1. "Where a trustee...bought...property"—(Continued).

(b) "The rule is, not that a trustee cannot buy from his cestui que trust, but that he shall not buy from himself. If a trustee will so deal with his cestui que trust that the amount of the transaction shakes of the obligation that attaches upon him as trustee, then he may buy." Ez parte Lacey, 6 Ves. 625.

(c) The rule is this:—"A trustee, who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude him from bargaining that he will no longer act as a trustee. The cestuis que trust may by a new contract dismiss him from that character, but even then, the transaction by which they dismiss him might be watched with infinite and the most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge that a trustee may acquire, which may be very useful to him, but the communication of which the Court can never be sure he has made, when entering into the new contract by which he is discharged." (Ibid)

(d) "It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser." Williams v. Scott, (1900) A.C, p. 503.

(2) Business—Property wrongfully purchased by trustee—Terms upon which sale will be set aside.

Where the subject-matter of purchase by trustee is a business, as a going concern, and where the trustee, subsequent to his purchase, carries it on under his own personal direction, on the sale being set aside, the trustee would be entitled to all outgoing for wages of assistants, expenditure of stock, etc., but no salary for his own management will be given. Re Norrington, 13 Ch. D. (C.A.) 654.

(3) Retirement of trustee—How it affects his right to buy.

On the retirement of the trustee from the office, the trustee is not prevented from buying the trust-estate. Re Boles and British Land Co., (1902) 1 Ch. 244.

(4) Advantage to trustee, not necessary.

In cases of wrongful purchase by a trustee, it is not necessary that he must be shown to have gained some advantage by the transaction, as by a subsequent sale at a profit, or that he himself purchased the property at an undervalue. Whitchcote v. Lawrence, 3 Ves., p. 750.

(5) Wrongful purchase through others—if valid.

(a) Through agents.

Where the trustee purchases the trust-estate, not in his name, but in the name or through the agency of another person, the purchase is invalid. Campbell v. Walker, 5 Ves. 678.

(b) Through co-trustee.

A similar purchase by a trustee through his co-trustee is invalid. Hall v. Noyes, 3 Ves. 743.

(c) Purchase through children or relations.

(i) Nor is the trustee allowed to enter into a like transaction, in the name of his children. Gregory v. Gregory, G. Coop. 201; Jac. 681.

(ii) But the mere fact that the actual purchaser is related to the trustee is not, of itself, any ground for impugning the sale. Coles v. Trecottick, 9 Ves. 284.
1. "Where a trustee....bought....property"—(Continued).

(6) Purchases at public auction by trustees.

—are impeachable similarly for, if bidders see the seller himself bidding against them, it is a discouragement for the bidders to bid. Ingle v. Richards, 28 Beav. 361.

(7) Auction sales—When trustees allowed to bid.

(a) Non-interference by trustee—cestui que trust—sui juris.

Where the trustee keeps himself aloof from the auction sale, leaving the matter to be done by the cestuis que trust alone, all of whom are sui juris, he may become the vendor. Coles v. Trecollack, 9 Ves. 234.

(b) Infants—Court's leave.

If the persons interested in the estate be infants, the trustee can bid only with the previous leave of the Court. Farmer v. Dean, 32 Beav. 327.

(c) Circumstances under which Court's leave would be given.

Only where all parties give their consent, and all other chances of procuring a sale have been exhausted, liberty to bid will be given for the trustee. Tennant v. Trenchard, 4 Ch. 547.

(8) Severance of relationship of trustee and cestui que trust—Right to purchase.

(a) The trustee must have shaken off his disability by the consent of the cestui que trust, freely given after full information, and must have bargained for the right to purchase. Chalmers v. Bradley, 1 J. and W. 51.

(b) The trustee must have communicated all his knowledge, gained in his position as trustee, to the beneficiary, in addition to giving a fair price. (Ibid.)

(9) Trustees de son tort—Purchase.

Where the trustees are erroneously treated as being such by all parties, and where they buy a share from a beneficiary in distress, or at an inadequate consideration, the purchase will not be upheld. Plowright v. Lambert, 52 L. T. 646.

(10) Trustee to preserve contingent remainders.

No disability to purchase attaches to a—Parkes v. White, 11 Ves. 209 (226).

(11) Trustee for "separate use."

Nor is a trustee for the separate use of a married woman prevented from purchasing. Parkes v. White, 11 Ves. 209.

(12) Trustee to bar dower.

A trustee to bar dower could purchase the trust property. Naylor v. Winch, 1 S. and S. 567.

(13) "Bare trustee"—Right of purchase.

A "bare trustee," whose only duty is to convey to his beneficiary, is not disabled from purchasing the trust estate. Pooley v. Ruetter, 4 Drew. 189.
1.—“Where a trustee....bought....property”—(Concluded).

(14) Purchase by executors and administrators.

Where an executor buys the assets of his testator with the assent of all parties' interested, his purchase will not be disturbed. *Watson v. Toone*, 6 Madd. 153.

(15) How such purchase must be made.

(a) They must act openly, and without any concealment, or it would be set aside, even after a long lapse of time. *Benningsfield v. Barter*, 12 A.C. 167.

(b) They must show that they have paid the highest price obtainable. *Champon v. Rigby*, 1 R. and M. 539; *Baker v. Read*, 18 Bea. 398.

(c) They must also show that persons interested in the estate knew every matter in respect of the value of the property. *Smedley v. Varley*, 23 Bea. 388.

(16) Co-owners and tenants in common.


(17) Tenants for life, Mortgagees, Agents, Counsels, Partners, Solicitors, Guardians, etc.

Principles, similar to those which apply to purchase by trustees, are applicable to purchases by—, see Godefroi, pp. 399 to 412.

2.—"The beneficiary....hands unsold."

(1) Suit to set aside purchase by trustee—Costs.

Where the trustee has wrongfully bought the trust property, and the *cestus que trust* subsequently institutes a suit for setting aside the purchase, the trustee, as a general rule, will have to bear the costs. *Sanderson v. Walker*, 13 Ves. 601; *Hall v. Hallett*, 1 Cox 141; *Cromie v. Ballard*, 2 Cox 253.

(2) Delay in bringing suit for recovery of trust property—Costs.

(a) Where there has been great delay on the part of the beneficiary in resorting to his remedy as against the trustee, who has wrongfully bought the trust estate, the Courts would not grant to the estuique trust the costs of suit, although he succeeds therein. *Attorney-General v. Lord Dudley*, G. Coop. 146.

(b) In cases where, on account of the delay in instituting the suit, the Court dismisses the suit of the beneficiary, the trustee will not be entitled to recover his costs from the plaintiff. *Gregory v. Gregory*, G. Coop. 201.

(3) Setting aside sale—Right of beneficiary to recover specific estate.

The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee. *Ex parte James*, Ves. 387 at 391; *Aberdeen v. Aberdeen*, 2 App. Cas. 544; *Ex parte Barret*, 10 Ves. 400.
2. — "The beneficiary... hands unsold" — (Continued).

(4) Discharge of trustee from sale.

The purchase by the trustee being wrongful, he is to be discharged from the sale at once, and the Court will make an order immediately, in respect of the re-conveyance of the property to the beneficiary, upon immediate repayment of the money to the trustee. Ex parte Bennett, 10 Ves., 400, 401.

(5) Purchase in one lot by trustee—Like remedy to cestui que trust in re-sale.

(a) Where the trustee has bought in one lot, the beneficiary, at time of re-sale, cannot insist on a re-sale of the property in different lots. Ex parte James, 8 Ves., 351, 352.

(b) If the beneficiary be very particular about the re-sale of the property in different lots, he must pay the trustee his principal and interest, and then, as absolute owner of the property, he may sell according to his pleasure. (Ibid.)

(6) When cestui que trust loses his right to recover.

Where part of the consideration paid by trustee for the purchase is not money, and the beneficiary has, by his subsequent dealings, put it out of his power to restore to the trustee the benefits derived from him, the beneficiary cannot set aside the transaction. Re Worsaan, 51 L.J. Ch. 669; Dunsdale v. Dunsdale, 3 Dr., 556, 577.

(7) Cestui que trust, when could ask for re-sale.

Where the assignee in bankruptcy has become the purchaser, the beneficiary may claim, not a re-conveyance of the specific estate, but a re-sale of the property, and the Court would grant an order therefor, under its directions. Lewin, p. 571.

(8) Terms of such re-sale.

The bidding must begin at the price at which the trustee purchased, and if there is an higher bid, the sale should be knocked down, and if there are no bidders, the trustee should be held to his bargain. Lester v. Lester, 6 Ves., 633, Ex parte James, 8 Ves., 351.

(9) Setting aside of sale—Time thereof.

Where the beneficiary elects to set aside the transaction, he must institute legal proceedings therefor within a reasonable time. Baker v. Read, 18 Beav., 398.

(10) Acquiescence of cestui que trust—Effect of.

Where the cestui que trust acquiesces in the wrongful purchase by the trustee for a long time, such acquiescence raises a reasonable presumption that the purchase was, in all respects, a fair one, and that the relation between the trustee and the cestui que trust had been previously abandoned. Pake v. White, 11 Ves., 226, See Morse v. Royal, 12 Ves., 374.

(11) Setting aside sale within reasonable time—Reasonable time, what.

(a) In one case, 7 years was held to be a reasonable time within which the sale must be set aside. Baker v. Read, 18 Beav., 398.
2.—"The beneficiary...hands unsold" (Continued).

(b) In another case, a suit to set aside a sale after the expiry of 20 years was dismissed. Price v. Byrn, 5 Ves. 681; Barwell v. Barwell, 34 Beav. 371. C

c) Relief has been refused after an acquiescence of 18 years and 17 years. Gregory v. Gregory, G. Coop. 201; Baker v. Read, 18 Beav. 898. D

d) Even after the expiry of more than 10 years, sale has been ordered to be re-opened, where the executor had purchased in the name of trustees for himself, and the transaction was vitiated by disguise and concealment. Watson v. Toome, 6 Madd. 453. E

(12) Equitable relief to the beneficiary—Effect of laches.

Where there had been laches on the part of the beneficiary in resorting to his remedies, and he could not offer any justifiable excuse therefor, such laches would be a bar to his remedies. Oliver v. Court, 8 Price, 167, 168. F

(13) Time allowed to a class of persons.

(a) A class of persons—such as creditors—must, generally, have a longer time allowed them for setting aside the sale. Wiscocote v. Lawrence, 3 Ves. 740; Boswell v. Coaks, 27 Ch.D. (C.A.) 424. G

(b) A class of persons cannot be expected, in the prosecution of their common interest, to exert the same vigour and activity as individuals would do in the pursuit of their exclusive rights. Hall v. Noye, 3 Ves. 748. H

(14) Laches, when bar to equitable relief.

(a) Laches, on the part of beneficiary, would operate as a bar to his remedy, only when it is shown that he knew that the trustee was the purchaser. Randall v. Errington, 10 Ves. 423. I

(b) Because, when the cestui que trust continues ignorant of the real state of the facts, he cannot be found fault with for not having "quarrelled with the sale." (Ibid), Chadney v. Bradley, 1 J and W. 61. J

(15) Suits to set aside wrongful purchases by trustee—Onus of proof.

(a) In such suits, the burden of proving the strict fairness of the transaction, and the disclosure of all information which they have acquired in their character of trustees, shall be on them. Gray v. Warner, 16 Eq. 577. K

(b) Where the trustee had been unwilling to enter into the transaction, and the beneficiary being sui juri had suggested the transaction, and threatened to enforce it, the burden is shifted from the trustee to the beneficiary. Luff v. Lord, 34 Beav. 220. L

(16) Reasonable time for setting aside sale—Circumstances to be considered.

In considering what may be regarded as a reasonable time, the Court must take into consideration the disadvantage to which the purchaser may be subjected by reason of the deaths of witnesses, and also the circumstances of each particular case. Barwell v. Barwell, 34 Beav. 371. M

(17) Delay as bar to relief—Considerations by Court.

Where delay is brought in as a bar to relief, the length of the delay, the nature of the acts done in the interval, the degree of diligence which might reasonably be required, and all the circumstances of the case must be duly considered by the Court. Re 'Ross, 20 C.D. 109. N
2.—"The beneficiary...hands unsold"—(Concluded).

(18) Express trust—Delay—Effect of.

In the case of an express trust, mere delay may be a good defence, irrespective of the statute of Limitation. *Ex parte Gault* (1897) 2 Q.B. p. 15.

(19) Delay by beneficiary—Poverty, how it affects.

Poverty of the beneficiary is a thing to be taken into consideration by the Court, but cannot be considered to be necessarily an excuse for delay in impugning a purchase by a trustee. *Roberts v. Tunstall*, 4 Hn. 257; *Oliver v. Court*, 8 Pr. 167.

(20) Successful impeachment of sale.

For successfully impeaching a purchase by the trustee, the beneficiary must proceed without delay, as laches will bar his title to such relief. *Hercy v. Dunwoody*, 2 Ves. 87.

3.—"If it has been...trust, by such person."

(1) Sale by trustee to one with notice—Right of beneficiary.

Where the trustee has sold the property, which he himself has wrongfully purchased, to another with notice of the trust, as against the latter also, the *cestui que trust* has a right to recover the specific estate. *Dunbar v. Tredenwack*, 2 B & B 304.

(2) Purchase from trustee with notice.

A purchaser from the trustee cannot maintain his bargain, if he had notice of the disability of the person from whom he derives his title. *Cookson v. Lee*, 23 L.J. Ch. 473.

(3) Sale by trustee to another without notice—Beneficiary's remedy.

(a) If, before the commencement of the legal proceedings by the beneficiary to recover the estate from the trustee, the latter has sold the estate to one, who took it without notice of the trust, the beneficiary's remedy will only be to compel the trustee to account for the difference of price. *Fox v. Mackreath*, 2 B.C.C. 400; *Randall v. Errington*, 10 Ves. 423. See also *Lord Hardwicke v. Vernon*, 4 Ves. 411.

(b) The trustee would be liable to so account to the beneficiary with interest at 4 per cent. *Hall v. Hallett*, 1 Cox. 134.

(4) Purchase of shares by trustee—Subsequent sale by him to another—Beneficiary's remedy.

(a) Where a trustee had purchased some shares (subject to trust) and subsequently conveyed them to X at a considerable advance of price, *held* that the trustee must account for every advantage he had made by the transaction, and is not liable to replace the specific shares. *Hall v. Hallett*, 1 Cox. 134.

(b) The *cestui que trust* has no such election of choosing between the specific thing and the advantage made of it. (*Ibid.*)

4.—"But in...trustee, with interest."

(1) Payment of purchase-money by trustee into Court—Setting aside sale—Equity.

(a) Where a trustee had paid in a portion of the same amount into Court, which had been invested in the funds, and he claimed the benefit of the rise of stock when the sale was set aside, *held* that he could receive his purchase-money only with interest. *Ex parte James*, 8 Ves. 337.
4.—"But in... trustee, with interest."—(Concluded).

(b) In a like case, if there had been a fall of the stock, he cannot be compelled to bear the loss. (Ibid.).

Y

(2) Setting aside sale—Liability of beneficiary to repay purchase-money.
Where the sale is set aside at the instance of the beneficiary, the latter is liable to repay the price at which the trustee bought, with interest at 4 per cent. Watson v. Toone, 6 Madd. 153, Ex parte James, 8 Ves. 337 (351).

Z

(3) General rule in respect of rate of interest.

(a) The general rule was that an executor or trustee was charged 4 per cent. at simple interest on monies which he retained—except in cases of active breach of trust or misconduct—as distinguished from mere negligence—where the higher mercantile rate of 5 per cent. was charged. Re Lambert, 1897, 2 Ch., p. 180.

A

(b) But in recent years, in England, the Court has reduced the rate of interest from 4 per cent. to 3 per cent. in ordinary cases. Barclay v. Andrew, 1899, 1 Ch., p. 686.

B

(4) Extenuating circumstances—How affect the rate of interest.

The Court will deal leniently in charging interest, with parties who can put forward extenuating circumstances, such as mere want of judgment, absence of improper motive or personal advantage, the onerous character of the trusts, or the like. Tebb v. Carpenter, 1 Madd. 290.

C

5.—"Expenses... incurred... preservation..."

(1) Costs of repairs.
Where, subsequent to his wrongful purchase, the trustee has effected improvements and repairs on the trust-property which prove substantial and lasting, or which have a tendency to bring the property to a better sale, he will be allowed the expenses which he has incurred in respect of such repairs and improvements. Ex parte Hughes, 6 Ves. 694, Ex parte Bennet, 10 Ves. 400, Yorke Building Co. v. Mackenzie, 8 B.P.C. 42.

D

(3) Repairs and improvements—Equities on setting aside sale—How affected by fraud.

(a) Repairs—Costs of, allowed.
Where transactions between the parties have been vitiated by fraud, on the setting aside of sale, allowances will be made to the trustee in respect of necessary repairs. Bagby v. Price, 1 G. Wils. 390.

E

(b) Improvements—Costs of, allowed.
In one case of improvements having been effected by trustee, where fraud was present, the Court even allowed the expenses of the improvements. Oliver v. Court, 8 Price 172.

F

(c) Improvements, costs of, not allowed.

(i) In another case of a like nature, where there was actual fraud, no allowance for improvements was made. Kenney v. Browne, 3 Ridg. 518.

G

(ii) "If a man has acquired an estate by rank and abominable fraud, and shall afterwards expend the money in improving the estate, is he, therefore, to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition that the common equity of the country was "to improve the right owner out of the possession of his estate." (Ibid.) See Stratton v. Murphy, 1 Ir. Rep. Eq. 361.

H
5.—Expenses . . . incurred . . . preservation . . .”—(Concluded).

(3) Trustee incurring expenses—Proper expenses what are.

See notes on S. 86, supra.

(4) Foundation of trustee's right to expenses.

(a) The right of the trustees to all costs and expenses properly incident to the execution of the trust is founded upon the contract between the author of the trust and his trustees, and is similar to that given to a mortgagee by virtue of his contract of mortgage. Cotterell v. Straton, 8 Ch., p. 302.

(b) In modern times, the Court will not discourage persons from becoming trustees, by inflicting costs, etc., upon them, if they have done their duty, or even if they have committed an innocent breach of trust. Turner v. Hancock, 20 C.D. 303.

(5) Misconduct of trustees—How it affects his right to costs.

Where there is proof of misconduct, the costs, expenses, etc., are in the discretion of the Judge, who may, or may not, allow them, according to the circumstances. Charles v. Jones, 38 C. D. 80.

6.—“And the trustee or purchaser . . . property.”

(1) Setting aside sale—Liability of trustee.

(a) Where a wrongful purchase of the trust-property by trustee is set aside, the trustee should account to the beneficiary for the profits of the estate, during the time when the property was in his possession. Ex parte James, 8 Ves. 351; Ex parte Lacey, 6 Ves. 690.

(b) Similar liability attaches to a vendee from the trustee in such cases. (Ibid.)

(2) Liability of trustee or purchaser to account for profits, but not with interest.

But either of them need not pay interest on the profits. Saskatchewan and Haugh Moore Coal Co. v. Edey (1900), 1 Ch. 167.

7.—“Be charged . . . occupation rent . . . property.”

Liability to pay occupation rent.

Where the trustee or purchaser from him has been in actual possession of the trust-property (after the wrongful purchase), either of them is liable to be charged with an occupation rent, for the period during which such wrongful occupation continued. Ex parte James, 8 Ves. 351.

8.—“Allow the . . . of trustee or purchaser.”

Deterioration of property wrongfully purchased—Liability of trustee, etc.

If, by acts of the trustee, the property should have deteriorated in value, when the purchase-money is repaid to the trustee on the setting aside of the sale, the latter must be content to receive his purchase-money with a proportionate reduction. Ex parte Bennet, 10 Ves. 401; Baugh v. Price, 1 Wils. 920.

9.—“Clause (a).”

Rights of lessees and bona fide transactions protected.

Where the estate is re-conveyed to the beneficiary, the re-conveyance cannot prejudice the titles and interests of lessees and others, who have entered into transactions with the trustee bona fide before the institution of the suit. York Buildings Company v. Mackenzie, 8 B.P.C. 42.

10.—"Clause (b)."

(1) Confirmation of sale by cestui que trust.

It is open to the beneficiary to ratify the sale to the trustee by an express and actual confirmation. *Morse v. Royal*, 12 Ves. 355.

(2) Confirmation by beneficiary—Subsequent annulment, if allowed

(a) Where the beneficiary elects to confirm the sale, he is estopped from annul-ling his own act, on the ground of no adequate consideration. *Roche v. O'Brien*, 1 B. and B. 353.

(b) After having once chosen to ratify the sale to the trustee, by express con-firmation of it, the beneficiary cannot question the same again. *Morse v. Royal*, 12 Ves. 355.

(3) Confirmation—Requisites of.

(a) Party to be "sui juris."

The confirming party must be *sui juris*, not labouring under any disability, as infancy or coverture. *Campbell v. Walker*, 5 Ves. 678.

(b) Act of confirmation—to be a deliberate one.

(i) The confirmation must be a solemn and deliberate act. *Morse v. Royal*, 12 Ves. 355; *Wood v. Downes*, 18 Ves. 120.

(ii) So, where fraud has vitiated the original transaction, the confirmation thereof is watched by the Court with the utmost strictness, and will not be allowed by the Court except on clear proof. *Morse v. Royal*, 12 Ves. 473.

(c) No "supressus viri" or "suggestio falsi."

There must be complete absence of *supressus viri* or *suggestio falsi*, and the beneficiary should be made acquainted with all the material circumstances of the case. *Murray v. Palmer*, 2 Sch. and Lef. 486.

(d) Full knowledge of legal effects of confirmation.


(e) Confirmation to be distinct and independent.

The confirmation should be wholly distinct from, and independent of, the original contract. *Wood v. Downes*, 18 Ves. 128.

(f) No coercion or undue influence.


(g) Confirmation—to be joint act of whole body.

If the cestuis que trust be a class of persons, the confirmation must be the joint act of the whole body. *Sir G. Colebrook's case*, 5 Ves. 622: *Ex parte Lacey*, Id. 628.

(4) Concurrence in breach of trust by cestui que trust.

(a) Active concurrence by a *cestui qui trust* in a breach of trust is a bar to his claim to sue in respect of it. *Walker v. Symonds*, 3 Sw. 164; *Brice v. Stokes*, 11 Ves. 319.
Act II of 1882 (Indian Trusts Act).

[10.—“Clause (b)—(Concluded).]

(b) Concurrence would be a bar, if the _cestui que trust_ was aware of every fact which would show that the act in question was a breach of trust. _Buckoridge v. Glasse_, Cr. and Ph. 185.

E

(5) **Condoning—Estops beneficiary.**

Where a beneficiary condones the trustee committing a breach, the former is estopped from suing in respect of the breach. _Evans v. Benyon_, 37 C.D. 399.

F

63. Where trust-property comes into the hands of a third person inconsistently with the trust 1, the beneficiary may require him to admit formally, or may institute a suit for a declaration that the property is comprised in the trust. 2

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands 3 or the hands of his legal representative or legatee 4, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations,

(a) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(b) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

(Notes).

1.—“Where trust—third person—trust.”

(1) **Volunteer—Following the estate into the hands of.**

(a) Where the alienee of the trust estate is a volunteer, the estate may be followed into his hands, irrespective of his having had notice of the trust or otherwise. _Manswell v. Manswell_, 2 P.W. 678.

G

(b) The fact that he paid no consideration for the conveyance induces the Court to introduce a fiction (viz.) that he had notice of the trust, while as a matter of fact he had none. _Lewin_, p. 1075.

H

(2) **Purchase of the estate with notice—Liability of purchaser.**

(a) Where the property is conveyed to one for full consideration, and the vendee entered into the transaction with notice of the trust—whether the notice be actual or constructive, the vendee cannot have a better title than the person of whom he took the conveyance. _Boursot v. Savage_, 2 L.R. Eq. 134; _Durbar v. Tredennick_, 2 B. and B. 319; _Damey v. Davidson_, 16 Ves. 249.

I

(b) His purchase will not be of any validity whatever, for the reason that he throws away his money voluntarily, and of his own free will, knowing full well of the right of some other person to the property. _Mead v. Lord Orrey_, 3 Atk. 238.
I.—"Where trust . . . third person . . . trust"—(Concluded).

(c) A person, purchasing property with the knowledge of the existence of the trust relating to it, is in the position of the original trustee so far as regards limitation, and cannot therefore claim the benefit of that law. *Luttsun v. Begogon, 5 W.R. 120.*

(3) Purchase of the estate without notice—if valid.

Where a *bona fide* purchaser has no notice, either expressly or constructively, then he takes a good title, which cannot be impugned. *Burgess v. Wheate, 1 Eden 195.*

(4) Payment of trust money into bank—Bank’s liability—Beneficiary’s right to follow.

(a) Bank must have notice.

If the Bank has notice (either direct, or by reasonable inference from facts) that the property or money is being wrongfully used, the bank is liable. *Thomson v. Clydesdale Bank (1893) A.C. 282.*

(b) Negotiable instruments.

Where a banker takes a negotiable instrument in good faith for value, he obtains a title against all the world. *Earl Sheffield v. London and Joint Stock Bank, 13 A.C. 393.*

(c) Knowledge as trust money.

In order to make the bankers liable, it must be shown that they received the money, knowing the same to be trust money. *Union Bank of Australia v. Murray Ayresley, (1898) A.C. 693.*

(5) Stolen property—Right to follow.

Stolen property, or property purchased with the proceeds thereof, may be followed into the hands of the trustee in bankruptcy of the thief. *Ex parte Manchester and County Bank, 39 W.R. 303 (Eng).*

(6) Trustees to preserve contingent remainders—Purchase from—Liability of purchaser.

A purchaser, whether voluntary or for value, from trustees to support contingent remainders, having notice of the trust, is liable to restore the land, since the conveyance is a clear breach of trust. *Gorges v. Pye, 7 B.P.C. 221.*

(7) Trustee—Alienations by—Limitation—Title of purchasers.

Where a suit brought by the beneficiary to set aside, as fraudulent, certain alienations made by the trustee, was dismissed by the lower Appellate Court, as barred by limitation, on the ground that more than 12 years had elapsed since the execution of such deeds of alienations, held:—

(1) that this was not sufficient, and that the Court should have tried whether the purchasers were cognizant, at the time of their purchase, of a subsisting trust affecting the property; for, if so, they would have taken it subject to the trust, and would stand in the shoes of the original trustee, and would not be *bona fide* purchasers from trustees, entitled to the benefit of the Law of Limitation; and

(2) that, if the trustee had power to make valid grants, the grantees would have a perfectly good title, if they took for valuable consideration without notice of the trust. *5 W.R. 120.*
2.—"The beneficiary....In the trust."

(1) **Right to follow trust property—General rule.**

In every case in which the trustee has converted any part of the trust estate, as between the *cestui que trust* and the trustee, and all parties claiming under the trustee, all property, however it may be changed or altered in its nature or character, and all the fruit or profit accruing from it, continue subject to the trust, subject only to the requirement that the property so claimed to be trust property is capable of being identified as in fact acquired with, or shown to represent, the original trust estate. *Perrin v. Defell*, 4 D.M. and G. 372; *Re Oatway* (1908) 2 Ch. 356 (360); *Harris v. Truman*, 9 Q.B.D. 264.

(2) **Right to follow trust property—Ground of rule.**

The principle upon which this rule is based is that the trustee cannot assert any title of his own as against that of the *cestui que trust*, and that, unless he has dissipated the whole trust fund, in which event nothing remains subject to the trust, any property which can be traced into other property into which it has been converted remains subject to the trust, and the whole of the property, in case any part of it represents property of the trustee himself, is treated as belonging to the trust, except so far as he may be able to distinguish what is his own. *Taylor v. Plumer*, 3 M. and S. 562; *Lupton v. White*, 15 Ves. 431; *Cook v. Addision*, 7 Eq. 406; *Ex p. to Barber*, 25 W.R. 522.

(3) **Right to follow trust property—Trustee in bankruptcy.**

The rule of following trust property applies against the trustee in bankruptcy, as fully as against the trustee himself, even when the bankruptcy is about to abate with the property together with other money of his own. *Firth v. Castland*, 2 H. and M. 417.

(4) **Limitation—Whether a bar to equitable relief—Direct trust.**

(a) As between *cestus que trust* and the trustee in direct trusts, no length of time is a bar to equitable relief. *Bennett v. Colley*, 2 M. and K. 295 (292)

(b) For, by reason of the privity existing between them, the possession of the one is considered to be the possession of the other also, there being no adverse title. *Wedderburn v. Wedderburn*, 22 Beav. 84.

(5) **Debt—Subject matter of trust—Limitation.**

(a) *Debt under contract or covenant.***

Where the subject matter of the trust is a debt under a contract or a covenant, it is always the case that, when the trustee is barred, the *cestus que trust* is barred also. *Stone v. Stone*, L.R. 5 Ch. App. 74; *Coleman v. Bucks and Oxon Union Bank* (1897) 2 Ch. 243.

(b) *Notice of trust by debtor.*

But where the debtor borrowed the money as trust money, or knowing it to be such, he cannot set up the statute *Soar v. Ashwell* (1893) 2 Q.B. 390 (397).

(6) **Fraud—Limitation—Equitable relief.**

(a) Any amount of time will not cover a fraud as long as it remains concealed. For, until the fraud is discovered, or until the fraud might with reasonable diligence have been discovered, the title to avoid the transaction cannot properly arise. *Blair v. Bromley*, 2 Ph. 354.
2. "The beneficiary...in the trust"—(continued).

(b) After discovery of the fraud, the trustee (as defendant) may take shelter under the statute. Then he may say (as a rejoinder to plaintiff) "You shall not bring the matter under discussion at this distance of time. It is entirely your own neglect that you did not do so within the period limited by statute." 

Hovenden v. Lord Annesley, 28 Ch. and Lef., 634.

(7) Nature of such fraud.

The fraud must be that of the person who set up the statute, or of some one for whose fraud he is in law responsible, and not that of a stranger.

Wells v. Earl House, (1893) 2 Ch. (C.A.) 545.

(8) Fraud, not to be subsequent to the accrual of cause of action.

The fraud relied upon by the defendant should not be one committed subsequently to the time when the right of action first accrued. Thorne v. Heard, (1894) 1 Ch. 599 (605).

(9) Equitable relief—Bar from presumption.

The Court, after a great length of time, will presume some act to have been done, which, if done, is a bar to the demand of equitable relief.


(10) Time within which the presumption is raised.

(a) The period within which the Court raises the presumption depends upon the circumstances of each particular case. Eldridge v. Knott, Cwmp. 214.

(b) As a general rule, twenty years is the period within which the Court raises the presumption. (Ibid.)

(c) But where there is a statute fixing a specified period in respect of this presumption, the Court will not entertain a presumption within a less time than that fixed by the statute. (Ibid.)

(11) Ground of such presumption—Quieting possession.

(a) Generally such presumptions are made by Courts, not necessarily because they really believe what they presume, but for the purpose of quieting the possession. Eldridge v. Knott, Cwmp. 215.

(b) "It is said you cannot presume unless you believe. It is because there are no means of creating belief or disbelief that such general presumptions are raised." Hillary v. Walker, 12 Ves. 206.

(12) Presumption—Ignorance, mistake, distress—Effect of, on equitable relief.

(a) Ignorance, mistake.

The Court cannot presume a person to have abandoned his right, so long as he remains in ignorance of it, or labors under a mistake. Randall v. Errington, 10 Ves. 427.

(b) Distress—Laches.

The distress of one, so far as it accounts for his laches, will pro tanto weaken the foundation of the presumption. Hillary v. Walker, 12 Ves. 266; Byrne v. Frere, 2 Moll. 171, 178.
2.—"The beneficiary...in the trust"—(Continued).

(13) Equitable relief—Presumption against a class of persons.

(a) Where a class of persons release their right, the presumption cannot be made in the same way, as in the case of an individual. *Whicote v. Lawrence*, 3 Ves. 752.

(b) For one, who has only an aliquot interest in the property, cannot be expected to pursue his remedy with the same spirit as if he were the exclusive proprietor. *(Ibid.)*

(14) Bar to equitable relief from public or private inconvenience.

(a) Where, on account of delay, the administering of relief would lead to great public or private inconvenience, the relief will not be granted to the beneficiary. *Attorney-General v. Mayor of Exeter*, Jac. 448.

(b) So, in an action for an account, a settlement may be presumed, where there is great delay and it is probable that most of the parties are dead, and the vouchers and receipts lost. *Hunton v. Davies*, 2 Ch. Rep. 44; *Pearson v. Belchier*, 4 Ves. 627; *Hercy v. Dimwoody*, 2 Ves. 87.

(15) Bar to equitable relief from laches of beneficiary.

(a) Lapse of time or delay in suing, if not accounted for by disability or other circumstances, constitutes *per se* laches disentitling a person to relief from the Court. *Oliver v. Court*, 8 Price 167; see *Hercy v. Dimwoody* (2 Ves. 98); *Earl of Powis v. Lord Windsor*, 2 Ves. 473.

(b) So, where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than 20 years may bar his title to relief. *Oliver v. Court*, 8 Price 167.

(16) Acquiescence of beneficiary, a bar to relief—Direct acquiescence.

(a) Where the act complained of was done with the full knowledge and express approbation of the *cestui que trust*, he will not be entitled to relief. *Kent v. Jackson*, 14 Beav. 367 (384).

(b) The reason is that a person cannot be allowed to seek relief against the very transaction to which he was himself a party. *(Ibid.)* *Styles v. Guy*, 1 Mac. and G. 427.

(17) Acquiescence indirect, a bar to relief.

(a) Where a person, having a right to set aside a transaction, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection, the Court will not relieve him. *Phillipson v. Gatty*, 7 Hare 516; *Blake v. Gale*, 31 Ch.D. 196; *Mills v. Fox*, 37 Ch.D. 133.

(b) But where the breach of trust has been completed, without any knowledge or assent on the part of the person seeking relief, that can be no acquiescence in the strict sense of the word. *Lewin*, p. 1095.

(18) Acquiescence—Definition of.

Acquiescence has been defined as "quiescence" under such circumstances that assent may be reasonably inferred from it, and is an instance of the law of estoppel by words or conduct. *Lewin*, p. 1095.
2.—"The beneficiary... in the trust"—(Continued).

(19) Trustee committing breach—Remedy of beneficiary—Account of mesne rents and profits—When given.

(a) Account, independent of any other relief.

An account of mesne rents and profits arising from the trust estate will be allowed, when the same is sought independently of the relief against the corpus of the land. Lewin, p. 1118.

(b) Account, incidental.

The account will also be allowed, if the same is prayed for as incidental or collateral to any other relief which the cestus que trust may claim. (Ibid.)

(20) Account of mesne profits—Express trust.

Against an express trustee, committing breach, as limitation does not run between trustee and cestus que trust, the account will be directed from the time when the rents were withdrawn. Attorney-General v. Breicer's Company, 1 Mer. 495; Mathew v. Brise, 14 Beav. 341.

(21) Following trust property into the hands of a volunteer claiming under a trustee—Account of mesne profits.

Thus. In such cases, the beneficiary, where he establishes his claim to the property, has a right to the mesne profits and rents from the very commencement of his title. Kidney v. Cowsmaker, 12 Ves. 158.

(22) Account of mesne profits—General rule—English law.

(a) Where the defendant is bona fide in possession, the account will be directed from the time of the accrual of the title. Dormor v. Fortescue, S.C. 3 Atk. 130.

(b) But the account will not be carried back beyond six years before the institution of the suit. Reade v. Reade, 5 Ves. 744.

(c) And where there has been great laches in bringing the suit, the Court will not direct an account beyond the date of the decree. Acherley v. Roe, 5 Ves. 665.

(d) But in India, in a suit against an express trustee, an account of mesne profits for the whole period will be decreed, because S. 10 of the Limitation Act does not bar such suits. Powell, p. 277.

(23) Assignee of trustee—Liability of—Account of mesne profits.

(a) Assignee—Primarily liable.

Where the trustee, in committing a breach, assigns the property to X, the latter must account for the mesne profits primarily. Silkstone and Haigh Moor Coal Co. v. Riley, (1900) 1 Ch. 167.

(b) Trustee when liable.

But where the assignee is insolvent, the trustee, who tortiously made the assignment, shall be answerable personally. (Ibid.)

(24) Attachment of property into which the trust estate has been converted.

(a) If the trust estate has been tortiously disposed of by the trustee, the beneficiary may follow and attach the property that has been substituted, in the place of the trust estate, so long as the metamorphosis can be traced. Taylor v. Plumer, 3 M. and S. 575 at 582.

(b) "An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him." (Ibid.)
2.—"The beneficiary...in the trust"—(Continued).

(25) Right to follow chattels—when lost — English law.

Even in the case of chattels, where they have been purchased in market overt, they cannot be recovered by the beneficiary. Lewin, p. 1125.

(26) Following trust property—Nature of evidence, for.

In order to establish the right to follow the trust property into the property into which it has been converted, it is necessary to show clearly every transaction by which the original property has assumed its new form. Harford v. Lloyd, 20 Beav. 310.

(27) Right to follow after order to pay into Court.

Where, on a breach of trust having been committed, the cestui que trust institutes an action, and an order therein has been passed by the Court directing the trustee to pay the money into Court, the beneficiary is not estopped from following the money into the unauthorised investments, if the order to pay in is not obeyed. Francis v. Francis (5 D. M. and G. 108).

(28) Illegal trust—Right to follow, if applicable.

The doctrine of following trust money is not applicable, where the purpose for which the trust is created is a fraudulent or illegal one, and where the cestui que trust permits the money to remain to the credit of the alleged trustee until after the rights of the creditors have supervened. Re Great Berlin Steamboat Co., 26 C.D. 616, See Barclay v. Pearson, (1893) 2 Ch. 163.

(29) Purchase of property with trust funds—Election of beneficiary

(a) Where the trustee commits a breach of trust by purchasing property with the trust funds, the beneficiary has a right to elect to take land purchased with the trust money, or to have a charge upon it. Hisk v. Webb, Pr. Ch. 84.

(b) The beneficiary can elect to affirm the sale of land held in trust, and to follow the purchase-money. Re Champion, (1893) 1 Ch. 101.

(30) No evidence to follow trust fund—Presumption of purchase under trust, when raised.

Where there is no evidence to trace the trust fund into land, the Court will presume that a purchase has been made with the trust funds, where there is nothing to show that it was made with any other motive. Lewis v. Madocks, 17 Ves. 48; Mathias v. Mathias, 3 Sm. and G. 552.

(30-a) Absence of resources with trustees to make purchase.

Such presumption is also raised where the means of trustees are clearly not sufficient to have enabled them to make the purchase out of their own resources. Ryall v. Ryall, 1 Atk. 59.

(31) Nature of right to follow land.

The right to follow trust money into land is an equity or equitable right or lien, as distinguished from an equitable interest or estate, and is subject to the rule that a subsequent equitable mortgagee, even without notice of it, is postponed to it on the ground of its priority in point of time. Cave v. Cave, 15 C.D. 639.
2.—"The beneficiary...in the trust"—(Concluded).

(a) Where the trustee has so dealt with the trust fund, as it can no more be distinguished or traced, the beneficiary’s lien and his right to follow the property ceases out of necessity. *Riella v. Roll*, 1 Atk. 168. T

(b) "In order that the rule as to following trust-money should apply, there must be something specific, which is capable of being identified as that into which the trust-money has been converted." *Re Hallet and Co.*, 2 Q.B. 237. U

(33) Debts barred as against trustee, barred also against beneficiary.

When a debt due from a third party, which is the subject matter of the trust, becomes barred as against the trustee, the *cestui que trust*, will also be barred in respect of it. *Stone v. Stone*, 5 Ch. Ap. 74. V

(34) Invalid trust—Right to recover trust property—Limitation.

Under Art. 130, Sch. II, Limitation Act (1877), the right to recover property settled on invalid trusts accrues directly the property is conveyed to the trustee. 20 B. 511. W

3.—"Where the trustee...his hands."

(1) Money, notes, etc.—Right to follow, when lost.

(a) In the case of money, notes and bills, for the protection of commerce, they cannot be pursued, when they have passed into the hands of *bona fide* holders in circulation. *Collins v. Stumson*, 11 Q.B.D. 142. X

(b) But money, notes and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they passed had express notice of the trust. *Verney v. Carding*, 18 Ch. and Lef. 345. Y

(c) If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker’s, the person for whom he paid it can follow it and has a charge on the balance in the banker’s hand. *In re Hallett’s estate*, 13 Ch. D. 696. Z

(d) The only difference to be taken between money on the one hand and notes and bills on the other, is that money is not “earmarked” and so cannot be traced except under particular circumstances, but notes and bills, because they have a number and date, can, in general, be identified without any difficulty. *Ford v. Hopkins*, 1 Salk 283. A

(2) Trust money mixed with trustee’s money—Right to follow.

(a) Where money belonging to the trustee’s money, the *cestui que trust* is entitled to follow it into the hands of the trustee. *Penwell v. Deffell*, 4 De G. M. and G. 392. B

(b) The reason is that, though the identical pieces of copper cannot be ascertained, yet, as there is so much belonging to the trust in general heap, the right to follow is not taken away. (*Ibid.*) C

(3) Misappropriation of trust-moneys—Bankruptcy of trustee.

Where a trustee misappropriates trust moneys, and he subsequently makes it good on the eve of a bankruptcy, it is not a fraudulent preference on
3.—"Where the trustee...his hands"—(Continued).

his part. Ex parte Stubbons, L. R. 17 Ch. D. 58; Ex parte Taylor, L. R. 18 Q. B. D. 395; Sharpe v. Jackson (1899) A. C. 419; France and Gurrards' Trustees v. Huning, (1897), 2 Q. B. 19; Taylor v. London and County Banking Co. (1901), 2 Ch. 231.

(4) Breach of trust by trustee—Appropriation.

No trustee can acquire a title to trust property by an appropriation against the trust. 1 C.W.N. 265 = 19 A. 277 = 24 I.A. 10.

(5) Money—Right to follow.

(a) In the case of money, there must be in fact a payment, since the doctrine of following depends upon identification of the subject-matter. Re Hallet and Co., 1894, 2 Q.B.1. 237.

(b) So, where money not actually received was credited to an account, the doctrine was held inapplicable. (Ibid.)

(6) Money, right to follow—Executor.

A beneficiary cannot follow money into the hands of an executor, who has not improperly retained it in payment of his own debt, to the prejudice of a creditor of higher degree. Re Fludger, Wingfield v. Erskine (1898), 2 Ch. 569.

(7) Persons standing in a fiduciary relation—Other than trustee.

(a) Agents, Bailee, Solicitor.

All persons, standing in a fiduciary relation as the trustee—such as agents, bailee, solicitor, collector of rents, etc., are liable in the same way as a trustee. Lyell v. Kennedy, 14 A.C. p. 459.

(b) Banker.

So, where trust funds have been misapplied, and can be traced into particular investments, those investments will be charged with the amount of the trust funds so misapplied in the hands of a banker.

(c) Stock broker.

Similar right exists, where the funds are in the hands of a stock broker. Ex parte Cooke, 4 C.D. 123.

(d) Consignee.

In the case of a bailee or consignee, the rule is applicable, only where he is a factor in a fiduciary position with a duty to remit the proceeds of sale to his principal, and not where the consignee is one who receives goods from any one and trades on his own account, making advances on them. Fiskham v. Peel, 28 W.R. 941.

(8) Trustee—Beneficiary committing breach—Assignment—Right of cestui que trust to follow.

(a) Where a trustee, having an interest in the trust fund, assigns his beneficial interest, and then commits breach by abstracting any part of the trust fund, the other beneficiary has a right to follow that portion of it which is comprised in the assignment. Hopkins v. Goman, 1 Moll. 561.

(b) The reason is that the trustee could take no interest in the estate, while a breach of trust by him remains unsatisfied. Morris v. Livie, 1 Y. and C.C.C. 990.
3.—"Where the trustee...his hands"—(Concluded).

(9) Confusion of trust stock with the trustee's own stock—Right of beneficiary to follow.

Where a trustee, having stock of his own and similar stock held upon trust, sells part of it from time to time, and where, on his death, the stock in his name was found to be insufficient to answer the trust, the whole will be deemed as appropriated to the trust. Amies v. Shillern, 9 Jur. 122.

(10) Trustee of two funds—Breach of trust in respect of one—Repairing breach at expense of another—Right of beneficiary to follow.

Where a trustee of two funds, held on different trusts, commits breach in respect of one, and then restores one fund at the expense of another by payment into Court, the cestuis que trust cannot follow the fund into the hands of those who have so restored it, because the latter take it as purchasers for value without notice of the fraud, if as a matter of fact they had no such notice. Thomsen v. Hunt, 3 D. and J. 563.

(11) Charitable trusts—Blending of trust funds by trustee—Right to follow.


(12) Following money lent for special purpose.

When money has been advanced for a particular purpose, such as the purchase of a business, there is a fiduciary duty so to apply it and where the borrower, without so applying, uses the same for his own purposes, it may be followed, to the extent of the balance remaining, if it can be traced, even against the trustee in bankruptcy of the borrower. Gibert v. Conard, 52 L.T. 51.

4.—"Or the hands of his legal representative or legatee."

(1) Legal representative liable to the extent of assets.

In England, in cases of breaches of trust by a trustee, the legal representative is liable to the beneficiary, to the extent of his assets, for the consequences of breach. Devaynes v. Robinson, 24 Beav. 86.

(2) Right of beneficiary as against legatee of trustee.

The assets paid up into the hands of the legatee of a defaulting trustee can be followed by the beneficiary, to make good the breach of trust. Gillespie v. Alexander, 3 Russ. 167.

Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

1 (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.
Nothing in section 63 applies to money, currency-notes, and negotiable instruments in the hands of a bona fide holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, section 108, or the liability of a person to whom a debt or charge is transferred.

(Notes).

1. "Clause (a)."

(1) Purchase of trust-property by third persons—General rule.

The general rule that a party to an illegal or fraudulent contract cannot derive any benefit from it obtains in the case of trusts. And all persons who obtain possession of trust funds, with a knowledge that their title is derived from a breach of trust, will be compelled to turn such trust funds in their hands. Gray v. Lewis, 8 L.R. Eq. 526 (543).

(2) Absence of notice at time of purchase—Discovery of trust at time of conveyance—Effect of.

(a) Where the purchaser has no notice of the trust at the time of purchase, but afterwards discovers the trust, and obtains a cognizance from the trustee, he cannot take a valid title. Sanders v. Dehew, 2 Vern. 271.

(b) In this case, notice of the trust at the time of conveyance converts the purchaser into a trustee, and his purchase consequently results in a breach of trust. Langton v. Astrey, 2 Ch. Rep. 30.

(3) Shares in companies, purchase of.

In the case of shares in companies, if the purchaser has no notice at the time of purchase, but has before registration, still he is protected. Dodds v. Hills, 2 Ham. and Mil. 424.

(4) Improper loans of trust moneys.

Cannot be barred, so far as a beneficiary is concerned. Ernest v. Crosskill, 2 De, Gey P. and J. 198.

(5) Notice, actual and constructive.

See notes on S 3, supra.

(6) Notice after part-payment—effect of.

(a) Part-payment of the purchase-money before notice is not sufficient to give a good title to purchaser. Rayne v. Baker, 1 Giff. 241.

(b) Nor is the giving of security for it. Tournelle v. Nash, 3 P.W. 306.

(c) The whole of the purchase-money must have been duly paid before notice of the trust. Story v. Windsor, 2 Atk. 690.

(7) Complete conveyance to vestee necessary.

For the plea of purchase without notice to be effectual, the property must, before any such notice reaches the purchaser, have been completely conveyed to him. Wigg v. Wigg, 1 Atk. 382; Roots v. Williamson, 38 C.D. 485.
2.—“A transferee...transferee.”

(1) Vendee without notice from vendee with notice.

(a) General rule.

(i) The title of a purchaser for value without notice, from one with notice, is
impeachable, and the beneficiary cannot follow the property in his
(ii) The reason is that the *bona fides* of the second vendee is a good defence in
itself, and the *mal a fides* of the vendor ought not to invalidate it.
(*Ibid.*) E

(b) Exception in charitable trusts.

This general rule is not applicable in the case of charitable trusts. For a
purchaser without notice from a purchaser with notice shall be bound
by the claim of charity. *Sutton Colefield Case*, 1d. 68. F

(2) Vendee with notice from vendee without notice.

(a) Title good—General rule.

A purchase of trust-property with notice, from a vendee without notice, is valid
and cannot be impugned. *Towther v. Carlton*, 2 A.tk. 242; *Re Barrow’s*
Case, L.R. 14 Ch. D. 432. G

(b) Reason for the view.

The second vendee takes a good title, not from the merits of his purchase, but
from the merits of the first purchaser. For, if an innocent purchaser
were prevented from disposing of his property, it would result in a
clag being placed upon the free circulation of property. *Harrison v.*
Forth, Pr. Ch. 51. H

(c) Exceptions to the rule.

(i) Where the subject-matter of the purchase is an equitable estate, and is
subject to the prior equitable interest. *Ford v. White*, 16 Beav. 120 I

(ii) Where a person has sold property by fraud, and, alleging that he has given
no notice, gets it back from him. *Kennedy v. Daly*, 18 Ch. and L.
379. J

(3) Bona fide Vendee from trustee—Subsequent purchase by trustee—Effect of.

Where the trustee sells the trust estate to a *bona fide* purchaser without
notice, and afterwards himself becomes the owner of the lands, though
for good and valuable consideration, the trust revives. *Booy v. Smith*,
2 Ch. Ca. 124, 1 Vern. 60. K

(4) Choses in action, purchase of, from trustee—Effect

(a) Vendee cannot take a better title than vendor.

As regards choses in action and other personal estate not transferable at law,
which may have been purchased from a trustee, the purchaser, whatever
amount he might have paid, cannot take better title than his
vendor. *Ord v. White*, 3 Beav. 357. L

(b) Sale subject to equities.

The vendee must (in conformity with the rules governing assignments of choses
in action) hold them subject to the same equities as the trustee did.
*Cockell v. Taylor*, 15 Beav. 103; *Clack v. Holland*, 19 Beav. 262. M

3.—“Nothing in S. 63...in circulation.”

See notes on §. 63, supra. N
4.—"Or shall be....Contract Act (1872), S. 108."

Vendee taking a better title than vendor, when

As to circumstances under which the buyer takes a better title than the seller, see the exceptions to S. 108, Indian Contract Act.

5.—"Or the liability....charge is transferred."

Transfer of debt or charge, if affected by S. 63

S. 63 does not affect the liability of a person to whom a debt or charge is transferred. 2 A. 460.

65. Where a trustee wrongfully sells or otherwise transfers trust-property, and afterwards himself becomes the owner of the property, the property again becomes subject to the trust notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

(Notes).

1.—"Acquisition by trustee of trust-property wrongfully converted."

(1) Lands sold by trustee coming into his possession subsequently.

See Booy v. Smith, 2 Ch. Cas. 124, under S. 64, supra.

(2) Defaulting trustee cannot claim as against beneficiary.

No beneficial interest in the trust-estate can be claimed by a defaulting trustee as against the beneficiary, even when the trustee derives title thereto as the next-of-kin of a deceased beneficiary or in other ways. Jacobs v. Rylance, L.R. 17 Eq. 341.

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

(Notes).

1.—"Right in case of blended property."

(1) Basis of section.

This section accords with Cook v. Addison, L.R. 7 Eq. 470. See Whit. Stokes, Vol. I, p. 829.

(2) Mixing up of trust moneys with common fund—Breach of duty.

(a) It is a grave breach of duty in trustees to mix the incomes raised by them from trust properties, or moneys raised by taking out letters of administration, in one common fund with their own moneys. This grave breach of duty in trustees, in some circumstances, would expose them to very serious consequences, criminal as well as civil. 6 C. 70 (76) =7 C.L.R. 19.
I. — "Right in case of blended property"—(Continued).

(b) "The trustee, wherever the trust-property may be placed, must always be careful not to amalgamate it with his own; for, if lie do, the cestus que trust will be held entitled to every portion of the blended property, which the trustee cannot prove to be his own." Lupton v. White, 15 Ves. 432.

(c) The principle on which the above is based is that, when a person promising to keep the property of another distinct mixes it with his own, the whole must be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorised mixture on his part. (Ibid.)

(d) In Duke of Leeds v. Earl of Amberst, Shadwell, V. C., says "The general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effect of it to recur upon himself." See Agnew, p. 319.

(3) Trust-property mixed with other property so as to be not traceable.

(a) If the trust property has become so mixed up with the trustee's private property as to render it impossible to trace it, e.g., where it has been converted into money, which has been put into circulation (Miller v. Race, 1 Burr. 453), or has otherwise become indistinguishable, then (since the actual property is gone and that which stands in its place cannot be identified), the beneficiary can only proceed against the trustee personally for the breach. See Underhill, p. 383.

(b) Under the above circumstances, if the trustee happens to be a bankrupt, he can prove against his estate. Ee parte Dumas, 1 Atk. 232.

(c) Where the trust money has been inseparably mixed up with the trustee's private money the beneficiary can claim a lien for the former upon the whole of the mixed funds. Lewis v. Madocks, 17 Ves. 48; see Re Pumfrey, 22 Ch. D. 255; Lewin, p. 1196.

(4) Trust property mixed with other property which can be traced

(a) Where, however, the mixed fund can be identified or traced out, e.g., where the trustee has paid in the trust fund to his general banking account, the beneficiary can enforce his charge or lien upon the whole mixed fund. Hallet, 13 Ch. D. 696.

(b) Where a trustee paid trust money into his current account, and, out of money drawn upon that account, purchased an investment in his own name, and afterwards applied the balance for his purposes, held that his representatives have no right to maintain that out of the trustee's own money the investment was purchased, and that what he had subsequently spent was the trust money. Re Oatway, Hertslet v. Oatway, (1908) 2 Ch. 356.

(5) Trust funds employed by trustee in trade.

On a trustee mixing trust funds with his own moneys, and employing the mixed fund in a trade or adventure of his own, the beneficiary may, if he prefers it, insist on charging the trustee with the principal and
1. "Right in case of blended property"—(Continued).

a proportionate share of the profits, instead of the principal and interest only. It is not in his province to claim both interest and profits concerning the money employed in trade. He must elect between them. Vyse v. Porter, L R. 8 Ch. 334; see, also, Docker v. Somes, 2 M. and K. 664.

(6) Identification, necessity for.

On a trustee mixing the trust fund with his own moneys, prior to a charge or lien being substantiated, it must be shown that the trust fund in fact forms part of the fund or property whereon the lien is claimed.

"In order that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that" into which the money has been converted, and where a transaction has been carried out by set-off in account, so that no cheque, note, coin, or credit has ever passed or existed in specie, the doctrine is inapplicable. Re Hallet & Co., 2 Q B. (C.A.); Ex parte Hardcastle, 29 W.R. 615.

(7) Effect of trustee bound to invest a certain sum, purchasing at that amount.

(a) The mere fact of a trustee having trust money in his hands while making a purchase will not be enough for attaching the trust on lands bought by him. Sealy v. Starell, 2 Ir. R. Eq.

(b) But, where a trustee, bound to lay out money on land, purchases an estate for a sum corresponding with the amount to be invested, the Court may presume the trust money to have been so applied. Price v. Blackmore, 6 Beav. 507.

(c) But if it can be shown that the trustee, who is bound to lay out money on land, was mistaken in the nature of his trust, and acted under a different notion, no such presumption can arise. Perry v. Philips, 4 Ves. 108.

(8) Beneficiary, if can take land itself or has only lien.

(a) "Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest." Lane v. Dighton, Amb. 409; see Lewin, 11th Ed., p. 1130.

(b) "But where the entire land is clearly the fruit of the trust fund, the beneficiary must, on principle, have a right to take the land itself, whether the purchase was or was not of the description authorised by the trust." Trench v. Harrison, 17 Sim. 111.

(9) Right of trustee concurring in breach to follow trust funds.

Where a trustee himself concurs in a breach of trust, he is at liberty, in spite of such concurrence, to institute proceedings against his co-trustee, to follow the trust funds. Carson v. Sloane, 13 L.R. Ir. 139.

(10) Money followed through bank.

(a) "If a trustee pay trust-money into a bank to the account of himself, not in any way car-marked with the trust, and also keep private money of his own to the same account, the Court will disentangle the account, and separate the trust from the private money, and award the former specifically to the cestui que trust. Pennell v. Detell, 4 De G. M. and G. 372."
1.—"Right in case of blended property"—(Concluded).

(b) In the case of a person occupying a fiduciary position, although not an express trustee, as a factor or agent, the same rule is equally applicable. *Hallet’s Estate,* 13 Ch. D. (C.A.) 696.

(c) The same rule has been applied to the case of a person, who borrows money for a specific purpose and does not apply it for the purpose for which it was advanced. *Custis v. Gonard,* 52 L.T.N.S. 54.

(d) In a case in which the question is only between the *extant que trust* and the trustee, as long as the trustee has money of his own standing to his account, the trustee's drawings for his purpose will be attributed to his private money, leaving the trust money intact. *Hallet’s Estate,* 13 Ch. D. (C.A.) 696.

(e) On a trustee exhausting his own money, the sums drawn out, in the absence of evidence to the contrary, will be attributed to the earliest deposits. *Ibid.*

(11) Bankers and agents—Moneys of constituents ordered to be invested, mixed with their own, before insolvency.

Where the insolvents, carrying on business as bankers and commission agents, invested a portion only of the moneys of one of their constituents in securities, and satisfactorily explained their not having invested the remainder also as required by the constituent, it was held that they held the money as bankers and not as agents, and that they were, in consequence, justified in not having kept the money separate from their own funds. *6 C. 70=7 C.L.R. 19.*

(12) Trust funds intermixed and dealt with as common fund—Apportionment of profits.

When two or more trust funds are intermixed and dealt with as a common fund, the profits are apportioned between the beneficiaries, in the proportions to which they were originally entitled to the common fund. See *Provost of Edinburgh v. Lord Advocate,* 4 App. Cas. 823.

(13) Bailor and bailee—Effect of mixture without bailor's consent when goods cannot be separated.

*Indian Law*—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from other goods, the bailor is entitled only to compensation.

*English Law*—But according to *English Law* the bailor takes the whole of the goods. See Agnew, p. 319.

(14) Commission agent mixing his goods with those of principal.

On a Commission agent mixing his goods with those of his principal, and destroying his books of account, the Court disallowed him his commission. *Gray v. Harg,* 30 Beav. 219.

(15) Beneficiary seeking to enforce lien, *onus on*.

In cases where the beneficiary claims a charge over specific fund or property, in order to enable him to exercise his lien, the *onus is* upon him to show that the specific fund includes the trust fund in it. *Hardcastle,* 29 W.R. 615.
67. If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account, of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

2 (a) A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.

3 (b) A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade, and employs A's assets in the partnership business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.

(Notes).

1. — "Wrongful employment...partnership purposes."

(1) Principle of the section.

This section declares that, if a partner, being a trustee, wrongfully employs trust-property in the business, his co-partners are personally liable if they have notice of the breach of trust, but not otherwise. Whit. Stokes, Vol. 1, p. 829.

(2) Partners when liable for such wrongful employment.

(a) Partners, knowingly permitting one of their co-partners happening to be a trustee to employ trust funds in the partnership business, even if they be not responsible as partners, can be held liable for having been parties to the breach of trust. Fleckton v. Bunning, L.R. 8 Ch. 323 (n); see also, Vyse v. Forstie, 7 H.L.C. 318.

(b) Partners having notice of such breach of trust will be held liable for the money as constructive trustees, though they do not constitute active trustees so as to be prohibited from profiting by their trust. Stroud v. Gayer, 28 Beav. 130.

(3) Right of beneficiary to follow trust money into the hands of a firm.

(a) Owing to the mere fact that trust funds have been employed in a partnership concern, the firm cannot be made liable. Ex parte Apsley, 3 Bro. C.C. 265.

(b) For making the firm liable, all the partners must have been implicated in the breach of trust. Lindley, 4th Ed., p. 312.

(c) There would be manifest injustice if persons are made liable for a breach of trust of which they are wholly ignorant. (Ibid.)
I.—“Wrongful employment... partnership purposes”—(Concluded).

(d) If an imputation against the partners that they knew, or ought to have known, that trust monies were being employed in a partnership concern, can be made, such partners will be held bound to see that the trust to which the money is subject authorises the use of it, and will have to answer for a breach of trust in case of its misapplication or loss. Landley, 4th Ed., p. 312.

(c) The beneficiary's right to follow the trust money is an incident of his ownership, and the fact that the money has to be traced not to a single individual but to the hands of a firm cannot make any difference. See Landley, II, 1-4.

(1) Deceased partner's funds used in trade by surviving partner as his executors.

"If a surviving partner, being the executor of a deceased partner, continue the testator's capital, without authority, in his trade, — the Court will follow the trust capital throughout all its ramifications, and give to the beneficiaries of the deceased partner's estate the fruits derived from that capital, whatever change and fluctuations it might have undergone." See Lewin, 11th Ed, p. 1126.

(5) Trustee trading with deceased partner's money.

As regards the liability of a trustee or executor employing funds of his deceased partner in a partnership concern, see Crawshay v. Collins, J. and W. 267, 279, Willet v. Blanford, 1 Hare 253.

2.—“III. (a).”

Partnership determined—Partner retaining assets instead of winding up—Effect.

When a partnership is dissolved by efflux of time or bankruptcy or death, and a partner, instead of winding up the partnership affairs, retains all the assets in the concern, such partner must not only account for the share of the profit, but also for the improper employment of capital. Whallet v. Blanford, 1 Hare 235.

N.B.—The above is the principle recognised in this illustration.

3. "III. (b)."

This illustration is based on Pickton v. Bunning, 8 L R Ch. App. 323 (n), noted supra.

68. Where one of several beneficiaries—

(a) joins in committing breach of trust, or

(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not, within a reasonable time, take proper steps to protect the interests of the other beneficiaries, or
(d) has deceived the trustee, and thereby induced him to commit a breach of trust.

the other beneficiaries are entitled to have all his beneficial interest impounded as against him, and all who claim under him (otherwise than as transferees for consideration without notice of the breach), until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

(Notes).

I.—"Liability of beneficiary joining in a breach of trust."

(1) One of several beneficiaries joining in a breach of trust.

(a) Where one of several beneficiaries joins with a trustee in committing a breach of trust, and the trust, estate is put to loss, the other beneficiaries have a right to have the whole of the interest in the trust-property stopped and accumulated in the hands of the trustees, until the amount impounded with the accumulations thereon has compensated for the loss for which that beneficiary is responsible. *Re Ex parte King, 2 M. and A. 410; see Arner, p. 322.

(b) A beneficiary concerned in the breach of trust should not be allowed to receive any part of the benefits to which he may be entitled, until and unless he has made good the breach of trust. Woodvätt v. Gresley, 8 S. & R. 180.

(2) Rule adopted by Court in such cases.

"Nothing can be more clear than the rule which is adopted by the Court in these cases, that, if one party having a partial interest in the trust fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought on them. What the Court does in such a case is, to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exequation of the trustees, who, by his request and desire, acquiescence or by any other mode of concurrence, have been induced to do the improper act." Lincoln v. Wright, 4 Beav. 492; Jacobus v. Ryland, L.R. 17 Eq. 341.

(3) Any equitable interest of beneficiary impoundable.

For the purpose of being impounded, it is not necessary that the equitable interest of the co-beneficiary must be an original interest; it is sufficient if the interest be a derivative one. Chilingworth v. Chambers, 1 Ch. 685.
1.—"Liability of beneficiary joining in a breach of trust"—(Continued).

(4) Breach of trust—Estate legally vested in wrong-doer, also available
   
   (a) To repair the breach of trust, even an estate legally vested in the wrong-doer by the settlement—an instrument inter vivos—may, owing to an implied contract, be made available. 
   *W*ood*yatt v. Gresley, 8 Sim. 180.

   (b) But to a legal devisee the doctrine cannot be extended. 
   *E*ghert v. Dutter, 21 Beav. 560

(5) Legal estate of beneficiary, not impoundable
   
   The equitable interest of the beneficiary can alone be impounded, and not his legal estate. 
   *F*ow v. *B*uckby, 3 Ch. D. 504.

(6) Right of trustee to recover from beneficiary for life on behalf of beneficiary in remainder

   Trustees are entitled to stand in the place of the cestui que trustent in remain-der, for the purpose of recovering against the cestui que trustent for life, who instigated a breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust. 
   *R*oby v. *R*idehalgh, 7 D. M. G. 100

(7) Beneficiary in default under covenant in trust—Instrument

   (a) On a beneficiary being in default under a covenant in the trust instrument for payment of money, the trustee has the right to retain the trust property till the default is made good. 
   *Re* Weston, (1900) 2 Ch. 164

   (b) Souse—This right exists in favour of trustees of a voluntary settlement, provided the same is enforceable by the Court. 
   *I*bid.

(8) Co-trustee being also a beneficiary.

   (a) When a trustee, a party to a breach of trust, is also a beneficiary, his entire beneficial interest, accrued before or after the breach, must be ap-plied in making good the loss. 
   *See* Lewin, 11th Ed., p. 1154

   (b) But in *Burke* v. *Mickledthwait*, 48 Beav. 100, the co-trustee’s lien seems to have been limited to the amount of the contribution.

(9) Impounding of interest of beneficiaries indebted to trust estate.

   In England, the right to impound has not been restricted to the case of the beneficiary joining the breach of trust, but has been extended also to cases of beneficiaries being debtors to the trust estate. 
   *Davies* v. *Jagy*ard, 2 Ch. 164, see *Aker*man, 3 Ch. 43.

(10) Lien to impound beneficiary’s interest, priority of.

   The lien on a beneficiary’s interest, for the purpose of its being impounded by the other beneficiaries, is superior to the right of any mortgagee from such beneficiary. 

(11) Interest of beneficiary against whom to be applied.

   (a) The interest of a beneficiary concurred in a breach of trust will be applied to make good the loss to the trust-fund, as against his assignee in insolvency. 
   *Ex parte Turpin*, 1 D. and C. 130.

   (b) Judgment-creditors 

   (c) Or general creditors, *Williams* v. *Allen*, 32 Beav. 650.

   (d) And as against any individual claiming under him (save in the case of purchasers for value without notice of the breach of trust). 
   *W*ood*yatt v. 
   *G*resley, 8 Sim. 180.
1. "Liability of beneficiary joining in a breach of trust"—(Concluded).

(e) The rule under consideration is also applicable to a married woman entitled to her separate use, since a married woman acting with respect to her separate property is competent to act, in all respects, as if she were not married. *Hulme v. Pennant*, 1 Bro. C.C. 20.  

(f) But such a rule is not applicable, where the property is settled on a married woman for her separate use without power of anticipation. *Gregby v. Corr*, 1 Ves. 518.

(12) Right to impound, as against beneficiary's transferees.

The right of beneficiaries to impound their co-beneficiary's interest extends not only against him as such, but also against his bona fide transferees for value without notice. *Jacobs v. Rylance*, 17 Eq. 351; see *Edgar v. Plomby*, A.C. 431 (1900).

(13) Beneficiary's concurrence in breach of trust.

(v) A beneficiary concurring in a breach of trust is for ever estopped from proceeding against the trustee for the consequences of the act. *Bruce v. Stokes*, 11 Ves. 319.

(b) Therefore, a beneficiary who is also a trustee has no right to hold his co-trustee responsible for any act in which they both joined. *Butler v. Carter*, 5 L.R. Eq. 281.

(14) Concurrence in breach of trust, essentials for.

In order that a person might be held to have concurred in a breach of trust, it must be shown that he was aware of the facts and had the means of knowing that a breach of trust was involved in the acts assented to by him. *Bucheridge v. Gla..se*, 1 Cr. and Ph. 126, Lewin, p. 1172.

(15) Acquiescence of beneficiary.


(16) Gross laches.

•

(a) , e.g., for 20 years, will disentitle the beneficiary to relief. *Bright v. Legerton* (No. 1), 29 Beav. 60.

(b) But, mere knowledge of a right to sue for a breach of trust, without suing for a few years, cannot destroy the right to impeach the transaction. (Ibid.)

2. 'Married woman.'

(1) Femes covert and infants.


(b) But neither coverture nor infancy is a protection, if they are guilty of actual fraud. *Lewin*, p. 1168.

(2) Beneficial interest of married woman.

In England, the beneficial interest can be impounded even in the case of a married woman restrained from anticipation. *Halt*, 2 Ch. 525.

(3) Married women subject to the Indian Succession Act.

—— are at liberty to deal with their property, as if unmarried. (See S. 4, Act X of 1865).
Rights and liabilities of beneficiary's transferee. 1

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

(Notes).
(N.B.—See, also, notes to S. 58, supra.)

I.—“Rights and liabilities of beneficiary’s transferee”

(1) Beneficiary’s right to transfer.

According to S. 58, supra, a beneficiary may transfer his interest in the trust fund.

(2) Equities affecting beneficiary enforceable against his assignee.

(a) According to this section, an assignee is bound by the equities affecting his assignor, and could therefore take only subject to such equities. Foad v. White, 16 Beav. 120.

(b) A person who takes an equitable mortgage, with notice of a prior equitable mortgage, is not at liberty, by assignment to another without notice, to give him a better title than he has himself. (Ibid.)

(3) Obtaining transfer of equitable interest fraudulently

A mortgagee or sells an equitable interest to B, which mortgage or sale is fraudulently obtained, and then B transfers to C. Here C, though he has notice of the fraud or not, takes subject to A’s equity to have the mortgage or sale set aside. Cockell v. Taylor, 15 Beav. 103.

(4) Beneficiary debtor to trust estate.

(a) The assignee from a beneficiary in debts to the trust-estate can get the right to the beneficial interests assigned to him, only on his discharging the debts due by his assignor. Priddy v. Rose, 3 Mer. 86.

(b) Such an equity attaches on an assignee from a beneficiary, whose interest is liable to be impounded, by reason of his complicity in a breach of trust. Bolton v. Currie (1898), 1 Ch. 544.

(5) Trustee debtor to trust estate

(a) A similar equity attaches on an assignee from a trustee or executor having a beneficial interest, but is a debtor to the trust or executorship. Black v. Holland, 19 Beav. 262.

(b) On a trustee, having a beneficial interest in the trust-estate and owing money to it, assigning his interest, the assignee is under obligation to discharge the debt owing to the trust-estate by the trustee. This is the case, whether the original debt was contracted before or after assignment. Morris v. Irby, 1 Y. and C.C. 380.

(6) Assignor not acquiring fiduciary position until after assignment.

Where an assignor does not acquire his fiduciary position until after the assignment, no equity will arise against him in respect of a subsequently incurred debt. Irby v. Irby, 30 Beav. 632.

(7) Set-off affecting assignee.

An assignee from a beneficiary is liable to the same equities as his assignor, not merely in respect of the actual payments, but in regard to the right of set-off. Cavendish v. Greaves, 24 Beav. 163 (178).
CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE

Office how vacated.

70. The office of a trustee is vacated by his death or by his discharge from his office.

(Note)

1. "Discharge."
See notes under § 71, infra.

Discharge of trustee.

71. A trustee may be discharged from his office only as follows:—

(a) by the extinction of the trust;
(b) by the completion of his duties under the trust;
(c) by such means as may be prescribed by the instrument of trust;
(d) by appointment under this Act of a new trustee in his place;
(e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or
(f) by the Court to which a petition for his discharge is presented under this Act.

(Note).

1. "Clauses (a) and (b)."
See notes to § 77, infra.

2. "Clause (c)."

(1) Reason for this provision.

Since a person creating a trust may mould it in any way he pleases, he may provide that, on the occurrence of certain events, and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted. See Apnuew, p. 327.

(2) Form of power most commonly in use in instruments drawn according to English precedents.

(a) "In case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them, shall die or be abroad for twelve calendar months, or be desirous of being discharged from, or refuse, decline, or become incapacible (untill), to act in, the trust shall be lawful for the cestui que trust, to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee, or the executors or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee." Lawin, 11th Ed., pp. 786, 787.
2.—"Clause (c)"—(Concluded).

(b) "The best forms provide that a refusing or retiring trustee shall, if willing to execute the power, be deemed to be a continuing trustee." Agnew, p 327.

(c) "But it is attended with this inconvenience, that, if the refusing or retiring trustee do not join, evidence may be called for that he was not willing." Lewin, 11th Ed., p 786.

(d) "Sometimes the power is given to the surviving, continuing, or other trustee—a addition which has been found useful in practice." See *Lead Cambus v. Best*, 19 Beav. 414, Agnew, p 327.

(e) The power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees, and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement." Lewin, 11th Ed., p. 787

Trustees to see that circumstances urging him to retire are precisely those contemplated by the proviso

A trustee must carefully ascertain that the circumstances under which he retires from the trust are precisely those contemplated in the terms of the proviso. For if it is otherwise, the trustee resigning will be made liable for all the evil consequences just as if he had delegated the office. See Lewin, p. 786.

Beneficiary's power to remove and appoint trustee, to be exercised reasonably.

An instrument creating a trust may confer on its beneficiaries the power to remove a trustee appointed under it and appoint a new one in his place, but the power must be exercised reasonably, and the Court will not uphold the removal, unless it is satisfied that the power was exercised for the benefit of the trust, and not in a capricious manner. *9 Domo L.R. 514 (141), [Ipper v. Tuckey, (141), 2 Eq. and Lat. 35, H.]*

Difficulties justifying retirement must arise in connection with administration of trust

The unexpected difficulties justifying the retirement of a trustee must, nevertheless, arise in connection with the administration of trusts, and not relate to himself individually, or to any act of his own. *Forsyth v. Huggonson*, 20 Beav. 485.

Retirement justified.

The doubt as to whether the trusts have been declared according to the intent of the parties justifies the retirement. *Neale v. Darnes*, 51 D. M. and G. 288.

3.—"By appointment .. of a new trustee in his place."

(N.B.—See also notes under Ss. 78, 74, 75, supra.)

Misbehaviour of trustee

A trustee who has misbehaved can, at the request of the beneficiaries, be removed from office, by the Court appointing a new trustee in his place. *Millard v. Eyre*, 2 Ves. 91; see *Palmer v. Camer*, 32 Beav. 564.
3. "By appointment...of a new trustee in his place"—(Conclusion).

(2) Bankrupt trustee.

(a) A trustee becoming a bankrupt is liable to be removed from office, and the fact that he has obtained the order of discharge cannot make any difference. *Burke, 45 L. J. Ch. 52*

(b) If a trustee becoming a bankrupt refuses to join in the appointment of a new trustee, the Court should, at the request of the beneficiaries, remove him and appoint a new one. *Re Adams, 12 Ch. D. 634.*

(3) Costs of appointment of new trustee, prior to Trustee Act, 1883.

Previous to the conferring on trustees of the statutory powers under the Trustee Act, 1883, where the circumstances preventing the continuance of the trustee’s duties arose from any act of his own, or anything relating to himself, he had to pay the costs of the appointment of a new trustee. *Pershaw v. Haggison, 20 Beav. 485.*

4. "By consent contract."

Discharge by beneficiaries.

(1) Beneficiaries to be *sui juris*.

(a) A trustee can only be effectually discharged by the common consent of all beneficiaries, if they are all competent to contract. *Wilkinson v. Parry, 4 Russ. 276*

(b) They should not be infants, for, if any of them are infants, no discharge by those who are *sui juris* will prevent the trustee from his liability to the infant beneficiaries. *Wilkinson v. Parry, 4 Russ. 276.*

(c) "The rule will be the same, whatever the disability may be." See Agnew, p. 337.

(2) Concurrence of majority of beneficiaries insufficient for discharge of trustee.

(a) All the beneficiaries must concur in the discharge, a discharge by the majority being ineffectual. *Ex parte Hughes, 6 Vos. 622.*

(b) For, even in the case of a numerous body of creditors, the consent of the majority is no estoppel as against the rest. (Ibid.)

(3) Forcible removal.

A trustee cannot be forcibly removed by a beneficiary or a trustee. *Ex parte Hughes, 6 Vos. 617*

(4) Beneficiary not in existence.

Where all or any of the beneficiaries are unborn, the trustee cannot, with safety, be discharged under the clause, as he cannot have the sanction of all the parties interested. See Godefroi, 3rd Ed., p. 705.

(5) Trustee obtaining sanction of all beneficiaries, *sui juris*—Effect.

A trustee obtaining the joint sanction of all the beneficiaries, who are of full age and *sui juris*, cannot afterwards be made responsible on the ground of delegation of his office. See Godefroi, p. 705.
5.—"By Court...Act."
(N.B.—See notes to S. 72, infra).

(1) Discharge of trustee by order of Court.
A trustee can retire on the order of Court to that effect. *Re Gregson*, 34 Ch. D. 209.

(2) Issue of originating summons for appointment of new trustee.
A trustee wishing to retire, by appointing a new trustee in his place, may get an originating summons under the rules of the supreme Court for the appointment of such a trustee. *Re Somerset*, W.N. (1887), 122.

(3) Payment of costs of retiring trustee.
(a) A trustee wishing to retire from office must be paid his costs from the estate. *Stokes*, 18 Eq. 383.
(b) A trustee retiring on proper grounds and out of necessity will be entitled to get his costs from the trust-estate. *Greenwood v. Wakeford*, 1 Beav. 576; *Gardiner v. Downes*, 22 Beav. 395.

72. Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office; and, if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But, where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

(Notes).

I.—"Every trustee may apply...to be discharged from his office."

(1) Duties becoming complicated—Discharge.
Where the duties of the trust have become more complicated than they originally were, the trustee may insist on being discharged and may enforce that right by action. *Greenwood v. Wakeford*, 1 Beav. 576.

(2) Trustee getting himself discharged on application to Court.
(a) By submitting the management of the trust to the Court, the trustee may in a proper case get himself relieved of the liabilities of his office. *Forshaw v. Higginson*, 20 Beav. 485.
(b) In such an action, the Court, in a proper case, exercises its jurisdiction for discharging a trustee, without appointing a new trustee in his place. *Re Cherdron's Settlement*, (1902) 1 Ch. 692.

(3) No new trustee can be found—Trustee's right to be discharged.
(a) In cases where no other fit person can be found willing to act, the right of the trustee to be discharged must depend on the circumstances of the case. *Lewin*, p. 814.

(b) It is not possible for the Court to divest the trustee of the estate, before some one can be found to take it. See *Forshaw v. Higginson*, 20 Beav. 485.
1.—"Every trustee may apply.... to be discharged from his office"—(Old).

(4) Discharge of executor, when can be made.

"An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court, from his executorship, when the funeral and testamentary expenses and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office, like any other trustee." Lewin, 11th Ed., pp. 816, 817.

(5) Effect of discharge of executor.

Where he has made out a proper case for his discharge, the Court could discharge an executor on his own application. Such a discharge however would not affect his liability for his past acts and omissions as executor—it would only relieve him from the duties of the office subsequent to the discharge. 29 B. 188 = 7 Bom. L.R. 195.

2.—"Sufficient reason for such discharge."

(1) Trustee cannot capriciously retire.

A trustee accepting a trust will not be allowed, voluntarily, from mere caprice or other trivial cause, to throw it up at the expense of his beneficiary. The Court ought to come to a conclusion in each case, whether the conduct of the trustee in the particular instance falls within the rule. Coonan v. Courtenay, 3 J. and Lat. 583.

(2) Wilful misbehaviour on the part of the trustee.

——will amount to sufficient reason for his discharge. Palheiro v. Carew, 33 Beav. 564.

3.—"Direct his costs to be paid out of the trust property."

(1) Costs of trustee retiring on proper grounds.

See under S. 71, supra.

(2) Costs of trustee's representatives refusing to act.

An executor of a trustee or any other of his representatives may refuse to act in the trusts and claim his costs. Legg v. Macknell, 1 Giff. 165; Aldridge v. Westbrooke, 4 Beav. 212.

(8) Complication of trust.

On a trust, originally a simple one, becoming embarrassing from its complication, the trustee may apply to be relieved, and will be given his costs. Barker v. Petie, 2 Drew 340.

(4) Costs to be borne by trustee retiring capriciously.

Where a trustee retires capriciously and without proper reasons, he will have to bear the costs of the retirement. Howard v. Rhodes, 1 Keen 591.

4.—"But where.... place."

Trustee desiring to retire from mere caprice.

On a, it is doubtful whether the Court can or will discharge him, unless another person is found as substitute. Ardill v. Savage, 1 Ir. Eq. Rep. 79.
(1) Trustee entitled to discharge not bound to nominate substitute.

Where the trustee is not retiring voluntarily and from mere caprice, but is entitled to be discharged from his trust, he is not bound to show to the Court that there is some other person ready to accept the trust. *Courtenay v. Courtenay*, 3 J. & L. 583.

(2) Part of trust estate lost.

On a part of the original trust estate being supposed to be lost, or not forthcoming, the Court will not appoint new trustees, so as to make them partial trustees only, but will appoint them trustees generally. The Court, if required, will, at the same time, to protect the trustees, direct an enquiry, when any portion of the trust fund has been lost, and what steps should be taken for its recovery. *Bennett v. Burgis*, 5 Hare 293.

(3) Application for discharge — Procedure — English and Indian law.

(a) According to the law prevalent in England, an application by the trustee, to the Court, to be discharged from the trust, must be by suit or bill. *Ex parte Anderson*, 5 Ves. 248.

(b) If, however, a suit re the trust estate is pending, the trustee may move in the suit itself for his discharge; he may solicit dismissal by petition or motion. — *v. Osborne*, 6 Ves. 455.

(c) According to Indian law, he can apply by petition (*Vide* section).

(4) Service on opponents to application beyond jurisdiction.

Service may be ordered by the Court, on opponents to an application for discharge, out of the Court’s jurisdiction, or, substituted service may be effected. *In re Bevelli Telegraph Co.*, 43 L.J. Ch. 720.

73. Whenever any person appointed a trustee disclaims 1, or any trustee, either original or substituted, dies 2, new trustees on or is, for a continuous period of six months, absent from British India 3, or leaves British India for the purpose of residing abroad 4, or is declared an insolvent 5, or desires to be discharged from the trust 6, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust 7, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) The person nominated for that purpose by the instrument of trust (if any) 8, or

(b) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and
Act II of 1882 (Indian Trusts Act).

continuing trustee, or (with the consent of the Court) the retiring trustee, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee, the number of trustees may be increased.

The Official Trustee may, with his consent, and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

(Notes.)

(N.B.—See notes on S. 60, supra.)

(General).

Provisions of the section—source of.

The provisions of the section have been taken from the Trustee Act, 1893, which, after providing for the appointment of new trustees, enacts certain rules also for the vesting of the trust property in the trustees newly appointed. See S. 10 of Trustee Act, 1893.

1.—"Whenever any...disclaims."

(1) Disclaimer by a trustee—Effect of, etc.

See notes on S. 44, supra.

(2) Disclaimer of trusts amounts to retirement—Appointment of new trustee justifiable.

(a) A disclaimer of trusts, even after the trustee has acted in them, is regarded as a desire to retire, and an appointment of new trustees would be justifiable. Noble v. Maynoth, 14 Beav. 471.

(b) A disclaiming trustee comes within the meaning of a retiring trustee. Vescoueent D'Adhemar v. Bertrand, 35 Beav. 19.

2.—"Or any trustee...dies."

(1) Death of one of the trustees, effect of, on the administration of trust estate.

See notes on S. 44, supra.

(2) Death of a trustee—Appointment of another in his place.

A trustee can be appointed in the place of one dying in the testator's life-time, by the surviving or continuing trustees, either under a power in the settlement, or under the statutory power. Re Hadleys' Trusts, 6 De. G. and Sm. 67.
3.—“Or is for a continuous......British India.”

(1) Absence from the United Kingdom—English law.

(a) ABSENCE FOR MORE THAN TWELVE MONTHS.

Where a trustee is out of the United Kingdom for more than twelve months, a new trustee could be appointed. S. 10 of Trustee Act, 1893.

(b) CONCURRENCE OF SUCH TRUSTEE IF NECESSARY FOR NEW APPOINTMENT.

It is unnecessary to get the consent of such trustee, who is abroad, for the appointment of a new trustee, unless he is willing and competent to concur. Re Coades to Parsons, 34 Ch. D. 370.

(c) WILLINGNESS AND COMPETENCY OF TRUSTEE OUT OF THE UNITED KINGDOM—ONUS OF PROOF.

The onus of proving that he was willing and competent is upon the person impugning the validity of the appointment. (Ibid.)

(2) Temporary absence—if sufficient for appointing a new trustee.

A mere temporary absence, with the intention of returning, cannot justify the appointment of a new trustee. Re Moranan Society, 26 Beav. 101.

4.—“Or leaves British India......abroad.”

(1) Trustee residing abroad.

(a) Where a trustee has left the country to reside permanently abroad, and his whereabouts are not known, a new trustee may be appointed. Re Bignold's Settlement Trusts, 7 L.R. Ch. App. 223; Re Harrison's Trusts, 22 L.J. Ch. 69.

(b) Where a trustee goes away abroad, for a very long period, or, resides there permanently, the Court may remove him at the instance of the beneficiary. Buchanan v. Hamilton, 5 Ves. 722.

(c) Where a trustee had taken a five years' lease of a house in a foreign country, for the purpose of residence, there was held to have been sufficient ground for his removal from office. Payne v. Slagford, 1 Ch. 288.

5.—“Or is declared an insolvent.”

Recent bankruptcy necessary for removal.

In order that the insolvency of a trustee may justify his removal from office, it is necessary that he must have been recently declared a bankrupt. Adam's Trust, 12 Ch. D. 634; Banker, 1 Ch. D. 48.

6.—“Or desires to be discharged from the trust.”

Retirement of trustee in consideration of premium.

(a) In consideration of premium paid to him for so doing, a trustee cannot retire from office, and an appointment, made by the retiring trustee, of the person who so paid the premium, is invalid. Sugdeve v. Crossland, 3 Sm. and G. 192.

(b) Nor could he retire in favour of one, who intends to commit a breach of trust. If he so retires, he is responsible for the misbehaviour of the trustee who is newly substituted in his place. Palloret v. Carew, 32 Beav. 564; Head v. Gould, (1898) 2 Ch. 250 at 273, 274.
7.—"Or refuses or becomes......incapable to act in the trust."

(1) Incapacity, a ground for appointing a new trustee.

(a) Personal incapacity on the part of a trustee to act in the administration of trust property is a sufficient reason for appointing a new trustee. *Re Bynold's Settlement Trusts*, 7 L.R. Ch. App. 293; *Re Wheeler and Richardson*, (1896) 1 Ch 315

(b) It does not embrace the case of a trustee, who is an abscinding bankrupt—though such a person would be unfit. *Re Watts*, 9 Ha. 106; *Re Roche*, 2 Dr and War 287.

(c) Nor does it cover the case of one who is permanently resident abroad. *Washington v. Washington*, 10 Sim 104.

(2) Lunacy of person with power to appoint—Duty of Court.

Where the person, in whom the power of appointing is vested, becomes a lunatic, the Court will appoint a person to exercise such power or give the required consent on behalf of the lunatic. *Re Fuller*, 2 Ch. 551

(3) Refusing or retiring trustee, powers of

Under the English law, the privilege of appointment vested in a surviving or continuing trustee as such cannot be exercised by a refusing or retiring trustee. *Travis v. Tynemouth*, 34 L.J. Ch. 666.

(4) Discretion of Court to remove trustee found unfit

In the matter of removal of trustees, the Court has a large discretion enabling it to so remove a trustee whenever it finds him unfit or incapable of performing the duties relating to the trust. *Lemann*, 22 Ch. D. 683; *Re Phelps*, 41 Ch. D 451

8.—"A new trustee in his place by (a) the person nominated......trust (if any)."

(1) Power to appoint, personal right.

The power to appoint, conferred on a person under an instrument of trust, is to be construed as a personal right, and cannot be taken as incident to the donee's estate. *East*, 8 Ch. Ap. 785

(2) Power to appoint, not imperative.

The statutory power to appoint is not imperative, and consequently, it is not obligatory on the donee of such a power to exercise the same by way of appointing a new trustee. *Itt Knight*, 26 Ch. D. 82.

(3) Donee of the power, when may act as trustee

It is only under special circumstances that the donee of the power may himself act as trustee, and that only on obtaining the sanction of the Court. *Montefiore v. Guadella*, 2 Ch. 723.

(4) Joint-holders of power to appoint new trustees—power of survivor.

Where the persons holding a joint power of appointment under an instrument of trust fail to agree as to the person to be appointed, the surviving or continuing trustees get the statutory power to appoint. *Re Shepard*, W. N. (1882). 294.