TRUSTS AND DUTIES OF TRUSTEES

AMERICAN SCHOOL of CORRESPONDENCE
CHICAGO ILLINOIS

TRUSTS AND DUTIES OF TRUSTEES

INSTRUCTION PAPER

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TRUSTS AND DUTIES OF TRUSTEES

CHAPTER I

ORIGIN AND HISTORY OF EXPRESSED TRUSTS

§ 1. Origin and History of Uses. It has always been the policy of our system of law that property should be freely transferable. In the twelfth century so much land had been given to religious corporations and thus taken from the land market, that Parliament in 1217 passed the Statute of Mortmain (dead hand) forbidding the holding of land by such bodies. To evade this statute, it became the custom to convey property to a friend of the religious body who allowed the corporation to use the property as if it were theirs absolutely. At first his obligation to do this was a merely moral one, but about 1450 courts of equity, whose chancellors were often ecclesiastics, gave a remedy against him if he did not carry out his obligation. The person holding the legal title in this way was called the *feoffee* (to use) and the beneficiary was called the *cestui que use,* an old French Latin term, meaning "the one for whom the use was held." Once established, uses were employed for other purposes. Since the law of forfeiture of property for treason applied only to the legal title and not to the equitable "use", it became common for the nobility of England, who were frequently engaged in civil wars, to convey the legal title of their land to some humble non-combatant, to hold for the use of their families, and thus avoid the loss of their property to their families, if they should be defeated in war and afterwards tried and convicted of treason.

§ 2. Statute of Uses and Its Effects. The employment

of uses became very common and led to many evils; e. g., the creditor of the *cestui que use* could not reach his interest to satisfy their claims; his widow got no dower; conveyances were frequently made for fraudulent purposes; and land titles became unsettled. Parliament again interfered in 1534 by passing a statute called the Statute of Uses, which was intended to put an end to these evils. It provided that whenever *A* should be seized to the use of *B*, the legal title should be adjudged to be in *B* and not in *A*. This was called "executing the use". The statute was effectual, at least for the time and as far as it went, in preventing the separation of the legal title and the equitable interest; but the chief importance of this statute was the unforeseen one that it was employed to make conveyances, that is, after the Statute of Uses was passed. To convey a legal title it was necessary merely to create a use in the person to whom it was wished to convey the estate. The Statute of Uses then operated to give him the legal title.

§ 3. Uses Not Affected by the Statute of Uses. The statute was construed as not affecting uses in personal property, uses for married women, and those uses where the *feoffee* to uses had active duties to perform; these active uses came to be called "trusts", to distinguish them from uses which were so important in the law of conveyancing. Several years later it was held that if land were conveyed to *A* to the use of *B* to the use of *C*, the Statute of Uses could operate only once, that is, in favor of *B;* then the legal title was in *B* to the use of *C*. The courts recognized this second use, calling it a passive trust to distinguish it from uses which were executed. As we shall see later these passive trusts in land have in some jurisdictions been abolished. The subject of express trusts thus covers active trusts in both real and personal property, and passive trusts in personal property which were unaffected by the Statute of Uses, and passive trusts in land which have originated since the Statute of Uses.

§ 4. Ways in Which Express Trusts May Be Created. Express trusts may be created in either of the following

ways: (1) *A* conveys property to *B* in trust for *A;* (2) *A* conveys property to *B* in trust for *C;* (3) *A* declares himself trustee of property for *C*.

The one who holds the legal title in trust is called the trustee; the beneficiary of the trust is usually called the *cestui que trust,* in order to distinguish him from other beneficiaries, such as beneficiaries of contracts and beneficiaries of bailments. The words "*cestui que trust*" mean "the one for whose benefit the trust exists."

§ 5. Express Trusts a Part of Equity Jurisdiction. The subject of express trusts is a part of equity jurisdiction, the *cestui que trust* always having the right to proceed in equity against his trustee for a breach of the latter's obligation. The topic is also closely related to the subject of property because there can properly be no trust unless there is trust property. The subject of express trusts bears a close analogy to contracts in that—with one exception to be noted later—a trust does not arise unless all the essentials of a contract are present.

§ 6. Advantages of Trusts at the Present Time. Where the parties who are entitled to the beneficial ownership of property are incompetent, by reason of infancy, insanity, etc., to manage it themselves, it is quite advantageous to have it managed for them by trustees. Even where the parties are competent, it is sometimes considered advantageous—especially in cases of large estates left by an ancestor to several heirs—to keep the property together as a unit by means of creating a trust. Public or charitable purposes such as hospitals, schools, universities, etc., could not be carried out except by means of a trust.

§ 7. Two Meanings of the Word "Trustee." The word "trustee" is sometimes used in a very broad sense, including other fiduciaries such as bailees, executors, and administrators, etc., but in this article it will be used in the narrower sense, and the term "fiduciary," meaning one in whom peculiar confidence is reposed, will be used when the broader meaning is intended.

CHAPTER II

NATURE AND REQUISITES OF EXPRESS TRUSTS

TRUST DISTINGUISHED FROM BAILMENT

§ 8. Reason for Distinguishing Trusts from Other Legal Relations. An effective way of showing the nature of a trust is to distinguish it from other relations which in some respects are similar, and which are, therefore, likely to be confused with trusts.

§ 9. Similarities. A trust of chattels is similar to a bailment in that both the trustee and bailee are fiduciaries; that is, they are both entrusted with or have the care of property for the benefit of another, and generally speaking their duty of care is the same, viz, that which is exercised by prudent persons with their own property under similar circumstances.

§10. Differences. If *A* delivers chattels to *B* for the use of *C*, and *A* intended to transfer only the *possession* to *B*, then *B* is regarded as a bailee and not as a trustee; for *C* has a remedy against *B* in the common-law action of detinue whereby he gets the possession of the thing itself; his right is thus said to be *in rem;* that is, against the thing. The beneficiary of a bailment having thus an adequate remedy at law, can not sue in equity.

If, however, *A* intended to transfer the *title* to *B* as well as the possession, *B* becomes a trustee; *C's* remedy against *B* is a bill in equity to compel him to account for the chattel; he can not bring detinue to get the chattel itself, and hence his right is not *in rem*.

TRUST DISTINGUISHED FROM DEBT

§ 11. Similarities. A trust is similar to a debt in that the obligation of both may arise upon the transfer to them of the title to property.

§ 12. Differences. One of the important differences is that the trustee is a fiduciary; that is, his obligation is to hold the property so received for the benefit of the *cestui que trust*; the debtor, on the other hand, may do as he likes with the property; he gets the beneficial interest as well as the legal title, and his obligation is to pay a fixed sum of money out of his property generally. It follows from this that if the property so received by the trustee be lost without his fault, the trustee will not be liable for the loss; whereas, if the property so received by the debtor be lost without his fault, the loss will fall on him, and it does not lessen his liability to the creditor.

If the trustee should become bankrupt the *cestui que trust* may demand an accounting of the property so held in trust, if it can be found, and need not come in with the general creditors of the trustee. In case the debtor becomes bankrupt, however, the creditor must share with the other creditors even though the debtor still has the property which he received from the creditor.

§ 13. A Trust Changed into a Debt. With the consent of the creditor, the debtor may change his obligation into that of trustee provided he has the money set aside for the creditor. Likewise the trustee may, with the consent of the *cestui*, change his obligation into that of debtor. This may sometimes be done even without the consent of the *cestui*. If *A* indorses and deposits a draft on *B* in the *X* Bank for the purpose of collection, the *X* Bank becomes trustee of the draft for *A* till collection and agent of *A* in thus collecting; when the draft is collected the Bank does not, however, need to keep apart the money so collected as a trust fund, but may place it in with its general funds and debit itself with the amount, thus making itself a debtor. This right is given to a bank because it would cause great inconvenience to a bank and, therefore, increase expense to the depositor of the draft if the sum so collected had to be kept separate.

Where money is deposited in a bank in the usual way, the bank becomes a mere debtor, and hence the depositor

will lose if the bank fails. This shows that the common phrase "having money in the bank" is not literally true.

§ 14. Test of Determining Whether a Debt or a Trust. In a particular case it may be a difficult matter to determine whether an obligation is that of trustee or debtor. If, however, interest is to be paid by the one receiving the property, this shows conclusively that it is a debt and not a trust. In Pittsburg National Bank of Commerce v. McMurray,[1] the plaintiffs had been in the habit for several years of sending money to one Gill as their agent and attorney for the purpose of investing it, on the understanding that Gill was to pay interest on the money from the time he thus received it until he invested it. The court held that Gill was a debtor, saying:

"Undoubtedly the receipt by him of the money for investment without more, would have made him a trustee. The money would have been trust money, and, if misapplied, could have been followed until it reached the hands of an innocent holder for value. But the agreement to pay interest necessarily implied the right to use the money. Interest is the price or consideration for the use of money. It follows that Gill became the mere banker or debtor of the plaintiffs, subject to the duty of investing the money in a mortgage when a suitable opportunity should occur. In the meantime he had the right to use it in any way his convenience or necessities required."

§ 15. Trustee Liable Also as Debtor. Though usually one is liable either as debtor or trustee and not in both capacities at the same time—unless there is an agreement to that effect—there is in some jurisdictions an exception to this rule. Suppose *A* indorses to the *X* Bank in Chicago a draft upon *B* payable in New York; the *X* Bank will in the usual course of business indorse the draft to its correspondent bank in New York which does the collecting; if after collecting but before remitting to the *X* Bank, the New York bank fails, the *X* Bank is held liable in some jurisdictions as a debtor and thus must pay in full, though they may be able to collect only a small amount from the New York bank.

[1] 98 Pa. 538.

TRUST DISTINGUISHED FROM CONTRACT FOR THE BENEFIT OF THIRD PERSON

§ 16. In American Law. If *A* sells property to *B* and exacts from *B* a promise that he will pay the purchase price to *C* instead of to *A*, *C* is called the beneficiary of the contract between *A* and *B*; if the money was to be paid by *B* to *C* in payment of a debt due to *C* from *A*, *C* is called a payment beneficiary; if there was no such obligation on the part of *A* to *C*, *C* is called a sole beneficiary, because he is the only one beneficially interested in the performance of the contract, or gift beneficiary, because the result of the performance will be a gift from *A* to *C*. In probably more than half of the States he is allowed to sue at common law in special *assumpsit* on this promise made for his benefit; and in probably all of the States the obligation would be carefully distinguished from a trust and he would not be able to get any remedy in equity on the ground of trust. The fundamental difficulty in finding a trust in such cases is that unless *B* has the money set aside, there is no trust property. In Steel v. Clark[2] the court said:

"It is true that when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust would thereby be created as would give equity jurisdiction to compel the application to the purpose of the trust. But such is not this case. Here was a sale of a farm by the owner in order to pay his debts, among which was this debt due his brother Thomas, and which Brewster refused to pay. It is an ordinary case of debtor and creditor, and the Statute of Limitations was a bar to a recovery. . . . We fail to see in the transaction any indication of a trust to any greater extent than any ordinary *assumpsit* by one person for a valuable consideration, to pay a debt he owes to a third party, instead of paying to the party with whom he contracted."

§ 17. In English Law. In England the beneficiary of a contract is denied any common-law remedy on the contract, on the ground of lack of privity. This hardship on the beneficiary has led the English courts to give equitable relief on the ground of a trust, thus making the English

[2] 77 Ill. 471.

law of trusts illogical on this point. Thus in Moore v. Darton,[3] Moore borrowed of Miss Darton 100£ and gave the following receipt: "Received the 22d of October, 1843, of Miss Darton, for the use of Ann Dye, One Hundred Pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent to be paid to Miss Darton." This transaction was held to create a trust from the death of Miss Darton, and Ann Dye was allowed to recover in equity upon that ground, though, of course, there was no reason to suppose that Moore would have 100£ set aside at that time. In most jurisdictions in this country, as already stated, Ann Dye could have recovered at common law in special *assumpsit* on the promise.

TRUST OF CHOSE IN ACTION DISTINGUISHED FROM ASSIGNMENT

§ 18. **Similarities.** Briefly, a chose in action is a right to sue. The most common legal chose in action is an ordinary debt. If the debtor has promised to pay the creditor or his assignee, the chose in action is called "negotiable" because the title to it may be transferred by the creditor. If the promise is merely to pay the creditor and not the creditor's assignee, the legal title can not be transferred by the creditor and the chose in action is called "non-negotiable".

If *A* has an ordinary nonnegotiable chose in action against *B*, such as for goods sold and delivered or for work and labor done, and assigns this claim to *X*, *X* does not get the legal title unless *B* assented to the transfer and agreed to pay *X* instead of *B*—the legal title remains in *A* but *X* is entitled to the beneficial interest. If instead of assigning the chose in action to *X*, *A* had declared himself trustee of it for *X*, in this case, also, *A* as such trustee would have the legal title and *X* would have the beneficial interest.

§ 19. **Differences.** In the case of the trust of the chose in action the proper person to collect the chose in action from *B* is *A*, and *X* has no remedy either directly or indi-

[3] 4 De Gex & Smale, 517.

rectly against *B* as long as *A* performs his duty as trustee. In the case of the assignment, however, *A's* duty is not to sue *B* but to allow *X* as his representative to sue *B*. Before it was changed by statute, *X* was compelled to sue in the name of *A*; now he is generally allowed to sue in his own name, but he still sues as the representative of *A*. He has no remedy in equity unless *A* threatens to collect from *B* and he desires to enjoin *A* from doing so.

It follows from the above that in the case of a trust *B* will be protected in paying the trustee unless he knows that the trustee is about to commit a breach of his trust; while in the case of the assignment, *B* will not be protected in paying *A*, the assignor, unless he was ignorant of the assignment.

TRUST DISTINGUISHED FROM EXECUTORSHIP

§ 20. **Similarities.** The executor of a will is like a trustee in that he is also a fiduciary; his duty is to deal with the property for the benefit of the creditors and legatees of the testator, and as executor he has no beneficial interest in the property. If a will directs that the persons appointed as executors shall do other things than executors are bound to do, they become trustees as soon as these duties are undertaken. So if the executor can not legally pay over a legacy because the legatee is an infant, he becomes trustee as soon as he has the amount ready to pay over, and is bound by the ordinary duties of trustee, such as investment and the like.[4]

§ 21. **Differences.** The legatee's remedy against the executor is in the Probate court; if the executor has become a trustee his liability is then in equity, and, as we have just seen, he is under obligation to invest the money. The executor holds adversely to the legatee, and hence the latter may be barred by the running of the Statute of Limitations without actual knowledge of the legacy; but if the executor becomes trustee, this Statute of Limitations has no bearing on his obligation as such trustee; and the Statute of Limitations in respect to a trust will not begin to

[4] *In re* Smith, 42 Chancery Division 302.

run till the trustee has repudiated his trust to the knowledge of the *cestui*, because he is considered as not holding adversely to the *cestui* but for his benefit; and the *cestui* is entitled to notice if the trustee claims the property as his own.

LANGUAGE NECESSARY TO CREATION OF TRUST

§ 22. Mandatory Words. If the person who attempts to create a trust uses the word "trust" or words of command, the attempt will be successful, if the property conveyed has been clearly defined; and if there are no conditions imposed upon the transferee which would be inconsistent with a trust, such as the payment of interest.

§ 23. Precatory Words. If only precatory words are used—such as wish, hope, desire, entreat, etc.—there is a conflict of authority as to whether this is sufficient to impose a trust obligation on the transferee of the property. Formerly, the weight of authority was that if the property conveyed and the *cestui que trust* are clearly defined, the words if used in a will are sufficient. Thus in Harding v. Glyn,[5] one Nicholas Harding by will gave "to Elizabeth, his wife, all his estates, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did desire her at or before her death to give such leases, house, furniture, goods, and chattels, plate and jewels onto and amongst such of his own relations as she should think most deserving and approve of." It was held that the widow took as trustee and got no beneficial interest.

The tendency of modern cases, however, is against construing such words as creating a trust. Thus *In re* Diggles,[6] Mary Ann Diggles bequeathed all her real and personal estate to her daughter Frances Edmondson, "and it is my desire that she allow to my relative and companion, Ann Gregory, now residing with me, an annuity of 25£ during her life. . . ." This was held not to create a trust, the courts saying:

[5] 1 Atkins, 469.

[6] 39 Chancery Division, 253.

"No doubt in the old cases slight expressions were laid hold of to create a trust, but the recent authorities have gone the other way. . . . A reasonable construction is to be given the will; and in my opinion upon the reasonable construction of this will, the testatrix cannot be held to give a binding direction."

CONSIDERATION

§ 24. Meaning of Consideration. The essential idea involved in consideration is that of exchange. Thus the consideration for a promise in the law of contracts is that which is given in exchange for the promise. Thus if *A* promises *B* one dollar if *B* will mow his lawn, the consideration for *A's* promise to pay the dollar is the mowing of the lawn, because it is to be in exchange for it. And in the law of conveyancing, the consideration for the conveyance of property is that which is given in exchange for the property. If *A* conveys to *B* a farm in consideration of *B's* paying or promising to pay $5,000, the consideration of the conveyance is the payment or the promise of payment of the money.

§ 25. Requirement of Consideration in the Law of Uses. It was the law of uses before the Statute of Uses was passed that a consideration was necessary to create or "raise" a use. If *A* conveyed property to *B* for the use of *C*, the receipt of the property by *B* was consideration for his obligation to hold the property to the use of *C*. If *A* wished to create a use in *C* without making any conveyance, his having the property could not be consideration for the use because he already had the property and, therefore, unless *A* received something of value, such as money, etc., in exchange for his promise to hold to *C's* use, such promise was wholly without effect.

§ 26. Covenant to Stand Seized. After the Statute of Uses was passed and uses became important in the law of conveyancing, the rule requiring consideration was modified so that one might create a use in favor of a near relative by blood or marriage—such as son, daughter, son-in-law, daughter-in-law—by a mere declaration under seal

without receiving anything in exchange. The Statute of Uses would then operate to transfer the legal title to the near relative in whom the use had thus been created. Such a conveyance is called a covenant to stand seized; the near relationship upon which it is based is usually referred to as "good consideration". Strictly speaking, however, there is no consideration in the true sense of exchange; sometimes consideration in the sense of exchange is called "valuable" consideration to distinguish it from the so-called "good" consideration.

§ 27. Consideration in the Law of Trusts. Until 1811 a valuable consideration was essential to the creation of a trust. In that year the case of *Ex parte* Pye[7] decided that if *A* declare himself trustee for *C*, this mere declaration was sufficient to make *A* trustee and invest the equitable interest in *C* whether *C* be a near relative or a stranger. This case, though a radical innovation, has been generally followed.

§ 28. Effect of Ex Parte Pye. Limitation of the Doctrine. It has always been the law as to gifts that, in order to transfer the legal title and thus make the gift effectual, the donor must either deliver the property or make a conveyance by deed or will; a mere declaration of intention or a promise, no matter how clear, is ineffectual. Since *Ex parte* Pye held that a mere declaration of trust is sufficient, it was natural that the donee of every imperfect gift would try to have the court construe the transaction to be a declaration of trust, which for most purposes would be as satisfactory to the donee as the legal title would be. In a few English cases the donees were successful. Thus, in Morgan v. Malleson,[8] the testator had given to his medical attendant, one Dr. Morris, the following memorandum: "I hereby give and make over to Dr. Morris an India bond, No. D, 506, value £1,000, as some token for all his very kind attention to me during illness." The bond itself was not transferred to the possession of Dr. Morris and there was no consideration for the testator's promise to make this

[7] 18 Vesey, 140.

[8] Law Reports, 10 Equity, 475.

transfer. This was held to create a trust in favor of Dr. Morris.

The great weight of authority and the better view is against this case, and the doctrine of *Ex parte* Pye has been held applicable only to cases where there is a clear intent to become trustee and, therefore, not applicable to imperfect gifts. In Richards v. Delbridge,[9] the court in a similar case held that there was no trust, saying:

"The true distinction appears to be plain and beyond dispute; for a man to make himself trustee, there must be an expression of intention to become trustee; whereas, words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose fiduciary or otherwise. . . . If a gift is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

§ 29. Exception in the United States in Favor of a Wife. Apart from statute a husband can not convey property to his wife, and an attempt to do so has no effect at common law. In many jurisdictions in this country, however, these attempts to convey to the wife have been upheld in equity as valid declarations of trust based upon the husband's obligation to make a provision for her. These decisions, though not logical, are justified in the United States on the grounds of policy from the fact that the wife is not usually provided for upon her marriage as she is in England.

STATUTE OF FRAUDS

§ 30. Writing Unnecessary Apart from Statute. Apart from statute, a trust either of personal or real property may be created orally. Thus if *A* conveys property to *B* upon trust for *C*, nothing need be said of the trust in the conveyance; an oral agreement between *A* and *B* that *B* will hold as trustee is sufficient if there is no statute requiring a memorandum.

[9] Law Reports, 18 Equity 11.

§ 31. **Usual Provisions of the Statute of Frauds.** In a few States the Statute of Frauds provides that trusts in land shall be created in writing. By the English Statute of Frauds, which has been substantially copied in many States, the requirement is that "all declarations or creations of trust or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts . . ." The statute by its terms does not apply to movable chattels; and resulting and constructive trusts are expressly excepted.

§ 32. **Construction of the Statute.** Unless the statute expressly requires that the creation of the trust shall be in writing, it is held that the writing is not necessary to the creation but merely to the enforcement of the trust; that is, the statute merely gives a defense. The memorandum is sufficient if made at any time before suit is brought; and is effectual even if made after bankruptcy of trustee, provided creation of trust was before bankruptcy.

On the other hand, the doctrine of the memorandum relating back to the oral creation of the trust will not be applied so as to injure innocent parties whose rights may have attached between the oral creation and the memorandum. Thus, if *A* orally declares himself trustee of land for *C*, then sells and conveys the land to *B*, and later makes the memorandum of the declaration in favor of *C*, the memorandum will be effectual so as to make *A* liable to *C* as trustee, but it will not prejudice the rights of *B* who had a right to assume that the oral declaration of trust would never be enforced.

§ 33. **The Proper Party to Sign the Memorandum.** If *A* conveys property to *B* upon trust for *C*, *A* may comply with the statute by expressing the trust in the instrument of conveyance. If he fails to do this, however, only *B* can then comply with the statute, since he is the party to be charged with the trust. If *A* declares himself trustee of land for *C*, *A* is the only party who can ever comply with the statute.

SUBJECT-MATTER OF A TRUST

§ 34. The General Rule. Though most trusts are of real estate, chattels and choses in action may also be held in trust. The *cestui's* trust interest itself may in turn be held in trust, being an equitable chose in action. In short, practically everything of which one may predicate property may be held in trust.

§ 35. Exceptions. Purely personal rights, such as offices, can not be assigned to others and, therefore, can not be held in trust for others.

In *Graves v. Graves*,[10] the testator devised his homestead Gravesend, to his wife for life; "And I do hereby declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." The sister now asked for a declaration of her right to reside at Gravesend and to be boarded by Mrs. Graves. The court held that there was no trust property and, therefore, no trust obligation. The homestead was evidently not meant to be held in trust, and the right to live at Gravesend, being conditional upon their being able to live together upon friendly terms, could not be enforced.

CESTUI QUE TRUST

§ 36. Who May Be a Cestui Que Trust? At the present time anyone capable of holding property for himself may be the beneficiary of a trust. This practically means that any human being may be a *cestui que trust.* In the time of slavery, a slave was, of course, incapable of holding property and likewise incapable of being a *cestui.* At one time it was held that an alien while entitled to take as a *cestui que trust* could not continue to hold the trust interest; but this has been abrogated practically everywhere by statute at the present time.

§ 37. Public or Charitable Trusts. The rule as to charitable trusts differs in two important respects from the rule as to private trusts: the *cestui que trust* need not be definite and the trust may last forever. Thus, a devise of property to *B* upon trust to apply the income each year

[10] 13 Irish Chancery Reports, 182.

for the benefit of the worthy poor of *X* County is valid, though it is obvious that the parties to be benefited are not specified and though the income is to be applied perpetually. In fact, it is one of the essential features of a charity that the persons to be benefited should not be specified because it must be for the benefit of the public. If a charitable corporation is named as the immediate *cestui*, it is the proper party to enforce the trust; otherwise, the State will enforce it through the Attorney-General.

§ 38. Private Trusts—Must not Last Indefinitely. If the trust is for a private purpose, it is a fatal objection if the application of the income is to last indefinitely. Thus, where a testator left $10,000 upon trust to apply the income each year to employ a brass band to play on the anniversary of his death, this was held void; if the trust had been limited to a period of years—say fifteen or twenty—it would probably have been held valid.

§ 39. Private Trusts—Cestui not Capable of Enforcing. The object or purpose of the trust must be definite, but the *cestui* does not need to be capable of enforcing. Thus a bequest to *T* upon trust to apply the income of $750 for fifty years toward the maintenance of the testator's horses and hounds if they should live so long, and a bequest of $300 upon trust to erect a monument to the first husband of the testator's wife, were both held valid, though it is obvious that there is no one to hold the trustee responsible if he refuses to carry out the trust. As will be seen later, the trustee could not profit by such refusal, but would be bound to account for the property to the next of kin of the testator. If instead of the $750 being for the benefit of the testator's own horses and hounds, it had been for a horse and hound hospital, it would have been good as a charity; and the Attorney-General would have enforced it if the trustee had been unwilling to act.

§ 40. Private Trusts—Cestui Indefinite. In Morice v. Bishop of Durham,[11] one Ann Cracherode bequeathed her personal estate to the Bishop of Durham upon trust to pay

[11] Vesey, 521.

debts and legacies "and to dispose of the residue to such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve." The words "benevolence and liberality", being broader than charity, the gift could not be upheld as a charity; if the word charity had been used in the place of benevolence, the trust would have been valid and enforcible as a public trust. The Bishop was willing to carry out the terms of the will, but the court held that the trust was invalid for indefiniteness, and declared a resulting trust for the next of kin of the testator. The testator might have accomplished the result he desired by bequeathing the property to the next of kin, subject to a power of appointment in the Bishop of Durham, among such objects of benevolence and liberality as he should most approve.

THE TRUSTEE

§ 41. Who May Be a Trustee. Generally speaking, the creator of the trust may validly appoint anyone a trustee; e. g., an infant, a lunatic, a bankrupt; or, an alien may be so appointed. It was at one time thought that a corporation could not be a trustee for the same reason that it could not commit a crime, viz, that it had no conscience or soul; but it is well settled now to the contrary—in fact, it is very common for a corporation to be a trustee. In a strict sense, the State can not be a trustee because it can not be sued; the *cestui's* proper remedy is by petition and not by suit. Aliens may now be trustees generally unless disqualified by statute, though the law was formerly otherwise.

§ 42. Appointment of Trustee by Court. If for any reason a trusteeship should become vacant and the duty devolve on the court to appoint a trustee, the court will endeavor to appoint one who is capable of managing a trust estate and who will likely be fair to all the *cestuis.* Hence, a court, in the exercise of its discretion, would never appoint a lunatic or infant as trustee and would not appoint a non-resident of the State, a married woman, an insolvent, or one of the *cestuis,* unless there should be exceptional circumstances favoring such appointment. In England it

seems objectionable to have a relative of any of the *cestuis* appointed; but such appointments are common in this country.

§ 43. **Removal of Trustee.** If the trustee is guilty of serious misconduct, or is for any reason incapable of performing the trust duties, it is, of course, desirable that he should be removed. In the absence of statute, the proper equity court will accomplish the removal by commanding the trustee to convey the trust property to a person designated by the court to be the new trustee. If, however, the trustee is an infant or a lunatic, a transfer by him, even if made under order of the court, would be voidable. Hence, equity will not order a transfer but will issue an injunction against the trustee further interfering with the trust property, and will appoint a conservator who will manage the trust property but who will not, of course, have title. In England and in some States in this country, statutes have been passed which enable a court of equity to vest the title in a new trustee without a transfer by the old trustee. This legislation is worthy of commendation and ought to be copied everywhere.

§ 44. **Liability of an Infant Trustee.** An infant trustee would not be liable for such breaches of trust as consist in mere failure to act—in analogy to the nonliability of an infant on his contracts. If, however, the breach of trust consisted in wasting the trust property by positive acts of misconduct, it would seem that he would be liable therefor, in analogy to his common-law liability for his torts.

§ 45. **Disclaimer by Trustee.** No one is under any obligation to accept a trust. If a conveyance be made to *T* upon trust for *C*, the title passes as soon as the conveyance is made without waiting for the consent of *T*; but if *T* upon learning of the conveyance refuse to accept, such refusal or disclaimer relates back to the time of conveyance and operates to place the title back in the transferor just as if the conveyance had never been made. If *T* once accepts, it is too late to disclaim.

Although a transferee by deed or will can thus rid him-

self of the legal title of the property by disclaimer, the heir of the decedent can not thus escape; he must take the legal title, but if it is subject to a trust, he is entitled to his costs in being relieved of the trust property.

§ 46. Same Effect on Cestui's Rights. Neither disclaimer by the trustee nor refusal to act after acceptance will defeat the interest of the *cestui*. Equity will not allow a trust to fail for want of a trustee, but will appoint some person who is willing to serve.

The *cestui's* interest is likewise saved where the person or corporation appointed to act as trustee is forbidden by law to take the legal title; also, where the conveyance is upon trust but no trustee has been named.

NOTICE TO CESTUI QUE TRUST

§ 47. Notice not Necessary. If *A* conveys to *T* upon trust for *C*, the equitable interest vests in *C*, without his knowledge or consent, subject, of course, to disclaimer. The rule is similar, therefore, to the rule as to notice to the trustee; disclaimers by *cestuis* are very rare, because one does not usually refuse benefits.

CHAPTER III

NATURE OF CESTUI QUE TRUST'S INTEREST

CLAIM PURELY EQUITABLE, EXCEPT WHEN ACCOUNT WOULD LIE AT COMMON LAW

§ 48. Cestui's Remedy Against the Trustee. The subject of express trusts is a part of equity jurisdiction; the *cestui* may always bring a bill in equity against the trustee for an accounting, and need not proceed at common law even where he might do so. There is only one class of cases where he may proceed at common law for a breach of trust, viz, where, either by the terms of the trust, or by stating an account to the *cestui* the trustee's sole duty is to pay over money. In early times the proper common-law action in this class of cases was the action of account; but because of its clumsiness and costliness it has practically become obsolete in most jurisdictions and has been superceded by the action of debt—if the amount is certain—or by the action of *indebitatus assumpsit.*[1]

In Norton v. Ray,[2] the *cestui* brought a common-law action against the trustee for the value of the trust property which the trustee had wrongfully conveyed to *X*. The court held that the *cestui* must proceed in equity. If it had been the duty of the trustee to sell and convey the property and hand over the proceeds to the *cestui,* then the latter could have maintained a common-law action for such proceeds after they had been received by the trustee-account or *indebitatus assumpsit.*

§ 49. Liabilities of Trustee in Covenant and Special Assumpsit. If the trustee should execute an instrument under seal promising to carry out the trust, the *cestui* may, if he prefers, sue the trustee in the common-law action of covenant, which is the appropriate action upon sealed instru-

[1] For nature of these actions see article on Common-Law Pleading.
[2] 139 Mass., 230.

ments. In such a case the *cestui que trust* has his choice of remedies and is not barred from suing in equity.

If the promise to perform the trust is not under seal, special *assumpsit* would logically be allowed against the trustee wherever there was consideration for the promise. But the jurisdiction of equity over express trusts was so well settled before the action of special *assumpsit* came into general use that the latter action was practically never brought.

§ 50. The Trustee May Recover Against the Cestui in Ejectment or in Trover. The legal title being in the trustee, he may recover at common law against the *cestui* in ejectment for the trust land or in trover for the trust chattels. The *cestui's* only remedy is by getting a decree in equity forbidding the trustee to continue with his action at common law. In some jurisdictions, however, by statute a *cestui que trust* has been allowed to plead his equitable interest in the common-law court and, therefore, does not need in those jurisdictions to resort to a bill in equity.

Conversely, a *cestui* can not succeed in ejectment or in trover against his trustee, but must resort to a bill in equity.

CESTUI QUE TRUST IS CLAIMANT AGAINST TRUSTEE—NOT OWNER OF THE TRUST RES

§ 51. Cestui's Claim Enforcible Regardless of the Situs of the Trust Property. If a *cestui* wishes to sue his trustee it is not necessary that the court in which the suit is brought shall have jurisdiction of the trust property, or *trust res*, as it is usually called—a Latin term meaning thing or property. In the Earl of Kildare v. Eustace,[8] the defendant was trustee for the plaintiff of some land in Ireland; and the defendant being in England, the plaintiff brought suit against him in an English court. It was held that the court had jurisdiction, since the decree of a court of equity was in the nature of a command to the defendant and only affected the trust property through the carrying out of such commands; hence, it was not necessary that the trust property be in England.

[8] 1 Vern., 405.

§ 52. Jurisdiction of the Property Alone not Sufficient for the Enforcement of Cestui's Claim. Not only may the *cestui* sue the trustee wherever he can get jurisdiction of him but he must do so there if at all; jurisdiction of the property alone is not enough. This frequently works a hardship upon the *cestui* and, therefore, in some jurisdictions, for example, in Massachusetts, the legislature has vested in the court the power to confiscate in such cases the trustee's title to land lying within the State and invest it in a new trustee. In Felch v. Hooper,[4] the court said:

"Upon the facts stated in this bill, the land in question is charged with an implied trust in plaintiff's favor and the court is not powerless to enforce that trust merely because the parties holding the legal title are beyond its reach. It is said that the courts of equity will not allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint by a statute which provides that when a person, seized of an estate upon a trust express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the object of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require."

§ 53. Remedies of the Cestui. Common-Law Remedies of the Cestui Against Third Person. As has been already pointed out, the legal title to the trust property is in the trustee, if it is property of which you can predicate legal title. Where the property has been wrongfully interfered with by a third person, the trustee, therefore, and not the *cestui* is the proper party to sue the third person for such wrongful interference. Thus if the trust property, being chattels, is wrongfully taken and converted by *X*, the trustee and not the *cestui* is the proper party to bring the action of trespass, trover, or replevin. If the trust property is land and *X* wrongfully withholds possession, the trustee and not the *cestui* is the proper party to bring ejectment.[5]

[4] 119 Mass., 52.

[5] Rice v. Brown, 77 Ill. 549.

In Bailey v. New England Mutual Life Insurance Co.,[6] the defendants in their policy had agreed to pay the amount of the insurance to the insured's executor for the benefit of the widow. It was held that the executor and not the widow was the proper party to sue on the policy, the court saying:

"The principle is that in policies of this kind the executor becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It, therefore, necessarily follows that the *cestuis que trust* cannot maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own name might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties."

§ 54. Remedies Against Third Person in Equity. Meaning of Equitable Title. If the wrong done to the trust property by *X* is of such a nature that the proper remedy against him is in equity, here also the trustee and not the *cestui* is the proper party to sue. Thus, if *X* should induce the trustee by fraud to convey trust land to him, the trustee and not the *cestui* would be the proper party to bring a bill in equity for reconveyance.

It is frequently said that the *cestui* has the "equitable title" to the trust property. This does not mean, as we have just seen, that he may sue third persons in equity for wrongs to the trust property; it means merely that it is the duty of the trustee, in equity, to manage the trust property for the benefit of the *cestui*. For this reason it is better to use the phrase "equitable interest" than "equitable title". Strictly speaking there is no such thing as "equitable title".

§ 55. Remedy of Cestui Que Trust If the Trustee Refuses to Sue the Third Person. Since the trustee is the proper

[6] 114 Mass. 177.

party to sue for wrongs to the trust property, it is obviously his duty to do so. If he should refuse or fail to perform this duty, the *cestui's* remedy is to bring suit against the trustee and get a decree from a court of equity compelling him to bring the appropriate action in law or suit in equity against such third person. If the third person is within the jurisdiction of the court where the *cestui* brings his bill against the trustee, the *cestui* may have the third person joined with the trustee as a codefendant and thus both suits will be settled in one. This principle of thus avoiding multiplicity of suits is a fundamental one in equity jurisprudence. The *cestui* can not, however, sue the third person without joining the trustee, unless the latter should be beyond the jurisdiction of the court. In Morgan v. Kansas Pacific Railway Co.,[7] the courts said:

"Lewis, being the trustee, is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and, in such case, he must be made defendant. . . . The averment as to the request to Lewis to bring suit is controverted, but it is not proved on the part of the plaintiff. It would be necessary to prove it even though Lewis were served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court, nor is that fact proved."

§ 56. Suits by Third Persons Against Trustee. Suits whether at law or in equity brought by a third person with respect to the trust property are properly brought against the trustees only. There is, however, one exception to this rule in some jurisdictions on the ground of policy. If a suit is brought to foreclose a mortgage on the trust property, the *cestui* is required to be joined with the trustee as party defendant so that he may be assured an opportunity to raise the money to prevent foreclosure.[8]

§ 57. Burdens of Ownership Fall upon Trustee. Unless the taxing statute provides otherwise, the trustee and not the *cestui* is personally liable for the taxes on the trust

[7] 15 Federal Reporter, 55.

[8] Francis v. Harrison, 43 Chancery Division, 183.

property, and in case of personal property it is usually taxable at the residence of the trustee. In Latrobe v. Mayor and City Council of Baltimore,[9] the court said:

"That taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title we do not doubt, for at law the legal estate in the hands of a trustee has the legal incidents and obligation of an absolute title, subject only to the claims in equity of the *cestui que trust.*"

The trustee is also liable for a nuisance on trust land. In Schwab v. Cleveland,[10] the plaintiff, an adjoining land owner, brought an action against the defendant for injuries done to plaintiff's premises by the escape of water from a leader upon the house, the legal title of which was in the defendant. The courts said:

"There is no force in the objection, that the defendant can not be made liable as trustee. He owns as trustee, and owes the duty as owner to keep his pipes and drains from injuring his neighbor by reason of faulty construction or from being suffered to get in bad repair. Whether as between himself and beneficiary he can collect the damage from the trust estate is a question not now before us."

This question as to the right of the trustee over against the trust estate for reimbursement in case he is compelled to pay will be discussed in a later chapter.

§ 58. Remedy of Cestui Que Trust Who Is in Possession of the Trust Res. Although the *cestui* as such has no direct remedy against the third person, yet if he is in possession of the trust property, he may bring whatever remedies are proper for the violation of such possession. Thus, a *cestui* in possession of land may maintain trespass for an unlawful entrance by a third person.[11] A *cestui* in possession of the personal property of the trust estate may maintain trespass, trover, or replevin against a wrongful taker.[12]

§ 59. Remedy of Trustee against a Joint Wrongdoer. In Wetemore v. Porter,[13] the plaintiff trustee had wrongfully conveyed the trust property to the defendant with

[9] 19 Md. 13. [10] 28 Hun. 458. [11] Cox v. Walker, 26 Me. 504. [12] 28 Ga. 469. [13] 92 New York, 76.

intent to defraud the *cestui*. To an action brought to get back the trust property so conveyed, the defendant set up the defense that the trustee was himself a wrongdoer and, therefore, not entitled to maintain the action. The court refused to sustain this defense, saying:

"We see no reason why a trustee who has been guilty of even an intentional default is not entitled to his *locus penitentiæ* (place of repentance) and an opportunity to repair the wrong which he may have committed."

The trustee's right to get back the trust property in such a case would, however, be lost if before bringing suit against his confederate the *cestui* should sue him for his breach of trust or should sue the confederate himself. As will be seen later, the *cestui* may in such a case sue the confederate directly and have him declared a constructive trustee of the property, since the confederate received the property from the trustee with notice of the trust.

§ 60. Cestui Barred by Laches of Trustee. Since the trustee is the proper party to sue the third person with respect to wrongs committed on the trust property, it follows that if the trustee is barred by delay in bringing suit therefor, the *cestui* will also be barred. In Wych v. East India Company,[14] *A* had a claim against the defendant, and died leaving the plaintiff, at the time an infant of tender years, as his heir. *B* was appointed trustee for the plaintiff, but failed to bring suit on the claim before the Statute of Limitations had run. The plaintiff, after reaching majority, brought suit; but it was held that since *B*, the trustee, was barred, the plaintiff was also barred and could not take advantage of the exception in the Statute of Limitations in respect to suits brought by infants. A converse proposition would be found in a case in which, if the trustee were under disability—such as infancy, coverture or insanity—the exception in the statute would apply and thus the *cestui* would ultimately reap the benefit thereof even though he himself were not under any disability.

[14] 3 Peere Williams, 309.

§ 61. Cestui Cannot Vote as Owner of the Trust Property. Where stocks in a corporation are held in trust, the right to vote as owner is in the trustee and not in the *cestui,* unless provided otherwise by statute or by-law of the corporation.[15] It is, however, the trustee's duty to vote as the *cestui* directs—if the *cestui* is *sui juris;* and if irreparable damage would be likely to result from voting against the wishes of the *cestui,* the latter could enjoin his so voting.[16]

§ 62. Cestui Que Trust of an Obligation Can Not Discharge the Obligor. As pointed out in the preceding paragraph, obligations, that is, choses in action, may be held in trust; and the trustee and not the *cestui* is the proper party to sue the obligor thereon for the purpose of collection. Furthermore, the trustee and not the *cestui* can make a release of the obligation which will be valid at common law. Suppose *T* holds an obligation—*e.g.,* a note for $1,000—against *O* in trust for *C; T* may make a release valid at common law, but if it were made wrongfully in fraud of the rights of *C, C* could compel *T* to sue *O* on the obligation and enjoin *O* from setting up the release, unless *O* had paid value for the release without knowing that the release was a breach of the trust.

On the other hand, if *O* has been released by *C,* it is no bar to an action at common law by *T* upon the obligation. If, however, *C* is *sui juris* (of full right) and, therefore, legally capable of making a release, *O* may get an injunction against *T's* bringing or further pursuing the common-law action. This injunction is based upon what is called avoiding circuity of action; that is, if *T* were allowed to recover against *O, T* would then be bound as trustee to pay the amount of recovery over to *C,* his *cestui que* trust, and *C,* having released *O,* would be bound to pay the amount so received to *O;* consequently the parties would be in the same position as when they started. Equity, to avoid this useless circuity, will give an injunction and stop the first suit.

[15] *Re* Barker, 6 Wendell, 509. [16] McHenry v. Jewett, 90 New York 58.

§ 63. Purchaser of Trust Property Not Bound to See to the Application of the Purchase Money. If a trustee has, by the instrument creating the trust or otherwise, the power to sell or convert the trust property into money, is the purchaser bound to see that the trustee properly applies the purchase money? It was formerly held that he was so bound, in equity, so that if the trustee misapplied the purchase money the *cestui que trust* could compel the purchaser to pay it over again. This doctrine was a very inconvenient one; and at the present time it has been changed by statute or decision practically everywhere, so the present rule is that the purchaser may safely pay the trustee unless he knows that the trustee may misapply the money.

§ 64. Set-Off between Obligor and Trustee. Equitable Set-Off. In the very early law, if *A* sued *B* on one cause of action and *B* had another cause of action against *A*, *B* could not use this in any way as a defense, but was compelled to bring a separate suit. During the past century and a half, however, statutes have been generally passed, allowing *B* in such a case to set off his claim against *A's* claim (provided both claims are for liquidated or fixed amounts); and thus in many instances both causes of action can be settled in the one suit. Now suppose *T*, having an obligation for $1,000 against *O* in trust for *C*, sues *O*; *O* has a personal claim against *T* for $800. May *O* set off this $800 claim and thus reduce the recovery to $200? He may, at common law, because the statute of set-off has been construed to apply to the parties to the record. If, however, *O* knew of the trust at the time that he became bound to *T*, equity will, at the suit of *C*, enjoin *O's* relying on his set-off.

Conversely, if *O*, instead of having a claim against *T*, had a claim of $800 against *C*, he could not plead it by way of set-off at common law, because *C* is not a party to the record; that is, the action is brought in the name of *T* and not in the name of *C*. But equity, which looks to the real parties in interest, has allowed *O* to take advantage of the $800 claim; this is called equitable set-off.

CHAPTER IV

RESULTING AND CONSTRUCTIVE TRUSTS

CLASSIFICATION OF TRUSTS

§ 65. Classification of Trusts According to Form. Thus far we have been considering only express trusts; that is, trusts where the obligation is imposed according to the expressed intention of the parties. In this chapter we shall speak of trusts which are not express. These are called resulting trusts and constructive trusts. The distinction between express trusts on the one hand and resulting and constructive trusts on the other, although a distinction only in form, is important because the Statute of Frauds applies only to the first and not to the other two.

§ 66. Classification of Trusts According to Intent. If we should classify trusts according to intent rather than according to form, we would logically have three classes. In one class would be included all actually intended trusts whether the intention is expressed in language or is in inferred from circumstances; in another class we would have all those trusts which are imposed by law as a remedy for a wrong, without regard to the intention of the parties; besides these, there would be a middle class, viz, those trusts which are imposed by law according to what would probably have been the intent of the creator of the trust if he had thought about the state of facts which later occurred. The second class—trusts imposed without regard to the intent of the parties—is always called "constructive trusts"; while the term "resulting trusts" is usually applied to those trusts which are imposed according to either the real or supposed unexpressed intentions of the parties, thus including class 3 and part of class 1. The term "constructive trusts" is sometimes used in a broader sense to include all trusts except express trusts; and sometimes to include those trusts which are covered by classes

2 and 3 above. In this article the term will be used in the narrowest meaning—that is, trusts imposed without regard to the intention of the parties—for the sake of clearness and convenience.

§ 67. Practical Importance of the Distinction between Resulting and Constructive Trusts. The distinction between the resulting trusts on the one hand and constructive trusts on the other is not of great practical importance. There are two points of distinction, however, which are worthy of notice. Since a constructive trust is imposed without regard to the intent of the parties, as a specific remedy for a wrong, it is obvious that no statute of frauds or registry act would ever be construed as applying to them since they are in their nature incapable of having a written memorandum of their creation or of being recorded. Resulting trusts, on the other hand, especially those which are based upon the real intent of the party, might reasonably be required by statute to have a memorandum in writing or to be recorded.

Another point of distinction arises in the case of conflict of laws of different jurisdictions. Whether a resulting trust arises or not in a particular case depends properly upon the law of the jurisdiction where the property is situated, regardless of where the parties live, or where the transaction took place, or where the suit was brought. On the other hand, whether a constructive trust will be declared will depend entirely upon the law of the place where the remedy is sought—that is, where suit is brought—and nothing will turn upon where the wrong was done or where the property is located.

PURCHASE-MONEY-RESULTING TRUSTS

§ 68. Origin and History. Purchase-Money Uses. During the century prior to the Statute of Uses most of the land in England was held in use.[1] It was, therefore, natural for a purchaser of land to have the title conveyed to someone for his use; and so general was this practice that even if the use were not expressed at the time of convey-

[1] See *ante*, § 1, for reason.

ance, the law presumed that such a conveyance was for the use of the one who furnished the purchase money. When the Statute of Uses was passed, the statute executed these uses and thus annihilated them as interests separated from the legal title. Later, when a modern passive trust arose,[2] the same presumption was applied to them which had been applied to uses, though at that time it was not the usual thing for land to be held in trust. The reason for this application of the presumption to the law of resulting trusts seems never to have been explained.

§ 69. **The General Rule.** If *A* buys land and has the conveyance made to *B*, *B* is presumed to hold in trust for *A*; that is, although *B* has the legal title, he has the burden of showing that it was not meant as a gift to him; if, however, he can satisfy this burden of proof, he will be entitled to keep as donee of the property. In the anonymous case reported in 2 Ventris, 361, the court said:

"Where a man buys land in another's name, and pays money, it will be a trust for him who pays the money, though no deed declaring the trust, for the Statute of 29 Charles II., called the Statute of Frauds, doth not extend to trusts raised by operation of law."

If *A* furnishes some fractional part of the purchase money, there is a presumption of a resulting trust as to a proportional undivided part of the land. In McGowan v. McGowan,[3] the court said:

"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 part of the purchase money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* (for so much) 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 in force, must be shown to have been paid for some specific

[2] See *ante*, § 3.

[3] 14 Gray 119.

part, or distinct interest in the estate; that is, for his specific share as a tenancy in common or joint tenancy of one half, one quarter, or other particular fraction of the whole; or for a particular interest, as a life interest, 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. . . . In the case at bar, there is no allegation that any division of the property was contemplated by the parties; or that the work done by John McGowan in part payment for the conveyance was intended as anything but a small contribution toward the entire purchase."

Where a resulting trust is denied, as in McGowan v. McGowan, the one who furnishes part of the purchase price will usually be given an equitable lien upon the whole property to secure its repayment.

If *A* borrowed the money from *B* to buy the land and had the land conveyed to *B*, there would be the presumption of a resulting trust of the beneficial interest, *B* being entitled to hold the land merely as security for the repayment of a loan. In McDonough v. O'Neil,[4] the courts said:

"Where land conveyed by one person to another is paid for with money of a third, a trust results to the latter which is not within the Statute of Frauds. It is sufficient if the purchase money was lent to him by the grantee, provided the loan is clearly proved. . . . In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly."

§ 70. Limitations of the Rule. In order that a resulting trust may arise, the purchase money must be furnished not later than the time of conveyance; if it is furnished later the trust must be expressed in writing in order to be enforcible, because of the Statute of Frauds.

§ 71. Rebutting the Presumption. Conveyance to Wife or Child. If the conveyance is taken by *A* in the name of his wife or in the name of his child, this has the effect of rebutting the presumption of a resulting trust, and creates

[4] 113 Mass. 92.

the presumption of a provision for the wife or an advancement to the child. Such a presumption may, however, be rebutted and a resulting trust may still be shown by proving that the one who furnished the purchase money intended the conveyance to be upon trust for him; but the burden of proof is upon the one alleging the trust and not upon the one alleging that the transaction was a provision or advancement. The reason for this is that in case of a conveyance to a wife or child it is at least as likely—if not much more likely—that the husband or father intended a gift or provision rather than a trust. The distinction is somewhat analogous to the rule which allowed a use to be created gratuitously in favor of a near relative but required consideration in case of creating a use in favor of a stranger.[5] In Stock v. McAvoy,[6] the court said:

"Where a father purchases property in the name of his son, without making any form of declaration of trust, it is either a gift to his son absolutely or he is a trustee for his father. If the son is a trustee at all, he is wholly a trustee; but the strong presumption of law is that he is not a trustee at all; and it can only be displaced by evidence."

§ 72. Resulting Trust in Favor of Creditors. If *A* buys land and has the conveyance made to B in order to defraud *A's* creditors, *A* is prevented by the fraud from taking advantage of any resulting trust. This does not, however, bar the creditors of *A* from having a resulting trust declared for themselves to the extent of their claims against *A*.

§ 73. Criticism of the Presumption. Statutory Changes. If the Statute of Frauds had been logically drawn and construed, it would have applied to all actually intended trusts and, therefore, to purchase-money—resulting trusts. The English statute expressly excepted all trusts which might "arise or result by the implication or construction of law", and this was construed as excepting not only constructive but all resulting trusts. This, however, is not so objectionable as the rule of presumption which throws

[5] See *ante*, § 26.

[6] Law Reports, 15 Equity 55.

the burden upon the holder of the legal title to show that no trust was intended. Such a presumption seems entirely unjustifiable either on the score of probability or convenience and ought to be abolished by statute, as it has been in a few jurisdictions. Some jurisdictions—New York, Michigan, California, and others—have gone so far as to abolish purchase-money resulting trusts entirely, except in favor of creditors of the purchaser.

RESULTING TRUST WHERE INTENDED TRUST CAN NOT TAKE EFFECT

§ 74. Intended Trust Void for Uncertainty. If *A* conveys property gratuitously to *B* upon trust but does not state for whom or for what purpose; or if the gratuitous conveyance were to be upon trust "for such objects of benevolence and liberality as *B* in his discretion shall most approve",[7] then in both these cases there is a resulting trust for *A*, or for *A's* heir or next of kin.

§ 75. Intended Trust Void Because of Lapse of Cestui's Interest. If *A* conveys property by will to *B* upon trust for *X*, and *X* dies before *A* and, therefore, before the will takes effect, *X* can not take under the will; this is what is called in the law of wills a lapse of the equitable interest, and there is a resulting trust for the heirs or next of kin of *A*.

§ 76. Intended Trust Void Because of Illegality. If a gratuitous conveyance is made upon trust for an illegal purpose, there is a resulting trust to the grantor or to his heir, or next of kin. In Carrick v. Errington,[8] a conveyance was made of an interest in land to a Roman Catholic who at that time was disabled by statute from holding any interest in land. The court held that there was a resulting trust for the heir of the grantor because the intended trust, being illegal, could not take effect.

§ 77. Rule Where the Grantor Was Paid for the Conveyance. If in the cases discussed in the three preceding paragraphs, *A*, the grantor, was paid for the property con-

[7] See *ante*, § 40.

[8] 2 Perre Williams, 361.

veyed, there would be no resulting trust and, therefore, *B*, the trustee, would be entitled to keep the property, because there would be no one to take it away from him. In Van der Volgen v. Yates,[9] where *A's* heir in such a case sought to have a resulting trust declared, the courts said:

"The grantor attempted to convey the use and beneficial interest to the members of St. George's lodge either as a corporate body, capable of taking by succession forever, or to that association for a charitable use or perpetuity. In either case, if the conveyance had taken effect according to the grantor's intention, it would have passed his whole title, and no part of the use could have resulted in him or his representatives. . . . It can not be doubted that the parties believed when the deed was executed that the grantor conveyed his whole title in fee, and the intention of the parties that the entire use and interest of the grantor should pass, is as clear as if the limitation of the whole use had been valid and effectual. This intent being established, it followed, as a necessary consequence, that the sum of £100 consideration was paid and received as an equivalent for what was intended and supposed to have been conveyed; that is to say, for an estate in fee. . . . The complainants claim the resulting use or reversion of the land, being founded solely on the assumption that the grantor never was paid for it, must, therefore, fail because the assumption is disproved by the deed itself. A use never results against the intent of the parties. . . . The grantor can not have the purchase money and the land also. Payment of the purchase money for the entire title vests the entire use in the grantee excepting only so much of it as may be effectually declared for the benefit of some other person." (The term "use" is employed here to mean passive "trust".)

§ 78. Nature of the Trusts in This Section. The resulting trusts in this section are imposed upon the theory that if the grantor had known that the intended trust could not take effect, he would have preferred that the equitable interest should go to himself, or to his heir, or next of kin, rather than to the trustee. Such a presumption seems thoroughly just.

[9] 5 Seldon, 219.

WHERE THE CONVEYANCE TO THE TRUSTEE IS WITHOUT CONSIDERATION

§ 79. The Law As to Uses. During the century before the Statute of Uses it was the general custom, as we have seen, to have land held in use.[10] Hence, if *A* made a gratuitous conveyance to *B* without declaring any use, it was presumed that he did not mean to give away his property but that he meant merely to convey the legal title; consequently, a use resulted to the grantor. In Van der Volgen v. Yates,[11] the courts said:

"Before the Statute of Uses, and while uses were subjects of chancery jurisdiction exclusively, a use could not be raised by deed without a sufficient consideration. In consequence of this rule, the Court of Chancery would not compel the execution of a use, unless it had been raised for a good or valuable consideration. And where a man made a feoffment to another without any consideration, equity presumed that he meant it to the use of himself; unless he expressly declared it to the use of another, and then nothing was presumed contrary to his own expression. If a person had conveyed his lands to another without consideration, or declaration of uses, the grantor became entitled to the use of the land thus conveyed."

After the Statute of Uses was passed, which gave the legal title to the person holding the use, such a conveyance would, of course, be utterly useless and ineffectual, and consequently such conveyances were no longer made.

§ 80. No Resulting Trust. After the modern passive trust arose,[12] the question was raised as to whether there was a resulting trust in cases of gratuitous conveyances where no use was declared; this question was decided in the negative, the courts thus properly refusing to apply the old rule as to uses to modern trust. In Shortridge v. Lamplugh,[13] Holt, Chief Justice, said:

"It would be hard to construe such a feoffment or release to the use of the feoffer or releasor where such use does not

[10] See *ante*, § 1.
[11] 5 Selden, 219.
[12] See *ante*, § 3.
[13] 2 Lord Raymond, 798.

appear; but if they were made to such use, it ought to be shown on their side; and until that be shown, they must be intended to be made to the use of the feoffee and releasee. . . . Where a man makes a feoffment without valuable consideration to divers particular uses, so much of the use as he makes no disposition of remains in him; and that is reasonable, because the reason for the making of the feoffment appears, viz, the raising of the particular uses. But in this case no reason for the making of the release appears, if it was not to the use of the releasee."

§ 81. Whether a Constructive Trust in Such Cases. As we have just seen, if *A* makes a gratuitous conveyance to *B*, there is not only no presumption of a resulting trust, but a resulting trust for the grantor can not be given effect even if the intent that *B* hold upon trust be permanently proved unless such proof is in writing to comply with the Statute of Frauds. Does this mean, then, that *B* may keep the land? Suppose it be clearly shown by oral evidence that the transferee was meant to take only as trustee, will he be allowed to keep the property free from any equity? In England *A* may have *B* declared a constructive trustee on the ground that it would be unjust to allow *B* to keep the land; that is, though no wrong may have been committed in thus receiving the property, it was wrong thus to retain it. On the other hand, the weight of authority in this country is that *A* is not entitled to have *B* declared a constructive trustee of the land. The language of some of these decisions would lead one to infer that *A* would be entirely without remedy, but it seems safe to say that in all these jurisdictions *A* could recover against *B* in quasi-contract, for the value of the land on the ground of unjust enrichment.

§ 82. Criticism of the American Doctrine. Basis of Constructive Trusts. The reason for thus denying the constructive trust in this class of cases seems to be a failure to distinguish between intended trusts on the one hand, and pure constructive trusts which are imposed for a remedy for a wrong, on the other. If *A* conveys land to *B* upon an oral trust to reconvey upon request, the oral trust

can not, of course, be enforced because of the Statute of Frauds. The constructive trust which the English courts enforce in such a case happens to be identical in result with the unenforcible oral trust. This fact of identity seems to have led the American courts to feel that if they imposed a constructive trust in such a case for the dishonest retention of the property they would be violating the Statute of Frauds. The error of their position is shown by the very fact of their allowing an action in quasi-contract in common law for the value of the land—the basis of constructive trusts in quasi-contracts being exactly the same, viz, unjust enrichment, the difference between the two consisting merely in the remedy sought. If one wishes a specific property right he asks to have a constructive trust declared; if he wishes a mere money judgment, he sues at common law in quasi-contract.

§ 83. **Same.—Discussion of Analogous Cases.** If *A* conveys land to *B* by deed upon an oral trust for *C*, *C* can not, of course, enforce the oral trust because of the Statute of Frauds. But *B* is not allowed to keep the land. At the suit of *A*, *B* will be declared a constructive trustee and will be ordered to reconvey to *A*. Whereas, if the conveyance had been to *B* upon an oral trust to reconvey to *A* upon request, the American doctrine—as we have just seen—refuses to compel *A* to recover his land.

If *A* should borrow $1,000 from *B* and convey to him a piece of land upon *B's* oral agreement to reconvey the land upon repayment of the money borrowed with interest, *A* may, upon tender of the amount when due, get a decree that *B* reconvey. This is settled law everywhere, but it is usually treated as a part of the law of mortgages rather than as a part of the law of constructive trusts. We have then this strange result, that if *A* borrows money from *B* and conveys the land to him upon an oral agreement to hold as security, he may get the land back upon repayment of the amount borrowed, while if he borrows nothing he can not get the land back.

§ 84. **Same.—Further Analogous Cases.** If *A* gives to

B negotiable bonds in exchange for *B's* oral promise to convey land and *B* refuses to convey, *A* may get back the bonds themselves and does not need to content himself with suing for their value.

If *A* conveys his farm to *B* upon *B's* oral promise to convey *B's* farm to *A* and *B* refuses to convey, *A* may get a decree that *B* reconvey the farm conveyed to him by *A*.

WHERE AN EXPRESSED TRUST FAILS TO EXHAUST ENTIRE PROPERTY TRANSFERRED TO TRUSTEE

§ 85. The General Rule. In Ellcock v. Mapp,[14] Parre by his will devised all his estate to one "Edward Ellcock to and for the several uses, intents, and purposes following." The various objects specified did not exhaust the entire property. The court held that Edward Ellcock, who was also appointed executor of the will, should not take such residue beneficially, but that there was a resulting trust for the next of kin of the testator, to be distributed among them as directed by statute. The court said:

"The title of the distributees seems to me to be clear, inasmuch as the executor is distinctly and unequivocally invested with a fiduciary character as to the whole residue, though the trusts do not exhaust the whole. The circumstance that the trusts do not exhaust the whole has been rightly held to be immaterial. Here that circumstance does not affect the fiduciary character with which the executor has been invested. It only makes him a trustee *pro tanto* for statutory, instead of for testamentary objects. Upon principle, then, as well as upon the weight of authority, I am of the opinion that the executor in this case is merely a trustee."

§ 86. A Devise Subject to a Trust. If a devise or bequest be made of property to *D* "subject to" a trust in favor of *B*, and the trust does not exhaust the whole property, *D* is entitled to the beneficial interest in the residue, and there is no resulting trust for the heir or next of kin of the testator. In Clark v. Hilton,[15] the court said:

[14] 3 House of Lords Cases, 492, 1. [15] Law Reports, 2 Equity, 810.

"Here the testator, in the plainest language, has given to J. C. Hilton all his personal estate, subject to debts and legacies, and to the trust thereinafter mentioned. But if the property is given to J. C. Hilton subject to trusts specified, it can not be held subject to any other trust; and if after satisfying the trust specified there remains a surplus there is nothing in the language of the gift or in the contest to create a resulting trust in favor of the next of kin. . . . Where property is given to a man subject to certain defined trusts, there remains no right of anyone but the donee when these trusts are exhausted. Where, however, an estate is given to a man in the character of a trustee without anything to indicate that a beneficial interest is intended, then there is a resulting trust."

WHERE PROPERTY IS ACQUIRED BY ONE PERSON BY WRONGFUL USE OF PROPERTY OF ANOTHER

§ 87. Purchase of Property by Trustee or Other Fiduciary for His Own Benefit. If a trustee, executor, agent, or other fiduciary wrongfully misapplies the money or other property held by him in such fiduciary capacity in the purchase of other property for his own benefit, he may be held as constructive trustee of the property so acquired. In Lane v. Dighton,[16] a trustee in breach of his trust was alleged to have bought land with the trust money and to have taken the title thereto in his own name. The *cestui que trust* sought to have a constructive trust declared in the land; and the defendant argued that such a decree would be in violation of the Statute of Frauds. The court held that if the trust money was thus expended, the court would declare a constructive trust, saying:

"The court has been very cautious of following money into land, but has done it in some cases. No one will say that the court would, if it was actually proved that the money was laid out in land. The doubt with the court, in these cases, has been on the proof. There is difficulty on admitting proof; parol proof might let in perjury; but it has always been done when the fact has been admitted in the answer of the person laying it out."

[16] Ambler 409.

§ 88. Purchase of Property by Thief, Converter, or Disseizor. As will be discussed in a subsequent chapter,[17] if *D* disseizes *T* of trust land or takes and converts trust chattels, *D* can not be held as constructive trustee of such property by *C* because *D* does not claim in privity with *T* but claims in his own right; *D* is entitled to have the question of title between himself and *T* decided in a common-law court. Similarly, if *T* were the beneficial as well as the legal owner of the property, *D* could not be held as constructive trustee by *T* but must be sued at law in ejectment or replevin. Suppose, however, in either of the cases just put, that *D* should dispose of the property thus wrongfully taken and buy other property with the proceeds, may he be held as constructive trustee of the latter property?

In Campbell v. Drake,[18] one John Farrow while a clerk in a retail store had stolen some money from his employer, the plaintiff Campbell, and invested the money in a tract of land. Farrow died and the land descended to his brothers and sisters, who were the defendants. The plaintiff asked to have a constructive trust declared in the land, which would, of course, bind the defendants since they paid nothing for it. The court refused the decree, saying:

"We know not any precedent of such a bill. It is not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been entrusted with the whole possession of it, and that for the purpose of laying it out for the benefit of the equitable owner; and, therefore, all the benefit and profit the trustee ought, in the nature of his office, and from his relation to the *cestui que trust*, to account for to that person. But the case of a servant or a shopkeeper is different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. He was, in truth, guilty of a felony in possessing himself of the plaintiff's effects for the purpose of laying them out for his own interest; and

17 See *post*, § 128.

18 4 Iredell, Equity 94.

that fully rebuts the idea of converting him into a trustee. If, indeed, the plaintiff could actually trace the identical money taken from him into the hands of a person who got it without paying value, no doubt he could recover it; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property merely by showing that it was stolen money."

On the other hand, in Newton v. Porter,[19] a somewhat similar case in its facts, the court declared a constructive trust, saying:

"I think the defendant should be regarded and held as a trustee, and be adjudged to hold the notes and mortgage in question, and the avails thereof as trustees by construction, for the benefit of the plaintiff. (The stolen money had been invested in notes and mortgage.) The court should not refuse to allow a party to recover the avails of property stolen from him, on any technical grounds, when the merits of the cause clearly require that he should recover; and the court should jump all technicalities, and be as astute in discovering a remedy for upholding the rights of such a party as a thief is in contriving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another, and placing it in the hands of third persons."

§ 89. The Correct View Upon Principle. The court in the latter case seems to assume that it was a violation of strict principle to declare a constructive trust. It is not, however, inconsistent with the cases holding that there can not be a constructive trust declared in the property wrongfully taken, because the defendant actually does get the title to the new property, and, therefore, there is no remedy at common law which will give the plaintiff that property. And wherever the new property is more valuable than the property which was wrongfully taken, the rule in the former case would allow the thief to profit by his rascality. Equity should, therefore, interfere to prevent a failure of justice, else we would have the anomaly that one who steals property would be in a better situation

[19] 5 Lansing, 516.

than if he had obtained it by fraud or by breach of trust; for in the latter cases it is well settled that he will become constructive trustee of the proceeds of the property thus fraudulently procured, no matter how many times the form thereof is changed. As was said in Newton v. Porter:

"It would seem to be an anomaly in the law if the owner who has been deprived of his property by larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property in which it had been converted, than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided."

§ 90. Mingling of Trust Funds with the Trustee's Own Property. If a trustee wrongfully mingles $1,000 of trust money with $1,000 of his own, the trust attaches to the entire amount, and the *cestui* has an equitable lien on it for the amount of the trust property so commingled; consequently if half of the whole amount should be accidentally lost, the *cestui* would be entitled to the residue. If the trustee should place the entire sum in the bank, checks drawn for private purposes would be held to be drawn against his own share.

§ 91. Cestui Que Trust Must Trace Trust Funds to Be Entitled to a Preference. While the trustee is, of course, personally liable for his breaches of trust to the full extent of the loss by the *cestui*, yet if it is a contest between the *cestui* and the general creditors of an insolvent trustee, no trust can be declared unless the *cestui* can trace the trust funds. The requirement of the *trust res* in order to have a trust, applies, therefore, to constructive as well as to express trusts.[20] In Thompson's Appeal,[21] where a trustee had wrongfully sold part of the trust property and mingled the proceeds with his general assets, and then became insolvent, the court refused to allow the *cestui* to be a preferred claimant against the estate, saying:

"Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be

[20] See *ante*, § § 5-16.

[21] 22 Pa. Report 16.

traced, it will be held in its new form liable to the right of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified either as the original property of the *cestui que trust* or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* (in good faith) purchaser for a valuable consideration, without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fails. This is always the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description. This mixture has taken place in the case under consideration. It is impossible for a chancellor to lay his hands upon a single article of property or on a single dollar of money and say that any particular thing or sum of money is either the original property of Seth Mathew's heirs or the product of it."

§ 92. **Modification of the Foregoing Rule.** If *A* deposits money in the *X* Bank at a time when the officers of the bank know of its insolvency, such an act is fraudulent and *A* may get back his money in specie if he can identify it. Identification is usually impossible in such a case because of the mingling of the funds with the general assets of the bank. Where, however, the money was paid in so soon before the closing of the bank that the depositor can clearly show that the general assets of the bank have been increased thereby, he has been allowed a preferred claim to that extent, though he is not able to trace the exact fund deposited.

§ 93. **Right of Cestui Where the Trustee Invests Mixture in Land.** If a trustee takes $1,000 of his own money and $1,000 of trust money and buys land with the $2,000, what is the *cestui's* right? If the land should increase rapidly in value, it would obviously be to the *cestui's* interest to be allowed a constructive trust in a proportional part of the land; if, however, the land should be a bad investment or should decrease in value, it would be to the *cestui's* interest to have an equitable lien on the land to the extent of the amount of trust property invested, with interest thereon.

By the weight of authority and the better view he is allowed his choice of these two remedies on the ground that the trustee should not be allowed to profit by his misconduct. In a few States, however, he is allowed only the equitable lien.

WHERE A PERSON ACQUIRES AN INTEREST IN PROPERTY IN REGARD TO WHICH, BY REASON OF HIS FIDUCIARY POSITION, HE HAS A DUTY TO PERFORM FOR ANOTHER

§ 94. Trustee or Other Fiduciary Takes Renewal of Lease for His Own Benefit. In Keech v. Sanford,[22] *A* had devised, along with other property, a lease to *T* upon trust for *C*, an infant; before the expiration of the term the trustee applied to the lessor for a renewal for the benefit of the infant; this was refused and thereupon the trustee secured the renewal for himself. This *cestui* brought a bill against the trustee to have the lease assigned to him and to account for the profits thereon already accrued. The court sustained the bill, saying:

"I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed for the benefit of *cestuis;* though I do not say there is a fraud in this case, yet he should have rather let it run out than to have the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have a lease, on refusal to renew to the *cestuis.*"

§ 95. Same—Another Illustration. In Mitchell v. Read,[23] *A* and *B* were partners carrying on a hotel business and owned leases on different premises which were used for the partnership business. *A*, without the knowledge of *B*, took the renewal of one of these leases, to begin after the partnership had ceased. *B* insisted that the benefit of this lease should inure to the firm, and the court sustained this contention, saying:

[22] Select Cases in Chancery 61. [23] 61 New York 123.

"The relation of partners to each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. It has been frequently held that if one partner obtains a renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm after the renewed lease. It is conceded that this is the rule where the partnership is for a limited term and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation. . . . I, therefore, conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. The defendant was in possession as a member of the firm, and the firm held the good will for a renewal, which ordinarily attaches to the possession. By his occupancy, and the payment of the rent he was brought into intimate relation with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position, during the partnership, secretly to obtain the new leases. He must hold them for the firm."

§ 96. Trustee or Other Fiduciary with Authority to Sell Can Not Buy for Himself. If a trustee or other fiduciary buys from his beneficiary the property which is held in the fiduciary capacity, the transaction will be set aside and a constructive trust declared at the suit of the beneficiary unless the fiduciary can show that he divested himself of every advantage which he had gained as such fiduciary, by disclosing to the beneficiary whatever knowledge he may have acquired relative to the value of the property, etc. Courts of equity watch such transactions very carefully. It follows from this that if the fiduciary have authority to sell, that does not give him the right to bid at the sale like

other members of the public; and if he does bid it in for his own benefit he may, at the option of the beneficiary, be declared a constructive trustee thereof. And it is not necessary to show that the trustee profited thereby. In *Ex parte* Lacey,[24] Lord Eldon said:

"The rule I take to be this, not that a trustee can not buy from a *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust* as to shake off the obligation that attaches upon him as trustee, then he may buy. The rule is this: A trustee who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage to the benefit and advantage of himself. It does not preclude a new contract with those who have entrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestui que trust* may by a new contract dismiss him from that character; but even then that transaction by which he is dismissed must, according to the rules of this court, be watched with infinite and the most guarded jealousy, and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the *cestui que trust* the court can never be sure he has made when entering into the new contract by which he is discharged. . . . Upon these principles it is perfectly clear that an assignee under a commission of bankruptcy, being a trustee to sell for the benefit of the creditors and bankrupt, can not buy for his own benefit."

§ 97. Fiduciary with Authority to Buy Can Not Buy for Himself. If a fiduciary with authority to buy for his beneficiary buys the property for himself, this is a breach of his fiduciary obligation and the beneficiary may, if he chooses, have the fiduciary held as constructive trustee of the property thus acquired.

TRUST IMPOSED TO PREVENT USE OF THE STATUTE OF FRAUDS AND STATUTE OF WILLS AS INSTRUMENTS OF FRAUD

§ 98. Conveyance by Deed upon Oral Trust. As we have seen in a previous section,[25] if *A* gratuitously conveys land to *B* by deed upon an oral trust for *C*,

[24] 6 Vesey 625.

[25] See *ante*, § 83.

and *B* refuses to carry out the unenforcible oral trust, *A* may have a constructive trust declared and compel *B* to reconvey to himself. And, by the better view, the rule is the same where the gratuitous transfer is to *A* upon oral trust to reconvey to *A*.[26] In this class of cases it seems not to be necessary that *T* be notified before the conveyance that it was the intention of *A* that he should hold upon trust and not beneficially.

§ 99. General Provision of the Statute of Wills. Statute of Wills generally provides that no will shall be valid unless it shall be in writing and signed at the end thereof by the testator or his agent and that such signature shall be made or acknowledged in the presence of two or more witnesses.

§ 100. Conveyance by Will upon Oral Trust. If *A* devises property to *B* upon an oral trust for *C*—that is, a trust not expressed in the will—notice that he is not expected to take beneficially, but only upon trust, must, on account of the Statute of Wills, be communicated to him before the will takes effect, in order to charge him with the trust. In Riordan v. Banon,[27] the courts said:

"In order to fasten any trust upon an absolute bequest of property, it is necessary to prove knowledge on the part of the legatee of the intended property, and acquiescence either by words of consent or by silence, when the intention is communicated to them. If you attempt to raise a trust out of some uncommunicated intention, you contravene the express provisions of the statute, by varying the dispositions of the will by parol evidence."

If the notice, however, does reach him before the will takes effect and he does not dissent, *C* is allowed to enforce the oral trust instead of there being a constructive trust for the heir or next of kin or residuary legatee of *A*, as we would reasonably expect. In Stickland v. Aldridge,[28] the court said:

"In the ordinary case of an estate suffered to descend, the

[26] See *ante*, § 82.
[27] Irish Reports, 10 Equity, 469.
[28] 9 Vesey, 516.

owner being informed by the heir, that, if the estate is permitted to descend he will make a provision for the mother, wife, or other person, there is no doubt this court would compel the heir to discover whether he did make such promise. So, if a father devises to his youngest son, who promises, that if the estate be devised to him, he will pay $10,000 to the eldest son, this court would compel the former to discover whether that passed in parol and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of $10,000."

This seems to be squarely in violation of the Statute of Frauds, and can be justified, if at all, only upon the grounds of the strong desire of the courts to carry out the intention of the testator. In the case of a conveyance by deed upon an oral trust for a third person the grantor may demand a reconveyance and then get another person to carry out the trust; while in the case of the will such a course is impossible because the will does not take effect till after the death of the testator; and to allow a constructive trust for the heir of the testator would practically always be in contravention of his intent that the *cestui* shall have the property.

PROPERTY ACQUIRED THROUGH FRAUD AND MISTAKE BY NON-FIDUCIARY

§ 101. Land Obtained by Fraud. If *A*, who is not a fiduciary, induces *B* by fraudulent representations to convey land to himself, *B* may have *A* declared a constructive trustee and thus get a reconveyance of his land. The ordinary common-law remedy of an action for deceit for damages is considered inadequate and the plaintiff is allowed in equity to get specific reparation for the wrong. It is immaterial whether the conveyance be by deed or will, except that in the latter case the constructive trust will be for the heir of *B*.

§ 102. Chattels Obtained by Fraud. In case of chattels obtained by fraud, the defrauded party does not need to go into equity to get back his chattels, but may, in most jurisdictions, sue in replevin for their return. The action of replevin here takes the place of a bill in equity for a

constructive trust. This is shown by the fact that although generally if one may bring replevin for a chattel he may bring it against anyone who may have possession of it. The right to bring replevin for fraudulently acquired chattels can not be enforced against those who have paid value for the chattels in good faith.

§ 103. Acquiring Property by Mistake. *A* contracts to sell to *B* one hundred acres of his farm for $8,000. By mistake of the scrivner in drawing up the deed, the conveyance includes—in addition to the one hundred acres—another tract of twenty acres. Whether both *A* and *B* were ignorant of this mistake, or whether only *B* knew of the error, *A* may have *B* declared a constructive trustee of the twenty acres and thus get a reconveyance from him.

So, if the mistake had been to omit a part of the hundred-acre tract and thus convey only eighty acres, *B* could, in most jurisdictions, have *A* declared a constructive trustee of the twenty-acre tract which was not conveyed, unless *B* knew of the mistake at the time of the conveyance.

Further discussion of the subject of constructive trusts based upon fraud and mistake will be found in the article on "Equity".

PROPERTY ACQUIRED BY FELONY

§ 104. Murdering Testator to Prevent Revocation of a Will. *A*, having made a will in favor of *X*, threatens to revoke it; *X*, in order to prevent this, kills *A*; what are *X's* rights in the property? Upon this point there have been three different holdings: that *X* may keep beneficially; that the felony itself revokes the will as to *X*; that *X* got legal title but subject to a constructive trust in favor of the heir or next of kin of *A*. The third holding seems to be the sound one. It is difficult to see how there could be any revocation of a will by the act of killing the testator; on the other hand, the wrongdoer ought not to profit by his felony and, therefore, should be held as a constructive trustee. The same reasoning should properly apply if the murder were committed by *M*, since *X*, being a volunteer, ought not to be allowed to take advantage of *M's* felony.

§ 105. Ancestor Killed by Heir to Prevent His Making a Will. If an ancestor be killed by a prospective heir to prevent his making a will in favor of *Y*, the heir, it would seem, would not be allowed to take beneficially, but would be held as constructive trustee either for *Y*, or for the other heirs of the ancestor next entitled after himself.

The subject of constructive trusts will be further discussed incidentally in Chapters V and VI.

CHAPTER V

TRANSFER OF TRUST PROPERTY

BY ACT OF THE PARTY

(a) *BY ACT OF THE TRUSTEE*

§ 106. The Early Law. Equity first gave the *cestui* a remedy against the trustee about 1450. And what had previously been merely a moral obligation became a legal one. But this remedy was at first confined to trustees. If the trustee transferred the property, the *cestui's* property right was gone; the transferee of the property took it free from the trust. The argument was that since the transferee had not undertaken a trust, he was not bound by it. This inability or unwillingness of the courts at that time to impose obligations irrespective of consent was quite characteristic of early law generally and was not confined to this subject.

§ 107. Modern Law. About three or four centuries ago equity began to construct obligations; that is, to impose them in the absence of any undertaking, on the ground of unjust enrichment. Transferees of trust property no longer escaped liability merely because they had not undertaken any trust; they might be held as constructive trustees of the trust property against their consent.

§ 108. Limitation of the Doctrine of Constructive Trusts —Bona Fide Purchaser for Value Without Notice. This doctrine of holding the transferee bound by a constructive obligation did not apply to all transferees. If the transferee had received a conveyance from the trustee, had paid value for it, and had done both before receiving notice of a trust, he was protected and the *cestui's* equitable right in the property was thus extinguished, or "cut off". This limitation of the doctrine of constructive trusts is called

the doctrine of "*bona fide* purchaser for value without notice," and applies not only to trusts but to equitable rights generally. In such a case the purchaser, having paid in good faith, has as good an equity in the property as the *cestui*, and has, besides, the legal title. As between equal equities, the one who has the legal title should be protected.

§ 109. Elements of Bona Fide Purchaser for Value Without Notice. As was pointed out in the preceding paragraph, there are three elements necessary to make up a *bona fide* purchaser for value without notice, viz, receiving the conveyance, paying value, and doing both before receiving notice of the trust. If he has paid value in good faith without getting the conveyance, he has, of course, an equitable right to call upon the trustee for a conveyance; but the *cestui* has a similar equitable right which is prior in time. As between equities otherwise equal, the one which is prior in time usually prevails. In such a case taking a conveyance after knowledge of a trust will not improve the purchaser's position. To allow it to do so would be placing a premium upon dishonesty.

If a transferee has paid no value for the conveyance to him, he would have no equitable right to keep the property as against the *cestui*, even if he received a conveyance in good faith without knowledge of a trust. Although it is not dishonest for him to take the property, it is dishonest for him to keep after notice. A transferee who thus receives the property without paying any consideration therefor is called a "volunteer".

If the transferee has bought and received the conveyance in good faith from the trustee but receives notice of the trust before actually paying the purchase price therefor, it is generally held that the *cestui* may have him declared a constructive trustee and get a reconveyance even though the purchaser is willing to pay the purchase money to the *cestui*. This holding has been justly criticized, because it is unjust to take away the property from the transferee after he has changed his position by making

himself liable for the purchase price; and also because it gives to the *cestui* a choice of remedies against an innocent person; for the *cestui* may, if he prefers, affirm the wrongful sale by the trustee and compel the purchaser to keep the property and pay the price to the *cestui*. Where, however, the purchase price for the property has been marriage with the trustee, the weight of authority is that the transferee is entitled to keep the land, although the marriage with the trustee did not take place before the notice of the trust. This can only be reconciled with the general rule by drawing a distinction between contracts to marry and other contracts, in that there is usually a more serious change of position in entering into an engagement to marry than there is in becoming bound by an ordinary commercial contract.

§ 110. Part Payment of Purchase Money Before Notice of the Trust. It is usually stated that the transferee must pay the purchase price before receiving notice of the trust in order to become a *bona fide* purchaser for value without notice. Does this mean that he must pay all, a substantial part, or, is any part enough? On this point there is a conflict of authority. In perhaps most jurisdictions the transferee would probably not be entitled to keep the property unless he has paid all, but has merely a lien on it for what he has paid in good faith, and the *cestui* is entitled to a reconveyance upon tendering that amount. In other jurisdictions it has been held that the *cestui* can not get back the land where part of the purchase price has been paid in good faith, but is entitled only to an equitable lien on the land for the unpaid part of the purchase price. Whether a substantial part or merely any part must be paid to entitle the purchaser to keep the land, in these jurisdictions, does not seem to be settled. Assuming the general rule that at least some part of the purchase price must be paid by the transferee before notice of the trust, it would seem logical to require him to pay all.

§ 111. The Doctrine of Bona Fide Purchaser for Value Applied to Mortgagees and Pledgees. If instead of selling

the trust property the trustee merely mortgages it or—if it is personal property—pledges it, the mortgagee or pledgee will be protected to the extent of his advances only if he has received the mortgage or pledge and has advanced his money before notice of a trust.

§ 112. Purchaser with Notice from Bona Fide Purchaser for Value Without Notice, and Vice Versa. If *T*, the trustee, transfers to *A* who is either a volunteer or a purchaser with notice, and *A* in turn conveys to *D* who is a *bona fide* purchaser for value without notice, *D* will be protected. It is not essential that he receive the title from the trustee; he may receive it from anyone who has it.

If a *bona fide* purchaser for value should transfer the property to *D*, *D* will be protected even though he be a volunteer or a purchaser with notice. This is done in order to protect the *bona fide* purchaser fully; if it were held otherwise he might find it very difficult to sell his property where *T's* breach of trust had become well known. If, however, the property should be conveyed back to *T*, the original equity would reattach, though the property has passed through the hands of a *bona fide* purchaser for value without notice. It is the trustee's duty to get back the property and hold it for the *cestui;* and he would not be allowed to take advantage of the fact that the equities had been cut off. The same reasoning would seem to apply to a reconveyance to *A*—in the case put above—if he were a purchaser with notice and, therefore, subject to the equity, or if he were a volunteer and had received notice of the equity before selling to *D*. Although not fiduciaries in the strict sense of the word, it would be dishonest for them to buy back the property for their own benefit after it had passed through the hands of the *bona fide* purchaser for value.

§ 113. Purchaser with Notice and Volunteer Distinguished. It is sometimes said that the reason why a volunteer is not protected is because he is presumed to take with notice. The real reason, however, is because, not having paid, his equitable right to the property is inferior

to that of the *cestui*. In Giddings v. Eastman,[1] one Blanchard, who held property as constructive trustee for the plaintiff, died leaving his sister, Mrs. Eastman, and four other sisters as his heirs-at-law. Eastman and his wife bought the rights of the other four sisters, paying them value therefor without notice of the trust in favor of the plaintiff. It was held that Eastman and his wife should be charged as constructive trustees of the one-fifth inherited by Mrs. Eastman, but that they should be protected as to the four-fifths of which they were *bona fide* purchasers for value without notice.

§ 114. Nature of the Obligation of a Bona Fide Volunteer. It is obvious that one who receives the title to property in good faith but without paying value therefor, commits no wrong in receiving it; his wrong consists in keeping it after he has notice of the equity. If he should dispose of it before receiving notice he would be liable only for what he has left of the proceeds at the moment that he receives notice; and if he should later receive a reconveyance of the property after it has passed through the hands of a *bona fide* purchaser for value, he would be entitled to keep it free from any equity.

§ 115. The Bona Fide Purchaser for Value Without Notice Need Not Have the Conveyance Made to Himself. If *A* buys the trust property from *T*, pays value therefor, and has the conveyance made to *X* in trust for him, *T's* equity is just as effectually cut off as if the conveyance had been made to *A* himself, provided both *A* and *X* acted in good faith without knowledge of the trust. This is true because *A* might have taken the conveyance to himself and then conveyed it to *X* by way of gift; since he can do this there is no reason why he may not have the conveyance made to *X* directly.

§ 116. Bona Fide Purchaser for Value of Negotiable and Nonnegotiable Choses in Action Which Are Held in Trust. If the trustee, instead of conveying land or tangible chattels, should convey negotiable choses in action

[1] 5 Page 561.

(things giving a right of action therefor), that is, choses in action which are payable to the transferee thereof, the doctrine of *bona fide* purchase for value will equally apply since the trustee can, in such case, transfer title. If the chose in action is not negotiable, he cannot—unless the obligor assents thereto—give title to his transferee; he can give to the purchaser only a power of attorney to collect the chose in action; does the doctrine of *bona fide* purchaser for value apply to such a transfer, so as to cut off the *cestui's* equitable right? Upon this point there is conflict of authority; but the weight of authority seems to be that the purchaser is protected. This is the better view, since, although he has not the legal title, he has such an assignment as gives him the right to sue the obligor at law and the only assignment of which such property is capable without the consent of the obligor.

If there were an equity in favor of the obligor to the nonnegotiable chose in action—e. g., fraud, duress or failure of consideration—all transferees would, of course, take subject to this equity.[2] The *cestui* not being a party to the chose in action his equity is sometimes called an outside equity or latent equity to distinguish it from an equity in the favor of the obligor himself.

§ 117. Bona Fide Purchase for Value of Equitable Interests. If *T*, trustee for *C*, mortgages the trust land to *A* and then mortgages the equity of redemption thereof—that is, the right to redeem from the first mortgage—to *B*, does the doctrine of *bona fide* purchase for value apply to *B* as well as to *A*? Upon this point there is conflict of authority, some courts protecting *C* (the *cestui*), because he has the prior equity, others protecting *B*, thus extending the doctrine of *bona fide* purchase for value to mortgagees of equitable interest. A similar question arises where a *cestui* declares himself trustee of his equitable interest for *D* and then transfers his equitable interest to *E;* if we applied the rule of prior equity *D* would be protected; if, however, we applied the rule of *bona fide* purchaser for value without

[2] See article on Bills, Notes, and Checks.

notice to equitable interests, *E* would be protected if he paid value in good faith. The argument for *E* is that *D* has only an equity upon an equity while *E* is the assignee of the *cestui's* equity itself.

In Sturges v. Starr,[3] *T* was trustee for *C* of some property; *C* was induced by fraud to assign her trust claim to *X*, who sold to *Y* who paid value therefor in good faith; *Y* was protected.

(*b*) *BY ACT OF CESTUI QUE TRUST*

§ 118. Form of Conveyance by Cestui Que Trust. A form of conveyance which would be sufficient to pass the legal title to any particular property will pass the *cestui's* equitable interest thereto if executed by the *cestui*. On this point equity follows the law. Generally speaking, transfers of trust interests in personal property may be oral, while transfers of trust interests in land must usually be in writing.

§ 119. Effect of Successive Assignments by Cestui Que Trust. If the *cestui que trust* of land conveys, by sale or mortgage, his interest to *A* and then later fraudulently conveys, by sale or mortgage, the same interest to *B*, *A* will be protected everywhere because his equitable right to the property is prior in time to that of *B*. If, however, the trust property is personalty, a different rule prevails in many jurisdictions. Thus, in England and in several States in this country, *B* is entitled to protection in preference to *A*, if he took his assignment in good faith without notice of the previous assignment to *A*, and notified the trustee of his assignment before *A* gave notice to the trustee of his assignment. Therefore, where this is the law *A* must, in order to protect himself against a possible second assignment by the *cestui que trust*, notify the trustee thereof. This, it will be noticed, is somewhat analogous to our registry statutes which require the recording of deeds and mortgages in order to be effectual against later *bona fide* purchasers for value of the property; but while it might be a good enactment for a legislature, it seems diffi-

[3] 2 M. and K. 195.

cult to support it upon principle as a matter of judicial decision, for there seems to be no satisfactory grounds for a duty upon *A* towards *B* to notify *T* of his assignment. The rule is especially objectionable where *B* made no inquiry of *T* to find out whether there had been a previous assignment by the *cestui,* because in such a case he could not possibly have been misled by *A's* failure to notify the trustee; and in some jurisdictions *B* is protected only where he has made such inquiry, thus making a third line of decisions on this point.

§ 120. Rule Where Subsequent Assignment Is to Trustee. If *C* (the *cestui*) assigns his interest by sale or mortgage to *A* and then fraudulently assigns the same interest, by sale or mortgage, to *T* (his trustee), who acts without knowledge of the previous assignment to *A, T* will be protected because he has the legal title and as good an equity as *A's;* hence *T* is protected upon the familiar principle of *bona fide* purchase for value without notice, the only difference between this and the ordinary case being, that here *T* already had the legal title and, therefore, could not and need not receive the conveyance of it from *C.* In Newman v. Newman,[4] the court said:

"Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestui que trust,* and get a beneficial interest in the trust property, if they have no notice that there have been any prior incumbrances. They have got the legal estate and they have got the legal right; they have, therefore, got, in respect to the charge created in their favor, before they have got any notice of anything else, their right to retain that which the law has given them."

§ 121. Rule Where Subsequent Assignee Gets Assignment of the Legal Title from the Trustee. If, in the case discussed in section 119, B had not merely notified the trustee of his assignment from the *cestui* but had procured the assignment of the legal title from him in good faith, he would be everywhere protected as against *A* because he

[4] 28 Chancery Division, 674.

would be in the position of a *bona fide* purchaser for value without notice.

§ 122. Effect of Successive Assignments by Cestui Where Trustee Has Absolute Discretion. *In re* Coleman,[5] Alfred Coleman by will gave his residuary estate to trustees upon trust to pay the income to his wife during widowhood, "but in the event of her death or second marriage then I direct my said trustees to apply such rents, interest, dividends, and annual proceeds in and towards the maintenance, education, and advancement of my children in such manner as they shall deem most expedient until the youngest of my said children attains the age of twenty-one years, and on his or her attaining that age, then I direct my said trustees to distribute the whole of my said estate," etc. Alfred Coleman left four children. After the death of the widow the eldest child, John Soy Coleman, after he reached his majority but before the youngest child became of age, sold his share of his father's estate to one Henry, who now sued the trustees for one-fourth of the income of the estate. The court held that he was entitled to recover, and also that the trustees were not at liberty to pay the income to John Soy Coleman since it was their duty to apply it to the maintenance and education of the children. The court said:

"The contention of the assignee Henry was that each of the four children took a vested interest in one-fourth of the income till the youngest child attained twenty-one. I am of opinion that no child has a right to any share of the income. The trustees have a discretion to apply the income for the maintenance of the children in such manner as they think fit. This excludes the notion of the children being entitled to aliquot shares. I will assume, though I do not decide, that the trustees have no power to exclude a child, but I am clearly of the opinion that under this power they could make unequal allowances for the benefit of the children, and might allow only half-a-crown to one of them. This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors. It is a power to the trustees to give to each child what they think fit, and if they cannot altogether exclude a child who has

[5] 39 Chancery Division, 443.

become bankrupt or assigned his interest, they can allot to him as little as they think desirable. Then does the assignment include every benefit which the trustees give to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel-keeper to give him a dinner, he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment. I think that the declaration proposed by Lord Justice Fry is right, and I am of opinion that the trustees will not be at liberty to send over money or goods to J. S. Coleman."

The effect of the purported sale and transfer by the *cestui* was not, then, to pass a present interest, because the *cestui* had none; if, however, John Soy Coleman should be alive when the youngest child attained twenty-one, he would then be entitled to a share of the estate and the assignment would operate upon this property as soon as he thus acquired it.[6]

BY DEATH

(a) *DEATH OF THE TRUSTEE*

§ 123. Rule Where the Trustee Has Heirs. Although in early times only the trustee was bound by a trust,[7] yet for three or four centuries it has been the rule that a sole trustee's heirs, since they are volunteers, take the trust land subject to the trust. Likewise if the trust is of personal property, the executor or administrator takes subject to the trust. If one of several co-trustees dies, his title survives to the others; this remains true to the present day even though the doctrine of survivorship has been generally abolished as to property held beneficially.

In many jurisdictions, by statute, trust land does not descend to the trustee's heirs, but to the executor or administrator, or to the court, or to the oldest child. These statutes are to be commended since they avoid the inconvenience which occurs where there are several heirs who may live in many different jurisdictions.

[6] See article on Sales—Subject, After-Acquired Property.

[7] See *ante*, § 106.

§ 124. Rule Where the Trustee Dies Without Heirs. Where the trustee of allodial property—including, of course, all personal property—dies without heirs, the title of the property goes to the State; the State being a volunteer takes subject to the equity just as a private individual, the only difference being that the remedy against the State is by petition and not by subpœna, since the State cannot subpœna itself.

If, however, the trust property is land held by feudal tenure, the State would take as reversioner free from the trust, because the grant to the trustee having come to an end by want of heirs, the *cestui's* interest, which is dependent for existence upon that of the trustee's title, comes to an end also. It is just as if *A*, who has an estate for life with a reversion to *X*, should make a lease to *B* for ten years; if *A* should die at the end of two years, *B's* estate would also come to an end because it could not last longer than that of *A*, and *X* would be entitled to possession. By statute, however, in most jurisdictions the *cestui's* right has been preserved against the accident of the trustee dying without heirs.

(*b*) *DEATH OF CESTUI QUE TRUST*

§ 125. Rule Where the Cestui Que Trust Has Heirs. If the *cestui que trust* of land dies leaving heirs, the equitable interest descends just as the legal title would descend if the decedent had had the legal right at the time of his death instead of merely the equitable interest. There being no occasion for a different rule, equity thus follows the law. Likewise, if the trust property were personalty, the trust interest, upon the *cestui's* death, goes to his executor or administrator.

§ 126. Rule Where the Cestui Dies without Heirs. If the *cestui* of personal property or allodial real property dies without heirs, the equitable interest will go to the State, which will enforce the equity against the trustee. The State takes the property on the ground that since it has no other owner, the whole community should be entitled to it. This doctrine is called the doctrine of "*bona vacantia*"—

that is, goods without an owner—because the doctrine was first applied to personal property.

In case of feudal land it was at one time held in England that the trustee would be entitled to the beneficial interest in the property where the *cestui* died without heirs, because there was no one to interfere with him. The *cestui's* interest did not, of course, escheat to the State because the *cestui* was never a part of the feudal system; the feudal system looked only to the holder of the legal title. In England, by statute, equitable interests in land do now escheat to the State. While in this country the *cestui's* interest goes to the State just as his interest in personalty does, the doctrine of *bona vacantia* having been extended by judicial decision to cover all kinds of property.

BY DISSEIZIN

§ 127. Disseizor Not Liable as Constructive Trustee. If *X* disseizes *T*, the trustee of trust land, or converts personal property held in trust, *X* cannot be held as constructive trustee of such property since he does not claim in privity with the trustee but claims adversely to him.[8]

§ 128. Nature of Cestui's Rights. The disseizor, claiming title adversely to the trustee, is entitled to have the question settled in a common-law court. The proper remedy of the *cestui* is by bill in equity against his trustee to compel him to bring either ejectment or trover against *X*. If *X* happens to be in the same jurisdiction, he may be joined as codefendant in the suit in order to prevent multiplicity of actions; but most equity courts will not decide the question of title to real estate but will direct an issue to be decided by the appropriate court of common law.

BY MARRIAGE

(*a*) *MARRIAGE OF THE TRUSTEE*

§ 129. Early Law. During the existence of uses the widow, or widower, or a deceased trustee, or feoffee to uses was entitled to dower or curtesy, respectively, in trust

[8] See *ante*, § 88, for discussion of cases where the disseizor or converter invests the proceeds of property wrongfully taken in other property.

land. Until about three centuries ago the same rule was applied to all trusts.

§ 130. Modern Rule. After the *cestui's* right in equity to the beneficial use of the trust property became well settled, it was, of course, illogical to allow the widow or widower any right to property which had been held by the decedent in a fiduciary capacity. For about the last three centuries, therefore, such rights have been denied. The change was made by judicial decision.

(b) MARRIAGE OF CESTUI QUE TRUST

§ 131. Dower and Curtesy. When dower and curtesy were denied to the widow and widower of the trustee, it was the logical thing then to give it to the widow and widower of the *cestui.* This change was brought about in the case of curtesy by judicial decision but it could not be done in case of dower because it would upset land titles. In D'Arcy v. Blake,[9] the court said:

"The difficulty in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed as a principle in acting upon trusts to follow the law; and according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower this principle, if pursued to the utmost, would affect the title to a large proportion of the estates of the country; for that parties had been acting on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by

[9] 2 Schoales and Lefroy, 387.

the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not alien without her husband; and, therefore, nothing she could do could be understood by a purchaser to affect his interest; but where the husband was seized or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that the existence of a trust estate previously created prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous in this instance to the general principle that equity should follow the law; and it has been so long and so securely settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule."

In most jurisdictions at the present time the widow of the *cestui* is given dower in trust property by statute. A judicial decision giving dower would of course have operated retroactively upon land titles; but a statute may be made to operate only as to future transactions.

§ 132. Curtesy in Wife's Separate Equitable Estate. Where property is given to trustees upon trust for a married woman for her separate use, free from the control of her husband, this prevents the husband from getting any right to the property during coverture, but upon the death of the wife he is entitled to curtesy just as if there had been no clause in the trust instrument excluding him. The reason for this is that the clause was introduced for the benefit and protection of the wife, and its purpose ceases upon her death.

§ 133. Rights of Husband of Cestui Que Trust During Coverture. It is the rule at common law where not changed by statute that upon marriage the husband becomes owner thereby of all the wife's chattels and gets the right to collect all her choses in action as her representative or attor-

ney; if, however, he should fail to collect the choses in action during the coverture, his power of attorney to collect was revoked by the termination of the coverture, and the property never became a part of his estate. As we have seen previously, the right of the *cestui que trust* is an equitable chose in action against the trustee; now if tangible chattels are held in trust for the wife, must this equitable chose in action against the trustee be reduced to possession by the husband by getting the transfer of the legal title to the chattels by the trustee? It was at first held that he must do so, but later the contrary was held on the ground that equity should follow the law; that is, if the wife had had the legal title to the chattels at the time of marriage, they would have passed to her husband upon marriage, and hence if she had the equitable interest that ought to pass also. Hence, for this purpose, although a chose in action, it is not such a chose in action as must be reduced to possession by the husband during coverture in order to make it part of his estate. If part of the trust property consists of legal choses in action against third persons, they must, of course, be collected or otherwise reduced to possession by the trustee before the husband's rights to them would be perfected.

BY BANKRUPTCY

§ 134. **Bankruptcy of Trustee.** Where a trustee becomes bankrupt, the title to the trust property is usually held not to pass to the assignee in bankruptcy unless the trustee had also some beneficial interest therein—e. g., if he were one of several *cestuis* or if he had a lien on the trust property for advances. In the latter case, however, the assignee would take only whatever beneficial interest the bankrupt had and would hold the legal title subject to a constructive trust as to the residue. An assignee in bankruptcy representing ordinary creditors, is not, of course, a *bona fide* purchaser for value without notice because no value is paid; therefore, he takes subject to equities.

§ 135. **Bankruptcy of Cestui Que Trust; General Rule.** Generally speaking, when a *cestui* becomes bankrupt his

equitable interest passes to his assignees in bankruptcy, just as the legal title would pass if he had it; equity follows the law. The trust interest of the *cestui* is, by the general rule, just as much subject to the payment of his debts as if he had the legal title.

§ 136. Trust for the Separate Use of Married Women. It has always been the policy of the common law that property rights should be freely transferable either voluntarily or involuntarily, that is, by action of creditors; hence, any provision by the grantor of property that the grantee of the legal title shall not alienate it, or that it shall be free from the payment of any debts, is void. There was, however, no objection to granting an estate to "*A* for life or until he should attempt to convey it or become bankrupt," and then over to *B;* for in such case as soon as he attempted to convey or became bankrupt, his life estate came to an end and the creditors or transferees of *A* got nothing because there was nothing for them to get. This was not considered repugnant to the spirit of the common law because *A* was not thereby allowed to enjoy property at the same time that his creditors could not get it.

In the main, equity followed the policy of the common law and held that attempts to make equitable interest inalienable and free from the claims of creditors were void. It is true that equity upheld provisions which prevented alienations in cases of trust for married women for their separate use; but in such a case the only right to alien which the married woman had was given by equity courts —since such separate estates were entirely a creature of equity—and, consequently, there could be no objection to equity upholding a provision taking away such power of transfer.

§ 137. Trusts to Apply Income to Cestui's Support. In *In re* Bullock,[10] Mary Bullock by her will directed that her trustees "shall stand possessed of £15,000 upon trust to invest and pay the income of such investment to T. W. Bullock, during his life or until he shall become a bankrupt

[10] 60 Law Journal Reports, Ch. 341.

or a liquidating debtor, or cease to be entitled to receive such income, or any part thereof, for his own personal use or benefit, by any means or for any purpose; and in the event of, and upon the said T. W. Bullock becoming a bankrupt or a liquidating debtor, or ceasing to be entitled to receive the said income, or any part thereof, or for his own personal use or benefit by any means or for any purpose, to pay to him or apply for his benefit, during the remainder of his life, either the whole or so much and so much only of the said income as the trustees shall in their uncontrolled discretion think fit," etc. T. W. Bullock became bankrupt and the trustees asked the court for instructions as to what they should do with the income from the trust property. The court said:

"I was asked by the trustees to define the limits within which they may apply the income to Mr. Bullock's benefit. I find it extremely difficult to do this in the abstract, and I am unwilling to fetter the trustees' discretion, which was intended to be, and ought to be construed as, large. I could not refuse to determine any particular question submitted by them to the court, and if any real difficulty occurs, they would probably be justified in asking the court's protection. I can say no more at present than that they certainly may, in my opinion, spend the whole or any part of the income in maintenance, using that word in its most general and widest sense. The discretion is vested in them, and so long as they exercise it honestly—that is, as men of ordinary business habits and prudence, and with due regard for all the circumstances of the case—the court will not interfere with them."

In such a case as the above, since the trustees have an absolute discretion in applying the income, it is obvious that the creditors can not reach any of the funds.

§ 138. "Spendthrift Trusts". In Broadway National Bank v. Adams,[11] *X* had by will made the following bequest:

"I give the sum of $75,000 to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay

[11] 133 Mass., 170.

the net income thereof, semi-annually, to my said brother, Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignments. . . . . ."

The plaintiff, a creditor of Charles W. Adams, is seeking to have the *cestui's* interest applied to the payment of his claim. The court held that the creditor was not entitled to reach the trust interest, saying:

"The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decision of this court, which we have before cited, recognizes the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant can not alienate by anticipation, and his creditors can not reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right of the income which might hereafter accrue upon the trust funds with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

"We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of the trust fund, and thus provide against the

improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy, is that it defrauds the creditors of the beneficiary.

"It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give credit upon the basis of the estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence, they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restrictions that it shall not be alienable by anticipation and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it."

§ 139. Limitation of the Doctrine of Spendthrift Trusts. Although spendthrift trusts are not allowed in England and in many States in this country, perhaps the majority of American jurisdictions hold such trusts valid; and to the extent that they are held valid, equity does not follow the common-law policy preventing restraints on alienation.

Some limitations of the doctrine should be pointed out. Thus, it applies only to equitable interests for life, and not to equitable interests in fee. And if *A* conveys property to *T* upon trust for *A* for life free from the control of his creditors, such a provision is held void; a man can not thus settle his own property upon himself. In such jurisdictions the doctrine has been further limited by statute to a reasonable provision for the *cestui's* support. Such legislation makes the doctrine much less objectionable.

BY ACT OF CREDITORS

(a) CREDITORS OF TRUSTEE

§ 140. General Rule. Since the trustee has the legal title to the trust property, the trust property is, of course, liable at common law for his debts, and the creditors may levy thereon and have the property sold by the sheriff on execution. But unless the trustee has some beneficial interest in the trust property, equity will usually, at the suit of the *cestui*, enjoin the creditors of the trustee from levying thereon. If the *cestui* does not interfere, however, no one else can object to the levy.

In Stith v. Lookabill,[12] land had been conveyed to one Camman; *X*, a creditor of Camman, levied upon the land and it was sold at the execution sale to *Y*, who devised it to the plaintiff; and the land being in the possession of the defendant, the plaintiff brought an action in the nature of an action of ejectment to recover the possession. The defense set up was that Camman held the property in trust. The court held that the plaintiff was entitled to recover, saying:

"Under the old system the court of equity only interfered by injunction to prevent the trustee or his assignee from taking possession as against the *cestuis*, or their assignee or agent, but did not interfere in favor of a wrongdoer, who fails to connect himself in any way with the *cestui que trust*. Such is the law under the new system. In our case, for the purposes of the motion to non-suit, the *cestuis que trust* are not before the court, and the defendant stands as a wrongdoer withholding possession from the plaintiff who is the legal owner of the estate. If Camman had brought the action, the defendant, so far as, for the purposes of the motion, the matter now stands, would not have, under the old system, entitled himself to an injunction; neither can he do so with the new system, by which the equity of the case as well as the law is administered in the same forum, for the plain reason that he stands as a wrongdoer, withholding the possession from one having the legal estate, and does not in any way connect himself with the supposed *cestui que trust*."

[12] 71 N. C., 25.

If the defendant in the case cited above had been an assignee of the *cestui*, he would have been entitled to an injunction against the action at law, and to hold Stith as constructive trustee for him of the legal title, unless *Y*, who bought at the execution sale, had been a *bona fide* purchaser for value without notice. Whether the levying creditor would be protected by the doctrine of *bona fide* purchaser for value if he had bought at the execution sale is not well settled. The better view is that he should be, but, of course, he would be liable for the purchase price which was credited on his claim at the time of the purchase; as a creditor he is not entitled to protection; as a purchaser he should be.

§ 141. Right of Creditor Where the Claim Is for Property of Which a Trust Estate Has Received the Benefit. In Norton v. Phelps,[13] the plaintiffs had sold upon credit to *T*, who was trustee of a plantation for *C*, certain supplies for the plantation. The supplies were not paid for and *T* was not a resident of the State of Mississippi. The plaintiffs filed their bill asking to be paid out of the trust property. The court held that they were entitled saying:

"The principles applicable to this case are, that persons dealing with a trustee must look to him for payment of their demands, and that, ordinarily, the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But while this is the rule, there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or nonresident, so that the creditor can not recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. . . . Generally the trustee alone must be looked to. He stands between the creditor and the estate. He represents the estate, and deals for it. He is entitled to be reimbursed out of the trust estate

[13] 54 Miss., 467.

for all disbursements rightfully made by him on account of it, and creditors must get payment from him; but when they can not do that, and it is right for the trust estate to pay the demand, and it owes the trustee or would owe him if he had paid or should pay the demand, the rule, founded in policy, which denies the creditor access to the trust estate, yields to the higher consideration of justice and equity; and, in order that justice may be done, the creditor may be substituted as to the trust estate, to the exact position which the trustee would occupy if he had paid or should pay the demand, and seek to obtain reimbursement out of the estate."

In the case cited above the plaintiff proceeded in equity asking to be substituted to the position of the trustee; under such a theory, if the trustee were in arrears to the trust estate, the creditor's recovery would be reduced to that extent. There would seem to be no objection to the creditor's levying at common law upon the trust property and thus compelling the *cestui* to undertake the burden of getting an injunction in equity. It would seem that he would not be entitled to an injunction even if the trustee were in arrears; and a few cases have thus allowed the creditor to recover in full, without deduction, for the trustee's defaults to the trust estate.

(b) CREDITORS OF CESTUI

§ 142. Rule as to Priority. At common law—in the absence of bankruptcy statutes—creditors who levied upon property of an insolvent debtor were entitled to preference in the order of their respective levies; it was a race of diligence. In this respect equity follows the law with respect to creditors attempting to reach the debtor's equitable interest by giving preference in the order of the filing of their respective bills in equity.

§ 143. Defects of Machinery of Common-Law Execution. Equitable Execution. Equitable interests, as might be expected, could not be reached by an ordinary levy at common law. But furthermore legal choses in action, being intangible, were also beyond the reach of creditors; a sheriff could sell only tangible property of which it was

possible to deliver possession. To remedy this defect in the common-law machinery, courts of equity in most jurisdictions allowed a creditor, who could not get satisfaction by execution at common law, to file a bill in equity against his debtor and ask for a decree that the debtor assign to him his choses in action—or enough of them to pay his claim. The creditor could then collect the choses in action as the assignee and representative of his debtor. If the obligor of the chose in action happened to be within the jurisdiction he might be joined as a co-defendant in the equity suit, in order to avoid multiplicity of action. This bill which the creditor filed against his debtor was called a creditor's bill for equitable execution and applied to both legal and equitable choses in action. Hence, a creditor of a *cestui*, being unable to get satisfaction at common law out of tangible property held by the *cestui*, could file a bill in equity asking that the *cestui's* trust interest be subjected to the payment of the plaintiff's claim.

§ 144. Statutory Changes. By statute in many jurisdictions equitable interests in land may be levied upon and sold by the sheriff just as the legal title may be. Where the statute does not apply, the creditor of the *cestui* may still fall back upon his equitable remedy.

CHAPTER VI

EXTINGUISHMENT OF A TRUST

§ 145. Various Ways in Which a Trust May Be Extinguished. Wherever the entire legal title and the entire equitable interest unite in one person, the trust interest is extinguished, because one can not be trustee for himself or have an equitable chose in action against himself. The various ways in which a trust may be extinguished may be enumerated as follows:

(1) By surrender of the legal title by the trustee to the *cestui que trust.*

(2) By release by the *cestui que trust*—if *sui juris*—to the trustee.

(3) By conveyance by the trustee and *cestui*—if *sui juris*—to a third person.

(4) By the *cestui* inheriting the legal title from the trustee or the trustee inheriting the equitable interest from the *cestui.*

(5) By revocation where by terms of the creation of the trust the power of revocation has been reserved.

(6) In some jurisdictions, by statute, where the purposes of a trust are accomplished, and the trust becomes a dry or passive trust, the title of the trustee is passed by operation of law to the *cestui que trust.*

In all cases, the student must be careful not to confuse the termination of a trust with the termination of the duties of a trustee. For sufficient cause, such as sickness, or removal from the jurisdiction, or by consent of parties, a trustee may be relieved from the performance of duties imposed in connection with the execution of a trust. But even without trustees a trust will continue to exist, and it is in the power of a court of equity to appoint new trustees or to substitute for one trustee who has been relieved another person competent and qualified to act.

CHAPTER VII

DUTIES OF A TRUSTEE

DUTY TO CONVEY THE TRUST RES AS THE CESTUI QUE TRUST DIRECTS

§ 146. General Rule. The general rule is that if the *cestui* is *sui juris*, the trustee must convey at his direction. If there are several *cestuis*, however, they must all concur in order to be entitled to a conveyance; the trustee is not bound to convey less than the whole. In Goodson v. Ellison,[1] a defendant was trustee for eight *cestuis*, one of whom transferred his interest to the plaintiff; the plaintiff asked for a conveyance of part of the property. The court refused, saying:

"I confess it is quite new to me to be informed that you can call on a trustee from time to time to divest himself of different parcels of the trust estate so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, 'If you mean to divest me of my trust, divest me of it altogether and then make your conveyances as you think proper?' I have been accustomed to think that a trustee has a right to be delivered from his trust, if the *cestuis que trust* call for a conveyance."

If the trustee wrongfully refuses to convey and the *cestui* is compelled to sue for the conveyance, the trustee will be held liable for the costs of the suit. This is not unjust to the trustee, since, if he is in doubt as to his duty, he may apply to a court of equity for instructions.

§ 147. Extreme Illustration of Trustee's Duty to Convey. In Onslow v. Wallis,[2] A. L. Sarel conveyed certain lands to the defendant in trust for Louisa Sarel. Louisa Sarel died, having devised all her lands to the plaintiffs upon trust to sell and pay certain debts and legacies, and

[1] 3 Russell 583.

[2] 1 Hall and Twell 513.

then to pay certain legacies given by her in a certain memorandum signed by her and marked with the letter "A." The memorandum could not be found. The plaintiffs applied to the defendant to convey the land to them; the defendant insisted that he was entitled to hold it for his own benefit, subject to the payment of such portion of the charges created by the will as were properly chargeable thereon and which he offered to pay. The court held that the plaintiffs were entitled to a conveyance, saying:

"The testatrix, in this case, had a right to do what she pleased with the beneficial interest, and she did by her will direct the legal estate to be conveyed, or, at least, gave the property, to the trustee in her will. The question is, whether the defendant who appears to be the trustee of the legal estate, has any right to inquire for what purpose these parties are to hold the trust property. . . . Suppose the testatrix had simply directed that the estate should be transferred, and had appointed new trustees, and directed the existing trustees to convey to those who are trustees under the will, could the trustees of the legal estate dispute the title of the trustees under the will, because they might or might not have the means of carrying into effect the trust of the will? . . . I proceed on this ground, that there are persons appointed by the owner of the property, to whom the property is to be conveyed. They are the only parties having a right to it; whether or not they have power afterwards to dispose of all the beneficial interest, is a matter which the defendant Wall as mere owner of the legal estate had nothing whatever to do."

§ 148. Validity of Provision Postponing the Right of the Cestui to a Conveyance. In Saunders v. Vautier,[3] Richard Wright bequeathed certain stock to trustees upon trust to accumulate the interest and dividends which should accure thereon until Daniel Wright Vautier should attain the age of twenty-five years, and then to transfer the principal and accumulation to said Vautier absolutely. Upon attaining the age of twenty-one, Vautier petitioned to have the sum transferred to him, on the grounds that as the accumulation and postponement of payment was for his

[3] 4 Beavan 155.

benefit alone, he might waive it and call for an immediate transfer of the sum. The court granted the petition, saying:

"Where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute, indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge."

§ 149. Rule in the United States. The English decision discussed *ante* has been followed in some jurisdictions in this country, but the weight of authority is that such a provision is valid and that the *cestui* can not compel a conveyance till the time has elapsed. In Claflin v. Claflin,[4] the courts said in a similar case:

"This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust or when the purpose of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out. . . . It is plainly the testator's will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect. . . . It can not be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of a trustee as there would be if it were in his own."

[4] 149 Mass. 19.

It is to be observed that even where the English rule prevails, the postponement of the conveyance to the beneficiary may be accomplished by the testator giving a very small part of the beneficial interest to another person, e. g., to the trustee himself. The beneficiary can not then as a matter of absolute right compel the conveyance of the legal title, because he is not the sole *cestui que trust;* he would need to appeal to the discretion of the court which would not ordinarily defeat the expectations of the testator.

DUTY TO PUT CESTUI IN POSSESSION OF TRUST RES

§ 150. Cestui for Life Has No Absolute Right to the Possession. Wherever a *cestui* is entitled to a conveyance of the fee it seems that he would be entitled to be placed in possession of the *trust res.* A *cestui que trust* for life is not, of course, entitled to the conveyance of a life estate because this would involve the splitting up of the trust property. What right has a *cestui que trust* for life to be placed in possession of the *trust res?* The court said:

"There may be places where it may be plain from the expressions in the will that the testator did not intend that the property should remain under the personal management of the trustees. There may be cases in which it may be plain from the nature of the property that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of the family residence. There may be very special cases in which this court would deliver possession of the property to the *cestui que trust* for life, although the testator's intention appeared to be that it should remain with the trustee, as where the personal occupation of the trust property was beneficial to the *cestui que trust;* there, the court taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. The present case is not one of special circumstances."[5]

DUTY TO GIVE INFORMATION IN REGARD TO THE TRUST RES

§ 151. Extent of the Duty. A trustee is bound to keep a clear and accurate account of the trust property and

[5] Tidd v. Lister, 5 Maddock 429.

to produce them for the inspection of the *cestui que trust;* he must also produce all deeds and documents in his possession relating to the trust property. But where there are several *cestuis,* the trustee is not bound to give to one *cestui* any information as to the shares of the others unless it is necessary to do so in giving information to the former. Likewise, if the trustee procures opinions of counsel to guide him in the administration of the trust, he must produce them for the benefit of the *cestuis.*

DUTY AS TO INVESTMENT OF TRUST FUNDS

§ 152. General Nature of Trustee's Duty. In King v. Talbot,[6] the court said:

"The just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs.

"This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of an investment to be made.

"It, therefore, does not follow that, because prudent men may, and often do, conduct their own affairs with hope of getting rich, and therein take the hazard of adventure which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the trust itself, and are to be primarily regarded."

§ 153. Rule Where the Creator of the Trust Authorizes Certain Investments. Where the creator of the trust has authorized certain investments to be made or continued, the trustees will be justified in following the terms of the instrument creating the trust. For example, the trustee will be justified in making investments upon personal security alone if so authorized by the instrument creating the trust; whereas, in the absence of such authorization, such an investment, in most jurisdictions, would be a

[6] 40 N. Y. 76.

breach of trust without regard to the financial standing of the borrower or his sureties. In Holmes v. Dring,[7] the court said:

"It was never heard of that a trustee could lend an infant's money on private security. This is a rule that should be rung in the ears of every person who acts in the character of trustee, for such an act may very probably be done with the best and honestest intention, yet no rule in a court of equity is so well established as this."

§ 154. What Investments Are Authorized by Courts of Equity. In general, it may be said that investments in government securities or investments secured by first mortgages on real estate are at the present time proper investments everywhere. In England formerly only government securities were allowed, but by statute first mortgages on real estate have been authorized. In England these are the only authorized investments; and in most of the American jurisdictions the English rule has had enough influence to forbid a trustee from engaging in business enterprises or in speculating with stocks and bonds of private corporations. In Massachusetts and a few other jurisdictions, however, trustees have been allowed to invest part of the trust funds in stocks of business corporations. In Dickenson, Appellant,[8] the court said:

"A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are as safe as is possible in the affairs of this world, is great; and the amount of such securities is small, when compared with the amount of money to be invested. Trusts frequently provide for the payment of income to certain persons during their lives, as well as for the ultimate transfer of the *corpus* (body) of the trust property to persons ascertained or to be ascertained, at the termination of the trust; and a trustee must, so far as is reasonably practicable, hold the balance even between the claims of the life tenants and those of the

[7] 2 Cox, Equity Cases 1.
[8] 152 Mass 184.

remainder men. The life tenants desire a large income from the trust property, but they are only entitled to such an income as it can earn when invested in such securities as a prudent man investing his own money, and having regard to the permanent disposition of the fund, would consider safe. A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee, whose duty it is to keep the trust funds safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profit. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

In some jurisdictions the matter of investment to be made by trustees has been regulated by statute.

§ 155. Investments Generally Prohibited. Second mortgages on real estate are in some jurisdictions absolutely prohibited; but in others they are allowed if the trustee can show the fitness of such an investment. The making of foreign investments and the purchase of land or of chattels with the trust money are forbidden to the trustee unless they are specially authorized by the creator of the trust.

§ 156. Right of the Trustee to Deposit Trust Money in a Bank. It frequently happens that the trustee can not at once find a proper and desirable investment for trust money in his hands; in such a case he may place it in a reputable bank temporarily, if he has the deposit placed in his name as trustee. It is a breach of trust, however, if it is deposited for a fixed time to draw interest, because the trustee must be able to get at the fund at any time for permanent investment. It is also a breach of trust if the fund is left in the bank an unreasonable time, and the trustee

becomes liable for any loss if the bank fails. In Cann v. Cann,[9] the court said:

"The mortgage of £500 is paid off, and the trustees pay that money into a bank for the purpose of getting another mortgage. The question is, whether it was within their power as trustees to leave that sum in the bank for fourteen months. It seems to me that that was too long. If after six months they could not get a mortgage they ought to have invested it in government securities. Without attempting to draw a hard and fast line—for I consider that each of these cases must be judged on their merits—I say that leaving that money in the bank for fourteen months was leaving it there too long. The moment they began to leave the money there too long they became responsible for all the consequences of their default; and they are, therefore, liable for the £138 which has been lost through the failure of the bank."

§ 157. Placing Money in the Bank without Adding the Word "Trustee". If the trustee places trust money in a bank without adding the word "trustee" after his name, it is a breach of trust and he will be liable for the loss if the bank should become insolvent, and he is probably liable for interest from the time of such breach. This is true even though the trustee had no money of his own in the bank. The reason for such a strict rule is that if the bank is not informed of his fiduciary obligation, they will be justified in giving him personal credit on the security of the deposit, and thus become entitled to the rights of *bona fide* mortgagees for value. The rule does not, however, compel him to disclose the name of the *cestui;* nor does it prevent him from mingling several small trust funds and depositing them together.

§ 158. Margin Required in Mortgage Investments. Investments upon real estate mortgage security should have a certain margin in order to avoid loss through depreciation, and expenses of foreclosure. There is, apparently, no hard and fast rule as to the amount of margin required. In *In re* Salmon,[10] the court said:

[9] 33 Weekly Reporter. [10] 42 Chancery Division 351.

"It has been laid down that in the case of ordinary agricultural lands the margin ought not to be less than one-third of its value; whereas, in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast rules up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margin which in ordinary circumstances a careful investor of trust funds ought to accept. In the present case the value of the property was mainly derived from buildings, and was worth £1,750. The trustees lent £1,300 upon it. Now, we must have regard not only to the value but to the nature of the property. It consisted of small houses let at weekly rents, and we know the class of tenants likely to be attracted by cottage property in Hull. It was certainly not prudent to lend to this extent upon property the value of which depended on laborers' houses being wanted in that part of Hull. The investment, therefore, was a breach of trust as having been made improvidently."

§ 159. Converting Unauthorized Investments into Authorized. If the property placed in trust by the creator of the trust is invested in unauthorized security, it is the duty of the trustee to convert it, within a reasonable time, into authorized securities unless the creator of the trust has directed that they be continued.

§ 160. Collecting Debts Due the Trust Estate. It is the duty of the trustee to collect debts due the trust estate as soon as they become due; if, on account of delay in doing so, loss occurs, he is liable therefor. It is no defense that it would have caused ruin to the debtor not to delay collecting the claim even where a good business man might have so delayed or even where the creator of the trust himself, if living, would have granted indulgence; the trustee is not allowed to be charitable with the *cestui's* property. The trustee may, however, excuse himself if he can prove that more was probably to be realized on the claim by temporary indulgence of the debtor than by summary legal proceedings; or if he can prove that there were no reason-

able grounds for believing that anything could be realized by bringing an action.

§ 161. Extent of Trustee's Liability for Breach of Trust. If the trustee is guilty of misconduct whereby the trust funds are wholly or partially lost, he is generally liable for the amount thus lost with simple interest at the legal rate; and this seems to be the rule in the United States whether the misconduct of the trustee was willful, negligent, or innocent; in England if the breach was willful he is liable for compound interest. If, however, the investment wrongfully made by the trustee should turn out to be a successful one, the *cestui* may always, if he prefers, choose to take the investment instead and call upon the trustee for the profits thus made; a trustee is not allowed to make a profit by his wrongful act. And if the trustee has wrongfully invested in trade, the *cestui* is allowed to make the trustee pay compound instead of simple interest on the amount thus invested, unless the trustee can prove by disclosing the accounts that profits to that amount were not realized.

DUTY OF CUSTODY OF THE TRUST RES

§ 162. Trustee Generally Liable Only for Due Care, Not an Insurer. Like other fiduciaries, a trustee, as long as he is properly performing the duties of his trust, is liable only for due care of the trust property and is not liable as an insurer against accident. If the trust property is lost by destruction or robbery, or depreciates while it is rightfully in the custody of the trustee, the trustee is not liable therefor unless he was negligent. Nor is he liable for such loss if he has rightfully placed the property in the hands of another. In Jones v. Lewis,[11] the court said:

"The defendant is administratrix; supposing these goods had been in her custody and she had been robbed, I am clearly of opinion, if that fact be made out as it is probably made out here, she ought to have been discharged of these goods. . . . The only doubt then is, that they were not lost out of her custody, but out of her solicitors where they were put by her for a particular purpose. I do not

[11] 2 Vesey 240.

know that a bailee, executor, administrator, or trustee, is bound to keep goods always in his own hands. They are to keep them as their own, and take the same care; if, therefore, a man lodged trust money with a banker, if lost, in many cases the court has discharged the trustee, especially if lost out of the banker's hands by robbery. In the present case what has been done is what she would have done with her own, and, therefore, she is not liable for the goods so lost."

It is frequently the trustee's duty *not* to keep personal charge of trust funds. For example, it would not be considered due care for him to keep large sums of trust money at his residence. His duty is to deposit the money in a reputable bank at his earliest opportunity; and if he fails to do so he will be liable for the loss if the money is stolen.

§ 163. **Liability of Custodians of Public Funds.** Though fiduciaries are generally liable only for due care and not as insurers, there is in most jurisdictions an exception in case of a public officer—e. g., a county treasurer—whose duty it is to have custody of public funds; he is liable as an insurer. Hence, it is no defense that he deposited the money in a reputable bank in his capacity as fiduciary; if the bank fails he must bear the loss. This doctrine is based on public policy.

DUTY NOT TO DELEGATE THE TRUST TO ANOTHER

§ 164. **General Rule.** No one is bound to accept a trust, but after once accepting it he cannot convey the trust property to another or divest himself of any part of his trust duties at his pleasure. He must either get the permission of the *cestui* or *cestuis*—which will be sufficient only when they are all *sui juris*—or else secure a release from the proper equity court.

§ 165. **Transferee Has No Right to Act as Trustee.** While a transferee of a trustee—unless a *bona fide* purchaser for value without notice—is bound by the trust and may be charged upon a constructive trust, he is not necessarily entitled to act as trustee. This applies not only to a transferee by conveyance of a trustee during his lifetime

but also to his heirs or executor after his death. If, however, the property has been conveyed to *T*, his heirs and assigns upon trust, and *T* by will devises the property to *X*, *X* may act because of the express provision in the will as to assigns; but even here *T* is not allowed to rid himself of the trust by assigning it during his lifetime. And if the property has been conveyed to *T* and his heirs upon trust, the heir of *T* has been held competent to execute the trust, but not a devisee or an assignee *inter vivos*. By statute in many jurisdictions, upon the death of a sole trustee the title vests in the court and does not pass either to the heir or devisee.

§ 166. Right of a Majority of Trustees to Act. In a case of a private trust all the trustees must concur in order that their act may be valid; no one of them can delegate his discretion to the rest. Hence, if one of the trustees dies or becomes insane or disagrees with the others, the court must fill the vacancy; even a majority of the trustees are not competent to act unless the instrument creating the trust so provides. In Swale v. Swale,[12] where three trustees, one of whom refused to concur with the other two, the court said:

"Joseph Swale and Henry Anderson ask Mr. Holden to concur with them in making certain investments of the trust property. Mr. Holden, disagreeing with them, refused to concur. Thereupon, they continued to act in the trust without conferring with or consulting him. It appears also, that they have actually advanced money on certain securities omitting the name of Mr. Holden and that in one case they have taken a security in the name of one only. . . . The answer of the two trustees is this: They say, that if Mr. Holden will concur with them, they will be exceedingly happy to go on and act together, but if he differ from them then they must act for themselves. Considering the manner in which this court deals with trustees, whenever a breach of trust is committed, and the way in which Holden might be involved in one, it seems not unreasonable that he should insist on his view of the case being adopted, or, at

[12] 22 Beavan 584.

least, that the view of the other two trustees should not control his."

What the court referred to was the rule that a trustee is generally liable for the breach of trust of a co-trustee.

On the other hand, where the trust is for a public purpose, it is generally held that the will of the majority of the trustees controls.

§ 167. Trustee Can Not Delegate Power of Sale to Another. In Graham v. King,[13] King, who was trustee with authority to sell the trust property, was not present at the sale, but left the matter in the hands of his son, a minor. The court said:

"It is alleged that the property sold for greatly below its value, and an injunction was asked to restrain the trustee from making a deed to the purchaser at the sale. After hearing the proof, the court below decreed a perpetual injunction. The office and duties of a trustee are matters of personal confidence and he must exercise a just and fair discretion in doing whatever is right for the best interests of the *cestui*. He must in person supervise and watch over the sale, and adjourn it if necessary, to prevent a sacrifice of the property, and no one can do it in his stead, unless empowered thereto in the instrument creating the trust."

Whether, in case there are several trustees, all the trustees must attend the sale or whether a less number is enough, does not seem to be thoroughly settled. Of course the trustee or trustees may employ a third person to perform the mechanical parts of the sale which do not involve the exercise of discretion, such as auctioneering, advertising, etc.

§ 168. Trustee May Employ Broker in Making Investments. In Speight v. Gaunt,[14] a defendant has been appointed trustee of an estate by one John Speight. Wishing to invest some £15,000 of trust money in certain corporation bonds which were authorized as securities by the will, he employed one Cook, a stock broker, to buy them and later upon Cook's false representation that they had been

[13] 50 Mo. 22.

[14] 22 Chancery Division 727.

bought, he paid the money therefor to Cook; Cook appropriated the money to his own use and abscounded. The trustee is now sought to be held liable for the money thus lost. The court held that the trustee was not liable, Lindly, Lord Justice, saying:

"The real importance of this case is, that it lies between these two propositions—that a trustee can not delegate his trust, and that on the other hand, he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. Now, looking at the matter fairly and properly as a business man would look at it, can it be said to be an improper thing on the part of a trustee to go to a broker? That he might have acted otherwise is plain enough; but was it a reasonable and proper thing not to apply to the secretaries or treasurers of these corporations, but to employ a broker for that purpose? So far as the evidence goes, it appears to me that on the balance of the evidence it is impossible to say that this was an improper step for a trustee to take. . . . Now, assuming that the trustee was justified in employing Mr. Cook, and assuming that he was not negligent in not having his suspicions aroused, the next question is, was he acting improperly in paying the purchase money to the broker? . . . The evidence is conclusive that the ordinary practice in employing a broker on such occasions is to send a check to the broker. There was, therefore, no impropriety or breach of trust in his conduct."

EXAMINATION PAPER

TRUSTS AND DUTIES OF TRUSTEES

Read Carefully: Place your name and full address at the head of the paper. Any cheap, light paper like the sample previously sent you may be used. Do not crowd your work, but arrange it neatly and legibly. *Do not copy the answers from the Instruction Paper; use your own words, so that we may be sure you understand the subject.*

1. What was the object of Parliament in passing the Statute of Uses? What was the most important result of this statute?

2. In what three ways may express trusts be created? Illustrate.

3. Name three principal advantages of using trusts at the present time. Explain the two possible meanings of the word "trustee".

4. In what respect is a trust of chattels similar to a bailment? To a debt? In what respect dissimilar?

5. *A* deposits a draft in the *X* bank for collection. Is the *X* bank a trustee or debtor? Suppose the *X* bank collects the money, may it place it with its general funds and make itself a debtor?

6. *A* endorsed to a San Francisco bank a draft upon *B* in Portland. The San Francisco Bank sent the draft to its correspondent bank in Portland; the latter collected the money and then became insolvent before remitting. What is the extent of the liability of the San Francisco bank?

7. *A* owes *B* $200; *A* sells *X* a horse for $200 and *X* promises *A* that he will pay the purchase price to *B* in satisfaction of *A's* debt to *B*. Does *X* become a trustee? Why? What is *B's* remedy against *X* if *X* fails to pay as agreed? What is the English law on this point? Why?

8. *A* devised certain properties of *B* "hoping that *B* will at her death distribute the residue among *A's* relatives." Is *B* a trustee?

9. *A*, owning and having in his possession a horse, said to *B*: "I give you this horse". What are *B's* rights? Suppose *A* had

said, "I hereby declare myself trustee of this horse for you", what would be *B's* rights?

10. In what two important respects does the law as to charitable trusts differ from that of private trusts? Illustrate.

11. How may a trustee be removed? How will a court remove an infant trustee?

12. *A* conveys property to *T* upon trust for *X;* before *X* hears of this, *A*, having changed his mind, induces *T* to reconvey the land to *A*. Discuss *X's* rights.

13. Trust property is located in Illinois, but the trustee is in Indiana; the *cestui* wants to get a conveyance from the trustee. In which state will he properly bring his suit?

14. *T* having trust money to lend loaned it to *X;* at maturity *X* failed to pay. Who should sue *X*, *T* or the *cestui?* Suppose *T* had borrowed money from *Y* to carry on trust business, whom should *Y* sue to collect, *T* or the *cestui?*

15. *A* bought land of *B* and, by *A's* request, *B* conveyed the land to *A's* son, *M;* later *A* demands a conveyance from *M;* is he entitled to it? Is it important that the conveyance was made to *A's* son instead of to a stranger?

16. *A* gratuitously devised property to *R* in trust for *S; S* died before *A;* who is entitled to the property upon *A's* death? Would it make any difference if *A* had been paid for the devise?

17. *A* conveyed land to *B* upon an oral trust to reconvey it to *A* whenever *A* should request it; upon *A's* later request *B* refused; what remedy has *A?*

Suppose *A* had borrowed money from *B* and had conveyed the land as security upon an oral agreement to reconvey when the debt should be repaid; what is *A's* remedy when he repays the debt?

18. *A* gratuitously devised a piece of land to *R* in fee in trust for *S* for life; he devised another piece of land to *X* in fee subject to a trust for *Y* for life. After the death of *A*, *S*, and *Y*, who is entitled to the property?

19. *A* wrongfully takes a horse from *B;* how shall *B* proceed to get the horse back?

Suppose that before *B* discovers the wrongful act, *A* has sold the horse and invested the proceeds in a piece of land. Is *B* entitled to the land, and if so, how will he get it?

20. *T* took $500 of his own money and $500 of trust money and bought with the $1,000 a piece of land. What would you advise the *cestui* to do if the land increased rapidly in value? If it decreased?

21. Among other trust property which *T* held for *C* was a lease of a piece of land from *X;* upon the expiration of the lease, *X* refused to make a new lease to *T* for the benefit of *C* but was willing to make a lease to *T* for *T's* own benefit. *T* thereupon accepted the lease. Has *C* any right to the new lease?

22. *A* devised one piece of land to *R* and another to *X; A* then sent a letter to *R* telling him that he expected him to hold the land for the benefit of *S*, and a similar letter to *X* that *X* should hold for *Y; R* received the letter addressed to him, but the one sent to *X* did not reach *X*. Upon *A's* death what are the rights of the parties?

23. *A* by fraud induced *M* to convey to *A* a piece of land and fraudulently persuaded *L* to transfer to *A* a team of horses. Discuss the appropriate remedy of *M* and *L* to get back their property?

24. In violation of his trust *T* conveyed the trust property to *X* who first received notice of the trust after the conveyance but before he had paid any of the purchase money; is *C*, the *cestui*, entitled to the property?

Suppose *X* had paid part of the money in good faith before notice, would he be entitled to keep the property?

25. In violation of his trust *T* conveyed trust property to his son *L* by way of gift; *L* before notice of the trust sold and conveyed the property for $1,000 to *R* who paid for it and received the conveyance in good faith without notice of the trust; *R* then sold and conveyed the property to *S* who had notice of the trust, and *S* in turn conveyed the property to *C*. Discuss separately the liability of *T*, *L*, *R*, and *S* to *C*.

26. *T*, by authority of the *cestui*, loaned $500 to *Y* and took a non-negotiable note therefor. Later, in violation of his trust, *T* sold and assigned the note to *H* who paid value for the same in good faith. Is *H* entitled to keep the note as against the *cestui*?

27. *T* is trustee of certain personalty for *C; C* sold and assigned his interest to *X* and then in fraud of *X* later sold and assigned the same interests to *Y; Y* notified *T* of his assignment before *X* noti-

fied *T* of the assignment to himself. Who is entitled to protection, *X* or *Y*?

28. *T* being trustee for *C*, *T* dies without heirs; what becomes of the legal title? What becomes of *C's* interest?

Suppose instead of *T* dying, *C* had died without heirs, what becomes of *C's* interest?

29. *T* being trustee for *C* of certain land, *T* and *C* both die, each leaving a widow; which widow is entitled to dower?

Suppose *T* and *C* had both been married women and both had died leaving surviving husbands, which widower would be entitled to curtesy?

30. *A* devised a fund to *T* upon trust to pay the income thereof to *B* for life or till he should become a bankrupt; if *B* became a bankrupt *T* should then pay to *B* so much only of said income as *T* should in his uncontrolled discretion think fit. *B* later became bankrupt. What are the rights of *B's* creditors?

31. *M* devised $20,000 to *T* upon trust to pay the income to *A* for life free from the control of *A's* creditors. Discuss the rights of *A's* creditors.

32. *T* being trustee for *C* of a plumbing business, borrowed $500 from *X* for his own purposes and bought from *Y* $600 worth of plumbing supplies for the purpose of carrying on the plumbing business. *T* became insolvent. Discuss the rights of *X* and *Y* against the trust property.

33. *T*, having trust funds to invest, loaned part to *R* upon the personal security of *R* and *S;* loaned another part to *X* upon the security of a second mortgage on *X's* farm; with a third part he bought a house and lot; a fourth part he invested in the stock of a glue factory; and the residue he placed in a bank in his own name. Discuss *T's* liability to the *cestui* for these acts.

34. Suppose a trustee is robbed of trust money; under what circumstances is he liable to the *cestui* to make the loss good?

35. May a trustee employ a broker to sell trust property? An auctioneer? Must the trustee be present at the auction?

After completing the work, add and sign the following statement:
I hereby certify that the above work is entirely my own.
(Signed)