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THE UNIFORM ACTS RELATING TO TRUSTS

ELLEN L. NYLUND *

THE NEED FOR UNIFORM LEGISLATION

VISCOUNT Bryce in his *The American Commonwealth* characterized the advantages and disadvantages of the sovereignty of the separate states of the United States somewhat as follows:

Those faults on which I have laid stress, the waste of power by friction, the want of unity and vigour in the conduct of affairs by executive and legislature, are the price which Americans pay for the autonomy of their States, and for the permanence of the equilibrium among the various branches of their government.

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The want of uniformity in private law and methods of administration is an evil which different minds will judge by different standards. Some may think it a positive benefit to secure a variety which is interesting in itself and makes possible the trying of experiments from which the whole country may profit. Is variety within a country more a gain or a loss? Diversity in coinage, in weights and measures, in rules regarding bills and cheques and banking and commerce generally, is obviously inconvenient. . . . In the United States, the possibility of diversity of laws is immense. Subject to a few prohibitions contained in the Constitution, each State can play whatever tricks it pleases with the law of family relations, of inheritance, of contracts, of torts, of crimes. . . . But on the whole, far less inconvenience than could have been expected, seems to be caused by the varying laws of different States, partly because commercial law is the department in which the diversity is smallest, partly because American practitioners and judges have become expert

* Member of Illinois Bar.

in applying the rule for determining which law, where those of different States are in question, ought to be deemed to govern a given case. However, some States have taken steps to reduce this diversity by appointing commissions, instructed to meet and confer as to the best means of securing uniform State legislation on some important subjects, and progress in this direction has been made.¹

To the task of making uniform the laws of the several states the Commissioners on Uniform State Laws have devoted themselves for many years and have made notable progress. The beneficent effect of this work has been especially felt in the commercial fields in which most of the uniform laws have been drawn.² More recently they have embarked upon legislation dealing with the personal and family rights and relationships,³ and most recently they have ventured to make uniform the laws of trusts.⁴

There has been comparatively little statute law in the field of trusts. Trust law grew up like Topsy in the application of well-defined principles of equity, which grew out of the extraordinary remedies first applied in England by the King's Chancellor⁵ when no legal writs or remedies were available for the righting of obvious wrongs and from the informality of procedure in the ecclesiastical courts in their administration of decedents' estates and in punishing breaches of confidence.⁶ In this fashion from the "uses" of English law and equity jurisdiction we derive our present trust law.

Stemming as it does from one source, the law of trusts in the several sovereign states has developed very much

¹ (1926) I, 345.

² Uniform Acts on Sales, Conditional Sales, Warehouse Receipts, Bills of Lading, Negotiable Instruments, Stock Transfer, Partnership, Limited Partnership, Acknowledgments, Business Corporation, Arbitration, and others.

³ Uniform Marriage and Marriage License Acts, Marriage Evasion, Illegitimacy, Guardianship, Desertion and Nonsupport and Child Labor, Divorce Jurisdiction Acts.

⁴ Uniform Fiduciaries, Principal and Income, Trustees' Accounting, and Trusts Acts.

⁵ F. W. Maitland, *Equity* (1920), pp. 43 et seq.; Holdsworth, *History of English Law*, I, 449 ff.

⁶ See note 5 supra.

along the same channels, with the result that, with the possible exception of Louisiana, we can say that there is a law of trusts for all of the states. Differences which have arisen are not fundamental and not even by statute have laws deviated far from the original equitable principles other than in their interpretation. The exceptions to this general statement are chiefly in the statutes and are not numerous.

However, as is the case with constitutional, common and statute law, changes of conditions, especially through the more frequent use of trusts and the complexities of property interest in the trust res, put a strain on the law and precedents. These new situations demand constructions not contemplated when the law or principle was enunciated, and owing to human failings and diversities of thought, the courts of the various states have arrived at inconsistent results from the application of the same principles of law or equity. So it appears that the increasing use of express trusts has rapidly multiplied the problems of the relationship between trustees and cestuis que trustent and the respective rights of income and principal beneficiaries.

Whether or not the problem of trust legislation is a logical field for uniform state laws may be argued,⁷ but there is undeniably a growing demand for statutory regulation and a recognition of this demand.⁸ Some well recognized conflict of laws rules have been developed to apply where there is diversity of citizenship of the trustee and settlor and to determine what law is applicable in the administration of the trust, the jurisdiction to tax and the rights of the cestuis.⁹

⁷ 64 Trust Companies Magazine 765, Report of Committee of Southern Division of California Bankers' Association.

⁸ Richard G. Stockton in 16 The Trust Bulletin 3.

⁹ D. F. Cavers, "Trust Inter Vivos and The Conflict of Laws," 44 Harv. L. Rev. 163; Beale, "The Conflict of Laws," 443, 598 ff., 962, 1018 ff.; Hutchison v. Ross, 262 N. Y. 381, 187 N. E. 65, 89 A. L. R. 1067 (1933); Miller v. Douglass, 192 Wis. 486, 213 N. W. 320 (1927).

However, the most numerous difficulties in the creation and administration of trusts lie not so much in the conflict of laws as in the lack of any rule of law applicable or in rules of law too general in their terms to be applied with assurance to a particular situation or statement of facts. The ponderous motion of state legislatures in solving these problems with patchwork legislation of itself justifies the work of the Commissioners on Uniform State Laws. That this work should go so far as to change the rules of law established between beneficiaries by the courts of a state has been challenged by the Governor of Pennsylvania, who vetoed the Uniform Principal and Income Act.¹⁰

Is there a need for uniform trust laws? Uniform legislation on trusts in the several states is desirable in those matters which involve interstate transactions and a conflict of laws. The Uniform Fiduciaries Act is very clearly within this classification, inasmuch as the transfer of trust assets very frequently takes place outside of the state where the trust is administered. This is the case where the trust res consists of stocks of corporations which are traded in on a few metropolitan exchanges and where the transfer of title to the stocks is at the home office of the corporation or by stock transfer agents in one of three or four cities where these matters are centralized. This Act, among other things, modified the rule that one who pays money to or transfers property for a person acting in a fiduciary capacity has a duty to inquire into the authority of the fiduciary and the application of the property or proceeds. As trusts at this time very frequently comprise investments which necessitate inquiry into the laws of states other than that in which the trust is administered or in which the creator of the trust lived, the advantage of the Uniform Fiduciaries Act to those dealing with trustees across state boundaries is

¹⁰ "Inequities of Uniform Principal and Income Act," by Hon. George H. Earle, Governor of Pennsylvania, 65 Trust Companies Magazine 20.

readily appreciated. Similarly, the Uniform Trust Receipts Act has facilitated commercial transactions arising out of trusts and brought benefits to the trust as well as third parties dealing with trustee. Both of these acts were new legislation in the sense that they did not merely codify prevailing rules of law and iron out existing conflicts between the various state laws. They have, doubtless, been justified in large measure by the demand for commercial expediency.

The Uniform Principal and Income Act has been adopted in four states¹¹ and has apparently worked to advantage in eliminating troublesome problems arising out of fiduciary relationships and the apportionment of receipts and disbursements between income and principal. The Commissioners on Uniform State Laws have recently formulated two additional acts on trusts and trust administration which are respectively designated the "Uniform Trusts Act" and the "Uniform Trustees' Accounting Act."¹² They have not yet been enacted in any state.

All of these acts touch, at some point, matters of vital concern to the creator of a trust, the beneficiary of a trust, and the trustee. It appears to be appropriate to consider in what respects benefits will be derived and what burdens are entailed in their adoption and to what extent they codify, extend, or deviate from the law as now applied.

With a few specific exceptions which will be noted later, the four acts mentioned do not fall in the category of required legislation for commercial expediency in conducting interstate transactions, nor in general do they settle a problem of conflict of laws in determining which

¹¹ Oregon (1931), Virginia (1936), Florida (1937), North Carolina (1937).

¹² Uniform Trustees' Accounting Act was approved by the National Conference of Commissioners on Uniform State Laws in August, 1936, and revised September, 1937. Uniform Trusts Act was approved by the National Conference of Commissioners on Uniform State Laws in September, 1937.

state law governs the trust. However, they clarify and extend the existing state laws on certain questions and define the exceptions to those general principles of law where inequities have arisen. They may find their justification also in a greater ease with which reform measures can be legislated in codes and in a greater consistency of a complete and carefully planned act than can be attained by a separate consideration of each proposed measure if introduced singly.

UNIFORM TRUSTS ACT

Section 1 of the Uniform Trusts Act concerns "Definitions," about which little needs to be said. They have been carefully drawn. The difficulties of so circumscribing the use of a term as to confine its effect to the intended purposes, and yet to give it sufficient scope to extend the provisions of the law to new conditions which are within the spirit and intent of the provision, are apparent to anyone who might study the definitions with a view to understanding all their ramifications. The limitations of a few of these definitions in their application to the provisions of the act will be dealt with in the discussion of those provisions.

Section 2¹³ bears no distinct relation to the other provisions of this act. It appears to be a departure from the common law, in that a deposit for a special purpose does not necessarily create a trust of the credit,¹⁴ and some of

¹³ "Section 2. Bank Account to Pay Special Debts.

(1) Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

(2) If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor."

¹⁴ Samuel Haas Trimmed Hat Co. v. Service Association, 222 Mo. App. 307, 297 S. W. 129 (1927) (reserve fund guaranty); Citizens Bank and Trust Co. of Pryor v. Hale, 74 Okla. 184, 177 P. 366 (1918) (purchase price

the preferences which it creates are not now generally granted.¹⁵ It is understandable that the disappointment of numbers of investors to whom sinking fund deposits were lost during the past few years would have suggested the inclusion of such a provision. It carries in its wake the problem of the legality of preferences and a question of fraud on creditors. The purpose seems to be to assure payment of these specially designated classes of persons, as against general creditors, in the event of the depositor's becoming insolvent before the deposit is paid out. However, certain of these classes of obligees now have a preference under the Federal Bankruptcy Law.¹⁶

Section 2 may have one unfortunate result, namely the abrogation of the beneficent provisions of section 7 of the Uniform Fiduciaries Act.¹⁷ We have here an anomalous situation of a trustee, the depositor, under Section 2 having no control of the trust res, and the necessary result of this must be that checks drawn upon this account must be scrutinized by the bank to determine if they have been drawn for the proper purpose. Unless intended, then, to reimpose the duty of inquiry on the bank, the provision that the deposit shall be irrevocable for one year after the claim is due, unless otherwise provided, could be evaded. The provision of the Uniform Fiduciaries Act, referred to above, sought to avoid such inquiry except where the bank had actual knowledge of the breach of trust or had knowledge of such facts that payment was made in bad faith. Apart from the Uniform Fiduciaries Act, however, there had gradually evolved the principle that for the

of real estate); *Arlt v. Langley*, 56 S. D. 79, 227 N. W. 469 (1929) (deposit in replevin suit pending determination of ownership); *Wade v. City and County Bank*, 25 Cal. App. 675, 145 P. 145 (1914) (by contractor to pay materialmen and discharge laborers having mechanics' liens); *McGillivray v. First National Bank*, 56 N. D. 152, 217 N. W. 150 (1927).

¹⁵ *Zollman*, *Banks and Banking*, § 3175; *American Surety Co. v. Grace*, 151 Tenn. 575, 271 S. W. 739 (1925); *Cocke's Adm'r v. Loyall*, 150 Va. 336, 143 S. E. 881 (1928).

¹⁶ 3 U. S. C. A., Tit. 11, § 104(b).

¹⁷ Ill. Rev. Stat. 1937, Ch. 98, § 240.

sake of commercial expediency a bank should not have the burden of watching over the account of a trustee to look after the use and distribution of the fund. This is irrelevant to the question of whether a deposit of a trustee is a general or special deposit in the banks, upon which authorities are at variance.¹⁸ The purpose of section 2, however, appears to have been to establish rights against the depositor rather than against the bank in which the deposit is made or against its general creditors.

In Section 3¹⁹ we find enunciated the generally accepted rule that a trustee who uses trust funds for his own purposes or in such a way as to benefit himself directly²⁰ or indirectly²¹ is guilty of a breach of his trust.

It will be noted that non-corporate trustees are prohibited from lending money to a relative. Yet in Section 1, "relative" is defined as "a spouse, ancestor, descendant, brother or sister." It may be questioned whether Section 3 is not so limited herein as to foreclose inquiry into the propriety of a loan by the trustee to his uncle, aunt, niece, nephew, or cousin. While the cases decided under the

¹⁸ See 7 C. J. 633; 26 R. C. L. 1354; 8 R. C. L. Supp. 5874.

¹⁹ "Section 3. Loan of Trust Funds. Except as provided in Section 4, no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer, or employee of itself or of an affiliate; nor shall any non-corporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, or other business associate."

²⁰ 65 C. J. 653, n. 70; In re Randolph, 134 N. Y. S. 1117 (1911), affirmed 135 N. Y. S. 1138 (1912); Marion Trust and Banking Co. v. Roberson, 151 Tenn. 108, 268 S. W. 118 (1925); 1 Perry on Trusts (7th Ed.) 328; 3 Bogert on Trusts and Trustees 1726 ff.; 3 Pomeroy on Equity Jurisprudence (4th Ed.) § 1077; King v. Remington, 36 Minn. 15, 29 N. W. 352 (1886); Baldwin v. Allison, 4 Minn. 11 (1860); Jewett v. Miller, 10 N. Y. 402 (1852); Feamster v. Feamster, 35 W. Va. 1, 13 S. E. 53 (1891); Church v. Winton, 196 Pa. St. 107, 46 A. 363 (1900); Kenworthy v. Equitable Trust Co., 218 Pa. 286, 67 A. 469 (1907).

²¹ Loan by a trustee to his wife upon security of a mortgage on real estate was objected to on the ground that the trustee could not be impartial and could not conveniently enforce the remedy upon a default. In re Randolph, 134 N. Y. S. 1117 (1911), affirmed 135 N. Y. S. 1138 (1912); loan to a partnership of which the trustee was a member was held improper, Penn v. Fogler, 182 Ill. 76, 55 N. E. 192 (1899); to a corporation of which trustee was the secretary was held to be a conversion, First National Bank v. Selmsler Fuel and Grain Co., 55 S. D. 586, 227 N. W. 62 (1929); Genesee Wesleyan Seminary v. U. S. Fidelity and Guaranty Co., 247 N. Y. 52, 159 N. E. 720, 56 A. L. R. 964 (1928); 65 C. J. 653; Restatement of the Law of Trusts §§ 170, 206; Perry on Trusts (7th Ed.), § 429.

general principle of equity have apparently not gone beyond the classes here enumerated in holding the loan improper,²² it is conceivable that cases could arise where the principle might well be extended to more remote degrees of consanguinity if the circumstances indicated a disloyalty to the trust. Therefore the Act might beneficially have extended its language to embrace these possibilities. On the other hand, it can be said that the Act is not intended to abrogate the general principle of equity, which can still prevail under circumstances indicating that a loan to a relative, other than those in the prohibited classes, was made contrary to the interests of the trust.

The provision of the Act²³ which permits a corporate trustee to deposit in its own banking department funds awaiting investment, distribution, or payment of debts would resolve differences which now exist in several states where this question has arisen. The practice has been permitted in some cases²⁴ and has been held to be

²² *Enright v. Sedalia Trust Co.*, 323 Mo. 1043, 20 S. W. (2d) 517 (1929); *Pierce v. Dahlgren*, 300 F. 268 (1924); *Carrier v. Carrier*, 226 N. Y. 114, 123 N. E. 135 (1919); see note 21 *supra*.

²³ "Section 4. Corporate Trustee Depositing Trust Funds with Self.

(1) A corporate trustee which is subject to regulation and supervision by state or federal authorities may deposit with itself trust funds which are being held necessarily pending investment, distribution, or the payment of debts, provided it pays into the trust for such deposit such interest as it is required by statute to pay on uninvested trust funds, or, if there be no such statute, the same rate of interest it pays upon similar non-trust deposits, and maintains in its trust department as security for all such deposits a separate fund consisting of securities legal for trust investments and at all times equal in total market value to the amount of the deposits. But no such security shall be required to the extent that the deposit is insured or given a preference by any state or federal law.

(2) The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made from time to time, as long as the required value is maintained. The income of such securities shall belong to the corporate trustee. In all statements of its financial condition published, or delivered to [the state banking department], such corporate trustee shall show as separate items the amount of trust funds which it has deposited with itself and the amount of securities which it holds as security for the payment of such deposits."

²⁴ 3 *Bogert on Trusts and Trustees* 1897, § 598; *Bassett v. City Bank & Trust Co.*, 115 Conn. 1, 160 A. 60 (1932); *Tucker v. New Hampshire Trust Co.*, 69 N. H. 187, 44 A. 927 (1897); *Hayward v. Plant*, 98 Conn. 374, 119 A. 341 (1923). In the following cases it has not been criticized, but the

entirely improper in others.²⁵ The broadening of the Act to permit such deposits has undoubtedly been due to the demand for business expediency and the fact that state supervision of corporate trustees and the application of Federal Reserve Regulation F, Section 9,²⁶ have been assurance against an abuse of the privilege. Although it may in some cases tempt the trustee to delay reinvestments in order to have the use of the funds, it also makes for more efficient handling of cash balances. Authority to make such deposits has been granted in some states by statute.²⁷ This Act goes farther than most statutes in that it provides for a deposit of securities equivalent in market value to the cash with the trust department of the corporate trustee. This change from the provisions of the tentative draft of this section, which forbade deposit by the trustee in its own banking department, will doubtless meet the approval of corporate trustees and will offer no practical danger to the trust if the trustee is mindful of its duty to keep trust assets productive of income.²⁸ As a secured trust deposit it is in many ways better protected than a deposit with another bank, which may be regarded as a general deposit should that bank fail.

The prohibitions in Sections 5, 6, and 7 of the Act,²⁹

trustee has been required to pay to the trust profit from the use of the funds: In re Demmerle's Exr., 225 N. Y. S. 190 (1927); Matter of Haigh's Estate, 232 N. Y. S. 322 (1928); In re Estate of Moore, 211 Pa. 348, 60 A. 991 (1905); Reid v. Reid, 237 Pa. 176, 85 A. 85 (1912); Appeal of Van Dyke, 183 Pa. St. 647, 39 A. 2 (1898).

²⁵ Restatement of the Law of Trusts, § 170m; note, 16 Va. L. Rev. 392.

²⁶ This section requires that national banks shall set aside, in the trust department, against such deposits, United States bonds or other securities approved by the Federal Reserve Board of equivalent value.

²⁷ California, Connecticut, Delaware, Florida, Indiana, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Utah, Vermont.

²⁸ 3 Bogert on Trusts and Trustees 1938, § 611; Perry on Trusts (7th Ed.), Vol. I, § 452; 65 C. J. 795; Ogdon v. Allan, 225 Mass. 595, 114 N. E. 862 (1917); Siechrist v. Bose, 87 Md. 284, 39 A. 745 (1898); Cheever v. Ellis, 134 Mich. 645, 96 N. W. 1067 (1903); In re Jarvis, 180 N. Y. S. 324 (1920); Wight v. Lee, 101 Conn. 401, 126 A. 218 (1924); McMullen v. Sims, 37 S. W. (2d) 141 (Tex. Com. Appeals, 1931).

²⁹ "Section 5. Trustee Buying from or Selling to Self. No trustee shall directly or indirectly buy or sell any property for the trust from or to itself

against a trustee dealing with himself as vendor or purchaser and denying to a corporate trustee the right to buy its own stock, are in effect a statement of the prevailing law on these matters³⁰ which has not depended upon the fairness of the transaction³¹ nor upon the fact that the purchase was made by a third party for the trustee.³² However, some courts have made an exception where a trustee has purchased at a sale forced by a third party³³ or in the case where the consent was obtained from the

or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate."

"Section 6. Trustee Selling from One Trust to Another Trust. No trustee shall as trustee of one trust sell property to itself as trustee of another trust."

"Section 7. Corporate Trustee Buying Its Own Stock. No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate."

³⁰ Restatement of the Law of Trusts, § 170; Perry on Trusts (7th Ed.), § 195; 3 Bogert on Trusts and Trustees 1722, § 543; see note, 1 A. L. R. 747. On purchases see *Ball v. Hopkins*, 268 Mass. 260, 167 N. E. 338 (1929); *Clay v. Thomas*, 178 Ky. 199, 198 S. W. 762 (1917); *In re Holley's Estate*, 211 Iowa 77, 232 N. W. 807 (1930); *Jenkins v. Hammerschlag*, 56 N. Y. S. 534 (1899); *Romaine v. Hendrickson*, 27 N. J. Eq. 162 (1876), 28 N. J. Eq. 275 (1877); *Skinnell v. Mahoney*, 189 N. Y. S. 845 (1929); *Ungrich v. Ungrich*, 207 N. Y. 662, 100 N. E. 1134 (1912); *Gates v. Plainfield Trust Co.*, 127 N. J. Eq. 460, 191 A. 304 (1937); *Smith v. Miller*, 98 Va. 535, 37 S. E. 10 (1900); *Kelsey v. Detroit Trust Co.*, 265 Mich. 358, 251 N. W. 555 (1933); *Smith v. Tolversen*, 190 Minn. 410, 252 N. W. 423 (1934); *Landis v. First National Bank of Lamanda Park*, 66 P. (2d) 730 (Cal. App., 1937). On sales to the trust see *Campbell v. Campbell*, 8 F. 460 (1881); *Bermingham v. Wilcox*, 120 Cal. 467, 52 P. 822 (1898); *Magruder v. Drury*, 235 U. S. 106, 35 S. Ct. 77, 59 L. Ed. 151 (1914); *Kelly v. First Minneapolis Trust Co.*, 178 Minn. 215, 226 N. W. 696 (1929); *In re Security Bank & Trust Co.*, 178 Minn. 209, 224 N. W. 235 (1929), 226 N. W. 697 (1929); note, 14 Minn. L. Rev. 308; *Lawndale Nat. Bank v. Kaspar American State Bank*, 288 Ill. App. 555 (1937). But see *French v. Hall*, 198 Mass. 147, 84 N. E. 438, 16 L. R. A. (N. S.) 205 (1908).

³¹ *Cornet v. Cornet*, 269 Mo. 298, 190 S. W. 333 (1916); *In re Long Island Loan & Trust Co.*, 87 N. Y. S. 65, affirmed in 179 N. Y. 520, 71 N. E. 1133 (1904).

³² *Brackenridge, Adm'r v. Holland*, 2 Blackf. (Ind.) 377 (1830); *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252 (1816); *Michoud v. Girod*, 4 How. (U. S.) 503, 11 L. Ed. 1076 (1843); *Mitchell v. Reeder*, 104 Okla. 48, 231 P. 268 (1924); *Purchase v. Atl. Safe Dep. & Trust Co.*, 81 N. J. Eq. 344, 87 A. 444 (1912); *J. H. Lane & Co. v. Maple Cotton Mill*, 232 F. 421 (1916); *Scott v. Sierra Lbr. Co.*, 67 Cal. 71, 7 P. 131 (1885); *Broder v. Conklin*, 121 Cal. 282, 53 P. 699 (1898); *French v. Woodruff*, 25 Colo. 339, 54 P. 1015 (1898); *Houston v. Bryan*, 78 Ga. 181, 1 S. E. 252 (1887).

³³ *Allen v. Gillette*, 127 U. S. 589, 8 S. Ct. 1331, 32 L. Ed. 271 (1888); *Swineford v. Virginia Trust Co.*, 154 Va. 751, 152 S. E. 350 (1930).

cestuis who were sui juris.³⁴ This rule has generally been applied to prohibit a trustee from selling to his wife³⁵ or to a corporation in which he was interested.³⁶

Apart from the difficulty of proving disloyalty in the purchase or sale by a trustee dealing with himself as trustee of another trust, there are good practical considerations which might reflect on the wisdom of denying, in Section 6, the right of a trustee to deal with himself. If the trustee has no beneficial interest in either trust, the first presumption is that he would make an impartial determination when the need for selling property from one trust to another arises. A second consideration is the saving of commissions to the trust. Again, the knowledge that the trustee acquires of the quality of an investment in one trust might well serve the interests of the other trust. For example, in one trust the trustee holds a real estate mortgage; through his experience in holding it, he will have learned the financial standing of the mortgagor, the appraisement value of the property mortgaged, and the habit for promptness of the borrower in making interest payments. All of these factors are relevant to determining the value of the investment. If the trustee were required to buy from another, he would have to rely largely on statements about them by the seller or mortgagor. The statements of the former, with whom

³⁴ *Malone's Guardian v. Malone*, 255 Ky. 210, 73 S. W. (2d) 38 (1934); *Clay v. Thomas*, 178 Ky. 199, 198 S. W. 762 (1917).

³⁵ *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 20 A. 52 (1890); *Scottish-American Mortg. Co. v. Clowney*, 70 S. C. 229, 49 S. E. 569, 3 Ann. Cas. 437 (1904). But see, for approval of sale to a daughter, *Setaro v. Pernigotti*, 105 Conn. 685, 136 A. 571 (1927).

³⁶ *Allen Robbins v. Butler*, 24 Ill. 387 (1860); *Baxter v. Union Ind. Trust & Sav. Bank*, 273 Mich. 642, 263 N. W. 762 (1935); *Birmingham v. Wilcox*, 120 Cal. 467, 52 P. 822 (1898); *H. B. Cartwright & Bro. v. U. S. Bank & Trust Co.*, 23 N. M. 82, 167 P. 436 (1917); *Crawford County Bank v. Bolton*, 87 Ark. 142, 112 S. W. 398 (1908); *In re Filardo*, 221 Wis. 589, 267 N. W. 312 (1936); *First National Bank v. Selmsler Fuel & Grain Co.*, 55 S. D. 586, 227 N. W. 62 (1929); *Gay v. Young Men's Consol. Coop. Merc. Inst.*, 37 Utah 280, 107 P. 237 (1910); *MacFadden v. Jenkins*, 40 N. D. 422, 169 N. W. 151 (1918); *Mann v. Bank of Greenfield*, 323 Mo. 1000, 20 S. W. (2d) 502 (1929); *Otier v. Nieman*, 160 N. Y. S. 610 (1916); *In re Schuster's Estate*, 35 Ariz. 457, 281 P. 38 (1929). But see *Van Heusen v. Van Heusen Charles Co.*, 131 N. Y. S. 401 (1911).

the trustee deals at arm's length, are likely to be unreliable, and those of the mortgagor are entirely self-serving. This becomes important with the shifting of emphasis from the security to the personal obligation. Conceivably, a trustee might favor one trust at the expense of another, but the likelihood of escaping the day of reckoning is so remote that it would seemingly incline the trustee to dispose of an investment of questionable value to the public where he had no fiduciary obligations to consider.

The provision of Section 8³⁷ granting to a trustee the power to vote stock by proxy will be welcome to the many trustees to whom it has not been clear to what extent voting in this manner was a delegation of a discretionary power or personal confidence, and the conscientious trustee is mindful that the delegation of a discretionary duty is a breach of trust.³⁸ Except in a limited number of trusts where a trustee may have a controlling interest, the interest of the trustee is proportionately small, and the inconvenience of attending meetings of stockholders is great. Most trustees, if they vote by proxies at all, limited them to voting for named directors and to specific questions presented in advance of the meeting. The qualification upon this grant of authority will doubtless prevent the giving of general proxies.

A need has existed for authority to have stock, for which there is a general market, issued in the name of a nominee. Section 9³⁹ authorizes this practice. Although

³⁷ "Section 8. Voting Stock. A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it."

³⁸ 65 C. J. 665; Perry on Trusts (7th Ed.), § 408; 3 Bogert on Trusts and Trustees 1763, § 555; Restatement of the Law of Trusts, § 171; *McCullister v. Bishop*, 78 Minn. 228, 80 N. W. 1118 (1899); *Meck v. Behrens*, 141 Wash. 676, 252 P. 91 (1927); *Coleman v. Connolly*, 242 Ill. 574, 90 N. E. 278 (1909); *Spengler v. Kuhn*, 212 Ill. 186, 72 N. E. 214 (1904); *Markel v. Peck*, 144 Mo. App. 701, 129 S. W. 243 (1910).

³⁹ "Section 9. Holding Stock in Name of Nominee. A trustee owning stock may hold it in the name of a nominee, without mention of the trust in the stock certificate or stock registration book; provided that (1) the trust records and all reports or accounts rendered by the trustee clearly

the Uniform Fiduciaries Act provides for the transfer of stock held in the name of a trustee without inquiry into the trust terms,⁴⁰ provided no facts shall come to the knowledge of the transfer agent which would indicate bad faith in the making of the transfer, the marketability of stock issued in the name of a trustee has been lessened by the fact that stocks issued to and endorsed by the trustee are not generally accepted as negotiable in form. Although the Uniform Fiduciaries Act has been adopted by many of the states of the Union, and although a transfer may take place in a state which has adopted the Uniform Fiduciaries Act, transfer agents have been reluctant to rely upon the Uniform Fiduciaries Act without investigating the provisions of the trust and the power to make the sale. Furthermore, purchasers will not readily assume the burden of transfer when a fiduciary is the owner and time consuming delay may sometimes mean great changes in market values when the sale is finally consummated. Trustees have been prevented from taking the expedient course of having the stock issued to themselves without designation of the trust, for they thereby made themselves the insurer of the investment and committed a technical breach of trust.⁴¹ Having the

show the ownership of the stock by the trustee and the facts regarding its holding; and (2) the nominee shall deposit with the trustee a signed statement showing the trust ownership, shall endorse the stock certificate in blank, and shall not have possession of the stock certificate or access thereto except under the immediate supervision of the trustee. The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stock so held."

⁴⁰ "Section 3. Registration of Transfer of Securities Held by Fiduciaries. If a fiduciary in whose name are registered any shares of stock, bonds or other securities of any corporation, public or private, or company or other association, or of any trust, transfers the same, such corporation or company or other association, or any of the managers of the trust, or its or their transfer agent, is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or to see to the performance of the fiduciary obligation, and is liable for registering such transfer only where registration of the transfer is made with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making the transfer, or with knowledge of such facts that the action in registering the transfer amounts to bad faith."

⁴¹ *White v. Sherman*, 168 Ill. 589, 48 N. E. 128 (1897); *Gilbert v. Welsch*,

stock issued in the name of a nominee is for the manifest benefit of the trust estate, but the penalty imposed by Section 9 upon the trustee, as a guarantor that there will be no defalcations by the nominee, puts an unreasonably heavy burden upon him, except where he, individually, is the nominee and, as a result, trustees may be deterred from making use of this provision except where such matters can be absolutely controlled. It would seem to be fair to both cestuis and the trustee to require the trustee to exercise only reasonable care to avoid a loss to the trust estate from the use of a nominee. The provision contemplates a corporate trustee's using individuals as nominees or an individual trustee's using another individual as the nominee, for it requires a segregation of possession and access thereto from the nominee. This would, it is submitted, prevent an individual trustee from having stock issued in his own name without reference to the trust.

Where the trustee has been given powers which require the exercise of discretion or judgment, it has frequently been held that such discretionary power does not vest in a successor trustee.⁴² The term "discretionary powers," however, is one which may be as elastic as the term "duties of the trustee." It has therefore been difficult to define the limitations upon the authority of the successor trustee. Although it may be presumed that in view of the position of trust which this relationship implies, the selection of the trustee, in all cases, is predicated upon and determined by the confidence which the settlor has in the trustee he selects. When the trustee is a cor-

75 Ind. 557 (1881); *Chapter House Circle v. Hartford Nat. Bank & Trust Co.*, 121 Conn. 558, 186 A. 543 (1936); *De Jarnette v. De Jarnette*, 41 Ala. 708 (1868); *Knowlton v. Bradley*, 17 N. H. 458 (1845); *In re Hodges' Estate*, 66 Vt. 70, 28 A. 663 (1894).

⁴² 65 C. J. 673 ff.; 3 *Bogert on Trusts and Trustees* 1743, § 553; note, 13 *Minn. L. Rev.* 164; *Whitaker v. McDowell*, 82 Conn. 195, 72 A. 938 (1909); *Tilley v. Letcher*, 203 Ala. 277, 82 So. 527 (1919); *Jones v. Bevilard*, 205 N. Y. 446, 103 N. E. 719 (1913); *Hazard v. Bacon*, 42 R. I. 415, 108 A. 499 (1920).

poration and there is no assurance that the personnel will continue to be the same, Section 10⁴³ appears to be a very timely change in law and to be substantially in conformity with the settlor's wishes. In granting powers or authority to the trustee, the settlor has in mind not so much making it easier for the trustee to administer the trust estate as he has in mind the benefits which will accrue from giving a discretionary power which will permit an adjustment to changing circumstances and the changing needs of the beneficiaries. Few settlors, or lawyers who prepare the instrument creating the trust, after giving the matter considerable attention, consider themselves wise enough to anticipate all the needs of the trust administration and of the beneficiaries for an extended period of time. In some cases the courts have been very generous in finding the intent to have the discretionary powers vest in the office of trustee rather than merely in the individual or corporation which was named as first trustee. But the result of this is too great an uncertainty to be satisfactory.

Some states have by statute⁴⁴ provided for the action of the majority of three or more trustees with the saving benefits of Section 11 of this Act.⁴⁵ This has great practical advantages, for it facilitates action by the trustees when action is desirable, permits an adjustment to the

⁴³ "Section 10. Powers Attached to Office. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal."

⁴⁴ Ill. Rev. Stat. 1937, Ch. 148, § 33.

⁴⁵ "Section 11. Powers Exercisable by Majority.

(1) Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act, in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of such joinder.

(2) Nothing in this section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust."

idiosyncrasies of any individual trustee for or against certain investments, and seems to be what most settlors have in mind when they designate three or more trustees. There is a protection to the trust estate in paragraph (2), for under its provision the dissenting trustee is not relieved from responsibility to attempt to prevent the majority of the trustees from breaching their trust or acting in a manner wholly inconsistent with good judgment. It would be incumbent upon the dissenting trustee to prevent such conduct by a timely court interference. At the same time this paragraph also prevents a trustee, who finds he disagrees with his co-trustees, from adopting the arbitrary attitude that, since they are not agreeable, he will do nothing.

At common law, since the law courts did not recognize the trust relationship, the judgment, in an action against the trustee for breach of a contract *intra vires* the trust, was against the trustee personally, and execution issued on the judgment against his individual property instead of against the trust estate.⁴⁶ In such an event the trustee was, in equity, allowed to reimburse himself from the trust property. Through the theory of subrogation⁴⁷ or unjust enrichment,⁴⁸ the creditor might reach the trust

⁴⁶ *Petition of Eddy*, 6 F. (2d) 196 (1925); *Fay v. Day*, 106 Neb. 370, 183 N. W. 565 (1921); *Stanton Nat. Bank v. Swallow*, 113 Neb. 336, 203 N. W. 561 (1925); *Head v. Porter*, 240 S. W. 685 (Tex., 1922); *Allegheny Tank Car Co. v. Culbertson*, 288 F. 406 (1923); *Carr v. Leahy*, 217 Mass. 438, 105 N. E. 445 (1914); *Knipp v. Bagby*, 126 Md. 461, 95 A. 60 (1915); *Austin v. Parker*, 317 Ill. 348, 148 N. E. 19 (1925); *Taylor v. Mayo*, 110 U. S. 330, 4 S. Ct. 147, 28 L. Ed. 163 (1884); *Anglo-American Direct Tea Trading Co. v. Seward*, 2 N. E. (2d) 448 (Mass., 1936); *In re Ruggles' Est.*, 275 Mich. 237, 266 N. W. 332 (1936); *Kincaid v. Hensel*, 185 Wash. 503, 55 P. (2d) 1050 (1936).

⁴⁷ See 3 *Bogert on Trusts and Trustees* 1743, § 553; *Restatement of the Law of Trusts*, § 268; *Hilton's Adm'x v. Porter-Matlock Trust Co.*, 230 Ky. 401, 19 S. W. (2d) 1088 (1929); *King v. Stowell*, 211 Mass. 246, 98 N. E. 91 (1912); *Mason v. Pomeroy*, 151 Mass. 164, 24 N. E. 202 (1890); *In re Rosenfeldt's Will*, 185 Minn. 425, 241 N. W. 573 (1932); *Norton v. Phelps*, 54 Miss. 467 (1877).

⁴⁸ 3 *Bogert on Trusts and Trustees* 2117, 2154, § 715, § 725; *Restatement of the Law of Trusts*, § 269; *Newell v. Hadley*, 206 Mass. 335, 92 N. E. 507 (1910); *Mannix v. Purcell*, 46 Ohio St. 102, 19 N. E. 572 (1888); *Field v. Wilbur*, 49 Vt. 157 (1876); *Yerkes v. Richards*, 170 Pa. St. 346, 32 A. 1089 (1895); *Scheibeler v. Albee*, 99 N. Y. S. 706 (1906); *Manderson's Appeal*, 113 Pa. St. 631, 6 A. 893 (1886).

property in a proceeding in equity, but unless the trustee expressly contracted to be liable only as trustee and out of trust assets,⁴⁹ the creditor must, if it was possible, first have procured a judgment at law against the trustee in order to be entitled to subrogation. Section 12 of this Act,⁵⁰ in permitting a judgment and execution against the trust estate, obviates the time- and money-wasting double procedure. But where the trustee's contract is *ultra vires* and recovery cannot be obtained at law against the trustee, the creditor's only right against the estate will be, as formerly, in equity on the theory of unjust enrichment,⁵¹ for this section covers only contracts made within the trustee's power.

⁴⁹ Restatement of the Law of Trusts, § 271; Schumann-Heink v. Folsom, 328 Ill. 321, 159 N. E. 250 (1927); Adams v. Swig, 234 Mass. 584, 125 N. E. 857 (1920); Breid v. Mintrup, 203 Mo. App. 567, 219 S. W. 703 (1920); Brackett v. Foulds, 110 N. Y. S. 779 (1908); Shoe & Leather Nat. Bank v. Dix, 123 Mass. 148 (1877).

⁵⁰ "Section 12. Contracts of Trustee.

(1) Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible [by execution] out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(2) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of charitable trust the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

(3) The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word 'trustee' or the words 'as trustee' after the signature of a trustee to a contract shall be deemed *prima facie* evidence of an intent to exclude the trustee from personal liability."

⁵¹ See note 48 supra.

Under the existing practice, if the trustee reimburses himself from the trust assets, the cestuis may make objections thereto when the trustee files his account. But if the trustee, instead of reimbursing himself (an extrajudicial act), transfers trust funds to a judgment creditor under a writ of execution or pursuant to court order, the cestuis could not so readily object to the propriety of the trustee's act and his account would no doubt be approved. Paragraph (2) of Section 12, requiring the creditor to give notice to the beneficiaries of the existence and nature of the action, gives the beneficiaries an opportunity to safeguard their interests. This might be a needless precaution if it might always be assumed that the trustee would not be indifferent in his defense of the suit. No doubt his lack of diligence could be considered a breach of trust for which he would be accountable, but this is not always a fact easy to prove. Since a personal judgment will not be entered against the trustee, he has not the same incentive to resist the plaintiff's claim. In view of the untold possibilities which could arise to jeopardize the interests of the beneficiaries, the requirement of notice seems to be a wise precaution.

In suits for tort, as in suits on contract, the law courts have not generally recognized the liability of a trust estate.⁵² A judgment in a tort action, therefore, has as a rule been collectible solely out of the private property of the trustee. The modern trend, however, is in the direction of liability as trustees in those cases where there has been an unjust enrichment,⁵³ where the wrongful act was

⁵² *Wahl v. Schmidt*, 307 Ill. 331, 138 N. E. 604 (1923); *Louisville Trust Co. v. Morgan*, 180 Ky. 609, 203 S. W. 555 (1918); *T. L. Horn Trunk Co. v. Delano*, 162 Mo. App. 402, 142 S. W. 770 (1912); *Keating v. Stevenson*, 47 N. Y. S. 847 (1897); *Trani v. Gerard*, 168 N. Y. S. 808 (1918); *McCue v. Finck*, 46 N. Y. S. 242 (1897); *O'Toole v. Faulkner*, 29 Wash. 544, 70 P. 58 (1902).

⁵³ *Restatement of the Law of Trusts*, § 269; 43 *Harv. L. Rev.* 1122; *Bogert on Trusts and Trustees*, Ch. 34; *In re Hunter*, 151 F. 904 (1907); *Miller v. Smythe*, 92 Ga. 154, 18 S. E. 46 (1893); *Grimes v. Barndollar*, 58 Colo. 421, 148 P. 256 (1914); *Bright Nat. Bank v. Hanson*, 68 Ind. App. 61, 113 N. E. 434 (1916).

the act of an agent properly employed by the trustee,⁵⁴ where the tort liability is not based on negligence,⁵⁵ or where the obligation arises out of a tort committed in the usual course of the business conducted by the trustee with the trust property (although the trustee may have been negligent) and a benefit resulted to the trust estate by reason of the act.⁵⁶ There seems to be even more reason for the protection to the trust estate by requiring notice to the cestuis in tort actions, as provided in Section 14 of this Act,⁵⁷ than in the case of contracts, for, since

⁵⁴ See note 53; *Prinz v. Lucas*, 210 Pa. 620, 60 A. 309 (1905); *Wright v. Caney River Ry. Co.*, 151 N. C. 529, 66 S. E. 588 (1909).

⁵⁵ *Ireland v. Bowman & Cockrell*, 130 Ky. 153, 113 S. W. 56 (1908); *Bogert on Trusts and Trustees*, Ch. 34.

⁵⁶ *Smith v. Coleman*, 100 Fla. 1707, 132 So. 198 (1931); *In re Raybould*, [1900] 1 Ch. 199; *Bogert on Trusts and Trustees*, Ch. 34.

⁵⁷ "Section 14. Tort Liability of Trust Estate.

"(1) Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that (1) the tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or (2) that, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or (3) that, although the tort did not fall within classes (1) or (2) above, it increased the value of the trust property. If the tort is within classes (1) or (2) above, collection may be had of the full amount of damage proved, and if the tort is within class (3) above, collection may be had only to the extent of the increase in the value of the trust property.

"(2) In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

"(3) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of the action, or within such other period as the court may fix and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustee shall furnish the plaintiff a list of such beneficiaries and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

"(4) The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in Section 13.

"(5) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees."

the trustee might become personally liable if the trust were exonerated, he would have an interest which would motivate his being less diligent in disproving the tort liability of the trust estate. Although the insurance available for public liability has relieved the trustee to some extent from the damages accruing as a result of torts arising from attractive nuisances, elevator accidents, and the like, it none the less has seemed inequitable in many cases that the trustee should personally be obligated for these liabilities. Especially is this true if the trustee has no power of sale and the trust assets consist principally of real estate, for he would be handicapped in reimbursing himself for the loss.

Section 15⁵⁸ resolves the question of distribution of losses when the trustee has breached his trust by mingling trust funds and has become insolvent. There is respectable authority for the position that when trust funds are mingled, the entire fund is impressed with the trust,⁵⁹ that in the event of withdrawals from a commingled fund the trustee will be presumed to be honest and to have withdrawn his own funds first;⁶⁰ and that if

⁵⁸ "Section 15. Withdrawals from Mingled Trust Funds. Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal."

⁵⁹ 65 C. J. 973; *Halle v. Nat. Park Bank of New York*, 140 Ill. 413, 29 N. E. 727 (1892); *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332 (1910); *Kineon v. Bonsall*, 185 N. Y. S. 694 (1920); *Tooele County Board of Education v. Hadlock*, 79 Utah 478, 11 P. (2d) 320 (1932); *In re Hallett's Est.*, 13 Ch. Div. 696 (1879); *Byrne v. McGrath*, 130 Cal. 316, 62 P. 559 (1900).

⁶⁰ 4 *Bogert on Trusts and Trustees* 2678, § 926; 65 C. J. 975; *In re Stenning*, [1895] 2 Ch. 433; *Theodore Hamm Brewing Co. v. Flagstad*, 182 Iowa 826, 166 N. W. 289 (1918); *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292 (1902); *Moore v. Mansfield*, 248 Mass. 210, 142 N. E. 792 (1924); *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332 (1910); *Board of Fire and Water Com'rs of Marquette v. Wilkinson*, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493 (1899).

funds of several trusts are involved, they will share proportionately in the commingled fund.⁶¹

If A makes a conveyance of land to B upon B's oral promise to hold it in trust for A, the trust is unenforceable, under the Statute of Frauds.⁶² Section 16 of this Act⁶³ would give A a right to a reconveyance. Professor Bogert points out that courts of many states have already gone a long way to enforce an oral trust of real estate by decreeing a constructive trust on the ground that B's acts were fraudulent⁶⁴ or on the ground of unjust enrichment, based upon a failure of consideration⁶⁵ as well as in the exceptional cases where the conveyance was induced by confidential relationship, misrepresentation, contemplation of death, or where there has been part performance. This appears to have a desirable result, but an express

⁶¹ 4 Bogert on Trusts and Trustees 2678, § 926; *General Motors Acceptance Corp. v. Larson*, 110 N. J. Eq. 305, 159 A. 819 (1932); *Andrew v. Farmers' Sav. Bank of Goldfield*, 207 Iowa 394, 223 N. W. 249 (1929); *Central Auto Tire Co. v. Com. of Banks*, 252 Mass. 363, 148 N. E. 226 (1925); *In re Walter J. Schmidt & Co.*, 298 F. 314 (1923); *Cunningham v. Brown*, 265 U. S. 1, 44 S. Ct. 424, 68 L. Ed. 873 (1923). But see *contra*, *Downing v. Cunningham*, 256 Mass. 285, 152 N. E. 365 (1926); *Spokane County v. First Nat. Bank*, 68 F. 979 (1895).

⁶² Ill. Rev. Stat. 1937, Ch. 59, § 9: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect: Provided, that resulting trust or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol."

⁶³ "Section 16. Unenforceable Oral Trust Created by Deed.

(1) When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the Statute of Frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the Statute of Frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

(2) Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable."

⁶⁴ 3 Bogert on Trusts and Trustees 1588, note 22 and cases cited.

⁶⁵ 3 Bogert on Trusts and Trustees 1590-1, notes 31 and 32.

repeal of the objectionable section of the Statute of Frauds would seem to be preferable to indirect revocation by an inconsistent separate statute.

In restricting the settlor's right to waive the application of this Act⁶⁶ upon his trust to Section 6 to 15 inclusive of this Act, the Committee may have had it in mind that waivers might be inserted by the settlor, where a corporation is to be the trustee, without his considering the possible results. Not infrequently, however, an individual with whom the testator was engaged in business up to the time of his death is named as testamentary trustee. This individual may be the logical one to purchase the testator's interest in the business, but under this Act he could not do so, even with a prior court approval unless he anticipated his difficulties and declined to act as trustee. A trust will not fail for lack of a trustee, but the testator had confidence in the trustee he named, and he expected his trust to benefit by the selection. The problem resolves itself into the question of which situation presents the greater evil. It must not be supposed that settlors are incapable of understanding a waiver of their rights or that they waive such rights as a matter of course without inquiry or consideration.

This Act has made a commendable contribution toward codifying the law of trusts; but it could, in the writer's opinion, have been made much more helpful had it covered such topics as the rule against perpetuities, accumu-

⁶⁶ "Section 17. Power of Settlor.

"The settlor of any trust affected by this Act may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed upon him by this Act; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this Act; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Act; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by Sections 3, 4 and 5 of this Act."

lation of income, the requirements for valid charitable gifts, spendthrift trust limitations, essential requirements to exercising powers of appointment over trust property, and authorized trust investments. It is in problems arising under these headings that the greatest diversity of law occurs among the states, and it is these problems which are of vital interest to the creator of a trust. When a testator living in Illinois makes a will creating a testamentary trust, valid and effective under Illinois laws, and when he later moves to another state and dies shortly thereafter, his trust may be invalid because it violates the rule of that state against remoteness in vesting, or the trust created by his will may violate the laws of the state of his last domicile in any or all of these other features, which are so fundamental to the scheme of the trust he sets up. No doubt greater opposition would be raised to an Act which was not in accord with the present laws of a state on those questions, but since these are the subjects of controversy when the laws of several states are involved, it is submitted, they furnish the material for a Uniform Act which would have been of greater service.

UNIFORM TRUSTEES' ACCOUNTING ACT

Apart from statutory provisions, trustees are now required to account for their handling of trust assets, their receipts and disbursements.⁶⁷ But no form nor time for such accounting is required. An accounting may be demanded by anyone who has a beneficial interest in the trust,⁶⁸ including a contingent beneficiary,⁶⁹ and by co-

⁶⁷ 4 Bogert on Trusts and Trustees 2780-9, §§ 961-3; Perry on Trusts (7th Ed.), § 821; 65 C. J. 878; Restatement of the Law of Trusts, § 172; *Freeman v. Donohoe*, 65 Cal. App. 65, 223 P. 431 (1924); *Smallwood v. Lawson*, 183 Ky. 189, 208 S. W. 808 (1919); *Ingram v. Lewis*, 37 F. (2d) 259, 70 A. L. R. 702 (1930); *Madison Trust Co. v. Carnegie Trust Co.*, 152 N. Y. S. 517 (1915); *Boyer v. Day*, 132 Kan. 722, 297 P. 432 (1931); *Maxwell's Unknown Heirs v. Bolding*, 36 S. W. (2d) 267 (Tex. Civ. App., 1931); *Wylie v. Bushnell*, 277 Ill. 484, 115 N. E. 618 (1917).

⁶⁸ *Bennett v. Weber*, 323 Ill. 283, 154 N. E. 105 (1926). *Committee of a lunatic: Ex parte Nicholas*, 142 Md. 601, 121 A. 627 (1923). *Administrator*

trustees.⁷⁰ Failure to account upon demand is ground for removal of the trustee.⁷¹

Most of the states, by statute, require that the trustee of testamentary trusts shall render an account in some court. Several states set the time for rendering accounts, but only a few states specify what shall be included in the account.⁷² However, any person who is entitled to an accounting may question items of the account and require proof with regard to them or demand additional facts disclosing the trustee's acts.⁷³

When such accounts are voluntarily rendered or are rendered upon a demand which does not specify the information desired, unless it is required to do so by statute, it is unlikely that a trustee will disclose facts which prove his breach of duty. But the trustee can be required to answer questions about the administration to bring this out.

The provisions of this Uniform Trustees' Accounting Act are so comprehensive that if an account is made in accordance with it, without fraud or mistake, it should disclose to those who are interested any self dealing and the complete story of the administration of the trust. It has the very desirable feature of making each accounting final as to the facts which it discloses and would permit trustees to terminate questions of liability. This practice might be desired when a trust is likely to continue for a generation or longer.

of a deceased beneficiary: *Stuck v. Schumm*, 290 Mass. 159, 194 N. E. 895 (1935); *Brown v. Ricks*, 30 Ga. 777 (1860); *In re Ralph's Estate*, 155 N. Y. S. 147 (1915); *In re Wheeler's Estate*, 287 Pa. 416, 135 A. 252 (1926). Residuary legatee: *Cavert v. Ferrell*, 123 Kan. 254, 255 P. 62 (1927); *In re Wheeler's Estate*, 287 Pa. 416, 135 A. 252 (1926).

⁶⁹ *Furniss v. Furniss*, 133 N. Y. S. 535 (1911); *Meeks v. Meeks*, 100 N. Y. S. 667 (1906); *White v. White*, 25 S. W. (2d) 826 (Tex. Com. App., 1930); *In re Dority*, 57 N. Y. S. 1073 (1899).

⁷⁰ *Vose v. Galpen*, 18 Abb. Pr. (N. Y.) 96 (1864).

⁷¹ *Knowlton v. Fourth-Atlantic Nat. Bank*, 271 Mass. 343, 171 N. E. 721 (1930); *Appeal of Morse*, 92 Conn. 286, 102 A. 586 (1917).

⁷² Conn., Mass., N. Y., Del., N. J., Pa., and Dist. of Columbia.

⁷³ 65 C. J. 935, 4 *Bogert on Trusts and Trustees* 2780, § 961; *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. 859 (1888); *In re Scott's Estate*, 202 Pa. 389, 51 A. 1023 (1902); *Woolf v. Barnes*, 93 N. Y. S. 219 (1904).

In considering this Act, however, one should bear in mind that an accounting in itself will not assure the proper administration of a trust unless the beneficiaries concerned are competent to determine from the accounting whether or not the trust has been properly handled or unless they retain legal counsel or accountants to check these accounts. This is particularly true in those cases where large estates are involved and the accountings become complicated and lengthy. It is not to be supposed that the court will undertake to check each item to determine that there has been a proper administration unless objection is raised by the beneficiary to the allowance of the account. But the fact that the account is to be made under oath and is required to show⁷⁴ "that neither any seller of [to], nor buyer from, the trustee" was a person related by blood or marriage or connected with him in business and is required to show sources of purchases⁷⁵ would tend to deter the trustee from making intentional misstatements, for he would be guilty of perjury. Paragraph (e) of Section 3 of this Act⁷⁶ has been

⁷⁴ "Section 3. Intermediate Accountings. Within thirty days after the expiration of the first year after the first qualifying testamentary trustee was under a duty to file his inventory as prescribed in Section 2 the testamentary trustee then in office shall file with the [probate court of the county where the will was admitted to probate] an intermediate account under oath covering such year and showing. . . ." See footnotes following for subsections.

⁷⁵ "(c) in a separate schedule the trust principal on hand at the beginning of the accounting period and the then status of its investment; the investments received from the settlor and still held; additions to trust principal during the accounting period with the dates and sources of acquisition; investments collected, sold or charged off during the accounting period, with the consequent loss or gain and whether credited to principal or income, investments made during the accounting period, with the date, source and cost of each; deductions from principal during the accounting period, with the date and purpose of each; and trust principal on hand at the end of the accounting period, how invested, and the estimated market value of each investment. . . ."

⁷⁶ "(e) that neither any seller of, nor buyer from, the trustee of trust property during the accounting period was at the time of such sale or purchase (1) in the case of a corporate trustee an affiliate, or any officer, employee, or nominee of the trustee or of an affiliate; or was (2) in the case of a non-corporate trustee a relative, partner, employer, employee, or business associate; but none of the provisions of this subsection shall apply to purchases and sales made by brokers for the trustee or stock exchanges. . . ."

made more effective by the revision of 1937 by substituting the words "that neither" for "whether." This requires an affirmative statement by the trustee that no transaction such as described has taken place, where, as it was formerly stated, it might have been construed that a failure to make a statement on the matter, although one was required, was no perjury.

This Trustees' Accounting Act will very materially increase the cost of the administration of trusts. Not only will there, in all likelihood, be an increase in the trustee's fees, but there will be the court costs, attorney's fees in presenting the account, and possibly fees of attorneys of the beneficiaries or of certified public accountants employed by the beneficiaries. This additional cost will, of course, reduce the income payable to the income beneficiaries, and may be a factor to be considered by the settlor of the trust in determining the advisability of making outright distributions rather than trust provisions. There is however, in Section 15,⁷⁷ a right in the settlor to waive this duty of the trustee to account, and in Section 16,⁷⁸ a power in a beneficiary who is sui juris to waive the account. In this connection it should be noted that, in the usual family trust situation, it is unlikely that remainder beneficiaries would all be in being and sui juris at a time when such a waiver might be desirable.

⁷⁷ **"Power of Settlor.** The settlor of any trust affected by this Act may, by provision in the instrument creating the trust, if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties which would otherwise be placed upon him by this Act, or add duties to those imposed by this Act on his trustee with regard to inventories and accountings. But no expression of intent by any settlor shall affect the jurisdiction of the courts of this State over inventories and accounts of trustees, in so far as such jurisdiction does not depend upon the provisions of this Act."

⁷⁸ **"Power of Beneficiary.** Any beneficiary, if of full age and sound mind, may, if acting upon full information, by written instrument delivered to the trustee, excuse the trustee as to such beneficiary from performing any of the duties imposed on him by this Act or exempt the trustee from liability to such beneficiary for failure to perform any of the duties imposed upon the trustee by the terms of this Act."

It might have been feasible to provide that during the period that income is payable to beneficiaries, the waiver by the income beneficiaries alone will be sufficient to relieve the trustee of liability to render court accountings.

UNIFORM PRINCIPAL AND INCOME ACT

The Uniform Principal and Income Act has already been adopted in four states. Out of the need for certainty in trust administration, arbitrary rules are made in defining the rights of the life tenant and remainderman. The reason given by the Governor of Pennsylvania for vetoing the act⁷⁹ was that the Act favored the remainderman at the expense of the life tenants and permitted the accumulation of larger trust estates with the consequent diminishing of income to life tenants.

The Uniform Principal and Income Act does have the virtue of simplicity of application, and it meets some very trying problems in determining the apportionment of income and principal upon the death of a life tenant upon which courts have not been in complete accord.

It is provided in Section 2⁸⁰ that if the settlor of the trust makes provision contrary to the provisions of the Act, the Act shall not control. Section 3⁸¹ provides in part that all receipts of rents from real estate shall be

⁷⁹ See note 10 *supra*.

⁸⁰ "Section 2. Application of the Act—Powers of Settlor.

This act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this act."

⁸¹ "Section 3. Income and Principal—Disposition.

(1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself, or interest on money loaned, or interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income unless otherwise expressly provided in this act."

deemed income. This would dispose of the troublesome question of whether or not it were fairer to the remainderman to set up reserves for the deterioration or obsolescence of buildings. In several cases where the question has been judicially determined, it has been held improper to accumulate income to amortize the loss from the obsolescence or the deterioration of buildings situated upon real estate which is rented.⁸² This provision of the Act is consonant with the accepted practice.

There has been a difference of view on the matter of dividends of stock of a corporation other than the one which makes the declaration of the dividend. This Act, in Section 5,⁸³ follows the Massachusetts rule which holds such dividends to be income when paid from surplus.⁸⁴ In some states, they are held to be principal if the stock or other security represented was acquired by the declaring corporation before the creation of the trust,⁸⁵ but are held to be income if acquired after the creation of the

⁸² In re Edgar's Will, 282 N. Y. S. 795 (1935); Whitcomb v. Blair, 25 F. (2d) 528 (1928); Hubbell v. Burnet, 46 F. (2d) 446 (1931); Laffin v. Com. of Int. Rev., 69 F. (2d) 460 (1934); Smith v. Keteltas, 70 N. Y. S. 1065 (1901); on a boat, In re Chapman, 66 N. Y. S. 235 (1900).

⁸³ "Section 5. Corporate Dividends and Share Rights.

(1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee."

⁸⁴ Creed v. McAleer, 275 Mass. 353, 175 N. E. 761 (1931); Leland v. Hayden, 102 Mass. 542 (1869); Gray v. Hemenway, 212 Mass. 239, 98 N. E. 789 (1912) and 223 Mass. 293, 111 N. E. 713 (1916); Old Colony Trust Co. v. Jameson, 256 Mass. 179, 152 N. E. 52 (1926); Gray v. Hemenway, 268 Mass. 515, 168 N. E. 102 (1929); Lloyd v. Lloyd, 341 Ill. 461, 173 N. E. 491 (1930).

⁸⁵ U. S. Trust Co. of New York v. Heye, 224 N. Y. 242, 120 N. E. 645 (1918); In re Megrue, 224 N. Y. 284, 120 N. E. 651 (1918); Bourne v. Bourne, 240 N. Y. 172, 148 N. E. 180 (1925); Macy v. Ladd, 219 N. Y. S. 449 (1926); In re Flinn's Estate, 310 Pa. 206, 165 A. 31 (1932); Koehler v. Koehler, 99 N. J. Eq. 141, 132 A. 751 (1926); Foard v. Safe Deposit & Trust Co., 122 Md. 476, 89 A. 724 (1914).

trust.⁸⁶ By allocating to income all receipts except stock of the declaring corporation, the Massachusetts rule has the advantage of being easier to apply, because it does not necessitate inquiry into the time of acquisition of the stock or the source of the dividend. It may be that the so-called "New York" or "Pennsylvania" rule deals more equitably with the remainderman, but the technical distinction would perhaps often be lost sight of by individual trustees, who are not administering trusts professionally and to whom it would not occur to consult with legal counsel on dividend matters.

Similar differences of opinion exist as to extraordinary cash dividends, and the Massachusetts rule that cash dividends (other than liquidating dividends), however large, belong to income has been followed in this Act.⁸⁷ The majority of decisions, however, take into consideration the "intact value" of the principal and apportion extraordinary cash dividends between income and principal if the dividend was earned in part before the creation of the trust.⁸⁸

The problem of apportioning accrued income between life tenant and remainderman or successive life tenants

⁸⁶ *Sturgis v. Roche*, 217 N. Y. S. 79 (1926); *Macy v. Ladd*, 219 N. Y. S. 449 (1926); *In re Lavanburg's Estate*, 224 N. Y. S. 718 (1927); *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25 (1912).

⁸⁷ *Talbot v. Milliken*, 221 Mass. 367, 108 N. E. 1060 (1915); *Old Colony Trust Co. v. Shaw*, 261 Mass. 158, 158 N. E. 530 (1927); *Lannin v. Buckley*, 256 Mass. 78, 152 N. E. 71 (1926); *Minot v. Paine*, 99 Mass. 101 (1868); *Gibbons v. Mahon*, 136 U. S. 549, 10 S. Ct. 1057, 34 L. Ed. 525 (1890); *Lanston v. Lanston*, 290 F. 315 (1923); *Appeal of Harding*, 111 Conn. 325, 149 A. 846 (1930); *Smith v. Dana*, 77 Conn. 543, 60 A. 117, 69 L. R. A. 76 (1905); *Jackson v. Maddox*, 136 Ga. 31, 70 S. E. 865 (1911); *DeKoven v. Alsop*, 205 Ill. 309, 68 N. E. 930 (1903); *Lloyd v. Lloyd*, 341 Ill. 461, 173 N. E. 491 (1930); *Powell v. Madison Safe Deposit & Trust Co.*, 208 Ind. 432, 196 N. E. 324 (1935); *Thatcher v. Thatcher*, 117 Me. 331, 104 A. 515 (1918); *In re Joy's Estate*, 247 Mich. 418, 225 N. W. 878 (1929); *Hayes v. St. Louis Union Trust Co.*, 317 Mo. 1028, 298 S. W. 91 (1927); *Lamb v. Lehmann*, 110 Ohio St. 59, 143 N. E. 276 (1924).

⁸⁸ *Rhode Island Hospital Trust Co. v. Peckham*, 42 R. I. 365, 107 A. 209 (1919); *Earp's Appeal*, 28 Pa. St. 368 (1857); *In re Nirdlinger's Estate*, 290 Pa. 457, 139 A. 200 (1927); *In re Duffill's Estate*, 180 Cal. 748, 183 P. 337 (1919); *In re Gartenlaub's Estate*, 185 Cal. 375, 197 P. 90 (1921); *Baldwin v. Baldwin*, 159 Md. 175, 150 A. 282 (1930); *In re Jenkins' Estate*, 199 Wis. 131, 225 N. W. 733 (1929); *In re Dittmer's Estate*, 197 Wis. 304, 222 N. W. 323 (1928).

has also been realistically and practically dealt with in Section 4.⁸⁹ Rents were not apportionable at common law,⁹⁰ but they have been made so by statute in many states. It has been doubtful if any part of the interest on coupon bonds was payable to the income beneficiary or his estate if he died before maturity of the coupon. The Maine and Massachusetts rules⁹¹ in this particular were based upon the theory that each coupon is a separate negotiable obligation and is not severable and becomes income only on the maturity of the coupon. Massachusetts has changed this by statute.⁹² But in most states where the question has arisen, interest on coupon bonds has been held apportionable.⁹³ The provision of this Act which apportions interest represented by coupons will find

89 "Section 4. Apportionment of Income.

Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal."

⁹⁰ *Greene v. Huntington*, 73 Conn. 106, 46 A. 883 (1900); *Huff v. Latimer*, 33 S. C. 255, 11 S. E. 758 (1890); *Quinn v. Madigan*, 65 N. H. 8, 17 A. 976 (1889).

⁹¹ *Dexter v. Phillips*, 121 Mass. 178, 23 Am. Rep. 261 (1876); *Union Safe Deposit & Trust Co. v. Dudley*, 104 Me. 297, 72 A. 166 (1908).

⁹² Rev. Laws of Mass. 1932, Ch. 197, § 27.

⁹³ *Kahn v. Wells Fargo Bank & Union Trust Co.*, 137 Cal. App. 775, 27 P. (2d) 672 (1933); *Bridgeport Trust Co. v. Marsh*, 87 Conn. 384, 87 A. 865 (1913); *Wilmington Trust Co. v. Chapman*, 20 Del. Ch. 67, 171 A. 222 (1934); *U. S. Trust Co. v. Tobias*, 21 Abb. N. C. (N. Y.) 392 (1888); *Equitable Trust Co. v. Miller*, 189 N. Y. S. 293 (1921), affirmed in 233 N. Y. 650, 135 N. E. 955 (1922); *Wilson's Appeal*, 108 Pa. St. 344 (1885).

ready acceptance in those states where neither a decided case nor a statute now controls the situation. Annuities and interest on savings deposits, which were not apportionable at common law,⁹⁴ are likewise made so by the Act, which, it is submitted, fairly reflects most settlors' wishes, for income apportioned to the life tenant frequently is all that is available to pay the expenses of last illness and burial of the deceased life tenant. There is this draw-back, that by increasing the life tenant's right to accrued income it may become necessary in many cases to open administration of the deceased's estate to dispose of this income, when administration of the estate would not otherwise be necessary.

A slight difference of opinion also exists in determining the right of the estate of a deceased life tenant to share in dividends which have been declared after the death of the life tenant out of earnings during the period of the life tenancy, or before the death of the life tenant, but payable after his death.⁹⁵ Section 5 of the Uniform Principal and Income Act⁹⁶ establishes the right to the dividend by the date specified by the corporation to determine

⁹⁴ Savings deposits: *Greene v. Huntington*, 73 Conn. 106, 46 A. 833 (1900). Annuities: *Nehls v. Sauer*, 119 Iowa 440, 93 N. W. 346 (1903); *Chase v. Darby*, 110 Mich. 314, 68 N. W. 159 (1896); *Henry v. Henderson*, 81 Miss. 743, 33 So. 960 (1903); *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580 (1889); *Green v. Bissell*, 79 Conn. 547, 65 A. 1056 (1907).

⁹⁵ In New York and Pennsylvania dividends are apportionable by statute. In New Jersey there is a rebuttable presumption that dividends are earned uniformly from day to day and are apportioned accordingly unless the presumption is rebutted. See *Graves v. Graves*, 115 N. J. Eq. 547, 171 A. 681 (1934); *Lang v. Lang's Ex'r*, 57 N. J. Eq. 325, 41 A. 705 (1898); *Hagedorn v. Arens*, 106 N. J. Eq. 377, 150 A. 4 (1930); *Beattie v. Gedney*, 99 N. J. Eq. 207, 132 A. 652 (1926).

The remaining states do not permit apportionment of dividends. *Union and New Haven Trust Co. v. Watrous*, 109 Conn. 268, 146 A. 727 (1929); *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870 (1899); *In re Northern Central Ry. Div. Cases*, 126 Md. 16, 94 A. 338 (1915); *Nutter v. Andrews*, 246 Mass. 224, 142 N. E. 67 (1923); *In re Nirdlinger's Estate*, 290 Pa. 457, 139 A. 200 (1927); *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087 (1916); note, 83 A. L. R. 1261.

⁹⁶ "(5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend."

stockholders of record, or if none is specified, then by the date of declaring the dividend.

Section 5⁹⁷ also provides that all dividends of stock of the declaring corporation shall be allocated to principal. This is the rule followed in most of the states.⁹⁸ But in Kentucky and Delaware⁹⁹ such dividends were distributable as income. The Pennsylvania rule,¹⁰⁰ which has been adopted by many states, is that the presumption is that a stock dividend is declared out of earnings and belongs to the life tenant, but the intact book value of the original issue of stock must be maintained and it behooves the trustee to ascertain to what extent the surplus against which the new stock is issued represents earnings prior to the creation of the trust. It is obvious that the Pennsylvania and Kentucky rules favor the life tenant, but the rule adopted for this Section has the advantage of greater certainty over the Pennsylvania rule.

⁹⁷ "(1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee."

⁹⁸ *Old Colony Trust Co. v. Shaw*, 261 Mass. 158, 158 N. E. 530 (1927); *Lannin v. Buckley*, 256 Mass. 78, 152 N. E. 71 (1926); *Coolidge v. Grant*, 251 Mass. 352, 146 N. E. 719 (1925); *Eastman v. State Bank of Chicago*, 259 Ill. App. 607 (1931); *Rhode Island Hospital Trust Co. v. Tucker*, 52 R. I. 277, 160 A. 465 (1932).

⁹⁹ *Lightfoot v. Beard*, 230 Ky. 488, 20 S. W. (2d) 90 (1929); *Robinson v. Robinson's Ex'r*, 221 Ky. 245, 298 S. W. 701 (1927); *Goff v. Evans*, 217 Ky. 664, 290 S. W. 490 (1927); *Cox v. Gaulbert's Trustee*, 148 Ky. 407, 147 S. W. 25 (1912); *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778 (1892); *Dupont v. Peyton*, 15 Del. Ch. 255, 136 A. 149 (1927); *Bryan v. Aiken*, 10 Del. Ch. 1, 82 A. 817 (1912); *Ortiz v. Fidelity-Philadelphia Trust Co.*, 18 Del. Ch. 439, 159 A. 376 (1931).

¹⁰⁰ *In re Waterhouse's Estate*, 308 Pa. 422, 162 A. 295 (1932); *In re Duffill's Estate*, 180 Cal. 748, 183 P. 337 (1919); *Kalbach v. Clark*, 133 Iowa 215, 110 N. W. 599 (1907); *Baldwin v. Baldwin*, 159 Md. 175, 150 A. 282 (1930); *Goodwin v. McGaughy*, 108 Minn. 248, 122 N. W. 6 (1909); *In re Jenkins' Estate*, 199 Wis. 131, 225 N. W. 733 (1929); *In re Dittmer's Estate*, 197 Wis. 304, 222 N. W. 323 (1928).

In most states, excepting Pennsylvania, California, and New Hampshire,¹⁰¹ stock subscription rights are deemed principal, and Section 5 of this Act¹⁰² so provides. Paragraph (3) of Section 5 follows the more generally accepted view with regard to liquidating dividends, compromising slightly in favor of the intact-value-of-principal view, by allocating to income declared and arrears of guaranteed or preferred dividends. But it performs its greatest service in clarifying the situation in connection with dividends of a corporation in which a depletion of the principal assets takes place, as in mining, lumbering, or oil wells, where the amount of depletion may be difficult to determine and cover long periods of time. In such case the Act provides that the declaration of the corporation shall be accepted as to the amount of depletion.

Anomalous situations, so far as case law is concerned, are the stock distributions upon reorganizations under Section 77(b). Paragraph (4) of Section 5¹⁰³ is general in its terms and would, it is submitted, make disposition of such distributions to principal.

¹⁰¹ *Buder v. Franz*, 27 F. (2d) 101 (1928); *DeKoven v. Alsop*, 205 Ill. 309, 68 N. E. 930 (1903); *Powell v. Madison Safe Dep. & Trust Co.*, 208 Ind. 432, 196 N. E. 324 (1935); *Lauman v. Foster*, 157 Iowa 275, 135 N. W. 14 (1912); *Richmond v. Richmond*, 196 N. Y. 535, 89 N. E. 1111 (1909); *In re Jenkin's Estate*, 199 Wis. 131, 225 N. W. 733 (1929); *In re Merrill's Estate*, 196 Wis. 351, 220 N. W. 215 (1928). But see *In re Schnur's Estate*, 32 P. (2d) 970 (Cal., 1934); *Rockwell v. Dow*, 85 N. H. 58, 154 A. 229 (1931); *In re Hostetter's Estate*, 319 Pa. 572, 181 A. 567 (1935); *Jones v. Integrity Trust Co.*, 292 Pa. 149, 140 A. 862 (1928).

¹⁰² "(2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income."

¹⁰³ "(4) Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other."

Section 6¹⁰⁴ follows the minority view in the United States in charging premiums wholly to principal.¹⁰⁵ The majority view adheres to the amortization of premiums against income,¹⁰⁶ but this sometimes works a hardship on life tenants at times when good bonds uniformly sell at a premium. This view also has elements of uncertainty when premium bonds are sold at a premium before maturity and reinvestment is made in other premium bonds.

The disposition of the proceeds from wasting assets from real estate has always presented problems of allocation when such allocation was dependent upon whether the well or mine was opened at the creation of the trust. Although the rule prescribed by Section 9 of the Act¹⁰⁷ seems to be somewhat arbitrary and to be based upon an insubstantial distinction between rent from a lease and returns by way of royalty, it is not altogether harsh to the life tenant and appears to be workable.

104 "Section 6. Premium and Discount Bonds.

Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale any loss or gain realized thereon shall fall upon or enure to the principal."

¹⁰⁵ *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778 (1892); *In re Penn-Gaskell's Estate*, 208 Pa. 346, 57 A. 715 (1904); *Whitridge v. Williams*, 71 Md. 105, 17 A. 938 (1889).

¹⁰⁶ *In re Gartenlaub's Estate*, 185 Cal. 648, 198 P. 209, 16 A. L. R. 520 (1921); *Curtis v. Osborn*, 79 Conn. 555, 65 A. 968 (1907); *New England Trust Co. v. Eaton*, 140 Mass. 532, 4 N. E. 69 (1886); *Ballantine v. Young*, 74 N. J. Eq. 572, 70 A. 668 (1908); *In re Stevens*, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814 (1907); *In re Allis' Estate*, 123 Wis. 223, 101 N. W. 365 (1904); *In re Wells' Estate*, 156 Wis. 294, 144 N. W. 174 (1913).

107 "Section 9. Disposition of Natural Resources.

Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease or otherwise develop such natural resources, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit."

There has been very little law to guide trustees in the matter of disposing of the proceeds from unproductive real estate. A few cases hold that the income beneficiary was entitled to some portion of the net proceeds,¹⁰⁸ but in states where the question was not judicially determined, the tendency of cautious trustees more generally was in the direction of treating the entire proceeds as principal. Section 11¹⁰⁹ follows the rule of apportionment to the extent that the net proceeds represent profit and is a more equitable arrangement for income beneficiaries. With the full protection of this provision, after statutory enactment, there should be no reluctance to apportion the proceeds of sale.

The provisions of the Act regarding expenses of the trust follow the generally accepted rule that the regularly recurring charges should be paid out of income,¹¹⁰ but

¹⁰⁸ *Kinmonth v. Brigham*, 5 Allen (Mass.) 270 (1862); *Frankel v. Farmer's Loan & Trust Co.*, 209 N. Y. 553, 103 N. E. 1124 (1913); *In re Nordlinger's Estate*, 273 N. Y. S. 284 (1934); *Gould v. Gould*, 213 N. Y. S. 286 (1925); *Blakeley v. Marshall*, 174 Pa. St. 425, 34 A. 564 (1896); *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781 (1897).

¹⁰⁹ "Section 11. Unproductive Estate.

(1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year and until disposed of as hereinafter stated has not produced an average net income of at least one per centum per annum of its fair inventory value or in default thereof its market value at the time the principal was established or of its cost where purchased later, and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed, but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of five per centum per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive."

¹¹⁰ *Rothschild v. Weintheil*, 191 Ind. 85, 131 N. E. 917, 132 N. E. 687 (1921); *Dickinson v. Henderson*, 122 Mich. 583, 81 N. W. 583 (1900); *Goodwin v. McGaughy*, 108 Minn. 248, 122 N. W. 6 (1909); *Melvin v. Hoffman*, 290 Mo. 464, 235 S. W. 107 (1921); *Woodward v. James*, 115

extraordinary costs and expenses incurred in the protection, sale, or enhancement of principal shall be charged against principal.¹¹¹

The apportionment of taxes between successive life tenants or between life tenant and remainderman finds authority in a few cases¹¹² although taxes have been held not apportionable in others.¹¹³

Whether or not one concludes that the rights of income beneficiary and remainderman have been as equitably adjusted as is possible, one must admit that there is a considerable gain to all in a definite rule of law to guide the trustee and that the Uniform Principal and Income Act has disposed of the major problems in this field. This act imposes no additional burdens upon the creator of the trust or the cestuis. It does apprise the draftsman who is preparing the trust instrument that certain results will follow unless the settlor expresses himself in contrary fashion. It does not deter the settlor from making a provision as to the disposal of income contrary to the act or contrary to his own wishes, except as he may violate certain laws which, in any event, are fundamental to his disposing of property in trust.

N. Y. 346, 22 N. E. 150 (1889); *Rock Island Bank & Trust Co. v. Rhoads*, 353 Ill. 131, 187 N. E. 139 (1933).

¹¹¹ *Cogswell v. Weston*, 228 Mass. 219, 117 N. E. 37 (1917); *In re Duffill's Estate*, 188 Cal. 536, 206 P. 42 (1922); *Commercial Trust Co. of New Jersey v. Gould*, 105 N. J. Eq. 727, 149 A. 590 (1930); *Patterson v. Old Dominion Trust Co.*, 156 Va. 763, 159 S. E. 168 (1931); *In re Cole's Estate*, 102 Wis. 1, 78 N. W. 402 (1899); *In re Bechtoldt's Estate*, 266 N. Y. S. 408 (1933); *In re Dare's Estate*, 196 Cal. 29, 235 P. 725 (1925); *Gould v. Gould*, 213 N. Y. S. 286 (1925); *Commercial Trust Co. of New Jersey Bank v. Gould*, 105 N. J. Eq. 727, 149 A. 590 (1930).

¹¹² *In re Hone's Estate*, 274 N. Y. S. 101 (1934); *Matter of Johnson's Estate*, 84 Utah 168, 35 P. (2d) 305 (1934), discussed in 21 Va. L. Rev. 239 and N. Y. Law Jour., Aug. 11, 1934; *In re Schulz's Estate*, 231 N. Y. S. 677 (1928); *In re Fest's Estate*, 28 W. N. Cas. 415 (Pa., 1891); *In re Crump's Estate*, 13 Pa. Co. Ct. Rep. 286 (1893).

¹¹³ *Holmes v. Taber*, 91 Mass. 246 (1864); *Brodie v. Parsons*, 23 Ky. L. Rep. 831, 64 S. W. 426 (1901); *Robinson v. Bowler*, 18 Ohio C. C. N. S. 372; *Lantz' Estate v. McDaniel*, 99 Ind. App. 233, 190 N. E. 130 (1934). The foregoing charged taxes against life tenant, at time when they were assessed. *In O'Donnell v. Mathews*, 221 Mo. App. 657, 284 S. W. 204 (1926), held although assessed during life tenancy, they were not due and payable until after life tenant's death and were therefore charged against the next estate.