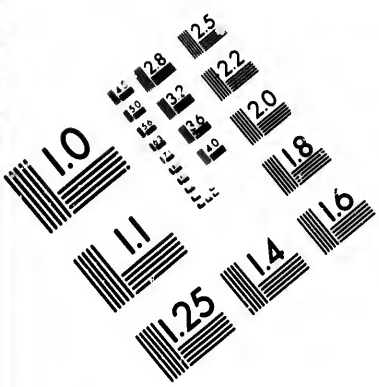

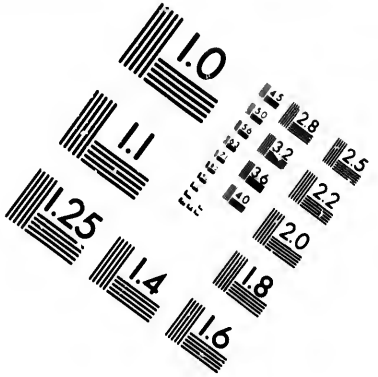

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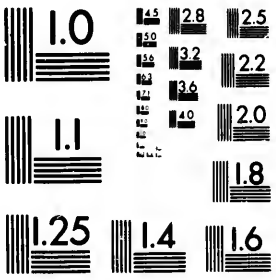

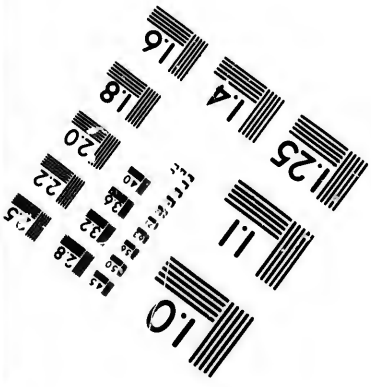

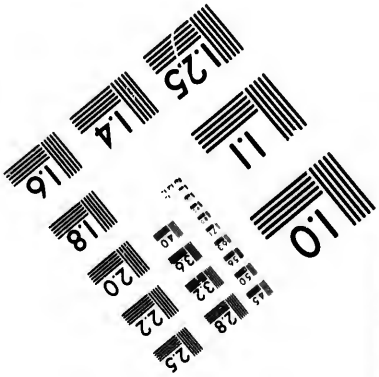

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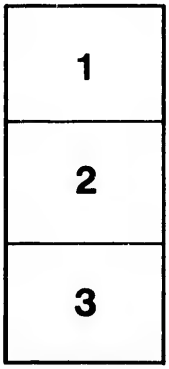

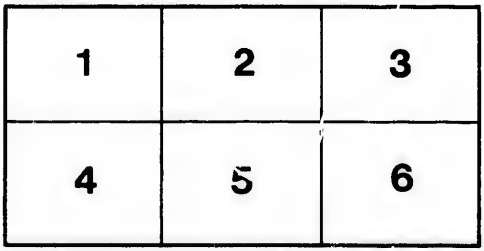

TRUSTEES

LIMITATIONS OF ACTIONS

AND

OTHER RELIEF.

LIMITATIONS OF ACTIONS AGAINST TRUSTEES

AND

RELIEF FROM LIABILITY FOR TECHNICAL BREACHES OF TRUST.

Being a concise treatise upon the position of Trustees

AS AFFECTED BY

The Imperial Statute, 51 and 52 Victoriae, Cap. 59, Section 8.
The Revised Statute of Ontario (1897), Cap. 129, Section 32.
The Nova Scotia Statute, 52 Victoriae, Cap. 18, Section 17.

AND BY

The Imperial Statute, 59 and 60 Victoriae, Cap. 35, Section 3.
The Ontario Statute, 62 Victoriae, Cap. 15, Section 1.
The New Brunswick Statute, 61 Victoriae, Cap. 26.

With an Appendix of Statutes.

COPIOUS REFERENCES AND A VERY FULL INDEX.

By FRANCIS A. ANGLIN, B.A.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

TORONTO:
CANADA LAW BOOK COMPANY,
32 TORONTO STREET.
1900.

PRINTED BY R. G. McLEAN,
LAW PRINTER,
TORONTO.

TO THE

HONOURABLE WILLIAM GLENHOLME FALCONBRIDGE,

ONE OF THE JUSTICES

OF HER MAJESTY'S HIGH COURT OF JUSTICE FOR ONTARIO,

QUEEN'S BENCH DIVISION,

THIS LITTLE WORK IS, AS A SLIGHT TOKEN OF ESTEEM,

RESPECTFULLY INSCRIBED.

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Page 6, Note 2, and Page 39, Note 1, add:—*Biggs* v. *Freehold L. & S. Co.*, 26 A.R. 232.

Page 94, Note 2, add:—The statutory provision, made by 19 & 20 Viet. (Imp.) cap. 97, sec. 10, not having been adopted in British Columbia, Nova Scotia, or New Brunswick (see Appendix A. p. 171), *Perry* v. *Jackson*, 4 T.R. 516, will still be serviceable as an authority in those Provinces.

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LIMITATIONS OF ACTIONS

AGAINST TRUSTEES.

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51 and 52 Victoriae (Imperial), cap. 59, sec. 8.
Revised Statutes of Ontario (1897), cap. 129, sec. 32.
52 Victoriae (Nova Scotia), cap. 18, sec. 17.

CHAPTER I.

PRE-EXISTING LAW.

Limitations in equity.

It is somewhat trite learning that, although not within the Statutes of Limitation, Courts of Equity have held themselves to be within the spirit and meaning of those enactments (1). In cases within their purview, equity follows the law—not, says Lord Redesdale, by analogy merely, but, in reality, in obedience to the statutes. In the opinion of Mr. Horace Davey, Q.C. (now Lord Davey), Courts of Equity are bound to act in obedience to the Statutes of Limitation only in cases within their ancillary jurisdiction; when exercising concurrent or exclusive jurisdiction they apply statutory limita-

(1) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. at p. 363; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. p. 630.

tions by analogy only (1). In cases of concurrent jurisdiction it has been strenuously, though not successfully, argued, that the Statutes must be regarded as obligatory (2).

Trusts.

Trusts, however, are within the exclusive jurisdiction of Courts of Equity. They are peculiarly creatures of equity, not cognizable at law, and, using the word "apply" in a sense restricted and narrow, though no doubt accurate, Mr. Justice Kekewich says that, before 1888, no Statute of Limitations applied to breaches of trust (3). Nevertheless, Courts of Equity, acting by analogy to the Statutes of Limitation, or upon presumptions of releases from lapse of time, or upon grounds of public convenience, or because of acquiescence or laches on the part of the plaintiff, will in many cases protect a defendant trustee against stale demands (4). *Ut sit finis litium* is deemed a desideratum in equity, just as it is at law. Like claims in respect of concealed

Limitations, acquiescence and laches as defences for trustees.

(1) Law Journal (1884) p. 101.

(2) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. 361-2; see *Knox* v. *Gye*, L.R. 5 H.L. 656, 674; *Metropolitan Bank* v. *Heiron*, L.R. 5 Ex. D. 319, per James, L.J., p. 323; per Cotton, L.J., p. 325.

(3) *How* v. *Earl Winterton*, (1896) 2 Ch. 632; but see 3 & 4 William IV., cap. 27, post; R.S.O. (1897) cap. 133, secs. 30 and 24; see Appendix A; see also per Romer, J., *In re Swain*, *Swain* v. *Bringeman*, (1891) 3 Ch., at p. 241.

(4) *Phillips* v. *Pennefather*, 8 Ir. R. Eq. 486; *Thomson* v. *Eastwood*, 2 A.C. 215, 236, 239, 257; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1218, 1279; *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221, 239; *Mack* v. *Mack*, 23 S.C.R. 146.

Express trusts.

frauds (1), "because the defendant's conscience is so affected that he ought not to be allowed to avail himself of the Statute or lapse of time," the rights of *cestuis qui trustent* against their trustees under express or direct trusts, have been ever consistently dealt with by the Court of Chancery as being outside the bounds and the reason of the doctrine of limitations. Subject to the equitable doctrine as to laches and acquiescence, in cases in which the claim was for damages, the trust fund being no longer in existence (2), such claims were, prior to 1888 (3), treated without regard to lapse of time. Where the trust property still exists in specie, neither laches nor acquiescence furnish a defence (4).

Constructive trusts.

"That time (by analogy to the Statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust," says Bowen, L.J., in *Soar* v. *Ashwell* (5), "is a doctrine which has been clearly and long established." In the practical application, however, of this apparently well-defined rule of equity, "the authorities do not seem to have drawn with any precision the line

(1) *Booth* v. *Warrington*, 4 Bro. P.C. 163; *Dean* v. *Thwaite*, 21 Beav. 621; *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. 351.

(2) *Harcourt* v. *White*, 28 Beav. 303, 308; *Bright* v. *Legerton*, 29 Beav. 60; *Green's Case*, L.R. 18 Eq. 428, 432.

(3) Nova Scotia, 1889; Ontario, 1891.

(4) *Browne* v. *Radford*, W.N. (1874) p. 124; *In re Cross*, *Harston* v. *Tenison*, 20 Ch. D. 109. But see Angell on Limitations, 5th ed., p. 165.

(5) (1893) 2 Q.B. 395.

of distinction between express and constructive trusts" (1). There are cases not falling strictly within either class, some of which have been treated as within the class in respect of which a Statute of Limitations will not be allowed to be vouched, and some within the class in respect of which such a statute may be vouched (2). Thus, although obviously not express or direct trustees, in the sense of having been "in terms nominated to be the trustees of trusts created in expressed terms written or verbal" (3), persons in the following positions have been held subject by Courts of Equity to the responsibilities and risks incurred by trustees of express or direct trusts:—persons who have assumed to act, and have acted, as trustees—"conduct equivalent to a written declaration" (4); persons knowingly participating in fraudulent acts of express trustees (5); persons who have received property subject to a trust and have disposed of it inconsistently with terms of that trust of which they are cognizant (6). Whatever the variety

Persons held responsible as express trustees.

(1) (1893) 2 Q.B. at p. 401, per Kay, L.J.

(2) S.C. at p. 393, per Lord Esher, M.R.

(3) Idem.

(4) *Life Association of Scotland* v. *Siddall*, 3 D. F. & J. 58, at p. 72.

(5) *Barnes* v. *Addy*, L.R. 9 Ch. 244. Compare with *Bonney* v. *Ridgard*, 17 Vesey 97, 4 Bro. C.C. 138; *Rolfe* v. *Gregory*, 4 De G. J. & S. 576.

(6) *Spickerell* v. *Hotham*, Kay 669; *Stone* v. *Stone*, L.R. 5 Ch. App. 74; *Lee* v. *Sankey*, L.R. 15 Eq. 204; *Wilson* v. *Moore*, 1 M. & K. 337; *Bridgman* v. *Gill*, 24 Beav. 302. Compare *Townshend* v. *Townshend*, 1 Bro. C.C. 550, and *Beckford* v. *Wade*, 17 Vesey 87.

and inconsistency in the language used about constructive trusts (1), it has been established beyond doubt that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive trustee of such property" (2). Fiduciary agents of every description who, as such, become depositaries of property are within the purview of this dictum (3).

Depositaries of trust property.

But defendants against whom claims are made founded upon alleged trusts, are entitled to have the existence of such trusts clearly established before the plaintiff can claim the benefit of the rule excluding them as trustees from the benefit of all Statutes of Limitation. Lord Cottenham so held in *Attorney-General* v. *Fishmongers' Co.* (4).

Trust must be clearly made out.

There is an all important distinction to be borne in mind in dealing with trusts "by implication." These may be express or constructive. Trusts

Implied trusts.

Express.

(1) As a recent instance compare judgment of Lindley, L.J., 631-2, with that of Kay, L.J., 638-9, *In re Lands Allotment Co.*, (1894) 1 Ch. 616.

(2) *Soar* v. *Ashwell*, L.R. (1893) 2 Q.B. at p. 397, per Bowen L.J.

(3) *Dooby* v. *Watson*, 39 Ch. D. 178; *Smith* v. *Pococke*, 2 Dr. 197. But see *Mara* v. *Browne* (1896) 1 Ch. 199; (1895) 2 Ch. 69; and for a case without the principle see *In re Sale Hotel and Botanical Gardens Co, Ltd.*, 46 W.R. at pp. 314 and 617; see also *Lister* v. *Stubbs*, 45 Ch. D. 1; *Foley* v. *Hill* 2 H.L.C. 28, 35; *Coyne* v. *Broody*, 15 A.R. 159; *Cook* v. *Grant*, 32 C.P. at pp. 521-2; *Secord* v. *Costello*, 17 Gr. 328; *Houghton* v. *Bell* 23 S.C.R. 498, *sub nom. Wright* v. *Bell*, 18 A.R. 25.

(4) 5 My. & Cr. 16.

inferred from the language of a written instrument and discoverable on the face of it, though implied rather than expressed, are nevertheless invariably treated by Courts of Equity as direct or express trusts; while, trusts established only by the application of equitable principles to the position or to the acts and conduct of parties,—"trusts to be made out by circumstances"—are regarded as constructive only (1), and the trustees thereof have been held entitled to the shelter of a period of limitation. Thus the resulting trust of surplus rents, in a case where land has been devised to a person upon trust to pay out of the rents certain annuities insufficient to exhaust the income, is inferrable from the deed, and therefore, though a trust by implication, is an express trust (2), while the resulting trust upon a failure of a gift to trustees for a charity within the Statute, 9 Geo. II., cap. 36, being a trust, not upon but "against the deed" or other instrument, and "due only to the fact that it is void," is, (if a trust at all) constructive merely (3). The former trusts are created by the words of the declarant, the latter by operation of law. An executor, though his testator may, of course, by apt language so constitute him (4), is not

Constructive.

Executors.

(1) *Banner* v. *Berridge*, 18 Ch. D. at p. 269; *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175.

(2) *Salter* v. *Cavanagh*, 1 Dru. & Walsh 668; *Patrick* v. *Simpson*, 24 Q.B.D. 128.

(3) *Churcher* v. *Martin*, 42 Ch. D. at p. 319; see too *Banner* v. *Berridge*, 18 Ch. D. 254.

(4) *Cameron* v. *Campbell*, 7 A.R. 361; *In re Swain, Swain* v. *Bringeman*, (1891) 3 Ch. 233.

virtute officii, an express trustee for creditors, legatees or persons entitled under the Statute of Distributions. He is only in a loose sense, and by operation of law (1), a trustee by implication (2), and as such is not excluded from the benefit of the Statutes of Limitation.

The Imperial Statute, 3 & 4 Will. IV., cap. 27 (3), makes certain provisions, defining and extending, rather than limiting (4), the rights of *cestuis que trustent* in actions for the recovery of lands or rents vested in trustees upon express trusts, subject to an exception in cases of concealed fraud. But this limitation does not affect other forms of action against trustees, and constructive trusts, and all trusts of personalty are wholly without the operation of this statute (5). It is in fact, as is the Act 37 & 38 Vict., cap. 57, sec. 10 (6), a provision for the security of property rather than for the protection of trustees. Neither section is available to the trustee against a personal claim upon him for breach of trust.

3 & 4 Will. IV. Imp., cap. 27.

(1) Imp. Stat. 11 Geo. IV. and 1 Will. IV. cap. 40; *Stewart* v. *Stewart*, 15 Ch. D. at p. 544; R.S.O. (1897) cap. 51, secs. 26-7; *In re Hodges*, 1 Gr. at p. 289.

(2) *In re Lacy, Royal General Theatrical Fund* v. *Kydd* (1899) 2 Ch. 149; *In re Davis* (1891) 3 Chy. 119; *In re Rowe*, W.N. (1889) 161; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 185.

(3) R.S.O. (1897) cap. 133, secs. 30 *et seq*; see Appendix A.

(4) *Marquis of Cholmondeley* v. *Lord Clinton*, 2 J. & W. 192.

(5) In *Banner* v. *Berridge*, 18 Ch. D. at p. 262, Kay J. says that this statute was extended by the Judicature Act of 1873, sec. 25, R.S.O. (1897) cap. 51, sec. 58, to trusts of personalty.

(6) R.S.O. (1897) cap. 133, sec. 24; see Appendix A.

Judicature Act, R.S.O. (1897), cap. 51, sec. 58, s.s. 1.

The 25th section of the Imperial Judicature Act of 1873 (embodied in our own Judicature Act) (1), which enacted that "no claim of a *cestui que trust* against his trustee for any property held on an express trust shall be held to be barred by any Statute of Limitations," "is," says Bagallay, L.J., "but a statutory declaration of a law which had always been recognized and administered in Courts of Equity" (2). But this "legislative recognition and expression of a previous well settled principle in equity" (3), like that principle itself, extends only to claims of the *cestui que trust* (4), or those representing or asserting his right to relief (5), in respect of his own property wasted or done away with by the trustee, and not to cases where the *cestui que trust*, can claim as due to him, as an equitable debt, money not belonging to him, but the receipt of which by the trustee is a fraud upon him (6). The claim for breach of trust, to which, before 1888 no lapse of time was a bar, must be, says Cotton, L.J., in respect

Its application.

(1) 44 Vict. (O.) cap. 5, sec. 17, ss. 2; R.S.O. (1897) cap. 51, sec. 58, ss. 1, and cap. 133, sec. 30, ss. 2; 47 Vict. (N.S.) cap. 25, sec. 14, ss. 1; 58 & 59 Vict. (Man.) cap. 6, sec. 39, ss. 1; R.S.B.C. (1897) cap. 187, sec. 89; see Appendix A.

(2) *In re Cross*, 20 Ch. D. 109.

(3) *Thorne* v. *Heard*, per Lindley, L.J. (1894) 1 Ch. at 605.

(4) *Lewellin* v. *Mackworth*, 2 Eq. Cas. Abr. 579; *Robinson* v. *Harkin* (1896) 2 Ch. 415.

(5) *In re Bowden, Andrew* v. *Cooper*, 45 Ch. D. 444.

(6) *Metropolitan Bank* v. *Heiron*, 5 Ex. D. 319; *in re Sale Hotel and Botanical Gardens Co., Ltd.*, 46 W.R. at p. 316.

of property which, prior to and but for the breach of trust, belonged to the *cestui que trust* (1).

Laches and acquiescence distinguished from limitations in equity.

The distinction between cases in which by the application of Statutes of Limitation, Courts of Equity relieve a defendant, and cases in which the plaintiff is held disentitled to succeed upon grounds of laches and acquiescence, is clear and well-defined. In the former class of case upon the effluxion of the period of limitation fixed by the Statute the plaintiff's remedy is held to be barred quite independently (except in cases of concealed fraud) of whether or not he was aware that he had a cause of action at the time when it first accrued to him (2). But, in the other class of case, knowledge of his right on the part of the plaintiff is essential; without knowledge there could be neither laches nor acquiescence (3). The length of time elapsed which will suffice to disentitle the plaintiff to succeed upon grounds of laches or acquiescence varies according to the circumstances of each case (4), and may be either longer or shorter than the period of limitation fixed

(1) *Metropolitan Bank* v. *Heiron*, 5 Ex. D. at p. 325; as to claims between *co-cestuis que trustent* see *Harris* v. *Harris* (No. 2) 29 Beav. 110; *Knight* v. *Bowyer*, 2 De G. & J. 421.

(2) *Byrne* v. *Frere*, 2 Molloy 171, 178.

(3) *Brittlebank* v. *Goodwin*, L.R. 5 Eq. at p. 550; *Cooper* v. *Green*, 3 De G. F. & J. 58, 74; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1279; *Blair* v. *Ormond*, 1 De G. & Sm. 428, 443; *Randall* v. *Errington*, 10 Vesey, 427; *Saderquist* v. *Ontario Bank*, 15 A.R. 609; 14 O.R. 586.

(4) *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 240; *In re Cross, Harston* v. *Tenison*, 20 Ch. D. 109; *Stewart* v. *Snyder*, 30 O.R. at p. 113.

Distinction *inter se*.

law (1). Laches and acquiescence are also distinguishable one from the other. The latter implies more than mere lapse of time. It involves the idea of assent express or implied (2). These remarks upon the former position of trustees in regard to the Statutes of Limitation, while by no means exhaustive, nor intended so to be, may perhaps prove of assistance in considering the statutory provision which may be called The Trustee Limitations Act, first introduced in England in 1888 (3), in Nova Scotia in 1889 (4), and in Ontario in 1891 (5), which it is now proposed to discuss.

(1) *Harcourt* v. *White*, 28 Beav. 303, 310; *Sharp* v. *Wright*, 28 Beav. 150; *Thomson* v. *Eastwood*, 2 A.C. at p. 236; *Roberts* v. *Tunstall*, 4 Hare 266-8; *Waterman* v. *Will*, Russell's N.S. Eq. 197; *Oakes* v. *Smith*, 17 Gr. 660.

(2) *Kent* v. *Jackson*, 14 Beav. 384; *Dann* v. *Spurrier*, 6 R.R. 119, 123; *Toothe* v. *Kittridge*, 24 S.C.R. 287; *Perley* v. *Snow*, Russell's N.S. Eq. D. 373.

(3) Imperial Act, 51 & 52 Vict. cap. 59, sec. 8.

(4) 52 Vict. (N.S.) cap. 18, sec. 17.

(5) 54 Vict. (O.) cap. 19, sec. 13; now R.S.O. (1897) cap. 129, sec. 32.

CHAPTER II.

The Statute—Its Scope.

Speaking of "The Trustee Act, 1888," Mr. Justice Kekewich says that he "can conceive of no subject of deeper interest to trustees, or to those who have to advise them or conduct their cases, than the proper construction and application of its provisions" (1). That Statute (section 8). as found in R.S.O. (1897) is in these terms:—

The statute.

(1) In any action or other proceeding against a trustee or any person claiming through 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 following provisions shall apply:

(*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through a trustee (2).

(1) *In re Somerset, Somerset* v. *Earl Poulett*, (1894) 1 Ch. at 245.

(2) In the English and Nova Scotia Acts the concluding words are "through him," instead of "through a trustee."

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the Statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes (1) an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1892 (2), and shall not deprive any executor

(1) The English and Nova Scotia Acts contain the words "shall be" instead of "becomes."

(2) In England this date is January 1st, 1890.

or administrator of any right or defence to which he is entitled under any existing Statute of Limitations (1).

Its general effect.

"The legislature has intervened and said that the old rule of equity is wrong, and that a trustee is entitled to be protected as much as any other person who owes money, except where he has committed an act of fraud or has put trust money into his own pocket. . . . . It is for the benefit of the public that actions against trustees for innocent breaches of trust should be put an end to. That is the principle" of the Statute (2).

It affects all trusts.

The Statute is (subject to the expressed exceptions) couched in terms unrestricted and wide enough to cover all trusts. Any possible doubts on this point would seem to be set at rest by the interpreting provision (3).

Directors.

Some question was, however, raised in an English case (4), as to the applicability of the Act to

(1) 52 Viet. (N.S.) cap. 18, sec. 17.

(2) *How* v. *Earl Winterton*, per Kekewich, J., (1896) 2 Ch. at pp. 632-3; *Thorne* v. *Heard*, (1895) A.C. at p. 504, per Lord Macnaghten.

(3) R.S.O. (1897) cap. 129, sec. 27, ss. 1, "For the purposes of the next five sections of this Act the expression 'trustee' shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee." (See 51 Viet. (N.S.) cap. 11, sec. 3.) Ss. 2, "The provisions of the said five sections relating to a trustee shall apply as well to several joint trustees as to a sole trustee." 51 & 52 Viet. (Imp.) cap. 59, sec. 1; see Appendix A.

(4) *In re Lands Allotment Co.*, (1894) 1 Ch. 616.

persons in the position of directors, "not properly speaking trustees . . . yet always considered and treated as trustees of money which comes to their hands or which is actually under their control." These persons, it was argued, were merely *quasi* trustees. But Lord Justice Lindley answered that to hold that directors are liable "upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of a Statute of Limitations which was passed for the benefit of trustees," would put the Court in a most grotesque position. The Lord Justice thinks directors are, *qua* company property under their control, express trustees, but, if not, that they are certainly trustees "by construction or implication of law" (1).

Are directors express or constructive trustees ?

Lord Justice Kay (2), citing *In re Forest of Dean Coal Mining Company* (3) for the proposition that directors are only trustees of assets in their hands or under their control, says that the obligation of directors in such cases arises "by construction or implication of law," and he points out that the definition clause in the Statute could not have expressly included directors, because "as directors they are not trustees at all, they are only trustees *qua* the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the Company."

(1) (1894) 1 Ch. at pp. 631-2.
(2) Idem at pp. 638-9.
(3) 10 Ch. D. 450, 453.

Lord Justice A. L. Smith adds (1): "As I understand the argument it is this: It is said that within the Act there may be an express trustee, there may be a trustee whose trust arises by implication of law (I leave out "construction of law"), and there may also be a *tertium quid*, and the *tertium quid* which Mr. Finlay suggests is a gentleman in a fiduciary position. Now I do not agree with him at all as to this *tertium quid*, for it seems to me that the *tertium quid* would be a man who is not an express trustee or whose trust arises by implication of law, and therefore would not be within the Act. But if he does come within this *tertium quid*, that is not being an express trustee or not a trustee whose trust arises by implication of law, he then has the ordinary Statute of Limitations to rely upon, which gives him a defence after a lapse of six years. If, however, the respondents are express trustees, or trustees "whose trust arises by implication of law," then they have the defence of the Statute of Limitations which is afforded by this Act of 1888, unless they are deprived thereof by reason of the three exceptions which are set out in section 8 of the Act. Therefore, it seems to me, whichever way you take this case, the Statut of Limitations is an available defence for these gentlemen."

Directors are within the statute.

Directors were likewise held entitled to the benefit of the Statute by Mr Justice Stirling in

(1) *In re Lands Allotment Company*, (1894) 1 Ch. at p. 643; see also *In re Sharpe* (1892) 1 Ch. at p. 154.

Formerly no limitation applied to directors.

Whitwam v. *Watkins* (1). The liability of a director for mis-application of the funds of the company, because it partakes of the character of liability for breach of trust, was formerly not barred by the Statute of Limitations (2). But directors are only trustees for the company not for creditors (3).

All persons, treated as trustees, are covered by the statute.

Exception.

It may therefore be regarded as settled that all persons upon whom Courts of Equity fasten the obligations and responsibilities of trusteeship, except Court officers such as liquidators, receivers, and trustees in bankruptcy (4), are trustees within the meaning of the Statute. Constructive trustees, formerly held entitled, whether by analogy to the Statute of Limitations or upon other equitable grounds, to protection by reason of lapse of time, can now rely upon an absolute statutory bar; and express trustees, not excluded by any of the exceptions, are given statutory assurance of relief which Courts of Equity had always denied them. In considering the efficacy of a plea of this statutory limitation, it is probably, in cases within the Statute, not material to which class, constructive or express, the trust belongs.

(1) 78 L.T. (N.S.) at p. 188.

(2) *In re Oxford Benefit Bdg. Society*, 35 Ch. D. 502; *Flitcroft's Case*, 21 Ch. D. 519, 537.

(3) *In re Wood's Ships' Co. Ltd.*, 62 L.T. (N.S.) 760, 762; *Poole, Jackson and Whyte's Case*, 9 Ch. D. 322, 328.

(4) *In re Cornish*, (1896) 1 Q.B. 99.

"Persons claiming through a trustee."

Although to cite authority upon the point wou'd seem unnecessary, it has been decided in Ireland, that the words in ss. 1.—"or any person claiming through him," *i.e.*, the trustee, mean, not a beneficiary of the trust, but a person claiming as his executor or administrator, or by assignment or otherwise under the trustee adversely to the *cestui que trust* (1).

The interpretation clause.

Ss. 4 of section 27 (2), the interpretation or definition clause, seems to call for some observation. Though perhaps intended to apply to some of the other sections of the original Act (3), rather than to what is now section 32 of R.S.O. (1897) cap. 129 (4), the provision, that "save as in the said sections (28-32) expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust" (5), may have an important bearing upon the case of a trustee who, without any fraudulent purpose,—in the sense of seeking a personal advantage, or designedly impairing the trust estate,—does that which he is expressly forbidden to do, or omits to do that which he is expressly directed to do. Such a

(1) (1) *Leahy* v. *DeMoleyns*, (1896) 1 I.R. 206, 213, 242.
(2) R.S.O. (1897) cap. 129.
(3) 54 Viet. (Ont.) cap. 19.
(4) 52 Viet. (N.S.) cap. 18, sec. 17.
(5) 52 Viet. (N.S.) cap. 18, sec. 22, ss. 2.

Wilful breach, if not fraudulent, is not excluded.

trustee can scarcely be heard to say that he has unwittingly contravened his trust; his breach is neither purely ignorant nor merely negligent: it is a wilful and conscious dereliction of duty. But this proviso, while it precludes the trustee from claiming that he is, by mere implication from any of the provisions of the Statute, absolved from the discharge of any such expressed duty, does not appear to mean that, even in such a case, though unable to maintain that his act or omission was authorized, he may not be entitled to the protection of section 32, R.S.O. (1897) cap. 129. Neither is such a breach of trust though wilful, necessarily fraudulent. There may be an entire absence of dishonest intent and motive. This aspect of it, however, leads rather to a consideration of the exceptions as expressed in the section.

CHAPTER III.

The Exceptions.

The First Exception—Fraud.

The exceptions to its operation stated in the Statute call for some special remarks. Three classes of trustees are by them denied the benefit of the Act:—The trustee who has been guilty of or privy to any fraud or fraudulent breach of trust: the trustee who still retains trust property; the trustee who has received and converted to his own use trust property or its proceeds. The general effect of these exceptions is to exclude, from the relief extended to the innocent trustee, his dishonest brother. The three exceptions.

The Statute does not apply "where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy." "These words in the Statute indicate moral complicity," says Kay, L. J., (1) speaking of the purport of the words "party or privy;" that is, moral guilt in the person sought to be charged. Wright, J., however, thinks that "it would be impossible to hold that moral fraud is required for the purpose of the section (2)." But that learned Judge continues—"The section seems to me to be directed to the relief Fraud: Moral complicity.

(1) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 608.

(2) *In re Sale Hotel and Botanical Gardens Co., Ltd.*, 46 W. R. at p. 316.

of trustees from what may be called innocent or negligent breaches of trust, and not breaches of trust in which for their own personal gain, the trustees have committed knowingly acts from the nature of which the law imputes to them knowledge that they are doing wrong," indicating that perhaps the confusion is really in the conception of moral as distinguished from legal fraud (1). Whenever by a wilful wrong or illegal act—by unjustifiable means—a trustee intentionally deprives his *cestui que trust* of the trust estate (2), and, *a fortiori*, if he does so for purposes of personal gain (3), there is unquestionably moral fraud.

Improper motive.

In most of the cases in which this exception of fraud has been discussed, the language of the judges (4) would seem to indicate that personal gain or profit to the trustee is an essential element of acts or conduct such as are requisite, upon this ground, to exclude a trustee from the benefit of the statute. The personal gain of the trustee would include that of any other person with whom he was in collusion or for whose benefit he committed the breach of trust. But, even if so extended, must this element be superadded to a wilful (5) act or omission in breach

Motive need not be personal gain to constitute fraud.

(1) See post p. 31 note.

(2) *Green* v. *Nixon*, 23 Beav. 535.

(3) *Haycraft* v. *Creasy* 2 East at p. 108; *Evans* v. *Edmonds* 13 C.B. 777; see Kerr on Fraud and Mistakes (2 ed.) pp. 1 and 2.

(4) *Mara* v. *Browne* (1895) 2 Ch. at p. 95; *Whitwam* v. *Watkins*, 78 L.T. (N.S.) at p. 190; *In re Sale Hotel and Botanical Gardens Co. Ltd.*, 46 W.R. at p. 316.

(5) *Re Lands Allotment Co.*, (1894) 1 Ch. at pp. 639-641.

of trust, and intended to impair or imperil the trust estate, in order to make a case of fraud within the exception? Of course, it seldom happens that a trustee is knowingly derelict to his trust, without seeking thereby to advantage himself or some other person in whom he is interested; but such cases may happen, and means distinctly illegal and inequitable may be deliberately resorted to—for instance, to gratify a feeling of ill-will towards the *cestui que trust*. The intent to deprive the *cestui que trust* in breach of trust by unfair or improper means, of trust property, it is submitted, suffices by itself to constitute acts done pursuant thereto fraudulent within the meaning of the exception, whatever may be the improper motive inducing their commission. In *Collings* v. *Wade* (1), FitzGibbon, L.J., says: "Fraud within the meaning of the Act, we think, must amount to dishonesty." But this word admits of more than one signification (2).

Davy *v.* Taylor.

In *Davy* v. *Taylor* (3), decided by the Court of Appeal for Ontario on March 15th, 1898, but not reported, Barclay, one of the two defendants having pleaded the Statute, (then 54 Vict., cap. 19, sec. 13,) was held disentitled to relief as party or privy to the fraudulent breach of trust, which was the subject of the action. The moneys of the estate, of which

(1) (1896) 1 In. Rep. 340, 349; see also p. 353.

(2) See post, part II., chap. IV.

(3) This statement of facts is taken from the judgment of Mr. Justice Maclennan.

the defendants were executors and trustees, had been deposited to their joint credit. Four thousand dollars were withdrawn by Taylor from the trust fund and used by him in his business. Barclay denied knowledge of this withdrawal at the time it took place, but Mr. Justice Maclennan distinctly finds that he was aware of it and consented to it. In any case he certainly became aware of it not very long afterwards. He did not take any step to make Taylor refund, but, on the contrary, for several years he either himself concealed, or connived at Taylor's concealment of this fact from the plaintiff, the life beneficiary. Indeed, he subsequently, with Taylor's assent, "took and converted to his own use $4000 of what was left, the result being that these two executors divided for their own use $8000 of the trust money in their hands. I therefore think," says Maclennan, J.A., "that, in respect of the $4000 taken by Taylor, the defendant Barclay was a party or privy to a fraudulent breach of trust and that this is a case excepted from the operation of the Act of 1891."

Mr. Justice Moss draws the same conclusion from Barclay's conduct subsequent to the time at which he admittedly knew of Taylor's misappropriation of the fund. Burton, C.J.O. and Osler, J.A., concur.

In this case the plaintiff was a co-executrix as well as life beneficiary, but, being resident in Chicago, took no part in the administration, and these moneys were never deposited to her credit.

CHAPTER IV.

Fraud of Agent—Concealed Fraud.

"Privy."

Where the trustee himself commits a fraudulent breach of trust the case is free from the difficulties which often arise where it is sought to hold him responsible for the fraudulent acts of another, as "party or privy" thereto. These words, which Lord Justice Kay says imply "moral complicity," mean more, his Lordship indicates, than would the expression "for which the trustee is liable" (1).

Thorne v. Heard.

In *Thorne* v. *Heard* (2), Heard and Marsh, first mortgagees, sold in 1878 under power of sale, employing Searle, who was also the mortgagor's solicitor, to conduct the sale for them. Searle received the sale moneys and after satisfying Heard and Marsh's claim retained the surplus, either concealing from them the existence of a second mortgage or falsely representing to them that he had the authority of Thorne, the second mortgagee, to receive the surplus moneys. Searle kept these moneys and did not inform Thorne of the sale, but, as mortgagor's solicitor, continued to pay him interest on the second mortgage as if it were still subsisting, until 1892, when Searle became bankrupt. Heard and Marsh, as well as Thorne, then, for the

(1) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 608.

(2) (1893) 3 Ch. 530; (1894) 1 Ch. 599; (1895) A.C. 495.

first time, became aware of the true state of affairs. In the action brought by Thorne against Heard and Marsh to hold them accountable to him, as trustees of the surplus, it was held in the House of Lords, (1) affirming the Court of Appeal (2) and Romer, J., (3) that, assuming Heard and Marsh to have been trustees for Thorne, they were not "party or privy" to Searle's fraud, nor were the surplus moneys still retained by them within the meaning of the exception to the Trustee Act, sect. 8 (R.S.O. sec. 32); that in committing and concealing the fraud Searle was not acting as agent for Heard and Marsh so as to make them chargeable with his act; and that there was nothing to prevent the Statute of Limitations running by virtue of the Trustee Act, 1888 (sec. 32 R.S.O. (1897) cap. 129) (4).

To fraud merely imputable to him the trustee is not necessarily "privy."

From the course of reasoning of the Judges of the Court of Appeal in *Thorne* v. *Heard* (5), (certainly not from any express statement to that effect), the cursory reader might infer that, where the trustee would be held liable for the fraud of an agent, [illegible] not "party or privy" thereto, in the sense of taking part in or knowing of and acquiescing in, or willingly deriving benefit from the acts done in breach of trust, he is to be excluded from the benefit

(1) (1895) A.C. 495.
(2) (1894) 1 Ch. 599.
(3) (1893) 3 Ch. 530.
(4) 52 Vict. (N.S.) cap. 18, sec. 17.
(5) (1894) 1 Ch. at pp. 603-5; 609-11.

of the Statute (1). But, upon examination, it will be readily perceived that the Judges are dealing with the contention that, assuming the section of the English Trustee Act, corresponding to section 32 R.S.O., (1897) cap. 129, to make the Statute of Limitations applicable, yet the concealed fraud of the alleged agent should be imputed to the principal, so as to defer the accrual of the cause of action against the principal until the discovery of such fraud (2). The statutory limitation, though held applicable to the trustee as being neither "party or privy" to the fraud (3), would thus be defeated. While, therefore concealed fraud of an agent, legally imputable (4) to his principal, may postpone the accrual of the cause of action until its discovery, such fraud, unless the trustee sought to be charged is himself in some way a participant in it (5), or at least assents to it or receives benefit from it (6), or aids in concealing it (7), so as to involve him in "moral complicity," will not exclude him from the benefit of section 32 R.S.O., (1897) cap. 129. But fraud, or fraudulent breach of trust, to which the trustee is "party or privy," however notorious and open, and whatever answer to the

Notoriety of fraud immaterial for purposes of the exception.

(1) *Thorne* v. *Heard*, (1894) 1 Ch. at pp. 610-11; 614-15.

(2) *Gibbs* v. *Guild*, 9 Q.B.D. 59.

(3) *Thorne* v. *Heard*, per Lord Davey, (1895) A.C. at p. 505.

(4) *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q.B.D. 714.

(5) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 606, per Lindley, L.J.

(6) S.C. (1895) A.C. at p. 503.

(7) *In re Lands Allotment Co.*, (1894) 1 Ch. at pp. 639-40.

action he may have upon equitable grounds of laches and acquiescence (1), will effectually prevent his claiming any benefit from the Statute now being considered.

Concealed fraud of agent, when imputable to trustee.

It would open too wide a field to enter upon anything like a discussion of the grounds upon or the circumstances under which the concealed fraud of an agent will be imputed to his trustee-principal, so as to prevent, until its discovery, time beginning to run in bar of the remedy of the injured person. Such fraudulent acts must be within the scope of the agency (2), and must be done in the interest or for the benefit of the principal, and not solely on the agent's own behalf or for his own benefit (3). There need be no active step taken to conceal secret fraud by either principal (4) or agent; its own furtive nature sufficing, if such as to make detection difficult or remote (5). But fraud is considered to have been discovered at the time when such reasonable notice of what has happened has been given to the person injured, as to make it his duty, if he intends to seek redress, to make enquiry and to ascertain

Effect of notice to *cestui que trust*.

(1) *Thomson* v. *Eastwood*, 2 A.C. 215; *Lindsay Petroleum Co.* v. *Hurd*, L.R. 5 P.C. 221; *Phillips* v. *Pennefather*, 8 Ir. R. Eq. 486.

(2) *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259.

(3) *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.*, 18 Q.B.D. 714; *Richards* v. *Bank of Nova Scotia*, 26 S.C.R. 381.

(4) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 611, per Kay, L.J.; *Moore* v. *Knight*, (1891) 1 Ch. 547.

(5) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. 351, 363-4; overruling *Ecclesiastical Commissioners* v. *N.E. Ry.*, 4 Ch. D. 845.

the circumstances of the case (1). On the other hand, although the injured person had means of ascertaining that he was defrauded, if, as between himself and the person guilty of the fraud, he was entitled to rely upon the latter, time will not run against him until there is something to arouse suspicion and he has had reasonable opportunity thereafter for enquiry (2).

Cestui que trust entitled to rely upon discharge of duty by trustee.

Clark v. *Bellamy* (3) a recent case in which Mr. Justice Street held executor-trustees liable, presents some peculiar circumstances. Thomas Clark had given a considerable sum of money to his solicitor for investment upon mortgage. The solicitor never invested the money, and probably made away with it during Clark's lifetime. Clark died in February, 1889. By his will he directed the income of $5,000, which sum was to be set apart for that purpose, to be paid to his widow during her life. The executors retained their testator's solicitor to manage the estate for them. The solicitor paid all the other beneficiaries under the will in cash, and represented to the executors that he held mortgages amounting to $5000, which he had set aside for the widow's benefit. Without ascertaining whether or not the mortgages actually did exist, the executors informed the widow that certain mortgages in the solicitor's hands had been set apart for her and that the

Clark *v.* Bellamy.

(1) *Marquis of Clanricarde* v. *Henning*, 30 Beav. at p. 180.

(2) *Rawlins* v. *Wickham*, 3 De G. & J. 304.

(3) 30 O.R. 532.

solicitor would collect and pay over the interest to her. The solicitor did pay such interest regularly until May 1st, 1892, when the last payment was made by him, many of his cheques bearing the statement that they were for interest on the $5,000. The executors took no part whatever in the management of the estate. The solicitor died in July, 1892, and the executors discovered in the Autumn of that year that no mortgages existed. The widow brought this action against the executors on June 10th, 1897.

Estoppel.

Mr. Justice Street held the trustees estopped from denying the truth of the statements made by them, and that "each payment was the renewal of the representation originally made"—such renewal being imputable to the trustees. The responsibility of the trustees for their own original mis-statement seems abundantly clear. "Those who, having a duty to perform, represent to those, who are interested in the performance of it, that it has been performed, make themselves responsible for all the consequences of its non-performance (1)", and such a representation is "a guarantee that the parties whose interests might be affected shall be placed in the same situation as if the facts represented were true (2)".

Principal and agent.

In applying to the subsequent representations of the solicitor the doctrine either of estoppel or of concealment of fraud as against the trustees, the

(1) *Blair* v. *Bromley*, 2 Ph. at p. 359.

(2) Idem at p. 360.

very nicest questions in the law of principal and agent arise. Did the solicitor act within the scope of his employment? When making his payments he was ostensibly doing, and was certainly purporting to do, what his principals had authorized and instructed. This distinguishes his position clearly from that of the solicitor in *Thorne* v. *Heard* (1). Perhaps as much cannot be said of the accompanying statements. But these payments, without any such express statements, made as they were, would be fraudulent misrepresentations. If the acts done by him were within the express instructions given to the solicitor, *cadit quaestio*. Could the trustees, who, however innocently, led the widow to expect the solicitor to do precisely what he ostensibly did, be heard to say that they were not? And would not the statements, if true, have been the ordinary concomitants of the payments, and therefore equally within the solicitor's authority?

Clark *v.* Bellamy distinguished from Thorne *v.* Heard.

If the idea that the case should be regarded as one of express authority to the agent, by reason of the information as to the instructions given him conveyed by the trustees themselves to the widow, be put aside, of both payments and statements it might be quite plausibly argued that they were made neither pursuant to the principals' instructions nor on their behalf, but on behalf of the agent himself as "holder by wrong of the fund"

Scope of agent's authority.

(1) (1895) A. C. at p. 502: (1894) 1 Ch. at p. 603.

(1). His authority was to pay over interest collected, not to advance his own moneys to conceal his fraud. Yet, as put in *Udell* v. *Atherton*, (2) "was (not) the agent's situation such as to bring the representations he made within the scope of his authority?" "Frauds," say their Lordships of the Judicial Committee, (3) "are beyond the scope of the agent's authority, in the narrowest sense of which the express[ion] admits, for principals do not generally authorize their agents to act wrongfully. A wider construction has been put on the words." If the principal "has put the agent in his place to do that class of acts he must be answerable for the manner in which the agent has conducted himself in doing the business (4), But did the solicitor act "for his principals' benefit?" (5). Though he certainly had his own purposes in view, in one sense the trustees reaped certain benefits from his payments, (6) and to that extent they may be regarded as made for their benefit. The accompanying misstatements may not, perhaps, at first blush seem to have been made for the trustees' benefit, but, if regarded as put upon or accompanying the cheques for

For principal's benefit.

(1) *Stewart* v. *Snyder*, 30 O.R. 110, 114.

(2) 7 H. & N. 172.

(3) *Mackay* v. *Commercial Bank of N.B.*, L.R. 5 P.C. at p. 411.

(4) *Barwick* v. *English Joint Stock Bank*, L.R. 2 Exch. 259.

(5) *British Mutual Banking Co.* v. *Charnwood Forest Co.* 18 Q.B.D. at p. 718.

(6) *Mackay* v. *Commercial Bank of N.B.*, L.R. 5 P.C. at p. 410.

the purpose of identifying them and making of them receipts available for the trustees, were they not likewise made for the trustees' benefit? But, as already said, the statements may be discarded. It seems possible, too, that the presence of this element of benefit to the principals may be deemed not indispensable in the fraudulent act itself, if, though not to be treated as expressly authorized, it is merely incidental to acts which have been so authorized, or which are within the scope of the agent's authority and for the principals' benefit (1).

Fraud of trustee.

Apart altogether from these questions of agency, may not the decision in *Clark* v. *Bellamy* be sustained upon the ground that the trustees themselves were guilty of legal fraud (2) in the statements made by them to the *cestui que trust*? "A misrepresentation is a fraud at law, although made innocently, and with an honest belief in its truth, if it be made by a man who ought in the due discharge of his duty to have known the truth, and be made under such circumstances or in such a way as to induce a

Innocent misrepresentation by one bound to know the truth.

(1) *Clark* v. *Bellamy* seems readily distinguishable from *Richards* v. *Bank of Nova Scotia*, 26 S.C.R. 381, which, however, should be carefully considered. This latter case does not appear to have been cited in *Clark* v. *Bellamy*.

(2) This phrase is used notwithstanding its unequivocal condemnation in *Derry* v. *Peek*, 14 A.C. 337, to describe the conduct of persons who, being under an obligation to know the truth, are held liable in equity for the consequences of misrepresentations, though made without knowledge of their falsehood and even with an honest belief in their truth—cases entirely distinguishable from actions for damages for false representation, *Brownlie* v. *Campbell*, 5 A.C. p. 935. Perhaps "equitable fraud" or "fraud in equity" would be a more apt phrase.

reasonable man to believe that it was true and was meant to be acted on and has been acted on by him accordingly to his prejudice (1)." This legal fraud remained undiscovered until after the death of the solicitor, and within six years before action, and the cause of action against the trustees did not accrue until its discovery (2). The existence of this fraud of the trustees is another ground of distinction between this case and *Thorne* v. *Heard* (3).

No privity within the meaning of the statute.

In neither case was the original fraud of the solicitor, or its concealment by him, such, that the trustees, themselves guiltless of moral wrong, would be held "party or privy" to it, and, therefore, the provisions of the section, embodied in the R.S.O. (1897) as section 32, were applicable to both: but in the one case time, under the Statute of Limitations thus made available, did not begin to run in favor of the trustees until within six years before action, because they were legally liable for their agent's concealment of fraud or estopped from denying the truth of his misrepresentations; in the other, neither the original fraud nor its subsequent concealment were imputable to the trustees so as to prevent the Statute running in their favor.

Clark v. *Bellamy* (4) is now in the Court of Appeal.

(1) Kerr on Fraud 2 Ed. pp. 29, 402; *Rawlins* v. *Wickham*, 3 De G. & J. 304, 313, 316; *Burrows* v. *Lock*, 10 Vesey 470.

(2) *Rawlins* v. *Wickham*, 3 De G. & J. 304, 314; *Betjeman* v. *Betjeman*, (1895) 2 Ch. 474.

(3) (1893) 3 Ch. 530; (1894) 1 Ch. 599; (1895) A.C. 495.

(4) 30 O.R. 532.

CHAPTER V.

Partners—Co-trustees—Acknowledgments.

Innocent partner's liability.

Partnership cases require careful consideration in determining the liability of one partner for the fraudulent acts of the other, of which he was ignorant (1). Upon examining the authorities it will be found, however, that the question generally raised is not so much whether the fraud debars the innocent partner from the protection of section 32, R.S.O., (1897) cap. 129, but rather, assuming the applicability of this section, from what date, for the purpose of the Statute of Limitations thereby made applicable, the cause of action as against the innocent partner, is to be deemed to have accrued,—and this question depends entirely upon the pre-existing law.

Solicitors as constructive trustees.

Incidentally it is interesting to note that, in *Mara* v. *Browne*, the Court of Appeal (2), reversing Mr. Justice North (3), held that "it is not within the scope of the implied authority of a solicitor, carrying on business in partnership, to constitute himself a constructive trustee, so as to subject his partner to liability in that character, the partner

(1) *Moore* v. *Knight*, (1891) 1 Ch. 547; *Mara* v. *Browne*, (1895) 2 Ch. 69; (1896) 1 Ch. 199; *Hughes* v. *Twisden*, 55 L.J. Ch. 481; *Blair* v. *Bromley*, 2 Ph. 359.

(2) (1896) 1 Ch. 199.

(3) (1895) 2 Ch. 69.

being ignorant of the dealings by which the constructive trust is established."

Liability of innocent co-trustee.

In cases of co-trusteeship where one trustee has, without necessity and under circumstances not sufficient to afford a justification in equity (1), been allowed exclusive control of the trust funds, and has, by conduct in breach of trust, lost such funds, his co-trustee may be held to be *in pari delicto* and liable to make good the loss (2). To render the trustee, not actively participating in the breach of trust, liable for a loss occasioned by the acts of his co-trustee, the former must himself have been culpably negligent at least.

Contribution between co-trustees.

In cases where one of two co-trustees has made good a loss sustained by breach of trust, he may, unless under the special circumstances of the case he would himself be held bound to indemnify his co-trustee, obtain contribution to that loss from such co-trustee (3). And the same rule as to liability, though not as to contribution, applies to cases in which the trust moneys have been lost through the fraud of one of two co-trustees. Excluding cases of discretionary trust, which can never be delegated (4),

(1) *Ex parte Belchier*, Ambler 219; *Re Speight*, 22 Ch. D. 727; 9 A.C. 1.

(2) *Robinson* v. *Harkin*, (1896) 2 Ch. 415; see also *Head* v. *Gould*, (1898) 2 Ch. 250; *Crowe* v. *Craig*, 29 N.S. Rep. 394; and see *Davy* v. *Taylor*, ante p. 21.

(3) *Chillingworth* v. *Chambers*, (1896) 1 Ch. 695, 707; *Bahin* v. *Hughes*, 31 Ch. D. 390; *Lingard* v. *Bromley*, 1 V. & B. 114; *In re Turner*, *Barker* v. *Ivimey*, (1897) 1 Ch. 536.

(4) *Crewe* v. *Dicken*, 4 Vesey 97.

one of two co-trustees, who, under circumstances which would in equity justify the confidence (1), places trust property in the hands of his fellow-trustee or permits it to be under his control, would not be held liable for a fraudulent misappropriation of such property by the co-trustee (2); and, notwithstanding the language of sub-sec. 2 of sec. 27 (3)— the provisions of section 32 "shall apply as well to several joint trustees as to a sole trustee,"—there would seem to be no reasonable ground upon which it could be contended that the fraud of his co-trustee should deprive an innocent trustee of the benefit of section 32.

Fraudulent co-trustee.

Section 27, s.s. 2.

Acknowledgments, whether made in writing or by part payment (though the case is not so clear perhaps as to the latter) in manner sufficient to debar the trustee making them, will probably not debar his co-trustee from the benefit of the Statute. This would seem to be clearly the case in England under the provisions of the Mercantile Law Amendment Act (19 & 20 Vict (Imp.) cap. 97, sec. 14), which places co-debtors (4) on the same footing upon which co-contractors are placed by Lord Tenterden's

Acknowledgment by co-trustee: its effect.

(1) *In re Speight*, 22 Ch. D. 727; 9 A.C. 1.

(2) *Re McLatchie*, 30 O.R. 179; *Re Crowter, Crowter* v. *Hinman*, 10 Ont. R. 159.

(3) R.S.O., (1897) cap. 129 (not adopted in Nova Scotia); see *Moore* v. *Knight*, (1891) 1 Ch. 553.

(4) See post pp. 36-37.

Act, R.S.O. (1897) cap. 146, sec. 2 (1). The former Act does not seem to be in force in Ontario r in Nova Scotia, but is in force in British Columbia (2), Manitoba (3) and New Brunswick (4). But as, under Lord Tenterden's Act, the admission of an agent of the debtor is held to be insufficient (5), it would seem to follow, apart from the provisions of the Mercantile Law Amendment Act, that one of two or more co-trustees would not be bound by an acknowledgment made by his fellow or fellows (6). In England, by the same Mercantile Law Amendment Act (sec. 13), an acknowledgment by an agent is declared to be sufficient to bind his principal, thus restoring the law as it stood under the Act, 21 James I., cap. 16, when admissions by an agent were held sufficient and those of a co-contractor bound his fellow (7).

Acknowledgment of agent.

Requisites of acknowledgments.

The requisites of an acknowledgment, in general, sufficient to avoid the effect of the Statute of James, may be succinctly stated as follows (8):—To revive

(1) See Appendix A.

(2) R.S.B.C. (1897) cap. 123, sec. 5.

(3) R.S. Man. (1891) cap. 36, sec. 9.

(4) C.S.N.B. (1877) cap. 85, sec. 6.

(5) *Hyde* v. *Johnston*, 3 Scott, 289; *Pott* v. *Clegg*, 16 M. & W. 321.

(6) As to specialty debts, see post p. 38.

(7) *Whitcomb* v. *Whiting*, Douglas 652; Smith's Leading Cases (9 Am. ed.), vol. I., p. 909.

(8) Banning on Limitations, (2 ed.) pp. 42 82.

the debt absolutely it must be an unqualified and unconditional promise of payment, or an absolute admission of indebtedness (1) from which such a promise may be inferred. If qualified or conditional its effect is limited by its terms (2). It must be made before action to the creditor or his agent, in a writing signed by the debtor (3), but need not state the amount of the debt. Part payment, to be the equivalent of an acknowledgment, must be made on account of the very debt, reasonably identified, and under circumstances evidencing a balance to be due and not negativing an implied promise to pay such balance (4). The payment need not be in money and may be made by or to an agent, if sufficiently authorized (5).

Part payment.

Where a payment made by one of two co-trustees is relied upon as an acknowledgment to bind the other, Lord Tenterden's Act not affecting the case, the sufficiency of the acknowledgment would appear to

Part payment by co-trustee.

(1) *Charlotte Co. Bank* v. *Ross*, 5 Allen 627; *Billings* v. *Rust*, 1 Thom. 61 or 88; *Keys* v. *Pollok*, 1 Thom. 81 or 109; *Cameron* v. *Grant*, 18 S.C.R. 716, 23 N.S.R. 50.

(2) *Roblin* v. *McMahon*, 18 O.R. 219; *Murdock* v. *Pitts*, James 258.

(3) *Colquhoun* v. *Murray*, 19 C.L.T. 241.

(4) *McKeen* v. *McDougall*, 2 Thom. 403; *Smyth* v. *McDonald*, Cochran 86.

(5) *Burt* v. *Palmer*, 5 Esp. 145; *Williams* v. *Innes*, 1 Camp. 364; *Evans* v. *Davies*, 4 A. & E. 840.

depend upon the agency of the trustee, who has made the payment, being satisfactorily established (1).

Acknowledgment of specialty debt.

An acknowledgment of a specialty debt may be given by an agent, whether it be by written admission or by part payment (2).

(1) The Nova Scotia statute embodying Lord Tenterden's Act contains these words: "But nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest by any person whomsoever." [R.S.N.S. (1884) cap. 112, sec. 2], which are also in the original Act 9 Geo. IV., cap. 14, but not in the Ontario Statute.

(2) R.S.O. (1897) cap. 72, sec. 8. See Appendix A.

CHAPTER VI.

The Second Exception—"Still Retained."

"Still retained" means at date of writ.

By the second exception claims "to recover trust property or the proceeds thereof still retained by the trustee" are excluded. "Still retained", it is well settled, means in the hands, or under the control of the trustee at the date of commencement of the action (1). Money in the hands of an agent for the, trustee, "so that he can get it" (2), is "still retained" by the latter, because "the intention of the exception in the Statute was to prevent a trustee using the bar by lapse of time to enable himself to appropriate a trust fund which he had not appropriated but had the power of appropriating. . . . . It would not be the intention of the Statute that the trustee might bar the *cestui que trust* and then recover the money from his own agent and keep it" (3).

Wassell v. Leggatt.

In *Wassell* v. *Leggatt* (4), a married woman, whose husband had forcibly deprived her, in 1876, of a legacy which she had received and which he knew to be her separate property, sued his executors to recover the money. The action was brought in

(1) *Thorne* v. *Heard*, (1895) A.C. at p. 503; S.C. (1894) 1 Ch. at pp. 602, 606, 613.

(2) S.C. (1894) 1 Ch. at p. 606.

(3) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 609, per Kay, L.J.

(4) (1896) 1 Ch. 554, 558.

1895. During the husband's lifetime the wife had frequently demanded the money. Mr. Justice Romer held that the husband was a trustee for the plaintiff. "No Statute", he says, "applies to the case, for the husband's executors cannot, on his behalf, avail themselves of sec. 8 of the Trustee Act 1888 (R.S.O., sec. 32), inasmuch as he retained the money and never accounted for or parted with the possession of it. The Statute of Limitations, therefore, cannot be relied on as a defence".

In *Collings* v. *Wade* (1) the Irish Court of Appeal held that this exception was inapplicable where trust funds were loaned improperly to a person, who applied them in payment of a debt, for which the trustees were liable as sureties.

Moneys "parted with."

Although this exception prevents the trustee, who "still retains" any trust property, from successfully pleading the Statute as to so much of the trust estate as is still under his control, the fact that he still has, or controls, some portion of the trust fund will not preclude him from setting up the Statute as an answer to a claim that he should make good any other portion of the trust property, which he had, more than six years before action, "parted with." It was so held, by Mr. Justice Kekewich, in *In re Davies, Ellis* v. *Roberts* (2), following *How* v. *Earl Winterton* (3), which plaintiff's counsel

(1) (1896) 1 Ir. Rep. 340, 353.
(2) (1898) 2 Ch. 142.
(3) (1896) 2 Ch. 625.

sought to distinguish, on the ground that the admission in that case was limited to the presence of assets in the trustee's hands six years before action, while in this case a balance of assets was admitted to be still in the defendant's hands. No fraud was charged. The order made limited the account directed to assets in hand six years prior to the date of the issue of the writ and subsequent receipts (1).

Property misappropriated by agent.

But, though trust property should be in the hands of an agent, and, up to a day before the commencement of the action, recoverable by the trustee, if, from any cause, other than the fraud of the trustee, such property was not, at the moment of the bringing of the action against the trustee, any longer recoverable from such agent, the trustee would be entitled to the benefit of section 32; and, although the placing or leaving of the property in the hands of such agent might have been a clear breach of trust (not fraudulent), if it occurred more than six (2) years prior to the issue of the writ against the trustee, the cause of action therefor would be barred (3). Nor, it is submitted, would the fact that the trustee had a right of action, *quantum valeret*, against his agent, in respect of the loss of the trust property, avail the *cestui que trust* in endeavoring to exclude the trustee from the benefit of section 32.

(1) See Appendix B.

(2) For periods of limitation, where breach of trust creates a specialty debt, see post. p. 56.

(3) *Stewart* v. *Snyder*, 30 O.R., 110, 114.

Nothing short of an ability, at the date of the commencement of the action, to recover the trust property, or some part of it or its proceeds,—and then only to the extent to which it might be recoverable, — would seem sufficient for that purpose (1). This exception has no bearing upon claims for damages for breach of trust. Such actions imply loss or alienation of the trust property, which it cannot therein be sought to "recover" as "still retained."

(1) But see *Thorne* v. *Heard*, (1894) 1 Ch. at p. 609, per Kay, L.J.

CHAPTER VII.

The Third Exception—"Property Converted."

The third exception debars from the benefit of the section the trustee who has "previously received and converted to his own use trust property, or the proceeds thereof," which it is sought to recover. Moneys deposited with a firm of solicitors for investment, and not in fact invested, but represented by the firm to have been invested, and in fact embezzled by a clerk of the firm, were deemed, by Mr. Justice Stirling, to have been converted to the use of the firm, within the meaning of this exception (1).

Moneys represented to *cestui que trust* to be invested, but in fact embezzled by employee.

Mr. Justice North points out that there may be such a conversion not involving fraudulent breach of trust (2), as in the case of a trustee, who appropriates trust funds to recoup himself amounts previously advanced out of his own funds upon securities, which he, in good faith, turns over to the trust estate, but which afterwards prove to have been inadequate.

Conversion may be innocent.

But this exception will not be held to extend to a case where the interest of the trustee in the security taken over is very trifling or indirect. Thus a trustee, who, with the concurrence of the mortgagor, applied a portion of his trust fund, advanced upon a mortgage, in payment of a debt previously charged

In re Gurney Mason *v.* Mercer.

(1) *Moore* v. *Knight*, (1891) 1 Ch. 547, 553.

(2) *Mara* v. *Browne*, (1895) 2 Ch. 69, 95.

on the mortgaged property in favor of a bank in which the trustee was a partner, was held not to have converted to his own use the money so applied (1). To hold the exception applicable to such a case, says Romer, J., would be "a perversion of language" (2).

In *Collings* v. *Wade* (3) the Irish Court of Appeal, affirming the Vice-Chancellor, held that trustees, who had wrongly loaned money to the husband of the adult plaintiff-*cestui que trust*, which he had paid into his bank in reduction of an overdraft, for which the trustees were liable as his sureties, were not precluded from the benefit of the Statute by this exception. The trustees did not apply the money to their own use; and "the use of the money made by the borrower cannot be made a constructive conversion of the money by the trustees to their own use, merely because they were sureties for the debt."

Moneys appropriated to another account.

Where there are moneys which, though still *de facto* in the hands of the trustee, are no longer held by him as part of the trust estate, and in respect to which he has been guilty of a breach of trust resulting in their loss to the *cestui que trust*, the case is within this exception, rather than within that of "property still retained."

Directors.

There may be many cases in which directors of companies, guilty of misapplication of company pro-

(1) *In re Gurney, Mason* v. *Mercer*, (1893) 1 Ch. 590.

(2) Idem at p. 593.

(3) (1896) 1 Ir. Rep. 340, 349, 353-4.

perty, as to which they stand in the position of trustees "for the shareholders, that is, for the company" (1), will be debarred from the benefit of the Statutes of Limitation under this third exception.

Directors as trustees.

In dealing with directors as trustees, it must always be remembered that, unlike "ordinary trustees, whose primary duty it is to preserve the trust property and not to risk it, directors have to carry on business and this necessarily involves risk" (2). While managing the Company's property either in investing it, or otherwise employing it in the manner contemplated by the charter and by-laws, directors are not responsible for honest mistakes of judgment (3), though they are for losses occasioned by culpable negligence (4) in such management. As already seen, they are liable for all losses arising from employing assets for purposes or in manner *ultra vires* of the Company.

Directors formerly not entitled to benefit of limitations.

Directors, subjected, upon the application of these principles, to liabilities, were formerly unable to claim any protection from the Statutes of Limitation (5). Unless debarred by the exceptions, they can now do so. Most of the cases, in which they will find themselves so debarred, will no doubt fall within

(1) *Poole, Jackson and Whyte's Case*, 9 Ch. D. 322, 328. *In re Wood's Ships' Co., Ltd.* 62 L.T. (N.S.) 760, 762.

(2) Lindley's Law of Companies, (1889) p. 364.

(3) *London Financial Association* v. *Kelk*, 26 Ch. D. 107, 144.

(4) *Evans* v. *Coventry*, 8 De G. M. & G. 835; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. D. 787.

(5) *In re Oxford Benefit Building Society*, 35 Ch. D. 502.

When the first exception applies.

the first exception, fraud or fraudulent breach of trust. Under this first exception, rather than under the third, but certainly under one or the other, will fall all the cases, in which directors and promoters (1) are held liable to account for profits made by themselves, upon, or in consequence of, sales by such fiduciaries of property belonging to them, or in which they are interested, to the Company, without full disclosure of such interest (2).

Sales to company by directors.

But there are other cases in which, though the first exception may prove no obstacle, the third exception will be found an insuperable barrier. Thus, directors, who have, with full disclosure and without fraud, sold to their Company property belonging to themselves, are not liable, if the purchase of the property be warranted by the constitution of the Company, to account for any profits made upon the transaction, (3) nor to indemnify the Company for any loss it may sustain through such a purchase. The fact that the property was their own and not that of strangers in this case is immaterial. But, if the acquisition of such property should be *ultra vires*, the fact that the Company's money, expended in its purchase, went into the pockets of the directors,

Ultra vires.

(1) *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A.C. 1218, per Lord Cairns at p. 1236. *In re Hess Mfg. Co.*, *Edgar* v. *Sloan*, 23 S.C.R. 644; 21 A.R. 66.

(2) *Liquidators of The Imperial Mercantile Credit Association* v. *Coleman*, L.R. 6, E. & I. App., 189, 198, 204.

(3) *Cavendish-Bentinck* v. *Fenn*, 12 A.C. 652.

and not into those of strangers, may entail very grave consequences to the vendors. The purchase being a breach of trust, the directors are liable for consequential loss to the company. Had the purchase been from strangers, the action for such a breach of trust against the directors would be barred six years after it occurred (1). But, the purchase money, property of the Company, having gone into the directors' own pockets must be regarded as "converted to their use" within the meaning of the third exception, and no plea of the Statute of Limitations could be successfully set up. Other cases will, no doubt, from time to time arise, which will be held to fall within the third exception, but the instance just given will suffice to illustrate the importance of this exception to directors of companies.

(1) *In re Lands Allotment Co.*, (1894) 1 Ch. 616.

CHAPTER VIII.

Clause A (1).

Having determined that the provisions, embodied in section 32, R.S.O. (1897) cap. 129, are not rendered inapplicable because of the breach of trust falling within one of the three exceptions just dealt with, some attention should be given to the question, what cases fall within clause A and what within clause B. Upon this point there is considerable divergence of opinion.

Clauses A. and B.

Clause A. assumes that there are some actions or proceedings against trustees, as such, to which a Statute of Limitations would be applicable, "if the trustee had not been a trustee" (2): Clause B. excludes all actions "to which any existing Statute of Limitations applies. Clause B. presents little difficulty in its application; not so Clause A.

Difficulties in application of Clause A.

"It is obvious," says Fry, L.J. (3), "that if a person had not been a trustee he could not be sued for breach of trust; and further, there is no right or privilege, that I am aware of, conferred by any

(1) "All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through a trustee."

(2) *How* v. *Earl Winterton*, (1896) 2 Ch. at pp. 638-9, 641.

(3) *In re Bowden*, *Andrew* v. *Cooper*, 45 Ch. D. 444, 450-1.

Statute of Limitations in respect of breach of trust"; and upon these grounds, the Statute only applying to actions for breach of trust (1), he would apparently hold clause A. entirely ineffective. Lord Justice Lindley shares these difficulties, but cannot think Fry, L.J. intended to hold clause A. entirely meaningless, and he proceeds to discuss possible forms of action against trustees, as such, to which a Statute of Limitations might apply, and, assuming that an action of account in equity excluding all trust, though having no equitable element in it and based upon legal rights, might lie, and would perhaps afford better machinery than an action at law, he adds:—"To any such action the Statute of Limitations would be as much a bar in equity as at law. See *Foley* v. *Hill* (2), and *Knox* v. *Gye*" (3) And the Lord Justice concludes that this action, if maintainable, would be subject to a six years' statutory bar. "This I take to be the law applicable to all cases which can be brought within Clause A." Lopes, L.J. concurs in this judgment.

View of Lindley, L.J.

But would an action for an account "excluding all trust", though brought in equity as for an equitable debt, be an action for breach of trust, or in any sense an action against a trustee, *qua* trustee?

Rigby, L.J. (4), premising that a right of action, to come within the Statute, must be founded on

View of Rigby, L.J.

(1) *How* v. *Earl Winterton*, (1896) 2 Ch. 641, per Rigby, L.J.
(2) 1 Ph. 399.
(3) L.R. 5 H.L. 656.
(4) *How* v. *Earl Winterton*, (1896) 2 Ch. 641.

some act or omission in breach of trust (1), for the purposes of clause A., would regard the obligation of the trustee as arising from a contract or promise to perform his trust, and the breach of trust as an actionable breach of duty. Thus discarding the idea of breach of trust, he would enquire what Statute of Limitations would be appropriate to such a breach of contractual duty, not to extinguish the cause of action but to bar the remedy, and this he would apply. To different cases Statutes, with periods for their running of varying lengths, might apply. In

Romer, J.

Thorne v. *Heard* (2), Romer, J. thought that a claim for an account of lost trust funds would come within

North, J.

Clause A., while in *Mara* v. *Browne* (3), North, J., adopting the view of Fry, L.J., thought that clause A. did not affect a claim against a trustee to make good trust moneys lost by improper investment. In *Collings* v. *Wade* (4) the Irish Court of Appeal apparently applied Clause A. to such a claim. In

Stirling, J.

Robinson v. *Harkin* (5) Mr. Justice Stirling held that a claim for contribution between co-trustees would fall within Clause A., as a claim for recovery of debt already subject to the Statutes of Limitation.

Six-year period of limitation.

It is an important question whether or not, in any case within Clause A., sec. 32, R.S.O. (1897) cap. 129, there would be any period of limitation applic-

(1) See Chap. XV.
(2) (1893) 3 Ch. 534.
(3) (1895) 2 Ch. 95
(4) (1896) 1 Ir. Rep. 349, 349.
(5) (1896) 2 Ch. at p. 426.

able other than six years. It may be taken as established that a right of action to be within the section must be founded on some act or omission in breach of trust (1). The action must necessarily be against the trustee, *qua* trustee, and, excluding the cases covered by the exception of property "still retained," what action can be suggested which would lie against a trustee, as such, not founded upon breach of trust innocent or fraudulent? If this be so, and if the relation between the trustee, who has been guilty of breach of trust, and his *cestui que trust* were always that of debtor and creditor as upon a simple contract debt, the period of limitation applicable would certainly be in every case six years. The relation of creditor and debtor upon simple contract gives to the person in the former position a right to recover money from the person occupying the latter. To this right the only statutory period of limitation applicable is six years.

Debtor and creditor.

Now, although, in *Ex parte Taylor* (2), Lord Esher, M.R. states, with all the positiveness of well settled conviction, that "a *cestui que trust* is not a creditor of his trustee—the parties do not stand in the relation of debtor and creditor," and this opinion is also expressed in many other cases, such as *Ex parte Stubbins* (3), *Ex parte Ball* (4), *Molson's Bank* v.

(1) Per Rigby, L.J., *How* v. *Earl Winterton*, (1896) 2 Ch. at p. 641. See chap. XV.

(2) 18 Q.B.D. at p. 301.

(3) 17 Ch. D. at p. 69.

(4) 35 W.R. 264 (reluctantly by Sir James Hannen).

Halter (1), *Sinclair* v. *Wilson* (2) and other cases, these were all cases of fraudulent preference, and the *cestui que trust* was held not to be a creditor, payment of whose claim would be a preference under the Bankruptcy Acts. But there are strong authorities the other way. Thus, in *Ex parte Kelly* (3), Lord Justice James says:—"No doubt if a trustee commits a breach of trust by stealing or otherwise misappropriating the money of his *cestui que trust*, he becomes a debtor to his *cestui que trust* in respect of the money which he has improperly taken, and, if he becomes a debtor in that way, he remains only a debtor and the *cestui que trust* only a creditor, unless he can 'ear-mark' the money which the trustee has misappropriated." See also *In re Cross, Harston* v. *Tenison* (4).

Halsbury, L.C., in Sharp *v.* Jackson.

But that a trustee, guilty of breach of trust, is the debtor of his *cestui que trust*, though the debt be only equitable (5), must now be regarded as settled, in view of the unmistakable language of Lord Chancellor Halsbury in the House of Lords, in the very recent case of *Sharp* v. *Jackson* (6), where His Lordship, having had his attention expressly

(1) 18 S.C.R. p. 94, per Strong, J.; 16 A.R. p. 331, per Osler, J.A.

(2) 20 Beav. at p. 331.

(3) 11 Ch. D. at p. 311.

(4) 20 Ch. D. at p. 120; also *Kearnan* v. *FitzSimon*, 3 Ridgw. 1; *Vernon* v. *Vawdry*, 2 Atk. 119.

(5) *Ex parte Blencowe*, L.R. 1 Ch. App. 393; *Ex parte Sturt*, L.R. 13 Eq. 309.

(6) (1899) A.C. 419, 426.

called to *Ex parte Taylor* (1), and *Ex parte Ball* (2), said:—"It has been suggested that there was a proposition which could be maintained, as to which I confess I entertain grave doubt whether any decision goes to that extent, namely, that the relation between a *cestui que trust* and a trustee who has misappropriated the trust fund is not that of debtor and creditor. That it may be something more than that is true; but that it is that of debtor and creditor I can entertain no doubt. As that question has been mooted and brought before your Lordship's House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that, although there are other and peculiar elements in the relations between a *cestui que trust* and a trustee, undoubtedly the relation of debtor and creditor can and does exist."

In *How* v. *Earl Winterton* (3), Kekewich, J., assumes that a breach of trust creates a simple contract debt.

Cestui que trust is owner of trust property in hands of trustee.

As indicated in *Sinclair* v. *Wilson* (4) and some other cases, the *cestui que trust* may, so long as the specific trust fund exists, be said rather to be the owner of that property in his trustee's hands,—but such a case would be excluded altogether from the

(1) 18 Q.B.D. 295.

(2) 35 W.R. 264.

(3) (1896) 2 Ch. 625, 632; but see per Rigby, L.J., p. 642.

(4) 20 Beav. at p. 331.

operation of section 32, R.S.O. (1897) cap. 129, by the second exception, as property "still retained."

After loss he is a creditor of the trustee-debtor.

When, however, the fund is gone, by misappropriation, the claim of the *cestui que trust*, no longer that of owner of specific property in hand, but that of a person having a right to compel his trustee to make good the loss sustained, is the claim of a creditor, the trustee being in the position of debtor.

To such a claim, except in the comparatively rare cases presently to be alluded to, the statutory period of limitation applicable, "if the trustee had not been a trustee", would unquestionably be six years, so that if any claim against a trustee, as such, can be brought within clause A. it would seem, as stated by Lord Justice Lindley (1), to be necessarily subject to this period of limitation, except in those cases in which the trustee has, in an instrument executed by him under seal, covenanted or undertaken to perform the trust, thus making the debt created by a breach of trust a specialty debt (2). Specialty debts will only arise in cases of express trusts.

Specialty-debts the sole exception from six-year period.

Are constructive trusts within Clause A.?

It has been suggested that the many cases of constructive trust, in which trustees, though not at all within the wording of the Statutes of Limitation, were held entitled to the benefit of them, the many

(1) *How* v. *Earl Winterton*, (1896) 2 Ch. p. 640.

(2) *Richardson* v. *Jenkins*, 1 Drew 477; *Jenkins* v. *Robertson*, 1 Eq. Rep. 123; *Isaacson* v. *Harwood*, L.R. 3 Ch. App. 225; *Westmoreland* v. *Tunnicliffe*, W.N. (1869) 182; *Adey* v. *Arnold* 2 De G. M. & G. 432; *Wood* v. *Hardisty* 2 Coll. C.C. 542. See post p. 56 for periods of limitation applicable to specialty debts.

breaches of such trusts, to which the Courts of Equity held themselves bound to apply the provisions of those Statutes (1), at least by analogy, in fact almost as "if the trustee had not been a trustee", may be regarded as intended to be covered by clause A., thus giving the trustee in such cases an absolute statutory protection in lieu of that to which he was before held entitled *per cursum cancellariae*. To such cases it is argued that, in a certain sense, "an existing Statute of Limitations applies" (2), and that they may, therefore, be excluded from clause B. Although the protection formerly accorded to trustees can scarcely be said to have been "a right or privilege conferred by any Statute of Limitations," and although the words "if the trustee had not been a trustee" would, in applying the section to such cases, be entirely inoperative and meaningless, yet it is contended that, in order to give to all honest trustees the benefit of the Statute, which is supposed to have been intended, breaches of such constructive trusts, if excluded from clause B., should be deemed to fall within clause A. But the construction of clause A. necessary to effect this seems strained to the degree of violence, and the ground for contending that these cases do not fall within clause B., seems entirely insufficient (3).

(1) *Petre* v. *Petre*, 1 Drew. 393: *Banner* v. *Berridge*, 18 Ch. D. 270.

(2) But see *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. p. 363, and *How* v. *Earl Winterton*, (1896) 2 Ch. 632.

(3) See post p. 66.

Six-year period generally applicable.

Failing this class of cases as subjects for the operation of clause A., unless it is to be held entirely inoperative, or is to be held to apply to actions against trustees other than those founded on breach of trust, resort must be had to some such constructions of that clause as those mentioned by the Lords Justices, Lindley and Rigby, in *How* v. *Earl Winterton* (1). But, as every case of breach of trust, not excluded by the exceptions, should presumably fall within one clause or the other,—A. or B.,—if the view, apparently taken by Lindley, L.J., were absolutely accurate,—that in such cases as might be brought within clause A. the period of limitation would be six years, (and this view would be sustainable in the great majority of cases upon the basis of the claim against a trustee for breach of trust being a simple contract debt as above explained),—the practical importance of determining within which clause any particular case should be held to fall, except in the case of a specialty debt, is not very great.

Periods of limitation for specialty debts.

In England, and likewise in the Provinces of Nova Scotia, New Brunswick, British Columbia and Manitoba, the period of limitation applicable to all personal claims for specialty debts is twenty years. In Ontario the same period of limitation applies to all personal claims upon specialty debts, except in the case of "actions upon any covenant contained in any indenture of mortgage made on or after the 1st day

(1) (1896) 2 Ch. at pp. 638, 641.

of July, 1894," to which a ten-year period of limitation is specially applied (1). In the other Provinces it is probable (2) that the Courts will follow the English Court of Appeal (3), which decided that, to claims upon mortgage covenants, the period of limitation prescribed for claims for moneys charged upon or payable out of lands applies, rather than that prescribed for claims upon bonds or other specialties not so charged. The Court of Appeal (4) for Ontario had decided otherwise, and this decision was followed (5) in Ontario up to 1894 in preference to that of the English Court of Appeal. To all moneys charged upon, or payable out of lands, other periods of limitation apply (6), but with these we are not now particularly concerned. In the case of claims against trustees, founded upon specialty debts, it is most important to determine whether or not they fall within clause A.

Mortgage covenants.

Clause A. does not appear to call for further comment.

(1) R.S.O. (1897) cap. 72, sec. 1. See Appendix A.

(2) *Trimble* v. *Hill*, 5 A.C. 342, 344.

(3) *Sutton* v. *Sutton*, 22 Ch. D. 511; *Fearnside* v. *Flint*, 22 Ch. D. 581; *In re Powers*, *Lindsell* v. *Phillips*, 30 Ch. D. 291; *In re Frisby*, *Allison* v. *Frisby*, 43 Ch. D. 106.

(4) *Allan* v. *McTavish*, 2 A.R. 278.

(5) *McDonald* v. *Elliott*, 12 O.R. 98.

(6) R.S.O. (1897) cap. 133.

CHAPTER IX.

Accrual of Cause of Action—Disabilities, Etc.

Before proceeding to consider the features peculiar to Clause B., it may be well to note that by neither section are the principles, which determine when a cause of action accrues, at all affected (1). The effect of concealed fraud has been already adverted to: reversionary interests of beneficiaries (2) are expressly protected by Clause B. (3); acknowledgments by payment of interest (4) or otherwise and disabilities (5) are dealt with upon long settled principles, and are given their well known effects in applying whatever Statute of Limitations is rendered available.

Payment of interest by mortgagor.

Thus, in *In re Somerset, Somerset* v. *Earl Poulett* (6), the trustees of a settlement, who, in 1878, had committed an innocent breach of trust, by investing trust money upon mortgage of property

(1) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 605.

(2) *In re Bowden*, 45 Ch. D. at p. 351.

(3) *How* v. *Earl Winterton*, (1896) 2 Ch. at p. 637; *Want* v. *Campain*, 9 T.L.R. 254; *Mara* v. *Browne*, (1895) 2 Ch. 96; *Collins* v. *Wade*, (1896) 1 Ir. Rep. 340.

(4) *In re Somerset*, (1894) 1 Ch. 231, 256, 264, 268; *Want* v. *Campain*, 9 T L.R. 254; *Hughes* v. *Twisden*, 55 L.J. Ch. 481; *Stephens* v. *Beatty*, 27 O.R. p. 88.

(5) *In re Somerset*, (1894) 1 Ch. p. 257; *Stewart* v. *Snyder*, 30 O.R. 115; *In re Page*, (1893) 1 Ch. 308.

(6) (1894) 1 Ch. 231. For the judgment pronounced in this case see Appendix B.

of insufficient value, were held entitled, under Section 8 of the Trustee Act of 1888 [Sect. 32 R.S.O. (1897) cap. 129], as against the life tenant in possession, though not as against the infant remaindermen, to set up the Statute of Limitations, notwithstanding the payment of interest by the mortgagor until 1890. The action was brought in 1892. The right of the tenant for life was held to be barred after six years from the time when the investment was made. The payment of interest, though equivalent to a payment by the mortgagor to the trustees and by them to the life tenant, is not an admission or acknowledgment "of any breach of trust nor of any liability on the part of the trustees that they owe, or are liable to make good, the principal sum to the plaintiff, or to any other of the *cestuis que trustent*; it is a mere acknowledgment that they had received from the mortgagor so much money in respect of his mortgage" (1). If payment of the interest "was evidence of anything, it was evidence of Mr. Somerset's (the life-tenant) acquiescence and acceptance of the mortgages as a proper investment" (2). That the right of recovery of the infant remaindermen was affected by the Statute was not contended. The judgment of Mr. Justice Wright, in *Want* v. *Campain* (3), was precisely to the same effect: see

Infant reversioners.

(1) Per Lindley, L.J., at p. 264.

(2) S.C. per Davey, L.J., at p. 274; see also per A. L. Smith, L.J., at pp. 268-9.

(3) 9 T.L.R. 254. See Appendix B.

also *Mara* v. *Browne* (1) and *In re Swain, Swain* v. *Bringeman* (2).

Statute runs from removal of disability.

On the other hand in *In re Page, Jones* v. *Morgan* (3), where a trustee for an infant had, in breach of trust, expended an infant's moneys upon his maintenance during his minority, the action, brought twelve years after the infant had attained his majority, to compel the trustee to replace such moneys, was held to be barred by the Statute.

Contribution between co-trustees; accrual of cause of action.

Again, in *Robinson* v. *Harkin* (4), an action by one of two co-trustees and infant *cestuis que trustent* against the other trustee to compel him to make good a loss sustained by his dealings with the trust fund in breach of trust, the defendant claimed contribution from his co-trustee, one of the plaintiffs, whereupon the latter sought, by amendment, to plead the Statute of Limitations. The moneys had been lost more than six years before the action was brought. Mr. Justice Stirling, in considering the effect of the proposed plea of the Statute, indicates that the case would fall within Clause A of the Statute, because an existing Statute of Limitations was applicable to it, and then points out (5) that time, under the Statute,

(1) (1895) 2 Ch. at p. 96.

(2) (1891) 3 Ch. 241. See *Collings* v. *Wade*, (1896) 1 Ir. R. 340.

(3) (1893) 1 Ch. 308. But see *Clarke* v. *Macdonell*, 20 O.R. 564, and cases there cited; *Lyall* v. *Kennedy*, 14 A.C. 437.

(4) (1896) 2 Ch. 415.

(5) Idem at p. 426.

would, as between the two co-trustees, in respect of the claim for indemnity, not begin to run until the claim of the *cestuis que trustent* had been established against one or both, as was held in *Wolmerhausen* v. *Gullick* (1), a case of contribution between co-sureties.

Cause of action accrues when breach occurs.

But, except where postponed by the application of some such rule, the cause of action, for the purposes of sec. 32, R.S.O. (1897) cap. 129, is held to have accrued when the breach of trust, which forms such cause of action, occurred (2), and not when the resulting damage happened (3), nor when either breach or damage became known to the *cestui que trust* (4). Nor will any theory of a continuing duty on the part of the trustee to his *cestui que trust*, or that a failure upon the part of the trustee to make good the loss resulting from the breach of trust, constitues a fresh violation of duty, giving a new cause of action, be permitted to disturb this well settled rule. "To give assent to such a doctrine," says Lord Herschell, "would practically put an end to the value of the Statute (5). Where a breach has

Continuing duty theory.

(1) (1893) 2 Ch. 514.

(2) *Thorne* v. *Heard*, (1894) 1 Ch. at p. 605; *Stephens* v. *Beatty*, 27 O.R. 79, 91; *In re Somerset*, (1894) 1 Ch. at p. 268; *How* v. *Earl Winterton*, (1896) 2 Ch. at 637.

(3) Mr. Justice Romer's expression apparently to the contrary in *In re Swain*, (1891) 3 Ch. at p. 241, must be inaccurate.

(4) *Stewart* v. *Snyder*, 30 O.R. 112, 115; *Howell* v. *Young*, 5 B. & C. 259.

(5) *Thorne* v. *Heard*, (1895) A.C. at p. 503; see p. 499.

been committed, which results in the loss of the corpus of the trust estate, "each gale of interest cannot be treated as creating a fresh cause of action against a trustee, without taking away the very relief which the section expressly gave." The Statute, in such a case, does not bar merely the right of the life tenant in possession to recover more than six years arrears of income, prior to the commencement of the action; his whole claim is barred (1). "Time runs from the breach of trust committed" (2).

(1) *Collings* v. *Wade*, (1896) 1 Ir. R. 340, 350.
(2) S.C. p. 354.

CHAPTER X.

Clause B (1).

The construction and operation of Clause B. must now be considered. The "action or other proceeding" must be brought "to recover money or other property." These words do not mean, exclusively, to recover trust property in specie (2),—"money as belonging to the person" (3). They extend to actions brought to compel trustees to account (4), and to any action which is in substance an action to make a trustee pay money into a fund as against which the *cestui que trust* has a claim (5), or to make good a loss consequent upon breach of trust (6). The words

"To recover money."

(1) "(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the Statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession."

(2) *In re Bowden* 45 Ch. D. at p. 451; *In re Swain*, (1891) 3 Ch. 241.

(3) *How* v. *Earl Winterton*, (1896) 2 Ch. 642.

(4) Idem at p. 633.

(5) Idem at p. 642.

(6) *In re Somerset*, (1894) 1 Ch. 268.

"Or other property."

"other property," it would seem, must be strictly construed, if not under the rule "*ejusdem generis*," from the very necessities of the case, as not extending the word "money." "Other property" cannot, though the Statute is confined to actions against trustees or those claiming through them, include trust property sought to be recovered from them in specie, because of the second exception. Such property would be "still retained." If the property sought to be recovered were lands, the case would fall within an existing Statute of Limitations, R.S.O. (1897) cap. 133, sec. 30 (1), and upon that ground, also, would be without Clause B.

It seems impossible to conceive of any action to recover property which might be brought against the trustee, as such, and which would not fall within the exceptions, yet would be an action to which no existing Statute of Limitations applied, except an action "to recover money", in the sense in which those words have been held to be used in clause B.

Only actions "to which no existing Statute of Limitations applies" are within Clause B.

The action must be "one to which no existing Statute of Limitations applies." Every action founded upon breach of an express trust is clearly within this description (2). But, says Lord Esher, against a breach of trust, made such by its construction, a Court of Equity allows Statutes of

(1) See Appendix A.

(2) R.S.O. (1897) cap. 51, sec 58, ss. 2; 47 Vict. (N.S.) cap. 25, sec. 14, ss. 1; 58 and 59 Vict. (Man.) cap. 6, sec. 39, ss. 1; R.S.B.C. (1897) cap. 187, sec. 89.

Limitation to be vouched (1). May it be said of such cases that the Statutes of Limitation apply to them? If so they would be excluded from the operation of clause B. For this, it may be plausibly contended, it is not requisite that the constructive trustee should enjoy "a right or privilege conferred by a Statute of Limitations" (2); it should suffice if the case be one to which an existing Statute has been held applicable, though by analogy only. But Mr. Justice Kekewich says, "no Statute applied to breaches of trust" (3). His Lordship uses the word "applied" as meaning "was in terms extended," and evidently regards it as so employed in clause B. Lord Justice Kay, regarding directors as trustees by implication of law, held them to be within clause B. (4). The interpretation clause (5) defining trustees, expressly brings such trustees within the Act, but of course this does not indicate that such cases would fall within one clause rather than the other. To cases of concealed fraud, entirely subject, like actions founded on breaches of trust, to equitable doctrines, Lord James of

Constructive trusts.

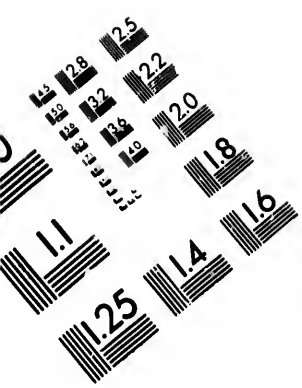
(1) *Soar* v. *Ashwell*, (1893) 2 Q.B. p 393; *Banner* v. *Berridge*, 18 Ch. D. p. 270.

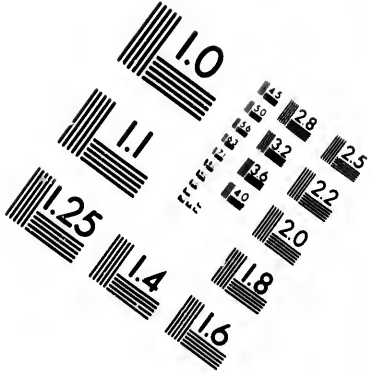
(2) *In re Bowden*, *Andrew* v. *Cooper*, 45 Ch. D. pp. 450-1; *How* v. *Earl Winterton*, (1896) 2 Ch. p. 638.

(3) S.C. p. 632.

(4) *In re Lands Allotment Co.*, (1894) 1 Ch. p. 639; see also *Whitcomb* v. *Watkins*, 78 L.T. 188.

(5) R.S.O. (1897) cap. 129, sec. 27; 51 Viet. (N.S.) cap. 11, sec. 3.





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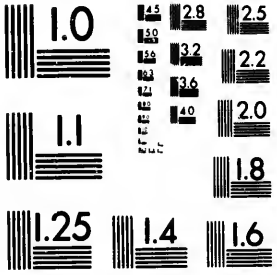

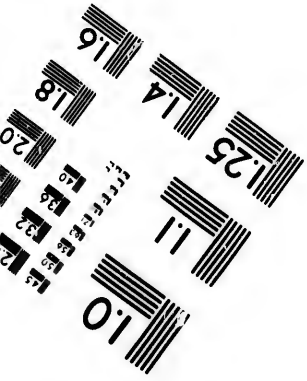

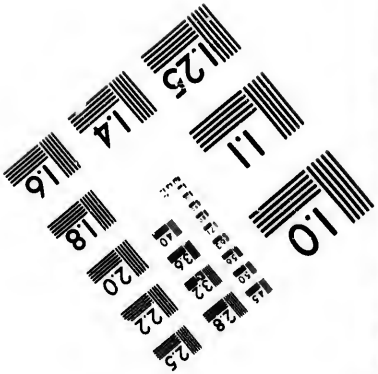

Hereford, sitting in the Judicial Committee, says "these Statutes really have no application"(1). The benefit of them was given by Courts of Equity in certain cases to constructive trustees, not by virtue of the Statutes themselves, but, as explained in *Smith* v. *Clay* (2), by a rule adopted by the Court of Chancery itself, whereby the Court, in the exercise of its own inherent power, applied the statutory periods of limitation to cases in equity similar to those at law covered by such Statutes. It seems reasonably clear, therefore, that the Statutes of Limitation cannot be said to have themselves "applied" to such cases. This discussion is however, rather academic than practical; for the inapplicability of clause B. depends upon the existence of a statutory provision already applicable, and which that clause would otherwise render applicable. If the constructive trustee, sued for breach of trust, is amply assured of protection under the previously well-established practice or rule of Courts of Equity, by the application to his case of the period of limitation prescribed by an existing Statute, not itself in terms covering his case, it must be matter of small moment to him whether or not he can as well claim the same protection from the same Court in virtue of clause B., of sec. 32, R.S.O. (1897) cap. 129. Of course, in the comparatively rare cases, in which

Constructive trustees are now assured of a period of limitation.

(1) *Bulli Coal Mining Co.* v. *Osborne*, (1899) A.C. p. 363.

(2) Reported in Note to *Deloraine* v. *Brown*, 3 B.C.C. 639.

breaches of trust result in specialty debts, this question might be of importance here if such debts could arise out of constructive trusts. But, as already explained, specialty debts only arise upon breaches of express trusts, and the question is of no practical moment, unless such cases should be held to fall within clause A. For, to all cases within clause B., the limitation period applicable is necessarily six years.

Bar as if claim "in action of debt for money had and received."

In all cases within clause B., "the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received". In *In re Somerset, Somerset* v. *Earl Poulett* (1), Mr. Warmington, Q.C., says, *arguendo*:—"From the time of Lord Mansfield there has been an equitable action for money had and received. The *cestui que trust* could not sue unless he got an admission from the trustee, but if he got that admission he could sue and the Statute of Limitations applied to the action and ran from the time when the money was received to the use of the plaintiff. Treating this action as analogous to an action for money had and received, there would be no right to sue until default made, that is, until the trustees failed to do their duty in paying the interest etc."

(1) (1894) 1 Ch. p. 244.

Time runs from breach, not from default in payment.

Mr. Justice Kekewich in dealing with these words of the Statute and this argument says (1):— "The plaintiffs' argument was that the principle of *Howell* v. *Young* (2) has no application to such a case as this, and that, according to the words of the Statute itself, the action must be treated as one for money had and received, and that so treating it, the plea cannot be maintained. The meaning of the provision, that is, of the particular language in which the provision is expressed, is not to my mind by any means clear, but I do not think that it means what was contended by the plaintiffs. It would have been easy and possibly better, to provide, if that had been the intention, that an action against trustees to recover money or other property to which no existing Statute of Limitations applied, should be brought within six years from the time when the right of recovery accrued, but, notwithstanding that it has not been so plainly provided, that must, I think, be the meaning of the section. I suppose that the words "money had and received" were used because in that particular form of action for debt there was more analogy to pleadings and proceedure in Chancery than in any other like action, and, in truth, an action of that character might have been brought, and sometimes was brought, against trustees, in what we now call the Queen's Bench Division, before the Judicature Acts. The controlling words for the

(1) (1894) 1 Ch. p. 255.
(2) 5 B. & C. 259.

purpose of construction are, I think, "an action of debt," and in such an action a plea that the right accrued six years before writ issued is good, and can only be defeated by acknowledgment, or some other act, taking the case out of the Statute. This apparently was the view of other Judges before whom the section has come, although the precise point either did not arise or was not argued before them". And in the same case Lord Justice A. L. Smith says (1):— "The defence is to be treated as if it were a plea of the Statute of Limitations pleaded at common law to an action for money had and received. The cause of action was complete when the defendants committed the breach of trust."

"Action of debt."

In *In re Bowden, Andrew* v. *Cooper* (2), Fry, L.J., says:—"If this had been an action for debt for money had and received, and the debt had arisen more than six years ago, and no acknowledgment had taken place, the lapse of time would have furnished a defence." A breach of trust, constituting the cause of action, is to be treated as having by, and at the moment of, its commission created a debt due by the trustee—as if he had then received money payable forthwith to his *cestui que trust*, and from that hour, save in the special cases already alluded to, time under the Statute begins to run in his favor (3).

The breach is the cause of action.

(1) (1894) 1 Ch. at p. 268.

(2) 45 Ch. D. at p. 451.

(3) See too *Collings* v. *Wade*, (1896) 1 Ir. R. 340.

CHAPTER XI.

Clause B.—Action for Account.

Although the action be brought for an account, the rule as to the time from which the Statute will be held to run will be the same as if the claim were for damages or to recover a stated sum of money. *How* v. *Earl Winterton* (1) illustrates this. A testatrix, who died in May, 1875, by her will devised to the defendant and another, who disclaimed, all her real estate upon trust to accumulate and invest the income for a period of fourteen years, and then to pay to the plaintiff an annuity of £50 during her life, payable half yearly. The plaintiff in this action, begun August 9th, 1895, alleged that the defendant had failed to invest surplus rents and profits, or to accumulate or otherwise make them available as security for her annuity; that he had failed to keep down interest on encumbrances, having had the means to do so, and that, in consequence of this and of his neglect in certain foreclosure proceedings, property had been lost and there was no estate available to satisfy plaintiff's annuity, of which she had been deprived *since November, 1894.* The defendant had no trust moneys in his hands at the issue of the writ and had never converted any to his own use. The plaintiff

How *v.* Earl Winterton.

(1) (1896) 2 Ch. 626.

claimed an account of all rents and profits received during the fourteen years; a declaration that the defendant was chargeable with the difference between such rents and profits and moneys properly expended and interest thereon,—and an account upon that basis; and a declaration that her annuity was charged on the amount so to be found due. The defendant, denying the breaches of duty and neglect charged, pleaded the Trustee Act of 1888. [Section 32, R.S.O. (1897) cap. 129] as a defence. At bar, however, it was admitted on his behalf that he had in his hands, on August 9th, 1889, that is six years before the issue of the writ, certain moneys liable to the trust for accumulation. No fraud was suggested. It was held by the Court of Appeal, affirming Mr. Justice Kekewich, that the plaintiff was entitled to an account of the moneys in the hands of the defendant six years before the issue of the writ and liable to the trust for accumulation, and also to an account of the rents which ought afterwards to have been accumulated, but not to an account from the death of the testatrix. The plaintiff had received her annuity regularly from the persons beneficially entitled to the real estate from 1889 to 1895, when prior mortgagees intervened and the annuity ceased to be paid.

Mr. Justice Kekewich says in the course of his judgment:— Kekewich, J.

"What Mr. Micklem (counsel for the plaintiff) proposes to prove is that at the end of the term there was

in the hands of the trustee a considerable sum, part of which he might have disposed of more than six years before the issue of the writ, but some of which still remained in his hands after the issue of the writ. That is entirely a question of evidence. He also proposes to prove that moneys had been received within the six years, and that the trustee is liable for that. That is a question of evidence, and upon that of course I must not trench. As at present advised, it seems to me that Mr. Micklem is entitled to an account upon that footing. . . . .

"This is an action brought by Mrs. How to recover trust property. It is an action for account and necessarily so. She is an annuitant whose annuity was paid up until November, 1894, and the form of her action must necessarily be to insist upon the trustee rendering an account of what he has received, of what he ought to have received and has not, and of what, having been received, has not been properly dealt with by him, and to make him liable accordingly; an account being taken, year by year, in order to see how far the annuity had been paid and how far it ought to have been paid. Mr. Micklem's point is this: that if on taking that account he shows that the trustee received, say £1000 at any time, he must account for that; and that it is no answer to say that at some point of time more than six years before action brought, that money has been parted with. When I use the expression 'parted with,' all I mean is, parted with

No account to be taken of moneys "parted with" more than six years before action.

by breach of trust. It is not a question of the trustee having converted the money to his own use, because then it would be excepted; nor of his having committed a fraudulent act, for that again would be excepted. I will take the case suggested by Mr. Micklem. Suppose the trustee, being the owner of this land, had subscribed to a parochial charity out of the money which he ought to have kept for the annuity, or had handed the money directly over to the rector of the parish, that would have been a breach of trust. Such a breach of trust constitutes a simple contract debt to which no Statute of Limitations applied before 1888, because no Statute applied to breaches of trust. But the legislature has intervened and said that the old rule of equity is wrong, and that a trustee is entitled to be protected as much as any other person who owes money, except where he has committed an act of fraud or has put trust money into his own pocket. If he has not done anything of that kind, a trustee, who has parted with money and is therefore a debtor, is as much entitled to protection as any other person. In my opinion I should be repealing the Statute, or depriving the Statute of a very large part of its remedial benefit, if I were to hold that it is not to be applied in that way. . . . .

"I cannot see that it is right to stop short of applying that principle here merely because this is an action for account and not an action simply to recover a certain sum of money. Therefore, an

account must be taken, with a special direction to the chief clerk that, as to moneys proved to have been parted with before six years from the issue of the writ, the Statute will be applicable."

Lindley, L.J.

Lord Justice Lindley, in the Court of Appeal, adds:—

"It has been decided, first by Kekewich, J., and again by this Court, on appeal by the trustee, that the plaintiff is entitled to an account of the moneys in the hands of the trustee on August 9th, 1889 (*i.e.*, six years before the commencement of this action), and liable to the trusts for accumulation under the will, and also to an account of the rents and profits subsequently received by the trustee which ought to have been accumulated. But the plaintiff is not content with this, and by her cross-notice she asks for an account from the death of the testatrix in May, 1875, and the plaintiff further seeks to charge the defendant with compound interest at 5 per cent. on all the balances of rents received by him and not properly invested and accumulated. . . . .

Each breach of trust a fresh cause of action.

"Each time the defendant failed to invest what he ought to have invested, he committed a breach of trust in respect of which the plaintiff might have sued him. A series of separate causes of action thus arose, each breach of trust giving her a fresh cause of action.

Right of reversioner.

"But her annuity did not begin until the end of the term, namely, on May 20th, 1889. Until that day she was rather in the position of a person entitled

in remainder than in the position of a person entitled in possession. Although she might have sued the trustee before her interest accrued in possession, she was not bound to do so. For the purposes of the Statutes of Limitation, therefore, her causes of action cannot be regarded as having first accrued before May 20th, 1889. Even then she could not have sued for her annuity. Her annuity commenced to run from that time, but no payment in respect of it became due to her until six months afterwards, namely, November 20th, 1889. She could not have sued for payment of any arrears of her annuity until that date. Her right, however, to sue for arrears is one thing, her right to sue her trustee for prior breaches of trust is another thing, and although her right to sue for arrears did not accrue till November, 1889 (1), her right to sue for the previous breaches of trust accrued six months earlier. In this particular case nothing really turns on this point, for the defendant has admitted that, within six years next before the issuing of the writ in this action, he had rents in his hands which he ought to have invested and accumulated; and there is reason to suppose that he has received some more since. *Thorne* v. *Heard* (2) shews that he cannot be treated as if he still retained these moneys so as to deprive him of the benefit of s. 8 of the Trustee Act, 1888, but neither that nor any other Statute protects him from liability to

Right to sue for default in payment.

(1) See *Collings* v. *Wade*, (1896) 1 Ir. Rep. 340, 350, 354.
(2) (1895) A.C. 495.

Account limited to six years.

account for breaches of trust committed by him within the six years next before the commencement of this action. The writ was issued on August 9th, 1895, and the account which has been directed is confined to that period. . . . .

"In the present case the action is maintainable in respect of the defendant's receipts since August 9th, 1889, and in respect of rents then in his hands which he ought to have accumulated. It is said that the amount of what he then had cannot be ascertained without taking an account from the death of the testatrix. This, however, is not so. What the defendant had in his hands in 1889 can be ascertained by an enquiry. It is a mere question of fact to be ascertained by evidence, and in particular by the examination of the defendant on oath, and the production of his earlier accounts, which of course are evidence against him. But to take an account of his receipts and payments from 1875 is quite another matter. That involves the disallowance of every payment which the defendant cannot now prove that he is entitled to have allowed as against the plaintiff. Such an account is necessary to ascertain what the defendant ought to have had on August 9, 1889, but it is not necessary to ascertain what in fact he then had. I see nothing in the nature of the accounts which renders it necessary in this case to go further back than six years".

Amount in hand six years before action a question of fact, not matter of account.

Order made.

The form of order settled in this case by Mr. Justice Kekewich, and subsequently confirmed and

used by him in *In re Davies, Ellis* v. *Roberts* (1), will be found in the Appendix B.

The judgments in *How* v. *Earl Winterton* (2), have been thus fully quoted because they elucidate several points in the construction and application of the Statutes of Limitation to claims against trustees in actions for account of trust funds founded upon breaches of trust. That the Statute bars any right to an account of moneys (excepting always cases in which there has been fraudulent misappropriation), "parted with" by the trustee more than six years before action is also laid down by Mr. Justice North in *In re Page, Morgan* v. *Jones* (3), and the same rule was applied in *In re Turner, Barker* v. *Ivimey* (4), before Mr. Justice Byrne, and was held to apply, notwithstanding an admission by the trustee that he "still retained" a balance of trust funds, by Mr. Justice Kekewich, in *In re Davies, Ellis* v. *Roberts* (5). Such moneys cannot be recovered; neither can the trustee be compelled to account for them.

The rule laid down.

The question, which did not directly arise in *How* v. *Earl Winterton* (6), viz.—whether or not the non-payment of each instalment of moneys, payable periodically, gives rise to a fresh cause of action,

Does non-payment of each gale give a fresh cause of action against the trustee?

(1) (1898) 2 Ch. 142 at p. 144.
(2) (1896) 2 Ch. 626.
(3) (1893) 1 Ch. at p. 308.
(4) (1897) 1 Ch. 536.
(5) (1898) 2 Ch. 142.
(6) (1896) 2 Ch. 626.

thus affording a new starting point for the Statute for each of a series of separate causes of action,—came up squarely for decision before the Irish Court of Appeal in *Collings* v. *Wade* (1). Although, as Lindley, L.J. said in *How* v. *Earl Winterton*,—"In this particular case nothing really turns on this point, for the defendant has admitted that, within six years next before the issuing of the writ in this action, he had rents in his hands which he ought to have invested and accumulated",—yet, the Court, by limiting the recovery to moneys in hand six years before the action was begun and to moneys since received, virtually held that any right the plaintiff might have to sue for arrears of annuity would not prevent her entire cause, or all her causes, of action being effectually barred by the expiration of six years from the commission of the breach of trust. But, in *Collings* v. *Wade* (1), where the adult plaintiff was life-tenant in possession (not a deferred annuitant as was Mrs. How), it was insisted on her behalf that non-payment of each gale was a separate cause of action, "as would have been the case if the capital was duly invested, and the income had been received and withheld by the trustees". The Court, therefore, had to decide whether or not the life-tenant, being barred by lapse of time as to her right of action for the breach of trust, could, nevertheless, sue the trustees for non-payment of all gales of income

(1) (1896) 1 Ir. R. 340.

which had fallen due within six years before action. The Court disposes of the matter in this unmistakable language:—

The lapse of six years from the breach bars all rights of beneficiaries *sui juris* in possession.

Fitzgibbon, L.J., says (1): "We cannot concur in this view. It appears to us that any defence which would have prevailed against her as regards the whole fund, if she had been the absolute beneficiary, or as regards the income, if she had been the sole plaintiff, must equally prevail to prevent her from recovering anything for herself from Wade, when she sues as co-plaintiff with her children. In other words, her whole claim is barred as against Wade. Furthermore, we think that each gale of interest cannot be treated as creating a fresh cause of action against a trustee without taking away the very relief which the section expressly gave. It would not be so treated, if the defendant were not a trustee, and the Act says that he is to have the same protection from the Statute of Limitations as if he "had not been a trustee". Walker, L.J. (2), answering the contention above stated, adds:—"I think this loses sight of the scope of the section. I think the effect was to free the trustee from all claims in respect of the life estate of Mrs. Collings, who is one of the claimants in respect of the breach of trust." He intimates that *Swain* v. *Bringeman* (3); *Want* v.

(1) (1896) 1 Ir. R. at p. 350.
(2) Idem p. 354.
(3) (1891) 3 Ch. 233.

Campain (1), and *In re Somerset* (2) are decisions to the same effect. So is *Stewart* v. *Snyder* (3).

Rule is general.

The recovery, in respect of interests in possession, must, therefore, except in cases of fraud or conversion, always be limited to funds in hand six years before action, or subsequently received by the trustees—that is, of course, where there has been no intervening acknowledgment. If the breach of trust, committed six years before action, results, without any further breach, or acknowledgement of liability, within that period, in a total loss, though such loss should occur within six years, the action will be completely barred; if the loss be only partial, the bar will be *pro tanto*. This would be the case, although the life-tenant should have received the income (4) steadily until after the expiry of the six years, which had barred his right of action, the breach of trust being meantime unknown to him. Thus, in the case of trustees, is the principle of *Howell* v. *Young* (5) carried to its ultimate logical, yet, only legitimate, conclusion.

(1) 9 T.L.R. 254; see Judgment as given in Seton on Decrees, vol. 3, p. 2127. See Appendix B.

(2) (1894) 1 Ch. 599.

(3) 30 O.R. 110; compare R.S.O. (1897) cap. 133, sec. 6, ss. 3.

(4) The trustee may, however, make payments to the *cestui que trust* in such manner, (for instance, if he pays, as income or interest, money out of his own pocket, in order to conceal the loss of the trust fund, or as interest upon such a fund admittedly lost and which the trustee concedes his liability to replace) as either to prevent the Statute running at all, or to keep alive or revive the claim of the *cestui que trust*.

(5) 5 B. & C. 259.

CHAPTER XII.

Reversionary Interests.

Reversioner may sue when breach occurs.

The judgment of Lord Justice Lindley, quoted in the last chapter, would seem to clearly indicate that a person in the position of a deferred annuitant, or chargee, or a remainderman, may have two distinct causes of action, one, that for breach of trust, the other that for non-payment of the annuity. Although the breach of trust itself might have been made the subject of an action the moment it occurred, yet the annuitant (or other person in like plight), being "rather in the position of a person entitled in remainder than in the position of a person entitled in possession," is not bound to exercise this right: but, the moment he becomes "entitled in possession," time begins to run against him as to the cause of action for any breach of trust already committed. Yet, although the right of action for non-payment could only be held to have accrued when the first payment fell due, (and the same rule would apply to each subsequent payment), upon those causes of action, when the whole corpus was lost and the right to have it replaced had been effectually barred, the annuitant would not have any further right to sue the trustee personally. Otherwise, for each instalment as the same fell due, he would acquire a fresh cause of action, which would only be barred at the

His right is deemed to accrue, for the purposes of the Statute, when his interest vests in possession.

expiration of six years from the due date of such instalment, and this, as Lord Justice FitzGibbon points out, would deprive the trustee of the very relief which the section was intended to give him (1).

A remainderman, though likewise entitled, immediately upon the commission of a breach of trust, to sue to have it repaired, cannot be held bound to do so until his interest is vested in possession, and only from that time will the Statute be held to run in bar of his remedy to recover the trust estate from his trustee. This is the plain effect of the concluding words of clause B., that "the Statute shall not begin to run against any beneficiary, unless and until the interest of such beneficiary becomes an interest in possession," corresponding to the similar provision in "The Real Property Limitation Act," R.S.O. (1897) cap. 133, sec. 5, ss. 11 & 12 (2).

Corresponding provision of "The Real Property Limitation Act."

But it is to be noted that, while the principle of "The Real Property Limitation Act" in respect of future interests is thus introduced and made applicable to actions against trustees for losses arising from breaches of trust, some of the restrictions or qualifications upon that principle have not been imported with it. Thus, there is no provision corresponding with that made by sec. 6 of "The Real Property Limitation Act" in respect of cases in which the person entitled to a particular estate, upon which the

(1) *Collings* v. *Wade*, (1896) 1 Ir. R. at p. 350.

(2) See Appendix A.

future estate or interest was expectant, was out of possession when his interest was determined, or with that, to be found in the same section (1), in respect of subsequent interests of other persons, or of future interests of the person whose right to a prior interest in possession had been barred.

When time begins to run against reversioners.

The cases cited in the preceding chapter all recognize that time only begins to run against a reversioner from the moment at which his estate becomes an estate in possession. Until then he is, for the purposes of the Statute, regarded as if his cause of action had not accrued, though in fact it had.

(1) See Appendix A.

CHAPTER XIII.

Married Women Cestuis que Trustent.

Time runs against a married woman.

Clause B. of section 32, R.S.O. (1897), cap. 129, though it does not prevent other persons under disabilities availing themselves of any answer thereby afforded to a plea of the Statute to the same extent as they might have done if suing in "an action of debt for money had and received," precludes a married woman, who is "entitled in possession for her separate use, whether with or without restraint upon anticipation," from claiming any advantage upon the score of disability. This provision does not appear to call for any extended comment.

It is noticed, but not discussed, by Fry, L.J., in *In re Bowden, Andrew* v. *Cooper* (1).

Wassell *v.* Leggatt.

In *Wassell* v. *Leggatt* (2), where the husband was held to be a trustee of separate property of his wife which he had taken forcibly from her, the right of the wife to recover such property from his executors was held not to be affected by the English provision corresponding to sec. 32, but, upon the ground, as stated above, that such property was "still retained" as part of the deceased trustee's estate. The Court did not have to consider the proviso affecting married women possessed of separate estate.

(1) 45 Ch. D. at p. 451.

(2) (1896) 1 Ch. 554.

In re Turner, Barker v. *Ivimey* (1) was an action brought by a married woman, life-tenant of an invested fund, and another person entitled in remainder, to compel the trustee to make good losses sustained by breaches of trust which had been committed more than six years before action. The plaintiff's counsel conceded that the plaintiff, tenant for life, could only recover six years' arrears of interest;—that her right of recovery was barred entirely (though of course that of the remaindermen was not), does not appear to have been argued, the defence resting upon sec. 9 of 55 and 56 Vict. (Imp.), cap. 53 (2), and sec. 3 of 59 and 60 Vict. (Imp.), cap. 35 (3). No case has yet arisen requiring a determination of the construction or applicability of the special provision of clause B. in regard to married women.

In re Turner.

No case really in point.

By sec. 7 of the Statute of James (4) coverture was one of the special disabilities which prevented the Statute running until their removal. But, whatever may, theretofore, have been the disabilities of a married woman at law, since the enactment of the Married Women's Property Acts, her powers and rights are so extensive in regard to her separate estate,—as indeed they were previously in equity, subject to the rule applicable where there was

The policy of this provision.

(1) (1897) 1 Ch. 536.

(2) R.S.O. (1897) cap. 130, sec. 9.

(3) 62 Vict. (O.) cap. 15, sec. 1; 61 Vict. (N.B.) cap. 26; see Appendix A.

(4) See Appendix A.

restraint on anticipation—that, having given her the advantages of discoverture, the powers of a *feme sole*, the legislature has been disposed, in so far as it relieved her from the former disabilities of coverture, to subject her to inconveniences, such as a statutory bar, against which, by reason of those same disabilities, it formerly so carefully protected her. The provision in clause B. in regard to married women is an instance of this policy.

It affects claims in respect of separate estate only.

The operation of this provision will necessarily be restricted to cases in which a married woman makes claim against her trustee in respect of her separate estate. That the Statute should be a bar to such a claim is not unreasonable, because, in respect of her separate estate, a married woman has the same facilities and rights of action as if discovert, and she enjoys all the advantages of the Statutes of Limitation when herself a defendant (1). Under the Married Women's Property Acts, subject to the power of the Court with the consent of the married woman to order otherwise (2), separate property, which she is restrained from anticipating, as was always the case in Equity, is not available to satisfy any liability or obligation incurred by her (3). But, although, for

(1) *In re Lady Hastings*, *Hallet* v. *Hastings*, 35 Ch. D. 94; *Beck* v. *Pierce*, 23 Q.B.D. 316. But see *Hodgson* v. *Williamson*, 15 Ch. D. 87, commented on in *In re Lady Hastings*, *Hallet* v. *Hastings*, 35 Ch. D. at p. 106.

(2) R.S.O. (1897) cap. 163, sec. 9.

(3) R.S.O. (1897) cap. 163, sec. 4; 56 and 57 Vict. (Imp.) cap. 63, sec. 1.

the protection of her separate estate, a restraint upon anticipation puts it out of her power to bind such estate, and prevents a creditor making it available for satisfaction of his debt—the degree of the protection afforded corresponding with that of the incapacity upon which it is founded—married women, *cestuis que trustent*, because able to sue for breach of trust in respect of their separate estate, quite as freely where it is subject to restraint on anticipation as where it is not, are, by the provision now being considered, should they fail to bring action within the period of statutory limitation, debarred in the one case as in the other, if the estate be in possession. A reversionary interest in such property will be protected by the provision of clause B. following that dealing specially with married women.

Reason of the provision.

Before leaving this clause attention should be directed to an instance of crude draughtsmanship which it contains. The enacting portion of the clause enables the trustee "to plead the lapse of time as a bar, etc." The restrictive phrase which follows is in these words:—"But so nevertheless that the Statute shall run, etc." Presumably "the Statute" applicable to "an action of debt for money had and received" is intended, but the phraseology is certainly noteworthy rather for its clumsiness and awkwardness than for its perspicuity.

CHAPTER XIV.

Co-cestuis Que Trustent.

Sub-section 2.

Sub-section 2 of Section 32 R.S.O., (1897) cap. 129, reads thus:

"No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded."

This sub-section has yet to receive express judicial construction in England and Canada. But it has been carefully considered by the Court of Appeal for Ireland in *Collings* v. *Wade* (1). By a settlement executed on the 7th of July, 1873, on the marriage of J. G. Collings and Eliza M. Collings (the plaintiff), of which Wade and Harvey were trustees, amongst other property, the following was put in settlement:—Two policies of insurance for £200 each and six shares of Canadian railway stock. The property was settled upon trust for the plaintiff for life with remainder to the children of the marriage, of whom there were six. The insurance money, amounting to £516, was paid to Wade in April, 1877, and was lent by him and his co-trustees to J. G. Collings without security and was lost. In 1879

Collings *v.* Wade.

(1) (1896) 1 Ir. R. 340.

Wade retired from the trusteeship and Skinner was appointed in his place. The trustees neglected to obtain a transfer of the Canadian railway shares until 1884, when the plaintiff transferred them to Harvey. On March 1st, 1884, Harvey sold these shares for £79. 8s. and appropriated the proceeds. J. G. Collings, the plaintiff's husband, died in 1895, never having repaid the £516 lent him by Wade. This action was brought by his widow and minor children against Wade, Harvey and Sharp to compel them to replace the trust funds and for an account. Wade lodged £516 in Court and pleaded the Statute of Limitations, reserving the right to contribution or indemnity against Harvey and Skinner, or against Mrs. Collings or any interest she might have in the fund. The Vice-Chancellor, who heard the case, having found Wade liable to pay interest at four per cent. on the sums of £516 and £79 to the plaintiff, Mrs. Collings, during her life, Wade appealed to the Court of Appeal. This Court held (reversing the decision of the Vice-Chancellor) that, by virtue of the Trustee Act, 1888, Section 3, on Wade lodging the £516 as he had done, and upon his paying into Court the proceeds of the sale of the Canadian railway shares, in case of the default of Harvey so to do, no interest was payable to the plaintiff, Mrs. Collings, during her life, but that such interest would be payable out of Court to the trustee, Wade, himself.

Judgment.

Barred life-tenant derives no benefit from recovery of remainder-man.

Dealing with the provision, that a barred beneficiary shall derive no benefit from a judgment obtained by another beneficiary, FitzGibbon, L.J. (1) says:—"But then it is said that the trust fund is now replaced, and that the income of it must, therefore, be paid to the tenant for life pursuant to the trust. It has not been replaced so far as Eliza Maria Collings is concerned; and Wade has a defence to any action for its replacement which she could bring against him. He not only had not the trust money in his hands, but he has been obliged to replace it with his own money, in order to meet the unbarred claim of the children. Under such circumstances we regard the lodgment of the money in court by Wade, as nothing more than a proceeding to secure the fund, so that it shall be forthcoming, when required to meet the claim of the children. When it is invested, which it must be, for security, this can neither accelerate the right of the children to receive the income, nor can it confer the right upon their mother, when she could not have enforced it for herself, if she had sued alone. To give it to her would be contrary to the express words of sub-section 2, for she would thereby derive a greater benefit from the judgment obtained by her children than she could have obtained if she had brought the action alone. It follows that the income of whatever money is replaced by Wade must be paid to him during the life of Eliza Maria Collings."

Life tenant being barred, the income belongs to the trustee while the life tenant lives.

(1) (1896) 1 Ir. R. at page 350.

Lord Justice Walker adds:—"Mr. Wade contends that Mrs. Collings, the tenant for life, is by sec. 8, sub-sec. 2, of the Trustee Act, 1888, put in the same position, as if she were the sole plaintiff. I am clearly of opinion that this is so, just as much as if she were entitled to and sued for the whole principal, and the sub-section was introduced for the very purpose of meeting the case of the joinder of one against whom the Statute had run with others against whom it furnished no bar. The learned Lord Justice points out that the decisions in *Want* v. *Campain* (1), and *In re Somerset* (2), are to the effect that the life-tenant, against whom time has run, cannot be benefitted by a decision in favour of remaindermen.

Other cases.

The import of sub-sec. 2, even were there no authority upon it, seems too plain to admit of doubt or confusion. Cases must often arise, in which the remedy of one beneficiary will be barred, while that of another still subsists. In addition to the cases where, the life-tenant being barred, the right of the remainderman is unaffected, as we have seen, by lapse of time, another case, which immediately suggests itself, is that in which, by some acknowledgment on the part of the trustee, given to one or more of several beneficiaries, as against him or them, the running of the Statute has been interrupted.

(1) 9 T.L.R. 254; but see judgment as given in Seton on Decrees, Vol. 3, p. 2127.

(2) (1894.)

Acknowledgment to one beneficiary does not help others.

This provision, unless the benefit of an acknowledgment given by the trustee to one beneficiary can be claimed by another in his own action against the trustee, clearly shuts out the latter *cestui que trust* from the enjoyment of the fruits of any judgment recovered by the former.

Acknowledgment must be to creditor or his agent.

Although Mr. Banning in his work on Limitations (1) says that it is still an open question whether an acknowledgment of debt, given by the debtor to some person other than his creditor or his creditor's agent, suffices to take the debt out of the Statute, it is clearly settled, in Ontario at all events, that such an acknowledgment, except in the case of a debt by specialty (2), will not "obviate the Statute" (3), on the ground that no acknowledgment, except one made to the creditor or his agent, imports a promise to pay the creditor, which, since Lord Tenterden's Act (4), is deemed essential. Formerly, in England, an acknowledgment or admission given to a third party was deemed sufficient (5), but, in England, as in Ontario, it is submitted that

(1) 2 ed. (1892) at pp. 64-7.

(2) *Moodie* v. *Bannister*, 4 Drew. 432; *Goodman* v. *Boyes*, 17 A.R. 531; see ante. p. 38.

(3) *Goodman* v. *Boyes*, 17 A.R. 528, 530; *Robertson* v. *Burrill*, 22 A.R. 356. But see *Roblin* v. *McMahon*, 18 O.R. at p. 225, and *Smith* v. *Poole*, 12 Sim. 17, there cited.

(4) 9 Geo. IV. Ch. 14; R.S.O. (1897) cap. 146, sec. 1, see Appendix A.

(5) *Peters* v. *Brown*, 4 Esp. 46; *Mountstephen* v. *Brooke*, 3 B. & Ald. 141; *Halliday* v. *Ward*, 3 Campbell, 32.

the law is now clearly otherwise (1). In applying the Statute to legal demands, Courts of Equity followed the same rule. "I have always understood," says Romilly, M.R., "that, since Lord Tenterden's Act, the acknowledgment or promise to pay must be made to the creditor" (2). Under the law as it stood prior to 1829 it was held in *Clark* v. *Hougham* (3), that an admission given by the defendant to one of several parties, whose interests were similar, enured to the benefit of all to take the case out of the Statute; and this decision does not rest on any ground of agency. But, upon the recent authorities, it would seem that, unless in the case of an acknowledgment made to someone entitled to represent them all (4), only an acknowledgment made by the trustee to the individual *cestui que trust* who sues, or to his lawful agent, can be relied upon in answer to a plea of the Statute.

Class action.

If an action be brought as a class action under Consolidated Rule 201 (Ont.), or be an action authorized by Consolidated Rule 203 (Ont.) to be

(1) *Stamford Banking Co.* v. *Smith*, (1892) 1 Q. B. 765; *Francis* v. *Hawkesby*, 1 El. & El. 1052; *Rogers* v. *Quinn*, 26 L.R. Ir. 136; *Green* v. *Humphreys*, 26 Ch. D. 474; *Godwin* v. *Culley*, 4 H. & N. 377; *Grenfell* v. *Girdlestone*, 2 Y. & C. 676; *Tanner* v. *Smart*, 6 B. & C. 603.

(2) *Fuller* v. *Redman*, 26 Beav. 614, 619.

(3) 2 B. & C. 149.

(4) *Robertson* v. *Burrill*, 22 A.R. 356.

brought by one of a class without joining the others, no judgment therein recovered could avail any member of the class who would himself have been debarred from suing on his own behalf (1).

As under R.S.O. cap. 72, sec. 4 (2), the former impediment of absence and its effects are done away with in the case of a plaintiff, it follows that the absence of one of several *cestuis que trustent* will not prevent the Statute running against his fellows. *Perry* v. *Jackson* (3) was authority to this effect, but is now superseded by the statutory provision just mentioned. Although the policy of the law will make the exceptions to the Statute available as far as possible to honest plaintiffs (4), it seems clear that no disability of one *co-cestui que trust* can be taken advantage of by another for the purpose of extending the time within which the latter must bring action (5).

(1) Ss. 2, sec. 32, R.S.O. (1897) cap. 129; see supra p. 88 and Appendix A.

(2) 19 & 20 Vict. (Imp.) cap. 97, sec. 10; see Appendix A.

(3) 4 T.R. 516.

(4) *Boatwright* v. *Boatwright*, L.R. 17 Eq. 74.

(5) See Darby & Bosanquet (2nd ed.), p. 59.

CHAPTER XV.

Statute Retrospective. Conclusion.

Retrospective operation of the Statute.

The combined effect of ss. 4 of the interpretation clause, sec. 27 (1); and of ss. 3 of sec. 32, R.S.O. (1897) Cap. 129 (2), calls for some brief notice. By the former the operation of the Act is extended, retrospectively, to trusts created by instruments executed before the date upon which the Statute became operative; so that all trusts, irrespective of the date of their creation, fall within section 32. By the latter subsection the operation of the Act is confined to actions commenced after the 1st day of January, 1892. But, in such actions, it is quite clear that the trustee will be entitled to the benefit of time elapsed between the date of the breach of trust, forming the cause of action, and the time at which the Statute came into force. The Act is retrospective in this respect. The earlier cases decided in England put this beyond doubt. *In re Bowden*, *Andrew* v. *Cooper* (3). *In re Swain*, *Swain* v. *Bringeman* (4), *Thorne* v. *Heard* (5): see also *Stephens* v. *Beatty* (6).

(1) R.S.O. (1897) cap. 129; 52 Vict. (N.S.) cap. 18, sec. 22, ss. 1, see Appendix A.

(2) 52 Vict. (N.S.) cap. 18, sec. 17, ss. 3.

(3) 45 Ch. D. 444.

(4) (1891) 3 Ch. 233.

(5) (1893) 3 Ch. 530; (1894) 1 Ch. 599; (1895) A.C. 495.

(6) 27 O.R. 75.

Other defences preserved.

By sub-section 3 of section 32, (1), it is further provided that that section "shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations." The insertion of this provision, if the operation of the Statute is limited to actions founded upon breach of trust, seems work of supererogation. The word "trustee," by the definition clause, includes "executors and administrators," and the entire section is framed to preserve and extend existing rights. By no reasonable construction of the section would it seem possible to hold that any "right or defence" of a trustee, "under any existing Statute of Limitations," is at all impaired or interfered with, much less taken away.

The presence of this clause would, but for the strong view to the contrary taken by the Court of Appeal in *How* v. *Earl Winterton* (2), and by Fry, L.J. in *In re Bowden* (3), almost justify a contention that the Statute is not restricted in its operation to cases founded upon breaches of trust. Executors are within the definition of trustees in this Statute; and there are other actions against executors, as such, to which existing limitations did apply. For instance, under R.S.O. (1897) cap. 129, sec. 11 (4), an action for any wrong to another in respect

(1) R.S.O. (1897) cap. 129; 52 Viet. (N.S.) cap. 18, sec. 17, ss. 3.
(2) (1896) 2 Ch. 626.
(3) 45 Ch. D. 444.
(4) See Appendix A.

to his person or property may be brought against the executor or administrator of the tort-feasor, but must be taken within one year from the decease of such tort-feasor. But the wording and evident purview of section 32, taken as a whole, would seem to indicate, almost conclusively, that no other actions, except those founded upon breaches of trust, can have been in the contemplation of the Legislature when it enacted that provision. And, since the decision of the English Court of Appeal in *Hoare* v. *Earl Winterton* (1), it would be rash to advance any other view as to the scope of the Statute.

Laches and acquiescence

The existence of the sub-section or clause now under consideration may, however, be made the foundation for a somewhat plausible argument that, other defences, formerly available to trustees, for instance, those founded on laches and acquiescence on the part of the *cestui que trust*, not being expressly preserved, the Legislature must be assumed to have intended to take them away. This argument is strengthened by the fact that, in the Imperial Act, 3 and 4 Will. IV., cap. 27 (2), providing *inter alia* for certain limitations upon actions brought to recover property vested in a trustee upon any express trust, it was deemed advisable, *ex majori cautela* no doubt, to provide expressly that nothing in the Act should "interfere with any rule of equity in refusing relief, on the ground of aquiescence, or otherwise, to any person whose right

(1) (1896) 2 Ch. 626.

(2) R.S.O. (1897), cap. 133; sec 33; see Appendix A.

to bring an action is not barred by virtue of this Act." But so favorably are defences upon grounds of laches and acquiescence looked upon, so firmly established is the maxim, *vigilantibus, non dormientibus æquitas subvenit*, that nothing but an express statutory prohibition would ever prevent a Court of Equity from giving effect to such defences, if well grounded.

Pleading. The Statute, because it bars remedies only without extinguishing rights, must be pleaded as a defence(1), and will be deemed part of the *lex fori*(2).

Conclusion. The more carefully the construction and the language of this entire provision, which should prove of the greatest advantage to trustees, is studied, the more closely it is scrutinized, the more fully is the truth and force of Lord Justice Lindley's comment upon it borne in upon the student. "Section 8" (R.S.O. (1897) cap. 129, sec. 32) "is cumbrously worded," says His Lordship, "and it is difficult to grasp the idea which underlies it: but the short effect of section 8 appears to me to be that, except in three specified cases (viz., fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use), a trustee, who has committed a breach of trust, is entitled to the benefit of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them" (3).

(1) *Dawkins* v. *Lord Penrhyn*, 4 A.C. 51, 58-9.
(2) *Pardo* v. *Bingham*, 4 Ch. App. 735.
(3) *How* v. *Earl Winterton*, (1896) 2 Ch. at p. 640.

RELIEF OF TRUSTEES

FROM LIABILITY FOR TECHNICAL BREACHES OF TRUST.

59 and 60 Victoriae (Imperial), cap. 35, sec. 3.
61 Victoriae (New Brunswick), cap. 26.
62 Victoriae (Ontario), cap. 15, sec. 1.

CHAPTER I.

Technical Breaches of Trust.

Former state of law bore hardly on trustees.

Prior to the enactment of the statutory provision, with which it is now proposed to deal very briefly, trustees were, even by the exercise of extraordinary diligence, often unable to avoid incurring liabilities for breach of trust. Although they had, in the management of the trust estate, acted in the utmost good faith, and had exercised what would, in ordinary business affairs, be deemed a sound discretion and a degree of caution not to be looked for in any but a prudent man, nevertheless, they not unfrequently found that some artificial rule laid down by Courts of Equity had been disregarded, or some duty which those Courts held to be prescribed by statute, or by technical construction of the trust instrument, had been neglected, and

that they had thus laid themselves open to a charge of breach of trust. Though their conduct had been both honest and reasonable, these unfortunate trustees could not claim immunity from personal loss. This, says the Master of the Rolls, Sir Nathaniel Lindley, in a very recent case, was "a very hard state of the law and one which shocked one's sense of humanity and fairness" (1). "It shocked one's conscience," says Lord Justice Rigby (2). "Now all this has been altered," he adds, referring to the provision for the relief of trustees from liability for what have been termed "technical breaches of trust," first enacted in England in 1896, and, with some modifications, adopted in New Brunswick in 1898, and in Ontario in 1899 (3).

Grounds of liability are numerous and varied.

To attempt to enumerate, at all exhaustively, or even to summarize with any degree of accuracy, the various classes of case in which, and the grounds upon which, Courts of Equity so held trustees liable, would be a most difficult undertaking and of magnitude far beyond the scope of this little work. We can but glance at the general rules, which appear to have governed the Courts in dealing with trustees, with a view the better to appreciate "the large alterations" which, says Mr. Justice Kekewich, the legislature has introduced "in a few words dealing with a large body of law" (4).

(1) *Perrins* v. *Bellamy*, (1899) 1 Ch. 797 at p. 800.

(2) S.C. at p. 801.

(3) 59 & 60 Viet. (Imp.) cap. 35, sec. 3; 61 Viet. (N.B.) cap. 26; 62 Viet. (Ont.) cap. 15, sec. 1. See Appendix A.

(4) *Perrins* v. *Bellamy*, (1898) 2 Ch. 521, 527.

Mr. Justice Story, in his work on Equity Jurisprudence, (1) says that the cases, in which the trustee, for his acts to the prejudice of his *cestui que trust*, will be held responsible in equity, are "difficult to be defined." They are as numerous and as varied as the objects and the structures of trusts themselves.

General rule of conduct prescribed for trustees.

It was formerly said that "a trustee is called upon to exert precisely the same care and solicitude on behalf of his *cestui que trust* as he would employ for himself, but greater measure than this a Court of Equity does not exact" (2). In a late case before Mr. Justice North, however, that learned Judge says:—"If you find that a trustee has acted with trust property as he would with his own, that is a point in his favour; but that is not enough, for what might be reasonable for a man to do with his own property might not be a proper dealing with trust property" (3).

As put by Lord Watson, in *Learoyd* v. *Whitely*, in the House of Lords (4):—"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs. Yet he is not allowed the same

(1) Second Eng. ed. p. 871.

(2) Lewin on Trusts, (8 ed.) p. 294; but see now 10 ed. p. 317.

(3) *In re Barker, Ravenshaw* v. *Barker*, 77 L.T. 712.

(4) 12 A.C., 727, 733; see also per Lindley, L.J., S.C., 33 Ch. D. 347, 355.

His limited discretion.

discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to that class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply." Therefore, not only must the trustee be circumspect and vigilant as a prudent business man, but he must moreover guard against any transgression of the rules prescribed by the Courts or by the Legislature for the management of trust property and the discharge of trustees' duties, or any departure from any special directions contained in the instrument creating the trust. Moreover, the Court "requires full explanations of all trustees' dealings and of the causes which may have led to outstanding debts not being collected, or to the disappearance of property belonging to the trust estate" (1). Any unexplained loss will be ascribed to negligence" (2).

He must be prudent, and must obey the rules of equity as well.

When a trustee will probably be relieved.

If a trustee fails to act as a prudent business man, he will probably find it difficult to convince the Courts that he has acted *reasonably* however honest may have been his intentions; but in many cases

(1) *Chisholm* v. *Barnard*, 10 Gr. 479.

(2) *Brown* v. *Sewell*, 11 Hare 53.

where, though prudent, he has transgressed some technical rule, or misunderstood some requirement of the trust instrument, couched, perhaps, in language difficult of construction, he may now be deemed to have acted not unreasonably and to be fairly entitled to relief.

In the great variety of cases that have claimed the attention of Courts of Equity, it is not always easy to reconcile the apparent strictness required in some instances with the seeming laxity permitted in others. Those Courts, however, do seem to have acted with uniformity in never excusing an unauthorized act, or an infraction of the rules laid down by themselves. But, though a trustee was always presumed to know the domestic law (1) and the rules of Equity, he was not held liable for the non-performance of a trust of which he was, through no fault of his own, ignorant (2). And, where the question was, whether, within his powers, the trustee had acted prudently, he was so far held not to be "a surety nor an insurer," that for mere errors of judgment he was not held responsible. To render himself personally liable for loss to the estate he must have failed to exercise ordinary prudence; he must himself have been guilty of some wrong of omission or commission (3). Beyond this it would

Ignorantia legis haud excusat.

The trustee is not an insurer.

(1) Lewin, (10 ed.) 392.

(2) *Youde* v. *Cloud*, L.R., 18 Eq. 634, 642. Misunderstanding the trust instrument would formerly not excuse: *In re Champion*, *Dudley* v. *Champion* (1893), 1 Ch. 101, 111; but see now *In re Grindey*, (1898) 2 Ch. 593.

(3) *In re Chapman*, *Cocks* v. *Chapman*, (1896) 2 Ch. 763, 775, 778.

be difficult to state any rule or principle to which every decision will be found to conform. The Statute will probably be found to afford relief to trustees much more frequently in the former class of case than in the latter.

Fraudulent trustees.

In the case of fraudulent breaches of trust, no limitation will ever be permitted, no excuse will ever be accepted in Equity. Strict and rigorous enforcement of liability to the last extremity is the inflexible policy of the Courts. Such cases are entirely excluded from the operation of the Statute we are considering, which is expressly restricted to cases where the trustee has acted *honestly*; they may, therefore, be dismissed from further consideration.

Innocent trustees treated with severity.

But, fortunately or unfortunately, consequences, which may almost be characterized as penal, have been meted out by Courts of Equity to innocent as well as to roguish trustees, where their management of the affairs of their trust did not accord, as Mr. Justice Story says, quoting Lord Bacon, with the dictates of "the general conscience of the realm, which is Chancery" (1). Though, theoretically, in a position analogous to that of a gratuitous bailee, the generous treatment accorded to the latter individual in the Courts of Law would be a most welcome surprise to a trustee brought before a Court of Equity to answer for some inadvertent breach of trust.

(1) Story's Equity, (2 Eng. ed.) p. 874; Bacon on Uses, by Rowe, p. 10.

CHAPTER II.

Some Duties and Responsibilities.

"His discretion," says Lord Justice Fry, speaking of the trustee, "is never an absolute one; it is always limited by the duty—the dominant duty, the guiding duty—of recovering, securing, and applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation." (1) These may be said to be palpable duties of trustees, to which the Courts exact a rigid adherence. Duties paramount.

Though the trustee, because the confidence reposed in him is personal, is bound to give to his *cestui que trust* the benefit of his own judgment, "I do not think it is true," says Lord Halsbury (2), "to say that one is entitled to consider the special qualities or degree of intelligence of the particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence." A discretionary trust can never be delegated, it is said, but, subject to this exception, if he select properly qualified persons (3), and there is a moral necessity for his doing so, arising from the Employment of agents.

(1) *In re Brogden*, 38 Ch. D. 546, 571.

(2) *Learoyd* v. *Whiteley*, 12 A.C. at p. 732.

(3) *In re Weall*, 42 Ch. D. 678.

usages of mankind, or the regular course of business in administering such property (1), the trustee may always justify the employment of agents. Indeed, in matters in which he is not and cannot be expected to be himself experienced, a trustee is not only entitled to rely upon, but he may be chargeable with negligence should he fail to avail himself of, the services of skilled and experienced persons. In doing so, however, he must always be careful not to accept the bare opinions of such skilled persons in matters upon which he should exercise his own judgment, based upon the data furnished by the professional men employed (2). And the trustee must take care, for instance, not to rely upon the advice of a solicitor respecting a matter of land value, nor upon that of a real estate surveyor respecting the propriety of an investment apart from the value of the property (3). Though the employment of an agent to collect or receive trust property may be lawful, undue delay in requiring an account (4) from any agent, or neglect to supervise his acts (5) will be unjustifiable (6). The same

Restrictions.

(1) *In re Speight*, *Speight* v. *Gaunt*, 9 A.C. 1, 19; 22 Ch. D. 727.

(2) *Learoyd* v. *Whiteley*, 12 A.C. pp. 732, 734.

(3) S. C. pp. 732, 734. See also *Fry* v. *Tapson*, 28 Ch. D. 268.

(4) R.S.O. (1897) cap. 129, sec. 28. See Appendix A. *McCarter* v. *McCarter*, 7 O. R. 243.

(5) *Low* v. *Gemley*, 18 S.C.R. 685; *Carruthers* v. *Carruthers*, (1896) A.C. 659.

(6) An exception was apparently made to this rule where the settlor had stipulated expressly (though only verbally) with the

principles apply between co-trustees as between a trustee and a stranger agent. (1) Of course regard must be had to any express direction of the trust instrument (2). The indemnity clauses infused into every trust instrument by Courts of Equity, and now by statute (3), are applied upon these principles. Co-trustees.

Trustees, finding that the trust estate or any portion of it is unsecured or upon unauthorized or unsafe investments, must, without undue delay, "reduce it into possession" (4). There is no inflexible rule as to the time which will be considered reasonable for this purpose. Each case must be governed by its own circumstances: and certain "reasonable discretion" must be allowed as Getting in the estate.

trustee that a certain named agent should receive, invest and accumulate all trust moneys, and that the trustee should have no trouble or concern in the matter. Under such circumstances a trustee was held, in *Mitchell* v. *Ritchey*, 12 Gr. 88, 11 Gr. 511, to be exonerated from liability for moneys misappropriated without his knowledge by the agent. But see *Carruthers* v. *Carruthers*, (1896) A.C. 659, and compare with *Mickleburgh* v. *Parker*, 17 Gr. 503, which, though probably no longer good law as to a consenting *cestui qui trust* (R.S.O. (1897) cap. 129, sec. 30; see Appendix A), is certainly sound as to *cestuis que trustent* who do not, or cannot consent.

(1) *In re Crowter*, *Crowter* v. *Hinman*, 10 O. R. 159. *In re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; *City Bank* v. *Maulson*, 3 Chy. Ch. 334.

(2) *Burritt* v. *Burritt*, 29 Gr. 321.

(3) R.S.O. (1897) cap. 129, sec. 3. 52 Vict. (N.S.) cap. 18, sec. 9. See Appendix A.

(4) *Sculthorpe* v. *Tipper*, L.R. 13 Eq. 232; *Hughes* v. *Empson* 22 Beavan, 181.

to the realization of unauthorized securities (1), and the collection of outstanding debts. (2) There are now certain statutory provisions protecting English trustees who retain unauthorized investments (3), but these do not appear to be in force in any of the Canadian provinces.

Realty.

Where the investments, upon taking over the trust estate, are found to be of an authorized kind and adequate, the trustee will, of course, merely retain them. If the trust property be realty, and the trust contemplates such property being retained, the trustee will, subject to any special directions contained in the trust instrument, in respect to this portion of his trust, be obliged to perform, as would a prudent business man, the usual work incident to ownership of such real estate (4). But, if there be an express direction in the trust instrument for the

(1) *In re Chapman, Cocks* v. *Chapman*, (1896) 2 Ch. 763, 776; *Ewart* v. *Gordon*, 13 Gr. 40; *Buxton* v. *Buxton*, 1 My. & Cr. 80.

(2) *Re Owens*, 47 L.T. 61. He may even compound or release in exercising a sound discretion, *Blue* v. *Marshall*, 3 P. Wms. 381; but must be prepared to show good reasons, *Baldwin* v. *Thomas*, 15 Gr. 119; R.S.O. (1897) cap. 129, sec. 33. See Appendix A.

(3) 57 & 58 Viet. (Imp.) cap. 10, sec. 4.

(4) See e.g., *Zimmerman* v. *Wilcox*, 19 Can. L.T. 337, 338; *Fervier* v. *Trepannier*, 24 S.C.R. 86; *Vernon* v. *Seaman*, Russ. N.S. Eq. D. 190. But the expenditure of money for improvements or repairs is not a matter in which he has an absolute discretion by any means; *Bowes* v. *Strathmore*, 8 Jur. 92; *Vyse* v. *Foster*, L.R. 8 Ch. App. 309; *Gilliland* v. *Crawford*, 4 Ir. R. Eq. 35; *Griggs* v. *Gibson*, 21 W.R. 818; *Bleazard* v. *Whalley*, 2 W.R. 608; *In re Colyer, Milliken* v. *Snelling*, 55 L.T. 344.

sale or conversion of this or any other class of property, or if the purposes of the trust require such a step to be taken, and the trustee omit to sell and convert when he ought (1), and a loss is thereby occasioned, although in refraining from selling he acted, as he thought, in the best interests of the estate, he will be held liable for having failed to perform a manifest duty.

Custody.

Having reduced the trust estate into possession, the trustee must, pending its permanent investment or its distribution, guard it with the same care and fidelity as a prudent man would his own. For any negligence he will be responsible. Moneys deposited in bank must not be placed to the trustee's own credit, nor allowed to remain unduly long (2); nor may trust funds be unnecessarily committed to, or left under the control of, any agent (3).

Investment a duty.

If the trust does not permit of the immediate distribution of the estate, but contemplates its investment, the trustee must diligently seek such investments as are authorized. He cannot allow the fund to remain unproductive, or merely on deposit at interest, without making himself accountable for any

(1) *Emes* v. *Emes*, 11 Gr. 325; *Grove* v. *Price*, 26 Beav. 103. A reasonable discretion as to time will be allowed even under these circumstances. But see *Phillips* v. *Phillips*, Freem. Ch. Ca. 11.

(2) *Cann* v. *Cann*, 33 W.R. 40.

(3) *Wynne* v. *Tempest*, 13 T.L.R. 360; *Bostock* v. *Floyer*, L.R. 1 Eq. 26; *Bayne* v. *Eastern Trust Co.*, 28 S.C.R. 606; 30 N.S.R. 173; *In re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Ghost* v. *Waller*, 9 Beav. 497.

loss of income to the *cestuis que trustent* arising from his failure to invest (1).

Lawful investments.

In making his investments, unless some others be authorized by the trust instrument (2), the trustee must confine himself to such as are prescribed by the Statutes in that behalf (3), which virtually embody all classes of investment permitted by the rules of Courts of Equity, as well as some others. If lending upon mortgage of real estate, he should secure first mortgages, (4) and should advance to an amount not exceeding, at the most, two-thirds of the value of the

Mortgages.

(1) *Spratt* v. *Wilson*, 19 O.R. 28; *Wiard* v. *Gable*, 8 Gr. 459.

(2) Special directions will generally not be construed so as to justify what, in their absence, would be breaches of trust, unless such construction be unavoidable. *Smith* v. *Smith*, 13 Gr. 81; *Lewis* v. *Nobbs*, 8 Ch. D. 591; *Spratt* v. *Wilson*, 19 O.R. 28; *Perley* v. *Snow*, Russ., N.S. Eq. D. 373; *Holmes* v. *Moore*, 2 Moll. 328; *Caldecott* v. *Caldecott*, 1 Y. & C.C.C. 312. Where there is a discretion, the course which the Court would take has been said to be the test of negligence. *Warner* v. *Torkington*, 4 L.J., Ch. (N.S.) 193; but see *Re Mackenzie Trusts*, 28 O.R. 312, where a letter of the settlor was held to justify an investment on personal security, a power to vary the directions of the deed as to investments having been reserved; the letter was treated as a defective execution of such power which the Court should aid.

(3) R.S.O. (1897) cap. 130 (see App. A); R.S.B.C. (1897) cap. 187, sec. 11; R.S. Man. (1891) cap. 146, secs. 22-26; 51 Viet. N.S., cap. 11, sec. 58. There appears to be no corresponding statutory provision in New Brunswick, where, therefore, recourse must be had for guidance to the rules of Courts of Equity.

(4) Lewin on Trusts, (10 ed.) p. 371; but see *In re Christ Church, Dartmouth*, Russ., N.S. Eq. D. 465; also *In re Turner*, (1897) 1 Ch. at p. 543; *Norris* v. *Wright*, 14 Beav. 291, 307, 308; *Fitzgerald* v. *Pringle*, 2 Moll. 534.

property (1), which must, moreover, be itself of a safe and proper kind for trustees' investment (2). Trustees may now absolutely protect themselves in England (3), Ontario (4), and Nova Scotia (5), by complying with the provisions of the Statutes respecting such investments. The various ways in which trustees may offend in the investment of the trust estate are far too numerous to discuss here. They may invest in unauthorized securities, but entirely at their own risk as to loss (6), both of capital and income (7), and cannot claim to set off against a loss made upon one unauthorized investment a gain above the ordinary made upon another (8). Protection. Liabilities.

Pending final distribution, the trustee must diligently collect and faithfully apply the income according to the requirements of the trust, either expending or accumulating it as may be prescribed. Income.

Finally, he must, when the proper time comes, satisfy himself beyond doubt that the trust estate Distribution.

(1) But see *In re Godfrey*, 23 Ch. D. 483.

(2) *Learoyd* v. *Whiteley*, 12 A.C. 727.

(3) 51 and 52 Vict. cap. 59, sec. 4.

(4) R.S.O. (1897) cap. 130, sec. 8.

(5) 52 Vict. (N.S.) cap. 18, sec. 13.

(6) *Clough* v. *Bond*, 3 M. & Cr. 496; *In re Brogden*, 38 Ch. D. 546, 567; *Fyler* v. *Fyler*, 3 Beav. 550.

(7) *Re Gabourie*, 13 O.R. 635; *Paterson* v. *Lailey*, 18 Gr. 13; *Harrison* v. *Randall*, 9 Hare. 397.

(8) *Wiles* v. *Gresham*, 2 Drew. 258, 271; *In re Barker*, 77 L.T. (N.S.) 712; *Robinson* v. *Robinson*, 11 Beav. 371, 375; *Fletcher* v. *Green*, 33 Beav. 426.

passes into the hands of those who are legally entitled to it, and whose receipt of it will effectually acquit and discharge him (1).

Many other duties.

Many incidental duties and responsibilities, which attach to almost every trust, have been necessarily overlooked in this synoptical outline. Most of these are often not expressed in trust instruments, but Courts of Equity expect them to be steadily acted upon and executed just as if they were so expressed, and in respect of any of these a trustee may very innocently become guilty of a breach of duty, which is breach of trust. In fine, as stated by Mr. Underhill, "any act or neglect on the part of a trustee, which is not authorized or excused by the terms of the trust instrument (2), or by law, is called a breach of trust" (3).

Breach of trust defined.

Special directions.

Almost every trust instrument contains some special direction, confers some unusual power, or imposes some extraordinary duty. Of these it is impossible to say anything except that such powers must be exercised within their limits, such duties must be discharged according to the terms in which they are prescribed, and such directions must be complied with according to their spirit, if not according to their letter (4).

(1) *In re Hulkes, Powell* v. *Hulkes*, 33 Ch. D. 552; *Eares* v. *Hickman*, 30 Beav. 136; *Sporle* v. *Barnaby*, 13 W.R. 151.

(2) *Re Hurst*, 63 L.T. 665.

(3) Trusts and Trustees (4th ed.) p. 2.

(4) *Cocker* v. *Quayle*, 1 Russ. & My. 535; *Bateman* v. *Davis*, 3 Madd. 98; *Greenham* v. *Gibbeson*, 10 Bingham 363.

Cestui que trust prompting breach of trust.

The *cestui que trust* may, by concurrence or acquiescence therein, or by so conducting himself as to induce it, or to mislead the trustee into it (1), debar himself from holding the trustee responsible for the consequences of any breach of trust (2). He may even render his interest in the trust estate liable to be impounded for the indemnification of a trustee, who has acted at his instigation or request, or with his consent in writing (3).

Excuse for former severity.

The severity with which trustees were formerly treated, when, without any moral default, they were guilty of breach of trust, was only excusable upon the old basis of the open-door of the Court of Chancery, whose aid and advice were always at the service of trustees (4). "In the old days, when a trustee could get rid of his trust entirely by throwing the whole of the obligation on the Court of Chancery, it might have been reasonable to hold him to the very strict performance of his trust, which we

(1) *Ford* v. *Chandler*, 8 Gr. 85.

(2) *Evans* v. *Benyon*, 37 Ch. D. 329; *Harrison* v. *Harrison*, 14 Gr. 586.

(3) R.S.O. (1897) cap. 129, sec. 30. (See Appendix A); 52 Viet. (N.S.) cap. 18, sec. 15; 51 & 52 Viet. (Imp.) cap. 59, sec. 6; *Griffith* v. *Hughes*, (1892) 3 Ch. 105; *Chillingworth* v. *Chambers*, (1896) 1 Ch. 685; *In re Somerset*, *Somerset* v. *Earl Poulett*, (1894) 1 Ch. 231; *Bolton* v. *Curre*, (1895) 1 Ch. 544. Prior to the Statute see *Sawyer* v. *Sawyer*, 28 Ch. D. 605; see also *Bayne* v. *Eastern Trust Co.*, 28 S.C.R. 606; 30 N.S.R. 173. As to manner of raising and dealing with such a question, see *In re Holt*, *In re Rollason*, *Holt* v. *Holt*, (1897) 2 Ch. 525.

(4) Per Rigby, L.J. in *Perrins* v. *Bellamy*, (1899) A.C. 801.

know was in those days enforced (1). But now, when that cannot be done, and there is no longer the power of getting rid of the trust by throwing it on the Chancery Division, as we used to do by throwing it on the old Chancery Court, I do not think that the law would be tolerated (I do not think it was tolerated before the passing of this Act) (2) which would make it reasonable that trustees should be held to the strict liability to which they were held in former days" (3).

How far the Statute enables the Court to relax its former rigour, may now be advantageously considered.

(1) Applications to Court, for directions, R.S.O. (1897), cap. 129, sec. 39: 22 and 23 Viet. (Imp.) cap. 35, sec. 30. See Appendix A.

(2) 59 & 60 Viet. (Imp.) cap. 35, sec. 3.

(3) *In re Roberts, Knight* v. *Roberts*, 76 L. T. at p. 484, per Rigby, L.J.

CHAPTER III.

The Statute—Its Effect.

The statutory provision designed to give to the Court the means and the power of shewing more consideration, than had been its wont, to "honest" trustees, and which the learned Master of the Rolls (Lindley) twice in the same judgment speaks of as "that extremely beneficial enactment," is, as adopted in Ontario, in the following words:— A beneficial enactment.

"If, in any proceeding affecting trustees or trust property, it appears to the Court that a trustee, whether appointed by the Court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee is or may be personally liable for any breach of trust, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee wholly or partly from personal liability for the same" (1). Its terms.

(1) 62 Viet. (Ont.) cap. 15, sec. 1; 61 Viet. (N.B.) cap. 26; 59 and 60 Viet. (Imp.) cap. 35, sec. 3; see Appendix A, where these provisions are given in full.

Its general effect.

"The law as it stood at the passing of the Act is not altered, but a jurisdiction is given to the Court under special circumstances, the Court being satisfied as to the several matters mentioned in the section, to relieve the trustee of the consequences of a breach of trust as regards his personal liability" (1).

Statute to be liberally construed.

That this enactment is to be fairly and liberally construed, so as to afford relief to trustees, is recognized in all the cases which have been decided upon it. Rigby, L.J., in *In re Roberts*, *Knight* v. *Roberts* (2), says, "I consider that that section has to be, carefully no doubt, but not grudgingly, exercised in favour of trustees who have acted honestly and reasonably," and in the same case (3), Lopes, L.J. cites with approval this passage from the judgment of Mr. Justice Byrne, in *In re Turner*, *Barker* v. *Ivimey* (4), the first case upon the Act:—"I think that the section relied on is meant to be acted upon freely and fairly in the exercise of judicial discretion." Although this may, therefore, perhaps be regarded as the cardinal canon of interpretation applicable to this Statute, the number and the class of cases in which it will be found of material assistance to trustees may not prove to be so extensive as might, not unnaturally, be anticipated.

(1) Per Stirling J., *In re Stuart*, (1897) 2 Ch. 583, 590.

(2) 76 L.T. 479, 485.

(3) At p. 484.

(4) (1897) 1 Ch. 536, 542; also *In re Stuart*, (1897) 2 Ch. at 588.

Few cases as yet.

The cases, in which the Statute has already been discussed, are comparatively few, owing to the recent date of its enactment. To explain its provisions, so far as the judicial exposition which the cases afford throws light upon them, alluding incidentally to some points not covered by the decisions, will be the purpose of this and the succeeding chapters.

The Court can only act upon evidence.

By the opening words of the English section—"if it appears to the Court"—it is made clear that, in applying the provisions of this Statute, the Court can only exercise the discretionary powers which it confers, when, by proper evidence, such circumstances are shown as make it apparent that the conduct of the trustee has been honest and reasonable, and such as ought fairly to be excused (1). The onus of establishing this is upon the trustee, and in the absence of sufficient evidence the Court cannot, however anxious to be indulgent, surmise or conjecture circumstances of justification or palliation (2). The breach of trust being shewn or admitted, the defence afforded by the Statute can only be made available by the production of competent and sufficient evidence, though the Court may, and will, draw all legitimate inferences from facts, of which it is put in a position to take judicial cognizance.

(1) *In re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583, 590; *In re Turner, Barker* v. *Irimey*, (1897) 1 Ch. 536; *In re Barker*, 77 L.T. 714; *In re Roberts*, 76 L.T. at p. 484.

(2) *Wood* v. *Middleton*, 79 L.T. 155.

Breach of trust is the basis of the Statute.

The foundation of the Statute, that which it assumes as its basis (1), is an existing liability for breach of trust alleged or found; and the person to be relieved is "a trustee" *simpliciter*, according to the New Brunswick Act (2), "a trustee," expressly including "an executor or administrator," according to the Imperial Statute (3), or, according to the Ontario enactment (4), "a trustee" or "any person who may in law be held to be fiduciarily responsible as a trustee."

Who are trustees within the Act.

Executors.

Now an executor, though for many purposes treated by Courts of Equity as a trustee (5), is not a trustee within the meaning of The Trustee Act, at all events until the estate is cleared by payment of debts (6). When it is intended to include an executor or administrator under the term "trustee" in a statute, it is usual (7), if not imperative, that that word shall, by an express definitive provision, be so extended. Therefore, while under the English Act, at the suit of a creditor for a *devastavit* (8), the provision now under con-

(1) *Perrins* v. *Bellamy*, (1899)1 Ch. at pp. 800, 802; (1898), 2 Ch. 527.

(2) 61 Viet. cap. 26. See Appendix A.

(3) 59 & 60 Viet. cap. 35, sec. 1, ss. 2, and sec. 3.

(4) 62 Viet. cap. 15, sec. 1.

(5) Williams on Executors, (9 ed.) pp. 1691, 243, 1876: *Cumming* v. *Landed Banking and Loan Co.*, 19 A.R. 447: reversed 22 S.C.R. 246; *In re Hyatt*, 38 Ch. D. 609.

(6) *Eaton* v. *Daines*, W.N. (1894) 32.

(7) R.S.O. (1897) c. 129, s. 27; 51 Viet. (N.S.) c. 11, s. 3.

(8) *In re Kay, Mosley* v. *Kay*, (1897) 2 Ch. 518. See also *In re Roberts, Knight* v. *Roberts*, 77 L.T. 479.

sideration is expressly made available to an executor or administrator by the definition clause, it is probable that it will not be available to him in New Brunswick; and, in Ontario, though an executor so sued will probably be regarded as covered by the rather inapt phrase; "any person who may in law be held to be fiduciarily responsible as a trustee," it will perhaps be safer not to rely too much upon this view until our Courts have so decided. For, as stated by Mr. Justice Story in *Smith* v. *Rines* (1), "it is not for Courts of Justice, *proprio marte*, to provide for all the defects or mischiefs of imperfect legislation." The words, "in law," are presumably not used here, as was formerly the phrase, "at law", in contradistinction to "in equity." If so, they would lead to a manifest absurdity, for "at law" the trustee and his fiduciary responsibility were unknown quantities. These words, "in law," will, therefore, probably be held to mean, or rather to have been used as an equivalent for, "in the Courts," which now of course administer law and equity concurrently.

"In law."

How far executors are covered by the Ontario Statute may possibly be decided in *Stewart* v. *Snyder* (2), now standing for judgment in the Ontario Court of Appeal, the benefit of this Statute, passed since the trial, having been there claimed for the defendant executor. But, as their testator was

(1) 2 Sumn. 338, 354; cited by Street, J., in *Gooderham* v. *Moore*, 31 O.R. 86, 91.

(2) 30 O. R. 110.

himself a trustee for the plaintiffs in respect to the subject matter of the action, it may not be necessary to determine this question, even should the defendant's conduct be held to be "honest and reasonable." Although the case turns largely upon the sufficiency, under R.S.O. (1897) cap. 129, sec. 38 (1), of the advertisement for creditors issued by the defendants, as executors (2), their failure or neglect to sufficiently comply with all the requirements of that provision, to entitle them to its absolute protection, does not conclusively establish that their conduct must be regarded as unreasonable under the Act of 1899 (3). Of course, when his purely executorial functions have been discharged, of the surplus the executor may, and, if it remains in his hands, generally does, become trustee (4). Thereafter he will be unquestionably within the protection of the Act.

Quasi trustees.

Persons, who are not actually trustees, but are placed in that position by Courts of Equity, and made subject to the responsibilities of trustees, will, no doubt, be held to be within the purview of the Ontario Statute; and, in view of the language of

(1) See Appendix A.

(2) Compare with, *In re Kay, Mosley* v. *Kay* (1897) 2 Ch. 518. Post p. 131.

(3) Ont. Imp. 1896; N.B. 1898. See *In re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583; also *In re Kay, ubi sup.*

(4) Lewin, (10 ed.) 795. See also *In re Grindey, Clews* v. *Grindey*, (1898) 2 Ch. 593.

Lindley, L.J., in *In re Lands Allotment Co.* (1), will probably be held to be covered also by the Imperial and New Brunswick Acts.

Mode of trustee's appointment not material.

Every trustee, however appointed, comes within the Act; and it is immaterial when the breach of trust occurred, for the Act is expressly made retrospective (2), and is applicable to cases already pending (3) when it became operative.

Statute retrospective.

Pleading.

It has been held that this Statute need not be specially pleaded as a defence (4), yet Sir F. H. Jeune, President of the Probate Division of the English High Court, points out that it will be better to plead it, so that parties may come prepared with evidence in answer (5), and Mr. Justice Stirling intimates that when, upon summary application or otherwise, an order or judgment of reference for enquiry is being made, the intention of the trustee to seek relief under the Statute should be brought to the attention of the Court, "in order to insure the proper evidence being before the Court" when the result of such enquiries is to be adjudicated upon (6).

(1) (1894) 1 Ch. 616, 631, supra p. 14.

(2) *Perrins* v. *Bellamy*, (1899) 1 Ch. 800; S. C. (1898) 2 Ch. 527. *In re Roberts, Knight* v. *Roberts*, 76 L.T. 483.

(3) *In re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.

(4) *Singlehurst* v. *Tapscott Steamship Co.* (*Ltd.*) W.N. (1899) 133.

(5) Idem.

(6) *In re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.

CHAPTER IV.

"HONESTLY."

Legal dishonesty.

The Statute is designed for the relief of the honest and reasonable trustee. Legal honesty may differ from moral honesty in much the same way as legal fraud (1) has been held to differ from moral fraud. A trustee, without having morally dishonest purposes, or being actuated by motives morally bad, may have such an intention to depart from his strict line of duty—that is, his legal duty—as will suffice to stamp his conduct as legally reprehensible and dishonest.

Fraud absolutely excluded.

To bring himself within the Statute the trustee must have acted "honestly." All fraudulent breaches of trust are, of course, completely excluded by this requirement; but, although in all the cases that have come before the Courts, the question raised has been not as to the honesty, but as to the reasonableness of the trustee's conduct, and it seems to have been almost taken for granted (2) that "honestly" is used as the equivalent of "not fraudulently," is this really all that the word means as employed in the Statute? Mr. Justice Kekewich apparently thinks

(1) See ante. p. 31, note.

(2) *In re Barker*, *Rarenshaw* v. *Barker*, 77 L.T. at 714; *In re Stuart*, *Smith* v. *Stuart*, (1897) 2 Ch. 583, 590; *Wynne* v. *Tempest*, W.N. (1897) 43; *In re Turner*, *Barker* v. *Irimey*, (1897) 1 Ch. at 541; *Perrins* v. *Bellamy*, (1899) 1 Ch. at pp. 800, 802.

"Honestly" means more than not fraudulently.

not, for he says, in *In re Second East Dulwich, &c., Bdg. Soc., Miall* v. *Pearce* (1), "the word 'honest' is used in many senses. A trustee is honest if he has not done anything dishonest. . . But in another sense he is dishonest. It seems to me that a man who accepts such a trusteeship, (under a deed for the dissolution of a Building Society) and does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations, is dishonest. He poses here before me as a poor man, the victim of his co-trustee. He was imposed on by Pearce, but suffered himself to be imposed on" (2). And the learned judge ordered the trustee to pay the costs of an action in which he had been already condemned to make good the defalcation of his co-trustee.

Meaning of "honestly."

The Century and Standard Dictionaries give *inter alia*, "properly" as a definition of "honestly:" and Mr. Stroud in his Judicial Dictionary says:—"The equivalent of the phrase, *bona fide*, is honestly." If, as Lord Justice Chitty says (3) the accompanying adverb, "reasonably, must mean reasonably as trustees," so must "honestly" mean "honestly as trustees." As put by Lord Blackburn,

(1) 79 L.T. 726.

(2) But compare with this the two cases, *Wynne* v. *Tempest*, W.N. (1897) 44, and *In re Turner*, (1897) 1 Ch. 536, where, under similar circumstances, the trustees' conduct was, though held to be unreasonable, not regarded as dishonest.

(3) *In re Grindey, Clews* v. *Grindey*, (1898) 2 Ch. 593, 601.

in the House of Lords, in *Jones* v. *Gordon* (1), dealing with the word, "honestly," used in the Bankruptcy Acts:—"If the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind—I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty." "Honestly," as the equivalent of "in good faith," is also discussed in *Tatam* v. *Haslar* by Mr. Justice Denman (2).

Can a wilful breach of trust be honest?

Now, can a trustee be said to act "honestly as a trustee," who, knowingly, though without fraudulent motive or intent, (3) commits a breach of trust? And, of course, as pointed out by Lord Blackburn, the conduct of the trustee who suspects he is doing wrong—that is, legally wrong—and designedly refrains from enquiry, is equally reprehensible. The word "honestly," as used in the Statute, will, upon further consideration, it is believed, be found to exclude from the operation of the Act many cases in.

(1) 2 A.C. 616, 629.
(2) 23 Q.B.D. 345, 348.
(3) Ante p. 20.

which it is impossible to detect actual fraud or fraudulent intent. On the other hand, most of the cases which, by this wider construction, the word "honestly" would exclude, will, in all probability, be cases in which it will also be held that the trustees have not acted reasonably—that is, reasonably as trustees. If this view of the Statute is correct, no wilful breach of trust can be held to fall within it; and, according to the view of Mr. Justice Kekewich, the trustee, who has entirely ignored his trust, or shewn supine indifference to its duties, must likewise be deemed dishonest. *Perrins* v. *Bellamy* (1), though at first blush it might seem to indicate that a conscious breach of trust may be honest within the meaning of the Statute, does not so hold: for, as pointed out by Lindley, M.R., the trustees, in that case, had put themselves in a position from which they could not recede, before they became aware that they were acting in breach of trust. They then "had to submit to the consequences of having entered into invalid contracts" (2).

(1) (1899) 1 Ch. 797.
(2) S.C. at. p. 801.

CHAPTER V.

"Reasonably."

No judicial definition yet given.

Most of the cases, in which the Statute now being discussed has come before the Courts, have turned upon the effect of the word "reasonably." Yet, we are still without any precise or accurate judicial definition of the meaning and effect of that term. Indeed, in the first case (1) in which the enactment came up for consideration, Mr. Justice Byrne, dealing with the contention that the trustee's conduct was reasonable, said :—

"It would be impossible to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and I think that each case must depend upon its own circumstances."

Each case must depend on its own circumstances.

This view has been further endorsed (2) since it was expressed, and in all the cases we find that the Judges refrain from attempting to define or limit the circumstances under which a trustee will, or will not, be deemed to have acted reasonably. The course of conduct shewn to have been pursued in each individual case is pronounced upon as it comes up. As put by Lindley, M.R., the Court must, in the exercise of the judicial discretion given it by the Act, say or decline to say in each case presented, "We are of

(1) *In re Turner, Barker* v. *Irimey*, (1897) 1 Ch. 536.

(2) *In re Kay*, per Romer, J., (1897) 2 Ch. at p. 524.

opinion it is not a case in which you ought to be held liable to make good the loss" (1). No case will necessarily be authority in another which is similar, unless the parity is so great that they may literally be described as "on all fours" one with the other.

General rule deducible from the cases.

Yet we may, perhaps, venture to draw some general deductions from the decided cases upon the question of what will be deemed such reasonable conduct as to fairly entitle a trustee to excuse. It will be found that in no case, where the trustee has failed to evince that ordinary care and prudence for the possession and exercise of which the acceptance of office renders him responsible, (2) has he been relieved. Where a loss has happened, not through a lack of such care or prudence, but through an error of judgment, he never would have been held personally liable, (3) and the Statute, therefore, has no application. On the other hand, where the breach of trust consists in an inadvertent disregard by the trustee of some technical rule, a mistaken assumption of power, or an omission to discharge some duty upon the erroneous belief of a lack of power—that is, where the breach is really a failure to comply with some obligation incumbent upon him *qua* trustee, and the disregard of which, were he not a trustee, would not subject him to rebuke for lack of prudence or care, or for impropriety,—if there be

(1) *Perrins* v. *Bellamy*, (1899) 1 Ch. at p. 800.

(2) *Learoyd* v. *Whiteley*, 12 A.C. at p. 731, per Lord Halsbury.

(3) *In re Chapman, Cocks* v. *Chapman*, (1896) 2 Ch. 763.

evidence upon which the Court can find that there is fair ground of excuse for the mistake that has been made, it will relieve the trustee from personal liability for such a breach of trust, upon the ground that he has acted reasonably. A careful perusal of the cases, which it is now proposed briefly to review, indicates the foregoing as the only general principle upon which the Act is to be administered, that can be fairly drawn from the authorities yet available.

Business imprudence not excused.

In the former class of case the unreasonableness of his conduct—that is, his lack of ordinary care and prudence—was the very essence of the trustee's offence; while, in the latter class, the fact that, viewed through any other spectacles than those of the Court of Chancery, his acts had been reasonable and commendable, formerly availed him naught as an answer to the suit of his *cestui que trust*. Thus, where the Court formerly permitted to the trustee "a reasonable discretion," the Statute will be found to have not materially affected his position. But where the Court held itself bound to exclude all considerations of prudence, all idea of discretion, and to act upon arbitrary rules, the greatest opportunity is presented for the remedial operation of this "beneficial enactment." That the Act is designed to relieve trustees from liability for "technical breaches of trust" would, therefore, appear to be a tolerably accurate statement of its scope and purview.

Breach of special duty *qua* trustee may be excused.

Thus, no trustee, who has wholly neglected his trust, or been culpably indifferent in regard to it,

entirely, or even too much, relying upon the integrity, ability, and judgment of his co-trustee, or of an agent (1), need look for relief under this provision. This sort of "unreasonable" conduct has been already several times unequivocally condemned. Over-confidence in co-trustee or agent.

In *In re Turner, Barker* v. *Ivimey* (2), a testatrix had appointed two trustees, Turner, a linen-draper, and Ivimey, a solicitor. The trust moneys were invested by Ivimey upon mortgage, which was an improper investment both in its nature and its value. The Court refused to excuse Turner, not being satisfied that he had acted with the same care which he would probably have taken if the money had been his own. He had relied on his co-trustee, the solicitor. There was no evidence offered to justify Turner's course except the fact that he was a linen-draper, and Ivimey a solicitor, and that the latter evidently had the confidence of the testatrix. These facts the learned Judge regarded as quite insufficient and held Turner liable, though entitled to indemnity from Ivimey. In re Turner, Barker v. Ivimey. Co-trustee.

In *Wynne* v. *Tempest* (3), before Mr. Justice Romer, it appeared that the defendant, a trustee, had permitted his co-trustee, a solicitor, to receive the proceeds of the sale of some trust property. The solicitor, whose firm was acting for the trust, deposited the moneys to the firm's credit, pending Wynne v. Tempest. Co-trustee.

(1) *In re Stuart, Smith* v. *Stuart*, (1897) 2 Ch. 583.
(2) (1897) 1 Ch. 536.
(3) W.N. (1897) 43.

the disposition of some questions as to their distribution. The solicitor died largely indebted to his bankers on his private account, and they succeeded in holding the firm account, including these trust moneys, to cover the amount due them. The defendant was held liable to make good to the trust estate the moneys so lost.

In re Second East Dulwich, Miall v. Pearce.

In re Second East Dulwich 745th Starr Bowkett Bdg. Soc., Miall v. *Pearce* (1), Mr. Justice Kekewich held one of two trustees under a deed of dissolution of a building society, who confided everything to the hands of his co-trustee without enquiry, knew nothing of the books, signed whatever documents his co-trustee put before him, and even swore to an affidavit which he did not understand, liable for moneys misappropriated by the co-trustee who had eventually absconded.

Co-trustee.

The conduct of the defendants in these three cases may certainly be said to be unreasonable, apart altogether from the consideration of duties peculiar to them as trustees.

Clark v. Bellamy.

In *Clark* v. *Bellamy* (2), where executor-trustees had relied entirely upon their testator's solicitor, who misappropriated a sum of $5,000.00, no reference could have been made to this enactment, which, at the date of the decision in that case (15th March, 1899), had not yet become law in Ontario. It will

Agent.

(1) 79 L.T. 726.

(2) 30 O.R. 532. See Ante p. 27.

no doubt be urged as a ground of defence in the Court of Appeal, where this case is awaiting argument.

In re Stuart, Smith v. Stuart.

Another illustration of the first part of the general rule above stated is afforded by the judgment of Mr. Justice Stirling, in *In re Stuart, Smith* v. *Stuart* (1). He held that a trustee who lent trust moneys upon advice, and under circumstances as to valuations, such, that, in the opinion of the Court, he would not have advanced the moneys, had they been his own, without further enquiries, could not be held to have acted reasonably. The trustee in this case placed too much confidence in "the long trusted solicitor of his testator." On his advice he lent trust moneys upon valuations made by surveyors not employed independently of the borrowers, and stating merely the amount for which the properties would be good security and not their actual value. The loans made were beyond what the surveyors had stated would be safe. The trustee was held liable for the loss sustained and not entitled to relief under the Statute. His conduct was unreasonable, regarding him as a business man merely.

Business imprudence.

In re Kay, Mosley v. Kay.

In re Kay, Mosley v. *Kay* (2) affords a good instance of the application of both portions of the general rule. In so far as the conduct of the executor in that case was imprudent, from the point of view of a business man, he was denied relief. But

(1) (1897) 2 Ch. 583.
(2) (1897) 2 Ch. 518.

Business imprudence not excused; technical breach excused.

in so far as his conduct, though reasonable as that of a business man merely, was nevertheless a breach of his duty as executor, the evidence being sufficient to satisfy the Court that he had not intentionally offended, and had what Lindley, M.R. calls "reasonable reasons" (1) for his conduct, he was excused. The testator, Kay, left an estate of £22,000 and, apparently, only £100 of debts. He died in June. His will bequeathed an "immediate legacy of £300" to his widow; this the executor paid, and he also allowed the widow to receive some of the income for the support of herself and family. In August a claim for rents, received by the testator and not accounted for, was sent in; in November the customary advertisement for creditors was issued; in December an action, claiming an account of the before mentioned rents upon a footing of wilful default, was begun. The executor, without going to the Court for directions, defended the action, and continued to allow the widow to receive moneys until judgment in April, 1896, which resulted in some £26,000 being found due from the testator's estate to the plaintiffs. The matter now came up on further consideration, upon a claim that the executor be ordered to make good the moneys paid by him to the widow, a liability from which he sought to be relieved under the Statute. Mr. Justice Romer held that, though there had been undue delay in issuing the

(1) *In re Roberts*, 76 L.T. 483.

advertisement for creditors, the executor had acted reasonably under all the circumstances in paying the £300 legacy and such further sums on account of income as were necessary to maintain the widow and family up to the issue of the writ, but not after, and that to this extent he might be relieved from personal liability.

The sums paid to the widow were not large in proportion to the testator's available assets, as they appeared. Some payments were bound to be made at once. The plaintiffs' claim was apparently not delayed by the slowness of the defendant in advertising, nor should the latter be refused the benefit of the Act merely because he was somewhat slow. But when served with a writ making a claim obviously very serious and important, and which might result in a very large sum being found due, it was the executor's duty to try and ascertain the extent of the claim. He did not do so. He must be held to have acted at his own risk in continuing payments after service of the writ.

The rule illustrated.

The breach of trust, here relieved against, was of the technical and arbitrary kind. As that of a business man, apart from the duties incumbent upon him *qua* executor, his conduct down to the issue of of the writ was highly reasonable. "It would be monstrous to suppose that it is the duty of an executor peremptorily to stop all supplies and allow the family to go to the workhouse, when he has every reason to believe that the testator has left

ample means for their support" (1). After the service of the writ, neither as a business man, nor as a trustee, could he be said to have acted prudently or reasonably, and to that extent he was, accordingly held disentitled to relief.

Technical faults.

The following cases illustrate the second portion of the general principle, or rule, upon which it would seem that the Statute will be applied, viz:—where there has been no "business imprudence or negligence," which would render the trustee liable, but he has merely committed some technical fault, if it be shewn that he acted inadvertently, and there is evidence upon which the Court can find that his transgression is not unreasonable, he will be excused.

In re Roberts, Knight v. Roberts.

In re Roberts, Knight v. *Roberts* (2). In this case the Court of Appeal held that where an executor, being *bona fide* and on reasonable grounds satisfied that he could not maintain an action against a debtor of his testator, took no proceedings to recover his debt, such executor was, on the principle of *Clack* v. *Holland* (3), not guilty of any default; but, if technically liable for a breach of trust, having acted honestly and reasonably, the Court held that he ought fairly to be excused. The deceased, a solicitor, had made an arrangement with the debtor, his client, that the latter should not be personally liable for his costs of an administration action unless the solicitor

(1) (1897) 2 Ch. 521.
(2) 76 L.T. 479.
(3) 19 Beav. 262.

should fail to recover them in such action. The facts of the case were complicated. The Court found that the defendant's belief that the claim was uncollectable was reasonable and well founded.

Conduct being reasonable, no liability apart from the Statute.

Lord Justice Lindley says: "It is not enough for a trustee to say 'I believed so and so, and I honestly believed so and so, and I believed I could not succeed, and I honestly believed I could not succeed' (1). The Court must go further than that and consider whether that honest belief is a reasonable belief. . . . . When the reasons are reasonable and satisfactory for his belief, and he honestly entertains that belief . . . . he is not liable". . . . . The judgment in *Clack* v. *Holland* "ought to be a guide to any Court which has to consider what ought to be done under the Act of 1896. The Act of 1896 comes in in a case like this, and ought to be applied to a case like this, where, even if there is, no doubt, on the evidence, a technical liability for a breach of trust, the Court is dealing with a thoroughly honest trustee who has acted reasonably and honestly and to the best of his ability, and who has committed no breach of trust, unless it is a very technical breach of trust."

But if there had been a technical breach the Statute would cover it.

It is to be noted that in this case, apart altogether from the Statute, the Court was of the opinion that the executor had incurred no liability. As a business man the executor could not reasonably

(1) Compare with *In re Christ Church, Dartmouth*, Russell's (N.S.) Eq. D. 465. Infra p. 146.

be expected to spend money in a vain endeavour to collect what he, on sufficient grounds, thought to be an uncollectable debt. As an executor he had a discretion in such a matter within which he was held to have acted wisely. But, had he made a mistake, there was abundant evidence to satisfy the Court that it was an inadvertent blunder, and one which, having sound and satisfactory reasons to excuse it, could not be held to be unreasonable. It was therefore, a fitting case for the application of the statutory remedy.

In re Grindey, Clews *v.* Grindey.

In re Grindey, Clews v. *Grindey* (1), was a case in which executors, acting upon their own idea of the construction of a clause in their testator's will, directing them "to maintain the estate in the like mode of investment as at his death," and believing the debtor to be a man of good credit, did not call in a debt of £166. The Court held this conduct of the executors reasonable. Without saying that the construction they had put upon the will was correct, Lindley, M.R. held it not to be unreasonable. The breach, if any, was technical, and, under the Statute, was deemed excusable.

Perrins *v.* Bellamy.

In the last reported case upon the Statute, *Perrins* v. *Bellamy* (2), we find the Court of Appeal, affirming Mr. Justice Kekewich, holding that, in a case where trustees, acting upon the advice of their solicitors as to their powers, sold certain leaseholds,

(1) (1898) 2 Ch. 593.
(2) (1899) 1 Ch. 797. (1898) 2 Ch. 521.

which it was clear they had not the power to sell, they must be relieved from personal liability for such a technical breach of trust. In this case the sale, from a business point of view, was, says Lindley, M.R., "a most judicious breach of trust . . . . and there is not one trustee in a thousand, or one business man in a thousand, who would not have done likewise" (1). This case shews that where the breach of trust has been technical, and there is evidence of reasonable precautions having been taken, (here there was the advice of solicitors upon deeds confusing enough to a layman) the Court will relieve.

Sale by trustees without power.

But, that such relief will not be granted, though the breach be purely technical, and, viewed as a business transaction, not unreasonable, in the absence of evidence shewing the trustee's mistake to have been such as ought to be excused, is well illustrated by *In re Barker, Ravenshaw* v. *Barker* (2). An executrix and life-tenant, acting on the advice of a commission agent, a friend and adviser of her husband, the testator, retained for fourteen years some shares, a large portion of which were only partly paid up. She was sued by the beneficiaries for an account. It being found by the chief clerk that, upon these speculative investments, she had, upon some of them, lost £1,536, and upon others, gained enough to make the net loss to the estate,

Court can only act upon evidence.

(1) (1899) 1 Ch. p. 801.
(2) 77 L.T. 712.

upon all the unauthorized investments which she had retained, only £349, Mr. Justice North held her liable to recoup to the estate the entire £1,536, and not entitled to relief under the Statute, the postponement of the sale not having been proven to be reasonable. This case exemplifies Lord Justice Chitty's view that the trustee must act "reasonably as a trustee," to bring himself within the Statute. The breach of trust, though technical, in the sense that, as a business transaction, it might not have been altogether imprudent, was very glaring, and the evidence failed to shew any ground upon which the Court could hold the trustee to have acted reasonably, or upon which she ought fairly to be excused.

Technical breach not excused.

That the Court will, under the Statute, deem conduct reasonable or unreasonable upon much the same grounds as previously, (that is in cases where its hands were not formerly tied by the presence of some transgression by the trustee, of a technical rule of duty, peculiarly applicable to him as such) is well illustrated by the view taken of the propriety or necessity of trustees securing professional advice. Thus, prior to the Act, in matters upon which as business men, they might be deemed to be fairly well informed, trustees were not liable for mistakes of judgment, even though they had not taken the advice of experts (1). But, where the questions

Business imprudence treated as formerly.

(1) *In re Chapman, Cocks* v. *Chapman*, (1896) 2 Ch. 763; *Learoyd* v. *Whiteley*, 12 A.C. 732-4.

arising involved matters upon which no prudent business man would act without seeking skilled assistance, it was always considered negligence and breach of duty on the part of a trustee, if, having acted without such advice, he made a mistake (1). Though formerly, should such advice, if taken, have proved erroneous, the trustee who acted upon it would not have been protected (2), it may be that he would now be saved from personal liability, as having taken every reasonable precaution. That the same principles will still prevail is shewn by *In re Grindey* (3), where, there being what he might easily regard as a plain direction, in what he might also well consider a simple matter, an executor was held not to be bound to obtain professional opinions: while, in *In re Barker* (4), the failure to take professional advice was severely commented on, and, in *In re Stuart* (5) the action of the trustee, based upon advice given by an improper person, was condemned.

A criterion of unreasonableness.

In this latter case it is intimated that, where a Statute points out a certain course which may be followed by a trustee with absolute safety (6), its

(1) *Perrins* v. *Bellamy*, (1898) 2 Ch. p. 530.

(2) *Boulton* v. *Beard*, 3 De G.M. & G. 608.

(3) (1898) 2 Ch. 593.

(4) 77 L.T. 712, 714.

(5) (1897) 2 Ch. 583.

(6) Though an executor or administrator may, in Ontario and Manitoba, protect himself personally, and his trust estate, against creditor's claims, by complying with the provisions of

requirements, *prima facie*, constitute a standard, by which the reasonableness of the trustee's conduct in such matters is to be judged, though non-compliance with such requirements is not, *per se*, and without more, a fatal obstacle to an application for relief under the Imperial Statute of 1896 (1).

Mr. Justice Romer, in *In re Kay* (2), takes a similar view with regard to some of the provisions made for the protection of executors.

The interest of the trust as a whole.

The course that is best, in the interest of the trust as a whole—for *cestuis que trustent* in reversion, as well as for those in possession—and, certainly, the course best calculated to preserve the corpus of the estate, though at the immediate expense of the income, will always be deemed reasonable (3).

"The grit of the section," says Mr. Justice Kekewich, "is in the words, 'reasonably and ought fairly to be excused'" (4), and the cases would seem to indicate that he is not mistaken.

R.S.O. (1897) cap. 129, sec. 35 (see Appendix A., *Gooderham* v. *Moore*, 31 O.R. 86), it is not probable that his failure to avail himself of this beneficial provision will be deemed even *prima facie* evidence of negligence in any action brought by the beneficiaries against him.

(1) 62 Vict. (Ont.) cap. 15, sec 3; 61 Vict. (N.B.) cap. 26.

(2) (1897) 2 Ch. 518.

(3) *Perrins* v. *Bellamy*, (1899) 1 Ch. 797, 801; (1898) 2 Ch. pp. 530-2. But see *Vickery* v. *Evans*, 33 Beav. 376.

(4) S.C. (1898) 2 Ch. at p. 528.

CHAPTER VI.

Miscellaneous—Conclusion.

"Ought fairly to be excused."

The words "and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court," have been commented upon in only one case.

"How much the words 'ought fairly to be excused,'" says Mr. Justice Kekewich (1), "add to the force of the word 'reasonably,' I am not at present prepared to say. I suppose, however, that in the view of the Legislature there might be cases in which a trustee, though he had acted reasonably, ought not fairly to be excused for the breach of trust." An objection by a *cestui que trust* to the course taken, notified to the trustee in advance, is suggested as a possible ground upon which to give effect to these words. "In the section the copulative 'and' is used, and it may well be argued that in order to bring a case within the section it must be shewn not merely that the trustee has acted 'reasonably,' but also that he 'ought fairly to be excused' for the breach of trust. I venture, however, to think that, in general and in the absence of special circumstances, a trustee who has acted 'reasonably' ought to be relieved, and that it is not incumbent on the Court to consider whether he

(1) *Perrins* v. *Bellamy*, (1898) 2 Ch. at p. 528.

ought fairly to be excused, unless there is evidence of a special character showing that the provisions of the section ought not to be applied in his favor."

These words have not yet been discussed in any other case, and it is rather difficult to suggest circumstances under which the trustee must be held to have acted "honestly and reasonably," and yet "ought (not) fairly to be excused." Judicial ingenuity may, however, yet find some proper application for these words.

Directions of the Court.

The difference between the practice at present and that formerly in vogue as to applications to the Court for directions has been already adverted to (1). Mr. Justice Kekewich thinks the words—"for omitting to obtain the directions of the Court in the matter in which he committed such breach of trust"—difficult to follow (2). "I do not see how the trustee can be excused for breach of trust without also being excused for the omission referred to, or how he can be excused for the omission without also being excused for the breach of trust. If I am at liberty to guess, I should suppose that these words were added by way of amendment and crept into the Statute without due regard being had to the meaning of the context. The fact that a trustee has omitted to obtain the directions of the Court has never been held to be a ground for holding him personally

Kekewich, J.

(1) Ante p. 113; R.S.O. (1897) cap. 129, sec. 39 (see Appendix A.); Con. Rule (Ont.) 938; 53 Vict. (N.B.) cap. 4, sec. 212.

(2) *Perrins* v. *Bellamy*, (1898) 2 Ch. pp. 528, 529.

liable, though it may be a reason guiding the Court in the matter of costs, or in deciding whether he has acted reasonably or otherwise, and especially so in these days when questions of difficulty, even as regards the legal estate, can be decided economically and expeditiously on originating summons. But, if the Court comes to the conclusion that a trustee has acted reasonably, I cannot see how it can usefully proceed to consider, as an independent matter, the question whether he has or has not omitted to obtain the directions of the Court."

Lindley, M.R.

The learned Master of the Rolls (1) thinks these words were put into the section in order to give trustees an answer to the argument which is sure to be urged. "Oh, you ought to have applied to the Court." Just how their presence in the section helps trustees His Lordship does not indicate.

Rigby, L.J.

Rigby, L.J. says that the Statute indicates that the omission to obtain the directions of the Court is one of the things against which trustees are to be protected. In *In re Grindey* (2), Lindley, M.R. and Chitty, L.J. intimate that the smallness of the amount involved—there £166—affords an answer to the contention that the trustee should have sought the directions of the Court.

Small sum involved.

In *In re Williams* (3), the Court of Appeal for

(1) *Perrins* v. *Bellamy*, (1899) 1 Ch. at p. 800, S.C. p. 802.

(2) (1898) 2 Ch. 593.

(3) 22 A.R. 196; see also *In re Foxwell's Estate*, 1 N.B. Eq. 195, where the Supreme Court of New Brunswick refused to entertain an application under 53 Vict. (N.B.) cap. 4, sec. 212, to determine which of two claimants were entitled to a fund.

Litigation inevitable.

Ontario held that it was not incumbent upon a trustee to seek the advice of the Court, where it was plain that the matter in question could not be disposed of without litigation. *Nemo tenetur ad inutilia* (1).

On the other hand, in *In re Barker* (2), Mr. Justice North, indicating what it would have been reasonable for a trustee to do, says: "He might have consulted a solicitor who might have advised that the opinion of the Court should be taken." He evidently thought this a precaution which cannot always be safely neglected.

A similar observation is made by Romer, J., in *In re Kay* (3).

When omission excusable and when not.

In this matter, therefore, the trustee's conduct must be considered in much the same way apparently as in regard to obtaining professional opinions, or skilled assistance. If the circumstances be such that an ordinarily prudent man would not have failed to avail himself of such a safeguard, the trustee's conduct will probably be deemed unreasonable, in cases in which his breach of trust has resulted in a loss to the estate, if he has omitted to take this precaution.

"The Court may relieve the trustee wholly or partly from personal liability." Although these

(1) *Taylor* v. *Magrath*, 10 O.R. 669; *Clack* v. *Holland*, 19 Beav. 262.

(2) 77 L.T. 712, 714.

(3) (1897) 2 Ch. 518, 524.

concluding words of the Statute are framed as enabling merely, and not mandatory, "may" no doubt means "shall," as it is axiomatic that where Statutes authorize acts for the benefit of others, the exercise of the power conferred is not discretionary (1). Lindley, M.R. recognizes this when he says:—"Being enabled, we ought to say, that the trustees are entitled to this protection" (2); as does likewise Rigby, L.J., when he says:—"If, then, we come to the conclusion that they are within the Act, I think we are bound in the exercise of the discretion vested in us to give them the relief which the Act provides" (3). For the same reason it is only in a proper case that the relief accorded to the trustee may be restricted under the words "wholly or partly." The Court cannot act arbitrarily. An instance, in which these words found their application very readily, was *In re Kay, Mosley* v. *Kay* (4), where the executor was relieved partly only, that is, so far as the Court found his conduct to have been reasonable.

The Statute is mandatory

"Wholly or partly."

Of course it is only the personal liability of the trustee that is affected by the Statute. All remedies of the *cestui que trust* against the trust estate, whether in the hands of the trustee or of strangers, are left intact and undiminished.

Personal liability only affected.

(1) *Blackwell's Case*, 1 Vern. 152; *Macdougal* v. *Patterson*, 11 C.B. 755; *Bustross* v. *White*, 1 Q.B.D. 423; *Shaw* v. *Reckitt*, (1893) 1 Q.B. 779.

(2) *Perrins* v. *Bellamy*, (1899) 1 Ch. at p. 801.

(3) S. C. at p. 803.

(4) (1897) 2 Ch. 518, Ante p. 131.

Nova Scotia law.

Nova Scotia has not yet adopted this Statutory provision. If trustees in that Province could always be assured of the indulgent treatment accorded by the Court, in *In re Christ Church, Dartmouth* (1), the need for a similar Act in Nova Scotia, would not seem to be very great. In that case trustees were sought to be made personally liable for a sum of about $1,150, invested by them upon mortgage, upon the ground that they had advanced an excessive amount, and upon a second mortgage, on property in which the mortgagor had only a two thirds interest, subject to a first mortgage of $1,200 upon the entire property, which was valued at $5,000. The trustees had the advice of a solicitor as to title and value. They were held to be not liable personally to make good the loss sustained by the trust estate, on the ground that, although the security was not first-class the trustees believed it to be safe when investing, and that there was not "wilful default" within R.S. N.S. (1884) cap. 114, sec. 24, corresponding to R.S.O. (1897) cap. 129, sec. 3 (2). It is interesting to compare the judgment in this case with the language of Lindley, L.J., in *In re Roberts, Knight* v. *Roberts* (3). No English precedent is cited by the learned Nova Scotia Judge.

It is to be regretted that a Statute of this character should not, where it is apparently so easy

(1) Russell's (N.S.) Eq. D. 465. But see *Perley* v. *Snow*, Russ. Eq. D. 373; *Vernon* v. *Seaman*, Russ. Eq. D. 190.

(2) See Appendix A.

(3) 76 L.T. 483.

a thing to do, be adopted in the colonies, if at all, in the same terms in which it has been passed in England. The departures made in the present instance may not be very serious, but they are sufficient to raise questions as to the applicability of some valuable English authorities to cases arising in Ontario and New Brunswick.

Though they have expressed themselves as being strongly desirous "not to narrow the effect of the Act," the Judges have found that the field of its operation cannot well be extended beyond cases in which the breach of trust has been of a "technical" character.

APPENDIX A.

STATUTES OF
ONTARIO, NOVA SCOTIA, NEW BRUNSWICK, BRITISH COLUMBIA AND MANITOBA.

I. Trustee Limitation Provisions:
- (*a*) Ontario 150
- (*b*) Nova Scotia 151

II. Express Trusts 152

III. Technical Breaches of Trust—Relief 153

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The Trustee Investment Act 159

V. Limitation of Actions:
- (*a*) Personal Actions 163
- (*b*) Specialties 169
- (*c*) Real Property 173

N.B.—*The Ontario statutory provisions, and those of the other Provinces, which are of immediate importance, are given in full. Corresponding statutory provisions of other Provinces are referred to in italics under each section of The Ontario Acts, or will be found at the end of each chapter.*

I. LIMITATIONS OF ACTIONS AGAINST TRUSTEES.

(*a*) ONTARIO.

REVISED STATUTE (1897), CHAPTER 129.

. . . . . .

SECTION 27.

Interpretation as to next five sections.

"Trustee." Imp. Act 51-52 V., c. 59, sec. 1.

(1) For the purposes of the next five sections of this Act the expression "Trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee.

Extend to joint trustees.

(2) The provisions of the said five sections relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

. . . . . .

Apply to all trusts.

(4) The said five sections shall apply as well to trusts created by an instrument executed before as to trusts created on or after the 4th day of May, 1891 and the powers by the said sections conferred are in addition to the powers conferred by the instrument, if any, creating the trust; Provided always that save as in the said sections expressly provided, nothing therein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do by the instrument creating the trust.

Proviso.

. . . . . .

SECTION 32.

Application of Statutes of Limitations to certain actions against trustees. Imp. Act 51-52 V., c. 59, sec. 8.

(1) In any action or other proceeding against a trustee, or any person claiming through 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 following provisions shall apply :

(*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.

(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received ; but so nevertheless that the Statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

(2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding, and this section had been pleaded.

(3) This section shall apply only to actions or other proceedings commenced after the first day of January, 1892, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations.

(*b*) NOVA SCOTIA.

51 VICTORIAE, CHAPTER 11, SECTION 3.—The word "trust" does not mean the duties incident to an estate conveyed by way of mortgage ; but, with this

exception, the words "trust" and "trustee" extend to and include implied and constructive trusts, and extend to and include cases where the trustee has some beneficial interest in the subject of the trust, and extend to and include the duties incident to the office of personal representative of a deceased person.

R.S.B.C. (1897), cap. 187, sec. 3.

52 Victoriae, cap. 18, sec. 17, is the same as sec. 32, R.S.O. (1897), cap. 129; and sec. 22 corresponds with ss. 4 of sec. 27, R.S.O. (1897), cap. 129.—This Nova Scotia Statute is to be read with, and as if part of, 51 Vict., cap. 11.

II. EXPRESS TRUSTS.

Former Law in England, Ontario and Nova Scotia.

Ontario Revised Statute (1897), cap. 51, sec. 58.

The law to be administered in Ontario, as to the matters next hereinafter mentioned, shall be as follows:

36-37 V., (Imp.) c. 66, sec. 25, ss. 2.

(1) Subject to the provisions of sec. 32 of *The Trustee Act*, no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.

NOVA SCOTIA—*R.S.N.S. (1884), cap. 104, sec. 13, ss. 1.*

OTHER PROVINCES.

Similar provisions are made by:

BRITISH COLUMBIA—*Revised Statute (1897), cap. 187, sec. 89.*

MANITOBA—*58 & 59 Victoriae, cap. 6, sec. 39, ss. 1.*

NEW BRUNSWICK *has no corresponding statutory provision.*

III. TECHNICAL BREACHES OF TRUST.

ENGLAND.

IMPERIAL STATUTE, 59 & 60 VICTORIAE, CAP. 35.

Sec. 1, ss. 2.—The administration of the property of any deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act.

. . . . . .

Sec. 3.—If it appears to the Court that a trustee whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court, in the matter in which he committed such breach, then the Court may relieve the trustee wholly or partly, from personal liability for the same.

NEW BRUNSWICK.

NEW BRUNSWICK STATUTE, 61 VICTORIAE, CAP. 26.

Where in any suit or proceeding in the Supreme Court in Equity it appears to the Court that a Trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the Trustee wholly or partly from personal liability for the same.

ONTARIO.

ONTARIO STATUTE, 62 VICTORIAE, CAP. 15.

Sec. 1. If in any proceeding affecting trustees or trust property it appears to the Court that a trustee,

whether appointed by the Court, or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust, whether the transaction, alleged or found to be a breach of trust, occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee wholly or partly from personal liability for the same.

There is no similar provision in any other Province of Canada.

IV. THE TRUSTEE ACT.

REVISED STATUTE OF ONTARIO (1897), CAP. 129.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Short title.

1. This Act may be cited as "The Trustee Act."

. . . . . .

Every trust instrument to be deemed to contain clause for the indemnity and reimbursement of the trustees. Imp. Act 22-23 V., c. 35, s. 31.

3. Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—"That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities

may be deposited; nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will or other instrument."

52 Vict. N.S., cap. 18, sec. 9.

. . . . . .

Actions against executors and administrators for torts.

11. In case any deceased person committed a wrong to another in respect of his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought at latest within one year after the decease. This section shall not apply to libel or slander.

In England the 3 and 4 W. IV., cap. 42, sec. 2, gives a similar remedy for wrongs committed within six months before the testator's death, the action to be brought within six months after the decease. This latter provision is in force in Nova Scotia (R.S.N.S. (1884), cap. 113, sec. 2); in British Columbia (R.S. B.C. (1897), cap. 73, sec. 40); in Manitoba (R.S. Man. (1891), cap. 146, sec. 48); see C.S.N.B. (1877), cap. 85, sec. 14—a most extraordinary provision.

. . . . . .

For Section 27, see Ante p. 150.

Appointment of agents by trustees for certain purposes. Imp. Act 51-52, c. 59, sec. 2.

28. (1) It shall be lawful for a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or any valuable consideration of property receivable by such trustee under the trust; and no trustee shall be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; Provided that nothing herein contained shall exempt a trustee from any liability which he would have

Proviso.

incurred if this section had not been enacted in case of permitting such money, valuable consideration, or property to remain in the hands or under the control of the solicitor for a period longer than is reasonably necessary to enable the solicitor to pay or transfer the same to the trustee.

(2) It shall be lawful for a trustee to appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to such trustee under or by virtue of a policy of assurance or otherwise; and no trustee shall be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment: Provided that nothing herein contained shall exempt a trustee from any liability which he would have incurred if this section had not been enacted, in case he permits such money to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable him to pay the same to the trustee.

(3) This section shall apply only where the money or valuable consideration or property was or is received on or after the 4th day of May, 1891.

. . . . . .

Trustees committing breach of trust at instigation of beneficiary. Imp. Act, 51-52 V., c. 59, sec. 6.

30. (1) Where a trustee has committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary is a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him.

(2) This section shall apply to breaches of trust committed as well before as after the 4th day of May, 1891, except where an action or other proceeding was then pending with reference thereto.

. . . . . .

FOR SECTION 32 SEE ANTE P. 150.

Powers of executors as to settling debts owing from or to their estates.

33. (1) It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they may think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, and, for any of the purposes aforesaid, to enter into, give and execute such agreements, instruments of composition, releases and other things, as they may think expedient, without being responsible for any loss occasioned thereby.

(2) None of the powers in this section conferred shall take effect, or be exercisable, by virtue of this Act, by any trustees or executors, if it is expressly declared in the deed, will or other instrument creating such trustees or executors, that such trustees or executors shall not have such power.

(3) This section shall apply and extend to both present and future trustees and executors.

R.S.B.C. (1897), cap. 187, sec. 24; R.S. Man. (1891), cap. 146, sec. 28; 51 Vict. N.S., cap. 11, sec. 68.

. . . . . .

If claim is rejected and notice given an action must be brought within a certain period.

35. In case the executor or administrator gives notice in writing referring to this section and of his intention to avail himself thereof to any creditor or other person of whose claims against the estate he has notice, or to the attorney or agent of such creditor or other person, that he the executor or administrator rejects or disputes the claim, it shall be the duty of the claimant to commence his action in respect of the claim within six months after the notice is given, in case the debt or some part thereof is due at the time of the notice, or within six months from the time the debt or some part thereof falls due

if no part thereof is due at the time of the notice, and in default the claim shall be forever barred;

Proviso. Provided always that in case the claimant shall be nonsuited at the trial the claimant, or his executors or administrators, may commence a new action within a further period of one month from the time of the nonsuit.

R.S. Man. (1891), cap. 146, sec. 31.

. . . . . .

Distribution of assets under trust deeds for benefit of creditors or of the assets of a testator or intestate after notice given by trustee, assignee or executor or administrator.
Imp. Act, 22-23 V., c. 35, sec. 29.

38. Where a trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or a particular class or classes of creditors, where the creditors are not designated by name therein, or an executor or an administrator has given such or the like notices as in the opinion of the Court in which such trustee, assignee, executor, or administrator, is sought to be charged, would have been given by the High Court in an action for the execution of the trusts of such deed or assignment, or an administration suit (as the case may be), for creditors and others to send in to such trustee, assignee, executor or administrator, their claims against the person for the benefit of the creditors of whom such deed or assignment is made, or the estate of the testator or intestate (as the case may be), the trustee, assignee, executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the proceeds of the trust estate, or the assets of the testator or intestate (as the case may be), or any part thereof amongst the parties entitled thereto, having regard to the claims of which the trustee, assignee, executor or administrator has then notice, and shall not be liable for the proceeds of the trust estate, or assets (as the case may be), or any part thereof, so distributed to any person of whose claim the trustee, assignee, executor, or administrator, had not notice at the time of the distribution thereof or a part thereof (as the case may be); but nothing in this Act con-

tained shall prejudice the right of any creditor or claimant to follow the proceeds of the trust estate or assets (as the case may be), or any part thereof, into the hands of the person or persons who may have received the same respectively.

R.S.B.C. (1897), cap. 187, sec. 26; R.S. Man. (1891), cap. 146, sec. 32; 51 Vict. (N.S.), cap. 11, sec. 65.

Trustees, etc., may apply for advice in management of trust property. Imp. Act, 22-23 V., c. 35, sec. 30.

39. (1) Any trustee, executor or administrator, shall be at liberty, without the institution of an action, to apply in Court or in Chambers in the manner prescribed by Rules of Court, for the opinion, advice, or direction of a Judge of the High Court on any question respecting the management or administration of the trust property or the assets of a testator or intestate.

(2) The trustee, executor or administrator acting upon the opinion, advice or direction given by the Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the said application; but this provision shall not extend to indemnify a trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if the trustee, executor or administrator has been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

R.S.B.C. (1897), cap. 187, sec. 77; R.S. Man. (1891), cap. 146, sec. 33, et seq.; 53 Vict. (N.B.), cap. 4, sec. 212; 51 Vict. (N.S.), cap. 11, sec. 63.

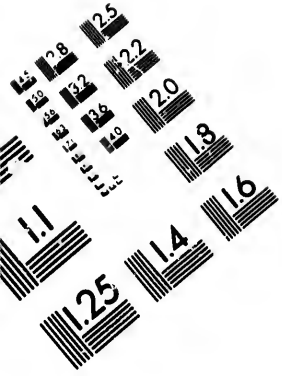
THE TRUSTEE INVESTMENT ACT.

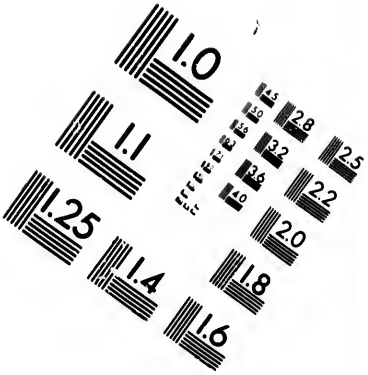
REVISED STATUTE OF ONTARIO (1897) CHAPTER 130.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Short title.

1. This Act may be cited as "The Trustee Investment Act."





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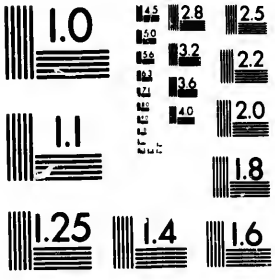

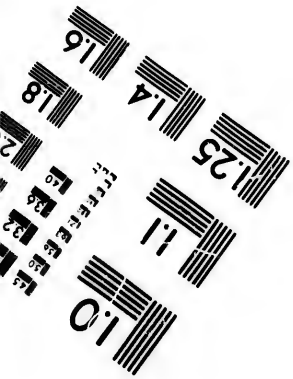

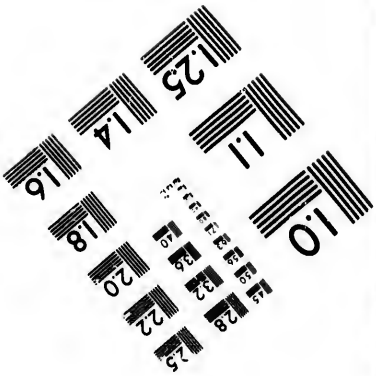

Trustees or executors may invest trust moneys in certain securities. Imp. Act, 23-24 V., c. 145, sec. 25.

2. (1) Trustees or executors having trust money in their hands, which it is in their duty, or which it is in their discretion, to invest at interest, shall be at liberty at their discretion, to invest the same in any stock, debentures or securities of the Government of the Dominion of Canada, or of this Province; or in securities which are a first charge on land held in fee simple, provided that such investments are in other respects reasonable and proper, and such trustees or executors shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same in any such stock, debentures or securities aforesaid, and also, from time to time, at their discretion, to vary any such investments as aforesaid, for others of the same nature; and any such moneys already invested in any such stock, debentures or securities as aforesaid, shall be held and taken to have been lawfully and properly invested.

This section to apply to all trustees, etc.

(2) This section shall apply and extend to both present and future trustees and executors.

R.S.B.C. (1897), cap. 187, sec. 11; R.S. Man. (1891), cap. 146, sec. 22; 51 Vict. (N.S.), cap. 11, secs. 58 and 64; 55 Vict. (N.S.), cap. 52; 56 Vict. (N.S.), cap. 8, sec. 2, ss. 6; 62 Vict. (N.S.), cap. 34.

Interpretation.

"Trustee."

3. (1) For the purposes of the following sections of this Act the expression "Trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee.

(2) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

(3) The expression "stock" shall include fully paid up shares.

(4) The expression "instrument" shall include an Act of the Legislature of Ontario.

Additional powers given.

4. The powers hereby conferred are in addition to the powers conferred by the instrument, if any,

creating the trust; Provided that nothing herein contained shall authorize any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust. Proviso.

5. (1) It shall be lawful for a trustee, unless expressly forbidden by the instrument (if any) creating the trust, to invest any trust funds in his hands in terminable debentures or debenture stock of the hereinafter mentioned societies and companies, provided that such investment is in other respects reasonable and proper, and that the debentures are registered, and are transferable only on the books of the society or company in his name as the trustee for the particular trust estate for which they are held *in* such debentures or debenture stock as aforesaid:— Investment of trust funds.

(N.B.—*The italicised word, "in," was probably a misprint in the original Act for the word "of," but this section is cumbrously worded at best.)*

(*a*) Of any incorporated society or company which has been, or shall hereafter be authorized by any lawful authority to lend money upon mortgages on real estate, or for that purpose and other purposes, such society or company having a capitalized, fixed, paid up and permanent stock not liable to be withdrawn therefrom amounting to at least $500,000, and having a reserve fund amounting to not less than 25 per cent. of its paid up capital, and its stock having a market value of not less than 25 per cent. premium, and the society or company having during each of the ten years next preceding the date of investment, paid a dividend of not less than six per cent. on its ordinary stock;

(*b*) Or of any society or company heretofore incorporated under chapter 164 of the Revised Statutes of Ontario, 1877, or any Act incorporated therewith, or under chapter 169 of the Revised Statutes of Ontario, 1887, having a capitalized, fixed, paid up and permanent stock not liable to be withdrawn therefrom amounting to at least $100,000, and having a reserve fund amounting to not less

than 15 per cent. of its paid up capital, and its stock having a market value of not less than 7 per cent. premium, and the society or company having during each of the ten years next preceding the date of investment paid a dividend of not less than six per cent. on its ordinary stock; provided that nothing in this clause (*b*) shall in any way affect any investment made under statutory authority before the passing of this Act.

(2) The trustees may from time to time vary any such investment.

Companies in which funds invested to be approved by Lieutenant-Governor.

6. No investments shall be made under authority of this Act in the debentures of any society or company of the class first hereinbefore mentioned which has not obtained an order of the Lieutenant-Governor in Council approving of investments in the debentures thereof; and such approval is not to be granted to any society or company which does not appear to have kept strictly within its legal powers in relation to borrowing and investment.

Revocation of Order in Council approving of investments.

7. The Lieutenant-Governor in Council if he deems it expedient may at any time revoke any Order in Council previously made approving of investments in the debentures or debenture stock of any society or company. Such revocation shall not affect the propriety of investments made before such revocation.

When trustee not chargeable for lending on insufficient security. Imp. Act, 51-52 V., c. 59, sec. 4.

8. (1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the

property is situate or elsewhere, and that the amount of the loan does not exceed one half of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. This section shall apply to a loan upon any property on which the trustee can lawfully lend.

(2) This section shall apply to transfers of existing securities as well as to new securities, and to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date.

52 Vict. (N.S.), cap. 18, sec. 13.

Trustee lending more than authorized amount. Imp. Act, 51-52 V., c. 59, sec. 5.

9. (1) Where a trustee has improperly advanced trust money on a mortgage security which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorized investment for such less sum, and the trustees shall only be liable to make good the sum advanced in excess thereof with interest.

(2) This section shall apply to investments made as well before as on and after the 4th day of May, 1891, unless some action or other proceeding was pending with reference thereto at the said date.

52 Vict. (N.S.), cap. 18, sec. 14.

V. LIMITATIONS OF ACTIONS.

(*a*) Personal Actions.

ENGLAND.

Imperial Statute 21 James I., Chapter 16, (Simple Contracts).

. . . . . .

21 Jac. 1., c. 16.

3. And be it further enacted, That all actions of trespass, quare clausum fregit . . . . all actions of tres-

pass, detinue, action sur trover and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault menace battery wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of Parliament shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass debt, detinue and replevin, for goods or cattle, and the said action for trespass, quare clausum fregit, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass of assault battery wounding imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; and the said action upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after.

4. And nevertheless be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint writ or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff his heirs executors or administrators, as the case shall require, may com-

mence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

. . . . . .

7. Provided nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass detinue action sur trover replevin actions of account actions of debt actions of trespass for assault menace battery wounding or imprisonment actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, *non compos mentis*, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discovert, of sane memory, at large and returned from beyond the seas, as other persons having no such impediment should have done.

ONTARIO.

Revised Statute (1897), cap. 111.

1. In all matters of controversy relative to property and civil rights resort shall continue to be had to the laws of England as they stood on the said 15th day of October, 1792, as the rule for the decision of the same, and all matters relative to testimony and legal proof in the investigation of fact and the forms thereof in the several Courts in Ontario, shall continue to be regulated by the rules of evidence established in England, as they existed on the day and year last aforesaid, except so far as the said laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament, still having the force of law in Ontario, or by any Act of the late Province

The law of England on 15th Oct., 1792, to be the rule of decision.

of Upper Canada, or of the Province of Canada, or of the Province of Ontario, still having the force of law in Ontario, or by these Revised Statutes.

English Statutes of Jeofails, etc. before 17th Jan., 1822, adopted.

2. The Statutes of Jeofails, of Limitations, and for the amendment of the law, excepting those of mere local expediency, which, previous to the 17th day of January, 1822, had been enacted respecting the law of England and then continued in force, shall be valid and effectual for the same purposes in Ontario, excepting so far as the same have, since the day last aforesaid, been repealed, altered, varied, modified or affected in the manner mentioned in section 1 of this Act.

REVISED STATUTE (1897), CAP. 146.

Promise by words only not sufficient to take the case out of the Statute of Limitations, 21 Jac. 1, c. 16.

1. No acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take out of the operation of the Act, passed in England in the twenty-first year of the reign of King James the First, any case falling within the provisions of the said Act respecting actions;

(*a*) Of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants;

(*b*) On simple contract or of debt grounded upon any lending or contract without specialty and

(*c*) Of debt for arrears of rent;

Case of two or more joint contractors or executors.

2. Where there are two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them, or by reason of any payment of any principal or interest made by any other or others of them.

3. In actions commenced against two or more such joint contractors, executors or administrators, if it appears at the trial or otherwise that the plaintiff, though barred by the said Act of King James the First or by this Act, as to one or more of such joint contractors, or executors or administrators, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, as aforesaid, judgment shall be given for the plaintiff as to the defendant or defendants against whom he recovers, and for the other defendant or defendants against the plaintiff.

Judgment where plaintiff is barred as to one or more defendants but not as to all.

4. No endorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom the payment has been made, shall be deemed sufficient proof of the payment so as to take the case out of the operation of the said Act of King James.

Endorsement, etc., made by the payee not to take a note, etc., out of the Statute.

5. The said Act of King James and this Act, shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of set-off on the part of any defendant.

Statute to apply to set-off.

NOVA SCOTIA.

REVISED STATUTE (1884), CHAPTER 112,

(SECS. 1 TO 5.)

Sec. **1.** No action of assumpsit trespass quare clausum fregit, detinue, trover, replevin, debt grounded upon any lending or contract without specialty, or for rent, account, or upon the case shall be brought but within six years after the cause of action.

Sec. **2.** Virtually corresponds with R.S.O. (1897), chapter 146, secs. 2 and 3.

. . . . . .

Secs. **4** and **5.** Correspond with R.S.O. (1897), chapter 146, secs. 4 and 5.

Certain other actions are specially provided for, and the usual provisions are made for disabilities, absence, etc., as in the Act of King James.

NEW BRUNSWICK.

Consolidated Statute (1877), Chapter 85, Secs. 1 to 4.

This statute prescribes a six year limitation for all actions except upon scire facias, judgment or specialty (twenty years), statutory money penalty (two years), and assault, battery, wounding, imprisonment or for words (two years).

The principle of Lord Tenterden's Act has also been adopted in New Brunswick, for which see R.S. O. (1897), chapter 146; ante p. 166.

. . . . . .

BRITISH COLUMBIA.

Revised Statute (1897), Chapter 123, Secs. 3, et seq.

The provisions of the Imperial Statute, 21 James 1, chapter 16, and of Lord Tenterden's Act (see R.S.O. (1897), chapter 146; ante p. 166), are in force in British Columbia.

MANITOBA.

Revised Statute (1891), Chapter 36.

Sec. **9.** "The Court may and shall decide and determine all matters of controversy relative to property and civil rights, both legal and equitable, according to the laws existing, or established and being in England, as such were, existed and stood of the 15th day of July in the year of one thousand eight hundred and seventy, so far as the same can be made applicable to matters relating to property and civil rights in this Province; and all matters relative

to testimony and legal proof in the investigations of fact and the forms thereof, and the practice and procedure in the Court may and shall be regulated and governed by the rules of evidence and the modes of practice and procedure as they were, existed and stood in England on the day and year aforesaid, except etc., as altered etc."

That the Statute of James is in force in Manitoba is assumed in many authorities (e.g., Ashdown v. Montgomery, 8 Man. Rep. 520). The foregoing Manitoba Statute must be taken to have introduced the Act of James, if not as affecting "property or civil rights," as matter of "legal proof," or of "practice and procedure." But compare with R.S.O. cap. 111, secs. 1 and 2, ante pp. 165, 166.

(*b*) LIMITATIONS—SPECIALTIES, ETC.

Ontario Revised Statute (1897), Chapter 72.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Limitation of time for commencing particular actions. 3-4 W. IV., c. 42, sec. 3 (Imp.)

1. (1) The actions hereinafter mentioned shall be commenced within and not after the times respectively hereinafter mentioned, that is to say:

(*a*) Actions for rent upon an indenture of demise,

(*b*) Actions upon a bond, or other specialty, except upon the covenants contained in any indenture of mortgage made on or after the 1st day of July, 1894.

(*c*) Actions upon a recognizance

within twenty years after the cause of such actions arose;

(*d*) Actions upon an award where the submission is not by specialty;

(*e*) Actions for an escape;

(*f*) Actions for money levied on execution, within six years after the cause of such actions arose;

(*g*) Actions for penalties, damages, or sums of money given to the party aggrieved, by any statute,

within two years after the cause of such actions arose;

(*h*) Actions upon any covenant contained in any indenture of mortgage, made on or after the 1st day of July, 1894, within ten years after the cause of such actions arose.

Where time specially limited.

(2) But nothing herein contained shall extend to any action given by any Statute, when the time for bringing the action is by the Statute specially limited.

R.S.B.C. (*1897*), *cap. 123, sec. 50.*
C.S.N.B. (*1877*), *cap. 85, secs. 1 and 2, ante p. 168.*
R.S.N.S. (*1884*), *cap. 112, sec. 24.*

Actions of account, etc., to be commenced within six years.

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of the action.

R.S.B.C. (*1897*), *cap. 123, sec. 4.*
R.S.N.S. (*1884*), *cap. 112, sec. 6.*

In case of disability of plaintiff.

3. In case a person entitled to such action, as aforesaid, is at the time of the cause of action accruing within the age of twenty-one years, or *non compos mentis*, then such person may bring the action, within such time after coming to or being of full age, or of sound memory, as other persons having no such impediment should, according to the provisions of this Act, have done.

R.S.B.C. (*1897*), *cap. 123, sec. 8.*
R.S.N.S. (*1884*), *cap. 112, sec. 25.*

Non-resident plaintiffs. 19-20 V., (Imp.) c. 97, sec. 10.

4. A plaintiff who is resident out of Ontario shall have no longer period of time to commence an action than if he were resident in Ontario when the cause of action or proceeding first accrued.

R.S.B.C. (*1897*), *cap. 123, sec. 51* (*to the contrary*).
R.S.N.S. (*1884*), *cap. 112, sec. 25* (*to the contrary*).

Non-resident defendants.

5. If a person against whom any such cause of action accrues is at such time out of Ontario, the person entitled to the cause of action may bring the action within such times as are before limited after the return of the absent person to Ontario.

R.S.B.C. (*1897*), *cap. 123, sec. 51.*
R.S.N.S. (*1884*), *cap. 112, sec. 25.*

As to cases where some joint debtors have been within and some without Ontario.

6. Where a cause of action, with respect to which the period of limitation is fixed by the Imperial Act of the 21st year of the reign of King James the First, cap. 16, sec. 3, or by any Act now in force in Ontario, lies against joint debtors, the person entitled to the same shall not be entitled to any time within which to commence such action against any one of the joint debtors who was within Ontario at the time the cause of action accrued, by reason only that some other of the joint debtors was at the time the cause of action accrued out of Ontario.

R.S.B.C. (*1897*), *cap. 123, sec. 55.*
R.S.N.S. (*1884*), *cap. 112, sec. 9.*

Recovery against one joint debtor no bar to action against another who is absent.

7. The person so entitled shall not be barred from commencing an action against the joint debtor who was out of Ontario at the time the cause of action accrued, after his return to Ontario, by reason only that judgment has been already recovered against the joint debtor who was within Ontario at the time aforesaid.

R.S.B.C. (*1897*), *cap. 123, sec. 55.*
R.S.N.S. (*1884*), *cap. 112, sec. 9.*

8. In case an acknowledgment in writing, signed by the principal party or his agent, is made by a

Effect of written acknowledgment or part payment. 3-4 W. IV., c. 42, sec. 5, (Imp.)

person liable upon an indenture, specialty or recognizance, or in case an acknowledgment is made by such person by part payment, or part satisfaction, on account of any principal or interest due on such indenture, specialty or recognizance, the person entitled may bring an action for the money remaining unpaid and so acknowledged to be due, within twenty years, or in the cases mentioned in clause (*h*) of sub-section 1 of section 1 within ten years, after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid; or in case the person entitled is at the time of the acknowledgment under disability, as aforesaid, or the party making the acknowledgment is, at the time of making the same, out of Ontario, then within twenty years, or in the cases aforesaid within ten years, after the disability has ceased, as aforesaid, or the party has returned, as the case may be.

R.S.B.C. (1897), cap. 123, sec. 52.
R.S.N.S. cap. 112, sec. 26.

An action to recover personal estate of an intestate or any part thereof, must be brought within twenty years. Imp. Act, 23-24 V., c. 38, sec. 13.

9. No action or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of a person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the estate or share, or some interest in respect thereof has been accounted for or paid, or some acknowledgment of the right thereto has been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no action shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given.

For corresponding statute law in New Brunswick and Manitoba, see C.S.N.B. (1877), cap. 85; R.S. Man. (1891), cap. 36, sec. 9.

(c) LIMITATIONS—REAL PROPERTY.

ONTARIO REVISED STATUTE (1897), CAP. 133.

1. This Act may be cited as "The Real Property Limitation Act." Short title.

. . . . . .

5. In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; When the right shall be deemed to have first accrued.

. . . . . .

(11) Where the estate or interest claimed is an estate or interest in reversion or remainder, or other future estate or interest, and no person has obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession. In case of future estates. Imp. Act 3-4 W. IV., c. 27, sec. 3.

(12) A right to make an entry or a distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion or remainder, or other future estate or interest, at the time at which the same became an estate or interest in possession, by the determination of any estate or estates in respect of which such land has been held or the profits thereof or such rent have been received, notwithstanding that the person claiming such land or rent, or some person through whom he claims, has, at any time previously to the creation of the estate or estates which have determined, been in the possession or receipt of the profits of such land, or in receipt of such rent. Further provision for case of future estates. Imp. Act, 3-4 W. IV., c. 27, sec. 5, 37-38 V., c. 57, sec. 2.

6. (1) If the person last entitled to any particular estate on which any future estate or interest was expectant has not been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry Time limited as to future estates when person entitled to particular estate out of

possession, etc. Imp. Act 37-38 V., c. 57, sec. 2.

or distress shall be made, and no such action shall be brought, by any person becoming entitled in possession to a future estate or interest, but within ten years next after the time when the right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the person whose interest has so determined, or within five years next after the time when the estate of the person becoming entitled in possession has become vested in possession, whichever of those two periods is the longer.

The case of bar of future estate and of a subsequent interest created after right of entry, etc., accrued to owner of particular estate. Imp. Act, 37-38 V., c. 57, s. 2.

(2) If the right of any such person to make such entry or distress, or to bring any such action, has been barred under this Act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will or settlement executed or taking effect after the time when a right to make an entry or distress, or to bring an action for the recovery of such land or rent, first accrued to the owner of the particular estate whose interest has so determined as aforesaid, shall make any such entry or distress, or bring any such action, to recover such land or rent.

When the right to an estate in possession is barred, the right of the same persons to future estates shall also be barred. Imp. Act. 3-4 W. IV., c. 27, s. 20.

(3) Where the right of any person to make an entry or distress, or to bring an action to recover any land or rent to which he has been entitled for an estate or interest in possession, has been barred by the determination of the period, hereinbefore limited, which is applicable in such case, and such person has, at any time during the said period, been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent has been recovered by some person entitled to an estate, interest or right which has been limited or taken

effect after or in defeasance of such estate or interest in possession.

. . . . . .

24. No action, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable, out of any land or rent, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising the same. Imp. Act 37-38 V., c. 57, sec. 10.

. . . . . .

Equitable Claims.

30. (1) Where any land or rent is vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him to bring an action against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent has been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

In case of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser. Imp. Act 3-4 W. IV., c. 27, sec. 25.

. . . . . .

31. In every case of a concealed fraud, the right of any person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud was or with reasonable diligence might have been first known or discovered.

In case of fraud no time shall run whilst the fraud remains concealed. Imp. Act 3-4 W. IV., c. 27, sec. 26.

Unless in the case of *bona fide* purchaser for value without notice. Imp. Act 3-4 W. IV., c. 27, sec. 26.

32. Nothing in the last preceding section contained shall enable any owner of lands or rents to bring an action for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know, and had no reason to believe that any such fraud had been committed.

Right to refuse relief on the ground of acquiescence or otherwise. Imp. Act 3-4 W. IV., c. 27, sec. 27.

33. Nothing in this Act contained shall be deemed to interfere with any rule of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

OTHER PROVINCES.

REAL PROPERTY LIMITATION ACTS.

BRITISH COLUMBIA—*See R.S.B.C.* (*1897*), *cap. 123, secs. 15 et seq.*

MANITOBA—*R.S. Man.* (*1891*), *cap. 89, and 57 Vict., cap. 16.*

NEW BRUNSWICK—*C.S.N.B.* (*1877*), *cap. 84.*

NOVA SCOTIA—*R.S.N.S.* (*1884*), *cap. 112, secs. 11 et seq., and 49 Vict., cap. 37.*

APPENDIX B.

THE ORDER MADE IN HOW V. EARL WINTERTON as found in the report of *In re Davies, Ellis* v. *Roberts*, (1898) 2 Chy. at p. 144, was in the following form:—"And the defendant by his counsel admitting that on the 9th August, 1889—six years before the issue of the writ—there were moneys in his hands liable to the trust for accumulation by the will of the testatrix directed. This Court doth order that the following account be taken, that is to say, 1. An account of the moneys in the hands of the defendant on the 9th August, 1889, liable to the trusts for accumulation under the will of the testatrix, Mary Rabett, and of the rents and profits of the testatrix's estate subsequently received by him in respect of the said term of fourteen years; but in ascertaining the actual amount of moneys in the hands of the defendant on the date aforesaid, any payments made before that date are to be allowed to the defendant." Further consideration adjourned. Costs reserved. Liberty to apply.

JUDGMENT IN WANT V. CAMPAIN (SETON ON DECREES 5 ED. P. 2127.)

Declare that the investment of the sum of £400 upon land at P., as in the pleadings mentioned, was, as against the plaintiffs other than the plaintiff W. (the tenant for life), improper. And the defendants C. and S. by their defence admitting assets of J. G. C., in the pleadings mentioned, for the purposes of this action, it is ordered that the defendants C. and S. do, within ten days after service of this order, pay into Court as directed by the schedule hereto the sum of £400. Declare that the plaintiff W. is debarred by the Trustee Act, 1888, from maintaining any action or other proceeding in respect of any impro-

priety in such investment, and accordingly from deriving any benefit from the relief hereinbefore granted. Declare that the defendants C. and S. are entitled to the income arising from the said sum of £400 during the residue of the life of the plaintiff W., as part of their testator's estate, and that after her decease the said sum shall be held upon the trusts subsequent to the life interest of the plaintiff W., declared by the settlement dated the 28th November, 1872, in the pleadings mentioned, of and concerning the moneys thereby settled. And let the said sum of £400, when paid into Court, be dealt with as in the said schedule hereto directed. Declare that the defendants C. and S., upon making such payment into Court as hereinbefore directed, will, after the death of the plaintiff W., and in the meantime subject to her life interest therein, be entitled to the said mortgage debt as part of the testator's estate. Defendants C. and S. to pay to plaintiffs their costs of action up to and including this judgment, except so far as same increased by reason of W. being a party plaintiff thereto. Liberty to persons interested to apply after the death of the plaintiff W. for payment out of Court of the £400, or any investment representing the same, as they may be advised. Add lodgment and payment schedule directing payment of £400 and investment in consols and payment of interest accruing during life of plaintiff W. to defendants C. and S. *Want* v. *Campain*, Wright, J., 6 February, 1893, B. 806; S. C., 9 Times L.R. 254.

JUDGMENT IN RE SOMERSET, SOMERSET V. EARL POULETT (SETON ON DECREES, 5 ED., P. 2128.

This action, &c.—Declare that the investment of the sum of £34,612 in the pleadings mentioned by the defendants and G. S., deceased, on the security of the estates, &c., comprised in the indentures, &c., in the pleadings mentioned, was, so far as regards the plaintiffs B., &c. (infants), a breach of trust on the

part of the defendants and the said G. S. Declare that so far as regards the plaintiffs B., &c. (infants), the said estates comprised in the said indentures would at the time of the investment of the said sum of £34,612 upon the security thereof have been a proper investment in all respects for the sum of £26,000, and no more, and ought to be deemed to have been an authorized investment for such sum of £26,000. Declare that so far as regards the plaintiffs B., &c. (infants), the defendants are jointly and severally liable to make good to the trust estate the difference between the aggregate amount of the proceeds of sale of such portion of the said estates as has been already sold, and the proceeds of sale of the remainder of such estates hereinafter directed to be sold, when sold, or the said sum of £26,000 (whichever shall be the larger sum) on the one hand, and the said sum of £34,612 on the other hand, and that until such difference shall have been made good the said plaintiffs are entitled to a lien for the amount of such difference upon the proceeds of sale of such portion of the said estates as has already been sold, and upon the portion of the said estates remaining unsold, and upon the proceeds thereof when sold; let the defendants proceed with the sale of such portion of the said estates as remains unsold. Declare that so far as regards the plaintiff A. (tenant for life), his right to sue in respect of the matters complained of by him in this action is barred by sec. 8 of the Trustee Act, 1888. Declare that the defendants are entitled to have the life interest of the said plaintiff A. in the whole of the trust estate under the said indenture of settlement of, &c., impounded by way of indemnity to the defendants in respect of their joint and several liability hereinbefore declared. And let the following inquiry be made: (1) An inquiry what is the amount of the difference for which the defendants are jointly and severally liable pursuant to the declaration in that behalf hereinbefore contained; And the defendants

by their counsel desiring to retire from the trust of the said indenture of settlement, Let the plaintiff A. be at liberty to exercise the power of appointment contained in the said indenture of settlement by appointing two or more proper persons trustees of the same indenture in the place of the defendants and G. S., deceased (usual consequential directions); Let the income arising from the whole of the said trust estate during the life of the plaintiff A., including any arrears of such income now outstanding, be from time to time applied as follows, that is to say:—In the first place, in paying to the defendants interest at the rate of 4 p.c. p.a. on the amount which may be paid by them under the declaration and inquiry hereinbefore contained, or on so much thereof as shall not have been recouped to them as hereinafter mentioned (such interest to be treated as commencing on the date of the said payment by the defendants), and in the second place in recouping to the defendants the amount to be so paid by them as aforesaid.—Tax costs of the infant plaintiffs, and also costs of the defendants, so far as increased by the plaintiff A., being joined as a plaintiff in his personal character.—Defendants to pay costs of infant plaintiffs when taxed, and plaintiff A. to pay defendants amount of their said costs when taxed.—Adjourn further consideration.—Liberty to apply.—*Re Somerset, S.* v. *E. Poulett*, Kekewich, J., 12th April, 1893, B. 488.

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