

TRUSTEE—BREACH OF TRUST—DUTY TO ENFORCE—PAYMENT OF TRUST FUNDS—ADMISSION OF ASSETS—PAYMENT OF LEGACY BY EXECUTORS DE BONIS PROPRIIS—RIGHT OF CREDITOR TO CALL ON LEGATEE TO REFUND.

The first case in the Chancery Division which it is necessary to notice is *In re Brogden, Billing v. Brogden*, 38 Chy. D. 546, in which the only point decided is that where a trustee neglects for a long period to take proceedings to recover the trust fund, he becomes personally liable to make it good, unless he can show clearly that the taking of proceedings to recover the fund would have been fruitless. In this case a trustee under a marriage settlement was entitled to £10,000 under a covenant made by a testator in his lifetime, and £10,000 as a legacy under the testator's will. These sums were not to be payable until five years after the testator's death,—applications were from time to time made for payment; but no legal proceedings were taken. The money was invested in a business in which the testator had been a partner, and which ultimately became insolvent. The trustee sought to exonerate himself from liability for the £10,000 legacy, on the ground that if the trust fund had been recovered by him he would have been liable to refund it to the unpaid creditors of the testator's estate. But Fry, L.J., says that if there had been a judgment against the executors *de bonis propriis* for the amount, the right of a creditor to recover would turn upon whether the money paid in pursuance of such a judgment was part of the assets of the testator. If it was, it could be recovered by creditors; but if it was not, it could not be so recovered. The Court of Appeal (Cotton, Fry and Lopes, L.JJ.) affirmed the decision of North, J., holding the trustee liable personally for neglect to get in the fund. The point of the decision is well summed up in the judgment of Lopes, L.J., at p. 574, where he says: "Such a trustee, in my opinion, is bound at the expiration of the specified time to demand payment of the trust funds; and, if that demand is not complied with within a reasonable time, to take active measures to enforce its payment, and, if necessary, to institute legal proceedings. I know of nothing which would excuse the right of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated."

It will thus be seen that the responsibility of a trustee for the trust fund arises even before it actually comes to his hands, and that if he negligently fail to take the necessary steps to get it into his hands, he may become just as much liable for its loss as if he had actually received it and made away with it himself.

PATENT—ASSIGNMENT—IMPLIED COVENANT.

*In re Railway and Electric Appliances Co.*, 38 Chy. D. 597, is a case in which Kay, J., had to consider the doctrine of implied covenants in deeds. Two gentlemen, Gilbert and Sinclair, were possessed of a patent which had been recently brought out, and in respect of which there were certain yearly payments