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Trusts

Maynard Jackson

TRUSTS

PROF. TILDEN

MAYNARD HOLBROOK JACKSON

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Prof. Tilden — CHAP II: PROBLEMS in TRUST Administration ①

TRUSTS: 1/26/60

Bogert's [redacted] Hornbook is recommended. Also, Nowman on Trusts.
Read the Rest., Trusts. Anl, the Appendixes in back of the bk.

A trust is not a legal person. The Tr^ee is the legally responsible person.
A trust is a relationship.

Definitions

The person who estab. the trust - settlor.
Trustee (T^ee) - the one to whom the trust or res is entrusted.
Beneficiary - the cestui que trust, or the one for whose benefit the trust is estab.
(a.) Life tenants
(b.) Remaindermen

A settlor can be a bene. of his own trust, or even a trustee of his own trust.

(1.)* DEGREE OF CARE AND SKILL REQUIRED *

In Re Whiteley (P. 377)

Gen. purposes of a T: safety of principal and such income as is consistent w/ security of the capital of the T.

T^ee took ~~partial~~ mort. as security on the purchase of and investment in a brickfield.
P was the bene. P alleged that T^ee acted w/o the required degree of care by investing in an asset wh was hard to sell and wh was easily capable of depreciating.
T^ee has obligation to preserve the capital, and an obligation to invest it properly for the purpose of income.
The appraisal of the land was only £200 altho' the full appraisal of the land, plant & machinery was

$6400. ∴, The mort. on $200 was inadequate.

The Tee must take such care and caution in re res so as to preserve and invest it, w/ the best interests of the income bene. and the remainderman in mind.

A Tee should invest the trust res as a reas. prudent Tee would, having in mind the life int. bene. + the remainderman bene. — T/P/A.

Quaere: Does the law recog. any distinction between a beneficient person who acts gratuitously and a professional Tee re the du/care and the degree/care?=

Ansr: is no judicial author. to that effect.

(See Ga. Code, secs. 108-402 ON TRUSTS and Degrees of Care + Skill)

Tuttle v. Gilmore (p. 381)

An exculpation clause wh said that the Tee could be liable only for "willful and intentional breaches of the trust..."

Court held that even tho' he did not willfully breach the trust, by accepting second morts. wh became worthless the Tee did act w/o the degree of care expected of the ord. prudent Tee and that was sufi to breach not only the trust but also the exculpation clause.

Can be trusts created by other that Ks. A will wh creates a trust is gratuitous, but a trust is nevertheless created.

This was a suit for an accounting and damages. "Accounting" is a word of art — the P is alleging that the assets of the trust res have been dissipated, and that the Tee should come

into court and tell what has happened. Tee said that he did not dissipate the res, and even if he had, he was liable only for a "willful and intentional" breach of trust.

The ct. strictly construed the clause by saying that by doing the act intentionally, ~~which~~ it amounted to a br/trust despite the clause.

New England Trust Co. v. Paine (p. 386)

This was a construction of the excul. clause wh was not ~~it~~ as strict.

Quaere: Does it matter whether the Tee is a malfeasor or a misfeasor ?? Does it matter whether the Tee is a professional or lay Tee ?? Note on p. 381: "a Tee wh advertised that it possessed unusual skills + abilities, and wh actually did have those capacities, will be held to a duty to exer. them."

Professional trustees are moving away from the use of these excul. clauses due to public relations. It "looks" bad.

Professional v. Amateur Trustee

There is no dichotomy between the pro. Tee and the amateur Tee in theory. But, in the minds of the judge and jury (if any) there is usually imposed a higher stand. of conduct.

Liability of Trustee

If a Tee is found to ~~have~~ be liable for br/trust, he is held to restore the res principal and the income wh it would have earned.

(4)

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(2.) * Duty of Loyalty: Self-dealing *

Magruder v. Drury (p. 390)

Bogert, Handbook, sec. 95, page 392.

T^ee rec'd. compensation as a broker for lending trust money. The trust money was repaid w/ interest so the trust made money. The T^ee was said by P to have breached the trust by having acquired conflicting interests.

It is no question that the trust lost, for the fact is that it gained. But the point is that a T^ee can make no profit out of his trust.

The fact that the trust estate would have had to pay some other broker the same fee as T^ee rec'd. is immaterial.

The T^ee must avoid putting himself in a position as it would seem — a fortiori, on it [redacted] would be a temptation to have a conflict. The T^ee has a duty to protect the interests of the estate, and not to permit his personal interests to in any wise conflict w/ his duty in that respect.

Same re TP's interests w/ might or do influence T^ee's decision or conflict w/ his duty to bene.

Marson v. Carson (p. 392)

Executor was T^ee of the T's estate then T's wife. T^ee (D) failed to pay off the creditors as per the trust provisions and then acquired at a forced sale by sheriff some of the prop. for himself.

Ct held for the Ps (creditors) a-

gainst the D (executor in this case who failed to liquidate assets and satisfy the decedent's debts) saying, "... one clothed in a fiduciary character cannot either directly or indirectly become a purchaser of the trust prop. at his own sale ~~and hold~~ or at the sale by another and hold such prop. against the dissent of the cestui que trust. He (T^ee) shall be denied all gain.

This case shows that some trust principles arise from other - than - trust fiduciary relationships.

It will be a conflict of interests, (T^ee's personal interests v. trust's interests) ~~or what~~ The T^ee acquires via sale some trust prop. whether the T^ee has himself conducted the sale or whether someone else conducted the sale.

But for T^ee's delay and nonfeasance, there would not have been a sheriff's sale anyway. So, it was the T^ee who caused someone else to sell, The T^ee cannot do indirectly what he cannot do directly.

Quaere: What if T^ee pays more than a fair price for trust prop.? Will be okay where T^ee has obtain license of Ct. before or after the sale. Better to have license of Ct. before sale.

Therefore, 4 are three methods whereby T^ee can acquire trust prop. w/o having to account:

(1.) License of court before acquisition.
(2.) License of court after.
(3.) Consent of all beneficiaries.

(p. 396) City Bank Farmers Trust v. Cannon

A settlor who reserves absolute power of modification and revocation possesses all the powers of ownership and for many purposes is treated as the absolute owner of the prop. held in trust.

Ct. held that the settlor's action in approving the exchange of Natl. City Bank shares for shares carrying a beneficial interest in the shares of the corporate T^ee and in opposing any sale of the new shares was by effective estoppel not only against her own objections but also against an objection by the recipients of her bounty to the acts of the T^ee wh she approved.

Consent by a settlor-life bene. w/ absolute power of revocation and alteration estops such settlor-life bene. and any remaindermen from objecting to the acts of the T^ee wh the settlor approved.

But, suppose the trust was estab. not only for the use of the shares of stock but also to insure that cousin Al, who is a teller in the bank, will have a job. Or that control will stay w/ the family? Could Cus' Al go against T^ee? Family members?

1st Nat. Bank of B'ham v. Basham (p. 397)

Bill in Eq. for a surcharging.

See p. 399 for discussion of "self-dealing."

One bank had two depts: commercial dept. and trust dept. The seller was the commercial dept., and the buyer was the trust dept. Was this self-dealing? = Ct. held no.

Ct. held for the Bank, but it could have gone the other way because although the bank did not, as a matter of fact, acquire a conflicting interest, it could have, and that is usually held sufficient to show a breach of trust.

It is T.Q. that the Tee kept full records as he went along rather than having made an ex post facto reconstruction. (Note: (as a fiduciary always (kept (sic) explicit records!)

This case seems to be an attempt to keep in step w/ the changing commercial picture.

The fact that this was during the depression had an effect also. The ct. does not want to impose a tight money policy.

Lupe: A Tee takes $206 of trust money + buys stock wch is later sold at $506. Tee puts back $206 + 2½% interest and keeps the remainder. - No good: Tee must account for full $506.

Norris v. Bishop (p. 404)

Ord. a settlor trans. full legal title to the Tee. On this happens & the

Modern American authorities often allow a Tee who is a lawyer to collect at least a reas. sum for legal services rendered to the trust.

settlor retains no power of revocation, the settlor cannot later come and get the assets back. It has been a full effective transfer.

Here a Tee was asking comp. for his professional services as atty. — not Tee — rendered in behalf of the trust. The dist. court put by & as comp. was any dist. ct. would have had to be paid to some other atty.

Consider small corp. v. big corp.? Small v. big trust.

Ct. allowed Tee to get the comp. "In making defense, the Tees had no personal interests to subserve. ... It was no conflict of interests."

Mosser v. Darrow (p. 409)

(Silden has "intellectual difficulty" w/ this case.) The problem of small v. big trusts arises here, too.

Allowance of or participation in disloyalty by a Tee is sufi to warrant surcharge.

(Read sec. 3)

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* (3.) The Tee's Powers; Different Types *

In Re Wellman's Will (p. 416)

Issue: Upon distribution must a Tee distribute in kind, or may he distribute in cash?

Holding and Rule of Law

In general, on the Testator, either expressly or by implication, has provided for distribution in kind it should be made that way. Apart from any express or implied direction, the benes. may still have a right to have distribution in kind on they have elected to have it that way provided the assets are fungible, i.e.,

in such form as to make a ~~division~~ division in kind practicable. In case the benes. are not all of one mind, this, in itself, may make distribution in kind impracticable.

It might make a difference whether the stock is a hard-to-get one with carries prestige with it, or the number of benes., etc.

Watling v. Watling (p. 420)

Issue: Whether a discretionary power given a T^ee is personal to the T^ee named or passes to a substituted T^ee upon the former's death or resignation. Depends necessarily upon the intention of the creator of the trust. Generally, 2 are 2 classes of trustee powers:

(1.) Discretionary
  (a.) those that apply to the T^ee personally
  (b.) those that apply to an office.
(2.) Mandatory - those expressed in the trust instrn.

Discretionary powers pose problems. So, on possible, avoid these in drafting the instrn. Or you can't state as explicitly as possible what shall govern the exercise of these powers.

In Re Sullivan's Will (p. 424)

Nebraska statute probided that Dependents of a bene. are proper parties to bring a suit for enforce-

ment of the trust.

The will created a trust for the support of L. Sullivan, w/ power in the trustees to use such portion of the principal of the trust as in their judg. may be required or necessary, they being the sole judges of such necessity w/o applying to the cts. for author. so to do, and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid."

Action to compel the Tees of this est. trust to pay to the wife and minor child of the named ben. sufficient sums for their support & maintenance. W + child collected.

This clause was interpreted as dispensing w/ the requirement of reasonableness in exer. of Tee's judg. (See p. 426)

Robinson v. Chance (p. 427)

Here, sole proprietor of a biz corp. created trust for purpose of allowing his Tees to benefit from the stock income and giving them the stock, control of the corp. This is called a "C.L. trust" or "Mass. trust."

Used frequently in Mass. by corps. to avoid a corp. excise tax.

So, the settlor is the Tee.

If you give yourself discretion and exer. it honestly, you can avoid ct. intervention. (The ct. did not give us this classic language used.)

Coxe v. Kriebel (p. 430)

Land owner → (mtge.) two Tees. During the life of the trust, the atty.

collected the interest as one of the Tees, then landowner → bank w/ mtge. The new mtgee. paid off the atty. - Tee on the mtge. (and that Tee gave the Bank a discharge. (Recording of the discharge will take off the record the 1st mtge.) Tee - atty. acted fraudulently in discharging. Then, that Tee died. The other Tee went to Ct. to have Ct. deter. what he should do in view of the fraud.

If a mtge. is attempted to be cancelled by one of two Trustees, the Release of it will be void, and the bene. or a successor Tee may have a decree reinstating the mtge. on the records.

One of plural Tees is inadequate to perform a trust act. So, the discharge was invalid because only one Tee acted. So, the discharge was ineffective and the Bank's title to the land was still unclear.

Monthly pymts. of interest to an agent does not imply power to collect the principal.

The Bank was held negl. because it could have made the ✓ payable to both Tees and was put on notice.

(4.) Delegation of Trust Powers to Agents & Co-Trustees

See Bogert, Hornbook, sec. 91, p. 371.

Carpenter v. Id (p. 433)

Bene. v. Tee for the loss of bonds stolen by an agent employed to receive new bearer bonds from the govt.

The power must be properly delegable, and that power must be delegated properly.

If is also a duty to keep trust prop. safely. The degree of diligence required depends upon the nature of the trust res. Thus, a Tee who places negot. bonds in a safety deposit box will not be responsible

for their loss if the are stolen; whereas, of course, he would be responsible if he left them in an unprotected situation.

The Ct. held that, generally, ministerial ~~duties~~ powers are delegable, but discretionary powers are not.

Meck v. Behrens (p. 436)

Ct. held that for the duties are not delegable the Tee who nevertheless delegates becomes an insurer for any loss resulting from the delegation.

The benes. can consent to the delegation of powers or duties, but the benes. must be capable of giving and must give legal consent. So, a minor bene. cannot consent. Thus, on a minor bene. "consents," and upon achieving majority, reverses that "consent," the Tee will be deemed to have acted w/o authority, and the standard of care to wh the Tee would have been held is higher.

A Tee is liable for the wrongful acts of a co-Tee to wh he consented, or wh, by his negl. he enabled the latter to commit, but for no others.

Caldwell v. Graham (p. 439)

Issue: whether a co-Tee is liable for the negl. or wrongful acts of the other Tee? Ct. held yes. Co-Tees have a duty to inquire of the acts of each other. How often? The nature of the trust, the Tees and other matters will deter. the answer.

Generally a Tee is liable only for his own acts. But if the Tee by failing to act or by

A co-Tee has a duty to be active and to supervise his fellow Tees; and this duty to supervise exists, whether an inactive Tee, at the time he becomes a Tee, finds the co-Tee in control, or has passively allowed the co-Tee to take exclusive poss. or has by his own positive act put the co-Tee into poss.

Ministerial acts may be delegated, but not discretionary acts. On the act of one of the Tees is ministerial, such as the receipt of money or the holding of prop., the other Tee is not chargeable for a loss of it, for he is neither an insurer of the safety of the trust funds nor a surety for his co-Tee.

acting, facilitates a br/trust, such Tee will be liable therefor even though the act of actual breach was done by another Tee.

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(5) * Securing Trust Prop; Setting Up Trust *

Kline's Estate (p. 451)

Test. trust. Upon T's death, title went to the executor until he marshalls assets, pays creditors and distributes per the will the remaining assets. The executor was to make a distribution to the Tee, but exec. made only a partial one and Tee no further pursued the remaining portion. Ct. found that executor's good reputation was no excuse. Executor died insolvent.

No matter on such prop. may be located, the Tee has a duty to use reas. skill and promptness in getting it into his hands. For loss of prop. due to failure to use ordinary diligence and care, the Tee will be liable. Duty to take poss. of trust prop.

Spektman v. Tatem (p. 449)

Wife is the settlor and conveyed via deed (any sealed instrm. not necessarily dealing w/realty) her interest in an estate. When that estate was settled, the executor transferred the prop. to the wife-settlor instead of the Tee to whom title in the prop.

reposed via the trust deed. The T^ee did not attempt to set the proc. from wife, and when she died the husband-bene. sued T^ee for damages for failure to collect the trust fund.

You cannot create, via express trust, a T^ee against his will. But, here the T^ee was a T^ee and had accepted.

Ct. found: "As soon as a T^ee has accepted the office he must bear in mind that he is not to sleep on it, but is required to take an active part in the execution of the trust. The Law knows not ... a passive T^ee. — when a T^ee has entered upon the trust he is bound at once to acquaint himself w/ the nature and particular circums. of the prop., and to take such steps as may be necessary for the due protection of it. ... Such, having once accepted and undertaken the trust, he cannot of his own motion abandon it, and evade its duties, and can only be relieved by the aid of a competent Ct."

DAMAGES

Damages will be assessed per not only what D did receive but what D might have rec'd.

* Title in prop. passes to a T^ee only upon delivery.

Sheffield v. Parker (P. 454)

Must distinguish between a T^ee and an executor. Here, the

same person was both. The question was that of mingling of personal prop. w/ trust prop. When a trust fund is to be created by an executor out of the assets of an estate, something more must be done by the exec. in order to impress the trust on particular prop. than to hold the prop. w/ an intention that it shall const. the trust fund. There must be some act of appropriation wh transfers it to the trust fund & gives the bens. the right to have it held for them.

McClure v. Middletown Trust Co. (p. 456)
1. Upon qualification as T^ee the first duty resting upon the D was to secure poss. of all the assets of the trust estate. In the performance of this duty the D was under no absolute duty to secure poss. of the assets, but merely to exercise due care in the preservation of the trust assets. Hence a T^ee is not negl. in failing to secure assets only w/ reas. chance of securing them.

Successor Trustees

This applies to successor-T^ees, and to deter. whether the pres. T^ee, receiving it's trust wh should have been rec'd, you must trace the history of the res to deter. what has happened to any absent prop., if any. (Keep good records, therefore.)

Trustee's Use of Personal Funds to Secure T Res

Benes. were asked to supply funds for suit to get trust money since the trust had no funds for that purpose. The benes. refused, and were therefore estopped to complain because T^ee was under no duty to use his own funds. That is true even tho T^ee might expect to be reimbursed, even on the bene. has promised to reimburse the T^ee; but, probably the T^ee would have to use his own funds on hand as trust assets but which are not liquid.

AGENTS

Liab. of T^ee for errors of judgment made by T^ee's ally. The ally. = an agent. "This is not a delegation of his powers, for the T^ee remains responsible for the reas. diligence of his agent or ally." — Or a T^ee is a corp., it is definitely liab. for the acts of its agents because a corp. can act only thru agents.

Corp. T^ee's liability for A's acts

The mere fact that you got advice of counsel is insufficient. The advice must meet the required standards. The T^ee is liab. for the errors of his counsel.

(Watch this case. — Exam?)

(6.) T^ee's Duty To Support The Trust

Carter v. Carter, (p. 461)

Son has made T^ee of insurance proceeds resulting from Son's father's death, and was instructed to pay wife #2 of father

$5000 ee. When father died, son refused to pay W #2. Ct. held that regardless of what may have been the relationship of son and W #1 (son's mother) and W #2, after settlor's (father's) death, he accepted the trust and became a Tee w/ W #1 + W #2 as benes.

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Hayward v. Plant (p. 467)

Tee cannot make profit incident to his being Tee.

(SEC. 7) - SAFEKEEPING AND PRESERVATION OF T PROP.

Mc Allister v. Commonwealth (p. 471)

Tee deposits trust funds in his own name. Bank fails + funds are lost. No negl. of Tee other than putting funds in his own name. Held: policy reasons (i.e., Tee's creditors' could attach funds) - Tee should be liab. Emphasized - risks inherent to Tee who does not keep a careful earmark.

Chapter House Circle Case (p. 473)

About same facts, but bene's name was on books. Bank - Tee made investments in its own name. - Tee not liab. on he takes title to trust prop. in his own name on no loss occurs as a result. Here, losses due to depression, not from putting investment in his own name.

Does Tee still have trust res here? Yes. In McAllister case total loss + b/trust. Here partial loss due to depression. - Codification of principle on p. 479.

A Tee has a duty to keep T prop. separate from his indiv. prop. and the prop. of other Ts. If he also has a duty to earmark the T prop. as that of the T in question in whatever way is practicable in view of the nature of the prop.

However, now y is a relaxation of those C.L. rules, and y is no liab. unless the failure to earmark has caused a loss to the T.

* Historical position - Tee liable as

Nominees (Tees or officers of the bank) are often used by corp. Tees to hold corp. stock in their names. The corp. Tee is liab. for their misconduct. Good under many statutes.

guarantor if he's guilty of a breach even if no loss is caused thereby. * View of this case — unless the technical br/ caused the loss, T^ee not liable.

(Sec. 8) * TRUSTEE'S DUTIES AS TO INVESTMENTS *

Moore v. Sanders (p. 481)

Action to remove T^ee b.g.t. 4 was an improper investment. T^ee had taken no action to invest res.

Quaere: What if res were small, e.g., $16, would that be enuf to relieve T^ee of responsibility here? * Can't draw a line. Depends on facts of each case. e.g., Re-reinderman, etc.

Historically — proper forms of investment were realty add 1st mtge. w/ adequate margin. Next class approvkd & popular: govt. bonds. Then, loans by State govts. municipal bonds, utilities, down to common stock of corps. considered reliable.

A T^ee should not put all of his eggs in one basket.

Mtges. — 50% on unimproved; 2/3 on improved prop. are approved margins today.

* Direct Reduction Loan — a loan wh is repaid a bank in installments and not in a lump sum.

Should also note the problem of diversification: should not concen-

trate trust funds to too great a degree.

(Aside) bypo: A + B are co-Tees of note executed by C to estate. Paid note to A + A deposited it in bank, w/ knowledge of B, in A's own name. A w/drew deposit + paid personal debt to D. — Question on last semester's exam.

Dealing w/ Tee knowing him to be Tee may impose serious liab. on the one so dealing. Should not deal w/ one known to be Tee in perpetrating fraud.

(T.I. case) Miller v. Pender (484)

PRUDENT INVESTOR RULE

Pee had power to invest "at his discretion." Be contends that Tee did not make a prudent investment.

Ct. held that the proper standard was for the Tee to invest as a prudent Tee would in conserving the trust prop.

P.I.R. applies to retention, purchase and sale of investments

Held, that the proper minimum standard was not such prudence as one would use in dealing w/ his own prop., but what one would use w/ a view to conserving trust prop. (i.e., dealing w/ another's prop.).

See here that a proper balance must be maintained between the income for the life Bee (i.e., income Bee) but also to conserve prop. for the remainderman.

Case = "prudent investor rule."

In "legal list" juris., if T^ee goes outside of the legal list but has broad grant of discretion from S^or in making investments, then T^ee will usually be held to have additional discretion.

In "prudent investor rule" juris., grant of discretion adds nothing to what has already been given by the law.

See p. 485

Legal List Juris.

(1.) Mandatory — T^ee shall invest in certain types of investments — any investment outside is for T^ee's account.

(2.) Permissive — if T^ee invests in approved investments, he will be taken to have invested prudently unless as a matter of fact, imprudence is proven.

Whether the list is permissive or mandatory, the T^ee must use reas. care in following it. Bogert, p. 421.

If S^or expressly PERMITS certain investments, T^ee must still use at least slight care.

A permission to retain covers securities substituted for the orig. holdings, if they represent substantially the same investment (question of fact), even tho' they differ in form.

Geographically, the Northeast has followed "prud. investor rule."

Authority to "keep certain investments held at death" will tend to decrease T^ee's liab. and to enlarge his discretion. That is to say, if Testator leaves nonlegals in estate and gives discretion to hold, then T^ee may hold them unless to do so would appear imprudent.

In "mandatory" juris., must unload nonlegals unless is a discretionary power given by S^or.

If such is given, then "mandatory" juris. may allow T^ee to invest in nonlegals if they construe clause liberally; if not, will then hold T^ee to legals.

In "permissive" juris., may allow "nonlegals" if they are prudent investments, and y is a greater tendency to broaden discretion if "power to invest" is given.

*In Re Salmon

T^ee invested in first mtge. over the proper margin allowed on such security.

T^ee liab. for investment over & above the proper margin.

Must have regard not only to the value of the prop. but also the nature.

*Springfield Safe Deposit (488)

T^ee mixed trust funds together & invested in a "common trust fund." "Participating certs." were issued to each of the trusts.

B^ene contended that trust funds could not be commingled. Said that funds could not be invested in a fraction of someone else's mtge.

Ct. held that old law was that trust funds could not be mixed w/ T^ee's own money or other trust money; but, held that y was greater convenience & benefit to trust ~~[illegible]~~ than danger to trust that resulted from mixing here — was all right under these facts.

T^ee had taken many precautions (see abstract p. A-6.).

Recent growth in NE. of "mutual funds" has come from courts' allowance of mixing trust funds to make investments.

Rule that trust funds shd be

be kept separate impeded ability of Tees to diversify investments.

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[Ch. 203, sec. 20 of Mass. G.L. - Receipts of Tees; Sufficiency.

Mass. G.L., ch. 203(a) - makes provisions for "common trust funds."

Dickinson, Appellant (p. 491)

Investment in real estate or chattels is almost always disallowed & considered bad.

Tee invested a large amount of the trust fund in one corp's stock. Ct. held that a Tee has a duty of diversification and must act within the scope of the prudent investor Rule.

State St. Trust Co. v. Walker (p. 505)

However, a Tee may be relieved from liab. for failure to sell an improper investment by a request of the bens. that he retain it.

Good investment initially, but the neighborhood wherein was located the house on which was this mtge. in which T invested, began deteriorating, and Tee took no action. Ct. found that T was negl. in failing to take action when he got notice of the decline in value.

The safety and preservation of the principal of the investment were paramount... The prox. cause of the loss having been found to be due to the failure of the Tees then in office to foreclose, they were jointly & severally chargeable for the investment less the amt. rec'd. upon foreclosure.

Joint & Several Liability: Measure of Dams.

Speculation w/ the T fund is condemned.

Caveat!! [Don't pick your T^ee or executor from your own generation.

Citizens' Nat. Bank v. Morgan (p. 509)
Bill for deviation from terms of trust.
4 wds a stat.
Cts. will permit change of an administrative provision, but not a substantive provision.

Types of Trust Provisions [Substan. – purpose of trust + rights of benes.
Admin. – manner of achieving the purpose.

* (Sec. 9) Management of Real Prop; Sales + Leases *
Re leases, see sec. 139 Bobert, p. 526.

Bogert, secs. 132-139. Young v. Young (p. 513)
Express grant of power to sell d/n ord. include power to mtge. §136.
Q. Can a Ct. author. a sale of realty on the trust instrn. prohibits same? = ⊛Yes, on, were Testator's directions strictly adhered to, it not only would have been a direct violation of the T's intention to preserve the prop. for the children and their heirs and so afford them an income, but in time it would have ~~been~~ resulted in the heirs receiving a diminshed amt. of what orig. had been left them.
⊛When such an unusual exigency arises in regard to the method of handling the prop. or the corpus of the trust fund, it is the right + duty of a Ct. of eq. to authorize such changes!

Rule of Law
T^ee's Power to sell
A power of sale will be implied on it is reas. necessary or highly convenient to accomplishing the pur's purposes.
A power of sale may include a power to exchange and a power to give an option to buy when reas. necessary.
The T. instrn. may give an imperative or discretionary power to sell. It may prohibit a sale or allow it only on cond.
This power is commonly attached to the office of the T^ee and not made personal to any particular T^ee. ⊛The same principles govern the implication of powers of sale in charitable T's. ⊛Benes' consent in advance to sale or ratification are gen. insuf'c to supply the otherwise lacking power, or the benes. may estop themselves to attack the validity of the sale.

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*(Sec. 10) Ks of the T^ees *(Bogert, §§ 125–128)

Purdy v. Bank of Amer. Nat. T. + S. Assoc. (p. 526)

See cbk. 527.

A T^ee has a right to be indemnified from T funds when he has prudently made a K w/in his T powers. One of the ways: the "right of exoneration" – on K is sued indiv. on a K w/ he made AS T^ee, he may assert this right of indemnity by suing in eq. to get a decree that initial liab rest on him AS T^ee.

Creditor – Bank exer. its lien in attaching the account of the trust in partial satis. of a debt owed by the trust. – Banker's lien.

Bene. brought this suit to recover the amt. of the credit upon her attaining age 30, probably the age at wh the trust was to end.

T was no express power to borrow, but T was a power to manage the ranch.

P is contending that since was no express power to borrow, the obligation was personal to the T^ee as an indiv. and that the trust prop. was ∴ wrongfully appropriated.

Trust not legal person. But, in Mass., the Mass. trust can sue or be sued.

D = creditor. Held, a T^ee will be held to have an implied power to borrow as necessary for the management of the trust. Thus, a T^ee may have implied power to K in behalf of the trust.

* The implication of power to K & borrow will depend to some degree on the nature of the trust itself.

Here it was necessary to borrow the money to preserve the trust estate from dissipation.

Smith v. Chambers (p. 529)

It is immaterial that the person K'ing w/ T^ee knew that the T existed, knew that the T^ee was acting in his fiduciary capacity, and that the K was one made in the course of the T administration. Nor is it relevant that the words "as T^ee" appeared in body of K following the signature of the T^ee on the K. If the 3rd person did not expressly agree to release the T^ee from personal liab. in the K itself, the T^ee is personally liable.

The K of a T^ee in administering a trust is his personal undertaking at C.L., & not that of the trust estate unless he ks against personal liab. ... The liab. of the T^ees is a personal liab., & execution on judgments secured against them may be levied upon their personal assets.

A person to whom the T^ee has become liab., cannot reach trust prop. in an action at law against the T^ee, altho' the liab. was properly incurred by the T^ee in the course of the administration of the trust.

Exclusion from personal liab. generally required to be expressed.

Min. View — U.T.A. 12 — T^ee may be sued in representative capacity if benes. are notified; does not prevent suit against T^ee personally.

Everett v. Drew (p. 531)

The T^ee is not the A of the benes.

Held, no P-A rel., but that of T^ee - cestui; and such a rel. is lawful, and, absent fraud, does not render the cestui's trust liable to suits at law upon ks made by the T^ee in his own name.

Covenant v. Disclaimer — The covenant against personal liab. (bilateral) raises implied warranty that trust will be liable. A disclaimer is unilateral, were talking of the former.

Tebaldi Supply Co., Inc. v. MacMillan (p. 532)

On a negot. instrm., under the N.I.L. 20

and the U.C.C. (3-403), the T^ee may escape personal liab. on he signs in a representative capacity.

James Stewart & Co., Inc. v. Nat. Shawmut Bank (p. 535)

Held, the explicit reference to the declaration of trust, & to the public record of it on it could be found, put the P on its notice to ascertain whether its provisions affected the K w/ the D (T^ee), and that the P (K^or) was bound by it, at least, to the extent to wh it imposed limitations on the powers or liabilities of the persons who signed on behalf of the trust.

A mere explicit reference to the trust instrument will amount to a showing of intent to incorporate into the K a provision for exclusion of personal liability found in the instrument. However, it would seem otherwise, for the trust instrm. provision will not excuse the T^ee from personal liab., unless the parties ked w/ the terms of the T instrm. in mind & in substance incorporated them into their K.

Methods of T^ee limiting his personal liab.:

(1.) K provision

(2.) Trust instrm. wh limits liab. and to wh such refer. is made.

Tilden: this seems to stretch the doctrine of constr. notice too far.

Quaere: Secret trusts?

Note the above case carefully for exam.

(See Bogert, bot. p. 497) Dessup v. Smith (p. 537)

Duty of T^ee to defend trust resulted in T^ee paying atty. fees out of trust fund. T^ee did not have such personal funds, and told atty. so and that he (atty.) would be paid from the trust fund.

It was held that the trust prop. could be subjected to the pymt. of the debt (atty. fees); the ct. saying: "A T^ee, who pays his own money for services beneficial to the trust, has a lien for reimbursement."(*)

(*) But if he's unable or unwilling to incur liab. himself, the law does not leave him helpless. In such circum., he has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services are rendered.

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On T^{ee} is allowed expressly to obligate the T estate, or for T^{ee} to be entitled to reimbursement, the K must be one wh is beneficial to the estate and w/in the $T^{ee's}$ powers.

A T^{ee} goes to Eq. & is w/in its juris. But, in Law Ct., the T^{ee} is treated individually. On the T^{ee} has to pay personally, he may have the ~~~~ right of reimbursement from the trust contingent upon his having acted w/in & per his trust powers.

On the T^{ee} should be reimbursed ~~but hasn't~~ yet, then the $T^{ee's}$ creditors should be allowed to stand in his shoes & collect what ~~~~ is due the T^{ee}. Then, what ct. could have juris. over this creditor's suit? =Eq. Further, could ~~creditor~~ sue trust directly or is his suit derivative? =Against T^{ee} as such directly.

Mason v. Pomeroy (p. 539)

Holding & Gen. Rule of law: The creditors may reach the trust property when the T^{ees} are entitled to be indemnified from, & that the creditors reach it by being substituted for the T^{ees}, & standing in their place.

Quere: What procedure must the cred. use to reach the trust funds? = Some cts. require that a judg. first be gotten & then that relied upon.

Here, ct. said that obtaining judg. first was not necessary.

Downey Co. v. 282 Beacon St. Trust (543)

(Note: compare w/ James Stewart Case, p. 535).

Here declar. of trust provided for K powers in T^{ee} but required that

T^ee has no right of indemnity against liab. incurred by him in making a K wh was not lawful or proper for him under the terms of the T instru., except to the extent that performance of the K has increased the value of the T estate.

both T^ees oper. the power + that non-liab. be expressed in the Ks. — Neither was done by T^ee #1. A "depression" case (1935).

Quaere: Must one dealing w/ a T^ee assertain his powers upon pain of implication that he has assented to deal w/ T^ee indiv., thereby confining his recourse to the T^ee individually? = This case implies "yes."

Suit here against trust per Mass. stat.

Re note 18, p. 546, Tilden agrees that "On this point the decision seems unsound."

Ct. held the T^ee personally liab. + not the trust because the T^ee volun. made himself liable contrary to his express obligation under the declaration of trust + he cannot be reimbursed therefor. Altho' the T^ee acted w/ good faith, he acted improperly.

Waiver of Right of Reimbursement

See In Re Oxley, p. 547.

(Sec. 11) * Liabs. of the T^ee Arising from Torts or Prop. Ownership *

Bogert, secs. 129-132.

Majority View

Kirchner v. Muller (p. 551)

Survival of actions - certain types of c/a do not die w/ the party. A T^ee is liab. for c/a that survive the settlor and for c/a that arise while trust endures + T^ee remains such.

But, here, decedent had died before the c/a arose. So, this was a tort of the T^ee. The duty breached arose merely because T^ee was

T^ee or Executor has been held entitled to reimbursement from the estate on he was free from willful misconduct in the tort wh occurred during his administration of the estate.
MAJORITY VIEW →

the title holder of the land, & that maintenance of the condition was the prox. cause of the injury.

Issue: whether the executrix was liab. in her indiv. or representative capacity? Held T^ee personally liable, and satis. must be from the T^ee's personal assets, not trust assets.

Would it be different if only one T^ee here signed a negot. instrm.?

Ewing v. Wm. L. Foley, Inc. (p. 556)

Damage to adjacent lot o/p due to br/ duty of lateral support.

T^ee sued in his indiv. capacity. Ct. held that the T^ee could be sued in his rep. capacity, i.e., directly against the trust assets. — This is so on T^ee is not chargeable w/ personal fault or negl. — The Minority View.

Minority View →

Majority View is the Kirchner Case.

Some cts. distinguish whether T^ee was active in the activity out of wh arose the negl., or whether T^ee was removed personally, in deter. whether the T^ee is free of personal fault or negl.

* In Re Reybold — if is a right of indemnity on T^ee is w/o personal fault, and on such exists, the tort creditor can proceed directly against the estate.

Ray v. Tucson Medical Center (p. 568)

P entered (free) the D, a charitable institution supported by a trust.

D alleges that a charitable institution should not be held liable.

In Mass., you cannot sue the (a) charity.
39 B.U.L. 349 - re charitable institutions.
The jurisdictions are split on the ?of liabelety of a char. institution.

Liability of Insurer of a Charity

A liab ins. co. will have the same immunity as the insured church (e.g.) in an immunity juris., unless the policy otherwise provides.

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BOGERT, Hornbook

PERSONAL LIAB. OF TEE FOR TORTS

A trustee of a private trust is personally liable for torts committed by himself, or by his servants or agents when they are acting in the course of their work for him. The trustee as Tee is not recognized as a juristic person, that is, not by a ct. of law. Assume John Doe is the Tee: the orthodox and majority view is that Doe will not be recognized in his rep. capacity, but only as an indiv. A recovered judg. against Doe may be satisfied out of Doe's own prop. in full, w/o regard to the amount of the trust prop. or the possibility of recovery by Doe from the trust. --- In a very few states are suits against the Tee as such and recovery from the trust prop. allowed. Y is also a slight tendency by stat. to allow liab. of Doe as Tee and satis. out of the trust prop.

Kirchner v. Muller (Major.)

Ewing v. Wm. L. Foley, Inc. (Minority)

A Tee of a charitable trust is personally liab. for torts committed by himself, but per the older orthodox view not those committed by A's or S's. Y is a strong modern trend toward extending the liab. of Tees for charity and charitable corps. to some or all cases of torts due to the fault of A's or S's. Reason for the split: opposing policy reasons. Older view says that charities should be protected even at the expense of indivs. Modern view says that the indiv. harmed should be protected.

TEES RIGHT OF INDEMNITY AS TO TORTS

A Tee is entitled to be indemnified against liab. for torts in the following cases:

(1.) Ou he was not personally at fault;
(2.) Ou, even tho' the Tee was personally blameworthy, the tort occured as a normal incident of the kind of activity in which the Tee was engaged; e.g., ou the Tee carries on a paper and Eees occasionally commit a slander;
(3.) Ou the commission of the tort increased the value of the trust prop.

Ou a Tee has a right of indemnity he may use it in the ways discussed w/ regard to contracts. He may first pay the tort claim out of T prop. by self-help, reimburse himself for the payt. of the claim, secure a decree of exoneration from initial liab., or procure reimbursement thru accounting or other proceedings. Same rules re right of indemnity in charitable trusts.

TORT CREDITORS RIGHTS AGAINST THE Tee AS Tee

Ou a Tee of a T is liab. for a tort but collection cannot be had from him due to his insolvency or other cause, the injured party may sue the Tee in his rep. capacity in equity and collect from T prop., if the Tee would have been entitled to be reimbursed if he had paid the claim out of his own pocket. P must prove the following:

(1.) inability to collect from Tee;
(2.) tort was one for which Tee had a right of indemnity;
(3.) Tee was not indebted to the T estate in such a way as to destroy his right of indemnity(applicable to both private and char. Ts).

A few states don't require that you rely on the derivative theory but allow a direct suit against Tee in his rep. capacity. (Ga.)

LIAB. OF THE Tee AS PROP. OWNER

The Tee's liabs. arising from holding title to the T prop. are the same as if he owned the prop. absolutely. Examples of such liab. exist in the case of taxes, covenants running w/ the land, & calls or assessments on the stock of a corp. He has a right of indemnity against personal liab. incurred as a title holder.

Rule of Law

Smith v. Rizzuto, c/b 562, held,"...if the liab. arises from the mere fact that the fee title is in the Tee, the liab. of the Tee to 3rd persons is ltd. to the extent to which the T estate is sufi to indemnify him ou he is w/o fault and ou he is not responsible for the insufi of the estate to make indemnity.

(SEC.12.) ALLOCATION OF BURDENS AND BENEFITS TO PRINCIPAL OR INCOME ACCTS.

A. Tee's Duty in General

It is the duty of the Tee to act fairly toward both the income benes. and the remaindermen and not to favor one over the other.

Bogert, Secs. 111-124.

In general, benefits rec'd. for the use of T prop. or as a gain produced by it should be treated as T income; & prop. rec'd. as a substitute for, or change in the form of, the orig. T res should be allocated to T principal. The law at the time of the receipt of the prop. will govern in deter. what is income and what is principal.

The life tenant is not a Tee for the remaindermen, and he owns a separate interest. Y is no simultaneous ownership of the same prop. interest, divided into legal and eq. parts.

B. INCOME REC'D. BY TESTAMENTARY Tee FROM EX'R.

The Tee must decide whether to treat income earned during the period of admin. and rec'd. from the Ex'r., as income or capital of the test. T.

If the T is a residuary T, the Tee may receive from the Ex'r. (I.) income earned by prop. wh was sold by the Ex'r. to produce a fund for the pymt. of debts and taxes; or(2) income of the prop. actually turned over to the Tee as capital of the residuary T. By the maj. rule the first type should be treated as capital of the resid. T and the 2nd as income.

A test. Tee who is given by the testator specific prop., and not a residue, is entitled to receive from the Ex'r the income earned by that prop. during the period it was held by the Exr, & should treat such income as income of his T.

Ou a sum of money is given by will to a Tee, he is entitled to receive from the Exr such sum and interest on it from the date of the testator's death at the average rate earned by all the assets handled by the Exr, & should allocate it to T income.

These dispositions are made by the ct., in the absence of stat. or express direction by the testator, on the basis of inferred intent as to the meaning of "residue" and as to the S's desires about pymts

to the income benes of the T. The fact that the income cestuis are usually closest in affection and family relationship to the S and are naturally the principal subjects of his concern is influential in [illegible] deter. implied intent in this and other similar cases.

C.) Interest on Notes and Bonds

Should ord. be treated by the Tee as income, since it is the price paid for the use of T funds.

At C.L., if a bond is purchased by a Tee at a premium, he should amortize in order to prevent loss to the principal of the T on the maturity of the bond, by deducting from the interest pymts. an amt. wh on the maturity of the bond will total the amt. of the premium paid.

At C.L., if a bond is purchased at a discount, the Tee is under no duty to pay to the income bene. the difference between the cost of the bond & the amt. paid on it at maturity.

Under the U.P. and I.A., a Tee is under no duty to amortize for premiums or to accumulate for discount. In a number of states, the appreciation in the value of U.S, savings bonds is treated as income when collected.

D.) Rents

Net rents should be treated as income. From the gross rent should be deducted such items as the cost of collecting the rent, insurance, and repairs, but not the expense of making improvements. Altho' in accounting practice w/ regard to porporate and tax matters a reserve for depreciation and obsolescence is deducted from gross rents to compute actual income, by the wt/author. a Tee is not allowed to follow this procedure.

E.) Cash Dividends

At C.L., y were 3 principal rules re the allocation of benefits rec'd by a Tee on acct. of porporate stock:

(1) Kentucky Rule -- all benefits treated as T income. This rule is now even modified in Ky.

(2) Pa. Rule -- even abandoned in Pa.

(3) Mass. Rule -- based on ease of admin. (The maj. rule.) It was based on the idea that most cash dividends come from current earnings and therefore should go to T income, while most stock dividends are based on earnings accumulated over a long period of years and should be alloted to T capilal. Under this rule, ordinary & extraord. cash dividends were to be treated as T income. This rule has been adopted in substance by the U.P.&I.A., now in force in 16 states, and was followed considerably at C.L.

Dividends payable in stock or cash, at the option of the Tee, are regarded as cash dividends, no matter what election the Tee makes.

The S may comtrol the allocation of any corporate benefit or give to the Tee discretion as to the disposition of it.

A stmt. by the directors of the corp. in their resolution declaring the dividend as to its source may be relied upon by the Tee.

F.) Stock Dividends

Under the orig. Ky. Rule, stock dividends were T income, but this rule has recently been modified by stat.

Under the Mass. Rule, dividends in the stock of the declaring corp. are T capital, but dividends in the stock of corps. other than the declaring corp. are T income. The U.P.I.A. follows this rule.

Under the Pa. Rule, stock dividends are T capital to the extent necessary to preserve the dollar value of the T's orig. investment in the stock; and beyond that are T income.

G.) Stock Subscription Rights

In most states a Tee who owns corp. stock and receives a stock subscription right should treat the right or its proceeds as T capital. In a few states following the Pa. C.L. rule, the effect of the issuance of the stock subscription right on the value of the T's investment

in the corp. is considered and only such part of the value of the right as is necessary to preserve the orig. value of the T's investment in the corp. is treated as T capital. The U.P.I.A. treats most stock subscription rights as T capital.

H. PROFITS FROM MERCHANDISING OR AGRICULTURE

Ou a Tee is empowered to carry on a S's biz, the profits therefrom, after the deduction of operating expenses and the maintenance of inventory, should be allocated to T income.

I. SUMS RECEIVED IN THE SETTLEMENT OF CLAIMS

The Tee sometimes receives money in the settlement of claims, as in the case of the taking of T prop. wh was insured, and cases of wrongful injury to or misappropriation of T prop. Since these pymts. are ord. made on acct. of the loss or inj. to T prop., they are to be treated by theTee usually as substituted principal of the T, but if they are on acct. of lost T incomethe income acct. should share in the amt. collected.

J. PROFITS AND LOSSES ON THE SALE OF T ASSETS

The proceeds of the sale of T prop. are ord. to be treated as T principal, even tho' they include a profit over cost priceor inventory value. Losses on such sales fall on T capital.

K. PROCEEDS OF SALE OF UNPRODUCTIVE PROP.: MTGE. SALVAGE OPERATIONS

If a Tee holds unproductive or underproductive prop wh he has a duty to sell, and the sale is delayed,the Tee is under a duty to apportion the net proceeds of the sale between income and capital accts. in such a way as to bring to T income the amt it would have rec'd. if the prop. had been sold as soon as the duty to sell arose and the proceeds had been invested in normally productive prop. This assumes that S made no express direction re the disposition of such proceeds. The rule applies whether the sale produces more or less than the inventory value or cost of the prop.

Ou a Tee holds a mtge., y is ~~## #####~~ a default, ha forecloses, buys in the prop., holds it for a time, and sells it, the transaction is sometimes called a "mtge salvage operation". Some cts. treat the case as merely one instance of a delayed sale of unproductive prop; others divide the proceeds in proportion to the amt. of interest & principal due on the mtge.

The U.P.I.A, treats all unproductive prop. (including mtges.) un- a single section and considerably modifies the C.L. rules. In some states,remtges., stats. award the entire amt to T capital.

L. INCOME AND PROCEEDS OF SALE OF WASTING PROP; NATURAL RESOURCES

Ou the Tee holds wasting prop. & is not permitted by the T instru. to retain it, he should sell it as soon as possible. If y is delay in selling, he should set aside an amortization fund uot of the income of this prop. in order to replace capital wh wastes. Upon the sale of wasting prop. the proceeds should be apportioned between income and capital in such a way as to bring average, normal income to the temporary bene. and to preserve the capital of the T.

M. APPORTIONMENT OF PERIODIC RECEIPTS: SUCCESSIVE BENES.

Ou a T begins or ends, or the right to receive income shifts from one bene. to another during the life of the T, and the Tee shortly thereafter receives a petiodic pymt. like rent, interest, or a dividen covering a period wh began before the change in ownership, he is under a duty to apportion the pymt. in the case of interest only. By stat., some periodic pymts. are apportionable.

N. SOURCE FROM WH EXPENSES SHOU LD BE PAID

The Tee should pay the ord. current, running expenses of the admin. of the T out of T income, but should pay from T capital any expenses wh are extraord. or solely beneficial to the remainder interests under the T. While no hard and fast rule cam be laid down, in general the cost of keeping the T prop. productive and secure is to be borne from T income. --- An example of an expense that should normally be

borne from T capital: special assessments for public improvements or the cost of improvements made by the Tee where the improvement will probably last longer than the income beneficiary's interest. See Plympton v. Boston Dispensary, c/b 576. — as between tenant for life and remainderman, ord. taxes are to be paid by the tenant for life.

But, when the whole estate is subject to, and benefited by the discharge of, an incumbrance not created by either, eg. will apportion it ratably between their different interests.

Patricia

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Principal or Income (cont'd.)

These rules, note, apply only on the settlor was silent as to what his intent was.

Edwards v. Edwards (p. 598)

Here, provision was made for income for an income benef. but was no income coming in. Unproductive land sold for $196,500.00; was worth $1506 at T's death.

Youre trying to find out what portion would life tenant get.

X = amt. going to the corpus
P = proceeds ± (net proceeds from sale).
T = time (yrs.)
R = the current average yearly rate of net return to trust beneficiaries expressed in decimal form.
P − X = share of income ben.

$$X = \frac{P}{1+(TR)}$$

In Re Knox's Estate (p. 602)

A return of capital goes to trust corpus.

Corporate Declaration of Distributions

Ord., if the corp., acting in good faith, reports to its stockholders that a dividend is so much surplus and so much return of capital, T<u>ee</u>s usually find it safe & expedient to rely on that distribution.

But, here, the ct. seems preoccupied w/ the wasting asset problem & it does not have to be.

Held, on the owner of land, containing minerals, creating a legal life estate w/ the remainder over the life beng. is entitled to retain for himself all proceeds derived from the operation of the mines, w/o making provision for a fund to offset depletion.

In Pa., depletion reserves subsequently distributed as dividends is income, not a return of capital. — Holding here.

Tees often keep two separate accounts: (1.) Capital acc't, and (2.) income acc't. He must decide where all expenditures and all incoming monies are going to be applied.

In Re Elsner's Will p. 607

Re wasting assets, e.g., rights to royalties here. The K right presumably could have been sold at the height of the royalties' income, but Tee did not do so. The Tees collected royalties and now ask whether these sums should be treated as trust income or capital.

The principal here was the beneficial interest the author had in this K — its present value as a producer of income.

Dumaine v. Dumaine (p. 619)

Re the discretionary powers of the Tee to decide whether prop. rec'd. by him is income or

* (Sec. 13) Principal, Pymts. & Distributions to Beneficiaries *

Bogert 109-110.

T^ee is absolutely liable for a breach of these duties.

In Re Swiffin's Estate (p. 624)

T^ee has a duty to make income pymts. to the income benes. as designated by the trust instrm. and to no others, and reas. mistake in making pymts. to someone else is no excuse and T^ee will be liable for pymts. erroneously made.

Here, the bene. died before any pymts. were made, and the T^ee had a duty to ascertain, first, whether the bene. existed or not.

Bennett v. Nashville Trust Co. (p. 627)

Provisions were for T^ee to accumulate income until bene. reached 25 yrs. of age. So, she was the income *and* remainder bene. This makes the situation different.

She came in and asked for the money (income) now for school expenses. Generally, cts. will NOT interfere w/ the dispositive provisions, but will interpret the administrative provisions.

In "anticipation" problems, the unity of interest is almost a prerequisite (income and remainder benes = same person). Change of circumstances, minor complainants, et al, will be considered in reaching a decision.

Ct. said: "It is to be noted that what is asked in complainant's behalf will not, or grant, affect the rights of any other legatee or bene. under the will."

"The ct. will only so direct a use in behalf of a bene. on an exigency non existant at the creation of the T, has arisen, when exigency is not one then anticipated by the Testator; for, if the testator saw or foresaw the plight of his bene., + yet intended that his gift should be w/held until she matured in age, we would deem it to be beyond the power of the ct. to alter a purpose thus declared.

In Re Van Dousen's Estate (p. 630)

Eng. View allows termination of the trust upon concurrence of all benes, i.e., on all consent.

A ct. of eq. may modify a T on a proper showing of changed conditions occurring after the death of the testator and after the creation of a T if the rights of all the benes. may be protected.

* American View — contra, cannot disturb S's intent as no reason for so doing. Once settlor said that the trust should be, agreement by all benes. to abolish the trust will be nugatory. So, settlor's intent will reign supreme.

Ketcham Case (p. 632)

SPENDTHRIFT TRUSTS

In construing wills, the intent of the T must prevail unless in violation of some established rule of public policy or statutory enactment.

What is a "spendthrift trust?" A trust w/ prohibits alienation of certain or all beneficial rights. Often done on settlor knows of the loose, licentious or spending ways of a bene, and seeks to provide for that bene's needs but not that indulgences.

The rule used here is the rule in wills rather than the rules in trusts.

A Ct. will enforce a spendthrift trust.

"stock in trade"

The real work of art should be done in drafting the instrn. not in arguing the case.

* SEC. 14 Changes in Trustee Personnel *

[A.] Notice to and Acceptance by the T^ee : Resignation (Sec. 31 Hornbook)

(1.) It is not necessary to the creation of a trust that the settlor notify the T^ee that he has created the trust, nor is it ord. necessary that the T^ee accept the trust and agree to perform his duties under it.

Distinguish this from the doctrine that acceptance of the trust is necessary to the vesting of title to the trust prop. in any particular T^ee + to the fastening of trust duties upon him.

(2.) In the rare case on the T^ee is a personal T^ee, and the S's expressed intention is that the named T^ee and he alone can perform the trust, acceptance by that T^ee is needful if the trust is to arise.

(3.) Every person who is tendered the office of T^ee has the power to accept or decline it. He cannot be forced to become a T^ee. He must accept or disclaim the trust as tendered & cannot accept in part and reject in part or accept on conds. of his own choice. Acceptance is thus necessary in order to make a particular person a T^ee.

An exception may exist in the case of burdensome & worthless prop. Acceptance on conds. different from those fixed by the S = REJECTION.

(4.) Acceptance or disclaimer by the T^ee may be express or implied. The attitude of the T^ee toward the trust prop and duties and the bene. will ord. be determinative, if no direct position is taken by the T^ee.

Even tho' the trust prop. is realty, the T^ee may disclaim by parol.

(5.) Acceptance or disclaimer relates back to the date of the trust's completion by S. If y is acceptance, the T^ee is treated as having been such from the date of the trust creation. If by is disclaimer the legal title is deemed never to have

left the S. Whether y is acceptance or declination (except in the rare case of personal trusts) the equitable interest is regarded as being in the bene. from the date of trust creation, and the ct. (eq.) has power to fill vacancies created by disclaimer.

(6.) Ord. it would seem that acceptance or disclaimer should be final and not subject to retraction; but y is some authority for permitting a T^ee to change his position in this regard if this can be done w/o unfairness to others.

(7.) A T^ee who has accepted the trust may resign either by complying w/ the requirements for resignation prescribed by the trust instrument, or by securing the consent of the ct. of eq. If all the benes. are competent, & the T^ee presents a resignation to them, and they accept it, they will not be able to hold the T^ee liable for his failure to act in the future.

(8.) If two T^ees are named in the orig. settlement, and one rejects the trust, the title to the trust prop. vests in the other T^ee as if the T^ee who declines had not been named.

(B.) Transfer of title to the T^ee; Nature of His Interest; Filling Vacancies (sec 32 Hornbook)

(1.) In order to make a particular person T^ee the S must go thru whatever acts of formality are required in order to vest that person w/ the prop. interest w/ the S intends him to hold in trust.

(2.) In the case of declarations of trust the declarant already owns the prop. and no transfer of title to a Tee is needed. He ceases to hold for his own benefit & thereafter holds for the benefit of another.

(3.) In the case of a trust creation via transfer to a third person the conveyancing formalities which the S must adopt depend upon the time at which title is to pass, the type of prop. involved, and whether the transfer is voluntary or for a consid.

(4.) If transfer is to occur at the moment of death of the transferror, the law of wills must be consulted; if during the life of the transferor, the law of sales if consid. is involved, the law of gifts if the transfer is voluntary. As to transfers of personal prop. the law varies somewhat, dependent on the nature of the interest being passed.

(5.) In order to complete a trust & make a certain person Tee, transfer of poss. to him is immaterial as such, but it may be necessary to pass title.

(6.) If two or more persons are named as Tees a transfer of title to them makes them joint tenants, unless the S provides otherwise. Hence title & the trust powers remain in survivors and the successors of a deceased cotrustee have no interest in the trust.

Gen. Rule (C.L.) - the ownership of the T prop. devolves upon the persons who would take the absolute prop. of the deceased.

(7.) In the absence of statute, upon the death of a sole T^ee intestate, the title to the trust prop. vests in the T^ee's heirs or personal rep. depending upon the nature of the prop., whether real or personal. If the deceased sole T^ee left a will title to the trust prop. but not the trust office, passes to the devisees or executor named in the will.

(8.) By stat. in several states, on the death of a sole T^ee the title to the trust prop. vests in the ct. of eq.

(9.) The ct. has power to fill vacancies caused by the death of T^ees or for other reason.

(10.) The size of the prop passed from S to T^ee depends upon the needs of the trust. whatever interest the S had passes to the T^ee in so far as it is needed by the T^ee in order to enable him to carry out the purposes of the trust. No technical words are required in order to pass such interest.

(11.) Since the T^ee's title is not a beneficial one and his holdings is a rep. only, his prop. interest is not one with gives his personal creditors any rights to take the trust prop., nor does his spouse have dower or curtesy.

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* Sec. 17 Alteration of Trusts - Cy Pres Doctrine (cont'd.)

The judicial cy pres power is the authority of the ct. of eq. to order the T to apply the T prop. to a substituted charitable purpose, as nearly as possible like the S's orig. charitable object, when the S's had a broad charitable intent & the carrying out of his stated charitable purpose was at the beginning of the T, or later be-came, impossible or inexpedient. This power is exercised by near-ly all American cts.

Da Costa v. De Pas (p. 686)

Money left for inducing of teaching of Judaism. Ct. held that the gift was made to an "illegal" charity because it was "a religion contrary to the estab. one," and that it, i.e., the money "escheated" to the state via PREROGATIVE CY PRES, and that the heirs at law could not take.

Jackson v. Phillips (p. 690)

Here, due to the 13th Amend., slavery was abolished, thereby making impossible of performance the stated wish as to the object of S. However, the general purpose of S was to help educate the Negro to assume his place in society.

In Re Fletcher's Estate (p. 695)

$100,000 left to estab. hospital, but the funds were far inadequate. Clause in will provided for a bequest to one Chadwick if the hospital bequest were to become "inoperative." - This is excellent and should be followed in prac-tice.

Cy pres applies only on gen. failure of T's orig. intent and the bequest would but for the cp doctrine go to the re-siduary clause. It is a crutch to give some effect to T's gen. intent or if is general intent.

S's must have had a broad gen. intent to aid charity as a whole, or some particular class of charitable objects in the way chosen by him or in some other way. His intent must not be narrow and particular.

If cy pres is not applied, either because the doctrine is not used in the state, or because the S's had a narrow charitable intent and the T fails, it is a result-ing T for the S's or his successors, if the transfer in T was gratuitous, or if the T's paid consideration for the transfer to them, they are allowed to retain the prop. on the failure of the T.

Sec. 15 Records and Accounting - (4/4 140-143)

A. Duty to Retain T Documents and Vouchers and to Keep Books - (sec. 140)

(1) — A Tee has the duty to keep records of his transactions, to retain correspondence, to secure vouchers for all his expenditures and preserve them, and to procure & file all other documents wh may throw a light on the events wh occur during the administration.

(a) Standard of care is that of an ord. prudent bizman operating a biz for another. Thus, he should maintain a complete bookkeeping system according to accepted practices.

(2) Br/duty may result in

(a) Removal of the Tee,

(b) Denial or reduction of his compensation, or

(c) Charging Tee w/ the costs of an accounting proceeding.

(d) Cts. will "resolve all doubts against the Tee."

B. Duty to furnish information to the Bene. (sec. 173)

(1) Bene. is entitled to know what's happening and has the right to verify what he is told by the Tee, by personal inspection. Can examine books, accounts, etc..

(2) Tee is under a duty to furnish all pertinent info. upon demand.

(a) Tee is under a duty to volunteer info. to the bene. (if reas. regard for the interests of the bene. requires it), and not merely to wait until the bene. asks for it.

(3) Ben. is entitled to examine legal opinions obtained by the T^ee except those that are personal to him and privileged.

(4) T^ee has duty of confidence not to disclose to non-benes. facts re the T.

(5) If one co-T^ee excludes the others from access to T books & papers, the Ct. will order him to make the records available.

C. Duty to Render Ct. Acctng.

(1) T^ee has a duty to account when such is sought by one w/ a financial interest in the proper admin. of the T or estate by the T^ee:

(a) Types:

(A) Final — ends of the T

(B) Intermediate —

(2) T^ee may be relieved from the duty of acctng.

(a) Laches on part of the bene. in demanding an acctng.

(b) Estoppel of bene. by failure to act or acctng.

D. Procedure on Accounting: Effect of Ct. Approval

(See sec. 143, p. 539

* Three classic areas of application of C/P:
1. Illegality of bequest
2. Impossibility of bequest
3. Inadequacy of fund for purpose of the bequest.

Bowden v. Brown (p. 697)
- must be a general charitable intent for C/P to apply.

There seems to be a more liberal application of C/P to more varied factual situations.

Duncan v. Higgins (p. 698)
Here object of the gift went out of existence.

"T+S" You should spell out the purpose for wh the gift is made.

Quaere: Does C/P apply to outright gifts to charitable institutions? — Yes.
Is the intent a general charitable intent or a specific, narrow intent? Ct. held the latter, & the gift failed, and the heirs at law was allowed to take.

Always be on guard in this area to carefully draft so as to avoid litigation.

(SEC. 18) REVOCATION OR TERMINATION OF TRUST

Harshaw v. McCombs (p. 703)
S v. Tee. — A bad assumption is that a child will predecease the parent.

The Ct. rule was that a S cannot revoke a trust absent a power of revocation, except that a scrivener's error may be corrected.

upon the showing of fraud, surprise or mistake, want of freedom, undue influence, suggestion of falsehood or suppression of the truth, and the correction may be via insertion of a power of revocation.

Bixby v. California Trust Co. (p. 706)
On the trustor is the sole bene. even of an irrevocable ~~spendthrift~~ spendthrift trust, he can compel termination in the absence of a showing of incapacity or other reason why he should not be permitted to exercise control over his property.

What is a living trust?
What does material trust purpose mean?

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HORNBOOK Sec. 148 Power to Revoke a Trust--- The S has NO POWER to take back the T prop. and revoke the T, whether it was voluntary or created for a consid., unless he reserves such power expressly at the time of T creation, except in the case where the S is also the sole bene.

If the S directed that a power of revocation ~~inserted~~ be inserted, but this was not done due to mistake or fraud on the part of the persons preparing the instru. for the S, he may have it reformed to include the intended power of revocation; but a mistake as to the law w/ regard to the necessity of inserting a power of rev. is of no effect.

In a few states by stat., voluntary Ts are revocable, unless expressly made irrevocable, or are made revocable on the written consent of all benes.

The S may reserve to himself alone, or to himself jointly w/ others, or may grant to a third person, the power to revoke or terminate the T. Such power is personal and not transferrable, but may be relinquished. It must be exercised strictly in accordance w/ its terms.

In deciding whether to make his T revocable and so protect himself in changes in the financial situation of the S & in relationships w/ the benes., the S should carefully weigh the tax consequences, since the insertion of such a power may render him liable to income taxation on the income of the T and have important consequenses w/ respect to gift, inheritance, and estate taxation.

See. 149 NATURAL TERMINATION OF THE TRUST

On T's duration is fixed by the instru., that is binding.

If the instru. does not expressly fix the trust's duration, it will be deemed to have been intended that the T last until the S's purposes have been accomplished.

Neither the death of the S, Tee, or a bene. causes the T to terminate, in the absence of express or implied ~~consent~~ provision to that effect.

After the termination of the T the Tee has such powers over the T prop. as are necessary to enable him to account, receive his discharge, and complete his administration.

Upon the ending of the T the Tee has a duty to deliver the T prop. to the person entitled thereto, and for unreasonable delay in doing so the Tee will be liable for the value of the prop.

See. 150 PURPOSE ACCOMPLISHED OR BECOMES IMPOSSIBLE OF ACCOMPLISHMENT OR ILLEGAL

If the T purpose of a private T becomes accomplished before the date of the natural termination of the T, ec. will consider the T terminated, either because of the application of the S/Uses to a passive real prop. T, or because equity will not compel the futile and useless act of holding the prop. in T for a longer period.

A resulting T arises on the illegality or impossibility existed before the attempt to create a private, express T, or afterwards. If before, the private T never arose. If afterwards, the T terminates.

If it becomes impossible or illegal to accomplish the purposes of the S at a time before the natural date for termination of the trust, the ct. will terminate the trust or consider it terminated in the case of a private T. Charitable Ts are treated differently: cy pres; removal of Tee for abuse of the ch/t

See. 151 DESTRUCTION OF TRUST BY MERGER OF INTERESTS

Ou, after the T has been created, the interests of all the benes. pass by operation of law or conveyance to the Tee, the eq. & legal interests merge, no purpose of the S can thereafter be accomplished thru the T, and it terminates.

Ou during the course of T admin. all beneficial interests under and following the T come into the ownership of one person or group by sale, gift, or operation of law these intereste will merge, and the ct.will terminate the T, if such transactions prevent the accomplishment of all the S's purposes. (Must defeat S's intended purposes.)

One bene. , or all benes., may, if competent,surrender their interests to the tee., and end the T in whole or in part. If real prop. is involved, some states require the surrender to be manifested by a writing, signed by the surrenderer.

Sec. 152 TERMINATION OF TRUST BY COURT DECREE ON REQUEST OF BENES.

Ou the S and all the benes. of a T join in applying to the ct. for a termination of the T, it will be ended, even tho' the purposes which the S orig. had in mind have not been accomplished.

Even tho' all the benes. are competent and ascertained and they apply for a decree of termination, it will not be granted, according to the majority Amer. rule, if one or more purposes which the S sought to accomplish by the T may still be achieved by a continuance of the T, and if the S does not join w/ the cestuis; but in Engl nd and some American juris. such a decree will be allowed.

In case of a bona fide dispute regarding the validity of a T the cts. sometimes approve a compromise settlement wh terminates or modifies the T, in order to put an end to litigation and family quarrels.

Methods of Termination:

1. By the terms of the T
2. Accomplishment of T purpose
3. Impossibility
4. Illegality
5. Merger of Interests
6. Court decree on request from S + all benes.

Matter of Totten (p. 25)

Re whether an irrevocable trust was estab. by a series of deposits by P's sister, deceased. The custom of the bank was that the deposits were made "in trust for" some person named. Decedent retained the pass book.

The lower Ct. held no irrevocable T was set up, basd. on the ground that the facts did not warrant an inference that decedent intended to set up a T.

Decedent had made deposits of her own money. Ct. said this money remained the money of decedent. Title to the T res passes upon estab. a valid T. Did title pass here? Ct. held no.

It doesn't matter re the T's validity whether the bene. knew of the T, but it may have some evid. weight.

The whole issue here is whether the ownership of the money passed, and if it did, to whom did it pass? = Yes, to the bene. upon her death. "You cannot take it w/ you." Nothing is ever left w/o an owner. Q. So, did title rest at her death in her estate's admr, or to the alleged bene.? =

Ct. held the T was merely tentative during the decedent's life. The gen. rule was that a T, once estab., was irrevocable in the absence of a power of revocation expressed. Here, however, the ct. held that despite the absence of an

expressed power of rev., the decedent, by his conduct, rebutted this presumption.

Rationale: this was a tentative T wh became irrevocable as to the amt. in the acct. at death, and that title, i.e., passed to bene. at decedent's demise.

This was a "savings bank T", and this case is a landmark.

Tilden: "this case violates the S/Wills and is poor law."

In some Western states, by stat., the presumption is that a T is revocable until made irrevocable.

* Mass. view - The mere opening of a bank acct. like this is not supi of itself to show an irrevocable T. There must be other evid. e.g., delivery to bene. of the pdsbook is "strong evid. of a real T intent."

In Re Halpern's Estate (p. 29)

Ct. held that the Ts were valid and not illusory.

A T may be illusory but not so merely because the widow was left short. It would be illusory if there were no such person as the named beneficiary. Quaere: what is "illusory"? Not bona fide.

Scanlon's Estate (p. 31)

Intention here was to estab. a revocable T w/ the will as the revoking instrm.

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* Chap. I The Creation of Trusts *

(Sec. 1.) Expressed or Implied Trust Intent

De Lemil's Ex'rs. v. De Lemil (p. 1)

A TRUST is a fiduciary relationship in which one person is the holder of the title to prop., subject to an equitable obligation to keep or use the prop. for the benefit of another.

The duty of the T^ee is enforceable by the bene. This quality of enforceability by the bene., notwithstanding a lack of privity, is a characteristic of the trust.

Express trust:
1. S^or must have power to create it.
2. S^or manifests an intent to have the T arise.
3. S^or goes thru the requisite formalities.

The question here was whether a valid trust in certain securities (in safety deposit box for daughter) was estab. or whether they are to be regarded as passing under the will of the alleged settlor.

Ct held that a valid trust was created.

"A T will arise as a result of a manifestation by some external expression of an intention to create it. That intention and purpose may be manifested by explicit declarations or other acts + words."

"The owner of prop. can make himself a T^ee of it for another by conduct alone, w/o words, w/o a writing, w/o a delivery of the prop., w/o receiving consideration, w/o that other being apprised of the creation of the T in his behalf, w/o the owner's knowing that what he was creating was called a T, + w/o his making any communication to any other person."

"The failure of the S to communicate his intention to any one or to hand to any one an instrm. wh he has drawn up (or to notify the bene. in some way) declaring his intention is some evid., but it's not conclusive, that he does not have a fixed + definite intention to create a trust."*

Held, the placing + leaving of the securities in the box was "an external expression or a declaration," i.e.,

* "... and it may be evid. that the S in a T is created he reserves a power to revoke the T.

If the creation of the T was induced by fraud, undue influence or other invalidating cause, the S^or or his successors may have it set aside.

The T instrn. may be set aside on account of the disability (eg., bankruptcy, mental incapacity, infancy) of the S^or whenever a grant by S. T could be overturned for the same reason.

There may be a T upon a T. The bene. may settle his equitable interest in T in the same way that the owner of the legal title may create a T.

Principal methods of T creation:

1. T declarations (S^or = T^ee)
2. T transfers (eg. wills)
3. Ks in favor of a T^d.

a sufficient manifestation of intent to then create a T and to then & there declare himself a T^ee of that particular prop. for his daughter.

"If by the terms of the T an interest passes to the bene. during the life of the S, the T is not testamentary merely because the S reserves a beneficial life estate nor because he reserves in addition a power to revoke the T in whole or in part and a power to modify the T."

"In trust," "trustee," or other words of art, need not be used to manifest an intention to create a T.

The use of the words "T" or "T^ee" do not make it certain that a Ct. will find a T intent.

On the duties wh one undertakes are those of trusteeship he may be held to become an express T^ee, even tho' he expressly stated that he refused to become a T^ee.

[See sample trust instrns. in Library on Reserve.

Ponzelius v. Id. (p. 6)

"The alleged trust deed ... is invalid because no enforceable obligation is imposed upon D as T^ee."

Even tho' the words of trust were used, it was not a trust in fact.

Young v. Young (p. 8)

Many legal devices are available

Uncertainty + ambiguity in the description of the T elements tends to show that no T was designed; but, if the intent to create a T be assumed, it cannot be effected unless certain essential elements of T are properly described, namely the SUBJECT-MATTER, T PURPOSE, + the CESTUIS QUE T.

to a donor whereby he may convey to the object of his bounty, but he must appropriately estab. such relationship.

Equity will not interpose to perfect a defective gift or volun. settlement made w/o consid. If legally made, it will be upheld, but it must stand as made, or not at all.

A Ct. of eq. cannot by its author. render that gift perfect wh the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection.

Ashley's Admrs. v. Denton (p. 10)

Mother told son to take Slaves to another state to estab. a new home and then to send for her. Son was never heard from again. P (mother) brought this bill in eq. to get return of the slaves. D/P. D appeabd: eq. had no juris. because P had adequate remedy at law. P contends that eq. had juris. because P's case was founded on a trust, and that the son was holding the slaves for the use of P.

Held. 1. was no trust although was a fiduciary relationship between P and her son, to wit: B^{or} - B^{ee}, 1 was no trustee-benef. rel.

The Juris. of equity ought to be confined to cases of controlling legal rights, vested and remaining in T^ee, created as such in some proper mode, and not to be extended to

all cases of abused confidence.

Woodward v. Walling (p. 120)

Devise here S w/ two conds.

Do y is an estate subject to termination, what doctrine of interpretation applies? A limitation whereby an estate may be determined (ended) must be clearly expressed in order to be enforced as such.

Rule of Construction

S's intent was to provide for daughter's security and not to give her the land and prop.

Trust v. equitable charge — (p. 30, sec. 14 of Bogert) in a trust, legal title goes to trustee for the benefit of the bene. In an eq. charge, S devises not to a D, but to a devisee who takes title in his own right and has equitable title subject to a certain obligation to perform. Failure to perform will result in someone else taking over. So, in the eq. charge, he (devisee) has legal and beneficial title subject to an obligation to perform or pay someone something. He can pay any way he wishes, i.e., out of any source he chooses.

Trust v. Equitable Charge (sec. 14 of Bogert)

Merton v. O'Brien (p. 15)

P is alleging y was a trust on the realty w/ was subject to a lien; that, i.e., the S/L had not run as S/L begins to run on a trust (express or acknowledged) only upon a denial or repudiation or breach of the trust.

P alleged that this was an equitable ~~trust~~ lien and that the S/L begins to run when the lien

falls due; that the lien had fallen due over 6 years ago; & that the S/L had run and this action was barred.

Held, no trust here. Thus, the S/L had run & the action was barred. "(P) was simply a devisee of real estate, upon wh was imposed a money charge or lien in favor of a third person.

Ou an obligation is imposed on a devisee wh can be settled out of any property he wishes, a T is negated. On the obligation is required to be settled out of the corpus, a T will be found in this situation.

In Re Humphrey's Estate (p. 17)

Mere precatory words in an otherwise explicit devise will not create a trust.

Historically, precatory words were construed as mandatory. But, today, if the words are precatory, y is no trust. Thus, "precatory trust" is a misnomer today.

v. Cantrell (p. 20)

Ps are alleging that certain language of D's husband's will created a trust in some prop. wh D was to hold in trust for Ps until D's death.

A precatory trust may be found on the Trustor (S) was a stranger to the devisee or alleged T. Such a situation will support an inference that a trust was intended.

This problem arises on an outright

Precatory expressions are words of entreaty, request, wish or recommendation.
— A question of construction for the Cts. as to whether the precatory words were intended by Testator to create a T. The natural significance of precatory words is not a T, but an intent to create a T may be shown by the other portions of the instrm. or by extrinsic circumstances.
(a stranger to the affections . . . .")

T classifications:
1. Express T
2. Implied T
   a. Resulting T - "intent-enforcing"
   b. Constructive T - "fraud-rectifying"

gift is made, followed by precatory language.

A "stranger to the affections" may be an impersonal bank or professional Tee or atty. e.g. Colman v. Colman (p. 234)

From a S who has no prop. interest obviously no prop. interest can pass to Tee or cestui.

An express T, unlike a constructive T, is created only if the S properly manifests an intention to create a trust.

An abortive attempt to create a T by a particular method will not be construed to be a trust on a different theory.

See p. #7 of notes at this point.

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(Sec. 2) Inferred T Intents — Implied T - a variety of Expressed T.
Resulting Ts — Inferred T - contra.

Jackson v. Jackson (p. 38)

Gifts.

It is a C.L. presumption that the one who paid for something did so for his own benefit and intends to be the owner regardless of where the title is.

But, on there is blood relationship, the payor is deemed to have made a gift. This is a rebuttable presump.
(333 Mass 129)

Oral evid. permitted to rebut presump. of gift to wife. If this had been an express trust, oral evid. would not have been admissible as against the S/E.

The presump. of gift rises only if a factual situation raising in-

ference of affection, or on y is blood relationship.

Fox v. Shanley (p. 43)

Constructive T – constructed by the Eq. Ct. to prevent injustice or unjust enrichment. It is not said that any T was intended or could be implied.

Resulting T – an implied-in-fact or inferred T. Rests upon a presumed agreement between the parties.

If you are going to acquire status under a resulting T, you must do so at or before the time the T results.

e.g., 5 into 15 → In Mass., y will be an aliquot (even) division, or such can be made, Aliquant – a divisor that leaves a remainder after division into the dividend. e.g., 5 into 16.

So, a Ct. might find a resulting T in ⅓ of prop. on such finding is warranted.

Armstrong v. Blalack (p. 46)

The intention of the parties at the time of purchase will govern.

Gen. rule: on a transfer of prop. is made to one person and the purchase price is paid by another, a resulting T arises in favor of the person by whom the purchase price is paid.

Exception: on payor pays purchase price as a loan to the transferee. On a transfer of prop. is made to one person but the purchase price

is advanced by another as a loan to the transferee, no R/T arises.

If the payor is the wife and she puts something in H's name, the presumption (that would operate if payor = H) does not operate so that a gift to H is not presumed.

Larisey v. Larisey (p. 47)

The presumption that no gift was intended but that the payor was intended to have the beneficial interest, is not to take effect on y as a contrary intent. The presump. is based on the absence of evid. of such contrary intent.

Karas v. Karas (p. 49)

H v. W. H claims W was to have held the prop. for their mutual benefit. T/W/A.

A general contribution (major. view) to purchase price will not be sufficient of itself to raise a R/T.

Foreman v. Foreman (p. 51)

Since by stat. y could not be a R/T the ct. said y would be found a constructive T (C/T) and that the stat. does not prevent a C/T.

See bot. pp 53 + 54.

A C/T is found by act. to prevent unjust enrichment or fraud. i.e. a man may not have intended to create a T but may have intended to defraud. However, the ct. will not allow the fraud and will find a C/T. It is a passive T, ie, performed right after decree to completion.

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(Sec. 3) T Subject Matter

I res not reachable to satis. T^ee's personal debts.

U.S. T Co. v. Comm. of Internal Revenue (55)

Is a given income taxable to a bene. under a T, or to one alleging to be a T^ee who is not really a T^ee?

Here, T^el set up T for 3 benes. w/ T instru. benes. exer. power pursuant under the T instru. and made 3 Ts. So, each became a bene. as to $106 rather than 3 benes. of a $306.

Ct. held that 3Ts were created. A T may have a res of every kind of vested right wh the law recog. as valuable and alienable or assignable. (Y are prop. rights wh are inalienable and writers usually treat them as exceptions.)

Malera v. Cooper (p. 59)

Creditor v. debtor on a P/N. Defense stated is that y had been a T created by D, i.e., defense of pymt. Ct. rejected this T argument because D had no T res and never had any. Tx had gotten poss. of the P/N, and D could only allege that he had the $1000^{00} in T. But, that $1000^{00} did not really exist; y was only a debt wh was cancelled. You cannot be T^ee of an obligation.

How tangible must assets be to be a res for T purposes? Receivables on the books of a biz are choses in action, and can be the subject matter of the T res.

If D had ~~not~~ kept the note, it would have been a chose in action and would have qualified as T res.

We are talking here about T creation. The creditor has a chose in action, not the debtor. The debtor has nothing to hold. In general, just to tell a debtor to create a T of the debt

The subject matter of the T must be certain. It must be either described in the T instru. or a formula given for identifying it. If uncertain it (T) will be void.

It must be specific + identifiable at any given time, but may be changed by the T^ee thru sale and reinvestment.

will not create a T because the debtor has nothing he can put in T.

People ex rel. Barrett v. Cairo-Alexander Cty. Bank (p. 61)

Because the Bank did not phy. transfer the funds of P's insolvent on deposit in a commercial acct. to a "T account", the ct. held y was no T created. Therefore, P (receiver in bankruptcy of depositor) could not be preferred.

Things called "Ts" may not be T, and Ts may be not called "Ts."

If a bank as Tee takes T funds and buys securities, and the bank then fails, the orig. amt. will still be turned over to another Tee for the benefit of the benes.

On a Tee deposits T funds in a checking or savings acct., he will be a guarantor to the benes. for any loss due to, eg., failure of the bank and pymt. thereby of $.50 on the dollar.

Here, at the time the account came into being, the parties were not thinking of a T. What was the T purpose? For whom was the bank to do something? And, if the bank was Tee, and deposited the funds w/ itself in a commercial acct., it would take the chance of its failure and lieb. as guarantor. But, y was no Tee

A valid T could have been setup. The bene. would have been the now insolvent Bridge Co.

Squire v. Nalley (p. 76)

Did the escrow agreement create a T fund? Ct. held that the escrow agreement author., by the passing of absolute title to the T Co., the T Co. to mingle the "T funds" w/ general depositary assets.

In an escrow agreement, once the parties

putting things in escrow have performed, the things held in escrow for them become their's.

!! TEST !! Is there a T res sufi identifiable to warrant a finding of T? That's a test. Silden said: transfer on books should be sufi.

Brainard v. Comm. of I.R. (p. 63)

Purported T of profits. By the time the profits came in, the T, if at all, had been created. Therefore, since the T res + T intent did not concur, P was liable for taxes on the profits as income. He might also be liable for gift taxes for the gift to the T after he got the funds.

McKay v. Paradise (p. 68)

Ex owed assoc. money wh had been paid to it by its ees for the assoc. So, debtor + creditor here. (seems like embezzlement). These were "automatic deductions" from pay checks. Did a res ever exist?

Ct. held no T. Bankrupt was a debtor who failed to pay his debt.

→ The result might be different today.

Wallace v. Elliott (p. 70)

Claims for preferences. T/B/R. A coupon acct. was set up, but ct. held this was a transaction and created only the rel. of debtor + creds. between the bank and appellants.

Go to NEXT SEC.

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(Sec. 4) *SELECTION OF A TRUSTEE* (Bogert 29-33)

Estate of McCray (p. 94)

A T will not be allowed to fail for want of a T^ee, even tho' none be named.

The lack of capacity of grantee to receive legal title does not defeat the creation of the T. [Note diff. between lack of capacity re creation of T, and re discharge of the T.] Wittmeier v. Heiligenstein (p. 95)

T^ees may be of diff. types or functions.

Blades v. Norfolk S. Ry. Co. (p. 100)

MERGER

If A → "to B in T for B" merger takes place and B's legal + eq. titles merge into absolute title so that the T will not be allowed to arise.

Partial Merger

If A → "to B in trust for B + C" = [Mass.] On Mass., no partial merger, and B would hold all in T. [N.Y.] In N.Y., y would be merger as to ½ and B would be absolute owner of his part.

HERE, X → A, B + C as T^ees for A, B + C.

Court held the grantees held as T^ees as JTs, and the eq. title as bens as Ts in C.

a

Y cannot be a sole T^ee for himself as bene. But, if A + B held as T^ees for A, valid.

A → "A+B for A." – Valid.

The reasons for these things is that a person cannot be obligated only to himself, but if y are others as Tees or benes., the T will arise + continue.

Gathright's Tee v. Gaut (p. 103)

Advisors to Trustees

Tees here could do nothing w/o the advice and consent of the advisors set up by the Settlor. Advisors are out of the State and could not be reached. Clause allowed that any circuit Judge could be the advisor absent the other advisors.

They went to the judge in his indiv. capacity. Ct. said that a Ct.'s assistance may be invoked in an unofficial capacity.

A S may adorn a T w/ auxiliaries in addition to Tees, vesting them w/ certain powers, maybe advisory or veto powers. The Bene.(s) may be the "advisor(s)". They are in a fiduciary capacity to benes., and have no legal title as that is in the Tee.

PERSONAL TRUSTEES

Was the designated Tee the only one who can be the Tee? i.e. was he a personal Tee intended by S to be the one and only Tee? If so, and if such "Tee" cannot or will not be the Tee, the T will fail.

Tilden: not good to have auxiliaries because y may be much strife between Tees who want power, and the advisors.

If advisor wants Tee to do or

not do something, what can advisor do to compel compliance? Depends on the wording of the T instrn.

What about succeeding T^ees in the merger situation?

In this case, the judges were stipulated to be advisors as a class. Therefore, since no particular Judge was designated, this was not a personal T.

Adams v. Adams (p. 106)

Two kinds of Ts:

1. Testamentary - will
2. Inter vivos - deed

Ee test. T^ee qualifies by accepting the T, posting bond, filing petition for appointment + getting other papers (military o.k., et al).

The Inter vivos T^ee qualifies by accepting poss. of the res.

Holding — Here ct. said that a named T^ee may disclaim impliedly by inaction.

The judge of probate has juris. to fill the vacancy w/ the naming (i.e., appointing) of someone else.

On bond is required by stat., the ct. may allow the bond w/o sureties. On a will says "no bond required" and statute requires a bond, the phrase in the will is interpreted as being not to require sureties.

A person cannot be compelled to accept a T and become Tee. Thus, one who has disclaimed has a complete defense to a suit by benes. against such one for failure or refusal to accept the T res. The Tee's liability begins as of the date of acceptance of the T.

Oliff's Estate (p. 108)
Executor was also Tee. When did he become Tee?

Q was no gap between the time he was Ex or and the time he was Tee, and the wrong complained of occurred while he was Ex or (so, since P) was being sued as Tee he defended by saying "I did that wrong but while I was Ex or. (What about the tort doctrine that a person will not be allowed to defend himself by pleading his own wrong.) Moral: when you sue, read the book.

Rules of Law

One appointed as Tee only becomes same as of the date of qualification under the statute.

The Tee takes such interest in the prop. conveyed to him as is necessary to the execution of the T and no more, regardless of formal words of conveyance or the lack of them.

The spouse of a Tee is not entitled to dower or curtesy.

See Sec. 5 — Methods of Consideration; Creation (Bogert 10, 22-24.)

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Sec. 6 — The Bene. (Cont'd.) Bogert 34-39

Morice v. Bishop of Durham (p. 158)

Name case.

In case of private T, if bene. is not sufi identified, the T will fail.

Here, the issue is not whether this is a charitable T.

A resulting T will arise, on the T fails for lack of certainty, in favor of the S or.

Townsend v. Gordon (p. 160)

"If prop. is transferred to a person to be disposed of by him in any manner or to any person he may select, NO T is created and the transferee takes the prop. for his own benefit."

In Re Davis' Estate (p. 162)

A Tee may be invested w/ discretion or be given the power to select one or more benes. from a class named in the will, or even to deter. the amt. the benes. selected by him should receive so long as the Tee is required to divide the prop. to the CLASS indicated by the testator.

Stoehr v. Miller (p. 165)

Prop. cannot be forced upon a bene. against his will, and a valid T does not exist if the bene., when informed of it, clearly and unequivocally rejects or renounces its benefits.

If the bene., when he learns of the T accepts it, his acceptance relates back to the date of the declaration. If he repudiates it when

he learns of it, his repudiation relates back in the same manner, and the title must be regarded as having been in the Sor all of the time.

(Sec. 7) * The Incidents of the Beneficiary's Interest

(p.170) Blair v. Commissioner of Internal Revenue

In the absence of a valid restraint upon alienation (i.e., spendthrift T provision), a beneficial interest is freely assignable and alienable.

Duncanson v. Lill (p.172)

A land T wh stated that Tee should hold both legal & eq. title & that right of Bene. should be a personal right.

Thus, when Bene. assigned to Assee, Ct. held that no change of title was made, but remained in Tee. Bene had personalty here even tho it was a right to proceeds from realty. "The Assee merely took the place of the assor as Bene's. under the T agreement & the T cont'd. to exist. The acquisition of those rights by the Assee effected no change or transfer of the title to the real estate."

Marx v. McGlynn (p.173)

Ct. held that even tho' an alien may not take title to realty, the statute d/n prevent an alien from holding personalty.

Right to receive profits from land is a personal right, and ∴, T is not invalidated.

Beneficial int. here was held to be personal prop.

"The title both legal & equitable, is in the Tee, and it is expressly provided

that a bene. or C.Q.T. in such a case takes no interest in the lands, but has the simple right to enforce the perf. of the T in equity.

S → T for X, Y & Z!! Is the int. of B real or personal? — In a given case it may affect the succession rights.

Cuvriden v. Chandler (p.175)

B_1^{ee} tried to transfer his int. to his wife & kids in T w/ wife ast^e. Ct. held that the deed under seal took the place of phy. transfer (delivery). How do you deliver title to tangible personal prop.? By delivery of the chattel, and if documented goods, by delivery of B/L, receipt, etc.

But, here it was not feasible to make a manual delivery, the poss. being in T^ees for B_1.

A beneficial int. in a T is transferrable.

The delivery of a deed under seal is deemed to be delivery of the prop. conveyed.

Can you do this w/ a chose in action w/o a seal? Seems so, but you will have a tough time getting around T^ee who should have some memo on wh to build his defense for transferring.

Matthews v. Thompson (p.176)

Testator owed sis & bro. much $$. Testator → realty "to nephew in T for sis & brothers." Later, at request of Bees, T^ee reconveyed to testator. Upon testator's death, his wife got prop.

The letter requesting reconveyance was

Spendthrift T - one estab to prevent the bene's habits from dissipating his principal. ('bit of levity.)

in writing, but not sealed + delivered to T^ee. B^ors now sue and allege the letter to be invalid + T^ee not to have had power to recovery.

Ct. held the T^ee had power by this letter.

Basic proposition: suppose a land-owner borrows money. Then, he makes a declaration of T of himself as T^ee for benefit of his wife + kids, but this is not on record. When C^ors go for his land, he says, "sorry, but I'm only a T^ee." This is what they seem to be doing in this case, but it turned out that they couldn't revoke the T.

Jos. Wheeler
48 Fayette St.
Cambridge 39, Mass.
- 2 $2.50 tickets

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(Sec. 8) SPENDTHRIFT AND RELATED Ts

Brandon v. Robinson (p. 188)

The poss. of prop. entails the obligations of prop.

This was the English view re the Sp/T.

Broadway Nat'l. Bank v. Adams (p. 191)

The rule of the C.L. is that a man cannot attach to a grant or transfer of prop., otherwise absolute, the condition that it shall not be alienated; such cond. being repugnant to the nature of the estate granted.

Ct. held that "if the intention of the founder of a T, like [this one], is to give to the equitable life tenant a qualified beneficial

and not an absolute estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in eq."

"... Any other person, having the entire right to dispose of his prop., may settle it in T in favor of a bene., and may provide that it shall not be alienated by him by anticipation and shall not be subject to be seized by his Cors in advance of its pymt. to him."

So, a Cor of a bene. of a valid spendthrift T cannot reach the bene's interest in satis. of the bene's debt.

Mackason's Appeal p. 196

Quaere: Is the owner of prop. able to dispose of it so that he can have full use of it but put it beyond his Cors?

The Ct. held that the object of this T being avowed to be avoidance of Cors and estab. for settlor's own benefit the T will not stand. I.e. A Sp/T estab. by the S for his own benefit will not be immune from attack by Cors of the S. There was no T purpose any more here. This view is uniformly held.

"Black-letter" Law

Suppose S —Life ins.→ T^ee for Bene. a life ins. policy insuring S. Is it valid? Can

it be hit for inheritance taxes?

Eaton v. Boston T. Co. (p. 199)

T^ee in bkrptcy is saying that "all assets of the bene. of the T are mine."

Did the provision "said income to be free from the interference or control of her Cors" make the T invalid? No, valid in Mass., and even tho' it can be assigned, due to the restraint on Cors, it cannot be reached by Cors in Mass.

Also, the Bankruptcy Act bows to Mass. law. "The law of Mass. treats such restrictions as limiting the character of the equitable prop. and inherent in it."

Can a right to revoke be called a personal right or interest, and/or non-transferrable? An asset?

Watch your own juris.

Hull v. Farmers' Loan + T Co. (p. 201)

Does bankruptcy = pymt.? It is no doubt that the Cor's rights of enforcement are terminated (same result when S/L tolls); but that does not necessarily mean that it has been pymt.

Here, court held that P (T^ee in bkrptcy) could not reach the interest of the bene. held in T by the D.

Ct. held this was not a case on a Testator seeks to bequeath personal prop. wh shall be free from liab for the bene's debts.

Here, the testator has "merely prescribed the cond." ("my said son shall have the principal of said T fund whenever he shall become finan-

cially solvent ....") on wh he will make a gift of the principal." "The nature of the cond. itself determines the controversy."

Erickson v. Erickson (p. 202)

In Re Moorehead's Estate (p. 207)

There was held by the court here of public policy.

This was a suit by wife for support out of trust funds to wh her husband was entitled and wh were being held in T for H.

T had been a testamentary T, and in it were the words to the effect that the bene's int. should not be affected by "Ks," "debts," and "creditors." However, Ct. held that the wife could have her support.

Talley v. Ferguson (p. 209)
Debts not typical Southern T
mtge.

Assign. -
Charitable T.

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(Sec. 10) The T Purpose: Passive and Illegal Ts

Re the Stat. of Uses (1535).

Craig v. Kinsey (p. 270)

Three exceptions to the S/U:

1. On a use was ltd. upon a use;
2. On a copyhold or leasehold estate or personal prop. was ltd. to uses;
3. On such powers or duties were imposed, w/ the estate upon a donee to uses (T ee) that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power.

Special or active Ts were never w/in the purview of the statute, and if powers or duties are imposed upon a donee to uses, i.e., a T ee, to make it necessary that he should continue to hold the legal title in order to perform his duty or execute the power, the T is such a special or active T as will remain unexecuted by the statute. ... If any agency, duty or power be imposed on the T ee, as to preserve contingent remainders or to raise a sum of money, or to dispose of the estate, by sale, and many other cases, the S/U will not operate.

A passive T is primarily tho' not necessarily ltd. to realty.

Phillips v. Vermule (p. 272)

Bene. can compel Conveyance

Ou Tee fails to convey the title at the time provided, the cestui que T can go into Eq. and that Ct. considering as done that ought to have been done, will allow Agreement to be brought against the donee to uses.

This case is within the third exception to the possible Ts.

This was an active T until the prescribed time of conveyance of title by the T^ee arrived, but thereafter it became passive.

An active T can become passive on the expiration of ~~[redacted]~~ the duty to be performed by the T. e.g. "To my wife to the use of John until he returns from the service."

If the T^ee is to pay the gross income to the cestui, the T may be passive.

But, ou he is to pay the NET income the T is active.

Gifts to T^ees to sell are usually accompanied by express or implied directions to manage pending sale + hence are active.

Ts to invest carry express or implied powers to pay or apply

income and are active.

Passive T — like any other T so far as it had the normal elements of an express T, but it has lost its continuing purpose either because it never had any or because the purpose has expired.

Reed v. Browne (p. 275)

An income tax case. State says that D was liable for the taxes. She said that she had assigned the income to the nephews. State rebutted: statute did not allow assignment of this type and that, ∴, D was still liable. D rejoined by saying that this had become a passive T, and that the S/u executed the T and that, therefore, she could and did convey a good FSA by the assignment.

Could this be called a renunciation of the T? See Wilmington Trust Co. v. Carpenter, p. 167.

This problem arose because of the N.Y. stat. prohibition against the assignability of the beneficial interest. However, most states don't have this type of statute.

MacRae v. MacRae p. 277

The Settlor-cestui of a T put an

illegal purpose (as, e.g., to cheat his (loss) will not be aided by eq. in a suit to recover the prop.

Thompson v. Steinkamp (p. 284)
Ct. found this to be a passive T aid, thus, by executing it, the land was reconveyed to the estate.
It was said that the wrongdoing of the H defeated the T and that since Wife #1 had no part of the fraud, she got the prop back.

Newman v. Dore p. 286
Right of election giving to surviving spouse to take dower or stat. forced share. The only exception: ok a T is set up wh equals or exceeds the intestate share.
Husband – deceased set up such a T. However, Ct. held that the T was illusory due to power of admin. in Settlor – husband and power of revocation, in this case; that

the T^ee was really the Agent of the Settlor.

Why was the T defective? Was it one factor or a combination of factors? Probably the latter.

Presumption of gift (causa mortis) on it is made w/in 3 (?) years of life. — Rebuttable.

A T to convey as the deed. May direct is passive.

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Note: Tho' omitted, the secs. 11, 13 & 14 are important.

(Sec. 12) CONSTRUCTIVE TRUSTS (Page 306)

Many similar features as the Resulting Ts. These CsT/Ts are raised by operation of law by the use of presumptions. It is constructed by the ct. as a remedial device.

In a sense, not a T because the one recog. as Settlor here never intended to be a settlor, & "T^ee" never really intended to be a T^ee.

Created to prevent the perpetration of a wrong.

Note: In Mass., you can accumulate under a T for a long time despite the rule against perpetuities.

Complainant need not prove inadequacy of remedy at law.

Must ~~prove~~ identify the particular prop & as a res of the T, & cannot recover by merely proving wrong doing by the D and that the latter has some assets.

Newton v. Porter (p. 309)

P is true owner of bonds, and sues the taker of the bonds from the thieves. P alleges that since D took the

bonds + securities w/ notice of their being stolen, the D should be declared, for the securities and proceeds of stolen bonds, Con/T^ee for the P.

The bonds were negotiable by delivery and had been negotiated. Thus, P seeks to get the proceeds from the sale of the bonds.

This ct. held for P, saying that this equitable right to follow the proceeds would continue + attach to any securities or property in wh the proceeds were invested, so long as they could be traced + identified, and the rights of BFPs had not intervened.

When did the T arise? At the time of the wrong, or at the time of eq. decree declaring the con/T to exist? Cts. are split here.

Con/T + resulting T are passive: once the ct. holds for the P, it ceases to be a T. They do not involve administrative duties. They are not, however, executed by the Statute of Uses or any similar rule. The sole obligation of the T^ee is to convey to the bene.

Ct. said in Newton case, that if the orig. prop. wrongfully obtained is sold or transferred, etc., the substituted property will be placed under the C/T.

Neiman v. Hurff (p. 310)

D here killed his wife and was confined in prison. During her lifetime the decedent + D owned a home as tenants by the entirety. [Where does a tenancy by the entirety vest?]

At C.L., no one shall be allowed to profit by his own wrong. So, a beneficiary under a will who kills testator will not be allowed to take. Same on ben. under ins. policy kills the insured.

D and his wife also held some stock as joint tenants. Decedent named as her sole bene. the Damon Runyan Fund.

So, Ct. held that a murderer or other wrongdoer shall not enrich himself by his iniquity at the expense of an innocent person. T/P (Rep. of the Damon Runyan Fund) saying that D is a c/tee of that part of the subject matter wh came to D by reason of his wrong - the wife's ½ title vested in the D as T/E for himself and the Runyon Fund. So, in the bond and securities, the Fund got beneficial interest in ½ of them and a beneficial int. in the other ½ subject to a lien of D for so much as he put into their purchase.

Some juris. don't recog. tenancy by the entirety any longer. If N.J. is one

of those states, then the court's language may be explained (Tilden says that he cannot understand the cts. holding re the division of ½ interests due to question of survival and whether the decedent might not have survived the D.)

Bohannon v. Trotman p. 314

In holding for P, ct. held that if X makes fraudulent representations to a testator for his own benefit, and gets the prop. at death, he will hold it in trust for the beneficiary who would have taken; and that prop. obtained by one thru the fraudulent practices of a third person will be held under a constructive T for the person defrauded, tho' the person who rec'd the benefit is innocent of collusion. If such person accepts the prop., he adopts the means by wh it was procured. "If it comes thru a polluted channel, the obligation of restitution will follow it."

Similar principles are applied in the case of undue influence, duress and mistake.

Edwards v. Strong p. 316

P (Strong) made oral agreement w Athans to obtain an option on a "key" city lot, Athans acting as A for P for this purpose. Athans',

however, secured the option in his own name and, along w/ Ds, exer. the option themselves in D's name.

P v. D (who had full knowledge of Athans' fiduciary capacity) to impose a C/T on the legal title to the lot of land.

S/F argument failed because of failure of D to plead it.

He who would have eq. must be willing to do eq. So, P had to reimburse D to the extent of the commission agreed by P to be paid to Athans.

S/F notwithstanding, ct. said it would enforce the C/T because to do otherwise, would be to allow a fraud to be perpetrated.

This is like a Tee who uses T assets for the purchase of land in his own name. So long as the assets can be traced, the bene. can recover. Exception: on the buyer is a BFP; the bene. will not recover the assets or goods from the BFP. But, Tee would be liable.

As in agency cases on the A breaches the duty and/or the K, a C/T will be raised in favor of the Pr over the thing wrongfully obtained by A's breach.

Searson v. Webb (p. 318)

a C/T is the creation of the ct. and is permitted to be proved by

parol despite the S/F upon the ground that the stat. will not be permitted to shield a fraud.

"A C/T, unlike an express T, is not a fiduciary relation, although the circumstances which give rise to a C/T may or may not involve a fiduciary relation."

See 104 Mass. 182; 227 So. 27: a joint venture is a fiduciary relationship.

"So also, in certain cases on the D wrongfully prevents the P from acquiring prop. and acquires the prop. for himself, the P can be compelled to surrender the prop. ~~to himself~~ to the P and not merely to restore the prop to the person from whom the D wrongfully acquired it.

Gen. Rule: a purchase, upon his own account or for his own benefit, by a fiduciary and confidant, of the prop. constituting the subject matter of the confidence or fiduciary relationship, in violation of the T or confidence reposed in him, raises a C/T in favor of his Pr or confider.

(Chap. III) Remedies Available for T Enforcement

To get an injunction, e.g., you still must show the usual requisites (irreparable injury or harm).

3 MAY 60

On a fiduciary finds himself in a position of not knowing what to do, he may appeal to the court for instructions. A decree will protect the Tee from personal liability.

5 MAY 60

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Measure of Damages

If bene is bringing the petition against several T^ees, his action runs not against the T^ees per se but against the T, and T^ees will be liable jointly and severally.

If one T^ee sues a fellow-T^ee (e.g., for indemnification or contribution), the liability is several.

See differences between Indemnification & Contribution.

Y was a case on T^ee - I stole from the T and then sued the other T^ees to restore the T, on the ground that they were negl. in failing to keep an eye on the T. T^ee #1 recovered.

In Re Deare (755)

Bruns. v. T^ee to get diff. between loss in the decline of stock (held in T) in value. Other prop. had gained in value, but was not [redacted] the legal list. [redacted]

Ct. held for bene. - to hold otherwise would encourage unwarranted speculations. Thus, here is an application of social policy. Furthermore, T^ee had duty to get rid of the stock not on the list.

Was T^ee personally responsible for the legal expenses? Ct. held that

If this were brought in a "prudent investor" juris. rather than "legal list" juris., quaere?

I gets benefit of a gain from an illegal investment goes into the T. Due to "he who seeks eq. must do eq.", the T would get the diff. between the amt. of the gain & the expenses therein involved.

Will of Mendel (757)

Unlawful investment by prior T^ees.

Why elect to pursue eq. lien rather than trace? Assume orig. T = $106. Fruits of the T res = $206. Tracing presumes title to the res in any form remains in the T. Thus, on the asset has appreciated, trace. On asset has depreciated, use lien: the P&H would have a lien on the full amt. of the depreciated asset, and would be a general cor (along w/ other cors) of T^ee indiv. in T^ee's own assets to the extent of the deficiency. See §157-159 of Bogert.

* (Sec. 5) Tracing T Funds; Identification; Presumptions in Aid of Tracing *

[Note: under modern damage law, the T^ee is liable to the T only to the extent of the loss ~~due to T^ee's~~ caused by T^ee's wrongdoing.]

When ~~T~~ cor has located res or its products, then T ~~he~~ makes election of remedies.

The benef. has the B/P that the assets before the ct. are T res or its fruits.

Appeal of Cross ch. 761

A Resulting T will attach as to prop. acquired w/ T funds if the prop. was acquired at the time of the existence of the T and w/ ~~out~~ T funds.

Attempt here to get either a ~~resulting~~ T imposed, or a lien. However, the ct. did not allow the R/T theory.

Tracing is based primarily on prop. con-

cept. The lien here rejected was based on equity's show of favoritism.

Mass. Bonding & Insurance Co. v. Jocelyn 762

Ct. held they would impose T on the proceeds because the illegal use of the funds was the only thing wh kept the policy alive, thereby making it possible for benefits to flow. The funds came from a bank acct. in wh were commingled the T^ees personal funds and the T funds (mostly).

How could we gauge the amt. of return? Held, "the trial ct. was right in prorating as (it) did the proceeds of the policies in wh but partial pymts. of premiums were made but of the moneys of the estates. The decree ltd. recovery to the amt. of the actual shortage as determined by the probate ct. This ... the P was clearly entitled to."

A T^ee may make no profit out of the handling of a T estate. ... Ou money held upon T is misapplied by the T^ee and traced into an unauthorized investment in prop. of any nature, the investment thus made, in the absence of a claim of bona fide ownership by a third person, may be treated by the bene. as made for his benefit. The consid. for the investment is T money and ~~prop~~ the bene. becomes the eq. owner of the prop. purchased therewith. His right thereto is a prop. right, not one created by any preference or favoritism shown

by a ct. of eq.

Tracing can be like tracing stray cobs up a certain stand.

If a T is imposed, tracing must occur.

The issue here is whether the amt. of recovery to the T is to be the amt. of res spent wrongfully + the gain directly attributable thereto, or a pro rata amt. of the entire insurance return?

Slater v. Oriental Mills 766

hypo: T[e] uses T funds to pay his Mge. T indiv. owned B/A on wh this mort. was. After discharge, the bene. will be subrogated to the former rights of the mor and the discharge will be stricken from the record.

This ct. held that "on the prop. or its substantial equivalent remains, we concede its force; but on it is dissipated and gone, the appropriation of some other prop. in its stead simply takes from cors that wh clearly belongs to them.

Jas. Roscoe (Bolton), Ltd. v. Winder 774

Purchaser of biz was assigned accts receivable by S, and B was to hold the proceeds of the collections. B put the proceeds into an acct. On May 19, B spent all the money except £25, replacing the amt. spent on May 21.

The P is seeking the proceeds from the collections by B, but ct. said that tracing stopped at the time the withdrawn funds were spent. Trace here: debt → funds.

swollen assets doctrine?

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in acct. before w/drawal → stop!

Mitchell v. Dunn 779

T^{ee} alleged that the amt. she withdrew from the acct. was her own and not that of the T. She (T^{ee}) later dissipated the amt. remaining in the acct.

T^{ee}-P is saying that the prop. (land) bought by D-T^{ee} w/ the funds w/drawn, is subject to the T due to a trace. D is saying the above.

Held, T./P: alth' there is a presumption in a case like this that the funds first withdrawn were the T^{ee}'s individually, but this rule will not be allowed on T^{ee} is shown to be dishonest. Dishonesty was here shown.

ABSTRACTS - TRUSTS

Chap. II

Sec. 7 - Safekeeping and Preservation of Trust Prop.
See Bogert, Hornbook, secs. 99 + 100.

HAYWARD v. PLANT - 98 Conn. 374, 119 A. 341 (1923) [(p. 468)]

Action: In Equity to deter. the compensation of 5 executors, one of whom was the U.S. Trust Co.

Facts: U.S. Trust Co., one of the executors and a corporate T^ee, having banking powers, deposited trust funds w/ itself. The Trust Co. deducted from the gross profits upon this deposit its proportionate share of the expenses of its banking biz, + credited to the estate the balance as the net profit earned upon this deposit.

Issue: whether a T^ee who is also a custodian can benefit by the use of the trust funds in his keeping?

Ct. below overruled the claim of the here appellants that the gross profit should be deducted from the amount found by the trial ct. to be the just + reas. compensation for this executor. Appellants ask to have the finding corrected by adding the total amt. rec'd. by the Trust Co. from the use of these funds, in excess of that w/h it allowed & estate.

Holding: Affirmed.

Reasoning: On a corp. T^ee's duties as executor do not involve the care + custody of its cash funds in its banking ~~deposits~~ dept., the gen. rule that a T^ee must not profit by the use of the trust funds in his keeping, does not apply.

The Trust Co. was entitled to reas. profits and compensation for its expenses of the care + custody of the deposit as the custodian of the deposit, a position wholly apart from and unrelated to its duties as an executor. - Convenience outweighs disloyalty.

McAllister v. Commonwealth (p. 471)

Action: Surcharge of T^ee by beneficiaries.

Facts: T^ee deposited trust funds in his own name + the bank of deposit failed.

A-2

Below, T/P on basis of P's requested charges to the jury. D appealed.

Issue: Whether a T^ee, who deposits trust funds in his OWN NAME, is responsible for the loss of such funds arising from such deposit?

Holding: Yes. T/P/A.

T^ee liable if loss occurs even if he acted in good faith.

If a T^ee, who even acts w/o willful impropriety, shall undertake to make a deposit in a banking institution, the such must go down on the books of the institution, in such Terms as not to be misunderstood, that they are the funds of the specific trust to wh they belong, or the T^ee cannot, when brought to account, call it trust property. He must yield to any wh is essential to the public welfare, and pay the money wh is lost.

Chapter House Circle of the King's Daughters v. Hartford Nat. Bank + Trust Co. (p. 473)

Action: To disavow a mtge. investment and compel D to replace in the agency acct. the amt. invested in the mtge. w/ interest.

Facts: D, acting as agent for investment for P, invested P's money in mtge. and rec'd. mtge. & note secured by it in its own name. Then D executed written declaration of trust of the realty, acquired by foreclosure + purchase, for the P. Tho' D's records + books showed that the mtge. was held for the P, the mtge. nor its record showed such + P did not know it.

T/D. P appealed.

Issue: Whether a T^ee commits a br/Trust when it invests the funds it holds as agent for the beneficiary in a mtge. loan taken in its own corporate name, w/o designating the capacity in wh it

took and was holding the security?

Holding. Yes. J/D/Rvsd. if.... J/D/A if....

If the T^ee takes title to the trust prop. in his indiv. name in good faith, and no loss results from his doing so, he is not liable for br/trust. However, even if he acted in good faith, if a loss resulted from the fact that he took title in his own name, he would be liable for the loss.

Earmarking Rule

An exception to the earmarking rule has been made in the case of bearer bonds. A T^ee may hold them and is not under a duty to get them registered.

On the loss is due to circumstances wh would have brought it about, even if the funds had been deposited or invested in the name of the T^ee as such, the Pltf. - cestui is entitled to recover only such losses as resulted from the fact that the T^ee - Defendant took the note + mtge in its indiv. name, not losses due to general big conds. wh would have occurred even tho' the mtge. had been taken + held in the name of the D as T^ee.

*NOTE: HOLDING TRUST PROP. IN THE NAME OF NOMINEES

Through the efforts of corporate fiduciaries statutes have been passed in many states sanctioning this practice on condition that the corp. be liable for the acts of its nominees and that the control of the stock by the nominees be safeguarded. This practice is done in order to save time + expense incidental to proof of power in compliance the T^ee to trans. the stock in compliance w/ stock exch. rules or rules of transfer agents.

A-4

Sec. 8 The Trustee's Duties as to Investments

Moore v. Sanders (p. 481)

Action: To remove one T^ee and substitute another.

Facts: Appellant (D) rec'd. the fund and held it for 8 months w/o investing it + w/o telling P, guardian of the benes., of the fund's existence. Instrm. silent re these duties. Ct. below found for P and appointed her as T^ee. D appealed on the grounds that the evid. showed no good cause for removal.

Issues: (1.) Whether ∃ is an implied duty to invest?

(2.) Whether ∃ is an implied duty to notify the benes. or their guardian of the fund's existence?

Holding: Yes to both. T/P/A.

(1.) On trust money cannot be applied either immediately or w/in a short time to the purposes of the trust, it is the duty of the T^ee to make the fund productive to the cestui que trust by investment of it in some proper security, and a duty to invest arises by necessary implication from direction to pay over the interest or income.

It's the duty of the T^ee in the exer. of sound judg. + discretion to convert unproductive prop. into an income producing fund as soon as can reas. be done under all the circumstances.

(2.) It was the duty of the T^ee to notify the guardian of the benes. of the existence of the fund.

Miller v. Pender (p. 484)

Action: Accounting and surcharge.

Facts: Action for accounting and to surcharge a T^ee for br/duties as to investments.

Trial ct. — T^ee was given power "to invest the same in such securities as said T^ee shall deem proper (even tho' the same shall not be classified as trust investments under the laws of N.H.) ...." Trial ct. found that T^ee had broad discretion, but used the st/care of an OPM "in dealing w/ his own prop." Ps excepted. D = T^ee.

Issue: Whether a T^ee w/ broad powers of discretion, who invests trust funds w/ the "care & skill wh a man of ord. prudence would exer. in dealing w/ his own prop," has satis. the required st/care?

Holding: Not necessarily. T/D/R.

St/care

In making investments for a trust, the proper standard to follow is the care & skill of a prudent man in conserving the trust prop. — not that of a man of ord. prudence.

Dictum: Provisions enlarging the powers to invest are strictly construed.

On by stat. or by judicial decision the scope of trust investments is narrowed, an authorization to the T^ee to make investments "in his discretion" is ord. interpreted to enlarge his powers so that he can properly make such investments as a prudent man would make. — In states in wh, in the absence of a provision of the trust

sistem., the T^ee can properly make such investments as a prudent man would make, a provision authorizing him to make investments "in his discretion" ord. does not extend his powers. A provision in the terms of the trust authorizing the T^ee to exercise his discretion in making investments is not interpreted as permitting him to make investments wh a prudent man would not make.

"Securities" includes, in its commonly used broader sense, unsecured obligations such as debentures and shares of stock.

The DAMAGES for this br/trust duty: the losses from securities that the T^ee was not author. to invest in to the extent that said losses were due to the lack of prudence as stated above and not due to general econ. conds. w/o such lack of prudence in conserving the trust estate.

Springfield Safe Deposit & Trust Co. v. 1st Unitarian Society (p. 458)

Action: Accounting.

Facts: D-T^ee invested trust funds in a partial interest in a mtge. The amt. lent by D on this mtge. was entirely composed of the funds of this and other trusts, the records of the T^ee (D) showed the interests of each participating trust, & a cert. of int. in such mtge. was filed in the portfolio of each such trust. A was a default, foreclosure, and a loss. This was during depression.

P alleged that D br/trust by mixing

this trust's funds w/ other trusts' funds in purchasing the mtge.

D showed widespread custom in support of the investment.

Issue: Whether an investment of trust funds in a partial interest in a mtge. is a br/~~trust~~ as a matter of law?

Holding: No. T/D.

Participating Mortgages

The mere fact that trust funds are combined w/ funds not held in trust or w/ funds of other trusts in making investments does not necessarily make the investments improper, provided that the investments are in other respects proper. Thus, an investment of trust funds in a participating interest in one or more first mtgs. on land, or in a group of securities w/ are all proper trust investments, may be a proper trust investment. Such investments are not proper if they are not such as a prudent man would make of his own prop. having primarily in view the preservation of the estate and the amt. and regularity of the income to be derived.

Dickinson, Appellant

P. 491

Action: Appeal from a partial disallowance of an accounting.

Facts: Tee here, in good faith & w/ qualified advice, made two separate investments, amounting to about 1/3 of the total trust funds, in the private corporation's (Union Pacific R.R. Co.) stock at a time when that corp. was still developing & heavily indebted.

p. 7-8

Issue: Whether a bona fide investment of so large a proportional part of the prop. is an exercise of sound discretion, i.e., "prudent?"

Holding: No. T^ee's last investment disallowed, and T^ee must be chgd. w/ the amount of it.

A T^ee must in the investment of the trust fund act w/ good faith and sound discretion, and must observe how men of prudence, discretion, & intelligence manage their own affairs, not in regard to speculation, but in regard to the ~~performance~~ permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

The question of lawfulness & fitness of the investment is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated.

Duty to maintain a balance

A T^ee must, so far as is reas. practicable, hold the balance even between the claims of the life tenants and those of the remaindermen.

duty of safe investment.

A T^ee has a duty to keep the trust fund safely invested in productive prop.

Stocks & bonds of private corps. are acceptable, but investments in them must be made discreetly and in good faith.

Duty to diversify often recog. Some cts. hold that failure to diversify is not alone a ground for surcharge.

St. Louis Union Trust Co. v. Foberman (p. 495)

Action: For bill of instructions
Facts: P seeks answers to the two questions on pbk. 495.
Holding: J/P/A

A-10

ABSTRACTS

Sec.3. THE TRUST SUBJECT MATTER (See secs.25-28 h/b)

Molera v. Cooper (p.59)

Facts: Suit by P upon a P/N executed by D to P's Tx. P/N dated 7/2/'09. On 4/IO/II, Tx verbally attempted to release D from note in consideration of D's promise to hold the full proceeds of note & interest in T for D's two minor wards. P's demurrer to D's ans. sustained. D appealed.

Issue: Must y be a prop. interest w/ respect to wh the obligation of the Tee relates?

Holding: Yes. J/P/Aff. Every T must have some prop. as its subject matter. It must be some interest recog. by equity as capable of ownership and as transferrable. Here, y was never any T prop. in existence wh could be the subj. of theT. The only prop. right was a debt owed Tx by D, but no prop. or estate therein was vested in D. A mere promise to obtain money is insufi until actual $ gotten.

People ex rel. Barrett v. Cairo-Alexander Cty. Bank (p.6I)

Facts: Creditor's claim for preference on T theories. At request of P's receiver, Pres. of bank ordered transfer of P's acct. to a"T acct." Debit made against commercial acct. of P and credit made to a T acct. No funds were actually moved and no T agreement executed. P alleges bank was its Tee and that the T acct. was secured by securities deposited w/ State Auditor.

Issue: Whether the creation of a T acct. by a bank for the benefit of a depositor requires the actual transfer of funds from the depositor's commercial acct. to a T acct.?

Holding: Yes. J/P/Rvsd. Under these facts, the creation of a T requires that the T res be set aside and not allowed to remain mingled in a common till. An ineffectual effort to pledge assets of a debtor to secure and give priority to one depositor over another will not create a Trust. The funds in question were not secured by the deposit of securities w/ the State Auditor because the Act permitting such finding applies only ou a T has been created, and y was no T here.

Dissent: Trans. on the books was sufi due to the way of doing biz in banking institutions. Since y was an effective transfer to the T dept. of the bank, y was a T; thus, the deposited securities w/ the Auditor can be reached.

Brainard v. Comm. of Internal Revenue (p.63)

Facts: Father declared himself, upon advice of counsel, Tee of his I928 stock trading for the benefit of his family.

Holding: If a person purports to declare himself Tee of an interest not in existence or if he purports to transfer such an interest to another in T, no T arises even when the interest comes into existence in the absence of a manifestation of intention at that time. An interest wh has not yet come into existence or wh has ceased to exist c/n be held in T.

A person can make a K binding himself to create a T of an interest if he should thereafter acquire it; but such an agreement is not binding as a K unless the law of K is complied W/. i.e., An attempted creation, being merely a promise to transfer prop. in the future, is invalid unless suported by consideration.

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TRUSTS