuller *v.* Wilson, 3 Ad. & El. (N. S.) 58. See also Cornfoot *v.* Fowke, 6 M. & W. 358; National Exchange Co. *v.* Drew, 2 Macq. 103; Sugd. 144, V. & P. 718; Gentry *v.* Law, 4 Nev. 97.

[2] Hortopp *v.* Hortopp, 21 Beav. 259; Scholefield *v.* Templar, John. 155; Cassard *v.* Hinman, 6 Bosw. 9; Wilde *v.* Gibson, 1 H. L. Cas. 605; Elwell *v.* Chamberlain, 31 N. Y. 619; Bennett *v.* Judson, 21 N. Y. 238; Buford *v.* Caldwell, 3 Mo. 477; Thomas *v.* McCann, 4 B. Mon. 601; Perham *v.* Randolph, 4 How. (Miss.) 435; Stone *v.* Denny, 4 Met. 161; Gentry *v.* Law, 4 Nev. 97.

[3] Blair *v.* Bromley, 2 Phill. 239, 354.

[4] Bellamy *v.* Sabine, 2 Phill. 425; Blackie *v.* Clarke, 15 Beav. 595.

[5] Fisher *v.* Boody, 1 Curtis, 206; Beach *v.* Dyer, 93 Ill. 295.

[6] Ibid. And it must be a fraud at the time of the purchase, not afterwards. Wheeler *v.* Reynolds, 67 N. Y. 227.

may be, courts of justice cannot undertake to sit as censors upon mere morals. There are in every community two classses of rights, — perfect rights, and imperfect rights. Perfect rights are those that may be enforced, or for the breach of which damages may be recovered; imperfect rights are those which are conceded to every man, but which cannot be enforced by human tribunals, and for the breach of which no damages can be recovered. Thus every man has a right to the utmost good faith, and the most perfect frankness and truthfulness in all the transactions of business; but courts of justice would be utterly powerless to enforce such a standard of morality. They would have neither the time nor the means of investigating the innumerable arts of buyers and sellers. And so courts have been obliged to lay down certain practical rules and limitations upon the subject of misrepresentation. Thus the misrepresentation must generally be of facts, or matters of fact, and not of mere matters of expectation or opinion,[1] as if one should represent that an estate contained a valuable mine, when in fact no mine existed,[2] or that an estate contained only two or three hundred acres, when in fact it contained over twelve hundred acres, or that there was no timber upon it, when there was a large amount of valuable timber,[3] or the seller should falsely represent that the custom of a public-house was a certain sum monthly,[4] or that an estate was situate in one locality or county, when it was situate in another,[5] or that stocks were selling for such a sum in the market, when they were worthless,[6] or that a third person has paid a certain sum for the same property,[7] or that it rents for so much.[8] In these and similar cases the misrepresentation is of

[1] Ferson *v.* Sanger, 1 Wood. & M. 146; Warner *v.* Daniels, id. 98; Rush *v.* Vought, 55 Penn. St. 437.

[2] Lowndes *v.* Lane, 2 Cox. 363.

[3] Tyler *v.* Black, 13 How. 230.

[4] Pilmore *v.* Hood, 6 Scott, 827.

[5] Best *v.* Stow, 2 Sandf. Ch. 298; Bennett *v.* Judson, 21 N. Y. 238.

[6] Manning *v.* Albee, 11 Allen, 522. See Warner *v.* Daniels, 1 Wood. & M. 102.

[7] Medbury *v.* Watson, 6 Met. 259.

[8] Elkins *v.* Tresham, 1 Sev. 102; 1 Sid. 146.

facts that go to the merits of the contract, and avoids it, if false. But if the representation is to the value, which is matter of opinion, it will not in general avoid the contract, as where the affirmation is that the estate is worth so much; or even if the representation is stronger, as that so much was given for it, or that so much has been offered or refused.[1] Any person who confides in or is cheated by such representations is considered too careless of his own interests to invoke the interposition of courts.[2] A misrepresentation, however, of a mere matter of opinion may avoid a contract, or convert the fraudulent party into a trustee, where the other party is known to place confidence in the opinions and judgments of the person with whom he is dealing, or where the relations between the parties are of a confidential and fiduciary character, or where one party has peculiar or exclusive means of acquiring proper information upon which to form a judgment or opinion,[3] or where the representations are such that one party is induced to rely upon the opinions of the other.[4]

§ 174. Again, the misrepresentation must be of some fact material to the contract, or of something that goes to its essence;[5] as if an estate is represented to contain one thousand acres, and it contains nine hundred and ninety-nine acres,[6] or if the age of an

[1] Hepburn *v.* Dunlop, 1 Wheat. 189; Irvine *v.* Kirkpatrick, 3 Eng. L. & Eq. 17; Medbury *v.* Watson, 6 Met. 259; Bacon *v.* Bronson, 7 John. Ch. 144; Stone *v.* Denny, 4 Met. 151; Small *v.* Atwood, 3 Younge Exch. 407; Veasey *v.* Doton, 3 Allen, 351; Hemmer *v.* Cooper, 8 Allen, 334; Best *v.* Blackburn, 6 Litt. 51; Speiglemyer *v.* Crawfort, 6 Paige, 254.

[2] Manning *v.* Albee, 11 Allen, 522; 2 Kent, 484, 485; Vernon *v.* Keys, 12 East, 632; Hough *v.* Richardson, 3 Story, 696; Jenkins *v.* Eldredge, id. 181.

[3] Scheoffer *v.* Sleade, 7 Blackf. 178; Hill *v.* Gray, 1 Starkie, 352; Keates *v.* Cadogan, 2 Eng. L. & Eq. 321.

[4] Reynell *v.* Sprye, 8 Hare, 222; 1 De G., M. & G. 660.

[5] Phillips *v.* Bucks, 1 Vern. 227; Hough *v.* Richardson, 3 Story, 659; Turnbull *v.* Gadsden, 2 Strobh. Eq. 14; Morris Canal *v.* Emmett, 9 Paige, 186; Clark *v.* Everhart, 63 Penn. St., 347.

[6] Ibid.; Stebbins *v.* Eddy, 4 Mason, 414; Winston *v.* Gwathmey, 8 B. Mon. 19; Winch *v.* Winchester, 1 Ves. & B. 375; Ingpont *v.* Worcup, Finch. 310.

article is represented to be ten years, and it is a few months more or less,[1] or a thing is represented to have been purchased in one place and it is in fact purchased at another,[2] or if a spring of water is represented to be upon a given tract of land, when in fact it is not:[3] in all these matters the facts represented are too trifling or collateral to be material, and no relief would be granted. Yet, if the leading motive of the purchase of an estate was known to be material, relief would be granted. As, if the leading motive of the purchase of an estate was known to be the purpose of acquiring a spring of water, then a fraudulent misrepresentation as to the locality of the spring would become material to the contract; or if the vendor should fraudulently point out the boundary lines, so as to take in the spring, or more land than belonged to him, the contract would be avoided.[4] But if the boundaries are properly pointed out, a misrepresentation as to the number of acres in a farm is not material.[5]

§ 175. The misrepresentation must also be of something peculiarly within the knowledge of one of the parties, or the facts must be of such a nature that both parties cannot easily obtain the information. Thus, if both parties have the same means of information, as if both parties go upon a tract of land and have equal means of judging of the quantity of timber upon it,[6] or if representations are made of town lots and the future prospects of the town, and the facts are equally open to both parties upon inquiry,[7] or if there is a misrepresentation of title, and the facts are equally accessible to both parties,[8] or generally, if both par-

[1] Geddes *v.* Pennington, 5 Dow, 159.
[2] Ibid.
[3] Winston *v.* Gwathmey, 8 B. Mon. 19.
[4] Elliott *v.* Boaz, 9 Ala. 772.
[5] Stebbins *v.* Eddy, 4 Mason, 414; Morris Canal *v.* Emmett, 9 Paige, 168.
[6] Hough *v.* Richardson, 3 Story, 659; Tindall *v.* Harkinson, 19 Ga. 448.
[7] Bell *v.* Henderson, 6 How. (Miss.) 311.
[8] Glasscock *v.* Minor, 11 Mo. 655; Juzan *v.* Toulmin, 9 Ala. 662.

ties have the same information, or an equal opportunity to obtain the same information, there cannot be such a fraud, arising from such a misrepresentation as will convert one of the parties into a trustee.[1] So if there are fraudulent misrepresentations sufficient to avoid the contract, and the innocent party obtains a knowledge of all the facts before completing the contract, he can have no relief.[2] And so if the misrepresentations, though fraudulent, are so vague and uncertain that they ought not to mislead a reasonable man, but should rather put him upon inquiry, he can have no relief.[3]

§ 176. The action of courts in cases of alleged fraud will frequently depend upon the form in which the matter is brought before them, and upon the relief sought in the proceedings. Thus a bill may be brought by a party for the specific performance of a contract which he holds, or a bill may be brought by a party to set aside the contract, or convert the opposite party who holds under the contract into a trustee, or a suit may be brought by a party at common law to recover damages for the breach of the same contract. It does not follow, because a court of equity would refuse to decree the specific performance of a contract, that it would also, on a proper bill, decree the contract to be set aside, or that it would order the party claiming under it to be trustee for the other party.[4] And so if a party comes into a court of equity to ask that an agreement which he holds may be specifically performed by the opposite party, he must come with clean hands, as it is said. There must not be any fraud, misrepresentation, or concealment on his part in procuring the contract; or, still stronger, there must not be a suspicion of concealment, misrepresentation, fraud, or unfairness adhering to him. And

[1] Hobbs *v.* Parker, 31 Maine, 143; Hutchinson *v.* Brown, 1 Clark, 408.

[2] Yeates *v.* Prior, 6 Eng. 68; Knuckolls *v.* Lea, 10 Humph. 577; Pratt *v.* Philbrook, 33 Maine, 17.

[3] Hough *v.* Richardson, 3 Story, 659.

[4] 1 Story's Eq. Jur. § 693.

even further, if the bargain imposes great hardship on the defendant, or is made under any misapprehension or mistake, or unadvisedly, courts of equity will decline to interfere actively in decreeing a specific execution of the agreement, but will leave the parties to their rights at law.[1] It will be seen from this that it requires much less evidence of fraud to enable a defendant to resist the specific performance of an agreement, than it requires to enable him to succeed as a plaintiff in a bill to set aside the same contract.[2] In the case last named he must establish the fraud affirmatively, by proof of the facts and circumstances, to the reasonable satisfaction of the court. And there may be such a case that the court would refuse to set aside a contract on the one side, because the evidence of fraud was insufficient to set the court in motion; and on the other side it would refuse to decree a specific performance, because the circumstances were too suspicious to allow it actively to interfere for the other party. In such case the parties would be left to an action at common law upon the agreements with such rights as they may have in a common-law suit.[3]

§ 177. The rules that apply to affirmative acts or representations which mislead, deceive, and defraud, are of comparatively easy application in most cases. A single affirmative word upon a material matter tending to mislead, and actually misleading, is enough to establish fraud.[4] (*a*) It is the *suggestio*

[1] Savage *v.* Brocksopp, 18 Ves. 335; Cadman *v.* Horner, id. 12; Clermont *v.* Tasburg, 1 Jac. & W. 112; Wall *v.* Stubbs, 1 Madd. 80; Mortlock *v.* Buller, 10 Ves. 292.

[2] Ibid.; Townshend *v.* Stangroom, 6 Ves. 328 n.; Lowndes *v.* Lane, 2 Cox, 363.

[3] Story's Eq. Jur. § 693.

[4] Turner *v.* Harvey, 1 Jac. 169.

(*a*) The rule in most jurisdictions now is that one person is not liable, at least in an action of deceit, for a false representation upon the faith of which another person acts, even though made carelessly or negligently, and without investigation, provided he made it in the honest belief that it was true. Derry *v.* Peek, 14 A. C. 337; Angus *v.* Clifford,

falsi which may be defined to be a false affirmation, in whatever form it may be made, whether by words or acts, of a material fact, rightfully acted upon by the other party: such an affirmation avoids the contract or converts the offending party into a trustee for the person defrauded. But how far a contracting party may legally conceal facts known to him, affecting the value of the subject-matter of the agreement, is another and more difficult question. There is no doubt in sound morals upon the matter. The natural instincts of every right-minded man concur with every writer on morals in condemning every concealment that suffers another to contract in ignorance of the facts that give value to his property.[1] The common law teaches as high a standard of morals as any other system of law. The decisions of judges and the books of elementary writers contain the highest and purest maxims of good faith and sound morality in every transaction and relation of life. Whenever, therefore, a question of concealment arises, either in a suit at common law or in equity, it cannot be a question what the highest morality requires; but it is a question how far courts can go practically in giving relief, without rendering the contracts of men so uncertain that no business could be transacted without danger of prolonged litigation. In communities governed by known, fixed, and practical rules, and not by the mere

[1] Cic. de Off. Lib. 3, c. 12, 13; Paley, Mor. Phi. B. 3, c. 7; Grotius, B. 2, c. 12, § 9; Puff. De Jure Nat. B. 5, c. 3, § 4.

[1891] 2 Ch. 449; Nash *v.* Minnesota Title Co., 163 Mass. 574; Kountze *v.* Kennedy, 147 N. Y. 124; Houston *v.* Thornton, 122 N. C. 365. But indifference as to the truth or falsity is inconsistent with an honest belief in the truth of the representation. Ibid. The above rule does not apply when there is a legal obligation on the part of one person towards another to give him correct information, such as the obligation of a trustee to give, on demand, to his *cestui que trust* information as to the trust fund; but the trustee is not obliged to answer the inquiries of a stranger, like an intending incumbrancer, who is about to deal with the *cestui que trust*. Low *v.* Bouverie, [1891] 3 Ch. 82; *Re* Wyatt, 65 L. T. 214; [1891] W. N. 137, 192; *In re* Tillott, [1892] 1 Ch. 86; *In re* Dartnall, [1895] 1 Ch. 474.

discretion of men or judges, it sometimes happens that courts must decline to give relief in cases where a man of pure principles and delicate honor would scorn to obtain or hold an advantage. Thus, in all cases of *suggestio falsi*, where active steps have been taken to deceive and gain an advantage, courts have little trouble in giving relief; but where an advantage has been gained by concealment, or *suppressio veri*, as it is called, or by mere silence, it is more difficult to lay down fixed rules that may not do more harm than good to business and society. However, concealment, or *suppressio veri*, is often of that fraudulent character that avoids a contract or converts the offending party into a trustee.

§ 178. There may be such relations between the parties that silence, or the non-disclosure of a material fact, will be a fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided, or he may be held as a constructive trustee.[1] Thus, if an attorney contracts with his client without disclosing to him material facts in his possession, the contract would be void. The trust and confidence of the client in his attorney is such that an obligation is imposed upon the attorney to communicate every material circumstance of law or fact. Mere silence, under such circumstances, becomes fraudulent concealment.[2] The same rule applies to all contracts of an agent with his principal, prin-

[1] Pidcock *v.* Bishop, 3 B. & Cr. 605; Martin *v.* Morgan, 1 Brod. & Bing. 289; Squire *v.* Whitton, 1 H. L. Cas. 333; Owen *v.* Homan, 3 Eng. L. & Eq. 121; 5 Mac. & Gor. 378; Etting *v.* Bank of U. S. 11 Wheat. 59; Carew's Case, 7 De G., M. & G. 43; Smith *v.* Bank of Scotland, 1 Dow, P. Cas. 292; Clark *v.* Everhart, 63 Penn. St. 347; Miller *v.* Welles, 23 Conn. 33.

[2] Bulkley *v.* Wilford, 2 Clark & Fin. 102. [Luddy's Trustee *v.* Peard, 33 Ch. Div. 500; U. S. *v.* Coffin, 83 Fed. 337; Darlington's Estate, 147 Pa. St. 624.]

cipal with his surety, (*a*) landlord with his tenant, parent with his child, guardian with his ward, ancestor with the heir, husband with his wife, trustee with his *cestui que trust*, executors or administrators with creditors, legatees, or distributees of the estate, partners with their copartners, appointors with their appointees, and part-owners with part-owners;[1] though the part-owners of a ship, holding by several and independent titles, were held not to stand in such confidential relations to each other that one was under obligation to communicate material facts upon a negotiation to purchase.[2] If any of the parties above named propose to contract with the persons with whom they stand in such relations of trust and confidence, they must use the utmost good faith. It is not enough that they do not affirmatively misrepresent: *they must not conceal; they must speak, and speak fully to every material fact known to them*, or the contract will not be allowed to stand.[3] Thus, if a partner who keeps the accounts of the firm should purchase his copartner's interest, without disclosing the state of the accounts, the agreement could not stand.[4] The same rule applies to family relations in general; as, where a younger brother disputed the legitimacy of his elder brother, and a settlement and partition were entered into, the younger brother having in his possession facts that tended to show that his parents intermarried before the birth of the elder, which facts he did not

[1] Beaumont *v.* Boultbee, 5 Ves. 485; Ormond *v.* Hutchinson, 13 Ves. 51; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Wellford *v.* Chancellor, 5 Grat. 39. [Schneider *v.* Schneider, 125 Iowa, 1; *infra*, §§ 195 *et seq.* and notes.]

[2] Mathews *v.* Bliss, 22 Pick. 48.

[3] Maddeford *v.* Austwick, 1 Sim. 89; 2 M. & K. 279; Popham *v.* Brooke, 5 Russ. 8; Gordon *v.* Gordon, 3 Swanst. 470; Cocking *v.* Pratt, 1 Ves. 401; Higgins *v.* Joyce, 2 Jones & La. 328; Farnham *v.* Brooks, 9 Pick. 234; Ogden *v.* Astor, 4 Sandf. S. C. 312; Ormond *v.* Hutchinson, 13 Ves. 51; Beaumont *v.* Boultbee, 5 Ves. 485; Gartside *v.* Isherwood, 1 Bro. Ch. 558.

[4] Maddeford *v.* Austwick, 1 Sim. 89; 2 M. & K. 279; Smith *in re* Hay, 6 Madd. 2; Popham *v.* Brooke, 5 Russ. 8.

(*a*) A surety is under no larger obligation to disclose to his cosurety than the creditor is under to both of them. Mackreth *v.* Walmesley, 51 L. T. 19.

communicate, the settlement was set aside.[1] The duty of disclosing facts arises either from a fiduciary relation, or from a trust properly understood to be reposed in one party by another about a matter concerning which the latter has peculiar means of information.[2]

§ 179. There are, also, cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. Thus, if a party taking a guaranty from a surety does not disclose facts within his knowledge that enhance the risk, and suffers the surety to bind himself in ignorance of the increased risk,[3] or if a party already defrauded by his clerk should receive security from a third person for such clerk's fidelity, without communicating the fact of the fraud already committed, thus holding the clerk out as trustworthy;[4] in both these and in similar cases the contracts would be void for concealment. Silence as to such facts, under such circumstances, would be equivalent to a positive affirmation that no such facts existed.[5] And so, if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the relation was confidential, and yet not to state

[1] Gordon *v.* Gordon, 3 Swanst. 399; Cocking *v.* Pratt, 1 Ves. 401.

[2] Maclary *v.* Reznor, 3 Del. Ch. 445.

[3] Martin *v.* Morgan, 1 Brod. & Bing. 289; Pidcock *v.* Bishop, 3 B. & Cr. 605; Owen *v.* Homan, 3 Eng. L. & Eq. 121; 25 Eng. L. & Eq. 1; 4 H. L. Cas. 997; Carew's Case, 7 De G., M. & G. 43; Leith Banking Co. *v.* Bell, 8 Shaw & Dun. 721; Railton *v.* Matthews, 10 Cl. & Fin. 935; Hamilton *v.* Watson, 12 id. 119; Squire *v.* Whitton, 1 H. L. Cas. 333; N. British Ins. Co. *v.* Lloyd, 28 Eng. L. & Eq. 456; 10 Exch. 523; Evans *v.* Kneeland, 9 Ala. 42.

[4] Franklin Bank *v.* Cooper, 36 Maine, 195; Smith *v.* Bank of Scotland, 1 Dow. P. Cas. 272; Maltby's Case, id. 294; Etting *v.* Bank of U. S., 11 Wheat. 59.

[5] Franklin Bank *v.* Cooper, 36 Maine,195; Smith *v.* Bank of Scotland, 1 Dow, P. Cas. 272; Maltby's Case, id. 294; Etting *v.* Bank of U. S., 11 Wheat. 59.

material facts, is fraudulent. It is said that a party in such circumstances *is bound to destroy the confidence reposed in him, or to state all the facts which such confidence demands.*[1] He cannot himself contract at arm's length, and permit the other to act as though the relation was one of trust and confidence. And so, if one party knows that the other has fallen into a delusion or mistake as to an article of property, and he does not remove such delusion or mistake, but is silent, and enters into a contract, knowing that the other is contracting under the influence of such delusion or mistake, the contract may be set aside; *for, not to remove that delusion or mistake is equivalent to an express misrepresentation.*[2]

§ 180. There must be a positive concealment to amount to a *suppressio veri.* Mere silence, if nothing is done to conceal a fact, is not in general *suppressio veri. Aliud est celare, aliud tacere.* Mere silence between strangers, contracting at arm's length, and understanding that they are so contracting, will not in general avoid a contract, or convert one of the parties into a trustee for the other.[3] Thus, the value of property may frequently depend upon extrinsic facts; as, whether there is peace or war, whether there is or is not a demand in the market, or in a distant place for property of that description, whether transportation is accessible, or whether the money market is easy or close. If one having information upon such matters enters into a contract with another with whom he has no confidential or fiduciary relations, and he neither says nor does anything to mislead or deceive, but is simply silent upon the

[1] Per Mr. Redfield, 1 Story's Eq. Jur. § 212 a; Bruce *v.* Ruler, 2 Man. & Ry. 3; Fitzsimmons *v.* Joslin, 21 Vt. 129; Hanson *v.* Edgerly, 29 N. H. 343; Bank of Republic *v.* Baxter, 31 Vt. 101; Allen *v.* Addington, 7 Wend. 10; 11 Wend. 374; Paddock *v.* Strobridge, 29 Vt. 470; Dolman *v.* Nokes, 22 Beav. 402; Hayward *v.* Cope, 25 Beav. 140; Foot *v.* Foote, 58 Barb. 258; Babcock *v.* Case, 61 Penn. St. 427.

[2] Keates *v.* Cadogan, 2 Eng. L. & Eq. 318; Hill *v.* Gray, 1 Starkie, 434.

[3] Fox *v.* Mackreth, 2 Bro. Ch. 300; 2 Cox, 320; Harris *v.* Tyson, 24 Penn. St. 359; Mathews *v.* Bliss, 22 Pick. 48.

facts known to him, equity will not in general disturb the contract;[1] but if he speaks a word, or does an act, that tends to mislead the other party, or throw him off his guard, the contract may be avoided, and he may be converted into a trustee.[2] The law permits persons to deal at arm's length, if they both understand that they are so dealing, and it permits them to be silent as to matters known only to one of them, if no inquiries are made; but it does not permit any artifice to be added to silence, in order to conceal a fact material to the contract. Thus, concealment, or *suppressio veri*, which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is defined to be the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely *in foro conscientiæ, sed juris et de jure*, to know.[3] Thus, if a stranger discover a valuable mine or spring, or any other thing or circumstances, on or in connection with land of another, he may be silent, and purchase the land;[4] but if he use any art to prevent a knowledge of the fact from coming to the owner, equity will rescind the contract,[5] and a very slight act will convert innocent silence into fraudulent concealment.[6] But if one of the parties employs an agent to contract, and the agent, knowing a material fact, is silent

[1] Fox *v.* Mackreth, 2 Bro. Ch. 300; 2 Cox, 320; Harris *v.* Tyson, 24 Penn. St. 359; Mathews *v.* Bliss, 22 Pick. 48; Mr. Kent, in the earlier editions of his Commentaries, stated a broader doctrine, but his later editions state the doctrine as in the text. See 2 Kent, 482, 484, 490, and notes; Laidlaw *v.* Organ, 2 Wheat. 178.

[2] Turner *v.* Harvey, Jac. 169; Laidlaw *v.* Organ, 2 Wheat. 178; Mathews *v.* Bliss, 22 Pick. 48.

[3] Young *v.* Bumpass, 1 Freem. Ch. 241; 1 Story's Eq. Jur. § 207; Irvine *v.* Kirkpatrick, 3 Eng. L. & Eq. 17; Laidlaw *v.* Organ, 2 Wheat. 178.

[4] Fox *v.* Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Lead. Cas. Eq. 188; Harris *v.* Tyson, 24 Penn. St. 359; Earl of Bath, &c., Case, 3 Ch. Cas. 56, 74, 103, 104; Mathews *v.* Bliss, 22 Pick. 48.

[5] Bowman *v.* Bates, 2 Bibb, 47.

[6] Turner *v.* Harvey, Jac. 169; Laidlaw *v.* Organ, 2 Wheat. 178; Torrey *v.* Buck, 1 Green, Ch. 380; Mathews *v.* Bliss, 22 Pick. 48.

or conceals it, his principal will not be affected with the knowledge, nor will the contract be vitiated.[1]

§ 181. Courts of equity will not only interfere in cases of fraud, to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere, and treat the case exactly as if the acts had been done; and this they will do, by converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done.[2] If one by a promise to buy land at an auction sale for one having an equitable interest in it induces the latter and her friends not to bid against him, he will be held a trustee.[3] Where one induces the owner of real estate not to redeem it by a promise to hold the property until paid by the rents and profits, and then to return the estate, equity will hold him to his promise.[4] So, if a delay is agreed to in the sale of land on a promise of the debtor to sell privately and apply the proceeds in a certain manner, the proceeds will be impressed with a trust.[5] If a person by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded, to the extent of the interest intended for him.[6] (*a*)

[1] Wilde *v.* Gibson, 1 H. L. Cas. 605, reversing same case, 2 Y. & Col. 542.

[2] Middleton *v.* Middleton, 1 Jac. & W. 96; Reech *v.* Kennegall, 1 Ves. 123; Oldham *v.* Litchford, 2 Vern. 506; Dutton *v.* Poole, 2 Lev. 211; Mestaer *v.* Gillespie, 11 Ves. 638, and cases cited; Jenkins *v.* Eldredge, 3 Story, 181. See remarks in McGowan *v.* McGowan, 14 Gray, 119; Morey *v.* Herrick, 18 Pa. St. 128; Wallgrave *v.* Tebbs, 2 K. & J. 313; Dixon *v.* Olmius, 1 Cox, Ch. 414.

[3] Cowperthwaite *v.* Bank, 102 Penn. St. 397; Heath's App., 100 id. 1. [See Prondzinski *v.* Garbutt, 10 N. D. 300.]

[4] Scheffermeyer *v.* Schaper, 97 Ind. 70.

[5] Boyce *v.* Stanton, 15 Lea, 346.

[6] Middleton *v.* Middleton, 1 Jac. & W. 96; Reech *v.* Kennegall, 1 Ves.

(*a*) Cases of constructive trusts imposed upon the grantee in a deed absolute in form, but given in reliance upon a parol agreement of

So, where the tenant in tail in remainder, fraudulently or by force, prevented the tenant in tail for life in possession from suffering a common recovery, and thereby barring the entail for the purpose of providing for other persons by will out of the estate, it was held that the tenant in tail in remainder, when the estate came to him, was a trustee, and the court took care that the estate should go precisely as if the common recovery had been suffered, although the tenant in tail was a married woman, and the fraud had been committed by her

123; Oldham *v.* Litchford, 2 Vern. 506; Dutton *v.* Poole, 2 Lev. 211; Mestaer *v.* Gillespie, 11 Ves. 638, and cases cited; Jenkins *v.* Eldredge, 3 Story, 181. See remarks in McGowan *v.* McGowan, 14 Gray, 119; Morey *v.* Herrick, 18 Penn. St. 128; Church *v.* Ruland, 64 id. 432; Wallgrave *v.* Tebbs, 2 K. & J. 313; Dixon *v.* Olmius, 1 Cox, Ch. 414; Fischbeck *v.* Gross, 112 Ill. 208.

the grantee to convey to or to hold for the benefit of another. Ammonette *v.* Black, 73 Ark. 310; Loomis *v.* Loomis, 148 Cal. 149; Becker *v.* Schwerdtle, 141 Cal. 386; Jones *v.* Jones, 140 Cal. 587; Crabtree *v.* Potter, 150 Cal. 710; Odell *v.* Moss, 137 Cal. 542; Kimball *v.* Tripp, 136 Cal. 631; Alaniz *v.* Casenave, 91 Cal. 41; Fisk's Appeal, 81 Conn. 433; Gallagher *v.* Northrup, 215 Ill. 563; Crossman *v.* Keister, 223 Ill. 69; Larmon *v.* Knight, 140 Ill. 232; Giffen *v.* Taylor, 139 Ind. 573; Gregory *v.* Bowlsby, 126 Iowa, 588; Pendleton *v.* Patrick, 57 S. W. 464 (Ky. 1900); Collins *v.* Collins, 98 Md. 473 (*semble*); Lewis *v.* Lindley, 19 Mont. 423; Schneringer *v.* Schneringer, 81 Neb. 661; Pollard *v.* McKenney, 69 Neb. 742; Koefoed *v.* Thompson, 73 Neb. 128; Fox *v.* Fox, 77 Neb. 601; Bowler *v.* Curler, 21 Nev. 158; Ahrens *v.* Jones, 169 N. Y. 555; Goldsmith *v.* Goldsmith, 145 N. Y. 313; Richardson *v.* McConaughey, 55 W. Va. 546 (*semble*); *In re* Duke of Marlborough, [1894] 2 Ch. 133; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196; Vanbever *v.* Vanbever, 97 Ky. 344. Cases of constructive trusts imposed upon a devisee or legatee who has orally agreed with the testator to convey to or hold for the benefit of another all or part of the property. Jerome *v.* Bohm, 21 Colo. 322; Bohm *v.* Bohm, 9 Colo. 100; Buckingham *v.* Clark, 61 Conn. 204; Dowd *v.* Tucker, 41 Conn. 197; Hughes *v.* Bent, 118 Ky. 609; Gilpatrick *v.* Glidden, 81 Me. 137; Laird *v.* Vila, 93 Minn. 45; Ragsdale *v.* Ragsdale, 68 Miss. 92; Smullin *v.* Wharton, 73 Neb. 667; Powell *v.* Yearance, 73 N. J. Eq. 117; Matter of Will of O'Hara, O'Hara *v.* Dudley, 95 N. Y. 403; Amherst College *v.* Ritch, 151 N. Y. 282 (*semble*); Rutherfurd *v.* Carpenter, 119 N. Y. S. 790; McCloskey *v.* McCloskey, 205 Pa. St. 491; Hoge *v.* Hoge, 1 Watts (Pa.) 163, 214; Washington's Estate, 220 Pa. St. 204. Cases of mutual wills. Stone *v.* Hoskins, (1905) Prob. 194; Stone *v.* Manning, 103 Tenn. 232.

husband, and she was not privy to it.[1] And where issue in tail prevented his father, tenant in tail, from suffering a recovery, by promising to provide for younger children, in favor of whom the recovery was to be suffered, equity converted the tenant in tail into a trustee for the younger children.[2] And where a person fraudulently intercepts a gift intended for another, by promising to hand it over if it is left to him, equity will compel an execution of the promise, by converting such person into a trustee.[3] So, if devisees or heirs prevent a testator from charging his estate with annuities or legacies, by saying that it is not worth while to put them in the will, and that they will pay them, they will be trustees for such intended annuitants or legatees.[4] So, if an executor prevents a gift or legacy from being given to one, by promising to pay it as if inserted in the will, he will be a trustee.[5] So, where a testator held a note against his father, which he intended to give up in his will, the residuary legatee promising that she would surrender the note, equity held her to be a trustee.[6] So, where one fraudulently

[1] Luttrell *v.* Olmius, and Waltham's Case, cited 11 Ves. 638; and 14 Ves. 290.

[2] Jones *v.* McKee, 6 Barr, 428; Devenish *v.* Baines, Prec. Ch. 4.

[3] Hoge *v.* Hoge, 1 Watts, 213; Devenish *v.* Baines, Prec. Ch. 4; Church *v.* Ruland, 64 Penn. St. 432; Dowd *v.* Tucker, 41 Conn. 198; Williams *v.* Vreeland, 29 N. J. Eq. 417. [Rollins *v.* Mitchell, 52 Minn. 41.]

[4] Chamberlain *v.* Chamberlain, 2 Freem. 34; Oldham *v.* Litchford, 2 Vern. 506; Mestaer *v.* Gillespie, 11 Ves. 638; Huguenin *v.* Baseley, 14 Ves. 290; Griffin *v.* Nanson, 4 Ves. 344; Hoge *v.* Hoge, 1 Watts, 213; Jones *v.* McKee, 3 Barr, 496, and 4 Barr, 428; Norris *v.* Frazer, L. R. 15 Eq. 329; McCormick *v.* Grogan, L. R. 4 H. L. 82. [Cassels *v.* Finn, 122 Ga. 33, 106 Am. St. 91, note; Gemmel *v.* Fletcher, 76 Kan. 577; Ransdel *v.* Moore, 153 Ind. 393; Grant *v.* Bradstreet, 87 Me. 583; Whitehouse *v.* Bolster, 95 Me. 458; Ragsdale *v.* Ragsdale, 68 Miss. 92; Williams *v.* Vreeland, 29 N. J. Eq. 417; Powell *v.* Yearance, 73 N. J. Eq. 117; Williams *v.* Fitch, 18 N. Y. 546; Richardson *v.* Adams, 10 Yerg. (Tenn.) 273; Bennett *v.* Harper, 36 W. Va. 547; Brook *v.* Chappell, 34 Wis. 405. See *contra*, as to real estate, Moore *v.* Campbell, 102 Ala. 445, 113 Ala. 587.]

[5] Thynn *v.* Thynn, 1 Vern. 296; Reach *v.* Kennigate, Amb. 67; Barrow *v.* Greenbough, 3 Ves. 152; Chamberlain *v.* Agar, 2 V. & B. 250; Podmore *v.* Gunning, 7 Sim. 644.

[6] Richardson *v.* Adams, 10 Yerg. 273; Jones *v.* McKee, 3 Barr, 496.

procured a deed to be made to herself, instead of to another.[1] But there must be some actual fraud in procuring a deed or devise to one's self: the mere breach of a promise to convey is not enough.[2] (*a*) Where the plaintiff wished to buy certain

[1] Miller *v.* Pearce, 6 Watts & S. 97. [Butterfield *v.* Nogales Copper Co., 9 Ariz. 212; Stewart *v.* Douglass, 148 Cal. 511; Sanford *v.* Sanford, 139 U. S. 642; Walker *v.* Daly, 80 Wis. 222.]

[2] Hoge *v.* Hoge, 1 Watts, 213.

(*a*) Recent decisions show a conflict of authority upon this point. In many cases it has been held that it is necessary to show a fraudulent intention at the time the promise was made, that is to say, an intention not to perform the promise, so that the conveyance, devise or inheritance can be said to have been procured by fraud. Patton *v.* Beecher, 62 Ala. 579 (overruling Barrell *v.* Hanrick, 42 Ala. 60); Manning *v.* Pippen, 86 Ala. 357; 95 Ala. 537; Brock *v.* Brock, 90 Ala. 86; Cassels *v.* Finn, 122 Ga. 33, 106 Am. St. 91; Orth *v.* Orth, 145 Ind. 184, 196; (*semble*); Peterson *v.* Boswell, 137 Ind. 211 (*semble*); Gregory *v.* Bowlsby, 115 Iowa, 327. (See 126 Iowa, 588); Willis *v.* Robertson, 121 Iowa, 380. (Compare with Newis *v.* Topfer, 121 Iowa, 433); Heddleston *v.* Stoner, 128 Iowa, 525; Rogers *v.* Richards, 67 Kan. 706 (*semble*); Randal *v.* Constans, 33 Minn. 329; Henderson *v.* Murray, 108 Minn; 76 (*semble*); Lovett *v.* Taylor, 54 N. J. Eq. 311, 321 (*semble*); Grove *v.* Kase, 195 Pa. St. 325 (*semble*); Braun *v.* First German E. L. Church, 198 Pa. St. 152 (*semble*); Bedilian *v.* Seaton, 3 Wall. Jr. 279.

The weight of authority, however, is to the effect that it is unnecessary to show any actual fraudulent intent at the time the promise is made or at the time the title vests in the alleged trustee, if the promise was the main inducement of the transfer to him or of the ancestor's failure to make a deed or will in favor of the intended beneficiary. Some of the decisions are based upon the theory that fraud at the time of making the promise will be inferred from failure to perform it subsequently. Larmon *v.* Knight, 140 Ill. 232; Gemmel *v.* Fletcher, 76 Kan. 577; Koefoed *v.* Thompson, 73 Neb. 128; Pollard *v.* McKenney, 69 Neb. 742; Grove *v.* Kase, 195 Pa. St. 325. But most of the cases go to the extent of holding that the fraud lies in failure to carry out the parol agreement made under such circumstances, even if the agreement was made with an honest intention of performing it. Odell *v.* Moss, 137 Cal. 542; Jones *v.* Jones, 140 Cal. 587; Alaniz *v.* Casenave, 91 Cal. 41; Kimball *v.* Tripp, 136 Cal. 631; Feeney *v.* Howard, 79 Cal. 525; Curdy *v.* Berton, 79 Cal. 420; Jerome *v.* Bohm, 21 Colo. 322; Bohm *v.* Bohm, 9 Colo. 100; Stahl *v.* Stahl, 214 Ill. 131; Giffen *v.* Taylor, 139 Ind. 573; Ransdel *v.* Moore, 153 Ind. 393; Grant *v.* Bradstreet, 87 Me. 583; Gilpatrick *v.* Glidden, 81 Me. 137;

land and engaged the defendant to find some one who would lend the plaintiff the necessary money, and the defendant dis-

Collins *v.* Collins, 98 Md. 473 (*semble*); Ragsdale *v.* Ragsdale, 68 Miss. 92; Benbrook *v.* Yancy, 51 So. 461 (Miss. 1910); Smullin *v.* Wharton, 73 Neb. 667 and 690; Powell *v.* Yearance, 73 N. J. Eq. 117; Ahrens *v.* Jones, 169 N. Y. 555; Goldsmith *v.* Goldsmith, 145 N. Y. 313; McCloskey *v.* McCloskey, 205 Pa. St. 491 (*semble*); Gore *v.* Clarke, 37 S. C. 537 (*semble*); Stone *v.* Manning, 103 Tenn. 232. See also note to Cassels *v.* Finn, 106 Am. St. Rep. 91; Olliffe *v.* Wells, 130 Mass. 221. But see Crossman *v.* Keister, 223 Ill. 69.

The theory of the best considered of these cases seems to be that the parol agreement which is relied upon by the grantor, testator or ancestor imposes a conscientious obligation upon the promissor, a violation of which for his advantage is such fraud that equity will make him a constructive trustee for the intended beneficiary in order to prevent the provisions of the statute of frauds or the statute of wills from being made an instrument of fraud. The doctrine is thus expounded in a dictum by Chief Justice Gray in Olliffe *v.* Wells, 130 Mass. 221, 225: "Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not a valid testamentary disposition by the deceased. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it inures to the benefit of the *cestuis que trust;* and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust." In Powell *v.* Yearance, 73 N. J. Eq. 117, it is said that such a trust "is not based necessarily on any imputation of fraud, or intention to defraud, at the time of making the promise, but of afterwards holding, or attempting to hold, the estate, as if the promise, on which the estate was received in its original condition, had not been made. The fraud consists in holding, or attempting to hold, the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received, and which it is obligatory in conscience to carry out."

In Heinisch *v.* Pennington, 73 N. J. Eq. 456, it was said: "The sole equitable basis of depriving a legatee or devisee of the full protection of the statute of wills is that by reason of a promise to the testator made by the legatee or the person through whom the legacy was given the testator was induced to make, or leave unaltered, the legacy or devise, and the equitable remedy for the purpose of preventing the statute of wills from becoming a means of fraud is that of impressing the property received by the legatee under the will, with a trust arising *ex maleficio* and converting the

suaded the plaintiff from seeking the money in other directions, in consequence of which the plaintiff did to some extent abstain

legatee, as a holder of property bequeathed, into a trustee." See also Gilpatrick *v.* Glidden, 81 Me. 137; McCloskey *v.* McCloskey, 205 Pa. St. 491; 20 Harvard Law Rev. 403, 412.

Some of the decisions which hold this view lay stress upon the relation of trust and confidence occupied by the constructive trustee by reason of other circumstances than his parol agreement, such as the near relationship of husband and wife, parent and child or brother and sister. Feeney *v.* Howard, 79 Cal. 525; Jones *v.* Jones, 140 Cal. 587; Ransdel *v.* Moore, 153 Ind. 393; Goldsmith *v.* Goldsmith, 145 N. Y. 313; Kimball *v.* Tripp, 136 Cal. 631; Bohm *v.* Bohm, 9 Colo. 100; Stahl *v.* Stahl, 214 Ill. 131; Koefoed *v.* Thompson, 73 Neb. 128; Lamb *v.* Lamb, 18 N. Y. App. Div. 250, 46 N. Y. S. 219; Hutchinson *v.* Hutchinson, 84 Hun, 482; Cardiff *v.* Marquis, 114 N. W. 1088 (N. D. 1908); Hanson *v.* Svarverud, 120 N. W. 550 (N. D. 1909). See also Newis *v.* Topfer, 121 Iowa, 433; Vanbever *v.* Vanbever, 97 Ky. 344; Henderson *v.* Murray, 108 Minn. 76. But it would seem that the mere fact that reliance upon the performance of the unenforceable agreement induced the transfer, or the failure to transfer, is sufficient in itself to establish a conscientious obligation, breach of which amounts to fraud. See Amherst College *v.* Ritch, 151 N. Y. 282; O'Hara *v.* Dudley, 95 N. Y. 403; Gore *v.* Clarke, 37 S. C. 537; Powell *v.* Yearance, 73 N. J. Eq. 117; Goodwin *v.* McMinn, 193 Pa. St. 646.

Other cases have taken the view that equity will not impose a trust because of breach of an oral agreement in such cases, unless the alleged trustee was active in procuring the conveyance or devise or in inducing the ancestor not to make a will. McCloskey *v.* McCloskey, 205 Pa. St. 491; Orth *v.* Orth, 145 Ind. 184, 196; Ragsdale *v.* Ragsdale, 68 Miss. 92. But the better opinion seems to be that proof that the former owner of the property actually relied upon the agreement and would not have conveyed or devised the property or allowed it to descend to the promissor except for his promise, is sufficient foundation for the trust. Gilpatrick *v.* Glidden, 81 Me. 137.

As the constructive trust in such cases is based upon the fact that property has been acquired by means of a promise or representation, no trust will be raised unless the fraudulent person has actually acquired property which he would not have acquired except for his promise. Loomis *v.* Loomis, 148 Cal. 149; Verzier *v.* Convard, 75 Conn. 1; Robinson *v.* Denson, 3 Head (Tenn.) 395. Likewise there can be no constructive trust where the person who gets the property is not party to any agreement or understanding, however much confidence the grantor, testator or ancestor may have had that such person would carry out his wishes, and however clearly his wishes may be expressed. Fairchild *v.* Edson, 154 N. Y. 199; Sale *v.* Thornberry, 86 Ky. 266; Hodnett's Estate, 154 Pa. St. 485;

from trying to get the funds elsewhere, and the defendant bought the land on his own behalf with his own money and

Shultz's Appeal, 80 Pa. St. 396; Whitehouse *v.* Bolster, 95 Me. 458; Flood *v.* Ryan, 220 Pa. St. 450; Patten *v.* Warner, 11 App. D. C. 149, 161. See also McCloskey *v.* McCloskey, 205 Pa. St. 491. As to the effect of precatory words in a will see *supra*, § 112, and note.

The promise, however, need not be an express one, but may be inferred from conduct which must have induced the belief of the grantor, testator or ancestor that his expressed wishes would be carried out. Mere silence may be sufficient. Becker *v.* Schwerdtle, 141 Cal. 386; Curdy *v.* Berton, 79 Cal. 420; Gilpatrick *v.* Glidden, 81 Me. 137; O'Hara *v.* Dudley, 95 N. Y. 403; Amherst College *v.* Ritch, 151 N. Y. 282; Brook *v.* Chappell, 34 Wis. 405. But see McCloskey *v.* McCloskey, 205 Pa. St. 491. See also Orth *v.* Orth, 145 Ind. 184, 196. Thus where a husband devised property to his wife with the "request" that if she married again she would see that the interests of his children in the property were protected, a disregard of the request would not raise a constructive trust, there having been no agreement or understanding to which the wife was a party, that the testator's request would be carried out. Sale *v.* Thornberry, 86 Ky. 266. But where a testator left property to three persons absolutely so far as appeared in the will, but in a letter, written and delivered to them contemporaneously with the making of the will, gave them certain instructions for the use of the property for charitable purposes, and their conduct had been such as to induce the testator to believe that they would carry out his instructions, they were not allowed to take the bequest as an absolute one. O'Hara *v.* Dudley, 95 N. Y. 403. See also Amherst College *v.* Ritch, 151 N. Y. 282.

When the agreement of the devisee or legatee which was the inducement of the devise or bequest, was to devote the property to certain uses for which a trust cannot legally be created; that is to say, when the parol trust if properly declared would have been void, the devisee or legatee will neither be ordered nor be permitted to carry out his agreement. On the other hand he will not be permitted to hold the property as an absolute gift, but a resulting trust for the heirs or next of kin will be decreed. O'Hara *v.* Dudley, 95 N. Y. 403; Amherst College *v.* Ritch, 151 N. Y. 282; Gore *v.* Clarke, 37 S. C. 537; Edson *v.* Bartow, 154 N. Y. 215. See Olliffe *v.* Wells, 130 Mass. 221, 225: — "If the trust set up is a lawful one, it inures to the benefit of the *cestuis que trust;* and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust." See Moran *v.* Moran, 104 Iowa, 216.

In one or two cases where a conveyance of real estate has been obtained by a parol agreement to hold for the benefit of another and the parol agreement has been repudiated, it has been suggested that the property must be restored

took a deed to himself, it was held that the defendant was not a trustee for the plaintiff either on the ground of agency or fraud. Judge Holmes said: "In any view of the law, before we can convert a man into a trustee, on the ground of fraud, we must be able to see with some reasonable certainty that his fraud was the means of depriving the plaintiff of the property he seeks to follow," and in this case he did not deem it probable that such was the consequence of the defendant's fraudulent concealment of his intent to buy, and of his dissuasions.[1] We think this decision is open to severe criticism. Such fraudulent conduct should be repressed with a strong hand, the presumption should be against the evil doer so strongly as to cut off the chance of his gaining an advantage by his own wrong or keeping it if gained. (*a*) If an heir fraudulently, or through

[1] Collins *v.* Sullivan, 135 Mass. 461; 463.

to the grantor for failure of consideration of the transfer. See Randall *v.* Constans, 33 Minn. 329, 338; Thompson *v.* Marley, 102 Mich. 476.

(*a*) Theft and felony do not prevent the felon from being held a trustee. Nebraska Nat. Bank *v.* Johnson, 51 Neb. 546; Grouch *v.* Hazlehurst L. Co., (Miss.) 16 So. Rep. 496; Clifford Banking Co. *v.* Donovan Co., 195 Mo. 262.

It has been held in New York that a person who kills another to secure the latter's property by descent or devise, or to prevent the revocation of his will, cannot take as heir or under the will, on the ground of public policy. Riggs *v.* Palmer, 115 N. Y. 506; Ellerson *v.* Westcott, 148 N. Y. 149. This seems to be the rule in England likewise. Cleaver *v.* Mutual R. F. Life Ass'n, [1892] 1 Q. B. 147; Lundy *v.* Lundy, 24 Can. Supr. Ct. 650. In several decisions in other jurisdictions the contrary has been held, on the ground that the murder cannot alter the will or the law of descent. Shellenberger *v.* Ransom, 41 Neb. 631; 31 Neb. 61; Owens *v.* Owens, 100 N. C. 240; Carpenter's Estate, 170 Pa. St. 203; Deem *v.* Millikin, 6 Ohio Cir. Ct. 357. In an article in 36 Am. L. Reg. N. S. 225, Prof. J. B. Ames points out a method of reaching the desirable result of the New York and English decisions without declaring the will revoked or making an exception to the law of descent. He argues very convincingly that the murderer in such a case should be held to take the legal title but to hold it upon a constructive trust for his victim's heirs or next of kin, other than himself, on the ground that the property might not have come to him except for crime.

A somewhat similar case in New

ignorance, procure a will to be revoked, so that the estate comes to him, he will be a trustee; as, where A. had sold a part of his estate, and the purchaser desired a fine to be levied, B., his heir, acting as his attorney, advised a fine to be levied of his whole estate, whereby A.'s will was revoked, and the estate descended to B.; the devisee under the will called upon B. to hold the property as his trustee, and he was so held by the court; Lord Eldon saying, "You, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be trustee of the property for the benefit of that person who would have been entitled to it if you had known what; as an attorney, you ought to have known, and, not knowing it, you shall not take advantage of your own ignorance."[1] In such cases it has been held that mere promises are not enough, that there must be some proof of a fraudulent intent or purpose to create a trust; it is also held that such trust does not follow the property, but is only an agreement which equity will enforce.[2]

[1] Bulkley *v.* Wilford, 2 Cl. & Fin. 177; 8 Bligh. (N. S.), 11; Segrave *v.* Kirwan, Beat. 157; Nanney *v.* Williams, 22 Beav. 452. See Mix *v.* King, 55 Ill. 434.

[2] Bedilian *v.* Seaton, 3 Wall. Jr. 280. [See note (*a*), *supra*, p. 289 *et seq.*]

York, Piper *v.* Hoard, 107 N. Y. 73, seems to support such a view. In that case property had been left to F. and his heirs subject to the limitation that it should go to J. and his heirs in case F. should die without issue. H. having purchased F.'s entire interest, induced a woman to marry F. by representing that F. owned this property and that it would descend to his heirs. An heir having been born as a result of this marriage and F. having died, H. was decreed to be a constructive trustee for the heir.

Where the assignee of a life insurance policy has feloniously caused the death of the insured, it has been held that his conduct has shut him out from recovering from the insurance company. N. Y. Mut. Life Ins. Co. *v.* Armstrong, 117 U. S. 591. But it has been held otherwise where an insane beneficiary has killed the insured. Holdom *v.* A. O. U. W., 159 Ill. 619. See also Cleaver *v.* Mut. R. F. Life Ass'n, [1892] 1 Q. B. 147.

§182. While a court of equity will thus create a trust where a person has by fraud prevented a will from being made in favor of another, it has no jurisdiction to prevent the probate of, or to set aside, a will fraudulently procured. Ecclesiastical and common-law courts in England, and probate courts with the common-law courts in the United States, alone have jurisdiction over wills. Thus, until within a short period all wills in England were first presented to the ecclesiastical courts, and they were there allowed or disallowed according to the evidence. If they were allowed, the final judgment allowing them was conclusive upon the personalty until such judgment was reversed or annulled. The validity of such will, however, so far as real estate was concerned, was tried in the courts of common law as often as the title to the separate parcels of land was in controversy. Whenever in the prosecution or defence of a real action such will of real estate was given in evidence, not only its execution was tried, but its validity, as whether it was obtained by undue influence or fraud, or whether the testator was of sound mind. Courts of equity in a few early cases assumed jurisdiction to set aside wills procured by fraud,[1] but it is now well settled that they will not interfere, but that courts of common law have exclusive jurisdiction; nor will they interfere to set aside the judgment or probate of a will procured by fraud.[2] To set aside such a judgment, proceedings must be had in the nature of proceedings for a new trial in the court in which such judgment or decree was passed.[3] The extent to

[1] Maundy *v.* Maundy, 1 Ch. R. 66; Well *v.* Thornagh, Pr. Ch. 123; Goss *v.* Tracy, 1 P. Wms. 287; 2 Vern. 700.

[2] Roberts *v.* Wynne, 1 Ch. R. 125; Herbert *v.* Lownes, id. 13; Archer *v.* Mosse, 2 Vern. 8; Thynn *v.* Thynn, 1 Vern. 296; Denevish *v.* Baines, 1 Pr. Ch. 3; Barnesley *v.* Powell, 1 Ves. 287; Marriott *v.* Marriott, Str. 666; Plume *v.* Beale, 1 P. Wms. 388; Rockwood *v.* Rockwood, 1 Leon. 192; Cro. Eliz. 163; Dutton *v.* Poole, 1 Vent. 318; Beringer *v.* Beringer, 26 Car. II.; Chamberlain *v.* Chamberlain, 2 Freem. 34; Leicester *v.* Foxcroft, Gilb. 11; Ketrick *v.* Barnsby, 3 Bro. P. C. 358; Webb *v.* Claverden, 2 Atk. 424; Bennett *v.* Vade, id. 324; Anon., 3 Atk. 17; Sheffield *v.* Buckingham, 1 Atk. 628; Allen *v.* Macpherson, 5 Beav. 469; 1 Phill. 133; 1 H. L. Cas. 191; Murray *v.* Murphy, 39 Miss. 214.

[3] Waters *v.* Stickney, 12 Allen, 1.

which a court of equity will go in correcting a fraud perpetrated in relation to a will, is to give relief where fraud has prevented a will from being made, or where a fraud has been practised upon the legatee, as where a name is inserted fraudulently in a will in place of the intended devisee or legatee, or where the revocation of a will has been procured or prevented by fraud,[1] or where there is a gift to executors under such circumstances that it ought to be a trust for relations, or where a legatee promises the testator that he will hand over the legacy to a third person.[2] In all these cases the will itself is established, but certain other collateral things are decreed growing out of the manner in which the will was procured.[3] In New York, New Jersey, and South Carolina, the old English practice is followed, and wills must be proved whenever they are used to establish or defeat the title to real estate, nor has a court of equity jurisdiction to set them aside. This rule has been modified in New York so far that when the title of real estate depends upon a will, the validity of which is doubted, and the parties are not in possession of the real estate, nor in such a position that a real action can be brought, or if there is any technical reason why a real action cannot be sustained, a court of equity will take jurisdiction to prevent a failure of justice.[4] In nearly all the other States the judgments of the courts of probate allowing a will are conclusive upon all the world, both as to real and personal estate. In all actions at law involving title under such wills, it is only necessary to produce the judgment of the probate court allowing them. Courts of equity have no jurisdiction to set aside such wills for fraud, nor can they set aside

[1] Bulkley *v.* Wilford, 2 Cl. & Fin. 177; 8 Bligh (N. S.) 11; Segrave *v.* Kirwan, Beat. 157; Nanney *v.* Williams, 22 Beav. 452; Dowd *v.* Tucker, 41 Conn. 198; Williams *v.* Vreeland, 29 N. J. Eq. 417.

[2] Kennell *v.* Abbott, 4 Ves. 802; Marriott *v.* Marriott, Str. 666, cited Gilbert, 203, 209; Williams *v.* Fitch, 18 N. Y. 546; 7 Sim. 644; 1 Watts, 163; Church *v.* Ruland, 64 Penn. St. 432.

[3] Marriott *v.* Marriott, Str. & Gil. *ut supra.* [Sohler *v.* Sohler, 135 Cal. 323; Sumner *v.* Staton, 151 N. C. 198.]

[4] Brady *v.* McCosker, 1 Comst. 214; Clarke *v.* Sawyer, 2 id. 498.

the judgments of the probate court allowing them.[1] If, however, a will is probated by accident or mistake, or the probate is procured by fraud, the judgment may be reversed or modified by proceedings in the same court in the nature of a petition for a review or for a new trial.[2] This, however, may depend upon the statutes of the several States giving jurisdiction to their several courts of probate. While courts of equity will not interfere to set aside wills procured by fraud, or to set aside the probate of those procured by fraud, they will not interfere in favor of the fraudulent party to enable him to establish any rights under the will.[3] As a general rule neither courts of equity nor of common law will take notice of a will for any purpose unless it has been proved in the courts of probate having jurisdiction over such matters.[4]

§ 183. Another instance of a constructive trust arising from fraud in relation to deeds or wills, is where a party has suppressed or destroyed a deed or other instrument of title. Every one is entitled to aid from the judicial tribunals in all cases of fraud, and if a defendant has fraudulently suppressed or destroyed the evidence of a man's title, and is in possession of the property himself, he ought to be declared a trustee for the rightful owner under the suppressed paper;[5] and if a deed or will is

[1] Gould *v.* Gould, 3 Story, 516; Fouvergne *v.* New Orleans, 18 How. 470; Gaines *v.* Chew, 2 How. 645; Tarver *v.* Tarver, 9 Pet. 180; Adams *v.* Adams, 22 Vt. 50; Cotton *v.* Ross, 1 Paige, 396; Muir *v.* Trustees, 3 Barb. Ch. 477; Hamberlin *v.* Tenny, 7 How. (Miss.) 143; Lyne *v.* Guardian, 1 Miss. 410; Hunter's Will, 6 Ohio, 499; Watson *v.* Bothwell, 11 Ala. 653; Johnson *v.* Glasscock, 2 Ala. 233; Hunt *v.* Hamilton, 9 Dana, 90; McDowall *v.* Peyton, 2 Des. 313; Howell *v.* Whitchurch, 4 Heyw. 49; Burrows *v.* Ragland, 6 Humph. 481; Blue *v.* Patterson, 1 Dev. & Bat. Eq. 459; Trexler *v.* Miller, 6 Ired. Eq. 248.

[2] Waters *v.* Stickney, 12 Allen, 1.

[3] Nelson *v.* Oldfield, 2 Vern. 76.

[4] Price *v.* Dewhurst, 4 My. & Cr. 76, 80, 81; Gaines *v.* Chew, 2 How. 645, 646.

[5] Bates *v.* Heard, Toth. 66; 1 Dick. 4; Tucker *v.* Phipps, 3 Atk. 360; Hayne *v.* Hayne, 1 Dick. 18; Eyton *v.* Eyton, 2 Vern. 280; Pr. Ch. 116; Dalston *v.* Coatsworth, 1 P. Wms. 731; Woodroff *v.* Burton, 1 P. Wms. 734;

destroyed or suppressed, a court of equity can give relief. There seems to be no difficulty in this matter so far as relates to deeds,[1] nor so far as relates to wills of real estate in those jurisdictions where a will must be proved in court in every instance where it is necessary to the title of real estate; but in jurisdictions where a will cannot be noticed by other courts until it is first proved in a court of probate, there is a difficulty in proceeding in equity for fraud in suppressing it, except by a bill of discovery of evidence to use in the courts of probate in proving the will. Accordingly it has been determined in some States that a will cannot be acted upon in courts of equity, although lost, destroyed, or suppressed, until it is first proved in a probate court.[2] In other States, courts of equity, in cases of suppressed or spoliated wills, have taken jurisdiction *in odium spoliatoris*, and have allowed such will to be proved, and have carried its provisions into effect, as a court of probate would have done if the will had been produced and regularly administered.[3]

§ 184. If a party in ignorance and mistake of his rights and interests execute a conveyance, although no fraud is practised

Saltern *v.* Melhuish, Amb. 249; Cowper *v.* Cowper, 2 P. Wms. 748; Gartside *v.* Radcliffe, 1 Ch. Cas. 292; Hunt *v.* Mathews, 1 Vern. 408; Wardour *v.* Beresford, id. 452; Downes *v.* Jennings, 32 Beav. 290; Ransom *v.* Rumsey, 2 Vern. 561; 1 P. Wms. 733; Hampden *v.* Hampden, 3 Bro. P. C. 550; 1 P. Wms. 733; Spencer *v.* Smith, 1 N. C. C. 75; Middleton *v.* Middleton, 1 J. & W. 99; Wood *v.* Abrey, 3 Mod. 423; Floyer *v.* Sherrard, Amb. 18; Coles *v.* Trecothick, 9 Ves. 246; Law *v.* Barchard, 8 Ves. 133; White *v.* Damon, 7 Ves. 35; Moth *v.* Atwood, 5 Ves 845; Stephens *v.* Bateman, 1 Bro. Ch. 22; Griffith *v.* Spratley, 2 id. 179.

[1] Ward *v.* Webber, 1 Wash. (Va.) 274.

[2] Morningstar *v.* Selby, 15 Ohio, 345; Gaines *v.* Chew, 2 How. 345; Gaines *v.* Hennen, 24 How. 553.

[3] Bailey *v.* Stiles, 1 Green, Ch. 220; Allison *v.* Allison, 7 Dana, 90; Legare *v.* Ashe, 1 Bay, 464; Meade *v.* Langdon, cited 22 Vt. 59; Buchanan *v.* Matlock, 8 Humph. 390. In New York, the matter is regulated by statute, and courts of equity or the Supreme Court has exclusive jurisdiction in case of a lost or spoliated will. Bowen *v.* Idley, 6 Paige, 46; Bulkley *v.* Redmond, 2 Brad. Sur. 281.

upon him, a court of equity will relieve against the instrument; for it is against good conscience to take advantage of one's ignorance to obtain his property.[1] Thus, if an heir, in ignorance of the value of his inheritance,[2] or in ignorance that some legacies or devises had lapsed,[3] should convey his interest for an inadequate consideration, equity would convert the purchaser into a trustee. And if the purchaser should have full knowledge, or should stand in any confidential relation, or should practise the slightest art to mislead or conceal, the equities would of course be much stronger against the transaction;[4] but these circumstances are not necessary to avoid the conveyance, for relief will be granted where both parties are in a mutual state of ignorance, or are laboring under the same mistake.[5] It is to be observed, however, that the ignorance or mistake which entitles a party to relief must be as to some matter of fact; and that mistake or ignorance of the law, or of the consequences that will follow from the conveyance, will not entitle a party to relief.[6] (*a*) This rule is established by reason

[1] Bingham *v.* Bingham, 1 Ves. 126; Ramsden *v.* Hylton, 2 Ves. 394; Turner *v.* Turner, 2 Ch. R. 81; Dunnage *v.* White, 1 Swanst. 137; Naylor *v.* Wynch, 1 S. & S. 564; Evans *v.* Llewellyn, 2 Bro. Ch. 150; 1 Cox, 333; Gossmour *v.* Pigge, 8 Jur. 526; McCarthy *v.* Decaix, 2 R. & M. 614; Huguenin *v.* Baseley, 14 Ves. 273; Hore *v.* Beecher, 12 Sim. 465; Marshall *v.* Collett, 1 Y. & Col. Exch. 238; Midland Great Western Ry. *v.* Johnson, 6 H. L. Cas. 811. [Fry *v.* Lane, 40 Ch. Div. 312.]

[2] Beard *v.* Campbell, 2 A. K. Marsh. 125; Tyler *v.* Black, 13 How. 231.

[3] Pusey *v.* Desbouvrie, 3 P. Wms. 316.

[4] Gossmour *v.* Pigge, 13 L. J. Ch. 322; Tyler *v.* Black, 13 How. 231; McCarthy *v.* Decaix, 2 R. & M. 222; Cocking *v.* Pratt, 1 Ves. 400.

[5] Ibid.; Lansdowne *v.* Lansdowne, 2 J. & W. 205; Mose. 364; Willan *v.* Willan, 16 Ves. 72.

[6] Marshall *v.* Collett, 1 Y. & C. Exch. 238; Midland Great Western Ry. *v.* Johnson, 6 H. L. Cas. 811; Hunt *v.* Rousmaniere, 1 Pet. 1; Brown *v.* Ingham, 1 Bro. Ch. 92; Pullen *v.* Ready, 2 Atk. 591; Magniac *v.* Thompson, 2 Wall. Jr. 209; Campbell *v.* Carter, 14 Ill. 286; Hall *v.* Read, 2 Barb. Ch.

(*a*) In Massachusetts, if by mistake a discharge of a mortgage is taken instead of an assignment, and no intervening rights are affected, a court of equity may direct such discharge to be cancelled and the assignment substituted. Short *v.* Currier, 153 Mass. 182.

of the great danger of abuse that would arise if parties were allowed to reclaim their property upon allegations that they were ignorant of the law, or mistook the consequences of their acts.[1] Thus, if a party has full knowledge of all the facts, and intends to do the acts or execute the instruments in question in the form in which they are executed, he cannot have relief because he was ignorant of or mistook the law, or because the consequences which legally and naturally follow from the transaction are different from what he expected.[2] But if there is a mistake in the instrument itself, and it contains what was not agreed or intended, or does not contain all that was agreed and intended, to be in the writing, equity will give relief.[3] And if are there any other ingredients in the case, as if there is joined to a party's ignorance or mistake of the law some practice upon him to lead him into the bargain,[4] or if the other party, knowing his ignorance or mistake, still suffers him to go on without information,[5] equity will give relief. If there are any exceptions to the rule that ignorance or mistake of the law is not a ground for relief, they are few in number, and have something peculiar in their character, which calls in other elements

503; Brown *v.* Armistead, 6 Rand. 594; Hinchman *v.* Emans, Saxt. 100; Freeman *v.* Cook, 6 Ired. Eq. 378; Gunter *v.* Thomas, 1 Ired. Eq. 199; Crofts *v.* Middleton, 2 K. & J. 194; Wintermute *v.* Snyder, 2 Green, Ch. 498; Farley *v.* Bryant, 32 Maine, 474; Freeman *v.* Curtis, 51 id. 140; Fergerson *v.* Fergerson, 1 Ga. Dec. 135.

[1] Bilbie *v.* Lumley, 2 East, 472; Lyon *v.* Richmond, 2 Johns. Ch. 51; Shotwell *v.* Murray, 1 id. 512; Storrs *v.* Barker, 6 id. 169; Proctor *v.* Thrall, 22 Vt. 262.

[2] Storrs *v.* Barker, 6 Johns. Ch. 169; Lyon *v.* Saunders, 23 Miss. 124; Shafer *v.* Davis, 13 Ill. 395; Emmett *v.* Dewhirst, 8 Eng. L. & Eq. 83; Hunt *v.* Rousmaniere, 1 Pet. 1; Farley *v.* Bryant, 32 Maine, 474; Freeman *v.* Curtis, 51 id. 140; Mellish *v.* Robertson, 25 Vt. 608; Gilbert *v.* Gilbert, 9 Barb. 532; Arthur *v.* Arthur, 10 Barb. 9.

[3] Heacock *v.* Fly, 14 Pa. St. 541; Larkins *v.* Biddle, 21 Ala. 256; Wyche *v.* Green, 11 Ga. 169; 16 Ga. 49; Moser *v.* Lebenguth, 2 Rawle, 428; Fitzgerald *v.* Peck, 4 Litt. 127.

[4] 1 Story's Eq. Jur. § 133.

[5] Cook *v.* Nathan, 16 Barb. 342; Langstaffe *v.* Fenwick, 10 Ves. 405.

of equity, or they stand upon some urgent pressure of circumstances.[1]

§ 185. When a conveyance is made to compromise claims which the parties deem doubtful,[2] and especially if the conveyance has for its object the settlement of family controversies,[3] courts will support it if possible, although founded in ignorance or mistake of facts, as well as of law; provided no fraud has been used to mislead and deceive the party executing the conveyance.[4]

§ 186. If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee, and will execute the trust by reforming the deed or by ordering a reconveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such

[1] State *v.* Paup, 13 Ark. 135; Hunt *v.* Rousmaniere, 1 Pet. 1; 1 Story's Eq. Jur. §§ 116, 137.

[2] Brown *v.* Pring, 1 Ves. 407; Cann *v.* Cann, 1 P. Wms. 727; Naylor *v.* Winch, 1 Sim. & S. 555; Goodman *v.* Sayers, 2 J. & W. 263; Pickering *v.* Pickering, 2 Beav. 91; Stewart *v.* Stewart, 6 Cl. & Fin. 699; Gibbons *v.* Caunt, 4 Ves. 849; Neale *v.* Neale, 1 Keen, 672; Att. Gen. *v.* Boucherett, 25 Beav. 116; Wiles *v.* Greshon, 5 De G., M. & G. 770; Bradley *v.* Chase, 22 Maine, 511; Richardson *v.* Eyton, 15 Eng. L. & Eq. 51; 2 De G., M. & G. 79.

[3] Currie *v.* Steele, 2 Sandf. 542; Stone *v.* Godfrey, 27 Eng. L. & Eq. 318; 5 De G., M. & G. 76; Gordon *v.* Gordon, 3 Swanst. 463, 476; Stockley *v.* Stockley, 1 V. & B. 29; Bellamy *v.* Sabine, 2 Phill. 425; Stapilton *v.* Stapilton, 1 Atk. 10; 3 Lead. Cas. Eq. 684; Cann *v.* Cann, 1 P. Wms. 727; Persse *v.* Persse, 1 West, 110; 7 Cl. & Fin. 279; Cory *v.* Cory, 1 Ves. 19; Heap *v.* Tonge, 7 Eng. L. & Eq. 189; 9 Hare, 90; Leonard *v.* Leonard, 2 Ball & B. 171; Dunnage *v.* White, 1 Swanst, 137; Harvey *v.* Cook, 4 Russ. 34; Jodrell *v.* Jodrell, 9 Beav. 45; Frank *v.* Frank, 1 Ch. Cas. 84.

[4] Smith *v.* Pincombe, 10 Eng. L. & Eq. 50; 3 Mac. & G. 653; Groves *v.* Perkins, 6 Sim. 576; Hoge *v.* Hoge, 1 Watts, 163; Dunnage *v.* White, 1 Swanst. 137; Evans *v.* Llewellyn, 1 Cox, 333; 2 Bro. Ch. 150; Townshend, *v.* Stangroom, 6 Ves. 333; Chesterfield *v.* Janssen, 2 Ves. 155; Ormond *v.* Hutchinson, 13 Ves. 51; Henly *v.* Cook, 4 Russ. 34; Stainton *v.* Carson Co., 6 Jur. (N. S.) 360; Ashurst *v.* Mill, 7 Hare, 502; Lawton *v.* Campion, 18 Beav. 87; Bennett *v.* Merriman, 6 Beav. 360; Hogton *v.* Hogton, 15 Beav. 278; 11 Eng. L. & Eq. 134.

mistake.[1] If by a mistake of a third party land is deeded to the husband instead of the wife, as it should have been by reason of the consideration and the agreement, the husband holds in trust for her.[2] But courts require the most full and satisfactory proof before they will vary by parol evidence the contract between the parties, as written and signed by them,[3] and will not give relief unless the mistake is common to both parties,[4] except the case is such that the parties may be restored to their original situation.[5] But fraud on one party and mistake on the side of the other is a good cause for setting aside a transaction.[6]

§ 187. Lord Hardwicke, in his analysis of the various kinds of fraud, stated one species to be "fraud apparent from the intrinsic value and subject of the bargain, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other."[7] The meaning of this is, that fraud may be proved by the inadequacy of the consideration paid for property by the purchaser on the one hand,[8] or the consideration may be so extravagantly large on the other,[9] as to show that the purchaser was imposed

[1] Exeter *v.* Exeter, 3 M. & Cr. 321; Lindo *v.* Lindo, 1 Beav. 496; Ramsden *v.* Hylton, 2 Ves. 304; Beaumont *v.* Bramley, T. & R. 52; Underhill *v.* Horwood, 10 Ves. 225; Canedy *v.* Marcy, 13 Gray, 373; Brown *v.* Lamphear, 35 Vt. 252; Green *v.* Morris, 1 Beasley, 170; Richardson *v.* Bleight, 8 B. Mon. 580; Whaley *v.* Eliot, 1 A. K. Marsh. 343; Belknap *v.* Scaley, 2 Duer, 570; Gray *v.* Woods, 4 Blackf. 432; Peters *v.* Goodrich, 3 Conn. 146; Oliver *v.* Ins. Co., 2 Curtis, 277; Tilton *v.* Tilton, 9 N. H. 385; Farley *v.* Bryant, 32 Maine, 474; Loss *v.* Obry, 22 N. J. Eq. 52. [Cole *v.* Fickett, 95 Me. 265.]

[2] Lide *v.* Law, 27 Kans. 242.

[3] Sawyer *v.* Hovey, 3 Allen, 331; Gillespie *v.* Moore, 2 Johns. Ch. 585; Andrews *v.* Essex Ins. Co., 3 Mason, 10; 1 Story's Eq. Jur. § 157.

[4] Andrews *v.* Essex Ins. Co., 3 Mason, 10; Bradford *v.* Romney, 30 Beav. 431.

[5] Garrard *v.* Fankell, 30 Beav. 445; Harris *v.* Pepperell, L. R. 5 Eq. 1.

[6] Bloodgood *v.* Sears, 64 Barb. 76; Welles *v.* Yates, 44 N. Y. 525.

[7] Chesterfield *v.* Janssen, 2 Ves. 155; Harvey *v.* Mount, 8 Beav. 439.

[8] Ibid.; Rosevelt *v.* Fulton, 2 Cow. 129; McDonald *v.* Neilson, 2 Cow. 139.

[9] Cockell *v.* Taylor, 15 Beav. 103.

upon. It is to be observed, however, that the consideration alone, whether too large or too small, cannot of itself prove fraud in a transaction, for the reason that a mere voluntary conveyance, without *any* consideration, is good and valid between the parties. On the same ground mere inadequacy of consideration will not vitiate a deed,[1] and so if a party, knowing that the consideration is inadequate, enters into the agreement with his eyes open, he cannot have relief.[2] It is only where some fraud is practised upon a party that the consideration of a conveyance is material.[3] If it appears that a person intended to convey his property for a consideration reasonably proportionate to its value, but that in fact the consideration received was grossly inadequate, then a court of equity would infer that some fraud or deceit had been practised upon him;[4] or, as Lord Thurlow said, "where the inadequacy of the consideration is so gross and manifest that it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it,[5] the court will infer from that fact *alone*, that

[1] Pickett *v.* Loggon, 14 Ves. 215; Reynell *v.* Sprye, 8 Hare, 222; 1 De G., M. & G. 600; Howard *v.* Edgell, 17 Vt. 9; Osgood *v.* Franklin, 2 Johns. Ch. 1; 14 Johns. 527; Butler *v.* Haskell, 4 Des. 651; Erwin *v.* Perham, 12 How. 197; Judge *v.* Wilkins, 19 Ala. 765; McCormick *v.* Malin, 5 Blackf. 509; Delafield *v.* Anderson, 7 S. & M. 630; Farmers Bank *v.* Douglass, 11 S. & M. 469; Robinson *v.* Robinson, 4 Md. Ch. 183; Powers *v.* Hale, 5 Foster, 145; Dun *v.* Chambers, 4 Barb. 376; Mann *v.* Betterly, 21 Vt. 326; Green *v.* Thompson, 2 Ired. Eq. 365; White *v.* Flora, 2 Overt. 426; Forde *v.* Herron, 4 Munf. 316; Holmes *v.* Fresh, 9 Miss. 201; Young *v.* Frost, 5 Gill, 287; Coster *v.* Griswold, 4 Edw. 364; Westervelt *v.* Matheson, 1 Hoff. 37; Davidson *v.* Little, 27 Penn. St. 251; Coles *v.* Trecothick, 9 Ves. 246; Moth *v.* Atwood, 5 Ves. 845; White *v.* Damon, 7 Ves. 35; Low *v.* Barchard, 8 Ves. 133; Griffith *v.* Spratley, 2 Bro. Ch. 179; Stephens *v.* Bateman, 1 id. 22; Wood *v.* Abrey, 3 Madd. 423; Floyer *v.* Sherrard, Amb. 18; Harrison *v.* Guest, 6 De G., M. & G. 424; 8 H. L. Cas. 481; Denton *v.* Donner, 23 Beav. 285; Eyre *v.* Potter, 15 How. 60; Chaires *v.* Brady, 10 Fla. 133.

[2] Willis *v.* Jernegan, 2 Atk. 251.

[3] Huguenin *v.* Baseley, 14 Ves. 273; Wormack *v.* Rogers, 9 Ga. 60; How *v.* Weldon, 2 Ves. 516; Mann *v.* Betterly, 21 Vt. 326.

[4] Gwynne *v.* Heaton, 1 Bro. Ch. 8; Baugh *v.* Price, 3 Wilson, 320; Eyre *v.* Potter, 15 How. 60; Butler *v.* Haskell, 4 Des. 652; Barnett *v.* Spratt, 4 Ired. Eq. 171; Wright *v.* Wilson, 4 Yerg. 294; Juzan *v.* Toulmin, 9 Ala. 692.

[5] Gwynne *v.* Heaton, 1 Bro. Ch. 8; Hamet *v.* Dundass, 4 Barr, 178.

there must have been such imposition or oppression in the transaction, or such a want of common understanding in the party, as to amount to a case of fraud, from which no advantage or benefit ought to be derived by the other party."[1] Other authorities say that courts will act on the fact *alone* of inadequacy of consideration when it is so gross and manifest as to *shock the conscience*.[2] This principle is loose enough,[3] if it is a principle, and of course every case would depend upon its own facts and circumstances. Where there are suspicious circumstances connected with the fact of inadequacy of price, as where the parties stand in a fiduciary relation to each other,[4] or one of them is in distress,[5] or is ignorant,[6] or is weak-minded and imbecile,[7] inadequacy of consideration will become very pertinent, and oftentimes conclusive evidence that fraud and undue

[1] Heathcote *v.* Paignon, 2 Bro. Ch. 175; Underhill *v.* Horwood, 10 Ves. 219; Ware *v.* Horwood, 14 Ves. 28; Stilwell *v.* Wilkinson, Jac. 282; Barnett *v.* Spratt, 4 Ired. Eq. 171.

[2] Horsey *v.* Hough, 38 Md. 130; Coles *v.* Trecothick, 9 Ves. 246; Osgood *v.* Franklin, 2 Johns. Ch. 1; 14 Johns. 527; Gwynne *v.* Heaton, 1 Bro. Ch. 9; Underhill *v.* Horwood, 10 Ves. 209; Peacock *v.* Evans, 16 Ves. 512; Wright *v.* Wilson, 2 Yerg. 294; Deaderick *v.* Watkins, 8 Humph. 520; Stilwell *v.* Wilkinson, Jac. 280; Copis *v.* Middleton, 2 Madd. 409; Howard *v.* Edgell, 17 Vt. 9; Butler *v.* Haskell, 4 Des. 652; Eyre *v.* Potter, 15 How. 60; Gist *v.* Frazier, 2 Litt. 118; Seymour *v.* Delancy, 6 Johns. Ch. 222; Juzan *v.* Toulmin, 9 Ala. 692; James *v.* Morgan, 1 Lev. 111; Rice *v.* Gordon, 11 Beav. 215; Booker *v.* Anderson, 35 Ill. 66.

[3] Gibson *v.* Jeyes, 6 Ves. 273; Warfield *v.* Ross, 38 Md. 85.

[4] Herne *v.* Meeres, 1 Vern. 456; Gibson *v.* Jeyes, 6 Ves. 266; Shaeffer *v.* Sleade, 7 Blackf. 178; Brooke *v.* Berry, 2 Gill, 83; Wright *v.* Wilson, 2 Yerg. 294; Butler *v.* Haskell, 4 Des. 680.

[5] Cockell *v.* Taylor, 15 Beav. 103; Warfield *v.* Ross, 38 Md. 85.

[6] Herne *v.* Meeres, 1 Vern. 456; Pickett *v.* Loggon, 14 Ves. 215; Murray *v.* Palmer, 2 Sch. & Lef. 477; Gwynne *v.* Heaton, 1 Bro. Ch. 1; Wood *v.* Abrey, 3 Madd. 417; McKinney *v.* Pinkard, 2 Leigh, 149; Gasque *v.* Small, 2 Strob. Eq. 72; Esham *v.* Lamar, 10 B. Mon. 43; Butler *v.* Haskell, 4 Des. 680; Cookson *v.* Richardson, 69 Ill. 137.

[7] Clarkson *v.* Hanway, 2 P. Wms. 203; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Stanhope *v.* Toppe, 2 Bro. P. C. 183; McArtee *v.* Engart, 13 Ill. 242; Wormack *v.* Rogers, 9 Ga. 60; How *v.* Weldon, 3 Ves. 517; Addis *v.* Campbell, 4 Beav. 401; Holden *v.* Crawford, 1 Atk. 390; Mann *v.* Betterley, 21 Vt. 326; Crane *v.* Conklin, Saxt. 346; Brooke *v.* Berry, 2 Gill, 83; Rumph *v.* Abercrombie, 12 Ala. 64.

influence have been used to bring about a bargain advantageous to the one side and ruinous to the other.

§ 188. Immediately connected with this subject is the sale by an heir or reversioner of his expectancy or reversionary interest. It is said that "it is incumbent upon those who deal with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. In all such cases the issue is upon the adequacy of the price. No proof of fraud is necessary; and the relief is given upon general principles of mischief to the public, without requiring particular evidence of actual imposition." [1] Such a purchase is a constructive fraud, and the purchaser, if a stranger, will be compelled to account and to give up the bargain, if found to be advantageous.[2] A sale by an heir will not be supported against him unless it is perfectly fair in every respect, and beyond suspicion, and for an adequate price.[3] The burden is upon the purchaser to show the fairness of the transaction and the sufficiency of the consideration, and not upon the heir to impeach either the one or the other; [4] and it is said that it is immaterial that the heir is of

[1] Sir William Grant in Gowland *v.* De Faria, 17 Ves. 20.

[2] Jenkins *v.* Pye, 12 Pet. 258; Call *v.* Gibbons, 3 P. Wms. 290; Barnardiston *v.* Lingood, 2 Atk. 133; Walmesley *v.* Booth, id. 28; Gwynne *v.* Heaton, 1 Bro. Ch. 10. [Aylesford *v.* Morris, 8 Ch. 484; Fry *v.* Lane, 40 Ch. Div. 312; James *v.* Kerr, 40 Ch. Div. 449.]

[3] Knott *v.* Hill, 1 Vern. 167; Westerfield *v.* Janssen, 2 Ves. 125; 1 Lead. Cas. Eq. 428–494, Eng. and Am. notes; Bawtree *v.* Watson, 3 M. & K. 339; Portmore *v.* Taylor, 4 Sim. 182; Peacock *v.* Evans, 16 Ves. 512; Newton *v.* Hunt, 5 Sim. 54; Talbot *v.* Staniforth, 1 John. & H. 484; Foster *v.* Roberts, 29 Beav. 467; Jones *v.* Ricketts, 31 Beav. 130; Salter *v.* Bradshaw, 26 Beav. 161; Bury *v.* Oppenheim, id. 594; King *v.* Hamlet, 4 Sim. 223; 2 M. & K. 456; Denton *v.* Donner, 23 Beav. 285; Hannah *v.* Hodgson, 30 Beav. 19; St. Albyn *v.* Harding, 27 Beav. 11; Nesbitt *v.* Berridge, 32 Beav. 282; Perfect *v.* Lane, 31 L. J. Ch. 489; Edwards *v.* Burt, 2 De G., M. & G. 55; Aldborough *v.* Frye, 7 Cl. & Fin. 436.

[4] Gowland *v.* De Faria, 17 Ves. 24; Coles *v.* Trecothick, 9 Ves. 246; Davis *v.* Marlborough, 2 Swanst. 141; Portmore *v.* Taylor, 4 Sim. 209; Shelley *v.* Nash, 3 Madd. 236; Nimmo *v.* Davis, 7 Tex. 260; Poor *v.* Hazleton, 15 N. H. 564.

mature age.[1] In this country the rule may be stated with still more severity, that the sale, by an heir, of his expectancy during the life of the ancestor, is contrary to public policy and is void, unless such sale is assented to by the ancestor, and supported by an adequate consideration.[2] (*a*) If, however, the sale is at auction, it will be some proof of fairness and sufficiency of price,[3] and if the sale is made with the knowledge and assent of the ancestor it will be good.[4] (*b*) But it seems that the rule is confined to those expectancies that combine the relation of heir with that of remainder-man and reversioner. If the expectant is not heir, but is simply entitled to a remainder or reversion by virtue of some instrument or settlement, he may sell and assign his future interest, and such sale will not be avoided unless some of the common rules of equity are violated by the purchaser. In such cases there is no fraud upon parents or third persons, consequently there is nothing contrary to public policy in such purchases.[5]

[1] Davis *v.* Marlborough, 2 Swanst. 146; Evans *v.* Cheshire, Belt, Supp. 305; Addis *v.* Campbell, 4 Beav. 401.

[2] Varick *v.* Edwards, 1 Hoff. 383; Boynton *v.* Hubbard, 7 Mass. 112; Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Poor *v.* Hazleton, 15 N. H. 564; Nimmo *v.* Davis, 7 Tex. 266; Jenkins *v.* Pye, 12 Pet. 257; Davidson *v.* Little, 22 Penn. St. 252.

[3] Fox *v.* Wright, 6 Madd. 111; Shelley *v.* Nash, 3 Madd. 232; Newman *v.* Meek, 1 Freem. Ch. 441; Erwin *v.* Parham, 12 How. 197.

[4] Fitch *v.* Fitch, 8 Pick. 480; Trull *v.* Eastman, 3 Met. 121; Nimmo *v.* Davis, 7 Tex. 266; King *v.* Hamlet, 2 M. & K. 456; 3 Cl. & F. 218. In Ohio, however, it has been held that a contract is invalid by which a son released to his father, in consideration of an advancement, all his expectancies upon the father's estate. Needles *v.* Needles, 7 Ohio St. 432. The case is not sustained by other authorities, and seems not to rest upon the principles applicable to such transactions.

[5] Cribbins *v.* Markwood, 13 Grat. 495; Dunn *v.* Chambers, 4 Barb.

(*a*) It has been held that the absence of the ancestor's consent is only potent evidence of fraud and that his assent is not an absolute essential of the sale. Hale *v.* Hollon, 90 Tex. 427. See *contra*, McClure *v.* Raben, 133 Ind. 507.

(*b*) Where the heir deals, not behind his father's back, but with his sanction and assistance, and has all the protection that his father can give him, he is not entitled to relief as if the contract had been entered into without such paternal protection. O'Rorke *v.* Bolingbroke, 2 A. C. 814, 828.

§ 189. Another kind of constructive trust arises from the mental incapacities of parties to enter into contracts. Thus a *non compos mentis* cannot make a binding contract.[1] The deed of such person is either absolutely void, or at least voidable,[2] and equity will give relief by declaring a party taking under such a conveyance to be a trustee, and by ordering him to execute a reconveyance.[3] Whether a person has capacity enough to make a contract, is always a question of fact in each particular case; for mere weakness of mind, not amounting to idiocy or insanity, is no ground for avoiding a contract. Courts cannot measure the extent of a party's understanding. If, therefore, a person is not an idiot nor an insane person, he may enter into contracts, although he may be of a low order of intelligence and of weak reasoning powers.[4] At the same time

376; Davidson *v.* Little, 22 Penn. St. 252; Wiseman *v.* Beake, 2 Vern. 121; Cole *v.* Gibbons, 3 P. Wms. 290; Barnardiston *v.* Lingood, 2 Atk. 133; Bowers *v.* Heaps, 3 V. & B. 117; Davis *v.* Marlborough, 2 Swanst. 130; Addis *v.* Campbell, 4 Beav. 401; Nickolls *v.* Gould, 2 Ves. 422; Henley *v.* Axe, 2 Bro. Ch. 17; 2 Swanst. 141; Griffith *v.* Spratley, 2 Bro. Ch. 179; 1 Cox, 383; Moth *v.* Atwood, 5 Ves. 845; Montesquieu *v.* Sandys, 18 Ves. 302. [See Fry *v.* Lane, 40 Ch. Div. 312.] The peculiar character and position of sailors call for the interposition of courts when they are defrauded, and when one has sold his prize-money for a small sum, the Master of the Rolls said that it was reasonable to regard them as young heirs, and to relieve them accordingly. How *v.* Weldon, 2 Ves. 515.

[1] Chesterfield *v.* Janssen, 2 Ves. 155.

[2] Allis *v.* Billings, 6 Met. 415; Breckenridge *v.* Ormsby, 1 J. J. Marsh. 239; Price *v.* Berrington, 3 Mac. & G. 486; Molton *v.* Camroux, 2 Exch. 487; 4 Exch. 17; De Silver's Est., 5 Rawl. 111; Bensell *v.* Chancellor, 5 Whart. 376; Beals *v.* Lee, 10 Barr, 56.

[3] Rushloy *v.* Mansfield, Toth. 42; Mansfield's Case, 12 Co. 123; Addison *v.* Mascall, 2 Vern. 678; 3 Atk. 110; Price *v.* Berrington, 7 Hare, 394; 3 Mac. & G. 486; Addison *v.* Dawson, 2 Vern. 678; Welby *v.* Welby, Toth. 164; Wright *v.* Booth, id. 166; Wilkinson *v.* Brayfield, 2 Vern. 307; Clark *v.* Ward, Pr. Ch. 150; Ferres *v.* Ferres, Eq. Ab. 695; Att. Gen. *v.* Parnther, 3 Bro. Ch. 441.

[4] Osmond *v.* Fitzroy, 3 P. Wms. 130; Willis *v.* Jernegan, 2 Atk. 251; 1 Story's Eq. Jur. § 235; *Ex parte* Allen, 15 Mass. 58; Hadley *v.* Latimer, 3 Yerg. 537; Mann *v.* Betterley, 21 Vt. 326; Thomas *v.* Sheppard, 2 McCord, Eq. 36; Rippy *v.* Gant, 4 Ired. Eq. 447; Mason *v.* Williams, 3 Munf. 126; Morrison *v.* McLeod, 2 Dev. & Bat. Eq. 221; Green *v.* Thompson, 2 Ired. Eq. 365; Bath & Montague's Ca., 3 Ch. Cas. 107.

such persons are easily imposed upon and defrauded; and if it appears that one of the parties to a contract is of weak mind and feeble powers, the whole transaction will be carefully investigated, and the conduct of the person procuring such contract will be closely scrutinized; for arts and practices that would be perfectly harmless in a transaction with a man of high intelligence and prudence and great power of observing and reasoning may, and probably would, deceive and mislead a person of weak mind and feeble powers, although not incapable of entering into contracts and transacting business generally.[1] Therefore the weakness of a party's mind is a very material fact in determining the character of a transaction, and if, in contracts with such persons, there is found the least art or stratagem, or any undue influence, or any ingredient of fraud or suspicion of unfairness, courts will set the contract aside, or convert the offending party into a trustee.[2] Upon these principles, if the contract is of an unusual, unreasonable, or extraordinary character,[3] or if it is without consideration, or upon an inadequate consideration,[4] or if the instrument falsely recites a consideration,[5] or if there is actual proof of undue in-

[1] Bridgman *v.* Green, Wilm. 61; 2 Ves. 627; Donnegal's Case, id. 407; Gartside *v.* Isherwood, 1 Bro. Ch. 560; Blackford *v.* Christian, 1 Knapp, 77; Dunn *v.* Chambers, 4 Barb. 376; Clark *v.* Malpas, 4 De G., F. & J. 401.

[2] Griffin *v.* De Veulle, 3 Wood. Lect. App. 16; Nottige *v.* Prince, 2 Gif. 246; Longmate *v.* Ledger, id. 157; Baker *v.* Monk, 33 Beav. 419; Boyse *v.* Rossborough, 6 H. L. Cas. 2; Harding *v.* Handy, 11 Wheat. 103; Tracey *v.* Sackett, 1 Ohio St. 54; Whitehorn *v.* Hines, 1 Munf. 557; Whelan *v.* Whelan, 3 Cow. 537; Deatly *v.* Murphy, 3 A. K. Marsh. 472; Brogden *v.* Walker, 2 H. & J. 285; Rumph *v.* Abercrombie, 12 Ala. 64.

[3] Fane *v.* Devonshire, 2 Bro. P. C. 77; Bridgman *v.* Green, 2 Ves. 627; Dent *v.* Bennett, 7 Sim. 539; 4. M. & Cr. 629; Malin *v.* Malin, 2 Johns. Ch. 238; Bennett *v.* Vade, 2 Atk. 235; Nantes *v.* Corrock, 9 Ves. 181; Willan *v.* Willan, 16 Ves. 72; Ball *v.* Maurice, 3 Bligh (N. S.) 1; 1 Dow (N. S.) 392.

[4] Ibid.; Clarkson *v.* Hanway, 2 P. Wms. 203; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Hutchinson *v.* Tindall, 2 Green. Ch. 357; Rumph *v.* Abercrombie, 12 Ala. 64; Fillmer *v.* Gott, 7 Bro. P. C. 70; Hunt *v.* Moore, 2 Barr, 105.

[5] Gibson *v.* Russell, 2 Younge & C. Ch. 104; Harvey *v.* Mount, 8 Beav. 439.

fluence, (*a*) or of art or circumvention,[1] or if there is a fiduciary, confidential, or influential relation between the parties,[2] courts will interfere and protect a person of weak mind from his contracts.

§ 190. Mental weakness is not of itself a sufficient ground for avoiding an agreement, but it must appear that some advantage was taken of it to procure a favorable contract; and if the other party stood in some fiduciary relation to the person of weak mind, the burden is upon him to show that the contract was in every respect fair, and that no advantage was obtained from the influential position on the one hand, or from the feebleness of mind on the other. And it is quite immaterial from whence the mental weakness arises. It may arise from a natural and permanent imbecility of mind, or it may arise from some temporary illness or debility, or from the weakness and infirmity of extreme old age. Each case must depend upon its own circumstances. If there is a fixed and permanent state of idiocy or insanity, or if the party is a declared lunatic and his affairs are

[1] Portington *v.* Eglington, 2 Vern. 189; Gartside *v.* Isherwood, 1 Bro. Ch. 558; Bridgman *v.* Green, 2 Ves. 627; Edmunds *v.* Bird, 1 V. & B. 542; Fox *v.* Mackreth, 2 Bro. Ch. 420.

[2] Kennedy *v.* Kennedy, 2 Ala. 571; Brice *v.* Brice, 5 Barb. 533; Buffalow *v.* Buffalow, 2 Dev. & Bat. Eq. 241; Osmond *v.* Fitzroy, 3 P. Wms. 130; Dent *v.* Bennett, 7 Sim. 539; 2 M. & C. 269; Cruise *v.* Christopher, 5 Dana, 181; Whipple *v.* Clure, 2 Root, 216; Brooke *v.* Berry, 2 Gill, 83; McCraw *v.* Davis, 2 Ired. Eq. 618; Huguenin *v.* Baseley, 14 Ves. 273; Griffith *v.* Robins, 3 Madd. 191; Whelan *v.* Whelan, 3 Cow. 537.

(*a*) The influence, in such cases, to invalidate a conveyance, must be of such a nature as to deprive the grantor of his free agency. Dorsey *v.* Wolcott, 173 Ill. 539; Francis *v.* Wilkinson, 147 Ill. 370; Maynard *v.* Tyler, 168 Mass. 107; Trost *v.* Dingler, 118 Penn. St. 259; McFadin *v.* Catron, 120 Mo. 252; Rozell *v.* Vansyckle, 11 Wash. 79; Parrish *v.* Parrish, 33 Or. 486; Wise *v.* Foote, 81 Ky. 10. A gift, as well as a conveyance, may be set aside in equity for undue influence, or the donor's executors may recover the gift, though the donee did not stand in any confidential relation to the donor. James *v.* Kerr, 40 Ch. D. 449; Morley *v.* Loughnan, [1893] 1 Ch. 736; Lewis *v.* Merritt, 113 N. Y. 386; Woodbury *v.* Woodbury, 141 Mass. 329.

in the hands of a committee or of a guardian, there can be little or no doubt. Questions generally arise where there is not this entire want of capacity, — where no general rule can be laid down, but the court is left to judge of the capacity of the contracting party, of the circumstances under which the contract was made, and whether from all the facts in the case the contract ought in equity and good conscience to be sustained. Extreme old age, accompanied by great infirmity; or extreme weakness and feebleness of mind, arising from temporary illness or permanent imbecility, stopping short of absolute incapacity, — are all pertinent facts, tending to show, if accompanied by other circumstances, a fraudulent contract; but if upon all the evidence the contract is a fair one, if the enfeebled person is surrounded by his friends, who understand the transaction and explain it to the party, it will not be set aside.[1]

§ 191. Substantially the same rules apply to deeds and instruments executed by a drunken person. Drunkards, while laboring under the frenzy of drink, are *non compotes mentis* by their own act,[2] and it is said that they may plead *non est factum* to a deed executed while so drunk that they do not know what they are doing.[3] In such case there can of course be no intelligent consent to any contract. But equity will not always interfere to protect a drunken man from the folly of his own acts, and will not, on account of drunkenness alone, set aside a con-

[1] Griffith *v.* Robins, 3 Madd. 191; Harding *v.* Handy, 11 Wheat. 193; Dent *v.* Bennett, 7 Sim. 539; Att. Gen. *v.* Parnther, 3 Bro. Ch. 443; Hunter *v.* Atkins, 3 M. & K. 146; Lewis *v.* Pead, 1 Ves. Jr. 19; Pratt *v.* Barker, 1 Sim. 1; 4 Russ. 507; Rippy *v.* Gant, 4 Ired. Eq. 447; Gratz *v.* Cohen, 11 How. 1.

[2] Co. Litt. 247 a, 447 a; Beverley's Case, 4 Co. 124; Hendrick *v.* Hopkins, Cary, 93.

[3] Cole *v.* Robins, Bull. N. P. 172; Cook *v.* Clayworth, 18 Ves. 12; Reynolds *v.* Waller, 1 Wash. 212; Rutherford *v.* Ruff, 4 Des. 350; Gore *v.* Gibson, 13 M. & W. 623; Barrett *v.* Buxton, 2 Ark. 167; Peyton *v.* Rawlins, 1 Hayw. 77; Clifton *v.* Davis, 1 Pars. Eq. 31; French *v.* French, 2 Ham. 214; Wigglesworth *v.* Steers, 1 Hen. & Munf. 70; Shaw *v.* Thackray, 1 Sm. & Gif. 537.

tract or convert the other party into a trustee.[1] And this is more especially the rule where the object of the contract is to carry out a family settlement, or the contract is fair and reasonable in its terms.[2] But if there is any contrivance or management to induce drunkenness and to procure a contract, or if there was any unfair advantage taken of the drunkenness to procure a contract, it would be an actual fraud, and the court will not allow a party to retain any advantage procured in such manner, nor would it lend its aid to carry it into effect.[3]

§ 192. So, equity will relieve in all cases of contracts procured by duress, or fear, or apprehension; for if there has been any restraint upon a person's freedom to consent or dissent, or any practice upon his fears, it is a kind of fraud, and no one ought to enjoy an advantage gained in such manner.[4] Thus, if a contract is made with one in prison, or under any circumstances of oppression, equity will scrutinize it with great care.[5] And so, if advantage is taken of the extreme distress or necessity of a party, to obtain a favorable bargain from him, equity will

[1] Johnson *v.* Meddlicott, 3 P. Wms. 131 n.; Cory *v.* Cory, 1 Ves. 19; Nagle *v.* Bayler, 2 Dr. & W. 60; Cooke *v.* Clayworth, 18 Ves. 12; Maxwell *v.* Pittinger, 2 Green. Ch. 156; Morrison *v.* McLeod, 2 Dev. & Bat. Eq. 221; Whitesides *v.* Greenlee, 2 Dev. Eq. 152; Moore *v.* Read, 2 Ired. Eq. 580; Hotchkiss *v.* Fortson, 7 Yerg. 67; Belcher *v.* Belcher, 19 Yerg. 121; Hutchinson *v.* Brown, 1 Clark, Ch. 408; Harbison *v.* Lemon, 3 Blackf. 51.

[2] Cory *v.* Cory, 1 Ves. 19; Cooke *v.* Clayworth, 18 Ves. 12.

[3] Johnson *v.* Meddlicott, 3 P. Wms. 131; Say *v.* Barwick, 1 V. & B. 195; Jenness *v.* Howard, 6 Blackf. 240; Cory *v.* Cory, 1 Ves. 19; Cooke *v.* Clayworth, 18 Ves. 12; Crane *v.* Conklin, Saxt. 346; Calloway *v.* Wetherspoon, 5 Ired. Eq. 128; Hutchinson *v.* Tindall, 2 Green. Ch. 128; Phillips *v.* Moore, 11 Miss. 600; Cooley *v.* Rankin, id. 642; Cragg *v.* Holme, 18 Ves. 14 n.; Shiers *v.* Higgons, 1 Madd. Ch. Pr. 399; Nagle *v.* Baylor, 2 Dr. & W. 64; Shaw *v.* Thackray, 1 Sm. & Gif. 537.

[4] Att. Gen. *v.* Sothen, 2 Vern. 497; Crowe *v.* Ballard, 1 Ves. Jr. 220; Anon., 3 P. Wms. 29, n. (e); Gist *v.* Frazier, 2 Lit. 118; Evans *v.* Llewellyn, 1 Cox, 340; Hawes *v.* Wyatt, 3 Bro. Ch. 158.

[5] Att. Gen. *v.* Sothen, 2 Vern. 497; Roy *v.* Beaufort, 2 Atk. 190; Falkner *v.* O'Brien, 2 B. & B. 214; Underhill *v.* Horwood, 10 Ves. 209; Nicholls *v.* Nicholls, 1 Atk. 409; Griffith *v.* Spratley, 1 Cox, 333; Hinton *v.* Hinton, 2 Ves. 634.

give relief;[1] but the advantage must have been within the contemplation of the parties at the time.

§ 193. Of course, if two or more of these suspicious circumstances are found in the same case; as, if property is obtained from a person of weak mind, or under duress, or in great distress, for a grossly inadequate consideration, or upon any unusual, extraordinary, or oppressive terms, the evidence would be much stronger of some fraudulent practice, and would call upon the suspected party for a very complete vindication of the transaction, or he would be converted into a trustee.[2]

§ 194. Lord Hardwicke's "third species of fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed."[3] At law, fraud must be proved; but in equity there are certain rules prohibiting parties bearing certain relations to each other from contracting between themselves; and if parties bearing such relations enter into contracts with each other, courts of equity presume them to be fraudulent, and convert the fraudulent party into a trustee. And herein courts of equity go further than courts of law, and presume fraud in cases where a court of law would require it to be proved; that is, if parties within the prohibited relations or conditions contract between themselves, courts of equity will avoid the contract altogether, without proof, or they will throw upon the party standing in this position of

[1] Gould *v.* Okeden, 3 Bro. P. C. 560; Harvey *v.* Mount, 8 Beav. 439; Hawes *v.* Wyatt, 3 Bro. Ch. 156; Bosanquet *v.* Dashwood, Ca. t. Talb. 37; Proof *v.* Hines, id. 111; Pickett *v.* Loggon, 14 Ves. 215; Farmer *v.* Farmer, 1 H. L. Cas. 724; Fitzgerald *v.* Rainsford, 1 B. & B. 37; Underhill *v.* Horwood, 10 Ves. 209; Huguenin *v.* Baseley, 14 Ves. 273; Carpenter *v.* Elliott, 2 Ves. 494; Basy *v.* Magrath, 2 Sch. & Lef. 31; Ramsbottom *v.* Parker, 6 Madd. 6; Wood *v.* Abrey, 3 Madd. 417; Crowe *v.* Ballard, 1 Ves. Jr. 215; Nottige *v.* Prince, 6 Jur. (N. S.) 1066; Davis *v.* McNally, 5 Sneed, 583; Graham *v.* Little, 3 Jones, Eq. 152; Stewart *v.* Hubbard, id. 186.

[2] Griffin *v.* De Veulle, Wood. Lect. App. 16.

[3] Chesterfield *v.* Janssen, 2 Ves. 155.

trust, confidence, and influence, the burden of proving the entire fairness of the transaction. Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his *cestui que trust*, an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether, without proof or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust*, or other person holding a similar relation.[1]

§ 195. These principles are applied in their full vigor to all contracts and sales between trustee and *cestui que trust*.[2] The

[1] Hoghton *v.* Hoghton, 15 Beav. 278; Cooke *v.* Lamotte, id. 234; Ahearne *v.* Hogan, 1 Dr. 310; Espey *v.* Lake, 10 Hare, 260; Prideaux *v.* Lonsdale, 1 De G., J. & S. 433; Bayley *v.* Williams, 11 Jur. (N. S.) 236; Clark *v.* Malpas, 31 Beav. 80; Grosvenor *v.* Sherratt, 28 Beav. 659; Beanland *v.* Bradley, 2 Sm. & Gif. 339; Taylor *v.* Taylor, 8 How. 183; Greenfield's Est., 14 Penn. St. 504; Graham *v.* Pancoast, 30 id. 89; Nace *v.* Boyer, id. 99; Wester's App. 54 id. 60; Sears *v.* Shafer, 2 Seld. 268; Buffalow *v.* Buffalow, 2 Dev. & Bat. 241; Prewett *v.* Coopwood, 30 Miss. 369; Graham *v.* Little 3 Jones, Eq. 152; Powell *v.* Cobb, id. 456; Gass *v.* Mason, 4 Sneed, 497; Lovatt *v.* Knipe, 12 Ir. Eq. 124; Ames *v.* Port Huron, 11 Mich. 139; European R. R. Co. *v.* Poor, 59 Maine, 277. [Darlington's Estate, 147 Pa. St. 624; Roby *v.* Colehour, 135 Ill. 300; Luddy's Trustee *v.* Peard, 33 Ch. Div. 500; U. S. *v.* Coffin, 83 Fed. 337; Liles *v.* Terry, [1895] 2 Q. B. 679; Dougan *v.* Macpherson, [1902] A. C. 197; Saunders *v.* Richard, 35 Fla. 28; Wildey *v.* Robinson, 85 Hun, 362.]

[2] Hatch *v.* Hatch, 9 Ves. 296; Hylton *v.* Hylton, 2 Ves. 549; Hunter *v.* Atkins, 3 M. & K. 135; Bulkley *v.* Wilford, 2 Cl. & Fin. 102; Farnam *v.* Brooks, 9 Pick. 212; Boynton *v.* Brastow, 53 Me. 362; Staats *v.* Bergen, 17 N. J. Eq. 554; Coffee *v.* Ruffin, 4 Cold. 487; Faucett *v.* Faucett, 4 Bush. 521; Korns *v.* Shaffer, 27 Md. 83; Baltimore *v.* Caldwell, 25 Md. 423; Smith

trustee is in such a position of confidence and influence over the *cestui que trust*, that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust*, unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust*.[1] (*a*)

v. Townshend, 27 Md. 368; Colborn *v.* Morton, 3 Keyes, 266; Pairo *v.* Vickery, 37 Md. 467; Wright *v.* Campbell, 27 Ark. 637.

[1] Crosskill *v.* Bower, 32 Beav. 86; Pooley *v.* Quilter, 2 De G. & J. 327; Spring *v.* Pride, 10 Jur. (N. S.) 646; *Ex parte* Ridgeway, 1 Jur. (N. S.) 97; Herne *v.* Meeres, 1 Vern. 465; Ayliffe *v.* Murray, 2 Atk. 59; Fox *v.* Mackreth, 2 Bro. Ch. 400; Coles *v.* Trecothick, 9 Ves. 246; *Ex parte* Lacey, 6 Ves. 625; Morse *v.* Royal, 2 Ves. 376; Whichcote *v.* Lawrence, 3 Ves. 740; Gibson *v.* Jeyes, 6 Ves. 277; Hunter *v.* Atkins, 3 M. & K. 135; Scott *v.* Davis, 4 M. & Cr. 87; Kerr *v.* Dungannon, 1 Dr. & W. 509; Van Epps *v.* Van Epps, 9 Paige, 237; Hawley *v.* Cramer, 4 Cow. 717; Campbell *v.* Walker, 5 Ves. 678; Michoud *v.* Girod, 4 How. 503; De Caters *v.* Chaumont, 3 Paige, 178; Child *v.* Bruce, 4 Paige, 309; Campbell *v.* Johnston, 1 Sandf. Ch. 148; Cram *v.* Mitchell, id. 251; Davis *v.* Simpson, 5 Har. & J. 147; Boyd *v.* Hawkins, 2 Ired. Ch. 304; Matthews *v.* Dragand, 3 Des. 25; Thorp *v.* McCullum, 1 Gilm. 614; Davoue *v.* Fanning, 2 Johns. Ch. 252; De Bevoise *v.* Sandford, 1 Hoff. 192; Stuart *v.* Kissam, 2 Barb. 493; Richardson *v.* Jones, 3 G. & J. 163; Clark *v.* Lee, 14 Iowa, 425; Zimmerman *v.* Harmon, 4 Rich. Eq. 165; Johnson *v.* Blackman, 11 Conn. 343; Moody *v.* Vandyke, 4 Binn. 31; Armstrong *v.* Campbell, 3 Yerg. 201; Bruch *v.* Lantz, 2 Rawle, 392; Herr's Est., 1 Grant's Cas. 172; Painter *v.* Henderson, 7 Barr, 48; Brackenridge *v.* Holland, 2 Blackf. 377; Scroggins *v.* McDougald, 8 Ala. 382; Thompson *v.* Wheatley, 5 S. & M. 499; Shelton *v.* Homer, 5 Met. 462; Freeman *v.* Harwood, 49 Maine, 195; Hickman *v.* Stewart, 69 Tex. 255; Patterson's Appl., 118 Penn. St. 571.

(*a*) "A trustee or an agent may purchase the trust property directly from his *cestui que trust sui juris*, or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open. But the condition is inexorable. Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee or agent, any material misrepresentation, concealment, or other disregard of this condition, renders the sale and the contract for it voidable at the election of the *cestui que trust* or principal." Bryne *v.* Jones, 159 Fed. 321.

The presumption is against the transaction. If a *cestui* confess judgment or make a deed to the trustee, the burden is on the latter to repel the intendment of law that there was undue influence.[1] If a trustee conveys trust property to himself, any one or more of the *cestuis* may avoid the deed.[2] In the case just cited the trustees conveyed the trust property to themselves through a third person, without actual intent to defraud, but for a consideration really inadequate. Considerable time had elapsed, there were future interests in the property represented only by the trustee, and persons other than the trustees had acquired rights in the land for value; wherefore on the whole the court allowed the property to be retained on payment of the difference between the actual consideration and its fair value with interest at annual rests. The general rule is, that the trustee shall not take beneficially by gift or purchase from the *cestui que trust*,[3] even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee;[4] the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se*,[5] to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit.[6] (*a*)

[1] Yonge *v.* Hooper, 73 Ala. 119. [Bronson *v.* Thompson, 77 Conn. 214; Booth *v.* Bradford, 114 Iowa, 562; Butman *v.* Whipple, 25 R. I. 578; Ludington *v.* Patton, 111 Wis. 208; Golson *v.* Dunlap, 73 Cal. 157; Cole *v.* Stokes, 113 N. C. 270.]

[2] Morse *v.* Hill, 136 Mass. 60.

[3] Coles *v.* Trecothick, 9 Ves. 234; Renew *v.* Butler, 30 Ga. 954; Cadwallader's App., 64 Penn. St. 293; Wright *v.* Smith, 23 N. J. Eq. 106; Smith *v.* Drake, id. 302.

[4] Wright *v.* Smith, 23 N. J. Eq. 106.

[5] McGaughey *v.* Brown, 46 Ark. 25. [Hamilton *v.* Dooly, 15 Utah, 280, 307; 1 Story's Eq. Jur. (13th ed.) § 322.]

[6] King *v.* Remington, 36 Minn. 25; Baldwin *v.* Allison, 4 Minn. 11;

(*a*) Or as agent for another. Silkstone & Haigh Co. *v.* Edey, [1900] 1 Ch. 167. Harrison *v.* Manson, 95 Va. 593; Ludington *v.* Patton, 111 Wis. 208;

So where the trustee in selling the property to a third person stipulates that the vendee is to sell it afterwards to the trustee, and the agreement is carried out, the trustee holds still as trustee, and not by an independent title as other purchasers from such vendee might have.[1] No trustee can directly or indirectly become a purchaser in his own behalf of the trust property, and hold it against the *cestui*[2] [unless the *cestui* has consented to the purchase]. (*a*) A purchase by a trustee inures to the

Jewett *v.* Miller, 10 N. Y. 402. [Feamster *v.* Feamster, 35 W. Va. 1; Church *v.* Winton, 196 Pa. St. 107; Kenworthy *v.* Equitable Trust Co., 218 Pa. St. 286.]

[1] De Celis *v.* Porter, 59 Cal. 464. [Darling *v.* Potts, 118 Mo. 506. See Tanney *v.* Tanney, 159 Pa. St. 277.]

[2] Marshall *v.* Carson, 38 N. J. Eq. 250; Creveling *v.* Fritts, 34 id. 134; People *v.* O. B. of S. B. B. Co., 92 N. Y. 98.

(*a*) A distinction should be made between a trustee's purchase directly from a *cestui* and a trustee's purchase of the trust property or of an outstanding adverse interest in it. In the former case the decisions already cited show that the purchase will be allowed to stand if the trustee sustains the burden of satisfying the court that no unfair advantage was taken of the *cestui* and that he was fully informed of everything which might have influenced him against the transaction or to demand a better price. See also Branch *v.* Buckley, 109 Va. 784; Ungrich *v.* Ungrich, 115 N. Y. S. 413; Copeland *v.* Bruning, 87 N. E. 1000 (Ind. App. 1909).

The same rule applies when the trustee purchases the trust property itself or an outstanding adverse interest with the consent of the *cestuis*. If he satisfies the court that the consent of the *cestuis* was fairly obtained without undue influence, that the *cestuis* were *sui juris* and fully understood all the material circumstances and that no advantage was taken by the trustee of the necessities of the *cestuis*, the trustee will be allowed to hold his purchase for his own benefit. Mills *v.* Mills, 63 Fed. 511; Cole *v.* Stokes, 113 N. C. 270.

But when no such consent of the *cestuis* is shown, the fairness of the transaction will not protect the trustee. Irrespective of the fairness of the price and the absence of oppression, equity will grant a *cestui* appropriate relief. Broder *v.* Conklin, 121 Cal. 282; Wing *v.* Hartupee, 122 Fed. 897; Mead *v.* Chesbrough B'ld'g Co., 151 Fed. 998; Frazier *v.* Jeakins, 64 Kan. 615; Golson *v.* Dunlap, 73 Cal. 157; Baker *v.* Lane, 118 S. W. 963 (Ky. 1909); Nabours *v.* McCord, 97 Tex. 526; McCord *v.* Nabours, 101 Tex. 495. But see Warren *v.* Pazolt, 203 Mass. 328. Thus in Smith *v.* Miller, 98 Va. 535, where one of several trustees bid at a public auction of

benefit of the *cestui* [if he so elects].[1] It is not, however, void but only voidable at the election of the *cestui que trust.*[2] (*a*)

[1] People *v.* Merchants' B'k, 35 Hun, 97.

[2] Dodge *v.* Stevens, 94 N. Y. 209; Gibson *v.* Barbour, 100 N. C. 192. [Shelby *v.* Creighton, 65 Neb. 485.]

trust land for the purpose of raising the price and with no intention of buying it, but it was knocked down to him and his co-trustees held him to his bid although he did not want to take the land, it was held that the *cestui* could have the sale to him set aside.

In St. Paul Trust Co. *v.* Strong, 85 Minn. 1, the same strict rule was applied to a sale by the trustee to the trust. In that case a trustee with funds of the trust estate to invest turned over to the trust certain notes and mortgages which it had bought on its own account but a few days before. Although the investment would have been a proper one if it had not taken the form of a sale by the trustee to itself and there was no doubt of its fairness, it was held that the *cestui* could avoid it. See also *In re* Long Island L. & Tr. Co., 87 N. Y. S. 65, 92 App. Div. 1 (affirmed 179 N. Y. 520). In view of this decision it would seem that a *cestui* can avoid a transfer by a trustee of an investment from one trust to another where the same trustee acts for both. But such a transfer is not absolutely void. McLaughlin *v.* Greene, 198 Mass. 153.

When a trustee improperly bids in for himself at public auction, the *cestuis* have a choice of remedies. "They may resort to a court of equity, either to compel a reconveyance upon payment of the purchase price, or to require the property to be resold, or upon their affirmation of the sale if the trustee has sold it in excess of the price paid by him he must account for the proceeds, or if unsold they may charge him in his accounts with its actual value at the time of sale." Hayes *v.* Hall, 188 Mass. 510. See also Booth *v.* Bradford, 114 Iowa, 562; Marr *v.* Marr, 73 N. J. Eq. 643.

If the trustee wishes to purchase the trust property at a public sale, either because he is willing to give more for the property than anybody else, or because he has interests in the property which he wishes to protect, his proper course is to obtain permission from court to bid at the sale. See Hayes *v.* Hall, 188 Mass. 510; Markle's Estate,

(*a*) And even while the title is in the trustee, it may be confirmed by acquiescence and lapse of time, as well as by the express act of the *cestui que trust.* Kahn *v.* Chapin, 152 N. Y. 305, 309; Harrington *v.* Erie S. Bank, 101 N. Y. 257; Hammond *v.* Hopkins, 143 U. S. 224; Hoyt *v.* Latham, id. 553; Morse *v.* Hill, 136 Mass. 60; Bresee *v.* Bradfield, 99 Va. 331; Bronson *v.* Thompson, 77 Conn. 214; Mead *v.* Chesborough B'ld'g Co., 151 Fed. 998; Quirk *v.* Liebert, 12 App. D. C. 394. But see Frazier *v.* Jeakins, 64 Kan. 615.

But there are exceptions to the rule, and a trustee may buy from the *cestui que trust*, provided there is a distinct and clear

182 Pa. St. 378; Corbin *v.* Baker, 167 N. Y. 128; Boswell *v.* Coakes, 23 Ch. Div. 302, 310.

It is usually inconsistent with the duty which a trustee owes to his *cestuis* for him to buy in for his own benefit incumbrances upon the trust property or outstanding titles which are adverse to the interest which he holds in trust, even where the sale is not brought about or controlled by him and where he is powerless to prevent it. After he has bought such a title or incumbrance the *cestuis* may elect to treat the purchase as made on behalf of the trust subject to the trustee's right to reimbursement for his legitimate expenditures, unless he is able to satisfy the court that the *cestuis* with full knowledge of all the circumstances and the legal effect of his purchase assented to it or neglected to take steps to purchase for themselves. Anderson *v.* Northrop, 30 Fla. 612, 665; Baugh's Ex'r *v.* Walker, 77 Va. 99; Baker *v.* Springfield, etc., Ry. Co., 86 Mo. 75; Mullen *v.* Doyle, 147 Pa. St. 512; McClanahan's Heirs *v.* Henderson's Heirs, 2 A. K. Marsh. 388; Mead *v.* Chesbrough B'ld'g Co., 151 Fed. 998.

In the absence of their actual consent it seems to be necessary for the trustee to show that if he had not purchased, the interest would have gone to a stranger to the trust without any neglect or violation of duty by him, with the effect that no possible injury has been done to the *cestuis* by reason of his becoming a purchaser. See Fisk *v.* Sarber, 6 W. & S. 18; Mullen *v.* Doyle, 147 Pa. St. 512; Steinbeck *v.* Bon Homme Mining Co., 152 Fed. 333. On general principles it seems to be inconsistent with his position as fiduciary to enter into competition with the *cestuis* in any way; and even when he has no power under the trust to apply trust property to the purchase of an adverse interest or the removal of an incumbrance, it may be his duty to apply to court for the necessary authority. See Johns *v.* Herbert, 2 App. D. C. 485; Stone *v.* Clay, 103 Ky. 314.

The trustee's disability to purchase does not apply to collateral interests in the property, which are not adverse. Haight *v.* Pearson, 11 Utah, 51. Accordingly it has been held that a trustee may purchase for himself the interest of a cotenant, Hopper *v.* Hopper, 79 Md. 400, or the reversion of leaseholds which are the subject of the trust. Bevan *v.* Webb, [1905] 1 Ch. 620; Randall *v.* Russell, 3 Mer. 190. See Anderson *v.* Lemon, 8 N. Y. 236; Mitchell *v.* Reed, 61 N. Y. 123, 143; Phillips *v.* Phillips, 29 Ch. Div. 673. But the trustee will not be permitted to make a profit at the expense of the interest which he holds in trust, by the purchase of collateral interests in the same property, Turner *v.* Fryberger, 94 Minn. 433; or even by the purchase of property which is entirely distinct from that held in trust. Fulton *v.* Whitney, 66 N. Y. 548.

The courts do not favor the trustee's purchase of a *cestui's*

contract, ascertained after a jealous and scrupulous examination of all the circumstances; that the *cestui que trust* intended the trustee to buy, and there is fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee.[1] The trustee

[1] Wright *v.* Smith, 23 N. J. Eq. 106; Bryan *v.* Duncan, 11 Ga. 67; Dobson *v.* Racey, 3 Sandf. 61; Paillon *v.* Martin, 1 id. 569; Brackenridge *v.* Holland, 2 Blackf. 377; Stuart *v.* Kissam, 2 Barb. 494; Braman *v.* Oliver, 2 Stewart, 47; Julian *v.* Reynolds, 8 Ala. 680; Stallings *v.* Foreman, 2 Hill, Ch. 401; Pratt *v.* Thornton, 28 Maine, 355; McCartney *v.* Calhoun, 17 Ala. 301; Marshall *v.* Stevens, 8 Humph. 159; Beeson *v.* Beeson, 9 Barr, 279; McKinley *v.* Irvine, 14 Ala. 681; Farnam *v.* Brooks, 9 Pick. 212; Lyon *v.* Lyon, 8 Ired. Eq. 201; Harrington *v.* Brown, 5 Pick. 519; Jennison *v.* Hapgood, 7 Pick. 1; Dunlap *v.* Mitchell, 10 Ohio, 117; Scott *v.* Freeland, 7 Sm. & M. 410; Pennock's App., 4 Penn. St. 446; Bruch *v.* Lantz, 2 Rawle, 392; Field *v.* Arrowsmith, 3 Humph. 442; Monro *v.* Allaire, 2 Caines' Cas. 163; Salmon *v.* Cutts, 4 De G. & Sm. 131; Harrison *v.* Guest, 6 De G., M. & G. 431; Herbert *v.* Smith, 6 Lans. 493; Birdwell *v.* Cain, 1 Cold. 301; Rice *v.* Cleghorn, 21 Ind. 80; Johnson *v.* Bennett, 39 Barb. 37; Buel *v.* Buckingham, 16 Iowa, 284; Brown *v.* Cowell, 116 Mass. 465; *post*, § 428; Graves *v.* Water-

beneficial interest at a judicial sale or a mortgagee's sale. Turner *v.* Butler, 126 Mo. 131; Petrie *v.* Badenoch, 102 Mich. 45; Appeal of Ricketts, 12 A. 60 (Pa. 1888). But see Kern *v.* Kern, 36 Or. 5; Bush *v.* Webster, 72 S. W. 364 (Ky. 1903).

The general rule is that a tenant in common or a tenant for life will not be permitted to purchase an outstanding title or incumbrance on the common property and then set it up against his cotenant or the remainder-man; but he will usually hold subject to the right of the others who are interested with him in the property to elect to contribute proportionately to the expense and to share in the benefit. Morrison *v.* Roehl, 215 Mo. 545; Keller *v.* Fenske, 123 Wis. 435; Downing *v.* Hartshorn, 69 Neb. 364; First Cong. Church *v.* Terry, 130 Iowa, 513; Griffith *v.* Owen, [1907] 1 Ch. 195.

When a tenant for life or any other person who has the duty of paying taxes allows the land to be sold for taxes and purchases, either at the tax sale or from a holder of the tax title, his purchase amounts to no more than payment of the taxes or redemption. Blair *v.* Johnson, 215 Ill. 552; Magness *v.* Harris, 80 Ark. 583; Crawford *v.* Meis, 123 Iowa, 610; Blake *v.* O'Neal, 63 W. Va. 483. See also Boon *v.* Root, 137 Wis. 451; Lewis *v.* Wright, 148 Mich. 290.

A life beneficiary is under no disability to make an honest purchase from a trustee who has power of sale. Albany Exchange Bank *v.* Brass, 59 App. Div. (N. Y.) 370.

must clear the transaction of every shadow of suspicion,[1] and if he is an attorney he must show that he gave his client, who sold to him, full information and disinterested advice.[2] Lord Eldon said he admitted that the exception was a difficult case to make out.[3] And it may be said generally that it is difficult to find a case where such a transaction has been sustained.[4] Any withholding of information,[5] or ignorance of the facts or of his rights on the part of the *cestui*,[6] or any inadequacy of price,[7] will make such a purchaser a constructive trustee. The *cestui que trust* must know that he is dealing with the trustee. Therefore, if the trustee purchases through an agent or third person, and the *cestui que trust* does not know the trustee in the transaction, the contract will be void, or a trust in the agent.[8] The rule is that the trustee shall not purchase directly or indirectly; therefore if the trustee conveys to a stranger, and the stranger conveys back to the trustee, the transaction is equally void.[9] (*a*)

man, 63 N. Y. 657; Golson *v.* Dunlap; 73 Cal. 157; Miggett's App., 109 Penn. St., 520.

[1] Lathrop *v.* Pollard, 6 Col. 424; Jones *v.* Lloyd, 117 Ill. 597; Porter *v.* Woodruff, 36 N. J. Eq. 174; Everett *v.* Henry, 67 Tex. 402. [Cole *v.* Stokes, 113 N. C. 270; Bronson *v.* Thompson, 77 Conn. 214; Booth *v.* Bradford, 114 Iowa, 562; Butman *v.* Whipple, 25 R. I. 578; Ludington *v.* Patton, 111 Wis. 208; Dougan *v.* Macpherson, [1902] A. C. 197; Mills *v.* Mills, 63 Fed. 511.]

[2] Dunn *v.* Dunn. 42 N. J. Eq. 431.

[3] Coles *v.* Trecothick, 9 Ves. 246.

[4] 2 Sugd. V. & P. (8 Am. ed.) 687. [But see *supra*, note *a*, p. 316.]

[5] Fox *v.* Mackreth, 2 Bro. Ch. 400; Scott *v.* Davis, 4 M. & Cr. 87; Herne *v.* Meeres, 1 Vern. 465; Cook *v.* Sherman, 4 McCrary, 20.

[6] Leach *v.* Leach, 65 Wis. 284.

[7] Pugh *v.* Bell, 1 J. J. Marsh. 398; Morse *v.* Royal, 12 Ves. 373.

[8] Randall *v.* Errington, 10 Ves. 423. [Tyler *v.* Sanborn, 128 Ill. 136.]

[9] Dobson *v.* Racey, 3 Sandf. 61.

(*a*) If, however, the original sale by the trustee to the third person was in good faith and with no understanding that the latter should sell back to the trustee, the trustee's purchase cannot be avoided. Dry Goods Co. *v.* Gideon, 80 Mo. App. 609. But the court will carefully scrutinize the transaction for collusion. Chorrmann *v.* Bachmann, 104 N. Y. S. 151, 119 App. Div. 146; *Re* Postlethwaite, 59 L. T. 58.

It has been held that a trustee

So, if the trustee purchases at auction of the *cestui que trust*, the presumption is strongly against the transaction,[1] and the purchase is generally void.[2] And one of several trustees is under the same disabilities:[3] they cannot convey to each other.[4] And so, if the purchase is made by an agent or attorney of the trustee.[5] Nor can the trustee's wife purchase.[6] Nor can the trustee purchase as agent for another.[7] The *cestui que trust* is not estopped to avoid such sales, although he has taken a legacy under the will of the trustee, if such legacy is not a charge upon the trust estate and is not otherwise connected with the trust fund.[8] If such sales are avoided, upon a reconveyance the trustee is entitled to receive back all the purchase-money

[1] Att. Gen. *v.* Dudley, Coop. 146; Whelpdale *v.* Cookson, 1 Ves. 9; Lister *v.* Lister, 6 Ves. 631; Sanderson *v.* Walker, 13 Ves. 601; Downes *v.* Grazebrook, 3 Mer. 200; Campbell *v.* Walker, 3 Ves. 378; Whitcomb *v.* Minichin, 5 Madd. 91.

[2] Roberts *v.* Roberts, 65 N. C. 27. [See *supra*, note *a*, p. 316.]

[3] Whichcote *v.* Lawrence, 3 Ves. 740. [Nabours *v.* McCord, 97 Tex. 526.]

[4] Boynton *v.* Brastow, 53 Maine, 362. [Smith *v.* Miller, 98 Va. 535.]

[5] Campbell *v.* Walker, 5 Ves. 378; Cox *v.* John, 32 Ohio St. 532.

[6] Dundas's App., 64 Penn. St. 325; Leitch *v.* Wells, 48 Barb. 637. But it has been held that the trustee's wife might purchase where the trust property was sold under a judicial decree of sale, in the absence of fraud and collusion, if the sale is affirmed by a decree of the court upon a report of the proceedings. Armstrong's App., 69 Penn. St. 409. [Frazier *v.* Jeakins, 64 Kan. 615; Hayes *v.* Hall, 188 Mass. 510; Mortgage Co. *v.* Clowney, 70 S. C. 229; Tyler *v.* Sanborn, 128 Ill. 136.]

[7] North Baltimore, &c. Ass'n *v.* Caldwell, 25 Md. 420; James *v.* James, 55 Ala. 525. [Harrison *v.* Manson, 95 Va. 593; Ludington *v.* Patton, 111 Wis. 208.]

[8] Smith *v.* Townshend, 27 Md. 368.

who has entered into a binding contract to sell trust property to a third person cannot properly purchase the vendee's right to a conveyance while the contract remains executory. The vendee cannot hold the trustee to his bargain to take the property; Delves *v.* Gray, [1902] 2 Ch. 606; and if they complete their bargain, the transaction is voidable by the *cestui*, just as if the original sale had been directly to the trustee. Wing *v.* Hartupee, 122 Fed. 897; Williams *v.* Scott, [1900] A. C. 499; Parker *v.* McKenna, 10 Ch. 96.

and all other claims which he may have against the estate.[1] (*a*) And he may purchase of the *cestui que trust* property not embraced in the trust fund, care being taken that the influence of the relation does not affect the transaction.[2] Sometimes the trustee is allowed, by decrees of sale, to be a bidder for the property at his own auction; in such case the trustee must show the utmost diligence and good faith for the interest of the *cestui que trust*.[3] Where a trustee has an interest to protect by bidding at a sale of trust property, he may ask the court for permission to bid, and when this is granted after hearing all parties interested, he can bid, and obtain a perfect title.[4] And a trustee may buy at a sale procured by some one else, not controlled by himself, in good faith to protect the interests of himself and others.[5] (*b*) A trustee who has *bona fide* sold the property to a third person may afterwards buy it for himself,[6] and the prohibition does not apply where the sale of the property is by a judgment creditor of the *cestui* through the sheriff, and not the trustee's sale.[7] Acquiescence, lapse of time, or

[1] Elliott *v.* Pool, 6 Jones, Eq. 42.

[2] Eldredge *v.* Smith, 34 Vt. 484.

[3] Cadwallader's App., 64 Penn. St. 293; Colgate *v.* Colgate, 23 N. J. Eq. 372.

[4] Scholle *v.* Scholle, 101 N. Y. 167. [Markle's Estate, 182 Pa. St. 378; Boswell *v.* Coaks, 23 Ch. Div. 302, 310; Hayes *v.* Hall, 188 Mass. 510.]

[5] Lusk's App., 108 Penn. St. 152; Allen *v.* Gillette, 127 U. S. 589. [See *supra*, note *a*, p. 316 *et seq.*]

[6] Welch *v.* McGrath, 59 Iowa, 519. [See Tanney *v.* Tanney, 159 Pa. St. 277; Dry Goods Co. *v.* Gideon, 80 Mo. App. 609.]

[7] Clark *v.* Holland, 72 Iowa, 36.

(*a*) So the assignee of a contract to purchase real estate, who receives it in trust for the assignor, has an equitable lien on the land, when he receives the title, for so much of moneys paid as he necessarily advanced to prevent a forfeiture under the contract to purchase, and preserve the interest of his assignor, though he did not ask or receive the latter's approval thereof. Stewart *v.* Fellows, 128 Ill. 480.

(*b*) An executor is not precluded from purchasing at the sale of an heir's interest in real estate, that not being within his control as trustee, but the court will scrutinize the transaction for any unfairness. Haight *v.* Pearson, 11 Utah, 51.

express act of the *cestui* may make the trustee's title good.[1] Matters of indebtedness growing out of relations of trust and confidence are subject to adjustment and settlement the same as claims arising in other transactions.[2]

§ 196. If among the assets of the trust estate there are leases, the trustee cannot renew them in his own name; and if he renews them in his own name, he must hold them by a constructive trust for the same persons beneficially interested in the old leases.[3] Even if the lessor refuse to renew the lease for the benefit of the *cestui que trust*, and the trustee takes it in his own name, he is still a constructive trustee, and he must account for all the income and profits. (*a*) This is on the ground that a trustee should be under no temptations to make any contracts in relation to the trust property, even collaterally, on his own private account.[4] The same rule extends to all persons who

[1] Harrington *v.* Erie County Savings Bank, 101 N. Y. 257. [Hammond *v.* Hopkins, 143 U. S. 224, 252; Hoyt *v.* Latham, 143 U. S. 553; Kahn *v.* Chapin, 152 N. Y. 305.]

[2] Clute *v.* Frasier, 58 Iowa, 273.

[3] Keech *v.* Sandford, commonly called the Rumford Market Case, Sel. Ch. Cas. 61; 1 Lead. Cas. Eq. 36; Eng. & Am. notes; Griffin *v.* Griffin, 1 Sch. & Lef. 354; Pickering *v.* Vowles, 1 Bro. Ch. 198; Pierson *v.* Shore, 1 Atk. 480; Nesbitt *v.* Tredennick, 1 B. & B. 46; Turner *v.* Hill, 11 Sim. 14; Whalley *v.* Whalley, 1 Vern. 484; Holt *v.* Holt, 1 Ch. Cas. 190; Anon., 2 id. 207; Abney *v.* Miller, 2 Atk. 597; Killick *v.* Flexney, 4 Bro. Ch. 161; Luckin *v.* Rushworth, Finch, 392; Mulvaney *v.* Dillon, 1 B. & B. 409; Fosbrook *v.* Balguy, 1 M. & K. 226; Owen *v.* Williams, Amb. 794; Fitzgibbon *v.* Scanlan, 1 Dow, 261; Bradford *v.* Brownjohn, L. R. 3 Ch. 714. [The new lease "is treated as a graft or addition to the trust property and itself forms part of the trust property." Bevan *v.* Webb, [1905] 1 Ch. 620. See also *infra*, § 538 and notes.]

[4] Keech *v.* Sandford, Sel. Ch. Cas. 61; Griffin *v.* Griffin, 1 Sch. & Lef. 353.

(*a*) The trust which the court fastens upon the new lease is not confined to the renewal by a person who was at the time in a fiduciary position, but extends to other cases in which the renewal has been obtained by virtue of the original lease. *In re* Lulham, 53 L. J. Ch. (N. S.) 928, 931.

have only a partial interest in property: they shall not take advantage of their situation to renew leases in their own names; as, tenants for life,[1] mortgagees,[2] devisees subject to debts, legacies, or annuities,[3] joint tenants,[4] or partners;[5] and where there was a mere tenancy at will, it was held that the tenant could not renew in his own name, and deprive the remainder-man of what might come to him.[6] And if, instead of renewing, the trustee or other person sell the right to renew for money, he must account for the price to the persons beneficially interested.[7] Nor can an agent acting for the trustee renew in his own name.[8] The same rule applies when the trustee of an equity of redemption becomes the purchaser in a foreclosure suit,[9] and to the purchase by a trustee of any property, not a part of the trust fund, which has the necessary effect to diminish the trust fund.[10]

[1] Eyre *v.* Dolphin, 2 B. & B. 290; Rawe *v.* Chichester, Amb. 719; Coffin *v.* Fernyhough, 2 Bro. Ch. 291; Taster *v.* Marriott, Amb. 668; James *v.* Dean, 11 Ves. 383; 15 Ves. 236; Kempton *v.* Packman, 7 Ves. 176; Giddings *v.* Giddings, 3 Russ. 241; Crop *v.* Norton, 9 Mod. 233; Buckley *v.* Lanauze, Llo. & Goo. t. Plunk. 327; Tanner *v.* Elworthy, 4 Beav. 487; Waters *v.* Bailey, 2 Y. & C. Ch. 218; Yem *v.* Edwards, 3 K. & J. 564; 1 De G. & J. 598; Brookman *v.* Hales, 2 V. & B. 45. [See Phillips *v.* Phillips, 29 Ch. Div. 673; *In re* Biss, [1903] 2 Ch. 40; *infra*, § 538, note.]

[2] Rushworth's Case, Freem. 13; Nesbitt *v.* Tredennick, 1 B. & B. 46.

[3] Jackson *v.* Welch, Llo. & Goo. t. Plunk. 346; Winslow *v.* Tighe, 2 B. & B. 195; Stubbs *v.* Roth, id. 548; Webb *v.* Lugar, 2 Y. & C. 247; Jones *v.* Kearney, 1 Conn. & Laws. 34.

[4] Palmer *v.* Young, 1 Vern. 276. [*In re* Biss, [1903] 2 Ch. 40; *In re* Lulham, 53 L. J. Ch. 928. But see Tygart *v.* Wilson, 39 App. Div. (N. Y.) 58; Chittenden *v.* Witbeck, 50 Mich. 401; Phillips *v.* Reeder, 18 N. J. Eq. 95. See *infra*, § 538, note.]

[5] Fetherstonhaugh *v.* Fenwick, 17 Ves. 298; *Ex parte* Grace, 1 Bos. & P. 376; Clegg *v.* Fishwick, 1 Macn. & G. 294, 299, Am. ed. Perkins, note 1; Clegg *v.* Edmondson, 8 De G., M. & G. 787. [Sneed *v.* Deal, 53 Ark. 152; Leach *v.* Leach, 18 Pick. 68, 76; Mitchell *v.* Reed, 61 N. Y. 123; Johnson's Appeal, 115 Pa. St. 129.]

[6] James *v.* Dean, 11 Ves. 383; 15 Ves. 236; *Re* Tottenham, 16 Ired. Ch. 118.

[7] Owen *v.* Williams, Amb. 734.

[8] Edwards *v.* Lewis, 3 Atk. 538.

[9] Hubbell *v.* Medbury, 53 N. Y. 98; Terrett *v.* Crombie, 6 Lans. 83. [See note *a* in § 195 (on p. 318).]

[10] Fulton *v.* Whitney, 67 N. Y. 548.

§ 197. It is thus seen that the rule against purchasing by trustees, of the *cestui que trust*, amounts almost to prohibition; for if a trustee purchases the property, and sells it at a profit, he must account for it as a trustee; not because there was any fraud in the transaction, but because it is against the policy of the law to allow such transactions [without the consent of the *cestui* given freely after he has been fully informed.][1] Nor is it material that there should be an advantage, or profit, arising out of a purchase by the trustee from the *cestui que trust*. It is not necessary to prove such advantage or profit: it is enough to show the relation and the purchase. The trustee can make no profit from his management of the estate, and he is bound not to put himself in any position where his private interests may conflict with the interests of the *cestui que trust*.[2] (*a*) If a

[1] Hawley *v.* Cramer, 4 Cow. 117; Prevost *v.* Gratz, 1 Pet. 66, 367; 6 Wheat, 481; Edwards *v.* Meyrick, 2 Hare, 60; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Fox *v.* Mackreth, 2 Bro. Ch. 400; 1 Cox, 310; John *v.* Bennett, 39 Barb. 237; Kent *v.* Chalfant, 7 Minn. 487; Tiffany *v.* Clark, 1 N. Y. Sup. Ct. Add. 9; Handlin *v.* Davis, 81 Ky. 34. An administrator who has bid in, in his own name, at a foreclosure of a mortgage belonging to his intestate, under the act authorizing him to do so, holds in trust, and cannot sell without the authority of the court. Rafferty *v.* Mallory, 3 Biss. 362. But see Frouberger *v.* Lewis, 79 N. C. 426, where an exception to the rule is said to be in case the trustee has a personal interest in the property, when he may bid at the sale to protect that interest; but then he ought to obtain the sanction of the court.

[2] *Ex parte* Lacey, 6 Ves. 625; Chesterfield *v.* Janssen, 2 Ves. 138; Campbell *v.* Walker, 5 Ves. 678; 13 Ves. 138; Cane *v.* Allen, 2 Dow. 289; Slade *v.* Van Vechten, 11 Paige, 21; Davoue *v.* Fanning, 2 Johns. Ch. 252; Michoud *v.* Girod, 4 How. 503; Dobson *v.* Racey, 3 Sandf. 61; Morse *v.* Royal, 12 Ves. 355; *Ex parte* James, 8 Ves. 337; *Ex parte* Bennett, 10 Ves. 381; Saagar *v.* Wilson, 4 S. & W. 102. Such transactions are fraudulent *per se*. Nelson *v.* Hoyvner, 66 Ill. 487. The attorney of the trustee comes equally within the prohibition, and it makes no difference in the application of the rule that a third person has conducted the business and shares in the profits. Cox *v.* John, 32 Ohio St. 532. [*Infra*, § 427 *et seq.*]

(*a*) The last part of this statement seems to need some qualification. Except so far as concerns dealing with the trust property, the trustee is not disabled from pursuing his private business for his own benefit merely because his interests conflict with those of the

trustee purchases the trust property, the *cestui que trust* may have the purchase set aside and the property resold.[1] The general rule is that only lapse of time or ratification can make the purchase good, and the burden of proof is on the trustee to show laches or acquiescence.[2] But if he has made a fair sale to a third party, it has been held that the trustee could repurchase from his [vendee], though the transaction will be jealously scrutinized in equity.[3]

§ 198. The *cestui que trust* alone can avoid such conveyances.[4] (*a*) They are at his option. And if they are found to be beneficial to him or otherwise, he may compel the trustee

[1] Sypher *v.* McHenry, 18 Iowa, 232. [Hayes *v.* Hall, 188 Mass. 510.] After the trust is ended and the trustee has made a sale under his power, the trustee, acting in good faith, may deal with the property and become the owner of what was trust property by purchase or otherwise. Bush *v.* Shearman, 80 Ill. 160. But the court will carefully see that good faith is observed; and a settlement of guardian's account and conveyance of minor's property on the day he becomes of age, and while he is unadvised of his rights, under the influence and control of others, is not binding, and can only be upheld by clear proof that it is just and equitable. Berkmeyer *v.* Kellerman, 32 Ohio St. 239. See Sugd. V. & P. (8th Am. ed.) 685 *et seq.*, where the rules are clearly stated by Lord St. Leonards, and the American cases are all collected and arranged by Hon. J. C. Perkins.

[2] Pearce *v.* Gamble, 72 Ala. 341.

[3] Foxworth *v.* White, 72 Ala. 224. [Dry Goods Co. *v.* Gideon, 80 Mo. App. 609. See Chorrman *v.* Bachmann, 104 N. Y. S. 151, 119 App. Div. 146; *Re* Postlethwaite, 59 L. T. 58, *supra*, § 195.]

[4] Rice *v.* Cleghorn, 21 Ind. 80. [Bronson *v.* Thompson, 77 Conn. 214; Bresee *v.* Bradfield, 99 Va. 331.]

trust. Thus it has been held that a trustee who had been directed to continue a testator's business could not be enjoined from opening a business of the same nature which would to some extent compete with the trust business. Moore *v.* M'Glynn, [1894] 1 Ir. 74. But the existence of such a conflict of interests would be a good cause for the resignation of the trustee or his removal in case he refuses to resign. Moore *v.* M'Glynn, [1894] 1 Ir. 74. See Matter of Hirsch, 116 App. Div. (N. Y.) 367, *infra*, § 427, note.

(*a*) In Bresee *v.* Bradfield, 99 Va. 331, it was held that the creditors of the *cestui* could not avoid the conveyance when there was no actual fraud.

to complete a purchase and take the estate and pay the purchase-money.[1]

§ 199. The above rule does not apply to mere naked or dry trustees who practically have no interest in or power over the estate, as trustees to preserve contingent remainders.[2] (*a*) Where the trustee has no duty to perform, as where one is trustee in fee for another in fee, having no authority over the estate, and standing in no relation of influence over the *cestui que trust*, the person named as trustee may purchase;[3] and if the *cestui que trust* make all the arrangements for the sale, such as plans, notices, choice of auctioneer, terms and conditions, and the trustee is in no situation to obtain any exclusive information, the court will deal with the contract as with contracts between other parties.[4] A mortgagee may purchase of the mortgagor under a decree of foreclosure or otherwise,[5] but if the mortgage contains a power of sale, the mortgagee becomes a trustee of the power of sale for the mortgagor, and neither he nor his agents, attorneys, or auctioneers, can purchase for themselves or others; or, if they do, they become constructive trustees.[6] (*b*) And so the pledgee of stock cannot buy the same

[1] Thorp *v.* McCullum, 1 Gilm. 624; McClure *v.* Miller, 1 Bail. Ch. 107; Lister *v.* Lister, 6 Ves. 631; *Ex parte* Reynolds, 5 Ves. 707; Sanderson *v.* Walker, 13 Ves. 603; Larco *v.* Casaneuava, 30 Cal. 560.

[2] Parker *v.* White, 11 Ves. 226; Naylor *v.* Winch, 1 S. & S. 567; Sutton *v.* Jones, 15 Ves. 587; Pooley *v.* Quilter, 4 Drew. 189. [Inlow *v.* Christy, 187 Pa. St. 186.]

[3] Pooley *v.* Quilter, 4 Drew. 189.

[4] Coles *v.* Trecothick, 9 Ves. 248; Monro *v.* Allaire, 2 Caines' Cas. 183; Salmon *v.* Cutts, 4 De G. & Sm. 131.

[5] Iddings *v.* Bruen, 4 Sandf. Ch. 223; Murdoch's Case, 2 Bland, 461; Knight *v.* Majoribanks, 2 Mac. & G. 10; 2 Hall & T. 308; Rhodes *v.* Sanderson, 36 Cal. 414.

[6] Dobson *v.* Racey, 4 Seld. 216; Waters *v.* Groom, 11 Cl. & Fin. 684; Mapps *v.* Sharpe, 32 Ill. 13; Murray *v.* Vanderbilt, 39 Barb. 140; Black-

(*a*) So also of a trustee who is only a stakeholder. Halman *v.* Burlen, 198 Mass. 494.

(*b*) In Massachusetts, a mortgage with power of sale usually authorizes the mortgagee to become a

even at the broker's board.[1] Where land is devised to one charged with the payment of an annuity to another for life, the devisee does not stand in the position of trustee for the annu-

ley *v.* Fowler, 31 Cal. 326; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546; Elliott *v.* Wood, 53 Barb. 285; Thornton *v.* Jarvin, 43 Mo. 153; Wall *v.* Town, 45 Ill. 493; Robinson *v.* Cudwin, 41 Ala. 693; Allen *v.* Chatfield, 3 Minn. 435; Montague *v.* Dawes, 14 Allen, 369. See Bailey *v.* Ætna Insurance Co., 10 Allen, 286; Fowle *v.* Merrill, 10 Allen, 350; Smith *v.* Provin, 4 Allen, 516; Woodlee *v.* Burch, 43 Mo. 231; Dyer *v.* Shurtleff, 112 Mass. 165. See Scott *v.* Mann, 33 Tex. 721. [Douthit *v.* Nabors, 133 Ala. 453; Payton *v.* McPhaul, 128 Ga. 510, 517; Nichols *v.* Otto, 132 Ill. 91; Patten *v.* Pearson, 57 Me. 428; Korns *v.* Shaffer, 27 Md. 83; Houston *v.* National Mut. B'ld'g Ass'n, 80 Miss. 31; McNees *v.* Swaney, 50 Mo. 388; Very *v.* Russell, 65 N. H. 646; Rich *v.* Morisey, 149 N. C. 37.] But a second mortgagee may purchase under a power of sale contained in a prior mortgage. Parkinson *v.* Hanbury, 1 Dr. & Sm. 143; 2 De G., J. & S. 455; Shaw *v.* Bunney, 34 L. J. Ch. 257; 11 Jur. (N. S.) 99; 2 De G., J. & S. 468; Kirkwood *v.* Thompson, 11 Jur. (N. S.) 385; 2 De G., J. & S. 613. And it is said that the administrator of the mortgagee may purchase. Woodlee *v.* Burch, 43 Mo. 231. And so a trustee may buy the equity of redemption in property on which he holds a mortgage as trustee. Britton *v.* Lewis, 8 Rich. Eq. 271; Eldridge *v.* Smith, 5 Shaw, 484. The power of sale is a power coupled with an interest and is irrevocable. Capron *v.* Attleborough Bk., 11 Gray, 492. And can be executed after the death of the mortgagor. Varnum *v.* Meserve, 8 Allen, 158; Harnehall *v.* Orndorff, 35 Md. 340. As to form of notice, see Roche *v.* Farnsworth, 106 Mass. 509, and remarks of Endicott, J., upon this case in Dyer *v.* Shurtleff, 112 Mass. 165. Equity will aid the defective execution of a power of sale in a mortgage in favor of a *bona fide* purchaser who has paid his money for the estate. Beatty *v.* Clark, 20 Cal. 11; Rowon *v.* Lamb, 4 Green, 468. The whole matter of power of sale in mortgages, with the authorities, is stated in 1 Sugd. V. & P. 65–68. If a power of sale in a mortgage provides for the payment of the expenses of the sale, counsel fees may be paid. Varnum *v.* Meserve, 8 Allen, 158. But the mortgagee can receive nothing for his own time and trouble in executing the power. Imboden *v.* Atkinson, 23 Ark. 622. [See *infra*, § 602 *v.*]

[1] Maryland Ins. Co. *v.* Dalrymple, 25 Md. 242; Baltimore Ins. Co. *v.* Dalrymple, id. 269; Byron *v.* Rayner, id. 424.

purchaser; in such case, he may if so authorized, make the deed directly to himself. Hall *v.* Bliss, 118 Mass. 554. See also Marquam *v.* Ross, 47 Or. 374; Mutual Loan & Banking Co. *v.* Haas, 100 Ga. 111. The power of sale may be fully executed by one to whom the mortgage has been assigned as collateral security. Holmes *v.* Turner's Falls Co., 150 Mass. 536.

itant, and he may purchase the annuity at a profit.[1] So a *cestui que trust* may devise property to his trustee, and there is no presumption against such gifts.[2] A *cestui que trust* may purchase the trust property or other property of the trustee, and the purchase will be good; at least the trustee cannot set it aside.[3] But sales to a *cestui que trust* involving an investment of the trust fund, or any dealing in relation to it, may be avoided by the *cestui que trust*.[4]

§ 200. Conveyances from wards to guardians are investigated with more severity by courts than contracts between parent and child, for the reason that there is not that family relationship and affection which sustain and uphold family settlements. The relation between guardian and ward is one of great influence over the ward, and is generally founded upon the pecuniary relation between them. While the relation actually subsists, no contracts can be made.[5] But if a contract or conveyance is made by the ward to the guardian just after attaining his property, and before a full settlement is made, and while the influence of the guardian is still in full force, courts will examine it in all its aspects; and the guardian claiming under such a conveyance must satisfy the court that the transaction was fair and proper, and that it did not proceed from undue influence, or from any fear, hope, or other unworthy motive induced in the mind of the ward by the conduct of the guardian.[6]

[1] Powell *v.* Murray, 2 Edw. 636.

[2] Stump *v.* Gaby, 5 De G., M. & G. 623; Hindson *v.* Wetherill, id. 301. But see Waters *v.* Thorn, 22 Beav. 547.

[3] Walker *v.* Brungard, 13 Sm. & M. 723; Bank *v.* Macy, 4 Ind. 362. [Albany Exchange Bank *v.* Brass, 59 App. Div. (N. Y.) 370.]

[4] McCants *v.* Bee, 1 McCord, Ch. 382; Chester *v.* Greer, 5 Humph. 26; Wade *v.* Harper, 3 Yerg. 383. Where a sale of land by trustee of a bank is sought to be avoided by the *cestui que trust*, the improvements cannot be made a charge against the seller. Paine *v.* Irwin, 16 Hun, 390.

[5] Dawson *v.* Massey, 1 B. & B. 226; Blackmore *v.* Shelby, 8 Humph. 439; Bostwick *v.* Atkins, 3 Comst. 53; Gallatian *v.* Cunningham, 8 Cow. 361; Clarke *v.* Devereaux, 1 S. C. 172.

[6] Richardson *v.* Linney, 7 B. Mon. 471; Andrews *v.* Jones, 10 Ala. 400;

If there is the slightest suspicion of any improper motive for a gift, as that a better or more speedy settlement may be obtained, the conveyance will be avoided, and the guardian will continue to hold the property in trust for the ward. Where a guardian improperly procures an infant's land to be sold by decree of a court, the conveyance will be avoided; but if the land has been conveyed to an innocent purchaser without notice, the title will be allowed to stand.[1] (*a*) The influence of the guardian over the ward may be so subtle, and the motives of the gift may be of such a nature, as to baffle a court of equity in reaching them. Therefore it has been said that, although the gift from the ward may be a highly moral act, and alike creditable and honorable to him, yet, if the court is not entirely satisfied by clear demonstration that the gift was properly made, it will be set aside. Nothing can be allowed to stand that proceeds from the pressure of the relation of guardian and ward fresh upon the mind of the ward.[2] But if the relation has entirely ceased, and a full settlement has been made, and the ward has obtained the full control of his property, and if sufficient time has elapsed to emancipate the mind of the ward from all undue

Eberts *v.* Eberts, 54 Penn. St. 110; Dawson *v.* Massey, 1 B. & B. 229; Aylward *v.* Kearney, 2 id. 463; Wright *v.* Proud, 13 Ves. 136; Wedderburn *v.* Wedderburn, 4 M. & C. 41; Mulhallen *v.* Marum, 3 Dr. & W. 317; Cary *v.* Mansfield, 1 Ves. 379; Garvin *v.* Williams, 44 Mo. 465; Amer. Law Reg. vol. 11 (N. S.), 656; Ashton *v.* Thompson, 32 Minn. 25. [Willis *v.* Rice, 157 Ala. 252; Drake *v.* Wild, 65 Vt. 611.]

[1] Gwinn *v.* Williams, 30 Md. 376.

[2] Hatch *v.* Hatch, 9 Ves. 297; Hylton *v.* Hylton, 2 Ves. 548; Pierce *v.* Waring, id., and 1 Ves. 380, and 1 P. Wms. 120, n.; 1 Cox, 125; Wood *v.* Downes, 18 Ves. 126; Johnson *v.* Johnson, 5 Ala. 90; Williams *v.* Powell, 1 Ired. Eq. 460; Caplinger *v.* Stokes, Meigs, 175; Somes *v.* Skinner, 16 Mass. 348; Whitman's App. 28 Penn. St. 348; Hawkin's App., 32 id. 263; Scott *v.* Freeland, 7 Sm. & M. 420; Garvin *v.* Williams, 44 Mo. 465.

(*a*) A guardian, unlike a trustee, has no title to his ward's property; suits must be brought in the latter's name; and contracts made by the guardian bind only himself. Lombard *v.* Morse, 155 Mass. 136; Kingsbury *v.* Powers, 131 Ill. 182. The probate court may authorize a guardian's conveyance of his ward's property. State *v.* Hamilton County Com'rs, 39 Ohio St. 58.

impressions and influences, it may not only be proper, but highly meritorious and honorable, for a ward to make a fitting gift to a guardian who has faithfully performed his trust; and a court fully satisfied upon these points would uphold it.[1]

§ 201. In the same manner courts of equity carefully scrutinize contracts between parents and children by which the property of children is conveyed to parents. The position and influence of a parent over a child are so controlling, that the transaction should be carefully examined, and sales by a child to a parent must appear to be fair and reasonable.[2] Such contracts are not, however, *prima facie void*, but there must be some affirmative proof of undue influence or other improper conduct to render the transaction void; for while the parent holds a powerful influence over the child, the law recognizes it as a rightful and proper influence, and does not presume, in the first instance, that a parent would make use of his authority and parental power to coerce, deceive, or defraud the child.[3] Therefore it is always necessary to prove some improper and undue influence, in order to set aside contracts between parents and children.[4] (*a*) As purchases by a parent in the name of a child do not create a resulting trust, but are presumed, in the first instance, to be the advances made by the parent to the child, so conveyances to the parent by the child may be proper family arrangement, and for the best interest of the

[1] Hylton *v.* Hylton, 2 Ves. 547; Hatch *v.* Hatch, 9 Ves. 548.

[2] Blunder *v.* Barker, 1 P. Wms. 639; Wallace *v.* Wallace, 2 Dr. & W. 452; Cocking *v.* Pratt, 1 Ves. 401; Heron *v.* Heron, 2 Atk. 181; Carpenter *v.* Heriot, 1 Eden, 328; Young *v.* Peachey, 2 Atk. 254.

[3] Jenkins *v.* Pye, 12 Pet. 253, 254.

[4] Cocking *v.* Pratt, 1 Ves. 401; Hawes *v.* Wyatt, 3 Bro. Ch. 156; 2 Cox, 263; Heron *v.* Heron, 2 Atk. 161; Young *v.* Peachey, id. 254; Carpenter *v.* Heriot, 1 Eden, 328. [Hoblyn *v.* Hoblyn, 41 Ch. Div. 200.]

(*a*) If a father abandons the benefit which he unfairly obtains by a settlement from his child, the rest of the settlement may stand good. Hoblyn *v.* Hoblyn, 41 Ch. D. 200. See Bainbrigge *v.* Browne, 18 Ch. D. 188.

child.[1] If no such considerations can be found in the case, and the conveyance, after all allowances are made, is found to have been wrongfully obtained from the child, a court of equity will set it aside or convert the parent into a trustee.[2] But the proceedings must be had at once. The child cannot wait until the parent's death or until the rights of other parties have intervened.[3] The same rules apply when contracts are made between children and those who have put themselves *in loco parentis*;[4] and so when family relatives make use of their position and influence to obtain undue and improper advantages, as where two brothers obtained a deed from a sister, it was set aside.[5]

§ 202. [The relation of an attorney to his client is one of especial trust and confidence; and an attorney who acquires property in violation of this trust and confidence may be adjudged a constructive trustee for the client. The principles are practically the same as those applicable to trustee and *cestui*.

[1] Blackborn *v.* Edgeley, 1 P. Wms. 607; Cooke *v.* Burtchaell, 2 Dr. & W. 165; Browne *v.* Carter, 5 Ves. 877; Tendrill *v.* Smith, 2 Atk. 85; Cory *v.* Cory, 1 Ves. 19; Kinchant *v.* Kinchant, 3 Bro. Ch. 374; Tweddell *v.* Tweddell, T. & R. 14; Hartopp *v.* Hartopp, 21 Beav. 259; Hannah *v.* Hodgson, 30 Beav. 19.

[2] King *v.* Savery, 1 Sm. & Gif. 271; 5 H. L. Ca. 627; Berdoe *v.* Dawson, 11 Jur. (N. S.) 254; Bury *v.* Oppenheim, 26 Beav. 594; Baker *v.* Bradley, 7 De G., M. & G. 597; 35 Eng. L. & Eq. 449; Field *v.* Evans, 15 Sim. 375; Slocumb *v.* Marshall, 2 Wash. C. C. 397; Brice *v.* Brice, 5 Barb. 533; Whelan *v.* Whelan, 2 Cow. 537; Young *v.* Peachey, 2 Atk. 254; Glisson *v.* Ogden, id. 258; Baker *v.* Tucker, 2 Eng. L. & Eq. 1; Blackborn *v.* Edgeley, 1 P. Wms. 607; Morris *v.* Burroughs, 1 Atk. 402; Tendrill *v.* Smith, 2 Atk. 85; Hoghton *v.* Hoghton, 15 Beav. 278; Cooke *v.* Lamotte, id. 234; Wallace *v.* Wallace, 2 Dr. & W. 452; Hunter *v.* Atkins, 3 M. & K. 146; Archer *v.* Hudson, 7 Beav. 551; Findley *v.* Patterson, 2 B. Mon. 76.

[3] Wright *v.* Vanderplank, 2 K. & J. 1; 8 De G., M. & G. 133; Brown *v.* Carter, 5 Ves. 877; Taylor *v.* Taylor, 8 How. 201; Crispell *v.* Dubois, 4 Barb. 393.

[4] Archer *v.* Hudson, 7 Beav. 551; Maitland *v.* Backhouse, 16 Sim. 68; Maitland *v.* Irving, 15 id. 437.

[5] Sears *v.* Shafer, 2 Seld. 268; Hewitt *v.* Crane, 2 Halst. Ch. 159; Boney *v.* Hollingsworth, 23 Ala. 690.

When an attorney deals directly with his client, either in purchasing from him or in selling to him, as well as in making contracts with him during the time of his employment as attorney, such dealing will be carefully scrutinized by the court to make sure that the consent of the client was freely given and that no material matters of fact or of law were concealed from him. The courts cast upon the attorney the burden of proving that no undue advantage was taken of the client by reason of the relation subsisting between them. The courts look with suspicion upon such a transaction and will allow the client to avoid it, if the attorney fails to show that it was fair, and with the full consent of the client.[1] The rule is well stated as follows, in Roman *v.* Mali, 42 Md. 531, 559: "The attorney is under no actual incapacity to deal with or purchase from his client.

[1] Newman *v.* Payne, 2 Ves. Jr. 199; Welles *v.* Middleton, 1 Cox, 112; 4 Bro. P. C. 245; Harris *v.* Tremenheere, 15 Ves. 34; Hunter *v.* Atkins, 3 M. & K. 135; Cane *v.* Allen, 2 Dow, 289; Champion *v.* Rigby, 1 R. & M. 539; Bellow *v.* Russell, 1 B. & B. 107; Gibson *v.* Jeyes, 6 Ves. 277; Uppington *v.* Buller, 2 Dr. & W. 184; Walmsley *v.* Booth, 2 Atk. 30; Montesquieu *v.* Sandys, 18 Ves. 302; Edwards *v.* Meyrick, 2 Hare, 60; Wood *v.* Downes, 18 Ves. 120; Lewis *v.* Hillman, 3 H. L. Cas. 607; Salmon *v.* Cutts, 4 De G. & Sm. 131; Holman *v.* Loynes, 4 De G., M. & G. 270; King *v.* Savery, 5 H. L. Cas. 627; Robinson *v.* Briggs, 1 Sm. & Gif. 184; Greenfield's Est., 2 Harris, 489; Merritt *v.* Lambert, 10 Paige, 357; Wallis *v.* Loubat, 2 Denio, 607; Howell *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640; Barry *v.* Whitney, 3 Sand. S. C. 696; Hawley *v.* Cramer, 4 Cow. 717; Mott *v.* Harrington, 12 Vt. 199; Miles *v.* Ervin, 1 McCord, Ch. 524; Waters *v.* Thorn, 22 Beav. 547; Bank *v.* Tyrrell, 27 Beav. 273; 10 H. L. Cas. 26; Wall *v.* Cockerell, id. 229; Brown *v.* Kennedy, 33 Beav. 133; Smedley *v.* Varley, 23 Beav. 359; O'Brien *v.* Lewis, 4 Gif. 221; Corley *v.* Stafford, 1 De G. & J. 238; Spring *v.* Pride, 10 Jur. (N. S.) 646; Gresley *v.* Mousley, 4 De G. & J. 78; Barnard *v.* Hunter, 2 Jur. (N. S.) 1213; Douglass *v.* Culverwell, 31 L. J. Ch. 65, 543; Brock *v.* Barnes, 40 Barb. 521. [Gibson *v.* Gossom, 47 S. W. 237 (Ark. 1898); Kofoed *v.* Gordon, 122 Cal. 314; Coffey *v.* Quint, 92 Cal. 475; Valentine *v.* Stewart, 15 Cal. 387, 401; Donahoe *v.* Chicago Cricket Club, 177 Ill. 351; Elmore *v.* Johnson, 143 Ill. 513; Roby *v.* Colehour, 135 Ill. 300; Dunn *v.* Record, 63 Me. 17; Merryman *v.* Euler, 59 Md. 588; Marshall *v.* Joy, 17 Vt. 546; U. S. *v.* Coffin, 83 Fed. 337; Pisani *v.* Att. Gen., L. R. 5 P. C. 517, 536; Savery *v.* King, 5 H. L. Cas. 627, 655; Luddy's Trustee *v.* Peard, 33 Ch. Div. 500; Readdy *v.* Pendergast, 55 L. T. 767; Weeks on Attorneys at Law (2d ed.), § 273 *et seq.*]

All that can be required is, that there has been no abuse of the confidence reposed, no imposition or undue influence practised, nor any unconscionable advantage between parties occupying such relation to each other; the onus of the case is cast upon the attorney of showing that nothing has happened in the course of the dealing which might not have happened had no such connection subsisted, and that the transaction has been fair in all respects. If the Court be satisfied that the party holding the relation of client performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that no concealment or undue means were used to obtain his consent to what was done, the transaction will be maintained."] If the attorney cannot produce evidence that puts the transaction clearly beyond all doubt or question, it will be set aside or he will be converted into a trustee.[1] This disability of an attorney continues as long as the relation of attorney and client continues, and as much longer as the influence of the relation can be supposed to extend. If the relation has ceased, but the influence of the relation continues to affect the minds of the parties, all contracts made under the influence will be avoided.[2] But if the relation has entirely ceased, and there can be supposed to be no influence remaining, the rule will not apply.[3] And so, if an attorney makes a purchase of a client of property entirely disconnected with the subject of the litigation, and the transaction is in all respects as if it had taken place between strangers, the rule will not apply.[4] So the rule does not apply to a gift to an attorney in the will of a client, if the will is a good and valid instrument in the courts where it is presented for probate;[5] and a voidable conveyance to an attor-

[1] Ibid.; Smith *v.* Brotherline, 62 Penn. St. 461.

[2] Henry *v.* Raiman, 25 Penn. St. 354; Leisenring *v.* Black, 5 Watts, 303; Hockenbury *v.* Carlisle, 5 Watts & S. 350.

[3] Wood *v.* Downes, 18 Ves. 127.

[4] Edwards *v.* Meyrick, 2 Hare, 60; Bellows *v.* Russell, 1 B. & B. 104; Montesquieu *v.* Sandys, 18 Ves. 302.

[5] Hindson *v.* Wetherell, 5 De G., M. & G. 30; overruling same case, 1 Sm. & G. 604. But see 23 L. Rev. 442, and notes to 1 Sm. & G. 604.

ney may be confirmed in the will of the client.[1] But the rule will not apply to an attorney incidentally consulted concerning some point of the litigation, but who is not employed or confided in, for the management of the case,[2] nor will it apply to the attorney upon the other side.[3] Nor will it apply after the relation has ceased and the attorney has assumed a hostile position in endeavoring to collect his fees.[4] If an attorney takes an absolute deed from a client in payment of his fees, the court may order it to stand as a mortgage security,[5] and where there was a fair agreement that an attorney's fees should be charged upon the estate, if recovered, the court allowed it to stand in the absence of undue influence,[6] and so the court will not interfere after a great lapse of time where the sale was for full value.[7]

[§ 202 *a*. There is no absolute incapacity in an attorney to receive a gift from his client, but the presumption of fraud or undue influence is very strong. "The clearest evidence is required, that there was no fraud, influence or mistake; that the transaction was perfectly understood by the weaker party; and usually evidence is required, that a third and disinterested person advised such party of all his rights." [8]]

[§ 202 *b*. The courts will protect a client from purchases by his attorney, without the client's consent, of any outstanding

[1] Stump *v.* Gaby, 2 De G., M. & G. 623. But see Waters *v.* Thorn, 22 Beav. 447.

[2] Dobbins *v.* Stevens, 17 S. & R. 13. Devinney *v.* Norris, 8 Watts, 314.

[3] Bank *v.* Foster, 8 Watts, 305.

[4] Johnson *v.* Fesemeyer, 3 De G. & J. 13; Smith *v.* Brotherline, 62 Penn. St. 461.

[5] Pearson *v.* Benson, 28 Beav. 598; Morgan *v.* Higgins, 5 Jur. (N. S.) 236.

[6] Moss *v.* Bainbridge, 6 De G., M. & G. 292; Blagrave *v.* Routh, 2 K. & J. 509.

[7] Clanricarde *v.* Henning, 30 Beav. 175.

[8] [Nesbit *v.* Lockman, 34 N. Y. 167. See also Whipple *v.* Barton, 63 N. H. 613; Harris *v.* Tremenheere, 15 Ves. 34; Liles *v.* Terry, (1895) 2 Q. B. 679; Tyars *v.* Alsop, 61 L. T. 8.]

title to or adverse interest in the property which is the subject matter of litigation or other controversy in which the attorney has been employed. Thus an attorney employed to settle outstanding claims against his client will not be permitted to buy them in on his own account and then collect the full amount from the client.[1] An attorney who has been consulted about a title to land owned by his client, or which the latter contemplates buying, will not be permitted to purchase an outstanding adverse title and then set it up in opposition to his client.[2] The same is true of an attorney's purchase of a tax title to his client's land, which is the subject of litigation in which he is employed.[3] Similarly, an attorney who has been consulted by a mortgagor in regard to mortgaged property, cannot buy it in for himself at foreclosure sale, when the mortgagor is seeking to buy it.[4] When the client is a judgment creditor his attorney will not be permitted to buy and hold for his own benefit at the execution sale in favor of his client, if the latter was attempting to purchase on his own account,[5] even though the attorney was not employed to purchase for him.[6] Such dealings by an attorney in competition with his client or in opposition to him in a matter relating to the employment are so inconsistent with the position of trust and confidence which the attorney occupies that the client will be given relief without being obliged to show that there was in fact any fraud or unfairness. "The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity."][7]

[1] Sutliff *v.* Clunie, 37 P. 224 (Cal. 1894); De Chambrun *v.* Cox, 60 Fed. 471.

[2] Eoff *v.* Irvine, 108 Mo. 378.

[3] Wright *v.* Walker, 30 Ark. 44; Cunningham *v.* Jones, 37 Kan. 477; Olson *v.* Lamb, 56 Neb. 104; Jackson *v.* Strader, 61 W. Va. 161.

[4] Case *v.* Carroll, 35 N. Y. 385. See also Larey *v.* Baker, 86 Ga. 468.

[5] Pearce *v.* Gamble, 72 Ala. 341; Taylor *v.* Young, 56 Mich. 285; Newcomb *v.* Brooks, 16 W. Va. 32, 72.

[6] Ward *v.* Brown, 87 Mo. 468.

[7] Gilbert *v.* Hewetson, 79 Minn. 326; Newcomb *v.* Brooks, 16 W. Va. 32, 72; Jackson *v.* Strader, 61 W. Va. 161. For limitations upon the rule

§ 203. All the dealings between attorney and client will be carefully examined by courts [and tested by the same principle, if the client seeks relief].[1] Thus a bond obtained from a poor and distressed client, the consideration not appearing with sufficient clearness, was set aside,[2] and so a bond was not allowed to stand except for the amount of fees actually due,[3] and a judgment was inquired into after a considerable lapse of time.[4] And even where a barrister married a lady client, and undertook to draw the marriage settlement, according to the stipulations between them, it was held to be open to investigation by the court.[5] The same rules are applied to all persons standing in the relation of attorneys or confidential advisers, although they are not attorneys in fact; thus clerks in an attorney's office, who do business for the client and obtain a knowledge of his affairs and his confidence, cannot avail themselves of their position to make favorable bargains or purchases,[6] and so one who acts as a confidential adviser in a matter before a magistrate, where attorneys are not employed, is under the same obligations and disabilities.[7] Of course, if there is actual fraud committed by an attorney in a purchase from a client, the transaction will be summarily dealt with.[8]

§ 204. The same principles apply to transactions between all persons standing in confidential and influential relations to each other. The person thus possessing the confidence of

see, Page *v.* Stubbs, 39 Iowa, 537; Herr *v.* Payson, 157 Ill. 244; Rogers *v.* Gaston, 43 Minn. 189; Pacific R. R. Co. *v.* Ketchum, 101 U. S. 289.

[1] [See Clark *v.* Girdwood, 7 Ch. Div. 9; James *v.* Kerr, 40 Ch. Div. 449.]

[2] Proof *v.* Hines, Cas. t. Talb. 111; Walmesley *v.* Booth, 2 Atk. 28.

[3] Newman *v.* Payne, 4 Bro. Ch. 350; 2 Ves. Jr. 200; Langstaffe *v.* Taylor, 14 Ves. 262; Pitcher *v.* Rigby, 9 Price, 79; Jones *v.* Roberts, 9 Beav. 419.

[4] Draper's Company *v.* Davis, 2 Atk. 295.

[5] Corley *v.* Stafford, 1 De G. & J. 258.

[6] Hobday *v.* Peters, 28 Beav. 349; 6 Jur. (N. S.) 794; Cowdry *v.* Day, 5 Jur. (N. S.) 1199; Gardner *v.* Ogden, 22 N. Y. 327; Poillon *v.* Martin, 1 Sandf. Ch. 569.

[7] Buffalow *v.* Buffalow, 5 Dev. & Bat. Eq. 241.

[8] Webster *v.* King, 33 Cal. 348.

another, and having an influence by reason of such confidence, cannot use his influence to obtain contracts, conveyances, or property, and the burden of proof is always on the party standing in the position of influence, to show the transaction just and fair.[1] *Quasi* guardians, husband and wife, confidential advisers, stewards, keepers of asylums in which the *quasi ward* may have been treated, and confidential medical advisers, all come within the rule.[2] But the mere fact that the donee is an attending physician, there being no confidential relation, will not avoid a deed.[3] But the administrator of a deceased partner may buy the partnership property, although he may be a surviving partner.[4] (*a*)

§ 205. [The same principles apply to attempted purchases by administrators and executors of the estate under their charge

[1] Holt *v.* Agnew, 67 Ala. 368.

[2] Trevelyan *v.* Charter, 9 Beav. 140; 11 Cl. & Fin. 714; Revett *v.* Harvey, 1 S. & S. 502; Huguenin *v.* Baseley, 14 Ves. 273; Gray *v.* Mansfield, 1 Ves. 379; Wright *v.* Proud, 13 Ves. 136; Ahearne *v.* Hogan, 1 Dr. 310; Billing *v.* Southee, 9 Hare, 534; 16 Jur. 188; Crispell *v.* Dubois, 4 Barb. 393; Blackie *v.* Clarke, 22 L. J. Ch. 377; Whitehorn *v.* Hines, 1 Munf. 559; Shallcross *v.* Oldham, 2 John. & H. 609; Dent *v.* Bennett, 4 M. & Cr. 269; Gibson *v.* Russell, 2 Y. & C. N. R. 104; Pratt *v.* Barker, 1 Sim. 1; Swissholm's App., 56 Penn. St. 475; Falk *v.* Turner, 101 Mass. 494; Rhodes *v.* Bate, L. R. I. Ch. 252. [Markley *v.* Camden Safe Dep. & Tr. Co., 69 A. 1100 (N. J. Ch. 1908).]

[3] Doggett *v.* Lane, 12 Mo. 215.

[4] Savage *v.* Williams, 15 La. An. 250; Carter *v.* McManus, id. 641; Dugas *v.* Gilbeau, id. 581.

(*a*) The cases cited as authority for this proposition are under a statute of Louisiana which authorizes a surviving partner to purchase the assets of the firm. The general rule seems to be that the appointment of a surviving partner as executor or administrator of the estate of his deceased copartner does not increase the powers which he has in either capacity, and does not enable him to avoid the general rule that a fiduciary cannot sell trust property to himself without the intervention of somebody whose only interest is to protect those beneficially interested. Although the administrator or executor of a deceased partner may assent to a purchase by the surviving partner, it seems that such assent should not be effective when he is also a surviving partner. See Parsons on Partnership (4th ed.), § 352; Lindley on Partnership (7th ed.), 530, 653.

to administer.[1] When the purchase is directly from beneficiaries of their interests, or when the purchase is assented to by all the beneficiaries, the executor or administrator has the burden of showing that the beneficiaries selling or those assenting to his purchase knew that he was the purchaser and were fully informed by him of everything which might influence them in selling their interests or assenting to his purchase of the property, and that no undue influence was used by him and no unfairness practised.[2] When he attempts to purchase the property without the assent of all the persons beneficially interested, the purchase is voidable at the option of any beneficiary, and the question of fairness does not enter.[3] When he purchases an outstanding interest adverse to the title of the decedent, those interested may elect to have him adjudged a trustee of such interest for their benefit.[4] But one or more of those beneficially interested cannot avoid a purchase by him of the beneficial interest of another.[5] The rule cannot be evaded by procuring a third person to purchase in the first in-

[1] Davoue *v.* Fanning, 2 Johns. Ch. 252; Van Epps *v.* Van Epps, 9 Paige, 237; Ward *v.* Smith, 3 Sandf. Ch. 592; Ames *v.* Browning, 1 Bradf. 321; Rogers *v.* Rogers, 3 Wend. 503; Bostwick *v.* Atkins, 1 Comst. 53; Michoud *v.* Girod, 4 How. 504; Drysdale's App., 14 Penn. St. 531; Moody *v.* Vandyke, 4 Binn. 31; Beeson *v.* Beeson, 9 Barr, 279; Winter *v.* Geroe, 1 Halst. Ch. 319; Conway *v.* Green, 1 H. & J. 151; Bailey *v.* Robinson, 1 Grat. 4; Hudson *v.* Hudson, 5 Munf. 180; Baines *v.* McGee, 1 Sm. & M. 208; Baxter *v.* Costin, 1 Busb. Eq. 262; Breckenridge *v.* Holland, 2 Blackf. 377; Edmunds *v.* Crenshaw, 1 McCord, Ch. 252. But in South Carolina an executor may purchase the personal property. Stallings *v.* Foreman, 2 Hill Eq. 401; and so in Alabama, Julian *v.* Reynolds, 8 Ala. 680; Peyton *v.* Enos, 16 La. An. 135; Van Weckle *v.* Malla, id. 325; Huston *v.* Cassidy, 2 Beas. 228; Mulford *v.* Winch, 3 Stockt. 16; Culver *v.* Culver, id. 215; Dugas *v.* Gilbeau, 15 La. An. 581.

[2] Woerner, Am. Law of Administration (2d ed.), §§ 334, 487; Handlin *v.* Davis, 81 Ky. 34.

[3] Faucett *v.* Faucett, 1 Bush. 511; Bechtold *v.* Read, 49 N. J. Eq. 111; *In re* Taylor Orphan Asylum, 36 Wis. 534; Woerner, Am. Law of Administration (2d ed.), §§ 334, 487.

[4] Merrick *v.* Waters, 51 App. Div. 83, 64 N. Y. S. 842 (affirmed 171 N. Y. 655).

[5] Hale *v.* Aaron, 77 N. C. 371.

stance, and by receiving a conveyance from such third person.[1]] This rule is so strict, that they cannot purchase any of the assets of the estate under their charge, although the assets are ordered by the court to be sold at public auction;[2] and even where a creditor seized a portion of the estate and exposed it to public sale, it was held that the executor or administrator could not purchase.[3] So if an executor join with others in the purchase of the estate the sale may be avoided.[4] If, however, the estate is sold in good faith to a stranger, with no collusion between him and the executor, there is nothing to prevent the executor from purchasing it afterwards like any other property.[5] So an executor may purchase the interest of a third person in the estate.[6] If fraud is superadded to a purchase by an executor, or any use of his situation is made to make a more favorable purchase, it will of course be avoided, or he will be ordered to account for the property and all the profits received.[7] But generally a purchase of the assets of an estate by an executor is not void, but only voidable, and such sale may be confirmed by all the parties interestedin the estate;[8] and so a long acquies-

[1] Davoue *v.* Fanning, 2 Johns. Ch. 252; Paul *v.* Squibb, 12 Penn. St. 296; Woodruff *v.* Cook, 2 Edw. Ch. 259; Hawley *v.* Cramer, 4 Cow. 717; Beaubien *v.* Poupard, Harr. Ch. 206; Buckles *v.* Lafferty, 2 Rob. 292; Hunt *v.* Bass, 2 Dev. Eq. 292; Forbes *v.* Halsey, 26 N. Y. 53; Miles *v.* Wheeler, 43 Ill. 123; Kruse *v.* Stephens, 47 Ill. 112; Smith *v.* Drake, 23 N. J. Eq. 302; Tiffany *v.* Clark, 1 N. Y. Sup. Ct. Add. 9.

[2] Wallington's Est., 1 Ashm. 307; Beeson *v.* Beeson, 9 Barr, 279; Rham *v.* North, 2 Yeates, 117; Jewett *v.* Miller, 10 N. Y. 402; Fox *v.* Mackreth, 1 Lead. Cas. Eq. 1; Colgate *v.* Colgate, 23 N. J. Eq. 372; Colburn *v.* Morton, 1 N. Y. Dec. 378; Farrar *v.* Farley, 3 S. C. 11. [Faucett *v.* Faucett, 1 Bush. 511; *In re* Taylor Orphan Asylum, 36 Wis. 534.]

[3] Spindler *v.* Atkinson, 3 Md. 410; Fleming *v.* Teran, 12 Ga. 394; Wyncoop *v.* Wyncoop, 12 Ind. 206. But the contrary rule was held in Fisk *v.* Sarber, 6 Watts & S. 18; Prevost *v.* Gratz, 1 Pet. C. C. 364; Campbell *v.* Johnson, 1 Sandf. Ch. 148; Bank of Orleans *v.* Torrey, 7 Hill, 260.

[4] Mitchum *v.* Mitchum, 3 Dana, 260; Paul *v.* Squibb, 12 Penn. St. 296.

[5] Silverthorn *v.* McKinister, 12 Penn. St. 67. [Johnson *v.* Kay, 8 Humph. 142.]

[6] Alexander *v.* Kennedy, 3 Grat. 379.

[7] Vanhorn *v.* Fonda, 5 Johns. Ch. 388; Hudson *v.* Hudson, 5 Munf. 180.

[8] Harrington *v.* Brown, 5 Pick. 519; Bruch *v.* Lantz, 2 Rawle, 392;

cence in a purchase made by an executor, by all the heirs, would be held to be a confirmation.[1] If an administrator purchases the estate at his own sale, and afterwards conveys the estate to a third person, his vendee will be charged with notice of the defect of title, as it would be apparent upon the face of the deed.[2] But if the administrator should collusively convey to a third person and take back a deed from him, and then himself sell, the purchaser would not probably be charged with notice unless he had actual notice.[3]

§ 206. The relation of principal and agent is a fiduciary one, and the same observations apply as to other relations of trust and confidence. (*a*) Some have doubted whether it would not have been wiser to have prohibited all contracts between parties sustaining these relations to each other, and to have thus taken away all temptation to abuse the trust, rather than to investigate each case as it arises.[4] But perhaps the entire freedom of

Pennock's App., 14 Penn. St. 446; Longworth *v.* Goforth, Wright, 192; Dunlap *v.* Mitchell, 10 Ohio, 117; Williams *v.* Marshall, 4 G. & J. 377; Moore *v.* Hilton, 12 Leigh, 2; Scott *v.* Freeland, 7 Sm. & M. 410; Lyon *v.* Lyon, 8 Ired. Eq. 201.

[1] Jennison *v.* Hapgood, 7 Pick. 1; Hawley *v.* Cramer, 4 Cow. 719; Ward *v.* Smith, 3 Sandf. Ch. 592; Baker *v.* Read, 18 Beav. 398; Musselman *v.* Eshelman, 10 Barr, 394; Bell *v.* Webb, 2 Gill, 164; Todd *v.* Moore, 1 Leigh, 457.

[2] Lazarus *v.* Bryson, 3 Binn. 59; Ward *v.* Smith, 3 Sandf. 592; Smith *v.* Drake, 23 N. J. Eq. 302; Potter *v.* Pearson, 60 Maine, 220.

[3] Johnson *v.* Bennett, 39 Barb. 237.

[4] Dunbar *v.* Tredennick, 2 B. & B. 319; Norris *v.* La Neve, 3 Atk. 38; Fairman *v.* Bavin, 29 Ill. 75.

(*a*) The agent is under the same duty as a trustee not to attempt personal gain directly or indirectly by purchasing or dealing with his principal's property. Lister *v.* Stubbs, 45 Ch. D. 1; Stevenson *v.* Kyle, 42 W. Va. 229; Tyler *v.* Sanborn, 128 Ill. 136; Darlington's Estate, 147 Penn. St. 624; Luscombe *v.* Grigsby, 11 S. D. 408, 78 N. W. 357. He becomes a constructive trustee when, in violation of his duty to his principal, or by misusing the latter's funds, he purchases real estate for himself. Ibid.; Gashe *v.* Young, 51 Ohio St. 376; Boswell *v.* Cunningham, 32 Fla. 277; Lee *v.* Patten, 34 Fla. 149.

trade and business, and the convenience of society, demand that there should be at least the possibility of dealing between persons bearing these relations, and thus there is no absolute prohibition. The principal may buy and sell of the agent, and he may make an agent the object of his bounty, but there must be the utmost good faith and frankness in the dealing.[1] The principal is entitled to the best skill and judgment of his agent in the conduct of his affairs. If at the same time the agent is at liberty to purchase the property of his principal, there would be such a conflict between his duty and his interest, that there could be no safety in business. An agent, therefore, if he purchases property of his principal, must communicate fully and truly every fact in relation to such property within his knowledge; (*a*) and he must also be known as the purchaser, for if he acts secretly the contract will certainly be held to be fraudulent; (*b*) and so if he is employed to purchase for another and he purchases for himself, he will be held to be a trustee.[2] No per-

[1] Selsey *v.* Rhoades, 2 S. & S. 49; 1 Bligh, 1; Kerr *v.* Dungannon, 1 Dr. & W. 509, 541; Huguenin *v.* Baseley, 14 Ves. 273; Molony *v.* Kernan, 2 Dr. & W. 31; Harris *v.* Tremenheere, 15 Ves. 40; Winchelsea *v.* Garrety, 1 M. & K. 253; Benson *v.* Heatham, 1 Y. & C. Ch. 326; Neeley *v.* Anderson, 2 Strob. Eq. 262; Brooke *v.* Berry, 2 Gill, 83; Persch *v.* Quiggle, 57 Penn. St. 247.

[2] Lees *v.* Nuttall, 1 R. & M. 53; Taml. 282; Church *v.* Marine Ins. Co., 1 Mason, 341; Crowe *v.* Ballard, 3 Bro. Ch. 120; Barker *v.* Ins. Co., 2 Mason, 369; Massey *v.* Davies, 2 Ves. Jr. 318; Woodhouse *v.* Meredith, 1 J. & W. 204; Purcell *v.* Macnamara, 14 Ves. 91; Wott *v.* Grove, 2 Sch. & Lef. 492;

(*a*) The agent must communicate to his principal in such cases all his knowledge, with respect to the property, which he has acquired as agent or which his duty as agent would require him to communicate to his principal if the sale was to a third person, and he has the burden of proving affirmatively that he has made full disclosure of everything within his knowledge that the principal should know. Fraudulent intent need not be shown. Roby *v.* Colehour, 135 Ill. 300; Darlington's Estate, 147 Pa. St. 624.

(*b*) Thus where an agent, employed to sell, secured a purchaser at a price satisfactory to the vendor but the purchaser refused to abide by his bargain and the agent's wife purchased at the agreed price without the knowledge of the vendor, a constructive trust was decreed for the vendor. Tyler *v.* Sanborn, 128 Ill. 136.

son whose duty to another is inconsistent with his taking an absolute title to himself will be permitted to purchase for himself. For no one can hold a benefit acquired by fraud or a breach of his duty.[1] (*a*) All the knowledge of the agent belongs

Lowther *v.* Lowther, 13 Ves. 102; Green *v.* Winter, 1 Johns. Ch. 27; Morret *v.* Paske, 2 Atk. 53; Coles *v.* Trecothick, 9 Ves. 246; Parkist *v.* Alexander, 1 Johns. Ch. 394; Gray *v.* Mansfield, 1 Ves. 379; Belt, Suppl. 167; Fox *v.* Mackreth, 2 Bro. Ch. 400; 2 Cox, 320; 1 Lead. Cas. Eq. 92, and notes; Dennis *v.* McCoy, 32 Ill. 429; Safford *v.* Hinds, 39 Barb. 625; Squire's App., 70 Penn. St. 268. [Sun Dance, etc., Mining Co. *v.* Frost, 7 Ariz. 289; Eisert *v.* Bowen, 117 App. Div. 488, 102 N. Y. S. 707; Seacoast R. Co. *v.* Wood, 65 N. J. Eq. 530; Halsell *v.* Wise County Coal Co., 19 Tex. Civ. App. 564; Brookings Land & Trust Co. *v.* Bertness, 17 S. D. 293; Hughes *v.* Willson, 128 Ind. 491; Luscombe *v.* Grigsby, 11 S. D. 408; Ellis *v.* Allen, 99 Wis. 598.]

[1] Reed *v.* Warner, 5 Paige, 650; Sweet *v.* Jacocks, 6 Paige, 355; Lees *v.* Nuttall, 1 R. & M. 53; Torrey *v.* Bank of Orleans, 6 Paige, 650; Greenfield's Est., 2 Harris, 489; Sheriff *v.* Neal, 6 Watts, 534; Plumer *v.* Reed, 2 Wright, 46; Hoge *v.* Hoge, 1 Watts, 163; Swartz *v.* Swartz, 4 Barr, 353; Harrold *v.* Lane, 3 Penn. St. 268; Jenkins *v.* Eldredge, 3 Story, 181; Morris *v.* Nixon, 1 How. 118; Seichrist's App., 66 Penn. St. 237; Squire's App., 70 id. 268.

(*a*) Even when the purchase of the property for the principal does not lie within the scope of the agency, the agent cannot purchase for himself or for another person, if he owes the duty of giving his principal the first chance. A purchase by him in violation of this duty or in competition with his principal will give the latter the right to elect to hold the agent, or whoever takes title, as a constructive trustee, subject to the right to be reimbursed for what was actually paid for the property. Johnson *v.* Knappe, 123 N. W. 857 (S. D. 1909). Thus where an agent employed to purchase land at a price not to exceed $18 per acre finds that he cannot get it at that price, but without consulting his principal buys it for himself at a slightly greater price, taking title in the name of his wife, if the principal elects to take the land at the price paid, equity will decree the agent's wife to be a constructive trustee. Brookings Land & Trust Co. *v.* Bertness, 17 S. D. 293. "If one employs and pays an agent to investigate the title or the character of land for the purpose of purchasing it, and the agent uses the knowledge he acquires in this way to forestall his principal and obtain a title to the property for himself it is no answer to the suit of the former to recover the land from his agent, that the employer never had any title or interest in it or that he was not injured by the act of the agent." Trice *v.* Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176.

to the principal for whom he acts, and if the agent use it for his own benefit, he will become a trustee for his principal.[1] Whenever one person is placed in a relation to another, by the act or consent of that other, or the act of a third person, or of the law, so that he becomes interested for him or with him in any subject of property or business, he will in equity be prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has been associated.[2] Therefore, whatever an agent may be employed to do, he cannot use his position nor the knowledge obtained by his employment to obtain

[1] Gillett *v.* Peppercorne, 3 Beav. 78; Taylor *v.* Salmon, 2 Mee. & Comp. 139; 4 M. & C. 139; Voorhees *v.* Church, 8 Barb. 136; Van Epps *v.* Van Epps, 9 Paige, 237; Torrey *v.* Bank, &c., id. 649; Cram *v.* Mitchell, 1 Sandf. 251; Dobson *v.* Racey, 3 Sandf. 61; Reed *v.* Norris, 2 M. & Cr. 361; Ringo *v.* Binns, 10 Pet. 269; Farnham *v.* Brooks, 9 Pick. 212; Davis *v.* Hamlin, 108 Ill. 39.

[2] Davis *v.* Hamlin, 108 Ill. 39; Allen *v.* Jackson, 122 Ill. 567. [Lagarde *v.* Anniston Co., 126 Ala. 496; Merrick *v.* Waters, 51 N. Y. App. Div. 83, 64 N. Y. S. 542; Gilbert *v.* Hewetson, 79 Minn. 326; Frohlich *v.* Seacord, 180 Ill. 85; Walker *v.* Walker, 199 Pa. St. 435.]

Where an agent of a theatre corporation whose principal places of business were held on lease, procured renewals of the leases to another corporation, the latter was held to be a constructive trustee of the leases for the former lessee. McCourt *v.* Singers-Bigger, 145 Fed. 103.

But the fact of agency does not require the agent to give his principal the first chance at every bargain which comes to his knowledge. Copper River Mining Co. *v.* McClellan, 2 Alaska, 134; Stanford *v.* Mann, 167 Ill. 79.

When the principal has the option of electing to adopt the purchase of the agent and have him declared a trustee, he must exercise his option within a reasonable time after learning of his right. He cannot wait to see whether or not the venture is to be profitable. Steinbeck *v.* Bon Homme Mining Co., 152 Fed. 333, 81 C. C. A. 441.

It may be well to note the difference between property of the principal in the custody of the agent and property of which the agent is constructive trustee for the principal. With respect to the former the agent's power to transfer both legal and equitable title rests upon his actual or apparent authority. With respect to property which he has improperly acquired in his own name and which he holds, therefore, as constructive trustee, he can transfer his legal title irrespective of authority, but the beneficial interest will not pass except to *bona fide* purchasers for value without notice of the constructive trust.

a bargain from his principal. Nor can he take advantage of his own negligence; as where an agent allowed his principal's property to be sold for taxes and bought it himself, he was held as a trustee, although the relation of principal and agent had ceased.[1] In some cases he may innocently purchase of his principal; but if he conceals himself and acts through another, either in purchasing from or selling to his principal, he may be held as a trustee, or the contract may be entirely avoided;[2] or if he accepts any benefits in conducting the business of his principal, he will hold them in trust for him,[3] or if he makes use of his position in any way to obtain a title to himself.[4] If in matters within the purposes of his agency he takes a conveyance in his own name, he is a trustee *ex maleficio*,[5] as if he buys a tax certificate for his principal and then takes the deed in his own name.[6] And where one partner C. gets a lease of the premises in his father's name when the other partner D. had a right to expect he would secure a joint lease for the partnership, C.'s father holds in trust not only for C. but for D. also.[7] So if he buys for himself and his partner the land which he was engaged to buy for the plaintiff, and has the deed made to his

[1] Morris *v.* Joseph, 1 W. Va. 256. [Sun Dance, etc., Mining Co. *v.* Frost, 7 Ariz. 289.]

[2] Winn *v.* Dillon, 27 Miss. 494; Lewis *v.* Hillman, 3 H. L. Cas. 629; Parkist *v.* Alexander, 1 Johns. Ch. 394; Sweet *v.* Jacocks, 6 Paige, 364; Bank of Orleans *v.* Torrey, 7 Hill, 260; 9 Paige, 653; Myer's App., 2 Barr, 463; Rankin *v.* Porter, 7 Watts, 387; Piatt *v.* Oliver, 2 McLean, 267; 3 How. 353; Church *v.* Ins. Co., 1 Mason, 341; Teakle *v.* Barley, 2 Brock. 44; Oldham *v.* Jones, 5 B. Mon. 467; Banks *v.* Judah, 8 Conn. 146; Copeland *v.* Ins. Co., 6 Pick. 198; McGregor *v.* Gardner, 14 Iowa, 326; Clark *v.* Lee, id. 425. [Tyler *v.* Sanborn, 128 Ill. 136.]

[3] Bailey *v.* Watkins, Sug. Law of Prop. 726; Gaskell *v.* Chambers, 26 Beav. 360. [Lister *v.* Stubbs, 45 Ch. Div. 1.]

[4] Smith *v.* Wright, 49 Ill. 403.

[5] Squire's App., 70 Penn. St. 268; McMurry *v.* Mobley, 39 Ark. 313; Vallette *v.* Tedens, 122 Ill. 607; Byington *v.* Moore, 62 Iowa, 470; Kraemer *v.* Duestermann, 37 Minn. 469. [Seacoast R. Co. *v.* Wood, 65 N. J. Eq. 530; Copper River Mining Co. *v.* McClellan, 2 Alaska, 134; Roby *v.* Colehour, 135 Ill. 300; McCourt *v.* Singers-Bigger, 145 Fed. 103.]

[6] Collins *v.* Rainey, 42 Ark. 531.

[7] Cushing *v.* Danforth, 76 Maine, 114.

partner and pays the money from his own funds, still a trust will result, and the payment will be considered only as a loan, on security of the title.[1] But where one breaks a mere parol agreement to buy land for another and buys it himself, there is no trust, but only a breach of parol contract.[2] The test is whether the act is inconsistent with duties resulting from a relation of confidence between the parties.[3] (*a*)

[1] Bryan *v.* McNaughton, 38 Kans. 98.
[2] Hackney *v.* Butts, 41 Ark. 394. See § 134.
[3] Farley *v.* Kittson, 27 Minn. 102, at 105.

(*a*) By the weight of American authority, a mere parol agreement to purchase land for another does not create such a fiduciary relation that the promisor will be declared a constructive trustee if he purchases for himself with his own money. Mitchell *v.* Wright, 155 Ala. 458; Butts *v.* Cooper, 152 Ala. 375; Scribner *v.* Meade, 10 Ariz. 143; Parramore *v.* Hampton, 55 Fla. 672; Wilhite *v.* Skelton, 5 Ind. Ter. 621, 82 S. W. 932; Forrest *v.* O'Bryan, 126 Iowa, 571; Burden *v.* Sheridan, 36 Iowa, 125; Fischli *v.* Dumaresly, 3 A. K. Marsh. 23; Camden Land Co. *v.* Lewis, 101 Me. 78; Bourke *v.* Callanan, 160 Mass. 195; Emerson *v.* Galloupe, 158 Mass. 146; Parsons *v.* Phelan, 134 Mass. 109; Collins *v.* Sullivan, 135 Mass. 461; Dougan *v.* Bemis, 95 Minn. 220; Largey *v.* Leggat, 30 Mont. 148; Nestal *v.* Schmid, 29 N. J. Eq. 458; Wallace *v.* Brown, 10 N. J. Eq. 308; Wheeler *v.* Hall, 54 App. Div. (N. Y.) 49; Lancaster Trust Co. *v.* Long, 220 Pa. St. 499; Whiting *v.* Dyer, 21 R. I. 278; Nash *v.* Jones, 41 W. Va. 769. See also Lyons *v.* Bass, 108 Ga. 573.

These decisions seem not to have been intended to impeach the doctrine, that one holding a fiduciary relation to another will be a constructive trustee for the latter as to all property which his duty as fiduciary requires that he should acquire for him. They must be taken as holding no more than that the mere parol agreement to buy for another does not create such a relation of trust and confidence that equity should interfere to do justice in case of a breach of the agreement. Probably all courts would agree that if the purchaser is clearly shown to be an agent and his duty as agent required him to purchase for his principal, he would be a constructive trustee. Roby *v.* Colehour, 135 Ill. 300; Hughes *v.* Willson, 128 Ind. 491; Ellis *v.* Allen, 99 Wis. 598; Seacoast R. Co. *v.* Wood, 65 N. J. Eq. 530; Holmes *v.* Holmes, 106 Ga. 858; Sherman *v.* Herr, 220 Pa. St. 420.

If it is shown that the parol agreement has given the alleged trustee a material advantage enabling him to acquire the property at a smaller price, some courts seem inclined to declare him a construc-

§ 207. The directors of corporations are trustees and agents of the shareholders and of the corporation, and the same rules

tive trustee, when they would not do so on proof of the parol agreement only. See Scribner *v.* Meade, 10 Ariz. 143; Largey *v.* Leggat, 30 Mont. 148; Woodfin *v.* Marks, 104 Tenn. 512.

There is considerable authority for the view that a parol agreement to purchase for another creates an agency notwithstanding the statute of frauds, and that the unfaithful agent will be declared a constructive trustee if he purchases on his own account. Koyer *v.* Willmon, 150 Cal. 785; Chastain *v.* Smith, 30 Ga. 96; Rose *v.* Hayden, 35 Kan. 106; Johnson *v.* Hayward, 74 Neb. 157, 5 L. R. A. (N. S.) 112; Morris *v.* Reigel, 19 S. D. 26; Halsell *v.* Wise County Coal Co., 19 Tex. Civ. App. 564. In England the case of Bartlett *v.* Pickersgill, 1 Eden, 515, 4 East, 577, was for a long time considered as having settled the law on this point against a constructive trust, but in a dictum in Heard *v.* Pilley, 4 Ch. 548, it was declared that Bartlett *v.* Pickersgill could not be considered law in England. In another dictum in the later case of James *v.* Smith, [1891] 1 Ch. 384, the doctrine of Bartlett *v.* Pickersgill was stated to be good law notwithstanding Heard *v.* Pilley. In a still later case, Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196, it was held that the doctrine of Bartlett *v.* Pickersgill was no longer law in England and that the dictum in James *v.* Smith was not a correct statement of the law. The facts of Rochefoucauld *v.* Boustead did not raise the precise point under discussion, since the arrangement which was held to create a fiduciary relation was between the mortgagor of property and a third person who had been delegated to buy in the property at a foreclosure sale upon the understanding that he would hold the title as security merely for what he paid.

Where the title has been acquired by purchase at foreclosure sale or a sale on execution after an oral agreement with the owner of the property to bid it in for him, most courts seem to agree that the purchaser will be charged with a constructive trust, if necessary, subject to his right to reimbursement for what he has paid out. Waller *v.* Jones, 107 Ala. 331; Holmes *v.* Holmes, 106 Ga. 858; Collins *v.* Williamson, 94 Ga. 635; Pope *v.* Dapray, 167 Ill. 478; Carr *v.* Craig, 138 Iowa, 526; Parker *v.* Catron, 120 Ky. 145; Griffin *v.* Schlenk, 102 S. W. 837 (Ky. 1907); Carter *v.* Dotson, 92 S. W. 600 (Ky. 1906); Phillips *v.* Hardenburg, 181 Mo. 463; Dickson *v.* Stewart, 71 Neb. 424; Ryan *v.* Dox, 34 N. Y. 307; Davis *v.* Kerr, 141 N. C. 11; Hinton *v.* Pritchard, 107 N. C. 128; Coleman *v.* McKee, 24 R. I. 596; Woodfin *v.* Marks, 104 Tenn. 512; Chadwick *v.* Arnold, 34 Utah, 48; Frost *v.* Perfield, 44 Wash. 185; Ellis *v.* Allen, 99 Wis. 598; Cutler *v.* Babcock, 81 Wis. 195; Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196. See Eisert *v.* Bowen, 102 N. Y. S. 707, 117 App. Div. 488; Avery *v.* Stewart, 136 N. C. 426. But the contrary view has been taken in Massachu-

are applied to the contracts of directors with the corporation as are applied to the dealings of other parties holding a fiduciary

setts. Bourke *v.* Callanan, 160 Mass. 195.

In some of these cases additional facts made the equity stronger, as where the purchaser was enabled to obtain a better bargain because of his understanding with the owner, Coleman *v.* McKee, 24 R. I. 596; Phillips *v.* Hardenburg, 181 Mo. 463; Avery *v.* Stewart, 136 N. C. 426; or where the purchaser occupied a position of trust and confidence apart from that raised by the oral agreement. Frost *v.* Perfield, 44 Wash. 185 (lessor); Carter *v.* Dotson, 92 S. W. 600 (Ky. 1906) (son-in-law); Griffin *v.* Schlenk, 102 S. W. 837 (Ky. 1907) (a co-owner); Eisert *v.* Bowen, 117 N. Y. App. Div. 488, 102 N. Y. S. 707. In Avery *v.* Stewart, 136 N. C. 426, at p. 442, it is said: "The mere non-performance of a beneficial parol agreement is not such fraud or bad faith as will induce a court of equity to compel performance. There must be a salutary and proper limitation of the doctrine of parol trusts, and it will be found, we think, in confining the equity to enforce trusts arising out of parol agreements to transactions involving some element of fraud or bad faith apart from the mere breach of the agreement itself, which makes it inequitable that the vendee should hold the legal title absolutely or discharged of any trust. In this case it is apparent that the defendant would never have acquired the legal title to the land if the plaintiff had not requested him to advance the money and take the title in trust for him, and if he had not solemnly promised to do so. If he had declined, the plaintiff no doubt would have made other arrangements to secure the title for himself."

Where the purchase is at a sale on execution or on foreclosure of a mortgage, it has been suggested that a purchaser who buys with the understanding that he will hold the title merely as security for what he pays, is in the same position as a person taking an absolute conveyance directly from the title holder with a parol defeasance, since a sheriff's sale or a mortgagee's sale is, in the eye of the law, a transfer by the debtor or mortgagor. Dickson *v.* Stewart, 71 Neb. 424; Stafford *v.* Stafford, 29 Tex. Civ. App. 73.

Where one has purchased property with his own funds under a parol agreement to hold the title for another until he is reimbursed, a resulting, rather than a constructive, trust arises, since the funds used in such a case are really lent to the *cestui* and are his at the time of the purchase. If this was the situation at the time the property was bought, the title holder cannot subsequently change it by repudiating his parol agreement, even in those jurisdictions where he would not be held to be a constructive trustee because of his agency. See dissenting opinion in Bourke *v.* Callanan, 160 Mass. 195; Miller *v.* Miller, 101 Md. 600; Herlihy *v.* Coney, 99 Me. 469; Towle *v.* Wadsworth, 147 Ill. 80; Dooly *v.* Pinson, 39 So. 664 (Ala.).

When the person who has orally agreed to purchase for another uses the latter's funds or other

relation to each other.[1] (*a*) The directors are intrusted with the management of the property of the corporation for the best interests of all the members, and the directors are bound to execute their trust; nor must they allow their private interests to interfere with the duties of the trust that they have assumed, nor assume a position tending to produce a conflict between their private interests and the discharge of their fiduciary duties.[2] It is said that the contracts of trustees are

[1] Gaskell *v.* Chambers, 26 Beav. 360; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586; *Ex parte* Bennett, 18 Beav. 339; Cumberland Coal Co. *v.* Hoffman Steam Coal Co., 18 Md. 456; Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; 25 Md. 117; Aberdeen R. Co. *v.* Blaikie, 1 McQueen, 461; Michoud *v.* Girod, 4 How. 544; Hodges *v.* New Eng. Screw Co., 1 R. I. 321; York & North Midland R. Co. *v.* Hudson, 16 Beav. 485; 19 Eng. L. & Eq. 365; Benson *v.* Heathorne, 6 Y. & C. C. C. 326; Verplanck *v.* Ins. Co., 1 Edw. Ch. 84; Percy *v.* Milladon, 3 La. 568; Robinson *v.* Smith, 3 Paige, 222; Murray *v.* Vanderbilt, 39 Barb. 237; Flint, &c. R. R. Co. *v.* Dewey, 14 Mich. 477; European & N. Am. Railw. Co. *v.* Poor, 59 Maine, 277; Scott *v.* Depeyster, 1 Edw. Ch. 513; Butts *v.* Wood, 38 Barb. 188; Ashurst's App., 60 Pa. St. 290; Drury *v.* Cross, 7 Wall. 299; Sawyer *v.* Hoag, 17 Wall. 610; Land Credit Co. *v.* Fermoy, L. R. 8 Eq. 12; Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 503.

[2] It is a breach of trust for railroad directors to assume inconsistent obligations by becoming members of a company with whom they have made a contract to build and equip their road; and in such case no ques-

property in payment, all courts would raise a constructive trust, if the circumstances did not cause a trust to result. Sanford *v.* Hamner, 115 Ala. 406; Gashe *v.* Young, 51 Ohio St. 376; Boswell *v.* Cunningham, 32 Fla. 277; Lee *v.* Patten, 34 Fla. 149.

(*a*) Promoters of a corporation cannot rightfully gain any advantage over other members and are liable for profits received by them in violating their duty. Fountain Spring Park Co. *v.* Roberts, 92 Wis. 345, 347; Old Dominion, etc., Co. *v.* Bigelow, 203 Mass. 159; see Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101; 35 Am. L., Reg. N. S. 713. Where a person who was promotor and president of a corporation agreed with the other members to purchase a site for its plant with money to be treated as a payment on his subscription to its stock, and after making such payment, and secretly taking the deed in his own name, constructed the plant with corporate funds, leading the other members to suppose that the corporation owned the land, he was held to be a constructive trustee *ex maleficio* of the land for the corporation's benefit. Nester *v.* Gross, 66 Minn. 371. See *supra*, § 178.

of two classes. One class consists of contracts made by trustees with themselves, or with a board of trustees or directors of which they are members. These contracts are void from the fact that no man can contract with himself. If, therefore, a board of directors should convey all the property of a corporation to themselves, the conveyance would be void, without any inquiry into its fairness, or whether it was beneficial to the corporation or not. And the same rule applies if a board of directors convey the property of a corporation, or any part of it, to one of their number, he being one of the trustees negotiating a contract with himself.[1] And the same rule was applied where the trustees of one corporation, being the trustees of another corporation, conveyed the property of the one corporation to another, although there was a decree of court.[2] The other class of contracts is where a trustee contracts with the *cestui que trust*, or a third person. These contracts are not void; as where a director makes a purchase of property from the corporation itself, acting independently of its directors, the contract is not void; but the same rules apply, that apply to other trustees purchasing of the *cestui que trust:* the burden is upon the trustee to vindicate the transaction from all suspicion.[3] And so all advantages, all purchases, all sales, and all sums of money received by directors in dealing with the prop-

tion will be allowed to be raised as to the fairness of the transaction, and no injury to the *cestui que trust* need be proved. Gilman C. & S. R. R. Co. *v.* Kelly, 77 Ill. 426. But where stockholders sanction a contract under which directors loan money to the corporation, and its bonds secured by mortgage are given, if the money is properly applied, the corporation is estopped from setting up that the bonds and mortgage are void by reason of the trust relations which directors sustain to it. Hotel Co. *v.* Wade, 97 U. S. 75. A director who receives paid-up shares from the promoters of the corporation for acting as director will hold as trustee, and may be required to pay the highest value of the shares at the election of the company. Nant-y-Glo & Blaina Iron Works Co. *v.* Grave, L. R. 12 Ch. 738.

[1] Cumberland Coal Co. *v.* Sherman, 30 Barb. 563; Ogden *v.* Murray 39 N. Y. 202; Bliss *v.* Matteson, 45 N. Y. 22; Buffalo, &c. R. R. Co. *v.* Lampson, 47 Barb. 533; Imperial Mer. Cred. Ass'n *v.* Coleman, L. R. 6 Ch. 565.

[2] St. James Church *v.* Church of the Redeemer, 45 Barb. 356.

[3] Ibid.; Beeson *v.* Beeson, 9 Penn. St. 280.

erty of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys, or advantages received by them by reason of their position as trustees.[1] (*a*)

§ 208. Again, if the parents, relations, agents, or friends of young persons hold out inducements of marriage by representing the amount of property that will come to one or the other of the parties; or if they hold out pecuniary considerations to induce the marriage, and if the marriage and a marriage settlement take place upon the faith of such representations and inducements, the persons making them will be bound to make them good: if the persons making the representations and holding out the inducements have the property referred to in their hands or under their control, a court of equity will construe them into trustees of such property for the parties to whom the inducements were held out; and the court will compel them to execute the trust by making good the representations or inducements, if they are of such a character that a party entering into a marriage might reasonably have relied upon them.[2] If, however, a person states his intention to confer property upon one of the parties to a marriage, as that he has made his will giving a certain estate to one of the parties, and that he does not know any reason, or have any intention of altering it, but

[1] Gaskell *v.* Chambers, 26 Beav. 360; Bowers *v.* City of Toronto, 11 Moore, P. C. Cas. 463; *Ex parte* Hill, 32 L. J. Ch. 154.

[2] Hamersley *v.* De Biel, 12 Cl. & Fin. 45; Downes *v.* Jennings, 32 Beav. 290; Hunt *v.* Mathews, 1 Vern. 408; Walford *v.* Gray, 11 Jur. (N. S.) 106, 403; Jordan *v.* Money, 5 H. L. Cas. 185; 8 Jur. (N. S.) 281; Caton *v.* Caton, L. R. 2 H. L. 127; Coverdale *v.* Eastwood, L. R. 15 Eq. 122; Saunders *v.* Cramer, 3 Dr. & War. 87; Moorhouse *v.* Calvin, 15 Beav. 341; Laver *v.* Fielder, 32 Beav. 1; 1 Story's Eq. Jur. §§ 268–272.

(*a*) Directors, or other officers of a corporation, who acquire an interest in property which is adverse to the interests of the corporation in the same property may be required to hold such interest in trust for the benefit of the corporation, subject to reimbursement for their actual outlay. Lagarde *v.* Anniston Co., 126 Ala. 496; Northwestern Land Assoc. *v.* Grady, 137 Ala. 219.

at the same time refuses to make any contract or agreement, or to be bound in any way not to alter his will, equity will not compel the execution of such a representation or intention; and the estate named cannot be affected by a constructive trust in favor of the party to the marriage, in case the will is afterwards altered, and the estate is given to some other person.[1]

§ 209. These rules apply to every kind of fiduciary relation. The principle is the same in all of them. Assignees of bankrupt or insolvent estates are subject to the same rules, whether they are appointed by courts and by operation of law, or by voluntary assignments, or by deeds of trust for creditors.[2] So the solicitors of a bankrupt cannot purchase his property. Committees or guardians of a lunatic cannot obtain the ownership of the property,[3] nor can the directors, trustees, or governors of a charity so deal with the funds of the charity, or take leases of the charity lands, as to make a profit to themselves.[4] And so of partners and joint contractors, or purchasers and receivers. In all these cases the fiduciary must account for all the trust property that comes to his hands, whether by purchase or otherwise, and for all profits which may come to him by dealing with such property, and even for all bonuses or gratuities given to him by strangers for contracts made with them in relation to the trust property.[5] For example, a bank officer cannot

[1] Maunsell *v.* Hedges, 4 H. L. Cas. 1039; 1 Lead. Cas. Eq. 782; Kay *v.* Crook, 3 Sm. & Gif. 407; Stroughill *v.* Gulliver, 2 Jur. (N. S.) 700; Randall *v.* Morgan, 12 Ves. 67; De Biel *v.* Thompson, 3 Beav. 469, 475; 1 Jon. & La. 539, 569.

[2] *Ex parte* Hughes, 6 Ves. 617; Morse *v.* Royal, 12 Ves. 372; *Ex parte* Morgan, id. 6; *Ex parte* Lacey, 6 Ves. 625; *Ex parte* Reynolds, 5 Ves. 705; *Ex parte* Bennett, 10 Ves. 381; Campbell *v.* McLain, 23 Leg. Intel. 26, Phila.; Fisk *v.* Sarber, 6 W. & S. 18; Beeson *v.* Beeson, 9 Barr, 284; Dorsey *v.* Dorsey, 3 H. & J. 410; Chapin *v.* Weed, 1 Clark, 264; Saltmarsh *v.* Beene, 4 Porter, 283; Harrison *v.* Mocks, 10 Ala. 185; Wade *v.* Harper, 3 Yerg. 383.

[3] Wright *v.* Proud, 13 Ves. 136; Campbell *v.* McLain, 51 Penn. St. 200.

[4] Att. Gen. *v.* Clarendon, 17 Ves. 500.

[5] Bailey *v.* Watkins, Sug. Law of Prop. 726; Parshall's App., 65 Penn. St. 233; Swissholm's App., 56 id. 475; King *v.* Wise, 43 Cal. 628; Carr *v.*

make a profit for himself by loaning the bank's money, but will have to bear all losses arising from the attempt.[1] Whenever two persons stand in such relation that confidence is necessarily reposed by one, and the influence growing out of that fact is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage.[2] Trustees cannot use their relations to the trust property for their personal advantage.[3]

§ 210. But equity goes even further than this. It not only watches over these defined relations of parties, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance, and confidential advice.[4] It is well known that habits of kindness, confidence, and trust grow between neighbors and friends; and if advantage is taken of such relations to obtain an unfair bargain, equity will set it aside or convert the offending party into a trustee.[5] Of course no rules can be laid down by which to judge all such cases; for every case must of necessity depend upon its own facts.[6] Nor will a gift or sale be set aside merely because it is to a confidential friend or adviser, even though it is made by an old and infirm person, or by one of weak mind; but if there is any proof of any superadded concealment, misrepresentation, or contrivance, or any art by which the party was thrown off his guard, or unduly influenced by his trust and confidence in, or partiality for a supposed

Houser, 46 Ga. 477. [See Frohlich *v.* Seacord, 180 Ill. 85. But see Heckscher *v.* Blanton, 66 S. E. 859 (Va. 1910).]

[1] Oakland Bank of Savings *v.* Wilcox, 60 Cal. 126. See also Dowling *v.* Feeley, 72 Ga. 557.

[2] Bohm *v.* Bohm, 9 Col. 100.

[3] Ellicott *v.* Chamberlin, 38 N. J. Eq. 604.

[4] Hunter *v.* Atkins, 3 M. & K. 140; James *v.* Holmes, 8 Jur. (N. S.) 553, 732; Falk *v.* Turner, 101 Mass. 194.

[5] Ibid.; Dent *v.* Bennett, 4 M. & Cr. 277; Smith *v.* Kay, 7 H. L. Cas. 750.

[6] Hunter *v.* Atkins, 3 M. & K. 140.

friend, equity will interpose and correct the wrong.[1] Dealings of ship-owners with their masters,[2] of parishioners with their clergymen,[3] of medical advisers with their patients,[4] of friends and neighbors who by their suitation and habits of intercourse have obtained the confidence of each other,[5] and of a man and woman living together as husband and wife,[6] come within this rule. And so the relation of landlord and tenant, partner and partner, principal and surety, and tenants in common (*a*) may create such influences of trust and confidence that courts of equity will construe a trust to arise out of their contracts, or will decree such contracts to be set aside.[7]

§ 211. So property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as

[1] Dent *v.* Bennett, 7 Sim. 539; 4 M. & C. 269; Huguenin *v.* Baseley, 14 Ves. 273; Gibson *v.* Russell, 2 N. C. C. 104; Griffiths *v.* Robins, 3 Madd. 191; Popham *v.* Brooke, 5 Russ. 8; Maul *v.* Reder, 51 Penn. St. 377; Lengenfitter *v.* Ritching, 58 Penn. St. 487.

[2] Shallcross *v.* Oldham, 2 John. & H. 609.

[3] Greenfield's Estate, 24 Penn. St. 232; Scott *v.* Thompson, 21 Iowa, 599.

[4] Pratt *v.* Barker, 1 Sim. 1; 4 Russ. 507; Crisspell *v.* Dubois, 4 Barb. 393; Billing *v.* Southee, 10 Eng. L. & Eq. 37.

[5] Hunter *v.* Atkins, 3 M. & K. 113; Greenfield's Estate, 14 Penn. St. 489; Cooke *v.* Lamotte, 15 Beav. 234; Smith *v.* Kay, 7 H. L. Cas. 750.

[6] James *v.* Holmes, 9 Jur. (N. S.) 553, 732; 4 De G., F. & J. 470.

[7] Maddeford *v.* Austwick, 1 Sim. 89; Farnham *v.* Brooks, 9 Pick. 212; Oliver *v.* Court, 8 Price, 127; Griffiths *v.* Robins, 3 Madd. 191; People *v.* Jansen, 7 Johns. 332; 2 Johns. 554; Dawson *v.* Lawes, Kay, 280; Campbell *v.* Moulton, 30 Vt. 667; Boultbee *v.* Stubbs, 18 Ves. 23; *Ex parte* Rushforth, 10 Ves. 409; Hayes *v.* Ward, 4 Johns. Ch. 123; Mayhew *v.* Crickett 2 Swanst. 186; Keller *v.* Auble, 58 Penn. St. 412; Duff *v.* Wilson, 72 id. 442; Mandeville *v.* Solomon, 33 Cal. 38.

(*a*) Tanney *v.* Tanney, 159 Pa. St. 277; Van Wagenen *v.* Carpenter, 27 Colo. 444; Turner *v.* Sawyer, 150 U. S. 578; Va. Coal Co. *v.* Kelly, 93 Va. 332; Brundy *v.* Mayfield, 15 Mont. 201; Parker *v.* Brast, 45 W. Va. 399; Barbour *v.* Johnson, 21 D. C. 40.

Lord Ch. Justice Wilmot said, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." [1] This principle of course cannot prevail against a purchaser in good faith for a valuable consideration, and without notice of any fraudulent influence.

§ 212. So a contract intended to defraud third persons, who are not parties to it, will be set aside, or a trust will be declared for such third persons.[2] Thus, if property is conveyed by a debtor for the purpose of defrauding his creditors, the conveyance is void at law, and in some cases equity will construe it to create a trust for the creditors.[3] And so if in an arrangement and composition of creditors with the debtor, one of them secretly obtains an extra advantage for executing the composition deed, he will be converted into a trustee by reason of the fraud, and the agreement will be null and void.[4] Again, a transfer in fraud of a wife, it being intended to prevent her from obtaining alimony, might raise a constructive trust in favor of the wife.[5] In this connection it must be noted that on the same facts there is a decided difference as to the manner in

[1] Bridgman *v.* Green, 2 Ves. 627; Wilm. 58, 64; Luttrell *v.* Olmius, cited 11 Ves. 638; 14 Ves. 290; Huguenin *v.* Baseley, id. 289; Graves *v.* Spier, 58 Barb. 349; Newton *v.* Porter, 5 Lans. 417. But see Dixon *v.* Caldwell, 15 Ohio, 412.

[2] See § 171.

[3] Loomis *v.* Lift, 16 Barb. 543; Jones *v.* Reeder, 22 Ind. 111. See 1 Story's Eq. Jur. §§ 350-381; Buck *v.* Voreis, 89 Ind. 116.

[4] Chesterfield *v.* Janssen, 2 Ves. 156; 15 Ves. 52; Mann *v.* Darlington, 15 Penn. St. 310; Case *v.* Gerrish, 15 Pick. 50; Ramsdell *v.* Edgarton, 8 Met. 227; Lothrop *v.* King, 8 Cush. 382; Partridge *v.* Messer, 14 Gray, 180; Kahn *v.* Gunherts, 9 Ind. 430; Spooner *v.* Whiston, 8 Moore, 580, Mallalieu *v.* Hodgson, 16 Ad. & El. N. R. 689-715; Turner *v.* Hoole, Dowl. & Ry. N. P. 27; Smith *v.* Cuff, 6 M. & S. 160; Horton *v.* Riley, 11 M. & W. 492; Alsager *v.* Spalding, 6 Scott, 204; Arnold 181; 4 Bing. N. C. 407; Leicester *v.* Rose, 4 East, 380; Howden *v.* Haight, 11 Ad. & El. 1038; Fawcett *v.* Gee, 3 Anst. 910; Breck *v.* Cole, 4 Sandf. 83; Knight *v.* Hunt, 5 Bing. 433; Bliss *v.* Mattheson, 45 N. Y. 42.

[5] Tyler *v.* Tyler, 25 Brad. Ill. 333, 126 Ill. 525. [See also Nichols *v.* Nichols, 61 Vt. 426.]

which equity will treat persons standing in differing relations to those facts. In favor of the person defrauded a trust will be raised by law, but in favor of the fraudulent grantor none; (*a*) although if there is an *express* trust in favor of the grantor, the trustee will not be excused from performance by showing that the transaction was a fraud on some third person.[1]

§ 213. If a man or woman on the point of marriage privately convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust, or subject to the rights of the defrauded husband or wife.[2] But

[1] Ibid.; Fast *v.* McPherson, 98 Ill. 496. [Ownes *v.* Ownes, 23 N. J. Eq. 60.]

[2] Hunt *v.* Mathews, 1 Vern. 408; England *v.* Downes, 2 Beav. 522; Ball *v.* Montgomery, 2 Ves. Jr. 191; Strathmore *v.* Bowes, 2 Bro. Ch. 345; 2 Cox, 485; 1 Ves. Jr. 22; Goddard *v.* Snow, 1 Russ. 485; Tucker *v.* Andrews, 13 Maine, 124; Waller *v.* Armistead, 2 Leigh, 11; Logan *v.* Simmons, 3 Ired. Eq. 487; Terry *v.* Hopkins, 1 Hill, Eq. 1; Duncan's App., 43 Pa. St. 68;

(*a*) Springfield Homestead Ass'n *v.* Roll, 137 Ill. 205; Brown *v.* Brown, 66 Conn. 493. As a general rule equity will not declare a trust in favor of a grantor who needs to allege his own fraudulent purpose in order to establish the basis for a constructive or resulting trust. Derry *v.* Fielder, 216 Mo. 177. See 18 Harv. Law Rev. 547; Monahan *v.* Monahan, 77 Vt. 133. Where one conveys to another or takes a conveyance in another's name upon a secret trust for the fraudulent purpose of putting his property beyond the reach of his creditors, equity will give him no assistance in enforcing the trust. Springfield Homestead Ass'n *v.* Roll, 137 Ill. 205; Moore *v.* Horsley, 156 Ill. 36; Heinz *v.* White, 105 Ala. 670. See Barber *v.* Barber, 146 Ind. 390; Chantler *v.* Hubbell, 34 Wash. 211. But a constructive or resulting trust will be declared in behalf of his creditors to the extent that the property is needed for the payment of their demands. If, however, the debtor has other property which the creditors can reach and apply to the satisfaction of their demands it has been held that they must exhaust that first. Gilbert *v.* Stockman, 81 Wis. 602. If the holder of the title chooses to carry out the secret trust voluntarily notwithstanding his defence, the court will not prevent him from doing so, and his own creditors have no right to object. Polley *v.* Johnson, 52 Kan. 478; Yardley *v.* Sibbs, 84 Fed. 531;

such conveyance is not void at law unless there is an actual fraud.[1] Nor will such conveyance be avoided, if made for a good consideration;[2] or for a valuable consideration;[3] or with the knowledge or concurrence of the other party, although an infant;[4] and the party alleging fraud must prove it to the satisfaction of the court.[5] For the same reasons a conveyance by a husband during the pendency of a divorce suit on the part of his wife, in order to avoid the payment of alimony, will be held to be fraudulent and void.[6] If an intended husband has no knowledge of the particular property conveyed, and the negotiations for the marriage have no reference to that particular

Wrigley *v.* Swainson, 3 De G. & Sm. 458; Manes *v.* Durant, 2 Rich. Eq. 404; McAfee *v.* Ferguson, 9 Mon. 495; Linker *v.* Smith, 4 Wash. 224; Ramsay *v.* Joyce, 1 McMull. Eq. 237; Williams *v.* Carle, 2 Stockt. Ch. 543; Lewellin *v.* Cobbald, 1 Sm. & Gif. 376; Cheshire *v.* Payne, 16 B. Mon. 618; Carleton *v.* Dorset, 2 Vern. 17; 2 Cox, 63; McDonnell *v.* Hesilridge, 16 Beav. 346; Howard *v.* Hooker, 2 Ch. R. 81; St. George *v.* Wake, 1 M. & K. 622; Taylor *v.* Pugh, 1 Hare, 608; Ashton *v.* McDougall, 5 Beav. 56; Griggs *v.* Staples, 2 De G. & Sm. 572; Smith *v.* Smith, 2 Halst. Ch. 515; Petty *v.* Petty, 4 B. Mon. 215; Belt *v.* Ferguson, 3 Grant, 289. [Murray *v.* Murray, 90 Ky. 1; Beere *v.* Beere, 79 Iowa, 555; Nichols *v.* Nichols, 61 Vt. 426; Collins *v.* Collins, 98 Md. 473.]

[1] Richards *v.* Lewis, 11 C. B. 1035; Logan *v.* Simmons, 1 Dev. & Bat. Law, 13. [Murray *v.* Murray, 90 Ky. 1; Kinne *v.* Webb, 54 Fed. 34, 39; Alkire *v.* Alkire, 134 Ind. 350; Dudley *v.* Dudley, 76 Wis. 567; Bliss *v.* West, 58 Hun, 71; Nichols *v.* Nichols, 61 Vt. 426. But see Ferebee *v.* Pritchard, 112 N. C. 83.]

[2] De Manville *v.* Crompton, 1 V. & B. 354; England *v.* Downes, 2 Beav. 522; Smith *v.* Smith, 2 Halst. Ch. 515; Tucker *v.* Andrews, 13 Me. 124; Manes *v.* Durant, 2 Rich. Eq. 404; Terry *v.* Hopkins, 1 Hill, Eq. 1; Hunt *v.* Mathews, 1 Vern. 408; King *v.* Cotton, 2 P. Wms. 674; Mos. 259. [But see Nichols *v.* Nichols, 61 Vt. 426.]

[3] Blanchet *v.* Foster, 2 Ves. 264. But if the consideration is fraudulently stated in the deed, it will make the conveyance fraudulent. Lewellin *v.* Cobbald, 1 Sm. & Gif. 376.

[4] St. George *v.* Wake, 1 M. & K. 610; McClure *v.* Miller, 1 Bail. Eq. 108; Knottman *v.* Peyton, 1 Speer's Eq. 46; Terry *v.* Hopkins, 1 Hill, Eq. 1; Cheshire *v.* Payne, 16 B. Mon. 618; Fletcher *v.* Ashley, 6 Grat. 332; Slocombe *v.* Glubb, 2 Bro. Ch. 545.

[5] St. George *v.* Wake, 1 M. & K. 610; England *v.* Downes, 2 Beav. 522.

[6] Blenkinsop *v.* Blenkinsop, 1 De G., M. & G. 495; Krupp *v.* Scholl, 10 Penn. St. 193. [Tyler *v.* Tyler, 126 Ill. 525.]

property, its conveyance is not fraudulent, unless it was actually intended as a fraud upon him,[1] and so there must be an intent to defraud the individual who is afterwards married; for if a deed is made to defraud another individual who is not married, but a marriage afterwards takes place with a person, not in contemplation at the time, there is no fraud.[2] If no notice of the conveyance is shown to have been given, it will be presumed that no notice was had;[3] and it is always a question of fact upon the whole transaction whether the conveyance is fraudulent.[4] If, however, the property is of that character that the husband could obtain no right over it by the marriage, the conveyance of it by the wife before marriage cannot be set aside.[5] In all ante-nuptial contracts there must be the utmost good faith between the parties, and a grossly disproportionate settlement may be evidence of a fraudulent concealment.[6] (*a*)

[1] Thomas *v.* Williams, Mos. 177; DeManville *v.* Crompton, 1 V. & B. 354; St. George *v.* Wake, 1 M. & K. 622; and see Goddard *v.* Snow, 1 Russ. 485.

[2] Strathmore *v.* Bowes, 1 Ves. Jr. 22; 2 Bro. Ch. 345; 2 Cox 28; 6 Bro. P. C. 427; 1 Lead. Cas. Eq. 325; England *v.* Downes, 2 Beav. 522; Cheshire *v.* Payne, 16 B. Mon. 618; Wilson *v.* Daniel, 13 B. Mon. 351.

[3] Cole *v.* O'Neill, 3 Md. 174; Wrigley *v.* Swainson, 3 De G. & Sm. 458.

[4] Ibid.

[5] Ibid. Whether the deed on record is notice or not, is a question. Cole *v.* O'Neill, 3 Md. 174.

[6] Kline's Est., 64 Penn. St. 122.

(*a*) A wife's expectancy of a share of her husband's property after death which the law gives her in addition to her right of dower will be protected against transfers by the husband *for the purpose* of depriving her of her share. Nichols *v.* Nichols, 61 Vt. 426; Brownell *v.* Briggs, 173 Mass. 529. But see Lines *v.* Lines, 142 Pa. St. 149; Seaman *v.* Harmon, 192 Mass. 5; Kelley *v.* Snow, 185 Mass. 288. The mere transfer without consideration, however, is not enough; the fraudulent intent must be made clear to the court. See Nichols *v.* Nichols, 61 Vt. 426.

It has been held that a purchaser's taking title in the name of a third person for the purpose of preventing his wife from acquiring dower rights, is fraudulent. Derry *v.* Fielder, 216 Mo. 177. But the better opinion is that such a purpose does not render the transaction fraudulent, since the wife had no dower rights in the purchase money and the husband was under no

§ 214. There are certain purposes for which neither express law nor public policy will allow parties to contract; thus, the law will not permit contracts for the procuring of marriages,[1] or of public offices,[2] or of legislation,[3] or of illicit cohabitation.[4] If, therefore, such contracts are entered into, equity will enjoin their performance.[5] And the party creating the interest, although *in pari delicto*, may apply for an injunction. In such cases, the person applying must return any benefit that he may have received.[6] Such contracts are equally void at law, and if the parties are *in pari delicto*, the law will leave them where it finds them. If one party has advanced money upon an immoral or illegal contract, the law will give him no aid to recover it back. But equity will sometimes fasten a trust upon the conscience of the party who has received money or property under such contracts, and compel him to repay or reconvey it,[7] especially if the illegal purpose fails.[8]

[1] Drury *v.* Hook, 1 Vern. 412; Cole *v.* Gibson, 1 Ves. 507; Debenham *v.* Ox, id. 277; Smith *v.* Aykwell, 3 Atk. 566; Smith *v.* Bruning, 2 Vern. 392; Williamson *v.* Gihon, 2 Sch. & L. 357; Roberts *v.* Roberts, 3 P. Wms. 76.

[2] Hartwell *v.* Hartwell, 4 Ves. 811; Morris *v.* McCulloch, Amb. 432; 2 Eden, 190; Writhingham *v.* Burgoyne, 2 Anst. 900; Harrington *v.* Duchattel, 1 Bro. Ch. 124.

[3] Robinson *v.* Cox, 9 Mod. 263; Walker *v.* Perkins, 3 Burr. 1568; 1 Bla. 517; Rex *v.* Inhabitants of Northwingfield, 1 B. & Ad. 912; Winebrinner *v.* Weiseger, 3 Monr. 35; Travinger *v.* McBurney, 5 Cow. 253; Cusack *v.* White, 3 Const. Ct. R. 284; Fuller *v.* Dame, 18 Pick. 472; Pingry *v.* Washburn, 1 Aiken, 264; Grolick *v.* Ward, 5 Halst. 87; Wood *v.* McCann, 6 Dana, 366; Clippinger *v.* Hipbaugh, 3 W. & S. 315; Harris *v.* Roop, 10 Barb. 489; Sedgwick *v.* Stanton, 4 Kern. 289; Frost *v.* Belmont, 6 Allen, 152.

[4] Marshall *v.* Baltimore & Ohio Railw., 16 How. 153.

[5] Robinson *v.* Gee, 1 Ves. 251; Gray *v.* Mathias, 5 Ves. 286; Franco *v.* Bolton, 3 Ves. 370.

[6] St. John *v.* St. John, 11 Ves. 535; Reynell *v.* Sprye, 1 De G., M. & G. 660.

[7] Smith *v.* Bruning, 2 Vern. 302; Morris *v.* McCulloch, Amb. 432; Ownes *v.* Ownes, 23 N. J. Eq. 60.

[8] Symes *v.* Hughes, L. R. 9 Eq. 475.

obligation to her to purchase land. Seaman *v.* Harmon, 192 Mass. 5; Phelps *v.* Phelps, 143 N. Y. 197; Nichols *v.* Park, 79 N. Y. S. 547; 78 App. Div. 95.

§ 215. If at a sale of an estate of a debtor upon execution, any one announces, for the purpose of preventing competition, that he is bidding or purchasing for the debtor;[1] or if, upon the sale of the property of a deceased person, a bidder announces that he is purchasing for the benefit of children or heirs, or if at a mortgagee's sale a person announces that he is purchasing for the mortgagor, and thus prevents competition, the purchaser will be held to be a trustee for the benefit of the parties interested in the property.[2] So if any one professing to act for another purchases for himself, he will be held as a trustee.[3] But in such cases there must be some proof of fraud and deceit practised by the purchaser; the mere breach of a parol agreement will not create a constructive trust in such cases;[4] and if the conduct of the purchaser is not fraudulent and produces no injury, a trust is not raised.[5] If the parties for whom the purchaser pretends to buy have no interest in the property, they cannot establish a trust.[6]

[1] Kinard *v.* Hiers, 2 Rich. Eq. 423; Lloyd *v.* Currin, 3 Humph. 462; Seichrist's App., 66 Penn. St. 237; Miller *v.* Antle, 2 Bush, 407; Brannin *v.* Brannin, 18 N. J. Ch. 282; Crutcher *v.* Hord, 4 Bush, 360; Roach *v.* Hudson, 8 Bush, 410; Brown *v.* Lynch, 1 Paige, 147; Tankard *v.* Tankard, 84 N. C. 286.

[2] Brown *v.* Dysinger, 1 Rawle, 408; Kellum *v.* Smith, 9 Casey, 158; Sheriff *v.* Neal, 6 Watts, 534; Sharp *v.* Long, 4 Casey, 443; Morey *v.* Herrick, 6 Harris, 123; Williard *v.* Williard, 6 P. F. Smith, 119; Robertson *v.* Robertson, 9 Watts, 32; Plumer *v.* Reed, 2 Wright, 46; Beegle *v.* Wentz, 73 Penn. St. 369; Kisler *v.* Kisler, 2 Watts, 323; McCaskey *v.* Graff, 11 Harris, 321; Abbey *v.* Dewey, 1 Casey, 114; McRarey *v.* Huff, 32 Ga. 681; Ryan *v.* Dox, 34 N. Y. 307; Mackay *v.* Martin, 26 Tex. 225; Dennis *v.* McCagg, 32 Ill. 429; Cook *v.* Cook, 69 Penn. St. 443; Jenckes *v.* Cook, 9 R. I. 520. So, as to a party holding *bona fide* a claim upon the property, whether valid or not. Wolford *v.* Hemington, 86 Penn. St. 39. [Woodfin *v.* Marks, 104 Tenn. 512.]

[3] Rothwell *v.* Dawes, 2 Black (U. S.) 613; O'Neil *v.* Hamilton, 44 Penn. St. 18; Coe *v.* Bradley, 49 Maine, 388; Baylis *v.* Baxter, 22 Col. 175; Adams *v.* Bradley, 12 Mich. 346; Drennen *v.* Walker, 21 Ark. 539.

[4] Minott *v.* Mitchell, 30 Ind. 288. [See § 206, note.]

[5] Taylor *v.* Boardman, 24 Mich. 287.

[6] Rogers *v.* Simmons, 58 Ill. 76; Walter *v.* Klock, 55 Ill. 82. [See § 206, note.]

§ 216. Again, if a testator make a devise, or a grantor a conveyance, upon a secret trust in fraud of the law, or for a purpose forbidden by law, or contrary to public policy, those interested may bring a bill alleging the secret trust, and the fraud upon the law, and the persons to whom the devise or conveyance was made must answer, notwithstanding the statute of frauds.[1] If such fraudulent trust appear by the answer,[2] or by any clear and explicit proof in opposition to the answer,[3] a trust will be declared and enforced in favor of those interested in the estate, or in the event of the failure of the illegal trust. In all cases of actual fraud parol evidence is admissible, otherwise a fraud put in writing would always escape.[4]

§ 217. Another large class of constructive trusts arises from purchases or conveyances from trustees, or other persons holding a fiduciary relation to property. It is a universal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased.[5] And even

[1] Muckleston *v.* Brown, 6 Ves. 52; Podmore *v.* Gunning, 7 Sim. 644; Chamberlain *v.* Agar, 2 V. & B. 259; Strickland *v.* Aldridge, 9 Ves. 513; Edwards *v.* Pike, 1 Eden, 267; Walgrave *v.* Tebbs, 2 K. & J. 313; Robinson *v.* King, 6 Ga. 550.

[2] Cottingham *v.* Fletcher, 2 Atk. 155; Bozon *v.* Statham, 1 Eden, 508; Bishop *v.* Talbot, cited 6 Ves. 60; Adlington *v.* Cann, 3 Atk. 141; Paine *v.* Hall, 18 Ves. 473; 1 Eden, 515, n. (a).

[3] How *v.* Camp, Walk. Ch. 427; Strickland *v.* Aldridge, 9 Ves. 520; Pring *v.* Pring, 2 Vern. 99.

[4] Ibid. [*Supra*, § 212, note.]

[5] Le Neve *v.* Le Neve, Amb. 436; 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 23 and notes; Merry *v.* Abney, 1 Ch. Cas. 38; Potter *v.* Sanders, 6 Hare, 1; Kennedy *v.* Daly, 1 Sch. & L. 355; Crofton *v.* Ormsby, 2 Sch. & L. 583; Ferras *v.* Cherry, 2 Vern. 384; Daniels *v.* Davidson, 16 Ves. 249; Brooke *v.* Bulkeley, 2 Ves. 498; Jennings *v.* Moore, 2 Vern. 609; 2 Bro. P. C. 278; Birch *v.* Ellames, 2 Anst. 427; Mackreth *v.* Symmons, 19 Ves. 349; Grant *v.* Mills, 2 V. & B. 306; Saunders *v.* Dehew, 2 Vern. 271; Mansell *v.* Mansell, 2 P. Wms. 681; Wigg *v.* Wigg, 1 Atk. 382; Dunbar *v.* Tredennick, 2 B. & B. 319; Pawlett *v.* Att. Gen., Hardr. 465; Burgess *v.* Wheate, 1 Eden, 195; Adair *v.* Shaw, 1 Sch. & L. 262; Mead *v.* Orrery, 3 Atk. 238; Bovey *v.* Smith, 1 Vern. 149; Phayre *v.* Peree, 3 Dow, 129; Wormley *v.* Wormley, 8 Wheat.

if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person.[1] (*a*) Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, *whether he have notice or not;* for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject. (*b*) Such purchases from

421; Oliver *v.* Piatt, 3 How. 333; Caldwell *v.* Carrington, 9 Peters, 86; Wright *v.* Dame, 22 Pick. 55; Clarke *v.* Hackerthorn, 3 Yeates, 269; Peebles *v.* Reading, 8 S. & R. 495; Reed *v.* Dickey, 2 Watts, 495; Hood *v.* Fannestock, 1 Barr, 470; Wilkins *v.* Anderson, 1 Jones, 399; Denn *v.* McKnight, 6 Halst. 385; Murray *v.* Ballou, 1 Johns. Ch. 566; Bailey *v.* Wilson, 1 Dev. & Bat. 182; Massey *v.* McIlwaine, 2 Hill, Eq. 426; Benzien *v.* Lenoir, 1 Car. L. R. 504; Pugh *v.* Bell, 1 J. J. Marsh, 403; Liggett *v.* Wall, 2 A. K. Marsh. 149; Truesdell *v.* Calloway, 6 Miss. 605; Suydam *v.* Martin, Wright, 384; Winged *v.* Lefebury, 1 Eq. Ca. Abr. 32; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Case *v.* James, 29 Beav. 512; Cary *v.* Eyre, 1 De G., J. & S. 149; Jones *v.* Shaddock, 41 Ala. 362; Ryan *v.* Doyle, 31 Iowa, 53; Smith *v.* Walter, 49 Mo. 250; James *v.* Cowing, 17 Hun (N. Y.), 256. [Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616; Bailey *v.* Winn, 101 Mo. 649; Davis *v.* Settle, 43 W. Va. 17; Handy *v.* Rice, 98 Me. 504; Pope *v.* Prince, 105 Va. 209; Murphy *v.* Farmer's etc. Bank, 131 Cal. 115.]

[1] Ibid.

(*a*) Of course this does not apply when the trustee has authority under the trust to sell the property free from the trust, and the purchaser has no notice of an intended misapplication of the proceeds. *Infra*, § 800 and note.

When the sale is in breach of trust and to a purchaser who has notice, the *cestui* or those representing his interest may elect either to charge him with the same trust or to confirm the sale and have the trust attached to the proceeds, *In re* Champion, [1893] 1 Ch. 101; Indiana, etc., R. Co. *v.* Swannell, 157 Ill. 616; Libby *v.* Frost, 98 Me. 288; or to the property into which the proceeds can be traced. Valentine *v.* Ricardt, 126 N. Y. 272. See also Am. Sugar Refining Co. *v.* Francher, 145 N. Y. 552; Converse *v.* Sickles, 44 N. Y. S. 1080; Anderson *v.* Foster, 112 Ga. 270. But after having made his election by suing the trustee and taking judgment against him for the value of the property wrongfully sold, he has no right to follow the trust property into the hands of the purchaser. Carter *v.* Gibson, 61 Neb. 207; Libby *v.* Frost, 98 Me. 288.

(*b*) So equity has jurisdiction to decree an account of the rents and

trustees, whether for value or not, are fraudulent, and equity will follow the property and fasten the original trust upon it for the security of the *cestui que trust*, or other person holding an equitable interest.[1] The rule applies not only to express trusts, or those expressly declared by written instruments, but it applies to constructive trusts, or those trusts that arise from fraud. Thus, if a party procures a conveyance of property from another by fraud, he shall be held to be a constructive trustee; and if he sells such property to a third person who has full knowledge or notice of the fraud, such third person will be equally held as a trustee.[2] After a purchase is once made from a trustee with notice of the trust, the person taking the title cannot bar the interest of the *cestui que trust* by buying in other interests, or by levying a fine or suffering a recovery, obtaining a judgment, or by procuring the assignment to himself of outstanding mortgages or terms.[3] Having once taken with notice of the trust, he is a trustee in law, and a trustee cannot defeat the interests of his *cestui que trust;* on the contrary, all the interest that the trustee, or constructive trustee, shall thus buy in, will inure to the benefit of the title for the *cestui que trust*.[4]

[1] Ibid.; Lyford *v.* Thurston, 16 N. H. 399.

[2] Pye *v.* George, 1 P. Wms. 128; Saunders *v.* Dehew, 2 Vern. 271; Mansell *v.* Mansell, 2 P. Wms. 681; Smith *v.* Bowen, 35 N. Y. 83; Lyons *v.* Bodenhamer, 7 Kans. 455; Sadler's Appeal, 87 Penn. St. 154.

[3] Moloney *v.* Kernan, 2 Dr. & W. 31; Brook *v.* Bulkeley, 2 Ves. 498.

[4] Bovey *v.* Smith, 1 Vern. 145; Kennedy *v.* Daly, 1 Sch. & L. 37. [*Supra*, § 195, note.]

profits of lands against a disseizor, when the land owners are infants or persons *non compos mentis*. Robinson *v.* Burritt, 66 Miss. 356. But an innocent tenant, entering under the disseizor, and paying rent to him without notice of such owner's title, will not be required to again pay the rent to the owner. Boylan *v.* Deinzer, 45 N. J. Eq. 485.

An involuntary trust is enforceable against persons who come into possession of the property only to the same extent, in the same manner, and with like force and effect as against the original trustee. Gray *v.* Farmers' Exchange Bank, 105 Cal. 60, 64.

§ 218. Of course, the opposite proposition is also true, that a purchaser for a valuable consideration without actual or constructive notice of the trust, holds the property discharged of the interest of the *cestui que trust.* It is thus stated on great authority: "A purchaser, *bona fide* without notice of any defect in his title at the time he made the purchase, may buy in a statute or mortgage, or any other incumbrance, and if he can defend himself at law by any such incumbrance bought in, his adversary shall never be aided in a court of equity for setting aside such incumbrance, for *equity will not disarm a purchaser, but assist him;* and precedents of this nature are very ancient and numerous; viz., where the court hath refused to give any assistance against a purchaser, either to an heir, or to a widow, or to the fatherless, or to creditors, or even to one purchaser against another." And it may be added that nothing is clearer than that a purchaser for valuable consideration without notice of a prior equitable right, obtaining the *legal* estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that *where equities are equal the law shall prevail.*[1] But while a purchaser

[1] Bassett *v.* Nosworthy, Ca. t. Finch, 102; 2 Lead. Cas. Eq. 1 & notes; Jerrard *v.* Saunders, 2 Ves. Jr. 457; Goleborn *v.* Alcock, 2 Sim. 552; Sanders *v.* Deligne, Freem. 123; Fagg's Case, 1 Vern. 52; 1 Ch. Cas. 68; Harcourt *v.* Knowel, 2 Vern. 159; Siddon *v.* Charnells, Bunb. 298; Jones *v.* Powles, 3 M. & K. 581; Willoughby *v.* Willoughby, 1 T. R. 763; Blake *v.* Hungerford, Pr. Ch. 158; Charlton *v.* Low, 3 P. Wms. 328; *Ex parte* Knott, 15 Ves. 609; Shine *v.* Gough, 1 B. & B. 436; Bowen *v.* Evans, 1 Jon. & La. 264; Boone *v.* Chiles, 10 Pet. 177; Watson *v.* Le Roy, 6 Barb. 485; Walwyn *v.* Lee, 9 Ves. 24; Varick *v.* Briggs, 6 Paige, 325; Demarest *v.* Wynkoop, 3 Johns. Ch. 147; Dan *v.* McKnight, 6 Halst. 385; Howell *v.* Ashmore, 1 Stockt. 82; Heilner *v.* Imbrie, 6 S. & R. 401; Mundine *v.* Pitts, 14 Ala. 84; Tomkins *v.* Powell, 6 Leigh, 576; Woodruff *v.* Cook, 1 Gill & J. 270; Whittick *v.* Kane, id. 202; High *v.* Batte, 10 Yerg. 335; Jones *v.* Zollicoffer, 2 Taylor, 214; Owings *v.* Mason, 2 A. K. Marsh. 384; Halstead *v.* Bank of Kentucky, 4 J. J. Marsh. 554; Blight *v.* Banks, 6 Mon. 198; Hughson *v.* Mandeville, 4 Des. 87; Goodtitle *v.* Cummings, 8 Blackf. 179; Maywood *v.* Lubcock, 1 Bail. Eq. 382; Brown *v.* Budd, 2 Cart. 442; Fletcher *v.* Peck, 6 Cranch, 36; Alexander *v.* Pendleton, 8 Cranch, 462; Vattier *v.* Hinds, 7 Pet. 252; Dana *v.* Newhall, 13 Mass. 498; Connecticut *v.* Bradish, 14 Mass. 296; Trull *v.* Bigelow, 16 Mass. 406; Boynton *v.* Rees, 8 Pick. 29; Gallatian

for value without notice may lay hold upon any plank to save himself, he cannot, after notice of the trust, take any conveyances from the trustee of outstanding legal interests; for that is a breach of the trust, and he cannot commit a breach of the trust to protect himself.[1] But a purchase of an equitable interest only, although for a valuable consideration and without notice, cannot prevail against a legal title. In law the legal title must always prevail, and in equity the legal title will prevail if the equities are equal.[2]

§ 219. This protection of a *bona fide* purchaser for value without notice is clear and certain, but it is hedged about with great care. *It is said to be a shield to protect, and not a sword to attack.* It is surrounded with restrictions, so that it may not become a cloak for fraud. The defendant in a suit in equity must clearly and unequivocally swear in his answer that he is a purchaser for value without notice,[3] and he must set forth

v. Erwin, Hopk. 48; 8 Cow. 36; Bumpus *v.* Platner, 1 Johns. Ch. 213; Griffith *v.* Griffith, 9 Paige, 315; Mott *v.* Clark, 9 Barr, 399; Brackett *v.* Miller, 4 W. & S. 102; Filby *v.* Miller, 1 Casey, 264; Rutgers *v.* Kingsland, 3 Halst. Ch. 178, 658; Holmes *v.* Stout, 3 Green, Ch. 492; City Council *v.* Paige, Spear, Ch. 159; Lacy *v.* Wilson, 4 Munf. 412; Curtis *v.* Lanier, 6 id. 42; Dixon *v.* Caldwell, 15 Ohio St. 412; Dillaye *v.* Commerical Bank, 51 N. Y. 345; Carter *v.* Carter, 3 K. & J. 639; Sugd. V. & P. 470; Colesbury *v.* Dart, 58 Ala. 573; Hamilton *v.* Mound City Mut. Life Ins. Co., 3 Tenn. Ch. 124. [Home Bank *v.* Peoria Trotting Soc., 206 Ill. 9.]

[1] Saunders *v.* Dehew, 2 Vern. 271; Freem. 123; Allen *v.* Knight, 5 Hare, 272; Terrett *v.* Crombie, 6 Lans. 82.

[2] Snelgrove *v.* Snelgrove, 4 Des. 274; Daniel *v.* Hollingshead, 16 Ga. 196; Larrow *v.* Beam, 10 Ohio, 148; Jones *v.* Zollicoffer, 2 Taylor, 214; Brown *v.* Wood, 6 Rich. Eq. 155; Blake *v.* Heyward, 1 Bail. Eq. 208; Shirras *v.* Caig, 7 Cranch, 48; Jones *v.* Jones, 8 Sim. 633; Pensonneau *v.* Bleakley, 14 Ill. 15; Boone *v.* Chiles, 10 Pet. 177; Kramer *v.* Arthurs, 7 Barr, 165; Wailes *v.* Cooper, 24 Miss. 208; Sergeant *v.* Ingersoll, 7 Barr, 340; 3 Harris, 343; Flagg *v.* Mann, 2 Sumn. 486, 556; Cottrell *v.* Hughes, 15 C. B. 532; Vattier *v.* Hinde, 7 Pet. 252; Parsons *v.* Jury, 1 Yerg. 296; Gallion *v.* McCaslin, 1 Blackf. 91; Marles *v.* Cooper, 22 Miss. 208. [Urpman *v.* Lowther Oil Co., 53 W. Va. 501, 513; Shropshire, etc., Co. *v.* Queen, 7 H. L. 496. 1 Ames' Cases on Trusts (2d ed.) 305, note.]

[3] Sugd. V. & P. 507; Marshall *v.* Frank, 8 Pr. Ch. 480; 1 Anst. 14; Blacket *v.* Langlands, Sel. Cas. Ch. 51; Gilb. 58.

all the particulars of the purchase, and the title or pretended title of the person from whom he purchased.[1] He must show an actual conveyance and not merely an agreement for a conveyance;[2] and it must be shown that the consideration-money named in the deed was paid in good faith. It is not enough that the consideration was secured to be paid; nor is a recital of payment in the deed sufficient: there must be an actual payment.[3] Then he must also make an explicit denial of notice of the title which is attempted to be set up. A denial of knowledge of the particular person who might assert such title is not sufficient;[4] notice must be positively and affirmatively denied, and not evasively or inferentially.[5] If particular instances or circumstances of notice or of fraud are alleged, there must be clear, special, and particular denials of each and every circumstance.[6] These stringent rules are necessary for the protection of the equitable interests of one person, where the legal title is in the hands of another.[7]

[1] Walwyn *v.* Lee, 9 Ves. Jr. 26; Story *v.* Winsor, 3 P. Wms. 279; Head *v.* Egerton, 1 Vern. 246; Trevanion *v.* Morse, 3 Ves. 32, 226; Amb. 421; Jackson *v.* Rowe, 4 Russ. 514; Lanesborough *v.* Kilmaine, 2 Moll. 403; Hughes *v.* Garth, Amb. 421; Page *v.* Lever, 2 Ves. Jr. 450; Dobson *v.* Leadbeater, 13 Ves. 230.

[2] Head *v.* Egerton, 1 P. Wms. 281; Brandlyn *v.* Ord, 1 Atk. 571.

[3] Millard's Case, Freem. 43; Wagstaff *v.* Read, 2 Ch. Cas. 156; More *v.* Mayhow, 1 id. 34; 2 Freem. 175; Day *v.* Arundel, Hard. 510; Hardingham *v.* Nichols, 3 Atk. 304; Maitland *v.* Wilson, id. 814; Moloney *v.* Kernan, 2 Dr. & War. 31. But see Parker *v.* Crittenden, 37 Conn. 148. [Condit *v.* Bigalow, 64 N. J. Eq. 504, 511.]

[4] Kelsal *v.* Bennett, 1 Atk. 522; Brompton *v.* Barker, cited 2 Vern. 159, is not law.

[5] 3 P. Wms. 244, n. (f); Bran *v.* Marlborough, 2 P. Wms. 492 (6 Res.); Hughes *v.* Garner, 2 Y. & Col. Exch. 328.

[6] Pennington *v.* Beechey, 2 S. & S. 282; Anon. 2 Ch. Cas. 161; Price *v.* Price, 1 Vern. 185; Hardman *v.* Ellames, 5 Sim. 650; 2 M. & K. 732.

[7] Alexander *v.* Pendleton, 8 Cranch, 462; Hunter *v.* Simrall, 5 Litt. 62; Boone *v.* Chiles, 10 Pet. 177; Bush *v.* Bush, 3 Strob. Eq. 131; Blight *v.* Bank, 6 Mon. 698; Halstead *v.* Bank of Kentucky, 4 J. J. Marsh. 554; Moore *v.* Clay, 7 Ala. 142; Pillow *v.* Shannon, 3 Yerg. 308; Nantz *v.* McPherson, 7 Munf. 599; Dillard *v.* Crocker, 1 Spear, Eq. 20; Vattier *v.* Hinde, 7 Pet. 252; Jackson *v.* Rowe, 2 S. & S. 472; Jones *v.* Powles, 3 M. & K. 581.

§ 220. These leading propositions are simple and plain enough, but difficulties frequently arise as to what is a valuable consideration, and whether a purchaser had notice of the equitable estate, and when and how he obtained it. It is well established that a conveyance, to be good against the equitable interest of a *cestui que trust*, must be for a *valuable* consideration, and that a conveyance for a *good* consideration, as for love and affection, is not sufficient.[1] But if the consideration is valuable, it need not be adequate: mere inadequacy of consideration will not defeat a purchase for a valuable consideration without notice; but gross inadequacy of a valuable consideration would be evidence affecting the good faith of the transaction.[2] Marriage is a valuable consideration for a conveyance; but if a conveyance after marriage is made in pursuance of an agreement before marriage, it must be made clearly to appear.[3] The general definition of a valuable consideration embraces not only some valuable thing or property given or transferred to another, but also some loss of property or right, or the forbearing of some legal right or remedy.[4]

§ 221. In order that one may claim protection as a *bona fide* purchaser, the money must have been actually paid and the conveyance taken before notice is received of the trust. (*a*) If

[1] Upshaw *v.* Hargrove, 6 Sm. & M. 292; Frost *v.* Beekman, 1 Johns. Ch. 288; Patten *v.* Moore, 32 N. H. 382; Boone *v.* Baines, 23 Miss. 136; Everts *v.* Agnes, 4 Wis. 343; Swan *v.* Ligan, 1 McCord, Ch. 232.

[2] Moore *v.* Mayhow, 1 Ch. Cas. 34; Wagstaff *v.* Read, 2 Ch. Cas. 156; Bullock *v.* Sadlier, Amb. 764; Mildmay *v.* Mildmay, cited Amb. 767. [Mackay *v.* Gabel, 117 Fed. 873.]

[3] Harding *v.* Hardrett, t. Finch, 9; Lord Keeper *v.* Wyld, 1 Vern. 139.

[4] It is impossible to pursue this subject in all its details and distinctions in a work of this character without exceeding all reasonable limits. The cases will be found most industriously collected in the notes to Bassett *v.* Nosworthy, 2 Lead. Cas. Eq. 103–109, and the distinctions and qualifications are fully discussed. [See *infra*, § 815c.]

(*a*) Halloran *v.* Holmes, 13 N. D. 411; Lain *v.* Morton, 63 S. W. 286 (Ky. 1901); Trice *v.* Comstock, 121 Fed. 620; Hayden *v.* Charter Oak Driving Park, 63 Conn. 142, 147; 1 Ames' Cases on Trusts (2d ed.), 287.

the money is secured, but not paid, notice of the trust will convert the purchaser into a trustee,[1] and so if the money is paid, but the conveyance is not executed, the weight of authority is that notice of the trust will destroy the protection of the purchaser.[2] It is held that the money must be wholly paid before notice.[3] This rule proceeds upon the ground, that, as the purchaser is taking the transfer of a title that defeats the equitable right of a third person, he shall be held to take such title subject to all the equities that attach to it at the time it passes. If, therefore, he pays no money at the time the title passes, he has no equity to set up against the equity of a third person, and if he has notice before he pays the money, he pays in his own wrong. And so, if he has paid his money, but has not yet taken the title when he receives notice, he takes the title subject to all the equities that attach to it when the conveyance is actually made to him, as he then has a right to refuse the conveyance and to demand back his money.[4] In Pennsylvania, however, it is established that part-payment of the purchase-money before notice will give the purchaser an equity *pro tanto*.[5] So,

[1] Tourville *v.* Naish, 3 P. Wms. 387; Story *v.* Winsor, 2 Atk. 630; More *v.* Mayhow, 1 Ch. Cas. 34; Jones *v.* Stanley, 2 Eq. Cas. Ab. 685; High *v.* Batte, 10 Yerg. 555; Christie *v.* Bishop, 1 Barb. Ch. 105; Murray *v.* Ballou, 1 Johns. Ch. 566; Jackson *v.* Cadwell, 1 Cow. 622; Jewett *v.* Palmer, 7 Cow. 65, 265; Heatley *v.* Finster, 2 Johns. Ch. 19; Harris *v.* Norton, 16 Barb. 264; Patten *v.* Moore, 32 N. H. 382; McBee *v.* Loftes, 1 Strob. Eq. 90; Hunter *v.* Simrall, 5 Litt. 62; Palmer *v.* Williams, 24 Mich. 333; Blanchard *v.* Tyler, 12 Mich. 339; Stone *v.* Welling, 14 Mich. 514; Dixon *v.* Hill, 5 Mich. 404; Warner *v.* Whittaker, 6 Mich. 133; Thomas *v.* Stone, Walk. Ch. 117; Lewis *v.* Phillips, 17 Ind. 108; Rhodes *v.* Green, 36 Ind. 10; Dugan *v* Vattier, 3 Blackf. 245; Perkinson *v.* Hanna, 7 Blackf. 400. But see Parker *v.* Crittenden, 37 Conn. 148; 2 Dart, V. & P. 760.

[2] Wigg *v.* Wigg, 1 Atk. 384; 2 Sugd. V. & P. 274. [Ames' Cases on Trusts (2d ed.) 288.]

[3] Wormley *v.* Wormley, 8 Wheat. 421; Wood *v.* Mann, 1 Sumn. 506.

[4] Warner *v.* Winslow, 1 Sandf. Ch. 430; Vattier *v.* Hinde, 7 Pet. 252; Bush *v.* Bush, 3 Strob. Eq. 131; Kyle *v.* Tait, 6 Grat. 44; Doswell *v.* Buchanan, 3 Leigh, 362; Dillard *v.* Crocker, 1 Spear, Eq. 20; Duncan *v.* Johnson, 2 Eng. 190; Cook *v.* Bronaugh, 8 Eng. 190; Frost *v.* Beekman, 1 Johns. Ch. 288; Cole *v.* Scott, 2 Wash. 141; Abell *v.* Howe, 43 Vt. 403.

[5] Youst *v.* Martin, 3 Serg. & R. 423; Lewis *v.* Bradford, 10 Watts, 67;

if a purchaser without notice make improvements on the land, not having paid the purchase-money in full, he will have an equitable lien on the land for the amount of his expenditures, although he has no defence to a bill to enforce the rights of the *cestui que trust*.[1] This is in analogy to the statutes that give a defendant in a real action a claim for improvements upon an estate, which he has made in ignorance of the title against him.

§ 222. The notice of the trust may be either to the purchaser himself, or to his agent, counsel, or attorney. The general rule is that notice to an agent is notice to his principal.[2] The notice, if to an agent, must be to an agent for the purpose of the purchase, and the notice must be to him while engaged in the transaction,[3] for the reason that notice to agents generally, without reference to the particular business in hand, is not

Bellas *v.* McCarthy, 10 Watts, 13; Juvenal *v.* Jackson, 2 Harris, 519; Uhrich *v.* Beck, 1 Harris, 631; 4 Harris, 499; Paul *v.* Fulton, 25 Mo. 156.

[1] Boggs *v.* Varner, 6 Watts & S. 469; Farmers' Loan Co. *v.* Maltby, 8 Paige, 563; Frost *v.* Beekman, 1 Johns. Ch. 288; Doswell *v.* Buchanan, 3 Leigh, 361; Flagg *v.* Mann, 2 Sumn. 486; Everts *v.* Agnes, 4 Wis. 343.

[2] Hovey *v.* Blanchard, 13 N. H. 145; Aster *v.* Wells, 4 Wheat. 466; Bank of U. S. *v.* Davis, 2 Hill, 451; Griffith *v.* Griffith, 9 Paige, 315; Jackson *v.* Winslow, 9 Cow. 13; Jackson *v.* Sharp, 9 Johns. 163; Jackson *v.* Leek, 19 Wend. 339; Westerwelt *v.* Hoff, 2 Sandf. 98; Barnes *v.* McChristie, 3 Penn. 67; Blair *v.* Owles, 1 Munf. 38; Brotherton *v.* Hutt, 2 Vern. 574; Newstead *v.* Searles, 1 Atk. 265; Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. 64; 2 Lead. Cas. Eq. 165, notes; Tunstall *v.* Trappes, 3 Sim. 301; Maddox *v.* Maddox, 1 Ves. 61; Ashley *v.* Bailley, 2 Ves. 368; Bracken *v.* Miller, 4 Watts & S. 108; Espin *v.* Pemberton, 3 De G. & J. 547. [Chapman *v.* Hughes, 134 Cal. 641, 658.]

[3] Howard Ins. Co. *v.* Halsey, 4 Seld. 271; Bracken *v.* Miller, 4 Watts & S. 102; Bank of U. S. *v.* Davis, 2 Hill, 451; Hood *v.* Fahnestock, 8 Watts, 489; Winchester *v.* Baltimore R. R. Co., 4 Md. 231; Preston *v.* Tubbin, 1 Vern. 286; Mountford *v.* Scott, 3 Madd. 34; Warwick *v.* Warwick, 3 Atk. 291; Ashley *v.* Bailley, 2 Ves. 368; Worsley *v.* Scarborough, 3 Atk. 392; Tylee *v.* Webb, 6 Beav. 552; 14 Beav. 14; Finch *v.* Shaw, 19 Beav. 500; 5 H. L. Cas. 905; Fuller *v.* Bennett, 2 Hare, 394. [Brookhouse *v.* Union Publishing Co., 73 N. H. 368; Mack *v.* McIntosh, 181 Ill. 633.] But see Abell *v.* Howe, 43 Vt. 403.

binding upon the principal.[1] Notice to a husband is not notice to a wife, unless he is her agent, and is engaged upon the business when he receives the notice.[2] Upon the same principle, knowledge by an executor before the death of his testator is not notice to him after his appointment as executor.[3] It has been held in some cases, that the notice to the principal, to convert him into a trustee, must be given to him during the progress of the transaction, as he might have known the facts long before and forgotten them.[4] If the first purchaser from the trustee take the property, *bona fide* for value and without notice, all purchasers from him will take the property discharged of the equitable claims, although they have notice of them at the time they purchase of the first purchaser, and such notice to them cannot convert them into trustees.[5] But if the property comes back into the hands of the original trustee, or into the hands of any one affected with the guilt of the original sale, he will be a trustee for the defrauded party, although the property may have passed through several innocent hands.[6]

[1] Ibid.; U. S. Insurance Co. *v.* Schriver, 3 Md. Ch. 381; Fulton Bank *v.* New York Coal Co., 4 Paige, 127; Bank *v.* Payne, 25 Conn. 444; North River Bank *v.* Aymar, 3 Hill, 362; Henry *v.* Morgan, 2 Benn. 497; Ross *v.* Horton, 2 Cushman, 591.

[2] Snyder *v.* Sponable, 1 Hill, 567; 7 Hill, 427.

[3] Gold *v.* Death, Cro. Jac. 381; Hob. 92.

[4] Hamilton *v.* Royse, 2 Sch. & Lef. 377; 2 Sugd. V. & P. 277; Henry *v.* Morgan, 3 Binn. 497; Boggs *v.* Varner, 6 Watts & S. 469; Bracken *v.* Miller, 4 Watts & S. 111.

[5] Harrison *v.* Forth, Pr. Ch. 51; Sweet *v.* Southcote, 2 Bro. Ch. 66; Brandlyn *v.* Ord, 1 Atk. 571; Lowther *v.* Charlton, 2 Atk. 242; Lacy *v.* Wilson, 4 Munf. 313; Fletcher *v.* Peck, 6 Cranch, 87; Boone *v.* Chiles, 10 Pet. 187; Truluck *v.* Peoples, 3 Kelly, 446; Griffith *v.* Griffith, 9 Paige, 315; Boynton *v.* Reese, 8 Pick. 329; Mott *v.* Clarke, 9 Barr, 399; Trull *v.* Bigelow, 16 Mass. 406; Parker *v.* Crittenden, 37 Conn. 145; Terrett *v.* Crombie, 6 Lansing, 82. [English *v.* Lindley, 194 Ill. 181; Arnett's Committee *v.* Owens, 65 S. W. 151 (Ky. 1901); Ford *v.* Axelson, 74 Neb. 92; Long *v.* Fields, 31 Tex. Civ. App. 241; 1 Ames' Cases on Trusts (2d ed.) 286.]

[6] Bovey *v.* Smith, 1 Vern. 149; Schutt *v.* Large, 6 Barb. 373; Lawrence *v.* Stratton, 6 Cush. 163; Church *v.* Ruland, 64 Penn. St. 441. [Williams *v.* Williams, 118 Mich. 477; Bourquin *v.* Bourquin, 120 Ga. 115; 1 Ames' Cases on Trusts (2d ed.) 287.]

§ 223. Notice to the purchaser may be either actual or constructive. Actual notice is a knowledge of the facts of the trust brought home to the purchaser, or a knowledge of such facts as should lead him to a knowledge of the actual facts of the case.[1] Constructive notice is a legal presumption of notice unless controlled, and in most cases it is not susceptible of rebuttal, even by evidence that in fact there was no actual knowledge.[2] Thus, by statutes of the several States the recording of a deed is made notice to all subsequent purchasers, though it frequently happens that purchasers have no actual knowledge from the record; but that does not rebut the fact of notice, for the reason that it is their duty to examine the records; they are therefore conclusively affected with notice of all of the record which is legally made, and which it was their duty to examine.[3] (*a*) *Lis pendens* is constructive notice; that is, a suit pending in the public courts, concerning the title of the property purchased, is constructive notice to the purchaser.[4] (*b*)

[1] Mayor *v.* Williams, 6 Md. 235.

[2] Rogers *v.* Jones, 8 N. H. 264; Plumb *v.* Fluitt, 2 Anst. 432; Griffith *v.* Griffith, 1 Hoff. 153; Farnsworth *v.* Child, 4 Mass. 637.

[3] Maul *v.* Reder, 59 Penn. St. 167; Smith *v.* Burgess, 133 Mass. 511, 514.

[4] Drew *v.* Norbury, 9 Ir. Eq. 176. Upon the filing of a bill in equity, and before the service of the subpœna, a suit is *lis pendens*. Ibid. See Leitch *v.* Wells, 48 N. Y. 591.

(*a*) But they do not have constructive notice of recorded instruments which do not come within the chain of title, Claiborne *v.* Holland, 88 Va. 1046; or of instruments which, though recorded, are not legally upon the records. Rothschild *v.* Daugher, 85 Tex. 332; Bowden *v.* Parrish, 86 Va. 67; Wasson *v.* Connor, 54 Miss. 351. Such irregularity in the recording of instruments containing notice of the trust would of course not avail a purchaser who had actual knowledge of their contents or knowledge of their existence. Gross *v.* Watts, 206 Mo. 373, 394; Ladnier *v.* Stewart, 38 So. 748 (Miss. 1905).

(*b*) Briefly stated, the doctrine of *lis pendens* is that a purchaser of property during the pendency of a suit in relation to it takes his title subject to any judgment which may be rendered with reference to the property in the suit then pending. Norris *v.* Ile, 152 Ill. 190; Allison *v.* Drake, 145 Ill. 500. See also Burleson *v.* McDermott, 57 Ark. 229; Duff *v.* McDonough, 155 Pa. St. 10. It is sometimes said that the suit is constructive notice of the adverse claims against the prop-

Actual possession by the *cestui que trust*, or some person other than the vendor, is constructive notice to the purchaser that there is some claim, title, or possession of the property adverse to his vendor; and this fact should put him upon his inquiry,

erty. State *v.* Wichita County, 59 Kan. 512; Jewett *v.* Iowa Land Co., 64 Minn. 531, 540; Jaycox *v.* Smith, 45 N. Y. S. 299. Although the effect upon a purchaser *pendente lite* is usually much the same as if this were so, the doctrine seems to be based not upon the theory of constructive notice, but upon the legal necessity of preserving the *res* of the litigation for the judgment of the court and of subjecting it to the judgment without pausing to bring in and pass upon the rights of those who have purchased while the suit is pending. Allison *v.* Drake, 145 Ill. 500; Stout *v.* Philippi M'f'g Co., 41 W. Va. 339; Osborn *v.* Glasscock, 39 W. Va. 749, 760; Wigram *v.* Buckley, [1894] 3 Ch. 483. If the owner were able to convey to a purchaser for value without notice, he would in many cases have the power to defeat the judgment of the court.

The effect of the doctrine is not precisely the same as constructive notice of the claim sued upon, for if the suit is dismissed, a judgment in a subsequent suit upon the same grounds will not bind a *bona fide* purchaser without notice, who acquired his interest during the pendency of the first suit. Allison *v.* Drake, 145 Ill. 500; Pipe *v.* Jordan, 22 Colo. 392, 47 Cent. L. J. 408; Rector *v.* Fitzgerald, 59 Fed. 808.

The harshness of the rule upon *bona fide* purchasers for value without notice of the litigation has caused the legislatures of England and of many of the States to restrict the doctrine by statute, so that *lis pendens* does not affect *bona fide* purchasers for value unless notice of it is recorded, usually at the registry of deeds in the county where the land lies. Digest of Stats. of Ark. (1904), §§ 5149–5154; Mass. R. L. (1902), ch. 134, § 12; Compiled Laws of Mich. (1897), § 441–442; Miss. Code (1906), §§ 3147–3148; Mont. Code Civ. Proc. (1907), § 6517; Baker *v.* Bartlett, 18 Mont. 446; N. Y. Code (1895), §§ 1670–1672; Pa. P. L. 1856, 532, § 2; 2 Purdon's Dig. (13th ed.) p. 1033, § 28; Va. Code (1904), § 3566; Code of W. Va. (1899), ch. 139, § 13; 2 & 3 Vict. c. 11, s. 7. See also statutes of other States. McIlwrath *v.* Hollander, 73 Mo. 105. The statutes as a rule deal with *lis pendens* only when the action concerns real estate, leaving the common-law rule as to personalty unchanged. But many jurisdictions have held that the doctrine never applied to other property than real estate or chattel interests in real estate. Wigram *v.* Buckley, [1894] 3 Ch. 483. Others hold that the doctrine applies to personalty other than money and negotiable instruments. Stout *v.* Philippi M'f'g Co., 41 W. Va. 339; Osborn *v.* Glasscock, 39 W. Va. 749, 760, and cases cited; Norris *v.* Ile, 152 Ill. 190. See also State *v.* Wichita County, 59 Kan. 512.

for if he had inquired he would have discovered the exact title and the equitable claims upon it; he therefore has constructive notice. (*a*) There are many other facts and circumstances from

(*a*) For recent cases holding that possession of land by other than the grantor at the time of a sale or other transfer is notice to the purchaser of equities and unrecorded rights of the possessor, see Rankin M'f'g Co. *v.* Bishop, 137 Ala. 271; Scheuer *v.* Kelley, 121 Ala. 323; Shiff & Son *v.* Andress, 40 So. 824 (Ala. 1906); Beattie *v.* Crewdson, 124 Cal. 577; Allen *v.* Moore, 30 Colo. 307; Bridger *v.* Exchange Bank, 126 Ga. 821; Austin *v.* So. Home Ass'n, 122 Ga. 439; Baldwin *v.* Sherwood, 117 Ga. 827; Georgia, etc., Ass'n *v.* Faison, 114 Ga. 655; Joiner *v.* Duncan, 174 Ill. 252, 257; O'Neill *v.* Wilcox, 115 Iowa, 15; Crooks *v.* Jenkins, 124 Iowa, 317; Townsend *v.* Blanchard, 117 Iowa, 36; Gray *v.* Zellmer, 66 Kan. 514; Bryant *v.* Main, 77 S. W. 680 (Ky. 1903); Holmes *v.* Deppert, 122 Mich. 275; Niles *v.* Cooper, 98 Minn. 39; Oberlender *v.* Butcher, 67 Neb. 410; Salvage *v.* Haydock, 68 N. H. 484; English *v.* Rainear, 55 A. 41 (N. J. Ch. 1903); Essex County Bank *v.* Harrison, 57 N. J. Eq. 91, 96; Flaherty *v.* Kayser, 48 A. 565 (N. J. 1901); Cornell *v.* Maltby, 165 N. Y. 557; Collins *v.* Davis, 132 N. C. 106; Ambrose *v.* Huntington, 34 Or. 484; Collum *v.* Sanger Bros., 98 Tex. 162; Ramirez *v.* Smith, 94 Tex. 184; Sowles *v.* Butler, 71 Vt. 271, 278; Allen *v.* Gates, 73 Vt. 222; Peterson *v.* Philadelphia M't'g Co., 33 Wash. 464, 473; Martin *v.* Thomas, 56 W. Va. 220. See also Cunningham *v.* Pattee, 99 Mass. 248, 252. For a good collection of cases upon this and related points see note to Crooks *v.* Jenkins, (124 Iowa, 317) in 104 Am. St. Rep. 331.

When the possessor is a mere tenant of one claiming adversely to the vendor, the former's possession is sufficient notice to put the purchaser upon inquiry and to charge him with all equities and unrecorded rights, not only of the tenant but also of the landlord, which reasonable inquiry would have revealed to him. Austin *v.* Southern Home Ass'n, 122 Ga. 439; Walker *v.* Neil, 117 Ga. 733, 745; O'Neill *v.* Wilcox, 115 Iowa, 15; Townsend *v.* Blanchard, 117 Iowa, 36; Crooks *v.* Jenkins, 124 Iowa, 317; Thompson *v.* Borg, 90 Minn. 209; Niles *v.* Cooper, 98 Minn. 39; Essex County National Bank *v.* Harrison, 57 N. J. Eq. 91, 96; Randall *v.* Lingwall, 43 Or. 383; Ambrose *v.* Huntington, 34 Or. 484; Collum *v.* Sanger, 98 Tex. 162. But see Hunt *v.* Luck, [1901] 1 Ch. 45. The better opinion seems to be that failure to inquire does not charge the purchaser with constructive notice of the adverse claims except in cases where and to the extent that reasonable inquiry would have informed him of such claims. Cornell *v.* Maltby, 165 N. Y. 557; Hunt *v.* Luck, [1901] 1 Ch. 45.

To have the effect of notice, possession must be shown either to have been actually brought to the attention of the purchaser or to have been "open, visible, exclusive and unambiguous, not liable to be misconstrued or misunderstood." Ran-

which courts will presume that a purchaser had notice of the equities attached to an estate.[1] If in any way a person pur-

[1] It is impossible to state all the distinctions that have been established upon this fruitful source of litigation. The principles are most ably stated in the notes to Le Neve *v.* Le Neve, 2 Lead. Cas. Eq. 23; Calhoun *v.* Burnett, 40 Miss. 599; Pilcher *v.* Rawlins, L. R. 11 Eq. 53; Carter *v.* Carter, 3 K. & J. 687; Farris *v.* Dunn, 7 Bush, 276.

kin M'f'g Co. *v.* Bishop, 137 Ala. 271. Thus it has been held that a grantor remaining in possession after giving his deed may be presumed by a subsequent purchaser to be merely a tenant by sufferance of his grantee. Hockman *v.* Thuma, 68 Kan. 519; Smith *v.* Phillips, 9 Okla. 297. And it has been held that possession by a co-tenant gives no notice of a claim to the whole title. Martin *v.* Thomas, 56 W. Va. 220. See *contra*, Collum *v.* Sanger, 98 Tex. 162.

The rule that possession by another than the grantor is notice of possible rights and equities, is the most frequent illustration of the general rule that equity will not give one the protection accorded to a *bona fide* purchaser for value if his lack of knowledge of the equitable or unrecorded interests of others in the property is due to his own failure to take notice of obvious facts which would put a reasonably prudent and honest man upon inquiry. In Kirsch *v.* Tozier, 143 N. Y. 397, the general rule was stated as follows: "A purchaser is not required to use the utmost circumspection. He is bound to act as an ordinarily prudent and careful man would do under the circumstances. He cannot act in contravention to the dictates of reasonable prudence or refuse to inquire when the propriety of inquiring is naturally suggested by circumstances known to him." See also Albany Exch. Bank *v.* Brass, 59 App. Div. (N. Y.) 370. And in Anderson *v.* Blood, 152 N. Y. 285, it was said: "If the facts within the knowledge of the purchaser are of such a nature as in reason to put him on inquiry and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry as suggested by the facts, would have revealed." See Cahill *v.* Seitz, 86 N. Y. S. 1009, 93 App. Div. 105. The rule in England is thus stated by Lindley, M. R., in Oliver *v.* Hinton, [1899] 2 Ch. 264, 274: "To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate, it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority." See also Williams *v.* Smith, 128 Ga. 306; Lyon *v.* Gombert, 63 Neb. 630; Condit *v.* Maxwell, 142 Mo. 266; Interstate Inv. Co. *v.* Bailey, 93 S. W. 578 (Ky. 1906); Lain *v.* Morton, 63 S. W. 286 (Ky. 1901); Swasey *v.* Emerson, 168 Mass. 118; Kenney *v.* Altvater, 77 Pa. St. 34; Trinidad *v.* Milwaukee, etc., Co., 63 Fed. 883.

Recital in bonds that they are

chases, with what the law construes to be full notice that another has a legal or equitable title to the property, or that he has been deprived of his interest by accident, mistake, or fraud, he will be held as a trustee.[1]

§ 224. The same general principles affect the sales of property by executors or administrators. Executors can deal with real estate only as they are empowered to do so by the will of testators. Purchasers must therefore look to the will for the power of the executor. If they purchase in good faith from an executor with power to sell, they will take a good title; but if they make a fraudulent or collusive purchase from an executor with full power to sell, they still hold the estate upon the same trusts to which it was subject in the hands of the executor. If there are no powers to sell real estate given to executors in the will, they have no authority to deal with it, unless it is wanted to pay debts or legacies, in which case both executors and administrators must obtain an order or license from the court of probate to sell. In such case the purchaser must see that the order of the court was regularly obtained, and that it is properly complied with. Any fraud or collusion on the part of the executor or administrator, in procuring the decree of the court or in the conduct of the sale, would convert the purchaser into a trustee for heirs-at-law or other persons interested.[2] So, if an executor or administrator purchases indirectly of himself through a third person, and takes a deed to himself through such third person, the sale will be void, or the estate will be held in trust by such administrator or executor for the heirs-at-law or other persons interested.

[1] Forbes *v.* Hall, 34 Ill. 159.

[2] Brush *v.* Ware, 15 Pet. 93; Brock *v.* Phillips, 2 Wash. 68.

secured by deed of trust does not charge a *bona fide* purchaser with notice of a provision in the trust deed to the effect that the bonds were to be enforced at law only after an attempt to collect them through the trustees. Guilford *v.* Minneapolis, etc., R. Co., 48 Minn. 560.

§ 225. An executor or administrator generally has full power over the personal estate under his charge. Therefore he may sell the same and give a good title to a purchaser.[1] This is the rule at common law, and it prevails in all States where it is not changed by statute. In some States there are statutes that direct executors or administrators to sell the personal estate of the deceased at public auction, or in such manner as the court having jurisdiction over the administration shall order. In such States, purchasers must see to it that executors and administrators, in making sales, pursue the course marked out for them by the statutes or by the orders of the court, or they will take no title.[2] In all sales by executors and administrators *good faith* is indispensable. If therefore a purchaser knows, or has notice, that a sale by an administrator is fraudulent or collusive, or is a *devastavit*, or is for the purpose of misapplication of the assets, his title will not be allowed to prevail against the beneficial interests of creditors, specific or residuary legatees, or next of kin or heirs.[3] Equity will examine the transaction; and if circumstances appear sufficient to put the purchaser

[1] Field *v.* Schieffelin, 7 Johns. Ch. 155; Rayner *v.* Pearsall, 3 Johns. Ch. 578; Hertell *v.* Bogert, 9 Paige, 57; Yerger *v.* Jones, 16 How. 37; Miles *v.* Durnford, 2 Sim. (N. S.) 234; Tyrrell *v.* Morris, 1 Dev. & Batt. 559; Hunter *v.* Lawrence, 11 Grat. 117; Bond *v.* Ziegler, 1 Kelly, 324; Crane *v.* Drake, 2 Vern. 616; Ewer *v.* Corbett, 2 P. Wms. 148; Newland *v.* Champion, 1 Ves. 105; Jacomb *v.* Harwood, 2 Ves. 268; Elmlie *v.* McAulay, 3 Bro. Ch. 626; Utterson *v.* Maire, 4 Bro. Ch. 270; 2 Ves. Jr. 95; Scott *v.* Tyler, 2 Dick. 725; Bonney *v.* Ridgard, 1 Cox, 145; Dickson *v.* Lockyer, 4 Ves. 42; Doran *v.* Simpson, id. 665; Hill *v.* Simpson, 7 Ves. 152.

[2] Fambro *v.* Gantt, 12 Ala. 305; Bond *v.* Barksdale, 4 Des. 526; Bond *v.* Ziegler, 1 Kelly, 324; Baines *v.* McGee, 1 Sm. & M. 208.

[3] Petrie *v.* Clark, 11 Serg. & R. 388; Wylson *v.* Moore, 1 M. & K. 337; Cole *v.* Miles, 10 Hare, 179; Saxon *v.* Barksdale, 4 Des. 526; McNair's App., 4 Rawle, 155; Johnson *v.* Johnson, 2 Hill, Eq. 277; Mead *v.* Orrery, 3 Atk. 235; McLeod *v.* Drummond, 14 Ves. 361; 17 Ves. 169; Field *v.* Schieffelin, 7 Johns. Ch. 155; Colt *v.* Lasnier, 9 Cow. 320; Sacia *v.* Berthoud, 17 Barb. 15; Williamson *v.* Branch Bank, 7 Ala. 906; Swink *v.* Snodgrass, 17 Ala. 653; Garnett *v.* Macon, 6 Call. 361; Dodson *v.* Simpson, 2 Rand. 294; Graff *v.* Castleman, 5 Rand. 204; Parker *v.* Gillian, 10 Yerg. 294; Williamson *v.* Morton, 2 Md. Ch. 94; Lowry *v.* Farmers' Bank, 10 P. L. J. 3; Am. L. J. (N. S.) 111. [*Infra*, § 800.]

on his guard or upon his inquiry, the sale will be avoided or the purchaser will be held as trustee.[1] If the transfer is by way of pledge or sale for the security or payment of the private debt of the administrator, it will be equivalent to full notice of the illegality of the transaction, and fraudulent.[2] But if an administrator make a pledge of the assets for a contemporaneous advance of money for the use of the estate, it will be held to be a valid transaction; or if the sale or pledge or mortgage is afterwards made for a previous advance made in good faith for the alleged benefit of the estate, it will be valid.[3] Of course knowledge on the part of the purchaser, that the executor or administrator is dealing with the assets in a fiduciary capacity, is not enough to raise any suspicion, for the reason that it is the duty of the administrator to dispose of the assets and settle the estate; and so a trustee may sell and transfer absolutely the personal property of his trust, if he have power to vary the securities; and if he sells and transfers notes, stocks, or other securities standing in his name as trustee, the purchaser, from that fact alone, cannot be holden as a constructive trustee, although the trustee in fact transfers such securities or order to obtain money for his own personal use. The mere fact that the word "trustee" is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. (*a*) If he has such power, a purchaser

[1] McNeillie *v.* Acton, 4 De G., M. & G. 744.

[2] Petrie *v.* Clark, 11 Serg. & R. 388; Shaw *v.* Spencer, 100 Mass. 382; Judson *v.* National City Bank, 8 Blatch. 430, and cases cited; Pendleton *v.* Fay, 2 Paige, 202; Bayard *v.* Farmers', &c. Bank, 52 Penn. St. 232; Baker *v.* Bliss, 39 N. Y. 76; Carr *v.* Hilton, 1 Curtis, 390–393; Field *v.* Schieffelin, 7 Johns. Ch. 155; Williamson *v.* Morton, 2 Md. Ch. 94; Garrard *v.* R. R. Co., 29 Penn. St. 154; Collinson *v.* Lister, 7 De G., M. & G. 634; Dodson *v.* Simpson, 2 Rand. 294; Williamson *v.* Branch Bank, 7 Ala. 906.

[3] Petrie *v.* Clark, 11 Serg. & R. 388; Miles *v.* Durnford, 2 Sim. (N. S.) 234; Russell *v.* Plaice, 18 Beav. 21; 11 Jur. 124; 19 Jur. 445.

(*a*) The description of the grantee in a deed as "trustee" without more to indicate the *cestuis* or the terms of the trust is notice to subsequent grantees of the existence of whatever trust there is and of all limitations

in *good faith* will be protected, although the trustee use the money for his private purposes.[1] But if a purchaser takes securities from a trustee, with the word "trustee" upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the purchaser may be held as a trustee.[2] And so, if an executor, guardian, or trustee hold certificates of shares in a corporation, he may sell the same, and the corporation would be protected in issuing new certificates to the purchaser, but if the corporation knew that the sale or transfer was a breach of the trust or a *devastavit*,

[1] Ashton *v.* Atlantic Bank, 3 Allen, 217; Creigton *v.* Ringle, 3 S. C. 77; Dillaye *v.* Com. Bank. 51 N. Y. 355. [See *infra*, § 800, note *a*.]

[2] Shaw *v.* Spencer, 100 Mass. 388; Jaudon *v.* National Bank, 8 Blatch. 430; Duncan *v.* Jaudon, 14 Wall. 15. [See *infra*, § 800, note *a*.]

upon the authority of the trustee. Sternsfels *v.* Watson, 139 Fed. 505; Sturtevant *v.* Jaques, 14 Allen, 523; Johnson *v.* Calnan, 19 Colo. 168; Kenworthy *v.* Equitable Trust Co., 218 Pa. St. 286; Snyder *v.* Collier, 123 N. W. 1023 (Neb. 1909). See Davidson *v.* Mantor, 45 Wash. 660; Rua *v.* Watson, 13 S. D. 453. Although such a description does not in itself create a trust, it is a warning to every one who reads it. Geyser-Marion Gold Min. Co. *v.* Stark, 106 Fed. 558. The same is true where certificates of stock stand in the name of one as "trustee," First Nat. Bank *v.* Broadway Bank, 156 N. Y. 459; Shaw *v.* Spencer, 100 Mass. 382; Cooper *v.* Ill. Cen. R. Co., 57 N. Y. S. 925, 38 App. Div. 22; Bohlen's Estate, 75 Pa. St. 304, 313; Clemens *v.* Heckscher, 185 Pa. St. 476; Marbury *v.* Ehlen, 72 Md. 206. See Grafflin *v.* Robb, 84 Md. 451; or where negotiable paper is made payable or indorsed to him as "trustee," Bank *v.* Looney, 99 Tenn. 278; Ford *v.* Brown, 114 Tenn. 467, 475; Mercantile Bank *v.* Parsons, 54 Minn. 56; Cunningham *v.* Davenport, 147 N. Y. 43; Isham *v.* Post, 71 Hun, 184; Third Nat. Bank *v.* Lange, 51 Md. 139. See Fox *v.* Citizens' Bank & Tr. Co., 35 L. R. A. 678 (Tenn. 1896); or where a bank deposit stands in his name as "trustee," Farmers' & Traders' Bank *v.* Fidelity & Dep. Co., 108 Ky. 384; State Bank *v.* McCabe, 135 Mich. 479; or an account with a stock broker. Jeffray *v.* Towar, 63 N. J. Eq. 530.

The same principle applies where instead of the word "trustee" some other word is used to indicate a fiduciary capacity, *e. g.*, guardian, agent or attorney. Cohnfeld *v.* Tanenbaum, 176 N. Y. 126; Shelton *v.* Laird, 68 Miss. 175; Hill *v.* Flemming, 128 Ky. 201; Hazeltine *v.* Keenan, 54 W. Va. 600; O'Herron *v.* Gray, 168 Mass. 573. But see Sparrow *v.* State Exch. Bank, 103 Mo. App. 338.

it might be held as a constructive trustee for the persons beneficially interested; but the mere fact that the fiduciary character of the vendor appeared upon the face of the transaction would put the corporation upon no inquiry beyond ascertaining whether he had authority to change the securities.[1] (*a*)

§ 226. The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property.[2] Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive.[3] Lord Hardwicke stated "that the court adhered to this principle, that the statute of frauds should never be understood to protect fraud, and therefore wherever a case is infected with fraud, the court will not suffer the statute to protect it."[4] Lord Thurlow added, that "the moment you impeach a deed for fraud you must either deny the effect of fraud upon the deed, or you must admit parol evidence to prove it."[5] If this was not so, the law would be re-

[1] Ashton *v.* Atlantic Bank, 3 Allen, 217; and cases cited *supra*.

[2] Kayser *v.* Maugham, 8 Col. 232; Bohm *v.* Bohm, 9 id. 100.

[3] Hall *v.* Livingston, 3 Del. Ch. 348.

[4] Reach *v.* Kennigate, 1 Ves. 125; Young *v.* Peachey, 2 Atk. 258; Walker *v.* Walker, id. 98; Hutchins *v.* Lee, 1 Atk. 448; Montacute *v.* Maxwell, 1 P. Wms. 620; Lincoln *v.* Wright, 4 De G. & J. 16; Childers *v.* Childers, 1 De G. & J. 482; Davis *v.* Oty, 35 Beav. 208; Ryan *v.* Dox, 34 N. Y. 307; Haigh *v.* Kaye, L. R. 7 Ch. 474.

[5] Shelborne *v.* Inchinquin, 1 Bro. Ch. 350; Hare *v.* Sherewood, 1 Ves. Jr. 243; Townshend *v.* Stangroom, 6 Ves. 333; Pym *v.* Blackburn, 3 Ves. 38, n.; and see Conolly *v.* Howe, 5 Ves. 701.

(*a*) Since there is no presumption that a trustee has authority to make a transfer of trust property, a corporation which at his request makes a transfer on its books of stock standing in his name as trustee may be liable for loss due to an unauthorized transfer, if the lack of authority could have been learned by reasonable investigation. Cooper *v.* Ill. Cen. R. Co., 57 N. Y. S. 925, 38 App. Div. 22; Bohlen's Estate, 75 Pa. St. 304, 313; Lowell, Transfer of Stock, §§ 151, 152; 1 Cook on Corporations (6th ed.) § 327. It is said to be otherwise in the case of executors or administrators since they may be presumed to have authority to sell personalty. See *infra*, § 809 *et seq.*

duced to this absurdity, — if a fraud could once succeed in procuring the transaction to be reduced to writing and signed by the parties, it would be protected by the law itself, and there would be no possible means of reaching and correcting the wrong. But in such case the bill must contain a clear and distinct charge of fraud.[1] Therefore, whenever the bill sets out a clear case of fraud, parol evidence will be admitted to prove it, even if the effect of such evidence is to contradict, vary, alter, or destroy written instruments.[2] The mere refusal of a grantee to execute, or the denial of the existence of an invalid parol trust upon which she promised to hold the property, is not such a fraud as will take the case out of the statute.[3] (*a*) But where a valuable interest passes to one on the faith of a contract he refuses to perform, equity will compel restitution or give other appropriate relief.[4] In any case if the trust arises from the acts of the parties, and not exclusively from their agreements, the statute of frauds is not a bar to the proof.[5] But where a con-

[1] Irnham *v.* Child, 1 Bro. Ch. 94; Portmore *v.* Morris, 2 Bro. Ch. 219; Forsyth *v.* Clark, 3 Wend. 637; Gouverneur *v.* Elmendorf, 5 Johns. Ch. 79; Kennedy *v.* Kennedy, 2 Ala. 571; Skrine *v.* Simmons, 11 Ga. 401; McCalmont *v.* Rankin, 8 Hare, 18.

[2] Young *v.* Peachey, 2 Atk. 257; Thynn *v.* Thynn, 1 Vern. 296; Irnham *v.* Child, 1 Bro. Ch. 93; Cripps *v.* Gee, 4 Bro. Ch. 475; Oldham *v.* Lechford, 2 Vern. 506; Drakeford *v.* Wilks, 3 Atk. 539; Reach *v.* Kennigate, 1 Ves. 125; Amb. 67; Pember *v.* Mathers, 1 Bro. Ch. 52; Wilkinson *v.* Bradfield, 1 Vern. 307; Miller *v.* Cotton, 5 Ga. 346; Christ *v.* Diffenbach, 1 Serg. & R. 464; Watkins *v.* Stockett, 6 H. & J. 345; Elliott *v.* Connell, 5 Sm. & M. 91; Barrell *v.* Hanrick, 42 Ala. 60 (*b*); Judd *v.* Mosely, 31 Iowa, 433.

[3] Scott *v.* Harris, 113 Ill. 447; Tatge *v.* Tatge, 34 Minn. 275; Townsend *v.* Fenton, 32 Minn. 482.

[4] Randall *v.* Constans, 33 Minn. 329; Johnson *v.* Krassin, 25 Minn. 118. [See *supra*, § 181, note, p. 289 *et seq.*]

[5] Judd *v.* Mosely, 30 Iowa, 428; Bryant *v.* Hendricks, 5 Iowa, 256; Kincell *v.* Feldman, 22 Iowa, 363; Ferguson *v.* Hass, 64 N. C. 772; Squire's App., 70 Penn. St. 268; Reese *v.* Wallace, 113 Ill. 595. And so the statute of frauds is not a bar to relief in other cases of absolute deeds, where they

(*a*) There is much authority to the contrary. See *supra*, § 181, note, p. 289 *et seq.*

(*b*) Barrell *v.* Hanrick was overruled in Brock *v.* Brock, 90 Ala. 86; Manning *v.* Pippen, 86 Ala. 357; 95 Ala. 537.

veyance in trust is made voluntarily without solicitation or undue influence, a mere promise to hold in trust is within the

are used in a manner and for purposes not contemplated at the time of their execution. Thus a deed may be shown to be a mortgage or security for a debt, although there was no written defeasance, and no fraud, accident, or mistake. [Potter *v.* Kimball, 186 Mass. 120; Weiseham *v.* Hocker, 7 Okla. 250; Stafford *v.* Stafford, 29 Tex. Civ. App. 73.] This proposition has been much discussed. The latest case, Campbell *v.* Dearborn, 109 Mass. 130, contains a review of the authorities and a succinct statement of the doctrine; and as it is upon a subject closely connected with constructive trusts, the case is given at large.

" From those facts, and from the bill and answer, we think these points must be taken to be established; to wit, 1st, that the plaintiff had purchased the parcel of land in controversy, and held a contract from Tirrill for its conveyance to himself upon payment of the sum of $5500; 2d, that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the defendant was given by way of security therefor. The report finds, 'from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe' this to be the case.

. . . . . .

" From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

" The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery. Hughes *v.* Edwards, 9 Wheat. 489; Sprigg *v.* Bank of Mount Pleasant, 14 Pet. 201, 208; Morris *v.* Nixon, 1 How. 118; Russell *v.* Southard, 12 How. 139; Taylor *v.* Luther, 2 Sumner, 228; Flagg *v.* Mann, id. 486; Jenkins *v.* Eldredge, 3 Story, 181; Bentley *v.* Phelps, 2 Wood. & M. 426; Wyman *v.* Babcock, 2 Curtis C. C. 386, 398; s. c. 19 How. 289. Although not bound by the authority of the courts of the United States in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the State and federal courts. We are disposed, therefore, to yield much deference to the decisions above referred to, and to follow them unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

" We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud or breach of trust, which affords ground of jurisdiction and judicial interference. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in

statute.[1] If a bill is brought for relief, on the ground that the instrument is framed contrary to the intention of the parties

that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

"The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance 'be omitted by design upon mutual confidence between the parties.' In Russell *v.* Southard, 12 How. 139, 148, it is declared to be the doctrine of the court, 'that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase-money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage.' The conclusion of the court was, 'that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage.'

"This doctrine is analogous, if not identical, with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void. 4 Kent, Com. 159; Cruise, Dig. (Greenl. ed.) tit. xv. c. 1, § 21; 2 Washb. Real Prop. (3d. ed.) 42; Williams on Real Prop. 353; Story, Eq. § 1019; Adams, Eq. 112; 3 Lead. Cas. in Eq. (3d Am. ed.); White & Tudor's notes to Thornbrough *v.* Baker, pp. 605 [*874] *et seq.*; Hare & Wallace's notes to s. c. pp. 624 [*894] *et seq.*

"The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal. Erskine *v.* Townsend, 2 Mass. 493; Killeran *v.* Brown, 4 Mass. 443; Taylor *v.* Weld, 5 Mass. 109; Carey *v.*

[1] McClain *v.* McClain, 57 Iowa, 167. [But see *supra*, § 181, note, p. 289 *et seq.*]

through mistake, accident, surprise, or fraud, in such case, Lord Hardwicke said "that a mistake could never be proved

Rawson, 8 Mass. 159; Parks *v.* Hall, 2 Pick. 206, 211; Rice *v.* Rice, 4 Pick. 349; Flagg *v.* Mann, 14 Pick. 467, 478; Eaton *v.* Green, 22 Pick. 526. The case of Flagg *v.* Mann is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact and not a mere security for a loan.

"By the statute of 1855, c. 194, § 1, jurisdiction was given to this court in equity 'in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages.' Gen. Sts. c. 113, § 2. The authority of the courts under this clause is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

"If, then, the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. 'For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud.' Cotterell *v.* Purchase, Cas. temp. Talbot, 61. See also Barnhart *v.* Greenshields, 9 Moore, P. C. 18; Baker *v.* Wind, 1 Ves. Sen. 160; Mahlor *v.* Lees, 2 Atk. 494; Williams *v.* Owen, 5 Myl. & Cr. 303; Lincoln *v.* Wright, 4 De Gex & Jones, 16.

"As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to, or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized, both at law and in equity. Stackpole *v.* Arnold, 11 Mass. 27; Fletcher *v.* Willard, 14 Pick. 464; 1 Greenl. Ev. § 284; Perry on Trusts, § 226.

"The reasons for extending the doctrine, in equity, to absolute deeds,

but by parol evidence, consequently it must be received." [1] But where through mistake of law, or carelessness or inattention, an

where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to Woollam *v.* Hearne, 2 Lead. Cas. in Eq. (3d Am. ed.) 676, and to Thornborough *v.* Baker, 3 id. 624. See also Adams Eq. 111; 1 Sugd. Vend. (8th Am. ed.), Perkins's notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here. 2 Washb. Real Prop. (3d. ed.) 35 *et seq.*

"Upon the whole, we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

"It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustaind by the court. It is to the determination of this question that the parol evidence is mainly directed.

"The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. 'If the purchaser, instead of taking the risk of the subject of the contract on himself, takes a security for repayment of the principal, that will not vitiate the transaction, and render it a mortgage security.' 1 Sugd. Vend. (8th Am. ed.) 302, in support of which the citations by Mr. Perkins are numerous. But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment. Eaton *v.* Green, 22 Pick. 526, 530.

"Although proof of the existence and continuance of the debt, for which

[1] Baker *v.* Paine, 1 Ves. 457; Towers *v.* Moor, 2 Vern. 98; Langley *v.* Brown, 2 Atk. 203; Townsend *v.* Stangroom, 6 Ves. 328; Taylor *v.* Radd, 5 Ves. 595, 596, n.; Henkle *v.* Royal Ins. Co., 1 Ves. 318; Rogers *v.* Earl, 1 Dick. 294; Barstow *v.* Kilvington, 5 Ves. 593; Hunt *v.* Rousmanier, 8 Wheat. 174; Gower *v.* Sternes, 2 Whart. 75; Keisselbrock *v.* Livingston, 4 Johns. Ch. 144; Peterson *v.* Grover, 20 Maine, 363; Newson *v.* Bufferlow, 1 Dev. Eq. 379; Goodell *v.* Freed, 15 Vt. 448; Harrison *v.* Howard, 1 Ired. Eq. 407; Blanchard *v.* Moore, 4 J. J. Marsh. 471; Perry *v.* Pearson, 1 Humph. 431.

important provision is omitted from a deed, and no fraud is charged or proved, parol evidence cannot be received against the denial of the defendant in his answer to reform, vary, or defeat the instrument.[1] Parol evidence, however, is not favor-

the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect, yet the absence of such proof is far from being conclusive to the contrary. Rice *v.* Rice, 4 Pick. 349; Flagg *v.* Mann, 14 Pick. 467, 478; Russell *v.* Southard, 12 How. 139; Browne *v.* Dewey, 1 Sandf. Ch. 56. When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed, to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

"A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists: Story, Eq. §§ 239, 245, 246; and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so. Kerr on Fraud and Mistake, 186 and note; Wharf *v.* Howell, 5 Binn. 499.

"Another circumstance that may and ought to have much weight is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance. Cotterell *v.* Purchase, Cas. temp. Talbot, 61; Lincoln *v.* Wright, 4 De Gex & Jones, 16.

"These several considerations have more or less weight, according to the circumstances of each case. Conway *v.* Alexander, 7 Cranch, 218; Bentley *v.* Phelps, 2 Wood. & M. 426. It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import." So, if it is necessary for an absolute grantee to come into a court of equity for relief, as for a loss of the deeds, the court can compel him to do equity, as to make a settlement upon parties entitled to a settlement by parol understanding. Phillips *v.* Phillips, 50 Mo. 603.

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[1] Lemon *v.* Whitely, 4 Russ. 423; Irnham *v.* Child, 1 Bro. Ch. 92; Portmore *v.* Morris, 2 id. 219; Rich *v.* Jackson, 4 id. 614; 6 Ves. 334, n.; Jack-

ably received by courts in any case, and they will not act upon it against written instruments, unless it is exceedingly clear and certain, and uncontradicted by other evidence.[1] In Pennsylvania, however, a different rule prevails, and parol evidence of the verbal agreements and stipulations upon the faith of which the contract was made, is received in evidence to control its operation or to explain its meaning.[2]

§ 227. The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised.[3] In the view of a court of equity, he is still the owner of the estate, subject to repay whatever money or other property he may have received from the fraudulent grantee. And so the equitable interest of a purchaser under a contract of sale is of that character that it may be assigned or devised.[4]

son *v.* Cator, 5 Ves. 688; Hare *v.* Sherwood, 1 Ves. Jr. 241; Anon. Skin. 159; Mortimer *v.* Shortall, 2 Dr. & W. 363; Alexander *v.* Crosbie, Llo. & Go. 145; London R. Co. *v.* Winter, 1 Cr. & Phil. 57; Garwood *v.* Eldridge, 1 Green, Ch. 146; Lyon *v.* Richmond, 2 Johns. Ch. 60; Wheaton *v.* Wheaton, 9 Conn. 96; Hunt *v.* Rousmanier, 1 Pet. 1; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 282; Westbrook *v.* Harbeson, 2 McCord, Ch. 112; Dwight *v.* Pomroy, 17 Mass. 303; Robson *v.* Harwell, 6 Ga. 589; Chamness *v.* Crutchfield, 2 Ired. Eq. 148; Movan *v.* Hayes, 1 Johns. Ch. 339; Ratcliff *v.* Ellison, 3 Rand. 537; Richardson *v.* Thompson, 1 Humph. 151.

[1] Barrow *v.* Greenhough, 3 Ves. 154; Townshend *v.* Stangroom, 6 Ves. 334; Shelborne *v.* Inchinquin, 1 Bro. Ch. 341; Miller *v.* Cotten, 5 Ga. 346. See the whole matter elaborately discussed and all the authorities collected in notes to Woollam *v.* Hearne, 2 Lead. Cas. Eq. 684; Barkley *v.* Lane, 6 Bush, 58; Collier *v.* Collier, 30 Ind. 32; Lingenfitter *v.* Richings, 62 Penn. St. 128.

[2] Chalfant *v.* Williams, 35 Penn. St. 212; Clark *v.* Partridge, 2 Barr, 13; 4 Barr, 166; Oliver *v.* Oliver, 4 Rawle, 141; Rearich *v.* Swinehart, 1 Jones, 238; Christ *v.* Diffenbach, 1 Serg. & R. 464.

[3] Stump *v.* Gaby, 2 De G., M. & G. 623; McKissick *v.* Pickle, 4 Harris, 140; Kane County *v.* Herrington, 50 Ill. 232.

[4] Stump *v.* Gaby, 2 De G., M. & G. 623; Morgan *v.* Halford, 1 Sm. & Gif. 101; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Malin *v.* Malin, 1 Wend. 625; Clapper *v.* House, 6 Paige, 149; Kent *v.* Mehaffey, 10 Ohio St. 204.

§ 228. Time does not bar a direct trust where the relation of trustee and *cestui que trust* is admitted to exist, but diligence must be used to establish a constructive trust on the ground of fraud. A court of equity will refuse its aid to stale demands, where a party has slept upon his rights, or has acquiesced for a great length of time.[1] And so a constructive trust will be barred by long acquiescence, although the fraud was evident and the relief was originally clear.[2] It is difficult to state as a general proposition what length of time will bar relief from the consequences of a fraud. It is necessarily subject to the equitable discretion of the court, and must depend upon the nature of each case and the circumstances of the parties.

§ 229. Therefore no certain time can be stated as a limit beyond which relief will not be given. In several cases twenty

[1] Smith *v.* Clay, 3 Bro. Ch. 639, n.; Cholmondeley *v.* Clinton, 1 J. & W. 151; Chalmer *v.* Bradley, id. 59; Beckford *v.* Wade, 17 Ves. 97; Portlock *v.* Gardner, 1 Hare, 594; Hawley *v.* Cramer, 4 Cow. 117; Dobson *v.* Racey, 3 Sandf. Ch. 61; Powell *v.* Murray, 2 Edw. Ch. 644; 10 Paige, 256; Piatt *v.* Vatier, 9 Pet. 405; McKnight *v.* Taylor, 1 How. 161; Wagner *v.* Baird, 7 How. 234; Veasie *v.* Williams, 8 How. 134; Hallett *v.* Collins, 10 How. 174; Hough *v.* Richardson, 3 Story, 659; Gould *v.* Gould, 3 Story, 516; Peebles *v.* Reading, 8 Serg. & R. 484; Irvine *v.* Robertson, 3 Rand. 549; Colman *v.* Lyne, 4 Rand. 454; Anderson *v.* Burchell, 6 Grat. 405; 2 Story's Eq. Jur. § 1520, notes.

[2] Bonny *v.* Ridgard, cited 4 Bro. Ch. 138; Andrew *v.* Wrigley, 4 Bro. Ch. 124; Blennerhassett *v.* Day, 2 B. & B. 118; Gregory *v.* Gregory, Cowp. 201; Jac. 631; Selsey *v.* Rhoades, 1 Bligh (N. S.), 1; Champion *v.* Rigby, 1 R. & M. 539; *Ex parte* Granger, 2 Deac. & Ch. 459; Collard *v.* Hare, 2 R. & M. 675; Norris *v.* Neve, 2 Atk. 38; Pryce *v.* Byrn, 5 Ves. 681, cited Campbell *v.* Campbell, id. 678, 682; Morse *v.* Royal, 12 Ves. 355; Medlicott *v.* O'Donnell, 1 B. & B. 156; Hatfield *v.* Montgomery, 2 Porter, 58; Bond *v.* Brown, 1 Harp. Eq. 270; Edwards *v.* Roberts, 7 Sm. & M. 544; Peacock *v.* Black, Halst. Eq. 535; Steele *v.* Kinkle, 3 Ala. 352; Smith *v.* Clay, Amb. 645; Bond *v.* Hopkins, 1 Sch. &. Lef. 413; Hovenden *v.* Annesley, 2 Sch. & Lef, 630–640; Stackhouse *v.* Barnston, 10 Ves. 466; *Ex parte* Dewdney, 15 Ves. 496; Kane *v.* Bloodgood, 7 Johns. Ch. 93; Dexter *v.* Arnold, 3 Sumn. 152; Decouche *v.* Savetier, 3 Johns. Ch. 190; Murray *v.* Coster, 20 Johns. 576; Prevost *v.* Gratz, 6 Wheat. 481; Hughes *v.* Edwards, 9 Wheat. 489; Elmendorf *v.* Taylor, 10 Wheat. 168; Miller *v.* McIntire, 6 Pet. 61; Sherwood *v.* Sutton, 5 Mason, 143; Williams *v.* First Pres. Soc., 1 Ohio St. 478.

years has been held to be a bar;[1] and so where one had acquiesced for twenty-five years,[2] and twenty-one years,[3] and in another case the lapse of eighteen years was held to be a bar.[4] So a delay of thirty years,[5] of thirty-eight years,[6] of forty-six years,[7] of fifty years,[8] of twenty-seven years,[9] and of seventeen years,[10] has been held to be such *laches*, if unexplained, as would be a bar to a bill for relief. Under the circumstances of other cases, a delay of twelve years,[11] of eleven years,[12] of eighteen years, was held to be no bar.[13] In Michoud *v.* Girod the law was elaborately examined and stated by Mr. Justice Wayne as follows, "that within what time a constructive trust will be barred must depend upon the circumstances of the case.[14] There

[1] Smith *v.* Clay, 3 Bro. Ch. 639, n.; Hovenden *v.* Annesley, 2 Sch. & Lef. 636; Stackhouse *v.* Barnston, 10 Ves. 466; Pryce *v.* Byrn, 5 Ves. 681; Ward *v.* Van Bokkelen, 1 Paige, 100; Thompson *v.* Blair, 3 Murph. 593; Farr *v.* Farr, 1 Hill, Eq. 391; Field *v.* Wilson, 6 B. Mon. 479; Bruce *v.* Child, 4 Hawks, 372; Perry *v.* Craig, 3 Miss. 525; Ferris *v.* Henderson, 12 Penn. St. 54; Bank of U. S. *v.* Biddle, 2 Pars. Eq. 31; Walker *v.* Walker, 16 Serg. & R. 379; McDowell *v.* Goldsmith, 2 Md. Ch. 370; Norris's App. 71 Penn. St. 124. In Paschall *v.* Hinderer, 28 Ohio St. 568, it is said: The statute does not apply in equity to bar a trust except in three classes of cases: first, where there is a concurrent remedy at law to which there is a fixed limitation; second, where there is an open denial of the trust, with notice which requires action by the *cestui que trust*, and afterwards a lapse of time which would amount to a bar in law; and third, where there are circumstances shown which with lapse of time raise a presumption that the trust has been extinguished.

[2] Blennerhassett *v.* Day, 2 B. & B. 118.

[3] Selsey *v.* Rhoades, 1 Bligh (N. S.) 1.

[4] Gregory *v.* Gregory, Coop. 201; Jac. 631; Champion *v.* Rigby, 1 R. & M. 539; Roberts *v.* Tunstall, 4 Hare, 257.

[5] Harrod *v.* Fountleroy, 3 J. J. Marsh. 548; Phillips *v.* Belden, 2 Edw. Ch. 1; Page *v.* Booth, 1 Rob. Va. 161; Bond *v.* Brown, Harp. Eq. 270.

[6] Powell *v.* Murray, 10 Paige, 256.

[7] Maxwell *v.* Kennedy, 8 How. 210.

[8] Anderson *v.* Barwell, 6 Grat. 405.

[9] Hayes *v.* Goode, 7 Leigh, 486.

[10] Baker *v.* Read, 18 Beav. 398; Emerick *v.* Emerick, 3 Grant, 295.

[11] Butler *v.* Haskell, 4 Des. 651; Newman *v.* Early, 3 Tenn. Ch. 714.

[12] Rhinlander *v.* Barrow, 17 Johns. Ch. 538; Mulhallen *v.* Marum, 3 Dr. & W. 315.

[13] Bell *v.* Webb, 2 Gill, 263; Grisby *v.* Mousley, 4 De G. & J. 78.

[14] Boone *v.* Chiles, 10 Pet. 177; Trafford *v.* Wilkinson, 3 Tenn. Ch. 701.

is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it." [1] If there is no fraud chargeable on any party, but a simple mistake or accident is made by which a title is changed, more diligence is required, and acquiescence for a less time will bar the suffering party of his relief. An acquiescence for seventeen years,[2] or for nineteen years,[3] has been held to be fatal to an application for relief. But where trustees without actual fraud conveyed to themselves, a sleeping on their rights for five years after knowing of the transaction was held not to bar the *cestuis*, the court intimating that where no conduct of the *cestuis* indicated acquiescence, mere delay for less time than twenty years would not affect them.[4] Where there are two remedies, pursuing one first and waiting till it has run its course before making trial of the other is not *laches*.[5]

§ 230. The statute of limitations is not necessarily controlling, as to the time within which relief is to be sought, in the case of a constructive trust by reason of fraud. A demand may

[1] Michoud *v.* Girod, 4 How. 561; Trevelyan *v.* Charter, 11 Cl. & Fin. 714; Pyrn *v.* Byrne, 5 Ves. 681; Maloney *v.* L'Estrange, Beat. 406; Carpenter *v.* Canal Co., 35 Ohio St. 307. Lapse of time is no bar to a trust clearly established; and in cases where fraud is imputed and proved, length of time ought not, upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successful is rather an aggravation, and calls more loudly for decisive and ample relief. Per Story, J., in Prevost *v.* Gratz, 6 Wheat. 481. In this case forty years and the death of all the parties was held sufficient to warrant the presumption of the discharge and extinguishment of a trust, proved to have existed by strong circumstances.

[2] Hite *v.* Hite, 1 B. Mon. 177; Emerick *v.* Emerick, 3 Grant, 295.

[3] Bruce *v.* Child, 4 Hawks, 372.

[4] Morse *v.* Hill, 136 Mass. 60, 66, and cases cited.

[5] Blake *v.* Traders' Nat'l Bk., 145 Mass. 13, 17.

be stale, and not entitled to relief under the circumstances of the case, although much less than the time allowed by the statute of limitations has elapsed; and so a party may be entitled to relief although much more than the statute limit has gone by.[1] In some States, however, the statute is applied to constructive trusts, unless they are concealed or undiscovered. In such States, relief must be sought within six years if it is sought by bill in equity to set aside a deed, or to establish a trust.[2] In Pennsylvania, the limit is five years.[3] In other States, it has been decided in analogy to the statute which bars a real action after twenty years, that relief must be sought within the twenty years named in the statute.[4] In South Carolina, it is held that an action to set aside a deed as fraudulent is equivalent to an action for deceit, and must be brought within the limit of the statute for personal actions.[5] But if the fraud is unknown to the injured party, or is concealed, or he is under disability, or out of the country, or the delay is caused by the defendant,[6] the lapse of time will not be *laches* which bar relief.

[1] Mason *v.* Crosby, 1 Wood. & M. 342; Piatt *v.* Vatier, 1 McLean, 146; 9 Pet. 405; Juzan *v.* Toulmin, 9 Ala. 662.

[2] Farnham *v.* Brooks, 9 Pick. 212; Sears *v.* Shafer, 2 Seld. 268; Williamson *v.* Field, 2 Sandf. Ch. 534; Pilcher *v.* Flinn, 30 Md. 202.

[3] Miller *v.* Franciscus, 40 Penn. St. 335; Rider *v.* Maul, 46 Penn. St. 376; Ashurst, App. 60 id. 290.

[4] Ward *v.* Van Bokkelen, 1 Paige, 100; Walker *v.* Walker, 16 Serg. & R. 379; Ferris *v.* Henderson, 12 Penn. St. 54; Bank of U. S. *v.* Biddle, 2 Pars. Eq. 31; Thompson *v.* Blair, 3 Murph. 593; Farr *v.* Farr, 1 Hill, Eq. 391; Perry *v.* Craig, 3 Miss. 525; Field *v.* Wilson, 6 B. Mon. 479; Bruce *v.* Child, 4 Hawks, 372; McDowel *v.* Goldsmith, 2 Md. Ch. 370.

[5] Parkam *v.* McCravy, 6 Rich. Eq. 143; McDonald *v.* May, 1 Rich. Eq. 91; Bradley *v.* McBride, Rich. Eq. Cas. 202, is overruled.

[6] Sears *v.* Shafer, 2 Seld. 268; Richardson *v.* Jones, 3 G. & J. 163; Doggett *v.* Emerson, 3 Story, 700; Callender *v.* Calgrove, 17 Conn. 1; Phalen *v.* Clarke, 19 Conn. 421; Hallett *v.* Collins, 10 How. 174; Rider *v.* Bickerton, 3 Swanst. 81, n.; Blennerhassett *v.* Day, 2 B. & B. 118; Trevelyan *v.* Charter, 11 Cl. & Fin. 714; Bowen *v.* Evans, 2 H. L. Cas. 257; Warner *v.* Daniel, 1 W. & M. 111; Murray *v.* Palmer, 2 Sch. & Lef. 487; Aylewood *v.* Kearney, 2 B. & B. 263; Pickett *v.* Loggan, 14 Ves. 215; Purcell *v.* McNamara, id. 91; Ferris *v.* Henderson, 12 Penn. St. 49; Michoud *v.* Girod, 4 How. 561; Henry County *v.* Winnebago, &c., 52 Ill. 299.

If a party has knowledge of the fraud, a want of evidence will not excuse his delay,[1] nor will poverty and an inability to prosecute the action.[2] If there has been great delay, courts will require very clear evidence to impeach a transaction as fraudulent, and to convert the fraudulent party into a trustee.[3] So, if a great length of time has elapsed, courts will sometimes grant the relief prayed for by setting aside the conveyance, but will decree an account for only six years,[4] or from the time of filing the bill,[5] and without costs.[6]

[1] Parkam *v.* McCravy, 6 Rich. Eq. 114.

[2] Roberts *v.* Tunstall, 4 Hare, 357; Maxwell *v.* Kennedy, 8 How. 210; Locke *v.* Armstrong, 2 Dev. & Bat. 147; Perry *v.* Craig, 3 Miss. 516.

[3] Chalmers *v.* Bradley, 1 J. & W. 59; Powell *v.* Murray, 10 Paige, 256; Bowen *v.* Evans, 2 H. L. Cas. 257; Westbrook *v.* Harwell, 2 McCord, Eq. 112; Phillips *v.* Belden, 2 Edw. Ch. 1; Jennings *v.* Broughton, 3 De G., M. & G. 126; Chandos *v.* Brownlow, 2 Ridg. P. C. 397; Montgomery *v.* Hobson, Meigs, 437; Page *v.* Booth, 1 Rob. 161.

[4] Pearce *v.* Newlyn, 3 Madd. 189.

[5] Pickett *v.* Loggan, 14 Ves. 215; Malony *v.* L'Estrange, Beatt. 406; Mulhallen *v.* Marum, 3 Dr. & W. 317.

[6] Pearce *v.* Newlyn, 3 Madd. 189; Att. Gen. *v.* Dudley, Coop. 146.

CHAPTER VII.

TRUSTS THAT ARISE BY EQUITABLE CONSTRUCTION IN THE ABSENCE OF FRAUD.

§ 231. Trust by equitable construction. Illustration.
§ 232. Vendor's lien for the purchase-money of this description. States in which it exists.
§ 233. This lien does not contravene the statute of frauds.
§ 234. The nature of the interest of the vendor under this lien.
§§ 235-237. When the lien exists and when not.
§§ 238-239. The parties between whom the lien exists.
§ 240. Trust by construction where a conveyance is made that cannot operate at law.
§ 241. Constructive trust where trust property is transferred by gift from the trustee.
§ 242. Constructive trust where a corporation distributes its capital stock without paying its debts.
§ 243. A person holding the legal title as security is a constructive trustee.
§ 244. Executor indebted to the testator's estate is a constructive trustee.
§ 245. A person may become a trustee *de son tort* by construction.
§ 246. An agent may become a constructive trustee.
§ 246*a*. Other equitable trusts. See § 247 *a*.
§ 247. A person holding deeds or papers or property belonging to another may be a constructive trustee.

§ 231. It frequently happens that courts of equity construe a trust to arise from the contracts and dealings of parties, although a trust is not within their contemplation, and there is no fraud, actual or constructive. In this respect, courts of equity proceed in a manner and upon principles entirely unknown to courts of law. Thus, if the intention of the testator cannot be carried out without appointing a trustee, that will be done.[1] So, if parties enter into a valid contract for the sale and conveyance of lands, and the vendor neglects or declines

[1] Quigley *v.* Gridley, 132 Mass. 39, 40.

to convey, courts of law can only give the vendee an action for damages for a breach of the contract, but the legal title to the property will not be affected; it will still remain in the vendor. A court of equity, however, looks upon that as already done, which was agreed to be done.[1] From the date of the contract it looks upon the beneficial interest as in the vendee, and the legal title only as in the vendor. By construction the vendor holds the legal title in trust for the vendee.[2] (*a*) Equity proceeds, *in personam*, against the vendor amd makes him a trustee, and then orders him to execute the trust by conveying the legal title to the person to whom he has agreed to convey it. The purchaser is in like manner a trustee of the purchase-money, and the court will order him to pay it over, and receive a conveyance of the legal title to the land.[3] And, *a fortiori*, if the purchaser has paid the purchase-money the vendor becomes a mere trustee of the legal title for the purchaser;[4] so, if the purchaser has paid part of the purchase-money, the vendor becomes a trustee

[1] Fonbl. Eq. Tr. B. 1, c. 6, § 8.

[2] Wall *v.* Bright, 1 J. & W. 500; Green *v.* Smith, 1 Atk. 572; Davie *v.* Beardsham, 1 Ch. Cas. 39; Atcherley *v.* Vernon, 10 Mod. 518; McKay *v.* Carrington, 1 McLean, 50; Crawford *v.* Bertholf, Saxt. 458; Ten Eyck *v.* Simpson, 1 Sandf. Ch. 244; Kerr *v.* Day, 14 Penn. St. 112; Moore *v.* Burrows, 34 Barb. 173; Adams *v.* Green, id. 176; Wickman *v.* Robinson, 14 Wis. 493; Conway *v.* Kinsworthy, 21 Ark. 9; Dana *v.* Petersham, 107 Mass. 598; Currie *v.* White, 45 N. Y. 822; Reed *v.* Lukens, 44 Penn. St. 200; Lamb *v.* Davenport, 1 Sawyer, 609; Potter *v.* Jacobs, 111 Mass. 32. [Stubbs *v.* Pitts, 84 Ark. 160; First Nat. Bank *v.* Edgar, 65 Neb. 340; Atteberry *v.* Burnett, 113 S. W. 526 (Tex. 1908).]

[3] Green *v.* Smith, 1 Atk. 572; Pollexfen *v.* Moore, 3 Atk. 272; Dexter *v.* Stewart, 7 Johns. Ch. 52.

[4] Waddington *v.* Banks, 1 Brock. 97; Fenno *v.* Sayre, 3 Ala. 458; Brown *v.* East, 5 Mon. 415; Payne *v.* Atterbury, Harring. Ch. 414; Neeson *v.* Clarkson, 4 Hare, 97. [Scadden Flat Gold Mining Co. *v.* Scadden, 121 Cal. 33.]

(*a*) Thus where the vendor after an executory contract to sell conveyed and released to a third person certain easements appurtenant to the land, the vendee under the contract is entitled to the proceeds. Marvin *v.* Bernheimer, 77 N. Y. S. 915. The equitable interest of the vendee of such an executory contract descends to his heirs. Cutler *v.* Meeker, 71 Neb. 732.

to the extent of the money paid.[1] If the vendor does not own the land, or some part of that which he agrees to convey, and afterwards obtains the title, he will immediately become a trustee for the purchaser.[2] This equity will not be affected by the death or bankruptcy of either party. If the vendor dies before he has conveyed the land, the legal title will descend to his heirs subject to the trust; and they or his legal representatives will be ordered to execute the trust.[3] But the lien or trust will not exist where the purchaser by his own fault abandons the contract,[4] or where the contract is for any cause illegal.[5] If the purchaser abandons the contract because the vendor cannot fulfil it as agreed upon, as if it is to give a good title, the trust or lien will not continue.[6] Wherever one wrongfully obtains the legal title to land which in equity and good conscience belongs to another, equity will raise a constructive trust.[7] (*a*)

§ 232. Similar to this is the constructive lien or trust in favor of a vendor for his unpaid purchase-money; for the vendor of land has a lien on the land for the amount of the purchase-money, not only against the vendee himself and his

[1] Wythes *v.* Lee, 3 Drew. 396; Westmacott *v.* Robins, 4 De G., F. & J. 390.

[2] Tyson *v.* Passmore, 2 Barr, 122; McCall *v.* Coover, 4 Watts & S. 151.

[3] Paul *v.* Wilkins, Toth. 106; Barker *v.* Hill, 2 Ch. R. 113; Winged *v.* Lefebury, 2 Eq. Cas. Ab. 32, pr. 43; Orlebar *v.* Fletcher, 1 P. Wms. 737; Bowles *v.* Bowles, 6 Ves. 95, n.; Whitworth *v.* Davis, V. & B. 545; Tiernan *v.* Roland, 15 Penn. St. 429; Rutherford *v.* Green, 2 Ired. Eq. 121; Jacobs *v.* Lake, id. 286; Newton *v.* Swazey, 8 N. H. 9; Glaze *v.* Drayton, 1 Dev. 109. In Massachusetts, the probate court or the supreme judicial court may authorize the executor or administrator, or the guardian of an insane person, to convey in such cases. Public Stat. 1882.

[4] Dinn *v.* Grant, 5 De G. & Sm. 451.

[5] Ewing *v.* Osbaldiston, 2 My. & Cr. 88.

[6] Wythes *v.* Lee, 3 Drew. 396.

[7] Lakin *v.* S. B. M. Co., 11 Sawy. (U. S.) 231.

(*a*) Thus one who purchases with knowledge that another has a bond for title takes subject to the latter's equity. **Handy *v.* Rice, 98** Me. 504.

heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. To the extent of the lien, the vendee becomes a trustee for the vendor; and the vendee's heirs, and all other persons claiming under him or them with notice, are construed by courts of equity to be trustees. This doctrine is well established in the jurisprudence of England,[1] and it has been recognized, and acted upon, in many of the United States.[2] The

[1] See Mackreth *v.* Symmons, 15 Ves. 329, where Lord Eldon cited and commented upon all the cases previous to that time. See s. c. 1 Lead. Cas. Eq. 336, where the later English cases are quoted, and also the American cases. Lemon *v.* Whiteley, 4 Rus. 423; Chapman *v.* Tanner, 1 Vern. 267; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Burgess *v.* Wheat, 1 Eden, 211; 1 W. Black. 150. [See Davies *v.* Thomas, (1900) 2 Ch. 462, 467.]

[2] In Maine the doctrine is entirely rejected as inconsistent with the registry laws and policy of the State: Philbrook *v.* Delano, 29 Maine, 415. In New Hampshire the court has left it undecided: Arlin *v.* Brown, 44 N. H. 102, and see Buntin *v.* French, 16 N. H. 592. In Vermont the doctrine was established in an able judgment by Ch. J. Redfield: Manly *v.* Slason, 21 Vt. 271, but abolished by Stat. 1851. In Massachusetts it is rejected: Ahrend *v.* Odiorne, 118 Mass. 261. In Connecticut it is undecided: Atwood *v.* Vincent, 17 Conn. 575. See Watson *v.* Wells, 5 Conn. 468; Dean *v.* Dean, 6 Conn. 285; Meigs *v.* Dimock, id. 458; Chapman *v.* Beardsley, 31 Conn. 115. In Rhode Island it is recognized: Kent, Adm'r, *v.* Gerhard *et ux.*, 12 R. I. 92. [Smith Granite Co. *v.* Newall, 22 R. I. 220.] In New York it is well established: Stafford *v.* Van Renselaer, 9 Cow. 316; Garson *v.* Green, 1 Johns. Ch. 308; White *v.* Williams, 1 Paige, Ch. 502; Fish *v.* Howland, id. 20; Warner *v.* Van Alstyne, 3 id. 513; Shirley *v.* Sugar Ref., 2 Edw. Ch. 505; Dubois *v.* Hall, 43 Barb. 26; Warren *v.* Fenn, 28 id. 333; Champion *v.* Brown, 6 Johns. 402. [Bach *v.* Kidansky, 186 N. Y. 368; Hubbell *v.* Hendrickson, 175 N. Y. 175, 178.] In New Jersey, also: Vandoren *v.* Todd, 2 Green, Ch. 397; Brinkerhoff *v.* Vansciven, 3 id. 251; Herbert *v.* Scofield, 1 Stockt. Ch. 492. [Harter *v.* Capital City Brewing Co., 64 N. J. Eq. 155; Morgan *v.* Dalrymple, 60 N. J. Eq. 466.] In Pennsylvania the doctrine is rejected, though there may be such a conditional title conveyed, as will give the vendor a preference for the purchase-money over all others claiming under the vendee: Irvine *v.* Campbell, 6 Binn. 118; Stouffer *v.* Coleman, 1 Yeates, 393; Kauffelt *v.* Bower, 7 Serg. & R. 64; Semple *v.* Burd, id. 286; Bear *v.* Whisler, 7 Watts, 147; Zentmyer *v.* Miltower, 5 Penn. St. 403; Stephen's App., 38 id. 9; Springer *v.* Walters, 34 id. 328; Hepburn *v.* Snyder, 3 id. 72; Megargel *v.* Saul, 3 Whar. 19; Cook *v.* Trimble, 9 Watts, 15; Heist *v.* Baker, 49 Penn. St. 9; Straus's App., id. 353. In Delaware the point is undecided: Budd *v.* Basti, 1 Harr. 69. In Maryland it is well established: White *v.* Casanave,

principle upon which the lien depends is this: that a person who has obtained the estate of another ought not, in conscience,

1 Har. & J. 106; Ghiselin *v.* Ferguson, 4 Har. & J. 522; Pratt *v.* Van Wyck, 6 id. 495; Magruder *v.* Peter, 11 id. 217; Repp *v.* Repp, 12 id. 341; Moreton *v.* Harrison, 1 Bland, Ch. 491; Carr *v.* Hobbs, 11 Md. 285; Hummer *v.* Schott, 21 Md. 307; Hall *v.* Jones, id. 439; Bratt *v.* Bratt, id. 578. In Virginia it was long acted upon: Graves *v.* McCall, 1 Call, 414; Handley *v.* Lyons, 5 Munf. 342; Duvall *v.* Bibb, 4 Hen. & M. 113; Hatcher *v.* Hatcher, 1 Rand. 53; Redford *v.* Gibson, 12 Leigh, 332. But it is now abolished by the code: Yancy *v.* Manck, 15 Grat. 300; Hempfield R. R. Co. *v.* Thornbury, 4 W. Va. 261. [Va. Code, (1904), § 2474. Also in West Virginia Code (1906) ch. 75, § 3110; Board *v.* Wilson, 34 W. Va. 609, 617; Scraggs *v.* Hill, 43 W. Va. 162.] In North Carolina, after being acted upon for some time, it was overruled: Cameron *v.* Mason, 7 Ired. Eq. 180; Gabee *v.* Sneed, 1 Dev. & B. 333; Wamble *v.* Battle, 3 Ired. Eq. 182; Henderson *v.* Burton, id. 259. In South Carolina it was never acted upon: Wragg *v.* Comptroller-Gen. 2 Des. 509. In Georgia it is acted upon: Marine Fire Ins. Co. *v.* Early, Charl. 279; Hampden *v.* Miller, Dud. 120; Mounce *v.* Byars, 16 Ga. 469; Chance *v.* McWharter, 26 Ga. 315; Stile *v.* Griffin, 27 Ga. 504; Mims *v.* Lockett, 23 Ga. 237; Mims *v.* Macon and Western Railroad, 3 Kelly, 333. [But has been abolished by statute, Ga. Code (1895), § 2823.] Also in Florida: Woods *v.* Bailey, 3 Fla. 41. [McKinnon *v.* Johnson, 54 Fla. 538; Rewis *v.* Williamson, 51 Fla. 529.] And so in Alabama: Burns *v.* Taylor, 23 Ala. 255; Haley *v.* Bennett, 5 Porter, 452; Roper *v.* McCook, 7 Ala. 318; Griffin *v.* Camack, 36 Ala. 695. [Hood *v.* Hammond, 1 28 Ala. 569, 576.] So in Mississippi: Trotter *v.* Erwin, 27 Miss. 772; Stewart *v.* Ives, 1 Sm. & M. 197; Tanner *v.* Hicks, 4 id. 294; Upshaw *v.* Hargrave, 6 id. 286; Dunlop *v.* Burnett, 5 id. 702; Servis *v.* Beatty, 32 Miss. 52. [Matthews *v.* Delta, etc., R. R. Co., 90 Miss. 429.] It is established in Texas: Pinchain *v.* Collard, 13 Tex. 333; Wheeler *v.* Lane, 21 Tex. 583; McAlpin *v.* Burnett, 23 Tex. 649. So in Arkansas: English *v.* Russell, Hemp. 35; Scott *v.* Orbinson, 2 Ark. 202; Shall *v.* Biscoe, 18 Ark. 142. So in Missouri; Marsh *v.* Turner, 4 Mo. 53; McKnight *v.* Brady, 2 Mo. 110; Davis *v.* Lamb, 30 Mo. 441; Bledsoe *v.* Games, id. 448; Delassus *v.* Poston, 19 Mo. 425. [Dickason *v.* Fisher, 137 Mo. 342.] So in Tennessee: Brown *v.* Vanlier, 7 Humph. 239; Eskridge *v.* McClure, 2 Yerg. 84; Marshall *v.* Christmas, 3 Humph. 616; Campbell *v.* Baldwin, 2 Humph. 248; Uzzell *v.* Mack, 4 Humph. 319; Medley *v.* Davis, 5 Humph. 387; Norvell *v.* Johnson, id. 489; Taylor *v.* Hunter, id. 569. [Electric Light Co. *v.* Gas Co., 99 Tenn. 371, 376.] So in Kentucky: Muir *v.* Cross, 10 B. Mon. 277; Fowler *v.* Rust, 2 A. K. Marsh. 294; Taylor *v.* Alloway, 2 Litt. 216; Mosely *v.* Garrett, 1 J. J. Marsh. 212; Richardson *v.* Baker, 5 id. 323; Cox *v.* Fenwick, 3 Bibb, 183. [See Ky. Stats. 1909, § 2053.] So in Ohio: Williams *v.* Roberts, 5 Ohio, 35; Tiernan *v.* Bean, 2 Ham. 383; Magham *v.* Coombs, 14 Ohio, 428; Neil *v.* Kinney, 11 Ohio St. 58. [Campbell *v.* Sidwell, 61 Ohio St. 179, 186.] So in Indiana: McCarty *v.*

to keep it, and not pay the consideration-money in full; and a third person, who receives the estate with full knowledge that it has not been paid for, ought not, as a matter of equity, to be allowed to keep it without paying for it.[1] It will at once be seen, that, as between the parties, this lien is founded in natural justice.[2] The civil law gave a lien on both real and personal property to the vendor for the purchase-money, and the principle was early introduced into English equity, as to real estate.[3]

Pruet, 4 Ind. 46; Lagow *v.* Badollet, 1 Blackf. 416; Evans *v.* Goodlett, id. 246; Merritt *v.* Wiles, 18 Ind. 171; Cox *v.* Wood, 20 Ind. 54. [Ballard *v.* Camplin, 161 Ind. 16.] So in Illinois: Trustees *v.* Wright, 11 Ill. 603. [Ross *v.* Clark, 225 Ill. 326; Koch *v.* Roth, 150 Ill. 212, 219.] So in Michigan: Sears *v.* Smith, 2 Mich. 243; Carroll *v.* Van Renselaer, Harring. Ch. 225. [Shaw *v.* Tabor, 146 Mich. 544; Lyon *v.* Clark, 132 Mich. 521.] Also in Iowa: Pierson *v.* David, 1 Iowa, 23; Rakestraw *v.* Hamilton, 14 Iowa, 147; Patterson *v.* Linder, id. 414; Tupple *v.* Viers, id. 515; Grapengether *v.* Fejervary, 9 Iowa, 163; Hays *v.* Horine, 12 Iowa, 61. [See Code of Iowa, (1897) § 2924; Fisher *v.* Shropshire, 147 U. S. 133.] So in Wisconsin: Toby *v.* McAllister, 9 Wis. 463. [Halvorsen *v.* Halvorsen, 120 Wis. 52; Berger *v.* Berger, 104 Wis. 282.] Also in Minnesota: Daughaday *v.* Payne, 6 Minn. 443. In Kansas there is no lien: Simpson *v.* Munder, 3 Kans. 172. And so in Nebraska: Edminster *v.* Higgins, 6 Neb. 265. [Ansley *v.* Pasahro, 22 Neb. 662.] The lien exists in California: Truebody *v.* Jacobson, 2 Cal. 269; Taylor *v.* McKinney, 20 Cal. 618; Baum *v.* Grigsby, 21 Cal. 172; Sparks *v.* Hess, 15 Cal. 186; Walker *v.* Sedgwick, 8 Cal. 398; Cahoon *v.* Robinson, 6 Cal. 225; Salmon *v.* Hoffman, 2 Cal. 138; Burtt *v.* Wilson, 28 Cal. 632. [Selna *v.* Selna, 125 Cal. 357.] The same doctrine is held in the courts of the United States: Chilton *v.* Braiden, 2 Black, 458; Gilman *v.* Brown, 1 Mason, 191; 4 Wheat. 255; Bayley *v.* Greenleaf, 7 Wheat. 46; Bush *v.* Marshall, 6 How. 284; Galloway *v.* Finley, 12 Pet. 264; McLearn *v.* McLellan, 10 Pet. 640; Cole *v.* Scott, 2 Wash. 141. [Slide & Spur Gold Mines *v.* Seymour, 153 U. S. 509.] (*a*)

[1] Hughes *v.* Kearney, 1 Sch. & Lef. 135; Chilton *v.* Braiden, 2 Black. 9 458.

[2] Inst. Lib. 2, tit. 1, § 41; Blackburn *v.* Gregson, 1 Cox, 100; Chapman *v.* Tanner, 1 Vern. 267.

[3] Mackreth *v.* Symmons, 15 Ves. 337; Dig. Lib. 18, tit. 1, c. 19, 22, 53; Domat, B. 3, tit. 1, § 5, art. 4.

(*a*) See also Rhodes *v.* Arthur, 19 Okla. 520. The lien is not recognized in Oregon, Frame *v.* Sliter, 29 Or. 121; or in Alaska, Lindbloom *v.* Kidston, 2 Alaska, 292; or in Arizona, Baker *v.* Fleming, 6 Ariz. 418.

Courts administer the equity by converting the purchaser into a trustee.[1] They, in effect, say, that if one conveys his land and takes no security for the purchase-money, the purchaser shall be a trustee of the land for the vendor until it is paid.[2]

§ 233. It has been objected that the creation of this lien or trust by courts of equity is a repeal of the statute of frauds. It is answered, that the raising of such a trust is no more in contravention of the statute than the creation of any other resulting or constructive trust by operation of law upon the acts and contracts of parties, where they do not contemplate or intend a trust.[3] It is further objected, in the United States, that the raising of such trusts is contrary to the policy of the registry laws which require all deeds and liens to be matter of record.[4] But, as between the parties, the raising of a trust to secure the purchase-money is no more against the policy of the registry laws than is the raising of a resulting trust to secure the actual purchaser, where the deed is taken in the name of another, or the raising of a constructive trust where one man has defrauded another of his title. In either case there is a secret trust that does not appear upon the records of the registry. So, as against third persons who take the land with notice that the purchase-money is unpaid, the policy of the registry laws applies in the same manner that it applies to other unrecorded deeds or liens.[5] Thus, if a second purchaser or mortgagee has notice of a prior sale or mortgage for a valuable consideration, he cannot, by putting his deed or mortgage first on record, deprive the prior purchaser or mortgagee of his title or security.[6] It is, however, true that many courts have looked upon this trust with disfavor, although they have recognized its existence,[7] and

[1] Ibid.; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Walker, Am. Law, 315.
[2] Ibid.
[3] Mackreth *v.* Symmons, 15 Ves. 329; Manly *v.* Slason, 15 Vt. 271.
[4] Philbrook *v.* Delano, 29 Maine, 415.
[5] Manly *v.* Slason, 21 Vt. 271.
[6] Bayley *v.* Greenleaf, 7 Wheat. 51; Conover *v.* Warren, 1 Gil. 502; Brawley *v.* Catron, 8 Leigh, 527; Moore *v.* Halcombe, 3 Leigh, 600.
[7] Vermont and Virigina, *ut sup.* [Ross *v.* Clark, 225 Ill. 326, 330.]

some States have formally abolished it by statute.[1] While other courts deem it highly equitable, and eminently consistent with the most perfect ideas of moral justice.[2]

§ 234. In most cases the *cestui que trust* has an equitable estate in the land to which his trust attaches, an estate which he may sell, assign, or devise; but a vendor having only a lien for his purchase-money, has no estate in the land. It is neither *jus in re* nor *jus ad rem*. It is the mere possibility of a right, until it is established by a final decree of a court in each case.[3] (*a*) It is not a direct trust in the land itself, but a collateral trust for the security of the debt. It is in fact a remedy for a debt, and not a right of property. It follows, that the remedy can be enforced only so long as the debt can be enforced; that where an action for the purchase-money is gone, the right to enforce the lien, or the lien itself, is gone also. This lien or trust continues so long as the purchase-money remains unpaid, or so long as an action can be maintained for its collection. If the action is barred by the statute of limitations, the remedy to enforce the lien is gone also.[4] In this respect the vendor's lien differs from a mortgage, which may be enforced against the land after all right to enforce the debt against the mortgagor

[1] Ibid.

[2] Manly *v.* Slason, 21 Vt. 278.

[3] Gilman *v.* Brown, 1 Mason, 21; 1 Lead. Cas. in Eq. 272-275; Williams *v.* Young, 17 Cal. 403; 21 Cal. 227. [Halvorsen *v.* Halvorsen, 120 Wis. 52, 56.]

[4] Borst *v.* Corey, 15 N. Y. 505; Sheratz *v.* Nicodemus, 7 Yerg. 9; Trotter *v.* Erwin, 27 Miss. 772; Addams *v.* Hefferman, 9 Watts, 530; Alexander *v.* McMurray, 8 Watts, 504. But in Maryland it was held to be a direct trust and property in the land, like a mortgage, which could be enforced after the personal obligation of the vendee was gone. Moreton *v.* Harrison, 1 Bland, 491; Lingan *v.* Henderson, id. 236. And see Relfe *v.* Relfe, 34 Ala. 500. [It is held in Alabama that the vendor's lien is preserved though the statute of limitations has operated to bar the recovery of the purchase-money as a debt. Hood *v.* Hammond, 128 Ala. 569, 578, and cases there cited.]

(*a*) The lien is joint when different vendors join in one contract for an entire price. Brisco *v.* Minah C. M. Co., 82 F. R. 952; 89 id. 891.

is barred by the statute of limitations, or by his discharge in bankruptcy. (*a*) If a *cestui que trust* conveys his equitable estate in land, he will have the same lien upon it for the purchase-money as in the case of a legal estate.[1]

§ 235. The lien exists, notwithstanding the deed recites[2] or acknowledges[3] that the consideration is paid, and notwithstanding a receipt of the payment is indorsed upon the back of the deed,[4] if in fact it is not paid. (*b*) And if the consideration is not to be paid until after the death of the grantor, and then only upon a contingency, as if no claim for dower is made in the mean time, the lien will arise;[5] but if the consideration of the sale is something other than money, as if the vendor makes the sale for the consideration of his future support, no lien will arise;[6] nor if in consideration that his debts are paid;[7] nor if the

[1] Iglehart *v.* Armiger, 1 Bland, 519; Galloway *v.* Hamilton, 1 Dana, 576; Lignon *v.* Alexander, 7 J. J. Marsh. 288; Stewart *v.* Hatton, 3 id. 178. But see Bayley *v.* Greenleaf, 7 Wheat. 46; Schnebly *v.* Ragan, 7 Gill & J. 120. [Board *v.* Wilson, 34 W. Va. 609, 617.]

[2] Thornton *v.* Knox, 6 B. Mon. 74; Mackreth *v.* Symmons, 15 Ves. 337; Hughes *v.* Kearney, 1 Sch. & Lef. 135; Winter *v.* Anson, 3 Russ. 488; 1 Sim. & S. 434; Saunders *v.* Leslie, 2 B. & B. 514. [Halvorsen *v.* Halvorsen, 120 Wis. 52; Coppage *v.* Murphy, 68 S. W. 416 (Ky. 1902); Cecil *v.* Henry, 93 S. W. 216 (Tex. Civ. App. 1906); Zwingle *v.* Wilkinson, 94 Tenn. 246; Chastain *v.* Hames, 124 Ala. 618.]

[3] Gilman *v.* Brown, 1 Mason, C. C. 214; Sheratz *v.* Nicodemus, 7 Yerg. 9; Ewbank *v.* Poston, 5 Mon. 287; Redford *v.* Gibson, 12 Leigh, 344; Tribble *v.* Oldham, 5 J. J. Marsh. 144.

[4] Ibid.

[5] Redford *v.* Catron, 8 Leigh, 528.

[6] Arlin *v.* Brown, 44 N. H. 105; McCandlish *v.* Keen, 13 Grat. 615; Brawley *v.* Catron, 8 Leigh, 528; McKillip *v.* McKillip, 8 Barb. 552. [Peters *v.* Tunell, 43 Minn. 473.]

[7] Chapman *v.* Beardley, 3 Conn. 115.

(*a*) But a lien expressly reserved in the deed is treated as a mortgage. Smith *v.* Butler, 72 Ark. 350; Fryberger *v.* Berven, 88 Minn. 311, 315; Elmendorf *v.* Beirne, 4 Tex. Civ. App. 188; Gordon *v.* Johnson, 186 Ill. 18.

(*b*) The lien exists for the actual consideration notwithstanding that the deed recites a different consideration. Matthews *v.* Delta. etc., R. Co., 90 Miss. 429.

amount of the consideration is uncertain and unliquidated.[1] Nor if it appears that the consideration is that the vendee shall enter into covenants to do certain things.[2] If a note or bond is taken for the consideration, and includes anything other than the price of the land sold, the lien will not attach.[3]

§ 236. Where a vendor takes security for the purchase-money, it is often a difficult question to determine whether he has thereby abandoned or waived his lien. Much of the litigation upon vendor's liens has arisen over this question, — whether the lien was abandoned or not by the parties. Of course, it is a pure question of fact or intention. By the civil law, the taking of any kind of security was an abandonment of the lien upon the property; this rule has not prevailed in England. The rule in England is, that *prima facie* the vendor has a lien for the purchase-money: the presumption in favor of this lien continues until it is displaced by satisfactory evidence that the lien has been abandoned or extinguished. The burden is on the vendee to repel the presumption. The taking of security by the vendor is evidence upon that question, more or less satisfactory according to the nature of the security taken and the circumstances under which it is taken.[4] It has been held that the taking of a mortgage on another estate was not conclusive

[1] Ibid. [Harter *v.* Capital City Brewing Co., 64 N. J. Eq. 155; Warner *v.* Bliven, 127 Mich. 665; Ross *v.* Clark, 225 Ill. 326. But see Halvorsen *v.* Halvorsen, 120 Wis. 52. See also Rhodes *v.* Arthur, 19 Okla. 520; Leak *v.* Williams' Adm'r, 99 S. W. 630 (Ky. 1907); Neil *v.* Rosenthal, 105 N. Y. S. 681, 120 App. Div. 810.]

[2] Buckland *v.* Pocknell, 13 Sim. 406; Dixon *v.* Gayfere, 17 Beav. 421; 21 Beav. 118; Clarke *v.* Boyce, 3 Sim. 499; Parrott *v.* Sweetland, 3 My. & K. 655. [Whiteley *v.* Central Trust Co., 76 Fed. 74.] In Alabama the lien was held to arise in case of an exchange of lands. Burns *v.* Taylor, 23 Ala. 255.

[3] McCandlish *v.* Keen, 13 Grat. 605; James *v.* Bird, 8 Leigh, 51.

[4] Nairn *v.* Prowse, 6 Ves. 759; Mackreth *v.* Symmons, 17 Ves. 342; Garson *v.* Green, 1 Johns. Ch. 308; Lewis *v.* Caperton, 8 Grat. 148; Plowman *v.* Riddle, 14 Ala. 169; Hughes *v.* Kearney, 1 Sch. & Lef. 136; Saunders *v.* Leslie, 2 B. & B. 514; Bradford *v.* Marvin, 2 Fla. 463.

evidence that the lien was abandoned;[1] and so, bills or notes indorsed by third persons, or bonds with a surety, are not necessarily conclusive evidence that the vendor in taking them waives his lien.[2] It may be, in such cases, that the vendor accepted them as evidences of the amount of the purchase-money and debt, or as security in addition to his lien. But if the security taken is totally distinct and independent, it will be very strong evidence that it was intended to be substituted in place of the lien;[3] and if it is in any way inconsistent with the continued existence of the lien, it will, of course, be conclusive evidence that the lien was abandoned or extinguished.[4] Lord Eldon, after a careful review of the authorities, came to the conclusion that every case depended upon its own peculiar facts and circumstances; that different judges would have determined the same case differently; and that there was no general rule that was satisfactory; and he adds, "If I had found it laid down in distinct and inflexible terms, that when the vendor takes security for the consideration he has no lien, that would be satisfactory."[5]

§ 237. In the United States, the rule that Lord Eldon said would be satisfactory substantially prevails. Thus, if the vendor does any act which manifests an intention to rely upon

[1] Ibid.; Saunders *v.* Leslie, 2 B. & B. 514.

[2] Hughes *v.* Kearney, 1 Sch. & Lef. 135; Gibbons *v.* Baddall, 2 Eq. Ab. 682; Grant *v.* Mills, 2 Ves. & B. 306; Cooper *v.* Spottiswood, Taml. 21; *Ex parte* Peake, 1 Madd. 349; *Ex parte* Loring, 2 Rose, 79; Saunders *v.* Leslie, 2 B. & B. 514; Winter *v.* Anson, 3 Russ. 488; 1 S. & S. 434; Fawell *v.* Heelis, Amb. 724; Frail *v.* Ellis, 17 Eng. L. & Eq. 457; Buckland *v.* Pocknell, 13 Sim. 406; Blair *v.* Bromley, 5 Hare, 542; 2 Phill. 354; Hewitt *v.* Loosemore, 9 Hare, 449; Kyles *v.* Tait, 6 Grat. 44; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Coppin *v.* Coppin, 2 P. Wms. 291; Clark *v.* Royle, 3 Sim. 499; Elliott *v.* Edwards, 3 Bos. & P. 181.

[3] Ibid.; Gilman *v.* Brown, 1 Mason, 191; Cood *v.* Pollard, 9 Price, 544; 10 Price, 109; Parrott *v.* Sweetland, 3 My. & K. 655; Nairn *v.* Prowse, 6 Ves. 752; Mackreth *v.* Symmons, 15 Ves. 342.

[4] Manly *v.* Slason, 21 Vt. 271; Hallock *v.* Smith, 3 Barb. 267; *Ex parte* Parkes, 1 Glyn & Jam. 228.

[5] Mackreth *v.* Symmons, 15 Ves. 342.

any security independent of the lien, he will be held to have waived it;[1] as if he accept a mortgage on other property,[2] or a bond or note with a third person as surety[3] or indorser,[4] or if he takes a pledge of stock as collateral,[5] (*a*) he will be held to have waived his lien. So, if he takes a mortgage on the same land sold for part of the purchase-money, or for the whole,[6] he will be held to have waived his lien for the remainder.[7] But in

[1] Blackburn *v.* Gregson, 1 Bro. Ch. 424; and notes by Perkins; Buntin *v.* French, 16 N. H. 592; Coit *v.* Fougera, 36 Barb. 195; Griffin *v.* Blanchard, 17 Cal. 70; Phelps *v.* Conover, 25 Ill. 309; Selby *v.* Stanley, 4 Minn. 65; Hane *v.* Van Deusen, 32 Barb. 92; Parker *v.* Sewell, 24 Tex. 238; Dibble *v.* Mitchell, 15 Ind. 435.

[2] Richardson *v.* Ridgely, 8 Gill & J. 87; White *v.* Dougherty, 1 Mart. & Y. 309; Young *v.* Wood, 11 B. Mon. 123; Mattix *v.* Weand, 19 Ind. 151; Harris *v.* Harlan, 14 Ind. 104; Shelby *v.* Perrin, 18 Tex. 515; Camden *v.* Vail, 23 Cal. 633; Hadley *v.* Pickett, 25 Ind. 450. [Griffin *v.* Smith, 143 Fed. 865; Shrimsher *v.* Newton, 3 Ind. Terr. 555; Electric Light Co. *v.* Gas Co., 99 Tenn. 371, 376.]

[3] Boon *v.* Murphy, 6 Blackf. 272; Williams *v.* Roberts, 5 Ohio, 35; Mayham *v.* Coombes, 14 Ohio, 428; Wilson *v.* Graham, 5 Munf. 297; Francis *v.* Hazelrigg's Ex'rs, Hardin, 48; Way *v.* Patty, 1 Carter, 102; Burger *v.* Potter, 32 Ill. 66; Sears *v.* Smith, 2 Mich. 243; Porter *v.* Dubuque, 20 Iowa, 440. [Spear's *v.* Taylor, 149 Ala. 180; Hammett *v.* Stricklin, 99 Ala. 616; Kinney *v.* Ensminger, 94 Ala. 536.]

[4] Foster *v.* Trustees, 3 Ala. 302; Gilman *v.* Brown, 1 Mason, 191; 4 Wheat. 255; Marshall *v.* Christmas, 3 Humph. 616; Burke *v.* Gray, 6 How. (Miss.) 527; Conover *v.* Warren, 1 Gilm. 498; Bradford *v.* Marvin, 2 Fla. 463.

[5] Lagow *v.* Badollet, 1 Blackf. 416. [See also Dalliba *v.* Riggs, 7 Idaho, 779, 795.]

[6] Little *v.* Brown, 2 Leigh, 355; Hadley *v.* Pickett, 25 Ind. 450. [Baker *v.* Updike, 155 Ill. 54, 58.] But see to the contrary, Boos *v.* Ewing, 17 Ohio, 520; Baum *v.* Grigsby, 21 Cal. 172.

[7] Brown *v.* Gilman, 4 Wheat. 291; Fish *v.* Howland, 1 Paige, 30; Phillips *v.* Saunderson, 1 Sm. & M. 465. Even if the mortgage is void. Camden *v.* Vail, 23 Cal. 633; Way *v.* Patty, 1 Ind. 102. [Hunton *v.* Wood, 101 Va. 54, 59.]

(*a*) Or obtains a judgment for the price in whole or in part, and sells the land thereunder. Dickason *v.* Fisher, 137 Mo. 342. Merely obtaining judgment on the note does not waive the lien. Zwingle *v.* Wilkinson, 94 Tenn. 246; Strain *v.* Walton, 11 Texas C. App. 624. Or if he takes a note of a person other than the vendee. Bennett *v.* Murphy, 108 N. Y. S. 231, 123 App. Div. 102.

these cases the presumption that the vendor intended to waive his lien by taking such securities may be rebutted by any satisfactory evidence that it was not intended that the lien should be waived.[1] (*a*) On the other hand, the presumption of a lien may be rebutted, though no security is taken, by satisfactory evidence that it was intended that the lien should not be relied on.[2] But, generally, the mere taking of the vendee's note, or bond, or bill, or check,[3] or the renewal of these evidences of debt,[4] will not be sufficient evidence that the vendor intended to waive his lien.[5] But any conduct in the vendor that makes it unjust, unfair, or inequitable for him to insist upon the lien, will discharge it.[6] If worthless securities are fraudulently imposed upon the vendor, he will retain his lien.[7]

[1] Mims *v.* Macon and Western R. R., 3 Kelly, 333; Campbell *v.* Baldwin, 2 Humph. 248; Kyles *v.* Tait, 6 Grat. 48; Tiernan *v.* Thurman, 14 B. Mon. 277; Sears *v.* Smith, 2 Mich. 243; Daughaday *v.* Paine, 6 Minn. 443. [Jones *v.* Davis, 121 Ala. 348; Hood *v.* Hammond, 128 Ala. 569; Spears *v.* Taylor, 149 Ala. 180; Acree *v.* Stone, 142 Ala. 156; Lucas *v.* Wade, 43 Fla. 419; Scott *v.* Edgar, 159 Ind. 38; Lawson *v.* Spencer, 81 Mo. App. 169, 175; Shelley *v.* Estes, 83 Mo. App. 310; Slide & Spur Gold Mines *v.* Seymour, 153 U. S. 509; Boies *v.* Benham, 127 N. Y. 620; Bennett *v.* Murphy, 108 N. Y. S. 231, 123 App. Div. 102.]

[2] Clark *v.* Hunt, 3 J. J. Marsh. 553; Phillips *v.* Saunderson, 1 Sm. & M. 462; Redford *v.* Gibson, 12 Leigh, 332; Scott *v.* Orbinson, 21 Ark. 202. [Walton *v.* Young, 132 Ala. 150.]

[3] Honore *v.* Bakewell, 6 B. Mon. 67; Baum *v.* Grigsby, 21 Cal. 172; Walker *v.* Sedgwick, 8 Cal. 398. [Lyon *v.* Clark, 132 Mich. 521, 524; Knight *v.* Knight, 113 Ala. 597.]

[4] Mims *v.* Lockett, 23 Ga. 237. [Eubank *v.* Finnell, 118 Mo. App. 535, 543.]

[5] Cox *v.* Fenwick, 3 Bibb, 183; Evans *v.* Goodlet, 1 Blackf. 246; Taylor *v.* Hunter, 5 Humph. 569; Garson *v.* Green, 1 Johns. Ch. 308; White *v.* Williams, 1 Paige, 502; Clark *v.* Hunt, 3 J. J. Marsh. 553; Thornton *v.* Knox, 6 B. Mon. 74; Aldridge *v.* Dunn, 7 Blackf. 249; Ross *v.* Whitson, 6 Yerg. 50; Tompkins *v.* Mitchell, 2 Rand. 428; Truebody *v.* Jacobson, 2 Cal. 269; Pinchain *v.* Collard, 13 Tex. 333; Sheratz *v.* Nicodemus, 7 Yerg. 9; Manly *v.* Slason, 2 Vt. 271; Baum *v.* Grigsby, 21 Cal. 172.

[6] Redford *v.* Gibson, 12 Leigh, 343; Fowler *v.* Rust, 2 Marsh. 294;

[7] Coit *v.* Fougera, 36 Barb. 195; Toby *v.* McAllister, 9 Wis. 463.

(*a*) Or where the vendor has been induced to take the other security by fraudulent representations of the vendee. Jones *v.* Rush, 156 Mo. 364, 373.

§ 238. It has been said before, that the lien for the purchase-money is not an estate in the land, nor is it a charge on the land; but it is an equity between the parties, their representatives or privies in law or estate, to be resorted to in case of failure of payment by the vendee. It is a possibility that may be perfected by proceedings in equity into an actual estate or interest in the land.[1] (a) Having such a character, it is generally considered to be a personal privilege in the vendor, which descends to his heirs or representatives with the debt for the purchase-money, but which cannot be assigned to a third person, with or without the bond, note, bill, or check which the vendee gave for the consideration.[2] If one of several purchasers pays

Clark *v.* Hunt, 3 J. J. Marsh. 558; Phillips *v.* Saunderson, 1 Sm. & M. 462; McCown *v.* Jones, 14 Tex. 682; Scott *v.* Orbinson, 21 Ark. 202; Clamer *v.* Rawlings, 9 S. & M. 122; Lynch *v.* Dearth, 2 Penn. St. 101.

[1] Young *v.* Williams, 17 Cal. 403; 21 Cal. 227; Keith *v.* Horner, 32 Ill. 524.

[2] Dixon *v.* Dixon, 1 Md. Ch. 220; Wellborn *v.* Williams, 8 Ga. 258; Green *v.* Demoss, 10 Humph. 371; Walker *v.* Williams, 30 Miss. 165; Briggs *v.* Hill, 6 How. (Miss.) 362; Shall *v.* Biscoe, 18 Ark. 142; Brush *v.* Kinsley, 14 Ohio, 20; Horton *v.* Horner, id. 437; Sheratz *v.* Nicodemus, 7 Yerg. 9; Gann *v.* Chester, 5 Yerg. 205; White *v.* Williams, 1 Paige, 502; Hallock *v.* Smith, 3 Barb. 267; Green *v.* Crockett, 2 Dev. & Bat. Eq. 390; Moreton *v.* Harrison, 1 Bland, 491; Webb *v.* Robinson, 14 Ga. 216; Dickinson, *v.* Chase, 1 Morris (Iowa), 492; Jackman *v.* Hallock, 1 Ohio, 318; Tiernan *v.* Beam, 2 Ohio, 383; Clairhorn *v.* Crockett, 3 Yerg. 27; Briggs *v.* Planters' Bank, 1 Freem. Ch. 574; Iglehart *v.* Amiger, 1 Bland, 519; Hayden *v.* Stuart, 4 Md. Ch. 280; Hall *v.* Maccubbin, 5 Gill & J. 107; Baum *v.* Grisby, 21 Cal. 172; Lewis *v.* Covilland, id. 178; Williams *v.* Young, id. 227; Keith *v.* Horner, 32 Ill. 524; Richards *v.* Leming, 27 Ill. 431; Watson *v.* Bane, 7 Md. 117. [McCrory *v.* Guyton, 154 Ala. 355; Martin *v.* Martin, 164 Ill. 640; Gruhn *v.* Richardson, 128 Ill. 178, 184; Law *v.* Butler, 44 Minn. 482; First Nat. Bank *v.* Salem, etc., Flour-Mills Co., 39 Fed. 89; Evans *v.* Enloe, 70 Wis. 345; Zwingle *v.* Wilkinson, 94 Tenn. 246. Vendor's lien passes to assignee of the claim for purchase-money in Mississippi by statute. Code of Miss. (1906) § 4001; Elmslie *v.* Thurman, 87 Miss. 537. Without statute in Indiana, Mulky *v.* Karsell, 31 Ind. App. 595, 597. Assignable in Missouri, Dickason *v.* Fisher, 137 Mo. 342. In Texas it is held that where the purchase-money notes recite that they are such, the vendor's lien passes by

(a) The lien is enforceable in equity, although the legal remedy has not been exhausted. Burgess *v.* Fairbanks, 83 Cal. 215.

the whole purchase-money, he does not thereby secure a lien on his co-purchasers' shares;[1] nor does a lien accrue to a third person who loans the purchase-money to the vendee and takes his note therefor;[2] but if it is agreed by the vendor that a note for the purchase-money shall be given to a third person, it seems that the vendor's lien will go with the note.[3] (*a*) If the note given to the vendor for the purchase-money is indorsed by him, and afterwards paid by him, his lien will revive and attach to it.[4] If a surety to the vendee's note or bond for the purchase-money is obliged to pay the debt, he will be subrogated to the vendor's lien, and will have a right to have it enforced for his benefit.[5] If a vendor having a lien on real estate for his pur-

assignment to a purchaser of the notes. Sanger Bros. *v.* Brooks, 100 S. W. 798 (Tex. Civ. App. 1907).] But in Alabama, Texas, Kentucky, Indiana, and Iowa, a different rule prevails. In those States the assignment of the note given for the purchase-money carries with it to the assignee the vendor's lien. Roper *v.* McCook, 7 Ala. 318; White *v.* Stover, 10 Ala. 441; Grigsby *v.* Hair, 25 Ala. 327; Griffin *v.* Camack, 36 Ala. 695; Murray *v.* Able, 18 Tex. 515; McAlpin *v.* Burnett, 19 Tex. 497; Moore *v.* Raymond, 15 Tex. 554; Edwards *v.* Bohannon, 2 Dana, 98; Honore *v.* Bakewell, 6 B. Mon. 67; Lagow *v.* Badollet, 1 Blackf. 417; Brumfield *v.* Palmer, 7 id. 227; Fisher *v.* Johnson, 5 Ind. 492; Kern *v.* Hazlerigg, 11 Ind. 443; Rakestraw *v.* Hamilton, 14 Iowa, 147; Pierson *v.* David, 1 Clarke, 23.

[1] Glasscock *v.* Glasscock, 17 Tex. 480.

[2] Stansell *v.* Roberts, 13 Ohio, 148; Skeggs *v.* Nelson, 25 Miss. 88; Crane *v.* Caldwell, 14 Ill. 468.

[3] Dryden *v.* Frost, 3 My. & Cr. 670. In this case the third person was a prior mortgagee, and had the title-deeds in his possession. Colcord *v.* Scamonds, 5 B. Mon. 265. [McCrory *v.* Guyton, 154 Ala. 355; Zwingle *v.* Wilkinson, 94 Tenn. 246.]

[4] 1 Lead. Cas. in Eq. 368.

[5] Kleiser *v.* Scott, 6 Dana, 137; Welch *v.* Parran, 2 Gill, 329; Ghiselin *v.* Ferguson, 4 Har. & J. 522; Magruder *v.* Peter, 11 Gill & J. 228; Burke *v.* Chrisman, 3 B. Mon. 50; Freeman *v.* Mebane, 2 Jones, Eq. 44; Jordan *v.* Hudson, 11 Tex. 82; Eddy *v.* Traver, 6 Paige, 521; *In re* McGill, 6 Barr, 504; Kinney *v.* Harvey, 2 Leigh, 70; Haffey *v.* Birchetts, 11 Leigh, 83; Schermerhorn *v.* Barhydt, 9 Paige, 30; Tompkins *v.* Mitchell, 2 Rand. 428; Melerey *v.* Cooper, 2 Bland, 199.

(*a*) Where the vendor's lien is expressly reserved in the deed of transfer it has been held to be assignable like a mortgage. Smith *v.* Butler, 72 Ark. 350; Fryberger *v.* Berven, 88 Minn. 311, 315; Elmendorf *v.* Beirne, 4 Tex. Civ. App. 188; Gordon *v.* Johnson, 186 Ill. 18.

chase-money enforces his debt against the personal assets of a deceased vendee, and thereby deprives creditors or legatees of the deceased vendee of the chance of being paid their debts or legacies, equity will substitute them in the place of the vendor, or will marshal the assets in order to do justice to all.[1] (*a*)

§ 239. This equitable lien or trust prevails against the purchaser, his heirs, and all persons claiming under him or them with notice that the purchase-money is unpaid.[2] It prevails against the right of dower of the widow of the vendee,[3] also against a voluntary donee, or a purchaser without notice,[4] as also against a purchaser for value, if he had notice that the purchase-money remained unpaid.[5] If the purchaser from the

[1] 2 Sugd. V. & P. 873–878 (7th Am. ed.) where the cases are collected and commented on.

[2] Hearle *v.* Botelers, Cary, Ch. 25; Mackreth *v.* Symmons, 15 Ves. 329; Gibbons *v.* Baddall, 2 Eq. Cas. Ab. 682; Walker *v.* Preswick, 2 Ves. 622; Elliot *v.* Edwards, 3 Bos. & P. 181; Winter *v.* Anson, 3 Russ. 493; Garson *v.* Green, 1 Johns. Ch. 308; Warner *v.* Van Alstyne, 3 Paige, 513; Wade *v.* Greenwood, 2 Robin. 475; Ewbank *v.* Poston, 5 Mon. 285; Neil *v.* Kinney, 11 Ohio St. 58. [Berger *v.* Berger, 104 Wis. 282.]

[3] Warner *v.* Van Alstyne, 3 Paige, 513; Wilson *v.* Davidson, 2 Rob. 385; Ellicott *v.* Welch, 2 Bland, 243; Nazareth, &c., *v.* Lowe, 1 B. Mon. 257; Fisher *v.* Johnson, 5 Ind. 492; Crane *v.* Palmer, 8 Blackf. 120; Williams *v.* Wood, 1 Humph. 408; Besland *v.* Hewett, 11 Sm. & M. 164. [Sarver *v.* Clarkson, 156 Ind. 316.]

[4] Upshaw *v.* Hargrave, 6 Sm. & M. 286; High *v.* Batte, 10 Yerg. 186, 335; Mounce *v.* Byars, 16 Ga. 469; Burlingame *v.* Robbins, 21 Barb. 327; Hallock *v.* Smith, 3 Barb. 267.

[5] Wilcox *v.* Calloway, 1 Wash. 38; Graves *v.* McCall, 1 Call, 414; Redford *v.* Gibson, 12 Leigh, 332; Wright *v.* Woodland, 10 Gill & J. 388; Ghiselin *v.* Ferguson, 4 Har. & J. 522; Mounce *v.* Byars, 11 Ga. 180; Thornton *v.* Knox, 6 B. Mon. 74; Honore *v.* Bakewell, id. 67; Tiernan *v.* Thurman, 14 B. Mon. 279; Eskridge *v.* McClure, 2 Yerg. 84; Sheratz *v.* Nicodemus, 7 Yerg. 9; Pierce *v.* Gates, 7 Blackf. 162; Brumfield *v.* Palmer, id. 227; McKnight *v.* Brady, 2 Mo. 110; Briscoe *v.* Bronaugh, 1 Tex. 326; Pintard *v.* Goodloe, Hemp. 527; Amory *v.* Reilly, 9 Ind. 490; Manly *v.* Slason, 21 Vt.

(*a*) It has been held that a vendor's lien good against a subsequent mortgage is entirely extinguished by a reconveyance of the land to the original vendor. Ocean Beach Ass'n *v.* Trenton Trust, etc., Co., 48 A. 559 (N. J. Ch. 1901).

vendee has not paid over the purchase-money, equity will attach the lien or trust to the money in his hands.[1] But a *bona fide* purchaser for value from the vendee, without notice, will take the estate unaffected by the trust or lien;[2] or if by intermediate conveyances through persons who have notice the estate finally comes to a *bona fide* purchaser for value without notice, it will be discharged of the lien.[3] A *bona fide* purchaser is defined to be one who at the time of his purchase advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase should be set aside;[4] of course, a mortgagee without notice for a new consideration comes within this definition.[5] So, a conveyance or mortgage to individual creditors without notice is held to prevail against the lien, as where the equities are equal the legal title prevails.[6] But the lien prevails against assignees in bank-

271; Hallock *v.* Smith, 3 Barb. 267; Cator *v.* Pembroke, 1 Bro. Ch. 302; Ewbank *v.* Poston, 5 Mon. 291; McAlpin *v.* Burnett, 19 Tex. 497; Pierson *v.* David, 1 Clarke, 23; Grapengether *v.* Fejervary, 9 Iowa, 163; Merritt *v.* Wells, 18 Ind. 171. [Rewis *v.* Williamson, 51 Fla. 529; Harter *v.* Capital City Brewing Co., 64 N. J. Eq. 155; Koch *v.* Roth, 150 Ill. 212, 219.]

[1] Ripperdon *v.* Cozine, 8 B. Mon. 465.

[2] Bayley *v.* Greenleaf, 7 Wheat. 46; Clark *v.* Hunt, 3 J. J. Marsh. 553; Duval *v.* Bibb, 4 Hen. & M. 113; Wood *v.* Bank of Kentucky, 5 Mon. 194; Blights, &c., *v.* Bank, &c., 6 Mon. 192; Taylor *v.* Hunter, 5 Humph. 569; Stewart *v.* Ives, 1 Sm. & M. 197; Carnes *v.* Hubbard, 2 S. & M. 108; Dunlop *v.* Burnett, 5 Sm. & M. 702; Work *v.* Brayton, 5 Ind. 396; Carter *v.* Bank of Georgia, 24 Ala. 37; Bradford *v.* Harper, 25 Ala. 337; Webb *v.* Robinson, 14 Ga. 216; Champion *v.* Brown, 6 Johns. Ch. 402; Collier *v.* Harkness, 26 Ga. 362; Selby *v.* Stanley, 4 Miss. 65; Scott *v.* Orbinson, 21 Ark. 202. [Hertzfeld *v.* Bailey, 103 Ala. 473; Hawes *v.* Chaille, 129 Ind. 435; Robinson *v.* Owens, 103 Tenn. 91.]

[3] Boon *v.* Barnes, 23 Miss. 136.

[4] Ibid.

[5] Duval *v.* Bibb, 4 Hen. & M. 113; Wood *v.* Bank of Kentucky, 5 Mon. 194; Clark *v.* Hunt, 3 J. J. Marsh. 553; Growing *v.* Behn, 10 B. Mon. 383. [Hubbell *v.* Hendrickson, 175 N. Y. 175; Campbell *v.* Sidwell, 61 Ohio St. 179.]

[6] Bayley *v.* Greenleaf, 7 Wheat. 56; Mitford *v.* Mitford, 9 Ves. 100; Moore *v.* Holcombe, 3 Leigh, 597; Webb *v.* Robinson, 14 Ga. 216; Dunlop *v.* Burnett, 5 Sm. & M. 702; Johnson *v.* Cawthorn, 1 Dev. & Bat. 32; Harper *v.* Williams, id. 179; Roberts *v.* Rose, 2 Humph. 145; Gann *v.* Chester,

ruptcy or insolvency, and against a general assignment by a failing debtor, in trust for all his creditors. (*a*) In these cases the vendees are looked upon as volunteers, and, as such, they have the rights only of the debtor himself.[1] Notice to the agent of the purchaser is notice to the purchaser,[2] and if the vendor remain in possession it will be sufficient to put a purchaser upon his inquiry and is constructive notice,[3] and any fact that would put a reasonable man upon his inquiry will affect the purchaser with notice.[4] So, if a purchaser knows that a part of the purchase-money is unpaid, he is put upon his inquiry;[5] and such purchaser is bound to take notice of all the recitals in the deed to the vendee.[6]

5 Yerg. 205; but see Brown *v.* Vanlier, 7 Humph. 239; Shirley *v.* Sugar Ref., 2 Edw. 505; Repp *v.* Repp, 12 Gill & J. 341; Ringgold *v.* Bryan, 3 Md. Ch. 488; Aldridge *v.* Dunn, 7 Blackf. 249; but see Chance *v.* McWortee, 26 Ga. 315. [See Robinson *v.* Owens, 103 Tenn. 91.]

[1] Mitford *v.* Mitford, 9 Ves. 100; Fawell *v.* Heelis, Amb. 726; Blackburn *v.* Gregson, 1 Bro. Ch. 420; Grant *v.* Mills, 2 Ves. & B. 306; *Ex parte* Peake, 1 Madd. 356; Chapman *v.* Tanner, 1 Vern. 267; Bayley *v.* Greenleaf, 7 Wheat. 54; Green *v.* Demoss, 10 Humph. 371; Brown *v.* Heathcote, 1 Atk. 160; Simond *v.* Hilbert, 1 Russ. & My. 729; Jewson *v.* Moulson, 2 Atk. 417; Stott *v.* Surman, Willes, 402; Warrall *v.* Morlar, 1 P. Wms. 459. And so of judgment creditors. Flanders *v.* Thompson, 3 Woods, 9; Rodgers *v.* Bowner, 45 N. Y. 379; Birkhard *v.* Edwards, 11 Ohio St. 84; Bank *v.* Campbell, 2 Rich. (S. C. Eq.) 179; Watkins *v.* Russell, 15 Ark. 73; Thomas *v.* Kennedy, 24 Iowa, 397; Dunlop *v.* Burnett, 5 Sm. & M. 702. [Lyon *v.* Clark, 132 Mich. 521.]

[2] Mounce *v.* Byars, 11 Ga. 180; Frail *v.* Ellis, 17 Eng. L. & Eq. 457.

[3] Ringgold *v.* Bryan, 3 Md. Ch. 488; Hamilton *v.* Fowlkes, 16 Ark. 340; Hopkins *v.* Garrard, 6 B. Mon. 67.

[4] Frail *v.* Ellis, 17 Eng. L. & Eq. 457; Briscoe *v.* Bronaugh, 1 Tex. 328.

[5] Manly *v.* Slason, 21 Vt. 271.

[6] Kilpatrick *v.* Kilpatrick, 23 Miss. 124; Thornton *v.* Knox, 6 B. Mon. 74; Woodward *v.* Woodward, 7 B. Mon. 116; McRemmon *v.* Martin, 14 Tex. 318; Tiernan *v.* Thurman, 14 B. Mon. 277; Honore *v.* Bakewell, 6 B. Mon. 67; Hutchinson *v.* Patrick, 22 Tex. 318; McAlpin *v.* Burnett, 23 Tex. 649.

(*a*) Also, as against attaching creditors, even though their claims arose after the conveyance. Miller *v.* Albright, 60 Ohio St. 48. See also Campbell *v.* Sidwell, 61 Ohio St. 179.

§ 240. A person may also become a trustee by construction, in the absence of fraud, where a trust is created; but if no trustee is appointed,[1] or the trustee named is incapable of taking,[2] or refuses to act,[3] or dies,[4] or the office becomes vacant in any other way;[5] in all such cases every person to whom the trust property comes, by reason of there being no trustee, will be treated as a trustee, and he may be ordered to account, and to convey the property to such other persons as trustees as the court may appoint.[6] As where a man makes a devise in trust by his will, but names no trustee, the land descends to his heirs, but in trust for the purposes named in the will; and his heirs would be required to account for the property, and to convey the same to such trustees as the court might appoint.[7] Courts of equity have inherent jurisdiction over all matters of trust and trustees, and they never allow a trust to fail for want of a trustee.[8] So, if a party forbidden by law to convey his property to some person standing in a certain relation to him, as if a husband who cannot convey to his wife should make an absolute conveyance directly to her, the conveyance would not pass the legal title, but equity would construe it into a declaration of trust, and the husband into a trustee for the wife.[9]

[1] White *v.* White, 1 Bro. Ch. 12; Dodkin *v.* Brunt, L. R. 6 Eq. 580.

[2] Sonley *v.* Clockmakers' Co., 1 Bro. Ch. 81; *Ex parte* Turner, 1 Bailey Ch. 395.

[3] King *v.* Donnelly, 5 Paige, 46; Hawley *v.* James, id. 318; De Peyster *v.* Clendining, 8 Paige, 295; Lee *v.* Randolph, 2 Hen. & M. 12; *Ex parte* Kunst, 1 Bailey, 489; Dawson *v.* Dawson, Rice, 243; Field *v.* Arrowsmith, 3 Humph. 448.

[4] Dunscomb *v.* Dunscomb, 2 Hen. & M. 11.

[5] Gibson's Case, 1 Bland, 138.

[6] Ibid.; Cushney *v.* Henry, 4 Paige, 345; McIntire School *v.* Zan. Canal, &c., 9 Ham. 203; White *v.* Hampton, 13 Iowa, 259; McKenna *v.* Phillips, 6 Whart. 571; Boykin *v.* Ciples, 2 Hill, Eq. 200; Wilson *v.* Towle, 36 N. H. 129; Pool *v.* Cummings, 20 Ala. 563; Griffith *v.* Griffith, 5 B. Mon. 113.

[7] Stone *v.* Griffin, 3 Vt. 400.

[8] McCartney *v.* Bostwick, 32 N. Y. 53; Vidal *v.* Girard, 2 How. 128.

[9] Huntly *v.* Huntly, 8 Ired. Eq. 250; Garner *v.* Garner, Busbee Eq. 1. [Carter *v.* McNeal, 86 Ark. 150; Sims *v.* Rickets, 35 Ind. 181; Stark *v.* Kirchgraber, 186 Mo. 633; Sayres *v.* Wall, 26 Gratt. 354; Jones *v.* Obenchain, 10

Therefore if, upon the death of the trustee without heirs, the legal title should escheat to the Crown or the State, equity would follow the property and execute the trust by the appointment of new trustees or otherwise.[1]

§ 241. Another instance of a constructive trust without fraud is where a person receives the trust property from the trustee without notice of the trust, by way of voluntary gift or without paying a valuable consideration. If such person had notice of the trust, it would be a fraud to receive the trust fund even if he paid a valuable consideration, and he would be held as a constructive trustee;[2] but if he paid a valuable consideration without notice, he would hold the property unaffected by the trust.[3] And if he receives the property without paying a valuable consideration, and without notice, equity holds the absence of a consideration as equivalent to notice, and construes the taker into a trustee, and liable as such to the same extent as the trustee from whom he took it.[4] But if a person comes into possession of the trust property, not by, under, or through the trustee, but against him, as by disseizing or ousting him, he will not be bound by the trust, although he have notice of it; for the disseizor creates a title for himself paramount to the title of the trustee,[5] and all outstanding terms attending the inheritance will attend the title of the disseizor until he is dispossessed by some other paramount title.[6] In States where registry laws are in force, the registry of a deed from a grantor who had no right to the land is not constructive notice to the true owner that such deed has been

Gratt. 259. See *contra*, Livingstone *v.* Murphy, 187 Mass. 315; Stetson *v.* O'Sullivan, 8 Allen, 321. See *supra*, § 109, and notes.]

[1] Stat. 4 & 5 Will. IV. c 23; Hughes *v.* Wells, 9 Hare, 749; 13 Eng. L. & Eq. 389.

[2] *Ante*, § 220.

[3] *Ante*, §§ 217, 218.

[4] Mansell *v.* Mansell, 2 P. Wms. 691; Pye *v.* George, 1 P. Wms. 128.

[5] Finch's Case, 4 Inst. 85; Sugd. Gilb. Uses, 429.

[6] Reynolds *v.* Jones, 2 S. & S. 206.

made, and it is constructive notice only to subsequent purchasers under the same grantor.[1]

§ 242. Analogous to the gift or sale of the trust property by trustees is the right of dealing with its property by a corporation. A corporation holds its property in trust, *first*, to pay its creditors, and, *second*, to distribute to its stockholders *pro rata*.[2] (*a*) If therefore a corporation should dissolve, and

[1] Bates *v.* Norcross, 14 Pick. 225; Tilton *v.* Hunter, 11 Shep. 29; Stuyvesant *v.* Hall, 2 Barb. Ch. 151; Keller *v.* Nutz, 5 S. & R. 246; Woods *v.* Farmene, 7 Watts, 382; Crockett *v.* McGuire, 10 Miss. 34.

[2] National Bank, &c., *v.* Lake Shore, &c., R. R. Co., 21 Ohio St. 232.

(*a*) Although it is frequently stated in the decisions that the assets of a corporation are a "trust fund" for the benefit of its creditors, Olmstead *v.* Vance, 196 Ill. 236; Allen *v.* Grant, 122 Ga. 552; Hurd *v.* N. Y. & C. Steam Laundry Co., 167 N. Y. 89; Holshouser *v.* Copper Co., 138 N. C. 248, 251; Washington Liquor Co. *v.* Alladio Café Co., 28 Wash. 176, the better opinion supported by the great weight of authority, is that there exists no trust relation between a corporation and its creditors, and that the rights of creditors in its property are not essentially different from the rights of creditors of individuals in the property of the latter. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205; Farwell Co. *v.* Sweetzer, 10 Colo. Ap. 421; Fear *v.* Bartlett, 81 Md. 435; Hospes *v.* Northwestern Manuf. Co., 48 Minn. 174; Memphis Barrel Co. *v.* Ward, 99 Tenn. 172; Ballin *v.* Merchants' Exchange Bank, 89 Wis. 278; Hollins *v.* Brierfield Coal Co., 150 U. S. 371; Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809. See also 25 Am. L. Rev. 749; 2 Clark & Marshall, Private Corporations and Supplement, §§ 767–768; 1 Cook on Corporations (6th ed.), § 9; 1 Purdy's Beach on Private Corporations, § 299. A full discussion of the "trust fund" doctrine seems to belong more properly to a treatise on the law of corporations.

Similarly the relation between the corporation and its stockholders is so different from that of an ordinary trustee and *cestui que trust* that the word trust as applied to the relation is likely to mislead. The stockholder has no equitable interest in specific parcels or articles or property owned by the corporation. He has only a right to a proportionate share of the profits and to have the property used for certain purposes only. Equity will on occasion protect him in these rights by restraining *ultra vires* acts authorized by a majority, including in *ultra vires* acts a use or disposition of the property for a purpose other than the advancement of the interests of the corporation, as, for example, a use of the property and business of the company for the benefit of

divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting all persons, except *bona fide* purchasers for value, to whom its property had come, into trustees, and would compel them to account for the property and contribute to the payment of the debts of the corporation to the extent of its property in their hands.[1] In England, the doctrine of constructive trusts is not enforced against the Bank of England in regard to its stock standing upon its books; the bank is bound to recognize only the person who has the legal title.[2] But Chief Justice Taney said that the decisions as to the Bank of England were exceptions depending upon the policy of the acts of parliament in reference to the bank, and that certainly none of the English cases convey the idea that, upon general principles of law, a bank is not bound to notice a trust of its own stocks, and must look only at the legal estate.[3] In the United States it is well established, that if a corporation that requires a transfer of its stock to be made by its own officers upon its own books permits a transfer to be made, by an executor, trustee,

[1] Mumma *v.* Potomac Co., 8 Pet. 281; Vose *v.* Grant, 15 Mass. 515; Spear *v.* Grant, 16 Mass. 9; Wood *v.* Dummer, 3 Mason, 308; 2 Story's Eq. Jur. § 1252; Hill *v.* Fogg, 41 Mo. 562; Hastings *v.* Drew, 76 N. Y. 9.

[2] Pearson *v.* B'k of Eng., 2 Bro. Ch. 529; Hartga *v.* B'k of Eng., 3 Ves. Jr. 55; B'k of Eng. *v.* Parsons, 5 Ves. 668; Austin *v.* B'k of Eng., 8 Ves. 522; B'k of Eng. *v.* Lunn, 15 Ves. 583; Bristed *v.* Williams, 3 Hare, 235; Humberstone *v.* Chase, 2 Y. & C. 209; Franklin *v.* B'k of Eng., 9 B. & C. 156; B'k of Eng. *v.* Moffat, 3 Bro. Ch. 260; Pearson *v.* B'k of Eng., 2 Cox, 178; Rider *v.* Kidder, 10 Ves. 369; Ripley *v.* Waterworth, 7 Ves. 440; Stat. 4 W. & M. c. 3, § 10; 5 W. & M. c. 20, § 20; 1 Geo. I. St. 2, c. 19, § 12; 30 Geo. II. c. 19, § 49; 7 Will. IV. & 1 Vic. c. 26; 8 & 9 Vic. c. 97; Lewin on Trusts (2d Am. ed.), 32.

[3] Lowry *v.* Commercial B'k, 3 Bankers' Mag. 201; 10 Pa. Law Jour. (3 Am. L. J. N. S.) 111.

another corporation of which the majority are members. Menier *v.* Hooper's Tel. Works, 9 Ch. 350; Farmers' L. & Tr. Co. *v.* N. Y. & N. R. Co., 150 N. Y. 410; Brewer *v.* Boston Theatre, 104 Mass. 378; Sage *v.* Culver, 147 N. Y. 241; Gamble *v.* Queen's County Water Co., 123 N. Y. 91. See also Mason *v.* Pewabic Mining Co., 133 U. S. 50.

or guardian, of stock held by such persons in a fiduciary capacity, such corporation, knowing the trust, and that the transfer is made for purposes other than such trust, will be held in equity as a constructive trustee of the stock thus wrongfully conveyed, and will be liable to make it good to the *cestui que trust*.[1] (*a*) And if a corporation negligently enter the names of the parties upon its books, in such manner that the stock is improperly transferred, it will be liable as a constructive trustee.[2] Accordingly a corporation has a right to require from all fiduciary holders of stock evidence of their authority to make the transfer.[3] It has been held that the mere addition of the word "trustee," without any reference to the terms of the trust or the persons of the *cestuis que trust*, is not sufficient notice to a bank to render it liable in case the stock is wrongfully transferred by the holder;[4] and it it said that, as a guardian has a right to sell the personal property of his ward, a corporation is not liable if he wrongfully transfers the stock on its books.[5] If purchasers of stock in a corporation have notice that their vendors are trustees, they will be held as constructive trustees; and if the certificates are passed over to the purchaser with the word "trustee" added to the name of the seller, the purchaser is bound to inquire into the particulars of the trust, and he has such notice as will bind him as a trustee if the sale was wrong-

[1] Mechanics' B'k *v.* Seton, 1 Pet. 299; Porter *v.* B'k of Rutland, 19 Vt. 410; Albert *v.* Savings B'k, 1 Md. Ch. 407; 2 Md. 160; Farmers' B'k *v.* Wayman, 5 Gill, 356; Atkinson *v.* Atkinson, 8 Allen, 15; Loring *v.* Salisbury Mills, 125 Mass. 138; Holden *v.* New York & Erie Bank, 72 N. Y. 286.

[2] Farmers' B'k *v.* Wayman, 5 Gill, 356.

[3] Bayard *v.* Farmers' & Mech. Nat. B'k, 2 Leg. Int. 164.

[4] Albert *v.* Savings B'k, 1 Md. Ch. 407; 2 Md. 160. But see to the contrary, Walsh *v.* Stille, 2 Pars. Eq. 17.

[5] B'k of Virginia *v.* Craig, 6 Leigh, 339. But see Atkinson *v.* Atkinson, 8 Allen, 15. In the last case, however, the transfer was after the removal of the guardian and the appointment of another in his place.

(*a*) See Lowell, Transfer of Stock, §§ 151, 242; 1 Cook on Corporations (6th ed.), § 327; Cooper *v.* Ill. Cen. R. Co., 57 N. Y. S. 925, 38 App. Div. 22; Bohlen's Estate, 75 Pa. St. 304, 313; *supra*, § 225, note, p. 377 *et seq.*

fully made.[1] But if the purchaser does not see the certificates of the stock in the seller's hands, as if the seller himself transfer the stock upon the books of the company, and brings to the purchaser new certificates that he is entitled to so many shares, the purchaser would not be affected with notice, and would not be held as a trustee.[2] (*a*)

§ 243. Again, if one receives a conveyance of lands or other property absolute in form, but really as security for a debt, he will hold the legal title in trust for the grantor after the payment of the debt, and before a reconveyance.[3] So, if one receives personal property, agreeing to hold it for another, or to sell it and pay the proceeds to the holder of a note, draft, or other debt, he becomes a trustee, and a bill in equity may be maintained against him and his pledges to enforce the trust.[4] But if such conveyance is fraudulent and void, the *bona fide* holder of the note or draft cannot enforce the trust.[5] In England, upon the death of the mortgagee the mortgage debt goes to his

[1] Walsh *v.* Stille, 2 Pars. Eq. 17; Reeder *v.* Barr, 4 Ham. 446; Simons *v.* S. W. Railway B'k, 2 Am. Law Reg. 546; Atkinson *v.* Atkinson, 10 Allen, 15.

[2] Lowry *v.* Commercial B'k, 3 Bankers' Mag. 201; 10 Pa. Law Jour. 111; Albert *v.* Savings B'k, 2 Md. 160; Atkinson *v.* Atkinson, 10 Allen, 15.

[3] Maverick, &c., Soc. *v.* Lovejoy, 6 Allen, 163; Baldwin *v.* Bannister, 3 P. Wms. 251; Poole *v.* Pass, 1 Beav. 600; Cru. Dig. tit. 15; Mort. c. 3, § 5, tit. 15, c. 2, § 39; Wilkinson *v.* Stewart, 30 Ill. 48; Smyth *v.* Carlisle, 16 N. H. 464.

[4] Michigan State Bank *v.* Gardner, 15 Gray, 362; Ulman *v.* Barnard, 7 Gray, 554; Martin *v.* Coles, 1 M. & S. 140; Graham *v.* Dyster, 6 M. & S. 1; Rodriquez *v.* Hefferman, 5 Johns. Ch. 417; De Wolf *v.* Gardner, 12 Cush. 19; Ellis *v.* Lamme, 42 Mo. 153; Petersham *v.* Tash, 2 Stra. 1178; Warner *v.* Martin, 11 How. 224; Evans *v.* Potter, 2 Gall. 13; Daubigny *v.* Duval, 5 T. R. 604; Guerreiro *v.* Peile, 3 B. & Ald. 616; De Bouchout *v.* Goldsmid, 5 Ves. 211; Skinner *v.* Dodge, 4 Hen. & M. 423; Newson *v.* Thornton, 6 East, 17; McCombie *v.* Davies, 7 East, 5; Kinder *v.* Shaw, 2 Mass. 398; Van Amringe *v.* Peabody, 1 Mason, 440.

[5] Potter *v.* McDowall, 43 Mo. 93.

(*a*) As to notice of the trust and the duty of third persons to inquire into the authority of the trustee, see *infra*, § 800 *et seq.*

personal representatives, but the fee in the mortgaged real estate descends to his heirs, if not otherwise disposed of; but his heirs hold it upon a constructive trust, as security for the debt, which has gone to his executors or administrators.[1] (a) In nearly all the United States, both the debt and the mortgage security are chattel interests, and go to the executors or administrators, and not to the heirs,[2] and payment of the mortgage debt discharges the mortgage; but while the mortgagee is in possession, he is a constructive trustee up to the time that the mortgagor's equity of redemption expires, and he is bound to account for the rents and profits in due course of administration.[3] It has even been thought that he is liable for the rents and profits after he has transferred his mortgage;[4] but, as he has a right to assign his mortgage without notice to the mortgagor, it would seem that he would not be liable for anything after he had assigned his mortgage and the possession.[5] If a mortgagee assigns the mortgage debt but not the mortgage, he holds the title to the mortgaged premises in trust for the owner of the debt.[6] So one who takes a mortgagee's title holds it in trust for the owner of the debt which the mortgage was intended to secure.[7]

§ 244. At common law, if a testator appointed his debtor to be the executor of his will, the debt was extinguished, on the ground that, as the executor could not maintain an action

[1] Ellis *v.* Guavas, 2 Ch. Cas. 60; Chase *v.* Lockerman, 11 G. & J. 185.

[2] See Greenleaf's Cruise, Dig. tit. 15, c. 2, §§ 39, 40, and notes; 4 Kent, 160, 194.

[3] Coppring *v.* Cooke, 1 Vern. 270; Bentham *v.* Haincourt, Pr. Ch. 30; Parker *v.* Calcroft, 6 Madd. 11; Hughes *v.* Williams, 12 Ves. 493; Maddocks *v.* Wren, 2 Ch. R. 109.

[4] Venables *v.* Foyle, 1 Ch. Cas. 3.

[5] Ringham *v.* Lee, 15 Sim. 400; *Re* Radcliffe, 22 Beav. 201.

[6] Torrey *v.* Morrill, 53 Vt. 331.

[7] Jordan *v.* Cheney, 74 Maine, 359.

(a) As to the equitable mortgage created by deposit of title-deeds, see 4 Kent Com. (14th ed.) 150, 151, and notes; Bullowa *v.* Orgo (N. J. Eq.), 41 Atl. 494.

against himself, the remedy was gone, and where the remedy is gone, the debt is gone.[1] Equity, however, construes the debtor, although he is executor, to be a trustee, and the creditors, legatees, and next of kin of the testator can enforce the trust by compelling the executor to account for the amount of the debt due from him to the testator.[2] In most of the United States this matter is regulated by statute, and the executor may be required by the probate court to put the amount of his debt to the testator into his inventory, or the court of probate may require the executor to charge himself with the amount of his debt in his account.[3] And so legatees and distributees may become constructive trustees for creditors of the estate, if the executor or administrator, by accident or mistake, pays over or distributes the estate before all debts are paid. The executor may be sued at law in such case by the creditor, and he may recover over against the persons to whom he has paid the estate. In equity, however, creditors can follow the fund liable for their debts into the hands of the persons to whom it has come, and treat them as constructive trustees, as they are not entitled to anything out of the estate till the debts are first satisfied.[4]

§ 245. A person may become a trustee by construction, by intermeddling with, and assuming the management of, property without authority. Such persons are trustees *de son tort*, as persons who assume to deal with a deceased person's estate

[1] 2 Williams' Ex'rs, 1129; 2 Story's Eq. Jur. § 1209.

[2] Berry *v.* Usher, 11 Ves. 90; Simmons *v.* Gutteridge, 13 Ves. 264; Carey *v.* Goodinge, 3 Bro. Ch. 111; Errington *v.* Evans, 2 Dick. 456; Flud *v.* Rumsey, Yel. 160; Phillips *v.* Phillips, Freem. 11; 1 Ch. Cas. 292; Brown *v.* Selwyn, Cas. t. Talb. 203; 3 Bro. P. C. 607; 2 Story's Eq. Jur. § 1209.

[3] Pusey *v.* Clemson, 9 S. & R. 204; Griffith *v.* Chew, 8 S. & R. 32; Hill on Trustees, 172, notes (4th Am. ed.).

[4] 2 Story's Eq. Jur. §§ 1250, 1251; Russell *v.* Clark, 7 Cranch, 69; McCall *v.* Harrison, 1 Brock. 126; Buck *v.* Swazey, 35 Me. 52; Riddle *v.* Mandeville, 5 Cranch, 329; Anon. 1 Vern. 162; Newman *v.* Barton, 2 Vern. 205; Noel *v.* Robinson, 1 Vern. 94; White School House *v.* Post, 31 Conn. 240; Boddy *v.* Lefevre, 1 Hare, 602, n.

without authority are administrators *de son tort*. Thus an administrator has no right to interfere with the real estate of an intestate unless it is wanted to pay debts; and if he assume to act in relation to the real estate as a trustee, those interested may treat him as such, and he cannot demur to a bill charging him with neglect of duty, and praying for his removal.[1] If one enters upon an infant's lands, and takes the rents and profits, he may be charged as a guardian or trustee,[2] and so if one takes personal property.[3] If a deceased person holds money or other property in trust for another, and his heir, executor, administrator, or other person assume possession of such property, a constructive trust will be imposed upon them.[4] (*a*) During the

[1] Le Fort *v.* Delafield, 3 Edw. 31; McCoy *v.* Scott, 2 Rawle, 222; Schwartz's Estate, 14 Penn. St. 42; People *v.* Houghtaling, 7 Cal. 348.

[2] Wyllie *v.* Ellice, 1 Hare, 505; Drury *v.* Connor, 1 H. & G. 220; Bloomfield *v.* Eyre, 8 Beav. 250.

[3] Chaney *v.* Smallwood, 1 Gill, 367; Goodhue *v.* Barnwell, Rice, Eq. 198; Bennett *v.* Austin, 81 N. Y. 308.

[4] White School House *v.* Post, 31 Conn. 248; People *v.* Houghtaling, 7 Cal. 348.

(*a*) A trustee *de son tort*, although a constructive trustee, differs materially from a trustee *in invitum* from the fact that he does not deny the beneficial ownership of the *cestui*. He holds or uses the property in recognition of this beneficial ownership, but without the legal right or authority to do so. He is a sort of *de facto* trustee who is not allowed to escape the responsibilities and liabilities which he has voluntarily assumed. Thornton *v.* Gilman, 67 N. H. 392; Lehmann *v.* Rothbarth, 111 Ill. 185; Bailey *v.* Bailey, 67 Vt. 494; *In re* Mitchell's Will, 74 Vt. 186, 195; Putnam *v.* Lincoln Safe Dep. Co., 191 N. Y. 166, 185; Roggenkamp *v.* Roggenkamp, 68 Fed. 605; Huntley *v.* Denny, 65 Vt. 185. Thus where a trustee wrongfully but without fraudulent intent, turned over to the life beneficiary a large amount of trust securities, it has been held that the life beneficiary became a trustee *de son tort* in the absence of evidence that she denied the trust or acted in hostility to it. "Not having acted in hostility to, or in fraud of, the trust, she may be said to have constituted herself by her acts a trustee *de son tort* of the trust properties. That is to say there had been such a voluntary assumption of responsibilities by her with respect to the trust estate, or to a part thereof, as to estop her and the representatives of her estate from denying an equal and continuous accountability with the trustee, when called upon by those entitled to assert claims to the estate." Put-

possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees;[1] and they cannot avoid their liability by showing that they were not in fact trustees,[2] nor can they set up the statute of limitations.[3] (*a*) Of course, such unauthorized persons will always be liable to be deprived of the possession at the suit of those beneficially interested, and they will be liable for all the costs, expenses, and damages which their unauthorized intermeddling may have occasioned. Still there may be cases where an unauthorized person may interfere from necessity to preserve and protect the property. In such cases courts of equity have power to do exact justice by decrees as to costs, compensation, and other similar matters. In all cases a person beneficially interested coming into equity must do equity, and join all who have interfered with the possession; and he cannot proceed against one alone as at law for a trespass, and compel one to bear the whole burden of the wrongful intrusion.[4]

§ 246. If an agent is employed by a trustee and thus comes into possession of the property, he will be accountable to his

[1] Wilson *v.* Moore, 1 Myl. & K. 127. [Thornton *v.* Gilman, 67 N. H. 392.]

[2] Rackham *v.* Siddall, 1 Mac. & G. 607; 2 Hall & T. 44; 16 Sim. 297; Hope *v.* Liddell, 21 Beav. 183.

[3] Goodhue *v.* Barnwell, Rice, Eq. 198. [Putnam *v.* Lincoln Safe Dep. Co., 191 N. Y. 166, 185; Soar *v.* Ashwell, [1893] 2 Q. B. 390; Easterly *v.* Barber, 65 N. Y. 252, 259.]

[4] Wyllie *v.* Ellice, 6 Hare, 515; Phene *v.* Gillon, 5 Hare, 5.

nam *v.* Lincoln Safe Deposit Co., 191 N. Y. 166, 185.

This class of trustees has been held to include those who with knowledge of the trust participate with the express trustee in an unauthorized use of the trust property, without, however, denying the beneficial interest of the *cestui*. Thus where a surviving partner without proper authority lent the assets of the late firm to another partnership, his copartner who had notice of this misuse of trust property has been held to be chargeable as a trustee *de son tort*. Russell *v.* McCall, 141 N. Y. 437; Penn *v.* Fogler, 182 Ill. 76, 96.

(*a*) A trustee of this sort, like an express trustee, is incapacitated from purchasing for himself at a tax sale of the "trust" property. Thornton *v.* Gilman, 67 N. H. 392.

employer, and will not be responsible as a constructive trustee.[1] But if such agent should act fraudulently or collusively he might be made a trustee by construction, and, as such, accountable to the *cestui que trust*.[2] (*a*)

§ 246 *a*. If a vendor undertakes to sell a good title to land for a valuable consideration, and his title is defective, but he afterwards obtains a perfect title, equity will compel him to hold it in trust for his vendee.[3] If, however, such vendor had

[1] Keane *v*. Robarts, 4 Madd. 332; Nickolson *v*. Knowles, 5 Madd. 47; Myler *v*. Fitzpatrick, 6 Madd. 360; Davis *v*. Spurling, 1 R. & M. 64; Tam. 199; Crisp *v*. Spranger, Nels. 109; Saville *v*. Tancred, 3 Swanst. 141; Fyler *v*. Fyler, 3 Beav. 550; Maw *v*. Pearson, 28 Beav. 196; Lockwood *v*. Abdy, 24 Sim. 437; *Ex parte* Burton, 3 Mont., D. & De Gex, 364; *Re* Bunting, 1 Ad. & El. 467.

[2] Fyler *v*. Fyler, 3 Beav. 550; Att. Gen. *v*. Leicester, 7 Beav. 171; Hardy *v*. Caly, 33 Beav. 365; Bridgman *v*. Gill, 24 Beav. 302; Portlock *v*. Gardner, 1 Hare, 606; *Ex parte* Woodin, 3 Mont., D. & De G. 399; Bodenham *v*. Hoskyns, 2 De G., M. & G. 903; Panell *v*. Hurley, 2 Coll. 241; Alleyne *v*. Darcy, 4 Ired. Ch. 199, 5 Ired. Ch. 56.

[3] Clark *v*. Martin, 49 Penn. St. 299; Hope *v*. Stone, 10 Minn. 14; Doyle *v*. Peerless, 44 Barb. 239; Kelley *v*. Jenness, 50 Maine, 455; Cobb *v*. Stewart, 4 Met. (Ky.) 255; Dalheguey *v*. Tabor, 22 Cal. 279; Wasby *v*. Foreman, 30 Cal. 90; Kane County *v*. Herrington, 50 Ill. 232.

(*a*) A person employed by the trustee as agent may become trustee *de son tort*, *i. e.*, accountable to the *cestui* as a trustee, but only when he has been given or has assumed the control of trust property to an extent that the trustee had no right to delegate control. In *In re* Barney, [1892] 2 Ch. 265, it was said to be essential to the character of a trustee *de son tort*, "that he should have some trust property either actually vested in him, or so far under his control that he has nothing to do but require that, perhaps by one process, perhaps by another, it should be vested in him." See Soar *v*. Ashwell, [1893] 2 Q. B. 390. The mere fact of his participation in a breach of trust as agent of the trustee does not make him trustee *de son tort*, although he may be liable in some form to the *cestui*. Barnes *v*. Addy, 9 Ch. 244. See Blyth *v*. Fladgate, [1891] 1 Ch. 337; Brinsden *v*. Williams, [1894] 3 Ch. 185. A solicitor employed by the trustee in regard to trust matters and accepting payment for his services out of trust funds, knowing at the time that the trustees had been guilty of a breach of trust, does not hold the payment as constructive trustee when he has no notice that the trustee had been guilty of such a breach of trust as would preclude him from using trust funds for the payment. *In re* Blundell, 40 Ch. Div. 370.

conveyed the land with full covenants of warranty, the title which he afterwards obtains will enure for the benefit of his grantee, and the vendor will be estopped by his covenants from setting up his after-acquired title against his vendee.[1] And if a purchaser of land with notice of a prior mortgage afterwards sells the same to an innocent purchaser for its full value, equity will compel him to hold the proceeds in trust for the mortgagee.[2] So, if one procures and puts on record a deed of land with notice of a prior deed and in fraud of a prior purchaser, equity will compel him to hold the legal title in trust for the first grantee.[3] So, if a person sells stock, and it is conveyed in such a manner that the conveyance is void and the legal title is still in the vendor, he will hold it in trust for the actual vendee, and he may be compelled to take the title and assume the burdens.[4]

§ 247. Where a person has possession of title-deeds or other documents in relation to property, and other persons are interested in the same property, and claim title through or under the same papers, the person having the possession of the papers is a constructive trustee for the other persons interested in the same property, and a court of equity will compel him to produce the deeds or papers at the suit of those claiming an interest in the common property.[5]

§ 247 *a*. If a person becomes surety for the debt of another, and the creditor holds mortgages or other securities from the debtor for the same debt, the surety, if he pay the debt, has a right to claim that the creditor shall hold the securities in trust for him; in other words, the surety upon paying the debt is subrogated into the rights of the original creditor;[6] and if an

[1] Somes *v.* Skinner, 3 Pick. 51; White *v.* Patten, 24 Pick. 324; 2 Smith, Lead. Cases (4 Amer. ed.) 550; Nash *v.* Spofford, 8 Met. 192.
[2] Moshier *v.* Knox College, 32 Ill. 155.
[3] Troy City Bank *v.* Wilcox, 24 Wis. 671.
[4] Brown *v.* Black, L. R. 15 Eq. 367.
[5] Lewin on Trusts, 156, 157 (5th Lond. ed.).
[6] Garnsey *v.* Gardner, 4 Maine, 167.

assignor receives payment for a chose in action which he has assigned, he holds the proceeds in trust for the assignee.[1] So, if one sells the property of another and deposits the money in bank in his own name, upon notice to the bank, by the owner of the property, of the facts, and a demand for the money, the bank becomes a *quasi* or constructive trustee for the true owner.[2]

[1] *Post*, § 438; Fortescue *v.* Barnett, 3 Myl. & K. 36.

[2] Bank of Wellsborough *v.* Bache, 71 Penn. St. 213; Arnold *v.* Macungie Bank, id. 287; Twitchell *v.* Drury, 25 Mich. 393; Campan *v.* Campan, id. 127. [See *supra*, § 122, as to the bank's lien upon deposits not known to be trust funds.]

CHAPTER VIII.

TRUSTS THAT ARISE BY CONSTRUCTION FROM POWERS.

§ 248. The nature of powers that imply a trust.
§ 249. Court will execute such powers as trusts.
§§ 250, 251. Instances of powers which the court will execute as trusts.
§ 252. Instances of powers that are not trusts.
§ 253. Where the power is too uncertain.
§ 254. The power must be executed as given or it will remain a trust to be executed by the court.
§§ 255, 256. In what manner the court will execute a trust arising out of a power.
§ 257. Whether courts will distribute *per stirpes* or *per capita*.
§ 258. And whether to those living at the death of donor or of the donee.

§ 248. PROPERTY is sometimes given to a person with a power to dispose of it for a particular purpose, or to a particular class of persons, or to certain persons to be selected or designated by the donee from a particular class. If the donee executes the power and disposes of the property, or designates or selects the persons who are to take under the gift, it goes as directed, and there is no great room for doubt or question; but if the donee refuses or neglects to execute the power, it becomes a grave inquiry whether the persons in whose favor the power might have been executed have any interest in the property, or any remedy for the non-exercise of the power by the first taker or donee. In dealing with the cases that have arisen upon these inquiries, courts have distributed powers into *mere powers*, and *powers coupled with a trust*, or *powers which imply a trust*.[1] *Mere powers* are purely discretionary with the donee: he may or may not exercise or execute them at his sole

[1] Brown *v.* Higgs, 8 Ves. 574; White *v.* Wilson, 1 Drew. 298.

will and pleasure, and no court can compel or control his discretion, or exercise it in his stead and place, if for any reason he leaves the powers unexecuted.[1] (*a*) If the donee executes the powers, but executes them in a defective manner, courts may aid the execution and supply the defects, but they cannot exercise or execute mere naked powers conferred upon a donee.[2] It is different with powers coupled with a trust, or powers which imply a trust. In this class of cases the power is so given that it is considered *a trust* for the benefit of other parties; and when the form of the gift is such that it can be construed to

[1] Greenough *v.* Welles, 10 Cush. 576; Eldredge *v.* Heard, 106 Mass. 582. [Sayer *v.* Humphrey, 216 Ill. 426.]

[2] Wilkinson *v.* Getty, 13 Iowa, 157; Arundell *v.* Philpot, 2 Vern. 69; Tompkyn *v.* Sandys, 2 P. Wms. 228, n.; Bull *v.* Vardy, 1 Ves. Jr. 272. [Mutual Life Ins. Co. *v.* Everett, 40 N. J. Eq. 345; *In re* Courtier, 34 Ch. Div. 136; Larkin *v.* Wickoff, 72 A. 98 (N. J. Ch. 1909).] And even if a party intended to execute a power, but is prevented by sudden death, the court will not execute the power. Pigott *v.* Penrice, Com. 250; Gilb. Eq. 138; Sugd. on Powers, 392.

(*a*) Every power which is to be exercised solely for the benefit of others than the donee is to some extent a trust, even though the donor has vested in the donee the absolute right to decide whether or not he shall execute it. Although the court cannot compel the donee of such a power to exercise it, yet if he attempts to do so, the courts will see that he has not used the power to gain an advantage for himself or for anybody not included in the class of those for whose benefit he was authorized to exercise it. Degman *v.* Degman, 98 Ky. 717; *In re* Perkins, [1893] 1 Ch. 283; Whelan *v.* Palmer, 39 Ch. Div. 648; *In re* Kirwan's Trusts, 25 Ch. Div. 373; Tempest *v.* Camoys, 21 Ch. Div. 571. See also Lovett *v.* Farnham, 169 Mass. 1; Price *v.* Bassett, 168 Mass. 598; Read *v.* Patterson, 44 N. J. Eq. 211. Nor can he delegate the power. Hood *v.* Haden, 82 Va. 588. Hutchinson *v.* Tottenham, [1898] 1 Ir. 403; Cramton *v.* Rutledge, 157 Ala. 141.

In England a donee of a power of appointment with no duty imposed upon him of making the appointment, may extinguish the power by release or by contract not to execute it. Conveyancing Act, 1881, § 52 (44 and 45 Vict. c. 41); *In re* Chisholm's Settlement, [1901] 2 Ch. 82; *In re* Somes, [1896] 1 Ch. 250; *In re* Radcliffe, [1892] 1 Ch. 227; Smith *v.* Houblon, 26 Beav. 482. But it has been held that if there is coupled with the power a duty of exercising it, the power cannot be released. Saul *v.* Pattinson, 55 L. J. Ch. 831; *Re* Eyre, 49 L. T. 259.

be a *trust*, the power becomes *imperative*, and *must* be executed. Courts will not allow a clear trust to fail for want of a trustee; nor will they allow a trust to fail by reason of any act or omission of the trustee; therefore, courts will not allow a trust to fail, or to be defeated by the refusal or neglect of the trustee to execute a power, if such power is so given that it is reasonably certain that the donor intended that it should be exercised. There are mere powers and mere trusts. There are also powers which the party to whom they are given is intrusted with and required to execute. Courts consider this last kind of power to partake so much of the character of a trust to be executed, that they will not allow it to fail by the failure of the donee to execute it, but will execute it in the place of the donee.[1] (*a*)

[1] Burgess *v.* Wheate, 1 Wm. Black. 162; Sugd. on Pow. 393–398; Lucas *v.* Lockhart, 10 Sm. & M. 466; Harrison *v.* Harrison, 2 Grat. 1; Greenough *v.* Welles, 10 Cush. 576; Erickson *v.* Willard, 1 N. H. 217; Harding *v.* Glyn, 1 Atk. 496; Cruwys *v.* Colman, 9 Ves. 319; Forbes *v.* Ball, 3 Mer. 437; Witts *v.* Boddington, 3 Bro. Ch. 95; Walsh *v.* Wallinger, 2 R. & My. 78; Grieveson *v.* Kersopp, 2 Keen, 654; Jones *v.* Torin, 6 Sim. 255; Martin *v.* Swannell, 2 Beav. 249; Fenwick *v.* Greenwell, 10 Beav. 412; Fordyce *v.* Brydges, 10 Beav. 90; 2 Phill. 497; Burrough *v.* Philcox, 5 My. & Cr. 73; Falkner *v.* Wynford, 15 L. J. Ch. 8; 9 Jur. 1006; Penny *v.* Turner, 15 Sim. 368; 2 Phill. 493; Alloway *v.* Alloway, 4 Dr. & War. 380; Salusbury *v.* Denton, 3 K. & J. 535; Joel *v.* Mills, id. 474; Reid *v.* Reid, 25 Beav. 469; Brown *y.* Higgs, 8 Ves. 574; Babbitt *v.* Babbitt, 26 N. J. Eq. 44. In this case Lord Eldon said, if the power be one which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts this principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interest of those for whose benefit he is called upon to execute it. In Att. Gen. *v.* Downing, Wilm. 23, Ld. Ch. J. Wilmot said, as to the objection that those powers are personal to the trustees, and by their death become unexecutable, they are not *powers* but *trusts*, and there is a very essential difference between them. *Powers* are never imperative: they leave the acts to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. The court supplies the *defective execution*

(*a*) It is frequently difficult to determine whether a discretion given to the donee of a power was intended to be the uncontrolled right to

Lord Hardwicke observed that such powers ought rather to be called trusts than powers.[1] In all cases these powers or trusts

of powers, but never the *non-execution* of them; for they are not meant to be *optional*. But a person who creates a trust means it shall be executed *at all events*. The individuals named as trustees are only the 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, the court assumes the office. There is some personality in every choice of trustees, but this personality is *res unius ætatis*, 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 his place. Brook *v.* Brook, 3 Sm. & Gif. 280; Withers *v.* Yeadon, 1 Rich. Ch. 324; Miller *v.* Meetch, 8 Barr, 417; Gibbs *v.* Marsh, 2 Met. 243; Grimke *v.* Grimke, 1 Des. Eq. 375, n.

[1] Godolphin *v.* Godolphin, 1 Ves. 23.

choose between execution or non-execution, or a right to decide, in the exercise of an honest judgment, when and to what extent the power should be exercised. If the former is the case the courts cannot interfere in case of non-execution, for there is no trust until execution is attempted. Towler *v.* Towler, 142 N. Y. 371. See also Condit *v.* Reynolds, 66 N. J. Law, 242; Smith *v.* Floyd, 108 N. Y. S. 775, 124 App. Div. 277.

If it was intended to impose upon the trustee the duty of exercising the power when in his honest judgment the proper time arrives or to the extent that the circumstances require in order to accomplish the intention of the donor, then the courts will compel the exercise of the power in a proper manner and at the proper time if the trustee arbitrarily declines or neglects to act, provided the beneficiaries are clearly defined. Smith *v.* Floyd, 140 N. Y. 337. See *Re* Stanger, 64 L. T. 693; Dillingham *v.* Martin, 61 N. J. Eq. 276; Cutter *v.* Burroughs, 100 Me. 379. The rule is stated as follows by Jessel, M. R., in Tempest *v.* Camoys, 21 Ch. Div. 571. "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of trustees, but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, must be properly exercised. . . . But in all cases where there is a trust or duty coupled with the power the Court will then compel the trustees to carry it out in a proper manner and within a reasonable time."

But the court will not interfere with the trustee's honest discretion as to the particular time or manner of his *bona fide* exercise of the power. *Re* Burrage, 62 L. T. 752; Dick *v.* Harby, 48 S. C. 516. As to the court's control of discretionary powers of trustees, see *infra*, § 511, note.

In New York it has been provided by statute that every trust power is to be construed as imperative "un-

must be construed according to the intention of the parties, to be gathered from the whole instrument.[1]

§ 249. In all cases where parties have an *imperative power or discretion* given to them, and they die in the testator's lifetime,[2] or decline the trust or office,[3] or disagree as to the execution of it,[4] or do not execute it before their death,[5] or if from any other circumstance [6] the exercise of the power by the party intrusted with it becomes impossible, the court will imply a

[1] Kerr *v.* Verner, 66 Penn. St. 326; Guion *v.* Pickett, 42 Miss. 77.

[2] Maberly *v.* Turton, 14 Ves. 499; Att. Gen. *v.* Downing, Wilm. 7; Amb. 550; Att. Gen. *v.* Hickman, 2 Eq. Cas. Ab. 193.

[3] Izod *v.* Izod, 32 Beav. 242; Doyley *v.* Att. Gen., 2 Eq. Cas. Ab. 194; Gude *v.* Worthington, 3 De G. & Sm. 389.

[4] Wainwright *v.* Waterman, 1 Ves. Jr. 311; Moseley *v.* Moseley, t. Finch, 53.

[5] Harding *v.* Glyn, 1 Atk. 469; Croft *v.* Adam, 12 Sim. 639; Hewett *v.* Hewett, 2 Eden, 332; Flanders *v.* Clark, 1 Ves. 10; Grieveson *v.* Kirsopp, 2 Keen, 653.

[6] Att. Gen. *v.* Stephens, 3 M. & K. 347.

less its execution or non-execution is made expressly to depend on the will of the grantee." IV Consol. Laws [1909], p. 3405, § 157; Smith *v.* Floyd, 140 N. Y. 337; And it has several times been held that executors may execute a testamentary power where no donee of the power was named. Sweeney *v.* Warren, 127 N. Y. 426; Drake *v.* Paige, 127 N. Y. 562; Taber *v.* Willetts, 37 N. Y. S. 233, 1 App. Div. 285 (affirmed, 153 N. Y. 663); Lesser *v.* Lesser, 32 N. Y. S. 167. See also Bradt *v.* Hodgdon, 94 Me. 559.

When the purpose for which a power was given has been accomplished or has failed, the power ceases. Trask *v.* Sturges, 170 N. Y. 482. But a power of sale given to a trustee may continue after the main trust has terminated if such was the intention of the donor. Binns *v.* La Forge, 191 Ill. 598; Moll *v.* Gardner, 214 Ill. 248, 252; Lawrence *v.* Lawrence, 181 Ill. 248; *In re* Sudeley, [1894] 1 Ch. 334.

In New York and in several other States which have abolished trusts where the duties and powers imposed upon the person named as trustee do not require that he should be vested with a legal estate, many attempted trusts which fail as trusts are valid as powers in trust. Syracuse Sav. Bank *v.* Porter, 36 Hun, 168; Murray *v.* Miller, 178 N. Y. 316; Matter of Kellogg, 187 N. Y. 355; Townshend *v.* Frommer, 125 N. Y. 446; Murphey *v.* Cook, 11 S. D. 47; McLenegan *v.* Yeiser, 115 Wis. 304; IV N. Y. Consol. Laws [1909], p. 3391, § 99. It is otherwise in California. Estate of Fair, 132 Cal. 523.

trust, and will put itself in the place of the trustee, and will exercise the power by the most equitable rule. And the court will act retrospectively in executing these powers as *quasi* trusts;[1] and although there may be great difficulties and impracticabilities in the way, yet the court will exercise the power and enforce the trust:[2] for, if the trust or power can by *any possibility* be exercised by the court, the non-execution by the party intrusted shall not prejudice the party beneficially interested, or the *cestui que trust*.[3] Thus a power to sell given to an equitable tenant for life may be executed after his death by trustees under a decree of a court of equity.[4]

§ 250. In some cases the donor makes a direct gift to one party, but subjects the gift to the discretion or power of some previous taker or other party; as if a donor limit a fund "upon trust for the children of A. as B. shall appoint." In such case the children of A. take a vested interest in the subject of the gift, liable to be divested by the exercise of the power by B. Therefore, on the failure of the power, the children of A. become as absolutely entitled as if the discretion or power had never been given to B.[5] But while the exercise of the power is pos-

[1] Maberly *v.* Turton, 14 Ves. 499; Edwards *v.* Grove, 2 De G., F. & J. 222.

[2] Pierson *v.* Garnet, 1 Bro. Ch. 46.

[3] Brown *v.* Higgs, 5 Ves. 505. [See § 248 and notes.]

[4] Faulkner *v.* Davis, 18 Grat. 651. [The court was of opinion that the creator of the trust intended the power of sale to survive the life tenant, but to rest upon his discretion during his life.] Where the discretionary power is such as would not belong to the court by virtue of its jurisdiction over the subject-matter, independent of the will, as, for instance, a power of selecting the beneficiaries of testator's bounty, the court will not execute it, and under the rules cannot confer it upon an appointee. In such cases it is executed equitably by distributing equally among the distributees. But where the discretion applies to some ministerial act, as leasing or selling land, felling timber, and the like, the court will exercise control. Druid Park Heights Co. *v.* Oettinger, 53 Md. 63.

[5] Davy *v.* Hooper, 2 Vern. 665; Jones *v.* Torin, 6 Sim. 255; Fenwick *v.* Greenwell, 10 Beav. 412; Hockley *v.* Mawbey, 1 Ves. Jr. 143, 149, 150; Madoc *v.* Jackson, 2 Bro. Ch. 588; Falkner *v.* Wynford, 9 Jur. 1006; Rhett *v.* Mason, 18 Grat. 541; Carson *v.* Carson, Phill. (N. C.) Eq. 57.

sible, the donee of it may exercise his discretion in favor of any that he may select; he may select those who are living at the donor's death, or those living at his own death.[1] In other cases an estate is vested in a donee "upon trust to dispose of it among the children of A." Here the children of A. take nothing directly by way of the gift, but their interest must come to them through the medium of the power.[2] If the trust is to dispose of it equally among the children of A., the bequest, though in form a power, is equivalent to a simple gift.[3] If the donee may distribute or dispose of it *unequally* among the children of A., and no distribution or disposition is made by him, the court will execute the power and distribute the fund *equally* among the objects of it.[4] In other cases the property is vested in a donee with a discretion as to the objects to which, and also as to the proportions in which, it is to be given over. Of course the first question to be determined in all such cases is, Did the donor intend to give a *mere power*, or did he create a trust, or will the court imply a trust? Lord Cottenham stated the general rule deduced from the cases as follows: "When there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. When such an intention appears, the case arises, as stated by Lord Eldon in Brown *v.* Higgs,[5] of the power being so given as to make it the duty of the donee to execute it; and, in such case, the court will not permit the objects of the

[1] Lambert *v.* Thwaites, Law R. 2 Eq. 151; Woodcock *v.* Renneck, 4 Beav. 190; affirmed 1 Phill. 72.

[2] Ward *v.* Morgan, 5 Cold. 407.

[3] Rayner *v.* Mowbray, 3 Bro. Ch. 234; Phillips *v.* Garth, id. 64.

[4] Hands *v.* Hands, 1 T. R. 437, note; Pope *v.* Whitcomb, 3 Mer. 698; *Re* White's Trust, 1 Johns. 656; Finch *v.* Hollingsworth, 21 Beav. 112; Brown *v.* Pocock, 6 Sim. 257; Grieveson *v.* Kirsopp, 2 Keen, 656; Walch *v.* Wallinger, 2 R. & M. 78; Tam. 425; 1 Rev. Stat. N. Y. 734; § 100; Dominick *v.* Sayre, 3 Sandf. 555; Hoag *v.* Kenney, 25 Barb. 396. [Wilson *v.* Duguid, 24 Ch. Div. 244.]

[5] 8 Ves. 574; 18 id. 192.

power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit." [1]

§ 251. Thus, where a testator gave an estate "to A. upon trust (subject to certain charges), to employ the remainder of the rent for such children of B. as A. should think most deserving, and that will make the best use of it, or for the children of his nephew, C., if any there are, or shall be," and A. died in the testator's lifetime, it was held to be a trust in favor of all the children of B. and C.[2] So where a testator directed certain property to remain until certain contingencies, and then gave life-estates in the property to two of his children, with remainder to their issue, and declared that in case his two children had no issue, the same should be disposed of by the survivor by will among his nephews and nieces or their children, or either of them, or to as many of them as his surviving child should think proper, it was held to be a trust in favor of the nephews and nieces and their children, subject to the power of selection and distribution by the surviving child.[3] So where a testator gave to B. in tail, and if she had no issue, she was to settle the estate upon such person as she thought fit by will, "confiding" in her not to transfer the estate from his nearest family, it was held to be a trust for the heir who was the nearest family or relation within the meaning of the will.[4] And where a testator gave his property to his son *in trust* to apply the income to the use of himself and family, and to give by deed or will all beyond what he should so apply, unto all or any child or children of his own in such proportions and in such manner as he should see fit, and his son died having devised the property to his wife with

[1] Burrough *v.* Philcox, 5 My. & Cr. 72; Witts *v.* Boddington, 3 Bro. Ch. 95; 5 Ves. 503; Harding *v.* Glyn, 1 Atk. 469.

[2] Brown *v.* Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 574; 18 Ves. 192; 2 Sugd. on Pow. 176; Longmore *v.* Broom, 7 Ves. 124; Jones *v.* Torin, 6 Sim. 255; Prevost *v.* Clark, 2 Madd. 458; Penny *v.* Turner, 2 Phill. 473; Fordyce *v.* Bridges, id. 497; White *in re*, John. 658.

[3] Burroughs *v.* Philcox, 5 My. & Cr. 73.

[4] Griffiths *v.* Evans, 5 Beav. 241.

directions to his executors to act under the will of his father, it was held to be a trust coupled with a power to appoint at his discretion among his children, that the power could not be delegated, that the son's will was not an execution of the power, and that his children took equally under their grandfather's will.[1] Where a man gave his property "wholly" to his wife to be disposed of by her and divided among his children at her discretion, the children took under the will and not as her heirs, in default of any distribution by her.[2] And where a testator gave his estate to his wife during her life, and gave all the remainder to his two brothers A. and B. who were also his executors, "with full confidence that they will dispose of such residue among our brothers and sisters and their children, as they shall judge shall be most in need of the same, this to be done according to the best of their discretion;" it was held to be a trust for the brothers and sisters and their children, to the exclusion of A. and B. and their children; and the court executed the trust, and exercised the powers.[3] Where a testator gave his wife certain property, and desired *her* "to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of," after the death of the wife without appointing, the court decreed a trust, and divided the property equally among the relations.[4] Where a tenant for life "is desired to give it among his children as he should think fit," [5] or the "residue is to be disposed of among her children as she shall think proper," [6] or where after the death of testator's wife the gift "is to such of his grandchildren as she should appoint," [7] it was held to be a trust for selection or distribution, and in default of the exercise of the power the

[1] Withers *v.* Yeadon, 1 Rich. Eq. 324.

[2] Collins *v.* Carlisle, 7 B. Mon. 14; Russell *v.* Kennedy, 3 Brews. 438.

[3] Bull *v.* Bull, 8 Conn. 47; see Gilbert *v.* Chapin, 19 Conn. 351; Harper *v.* Phelps, 21 Conn. 257.

[4] Harding *v.* Glyn, 1 Atk. 469.

[5] 2 Sugd. on Pow. 181.

[6] Kemp *v.* Kemp, 5 Ves. 849.

[7] Witts *v.* Boddington, 3 Bro. Ch. 95.

court enforced it as a trust and distributed it equally among all the objects named.[1] In such cases the word "children" will embrace grandchildren if such appears to be the general intent of the donor.[2] (*a*)

§ 252. But where a testator empowered his wife to give away £1000 of his estate at her death, £100 to A., £100 to B., and the rest by her will, and she died without having executed the power, it was held to be a mere power, and no trust, and the court refused to carry it into effect.[3] (*b*) So where a tes-

[1] Whitehurst *v.* Harker, 2 Ire. Ch. 292; Fowler *v.* Hunter, 2 Y. & J. 506; Longmore *v.* Brown, 7 Ves. 124; Salusbury *v.* Denton, 3 Kay & J. 529; Kennedy *v.* Kingston, 2 J. & W. 431; Davy *v.* Hooper, 2 Vern. 665; Maddison *v.* Andrew, 1 Ves. 57; Hockley *v.* Mawbey, 1 Ves. Jr. 143; Croft *v.* Adam, 12 Sim. 639; Brown *v.* Pocock, 6 Sim. 257; McNeilledge *v.* Galbrath, 8 Serg. & R. 43; Harrison *v.* Harrison, 2 Grat. 1; Frazier *v.* Frazier, 2 Leigh, 642; Cruse *v.* McKee, 2 Head, 1; Thompson *v.* Norris, 2 N. J. Eq. 489; Jecko *v.* Lansing, 45 Mo. 167. [Wilson *v.* Duguid, 24 Ch. Div. 244.]

[2] Ingraham *v.* Meade, 3 Wall. Jr. 32. [Edgerly *v.* Barker, 66 N. H. 434; Williams *v.* Knight, 18 R. I. 333; Osgood *v.* Lovering, 33 Me. 464, 469.]

[3] Bull *v.* Vardy, 1 Ves. Jr. 270; *In re* Eddowes, 1 Dr. & Sm. 395. [See also Towler *v.* Towler, 142 N. Y. 371.]

(*a*) Such intention must, it seems, be clear, or this construction be necessary to make the grant or devise effective. Ormsby *v.* Dumesnil, 91 Ky. 601; Bowker *v.* Bowker, 148 Mass. 198; Bragg *v.* Carter, 171 Mass. 324. See Connor *v.* Gardner, 230 Ill. 258.

As to the meaning of the word "issue," see Drake *v.* Drake, 134 N. Y. 220; Soper *v.* Brown, 136 N. Y. 244; Chwatal *v.* Schreiner, 148 N. Y. 683.

In a will by a testator who had no children of his own and no reasonable expectation of any, the word "children" has been held to mean step-children. *In re* Jeans, 72 L. T. 835.

(*b*) A power given to a life tenant to sell the property for his own benefit or to dispose of it by will is extinguished by the death of the life tenant without having exercised it; and the power cannot be exercised by his personal representatives for the benefit of his estate. Bailey *v.* Worster, 103 Me. 170; Crawford *v.* Langmaid, 171 Mass. 309; Sites *v.* Eldredge, 45 N. J. Eq. 632; Cotton *v.* Burkelman, 142 N. Y. 163; Cheney's Ex'r *v.* Stafford, 76 Vt. 16. In some jurisdictions statutes have given creditors of the donee of such a power the same rights as if he were owner of the fee. Hood *v.* Bramlett, 105 Ala. 660; Auer *v.* Brown, 121 Wis. 115. But in the absence of

tator gave £30,000 to his wife for life, to be distributed at her decease to and amongst such of his children and in such manner

such statute provisions, creditors of the donee of even an unlimited power of disposition cannot reach the property until the power is exercised, and cannot compel its exercise. Jones *v.* Clifton, 101 U. S. 225; Brandies *v.* Cochrane, 112 U. S. 344; *Ex parte* Gilchrist, 17 Q. B. Div. 521. But see Morgan's Estate, 223 Pa. St. 228; Ullman *v.* Cameron, 92 App. Div. (N. Y.) 91.

It is general law that the exercise of an unlimited power of disposition gives to creditors of the donee of the power the right to treat the property as part of the donee's estate for the satisfaction of their demands, even though he does not exercise the power for his own benefit. Olney *v.* Balch, 154 Mass. 318; Emmons *v.* Shaw, 171 Mass. 410; Loring *v.* Wilson, 174 Mass. 132; Freeman *v.* Butters, 94 Va. 406; Brandies *v.* Cochrane, 112 U. S. 344; *In re* Lawley, [1902] 2 Ch. 799. But in some States it has been held otherwise where the power of appointment, though general, was to be exercised only by will. Dunglison's Estate, 201 Pa. St. 592; Humphrey *v.* Campbell, 59 S. C. 39; Wales *v.* Bowdish's Ex'r, 61 Vt. 23.

In most jurisdictions a life estate is not raised to a fee contrary to the intention of the donor by the added gift of a power to dispose of the remainder. Melton *v.* Camp, 121 Ga. 693; Griffin *v.* Griffin, 141 Ill. 373; Ducker *v.* Burnham, 146 Ill. 9; Paxton *v.* Paxton, 141 Iowa, 96; Steiff *v.* Seibert, 128 Iowa, 746; Webb *v.* Webb, 130 Iowa, 457; Pedigo's Ex'x *v.* Botts, 89 S. W. 164 (Ky. 1905); Dana *v.* Dana, 185 Mass. 156; Welsh *v.* Woodbury, 144 Mass. 542; Kent *v.* Morrison, 153 Mass. 137; Welsh *v.* Gist, 101 Md. 606; Semper *v.* Coates, 93 Minn. 76; Underwood *v.* Cave, 176 Mo. 1; Grace *v.* Perry, 197 Mo. 550; Loosing *v.* Loosing, 85 Neb. 66; Johnson *v.* Johnson, 51 Ohio St. 446; Wooster *v.* Cooper, 53 N. J. Eq. 682; Ryan *v.* Mahan, 20 R. I. 417; *In re* Richards, [1902] 1 Ch. 76; 2 Jarman on Wills (Bigelow's 6th Am. ed.), 1131, note. See *contra* Hood *v.* Bramlett, 105 Ala. 660; McKnight *v.* McKnight, 120 Tenn. 431; Hair *v.* Caldwell, 109 Tenn. 148, 155; Bradley *v.* Carnes, 94 Tenn. 27; Brown *v.* Strother, 102 Va. 145; Davis *v.* Heppert, 96 Va. 775; Farish *v.* Wayman, 91 Va. 430; Hansbrough *v.* Trustees, 65 S. E. 467 (Va. 1909); Randall *v.* Harrison, 109 Va. 686.

For cases where the life tenant has been given the power to encroach upon the *corpus* for support, see Kennedy *v.* Alexander, 21 App. D. C. 424; Newlin *v.* Phillips, 60 A. 1068 (Del. Ch. 1905); McGuire *v.* Gallagher, 99 Me. 334; Haseltine *v.* Shepherd, 99 Me. 495; *In re* Davison's Trust Estate, 103 Md. 479; Parker *v.* Travers, 71 A. 612 (N. J. Ch. 1908); Fiske *v.* Fiske, 26 R. I. 509; Sires *v.* Sires, 43 S. C. 266.

Where the life tenant's power of disposition during her life is limited to the purpose of her support or maintenance, even when the occasion for the disposition is left to her judgment, the court will not permit a disposition for other purposes than

and proportion as she should appoint, it was held to be a mere power which the court could not execute in default of an appointment by her.[1] (*a*)

§ 253. If the power to be executed is so uncertain as to its objects, that a court of equity cannot say what particular person or persons or class of persons are to take an interest under it as a trust, it will be considered a mere power which cannot be carried into effect;[2] or if the subject-matter to be

[1] Marlborough *v.* Godolphin, 2 Ves. 61; 5 Ves. Jr. 506. In this case Lord Hardwicke drew a distinction between a gift "amongst my children as A. should appoint," which he considered a trust, and a gift "among *such* of my children as A. should appoint," which he considered a mere power. This distinction, however, is not now acted upon. Crossling *v.* Crossling. 2 Cox, 396, is to the same effect as Marlborough *v.* Godolphin. These cases have not been expressly overruled, but they have not been followed in the later cases, and if they were to come before the courts at the present day, it is probable that they would be held to be implied trusts, and not mere powers, as courts will, if possible, construe such bequests into gifts to the parties to be benefited. Hill on Trust, 69; 2 Sugd. on Powers, 181; Brown *v.* Pocock, 6 Sim. 257.

[2] Stubbs *v.* Sargon, 2 Keen, 255; Ommanny *v.* Butcher, 1 T. & R. 260;

those limited. Hoxie *v.* Finney, 147 Mass. 616. Thus she cannot convey the property by deed of trust; Phillips *v.* Wood, 16 R. I. 274; nor can she convey by way of gift. Terry *v.* Rector, etc., 81 N. Y. S. 119, 79 App. Div. 527; Stocker *v.* Foster, 178 Mass. 591; Garland *v.* Smith, 164 Mo. 1; Gardner *v.* Whitford, 23 R. I. 396; Sires *v.* Sires, 43 S. C. 266. It has been held that a power in the life tenant to sell for her support does not include power to mortgage for the same purpose. O'Brien *v.* Flint, 74 Conn. 502. But a power "to sell or dispose of any or all said real estate upon any terms" has been held to include power to mortgage. Jackson *v.* Everett, 58 S. W. 340 (Tenn. 1894).

(*a*) The cited case of Marlborough *v.* Godolphin appears to be now overruled. Of it Lord St. Leonards (on Powers, p. 592) says: "As the right to exclude some does not prevent the class from taking in default of appointment, it should seem that if a case in the very terms of Duke of Marlborough *v.* Godolphin were now to occur, it would be decided that the children took as tenants in common in default of appointments, either by implication, which seems the true construction, or because the power was coupled with a trust." This is approved in Salusbury *v.* Denton, 3 K. & J. 529, and in Wilson *v.* Duguid, 24 Ch. D. 244, the latter case fully reviewing the older authorities.

affected by the power is too uncertain to be dealt with by the court, a trust will not be implied.[1] And where there is an express limitation of the property over in case the power is not executed, of course no trust can be implied.[2]

§ 254. The general rule is, that the power given must be strictly executed as given, or it will remain as a trust for the person or class in whose favor it is given; thus, if the donee is to dispose of the property to such person of a particular class as she shall select in a last will and testament, and the disposition is made by a deed, the power is not executed, and it will be construed into a trust for the whole class, or will go over, if there is a gift over in default of an appointment or execution of the power.[3] So if the power is attempted to be executed in favor of a person or a class, outside of the persons or classes in whose favor it is given, the execution will be bad, and it will remain as a trust for all those in whose favor it was given.[4] As if the power is to distribute among children, it cannot be executed by a distribution among grandchildren.[5] Where the power is to distribute among a certain class, something must

Wheeler *v.* Smith, 9 How. 79; Robinson *v.* Allen, 11 Grat. 785; Harper *v.* Phelps, 21 Conn. 257; Thompson *v.* McKissick, 3 Humph. 631; Ellis *v.* Ellis, 15 Ala. 296. [Condit *v.* Reynolds, 66 N. J. L. 242; Gambell *v.* Trippe, 75 Md. 252.]

[1] Gibbs *v.* Marsh, 2 Met. 243.

[2] Pritchard *v.* Juinchant, Amb. 126; 5 Ves. 596, n.; 2 Sugd. on Pow. 183; Lines *v.* Durden, 5 Fla. 51. [Sayer *v.* Humphrey, 216 Ill. 426.]

[3] Moore *v.* Dimond, 5 R. I. 121; Bentham *v.* Smith, 1 Cheev. 33 (2d part); Halsen *v.* Kean, 2 Taylor, 279; Christy *v.* Pulliam, 17 Ill. 59; Balteel *v.* Plumer, L. R. 8 Eq. 585; Garth *v.* Townsend, L. R. 7 Eq. 220; Thacker *v.* Kay, L. R. Eq. 408.

[4] Jarnagin *v.* Conway, 2 Humph. 50; Horwitz *v.* Norris, 49 Pa. St. 219; Knight *v.* Garborough, Gilmer, 27; Little *v.* Bennett, 5 Jones, Eq. 156; Lippincott *v.* Ridgway, 3 Stockt. 526; Varrell *v.* Wendell, 20 N. H. 431; Wickesham *v.* Savage, 58 Penn. St. 219; *In re* Gratwick's Trust, L. R. 1 Eq. 117; Carson *v.* Carson, Phill. Eq. (N. C.) 57.

[5] Horwitz *v.* Norris, 49 Penn. St. 219; Churchill *v.* Churchill, L. R. 5 Eq. 44; Moriarty *v.* Martin, 3 Ir. Ch. 26. [Herrick *v.* Fowler, 108 Tenn. 410. Even when all the children have died before the time for the execution of the power. Smith *v.* Hardesty, 88 Md. 387.]

be given to each one or the execution of the power is bad.[1] (*a*) But the proportion is left to the trustee.[2] And the donee of the

[1] Ibid.; Lippincott *v.* Ridgway, 2 Stockt. 164; 3 id. 526; Booth *v.* Alington, 39 Eng. L. & Eq. 250. [Degman *v.* Degman, 98 Ky. 717. See *contra*, McGibbon *v.* Abbott, 10 App. Cas. 653.] It seems that this is not the rule in Pennsylvania. Graeff *v.* De Turk, 44 Penn. St. 527.

[2] Portsmouth *v.* Shackford, 46 N. H. 423.

(*a*) A power to appoint "to and among my grandchildren in such shares and proportions and in such manner as she (the donee) shall think right and proper" has been held to be non-exclusive; that is to say, the donee of the power could not entirely exclude any grandchild from a share. Cameron *v.* Crowley, 72 N. J. Eq. 681. See also Degman *v.* Degman, 98 Ky. 717; Thrasher *v.* Ballard, 35 W. Va. 524; Wright *v.* Wright, 41 N. J. Eq. 382. A power to dispose of property "among our children and grandchildren in such proportions as he (the donee) may choose" has been held to give each member of the class the right to a substantial, though not an equal, share of the property. Hatchett *v.* Hatchett, 103 Ala. 556. A power to divide among testator's children "to the best advantage, as she sees fit and proper" has been held to be non-exclusive. Faloon *v.* Flannery, 74 Minn. 38. But a power to divide "among such of my children or their issue, in such shares or proportions as she (the donee) may see proper and best" does not require that a share be given to every one of the class. McNeile's Estate, 217 Pa. St. 179. A power to dispose of "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form as my said daughter shall by deed or will appoint" has been interpreted to give the donee the power to entirely exclude members of the class because the class was or might be so large that the testatrix could not have intended that all should take something. *In re* Veale's Trusts, 4 Ch. Div. 61.

Whether the donee of the power in such cases has the power to entirely exclude any member of the class is obviously entirely a question of the intention of the donor of the power. In England statutes have changed the rule as stated in the text, so that power to appoint or distribute to members of a class is no longer non-exclusive, unless it appears to have been the donor's intention to make the power non-exclusive. 37 and 38 Vict. c. 37. The tendency of most of the American courts is to apply the same rule without the aid of statutes. Cases cited *supra*.

The equitable rule against "illusory" appointments to members of a class, *i. e.*, appointments of an unsubstantial amount made for the purpose of complying with the rule that every member of the class must receive something, was never generally accepted in America and has been abolished by statute in England. Hawthorne *v.* Ulrich, 207 Ill. 430; 37 and 38 Vict. c. 37. But in Kentucky and Alabama recent divi-

power cannot execute it in favor of himself or his family, unless the terms of the power specially authorize him so to do.[1] (*a*)

[1] Bostick *v.* Winton, 1 Sneed, 524; Cruse *v.* McKee, 2 Head, 1; Holt *v.* Hogan, 5 Jones, Eq. 82; Bull *v.* Bull, 8 Conn. 47; Cooper *v.* Cooper, L. R. 8 Eq. 312.

sions indicate that the courts of those States would not regard an illusory appointment to one or more of the class as a proper execution of the power of appointment. Degman *v.* Degman, 98 Ky. 717; Hatchett *v.* Hatchett, 103 Ala. 556. See also Stephenson *v.* Norris, 128 Wis. 242, 259.

A non-exclusive power of appointment among members of a class may be properly exercised by giving the whole estate to one member of the class subject to a charge or upon condition of payment of a certain sum to each of the other members. Allder *v.* Jones, 98 Md. 101; Monjo *v.* Woodhouse, 185 N. Y. 295.

(*a*) Nor will the donee be permitted to obtain an advantage for himself, or for a person for whose benefit he has no authority to execute the power, by making a bargain therefor with one or more of the beneficiaries in whose behalf he has authority to execute the power. *In re* Kirwan's Trusts, 25 Ch. Div. 373; Degman *v.* Degman, 98 Ky. 717; *In re* Perkins, [1893] 1 Ch. 283; Whelan *v.* Palmer, 39 Ch. Div. 648. But where the donee of the power is one of the class among whom he has the power of appointment, he may appoint a share to himself. Taylor *v.* Allhusen, [1905] 1 Ch. 529.

It has been held in England that the donee of a power to appoint to members of a class who are to take equally in default of appointment may release his power of appointment, and the fact that his motive was to secure a benefit for himself does not render the release invalid. *In re* Somes, [1896] 1 Ch. 250; *In re* Radcliffe, [1892] 1 Ch. 227. See also Conveyancing, etc., Act, 1881, § 52 (44 and 45 Vict. c. 41); *In re* Chisholm's Settlement, [1901] 2 Ch. 82. But it has been held that a power coupled with a duty of exercising it cannot be released. Saul *v.* Pattinson, 55 L. J. Ch. 831; *Re* Eyre, 49 L. T. 259. In the last cited case, *Re* Eyre, it was said: "A trustee who has a power which is coupled with a duty is, I conceive, bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise from time to time whether the power should be used or not, and he could no more, by his own voluntary act, destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him."

The donee of an unlimited power of appointment by deed may dispose of the property for his own benefit. Phillips *v.* Pike, 106 N. Y. S. 486, 121 App. Div. 753; Mandel *v.* Fidelity Trust Co., 128 Ky. 239.

It is settled law in England and in some States that when the donee of a *general* power of appointment by will executes the power, his creditors have the right to treat the

Nor can he delegate the power or the execution of it to others.[1](a) It must be executed within the time named in the instrument,[2] and if the appointment is to be made at a person's decease, it must be by will.[3] It must also be executed for the precise purpose declared, and when the purpose becomes wholly unattainable the power ceases.[4]

[1] Singleton *v.* Scott, 11 Iowa, 589; Haslen *v.* Kean, 2 Taylor, 279; Withers *v.* Yeadon, 1 Rich. Eq. 324; Carr *v.* Atkinson, L. R. 14 Eq. 400; Webb *v.* Sadler, L. R. 14 Eq. 533. [McNeile's Estate, 217 Pa. St. 179; Hutchinson *v.* Tottenham, [1898] 1 Ir. 403.]

[2] Cooper *v.* Martin, L. R. 3 Eq. 47.

[3] Freeland *v.* Pearson, L. R. 3 Eq. 658.

[4] Hetzel *v.* Hetzel, 69 N. Y. 1; Brown *v.* Meigs, 11 Hun, (N. Y.) 203.

property as part of his estate for the satisfaction of their claims. Olney *v.* Balch, 154 Mass. 318; Emmons *v.* Shaw, 171 Mass. 410; Loring *v.* Wilson, 174 Mass. 132; Freeman *v.* Butters, 94 Va. 406; Brandies *v.* Cochrane, 112 U. S. 344; *In re* Lawley, [1902] 2 Ch. 799. This is probably general law when the donee has unlimited power of appointment by deed as well as by will; but it has been held in a few cases that where the power of appointment is by will only, the creditors of the appointor cannot reach the property. It is argued that as the appointor had no power to appropriate or appoint to his own use during his life, the reason for the general rule already stated fails. Wales *v.* Bowdish's Ex'r, 61 Vt. 23; Humphrey *v.* Campbell, 59 S. C. 39; Dunglison's Estate, 201 Pa. St. 592. Such a general power of appointment is not property, and in the absence of statute does not pass to the assignee in bankruptcy of its possessor, nor can he be compelled to execute it in favor of his creditors. Jones *v.* Clifton, 101 U. S. 225; Brandies *v.* Cochrane, 112 U. S. 344.

When a married woman is the donee of a power to convey the fee of real estate, it is not necessary that her husband join in a deed made in execution of the power. Young *v.* Sheldon, 139 Ala. 444; Antonini *v.* Straub, 130 Ky. 10; Armstrong *v.* Kerns, 61 Md. 364. See Married Women's Property Act, 1907 (7 Edw. 7, c. 18).

As to the application of the rule against perpetuities, see *infra*, § 383, note.

As to execution of a power of appointment, sale, etc., without reference to it, see *infra*, § 511 *c.* and notes.

(*a*) A power of appointment in favor of minor children may be exercised by an appointment to trustees for their benefit. *In re* Paget, [1898] 1 Ch. 290. A general power of appointment may be exercised by giving the appointee less than the entire legal estate and a power of appointment, either general or limited. McClellan's Estate, 221 Pa. St. 261; Mays *v.* Beech, 114 Tenn. 544; Lawrence's Estate, 136 Pa. St. 354.

§ 255. Generally, if the power is left unexecuted by the donee, the court will execute it as a trust, by dividing the fund equally among the objects or persons in favor of whom it was given, or from whom the selection might have been made, on the ground that *equality is equity.*[1] But if the donor of the power lays down any rule by which the *donee* or trustee is to be governed in his election and distribution of the fund, it is said the court will place itself in the position of the trustee. If the discretion of the trustee is to be founded upon, or measured by, a state of facts which the court can inquire into and apply as effectually as a private person could, it "can look with the eyes of the trustee," and can substitute its own judgment for that of the individual. Lord Hardwicke said in a case before him, "Here a rule is laid down; the trustees are to judge of the occasions and necessities of the family; the court can judge of such necessity; that is a judgment to be made from existing facts, so that the court can make the judgment as well as the trustee, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity;" and his Lordship referred the case to a master to report the facts, and decreed a distribution according to the necessities found.[2] This doctrine has been acted upon in similar cases.[3] In others, the courts have said that it was "impossible to distinguish between degrees of poverty," and that they would not attempt to apply the discretion given to the *donee* of the power,

[As upon the death of the person for whose sole benefit the power was given. Tucker *v.* Baldwin, 73 N. J. Eq. 224. See also Peirsol *v.* Roop, 56 N. J. Eq. 739; Gulick *v.* Griswold, 160 N. Y. 399.]

[1] Doyley *v.* Attorney General, 2 Eq. Cas. Ab. 195; Longmore *v.* Broom, 7 Ves. 124; Salusbury *v.* Denton, 3 K. & J. 403; Izod *v.* Izod, 32 Beav. 249; Gray *v.* Gray, 13 Ir. Ch. 404; Fordyce *v.* Brydges, 2 Phill. 497; Penny *v.* Turner, id. 493; Whithurst *v.* Harker, 2 Ir. Ch. 492; Kennedy *v.* Kingston, 2 J. & W. 431; Frazier *v.* Frazier, 2 Leigh, 642; Cruse *v.* McKee, 2 Head, 1; Davy *v.* Hooper, 2 Vern. 665. [Loosing *v.* Loosing, 85 Neb. 66.]

[2] Gower *v.* Mainwaring, 2 Ves. 87. Mr. Belt's edition has a misprint, the court *cannot judge.*

[3] Liley *v.* Hey, 1 Hare, 581; Hewett *v.* Hewett, 2 Eden, 332; Maberly *v.* Thurton, 14 Ves. 499; Bull *v.* Bull, 8 Conn. 48.

but would divide the fund equally.[1] This conflict of authority leaves the question open for further discussion. It would seem that there is no impossibility in the nature of things "in distinguishing between degrees of poverty," or in deciding what class of persons or relations come within the description, and should take under the gift of the donor. Lord Hardwicke's observations are just, and can be acted upon by courts. It is not so much a question whether courts of equity can exercise the discretion given to the trustee, as whether it is consistent with the dignity of courts to inquire into the relative necessities of a testator's relations, or whether they have the time to enter into such inquiries. So far as the dignity of courts is concerned, they may well remember that they are created to administer justice and equity to the people, and that no inquiries or decrees that can be successfully made are inconsistent with their position or duties.[2]

§ 256. If the donee of the power or trustee is to *select* from the donor's *relations* those to whom he is to give the property, in the execution of the power he may select from the whole circle of relations whether near or distant;[3] and he may exclude some;[4] but if the power is to *distribute* to the donor's relations, then the donee must confine himself to the relations that are so near that they would take under the statute of distributions.[5]

[1] McNeilledge *v.* Galbrath, 8 Serg. & R. 43; Harrison *v.* Harrison, 2 Grat. 1; Withers *v.* Yeadon, 1 Rich. Ch. 324.

[2] Upon the general subject of bequests to poor or necessitous relations, see Att. Gen. *v.* Buckland, 1 Ves. 231; Amb. 71; Anon. 1 P. Wms. 327; Widmore *v.* Woodroffe, Amb. 636; Brunsden *v.* Woolredge, id. 507; Mahon *v.* Savage, 1 Sch. & Lef. 111; Green *v.* Howard, 1 Bro. Ch. 33.

[3] Grant *v.* Lynham, 4 Russ. 292; Brown *v.* Higgs, 5 Ves. 501; Cruwys *v.* Colman, 9 Ves. 324; Swift *v.* Gregson, 1 T. R. 435, note f; Salusbury *v.* Denton, 3 K. & J. 536; Supple *v.* Lowson, Amb. 729; Harding *v.* Glyn, 1 Atk. 469; Mahon *v.* Savage, 1 Sch. & Lef. 111; Huling *v.* Farrer, 9 R. I. 410; Brunsden *v.* Woolredge, Amb. 507, seems inconsistent with the other authorities.

[4] Ingraham *v.* Meade, 3 Wall. Jr. 32.

[5] Clapton *v.* Bulmer, 10 Sim. 426; 5 My. & Cr. 108; Att. Gen. *v.* Price, 17 Ves. 373, note a; Isaac *v.* Defriez, Amb. 595; Carr *v.* Bedford, 2 Ch. R.

Courts have adopted the rule of the statute of distributions as a convenient rule in such cases, to prevent such gifts from being void for uncertainty. If the power devolves upon the court as a trust, whether it is one of *selection* or *distribution*, the court will act upon the rule of the statute of distributions,[1] unless the donor has himself established some rule of *selection* or distribution which the court can act upon.[2] And the same rule applies if the donor uses the word "family."[3] A gift to *nearest relations* or next of kin must be administered in the same way.[4] But it is said that a power of selection will be implied in the donee in the case of relations, where it would not have been implied in the case of children.[5] (*a*) A power to an unmarried woman to appoint to her family or next of kin may extend to any relative,[6] and such power may be executed after coverture.[7]

146; Pope *v.* Whitcombe, 3 Mer. 437; *In re* Jeaffreson's Trusts, L. R. 2 Eq. 276; Forbes *v.* Ball, 3 Mer. 437. This case seems inconsistent, but the question was whether it was a *power* or a *trust*, and not whether the authority was exceeded.

[1] Bennett *v.* Honywood, Amb. 708; Hutchinson *v.* Hutchinson, 13 Ir. Eq. 332; Gough *v.* Bult, 16 Sim. 45; Cowper *v.* Mantell, 22 Beav. 231.

[2] Ibid.; or unless the gift is in some sense a charity. White *v.* White, 7 Ves. 423; Mahon *v.* Savage, 1 Sch. & Lef. 111; Att. Gen. *v.* Price, 17 Ves. 371; Isaac *v.* Defriez, id. 373, note a.

[3] Cruwys *v.* Colman, 9 Ves. 319; Grant *v.* Lynham, 4 Russ. 297.

[4] Edge *v.* Salisbury, Amb. 70; Goodinge *v.* Goodinge, 1 Ves. 231.

[5] Spring *v.* Biles, 1 T. R. 435, note f; Mahon *v.* Savage, 1 Sch. & Lef. 111; Salusbury *v.* Denton, 3 K. & J. 536; Pope *v.* Whitcombe, 3 Mer. 689.

[6] Snow *v.* Teed, L. R. 9 Eq. 622.

[7] Wood *v.* Wood, L. R. 10 Eq. 220.

(*a*) In Wilson *v.* Duguid, 24 Ch. Div. 244, 251, Chitty, J., says in rendering his opinion: "It is now established that where there is power to appoint among relations so as to give the donee of the power the right of selection — the donee of the power can appoint to any relations, but in modelling the trusts to be applied in default or arising from the power being coupled with a duty, the Court has found itself under the necessity of confining the class of relations to a particular set of relations, and has adopted the rule that the relations who take in default of the exercise of the power in that case are those who are the next of kin according to the statute; they take as tenants in common, but not in the shares defined by the statute."

§ 257. Intimately connected with this subject is the inquiry whether courts will execute the power of distribution among the persons intended, by distributing *per capita* or *per stirpes*. Upon this matter it is to be observed that courts have adopted the statute of distributions as a convenient rule to point out the *relations* intended by a donor, when he uses that word in a gift. The only reason for adopting the rule was to prevent the gift from failing for uncertainty. The rule is used to point out the *persons* intended to take, but the terms of the gift are used to point out the *proportions*. If, therefore, there is no rule in the gift which can apply to determine the proportions, the court will make the distribution *per capita*, and everybody within the rule will take equally as tenants in common.[1] But if the gift is to the *next of kin* of the donor, it will be confined to the *nearest relations;* and those who would take by representation under the statute of distributions will be excluded if there are relations a degree nearer.[2] If the gift is to "my surviving nephews and nieces" after paying certain legacies and the termination of certain life estates, the representatives of a nephew who survived the testator, but died before the time for distribution, have no share.[3] If the fund is left for the "maintenance and education" of two children named, each will share equally without regard to their differing needs.[4] If the subject-matter of the gift is incapable of division, and is to be bestowed upon some one of a class to be selected by the donee, and no selection is made, the court will notwithstanding execute the power as a trust, if by any possibility it can be done.[5]

[1] Walker *v.* Maunde, 19 Ves. 427; Thomas *v.* Hole, Cas. t. Talb. 251; Phillips *v.* Garth, 3 Bro. Ch. 64; Stamp *v.* Cooke, 1 Cox, 326; Hinckley *v.* Maclaerns, 1 Myl. & K. 27; Withy *v.* Mangles, 4 Beav. 358; 10 Cl. & Fin. 215; Green *v.* Howard, 1 Bro. Ch. 33; Pope *v.* Whitcombe, 3 Mer. 689; Rayner *v.* Mowbray, 3 Bro. Ch. 234; De Laurencel *v.* De Boom, 67 Cal. 362. [Wilson *v.* Duguid, 24 Ch. Div. 244, 251.]

[2] Elmsley *v.* Young, 2 Myl. & K. 780; Withy *v.* Mangles, 4 Beav. 358; 10 Cl. & Fin. 215. [Harris *v.* Newton, 46 L. J. Ch. 268.]

[3] Denny *v.* Kettel, 135 Mass. 138.

[4] Jones *v.* Foote, 137 Mass. 543.

[5] Moseley *v.* Moseley, R. t. Finch. 53; Clarke *v.* Turner, Freem. 199;

§ 258. Another difficult question which courts must decide when they are called upon to execute these powers or trusts, is, whether the fund shall be distributed to the parties in interest living at the donor's death, or to those living at the donee's death. Upon this matter it has been determined that when it appears that the donee is to have his whole life to make the selection or distribution, or if the donee is to have the use of the fund for his life, then the court will distribute it to the parties entitled living at the death of the donee.[1] But if the donee is to make the distribution *immediately*, or as soon as may be, the court, on his death, without executing the power, will distribute the fund among those entitled at the death of the donor;[2] and the same rule will be followed if the donee die before the donor.[3] These rules, however, are applicable only when the final beneficiaries take *through the medium* of the power; for if they take directly by the form of the gift subject to be defeated by the execution of the power, they have a vested interest at the death of the donor, and of course those living at that time will take, if the power is not executed to defeat them.[4] Where the donee may execute the power by *deed* or *will* at any time during his life, and he dies leaving the power unexecuted, there is a conflict of the authorities upon the question to whom should the court give the funds: Mr. Lewin says that there is an equal conflict of principle.[5]

Richardson *v.* Chapman, 7 Bro. P. C. 318; Brown *v.* Higgs, 5 Ves. 504.

[1] Cruwys *v.* Colman, 9 Ves. 319; Brown *v.* Pocock, 6 Sim. 257; Bonser *v.* Kinnear, 2 Gif. 195; Birch *v.* Wade, 3 Ves. & B. 198; Walsh *v.* Wallinger, 2 R. & M. 78; Burrough *v.* Philcox, 5 My. & Cr. 72; Woodcock *v.* Renneck, 4 Beav. 190; 1 Phill. 72; Finch *v.* Hollingsworth, 21 Beav. 112; Doyley *v.* Att. Gen., 2 Eq. Cas. Ab. 194, pl. 15; Witts *v.* Boddington, 3 Bro. Ch. 95; Winn *v.* Fenwick, 11 Beav. 438; Tiffin *v.* Longman, 15 Beav. 275; Grieveson *v.* Kirsopp, 2 Keen, 653; Freeland *v.* Pearson, L. R. 3 Eq. 658.

[2] Brown *v.* Higgs, 4 Ves. 708; Longmore *v.* Broom, 7 Ves. 124; Cole *v.* Wade, 16 Ves. 27.

[3] Penny *v.* Turner, 2 Phill. 493; Hutchinson *v.* Hutchinson, 13 Ir. Eq. 332.

[4] Lambert *v.* Thwaites, L. R. 2 Eq. 151.

[5] Doyley *v.* Att. Gen., 2 Eq. Cas. Ab. 195; Harding *v.* Glyn, 1 Atk. 469;

Pope *v.* Whitcombe, 3 Mer. 689, are authorities that those living at the death of the donee should take. On the other hand, the cases of Hands *v.* Hands, 1 T. R. 437, note; Grieveson *v.* Kirsopp, 2 Keen, 653, are authorities that those living at the death of the donor should take. Mr. Lewin says, p. 600 (5th ed. Lond.): "Upon principle, too, as well as upon authority, this question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the court has to supply, is the non-exercise *just before his death;* and that default must, therefore, be supplied in favor of those who were objects at the date of the death of the donee. On the other hand, the donee of the power may exercise it in favor of the class existing at the time of exercise, to the exclusion of those who have died before, and also, where the power is one of selection, to the exclusion of those who may came into *esse* subsequently, but the court cannot act arbitrarily, and cannot show any favor, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it; that is, those living at the death of the testator, and those who come into being during the continuance of the life-estate; otherwise, should all the class predecease the tenant for life (an event not improbable where *children* or some limited class of relations are the objects), there would be a power imperative which is construed a trust, and no *cestui que trust*, — a result which, it is conceived, the court would be somewhat unwilling to adopt.

CHAPTER IX.

APPOINTMENT, ACCEPTANCE, DISCLAIMER, REMOVAL, RESIGNATION, SUBSTITUTION, AND NUMBER OF TRUSTEES, AND APPOINTMENT UNDER A POWER.

§ 259. Acceptance of the trust — how and when it should be accepted.
§ 260. What is an acceptance, and its effect.
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§ 261 *a*. Trustee's bond.
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§ 282. The proceedings to remove and substitute trustees.
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§ 286. Of the number of trustees.
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§ 287. Trustees cannot appoint their successors or new trustees unless power is given in the instrument of trust.
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§ 289. Powers of appointment frequently matters of personal confidence.
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§ 291. An appointment may be made to fill a vacancy occurring before the death of the testator.
§ 292. Unfitness and incapacity.
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§ 294. By whom the power may be exercised.
§ 295. The power must be strictly followed.
§ 296. Who may be appointed to exercise the power.
§ 297. Who may be appointed under a power.

§ 259. WHEN a trust is created by implication, result, or construction of law from acts of parties, they will be held by the law to the performance of the trust whether they are willing or unwilling to accept the situation; that is, when a trust is raised by law and thrust upon the conscience of a party, as the result or construction to be put upon his acts, in order to do complete justice, the acceptance or refusal of the party to be charged with the trust cannot alter his legal or equitable liability to act as a trustee, and to do all that is required of him to execute the trust. Subject to this qualification, no one is *compellable* to undertake a trust.[1] If a conveyance is made by a private individual or corporation to public officers and their successors in office, the successors are not bound, unless they accept the trust.[2] In voluntary or express trusts, no title vests in the proposed trustee, by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office, or in some way assumes its duties and liabilities.[3] And though a person may have promised or agreed

[1] Lowry *v.* Fulton, 9 Sim. 123; Robinson *v.* Pitt, 3 P. Wms. 251; Moyle *v.* Moyle, 2 Russ. & M. 715. And he may renounce the trust, though such renunciation may deprive a beneficiary of all means of obtaining a benefit intended for him by a testator. Beekman *v.* Bonsor, 23 N. Y. 298; Kennedy *v.* Winn, 80 Ala. 166.

[2] Delaplane *v.* Lewis, 19 Wis. 476.

[3] Maccubbin *v.* Cromwell, 7 Gill & J. 157; Bethune *v.* Dougherty, 21 Ga. 257; King *v.* Donnelly, 5 Paige, 46; Trask *v.* Donaghue, 1 Aik. 370; Burritt *v.* Silliman, 13 N. Y. 93; De Peyster *v.* Clendining, 8 Paige, 295; Bulkley *v.* De Peyster, 26 Wend. 21; Judson *v.* Gibbons, 5 Wend. 224; Cooper *v.*

beforehand to accept a trust, and his name is introduced into the will, conveyance, or settlement, yet he may decline to act, and it is proper for him to do so if he finds that his duties are different from what he conceived them to be when he entered into the agreement; or if for any reason he cannot attend to the proper discharge of the office.[1] Such refusal does not invalidate the deed or will: it only relieves the trustees, and enables the court to appoint others.[2] (*a*) The refusal to act should be affirmatively shown, either by an express disclaimer, or by such a tacit refusal to act as amounts to an express rejection;[3] for every gift by will or deed is supposed, *prima facie*, to be beneficial to the donee, and therefor the law will presume that every gift, whether in trust or not, is accepted until the contrary is proved.[4] Especially will this presumption prevail after a long lapse of

McClun, 16 Ill. 435; Matter of Robinson, 37 N. Y. 261; Armstrong *v.* Morrill, 14 Wall. 138.

[1] Doyle *v.* Blake, 2 Sch. & Lef. 239; Evans *v.* John, 4 Beav. 35; Smith *v.* Knowles, 2 Grant Cas. 413; Crook *v.* Ingoldsby, 2 Ir. Eq. 375.

[2] Brownell *v.* Downs, 11 How. 62; Nicoll *v.* Miller, 37 Ill. 387; Nicoll *v.* Ogden, 29 Ill. 323; Elstner *v.* Fife, 32 Ohio St. 358; Thatcher *v.* St. Andrews Church, 37 Mich. 264; Johnson *v.* Roland, 58 Tenn. 203. [Smith *v.* Davis, 90 Cal. 25; Prince *v.* Barrow, 120 Ga. 810; Adams *v.* Adams, 21 Wall. 185; Brandon *v.* Carter, 119 Mo. 572; Dailey *v.* New Haven, 60 Conn. 314.] Declining to act as executor is not a renunciation of the trust over a fund bequeathed in the will. Garner *v.* Dowling, 11 Heisk. (Tenn.) 48; Williams *v.* Cushing, 34 Maine, 370; Taintor *v.* Clark, 13 Met. 224.

[3] Read *v.* Robinson, 6 Watts & S. 331.

[4] Ibid.; Townson *v.* Tickell, 3 B. & Ald. 36; Thompson *v.* Leach, Ventr. 198; Wilt *v.* Franklin, 1 Binn. 502; Wise *v.* Wise, 2 Jon. & La. 412; Eyrick *v.* Hetrick, 13 Penn. St. 494; 4 Kent, 500; 4 Cru. Dig. 404–406; Goss *v.* Singleton, 2 Head, 67; Penny *v.* Davis, 3 B. Mon. 313; Furman *v.* Fisher, 4 Cold. 626.

(*a*) The same is true when the named trustee is legally incapable of taking title. In such cases the trust instrument is treated as creating a beneficial interest in the *cestui*, subject to his right to refuse to accept it, and a court of equity will on application appoint a trustee capable of taking the legal title and executing the trust. Smith *v.* Davis, 90 Cal. 25; Hickory *v.* Railroad, 137 N. C. 189; Willis *v.* Alvey, 69 S. W. 1035 (Tex. Civ. App. 1902). See Ewing *v.* Buckner, 76 Iowa, 467.

Disclaimer of the office of trustee is a disclaimer of the legal title of the estate conveyed or devised. *In re* Birchall, 40 Ch. Div. 436.

time, as twenty years,[1] or thirty-four years,[2] if the trustee has notice, and has not disclaimed, though he may have done nothing in the execution of the trust. And even where a deed was only four years old, and the trustees knew of their appointment, and did not object, Lord St. Leonards held that they could not be allowed to say that they did not assent to the conveyance.[3]

§ 260. If the trust is created by deed, the most obvious, natural, and effectual mode of signifying an acceptance is by signing the deed;[4] but such execution of the deed by the trustee is not necessary.[5] Where trusts are by will vested in the executors as such, accepting and qualifying as executor accepts the trusts.[6] (*a*) Acceptance may be presumed by acts of the trustee at or subsequent to the grant.[7] If the trustee acts under the deed in the performance of the trust, he will be held to have accepted, though he has not executed, the deed, and he

[1] *In re* Uniacke, 1 Jon. & La. 1; Eyrick *v.* Hetrick, 13 Penn. St. 493.

[2] *In re* Needham, 1 Jon. & La. 34.

[3] Wise *v.* Wise, 2 Jon. & La. 403–412; Penny *v.* Davis, 3 B. Mon. 314; Lewis *v.* Baird, 3 McLean, 65; Read *v.* Robinson, 6 Watts & S. 338.

[4] Patterson *v.* Johnson, 113 Ill. 559; a good case on acceptance.

[5] Flint *v.* Clinton Co., 12 N. H. 432; Cook *v.* Fryer, 1 Hare, 498; Montfort *v.* Cadogan, 17 Ves. 488; 19 Ves. 638; Small *v.* Ayleswood, 9 B. & Cr. 300; Leffler *v.* Armstrong, 4 Iowa, 482; Buckridge *v.* Glasse, 1 Cr. & Ph. 131; Bixler *v.* Taylor, 3 B. Mon. 362; Field *v.* Arrowsmith, 3 Humph. 442; Smith *v.* Knowles, 2 Grant, Ca. 413; Roberts *v.* Moseley, 51 Mo. 284.

[6] Earle *v.* Earle, 93 N. Y. 104.

[7] Harvey *v.* Gardner, 41 Ohio St. 642. [Daly *v.* Bernstein, 6 N. Mex. 380, 395; Brandon *v.* Carter, 119 Mo. 572.]

(*a*) As to conduct showing acceptance of a trust by an administrator *de bonis non* with the will annexed, see Freeman *v.* Brown, 115 Ga. 23. But the better view seems to be that an appointment of one as administrator *de bonis non* is not an offer of the trusteeship, and any assumption by him of the duties of trustee serve to make him no more than trustee *de son tort*. Penn *v.* Fogler, 182 Ill. 76; Casselman *v.* McCooley, 73 N. J. Eq. 253; Dunning *v.* Ocean Nat. Bank, 61 N. Y. 497. But see Sheets's Estate, 215 Pa. St. 164.

may be liable for a breach of the trust;[1] (*a*) but if the deed contains special covenants, the trustee cannot be sued upon them, if he has not executed it, though he may have accepted the deed.[2] Nor will the execution of the deed amount to a covenant to execute the trust, if it does not contain words that can be construed into such a covenant at law.[3] But the word "covenant" or "agree" is not necessary for that purpose; the word "declare" will suffice.[4] If there is a breach of the trust, but no execution of the deed other than by an acceptance of it, *a simple contract debt* only is created against the trustee or his estate,[5] but a breach of covenants under the hand and seal of the trustee creates a *specialty debt*, which in some jurisdictions takes precedence of simple contract debts.[6] This distinction is of no effect in the United States, as, in every State, probably the real estate of a deceased person is equally liable for his debts, however contracted or evidenced. If the trustee executes the deed, he should see to it that the recitals are all correct,

[1] Redenour *v.* Wherritt, 30 Ind. 485.

[2] Richardson *v.* Jenkins, 1 Drew. 477; Vincent *v.* Godson, 1 Sm. & Gif. 384.

[3] Wynch *v.* Grant, 2 Drew. 312; Courtney *v.* Taylor, 6 M. & Gr. 851; Newport *v.* Bryan, 5 Ir. Ch. 119; Adey *v.* Arnold, 2 De G., M. & G. 433; Marryatt *v.* Marryatt, 6 Jur. (N. S.) 572; Holland *v.* Holland, L. R. 4 Ch. 449.

[4] Richardson *v.* Jenkins, 1 Drew. 477; Saltoun *v.* Hanston, 1 Bing. N. C. 433; Cummins *v.* Cummins, 3 Jon. & La. 64; 8 Ir. Ch. 723; Jenkins *v.* Robertson, Law R. 1 Eq. 123.

[5] Jenkins *v.* Robertson, 1 Eq. R. 123; Lockhart *v.* Reilly, 1 De G. & J. 464; Vernon *v.* Vawdry, 2 Atk. 119; Barn. 280; Cox *v.* Bateman, 2 Ves. 19; Kearnan *v.* Fitzsimon, 3 Ridg. P. C. 18. If the trustee execute the deed, and it is a simple acceptance of the trust on his part, the breach of the trust is a simple contract debt, for there is no breach of any express covenant. Holland *v.* Holland, L. R. 4 Ch. 449.

[6] Gifford *v.* Manley, For. 109; Mavor *v.* Davenport, 2 Sim. 227; Benson *v.* Benson, 1 P. Wms. 131; Deg *v.* Deg, 2 P. Wms. 414; Turner *v.* Wardle, 7 Sim. 80; Bailey *v.* Ekins, 2 Dick. 632; Cummins *v.* Cummins, 3 Jon. & La. 64; Primrose *v.* Bromley, 1 Atk. 89; Wood *v.* Hardisty, 2 Coll. 542, commented upon in L. R. 1 Eq. 125.

(*a*) Or his conduct may estop him from denying an acceptance. McBride *v.* McIntyre, 91 Mich. 406; Lewin (11th ed.) 219.

otherwise he may be held liable to make them good.[1] Acceptance of the trust estops the trustee from denying the title of the person for whom he holds.[2] (*a*)

§ 261. Parol evidence of the conversations, acts, and admissions of a party are admissible to prove his acceptance of a trust.[3] Thus, if a person, with notice of his appointment to a trust, receives the income of the trust estate;[4] or executes a power of attorney;[5] or signs a joint draft, order, or receipt, to enable some other person to act in administering the estate or the trust;[6] or signs a receipt as trustee;[7] or gives notice to a tenant of the estate to pay rent to him;[8] or brings an action on the footing of the trust;[9] or interferes generally by ordering the trust property to be sold, or by being present at the sale, or by giving any directions implying ownership, or by frequently making inquiries of the acting trustee as to the affairs of the

[1] Gore *v.* Bowser, 3 Sm. & Gif. 6; Chaigneau *v.* Bryan, 1 Ir. Ch. 172; 8 Ir. Ch. 251; Story *v.* Gape, 2 Jur. (N. S.) 706; Bliss *v.* Bridgewater (cited Lewin on Trusts, 166, 5th ed.). But in Fenwick *v.* Greenwell, 10 Beav. 418, the Master of the Rolls refused to allow the recital of a representation to bind the trustees.

[2] Smith *v.* Sutton, Adm'r, 74 Ga. 528. [Alumni *v.* Theol. Seminary, 49 N. Y. S. 745; Saunders *v.* Richard, 35 Fla. 28, 42; Sterling *v.* Sterling, 77 Minn. 12; Morris *v.* Morris, 48 W. Va. 430.]

[3] Urch *v.* Walker, 3 My. & Cr. 703; James *v.* Frearson, 1 N. C. C. 375; 1 Y. & C. Ch. 370; Doe *v.* Harris, 16 M. & W. 517; Redenour *v.* Wherritt, 30 Ind. 485.

[4] Conyngham *v.* Conyngham, 1 Ves. 522.

[5] Harrison *v.* Graham, 1 P. Wms. 241, n.; 1 Wms. Ex'rs, 151; Hanbury *v.* Kirkland, 3 Sim. 265; Christian *v.* Yancey, 2 P. & H. (Va.) 240.

[6] Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Sadler *v.* Hobbs, 2 Bro. Ch. 114; Doyle *v.* Blake, 2 Sch. & Lef. 231.

[7] Kennedy *v.* Winn, 80 Ala. 166.

[8] Montfort *v.* Cadogan, 17 Ves. 487.

[9] Ibid.; O'Neill *v.* Henderson, 15 Ark. 235; Pond *v.* Hine, 21 Conn. 519; Penny *v.* Davis, 3 B. Mon. 314.

(*a*) He is estopped also to deny the validity of the conveyance to him; Guilfoil *v.* Arthur, 158 Ill. 600; Ownes *v.* Ownes, 23 N. J. Eq. 60; or the legality of his appointment. Harbin *v.* Bell, 54 Ala. 389.

trust,[1] or by not objecting when the instrument of trust is read to him,[2] — all these acts may be shown by parol, as evidence tending to prove an acceptance, and the evidence will be more or less conclusive according to the circumstances of each case. The general rule is, that *every voluntary interference* with the trust property will stamp a person as an acting trustee,[3] unless such *interference* can be *plainly* referred to some other ground of action than to an acceptance of the trust, as by showing that such a person acted, in interfering, as the mere agent of an acting trustee.[4] The mere fact that a person named as trustee in a deed takes the custody of the deed until another trustee can be appointed is not an acceptance, because his acts are plainly referable to another ground of action.[5] While parol evidence is competent to show whether a supposed trustee has or has not accepted the trust, it is not *competent,* in behalf of the trustee, to prove by such evidence the conversations or declarations of the settlor, in order to show what property was subject to the trust.[6] A trustee should take care that his acts in relation to the trust fund are *plainly referable* to some certain ground of action; for if his acts are *ambiguous,* or it is doubtful whether he intended to accept, or to act in some other capacity, the doubt will be against him, and he will be

[1] James *v.* Frearson, 1 Y. & C. Ch. 375; Shepherd *v.* McEvers, 4 Johns. Ch. 136; Crocker *v.* Lowenthal, 83 Ill. 579.

[2] James *v.* Frearson, *supra;* Chidgey *v.* Harris, 16 M. & W. 517; Butler *v.* Baker, 3 Co. 26 a; Hanson *v.* Worthington, 12 Md. 418; Roberts *v.* Moseley. 64 Mo. 507.

[3] White *v.* Barton, 18 Beav. 192; Harrison *v.* Graham, cited Churchill *v.* Hobson, 1 P Wms. 241 n. (y); Cummins *v.* Cummins, 8 Ir. Eq. 723; Doyle *v.* Blake, 2 Sch & Lef. 231; Malzy *v.* Edge, 2 Jur. (N. S.) 80; Lewis *v.* Baird, 3 McLean, 56; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Penny *v.* Davis, 3 B. Mon. 313.

[4] Stacy *v.* Elph, 1 M. & K. 195; Lowry *v.* Fulton, 9 Sim. 115; Dove *v.* Everard, 1 R. & M. 281; Taml. 376; Orr *v.* Newton, 2 Cox, 274; Balchen *v.* Scott, 2 Ves. Jr. 678; Carter *v.* Carter, 10 B. Mon. 327; Judson *v.* Gibbons, 5 Wend. 224. And the onus is on the alleged trustee. Kennedy *v.* Winn, 80 Ala. 165.

[5] Evans *v.* John, 4 Beav. 35; Smith *v.* Knowles, 2 Grant Cas. 413.

[6] Doyle *v.* Blake, 2 Sch. & Lef. 240.

construed to have accepted the trust and all its responsibilities.[1]

§ 261 *a*. Sometimes a bond is required by the instrument creating the trust, and sometimes the grantor expressly desires that the trustee shall not be required to give security. In the case of executors, statute law provides for the giving of a bond,[2] and in relation to express trustees in general, similar provisions may exist.[3] (*a*)

§ 262. At common law an executor was said to derive his authority from the will, and not from the appointment of the probate court.[4] Therefore most of the acts of persons nominated to execute wills were valid before the probate of the will.[5] Thus persons appointed by a testator in his will to administer his estate, and execute the trusts created by such will, might assume the trusts and proceed in the execution of them, without presenting the will for probate;[6] and the same evidence might be used to show that a trustee under a will had accepted such trust, and had assumed its responsibilities, as was admissible to show that a trustee under a deed had accepted

[1] Read *v.* Truelove, Amb. 417; Chaplin *v.* Givens, 1 Rice, Eq. 154; Doe *v.* Harris, 16 M. & W. 517; Lowry *v.* Fulton, 9 Sim. 115; Conyngham *v.* Conyngham, 1 Ves. 522; Montgomery *v.* Johnson, 11 Ir. Eq. 476.

[2] See § 262.

[3] Bates *v.* State, 75 Ind. 463; Hinds *v.* Hinds, 85 Ind. 312; Tucker *v.* State, 72 Ind. 242; Thiebaud *v.* Dufour, 54 id. 620.

[4] Toller's Ex'rs, 95.

[5] Easton *v.* Carter, 5 Exch. 8; Venables *v.* East Ind. Co., 2 Exch. 633; Toller's Ex'rs, 46, 47; Mitchell *v.* Rice, 6 J. J. Marsh. 625.

[6] Ibid.; Vanhorne *v.* Fonda, 5 Johns. Ch. 403.

(*a*) Testamentary trustees are now required to give bond in nearly all the States, and in many States a bond may be required of other trustees.

Where the creator of the trust has expressly provided that no bond shall be required, the court cannot require one unless the statute so provides. *Ex parte* Kilgore, 120 Ind. 94; Foss *v.* Sowles, 62 Vt. 221. A valid provision that a trustee shall be immune from giving bond or security will not usually be construed to extend to substituted trustees. Sneer *v.* Stutz, 102 Iowa, 462.

the office.[1] But in nearly all the United States there are statutes upon the subject which require that wills shall be presented for probate, and that executors and trustees under them shall give bonds for the faithful discharge of their duties. Where such statutes are in force, executors or trustees have no power or authority to act without appointment by the probate court, and a refusal or neglect to qualify by giving bonds will be considered a refusal and disclaimer of the trust.[2] In the absence of such statutes, if a person named as executor procures probate of the will, he will thereby constitute himself executor with all the liabilities attached to the office,[3] and if the same person is appointed executor and trustee, probate of the will by him will be an acceptance of the trusts.[4] But the same person

[1] Conyngham *v.* Conyngham, 1 Ves. 522; Doyle *v.* Blake, 2 Sch. & Lef. 231; James *v.* Frearson, 1 Y. & C. Ch. 370; Maccubbin *v.* Cromwell, 7 Gill & J. 157; Godwin *v.* Yonge, 22 Ala. 553; Latimer *v.* Hanson, 1 Bland, 51; Flint *v.* Clinton Co., 12 N. H. 432; Chaplin *v.* Givens, 1 Rice, Eq. 133; Baldwin *v.* Porter, 12 Conn. 473.

[2] Luscomb *v.* Ballard, 5 Gray, 403; Monroe *v.* James, 4 Munf. 195; Trask *v.* Donahue, 1 Aik. (Vt.) 373; Carter *v.* Carter, 10 B. Mon. 327; Mitchell *v.* Rice, 6 J. J. Marsh. 625; Robertson *v.* Gaines, 2 Humph. 381, Johnson's App., 9 Barr, 416; Simpson's App., id.; Wood *v.* Sparks, 1 Dev. & Bat. 396; Miller *v.* Meetch, 8 Barr, 417; Roseboom *v.* Moshier, 2 Denio, 61; Williams *v.* Cushing, 34 Maine, 370; Deering *v.* Adams, 37 id. 265; Knight *v.* Loomis, 30 id. 208; Groton *v.* Ruggles, 17 id. 137; Hanson *v.* Worthington, 12 Md. 418; Sawyer's App. 16 N. H. 459; Gaskill *v.* Gaskill, 7 R. I. 478; Mahony *v.* Hunler, 30 Ind. 246; *infra*, § 264, n. In many of the States there are statutes that authorize the judges of probate to appoint executors or trustees under wills, without requiring bonds with sureties, if the testator request it in his will, or if all the parties in interest, being *sui juris*, request it in writing. In such cases the court proceeds with great caution, and it may at any time require security if the circumstances seem to require it. Gibbs *v.* Guignard, 1 S. C. 359. In some jurisdictions the omission to give the bond required does not divest the trustee of the legal title. Gardner *v.* Brown, 21 Wall. 36. [Philbin *v.* Thurn, 103 Md. 342; Attwill *v.* Dole, 74 N. H. 300; McWilliams *v.* Gough, 116 Wis. 576.]

[3] Booth *v.* Booth, 1 Beav. 125; Ward *v.* Butler, 2 Moll. 533; Styles *v.* Guy, 1 Mac. & G. 431; Scully *v.* Delaney, 2 Ir. Eq. 165; and see Balchen *v.* Scott, 2 Ves. Jr. 678; Peeble's App., 15 Serg. & R. 39; Worth *v.* McAden, 1 Dev. & Bat. Eq. 209; Cummins *v.* Cummins, 3 Jon. & La. 64; Hanson *v.* Worthington, 12 Md. 418.

[4] Mucklow *v.* Fuller, Jac. 198; Williams *v.* Nixon, 2 Beav. 472; Clarke

may be appointed both executor and trustee under a will in such a manner that he may accept one of the offices and decline the other. As if a man is appointed executor, and *as* executor is to act as a trustee, in such case the probate of the will, and qualification as executor, will be an acceptance of the trust.[1] (*a*) But if from the will it appears that the testator intended to give his trustees a distinct and independent character, probate of the will by the executors will not make them trustees, unless they also accept the trust and qualify themselves according to law.[2] If the executor is not expressly appointed trustee, the court may determine from the whole will whether he is to act as trustee.[3] If the trust is given to one named, and the same

v. Parker, 19 Ves. 1; Cummins *v.* Cummins, 3 Jon. & La. 64; Hanson *v.* Worthington, 12 Md. 418; Baldwin *v.* Porter, 12 Conn. 473.

[1] De Peyster *v.* Clendining, 8 Paige, 295; Hanson *v.* Worthington, 12 Md. 418; Williams *v.* Conrad, 30 Barb. 524; Mucklow *v.* Fuller, Jac. 198; Booth *v.* Booth, 1 Beav. 125; Williams *v.* Nixon, 2 Beav. 472; Ward *v.* Butler, 2 Moll. 533; Wilson's Estate, 2 Penn. St. 325.

[2] De Peyster *v.* Clendining, 8 Paige, 295; Worth *v.* McAden, 1 Dev. & Bat. 209; Judson *v.* Gibbons, 5 Wend. 226; Williams *v.* Cushing, 34 Maine, 370; Deering *v.* Adams, 37 id. 265; Knight *v.* Loomis, 30 id. 204; Hanson *v.* Worthington, 12 Md. 418; Wheatley *v.* Badger, 7 Penn. St. 459. But see Anderson *v.* Earle, 9 S. C. 460.

[3] Sawyer's App., 16 N. H. 459; Carson *v.* Carson, 6 Allen, 397; Howard *v.* Amer. Peace Soc., 49 Maine, 288, 306. An executor must administer the trust created by will where there is no designation of the executor or any other person as trustee. Pettingill *v.* Pettingill, 60 Maine, 412; Richardson *v.* Knight, 69 id. 385.

(*a*) In jurisdictions where by statute testamentary trustees are required to give bond as such as a necessary qualification, it may be questioned whether an executor to whom trust duties and powers are given becomes a real trustee when the only bond he has filed is as executor. See Bean *v.* Commonwealth, 186 Mass. 348. If he is given the duties of a trustee, he undoubtedly has the right to qualify as trustee, even though the will does not describe him as such. Angus *v.* Noble, 73 Conn. 56; Seattle *v.* McDonald, 26 Wash. 98; *In re* Hodges' Estate, 63 Vt. 661; Codman *v.* Brigham, 187 Mass. 309; Bean *v.* Commonwealth, 186 Mass. 348; Hayward *v.* Spaulding, 71 A. 219 (N. H. 1908); Campbell *v.* Clough, 71 N. H. 181. And if without giving bond as trustee he performs the functions of one, his liability is that of a trustee, for he is at least trustee *de son tort*.

person is afterwards appointed executor, the trust is not annexed to the office of executor.[1] (*a*) The conditions of bonds of administrators are to administer the estate according to law. Bonds of executors are conditioned to administer an estate according to the will, though a condition to administer according to law is the same thing, because by law they are to administer according to the will. If, therefore, by the terms of the will the executor, *as executor*, is to keep the estate, or any portion of it, in his hands, and is to deal with it as a trustee, his bond will be held as security for the faithful performance of his duties, though such duties are much larger and different from those of an ordinary executor.[2] Where the income of property is given to one for life, and at his death the property is given over to another, and no trustee is named in the will, the executor is the trustee to hold the property during the life of the legatee for life.[3] If, however, the will contemplates that the executor, *as such*, is to perform only the ordinary duties of an executor, and that when the estate is settled by him, another duty is to arise to be performed, either by him or by another, then the bond of the executor is not security for those further duties; but the person who is to perform them must

[1] James's App., 3 Grant, 169. [West *v.* Bailey, 196 Mo. 517.]

[2] Saunderson *v.* Stearns, 6 Mass. 37; Prescott *v.* Pitts, 9 Mass. 376; Hall *v.* Cushing, 9 Pick. 395; Dorr *v.* Wainwright, 13 Pick, 328; Towne *v.* Ammidown, 20 Pick. 325; Perkins *v.* Moore, 16 Ala. 9; State *v.* Nicols, 10 Gill & J. 27; Wilson's Estate, 2 Penn. St. 325; Sheet's Est., 52 id. 257; Lansing *v.* Lansing, 45 Barb. 182.

[3] Wheeler *v.* Perry, 18 N. H. 307. [Clifford *v.* Stewart, 95 Me. 38; Carson *v.* Carson, 6 Allen, 398; Bullard *v.* Chandler, 149 Mass. 532; White *v.* Mass. Inst. of Technology, 171 Mass. 84; Clark *v.* Powell, 62 Vt. 442.]

(*a*) Where a person has been named in a will as executor and given duties and powers of a trustee, though not named as such, and a codicil to the will has revoked his nomination as executor and has named another person, the presumption is that the testator intended the revocation and the new nomination to apply to the trust functions as well as to the executorship. Mullanny *v.* Nangle, 212 Ill 247; Shey's Appeal, 73 Conn. 122; Cushman *v.* Cushman, 116 N. Y. App. Div. 763.

accept the office, and give a bond for their performance.[1] It may be further observed, that an executor will be considered as holding a legacy in his capacity as executor, unless the will clearly shows that the testator intended that he should hold it in the character of a trustee.[2] But after the lapse of twenty years the law will presume that an estate was fully administered, and that thereafter the executor held the funds as trustee.[3] So, if it appears that the executor made an actual final settlement of the estate as executor, he will be presumed to hold subsequently as a trustee.[4] As a general rule, executors' and trustees' bonds can be sued only by leave of court, upon good cause shown.[5]

§ 263. If the same person is both executor and trustee, it is sometimes difficult to determine whether, in a particular case, he is acting as executor or trustee. In England, the rule seems to be that if the executor assents to the legacy, if it is specific, or if part of the assets are clearly set apart and appropriated by him to answer a particular legacy, he will be considered to hold the fund as trustee for that trust, and not as executor.[6] In jurisdictions where executors and trustees are required to qualify and give bonds, it has been held that an executor, who is also a trustee under the will, cannot be considered as holding any part of the assets as trustee, until he has settled his account at the probate office as executor, and has been credited with the amount as executor with which he is after-

[1] Knight *v.* Loomis, 30 Maine, 204; Mastin *v.* Barnard, 33 Ga. 520; Perkins *v.* Lewis, 41 Ala. 649; Parsons *v.* Lyman, 5 Blatch. C. C. 170; Spark's Est., 1 Tuck. Sur. 443.

[2] State *v.* Nicols, 10 Gill & J. 27.

[3] Jennings *v.* Davis, 5 Dana, 127.

[4] State *v.* Hearst, 12 Miss. 365.

[5] Floyd *v.* Gilliam, 6 Jones, Eq. 183.

[6] Dix *v.* Burford, 19 Beav. 409; Brougham *v.* Poulett, id. 119; *Ex parte* Dover, 5 Sim. 500; Phillipo *v.* Munnings, 2 M. & Cr. 309; Byrchall *v.* Bradford, 6 Madd. 13; *Ex parte* Wilkinson, 3 Mont. & Ayr. 145; Willmot *v.* Jenkins, 1 Beav. 401.

wards to be charged as trustee.[1] In other cases it has been held that the change of property from the executor to the trustee, where they are the same persons, may be shown by some *authoritative and notorious act;*[2] but that the mere determination of the executor, in his own mind, to hold certain particular property thereafter in trust for a particular legatee under the will, is not such a setting apart as to discharge him from his liability as executor, and to charge him as trustee.[3] (*a*) Where

[1] Hall *v.* Cushing, 9 Pick. 395; Prior *v.* Talbot, 10 Cush. 1; Perkins *v.* Moore, 16 Ala. 9; Elliott *v.* Sparrell, 114 Mass. 404; Muse *v.* Sawyer, T. R. 204. [White *v.* Ditson, 140 Mass. 351; 3 Williams on Executors, (7th Am. ed.) p. 378, note.]

[2] Newcomb *v.* Williams, 9 Met. 534; Conkey *v.* Dickinson, 13 Met. 53; Hubbard *v.* Lloyd, 6 Cush. 522; De Peyster *v.* Clendining, 8 Paige, 310; Byron *v.* Mood, 2 McMull. 288; Hitchcock *v.* Bank of U. S., 7 Ala. 386; Perkins *v.* Moore, 16 Ala. 9; State *v.* Brown, 68 N. C. 554; Tyler *v.* Deblois, 4 Mason, 131. [See *In re* Sanborn's Estate, 109 Mich. 191; Wooden *v.* Kerr, 91 Mich. 188.] A defaulting trustee who becomes entitled to a portion of the trust, being one of the next of kin to a deceased *cestui que trust*, will be held to have paid himself, and the share standing to his account on distribution will be paid to the other *cestui que trust*, to the extent of the defalcation, Jacobs *v.* Ryland, L. R. 15 Eq. 341. See Ruffin *v.* Harrison, 81 N. C. 208, in which the court, from an examination of the cases cited, deduced the following principles: 1. Where the simple relation of debtor and creditor exists, and the same person, representing both, is to pay and receive, the possession of assets which ought to be applied to the debts is in law an application. 2. Where one is clothed with a double fiduciary capacity, and the balance remaining upon a full execution of one trust belongs to the other, if the amount has been ascertained definitely and authoritatively, and the fund is then in the trustee's hands, the law makes the transfer. 3. If the first trust is not closed, although the trustee may have rendered an account, which has not been passed upon by a competent tribunal, the fund remains unchanged, and is held as before. 4. The trustee may, by an unequivocal act indicating the intent, elect to hold the fund in possession in another capacity, and it will be thereby transferred.

[3] Miller *v.* Congdon, 14 Gray, 114. The question, in this case, was whether the estate or the legatee should suffer a certain loss; but it was not a question whether the executor should bear the loss in person. [Sheffield *v.* Parker, 158 Mass. 330; Collins *v.* Collins, 140 Mass. 502.]

(*a*) He may be held to be trustee in another State with respect to assets which he originally held as executor, although he has never accounted as executor in the State where he was appointed as such. Farmers' L. & Tr. Co. *v.* Pendleton, 75 N. Y. S. 294.

the executor may thus act in a double capacity, he must account in his capacity as executor, and the sureties on his bond as executor will be liable for the faithful discharge of his duties as such, until he has transferred his account to himself as trustee, and given a bond as trustee.[1] (*a*) But, at the same time, it is held that if the executor, acting as trustee under such a will, acts with fidelity and due diligence, he and his sureties will not be responsible should any loss happen either to the principal or interest of the trust fund; that is, that his liability in such a case is rather that of a trustee than that of an executor;[2] (*b*) and if he has acted in good faith in the invest-

[1] Prior *v.* Talbot, 10 Cush. 1. [See *In re* Roach's Estate, 50 Or. 179; Bellinger *v.* Thompson, 26 Or. 320.] A charge of the amount set apart in executor's account settled in probate court is conclusive against the executor. Elliott *v.* Sparrell, 114 Mass. 404.

[2] Hubbard *v.* Lloyd, 6 Cush. 522; Brown *v.* Kelsey, 2 Cush. 248; Dorr *v.* Wainwright, 13 Pick. 332; Right *v.* Cathill, 5 East, 491; Denne *v.* Judge, 11 East, 288.

(*a*) Probably this rule would not be applied to a liability for mere failure to perform a duty which is distinctly a trust duty. Perkins *v.* Lewis, 41 Ala. 649.

(*b*) So too, as to the effect of the act upon the property when, as may happen in rare cases, it makes a material difference whether he acted as executor or trustee, the nature of the act may determine in what capacity he acted. Vohmann *v.* Michel, 96 N. Y. S. 309; 109 App. Div. 659 (reversed on other grounds in 185 N. Y. 420); Philbin *v.* Thurn, 103 Md. 342. See *contra*, *In re* Roach's Estate, 50 Or. 179. See 1 Ames' Cases on Trusts, (2d ed.) 73.

The cases holding the executor-trustee liable on his bond as executor for all his dealing with the estate which has come into his hands as executor and which he has not formally turned over to himself as trustee, do not seem to go to the extent of holding that he cannot properly perform trust duties until he has been discharged as executor. In a case where the executor-trustee had turned over to himself as trustee certain investments, accounting for them at par value, it was held that the allowance of his final account as executor did not preclude a subsequent inquiry as to the propriety of the investment. Mattocks *v.* Moulton, 84 Me. 545, 549.

In Brigham *v.* Morgan, 185 Mass. 27, it was held by a divided court that a person who is both executor and trustee may be liable in both capacities for the loss due to an improper investment made by himself and another as co-executors and turned over to himself as trustee at its face value. There was, however,

ment of the legacy, any loss that may occur without his fault will fall upon the legatee or *cestui que trust*, and not upon him or the estate.[1] Where a decree in chancery created a separate estate for a married woman, and the court appointed a trustee to receive it, and ordered him to give bond for the faithful administration of the trust, the property vested in him upon his giving bond, and continued during his life; and, at his death, it did not vest in the *cestui que trust*, but remained subject to the orders of the court.[2]

§ 264. The executor of an executor, by accepting the office from his immediate testator, becomes the executor and trustee of his testator's testator. (*a*) This is the rule in England, where an executor comes into possession of all the assets in the hands of his testator, in whatever capacity such testator held them; and, by accepting the duty of administering the estate of his immediate testator, he accepts the duty of administering all the trusts with which the assets in his testa-

[1] Ibid.

[2] Witter *v.* Duley, 36 Ala. 135.

a strong dissent by three judges as to the liability of the trustee, the entire loss having occurred before the investment had been turned over.

Where there is a separate and distinct portion of the estate set apart for the trust and never vesting in the executor, as where the trust is of real estate, which is not needed to pay debts or legacies, it has been held that there is no reason why the same person should not at the same time be both executor and trustee of the different parts of the estate. Dingman *v.* Beall, 213 Ill. 238. See also Creamer *v.* Holbrook, 99 Ala. 52; Farmers' Loan & Trust Co. *v.* Pendleton, 75 N. Y. S. 294.

(*a*) In the United States the executor of a trustee does not usually succeed to the office. Although the title of trust personalty may pass to him charged with the trust, his only duty is to preserve it intact for a substituted trustee to be appointed by the court. In this respect his duties have been likened to those of a bailee. State *v.* Miss. Valley Trust Co., 209 Mo. 472; *In re* Scott's Estate, 202 Pa. St. 389; Burke *v.* Maguire, 154 Cal. 456; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238. In some States statutes have provided that the title of trust property shall not pass either to the trustee's heir or to his personal representatives. See *infra*, § 269 note.

tor's hands were charged.[1] An executor must administer and account for all the assets that come to his hands. If his testator held goods of a previous testator unadministered, or if his testator held assets as a trustee, probate courts may appoint an administrator with the will annexed of the first testator, or a new trustee; and it will be the duty of the executor of the last testator to settle an account with the administrator with the will annexed, or with the new trustee, and to pay over to them the assets that came to his hands. Until such proceedings are had, he will hold such assets upon the same terms and trusts that his testator held them; and it will be his duty to administer them accordingly. The proposition may be briefly stated thus: An executor, in proving the will and in accepting the office from his immediate testator, accepts not only all the trusts imposed by the immediate will under which he acts, but also all the trusts in respect to the assets which come to his hands with which his immediate testator was charged; and he must execute those trusts until he is relieved by a new appointment in the probate court, and a settlement and payment over of the assets. He will not be allowed to accept the trusts created by his immediate testator, and to repudiate those with which his testator was himself charged.[2] And so, a trustee cannot limit his acceptance and liability to any particular portion of the trust. For if he acts at all, though he disclaim a part he will be held to have accepted the entire trust;[3] as if one is appointed

[1] In the Goods of Perry, 2 Curt. 655; Goods of Beer, 15 Jur. 160; Shep. Touch. by Preston, 464; Wankford *v.* Wankford, Freem. 520; Haytan *v.* Wolfe, Cro. Jac. 614; Palm. 156; Hutt, 50; Schenck *v.* Schenck, 16 N. J. Eq. 174; Maudlin *v.* Armisted, 18 Ala. 702; Nichols *v.* Campbell, 10 Gratt. 561. See Knight *v.* Loomis, 30 Me. 204, where it is said that an administrator *de bonis non* under the will of a trustee is not constituted trustee by his appointment.

[2] Worth *v.* McAden, 1 Dev. & Bat. 199; Mitchell *v.* Adams, 1 Ired. (Law) 298; King *v.* Lawrence, 14 Wis. 238; Schenck *v.* Schenck, 1 Green, Ch. 174. [But see *In re* Ridley, [1904] 2 Ch. 774.]

[3] Urch *v.* Walker, 3 M. & Cr. 702; Read *v.* Truelove, Amb. 417; Doyle *v.* Blake, 2 Sch. & Lef. 231; Van Horn *v.* Fonda, 5 Johns. Ch. 403; Champlin *v.* Givens, 1 Rice, Eq. 154; Cummins *v.* Cummins, 3 Jon. & La. 64; Latimer *v.* Hanson, 1 Bland, 51; Flint *v.* Clinton Co., 12 N. H. 432.

trustee of real and personal estate, and he deals with the personal, he will be deemed to have accepted the entire trust;[1] and so, if the same instrument appoints him to two distinct trusts, he cannot divide them.[2] (*a*)

§ 265. If a person wrongfully interferes with the assets of a deceased person, he may become an administrator or executor *de son tort*. So, if a person by mistake or otherwise assumes the character of trustee, and acts as such, when the office does not belong to him, he thereby becomes a trustee *de son tort*, and he may be called to account by the *cestui que trust* for the assets received under color of the trust.[3]

[1] Ward *v.* Butler, 2 Moll. 533.
[2] Urch *v.* Walker, 3 M. & Cr. 702; Judice *v.* Prevost, 18 La. An. 601.
[3] Pearce *v.* Pearce, 22 Beav. 248; Life Ass'n *v.* Siddall, 3 De G., F. & J.

(*a*) When the same person is nominated by a will as both executor and trustee, one of these trusts may be accepted and the other disclaimed, if the testator has not directed otherwise; West *v.* Bailey, 196 Mo. 517; Daggett *v.* White, 128 Mass. 398; and, in general, the disclaimer of one of several trusts, when independent although created by the same instrument, does not prevent acceptance of the other trusts. *Re* Cunard's Trusts, 48 L. J. N. S. 192; Carruth *v.* Carruth, 148 Mass. 431. A person named as trustee of both English and foreign property cannot make a partial disclaimer of the trusts of English property and retain control of the foreign property. *In re* Lord and Fullerton's Contract, [1896] 1 Ch. 228.

When an executor with trust duties dies, resigns, or refuses to serve, and an administrator *de bonis non* is appointed by the court, the better practice is to appoint him also as substituted trustee, for in general the administrator *de bonis non* succeeds only to the office of executor and his appointment is not even a tender to him of the office or powers of trustee. This is undoubtedly true when the trust is clearly separate from the executorship. Knight *v.* Loomis, 30 Me. 204; Penn *v.* Fogler, 182 Ill. 76; Casselman *v.* McCooley, 73 N. J. Eq. 253; Mordecai *v.* Schirmer, 38 S. C. 294; Dunning *v.* Ocean Bank, 61 N. Y. 497; Greenland *v.* Waddell, 116 N. Y. 234. It has been held, however, in some cases that when the trust is attached to the office of executor, it goes to the administrator *de bonis non* with the will annexed by virtue of his appointment as such. Clifford *v.* Stewart, 95 Me. 38; Clark *v.* Powell, 62 Vt. 442; Sheets's Estate, 215 Pa. St. 164. See Freeman *v.* Brown, 115 Ga. 23.

Doubtless this would be held true generally of a power of sale for the purpose of paying debts. Joralemon *v.* Van Riper, 44 N. J. Eq. 299.

§ 266. When trustees have accepted the office, they ought to bear in mind that the law knows no such person as a *passive trustee*, and that they cannot sleep upon their trust. If such trustee remains quiet for any reason, and suffers some other to do all the business, and yet executes formal papers, as a power of attorney for the sale of stock, or a release or discharge of mortgages on payment, he is answerable for the money as if he had conducted the business. And further, the trustee should make himself acquainted with the nature and circumstances of the property; for though he is not responsible for anything that happens before his acceptance of the trust,[1] yet if a loss occurs from any want of attention, care, or diligence in him after his acceptance, he may be held responsible for not taking such action as was called for.[2] (*a*)

§ 267. It has been seen that a person named as trustee, either in a deed or will, may decline the office and disclaim the estate.[3] If he does so, he ought to execute an effectual disclaimer without delay, for after a long interval of time it will be presumed that he accepted the office.[4] If a person knows of his appointment, and lies by for a long time, it is for the court to say whether, under all the circumstances, such acquiescence

58; Hennessey *v.* Bray, 33 Beav. 96; Rackham *v.* Siddall, 18 Sim. 297; 1 Mac. & G. 607. [*Supra*, § 245.]

[1] Greaves *v.* Strahan, 8 De G., M. & G. 291; Prindle *v.* Holcombe, 245. Conn. 111; Stevens *v.* Gaylord, 11 Mass. 269; Ips Manuf. Co. *v.* Story, 5 Met. 310; Leland *v.* Felton, 1 Allen, 531; Kinney *v.* Ensign, 18 Pick. 236. [But see Brigham *v.* Morgan, 185 Mass. 27.]

[2] England *v.* Downes, 6 Beav. 269, 279; Townley *v.* Bond, 2 Conn. & Laws. 405; James *v.* Frearson, 1 Y. & C. Ch. 270; Taylor *v.* Millington, 4 Jur. (N. S.) 204; *Ex parte* Greaves, 25 L. J. 53; 2 Jur. (N. S.) 253; Malzy *v.* Edge, 2 Jur (N. S.) 8.

[3] *Ante*, § 259.

[4] Ibid.

(*a*) Thus he may make himself liable for loss due to his failure to take necessary proceedings to collect from the estate of his predecessor a loss to the trust fund occasioned by the latter's breach of trust. Bennett *v.* Pierce, 188 Mass. 186.

was an assent to the trust.[1] But if a trustee does no act in the office, there is no rule that requires him to disclaim within any particular time. Thus, he may disclaim after sixteen years if the delay can be so explained as to rebut the presumption of an acceptance.[2] A disclaimer will take effect as of the time of the gift, and will prevent the estate from vesting in the trustee disclaiming; therefore, a disclaimer, whenever made, will relate back to the time of the gift, if the party disclaiming has done no act which may be construed into an acceptance. It is therefore immaterial when the mere formal instrument of disclaimer is executed, provided that nothing has intervened to vest the estate in the trustee.[3]

§ 268. If a person has once accepted the office, either expressly or by implication, it is conclusive; and he cannot afterwards, by disclaimer or renunciation, avoid its duties and responsibilities.[4] And the reason is, that, if the estate has once vested in the trustee, it cannot be divested by a mere disclaimer, or renunciation, nor can he convey the estate against the consent of the *cestui que trust* without committing a breach of trust, unless the instrument creating the trust gives him that power, or unless there is the decree of a court to that effect. In such case the trustee may resign the trust, and convey the estate in the manner pointed out in the instrument creating the trust, if it speaks upon that subject; or the trustee may decline

[1] Doe *v.* Harris, 16 M. & W. 517; Paddon *v.* Richardson, 7 De G., M. & G. 563; James *v.* Frearson, 1 Y. & C. Ch. 370.

[2] Noble *v.* Meymott, 14 Beav. 471; Doe *v.* Harris, 16 M. & W. 517. [See Jago *v.* Jago, 68 L. T. 654.]

[3] Stacy *v.* Elph, 1 M. & K. 195–199. [*In re* Birchall, 40 Ch. Div. 436.]

[4] Conyngham *v.* Conyngham, 1 Ves. 522; Read *v.* Truelove, Amb. 417; Doyle *v.* Blake, 2 Sch. & Lef. 231; Stacey *v.* Elph, 1 M. & K. 195; Cruger *v.* Halliday, 11 Paige, 314; Shepherd *v.* McEvers, 4 Johns. Ch. 136; Latimer *v.* Hanson, 1 Bland, 51; Jones *v.* Stockett, 2 Bland, 409; Chaplin *v.* Givens, 1 Rice, Eq. 133; Perkins *v.* McGavock, 3 Hay, 265; Drane *v.* Gunter, 19 Ala. 731; Strong *v.* Willis, 3 Fla. 124; Thatcher *v.* Corder, 2 Keyes, 157; Armstrong *v.* Merrill, 14 Wall. 138. [Speakman *v.* Tatem, 48 N. J. Eq. 136.]

the office, and convey the estate to a new trustee, by the agreement of all parties in interest, if they are competent to act, and consent to the arrangement. But if the parties do not consent, or if there are minor children, married women, insane persons, or others incompetent to act, a trustee, after he has once accepted the office, can only be discharged by decree of a court having jurisdiction, and upon proper proceedings had.[1]

§ 269. If a person accepts a trust and dies, his heir cannot renounce or disclaim it. The acceptance vested the estate in the trustee, and the law at his death cast it upon the heir; and the heir cannot divest or repudiate the estate by a mere disclaimer.[2] (*a*) But if the heir is so named in the original instru-

[1] Courtenay *v.* Courtenay, Jo. & Lat. 519; Foreshow *v.* Higginson, 20 Beav. 485; Greenwood *v.* Wakeford, 1 Beav. 576; Coventry *v.* Coventry, 1 Keen, 758; Cruger *v.* Halliday, 11 Paige, 314; Drane *v.* Gunther, 19 Ala. 731; Shepherd *v.* McEvers, 4 Johns. Ch. 136; Diefendorf *v.* Spraker, 10 N. Y. 246; *Re* Bernstein, 3 Redf. (N. Y.) 20.

[2] Co. Litt. 9 a; 3 Cru. Dig. 318; Humphrey *v.* Morse, 2 Atk. 408.

(*a*) In the absence of statute provision as to the devolution of the trust property, on the death of a sole trustee real estate passes to the trustee's heir and personalty to his personal representative, subject to the trust. Lawrence *v.* Lawrence, 181 Ill. 248; Ewing *v.* Shannahan, 113 Mo. 188, 201; State *v.* Miss. Valley Trust Co., 209 Mo. 472; Hitch *v.* Stonebraker, 125 Mo. 128; Kirkman *v.* Wadsworth, 137 N. C. 453; Woodruff *v.* Woodruff, 44 N. J. Eq. 349; Fisher *v.* Dickenson, 84 Va. 318; Reeves *v.* Tappan, 21 S. C. 1; *In re* Cunningham, [1891] 2 Ch. 567; *In re* Morton, 15 Ch. D. 143. In South Carolina and Delaware the legal title of real estate vests in the common law heir of the trustee, the oldest son. Cone *v.* Cone, 61 S. C. 512; Reynolds *v.* Reynolds, 61 S. C. 243; St. Stephens Church *v.* Pierce, 8 Del. Ch. 179.

The title vests in the heir or personal representative only to prevent the title from being in abeyance, and the court will appoint a new trustee upon the application of the *cestuis* or of the heir or personal representative. Cone *v.* Cone, 61 S. C. 512; Sullivan *v.* Latimer, 35 S. C. 422; Lawrence *v.* Lawrence, 181 Ill. 248; Woodruff *v.* Woodruff, 44 N. J. Eq. 349. He has, however, a duty, similar to that of bailee, of protecting and caring for the property until he can turn it over to a person properly appointed. Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238; Ewing *v.* Shannahan, 113 Mo. 188, 201; Burke *v.* Maguire, 154 Cal. 456; State *v.* Miss. Valley Trust Co., 209 Mo. 472; *In re* Scott's Es-

ment of trust that he takes the estate *by purchase*, and not by inheritance or descent, or if he comes in under some arrangement, as a special occupant, he may use his own judgment in accepting or refusing the estate charged with the trust.[1] In most of the United States there are special provisions by statute regulating the resignation of trustees, and the proceedings to be had upon their death, for the preservation of the trust estates and the appointment of new trustees. If a person is appointed trustee and has neither accepted nor disclaimed during his life, it is an open question whether his heir or personal representative can disclaim after his death. The question was raised in Goodson *v.* Ellison,[2] but was left undecided. Mr. Hill thinks that a disclaimer by the heir may be supported on principle.[3] A later case seems strongly to imply that the heir cannot disclaim.[4] If an acting trustee dies, a person named cotrustee with him may disclaim after his death, if the one disclaiming has done no act amounting to an acceptance.[5]

§ 270. It was the clear opinion of Lord Coke, that if a freehold vested in a person by feoffment, grant, or devise, it could

[1] Creagh *v.* Blood, 3 Jon. & La. 170.
[2] Goodson *v.* Ellison, 3 Russ. 583, 587.
[3] Hill on Trustees, 222 (4th ed.). [See *In re* Ridley, [1904] 2 Ch. 774.]
[4] King *v.* Phillips, 16 Jur. 1080.
[5] Stacey *v.* Elph, 1 M. & K. 195.

tate, 202 Pa. St. 389. If no new trustee is appointed he may act as trustee. Kirkman *v.* Wadsworth, 137 N. C. 453; Reynolds *v.* Reynolds, 61 S. C. 243; Fisher *v.* Dickenson, 84 Va. 318.

In many States it is provided by statute that the trust shall not devolve upon either the heir or the personal representative of a deceased trustee. Some of these statutes provide that the title shall vest in the court, usually until a new trustee shall be appointed. Dyer *v.* Leach, 91 Cal. 191. IV N. Y. Consol. Laws (1909), p. 3395, § 111; Mich. Comp. Laws (1897), § 8852; Minn. Rev. Laws (1905), § 3262; Wis. Stat. (1898), § 2094; Kan. Gen. Stat. (1905), § 8621; Burns' Ind. Stat. (1908), § 4021. The effect of the statute provision in Alabama is that the title is in abeyance between the time of the death of the sole trustee and the time of the appointment of a new trustee. Ala. Code (1907), § 3415; Lecroix *v.* Malone, 157 Ala. 434.

not be divested except by matter of record; and this rule was established in order that a suitor might know, with more certainty, who was the tenant to the *præcipe*;[1] but, as a gift is not perfect in law until it is accepted by the assent of the donee, a disclaimer operates as evidence that the donee never assented, and consequently that the estate never vested in him. Accordingly, it is now established that a parol disclaimer is sufficient in all cases of a gift by deed or will of both real and personal estate.[2] And so a trust may be repudiated without an express disclaimer, as by evidence of the conduct of the party amounting to a refusal of the office,[3] or by any conduct inconsistent with an acceptance; and a disclaimer may be presumed after a long neglect to qualify or refusal to act.[4] But the parol expressions of a refusal of the trust, or parol evidence of conduct inconsistent with an acceptance, must be unequivocal, and extend to a renunciation of all interest in the property; for if such refusal or conduct is coupled with a claim to the estate of another character, it will not amount to a disclaimer.[5] But a person would act very imprudently who allowed so important a question, as

[1] Butler & Baker's Case, 3 Co. 26 a, 27 a; Anon. 4 Leon. 207; Shep. Touch. 285, 452; Bonifant *v.* Greenfield, Godb. 79; Siggers *v.* Evans, 5 El. & Bl. 380.

[2] Townson *v.* Tickell, 3 B. & Al. 31; Stacey *v.* Elph, 1 M. & K. 198; Bonifant *v.* Greenfield, Cro. Eliz. 80; Smith *v.* Smith, 6 B. & C. 112; Begbie *v.* Crook, 2 Bing. N. C. 70; 2 Scott, 128; Shep. Touch. 282, 452; Smith *v.* Wheeler, 1 Ventr. 128; Thompson *v.* Leach, 2 Ventr. 198; Rex *v.* Wilson, 5 Man. & R. 140; Small *v.* Marwood, 4 id. 190; Foster *v.* Dawber, 1 Dr. & Sm. 172; *Re* Ellison's Trust, 2 Jur. (N. S.) 62; Doe *v.* Smith, 9 D. & R. 136; Bingham *v.* Clanmorris, 2 Moll. 253; Peppercorn *v.* Wayman, 5 De G. & Sm. 230; Doe *v.* Harris, 16 M. & W. 517; Thompson *v.* Meek, 7 Leigh, 419; Roseboom *v.* Moshier, 2 Denio, 61; Comm. *v.* Mateer, 16 Serg. & R. 416; Nicolson *v.* Wordsworth, 2 Swanst. 369; Adams *v.* Taunton, 5 Madd. 435; Miles *v.* Neave, 1 Cox, 159; Sherratt *v.* Bentley, 1 Russ. & M. 655; Norway *v.* Norway, 2 M. & K. 278; Bray *v.* West, 9 Sim. 429.

[3] Stacey *v.* Elph, 1 M. & K. 195; Ayres *v.* Weed, 16 Conn. 291; Thornton *v.* Winston, 4 Leigh, 152; Wardwell *v.* McDonell, 31 Ill. 364; Williams *v.* King, 43 Conn. 572 and cases cited. [Mutual Life Ins. Co. *v.* Woods, 4 N. Y. S. 133; Brandon *v.* Carter, 119 Mo. 572.]

[4] Marr *v.* Peay, 2 Murph. 85.

[5] Doe *v.* Smith, 6 B. & C. 112; Judson *v.* Gibbons, 5 Wend. 224.

whether he was a trustee or not, to be a matter of inference and construction from conversations or conduct.[1]

§ 271. A disclaimer should be by deed or other writing that admits of no ambiguity, and is certain evidence.[2] And the instrument should be a *disclaimer* and not a *conveyance;* for if the trustee attempts to convey the estate, he may be held to have accepted the trust by the same act which was intended to be a refusal of the office.[3] Although Lord Eldon expressed the opinion, which seems to be the common-sense view that if the intention of the instrument is to disclaim, it ought to receive that construction, although it is in form a conveyance,[4] yet this distinction has not been acted on. A trust may also be disclaimed at the bar of the court and by counsel, or by answer in chancery.[5]

§ 272. If a person is nominated as trustee in a will, and a benefit is also given to him independent of the office, he can claim the testator's bounty, and yet disclaim the burden of the trust,[6] as an executor who is also a legatee may renounce the executorship and yet claim the legacy; but if the benefit is annexed to the office of trustee or executor, and is not a gift to the individual, the person named as executor or trustee

[1] Stacey *v.* Elph, 1 M. & K. 199; *In re* Tryon, 7 Beav. 496.

[2] Stacey *v.* Elph, 1 M. & K. 199. [See Avery *v.* Avery, 90 Ky. 613.]

[3] Crewe *v.* Dicken, 4 Ves. 97; Urch *v.* Walker, 3 M. & C. 702.

[4] Nicolson *v.* Wordsworth, 2 Swanst. 372; Att. Gen. *v.* Doyley, 2 Eq. Cas. Ab. 194; Hussey *v.* Markham, t. Finch, 258; Sharp *v.* Sharp, 2 B. & A. 405; Richardson *v.* Hulbert, 1 Anst. 65.

[5] Ladbrook *v.* Bleaden, 16 Jur. 630; Foster *v.* Dawber, 1 Dr. & Sm. 172; *Re* Ellison's Trust, 2 Jur. (N. S.) 62; Hickson *v.* Fitzgerald, 1 Moll. 14; Norway *v.* Norway, 2 M. & K. 278; Sherratt *v.* Bentley, 1 R. & M. 655; Legg *v.* Mackrell, 1 Gif. 166; Bray *v.* West, 9 Sim. 429; Clemens *v.* Clemens, 60 Barb. 366.

[6] Pollexfen *v.* Moore, 3 Atk. 272; Andrew *v.* Trinity Hall, 9 Ves. 525; Talbot *v.* Radnor, 3 M. & K. 524; Warren *v.* Rudall, 1 John. & H. 1; Buel *v.* Yelverton, L. R. 13 Eq. 131; *In re* Isabella Denby, 3 De G., F. & J. 350; Burgess *v.* Burgess, 1 Coll. 367.

cannot claim the benefit if he decline the office.[1] And a trustee who has power, under certain circumstances, to appoint a colleague and successor to execute the trusts, may disclaim the trusts, except the power of nominating other persons to be trustees in place of those originally appointed, and an appointment by one who has never acted except to make the nomination will be held valid.[2]

§ 273. If a person appointed trustee effectually disclaims, it is as if he had never been named in the instrument. All parties are placed in the same situation in respect to the trust property as if his name had not been inserted in the deed or will.[3] Therefore, if one of the several trustees disclaims, the entire estate will vest in the remaining trustee or trustees;[4] and if all the trustees or a sole trustee disclaim, the estate

[1] It is an established rule that bequests to individuals are considered, *prima facie*, to be given to them in that character, — a presumption to be repelled by the nature of the legacies or other circumstances arising in the will. Roper on Leg. 780; Slaney *v.* Watney, L. R. 2 Eq. 418. It is so, even if the persons are described in the legacy as "my good friends." Read *v.* Devaynes, 3 Bro. Ch. 95. Or if the legacy is given in the will among other legacies. Calvert *v.* Sebhon, 4 Beav. 222. Or if it is given in a codicil naming the person as an individual and not naming his office. Stackpole *v.* Howell, 13 Ves. 417; per Ch. J. Chapman in Kirkland *v.* Narramore, 105 Mass. 31. And see Lewis *v.* Matthews, L. R. 8 Eq. 277; Abbott *v.* Massie, 3 Ves. 148; Harrison *v.* Rowley, 4 Ves. 212; Cockerill *v.* Barber, 1 Sim. 23; 5 Russ. 585; Barnes *v.* Kirkland, 8 Gray, 512; Rothmaler *v.* Myers, 4 Des. 255; Dix *v.* Read, 1 S. & S. 237; Piggott *v.* Green, 6 Sim. 72; Billingslea *v.* Moore, 14 Ga. 370; Hall *v.* Cushing, 9 Pick. 395; Newcomb *v.* Williams, 9 Met. 525; Dixon *v.* Homer, id. 420; Brygdes *v.* Wotton, 1 V. & B. 134; Morris *v.* Kent, 2 Ed. Ch. 175; *In re* Hawken's Trust, 33 Beav. 570; Hanbury *v.* Spooner, 5 Beav. 630; Griffiths *v.* Pruen, 11 Sim. 202; King *v.* Woodhull, 3 Edw. Ch. 79; Brown *v.* Higgs, 4 Ves. 708; Thayer *v.* Wellington, 9 Allen, 283, 295; Granberry *v.* Granberry, 1 Wash. 246.

[2] *In re* Hadley, 5 De G. & Sm. 67; 9 Eng. L. & Eq. 67.

[3] Townson *v.* Tickell, 3 B. & Al. 31; Begbie *v.* Crook, 2 Bing. N. C. 70; Clemens *v.* Clemens, 60 Barb. 366; Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Ventr. 128; Legett *v.* Hunter, 25 Barb. 81; 19 N. Y. 445; Goss *v.* Singleton, 2 Head, 67. [Parkhill *v.* Doggett, 135 Iowa, 113.]

[4] Ibid.; Bonifant *v.* Greenfield, Cro. Eliz. 80; Denne *v.* Judge, 11 East, 288; Ellis *v.* Boston, Hartford, & Erie R. Co., 107 Mass. 13. [Wheeler's Appeal, 70 Conn. 511.]

will vest in the heir subject to the trusts.[1] The settlor must be presumed to have known the effect of a disclaimer by the trustees named by him.[2] It will be seen from this, that a disclaimer operates retrospectively, and vests the estate, *ab initio*, in those trustees only who accept the trust, and, in the absence of an acceptance by any of the trustees, in the heir.[3] It follows, that all the powers and authority vested in the trustees, *as such*, which are incidental or requisite to the execution of the trusts, are vested in those trustees only who accept the office. (*a*) They may, therefore, grant leases of the trust estate,[4] and sell and convey the same,[5] and give valid receipts for the purchase-money,[6] and the disclaiming trustee need not join in the deeds, nor can his concurrence be required or enforced. But it must be known whether one of several trustees disclaims or accepts before it can be known whether the acts of the others are valid or not.[7] And it is immaterial that a disclaiming trustee is expressly named as one of the persons by whom a power connected with the trust is to be exercised:[8] a power given to the trustees, or the *survivor* of them, may be exercised by an *acting* trustee, although the disclaiming trustee is still alive.[9] But if the power is given to the *person* and not to the *office*, a

[1] Stacey *v.* Elph, 1 M. & K. 195; Austin *v.* Martin, 29 Beav. 523; Goss *v.* Singleton, 2 Head, 67. In New York it rests in the court by statute.

[2] Browell *v.* Reed, 1 Hare, 435.

[3] Peppercorn *v.* Wayman, 5 De G. & Sm. 230; Stacey *v.* Elph, 1 M. & K. 195; Dunning *v.* Ocean Nat. Bk., 6 Lans. 296.

[4] Small *v.* Marwood, 9 B. & Cr. 307; Bayly *v.* Cumming, 10 Ir. Eq. 410.

[5] Cooke *v.* Crawford, 13 Sim. 91; Adams *v.* Taunton, 5 Madd. 435; Crewe *v.* Dicken, 4 Ves. 97; Nicolson *v.* Wordsworth, 2 Swanst. 378.

[6] Hawkins *v.* Kemp, 3 East, 410; Smith *v.* Wheeler, 1 Ventr. 128; 2 Ven. & Pur. 850; Vandever's App., 8 Watts & S. 405.

[7] Moir *v.* Brown, 14 Barb. 39. [Coleman *v.* Connolly, 242 Ill. 574.]

[8] Crewe *v.* Dicken, 4 Ves. 100; Adams *v.* Taunton, 5 Madd. 435.

[9] Sharp *v.* Sharp, 2 B. & Cr. 405; Peppercorn *v.* Wayman, 5 De G. & Sm. 230.

(*a*) La Forge *v.* Binns, 125 Ill. App. 527; Mullanny *v.* Nangle, 212 Ill. 247. This is often expressly provided by statute. Md. Public Gen. Laws (1904), Art. 93, §§ 293–295.

disclaimer by one will not vest the power in the other trustees, so as to enable them to exercise it. Powers that imply a personal confidence in the donee must be exercised by the persons in whom the confidence is placed, and to whom the power is given.[1] Such powers, therefore, will not vest by the disclaimer of one in his cotrustees, but will be absolutely gone.[2] (*a*)

§ 274. If a trustee once accepts the office, he cannot by his sole action be discharged from its duties. Having once entered upon the management of the trust, he must continue to perform its duties until he is discharged in one of three ways: first, he may be removed and discharged, and a new trustee substituted in his place, by proceedings before a court having jurisdiction over the trust; second, he may be discharged, and a new trustee appointed, by the agreement and concurrence of all the parties interested in the trust; and, third, he may be discharged, and a new trustee appointed, in the manner pointed out in the instrument creating the trust, if it makes any provisions upon that subject.[3] Mere abandonment of the trust will not vest the trust property in the hands of his cotrustee, nor relieve a trustee from liability.[4] If

[1] Cole *v.* Wade, 16 Ves. 44; Newman *v.* Warner, 1 Sim. (N. S.) 457; Eaton *v.* Smith, 2 Beav. 236; Att. Gen. *v.* Doyley, 2 Eq. Cas. Ab. 194; Walsh *v.* Gladstone, 14 Sim. 2; Wilson *v.* Pennock, 27 Pa. St. 238.

[2] Eaton *v.* Smith, 2 Beav. 236; Lancashire *v.* Lancashire, 2 Phill. 657; Robson *v.* Flight, 33 Beav. 268.

[3] Craig *v.* Craig, 3 Barb. Ch. 76; Drane *v.* Gunter, 19 Ala. 731; Thatcher *v.* Candee, 3 Keyes (N Y.), 157; Shepherd *v.* McEvers, 4 Johns. Ch. 186; Cruger *v.* Halliday, 11 Paige, 319; Ridgeley *v.* Johnson, 11 Barb. 527; Webster *v.* Vandeventer, 6 Gray, 428; Pearce *v.* Pearce, 22 Beav. 248; Sugden *v.* Crossland, 3 Sm. & Gif. 192; Jones *v.* Stockett, 2 Bland, 409; Perkins *v.* McGavock, 3 Hay. 265. [Stearns *v.* Fraleigh, 39 Fla. 603, 610; Jenkins *v.* Hammerschlag, 56 N. Y. S. 534 (a trustee for creditors).]

[4] Webster *v.* Vandeventer, 6 Gray, 428; Cruger *v.* Halliday, 11 Paige, 314; Thatcher *v.* Candee, 3 Keyes, 157.

(*a*) As to the vesting of powers in the surviving or continuing trustee upon the death, disclaimer, removal or resignation of one or more of several cotrustees, see *infra*, § 498.

a trustee conveys away the trust estate to another, even his cotrustee, and appoints another to execute the trust, the conveyance may pass the naked legal title, but it will have no effect in relieving the original trustee from responsibility, if the transaction is not sanctioned by the decree of the court, or by the consent of all parties interested; and it will transfer no authority to the person thus appointed, except to make him a trustee *de son tort*, if he attempts to interfere with the trust estate.[1]

§ 275. The *cestui que trust*, and all other persons, although contingently interested in the remainder or reversion of trust property,[2] are entitled to have the custody and the administration of it confided to *proper* persons, and to a proper *number* of persons. Thus if a trustee originally appointed by will die in the testator's lifetime, a new trustee may be appointed by the court to take the trust property; or if the original number of trustees is reduced by death, the *cestui que trust* may call upon the court to appoint new trustees in place of those deceased.[3] So if a trustee disclaims, or refuses to act after having once accepted,[4] or becomes so situated that he cannot effectually execute the office, as by becoming a permanent resident abroad,[5] (*a*)

[1] Pearce *v.* Pearce, 22 Beav. 248; Sugden *v.* Crossland, 3 Sm. & Gif. 192; Braybrooke *v.* Inskip, 8 Ves. 417; Chalmers *v.* Bradley, 1 J. & W. 68; Williams *v.* Parry, 4 Russ. 272; Adams *v.* Paynter, 1 Coll. 532; Cruger *v.* Halliday, 11 Paige, 314; Ardill *v.* Savage, 1 Ir. Eq. 79. [Spengler *v.* Kuhn, 212 Ill. 186.]

[2] Finlay *v.* Howard, 2 Dr. & W. 490; Cooper *v.* Day, 1 Rich. Eq. 26; *In re* Sheppard's Trusts, 4 De G., F. & J. 423; Rennie *v.* Ritchie, 12 Cl. & Fin. 204.

[3] Buchanan *v.* Hamilton, 5 Ves. 722; Hibbard *v.* Lamb, Amb. 309; Webb *v.* Shaftesbury, 7 Ves. 487; Millard *v.* Eyre, 2 Ves. Jr. 94; De Peyster *v.* Clendining, 8 Paige, 296; Dixon *v.* Homer, 12 Cush. 41; Mass. Gen. Hos. *v.* Amory, 12 Pick. 445; Greene *v.* Borland, 4 Met. 339. [But see Mullanny *v.* Nangle, 212 Ill. 247; La Forge *v.* Binns, 125 Ill. App. 527. See *infra*, § 286.]

[4] Wood *v.* Stane, 8 Price, 613; Moggeridge *v.* Grey, Nels. 42; Anon. 4 Ir. Eq. 700; Travell *v.* Danvers, Finch, 380; Irvine *v.* Dunham, 111 U. S. 327.

[5] O'Reilly *v.* Alderson, 8 Hare, 101; *Re* Ledwick, 6 Ir. Eq. 561; Com.,

(*a*) Removal from the State does not *ipso facto* render a trustee legally incapable of acting as such. Bonner *v.* Lessley, 61 Miss. 392.

or by absconding;[1] or if a *female* trustee marry;[2] or if the trustees of a church or chapel embrace opinions contrary to the founder's intentions;[3] or if the trustee becomes bankrupt,[4] or misconducts himself,[5] or deals with the trust fund for his own personal profit and advancement,[6] or commits a breach of trusts[7] or refuses

&c., *v.* Archbold, 11 Ir. Eq. 187; Lill *v.* Neafie, 31 Ill. 101; *In re* Reynolds' Settlement, L. R. 7 Ch. 224; Maxwell *v.* Finnie, 6 Cold. 434; Curtis *v.* Smith, 60 Barb. 9; Mennard *v.* Wilford, 1 Sm. & Gif. 426; *Re* Stewart, 8 W. R. 297; *Re* Harrison's Trusts, 22 L. J. Ch. 69; Dorsey *v.* Thompson, 37 Md. 25; Ketchum *v.* Mobile & Ohio R. R., 2 Woods, 532. [See Ames' Cases on Trusts, (2d ed.) 249, n.] The voluntary removal to, and becoming a resident of, a foreign country by a trustee under a mortgage by a railroad company, incapacitates him and vacates the office; and if, after such removal, he attempts to prosecute suit in federal court the state court will enjoin him. Farmers' Loan and Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130. And where the *cestui que trust* was prohibited by law from coming into the State, the court, on the trustee's petition, discharged him, and appointed one living in the same State with the *cestui que trust*. *Ex parte* Tunno, 1 Bailey, Ch. 395.

[1] Millard *v.* Eyre, 2 Ves. Jr. 94; Gale's Peti. R. M. Charlt. 109; *Re* Mais, 16 Jur. 608.

[2] Lake *v.* De Lambert, 4 Ves. 592; *Re* Kaye, L. R. 1 Ch. 387. By chap. 409 of the Acts of 1869, a married woman in Massachusetts may be appointed executrix, adminstratrix, guardian, or trustee, with the written assent of her husband; and the marriage of a single woman who holds such trusts shall not extinguish her authority, but her sureties on petition may be discharged, and she may be required to give new ones. [The assent of her husband is no longer necessary. R. L. (1902) c. 153, § 5. See also statutes of other States, removing the disabilities of married women.]

[3] Att. Gen. *v.* Pearson, 7 Sim. 309; Att. Gen. *v.* Shore, id. 317; Rose *v.* Crockett, 14 La. An. 811. If individuals pay their own money, and take a deed to themselves in trust for a parish, the courts will not appoint a trustee to fill a vacancy; but if the parish paid the money, the court will appoint. Draper *v.* Minor, 36 Mo. 290.

[4] Bainbrigge *v.* Blair, 1 Beav. 495; *In re* Roche, 1 Con. & Laws. 306; Com., &c., *v.* Archbold, 11 Ir. Eq. 187; Harris *v.* Harris, 29 Beav. 107; *Re* Bridgman, 1 Dr. & Sm. 164.

[5] Mayor of Coventry *v.* Att. Gen., 7 Bro. P. C. 235; Buckeridge *v.* Glasse, 1 Cr. & Ph. 122; Thompson *v.* Thompson, 2 B. Mon. 161; Deen *v.* Cozzens, 7 Rob. 178.

[6] *Ex parte* Phelps, 9 Mod. 357; Clemens *v.* Caldwell, 7 B. Mon. 171; Deen *v.* Cozzens, 7 Rob. 178; Kraft *v.* Lohman, 79 Ala. 323. [Gregg *v.* Gabbert, 62 Ark. 602.]

[7] Thompson *v.* Thompson, 2 B. Mon. 161; Mayor of Coventry *v.* Att.

to apply and pay over the income as directed,[1] or if he fails to invest as directed,[2] or permits a cotrustee to commit a breach of trust,[3] or if he loans the trust funds on personal security, although the *cestui que trust* approves of it,[4] or refuses to obey an order of the court,[5] or if trustees of a mortgage for the security of bond-holders of a railroad or other corporation refuse to foreclose or take other steps;[6] or if a trustee makes a grossly unreasonable claim upon the trust property adverse to the *cestui que trust;*[7] or if a husband, trustee for his wife, abandons and deserts her or treats her with cruelty;[8] or if a municipal corporation, holding property upon special trusts, is abolished;[9] or if a trustee becomes an habitual drunkard;[10] or a lunatic;[11] or if a hostile feeling exists between a discretionary trustee and the *cestui*,[12] or the trustee is antagonized by litigation,[13] or the trustee acts adversely to the interests of the *cestui*,[14] or if the

Gen., 7 Bro. P. C. 235; Att. Gen. *v.* Drummond, 1 Dr. & W. 353; 3 Dr. & W. 162; Att. Gen. *v.* Shore, 7 Sim. 309, n.; *Ex parte* Greenhouse, 1 Madd. 92.

[1] *Ex parte* Potts, 1 Ash. 340. [*In re* McGillivray, 138 N. Y. 308; Wilcox *v.* Quinby, 16 N. Y. S. 699.]

[2] Clemens *v.* Caldwell, 7 B. Mon. 171; Deen *v.* Cozzens, 7 Rob. N. Y. 178; Cavender *v.* Cavender, 114 U. S. 464.

[3] *Ex parte* Reynolds, 5 Ves. 707.

[4] Johnson *v.* Simpson, 9 Barr, 416.

[5] Ehlen *v.* Ehlen, 63 Md. 267. [Harrison *v.* Union Trust Co., 144 N. Y. 326.]

[6] Matter of Merchants' Bank, 2 Barb. S. C. 446.

[7] Cooper *v.* Day, 1 Rich. Ch. 26.

[8] Boaz *v.* Boaz, 36 Ala. 334; Fisk *v.* Stubbs, 30 Ala. 355; Smith *v.* Oliver, 31 Ala. 139; Abernathy *v.* Abernathy, 8 Fla. 243. But if the wife deserts the husband without cause, though the husband may be at some fault, it is no cause for removing him as her trustee. Abernathy *v.* Abernathy, 8 Fla. 243.

[9] Montpelier *v.* East Montpelier, 29 Vt. 12.

[10] Everett *v.* Prythergch, 12 Sim. 367; Bayles *v.* Staats, 1 Halst. Ch. 513.

[11] Matter of Wadsworth, 2 Barb. Ch. 387; *Re* Fowler, 2 Russ. 449; Anon., 5 Sim. 322; *In re* Holland, 16 Ch. D. 672; *In re* Nash, 16 Ch. D. 503; *In re* Watson, 19 Ch. D. 384; *In re* Martyn, 26 Ch. D. 745. [Bascom *v.* Weed, 105 N. Y. S. 459.]

[12] Wilson *v.* Wilson, 145 Mass. 490, 494. [See *infra*, § 276, notes.]

[13] Davidson *v.* Moore, 14 S. C. 251.

[14] Dickerson *v.* Smith, 17 S. C. 289.

trustee, appointed on an *ex parte* application of one of the *cestuis*, is his paid servant,[1] or if there is any other good cause,[2] as if the trust fund is in danger of being lost for want of care and attention by the trustee,[3] or if in any way the trustee has become incapable of performing the duties of the trust,[4] or his acts or omissions show a want of reasonable fidelity to the trust,[5] — in all these and similar cases the old trustees may be removed, and new ones substituted in their room. (*a*) The

[1] Mayfield *v.* Donovan, 17 Mo. App. 684.

[2] Piper's App., 20 Penn. St. 67; Franklin *v.* Hayes, 2 Swanst. 521.

[3] Jones *v.* Dougherty, 10 Ga. 273; Harper *v.* Straws, 14 B. Mon. 57; Holcomb *v.* Coryell, 1 Beas. 289; Lasley *v.* Lalsey, 1 Duv. 117; and see Commissioners *v.* Archibald, 11 Ir. Eq. 195; where L. Ch. Brady ably discusses the removal of trustees. *In re* Bernstein, 3 Redf. (N. Y.) 20. Or if a trustee identifies himself with one of two contending parties in relation to the trust fund. Scott *v.* Rand *et al.*, 118 Mass. 215. Or is so hostile to his cotrustees as to endanger the execution of the trust. Devasmer *v.* Dunham, 22 Hun (N. Y.), 87. Or is guilty of gross misconduct in execution of a discretionary trust. Babbit *v.* Babbit, 26 N. J. Eq. 44; Sparhawk *v.* Sparhawk, 114 Mass. 356.

[4] Austin *v.* Austin, 18 Neb. 309.

[5] Cavender *v.* Cavender, 114 U. S. 464. [Lanning *v.* Commissioners, 63 N. J. Eq. 1.]

(*a*) Other sufficient causes for removal are, wasting the estate in unnecessary litigation, *In re* McGillivray, 138 N. Y. 308; threatening the *cestuis* with disclosures injurious to their interests if they take proceedings against him. Grant *v.* Maclaren, 23 Can. Sup. 310.

A trustee's acceptance of a salaried elective office in a corporation some of whose stock constitutes part of the trust estate has been held a good ground for removal because of the possible conflict of his individual interest to retain the stock when the interest of the trust might require the sale of it. Gartside *v.* Gartside, 113 Mo. 348; Elias *v.* Schweyer, 40 N. Y. S. 906. See also Matter of Hirsch, 116 App. Div. (N. Y.) 367 (affirmed 188 N. Y. 584). But removal has also been refused by the court when this was the only ground. Dailey *v.* Wight, 94 Md. 269; Matter of Warren, 109 N. Y. S. 202, 125 App. Div. 169. Inevitable conflict between the interest of the trust and of the trustee as an individual is in general a good cause for removal. Moore *v.* McGlynn, (1894) 1 Ir. R. 74. If circumstances give rise to conflict of interests between the parts of trust property held on distinct trusts, the English courts, under the Trustee Act of 1850, § 32, would not necessarily deem it expedient to remove the trustees, but might appoint separate trustees. *In re* Aston's Trusts, 25 L. R. Ir. 96. See also Trustee Act, 1893, § 10.

matter rests in the sound discretion of the court.[1] And in a suit for the purpose, it will not be impertinent nor scandalous to charge the trustee with misconduct, or to impute to him a corrupt or improper motive, or to allege that his behavior is vindictive towards the *cestui que trust;* but it will be impertinent, and may be scandalous, to charge *general* malice or general personal hostility.[2] If the court have jurisdiction of the subject-matter, mere irregularity in the proceedings or in the appointment will not make it void in a collateral proceeding, nor can the regularity of the proceedings or of the appointment be inquired into in a collateral suit; such appointment must stand until it is reversed by a proceeding for the purpose in the same case.[3] In case of a trust for creditors, the court will not at the instance of some of them remove the assignee, unless he is in default, or is shown to be unfit for his office.[4] Equity will not exercise its power to take charge of and administer a trust when it is being properly administered by the trustee.[5] (*a*)

§ 276. It may be stated generally, that if the conduct or circumstances of the trustees are such as to render it very inconvenient, improper, or inexpedient for them to continue in the trust the court will exercise its discretion and relieve them, and appoint others in their place; as where the trustees were desirous of being discharged,[6] or were incapable through age

[1] Ibid., citing many cases. [Lamp *v.* Homestead Building Ass'n, 62 W. Va. 56; Gaston *v.* Hayden, 98 Mo. App. 683.]

[2] Portsmouth *v.* Fellows, 5 Madd. 450; Parsons *v.* Jones, 26 Ga. 644.

[3] Budd *v.* Hiler, 3 Dutch, 43; People *v.* Norton, 5 Selden, 176; Paules *v.* Dilley, 9 Gill, 222; Curtis *v.* Smith, 60 Barb. 9; Howard *v.* Waters, 19 How. 529; Hodgdon *v.* Shannon, 44 N. H. 572. [Dyer *v.* Leach, 91 Cal. 191; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238.]

[4] Jones *v.* McPhillips, 77 Ala. 314. [*Infra*, § 594, notes.]

[5] Meyers *v.* Trustees of Schools, 21 Ill. App. 223.

[6] Bogle *v.* Bogle, 3 Allen, 158; Howard *v.* Rhodes, 1 Keen, 581; Cov-

(*a*) A court having jurisdiction of the parties will not decline to remove a trustee for cause, merely because he was appointed in another State under a will which was never proved in the State where his removal is sought. Jones *v.* Jones, 30 N. Y. S. 177.

and infirmity of acting,[1] or so disagreed among themselves that they could not act,[2] or where cotrustees refused to act with one of their number,[3] or where the trustees appointed were municipal officers for the time being and are changed yearly,[4] or where a corporation appointed trustee had become subject to a foreign power,[5] — in these and the like cases the courts interposed and appointed other trustees. But if there is a controversy, the court will exercise a sound discretion. Mere disagreements between the trustee and *cestui que trust* will not justify a removal;[6] (*a*) nor the fact that the trustee forbids

entry *v* Coventry, id. 758; Greenwood *v.* Wakeford, 1 Beav. 576; Hamilton *v.* Frye, 2 Moll. 458.

[1] Gardiner *v.* Downes, 22 Beav. 395; Bennett *v.* Honywood, Amb. 710.

[2] Bagot *v.* Bagot, 32 Beav. 509; Uvedale *v.* Patrick, 2 Ch. Cas. 20.

[3] Uvedale *v.* Patrick, 2 Ch. Cas. 20.

[4] *Ex parte* Blackburne, 1 J. & W. 297; Webb *v.* Neal, 5 Allen, 575.

[5] Att. Gen. *v.* London, 3 Bro. Ch. 171.

[6] Clemens *v.* Caldwell, 7 B. Mon. 171; Gibbes *v.* Smith, 2 Rich. Eq. 131; Foster *v.* Davies, 4 De G., F. & J. 133; Unless the duties of the trustee require an intimate personal intercourse, or the trustee has discretionary power over the *cestui que trust.* McPherson *v.* Cox, 96 U. S. 404.

(*a*) In case of hostile relations between the trustee and a *cestui* the action of the court as to removal will be guided chiefly by consideration of what is best for the trust. The cause of disagreement is usually of minor importance. While the mere fact of hostility, even when it is irreconcilable and makes all intercourse impossible, may not be sufficient cause for removal, if it seriously interferes with the proper performance of the trust and the beneficial enjoyment of the *cestui*, the trustee should be removed, although not at fault in the matter. Polk *v.* Linthicum, 100 Md. 615; Anderson *v.* Kemper, 116 Ky. 339; Gartside *v.* Gartside, 113 Mo. 348, 356; Gaston *v.* Hayden, 98 Mo. App. 683; Trask *v.* Sturges, 63 N. Y. S. 1084; Marsden's Estate, 166 Pa. St. 213; Nathans's Estate, 191 Pa. St. 404; Neafie's Estate, 199 Pa. St. 307; Lister *v.* Weeks, 60 N. J. Eq. 215, 228; Disbrow *v.* Disbrow, 61 N. Y. S. 614, 46 App. Div. 111 (affirmed 167 N. Y. 606); and cases cited *infra*.

Although the *cestui* should not be permitted to procure the removal of a competent trustee by picking a quarrel with him, "It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate," and if the hostility interferes substantially with this purpose, *viz.*, the welfare of the beneficiaries, this in itself is a proper cause for removal. Letterstedt *v.* Broers, 9 A. C. 371, 386.

In May *v.* May, 167 U. S. 310,

social intercourse between his family and the beneficiaries,[1] and if a trustee fails in the disharge of his duties from an honest mistake, or mere misunderstanding of them, or from a misjudgment, it is no ground for removal;[2] and if a trustee in good faith refuses to exercise a purely discretionary power in favor of the estate, as to vary the securities, he will not be removed;[3] nor will he be removed for a mere constructive fraud, as for buying the trust property at his own sale;[4] and where a trust was to take effect in the future upon the happening of a certain event, and in the meantime it was to remain passive, the court refused to interfere, and remove the trustee for an alleged misfeasance.[5] In no case ought the trustee to be removed where there is no danger of a breach of trust, and some of the bene-

[1] Nickels *v.* Philips, 18 Fla. 732.

[2] In the Matter of Durfee, 4 R. I. 401; Att. Gen. *v.* Coopers' Co., 19 Ves. 192; Att. Gen. *v.* Caius College, 2 Keen, 150; Lathrop *v.* Smalley, 23 N. J. Eq. 192.

[3] Lee *v.* Young, 2 Y. & C. Ch. 532.

[4] Webb *v.* Dietrich, 7 W. & S. 401.

[5] Sloo *v.* Law, 1 Blatch. C. C. 512.

320, it is said by Gray, J.: "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be executed whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are grossly exaggerated."

In Price's Estate, 209 Pa. St. 210, 212, it is said: "While inharmonious relations between trustee and *cestui que trust*, not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious a condition as to make any personal intercourse impossible and to hinder the proper transaction of business between the parties, a due regard for the interests of the estate and the rights of the *cestui que trust* may require a change of trustee."

Similar principles apply where there is hostility between co-trustees. Myers's Estate, 205 Pa. St. 413; Disbrow *v.* Disbrow, 61 N. Y. S. 614, 46 App. Div. 111 (affirmed, 167 N. Y. 606).

ficiaries are satisfied with the management.[1] Nor will a trustee be removed for every violation of duty, or even breach of the trust, if the fund is in no danger of being lost.[2] (*a*) The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the courts. There must be a clear necessity for interference to save the trust property. Mere error, or even breach of trust, may not be sufficient; there must be such misconduct as to show want of capacity or of fidelity, putting the trust in jeopardy.[3]

§ 276 *a*. A trust will not be allowed to fail for want of a trustee; (*b*) and if the nominee dies before qualifying or afterward, the court will appoint a trustee.[4] So if no trustee is appointed by the grantor, or his appointment is void for uncertainty.[5] But if the trustee of a power that is purely personal and discretionary refuses to qualify, the trust cannot be executed.[6]

[1] Berry *v.* Williamson, 11 B. Mon. 245.

[2] Lathrop *v.* Smalley, 23 N. J. Eq. 192; Corlies *v.* Corlies, id. [Waterman *v.* Alden, 144 Ill. 90; Williams *v.* Nichol, 47 Ark. 254; Matter of O'Hara, 62 Hun, 531.]

[3] Massy *v.* Stout, 4 Del. Ch. 274. [*In re* Thieriot, 102 N. Y. S. 952, 117 App. Div. 686; Murdoch *v.* Elliot, 77 Conn. 247; Pfefferle *v.* Herr, (N. J. 1909) 71 A. 689; 2 Story's Eq. Jur. § 1289.]

[4] Schouler, Petitioner, 134 Mass. 426; Mendenhall *v.* Mower, 16 S. C. 304.

[5] State *v.* Griffith, 2 Del. Ch. 392.

[6] Jones *v.* Fulghum, 3 Tenn. Ch. 193. [See *infra*, § 503, note.]

(*a*) The point is discussed in the case of *In re* Wrightson, [1908] 1 Ch. 789, where the trustees admitted that they had been guilty of a breach of trust. A majority of the *cestuis* asked for their removal, but a large proportion opposed removal. The court declined to remove them, on the ground that "it would not be for the welfare of the *cestuis que trust* generally, or necessary for the protection of the trust estate, that these trustees should be removed." The case was treated as falling within the general principle laid down in Letterstedt *v.* Broers, 9 A. C. 371. See *In re* Hoysradt, 45 N. Y. S. 841.

(*b*) Harris *v.* Brown, 124 Ga. 310; Dwyer *v.* Cahill, 228 Ill. 617; French *v.* Northern Trust Co., 197 Ill. 30; Herrick *v.* Low, 103 Me. 353; Sells *v.* Delgado, 186 Mass. 25; Hiles *v.* Garrison, 70 N. J. Eq. 605; Inhabitants of Anson, Petitioners, 85 Me. 79.

§ 277. In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case. Irregularities in the proceedings of appointment not affecting the jurisdiction of the court will not avail in collateral suits.[1] (*a*) But an appointment where there is no vacancy, the former trustee not having relinquished the trust nor been deprived of it for abuse or mismanagement, is a nullity.[2] Where the trustees are required to give security, it will order such notice and to such persons as it sees fit.[3] It always has regard to the wishes of the author of the trust, to be gathered from the instrument of trust; if he has expressed a disapprobation of an individual, the court would refrain from appointing him; and so the court will not appoint a new trustee with a view to the interest of some of the *cestuis que trust*, for the trustee ought to hold an even hand between all parties, and not favor a particular one. Further, the court has regard to the nature of the trust, and to those instrumentalities by which it can best be carried into execution.[4] Accordingly, courts will not substitute trustees upon the mere *caprice* of the *cestui que trust*, and without a reasonable cause,[5] and although the instrument of trust or a statute gives the *cestui que trust* full power to remove and appoint other trustees, yet good cause must be shown or the court cannot be put in motion,[6] nor will they appoint a trustee out of the jurisdiction

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

[2] Augusta *v.* Walton, 77 Ga. 525, 526. [Mullanny *v.* Nangle, 212 Ill. 247; La Forge *v.* Binns, 125 Ill. App. 527.]

[3] Matter of Robinson, 37 N. Y. 271.

[4] *In re* Tempest L. R. 1 Ch. 487.

[5] O'Keeffe *v.* Calthorpe, 1 Atk. 18; Pepper *v.* Tuckey, 2 Jon. & La. 95; Ward *v.* Dorch, 69 N. C. 279; Bouldin *v.* Alexander, 15 Wall. 132.

[6] Stevenson's Appeal, 59 Penn. St. 101; 68 id. 101.

(*a*) A new trustee will not be appointed simply to distribute a trust fund in the possession of his predecessor's executor or administrator, but such representative will be ordered to make the payment. Boyer *v.* Decker, 40 N. Y. S. 469. In New York the execution of a decree removing a testamentary trustee or executor is not stayed by an appeal. Code Civ. Proc., § 2583; Stout *v.* Betts, 74 Hun, 266.

without security.[1] (*a*) There is no absolute rule of law that prevents a *cestui que trust* from being a trustee for himself and others, and the court is sometimes obliged to appoint him; but the arrangement is irregular and sometimes disastrous, and the court will not sanction it if it can be avoided.[2] So a husband may be trustee for a wife, and a wife for a husband,[3] but difficulties frequently grow out of the relation, and the courts have sometimes said that they would not make such appointments.[4] In no case will the court remove old trustees and substitute new ones, unless satisfied of the necessity of the removal, and of the fitness of the new trustee proposed. Nor will the court authorize the new trustees to nominate their successors. There was some doubt and difference of practice at first;[5] but it is now settled, except in charities,[6] that the

[1] *Ex parte* Roberts, 2 Strob. 86; Gibson's Case, 1 Bland, 138.

[2] Passingham *v.* Sherborne, 9 Beav. 424; Reid *v.* Reid, 30 Beav. 388; *Ex parte* Clutton, 17 Jur. 988; *Ex parte* Conybeare's Settlement, 1 W. R. 458; Wilding *v.* Bolder, 21 Beav. 222; Craig *v.* Hone, 2 Edw. Ch. 554. [Story *v.* Palmer, 46 N. J. Eq. 1; Stearns *v.* Fraleigh, 39 Fla. 603; Curran *v.* Green, 18 R. I. 332; People *v.* Donohoe, 70 Hun, 317; Robertson *v.* De Brulatour, 188 N. Y. 301; Woodbridge *v.* Bockes, 59 App. Div. (N. Y.) 503. See *supra*, § 59.]

[3] Tweedy *v.* Urquhart, 30 Ga. 446; Livingston *v.* Livingston, 2 Johns. Ch. 541; Bennett *v.* Davis, 2 P. Wms. 316; Shirley *v.* Shirley, 9 Paige, 363; Jamison *v.* Brady, 6 S. & R. 467; Boykin *v.* Cipples, 2 Hill, Ch. 200; Picquet *v.* Swann, 4 Mason, 455; Griffith *v.* Griffith, 5 B. Mon. 113; Gibson's Case, 1 Bland, 138; Watkins *v.* Jones, 28 Ind. 12; Gardner *v.* Weeks, 32 Ga. 696. [Stearns *v.* Fraleigh, 39 Fla. 603.]

[4] Dean *v.* Sanford, 9 Rich. Eq. 423. But the court will not appoint the husband trustee, under a trust for the separate use of his wife. Ely *v.* Burgess, 11 R. I. 115; *Ex parte* Hunter, Rice, Ch. (S. C.) 294.

[5] Joyce *v.* Joyce, 2 Moll. 276; White *v.* White, 5 Beav. 221.

[6] Lewin on Trusts, 606 (5th ed.).

(*a*) A foreign corporation not qualified to do business in the State where the trust is to be executed but named as trustee in the will creating the trust has been held to be competent to act as trustee upon furnishing a proper bond and appointing a resident agent upon whom service of process might be made. *In re* Satterthwaite's Estate, 60 N. J. Eq. 347. See also Penn. Ins. Co. *v.* Bauerle, 143 Ill. 459; Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 68 Ill. App. 666; Glaser *v.* Priest, 29 Mo. App. 1; Bell *v.* White, 73 A. 861 (N. J. Ch. 1909).

court will not delegate this part of its jurisdiction to new appointees.[1]

§ 278. If the instrument of trust requires the trustees of a charity to have a particular residence, it is irregular to appoint others not answering that description, provided there are those proper to be trustees.[2] But if it is the custom to appoint such non-residents, the court will not remove them, but will see that vacancies when they occur are properly filled.[3] And, generally, if an irregular appointment has been acquiesced in for a long time, the court will not remove.[4] In making the selection, the inquiry is whether the proposed appointment is proper, not whether it is the most proper.[5]

§ 279. It is laid down in several cases, that if a trustee becomes bankrupt he may be removed,[6] or if he becomes insolvent and compounds with his creditors; and this is on the ground that the *cestui que trust* has a right to have the trust administered by responsible trustees. (*a*) The English Bankrupt Act[7] pro-

[1] Bayley *v.* Mansell, 4 Madd. 226; Brown *v.* Brown, 3 Y. & C. 395; Bowles *v.* Weeks, 14 Sim. 591; Oglander *v.* Oglander, 2 De G. & Sm. 381; Southwell *v.* Ward, Taml. 314; Holder *v.* Durbin, 11 Beav. 594; overruling White *v.* White, 5 Beav. 221.

[2] Att. Gen. *v.* Cowper, 1 Bro. Ch. 439.

[3] Att. Gen. *v.* Daugars, 33 Beav. 621; Att. Gen. *v.* Clifton, 32 Beav. 596; Att. Gen. *v.* Stamford, 1 Phill. 737.

[4] Att. Gen. *v.* Cuming, 2 Y. & C. Ch. Ca. 150.

[5] Lancaster Charities, 7 Jur. (N. S.) 96.

[6] Bainbrigge *v.* Blair, 1 Beav. 495; *In re* Roche, 1 Conn. & Laws, 306; Com., &c., *v.* Archbold, 11 Ir. Eq. 187; Harris *v.* Harris, 29 Beav. 107.

[7] 12 & 13 Vict. c. 106, § 130.

(*a*) The court has declined to remove a trustee merely because it has been in financial difficulties, which have, however, been surmounted. Assets Realization Co. *v.* Trustees, etc., Ins. Corp., 65 L. J. Ch. 74. Statutes frequently state bankruptcy or insolvency as an adequate cause for removal, but the language is usually permissive.

In England it has been held that in an action to foreclose a mortgage held by a bankrupt trustee, the *cestuis* should be made parties, since the bankrupt trustee does not properly represent them. Francis *v.* Harrison, 43 Ch. Div. 183; Aylward *v.* Lewis, [1891] 2 Ch. 81.

vides, that, if a trustee becomes bankrupt, the chancellor, on petition and due notice, may order the trust estate to be conveyed by the bankrupt, the assignees, and all other persons interested, to such other persons as the chancellor shall think fit, upon the same trusts. Under this statute it has been determined that the court will exercise its discretion whether to remove the bankrupt or not,[1] but that *prima facie* the bankrupt is to be removed,[2] although he may have obtained his discharge.[3] But the court will not interfere long after the bankruptcy to remove the trustee, if he has obtained his discharge.[4] Generally the insolvency or bankruptcy of a trustee does not disqualify him for the trust,[5] nor does his bankruptcy affect the trust estate in his hands; and his certificate does not discharge him from fiduciary obligations.[6] In the United States, trustees are, or may be, required, in the great majority of cases, to give bonds or security for the safety of the trust fund: in all such cases it would seem that the bankruptcy of the trustee would not *per se* render him removable, unless there was some misconduct that rendered it proper for the court to exercise a sound discretion.

§ 280. In Bogle *v.* Bogle,[7] the court determined that one who, without compensation and for no definite time, undertook a trust for the benefit of another was entitled to a decree discharging him, when the further care of the property became inconvenient to him. Generally, trustees who have acted are not entitled, as against the trust estate, to refuse at pleasure to continue: they must have some good cause to entitle them to

[1] *Re* Roche, 2 Dr. & W. 289; 2 H. L. Cas. 461.
[2] Bainbrigge *v.* Blair, 1 Beav. 495.
[3] Ibid.
[4] *Re* Bridgman, 1 Dr. & Sm. 164.
[5] Shryock *v.* Waggoner, 28 Pa. St. 430; Turner *v.* Maule, 5 Eng. L. & Eq. 222; *Ex parte* Watts, 4 Eng. L. & Eq. 67. [Moorman *v.* Crockett, 90 Va. 185.]
[6] Belknap *v.* Belknap, 5 Allen, 468.
[7] 3 Allen, 158.

be relieved.[1] (*a*) If they have received a legacy or other benefit given to them *as trustees*, they cannot be allowed to retire except for good cause,[2] at least without restoring the legacy. It is a good cause for relief if the *cestui que trust* incumber and complicate the estate, and embarrass the trustee in the performance of his duties.[3] But where there is no cause for a discharge, except the wish of the trustee, or his convenience, he ought to pay the costs of the proceeding, and not impose the burden and expense upon the estate;[4] and so if the old trustee is removed for misconduct on his part.[5] But if the trustee has a good reason for his discharge, he will be entitled to his costs out of the estate as between solicitor and client.[6] Courts of equity, by virtue of their general chancery powers, have jurisdiction to accept the resignation of trustees, or to remove them for cause, and to appoint new trustees; and courts of probate in several States have power by statute to remove and appoint new trustees, whether they are created by will or deed.[7] Pro-

[1] Greenwood *v.* Wakeford, 1 Beav. 576; Cruger *v.* Halliday, 11 Paige, 314; Jones *v.* Stockett, 2 Bland, 409; *Re* Meloney, 2 Jon. & La. 391.

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

[3] Howard *v.* Rhodes, 1 Keen, 481; Coventry *v.* Coventry, id. 758; Greenwood *v.* Wakeford, 1 Beav. 576; Hamilton *v.* Frye, 2 Moll. 458.

[4] Matter of Jones, 4 Sanf. Ch. 615; Howard *v.* Rhodes, 1 Keen, 581; Courtenay *v.* Courtenay, 3 Jon. & La. 529.

[5] *Ex parte* Greenhouse, 1 Madd. 92; Howard *v.* Rhodes, 1 Keen, 581.

[6] Coventry *v.* Coventry, 1 Keen, 758; Taylor *v.* Glanville, 3 Madd. 176; Curteis *v.* Chandler, 6 id. 123; Greenwood *v.* Wakeford, 1 Beav. 581. [Richmond *v.* Arnold, 68 A. 427 (R. I. 1907); But see Wilson *v.* Clayburgh, 215 Ill. 506.]

[7] Bowditch *v.* Bannelos, 1 Gray, 220; King *v.* Donnelly, 5 Paige, 46; De Peyster *v.* Clendining, 8 Paige, 295; Field *v.* Arrowsmith, 3 Humph. 442; McCosker *v.* Brady, 1 Barb. Ch. 329; *In re* Potts, 1 Ash. 340; Matter of Mechanics' Bank, 2 Barb. S. C. 446; Dawson *v.* Dawson, Rice, Eq. 243; Lee *v.* Randolf, 2 Hen. & M. 12; *In re* Eastern R. R. Co., 120 Mass. 412. [The matter is dealt with by statute in nearly all the States.]

(*a*) A trustee will not be allowed to resign if a pending suit or other cause prevents a settlement of his accounts. *In re* Olmstead, 49 N. Y. S. 104. The court may impose conditions on accepting a resignation; *e. g.*, a waiver of commissions. *In re* Curtiss' Estate, 37 N. Y. S. 586.

ceedings are generally commenced directly for the removal and appointment of trustees; but when a bill or petition is already pending for the administration of the trust, the appointment or removal may be made upon motion in those proceedings.[1] And, further, if the trusts created in an instrument are of such a nature that they can be severed without injury to the estate, courts may allow the trustee to resign a part, and will commit that part to other trustees under proper arrangements for security.[2] But courts will not remove trustees against their will from one part of the trust, and leave them burdened with the responsibility of the remainder.[3] If the *cestuis* request a trustee who has misappropriated funds, &c., to resign, and make a promise to him on consideration that he will do so, the promise is void; it was the trustee's duty under such circumstances to comply with the request.[4]

§ 281. If a testator in his will appoint his executor to be a trustee, it is as if different persons had been appointed to each office;[5] a court of equity cannot remove him from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors; but if the office of trustee is separate from and independent of the office of executor, a court of equity may remove him from the office of trustee, and leave him to act as executor; or if he has

[1] —— *v.* Osborne, 6 Ves. 455; Webb *v.* Shaftesbury, 7 Ves. 487; —— *v.* Roberts, 1 J. & W. 251; *Ex parte* Potts, 1 Ash. 340.

[2] Craig *v.* Craig, 3 Barb. Ch. 76. [*In re* Aston's Trusts, 25 L. R. Ir. 96; English Trustee Act, 1893, § 10.] But where there is a single power of appointment in the trust instrument, though the estates are of a different description, or are held under a different title, or upon different trusts, there is no authority for dividing the trusts, and appointing different sets of trustees for the different estates or trusts. Cole *v.* Wade, 16 Ves. 27; *Re* Anderson, 1 Llo. & Goo. t. Sugd. 29; Curtis *v.* Smith, 6 Blatch. 537.

[3] Sturges *v.* Knapp, 31 Vt. 1.

[4] Withers *v.* Ewing, 40 Ohio St. 406, 407.

[5] Parsons *v.* Lyman, 5 Blatch. C. C. 170; Perkins *v.* Lewis, 41 Ala. 649. The fact of qualification as executor by a person named in the will both as executor and trustee does not of itself prove his acceptance of the office of trustee. Anderson *v.* Earle, 9 S. C. 460.

completed his duties as executor, and is holding and administering the estate simply as trustee, a court of equity may remove him.[1] (*a*)

§ 282. Courts of equity, having jurisdiction to remove and appoint trustees,[2] may be applied to either by bill or petition;[3] or, if a bill is already pending for administration of the estate, application may be made in those proceedings, by motion.[4] All

[1] Wood *v.* Brown, 34 N. Y. 339; Leggett *v.* Hunter, 25 Barb. 81; 19 N. Y. 445; Craig *v.* Craig, 3 Barb. Ch. 76; Matter of Wordsworth, 2 Barb. Ch. 381; *Ex parte* Dover, 5 Sim. 500; Quackenboss *v.* Southwick, 41 N. Y. 117.

[2] Bowditch *v.* Bannelos, 1 Gray, 220, and cases cited last section; Williamson *v.* Suydam, 6 Wall. 723; Livingston, Pet'r, 34 N. Y. 555. In absence of statutory provision, the weight of authority requires that the proceedings should commence by bill.

[3] Mitchell *v.* Pitner, 15 Ga. 319; *Ex parte* Knust, 1 Bail. Eq. 489; *Ex parte* Grenville Academies, 7 Rich. 470; Matter of Van Wyck, 1 Barb. Ch. 565; *Ex parte* Hussey, 2 Whart. 330; *Ex parte* Rees, 3 V. & B. 11; Miller *v.* Knight, 1 Keen, 129; Barker *v.* Peile, 2 Dr. & Sm. 340. This matter is mostly regulated by the statutes of the several States. Although proceedings by statute may be originated by petition, yet the proceedings may be by bill. Barker *v.* Peile, *ut supra; Re* Foster's Will, 15 Hun (N. Y.), 387; *Re* Ballou, Pet'r, 11 R. I. 360. In some cases it is said that the right to proceed by petition is confined to cases where there is a breach of the trust. *In re* Sanford Charity, 2 Mer. 456; *Re* Livingston, 34 N. Y. 567. [See Zehnbar *v.* Spillman, 25 Fla. 591, 594; Tuttle *v.* Merchant's Nat. Bank, 19 Mont. 11.]

[4] —— *v.* Osborne, 6 Ves. 455; —— *v.* Roberts, 1 J. & W. 251; Webb *v.* Shaftesbury, 7 Ves. 487; *Ex parte* Potts, 1 Ash. 340.

(*a*) In a case where the powers and duties of the executor-trustee were so intermingled and inseparable that removal as trustee would be ineffective if he was allowed to continue as executor, it was held that a court of equity might restrain him from continuing to act as trustee, although this necessarily restrained him from acting as executor. Bentley *v.* Dixon, 60 N. J. Eq. 353. Many States have avoided the difficulty arising in such a case by giving probate courts power of removal and general control over testamentary trustees.

The fact that a trustee whose removal is asked and who resides within the jurisdiction of the court, was appointed by a will of a citizen of another State and that the will was probated in the other State will not prevent his removal for cause. Jones *v.* Jones, 30 N. Y. S. 177, 187. See also Farmers' L. & Tr. Co. *v.* Pendleton, 75 N. Y. S. 294.

persons interested in the trust may institute proceedings in their own names, but notice should be given to all other parties in interest.[1] (*a*) If the trustee must give security for the fund, notice is within the discretion of the court;[2] but if the trust

[1] Abbott, Pet'r, 55 Maine, 580; Williamson *v.* Wickersham, 2 Coll. 52; Guion *v.* Melvin, 69 N. C. 242; Wardle *v.* Hargreaves, 11 Law Jour. (N. S.) Ch. 126; Henry *v.* Doctor, 9 Ohio, 49. [See Dyer *v.* Leach, 91 Cal. 191; Kennard *v.* Bernard, 98 Md. 513.] As to who are parties interested entitled to notice. Bradstreet *v.* Butterfield, 129 Mass. 339. In Pennsylvania under an act which provides that proceedings shall be upon petition "by any person interested, whether such interest be immediate or remote," it was held that the interest for such a purpose must be such as will certainly fall into possession sometime; and a bare possibility, dependent on the death of the first taker without issue, is not such an interest as will authorize a citation. Keene's App., 60 Penn. St. 506. But see Hartman's App., 90 id. 206, under a subsequent statute.

[2] Matter of Robinson, 37 N. Y. 261.

(*a*) Trustees who have disclaimed the trust need not be made parties to a proceeding to appoint a trustee. Brandon *v.* Carter, 119 Mo. 572. Nor is the creator of the trust a necessary party. De Peyster *v.* Beekman, 55 How. Pr. 90. And in jurisdiction where title vests in the court on the death of a sole trustee, no notice need be given to his personal representatives or heirs. *In re* Carpenter, 131 N. Y. 86. See also Sullivan *v.* Latimer, 35 S. C. 422.

A new appointment ought not to be made without notice to all the *cestuis*. Matter of Bartells, 96 N. Y. S. 579, 109 App. Div. 586; *In re* Earnshaw, 196 N. Y. 330. But see Kennard *v.* Bernard, 98 Md. 513; Offutt *v.* Jones, 110 Md. 233, 240. But a *cestui* who has assigned all his interest is not entitled to notice. Van Wyck *v.* Richman, 68 N. Y. S. 473. In some States statute provisions make a new appointment invalid where proper notice has not been given to all the *cestuis*. Simmons *v.* McKinlock, 98 Ga. 738, 745. See IV N. Y. Consol. Laws (1909), p. 3395, § 111; *In re* Earnshaw, 196 N. Y. 330; Butler *v.* Butler, 164 Ill. 171.

An adverse claimant to the land which is the subject of the trust is not entitled to be heard as to the appointment of a trustee of the land. White River Lumber Co. *v.* Clarke, 70 A. 247 (N. H. 1908).

Beneficiaries of several trusts established by the same will with the same trustee for all may unite in a proceeding for removal when they have common ground for relief. Gartside *v.* Gartside, 113 Mo. 348.

A trustee ought not to be removed by an *ex parte* proceeding without notice to him, and it has been held that an appointment of a new trustee after such a removal was invalid. Hitch *v.* Stonebraker, 125 Mo. 128.

instrument provides that notice of the proceedings for the appointment of new trustees shall be given to particular persons, the appointment will be irregular if the notice is not given.[1] The *cestui que trust* and those directly interested may of course originate the suit,[2] and those interested in remainder or reversion may begin proceedings.[3] (*a*) The trustees may bring the suit against the *cestui que trust;*[4] or one or more of several trustees may bring the suit against one or more of their co-trustees, joining the *cestui que trust* either as plaintiff or defendant.[5] In all public charities the Attorney General may begin proceedings by information or petition with or without a relator.[6] But where a settlor had conveyed property to a trustee for himself for life, and at his decease to his issue according to the statute of distributions, and in case of his dying without issue to his nephews, it was held that the trust was only an implied trust for the nephews; that they had no interest in the express trusts for the settlor for life; and that they

[1] Washington, &c. R. R. Co. *v.* Alexander, &c. R. R. Co., 19 Grat. 592.

[2] Bainbrigge *v.* Blair, 1 Beav. 495; Bennett *v.* Honywood, Amb. 708; Buchanan *v.* Hamilton, 5 Ves. 722; Portsmouth *v.* Fellows, 5 Madd. 450; Howard *v.* Rhodes, 1 Keen, 581; Millard *v.* Eyre, 2 Ves. Jr. 94; In Matter of Smith's Settlement, 2 De G. & Sm. 781; *Ex parte* Tunno, 1 Bail. Eq. 395.

[3] Finlay *v.* Howard, 2 Dr. & W. 490; Cooper *v.* Day, 1 Rich. Eq. 26; *Re* Livingston, 34 N. Y. 567; Joyce *v.* Gunnels, 2 Rich. Eq. 260; *Re* Sheppard, 1 N. R. 76, overruling same case, 10 W. R. 704; s. c. 2 De G., F. & J. 423. [Chappell *v.* Clarke, 94 Md. 178.]

[4] Coventry *v.* Coventry, 1 Keen, 758; Greenwood *v.* Wakeford, 1 Beav. 576.

[5] Lake *v.* De Lambert, 4 Ves. 592.

[6] Att. Gen. *v.* London, 3 Bro. Ch. 171; Att. Gen. *v.* Stephens, 3 M. & K. 347; Att. Gen. *v.* Clack, 1 Beav. 467; *Re* Bedford Charity, 2 Swanst. 520; Wilson *v.* Wilson, 2 Keen, 251; *Re* Fowey's Charities, 4 Beav. 225. [*Infra*, § 732, note.]

(*a*) But it has been held that contingent remainder-men are not necessary parties in a proceeding for the appointment of a new trustee. Whallen *v.* Kellner, 104 S. W. 1018 (Ky. 1907). See also Dexter *v.* Cotting, 149 Mass. 92; Matter of Earnshaw, 196 N. Y. 330; Offutt *v.* Jones, 110 Md. 233, 240.

could not maintain a petition for the removal of the trustee.[1] And where a *cestui que trust* drew an order on the trustees in favor of her children, it was held that this did not give the children such an interest in the funds that they were parties to proceedings for the appointment of new trustees.[2] If a trustee retires, allowing a new trustee to be appointed, without communication with the *cestui que trust*, and a suit is instituted complaining of such appointment, but seeking no relief against such retiring trustee, he is not a necessary party.[3] And if a trustee transfers the property to a new trustee appointed by order of court, he will be bound by the proceedings, though they were irregular and without notice to him.[4] If some of the *cestuis que trust* are minors, they ought to have a guardian *ad litem*, but a new trustee may be appointed.[5] The proceedings ought to be in a court having jurisdiction of the original trust.[6]

§ 283. If all the parties are *sui juris*, and consent to the appointment of the new trustee, the court will at once make the appointment, and direct the conveyances to be made.[7] But generally it will be referred to a master to report a proper person to be appointed.[8] Upon the coming in of the master's report, exceptions may be taken to it in the usual manner; but the exceptions must be to the unfitness of the person recommended,[9] and not that some other one is more fit.[10]

[1] *In re* Livingston, 34 N. Y. 555; *Ex parte* Brown, Coop. 295. [See Dexter *v.* Cotting, 149 Mass. 92.]

[2] Hawley *v.* Ross, 7 Paige, 103.

[3] Marshall *v.* Sladden, 7 Hare, 427.

[4] Thomas *v.* Higham, 1 Bail. Eq. 222.

[5] Hunter *v.* Gibson, 16 Sim. 158.

[6] Howard *v.* Gilbert, 39 Ala. 72. [But see Jones *v.* Jones, 30 N. Y. S. 177, 187.]

[7] O'Keeffe *v.* Calthorpe, 1 Atk. 18; Young *v.* Young, 4 Cranch, C. C. 499.

[8] Howard *v.* Rhodes, 1 Keen, 581; Buchanan *v.* Hamilton, 5 Ves. 722; Att. Gen. *v.* Stephens, 3 M. & K. 352; Millard *v.* Eyre, 2 Ves. Jr. 94; Seton's Decrees, 249; Matter of Stuyvesant, 3 Edw. Ch. 229; —— *v.* Roberts, 1 J. & W. 251; Att. Gen. *v.* Clack, 1 Beav. 474; Att. Gen. *v.* Arran, 1 J. & W. 229.

[9] Att. Gen. *v.* Dyson, 2 S. & S. 528.

[10] Ibid.

§ 284. The appointment of a new trustee is not complete until the property is vested in him; therefore the court usually embraces, in the decree appointing a new trustee, a direction for a proper conveyance to be executed to him alone, or to him jointly with the continuing or remaining trustees, by all the requisite parties, whether remaining trustees, or heirs or representatives of the last survivor, or trustees who have been removed from office.[1] If the old trustee refuses to deliver the property to the new incumbent, the former and his bondsmen are liable.[2] In some States it is provided by statute, that, upon qualification by the newly appointed trustee, the trust estate shall vest in him in like manner as it had or would have vested in the trustee in whose place he is substituted.[3] It has been determined that no conveyance is necessary where such statutes are in force, but that the trust estate vests immediately upon the appointment, by virtue of the statute, with all the powers and duties essential to the purposes of the trust.[4] And so if the instrument of trust provides for the vesting of the estate in the remaining, surviving, or new trustees, upon the removal, resignation, death, and appointment of others, the trust estate will vest according to the provisions of the instrument, as the creator of the trust may mould it at his pleasure.[5] It has already been seen that, if one of the trustees disclaims without having acted or accepted the trust, the estate vests in the acting trustees; and if a sole trustee disclaims before acting, the estate

[1] O'Keeffe *v.* Calthorpe, 1 Atk. 18.

[2] Bassett *v.* Granger, 136 Mass. 174; McKim *v.* Doane, 137 Mass. 195;

[3] Mass. Public Stat.; Trustees Act, 1850, 12 & 13 Vict. c. 74, §§ 33–36. Stearly's App., 3 Grant, 270. See Golder *v.* Bressler, 105 Ill. 419. [Coster *v.* Coster, 109 N. Y. S. 798, 125 App. Div. 516; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238. See Mass. Rev. Laws, c. 147, § 6; Conn. Gen. Stat. (1902) § 250.]

[4] Parker *v.* Converse, 5 Gray, 341; *Re* Fisher's Will, 1 W. R. 505; Smith *v.* Smith, 3 Dr. 72; Woolridge *v.* Planters' Bank, 1 Sneed, 297; Goss *v.* Singleton, 2 Head, 67; Gibbs *v.* Marsh, 2 Met. 243, 253; Duffy *v.* Calvert, 6 Gill, 487; Burdick *v.* Goddard, 11 R. I. 516. [See 1 Ames' Cases on Trusts, (2d ed.) 249; McCann *v.* Randall, 147 Mass. 81.]

[5] Ellis *v.* Boston, Hartford, & Erie R. R., 107 Mass. 13; National Webster Bank *v.* Eldridge, 115 Mass. 424.

vests in the heirs-at-law subject to the trust.[1] So where a vacancy results from the incapacity of the trustee, or upon his removal from the jurisdiction of the court, the want of power to compel a conveyance, *and the necessity of the case*, require the court to recognize the power of the remaining trustee to convey to his new cotrustee without a conveyance from the retiring or removed trustee.[2] In trusts, that do not come within the words or the spirit of the statute in relation to the vesting of trust estates in new appointees, and in cases where the trust instrument is silent concerning the vesting of the estate in new trustees, and *there is no necessity* for a departure from the ordinary rule of a conveyance, a conveyance must be made to the new trustee, in order to vest the estate in him.[3] When the removed trustee fails to obey an order of court for the delivery of the trust property to the new trustee, the latter may sue on the bond of the former trustee for damages.[4] The acceptance by the new trustee of a statement found among the papers of a deceased trustee showing his receipts and disbursements on account of the trust estate may amount to an accounting between the old and new trustees.[5] (*a*)

§ 285. A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even

[1] *Ante*, § 273.

[2] Cape *v.* Bent, 2 Jur. 653; O'Reiley *v.* Alderson, 8 Hare, 101; Mennard *v.* Wilford, 1 Sm. & Gif. 426; Eaton *v.* Smith, 2 Beav. 236; Cooke *v.* Crawford, 13 Sim. 91; *In re* Moravian Soc., 26 Beav. 101.

[3] Folley *v.* Wontner, 2 Jac. & W. 24; Owen *v.* Owen, 1 Atk. 496; Foster *v.* Goree, 4 Ala. 440; Crosby *v.* Huston, 1 Tex. 203; Miller *v.* Priddon, 1 De G., M. & G. 339. [See Hughes *v.* Brown, 88 Tenn. 578; Zimmerman *v.* Makepeace, 152 Ind. 199.]

[4] Phillips *v.* Ross, 36 Ohio St. 458.

[5] Gorsuch *v.* Briscoe, 56 Md. 573.

(*a*) New trustees are not affected with notice of incumbrances on the trust estate not disclosed in the trust documents, or by the retiring trustee who knew thereof. Hallows *v.* Lloyd, 39 Ch. D. 686. In New York it seems that the appointment of a new trustee does not preclude an administrator from denying the existence of the trust as created by his decedent. *Re* Carpenter, 131 N. Y. 86.

if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power. Thus, no *cestui que trust* who concurs in a breach of trust can afterwards call the trustee to an account for the disastrous consequences;[1] therefore, if a trustee conveys the trust estate to another person, and appoints such other person trustee, and all the *cestuis que trust* execute the conveyances, or otherwise consent to the transaction, they would be forever precluded from holding the retiring trustee responsible for any delegation of his office, or for any loss that occurred afterwards.[2] But the trustee must see to it that all the *cestuis que trust* are parties to the transaction and concur; for, even in the case of a large number of creditors, each individual must act for himself, or he is not estopped, and the consent of a majority cannot affect the rights of one who did not concur.[3] The trustee must also see to it that all the *cestuis que trust* are *sui juris*, and not married women, infants, or other persons incapable of acting, or of no legal capacity to consent. For if there are such *cestuis que trust*, there can be no discharge and substitution of trustees without the sanction of the court, in the absence of a power in the instrument of trust;[4] or if there may be parties in interest not yet in existence, as if the trust is for children not yet born, there can be no change of trustees by consent. But a *married woman* is considered *sui juris* in respect to her sole and separate estate, where there is no restraint against anticipation or alienation.[5]

§ 286. If there are two or more trustees named in an instrument of trust with power to appoint successors, and they all retire at the same time, they ought not to appoint a single trustee *only* in the place of two or more.[6] In such a case the

[1] Wilkinson *v.* Parry, 4 Russ. 276. [2] Ibid.

[3] Colebrook's Case, cited *Ex parte* Hughes, 6 Ves. 622; *Ex parte* Lacy, id. 628–630, n.

[4] Cruger *v.* Halliday, 11 Paige, 314.

[5] Hulme *v.* Hulme, 1 Bro. Ch. 20; Lewin on Trusts, 540, 541 (5th ed.).

[6] Hulme *v.* Hulme, 2 M. & K. 682; Mass. Gen. Hospital *v.* Amory, 12 Pick. 445.

settlor has fixed the number which he thinks necessary for the proper administration and safety of the trust fund; and if a single trustee is appointed and wishes to retire, he ought not to appoint a plurality of trustees, for in such a case he ought not to increase the machinery and expense of the trust contrary to the settlor's intention.[1] But the power may be so drawn that several may be put in place of one, or one in the place of several. Thus where a testator appointed two trustees, and the surviving or continuing trustee or trustees were authorized to appoint one or more persons to be trustee or trustees, in the room of the trustee or trustees so dying, etc., the surviving trustee appointed two new trustees, and the appointment was held by the court to be authorized.[2] So, three trustees have been appointed in place of two,[3] and three have been authorized in place of four,[4] and two in place of one,[5] and four in place of five.[6] In another case, one trustee was appointed by the court in place of two.[7] (*a*) And if a successor cannot be found

[1] Rex *v.* Lexdale, 1 Burr. 448; *Ex parte* Davis, 2 Y. & C. Ch. Ca. 468; 3 Mont. D. & De G. 304.

[2] D'Almaine *v.* Anderson, Lewin on Trusts, 468 (5th ed.); Hill on Trustees, 182.

[3] Meinertzhagen *v.* Davis, 1 Col. C. C. 335.

[4] Emmet *v.* Clarke, 3 Gif. 32.

[5] Hillman *v.* Westwood, 3 Eq. R. 142.

[6] Corrie *v.* Byrom, Lewin on Trusts, 468 (5th ed.); Hill on Trustees, 181.

[7] Greene *v.* Borland, 4 Met. 330. In this case the appointment was assented to by all parties, and great stress was laid upon that fact. The court might also have said that the proceedings were in a collateral matter, and that, as long as the appointment by a court having jurisdiction stood unreversed, its validity could not be tried in another and distinct proceeding. The case of Greene *v.* Borland is not necessarily inconsistent with Mass. Gen. Hospital *v.* Amory, 12 Pick. 445, decided by the same court. Dixon *v.* Homer, 12 Cush. 41; Att. Gen. *v.* Barbour, 121 Mass. 568; Hammond *v.* Granger, 128 Mass. 272.

(*a*) When one of several cotrustees dies or resigns or is removed, it does not necessarily follow that the court will appoint a new trustee to fill his place. Mallory *v.* Mallory, 72 Conn. 494; Fatjo *v.* Swasey, 111 Cal. 628. *In re* Chetwynd's Settlement, [1902] 1 Ch. 692; *In re* Lees' Settlement, [1896] 2 Ch. 508. There seems to be no rule one way or the other, but the court will be guided by the apparent wishes of the crea-

to a retiring trustee, the court may appoint the continuing trustees to be sole trustee or trustees.[1] Where real estate is given in trust to several persons and to the survivors or survivor, if some decline to act the others have the whole legal estate and all the powers of the trust.[2]

§ 287. The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust.[3] It follows, that a power

[1] *In re* Stokes Trusts, L. R. 13 Eq. 333.

[2] Long *v.* Long, 62 Md. 33; see § 414; Shockley *v.* Fisher, 75 Mo. 498.

[3] Selden *v.* Vermilyea, 3 Comst. 336; Wilkinson *v.* Parry, 4 Russ. 272; Adams *v.* Paynter, 1 Coll. 532; Chalmers *v.* Bradley, 1 J. & W. 68; Swarez *v.* Pumpelly, 2 Sandf. Ch. 336; Wilson *v.* Towle, 36 N. H. 129; Bayley *v.* Mansell, 4 Madd. 226; Winthrop *v.* Att. Gen., 128 Mass. 258.

tor of the trust, and more especially by consideration of what is best for the trust. Where it is apparent that the creator of the trust intended that there should always be a certain number of trustees, the court will usually appoint a new cotrustee, especially if the *cestuis* wish it. Tarrant *v.* Backus, 63 Conn. 277; Griswold *v.* Sackett, 21 R. I. 206. See also Force *v.* Force, 57 A. 973 (N. J. Eq. 1904). But see Mullanny *v.* Nangle, 212 Ill. 247; La Forge *v.* Binns, 125 Ill. App. 527.

If the creator has clearly stipulated that the original number of trustees shall be maintained, the court which has jurisdiction to appoint new trustees would doubtless fulfill his wishes unless circumstances have so changed that the interests of the trust clearly require a reduction of the original number. In Barker *v.* Barker, 73 N. H. 353, 1 L. R. A. (N. S.) 802, the court reduced the number of trustees by removals upon a showing that conditions had so changed that the administration of the trust required the change. The rule is stated as follows: "While a court of equity is reluctant to change the number of trustees from that designated by the creator of the trust, yet it seems to be in accordance with reason and authority that it may do so when, by reason of changed conditions in the estate, the number designated by the creator has become excessive or insufficient, and it is necessary to reduce or increase the number in order to effectuate the execution of the trust." See also note in 1 L. R. A. (N. S.) 802.

Under the English Trustee's Act of 1893, the court has power to increase the original number of trustees and to appoint a separate set of trustees for any property held on a trust distinct from the trusts relating to other property. See also Judicial Trustees Act, 1896 (59 and 60 Vict. c. 35); Douglas *v.* Bolam, [1900] 2 Ch. 749.

to appoint new trustees can seldom or never exist, except in express trusts created by deed or will. The person who creates the trust may mould it into whatever form he pleases: he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power; and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuance of the trust.[1] (*a*) And vacancies cannot be filled in any other way than that named by the grantor, unless in consequence of a statutory provision, or of a failure on the part of the remaining trustees to perform the duty of filling the vacancy, in which case equity will interfere.[2] (*b*) The power to

[1] Whelan *v.* Reilly, 3 W. Va. 597. The testator may authorize the trustee appointed by him to appoint his successor by will. Abbott, Pet'r, 55 Me. 580. While the settlor may make such provision as he may think best for filling vacancies, as a general proposition, yet it has been held that a power reserved to an assignor in a deed of trust for creditors, to appoint new trustees to fill vacancies occurring in the board, was void as interfering with the rights of creditors Planck *v.* Schermerhorn, 3 Barb. Ch. 644; Robins *v.* Embry, 1 Sm. & M. Ch. 207.

[2] Golder *v.* Bressler, 105 Ill. 419.

(*a*) The creator of the trust may give the power of appointing new trustees to the *cestuis* or to part of them. March *v.* Romare, 116 Fed. 355; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238. But apart from statute provisions the *cestuis* have no power to appoint new trustees, unless the trust instrument provides that they shall have such power. Whitehead *v.* Whitehead, 142 Ala. 163; Grundy *v.* Drye, 104 Ky. 825.

In England, statutes give the power of filling vacancies to surviving or continuing trustees or to personal representatives of the last surviving or continuing trustee unless the trust instrument makes a different provision. Trustee Act, 1893, § 10.

A power given to beneficiaries or to other persons to appoint a trustee does not relieve their appointee from the statutory requirement of giving a bond, and the appointors have no power to dispense with the bond. Butler *v.* Taggart's Trustee, 86 S. W. 541 (Ky. 1905).

(*b*) Where the trust instrument gives the power to appoint new trustees to two beneficiaries acting jointly, and joint action is impossible because of irreconcilable differences, the court will appoint on application of one with notice to the other. Cone *v.* Cone, 61 S. C. 512. To the same

appoint new trustees in place of the original ones can only be given by the author and creator of the trust. For, in cases where courts are called upon to appoint trustees, authority to appoint successors will not be given, but recourse must be had to the courts *toties quoties*.[1] There is, however, an exception to this rule in case of charitable trusts; for, in such cases, to save costs, and for convenience, courts of equity will not only appoint new trustees to fill vacancies, but they will sanction a scheme for the administration of the charity, which provides for the appointment and succession of trustees without a continual recourse to legal proceedings.[2]

§ 288. Every well-drawn instrument, creating trusts intended to continue for any considerable time, should contain authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resignation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts. In framing these powers, great care should be taken to provide for every possible contingency in which a resignation or new appointment may become convenient or necessary. The power should clearly express the cases in which new trustees may be appointed, and embrace every event which can render such an appointment necessary or desirable, as the death of all, any one, or more of

[1] Wilson *v.* Towle, 36 N. H. 129; Oglander *v.* Oglander, 2 De G. & Sm. 381; Holder *v.* Durbin, 11 Beav. 594; Bowles *v.* Weeks, 14 Sim. 591; Bayley *v.* Mansell, 4 Madd. 226; Southwell *v.* Ward, Taml. 314. A different practice was followed in Joyce *v.* Joyce, 2 Moll. 276; Sampayo *v.* Gould, 12 Sim. 426, and White *v.* White, 5 Beav. 221; but these cases are not authorities now. See Brown *v.* Brown, 3 Y. & C. 395.

[2] Att. Gen. *v.* Winchelsea, 3 Bro. Ch. 373; Att. Gen. *v.* Shore, 1 M. & Cr. 394; 12 Sim. 426.

effect see Griswold *v.* Sackett, 21 R. I. 206. But where it was provided that the court should appoint "subject to the approval of parties interested," the court had no power to appoint a person objected to by one beneficiary, where there was nothing to show that the *cestuis* could not agree upon some other proper person. Cole *v.* Watertown, 119 Wis. 133.

the original or substituted trustees, their absence from the country or State, their wish to resign, their original refusal to accept, and their future incapacity or unfitness to discharge the duties; the instrument should also point out clearly and by whom and in what manner the new appointments are to be made. Such provisions are extremely convenient, and save much perplexity, expense, and trouble; and where a settlement is to be drawn up under articles, by the direction of the court, it will order such provisions to be inserted as are *just and reasonable*.[1] Where it is necessary to act under the powers thus given

[1] Lindow *v.* Fleetwood, 6 Sim. 152; Brewster *v.* Angell, 1 J. & W. 628; Sampayo *v.* Gould, 12 Sim. 426; Belmont *v.* O'Brien, 2 Kern. 394. The following form is approved by both Mr. Lewin and Mr. Hill as a proper power for the appointment of new trustees: —

"Provided always, and it is hereby further declared, that if the trustees hereby appointed, or any of them, or any future trustees or trustee hereof, shall die (either before or after their or his acceptance of the trusts thereof), go to reside abroad, desire to be discharged from, renounce, decline, or become incapable or unfit to act in the trusts of these presents, while the same trusts or any of them shall be subsisting, then, and in every or any such cases, and so often as the same shall happen, it shall be lawful for the said (*the cestuis que trust* [*if any*] *for life*), or the survivors of them, by any writing or writings, under their, his, or her hands or hand, attested by two or more witnesses, and after the decease of such survivor, then for the surviving or continuing trustees or trustee hereof, or the executors or administrators of the then last acting trustee (whether such surviving trustees or trustee, or executors or administrators, respectively, shall be willing to act in other respects or not), by any writing or writings, under their or his hands or hand, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees hereof in the place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining, or becoming incapable or unfit to act as aforesaid. And that, so often as any new trustee or trustees hereof shall be appointed as aforesaid, all the hereditaments, &c., which shall, for the time being, be holden upon the trusts hereof, shall be thereupon conveyed, assigned, and transferred respectively, in such manner that the same may become legally and effectually vested in the acting trustees hereof for the time being, to and for the same uses, and upon the same trusts, and with and subject to the same powers and provisions as are herein declared, and contained of and concerning the same hereditaments and premises respectively, or such of the same uses, trusts, powers, and provisions as shall then be subsisting or incapable of taking effect.

"And that every new trustee, to be from time to time appointed as

in the instrument of trust, it is of the utmost consequence that there should be an exact compliance with the power and authority as given. For if the circumstances do not justify or demand a new appointment, as contemplated in the instrument of trust, or if there is any irregularity as to the persons by whom the new appointment is made, or as to the manner in which it is made, the retiring trustee will still be liable for any breaches of trust which may be committed, and the new trustee will be incapable of exercising any legal authority over the trust property, and will be a trustee only *de son tort*, if he interfere; and any purchaser of the trust property may find his title utterly worthless.[1] (*a*) The retiring trustee should be careful not to part with the control of the fund before the new trustee has been actually appointed and qualified; for if he transfer it into the name of the intended trustee, and by some accident the appointment is not completed, the old trustee still remains answerable for the fund.[2]

§ 289. These powers of appointing successors are frequently matters of *personal* confidence reposed in the trustees appointed by the settlor, and they are always matters of general trust and confidence to be strictly executed. The court will not prevent the exercise of discretion given for appointment, but will see that it is used to subserve the purposes of its creation.[3] Being powers given to third persons over the property of others, they

aforesaid, shall henceforth be competent in all things to act in the execution of the trusts hereof, as fully and effectually, and with all the same powers and authorities to all purposes whatsoever, as if he had hereby been originally appointed a trustee in the place of the trustee to whom he shall, whether immediately or otherwise, succeed."

[1] Adams *v.* Paynter, 1 Col. 532; Walker *v.* Brungard, 13 Sm. & M. 723.

[2] Pearce *v.* Pearce, 22 Beav. 248.

[3] Bailey *v.* Bailey, 2 Del. Ch. 95.

(*a*) Thus where the trust instrument provided that the beneficiaries might in case of vacancy appoint a new trustee "under their hand and seal," an appointment not under seal is ineffective. Sharpley *v.* Plant, 79 Miss. 175.

are construed with great strictness, and a great variety of decisions have been made upon the various forms in which the power has been expressed. Questions have arisen: (1) As to the time, occasion, or event when a new appointment may be made; (2) As to the person or persons by whom the appointment may be made; (3) As to the persons who may be appointed; (4) As to the number of persons who may be appointed; (5) As to the manner of making the new appointment.

§ 290. It should always be carefully considered whether the circumstances or events are such as the settlor intended for the retirement of one or more of the trustees appointed by him, and the substitution of new trustees; thus in a case where the power provided that, "in case either of the trustees, the said A. and B., shall happen to die, or desire to be discharged from, or neglect or refuse or become incapable to act in the trust, it shall be lawful for the survivor or survivors of the trustees so acting, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee," *both* the trustees declining to act, they executed a conveyance to two other persons, as an appointment of them as new trustees under the power; and it was held that the power was not well executed, that the word "survivor" referred to the trustee "continuing to act," that it was the intention of the testator that in case of the death, refusal, or incapacity of *one* of his trustees, the remaining one who had been named by him, and who was the object of his confidence, should have the power of associating with himself some other person, and that the *event* of both declining at the same time was not provided for.[1] Where a settlement upon a chapel contained a power for the appointment of new trustees upon the desertion or removal of any existing trustee, Lord Eldon held that the case of a trustee, who left the trust on account of its being converted by the other trustees to purposes different and distinct from the intention of the settlor,

[1] Sharp *v.* Sharp, 2 B. & Ad. 404; Guion *v.* Pickett, 42 Miss. 77. [See *In re* Wheeler, [1896] 1 Ch. 315; *In re* Stamford, id. 288.]

was an event not provided for.[1] And so where *cestuis que trust* were to appoint a trustee upon the refusal or neglect of the others to act, it was held that they could not appoint upon the death of one of them.[2] But generally where the power to appoint new trustees is given to the *survivor* of several trustees, it may be legally exercised by the *continuing* trustee upon the resignation or refusal of the others to act.[3]

§ 291. In some earlier cases, it was held that where a power was given to the surviving trustee or trustees to appoint new trustees *in case of the death of either of their* cotrustees, it did not authorize an appointment to fill a vacancy caused by the death of trustees during the *lifetime* of the testator, upon the ground that persons dying in the lifetime of the testator had never *filled the character* of trustees so as to come within the terms of the power;[4] but these are overruled by the later cases, and it may be considered as settled that the surviving trustee or trustees may fill vacancies caused by the death of persons

[1] Att. Gen. *v.* Pearson, 3 Mer. 412. In Morris *v.* Preston, 7 Ves. 547, power was given to a husband and wife, or the survivor, with the *consent* of the *cotrustees* or *trustees*, to appoint any new trustee or trustees, and upon such appointment the surviving cotrustees should convey the estate, so that the surviving trustee or trustees, and the new trustee or trustees, might be jointly concerned in the trusts in the same manner as such surviving trustee and the person so dying would have been in case he were living. No new appointment was made till after the death of both the original trustees. The new appointees having made a sale, the purchaser objected to the title on the ground of the invalidity of their appointment under the power; but the objection was waived without argument. Mr. Sugden regrets that the opinion of the court was not taken. 2 Sugd. on Powers, 529. He has, however, never since acted on the doctrine. As where a similar power was given, to a tenant for life, of appointing new trustees, one trustee died and the other became bankrupt, and it was objected that the power of appointment was gone, Sir Edward Sugden ruled to the contrary. *Re* Roche, 1 Conn. & Laws, 306; 2 Dr. & War. 287.

[2] Guion *v.* Pickett, 42 Miss. 77.

[3] Sharp *v.* Sharp, 2 B. & Ad. 405; Eaton *v.* Smith, 2 Beav. 236; Travis *v.* Illingworth, 2 Dr. & Sm. 344; Cooke *v.* Crawford, 13 Sim. 91; Hawkins *v.* Kemp, 3 East, 410.

[4] Walsh *v.* Gladstone, 14 Sim. 5; Winter *v.* Rudge, 15 Sim. 576.

nominated by the testator, whether they die in his lifetime or afterwards.[1] So if the continuing trustee or trustees are to appoint upon the *refusing* or *declining* of any of the original trustees, they may appoint upon the *disclaimer* of any one or more;[2] and so a payment of the trust fund into court, under an order or permission to that effect, is a *refusing* or *declining* by the trustee that authorizes the exercise of the power.[3]

§ 292. If the settlement provides that a new appointment may be made on either of the trustees becoming *unfit*, the power may be exercised if one of them becomes *bankrupt;*[4] but if the word is "incapable" without the word "unfit," a new appointment cannot be made, for the word "incapable" means personal incapacity and not pecuniary embarrassment,[5] and a bankrupt who had some time before obtained a first-class certificate of discharge was not regarded as coming within the term "unfit."[6] But where a trustee of property in London had been domiciled in New York for twenty years, he was declared *incapable* without the meaning of the word.[7] Where a power

[1] Lonsdale *v.* Beckett, 4 De G. & Sm. 73; *In re* Hadley's Trust, 5 De G. & Sm. 67; 9 Eng. L. & Eq. 67; Noble *v.* Meymott, 14 Beav. 477.

[2] *Re* Roche, 1 Conn. & Laws, 306; Walsh *v.* Gladstone, 14 Sim. 2; Mitchell *v.* Nixon, 1 Ir. Eq. 155; Cook *v.* Ingoldsby, 2 Ir. Eq. 375; Travis *v.* Illingworth, 2 Dr. & Sm. 344.

[3] *Re* William's Settlement, 4 K. & J. 87.

[4] *In re* Roche, 1 Conn. & Laws. 308; 2 Dr. & War. 287.

[5] *Re* Watt's Settlement, 9 Hare, 106; Turner *v.* Maule, 5 Eng. L. & Eq. 222; 15 Jur. 761. *In re* Bignold's Settlement, L. R. 7 Ch. 223; *Re* Blanchard, 3 De G., F. & J. 131. A statute in New York provides that administration, &c., shall not be granted to any person who shall be judged *incompetent* by the surrogate to execute the duties of the trust by reason of drunkenness, *improvidence*, or want of understanding. Under this statute it was held that mere *moral turpitude* does not *per se* disqualify, but that professional gambling was such evidence of *improvidence* as *prima facie* to disqualify. Coope *v.* Lowerre, 1 Barb. Ch. 45; McMahon *v.* Harrison, 2 Seld. 443.

[6] *Re* Bridgman, 1 Dr. & Sm. 164.

[7] Mennard *v.* Welford, 1 Sm. & Gif. 426. The opposite doctrine was previously held in Withington *v.* Withington, 16 Sim. 104; O'Reilly *v.* Alderson, 8 Hare, 101.

declared that, "if the trustees were not deemed *suitable* and *sufficient* to act as trustees by the *cestui que trust*, he might remove them, it was held to be a matter of discretion in the beneficiary to remove the trustees or not." [1]

§ 293. Where a suit is already pending in court for the administration of the trust, the donees of the power to appoint cannot exercise it without first obtaining the court's approval of the person proposed.[2] When it is desired to change the trustees during the pendency of the suit, a motion must be made, and such motion is referred to a master to report upon the person proposed. The master is to regard the power of appointment; but he is not bound to approve the proposed person.[3] If an appointment is made, however, by old trustees, it is not contempt, nor is it altogether void; but it puts the burden upon those making the appointment of proving, by the strictest evidence, that it was just and proper. If they fail in such proof, the act will be declared null and void.[4] So if the trustee or other person having power to appoint a new trustee is a lunatic, the court must appoint.[5]

§ 294. It will at once be seen that the power of appointing other trustees can be exercised only by those to whom it is expressly given. Therefore, if the power is not given to any one, new trustees can be appointed only by the court,[6] except where, as in England, statutory provisions may change this

[1] Walker *v.* Brungard, 13 Sm. & Mar. 758.

[2] Millard *v.* Eyre, 2 Ves. Jr. 94; Webb *v.* Shaftesbury, 7 Ves. 480; Peatfield *v.* Benn, 17 Beav. 552; Kennedy *v.* Turnley, 6 Ir. Eq. 399; Att. Gen. *v.* Clack, 1 Beav. 467; Middleton *v.* Reay, 7 Hare, 106; —— *v.* Roberts, 1 J. & W. 251.

[3] Webb *v.* Shaftesbury, 7 Ves. 487; Middleton *v.* Reay, 7 Hare, 106.

[4] Cape *v.* Bent, 3 Hare, 249; Att. Gen. *v.* Clack, 1 Beav. 467; Baker *v.* Lee, 8 H. L. Ca. 495.

[5] *In re* Sparrow, 1 L. R. 5 Ch. 662; *In re* White, L. R. 5 Ch. 698; *In re* Cuming, id. 72; *In re* Heaphy, 18 W. R. 1070; *In re* Nicholl, id. 416.

[6] Wilson *v.* Towle, 36 N. H. 129; Pierce *v.* Weaver, 65 Tex. 44, citing the text.

rule.[1] So if the power be given to particular persons by name, without saying more, or adding words of survivorship, it must be exercised jointly, and upon the death of one of them the power will be gone.[2] But if a power be given to a class consisting of several persons, as to "my trustees," "my sons," or "my brothers," and not to individuals by their proper names, the authority will exist in the class, so long as the plural number remains, although it may have been reduced in number by the death or resignation of some;[3] and where a power is given to "my executors" as a class, it may be exercised by a single surviving executor.[4] A power to be exercised by the survivor of two persons cannot be executed by the one dying first,[5] nor even by the two acting together during the lives of both.[6] So a power given to the surviving or continuing trustee to appoint a cotrustee, if *either* of the two decline to act, does not authorize an appointment if *both* decline.[7] So the power of appointment cannot be executed by *heirs*, *personal representatives*, or *assigns* of any trustee, unless the authority is expressly given in the instrument of trust.[8] In these, as in all other cases, the authority will be strictly confined to those persons who answer the precise description. Thus a power given to a trustee, his *heirs*, *executors*, or *administrators*, cannot be executed by a *devisee* or *assignee* of the trustee.[9] It is, however, well estab-

[1] Act 44 and 45 Vict. c. 41, [Trustee Act 1893, § 10.]

[2] Co. Litt. 113 a; 1 Sugd. Pow. 141.

[3] Gartland *v.* Mayott, 2 Vern. 105; Eq. Cas. Ab. 202; 2 Freem. 105; Dyer 177 a; Co. Litt. 112 b; Byam *v.* Byam, 10 Beav. 58; Belmont *v.* O'Brien, 2 Kern. 394; 1 Sugd. Pow. 144; McKim *v.* Handy, 4 Md. Ch. 230.

[4] 1 Sugd. Pow. 244; Davoue *v.* Fanning, 2 Johns. Ch. 252.

[5] Bishop of Oxford *v.* Leighton, 2 Vern. 376.

[6] McAdam *v.* Logan, 3 Bro. Ch. 320.

[7] Sharp *v.* Sharp, 2 B. & Ad. 405.

[8] Bradford *v.* Belfield, 2 Sim. 264; Eaton *v.* Smith, 2 Beav. 236; Davoue *v.* Fanning, 2 Johns. Ch. 252; Titley *v.* Wolstenholme, 7 Beav. 424; Granville *v.* McNeale, 7 Hare, 156; Hall *v.* May, 3 Kay & J. 585; Cooke *v.* Crawford, 13 Sim. 91.

[9] Bradford *v.* Belfield, 2 Sim. 264; Cole *v.* Wade, 16 Ves. 47; Cape *v.* Bent, 3 Hare, 245; Ackleston *v.* Heap, 1 De G. & Sm. 640; McKim *v.* Handy, 4 Md. Ch. 230; Mortimer *v.* Ireland, 6 Hare, 196.

lished, that a power given to a *surviving* trustee may be executed by a *continuing* or *acting* trustee, although a cotrustee who disclaimed is still living.[1]

§ 295. The number of parties undertaking to execute a power must come within the exact description given of the number of those who are to execute it; thus, if a power is given to be exercised by a certain specified number, or when they are reduced to a certain number, it cannot be exercised by a less number, and is gone if not exercised before the number is reduced below the number which is named for its execution.[2] But the power may be executed before the trustees are reduced to the lowest number specified, as where a conveyance to twenty-five trustees for a chapel directed that when, by death or otherwise, the number should be reduced to fifteen, a majority of those remaining should make up the number to twenty-five. The number was reduced to seventeen; and twelve, the others dissenting, elected eight new trustees, and it was held a good appointment under the power.[3]

§ 296. A married woman may exercise the power of appointing new trustees, if such power is expressly given to her, as she may exercise any other power given to her in an instrument of trust;[4] and she may appoint her husband trustee;[5] but an infant cannot exercise such power unless it is simply collateral.[6] The power may be given to a firm, their agents and assigns,[7] but not to a *court* that has no authority by law to act in the appointment of trustees. A grantor cannot confer new powers on a court though it may on the judge as an individual.[8] But

[1] Lane *v.* Debenham, 11 Hare, 188; Eaton *v.* Smith, 2 Beav. 236; Sharp *v.* Sharp, 2 B. & A. 405.
[2] Att. Gen. *v.* Floyer, 2 Vern. 748; Att. Gen. *v.* Litchfield, 5 Ves. 825.
[3] Dupleix *v.* Roe, 1 Anst. 86.
[4] *Ante*, § 49.
[5] Tweedy *v.* Urquhart, 30 Ga. 446.
[6] *Ante*, § 52.
[7] Leggett *v.* Grimmett, 36 Ark. 498.
[8] Leman *v.* Sherman, 117 Ill. 657; 18 Brad. (Ill.) 368.

if the court is one that by law may act in the appointment of trustees, the selection of the grantor will be effective.[1]

§ 297. The appointment may be by parol unless the power otherwise provides.[2] Where the appointment of new trustees is given to the discretion of the acting trustees, courts of equity will not interfere to control the exercise of the discretion if the old trustees act in *good faith*,[3] and if the administration of the trust is not already in the hands of or before the court by a pending suit.[4] Thus the old trustees in a case for the exercise of their discretion may appoint any suitable person. The inquiry in such cases is not whether the person proposed is the *most* suitable, but whether he is suitable.[5] It is generally the duty, however, of trustees to appoint new trustees, who are agreeable to the *cestuis que trust*, and who would administer the fund for their interest; to this end it is generally the duty of the

[1] Morrison *v.* Kelly, 22 Ill. 610.

[2] Leggett *v.* Grimmett, 36 Ark. 498.

[3] Bowditch *v.* Bannelos, 1 Gray, 220; Hodgson's Settlement, 9 Hare, 118. [See also March *v.* Romare, 116 Fed. 355; Reichert *v.* Mo. & Ill. Coal Co., 231 Ill. 238.] In Bowditch *v.* Bannelos, above cited, Ch. J. Shaw said: "But when we say that she (the *cestui que trust*) had power at her pleasure to appoint, we do not mean to say that this was an arbitrary power to appoint a person unfit or unsuitable to execute such a trust, as a minor, an idiot, a pauper, or person incapable of performing the duties. It must be a person of full age, sufficient mental and legal capacity, and in all respects capable of performing the required duties. In case of trust property of real and personal estate, we are not prepared to say whether an alien, not naturalized, and not capable by law to hold real estate, would or would not be a suitable or legal appointment. We think the power was not exhausted by the appointment of the first substitute, but that the same power existed, on every resignation, to appoint a new trustee, pursuant to the original trusts; but that this power, by necessary implication, was limited to the appointment of a person legally capable of executing it." Whether the nomination of her husband, on account of the conjugal relation, would have been incompatible with the scope of the whole instrument, and would be a valid objection, or whether the fact that another appointee was a foreigner having no domicile in the United States, an alien not naturalized, would be a valid objection, the court did not decide, because the nominations were withdrawn.

[4] *Ante*, § 293.

[5] *Ante*, § 278.

trustees to consult the *cestuis que trust* as to the appointment.[1] And a new appointee ought to consult the *cestuis que trust* before accepting the office.[2] An appointment for the mere purpose of having a particular solicitor employed in the management of the trust ought not to be allowed.[3] Generally, the new trustees appointed under a power should be amenable to the jurisdiction of the court; but where the *cestuis que trust* resides abroad, it may be proper to appoint trustees in the same jurisdiction with the beneficiary.[4] Though if the court is called upon to exercise the power, it will not appoint trustees out of its jurisdiction.[5] (*a*) Nor is the appointment of one of the *cestuis que trust* proper, as each of the *cestui que trust* has a right to a *disinterested* and *impartial* trustee.[6] This rule probably only affects the parties to the trust; for if a *cestui que trust* should be appointed, and should sell the estate under a power of sale, the purchaser would be protected.[7] *Cestuis que trust* are not absolutely incapacitated to take the trusts, and courts themselves sometimes appoint them;[8] but it is not generally desirable. So, near relationship is not a disqualification; but it is almost always better to have a capable person not intimately connected with the *cestuis que trust.*[9] Nor should the

[1] O'Reilly *v.* Alderson, 8 Hare, 101; Marshall *v.* Sladden, 7 Hare, 428; Peatfield *v.* Benn, 17 Beav. 522; Nagle's Est., 52 Penn. St. 154.

[2] Ibid.

[3] Marshall *v.* Sladden, 7 Hare, 428.

[4] Meinertzhagen *v.* Davis, 1 Col. C. C. 335; *Ex parte* Tunno, 1 Bail. Eq. 395.

[5] Guibert's Trust, 13 Eng. L. & Eq. 372. But see *Ex parte* Tunno, 1 Bail. Eq. 395.

[6] Passingham *v.* Sherborne, 9 Beav. 424.

[7] Reid *v.* Reid, 30 Beav. 388.

[8] *Ex parte* Clutton, 17 Jur. 988; 21 Eng. L. & Eq. 186; *Ex parte* Conybeare's Settlement, 1 W. R. 458; Make *v.* Norrie, 21 Hun, (N. Y.) 128. [Robertson *v.* De Brulatour, 188 N. Y. 301; Woodbridge *v.* Bockes, 59 N. Y. App. Div. 503; Nellis *v.* Rickard, 133 Cal. 617. See *supra*, § 59.]

[9] Wilding *v.* Bolder, 21 Beav. 222, where the husband of a *cestui que*

(*a*) But there is no invariable rule against appointment of a non-resident. Dodge *v.* Dodge, 109 Md. 164. See also La Forge *v.* Binns, 125 Ill. App. 527.

donee of a power to appoint nominate himself, for trustees cannot even pay over the assets to one of their own number.[1] (*a*) It is said, however, that if a trust with power of appointment is committed to trustees and the survivor of them, his executors or administrators, and the trustees all die, the appointment is in the executor of the survivor; and, as the instrument of trust declares him to be a proper person to execute the trust, he may appoint himself under the power. Mr. Lewin, however, says that "the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors cannot dispense with the *discretion* to be applied afterwards." [2]

trust was appointed trustee, the court required him to undertake to apply for the appointment of a new trustee in case he became sole trustee, 18 W. R. 416; 21 L. T. (N. S.) 781.

[1] —— *v.* Walker, 5 Russ. 7; Stickney *v.* Sewell, 1 M. & C. 14; Westover *v.* Chapman, 1 Col. C. C. 177.

[2] Lewin on Trusts, 472 (5th Lond. ed.).

(*a*) It has been held in England that where power of appointing new trustees was vested in the executors of the last acting trustee, an appointment of one of their number to be one of three trustees was valid. Montefiore *v.* Guedalla, [1903] 2 Ch. 723. But an opinion has been expressed in other cases that such an appointment is improper, even if the terms of the power do not exclude the appointors. See *In re* Sampson, [1906] 1 Ch. 435; *In re* Skeats' Settlement, 42 Ch. Div. 522; *In re* Newen, [1894] 2 Ch. 297.

CHAPTER X.

NATURE, EXTENT, AND DURATION OF THE ESTATE TAKEN BY TRUSTEES.

§ 298. Where trustees take and hold no estate, although an express gift is made to them. Statute of uses.
§ 299. Effect of the statute of uses upon conveyancing in the several States.
§ 300. Effect of the statute in the rise of trusts.
§§ 301, 302. Rules of construction which give rise to trusts.
§ 303. The word "seized."
§ 304. The primary use must be in the trustee to raise a trust.
§§ 305, 306. Personal property not within the statute.
§§ 307, 308. Where the statute executes trusts as uses, and where it does not.
§ 309. Where a charge upon an estate will vest an estate in trustees, and where not.
§ 310. Where the trust is for the sole use of a married woman.
§ 311. Trusts of personalty are not executed by the statute.
§ 312. The statute only executes the exact estate given to the trustee; but the trustee may take an estate commensurate with the purposes of the trust where it is unexecuted by the statute. Rules.
§§ 313, 314. Courts may imply an estate in the trustee where none is given.
§§ 315, 316. May enlarge the estate of the trustee for the purposes of the trust.
§ 317. Illustrations, explanations, and modifications of the rule.
§§ 318, 319. Rule in respect to personal estate.
§ 320. Distinctions between deeds and wills in England and the United States.

§ 298. It may happen that although words of express trust are used in the grant or bequest of an estate to a trustee, yet no estate vests or remains in the trustee. This may be because only a *power* is given and no estate, as where a testator simply directs his executor to sell certain property and apply the proceeds to certain purposes instead of granting the property to the executor or trustee to sell, &c., or because the statute of

uses *executes* the legal estate at once in the *cestui que trust*.[1] Thus, if A. grants or bequeaths land to B. and his heirs, in trust for C. and his heirs, the trustee, B., will take nothing in the land, but the legal title, as well as the beneficial use, will vest immediately in C.;[2] for the statute of uses,[3] so called, executes the possession and the legal title in the same person to whom the beneficial interest is given. As stated in previous sections,[4] a large part of the land in England was at one time held to uses. The legal title was in one person, but upon the trust and confidence that such person would apply it to the use of some person named, or that such legal owner would permit some other person to have the possession, use, and income of the estate. This system, originating partly in fraud of the law, and partly in the necessities and convenience of the subject, became at last the source of great abuses. To remedy these abuses, the statute of uses was enacted.[5] This statute executes the use by

[1] West *v.* Fitz, 109 Ill. 425.

[2] Austin *v.* Taylor, 1 Eden, 361; Williams *v.* Walters, 14 M. & W. 166; Robinson *v.* Grey, 9 East, 1; Chapman *v.* Blissett, Cas. t. Talbot, 150; Broughton *v.* Langley, 2 Salk. 150; 2 Ld. Raym. 873; Thatcher *v.* Omans, 3 Pick. 521; Upham *v.* Varney, 15 N. H. 466; Kinch *v.* Ward, 2 Sim. & St. 409, and see Doe *v.* Biggs, 2 Taunt. 109; Shapland *v.* Smith, 1 Bro. Ch. 75, and notes; Boyer *v.* Cockerell, 3 Kan. 282; Witham *v.* Brooner, 63 Ill. 344.

[3] 27 Henry VIII. c. 10, § 1.

[4] *Ante*, §§ 3, 4.

[5] *Ante*, §§ 5, 6, 7. And see the preamble of the statute. The first section of the statute was as follows: "That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized of and in any honors, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means, whatsoever it be; that in every such case, all and every such person and persons, and bodies politic that have or hereafter shall have any such use, confidence, or trust in fee-simple, fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seized, deemed, and adjudged, in lawful seizin, estate, and possession, of and in the same honors, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes, in the law of and in such like estates as they had or shall have

conveying the possession to the use, and transferring the use into possession, thereby making the *cestui que use* complete owner of the estate, as well at law as in equity. It does not abolish the conveyance to uses, but only annihilates the intervening estate, and turns the interest of the *cestui que use* into a *legal* instead of an *equitable* estate.[1] A *use*, a *trust*, and a *confidence* is one and the same thing, and if an estate is conveyed to one person for the use of, or upon, a trust for another and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used.[2] So absolute is the statute that it will operate upon all conveyances in the words above stated, although it was the plain intention of the settlor that the estate should vest and remain in the first donee; for the intention of the citizen cannot control express enactments of the legislature,[3] or positive rules of property.

*§ 299. The statute of uses is in force in most of the United States,[4] but where the statute is not in force either by adoption

in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have, or hereafter shall have, such use, confidence, or trust after such quality, manner, form, and condition as they had before, in, or to the use, confidence, or trust that was in them." Saund. on Uses, 70–82.

[1] Eustace *v.* Seamen, Cro. Jac. 696; 2 Black. Com. 333, 338; Thatcher *v.* Omans, 3 Pick. 529; Hutchins *v.* Heywood, 50 N. H. 495.

[2] Terry *v.* Collier, 11 East, 377; Right *v.* Smith, 12 East, 454; Broughton *v.* Langley, 2 Salk. 679; Ease *v.* Howard, Pr. Ch. 338, 345; Hammerston's Case, Dyer, 166 a, note; Ramsay *v.* Marsh, 2 McCord, 252; Moore *v.* Shultz, 13 Penn. St. 98; Jackson *v.* Fish, 10 Johns. 456; Parks *v.* Parks, 9 Paige, 107.

[3] Carwardine *v.* Carwardine, 1 Eden, 36; Gregory *v.* Henderson, 4 Taunt. 772. In this case the intent of the testator was loosely talked of, but it was an active trust, as pointed out by Heath, J. Doe *v.* Collier, 11 East, 377; Shapland *v.* Smith, 1 Bro. Ch. 75; 1 Sugd. Ven. 309, 314.

[4] 4 Kent, Com. 299; 1 Green. Cru. tit. 11, Use, c. 3, § 3, note. [See Kay *v.* Scates, 78 Am. Dec. 399, and note.]

or by re-enactment, and even where it is expressly repealed and a form of deed is enacted, a knowledge of the law of uses is necessary in order to understand and apply the common forms of conveyance.[1] The statute of uses, and the doctrines it established, are so interwoven with the history of every American State, and with the growth of its jurisprudence in regard to real estate, that the law of tenures is necessarily interpreted in America by the precedents established under the statute;[2] and in this branch of the law, as in all others, it is impossible to obtain a clear perception of its present state, without a full knowledge of the successive steps by which the latest development has been reached. The application of the statute has been very much modified in many of the States, but the general idea is still acted upon.[3] Mr. Washburn remarks, that it is

[1] Walk. Am. Law, 311; Helfensteine *v.* Garrard, 7 Ohio, 275; 2 Washb. on Real Prop. 152.

[2] 4 Kent, Com. 299–301.

[3] In Maine, a person may convey land by deed acknowledged and recorded. Rev. Stat. 1857, c. 73, § 1. [Rev. Stat. (1903), c. 75, § 1.] And a deed may be any species of conveyance, not plainly repugnant in terms, and necessary to give effect to the intention of the parties. Emery *v.* Chase, 5 Maine, 235. And the statute of uses is in force. Shapleigh *v.* Pilsbury, 1 Maine, 271; Emery *v.* Chase, 5 id. 232; Webster *v.* Cooper, 14 How. 496; Morden *v.* Chase, 32 Maine, 329.

In New Hampshire, the form in which lands may be conveyed is fixed by statute. Rev. Stat. But this does not exclude other known forms of conveyance at common law, and the statute of uses is in full force. Exeter *v.* Odiorne, 1 N. H. 232; Chamberlain *v.* Crane, id. 64; French *v.* French, 3 id. 234; Upham *v.* Varney, 15 id. 462; Hayes *v.* Tabor, 41 id. 526; Bell *v.* Scammon, 15 id. 394; Pritchard *v.* Brown, 4 id. 397; Dennett *v.* Dennett, 40 id. 498; Hutchins *v.* Heywood, 50 id. 496. [Fellows *v.* Ripley, 69 N. H. 410.]

In Vermont, there is a similar legislation as to the form of conveyances; but Chief-Justice Redfield held that the English statute of uses was not in force, for the reason that their court of equity could carry out the intention of parties without the help of the statute. Gorham *v.* Daniels, 23 Vt. 600; Sherman *v.* Dodge, 28 id. 26. Mr. Justice Thompson, of the United States court for the district, held the contrary. Soc. &c. *v.* Hartland, 2 Paine, C. C. 536. [See Atkins *v.* Atkins, 70 Vt. 565.]

In Massachusetts, a deed acknowleged and recorded conveys land without any other ceremony. Gen. Stat. 1860, c. 89, § 1. [Rev. Laws (1902), c. 127, § 1.] The form of deed in general use *gives, grants, bargains, sells* and

not a fair inference that the doctrine of uses would be inapplicable in any State where they are not declared not to exist,

conveys, upon a consideration, limiting the estate to the grantee and his heirs *to their use*. These words prevent a resulting use in the grantor; and it is a conveyance at common law, since the *grantee* and the *cestui que use* is the same person. But if, for any reason, it is necessary, in order to give effect to the conveyance, to construe it as operating under the statute of uses, the court will do so. Cox *v.* Edwards, 14 Mass. 492; Marshall *v.* Fish, 6 Mass. 24; Hunt *v.* Hunt, 14 Pick. 374; Wallis *v.* Wallis, 4 Mass. 135; Pray *v.* Pierce, 7 Mass. 381; Russell *v.* Coffin, 8 Pick. 143; Blood *v.* Blood, id. 80; Parker *v.* Nichols, 7 id. 111; Gale *v.* Coburn, 18 id. 397; Brewer *v.* Hardy, 22 id. 376; Thatcher *v.* Omans, 3 id. 522; Norton *v.* Leonard, 12 id. 157; Newhall *v.* Wheeler, 7 Mass. 189; Chapin *v.*Univer. Soc., 8 Gray, 580; Baptist Soc. *v.* Hazen, 100 Mass. 322; Durant *v.* Ritchie, 4 Mason, 45; Northampton Bank *v.* Whiting, 12 Mass. 104; Johnson *v.* Johnson, 7 Allen, 197. [See Carr *v.* Richardson, 157 Mass. 576; Dakin *v.* Savage, 172 Mass. 23.]

In Rhode Island, deeds of bargain and sale, lease and release, and covenants to stand seized, are recognized by statute. Rev. Stat. (1857), p. 335. [Gen. Laws (1909), c. 253, § 11.] And the statute of uses would seem to be in partial force. 1 Lomax, Dig. 188; Nightingale *v.* Hidden, 7 R. I. 132. [Fish *v.* Prior, 16 R. I. 566; Sullivan *v.* Chambers, 18 R. I. 799; Ames, Petitioner, 22 R. I. 54.]

In Connecticut, the act of acknowledging and recording a deed is held equivalent to livery of seizin. Barrett *v.* French, 1 Conn. 354. But the statute of uses is held to be part of its common law. Bacon *v.* Taylor, Kirb. 368; Barrett *v.* French, 1 Conn. 354; Bryan *v.* Bradley, 16 Conn. 474.

In New York, previous to 1827, the English statute of uses was in full force. Jackson *v.* Myers, 3 Johns. 388; Jackson *v.* Fish, 10 id. 456; Jackson *v.* Root, 18 id. 79; Jackson *v.* Cary, 16 id. 302; Jackson *v.* Dunsbagh, 1 Johns. Cas. 91; Jackson *v.* Cadwell, 1 Cow. 622. [See Brown *v.* Wadsworth, 168 N. Y. 225.] After that year, the rules of the common law were repealed; all uses and trusts were abolished, except such as were expressly authorized. Every interest in land is declared to be a legal right, and cognizable in a court of law except where it is otherwise provided. A conveyance by *grant*, *assignment*, or devise is substituted for a conveyance to uses, and future interests in lands may be conveyed by grant. 3 Rev. Stat. 15 (5th ed.); 4 Kent, 300. It has, however, been determined that if land is granted to one in fee in trust for another, the *cestui que trust* takes the estate absolutely, but subject, however, to such incumbrances as the trustee made upon the estate at the time of the conveyance, as if the trustee should give back a mortgage for the purchase-money, it would be held to be one transaction. Rawson *v.* Lampman, 1 Seld. 456. Nor have these statutes any application to securities by mortgage. King *v.* Merchants' Exchange Co., 1 Seld. 547. [The New York statutes expressly provide against passive trusts of real estate and that title shall vest at once in the person beneficially entitled.

either because no case has arisen in the courts of the State to test the question, or because a form of deed not known under

IV Consol. Laws (1909), p. 3389, § 91 *et seq.* See Wendt *v.* Walsh, 164 N. Y. 154; Jacoby *v.* Jacoby, 188 N. Y. 124; Adams *v.* Adams, 100 N. Y. S. 145, 114 App. Div. 390.]

In New Jersey, the statute of uses is substantially re-enacted. Den *v.* Crawford, 3 Halst. 107; Prince *v.* Sisson, 13 N. J. 168. [N. J. Gen. Stat. (1895), p. 877, § 119.]

In Pennsylvania, a statute declares all deeds in a prescribed form equivalent to a feoffment with livery of seizin at common law, and the statute of uses is also in full force. Opinion of the Judges, 3 Binn, 599; Welt *v.* Franklin, 1 Binn, 502; Ashhurst *v.* Given, 5 Wat. & S. 323; Sprague *v.* Woods, 4 id. 192; O'Kinson *v.* Patterson, 1 id. 395; Hurst *v.* McNeil, 1 Wash. C. C. 70; Franciscus *v.* Reigart, 4 Watts, 118. Indeed, at one time the Pennsylvania courts carried the application of the statute to an unsual extent, and held that *equitable* were converted into *legal* estates in all cases except active trusts, and even *then* if the purposes of the trust did not furnish a legitimate reason for not executing the trust in the beneficiary. Kuhn *v.* Newman, 26 Penn. St. 227; Whichcote *v.* Lyle, 28 id. 73; Bush's App., 33 id. 85; Kay *v.* Scates, 37 id. 31. But these cases were overruled, and the law restored to its former condition, in Barnett's App., 46 Penn. St. 392; Shankland's App., 47 id. 113; Earp's App., 75 id. 119; Deibert's App., 78 id. 296.

In Delaware, the statute provides that lands may be transferred by deed without livery, and that the legal estate shall accompany the use, and pass with it. Rev. Code (1852), p. 266. [Rev. Code (1893), c. 83, § 1.]

In Maryland, the English statute of uses is the foundation of their conveyances, and their rules of construction of it are nearly similar to the English rules. Lewis *v.* Beall, 4 Harr. & McH. 488; Mason *v.* Smallwood, id. 484; Matthews *v.* Ward, 10 Gill & J. 443; Cheney *v.* Watkins, 1 Harr. & J. 527; West *v.* Biscoe, 6 id. 465; Calvert *v.* Eden, 2 Harr. & McH. 331. [Rogers *v.* Sisters of Charity, 97 Md. 550; Numsen *v.* Lyon, 87 Md. 31; Hooper *v.* Felgner, 80 Md. 262; Graham *v.* Whitridge, 99 Md. 248.]

In Virginia, the statute of uses was a part of the colonial law; but it was repealed in 1792. Afterwards, in 1819, and in Rev. Code (1849), p. 502 [Va. Code (1904), § 2426], a partial substitute was adopted, by which the possession was transferred to the use only in cases of deeds of bargain and sale, lease and release, and deeds operating by way of covenant to stand seized to uses. If uses or trusts are raised by any other form of conveyance, as by devise, they remain, as before the statute of Henry VIII., mere equitable estates, not cognizable by courts of law. Bass *v.* Scott, 2 Leigh, 359; 1 Lomax, Dig. 188; 2 Matt. Dig. 34; Rowletts *v.* Daniel, 4 Munf. 473; Tabb *v.* Baird, 3 Call, 475; Duvall *v.* Bibb, id. 362. [The court of West Virginia, interpreting a statute worded precisely the same, held that it was designed only to aid those conveyances which could not pass the legal title without its aid and that a deed of bargain and sale to A., trustee for B., did

the statute of uses may have been declared by the statute of a State sufficient to convey lands.[1] It is true that Lord Hard-

not pass the legal title to B. Blake *v.* O'Neal, 63 W. Va. 483; W. Va. Code (1906), § 3033.]

In North Carolina, the statute is similar to the statute of Virginia. Rev. Code (1854), p. 270; Den *v.* Hanks, 5 Ired. 30; Smith *v.* Lockabill, 76 N. C. 465. [Code of N. C. (1908), § 1584. But it is not applied in the same way as the Virginia statute. See Smith *v.* Proctor, 139 N. C. 314; Webb *v.* Borden, 145 N. C. 188; Kirkman *v.* Holland, 139 N. C. 185; Wilson *v.* Leary, 120 N. C. 90.]

In South Carolina, the statute of uses was re-enacted in terms. 2 Stat. at Large, p. 467; Ramsay *v.* Marsh, 2 McCord, 252; Redfern *v.* Middleton, Rice, 464; Kinsler *v.* Clark, 1 Rich. 170; Chancellor *v.* Windham, id. 161; Laurens *v.* Jenney, 1 Spears, 356; McNish *v.* Guerard, 4 Strob. 74. [S. C. Civ. Code (1902), § 2580; Uzzell *v.* Horn, 71 S. C. 426; Young *v.* McNeill, 78 S. C. 143; Foster *v.* Glover, 46 S. C. 522; Holmes *v.* Pickett, 51 S. C. 271.]

In Georgia, the form of deed in general use is that of bargain and sale, which operates under the statute of uses. Adams *v.* Guerard, 29 Ga. 676. [Ga. Code (1895), § 3157, provides that in an executed trust for the benefit of a person capable of taking and managing property in his own right, the legal title is merged immediately in the equitable interest, and the perfect legal title vests in the *cestui*. See also §§ 3158 and 3149; Trammell *v.* Inman, 115 Ga. 874; Thompson *v.* Sanders, 118 Ga. 928; Taylor *v.* Brown, 112 Ga. 758.]

In Florida, there is a statute similar to the statute of Virginia, and the statute of uses is in partial force. Thompson's Dig., p. 178, § 4; 1 Lomax, Dig. 188. [Fla. Gen. Stat. (1906), § 2455.]

In Alabama, the statute of uses is part of the law of the State. Horton *v.* Sledge, 29 Ala. 478; You *v.* Flinn, 34 Ala. 411. [Ala. Civ. Code (1907), § 3408, provides that when a use, trust, or confidence is declared of any land or any charge upon the same for the mere benefit of a third person the legal title vests in the latter and not in the trustee. Huntington *v.* Spear, 131 Ala. 414; Berry *v.* Bromberg, 142 Ala. 339; Everett *v.* Jordan, 152 Ala. 259; Jordan *v.* Phillips, 126 Ala. 561; Edwards *v.* Bender, 121 Ala. 77.]

In Mississippi, there is a statute similar to the statute of Virginia. How & Hutch. Dig., p. 349. [See Miss. Code (1906), § 2762.]

In Louisiana, conveyances originated under the civil law, or the code of France.

In Texas, a statute recognizes deeds of bargain and sale, which operate under the statute of uses.

In Arkansas, the mode of conveyance is by deeds of bargain and sale, and of course the statute of uses must be a part of their law.

In Tennessee, the statute of uses [seems to be in force. Hughes *v.* Loan

[1] 2 Washburn on Real Property, 154.

wicke is reported to have said, that the statute of uses had no other effect than to add at most three words to a conveyance;[1]

Assoc., 46 S. W. 362 (Tenn. Ch. App. 1897). See Temple *v.* Ferguson, 110 Tenn. 84; Hart *v.* Bayliss, 97 Tenn. 72.]

The statute of Kentucky is in nearly the same words as the statute of Virginia. Rev. Stat., p. 279 (ed. 1860). [Ky. Stat. (1909), § 2057.]

In Ohio, the statute of uses was never in force, and if trusts or uses are raised by the form of conveyance they remain unexecuted, and mere equitable estates, cognizable only in courts of equity. Williams *v.* Presbyterian Church, 1 Ohio St. 497; Helfensteine *v.* Garrard, 7 Ham. 276; Foster *v.* Dennison, 9 Ohio, 124; Walker Am. Law, 124; Thompson *v.* Gibson, 2 Ohio, 439.

In Indiana, the statute of uses is enacted in substance. Rev. Stat. (1843), p. 447; Linville *v.* Golding, 11 Ind. 374; Nelson *v.* Davis, 35 Ind. 474. [The statute at present in force goes further than the statute of uses. Ind. Stat. Burns (1908), § 4024; Myers *v.* Jackson, 135 Ind. 136; Stroup *v.* Stroup, 140 Ind. 179.]

In Illinois, [the statute of uses is substantially re-enacted. Hurd's Rev. Stat. (1909), c. 30, § 3.]

In Michigan, the laws are similar to the statutes of New York. 2 Compt. Laws (1857), p. 824; Ready *v.* Kearsley, 14 Mich. 228. [Mich. Comp. Laws (1897), §§ 8829–8852.]

In Missouri, the statute of uses is re-enacted in substance. Rev. Stat. (1845), p. 218; Guest *v.* Farley, 19 Mo. 147. [Mo. Annot. Stat. (1906), § 4589; Cornwell *v.* Orton, 126 Mo. 355.]

In Iowa, uses are recognized, and deeds may operate under the statute of uses. Pierson *v.* Armstrong, 1 Iowa, 282.

In Wisconsin, the statute is very similar to the statute of New York, and all uses and trusts are abolished except those specially provided for. Rev. Stat. (1858), p. 529. [Wis. Stat. (1898), §§ 2071–2094. See Perkins *v.* Burlington Land and Imp. Co., 112 Wis. 509; McWilliams *v.* Gough, 116 Wis. 576.]

In Minnesota, [the statute law is the same as in New York. Minn. Rev. Laws (1905), §§ 3240–3262; Thompson *v.* Conant, 52 Minn. 208.]

In California, conveyances originated under the old Spanish law, and probably the statute of uses has little or no influence upon the law of the State. [It has been held not to be part of the law of the State. Estate of Fair, 132 Cal. 523, 533 *et seq.*; Estate of Dixon, 143 Cal. 511. See also Cal. Civ. Code, § 847 *et seq.*]

[Kansas Gen. Stat. (1909), § 9706, provides that "A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." It has

[1] Hopkins *v.* Hopkins, 1 Atk. 591.

Mr. Kent thinks this rather too strongly expressed, and says that the doctrine of the statute has insinuated itself deeply and thoroughly into every branch of the jurisprudence of real property.[1] It seems to have been the intention of the statutes of the various States to supply the want of livery of seizin, and to make all deeds, or other writings executed with certain formalities, equivalent to the old feoffments; therefore, any old and well-established rule of conveyancing ought not to be considered as abolished, in the absence of express provisions to that effect.

§ 300. The statute of uses at the time when it was passed had an immense effect upon the tenures of the realm. Many interests in land which had been merely equitable, and cognizable only according to the rules of equity, became at once legal interests, cognizable in courts of common law. Many persons who were seized of estates to uses, and who only could sue or be sued at law in relation to the same, ceased at once to have any title either at law or equity. Although it is probable that it was the intent of the statute to convert all uses or trusts

been held that a conveyance to grantees as trustees for others without setting forth the terms of the trust, but containing no restriction upon the trustees' power of disposition, does not come within the terms of this statute and that the trustees have a valid title. Webb *v.* Rockefeller, 66 Kan. 160; Boyer *v.* Sims, 61 Kan. 593. A similar statute in Indiana has been given a different interpretation. See Stroup *v.* Stroup, 140 Ind. 179.

The statute of uses has been held to be part of the common law of Colorado. Teller *v.* Hill, 18 Colo. App. 509; Morgan *v.* Rogers, 79 Fed. 577. And of Utah. Henderson *v.* Adams, 15 Utah, 30; Schenck *v.* Wicks, 23 Utah, 576.

It has been held not to be the law of Nebraska. Farmers' & Merchants' Ins. Co. *v.* Jensen, 58 Neb. 522.

In North Dakota and South Dakota, there are statutes practically the same as those of New York. No. Dak. Civ. Code (1905), §§ 4816–4837. Smith *v.* Security L. & T. Co., 8 N. D. 451. So. Dak. Civ. Code (1908), §§ 296–318.

In the District of Columbia, the statute of uses has been substantially re-enacted. D. C. Code (1905), § 1617.]

[1] 4 Kent, Com. 301.

into legal estates,[1] yet the convenience to the subject of being able to keep the legal title to an estate in one person, while the beneficial interest should be in another, was too great to be given up altogether, and courts of equity were astute in finding reasons to withdraw a conveyance from the operation of the statute.[2] Three principal reasons or rules of construction were laid down, whereby conveyances were excepted from such operation: first, where a use was limited upon a use; second, where a copyhold or leasehold estate, or personal property, was limited to uses; third, where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power.[3] In all of these three instances, courts both of law and equity held that the statute did not execute the use, but that such use remained, as it was before the statute, a mere equitable interest to be administered in a court of equity. These uses, which the statute did not execute, were called trusts, and justify Mr. Cruise's language that "a trust is a use not executed by the statute of 27 Henry VIII." The statute may execute the use in regard to one party and not as to another in the same deed; for example, where land is

[1] 1 Green. Cruise, tit. 12, c. 1, § 1.

[2] Mr. Cruise thought that the strict construction put upon the statute by the judges in a great measure defeated its effect. Id. Mr. Blackstone is of a similar opinion. 2 Black. Com. 336. And Lord Mansfield, in Goodright *v.* Wells, 2 Doug. 771, said that it was not the liberality of courts of equity, but the absurd narrowness of courts of law, resting on literal distinctions, which in a manner repealed the statute of uses, and drove *cestuis que trust* into equity.

[3] Hill on Trustees, 230. See § 735, a; Farr *v.* Gilreath, 23 S. C. 511; Preachers' Aid Society *v.* England, 106 Ill. 129 (referring to the text). Where an estate is conveyed to A. for the use of B., and nothing more is said, the title is immediately vested in B. by the statute, even though express words of trust are used; but if certain duties are imposed on A., such as collection of rents, making investments, &c., which require that he should keep the estate, the trust will be an active one, and the statute will not execute it. Kellogg *v.* Hale, 108 Ill. 164; Howard *v.* Henderson, 18 S. C. 189; Hooberry *v.* Harding, 10 Lea (Tenn.), 392; Henderson *v.* Hill, 9 Lea (Tenn.), 25. [Harris *v.* Ferguy, 207 Ill. 534.]

conveyed to A. in trust for B. for life, contingent remainder to C., the statute may execute the life estate in B., and still leave the fee in A. for the preservation of the remainder.[1]

§ 301. The first two of these rules originated in a strict construction of the technical words used in the statute, which are, "where any person is *seized* of any lands or to the use of another." If A. grants lands to B. for the use of C. for the use of D., B. was said to be "seized" of the lands to the use of C.; and the statute immediately executed the use in C. and gave him the legal title. But C. was said not to be "seized" in lands to the use of D., but only of a *use;* therefore the use of C. for D. remained, as it was before the statute, unexecuted.[2] It remained, therefore, a mere equitable estate or trust, cognizable in a court of equity alone. Hence the maxim that a use could not be limited on a use; not that such second use was void, but the statute did not execute it, and it remained a mere equitable interest. Thus, if lands come to A. and his heirs by feoffment, grant, devise, or other assurance, to the use of B. and his heirs, to the use of C. and his heirs; or to the use of C. in fee or for life, with remainders over; or to B. and his heir in trust to permit C. and D. to receive the rents, — in all these cases the statute executes the first use only in B. and his heirs, and the legal estate is vested in him, as trustee for the parties beneficially interested.[3]

[1] Howard *v.* Henderson, 18 S. C. 192; Williman *v.* Holmes, 4 Rich. Eq. (S. C.) 476. [Thompson *v.* Sanders, 118 Ga. 928. See *infra*, § 309 and notes.]

[2] Tyrrell's Case, Dyer, 155 a.

[3] Durant *v.* Ritchie, 4 Mason, 65; Hurst *v.* McNeil, 1 Wash. C. C. 70; Hutchins *v.* Heywood, 50 N. H. 496; Croxall *v.* Sherard, 5 Wall. 268; Reed *v.* Gordon, 35 Md. 183; Cueman *v.* Broadnax, 37 N. J. Eq. 523; Matthews *v.* Ward, 10 G. & J. 443; Whetstone *v.* Bury, 2 P. Wms. 146; Wagstaff *v.* Wagstaff, id. 258; Att. Gen. *v.* Scott, Forrest, 138; Doe *v.* Passingham, 6 B. & Cr. 305; Jones *v.* Lord Saye & Sele, 1 Eq. Cas. Ab. 383; Marwood *v.* Darell, Ca. t. Hard. 91; Hopkins *v.* Hopkins, 1 Atk. 581; Jones *v.* Bush, 4 Harr. 1; 1 Sand. Uses, 195; 2 Black. Com. 336; Williams *v.* Waters, 14 M. & W. 166; Ramsay *v.* Marsh, 2 McCord, 252; Burgess *v.* Wheate, 1 W. Black. 160;

§ 302. So where lands are conveyed by covenant to stand seized, or by bargain and sale, or by appointment under a power, to A. and his heirs, to the use of B. and his heirs, the *legal* estate will vest in A., and B. will take only an equitable interest; for these conveyances do not operate to transfer the seizin to A.[1] They merely raise a use which the statute executes in him, and stops there. Thus, in a deed of bargain and sale, the operation is as follows: the consideration and the bargain raise a use in the bargainee which the statute executes; and thus, under a deed of bargain and sale, the bargainee obtains both the use and the legal title. But no use can be limited and executed on a use. Hence, if A. conveys land to B., to the use of C., by a deed of bargain and sale, the statute will not execute the use in C., but the legal title will remain in B. subject to a trust for C., to be administered in equity; for the consideration and bargain only raise a use in B., which the statute executes but the use in B. for C. is in the nature of a use limited upon a use, which the statute does not execute.[2] (*a*)

Wilson *v.* Cheshire, 1 McCord, 233. The statute of uses in some of the States as Virginia, speaks of uses raised by deed. Consequently, it is said that uses raised by devise are not executed, but remain trusts. Judge Lomax, however, denies this construction. 1 Lomax, Dig. 188, 196. [But see Blake *v.* O'Neal, 63 W. Va. 483.] In New York, the uses named in the text would be executed in the *cestui que use* by the statute of uses and trusts, and he would have the entire legal title.

[1] Johnson *v.* Cary, 16 Johns. 304; 1 Cruise, Dig. tit. 12, c. 1, § 9; Gilb. on Uses, 67, 347. Mr. Blackstone condemned this rule. 2 Black. Com. 336. And Lord Mansfield said that the rule grew up from the absurd narrowness of courts of common law. Goodright *v.* Wells, 2 Doug. 771. And Mr. Greenleaf doubts if the rule that a use cannot be limited upon a use would be generally acted upon in the United States, especially in those States which have declared by statute what formalities shall alone be necessary to pass estates. Green. Cruise, Dig. tit. 12, c. 1, § 4, n. (vol. i, p. 380); and see Davis *v.* Hayden, 9 Mass. 514; Flint *v.* Sheldon, 13 Mass. 443; Marshall *v.* Fisk, 6 Mass. 24.

[2] The question has been raised in Massachusetts whether land can be conveyed by deed of bargain and sale to one for the use of another, and create anything more than a trust for the last beneficiary. Stearns *v.*

(*a*) It has been held in Massachusetts and Maryland that where the form of the deed is such that it may take effect either as a deed of bargain

§ 303. Another technical construction of the word "seized" withdrew all uses or trusts created in copyhold or leasehold estates, and all chattel interests and personal property, from the operation of the statute. The judges resolved in the 22d of Elizabeth that the word "seized" was only applicable to freeholds; consequently no one could be said to be "seized" of a leasehold or other chattel interests in real estate, or of personal property. Therefore, if A. gave leaseholds or personal property to B. for the use of C., the statute did not execute the use, but B. took the *legal* title in trust for C., which trust was not recognized at law, but only in equity.[1] So tenants by curtesy or in dower cannot stand seized to a use, for they are in by act of law in consideration of marriage and not in privity of estate; but in equity they would be held to execute any trusts charged upon their interests or estates.[2]

Palmer, 10 Met. 32; Norton *v.* Leonard, 12 Pick. 152. The general doctrine stated in the text is fully admitted, but it is claimed in answer that the deeds in general use, although in the general form of deeds of bargain and sale, are in fact, by force of the statutes, equivalent to grants or feoffments, and it is said that if deeds will not operate in the form in which they are drawn, they shall be construed to operate according to the intention of the parties. Higbee *v.* Rice, 5 Mass. 352; Pray *v.* Peirce, 7 Mass. 384; Knox *v.* Jenks, id. 494; Russell *v.* Coffin, 8 Pick. 143. The question was left undecided in Norton *v.* Leonard and Stearns *v.* Palmer, *ut supra*, but see the remarks of Chief Justice Dana, in Thatcher *v.* Omans, 3 Pick. 528. The same question may arise in other States, where their deeds are in form deeds of bargain and sale.

[1] *Ante*, § 6; Dyer, 369 a; Doe *v.* Routledge, 2 Cowp. 709; Sympson *v.* Turner, 1 Eq. Ab. 383; 2 Wooddes. Lect. pp. 295, 297; 1 Cruise, Dig., p. 354, and tit. 12, c. 1; Gilb. Ten. 182; Gilb. Uses, 67 n.; Rice *v.* Burnett, 1 Spear, Eq. 579; Joor *v.* Hodges, Spear, 593; Pyron *v.* Mood, 2 McMullan, 293. In some States, the statutes use the word "possessed" instead of the word "seized," in which case both real and personal estate and chattel interests would be transferred to the uses raised. Tabb *v.* Baird, 3 Call, 482. But this construction is controverted by Judge Lomax. 1 Lomax, Dig. 196.

[2] 1 Saunders on Uses, 86; 2 Fonbl. Eq. book 2, c. 6, § 1, and notes, p. 140.

and sale or as a feoffment, the court will construe it in such a way as to carry out the evident intention of the parties. Dakin *v.* Savage, 172 Mass. 23; Carr *v.* Richardson, 157 Mass. 576; Rogers *v.* Sisters of Charity, 97 Md. 550.

§ 304. From these instances, it will be seen that, in order to create a trust, it is necessary to prevent the legal estate from vesting in the *cestui que trust*, and it is necessary that not only the *legal* title, but the *primary use*, should vest in the trustee. Any form of conveyancing that will effect this, notwithstanding the statute, will create a trust; as if a grant or devise be made to a *trustee and his heirs*, to the *use of the trustee* and his heirs, or unto and to the use of the trustee and his heirs, the title and the primary use will both be vested in the trustee; and although there is a trust or use over to some other person, yet it will not be effected by the statute, it not being the primary use.[1] (*a*)

§ 305. The third rule of construction is less technical, and relates to special or active trusts, which were never within the purview of the statute.[2] Therefore if any agency, duty, or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents,[3] or to convey the estate,[4] or if

[1] Rackham *v.* Siddall, 1 Mac. & G. 607; Doe *v.* Passingham, 6 B. & C. 305; Robinson *v.* Comyns, t. Talb. 154; Doe *v.* Field, 6 B. & Ad. 564; Att. Gen. *v.* Scott, t. Talb. 138; Hopkins *v.* Hopkins, 1 Atk. 589; Harris *v.* Pugh, 12 Moore, 577; 4 Bingh. 335; Prise *v.* Sisson, 2 Beas. 168; Eckels *v.* Stewart, 33 Penn. St. 460; Freyvogle *v.* Hughes, 56 id. 228; Dodson *v.* Ball, 60 id. 49; McMullin *v.* Beatty, 56 id. 387; Keyser's App., 57 id. 636; Koenig's App., id. 352; Bacon's App., id. 504; Goodrich *v.* Milwaukee, 24 Wis. 422.

[2] Chapin *v.* Universalist Soc., 8 Gray, 580; Exeter *v.* Odiorne, 1 N. H. 232; Mott *v.* Buxton, 7 Ves. 201; Wright *v.* Pearson, 1 Edw. 125; Wheeler *v.* Newhall, 7 Mass. 189; Norton *v.* Leonard, 12 Pick. 152; Striker *v.* Mott, 2 Palge, 387; Wood *v.* Wood, 5 id. 596.

[3] Robinson *v.* Grey, 9 East, 1; Jones *v.* Saye & Sele, 1 Eq. Cas. Ab. 383; Barker *v.* Greenwood, 4 M. & W. 429; Sympson *v.* Turner, 1 Eq. Cas. Ab. 383; Chapman *v.* Blissett, Cas. t. Talb. 145; Garth *v.* Baldwin, 2 Ves. 646; Sherwin *v.* Kenny, 16 Ir. Ch. 138; Anthony *v.* Rees, 2 Cr. & Jer. 75; Doe *v.* Hampray, 6 Ad. & El. 206; White *v.* Barker, 1 Bing. N. C. 573; Kenrick *v.* Beauclerk, 3 Bos. & P. 178; Neville *v.* Saunders, 1 Vern. 415.

[4] Ibid.; Doe *v.* Edlin, 4 Ad. & El. 582; Doe *v.* Scott, 4 Bing. 505; Mott *v.* Buxton, 7 Ves. 201. [Kirkman *v.* Holland, 139 N. C. 185; Henson *v.* Wright, 88 Tenn. 501.]

(*a*) This is otherwise in States which have patterned their statutes after those of New York. See *supra*, § 299, note.

any control is to be exercised, or duty performed by the trustee in *applying* the rents to a person's maintenance,[1] or in making repairs,[2] or to preserve contingent remainders,[3] or to raise a sum of money,[4] or to dispose of the estate by sale,[5] — in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates. So if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal, or in the application of the income;[6] (*a*) or if the

See the elaborate case, Leggett *v.* Perkins, 2 Comst. 297; Brewster *v.* Striker, id. 19; Morton *v.* Barrett, 22 Mainė, 261; McCosker *v.* Brady, 1 Barb. Ch. 329; Doe *v.* Biggs, 2 Taunt. 109; Wickham *v.* Berry, 53 Penn. St. 70; Manice *v.* Manice, 43 N. Y. 203; Adams *v.* Perry, id. 487; Hutchins *v.* Heywood, 50 N. H. 500; Barnett's App., 46 Penn. St. 392; Shankland's App., 47 id. 113; Ogden's App., 70 id. 501; Deibert's App., 78 id. 296; Meecham *v.* Steele, 93 Ill. 135. [Clarke's Appeal, 70 Conn. 195, 219; Hart *v.* Seymour, 147 Ill. 598.]

[1] Sylvester *v.* Wilson, 2 T. R. 444; Doe *v.* Edlin, 4 Ad. & El. 582; Vail *v.* Vail, 4 Paige, 317; Porter *v.* Doby, 2 Rich. Eq. 52; Doe *v.* Ironmonger, 3 East, 533; Gerard Ins. Co. *v.* Chambers, 46 Penn. St. 485. [Hart *v.* Bayliss, 97 Tenn. 72; Chicago Term. R. Co. *v.* Winslow, 216 Ill. 166; Simmons *v.* Richardson, 107 Ala. 697.]

[2] Shapland *v.* Smith, 1 Bro. Ch. 75; Brown *v.* Ramsden, 3 Moore, 612; Tierney *v.* Moody, 3 Bing. 3. [Matthern *v.* Rankin, 228 Ill. 318; Reynolds *v.* Reynolds, 61 S. C. 243, 249.]

[3] Biscoe *v.* Perkins, 1 Ves. & B. 485; Barker *v.* Greenwood, 4 M. & W. 431; Vanderheyden *v.* Crandall, 2 Denio, 9.

[4] Wright *v.* Pearson, 1 Eden, 119; Stanley *v.* Lennard, id. 87.

[5] Bagshaw *v.* Spencer, 1 Ves. 142; Wood *v.* Mather, 38 Barb. 473. [Johnson *v.* Lee, 228 Ill. 167; Pope *v.* Patterson, 78 S. C. 334; Perkins *v.* Burlington Land & Imp. Co., 112 Wis. 509.]

[6] Exeter *v.* Odiorne, 1 N. H. 232; Ashhurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 W. & S. 19; Nickell *v.* Handly, 10 Grat 336. [Holmes *v.* Bushnell, 80 Conn. 233; Krebs's Estate, 184 Pa. St. 222.]

(*a*) The duty of paying over the rents and profits to the beneficiary involves the duty of management and renders a trust active. Webb *v.* Borden, 145 N. C. 188; Mason *v.* Mason, 219 Ill. 609; Burbach *v.* Burbach, 217 Ill. 547; Ure *v.* Ure, 185 Ill. 216; Slater *v.* Rudderforth, 25 App. D. C. 497; Newton *v.* Jay, 95 N. Y. S. 413, 107, App. Div. 457; West's Estate, 214 Pa. St. 35; Hunt *v.* Hunt, 124 Mich. 502; Forney's Estate, 161 Pa. St. 209; McIntosh's Estate, 158 Pa. St. 528; Harbster's Estate, 133 Pa. St. 351; Webber *v.* Webber, 108 Wis. 626. Likewise

purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division,[1] or until a request for a conveyance is made.[2] So if an estate is given upon a trust to sell or mortgage for the payment of debts, legacies, or annuities, or to purchase other lands to be settled to certain uses;[3] and this construction will not be affected by a power given to one of the *cestuis que trust* to control the sale of part of the estate,[4] nor by the fact that the direction for the payment of debts and legacies, out of the proceeds of the sale of the land, is only in aid of the personal property.[5]

[1] Posey *v.* Cook, 1 Hill (S. C.), 413; Morton *v.* Barrett, 22 Me. 261; Wood *v.* Mather, 38 Barb. 473; McCaw *v.* Galbraith, 7 Rich. L. 74; Williams *v.* McConico, 36 Ala. 22; Nelson *v.* Davis, 35 Ind. 474; McNish *v.* Guerard, 4 Strob. Eq. 66, was to the contrary upon the facts of that particular case. [Graham *v.* Whitridge, 99 Md. 248; Sanders *v.* Houston, etc., Co., 107 Ga. 49; Taylor *v.* Brown, 112 Ga. 758; McFall *v.* Kirkpatrick, 236 Ill. 281.]

[2] Walter *v.* Walter, 48 Mo. 140. [Johnson *v.* Lee, 228 Ill. 167; Dyett *v.* Central Trust Co., 140 N. Y. 54.]

[3] Curtis *v.* Price, 12 Ves. 89; Doe *v.* Ewart, 7 Ad. & El. 636, 668; Ashhurst *v.* Given, 5 W. & S. 323; Vaux *v.* Parke, 7 W. & S. 19; Keene *v.* Deardon, 8 East, 248; Bagshaw *v.* Spencer, 1 Ves. 142; Chamberlain *v.* Thompson, 10 Conn. 244; Sanford *v.* Irby, 3 B. & Al. 654; Creaton *v.* Creaton, 3 Sm. & Gif. 386; Spence *v.* Spence, 12 C. B. (N. S.) 199; Smith *v.* Smith, 11 C. B. (N. S.) 121.

[4] Chapman *v.* Blissett, Forr. 145; Naylor *v.* Arnitt, 1 R. & M. 501; Wykham *v.* Wykham, 18 Ves. 395. [Kirkman *v.* Holland, 139 N. C. 185; Pope *v.* Patterson, 78 S. C. 334.]

[5] Ibid.; Murthwaite *v.* Jenkinson, 2 B. & Cr. 257.

where a discretion is given to the trustee as to the time and manner of turning over the principal to the beneficiary, although he may have no discretion to withhold it indefinitely. Marshall's Estate, 147 Pa. St. 77; Krebs's Estate, 184 Pa. St. 222.

It has been held that a power given to the trustee to sell if and when he deems best prevents the statute of uses from vesting the title in the beneficiaries. Carrigan *v.* Drake, 36 S. C. 354. But in States which have statutes similar to the New York statute it seems probable that such a power alone would not be sufficient to prevent the vesting of legal title in the *cestuis*. See Drake *v.* Steele, 242 Ill. 301. As to the effect of an imperative power to sell, see *infra* § 311, note *b*.

§ 306. If, however, the trust simply is to *permit and suffer* A. to occupy the estate, or to receive the rents, the legal estate is executed in A. by the statute.[1] And a trust to hold for the use and benefit of, and to apply the rents to, the children of A., is executed in the children, notwithstanding the word "apply" is used.[2] But where the trust is "*to pay* unto" or to permit and suffer a person to receive the rents, using both expressions, the construction will be governed by the intention of the donor; and in this view the position of the words in the sentence, and the priority of the words, and the consideration whether the instrument is a deed or will, will have a material bearing upon the decision.[3] Mr. Jarman and Mr. Lewin suggest that the repugnancy would be obviated in such a case by construing the instrument to give an election or discretion to the trustees.[4]

§ 307. Although the direction may be for the trustees to *permit and suffer* another person to receive the rents, yet if any duty is imposed upon the trustees expressly or by implication, the legal estate will remain in them unaffected by the statute. (*a*) As if the direction is to *permit* A. to receive the *net*[5] rents, or the *clear*[6] rents, the trustees take the legal estate, the words *net* and *clear* implying that the trustees are to pay all charges,

[1] Right *v.* Smith, 12 East, 455; Wagstaff *v.* Smith, 9 Ves. 524; Gregory *v.* Henderson, 4 Taunt. 773; Warter *v.* Hutchinson, 5 Moore, 143; 1 B. & C. 721; Barker *v.* Greenwood, 4 M. & W. 429; Boughton *v.* Langley, 1 Eq. Cas. Ab. 383; 2 Salk. 679 (overruling Burchett *v.* Durdant, 2 Vent. 311); Doe *v.* Biggs, 2 Taunt. 109; Ramsay *v.* Marsh, 2 McCord, 252; Parks *v.* Parks, 9 Paige, 107; Witham *v.* Brooner, 63 Ill. 158. [Cornwell *v.* Orton, 126 Mo. 355; Byrne *v.* Gunning, 75 Md. 30.]

[2] Laurens *v.* Jenney, 1 Spears, 356.

[3] Doe *v.* Biggs, 2 Taunt. 109; Pybus *v.* Smith, 3 Bro. Ch. 340.

[4] 1 Jarm. Pow. Dev. 222, n.; Lewin on Trusts, 174 (5th Lond. ed.).

[5] Barker *v.* Greenwood, 4 M. & W. 421; Keene *v.* Deardon, 8 East, 248; Rife *v.* Geyer, 59 Penn. St. 395.

[6] White *v.* Parker, 1 Bing. N. C. 573.

(*a*) As where the trustee is given the duty of seeing that the taxes are paid and the property kept in repair. Carney *v.* Byron, 19 R. I. 283; Pugh *v.* Hayes, 113 Mo. 424.

and pay over the balance. So if, in addition to a devise in trust to preserve contingent remainders, there is a direction to *permit* A. to receive the rents and profits;[1] and so if trustees are to pay certain life annuities out of the rents, and subject to those annuities are to *permit and suffer* certain persons to receive the rents and profits.[2] So if the trustees are to exercise any control,[3] as if there is a trust to *permit and suffer* a woman to receive the rents, and that her receipts with the approbation of one of the trustees should be good.[4] (*a*)

§ 308. A mere *charge* of debts and legacies on real estate will not vest the estate in the trustees, unless there is some direction to them to raise the money and pay them, or unless there is some other implication that they are to exercise an *active trust* for the purpose.[5] (*b*) Nor does the legal estate vest in the trustees where the *charge* of the debts and legacies upon the real estate is contingent upon the insufficiency of any other fund, for in that case the trustees do not take an *immediate* vested interest;[6] but if the *charge* is made in aid of any other fund without contingency, the trustees will take immediately a

[1] Biscoe *v.* Perkins, 1 Ves. & B. 485, 489; Webster *v.* Cooper, 14 How. 499; Vanderheyden *v.* Crandall, 2 Denio, 9.

[2] Naylor *v.* Arnitt, 1 R. & M. 501.

[3] Exeter *v.* Odiorne, 1 N. H. 232.

[4] Gregory *v.* Henderson, 4 Taunt. 772; Barker *v.* Greenwood, 5 M. & W. 430.

[5] Doe *v.* Claridge, 6 Man. & Scott, 657; 1 Jarm. Pow. Dev. 224, n.; Kenrick *v.* Beauclerk, 3 B. & P. 178; Cadogan *v.* Ewart, 7 Ad. & El. 636, 668; Jones *v.* Saye & Sele, 8 Vin. 262; Creaton *v.* Creaton, 3 Sm. & Gif. 386; Collier *v.* McBean, 34 Beav. 426. [*In re* Stephens, 43 Ch. Div. 39.]

[6] Goodtitle *v.* Knott, Coop. 43; Hawker *v.* Hawker, 3 B. & Al. 537; Gibson *v.* Montfort, 1 Ves. 485.

(*a*) Or if there is a valid provision against anticipation, Ames, Petitioner, 22 R. I. 54, or a provision that the trustee take charge of the property if efforts should be made by creditors of the life beneficiary to subject the property to payment of his debts. People's Loan & Exch. Bank *v.* Garlington, 54 S. C. 413.

(*b*) Mere authority given to executors and trustees by will to pay debts does not charge them upon the testator's real estate. *In re* Head's Trustees, 45 Ch. D. 310.

legal estate.[1] So if the trustees are to demise the estate for a term, at rack-rent or otherwise, the term must come out of their interest, and the legal estate must be in them.[2] If, however, the instrument confers by construction upon the trustees a mere *power* of leasing, a good legal term may be created by the exercise of the power and without the legal estate in them.[3] So if a testator give his trustees a simple power of disposing of his estates, as that his executors or trustees, or other persons, shall sell or let or mortgage, or otherwise dispose of his estate, to pay his debts or legacies or annuities, or other charges, or where he directs his executors to raise money, no estate vests in the trustees, executors, or other persons, but it descends to the heir or the person to whom it is directed to go in the will, until it is wanted for the purposes named, and then it is divested only to the extent necessary for the purposes named. So where an estate was to remain in the hands of executors, for the use of the widow and children, until the youngest child should become twenty-one years old, the executors or trustees took no interest in the estate but a simple power.[4] Such directions are simple *powers* of disposition, which may be executed without any legal title.[5]

[1] Murthwaite *v.* Jenkinson, 2 B. & Cr. 357; Wykham *v.* Wykham 18 Ves. 395; and see Popham *v.* Bamfield, 1 Vern. 79.

[2] Doe *v.* Willan, 2 B. & Al. 84; Doe *v.* Walbank, id. 554; Osgood *v.* Franklin, 2 Johns. Ch. 20; Burr *v.* Sim, 1 Whart. 266; Riley *v.* Garnett, 3 De G. & Sm. 629; Brewster *v.* Striker, 2 Comst. 19; Doe *v.* Cafe, 7 Exch. 675.

[3] Doe *v.* Willan, 2 B. & Al. 84; Doe *v.* Simpson, 5 East, 162.

[4] Burke *v.* Valentine, 52 Barb. 412.

[5] Reeve *v.* Att. Gen., 2 Atk. 223; Hilton *v.* Kenworthey, 3 East, 553; Bateman *v.* Bateman, 1 Atk. 421; Fowler *v.* Jones, 1 Ch. Cas. 262; Lancaster *v.* Thornton, 2 Burr. 1027; Yates *v.* Compton, 2 P. Wms. 308; Fay *v.* Fay, 1 Cush. 94; Shelton *v.* Homer, 5 Met. 462; Bank of U. S. *v.* Beverly, 10 Peters, 532; 1 How. 134; Deering *v.* Adams, 37 Maine, 264; Jackson *v.* Schauber, 7 Cow. 187; 2 Wend. 12; Burr *v.* Sim, 1 Whart. 266; Guyer *v.* Maynard, 6 Gill & J. 420; Dabney *v.* Manning, 3 Ohio, 321; Jameson *v.* Smith, 4 Bibb, 307; Hope *v.* Johnson, 2 Yerg. 123; Bradshaw *v.* Ellis, 2 Dev. & Bat. Eq. 20. In Pennsylvania, such powers conferred upon executors pass the estate by force of a statute. Miller *v.* Meetch, 8 Penn. St. 417;

§ 309. Where a testator gave his wife an annuity, and a certain sum to his children to be paid when they arrive at twenty-one years, and appointed three persons by name, "as trustees of inheritance for the execution thereof," it was held that the trustees took the legal estate.[1] And if several trusts are created in the same instrument, some of which would be executed by the statute, and others would require the legal estate to remain in the trustees, they will take the legal estate; and this will be the case, though the trusts are limited to arise successively.[2] (*a*) In all cases where an estate is given to

Chew *v.* Chew, 28 id. 17. [See IV N. Y. Consol. Laws (1909), p. 3389, § 93; p. 3391, § 99; Mich. Comp. Laws (1897), § 8840; Minn. Rev. Laws (1905), § 3250; No. Dak. Civ. Code (1905), § 4825; So. Dak. Civ. Code (1908), § 306; Wis. Stat. (1898), § 8840.]

[1] Trent *v.* Harding, 10 Ves. 495; 1 B. & P. N. C. 116; 7 East, 95; *Re* Hough, 4 De G. & Sm. 371; *Re* Turner, 2 De G., F. & J. 527.

[2] Hawkins *v.* Luscombe, 2 Swanst. 375, 391; Horton *v.* Horton, 7 T. R. 652; Blagrave *v.* Blagrave, 4 Exch. 570; Brown *v.* Whiteway, 8 Hare, 156; Stockbridge *v.* Stockbridge, 99 Mass. 244. But see Tucker *v.* Johnson, 16 Sim. 341; Leonard *v.* Diamond, 31 Md. 536.

(*a*) Thus if an estate in fee is given to trustees for the benefit of a life beneficiary with active duties to perform during the existence of the equitable life estate and to hold upon a passive trust after the latter's death, the statute of uses will operate to vest the legal title in those entitled in remainder upon the ceasing of the active duties of the trustee at the death of the life beneficiary. Hooper *v.* Felgner, 80 Md. 262; Numsen *v.* Lyon, 87 Md. 31; Graham *v.* Whitridge, 99 Md. 248; Smith *v.* Proctor, 139 N. C. 314. It should be noted that this is an entirely different question from the one which often arises in such cases, viz., whether or not the estate originally conferred upon the trustees was an estate in fee or an estate *pur autre vie*.

Although the statute of uses will not operate to vest title of an estate in remainder when the persons entitled are not in being or not ascertained; Clarke *v.* E. Atlanta Land Co., 113 Ga. 21; Taylor *v.* Brown, 112 Ga. 758; Sanders *v.* Houston, etc., Co., 107 Ga. 49; Young *v.* McNeill, 78 S. C. 143; Cushman *v.* Coleman, 92 Ga. 772; it may operate when the *cestuis* come into being and the extent of their interests becomes certain, Mims *v.* Machlin, 53 S. C. 6; Henderson *v.* Adams, 15 Utah, 30; or upon the happening of the contingency which makes certain the beneficiaries and the extent of their interests. Uzzell *v.* Horn, 71 S. C. 426; Simonds *v.* Simonds, 199 Mass. 552. See Ames, Petitioner, 22 R. I. 54. But in such a case the trust for the intervening life estate may not

trustees to preserve contingent remainders, the statute does not execute the estate in the *cestui que trust;*[1] and in every case where the words "to the use of the trustees" are used, the statute does not execute the estate, although it is to the use of the trustees in trust for another; for the statute only executes the first use.[2]

§ 310. If an estate be given to trustees upon a trust for a married woman "for her sole and separate use," and "her receipts alone to be sufficient discharges," or if the trust be to "permit and suffer a *feme covert* to receive the rents to her separate use," the legal estate will vest in the trustees, and the statute will not execute it in the *cestui que trust.*[3] (*a*) In all

[1] Laurens *v.* Jenney, 1 Spears, 365; Co. Litt. 265 a, n. 2; 337 a, n. 2.

[2] *Ante*, § 304; Keene *v.* Deardon, 8 East, 248; Whetstone *v.* St. Bury, 2 P. Wms. 146; Pr. Ch. 591; Sympson *v.* Turner, 1 Eq. Cas. Ab. 383; Hopkins *v.* Hopkins, 1 Atk. 586; Hawkins *v.* Luscombe, 3 Swanst. 376, 388.

[3] Horton *v.* Horton, 7 T. R. 652; Neville *v.* Saunders, 1 Vern. 415; Jones *v.* Saye & Sele, 1 Eq. Cas. Ab. 383; Doe *v.* Claridge, 6 C. B. 641; Hawkins *v.* Luscombe, 2 Swanst. 391; South *v.* Alleyne, 5 Mod. 63, 101; Bush *v.* Allen, id. 63; Robinson *v.* Grey, 9 East, 1; Ayer *v.* Ayer, 16 Pick. 330; Williman *v.* Holmes, 4 Rich. Eq. 475; McNish *v.* Guerard, 4 Strob. Eq. 475; Franciscus *v.* Reigart, 4 Watts, 109; Escheator *v.* Smith, 4 McCord, 452; Bass *v.* Scott, 2 Leigh, 356; Rogers *v.* Ludlow, 3 Sandf. Ch. 104; Richardson *v.* Stodder, 100 Mass. 528. [Cushing *v.* Spalding, 164 Mass. 287; Walton *v.* Drumtra, 152 Mo. 489; Schiffman *v.* Schmidt, 154 Mo. 204; Temple *v.* Ferguson, 110 Tenn. 84; Carpenter *v.* Browning, 98 Ill. 282.]

terminate. See Sanders *v.* Houston, etc., Co., 107 Ga. 49; Clarke *v.* E. Atlanta Land Co., 113 Ga. 21; Graham *v.* Whitridge, 99 Md. 248; Smith *v.* McWhorter, 123 Ga. 287.

The statute of uses cannot operate to execute a dry trust where the beneficiary has no capacity to take a legal title, as where the conveyance is in trust for a partnership described by the firm name. Silverman *v.* Kristufek, 162 Ill. 222.

(*a*) It is otherwise in Georgia, where a married woman is not one of the class of persons for whom statute permits the creation of a trust, and the statutes have made her *sui juris*. Smith *v.* McWhorter, 123 Ga. 287; Thompson *v.* Sanders, 118 Ga. 928; Tillman *v.* Banks, 116 Ga. 250; Tramwell *v.* Inman, 115 Ga. 874. See also Snell *v.* Payne, 78 S. W. 885 (Ky. 1904); Adams' Trustee *v.* Adams, 56 S. W. 151 (Ky. 1900) where the court decreed a termination, the trustee having been given no active duties.

these cases the court will give this construction to the gift, if possible;[1] for if the statute should execute the estate in the married woman, certain rights would arise to the husband which might defeat the intention of the donor.[2] These are not the only words that will prevent the estate from vesting. Any words that show an intent to create an estate or a trust, for the sole and separate use of a married woman, will have the same effect.[3] (*a*) And a woman in contemplation of marriage may deed lands to another to stand seized to the sole use of the grantor, and the statute will not affect the transaction, but a trust will be created, as otherwise the intent of the parties would be defeated.[4] But it is said that if an estate is "released by deed" to A. and his heirs "upon a trust" for "the sole and separate use of the releasor," and no *active* duty is imposed upon the trustee in respect to the sole and separate estate, a common-law court will reject the sole and separate use as an estate unknown to the law; and it has been held in such case that the statute vested the estate in the *cestui que trust.*[5]

§ 310 *a.* But [in Pennsylvania] in order that an estate given to the sole and separate use of a woman may vest and remain in the trustees, it is necessary that she should be married or in immediate contemplation of marriage. (*b*) For if she is un-

[1] Ware *v.* Richardson, 3 Md. 505; Moore *v.* Shultz, 13 Penn. St. 98.

[2] Ibid.; Rice *v.* Burnett, 1 Spear, Eq. 580.

[3] Ayer *v.* Ayer, 16 Pick. 331; Kirk *v.* Paulin, 7 Vin. Ab. 95; Tyrrel *v.* Hope, 2 Atk. 558; Darley *v.* Darley, 3 Atk. 399; Hartley *v.* Hurle, 5 Ves. 540. [See *infra*, § 647 *et seq.*]

[4] Pittsfield Savings Bank *v.* Berry, 63 N. H. 109.

[5] Nash *v.* Allen, 1 Hurl. & Colt. 167; Williams *v.* Waters, 14 M. & W. 166 (see remarks on this case in Ware *v.* Richardson, 3 Md. 505); Roberts *v.* Moseley, 51 Mo. 282; Westcott *v.* Edmunds, 68 Penn. St. 34; Edmund's App., id. 24. [Woodward *v.* Stubbs, 102 Ga. 187.]

(*a*) But the mere fact that the person named as beneficiary is a married woman does not make the trust one for her "separate use" and for that reason outside the operation of the statute of uses. McKenzie *v.* Sumner, 114 N. C. 425; Foster *v.* Glover, 46 S. C. 522.

(*b*) The courts of Pennsylvania themselves admit that this limita-

married, or the estate is not given in the immediate contemplation of her marriage, it will vest in her at once by the statute of uses; or she will have the right to call for the execution of the trust at once, by a conveyance of the legal estate to her by the trustee, unless there are some other provisions in the will or purposes of the trust which render it an active trust, and the continuance of the legal estate in the trustees necessary for its purposes.[1] It is not necessary that the contemplation of her immediate marriage should appear upon the face of the will or settlement, if in fact an immediate marriage was contemplated, and such fact was probably known to the testator or settlor.[2] In such cases the trust will continue during the coverture of the woman, and at the decease of her husband she will have the right to call for a conveyance of the property as upon a termination of the trust.[3] A conveyance "in trust for B., wife of C., and her heirs and assigns forever," creates a trust during B.'s coverture and a legal estate afterwards. If C. dies, the legal estate is in B. and her heirs, though B. subsequently marries again.[4] (*a*)

[1] Lancaster *v.* Dolan, 1 Rawle, 231; Smith *v.* Starr, 3 Wharton, 63; Hammersley *v.* Smith, 4 Wharton, 129; McBride *v.* Smyth, 54 Penn. St. 250; Yarnall's App., 70 id. 339; Ogden's App., id. 501; 29 Legal Int. (May, 1872) 165; Wells *v.* McCall, 64 Penn. St. 207; Springer *v.* Arundel, id. 218; 7 Phila. R. 224; Credlant's Est., id. 58.

[2] Wells *v.* McCall, 64 Penn. St. 207; Springer *v.* Arundel, id. 218.

[3] Megargee *v.* Naglee, 64 Penn. St. 211; Yarnall's App., 70 id. 339; Freyvogle *v.* Hughes, 56 id. 230.

[4] Moore *v.* Stinson, 144 Mass. 594. [Cushing *v.* Spalding, 164 Mass.

tion upon the creation of equitable separate estates in married women is a peculiarity of the law of that State. Kuntzleman's Trust Estate, 136 Pa. St. 142; Quin's Estate, 144 Pa. St. 444. *Infra*, § 652, note. As the point involves the law peculiarly applicable to equitable separate estates of married women, reference is made to the chapter on that topic, § 652 *et seq.*, for the law in the other States and in England.

There is the further peculiarity in the law of Pennsylvania, that if a trust purports to be for the separate use of a woman who is not married or contemplating immediate marriage, the trust will not be kept alive by the fact that active duties have been given to the trustee, unless it appears that these duties were intended to be irrespective of coverture. Kuntzleman's Trust Estate, 136 Pa. St. 142.

(*a*) The fact that the person named as beneficiary of a passive

§ 311. As stated, chattel interests in land and personal property were never within the statute of uses, and the legal title to them will remain in the trustee, until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use.[1] But where the trust is at an end, the title is in the person entitled to the last use;[2] and a mere delivery, without other formality, gives such person full and absolute control of the property.[3] Until such delivery the law cannot recognize any equitable interests in the property.[4] If the *cestui que trust* is an infant, it is said that the trust will not be executed by delivering the property to him, because he is incapable of assenting to such transfer.[5] (*a*)

287; Temple *v.* Ferguson, 110 Tenn. 84; Roberts *v.* Moseley, 51 Mo. 282.]

[1] *Ante*, § 303; Harley *v.* Platts, 6 Rich. L. 315; Rice *v.* Burnett, 1 Spear, Eq. 590; Schley *v.* Lyon, 6 Ga. 530; Doe *v.* Nichols, 1 B. & Cr. 336; Slevin *v.* Brown, 3 Mo. 176. [Ure *v.* Ure, 185 Ill. 216; Byrne *v.* Gunning, 75 Md. 30. See Guild *v.* Allen, 28 R. I. 430, 437; Martin *v.* Fort, 83 Fed. 19, 24; Matter of De Rycke, 91 N. Y. S. 159, 99 App. Div. 596.]

[2] Westcott *v.* Edmunds, 68 Penn. St. 34; Bacon's App., 57 id. 500; Dodson *v.* Ball, 60 id. 492; Barnett's App., 10 Wright, 392; Rife *v.* Geyes, 59 Penn. St. 395; Freyvogle *v.* Hughes, 56 id. 228; Deibert's App., No. 1, 83 id. 462; Schaffer *v.* Lauretta, 57 Ala. 14.

[3] Ibid.; Bringhurst *v.* Cuthburt, 6 Binn. 398; Lawrie *v.* Bankes, 4 K. & J. 142.

[4] Ibid.; Iorr *v.* Hodges, 1 Spear, Eq. 593.

[5] Harley *v.* Platts, 6 Rich. L 315. But see Lawrie *v.* Bankes, 4 K. & J. 142; White *v.* Baylor, 10 Ir. Eq. 53; Bulstrode, 184.

trust is a minor will not prevent the statute of uses from operating to vest the estate in him. Hooper *v.* Felgner, 80 Md. 262; Thompson *v.* Conant, 52 Minn. 208. But the fact may have an important bearing upon the question whether or not the trust instrument imposes active duties on the trustee.

(*a*) A devise of lands to a trustee with an imperative direction to sell and to divide the proceeds among those entitled is an equitable conversion of the land and is treated as a trust of personalty so far as concerns the rights of those entitled to the proceeds. McWilliams *v.* Gough, 116 Wis. 576; Van Zandt *v.* Garretson, 21 R. I. 352. As to equitable conversion, see *infra*, § 448, note.

§ 312. In all cases where an estate is given to one for the use of another, in such manner that the statute of uses steps in and executes the estate in the *cestui que trust*, the statute executes in the *cestui que trust* only the estate that the first donee or trustee takes; that is, the statute executes or transfers the exact estate given to the trustee. Therefore, if A. give an estate to B. and his heirs for the use of C. and his heirs, the statute will execute the fee-simple in C. But if A. gives an estate to B. for the use of C. and his heirs, the statute will execute only an estate for the life of A. in C.; for that is the extent of the estate conveyed to B. by a deed in that form; that is, by a deed that has no words of inheritance in B.[1] While this is the rule in respect to estates which the statute executes, a very different rule applies to estates upon a trust or use not executed by the statute. In these cases, the extent or quality of the estate taken by the trustee is determined, not by the circumstance that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore, the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given.[2] On this principle, two

[1] Newhall *v.* Wheeler, 7 Mass. 189; Cro. Car. 231; Nelson *v.* Davis, 35 Ind. 474; Baptist Soc. *v.* Hazen, 100 Mass. 322; Idle *v.* Cooke, 1 P. Wms. 77; Doe *v.* Smeddle, 2 B. & A. 126; Chambers *v.* Taylor, 2 M. & Cr. 376; Vanhorn *v.* Harrison, 1 Dall. 137; Jackson *v.* Fish, 10 Johns. 456. Where a gift is made by deed to individuals and their "successors," without the word "heirs," in trust for or to the use of a corporation or religious society, an inheritance or succession is not created; and if the statute of uses applies to the conveyance, only a life-estate is executed in the corporation or religious society. Henderson *v.* Hunter, 59 Penn. St. 325; First Bap. Soc. in Andover *v.* Hazen, 100 Mass. 322.

[2] Cleveland *v.* Hallett, 6 Cush. 407; Gibson *v.* Montfort, 1 Ves. 485; Newhall *v.* Wheeler, 7 Mass. 189, 198; Oates *v.* Cooke, 3 Burr. 1684; Stearns *v.* Palmer, 10 Met. 32; Sears *v.* Russell, 8 Gray, 86; Gould *v.* Lamb, 11 Met. 84; Brooks *v.* Jones, id. 191; Fisher *v.* Fields, 10 Johns. 495; Doe *v.* Field, 2 B. & Ad. 564; Trent *v.* Hanning, 7 East, 99; Doe *v.* Willan, 2 B. & A. 84; 8 Vin. Ab. 262, pl. 18; Shaw *v.* Wright, 1 Eq. Cas. Ab. 176, pl. 8; Brewster *v.*

rules of construction have been adopted by courts: first, "Wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not." [1] (*a*) And, second, "Although a legal estate

Striker, 1 E. D. Smith, 321; Richardson *v.* Stodder, 100 Mass. 528; Fox *v.* Storrs, 75 Ala. 267; Gosson *v.* Ladd, 77 id. 224; West *v.* Fitz, 109 Ill. 425; Jourolmon *v.* Massengill, 86 Tenn. 82. See Henderson *v.* Hill, 9 Lea (Tenn.) 25; Young *v.* Bradley, 101 U. S. 782.

[1] Neilson *v.* Lagow, 12 How. 98; Sears *v.* Russell, 8 Gray, 86; Chamberlain *v.* Thompson, 10 Conn. 244; Cleveland *v.* Hallett, 6 Cush. 407; Payne *v.* Sale, 2 Dev. & Bat. Eq. 460; Nichol *v.* Walworth, 4 Denio, 385; Upham *v.* Varney, 15 N. H. 462; King *v.* Parker, 9 Cush. 71; Williams *v.* First Soc. in Cin., 1 Ohio St. 478; Hawley *v.* James, 5 Paige, 318; Deering *v.* Adams, 37 Maine, 265; Webster *v.* Cooper, 14 How. 499; Combry *v.* McMichael, 19 Ala. 751; Gill *v.* Logan, 11 B. Mon. 233; Powell *v.* Glen, 21 Ala. 468; King *v.* Akerman, 2 Black, 408; Ward *v.* Amory, 1 Curtis, C. C. 427; White *v.* Baylor, 10 Ir. Eq. 54; Meeting St. Bap. Soc. *v.* Hail, 8 R. I. 240; Nelson *v.* Davis, 35 Ind. 474; Kirkland *v.* Cox, 94 Ill. 400; Preachers' Aid Society *v.* England, 106 Ill. 128.

(*a*) This is generally true where the instrument creating the trust is a will, for in that case words of inheritance are not usually necessary to devise a fee, but the intention of the testator controls. Davies *v.* Jones, 24 Ch. Div. 190; Crane *v.* Bolles, 49 N. J. Eq. 373; People's L. & Exch. Bank *v.* Garlington, 54 S. C. 413; Bean *v.* Commonwealth, 186 Mass. 348; Olcott *v.* Tope, 213 Ill. 124; Smith *v.* McWhorter, 123 Ga. 287. But in a recent case in England where a trust was created by a deed of conveyance to trustees without words of inheritance, it was held that the trustees got only an estate for the life of the survivor, although it was clear from the deed that the creator of the trust intended to transfer the entire beneficial interest and did not intend that the legal title should revert to him or his heirs. *In re* Irwin, [1904] 2 Ch. 752. Probably the decision did not affect the rights of the *cestuis que trust*, but concerned only the title of the trustees, and the result probably was that the title, instead of descending to the heir or the representative of the surviving trustee, reverted to the heirs of the grantor charged with the same trust; for it is clear law in England, as well as in America, that words of inheritance are not necessary to transfer an equitable fee to the *cestui que trust*. If it is clear upon the face of the deed that the grantor intended to transfer the entire beneficial interest, absence of words of inheritance as to it will not prevent its passing. *In re* Irwing, [1904] 2 Ch. 752; *In re* Tringham's Trusts, [1904] 2 Ch.

may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires." [1]

[1] Norton *v.* Norton, 2 Sandf. 296; Williman *v.* Holmes, 4 Rich. Eq. 475; Watson *v.* Pearson, 2 Exch. 593; Blagrave *v.* Blagrave, 4 id. 569; 487; Smith *v.* Proctor, 139 N. C. 314; Holmes *v.* Holmes, 86 N. C. 205.

The rule in North Carolina prior to the statute of 1879 (see Code (1905) § 946), seems to have been in accord with *In re* Irwing. Smith *v.* Proctor, 139 N. C. 314; Allen *v.* Baskerville, 123 N. C. 126; Fulbright *v.* Yoder, 113 N. C. 456. But it has been declared the settled law in Massachusetts that where the declared purposes of the trust require a fee in the trustee, the absence of words of inheritance from the deed to him will not limit his estate to a life estate. Packard *v.* Old Colony Railroad, 168 Mass. 92; Cleveland *v.* Hallett, 6 Cush. 403; King *v.* Parker, 9 Cush. 71. And generally the American courts have taken the view that where the trust is created by deed, as well as where it is created by will, the extent of the legal interest given the trustee "is measured not only by words of inheritance or equivalent terms, but by the object and extent of the trust upon which the estate is given." Brown *v.* Reeder, 108 Md. 653; North *v.* Philbrook, 34 Me. 532; McFall *v.* Kirkpatrick, 236 Ill. 281 (*semble*); Smith *v.* McWhorter, 123 Ga. 287 (*semble*); Morffew *v.* S. F., etc., R. Co., 107 Cal. 587, 595; Carney *v.* Kain, 40 W. Va. 758, 764.

In many States the necessity of words of inheritance in deeds of conveyance has been done away with by statute.

When there are no words of inheritance used with reference to the *cestui*, and the deed does not show an intention to vest in him the entire beneficial interest and where he has no equitable right to it independently of the deed, as he would have, if he had paid the purchase money, it has been held that he gets only an equitable life estate. The fact that the legal title is conveyed to the trustee and his heirs will not enlarge the *cestui's* interest in such a case. See *In re* Tringham's Trusts, [1904] 2 Ch. 487; McElroy *v.* McElroy, 113 Mass. 509.

In cases of executory contracts to convey which equity will specifically enforce the technical requirement of words of inheritance is of little effect when the intention of the parties is clear. Phillips *v.* Swank, 120 Pa. St. 76; Dorr *v.* Clapp, 160 Mass. 538.

Wherever the form of the will or other instrument of title is not clear as to the title given the trustee, the court will apply as far as possible the general principle that the trustee's title shall be commensurate with the needs of the trust, and, so far as the rules of law permit, will enlarge or decrease the trustee's apparent title accordingly. Carney *v.* Kain, 40 W. Va. 758, 764; Morffew *v.* S. F., etc., R. Co., 107 Cal. 587, 595; Smith *v.* McWhorter, 123 Ga. 287.

§ 313. Thus courts have by construction implied an estate in the trustees, although no estate was given them in words; but, in all such cases, the trustees were required to do something that required a legal estate of some kind in them; as, where a testator gave to a married woman the rents and profits of certain lands to be paid her by his executors, it was held to be a devise of the land itself to the executors, although nothing was given them in terms, to enable them to carry out the purposes of the trust.[1] So a power given to executors to rent, lease, repair, and insure implies a legal title in them.[2]

§ 314. In the same manner, and for the same reasons, courts have enlarged or extended estates given to trustees. Thus, if A. gives an estate to B. without words of limitation, it is an estate for the life of B.; but if A. gives an estate to B. to pay certain annuities to persons named, for their lives, the trustee takes an estate for the lives of the several annuitants.[3]

Brown *v.* Whiteway, 8 Hare, 156; Saye & Sele *v.* Jones, 1 Eq. Cas. Ab. 383; 33 Bro. P. C. 113; Shapland *v.* Smith, 1 Bro. Ch. 75; Heardson *v.* Willamson, 1 Keen, 33; Player *v.* Nicholls, 1 B. & Cr. 142; Warter *v.* Hutchinson, 5 Moore, 153; 1 B. & Cr. 721; Chapman *v.* Blissett, Forr. 145; Doe *v.* Hicks, 7 T. R. 433; Nash *v.* Coates, 3 B. & A. 839; *Ex parte* Gadsden, 3 Rich. 468; Adams *v.* Adams, 6 Q. B. 866; Barker *v.* Greenwood, 4 M. & W. 429; Doe *v.* Claridge, 6 C. B. 641; Ware *v.* Richardson, 3 Md. 505; Pearce *v.* McClenaghan, 5 Rich. 178; Ellis *v.* Fisher, 3 Sneed, 231; Gardenhire *v.* Hinds, 1 Head, 402; Smith *v.* Metcalf, id. 64; Slavin *v.* Brown, 32 Mo. 176; Greenwood *v.* Coleman, 34 Ala. 150; Bryan *v.* Weems, 29 Ala. 423; Koenig's App., 57 Penn. St. 552; Ivory *v.* Burns, 56 id. 300; Wilcox *v.* Wilcox, 47 N. H. 488; McBride *v.* Smyth, 59 id. 245; West *v.* Fitz, 109 Ill. 425; Farmers' Nat'l Bank *v.* Moran, 30 Minn. 167; Davis *v.* Williams, 85 Tenn. 646. But see Watkins *v.* Specht, 7 Cold. 585; McElroy *v.* McElroy, 113 Mass. 509.

[1] Oates *v.* Cooke, 3 Burr. 1684; W. Black. 543; Bush *v.* Allen, 5 Mod. 63; Doe *v.* Woodhouse, 4 T. R. 89; Doe *v.* Homfray, 6 Ad. & El. 206; Doe *v.* Sampson, 5 East, 162; Feedey's App., 60 Penn. St. 349. [Davies *v.* Jones, 24 Ch. Div. 190; Bean *v.* Commonwealth, 186 Mass. 348; Crane *v.* Bolles, 49 N. J. Eq. 373.]

[2] Kellam *v.* Allen, 52 Barb. 605.

[3] Jenkins *v.* Jenkins, Willes, 656; Shaw *v.* Weigh, 2 Str. 798; Oates *v.* Cooke, 3 Burr. 1684, and other cases cited, § 313, n. 1.

§ 315. So, if land is devised to trustees without the word "heirs," and a trust is declared which cannot be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee-simple, to enable them to carry out the intention of the donor.[1] Thus, if land is conveyed to trustees, without the word "heirs," in trust to *sell*, they must have the fee, otherwise they could not sell.[2] The construction would be the same if the trust was to sell the whole or a part; for no purchasers would be safe unless they could have the fee;[3] and a trust to convey or to lease at discretion would be subject to the same rule.[4] *A fortiori*, if an estate is limited to trustees and their heirs in trust to sell or mortgage or to lease at their discretion, or if they are to convey the property in fee, or divide it equally among certain persons; for to do any or all these acts requires a legal fee.[5] (*a*)

[1] Villiers *v.* Villiers, 2 Atk. 72; Cleveland *v.* Hallett, 6 Cush. 407; Fisher *v.* Fields, 10 Johns. 505; Ellis *v.* Fisher, 3 Sneed, 231; Rackham *v.* Siddall, 1 Mac. & G. 607; 2 Hall & T. 44; Deering *v.* Adams, 37 Maine, 265; Brown *v.* Brown, 12 Md. 87; Webster *v.* Cooper, 14 How. 499; Blagrave *v.* Blagrave, 4 Exch. 569; Hawkins *v.* Chapman, 36 Md. 94; Farquharson *v.* Eichelberger, 15 Md. 72; Packard *v.* Marshall, 138 Mass. 302.

[2] Gibson *v.* Montford, 1 Ves. 491; Amb. 95; Shaw *v.* Weigh, 1 Eq. Cas. Ab. 184; Bagshaw *v.* Spencer, 1 Ves. 144; Glover *v.* Monckton, 3 Bing. 113; 10 Moore, 453; Hawker *v.* Hawker, 3 B. & A. 537; Warter *v.* Hutchinson, 5 Moore, 143; 1 B. & C. 121; Watson *v.* Pearson, 2 Exch. 594; Chamberlain *v.* Thompson, 10 Conn. 244; Doe *v.* Howland, 7 Cow. 277; Jackson *v.* Robins, 16 Johns. 537; Spessard *v.* Rohrer, 9 Gill, 262. [But see *supra*, § 312, note.]

[3] Bagshaw *v.* Spencer, 1 Ves. 144; Kirkland *v.* Cox, 94 Ill. 402.

[4] Booth *v.* Field, 2 B. & Ad. 556; Keen *v.* Walbank, id. 554; Brewster *v.* Striker, 2 Comst. 19; Deering *v.* Adams, 37 Maine, 265. But see Doe *v.* Cafe, 7 Exch. 675.

[5] Bagshaw *v.* Spencer, 1 Ves. 142; Keane *v.* Deardon, 8 East, 242; Cadogan *v.* Ewart, 7 Ad. & El. 636; Tompkins *v.* Willan, 2 B. & A. 84; Keen *v.* Walbank, id. 354; Garth *v.* Baldwin, 2 Ves. 646; Booth *v.* Field, 2 B. & Ad. 564; Rees *v.* Williams, 2 M. & W. 749; Shelly *v.* Eldin, 4 Ad. & El.

(*a*) It is not absolutely necessary that a valid power to sell be coupled with ownership of the fee. Thus, it frequently happens that a life tenant has power to sell the fee or a trustee of a life estate has the same power as an executor without any title at all. See Luquire *v.* Lee, 121 Ga. 624; Tillman *v.* Banks, 116 Ga. 250.

§ 316. Where an estate is given to trustees in fee upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee-simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power.[1] Where it is possible that the trustees may be under the necessity of exercising a power over the fee, as by mortgage, a gift to them of the fee will not be cut down;[2] and the rule is that all the trusts which trustees must execute are to be executed out of the estate given them.[3] Lord Talbot said that it was wholly a matter of intention whether the trustee should take a fee or not;[4] hence, in other cases, it has been said that if no intention appeared upon the face of the will that the trustees were to take anything beyond what was necessary for the execution of the trust, the estate, though limited to them and their heirs, would be cut down to the limit of the trust.[5] So trustees may take only a *chattel* interest in real estate, although limited to them and their heirs, as where they are to hold it in trust only for a short time to pay debts and legacies, and convey it to the *cestui que trust* when he comes of age or at a certain time;[6] and this construction will be much stronger if the fee is not

582; Creaton *v.* Creaton, 2 Sm. & Gif. 386; Collier *v.* Walters, L. R. 17 Eq. 265. [Crane *v.* Bolles, 49 N. J. Eq. 373; People's Loan & Exch. Bank *v.* Garlington, 54 S. C. 413.]

[1] Fenwick *v.* Potts, 8 De G., M. & G. 506; Poad *v.* Watson, 37 Eng. L. & Eq. 112; Watkins *v.* Frederick, 11 H. L. Cas. 354; Haddelsey *v.* Adams, 22 Beav. 266. A power of appointment superadded to a life-estate will not enlarge it into a fee; and so a power of appointment added to an estate of inheritance will not cut down the fee. Yarnall's App., 70 Penn. St. 342; Burleigh *v.* Clough, 52 N. H. 267.

[2] Fenwick *v.* Potts, 8 De G., M. & G. 506; Horton *v.* Horton, 7 T. R. 652; Brown *v.* Whiteway, 8 Hare, 156.

[3] Watson *v.* Pearson, 2 Exch. 593.

[4] Chapman *v.* Blissett, Forr. Cas. t. Talb. 145; Hawkins *v.* Luscombe, 2 Swanst. 375; Curtis *v.* Price, 12 Ves. 89; Collier *v.* McBean, L. R. 1 Ch. 80.

[5] Doe *v.* Hicks, 7 T. R. 433; Nash *v.* Coates, 3 B. & A. 839; Boteler *v.* Allington, 1 Bro. Ch. 72, is criticised in 7 T. R. 433, by Lord Kenyon; Webster *v.* Cooper, 14 How. 499; Beaumont *v.* Salisbury, 19 Beav. 198. [See Luquire *v.* Lee, 121 Ga. 624.]

[6] Goodtitle *v.* Whitby, 1 Burr. 228; Warter *v.* Hutchinson, 1 B. & Cr.

limited to them.[1] The same construction as to the estate of trustees will prevail where the limitation is to them and their heirs, to their use and behoof forever, whether it is contained in a deed or will.[2] Where a gift was made to one in trust for his wife for life, and to her heirs forever, subject to her husband's curtesy, the trustee took an estate for the life of his wife only and at her death the trust ceased.[3]

§ 317. Where a testator gave all his real and personal estate to trustees, "their executors, administrators, and assigns," in trust to pay several annuities, sums, and legacies, on the deficiency of the personal estates out of the rents, issues, and profits arising from the real estate, and gave the residue over, Lord Hardwicke held that if the annual reception of the rents and profits would satisfy the purposes of the trust, the trustees would take only a chattel interest in the real estate; but, as the land must be sold for the payment of the legacies, the trustees took the fee.[4] The court, however, is always reluctant to enlarge an estate in trustees beyond the terms of the gift; and it will not be done unless it is necessary for the execution of the trust.[5] Where it is plain that the trustees are to pay all charges, debts, legacies, annuities, or other moneys out of the rents and

721; Stanley *v.* Stanley, 16 Ves. 491; Badder *v.* Harris, 2 Dowl. & Ry. 76; Wheedon *v.* Lea, 3 T. R. 41; Pratt *v.* Timins, 1 B. & Ald. 530; Brune *v.* Martin, 8 B. & Cr. 497; Tucker *v.* Johnson, 16 Sim. 341; Glover *v.* Monckton, 3 Bing. 13; Doe *v.* Davies, 1 Q. B. 430; Player *v.* Nicholls, 1 B. & Cr. 336; Cadogan *v.* Ewart, 7 Ad. & E. 136, 667.

[1] Pearce *v.* Savage, 45 Maine, 90; Boraston's Case, 3 Co. 19; Player *v.* Nicholls, 1 B. & Cr. 336.

[2] Hawkins *v.* Luscombe, 2 Swanst. 375; Curtis *v.* Price, 12 Ves. 89; Venables *v.* Morris, 7 T. R. 342; Watkins *v.* Specht, 7 Cold. 585. But see Cooper *v.* Kynock, L. R. 8 Ch. 402.

[3] Noble *v.* Andrews, 37 Conn. 346.

[4] Gibson *v.* Montfort, 1 Ves. 485; Amb. 93; Woodgate *v.* Flint, 44 N. Y. 21, n.

[5] Heardson *v.* Williamson, 1 Keen, 33; White *v.* Simpson, 5 East, 162; Wykham *v.* Wykham, 3 Taunt. 316; 11 East, 458; 18 Ves. 395, 416; Ackland *v.* Lutley, 9 Ad. & El. 879; Doe *v.* Claridge, 6 C. B. 641.

profits of the estate, and no anticipation of the income is necessary or contemplated for that purpose, they will take a chattel interest, or a term for years necessary for the purpose, and not the legal inheritance;[1] and if the testator use an inartificial word, as that the trustees are to lend the estate, they will not take a fee.[2] A trust to preserve contingent remainders, without limitation to heirs, will not be enlarged; for the trust does not require an estate of inheritance.[3]

§ 318. If, however, the subject-matter of the gift to trustees is personal estate, the whole legal interest will vest in them without words of limitation. They may generally dispose of personal estate absolutely, being compelled to account for it.[4]

§ 319. In England, a distinction is kept up between limitations to trustees in wills and deeds. Thus it is said that in wills there is more room for construction to ascertain and carry into effect the intention of testators, and that in deeds the rules of property are carried into effect with more strictness. So it is said, that if in a deed an estate is given to a trustee *and his heirs*, there is no power to abridge the estate on the ground that the purposes of the trust do not require a fee in the trustees; and that, on the other hand, when an estate is given by deed to

[1] Cordall's Case, Cro. Eliz. 315; Carter *v.* Bernadiston, 1 P. Wms. 589; Hitchens *v.* Hitchens, 2 Vern. 404; Wykham *v.* Wykham, 18 Ves. 416; Heardson *v.* Williamson, 1 Keen, 33; Co. Litt. 42 a.

[2] Payne *v.* Sale, 2 Dev. & Bat. Eq. 455.

[3] Thong *v.* Bedford, 1 Bro. Ch. 14; Webster *v.* Cooper, 14 How. 499; Beaumont *v.* Salisbury, 19 Beav. 198; Co. Litt. 290 b; Butl. n. viii.

[4] Dinsmore *v.* Biggert, 9 Barr, 135; Nicoll *v.* Walworth, 4 Denio, 385; Chamberlain *v.* Thompson, 10 Conn. 244; Combry *v.* McMichael, 19 Ala. 751; Elton *v.* Shepherd, 1 Bro. Ch. 531; 2 Jarm. Pow. Dev. 631; Doe *v.* Willan, 2 B. & Ald. 84; Smith *v.* Thompson, 2 Swan, 386; Foster *v.* Coe, 4 Lans. 59; Fellows *v.* Heermans, id. 230; and Aiken *v.* Smith, 1 Sneed, 304, held that when personalty was limited to trustees, their heirs and executors, in trust for a married woman for life, and after her death to be equally divided among her children or to be conveyed to her children, the trustee took an estate for her life only, and that at her death the trust ceased. These cases, however, are not consistent with principle or authority, and probably would not be followed.

a trustee in trust without words of inheritance, there is no authority to enlarge the estate in the trustee because the purposes of the trust seem to require a larger estate. There is a very respectable amount of authority, even in England, that an estate given to trustees and their heirs in trust, by a deed, may be restricted to an estate for the life of another, where the purposes of the trust can all be answered by such an estate in the trustee.[1] In the cases sustaining the power to abridge the legal operation of the words of inheritance in a deed, there were some further limitations of the estate, either to the trustees or to third persons, inconsistent with the idea of a fee in the trustees.[2] The authorities, however, greatly preponderate, that courts cannot look to the equitable interests given or created by a *deed*, in order to determine whether the trustee under it takes a fee or not, if there are plain words of inheritance in it. Lord Eldon said, that it appeared to him very difficult to apply the doctrine to a *deed*, and he refused thus to cut down an estate.[3] While there is this conflict of authority upon the point, whether an estate given in fee by deed to trustees can be abridged to the extent of the trust, there is said to be no authority in England that an estate given by a deed to trustees without words of inheritance can be enlarged to suit the purposes of the trust;[4] although there is one expression by Lord Hardwicke that such enlargement is within the power of the court when the circumstances require it.[5]

§ 320. In the United States, the distinction between deeds and wills, in respect to the trustees' estate, has not been kept

[1] Curtis *v.* Price, 12 Ves. 89; Venables *v.* Morris, 7 T. R. 342, 438; Doe *v.* Hicks, id. 437; Brune *v.* Martyn, 8 B. & Cr. 497; Beaumont *v.* Salisbury, 19 Beav. 198, (where the authorities were commented on); Lewis *v.* Rees, 3 K. & J. 132; Cooper *v.* Kynock, L. R. 8 Ch. 403.

[2] Ibid.

[3] Wykham *v.* Wykham, 18 Ves. 395; Colomore *v.* Tyndall, 2 Y. & J. 605; Co. Litt. 20 b; Butl. n. viii.; Dinsmore *v.* Biggert, 9 Barr, 123; Lewis *v.* Rees, 3 K. & J. 132, where the authorities are reviewed by Wood, V. C.

[4] Pottow *v.* Fricker, 6 Exch. 570; Hill on Trustees, 251. [See *In re* Irwin, [1904] 2 Ch. 752; *supra*, § 312, note.]

[5] Villiers *v.* Villiers, 2 Atk. 72.

up; and the general rule is, that, whether words of inheritance in the trustee are or are not in the *deed*, the trustee will take an estate adequate to the execution of the trust, and no more nor less.[1] Courts will abridge the estate where words of inheritance are used, if the execution of the trust does not require a fee; and so they will enlarge the estate if no words of inheritance are used in a deed.[2] In examining the cases, however, where a trust ceases upon the death of a tenant for life, or upon the death of a person for whom the property was held in trust, care must be taken that this principle is not confounded with another. Thus, where an estate is given to trustees and their heirs in trust to pay the income to A. during her life, and at her decease to hold the same for the use of her children or her heirs, or for the use of other persons named, the trust ceases upon the death of A. for the reason that it remains no longer an *active* trust; the statute of uses immediately executes the use in those who are limited to take it after the death of A., and the trustees cease to have anything in the estate, not because the court has abridged their estate to the extent of the trust, but because, having the fee or legal estate, the statute of uses has executed it in the *cestui que trust*.[3] But where the operation of the statute

[1] King *v.* Parker, 9 Cush. 71; Stearns *v.* Parker, 10 Met. 32; Gould *v.* Lamb, 11 Met. 8; Cleveland *v.* Hallett, 6 Cush. 403; Att. Gen. *v.* Federal Street Meeting House, 3 Gray, 1; Wright *v.* Delafield, 23 Barb. 498; Fisher *v.* Fields, 10 Johns. 105; Welch *v.* Allen, 21 Wend. 147; Rutledge *v.* Smith, 1 Busb. Eq. 283; Liptrot *v.* Holmes, 1 Kelly (Ga.), 390; Cooper *v.* Kynock, L. R. 8 Ch. 402. [See *supra*, § 312, note.]

[2] Neilson *v.* Lagow, 12 How. 110; North *v.* Philbrook, 34 Maine, 537; Rutledge *v.* Smith, 1 Busb. Eq. 283; Cleveland *v.* Hallett, 6 Cush. 406. See to the contrary, Miles *v.* Fisher, 10 Ohio, 1.

[3] Parker *v.* Converse, 5 Gray, 336; Greenwood *v.* Coleman, 34 Ala. 150; Churchill *v.* Corker, 25 Ga. 479. See Vallette *v.* Bennett, 69 Ill. 336. And whenever the active duties required of the trustees have been performed and the purpose of the trust ceases, having no longer any proper object to serve, the legal estate is executed in the *cestui que trust*, without further action by the court or the trustee. Stoke's App., 80 Penn. St. 337; Dodson *v.* Ball, 60 id. 492; Wells *v.* McCall, 64 id. 207; Yarnall's App., 70 id. 335; Meacham *v.* Steele, 93 Ill. 135. And this is always so when an estate of inheritance or an absolute estate is put in trust for coverture. Megargee *v.* Naglee, 64 Penn. St. 216; Lynch *v.* Swayne, 83 Ill. 336. If

of uses does not put an end to the trust, and where it is necessary to enlarge an estate although there are no words of inheritance, courts have been obliged to resort to different expedients to avoid the technical rules of law upon the subject of inheritances.[1] In those States where no technical or other words are necessary to convey a fee no difficulties arise. (*a*)

the trust property is to be sold and proceeds distributed to the beneficiaries, there is still an active trust, and the estate is not executed in the *cestui*. Kirkland *v.* Cox, 94 Ill. 402; Read *v.* Power, 12 R. I. 16.

[1] Williams *v.* First Presby. Soc., 1 Ohio St. 498; Rutledge *v.* Smith, 1 Busb. Eq. 283; Co. Litt. 385, 386; 1 Prest. Touchstone, 182; Rawle on Covenants, 344; Shaw *v.* Galbraith, 7 Penn. St. 112. [See Brown *v.* Reeder, 108 Md. 653.]

(*a*) In many States statutes have done away with the necessity of words of inheritance in all conveyances.

CHAPTER XI.

PROPERTIES AND INCIDENTS OF THE LEGAL ESTATE IN THE HANDS OF TRUSTEES.

§ 321. Common-law properties attach to estates in trustees.
§ 322. Dower and curtesy in trust estates.
§§ 323, 324. Dower and curtesy in equitable estates of *cestui que trust*.
§ 325. Forfeiture and escheat of trust estates.
§ 326. Trustees must perform duties of legal owners.
§ 327. Forfeiture and escheat of the equitable estates of *cestui que trust*.
§ 328. Suits concerning legal title must be in name of trustee.
§ 329. Who has possession and control of trust estates.
§§ 330, 331. Who has possession of personal estate. Rights and privileges of trustees.
§ 332. Who proves debt against bankrupt.
§ 333. Who has the right of voting.
§ 334. Trustee may sell the legal estate.
§ 335. May devise the legal estate. But see § 341
§ 336. By what words in a devise the trust estate passes.
§ 337. Where a trust estate passes by a devise, and where not.
§ 338. The interest of a mortgage in fee.
§ 339. Propriety of devising a trust estate.
§ 340. Whether a devise can execute the trust.
§ 341. Rule in New York, &c.
§ 342. Where a testator has contracted to sell an estate.
§§ 343, 344. Rights of the last surviving trustee, and his heirs or executors.
§ 345. Trust property does not pass to bankrupt trustee's assignee.
§ 346. A disseizor of a trust estate is not bound by the trust.
§§ 347, 348. Merger of the equitable and legal titles.
§§ 349, 350. Presumption of a conveyance or surrender by trustee to *cestui que trust*.
§§ 351–353. Where the presumption will be made, and where not.
§ 354. Must be some evidence on which to found the presumption.
§ 355. Is made in favor of an equitable title, not against it.

§ 321. As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents, as if the trustee were the absolute

beneficial owner. The legal title vests in him, together with all the appurtenances and all the covenants that run with the land.[1] The trustee may sell and devise it, or mortgage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee.[2] (*a*) All these properties and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all incumbrances made or imposed upon the estate by the trustee, for other purposes than those of the trust, or in breach of the trust, are utterly disregarded by a court of equity, whatever may be the effect of such conveyances or incumbrances in a court of common law.[3] And as the trustee may in a court of law, as a general rule, deal with the legal estate in his hands, as if he was the absolute owner, so the *cestui que trust* in a court of equity may deal with the equitable estate in him: he is the beneficial and substantial owner, and in the absence of any disability, — that is, if he is *sui juris*, — he may sell and dispose of it; and any legal conveyance of it will have in equity the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate.[4] While a trust for the general benefit of one

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

[2] Zabriskie *v.* Morris & Essex R. Co., 33 N. J. Eq. 22. [As to the effect of a conveyance known to be in contravention of the terms of the trust, see Robinson *v.* Pierce, 118 Ala. 273.]

[3] Leake *v.* Leake, 5 Ir. Eq. 366.

[4] Matthews *v.* Wardel, 10 G. & J. 443; Burgess *v.* Wheate, 1 Eden, 226; Croxall *v.* Sherard, 5 Wall. 268; Reid *v.* Gordon, 35 Md. 184; Boteler *v.* Allington, 1 Bro. Ch. 72; Campbell *v.* Prestons, 22 Grat. 396.

(*a*) In several States statutes have rendered all conveyances by trustees in contravention of the terms of the trust absolutely void at law. See statutes of New York, Michigan, Minnesota, North Dakota, South Dakota, Wisconsin, Montana, California, Kansas. And in several States it is part of the statutory law that the title does not descend to the heir of a trustee or pass to his personal representative. *Ibid.*; Alabama.

sui juris, not confined to maintenance, may create a transmissible interest, yet a trust for the maintenance of an imbecile son will not create a transmissible interest, although the will contains a limitation over to the issue of such son.[1] In case of a trust for the use of a married woman as if she were sole, the husband has no control over the property, and cannot of himself lease or otherwise dispose of it.[2]

§ 322. The legal estate in the hands of a trustee was subject at common law to dower and curtesy;[3] but, as those who take in dower or curtesy take by operation of law, they are subject to the same equities as the original trustee; therefore, if the widow of a trustee should take dower in a trust estate, she would take her dower subject to the same trusts that the estate was under in the hands of her husband. It would thus be of no benefit to her; and it is now understood to be the equitable rule, that a widow has no dower in the lands held by her husband as trustee, and the same observations apply to the right of curtesy in trust estates.[4] (*a*) If, however, the equitable estate meets

[1] Gray *v.* Corbit, 4 Del. Ch. 135.

[2] Panill *v.* Coles, 81 Va. 380.

[3] Bennett *v.* Davis, 2 P. Wms. 319; Noel *v.* Jevon, Freem. 43; Nash *v.* Preston, Cro. Car. 190; Casborne *v.* English, 2 Eq. Cas. Ab. 728; Hinton *v.* Hinton, 2 Ves. 631; 1 Sugd. V. & P. 358.

[4] King *v.* Bushnel, 121 Ill. 656; Derush *v.* Brown, 8 Ham. 412; Green *v.* Green, 1 id. 249; Cooper *v.* Whitney, 3 Hill, 97; Powell *v.* Monson, etc., 3 Mason, 364; Bartlett *v.* Gouge, 5 B. Mon. 152; Cowman *v.* Hall, 3 Gill & J. 398; Robison *v.* Codman, 1 Sumn. 129; Dean *v.* Mitchell, 4 J. J. Marsh. 451; Ray *v.* Pung, 5 B. & Ald. 561; Gomez *v.* Tradesmen's Bank, 4 Sandf. 102.

(*a*) This equitable rule has been so far adopted by courts of law that it is not necessary or customary for the wife of a trustee to join in the latter's conveyances for the purpose of releasing dower and homestead or for the husband of a trustee to release curtesy. Substantially, if not theoretically, therefore, there is neither dower nor curtesy in the legal estate held by a trustee. Barker *v.* Smiley, 218 Ill. 68; Gritten *v.* Dickerson, 202 Ill. 372; King *v.* Bushnell, 121 Ill. 656; Schaefer *v.* Purviance, 160 Ind. 63; Johnston *v.* Jickling, 141 Iowa, 444. See 1 Ames' Cases on Trusts, (2d ed.) 374, notes; Lewin on Trusts, (11th

the legal estate in the same holder, the equitable merges in the legal estate, and dower and curtesy will attach;[1] and so they will attach so far as there is a beneficial interest in the trustee.[2]

[1] Hopkinson *v.* Dumas, 42 N. H. 303.

[2] 4 Kent, 43, 46; Prescott *v.* Walker, 16 N. H. 343.

ed.) 241. This is true whether the trust is express or implied. Thus it has been held that a wife has no dower rights in land which her husband has entered into a valid contract to convey to another either before acquiring the legal title or contemporaneously with the deed to him, Hallett *v.* Parker, 69 N. H. 134; or before his marriage. Oldham *v.* Sale, 1 B. Mon. 76. But it has been held that an unenforceable parol trust in land held by a husband does not deprive a wife of her dower rights, and that a subsequent reconveyance by the husband in recognition of the trust does not shut out her dower rights. Bartlett *v.* Tinsley, 175 Mo. 319; Pruitt *v.* Pruitt, 57 S. C. 155. But see Johnson *v.* Jickling, 141 Iowa, 444.

A wife's rights to dower in partnership lands of which her husband holds a moiety of the legal title is at least subject to the "trust" upon which it is held. Brewer *v.* Browne, 68 Ala. 210; Ratcliffe *v.* Mason, 92 Ky. 190, 194; Burnside *v.* Merrick, 4 Met. 537, 541; Dyer *v.* Clark, 5 Met. 562; Young *v.* Thrasher, 115 Mo. 222; Sparger *v.* Moore, 117 N. C., 449; Parrish *v.* Parrish, 88 Va. 529; Martin *v.* Smith, 25 W. Va. 579, 584. Whether or not the wife of a partner has dower in the portion of partnership real estate in which her husband, holding legal title, has an ultimate beneficial interest, has been a subject of controversy. Under the English statute and decisions the wife of a partner has no rights of dower in the land itself, because under the implied agreement of the partners, it is equitably converted, so that no partner has an ultimate right to partition, but only a right to share in the proceeds of the land. Deering *v.* Kerfoot's Ex'r, 89 Va. 491; Parrish *v.* Parrish, 88 Va. 529; *In re* Music Hall Block, 8 Ont. Rep. (Can.) 225. The same is true in America wherever the court has found an actual agreement which equitably converts the land. Greene *v.* Greene, 1 Ohio, 535; Mallory *v.* Russell, 71 Iowa, 63; Galbraith *v.* Gedge, 16 B. Mon. 631, 636; Markham *v.* Merrett, 7 How. (Miss.) 437. In the absence of such an agreement, a wife has dower in her husband's ultimate share of real estate remaining unconverted after the partnership has been wound up, but whether or not she has any vested or inchoate right of dower in the partnership real estate until the extent of her husband's ultimate share has been determined has not been clearly settled. See Strong *v.* Lord, 107 Ill. 25; Young *v.* Thrasher, 115 Mo. 222; Woodward-Holmes Co. *v.* Nudd, 58 Minn. 236, 27 L. R. A. 340; Dawson *v.* Parsons, 63 N. Y. State Rep. 320; Welch *v.* McKenzie, 66 Ark. 251; Walling *v.* Burgess, 122 Ind. 299; Huston *v.* Neil, 41 Ind. 504; Revelsky *v.* Brown, 92 Ala. 522; Du Bree *v.* Albert, 100 Pa. St. 483, 487.

§ 323. While speaking upon this subject, it may be said that, until lately, in England, the widow of a *cestui que trust* had no dower in his equitable estate, or his equitable fee in lands.[1] A widow was not dowable of a use, and lands were frequently conveyed to uses to defeat the right of dower.[2] Thus, if a man before marriage conveyed his lands to trustees upon trust for himself and his heirs in fee, or if after marriage he purchased lands, and took the conveyance to a trustee upon a trust for himself and his heirs, his wife had no right of dower.[3] But if lands were settled on trustees upon a trust for a woman and her heirs in fee, her husband was entitled to his curtesy.[4] This anomaly grew up from an attempt to give to equitable estates the same incidents that belong to legal estates; but when it was proposed to assign dower to a widow out of her husband's equitable estate, it was found that it would disarrange so many titles and estates that the attempt was abandoned. The same inconvenience did not arise in allowing curtesy to a husband, for the reason that a wife could not convey her equitable interests without her husband joining in the act, and thus, to allow him curtesy would not affect titles to any considerable extent.[5] But by a late statute a wife is now dowable in equity of all the lands in which her husband dies possessed of a beneficiary interest.[6]

[1] Dixon *v.* Saville, 1 Bro. Ch. 326; Maybury *v.* Brien, 15 Pet. 38; D'Arcy *v.* Blake, 2 Sch. & Lef. 387; 2 Eq. Cas. Ab. 384; 4 Kent, 43; 1 Rop. Hus. & Wife, 354; Banks *v.* Sutton, 2 P. Wms. 716, was overruled; Park on Dow. 138. In Pennsylvania, however, a wife can have dower in both legal and equitable estates. Dubs *v.* Dubs, 31 Penn. St. 154.

[2] Wms. Real Prop. 134–136; Perkins, § 349.

[3] Co. Litt. 208 a (n. 105).

[4] D'Arcy *v.* Blake, 2 Sch. & Lef. 387; Chaplin *v.* Chaplin, 3 P. Wms. 234; Att. Gen. *v.* Scott, t. Talb. 139; Watt *v.* Ball, 1 P. Wms. 108; Sweetapple *v.* Bindon, 2 Vern. 536; Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 Bro. Ch. 405.

[5] Chaplin *v.* Chaplin, 3 P. Wms. 234; Att. Gen. *v.* Scott, t. Talb. 139; Burgess *v.* Wheat, 1 Ed. 196; Dixon *v.* Saville, 1 Bro. Ch. 327; Banks *v.* Sutton, 2 P. Wms. 713; Casburne *v.* Casburne, 2 J. & W. 204; Watt *v.* Ball, 1 P. Wms. 109; D'Arcy *v.* Blake, 2 Sch. & Lef. 388.

[6] 3 & 4 Wm. IV., c. 105; 1 Spence, Eq. Jur. 505.

§ 324. The general rule in the United States is, that a wife is dowable in equity in all lands to which the husband had a complete [1] equitable title at the time of his death.[2] This rule, it is presumed, would apply in all the States where the common-law principles of dower prevail, except in Maine and Massachusetts, where a wife is not entitled to dower in her husband's equitable estates.[3] (*a*) The husband also in most States has

[1] It must be such a title as equity would enforce. Efland *v.* Efland, 96 N. C. 488.

[2] Shoemaker *v.* Walker, 2 Serg. & R. 554; Dubs *v.* Dubs, 31 Penn. St. 154; Reid *v.* Morrison, 12 Serg. & R. 18; Miller *v.* Beverly, 1 Hen. & M. 368; Clairborne *v.* Henderson, 3 id. 322; Lawson *v.* Morton, 6 Dana, 471; Bowie *v.* Berry, 1 Md. Ch. 452; Miller *v.* Stump, 3 Gill, 304; Hawley *v.* James, 5 Paige, 318; Thompson *v.* Thompson, 1 Jones (N. C.), 430; Gully *v.* Ray, 18 Ky. 113; Barnes *v.* Gay, 7 Iowa, 26; Lewis *v.* James, 8 Humph. 537; Rowton *v.* Rowton, 1 Hen. & M. 92; Gillespie *v.* Somerville, 3 St. & P. 447; Robinson *v.* Miller, 1 B. Mon. 93; Smiley *v.* Wright, 2 Ohio, 512; Davenport *v.* Farrar, 1 Scam. 314; Bowers *v.* Keesecker, 14 Iowa, 301; Peay *v.* Peay, 2 Rich. Eq. 409; Mershon *v.* Duer, 40 N. J. Eq. 333, a resulting trust in husband. [Pettus *v.* McKinney, 74 Ala. 108, 114; Redmond's Adm'x *v.* Redmond, 112 Ky. 760; Kirby *v.* Vantrece, 26 Ark. 368; Howell *v.* Jump, 140 Mo. 441, 454. Chiefly by statute. See Tenn. Code (1896), § 4139; N. J. Gen. Stat. p 1275, § 1; Radley *v.* Radley, 70 N. J. Eq. 248.]

[3] Hamlin *v.* Hamlin, 19 Maine, 141; Reed *v.* Whitney, 7 Gray, 533; Lobdell *v.* Hayes, 4 Allen, 187. [See Hopkinson *v.* Dumas, 42 N. H. 296, 306; Hall *v.* Hall, 70 N. H. 47; Mann *v.* Edson, 39 Me. 25.]

(*a*) It has been held in Rhode Island that where property was devised to A. and his heirs in trust for D. for life with a remainder to D. on termination of his own life estate, D.'s widow had no right of dower since D. was never seized in fee, even though a court of equity might on his application have terminated the trust and vested the fee in him. Kenyon *v.* Kenyon, 17 R. I. 539.

Where land held in trust has been equitably converted so that the sole beneficiary is entitled only to the proceeds, his widow is not entitled to dower. Hunter *v.* Anderson, 152 Pa. St. 386; Phelps *v.* Phelps, 143 N. Y. 197. Under an Indiana statute which provides that a conveyance or devise of lands to a trustee whose title is nominal only and who has no power of disposition, vests the title in the beneficiary, it has been held that a husband has the legal title and his wife dower in land which he has purchased with his own money and has had conveyed to a trustee to hold for his benefit for life and to convey at his request or as he should appoint by will. Stroup *v.* Stroup, 140 Ind. 179, 185; Ind. Stat. (Burns, 1908), § 4024. But it is otherwise in New York and in Massachusetts, and the fact

curtesy in the equitable estates of his wife.[1] But the wife must be actually in possession of her equitable interest: a mere right not in possession is not enough to entitle the husband to curtesy.[2] But the husband's curtesy will not be defeated by the negligence of the trustee, as where money is directed to be laid in land in such manner that the husband would have been entitled to his curtesy, and the trustee neglected to invest the money during the life of the wife, the husband was held to be entitled to his curtesy.[3] Nor will a trust for the separate use of the wife exclude the husband's curtesy, if at her decease the estate is to go to her heirs.[4]

[1] Tillinghast *v.* Coggeshall, 7 R. I. 383; Nightingale *v.* Hidden, id. 115; Dubs *v.* Dubs, 31 Penn. St. 154; Alexander *v.* Warrance, 17 Mo. 228; Robinson *v.* Codman, 1 Sumn. 128; Gardner *v.* Hooper, 3 Gray, 404; Houghton *v.* Hapgood, 13 Pick. 154; Rawlings *v.* Adams, 7 Md. 54; and see Fletcher *v.* Ashburner, 1 Bro. Ch. 503, and Amer. notes; 1 Green. Cruise, 147, n.; Cushing *v.* Blake, 30 N. J. Eq. 689.

[2] Parker *v.* Carter, 4 Hare, 413; Sartill *v.* Robeson, 2 Jones, Eq. 510; Pitt *v.* Jackson, 2 Bro. Ch. 51; Morgan *v.* Morgan, 5 Madd. 408; 4 Kent, Com. 31.

[3] Sweetapple *v.* Bindon, 2 Vern. 536; Dodson *v.* Hay, 3 Bro. Ch. 405; Parker *v.* Carter, 4 Hare, 413; Casborne *v.* Scarfe, 1 Atk. 609.

[4] Roberts *v.* Dixwill, 1 Atk. 609; Hearle *v.* Greenbank, 3 Atk. 715; Morgan *v.* Morgan, 5 Madd. 408; Follett *v.* Tyrer, 14 Sim. 125; Bennett *v.* Davis, 2 P. Wms. 316; Tillinghast *v.* Coggeshall, 7 R. I. 383.

that his motive in not taking title himself was to prevent his wife from acquiring rights of dower is not in itself fraudulent as to her. Phelps *v.* Phelps, 143 N. Y. 197; Seaman *v.* Harmon, 192 Mass. 5. See also Nichols *v.* Park, 79 N. Y. S. 547, 78 App. Div. 95.

A binding executory contract to convey land upon the payment of a price has been held not to create such an equitable estate in the vendee that his widow is entitled to dower in the land upon the performance of the contract by the administrator of the vendee after the latter's death. Hall *v.* Hall, 70 N. H. 47. See Schaefer *v.* Purviance, 160 Ind. 63. But it is otherwise in Massachusetts by statute. See Reed *v.* Whitney, 7 Gray, 533.

When land owned by a husband has been taken by right of eminent domain, the better opinion is that the wife's inchoate right of dower does not entitle her to have any part of the money received for the land either paid to her or set aside for her benefit on the contingency of her surviving her husband. Flynn *v.* Flynn, 171 Mass. 312. See *contra*, Wheeler *v.* Kirtland, 27 N. J. Eq. 534.

§ 325. At common law if a person holding land committed treason or felony, he forfeited his land to the crown; and if he died without heirs, the land escheated to the crown or to his superior lord. Exactly the same incidents applied to land held in trust for another, if the trustee committed a treason or felony, or died without heirs.[1] This rule of law has been changed in England by statute.[2] At the present day the land either will not be forfeited or escheat, or the crown or superior lord will take it subject to the same equities under which the trustee held it. In the United States, either the land would not be forfeited or escheat, by reason of the failure or incapacity of the trustee or his heirs, or the State would hold it, subject to all the equities it was under in the hands of the trustee. It might not go to the State, for the reason that, if trustees are wanting, courts will appoint new trustees; and if, for any reason, the trust estate should vest in the State, care would be taken that all the rights of the *cestui que trust* should be protected. There are statutes in most of the States determining the rights of the *cestui que trust* in such cases.

§ 326. The trustee is so far clothed with the legal title and all its incidents, that he must perform all the duties of the holder of the legal estate.[3]

§ 327. Before the statute of uses, the estate of the *cestui que use* was not forfeited for crime, and did not escheat upon failure of heirs; but the feoffee to uses held the estate absolutely as his

[1] Burgess *v.* Wheat, 1 Ed. 177; 1 Bro. Ch. 123; Hovenden *v.* Annesley, 2 Sch. & Lef. 617; Eales *v.* England, Pr. Ch. 200; Pawlett *v.* Att. Gen., Hard. 467; Att. Gen. *v.* Leeds, 2 M. & K. 243; Penn *v.* Baltimore, 1 Ves. 453; Williams *v.* Lonsdale, 3 Ves. Jr. 752; Reeves *v.* Att. Gen., 2 Atk. 223; Geary *v.* Bearcroft, Cart. 67; King *v.* Mildmay, 5 B. & Ad. 254; Wilks's Case, Lane, 54; Scounden *v.* Hawley, Comst. 172.

[2] 4 & 5 Wm. IV. c. 23; 39 & 40 Geo. III. c. 88; Hughes *v.* Wells, 9 Hare, 749; 14 Vic. c. 60.

[3] Wilson *v.* Hoare, 2 B. & Ad. 350; Trinity Coll. *v.* Brown, 1 Vern. 441; 2 Ld. Raym. 994; Bath *v.* Abney, 1 Dick. 260; Carr *v.* Ellison, 3 Atk. 73; 1 Cru. Dig. 305.

own.[1] And the same rule was afterwards followed in regard to trusts.[2] Although it was enacted by statute that the *cestui que use* or *cestui que trust* should forfeit his equitable interest upon conviction for *treason*,[3] yet the law never went further; and if the *cestui que trust* committed a *felony*, so that he could no longer claim his equitable rights, the trustee continued to hold the lands for his own use discharged of the trusts.[4] And so it was held, after great debate in Burgess *v.* Wheat, that if the *cestui que trust* left no heirs, the trust estate of inheritance did not escheat, but that the trustee thenceforth held the estate discharged of the trust.[5] This case has been doubted,[6] but it has been followed as the law.[7] This is upon the principle, that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership against all the world except the *cestui que trust*, and those claiming under him. But this principle does not apply to chattels, where there can be no tenant, nor to leaseholds,[8] nor to an equity of redemption.[9] In the United States, trustees would hold personal property subject to the right of the State as *ultima hæres*, in case the *cestui que trust* died without heirs or next of kin; and it is conceived that they would hold real estate under the same rule.[10]

[1] Burgess *v.* Wheat, 1 Ed. 199, per Sir Thomas Clarke, M. R.

[2] Att. Gen. *v.* Sands, 1 Hale, P. C. 249.

[3] 33 Hen. VIII. c. 20; 1 Hale, P. C. 248.

[4] Att. Gen. *v.* Sands, 1 Hale, P. C. 249.

[5] Burgess *v.* Wheat, 1 Ed. 177; 1 Black, 123; 1 Bro. Ch. 123.

[6] Middleton *v.* Spicer, 1 Bro. Ch. 204; Fawcet *v.* Lowther, 2 Ves. 300; Sweeting *v.* Sweeting, 33 L. J. Ch. 211.

[7] Taylor *v.* Haygarth, 14 Sim. 8; 8 Jur. 185; Henchman *v.* Att. Gen., 3 Myl. & K. 485; Onslow *v.* Wallis, 1 Mac. & G. 506; 1 Hall & T. 513; Rittson *v.* Stordy, 3 Sm. & Gif. 230; Barrow *v.* Wadkin, 24 Beav. 1. [See *In re* Bacons's Will, 31 Ch. D. 460.]

[8] Middleton *v.* Spicer, 1 Bro. Ch. 201; Walker *v.* Denne, 2 Ves. Jr. 170; Barclay *v.* Russell, 3 Ves. 424; Henchman *v.* Att. Gen., 3 Myl. & K. 485; Taylor *v.* Haygarth, 14 Sim. 8; Cradock *v.* Owen, 2 Sm. & Gif. 241; Bishop *v.* Curtis, 17 Jur. 23; Powell *v.* Merritt, 22 L. J. 208; 1 Sm. & Gif. 381.

[9] Down *v.* Morris, 3 Hare, 394.

[10] McCaw *v.* Galbraith, 7 Rich. L. 75; Darrah *v.* McNair, 1 Ash. 236; Matthews *v.* Ward, 10 G. & J. 443; 4 Kent, 425; Crane *v.* Ruder, 21 Mich. 25.

§ 328. It is the duty of the trustee to defend and protect the title to the trust estate; and, as the legal title is in him, he alone can sue and be sued in a court of law; the *cestui que trust*, the absolute owner of the estate in equity, is regarded in law as a stranger.[1] (*a*) The rule is carried to the extent that the grantee of the trustee can alone maintain an action upon the legal title, although the conveyance to him was a breach of the trust.[2] To protect himself, the trustee must defend the title if he is sued. It is his duty to give the *cestui que trust* notice of a suit hostile to his interests, and to defend the action in good faith. To act otherwise would be a breach of trust.[3] A trustee may also maintain an action for any trespass upon the land;[4] but if the

[1] May *v.* Taylor, 6 M. & Gr. 261; Gibson *v.* Winter, 5 B. & Ad. 96; Allen *v.* Imlett, Holt, 641; Goodtitle *v.* Jones, 7 T. R. 47; Baptist Soc. *v.* Hazen, 100 Mass. 322; Cox *v.* Walker, 26 Me. 504; Beach *v.* Beach, 14 Vt. 28; Moore *v.* Burnet, 11 Ohio, 334; Wright *v.* Douglass, 3 Barb. 59; Matthews *v.* Ward, 10 G. & J. 443; Mordecai *v.* Parker, 3 Dev. 425; Finn *v.* Hohn, 21 How. 481; Hooper *v.* Scheimer, 23 How. 235; Fitzpatrick *v.* Fitzgerald, 13 Gray, 400; Chapin *v.* Universalist Society, 8 Gray, 581; Crane *v.* Crane, 4 Gray, 323; Davis *v.* Charles River Railroad, 11 Cush. 506; Raymond *v.* Holden, 2 Cush. 268; Moody *v.* Farr, 33 Miss. 192; Adler *v.* Sewell, 20 Ind. 598; Western R. R. Co. *v.* Nolan, 48 N. Y. 517; Church *v.* Stewart, 27 Barb. 553; Ryan *v.* Bibb, 46 Ala. 323; Ponder *v.* McGruder, 42 Ga. 242; Kirkland *v.* Cox, 94 Ill. 402. [Bailey *v.* Selden, 112 Ala. 593; Simmons *v.* Richardson, 107 Ala. 697; Miller *v.* Butler, 121 Ga. 758; Sanders *v.* Houston Guano Co., 107 Ga. 49; McDevitt *v.* Bryant, 104 Md. 187; Attwill *v.* Dole, 74 N. H. 300; O'Malley *v.* Gerth, 67 N. J. Law, 610; Robinson *v.* Adams, 81 App. Div. (N. Y.) 20; 179 N. Y. 558; Butler *v.* Butler, 58 N. Y. S. 1094; 41 App. Div. 477; Price *v.* Krasnoff, 60 S. C. 172; *In re* Kenney, 136 Fed. 451. See Birmingham, etc., Co. *v.* Louisville, etc., Co., 152 Ala. 422; Kaylor *v.* Hiller, 72 S. C. 433.]

[2] Reece *v.* Allen, 5 Gilm. 241; Taylor *v.* King, 6 Munf. 358; Canoy *v.* Troutman, 7 Ired. 155; Cary *v.* Whitney, 48 Maine, 516; Matthews *v.* McPherson, 65 N. C. 189; Phillips *v.* Ward, 51 Mo. 295.

[3] Mackay *v.* Coates, 70 Penn. St. 350; Warland *v.* Colwell, 10 R. I. 369.

[4] Walker *v.* Fawcett, 7 Ired. 44.

(*a*) It has been held in Alabama that a trustee suing in equity for an injunction against the erection of telegraph poles on the trust property needs to allege that the trust is an active one, since he has no legal title if the trust is passive. Roman *v.* Long Distance Tel. & Tel. Co., 147 Ala. 389.

cestui que trust is in the actual possession of it, he may maintain an action for any injury done to his possession.[1] If, however, the trust is terminated by operation of law or otherwise, and the property has vested in the *cestui que trust*, he may after that time maintain an action upon the title;[2] and so if there has been a conveyance or surrender by the trustees to the *cestui que trust*,[3] or a presumption of a surrender from the fact that the purposes of the trust are all accomplished.[4] If the trustee is in possession, he must sue for all injuries to the possession, and he is the proper person to maintain the claim for damages for flowing the land under the mill acts, or for taking it for railroad purposes, turnpikes, or public highways.[5] (*a*) In

[1] Cox *v.* Walker, 26 Maine, 504; Stearns *v.* Palmer, 10 Met. 32; Second Cong. Soc. North Bridgewater *v.* Waring, 24 Pick. 309. [Thomas Machine Co. *v.* Voelker, 23 R. I. 441; Cape *v.* Plymouth Church, 117 Wis. 150.]

[2] Nicoll *v.* Walworth, 4 Denio, 385; Matthews *v.* McPherson, 65 N. C. 189; Lockhart *v.* Canfield, 49 Miss. 470.

[3] Den ex d. Obert *v.* Bordine, 1 Spencer (N. J.), 394; Hopkins *v.* Ward, 6 Munf. 38; Doggett *v.* Hart, 5 Fla. 215.

[4] Ibid.

[5] Davis *v.* Charles River R. R. Co., 11 Cush. 506; Woodruff *v.* Orange, 32 N. J. 49. [See Lewin on Trusts, (11th ed.) 851; 1 Ames on Trusts (2d ed.), 255.]

(*a*) If the trustee refuses to bring suit against a third person to protect the trust property or to recover it when it has been improperly transferred or when he has been disseised, the *cestui* is sometimes allowed to proceed in equity against the third person joining the trustee as a party defendant. Bailey *v.* Selden, 112 Ala. 593; Robinson *v.* Adams, 81 App. Div. (N. Y.) 20; 179 N. Y. 558; Butler *v.* Butler, 58 N. Y. S. 1094, 41 App. Div. 477. See Anderson *v.* Daley, 56 N. Y. S. 511. It is necessary to allege and prove that the trustee has been requested to bring suit and has refused. *Ibid.* And even when this is the case, it is within the discretion of the court whether or not to allow this form of procedure. See Sharp *v.* San Paulo Brazilian Ry. Co., 8 Ch. 597; Yeatman *v.* Yeatman, 7 Ch. Div. 210; Meldrum *v.* Scorer, 56 L. T. 471.

A trustee is not estopped from bringing suit to recover property transferred by himself in breach of trust without consent of all the *cestuis*, Ludington *v.* Mercantile Bank, 92 N. Y. S. 454, 102 App. Div. 251; Robertson *v.* De Brulatour, 188 N. Y. 301; Clemens *v.* Heckscher, 185 Pa. St. 476; nor is a substituted trustee. Safe Deposit & Tr. Co. *v.* Cahn, 102 Md. 530; Leake *v.* Watson,

Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* may maintain the suit if he is entitled to possession, or it may be maintained by the trustee.[1] In a few States there are statutes or codes which enact that parties beneficially interested in the subject-matter of the suit shall be made the parties' plaintiffs; but the right or duty of trustees, or persons holding the legal title in a fiduciary capacity, to sue is generally provided for.[2] Merely nominal trustees, as officers of a town or parish, cannot sue in their own name.[3] (*a*)

[1] School Dir. *v.* Dunkleberger, 6 Barr, 29; Presbyterian Cong. *v.* Johnston, 1 Watts & S. 56; Kennedy *v.* Fury, 1 Dall. 76; Hunt *v.* Crawford, 3 Pa. 426; Caldwell *v.* Lowden, 3 Brews. 63. [Chamberlain *v.* Maynes, 180 Pa. St. 39.]

[2] See Codes of New York and Ohio; McGill *v.* Doe, 9 Ind. 306. [See Cunningham *v.* Bank of Nampa, 13 Idaho, 167; Wright *v.* Conservative Inv. Co., 49 Or. 177; McDevitt *v.* Bryant, 104 Md 187; Zion Church *v.* Parker, 114 Iowa, 1; Pyle *v.* Henderson, 55 W. Va. 122; First Nat. Bank *v.* Hummel, 14 Colo. 259. As to whether or not the *cestuis* should be parties to suits by or against trustees, see *infra* § 873, note.]

[3] Regina *v.* Shee, 4 Q. B. 2; Manchester *v.* Manchester, 17 Q. B. 859; Queen *v* Commissioners, 15 Q. B. 1012; Connor *v.* New Albany, 1 Blackf. 88.

58 Conn. 332; First Nat. Bank *v.* Broadway Bank, 156 N. Y. 459, 467. And equity will take jurisdiction and give relief, although the trustee has an adequate remedy at law. Safe Dep. & Tr. Co. *v.* Cahn, 102 Md. 530.

The trustee is not estopped from setting up any defence which the *cestuis*, were they in person defending the action, might properly urge in their own behalf. Thus in defence to a foreclosure proceeding upon a mortgage given by himself, he is not estopped to set up that he had no power to mortgage. Wagnon *v.* Pease, 104 Ga. 417.

As to the duty of a trustee for the life beneficiary to protect the interests of the remainder-man in personalty, see Leake *v.* Watson, 58 Conn. 332.

(*a*) A trustee who owes his appointment to a court of another State than that in which he brings suit may nevertheless sue strangers to the trust, since he sues as legal owner, not in a representative capacity. Toronto Gen. Tr. Co. *v.* C. B. & Q. R. Co., 123 N. Y. 37; Pennington *v.* Smith, 69 Fed. 188; Iowa & Cal. Land Co. *v.* Hoag, 132 Cal. 627; Bradford *v.* King, 18 R. I. 743. But see Bangs *v.* Berg, 82 Iowa, 350; Hale *v.* Harris, 112 Iowa, 372.

§ 329. Whether the trustees are entitled to the possession, control, and management of real estate, as against the *cestui que trust*, depends upon the whole scope of the settlement, and the nature of the duties which the trustees are required to perform. A fund in trust for the sole use of a person, with power to dispose of the fund by will, does not give the *cestui* a right to recover possession of the fund from the trustee.[1] If the entire interest is vested in the trustees, and they are to manage the property, keep it insured, and pay taxes, premiums, annuities, and other charges out of the income, the court will imply that the trustees are to have the possession, and will not take it from them, unless there is some very clear intention expressed to control such directions.[2] (*a*) And the trustees may purchase whatever is necessary, and cultivate the land instead of renting it.[3] If the *cestui que trust*, or tenant for life, is a *female*, the court will continue the possession in the trustees for her protection in case of marriage.[4] So, if the trustees themselves have a beneficial interest, or a reversion or remainder after the death of the tenant for life, the court will continue the possession in them.[5] If, however, the plain intention of the settlement is that the *cestui que trust* is to have the possession, then all other

[1] Barkley *v.* Dosser, 15 Lea (Tenn.) 529.

[2] Tidd *v.* Lister, 3 Madd. 429; Naylor *v.* Arnitt, 1 R. & M. 501; Young *v.* Miles, 10 B. Mon. 290; Blake *v.* Bunbury, 1 Ves. Jr. 194, 514; 4 Bro. Ch. 21; Jenkins *v.* Milford, 1 J. & W. 629; Moseley *v.* Marshall, 22 N. Y. 200; Marshall *v.* Sladen, 4 De G. & Sm. 468; Matthews *v.* McPherson, 65 N. C. 189.

[3] Mayfield *v.* Kegour, 21 Md. 241.

[4] Ibid.; Weekham *v.* Berry, 55 Penn. St. 70.

[5] Ibid.

(*a*) Now, in England, the Settled Land Acts have granted such powers to and imposed such duties on tenants for life that, if the estate and trustees can be well protected by reasonable safeguards, an equitable tenant for life is to be let into possession and enabled personally to exercise these powers and discharge these duties when there is no urgent counter reason. See *In re* Wythes, [1893] 2 Ch. 369; *In re* Bagot, [1894] 1 Ch. 177; *In re* Newen, 2 id. 297; *In re* Bentley, 54 L. J. Ch. 782.

considerations must give way; as, if it is plain that the settlor intended the estate to be a place of residence for the *cestui que trust*, the intention must be carried out.[1] If the tenant for life takes a *legal* estate, subject to a charge, he will of course be entitled to the possession, so long as he discharges all incumbrances thus put upon the estate.[2] But if the tenant for life allows the annuities or other charges to fall in arrears, the trustees must take possession for the security of the annuitants, and must continue the possession until ample security is made for the future.[3] Security may be required in any case where the tenant for life is let into possession.[4]

§ 330. The trustee is entitled to the possession of all personal securities, such as bonds, notes, mortgages, and certificates of stocks, belonging to the trust estate; and he may maintain an action for their delivery, even against the *cestui que trust*.[5] All personal actions for injury to the personal property, or for its detention or conversion, such as trespass,[6] trover,[7] detinue,[8] or replevin,[9] must be brought in the name of the trustee, although

[1] Tidd *v.* Lister, 5 Madd. 432; Campbell *v.* Prestons, 22 Grat. 396.

[2] Denton *v.* Denton, 7 Beav. 388; Blake *v.* Bunbury, 1 Ves. Jr. 194; Tidd *v.* Lister, 5 Madd. 432.

[3] Ibid.

[4] Ibid.; Pugh *v.* Vaughn, 12 Beav. 517; Langston *v.* Ollivant, Coop. 33; Baylies *v.* Baylies, 1 Col. 137.

[5] Jones *v.* Jones, 3 Bro. Ch. 80; Poole *v.* Pass, 1 Beav. 600; Beach *v.* Beach, 14 Vt. 28; Gunn *v.* Barrow, 17 Ala. 743; White *v.* Albertson, 3 Dev. 241; Guphill *v.* Isbell, 8 Rich. L. 463; Presley *v.* Stribling, 24 Miss. 257; Pace *v.* Pierce, 49 Mo. 393; Ryan *v* Bibb, 46 Ala. 343; Western R. R. Co. *v.* Nolan, 48 N. Y. 513.

[6] McRaeny *v.* Johnson, 2 Fla. 520.

[7] Hower *v.* Geesaman, 17 Serg. & R. 251; Poage *v* Bell, 8 Leigh, 604; Coleson *v.* Blanton, 3 Hayw. 152; Guphill *v.* Isbell, 8 Rich. L. 463; Thompson *v.* Ford, 7 Ired. 418; Schley *v.* Lyons, 6 Ga. 530.

[8] Jones *v.* Strong, 6 Ired. 367; Murphy *v.* Moore, 2 Ired. Eq. 118; Chambers *v.* Mauldin, 4 Ala. 477; Parsons *v.* Boyd, 20 Ala. 112; Stoker *v.* Yelby, 11 Ala. 327; Baker *v.* Washington, 3 Stew. & P. 142; Newman *v.* Montgomery, 5 How. (Miss.) 742.

[9] Presley *v.* Stribling, 24 Miss. 527; Daniel *v.* Daniel, 6 B. Mon. 230.

the possession is in the *cestui que trust*,[1] (*a*) and although there may be a defect in the title of the trustee;[2] for the possession of the *cestui que trust* is the possession of the trustee, and in law he is not allowed to dispute the title or possession of his trustee.[3] The action of assumpsit is an equitable action, and, generally, if a promise is made to one for the benefit of another, the person for whose benefit the promise is made may bring the action; but if a promise is made to a trustee for the benefit of the *cestui que trust*, the trustee alone can sue.[4] So only those parties can sue on a contract with whom it is made, unless it is negotiable paper; therefore, substituted trustees cannot sue upon a contract made with their predecessors in the trust, but the suit must be in the names of the parties with whom it was made, for the benefit of the estate.[5] (*b*) Generally, all notices and tenders[6] must be made to the trustees; and they must use all due diligence in prosecuting suits in favor of the estate and of the *cestui que trust*, and they must take the proper care in defending such suits; and if appeals are taken from decrees or judgments in favor of the estate, or of the *cestui que trust*, they must duly support the rights of the *cestui que trust* in whatever court the case may be carried.[7] If the *cestui que trust* brings an action in the name of the trustee, the trustee may insist upon indemnity

[1] Jones *v.* Cole, 2 Bail. 330; Wynn *v.* Lee, 5 Ga. 236.

[2] Rogers *v.* White, 1 Sneed, 69.

[3] White *v.* Albertson, 3 Dev. 241. [Barker *v.* Furlong, [1891] 2 Ch. 172.]

[4] Treat *v.* Stanton, 14 Conn. 445; Porter *v.* Raymond, 53 N. H. 519. [See 1 Ames on Trusts, (2d ed.) 258.]

[5] Binney *v.* Plumly, 5 Vt. 500; Ingersoll *v.* Cooper, 5 Blackf. 420; Davant *v.* Guerard, 1 Spear, 242; Wake *v.* Tinkler, 16 East, 36.

[6] Cahoon *v.* Hollenback, 16 Serg. & R. 425; Henry *v.* Morgan, 2 Binn. 497.

[7] Wood *v.* Burnham, 6 Paige, 513.

(*a*) But a *cestui* who has the right of possession may sue third persons for damages due to disturbance of his possession. Cape *v.* Plymouth Church, 117 Wis. 150; Thomas Machine Co. *v.* Voelker, 23 R. I. 441.

(*b*) The substituted trustee has of course all the rights of an assignee of a chose in action, and as such has by statute in some States been given the right to sue in his own name. See Mass. R. L. [1902] c. 173, § 4.

against the costs.[1] If the trustee collusively releases such suit without the consent of the party beneficially interested, the court will set aside the release.[2] So, if a trustee discharges a debt or mortgage without payment, the court would set aside the discharge;[3] (*a*) and if a trustee refuses to bring a suit, or to allow his name to be used, equity will compel him to take such steps as the interest of the estate and of the *cestui que trust* requires.[4] In all such suits in the name of the trustee, a debt due from the *cestui que trust* cannot be set off.[5] If a trustee sue

[1] Ins. Co. *v.* Smith, 11 Penn. St. 120; Annesley *v.* Simeon, 4 Madd. 390; Roden *v.* Murphy, 10 Ala. 804. [Falmouth Bank *v.* Cape Cod Canal Co., 166 Mass. 550, 567.]

[2] Anon. Salk. 260; Bauerman *v.* Radenius, 7 T. R. 670; Legh *v.* Legh, 1 B. & P. 447; Payne *v.* Rogers, Doug. 407; Manning *v.* Cox, 7 Moore, 617; Hickey *v.* Burt, 7 Taunt. 48; Barker *v.* Richardson, 1 Y. & J. 362; Roden *v.* Murphy, 10 Ala. 804; Greene *v.* Beatty, Coxe, 142; Kirkpatrick *v.* McDonald, 11 Penn. St. 387.

[3] Woolf *v.* Bate, 9 B. Mon. 210.

[4] Blin *v.* Pierce, 20 Vt. 25; Chisholm *v.* Newton, 1 Ala. 371; Robinson *v.* Mauldin, 11 Ala. 978; Welch *v.* Mandeville, 1 Wheat. 233; Parker *v.* Kelly, 10 Sm. & M. 184; McCullum *v.* Coxe, 1 Dall. 139. [Sharpe *v.* San Paulo Brazilian Ry. Co., 8 Ch. 597; Yeatman *v.* Yeatman, 7 Ch. Div. 210; Meldrum *v.* Scorer, 56 L. T. 741.]

[5] Wells *v.* Chapman, 4 Sandf. Ch. 312; Campbell *v.* Hamilton, 4 Wash. C. C. 93; Woolf *v.* Bates, 9 B. Mon. 211; Beale *v.* Coon, 2 Watts, 183;

(*a*) So too of a judgment binding the trust property, if the judgment was obtained by collusion between the trustee and the creditor. Snelling *v.* Am., etc., Mort. Co., 107 Ga. 852. But the mere fact that the trustee has allowed the judgment to be entered by default is not sufficient to have it set aside in the absence of other evidence of collusion. Sanders *v.* Houston Guano Co., 107 Ga. 49.

It has been held that the trial judge may, of his own motion, order a trustee, who has been joined as defendant, to answer in his capacity of trustee to protect the rights of the *cestui*. Kaylor *v.* Hiller, 72 S. C. 433.

In an Alabama case where there was a proceeding at law for the taking, by right of eminent domain, of land held in trust for a railroad, the *cestui*, whose defence to the taking was that it had already devoted the land to a public purpose, was allowed to present this defence by a bill in equity for an injunction against the suit at law which had been brought against the trustee. Birmingham, etc., Co. *v.* Louisville, etc., R. Co., 152 Ala. 422.

for matters pertaining to the trust estate, a private debt due from the trustee cannot be set off.[1] [Under the Massachusetts statute] a trustee cannot set off against the assignee of the *cestui* a debt for money lent by him to the *cestui* before his appointment as trustee.[2]

§ 331. The trustee, being liable for a breach of the trust, if he permits any misapplication of the funds should of course have the possession and control of all personal property. So all the duties and privileges which attach to such property pertain to him. If the property consists of stocks in corporations, he may attend corporate meetings, vote, and hold office by virtue of such stock.[3] So the trustee is rated or assessed for taxes, and must see that the taxes upon the trust property are paid. The statutes of the various States determine the localities where such property shall be assessed: real estate is generally assessed in the parish, town, or county where it is situated; and personal property, either in the place of the domicil of the trustee or of the *cestui que trust*, as the statutes of a State may direct. In the absence of a statute, the law would look upon the trustee as the owner, and assess the property at his domicil.[4] (*a*)

§ 332. The trustee must prove a debt against a bankrupt debtor of the estate, as he is the person to receive the divi-

Tucker *v.* Tucker, 4 B. & Ad. 745; Porter *v.* Morris, 2 Harr. 509. [1 Ames on Trusts (2d ed.), 270.]

[1] Page *v.* Stephens, 23 Mich. 357. [See Ames' Cases on Trusts (2d ed.), 270.]

[2] Abbott *v.* Foote, 146 Mass. 333. [R. L. (1902) c. 174, § 6.]

[3] Matter of Barker, 6 Wend. 509; *Re* Phœnix Life Assur. Co., 2 John. & H. 279.

[4] Latrobe *v.* Baltimore, 19 Md. 13; Green *v.* Mumford, 4 R. I. 313; and see the statutes of the various States.

(*a*) If there are two or more trustees residing in different places the tax is divided, the trustees being treated as equal owners. Trustees *v.* Augusta, 90 Ga. 634, 20 L. R. A. 151 and note. But the matter of taxation of trust property has been largely dealt with by statute. See Mass. R. L. (1902), c. 12, § 23, cl. 5.

dend;[1] but in special cases the concurrence of the *cestui que trust* may be required, as where he may have a right to receive the payment.[2]

§ 333. In England, trustees had at common law the right to vote for local officers and for members of parliament, by virtue of the qualification conferred upon them by the trust property, if it was sufficient in amount. Statutes have, however, changed the common law, and given the right in most cases to the *cestui que trust*. In the United States, property qualifications of voters are generally abrogated.[3]

§ 334. Trustees of real or personal estate may, *at law*, sell, convey, assign, or incumber the same, as if they were the beneficial owners,[4] and each of several trustees may exercise all his rights of ownership. If the trustees are joint-tenants, each may receive the rents,[5] and each may sever the joint-tenancy by a conveyance of his share,[6] and each may collect the dividends on stocks, and on the death of one, the survivor may sell the whole estate.[7] The general power of a trustee to sell and convey the estate is co-extensive with his ownership of the legal title; and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate. Though the trustee may thus sell, even in breach of the trust, a conveyance without consideration will not injure the *cestui que trust;* as the grantee, who is a volunteer, will hold upon the same trusts as the trustee held, and if the purchaser for a valuable consideration have notice of the trust

[1] *Ex parte* Green, 2 Dea. & Ch. 116.

[2] *Ex parte* Dubois, 1 Cox, 310; *Ex parte* Butler, Buck, 426; *Ex parte* Gray, 4 Dea. & Ch. 778; *Ex parte* Dickenson, 2 Dea. & Ch. 520.

[3] See 5 Ired. Eq. Appendix; 4 Kent, Com. 195.

[4] Shortz *v.* Unangst, 3 Watts & S. 55; Canoy *v.* Troutman, 7 Ired. 155. [Marx *v.* Clisby, 130 Ala. 502.]

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

[6] Boursot *v.* Savage, L. R. 2 Eq. 134.

[7] Saunders *v.* Schmaelzle, 49 Cal. 59.

he will still hold the estate upon trust.[1] In New York, however, a statute has converted the trustee's ownership of the legal title into a power, or power in trust;[2] and where a trust is expressly created by a written instrument, every sale in breach or contravention of the trust is declared to be absolutely void, even if the sale is under the sanction of a court.[3] (*a*) Whether a trustee intends to convey an estate is frequently a question made upon conveyances, and it has been determined that a general assignment of all the trustee's estates, for the benefit of his creditors, does not pass estates held by him in trust.[4]

§ 335. As among the incidents of the trustee's legal title in the trust estate is his power to sell it, so he may devise it by his last will and testament. The principal question that here arises is, whether the words of the will of a trustee embrace estates held by him in trust, for a trust estate will not in all cases pass by the same words as would pass the beneficial ownership; for wherever an estate passes, not by operation of law, but by the intention of any one, it is necessary to find the intention from the instrument under the circumstances in which it is made; and an intention to devise a trust estate is not so readily inferred as an intention to devise a beneficial estate. (*b*) If the

[1] See *ante*, § 321.

[2] Anderson *v.* Mather, 44 N. Y. 249; New York, &c., *v.* Stillman, 30 N. Y. 174; Fitzgerald *v.* Topping, 48 N. Y. 441; Fellows *v.* Heermans, 4 Lans. 230; Martin *v.* Smith, 56 Barb. 600; Critton *v.* Fairchild, 41 N. Y. 289. The law is the same in Michigan. Palmer *v.* Wilkins, 24 Mich. 328. See Jones *v.* Shaddock, 41 Ala. 262; 1 Rev. Stat. 330, § 65; Briggs *v.* Palmer, 20 Barb. 392; Briggs *v.* Davis, 20 N. Y. 15; 21 N. Y. 574. [IV Consol. Laws (1909), p. 3392, § 105.]

[3] Cruger *v.* Jones, 18 Barb. 468; Lahens *v.* Dupasseur, 56 Barb. 256.

[4] Ludwig *v.* Highley, 5 Barr, 132; Abbott, Pet'r, 55 Maine, 480.

(*a*) Several other States have similar statutes. Mich. Comp. Laws (1897), § 8849; Minn. Rev. Laws (1905), § 3259; Mont. Civ. Code (1907), § 4549; No. Dak. Civ. Code, (1905), § 4836; So. Dak. Civ. Code (1908), § 317; Wis. Stat. (1898), § 2091; Kansas Gen. Stat. (1909), § 9698; Ind. Burns' Stat. (1908), § 4016.

(*b*) This question has but little practical importance in the United States. See *infra*, § 341.

trust is only a personal one, the donor using no words requiring continuance of the trust beyond the life of the immediate trustee, the estate cannot be devised by the trustee, but ceases at his death.[1]

§ 336. An assignment in general words by a trustee of all his estate for his creditors will not pass a trust estate, for the reason that the court will not presume that the trustee intended to commit a breach of trust;[2] for a similar reason it has at times been said that a devise of all a trustee's estates in general words would not operate upon estates that he held in trust, unless there appeared a positive intention that they should so pass.[3] The question was finally considered by Lord Eldon; and after a careful examination, the rule was declared to be, that "where the will contained words large enough, and there was no expression authorizing a narrower construction, nor any such disposition of the estate as it was unlikely a testator would make of property not his own, in such case the trust property would pass."[4] Mr. Hill states the rule, "that a general devise of real estate will pass estates vested in the testator as trustee or mortgagee, unless a contrary intention can be collected from the expressions of the will, or from the purposes or limitations to which the devised lands are subjected."[5] This general rule is acted upon in the United States.[6]

[1] Hinckley *v.* Hinckley, 79 Maine, 320.

[2] Cook *v.* Tullis, 18 Wall. 332; Kelly *v.* Scott, 49 N. Y. 595; *In re* McKay, 1 Lowell, 345; Chase *v.* Chapin, 130 Mass. 128. [1 Ames' Cases on Trusts, (2d ed.) 316.]

[3] Casborne *v.* Scarfe, 1 Atk. 605; Strode *v.* Russell, 2 Vern. 625; Leeds *v.* Munday, 3 Ves. 348; *Ex parte* Sergison, 4 Ves. 147; *Ex parte* Bowes, cited note, 1 Atk. 605; Pickering *v.* Vowles, 1 Bro. Ch. 198; Att. Gen. *v.* Buller, 5 Ves. 340.

[4] Braybrooke *v.* Inskip, 8 Ves. 436; Roe *v.* Reade, 8 T. R. 118; *Ex parte* Morgan, 10 Ves. 101; Langford *v.* Auger, 4 Hare, 313; Linsell *v.* Thacher, 12 Sim. 178; *Ex parte* Shaw, 8 Sim. 159; Hawkins *v.* Obeen, 2 Ves. 559.

[5] Hill on Trustees, 283.

[6] Taylor *v.* Benham, 5 How. 270; Heath *v.* Knapp, 4 Barr, 228; Jackson *v.* Delancy, 13 Johns. 537; Hughes *v.* Caldwell, 11 Leigh, 342; Merritt *v.* Farmers' Ins. Co., 2 Edw. Ch. 547; Ballard *v.* Carter, 5 Pick. 112 ; Asay

§ 337. Notwithstanding the rule, that a trust estate will pass by general words in a devise, unless there is something in the will to show a contrary intention, there has continued to be a conflict of opinion upon the propriety of the rule, and more conflict upon its application. But a charge of debts, legacies, and annuities upon the estate devised, or a power given to sell it, is an indication that the testator did not intend that the trust estate should pass under the words of his devise, for the reason that he could not have intended that his devisee should do that with the estate which would be a breach of trust.[1] So, if there is a limitation of the estate in strict settlement, with a great number of complicated conditions, contingencies, remainders, and limitations, it will not be presumed that a trustee intended to devise a dry trust in a legal title upon such terms, and the estate will not pass under general words;[2] so if the devise is to A. in tail with remainder over in strict settlement;[3] so a devise to a testator's nephews and neices in equal shares as tenants in common is to a class not ascertained at the date of the will, and will not by general words pass a trust estate.[4] So a devise to a woman for her separate use, imports a beneficial use, and not a dry legal estate, and the trust estate would not pass to her under general words.[5] But a devise to a woman, her heirs and assigns, to her and their own sole and absolute use, passes the estate for the reason that there is noth-

v. Hoover, 5 Barr, 35; Richardson *v.* Woodbury, 43 Me. 206; Drane *v.* Gunter, 19 Ala. 731. [See 1 Ames' Cases on Trusts, (2d ed.) 316.]

[1] Rackham *v.* Siddall, 16 Sim. 297; 1 Mac. & G. 607; Hope *v.* Liddell, 21 Beav. 183; Life Asso. of Scotland *v.* Siddall, 3 De G., F. & J. 58; Wall *v.* Bright, 1 Q. & W. 494; Leeds *v.* Munday, 3 Ves. 348; *Ex parte* Marshall, 9 Sim. 555; *Re* Morley's Trusts, 10 Hare, 293; Sylvester *v.* Jarman, 10 Price, 78; Roe *v.* Reade, 8 T. R. 118; Att. Gen. *v.* Buller, 5 Ves. 339; *Ex parte* Morgan, 10 Ves. 101; *Ex parte* Brettell, 6 Ves. 577; Merritt *v.* Farmers' Ins. Co., 2 Edw. Ch. 547.

[2] Braybrooke *v.* Inskip, 8 Ves. 434.

[3] Thompson *v.* Grant, 4 Madd. 438; *Ex parte* Bowes, cited 1 Atk. 603; Galliers *v.* Moss, 9 B. & Cr. 267; *Re* Horsfall, 1 McClel. & Y. 292.

[4] *Re* Finney's Est., 3 Gif. 465.

[5] Lindsell *v.* Thacher, 12 Sim. 178; the case istelf, not the marginal note.

ing inconsistent with their holding the absolute use in trust;[1] and a devise to A. and B. to be equally divided between them, as tenants in common, and their respective heirs, will pass the estate.[2] A devise of all my estates will pass trust property.[3] So a devise to A., his heirs and assigns, to and for his and their own use and benefit;[4] and a devise to A. and her heirs, to be disposed of, by her will or otherwise, as she shall think fit,[5] will pass trust property under general words, for there is no necessary breach of the trust.

338. The interest of a *mortgagee in fee* in the mortgaged land stands upon a somewhat different ground. The mortgagee has a debt due him which is the principal thing, and the mortgage is a beneficial interest in the land as security for the debt. This interest generally goes with the debt. And mortgage estates will pass by a general devise, notwithstanding a charge of debts and legacies, if the intent appears, to pass them as securities for money.[6] But if there are special trusts for sale, or other special charges annexed to the devise, inconsistent with the idea of holding the estate as security for money, it would not pass under a general devise.[7]

[1] Lewis *v.* Mathews, L. R. 2 Eq. 177.

[2] *Ex parte* Whiteacre, cited Lewin on Trusts, 186; 1 Saund. Uses & Tr. 359; *Re* Morley's Trusts, 10 Hare, 293.

[3] Braybrooke *v.* Inskip, 8 Ves. 425; Bangs *v.* Smith, 98 Mass. 273; Amory *v.* Meredith, 7 Allen, 397; Willard *v.* Ware, 10 Allen, 263; Stone *v.* Hackett, 12 Gray, 237.

[4] *Ex parte* Shaw, 8 Sim. 159; Bainbridge *v.* Ashburton, 2 Y. & C. 347; Sharpe *v.* Sharpe, 12 Jur. 598; *Ex parte* Brettell, 6 Ves. 577; Heath *v.* Knapp, 4 Barr, 228; Abbott, Petitioner, 55 Maine, 580.

[5] Ibid.

[6] *Ex parte* Barber, 5 Sim. 451; Doe *v.* Benett, 6 Exch. 892; *Re* Cantley, 17 Jur. 124; King's Mort., 5 De G. & Sm. 644; Knight *v.* Robinson, 2 K. & J. 503; Rippen *v.* Priest, 13 C. B. (N. S.) 508; *Re* Arrowsmith, 4 Jur. (N. S.) 1123; Mather *v.* Thomas, 6 Sim. 119; overruling Galliers *v.* Moss, 9 B. & C. 267; Sylvester *v.* Jarman, 10 Price, 78, and *Re* Cantley, 17 Jur. 124; Ballard *v.* Carter, 5 Pick. 112; Asay *v.* Hoover, 5 Barr, 35; Richardson *v.* Woodbury, 43 Maine, 206; Field's Mort., 9 Hare, 414, overruling Benvoise *v.* Cooper, 10 Price, 78, and in opposition to Doe *v.* Lightfoot, 8 M. & W. 553.

[7] *Re* Cantley, 17 Jur. 123.

§ 339. In allowing a trust estate to pass under general words of a devise, it is assumed that the testator does not intend by his devise to commit a breach of the trust. It is simply a question, whether the testator has devised, or can or should devise, a trust estate, or whether he should allow it to descend to his heir or legal representatives. It was said in Cook *v.* Crawford, that it was not lawful for the trustee to dispose of the estate, but that he ought to permit it to descend; that a devise did not differ from a deed *inter vivos;* and that it was only a *post mortem* conveyance.[1] On the other hand, it is said that there is a wide distinction between a conveyance and a devise. That during the trustee's lifetime there was a personal trust and confidence in his discretion, which he could not delegate; that the settlor could have reposed no confidence in the heir, for he could not know beforehand who the heir would be; that if the estate was allowed to descend, it might become vested in married women, infants, bankrupts, or persons out of the jurisdiction of the court; and that therefore it could not be a breach of trust for a trustee to devise the estate by will to persons capable of executing it, or of transferring it to other trustees.[2] Mr. Lewin concludes from these observations, that whether the devise of the trust estate is proper or not depends upon the circumstances of each case. If the heir is a fit person to execute the trust, the testator ought not to intercept the descent and pass the legal estate to another, and especially not to an unfit person. In such case the estate of the testator might be liable for the costs of restoring the trust estate to its proper channel or to proper trustees. If, however, the heir is an unfit person, as an infant, bankrupt, insolvent, lunatic, married woman, or out of the jurisdiction, it may be proper to devise the estate.[3] And this seems to be the result of the authorities.[4]

[1] Cook *v.* Crawford, 13 Sim. 98; and see Beasley *v.* Wilkinson, 13 Jur. 649.

[2] Titley *v.* Wolstenholme, 7 Beav. 435; Macdonald *v.* Walker, 14 Beav. 556; Wilson *v.* Bennett, 5 De G. & Sm. 479.

[3] Lewin on Trusts, 187, 188.

[4] Beasley *v.* Wilkinson, 13 Jur. 649. [See *infra*, § 341.]

§ 340. It does not follow that the devisee can execute the trust from the fact that the legal title is devised to him, nor does it follow that the heir can execute the trust from the fact that the legal title descends to him. How far either can execute the trust depends upon the intention of the settlor, to be gathered from the terms of the instrument.[1] Thus, if an estate is so vested in A. that A. alone shall *personally* execute the trust, neither the heir nor the devisee of A. could execute it, although holding the legal title.[2] As if an estate is vested in A. and his heirs upon a trust to sell, and A. devises the estate, neither the heir nor the devisee can sell: for the heir has nothing in the estate to sell, it having gone to the devisee; and the devisee has no power, he not being mentioned in the original settlement.[3] So, where property was vested in two trustees, their executors and administrators in trust, and the surviving trustee devised the property to A. and B., and appointed A., B., and C. executors, the court refused to hand over the property to A. and B., for the reason that devisees were not named as parties who could execute the trust; and the court refused to hand it over to the executors, for the reason that the legal title was given away from them; new trustees were therefore appointed to receive the property and execute the trust.[4] But where the word "assigns" is part of the limitation of the estate to trustees, as where an estate is vested in A., his heirs, executors, administrators, and *assigns* in trust, and A. devises the estate, the devisee may execute the trust, for the reason that he comes within the limitation of the persons who may take the trust property and execute the trust.[5] This principle has been

[1] Abbott, Pet'r, 55 Maine, 580.

[2] Mortimer *v.* Ireland, 6 Hare, 196; 11 Jur. 721; Ockleston *v.* Heap, 1 De G. & Sm. 640.

[3] Mortimer *v.* Ireland, 6 Hare, 196; 11 Jur. 721; Ockleston *v.* Heap, 1 De G. & Sm. 640; Cook *v.* Crawford, 13 Sim. 91; Stevens *v.* Austen, 7 Jur. (N. S.) 873; Wilson *v.* Bennett, 5 De G. & Sm. 475. [But see Osborne *v.* Rowlett, 13 Ch. Div. 774; *In re* Ingleby and Ins. Co., 13 L. R. Ir. 326.]

[4] *Re* Burtt's Est., 1 Dr. 319; Macdonald *v.* Walker, 14 Beav. 556.

[5] Titley *v.* Wolstenholme, 7 Beav. 425; Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

doubted and criticised,[1] but it seems to be acted upon in the English courts.[2]

§ 341. In New York, Michigan, Wisconsin, [Indiana, Minnesota, and Kansas] trust property, upon the death of the surviving trustee, does not descend to the heir, nor can it be devised, but it vests in the court, and will be administered by the court by the appointment of new trustees to execute the trust.[3] (*a*) In the other States, the trust estate descends to the heir, or vests in the devisee, as the legal title must go somewhere in the absence of a statute, upon the death of the surviving trustee.[4] Courts in the United States do not have occasion often to consider the question, whether the heir or devisee can execute the trust, as new trustees can be appointed in any case at the desire of the parties, and, in many States, the trust property may be vested in the new trustees by an order of the court. In most

[1] Ockleston *v.* Heap, 1 De G. & Sm. 642.

[2] Mortimer *v.* Ireland, 6 Hare, 196; 11 Jur. 721; Ashton *v.* Wood, 3 Sm. & Gif. 436; Hall *v.* May, 3 K. & J. 585; Lane *v.* Debenham, 11 Hare, 188.

[3] Clark *v.* Crego, 47 Barb. 597; Hawley *v.* Ross, 7 Paige, 103; McCosker *v.* Brady, 1 Barb. Ch. 329; People *v.* Morton, 5 Seld. 176; McDougald *v.* Cary, 38 Ala. 320; Hook *v.* Dyer, 47 Mo. 241. This rule is confined to real property. Trusts in personal property are governed by the ordinary rules that apply to them in other States. Bucklin *v.* Bucklin, 1 N. Y. Dec. 242.

[4] Trusts of real estate, on the death of the trustee, vest in the heir, trusts of personalty in the executor or administrator. Schenck *v.* Schenck, 16 N. J. Eq. 174. [Lawrence *v.* Lawrence, 181 Ill. 248; Ewing *v.* Shannahan, 113 Mo. 188, 201; State *v.* Miss. Valley Trust Co., 209 Mo. 472; Hitch *v.* Stonebraker, 125 Mo. 128; Kirkman *v.* Wadsworth, 137 N. C. 453; Woodruff *v.* Woodruff, 44 N. J. Eq. 349; Reeves *v.* Tappan, 21 S. C. 1; Fisher *v.* Dickenson, 84 Va. 318; St. Stephen's Church *v.* Pierce, 8 Del. Ch. 179. See Ames' Cases on Trusts (2d ed.), 345, 346 and notes.]

(*a*) IV N. Y. Consol. Laws (1909), p. 2846, § 20, p. 3395, § 111; Mich. Comp. Laws (1897), § 8852; Wis. Stat. (1898), § 2094; Burns' Ind. Stat. (1908), § 4021; Minn. Rev. Laws (1905), § 3262; Kan. Gen. Stat. (1909), § 9703; see Dyer *v.* Leach, 91 Cal. 191. In Alabama, the title does not descend but rests in abeyance until the appointment of a new trustee. Ala. Civ. Code (1907), § 3415; Lecroix *v.* Malone, 157 Ala. 434.

cases, it would simply be a question whether the words of the will were comprehensive enough to pass the trust estate, or whether it had descended to the heir; and this question would be important only in determining who should make a conveyance of the trust property to the new trustees, if it became necessary that a conveyance should be made. (*a*)

§ 342. If an owner of real estate contracts to sell it, he becomes a trustee of the legal title for the vendee; and if he dies before conveying the legal title, it will descend to his heir or heirs, as the legal title must vest somewhere; and so he may devise it; and the heir, in case it descends, and the devisee, in case it is devised, may be called upon to convey it to the vendee.[1] In Massachusetts, there is a statute authorizing the vendor's executor or administrator to convey such estate, under the direction of the court of probate.[2]

§ 343. Trust property is generally limited to trustees, as joint-tenants; and if by the terms of the gift it is doubtful, whether the trustees take as joint-tenants, or tenants in common, courts will construe a joint-tenancy if possible, on account of the inconvenience of trustees holding as tenants in common; and, where statutes have abolished joint-tenancy, an exception is generally made in the case of trustees. And courts will not allow a process for the partition of a trust estate.[3] Therefore, upon the death of one of the original trustees, the whole estate, whether real or personal, devolves upon the survivors, and so on to the last survivor; and upon the death of the last survivor, if he has made no disposition of the estate by will or otherwise, it devolves upon his heirs if real estate, and upon

[1] Wall *v.* Bright, 1 J. & W. 494; Read *v.* Read, 8 T. R. 118.

[2] Gen. Stat. c. 117; §§ 5 and 6; Reed *v.* Whitney, 7 Gray, 533. [Rev. Laws (1902), c. 148, § 1.]

[3] Baldwin *v.* Humphrey, 44 N. Y. 609; Saunders *v.* Schmaelzle, 49 Cal. 59.

(*a*) See *supra*, § 269, and notes.

his executors or administrators if it is personal estate.[1] The title in the surviving trustee is complete, and no breaches of trust after the death of his cotrustees can be charged upon their estate;[2] nor can the representatives of his cotrustees interfere with his management of the trust estate, even if he is insolvent or unfit for the trust.[3] The *cestui que trust* alone can interfere or apply to the court for redress or relief. So all rights of action are in the surviving trustee, and he may sue in his own name or as survivor, according as the cause of an action accrued before or after the death of his cotrustees;[4] and, in case of his death, his executor or administrator may continue the action.[5] The rule is that actions must be brought in the names of the parties to the contract.[6]

§ 344. So absolute is the rule that the heir or administrator takes the trust property upon the death of the last surviving trustee, that a husband, as administrator of his wife, takes the personal property that she held in trust, but he must hold it upon the original trust.[7] In England, the heir in case of real estate in trust, or the executor in case of personal, is competent to administer and execute the trusts, but they cannot execute

[1] Whiting *v.* Whiting, 4 Gray, 236; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; De Peyster *v.* Ferrars, 11 Paige, 13; Shook *v.* Shook, 19 Barb. 653; Shortz *v.* Unangst, 3 W. & S. 45; Gray *v.* Lynch, 8 Gill, 404; Mauldin *v.* Armstead, 14 Ala. 702; Powell *v.* Knox, 16 Ala. 364; Richeson *v.* Ryan, 15 Ill. 13; Stewart *v.* Pettus, 10 Mo. 755; Jenks *v.* Backhouse, 1 Binn. 91; King *v.* Leach, 2 Hare, 59; Watkins *v.* Specht, 7 Coldw. 585; Webster *v.* Vanderventer, 6 Gray, 429. [See 1 Ames on Trusts(2d ed.), 346. Except as otherwise provided by statute.]

[2] See *post*, § 426. [*Re* Palk, 41 W. R. 28; Head *v.* Gould, [1898] 2 Ch. 250.]

[3] Shook *v.* Shook, 19 Barb. 653.

[4] Richeson *v.* Ryan, 15 Ill. 13; Wheatley *v.* Boyd, 7 Exch. 20. [Maffet *v.* Or. & C. R. Co., 46 Or. 443.]

[5] Nichols *v.* Campbell, 10 Grat. 561; Powell *v.* Knox, 16 Ala. 364; Mauldin *v.* Armstead, 14 Ala. 702.

[6] Robins *v.* Deshon, 19 Ind. 204; King *v.* Lawrence, 14 Wis. 238; Farrell *v.* Ladd, 10 Allen, 127; Childs *v.* Jordan, 106 Mass. 323.

[7] *Ante*, § 264; Kuster *v.* Howe, 3 Ind. 268.

discretionary trusts confided *personally* to the original trustee, unless the power and confidence are also confided in them by the instrument.[1] In the United States, (*a*) the heirs or executors will take the trust property, and they must settle the accounts of the testator in relation to the trust. They must also see that the property is protected and preserved, but they are not under any obligation to execute the trust. They may decline the office, and generally the court will appoint new trustees to succeed to the original trustees. If the heirs or executors continue to act as trustees, they will be liable for no past breaches of trust, but only for breaches that occur under their own management.[2]

§ 345. It has been before stated that a general assignment for creditors does not pass a trust estate. In such case it requires special words to vest the estate in an assignee. So an assignment in bankruptcy of all the trustee's property does not pass estates which the bankrupt holds in trust.[3] If the bankrupt by a breach of trust has converted the trust estate into other property, the *cestui que trust* may follow it into the hands of the assignee, so far as he can identify the particular property obtained by breach of the trust.[4] But if the trust property has become so amalgamated with the general mass of the bankrupt's estate that it cannot be traced or identified, the *cestui que trust* must prove his claim.[5] If an assignee should get possession of

[1] *Ante*, § 264; Mansell *v.* Mansell, Wilm. 36; Cook *v.* Crawford, 13 Sim. 91; Hall *v.* Dewes, Jac. 189; Peyton *v.* Bury, 2 P. Wms. 626; Bradford *v.* Belfield, 2 Sim. 264; Cole *v.* Wade, 16 Ves. 45; Sharp *v.* Sharp, 2 B. & A. 405. See Townsend *v.* Wilson, 1 B. & A. 608.

[2] Baird's App., 3 W. & S. 459; Schenck *v.* Schenck, 16 N. J. Eq. 174; Hill *v.* State, 2 Ark. 604.

[3] *Ante*, § 336; Scott *v.* Surman, Willes, 402. [Lowell on Bankruptcy, § 368; 1 Ames' Cases on Trusts (2d ed.), p. 392.]

[4] Taylor *v.* Plumer, 3 M. & S. 562; *Ex parte* Sayers, 5 Ves. 169. [See *infra*, § 828 and note.]

[5] *Ex parte* Dumas, 1 Atk. 232; Ryall *v.* Rolle, id. 172; Scott *v.* Surman, Willes, 403.

(*a*) See *supra*, § 269, note.

the trust estate, and refuse to restore it, the trustee, though a bankrupt, may maintain a suit for its restoration, or the *cestui que trust* may have a bill for the appointment of new trustees, and the conveyance of the property to them.[1]

§ 346. It is now a universal rule that all those who take under the trustee, except purchasers for a valuable consideration without notice, take subject to the trust, and they must either execute the trust themselves, or convey the property to new trustees appointed by the court. Thus the heir, executor, administrator, devisee, and the assignee by deed or in bankruptcy, are bound by the trust; so are those who take dower or curtesy in the trust estate, or a creditor who levies an execution upon it. If the trust estate is forfeited to the crown or the State, it is still subject to the trust; so if it escheats upon the failure of heirs. But a disseizor is not an *assignee* of the trustee, he holds a wrongful title of his own, adversely to the trust. The *cestui que trust* has no remedy in such case, except to procure the trustee to bring an action upon his legal title to recover the possession. The *cestui que trust* could not maintain a suit in equity to compel the disseizor to hold upon the same trusts as the trustee; for there is no privity between the disseizor and disseizee.[2] The only remedy of the *cestui que trust* is against the trustee; and if he refuses to bring an action to recover the estate, he may be removed and a new trustee appointed. (*a*)

§ 347. Where the legal and equitable estate in the same land becomes vested in the same person, the equitable will merge in the legal estate; for a man cannot be a trustee for himself, nor

[1] Winch *v.* Keely, 1 T. R. 619; Carpenter *v.* Marnell, 3 B. & P. 40.

[2] Finch's Case, 4 Inst. 85; Gilbert on Uses by Sugd. 249; Reynolds *v.* Jones, 2 Sim. & S. 206; Turner *v.* Buck, 22 Vin. Ab. 21; Doe *v.* Price, 16 M. & W. 603. But the *cestui que trust* is the beneficial owner, and the court will protect him in an entry and occupation against a stranger. Oatman *v.* Barney, 46 Vt. 594. [See Ames on Trusts (2d ed.), 373.]

(*a*) See *supra*, § 328 and notes.

hold the fee, which embraces the whole estate, and at the same time hold the several parts separated from the whole.[1] (a) But in order that this may be true, the two estates must be commensurate with each other; or the legal estate must be more extensive or comprehensive than the equitable. The equitable fee cannot merge in a partial or particular legal estate.[2]

[1] Wade *v.* Paget, 1 Bro. Ch. 363; Selby *v.* Alston, 3 Ves. 339; Philips *v.* Brydges, id. 126; Goodright *v.* Wells, Doug. 771; Finch's Case, 4 Inst. 85; Harmood *v.* Oglander, 8 Ves. 127; Creagh *v.* Blood, 3 Jones & L. 133; James *v.* Morey, 2 Cow. 246; Mason *v.* Mason, 2 Sandf. Ch. 433; James *v.* Johnson, 6 Johns. Ch. 417; Cooper *v.* Cooper, 1 Halst. Ch. 9; Healy *v.* Alston, 25 Miss. 190; Brown *v.* Bontee, 10 Sm. & M. 268; Lewis *v.* Starke, id. 128; Nicholson *v.* Halsey, 1 Johns. Ch. 422; Butler *v.* Godley, 1 Dev. 94; Hopkinson *v.* Dumas, 42 N. H. 306; Gardner *v.* Astor, 3 Johns. Ch. 53; Downes *v.* Grazebrook, 3 Mer. 208; Ayliff *v.* Murray, 2 Atk. 59; Wills *v.* Cooper, 1 Dutch. (N. J.) 137; Habergham *v.* Vincent, 2 Ves. Jr. 204. [*In re* Hitchins, 80 N. Y. S. 1125; Greene *v.* Greene, 125 N. Y. 506; Tuck *v.* Knapp, 85 N. Y. S. 1001; Tilton *v.* Davidson, 98 Me. 55; Robb *v.* Washington & Jefferson College, 93 N. Y. S. 92, 103 App. Div. 327; Weeks *v.* Frankel, 197 N. Y. 304; Clarke *v.* Sisters, 82 Neb. 85.]

[2] Selby *v.* Alston, 3 Ves. 339; Hunt *v.* Hunt, 14 Pick. 374; Donalds *v.*

(a) The fact that one of the beneficiaries becomes one of the trustees or sole trustee does not bring about merger of his equitable interest in his legal estate. Miller *v.* Rosenberger, 144 Mo. 292; Burbach *v.* Burbach, 217 Ill. 547. And where the sole life beneficiary becomes trustee, the trust for the life beneficiary does not cease; there is no merger of the equitable life estate. Losey *v.* Stanley, 147 N. Y. 560; Irving *v.* Irving, 47 N. Y. S. 1052; Spengler *v.* Kuhn, 212 Ill. 186; Doscher *v.* Wyckoff, 113 N. Y. S. 655. But see Weeks *v.* Frankel, 197 N. Y. 304.

Where real estate was devised to four as trustees to collect the income and divide it among themselves equally, the trust to continue until such time as all four should agree to sell or to divide the land, the proceeds or the land to be then divided among them, it has been held that there was no merger of the equitable interests in the legal estate and the court declined to decree a termination of the trust on application of less than all of the four. Harris *v.* Harris, 205 Pa. St. 460. But in a similar case in New York it has been held that no trust ever came into existence. Greene *v.* Greene, 125 N. Y. 506. See Tilton *v.* Davidson, 98 Me. 55; Bronson *v.* Thompson, 77 Conn. 214.

It has been held that where the sole beneficiary of a passive trust of chattels is put into possession, he becomes the full legal owner. Kronson *v.* Lipschitz, 68 N. J. Eq. 367. As to termination of the trust by decree of court in certain cases, see *infra*, § 920.

And there will be no merger, if it is contrary to the intention of the parties.[1] If A. should convey lands to B. in trust for C. and her heirs, and C. should be the heir of B., upon the death of B. the legal title would descend to C., and thus both the legal and equitable title would meet in C.; but if C. was a married woman, and it was plainly the intention of the grantor or settlor, to be gathered from the whole instrument, that the trust should not cease, but continue an active trust, the court would not allow the equitable estate to merge in the legal, but a new trustee would be appointed to take the legal title.[2] Of course, in law the estates will merge wherever the interests meet; but courts of equity will preserve the estates separate, where the rights or interests of the parties require it. If the trustee acquires the equitable interest by any breach of his duty, or by fraud, courts will not allow it to merge.[3] So if there are intervening heirs who would be squeezed out, the estates will not merge.[4] So if the legal estate comes to the *cestui que trust* by a conveyance which turns out to be void, there will be no merger.[5] (*a*) Whether charges upon an estate,

Plumb, 8 Conn. 453; James *v.* Morey, 2 Cow. 284; Goodright *v.* Wells, Doug. 771; Philips *v.* Brydges, 3 Ves. 125; Robinson *v.* Cuming, t. Talbot, 164; 1 Atk. 475; Boteler *v.* Allington, 1 Bro. Ch. 72; Buchanan *v.* Harrison, 1 Jon. & Hen. 662; Merest *v.* James, 6 Madd. 118; Habergham *v.* Vincent, 2 Ves. Jr. 204.

[1] Gardner *v.* Astor, 3 Johns. Ch. 53; James *v.* Morey, 2 Cow. 246; Mechanics' Bank *v.* Edwards, 1 Barb. S. C. 272; Starr *v.* Ellis, 6 Johns. Ch. 393; Donalds *v.* Plumb, 8 Conn. 453; Den *v.* Vanness, 5 Halst. 102; Hunt *v.* Hunt, 14 Pick. 374; Nurse *v.* Yerwarth, 3 Swanst. 608; Saunders *v.* Bournford, Finch, 424; Thom *v.* Newman, 3 Swanst. 603; Mole *v.* Smith, Jac. 490. [Ingle *v.* Vaughan Jenkins, [1900] 2 Ch. 368. See Asche *v.* Asche, 113 N. Y. 232.]

[2] Gardner *v.* Astor, 3 Johns. Ch. 53; James *v.* Morey, 2 Cow. 246; Mechanics' Bank *v.* Edwards, 1 Barb. S. C. 272; Starr *v.* Ellis, 6 Johns. Ch. 393; Donalds *v.* Plumb, 8 Conn. 453; Den *v.* Vanness, 5 Halst. 102; Hunt *v.* Hunt, 14 Pick. 374; Nurse *v.* Yerwarth, 3 Swanst. 608; Saunders *v.* Bournford, Finch, 424; Thom *v.* Newman, 3 Swanst. 603; Mole *v.* Smith, Jac. 490

[3] Spence, Eq. Jur. 572. [4] Lewis *v.* Stark, 10 Sm. & M. 128

[5] Elliott *v* Armstrong, 2 Blackf. 208; Buchanan *v.* Harrison, 1 John. & H. 662; Brandon *v.* Brandon, 31 L. J Ch. 47.

(*a*) Or if he gets the legal title by mistake. *In re* Spencer, 128 Fed. 654.

as mortgages, will merge in the legal title, upon being paid off, depends upon the intention of the parties, and frequently upon the interests and equities between them.[1] If a leasehold is held by a wife in her right, but is in the occupation of her husband, and he purchases the reversion, there will be no merger.[2]

§ 348. Thus if a tenant for life pays off a charge or incumbrance upon an estate, it will be considered that, as his interest ceases with his life, he could never have intended that the charge should be extinguished, and not survive for the benefit of his representatives.[3] (*a*) And the same rule applies, though the tenant for life may be ultimately entitled to the reversion in fee, subject to remainders which fail.[4] Even in this case, evidence may be given that the tenant for life intended the charge to be merged and extinguished.[5] A tenant in tail in

[1] Hunt *v.* Hunt, 14 Pick. 374; Johnson *v.* Webster, 4 De G., M. & G. 474; Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244; Morley *v.* Morley, 25 L. J. Ch. 1; Compton *v.* Oxenden, 2 Ves. Jr. 264; Forbes *v.* Moffatt, 18 Ves. 390; Horton *v.* Smith, 4 K. & J. 630; Tomlinson *v.* Steers, 3 Mer. 210; Smith *v.* Phillips, 1 Keen, 694; Medley *v.* Horton, 14 Sim. 226; Brown *v.* Stead, 5 Sim. 535; Parry *v.* Wright, 1 S. & S. 369; 5 Russ. 542; Mocatta *v.* Murgatroyd, 1 P. W. 193; Greswold *v.* Marsham, 2 Ch. Cas. 170; Garnett *v.* Armstrong, 2 Conn. & Laws. 458; Watts *v.* Symes, 16 Sim. 646; Cooper *v.* Cartwright, 1 John. 679. [Gresham *v.* Ware, 79 Ala. 192; Boardman *v.* Larrabee, 51 Conn. 39; Coryell *v.* Klehm, 157 Ill. 462; Chase *v.* Van Meter, 140 Ind. 321; Patterson *v.* Mills, 69 Iowa, 755; Keith *v.* Wheeler, 159 Mass. 161; Gibbs *v.* Johnson, 104 Mich. 120; Collins *v.* Stocking, 98 Mo. 290; Hayden *v.* Lauffenburger, 157 Mo. 88; Bassett *v.* O'Brien, 149 Mo. 381; Fellows *v.* Dow, 58 N. H. 21; Smith *v.* Roberts, 91 N. Y. 470; Duffy *v.* McGuiness, 13 R. I. 595; Thorne *v.* Cann, [1895] A. C. 11; Adams *v.* Angell, 5 Ch. Div. 634; Liquidation Estates P. Co. *v.* Willoughby, [1898] A. C. 321.]

[2] Clark *v.* Tennison, 33 Md. 85.

[3] Pitt *v.* Pitt, 22 Beav. 294; Burrell *v.* Egremont, 7 Beav. 205; Redington *v.* Redington, 1 B. & B. 139; Faulkner *v.* Daniel, 3 Hare, 217; State *v.* Kock, 47 Mo. 582.

[4] Wyndham *v.* Egremont, Amb. 753; Trevor *v.* Trevor, 2 Myl. & K. 675.

[5] Astley *v.* Milles, 1 Sim. 298.

(*a*) This presumption is not rebutted by the fact that the tenant for life and the remainder-man are parent and child. *In re* Harvey, [1896] 1 Ch. 137.

possession has the power to convert the estate into an absolute fee; therefore, if he pays off an incumbrance, the presumption is that he intended it to merge.[1] But if the estate of the tenant in fee-simple or in tail is subject to any executory limitations that may defeat their estate, or if they pay off the charges under any mistake as to their title, the court would not allow the charges to merge or become extinguished.[2] But if a person pays or takes up the charges or incumbrances, and afterwards the legal title should come to him, the charges would merge.[3] So if a person, having the legal title and holding charges and incumbrances upon the estate, conveys in fee or in mortgage, and makes no mention of the charges or incumbrances, they would merge as between the grantor and grantee.[4] Generally, where the owner in fee-simple pays off a charge or incumbrance on an estate, the presumption of law is that such charge or incumbrance will merge;[5] but if he owns only a partial interest, the presumption is that the charge was to be kept on foot.[6] Mere possession of the property by the trustee or by the *cestui qui trust* is no evidence of a merger.[7]

§ 349. Sometimes where an estate has been vested by deed or will in trustees for a *cestui que trust*, whether it is a fee or some lesser estate, the law will presume that the trustees have surrendered, conveyed, or assigned the estate, whatever it was, to

[1] St. Paul *v.* Dudley, 15 Ves. 173; Buckinghamshire *v.* Hobart, 3 Swanst. 199; Jones *v.* Morgan, 1 Bro. Ch. 206.

[2] Drinkwater *v.* Combe, 2 S. & S. 340; Shrewsbury *v.* Shrewsbury, 3 Bro. Ch. 120; 1 Ves. Jr 227; Wigsell *v.* Wigsell, 2 S. & S. 364; Horton *v.* Smith, 4 K. & J. 624; Buckinghamshire *v.* Hobart, 3 Swanst. 199; Kirkham *v.* Smith, 1 Ves. 528.

[3] Horton *v.* Smith, 4 K. & J. 624; Trevor *v.* Trevor, 2 Myl. & K. 675; Wigsell *v.* Wigsell, 2 S. & S. 364.

[4] Tyler *v.* Lake, 4 Sim. 351; Johnson *v.* Webster, 4 De G., M. & G. 474.

[5] Hood *v.* Phillips, 3 Beav. 513; Pitt *v.* Pitt, 22 Beav. 294; Gunter *v.* Gunter, 23 Beav. 571; Swinfen *v.* Swinfen, 29 Beav. 199; Tyrwhitt *v.* Tyrwhitt, 32 Beav. 244.

[6] Price *v.* Gibson, 2 Eden, 115; Swinfen *v.* Swinfen, 29 Beav. 199; Compton *v.* Oxenden, 2 Ves. Jr. 263; Donisthorpe *v.* Porter, 2 Eden, 162.

[7] Broswell *v.* Downs, 11 Fla. 62.

the *cestui que trust*.[1] This presumption of law is necessary for the quieting of titles. If such presumptions could not be made, some titles would remain forever imperfect. There might be an outstanding legal estate, which would at any time defeat the tenant, if there could not be a presumption of a conveyance or surrender by the trustee to the *cestui que trust*. This presumption is somewhat different from that prescription by which one tenant by an open, peaceable, and adverse occupation, under a claim of right, obtains the legal title as against another person. In such case, after a definite period of time, a grant or conveyance is presumed in favor of the tenant in occupation, though it may be well enough understood that no such grant or conveyance was ever made. So there may be a presumption that a trustee has conveyed to the *cestui que trust*, though such presumption may not always be founded on a belief that such conveyance was actually made.[2] There is another difficulty between trustees and *cestuis que trust* which does not exist between adverse claimants of the same legal title. The titles, of the trustee and *cestui que trust* are not adverse to each other, and generally the possession of the *cestui que trust* is the possession of the trustee; at any rate it is generally consistent with the legal title of the trustee. Therefore, mere length of time as between trustee and *cestui que trust* will afford no ground for a presumption of a conveyance or surrender from the trustee to the *cestui que trust*,[3] as *cestuis que trust* may occupy the estate indefinitely under a merely equitable title.

[1] England *v.* Slade, 4 T. R. 682; Wilson *v.* Allen, 1 J. & W. 611; Noel *v.* Bewley, 3 Sim. 103; Cooke *v.* Salton, 2 S. & S. 154; Hillary *v.* Waller, 12 Ves. 239; Lade *v.* Holford, Bull. N. P. 110; Doe *v.* Hilder, 2 B. & A. 782; Emery *v.* Grocock, 6 Madd. 54; Townshend *v.* Champernown, 1 Y. & J. 583; Goodtitle *v.* Jones, 7 T. R. 47; Doe *v.* Sybourn, id. 2; Moore *v.* Jackson, 4 Wend. 59; Dutch Church *v.* Mott, 7 Paige, 77; Jackson *v.* Moore, 13 Johns. 513; 1 Green. Cruise Dig. 412; Matthews *v.* Ward, 10 Gill & J. 443; Jackson *v.* Pierce, 2 Johns. 226; Sinclair *v.* Jackson, 8 Cow. 543.

[2] Hillary *v.* Waller, 12 Ves. 252.

[3] Keene *v.* Deardon, 8 East, 263; Goodson *v.* Ellison, 3 Russ. 588; Hillary *v.* Waller, 12 Ves. 251; 1 Sugd. V. & P. 350, 470; Flournoy *v.* Johnson, 7 B. Mon. 694; Doe *v.* Langdon, 12 Q. B. 719.

§ 350. This presumption has been discussed at length in several cases, and some difference of opinion has been expressed;[1] but it seems now to be well settled that three circumstances must concur in order to raise the presumption of a conveyance or surrender by the trustee to the *cestui que trust:* (1) It must have been the duty of the trustee to make the conveyance; (2) There must be some sufficient reason to support the presumption; (3) The presumption must be in support of a just title, and not to defeat it.

§ 351. Thus where the *cestui que trust* becomes absolutely entitled to the whole beneficial interest in the trust estate, and the active duties of the trustee have ceased, the statute of uses generally executes the legal title of the trustee to the *cestui que trust,* and he obtains the legal as well as the beneficial estate. (*a*) But there are cases where the active duties of the trustee having ceased, the legal title does not pass without a conveyance. In such cases it is clearly the duty of the trustee to convey the legal title to the *cestui que trust,* or to such person as he shall appoint.[2] Therefore, if the beneficial owner has been a long time in possession, dealing with the estate in every respect as his own, it will be presumed that the trustee performed his duty and conveyed the legal estate to the proper person. As where a mortgage in fee was made to a trustee for the real mortgagee, and the *cestui que trust* or real mortgagee took a conveyance of

[1] Lade *v.* Holford, Bull. N. P. 110; Doe *v.* Sybourn, 7 T. R. 2; Goodtitle *v.* Jones, id. 49; Doe *v.* Read, 8 T. R. 118; see note, 1 Green. Cruise, 410; 2 Pow. on Mort. 491. [See also M'Queen *v.* Meade, 28 L. T. N. S. 768.]

[2] Langley *v.* Sneyd, 1 S. & S. 45; Carteret *v.* Carteret, 2 P. Wms. 134; Angier *v.* Stannard, 3 Myl. & K. 571; England *v.* Slade, 4 T. R. 682; Goodson *v.* Ellison, 3 Russ. 583.

(*a*) The N. Y. Consol. Laws, Vol. IV, p. 3389, §§ 91-93, taking away the trustee's title, when merely nominal, and vesting it in the beneficiary, do not apply when the trustee has himself an interest in the grant, either as an individual or with others. King *v.* Townshend, 141 N. Y. 358. See *supra,* § 142.

the equity of redemption, and ever after dealt with the estate as if the legal fee was in him, a conveyance of the mortgage was presumed to have been made to him by the trustee.[1] There was a use of the estate in this case for one hundred years. Where lands were conveyed to trustees for a religious society, which was afterwards incorporated, it was held, after the use of the land for one hundred and forty years by the incorporated society, that a conveyance by the trustees might be presumed.[2] So where several persons conveyed to a trustee a tract of land for the purposes of a partition by the trustee conveying back to each person his share in severalty, as set forth in the deed, it was held, after an occupation of many years by each person in severalty according to the intended partition, that the trustee might be presumed to have conveyed.[3] Where the trustees are to convey upon a certain event, or at a certain time, as when a minor becomes twenty-one, the presumption will arise after a much shorter lapse of time.[4] Thus, where trustees were to convey to the testator's son immediately on his coming of age, the son became of age in 1788, and granted a long lease in 1789, the court presumed a conveyance in 1792, or only four years after the event, there being no proof of an actual conveyance. Lord Kenyon said "there was no reason why the jury should not presume a conveyance from the trustees. They were bound to make one, and a court would have compelled them to have done it if they had refused. It is rather to be presumed that they did their duty. And as to time, the jury may be directed to presume a conveyance and surrender in much less time than twenty years." [5] So where the direction to the trustee to convey applies to only a part of the estate, the court may presume a conveyance of the whole, if the circumstances require or warrant such presumption.[6]

[1] Noel *v.* Bewley, 3 Sim. 103. [2] Dutch Church *v.* Mott, 7 Paige, 77.
[3] Jackson *v.* Moore, 13 Johns. 513.
[4] Wilson *v.* Allen, 1 J. & W. 611; Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Sybourn, 7 T. R. 2.
[5] England *v.* Slade, 4 T. R. 682; Marr *v.* Gilman, 1 Cold. 488.
[6] Hillary *v.* Waller, 12 Ves. 239.

§ 352. If the estate was originally conveyed to trustees for some particular purpose, as by way of security or indemnity, or to raise an annuity or portion, or for any other purpose, as soon as the purpose is accomplished, the trustees become mere dry trustees, and it is their duty to convey the estate to the beneficial owner.[1] Where, from lapse of time joined with other circumstances, there is a moral certainty that the purposes of the trust have all been accomplished, the court will act upon the certainty, and presume a reconveyance although there is no direct proof of the fact.[2]

§ 353. Where an estate is vested in trustees upon an express trust, they must retain the legal title until the trusts are fully executed. Therefore, no conveyance will be presumed, so long as the trustees have any duties to perform; for that would be to presume a breach of trust, which will never be presumed: the fact must be proved by competent evidence.[3] In Aiken *v.* Smith, the court presumed that the conveyance was made at the death of the tenant for life, that being the time fixed for the conveyance, and the time when the active duties of the trustees ceased.[4]

§ 354. But there must always be sufficient reason for presuming a reconveyance or surrender by the trustee; that is, there must be some evidence of such a conveyance, or some evidence upon which the presumption of the conveyance may be founded. The mere fact that the trustee was to convey upon the execution of the trust, or upon the happening of a certain event, is not enough. There must be some circumstance from which it may

[1] Hillary *v.* Waller, 12 Ves. 239; Doe *v.* Sybourn, 7 T. R. 2; Cooke *v.* Soltau, 2 S. & S. 154; *Ex parte* Holman, 1 Sugd. V. & P. 509; Emery *v.* Grocock, 6 Madd. 54; Doe *v.* Wright, 2 B. & A. 710; Bartlett *v.* Downes, 3 B. & Cr. 616.

[2] Emery *v.* Grocock, 6 Madd. 54; Hillary *v.* Waller, 12 Ves. 252.

[3] Beach *v.* Beach, 14 Vt. 28; Doe *v.* Staple, 2 T. R. 684; Keene *v.* Deardon, 8 East, 248; Flournoy *v.* Johnson, 7 B. Mon. 694.

[4] Aiken *v.* Smith, 1 Sneed, 304. This case is opposed to Rees *v.* Williams, 2 M. & W. 749.

be reasonably concluded that he did in *fact* convey. Mere length of time is not enough. Courts have refused after the lapse of one hundred and twenty years to presume a reconveyance, when there were no intermediate transactions to give force to the length of time;[1] for the possession during all that time may not be inconsistent with the trustee's title.[2] However, great lapse of time is an important circumstance; and the fact that it was the duty of the trustees to convey is another important circumstance. Very slight circumstances added to these will be sufficient to justify a court or jury in presuming a conveyance; and a conveyance may be presumed where the estate has been dealt with by the beneficial owner in a manner in which reasonable men do not deal with their estates, unless they are the legal as well as beneficial owners.[3]

§ 355. It is further said that the purpose of the presumption must be to prevent a just title from being defeated by mere matter of form.[4] The presumption is a shield for defence and not a sword for attack, as was said of another principle of law. As the presumption was introduced for the security of estates and the protection of innocent purchasers, it cannot be set up to eject them from their estates; and therefore the presumption will be made only in favor of the person in whom the beneficial title is clearly vested for the time being, whatever may be the extent of his equitable interest.[5] So it was not allowed to be set up in favor of a defendant who showed no title but a mere naked possession, which might have been obtained by a dis-

[1] Goodright *v.* Swymmer, 1 Kenyon, 385; Goodson *v.* Ellison, 3 Russ. 583; Langley *v.* Sneyd, 1 S. & S. 45; Doe *v.* Lloyd, Mathews on Presumptions, 215.

[2] Ibid.; Keene *v.* Deardon, 8 East, 363; Hillary *v.* Waller, 12 Ves. 250.

[3] Garrard *v.* Tuck, 8 C. B. 248; Cottrell *v.* Hughes, 15 C. B. 532; Hillary *v.* Waller, 12 Ves. 239; Wilson *v.* Allen, 1 J. & W. 611.

[4] Lade *v.* Holford, Bull. N. P. 110; Doe *v.* Sybourn, 7 T. R. 2; Goodtitle *v.* Jones, 7 T. R. 47.

[5] Doe *v.* Cook, 6 Bing. 179; Tenney *v.* Jones, 10 Bing. 75; Bartlett *v.* Downes, 8 B. & Cr. 616; Noel *v.* Bewley, 3 Sim. 103; Wilson *v.* Allen, 1 J. & W. 611.

seizin of the beneficial owner.[1] And where two litigants both claimed to be the beneficial owners, a surrender of an outstanding legal estate or term was not presumed, lest either obtaining it should defeat the other without regard to the merits of his beneficial title.[2]

§ 356. In England, there was a system of conveyancing by which outstanding terms were made to attend the legal title and protect it. Much litigation and discussion has been had over these terms, their merging in the legal title, and their presumed surrender. They have very little importance in this country, and the statement of the law concerning them is not deemed necessary.[3]

[1] Doe *v.* Cook, 6 Bing. 179; England *v.* Slade, 4 T. R. 682; Doe *v.* Sybourn, 7 T. R. 2.

[2] Doe *v.* Wrighte, 2 B. & A. 710.

[3] See Hill on Trustees, pp. 253–263.

CHAPTER XII.

EXECUTORY TRUSTS.

§§ 357–359. Nature of an executory trust. The rule in Shelley's Case.
§ 360. Distinction between marriage articles and wills.
§ 361. Construction of marriage articles and their correction.
§ 362. Where strict settlements will not be ordered.
§§ 363, 364. Settlement of personal property.
§ 365. Construction of marriage settlements.
§ 366. Executory trusts under wills.
§ 367. Who may enforce the execution of executory trusts.
§ 368. Inducements for marriage.
§§ 369, 370. Construction of executory trusts under wills.
§ 371. The words "heirs of the body" and "issue."
§ 372. When courts will reform executory trusts.
§ 373. How courts will direct a settlement of personal chattels.
§ 374. Whether courts will order a settlement in joint-tenancy.
§ 375. What powers the court will order to be inserted in a settlement.
§ 376. Settlement will be ordered *cy près* the intention.

§ 357. It is a fundamental proposition that equitable estates are governed by the same rules as legal estates, otherwise inextricable confusion would ensue.[1] If there was one rule on the equity side, and another on the law side of courts, there would be no certainty or uniformity of interpretation or construction. Thus at common law a grant to A. for life, remainder to the heirs of his body, vested an estate in fee-tail in A., which he could bar, and cut off the remainder. The same rule was applied to *executed* trusts. Thus if land is given to A. and his heirs in trust for B. for life, remainder to the heirs of his body, B. takes an equitable fee-tail;[2] for the same rules apply to the two species

[1] Frye *v.* Porter, 1 Mod. 300; Price *v.* Sisson, 2 Beas. 168; Cowper *v.* Cowper, 2 P. Wms. 753; Burgess *v.* Wheate, 1 Wm. Black. 123; Cushing *v.* Blake, 30 N. J. Eq. 689.

[2] This illustration states the law only in States where the rule in Shelley's Case, as it is called, is in force. In States where the rule is abrogated

of estate.[1] Therefore where technical words are used in the creation of an executed trust estate, they will be taken in their legal technical sense,[2] though Lord Hardwicke once added this qualification, "unless the intention of the testator or author of the trust plainly appeared to the contrary."[3] But this qualification has been time and again overruled, and it is now an established canon that a limitation in trust, perfected and declared by the settlor, shall have the same construction as in the case of an executed legal estate.[4] But while technical words receive their technical meaning in equitable as well as legal estates, technical words are not always necessary to create and limit equitable estates in fee. Thus an equitable fee may be created in a deed without the word "heirs," and an equitable entail without the words "heirs of the body," if the words used in their popular sense are equivalent to the technical words, or if the intention is sufficiently expressed and clear.[5] Thus if an estate is *devised* to A. and his heirs in trust for D. without other limitations, B. will take an equitable fee; for it is plain that B. is to take an equitable estate as large as the legal estate that passed to A. and his heirs, which is a legal fee.[6] But if an estate is conveyed by *deed* to A. and his heirs in trust for the grantor for life,

by statute, those who take in remainder under the limitation, take as purchasers; and the same rule applies to equitable estates.

[1] Noble *v.* Andrews, 37 Conn. 346.

[2] Wright *v.* Pearson, 1 Eden, 125; Bale *v.* Coleman, 8 Vin. 268; Jervoise *v.* Northumberland, 1 J. & W. 571; McPherson *v.* Snowdon, 19 Md. 197.

[3] Garth *v.* Baldwin, 2 Ves. 655.

[4] Brydges *v.* Brydges, 3 Ves. Jr. 125; Austen *v.* Taylor, 1 Eden, 367; Glenorchy *v.* Bosville, Ca. t. Talb. 19; Synge *v.* Hales, 2 B. & B. 507; Wright *v.* Pearson, 1 Eden, 125. But see Cushing *v.* Blake, 30 N. J. Eq. 389; Carter *v.* Montgomery, 2 Tenn. Ch. 216.

[5] Shep. Touch. by Preston, 106. [Smith *v.* Proctor, 139 N. C. 314; Holmes *v.* Holmes, 86 N. C. 205; McElroy *v.* McElroy, 113 Mass. 509; *In re* Irwing, [1904] 2 Ch. 752; *In re* Tringham's Trusts, [1904] 2 Ch. 487. See *supra*, § 312, note.]

[6] Moore *v.* Cleghorn, 10 Beav. 423; 12 Jur. 591; Knight *v.* Selby, 3 Man. & Gr. 92; Doe *v.* Cafe, 7 Exch. 675; Watkins *v.* Weston, 32 Beav. 238; McClintock *v.* Irving, 10 Ir. Ch. 481; Brenan *v.* Boyne, 16 Ir. Ch. 87; Betty *v.* Elliott, id. 110, n.; *Re* Bayley, id. 215.

remainder for his children, without the word "heirs," the children take an estate for life only, in analogy to the rules of law.[1]

§ 358. The rule in Shelley's Case was never a rule of intention, or of construction to reach and carry out the settlor's intention; but it was established as an absolute rule of property to obviate certain difficulties that would arise in relation to tenures, if certain persons to whom property was limited were allowed to take as purchasers, and not by descent.[2] (*a*) It is notorious that the

[1] Overton *v.* Halliday, 14 Beav. 467; 15 id. 480; 16 Jur. 71; Lucas *v.* Brandreth, 28 Beav. 274; Tatham *v.* Vernon, 29 id. 604; Nelson *v.* Davis, 35 Ind. 474.

[2] Doebler's App., 64 Penn. St. 9.

(*a*) The rule in Shelley's Case has been abolished by statute, wholly or partly, in more than half the States, including Massachusetts, Maine, Connecticut, Rhode Island, New Hampshire, New York, Michigan, Minnesota, Wisconsin, Missouri, Mississippi, Virginia, West Virginia, Alabama, California, Washington, and Ohio. 2 Washburn's Law of Real Property (6th ed.), § 1616, note. The rule was abolished in Iowa by c. 159, Laws of 1907, but the law is not retroactive. See Brokaw *v.* Brokaw, 113 N. W. 469 (Iowa 1907). In many other States the application of the rule has been limited by legislation converting estates tail into life estates with remainders in fee. 1 Washburn's Law of Real Property (6th ed.), § 219, note. See Wheelock *v.* Simons, 75 Ark. 19; Black *v.* Webb, 72 Ark. 336; Albin *v.* Parmele, 70 Neb. 740.

Except so far as limited by statute provisions, the rule is usually held to be part of the common law in the United States. Hardage *v.* Stroope, 58 Ark. 303; Black *v.* Webb, 72 Ark. 336; Wheelock *v.* Simons, 75 Ark. 19; Jones *v.* Rees, 69 A. 785 (Del. 1908); McFall *v.* Kirkpatrick, 236 Ill. 281; Pease *v.* Davis, 225 Ill. 408; Deemer *v.* Kessinger, 206 Ill. 57; Taney *v.* Fahnley, 126 Ind. 88; Hughes *v.* Nicklas, 70 Md. 484; Seeger *v.* Leakin, 76 Md. 500; Waller *v.* Pollitt, 104 Md. 172; Cook *v.* Councilman, 109 Md. 622; Starnes *v.* Hill, 112 N. C. 1; Walker *v.* Taylor, 144 N. C. 175; Perry *v.* Hackney, 142 N. C. 368; Pitchford *v.* Limer, 139 N. C. 13; Tyson *v.* Sinclair, 138 N. C. 23; Garver *v.* Clouser, 218 Pa. St. 611; Hastings *v.* Engle, 217 Pa. St. 419; Shapley *v.* Diehl, 203 Pa. St. 566; Eby *v.* Shank, 196 Pa. St. 426; Gadsden *v.* Desportes, 39 S. C. 131; Clark *v.* Neves, 76 S. C. 484; Davenport *v.* Eskew, 69 S. C. 292; Kennedy *v.* Colclough, 67 S. C. 118; Lacey *v.* Floyd, 99 Tex. 112; Brown *v.* Bryant, 17 Tex. Civ. App. 454; Vogt *v.* Vogt, 26 App. D. C. 46; De Vaughn *v.* Hutchinson, 165 U. S. 566; Grant *v.* Squire, 2 Ont. Law Rep. 131. The rule was law in Iowa previous to the statute of 1907, c.

rule disappointed the intention of settlors in most cases, and gave an absolute disposal of the inheritance to the first taker, where the settlor intended that such first taker should have only an estate for life.[1] As trusts are wholly independent of tenure,

[1] For these reasons the rule is now abolished in many of the States by statute. The proposition of the text, however, should be read in the light of the remarks of Agnew, J., in Yarnall's App., 70 Penn. St. 340: "In regard to wills the cases show that technical phrases, as well as forms of expression decided in other cases, are not permitted to overturn the intent of the testator, when that intent is clearly ascertained to be different in the will under examination by the court. This broad principle needs no citation to support it, for it is founded on the universal rule that the intention of the testator is the guide for the interpretation of wills. The rule in Shelley's Case is only an apparent not a real exception to this statement. It sacrifices a particular intent only to give effect to the main intent of the testator. All the authorities are agreed that this rule has no place in the interpretation of wills, and takes effect only when the interpretation has been first ascertained. Mr. Fearne, Contingent Remainders, p. 188, 159, which was expressly made not retroactive. Doyle *v.* Andis, 127 Iowa, 36; Ault *v.* Hillyard, 138 Iowa, 239; Kepler *v.* Larson, 131 Iowa, 438. See also Albin *v.* Parmele, 70 Neb. 740; Lippincott *v.* Davis, 59 N. J. Law, 241. For a good historical review of the rule see the opinion of Lord Macnaghten, in Van Grutten *v.* Foxwell, [1897] A. C. 658, 667. See also Bowen *v.* Lewis, 9 A. C. 890.

The rule has been extended by analogy to personalty, including leasehold estates. Hughes *v.* Nicklas, 70 Md. 484; Seeger *v.* Leakin, 76 Md. 500; Evans *v.* Weatherhead, 24 R. I. 502. But see *contra*, Jones *v.* Rees, 69 A. 785 (Del. 1908); Vogt *v.* Vogt, 26 App. D. C. 46 (*semble*).

In general the American cases agree with the English cases that the rule is an absolute rule of property, not a rule of construction, and in cases which come within the rule, the intention of the grantor or testator to create only a life estate in the first taker will have no effect. Hardage *v.* Stroope, 58 Ark. 303; Hughes *v.* Nicklas, 70 Md. 484; Travers *v.* Wallace, 93 Md. 507, 513; Lippincott *v.* Davies, 59 N. J. Law, 241; Perry *v.* Hackney,',142 N. C 368, 375; Wool *v.* Fleetwood, 136 N. C. 460, 469; Shapley *v.* Diehl, 203 Pa. St. 566, 569; Brown *v.* Bryant, 17 Tex. Civ. App. 454; Van Grutten *v.* Foxwell, [1897] A. C. 658; Evans *v.* Evans, [1892] 2 Ch. 173, 188. See Reilly *v.* Bristow, 105 Md. 326. But there seems to be some doubt on this point in some of the States. See Wescott *v.* Binford, 104 Iowa, 645; Doyle *v.* Andis, 127 Iowa, 36; Kepler *v.* Larson, 131 Iowa, 438; 7 L. R. A. (N. S.), 1109 and note; Granger *v.* Granger, 147 Ind. 95; Albin *v.* Parmele, 70 Neb. 740; De Vaughn *v.* Hutchinson, 165 U. S. 566.

they ought not to be affected by the rule, and a few cases have seemed to indicate that they were withdrawn from the operation of it;[1] but it is now established that the same rule shall apply to the same limitation whether it is of an equitable or a legal estate.[2] Thus the rule in Shelley's Case will be applied to a gift to A. and his heirs in trust for B. for life, and remainder to his heirs, or heirs of his body. The reason of the rule as applied to legal estates was some real or fancied difficulty concerning tenures, or to bring estates one generation sooner into commerce, or some other reason; for neither judges nor text-writers are agreed upon the original reasons of the rule. The reason of the

says, 'Nothing can be better founded than Mr. Hargrave's doctrine, that the rule in Shelley's Case is no medium for finding out the intention of the testator; that, on the contrary, the rule supposes the intention already discovered and to be a superadded succession to the heirs, general or special of the donee for life, by making such donee the ancestor *terminus* or *stirps*, from which the generation of posterity or heirs is to be accounted; and that whether the conveyance has or has not so constituted an estate of freehold, with a succession engrafted on it, is a previous question which ought to be adjusted before the rule is thought of; that, to resolve that point, the ordinary rules for interpreting the language of wills ought to be resorted to; that when it is once settled that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs of the tenant for life, and has really made him the *terminus*, or ancestor by reference to whom the succession is to be regulated, then comes the proper time to inspect the rule in Shelley's Case.' In Hileman *v.* Bouslaugh, 1 Harris, 351, Ch. J. Gibson expresses the same idea in fewer words, thus: 'This operates only on the intention of the testator when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills; but when this is ascertained, is found to be within the rule, then there is but one way; it admits of no exception.'"

[1] Withers *v.* Allgood, cited, and Bagshaw *v.* Spencer, 1 Ves. 150.

[2] Garth *v.* Baldwin, 2 Ves. 646; Wright *v.* Parsons, 1 Ed. 128; Brydges *v.* Brydges, 3 Ves. 120; Jones *v.* Morgan, 1 Bro. Ch. 206; Webb *v.* Shaftesbury, 3 Myl. & K. 599; Roberts *v.* Dixwell, 1 Atk. 610; West, 536; Britton *v.* Twining, 3 Mer. 175; Spence *v.* Spence, 12 C. B. (N. S.) 199; Coape *v.* Arnold, 2 Sm. & Gif. 311; Noble *v.* Andrews, 37 Conn. 346; Cushing *v.* Blake, 30 N. J. Eq. 689; Sprague *v.* Sprague, 12 R. I. 703. [Van Grutten *v.* Foxwell, [1897] A. C. 658; *In re* Youmans' Will, [1901] 1 Ch. 720; McFall *v.* Kirkpatrick, 236 Ill. 281; Jones *v.* Rees, 69 A. 785 (Del. 1908) *semble*.]

application of the rule to limitations of trust estates is to preserve a uniformity of the law in relation to the two kinds of estates in land. This leads Mr. Lewin to say, that although the rule is not *equally applicable* to trust estates, yet it is *equally applied*.[1] But the rule will not be applied to vest a fee or fee-tail in the first taker, unless the word "heir" is used as a term of succession, and not as a mere *designatio personæ*. Thus if an estate be *devised* to A. and his heirs in trust for B. for life, and after his decease in trust for the person who shall then be his heir, B. takes an estate for life only, and the person thus designated takes the estate by purchase.[2] (*a*) So if the legal estate is given to A. *in trust* for B. for life, and the legal remainder

[1] Lewin on Trusts, 88 (5th ed.).

[2] Greaves *v.* Simpson, 10 Jur. (N. S.) 609. [Evans *v.* Evans, [1892] 2 Ch. 173; Earnhart *v.* Earnhart, 127 Ind. 397.]

(*a*) It has been said that "to bring a devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or in tail as a *nomen collectivum* for the whole line of inheritable blood." Kuntzleman's Estate, 136 Pa. St. 142, 152; McCann *v.* McCann, 197 Pa. St. 452. And the following have been held not to be within the rule: A devise to a son and at his death "to his next nearest blood relations." McCann *v.* McCann, 197 Pa. St. 452. A devise to a son for life and at his death to his "nearest *male* heirs." Jones *v.* Jones, 201 Pa. St. 548. A devise to one "for and during his life, and after his death to his lawful heirs *born of his wife*." Thompson *v.* Crump, 138 N. C. 32. See also Ault *v.* Hillyard, 138 Iowa, 239; Brown *v.* Brown, 125 Iowa, 218; Gadsden *v.* Desportes, 39 S. C. 131; Starnes *v.* Hill, 112 N. C. 1.

The word "children," used to designate the successors in title, is not given the same effect as the word "heirs" for the purposes of the rule, and excludes the operation of the rule, Connor *v.* Gardner, 230 Ill. 258; Strawbridge *v.* Strawbridge, 220 Ill. 61; Reilly *v.* Bristow, 105 Md. 326; Hoover *v.* Strauss, 215 Pa. St. 130; Clark *v.* Neves, 76 S. C. 484; Brown *v.* Brown, 125 Iowa, 218; Cowell *v.* Hicks, 30 A. 1091 (N. J. Ch. 1895); in the absence of a clear intention to use the words to mean "heirs" or "heirs of the body." Shapley *v.* Diehl, 203 Pa. St. 566. See Brown *v.* Brown, 125 Iowa, 218. If the word "heirs" is used to mean "children" it has been held that the rule in Shelley's Case does not apply. Stisser *v.* Stisser, 235 Ill. 207.

The word "issue" primarily means heirs of the body, and under the rule would create an estate tail in the first taker unless it were shown to mean "children." Faison *v.* Odom, 144 N. C. 107; Hill *v.* Giles, 201 Pa. St. 215.

to the heirs of B., at his decease the rule cannot apply; for the legal and equitable estate cannot so coalesce that B. can take a fee either legal or equitable.[1] (*a*)

§ 359. But in order that technical words may receive their legal signification, and in order that the rule in Shelley's Case may be applied to limitations of equitable estates, the trusts must be *executed* and *not executory*.[2] All trusts are *executory* in

[1] Collier *v.* McBean, 34 Beav. 426; L. R. 1 Ch. 81.

[2] Egerton *v.* Brownlow, 4 H. L. Cas. 210; Rochford *v.* Fitzmaurice, 2 Dr. & W. 20; 4 Ired. Eq. 384; Tatham *v.* Vernon, 29 Beav. 604; Bacon's App., 57 Penn. St. 504. This distinction was very early established. Bale *v.* Coleman, 8 Vin. 267; Stamford *v.* Hobart, 3 Bro. P. C. 33; Papillon *v.* Voice, 2 P. Wms. 471; Glenorchy *v.* Bosville, t. Talb. 3; Gower *v.* Grosvenor, Barn. 62; Roberts *v.* Dixwell, 1 Atk. 607; Baskerville *v.* Baskerville, 2 Atk. 279; Woodhouse *v.* Haskins, 3 Atk. 24; Read *v.* Snell, 2 Atk. 648; Marryat *v.* Townley, 1 Ves. 102. Several of these cases were decided by Lord Hardwicke; but in Bagshaw *v.* Spencer, 1 Ves. 152, he nearly confounded and denied the distinction. In Exel *v.* Wallace, 2 Ves. 233, however, Lord Hardwicke explained his meaning, and desired to have it remembered that he did not mean to say that his predecessors were wrong. The distinction, as stated in the text, is now firmly established both in England and the United States. Barnard *v.* Broby, 2 Cox, 8; Wright *v.* Pearson, 1 Eden, 125; Austen *v.* Taylor, id. 366; Stanley *v.* Lennard, id. 95; Lincoln *v.* Newcastle, 12 Ves. 227; Jervoise *v.* Northumberland, 1 J. & W. 570; Deerhurst *v.* St. Albans, 5 Madd. 233; 2 Cl. & Fin. 611; Blackburn *v.* Stables, 2 V. & B. 369; Douglass *v.* Congreve, 1 Beav. 59; 4 Bing. N. C. 1; 5 Bing. N. C. 318; Boswell *v.* Dillon, 1 Dru. 297; Neves *v.* Scott, 9 How. 211; 13 How. 268; 4 Kent, Com. 218 *et seq.*; Garner *v.* Garner, 1 Des. 444; Porter *v.* Doby, 2 Rich. Eq. 49; Dennison *v.* Goehring, 7 Barr, 177; Findlay *v.* Riddle, 3 Binn. 152; Edmondson *v.* Dyson, 2 Kelly, 307; Wiley *v.* Smith, 3 Kelly, 559; Wood *v.* Burnham, 6 Paige, 518; 26 Wend. 19; Imlay *v.* Huntington, 20 Conn. 162; Berry *v.* Williamson, 11 B. Mon. 251; Horne *v.* Lyethe, 4 H. & J. 434; Loring *v.* Hunter, 8 Yerg. 31; Bold *v.* Hutchinson, 5 De G., M. & G. 558. Lord Northington said that the words

(*a*) The rule in Shelley's Case does not apply where one of the estates sought to be carved out is equitable and the other legal, even when the legal estate in remainder is by operation of the statute of uses. Slater *v.* Rudderforth, 25 App. D. C. 497; Vogt *v.* Vogt, 26 App. D. C. 46; Brown *v.* Wadsworth, 168 N. Y. 225; West's Estate, 214 Pa. St. 35; Mannerback's Estate, 133 Pa. St. 342. But see *In re* Youmans' Will, [1901] 1 Ch. 720.

one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee.[1] But such is not the meaning of judges when they speak of *executed* trusts, and *executory* trusts. These words refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property. Thus a trust created by a deed or will, so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an *executed* trust. In these trusts, technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created.[2] On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the directions thus given.[3] They are called *executory*, not because the trust is

"executory trusts" seemed to him to have no fixed signification. Lord King said a trust was executory where the party must come into court to have the benefit of the will. Mr. Lewin says the true criterion is, where the assistance of the court is necessary to complete the limitations, p. 89. Lord Eldon said the trust was executory where the testator had not completed the devise, but had left something to be done, so that the court must look to the intention. Jervoise *v.* Northumberland, 1 J. & W. 570. Lord St. Leonards distinguishes the two as follows: "Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out, from general expressions, what his intention is, or has he so defined that intention that you have nothing to do but to take that which is given you, and to convert them into legal estate?" Egerton *v.* Brownlow, 4 H. L. Cas. 210.

[1] Bagshaw *v.* Spencer, 1 Ves. 142; Egerton *v.* Brownlow, 4 H. L. Cas. 210; Coape *v.* Arnold, 4 De G., M. & G. 585.

[2] Wright *v.* Pearson, 1 Eden, 125; Austen *v.* Taylor, id. 367; 4 Kent, Com. 220; Jones *v.* Morgan, 1 Bro. Ch. 206; Jervoise *v.* Northumberland, 1 J. & W. 559; Boswell *v.* Dillon, 1 Dru. 291.

[3] Austen *v.* Taylor, 1 Eden, 366; Wright *v.* Pearson, id. 125; Jervoise

to be performed in the future, but because the trust instrument itself is to be moulded into form and perfected according to the outlines or instructions made or left by the settlor or testator.[1] (*a*) Thus land conveyed to A. upon trust, to settle the same upon B. and C. and their issue, in the event of their marriage, is an *executory trust*.[2] There is a conveyance or settlement to be executed by A., and the form or terms of this conveyance or settlement is to be determined by the intention of the original grantor.[3] When this conveyance or settlement is finally determined and made, the trust becomes *executed* in the sense of the word as applicable to this distinction, and it is afterwards gov-

v. Northumberland, 1 J. & W. 570; Coape *v.* Arnold, 4 De G., M. & G. 585; Neves *v.* Scott, 9 How. 211; Wiley *v.* Smith, 3 Kelly, 559; Edmondson *v.* Dyson, 2 Kelly, 307; Wood *v.* Burnham, 6 Paige, 518; 26 Wend. 19; Thompson *v.* Fisher, L. R. 10 Eq. 207; Cushing *v.* Blake, 30 N. J. Eq. 689. [See Gaylord *v.* Lafayette, 115 Ind. 423, 429.]

[1] Ibid. [2] Ibid. [3] Ibid.

(*a*) In Pillot *v.* Landon, 46 N. J. Eq. 310, 313, the distinction between executed and executory trusts is stated as follows by Garrison, J.: "The difference between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust; when, on the contrary, the creator of the trust, instead of fully declaring its limitations expresses in general terms his intent, leaving the manner in which this intent is to be carried into effect substantially undeclared, the trust is regarded as executory.

"In practice the chief distinction between an executed and an executory trust lies in the fact that the former executes itself by converting its limitations into the corresponding legal estates, whereas in the latter, the court may direct that form of settlement or conveyance which will best give effect to the settlor's intention, and for this purpose may even disregard the construction the instrument would receive at law.

"In the executory trust the language of the settlor is considered mainly as a guide to aid the court in carrying into effect his imperfectly declared purposes. In the executed trust the grantor has been his own conveyancer, and the equitable interests created by the language he has employed are treated as estates. In trusts of this kind the controlling inquiry is, not intention, but legal operation, and as the court cannot alter the nature of the estates the grantor has created, it will not speculate as to those purposes which he has failed to effectuate." See also Smith's Estate, 144 Pa. St. 428, 434.

erned by all the rules of an executed trust. The difference between the two kinds of trusts is this. In *executed* trusts the rules of property govern, and not the intention of the settlor, if it is contrary to the law or rule of property.[1] Thus if, in an executed trust, an estate is given to A. in trust for B. for life, with remainder to his heirs, B. takes an equitable fee [under the rule in Shelley's Case] and may convey the equitable inheritance and exclude his heirs, although it is perfectly certain that the settlor intended that B. should take an estate for his life only.[2] But an executory trust is settled and carried into effect according to the *intention* of the settlor.[3] Thus if an estate is conveyed to A. in trust, with instructions to convey it to B. for life, with remainder to his heirs, or to convey it in trust for B. for life, with remainder to his heirs, B. takes an estate for life only, and his heirs take by purchase at his decease, if such appeared to be the intention of the original gift or grant.[4]

§ 360. In the history of executory trusts, still another distinction has been drawn, or a distinction between executory trusts created by marriage articles, and executory trusts created

[1] Choice *v.* Marshall, 1 Kelly, 97; Schoonmaker *v.* Sheely, 3 Hill, 165; Kingsland *v.* Rapelye, 3 Edw. 2; Brant *v.* Gelston, 2 John. Ca. 384. [Pillot *v.* Landon, 46 N. J. Eq. 310, 313.]

[2] Ibid.

[3] Wood *v.* Burnham, 6 Paige, 513; 26 Wend. 9; 4 Kent, Com. 219; 1 West, Ch. t. Hardwicke, 542. A mere direction to convey will not render the trust executory, if the directions are so clear, and the limitations are so certainly defined, that there is nothing to do but to convey in accordance with them. In order that the trust may be executory, there must be some room for construction, in order to determine the intention of the settlor; that is, to determine what limitation shall be, and what shall not be, introduced into the conveyance to be made. Egerton *v.* Brownlow, 4 H. L. Cas. 210; Austen *v.* Taylor, 1 Ed. 341; Wight *v.* Leigh, 15 Ves. 564; Graham *v.* Stewart, 2 Macq. H. L. Ca. 205; Herbert *v.* Blunden, 1 Dr. & Walsh, 78; East *v.* Twyford, 9 Hare, 713; Doncaster *v.* Doncaster, 3 K. & J. 26; Stanley *v.* Stanley, 16 Ves. 491; Glenorchy *v.* Bosville, 1 Lead. Ca. Eq. 20, and notes; McElroy *v.* McElroy, 113 Mass. 509; Cushing *v.* Blake, 30 N. J. Eq. 689.

[4] Ibid.; Savage *v.* Tyers, L. R 8 Ch. 356. [See Steele *v.* Smith, 66 S. E. 200 (S. C. 1909).]

by wills. This is not so much a difference between two classes of executory trusts, as it is a difference between the rules that will be applied to the interpretation of *marriage articles and of wills*, in order to determine the intention of the settlor or the testator. Lord Eldon once said, that "there was no difference in the execution of an executory trust created by will, and a covenant in marriage articles; such a distinction would shake to their foundation the rules of equity."[1] But the great chancellor afterwards modified his expression.[2] And certainly there is no difference in the execution of the two trusts when it is settled what they are; but there is a difference in the construction of marriage articles and of wills in order to reach the intention of the creator of the trusts. Thus, in marriage articles, the intention of the parties to the articles is presumed to be a provision for the issue of the marriage, and such construction is given to the articles as to carry into effect this presumed intention if possible; while in construing wills, in order to settle the limitations of a trust, there is no such presumed leading intention; or, as Sir W. Grant put it, "I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter. Where the object is to make a provision by the settlement for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement be to limit an estate for life with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention. But if a will directs a limitation for life with remainder to the heirs of the body, the court has no such ground for decreeing a strict settlement."[3]

[1] Lincoln *v.* Newcastle, 12 Ves. 230; and see Turner *v.* Sargent, 17 Beav. 519; Reed *v.* Palmer, 53 Penn. St. 379.

[2] Jervoise *v.* Northumberland, 1 J. & W. 574; Townsend *v.* Mayer, 3 Beav. 443; Lassence *v.* Tierney, 1 Mac. & G. 551; Gardner *v.* Stevens, 30 L. J. Ch. 199; Crofton *v.* Davies, L. R. 4 C. B. 159.

[3] Blackburn *v.* Stables, 2 Ves. & B. 369; Bale *v.* Coleman, 8 Vin. 267;

§ 361. Thus if, in marriage articles, the real estate of the husband or of the wife is limited to the *heirs of the body* or to the *issue* [1] of the contracting parties, or either of them, or to the issue of the body, or to the issue and their heirs,[2] so that the words and limitations, taken in their legal sense, would enable the parents, or one of them, to defeat this provision for the children, equity will construe the articles to mean that the estate is limited to the parents for life, and the children will take at the decease of their parents or parent as purchasers; and equity will decree a formal settlement to be drawn in such way as to carry out this purpose.[3] If a settlement is already drawn *after* the marriage, but not in accordance with this rule, equity will correct and reform it so as to carry out this intention.[4] But if the settlement was formally drawn out before marriage contrary to this rule, the court will presume that the parties abandoned the articles, and entered into a new agreement, as expressed in the settlement.[5] If, however, a settlement before marriage is expressed on its face to be made to carry out the articles, and it does not carry them out in this respect, equity will reform it.[6] So if it can be shown in any other way that the formal settlement was intended to carry out the articles,

Strafford *v.* Powell, 1 B. & B. 25; Synge *v.* Hales, 2 B. & B. 508; Maguire *v.* Scully, 2 Hog. 113; Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 173; 2 Dr. & War. 18; 4 Ir. Eq. 375; Jervoise *v.* Northumberland, 1 J. & W. 574; Deerhurst *v.* St Albans, 5 Madd. 260.

[1] Dod *v.* Dod, Amb. 274.

[2] Phillips *v.* James, 2 Dr. & Sm. 404.

[3] Handick *v.* Wilkes, 1 Eq. Cas. Ab. 393; Gilb. Eq. 114; Trevor *v.* Trevor, 1 P. Wms. 622; Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 173; 2 Dr. & War. 18; 4 Ir. Eq. 375; Cusack *v.* Cusack, 5 Bro. P. C. 116; Davies *v.* Davies, 4 Beav. 54; Griffith *v.* Buckle, 2 Vern. 13; Jones *v.* Langton, 1 Eq. Cas. Ab. 392; Stonor *v.* Curwen, 5 Sim. 269; Barnaby *v.* Griffin, 3 Ves. 206; Horne *v.* Barton, 19 Ves. 398; Coop. 257; 22 L. J. (N. S.) Ch. 225. [Grier *v.* Grier, L. R. 5 H. L. 688.]

[4] Warrick *v.* Warrick, 3 Atk. 293; Sheatfield *v.* Sheatfield, Ca. t. Talb. 176; Legg *v.* Goldwire, id. 20; Burton *v.* Hastings, Gilb. Eq. 113; overruling same case, 1 Eq. Cas. Ab. 393; Briscoe *v.* Briscoe, 7 Ir. Eq. 129.

[5] Legg *v.* Goldwire, Ca. t. Talbot, 20; Warrick *v.* Warrick, 3 Atk. 291.

[6] Honor *v.* Honor, 1 P. Wms. 123; West *v.* Errissey, 2 P. Wms. 349; Roberts *v.* Kingsley, 1 Ves. 238.

and it does not do so, equity will reform it on the ground of mistake,[1] or if the settlement is made in the very words of the articles, and the legal effect of the words of the articles and settlement is different from the intention of the parties, the settlement will be corrected and reformed in order to carry out the exact intention of the parties.[2] If, however, there are any intervening rights, as those of an innocent purchaser without notice, his rights of course will be protected.[3] So it is established that daughters are included under the general term of *heirs* or *issue*, and that they take as purchasers.[4] And children includes grandchildren.[5] This has been held in England.[6] Of course in the United States, where primogeniture is abolished, estates will be settled upon sons and daughters equally, or upon daughters alone in default of sons. But if the children or issue of the marriage are provided for in some other way, as by portions to be raised for them in such manner that it appears that they are not intended to take as purchasers of the particular estate under the settlement, then the rule in Shelley's Case will prevail, and the parents or parent may sell the whole estate.[7] And so where there is an actual present conveyance of personal property by a marriage contract executed before marriage in

[1] Bold *v.* Hutchinson, 5 De G., M. & G. 568; Rogers *v.* Earl, 1 Dick. 294; 1 Sugd. V. & P. 143.

[2] West *v.* Errissey, 2 P. Wms. 349; Roberts *v.* Kingsley, 1 Ves. 238; Honor *v.* Honor, 1 P. Wms. 128; 2 Vern. 658; Powell *v.* Price, 2 P. Wms. 535; Gaillard *v.* Pardon, 1 McMul. Eq. 358; Neves *v.* Scott, 9 How. 197; Gause *v.* Hale, 2 Ired. Eq. 241; Smith *v.* Maxwell, 1 Hill, Eq. 101; Allen *v.* Rumph, 2 Hill, Eq. 1; Briscoe *v.* Briscoe, 7 Ir. Eq. 129.

[3] Warrick *v.* Warrick, 3 Atk. 291; Trevor *v.* Trevor, 1 P. Wms. 622; West *v.* Errissey, 2 P. Wms. 349. But if the purchaser have notice of the articles, they may be enforced against him. Davies *v.* Davies, 4 Beav. 54; Thompson *v.* Simpson, 1 Dr. & War. 491; Abbott *v.* Geraghty, 4 Ir. Eq. 15.

[4] West *v.* Errissey, 2 P. Wms. 349; Comyn, R. 412; 1 Bro. P. C. 225.

[5] Scott *v.* Moore, 1 Wins. (N. C.) Eq. 98.

[6] Burton *v.* Hastings, 2 P. Wms. 535; Gilb. Eq. 113; 1 Eq. Cas. Ab. 393; Hart *v.* Middlehurst, 3 Atk. 371; Maguire *v.* Scully, 2 Hog. 113; 1 Beat. 370; Marryat *v.* Townley, 1 Ves. 105; Phillips *v.* Jones, 4 Dr. & Sm. 406; 3 De G., J. & S. 72.

[7] Powell *v.* Price, 2 P. Wms. 535; Fearne's Con. Rem. 103.

trust for the wife, and at her death to the heirs of her body, it was held to be an executed trust, there being no further conveyances to be executed, and that the rule in Shelley's Case applied.[1]

§ 362. In England, when a married woman could not convey her interest in real estate, a strict settlement was not ordered under marriage articles that limited the *husband's* estate to the heirs of the body of the wife, for the reason that this created an entail that could not be barred without considerable difficulty; but since the Fines and Recoveries Act, this difficulty is removed.[2] Nor will the court order a strict settlement, if there is anything in the nature of the limitations, or otherwise on the face of the articles, which indicates that such was not the intention of the parties, for the reason that the rule now under discussion was established in order to carry out the intention of the parties. If, therefore, the intention of the parties appears to be in accordance with, or not contrary to, the ordinary rule, the ordinary rule will be allowed to prevail.[3]

§ 363. If personal property is agreed to be settled on the parents for life, and then to their heirs, or the heirs of their bodies, the chattels will not vest in the parents absolutely, but in the heirs when they are born;[4] and it is not necessary that they should survive their parents, or become actual heirs,[5] unless the gift is to the parents and their heirs living at the

[1] Carroll *v.* Renick, 7 Sm. & M. 799; Tillinghast *v.* Coggeshall, 7 R. I. 383.

[2] Rochford *v.* Fitzmaurice, 2 Dru. & W. 19; Highway *v.* Banner, 1 Bro. Ch. 587; Howel *v.* Howel, 2 Ves. 358; Green *v.* Ekins, 2 Atk. 477; Honor *v.* Honor, 1 P. Wms. 123.

[3] Rochford *v.* Fitzmaurice, 2 Dru. & W. 19; Highway *v.* Banner, 1 Bro. Ch. 587; Howel *v.* Howel, 2 Ves. 358; Green *v.* Ekins, 2 Atk. 477; Honor *v.* Honor, 1 P. Wms. 123; Power *v.* Price, 2 P. Wms. 535; Chambers *v.* Chambers, 2 Eq. Cas. Ab. 35; Fitzg. 127.

[4] Hodgeson *v.* Bussey, 2 Atk. 89; Barn. 195; Bartlett *v.* Green, 13 Sim. 218.

[5] Theebridge *v.* Kilburne, 2 Ves. 233.

death of the surviving parent, or there are other equivalent words.[1]

§ 364. If there is a covenant in marriage articles to settle personal property upon the same trusts, and for the same purposes, as the real estate is settled, the court will not apply the same limitations to the personal as to the real estate, for that would be to vest an absolute interest in the heirs at their birth; but the court will insert a provision making the personal property follow the course of the real estate.[2] Courts will also insert a provision that the children or issue shall take, as tenants in common, and not as joint-tenants, on account of the inconveniences of joint-tenancies, and from the presumed intention of the parties;[3] and so the court will insert other words and conditions, and vary the literal instruction of the articles in order to carry out the presumed intention, and promote a convenient settlement for the protection and security of all the parties,[4] as if the settlement is to be of all the property which the settlor might thereafter become entitled to, it will be construed to embrace only the property acquired during the marriage.[5] The

[1] Read *v.* Snell, 2 Atk. 642.

[2] Stanley *v.* Leigh, 2 P. Wms. 690; Gower *v.* Grosvenor, Barn. 63; 5 Madd. 348; Newcastle *v.* Lincoln, 3 Ves. 387, 394, 397; Scarsdale *v.* Curzon, 1 John. & H. 51. The matter referred to in the text seldom or never arises in the marriage settlements made in the United States, as primogeniture is abolished, and entails on the eldest son are seldom resorted to. But where personal chattels are made to vest under a marriage settlement in the eldest son as heir, and such son dies under age, very awkward effects follow; and, under covenants to settle personal property upon the same limitations as are applied to a settlement of real estate wherein the eldest son takes as heir, it was a matter of great discussion in the Court of Chancery and in the House of Lords, what kind of provisions ought to be inserted to protect the parents and other children in case the eldest son dies under age and without issue. Newcastle *v.* Lincoln, 3 Ves. 387; 12 Ves. 218.

[3] Taggart *v.* Taggart, 1 Sch. & Lef. 88; Rigden *v.* Vallier, 3 Atk. 734; Marryat *v.* Townley, 1 Ves. 103. Joint-tenancy is abolished by statute in most of the United States, with the exception, in some States, of gifts and grants to husband and wife.

[4] Kentish *v* Newman, 1 P. Wms. 234; Martin *v.* Martin, 2 R. & M. 507; Master *v.* De Croismar, 11 Beav. 184; Targus *v.* Puget, 2 Ves. 194.

[5] Steinberger *v.* Potter, 3 Green, Ch. 452.

court will not always order a formal settlement to be drawn out, but will declare the meaning and intention of the articles, and leave the parties to act upon the declaration, as if it was a formal settlement drawn out and executed by them.[1] So the court will sometimes rectify the settlement drawn under articles by a decree, without ordering a new deed to be drawn out and executed.[2]

§ 365. Marriage settlements, whether made in pursuance of articles, or under directions contained in wills, or under decrees of the court, are matters in which courts exercise the most liberal principles of equity. If a settlement is drawn up under a decree, and it is not in all respects in accordance with the decree, the court will set it aside, and order a new settlement.[3] In Grout *v.* Van Schoonhoven, the court ordered a new settlement, in substance that the trust should be for the wife during her life without power of anticipating the income; and upon her death for the use of her husband for life, in case he survived her; and, after the death of both, to be divided equally among all their children then living, and the descendants of such as had died leaving issue, *per stirpes;* with a power to make advances with the approbation of the trustees to the children, on their attaining full age or being married, out of the capital fund, in anticipation of the ultimate distribution, in order to set them up in the world.[4] An advance cannot be made in order that a child may put the money in his pocket, but an advance may be made to trustees under a marriage settlement for a child.[5] When there was power of advancement to a married woman, it was held that an advance to her husband to set him up in business might be allowed;[6] and so where there was power in a settlement to withdraw funds, and lay them out in the purchase of a trade for the

[1] Byam *v.* Byam, 19 Beav. 58.
[2] Tebbitt *v.* Tebbitt, 1 De G. & Sm. 506.
[3] Temple *v.* Hawley, 1 Sandf. Ch. 154.
[4] Grout *v.* Van Schoonhoven, 1 Sandf. Ch. 342.
[5] Roper *v.* Curzon, L. R. 11 Eq. 452.
[6] *In re* Kershaw's Trust, L. R. 6 Eq. 322.

benefit of husband and wife, the power may be exercised for the benefit of one after the death of the other.[1] In Imlay *v.* Huntington, a husband covenanted that he would pay over to certain trustees $10,000, and one-half of certain other expected moneys of his intended wife, to be held by said trustees in trust for the wife for the term of twenty years, after which time they were to convey to such persons as the wife should appoint. The marriage was consummated, and the husband received $60,000, which he continued to hold and manage as his own during the lifetime of his wife, making no payment to the trustees, and neither the trustees nor the wife requesting him to pay the sum over, or to make any settlement in pursuance of the articles. On the death of the wife, at the end of twenty years, her brothers and sisters, there being no issue of the marriage, applied to the court by bill in equity for the execution of the marriage settlement, in accordance with the articles and covenants entered into by the husband before marriage: but it was held that it was competent for the wife to discharge the husband from the fulfilment of the covenants, and to abandon the trust; that, under the circumstances of the case, the articles were abandoned by the wife and all the parties; that the wife's personal property vested absolutely in the husband; and that the wife's heirs had no right to maintain the bill for any part of her personal estate.[2]

§ 366. In executory trusts created by *wills*, no presumption arises *a priori* that a provision was intended for the children of the first taker, as in marriage settlements, and that such children were intended to take as purchasers. If the trust be "for A. and the heirs of his body,"[3] or "for A. and the heirs of his body and their heirs,"[4] or "for A. for life and after his decease

[1] Doorly *v.* Arnold, 18 W. R. 540.

[2] Imlay *v.* Huntington, 20 Conn. 146; Jones *v.* Higgins, L. R. 2 Eq. 538.

[3] Harrison *v.* Naylor, 2 Cox, 247; Bagshaw *v.* Spencer, 1 Ves. 151; Marshall *v.* Bousley, 2 Madd. 166; Robertson *v.* Johnston, 36 Ala. 197.

[4] Marryat *v.* Townley, 1 Ves. 104.

to the heirs of his body," [1] A. will be tenant in tail; and he may disappoint his heirs by barring the entail. So, where a testator directed an estate to be settled on his "daughter and her children, and, if she died without issue," remainder over, the court held that the daughter was tenant in tail; and that in a voluntary devise the court must take it as they find it, though upon like words in a marriage settlement it might be different.[2] So where a testator directed lands to be settled on his "nephew for life, remainder to the heirs male of his body, and the heirs male of every such heir male severally and successively, one after another, as they should be in seniority and priority of birth, every elder and the heirs male of his body to be preferred before the younger," it was held that, although the nephew took by a voluntary executory devise, the court must execute it in the words of the will and according to the rules of law, and that equity could not carry the words further than the same words would operate at law, and that the nephew took an estate tail. The words in this case all went upon the idea of an entail.[3] So if there is a direction that the trustees shall not give up their trust until "a proper entail was made to the heir male by them." [4] But in another similar executory trust, Lord Eldon declined to compel a purchaser to accept the title, on the ground that the entail was too doubtful to be acted upon in so grave a matter.[5] Where a testator devised real estate to his daughter, then unmarried, in trust for her heirs, she to receive the income for her and their support and education, and, if she should die leaving no heirs, then over to her brothers and sisters, it was held that the word "income" passed the estate to the daughter, that the word "heirs" was a word of limitation, and that the

[1] Blackburn *v.* Stables, 2 V. & B. 270; Seale *v.* Seale, 1 P. Wms. 290; Meure *v.* Meure, 2 Atk. 266; Robertson *v.* Johnston, 36 Ala. 197.

[2] Sweetapple *v.* Bindon, 2 Vern. 536.

[3] Legatt *v.* Sewell, 2 Vern. 551; McPherson *v.* Snowden, 19 Md. 197.

[4] Blackburn *v.* Stables, 2 V. & B. 367; Marshall *v.* Bousley, 2 Madd. 166; Dodson *v.* Dodson, 3 Bro. Ch. 405.

[5] Jervoise *v.* Northumberland, 1 J. & W. 559; Woolmore *v.* Burrows, 1 Sim. 512.

daughter took an estate tail.[1] In the gift of a fund the term "heirs at law" means next of kin or persons entitled under the statute of distributions relating to personal property.[2]

§ 367. In executory trusts under marriage articles, many distinctions arise upon the question, Who may enforce their specific performance, and compel the execution of the formal deed and the disposal of the property in accordance with the settlement that should have been made under the articles? Thus the general rule is, that parties, seeking a specific execution of such articles, must be those who come strictly within the reach and influence of the consideration of the marriage, or who claim through them, as the wife, or the husband, and the issue of the husband or wife, or both. As a general rule, mere volunteers, or collateral relatives of husband or wife, cannot interfere and ask for a specific performance of the articles.[3] (*a*) But there

[1] Allen *v.* Henderson, 49 Pa. St. 333.

[2] White *v.* Stanfield, 146 Mass. 424.

[3] Vernon *v.* Vernon, 2 P. Wms. 594; Edwards *v.* Warwick, id. 171; Osgood *v.* Strode, id. 245; Ithell *v.* Beane, 1 Ves. 215; 1 Dick. 132; Stephens *v.* Trueman, 1 Ves. 73; Pulvertoft *v.* Pulvertoft, 18 Ves. 90; 2 Kent, Com. 172, 173; Atherly on Mar. Sett. 145; Bradish *v.* Gibbs, 3 Johns. Ch. 550; West *v.* Errissey, 2 P. Wms. 349; Kettleby *v.* Atwood, 1 Vern. 298, 471; Williamson *v.* Codrington, 1 Ves. 512; Colman *v.* Sarrel, 1 Ves. Jr. 50; 3 Bro. Ch. 13; Ellison *v.* Ellison, 6 Ves. 662; Graham *v.* Graham, 1 Ves. Jr. 275;

(*a*) In *Re* Cameron and Wells, 37 Ch. D. 32, 37, Kay, J., said: "When any collateral takes an interest under a marriage settlement, it may be the bargain between the husband and wife that the collateral should so take; but that does not make him any the less a volunteer, because no consideration moves from him, which is the test whether the interest of the collateral is or is not that of a volunteer." It was there held that children of the husband by a former marriage, who were named as beneficiaries of the executory trust under the settlement, could not enforce the settlement as against a purchaser for value from the settlor, since such children were not parties to the consideration. It was admitted that children of a wife by a former marriage would, under the case of Newstead *v.* Searles (1 Atk. 265; 9 A. C. 320, n.), be treated differently, but the court considered this an exception which should not be extended.

are so many exceptions and qualifications to this rule, that a case is rarely decided upon it. The principle is, that, to bring collateral relations within the reach and influence of the consideration, there must be something over and above that flowing from the immediate parties to the marriage articles, from which it can be inferred that relatives beyond the issue were intended to be provided for, and that, if the provision in their behalf had not been agreed to, the superadded consideration would not have been given.[1] While this is the general rule, the courts seize hold of the slightest valuable consideration to give effect to the settlement in favor of collateral relatives; and it need not appear that these slight considerations were inserted in favor of distant relatives: the court will presume such to be the case.[2] The result of all the cases is, that, if from the circumstances under which marriage articles were entered into by the parties, or as collected from the face of the instrument itself, it appears to have been intended that the collateral relatives in a given event should take the estate, and a proper limitation to that effect is contained in the articles, a court of equity will enforce the trust for their benefit. Such parties are not volunteers outside the deed, but come fairly within the influence of the consideration upon which it is founded. Such consideration extends through all the limitations of the articles for the benefit of the remotest persons provided for, consistent with the rules of law.[3] But of course there is a more direct equity in favor of a wife and

Wycherly *v.* Wycherly, 2 Eden, 177, note; Bunn *v.* Winthrop, 1 Johns. Ch. 336; Gevers *v.* Wright, 3 Green, Ch. 330.

[1] Osgood *v.* Strode, 2 P. Wms. 245; Goring *v.* Nash, 3 Atk. 186; Hamerton *v.* Whitton, 2 Wils. 356; Williamson *v.* Codrington, 1 Ves. 512; Bleeker *v.* Bingham, 3 Paige, 246.

[2] Neves *v.* Scott, 9 How. 209; Stephens *v.* Trueman, 1 Ves. 73; Edwards *v.* Warwick, 2 P. Wms. 171.

[3] Neves *v.* Scott, 9 How. 210; Canby *v.* Lawson, 5 Jones, Eq. 32; Dennison *v.* Goehring, 7 Barr, 175; King *v.* Whitely, 10 Paige, 465. See this matter very learnedly discussed in Neves *v.* Scott, 9 Monthly Law Reporter, 67, Boston, June, 1846. This decision, however, was overruled in Neves *v.* Scott, 9 How. 98. The case was again discussed before the State court of Georgia, and the opinion of the circuit court of the district of

children.[1] So in respect to chattel interest, it has been held that a bond under seal, though voluntary, will uphold a decree for the execution of the trust in favor of those whom the obligor is under obligations to support, as wife or children; for a seal in law imports a consideration.[2] But this doctrine seems to be rejected; and it is now held that neither wife nor child can enforce a purely voluntary contract or [executory] settlement.[3]

§ 368. And where a third person — parent, agent, or friend of the parties — holds out any considerations of a pecuniary nature to induce a marriage, and articles are drawn up, and a marriage takes place, equity will compel the party holding out the inducements to make them good, or specifically perform the articles.[4]

§ 369. If, however, in an executory trust created in a will there are indications of an intention that the words "heirs of the body" shall be words of purchase and not of inheritance, they will receive that construction; that is, the intention of the testator will be carried out, if it is sufficiently clear, although the same words in an ordinary grant would create an estate tail. Thus, if there are other words in the will that indicate that the words "heirs of the body" are words of designation, and not of inheritance, such heirs will take by purchase, and the first taker

Georgia was followed. That case was in turn overruled in 13 How. 268. The judgment of the Supreme Court of the United States was, that on the face of that instrument the consideration extended to brothers and sisters; and, further, that it was an executed trust, and that they had an interest.

[1] Pulvertoft *v.* Pulvertoft, 18 Ves. 99.

[2] Bunn *v.* Winthrop, 1 Johns. Ch. 336; Minturn *v.* Seymour, 4 Johns. Ch. 500; Lechmere *v.* Carlisle, 3 P. Wms. 222; Walwyn *v.* Coutts, 3 Mer. 708; Antrobus *v.* Smith, 12 Ves. 44; Colman *v.* Sarrel, 1 Ves. Jr. 54; Beard *v.* Nutthall, 1 Vern. 427.

[3] Jefferys *v.* Jefferys, 1 Cr. & Phil. 138; Holloway *v.* Headington, 8 Sim. 325. [See *supra*, § 107.]

[4] Hammersley *v.* De Biel, 2 Cl. & Fin. 45.

of course will have only an estate for life. Thus, if the testator direct a settlement on A. for life "without impeachment of waste," [1] or with a limitation "to preserve contingent remainders," [2] or if he direct that "care be taken in the settlement that the tenant for life shall not bar the entail," [3] the superadded words show the intention to be, that the first taker shall have only an estate for life, with no power over the inheritance. So, where a gift was in trust for the separate use of a married woman for life, she alone to receive the rent, and her husband not to intermeddle, and, after her decease, to the heirs of her body, the wife took only for life, and the words "heirs of her body," were words of purchase; for if the wife takes the inheritance in tail, the husband will have curtesy, which would be contrary to the clause against his intermeddling.[4] So, where a testator directed an estate to be settled on a married woman for life for her separate use, and at her death on her *issue*, she was not tenant in tail; for there would be only an equitable estate in her, while a legal estate would vest in her issue, and the two estates could not coalesce in such manner as to make her tenant in tail.[5] So a direction to settle land on A. and the heirs of his body "as counsel shall advise," [6] or as "the executors shall think fit," [7] implies that a simple estate tail is not intended, for if it was there would be no need of the additional words. And where the trust was to settle on A. for life without impeachment of waste, remainder to his issue in *strict settlement*, the court directed the estates to be settled on A. for life, without impeachment for

[1] Glenorchy *v.* Bosville, Ca. t. Talb. 3; 1 Lead. Cas. Eq. 1, and notes.

[2] Pappillon *v.* Voice, 2 P. Wms. 471; Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 158.

[3] Leonard *v.* Sussex, 2 Vern. 526.

[4] Roberts *v.* Dixwell, 1 Atk. 607; West Ca. t. Hardw. 536; Turner *v.* Sargent, 17 Beav. 515; Stanley *v.* Jackman, 5 W. R. 302; Stonor *v.* Curwen, 5 Sim. 264; Shelton *v.* Watson, 16 Sim. 542.

[5] Stonor *v.* Curwen, 5 Sim. 268; Verulam *v.* Bathurst, 13 Sim. 386; Coape *v.* Arnold, 2 Sm. & Gif. 311; 4 De G., M. & G. 574. And see Collier *v.* McBean, 34 Beav. 426.

[6] White *v.* Carter, 2 Eden, 366; Amb. 670.

[7] Read *v.* Snell, 2 Atk. 642.

waste, remainder to his sons successively in tail male, remainder to his daughters as tenants in common in tail male, with cross-remainders in tail male, and with limitations to trustees to preserve contingent remainders.[1]

§ 370. Where a testator devised his estate to trustees for the term of six years, and to be then divided among his children or their issue, and conveyances to be given therefor, and directed that "in each deed or writing to any of my children shall be inserted and expressed a clause limiting such grant or interest conveyed to the grantee for life, *with remainder over to the right heirs of such grantee, their heirs and assigns forever*," it was held that the deeds must be so drawn as to give the children a life-estate only, and not a fee in their shares.[2] The same rule of construction has been established and enforced in Georgia,[3] and in Tennessee,[4] and has been recognized in South Carolina,[5] Maryland,[6] and Pennsylvania.[7]

§ 371. It will be observed that "heirs of the body" and "issue" are not synonymous terms. "Heirs" are technical words of limitation, while the word "issue" is *prima facie* a word of purchase; and courts have ordered a strict settlement when the word "issue" was used, when it would probably have

[1] Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Cas. 239; Coape *v.* Arnold, 2 Sm. & Gif. 311; 4 De G., M. & G. 574.

[2] Wood *v.* Burham, 6 Paige, 515; affirmed on appeal, 27 Wend. 9. The rule in Shelley's Case was in force in New York at the time, and would have applied to this case if it had not been an executory trust. The rule in Shelley's Case was soon after abrogated in that State, and the decision has ceased to be important; nor is the subject-matter now under discussion of importance in any State where the rule in Shelley's Case is abolished by statute.

[3] Edmondson *v.* Dyson, 2 Kelly, 307; Wiley *v.* Smith, 3 Kelly, 551, 559; Neves *v.* Scott, 9 How. 197; 13 How. 2 8.

[4] Loring *v.* Hunter, 8 Yerg. 4.

[5] Garner *v.* Garner, 1 Des. 437; Porter *v.* Doby, 2 Rich. Eq. 49.

[6] Horner *v.* Lyeth, 4 H. & J. 431.

[7] Findlay *v.* Riddle, 3 Binney, 139.

been otherwise if the word "heir" had been used.[1] (a) The words "heirs of the body,"[2] and "issue,"[3] embrace daughters; for they equally answer the description and are equally the objects of bounty; and where the words are words of purchase,

[1] Meure *v.* Meure, 2 Atk. 265; Haddelsey *v.* Adams, 22 Beav. 276; Rochford *v.* Fitzmaurice, 2 Conn. & Laws. 158; Bastard *v.* Proby, 2 Cox, 6; Dodson *v.* Hay, 3 Bro. Ch. 405; Stonor *v.* Curwen, 5 Sim. 264; Horne *v.* Barton, G. Coop. 257; Crozier *v.* Crozier, 2 Conn. & Laws. 311; Ashton *v.* Ashton, cited in Bagshaw *v.* Spencer, 1 Coll. Jur. 402; McPherson *v.* Snowden, 19 Md. 197. Where a testator intends the estate to go to the whole body of persons, in legal succession, constituting *in law* the entire line of descent lineal, he evidently means the same thing as if he had said "issue" or "heirs of the body;" or if he intends it to go to the whole line of descent, lineal and collateral, he means the same thing as if he had used the term "heirs," which, as a word of art, describes precisely the same line of descent. Per Agnew, J., in Yarnall's App., 70 Penn. St. 340. And see Kleppner *v.* Laverty, 70 Penn. St. 70; Kiah *v.* Grenier, 1 N. Y. Sup. Ct. 388.

[2] Bastard *v.* Proby, 2 Cox, 6.

[3] Meure *v.* Meure, 2 Atk. 265; Trevor *v.* Trevor, 13 Sim. 108; Ashton *v.* Ashton, *ut supra.*

(a) The word "issue" in a deed or will, when used as a word of purchase, means, in the absence of an intention disclosed to the contrary, descendants generally. Drake *v.* Drake, 134 N. Y. 220, 224; Soper *v.* Brown, 136 N. Y. 244. But if there is a clear intention to include only children in the word, the intention will control. Chwatal *v.* Schreiner, 148 N. Y. 683; Jackson *v.* Jackson, 153 Mass. 374. In a statute "issue" may include an adopted child. Buckley *v.* Frasier, 153 Mass. 525.

The word "children" in a deed of gift or a will does not include grandchildren unless such intention is clearly exhibited or the word appears to have been used as synonymous with issue or descendants. Osgood *v.* Lovering, 33 Me. 464, 469; Williams *v.* Knight, 18 R. I. 333; Pride *v.* Fooks, 3 De G. & J. 252. But if such intention appears it will be given effect. *Ibid.*; Edgerly *v.* Barker, 66 N. H. 434. For a case distinguishing between the *prima facie* meaning of "issue" and "children," see Pride *v.* Fooks, 3 De G. & J. 252. In a will by a testator who had no children of his own and no reasonable expectation of any, the word "children" has been held to include step-children. *In re* Jeans, 72 L. T. 835. In Connor *v.* Gardner, 230 Ill. 258, it was said: "The words 'sons,' 'daughters,' 'child' and 'children' are not technical legal terms to which a fixed meaning must be given regardless of the sense in which they are employed, but they are flexible and subject to construction, to give effect to the intention of the testator." For the interpretation of such words for the purposes of the rule in Shelley's Case see *supra*, § 358 and note.

the settlement, in default of sons, will be made upon daughters, as tenants in common in tail, with cross-remainders.[1] In the United States, the settlement would be made upon sons and daughters in common, with cross-remainders in default of issue, unless the direction was to settle upon some particular one of the heirs of the body or issue.

§ 372. If the limitations of an executory trust are imperfectly or defectively declared in a will, the court will rectify the limitations, and order the settlements to be made in accordance with the intention of the testator, and to be drawn up in proper form to effectuate that intention.[2] But if a testator undertake to be his own conveyancer, and himself draw up in his will all the particulars of the limitations upon which he desires his property to be settled, intending them to be final and to be carried into effect in the trusts, the court is bound by the words, as in Austen *v.* Taylor, where Lord Northington said that "the testator had referred no settlement to the trustees to complete, but had declared his own uses and trusts," and that there was no authority in the court to vary them.[3]

§ 373. When a testator has devised lands in strict settlement, and then devises personal chattels as *heirlooms*, to be held by, or in trust for, the parties entitled to the use of the real estate under the limitations of the settlement; or when he expresses a desire that the heirlooms should be held upon the same trusts as the real estate, — "so far as the rules of law and equity will permit," the tenant for life will have the use of the heirlooms,

[1] Marryat *v.* Townley, 1 Ves. 105; Meure *v.* Meure, 2 Atk. 265; Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Ca. 239; Bastard *v.* Proby, 2 Cox, 6; Ashton *v.* Ashton, in Spencer *v.* Bagshaw, *ut supra;* Shelton *v.* Watson, 16 Sim. 543.

[2] Franks *v.* Price, 3 Beav. 182; Doncaster *v.* Doncaster, 3 K. & J. 26; Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 173; 2 Dr. & War. 21.

[3] Austen *v.* Taylor, 1 Eden, 368. This case, however, has been criticised. See Green *v.* Stephens, 19 Ves. 76; Jervoise *v.* Northumberland, 1 J. & W. 572. And see East *v.* Twyford, 9 Hare, 713; Meure *v.* Meure, 2 Atk. 265; Harrison *v.* Naylor, 2 Cox, 247.

and they will vest absolutely in the first tenant in tail, upon his birth, though he die immediately after.[1] In such cases, the court regards the trust, either as executed, or, if the trust is executory, that it has no authority to insert a limitation over in case of the tenant in tail dying under twenty-one. But such a limitation over is not illegal; and if the bequest of the heirlooms is clearly executory, and if the intention of the testator is plainly manifested that no person shall take the chattels absolutely who does not live to become possessed of the real estate, the court will execute the intention by directing the insertion of a limitation that the absolute interest of the first tenant in tail, if he should die under twenty-one, should go over to the next person in remainder.[2] And so where the absolute vesting of the chattels is coupled with the actual possession, and is therefor suspended until the death of the tenant for life, the chattels will vest in the child, who, after the death of the tenant for life, shall fulfil all the requisites of being tenant in tail in possession.[3] (*a*)

§ 374. If the words of a will, taken in their ordinary sense, create a *joint-tenancy*, the court cannot order a settlement giving a *tenancy in common*, as it may do under marriage articles. But in some cases, where a testator is providing for his children, or

[1] Foley *v.* Burnell, 1 Bro. Ch. 274; Vaughan *v.* Burslem, 3 Bro. Ch. 101; Newcastle *v.* Lincoln, 3 Ves. 387; Carr *v.* Erroll, 14 Ves. 478; Trafford *v.* Trafford, 3 Atk. 347; Doncaster *v.* Doncaster, 3 K. & J. 26; Rowland *v.* Morgan, 6 Hare, 463; 2 Phill. 674; Gower *v.* Grosvenor, Barn. Ch. 54; 5 Madd. 337, overruled; Evans *v.* Evans, 17 Sim. 108; Tollemache *v.* Coventry, 2 Cl. & Fin. 611; 8 Bligh (N. S.), 547; Stapleton *v.* Stapleton, 2 Sim. (N. S.), 212; Deerhurst *v.* St. Albans, 5 Madd. 232, overruled; Scarsdale *v.* Curzon, 1 John. & H. 40, where all the cases are cited and commented on.

[2] Potts *v.* Potts, 3 Jo. & Lat. 353; 1 H. L. Cas. 671; Trafford *v.* Trafford, 3 Atk. 347; Lincoln *v.* Newcastle, 3 Ves. 387.

[3] Scarsdale *v.* Curzon, 1 John. & H. 40.

(*a*) In a devise of plate and a leasehold house, the words "to be enjoyed with and to go with the title," do not create an executory trust or cut down the devisee's interest to a life estate. *In re* Johnston, 26 Ch. D. 538.

where a grandparent *in loco parentis* is providing for his grandchildren, the court will order a settlement that will create a tenancy in common.[1] And, generally, executory trusts under wills will be construed in the same manner as marriage articles entered into after marriage.[2]

§ 375. When a settlement is directed in an executory trust, but there is no direction as to the powers to be given under it, the court cannot order the insertion of any powers,[3] except perhaps the power of leasing, which generally is an implied power to enable a party to enjoy the estate.[4] But if the executory articles or the will contain a direction to insert the "*usual powers*," powers to lease for twenty-one years,[5] of sale and exchange,[6] of varying the securities,[7] of appointing new trustees,[8] and (according to the nature of the property) of partition, of leasing mines, and of granting building leases, will be inserted.[9] But there is a distinction between powers for the management and enjoyment of the estate, and powers which are personally beneficial to one or more particular persons, such as powers of jointure, to charge portions, or to raise moneys for a particular purpose.[10] The court cannot therefore order these latter powers to be inserted under the direction to insert the *usual powers*, for there is no rule by which the court could be governed in reduc-

[1] Synge *v.* Hales, 2 B. & B. 499; Marryat *v.* Townley, 1 Ves. 102. But there were other circumstances in these cases that indicated a tenancy in common. McPherson *v.* Snowden, 19 Md. 197.

[2] Rochford *v.* Fitzmaurice, 1 Conn. & Laws. 158.

[3] Wheete *v.* Hall, 17 Ves. 80; Brewster *v.* Angell, 1 J. & W. 628.

[4] Woolmore *v.* Burrows, 1 Sim. 518; Fearne's P. W. 310; but see the late cases, Turner *v.* Sargent, 17 Beav. 515; Scott *v.* Steward, 27 Beav. 367; Charlton *v.* Rendall, 1 Hare, 296.

[5] Hill *v.* Hill, 6 Sim. 144; Bedford *v.* Abercorn, 1 M. & Cr. 312.

[6] Hill *v.* Hill, 6 Sim. 144; Bedford *v.* Abercorn, 1 M. & Cr. 312; Peake *v.* Penlington, 2 V. & B. 311.

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

[8] Lindow *v.* Fleetwood, 6 Sim. 152; Sampayo *v.* Gould, 12 Sim. 426; Brewster *v.* Angell, 1 J. & W. 628.

[9] Hill *v.* Hill, 6 Sim. 145; Bedford *v.* Abercorn, 1 M. & Cr. 312.

[10] Hill *v.* Hill, 6 Sim. 144.

ing the *corpus* of the estate.[1] So if certain particular powers are directed to be inserted, the *usual powers* will be qualified by the direction. Thus, where it was directed that the settlement should contain a power of leasing for twenty-one years, a power of sale and exchange, and of appointment of new trustees, it was held that a power of granting building leases could not be inserted.[2] So the powers must be inserted and executed as they are directed; as where a power was directed to be inserted of selling and exchanging estates in one county, *and all other usual powers*, it was held that the powers could not be extended to estates in other counties.[3] And where a testator directed the insertion of a power of making leases, *and otherwise according to circumstances*, and of appointing new trustees, the court refused to insert a power of sale and exchange, saying that, if where nothing is expressed nothing can be implied, it is impossible, where something is expressed, to imply more than is expressed, especially where the will notices what powers are to be given.[4] But under particular directions as to certain powers, and general directions that other usual powers should be inserted, the two directions being separate and independent of each other, it was held that a power to appoint new trustees might be inserted.[5] Where *proper powers* of making leases or otherwise were directed to be reserved in the settlement to the tenants for life while qualified to exercise them, and when disqualified to the trustees, and a power of sale and exchange was inserted in the settlement, Lord Eldon held that it was improperly introduced;[6] and Sir T. Plummer gave a similar decision, on the ground that the tenant for life ought not to have a power of sale unless it was expressly directed, nor ought the trustees to have such a power in the absence of an express direction.[7] But where there was a settle-

[1] Higginson *v.* Barneby, 2 S. &. S. 516.
[2] Pearse *v.* Baron, Jac. 158.
[3] Hill *v.* Hill, 6 Sim. 141.
[4] Brewster *v.* Angell, 1 J. & W. 625; Horne *v.* Barton, Jac. 439.
[5] Lindow *v.* Fleetwood, 6 Sim. 152.
[6] Brewster *v.* Angell, 1 J. & W. 625.
[7] Horne *v.* Barton, Jac. 437.

ment of stock with a power of varying the securities, and also a covenant to settle real estate upon the same trusts and with like powers, it was held that a power to sell and exchange was properly introduced in analogy to the power of varying the securities.[1]

§ 376. In drawing up the final deed of settlement under executory articles or a will, the intention of the settlor is to be carried out if possible. If the intention conflicts with any of the rules of law, it shall be executed so far, and as near as it can be. The doctrine of *cy près* applies to this class of executory trusts. (*a*) Thus, if a settlement is directed which would create a perpetuity, the court will order a settlement which shall carry the trust as far as it can extend without running counter to the rules against perpetuities. As where there was a devise to a corporation in trust to convey to A. for life, and after his death to his first son for life, and so on to the first son of such first son for life; and, in default of male issue, then to B. for life, and to his son for life after the death of B., and so as in the case of A., Lord Cowper said the attempt to create a perpetuity was vain, yet the directions should be complied with, so far as consistent with the law, and he directed that all the sons already born should take estates for life in succession, with limitations to unborn sons in tail.[2] But if the devise is such that it cannot be carried into effect, in any form approximating the intention of the testator, without contravening the law against perpetuities or remoteness, the whole trust will be void.[3]

[1] William *v.* Carter, Append. to Treatise on Powers, 945 (8th ed.); Elton *v.* Elton, 27 Beav. 634; Horne *v.* Barton, Jac. 437.

[2] See § 383; Humberston *v.* Humberston, 1 P. Wms. 332; 2 Vern. 737; Pr. Ch. 455; Parfitt *v.* Hember, L. R. 4 Eq. 443; Peard *v.* Kekewick, 15 Beav. 173; Lyddon *v.* Ellison, 19 Beav. 565; Williams *v.* Teal, 6 Hare, 239, and cases; Vanderplank *v.* King, 3 Hare, 1; Monypenny *v.* Dering, 16 M. & W. 418.

[3] Blagrave *v.* Hancock, 16 Sim. 371.

(*a*) See *infra*, § 390.

CHAPTER XIII.

PERPETUITIES AND ACCUMULATIONS.

§ 377. Definitions of a perpetuity.
§ 378. Executory devises — springing and shifting uses.
§ 379. Growth of rule against perpetuities.
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§ 381. Applies to the possible vesting of estates — not to the actual.
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§ 400. Accumulations in cases of life insurance.

§ 377. THAT the same rules apply to trusts as to legal estates is further apparent from the rule against perpetuities. A perpetuity has been declared to be "an estate unalienable, though

all mankind should join in the conveyance;" [1] and an executory devise is said to be "a perpetuity as far as it goes." Again, it has been said, that "a perpetuity is when if all that have interest join, yet they cannot pass the estate." [2] These are characteristics of a perpetuity. There are other descriptions given, as that "a perpetuity is a thing odious in the law, and destructive to the commonwealth: it would stop commerce and prevent the circulation of property." [3] Others have described the rule of law as respects the period of remoteness, rather than the thing itself called a perpetuity; [4] thus, "a perpetuity is a limitation tending to take the subject out of commerce for a longer period than a life or lives in being and twenty-one years beyond, and, in the case of a posthumous child, a few months more, allowing for the term of gestation." [5] Mr. Saunders says: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property, discharged of such future use or estate, before the event is determined, or the period is arrived, when such future use or estate is to arise. If that period is within the bound described by law, it is not a perpetuity." [6] This describes the thing itself, and not the rule of law, or the length of time, which may vary. Mr. Lewis gives a fuller definition: "A perpetuity is a future limitation, whether executory, or by way of remainder, and of either real or personal property, which is not to vest, until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property, subject to the future limitation, except with the concurrence of the individual interested under that limitation." [7] If such person is not yet in being,

[1] Scattergood *v.* Edge, Salk. 229.
[2] Washborne *v.* Downes, 1 Ch. Cas. 213.
[3] Duke of Norfolk's Case, 1 Vern. 164.
[4] Stanley *v.* Leigh, 2 P. Wms. 688.
[5] Rand. Perp. 48.
[6] Uses and Trusts, 204.
[7] Lewis on Perpetuity, 164. Jarman's Treatise on Wills contains this

as he may not be after an extended period, of course the estate cannot be conveyed, even if all the world join in the deed. (*a*)

marked sentence: "*Te teneam moriens* is the dying lord's apostrophe to his manor, for which he is forging these fetters that seem, by restricting the dominion of others, to extend his own." 1 Jar. on Wills, 226, note (ed. 1861).

(*a*) For a historical review of the cases showing the development of the rule see Gray on the Rule against Perpetuities (2d ed.), §§ 123–200. The rule is there stated as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Ibid.* § 201.

It is frequently said that the purpose of the rule is to prevent restraints upon alienation of property by the creation of remote interests in it which are inalienable by nature; but, although this is undoubtedly a usual result of its operation, it seems better to regard the rule as aiming to prevent the creation of remote unvested interests rather than to prevent restraints upon alienation of the property itself or of vested interests in it. In other words, the rule against perpetuities concerns itself solely with the time for the vesting of the limitations over, not with the duration of the prior estate. See Winsor *v.* Mills, 157 Mass. 362, 365; Gray *v.* Whittemore, 192 Mass. 367; Lembeck *v.* Lembeck, 73 N. J. Eq. 427; Loomer *v.* Loomer, 76 Conn. 522; Pulitzer *v.* Livingston, 89 Me. 359; Gray on Perpetuities (2d ed.), §§ 269, 278; but see 8 Harv. Law Rev. 211; Missionary Soc. *v.* Humphreys, 91 Md. 131, criticised in Gray on Perpetuities (2d ed.), § 245 c.

If the prior estate falls with the void limitation over, its failure is not because of its long duration but because of an expressed or implied intention of the donor or testator that it should be conditional upon the validity of the limitations over, as where it is only part of a general scheme which fails because the limitations over cannot take effect. Pitzel *v.* Schneider, 216 Ill. 87; Central Trust Co. *v.* Egleston, 185 N. Y. 23; Reid *v.* Voorhees, 216 Ill. 236; Schuknecht *v.* Schultz, 212 Ill. 43. See Smith *v.* Chesebrough, 176 N. Y. 317; Landram *v.* Jordan, 25 App. D. C. 291, 302. Whenever it appears that the prior estate was intended as an independent gift or grant to take effect irrespective of the gift over, the invalidity of the latter because of remoteness has no effect upon the former. Georgia Code [1895], § 3102; Chapman *v.* Cheney, 191 Ill. 574; Nevitt *v.* Woodburn, 190 Ill. 283; Quinlan *v.* Wickman, 233 Ill. 39; Johnson's Trustee *v.* Johnson, 79 S. W. 293 (Ky. 1904); Graham *v.* Whitridge, 99 Md. 248, 282; First Universalist Society *v.* Boland, 155 Mass. 171; Matter of Mount, 185 N. Y. 162; *In re* Gage, [1898] 1 Ch. 498; Patching *v.* Barnett, 51 L. J. Ch. 74. See note to Saxton *v.* Webber (Wis.), 20 L. R. A. 509; Edgerly *v.* Barker, 66 N. H. 434; *In re* Dugdale, 38 Ch. Div. 176. And the same is true in case of a void at-

§ 378. Executory devises are a species of testamentary dispositions, allowed by courts of law, and when properly exercised, they pass the *legal* estate or interest to all persons in favor of whom the dispositions are made. They are devises to take effect at a certain time in the future, or upon a certain event, and in favor of certain persons. Limitations by way of springing or shifting uses are similar in effect, except that they are created by deeds *inter vivos*, and are based upon the statute of uses. Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use. These executory devises, and shifting and springing uses, must vest in the persons intended to be benefited within the time allowed by law, or they will be declared illegal and of no effect. The same rules apply in equity to trusts. In cases of trusts the legal estate is vested in certain trustees, and their heirs; but the beneficial interest, or equitable estate, is given by the grantor, testator, or settlor to such person or persons, and upon such terms and upon such events, as he shall declare. The settlor can change and shift the beneficial enjoyment of the equitable estate from one person to another, in the future, in a manner analogous to the limitations of springing or shifting uses under the statute of uses.[1] (*a*) Courts of equity always take special care that future estates or interests shall not be destroyed by the present user

[1] Harrison *v.* Harrison, 36 N. Y. 543.

tempt to impose a restraint upon the alienation of a vested interest. Matter of Murray, 78 N. Y. S. 165, 75 App. Div. 246; Johnson's Trustee *v.* Johnson, 79 S. W. 293 (Ky. 1904).

The chief reason why the rule against perpetuities has been so often regarded as aimed against restraints upon alienation seems to be that with few exceptions restraints upon the power to alienate an interest in property can be imposed only by making the interest conditional upon some future contingency. But attempted restraints upon power to alienate vested interests come under an entirely different rule. See *infra*, § 386 *et seq.*

(*a*) See Powers *v.* Bullwinkle, 33 S. C. 293; Glover *v.* Condell, 163 Ill. 566; Smith *v.* Kimbell, 153 Ill. 368; Welch *v.* Brimmer, 169 Mass. 204; Naylor *v.* Godman, 109 Mo. 543; Gray on Perpetuities (2d ed.), §§ 268, 317.

of the property; and that the limitations of future equitable interests shall not transcend the limits assigned for the limitation of similar legal interests or executory devises, and shifting and springing uses at law.

§ 379. The rule against perpetuities has been gradually established by judicial decisions, and affords a most notable instance of the nice adaptation of the principles of the common law to the decision of a question which requires at once a due regard for the rights of persons and property, and a careful consideration of these larger principles of public policy so essential to the welfare of communities and States. For public policy is opposed to the perpetual settlement of property in families in such manner that it is forever inalienable, or inalienable so long as there may be a person to take, answering the designation of some testator who died generations before. The first stand of the judges was to allow only those limitations which would take effect at the end of one life from the death of the testator.[1] This was afterwards modified to include two or more lives in being, and running at the same time, "or where the candles are all burning at once;" for it is plain that such a space of time is only one life in being, — that of the longest liver.[2] The next step was much debated; but it was finally settled, that an executory devise might be made to vest at the end of lives in being and twenty-one years after, to allow for the infancy of the next taker, who by reason of infancy could not alienate the estate.[3] The statute of 10 & 11 Wm. III., c. 16, having provided that

[1] Pells *v.* Brown, Cro. Jac. 590; 1 Eq. Cas. Ab. 187, c. 4 (A. D. 1621); see Snow *v.* Cutler, 1 Lev. 135, t. Raym. 162; 1 Keb. 151, 752, 800; 2 Keb. 11, 145, 296; 1 Sid. 153.

[2] Goring *v.* Bickerstaff, Pollexf. 31; 1 Ch. Cas. 4; 2 Freem. 163 (1664); 2 Harg. Jurid. Arg. 46; Lloyd *v.* Carew, Shower, P. C. 137; Pr. Ch. 72.

[3] Taylor *v.* Biddal, 2 Madd. 289; Freem. 243; 1 Eq. Cas. Ab. 188, c. 11; F. C. R. 432; Laddington *v.* Kime, 1 Raym. 203; Gore *v.* Gore, 2 W. Kel. 204; 2 P. Wms. 28; 2 Stra. 948; Scattergood *v.* Edge, 12 Mod. 277; Duke of Norfolk's Case, 3 Ch. Cas. 32; Ch. R. 229; 2 Freem. 72; Pollexf. 223; Massenburgh *v.* Ash, 1 Vern. 234; Maddox *v.* Staine, t. Talb. 228; 2 Harg. Jurid. Arg. 50.

children *en ventre sa mère*, born after their father's death, should for the purposes of the limitations of estates be deemed to have been born in his lifetime, a further extension of nine or ten months was allowed for the period of gestation.[1] The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child *en ventre sa mère*.[2] Much discussion arose upon each one of these steps.[3] For instance, the term of twenty-one years, it was said, could not be allowed as a term in gross, and without reference to the infancy of some person interested in the estate; this question was not settled until Cadell *v.* Palmer, in the House of Lords in 1833, when it was finally determined, that twenty-one years might be allowed as a term in gross, without reference to the infancy of any person, but that the period of nine months for gestation should be allowed in cases only where the gestation had commenced[4] of some persons who, if born, would take an interest in the estate. By such steps, by imperceptible degrees, and after two centuries of doubt and litigation, and unaided by legislation, the judges framed and completed the *great rule against perpetuities*.[5]

§ 380. Thus all future legal estates which arise by way of executory devise, conditional limitation, or shifting and spring-

[1] Stephens *v.* Stephens, Cas. t. Talb. 228; Forrest, 228; Goodtitle *v.* Woods, Willes, 211; 7 T. R. 103 (n.); Sheffield *v.* Orrery, 3 Atk. 282; Gulliver *v.* Wicket, 1 Wils. 185; Bullock *v.* Stones, 2 Ves. 521; Goodman *v.* Goodright, 2 Burr. 873.

[2] Long *v.* Blackall, 7 T. R. 100; 2 Harg. Jurid. Arg. 105; 6 Cru. Dig. 488.

[3] Davies *v.* Speed, 12 Mod. 39; 2 Salk. 675; Holt, 731; Bostock's Case, Ley, 56; Roe *v.* Tranmer, 2 Wils. 75; Lloyd *v.* Carew, Show. P. C. 137; Pr. Ch. 72; 2 Harg. Jurid. Arg. 36; Carwardine *v.* Carwardine, 1 Ed. 34; Blandford *v.* Thackerell, 2 Ves. Jr. 241; 1 Sand. Uses & Tr. 198; Thellusson *v.* Woodford, 4 Ves. 337; Routledge *v.* Dorrill, 2 Ves. Jr. 357; Keily *v.* Fowler, Wilmot, 306; Beard *v.* Westcott, 5 Taunt. 393; 5 B. & A. 801; T. & R. 25; Bengough *v.* Edridge, 1 Sim. 173, 271.

[4] Cadell *v.* Palmer, 7 Bligh (N. S.), 202; 10 Bing. 140; 1 Cl. & Fin. 372; 1 Jarm. Wills, 222.

[5] Lewis on Perpetuity, pp. 140–162; 1 Powell on Devisees by Jar. 389, n. [Gray on Perpetuities, (2d ed.) § 201 *et seq.*, § 411 *et seq.*]

ing uses, must vest within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is *en ventre sa mère*, nine months more will be allowed; and all estates created as aforesaid, and so limited that they may not vest within that time, are void.[1] If the estates are created and limited by deeds *inter vivos*, the lives in being must be those persons who are living at the execution of the deed, and not at the death of the grantor or settlor.[2] And if an absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than twenty-one years;[3] but a term of

[1] Proprietors of Church in Brattle Square *v.* Grant, 3 Gray, 149; Sears *v.* Russell, 8 Gray, 86; 1 Shep. Touch. 126; 4 Kent, Conn. 128 and notes; 2 Fearne, Cont. Rem. 50; Nightingale *v.* Burrell, 15 Pick. 111; 6 Cru. Dig. tit. 38, c. 17, § 23; Cadell *v.* Palmer, 1 Cl. & Fin. 372, 423; Bacon *v.* Proctor, T. & R. 31; Mackworth *v.* Hinxman, 2 Keen, 658; Ker *v.* Duncannon, 1 Dr. & War. 509; Com., &c. *v.* De Clifford, id. 245; Welsh *v.* Foster, 12 Mass. 97; Tilbury *v.* Barbut, 3 Atk. 617; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Tyte *v.* Willis, Ca. t. Talb. 1; Att. Gen. *v.* Gill, 2 P. Wms. 369; Nottingham *v.* Jennings, 1 id. 25; Kampf v. Jones, 2 Keen, 756; Miller *v.* Macomb, 26 Wend. 229; Tator *v.* Tator, 4 Barb. 431; Ring *v.* Hardwicke, 2 Beav. 352; Ferris *v.* Gibson, 4 Edw. 707; Egerton *v.* Brownlow, 4 H. L. Cas. 1, 160. [Chilcott *v.* Hart, 23 Colo. 40; Georgia Code, (1895) § 3102; Post *v.* Rohrbach, 124 Ill. 600; Quinlan *v.* Wickman, 233 Ill. 39; Pitzel *v.* Schneider, 216 Ill. 87; Schuknecht *v.* Schultz, 212 Ill. 43; Merritt *v.* Bucknam, 77 Me. 253; Andrews *v.* Lincoln, 95 Me. 541; Towle *v.* Doe, 97 Me. 427; Graham *v.* Whitridge, 99 Md. 248, 274; Universalist Soc. *v.* Boland, 155 Mass. 171; Shepperd *v.* Fisher, 206 Mo. 208; Merrill *v.* Am. Baptist Union, 73 N. H. 414; Edgerly *v.* Barker, 66 N. H. 434; Kountz's Estate, 213 Pa. St. 390; Lawrence's Estate, 136 Pa. St. 354; Fitchie *v.* Brown, 211 U. S. 321; *In re* Frost, 43 Ch. Div. 246; *In re* Ashforth, [1905] 1 Ch. 535; *In re* Hancock, [1901] 1 Ch. 482; *In re* Bence, [1891] 3 Ch. 242; *In re* Dawson, 39 Ch. Div. 155; *In re* Harvey, 39 Ch. Div. 289.]

[2] Lewis on Perpetuity, 171, 172. Mr. Lewis observes an inconsistency in taking lives in being at the death of the testator, if the future interest is created by will, and lives in being at the date or execution of the deed, if such interests are created by deed. But it should be remembered that a will speaks as at the death of the testator, while a deed speaks as at the time of its execution, so that there is no inconsistency in principle. See Tregonwell *v.* Sydenham, 3 Dow. 194; 2 Jar. on Wills, 257; Ed. 1861. [*In re* Gage, [1898] 1 Ch. 498.]

[3] Crooke *v.* De Vandes, 9 Ves. 197; Palmer *v.* Holford, 4 Russ. 403;

any number of years may be taken, provided the term is so connected with some life or lives in being that the interest must vest in some person living at the death of the testator and at the time of the vesting.[1] So estates limited to take effect after an indefinite failure of issue of a living or deceased person are void, for the reason that the issue of such persons may not fail until after the term of a life or lives in being and twenty-one years has expired.[2] But a limitation over in case the heirs of A.'s body living at her death die before reaching the age of twenty-one, is not void if A. leave no heirs of her body, but it takes effect at her death.[3]

Speakman *v.* Speakman, 8 Hare, 180. [See Edgerly *v.* Barker, 66 N. H. 434; Towle *v.* Doe, 97 Me. 427; Andrews *v.* Lincoln, 95 Me. 541.]

[1] Lachlan *v.* Reynolds, 9 Hare, 796.

[2] Randolph *v.* Wendel, 4 Sneed, 646; Van Vechten *v.* Pearson, 5 Paige, 512; Van Vechten *v.* Van Vechten, 8 id. 104; Hone *v.* Van Schaick, 20 Wend. 564; Watkins *v.* Quarles, 23 Ark. 179; Campbell *v.* Harding, 2 Rus. & My. 390; Condy *v.* Campbell, 2 Cl. & Fin. 421, 427; Harrison *v.* Harrison, 36 N. Y. 543; Allen *v.* Henderson, 49 Penn. St. 233; Fisher *v.* Webster, L. R. 14 Eq. 287; Newill *v.* Newill, L. R. 7 Ch. 253; Roe *v.* Jeffery, 1 T. R. 589; Hawley *v.* James, 5 Paige, 318; 16 Wend. 61; Miller *v.* Macomb, 2 id. 229; 9 Paige, 265; Lorillard *v.* Coster, 5 id. 172; Boehm *v.* Clark, 9 Ves. 580; Black *v.* McAulay, 5 Jones, L. 375; Jackson *v.* Billinger, 18 Johns. 368; Fisk *v.* Keen, 35 Maine, 349; Bramlet *v.* Bates, 1 Sneed, 554; Jordan *v.* Roach, 32 Miss. 481; Gray *v.* Bridgforth, 33 Miss. 312; Tongue *v.* Nutwell, 13 Md. 415; Jones *v.* Miller, 13 Ind. 337; Chism *v.* Williams, 29 Mo. 288; Dodd *v.* Wake, 8 Sim. 615; Trafford *v.* Boehm, 3 Atk. 440; Ellicombe *v.* Gompertz, 3 Myl. & Cr. 127; Murray *v.* Addenbrook, 4 Russ. 407; Hayes *v.* Hayes, id. 311; Bell *v.* Phyn, 7 Ves. 453; Thackeray *v.* Sampson, 2 S. & S. 214; Cross *v.* Cross, 7 Sim. 201; Bradshaw *v.* Skilbeck, 2 Bing. N. C. 182; Budd *v.* State, 22 Md. 48; Johnson *v.* Currin, 10 Penn. St. 498; Bedford's App., 40 id. 18; Deihl *v.* King, 6 Serg. & R. 29; Eichelberger *v.* Barnitz, 17 Serg. & R. 293; Rice *v.* Satterwhite, 1 Dev. & B. Eq. 69; Postell *v.* Postell, Bail. Ch. 390; Conklin *v.* Conklin, 3 Sandf. Ch. 64; Brashear *v.* Marcy, 3 J. J. Marsh. 89; Allen *v.* Parkam, 5 Munf. 457; Mazyck *v.* Vanderhost, Bail. Ch. 48; Adams *v.* Chaplin, 1 Hill, Eq. 265; Lanesborough *v.* Fox, Ca. t. Talb. 262; Bennett *v.* Lowe, 5 Moor. & P. 485; Smith *v.* Dunwoody, 19 Ga. 237; McRee *v.* Means, 34 Ala. 378; Powell *v.* Brandon, 24 Miss. 343; Armstrong *v.* Armstrong, 14 B. Mon. 333. As to the legislation in the various States upon the failure of issue, see 2 Washburn, Real Prop. 683 (3d ed.). [See Smith *v.* Kimbell, 153 Ill. 368.]

[3] Egbert *v.* Schultz, 29 Ind. 242.

§ 381. It will be observed, that, in determining whether a particular devise is contrary to the rule against perpetuities, the inquiry is not whether the contingency upon which the estate is to vest actually occurs within the time limited by the rule, but whether it is possible that the event may not happen within the time. If it is possible that the event upon which an executory devise or shifting or springing use is to vest in some person may not happen within the time, the executory estate is void, although in fact the event actually happens within the time.[1] And it must further be observed, that, if the estate is to vest in some persons within the time limited, it will not be obnoxious to the rule against perpetuities, even if such person may not be entitled to the actual enjoyment of the property; that is, the rule as to perpetuities deals with the *vesting of the title*, and not with the *actual reception of the profits of an estate*.[2] A gift may be to unborn children for life and then to an ascertained person, if the *vesting* of the estate in the latter is not postponed too long. The person who is to take must become certain within the period, the right of possession may be postponed longer. (*a*)

[1] *Post*, § 393; Langdon *v.* Simson, 12 Ves. 295; O'Neill *v.* Lucas, 2 Keen, 313; Moore *v.* Moore, 6 Jones, Eq. 132; Welch *v.* Foster, 12 Mass. 97; Craig *v.* Hone, 2 Edw. Ch. 554; Robinson *v.* Bishop, 23 Ark. 378; Sears *v.* Putnam, 102 Mass. 5. [Gray on Perpetuities (2d ed.), § 214.]

[2] Loring *v.* Blake, 98 Mass. 253; Murray *v.* Addenbrook, 4 Russ. 407; Phipps *v.* Kelynge, 2 V. & B. 57, n. (c); Curtis *v.* Lukin, 5 Beav. 147; Otis *v.* McLellan, 13 Allen, 339; Yard's App., 64 Penn. St. 95. [Conn. Trust Co. *v.* Hollister, 74 Conn. 228; Armstrong *v.* Barber, 239 Ill. 389; Flanner *v.* Fellows, 206 Ill. 136; Gray *v.* Whittemore, 192 Mass. 367; Stone *v.* Forbes, 189 Mass. 163; Hull *v.* Osborn, 151 Mich. 8; Gates *v.* Seibert, 157 Mo. 254; Lembeck *v.* Lembeck, 73 N. J. Eq. 427; Kountz's Estate, 213 Pa. St. 390; Shallcross's Estate, 200 Pa. St. 122; Wainwright *v.* Miller, [1897] 2 Ch. 255. See also Wilber *v.* Wilber, 165 N. Y. 451; Matter of Roberts, 98 N. Y. S. 809; 112 App. Div. 732; Wells *v.* Squires, 102 N. Y. S. 597; 117 App. Div. 502 (affirmed 191 N. Y. 529); Quade *v.* Bertsch, 72 N. Y. S. 916; 65 App. Div. 600 (affirmed 173 N. Y. 615).]

(*a*) A devise or bequest of either a legal or an equitable interest to a class of persons the members of which are to be determined upon contingencies which may by any possibility not happen within the period set by the rule for the vesting of estates, is void as to all members of the class. *Re*

Moreover, if a certain estate is to vest within the time on a contingency which actually occurs, the devise is not affected by the fact that the estate was limited to take effect at another time in the event of an alternate contingency which may be too remote.[1] (a) If two constructions may be put upon a will, one

[1] Seaver *v.* Fitzgerald, 141 Mass. 401. [Gray *v.* Whittemore, 192 Mass. 367, 372; Brown *v.* Wright, 194 Mass. 540; *In re* Bowles, Page *v.* Page, Whitten, 62 L. T. 391; Patching *v.* Barnett, 51 L. J. Ch. 74 ; *In re* Mervin, [1891] 3 Ch. 197; *In re* Gage, [1898] 1 Ch. 498; *In re* Bence, [1891] 3 Ch. 242; Kountz's Estate, 213 Pa. St. 390. But see Edgerly *v.* Barker, 66 N. H. 434, where contrary to the general rule, the court applied the *cy près* doctrine and gave effect to the intention of the testator up to the limit of time allowed by the rule, cutting off the excess. Thus a remainder after life interests to such grandchildren of the testator as may live to attain twenty-five years of age is void, since some of the class may be born after the death of the testator, and in that event it may not be possible to determine the share of each member of the class until more than twenty-one years after the cessation of lives in being. *Re* Whitten, 62 L. T. 391. As was said in *In re* Dawson, 39 Ch. Div 155, "The rule with regard to perpetuities is that every member of the class, where it is a question of a class gift, must of necessity take within the time allowed."

It is immaterial that as events turn out the class is actually determined within the period set by the rule, *e. g.*, that no grandchild is born after the death of the testator. The rule acts as to possibilities at the time of the testator's death, or, in case the future estates are created by deed, at the time the deed is executed and delivered. And in determining these possibilities the courts refuse to consider a living person as incapable of having issue. *In re* Dawson, 39 Ch. Div. 155; White *v.* Allen, 76 Conn. 185.

In case of a gift to a class to be determined in the future, *e. g.*, to grandchildren, a distinction must be carefully drawn between postponement of their enjoyment or possession for more than twenty-one years after the death of their parent and the postponement of a vesting of their interests. If the share of each member of the class is to vest at his parent's death, the rule is not violated by a provision that the share shall not be paid to him until he attains twenty-five or until all the members of the class attain that age. Gray *v.* Whittemore, 192 Mass. 367, 373 *et seq.*; *In re* Turney, [1899] 2 Ch. 739. See Ogden *v.* McLane, 73 N. J. Eq. 159.

The rule of perpetuities does not apply to reversions, Kasey *v.* Fidelity Trust Co., 131 Ky. 609; First Universalist Soc. *v.* Boland, 155 Mass. 171; and will not prevent a trust from resulting for the heirs of the grantor upon failure of a declared trust or completion of its purpose at a time beyond the limit set by the rule for the vesting of estates. Hopkins *v.* Grimshaw, 165 U. S. 342.

(a) Thus where a life estate was

of which will offend against the rule against perpetuities, and the other not, the construction which will not offend against the rule will be adopted, if in other respects it can be sustained.[1] And so a will speaks, upon the subject of remoteness, from the time of the last codicil, and not from the date of the original will.[2] (*a*)

§ 382. The same rule applies with equal force in law and equity, and trusts and beneficial or equitable estates are subject

[1905] 1 Ch. 371; Evers *v.* Challis, 7 H. L. Cas. 531; Morton Trust Co. *v.* Sands, 195 N. Y. 28, 36; N. Y. Life Ins. & T. Co. *v.* Cary, 191 N. Y. 33; Schey *v.* Schey, 194 N. Y. 368; Perkins *v.* Fisher, 59 Fed. 801; Quinlan *v.* Wickman, 233 Ill. 39.]

[1] Martelli *v.* Holloway, L. R. 5 H. L. 532.

[2] Hosea *v.* Jacobs, 98 Mass. 65.

given to a son and on his death a further life estate to his widow and children, if he should leave any, with remainder to his children in fee, and if he should leave a widow but no children, the remainder after the widow's life estate to the issue of A. W., or failing such issue to the testator's right heirs-at-law, and the son died, never having married, A. W. having previously died leaving no issue, it was held that the gift over to the testator's right heirs was not too remote, since the life estates in the widow and children of the son were expressly made conditional on his dying leaving a widow and children or a widow alone. These conditions not happening, the gift over to testator's right heirs was direct and not after possible life estates. Brown *v.* Wright, 194 Mass. 540.

In a similar case, Gray *v.* Whittemore, 192 Mass. 367, 372, it was said, "This is not the case of a limitation expressed to be made upon one double contingency or upon the happening of two events which the testator has not separated, but one in which the testator has himself made the distinction and separation between the two different events, either one of which, if it occurs, will exclude the existence of the other. . . . It is true, no doubt, that where the testator has made only one contingency, though depending upon a twofold event, the courts will not split this up into two contingencies, one good and the other bad, and sustain the limitation on the ground that only the good contingency has taken place." This last proposition is supported by several recent decisions of the English court. *In re* Hancock, [1901] 1 Ch. 482; *In re* Harvey, 39 Ch. Div. 289; *In re* Bence, [1891] 3 Ch. 242. See Gray on Perpetuities (2d ed.), § 331; *In re* Wilcox, 194 N. Y. 288.

(*a*) But the period of time within which the estates must vest is reckoned from the date of the testator's death.

to the same restrictions.[1] A perpetuity will no more be tolerated when it is covered by a trust, than when it displays itself undisguised in the settlement of a legal estate.[2] "If," as Lord Guilford said, "in equity you could come nearer to a perpetuity than the common law admits, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might make well for the jurisdiction of chancery, but would be destructive to the commonwealth."

§ 383. Therefore, the creation of a trust or equitable interest, which may not vest in the object of the trust within the time limited by law for the vesting of legal estates, will be nugatory.[3] Thus where a testator devised his real estate to trustees, in trust to apply the rents to the support of his wife, and his present and future grandchildren, during the life of the wife, and on her death to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them and their heirs as tenants in common, it was held that the trust to convey was void, for the reason that some of the grandchildren might not become twenty-five years old until after the expiration of the life of the tenant for life, and twenty-one years in addition.[4] So a testator cannot authorize his trustees to limit an estate beyond the limits of the rule against perpetuities; but the persons appointed to take must be

[1] Duke of Norfolk's Case, 3 Ch. Cas. 20; 2 Ch. R. 229; 2 Freem. 72; Pollexf. 293; Massenburgh *v.* Ash, 1 Vern. 254; Schutter *v.* Smith, 41 N. Y. 329; Knox *v.* Jones, 47 N. Y. 397; Burrill *v.* Boardman, 43 N. Y. 254. *Æquitas sequitur legem*, but courts of equity have rather led the law courts in fashioning the rules against perpetuities. [Gray on Perpetuities, (2d ed.) § 322 *et seq.*; Pulitzer *v.* Livingston, 89 Me. 359.]

[2] Norfolk's Case, 1 Vern. 164; Humberston *v.* Humberston, 1 P. Wms. 332; Parfitt *v.* Hember, L. R. 4 Eq. 443; Sears *v.* Putnam, 102 Mass. 5; Lovering *v.* Worthington, 106 Mass. 86.

[3] Bailey *v.* Bailey, 28 Hun, 603. [Andrews *v.* Lincoln, 95 Me. 541; Towle *v.* Doe, 97 Me. 427.]

[4] Blagrave *v.* Hancock, 16 Sim. 374; Dodd *v.* Wake, 8 Sim. 615; Broughton *v.* James, 1 Coll. 26; 2 H. L. Cas. 406; Walker *v.* Mower, 16 Beav. 365; Leake *v.* Robinson, 2 Mer. 363; Sears *v.* Russell, 8 Gray, 86.

capable of taking directly under the will.[1] (*a*) So where a testator devised land to a corporation in trust to convey the same

[1] Marlborough *v.* Godolphin, 1 Ed. 404; Robinson *v.* Hardcastle, 2 T. R. 241, 380, 781; Fonda *v.* Fenfield, 56 Barb. 503; Barnum *v.* Barnum, 26 Md. 119. But a power to change trustees does not come within the principle. Clark *v.* Platt, 30 Conn. 282.

(*a*) A testator or grantor cannot by grant of a power accomplish a disposition of his property in the future in violation of the rule against perpetuities. Except in the case of unlimited powers of disposal by deed or by will, the validity of the execution of the power as regards the rule against perpetuities depends upon whether the attempted exercise would, under the circumstances existing at the date of the attempted exercise, have been valid if made at the time the deed or will creating the power took effect. Brown *v.* Columbia Finance, etc., Co., 123 Ky. 775; Graham *v.* Whitridge, 99 Md. 248, 269; Genet *v.* Hunt, 113 N. Y. 158; Dana *v.* Murray, 122 N. Y. 604; Lewine *v.* Gerardo, 112 N. Y. S. 192; Farmers' Loan & Tr. Co. *v.* Kip, 192 N. Y. 266; Lawrence's Estate, 136 Pa. St. 354; Boyd's Estate, 199 Pa. St. 487; Bartlett *v.* Sears, 81 Conn. 34.

If the power is to appoint by deed or will to whomever the donee chooses, the remoteness of appointment is to be determined from the point of time of its exercise, not from the time of its creation. Gray on Perpetuities (2d ed.), § 524; Rous *v.* Jackson, 29 Ch. Div. 521; Genet *v.* Hunt, 113 N. Y. 158. But notwithstanding this exception, the appointee takes under the instrument creating the power. *In re* Devon's Settled Estates, [1896] 2 Ch. 562, 567; *In re* Johnson's Estate, 19 N. Y. S. 963; Collins *v.* Wickwire, 162 Mass. 143; Olney *v.* Balch, 154 Mass. 318.

When the power is general in its scope but its exercise is limited to be by will of the donee, there is a difference of authority; but on principle and by the weight of authority the remoteness of the attempted disposition must be judged from the date of the creation of the power. Gray on Perpetuities (2d ed.), § 526; Lawrence's Estate, 136 Pa. St. 354; Genet *v.* Hunt, 113 N. Y. 158. See *contra*, Rous *v.* Jackson, 29 Ch. 521.

A power is not void because under it the donee "might, without departing from the express language, attempt to create an illegal estate. The power is in legal effect to do what is lawful and not what is unlawful." Hillen *v.* Iselin, 144 N. Y. 365, 378; Graham *v.* Whitridge, 99 Md. 248, 269; Brown *v.* Columbia Finance, etc., Co., 123 Ky. 775 (*semble*); McClellan's Estate, 221 Pa. St. 261; Stone *v.* Forbes, 189 Mass. 163. And the exercise of the power will be upheld so far as it is valid, if the invalid parts can be separated from the valid. Graham *v.* Whitridge, 99 Md. 248, 269; Brown *v.* Columbia Finance, etc., Co., 123 Ky. 775 (*semble*). See also Lewine *v.* Gerardo, 112 N. Y. S. 192.

Where the trust is to sell within a reasonable time after the death of

to A. for life, with remainder to his oldest son for life, remainder to the son's oldest son for life, and so on in an endless series, and in default of issue of A., then to B., for life, and remainder to his oldest son for life, and so on in the same manner as to the sons of A., it was held to be void and vain as a perpetuity.[1] So if any directions are given which, if complied with, must enforce a perpetuity, they will be void; as when a testator gave land to a college, and directed that the same should be leased forever to his wife's relations at two-thirds its value, it was held to be a void direction, as tending to a perpetuity.[2] (*a*)

[1] Humberston *v.* Humberston, 1 P. Wms. 332; Parfitt *v.* Hember, L. R. 4 Eq. 442; Floyer *v.* Bankes, L. R. 8 Eq. 115.

[2] Att. Gen. *v.* Greenhill, 9 Jur. (N. S.) 1307.

life beneficiaries and to divide the proceeds among persons, some of whom were not in being at the time the trust was created, it has been held that the trust for sale and division does not violate the rule against perpetuities, since the reasonable time, during which the sale is to be made and the trust terminated, cannot have been intended to exceed twenty-one years. *In re* Sudeley, [1894] 1 Ch. 334.

(*a*) Since the common-law rule against perpetuities concerns itself wholly with the vesting, or beginning, of legal and equitable interests, not with their duration, a provision that a trust shall continue for a time which extends or may extend beyond the limits allowed for the vesting of estates does not affect the validity of the trust if equitable interests covering the entire ownership of the property must fully vest within the proper time. Lembeck *v.* Lembeck, 73 N. J. Eq. 427; Armstrong *v.* Barber, 239 Ill. 389. See *In re* Daveron, [1893] 3 Ch. 421; *In re* Bevan's Trusts, 34 Ch. Div. 716. Thus the common form of trust for the holding and management of real estate for unincorporated associations, the members of which are the equitable owners of the property, does not tend to violate the rule against perpetuities from the fact that the duration of the trust is not limited on lives in being and twenty-one years, since the entire equitable ownership is vested in the members of the association from the beginning. Hart *v.* Seymour, 147 Ill. 598; Pulitzer *v.* Livingston, 89 Me. 359; Howe *v.* Morse, 174 Mass. 491; Loomer *v.* Loomer, 76 Conn. 522; see Holmes *v.* Walter, 118 Wis. 409. Attempted restraints upon the power of the equitable owners to alienate their interests may be void, but this is under an entirely different rule. See Howe *v.* Morse, 174 Mass. 491, explaining Winsor *v.* Mills, 157 Mass. 362; Butterfield *v.* Reed, 160 Mass. 361, 368. As to the effect of such

§ 384. In private trusts the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity, as before stated. (*a*) Nor can a settlor give his trustees a power to appoint the property subject to a trust, to new trusts to arise at or upon the termination of the trusts created by himself. But a trust created for charitable or public purposes is not subject to similar limitations, but it may continue for a permanent or indefinite time.[1] (*b*)

[1] Christ's Hospital *v.* Granger, 1 Mac. & G. 460; Att. Gen. *v.* Foster, 10 Ves. 344; Att. Gen. *v.* Newcombe, 14 Ves. 1; Fearon *v.* Webb. id. 19; Walker *v.* Richardson, 2 M. & W. 892; Att. Gen. *v.* Aspinal, 2 Myl. & Cr. 622; Att. Gen. *v.* Heelis, 2 S. & S. 76; Att. Gen. *v.* Shrewsbury, 6 Beav. 224; Odell *v.* Odell, 10 Allen, 1; Gass *v.* Wilhite, 2 Dana, 183; Griffin *v.* Graham, 1 Hawks, 131; Miller *v.* Chittenden, 2 Iowa, 362; Philadelphia *v.* Girard, 45 Penn. St. 26; Yard's App., 64 id. 95. The rule is held differently under the legislation of the State of New York. Levy *v.* Levy, 33 N. Y. 130; Bascombe *v.* Albertson, 34 N. Y. 598; Beekman *v.* Bonsor, 23 N. Y. 308; Yard's App., 64 Penn. St. 95, and see White *v.* Hale, 2 Cold. 77.

restraints in New York and in other States which have provided a statutory substitute for the rule against perpetuities, see *infra*, § 391 and note *a*, p. 640.

(*a*) See note (*a*) *supra*, p. 623.

(*b*) The rule against perpetuities "does not apply to a gift to a charity, with no intervening gift to or for the benefit of a private person or corporation; or to a contingent limitation over from one charity to another. But it does apply to a grant or devise to a private person, although limited over after an immediate gift to a charity." Mr. Justice Gray, in Hopkins *v.* Grimshaw, 165 U. S. 342, 355. See *In re* Tyler, [1891] 3 Ch. 252; *In re* Swain, [1905] 1 Ch. 669; First Universalist Soc. *v.* Boland, 155 Mass. 171; *In re* Clarke, [1901] 2 Ch. 110; St. John *v.* Andrews Inst., 191 N. Y. 254; Asylum *v.* Lefebre, 69 N. H. 238.

And the rule applies to a gift to a charity limited over after a gift to an individual, if the limitation is not to take effect within the time allowed by the rule. *In re* Bowen, [1893] 2 Ch. 491; Brooks *v.* Belfast, 90 Me. 318, 323; Merrill *v.* Am. Baptist Union, 73 N. H. 414; *In re* Swain, [1905] 1 Ch. 669; Merritt *v.* Bucknam, 77 Me. 253. See *infra*, § 736.

§ 385. A trust to raise a sum of money out of an estate will be good if properly limited, although the trust itself upon which the money is limited after it is raised is void as being too remote. In such case, the heir will take the money as personal estate.[1] Contingent remainders of trust estates do not follow the strict rules of legal estates, but they are made to wait upon the contingency. In legal estates, the contingency must happen before the time, or the estate is gone. In the contingent remainders of equitable estates here spoken of, if the contingency may happen within the time, the estate is made to wait: if it happens, the estate vests; if it does not happen, the estate fails.[2]

§ 386. A legal estate in fee cannot be conveyed to a person with a provision that it shall not be alienated, or that it shall not be subject to the claims of creditors; (*a*) and so trusts cannot in general[3] be created with a proviso, that the equitable

[1] Ellis *v.* Lynch, 8 Bosw. 465; Burnly *v.* Evelyn, 16 Sim. 290; Tregonwell *v.* Sydenham, 3 Dow. 194. But see Parson *v.* Snook, 40 Barb. 144.

[2] Mogg *v.* Mogg, 1 Mer. 654; Monypenny *v.* Deering, 7 Hare, 568; Alexander *v.* Alexander, 16 C. B. 59; Hopkins *v.* Hopkins, 1 Atk. 581; Festing *v.* Allen, 12 M. & W. 279; Sayer's Trusts, L. R. 6 Eq. 319; Litt *v.* Randall, 3 Sm. & G. 83; Hodson *v.* Ball, 14 Sim. 558; Jee *v.* Audley, 1 Cox, 324; Church in Brattle Square *v.* Grant, 3 Gray, 142; Arnold *v.* Congreve, 1 R. & M. 209; Wilson *v.* Wilson, 4 Jur. (N. S.) 1076; 28 L. J. (N. S.) 95; Storrs *v.* Benbow, 3 De G., M. & G. 390; Cattlin *v.* Brown, 11 Hare, 372; Griffith *v.* Pownall, 13 Sim. 393; Merlin *v.* Blagrave, 25 Beav. 125; Greenwood *v.* Roberts, 15 Beav. 92; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Seaman *v.* Wood, 22 Beav. 591; Vanderplank *v.* King, 3 Hare, 1; Webster *v.* Boddington, 26 Beav. 128; Curtis *v.* Lukin, 5 Beav. 147; Hardenburg *v.* Blair, 30 N. J. Eq. 42; Newark Meth. Episc. Ch. *v.* Clark, 41 Mich. 730.

[3] This is the rule in England and in some of our States; but the contrary is strongly held in a Massachusetts case of the year 1882. See § 827 *a*.

(*a*) *In re* Rossher, 26 Ch. Div. 801; Pritchard *v.* Bailey, 113 N. C. 521; Murray *v.* Green, 64 Cal. 363; Prey *v.* Stanley, 110 Cal. 423; Booker *v.* Booker, 104 N. Y. S. 21, 119 App. Div. 482; Clark *v.* Clark, 99 Md. 356; Female Orphan Soc. *v.* Y. M. C. A., 119 La. 278; Loosing *v.* Loosing, 122 N. W. 707 (Neb. 1909).

estate, or interest of the *cestui que trust*, shall not be alienated or charged with his debts.[1] (*a*) If it is ascertained that an interest is vested in the *cestui que trust*, the mode in which or the time when he is to reap the benefit is immaterial. The law does not allow property, whether legal or equitable, to be fettered by

[1] Snowdon *v.* Dales, 6 Sim. 524; Green *v.* Spicer, 1 R. & M. 395; Graves *v.* Dolphin, 1 Sim. 66; Brandon *v.* Robinson, 18 Ves. 429; Ware *v.* Cann, 10 B. & Cr. 433; Bradley *v.* Peixoto, 3 Ves. 324; Hood *v.* Oglander, 34 Beav. 513; Bird *v.* Johnson, 18 Jur. 976; Blackstone Bank *v.* Davis, 21 Pick. 43; Etches *v.* Etches, 3 Drew. 441; Sparhawk *v.* Cloon, 125 Mass. 262; Daniels *v.* Eldredge, id. 350.

(*a*) Restraints upon alienation of future income have been treated in many States as not necessarily inconsistent with the estate or interest granted to the beneficiary. (See *infra*, § 386 *a* and notes.) But restraints upon alienation of an equitable interest in the corpus of the estates are generally held to be void for repugnancy, except where the trust is for the separate use of a married woman. Winsor *v.* Mills, 157 Mass. 362; Cushing *v.* Spalding, 164 Mass. 287; Potter *v.* Couch, 141 U. S. 296; Seymour *v.* McAvoy, 121 Cal. 438; Johnson *v.* Preston, 226 Ill. 447; Kessner *v.* Phillips, 189 Mo. 515; *In re* Dugdale, 38 Ch. Div. 176. In Potter *v.* Couch, 141 U. S. 296, 315, the court said, citing many authorities: "The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation."

Attempted restraints upon alienation of absolute legal life estates and vested remainders are also void. Wool *v.* Fleetwood, 136 N. C. 460, 67 L. R. A. 444; Streit *v.* Fay, 230 Ill. 319. But it is an established rule in Kentucky that a will or deed creating an absolute estate may impose valid restraints upon alienation for a "reasonable" time. Lawson *v.* Lightfoot, 84 S. W. 739 (Ky. 1905); Kean *v.* Kean, 18 S. W. 1032, 19 S. W. 184 (Ky.); Morton's Guardian *v.* Morton, 120 Ky. 251; Stewart *v.* Brady, 3 Bush, 623; Smith *v.* Isaacs, 78 S. W. 434 (Ky. 1904).

A restraint upon power of alienation is not inconsistent with a legal title held in trust for others. Danforth *v.* Oshkosh, 119 Wis. 262, 275. See Asylum *v.* Lefebre, 69 N. H. 238.

restraints upon alienation. Therefore, when an equitable interest is once vested in the *cestui que trust*, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt. (*a*) Thus a trust for a person's support,[1] or to pay the interest to a person for life, as the trustees may think proper,[2] or when it shall become payable,[3] or in such sums or portions, and at such times and in such manner as the trustees think best,[4] may be exercised according to the discretion of the trustees; but the bankruptcy of the *cestui que trust* puts an end to the discretion of the trustees, and vests the whole interest in the assignees; and this is so, even where the trustees were directed to pay as they should think proper, and at their will and pleasure and not otherwise, so that the *cestui que trust* should have no right, claim, or demand, other than the trustees should think proper. The court thought, in Snowdon *v.* Dales, that, taking the whole instrument together, the *cestui que trust* had a vested interest, that these directions applied only to the manner of enjoyment, and that the equitable interest vested in the assignees at his bankruptcy.[5] The test is, Would executors of the *cestui que trust* have a right to call for any arrears? if so, the assignees would have the right to call for the future income or interest.[6] (*b*)

[1] Younghusband *v.* Gisborne, 1 Coll. 400.
[2] Green *v.* Spicer, 1 R. & M. 395.
[3] Graves *v.* Dolphin, 1 Sim. 66.
[4] Piercy *v.* Roberts, 1 Myl. & K. 4.
[5] Snowdon *v.* Dales, 6 Sim. 524.
[6] *Re* Sanderson's Trust, 3 K. & J. 497.

(*a*) See Riordan *v.* Schlicher, 146 Ala. 615; McCrea *v.* Yule, 68 N. J. Law, 465; Binns *v.* La Forge, 191 Ill. 598; Jastram *v.* McAuslan, 26 R. I. 320; Bronson *v.* Thompson, 77 Conn. 214; Wenzel *v.* Powder, 100 Md. 36; Whittredge *v.* Sweetzer, 189 Mass. 45. This statement, although generally true in the absence of restraint imposed by the creator of the trust, must be qualified by the established rule in many States, that valid restraints may be imposed upon a *cestui's* power of anticipating income or of alienating it before it is due. See *infra*, § 386 *a* and notes, and § 827 *a*.

(*b*) A wide discretion given to the trustee as to the time, and manner of payment of income does not necessarily make the income inalienable,

§ 386 *a*. This doctrine, that the incidents of a legal title attach to an absolute equitable interest, and that an equitable estate for life in any other than a married woman carries with it the power of alienation by the *cestui que trust*, and may be taken for the payment of his debts, and that no provision which does not operate to terminate his interest can protect it from the claims of creditors, is the well-settled law of England, and has been approved and applied in many *dicta* and decisions in the United States.[1] But it has not been allowed to pass unchallenged, and there is eminent authority in the Federal and the State courts for the proposition, that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to the objects of his bounty without making it alienable by them or liable for their debts, and that this intention, clearly expressed by the founder of a trust, must be carried out by the courts.[2] (*a*) In those

[1] *Ante*, § 386, cases cited; Tillinghast *v.* Bradford, 5 R. I. 205; Smith *v.* Moore, 37 Ala. 327; Hallett *v.* Thompson, 5 Paige, 583; Bramhall *v.* Ferris, 14 N. Y. 41, 44; Williams *v.* Thorn, 70 N. Y. 270; Nichols *v.* Levy, 5 Wall. 433, 441; Sellick *v.* Mason, 2 Barb. Ch. 79; McIllvaine *v.* Smith, 42 Mo. 45; Heath *v.* Bishop, 4 Rich. Eq. 46; Rider *v.* Mason, 4 Sandf. Ch. 352; Easterly *v.* Keney, 36 Conn. 18; Nickell *v.* Handley, 10 Grat. 336; Girard Life Ins. Co. *v.* Chambers, 46 Pa. St. 485; Dick *v.* Pitchford, 1 Dev. & B. Eq. 480; Mebane *v.* Mebane, 4 Ired. Eq. 131; Pacé *v.* Pace, 7 N. C. 119. And a trust made void by an illegal suspension of the power of alienation is not made valid by a power of sale in the trustee, the proceeds remaining subject to the trust. Garvey *v.* McDavitt, 11 Hun (N. Y.), 457; Brewer *v.* Brewer, id. 147; but see Braman *v.* Stiles, 4 Pick. 460.

[2] Nichols *v.* Eaton, 91 U. S. 716; cited and approved in Hyde *v.* Woods, 94 U. S. 523; Ashhurst *v.* Given, 5 Watts & S. 323; Holdship *v.* Patterson, 7 Watts, 547; Brown *v.* Williamson, 36 Penn. St. 338; Still *v.* Spear, 45 id. 168; Shankland's App., 47 id. 113; Pope *v.* Elliott, 8 B. Mon. 56; White *v.* White, 30 Vt. 338; Campbell *v.* Foster, 35 N. Y. 361. The argument in these cases proceeds upon the ground, that the doctrine of the English cases must rest upon the rights of creditors; and it is claimed that the

since this discretion must be exercised reasonably and does not give the trustee power to withhold all income. Endicott *v.* University of Va., 182 Mass. 156.

(*a*) The doctrine of the English

States, however, where the doctrine of the English cases has been adopted, these distinctions and observations must be borne

policy of the States of this Union has not been carried so far in furtherance of creditors' rights, that creditors can have no claim upon property which belonged to the founder of the trust, and of which he had the full and entire right of disposing as he chose, for the benefit of the *cestui que trust*, who parts with nothing in return, and that the intent of the donor clearly expressed in disposing of his property for a lawful purpose must be carried out; and the laws enacted in nearly or quite every State, exempting property of greater or less amounts in value from liability for the payment of debts, are relied on as showing the policy of these States. It is conceded that there are, however, limitations, which public policy or general statutes impose upon dispositions of property, such as those designed to prevent perpetuities and accumulations in corporations, &c. But the owner of property is governed by the rules of law, both in the use and enjoyment and in disposing of his property; and the doctrine in question seems to be founded upon the rule that title to property includes the right of alienation and liability for debts, and it seems impossible that there can be any reason in public policy, under a free government, having for its object the growth and development of a commercial people, for such a limitation of the incidents of title to property, and the argument from the exemption laws would seem to be well answered by the maxim, *expressio unius est exclusio alterius*. Many of the American cases, where the English doctrine has been doubted or denied, seem to have been cases of trusts for the support and maintenance of the *cestui que trust;* and a clearly manifested intention on the part of the donor that the income of the fund shall be devoted to that purpose may impose a duty and give a consequent power in the trustee, either in his discretion or under the direction of the court, to pay over the income only in such manner as shall insure its application in accordance with the intent of the donor and protect it from the claims of creditors and the improvidence of the beneficiary, with substantially the same result upon the absolute character of the estate of the *cestui que trust* as if the instrument declaring the trust had expressly provided that the payments should be made at the discretion of the trustee, — a result more in accordance with the rules of interpretation than a strict adherence to a definition to the extent of defeating the accomplishment of the benefit intended by the donor.

court, that restraints upon anticipation of income of trust property are invalid because inconsistent with the absolute right to the income, except where the beneficiary is a married woman, has been adopted by the courts of Alabama, Georgia, Kentucky, Rhode Island, Virginia, and North Carolina. *In re* Fitzgerald, [1903] 1 Ch. 933; Robertson *v.* Johnston, 36 Ala. 197; Jones *v.* Reese, 65 Ala. 134; Gray *v.* Obear, 54 Ga. 231; Bland's Adm'r *v.* Bland, 90 Ky. 400; Cecil's Trustee *v.* Rob-

in mind. If the absolute equitable interest is in the *cestui que trust*, it goes to his assignees or creditors in case of insolvency.

ertson, 105 S. W. 926 (Ky. 1907); Ratliff's Ex'rs *v.* Commonwealth, 101 S. W. 978 (Ky. 1907); Hubbard *v.* Hayes, 98 S. W. 1034 (Ky. 1907); Hutchinson *v.* Maxwell, 100 Va. 169; Honaker Sons *v.* Duff, 101 Va. 675; Young *v.* Easley, 94 Va. 193; Pace *v.* Pace, 73 N. C. 119 (modified by N. C. Code, (1905) § 1588). See also to a similar effect Conn. Gen. Stat. (1902), §§ 837–840; Holmes *v.* Bushnell, 80 Conn. 233; Honnett *v.* Williams, 66 Ark. 148, 153 (*dictum*).

The increasing weight of authority in America favors the rule that provisions against alienation or anticipation of income to which a beneficiary is absolutely entitled are not inconsistent with any estate granted to him and not against the policy of the law. Provisions against anticipation or alienation of income not due and payable or against liability to claims of creditors of the beneficiary have been held valid in the following States: California: — Seymour *v.* McAvoy, 121 Cal. 438. Maine: — Roberts *v.* Stevens, 84 Me. 325; Tilton *v.* Davidson, 98 Me. 55, 58. Maryland: — Smith *v.* Towers, 69 Md. 77; Brown *v.* Macgill, 87 Md. 161; Jackson Sq. Ass'n *v.* Bartlett, 95 Md. 661. Massachusetts: — Munroe *v.* Dewey, 176 Mass. 184; Huntress *v.* Allen, 195 Mass. 227; Slattery *v.* Wason, 151 Mass. 266; Nickerson *v.* Van Horn, 181 Mass. 562. Mississippi: — Leigh *v.* Harrison, 69 Miss. 923. Missouri: — Lampert *v.* Haydel, 96 Mo. 439; Kessner *v.* Phillips, 189 Mo. 515. Pennsylvania: — Seitzinger's Estate, 170 Pa. St. 500, 514; Board of Charities *v.* Lockard, 198 Pa. St. 572. Tennessee: — Jourolman *v.* Massengill, 86 Tenn. 84, 100. Texas: — Patten *v.* Herring, 9 Tex. Civ. App. 640; McClelland *v.* McClelland, 37 S. W. 350 (Tex. Civ. App. 1896); Wood *v.* McClelland, 53 S. W. 381 (Tex. Civ. App. 1899); Monday *v.* Vance, 92 Tex. 428 (*semble*). Vermont: — Barnes *v.* Dow, 59 Vt. 530. West Virginia: — Guernsey *v.* Lazear, 51 W. Va. 328; Talley *v.* Ferguson, 64 W. Va. 328. For *dicta* to the same effect in Illinois and Iowa, see Steib *v.* Whitehead, 111 Ill. 247; Bennett *v.* Bennett, 217 Ill. 434; King *v.* King, 168 Ill. 273; Olsen *v.* Youngerman, 136 Iowa, 404; Meek *v.* Briggs, 87 Iowa, 610. See also Hackley *v.* Littell, 150 Mich. 106; Castree *v.* Shotwell, 73 N. J. Eq. 590. None of these States goes to the extent of holding that a *cestui's* interest in the corpus of trust property, if he has an interest, can be made inalienable, except in case of married women. The American doctrine rests upon the ground that a right to receive income of a trust fund is not necessarily an interest in the fund itself. The limitations upon the American doctrine are stated as follows in Kessner *v.* Phillips, 189 Mo. 515, 524: "In order to have a spendthrift trust certain prerequisites must be observed: first, the gift to the donee must be only of the income. He must take no estate whatever, have nothing to alienate, have no right to possession, have no beneficial interest in the land, but only a qualified right to support, and an equitable interest only in the income;

And it may be said that, if an absolute equitable interest is given to a *cestui que trust;* no restraints upon alienation can be im-

second, the legal title must be vested in a trustee; third, the trust must be an active one, not a mere dry trust which may be executed under the statute of uses."

There are statute provisions in several States authorizing such restraints by the creator of the trust. Cal. Civ. Code, § 867; Blackburn *v.* Webb, 133 Cal. 420; No. Dak. Codes, (1905) § 4834; So. Dak. Code, (1908) § 315. No. Car. Code, (1905) § 1588 (applying to income not exceeding $500 per year payable to a relative of the trustor). See also Ga. Code, (1895) § 3149, as interpreted by Sinnott *v.* Moore, 113 Ga. 908; Moore *v.* Sinnott, 117 Ga. 1010. See Ariz. Stat., (1901) § 4232. Some States have statutes which provide that a person beneficially interested in the income of property held in trust cannot assign his right to future income unless the trust instrument provides that he shall have the right. N. Y. Real Property Law, (1909) § 103, Consol. Laws (1909), p. 3392; Personal Property Law (1909), § 15, ibid. p. 2844; Matter of Kirby, 100 N. Y. S. 155, 113 App. Div. 705; Stringer *v.* Barker, 96 N. Y. S. 1052, 110 App. Div. 37, Bergmann *v.* Lord, 194 N. Y. 70; Kan. Gen. Stat. (1909), § 9697; Minn. R. L. (1905), § 3257; Wis. Stat. (1898), § 2089; Burns' Ind. Stat. (1908), § 4015; Caldwell *v.* Boyd, 109 Ind. 447; Mont. Civ. Code (1907), § 4547.

In several States statutes have been interpreted to exclude creditors of a beneficiary from reaching income of a trust fund when the trust "has been created, or the fund so held in trust has proceeded from some person other than the debtor." N. Y. Code, § 1879; Everett *v.* Peyton, 167 N. Y. 117; Keeney *v.* Morse, 75 N. Y. S. 728, 71 App. Div. 104; see Ullman *v.* Cameron, 92 App. Div. (N. Y.), 91; Hurd's Ill. Rev. Stat. (1908) c. 22, § 49; Binns *v.* La Forge, 191 Ill. 598; Mich. Comp. Laws (1897), § 436; N. J. Gen. Stat. (1895), p. 390, § 91; Stout *v.* Apgar, 69 N. J. Eq. 337; Linn *v.* Davis, 58 N. J. Law, 29; Castree *v.* Shotwell, 73 N. J. Eq. 590. In Illinois and New Jersey the statutes have been interpreted to exclude creditors from the *cestui's* interest in the *corpus*. See *supra*.

In States where there are such statutes, it is frequently provided that in case of a trust to receive income with no valid direction for accumulation, the surplus of income over what is necessary for the support and education of the beneficiary shall be liable to the claims of his creditors. N. Y. Real Prop. Law, 1909, § 98, IV Consol. Laws, 1909, p. 3391; Wetmore *v.* Wetmore, 149 N. Y. 520; Everett *v.* Peyton, 167 N. Y. 117; Dittmar *v.* Gould, 69 N. Y. S. 708, 60 App. Div. 94; Williams *v.* Thorn, 70 N. Y. 270; Mich. Comp. Laws (1897), § 8841; Spring *v.* Randall, 107 Mich. 103; Cal. Civil Code, § 859; Magner *v.* Crooks, 139 Cal. 640; Minn. Rev. Laws (1905), § 3251; No. Dak. Codes (1905), § 4826; So. Dak. Code (1908), § 307. See also Conn. Gen. Stat. (1902), § 839.

In States which permit restraints on alienation of income, the inten-

posed. But a trust may be so created that no interest vests in the *cestui que trust;* consequently, such interest cannot be alien-

tion of the creator of the trust to impose such a restraint need not be express, but may often be gathered from the circumstances and the nature of the interest given to the beneficiary. Barnes *v.* Dow, 59 Vt. 530; Berry *v.* Dunham, 202 Mass. 133; Slattery *v.* Wason, 151 Mass. 266; Lampert *v.* Haydel, 96 Mo. 439; Roberts *v.* Stevens, 84 Me. 325; Tilton *v.* Davidson, 98 Me. 55, 58; Leigh *v.* Harrison, 69 Miss. 923; Steib *v.* Whitehead, 111 Ill. 247; Bennett *v.* Bennett, 217 Ill. 434; Patten *v.* Herring, 9 Tex. Civ. App. 640; Seymour *v.* McAvoy, 121 Cal. 438; Castree *v.* Shotwell, 73 N. J. Eq. 590; Talley *v.* Ferguson, 64 W. Va. 328; Mattison *v.* Mattison, 53 Or. 254. See Conn. Gen. Stat. (1902), §§ 837–840.

It has been held that where the sole beneficiary of an attempted spendthrift trust has been given, by the terms of the trust, power to direct a disposal of the principal fund for his own benefit and so to bring about a termination of the trust at will, his creditors can reach his interest in the trust property, since he is practically the equitable owner. Morgan's Estate, 223 Pa. St. 228; Ullman *v.* Cameron, 92 App. Div. (N. Y.) 91.

In all jurisdictions restraints on alienation are invalid as to the *cestui's* creditors when the trust property was his own before the settlement. Egbert *v.* De Solms, 218 Pa. St. 207; Kene *v.* Hill, 92 N. Y. S. 805, 102 App. Div. 370; Newton *v.* Jay, 95 N. Y. S. 413, 107 App. Div. 457; Schenck *v.* Barnes, 156 N. Y. 316; Raymond *v.* Harris, 82 N. Y. S. 689, 84 App. Div. 546; Pacific National Bank *v.* Windram, 133 Mass. 175; Jackson *v.* Von Zedlitz, 136 Mass. 342. See Ames' Cases, (2d ed.) p. 400; Hackley *v.* Littell, 150 Mich. 106. It has been held in several cases that the principle applies with equal force where a married woman has attempted to create a spendthrift trust for her separate use. Brown *v.* Macgill, 87 Md. 161; Jackson *v.* Von Zedlitz, 136 Mass. 342; Pacific Nat. Bank *v.* Windram, 133 Mass. 175; Stewart *v.* Madden, 153 Pa. St. 445; Ghormley *v.* Smith, 139 Pa. St. 584. See 12 Harvard Law Rev. 53. Section 19 of the Married Women's Property Act of 1882 seems to have provided for the same result in England. See Birmingham, etc., Soc. *v.* Lane, [1904] 1 K. B. 35.

A creditor of the settlor who has settled property in trust for his own benefit as to the income with power of appointment as to the principal, cannot reach the corpus of the trust property in default of an appointment, provided of course the settlement was not made to defraud creditors. Crawford *v.* Langmaid, 171 Mass. 309. Although the exercise of the general power of appointment may make the corpus liable for the payment of the appointer's debts, it is not so liable in default of appointment, and the creditors cannot compel its exercise. Crawford *v.* Langmaid, 171 Mass. 309. See also Bailey *v.* Worster, 103 Me. 170.

The validity of an attempted

ated, as where property is given to trustees to be applied in their discretion to the use of a third person, no interest goes to the third person until the trustees have exercised this discretion. So if property is given to trustees to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, not the *cestui que trust*, nor his creditors or assignees, can divest the property from the appointed purposes.[1] (*a*) Any conveyance, whether by operation of law or

[1] Rife *v.* Geyer, 59 Penn. St. 393; Wells *v.* McCall, 64 id. 207; White *v.* White, 30 Vt. 342; Clute *v.* Bool, 8 Paige, 83; Bramhall *v.* Ferris, 14 N. Y. 44; Doswell *v.* Anderson, 1 P. & H. (Va.) 185; Raikes *v.* Ward, 1 Hare, 445; Crockett *v.* Crockett, id. 451; Wetmore *v.* Truslow, 51 N. Y. 338; Graff *v.* Bonnett, 31 N. Y. 9; Locke *v.* Mabbett, 3 Court of App. Dec. 68; Blackstone Bank *v.* Davis, 21 Pick. 42; Etches *v.* Etches, 3 Drew. 441; Genet *v.* Beekman, 45 Barb. 382; Chase *v.* Chase, 2 Allen, 101; Loring *v.* Loring, 100 Mass. 340; Cole *v.* Littlefield, 35 Me. 439. See *ante*, § 117, and notes.

restraint on alienation is to be determined by the law of the locality where the property has its *situs*. Spindle *v.* Shreve, 111 U. S. 542, *In re* Fitzgerald, [1903] 1 Ch. 933. See Robb *v.* Washington & Jefferson Coll., 185 N. Y. 485. The same is true of the rights and remedies of creditors. Keeney *v.* Morse, 75 N. Y. S. 728, 71 App. Div. 104.

(*a*) It has been held in a jurisdiction which does not favor spendthrift trusts that a direction to trustees to "use part of the income and of said estate as may be necessary to provide for and comfortably maintain" the *cestui*, gives the *cestui* an interest which his creditors can reach. Ratliff's Ex'rs *v.* Commonwealth, 101 S. W. 978 (Ky. 1907). And where the trustee was directed to "apply" the income to the use of the *cestui*, it has been held that the *cestui's* interest was alienable, since in such a case the cestui is absolutely entitled to the whole income. Huntington *v.* Jones, 72 Conn. 45. But see Meek *v.* Briggs, 87 Iowa, 610. See also Ames' Cases on Trusts, (2d ed.) p. 405.

A distinction has been made between the gift of the whole or a definite part of the income of a trust fund for the support of a beneficiary and a mere right to support out of the income. In the former case it has been held that the beneficiary has an alienable interest, the words "for support" being construed as merely stating the reason for the gift and not necessarily showing an intention to limit the beneficiary's power of alienation or anticipation. Slattery *v.* Wason,

by the act of any of the parties, which disappoints the purposes of the settlor by divesting the property or the income from the purposes named, would be a breach of the trust. Therefore it may be said, that the power to create a trust for a specified purpose does, in some sort, impair the power to alienate property.

§ 386 *b*. In the cases referred to in the last section, it will be perceived that the trust may be for a particular purpose, and that purpose may not be exclusively for the benefit of the primary *cestui que trust;* as where an estate was vested in trustees by a marriage settlement in trust to apply the annual produce thereof "for the *maintenance and support of A. B., his wife and children,*" it was held that the wife and children were to be supported, and that A. B. was entitled to the surplus after their support, and that such surplus would go to his assignees in case of his bankruptcy:[1] but when the trustees have an arbitrary power of applying such part of an income as they see fit to support of a *cestui que trust*, and for no other purpose, it was held that nothing passed to his assignees.[2] And so if the trustees

[1] Page *v*. Way, 3 Beav. 20.

[2] Twopenny *v*. Peyton, 10 Sim. 487; *Re* Sanderson's Trust, 3 K. & J. 497; Lord *v*. Bun, 2 Y. & C. Ch. 98; Holmes *v*. Penney, 3 K. & J. 90. [Weymyss *v*. White, 159 Mass. 484; King *v*. King, 168 Ill. 273; Murphy *v*. Delano, 95 Me. 229; Nat. Bank *v*. Nashville Trust Co., 62 S. W. 392 (Tenn. Ch. App. 1901). And he has no interest which his creditors can reach. Nickerson *v*. Van Horn, 181 Mass. 562; Stone *v*. Westcott, 18 R. I. 685; Meek *v*. 151 Mass. 266; Jastram *v*. McAuslan, 26 R. I. 320. In a case of the latter kind it has been said that "when the right is given for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed." Slattery *v*. Wason, 151 Mass. 266. See also Barnes *v*. Dow, 59 Vt. 530; Holmes *v*. Bushnell, 80 Conn. 233.

Where the interest of a beneficiary in the income is not a separable interest as where the trustee is directed to expend the income for the benefit of a *cestui* and his family, he has no interest which his creditors can reach, or which he acting alone can assign. Brooks *v*. Raynolds, 59 Fed. 923. Talley *v*. Ferguson, 64 W. Va. 328. But all the beneficiaries could unite to transfer the interest of all of them. See Stern Bros. *v*. Hampton, 73 Miss. 555.

are to apply the money to the support of one and his wife and children, nothing tangible can pass to the assignees;[1] but if the power is not arbitrary, but is imperative on the trustees to pay over the income for the support of the *cestui que trust* and another person or persons, the assignees are entitled to take a part upon the insolvency of one, or the whole in the event of the death of the others.[2]

§ 387. There is a further exception to the general rule, that an equitable interest, without the right to alienate, cannot be created; and that is in the case of trusts created for married women. It is not unusual to create trusts for married women, and give such women all the rights of unmarried women over their separate equitable interests, and at the same time to insert a clause against their anticipating the income, by which means they are unable to assign or transfer it, or in any way receive any benefit from the property, except by receiving the income, as it becomes due and payable.[3]

§ 388. But though a settlor cannot put a restraint upon alienation, or exclude the rights of creditors, he may settle property upon another in such manner that it cannot be alienated, and creditors and assignees cannot take it. But in such case the *cestui que trust* must lose the use of the property in case of his bankruptcy. Thus A. may settle property upon B. until alienation or bankruptcy, with a limitation over to C. upon either event. Or A. may give real or personal estate to B. with a *proviso*, that, on alienation or bankruptcy, it shall shift over to

Briggs, 87 Iowa, 610; Chambers *v.* Smith, 3 A. C. 795; *Re* Bullock, 64 L. T. 736.]

[1] Godden *v.* Crowhurst, 10 Sim. 642; Kearsley *v.* Woodcock, 3 Hare, 185; Wallace *v.* Anderson, 16 Beav. 533; Hall *v.* Williams *et al.*, 120 Mass. 344.

[2] Rippon *v.* Norton, 2 Beav. 63; Wallace *v.* Anderson, 16 Beav. 533; Perry *v.* Roberts, 1 Myl. & K. 4.

[3] Pickering *v.* Coates, 10 Phila. 65; Ash *v.* Bowen, id. 96. See this matter stated *post*, chap. on Trusts for Married Women, §§ 670, 671.

C.[1] (*a*) But a clause divesting the property upon *alienation* alone, will embrace only the voluntary acts of the party, and

[1] Muggeridge Trusts, Johns. Ch. (Eng.) 625; Kearsley *v.* Woodcock, 3 Hare, 185; Joel *v.* Mills, 3 K. & J. 458; Large's Case, 2 Leon. 82; Churchill *v.* Marks, 1 Coll. 441; Sharpe *v.* Cossent, 20 Beav. 470; Shee *v.* Hale, 13 Ves. 404; Lewes *v.* Lewes, 6 Sim. 304; Cooper *v.* Wyatt, 5 Madd. 482; Lockyer *v.* Savage, 2 Stra. 947; Yarnold *v.* Moorhouse, 1 R. & M. 364; Stephens *v.* James, 4 Sim. 499; *Ex parte* Oxley, 1 B. & B. 257; Rochford *v.* Hackman, 9 Hare, 475; *Ex parte* Hinton, 14 Ves. 598; Stanton *v.* Hall, 2 R. & M. 175; Hall *v.* Williams, 120 Mass. 344; Nichols *v.* Eaton, 91 U. S. 716. [Olsen *v.* Youngerman, 136 Iowa, 404; Cherbonnier *v.* Bussey, 92 Md. 413; Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1; Bull *v.* Ky. Nat. Bank, 90 Ky. 452, 458; Bottom *v.* Fultz, 124 Ky. 302. Compare with Bland's Adm'r *v.* Bland, 90 Ky. 400; Cecil's Trustee *v.* Robertson, 105 S. W. 926 (Ky. 1907).]

(*a*) The foundation of the power to restrain alienation in this way "rests upon the fact that there remains or is vested in some one a valid remainder or reversion, whose estate in possession is contingent upon some event which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use." Conger *v.* Lowe, 124 Ind. 368.

It has been held that a provision that upon bankruptcy or whenever the *cestui* shall cease to be entitled to income for his own personal use, his absolute right to it shall be forfeited and his trustees shall thereafter have an "uncontrolled discretion" to apply all or such part of the income for his benefit, accumulating the surplus for his children, has the effect of putting income beyond the reach of the *cestui's* trustee in bankruptcy. *Re* Bullock, 64 L. T. 736. In a trust to pay income to A. during life "or until he shall assign, charge or incumber," it has been held that forfeiture provision is retroactive in effect and includes past acts creating an incumbrance unknown to the creator of the trust. West *v.* Williams, [1898] 1 Ch. 488.

But where an equitable fee is given, an attempted limitation to others, in case the donee should commit or suffer any act in consequence of which he would be deprived of the right to the beneficial enjoyment has been held to be void for repugnancy; but it was said that such a limitation over would not have been repugnant to a life estate. *In re* Dugdale, 38 Ch. Div. 176. See also Thomas *v.* Thomas, 87 L. T. 58; Potter *v.* Couch, 141 U. S. 296, 315. In the first cited case it was said, "The result is that a limitation, by way of use or in a will, to A. until he attempts to alien, and on that event to B. and his heirs is valid, A. taking an estate of freehold which only endures by the terms of the limitation until the attempted alienation, and B. taking a contingent remainder. But a limitation to A. and his heirs, but if he attempts to alien, to B. in fee, is an invalid gift over. So also where the limitation is to A. and 'his heirs' until he

will not apply to transfers by operation of the law, as by bankruptcy,[1] unless it was intended that the clause should have so wide a signification.[2] Nor will a power to confess judgment be a voluntary act of alienation, unless it was within the contemplation of the parties;[3] nor will the marriage of a woman be an alienation of her *choses in action*.[4] So if there is a clause against anticipation, an assignment of arrears already accrued, and not of future income, is good.[5] An assignment in general words will not embrace property which would be forfeited by such assignment.[6]

§ 389. If a testator devises his real estate in strict settlement, and then gives his personal estate to such tenant in tail as first attains the age of twenty-one, if the tenant in tail is not of age

[1] Lear *v.* Leggett, 2 Sim. 479; 1 R. & M. 690; Wilkinson *v.* Wilkinson, G. Coop. 259; 3 Swanst. 528; Whitfield *v.* Prickett, 2 Keen, 908. [*Re* Harvey, 60 L. T. 710.]

[2] Cooper *v.* Wyatt, 5 Madd. 482; Dommett *v.* Bedford, 6 T. R. 684.

[3] Avison *v.* Holmes, 1 John. & H. 530; Barnet *v.* Blake, 2 Dr. & Sm. 117.

[4] Bonfield *v.* Hassell, 32 Beav. 217.

[5] *Re* Stulz Trusts, 4 De G., M. & G. 404; 1 Eq. R. 334.

[6] *Re* Waley's Trust, 3 Eq. R. 380. And as to the general effect of proceedings in insolvency and bankruptcy, and of annulling the proceedings, see Lloyd *v.* Lloyd, 1 W. N. 307; Pym *v.* Lockyer, 12 Sim. 394; Brandon *v.* Aston, 2 Y. & C. Ch. 24; Churchill *v.* Marks, 1 Coll. 441; Townsend *v.* Early, 34 Beav. 23; Martin *v.* Margham, 14 Sim. 230; Graham *v.* Lee, 23 Beav. 388.

attempts to alien, and thereupon to B. and his heirs."

Such limitations over upon attempted alienation or upon the happening of any other contingency, are void within the rule against perpetuities unless the contingency must happen, if at all, within the period allowed by the rule for the vesting of estates. See Thomas *v.* Thomas, 87 L. T. 58; First Universalist Soc. *v.* Boland, 155 Mass. 171.

Where the settlor has made himself the beneficiary of an interest in the property, as of a right to the income, a provision that it shall cease upon his subsequent bankruptcy is treated as an attempt to defraud creditors even though the settlor was solvent at the time of the settlement; and even subsequent creditors have a right to have the debtor's interest applied to payment of their claims. Mackintosh *v.* Pogose, [1895] 1 Ch. 505; *In re* Johnson, [1904] 1 K. B. 134; Higginbottom *v.* Holme, 19 Ves. 88; Murphy *v.* Abraham, 15 Ir. Ch. 371; *infra*, § 555, note.

at the testator's death, the event may never occur, and the trust is void. But if the personal property is given upon trusts that correspond to the settlement of the real estate, with a proviso that it should not vest absolutely in any tenant in tail unless he attained twenty-one, the trust is good.[1]

§ 390. Thus where trusts are complete in themselves, or are what are termed executed trusts, courts will not mould, alter, or put any peculiar construction on them, in order to avoid or evade the rule against perpetuities. The ordinary rules of construction will be adhered to without regard to the consequences of avoiding trusts that are illegal.[2] But in cases of executory trusts, where trustees are directed to settle a formal deed of trust upon terms which are faintly and incompletely sketched, another rule will be applied. If from the articles or will it appears that a perpetuity was intended, that must be the end of the trust, whether executed or executory. But if the direct object of the limitations suggested in the articles is not the creation of a perpetuity, and if the remoteness is confined to some of the distant links only in the chain of limitations, equity, in decreeing the settlement, will carry into effect the general intention, especially if the expression of that intention clearly indicates that the limitations are to be carried out so far as the law allows.[3] (*a*)

[1] Gosling *v.* Gosling, 1 De G., J. & S. 1, 17, Am. ed. Perkins, note 1; s. c. L. R. 1 H. L. 279; Lincoln *v.* Newcastle, 12 Ves. 218; Dungannon *v.* Smith, 12 Cl. & Fin. 546; Scarsdale *v.* Curzon, 1 John. & H. 40.

[2] Blagrave *v.* Hancock, 16 Sim. 371.

[3] *Ante*, § 376; Bankes *v.* Le Despencer, 10 Sim. 576; 7 Jur. 210; 11 Sim. 508; Lincoln *v.* Newcastle, 3 Ves. 387; 12 Ves. 218; Phipps *v.* Kelynge, 2 V. & B. 57, n.; Woolmore *v.* Burrows, 1 Sim. 512; Dorchester *v.* Effingham, 10 Sim. 587, 588, n.; 3 Beav. 180; Kampf *v.* Jones, 2 Keen, 756; Tregonwell *v.* Sydenham, 3 Dow, 194; 1 Jar. on Wills, 235; n.; see argument of Sir Edward Sugden in Bengough *v.* Edridge, 1 Sim. 226, 227; Mogg *v.* Mogg, 1 Mer. 654; 1 Jar. on Pow. Dev. 414, and note; Trevor *v.* Trevor, 13 Sim. 108; 1 H. L. Cas. 239; Tennent *v.* Tennent, Drury, 161; Boydell *v.* Golightly, 14 Sim. 346; White *v.* Briggs, 15 Sim. 17; Vanderplank *v.* King, 3 Hare, 5;

(*a*) In Edgerly *v.* Barker, 66 N. H. 434, this principle was applied to an executed trust.

§ 391. In some of the States, legislation has been had whereby the period within which estates must vest is shortened. Thus in Alabama [1] estates may be given to wife and children, or children only, severally successively, and jointly, and to the heirs of the body of the survivor, if they come of age, and in default thereof over. But gifts to others than wife and children must vest within the term of three lives in being, and ten years thereafter. In Connecticut,[2] no estate can be given by deed or will to any person or persons, except such as are in being, or to the immediate issue or descendants of such as are in being at the time of making the deed or will. (*a*) In New York,[3] Michigan,[4] Minnesota,[5] and Wisconsin,[6] the absolute power of alienation cannot be suspended, by any limitation or condition, for a

Monypenny *v.* Deering, 7 Hare, 568; 2 De G., M. & G. 145; 16 M. & W. 418; Hare *v.* Pew, 25 Beav. 335; Humberston *v.* Humberston, 2 Vern. 737; 1 P. Wms. 332; Pr. Ch. 455; Deerhurst *v.* St. Albans, 5 Madd. 232; Jervoise *v.* Northumberland, 1 J. & W. 559; Blackburn *v.* Stables, 2 V. & B. 367; Rowland *v.* Morgan, 2 Phill. 763; Parfitt *v.* Hember, L. R. 4 Eq. 443.

[1] Code 1852, § 1309. [Civil Code (1907), § 3417.]

[2] Comp. Stat. 1854, p. 630, § 4.

[3] 2 Rev. Stat. (4th ed.) 133, §§ 15–20; Knox *v.* Jones, 47 N. Y. 398; Wood *v.* Wood, 5 Paige, 596; Amory *v.* Lord, 5 Seld. 503; Schutter *v.* Smith, 41 N. Y. 328; Gott *v.* Cook, 7 Paige, 531; Van Vechten *v.* Van Vechten, 8 Paige, 104. [Real Property Law, 1909, § 42 *et seq.* IV Consol. Laws (1909), p. 3381; Personal Property Law, 1909, § 11, ibid. p. 2840.]

[4] Comp. Laws, 1857, c. 85, §§ 15–26. [Comp. Laws, 1897, §§ 8796, 8797, 8789, 8910, 8911.]

[5] Comp. Stat. 1859, c. 31, §§ 15–26. [Rev. Laws, 1905, §§ 3203–3205, 3319.]

[6] Rev. Stat. 1858, c. 83, §§ 15–26. [Statutes 1898, § 2039 as amended by c. 511 of 1905, §§ 2038, 2040, 2152, 2153, two lives and twenty-one years. Neither the statute nor the common-law rule applies to personalty. Danforth *v.* Oshkosh, 119 Wis. 262; Becker *v.* Chester, 115 Wis. 90.]

(*a*) This provision in the statutes of Connecticut was repealed by chapter 249, Acts of 1895, leaving no statutory rule. The result seems to be that the common-law rule applies as to wills and deeds coming into operation since 1895; but the repeal had no retroactive effect, and the law as it existed previous to 1895 still controls as to interests created previous to that time. Tingier *v.* Chamberlin, 71 Conn. 466; Security Co. *v.* Snow, 70 Conn. 288; Cody *v.* Staples, 80 Conn. 82. See White *v.* Allen, 76 Conn. 185; Bates *v.* Spooner, 75 Conn. 501; Loomer *v.* Loomer, 76 Conn. 522.

longer period than the continuance of two lives in being at the creation of the estate, except that a contingent remainder in fee may be limited on a prior remainder in fee to take effect in the event that the persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined during their minority. Successive limitations of estates for life are not valid except to persons in being at the time of their creation. And if a remainder is limited on more than two successive estates for lives in being, all the subsequent successive estates are void; and upon the death of those two persons the remainder will take effect as if no other life-estate had been created. No remainder can be created for the life of a person other than the grantee or devisee of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term of years, unless it is for the whole residue of the term. If more than two lives are named, the remainder takes effect upon the death of the two persons first named, in the same manner as if no other persons had been named or lives introduced. A contingent remainder cannot be limited on a term for years, unless the contingency on which it is limited is such that it must vest during the continuance of two lives in being at the creation of such remainder, or at the termination of such term of years. Thus a limitation to A. for life, remainder to B. for life, remainder to C. and D., and the survivor of them, is within the statute, and void as to C. and D. as a limitation upon more than two lives in being.[1] If the power of alienation is suspended for an indefinite period, the trust is void.[2] (*a*)

[1] Arnold *v.* Gilbert, 5 Barb. 190.

[2] Donaldson *v.* American Tract Soc., 1 N. Y. Sup. Ct. Add. 15; Leonard *v.* Bell, 1 N. Y. Sup. Ct. 608; Kiah *v.* Grenier, id. 388.

(*a*) These provisions of the New York statutes have been interpreted as a modification of the rule against perpetuities. The statute is violated not only by attempts to place restraints upon vested interests, but by attempts to create either vested or future estates which from their nature or by some statute are inalienable for a period which by any

§ 392. In Ohio,[1] no estate can be limited to any person or persons, except they are in being, or to the immediate descend-

[1] Rev. Stat. 1854, c. 42, § 1. [Bates' Annot. Stat. (5th ed.) § 4200.]

possibility may last beyond the duration of two lives in being at the time of their creation. Such attempted estates are void even before the time set for their vesting. *In re* Wilcox, 194 N. Y. 288. This is true of estates which may not vest within the duration of two lives in being, because an unvested estate is inalienable. Dana *v.* Murray, 122 N. Y. 604; *In re* Wilcox, 194 N. Y. 288. The same is true of a trust to pay income which may continue beyond the duration of two lives in being at the time of its creation, because another statute has made the interest of a beneficiary of such a trust inalienable. Underwood *v.* Curtis, 127 N. Y. 523; Fowler *v.* Ingersoll, 127 N. Y. 472; Brown *v.* Quintard, 177 N. Y. 75; Herzog *v.* Title Guarantee & Tr. Co., 177 N. Y. 86; People's Trust Co. *v.* Flynn, 94 N. Y. S. 436, 106 App. Div. 78; Matter of Trotter, 104 App. Div. 118 (affirmed, 182 N. Y. 465); Robb *v.* Washington & Jefferson College, 185 N. Y. 485; Whitefield *v.* Grissman, 108 N. Y. S. 110, 123 App. Div. 233; Farmers' Loan & Trust Co. *v.* Kip, 192 N. Y. S. 266.

The fact that the trustee has power of sale will not save the trust if the interest of the beneficiaries is inalienable for a period which may extend beyond the duration of two lives in being. *In re* Wilcox, 194 N. Y. 288. On the other hand, a restraint upon the trustee's power to sell for a time which may exceed the statutory limit violates the statute even when the interests of the beneficiaries are alienable. See *In re* Walkerly, 108 Cal. 627.

The two lives which mark the possible suspension of absolute alienable ownership are not necessarily those of the persons interested. Schermerhorn *v.* Cotting, 131 N. Y. 48; Bird *v.* Pickford, 141 N. Y. 18. A child *en ventre sa mère* at the time of a testator's death has been held to be a life in being within the meaning of the statute. Cooper *v.* Heatherton, 73 N. Y. S. 14, 65 App. Div. 561. The fact that the person who is to take on the termination of the two lives in being is a minor, and for that reason incapable of alienating his interest in the property, does not affect the validity of a gift to him. Quade *v.* Bertsch, 72 N. Y. S. 916, 65 App. Div. 600 (affirmed 173 N. Y. 615). See Estate of Campbell, 149 Cal. 712.

In States which have a statute provision similar to that of New York a similar interpretation has been given the statute. Brown *v.* Columbia Finance, etc., Co., 123 Ky. 775; Fidelity Trust Co. *v.* Lloyd, 78 S. W. 896 (Ky. 1904); Phillips *v.* Heldt, 33 Ind. App. 388; Casgrain *v.* Hammond, 134 Mich. 419; Niles *v.* Mason, 126 Mich. 482; Torpy *v.* Betts, 123 Mich. 239; Campbell-Kawannanakoa *v.* Campbell, 152 Cal. 201; *In re* Walkerly, 108 Cal. 627; Estate of Campbell, 149 Cal. 712. But not all of them have statutes restraining the alienation of a *cestui's* right to income. See John-

ants of such as are in being at the time of making of the deed or will. In Mississippi,[1] fees-tail are prohibited, and converted into fees-simple; and estates may be limited in succession to two donees in being, and to the heirs of the body of the remainderman, and in default thereof to the heirs of the donor in fee. In Indiana,[2] the power of selling lands cannot be suspended, by any limitation or condition, longer than the continuance of any number of specified lives in being at the time of the creation of the estate; except that contingent remainders in fee may be limited on a prior remainder in fee, to take effect in the event that the person or persons to whom the first remainder is limited

[1] Code, 1857, c. 38, § 1, art. 3; see Jordan *v.* Roach, 32 Miss. 481. [Code (1906), § 2765; Banking Co. *v.* Field, 84 Miss. 646.]

[2] Rev. Stat. 1852, p. 238, § 40. [Burns' Stat. (1908), § 3998.]

son's Trustee *v.* Johnson, 79 S. W. 293 (Ky. 1904).

In Minnesota, Michigan, and Wisconsin the statutes forbidding restraints or alienation, though similar in form to the New York statute, do not apply to personalty. In Minnesota and Michigan it has been held that the common-law rule against perpetuities applies to personalty. *In re* Tower's Estate, 49 Minn. 371; Toms *v.* Williams, 41 Mich. 552, 569. In Wisconsin it has been held that neither the statute nor the common-law rule applies to personalty, Becker *v.* Chester, 115 Wis. 90; Danforth *v.* Oshkosh, 119 Wis. 262; Dodge *v.* Williams, 46 Wis. 70; see *In re* Adelman's Will, 138 Wis. 120; Holmes *v.* Walter, 118 Wis. 409; with the result that whenever a trustee has power to convert real estate and to hold the proceeds invested as personalty there is no unlawful restraint upon alienation, and no rule of remoteness applies to the beneficial interests. *Ibid.*

It has been held that the California statute provisions apply to all kinds of property. *In re* Walkerly, 108 Cal. 627, 656–658.

The New York court has held in several cases that the validity of a bequest of personal property with respect to the rule against perpetuities is to be determined by the law of the testator's domicile. Cross *v.* U. S. Trust Co., 131 N. Y. 330; Dammert *v.* Osborn, 140 N. Y. 30, 141 N. Y. 564. To the same effect see Penfield *v.* Tower, 1 N. D. 216. But the New York court has also upheld a bequest of personalty by a resident of that State, in trust to pay life annuities to seven persons, since the trust funds were to be paid over to a Pennsylvania corporation and there administered. Robb *v.* Washington and Jefferson Coll., 185 N. Y. 485. Although the trust would have been invalid under New York law because the interests of the annuitants are inalienable, the court seemed to be of opinion that this invalidity was cured because the interests were alienable in Pennsylvania.

shall be under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined during their minorities. In Kentucky,[1] the absolute power of alienation cannot be suspended by limitations or conditions for a longer period than during a life or lives in being and twenty-one years and ten months. So, in Iowa,[2] alienation cannot be suspended for a period longer than lives in being and twenty-one years. In Arkansas[3] and Vermont,[4] their constitutions declare that a perpetuity shall not be allowed. What is a perpetuity in those States would necessarily, in the absence of legislation, be determined by the common-law rule. So it is conceived that the common law prevails in those States. In all the other States, except perhaps Louisiana, where the rules of property were derived from the civil law or the code of France, and California, (*a*) where they were derived from the Spanish

[1] Rev. Stat. c. 80, § 34. [Stat. of Ky. (1909) § 2055; Brown *v.* Columbia Finance, etc., Co., 123 Ky. 775; Fidelity Trust Co. *v.* Lloyd, 78 S. W. 896 (Ky. 1904); Johnson's Trustee *v.* Johnson, 79 S. W. 293 (Ky. 1904).]

[2] Code, 1851, p. 1191. [Code, 1897, § 2901; Meek *v.* Briggs, 87 Iowa, 610, 618; Phillips *v.* Harrow, 93 Iowa, 92, 106.]

[3] Const. art. 2, § 19.

[4] Const. pt. 2, § 36; Gen. Stat. 1863, pp. 25, 446.

(*a*) Statute provisions similar to and evidently taken from the New York statutes have been enacted in California, Montana, North Dakota, and South Dakota, with the exception that the limit is "lives in being." Cal. Civ. Code, §§ 715, 716; Mont. Civ. Code (1907), §§ 4463–4465, 4492; No. Dak. Civ. Code (1905), §§ 4744–4746, 4771, 4772, 4872, 4873; So. Dak. Civ. Code, §§ 224–226, 251, 252, 353, 354.

The common-law rule was recognized in the following recent cases. Cribbs *v.* Walker, 74 Ark. 104, 120; Chilcott *v.* Hart, 23 Colo. 40; Quinlan *v.* Wickman, 233 Ill. 39; Keyes *v.* Northern Trust Co., 227 Ill. 354; Dwyer *v.* Cahill, 228 Ill. 617; Hill *v.* Gianelli, 221 Ill. 286; Pitzel *v.* Schneider, 216 Ill. 87; Schuknecht *v.* Shultz, 212 Ill. 43; Eldred *v.* Meek, 183 Ill. 26; Keeler *v.* Lauer, 73 Kan. 388; Towle *v.* Doe, 97 Me. 427; Andrews *v.* Lincoln, 95 Me. 541; Robinson *v.* Bonaparte, 102 Md. 63; Graham *v.* Whitridge, 99 Md. 248, 274; Gray *v.* Whittemore, 192 Mass. 367; Brown *v.* Wright, 194 Mass. 540; Howe *v.* Morse, 174 Mass. 491; Shepperd *v.* Fisher, 206 Mo. 208; Edgerly *v.* Barker, 66 N. H. 434; Ogden *v.* McLane, 73 N. J. Eq. 159; Lembeck *v.* Lembeck, 73 N. J. Eq. 427; Stephens *v.* Dayton, 220 Pa. St. 522; Kountz's Estate, 213 Pa. St. 390;

laws, the common-law rules as to perpetuities are in force, and trusts that are contrary to these rules are void.

§ 393. Intimately connected with this matter is the rule against accumulations. Trusts for accumulation must be strictly confined within the limits of the rule against perpetuities. It has been seen that a settlor may restrain the alienation of property for a life or lives in being and twenty-one years; and, in case the beneficiary is then *en ventre sa mère*, an addition of nine months may be made to the term. In analogy to this rule, a settlor may prevent the beneficial enjoyment of property for the same length of time, by directing an accumulation of the interest, income, rents, or profits.[1] If a trust for accumulation may possibly exceed this limit, it is wholly void, and it cannot be cut down to the legal limit. (*a*)

§ 394. The above is the rule where there are no statutes to control it. Trusts, by which the vesting, alienation, or enjoyment of property is postponed beyond the legal period, are considered as contrary to public policy, and therefore void; and as

[1] Fosdick *v.* Fosdick, 6 Allen, 43; Hooper *v.* Hooper, 9 Cush. 122; Thorndike *v.* Loring, 15 Gray, 391; Boughton *v.* James, 1 Coll. 26; 1 H. L. Cas. 406; Southampton *v.* Hertford, 2 V. & B. 54; Marshall *v.* Holloway, 2 Swanst. 432; Curtis *v.* Luken, 5 Beav. 147; Brown *v.* Stoughton, 14 Sim. 369; Scarisbrooke *v.* Skelmersdale, 17 Sim. 187; Turvin *v.* Newcome, 3 K. & J. 16; Craig *v.* Craig, 3 Barb. Ch. 76; Mathews *v.* Keble, L. R. 1 Eq. 467; L. R. 3 Ch. 691; Killam *v.* Allen, 52 Barb. 605; Dutch Reform Church *v.* Brandon, id. 228; White *v.* Howard, id. 294; Hillyard *v.* Miller, 10 Barr, 326.

Lawrence's Estate, 136 Pa. St. 354; Loyd *v.* Loyd, 102 Va. 519; Starcher Bros. *v.* Duty, 61 W. Va. 371, 373; Fitchie *v.* Brown, 211 U. S. 321 (Hawaii). See Georgia Code (1895), § 3102.

(*a*) An accumulation for more than twenty-one years may legally take place by operation of law. Bryan *v.* Collins, 16 Beav. 14, 17. As where the person who becomes entitled after accumulation of some years is an infant whose parent is capable of supporting him. A direction to apply rents or income in payment of a specified sum to a designated person is not a direction to accumulate. Rogers' Estate 179 Penn. St. 602.

In New York, directions to accumulate rents, except during the minority of legatees, are void by statute.

courts cannot substitute legal directions in the place of illegal provisions in a will, the whole fails if there is an illegal gift for accumulation. The period during which accumulation might go on was found to be inconvenient in case a settlor availed himself of all its terms. Thus Mr. Thellusson, by an ingenious and skilful use of these legal limitations, constructed a will by which a fortune of £600,000 was left to accumulate for some person to come into existence in the future, answering a certain description, while mere pittances were given to his children and grandchildren then in being. It was calculated that accumulations might go on under this will from seventy-five to one hundred years, and that the gross accumulation would amount to a sum from £32,000,000 to £100,000,000, according to the time during which it might accumulate. The will was most carefully considered and discussed in all the courts, but it was found to be drawn carefully within the law, and all its provisions were sustained.[1] Thereupon Parliament interfered, and passed a statute, usually called the Thellusson Act, which curtailed the period during which accumulations might be directed.[2] This act established four alternate periods during which accumulations might be made: (1) The life of the settlor; (2) Twenty-one years from the death of the settlor; (3) The minority or minorities of any persons living at the death of the settlor; (4) During the minority or minorities of any person or persons who, if of full age, would be entitled under the limitations to the income which is directed to be accumulated. (*a*)

[1] Thellusson *v.* Woodford, 4 Ves. 227; 11 Ves. 112; 4 Kent, Com. 285.
[2] Stat. 39 and 40 Geo. III. c. 98.

(*a*) The Accumulations Act of 1892 (55 and 56 Vict. c. 58) limits the choice to the fourth period, if there is a direction to accumulate for the purchase of land only. See *In re* Danson, 13 Rep. 633. It has been held that the Thellusson Act does not prevent accumulations for the purpose of improvements which are in the nature of repairs. Vine *v.* Raleigh, [1891] 2 Ch. 13, 26; *In re* Mason, [1891] 3 Ch. 467. As to the exception in favor of "portions," see *In re* Stephens, [1904] 1 Ch. 322. See also *In re* Heathcote, [1904] 1 Ch. 826.

§ 395. It has been determined that these four periods are alternative, and not cumulative, and that accumulations must be confined to one of them.[1] If the accumulation does not begin until several years after the testator's death, it must cease at the end of twenty-one years from his death,[2] excluding the day of his death.[3] The act further directs, that any accumulation directed contrary to its provision shall be void. By these words accumulations directed contrary to the statute are not wholly void, as at common law, but only the excess beyond the time allowed by the statute is void.[4] Mr. Lewis calls this a "rule of construction entirely novel."[5] It is also said, that the act is one of restraining force, and cannot give validity to trusts for accumulation, which are in themselves void, as transgressing the common-law limits of a perpetuity. Thus a direction to accumulate beyond the time allowed by the statute, but within the time allowed by the common law, will be good for the actual time allowed by the statute, and void only for the excess; but a direction to accumulate, beyond the rule of common law against perpetuity, is wholly void notwithstanding the statute. Consequently, in England a trust for accumulation may verge *almost* upon the outside of the limit of a perpetuity, and yet be

[1] Ellis *v.* Maxwell, 3 Beav. 587; Rosslyn's Trust, 16 Sim. 391; Wilson *v.* Wilson, 1 Sim. (N. S.) 288. [Jagger *v.* Jagger, 25 Ch. Div. 729; *Re* Errington, 76 L. T. 616.]

[2] Nettleton *v.* Stephenson, 3 De G. & Sm. 366; Att. Gen. *v.* Poulden, 3 Hare, 355; Webb *v.* Webb, 2 Beav. 493; Shaw *v.* Rhodes, 1 Myl. & Cr. 135.

[3] Toder *v.* Sansom, 1 Brown, P. C. 468; Lester *v.* Garland, 15 Ves. 248; East *v.* Lowndes, 11 Sim. 434. And the day of the death was excluded by the rules of the common law, independently of the statute. Toder *v.* Sansom, *ut supra*.

[4] Griffiths *v.* Vere, 9 Ves. 127; Palmer *v.* Holford, 4 Russ. 403; Langdon *v.* Simson, 12 Ves. 295; Rosslyn's Trust, 16 Sim. 391; Freke *v.* Lord Carbery, L. R. 16 Eq. 461. There are a great number of cases upon this construction, but they are not important in America. The reader can see 1 Jarm. on Wills, 286; Hill on Trustees, 394; Lade *v.* Holford, Amb. 479; Eyre *v.* Marsden, 2 Keen, 564; 4 Myl. & Cr. 231; Marshall *v.* Holloway, 3 Swanst. 432; Southampton *v.* Hertford, 2 V. & B. 61; Haly *v.* Dannister, 4 Madd. 277.

[5] Lewis on Per. 593.

void only for the excess beyond the time established in the statute; but if a trust for accumulation transcends in the slightest degree the boundary of a perpetuity, it is wholly void, and will fail without regard to the actual course of events.[1]

§ 396. If a good bequest is made to a devisee, subject to an illegal or void direction to accumulate, as where such direction is independently engrafted upon the devise, and can be stricken out without destroying the substantial form of the gift, the gift may be held to be good, but the direction to accumulate void.[2] But where the gift is limited to take effect *after* a prescribed period of accumulation, and out of the accumulated fund, as part of the subject-matter of the gift, and such period of accumulation is illegal or too remote, the gift itself will fail, as the form of the gift in such case is of the substance of it.[3] If the gift and all its accumulations are of necessity to vest in some person absolutely, in such manner that he will have a right to call for the fund, and stop the accumulations within the legal period, the bequest will be good, although such persons should allow the accumulations to go on as directed;[4] that is, the same rule applies as in the case of perpetuities. The law concerns itself with the possibilities of an illegal accumulation, and not with the fact, whether a person, having an absolute vested right to a fund, allows it to go on accumulating in accordance with a void direction.[5]

[1] Lewis on Per. 593, 594; Hargrave, Accum. 91, 110; 1 Pow. on Devi. by Jarm. 419; 2 Prest. Abst. 183. [See Smith *v.* Cuninghame, 13 L. R. Ir. 480.]

[2] Haxtum *v.* Corse, 2 Barb. Ch. 506; Craig *v.* Craig, 3 Barb. Ch. 76; Martin *v.* Margham, 14 Sim. 230; Williams *v.* Williams, 4 Selden, 525; Phelps *v.* Pond, 23 N. Y. 69; Kilpatrick *v.* Johnson, 15 N. Y. 322; Hawley *v.* James, 5 Paige, 318; Philadelphia *v.* Girard, 45 Penn. St. 1.

[3] Amory *v.* Lord, 5 Selden, 403.

[4] Phipps *v.* Kelynge, 2 Ves. & B. 57, n., 63, 62; Tregonell *v.* Sydenham, 3 Dow. 194; Lewis on Per. 640; Conner *v.* Ogle, 4 Md. Ch. 443; Saunders *v.* Vautier, 4 Beav. 115; Cr. & Phil. 240; Oddie *v.* Brown, 4 De G. & J. 179; Bateman *v.* Hotchkin, 10 Beav. 426; Bacon *v.* Proctor, T. & R. 31; Briggs *v.* Oxford, 1 De G., M. & G. 363; Williams *v.* Lewis, 6 H. L. Cas. 1013.

[5] *Ante*, § 181.

§ 397. When a direction to accumulate is void for a part of the term, the income during such void part will belong to the heir or next of kin, or to the residuary legatee. Mr. Jarman has pointed out the destination of such income as follows: (1) Where there is a present gift in possession, and the direction for accumulation is merely to govern the mode of enjoyment, the result is to give those entitled the present income, the same as if the direction had not been given.[1] (2) Where the trust for accumulation is grafted upon an estate where vesting is deferred or made contingent until after the period of accumulation, the statute by stopping the accumulation does not hasten the vesting or the possession, and the income goes to the residuary legatee or the heir, according as it is personal or real estate, until the vesting or possession of the estate is matured. But where the residue is not given absolutely, but only for life or years, the interest upon a legacy thus directed to be accumulated beyond the legal period goes into the residue of the estate as capital.[2] (3) Where a residue is directed to be accumulated, the income, when its accumulation becomes illegal, will go to the heir or next of kin, according as the property may be real or personal estate.[3] (*a*) (4) The income of the accumulations follows the

[1] Trickey *v.* Trickey, 3 Myl. & K. 560; Clulow's Trust, 5 Jur. (N. S.) 1002; 28 L. J. Ch. 696; Combe *v.* Hughes, 11 Jur. (N. S.) 194; 1 Jarm. on Wills, 292; Hawley *v.* James, 5 Paige, 318.

[2] Jones *v.* Maggs, 9 Hare, 605; Macdonald *v.* Brice, 2 Keen, 276; Eyre *v.* Marsden, id. 574; Ellis *v.* Maxwell, 3 Beav. 587; Nettleton *v.* Stephenson, 3 De G. & Sm. 366; Barrington *v.* Liddell, 10 Hare, 429; Att. Gen. *v.* Poulden, 3 Hare, 555; Crawley *v.* Crawley, 7 Sim. 427; Morgan *v.* Morgan, 4 De G. & Sm. 175; Hull *v.* Hull, 24 N. Y. 647; 1 Jarm. on Wills, 292. [But see *In re* Phillips, 49 L. J. Ch. 198.]

[3] Skrymsher *v.* Northcote, 1 Swanst. 566; Macdonald *v.* Bryce, 2 Keen, 276; Pride *v.* Fooks, 2 Beav. 437; Elborne *v.* Goode, 14 Sim. 165; Wilson *v.* Wilson, 1 Sim. (N. S.) 288; Bourne *v.* Buckton, 2 Sim. (N. S.) 91; Oddie

(*a*) See St. John *v.* Andrews Inst., 191 N. Y. 254; Duncklee *v.* Butler, 56 N. Y. S. 491, 38 App. Div. 99; Weinmann's Estate, 223 Pa. St. 508. As to the disposition of surplus income legally accumulated when there is no express direction as to whom it is to go, see Brown *v.* Wright, 168 Mass. 506; Farley *v.* Bucklin, 16 R. I. 378.

same rule as the accumulation.[1] These are substantially the same rules that apply to the distribution of income which is illegally directed to be accumulated at common law.

§ 398. In New York,[2] Michigan,[3] Wisconsin,[4] and Minnesota,[5] the common-law rules in relation to accumulations are changed by statutes, which are substantially the same in each State. In those States accumulations may be directed by deed or will, during the minority of one or more persons, to commence with the creation of the estate out of which the accumulation is to be made, and to end with the minority of the persons named. If there is a direction for an accumulation for a longer period, the excess only is void. (*a*) In Alabama,[6] accumulations

v. Brown, 4 De G. & J. 179; Halford *v.* Stains, 16 Sim. 488; Wilde *v.* Davis, 1 Sm. & G. 475; Eyre *v.* Marsden, 2 Keen, 564; 4 Myl. & Cr. 431; Edwards *v.* Tuck, 3 De G., M. & G. 40; Burt *v.* Sturt, 10 Hare, 415; 1 Jarm. on Wills, 292.

[1] Crawley *v.* Crawley, 7 Sim. 427; O'Neill *v.* Lucas, 2 Keen, 316; Morgan *v.* Morgan, 4 De G. & Sm. 175; 20 L. J. Ch. 441; 1 Jarm. on Wills, 292.

[2] Rev. Stat. (4th ed.) p. 135; [Real Property Law, 1909, § 62, IV Consol. Laws (1909), p. 3384; Personal Property Law, 1909, § 16, IV Consol. Laws (1909), p. 2844]; Craig *v.* Craig, 3 Barb. Ch. 76; Killam *v.* Allen, 52 Barb. 605; Hawley *v.* James, 5 Paige, 480; Hull *v.* Hull, 24 N. Y. 647; Robinson *v.* Robinson, 5 Lansing, 167; Williams *v.* Williams, 8 N. Y. 358; Kilpatrick *v.* Johnson, 15 N. Y. 322; Haxtun *v.* Corse, 2 Barb. Ch. 508; Lang *v.* Ropke, 5 Sandf. S. C. 363; Meserole *v.* Meserole, 1 Hun, 66; Pray *v.* Hedgeman, 27 Hun, 603.

[3] Comp. Laws, 1857, c. 85, §§ 15–26. [Comp. Laws, 1897, § 8819.]

[4] Rev. Stat. 1858, c. 83, §§ 15–26. [Statutes, 1898, § 2061. Limit for charities, twenty-one years.]

[5] Comp. Stat. 1859, c. 31, §§ 15–26. [Rev. Laws, 1905, § 3226.]

[6] Code, 1852, § 1310. [Civ. Code, 1907, § 3410.]

(*a*) Several other States have adopted the provisions of the New York statute. Cal. Civ. Code, §§ 723–725; Mont. Civ. Code (1907), §§ 4469–4470; No. Dak. Code (1905), § 4749; So. Dak. Civ. Code (1908), § 229; Burns' Ind. Stat. (1908), § 9724, applying only to income from personalty. Illinois has adopted the four periods of the Thellusson Act. Rev. Stat. (1908), c. 30, § 155, enacted in 1907. In Wisconsin it has been held that the statute does not apply to income of personalty. Scott *v.* West, 63 Wis. 529, 573 *et seq.* It has been held in New York that an accumulation for the benefit of an unborn child, though valid for

can go on only for ten years, unless they are for the benefit of a minor child in being at the creation of the trust, or at the death of the testator, in which case they may continue during its minority. In Pennsylvania,[1] trusts for accumulation cannot be created for a longer term than the life or lives of the grantor or testator, and the term of twenty-one years from the death of such grantor or testator, and if these limits are exceeded, the excess is void. In the other States, the common-law rules, as before stated, are supposed to prevail. The rule in regard to accumulation is analogous to the rules in regard to the vesting of executory estates. At common law, the same rule prevails in both cases. In many of the States, the rules regulating the vesting of such estates have been altered by statutes. Whether the modification of those rules by statute, without reference to the rule as to accumulations, would also alter the rule as to accumulations in those States does not seem to have been considered.

§ 399. Where there are no statutes regulating accumulations, a direction to accumulate a fund for a charity, for a term beyond the common-law limit, does not vitiate the gift for the charity,[2]

[1] Purd. Dig. 1861, p. 853, § 9. [Brightly's Purdon's Dig. (12th ed.) p. 1833, § 9. Exception in favor of trusts for charities. See Weinmann's Estate, 223 Pa. St. 508.]

[2] Odell *v.* Odell, 10 Allen, 1; but see Hillyard *v.* Miller, 10 Penn. St. 326;

the period of its minority, is invalid for the period preceding its birth. U. S. Trust Co. *v.* Soher, 178 N. Y. 442. Under the statute a direction to accumulate for the purpose of paying off existing mortgages on the trust property is invalid. Hafner *v.* Hafner, 71 N. Y. S. 1, 62 App. Div. 316 (affirmed 171 N. Y. 633); Kirk *v.* McCann, 101 N. Y. S. 1093, 117 App. Div. 56; Hascall *v.* King, 162 N. Y. 134. It has been held that where a trustee is charged with the duty of paying annuities, the statute does not prevent him from holding a reasonable reserve of accumulated surplus income for the purpose of providing for a possible deficiency of income. Spencer *v.* Spencer, 56 N. Y. S. 460 (App. Div.). Similarly, it has been held in Pennsylvania that a temporary withholding of income for the purpose of providing a reserve fund in the interest of judicious management, is not forbidden by the statute. Spring's Estate, 216 Pa. St. 529.

although no limit has been determined by courts during which an accumulation for a charity may be permitted. It is probable that courts would take care that no extraordinary or extravagant term for accumulation should be allowed for a future and prospective good. But where there are statutes against accumulations, charities will be governed by the same rules unless they are specially excepted.[1] (*a*)

§ 400. In Bassil *v.* Lister,[2] it was determined that a direction of a testator that premiums on policies of insurance should be paid out of his estate, upon the lives of his sons during their lives, was not a direction for an accumulation within the prohibition of the statute. The case is severely criticised in Jarman on Wills;[3] but it would seem, that it would not be illegal for a testator to direct the premiums to be paid upon a life policy, if the primary object of such a direction is not accumulation, but security or safety. The question cannot arise, however, in the absence of statutory provisions upon the subject of accumulations; for it can be an accumulation for one life only in being at the time, and such an accumulation is legal by the rules of the common law.

Philadelphia *v.* Girard, 45 id. 1. [St. Paul's Church *v.* Att. Gen., 164 Mass. 188, 203; Codman *v.* Brigham, 187 Mass. 309; Brigham *v.* Brigham Hospital, 134 Fed. 513; *In re* Swain, [1905] 1 Ch. 669. See *contra*, Brooks *v.* Belfast, 90 Me. 318, 323.]

[1] Martin *v.* Margham, 14 Sim. 230.

[2] Bassil *v.* Lister, 9 Hare, 177.

[3] 1 Jarm. 294–297.

(*a*) See Wharton *v.* Masterman, [1895] A. C. 186, where it was held that a legatee, whether an individual or a corporation, for whose sole benefit an accumulation is directed may terminate it.

CHAPTER XIV.

GENERAL PROPERTIES AND DUTIES OF THE OFFICE OF TRUSTEE.

§ 401. A trustee, having accepted the office, is bound to discharge its duties.
§ 402. He cannot delegate his authority except to agents in proper cases.
§ 403. Not responsible if he follow directions in employing agents.
§ 404. Where agents must be employed.
§ 405. When responsible for agents and attorneys.
§ 406. When not responsible.
§ 407. Difference of liability in law and equity.
§ 408. Trustees responsible for all mischiefs arising from delegating discretionary powers.
§ 409. Employing agents or attorneys may not be a delegation of authority or discretion.
§ 410. A sale or devise of the trust estate not a delegation of the trust.
§ 411. Several trustees constitute but one collective trustee.
§§ 412, 413. When they must all act and when not.
§ 414. As to the survivorship of the office of trustee.
§ 415. General rule as to liability for cotrustees.
§ 416. May make themselves liable, where otherwise they would not be.
§ 417. Trustees must use due diligence in all cases, or they will be liable for cotrustees.
§ 418. Cases of a want of due care and prudence.
§ 419. In case of collusion or gross negligence, a trustee will be liable for acts of cotrustees.
§ 420. When cotrustees are liable for others upon sales of real estate under a power.
§ 420 *a*. Indemnifying of one trustee by another.
§ 421. As to liability of coexecutors for the acts of each other.
§ 422. An executor must not enable his coexecutor to misapply the funds.
§ 423. When executors must all join they are not liable for each other's acts; but they must use due diligence.
§ 424. An executor must not allow money to remain under the sole control of his coexecutor.
§ 425. Executors and administrators governed by the same rules.
§ 426. Rule where coexecutors or cotrustees give joint bonds of security of the administration of the estate.
§ 427. Trustees can make no profit out of the office.

§ 428. Cannot buy up debts against the estate or *cestui que trust* at a profit.
§ 429. Cannot make a profit from the use of trust funds in business, trade, or speculation.
§ 430. All persons holding a fiduciary relation, subject to the same rule.
§ 431. All persons holding fiduciary relations to an estate, subject to the same rule.
§ 432. Can receive no profit for serving in their professional characters a trust estate.
§ 433. Trustees can set up no claim to the trust estate, and ought not to betray the title of the *cestui que trust*.
§ 434. In England, upon failure of heirs to the *cestui que trust*, trustee may hold real estate to his own use.
§ 435. Speculative questions.
§ 436. In the United States, the interest of the *cestui que trust* in real estate escheats.
§ 437. So it does in England and the United States in personalty.
§ 437 *a*. Contracts of trustee.
§ 437 *b*. Signature of trustee.

§ 401. A TRUSTEE, having accepted a trust, cannot renounce it. If any one undertakes an office for another, he is bound to discharge its duties, and he cannot free himself from liability by mere renunciation. He must be discharged by a court of equity, or by a special power in the instrument of trust, or by the consent of all parties interested in the estate, if they are *sui juris:* if all the parties are not *sui juris*, recourse must be had to a court of equity, in the absence of any provisions in the instrument of trust.[1] Nor can a party qualify his own acts. Where he is named trustee or executor, and acts in behalf of certain parties in the management of the estate, he cannot protest that he is not acting generally, and that he will not be responsible for any mismanagement. On the contrary, if he so acts, and his coexecutors accept the trust, and commit a *devastavit*, he

[1] *Post*, §§ 920–922; Doyle *v.* Blake, 2 Sch. & Lef. 245; Chalmer *v.* Bradly, 1 J. & W. 68; Read *v.* Truelove, Amb. 417; Manson *v.* Baillie, 2 Macq. H. L. Cas. 80; Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; Diefendorf *v.* Spraker, 6 Seld. 246; Shepherd *v.* McEvers, 4 Johns. Ch. 136; Matter of Jones, 4 Sandf. 615; Cruger *v.* Halliday, 11 Paige, 314; Courtenay *v.* Courtenay, 3 Jo. & Lat. 529. [Speakman *v.* Tatem, 48 N. J. Eq. 136.]

will be equally responsible.[1] Even if a trustee gives a bond for the due execution of the trust, and in a suit upon the bond is obliged to pay the full amount, he is not discharged from the trust, nor does the trust property vest in him beneficially. He is still a trustee, and must account for the trust property, and all the income and profits. Courts of equity, however, in such cases have power to do equity; and the trustee would not be ordered to convey the trust property without repayment to him of the money paid out on his bond.[2] Until the trustee has been discharged, the *cestui que trust* may require the due execution of the trust; and where the trustee will not take proper steps to enforce a claim against a debtor, he may file a bill against the trustee for the execution of the trust and to obtain the proper order for using the trustee's name or for obtaining a receiver to use the trustee's name.[3] Trustees will be held to great strictness in their dealings with the estate, but courts will treat them leniently when they act in good faith.[4] A trustee is bound to exercise ordinary care and judgment, and it is no excuse for him that he did not possess them; by accepting a trust, whether gratuitous or not, he undertakes that he does possess and will exercise them.[5] (*a*)

§ 402. The office of trustee is one of personal confidence, and cannot be delegated. If a person takes upon himself the management of property for the benefit of another, he has no right to impose that duty on others, and if he does he will be responsi-

[1] Lowry *v.* Fulton, 9 Sim. 123; Doyle *v.* Blake, 2 Sch. & Lef. 231; Read *v.* Truelove, Amb. 417; Urch *v.* Walker, 3 Myl. & Cr. 702; Van Horn *v.* Fonda, 5 Johns. Ch. 403.

[2] Moorcroft *v.* Dowding, 2 P. Wms. 314. See Barker *v.* Barker, 14 Wis. 131; Saunders *v.* Webber, 39 Cal. 287.

[3] Sharpe *v.* San P. Ry. Co., L. R. 8 Ch. 597.

[4] Crabb *v.* Young, 92 N. Y. 56.

[5] Hun *v.* Cary, 82 N. Y. 65.

(*a*) "Trustees are not bound to do anything dishonest or immoral for the sake of their *cestui que trust*." Per Kekewich, J., in Budgett *v.* Budgett, [1895] 1 Ch. 202, 215.

ble to the *cestui que trust*, to whom he owes the duty.[1] Therefore, if a trustee confides his duties or the trust fund to the care of a stranger,[2] or to his attorney,[3] or even to his cotrustee or coexecutor,[4] he will be personally responsible. But, before this responsibility can arise, the trustee must have accepted the office. Where a person named executor received a bill by post, and passed it over to a coexecutor who had accepted the trust, it was held that the act might be considered as the act of a stranger, and did not impose any responsibility.[5] So where a coexecutor collected money, and paid it to a banker, who was also his coexecutor, and whom the testator employed as his banker, he was held excused for trusting the same person as his coexecutor whom the testator trusted as his banker.[6]

[1] Turner *v.* Corney, 5 Beav. 517; Taylor *v.* Hopkins, 41 Ill. 442.

[2] Adams *v.* Clifton, 1 Russ. 297; Kilbee *v.* Sneyd, 2 Moll. 199; Hardwick *v.* Mynd, 1 Anst. 109; Venables *v.* Foyle, 1 Ch. Cas. 2; Douglass *v.* Browne, Mont. 93; *Ex parte* Booth, id. 248; Walker *v.* Symonds, 3 Swanst. 79, n. (a); Char. Corp. *v.* Sutton, 2 Atk. 405; Wilkinson *v.* Parry, 4 Russ. 272; Hulme *v.* Hulme, 2 Myl. & K. 682; Black *v.* Irwin, Harp. L. 411; Berger *v.* Duff, 4 Johns. Ch. 368; Pearson *v.* Jamison, 1 McLean, 199; Newton *v.* Bronson, 3 Kern. 587; Andrew *v.* N. Y. Bible Soc., 4 Sandf. 156; Niles *v.* Stevens, 4 Denio, 399; Beekman *v.* Bonsor, 23 N. Y. 298; Whittlesey *v.* Hughes, 39 Mo. 13; Graham *v.* King, 50 Mo. 22; Howard *v.* Thornton, id. 291; Bales *v.* Perry, 51 Mo. 449.

[3] Chambers *v.* Minchin, 7 Ves. 196; Griffiths *v.* Porter, 25 Beav. 236; Ingle *v.* Patridge, 32 Beav. 661; 34 Beav. 411; Bostock *v.* Floyer, L. R. 1 Ch. 26; *Ex parte* Townsend, 1 Moll. 139; Ghost *v.* Waller, 9 Beav. 497; Turner *v.* Corney, 5 Beav. 115; Sinclair *v.* Jackson, 8 Cow. 582. [See *infra*, §§ 409, 441, as to liability for loss due to employment of agents.]

[4] Langford *v.* Gascoyne, 11 Ves. 333; Clough *v.* Bond, 3 Myl. & Cr. 497; Eaves *v.* Hickson, 30 Beav. 136; Davis *v.* Spurling, 1 R. & M. 66; Anon., Mos. 35, 36; Harrison *v.* Graham, 1 P. Wms. 241, n. (y); Kilbee *v.* Sneyd, 2 Moll. 200; Marriott *v.* Kinnersley, Tam. 470; Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560; Dines *v.* Scott, T. & R. 361; Cowell *v.* Gatcombe, 27 Beav. 568; Trutch *v.* Lamprell, 20 Beav. 116; *Ex parte* Winnall, 3 D. & C. 22; Berger *v.* Duff, 4 Johns. Ch, 368. [Stong's Estate, 160 Pa. St. 13. See *infra*, §§ 415–419.]

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

[6] Churchill *v.* Hobson, 1 P. Wms. 241; Chambers *v.* Minchin, 7 Ves. 198. And see 1 P. Wms. 241, n. (y). [See Duckworth *v.* Ocean Steamship Co., 98 Ga. 193; Dover *v.* Denne, 3 Ont. L. Rep. 664; Bermingham *v.* Wilcox, 120 Cal. 467.]

§ 403. So trustees are not responsible, if they follow the directions of the settlor. Thus, where a testator recommended his executors to employ a person who had been his own agent and clerk, and they employed him to collect moneys, and he became insolvent, it was held that, as the testator pointed out the agent to whom certain business might be delegated, the executors were not liable for the loss, if they used due diligence to recover the money.[1] So if an executor pays over money which he has no right to retain. Thus a testator appointed A., B., and C. his executors, and authorized A. to sell real estate for certain purposes. A. employed B. as his agent to sell the real estate; B. sold the estate and paid the money over to A., who misapplied it; and it was held that B. received the money, not as executor, but as agent of A., and as A. had authority to sell, he had a right to the money, and that B. could not retain it, and was not responsible for it.[2]

§ 404. But there are circumstances where the trustees must employ agents. Lord Hardwicke said: "There are two sorts of necessity, *legal* necessity and *moral* necessity. As to the first a distinction prevails. Where two *executors* join in giving a discharge for money, and only one of them 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 receives, the other is not answerable, because his joining in the discharge was necessary. *Moral* necessity is from the usage of mankind, if the trustee acts prudently for the trust, as he would have done for himself, 'and according to the usage of business;' as if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable. So in the employment of stewards and agents; for none of these cases are on account of necessity, but because the persons acted in the

[1] Kilbee *v.* Sneyd, 2 Moll. 199; Doyle *v.* Blake, 2 Sch. & Lef. 239.

[2] Davis *v.* Spurling, 1 R. & M. 64; Tam. 199; Keane *v.* Roberts, 4 Madd. 332, 356; Crisp *v.* Spranger, Nels. 109.

usual method of business." [1] Other cases have held that "necessity includes the usual course of business," [2] as in employing a broker in making investments of a class usually so made.[3] But the agent must not be employed out of the scope of his regular business.[4] Where an executor in London remitted money to an executor in the country to pay debts there due, it was held to be a *necessary* transaction in the course of business, and the executor in London was not responsible for the loss of the money by his coexecutor in the country.[5] So, where A. and B. were assignees of a bankrupt, and B. signed dividend checks and delivered them to B. for his signature, and for delivery to the creditors, and they were stolen from B. and negotiated at the bank, it was held that A. was not responsible for the loss, as he had delegated the checks to B. in the necessary course of the business.[6] So a trustee is not called upon, in the ordinary course of business, to take security from the agent or other person whom he employs.[7] One trustee may employ his cotrustee as his agent, or one trustee may act for

[1] *Ex parte* Belchier, Amb. 219.

[2] Bacon *v.* Bacon, 5 Ves. 335; Clough *v.* Bond, 3 Myl. & Cr. 497; Joy *v.* Campbell, 1 Sch. & Lef. 341; Chambers *v.* Minchin, 7 Ves. 193; Langford *v.* Gascoyne, 11 Ves. 335; Davis *v.* Spurling, 1 R. & M. 66; Munch *v.* Cockerell, 5 Myl. & Cr. 214; Hawley *v.* James, 5 Paige, 487; May *v.* Frazer, 4 Litt. 391; Telford *v.* Barney, 1 G. Greene (Iowa), 575; Blight *v.* Schenck, 10 Barr, 285; Lewis *v.* Reed, 11 Ind. 239; Mason *v.* Wait, 4 Scam. 132. [See Donaldson *v.* Allen, 182 Mo. 626; *In re* De Pothonier, [1900] 2 Ch. 529; Lord De Clifford's Estate, [1900] 2 Ch. 707; Finlay *v.* Merriman, 39 Tex. 56; *In re* Weall, 42 Ch. Div. 674; *In re* Brier, 26 Ch. Div. 238.]

[3] Speight *v.* Gaunt, 22 Ch. D. 727, 9 App. Cas. 1. [Shepherd *v.* Harris, [1905] 2 Ch. 310.]

[4] Fry *v.* Tapson, 28 Ch. D. 268. [Robinson *v.* Harkin, [1896] 2 Ch. 415; McCloskey *v.* Gleason, 56 Vt. 264.]

[5] Joy *v.* Campbell, 1 Sch. & Lef. 341; Barrings *v.* Willing, 4 Wash. C. C. 251; Jones's App., 8 Watts & S. 147; State *v.* Guilford, 15 Ohio, 593; Deaderick *v.* Cantrell, 10 Yerg. 254; Thomas *v.* Scruggs, id. 401; Maccubbin *v.* Cromwell, 7 G. & J. 157.

[6] *Ex parte* Griffin, 2 G. & J. 114; Wackerbath *v.* Powell, Buck, 495; 2 G. & J. 151.

[7] *Ex parte* Belchier, Amb. 220.

the whole, within the scope of those duties where an agent may be employed.[1] (*a*)

§ 405. It was held in one case, that assignees were responsible for the loss of money by an attorney employed by them to collect debts due the estate, on the ground that there was no *necessity* for them to allow the attorney to receive a shilling of the money except the costs, as he could not give a valid receipt for the same;[2] and Lord Eldon was cited as an authority for this. Mr. Lewin questions this case, and says that trustees must not allow money to remain in the hands of an attorney, but that the authorities are doubtful which say that money may not pass through the hands of an attorney in the ordinary course of business. The case is authority, however, thus far, that attorneys cannot sign receipts for trustees, and if they authorize them so to do, the trustees will be responsible as for the acts of an agent improperly appointed.[3]

§ 406. If money is to be transmitted to a distant place, a trustee may do so through the medium of a responsible bank, or he may take bills from persons of undoubted credit, payable at the place where the money is to be sent; but the bills must be taken to him *as trustee:* if he neglects these precautions he will be responsible for any loss.[4]

[1] *Ex parte* Rigby, 19 Ves. 463; Abbott *v.* American Hard Rubber Co., 33 Barb. 579; Sinclair *v.* Jackson, 8 Cow. 543; Webb *v.* Ledsom, 1 K. & J. 385; Leggett *v.* Hunter, 19 N. Y. 445; Bowers *v.* Seeger, 3 Watts & S. 222. [Ubhoff *v.* Brandenburg, 26 App. D. C. 3; Shepherd *v.* Harris, [1905] 2 Ch. 310.]

[2] *Ex parte* Townsend, 1 Moll. 149; Anon. 12 Mod. 560; *Re* Fryer, 3 K. & J. 317. [See *infra*, § 409 and note.]

[3] Lewin on Trusts, 208.

[4] Wren *v.* Kirton, 11 Ves. 380; *Ex parte* Belchier, Amb. 219; Routh *v.*

(*a*) If a testator empowers his trustees to appoint a factor to the estate who may be one of themselves, but directs them to require annual accounts, the trustees are guilty of gross negligence if they do not call for such accounts. Carruthers *v.* Carruthers, [1896] A. C. 659.

§ 407. It is said that there is a difference in the rule, as applied to executors in a court of law and a court of equity. Thus, in a court of law, an executor will be charged with all the assets that come to his hands to be administered, and he must discharge himself by showing a legal administration of all of them; and he cannot discharge himself at law by showing that he intrusted them to another in the ordinary course of business; that he used due caution and prudence, and reposed a reasonable confidence in such other person; and that the assets were lost without negligence or default on his part. Such a state of facts would not sustain a plea of *plene administravit* in a court of law. But a court of equity would adjust the account of the executor upon equitable principles.[1] A court of probate, in taking the account, would also act upon equitable principles.[2]

§ 408. If a trust is of a *discretionary* nature, the trustee will be responsible for all the mischievous consequences of the delegation, and the exercise of the discretion will be absolutely void in the substitute.[3] Nor can a *discretionary* trust be delegated to a cotrustee.[4] Where a sum of money was given to three trustees to be distributed in charity in their *discretion*, and they divided it into three parts, and each took control of a third, Lord Hardwicke said: "I am of opinion that the trustees could not divide the charity into three parts, and each trustee nominate a third absolutely, because the determination of the propriety of every object was left by the testator to the discretion of *all* the executors." [5]

Howell, 3 Ves. 566; Massey *v.* Banner, 1 J. & W. 247; Knight *v.* Plymouth, 1 Dick. 120; 3 Atk. 480. [See Dunn *v.* Dunn, 137 N. C. 533.]

[1] Cross *v.* Smith, 7 East, 246; Jones *v.* Lewis, 2 Ves. 241; Poole *v.* Munday, 103 Mass. 174; Upson *v.* Badeau, 3 Bradf. Sur. 13.

[2] Ibid.

[3] Alexander *v.* Alexander, 2 Ves. 643; Att. Gen. *v.* Scott, 1 Ves. 413; Wilson *v.* Dennison, Amb. 82; 7 Bro. P. C. 296; Bradford *v.* Belfield, 2 Sim. 264; Hitch *v.* Leworthy, 2 Hare, 200; Doe *v.* Robinson, 24 Miss. 688; Singleton *v.* Scott, 11 Iowa, 589; Person *v.* Jamison, 3 McLean, 69, 197.

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

[5] Att. Gen. *v.* Gleg, 1 Atk. 356; *ante*, § 287.

§ 409. But it must be observed that the appointment of an attorney, proxy, or agent is not necessarily a delegation of the trust. The trustee must act at times through attorneys or agents, and if he determines in his own mind how to exercise the discretion, and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name. (*a*) So, if he gives instructions to his attorneys and agents how to act, it cannot be said to be a delegation of the trust.[1]

[1] Att. Gen. *v.* Scott, 1 Ves. 413; *Ex parte* Rigby, 19 Ves. 463; Ord *v.* Noel, 5 Madd. 498; Sinclair *v.* Jackson, 8 Cow. 582; Hawley *v.* James,

(*a*) Thus a trustee with a discretionary power of sale, having exercised this discretion as to the time and terms of sale, may delegate to an agent the execution and delivery of the deed. Smith *v.* Swan, 2 Tex. Civ. App. 563; Keim *v.* Lindley, 30 A. 1063, 1074 (N. J. Ch. 1895); 54 N. J. Eq. 418 (on appeal.) Similarly, when the donee of a power of appointment by will executes it by devising the property to executors with directions to sell and divide the proceeds among the appointees in certain named shares, it has been held that nothing had been delegated but a ministerial duty. McNeile's Estate, 217 Pa. St. 179; Papin *v.* Piednoir, 205 Mo. 521.

A trustee who has used reasonable care in the selection of his agents for the performance of ministerial duties and who has been reasonably prudent in his supervision of the acts of the agent is not required to make good to the trust estate a loss or damage caused by the negligence or dishonesty of the agent, provided the duties delegated were such as the trustee could properly delegate. The standard of reasonable conduct in such cases is the care which "an ordinarily prudent man would exercise in the management of his own property." Donaldson *v.* Allen, 182 Mo. 626, 650; Speight *v.* Gaunt, 9 App. Cas. 1, 22 Ch. Div. 727; see also § 441 and note. But a trustee who has "unnecessarily" turned trust funds over to an agent for management is liable to make good the loss due to the latter's dishonesty. Low *v.* Gemley, 18 Can. Sup. 685.

In the English case of Speight *v.* Gaunt, 9 App. Cas. 1, where trust funds had been embezzled by a broker employed by the trustees, the rule was stated to be, "that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless, he may in the administration of the trust funds avail himself of third parties, such as bankers, brokers, and others, if he does so from a moral necessity, or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his had led to that result."

§ 410. It has been before stated that a sale or devise of the trust estate by the trustee will not be a delegation or communication of a discretionary trust to the vendee or devisee, unless the original instrument of trust contemplated and authorized such an act by vesting the trust or power annexed to the estate in the trustee and his assigns or devisees.[1]

§ 411. Where a settlor vests his property in several cotrustees, they all form, as it were, one collective trustee; therefore they must perform their duties in their joint capacity,[2] even in making a purchase.[3] In law there is no such person known as an *acting* trustee apart from his cotrustees. All who accept the office are acting trustees. If any one trustee who has accepted refuses to join in the proposed act, or is incapable, the others cannot proceed without him, but an application must be made to the court.[4] (*a*) So, if trustees bring suits, or defend suits in court,

5 Paige, 487; Newton *v.* Bronson, 3 Kern. 587; Blight *v.* Schenck, 10 Barr, 285; *Ex parte* Belchier, Amb. 219; Bacon *v.* Bacon, 5 Ves. 335; Clough *v.* Bond, 3 Myl. & Cr. 497; Lewis *v.* Reed, 11 Ind. 239; Mason *v.* Wait, 4 Scam. 132; Powell *v.* Tuttle, 3 Comst. 396; Bales *v.* Perry, 51 Mo. 449.

[1] *Ante*, § 340; Saunders *v.* Webber, 39 Cal. 287.

[2] Smith *v.* Wildman, 37 Conn. 384; White *v.* Watkins, 23 Mo. 423; *Ex parte* Griffin, 5 G. & J. 116; Shook *v.* Shook, 19 Barb. 63; De Peyster *v.* Ferrers, 11 Paige, 13; Franklin *v.* Osgood, 14 Johns. 560; Cox *v.* Walker, 28 Maine, 504; Hill *v.* Josselyn, 13 Sm. & M. 597; Crewe *v.* Dicken, 4 Ves. 97; Fellows *v.* Mitchell, 1 P. Wms. 83; 2 Vern. 516; Churchill *v.* Hobson, id. 241; Chambers *v.* Minchin, 7 Ves. 198; Leigh *v.* Barry, 3 Atk. 584; Belchier *v.* Parsons, Amb. 219; *Ex parte* Rigby, 19 Ves. 463; Webb *v.* Ledsam, 1 K. & J. 385; Latrobe *v.* Tiernan, 2 Md. Ch. 480; Vandever's App., 8 Watts & S. 405; Sinclair *v.* Jackson, 8 Cow. 544; Ridgeley *v.* Johnson, 11 Barb. 527; Austin *v.* Shaw, 10 Allen, 552; King *v.* Stone, 6 Johns. Ch. 323; Powell *v.* Tuttle, 3 Comst. 396; Sherwood *v.* Read, 7 Hill, 431. [Winslow *v.* B. & O. R. Co., 188 U. S. 646; Ubhoff *v.* Brandenburg, 26 App. D. C. 3; Hosch Lumber Co. *v.* Weeks, 123 Ga. 336; Carr *v.* Hertz, 54 N. J. Eq. 127, 700; Tarlton *v.* Gilsey, 37 A. 467 (N. J. Ch. 1897); Poole *v.* Anderson, 80 Md. 454; 1 Ames on Trusts (2d ed.) 512 n.]

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

[4] Smith *v.* Wildman, 37 Conn. 384; Doyley *v.* Sherratt, 2 Eq. Cas. Ab. 742; *Re* Cong. Church *v.* Smithwick, 1 W. N. 196; Scruggs *v.* Driver, 31

(*a*) It seems well to note an important difference between cases where a trustee ignores his cotrustee in attempts to dispose of or bind

they must act jointly, (*a*) and they should all employ the same counsel. If they sever in their defence and incur extra costs, they might be compelled to bear them personally.

§ 412. A receipt for money, in the absence of special directions in the instrument of trust, must be signed by all the trustees, or it will be invalid.[1] Where the trustees are numerous, the court generally inserts an order that moneys may be paid to two or more.[2] This rule is, however, relaxed in the United States; and it has been held that payment of a mortgage to one of two trustees is a valid payment.[3] So all the trustees must join in proving a debt against a bankrupt;[4] but, under special circumstances, the court may order the proof to be made by one

Ala. 274; Matter of Wadsworth, 2 Barb. Ch. 381; Matter of Mechanics' Bank, id. 446; Burrill *v.* Sheil, 2 Barb. 457; Wood *v.* Wood, 5 Paige, 596; Davis *v.* McNeil, 1 Ired. Eq. 344; Matter of Van Wyke, 1 Barb. Ch. 565; Guyton *v.* Shane, 7 Dana, 498; Ridgeley *v.* Johnson, 11 Barb. 527; *Ex parte* Belchier, Amb. 219. [Fritz *v.* City Trust Co., 76 N. Y. S. 625, 72 App. Div. 532 (affirmed 173 N. Y. 622)].

[1] Walker *v.* Symonds, 3 Swanst. 63; Hall *v.* Franck, 11 Beav. 519.

[2] Att. Gen. *v.* Brickdale, 8 Beav. 223.

[3] Bowers *v.* Seeger, 8 Watts & S. 222.

[4] *Ex parte* Smith, 1 Dea. 191; M. & A. 506; *Ex parte* Phillips, 2 Dea. 334.

trust property and cases where he assumed to act as agent for his cotrustees, since the necessary participation of all the trustees may be by agency of one. The attempted disposal in cases of the former kind is entirely nugatory. Thus a lease of trust property signed by only one of two trustees is inoperative and cannot be ratified, since it does not purport to bind the other joint tenant. Winslow *v.* B. & O. R. Co., 188 U. S. 646. The same is true of an assignment of a bond and mortgage by less than the whole number of trustees. Fritz *v.* City Trust Co., 76 N. Y. S. 625, 72 App. Div. 532 (affirmed 173 N. Y. 622); Hosch Lumber Co. *v.* Weeks, 123 Ga. 336; Tarlton *v.* Gilsey, 37 A. 467 (N. J. Eq. 1897). But if the attempted disposal is made in the names of all, it becomes a question whether or not the trustee who acted or signed was properly authorized to act as agent for his cotrustees, or, in the absence of original authority, whether or not the cotrustees have ratified or adopted the act. Ubhoff *v.* Brandenburg, 26 App. D. C. 3.

(*a*) McGeorge *v.* Bigstone Gap. Imp. Co., 88 F. R. 599.

or more, even when payment must be made to all the trustees.[1] A different rule prevails in regard to bank stocks, for the bank recognizes only the legal title, and at law one joint-tenant may receive moneys; so one trustee may receive dividends upon public stocks,[2] or the rents of real estate, unless the tenant has had notice not to pay to one;[3] but all the trustees must join in conveying such stocks or in executing a conveyance of land,[4] or pledging the trust property.[5] A deed of land executed by one trustee does not convey his share, as in the case of ordinary joint-tenants.[6] Where a deed was executed by two of three trustees, the burden was put upon the purchaser to prove that the other trustee was dead.[7] It has been said, however, that in a case of necessity, and after considerable time, the concurrence of a cotrustee may be presumed in some transactions.[8] A banker may require checks to be signed by one only, or by all the trustees. But if trustees place money at a banker's in such manner that one of their number can withdraw it in his sole name, all the trustees will be liable in case of a loss under such an arrangement.[9] (*a*)

§ 413. In the case of a public trust, where there are several trustees, the act of the majority is held to be the act of the whole

[1] Ibid.

[2] Williams *v.* Nixon, 2 Beav. 472.

[3] Williams *v.* Nixon, 2 Beav. 472; Townley *v.* Sherborne, Bridg. 35; Gouldsworth *v.* Knight, 11 M. & W. 337; Husband *v.* Davis, 1 C. B. 645. See Webb *v.* Ledsam, 1 K. & J. 385; Mendes *v.* Guedalla, 2 John. & H. 259. [Dyer *v.* Riley, 51 N. J. Eq. 124.]

[4] Ibid.; Morville *v.* Fowle, 144 Mass. 109, 113. [Hosch Lumber Co. *v.* Weeks, 123 Ga. 336.]

[5] Ham *v.* Ham, 58 N. H. 70.

[6] Sinclair *v.* Jackson, 8 Cow. 543. [Chapin *v.* First Univ. Soc., 8 Gray, 580.]

[7] Ridgeley *v.* Johnson, 11 Barb. 527; Learned *v.* Welton, 40 Cal. 339; Burngarner *v.* Coggswell, 49 Mo. 259. [See *supra*, § 411, note *a*.]

[8] Vandever's App., 8 Watts & S. 405.

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

(*a*) But see *infra*, § 415, note, as to exceptions in case of the business "necessity" of such an arrangement.

number;[1] but the act of the majority must be strictly within the sphere of their power and duty.[2] When a special power is given to trustees, it cannot be exercised by a majority only: all must join.[3] If a settlement declares that, on the death or resignation of a trustee, the surviving trustees shall appoint his successor, all the surviving trustees must join in the appointment.[4] Where the trustees are numerous, as in the case of a charity, the court may direct that a majority shall form a quorum. Private trusts, where the rule prevails that all must join, cannot be affected by these principles, or by any agreements that may be made by the parties.[5] But an instrument of trust may contain express directions that the trust shall be administered according to the will of the majority of the trustees, in which case the minority will be compelled to give effect to the determinations of the majority.[6] (a) So if the power is given to either of two trustees.[7] So trustees are bound to concur in every merely ministerial act necessary for the execution of the trust; and if they refuse, they may be compelled by order of the court. But where it is a mere matter of personal discretion, the court cannot interfere, unless a cotrustee refuses to act from a corrupt or selfish motive.[8] But a majority of trustees cannot

[1] Wilkinson *v.* Malin, 2 Tyr. 544; Perry *v.* Shipway, 1 Gif. 1; 4 De G. & J. 353; Att. Gen. *v.* Shearman, 2 Beav. 104; Att. Gen. *v.* Cuming, 2 Y. & C. Ch. 139; Younger *v.* Welham, 3 Swanst. 180; Att. Gen. *v.* Scott, 1 Ves. 413; Wilson *v.* Dennison, Amb. 82. [See Bank *v.* Mt. Tabor, 52 Vt. 87.]

[2] Ward *v.* Hipwell, 3 Gif. 547; Sloo *v.* Law, 3 Blatch, 66, 459.

[3] *Re* Cong. Church *v.* Smithwick, 1 W. N. 196.

[4] Ibid.

[5] Swale *v.* Swale, 22 Beav. 585; State *v.* Lord, 31 L. J. Ch. 391.

[6] Att. Gen. *v.* Cumings, 2 Y. & C. Ch. 139; Taylor *v.* Dickinson, 15 Iowa, 483.

[7] Taylor *v.* Dickinson, 15 Iowa, 486.

[8] Clarke *v.* Parker, 19 Ves. 1; Tomlin *v.* Hatfield, 12 Sim. 167; Goulds-

(a) In New Hampshire it has been provided by statute that, "When more than one trustee is required to execute a trust, a majority of the trustees shall be competent to act in all cases, unless the instrument or authority creating the trust shall otherwise provide." Laws of 1901, c. 2; Ladd *v.* Ladd, 74 A. 1045, (N. H. 1909).

deprive one of their number of his right and interest in the trust property.[1]

§ 414. A *bare authority*, committed to several persons, ceases upon the death of one; but if the authority is coupled with an interest, it passes to the survivors.[2] The committee of a lunatic's estate are mere protectors without any interest, and the death of one extinguishes the office.[3] An executorship survives, for the joint executors have an interest in the estate.[4] So testamentary guardianship survives, as such guardians have an authority over the estate.[5] So cotrustees have an authority coupled with an interest in the legal title of the estate, and the office is impressed with the quality of survivorship.[6] If land is given to two trustees in trust to sell, and one dies, the other may sell, as he holds the legal title in the land, and the office of trustee.[7] (*a*) Otherwise, the precaution taken by a settlor to guard

worth *v.* Knight, 11 M. & W. 337; Burrill *v.* Sheil, 2 Barb. 457; Matter of Mechanics' Bank, id. 446.

[1] Meth. Ep. Church *v.* Stewart, 27 Barb. 553.

[2] Co. Litt. 113 a; Eyre *v.* Shaftsbury, 2 P. Wms. 108, 121, 124; Att. Gen. *v.* Gleg, 1 Atk. 356; Amb. 584; Mansell *v.* Vaughn, Wilm. 49; Butler *v.* Bray, Dyer, 189 b; Peyton *v.* Bury, 2 P. Wms. 628. See § 286. [See *infra*, § 491 *et seq.*]

[3] *Ex parte* Lyne, t. Talb. 143.

[4] Adams *v.* Buckland, 2 Vern. 514; Hudson *v.* Hudson, t. Talb. 129.

[5] Eyre *v.* Shaftsbury, 2 P. Wms. 102. But if joint guardians are appointed by the court, the death of one destroys the guardianship. Bradshaw *v.* Bradshaw, 1 Russ. 528; Hall *v.* Jones, 2 Sim. 41.

[6] Hudson *v.* Hudson, t. Talb. 129; Co. Litt. 113 a; Att. Gen. *v.* Gleg, Amb. 585; Billingsley *v.* Mathew, Toth. 168; Gwilliams *v.* Rowell, Hard. 204; Stewart *v.* Peters, 10 Mo. 755; Butler *v.* Bray, Dyer, 189 b; Dominick *v.* Sayre, 3 Sandf. 555; Belmont *v.* O'Brien, 2 Kern. 394; De Peyster *v.* Ferrers, 11 Paige, 13; Moses *v.* Murgatroyd, 1 Johns. Ch. 119; Shook *v.* Shook, 19 Barb. 653; Gregg *v.* Currier, 36 N. H. 200; Powell *v.* Knox, 16 Ala. 364; Parsons *v.* Boyd, 20 Ala. 112; Leggett *v.* Hunter, 19 N. Y. 445; Aubuchon *v.* Lory, 23 Mo. 99; Barton *v.* Tunnell, 5 Harr. 182; Smith *v.* McConnell, 17 Ill. 135; Hopper *v.* Adee, 3 Duer, 235; Britton *v.* Lewis, 8 Rich. Eq. 271.

[7] Warburton *v.* Sandys, 14 Sim. 622; Watson *v.* Pearson, 2 Exch. 594;

(*a*) So too where only one of the three named as trustees qualifies. Draper *v.* Montgomery, 95 N. Y. S. 904, 108 App. Div. 63.

his estate, by increasing the number of trustees, would be futile; for the death of one of them might result in defeating his whole trust. Where the trust was to raise £2000 out of the testator's estate, by sale or otherwise at the discretion of the trustees, who should invest the same in their own names upon trust, one of the trustees died and the other sold; and Vice-Chancellor Wood held that the survivor could make a good title. He said: "I find a clear estate in the vendor, and a clear duty to perform. Is it to be said that the sale is a breach of trust, because the co-trustee is dead? If I were to lay down such a rule, it would come to this, that when an estate is vested in two or more trustees, to raise a sum by sale or mortgage, you must come into this court on the death of one of the trustees." [1] The survivorship of the trust will not be defeated, because the settlement contains a power for restoring the original number of trustees by new appointment,[2] unless there is something in the instrument that specially manifests such an intention.[3] Where an act of Parliament declared that "survivors should, and they were thereby required" to appoint new trustees, the court expressed an opinion that the clause was not imperative, but simply directory.[4]

§ 415. The general rule is, that one trustee shall not be responsible or liable for the acts or defaults of his cotrustee. This rule was established in the time of Charles the First, after very great consideration and consultation by the judges in the case of Townley *v.* Sherborne,[5] wherein it was resolved "that

Att. Gen. *v.* Litchfield, 5 Ves. 825; Att. Gen. *v.* Cumings, 2 Y. & C. Ch. 139; Stater *v.* Wheeler, 9 Sim. 156. [See *infra*, § 491 *et seq.*]

[1] Lane *v.* Debenham, 11 Hare, 188; Hind *v.* Poole, 1 K. & J. 383.

[2] Doe *v.* Godwin, 1 D. & R. 259; Att. Gen. *v.* Cuming, 2 Y. & C. Ch. 139; Jacob *v.* Lucas, 1 Beav. 436; Warburton *v.* Sandys, 14 Sim. 622; Hall *v.* Dewes, Jac. 193; Att. Gen. *v.* Floyer, 2 Vern. 748; Townsend *v.* Wilson, 1 B. & A. 608.

[3] Foley *v.* Wontner, 2 J. & W. 245; Jacob *v.* Lucas, 1 Beav. 436.

[4] Doe *v.* Godwin, 1 D. & R. 259. And see Att. Gen. *v.* Locke, 3 Atk. 166; Stamper *v.* Millar, id. 212; Rex *v.* Flockwood, 2 Chit. 252.

[5] Townley *v.* Sherborne, Bridg. 35; 3 Lead. Cas. Eq. 718, and notes; Bowers *v.* Seeger, 8 Watts & S. 222; Sinclair *v.* Jackson, 8 Cow. 543; Van-

where lands or leases were conveyed to two or more upon trust, that one of them receives all or the most part of the profits, and after dyeth or decayeth in his estate, his cotrustee shall not be charged or compelled in chancery to answer for the receipts of him so dying or decayed, unless some practice, fraud, or evil dealing appear to have been in them to prejudice the trust; *for they being by law joint-tenants*, or tenants in common, every one by law may receive either all or as much of the profits as he can come by; it is no breach of trust to permit one of the trustees to receive all or the most part of the profits; it falling out many times that some of the trustees live far from the lands, and are put in trust out of other respects than to be troubled with the receipt of the profits. But his lordship and the said judges did resolve, that if, upon the proofs or circumstances, the court should be satisfied that there had been any *dolus malus*, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits, he should be charged though he received nothing." And the same doctrine has been acted upon from that day to this.[1] Connivance, co-operation, permission, acquiescence, or participation will bring liability;[2] and ignorance of the default of a cotrustee if it results from neglect is no excuse, as where one trustee collects a fund and keeps it without reinvestment, the other trustees may be liable.[3] (*a*)

dever's App., 8 Watts & S. 405. And see Leigh *v.* Barry, 3 Atk. 584; Anon. 12 Mod. 560; Taylor *v.* Benham, 5 How. 233; Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Ray *v.* Doughty, 4 Blackf. 115; Jones's App., 8 Watts & S. 143; Peters *v.* Beverly, 10 Peters, 532; 1 How. 134; Taylor *v.* Roberts, 3 Ala. 86; State *v.* Guilford, 18 Ohio, 509; Latrobe *v.* Tiernan, 2 Md. Ch. 480; Worth *v.* McAden, Dev. & B. Eq. 109; Boyd *v.* Boyd, 3 Grat. 114; Glenn *v.* McKim, 3 Gill, 366; Stell's App., 10 Penn. St. 149; Banks *v.* Wilkes, 3 Sandf. Ch. 99. And see Royall *v.* McKenzie, 25 Ala. 363.

[1] Ibid. [Bruen *v.* Gillet, 115 N. Y. 10; Purdy *v.* Lynch, 145 N. Y. 462; Fesmire's Estate, 134 Pa. St. 67, 83; Graham's Estate (No. 1), 218 Pa. St. 344; Colburn *v.* Grant, 16 App. D. C. 107; 181 U. S. 601; Litzenberger's Estate, 85 Hun, 512; Laurel County Court *v.* Trustees, 93 Ky. 379.]

[2] Hinson *v.* Williamson, 74 Ala. 180; Knight *v.* Haynie, id. 542.

[3] Richards *v.* Seal, 2 Del. Ch. 266. [Fesmire's Estate, 134 Pa. St. 67, 83.]

(*a*) In the administration and management of the affairs of a trust it is usually impracticable for every trustee to actually participate in

§ 416. In the same case of Townley *v.* Sherborne, it was determined that if the trustees joined in signing a receipt for

every act. To some extent they may delegate to each other the merely ministerial duties of management, and each is entitled to rely upon the honesty and prudence of the other unless he has notice of facts which should lead him to distrust the other. On the other hand, a trustee cannot escape the responsibility for the proper management and the safety of the trust property by remaining passive and allowing his cotrustee to have the control and management of the property. A trustee's liability for losses due to the dishonesty or culpable mismanagement of his cotrustee must depend largely upon the circumstances of each case, and, except where he has delegated some positive duty requiring the exercise of his discretion, depends upon whether or not he has acted in the matter with the caution and prudence which a reasonable man would exercise in the conduct of his own affairs. He is neither "an insurer of the trust funds against the possibility of loss, nor a surety for his cotrustee." Fesmire's Estate, 134 Pa. St. 67, 83; Bermingham *v.* Wilcox, 120 Cal. 467; *In re* Gasquoine, [1894] 1 Ch. 470.

Liability for acts of his cotrustee in which he has not participated and which he has not sanctioned rests upon neglect of some duty which has made the loss possible. Graham's Estate, 218 Pa. St. 344; Colburn *v.* Grant, 16 App. D. C. 107; 181 U. S. 601; Barroll *v.* Foreman, 88 Md. 188; Bruen *v.* Gillet, 115 N. Y. 10; Dover *v.* Denne, 3 Ont. L. Rep. 664; Shepherd *v.* Harris, [1905] 2 Ch. 310; Speight *v.* Gaunt, 9 App. Cas. 1. See also *infra*, § 848.

Where funds for investment have come into the hands of one trustee, the other has the duty of seeing for himself that they have been properly invested, and if he fails to do so he is liable for a loss made possible by his negligence. He is not protected in taking the cotrustee's word that he has properly invested the funds. Thompson *v.* Finch, 8 De G., M. & G. 560; Bermingham *v.* Wilcox, 120 Cal. 467; Beatty's Estate, 214 Pa. St. 449; Fesmire's Estate, 134 Pa. St. 67, 83; Strong's Estate, 160 Pa. St. 13; Robinson *v.* Harkin, [1896] 2 Ch. 415. So also of neglect to ascertain whether or not a cotrustee has properly deposited to the credit of the trust account a large sum which has been paid to him. Wynne *v.* Tempest, [1897] W. N. 43.

It is sometimes said that a trustee who "unnecessarily" does any act by which trust funds are transferred from the joint possession of all to the sole possession of one is responsible for a resulting misappropriation by the latter, but the word "unnecessarily" is not to be taken in its literal sense. It has been said that an act "is unnecessary when done outside the usual course of business pertaining to the subject," and that "the true question is, taking into consideration all the facts and circumstances, has the trustee employed such prudence and diligence in the discharge of his duties as in general men of average prudence and discretion would under like circumstances employ in their

money, they should each be responsible for it.[1] (a) But where the administration of a trust is vested in several trustees, they

[1] Townley *v.* Sherborne, Bridg. 35; Spalding *v.* Shalmer, 1 Vern. 303; Sadler *v.* Hobbs, 2 Bro. Ch. 114; Bradwell *v.* Catchpole, cited 3 Swanst. 78, note (a); Fellowes *v.* Mitchell, 2 Vern. 516.

own affairs?" Purdy *v.* Lynch, 145 N. Y. 462. In the cited case where three trustees had the duty of paying out trust funds to a large number of beneficiaries and two of them allowed the third to have the custody of the funds and intrusted him with paying them out, the court, applying the foregoing test, held that the two were not liable for misappropriations of the one to whom they had left control.

Similar language was used in Shepherd *v.* Harris, [1905] 2 Ch. 310, where the dishonest trustee, who was a broker, obtained exclusive control of the trust funds in the course of his employment as a broker in the sale of certain trust securities for the purpose of purchasing certain others. As the usual business precautions were taken and as the defaulting trustee was a broker of good standing at the time, the innocent trustee was held not to be liable. See also *In re* Gasquoine, [1894] 1 Ch. 470.

Allowing a cotrustee to have the custody of non-negotiable securities and to collect and pay over the income to the persons entitled has been held not such negligence as will render a trustee liable to make good the default of the cotrustee in paying over the income. Dyer *v.* Riley, 51 N. J. Eq. 124; Fesmire's Estate, 134 Pa. St. 67, 83. See also Colburn *v* Grant, 16 App. D. C. 107, 181 U. S. 601.

It has been held that a trustee who has no cause to suspect that his cotrustee is dishonest, is not liable for the latter's misappropriation of unregistered negotiable bonds which were kept in a place of deposit to which either trustee had access without the other. *In re* Halstead, 89 N. Y. S. 806, 95 N. Y. S. 1131. But the innocent trustee has been held liable to make good his cotrustee's misappropriations of such securities when, after receiving notice of a misuse of the securities and compelling their return to the place of deposit, he took no steps to prevent a similar misuse, other than to exact a promise from the delinquent trustee. Matter of Howard, 97 N. Y. S. 23, 110 App. Div. 61 (affirmed 185 N. Y. 539); *In re* Adams' Estate, 221 Pa. St. 77. See also Matter of Westerfield, 63 N. Y. S. 10, 48 App. Div. 542. And the negligence in such a case has been held to be a "willful" breach of trust. Matter of Howard, *ubi supra*.

It has also been held that a trustee is negligent in allowing a cotrustee an opportunity to collect a note after the latter has become insolvent. Darnaby *v.* Watts, 21 S.

(a) In view of later decisions it seems doubtful if much should usually turn upon mere receipt of the trust funds. See Purdy *v.* Lynch, 145 N. Y. 462; Bruen *v.* Gillet, 115 N. Y. 10; see also note *a*, § 415.

must all join in signing a receipt for the principal or capital sum of the trust fund, and it is now established that a trustee who joins in the receipt for *conformity*, but without receiving any of the money, shall not be answerable for the misapplication of the money by his cotrustee who receives it; as it would be tyranny to punish a trustee for an act which the nature of his office compelled him to do.[1] But in such case the burden is on the trustee to prove that his acknowledgment of the receipt of the money was merely for conformity, and that in fact he received none of the money, and that his cotrustee received it all.[2] If there is

[1] *In re* Freyer, 3 K. & J. 317; Brice *v.* Stokes, 11 Ves. 324; 3 Lead. Cas. Eq. 730; Harden *v.* Parsons, 1 Eden, 147; Westley *v.* Clarke, id. 359; Heaton *v.* Marriott, cited Pr. Ch. 173; *Ex parte* Belchier, Amb. 219; Leigh *v.* Barry, 3 Atk. 584; Fellowes *v.* Mitchell, 1 P. Wms. 81; Gregory *v.* Gregory, 2 Y. & C. 316; Sadler *v.* Hobbs, 2 Bro. Ch. 117; Chambers *v.* Minchin, 7 Ves. 198; Shipbrook *v.* Hinchinbrook, 16 Ves. 479; Harrison *v.* Graham, 3 Hill's MS. 239, cited 1 P. Wms. 241; Carsey *v.* Barsham, cited 1 Sch. & Lef. 344; Anon. Mose. 35; *Ex parte* Wackerbath, 2 G. & J. 151; Kip *v.* Deniston, 4 Johns. 23; Jones's App., 8 Watts & S. 147; Irwin's App., 35 Penn. St. 294; Sterrett's App., 2 Penn. 419; Wallis *v.* Thornton, 2 Brock. 434; Monell *v.* Monell, 5 Johns. Ch. 283; Deaderick *v.* Cantrell, 10 Yerg. 264; Aplyn *v.* Brewer, Pr. Ch. 172; Churchill *v.* Hodson, 1 P. Wms. 241; Att. Gen. *v.* Randell, 7 Bacon, Ab. 184; Murrell *v.* Cox, 2 Vern. 173; Terrell *v.* Mathews, 11 L. J. (N. S.) Ch. 31; McMurray *v.* Montgomery, 2 Swanst. 374; Griffin *v.* Macauley, 7 Grat. 476; Worth *v.* McAden, 1 Dev. & B. Eq. 199; Stowe *v.* Bowen, 99 Mass. 194.

[2] Brice *v.* Stokes, 11 Ves. 324; Scurfield *v.* Howes, 3 Bro. Ch. 95, note (8); Chambers *v.* Minchin, 7 Ves. 186; Monell *v.* Monell, 5 Johns. Ch. 394; Hall *v.* Carter, 8 Ga. 388; Manahan *v.* Gibbons, 19 Johns. 427; Martindale *v.* Picquot, 3 K. & J. 317; Cottam *v.* Eastern Counties Ry. Co., 1 John. & H. 243.

W. 333 (Ky. 1893). The rule is stated as follows in the last cited case: "Although it is a well-established general rule that one trustee is not responsible for the waste of his cotrustee, it is equally well settled that if the trustee connives at the waste or misappropriation of his cotrustee or has reason to believe that he will waste or misappropriate the trust estate, or that his condition has so changed as to make it unsafe for him to control the estate, it is the duty of the trustee, upon being informed of these conditions, to take prompt action to secure the estate against the apprehended waste or misappropriation; for it is well settled that a trustee is responsible for all loss by his associate, caused by his actual or constructive negligence or connivance."

no evidence upon this point, all the trustees who join in signing the receipt will be held responsible *in solido*, on the ground that the acknowledgment in the receipt is *prima facie* evidence of the facts stated.[1] At law the receipt is *conclusive* evidence and estops the trustee from denying that he received any of the money;[2] but a court of equity rejects estoppels, and pursues the actual truth, and will determine and decree according to the verity and justice of the fact.[3] But if a trustee, signing a receipt, receives any part of the money, and it does not appear how much, he will be answerable for the whole; as, where he mixes his corn with another's heap, he must lose the whole.[4]

§ 417. It was said in Townley *v.* Sherborne,[5] that individuals are sometimes joined in a trust, where it is not expected that they are to take an active part in its management; and it is well settled that each of several trustees is not bound to take upon himself the active management of every part of a trust; and it seems that the management of the whole may be left to any one of the number.[6] So trustees may apportion their duties among themselves, as where one of two guardians accepted the trust, saying he would take care of the real estate, but would have nothing to do with receiving and disbursing money, which duties the other guardian assumed, it was held that the former was not answerable for the defaults of the latter.[7] It sometimes

[1] Ibid.; Westley *v.* Clarke, 1 Eden, 359; Maccubbin *v.* Cromwell, 7 G. & J. 157; Hengst's App., 24 Penn. St. 413. The answer of the trustee in chancery would not be sufficient evidence unless responsive to the bill. Monell *v.* Monell, 5 Johns. Ch. 283; Maccubbin *v.* Cromwell, 7 Gl. & J. 157. But as parties are now witnesses, the rule is not very important.

[2] Harden *v.* Parsons, 1 Eden, 147.

[3] Ibid.; Fellowes *v.* Mitchell, 1 P. Wms. 83.

[4] Ibid.

[5] Bridg. 35.

[6] Ray *v.* Doughty, 4 Blackf. 115; Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; State *v.* Guilford, 18 Ohio, 500. [Colburn *v.* Grant, 16 App. D. C. 107; 181 U. S. 601; Graham's Estate (No. 1), 218 Pa. St. 344; Purdy *v.* Lynch, 145 N. Y. 462; Fesmire's Estate, 134 Pa. St. 67, 83; Duckworth *v.* Ocean Steamship Co., 98 Ga. 193; Dover *v.* Denne, 3 Ont. L. Rep. 664.]

[7] Jones's App., 8 Watts & S. 143. But see Gill *v.* Att. Gen., Hardr. 314.

happens that the convenience or necessities of business require the trust funds to be in the hands of one trustee. If a loss happens from the default of such trustee, the others will not be held to answer. As where a bond is to be collected by one trustee, or money is put in the hands of one to be paid away; or where a fund was given to three trustees, one in London and two in Cornwall, to build an almshouse in London, it was held that the fund was properly in the hands of the trustee in London, and that during the construction of the almshouse the others were not answerable for the loss of part of it by his insolvency.[1] The same rule applies where the shares of a company are required to be in the name of a single individual;[2] and so where the settlor appoints one of the trustees to perform certain acts, or make certain sales, or receive certain moneys.[3] But if trustees expressly agree to be answerable for each other, courts will hold them to their agreement.[4] So this power to apportion the duties of the trust, or the rule that a trustee not receiving the money shall not be liable for the defaults of his cotrustees, does not excuse him for not exercising a general superintendence and care over the trust, or for not intervening, if the fact come to his knowledge that the fund is unsafe, or that it ought not longer to remain under the control of the other trustee.[5] Even

[1] Att. Gen. *v.* Randell, 2 Eq. Cas. Ab. 742; 7 Bacon, Ab. 184; Clough *v.* Bond, 3 M. & Cr. 497; Townley *v.* Sherborne, Bridg. 35; 3 Lead. Cas. Eq. 718, notes; *Ex parte* Griffin, 2 G. & J. 114; Bacon *v.* Bacon, 5 Ves. 331; Hovey *v.* Blakeman, 4 id. 596; Williams *v.* Nixon, 2 Beav. 472; Curtis *v.* Mason, 12 L. J. (N. S.) Ch. 442; Broadhurst *v.* Balguy, 1 N. C. C. 28; Hanbury *v.* Kirkland, 3 Sim. 265. But see Cowell *v.* Gatchcombe, 27 Beav. 568.

[2] Consterdine *v.* Consterdine, 31 Beav. 331.

[3] Davis *v.* Spurling, 1 R. & M. 64; Paddon *v.* Richardson, 7 De G., M. & G. 563; Birls *v.* Betty, 6 Madd. 90.

[4] Leigh *v.* Barry, 3 Atk. 583; Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 2 Pick. 535.

[5] Clark *v.* Clark, 8 Paige, 153; Evans's Est. 2 Ash. 470. [Matter of Howard, 97 N. Y. S. 23, 110 App. Div. 61 (affirmed 185 N. Y. 539); *In re* Adams's Estate, 221 Pa. St. 77; Darnaby *v.* Watts, 21 S. W. 333 (Ky. 1893). Even when he has been excluded from the management and control of the trust property with the consent of the *cestui*. Matter of Westerfield, 63 N. Y. S. 10, 48 App. Div. 542.]

a direct provision in the deed of settlement, that trustees shall not be liable for the defaults of their cotrustees, does not excuse them from this general care and superintendence, and from the duty of intervening, if they hear any fact tending to call for their intervention; nor will it justify them in paying over the money to the sole credit of one trustee; and generally it will not authorize them to do any acts which would be a breach of trust, if such clause was not in the deed or will.[1] While one trustee is not liable for the defaults of cotrustees which he has not the means of preventing or guarding against, yet he must exercise due care in the approval of or acquiescence in the acts of his associates.[2] If the trustees join in accounting, and hold themselves out, in joint accounts, as acting together and as jointly liable, they will be estopped to deny their joint liability to those who have acted on a knowledge of such accounts; and this would be almost conclusive evidence of a joint liability in all cases.[3] So, if the will makes them all liable for the acts of each, or contemplates the joint action and joint liability of all, they cannot excuse themselves if they accept the trust.[4]

§ 418. Though a trustee may join in a receipt without receiving any of the money, and may not be liable or answerable for

[1] Mucklow *v.* Fuller, Jac. 198; Williams *v.* Nixon, 2 Beav. 472; Leigh *v.* Barry, 3 Atk. 584; Dawson *v.* Clark, 18 Ves. 254; Underwood *v.* Stevens, 1 Mer. 712; Hanbury *v.* Kirkland, 3 Sim. 265; Langston *v.* Olivant, Coop. 33; Brumridge *v.* Brumridge, 27 Beav. 5; Rehden *v.* Wesley, 29 id. 213; Drosier *v.* Brereton, 15 id. 221; Fenwick *v.* Greenwell, 10 id. 418; Pride *v.* Fooks, 2 id. 430; Sadler *v.* Hobbs, 2 Bro. Ch. 114; Bone *v.* Cook, McClel. 168; 13 Price, 332; Clough *v.* Dixon, 8 Sim. 594; 3 M. & Cr. 490; Dix *v.* Burford, 19 Beav. 409; Litchfield *v.* White, 3 Selden, 438; Wilkins *v.* Hogg, 3 Gif. 116; 10 W. R. 47; Worral *v.* Harford, 8 Ves. 8; Moyle *v.* Moyle, 2 R. & M. 170; Munch *v.* Cockerell, 9 Sim. 339; 5 M. & Cr. 178; Macdonnel *v.* Harding, 7 Sim. 176. [Matter of Howard, 97 N. Y. S. 23, 110 App. Div. 61 (affirmed 185 N. Y. 539).] But a testator can draw the indemnity clause so broad that cotrustees will not be liable even for gross negligence. Wilkins *v.* Hogg, 3 Gif. 116; 10 W. R. 47. [2] Earle *v.* Earle, 93 N. Y. 104.

[3] Hengst's App., 24 Penn. St. 413; Clark's App., 18 id. 175; Duncommun's App., 17 id. 268.

[4] Burrill *v.* Sheil, 2 Barb. 457; Contee *v.* Dawson, 2 Bland, 264; Wood *v.* Wood, 5 Paige, 596; Weigand's App., 28 Penn. St. 471.

it, yet he may be responsible for the whole, though he receives none; thus, if knowing that his cotrustee has no character or credit, and is unfit to manage the trust funds, he suffers the money to be received by him, or to remain in his hands, he will be answerable, as if he receives it himself, on the ground that he has committed a breach of trust in not using due care and diligence;[1] and the same rule will apply if he suffers the money to remain in the hands of his cotrustee, however competent and responsible, longer than is necessary.[2] (a) It is also the duty of the trustee to ascertain the actual facts, and not rely upon the bare assertion of his cotrustee, in relation to the condition of the trust fund.[3] Thus, where two trustees allowed their cotrustee to open a box at their banker's in which were stocks and bonds, and he converted some of the trust property to his own use, but assured his cotrustees that all was right, they were held to answer for the loss, because they had not taken the pains to ascertain the facts, but had relied upon the assertion of their

[1] Clark *v.* Clark, 8 Paige, 153; Wyman *v.* Jones, 4 Md. Ch. 500; Elmendorf *v.* Lansing, 4 Johns. Ch. 562; Ringgold *v.* Ringgold, 1 H. & G. 11; State *v.* Guilford, 15 Ohio, 593; Pim *v.* Downing, 11 Serg. & R. 71; Evans's Est., 2 Ash. 470; Jones's App., 8 Watts & S. 147. But the circumstances must be such as would put a reasonable man upon his guard in relation to his own property. Jones's App., 8 Watts & S. 147; Lincoln *v.* Wright, 4 Beav. 427; Lockwood *v.* Riley, 1 De G. & J. 464. [Darnaby *v.* Watts, 21 S. W. 333 (Ky. 1893); *In re* Adams's Estate, 221 Pa. St. 77.]

[2] Brice *v.* Stokes, 11 Ves. 319; *Re* Freyer, 3 K. & J. 317; Gregory *v.* Gregory, 2 Y. & C. 313; Bone *v.* Cook, McClel. 168; Thompson *v.* Finch, 22 Beav. 316; Lincoln *v.* Wright, 4 Beav. 427.

[3] Thompson *v.* Finch, 22 Beav. 316; 8 De G., M. & G. 560; Hanbury *v.* Kirkland, 3 Sim. 265; Bates *v.* Underhill, 3 Redf. (N. Y.) 365. [Bermingham *v.* Wilcox, 120 Cal. 467; Beatty's Estate, 214 Pa. St. 449; Fesmire's Estate, 134 Pa. St. 67, 83; Robinson *v.* Harkin, [1896] 2 Ch. 415.]

(a) The same is true of securities which can be negotiated by one trustee without the knowledge of the other. *In re* Adams's Estate, 221 Pa. St. 77; Matter of Howard, 97 N. Y. S. 23,110 App. Div. 61 (affirmed 185, N. Y. 539). It would seem that the word "necessary" is used in the sense of "advantageous and prudent." Purdy *v.* Lynch, 145 N. Y. 462; *In re* Halstead, 89 N. Y. S. 806; 95 N. Y. S. 1131; Dover *v.* Denne, 3 Ont. L. Rep. 664.

cotrustee.[1] So trustees must ascertain the condition of the funds at all times within which a reasonable man should ascertain the condition of his own property; as where a mortgage to three trustees had been paid off, and the money came to the hands of one, and was invested in bills and notes of the East India Company payable in two years, and these were paid into the hands of the same trustee to whom the mortgage had been paid, and the acting trustee asked to have the money remain in his hands on a mortgage to be given; and it so remained for a year, no mortgage being executed, the other trustees taking no active steps for several years to know the actual condition of the trust fund; this was held to be a breach of trust, and they were decreed to make good the loss.[2] A trustee is bound to inquire and ascertain for what purpose a cotrustee desires the money; what investments he proposes to make, and what securities he proposes to take, and he must take pains to see that the proposed investments are actually made.[3] If a trustee performs his duty in these respects, and his cotrustee, in spite of these precautions, squanders or wastes the fund, he will not be answerable therefor. So if the cotrustee gets possession of the trust fund by a fraud or crime, the others will not be liable.[4] But if a trustee receive any portion of the funds from a transaction, he must personally see to the application of them: he cannot pass them over to his cotrustee for investment or distribution; and if he do so, he will be personally responsible for the acts and defaults of such cotrustee.[5]

[1] Mendes *v.* Guedalla, 2 John. & H. 259.

[2] Walker *v.* Symonds, 3 Swanst. 1. See Thompson *v.* Finch, 22 Beav. 326.

[3] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Thompson *v.* Finch, 22 Beav. 326. [Fesmire's Estate, 134 Pa. St. 67, 83; Beatty's Estate, 214 Pa. St. 449; Stong's Estate, 160 Pa. St. 13; Bermingham *v.* Wilcox, 120 Cal. 467; Thompson *v.* Finch, 8 De G., M. & G. 560.]

[4] Cottam *v.* Eastern Counties R. R. Co., 1 John. & H. 243; Mendes *v.* Guedalla, 2 John. & H. 259; Barnard *v.* Bagshaw, 9 Jur. (N. S.) 220; 3 De G., J. & S. 355; Trutch *v.* Lamprell, 20 Beav. 116; Baynard *v.* Woolley, id. 583; Griffiths *v.* Porter, 25 Beav. 236; Eager *v.* Barnes, 31 Beav. 579; Margetts *v.* Perks, 34 L. J. Ch. 109.

[5] Sterrett's App., 2 Penn. 219; Clark's App., 18 Penn. St. 175; Nyce's

§ 419. In the original case of Townley *v.* Sherborne, it was determined that if there was any *dolus malus*, or any evil practice, or fraud, or ill intent in him that permitted his companion to receive the whole fund, *he* should be charged that received nothing.[1] Thus, if one trustee stands by and sees his cotrustee misemploy or misapply the money;[2] or acquiesces in the wrongful use of the money by his cotrustee;[3] or if a trustee acquiesces in his cotrustee's retaining the money in his hands unnecessarily;[4] or if he connives at a breach of trust by his cotrustee;[5] or conceals such breach;[6] or makes any misrepresentation respecting the investment of the fund;[7] or if he does any act to put the money out of his own control and into the sole power of his cotrustee, as by joining in a conversion of the property and allowing his cotrustee to receive and retain the proceeds exclusively;[8] or if he makes over the trust fund exclusively to his cotrustee;[9] or executes a power of attorney to him;[10] or

App., 5 Watts & S. 254; Commonwealth *v.* McAlister, 28 Penn. St. 480; Deaderick *v.* Cantrell, 10 Yerg. 263; McMurray *v.* Montgomery, 2 Swanst. 374; Hughlett *v.* Hughlett, 5 Humph. 453; Mumford *v.* Murray, 6 Johns. Ch. 1; Ray *v.* Doughty, 4 Blackf. 115; Worth *v.* McAden, 1 Dev. & B. Eq. 199; Graham *v.* Davidson, 2 Dev. & B. Eq. 155; Sparhawk *v.* Buell, 9 Vt. 41; Edmonds *v.* Grenshaw, 14 Peters, 166.

[1] Townley *v.* Sherborne, Bridg. 35; Mucklow *v.* Fuller, Jac. 198.

[2] Williams *v.* Nixon, 2 Beav. 475.

[3] Booth *v.* Booth, 1 Beav. 125; Dix *v.* Burford, 19 Beav. 409.

[4] Lincoln *v.* Wright, 4 Beav. 427; James *v.* Frearson, 1 N. C. C. 370; Evans's Est., 2 Ash. 470; Pim *v.* Downing, 11 Serg. & R. 71; Styles *v.* Guy, 1 H. & Tw. 523; 1 Mac. & Gor. 422; 16 Sim. 230; Scully *v.* Delany, 2 Ir. Eq. 165; Egbert *v.* Butter, 21 Beav. 560; West *v.* Jones, 1 Sim. (N. S.) 205.

[5] Boardman *v.* Mosman, 1 Bro. Ch. 68. [6] Ibid.

[7] Bates *v.* Scales, 12 Ves. 402.

[8] Sadler *v.* Hobbs, 2 Bro. Ch. 114; Chambers *v.* Minchin, 7 Ves. 198; Hanbury *v.* Kirkland, 3 Sim. 265; Clough *v.* Bond, 3 M. & Cr. 496; Scurfield *v.* Howes, 3 Bro. Ch. 90; Shipbrook *v.* Hinchinbrook, 11 Ves. 252; Brice *v.* Stokes, id. 319; Underwood *v.* Stevens, 1 Mer. 713; Bradwell *v.* Catchpole, 3 Swanst. 78, n.; Williams *v.* Nixon, 2 Beav. 472; Broadhurst *v.* Balguy, 1 N. C. C. 16; Curtis *v.* Mason, 12 L. J. (N. S.) Ch. 443.

[9] Keble *v.* Thompson, 3 Bro. Ch. 111; Langford *v.* Gascoyne, 11 Ves. 333; French *v.* Hobson, 9 Ves. 103; Joy *v.* Campbell, 1 Sch. & Lef. 341; Moses *v.* Levi, 3 Y. & C. 359.

[10] Harrison *v.* Graham, 1 P. Wms. 241, n.; Hewett *v.* Foster, 6 Beav.

signs a draft or order, or assigns a mortgage, enabling his cotrustee to deal with the investments exclusively;[1] or if he suffers the trust fund to be invested in the sole name of his cotrustee;[2] or to be paid into bank to his sole credit,[3] — in all these cases there is an actual or constructive breach of trust, which renders all the trustees liable for any loss; and so if a trustee does not collect a debt due to the estate from his cotrustee.[4] In all cases, if a trustee becomes aware of any fact tending to show that his cotrustee is committing a breach of trust, or if he learns any fact endangering the trust fund, he must communicate it to his cotrustees or make application to the court,[5] and take active measures to protect the fund, or he will be personally liable for its loss. If a trustee himself receives the trust fund or part of it, and pays it over to his cotrustee, who wastes it, he will be liable for it;[6] and so if he permits his cotrustee to receive money, having notice that it will be misapplied, or if he is guilty of any negligence or want of reasonable care.[7]

§ 419 *a*. If the trust instrument gives the *cestui* a right to appoint one to whom the trustee shall convey, this power cannot be exercised by will, for the will takes effect only at the death

259; Monell *v*. Monell, 5 Johns. Ch. 283; Pim *v*. Downing, 11 Serg. & R. 66; Duncommun's App., 17 Penn. St. 268.

[1] Sadler *v*. Hobbs, 2 Bro. Ch. 114; Broadhurst *v*. Balguy, 1 Y. & C. C. C. 16.

[2] Walker *v*. Symonds, 3 Swanst. 58.

[3] Clough *v*. Bond, 3 M. & Cr. 490.

[4] Mucklow *v*. Fuller, Jac. 198; Candler *v*. Tillett, 22 Beav. 254.

[5] Wayman *v*. Jones, 4 Md. Ch. 506; Chertsey *v*. Market, 6 Price, 279; Powlet *v*. Herbert, 1 Ves. Jr. 297; Franco *v*. Franco, 3 Ves. 75; Walker *v*. Symonds, 3 Swanst. 71; Brice *v*. Stokes, 11 Ves. 319; Olive *v*. Court, 8 Price, 166; Att. Gen. *v*. Holland, 2 Y. & C. 699; Booth *v*. Booth, 1 Beav. 125; Williams *v*. Nixon, 2 Beav. 472; Blackwood *v*. Burrows, 2 Conn. & Laws. 477; Holcomb *v*. Holcomb, 2 Beas. 413; Crane *v*. Hearn, 26 N. J. Eq. 378.

[6] Mumford *v*. Murray, 6 Johns. Ch. 1; Monell *v*. Monell, 5 Johns. Ch. 283; Clark *v*. Clark, 8 Paige, 153; Ringgold *v*. Ringgold, 1 H. & G. 11; Glenn *v*. McKim, 3 Gill, 366; Evans's Est., 2 Ash. 470; Graham *v*. Austin, 2 Grat. 273; Graham *v*. Davidson, 2 Dev. & B. Eq. 155. [But see *supra*, § 417.]

[7] Schenck *v*. Schenck, 1 Green, Ch. 174.

of the *cestui*, and that very event terminates the relation of trust between the trustee and *cestui*.[1] This reasoning seems very flimsy, and likely to produce injustice if applied to cases where the facts are different from those in the above case, where the title was held to have passed by the will itself, though not by the trustee's deed in pursuance of the will.

§ 420. In a few cases, it has been held that, if trustees join in executing a power of sale, and one receive the money, all must be held answerable, if it is lost by the one that receives it.[2] These decisions have been founded upon the rule, that all the trustees who join in any transaction must be responsible for carrying it through. But they ignore the other rule, that a power must be strictly executed by all the persons to whom it is given, and that if a trustee joins in the power, and signs receipts for conformity, but receives none of the money, omits no duty, and does no act tending to a breach of the trust, he will not be held for a loss occasioned by a breach of trust by the other trustees. The great preponderance of authority is, that a sale under a power is not different from the execution of a receipt for the trust moneys.[3] If, however, a proper investment of the money received under a sale is once made, the liability of a non-acting trustee ceases under all the cases.[4] If a trustee renounces the trust, he, of course, cannot be liable for a breach of the trust by the other trustees, unless the trust fund

[1] Bradstreet *v.* Kinsella, 76 Mo. 63.

[2] Spencer *v.* Spencer, 11 Paige, 299; Ringgold *v.* Ringgold, 1 H. & G. 11; Maccubbin *v.* Cromwell, 7 G. & J. 157; Deaderick *v.* Cantrell, 10 Yerg. 263; Wallace *v.* Thornton, 2 Brocken. 434; Hauser *v.* Lehman, 2 Ired. Eq. 594.

[3] See *ante*, § 416, note; Griffin *v.* Macauley, 7 Grat. 476; Atcheson *v.* Robertson, 3 Rich. Eq. 132; Kip *v.* Deniston, 14 Johns. 23; Jones's App., 8 Watts & S. 147; Boyd *v.* Boyd, 3 Grat. 114. But if a trustee not only join in the execution of the power, but in receiving the money, he must keep it in the joint names of the trustees until invested; and he cannot pay it over to his cotrustee without being responsible for it if lost. Ringgold *v.* Ringgold, 1 H. & G. 11; Glenn *v.* McKim, 3 Gill, 366.

[4] Glenn *v.* McKim, 3 Gill, 366.

is in some manner in his hands, and is misapplied by him.[1] So the estate of a deceased trustee cannot be liable for a breach of trust by a surviving trustee, after the decease of a cotrustee.[2] (*a*) A distinction has been attempted between discretionary trusts and directory trusts as follows: it has been said, that, in discretionary trusts, that is, where the funds may be invested or employed according to the discretion of the trustees, a non-acting trustee will not be responsible for a misapplication of the fund by a cotrustee, unless he is guilty of some fraud or negligence that amounts to a breach of trust, upon the principles before stated;[3] but where a will is peremptory that certain investments shall be made by the trustees, all the trustees will be liable if the directions of the will are not carried out.[4] But these directory trusts may be executed by a part of the trustees, and the others may join for *conformity*, without doing more than is absolutely necessary to accomplish the trust, and therefore these trusts fall within the rule, that a trustee who signs receipts for *conformity*, and does no more, is not liable for a breach of trust by his cotrustee.[5] But if the will expressly provide for the joint action and responsibility of the executors or trustees, it will be binding upon all those who assume the trust, and render them all liable for any loss through the default of one.[6]

§ 420 *a*. Where there are two trustees, and the management of the trust is left to one, and the acting trustee commits a

[1] Claggett *v.* Hall, 9 G. & J. 80.

[2] Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 20 Pick. 535. [Graham's Estate (No. 1), 218 Pa. St. 344; *Re* Palk, 41 W. R. 28.]

[3] Deaderick *v.* Cantrell, 10 Yerg. 264; Thomas *v.* Scruggs, id. 400.

[4] Ibid.

[5] *Ante*, § 416, note.

[6] Weigand's App., 28 Penn. St. 471; Wood *v.* Wood, 5 Paige, 596; Contee *v.* Dawson, 2 Bland, 264; Burrill *v.* Sheil, 2 Barb. 457.

(*a*) If trustees have resigned with the certainty that their successors will commit a breach of trust which they themselves had refused to do, it has been intimated that they will be liable for the loss if the facts show that their resignation was for that purpose. Head *v.* Gould, [1898] 2 Ch. 250.

breach of trust, the passive trustee is not entitled to indemnity from the acting trustee, unless there are some special circumstances, as where the acting trustee is solicitor for the trust, or has derived a personal benefit from his breach of trust.[1] (*a*)

§ 421. Following the rule as to cotrustees, executors are generally liable only for their own acts, and not for the acts of their coexecutors.[2] But while cotrustees may not be liable for money

[1] Bahin *v.* Hughes, 31 Ch. D. 390. [See *In re* Linsley, [1904] 2 Ch. 785.]

[2] Hargthorpe *v.* Milforth, Cro. Eliz. 318; Anon. Dyer, 210 a; Went. Ex. 306; Williams *v.* Nixon, 2 Beav. 472; Peters *v.* Beverly, 10 Peters, 532; 1 How. 134; Sutherland *v.* Brush, 7 Johns. Ch. 17; White *v.* Bullock, 20 Barb. 91; Douglas *v.* Satterlee, 11 Johns. 16; Banks *v.* Wilkes, 3 Sandf. Ch. 99; Moore *v.* Tandy, 3 Bibb, 97; Fennimore *v.* Fennimore, 2 Green, Ch. 292; Call *v.* Ewing, 1 Blackf. 301; Williams *v.* Maitland, 1 Ired. 92; Kerr *v.* Kirkpatrick, 8 Ired. Eq. 137; Clarke *v.* Blount, 2 Dev. Ch. 51; Clarke *v.* Jenkins, 3 Rich. Eq. 318; Knox *v.* Pickett, 4 Des. 190; Kerr *v.* Water, 19 Ga. 136; Charlton *v.* Durham, L. R. 4 Ch. 433; McKim *v.* Aulbach, 130 Mass. 481. [Cocks *v.* Haviland, 124 N. Y. 426; Nanz *v.* Oakley, 120 N. Y. 84.]

(*a*) Although the liability of a trustee to the *cestuis* for breaches of trust which were committed by his cotrustee without his actual participation is not that of a surety, cases sometimes arise where one trustee, though equally liable to the *cestuis*, is entitled to indemnity from the guilty cotrustee, *e. g.*, where one trustee has appropriated trust funds to his own use without the knowledge of the other, who, however, is liable, because his neglect of duty gave the other his opportunity. Bahin *v.* Hughes, 31 Ch. Div. 390.

A proper case for indemnity may arise also where a trustee unwittingly participated in a breach of trust through his reliance upon the advice of a solicitor trustee in a matter wherein the latter could be expected to have special knowledge. *In re* Linsley, [1904] 2 Ch. 785. See also McCartin *v.* Traphagan, 43 N. J. Eq. 323, 334. *Supra*, § 420 *a*.

But in general the courts will not give indemnity on the ground that one trustee was more active in the breach than the others or was more to blame than the others. Cases cited *supra*. A reason that is sufficient to entitle a trustee to indemnity from a cotrustee would usually be sufficient to relieve him from all liability to the *cestui* for the breach.

As to a trustee's right to indemnity from a *cestui* who has received the entire benefit of the breach of trust, see *infra*, § 848 and note. As to contribution among trustees who are jointly liable, see *infra*, § 848.

which they did not receive, although they joined in the receipt, coexecutors are always liable if they join in the receipts. (*a*) The reason is this: trustees *must* join in many acts, they having for the most part a joint power, while executors have a several power, over the estate. Each executor has an independent right over the personal property of his testator: he may sell it, and receive the purchase-money, and give receipts in his own name. If, therefore, an executor joins his coexecutor in signing a receipt, he does an unmeaning act, unless he intended to render himself jointly answerable for the money; and so the courts hold, that if an executor joins in giving a receipt for money he shall be answerable, whether he received any of it or permitted his coexecutor to receive the whole.[1] So, if an executor joins in executing a power of sale, given in the will, he will be responsible for the appropriation of the proceeds, though his coexecutor received all the money.[2] An attempt has been made

[1] Aplyn *v.* Brewer, Pr. Ch. 173; Murrill *v.* Cox, 2 Vern. 560; *Ex parte* Belchier, Amb. 219; Leigh *v.* Barry, 3 Atk. 584; Harrison *v.* Graham, 1 P. Wms. 241; cited Darwell *v.* Darwell, 2 Eq. Cas. Ab. 456; Gregory *v.* Gregory, 2 Y. & C. 316; Hall *v.* Carter, 8 Ga. 388; Monell *v.* Monell, 5 Johns. Ch. 283; Monahan *v.* Gibbons, 19 Johns. 427; Sterrett's App., 2 Penn. 219; Jones's App., 8 Watts & S. 143; Johnson *v.* Johnson, 2 Hill, Eq. 290; Clarke *v.* Jenkins, 3 Rich. Eq. 318. [See Fesmire *v.* Shannon, 143 Pa. St. 201.]

[2] Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Hauser *v.* Lehman, 2 Ired. Eq. 594; Mathews *v.* Mathews, 1 McMul. Eq. 410; Johnson *v.* Johnson, 2 Hill, Eq. 277; Murray *v.* Montgomery, 2 Swanst. 374; Deaderick *v.* Cantrell, 10 Yerg. 263.

(*a*) "At the present day, executors and administrators hold the assets of the estate in a fiduciary capacity. Their rights and liabilities, in respect of the fund in their hands, are very like those of trustees. But this way of regarding them is somewhat modern." Judge Holmes, in an article in 9 Harv. L. Rev., p. 42, which reviews instances of this change in the law. "The executor originally was nothing but a feoffee to uses. The heir was the man who paid his ancestor's debts and took his property. The executor did not step into the heir's shoes, and come fully to represent the person of the testator as to personal property and liabilities until after Bracton wrote his great treatise on the Laws of England." Ibid., in 12 Harv. L. Rev. 446. See also Walker *v.* Walker's Ex'r, 88 Ky. 615, 625; 3 Williams on Executors, (Am. ed.) 395, note.

to break down these distinctions between executors and trustees, and to establish the rule, that no intention to be jointly answerable can be inferred from the mere fact of signing a receipt without receiving any part of the money either separately or jointly.[1] And it appears now to be well settled, that if the joint receipt is purely nugatory, and no funds pass upon it into the hands of either executor, a coexecutor will not be liable.[2]. So far the doctrine of Lord Northington in Westerly *v.* Clarke has been agreed to, though the case itself seemed to go further.[3] Lord Harcourt, in Churchill *v.* Hobson,[4] started another distinction, that executors who joined in the receipt were liable to creditors, though they did not receive the money, while they were not liable to legatees or heirs; but this distinction has no standing in a court of equity, whatever may be the rule at law, and is now overruled.[5]

§ 422. If an executor does any act to transfer the property into the exclusive control of a coexecutor, and thus enables his coexecutor to misapply the same, he will be liable;[6] as if

[1] Westerly *v.* Clarke, 1 Ed. 537; 1 Dick. 329; Candler *v.* Tillett, 22 Beav. 257; Harden *v.* Parsons, 1 Ed. 147; Churchill *v.* Hobson, 1 P. Wms. 241, n.; Stell's App., 10 Penn. St. 152; McNair's App., 4 Rawle, 145; Ochiltree *v.* Wright, 1 Dev. & B. Eq. 336; Doyle *v.* Blake, 2 Sch. & Lef. 242; McKim *v.* Aulbach, 130 Mass. 481.

[2] Westerly *v.* Clarke, 1 Ed. 537; Scurfield *v.* Howes, 3 Bro. Ch. 94; Hovey *v.* Blakeman, 4 Ves. 608; Chambers *v.* Minchin, 7 Ves. 198; Brice *v.* Stokes, 11 Ves. 319; 3 Lead. Cas. Eq. 557, 558.

[3] Scurfield *v.* Howes, 3 Bro. Ch. 94; Hovey *v.* Blakeman, 4 Ves. 608; Chambers *v.* Minchin, 7 Ves. 198; Brice *v.* Stokes, 11 Ves. 325; 3 Lead. Cas. Eq. 725–759; Walker *v.* Symonds, 3 Swanst. 64; Shipbrook *v.* Hinchinbrook, 16 Ves. 479; Joy *v.* Campbell, 1 Sch. & Lef. 341; Doyle *v.* Blake, 2 id. 242.

[4] 1 P. Wms. 241; Gibbs *v.* Herring, Pr. Ch. 49; Harden *v.* Parsons, 1 Eden, 147.

[5] Sadler *v.* Hobbs, 2 Brown, Ch. 117; Doyle *v.* Blake, 2 Sch. & Lef. 239.

[6] Townshend *v.* Barber, 1 Dick. 356; Moses *v.* Levi, 3 Y. & C. 359; Candler *v.* Tillett, 22 Beav. 263; Clough *v.* Dixon, 3 Myl. & Cr. 497; Dines *v.* Scott, T. & R. 361; Edmonds *v.* Crenshaw, 14 Pet. 166; Sparhawk *v.* Buell, 9 Vt. 41; Adair *v.* Brimmer, 74 N. Y. 539. [*In re* Osborn, 87 Cal. 1; Walker *v.* Walker, 88 Ky. 615.]

he joins in drawing [1] or indorsing [2] a bill or note, or delivers or assigns securities to his coexecutor to enable him to receive the money alone,[3] or if he gives him a power of attorney,[4] or does any other act that enables his coexecutor to misapply the money; and so it was held, "that, if by agreement between the executors, one be to receive and intermeddle with such a part of the estate, and the other with such a part, each of them will be chargeable for the whole, because the receipts of each are pursuant to the agreement made betwixt both." [5] Probably the case would not now be followed, but it illustrates the principle.

§ 423. But if the act is such that it is absolutely necessary that the executors should all join in it, their liability will be put upon the same ground as the liability of trustees joining; as, if it is necessary that they should indorse a bill in order to collect it,[6] or that they should join in transferring stock.[7] But even if the act is indispensable, it is still the duty of the executor to see that it is consistent with a due execution of the trust,[8] and he must not rely upon the representations or assertions of his coexecutor, as to its necessity. He must use due diligence and make due investigations to ascertain if the representations are true; [9] as where the debts should have been long paid in the ordinary course of administration a coexecutor applied to the other to join in a sale of stocks to pay the debts, and the executor

[1] Sadler *v.* Hobbs, 2 Bro. Ch. 114.

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

[3] Candler *v.* Tillett, 22 Beav. 236.

[4] Doyle *v.* Blake, 2 Sch. & Lef. 231; Lees *v.* Sanderson, 4 Sim. 28; Kilbee *v.* Sneyd, 2 Moll. 200.

[5] Gill *v.* Att. Gen., Hardw. 314; Moses *v.* Levi, 3 Y. & C. 359; Lewis *v.* Nobbs, L. R. 8 Ch. D. 591.

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

[7] Chambers *v.* Minchin, 7 Ves. 197; Shipbrook *v.* Hinchinbrook, 11 Ves. 254; 16 Ves. 479; Terrell *v.* Mathews, 1 Mac. & G. 434, n.; Murrill *v.* Cox, 2 Vern. 570; Scurfield *v.* Howes, 3 Bro. Ch. 94; Moses *v.* Levi, 3 Y. & C. 359.

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

[9] Ibid.

inquired and learned that there were debts to be paid, but it afterwards appeared that the coexecutor had the money to pay the debts in his own hands; the executor who joined in conveying the stocks was held for the default of his coexecutor, on the ground of negligence in not knowing how the assets in the hands of the coexecutor were disposed of, and how it happened that the debts remained unpaid.[1]

§ 424. So an executor will be called upon to make good the loss of money that he allows to remain two years or any other unreasonable time in the hands of his coexecutor;[2] but he will not be called upon to repay that part which he can show that his coexecutor actually expended in the execution of the trust.[3] So, if an executor neglects for an unreasonable time to insist upon the payment of a debt to the estate due from his coexecutor, he will be liable to pay the debt himself.[4] (*a*)

§ 425. The same rules that apply to the powers and liabilities of coexecutors apply also to the powers and liabilities of joint administrators. There is one *dictum* that the liability of joint administrators is like the liability of cotrustees,[5] but it is well settled that the liability of joint administrators and coexecutors is identical.[6]

[1] Shipbrook *v.* Hinchinbrook, 11 Ves. 254; Bick *v.* Mathews, 3 Myl. & K. 312; Clark *v.* Clark, 8 Paige, 152.

[2] Scurfield *v.* Howes, 3 Bro. Ch. 91; Styles *v.* Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Lincoln *v.* Wright, 4 Beav. 427.

[3] Shipbrook *v.* Hinchinbrook, 11 Ves. 252; 16 Ves. 477; Williams *v.* Nixon, 2 Beav. 472; Kilbee *v.* Sneyd, 2 Moll. 213; Underwood *v.* Stevens, 1 Mer. 172; Brice *v.* Stokes, 11 Ves. 328; Hewett *v.* Foster, 6 Beav. 259.

[4] Styles *v.* Guy, 1 Mac. & G. 422; 1 H. & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Scully *v.* Delany, 2 Ir. Eq. 165; Candler *v.* Tillett, 22 Beav. 257; Carter *v.* Cutting, 5 Munf. 223.

[5] Hudson *v.* Hudson, 1 Atk. 460.

[6] Willand *v.* Fenn, 2 Ves. 267, cited; Murray *v.* Blatchford, 1 Wend. 583; O'Neall *v.* Herbert, 1 McMul. Eq. 495.

(*a*) An executor cannot escape liability for loss due to failure to call in loans on personal security by leaving the matter in the hands of his coexecutor. **Stong's Estate, 160 Pa. St. 13.**

§ 426. It must be borne in mind, that in the United States, administrators, executors, guardians, and a large class of trustees, are appointed by judges of probate, surrogates, ordinaries, or officers exercising a similar jurisdiction. All trustees appointed under wills, proved and recorded in probate courts, are appointed by decrees of the court in the same manner as executors. In many cases, a bond with sureties is required as a prerequisite to an appointment and qualification to act, unless such bond is expressly waived by the testator or the *cestui que trust*. This bond generally runs to the judge or some officer for the use and protection of those beneficially interested in the estate. If it is a joint bond, executed by all the joint administrators, guardians, coexecutors or cotrustees, it is in the nature of an agreement to be answerable for each other's acts and defaults. The remedy for a breach of trust in such cases is a suit upon the bond in the name of the proper person for the benefit of those interested, against all the joint makers and sureties of the bond; and any breaches of trust, committed by either or all of the trustees, may be given in evidence, and a judgment against all will be rendered, although the breach of trust was committed by one alone.[1] This joint liability of all the cotrustees under a joint bond results from the nature of the bond, and from the technical nature of an action at law for a breach of the bond by a breach of the trust. If, however, one of the coexecutors or cotrustees dies and a breach of trust is committed by the survivor after his death, the estate of the deceased executor cannot be made liable for the breach of the trust.[2] It will be seen at once, that very few of the rules heretofore stated in relation to

[1] Ames *v.* Armstrong, 106 Mass. 35; Hill *v.* Davis, 4 Mass. 137; Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 20 Pick. 535; Newcombe *v.* Williams, 9 Met. 525; Sparhawk *v.* Buell, 9 Vt. 41; Boyd *v.* Boyd, 1 Watts, 368; Bostick *v.* Elliott, 3 Head, 507; Braxton *v.* State, 25 Ind. 82; Jeffries *v.* Lawson, 39 Miss. 791; Gayden *v.* Gayden, 1 McMul. Eq. 435; Hughlett *v.* Hughlett, 5 Humph. 453; Clarke *v.* State, 6 G. & J. 288; South *v.* Hay, 3 Mon. 88; Anderson *v.* Miller, 6 J. J. Marsh. 568; Morrow *v.* Peyton, 8 Leigh, 54; Babcock *v.* Hubbard, 2 Conn. 539.

[2] Brazer *v.* Clark, 5 Pick. 96; Towne *v.* Ammidown, 20 Pick. 535.

the liabilities of executors or trustees for the acts and defaults of their coexecutors or cotrustees have any bearing upon the liability of cotrustees who have given a joint bond for the faithful execution of the trust. The statutes of many of the States, however, provide that separate bonds with sureties may be taken from each of the administrators, executors, guardians, or trustees, as the case may be. And where separate bonds are taken from each of the executors or trustees, the liability of the executor or trustee for the acts and defaults of his coexecutor or cotrustee would be governed by the rules and principles hereinbefore stated.[1] But if they sign a joint bond, they are jointly liable.[2]

§ 427. Trustees hold a position of trust and confidence. The legal title of the trust property is in them, and generally its whole management and control is in their hands. At the same time the beneficiaries of the trust may be women, or children, or persons incompetent to protect their own interests. For these reasons, to protect the weak and helpless on the one hand, and to prevent trustees from using their position and influence for their own gain, and to prevent them from hazarding the trust property upon what they may think to be profitable speculations, on the other, they are not allowed to make any profit from their office. They cannot use the trust property, nor their relation to it, for their own personal advantage. All the power and influence which the possession of the trust fund gives must be used for the advantage and profit of the beneficial owners, and not for the personal gain and emolument of the trustee. No other rule would be safe; nor would it be possible for courts to apply any other rule, as between trustee and *cestui que trust*.[3] (*a*)

[1] McKim *v.* Aulbach, 130 Mass. 481.

[2] Ames *v.* Armstrong, 106 Mass. 18.

[3] Burgess *v.* Wheate, 1 Ed. 226; Docker *v.* Somes, 2 Myl. & K. 664; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 126; Bentley *v.* Craven, 18 Beav. 75;

(*a*) A trustee will not be allowed to retain for himself a profit made from his dealings with trust property, although he is able to show that the

This rule is so stringent that Lord Eldon once sent a case to a master to inquire whether the privilege of sporting on the trust

Gubbins *v.* Creed, 2 Sch. & Lef. 218; *Ex parte* Andrews, 2 Rose, 412; Hamilton *v.* Wright, 9 Cl. & Fin. 111; Middleton *v.* Spicer, 1 Bro. Ch. 205; Sherrard *v.* Harborough, Amb. 165; *Re* Shrewsbury School, 1 Myl. & Cr. 647; Martin *v.* Martin, 12 Sim. 579; Cooke *v.* Cholmondeley, 3 Drew. 1; Hawkins *v.* Chappell, 1 Atk. 621; Johnson *v.* Baber, 22 Beav. 562; 6 De G., M. & G. 439; Parshall's App., 65 Penn. St. 233; Ellis *v.* Barber, L. R. 7 Ch. 104; Sloo *v.* Law, 3 Blatch. C. C. 457; Williams *v.* Stevens, L. R. 1 P. C. 352.

profit was not made at the expense of the trust. Jarrett *v.* Johnson, 216 Ill. 212; Bay State Gas Co. *v.* Rogers, 147 Fed. 557. But see, *contra*, Heckscher *v.* Blanton, 66 S. E. 859 (Va. 1910). Thus where a trustee of property which his duty as trustee required him to insure joined an underwriters' association and by reason of his membership received a commission on insurance premiums paid by him on the trust property, he was required to turn his commission over to the trust, although the insurance premiums were no larger because of his commissions. White *v.* Sherman, 168 Ill. 589. But with respect to such commissions he is a debtor, not a trustee, and the *cestui* is not entitled to trace them into property which the trustee has purchased and claim it as belonging to the trust. Lister *v.* Stubbs, 45 Ch. Div. 1.

Where one of two cotrustees received a bonus upon an investment which resulted in a loss to the trust estate, he was obliged to make good the loss on the investment, and also to turn over the bonus to the trust estate. *In re* Smith, 44 W. R. 270.

A trustee may retain for himself remuneration as director of a corporation when his election as director was due to his ownership of shares of stock as trustee. *In re* Dover Coalfield Extension, [1907] 2 Ch. 76; [1908], 1 Ch. 65. See *contra*, *In re* Francis, 74 L. J. Ch. 198. The distinction between these two cases lies in the fact that the commissions in the former case were paid to the trustee in a matter wherein he acted for the trust, while in the latter case his remuneration as director was for services rendered entirely to the corporation. See also Whitney *v.* Smith, 4 Ch. 513, where a solicitor obtained employment in a matter disconnected with the trust because of his position as trustee. In Matter of Hirsch, 116 App. Div. 367 (affirmed 188 N. Y. 584), the opinion was expressed that it was improper conduct for a trustee who had been elected president of a corporation by reason of his ownership of stock held in trust, to allow the directors to vote him a large increase of salary over that which the former president had drawn.

The same principle applies to agents and partners. Thus an agent to buy or sell cannot retain for himself a commission or bonus, paid entirely by the other party to the transaction. Williamson *v.* Krohn, 66 Fed. 655.

estate could be let for the benefit of the *cestui que trust;* if not, he thought the game should belong to the heir; the trustee might appoint a game-keeper for the preservation of game for the heir, but he ought not to keep up a lodge for his own pleasure.[1] So where a trustee retired from the office in consideration that his successor paid him a sum of money, it was held that the money so paid must be treated as a part of the trust estate, and that the trustee must account for it, as he could make no profit, directly or indirectly, from the trust property or from the position or office of trustee.[2] If a trustee joins in betraying the trust for private gain, he will have to bear any loss that may fall on him by the dishonesty of his confederates. The law will not aid him against them. It will not unravel a tangled web of fraud for the benefit of one through whose agency the web was woven and who has himself become enmeshed therein.[3] Trustees may be enjoined from carrying out a contract made for their own benefit.[4] But where one holds a trust for the support of another, the trustee may supply goods from his store at a fair price. This is not dealing with the trust for his private gain.[5]

§ 428. A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase.[6] But if a trustee buys up an outstanding debt

[1] Webb *v.* Shaftesbury, 7 Ves. 480; Hutchinson *v.* Morritt, 3 Y. & C. 47.
[2] Sugden *v.* Crossland, 3 Sm. & Gif. 192.
[3] Farley *v.* St. Paul M. & M. Rd., 4 McCrary, (U. S.) 142.
[4] Sloo *v.* Law, 3 Blatch. C. C. 457.
[5] Cogbill *v.* Boyd, 77 Va. 450.
[6] Robinson *v.* Pett, 3 P. Wms. 251, n. (a); Pooley *v.* Quilter, 4 Drew. 184; 2 De G. & J. 327; Morret *v.* Paske, 2 Atk. 54; Dunch *v.* Kent, 1 Vern. 241; Darcy *v.* Hall, id. 49; *Ex parte* Lacey, 6 Ves. 628; Anon. 1 Salk. 155; Fosbrooke *v.* Balguy, 1 Myl. & K. 226; Carter *v.* Horne, 1 Eq. Cas. Ab. 7; Schoonmaker *v.* Van Wyke, 31 Barb. 457; Matter of Oakley, 2 Edw.

for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves.[1] Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*.[2] The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity.[3] So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits of the sale for himself.[4]

478; Herr's Est., 1 Grant's Cas. 272; Quackenbush *v.* Leonard, 9 Paige, 334; Slade *v.* Van Vechten, 11 Paige, 21; Barksdale *v.* Finney, 14 Grat. 338; King *v.* Cushman, 41 Ill. 31. [Baugh's Ex'r *v.* Walker, 77 Va. 99. See Bush *v.* Webster, 72 S. W. 364 (Ky. 1903). *Supra*, § 195, note *b*.]

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

[2] Vaughton *v.* Noble, 30 Beav. 34; Baxter *v.* Costin, 1 Busb. Eq. 262; Andrews *v.* Hobson, 23 Ala. 219; Mason *v.* Martin, 4 Md. 124; Green *v.* Winter, 1 Johns. Ch. 26; Spindler *v.* Atkinson, 3 Md. 409; Wiswall *v.* Stewart, 3 Ala. 433. [Avery *v.* Avery, 90 Ky. 613.]

[3] *Ex parte* Lacey, 6 Ves. 626; Scott *v.* Davis, 1 Myl. & Cr. 87; Coles *v.* Trecothick, 9 Ves. 234; Morse *v.* Royal, 12 Ves. 372; Dunlop *v.* Mitchell, 10 Ohio, 17; Harrington *v.* Brown, 5 Pick. 519; Bolton *v.* Gardner, 3 Paige, 273; Ames *v.* Downing, 1 Bradf. 321; Lyon *v.* Lyon, 8 Ired. Eq. 201; Pennock's App., 14 Penn. St. 446; Bruch *v.* Lantz, 2 Rawle, 392; Stuart *v.* Kissam, 2 Barb. 493; Jones *v.* Smith, 33 Miss. 215; Soller *v.* Chandler, 26 Miss. 154; Herne *v.* Meeres, 1 Vern. 465; Smith *v.* Isaac, 12 Mo. 106; *ante* § 195.

[4] Beeson *v.* Beeson, 9 Barr, 279; Patton *v.* Thompson, 2 Jones, Eq. 285; Mason *v.* Martin, 4 Md. 124; Spindler *v.* Atkinson, 3 Md. 409; Davoue *v.* Fanning, 2 Johns. Ch. 252; Iddings *v.* Bruer, 4 Sandf. Ch. 222; Hendricks *v.* Robinson, 2 Johns. Ch. 283; Evertson *v.* Tappan, 5 id. 497; Smith *v.* Lansing, 22 N. Y. 530; Ames *v.* Downing, 1 Bradf. 321; Andrews *v.* Hobson, 23 Ala. 219; Charles *v.* Dubois, 29 Ala. 367; Wiswall *v.* Stewart, 32 Ala. 433; Bellamy *v.* Bellamy, 6 Fla. 62; Schoonmaker *v.* Van Wyke, 31 Barb. 457. [*Supra*, § 195, n.]

§ 429. Trustees cannot make a profit from the trust funds committed to them, by using the money in any kind of trade or speculation, nor in their own business; nor can they put the funds into the trade or business of another, under a stipulation that they shall receive a *bonus* or other profit or advantage. In all such cases, the trustees must account for every dollar received from the use of the trust-money (*a*) and they will be absolutely responsible for it if it is lost in any such transactions. (*b*) By this rule, trustees may be liable to great losses

(*a*) Smelting Co. *v.* Reed, 23 Colo. 523.

(*b*) He becomes an insurer of the fund with at least simple interest and must make good any loss, accidental or otherwise. Bangor *v.* Beal, 85 Me. 129; *Re* Hodges' Estate, 66 Vt. 70; Ward *v.* Tinkham, 65 Mich. 695. He incurs the same liability when he deposits money in the bank or invests in his own name as an individual. White *v.* Sherman, 168 Ill. 589.

When the misappropriated trust funds have been so mingled with funds of the trustee that their increase and income cannot be determined, it is usual to impose upon him a charge of interest at not less than the legal rate, and at a rate as much larger as may be necessary to give to the trust all the estimated increase and income of the misappropriated funds. (See cases cited *infra*, this note.) His liability with respect to income upon misappropriated trust funds is to make up to the trust the income which the trust funds would have earned if they had been properly invested, and to turn over to the trust all the actual profit or income in excess of this amount. General Proprietors *v.* Force, 72 N. J. Eq. 56. (See also cases cited *infra*, this note.) The charge of simple interest at the legal rate usually brings to the trust more than the funds would have earned if properly invested as trust funds should be, but it is reasoned that the most lenient view of such a transaction is that the trustee is a borrower of the trust funds and as such should pay the legal rate. Bangor *v.* Beal, 85 Me. 129; Society *v.* Pelham, 58 N. H. 566; Stanley's Estate *v.* Pence, 160 Ind. 636; Conn. *v.* Howarth, 48 Conn. 207; Erie School District *v.* Griffith, 203 Pa. St. 123; White *v.* Ditson, 140 Mass. 351, 362; Young's Estate, 97 Iowa, 218; Wolfort *v.* Reilly, 133 Mo. 463.

Simple interest in excess of the legal rate or compound interest is imposed, not for the purpose of punishing the trustee for his breach of trust, but for the purpose of giving to the trust the increase and profits earned by the trust funds. Hazard *v.* Durant, 14 R. I. 25; Cook *v.* Lowry, 95 N. Y. 103; Kane *v.* Kane's Adm'r, 146 Mo. 605; Perrin *v.* Lepper, 72 Mich. 454, 551, 555; Lehman *v.* Rothbarth, 159 Ill. 270; *In re* Davis, [1902] 2 Ch. 314; Forbes *v.* Allen, 166 Mass. 569; Forbes *v.* Ware, 172 Mass. 306; *In re* Ricker's Estate, 14 Mont. 153, 29 L. R. A. 622 and note; Hughes *v.* The People,

while they can receive no profit; and the rule is made thus stringent, that trustees may not be tempted from selfish mo-

111 Ill. 457; *In re* Eschrich, 85 Cal. 98; *In re* Clary, 112 Cal. 292. See also Vyse *v.* Foster, 8 Ch. 309, 335. But see Page's Ex'r *v.* Holman, 82 Ky. 573. In Forbes *v.* Ware, 172 Mass. 306, the conclusion of the court is summed up as follows: "In other words, the principle of liability is accountability for what has been received, or ought to have been received, or must be presumed to have been received, and not punishment for a breach of duty."

Where the trustee has used trust funds in his own business, the court will not usually give to the trust a definite share of the profits, but will charge the trustee with interest at a rate based to some extent upon the size of the profits earned in the business if the rate of return is larger than simple interest at the legal rate. Faulkner *v.* Hendy, 103 Cal. 15; *In re* Thompson, 101 Cal. 349; Page's Ex'r *v.* Holman, 82 Ky. 573. But where the business itself is partly the property of the trust estate a definite share of the profits should be given to the trust. This is frequently the case where a surviving or solvent partner continues the business on his own account. Perrin *v.* Lepper, 72 Mich. 454, 551; Jones *v.* Dexter, 130 Mass. 380. See Byrne *v.* McGrath, 130 Cal. 316.

It has been held that where persons borrow trust funds with notice that the loan to them is a breach of trust, the rate of interest charged is not based upon the earnings of the trust funds. In other words the principle that the trustee shall not be permitted to gain a profit from the use of trust funds has no application to such borrowers. Stroud *v.* Gwyer, 28 Beav. 130; Dent *v.* Slough, 40 Ala. 518; Rau *v.* Small, 144 Pa. St. 304. See 30 Am. Law Reg. (N. S.), 569. But when the trustee lends to a partnership of which he is a member the principle applies to the extent that his share of profits is increased by use of the trust funds. See *In re* Davis, [1902] 2 Ch. 314; Hankey *v.* Garratt, 1 Ves. Jr. 236; Docker *v.* Somes, 2 Myl. & K. 655; 30 Am. Law Reg. (N. S.) 569. On the question of liability of the trustee's copartners in such cases, see *infra*, § 846 and note.

If misappropriated trust funds can be traced and identified their entire increase and income belong to the trust. Hazard *v.* Durant, 14 R. I. 25. Thus where a trustee used trust funds to pay all the premiums on a policy of insurance upon his life, it has been held that the entire proceeds of the policy belonged to the *cestui*. Holmes *v.* Gilman, 138 N. Y. 369. See also Byrne *v.* McGrath, 130 Cal. 316. But see *In re* Ricker's Estate, 14 Mont. 153, 29 L. R. A. 622.

Where it appears that an article of property or a parcel of land has been purchased with a fund of which the trust funds form only a small part, it has not been clear from the cases whether the *cestui* is entitled to a share in the property itself, if it has increased in value, or is confined to his lien upon the property for the principal of the trust funds which have gone into it and an equitable share of the increase, as income upon

tives to embark the trust fund upon the chances of trade and speculation.[1] If a trustee charge a bonus in his account for his skill and services in conducting the business of the trust, it will be set aside.[2]

§ 430. All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation.[3] Thus partners stand in a fiduciary relation to each other, and if a partner, instead of winding up the partnership affairs, when for any reason he ought to do so, continues to use the partnership property in business, and makes a profit thereon, he must account for it.[4]

[1] Docker *v.* Somes, 2 Myl. & K. 664; Willett *v.* Blanford, 1 Hare, 253; Cummins *v.* Cummins, 6 Ir. Eq. 723; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; 22 Beav. 84; Townend *v.* Townend, 1 Gif. 201; Parker *v.* Bloxam, 20 Beav. 295; Manning *v.* Manning, 1 Johns. Ch. 527; Brown *v.* Ricketts, 4 id. 303; *In re* Thorp, Davies, 290; William *v.* Stevens, L. R. 1 P. C. 352; Blauvelt *v.* Ackerman, 20 N. J. Eq. 141; Durling *v.* Hammer, id. 220; Pluman *v.* Slocum, 41 N. Y. 53; Frank's App., 5 Penn. St. 190.

[2] Barrett *v.* Hartly, L. R. 2 Eq. 789.

[3] Hawley *v.* Cramer, 4 Cow. 717; Richardson *v.* Spencer, 18 B. Mon. 450; Thorp *v.* McCullum, 1 Gil. (Ill.) 615; Van Epps *v.* Van Epps, 9 Paige, 237; Ackerman *v.* Emot, 4 Barb. 626.

[4] Bentley *v.* Craven, 18 Beav. 75; Parsons *v.* Hayward, 31 Beav. 199; Crawshay *v.* Collins, 15 Ves. 226; Brown *v.* De Tastet, Jac. 284; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; 22 Beav. 84. [Perrin *v.* Lepper, 72 Mich. 454, 551.] A partner who receives the partnership property on a resale from the purchaser at public auction, by a secret arrangement between them, is bound to account as if no sale had been made, although his copartner was a bidder at the auction sale. Jones *v.* Dexter, 130 Mass. 380.

the investment. In New Jersey it has been held that the *cestui* has the option of claiming the land subject to the trustee's lien for the amount of his own money used in the purchase and improvement, or of claiming a lien for the amount of trust funds put into the land. Bohle *v.* Hasselbroch, 64 N. J. Eq. 334. See also Rochfoucauld *v.* Boustead, [1898] 1 Ch. 550. Other recent cases seem inclined to confine the *cestui* to an equitable lien upon the property into which the trust funds are traced. Humphreys *v.* Butler, 51 Ark. 351; Lehman *v.* Rothbarth, 159 Ill. 270; *In re* Ricker's Estate, 14 Mont. 153, 29 L. R. A. 622, and note; Bresnihan *v.* Sheehan, 125 Mass. 11. See also 19 Harv. Law Rev. 511 (article by Prof. J. B. Ames).

But in making up the accounts, courts will make a just allowance for time, skill, and other elements of success in conducting the business.[1] If a trader has trust funds in his hands, not in a fiduciary character, but through a breach of trust by a trustee, he is liable only for interest.[2] Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule.[3] (*a*)

§ 431. So if persons, standing in such a relation to an estate, obtain advantages in respect to it, those who succeed to the estate shall have the advantages which are thus obtained.[4] As where a mortgagee had purchased the right of dower of the widow of a deceased mortgagor, the heir of the mortgagor, upon a bill to redeem, was held to have the right to take the purchase of the dower at the price which the mortgagee had paid.[5] So an heir cannot hold an incumbrance for more than he gave for it, against the creditors of the ancestor's estate,[6] and it is conceived that the same rule applies to a devisee.[7] But if the heir or devisee is himself an incumbrancer at the death of the ancestor,

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

[2] Strowd *v.* Gwyer, 28 Beav. 130; Townend *v.* Townend, 1 Gif. 210; Simpson *v.* Chapman, 4 De G., M. & G. 154; Macdonald *v.* Richardson, 1 Gif. 81; Brown *v.* De Tastet, Jac. 284; Chambers *v.* Howell, 11 Beav. 6; *Ex parte* Watson, 2 V. & B. 414. [Dent *v.* Slough, 40 Ala. 518; Rau *v.* Small, 144 Pa. St. 304. See 30 Am. Law Reg. (N. S.) 569.]

[3] Morret *v.* Paske, 2 Atk. 52; Powell *v.* Glover, 3 P. Wms. 251; Great Luxembourg Ry. Co. *v.* Magnay, 23 Beav. 640; 25 Beav. 586; Chaplin *v.* Young, 33 Beav. 414; Bowes *v.* Toronto, 11 Moore, P. C. C. 463; Docker *v.* Somes, 2 Myl. & K. 665.

[4] Baldwin *v.* Bannister, cited 3 P. Wms. 251; Dobson *v.* Land, 8 Hare, 220; Arnold *v.* Garner, 2 Phill. 231; Mathison *v.* Clarke, 3 Drew. 3.

[5] Ibid.

[6] Lancaster *v.* Evors, 10 Beav. 154; 1 Phill. 354; Morret *v.* Paske, 2 Atk. 54; Long *v.* Clopton, 1 Vern. 464; Brathwaite *v.* Brathwaite, id. 334; Darcy *v.* Hall, id. 49.

[7] Long *v.* Clopton, 1 Vern. 464; Davis *v.* Barrett, 14 Beav. 542.

(*a*) Namely, the rule applicable to trustees.

he may buy in a prior, but not a subsequent, incumbrance, and hold it for the whole amount due. The court considers him, in buying such a prior incumbrance, not as heir or devisee, but as an incumbrancer or stranger; and so if, as such prior incumbrancer, he obtains a prior incumbrance by the bounty or gift of another, he shall hold such bounty or gift for the benefit of his own incumbrance, and there is no reason why he should hold it for the benefit of the creditors of the ancestor.[1] So the heir or devisee may hold a prior incumbrance for full value, though bought for less, against a subsequent incumbrancer.[2] So, if one of several joint purchasers of an estate buy in an incumbrance for less than its face, he shall hold it for his copurchasers at the same price he paid.[3] And the opinion has been expressed, that a tenant for life holds the same relation toward the remainder-man; and if such tenant buy in an incumbrance upon the estate for less than its face, he cannot claim from the remainder-man more than he gave.[4]

§ 432. The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to reasonable compensation. But both in England and the United States, a trustee can receive no indirect profit from the estate by reason of his connection with it. Thus a trustee cannot be appointed *receiver* with a salary,[5] nor would he be

[1] Davis *v.* Barrett, 14 Beav. 542; Darcy *v.* Hall, 1 Vern. 49; Anon. 1 Salk. 155.

[2] Davis *v.* Barrett, 14 Beav. 542.

[3] Carter *v.* Horne, 1 Eq. Cas. Ab. 7. [Morrison *v.* Roehl, 215 Mo. 545. See *supra*, § 195, note.]

[4] Hill *v.* Brown, Dr. 433. [Downing *v.* Hartshorn, 69 Neb. 364; Keller *v.* Fenske, 123 Wis. 435; First Cong. Church *v.* Terry, 130 Iowa, 513; Griffith *v.* Owen, [1907] 1 Ch. 195. See also Magness *v.* Harris, 80 Ark. 583; Blair *v.* Johnson, 215 Ill. 552; Crawford *v.* Meis, 123 Iowa, 610; Boon *v.* Root, 137 Wis. 451; Lewis *v.* Wright, 148 Mich. 290; *supra*, § 195, note.]

[5] Sutton *v.* Jones, 15 Ves. 584; Morison *v.* Morison, 4 Myl. & Cr. 215; Sykes *v.* Hastings, 11 Ves. 363; —— *v.* Jolland, 8 Ves. 72; Anon., 3 Ves. 515.

appointed without compensation except under peculiar circumstances; for it is his duty to superintend and watch over the receiver.[1] The same reasons do not apply for excluding a dry trustee.[2] If trustees are factors,[3] or brokers,[4] or commission agents,[5] or auctioneers,[6] or bankers,[7] or attorneys, or solicitors,[8] they can make no charges against the trust estate for services rendered by them in their professional capacity to the estate of which they are trustees. They may employ the services of such agents, if necessary, and pay for them from the estate; but if they undertake to act in such capacities themselves for the estate, they can receive no compensation. (*a*) This rule is so

[1] Sykes *v.* Hastings, 11 Ves. 363.
[2] Sutton *v.* Jones, 15 Ves. 587.
[3] Scattergood *v.* Harrison, Mos. 128.
[4] Arnold *v.* Garner, 2 Phill. 231.
[5] Sheriff *v.* Aske, 4 Russ. 33.
[6] Mathison *v.* Clarke, 3 Drew. 3; Kirkman *v.* Booth, 11 Beav. 273.
[7] Crosskill *v.* Bower, 1 Dr. & Sm. 319.
[8] Pollard *v.* Doyle, 1 Dr. & Sm. 319; Moore *v.* Frowd, 3 Myl. & Cr. 46; Frazer *v.* Palmer, 4 Y. & C. 515; York *v.* Brown, 1 Col. C. C. 260; Broughton *v.* Broughton, 5 De G., M. & G. 160; *In re* Sherwood, 3 Beav. 338; Douglass *v.* Archbutt, 2 De G. & J. 148; Harbin *v.* Darby, 28 Beav. 325; Morgan *v.* Homans, 49 N. Y. 667; Gomley *v.* Wood, 9 Ir. Eq. 418; Binsse *v.* Paige, 1 Keyes, 87; 1 N. Y. Decis. 138. [Clarkson *v.* Robinson, [1900] 2 Ch. 722. See *contra*, Perkins's Appeal, 108 Pa. St. 314.]

(*a*) In the United States, where trustees are allowed compensation for care, custody, management, and other ordinary services, it is usual to allow them reasonable compensation also for extraordinary services, *i. e.*, services of a nature not usually required of a trustee and for which he would have had the right to employ another person. Turnbull *v.* Pomeroy, 140 Mass. 117, 118; Willis *v.* Clymer, 66 N. J. Eq. 284; Perkins's Appeal, 108 Pa. St. 314; Jarrett *v.* Johnson, 216 Ill. 212; Morris *v.* Ellis, 62 S. W. 250 (Tenn. Ch. App. 1901); *infra*, §§ 917–919, and notes. See also Matter of Froelich, 107 N. Y. S. 173, 122 App. Div. 440. "When it is once admitted that a trustee may be paid for ordinary services, it is hard not to admit also that there may be circumstances under which he may be allowed an additional sum for extraordinary services which it was not his duty to render." Holmes, J., in Turnbull *v.* Pomeroy, 140 Mass. 117, 118.

On similar principles a surviving partner, who is not usually entitled to compensation for services in winding up the affairs of the partnership has been allowed compensa-

strict, that if the trustee has a partner, and employs such partner, no charge can be made by the firm;[1] but if the trustee is excluded from all participation in the compensation, the partner of the trustee may be paid like any other person for similar services.[2] In one case where several trustees were made defendants, one of them, being a solicitor, conducted the defence, and was allowed his full costs, it not appearing that the costs were increased by such conduct.[3] This case is put upon the ground that the services were rendered under the eye of the court, and there could be no danger of collusion; but the case is not approved in England, and has not been followed.[4] In the United States, a trustee has been refused compensation as solicitor, for professional services rendered by himself for himself as trustee, on the ground that no man can make a contract with himself.[5]

§ 433. Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust*.[6]

[1] Collin *v.* Carey, 2 Beav. 128; Lincoln *v.* Winsor, 9 Hare, 158; Christophers *v.* White, 10 Beav. 523; Lyon *v.* Baker, 5 De G. & Sm. 622; Manson *v.* Baillie, 2 Macq. (H. L.) 80. [See *contra*, Turnbull *v.* Pomeroy, 140 Mass. 117; Thayer *v.* Badger, 171 Mass. 279.]

[2] Clack *v.* Carlon, 7 Jur. (N. S.) 441; Burge *v.* Burton, 2 Hare, 373.

[3] Cradock *v.* Piper, 1 McN. & G. 664; 1 Hall & T. 617; overruling Bainbrigge *v.* Blair, 8 Beav. 588.

[4] Lyon *v.* Baker, 5 De G. & Sm. 622.

[5] Mayer *v.* Galluchet, 6 Rich. Eq. 2; Jenkins *v.* Fickling, 4 Des. 470; Edmonds *v.* Crenshaw, Harp. 232. [See note *a*, *supra*.]

[6] Att. Gen. *v.* Monro, 2 De G. & Sm. 163; Stone *v.* Godfrey, 5 De G., M. & G. 76; Frith *v.* Curtland, 2 Hem. & M. 417; Pomfret *v.* Winsor, 2 Ves. 476; Kennedy *v.* Daley, 1 Sch. & Lef. 381; *Ex parte* Andrews, 2 Rose, 412; Conry *v.* Caulfield, 2 B. & B. 272; Newsome *v.* Flowers, 30 Beav. 461; Shields *v.* Atkins, 3 Atk. 560; Langley *v.* Fisher, 9 Beav. 90; Reece *v.* Frye,

tion for necessary services which lay outside his duty as surviving partner. Vanduzer *v.* McMillan, 37 Ga. 299; Starr *v.* Case, 59 Iowa, 491, 503; Thayer *v.* Badger, 171 Mass. 279.

In some States it is expressly provided by statute that trustees shall receive compensation for such services in addition to that allowed for their ordinary services. *Infra*, §§ 917–919 and notes.

Nor can he deny his title.[1] If a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust. But if a claim is made upon him by a third person, adverse to the *cestui que trust*, he may decline to deliver over the property to his *cestui que trust* until the title is determined, or he is indemnified or secured against the consequences,[2] or he may pay the fund into court,[3] and if he neglects to do so, and thus makes a suit necessary, he will recover only such costs as he would have been entitled to if he had paid the money into court.[4] A trustee must assume the validity of the trust under which he acts, until it is actually impeached, although he may have some suspicion that there may have been fraud or collusion in the appointment and settlement.[5] (*a*) So, if a trustee obtains a knowledge of facts that would defeat the title of his *cestui que trust*, and give the property over to another, he is not justified in morals in communicating such facts to such other person. His duty is to manage the property for his *cestui que trust*, and not to keep his conscience, or betray his title or interests;[6] and he can make no admissions prejudicial to the rights of his *cestui que trust*,[7] nor can he use his influence to defeat the purposes of the trust as declared by the creator of it.[8] (*b*)

1 De G. & Sm. 279; Benjamin *v.* Gill, 45 Ga. 110. [Ownes *v.* Ownes, 23 N. J. Eq. 60. As to purchase of incumbrance or adverse interest see *supra*, § 195, note.]

[1] Von Hurter *v.* Spergeman, 2 Green, Ch. 185. [Associate Alumni *v.* General Theol. Seminary, 49 N. Y. S. 745.]

[2] Neale *v.* Davies, 5 De G., M. & G. 258.

[3] Gunnell *v.* Whitear, L. R. 10 Eq. 664.

[4] Ibid.; Weller *v.* Fitzhugh, 22 L. T. (N. S.) 567.

[5] Beddoes *v.* Pugh, 26 Beav. 407; Reid *v.* Mullins, 48 Mo. 344.

[6] Lewin, 234.

[7] Thomas *v.* Bowman, 30 Ill. 34; 29 Ill. 426.

[8] Ellis *v.* Barker, L. R. 7 Ch. 104.

(*a*) A party to a contract, who seeks to be relieved therefrom, and relies upon its illegality or want of consideration, may be estopped from setting up such a defence, and a trustee who has accepted and entered upon the administration of the trust, cannot allege the invalidity of his appointment as a reason for not accounting for the trust property. Harbin *v.* Bell, 54 Ala. 389; Saunders *v.* Richard, 35 Fla. 28, 42.

(*b*) Where a creditor of the *cestui* is seeking to reach the latter's inter-

§ 434. In England, a trustee, being in possession of real estate in trust, may profit from his trust if the *cestui que trust* dies without heirs; for, as the trustee is tenant in possession, there is no such failure of a tenant as to cause an escheat; and the trustee thenceforth holds the lands for his own use, there being no *cestui que trust* to call him to an account.[1] This is a benefit to the trustee; but it arises rather from an absence of right in others, than from an affirmative right in himself. But if he is not in possession, or if he has need of the assistance of a court of equity to enforce his rights, the court will not act;[2] though it is said, that having the legal title, which a court of law must recognize, he can obtain all the rights which a court of law must give.[3] But if the *cestui que trust* devise the estate to another upon trusts that fail, the trustee must pass over the estate to the devisee, for the reason that the trustee can have no advantage from trusts that so fail, and he has no equity against the devisee to keep the estate.[4]

§ 435. Upon this rule of law in England, several questions were started in the case of Burgess *v.* Wheate,[5] which are rather curious than practical in this country; as, for instance, if a purchaser should pay the money in full for land, and die without heirs, before he obtained a conveyance, could the vendor keep both land and purchase-money?[6] Again, if a mortgagor in

[1] Burgess *v.* Wheate, 1 Eden, 177, 186, 216, 256; Taylor *v.* Haygarth, 14 Sim. 8; Daval *v.* New River Co., 3 De G. & Sm. 394; Cox *v.* Parker, 22 Beav. 168; Barrow *v.* Wadkin, 24 Beav. 9; Att. Gen. *v.* Sands, Hard. 496.

[2] Burgess *v.* Wheate, 1 Eden, 212; Onslow *v.* Wallis, 1 McN. & G. 506; Williams *v.* Lonsdale, 3 Ves. Jr. 752.

[3] King *v.* Coggan, 6 East, 431; 2 Smith, 417; King *v.* Wilson, 10 B. & C. 80.

[4] Onslow *v.* Wallis, 1 McN. & G. 506; Jones *v.* Goodchild, 3 P. Wms. 33.

[5] 1 Eden, 177.

[6] Ibid. 212.

est in the trust property, the trustee cannot safely waive any of the necessary legal steps. Kutz *v.* Nolan, 224 Pa. St. 262.

fee should die without heirs, could a mortgagee in fee keep the whole estate, for the reason that there was no person having a right to redeem?[1] Of course the equity of redemption would be assets for the payment of the debts of the mortgagor.[2] But if there were no debts, could the mortgagee keep a large estate for a small debt?[3] Another question was raised, whether a trust in such cases might not result to the grantor.[4] No answers have been given to these questions by decided cases, and as they were put more than a century ago, it is not probable that a case will arise requiring their judicial determination.

§ 436. In the United States, if a *cestui que trust* should die without heirs, the trustee could not hold for his own beneficial use; but he would hold for the State as *ultima hæres* where all other heirs fail.[5]

§ 437. Where a *cestui que trust* of chattel dies without heirs, the trustee can take no benefit; for the beneficial use in such chattel will go as *bona vavantia* to the crown or State. So, if the *cestui que trust* makes a will and appoints an executor, but makes no further disposition of his personalty, the executor will take for the State; for the executor can take no beneficial interest unless the will expressly gives it to him.[6]

§ 437 *a*.[7] Payment of a trust debt by crediting the trustee's individual account is not good.[8] A trustee may in good faith

[1] Ibid. 210.

[2] Beale *v*. Symonds, 16 Beav. 406; Downe *v*. Morris, 3 Hare, 394.

[3] 1 Eden, 236, 256.

[4] 1 Eden, 185.

[5] McCaw *v*. Galbraith, 7 Rich. L. 75; Matthews *v*. Ward, 10 G. & J. 443; Darrah *v*. McNair, 1 Ashm. 236; Ringgold *v*. Malott, 1 Harr. & John. 299; 4 Kent, 425; 1 Cruise, Dig. 484; Crane *v*. Reeder, 21 Md. 25.

[6] Middleton *v*. Spicer, 1 Bro. Ch. 201; Taylor *v*. Haygarth, 14 Sim. 8; Russell *v*. Clowes, 2 Col. C. C. 648; Powell *v*. Merritt, 1 Sm. & Gif. 381; Cradock *v*. Owen, 2 Sm. & Gif. 241; Read *v*. Steadham, 26 Beav. 495, Cane *v*. Roberts, 8 Sim. 214.

[7] See §§ 815 *a*, 815 *b*.

[8] Maynard *v*. Cleveland, 76 Ga. 52.

compromise a doubtful debt due the trust estate, and a fraud committed by him upon others is admissible to show his zeal for the interests of the estate.[1] But a compromise of a debt due from the trust by which an advantage is gained, as where a legatee accepted $1100 for a $3000 legacy, inures to the benefit of the trust estate, and the trustee cannot transfer the whole gain to *one* of the *cestuis*.[2] A trustee to sue for and recover certain property may make a fair and judicious compromise by which the title is secured to the *cestui*.[3] Church trustees cannot, by their acts, create any lien on the trust property unless they have express authority for so doing.[4] A trustee can be held personally for materials ordered by him for the trust estate, and on contracts made by him in its behalf, unless there be a special agreement to look only to the trust, and this even though the trustees acted under order of the court, this being merely a security to the trustee that he shall be indemnified out of the trust funds.[5] (*a*) But the mere fact of want of authority in a

[1] Id. 68 *et seq.*

[2] Mitchell *v.* Colburn, 61 Md. 244.

[3] Caldwell *v.* Brown, 66 Md. 293.

[4] Trustees First M. E. Church *v.* Atlanta, 76 Ga. 181.

[5] Gill *v.* Carmine, 55 Md. 339; Hackman *v.* MaGuire, 20 Mo. App. 286; People *v.* Abbott, 107 N. Y. 225; Kedian *v.* Hoyt, 33 Hun, 145. [Dantzler *v.* McInnis, 151 Ala. 293; Johnson *v.* Leman, 131 Ill. 609; Hussey *v.* Arnold, 185 Mass. 202; McGovern *v.* Bennett, 146 Mich. 558; Truesdale *v.* Philadelphia Tr. Co., 63 Minn. 49; Koken Iron Works *v.* Kinealy, 86 Mo. App. 199; Blewitt *v.* Olin, 14 Daly, 351; Mitchell *v.* Whitlock, 121 N. C. 166; Fehlinger *v.* Wood, 134 Pa. St. 517; Neal *v.* Bleckley, 51 S. C. 506; McIntyre *v.* Williamson, 72 Vt. 183; Taylor *v.* Davis, 110 U. S. 330, 334; Brazier *v.* Camp, 63 L. J. Q. B. 257.]

(*a*) A trustee is likewise personally liable to third persons for his *torts* either of misfeasance or of nonfeasance in failing to keep the trust property in repair, irrespective of his right to reimbursement. Baker *v.* Tibbetts, 162 Mass. 468; Shepard *v.* Creamer, 160 Mass. 496; Odd Fellows Hall Ass'n *v.* McAllister, 153 Mass. 292; O'Malley *v.* Gerth, 67 N. J. Law, 610; Gillick *v.* Jackson, 83 N. Y. S. 29; Norling *v.* Allee, 13 N. Y. S. 791. See Brown *v.* Wittner, 59 N. Y. S. 385, 43 App. Div. 135. *In re* Raybould, [1900] 1 Ch. 199; Prinz *v.* Lucas, 210 Pa. St. 620. And also for the *torts* of his agents. Blewitt *v.* Olin, 14 Daly (N. Y.) 351. As

trustee to bind the estate will not make him personally liable in cases of executory contract where the facts show that no such

to the liability of trustees of charitable funds for *torts* of employees and agents, see *infra*, § 747, note.

He may undoubtedly relieve himself from personal liability upon his contracts for the benefit of the trust by a special provision in the contract. Packard *v.* Kingman, 109 Mich. 497; Mitchell *v.* Whitlock, 121 N. C. 166; Kohen Iron Works *v.* Kinealy, 86 Mo. App. 199; Hussey *v.* Arnold, 185 Mass. 202. But description of himself as trustee is not sufficient. Taylor *v.* Davis, 110 U. S. 330, 335; Connally *v.* Lyons, 82 Tex. 664; McIntyre *v.* Williamson, 72 Vt. 183; McGovern *v.* Bennett, 146 Mich. 558; Tuttle *v.* First Nat. Bank, 187 Mass. 533. Thus it has been held that a trustee with authority to mortgage who describes himself in the mortgage note as trustee and puts the word "trustee" after his signature is nevertheless personally liable upon the note. Hall *v.* Jameson, 151 Cal. 606. But a description of himself in the contract as trustee is doubtless some evidence of an agreement with the other party that he shall not be personally liable. See Crate *v.* Luippold, 43 N. Y. S. 824, 13 App. Div. 617.

Most courts do not recognize a liability of a trustee in his representative capacity. Johnson *v.* Leman, 131 Ill. 609; Shepard *v.* Creamer, 160 Mass. 496; Truesdale *v.* Philadelphia Trust Co., 63 Minn. 49; Hampton *v.* Foster, 127 Fed. 468. But see Yerkes *v.* Richards, 170 Pa. St. 346; Prinz *v.* Lucas, 210 Pa. St. 620; Scheibeler *v.* Albee, 99 N. Y. S. 706, 114 App. Div. 146; Ferrier *v.* Trépannier, 24 Can. Sup. 86.

A trustee's liability as stockholder for calls, etc., is a personal one, but, in most States has been limited by statute to the trust property. See U. S. Rev. Stats., § 5152, as to national banks; Pauly *v.* State Loan & Trust Co., 165 U. S. 606; Hampton *v.* Foster, 127 Fed. 468; Fowler *v.* Gowing, 152 Fed. 801, holding that in New York an action against a trustee stockholder in an insolvent bank must be brought against him as trustee.

As to the rights of creditors to resort to the trust property, see *infra*, § 815 *b*, and note.

A substituted trustee is of course not personally liable for the *torts* of his predecessor or for the latter's contracts for the benefit of the trust estate unless he assumes them, and his acceptance of the trust is not in itself an assumption of the previous trustee's obligations. Foote *v.* Cotting, 195 Mass. 55; U. S. Trust Co. *v.* Stanton, 139 N. Y. 531.

It has been held by a divided court that three cotrustees who continued the business of the testator under a firm name for the benefit of the trust estate were not copartners since they were not beneficially interested in the business, and that a retiring cotrustee had no duty of giving notice of his retirement to those having credit dealings with the business. Failing to give notice of his retirement he was nevertheless held not to be liable on contracts with a prior dealer who did not know

liability was intended by either of the parties.[1] A trustee with absolute control can give a license for his life to a railway company to use the land for a roadbed.[2] A trustee cannot go beyond the purposes of the trust deed and bind the estate.[3]

§ 437 *b*. Though "trustee" be added to the signature of a note or bond it may be mere *descriptio personæ*, and the obligation individual.[4] And, on the other hand, although the signature of a receipt be merely that of the trustee as an individual, the receipt may be really given as trustee and bind the *cestuis*.[5] A note, though not signed as trustee, will, as between the *cestui* and the trustee, be the obligation of the former if the debt was properly incurred for its benefit.[6]

[1] Michael *v*. Jones, 84 Mo. 578. [Fehlinger *v*. Wood, 134 Pa. St. 517, 523.]

[2] Tutt *v*. R. R. Co., 16 S. C. 365.

[3] Pracht & Co. *v*. Lange, 81 Va. 711.

[4] Cruselle *v*. Chastain, 76 Ga. 840; Bowen *v*. Penny, id. 743. [Hall *v*. Jameson, 151 Cal. 606.]

[5] Thomassen *v*. Van Wyngaarden, 65 Iowa, 689.

[6] Bushong *v*. Taylor, 82 Mo. 660.

he had retired. Noyes *v*. Turnbull, 54 Hun, 26, 130 N. Y. 639. See also Wells-Stone Co. *v*. Grover, 7 N. D. 460, 41 L. R. A. 252.

CHAPTER XV.

POSSESSION — CUSTODY — CONVERSION — INVESTMENT OF TRUST PROPERTY, AND INTEREST THAT TRUSTEES MAY BE MADE TO PAY.

§ 438. Duty of trustee to reduce the trust property to possession.
§ 439. Time within which possession should be obtained.
§ 440. Diligence necessary in acquiring possession.
§ 441. The care necessary in the custody of trust property.
§ 442. In what manner certain property should be kept.
§ 443. Where the property may be deposited.
§§ 444, 445. How money must be deposited in bank.
§ 446. Within what time trustee should wind up testator's establishment.
§ 447. Trustee must not mix trust property with his own.
§ 448. When a trustee is to convert trust property.
§ 449. General rule as to conversion.
§ 450. When a court presumes an intention that property is to be converted.
§ 451. When the court presumes that the property is to be enjoyed by *cestui que trust in specie*.
§ 452. Of investment.
§ 453. As to investment in personal securities.
§ 454. As to the employment of trust property in trade, business, or speculation.
§ 455. Rule as to investments in England.
§ 456. Rule in the United States.
§§ 457, 458. Rule as to real securities.
§ 459. Of investments in the different States.
§§ 460, 461. Construction, where the instruments of trust direct how investments may be made.
§ 462. Within what time investments must be made.
§ 463. Trustees must not mingle their own money in investments.
§ 464. Must not use the trust-money in business.
§ 465. Original investments and investments left by the testator.
§ 466. Changing investments.
§ 467. Acquiescence of *cestui que trust* in improper investments.
§ 468. Interest that trustees must pay upon trust funds on any dereliction of duty.
§ 469. When he is directed to invest in a particular manner.

§ 470. When he improperly changes an investment.
§ 471. When compound interest will be imposed, and when other rules will be applied.
§ 472. Rule where an accumulation is directed.

§ 438. THE first duty of a trustee, after his appointment and qualification to act, is to secure the possession of the trust property and to protect it from loss and injury. Until possession is properly taken by the trustee the grantor is entitled to the profits of the estate.[1] If the trust property is an equitable interest or estate, he must give notice to the holder of the legal title; and if he cannot have the legal title transferred to himself, he must take such steps that no incumbrances can be put upon it by the settlor or assignor. If the trust fund consists in part of notes, bonds, policies of insurance, and other similar *choses in action*, notice should be given to the promisors, obligors, or makers of the instruments. This is the general rule in England and in many of the United States.[2] (*a*) In some

[1] Frayser *v.* Rd. Co., 81 Va. 388.

[2] Jacob *v.* Lucas, 1 Beav. 436; Wright *v.* Dorchester, 3 Russ. 49, n.; Timson *v.* Ramsbottom, 2 Keen, 35; Forster *v.* Blackstone, 1 Myl. & K. 297; Roofer *v.* Harrison, 2 K. & J. 86; Loveredge *v.* Cooper, 3 Russ. 30; Dearle *v.* Hall, id. 1; Meux *v.* Dell, 1 Hare, 73; Stocks *v.* Dobson, 4 De G., M. & G. 11; Voyle *v.* Hughes, 2 Sm. & Gif. 18; Ryall *v.* Rowles, 1 Ves. 348; 1 Atk. 165; Dow *v.* Dawson, 1 Ves. 331; 3 Lead. Cas. Eq. 612; Jones *v.* Gibbons, 9 Ves. 410; Thompson *v.* Spiers, 13 Sim. 469; Waldron *v.* Sloper, 1 Drew. 193; *Ex parte* Boulton, 1 De G. & J. 163; Pierce *v.* Brady, 23 Beav. 64; Martin *v.* Sedgwick, 9 Beav. 333; Evans *v.* Bicknell, 6 Ves. 174; Dunster *v.* Glengall, 3 Ir. Eq. 47; Forster *v.* Cockerell, 9 Bligh (N. S.), 332, 3 Cl. & Fin. 456; Feltham *v.* Clark, 1 De G. & Sm. 307; *In re* Atkinson, 2 De G., M. & G. 140; Mangles *v.* Dixon, 18 Eng. L. & Eq. 82; Brashear *v.* West, 7 Pet. 608; Stewart *v.* Kirkland, 19 Ala. 162; Cummings *v.* Fullam, 13 Vt. 134; Northampton Bank *v.* Balliet, 8 Watts & S. 311; Bean *v.* Simpson, 4 Shep. 49; Phillips *v.* Bank of Lewistown, 18 Penn. St. 394; Laughlin *v.* Fairbanks, 8 Mo. 367; Campbell *v.* Day, 16 Vt. 358; Barney *v.* Douglass, 19 Vt. 98; Ward *v.* Morrison, 25 Vt. 593; Loomis *v.* Loomis, 2 Vt. 201; Adams *v.*

(*a*) In these jurisdictions an assignment of a *cestui's* interest in personalty or income takes effect as between assignees at the date of notice to the trustee. Lambert *v.* Morgan, 110 Md. 1; Low *v.* Bouverie, [1891] 3 Ch. 82; *In re* Wyatt, [1892] 1 Ch. 188; Stephens *v.* Green, [1895] 2 Ch. 148.

States, however, it is held that an assignment of a *chose in action* is complete in itself when the assignor and assignee have completed the transfer, and that notice to the debtor is not necessary in order to make the assignment valid as against third persons, or attaching creditors, or subsequent assignees without notice.[1] But it seems to be agreed in all the cases, that, if the debtor without notice and in *good faith* pays the debt to the assignor, it will be a good payment, and discharge him from further liability;[2] but if he should pay after notice he would still be

Leavens, 20 Conn. 73; Van Buskirk *v.* Ins. Co., 14 Conn. 145; Foster *v.* Mix, 20 Conn. 395; Bishop *v.* Halcomb, 10 Conn. 444; Woodbridge *v.* Perkins, 3 Day, 364; Judah *v.* Judd, 5 Day, 534; Murdock *v.* Finney, 21 Mo. 138; Cladfield *v.* Cox, 1 Sneed, 330; Fisher *v.* Knox, 13 Penn. St. 622; Judson *v.* Corcoran, 17 How. 614. But see Beavan *v.* Oxford, 6 De G., M. & G. 507; Kekewich *v.* Manning, 1 De G., M. & G. 176; Clack *v.* Holland, 24 L. J. 19; Barr's Trusts, 4 K. & J. 219; Scott *v.* Hastings, id. 633; Bridge *v.* Beadon, L. R. 3 Eq. 664; *In re* Brown's Trusts, L. R. 5 Eq. 88; Lloyd *v.* Banks, L. R. 4 Eq. 222; 3 Ch. 488. [Low *v.* Bouverie, [1891] 3 Ch. 82; *In re* Wyatt, [1892] 1 Ch. 188; Stephens *v.* Green, [1895] 2 Ch. 148; *Re* Patrick, 39 W. R. 113; Graham Paper Co. *v.* Pembroke, 124 Cal. 117; Lambert *v.* Morgan, 110 Md. 1; Houser *v.* Richardson, 90 Mo. App. 134; Jack *v.* National Bank, 17 Okla. 430; Phillips's Estate, 205 Pa. St. 525; Dillingham *v.* Traders' Ins. Co., 120 Tenn. 302. See also Goldthwaite *v.* Nat. Bank, 67 Ala. 549, 554; Tison *v.* People's Sav. & L. Ass'n, 57 Ala. 323, 331; Duke *v.* Clark, 58 Miss. 465, 474; Williams *v.* Donnelly, 54 Neb. 193; Starr *v.* Haskins, 26 N. J. Eq. 414; Tate *v.* Security Co., 63 N. J. Eq. 559, 561; Ga. Code (1895), § 3077; 1 Ames' Cases on Trusts (2d ed.), 326.]

[1] Sharpless *v.* Welch, 4 Dall. 279; Bholen *v.* Cleveland, 1 Mason, 174; Dix *v.* Cobb, 4 Mass. 508; Wood *v.* Partridge, 11 Mass. 488; Warren *v.* Copelin, 4 Met. 594; Littlefield *v.* Smith, 17 Me. 327; Corser *v.* Craig, 1 Wash. C. C. 24; United States *v.* Vaughn, 3 Binn. 394; Muir *v.* Schenk, 3 Hill, 228; Talbot *v.* Cook, 7 Mon. 438; Maybin *v.* Kirby, 4 Rich. Eq. 105; Stevens *v.* Stevens, 1 Ashm. 590; Beckwith *v.* Union Bank, 5 Seld. 211; Conway *v.* Cutting, 50 N. H. 408; Garland *v.* Harrington, 51 N. H. 409. [Columbia Finance & Tr. Co. *v.* First Nat. Bank, 116 Ky. 364, 375; Putnam *v.* Story, 132 Mass. 205, 211; Whittredge *v.* Sweetzer, 189 Mass. 45; Thayer *v.* Daniels, 113 Mass. 129; Central Trust Co. *v.* West India Imp. Co., 169 N. Y. 314, 323; Fairbanks *v.* Sargent, 104 N. Y. 108, 116; Niles *v.* Mathusa, 162 N. Y. 546, 552; Downer *v.* So. Royalton Bank, 39 Vt. 25; Tingle *v.* Fisher, 20 W. Va. 497; Quigley *v.* Welter, 95 Minn. 383 (*semble*). See 1 Ames' Cases on Trusts (2d ed.), 326.]

[2] Reed *v.* Marble, 10 Paige, 509; Mangles *v.* Dixon, 18 Eng. L. & Eq. 82; 1 Mac. & G. 446; 3 H. L. Cas. 739, and cases before cited; Stocks *v.* Debson, 4 De G., M. & G. 11.

liable to the assignee.[1] Under all circumstances, it is safer to give notice to the debtor, whether the courts of a State hold notice necessary or not. If the assignor receive the money of the debtor after the assignment, he will hold the money in trust for the assignee.[2] These general rules concerning notice do not apply to equities in real estate.[3] Trustees should also insist upon possession of all the notes, bonds, policies, and other obligations for the payment of money being delivered to them; for if negligent in this respect, and suits and costs arise, they might be made responsible personally.[4] So, if there are debts or securities already due and payable to the trust estate, the trustees must proceed to collect them. (*a*) If any loss happens to the estate from any delay, they would be responsible,[5] and they may accept payment even before the debts are due.[6] Where it is important for the trustees to give notice of an assignment to them, notice to one of several obligors is notice to all: so notice to one of several of a society of underwriters is suffi-

[1] Brashear *v.* West, 7 Pet. 608, and cases before cited; Judson *v.* Corcoran, 17 How. 414.

[2] Ellis *v.* Amason, 2 Dev. Eq. 273; Fortesque *v.* Barnett, 3 Myl. & K. 36.

[3] Wilmot *v.* Pike, 5 Hare, 14; Etty *v.* Bridges, 2 Y. & Col. 486; *Ex parte* Boulton, 1 De G. & J. 163; Webster *v.* Webster, 31 Beav. 393; Stevens *v.* Venables, 30 id. 625; Barr's Trusts, 4 K. & J. 219; Van Rensalaer *v.* Stafford, Hopk. Ch. 569; 9 Cow. 316; Poillon *v.* Martin, 1 Sandf. Ch. 569.

[4] Fortesque *v.* Barnett, 3 Myl. & K. 36; Meux *v.* Bell, 1 Hare, 82; Evans *v.* Bicknell, 6 Ves. 174; Knye *v.* Moore, 1 S. & S. 65; Lloyd *v.* Banks, L. R. 4 Eq. 222; 3 Ch. 488.

[5] Caffrey *v.* Darbey, 6 Ves. 488; McGachen *v.* Dew, 15 Beav. 84; Tebbs *v.* Carpenter, 1 Madd. 298; Waring *v.* Waring, 3 Ir. Eq. 335; Platel *v.* Craddock, C. P. Coop. 481; Wiles *v.* Gresham, 2 Drew. 258; Grove *v.* Price, 26 Beav. 103; Rowley *v.* Adams, 2 H. L. Cas. 725; Macken *v.* Hogan, 14 Ir. Eq. 220; Mucklow *v.* Fuller, Jac. 198; Powell *v.* Evans, 5 Ves. 839; Lowson *v.* Copeland, 2 Bro. Ch. 156; Caney *v.* Bond, 6 Beav. 486; Cross *v.* Petree, 10 B. Mon. 413; Wolfe *v.* Washburn, 6 Cow. 261; Waring *v.* Darnall, 10 G. & J. 127; Hester *v.* Wilkinson, 6 Humph. 215; Garner *v.* Moore, 3 Drew. 277; Neff's App., 57 Penn. St. 91.

[6] Mills *v.* Osborne, 7 Sim. 30.

(*a*) They have implied power to employ attorneys for the purpose. Vilas *v.* Bundy, 106 Wis. 168.

cient; and if the obligors compose a corporation, there must be notice to the directors or trustees of the corporation.[1] So, if notice to trustees is necessary in any case, notice to one is sufficient.[2]

§ 439. There is no fixed time within which *executors* are to get in the *choses in action* of the testator. They must use due diligence; and what is due diligence depends upon the existing facts in every case, and a large discretion must necessarily be vested in the executor.[3] If there is property that cannot be kept without great expense, it should be sold forthwith. If the testator's establishment is expensive, it should be broken up within a reasonable time; and, under special circumstances, two months were held to be reasonable.[4] If there are shares or stocks in corporations, the executors must exercise a sound discretion to sell in the most advantageous manner, and at the most advantageous time. In the case of some Crystal Palace shares owned by a testator, a sale within a year was held to be the exercise of a reasonable discretion, although it was claimed that they ought to have been sold within two months.[5] So, where a large part of an estate consisted of Mexican bonds, which the testator directed to be converted "with all convenient speed," it was held that these words added nothing to the implied duty of every executor to convert such property with all reasonable speed; that a conversion in the course of the second year was proper and reasonable; that if executors were bound to sell at once without reference to the circumstances, there would often be a great sacrifice of property, and therefore that executors were bound to exercise a *reasonable discretion*,

[1] Timson *v.* Ramsbottom, 2 Keen, 35; Meux *v.* Bell, 1 Hare, 88; *Re* Styan, 1 Phill. 155; Smith *v.* Smith, 2 Cr. & Mee. 31; Duncan *v.* Chamberlayne, 11 Sim. 123.

[2] Greenhill *v.* Willis, 4 De G., F. & J. 147.

[3] Waring *v.* Darnall, 10 G. & J. 127; Hughes *v.* Empson, 22 Beav. 188.

[4] Field *v.* Pecket, 29 Beav. 576.

[5] Hughes *v.* Empson, 22 Beav. 138; Bate *v.* Hooper, 5 De G., M. & G. 338; Wilkinson *v.* Duncan, 26 L. J. (N. S.) Ch. 495.

according to the circumstances of each case.[1] But generally stock should be sold within the year allowed for the settling of a testator's estate, and a delay beyond this time may render the executors or trustees liable for the loss, although they act in good faith, and although some of the trustees became of age only a short time before the sale.[2] If, however, it is clear that the trustees have a discretion to sell or not according to their judgment, the case will be governed by the intention and not be the general rule.[3]

§ 440. Personal securities change from day to day; and as the death of the testator puts an end to his discretion in regard to them, unless he has exercised it in his will, the executor or trustee will become personally liable, if he does not get in the money within a reasonable time.[4] He must not allow the assets to remain out on personal security,[5] (*a*) though it was a loan or investment by the testator himself.[6] It is not enough for the executor to apply for payment through an attorney: he

[1] Buxton *v.* Buxton, 1 M. & C. 80; Prendergast *v.* Lushington, 5 Hare, 171; Hester *v.* Wilkinson, 6 Humph. 215; Waring *v.* Darnall, 10 G. & J. 127.

[2] Sculthorpe *v.* Tiffer, L. R. 13 Eq. 238; Grayburn *v.* Clarkson, L. R. 3 Ch. 605.

[3] Mackie *v.* Mackie, 5 Hare, 70; Wrey *v.* Smith, 14 Sim. 202; Sparling *v.* Parker, 9 Beav. 524.

[4] Bailey *v.* Young, 4 Y. & Col. Ch. 226; Will's App., 22 Penn. St. 330; Mucklow *v.* Fuller, Jac. 198; Tebbs *v.* Carpenter, 1 Madd. 297.

[5] Lowson *v.* Copeland, 2 Bro. Ch. 156; Caney *v.* Bond, 6 Beav. 486; Att. Gen. *v.* Higham, 2 Y. & Col. Ch. 634; Hemphill's App., 18 Penn. St. 303.

[6] Powell *v.* Evans, 5 Ves. 839; Bullock *v.* Wheatley, 1 Col. C. C. 130; Tebbs *v.* Carpenter, 1 Madd. 298; Clough *v.* Bond, 3 Myl. & Cr. 496; Hemphill's App., 18 Penn. St. 303; Pray's App., 34 id. 100; Barton's App., 1 Pars. Eq. 24, is overruled; Kimball *v.* Reading, 11 Foster, 352. In England, bank stock must be converted. Mills *v.* Mills, 7 Sim. 509; Howe *v.* Dartmouth, 7 Ves. 150; Price *v.* Anderson, 15 Sim. 473. [As to continuation of the testator's investments, see *infra*, § 465 and notes.]

(*a*) Unless so directed or authorized by the creator of the trust. Denike *v.* Harris, 84 N. Y. 89, reversing s. c. 23 Hun, 213.

must follow the collection actively by legal proceedings,[1] unless he can show that such proceedings would have been futile and vain.[2] An executor must take the same steps when his *co-executor* is a debtor to the estate, even if the testator has been in the habit of depositing or lending money to the coexecutor as to a banker.[3] Executors are not justified in dealing with a testator's money as he dealt with it himself, nor may they trust all the persons that he trusted. Nor will a direction in the will "to call in securities not approved by them" excuse executors from not calling in personal securities; for such direction refers to the different kinds of securities sanctioned by law and the court, and not to all investments outside the sanctions of the law.[4] If the executors are to get in the money "whenever they think proper and expedient," they will be liable for the fund if they allow it to remain uncollected out of kindness or regard for the tenant for life, and not upon an impartial judgment for the best interest of all the parties.[5] If the outstanding debt is secured by a real mortgage, it ought not to be called in, if it is safe, until it is wanted in the course of the administration.[6] But pains should be taken to ascertain whether the security is safe.[7] If the mortgage security is not adequate, the executor or trustee must insist upon payment, even where the *cestui que trust* is to consent to every change of investment, and he refuses to consent; for nothing will justify conduct that endangers the

[1] Lowson *v.* Copeland, 2 Bro. Ch. 156; Horton *v.* Brocklehurst, 29 Beav. 511; Paddon *v.* Richardson, 7 De G., M. & G. 563; Wolfe *v.* Washburn, 6 Cow. 261.

[2] Clack *v.* Holland, 19 Beav. 262; Hobday *v.* Peters, 28 id. 603; Alexander *v.* Alexander, 12 Ir. Eq. 1; Maitland *v.* Bateman, 16 Sim. 233, and note; Walker *v.* Symonds, 3 Swanst. 71; East *v.* East, 5 Hare, 343; Ratcliff *v.* Wynch, 17 Beav. 217; Ball *v.* Ball, 11 Ir. Eq. 370; Styles *v.* Guy, 16 Sim. 232; Billing *v.* Brogden, 38 Ch. D. 546.

[3] Styles *v.* Guy, 1 Mac. & G. 428; 1 Hall & Tw. 523; Egbert *v.* Butter, 21 Beav. 560; Candler *v.* Tillett, 22 Beav. 257; Mucklow *v.* Fuller, Jac. 198.

[4] Styles *v.* Guy, 1 Mac. & G. 428; Scully *v.* Delany, 2 Ir. Eq. 165.

[5] Luther *v.* Bianconi, 10 Ir. Ch. 194.

[6] Orr *v.* Newton, 2 Cox, 274; Howe *v.* Dartmouth, 7 Ves. 150; Robinson *v.* Robinson, 1 De G., M. & G. 252.

[7] Ames *v.* Parkinson, 7 Beav. 384.

fund.[1] (*a*) But if the fund is safe on a security sanctioned by the court and selected by the testator, it might be a breach of trust to call it in, and allow it to remain unproductive, or to invest it anew.[2] But if trustees are ordered by the court to call in securities, and they neglect to do so, they will be liable for any loss that occurs.[3] So, if trustees compromise a debt due from a bankrupt estate, they must show that the bankrupt would have obtained his discharge, and that it was impossible to get the whole debt, or they will be liable for the loss.[4] If the trustee himself owes the estate, he must treat his indebtedness as assets collected, and if he becomes bankrupt, he must prove the debt against himself, or he will be liable, even if he gets his discharge.[5] But in the United States bankrupts are not discharged from any liabilities which they are under in a fiduciary capacity. (*b*)

§ 441. It was observed in Harden *v.* Parsons,[6] that no man can require, or with reason expect, that a trustee should manage

[1] Harrison *v.* Thexton, 4 Jur. (N. S.) 550.

[2] Orr *v.* Newton, 2 Cox, 276.

[3] Davenport *v.* Stafford, 14 Beav. 338.

[4] Wiles *v.* Gresham, 2 Dr. 258; 5 De G., M. & G. 770. Lord Justice Turner expressed a doubt, whether the trustees should have been charged, without further inquiry. Bacot *v.* Hayward, 5 S. C. 441. [See *infra*, § 482, as to power to make advantageous compromises.]

[5] Orrett *v.* Corser, 21 Beav. 52; Prindle *v.* Holcombe, 45 Conn. 111; Ipswich Manuf. Co. *v.* Story, 5 Met. 310; Chenery *v.* Davis, 16 Gray, 89; Hazelton *v.* Valentine, 113 Mass. 472; Pettee *v.* Peppard, 120 Mass. 523. The acceptance of the trust requires him to treat an indebtedness for which he was previously responsible as assets collected. Stevens *v.* Gaylord, 11 Mass. 269; Ips. Manuf. Co. *v.* Story, 5 Met. 310; 18 Pick. 236; 1 Allen, 531; 10 Cush. 176; 120 Mass. 523.

[6] 1 Eden, 148.

(*a*) But see *In re* Medland, 41 Ch. Div. 476, holding that there is no absolute rule that the investment must be called in, but that such a matter must be dealt with as a practical one for the safety of the fund. See also *In re* Chapman, [1896] 2 Ch. 763; *infra*, § 466, note.

(*b*) The exact wording of the U. S. Bankruptcy Law of 1898, § 17, is: debts which "were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

another's property with the same care and discretion as his own. But this is neither sound morality nor good law. A trustee must use the same care for the safety of the trust fund, and for the interests of the *cestui que trust*, that he uses for his own property and interests.[1] And even this will not be sufficient if he is careless in his own concerns; for a trustee must in all events use such care as *a man of ordinary prudence uses in his own business of a similar nature.*[2] Thus, where a trustee had £200 of his own money, and £40 of trust-money, in his house, and he was robbed by his servant, he was not held responsible.[3] And where a trustee deposited articles with his solicitor, to be passed over to a party entitled to them, and the articles were stolen, the trustee was not held responsible.[4] But if a trustee employs an agent, and the agent steals or appropriates the property intrusted to him, the trustee will be held responsible; that is, the trustee is not responsible for the crimes of strangers, but he is responsible for the criminal acts of agents employed by himself about the trust fund,[5] (*a*) and for any loss that may

[1] Morley *v.* Morley, 2 Ch. Cas. 2; Jones *v.* Lewis, 2 Ves. 241; Massey *v.* Banner, 1 J. & W. 247; Att. Gen. *v.* Dixie, 13 Ves. 534; *Ex parte* Belchier, Amb. 220; *Ex parte* Griffin, 2 G. & J. 114; Taylor *v.* Benham, 5 How. 233; King *v.* Talbott, 50 Barb. 453; 40 N. Y. 86; Miller *v.* Proctor, 20 Ohio St. 444; Neff's App., 57 Penn. St. 91; King *v.* King, 37 Ga. 205; Campbell *v.* Campbell, 38 Ga. 304; Roosevelt *v.* Roosevelt, 6 Abb. (N. Y.) N. Cas. 447; Gould *v.* Chappell, 42 Md. 466; Carpenter *v.* Carpenter, 12 R. I. 544; Davis *v.* Harmon, 21 Grat. 194.

[2] Woodruff *v.* Snedecor, 68 Ala. 442.

[3] Morley *v.* Morley, 2 Ch. Cas. 2. [To same effect see Stevens *v.* Gage, 55 N. H. 175; Carpenter *v.* Carpenter, 12 R. I. 544.]

[4] Jones *v.* Lewis, 2 Ves. 240; Foster *v.* Davis, 46 Mo. 268.

[5] Bostock *v.* Floyer, L. R. 1 Eq. 28; Hopgood *v.* Parkin, L. R. 11 Eq. 74.

(*a*) In view of later decisions the proposition in the text cannot be considered a correct statement of the law. Of the two cases cited as authority, Hopgood *v.* Parkin has been discredited by subsequent English decisions, and Bostock *v.* Floyer has been construed to hold merely that misapplication of trust funds by an agent renders the trustee liable where he has unnecessarily entrusted the agent with the custody of trust funds. Speight *v.* Gaunt, 22 Ch. Div. 727, 761; *Re* Partington, 57 L. T. 654, 661.

Although a trustee cannot prop-

fall upon the estate by the forgery of a signature upon which he pays money.[1]

[1] Eaves *v.* Hickson, 30 Beav. 136.

erly delegate his trust to an agent, "he is justified in employing qualified persons as agents when in so doing he follows the ordinary course of business of a like nature," and when "according to the usual and regular course of such business moneys payable or receivable ought to pass through the hands of such agents, the course may be properly followed by the trustees, though the moneys are trust moneys." Rochfort *v.* Seaton, [1896] 1 Ir. R. 18; Speight *v.* Gaunt, 9 App. Cas. 1, 5; 22 Ch. Div. 727; McCloskey *v.* Gleason, 56 Vt. 264; Finlay *v.* Merriman, 39 Tex. 56. If the employment of agents is reasonably necessary for the performance of the duties of the trust, and the trustee selects persons who are apparently honest and properly qualified and uses reasonable supervision over them, he is not responsible for their lack of intelligence or dishonesty. *In re* Weall, 42 Ch. Div. 674; Jobson *v.* Palmer, [1893] 1 Ch. 71; Lord De Clifford's Estate, [1900] 2 Ch. 707; Carpenter *v.* Carpenter, 12 R. I. 544.

Thus a trustee may properly employ agents to collect sums due the estate, and is not responsible for losses of collections due to dishonesty or insolvency of such persons, if he took proper care in appointing them and exercised reasonable supervision over them. *In re* Brier, 26 Ch. Div. 238; Finlay *v.* Merriman, 39 Tex. 56. Similarly where trust funds have been lost through embezzlement by a broker employed by trustees to purchase certain securities, and the usual business precautions were taken, they have been held not to be responsible for the loss. Speight *v.* Gaunt, 9 A. C. 1. But where the trustee was negligent in selecting his broker and unnecessarily put the trust funds into his custody, he was held to be liable for the loss due to the broker's dishonesty. Robinson *v.* Harkin, [1896] 2 Ch. 415. And where the trustee has not exercised proper supervision ove his agent and has unnecessarily given him the opportunity to misappropriate the trust funds, he is liable for the loss. McCloskey *v.* Gleason, 56 Vt. 264.

Where a loss of trust funds was due to the failure of a solicitor, employed by the trustees, to see that a certain assignment was properly executed, it was held that the trustees were not liable, since this was a matter in which they must necessarily rely upon solicitors. Rochfort *v.* Seaton, [1896] 1 Ir. R. 18. But a trustee cannot properly delegate the responsibility of choosing proper investments to a solicitor or a broker, even when the latter is a cotrustee. *Re* Partington, 57 L. T. 654, 661; Cowper *v.* Stoneham, 68 L. T. 18; Hanscom *v.* Marston, 82 Me. 288. And he cannot properly leave the trust funds in the hands of a solicitor or other agent while he is seeking a proper investment. Speight *v.* Gaunt, 9 App. Cas. 1, 5; Bostock *v.* Floyer, 1 Eq. 26.

Although a trustee may properly

§ 442. Several trustees, residing in different places, cannot all have the custody of the same articles; therefore it is said that articles of plate, which pass by delivery, and stocks and bonds, payable to the bearer, with coupons to be cut off for the interest, should be deposited at a responsible banker's.[1]

§ 443. A trustee may deposit money temporarily in some responsible bank or banking-house;[2] and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss, as where the bank failed in consequence of war;[3] but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his *own credit*, and not to the separate account of the trust estate,[4] even though he had no other funds in bank, and told the officers at the time of deposit that the funds were held by him in trust.[5] So if he allows another person to draw

[1] Mendes *v.* Guedalla, 2 John. & H. 259. [*In re* De Pothonier, [1900] 2 Ch. 529.]

[2] Rowth *v.* Howell, 3 Ves. Jr. 565; Jones *v.* Lewis, 2 Ves. 241; Adams *v.* Claxton, 6 Ves. 226; *Ex parte* Belchier, Amb. 219; Att. Gen. *v.* Randall, 21 Vin. Ab. 534; Massey *v.* Banner, 1 J. & W. 248; Horsley *v.* Chaloner, 2 Ves. 85; France *v.* Woods, Taml. 172; Dorchester *v.* Effingham, id. 279; Freme *v.* Woods, id. 172; Wilks *v.* Groome, 3 Dr. 584; Johnston *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen, 29 Beav. 211. [Law's Estate, 144 Pa. St. 449; Baer's Appeal, 127 Pa. St. 360.]

[3] Douglas *v.* Stephenson's Ex'r, 75 Va. 749. [Moore *v.* Eure, 101 N. C. 11; Atterberry *v.* McDuffee, 31 Mo. App. 603, 611.]

[4] Wren *v.* Kirton, 11 Ves. 377; Fletcher *v.* Walker, 3 Madd. 73; Macdonnell *v.* Harding, 7 Sim. 178; Mathews *v.* Brise, 6 Beav. 239; Massey *v.* Banner, 1 J. & W. 241; see remarks on this case in Pennell *v.* Deffell, 4 De G., M. & G. 386, 392; School Dis. Greenfield *v.* First National Bank, 102 Mass. 174; Mason *v.* Whitehorn, 2 Cold. 242.

[5] William's Adm'r *v.* Williams, 55 Wis. 300. [*In re* Arguello, 97 Cal. 196;

deposit trust funds in a bank of good standing for a reasonable time pending investment or distribution and may properly deposit in a bank the securities in which he has invested trust funds, he has been held to be liable to replace the loss caused by misappropriations by the cashier of a bank whom he has requested to purchase certain bonds and to place them on deposit in the bank for him, when he has not taken the precaution to find out for himself that the bonds have been purchased and placed on special deposit in his name. Key *v.* Hughes' Ex'r, 32 W. Va. 184.

upon the fund and misapply the money;[1] so if he deposits the money in such manner that it is not under his own exclusive control, as where money is deposited in bank so that it cannot be drawn without the concurrence of other persons, the trustee will be liable for the failure of the bank, on the principle that it is the duty of the trustee to withdraw the money from the bank upon the slightest indication of danger or loss, and he cannot perform this duty promptly if he is clogged by the necessity of procuring the concurrent action of other persons.[2] (*a*) So he will be liable if he keeps money in bank an unreasonable length of time, or where it is his duty to invest the fund in safe securities,[3] or to pay it over to newly appointed trustees,[4] or into court;[5] or if, having no occasion to keep a balance on hand for the purposes of the trust, he lends the money to the bank on interest upon personal security, that being a security not sanctioned by the court.[6]

§ 444. Trustees may leave money in the custody of third persons when it is necessary in the course of business, as where money is left in the hands of an auctioneer as agent of both parties on a sale or purchase;[7] and during the negotiation of

Booth *v.* Wilkinson, 78 Wis. 652; O'Connor *v.* Decker, 95 Wis. 202; Milmo's Succession, 47 La. Ann. 126, 127; McCollister *v.* Bishop, 78 Minn. 228. 1 Ames on Trusts, (2d ed.) 481–484, notes.]

[1] Ingle *v.* Partridge, 32 Beav. 661; 34 id. 411.

[2] Salway *v.* Salway, *alias* White *v.* Baugh, 2 R. & M. 215; 9 Bligh, 181; 3 Cl. & Fin. 44; overruling same case, 4 Russ. 60.

[3] Moyle *v.* Moyle, 2 R. & M. 710; Johnston *v.* Newton, 11 Hare, 169. [Hetfield *v.* Debaud, 54 N. J. Eq. 371; Stambaugh's Estate, 135 Pa. St. 585; Whitecar's Estate, 147 Pa. St. 368; Young's Estate, 97 Iowa, 218; Dick's Estate, 183 Pa. St. 647.]

[4] Lunham *v.* Blundell, 4 Jur. (N. S.) 3.

[5] Wilkinson *v.* Bewick, 4 Jur. (N. S.) 1010.

[6] Darke *v.* Martyn, 1 Beav. 525. [Baer's Appeal, 127 Pa. St. 360. Held otherwise in Hunt, Appellant, 141 Mass. 515.]

[7] Edmonds *v.* Peake, 7 Beav. 239. [See *supra*, § 441, note.]

(*a*) But it has been held no impropriety for a trustee to enter into an agreement with the sureties on his bond to deposit trust funds at a certain bank. McCollister *v.* Bishop, 78 Minn. 228.

an investment, the trustees may buy exchequer bills;[1] but if they leave the exchequer bills undistinguished in the hands of a banker or broker, they will be liable for the loss of the money.[2] But if trustees deposit money in bank to their own credit;[3] or if they leave it for an unreasonable time, as a year after the testator's death and after all debts and legacies are paid;[4] or if they place their papers and receipts in the hands of their solicitor, so that he can receive their money and misapply it;[5] or if the money is so paid into bank that it may be drawn out upon the check of one trustee and misapplied;[6] or if they neglect to sell property when it ought to have been sold,[7] or suffer money to remain upon personal security,[8] or upon an unauthorized security;[9] or if the money is left improperly or unadvisedly in the hands of a coexecutor or cotrustee, so that he has an opportunity to misapply it, — all the trustees will be responsible for any loss that may occur to the trust fund.[10] (*a*) So trustees are liable for the attorneys and solicitors whom they employ; as where they employ a solicitor to examine the title to a proposed mortgage, and they are misled by him in such manner that a loss occurs to the estate, they are liable to make it good.[11] (*b*)

[1] Mathews *v.* Brise, 6 Beav. 239.

[2] Ibid.

[3] Massey *v.* Banner, 1 J. & W. 241; Wren *v.* Kirton, 11 Ves. 377; Mason *v.* Whitehorn, 2 Cold. 242. [*Supra*, § 443.]

[4] Ibid.

[5] Ghost *v.* Waller, 9 Beav. 497; Rowland *v.* Witherden, 3 Mac. & G. 568.

[6] Clough *v.* Bond, 3 Myl. & Cr. 490; Clough *v.* Dixon, 8 Sim. 594. [Unless reasonable business necessity justifies such a course, *supra*, § 415, note.]

[7] Phillips *v.* Phillips, Freem. Ch. 11.

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

[9] Hancom *v.* Allen, 2 Dick. 498 and n.; Howe *v.* Dartmouth, 7 Ves. 137.

[10] Langford *v.* Gascoyne, 11 Ves. 333; Shipbrook *v.* Hinchinbrook, id. 252; 16 Ves. 478; Underwood *v.* Stevens, 2 Mer. 712; Hardy *v.* Metropolitan Land Co., L. R. 7 Ch. 429.

[11] Hopgood *v.* Parkin, L. R. 11 Eq. 74; Bostock *v.* Floyer, L. R. 1 Eq. 26.

(*a*) As to a trustee's liability for the *devastavit* or other breach of trust committed by a cotrustee, see *supra*, § 415, note *a*.

(*b*) Later authorities have limited the scope of the two cases cited above so that the text needs considerable qualification. In cases where

§ 445. In one case it was said, that an executor would not be liable if he had placed money in bank under the control of a coexecutor. The money was entered on joint account, but the individual checks of the coexecutors could draw it out. This was held to be the ordinary and reasonable course of business.[1] If, however, there is any fraud, collusion, or wilful default, or gross neglect, or if the executor has any reason to interfere, and does not put a stop to the mismanagement of his coexecutor, he will be held liable.[2] The case of Kilbee *v.* Sneyd, however, is so doubtful on this point, and contrary to authority, that it would be unsafe to act upon it.[3]

§ 446. Trustees and executors have a reasonable time to wind up a testator's estate, and make investments; and they may, without responsibility, keep the money in a reliable bank for one year after the death of the testator;[4] (*a*) but if they draw the money out of bank, and make any irregular investment, or lend it to another bank on interest, they will be responsible for the loss of the money, even if the will directs that the trustees shall not be responsible for losses by a banker; the construction of such direction being that the trustees shall not be liable for loss of money deposited with a banker in the ordinary manner.[5]

[1] Kilbee *v.* Sneyd, 2 Moll. 186.

[2] Ibid. 203, 213.

[3] Clough *v.* Dickson, 8 Sim. 594; 3 Myl. & Cr. 490; Gibbons *v.* Taylor, 22 Beav. 344; Ingle *v.* Partridge, 32 Beav. 661; 34 Beav. 411.

[4] Johnston *v.* Newton, 11 Hare, 160; Swinfen *v.* Swinfen, 29 Beav. 211; Wilks *v.* Groome, 3 Dr. 584.

[5] Rehden *v.* Wesley, 29 Beav. 213.

the employment of or reliance upon attorneys and solicitors is reasonably necessary, trustees are not liable to make good losses due to the default or carelessness of the agent, when he has been trusted or relied upon no further than was reasonably necessary. *Supra*, § 441, note; Rochfort *v.* Seaton, [1896] 1 Ir. R. 18.

(*a*) There seems to be no rule that trustees and executors may retain the trust funds uninvested for a year and no more. They must act with reasonable diligence in view of all the circumstances. See Dick's Estate, 183 Pa. St. 647; Dorris *v.* Miller, 105 Iowa, 564; Howard *v.* Manning, 65 Ark. 122; *In re* Clark's Estate, 39 N. Y. S. 722; *In re* Muller, 52 N. Y. S. 565.

§ 447. The trustee must not mingle the trust fund with his own. (*a*) If he does, the *cestui que trust* may follow the trust property, and claim every part of the blended property which the trustee cannot identify as his own.[1]

§ 448. There may be express trusts for conversion; that is, to sell the trust fund, as it exists at the time of the testator's decease, and convert the same into some other kind of property or investment; (*b*) and there may be an express trust to allow

[1] Lupton *v.* White, 15 Ves. 432, 440; Chedworth *v.* Edwards, 8 Ves. 46; White *v.* Lincoln, id. 363; Fellowes *v.* Mitchell, 1 P. Wms. 83; Gray *v.* Haig, 20 Beav. 219; Leeds *v.* Amherst, id. 239; Mason *v.* Morley, 34 Beav. 471, 475; Cook *v.* Addison, L. R. 7 Eq. 470; Morrison *v.* Kinstra, 55 Miss. 71. [Fant *v.* Dunbar, 71 Miss. 576.]

(*a*) Nor with funds of a third person. Westover *v.* Carman's Estate, 49 Neb. 397.

(*b*) Under the generally recognized doctrine of equitable conversion an imperative direction to a trustee or to a donee of a power of sale, to change the form of the property has the effect of determining the nature of the beneficial interests as if the actual conversion had been made as directed at the moment their interests were created. Allen *v.* Watts, 98 Ala. 384; Burbach *v.* Burbach, 217 Ill. 547; Boland *v.* Tiernay, 118 Iowa, 59; Brown Banking Co. *v.* Stockton, 107 Ky. 492; Snover *v.* Squire, 24 A. 365 (N. J. Ch. 1892); Matter of Russell, 168 N. Y. 169; Duckworth *v.* Jordan, 138 N. C. 520, 525; Williamson's Estate, 153 Pa. St. 508; Thomman's Estate, 161 Pa. St. 444; Howell *v.* Mellon, 189 Pa. St. 169; Petition of Holder, 21 R. I. 48; Martin *v.* Moore, 49 Wash. 288; Lynch *v.* Spicer, 53 W. Va. 426, 430; Handley *v.* Palmer, 91 Fed. 948. See also cases cited *infra*. See Lackey's Estate, 149 Pa. St. 7. Thus if a testator has directed trustees under his will or his executor to sell his real estate, the interests of those entitled under his will are treated as personalty and the trust is treated as a trust of personalty from the beginning, although the actual conversion does not take place at once. Harrington *v.* Pier, 105 Wis. 485. Likewise an imperative direction to convert personalty into real estate makes the interests of those entitled real estate. McFadden *v.* Hefley, 28 S. C. 317; Phillips *v.* Ferguson, 85 Va. 509; *In re* Cleveland's Settled Estates, [1893] 3 Ch. 244. A discretion given to the trustee to postpone the actual conversion does not postpone the time of the equitable conversion, provided the actual conversion is to take place some time at all events. Bates *v.* Spooner, 75 Conn. 501, 508; Burbach *v.* Burbach, 217 Ill. 547; Lambert *v.* Morgan, 110 Md. 1, 29; Crane *v.* Bolles, 49 N. J. Eq. 373; Underwood *v.* Curtis, 127 N. Y. 523; Russell *v.* Hilton, 80 N.

the *cestuis que trust* the use and enjoyment of the *specific* property devised. Both of these forms of trust must be strictly executed,

Y. S. 563, 80 App. Div. 178; *In re* Hosford, 50 N. Y. S. 550; Severns's Estate, 211 Pa. St. 65; Tasker's Estate, 215 Pa. St. 267; Att. Gen. *v.* Dodd, [1894] 2 Q. B. 150.

Where a trustee is given mere authority to convert in his discretion without the imperative duty of doing so there is no equitable conversion. Ness *v.* Davidson, 49 Minn. 469; Condit *v.* Bigalow, 64 N. J. Eq. 504, 507; Matter of Tatum, 169 N. Y. 514; Matter of Coolidge, 85 App. Div. (N. Y.) 295; Matter of Bingham, 127 N. Y. 296; Carberry *v.* Ennis, 76 N. Y. S. 537, 72 App. Div. 489; Penfield *v.* Tower, 1 N. D. 216; Cooper's Estate, 206 Pa. St. 628; Sauerbier's Estate, 202 Pa. St. 187; Taylor *v.* Haskell, 178 Pa. St. 106; Solliday's Estate, 175 Pa. St. 114; Ingersoll's Estate, 167 Pa. St. 536; Becker's Estate, 150 Pa. St. 524; Bennett *v.* Gallaher, 115 Tenn. 568; Bedford *v.* Bedford, 110 Tenn. 204; Wayne *v.* Fouts, 108 Tenn. 145, 148. Actual conversion in the exercise of such a discretionary power converts the interests of the beneficiaries. Matter of McKay, 77 N. Y. S. 845, 75 App. Div. 78. But mere changes in investments for convenience of management do not convert the interests of those entitled. Gray *v.* Whittemore, 192 Mass. 367; Henszey's Estate, 220 Pa. St. 212. See also Hovey *v.* Dary, 154 Mass. 7.

An imperative direction to convert upon the happening of a contingency which may never occur does not accomplish equitable conversion until the happening of the contingency. Ford *v.* Ford, 70 Wis. 19. Likewise of a direction to convert if and when requested by the *cestuis*. Wheless *v.* Wheless, 92 Tenn. 293; Meade *v.* Campbell, 34 S. E. 30 (Va. 1899). To a similar effect see Pyott's Estate, 160 Pa. St. 441. But an imperative direction to convert upon request of life beneficiaries, or after their death at a time left to the discretion of the trustees, accomplishes equitable conversion of the interests of the remainder-men, since the conversion is to take place some time at all events. Att. General *v.* Dodd, [1894] 2 Q. B. 150.

Where the actual conversion is mandatory but is postponed to the happening of a future event, as, *e. g.*, the death of the life tenant, it has been held by some courts that there is no equitable conversion until the happening of the future event. Sayles *v.* Best, 140 N. Y. 368; Liveright *v.* Sternberger, 115 N. Y. S. 349, 131 App. Div. 13; Williams *v.* Lobban, 206 Mo. 399. But other courts have held that the equitable conversion dates from the beginning. Lash *v.* Lash, 209 Ill. 595; Beaver *v.* Ross, 140 Iowa, 154; Duckworth *v.* Jordan, 138 N. C. 520.

If it is clear from the whole will that the testator intended that conversion should be made at all events, an imperative direction to convert is frequently implied. Clarke's Appeal, 70 Conn. 195; Davenport *v.* Kirkland, 156 Ill. 169; Boyce *v.* Kelso Home, 107 Md. 190; Harris *v.* Ingalls, 74 N. H. 339; Roy *v.* Monroe, 47 N. J. Eq. 356; Crane *v.* Bolles, 49 N. J. Eq. 373; Matter of

and generally no question arises upon them. But a question sometimes arises from the situation and character of the prop-

Gantert, 136 N. Y. 106; Merritt *v.* Merritt, 53 N. Y. S. 127, 32 App. Div. 442; Keim's Estate, 201 Pa. St. 609; Severns's Estate, 211 Pa. St. 65; Fahnestock *v.* Fahnestock, 152 Pa. St. 56; Mustin's Estate, 194 Pa. St. 437; Marshall's Estate, 147 Pa. St. 77; McFadden *v.* Hefley, 28 S. C. 317; Williams *v.* Williams, 135 Wis. 60; Benner *v.* Mauer, 133 Wis. 325, 329; Dodge *v.* Williams, 46 Wis. 70; Att. Gen. *v.* Dodd, [1894] 2 Q. B. 150. See Reid *v.* Clendenning, 193 Pa. St. 406. In Becker *v.* Chester, 115 Wis. 90, 118, it was said: "When the execution of the scheme of the testator would be impossible, or attended with such difficulties that it would be unreasonable to suppose that its execution was contemplated by him without the conversion of real estate into personal property, a direction for such conversion will be deemed imperatively expressed in the will by necessary implication, to the same effect as if expressed in words; and the realty so directed to be converted will be deemed impressed with the character of personal property from the time of the death of the testator."

In Matter of Tatum, 169 N. Y. 514, it was said: "In order that a court shall be justified in so construing the will of a decedent as to effect a change in the apparent character of his estate, and in regulating its final distribution, the equivalent of such a direction should be found in the general scheme of the will, when the only power given to sell the real estate is discretionary. Unless the purpose of the testator will fail without conversion, equity will not presume it. There should be an implication of a direction to convert, so unequivocal and so strong as to leave no substantial doubt in the mind. Indeed, conversion, to be decreed, must be so necessary, as that, without it, the provisions of the will would be rendered unreasonable and incapable of a just and effective operation." Matter of Coolidge, 85 App. Div. (N. Y.) 295, affirmed 177 N. Y. 541.

The general rule has been stated as follows in Pennsylvania: "To work a conversion of real estate into personalty, there must be either (*a*) a positive direction to sell; or (*b*) an absolute necessity to sell in order to execute the will; or (*c*) such a blending of realty and personalty, by the testator, in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money." Darlington *v.* Darlington, 160 Pa. St. 65, 70; Reid *v.* Clendenning, 193 Pa. St. 406; Hunt's Appeal, 105 Pa. St. 141.

An imperative direction to convert accomplishes equitable conversion only to the extent required to accomplish the manifest purpose for which conversion was directed; and, if the actual conversion will not accomplish the purpose for which it was directed or is unnecessary, there is no equitable conversion, and the property passes to those entitled in its original form. Trask *v.* Sturges, 170 N. Y. 482, 489; Jones *v.* Kelly, 170 N. Y. 401; Phillips *v.* Ferguson,

erty, and the relations of the *cestuis que trust* to it, whether the trustee is to convert the property into another form, or allow the *cestuis que trust* to enjoy it *in specie:* that is, the court is left to infer or imply, from the construction of the instrument, the character of the property and the relations of the *cestuis que trust*, whether it was the intention of the testator that the property should be converted, or whether the beneficiaries should take the use of it specifically, according to the terms in which

85 Va. 509; McHugh *v.* McCole, 97 Wis. 166; and cases cited *infra*. Thus a trust for sale which is invalid because of the rule against perpetuities does not work an equitable conversion. Goodier *v.* Edmunds, [1893] 3 Ch. 455. Where conversion of realty was directed upon the death of the life tenant for the purpose of division between two daughters, and both daughters died before the life tenant, it was held that, the purposes for which conversion had been ordered having ceased to exist, the property resumed its original character. Painter *v.* Painter, 220 Pa. St. 82. See also Rudy's Estate, 185 Pa. St. 359; *In re* Richerson, [1892] 1 Ch. 379.

Where the purpose for which a sale of land was directed does not entirely consume the proceeds, the surplus will be treated as real estate so far as necessary to determine who is entitled. Harris *v.* Achilles, 114 N. Y. S. 855, 129 App. Div. 847; Canfield *v.* Canfield, 62 N. J. Eq. 578; Moore *v.* Robbins, 53 N. J. Eq. 137; James *v.* Hanks, 202 Ill. 114; Fifield *v.* Van Wyck, 94 Va. 557; Harrington *v.* Pier, 105 Wis. 485, 492. And where a testator directs land to be sold "the conversion will, unless a contrary intention distinctly appears, be deemed to have been directed merely for the purposes of the will, and consequently if these purposes fail or do not require it, it will in equity be considered land and be given to the heir." *In re* Alabone's Estate, 72 A. 427, (N. J. Prerog. 1909); Moore *v.* Robbins, 53 N. J. Eq. 137.

Where the trustee or executor sells land under a decree of court and not under any direction in the will or trust instrument, the proceeds are treated as real estate until they reach the hands of those beneficially entitled. Smith *v.* Smith, 174 Ill. 52, 59; Chapin, Petitioner, 148 Mass. 588. In case the beneficial owner is an infant, the proceeds retain the character of real estate until he becomes of age. Wetherill *v.* Hough, 52 N. J. Eq. 683; Merriam *v.* Dunham, 62 N. J. Eq. 567; Major *v.* Hunt, 64 S. C. 97; Findley *v.* Findley, 42 W. Va. 372, 378; Matter of McMillan, 110 N. Y. S. 622, 126 App. Div. 155. Conversely, where under order of court an infant's personalty is used in the purchase of land, his interest will be treated as personalty during his minority. Matter of Bolton, 159 N. Y. 129.

As to the effect of an option to purchase given by a decedent see Smith *v.* Loewenstein, 50 Ohio St. 346; Adams *v.* Peabody Coal Co., 230 Ill. 469; *In re* Isaacs, [1894] 3 Ch. 506; *In re* Pyle, [1895] 1 Ch. 724.

it is given. All such cases must be determined by their own facts and the construction of the instrument under which the trust exists.[1]

§ 449. A court of equity has authority to decree the conversion of a trust fund from personal to real estate, or, *vice versa*, where such conversion is not contrary to the will of the donor expressly or impliedly, and is for the interest of the *cestui*.[2] The general rule is, that where the testator gives his persona property, or the residue of his personal property, or the interest of his personal property,[3] in trust, or directly to several persons in succession,[4] and the property is of such a nature that it grows less valuable by time, as where it is leaseholds or annuities, or where the property is wasted or consumed in the use of it, the court implies an intention that such property shall be converted into a fixed and permanent form, so that the beneficiaries may take the use and income of it in succession. Accordingly, in England, such property is converted into the investments allowed by law; and in the United States it must be converted into safe investments, according to the rules in force in the State where the trust is to be administered; and if the trustees fail to do so in a reasonable time, they will be guilty of a breach of trust.[5]

§ 450. The court presumes an intention that perishable property shall be converted, where several persons are to enjoy it in succession; not so much from the actual fact of such an inten-

[1] Hidden *v.* Hidden, 103 Mass. 59.

[2] *Ex parte* Jordan, 4 Del. Ch. 615.

[3] Howe *v.* Dartmouth, 7 Ves. 137; Cranch *v.* Cranch (cited id. 142, 147; Litchfield *v.* Baker, 2 Beav. 481; Crowley *v.* Crowley, 7 Sim. 427; Sutherland *v.* Cook, 1 Col. C. C. 498; Johnson *v.* Johnson, 2 Col. C. C. 441); Fearns *v.* Young, 9 Ves. 549; Benn *v.* Dixon, 10 Sim. 636; Oakes *v.* Strachey, 13 Sim. 414. [*In re* Game, [1897] 1 Ch. 881; Blake *v.* O'Reilly, [1895] 1 Ir. R. 479; Porter *v.* Baddeley, 5 Ch. D. 542; Rowlls *v.* Bebb, [1900] 2 Ch. 107.]

[4] House *v.* Way, 12 Jur. 959.

[5] Bate *v.* Hooper, 5 De G., M. & G. 338; see *post*, Chap. XVII. [1 Ames' Cases on Trusts (2d ed.), 491, note.]

tion, as from its being a convenient means of adjusting the rights of those who are to enjoy the property in succession.[1] (*a*) This presumption is made, unless a contrary intention is indicated upon the face of the will. The later authorities give effect to slighter indications than the older cases.[2] The object of the rule is to secure a fair adjustment of the rights of all the *cestuis que trust* in succession; for if the property would greatly depreciate in value in the hands of the first taker, the remainder-man might fail to receive the benefit intended to be given to him; the court, therefore, orders the perishable property to be converted into a permanent fund, unless a contrary intention is indicated in the will. So, if property, not liable to waste, but bearing a high rate of interest, and subject to great risk, is given to one person for life, and to another in remainder, the beneficiary in remainder may call for a conversion of the stocks or bonds into a less hazardous and more permanent investment, that their interests may be better protected;[3] but the court will not call in real securities without directing an inquiry whether it is necessary for the safety or benefit of all parties.[4] On the other hand, the court applies the same principles to the protection of the first taker or tenant for life; and so, if there are reversionary interests that may not fall in and become beneficial to the tenant for life, but may come into the possession of the

[1] Cape *v.* Bent, 5 Hare, 35; Pickering *v.* Pickering, 4 Myl. & Cr. 303; Hinves *v.* Hinves, 2 Hare, 611; Prendergast *v.* Prendergast, 3 H. L. Cas. 195; see Cotton *v.* Cotton, 14 Jur. 950.

[2] Morgan *v.* Morgan, 14 Beav. 82; Craig *v.* Wheeler, 29 L. J. Ch. 374; Mackie *v.* Mackie, 5 Hare, 77; Wightwick *v.* Lord, 6 H. L. Cas. 217; Blann *v.* Bell, 5 De G. & Sm. 658; 2 De G., M. & G. 775; Burton *v.* Mount, 2 De G. & Sm. 383; Howe *v.* Howe, 14 Jur. 359; 2 Spence, Eq. Jur. 42, 554.

[3] Thornton *v.* Ellis, 15 Beav. 193; Blann *v.* Bell, 5 De G. & Sm. 658; 2 De G., M. & G. 775; Wightwick *v.* Lord, 6 H. L. Cas. 217.

[4] Howe *v.* Dartmouth, 7 Ves. 150.

(*a*) Since the topic of this and the following section deals with the conflicting rights of life-beneficiary and remainder-men rather than with the actual conversion by the trustees, it seems best to confine the notes upon the topic to later sections which deal more particularly with the rights of life-beneficiaries and those entitled in remainder. *Infra*, § 548 *et seq.* and notes.

remainder-man, the court may order the reversions to be sold, and the purchase-money to be invested, so that the tenant for life may have the income for life.[1] And if the trustees have a discretion as to the time of sale, which the court cannot control, and they sell when the reversion falls in, the court will give the tenant for life the difference between the actual price for which the reversion sold, and its estimated value one year after the testator's death.[2] (*a*)

§ 451. (*b*) On the other hand, an intention may be implied from the form or terms of the gift, that the property is to be enjoyed by the *cestuis que trust in specie;* as, if there is a *specific gift* of leaseholds or of stocks, the specific legatee will take the rents and dividends of the specified property.[3] A general direction to pay rents to the tenant for life, after the mention of leaseholds, is a specific devise;[4] but it is still a matter of doubt upon the authorities, whether such a direction, unconnected with any mention of the leaseholds, is a specific devise or not.[5]

[1] Ibid.; Fearns *v.* Young, 9 Ves. 549; Dimes *v.* Scott, 4 Russ. 200. [Rowlls *v.* Bebb, [1900] 2 Ch. 107.]

[2] Wilkinson *v.* Duncan, 23 Beav. 469.

[3] Vincent *v.* Newcombe, Younge, 599; Lord *v.* Godfrey, 4 Madd. 455; Pickering *v.* Pickering, 4 Myl. & Cr. 299; Hubbard *v.* Young, 10 Beav. 205; Harris *v.* Poyner, 1 Dr. 181; Mills *v.* Mills, 7 Sim. 501; Dunbar *v.* Woodcock, 10 Leigh, 628; Harrison *v.* Foster, 9 Ala. 955; Hale *v.* Burrodale, 1 Eq. Ca. Ab. 461; Bracken *v.* Beatty, 1 Rep. in Ch. 110; Evans *v.* Iglehart, 6 G. & J. 171; Alcock *v.* Sloper, 2 Myl. & K. 702; Pickering *v.* Pickering, 2 Beav. 57.

[4] Blann *v.* Bell, 2 De G., M. & G. 775; Crowe *v.* Crisford, 17 Beav. 507; Hood *v.* Clapham, 19 Beav. 90; Marshall *v.* Brenner, 2 Sm. & Gif. 237; Elmore's Trusts, 6 Jur. (N. S.) 1325.

[5] Goodenough *v.* Tremamondo, 2 Beav. 512; Hunt *v.* Scott, 1 De G. &

(*a*) The equitable income is now reckoned as if the actual conversion had taken place at the date of the testator's death. Edwards *v.* Edwards, 183 Mass. 581; Kinmonth *v.* Brigham, 5 Allen, 270; *In re* Hill, 50 L. J. Ch. 551; *In re* Goodenough, [1895] 2 Ch. 537; Rowlls *v.* Bebb, [1900] 2 Ch. 107. As to this point and as to other questions regarding the adjustment of the rights of life beneficiary and remainder-man, see *infra*, § 548 *et seq.* and notes.

(*b*) See *infra*, § 548 *et seq.* and notes.

A mere direction to pay dividends is not a specific devise of the stocks.[1] But a bequest of the "interest, dividends, or income of all moneys or stock, and of all other property yielding income at the testator's death," has been held to be specific, and the trustees could not convert.[2] If the devise is specific, the direction to vary the securities will not affect the rights of a specific legatee, for such direction is only for the protection of the trust fund.[3] A debt due to a testator is not devised specifically, although it is embraced in the residue of an estate specifically devised, as it is in no sense in the nature of an investment, and is therefore to be converted.[4] And if a testator use any expression implying that leaseholds or stocks or other property are not to be converted, as if he names a time for the sale of them, as at or after the death of the tenant for life, the trustees will have no power to convert the property until the time arrives.[5] But where a testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, and at her decease to be disposed of as therein directed,

Sm. 219; Wearing *v.* Wearing, 23 Beav. 99; Pickup *v.* Atkinson, 4 Hare, 624; Craig *v.* Wheeler, 29 L. J. Ch. 374; Vachell *v.* Roberts, 32 Beav. 140; Harvey *v.* Harvey, 5 Beav. 134; Att. Gen. *v.* Potter, id. 164.

[1] Neville *v.* Fortescue, 16 Sim. 333; Blann *v.* Bell, 2 De G., M. & G. 775; Sutherland *v.* Cook, 1 Col. C. C. 503; Hood *v.* Clapham, 19 Beav. 90.

[2] Boys *v.* Boys, 28 Beav. 436.

[3] Lord *v.* Godfrey, 4 Madd. 455; Llewellyn's Trusts, 29 Beav. 171; Morgan *v.* Morgan, 14 Beav. 72.

[4] Holgate *v.* Jennings, 24 Beav. 630. There is some doubt upon the principles of this case.

[5] Collins *v.* Collins, 2 Myl. & K. 703; Vaughan *v.* Buck, 1 Phill. 78; Lichfield *v.* Baker, 13 Beav. 451; Harris *v.* Poyner, 1 Dr. 180; Chambers *v.* Chambers, 15 Sim. 190; Daniel *v.* Warren, 2 Y. & Col. Ch. 290; Rowe *v.* Rowe, 29 Beav. 276; Alcock *v.* Sloper, 2 Myl. & K. 699; Hind *v.* Selby, 22 Beav. 373; Bowden *v.* Bowden, 17 Sim. 65; Burton *v.* Mount, 2 De G. & Sm. 383; Skirving *v.* Williams, 24 Beav. 275; Hinves *v.* Hinves, 3 Hare, 609; Harvey *v.* Harvey, 5 Beav. 134; Bethune *v.* Kennedy, 1 Myl. & Cr. 114; Hunt *v.* Scott, 1 De G. & Sm. 219; Pickering *v.* Pickering, 2 Beav. 31; 4 Myl. & Cr. 289; Prendergast *v.* Prendergast, 3 H. L. Cas. 195; Hood *v.* Clapham, 19 Beav. 90; Neville *v.* Fortescue, 16 Sim. 333; Howe *v.* Howe, 14 Jur. 359.

it was held that the trustees must convert, as there was no indication that she should enjoy any of the property *in specie*.[1]

§ 452. After a trustee has reduced the trust fund to possession, and has secured the proper custody, and after he has converted so much of the property as was necessary to sell for money, his next duty is to invest the proceeds. It is one of the most important of the duties of trustees to invest the trust fund in such manner that it shall be safe, and yield a reasonable rate of income to the *cestui que trust*. If there are directions in the instrument of trust as to the time, manner, and kind of investment, the trustees must follow the direction and power so given them. The creator of a trust may specify the kind of investment and what security may be taken, or he may dispense with all security.[2] In the absence of such directions and powers, the trustees must be governed by the general rules of the court, or by the statutes and laws of the State in which the trust is to be executed. If there are no directions in the instrument, nor rules of court, nor statutory provisions in relation to investments, they must be governed by a sound discretion and *good faith*.[3] They must not have speculation in view, but rather a permanent investment, considering both the probable income and the probable safety of the capital.[4] A trustee should clearly indicate the investments he makes on behalf of the trust. If he invests apparently in his private capacity and after loss claims it was a trust transaction, he opens himself to suspicion of maladmin-

[1] Benn *v.* Dixon, 1 Phill. 76; Thornton *v.* Ellis, 15 Beav. 193; Morgan *v.* Morgan, 14 Beav. 92; Blann *v.* Bell, 2 De G., M. & G. 775; Hood *v.* Clapham, 19 Beav. 90; Lichfield *v.* Baker, 13 Beav. 481.

[2] Denike *v.* Harris, 84 N. Y. 89.

[3] As a general rule investments by executors and testamentary trustees, which take the funds beyond the jurisdiction of the court, will not be sustained, and the trustee makes such investments at the peril of being held responsible for the safety of investment. This rule is not inflexible, but the circumstances must be very unusual to justify the exception to it. Cruiston *v.* Olcott, 84 N. Y. 339.

[4] Emery *v.* Batchelder, 78 Me. 233. [Mattocks *v.* Moulton, 84 Me. 545; Hart's Estate, 203 Pa. St. 480; Matter of Hall, 164 N. Y. 196.]

istration.[1] A trustee ought not as a rule to invest in second mortgages.[2] Trustees ought to invest in government or State securities, or in bonds and mortgages on unincumbered real estate. The rule is not inflexible, but subject to the higher rule that the trustees are always to employ such care and diligence in the trust business as careful men of discretion and intelligence employ in their own affairs.[2] In Rhode Island, neither statute nor rule of court fixes any special class of investments for trust funds, and trustees are therefore only required to be prudent, having regard to the income and the permanence and safety of the investment.[4] Any loss occasioned by his negligence he must bear.[5] It is the duty of trustees having funds for investment to *keep* them invested, and if they retain trust-moneys uninvested beyond a reasonable time, six months being usually allowed, they are *prima facie* liable for interest.[6] Voluntary investments must not be made by a trustee beyond the jurisdiction of the court having charge of the trust, except in case of necessity for the saving of the fund. If he does so, the investment is at his peril of loss.[7] (*a*) Where a trustee invested in a confederate bond which perished on his hands, he was held not liable, having acted in good faith and with due discretion according to the

[1] State *v.* Roeper, 82 Mo. 57. [White *v.* Sherman, 168 Ill. 589; *Re* Hodges' Estate, 66 Vt. 70; Estate of Cousins, 111 Cal. 441, 447; Coffin *v.* Bramlett, 42 Miss. 194.]

[2] Com'rs of Somerville *v.* Johnson, 36 N. J. Eq. 211; Tuttle *v.* Gilmore, id. 617.

[3] Mills *v.* Hoffman, 26 Hun, 594.

[4] Peckham *v.* Newton, 15 R. I. 321.

[5] Cogbill *v.* Boyd, 77 Va. 450.

[6] Lent *v.* Howard, 89 N. Y. 169. [Young's Estate, 97 Iowa, 218; Hetfield *v.* Debaud, 54 N. J. Eq. 371; Stambaugh's Estate, 135 Pa. St. 585; Whitecar's Estate, 147 Pa. St. 368. But see *In re* Wiley, 91 N. Y. S. 661, 98 App. Div. 93.]

[7] Ormiston *v.* Olcott, 84 N. Y. 339. [McCullough *v.* McCullough, 44 N. J. Eq. 313; Pabst *v.* Goodrich, 133 Wis. 43.]

(*a*) In Massachusetts the court has expressed disapproval of such investments, but has declined to lay down any arbitrary rule against them. Thayer *v.* Dewey, 185 Mass. 68. See also Gouldey's Estate, 201 Pa. St. 491.

lights of the time of investing.[1] The test of liability is whether or no the trustees have acted as prudent men would have acted in the management of their own property.[2]

§ 453. There is one rule that is universally applicable to investments by trustees, and that rule is, that trustees cannot invest trust-moneys in personal securities. If trustees have a discretion as to the kind of investments, it is not a sound discretion to invest in personal securities.[3] Lord Hardwicke said, that "a promissory note is evidence of a debt, but no security for it."[4] Baron Hothman observed, that "lending on personal credit for the purpose of a larger interest was a species of gam-

[1] Waller *v.* Catlett, 83 Va. 200. [Finch *v.* Finch, 28 S. C. 164; Franklin *v.* McElroy, 99 Ga. 123; Baldy *v.* Hunter, 98 Ga. 170; 171 U. S. 388; compare Lamar *v.* Micou, 112 U. S. 452.]

[2] Godfrey *v.* Faulkner, 23 Ch. D. 483. [Rae *v.* Meek, 14 App. Cas. 558; *Re* Somerset, [1894] 1 Ch. 231; Dickinson, Appellant, 152 Mass. 184; Gilbert *v.* Kolb, 85 Md. 627; Mattocks *v.* Moulton, 84 Me. 545; Matter of Hall, 164 N. Y. 196; Hart's Estate, 203 Pa. St. 480; *In re* Allis's Estate, 123 Wis. 223; Pabst *v.* Goodrich, 133 Wis. 43.]

[3] Walker *v.* Symonds, 3 Swanst. 62; Darke *v.* Martin, 1 Beav. 525; Terry *v.* Terry, Pr. Ch. 273; Adye *v.* Feuilleteau, 1 Cox, 24; Vigrass *v.* Binfield, 3 Madd. 62; Harden *v.* Parsons, 1 Eden, 149, note (*a*); Anon. Lofft, 492; Keble *v.* Thompson, 3 Bro. Ch. 112; Wilkes *v.* Steward, G. Coop. 6; Clough *v.* Bond, 3 Myl. & Cr. 496; Pocock *v.* Reddington, 5 Ves. 799; Collis *v.* Collis, 2 Sim. 365; Blackwood *v.* Borrowes, 2 Conn. & Laws. 477; Watts *v.* Girdleston, 6 Beav. 188; Graves *v.* Strahan, 8 De G., M. & G. 291; Fowler *v.* Reynal, 3 Mac. & G. 500; Smith *v.* Smith, 4 Johns. Ch. 281; Nyce's Est., 5 Watts & S. 245; Soyer's App., 5 Penn. St. 377; Willes's App., 22 id. 330; Gray *v.* Fox, Saxton, Ch. 259; Harding *v.* Larned, 4 Allen, 426; Clark *v.* Garfield, 8 Allen, 427; Moore *v.* Hamilton, 4 Fla. 112; Spear *v.* Spear, 9 Rich. Eq. 184; Barney *v.* Saunders, 16 How. 545, 546. But see Knowlton *v.* Brady, 17 N. H. 458. Taking notes for a loan without security is negligence, and renders the trustee responsible if the debtor becomes insolvent. Judge of Probate *v.* Mathes, 60 N. H. 433. [Dufford *v.* Smith, 46 N. J. Eq. 216; *In re* Blauvelt's Estate, 20 N. Y. S. 119; Nobles *v.* Hogg, 36 S. C. 322; Baer's Appeal, 127 Pa. St. 360; Matter of Myers, 131 N. Y. 409; Simmons *v.* Oliver, 74 Wis. 633; *In re* Roach's Estate, 50 Or. 179. But see Hunt, Appellant, 141 Mass. 515, holding that a loan to a bank in good standing was prudent.]

[4] Walker *v.* Symonds, 3 Swanst. 81, note (a), citing Ryder *v.* Bickerton.

ing."[1] Lord Kenyon said, that "no rule was better established than that a trustee could not lend on mere personal security, and it *ought to be rung in the ears* of every one who acted in the character of trustee."[2] It makes no difference that there are several joint promisors;[3] nor that the loan is to a person to whom the testator loaned money on his personal promise;[4] nor will personal sureties justify the loan.[5] There must be express authority in the instrument of trust to authorize a loan on personal promises.[6] Loose, general expressions, leaving the nature of the investments to the trustees, will not justify such loans.[7] All the terms and conditions of a loan, to be made on personal security, must be strictly complied with; as, if a loan is authorized to a husband, upon the written consent of the wife, such consent must be had in the required form;[8] and a subsequent assent will not save the trustees from responsibility.[9] An authority to loan on personal security will not justify the trustees in lending to one of themselves;[10] nor will it justify them

[1] Adye *v.* Feuilleteau, 1 Cox, 25.

[2] Holmes *v.* Dring, 2 Cox, 1; Wynne *v.* Warren, 2 Heisk. 118; Dunn *v.* Dunn, 1 S. C. 350. A trustee, investing in personal securities, continues responsible for them after a transfer to his successor, until they are paid or legally invested. For those that are paid he is relieved from responsibility, although the money may never be received by the trust estate. *In re* Foster's Will, 15 Hun (N. Y.), 387.

[3] Ibid.; Clark *v.* Garfield, 8 Allen, 427.

[4] Styles *v.* Guy, 1 Mac. & G. 423. [Dufford *v.* Smith, 46 N. J. Eq. 216.]

[5] Watts *v.* Girdleston, 6 Beav. 188. [Simmons *v.* Oliver, 74 Wis. 633.]

[6] Forbes *v.* Ross, 2 Bro. Ch. 430; 2 Cox, 113; Child *v.* Child, 20 Beav. 50.

[7] Pocock *v.* Reddington, 5 Ves. 799; Wilkes *v.* Stewart, G. Coop. 6; Mills *v.* Osborne, 7 Sim. 30; Wynne *v.* Warren, 2 Heisk. 118. [See *infra*, § 460, note.]

[8] Cocker *v.* Quayle, 1 R. & M. 535; Pickard *v.* Anderson, L. R. 13 Eq. 608; Forbes *v.* Ross, 2 Bro. Ch. 430.

[9] Bateman *v.* Davis, 3 Madd. 98.

[10] Forbes *v.* Ross, 2 Bro. Ch. 430; 2 Cox, 113; —— *v.* Walker, 5 Russ. 7; Stickney *v.* Sewell, 1 Myl. & Cr. 814; Francis *v.* Francis, 5 De G., M. & G. 108; De Jarnette *v.* De Jarnette, 41 Ala. 708.

in lending to a relation, for the purpose of accommodating him.[1] (a)

§ 454. So, in the absence of express authority, the employment of trust funds in trade or speculation, or in a manufacturing establishment, will be a gross breach of trust.[2] (b) However advantageous such an investment may appear, the trustee investing the funds in such undertakings will be compelled to make good all losses, and to account for and pay over all profits.[3] (c)

[1] Ibid.; Langston *v.* Ollivant, G. Coop. 33; Cock *v.* Goodfellow, 10 Mod. 489; Fitzgerald *v.* Pringle, 2 Moll. 534.

[2] Munch *v.* Cockerell, 5 Myl. & Cr. 178; Kyle *v.* Barnett, 17 Ala. 306; Flagg *v.* Ely, 1 Edm. (N. Y.) 206; King *v.* Talbott, 40 N. Y. 96; 50 Barb. 453; Tucker *v.* State, 72 Ind. 242. [Warren *v.* Union Bank, 157 N. Y. 259, 268.] And parol request by testator to trustee to carry on the business for the benefit of his family is inadmissible to prove authority. Raynes *v.* Raynes, 51 N. H. 201.

[3] French *v.* Hobson, 9 Ves. 103; Brown *v.* De Tastet, Jac. 284; Cook *v.* Collingridge, id. 607; Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Docker *v.* Somes, 2 Myl. & K. 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; Martin *v.* Rayborn, 42 Ala. 648.

(a) Authority to lend to a certain named partnership does not authorize a loan to a partnership of the same name and conducting the same business after the death or retirement of one or more members. *In re* Tucker, [1894] 1 Ch. 724; Smith *v.* Patrick, [1901] App. Cas. 282.

Trustees having a power with the consent of the tenant for life, to lend on personal securities, may lend on such securities to the tenant for life himself if they are satisfied that the loan will be repaid. *In re* Laing's Settlement, [1899] 1 Ch. 593, controverting Lewin on Trusts, (10th ed.) 335. See 11th ed., 343.

(b) Thus a trustee properly holding an investment in shares of a national bank has no right to continue the investment in the business after the bank has surrendered its charter and the stockholders have voted to continue the business as a partnership. Penn *v.* Fogler, 182 Ill. 76. As to investment in shares of a business corporation, see *infra*, §§ 455, 456.

(c) He must make good not only all losses to the corpus of the trust fund, *Re* Massingberd's Settlement, 60 L. T. 620; *Re* Walker, 62 L. T. 449; Head *v.* Gould, [1898] 2 Ch. 250; but all losses of income, as well. Matter of Myers, 131 N. Y. 409; *In re* Harmon's Estate, 61 N. Y. S. 50, 45 App. Div. 196.

Ordinarily the gain on one unauthorized investment cannot be used to offset the loss on another, but if all the investments can be con-

The law discourages all such use of trust funds, by rendering it certain that the trustee shall make no profit from such investments, and that he shall be responsible for all losses. And if a trustee stands by, and sees his cotrustee employ the funds in that manner, he will be equally liable.[1] The same rule applies if the trustees simply continue the trade or business of the testator.[2] It is their duty to close up the trade, withdraw the fund, and invest it in proper securities at the earliest convenient moment; and the same rule applies although the trustees may have been the business agents or partners of the testator.[3] Nor will a power "to place out at interest, or other way of improvement," authorize the employment of the money in a trading concern.[4] In one case the direction was to "employ" the money, and it was thought that it savored of trade, and might be employed in that manner;[5] but it would not be safe for trustees to rely upon that case as an authority, even if their trust instrument contains a similar direction. If the settlor authorize his trustees to continue the fund in a trading firm, it will be a breach of trust, if the trustees allow the fund to remain after a change in the firm, as by the death or withdrawal of one of the partners.[6] If the

[1] Booth *v.* Booth, 1 Beav. 125; *Ex parte* Heaton, Buck. 386; Bates *v.* Underhill, 3 Redf. (N. Y.) 365. [*Supra*, § 415 and notes.]

[2] Ibid.; Kirkman *v.* Booth, 11 Beav. 273. In some cases, an executor is bound to complete the contracts of the testator. Collinson *v.* Lister, 20 Beav. 356.

[3] Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41. [*In re* Smith, [1896] 1 Ch. 171; Eufaula Nat. Bank *v.* Manasses, 124 Ala. 379.]

[4] Cock *v.* Goodfellow, 10 Mod. 489.

[5] Dickinson *v.* Player, C. P. Coop. 178 (1837, 1838).

[6] Cummins *v.* Cummins, 3 Jo. & Lat. 64; 8 Ir. Eq. 723. [Smith *v.* Pat-

sidered as parts of one transaction, the *cestui* will not be allowed to affirm those which are profitable and to disaffirm those which have resulted in a loss. English *v.* McIntyre, 51 N. Y. S. 697; *In re* Porter's Estate, 25 N. Y. S. 822. See *In re* Smith, 44 W. R. 270.

Where the life beneficiary has shut himself out from objecting to the misuse of trust funds, as where he himself has used them up through the negligence of the trustee, the latter, although liable to replace the principal, is entitled to the income, even after the bankruptcy of the life beneficiary. Fletcher *v.* Collis, [1905] 2 Ch. 24.

trustees are directed to continue the testator's trade, they can invest none of his general assets in the business. They are confined to the fund already embarked in the trade.[1] If the trustees act in good faith in continuing the testator's business under such directions in a will, they will not be liable for any loss;[2] but they must act in good faith and without collusion or interested motives. So trustees are not bound to continue the capital in such trade, and they ought not to do so against their judgment.[3] But if all the *cestuis que trust* are *sui juris*, and capable of acting for themselves, and they desire an executor, administrator, or trustee to continue the business of the testator a few months, in order to preserve it for his son, and the executor acts in accordance with their request, and uses his best skill and judgment in the conduct of the trade, he will be allowed for the loss in his accounts.[4] (*a*)

§ 455. In England, trustees cannot invest the trust fund in the stock or shares of any bank or private or trading corpora-

rick, [1901] A. C. 282; *In re* Tucker, [1894] 1 Ch. 724; *Re* Webb, 63 L. T. 545.]

[1] McNeille *v.* Acton, 4 De G., M. & G. 563; 17 Jur. 104. And the court will keep separate the trade property, and apply it exclusively to the purposes of the trade. Owen *v.* Delamere, 15 Eq. Cas. 139; *Ex parte* Richardson, 3 Madd. 138; *Ex parte* Garland, 10 Ves. 120. [Gallagher *v.* Ferris, 7 L. R. Ir. 489; *In re* Johnson, 15 Ch. Div. 548.]

[2] Paddon *v.* Richardson, 7 De G., M. & G. 563. [*In re* Crowther, [1895] 2 Ch. 56.]

[3] Murray *v.* Glasse, 23 L. J. Ch. 124.

[4] Poole *v.* Munday, 103 Mass. 174.

(*a*) A power expressly given to trustees to postpone the sale of the testator's business as long as they should deem it expedient, carries with it by implication, authority to carry on the business on behalf of the trust. *In re* Crowther, [1895] 2 Ch. 56. In the cited case the trustees carried on the business for twenty-two years. See also Sanders *v.* Houston Guano, etc., Co., 107 Ga. 49.

As to the remedies of trade creditors against the trustees and against the trust property where the trustee continues the business, see *infra*, § 815 *b* and note.

As to power of assignees for the benefit of creditors to continue the assignor's business, see *infra*, § 598, note.

tion; for the capital depends upon the management of the directors, and is subject to losses.[1] (*a*) It is apparent, that a manufacturing or trading corporation may lose its whole capital in the prosecution of its business strictly within the terms of its charter.[2] Lord Eldon said of bank stock, that "it is as safe, I trust and believe, as any government security; but it is not government security, and therefore this court does not lay out or leave property in bank stock, and what this court will decree it expects from trustees and executors."[3] By Lord St. Leonards' Act, 22 & 23 Vict. 35, trustees, not forbidden by the instrument of trust, are authorized to invest in Bank of England or Ireland or East India stock. This act was held not to authorize an investment in these stocks of trust funds settled before the passage of the act.[4] By 23 & 24 Vict. c. 38, the original act was made retrospective, and the courts of chancery were authorized to issue general orders, from time to time, as to the investment of funds subject to its jurisdiction, either in three per cent consolidated or reduced, or new bank annuities, or in such other stocks, funds, or securities as the court shall think fit; and trustees, having power to invest trust funds in government securities, or upon railway stocks, funds, or securities, may invest in the stocks, funds, or securities which may be designated by the general order of the court. In pursuance of the statute, a general order was issued in 1861, as follows: "Cash

[1] Haynes *v.* Reddington, 1 Jo. & Lat. 589; 7 Ir. Eq. 405; Clough *v.* Bond, 3 Myl. & Cr. 496; Powell *v.* Cleaver, 7 Ves. 142, n.

[2] Trafford *v.* Boehm, 3 Atk. 440; Mills *v.* Mills, 7 Sim. 501; Hancom *v.* Allen, 2 Dick. 499, n.; 7 Bro. P. C. 375; Emelie *v.* Emelie, id. 259; Peat *v.* Crane, 2 Dick. 499, n.; Clough *v.* Bond, 3 Myl. & Cr. 496.

[3] Howe *v.* Dartmouth, 7 Ves. 150; Band *v.* Fardell, 7 De G., M. & G. 633; King *v.* Talbott, 40 N. Y. 86.

[4] *Re* Miles's Will, 5 Jur. (N. S.) 1266; Dodson *v.* Sammell, 6 Jur. (N. S.) 137; 1 Dr. & Sm. 575. The Vice-Chancellor held the other way in Page *v.* Bennett, 2 Gif. 117; Simson's Trusts, 1 John. & H. 89; Mortimer *v.* Picton, 4 De G., J. & S. 166, 179. [See 56 and 57 Vict. c. 53.]

(*a*) A trustee's field of investment in England has been extended by statute. See Trustee Act of 1893, 56 and 57 Vict. c. 53, as interpreted by *In re* Smith, [1896] 2 Ch. 590.

under the control of the court may be invested in bank stock, East India stock, exchequer bills, and £2 10*s.* annuities, and upon freehold and copyhold estates, respectively in England and Wales, as well as in consolidated £3 per cent annuities, reduced £3 per cent annuities, and new £3 per cent annuities." There are also provisions in the act by which trustees may apply to the court for leave to change their investments into those now allowed by the act and the court; but the act does not apply where the fund is settled specifically and there is no power of varying the securities.[1] Courts may give directions as to investments by trustees by decrees in particular suits, or by the promulgation of general orders or rules of court.[2] (*a*) It is said that the public policy in England of compelling trustees to invest trust funds in government funds originated largely in the necessities of the government, and the public advantage of creating a market and demand for government securities.[3]

§ 456. The English rule, in relation to investments of trust funds in bank stock and shares in trading and manufacturing corporations, prevails in New York and Pennsylvania.[4] It is agreed, that trustees cannot invest trust funds in trade, nor directly in manufacturing, nor in business generally, nor in personal securities, unless there is an authority contained in the instrument of trust. The reasoning is, that trustees cannot use the trust fund in carrying on a private manufacturing estab-

[1] Ward's Settlement, 2 John. & H. 191; *Ex parte* Great No. Ry. Co., L. R. 9 Eq. 274; *In re* Wilkinson, id. 343.

[2] Wheeler *v.* Perry, 18 N. H. 307. [Drake *v.* Crane, 127 Mo. 85.]

[3] Brown *v.* Wright, 39 Ga. 96.

[4] Ackerman *v.* Emott, 4 Barb. 626; Hemphill's App., 18 Penn. St. 303; Worrall's App., 22 id. 44; Morris *v.* Wallace, 3 id. 319; Nyce's Est., 5 Watts & S. 254. [See also White *v.* Sherman, 168 Ill. 589; Penn *v.* Fogler, 182 Ill. 76; *In re* Allis's Estate, 123 Wis. 223; Simmons *v.* Oliver, 74 Wis. 633.]

(*a*) But where the creator of the trust has directed that the funds be invested in a specified security and in no other, the court will not direct or authorize an investment in other securities, so long as the required investment is possible. Ovey *v.* Ovey, [1900] 2 Ch. 524.

lishment, nor in the business of private bankers, nor in underwriting, nor in trade and commerce, and that there is no difference in principle between carrying on such enterprises themselves with the trust fund, or lending it to other individuals to do so on their personal security, and buying shares or stocks in such business corporations carried on by other private individuals, or by the trustees themselves, as officers or agents. Perhaps these are the only States in which the strict English rule is holden. In Maryland, investments in bank stock, gas stock, etc., are good.[1] In Massachusetts, it is held that trustees may invest in bank stocks, and in the shares of manufacturing and insurance corporations,[2] or in the notes of individuals secured by such stocks and shares as collateral securities,[3] or in certificates of deposit issued by a National Bank.[4] The court justifies this rule in an elaborate opinion, affirming that such stocks are subject to no greater fluctuations than government securities; that they are as safe as real securities, which may depreciate in value, or the title fail; that claims against such corporations can be enforced at law,[5] while government funds can only be enforced by supplicating the sovereign power; and that government securities have hitherto been so limited in amount that it was impossible for the trust funds of the country to be invested in that manner. The last reason no longer exists. There are now national, state, county, town, and city bonds in sufficient amounts to absorb all trust funds seeking investment, and it is not to be denied that such investments are more permanent and safe. It may be

[1] McCoy *v.* Horwitz, 62 Md. 183.

[2] Harvard Coll. *v.* Amory, 9 Pick. 446.

[3] Lovell *v.* Minot, 20 Pick. 116; Brown *v.* French, 125 Mass. 410.

[4] Hunt, Appellant, 141 Mass. 515, 523.

[5] It is said that loans by the city of Boston always command a higher premium in the market than the loans of the Commonwealth. The difference in part is said to be that the city of Boston can be sued upon its contracts, and a judgment against it can be satisfied by seizing, upon an execution, any property of any citizen within the municipal limits; while no suit can be maintained against the State, but everything depends upon the good faith and honor of the legislature in supplying the means of payment.

admitted, that great public emergencies and national dangers have an unfavorable effect upon the value of public securities; but such emergencies and dangers have the same effect upon the stocks of private corporations. In addition to these depressing influences, the capital of such companies runs the risks and chances of trade, business, and speculation. Calamities that depress public credit seldom occur, while the risks of trade are constant. It would seem to be the wiser course to withdraw the funds, settled for the support of women, children, and other parties who cannot exercise an active discretion in the protection of their interests, as much as possible from the chances of business. It may be said, that settlors may always do this by directing in what manner the funds settled by them shall be invested. But it would seem to be wiser for the court to establish the safest rule in the absence of special directions, and leave it to the settlor, if he prefers, to direct a less safe investment.[1]

[1] A large number of cases have been adjudged in the late confederate States, involving the legality of investments by trustees in the bonds and securities of the confederacy. No new principles have been so established that it is necessary to alter the text; but for convenience the principal cases are noted in this place. Under § 34 of the act of Nov. 9, 1861, of Alabama, which authorized trustees to invest in confederate bonds, or to receive payment in confederate notes, it was held that trustees were justified in making such investments previous to the re-establishment of the authority of the United States. Watson *v.* Stone, 40 Ala. 451; Dockey *v.* McDowell, 41 Ala. 476. But a guardian was held liable to account for the cash in full, who received payment in confederate notes after the re-establishment of such authority. Where a trustee procured an *ex parte* order to invest in confederate bonds, he was held liable for the loss. Snelling *v.* McCreary, 14 Rich. Eq. 291. Where a trustee received payment of a debt due to the trust fund, in the currency in common use, and reinvested it in securities which became worthless by the result of the war, he was not held liable for the loss. Campbell *v.* Miller, 38 Ga. 304. To the same effect is Brown *v.* Wright, 39 Ga. 96, which contains an able statement of the policy of the English government in directing trust funds to be invested in public securities.

In Virginia, commissioners who collected money by order of the court in confederate notes, and held a balance subject to contested liens until it became worthless, were held not liable for the loss. Davis *v.* Harman, 21 Grat. 200. And substantially the same rule was held in Dixon *v.* McCue, 21 Grat. 374. In Morgan *v.* Otey, 21 Grat. 619, it was held that payments

§ 457. The power to lend on mortgage was doubted or denied, until Lord St. Leonards' act, unless there was an express power in the instrument of trust, or a decree of the court. Lord Harcourt, Lord Hardwicke, and Lord Alvanley appeared to have thought that a trustee or executor might invest the money in *well-secured real estates*.[1] But Lord Thurlow said, that in *latter* times the court had considered it improper to invest any part of

should be made in the currency of the day. See Kraken *v.* Shields, 20 Grat. 377. In Walker *v.* Page, 21 Grat. 637, it was held that a sale of infant's lands for confederate money was valid at the time it was made, and that further development of events did not vitiate it. In Myers *v.* Zetelle, 21 Grat. 733, it was held that an agent or trustee who in *good faith* sold property, and invested the proceeds in confederate securities, at a time when no other investments were open to him, was protected from loss. And see Bird *v.* Bird, 21 Grat. 711; Beery *v.* Irick, 22 Grat. 614; Campbell *v.* Campbell, id. 649; Colrane *v.* Worrel, 30 Grat. 434.

In State *v.* Simpson, 65 N. C. 497, it was held that a guardian who collected in money which was well secured to his ward, and invested the same in confederate bonds, was guilty of *laches*, and was liable for the loss. See Alexander *v.* Summey, 66 N. C. 578. An agent or trustee is authorized to receive payment of debts in the currency received by prudent business men for similar purposes. Baird *v.* Hall, 67 N. C. 230. See Wooten *v.* Sherrard, 68 N. C. 334.

In Creighton *v.* Pringle, 3 S. C. 78, a trustee was held guilty of a breach of trust in investing in confederate bonds. Cureton *v.* Watson, 3 S. C. 451. But see Hinton *v.* Kennedy, id. 459.

If a trustee, acting in *good faith*, receive funds in bank-notes which are depreciated, he will be protected if such notes were the only money attainable. Barker *v.* McAuley, 4 Heisk. 424.

When a trustee kept the identical money received by him, he was allowed to turn it over to the person entitled to receive it, without loss to himself; but if he has not kept it, he will be charged with the nominal sums collected by him. Saunders *v.* Gregory, 3 Heisk. 507.

In Texas, trustees could not receive confederate money in discharge of obligations to them. Turner *v.* Turner, 36 Tex. 41. And see Scott *v.* Atchison, id. 76; Kleberg *v.* Bond, 31 Tex. 611; Woods *v.* Toombs, 36 Tex. 85; Turpin *v.* Sanson, id. 142; McGar *v.* Nixon, id. 289; Lacey *v.* Clements, id. 661.

In the Supreme Court of the United States payment to an agent or trustee in anything but lawful money of the United States, or bank-notes of the current value of their face, is held invalid. Ward *v.* Smith, 7 Wall. 451; Horn *v.* Lockhart, 17 Wall. 570; McBurney *v.* Carson, 99 U. S. 567.

[1] Brown *v.* Litton, 1 P. Wms. 141; Lyse *v.* Kingdon, 1 Coll. 188; Knight *v.* Plymouth, 1 Dick. 126; Pocock *v.* Reddington, 5 Ves. 800.

a lunatic's estate upon private security.[1] Sir John Leach refused to allow an infant's money to be invested in that manner, and expressed surprise that any precedent could be found to the contrary.[2] In a late case, the trustees invested in mortgages at the request of the tenant for life, and to procure a higher rate of interest, and they were held liable for the loss; but the case did not go to the full extent of deciding that trustees could not invest on *real securities*, for the reason that they had consulted the interests of the tenant for life, at the expense of those of the remainder-man, but the court did not favor mortgages.[3] If trustees are directed to invest in public funds, of course they cannot invest in mortgages.[4] Previous to the acts before mentioned,[5] courts did not sanction mortgages;[6] but the practice is now relaxed, and a loan upon freeholds of inheritance to the extent of two-thirds of their value may be allowed.[7] But the rule of two-thirds is not inflexible. It may be improper to loan even two-thirds of the present value; as, where the value depends upon the chances of trade or business, and where the property consists of houses liable to deterioration.[8] So it may not be a breach of trust under certain circumstances to loan more than two-thirds.[9] (*a*) Trustees ought not to lend on a second mort-

[1] *Ex parte* Calthorpe, 1 Cox, 182; *Ex parte* Ellice, Jac. 234.

[2] Norbury *v.* Norbury, 4 Madd. 191; Widdowson *v.* Duck, 2 Mer. 494; *Ex parte* Fust, 1 C. P. Coop. (t. Cott.) 157, n. (e); *Ex parte* Franklyn, 1 De G. & Sm. 531; *Ex parte* Johnson, 1 Moll. 128; *Ex parte* Ridgway, 1 Hog. 309.

[3] Raby *v.* Ridehalgh, 7 De G., M. & G. 108.

[4] Pride *v.* Fooks, 2 Beav. 430; Waring *v.* Waring, 3 Ir. Ch. 331.

[5] *Ante*, § 455.

[6] Barry *v.* Marriott, 2 De G. & Sm. 491; *Ex parte* Franklyn, 1 De G. & Sm. 531.

[7] Stickney *v.* Sewell, 1 Myl. & Cr. 8; Norris *v.* Wright, 14 Beav. 307; Macleod *v.* Annesly, 16 Beav. 600.

[8] Ibid.; Phillipson *v.* Gatty, 7 Hare, 16; Drosier *v.* Brereton, 15 Beav. 221; Stretton *v.* Ashmall, 3 Dr. 9; 3 De G. 26; 24 L. J. Ch. 277; Farrar *v.* Barraclough, 2 Sm. & Gif. 231. [Rae *v.* Meek, 14 A. C. 558.]

[9] Jones *v.* Lewis, 3 De G. & Sm. 471. This case was reversed on appeal. See Lewin on Trusts, 263 (5th ed.).

(*a*) In some States statutes have provided that the real estate must be at least double the amount of the mortgage. N. H. Pub. St. (1901), c.

gage, though it might not be a breach of trust in all cases to do so;[1] and so they ought to have a power of sale inserted in the deed, although it might not be a breach of trust to neglect it.[2]

§ 458. There can be no doubt that mortgages on real estate are considered proper investments in the United States, and perhaps they are the only investments which are not objection-

[1] Norris *v.* Wright, 14 Beav. 291; Drosier *v.* Brereton, 15 Beav. 221; Robinson *v.* Robinson, 11 Beav. 371; 1 De G., M. & G. 247; Waring *v.* Waring, 3 Ir. Eq. 337; Lockhart *v.* Reilly, 1 De G. & J. 476; Nance *v.* Nance, 1 S. C. 209. [*In re* Blauvelt's Estate, 20 N. Y. S. 119; Taft *v.* Smith, 186 Mass. 31.]

[2] Farrar *v.* Barraclough, 2 Sm. & Gif. 231.

198, § 11, c. 178, § 9; N. J. Laws of 1899, ch. 103. Mr. Loring states that this is the usual margin of security required. Loring's Trustee's Handbook, (3d ed.) p. 116. See 1 Ames, Cases on Trusts, (2d ed.) 485, n. By statute in New York the value of the real estate must exceed the amount of the mortgage by at least 50 per cent, IV N. Y. Consol. Laws (1909), p. 2847, § 21. In *In re* Somerset, [1894] 1 Ch. 231, Kekewich, J., referring to Speight *v.* Gaunt, 9 A. C. 1, and Learoyd *v.* Whiteley, 12 id. 727, said in substance: When there is no actual breach of trust, trustees are simply judged by the rule that they are to exercise ordinary care and prudence in the discharge of their duties. Their liability, as regards any particular transaction, is not increased by reason of the fact that one of their number is skilled in the business with which the transaction is concerned. As regards investments in mortgages, it is the duty of the trustees to decide for themselves, and to exercise their own judgment, as to the sufficiency of the securities, even though a surveyor, solicitor, or other trusted agent, has expressed to them his opinion on the subject. There is no absolute rule respecting the choice of securities falling within the strict limits of authorized investments, or the amount proper to be advanced against any particular security. In this case it was said to be wrong for the trustee to advance a sum largely in excess of what was otherwise right because it was believed that the mortgagor was personally good for the loan.

In Learoyd *v.* Whiteley, 12 App. Cas. 727, 733, and in *In re* Salmon, 42 Ch. Div. 351, 367, the court, without attempting to lay down any fixed rule, expressed the opinion that where the mortgage security is agricultural land the margin of value should not be less than one-third the value of the land, and where the land derives its value from buildings erected on it or from use in trade, the margin of value should not be less than one-half.

able in some one of the States. In the absence of public funds to an amount hitherto sufficient to absorb the money to be invested by trustees, different rules have been established in the several States, but mortgages upon estates of inheritance, taken with proper caution as to the amount and the title, have been named in all the States as proper and safe investments; so that the question in the United States is whether the security is in fact what it is called, security upon real estate. A loan to a company owning coal lands and a canal, to a much greater value than its debts, the interest on the loan being a preferred claim upon the income, was held to be substantially on real estate;[1] but an investment in the stock of a similar company, which stock was not preferred, was held to be a breach of trust.[2] An investment in railway bonds, secured by a mortgage of the road-bed, franchise, and other property, is not real security, though real estate is covered by the mortgage; for the method of enforcing such a bond is very different from the ordinary manner of foreclosing a mortgage, and whether such a bond can be enforced at all depends upon the concurrent will of so many bondholders, that, at best, it is only nominal real estate.[3] London Dock stock and sewer bonds are not real security.[4] It is not a breach of trust to leave funds in turnpike bonds, secured by a mortgage of the tolls and real estate of the company, as they had been invested by the testator.[5] Under the right of the trustees to invest trust funds in real securities, they cannot convert the funds into real estate by taking the legal title absolutely to themselves in trust; and if they do so, the *cestui que*

[1] Twaddell's App., 5 Penn. St. 15.

[2] Worrall's App., 21 Penn. St. 508.

[3] Mant *v.* Leith, 15 Beav. 524; Allen *v.* Gaillard, 3 S. C. 279. It is not sufficient for a trustee to say, in defence of an investment, that it is on real security. There are other things to be considered, the nature of the property and other matters. The property, though sufficient, may be involved in litigation. *Per* Master of Rolls in Mant *v.* Leith. [See Clark *v.* Anderson, 13 Bush, (Ky.) 111, 119.]

[4] Robinson *v.* Robinson, 11 Beav. 371.

[5] Robinson *v.* Robinson, 21 L. J. Ch. 111; 1 De G., M. & G. 247; Miller *v.* Proctor, 20 Ohio St. 444.

trust may elect to take the land, or the trust-money and interest;[1] though a direction to invest in *productive real estate* was held to justify the purchase of dwelling-houses, or the purchase of a right of dower in order to render the property more productive.[2] If a testator has already invested in mortgages, a trustee may make such further advances of money as are necessary to secure the first investment. No general rule can be stated; but the trustee in such case must make a careful investigation and exercise a sound discretion, or his advances will not be allowed in case of a loss.[3] And so a guardian, in case of a grave emergency, may buy in land for the minor to save a certain loss;[4] so an administrator may buy in the land of a debtor to his estate to save the debt.[5] (*a*) Such an investment is a mere temporary expedient, and is to be treated as personal estate.[6] A loan of trust funds on real mortgage does not change

[1] Mathews *v.* Heyward, 2 S. C. 239; Ouseley *v.* Anstruther, 10 Beav. 456; Royer's App., 11 Pa. St. 36; Kaufman *v.* Crawford, 9 Watts & S. 131; Bonsall's App., 1 Rawle, 273; Bellington's App., 3 Rawle, 55; Ringgold *v.* Ringgold, 1 H. & G. 11; Morton *v.* Adams, 1 Strob. Eq. 72; Heth *v.* Richmond, &c., Co., 4 Grat. 482; Eckford *v.* De Kay, 8 Paige, 89; Winchelsea *v.* Nordcliffe, 1 Vern. 134. And if a mortgage is given back, the mortgagor, if he have notice of the misapplication of the trust fund, cannot enforce his mortgage until the fund has first been replaced. Mathews *v.* Heyward, 2 S. C. 239.

[2] Parsons *v.* Winslow, 16 Mass. 368.

[3] Collinson *v.* Lister, 20 Beav. 356.

[4] Bonsall's App., 1 Rawle, 273; Royer's App., 11 Penn. St. 36.

[5] Bellington's App., 3 Rawle, 55.

[6] Oeslager *v.* Fisher, 2 Penn. St. 467.

(*a*) A trustee with no authority to purchase land may be authorized by court to buy in on foreclosing a mortgage investment where this course is necessary to protect the trust estate from loss. *In re* Bellah, 8 Del. Ch. 59; *In re* Baker, 8 Del. Ch. 355.

It has been held that a trustee who was directed to hold and invest a certain fund of personalty as a reserve fund to guard against losses by shrinkage in value of certain trust real estate, had authority to contribute over $20,000, from the fund, by way of donation towards the building of a hotel on neighboring property when the effect of having the hotel there was to increase greatly the value of the trust real estate. Drake *v.* Crane, 127 Mo. 85. But this seems to be an exceptional case.

the character of the funds, nor constitute an investment in real estate.[1] The court may order an investment of accumulations, or of the principal fund temporarily in real estate, with a declaration that it shall continue personalty;[2] and so a court may order an investment in real estate generally, where no other way is pointed out in the trust instrument.[3] Where a trustee or guardian is obliged to take land subject to a mortgage, the trustee becomes personally liable to pay off the mortgage, to protect the interest of the *cestui que trust*. In such case, the guardian or trustee may have the possession of the estate or the management of the trust fund, in order to secure himself for the advancement so made.[4] But there must be an urgent necessity to justify such a proceeding. If a trustee is authorized to invest in real estate, stock, or securities, he cannot mortgage the trust fund in order to raise money to invest in such manner, nor invest in machinery for the use of the *cestui que trust*.[5] (*a*) In all cases the trustee ought to exercise high diligence in ascertaining the valuation, situation, condition, and productiveness of the real estate or other property upon which it is proposed to make a loan of the trust-money; for he will be liable for the loss if he is guilty of any negligence in this respect.[6]

§ 459. In a few States, there are statutes authorizing trustees to invest in a particular manner, and excusing them from respon-

[1] Milhous *v.* Dunham, 78 Ala. 48.
[2] Webb *v.* Shaftesbury, 6 Madd. 100.
[3] *Ex parte* Calmes, 1 Hill, Eq. 112.
[4] Woodward's App., 38 Penn. St. 322.
[5] Rider *v.* Sisson, 7 R. I. 341. [See Warren *v.* Pazolt, 203 Mass. 328, 349, 351.]
[6] Budge *v.* Gummon, L. R. 7 Ch. 721; Smethurst *v.* Hastings, 30 Ch. D. 490; Olive *v.* Westerman, 34 Ch. D. 70; Whiteley *v.* Learoyd, 33 Ch. D. 347. [Gilbert *v.* Kolb, 85 Md. 627; *In re* Roach's Estate, 50 Or. 179.]

(*a*) It has been held that a trustee who has been authorized to invest in real estate but who has been given no express power of mortgage, may give back a valid mortgage for part of the purchase price. Hannah *v.* Carnahan, 65 Mich. 601. A second mortgage given by the trustee subsequently for an advance of money was held to be void. Ibid.

sibility if their investments are made in good faith in the prescribed securities. (*a*) Thus in Pennsylvania,[1] an executor, guardian, or trustee may apply to the Orphans' Court, and the court may direct an investment in the stocks or public debt of the United States, of the State, or of the city of Philadelphia, or in real securities, or in the stock of the incorporated districts of Philadelphia County, of Pittsburg and Alleghany, and the waterworks of Kensington, Philadelphia County. But it has been held that trustees are not confined to these funds; that the acts are for their benefit; that they can elect other kinds of investment, but will be responsible for losses.[2] In New York, there does not appear to be any legislation on the subject; but trustees are bound by the rules of the court to invest in real securities, or government bonds, or in the State loan, or in loans of the New York Life Insurance and Trust Company.[3] (*b*) In New Jersey, a statute authorized an investment to be made upon an application to the court, but does not establish any particular funds. (*c*) In Gray *v.* Fox, the court laid down the rule that investments must be made in government stocks, or in real security.[4] In Maryland, there is neither statute nor rule of

[1] Acts 1832, 1838, 1850, 1852. [Brightly's Purdon's Dig. of Pa. St. (1894), p. 593, §§ 121, 122, 123; Pa. Const. § 69.]

[2] Barton's Est., 1 Pars. Eq. 24; Worrall's App., 9 Barr, 108; Twaddell's App., 5 Penn. St. 15.

[3] Ackerman *v.* Emott, 4 Barb. 626; and see Smith *v.* Smith, 4 Johns. Ch. 281, 445; King *v.* Talbott, 40 N. Y. 86, 97. This case contains a full discussion of the law in New York. Hun *v.* Cary, 82 N. Y. 65.

[4] Gray *v.* Fox, Saxton, 259; Lathrop *v.* Smalley, 23 N. J. Eq. 192; Corliss *v.* Corliss, id.

(*a*) See these statutes collected in Loring's Trustee's Handbook (3d ed.), 117; 1 Ames on Trusts (2d ed.), 486, n.; and 9 L. R. A. 279, 280, n.; Clark *v.* Beers, 61 Conn. 87.

(*b*) For legislation in New York, see IV Consol. Laws (1909), p. 2847, § 21; I id. p. 155, § 146.

(*c*) By Laws of New Jersey, 1899, c. 103, trustees are authorized to invest in mortgages on security of real estate worth twice the amount loaned, bearing interest between 3% and 6%, in bonds of the United States and of the State of New Jersey, and in certain municipal bonds. By Laws of 1903, c. 146, the field of investment is extended to include securities authorized for savings banks.

court to guide the trustees. The courts do not approve of changes in investments, unless express power is given in the instrument of trust; as where a testator gave certain stocks in trust without direction to vary the security, and the trustee disposed of the stocks and invested the money in other securities, he was ordered to replace the entire sum in the same stocks, although the number of shares were increased by the change.[1] In Maine, New Hampshire, (*a*) Vermont, Michigan, and Missouri, the courts may, upon application, direct trustees as to the manner of investment, but no special investments are pointed out.[2] If trustees invest according to the direction of the courts, they are not responsible for any loss. In Georgia, if trustees invest in the stocks, bonds, or other securities, issued by their own State, or in such other securities as shall be ordered by the court, they will be exempt from loss.[3] In Mississippi, an investment in bank stocks is allowed.[4] In States where there are no statutes nor rules of court regulating investments, trustees are bound to act in good faith and with a sound discretion in investing trust-

[1] Murray *v.* Feinour, 2 Md. Ch. 418; Evans *v.* Iglehart, 6 Gill & J. 192; Gray *v.* Lynch, 8 Gill, 405; Hammond *v.* Hammond, 2 Bland, 306. [See Hunt *v.* Gontrum, 80 Md. 64; Lowe *v.* Convention, 83 Md. 409.]

[2] Knowlton *v.* Brady, 17 N. H. 458. It is impossible to cite the statutes of all the States. Practising attorneys will of course know the legislation of their own States.

[3] [Ga. Code, (1895) § 3180. Any other investment must be under order of the court, or else at the risk of the trustee.] Brown *v.* Wright, 39 Ga. 96.

[4] Smyth *v.* Burns, 25 Miss. 422. These rules and regulations are established for the protection of trustees: so long as they in good faith confine their investments to those allowed by law, they are protected from loss. Stanley's App., 8 Penn. St. 432; Twaddell's App., 9 id. 108; Seidler's Est., 5 Phila. 85; Barton's Est., 1 Pars. Eq. 24; Johnson's App., 43 Penn. St. 431; Morris *v.* Wallace, 3 id. 319; McCahan's App., 7 id. 56; Hemphill's App., 18 id. 303; Rush's Est., 12 id. 378; Nyce's Est., 5 Watts & S. 254.

(*a*) In New Hampshire a statute prescribes investment in mortgages upon security of real estate worth at least double the amount of the loan, or in savings banks incorporated in New Hampshire, or in banks of the United States, of the State of New Hampshire, or of certain municipal corporations. N. H. Pub. St. [1901], c. 198, § 11; c. 178, § 9. See also c. 178, § 8.

money; and if they so act they are not responsible for any loss that may happen.[1] (*a*) But to invest in mere personal securities is not a sound discretion anywhere.[2] Nor is it a sound discretion for trustees to subscribe trust funds to new enterprises, as for the stock of new manufacturing, insurance, or railroad corporations, when the undertaking must, in the nature of things, be experimental; and it will not excuse the trustee that he subscribes his own money to such enterprises, as it is permitted to him to speculate with his own money if he sees fit.[3]

[1] Clark *v.* Garfield, 8 Allen, 427. [Peckham *v.* Newton, 15 R. I. 321; Emery *v.* Batchelder, 78 Me. 233; Massey *v.* Stout, 4 Del. Ch. 274, 288. See also Citizens' Nat. Bank *v.* Jefferson, 88 Ky. 651, 659; Durrett's Guardian *v.* Commonwealth, 90 Ky. 312.]

[2] *Ante*, § 453.

[3] Kimball *v.* Reading, 31 N. H. 352; Ihmsen's App., 43 Penn. St. 471.

(*a*) The Massachusetts rule, as laid down in Harvard College *v.* Amory, 9 Pick. 446, and followed in many subsequent decisions, is that trustees should "observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital invested." Thayer *v.* Dewey, 185 Mass. 68; Taft *v.* Smith, 186 Mass. 31; Green *v.* Crapo, 181 Mass. 55; Pine *v.* White, 175 Mass. 585, 590. In applying the rule, in Dickinson, Appellant, 152 Mass. 184, 187, the court said: "A trustee, whose duty it is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend-paying stock and interest-bearing bonds, of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments." In this case the trustees having invested about $3500, between one-fourth and one-fifth of the total trust fund, in the stock of the Union Pacific Railroad in 1881, then a comparatively new road running largely through an unsettled country, invested $2500 of the funds in the same stock. The last investment was held not a prudent investment, although the first investment was allowed. An important consideration with the court seems to have been that so large a proportion of the trust fund was put into this somewhat risky investment. For a similar decision on very similar facts, see Davis, Appellant, 183 Mass. 499. See also Warren *v.* Pazolt, 203 Mass. 328, 345 *et seq.*

§ 460. The instrument of trust frequently contains directions respecting the investment of the trust funds. If the directions are so general that they do not point to any particular class or classes of investments, the trustees must invest in those securities that are sanctioned by the court; as, if the trust is to invest in "good and sufficient security," the court will sanction no security not allowed by its rules and orders.[1] If the trustee is to invest at his "discretion," he cannot invest in personal securities.[2] (*a*) The powers and directions given in the instrument

[Randolph *v.* E. Birmingham Land Co., 104 Ala. 355; Aydelott *v.* Breeding, 111 Ky. 847; Matter of Hall, 164 N. Y. 196; Mattocks *v.* Moulton, 84 Me. 545.]

[1] Booth *v.* Booth, 1 Beav. 125; Trafford *v.* Boehm, 3 Atk. 440; De Manneville *v.* Crompton, 1 V. & B. 259; Wilkes *v.* Steward, Coop. 6; Ryder *v.* Bickerton, 3 Swanst. 80, n.; Nance *v.* Nance, 1 S. C. 209; Womack *v.* Austin, id. 421. [Clark *v.* Clark, 50 N. Y. S. 1041; Caspari *v.* Cutcheon, 110 Mich. 86.]

[2] Ibid.; Pocock *v.* Reddington, 5 Ves. 794; Wormley *v.* Wormley, 8 Wheat. 421; 1 Brock. 339; Langston *v.* Ollivant, Coop. 33.

(*a*) The creator of the trust may extend the field of investments into which the trustee may properly put the trust money, either by designating certain investments or by general words. Bartol's Estate, 182 Pa. St. 407; *In re* Allis's Estate, 123 Wis. 223; *In re* Smith, [1896] 1 Ch. 71. But unless the language of the trust instrument is mandatory, a trustee making investments within the extended field is not relieved from the responsibility of exercising the care and prudence which a reasonable man would exercise in making permanent investments for the purpose of insuring a steady income. Gilbert *v.* Kolb, 85 Md. 627; Rae *v.* Meek, 14 App. Cas. 558; Hutton *v.* Annan, [1898] A. C. 289; *In re* Turner, [1897] 1 Ch. 536; *In re* Sharp, 45 Ch. Div. 286, 289.

A trustee who has been expressly directed or authorized by the trust instrument to invest at his discretion, or as he may think proper or best, must exercise the care and prudence usual with investors who are seeking to place their funds where they will be reasonably sure of the ultimate return of their principal and of a reasonable rate of income. He must not speculate for the purpose of increasing the principal nor invest in hazardous enterprises or upon security of speculative value for the purpose of getting an extra large income. His duty is to be measured by the usual conduct of a man of ordinary prudence making permanent investments of his own savings outside of ordinary business risks. Hart's Estate, 203 Pa. St. 480; *In re* Allis's Estate, 123 Wis. 223; Pabst *v.* Goodrich, 133 Wis. 43; Matter of Hall, 164 N. Y. 196; Mattocks *v.*

must be strictly followed;[1] thus a power to invest in bank stocks or lots of land will not authorize an investment in the loan of

[1] Wood *v.* Wood, 5 Paige, 596; Burrill *v.* Sheil, 2 Barb. 457; Womack *v.* Austin, 1 S. C. 421; Sanders *v.* Rogers, id. 452; Ihmsen's App., 43 Penn. St. 471.

Moulton, 84 Me. 545. In States where the field of investments proper for trustees is fixed by statute or by rule of court, the effect of giving a trustee discretion in the choice of investments is to give him practically the same authority that trustees usually have under the Massachusetts rule without such an express authorization. Matter of Hall, 164 N. Y. 196.

An authority to trustees to invest in such "securities as may in their judgment be best" does not relieve them of the duty of investigating as to the safety of the particular investment into which they put the funds. Hart's Estate, 203 Pa. St. 480. It is not a reasonable exercise of their discretion to risk the trust funds in the stock of a new enterprise, Matter of Hall, 164 N. Y. 196; Mattocks *v.* Moulton, 84 Me. 545; or in a mortgage upon security which proper investigation would have shown to be insufficient in value, Gilbert *v.* Kolb, 85 Md. 627; or upon security of property of a speculative value. Rae *v.* Meek, 14 App. Cas. 558; *In re* Harmon's Estate, 61 N. Y. S. 50, 45 App. Div. 196. Nor can they properly expend trust funds in the opening and operation of mines in leasehold mining property which was part of the original trust property, Shinn's Estate, 166 Pa. St. 121; or in the purchase of mining lands. Butler *v.* Butler, 164 Ill. 171.

In jurisdictions which follow the Massachusetts rule as to investments generally by trustees, words in the trust instrument expressly authorizing the trustee to invest according to his discretion do not usually change his duty of prudence and watchfulness for the safety of both principal and income. Mattocks *v.* Moulton, 84 Me. 545; Davis, Appellant, 183 Mass. 499, 502. As to whether a discretion in the choice of investments will pass to a surviving trustee or to a substituted trustee, see *infra*, § 505, note *a*.

A trustee's acceptance for himself of a commission from the corporation in whose shares he invests trust funds is inconsistent with an honest exercise of judgment, and renders him liable to account to the trust for the commission or bribe and also to make good any loss upon the investment. *In re* Smith, [1896] 1 Ch. 71. In the cited case an innocent cotrustee who did not know of the commission and honestly considered the investment a good one, was held not to be liable.

A direction to invest in such "securities" as the executors "may think proper," has been held not to authorize investment in shares, not fully paid up, of an unincorporated bank. Murphy *v.* Doyle, 29 L. R. Ir. 333; *In re* Kavanagh, 27 L. R. Ir. 495. The decision in the cited cases was based partly at least upon the finding that these shares were not "securities" within the meaning

the United States.[1] A power to loan on *real securities* does not justify a loan upon railroad bonds secured by mortgage of the road;[2] nor does a power to loan upon mortgage authorize an investment in railroad mortgage bonds.[3] A power to invest in "good and sufficient securities in Virginia and Maryland," authorizes a loan upon town securities.[4] A direction to invest "in any public stocks or securities bearing an interest," embraces a coal and navigation company, that being within the popular meaning of the testator.[5] If there is a direction to invest trust funds in real securities in a foreign jurisdiction, the court will allow the investment;[6] but if no such power is given, such investment will not be allowed.[7] Where trustees were authorized in their discretion to invest in a dwelling-house for the daughter of the testator, and she was married and went to reside in a foreign jurisdiction, it was held, that they might invest in a dwelling-

[1] Banister *v.* McKenzie, 6 Munf. 447.

[2] Mortimore *v.* Mortimore, 4 De G. & J. 472; Mant *v.* Leith, 15 Beav. 525; Harris *v.* Harris, 29 Beav. 107; King *v.* Talbott, 50 Barb. 453; 40 N. Y. 86; Allen *v.* Gaillard, 1 S. C. 279; Bromley *v.* Kelly, 39 L. J. Ch. 274.

[3] Ibid.

[4] McCall *v.* Peachy, 3 Munf. 288. But if such securities are greatly depreciated, it would be a breach of trust to invest in them. Trustees, &c., *v.* Clay, 2 B. Mon. 386.

[5] Rush's Est., 12 Penn. St. 375. See Hemphill's App., 18 Penn. St. 303.

[6] Burrill *v.* Sheil, 2 Barb. 457.

[7] Rush's App., 12 Penn. St. 375. [McCullough *v.* McCullough, 44 N. J. Eq. 313; Pabst *v.* Goodrich, 133 Wis. 43. In Massachusetts the court has expressed disapproval of such investments, but has declined to lay down any arbitrary rule against them. Thayer *v.* Dewey, 185 Mass. 68. See also Gouldey's Estate, 201 Pa. St. 491.]

of the trust instrument. But it has been held in a later English decision that the word "securities" used in the will of a general broker was intended to include shares of stock in corporations. *In re* Rayner, [1904] 1 Ch. 176.

Under the English Judicial Trustees Act of 1896 (59 and 60 Vict., c. 35), § 3, a trustee who seeks relief for loss on investments which are in breach of trust has the burden of proof to show that he acted, not only honestly, but also reasonably. *In re* Stuart, [1897] 2 Ch. 583; *In re* Turner, [1897] 1 Ch. 536; *Re* Barker, 46 W. R. 296.

house at the place of her residence, although it was in a foreign jurisdiction.[1] But where they were authorized to invest in bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country, they were not allowed to invest in railway bonds, though guaranteed by a foreign government.[2] As before stated, all these powers are strictly construed; as, if the trustees are authorized to loan £3000 on personal securities, and they lend £5000, it is a breach of trust;[3] and if the power is to loan on bond, they cannot loan on a promissory note.[4] If the trustees may loan the trust fund to the husband, with the consent of the wife, they cannot allow the loan to continue if the husband becomes bankrupt; and they will be guilty of a breach of trust, if they do not use due diligence in calling in the loan, or in collecting such dividends as may be coming. An entire change of circumstances may change their duty, although the wife may still desire that her husband should have the use of the money.[5] Generally, where the trustees are required to invest the fund in a particular manner, with the approbation of any person, such requirement becomes imperative upon the request of such person.[6] So, if any formalities are prescribed as to the investment, they must be strictly complied with; as, where the written consent of a wife is a prerequisite to a loan to her husband, a verbal consent will not relieve the trustees from the consequences of a breach of trust, if they act on such verbal consent.[7] A subsequent consent is not sufficient where a previous consent was contemplated;[8] nor is it enough for a wife to join the husband in a petition for an order that a loan be made

[1] Amory *v.* Green, 13 Allen, 413.

[2] *In re* Langdale's Settlement, Trust, L. R. 10 Eq. 39.

[3] Payne *v.* Collier, 1 Ves. Jr. 170.

[4] Greenwood *v.* Wakeford, 1 Beav. 576.

[5] Wiles *v.* Gresham, 2 Drew. 258; 24 L. J. Ch. 264; Langston *v.* Ollivant, Coop. 33; and see Boss *v.* Goodsall, 1 N. C. C. 617; Burt *v.* Ingram, Lewin on Trusts, 339 (4th ed.).

[6] Cadogan *v.* Essex, 2 Dr. 227; McIntire *v.* Zanesville, 17 Ohio St. 352.

[7] Cocker *v.* Quayle, 1 R. & M. 535; Hopkins *v.* Myall, 2 R. & M. 86; Kellaway *v.* Johnson, 5 Beav. 319.

[8] Bateman *v.* Davis, 3 Madd. 98; Adams *v.* Broke, 1 N. C. C. 627.

to him.[1] If the trustees go beyond the prescribed limits, neither good faith nor care nor diligence, if they can accompany a departure from the direction of the instrument of trust, will protect them if a loss occurs.[2] If it is impossible for them to invest according to the directions, they must invest in the securities prescribed by the law or by the court, or in the safest class of securities.[3]

§ 461. A direction to invest in good freehold security must be strictly complied with;[4] (*a*) an authority to invest in ground rents authorizes an investment in redeemable ground rents, that being the kind of ground rent in the place where the investment is to be made;[5] a power to invest in good private security does not authorize the trustees to use the funds themselves.[6] Where stock is settled on a husband and wife for life, with remainder to the children, with a power to vary the securities for greater interest, the trustees cannot purchase an annuity for one of the tenants for life.[7] If, however, the existing securities are unsafe, and it is proper to call in the money and reinvest it, trustees may make a temporary investment in safe funds until an investment can be advantageously made in the securities directed by the testator.[8] If the direction is to invest in land or any other

[1] Norris *v.* Wright, 14 Beav. 291; Fitzgerald *v.* Pringle, 2 Moll. 534; Dunne *v.* Dunne, 1 S. C. 350.

[2] Ackerman *v.* Emott, 4 Barb. 626; Spring's App., 71 Penn. St. 11; Ringgold *v.* Ringgold, 1 H. & G. 25; Cloud *v.* Bond, 3 Myl. & Cr. 490.

[3] McIntire *v.* Zanesville, 17 Ohio, 352.

[4] Wyatt *v.* Wallace, 8 Jur. 117; 1 Coop. 155, n.

[5] *Ex parte* Huff, 2 Barr, 227.

[6] Westover *v.* Chapman, 1 Col. C. C. 177; Forbes *v.* Ross, 2 Bro. Ch. 430; 2 Cox, 113; *ante*, § 453.

[7] Fitzgerald *v.* Pringle, 2 Moll. 534.

[8] Sowerby *v.* Clayton, 3 Hare, 430; 8 Jur. 597; Mathews *v.* Brice, 6 Beav. 329; *Ex parte* Chaplin, 3 Y. & C. 397; Knott *v.* Cottee, 6 Beav. 77; Brownley *v.* Kelly, 39 L. J. Ch. 272.

(*a*) Thus authority to purchase freeholds does not include the purchase of an equity of redemption. Worman *v.* Worman, 43 Ch. Div. 296.

security, it will be implied that the settlor intended the investment to be made in land if it could be done advantageously, and the alternative part of the direction is to be followed only in case an investment cannot be made in land; and this construction will be followed unless there is some other controlling consideration in the instrument.[1] And if trustees are authorized to lend on mortgage to *three persons*, they cannot lend to *two* of them, although they get the entire interest in the estate; nor can they lend to the *three* without the mortgage at the time, although they get the security in two years after. It is no excuse to say that the delay did not occasion the loss. The conclusive answer is, that they committed a breach of trust in not obeying the power, and they must make good the loss.[2] And so trustees cannot let money on a mortgage to one of themselves.[3] Under a power to loan on mortgage they may continue existing mortgages, if safe.[4]

§ 462. A trustee must invest the trust funds in his hands, in the manner directed, within a *reasonable time*, although no direction is given in the deed or will as to the time or manner of investment. If he neglects for an unreasonable time to make the investment, he may be charged with interest; and if any loss or damage occurs to the *cestui que trust* from the delay, the trustee must make it up.[5] What is a reasonable time depends

[1] Earlom *v.* Saunders, Amb. 340; Cookson *v.* Reay, 5 Beav. 32; Cowley *v.* Hartstonge, 1 Dow, 361; Hereford *v.* Ravenhill, 5 Beav. 51; Fowler *v.* Reynal, 3 Mac. & G. 500; 2 De G. & Sm. 749.

[2] Earlom *v.* Saunders, Amb. 340; Cookson *v.* Reay, 5 Beav. 32; Cowley *v.* Hartstonge, 1 Dow, 361; Hereford *v.* Ravenhill, 5 Beav. 51; Fowler *v.* Reynal, 3 Mac. & G. 500; 2 De G. & Sm. 749.

[3] Stickney *v.* Sewall, 1 Myl. & Cr. 8; —— *v.* Walker, 5 Russ. 7; Fletcher *v.* Green, 33 Beav. 426; Francis *v.* Francis, 5 De G., M. & G. 108; Crosskill *v.* Bower, 32 Beav. 86; De Jarnette *v.* De Jarnette, 41 Ala. 708.

[4] Angerstein *v.* Martin, T. & R. 239; Ames *v.* Parkinson, 7 Beav. 379.

[5] Lyse *v.* Kingdom, 1 Coll. 184; Bates *v.* Scales, 12 Ves. 402; Ryder *v.* Bickerton, 3 Swanst. 80; Trafford *v.* Boehm, 3 Atk. 440; Lomax *v.* Pendleton, 3 Call, 538; Garniss *v.* Gardner, 1 Edw. Ch. 128; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Chase *v.* Lockerman, 11 G. & J. 185; Armstrong *v.* Miller, 6 Ham. 118; Handly *v.* Snodgrass, 9 Leigh, 484; Aston's Est., 5 Whart.

upon circumstances. When the trustees were directed to invest in the purchase of land with *all convenient speed*, a year was held to be a reasonable time.[1] But where the trustees are directed to invest in *freehold securities*, they will not be charged with interest until it has been shown that they could have invested according to the direction; for it is not always practicable to procure such securities.[2] So a year from the testator's death was considered a reasonable time within which to make an investment in United States stock.[3] On the other hand, the Supreme Court of the United States allowed three months as a reasonable time within which to invest capital sums of a trust fund paid in to a banker, and charged the trustee for the sum lost by the failure of the banker after that time.[4] In other cases, six months have been allowed as a reasonable time within which to invest trust funds; and trustees have been charged with interest when they kept the money uninvested for a longer time.[5] But where the trustees make no effort to invest the money, they may be charged with interest from a period earlier than six months.[6] Where a trustee or executor is directed to invest a legacy *immediately in stock*, and he retains the sum for the period of one year or more, or for an unreasonable time, and the price of the stock rises, he will be ordered to purchase as

228; *In re* Thorp, Davies, 290; Shipp *v.* Hettrick, 63 N. C. 329; Owen *v.* Peebles, 42 Ala. 338. [Stambaugh's Estate, 135 Pa. St. 585; Whitecar's Estate, 147 Pa. St. 368; Hetfield *v.* Debaud, 54 N. J. Eq. 371; Young's Estate, 97 Iowa, 218. But see *In re* Wiley, 91 N. Y. S. 661, 98 App. Div. 93.]

[1] Parry *v.* Warrington, 6 Madd. 155; Johnson *v.* Newton, 11 Hare, 160.

[2] Wyatt *v.* Wallis, 1 Coop. 154, n.; 8 Jur. 117.

[3] Cogswell *v.* Cogswell, 2 Edw. Ch. 231. This was in analogy to the payment of legacies, which may be done in one year; a trustee with ready money ought to invest with more promptness.

[4] Barney *v.* Saunders, 16 How. 543.

[5] Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508; Manning *v.* Manning, id. 527; Merrick's Est., 2 Ash. 485; Worrall's App., 23 Penn. St. 44; Armstrong *v.* Walkup, 12 Grat. 608; Hooper *v.* Savage, 1 Munf. 119; Frey *v.* Frey, 2 C. E. Green, 72.

[6] Ringgold *v.* Ringgold, 1 H. & G. 11; Witmer's App., 87 Penn. St. 120. Two months not an unreasonable allowance of time for reinvestment.

much stock as could have been purchased at the time the fund ought to have been invested.[1] Where trustees were directed to invest in the funds, and they paid the money into a banker's with directions to invest in bank annuities, which the banker neglected to do, and the trustees made no inquiry for five months, they were held, after the failure of the banker, for the money or the stock at the option of the *cestui que trust*.[2] Trustees and guardians are held to a stricter rule in relation to investments than executors acting as trustees, for trustees and guardians generally take an estate ready to be invested; and trustees will be held to a stricter rule in relation to capital sums, than in relation to current income from interest, dividends, rents, and other smaller sums; thus in Barney *v.* Saunders,[3] before cited, three months were held as a reasonable time within which trustees ought to have invested capital sums paid into the banker's, and they were held responsible for the loss of capital after that time by the failure of the banker, while they were not held liable to replace small sums paid into the same banker's from the rents, interest, and dividends upon the same estate. An executor will not in general be charged with interest for not investing before the expiration of a year from the testator's death.[4] A year is a reasonable time within which an executor may call in the testator's estate and pay off his liabilities; and it is necessary, during that time, that the executor

[1] Byrchall *v.* Bradford, 6 Madd. 235; Pride *v.* Fooks, 2 Beav. 430; Watts *v.* Girdlestone, 6 Beav. 188; Clough *v.* Bond, 3 Myl. & Cr. 496; Robinson *v.* Robinson, 1 De G., M. & G. 256; Phillipson *v.* Gatty, 7 Hare, 516. [See *Re* Massingberd's Settlement, 60 L. T. 620; *Re* Walker, 62 L. T. 449.]

[2] Challen *v.* Shippam, 4 Hare, 555.

[3] Barney *v.* Saunders, 16 How. 545; Lomax *v.* Pendleton, 3 Call, 538.

[4] But where it is the duty of executors within a reasonable time to separate a legacy from the estate, and to invest it to accumulate, or for the support and maintenance of the legatee, neglect to do so makes them chargeable with legal interest; and they will not be allowed to limit their liability by showing the rate of interest received upon the general fund, nor be excused by the fact that it was for the interest of the residuary legatee to have the funds kept together. Fowler *v.* Colt, 25 N. J. Eq. 202. [See Dick's Estate, 183 Pa. St. 647.]

should keep the money on hand. In most States an executor is allowed that time by statute; and he is exempt from suit by creditors during that year. After that time, if an executor keeps money in his hands without any apparent reason, except for the purpose of using it, it becomes a breach of trust or negligence; and the court may charge him with interest, or with the principal sum if lost.[1] So an executor will be charged with interest during the year, if he receives interest by loaning or using the money.[2]

§ 463. Trustees ought not to mix trust-money with other moneys, and take a joint mortgage for the whole, for this would be to complicate the trust with the rights of strangers; (*a*) nor should a mortgage in such case be taken in the name of a common trustee, for that would be a delegation of the rights of the trustee;[3] but where the trust fund was very small, it was held to be proper for a trustee to put some of his own money with it in order to loan it to the best advantage on a mortgage.[4] (*b*) Trustees must personally see to it that the security

[1] Forbes *v.* Ross, 2 Cox, 115; Flanagan *v.* Nolan, 1 Moll. 85; Moyle *v.* Moyle, 2 R. & M. 710; Johnson *v.* Newton, 11 Hare, 160; Hughes *v.* Empson, 22 Beav. 181; Johnston *v.* Prendergast, 28 Beav. 480; Williamson *v.* Williamson, 6 Paige, 300; Dillard *v.* Tomlinson, 1 Munf. 183; Carter *v.* Cutting, 5 Munf. 224; Minuse *v.* Cox, 5 Johns. Ch. 441; Cogswell *v.* Cogswell, 2 Edw. Ch. 231. [Young's Estate, 97 Iowa, 218; *In re* Estate of Danforth, 66 Mo. App. 586, 590.]

[2] Lund *v.* Lund, 41 N. H. 359; Stearns *v.* Brown, 1 Pick. 530; Wyman *v.* Hubbard, 13 Mass. 232; Griswold *v.* Chandler, 5 N. H. 499; Mathes *v.* Bennett, 21 N. H. 199; Wendell *v.* French, 19 N. H. 205; Chambers *v.* Kerns, 6 Jones, Eq. 280. [Westover *v.* Carman's Estate, 49 Neb. 397; Matter of Myers, 131 N. Y. 409; Dorris *v.* Miller, 105 Iowa, 564.]

[3] Lewin on Trusts, 268.

[4] Graves's App., 50 Penn. St. 189.

(*a*) Trustees should not ordinarily mingle funds of different trusts in one investment, even though the different trusts were established by the same will. McCullough *v.* McCullough, 44 N. J. Eq. 313, 316.

(*b*) But he should take the mortgage as trustee, not in his individual name. *Re* Hodges' Estate, 66 Vt. 70. See Dunn *v.* Dunn, 137 N. C. 533.

is forthcoming upon parting with the money;[1] as, where they allowed their solicitors to receive the money upon representations that the mortgage was ready, and there was no mortgage, and the solicitors misapplied the money, the trustees were held to make up the loss.[2] When the money is paid in to a banker or broker for investment, the trustees must see that the investment is made at once, and the securities taken in the proper form, or they will be liable for any loss that may happen;[3] or where money is suffered to remain in the hands of third persons unnecessarily, and a loss happens, the trustees must make it up.[4] So, if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank.[5] But as between the trustee, his representatives, and the *cestui que trust* the *cestui que trust* may follow the money into the hands of the banker. If it is a simple account, not complicated by mixture with deposits of the trustee's own moneys and withdrawals, it is a simple debt which the *cestui que trust* may claim to be held and applied to the trust; but the deposit of the trustee's own money, and the withdrawal of part by checks, will not defeat the right of the *cestui que trust*. (*a*) If anything of the trust fund remains in the hands of the banker under this rule, it will be applied to

[1] Cogbill *v.* Boyd, 77 Va. 450. [Key *v.* Hughes's Ex'rs, 32 W. Va. 184.]

[2] Rowland *v.* Witherden, 3 Mac. & G. 568; Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 N. & C. Ch. 16; Ghost *v.* Waller, 9 Beav. 497; 13 Beav. 336.

[3] Challen *v.* Shippam, 4 Hare, 555; Byrne *v.* Norcott, 13 Beav. 336. [Key *v.* Hughes's Ex'rs, 32 W. Va. 184.]

[4] Barney *v.* Saunders, 16 How. 543; Anon. Lofft, 492; Fletcher *v.* Walker, 3 Madd. 73; Moyle *v.* Moyle, 2 R. & M. 701; Macdonnell *v.* Harding, 7 Sim. 178; Massey *v.* Banner, 4 Madd. 419; 1 J. & W. 241; Lowry *v.* Fulton, 9 Sim. 115; Mathews *v.* Brice, 6 Beav. 239; Munch *v.* Cockerell, 9 Sim. 115; Johnson *v.* Newton, 11 Hare, 160.

[5] Ibid.; Wren *v.* Kirton, 11 Ves. 377; Pennell *v.* Deffell, 4 De G., M. & G. 392; *Ex parte* Hilliard, 1 Ves. Jr. 89; Rocke *v.* Hart, 11 Ves. 61; Freeman *v.* Fairlee, 3 Mer. 39; Jenkins *v.* Walter, 8 G. & J. 218; Luken's App., 7 Watts & S. 48; Stanley's App., 8 Penn. St. 131; Royer's App., 11 id. 36. [Coffin *v.* Bramlitt, 42 Miss. 194. See *supra*, § 443.]

(*a*) See *infra*, § 828, note.

the purposes of the trust.[1] This is a rule for the protection of the *cestui que trust* in case of the failure or bankruptcy of the trustee. But it does not affect the general rule before stated, that where a trustee deposits the trust-money in his own name, or mixes the money with his own, he must pay interest for it, and be responsible for the principal, in case of the failure of the banker or of any other loss.[2]

§ 464. Trustees cannot use trust-moneys in their business, nor embark i tin any trade or speculation;[3] nor can they disguise the employment of the money in their business, under the pretence of a loan to one of themselves,[4] nor to a partnership of which they are members;[5] nor can the money be loaned on security to be reloaned back to the trustee, or by the trustee at

[1] Pennell *v.* Deffell, 4 De G., M. & G. 392; Frith *v.* Cortland, 2 Hem. & M. 417; 34 L. J. Ch. 301; Kip *v.* Bank of N. Y. 10 Johns. 65; Kennedy *v.* Strong, id. 289; School, &c., *v.* Kirwin, 25 Ill. 73; McAllister *v.* Commonwealth, 30 Penn. St. 536; Morrison *v.* Kinstra, 55 Miss. 71.

[2] Mumford *v.* Murray, 6 Johns. Ch. 1; Kellett *v.* Rathbun, 4 Paige, 102; Jacot *v.* Emmett, 11 Paige, 142; De Peyster *v.* Clarkson, 2 Wend. 77; Garniss *v.* Gardner, 1 Edw. Ch. 128; Spear *v.* Tinkham, 2 Barb. Ch. 211; Merrick's Est., 2 Ash. 485; Dyott's Est., 2 Watts & S. 565; Beverleys *v.* Miller, 6 Munf. 99; Diffenderffer *v.* Winder, 3 G. & J. 341; Peyton *v.* Smith, 2 Dev. & B. Eq. 325; Jameson *v.* Shelly, 2 Humph. 198; Kerr *v.* Laird, 27 Miss. 544; *In re* Thorp, Davies, 290.

[3] Tebbs *v.* Carpenter, 1 Madd. 304; Lee *v.* Lee, 2 Vern. 548; Adye *v.* Feuilleteau, 1 Cox, 24; Piety *v.* Stace, 4 Ves. 622; Docker *v.* Somes, 2 Myl. & K. 655; Palmer *v.* Mitchel, id. 672, n.; Miller *v.* Beverleys, 4 Hem. & M. 415; *In re* Thorp, Davies, 290; Manning *v.* Manning, 1 Johns. Ch. 527; Brown *v.* Ricketts, 4 Johns. Ch. 303. At one time it was held that executors might employ money in their trade, especially if they were solvent, and if the assets were generally, and not specifically, bequeathed. Grosvesnor *v.* Cartwright, 2 Ch. Cas. 212; Linch *v.* Cappey, id. 35; Brown *v.* Litton, 1 P. Wms. 140; Ratcliffe *v.* Graves, 2 Ch. Cas. 152; Bromfield *v.* Wytherly, Pr. Ch. 505; Adams *v.* Gale, 2 Atk. 106; Child *v.* Gibson, id. 603; but Mr. Lewin says that Lord North overruled above forty cases, and a twenty years' practice, in Ratcliffe *v.* Graves, 1 Vern. 196; Newton *v.* Bennett, 1 Bro. Ch. 361; Adye *v.* Feuilleteau, 1 Cox, 25; Lewin on Trusts, 255, 276. [St. Paul Trust Co. *v.* Kittson, 62 Minn. 408. See *supra*, § 429, n.]

[4] Townend *v.* Townend, 1 Gif. 201.

[5] Kyle *v.* Barnett, 17 Ala. 306. [Matter of Myers, 131 N. Y. 409.]

a profit.[1] If a trustee makes such use of the money, he will be responsible for all loss, and he may be compelled to pay the highest rate of interest; (*a*) or the *cestui que trust* may follow the money, and insist upon all the profits made by such use; and if the trustee is a trader or business man, he will be presumed to use and employ the money in his business if he deposits it in bank in his own name; for such business men must generally keep some money in bank for the purposes of their credit, and such trust-money answers the purpose as if it was their own.[2] If the trust fund is employed in business, the whole increase will belong to the fund; but if the trustee is also one of the beneficiaries, he will be entitled to his share, and it will go to his representatives upon his death.[3] Where an executor bought stock in his own name with the trust fund, and the stock rose in price, it was held that he was liable for the market-price of the stock at the time of the decree. If the investment is profitable, the *cestuis que trust* are entitled to the profits; if disastrous, they are entitled to interest on the money; and if the investment has been made with funds of the estate mingled with funds of the executor in various stocks, and the funds of the estate cannot be traced and identified in any particular stocks, the *cestuis que trust* are entitled to select the most profitable stocks.[4]

§ 465. There is said to be a distinction between an original investment improperly made by trustees, and an investment

[1] Ratcliffe *v.* Graves, 2 Ch. Cas. 152; 1 Vern. 196.

[2] Treves *v.* Townshend, 1 Bro. Ch. 284; Moons *v.* De Bernales, 1 Russ. 301; *In re* Hilliard, 1 Ves. Jr. 90; Sutton *v.* Sharp, 1 Russ. 146; Rocke *v.* Hart, 11 Ves. 61; Brown *v.* Southhouse, 3 Bro. Ch. 107; Lamb's App., 58 Penn. St. 142. [See also *supra*, § 429, note.]

[3] Hook *v.* Dyer, 47 Mo. 24.

[4] Norris's App., 71 Penn. St. 106. [See *In re* Oatway, [1903] 2 Ch. 356; City of Lincoln *v.* Morrison, 64 Neb. 822; Putnam *v.* Lincoln Safe Dep. Co., 104 N. Y. S. 4; 118 App. Div. 468; Bromley *v.* Cleveland, etc., R. Co., 103 Wis. 562. As to what is sufficient identification of the trust funds, see *infra*, § 828, and note (*a*).]

(*a*) As to a trustee's use of trust funds in his own business and his resulting liability, see *supra*, § 429, note.

made by the testator himself, and simply continued by a trustee;[1] but it is a distinction that cannot be safely acted upon. If a testator gives any directions in his will to continue his investments already made, trustees must of course follow such directions; and if they follow them in good faith, they will not be liable for any losses, unless they are negligent in failing to change an investment, when it ought to be changed to save it; (*a*) for it cannot be supposed that the direction of a testator to continue a certain investment relieves the trustees from the ordinary duty of watching such investment, and of calling it in when there is imminent danger of its loss by a change of circumstances. If no directions are given in a will as to the conversion and investment of the trust property, trustees to be safe should take care to invest the property in the securities pointed out by the law. It is true that a testator during his life may deal with his property according to his pleasure, and investments made by him are some evidence that he had confidence in that class of investments; but, in the absence of directions in the will, it is more reasonable to suppose that a testator intended that his trustees should act according to law. Con-

[1] Powell *v.* Evans, 5 Ves. 841; Clough *v.* Bond, 3 Myl. & Cr. 496; Harvard Col. *v.* Amory, 9 Pick. 446; Thompson *v.* Brown, 4 Johns. Ch. 628; Knight *v.* Plymouth, 3 Atk. 480; 1 Dick. 120; Rowth *v.* Howell, 3 Ves. 565; Wilkinson *v.* Stafford, 1 Ves. Jr. 41; Vez *v.* Emery, 5 Ves. 144; Barton's Est., 1 Pars. Eq. 24; Murray *v.* Feinour, 2 Md. Ch. 418; Brown *v.* Campbell, Hopkins, 233; Smith *v.* Smith, 4 Johns. Ch. 283; See 11 Amer. Law Reg. 208 (N. S.), April, 1874; Pierce *v.* Bowker, 130 Mass. 262, where a trustee in good faith continued an investment in railroad stock originally made by his testator, until, gradually falling in value, it became worthless.

(*a*) Where a testator has authorized his executors to continue his own investments, it has been held that they have no authority to carry on margin purchases of stocks which the testator had made before his death, since such a venture is not an investment, but a speculation. Matter of Hirsch, 116 N. Y. App. Div. 367 (affirmed 188 N. Y. 584).

Where a testator by express words authorized, but did not require, three trustees to continue certain investments which they would not, under the law or under any direction in the will, have had authority to make, it was held that any one of the three could bring about a sale of the investments against the wishes of the other two. *Re* Roth, 74 L. T. 50.

sequently, in States where the investments which trustees may make are pointed out by law, the fact that the testator has invested his property in certain stocks, or loaned it on personal security, will not authorize trustees to continue such investments beyond a reasonable time for conversion and investment in regular securities.[1] But in States where there are no fixed funds or securities in which trustees shall invest, the fact that a testator has invested his property in particular stocks, shares of corporations, mortgages, or other securities, thus indicating his confidence in such investments, will go far to justify the trustees in continuing them.[2] So trustees, in the usual course of dealing, may take notes on short time for small sums of rent due their estate, that having been the usual course of dealing with the tenants by the testator.[3] Taking all the cases together, it would appear to be a settled principle that trustees are not justified, in the absence of express or implied directions in the will, in continuing an investment permanently, made by the testator, which they would not be justified themselves in making. (*a*) The principle probably has this qualification, that if a

[1] Hemphill's App., 18 Penn. St. 303; Pray's App., 34 id. 100, overrules the case of Barton's Est., 1 Pars. Eq. 24; Kimball *v.* Reading, 11 Foster, 352. [Babbitt *v.* Fidelity Tr. Co., 72 N. J. Eq. 745.]

[2] Harvard Coll. *v.* Amory, 9 Pick. 446. [Peckham *v.* Newton, 15 R. I. 321.]

[3] Smith *v.* Smith, 4 Johns. Ch. 283.

(*a*) In Connecticut, trustees are authorized by statute to continue investments made by the creator of the trust, unless otherwise ordered by the court, so long as in the exercise of reasonable prudence they deem a change unnecessary, even when the investment is not within the class authorized by law for trustees. Conn. Gen. St. (1902), § 255; Beardsley *v.* Bridgeport, etc., Asylum, 76 Conn. 560. For a similar provision see N. J. Laws of 1899, ch. 103; Babbitt *v.* Fidelity Trust Co., 72 N. J. Eq. 745.

The rule that a trustee must convert and reinvest the proceeds of investments which are not in the class authorized by law does not apply to a trust created by a voluntary declaration of trust by way of gift, the donor making himself trustee. Thus where in New York an owner of shares of stock in a national bank made a voluntary declaration of trust without consideration for

trustee continue such investment in good faith, and a loss happens, he would be held to replace the original sum only, without interest.[1]

§ 466. Except upon emergency, to protect the fund from depreciation, or to convert wasting securities to those of a permanent character, or investments in securities that are not authorized by law into such as are allowed, trustees may not sell or vary specific securities given in trust, nor securities left by a testator in which he has himself invested the funds.[2] (*a*)

[1] Lowson *v.* Copeland, 2 Bro. Ch. 157; Tebbs *v.* Carpenter, 1 Madd. 298.

[2] Angell *v.* Dawson, 2 Y. & C. 316; Flyer *v.* Flyer, 3 Beav. 550; Neville *v.* Fortescue, 16 Sim. 333; Boys *v.* Boys, 28 Beav. 436; Murray *v.* Feinour, 2 Md. Ch. 418; Ward *v.* Kitchen, 30 N. J. Eq. 31: Crackelt *v.* Bethune, 1 Jac. & W. 566; Witter *v.* Witter, 3 P. Wms. 100; Hammond *v.* Hammond, 2 Bland, 306. But where the trustee has performed, without authority, an act which, at the time it was done, was obviously for the benefit of all concerned, and which upon proper application would have been ordered, his act will be ratified, and held of the same validity as if previously ordered. Gray *v.* Lynch, 8 Gill, 405. Where trustees under a will exceeded their power by buying real estate with trust funds, and continued to buy and sell, at first with a profit, but ultimately with a loss of a large part of the fund, no lack of good faith being found, they were held liable for the amount of the trust fund before the first purchase of real estate only, with interest from the time the beneficiary should have received the income. Baker *v.* Disbrow, 3 Redf. (N. Y.) 348. [See Massey *v.* Stout, 4 Del. Ch. 274, 288; Emery *v.* Batchelder, 78 Me. 233.]

the benefit of his children, and the bank afterwards became insolvent, it was held that the trustee was not personally liable to make good the loss suffered by the *cestuis*. Fowler *v.* Gowing, 152 Fed. 801.

(*a*) Trustees usually have implied, if not express, authority to change trust investments whenever the safety of the trust fund or good management requires. Citizens' Nat. Bank *v.* Jefferson, 88 Ky. 651; Hays *v.* Applegate, 101 Ky. 22. But see Branch *v.* De Wolf. 28 R. I. 542. And even when a trustee has no authority to change investments, it is part of his duty to apply to court for authority when the safety of the trust fund requires that a change be made. Johns *v.* Herbert, 2 App. D. C. 485. See Stone *v.* Clay, 103 Ky. 314.

When after a proper investment on the security of a mortgage, the real estate falls in value below what is regarded as safe for trust investments, the course of the trustee must be guided by circumstances. If the mortgage is overdue, there is no absolute rule that he must fore-

Nor can they change the character of the investments from realty to personalty, or *vice versa*, without special authority.[1] And if, without authority, trustees change investments properly made for others improper or unauthorized by law, they may be required to replace the securities sold, and also to invest any profits which may have accrued in the same securities;[2] or the *cestui que trust* may elect to take the money with interest upon it.[3] And even if trustees have express power to vary the securities, they will not be allowed to do so capriciously, or without some apparent object;[4] and they ought not to sell out an investment without having in view an immediate reinvestment: if they do so, they may be held to pay the loss that may occur.[5] If an

[1] *Post*, § 602 *et seq.*; Quick *v.* Fisher, 9 N. J. Eq. 802.

[2] Powlett *v.* Herbert, 1 Ves. Jr. 297; Evans *v.* Inglehart, 6 Gill & J. 192. In such cases of unauthorized varying the securities the trustee takes upon himself the burden of proving entire *bona fides*, and that there was reasonable ground to believe that the fund would be benefited; and if this can be shown the courts will sustain his action. Washington *v.* Emery, 4 Jones (N. C.), 32; Cornwise *v.* Bourgum, 2 Ga. Dec. 15.

[3] Forrest *v.* Elwes, 4 Ves. 497; Fowler *v.* Reynall, 2 De G. & Sm. 749; 3 Mac. & G. 500.

[4] Brice *v.* Stokes, 11 Ves. 324; De Manneville *v.* Crompton, 1 V. & B. 359; Fowler *v.* Reynall, 3 Mac. & G. 500.

[5] Hanbury *v.* Kirkland, 3 Sim. 265; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Watts *v.* Girdlestone, 6 Beav. 190.

close or press the personal claim against the mortgagor. The question is a practical one for the trustee to determine under all the circumstances with view to what seems best for the interest of the *cestuis*. *In re* Chapman, [1896] 2 Ch. 763; *In re* Medland, 41 Ch. Div. 476.

Where a trustee sells a proper investment *for the purpose* of putting the proceeds into an unauthorized investment, the *cestui* has the option of requiring him to replace the proceeds or of requiring him to replace the original investment, together with the income which it would have produced if it had been retained. *Re* Walker, 62 L. T. 449; *Re* Massingberd's Settlement, 60 L. T. 620.

Thus if the securities in which the funds were originally invested have risen in value since the change the trustee may be required to make up this difference as well as any loss of funds put into the new investment, or if the former have fallen in value the *cestui* may elect to take the actual proceeds. And this is true even when the trustee had authority to sell for a proper purpose. *Re* Walker, 62 L. T. 449.

investment in a particular fund or stock is directed by a testator, it cannot be varied except by the consent of all the parties interested; and if there are parties not *sui juris*, or not in being, the court itself will not order a change.[1] Where an investment was not to be varied without the consent of the testator's wife, and she waived the provisions of the will, her consent was still held necessary.[2] In those States where there are no stocks, funds, or securities, prescribed by law, or by the order of court, in which trustees must invest in order to be safe, and investments are once made by trustees in safe and proper securities, or where investments are left by the testator in such securities, the courts will be very adverse to a change, and will not allow one, except for some very controlling motive. The reason is, that where there is no rule governing investments by trustees, except that they shall act in good faith and upon a sound discretion, courts are very averse to change proper investments once made, and select others by so very indefinite a rule.[3] (*a*)

§ 467. If trustees make an improper investment with the knowledge, assent, and acquiescence, or at the request of the *cestui que trust*, they cannot be held to make good the loss, if one happens;[4] but the *cestuis que trust*, to be affected by such

[1] Wood *v.* Wood, 5 Paige, 596; Trans. University *v.* Clay, 2 B. Mon. 386; Contee *v.* Dawson, 2 Bland, 264; Deaderick *v.* Cantrell, 10 Yerg. 263; Burrill *v.* Sheil, 2 Barb. 457; Personeau *v.* Personeau, 1 Des. 521; Lamb's App., 58 Penn. St. 142.

[2] Plympton *v.* Plympton, 6 Allen, 178.

[3] Murray *v.* Feinour, 4 Md. Ch. 418.

[4] Booth *v.* Booth, 1 Beav. 125; Langford *v.* Gascoyne, 11 Ves. 333; Nail *v.* Punter, 5 Sim. 355; Farrar *v.* Barraclough, 2 Sm. & G. 231; Broadhurst *v.* Balguy, 1 Y. & C. Ch. 16; Raby *v.* Ridehalgh, 7 De G., M. & G. 104; Walker *v.* Symonds, 3 Swanst. 64; Munch *v.* Cockerell, 5 Myl. & Cr. 178; Poole *v.* Munday, 103 Mass. 174; Brice *v.* Stokes, 11 Ves. 319. [Mat-

(*a*) But the matter of changing investments has been said to be "one of those discretionary powers that the court will not control, further than to see that it exercised *bona fide* and with ordinary prudence." Massey *v.* Stout, 4 Del. Ch. 274, 288; Emery *v.* Batchelder, 78 Me. 233.

consent or acquiescence, must be *sui juris*, and capable of acting for themselves;[1] if, therefore, they are married women, or minor children, or other persons incapacitated, or under disability, they cannot be bound by any alleged acquiescence, nor by their urgent requests,[2] although a married woman may acquiesce in the investment of trust property, given to her sole and separate use, in such manner that she cannot afterwards complain of the investment as improper.[3] But in order that the *cestuis que trust* may be bound by their acquiescence in an improper investment, there must be, on their part, full knowledge of all the facts and circumstances;[4] and the trustee must be free from all suspicion of misrepresentation or concealment.[5] The remainder-man cannot acquiesce in an investment, until his interest falls into possession, so as to be bound.[6] If the improper investment has been made, at the request of the tenant for life, and such tenant has received an increased income by reason of the improper investment, such increased income can be recovered back from the tenant for life.[7] But if the

ter of Hall, 164 N. Y. 196; Phillips *v.* Burton, 52 S. W. 1064 (Ky. 1899); *In re* Somerset, [1894] 1 Ch. 231. See *infra*, §§ 849–851, as to consent, acquiescence, or ratification of *cestui* in case of a breach of trust.]

[1] Buckeredge *v.* Glasse, 1 Cr. & Phil. 135.

[2] Walker *v.* Symonds, 3 Swanst. 69; Hopkins *v.* Myall, 2 R. & M. 86; Ryder *v.* Bickerton, 3 Swanst. 80, n.; March *v.* Russell, 3 Myl. & Cr. 31; Nail *v.* Punter, 5 Sim. 556; Kellaway *v.* Johnson, 5 Beav. 319; Bateman *v.* Davis, 3 Madd. 98; Cocker *v.* Quayle, 1 R. & M. 535; Murray *v.* Feinour, 2 Md. Ch. 422; Barton's Est., 1 Pars. Eq. 47; Kent *v.* Plumb, 57 Ga. 207.

[3] Mant *v.* Leith, 15 Beav. 524; Brewer *v.* Swirles, 2 Sm. & G. 219; Sherman *v.* Parish, 53 N. Y. 483. But she may maintain a suit to correct the irregularity, although she cannot claim anything as for a breach of the trust. Ibid.

[4] Munch *v.* Cockerell, 5 Myl. & Cr. 178; Montford *v.* Cadogan, 17 Ves. 489. And they must be apprised of the effect of their legal rights. Adair *v.* Brimmer, 74 N. Y. 539. [White *v.* Sherman, 168 Ill. 589.]

[5] Burrows *v.* Walls, 5 De G., M. & G. 233; Underwood *v.* Stevens, 1 Mer. 712; Walker *v.* Symonds, 3 Swanst. 1. [Nichols, Appellant, 157 Mass. 20; McKim *v.* Glover, 161 Mass. 418.]

[6] Bennett *v.* Colley, 5 Sim. 181; 2 Myl. & K. 225; Brown *v.* Cross, 14 Beav. 105.

[7] Dimes *v.* Scott, 4 Russ. 195; Mehrtens *v.* Andrews, 3 Beav. 72; Howe

tenant for life protested against the illegal investment, and desired the trustees to make a proper investment, the increased income from the illegal investment cannot be recovered back.[1] In all cases the assent to an illegal investment must be so formal that the trustees are justified in acting upon it. If it is a mere expression that a certain investment would be safe, without any intention that the trustees should act upon it, the *cestui que trust* will not be bound.[2] (*a*) So an assent to a particular investment cannot justify a subsequent mismanagement of the investment.[3] And acquiescence by the *cestui que trust* will not be presumed from mere lapse of time, if he has done nothing to acknowledge it, or has received no benefit.[4] Any party whose rights are endangered by an improper or unauthorized investment may apply to the court for redress;[5] but if the investment was made by mistake, or has been corrected, the trustees will not be removed, or they will not be deprived of the funds.[6]

§ 468. It is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest that trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay, they

v. Dartmouth, 7 Ves. 150; Mills *v.* Mills, 7 Sim. 101; Pickering *v.* Pickering, 4 Myl. & Cr. 289; Holland *v.* Hughes, 16 Ves. 114; Hood *v.* Clapham, 19 Beav. 90; M'Gachen *v.* Dew, 15 Beav. 84; Raby *v.* Ridehalgh, 7 De G., M. & G. 104; Band *v.* Tardell, id. 628; Stewart *v.* Sanderson, L. R. 10 Eq. 26. [See also Fletcher *v.* Collis, [1905] 2 Ch. 24; Chillingworth *v.* Chambers, [1896] 1 Ch. 685.]

[1] Bate *v.* Hooper, 5 De G., M. & G. 358; and see Turquand *v.* Marshall, L. R. 6 Eq. 112; Hood *v.* Clapham, 19 Beav. 90.

[2] Nyce's App., 5 Watts & S. 254.

[3] Lockhart *v.* Reilly, 39 Eng. L. & Eq. 135.

[4] Phillipson *v.* Gatty, 7 Hare, 516.

[5] Bromley *v.* Kelly, 39 L. J. Ch. 274. [6] Ibid.

(*a*) An assent to an investment outside the proper field does not relieve the trustee from the duty of investigating as to its safety. *In re* Salmon, 42 Ch. Div. 351.

will be charged with interest at the rate of four per cent: but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of five per cent; (*a*) and, in certain special cases of misconduct, the court will order annual or semi-annual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed. (*b*) The general rules, so far as they can be

(*a*) *In re* Davis, [1902] 2 Ch. 314; Vyse *v.* Foster, 8 Ch. 309, 335; Ames' Cases on Trusts, (2d ed.) 496, n., 498, n.

(*b*) Trustees are not charged with interest on uninvested trust funds in their hands, where the funds have not earned interest, unless they have negligently failed to invest or have used the funds for their own benefit, or have detained the funds beyond the time when they ought to have turned them over to the *cestuis*. Griffith's Estate, 147 Pa. St. 274; Williams *v.* Haskins, 66 Vt. 378; *In re* Nesmith, 140 N. Y. 609.

The best considered cases base a charge of interest and the amount of such interest upon one of three theories, according to the circumstances of the case: (1) Making up to the trust estate income which the trust funds ought to have made or would probably have made, if they had been properly invested in accordance with the trustee's duty. (2) Giving to the trust estate all the income, profits, or benefits which the trustee has actually received from his use of the trust funds. (3) Giving to the trust estate the same rate of interest charged against a person who detains or borrows money of another without a special contract as to interest, *i. e.*, simple interest at the legal rate. Howard *v.* Manning, 65 Ark. 122; Forbes *v.* Ware, 172 Mass. 306; Bangor *v.* Beal, 85 Me. 129; General Proprietors *v.* Force, 72 N. J. Eq. 56. See 1 Ames' Cases on Trusts (2d ed.), 482, 484, 496 and notes. See also cases cited *infra*, this note.

Cases where the trustee has simply detained in his hands trust funds which he ought to have paid over, but has not used them for his profit, fall within the first or the third class, whichever is most advantageous to the *cestui*. *In re* Estate of Danforth, 66 Mo. App. 586, 590; Weisel *v.* Cobb, 118 N. C. 11. Since trust funds when properly invested do not usually yield 6 % interest, compound interest at 6 % or a higher rate in cases of this class would usually be excessive on the theory of making up what the trust funds ought to have produced. Forbes *v.* Ware, 172 Mass. 306, 309. Accord-

drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money

ingly when the legal rate is as high as 6 % the interest charged against a trustee in such cases would be simple interest at the legal rate.

Cases where the trustee has merely failed to earn an income for the trust, by neglect of his duty to invest or by making improper investments, fall within the first class. He must make good any loss of principal and any deficiency of income which his failure of duty or other breach of trust has caused. Howard *v.* Manning, 65 Ark. 122; Dick's Estate, 183 Pa. St. 647; *In re* Muller, 52 N. Y. S. 565, (6 % simple). When he has improperly changed from an authorized investment to one which was unauthorized he may be charged not only with loss of principal and of income which the fund would have earned but with profits which would have come to the principal of the fund through a subsequent rise in value of the securities which he has improperly sold. *Re* Walker, 62 L.T. 449; *Re* Massingberd's Settlement, 60 L. T. 620.

Cases where the trustee has used the trust fund for his own profit or in his own business would usually come within the second or third class. He should be charged at least simple interest at the legal rate, and as much more as may be necessary to take from him all the income, profit, or other pecuniary benefits he may have received from his use of the funds. Forbes *v.* Ware, 172 Mass. 306; *In re* Thompson, 101 Cal. 349; Conn. *v.* Howarth, 48 Conn. 207; Cook *v.* Lowry, 95 N. Y. 103.

The charge of simple interest at the legal rate in such a case is based upon the reasoning that the most lenient view of such a transaction is to regard the trustee as a borrower of the trust funds without a special agreement as to interest. Conn. *v.* Howarth, 48 Conn. 207; Stanley's Estate *v.* Pence, 160 Ind. 636; Young's Estate, 97 Iowa, 218; Bangor *v.* Beal, 85 Me. 129; White *v.* Ditson, 140 Mass. 351, 362; Wolfort *v.* Reilly, 133 Mo. 463; Society *v.* Pelham, 58 N. H. 566; Erie School District *v.* Griffith, 203 Pa. St. 123; Page's Ex'r *v.* Holman, 82 Ky. 573; *Re* Hodges' Estate, 66 Vt. 70; Matter of Myers, 131 N. Y. 409; Westover *v.* Carman's Estate, 49 Neb. 397.

The better opinion is that compound interest or a high rate of interest should not be imposed upon a trustee as a penalty. Forbes *v.* Ware, 172 Mass. 306; Forbes *v.* Allen, 166 Mass. 569; Kane *v.* Kane's Adm'r, 146 Mo. 605; Perrin *v.* Lepper, 72 Mich. 454, 556; Hazard *v.* Durant, 14 R. I. 25; General Proprietors *v.* Force, 72 N. J. Eq. 56; Lehman *v.* Rothbarth, 159 Ill. 270; Hughes *v.* People, 111 Ill. 457. See Vyse *v.* Foster, 8 Ch. 309, 335. But see Eastman *v.* Davis, 68 Vt. 225; Page's Ex'r *v.* Holman, 82 Ky. 573.

As to the liability of trustees to turn in to the trust all benefits or profits from use of trust property, see *supra*, § 429 and note.

with his own, or uses it in his private business,[1] or deposits it in bank in his own name, or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so,[2] he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.[3]

[1] Cool *v.* Jackman, 13 Brad. (Ill.) 560; Lehmann *v.* Rothbarth, 111 Ill. 185; Society *v.* Pelham, 58 N. H. 566; the trustee must pay interest from the time of diverting the fund.

[2] Judd *v.* Dike, 30 Minn. 385; Pickering *v.* De Rochemont, 60 N. H. 179; Lyons *v.* Chamberlin, 25 Hun, 49. [Mades *v.* Miller, 2 App. D. C. 455.]

[3] Burdick *v.* Garrick, L. R. 5 Ch. 241; Blogg *v.* Johnson, L. R. 2 Ch. 225; Berwick *v.* Murray, 7 De G., M. & G. 843; Treves *v.* Townshend, 1 Bro. Ch. 384; Forbes *v.* Ross, 2 Bro. Ch. 430; Piety *v.* Stace, 4 Ves. 620; Ashburnham *v.* Thompson, 13 Ves. 402; Bates *v.* Scales, 12 Ves. 402; Pocock *v.* Reddington, 5 Ves. 794; Sutton *v.* Sharp. 1 Russ. 146; Crackelt *v.* Bethune, 1 J. & W. 122; Att. Gen. *v.* Solly, 2 Sim. 515; Heathcote *v.* Hulme, 1 J. & W. 122; Brown *v.* Sansome, 1 McC. & Y. 327; Westover *v.* Chapman, 1 Coll. 177; Robinson *v.* Robinson, 1 De G., M. & G. 247; Jones *v.* Foxall, 15 Beav. 392; Saltmarsh *v.* Barrett, 21 Beav. 349; Knott *v.* Cottee, 16 Beav. 77; Rocke *v.* Hart, 11 Ves. 58; Lincoln *v.* Allen, 4 Bro. P. C. 553; Younge *v.* Combe, 4 Ves. 101; Dawson *v.* Massey, 1 Ball & B. 231; Hicks *v.* Hicks, 3 Atk. 274; Perkins *v.* Boynton, 1 Bro. Ch. 375; King *v.* Talbott, 40 N. Y. 86; Nelson *v.* Hagerstown Bank, 27 Md. 53; Cook *v.* Addison, L. R. 5 Ch. 466; Duffy *v.* Duncan, 35 N. Y. 187; Young *v.* Brush, 38 Barb. 294; Owen *v.* Peebles, 42 Ala. 338; Wistar's App., 54 Pa. St. 60; Newton *v.* Bennett, 1 Bro. Ch. 359; Littlehales *v.* Gascoigne, 3 Bro. Ch. 73; Franklin *v.* Firth, id. 433; Longmore *v.* Broom, 7 Ves. 124; Trimleston *v.* Hammil, 1 Ball & B. 385; Tebbs *v.* Carpenter, 1 Madd. 290; Mousley *v.* Carr, 4 Beav. 49; Hoskins *v.* Nichols, 1 N. C. C. 478; Beverleys *v.* Miller, 6 Munf. 99; Diffenderffer *v.* Winder, 3 G. & J. 341; Mumford *v.* Murray, 6 Johns. Ch. 1; Jacot *v.* Emmett, 11 Paige, 142; Kellett *v.* Rathbun, 4 Paige, 102; De Peyster *v.* Clarkson, 2 Wend. 77; Garniss *v.* Gardner, 1 Edw. Ch. 128; Spear *v.* Tinkham, 2 Barb. Ch. 211; Manning *v.* Manning, 1 Johns. Ch. 527; Brown *v.* Rickett, 4 id. 303; Williamson *v.* Williamson, 6 Paige, 298; Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508; Minuse *v.* Cox, 5 Johns. Ch. 448; Cogswell *v.* Cogswell, 2 Edw. Ch. 231; Gray *v.* Thompson, 1 Johns. Ch. 82; Armstrong *v.* Miller, 6 Ohio, 118; Astor's Est., 5 Whar. 228; Merrick's Est., 2 Ash. 285; Worrall's App., 23 Penn. St. 44; Graves's App., 50 id. 189; Hess's Est., 69 id. 454; Peyton *v.* Smith, 2 Dev. & B. Eq. 325; Jameson *v.* Shelly, 2 Humph. 198; Dyott's Est., 2 Watts & S. 655; *In re* Thorp, Davies, 290; Carr *v.* Laird, 27 Miss. 544; Lomax *v.* Pendleton, 3 Call, 538; Handy *v.* Snodgrass, 9 Leigh, 484; Dillard *v.* Tomlinson, 1 Munf. 183; Carter *v.* Cutting, 5 Munf. 223; Wood *v.* Garnett, 6 Leigh, 271; Miller

This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and if they make more than legal interest, they shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money.[1] If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made.[2] There may be an exception to the rule, that a deposit of the trust-money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty.[3] If therefore the sums are small, and the trustee receives no credit or profit from the act, or if the act was accidental, or beneficial to the *cestui que trust*, legal interest will not be imposed upon the trustee;[4] or if the trustee was a member of a firm of bankers, and he deposited with the firm in his name as trustee, he will not be charged with interest, although the firm made a profit from the deposit.[5] The proper mode of taking the account of trustees is to treat all the income of the trust received during the current year as unproductive, and to charge against the income of the current year all the disbursements, including the compensation

v. Beverleys, 4 Hem. & W. 415; Chase *v.* Lockerman, 11 G. & J. 185; Ringgold *v.* Ringgold, 1 H. & G. 11; Arthur *v.* Marster, 1 Harp. Eq. 47; Rowland *v.* Best, 2 McCord, Ch. 317; Lyles *v.* Hattan, 6 G. & J. 122; Griswold *v.* Chandler, 5 N. H. 497; Lund *v.* Lund, 41 N. H. 355; Turney *v.* Williams, 7 Yerg. 172; Williams *v.* Powell, 16 Jur. 393; Dornford *v.* Dornford, 12 Ves. 127; Wright *v.* Wright, 2 McCord, Ch. 185; Knowlton *v.* Bradly, 17 N. H. 458; McKim *v.* Hibbard, 142 Mass. 422. [White *v.* Ditson, 140 Mass. 351; Forbes *v.* Ware, 172 Mass. 306; *Re* Hodges' Estate, 66 Vt. 70; Matter of Myers, 131 N. Y. 409; *In re* Estate of Danforth, 66 Mo. App. 586, 590.]

[1] Barney *v.* Saunders, 16 How. 543; Oswald's App., 3 Grant, 300; Martin *v.* Rayborn, 42 Ala. 468.

[2] Bentley *v.* Shreve, 2 Md. Ch. 219; Rapalje *v.* Hall, 1 Sandf. Ch. 339.

[3] McKnight *v.* Walsh, 23 N. J. Eq. 136; 24 N. J. Eq. 492.

[4] Rapalje *v.* Hall, 1 Sandf. Ch. 399; Graves's App., 50 Penn. St. 189; Bond *v.* Abbott, 42 Ala. 499.

[5] Hess's Est., 69 Penn. St. 454. [Dick's Estate, 183 Pa. St. 647.]

or commissions of the trustees for the same year, and to strike a balance, upon which, as a general rule, interest is to be allowed,[1] but in such a way as not to compound it.[2] If, however, these balances are too small to invest, or for any reason the trustees might equitably keep them on hand, interest will not be allowed upon them until the balances so accumulate as to be properly invested, or until the trustees ought to invest them.[3] Of course, as soon as a trustee properly pays the fund into court, his liability for interest ceases.[4] But so long as any litigation is pending over the fund, and the money is not brought into court, the trustee is bound to keep it invested, and he is liable for legal interest.[5] But a guardian is not liable to interest while the settlement of his account is pending.[6]

§ 469. (2) If a trustee is directed and bound to invest in a particular stock or fund within a certain time, or within a reasonable time, and he neglects to make the investment as directed, the *cestui que trust* has his election to take the money and

[1] Boynton *v.* Dyer, 18 Pick. 1; Pettus *v.* Clawson, 4 Rich. Eq. 92; Jones *v.* Morrall, 2 Sim. (N. S.) 241; Clarkson *v.* De Peyster, 2 Wend. 78; Vanderheyden *v.* Vanderheyden, 2 Paige, 288; Luken's App., 47 Pa. St. 356; Reynolds *v.* Waker, 29 Miss. 250; Roach *v.* Jelks, 40 Miss. 754; Crump *v.* Gerack, id. 765.

[2] Rowland *v.* Best, 2 McCord, Ch. 317; Jordon *v.* Hunt, 2 Hill, Eq. 145; Walker *v.* Bynum, 4 Des. 555; Powell *v.* Powell, 10 Ala. 900; Shephard *v.* Stark, 3 Munf. 29; Burwell *v.* Anderson, 3 Leigh, 348; Garrett *v.* Carr, 3 id. 407; Campbell *v.* Williams, 3 Mon. 122; Jones *v.* Ward, 10 Yerg. 160. See Eliott *v.* Sparrell, 114 Mass. 404.

[3] Rapalje *v.* Hall, 1 Sandf. Ch. 399; Woods *v.* Garnett, 6 Leigh, 271; Graves's App., 50 Penn. St. 189; Luken's App., 47 id. 356. Trustee is generally chargeable with interest to be computed from the first day of January following his receipt of the funds. Livingston *v.* Wells, 8 S. C. 347.

[4] January *v.* Poyntz, 2 B. Mon. 404; Yundt's App., 13 Penn. St. 575; Lane's App., 24 id. 487; Younge *v.* Brush, 38 Barb. 294; Brandon *v.* Hoggatt, 32 Miss. 335.

[5] Ibid. [But see Dorris *v.* Miller, 105 Iowa, 564.]

[6] Yader's App., 45 Penn. St. 394. But a trustee who retained funds in his hands, making a claim to them as his compensation, which he failed to establish, was charged with interest from the time he ought to have paid them. Jenkins *v.* Doolittle, 69 Ill. 415.

legal interest thereon, or so much stock as the money would have purchased at the time when the investment ought to have been made, and the dividends thereon.[1] It has been held in some cases, that if trustees were directed to invest in *stocks, or in real estate,* and they neglected to do either, the *cestui que trust* might have the amount of stocks that could have been purchased, and the dividends thereon.[2] On the other hand, it has been held, and is now established in such case, that, as the trustees might have invested in real securities, and such real securitiestmight have been of less value than the original fund, the *cestui que trust* can have only the money and legal interest thereon, and cannot claim the amount of stocks that might have been purchased.[3] If trustees are directed to invest a certain fund separately, they will be liable for losses occurring by reason of neglecting this provision.[4] In Wisconsin, it has been held that if a trustee is directed to invest in United States bonds or in real estate security, the interest which he might have obtained upon proper real estate security is the measure of his liability for failure to invest the fund.[5]

§ 470. (3) If the trust fund was properly invested, according to the direction of the trust instrument, or according to law, and the trustee improperly converts the fund into money and neglects to invest it, or invests it improperly, or uses it in trade, business, or speculation, the *cestui que trust* may, at his electoni, take the diivdends or interest which the fund would have produced if the investment had been suffered to remain where it

[1] Shepherd *v.* Mauls, 4 Hare, 504; Robinson *v.* Robinson, 1 De G., M. & G. 256; Byrchall *v.* Bradford, 6 Madd. 235; Vyse *v.* Foster, 8 Ch. 334; Ihmsen's App., 43 Penn. St. 471; Blauvelt *v.* Ackerman, 20 N. J. Eq. 141; Darling *v.* Hammer, id. 220; McElhenny's App., 46 Penn. St. 347.

[2] Hockley *v.* Bantock, 1 Russ. 141; Watts *v.* Girdlestone, 6 Beav. 188; Ames *v.* Parkinson, 7 Beav. 379; Ouseley *v.* Anstruther, 10 Beav. 456.

[3] Marsh *v.* Hunter, 6 Madd. 295; Shepherd *v.* Mauls, 4 Hare, 500; Robinson *v.* Robinson, 1 De G., M. & G. 256; Phillipson *v.* Gatty, 7 Hare, 516; Rees *v.* Williams, 1 De G. & Sm. 314.

[4] Wilmerding *v.* McKesson, 103 N. Y. 329.

[5] Andrew *v.* Schmitt, 64 Wis. 664.

was properly made; or he may take legal interest on the fund; or he may take all the profits that have been made upon the fund.[1] If the *cestui que trust* elects to take the profits, he must take them during the whole period, subject to all the losses of the business: he cannot take profits for one period and interest for another.[2]

§ 471. (4) If the trustee improperly changes an investment, and refuses to reinvest the money in a legal manner; or if he refuses to invest the fund in the first instance; or if he uses the fund in trade, business, or speculation; or makes an improper or illegal investment, — the *cestui que trust* may have the income that would have accrued from the proper investment; or he may have simple interest at the legal rate;[3] or he may take all the profits of the trade or business, or other investment or employment of the money, and if the trustee refuse to account for the profits arising from his use of the money, or if he has so mingled the money and the profits with his own money and profits that he cannot separate and account for the profits that belong to the *cestui que trust*, the *cestui que trust* may have legal interest computed with annual rests, in order to compound it.[4] (*a*) And sometimes even biennial rests will be allowed in computing

[1] Jones *v.* Foxall, 15 Beav. 392; Robinett's App., 36 Penn. St. 174; Saltmarsh *v.* Barrett, 31 Beav. 349; Kyle *v.* Barnett, 17 Ala. 306; Barney *v.* Saunders, 16 How. 543; Brown *v.* De Tastet, Jac. 284; Cook *v.* Collingridge, id. 607; Crawshay *v.* Collins, 15 Ves. 218; 2 Russ. 325; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Docker *v.* Somes, 2 Myl. & K. 655; Wedderburn *v.* Wedderburn, 2 Keen, 722; 4 Myl. & Cr. 41; Norris's App., 71 Penn. St. 125. [See *supra*, § 429, note.]

[2] Heathcote *v.* Hulme, 1 J. & W. 122.

[3] Cogbill *v.* Boyd, 79 Va. 1, and cases in next note; Seguin's App., 103 Penn. St. 139.

[4] Jones *v.* Foxall, 15 Beav. 392; Raphael *v.* Boehm, 11 Ves. 92; 13 Ves. 407; 1 Madd. 167; Saltmarsh *v.* Barrett, 31 Beav. 349; Walker *v.* Woodward, 1 Russ. 107; Heighington *v.* Grant, 5 Myl. & Cr. 258; 2 Phill. 600; Williams *v.* Powell, 15 Beav. 461; Walrond *v.* Walrond, 29 Beav. 586; Stackpole *v.* Stackpole, 4 Dow. P. C. 209; Eliott *v.* Sparrell, 114 Mass. 404; State *v.* Howarth, 48 Conn. 207; Cook *v.* Lowry, 95 N. Y. 103.

(*a*) See *supra*, § 468, note.

the compound interest where the trustee has used the fund in his own business.[1] There has been considerable conflict of opinion and authority upon the matter of compounding interest against a trustee. Lord Cranworth said, that a trustee might as well be charged with more principal than he had received as to be charged with more interest.[2] In another case, it was said in England that a trustee would be charged with more than four per cent interest:[3] (1) when he *ought* to have received more; (2) when he *did* receive more; (3) when he is *presumed* to receive more; and (4) when he is estopped to say he did not receive more.[4] Compound interest was allowed in one case where the trustee held the fund after the minor *cestui* came of age without making any arrangement with the child or explaining to him his rights.[5] The burden is on the trustee to show that he made no profits, or received no benefit from the money;[6] and if he refuses to account or to show the amount of profits received, the court will give compound interest, in order that it may be certain that the *cestui que trust* gets the profits of the trade or business in which the trustee has employed the money.[7]

[1] Page's Ex'r *v.* Holman, 82 Ky. 573.

[2] Att. Gen. *v.* Alford, 4 De G., M. & G. 851.

[3] Penney *v.* Avison, 3 Jur. (N. S.) 62.

[4] Att. Gen. *v.* Alford, 4 De G., M. & G. 851; Norris's App., 71 Penn. St. 106. [Forbes *v.* Ware, 172 Mass. 306.]

[5] Emmet *v.* Emmet, 17 Ch. D. 142.

[6] Knott *v.* Cottee, 16 Beav. 77; 16 Jur. 752; Swindall *v.* Swindall, 8 Ired. Eq. 286; Ringgold *v.* Ringgold, 1 H. & G. 11; Diffenderffer *v.* Winder, 3 G. & J. 311; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Bryant *v.* Craige, 12 Ala. 354; Hodge *v.* Hawkins, 1 Dev. & B. Eq. 566; Hugh *v.* Smith, 2 Dana, 253; Karr *v.* Karr, 6 Dana, 3; Smith *v.* Kennard, 38 Ala. 695; McElhenny's App., 61 Penn. St. 188. Annual rests were allowed in Harland's Acct., 5 Rawle, 329; Livingston *v.* Wells, 8 S. C. 347; the question was left open in Dietterich *v.* Heft, 3 Penn. St. 91; McCall's Est., 1 Ash. 357; Pennypacker's App., 41 Penn. St. 44, and rests were wholly rejected in Graves's App., 50 Penn. St. 189.

[7] Knott *v.* Cottee, 16 Beav. 77; 16 Jur. 752; Swindall *v.* Swindall, 8 Ired. Eq. 286; Ringgold *v.* Ringgold, 1 H. & G. 11; Diffenderffer *v.* Winder, 3 G. & J. 311; Schieffelin *v.* Stewart, 1 Johns. Ch. 620; Bryant *v.* Craige, 12 Ala. 354; Hodge *v.* Hawkins, 1 Dev. & B. Eq. 566; Hugh *v.* Smith, 2 Dana, 253; Karr *v.* Karr, 6 Dana, 3; Smith *v.* Kennard, 38 Ala. 695; McElhenny's App., 61 Penn. St. 188. Annual rests were allowed in Harland's Acct., 5

To justify the compounding of interest, there must be a wilful breach of duty,[1] and not simple neglect; there must be some special and peculiar circumstances.[2] Compound interest will not be given against negligent trustees where the facts do not indicate a withdrawal of the funds from their legitimate channels of accumulation, or a realization by the trustees of profits on the assets.[3] If the money is simply used in business, and it appears that the profits were not equal to the interest, annual rests will not be made.[4] It appears now to be the settled doctrine, that compound interest will not be given as a penalty for a breach of trust, nor will it be given for an employment of the money in the course of trade, if the profits made in the trade can be clearly ascertained, and are less than legal interest, or less than five per cent; but if nothing appears as to the profits, the courts will presume that the ordinary profits of trade are made, or five per cent in England and the legal interest in the United States. And if the interests or profits of the fund are retained in the trade, instead of being paid out, it will be presumed that the trustees made a similar rate of interest or profit upon the sum retained in trade, and therefore annual rests will be made, and compound interest given; not as punishment or

Rawle, 329; Livingston *v.* Wells, 8 S. C. 347; the question was left open, Dietterich *v.* Heft, 3 Barr, 91; McCall's Est., 1 Ash. 357; Pennypacker's App., 41 Penn. St. 44, and rests were wholly rejected in Graves's App., 50 Penn. St. 189. [See Forbes *v.* Ware, 172 Mass. 306; Lehman *v.* Rothbarth, 159 Ill. 270; Hughes *v.* The People, 111 Ill. 457; Forbes *v.* Allen, 166 Mass. 569; Perrin *v.* Lepper, 72 Mich. 454, 551; Kane *v.* Kane's Adm'r, 146 Mo. 605; *In re* Ricker's Estate, 14 Mont. 153, 29 L. R. A. 622, note; Cook *v.* Lowry, 95 N. Y. 103; Hazard *v.* Durant, 14 R. I. 25. *In re* Davis, [1902] 2 Ch. 314.]

[1] Hughes *v.* People, 111 Ill. 457; Wilmerding *v.* McKesson, 103 N. Y. 329.

[2] Garniss *v.* Gardner, 1 Edw. Ch. 128; Ackerman *v.* Emott, 4 Barb. 626; Tebbs *v.* Carpenter, 1 Madd. 290; Fay *v.* Howe, 1 Pick. 528 and n.; Clemens *v.* Caldwell, 7 B. Mon. 171; Fall *v.* Simmons, 6 Ga. 272; Kennan *v.* Hall, 8 Ga. 417; Cartledg *v.* Cutliff, 21 Ga. 1.

[3] Ames *v.* Scudder, 83 Mo. 189.

[4] Utica Ins. Co. *v.* Lynch, 11 Paige, 521; Kyle *v.* Barnett, 17 Ala. 306; Ringgold *v.* Ringgold, 1 H. & G. 11; Myers *v.* Myers, 2 McCord, Ch. 214; Wright *v.* Wright, id. 185; Johnson *v.* Miller, 33 Miss. 553.

penalty, but because the fund and the income employed in trade are presumed to produce that amount of income, interest, or profit.[1] The trustee must seek out the *cestui que trust* to pay the income to him, or he must pay interest upon it. So, where a trustee receives property and sells it, he must account for the proceeds. And if he refuses, he will be charged with the highest value that can be sustained by the evidence.[2] But a mere payment into bank to the general account of the trustee is not such an employment of the money as to justify compound interest.[3] A trustee is accountable for all interest and profits *actually* received by him from the trust fund, and for all which he *might have obtained by due diligence and reasonable skill.*[4]

§ 472. If a trustee is directed to make a certain investment, and to accumulate the income, and he neglects or refuses so to do, the *cestui que trust* is entitled to compound interest, upon all the authorities. If, by the instrument of trust, interest is to be added to principal semi-annually, semi-annual rests will be made; otherwise annual rests will be made,[5] or an inquiry will be directed to ascertain what would have been the amount of the accumulation if the directions had been followed, in order to

[1] Jones *v.* Foxall, 15 Beav. 388; Burdick *v.* Garrick, L. R. 5 Ch. 233. See the matter of compound interest elaborately discussed by Mr. Justice Scarburgh in Ker *v.* Snead, 11 Law Rep. 217, Boston, Sept. 1848; and Wright *v.* Wright, 2 McCord, Eq. 200-204; McKnight *v.* Walsh, 23 N. J. Eq. 136; 24 id. 498; Lothrop *v.* Smalley, 23 id. 192. [See *supra*, § 429, note *b*.]

[2] McKnight *v.* Walsh, 23 N. J. Eq. 136; Burdick *v.* Garrick, L. R. 5 Ch. 233.

[3] Norton's Estate, 7 Phila. 484.

[4] Cruce *v.* Cruce, 81 Mo. 676.

[5] Raphael *v.* Boehm, 11 Ves. 92; 13 Ves. 407, 590; Dornford *v.* Dornford, 12 Ves. 127; Knott *v.* Cottee, 16 Beav. 77; Pride *v.* Fooks, 2 Beav. 430; Byrne *v.* Norcott, 13 Beav. 336; Stackpole *v.* Stackpole, 4 Dow. P. C. 209; Brown *v.* Southouse, 3 Bro. Ch. 107; Karr *v.* Karr, 6 Dana, 3; Bowles *v.* Drayton, 1 Des. 489; Hodge *v.* Hawkins, 1 Dev. & Bat. 564; Wilson *v.* Peake, 3 Jur. (N. S.) 155; Brown *v.* Sansome, 1 McCle. & Yo. 427; Lesley *v.* Lesley, 1 Dev. 117; Fitham *v.* Turner, 23 L. T. (N. S.) 345; Court *v.* Robarts, 6 Cl. & Fin. 64; Townsend *v.* Townsend, 1 Gif. 201.

charge the trustee with the amount.[1] And where a trustee was ordered by the court to invest a sum in controversy, and he neglected to do so, he was ordered to bring the whole sum into court with compound interest.[2] Interest may be allowed against a trustee, although the bill does not pray for it.[3] If a trustee improperly withholds money as a commission, he may be made to pay compound interest on it.[4]

[1] Brown *v.* Sansome, 1 McCle. & Yo. 427.

[2] Latimer *v.* Hansom, 1 Bland, 51; Winder *v.* Diffenderffer, 2 Bland, 166; McKnight *v.* Walsh, 23 N. J. Eq. 136; 24 id. 498; Lathrop *v.* Smalley, 23 id. 192.

[3] Blogg *v.* Johnson, L. R. 2 Ch. 225.

[4] McKnight *v.* Walsh, 23 N. J. Eq. 136.

END OF VOL. I.