

vestment not in terms authorized by the power of investment, he clearly falls within the section; and in such a case his ignorance or forgetfulness of the terms of the power would not protect him—at all events, not unless he could give some good reason why it should—*e.g.* that it was caused by the trustee. But if all that a *cestui que trust* does is to instigate, or request, or consent in writing to, an investment which is authorized by the terms of the power, the case is very different. He has a right to expect that the trustees will act with proper care in making the investment, and if they do not, they cannot throw the consequences on him, unless they can show that he instigated or requested, or consented in writing to their non performance of their duty in this respect."

*Note.*—For the rule of the Court, independently of statute, giving a trustee recoupment from a beneficiary instigating a breach of trust, see *Raby v. Ridehalgh*, 24 Law J. Rep. Chanc. 528; 7 De Gex M. & G. 104; *Sawyer v. Sawyer*, 54 Law J. Rep. Chanc. 444; L. R. 28 Chanc. Div. 595.

#### "FRAUDULENT BREACH OF TRUST."

The word "Fraudulent" preceding the phrase "Breach of Trust," of course, alters its complexion. By it personal fraud is added, and the breach of trust must then be one accomplished or aided by the personal fraud of the trustee whose conduct is impugned.

This phrase is used in section 8 of the Trustee Act, 1888—a section of that Act which remains unrepealed by the Trustee Act, 1893. By the section just mentioned a trustee may plead the Statute of Limitations in any action against him, "*except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee or previously received by the trustee and converted to his use.*" The exception here, as to "fraud or fraudulent breach of trust," connotes actual fraud to which a trustee is party or privy—*i.e.* one in which "he has personally in some way participated" (*per* Lord Justice Lindley, *Thorne v. Heard*, 63 Law J. Rep. Chanc. 360; L. R. (1894) 1 Chanc. 599).

The phrase "Fraudulent Breach of Trust" also occurs in section 30 of the Bankruptcy Act, 1883, by which section an order of discharge in bankruptcy does not release the bankrupt from any debt or liability incurred by "any fraud or fraudulent breach of