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Kingsley A. Taft
Member of Ohio bar

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*Kingsley A. Taft**

ALTHOUGH, under certain circumstances, the beneficiaries also may be able to enforce them,[1] it is well settled that a successor trustee has the power to assert and enforce claims against his predecessor trustee for breaches of trust by the predecessor.[2] Generally, wherever the circumstances are such that certain action or inaction by beneficiaries would bar them from taking advantage of a particular remedy if they were not under any incapacity, such action or inaction by the successor trustee will likewise be a bar.[3] Therefore, in considering what remedies are available to the successor trustee and what activity or inactivity of that trustee may bar those remedies, reference will be made not only to those authorities dealing with claims by a successor trustee against his predecessor but also those authorities dealing with claims asserted directly by a beneficiary against his trustee.

EXTENT OF DUTY TO LOOK FOR AND ENFORCE SUCH CLAIMS

After a successor trustee is appointed, his first duty is to get possession of all of the trust estate.[4] In doing this, he must necessarily examine the property which is turned over to him by the predecessor trustee and at least examine his predecessor's accountings so as to satisfy himself that he has apparently obtained possession of the whole trust estate.[5]

*A.B., Amherst; LL.B., Harvard; Member of Ohio bar.—*Ed.*

[1] 2 SCOTT, TRUSTS 1568 et seq. (1939).

[2] 1 TRUSTS RESTATEMENT, § 177, comment a, § 223, comment d (1935); In re Straut's Estate, 126 N. Y. 201, 27 N. E. 259 (1891); 3 SCOTT, TRUSTS 1556 et seq. (1939).

[3] 3 SCOTT, TRUSTS 1777 et seq. (1939); Hart v. Citizens' Nat. Bank, 105 Kan. 434, 185 P. 1 (1919); Veazie v. McGugin, 40 Ohio St. 365 (1883); Smith v. Baker, L. R. 8 C. P. 350 (1873) (trustee in bankruptcy). But cf. Head v. Gould, [1898] 2 Ch. 250 (infant cestui allowed relief against predecessor trustee when conduct of successor trustee would ordinarily have barred it).

[4] 2 SCOTT, TRUSTS 1182 (1939); 3 BOGERT, TRUSTS AND TRUSTEES 1838 (1935).

[5] Villard v. Villard, 219 N. Y. 482, 114 N. E. 789 (1916); In re Brooke's Estate, 321 Pa. 529, 184 A. 54 (1936); State Street Trust Co. v. Walker, 259 Mass. 578, 157 N. E. 334 (1927) (liable for failure to enforce claim against predecessor where reasonable examination of particular asset would have disclosed probable claim because he should not have acquired it for trust). See In re Komara's Estates, 311 Pa. 135, 166 A. 577 (1933); Kendall v. DeForest, (C. C. A. 2d, 1900) 101 F. 167.

If such an examination discloses something suspicious, or if there is some reason to question the integrity of the predecessor trustee, the successor trustee must make an additional, more extensive investigation, to determine whether his predecessor has properly administered the trust estate and fully accounted.[6] If not, the successor trustee should not be under any obligation to make such an investigation on the chance that his predecessor may have concealed some wrong to the trust. In other words, the successor trustee should be protected if he assumes that, in the absence of any indications to the contrary, his predecessor acted honestly and without negligence in administering the trust.[7] In these times, for example, even a substantial depreciation in the value of trust assets might not necessarily require such additional examination, if the depreciated trust assets were, on their face, proper trust investments and there were no other suspicious circumstances.[8]

Suppose that the successor trustee does learn facts which lead him to believe that, in acquiring certain property for the trust, his predecessor had an interest adverse to that of the trust estate. It is fundamental that it is improper for, and a breach of trust by, a trustee to acquire property for a trust where he has an interest in such acquisition adverse to the interests of the trust.[9] Where the predecessor trustee

[6] State Street Trust Co. v. Walker, 259 Mass. 578, 157 N. E. 334 (1927).

[7] See Spooner v. Dunlap, 87 N. H. 384, 180 A. 256 (1935); Spillios v. Papps, 288 Mass. 23, 192 N. E. 155 (1934).

See also 4 BOGERT, TRUSTS AND TRUSTEES 2497 (1935) ("The trustee is aided by the presumption of the regularity of his proceedings"); Offenstein v. Gehner, 223 Mo. 318 at 324, 122 S. W. 715 (1909) ("The presumption is that the trustee has acted in good faith, and has done his duty and the burden is on the plaintiff to allege and prove the contrary"); Speers Sand & Clay Works v. American Trust Co., (C. C. A. 4th, 1927) 20 F. (2d) 333.

This problem is analogous to the problem as to what duty of inquiry is imposed upon directors relative to the administration of a bank by its employees. See 7 AM. JUR. 222 (1937).

[8] Courts take judicial notice of the fact of a general decline of prices during periods of depression like the present. First Nat. Bank of Birmingham v. Basham, (Ala. 1939) 191 So. 873. See 20 AM. JUR. 127-128 (1939). If such a fact is sufficiently well known to be judicially noticed, depreciation in the value of trust assets should not, without other circumstances, arouse any suspicion about the trust's administration.

[9] 2 POMEROY, EQUITY JURISPRUDENCE, 4th ed., 2045 (1918); 1 TRUSTS RESTATEMENT, § 170, comments b, h, i, n. § 206, comment c (1935); 3 BOGERT, TRUSTS AND TRUSTEES 1541 (1935); Scott, "The Trustee's Duty of Loyalty," 49 HARV. L. REV. 521 at 539, 543 (1936); 44 HARV. L. REV. 1281 (1931); annotations, 105 A. L. R. 449 (1936), 112 A. L. R. 780 (1938).

It is generally held, however, that a sale of property by a trustee of one trust to himself, as trustee of another trust, is proper if the trustee shows that the transaction was fair to both trusts. 1 TRUSTS RESTATEMENT, § 170, comment q (1935); French

has done this, a so-called "self dealing" claim can be asserted against him.

The duty of the successor trustee in the supposed case is clear. Unless the expenses of asserting it, as compared to the probable recovery and chances of success, indicate that the assertion of a claim will probably not benefit the trust estate,[10] he must assert a claim against his predecessor, and he must take reasonable steps to enforce it. He will be liable for damages to the extent to which a loss results from his failure to take such steps.[11]

REMEDIES AVAILABLE

1. *Recovery of Loss to Trust Estate at Time of Wrongful Acquisition*

Of course, if the improper (because of the adverse interest of the predecessor trustee) acquisition by his predecessor has been profitable to the trust estate, the successor may, and should, elect to ratify the improper acquisition. In addition, if the predecessor trustee profited by that improper acquisition, the successor can still hold the predecessor accountable for any profit which the latter made at the expense of the

v. Hall, 198 Mass. 147, 84 N. E. 438 (1908); Springfield Safe Deposit & Trust Co. v. First Unitarian Society, (Mass. 1936) 200 N. E. 541; Barker v. First Nat. Bank of Birmingham, (D. C. Ala. 1937) 20 F. Supp. 185; Lima First American Trust Co. v. Graham, 54 Ohio App. 85, 6 N. E. (2d) 33 (1936); Scott, "The Trustee's Duty of Loyalty," 49 HARV. L. REV. 521 at 533 (1936). In such a situation the trustee of the selling trust necessarily has an interest adverse to the purchasing trust. This rule gives the beneficiary less protection from his trustee than the protection given a principal from his agent. See 2 AGENCY RESTATEMENT, § 313(2) (1933). There is no justification for such a rule. If an agent is not permitted to serve two masters at the same time, it would seem to follow *a fortiori* that a trustee should not be permitted to serve two beneficiaries who have conflicting interests in the same transaction. The need for protecting the average beneficiary of a trust from possible injury by his trustee would seem to be far greater than the need for protecting the average principal from possible injury by his agent. See Barker v. First National Bank, supra; Shanley's Estate v. Fidelity Union Trust Co., 5 N. J. Misc. 783, 138 A. 388 (1927); Connell's Estate, 32 Pa. Dist. & Co. 20 (1938).

This article will not consider the liability of a corporate trustee for retaining its own stock which was a part of the trust estate on the appointment of such trustee. See In re Paterson Nat. Bank, 125 N. J. Eq. 73, 4 A. (2d) 59 (1939).

[10] 2 SCOTT, TRUSTS 938, 1045 (1939); In re Hartje's Estate, 320 Pa. 76, 181 A. 497 (1935); Hobday v. Peters, 28 Beav. 603, 54 Eng. Rep. 498 (1860).

[11] 1 TRUSTS RESTATEMENT, § 223 (1935); McClure v. Middletown Trust Co., 95 Conn. 148, 110 A. 838 (1920); Bennett v. Pierce, 188 Mass. 186, 74 N. E. 360 (1905). Perhaps the trustee's ignorance of the law giving a right of action against his predecessor might be an excuse for failing to take such steps. See Miller v. Proctor, 20 Ohio St. 442 (1870).

trust.[12] The successor can do this, even where the improper acquisition has caused no loss to the trust estate.[13]

Likewise, where the predecessor trustee, although not himself profiting by the improper acquisition, permitted someone else to profit at the expense of the trust estate by intentionally[14] causing the trust estate to pay more for the particular property than it was worth, the successor trustee can hold his predecessor accountable for the excess in price which he caused the trust estate to pay. The predecessor has, in effect, given part of the trust assets to someone else, by paying the excessive price for the property improperly acquired. He should be required to account for the part of the trust estate so improperly diverted from the trust.

However, it may be decidedly disadvantageous to the trust estate to rely merely upon the right to get back, in one instance, the profit made by the trustee, and, in the other, the excess in price paid for the property improperly acquired. For example, if the relief which could be obtained by seeking such profit or excess in price, plus the then value of the particular property improperly acquired, is less than the amount expended for that property, with allowable interest to date, the trust estate can obviously not be made whole by merely getting such profit or excess in price. Under such circumstances, the successor trustee should be interested in making his predecessor account for the depreciation in the value of the particular property improperly acquired.

[12] 2 SCOTT, TRUSTS 876, 903 (1939); White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897); Carey v. Safe Deposit & Trust Co., 168 Md. 501, 178 A. 242 (1935). See Kimber v. Barber, L. R. 8 Ch. App. 56 (1872).

But probably not where the sale was of property not purchased for the purpose of resale. Even then, however, the successor trustee or beneficiary probably has a right of rescission. Scott, "The Trustee's Duty of Loyalty," 49 HARV. L. REV. 521 at 541 (1936).

[13] Magruder v. Drury, 235 U. S. 106, 35 S. Ct. 77 (1914); White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897); Benson v. Heathorn, 1 Y. & C. C. 325, 62 Eng. Rep. 909 (1842); Bentley v. Craven, 18 Beav. 75, 52 Eng. Rep. 29 (1853).

The trustee may be held accountable for a profit made at the time of the wrongful acquisition, as well as for damages resulting therefrom. In re Smith, [1896] 1 Ch. 71.

[14] See Benson v. Heathorn, 1 Y. & C. C. 325, 62 Eng. Rep. 909 (1842); 1 TRUSTS RESTATEMENT, § 210, comment b (1935). If the trustee has unintentionally but negligently permitted someone else to so profit at the expense of the trust estate, he would be accountable for the excess in price paid or for the damages resulting from his negligence by way of depreciation in value of the assets acquired. This result necessarily follows from the trustee's duty to use care and skill to preserve the trust property. See 2 SCOTT, TRUSTS 932 (1939). However, in the absence of intention to harm the trust or of possible advantage to the trustee, there would seem to be no ground for the rescission of the transaction. Where the trustee has, unintentionally and without negligence, permitted someone else to profit at the expense of the trust, he will not be liable. In re Smith, [1896] 1 Ch. 71.

2. *Recovery of Depreciation in Value of Property Improperly Acquired*

(a) *Equitable Lien or Rescission Remedy*

It is well settled that the successor trustee can hold his predecessor accountable for the depreciation in the value of the property improperly acquired by rejecting such property, claiming from his predecessor the amount paid for it with allowable interest, and asserting an equitable lien against the property.[15] In so rejecting the improperly acquired property, the successor trustee is treating that property as belonging to his predecessor, subject to the equitable lien which he asserts against it. He is, in effect, rescinding the transaction by which his predecessor purported to acquire that property for the trust estate.

(b) *Damage Remedy*

If the successor trustee knows all the material facts and treats the property so improperly acquired by his predecessor as a part of the trust estate, can he still hold his predecessor liable for its depreciation in value? In order to do so, the successor trustee, by showing the adverse interest of his predecessor, would argue that his predecessor was under a duty not to acquire that property for the trust estate. Then, he would contend that the trust estate had been damaged to the extent of the depreciation in value of the property so improperly acquired as a result of the violation of that duty by his predecessor.

It is usually stated broadly that, where damages result to a trust estate as a result of a breach of the trustee's duty to the trust estate, the trustee becomes liable to the trust estate on account of such damages.[16]

[15] 2 SCOTT, TRUSTS 876, 1120 (1939); Scott, "The Trustee's Duty of Loyalty," 49 HARV. L. REV. 521 at 540 (1936); In re Harbeck's Estate, 142 Misc. 57, 254 N. Y. S. 312 (1931); Francis v. Francis, 5 De G. M. & G. 108, 43 Eng. Rep. 811 (1854); see In re Salmon, L. R. 42 Ch. Div. 351 at 357 (Ct. App. 1889); In re Mendel's Will, 164 Wis. 136, 159 N. W. 806 (1916).

This article will not consider any rights which the successor trustee might have to impress a constructive trust on property acquired by the predecessor with the money received by the predecessor on the sale of his own property to the trust, or to impress a constructive trust on the product of such property; or to assert that his general claim against the predecessor trustee is secured by an equitable lien on all or some part of the predecessor trustee's general assets. See Scott, "The Right to Follow Money Wrongfully Mingled with Other Money," 27 HARV. L. REV. 125 (1913); and Taft, "A Defense of a Limited Use of the Swollen Assets Theory where Money has Wrongfully been Mingled with Other Money," 39 COL. L. REV. 172 (1939).

[16] 1 TRUSTS RESTATEMENT, § 205 (1935).

DISADVANTAGES OF THE DAMAGE REMEDY AS COMPARED TO THE EQUITABLE LIEN REMEDY

1. *Doubt as to Existence of Damage Remedy*

In determining whether the successor trustee can treat the improperly acquired property as part of the trust estate and still recover damages resulting from its acquisition, the nature of the improper acquisition must be considered. Many authorities fail to do this, and give the impression that, wherever there is a self dealing transaction, a successor trustee or beneficiary must either promptly rescind and pursue the equitable lien remedy or be barred from any relief whatsoever.[17]

If the property improperly acquired could have been properly acquired for the trust but for the adverse interest of the trustee in such acquisition and if a fair price was paid for it, it can hardly be argued that the acquisition damaged the trust. However, in order to guard against any possible wrong to the trust, the law gives the beneficiary or the successor trustee a right to rescind the acquisition within a reasonable time after learning the facts. This right to rescind is not based upon any harm which the predecessor trustee caused but is given to protect the trust from any harm that he might have caused to the trust and which the beneficiary or successor trustee might not be able to discover.[18]

[17] 4 BOGERT, TRUSTS AND TRUSTEES 2716 (1935); 2 SCOTT, TRUSTS 1160 (1939); 1 TRUSTS RESTATEMENT, § 218 (1935) ("if . . . the beneficiary affirms the transaction, he cannot thereafter reject it and hold the trustee liable for any loss accruing after the . . . transaction"); ibid., comment d; but cf. ibid., § 210, comment b. Cf. 2 AM. JUR. 223 (1936), on agency; but cf. 2 AGENCY RESTATEMENT, § 416 (1933).

In 4 SEDGWICK, DAMAGES, 9th ed., 2585 (1912) it is said: "A suit against a trustee is within the exclusive jurisdiction of equity and the relief administered is ordinarily a decree for an account. Where this is the case, the principles of the law of damages have no place."

[18] 2 POMEROY, EQUITY JURISPRUDENCE, 4th ed., 2045 (1918); 44 HARV. L. REV. 1281 (1931); 3 BOGERT, TRUSTS AND TRUSTEES 1515, 1542 (1935); 2 SCOTT, TRUSTS 875 (1939); 1 TRUSTS RESTATEMENT, § 170, comment h (1935); Re Filardo, 221 Wis. 589, 267 N. W. 312 (1936); Ottawa Banking & Trust Co. v. Crookston State Bank, 185 Minn. 22, 239 N. W. 666 (1931); In re Bender's Estate, 122 N. J. Eq. 192, 192 A. 718 (1937), affd. 123 N. J. Eq. 171, 196 A. 677 (1938). See Piatt v. Longworth's Devisees, 27 Ohio St. 159 at 195 (1875).

But cf. recent cases refusing remedy by way of rescission where the trustee carried trust assets in his own name without designation that they were held in trust, on ground that that was not the cause of loss to trust estate. Chapter House Circle v. Hartford National Bank & Trust Co., 121 Conn. 558, 186 A. 543 (1936), noted 35 MICH. L. REV. 516 (1937); Rotzin v. Miller, 134 Neb. 8, 277 N. W. 811 (1938); Cox v. Camden Safe Deposit & Trust Co., 124 N. J. Eq. 490, 2 A. (2d) 473 (1938); In re Guthrie's Estate, 320 Pa. 530, 182 A. 248 (1936); In re Harton's Estate, 331 Pa. 507, 1 A. (2d) 292 (1938); Springfield Safe Deposit & Trust Co. v. First

In the absence of proof that the price paid was unfair, the beneficiary or successor trustee must rescind the transaction of purchase within a reasonable time after learning the facts giving a right to rescind, in order to recover anything from the predecessor trustee and to avoid a holding that there has been an election to ratify the transaction.[19]

Where, however, it can be shown that an unfair price was paid for the property or that the trustee had no power to acquire the property, the situation is different. If the unfair price was paid knowingly, the beneficiary or successor trustee should have an action for damages against the predecessor trustee.[20] If the unfair price was paid as a result of negligence of the predecessor trustee, the beneficiary or successor trustee would have an action for damages based upon the failure of the predecessor trustee to perform his duty to use due care in the

Unitarian Society, (Mass. 1936) 200 N. E. 541; Voorhies v. Blood, 127 Fla. 337, 173 So. 705 (1937). Perhaps these cases and those which permit a trustee of one trust to buy from himself, as trustee of another trust (supra, note 9), mark the beginning of a departure from the general rule permitting rescission in cases of self dealing regardless of whether the transaction was fair to the trust. As supporting a tendency toward such a departure, see In re McGuffey's Estate, 123 Pa. Super. 432, 187 A. 298 (1936); First Nat. Bank of Birmingham v. Basham, (Ala. 1939) 191 So. 873; In re Harper's Estate, 98 Mont. 356, 40 P. (2d) 51 (1934).

[19] Hoyt v. Latham, 143 U. S. 553, 12 S. Ct. 568 (1892). The acquisition is wrongful only because of the self-interest of the trustee. To protect the trust estate, the acquisition can be rescinded, even though there is no other ground of complaint. See note 18, supra. For the same reason, a right to rescind may be given solely on the ground that an investment is wholly unauthorized. In the latter case the predecessor trustee cannot be held liable for damages if the successor sells the unauthorized investment without notice to the predecessor. See In re Salmon, L. R. 42 Ch. Div. 351 (Ct. App. 1889). Such a sale without notice to the predecessor would recognize the acquisition as having been within the power of the predecessor trustee. If he was authorized to acquire the investment, such acquisition would not be wrongful. If not wrongful, he should not be liable for damages resulting therefrom. The subsequent decision in In re Lake, [1903] 1 K. B. 439, while recognizing the principles enunciated in In re Salmon and purporting to follow them, does not do so when it holds that the successor trustee can recover for depreciation in value of a wholly unauthorized investment after treating it as a trust investment and so recognizing as rightful that which would otherwise have been wrongful.

[20] Such action would be analogous to that of a vendee against a vendor on account of a sale induced by fraud of the vendor. The trustee has, in effect, made a false representation by concealing from the cestui the fact that he paid an unfair price. 12 R. C. L. 311 (1916). The defrauded vendee may elect to rescind or to recover damages caused by the fraud. See Shappirio v. Goldberg, 192 U. S. 232 at 242, 24 S. Ct. 259 (1903), stating, "when a party discovers that he has been deceived . . . he may resort to an action at law to recover damages, or he may have the transaction set aside . . . by . . . rescission of the contract. If he choose the latter remedy, he must act promptly. . . ."

administration of the trust.[21] If the trustee had no power to acquire the property, he might be liable for damages resulting from his breach of trust in acquiring it.[22]

These actions for damages where an unfair price has been paid, either knowingly or negligently or where the trustee had no power to acquire the property, could be asserted even where the trustee had no interest adverse to the trust in the acquisition of the property.[23] Those authorities which give the impression that, wherever there is a self dealing transaction, the successor trustee or beneficiary must either promptly rescind and pursue the equitable lien remedy or be barred from any relief whatsoever, probably state the rule too broadly.[24] They should not be applied, for example, where, in the self dealing acquisition, an unfair price was paid, either knowingly or negligently, by the predecessor trustee. Where, however, the only complaint which can be made about the acquisition is that the predecessor trustee had an interest in it adverse to that of the trust, it is probably accurate to say that the successor trustee must, after knowledge of his rights, either rescind the transaction or be barred of any remedy.

2. *The Amount of Damages*

Where the equitable lien remedy can be asserted, the general claim against the predecessor is for the full amount expended by him in the improper acquisition,[25] less the amount received back, and represents at least the full depreciation of the property improperly acquired to the date upon which the value of the claim against the insolvent estate is

[21] Fry v. Tapson, L. R. 28 Ch. Div. 268 (1884); In re Salmon, L. R. 42 Ch. Div. 351 (Ct. App. 1889); In re Olive, L. R. 34 Ch. Div. 70 (1886). See Hunsberger v. Guaranty Trust Co., 164 App. Div. 740, 150 N. Y. S. 190 (1913), affd. 218 N. Y. 742, 113 N. E. 1058 (1915).

[22] Conover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 A. 844 (1917), affd. 89 N. J. Eq. 584, 106 A. 890 (1918); In re Lake, [1903] 1 K. B. 439. However, it would seem that an election to treat the wrongfully acquired property as trust property should bar recovery for damages on the ground that such election would recognize the acquisition as within the power of the trustee and that, if the power of the trustee was so recognized, he could not be held liable for damages on the ground that he did not have that power. See note 19, supra.

[23] UNDERHILL, TRUSTS AND TRUSTEES, 8th ed., 473 (1926). See cases cited in notes 21 and 22, supra.

[24] However, the rule is probably not stated too broadly in those jurisdictions where the only recovery allowed against the trustee for paying the unfair price is for the excessive amount of the price paid. See note 27, infra. There is always such a liability on the trustee for intentionally or negligently losing trust assets by paying the excessive price. See 1 TRUSTS RESTATEMENT, § 210, comment b after illustration 4 (1935). But see ibid., § 218, comment d. Cf. note 14, supra.

[25] See note 15, supra.

fixed. The transaction whereby the predecessor improperly acquired the property is regarded as rescinded and there is no difficulty in fixing the amount of the general claim. If the remedy is successfully asserted and the predecessor trustee has remained solvent, the trust estate is clearly made whole. If the predecessor trustee has not remained solvent, the successor trustee has, in addition, a lien against any remaining part of the improperly acquired property as security for the payment of the general claim until that general claim is paid in full.[26]

Where the damage remedy is asserted, however, serious questions may arise as to the amount which can be recovered. Where an unfair price was paid, the damages might be limited either to the excess in price paid,[27] or to the difference between the price paid with allowable interest and the value within a reasonable time after the discovery by the beneficiary or successor trustee of the material facts upon which the claim was based.[28] However, depreciation after such discovery might be allowed.[29]

[26] See note 15, supra.

[27] Tracy v. Central Trust Co., 327 Pa. 77, 192 A. 869 (1937); 1 TRUSTS RESTATEMENT, § 205, comment e, § 206, comment c (1935); Doyle v. Chatham & Phenix Nat. Bank, 253 N. Y. 369, 171 N. E. 574 (1930). Cf. actions for damages for sale induced by fraud where recovery is not allowed for depreciation between date of fraudulent sale and subsequent discovery of fraud or any later date. Annotations at 57 A. L. R. 1142 at 1150 (1928), and 108 A. L. R. 1060 at 1064 (1937).

[28] Cf. actions for damages for sale induced by fraud where recovery is allowed for depreciation between date of fraudulent sale and subsequent discovery of fraud. Annotations at 57 A. L. R. 1142 at 1153 (1928), and 108 A. L. R. 1060 at 1064-1066 (1937).

[29] Conover v. Guarantee Trust Co., 88 N. J. Eq. 450, 102 A. 844 (1917), affd. 89 N. J. Eq. 584, 106 A. 890 (1918). See Murphy-Bolanz Land & Loan Co. v. McKibben, (Tex. Comm. App. 1922) 236 S. W. 78; Richardson v. Union Mortgage Co., 210 Iowa 346, 228 N. W. 103 (1929) (burden on trustee to prove damages less than ultimate depreciation).

Cf. actions for damages for sale induced by fraud where recovery takes into consideration value of the property sold, even after discovery of the fraud. Annotations at 57 A. L. R. 1142 at 1151-1152 (1928), and 108 A. L. R. 1060 at 1066-1067 (1937).

It has been said that, if the breach of trust consists only in purchasing at too high a price, the trustee is not chargeable with a subsequent depreciation in value of the property as he would be if he were not authorized to purchase the property. 1 TRUSTS RESTATEMENT, § 205, comment e (1935). This would seem to indicate that the successor trustee could not even rescind an acquisition where the predecessor trustee negligently paid too high a price. In England, however, it is well settled that if a trustee is negligent in acquiring property for the trust estate, he is liable for its subsequent depreciation. Smethurst v. Hastings, L. R. 30 Ch. Div. 490 (1885); Fry v. Tapson, L. R. 28 Ch. Div. 268 (1884); In re Olive, L. R. 34 Ch. Div. 70 (1886); In re Salmon, L. R. 42 Ch. Div. 351 (Ct. App. 1889). This result is reached even where the successor trustee has sold the wrongfully acquired property with full knowledge of the breach of trust and without notice to the predecessor

3. *Where Predecessor Trustee is Insolvent*

If the predecessor trustee is insolvent, the successor, by pursuing the damage remedy, has only a general, unsecured claim against his predecessor for all or some part of the amount of depreciation in value of the improperly acquired property. The amount which can be realized on that claim will necessarily be limited in two ways. In the first place, the claim will almost always be for only a part of the original investment. In the second place, the amount realized on that claim will be limited by the percentage of dividends paid on account of general claims against the insolvent predecessor trustee.

On the other hand, under the equitable lien theory, the successor trustee will generally have a claim for the full amount originally used by the predecessor trustee in purchasing the property improperly acquired, without any deduction on account of its value when or after the claim is made. Possibly, there might be deducted from the amount of that general claim any amount which might have been realized from the property improperly acquired prior to the time when the amount of the claim was determined.[80] Obviously, however, the amount of the general claim, under the equitable lien theory, would almost always be

trustee of the proposed sale or rejection of the wrongfully acquired investment. In re Salmon, supra. Probably the English courts in these cases are really not awarding damages but are merely requiring the trustee to account. See 4 SEDGWICK, DAMAGES, 9th ed., 2585 (1912), quoted supra, note 17. The effect, however, is to permit rescission.

[80] See White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897); In re Harbeck's Estate, 142 Misc. 57, 254 N. Y. S. 312 (1931); Gates v. Plainfield Trust Co., 121 N. J. Eq. 460, 191 A. 304 (1937). This question would be particularly important in the event of insolvency of the predecessor trustee after there had been a sale of the wrongfully acquired property. If the claim was for the full amount used by the predecessor trustee in the wrongful acquisition, with allowable interest, instead of only for that amount less the amount received from the wrongfully acquired property, the trust estate would obviously receive greater dividends from the estate of the insolvent predecessor trustee. Of course, when the amount received from the wrongfully acquired property plus dividends from the predecessor trustee's estate equalled the amount invested in the wrongfully acquired property, the trust estate would be entitled to no further dividends and the estate of the insolvent predecessor trustee would be entitled to any remaining part of the wrongfully acquired property. In re Riordan's Trusteeship, 216 Iowa 1138, 248 N. W. 21 (1933). If the acquisition is rescinded, it can be argued that the claim against the predecessor trustee should always be for the amount wrongfully paid, with allowable interest. This is the rule in England. See In re Lake, [1903] 1 K. B. 439 (where the claim was limited to depreciation because the successor trustee had sold the wrongfully acquired property without notifying the predecessor of his rejection of it as a trust asset, but where it was pointed out that, if there had been a rescission, the claim would have been for the full amount invested, with allowable interest).

greater than under the damage theory.[81] Instead of probably being limited to some part of the amount of depreciation in value of the improperly acquired property, it will equal at least the amount expended to purchase the improperly acquired property with allowable interest and less any amounts realized from that property. While, under the equitable lien theory, the claim will be a general one,[82] the percentage of dividends paid on account of it will be on a claim which will almost always be for a greater amount than the claim would be if the damage remedy were asserted.

Furthermore, under the equitable lien theory, the successor trustee may retain the property improperly acquired until that claim is fully satisfied.[83] As a result, the time may well come when a receiver or assignee of the insolvent predecessor trustee will find it advantageous to make the trust estate whole by paying that claim in full, in order to get possession of the improperly acquired property, which, after the payment of several dividends on the claim, may be worth more than the balance due on the claim.

However, if an equitable lien on the wrongfully acquired property is denied, assertion of the rescission remedy may be no more advantageous than the damage remedy in those few cases where a claim for the full amount of depreciation can be asserted under the damage theory.[84]

DIFFICULTIES WITH THE EQUITABLE LIEN REMEDY

1. *Avoiding Possible Defenses Against It*

Since the equitable lien remedy is based upon the right of the beneficiary or successor trustee to rescind, it is probably subject to all of those defenses usually available against one who has an equitable right to rescind. Thus, consent of a beneficiary to the adverse interest of the trustee in an otherwise improper acquisition will usually prevent rescission[85] in so far as that beneficiary's proportionate interest in the acquired

[81] It might not be, if the measure of damages were the difference between either the value at the time of the discovery of the facts giving a right of rescission, or at the time of the wrongful acquisition, and the amount paid (supra, notes 27 and 28), and if the value of the property had increased after such time, and if the successor trustee was not required to credit such appreciation in value against his claim for damages. See 5 WILLISTON, CONTRACTS, rev. ed., 3884 (1937).

[82] First Nat. Bank of St. Petersburg v. Solomon, (C. C. A. 5th, 1933) 63 F. (2d) 900; In re Harbeck's Estate, 142 Misc. 57, 254 N. Y. S. 312 (1931).

[83] See supra, note 15.

[84] See Ulmer v. Fulton, 129 Ohio St. 323, 195 N. E. 557 (1935).

[85] 1 TRUSTS RESTATEMENT, § 216 (1935).

property is concerned.[36] To the same extent, a release by the beneficiary may affect the right to rescind,[37] as may the beneficiary's subsequent affirmance of the acquisition,[38] whether such affirmance is intentional or not.[39] Furthermore, laches of a beneficiary may prevent rescission in so far as his proportionate interest in the wrongfully acquired property is concerned.[40] Of course, absence of knowledge of material facts[41] or incapacity to act[42] may prevent what would otherwise operate to bar rescission from doing so.

Generally, wherever the circumstances are such that certain action or inaction by beneficiaries not under any incapacity would prevent rescission, such action or inaction by a successor trustee would bar rescission.[43]

Difficult questions will arise, not only as to whether or when knowledge of a beneficiary or successor trustee was sufficient, so that his action or inaction would bar the right to rescind, but also as to whether the particular action or inaction was sufficient to bar that right.[44]

In order to avoid difficulties in asserting the equitable lien remedy, the successor trustee should notify the predecessor trustee, promptly after learning the facts, that he repudiates the improper acquisition and rejects the property so acquired; that he claims from the predecessor trustee the full amount charged for the improperly acquired property with allowable interest and less any amounts realized therefrom; and that he will retain the rejected property as property of the predecessor

[36] Ibid., § 216, comment g.

[37] Ibid., § 217.

[38] Ibid., § 218; In re McFarlane's Estate, 317 Pa. 377, 177 A. 12 (1935); In re Hoffman's Estate, 183 Mich. 67, 148 N. W. 268, 152 N. W. 952 (1915).

[39] Hine v. Hine, 118 App. Div. 585, 103 N. Y. S. 535 (1907); Mills v. Hoffman, 92 N. Y. 181 (1883); Albert Lea Foundry Co. v. Iowa Savings Bank, (C. C. A. 8th, 1927) 21 F. (2d) 515. But see Boerum v. Schenck, 41 N. Y. 182 (1869).

[40] 1 TRUSTS RESTATEMENT, § 219 (1935). Hoyt v. Sprague, 103 U. S. 613 (1880).

[41] Hodge v. Mackintosh, 248 Mass. 181, 143 N. E. 43 (1924); Smethurst v. Hastings, L. R. 30 Ch. Div. 490 (1885); McAllister v. McAllister, 120 N. J. Eq. 407, 184 A. 723 (1936), affd. 121 N. J. Eq. 264, 265, 190 A. 52, 53 (1937).

[42] Head v. Gould, [1898] 2 Ch. 250.

[43] Supra, note 3.

[44] See White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897); In re Hoffman's Estate, 183 Mich. 67, 148 N. W. 268, 152 N. W. 952 (1915); Hine v. Hine, 118 App. Div. 585, 103 N. Y. S. 535 (1907); Adair v. Brimmer, 74 N. Y. 539 (1878); Zimmerman v. Fraley, 70 Md. 561, 17 A. 560 (1889); Michigan Home Missionary Society v. Corning, 164 Mich. 395, 129 N. W. 686 (1911); In re Long Island Loan & Trust Co., 92 App. Div. 1, 87 N. Y. S. 65 (1904), affd. 179 N. Y. 520, 71 N. E. 1133 (1904); Mills v. Hoffman, 92 N. Y. 181 (1883).

trustee subject to a lien (which he asserts) against that property for the amount claimed.

Such a statement to the predecessor trustee should be sufficient to prevent the predecessor from later asserting that any treatment of the improperly acquired property, as the successor might believe was for the best interests of the trust estate, was inconsistent with and so a bar to rescission. However, any misunderstanding in this respect could probably be avoided by having the successor trustee further notify the predecessor trustee that he will dispose of the wrongfully acquired property in partial or full satisfaction of the claim secured by it, or otherwise act with reference to that property, as the successor trustee believes will be for the best interests of his trust estate and the beneficiaries thereof.

2. *Right to Sell or Otherwise Deal with Property Against Which Equitable Lien has been Asserted*

After asserting the equitable lien remedy and before the courts have determined his rights, the successor trustee will usually have problems arising in connection with treatment of the property against which he is asserting an equitable lien to secure his claim.

Where the successor trustee relies upon the equitable lien remedy, he is electing to rescind the transaction whereby his predecessor sought to purchase the property for the trust estate. In order not to be barred by laches, he must promptly give the predecessor notice of rescission on discovering his rights and offer to return the property on repayment of the amount paid for it. Unless he treats the property as that of the predecessor trustee, he cannot claim from the predecessor trustee the money used for its purchase. He cannot claim for the trust both the property and the trust money used by the predecessor in purchasing it. By claiming the property, he would be electing to abandon his inconsistent claim to the trust money invested in it.[45]

If the holder of an equitable lien does not have a right to sell the property against which he claims a lien, then his sale of the property may well be held an election to abandon the equitable lien remedy. His sale of the property against which he was asserting a lien would then be the exercise of a right inconsistent with the ownership of that property by his predecessor, and with the existence of only an equitable lien interest in the property.[46]

[45] See supra, notes 38 and 39.

[46] 1 JONES, LIENS, 3d ed., 1032 (1904). See Hudson v. Swan, 83 N. Y. 552 (1881).

Suppose also that some adjustment is proposed with reference to the property against which the fiduciary has asserted an equitable lien. This might occur, for example, where the property claimed to have been improperly purchased consisted of securities and the trustee believed he should agree to a proposed adjustment of the rights of holders of such securities. If the holder of an equitable lien does not have the right to exercise such an act with reference to the property against which he has asserted an equitable lien, he might be held to have exercised rights inconsistent with the existence of his equitable lien interest, although consistent with the ownership of the property. He might then be held either to have waived his lien or to have elected to abandon the equitable lien remedy.[47]

There is always the possibility that the claim against the predecessor trustee on account of self dealing may be rejected by the courts even though the successor trustee believes it is meritorious and has reasonable grounds to so believe. If the claim asserted should ultimately be disallowed by the courts, the effect of the decision would be to establish that the property, against which the equitable lien had been asserted, was part of the trust estate all along.

It is the duty of the trustee to sell trust property where he believes that its price is much more likely to fall than to remain where it is or go higher. For a breach of this duty the trustee would be liable for subsequent depreciation in the value of the property.[48] If, therefore, the claim asserted is ultimately disallowed by the courts, and the trustee has not sold the property against which the equitable lien was asserted, even though the trustee believed that it was more likely to fall in value than to remain where it was or go higher, the trustee might be subjected to liability for failure to sell it.

While the claim against the predecessor trustee on account of self dealing is pending, what can the successor trustee do with the property against which he asserts an equitable lien to secure that claim? If he does nothing and the claim is ultimately allowed and his predecessor remains solvent, the successor trustee is obviously safe. If, however, he does nothing and the claim is ultimately disallowed, the sucessor trustee may be held liable for failure to dispose of the property against which he had asserted an equitable lien, or for failure to approve an adjustment relative to that property which would have been advantageous to it.

[47] But see Brintnall v. Smith, 166 Mass. 253, 44 N. E. 223 (1896); 1 JONES, LIENS, 3d ed., 1040 (1914).

[48] 1 TRUSTS RESTATEMENT, §§ 209, 230 (1935).

Even if the claim is ultimately allowed, if the predecessor trustee is or has become insolvent and the property against which an equitable lien was asserted has fallen in value, the successor may be held liable for failure to dispose of that property or to approve an advantageous adjustment relative to it. In the latter instance, however, liability could not be asserted against the successor unless he had a right to dispose of the property or approve the adjustment without prejudicing the equitable lien that he was asserting against the property. However, in order to be safe, the successor trustee must know that the law does not give him such a right.

If the successor trustee sells the securities against which he has asserted an equitable lien, or otherwise deals with them as only an owner usually would have the right to do, will the court ultimately hold that he has some of the rights of an owner and protect him by holding that he has not prejudiced his right to assert the equitable lien remedy? If, for example, the successor trustee sells property against which he has asserted an equitable lien to secure the claim on account of its improper acquisition, will that prejudice him in asserting the equitable lien remedy? The *Restatement of the Law of Trusts* and most textbooks give very little help on this problem.[49]

The use of the word "lien" in this respect is unfortunate in that it might lead to decisions hampering the successor fiduciary in the enforcement of claims against a predecessor who was a wrongdoer. A lien may be created by contract or be imposed by law.[50] In creating a lien, the owner of the property may agree that the lienholder shall have a right to sell. Such an agreement will be given effect.[51] The grant by the owner to the lienholder of a power of sale has been said to be the one characteristic which distinguishes a pledge from a common-law lien.[52] It may be argued that an equitable lien is one given by

[49] In 2 SCOTT, TRUSTS 1120 (1939), it is said: "If the trustee does not replace the purchase price, the beneficiaries can have the property sold and compel the trustee to pay the deficiency."

In UNDERHILL, TRUSTS AND TRUSTEES, 8th ed., 474 (1926), it is said: "In such a case [apparently, although not clearly so stated, where an improvident but authorized investment has been made], if the trustee in fault retires, the new trustee need not put him to his election to take over the security, but may realize the security without notice to him, and charge him with the entire deficiency or (if he has become bankrupt) prove for it. This, however, is not so where the security is one of a class not authorized at all. In such cases, unless the beneficiaries are under disability, they must give the trustee the option of taking over the security before realizing it."

[50] 17 R. C. L. 597 (1917).

[51] Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995 (1895).

[52] Ibid.

a contractual obligation which the law implies, i.e., the quasi-contractual obligation to prevent unjust enrichment. However, the law really imposes such quasi-contractual obligation as a means of preventing unjust enrichment. It is not based upon any agreement.[53] Certainly where a thief steals property he does not intend to pay for it. Nevertheless he is bound by a quasi-contractual obligation to do so.[54] It is more accurate to say that the law imposes this obligation on the thief than to say that the law implies an agreement on the part of the thief to pay.

So-called common-law liens were imposed by law irrespective of statute.[55] The holder of such a lien did not have a right to sell the property against which he held a lien.[56] His sale of the property against which he held a lien was held to be the exercise by him of a right inconsistent with the existence in him of a lien interest in the property, and so a waiver of such lien.[57]

The term "equitable lien" is not particularly helpful. That term was originally used merely to describe a lien which equity recognized even though the lienholder did not have the possession which was essential to the existence of a common-law lien.[58]

There is, however, some analogy between the situation of the successor trustee who has a right to rescind, and the buyer of personal property who has a right to rescind. The latter is now given a so-called "vendee's lien" to secure what the seller should pay him on rescission.[59] The holder of the vendee's lien is usually given a right of sale to enforce that lien.[60] The law, in this situation and without statutory assistance, grants a power of sale, as an additional protection, to the party for whose protection it imposes a lien.

The tendency of courts, even before enactment of the Sales Act, to recognize a vendee's lien as giving a right to the lienholder to deal

[53] See Whitbread & Co. v. Watt, [1902] 1 Ch. 835 (Ct. App.).

[54] RESTITUTION RESTATEMENT, § 128, comment h, 1 (1937).

[55] 17 R. C. L. 601 (1917).

[56] 1 JONES, LIENS, 3d ed., 1043 (1914); Saltus v. Everett, 20 Wend. (N. Y.) 267 (1838). See Glidden v. Mechanics' Nat. Bank, 53 Ohio St. 588, 42 N. E. 995 (1895).

[57] 1 JONES, LIENS, 3d ed., 1032 (1914). See Hudson v. Swan, 83 N. Y. 552 (1881).

[58] 17 R. C. L. 603 (1917).

[59] 2 WILLISTON, SALES, 2d ed., 1298 (1924).

[60] Ibid.; Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891 (1906); Descalzi Fruit Co. v. Sweet & Son, 30 R. I. 320, 75 A. 308 (1910); Rubin v. Sturtevant, (C. C. A. 2d, 1897) 80 F. 930; Wilson & Co. v. Werk Co., 104 Ohio St. 507, 136 N. E. 202 (1922). See annotation, 24 A. L. R. 1445 (1923).

with the property almost as an owner where the lien is on property of a nature likely to depreciate in value[61] should be followed in the case of a successor trustee who has an equitable lien on property improperly purchased by his predecessor. This is especially so where, as is usually the case, the property is of a nature subject to depreciation in value.

The predecessor trustee, a wrongdoer, should not be permitted to force the successor trustee, as a practical matter, to abandon part of his claim in order to protect the property which secures it. If the predecessor has been a wrongdoer, the law should be more concerned with compelling him to make restitution than with giving him a technical defense. On the other hand, the law should not make it difficult for the innocent successor trustee to protect the trust estate. Where the law gives a lien to the successor trustee to enable him to fully realize his claim, the law should give the successor trustee all the rights in the lien property reasonably necessary to accomplish the purpose sought to be accomplished in giving the so-called "lien." If it is reasonably necessary for the successor fiduciary to be able to sell and otherwise to deal with the lien property in order fully to realize his claim, the law should give him the right to do so. If the successor trustee has a right to rescind, then the predecessor trustee is under an obligation to repay any trust moneys used by the predecessor to buy the property. If he refuses or fails to perform this obligation by repaying such moneys, it is difficult to understand why the law should hamper the successor trustee in an honest effort to realize upon his claim for such moneys by selling the lien property when he bona fide believes it should be sold.

When the successor trustee notifies the predecessor of an election to rescind, the successor is either right or wrong. If the successor is right, the predecessor trustee should repay the trust estate and take back the property. If he does not do this, he should not be permitted to complain about any efforts of the successor trustee in protecting the trust estate by a sale of that property for his predecessor's account, in order to enforce the lien against it for the amount which the predecessor should pay. If the successor is wrong, then the predecessor trustee will succeed in court in preventing the claim from being established, and will not be prejudiced by anything that the successor does with the property. If the successor trustee is right, it is not his fault that the predecessor trustee does not repay him. He should not therefore have to decide either to abandon his claim or to run the risk of a depreciation

[61] Rubin v. Sturtevant, (C. C. A. 2d, 1897) 80 F. 930; Jones v. Bloomgarden, 143 Mich. 326, 106 N. W. 891 (1906).

in value of the lien property, which may ultimately decrease the value of the claim against the predecessor, especially where the predecessor is insolvent. Even if the successor trustee is wrong, he should not have to risk a liability for failure to sell in order to perform his duty in asserting a claim. Frequently, he should assert such a claim, even though a court may ultimately find against him.

The few cases which have considered this problem have at least indicated that the equitable lien of the beneficiary or successor trustee against property improperly acquired for the trust gives its holder greater rights than the holder of a common-law lien. They indicate that the holder of such an equitable lien has substantially the rights of a pledgee or of a rescinding vendee.[62]

[62] In England, the cases clearly hold that the successor trustee or beneficiary has a right to sell the rejected investment in order to enforce his equitable lien thereon. This right, however, is subject to the option which must be given the guilty trustee, in some instances, to replace the money invested and take over the rejected investment. In re Salmon, L. R. 42 Ch. Div. 351 (Ct. App. 1889); In re Lake, [1903] 1 K. B. 439. In this country, the cases are not so clear. In In re Mendel's Will, 164 Wis. 136, 159 N. W. 806 (1916), successor trustees obtained a judgment against their insolvent predecessor for the amount invested in unauthorized securities. The judgment provided that, upon its payment, the securities should be surrendered to the liquidator of the predecessor and that until such payment the successors were entitled to hold the securities and enforce them in any proper way on account of the liability of the predecessor. In affirming this judgment, the court said (164 Wis. at 143-144): "Counsel . . . contend that the judgment, affording respondents the benefit of the securities, so far as money can be realized therefrom, to restore the trust funds, is inconsistent with the judgment against the guilty trustee for the money improperly diverted,—that appellant cannot have the securities in question and have a judgment for a recovery of the money invested therein, as well. The difficulty with that is that the judgment does not proceed upon the theory that the title to the securities is in the trustees, or that they are to have them; but rather upon the ground that the securities have been rejected, subject to an equitable lien thereon in favor of the trust fund."

In Murphy-Bolanz Land & Loan Co. v. McKibben, (Tex. Comm. App. 1922) 236 S. W. 78, a trustee, while acting as agent for the seller, used $2400 of the trust's money to purchase land subject to a purchase money lien of $10,100. In holding that the beneficiary could recover the $2400 from the trustee, the court said (pp. 81-82): "It is true that she paid interest upon the deferred payments to prevent a foreclosure and that she listed the property with various real estate brokers for sale, but in so doing was relying upon them to fulfill their promise to sell. These acts were merely precautionary methods upon her part to protect the imperiled fund, but which do not in any sense amount to a ratification of the purchase, or an election of remedies by her. Under the unrepudiated promise, subsequently repeated to her, she had a right to deal with the property as she did without being charged with ratifying their act of purchase."

In Parkerson v. Borst, (C. C. A. 5th, 1920) 264 F. 761, an attorney, entrusted with investment of funds for his client, bought for the client certain notes, in the sale of which the attorney had a substantial pecuniary interest. The client sued the attorney for her money invested in the notes. It was held that her receipt of a dividend on the

EFFECT OF UNSUCCESSFUL ASSERTION OF ONE REMEDY ON RIGHTS UNDER OTHER

By asserting the damage remedy the successor elects to treat the improperly acquired property as a trust asset. It would be inconsistent to permit him later to change his mind and, by asserting the equitable lien remedy, treat that asset as belonging to the predecessor trustee. Where the damage remedy is asserted, the predecessor trustee has no reason to believe that the risk of further depreciation in value of the property claimed to have been wrongfully acquired will rest upon him.[62a] It would, therefore, be unfair to him to permit the successor trustee to change his mind so as to cast that risk back upon the predecessor trustee. The assertion of the damage remedy should bar a later assertion of the equitable lien remedy.[63]

Suppose, however, that the successor is unsuccessful in asserting the equitable lien remedy in an instance where he could have succeeded in asserting the damage remedy. For example, this may occur where his right to rescind the improper acquisition has been barred by laches, or where his sale or other control over the improperly acquired property is held inconsistent with the assertion of a lien against it and so an election to abandon the right of rescission.

By asserting the equitable lien remedy, the successor trustee elects to treat the improperly acquired property as belonging to the predecessor trustee. It might be held that it would be inconsistent to permit him later to change his mind and, by asserting the damage remedy,

notes from the trustee in bankruptcy of the maker did not prevent her recovery from the attorney for the balance of her money invested in the notes. The court said (p. 767): "if plaintiff had voluntarily, and without an order of court directing her so to do, filed her claim in bankruptcy as holder of the notes, and had applied the proceeds so obtained by way of credit on her claim, she would not have been estopped to proceed with her suit for conversion, since her action, by any process of reasoning, could not have been construed as the election by her of an inconsistent remedy, but merely a following of some of the proceeds of a conversion, for the purpose of application and credit pro tanto on her claim."

Cases like Albert Lea Foundry Co. v. Iowa Savings Bank, (C. C. A. 8th, 1927) 21 F. (2d) 515, can probably be distinguished either on the ground that no equitable lien was asserted at the time of the notice of intention to rescind, or on the ground that the existence of an equitable lien was not advanced as a reason for permitting the rescinding party to deal with the property.

[62a] See notes 27 and 28. But see note 29.

[63] 2 SCOTT, TRUSTS 1161 (1939); 18 AM. JUR. 154 (1938). See Frederickson v. Nye, 110 Ohio St. 459, 144 N. E. 299 (1923). Cf. Thomas v. Taggart, 209 U. S. 385, 28 S. Ct. 519 (1908). The conclusions supported by notes 63, 64 and 65 are suggestions. The cases on this and analogous questions are far from uniform in their conclusions. See 38 COL. L. REV. 292 (1938).

treat that property as trust property. However, following the analogy of cases involving rescission, the successor trustee should be permitted to change his mind in this instance,[64] unless the predecessor has agreed to the rescission and acted in reliance upon it.[65]

Where the equitable lien remedy is asserted, the predecessor knows that the successor intends him to have the owner's risk of depreciation in value of the improperly acquired property. Thereafter that property may go either up or down in value. If it has gone down and the successor is allowed to assert the damage remedy, there is no prejudice to the predecessor trustee. The amount recovered under the damage remedy would not include the subsequent depreciation[66] as under the equitable lien remedy. The predecessor would be helped and not hurt by the successor's change in position.

If, on the other hand, it has gone up in value, a court could protect the predecessor by requiring the successor trustee to credit the amount of appreciation on the damages claimed.[67] This would clearly prevent any prejudice to the predecessor trustee. Even if a court refused to require the successor trustee to credit such appreciation in value against the damages claimed, it could justify permitting such a change of position. It could argue that, if the predecessor trustee has not accepted the offer of rescission, there could be no prejudice to the predecessor trustee in allowing the successor trustee to withdraw his offer and take the same position as the predecessor,—that is, the position that the improperly acquired property was a trust asset.[68]

Even though it may be doubtful in a particular case whether the more advantageous equitable lien remedy can be successfully asserted, the successor trustee should always resort to that remedy because, if he is unsuccessful in establishing his rights under it, that will probably not prejudice any right to recovery which he may have under the less advantageous damage remedy.

[64] 18 AM. JUR. 154 (1938); 2 WILLISTON, SALES 1537 (1924); In re Lake, [1903] 1 K. B. 439. See In re Rose, (D. C. Tex. 1930) 39 F. (2d) 242. But see Lee v. Thoma, 1 Ohio App. 384 (1913), affd. without opinion 91 Ohio St. 444, 110 N. E. 1062 (1915). Contra, Albert Lea Foundry Co. v. Iowa Savings Bank, (C. C. A. 8th, 1927) 21 F. (2d) 515.

[65] 18 AM. JUR. 154 (1938).

[66] See note 28, supra. But see note 29, supra. Even if it did include subsequent depreciation, there would be no prejudice to the predecessor trustee. He would be liable for such depreciation under the equitable lien remedy. See notes 15, 25, and 26, supra.

[67] But see note 31, supra.

[68] See 18 AM. JUR. 154 (1938).

CONCLUSIONS

The following conclusions may be drawn as to the duty of a successor trustee with reference to self dealing claims against his predecessor trustee:

1. If his examinations of the trust property and the predecessor trustee's accountings disclose something suspicious or if he has reason to question the integrity of his predecessor, the successor trustee should investigate the facts relative to purchases for the trust made by his predecessor, with a view to ascertaining whether the predecessor had any interests adverse to those of the trust in making purchases of property for the trust estate.

2. If the facts disclosed by such an investigation reasonably indicate that there were self dealing purchases by the predecessor trustee, a claim on account of such purchases should be made against the predecessor trustee, unless the expenses of asserting the claim and the chances of success are such as to indicate no probable benefit to the trust estate.

3. Where the trust estate has profited from the improperly acquired property, the claim should be only for the profit made by the predecessor or the excess in price paid by him.

4. Where the trust estate has not so profited, the successor trustee should also promptly assert the equitable lien remedy against the predecessor trustee.

5. In asserting the equitable lien remedy, the successor trustee should notify the predecessor trustee, promptly after learning the facts, that he repudiates the improper acquisition and rejects the property so acquired; that he claims from the predecessor trustee the full amount charged for the improperly acquired property with allowable interest and less any amounts realized therefrom; that he will retain the rejected property as property of the predecessor trustee subject to a lien which he asserts against that property for the amount claimed; and that he will dispose of that property in partial or full satisfaction of such claim, or otherwise act with reference to that property, as he believes will be for the best interests of the trust estate and the beneficiaries thereof.

6. After so asserting the equitable lien remedy, the successor trustee, while recognizing the improperly acquired property as that of the predecessor trustee against which he has only an equitable lien, should deal with that property with the idea of realizing for the trust estate the greatest possible amount on the claim asserted, even though such deal-

ing with the property may require the exercise by the successor trustee of control over the property such as only an owner thereof would ordinarily be entitled to exercise.

7. An unsuccessful assertion of the more advantageous equitable lien remedy will probably not prejudice the successor fiduciary in asserting any right to recovery which he may have under the damage remedy.