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## Trusts--Power of Court to Require Trustee in Deed of Trust to Insure

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such statutes can be and have been quickly and easily amended.<sup>8</sup> It would probably suffice to provide that the income should be taxed to the settlor if he could revest title in himself within a period deprivation of the income of which would be a substantial economic loss to the settlor. Three years may be suggested as an appropriate length for the period.

—FREDERICK H. BARNETT.

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TRUSTS — POWER OF COURT TO REQUIRE TRUSTEE IN DEED OF TRUST TO INSURE. — Pending a chancery suit charging usury in loans secured by a deed of trust for the benefit of creditors, the chancellor upon the suggestion of the trustee ordered him to procure insurance on buildings covered by the trust deed, which contained no provision for insurance. The order constituted insurance premiums part of the cost of the suit. The trustee insured for one year but the buildings were destroyed by fire one day after the expiration of the policy, and before the usury proceeding was finally settled. The grantor of the deed of trust, purporting to act for himself and the beneficiaries thereunder, sought to hold the trustee liable for the failure to renew the policy. A decree overruling a demurrer to the bill was reversed on appeal. The court held, in effect, that the decree requiring insurance was void for the want of jurisdiction. *Kile v. Forman*.<sup>1</sup>

From the facts as stated in the opinion, it seems that the court could have disposed of the case on the ground that the grantor was not a proper party to bring suit. For if the grantor had parted with his title, conveying to the trustee absolutely, the trustee's obligations were only to the beneficiaries; and on the other hand, if the conveyance were a deed of trust in the nature of a mortgage, the grantor remaining in possession and control, as apparently he did, the trustee owed him no fiduciary responsibilities, except those expressly designated in the trust instrument.<sup>2</sup>

But as between a beneficiary and a trustee, the latter owes

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<sup>8</sup> Thus on March 2, 1931, the Supreme Court decided that the estate of a settlor had been improperly taxed. A bill to amend the statute was introduced into the House of Representatives the next day, was passed unanimously by both Houses of Congress and signed by the President on the same day. See note (1931) 37 W. VA. L. Q. 438.

<sup>1</sup> 167 S. E. 744 (W. Va. 1933).

<sup>2</sup> In the absence of agreement or covenant no relation of trust or confidence exists between the beneficiary and trustee on one side and the grantor of a deed of trust on the other. *Summers v. County of Kanawha*, 26 W. Va. 159, 171 (1885).

the former fiduciary duties, which may vary somewhat with the nature of the trust. In an active trust situation where the trustee has control and management of the property, the courts are generally in accord on the proposition that the trustee must make necessary repairs,<sup>3</sup> pay taxes<sup>4</sup> and secure insurance.<sup>5</sup>

Under the deed of trust relationship of the principal case there probably was no duty at the inception upon the trustee to procure insurance.<sup>6</sup> But admitting this to be the rule, was the chancellor without jurisdiction to require insurance under the facts of the case? The trustee sought the aid of the court pending the usury proceeding which continued for over two years. A court of equity has broad power to protect and preserve the trust from destruction.<sup>7</sup> The chancellor has on occasion overridden the express language of the settlor in the matter of investments.<sup>8</sup> This power to protect the *res* would seem to be extensive enough to include the requiring of insurance. Whether it be appropriate in a given case so to require is a matter of propriety and not of fundamental jurisdiction and thus would not be subject to collateral attack. That the trustee may be subjected temporarily to the financial burden of the insurance is not controlling in the light of the accepted theory of trustee liability to third parties in trust administration.

—CHARLES W. CALDWELL.

<sup>3</sup> *Disbrow v. Disbrow*, 167 N. Y. 606, 60 N. E. 1110 (1901); 2 PERRY, TRUSTS AND TRUSTEES (6th ed. Baldes 1929) § 526.

<sup>4</sup> *Morris v. Joseph*, 1 W. Va. 256 (1866); PERRY, *op. cit. supra* n. 3, § 527.

<sup>5</sup> *Bridge v. Bridge*, 146 Mass. 373, 15 N. E. 899 (1888); PERRY, *op. cit. supra* n. 3, § 527.

To the effect that the money paid for insurance should come from the income of the life tenant, see *Stevens v. Mulcher*, 152 N. Y. 551, 46 N. E. 965 (1897).

<sup>6</sup> It has been stated as an elementary principal of law that the trustee's duties, powers and liabilities are defined and limited by the instrument creating the trust, and he can do with the trust property only what the instrument expressly or impliedly authorizes him to do. *Carter v. Carter*, 87 W. Va. 254, 104 S. E. 558 (1920); *George v. Zinn*, 57 W. Va. 16, 49 S. E. 904 (1904); *Miller v. Mitchell*, 58 W. Va. 431, 52 S. E. 478 (1905); *Diehl v. Cotts*, 48 W. Va. 255, 37 S. E. 546 (1900); and *Atkinson v. Beckett*, 34 W. Va. 584, 12 S. E. 717 (1890).

<sup>7</sup> *Stephens v. Collison*, 274 Ill. 389, 113 N. E. 691 (1903).

<sup>8</sup> In the investment of trust funds the chancellor, under the "doctrine of necessity", has the power to break in upon the trust and thwart the express intention of the settlor. *Pennington v. Metropolitan Museum of Art*, 65 N. J. Eq. 11, 55 Atl. 468 (1900).

Where the income is not sufficient to make repairs and pay taxes, the court can order a sale. *Gavin v. Curtin*, 171 Ill. 640, 49 N. E. 523 (1898). But see *New York Life Ins. Co. v. Kennedy*, 146 Va. 197, 135 S. E. 882 (1926), where the court said that a court of equity does not have the power to decree a sale on credit when the deed of trust requires cash, even though there would be a benefit to the beneficiaries and grantor.