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CASE NOTES

DUTY OF TRUSTEE TO INSURE PROPERTY DEEDED TO HIM FOR PURPOSE OF SALE.—Does a duty to insure devolve upon a trustee in a deed of trust for purpose of sale? The Supreme Court of Appeals of West Virginia answered this question in the negative in *Kile* v. *Forman*,[1] a case involving a deed of trust to the defendant, Forman, of the legal title solely for the purpose of selling the property upon request of the beneficiaries. The deed of trust was in the nature of a mortgage, the grantor remaining in possession and control of the property. There was no provision in the trust instrument imposing upon the trustee the obligation to insure the premises. In pursuance of the trust the grantee advertised the property for sale. The sale, however, was restrained by a bill filed in a chancery proceeding to purge the secured debt of usury. The effect of the restraining order was to postpone the sale during the proceedings, which continued for more than two years. Meanwhile the court ordered that the trustee insure the buildings and that the premium be taxed as costs of the suit. In compliance with the order of the court, the trustee caused the buildings to be insured for one year. On the day after the insurance expired the buildings were burned. The grantor, on behalf of himself and the beneficiaries

[1] 113 W. Va. 313, 167 S. E. 744 (Feb. 7, 1933).

under the deed of trust, sued the trustee for the loss resulting from the trustee's failure to renew the insurance, the theory of the plaintiff's case being that the trustee breached his duty by not keeping the property insured.[2] A decree which overruled a demurrer was reversed on appeal.

Where there is no duty it is plain there can be no breach. The initial inquiry is whether there was a duty. The pleadings in the case indicated that the trustee was clothed with the legal title merely for the purpose of selling the property when the beneficiaries should request him to do so. There was no showing that the trustee had funds in his hands with which to pay for insurance on the property. It may be assumed, therefore, that there was no express requirement in the deed of trust that the trustee insure the premises. Was it, then, to be implied? It is established that the trust itself, whatever its character, constitutes the charter of the extent of the trustee's powers and duties.[3] The grantor may very properly require the trustee to insure the trust property and keep it insured while he holds it for the purpose of making a sale, provided he apprises the trustee of that duty in the instrument conferring the power upon him, and provided the trustee accepts the obligation thereunder and provision is made to reimburse him for the expense. In a carefully drawn trust instrument one would expect to find directions respecting insurance of the trust property, and the use and application of the proceeds in case of damage or destruction by fire, which directions are binding upon the trustee. But in the absence of directions to insure, whether such omission is by accident or by design, a reasonable person cannot require a trustee to take upon himself the burden of curing the defect and make him responsible for loss resulting from a failure to do so.

We may start with the proposition that directions in a trust agreement furnish the sole guide to the conduct of the trustee, and he must follow strictly those directions in the absence of conferred discretionary powers.[4]

The duties and powers of Forman in this case sprang from an instrument which clothed him with a power of sale. It is elementary that the powers of trustees under deeds of trust with power of sale depend entirely on the terms of the deeds.[5] "A power of sale, like all other powers, can be exercised only in the

[2] The power of the court to require the trustee to insure is discussed in 39 West Virginia Law Quarterly 364.

[3] John Norton Pomeroy, Jr., A Treatise on Equity Jurisprudence, (4th Ed.) III, sec. 1062.

[4] 26 R. C. L., p. 1372; Bryson v. Bryson, 62 Cal. App. 170, 216 P. 391 (1923).

[5] Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees, (7th Ed.) II, sec. 602g; Carter v. Carter, 87 W. Va. 254, 104 S. E. 558 (1920).

mode, and upon the exact conditions, terms, and occasions prescribed in the instrument of trust. . . .''[6] A power to sell is not an incidental to the office of trustee, for the theory of a trust in the beginning contemplated the trustee's holding and caring for the trust property to avoid feudal dues and incidents, and nothing more.[7] If, then, the duty to insure was not imposed by the deed of trust, it cannot be said to have been incidental to the power to sell, for we have seen that a power of sale is like all other powers and can be exercised only in conformity with the requirements of the document which creates it. Certainly a power to insure is no more incidental to the office of trustee than a power of sale.

Where the grantor has parted with his title to property and has given to the trustee the management and possession of it, good business judgment would seem to dictate that the trustee insure it against loss.[8] But where the trustee is not in possession of the property and is not expressly charged with its complete management, it is difficult to find a basis for imposing upon him the duty to insure the premises. If a duty to insure may be implied from a mere power to sell, why may not a duty to mortgage, to lease, to exchange, to repair or to make improvements be implied from such power? If we admit the soundness of this proposition, we must with equal breadth of mind concede that the limits of the implied powers and duties of trustees will be defined and bounded only by the grantor's fancy. But it is settled that a power to sell does not include a power to mortgage,[9] nor to lease,[10] nor to exchange.[11] The implied power of a trustee to make repairs will not be extended beyond such repairs as are necessary to preserve the trust estate. ''Regard should be had to the probable duration of the trust, in determining whether temporary and slight, or more permanent and thorough repairs, should be made.''[12]

In an Iowa case[13] the trust agreement gave the trustee full

[6] Perry on Trusts, sec. 783.

[7] Augustus Peabody Loring, A Trustee's Handbook, pp. 64-5.

[8] Perry on Trusts, sec. 527.

[9] Austin v. Parker, 317 Ill. 348, 148 N. E. 19 (1925); First National Bank v. National Broadway Bank, 156 N. Y. 459, 471, 51 N. E. 398 (1898); Heiseman v. Lowenstein, 113 Ark. 404, 169 S. W. 224 (1914).

[10] Seymour v. Bull, 3 Day (Conn.) 388.

[11] Holsapple v. Schrontz, 65 Ind. App. 390, 117 N. E. 547 (1917):

"Power to sell trust property does not authorize a trustee to barter or exchange it for other property. Such power can only be exercised in conformity with the requirements of the instrument by which the trust is created and in furtherance of the ends to be attained by the creation of the trust."

[12] Rathbun v. Colton, 15 Pick. (Mass.) 471, 484 (1834).

[13] Booth v. Bradford, 114 Iowa, 562, 87 N. W. 685 (1901), cited in Russell v. Russell, 109 Conn. 187, 145 A. 648 (1929).

power to dispose of the property and handle it as his own, the proceeds to be applied to specific debts of the cestui. It was expressly provided that the trustee should be repaid any money or expenses advanced in his efforts to protect and dispose of the property. The trustee expended a sum for repairs and improvements, which the court disallowed, saying: "A trustee cannot ordinarily make improvements, and charge the cost thereof to the beneficiary, unless clearly authorized by the instrument creating the trust. . . . He will, however, be allowed for repairs when such repairs are necessary to the preservation of the estate. . . . We do not think the trust agreement contemplated the making of permanent improvements, and are constrained to hold that defendant has not made such a showing with reference to repairs as that he should be allowed therefor."

In the principal case the trustee had advertised the property for sale, but he was restrained from consummating the sale by the act of the grantor in the usury proceeding. How did this action of the grantor affect the duty of the trustee? If no duty existed when the trust agreement was made and the duties of the trustee were undertaken, it cannot be said that other and more extensive duties were imposed when the grantor restrained the sale. The position of the grantor remained unchanged so far as the rents and profits were concerned, for it is not denied that he continued to receive them. Is there any basis for saying that the trustee's position should become more onerous by reason of the grantor's act in restraining the sale? "In determining whether the acts of a trustee have been prudent, within the meaning of the rule, we must 'look at the facts as they exist at the time of their occurrence, not aided or enlightened by those which subsequently take place' (per Peckham, J., in *Purdy* v. *Lynch,* 145 N. Y. 462, 475, 40 N. E. 232, 236); for it is an obvious truth that 'a wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by' (per Collin, J., in *Costello* v. *Costello,* 209 N. Y. at page 262, 103 N. E. 148, 152); and it is impossible to say that trustees are wanting in sound discretion 'simply because their judgment turned out wrong' (per Holmes, J., in *Green* v. *Crapo,* 181 Mass. 55, 58, 62 N. E. 956, 957)."[14]

The defendant's duty to insure the premises must emanate from the deed of trust and not from the grantor's subsequent act or from the action of the chancellor in making an order which required the trustee to obtain the insurance. The fact that Forman complied with the court's order and actually procured the insurance for one year can have no bearing on the case so far as his duty to the grantor is concerned. "The powers of trustees

[14] Re Fulton Trust Company of New York, 257 N. Y. 132, 177 N. E. 397, 77 A. L. R. 499, 502 (1931).

under deeds of trust . . . depend entirely upon the terms of the deeds. Such powers are created by, and exist in, the deeds, and of course they exist in the terms in which they are created, and in no others. . . . They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them."[15] The directions of the court in a proceeding instituted by persons interested in the property are imperative, and for a refusal or neglect to obey them a trustee is liable to punishment.[16] Forman would likewise have been liable to punishment for failing to comply with the order of the chancellor if the order was proper.

An English text writer states that "an executor has been held not to be answerable for having omitted to secure the safety of leasehold premises by insuring them against fire.[17] One of the distinctions between the estate of an executor and that of a trustee is in its duration. But where the trust is one to sell property, which in the ordinary course should be discharged without unusual delay, it can be said that the statement quoted will apply equally to such trustee and that he should not be answerable for an omission to insure the premises against fire, unless distinctly specified in the deed. The same writer states that a trustee is bound to make good the loss where he has suffered a policy to lapse through neglect to pay the premium, but he qualifies this by the provision that the trustee must have funds in hand for payment of the premiums, "for if he had none, and could procure none, he would be exempt from liability."[18] Forman had no funds in hand to pay the insurance premium and the effect of the chancellor's order that he insure was, as the Supreme Court of Appeals said, to require him to "advance money out of his own pocket, or to secure a credit from a third party," which the chancellor had no right to do. There are numerous cases which hold that a trustee is personally liable for materials ordered by him for the trust estate and on contracts made by him in its behalf, unless there be a special agreement to look only to the trust, and this even though the trustees acted under the court's order.[19]

[15] Perry on Trusts, sec. 602g.

[16] Pomeroy on Equity Jurisprudence, sec. 1064.

[17] Lewin's Practical Treatise on the Law of Trusts (13th Ed.), p. 274.

[18] Ibid., p. 945.

[19] Taylor v. Mayo, 110 U. S. 330, 335 (1884); Dantzler v. McInnis, 151 Ala. 289, 44 So. 193 (1907); Johnson v. Leman et al., 131 Ill. 609, 23 N. E. 435 (1890). The latter was a suit by a broker against the trustee of the Sherman House property in Chicago for commission earned in negotiating a loan for the best interests of the estate. In refusing to hold the estate liable, even though the services were useful to it, the court said:

"The general rule is, that the expenses of properly administering a trust are a lien, on behalf of the trustee, on the estate in his hands, and he will not be

It is true that courts have held that in some cases the duty to maintain reasonable insurance devolved upon the trustees, but these were situations where the trust was more comprehensive than the one under consideration here and where the nature of the trust justified the holding. One of these decisions was *Stamford Trust Company* v. *Mack*,[20] where the testator left a fund to defray the taxes on real estate and the expense of insurance during the continuance of the trust. When the fund became exhausted the trustee had no money at hand for the purposes stated and it became necessary to resort to either the principal or income of another fund or to sell a portion of the realty. Upon the trustee's seeking the direction of the court it was held to be the trustee's duty to maintain reasonable insurance on the property, the will having made an express bequest to pay taxes, insurance, and keep the land free of incumbrances, and that the trustee had power to sell a part of the realty to defray the cost of the insurance and to pay the taxes. This case is readily distinguishable from the present case in that the trustee in the Stamford case, in addition to the power of sale, was under the duty to maintain the building for the use of the testator's nieces and nephews while they remained unmarried or widowed, while in the West Virginia case the trustee's power of sale was not coupled with any such duty of maintenance but was solely to dispose of the property upon proper request of the beneficiaries.

Furthermore, the object of a trust to sell is the disposition of the property, and, in the absence of express provision for the necessary incidents of maintenance and preservation, such as repairs and insurance, these do not attach. Where the trustee is invested with the control and management of the property and the object of the trust is to keep the estate intact for a particular purpose, it is but natural to presume that the trustor intended that the trustee keep the property in repair and provide insurance. Any other conclusion would defeat the purpose of the trust.

compelled to part with his control of that estate until such expenses are paid. But this, unless it may be in exceptional cases, does not extend to persons employed by the trustee. In general, their only remedy for compensation is personal, against the trustee employing them." See also Hussey v. Arnold, 185 Mass. 202, 204, 70 N. E. 87 (1904), and People v. Abbott, 107 N. Y. 225, 13 N. E. 779 (1887). Griggs v. Nadeau, 221 F. 381 (C. C. A. 8th Cir., 1915), was a case where a broker sought to charge the estate of a decedent resident of Illinois for services in procuring purchasers for the Minnesota lands belonging to the estate. A judgment was rendered against two individuals as executors of the estate of King, deceased. The district court reversed the judgment, holding that an executor or administrator is without power to bind the estate he represents by his individual contract, unless expressly authorized by the will or by statute, or by an order of the probate court in which the administration is pending. A person thus employed, in the absence of such authority, must look to the executor, individually, who employed him.

[20] 91 Conn. 620, 101 A. 235 (1917).

"Trustees invested with general powers of control and management are not bound to strict limitations; they are justified in making ordinary repairs and improvements and insuring the property, and are allowed to hold the estate until reimbursed . . ."[21] Although the limitations are not so close where the trustee has general powers of management and control of real estate, yet even in such cases he cannot, in making repairs, go beyond the necessity of the case, at the risk of having his expenses disallowed.[22]

In the principal case, since there was no express obligation that the trustee insure the property and the trust was not one which required the maintenance of the property, can it be argued that the assumption by the trustee of the duties of his office made him an insurer of the property? The cases hold to the contrary and justify the statement that the trustee is not an insurer of trust funds or property, and is not answerable for losses not attributable to lack of fidelity or failure to exercise the care and prudence which ordinary men exercise in managing their own affairs, as where loss results from an error of judgment. Physicians and lawyers acting in good faith are not held accountable for normal errors of judgment—all the more reason then why a trustee, in all probability a layman, should not be held for similar errors.

It must not be forgotten that the sale was delayed for more than two years by the action of the grantor. In his suit against the trustee, the grantor purported to act on behalf of himself and the beneficiaries under the trust, and it is fair to presume that the persons interested in the sale consented to its postponement. There are cases which hold that where disaster follows a course which was assented to by the beneficiaries the trustee cannot be chargeable for the loss.[23]

Textwriters, in commenting upon the trustee's duty to insure, express favor for the view that the trustee "may" insure where the trust instrument does not expressly require it, if continued management of property is involved, but there is no positive statement that the trustee is *bound* to insure. "A trustee would probably be justified in insuring the property, and in case of loss the insurance money would belong to the cestui que trust; but where there is a tenant for life entitled to the income, it would be safer to have such tenant's consent before paying the premium out of his income. A mortgagee cannot insure at the expense of the mortgagor without a special stipulation to

[21] Note to Johnson v. Leman, 131 Ill. 609 in 19 Am. St. Rep. 63, 71.

[22] Bridge v. Brown, 2 Y. & C. C. C. 181, 63 Eng. Rep. 79 (1843).

[23] Swaine v. Hemphill, 165 Mich. 561, 131 N. W. 68 (1911). Pearson v. Gillenwaters, 99 Tenn. 446, 42 S. W. 9 (1897), petition for rehearing denied, 99 Tenn. 462, 42 S. W. 199.

that effect; and if he insures without such stipulation, he cannot charge the premiums to the mortgagor in his accounts."[24] This sentence is pertinent here, since the deed of trust was in the nature of a mortgage.

It is not disputed that if Forman, the trustee, had himself neglected to sell or offer the property for sale for a period of two years and the loss by fire had occurred in the meantime, he would be answerable for the loss.[25] But there was no such neglect here. The court was right in refusing to hold the trustee liable. The effect of a contrary holding would be to render trustees extremely reluctant to assume duties of the character involved here, and thereby incur liabilities which they could not have contemplated when they assumed the trust. Such an extension of the liability arising from the assumption of a duty to take title to, and sell property for, the benefit of third persons is contrary to the well-recognized limits of trustees' obligations in such cases, is unwarranted by the nature of the trust, and is unsupported by sound reason.

IN A FORECLOSURE PROCEEDING BROUGHT BY A TRUSTEE, ARE THE HOLDERS OF BONDS SECURED BY THE TRUST DEED NECESSARY OR PROPER PARTIES TO THE SUIT?—In the case of *Firebaugh* v. *Traff et al.*,[1] recently decided by the Supreme Court of Illinois, the court passed upon the question as to whether in a foreclosure proceeding brought by a trustee, the holders of bonds secured by the trust deed are necessary or proper parties to the suit. In an action brought by Firebaugh as trustee to foreclose upon the trust deed given to secure a bond issue of $160,000, the issue in the case was the necessity of joining the bondholders as parties. During the course of the proceedings, a subpoena duces tecum was served upon Firebaugh to compel him to produce the list of the names and addresses of the holders and owners of the bonds secured by the trust deed under foreclosure. For a refusal to comply with the order, Firebaugh was adjudged guilty of contempt.

Upon appeal to the Supreme Court, the court, in order to decide the validity of the commitment for contempt, had to consider and pass upon the validity of the subpoena issued by the master in chancery. The court held, in reversing the Superior Court, that the order requiring the production of the lists was invalid, and that Firebaugh was not in contempt of court for his failure to comply therewith. The court based its decision on the ground that the names were not material to prove any alle-

[24] Perry on Trusts, II, sec. 487.

[25] Lewin's Practical Treatise on the Law of Trusts (13th Ed.), p. 945.

[1] 353 Ill. 82, 186 N. E. 526.

gations under which the master was proceeding to take testimony for the reason that the bondholders were not necessary or proper parties to the foreclosure proceedings.

To consider properly the issue decided in this case, it is necessary to go afield somewhat and trace the early English cases from which this principle has been derived. From the time of its inception the principle was maintained for the purpose of convenience and to secure a remedy where otherwise it might be lost.

The early English cases while not involving bondholders as such, did involve the principle of representation, which is the principle applied in allowing the trustee to sue for and on behalf of the bondholders. John Adams[2] states that where several persons have distinct rights in a common fund and they are very numerous, one has been allowed to sue on behalf of all.

This was true of the early cases in England brought by seamen to recover for their share of the profits derived from engaging in privateering. In the case of *Leigh* v. *Thomas*,[3] which was a bill filed to compel an accounting of the prize money recovered for the capture of a ship, the bill was filed by two of the seamen who had been appointed by sixty-four of a crew of eighty to maintain the action on behalf of the whole crew. A demurrer was filed to the bill for want of necessary parties. The court in sustaining the demurrer stated that as a general rule all persons interested had to be made parties to the suit, but recognized, as a practical exception, that where, due to the number of interested parties, it is impossible to make them all parties, the action might be maintained by a few on behalf of the whole. The demurrer was sustained because the complainants failed to establish their authority to bring the action on behalf of the whole.

In a later case[4] of a like nature, the court allowed the action stating that due to the uncertainty of the whereabouts or existence of seamen, the action could be maintained by one on behalf of all in order not to deprive those who were entitled to relief of a chance to bring their action.

Another group of early English cases[5] in which a like principle was applied were those cases wherein several creditors sued a common debtor. Likewise, in those cases[6] where several legatees sought recovery against the executor, the courts held that the executor was also a trustee, and an adjudication binding upon him as to the trust res would bind all the legatees, who

[2] John Adams, The Doctrine of Equity, (4th Am. Ed.), p. 674.

[3] 2 Ves. Sr. 312, 28 Eng. Rep. 201.

[4] Good v. Blewitt, 13 Ves. Jr. 397, 33 Eng. Rep. 343.

[5] Adair v. The New River Co., 11 Ves. Jr. 429, 32 Eng. Rep. 1153.

[6] Allen v. Knight, 5 Hare 272, 67 Eng. Rep. 915.

were the cestuis que trustent. It is from these cases that Story[7] reaches the conclusion that the rights of the creditors or legatees will be bound by the decision of the court when fairly obtained for or against the trustees on behalf of the cestuis que trustent.

Decisions in the English land cases[8] followed, in which land was bought with a joint fund raised by subscriptions, and held by trustees for the benefit of the several subscribers. By virtue of the agreement, the trustee was given full power to control the land subject only to the terms of the undertaking. The courts in handling actions pertaining to the trust res under such circumstances held that the trustee was the party necessary to appear, and that he sufficiently represented the subscribers. These cases, though not directly in point, are the forerunners of the cases involving the rights of the bondholders.

One of the earliest cases in the United States was that of *Hays* v. *Dorsey*,[9] in which the trustee filed a bill to foreclose the trust deed. By way of defense, objection was made to the bill on the ground that the cestui que trust had not been joined as a party complainant. The court held that the trustee is the proper party to file a bill to foreclose, and that the cestui que trust need not be made a party.

The development of the entire theory underlying the trust deed as security for a bond issue was given a great impetus in the growth and expansion of the railroads in the United States.[10] In the case of *Shaw et al.* v. *Norfolk County Railroad Company et al.*,[11] a trust deed had been executed to secure a bond issue floated to raise funds for the construction of the railroad. Subsequently a bill was filed by the trustee in the trust deed to foreclose the trust deed. The railroad company filed a demurrer setting forth the failure to join the bondholders as complainants in the bill. The court overruled the demurrer, stating that the bondholders need not be made parties to the bill brought by the trustee to foreclose the trust deed.

The case of *Wright et al.* v. *Bundy*[12] was also a case in which the trustee in a trust deed executed by a railroad company filed a bill in equity to foreclose the trust deed. In its answer, the railroad sought a dismissal for failure to join the beneficiaries as complainants. In overruling the contention of the defendant, the court held that the beneficiaries under a trust deed, in an action brought by the trustee to foreclose the trust deed, are not necessary parties and need not be joined for any purpose.

[7] Joseph Story, Commentaries on Equity Pleadings, (9th Ed.), sec. 150.
[8] Alexander v. Cana, 1 De G. and Sm. 415, 63 Eng. Rep. 1129; Meux v. Maltby, 2 Swans. 277, 36 Eng. Rep. 621.
[9] 5 Md. 99.
[10] James G. Smith, American Law Review, Nov.-Dec. 1927, pp. 900-911.
[11] 5 Gray 162 (Mass.).
[12] 11 Ind. 398.

Pomeroy[13] makes the statement that the trustee, being vested with the legal interest, is the proper person to institute or defend actions involving the trust res, and to do such other things as can be done only by the one having the legal estate. It is evident that the trust res is considered as being solely under the control of the trustee and, therefore, in actions involving the trust res as such, the trustee is deemed to be the proper party to deal in respect thereto.

A New Jersey equity case,[14] while recognizing the general doctrine by its decision, placed a slight restriction upon it. This was a bill for foreclosure by the trustee under the trust deed. The defendant filed a demurrer to the bill, assigning as ground for the demurrer the want of the bondholders as parties complainant. The court in overruling the demurrer held that as a general requirement, in those cases where there are a large number of persons, some of whom may even be unknown to the orators, the courts of equity have permitted the orators to maintain the bill notwithstanding the want of parties, where it is plainly shown that the interests of the absent persons are sufficiently represented by the orators of the bill. By its decision, however, the court intimated that the exception would not be invoked where the beneficiaries were few in number or actually known to the complainants. It is quite probable that the court in its opinion in this case[15] was attempting to apply the equitable doctrine of representation that courts of equity, in applying the general principle in regard to the necessity for all interested persons being joined as parties to the suit, never allow it to produce inconvenience; and, therefore, where a joinder of all interested persons is practically impossible because they are unknown or too numerous, one or more may sue or be sued on behalf of the whole.[16]

Although the procedure of allowing the trustee to sue for and on behalf of the cestuis que trustent is somewhat akin to the doctrine of representation, the two are not one and the same, and can be readily distinguished. Under the theory of the doctrine of representation each one of the several persons interested have an equal right to assert; and, in order not to deprive some of their right, they are allowed to bring the suit for themselves and on behalf of the others. Where the trustee sues for and on behalf of the cestuis que trustent, the right to bring suit is vested in

[13] J. N. Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America, (Students' Edition), p. 550, sec. 989.

[14] Camden Safe Deposit and Trust Co. v. Dialogue, 75 N. J. Eq. 600, 72 A. 358.

[15] Camden Safe Deposit and Trust Co. v. Dialogue, 75 N. J. Eq. 600, 72 A. 358.

[16] Mitford's and Tylor's Pleadings and Practice in Equity, p. 22.

him, and, as a general proposition, the cestuis que trustent do not have any right or power to initiate a suit.[17] The attitude of the courts in respect to this question was ably stated in the case of *The New Jersey Franklinite Company* v. *Ames*,[18] wherein the court said that "The cestuis que trustent of a trust deed given to secure a bonded indebtedness were not necessary parties to a bill brought by the trustee to foreclose, whether the trust deed constituted a prior or subsequent encumbrance, or whether the trustee was complainant or defendant.

The courts have gone even further in holding that the trustee is the proper party to suits involving the trust deed as such, as in the case of *Miller and Knapp* v. *The Rutland and Washington Railroad Company et al.*[19] In this case the railroad company had executed three separate trust deeds each of which was given to secure an independent bond issue. It developed that the first trust deed was defectively executed, in that it was signed by the president of the railroad in his individual capacity and not as president. In an action brought by the trustees of the first trust deed to foreclose upon it, the trustees of the second and third trust deeds were made defendants. The defective execution of the first trust deed was raised in an attempt to have the second and third trust deeds declared as prior liens. The decree gave priority to the first trust deed when it was proved that the trustees of the other two trust deeds had had actual knowledge of the first trust deed at the time their trust deeds were executed. Objection was made by the bondholders under the second and third trust deeds, but the court refused to change the decree, stating that the knowledge of the trustees was binding upon the bondholders.

A Wisconsin case[20] similar in substance was decided in the same way. Here the action was brought by the trustee under the first trust deed to close out the second trust deed. Only the trustee of the second trust deed was made defendant, and objection was made that a final decree could not be rendered without making the bondholders parties. In granting the relief prayed for, the court held that the rights of the bondholders were fairly and fully represented by the trustee, could be adequately tried without making the bondholders parties, and therefore the bondholders did not have to be joined as parties to the suit.

[17] Sturges and Douglass v. Knapp et al., 31 Vt. 1; Seibert v. Minneapolis and St. Louis Railroad Co. et al., 52 Minn. 148, 53 N. W. 1134; Van Vechten and Sebring v. Terry et al., 2 Johns. Ch. 197 (N. Y.); Halsted v. Tyng et al., 3 Green 375 (N. J. Eq.).

[18] 1 Beasley 507 (N. J. Eq.).

[19] 36 Vt. 452.

[20] The Board of Supervisors v. The Mineral Point Railroad Company et al., 24 Wis. 93.

An action was brought to set aside a trust deed as being fraudulent in the case of *Winslow* v. *The Minnesota and Pacific Railroad Company et al.*[21] The trustee was made a party defendant as the party in interest in respect to the trust deed. A petition was filed by a bondholder asking leave of court to intervene and defend, alleging that the trustee was not performing his duties as required by the trust deed. The court stated that, in general, where an action is brought to set aside a trust deed, the bondholders are not necessary parties; but if facts exist to justify so doing, the bondholders may, in the discretion of the court, be admitted to defend. The petition in this particular case was denied for failure on the part of the petitioner to establish sufficiently the necessity for intervention.

A large volume of case law concerning this question is to be found in the cases arising in the Federal courts. A typical case illustrating this point is *Smith* v. *Bell.*[22] This was a bill filed by the trustee to foreclose the trust deed. There was only one cestui que trust. The defendant, grantor, questioned the jurisdiction of the Federal court, alleging that both he and the cestui que trust were residents of Oklahoma. The trustee was a resident of Pennsylvania. The court overruled the objection and granted the prayer of the bill. In sustaining its ruling the court held that the citizenship and residence of the trustee in the trust deed, and not that of the beneficiary, determines the jurisdiction of a Federal court to entertain a suit to foreclose the trust deed, because the trustee is, and the beneficiary is not, an indispensable party to the suit.

For proper authority pertaining to the capacity of the trustee to bring the suit on behalf of the cestuis que trustent in a Federal court, it is necessary to refer to the equity rules[23] of the Federal courts. Rule 37 states, in part, that every action shall be prosecuted in the name of the real person in interest, but a trustee of an express trust may sue in his own name without joining with him the party for whose benefit the action is brought. The context of this rule makes it evident that the right to bring or defend any action concerning the trust deed is vested in the trustee.[24]

The trustee is not only the proper and necessary party to the suit when he himself brings the action or is the party defendant actually being sued, but also in such cases where the trust res is

[21] 4 Minn. 313.

[22] 217 F. 243.

[23] United States Code Annotated, Equity Rules, Title 28, Rule 37.

[24] Kerrison et al. v. Stewart et al., 93 U. S. 155. See also Port Wentworth Terminal Corp. et al. v. Equitable Trust Co. of New York, 18 F. (2d) 379; American Tube and Iron Co. v. Kentucky Southern Oil and Gas Company et al., 51 F. 826.

involved incidentally. In all such cases where the trust res as such is involved in litigation, the trustee is the necessary party to the suit, and the bondholders need not be joined.[25] From the character and nature of his undertaking, the trustee is under the supervision and control of the equity courts, and is held strictly accountable for his conduct. Therefore the courts conclude that the trustee can be relied on to supervise sufficiently the interests of his cestuis que trustent.

The courts recognize that under special circumstances it is occasionally advisable to allow a bondholder or bondholders to intervene. The extent to which the courts exercise this qualification is to be found expressed in the case of *Investment Registry, Limited* v. *Chicago and Milwaukee Electric Railroad Company et al.*[26] The trustee of the trust deed involved in this case filed a bill asking for the appointment of a receiver. A holder of some of the bonds secured by the trust deed involved in this case filed a petition asking leave of court to intervene, setting forth as the necessity for intervention, facts tending to show a partiality in the trustee detrimental to the bondholders, disqualifying him as the true representative of the bondholders. The petition was denied by the court. In dismissing the petition, the court held that the right of the bondholders to intervene depended upon a showing of good cause; and held further that both the reasonableness of the cause and the method of determining the cause was discretionary with the court. The court held that it could hear and base the ruling as to the prayer of the petition upon the petition itself, upon the merits of the entire case, upon the return made in compliance with a rule to show cause, or upon all of them combined. It would appear from this decision that the courts were rather reluctant to grant petitions to intervene.

A further consideration of cases in which bondholders sought to intervene will make it clear that the courts are hesitant in allowing intervention. After the trustee had recovered a decree of foreclosure subject to specified conditions, several bondholders filed a petition to intervene for the purpose of having the conditions stricken from the decree.[27] The court held that the trustee represents the bondholders and, if he acts in good faith, whatever binds him binds them, although they are not actual parties to the suit; that they had no right, therefore, to be made parties, except where the trustee acted in bad faith; and that in fact the trustee here had acted properly.

In all the cases where the bondholders sought to intervene, the courts consistently held that the right to intervene did not

[25] Carpenter et al. v. Knollwood Cemetery et al., 198 F. 297.

[26] 213 F. 492.

[27] Farmers' Loan and Trust Co. v. Kansas City, Wyandotte & Northwestern R. Co. et al., 53 F. 182.

exist as a matter of right but was discretionary with the court.[28] Although the cases vary in their statement as to what would be sufficient ground to justify an intervention, the one underlying element to be found in them all is the existence of bad faith in the trustee. The court in *Bowling Green Trust Company* v. *Virginia Passenger and Power Company*[29] said that a court should be slow to interfere with a trustee in the apparent discharge of his duties, especially so where the purpose of the intervention is not to seek actual relief but to obstruct the trustee in the discharge of his duties.

In two cases in which the trustee was alleged to be representing conflicting interests and therefore incapable of faithfully performing his trust as to each interest, the court in each case considered the petition on the basis of whether there was an actual necessity for intervention in order to protect the interests of the bondholders. The petition in the one case[30] alleged that the trustee was trustee in twelve trust deeds upon the property of one railroad to secure as many bond issues, all of which were being foreclosed. In the foreclosure proceedings, however, a receiver had been appointed to administer the closing of the several bond issues. The court in denying the petition said that the mere fact that the same trustee is trustee under twelve trust deeds is not of itself sufficient ground for allowing intervention by the bondholders, in the absence of a showing of negligence on the part of the trustee or that there are conflicting interests between the several cestuis que trustent.

The other case[31] was a bill to foreclose filed by the trustee who represented several classes of bondholders. A petition to intervene was filed asking that a representative group of each class of bondholders be appointed and allowed to appear in the case on behalf of their class. The court granted the relief asked for by the petition, holding that where the same trustee represents several classes of bondholders, in the same property, whose interests are antagonistic, each class will be allowed to have an independent representative.

Illinois courts have consistently followed the principle of representation in such cases. The case of *The Chicago and Great Western Railroad Land Company et al.* v. *Peck et al.*[32] is fre-

[28] Wetmore et al. v. St. Paul and Pacific Railroad Co., 3 F. 177; Brown v. Denver Omnibus and Cab Co. et al., 254 F. 560; Continental and Commercial Trust and Savings Bank v. Allis-Chalmers Co., 200 F. 600; Palmer v. Bankers' Trust Co. et al., 12 F. (2d) 747; Elwell v. Fosdick et al., 134 U. S. 500.

[29] 132 F. 921.

[30] Clyde et al. v. Richmond and Danville R. Co. et al. (In Re Brown et al.), 55 F. 445.

[31] Farmers' Loan and Trust Co. v. Northern Pacific Railroad Co. et al., 66 F. 169.

[32] 112 Ill. 408.

quently cited by the courts in later decisions as having established the principle as applied in Illinois. It was there held that as a general rule of chancery procedure all persons interested in the subject matter of a suit had to be made parties and in an action to foreclose upon a trust deed the cestuis que trustent as well as the trustee should be made parties to the bill. The court further held that where the beneficiaries are very numerous and are sufficiently represented by their trustee, they need not all be made parties; the impracticability of making all the beneficiaries parties is sufficient reason for dispensing with the general rule. The principle as thus expressed has been followed ever since.[33]

From the decisions in all the cases considered herein, it can be concluded that the court in its ruling in the Firebaugh case followed and applied the principle that is approved and upheld in practically all the courts. Furthermore, taking into consideration the nature of a trust deed, the relation of the trustee to the cestuis que trustent, and his duties in regard thereto, the adopted principle is the proper one to be applied.

[33] The St. Louis & Peoria R. Co. v. Kerr et al., 153 Ill. 182; The Farmer's Loan and Trust Co. v. The Lake Street Elevated R. Co. et al., 173 Ill. 439; Chicago Title and Trust Co. v. Illinois Merchants Trust Co., 329 Ill. 334; Chandler v. O'Neil, 62 Ill. App. 418; Breed v. Baird, 139 Ill. App. 15; American Trust and Safe Deposit Co. v. 180 East Delaware Building Corp. et al., 262 Ill. App. 67. In view of the language of sections 23 and 24 of the Illinois Civil Practice Act it is not probable that the practice heretofore prevailing will be disturbed.