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FEDERAL TAXATION OF PERSONAL LIFE INSURANCE TRUSTS

THE desire to take advantage of the relative immunity from taxation that has been attained by use of the life insurance and trust devices has been an important factor in stimulating the rapid development and great popularity of the combination of the two—the life insurance trust. But the determination of legislatures to close up the avenues of escape from taxation has rivaled the industry of the taxpayer in finding loop-holes. Tax laws have been evolved to limit this use of the simple trust and the life insurance policy. The effect of these statutes on the life insurance trust, as well as the effect of the statutes aimed specifically at the life insurance trust, may be expected to prove a fertile subject of judicial controversy.

There are two main types of personal life insurance trusts, the simple or unfunded, and the funded.[1] In those of the simple variety, the so-called trust

1. In regard to the creation of the various types of personal life insurance trusts and the relationships created between the parties to the transactions, see REMSEN, THE PREPARATION OF WILLS AND TRUSTS (2nd ed. 1930) c. 25; SCULLY, INSURANCE TRUSTS (1927); SHATTUCK, THE LIVING INSURANCE TRUST (1928); Phillips, *Life Insurance Trusts: A Recapitulation for the Draftsman* (1933) 81 U. OF PA. L. REV. 284.

may be created either by naming as beneficiary of the policy the trustee who is to take charge of the proceeds or by merely assigning the policy to the trustee. In both cases the policy will be delivered to the trustee along with the trust instruments. In the funded type, either of the same procedures may be followed, the trustee being made beneficiary or assignee, but at the same time as the policy and the deed of trust are delivered, a "fund" consisting of income-producing securities is transferred to the trustee as well. This fund will be held in trust during the life of the settlor by the trustee, who will apply the income to the payment of the insurance premiums and will, after the settlor's death, make such disposal of the corpus of the fund and the proceeds of the policy as the trust instrument requires.

I. The Federal Income Tax

The problem of the application of income tax statutes to life insurance trusts can, of course, involve only the funded type.[2] A tax must be paid by someone upon the income from the securities in the fund; but the settlor may escape the higher brackets of the surtax if the income is taxable to the trustee or the beneficiary rather than to himself.

Under the federal statutes[3] and treasury regulations,[4] the settlor is liable for the tax on all the income of a revocable trust whether the power of revocation rests in himself alone, or in one not having a "substantial adverse interest," or in both together. That the taxing of the income of a trust to the settlor when he has reserved the power of revocation is not the measuring of one man's tax with reference to the income of another, and therefore is not unconstitutional as a violation of the due process clause of the Fifth Amendment, was decided in *Corliss v. Bowers*.[5] Whether or not the settlor actually receives such income, it is as much subject to his unfettered command as if the trust had never been created. Even where his command is partially fettered, as in the case of funded life insurance trusts, irrevocable for a period of years but with the reservation to the settlor of the option at the end of the period of extending the trusts for a like period or of terminating them, the measure of control retained has been enough to convince a unanimous court of the liability of the settlor to income taxation.[6] Where the power of revocation is lodged not solely in the settlor but is exercisable only in conjunction with another person or by another person alone, the courts have not explored all the possibilities. The earlier statute which made the income taxable to the settlor when he retained the power of revocation in conjunction with

2. In the simple life insurance trust, the premiums are paid directly by the settlor or by the beneficiary of the policy, and the amounts paid would be, if paid out of income, included in their taxable income before being so used.

3. Section 166, Revenue Act of 1934.

4. U. S. Treas. Reg. 77, Arts. 861 and 881.

5. 281 U. S. 376 (1930).

6. DuPont v. Commissioner, 289 U. S. 685 (1933), aff'g 63 F. (2d) 44 (C. C. A. 3d, 1933), aff'g 20 B. T. A. 482 (1930), sub. nom. Irenee DuPont. The length of the period was three years. The members of the Court agreed unanimously on this ground of the decision, although four justices dissented in regard to the constitutionality of Section 167, which taxes to the settlor the income of a trust used to pay the premiums of insurance taken out on his life. See note 19, *infra*.

"any person not a beneficiary" was held constitutional in *Reinecke v. Smith*,[7] because of the ease with which the settlor could choose a person amenable to his wishes and thus evade the higher tax. But this statute left several apparent loop-holes through the appointment of a stranger to the trust as sole holder of the power or a nominal beneficiary as sole[8] or joint holder. To remedy this, the Income Tax Law of 1932 classified as revocable all trusts where the power of revocation was held by the settlor or one not having a "substantial adverse interest" or both together. In the abstract, there can be little doubt of the constitutionality of the changed phraseology in the light of the purpose of the substitution.[9] But the problem of determining the degree of the substantiality of interest requisite to escape the statute is less easy of solution. Several measures of substantiality are possible: where the interest of the power-holder is definite and certain, its mathematical relationship to the whole of the adverse interest might have some weight; or a property classification might be attempted, based upon the degrees of remoteness of the various interests.[10] However, both of these mechanical tests are of questionable value; the former fosters a distinction without a difference, for, though there may be a great monetary variance between the size of two beneficiaries' interests, the one whose interest is the smaller may none the less have the greater need of it, prize it the more, and would resist more strongly any attempts to deprive him of it. The latter test would probably result in nothing but a verbal distinction in view of the ease with which future interests may be manipulated from interests subject to conditions precedent to those subject to conditions subsequent. Very probably, it is because of the inadequacy of purely mechanical divisions that Congress has phrased the statute so broadly, thus permitting the courts to decide each case as it arises from the practical standpoint of whether or not the settlor remains the dominus of the trust.[11] Nevertheless, in one respect the statute may not be broad enough. As is often the case, the sole or joint holder of the power may be a member of the settlor's immediate family whose

7. 289 U. S. 172 (1933). The trustee was held to be indistinguishable in this regard from a stranger to the trust since he had no interest adverse to the settlor. Also, William R. Stewart, 28 B. T. A. 256 (1933); Robert B. Bowler, 31 B. T. A. (Nov. 14, 1934). In Bromley v. Commissioner, 66 F. (2d) 552 (C. C. A. 3d, 1933), "any person" was construed to include the plural.

8. Commissioner v. Yeiser, 75 F. (2d) 956 (C. C. A. 6th, 1935); Valentine Bliss, 26 B. T. A. 731 (1932).

9. Cf. Reinecke v. Smith, *supra* note 7, at 178 and Burnet v. Wells, 289 U. S. 670, 678 (1933).

10. In Smith v. Commissioner, 59 F. (2d) 56 (C. C. A. 1st, 1932) the court ventured the opinion that a line could be drawn "between beneficiaries holding vested and contingent interests based on their respective degrees of remoteness." That such a distinction is not workable under other circumstances has been proved by the experience of the courts with the federal estate tax. Cf. Kline v. United States, 283 U. S. 231 (1931) and McCormick v. Burnet, 283 U. S. 784 (1931) rev'g, per curiam, 43 F. (2d) 277 (C. C. A. 7th, 1930) and see (1935) 44 YALE L. J. 1233.

11. It has been suggested that where the adverse interest is contingent, its substantiality should be measured by the probability of the contingency occurring. Surrey, *Assignments of Income and Related Devices: Choice of the Taxable Person* (1933) 33 COL. L. REV. 791, 822.

interest may be extremely large proportionally but only nominally adverse because of the family relationship and his dependence upon the settlor. It would seem likely that such an interest would be held adverse under the present statute, and yet it offers an easy method of tax-evasion.

Congress made another change of phraseology in the 1934 act in regard to revocable trusts. Prior acts had provided that the settlor would be taxable for the income tax only where the trust was revocable "during the taxable year." The inclusion of the quoted words made it possible for the settlor to retain a method of regaining the trust res and yet evade taxation. By making the trust revocable only during the year subsequent to the giving of notice to the trustee, the trust could not be said to be revocable during the taxable year if such notice had not been given. *Lewis v. White*[12] affords the best illustration of this procedure. There, the settlor created a trust the income of which was to be paid to his wife during his lifetime. The instrument further provided that it "may be revoked, altered and/or amended by the Trustor on or after the first day of January in any year but only upon condition that and provided the Trustor shall in the preceding calendar year have notified in writing the trustees of his intention so to revoke, alter and/or amend this instrument." The District Court for the District of Massachusetts decided that the income from this trust was not taxable under this section since this section referred only to unconditional powers of revocation. The court relied in part upon a statement of the Senate Finance Committee[13] and might have based its decision solely upon the ground, as did the Court of Appeals for the Second Circuit in a later case,[14] that it was the intent of Congress to exclude such a conditional power from the operation of the statute. But the opinion in *Lewis v. White* also contains the constitutional argument that to tax the income of such a trust to the settlor would be to measure one person's tax on another's income. Now that Congress has definitely expressed its intention by deleting the phrase "during the taxable year" from Section 166 of the Revenue Act of 1934, it is very unlikely that the Supreme Court would hold it unconstitutional to tax to the settlor the income of such a conditionally revocable

12. 56 F. (2d) 390 (D. Mass. 1932). In an earlier case, Clapp v. Heiner, 34 F. (2d) 506 (D. Penn. 1929), aff'd, 51 F. (2d) 224 (C. C. A. 3d, 1931), the period of notice was six months, a period that could fall within the taxable year. In holding the settlor liable for the tax on the income of this trust, the court said that such a conditionally revocable trust was taxable irrespective of the period of notice, in as much as the statute made him liable because he retained a power of revocation and his possession of the power did not depend upon the notice that had to be given before the revocation was effective. On the authority of that statement, the Board of Tax Appeals held the settlor liable in Elida B. Langley, 24 B. T. A. 1156 (1931), a case which, factually, was identical to Lewis v. White. The decision in the Langley case was later reversed, see note 14, *infra*.

13. "The subdivision of the House Bill has been rewritten in order that there shall not be taxed to the grantor the income of a trust as to which the grantor has a power of revocation subject, however, to a condition which has not happened." Senate Finance Committee Report no. 398, 68th Congress, 1st Sess. (1924).

14. Langley v. Commissioner, 61 F. (2d) 796 (C. C. A. 2d, 1932), rev'g 24 B. T. A. 1156 (1931). Mabel A. Ashforth, 26 B. T. A. 1188 (1932) followed Lewis v. White, the Board expressly overruling its decision in the Langley case; also Faber v. United States, 1 F. Supp. 859 (Ct. Cl. 1932).

trust.[15] A power though subject to a condition precedent is none the less a power. There is no practical difference in the control over the trust retained by the settlor in this case from that retained in the case of the reservation of an unconditional power of revocation. In both cases, the settlor holds a sufficiency of the incidents of ownership to direct the future of the trust, to divest the beneficiaries and regain the property if he so desires. Realistically, it can hardly be maintained that where he had retained the conditional power he has so transferred the property that it can no longer be considered his. That the Supreme Court is committed to such reasoning is seemingly indicated by the *DuPont*[6] case, for there the settlor was held liable for the tax on the income of a funded life insurance trust which, though irrevocable for a term of years, could be continued or terminated by the settlor at the expiration of that time. This scheme is in effect a reservation of a power of revocation conditional upon the settlor's outliving the named term of years.[16]

All that has been said concerning revocable and conditionally revocable trusts may here seem irrelevant in the light of the specific statute[17] which taxes to the settlor the income of a trust used to pay the premiums of insurance taken out on his life. Since the Supreme Court held this statute constitutional as to irrevocable trusts in *Burnet v. Wells*,[18] it follows, a fortiori, that the settlor must also be liable for the tax on the income of a trust revocable either absolutely or conditionally.[19] But it is obvious from the opinion that the case

15. Several writers express the opinion that the Lewis v. White device is one "which seems to be immune from the risk of Congressional restriction." Legis. (1932) 32 Col. L. Rev. 1205, 1223; (1933) 81 U. of Pa. L. Rev. 345. But see Frances Marshall Canfield, 31 B. T. A. Nov. 23, 1934.

16. A conditional power of revocation may also be compared to the irrevocable assignment of future incomes where the assignor has not transferred the property producing the income, that is, to such a case as was involved in Burnet v. Leininger, 285 U. S. 136 (1932). For, though the settlor may have irrevocably surrendered the income for the year —not having given notice the previous year—, he still retains such substantial control over the future of the corpus that its ownership may be attributed to him for tax purposes. Cf. also Lucas v. Earle, 281 U. S. 111 (1930).

17. Section 167(a)(3), Revenue Act of 1934: "Where any part of the income of a trust . . . (3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor . . . then such part of the income of the trust shall be included in computing the net income of the grantor."

18. 289 U. S. 670 (1933), rev'g 63 F. (2d) 425 (C. C. A. 8th, 1933), rev'g 19 B. T. A. 1213 (1930), sub nom. Frederick B. Wells. Followed in Pillsbury v. Burnet, 67 F. (2d) 151 (App. D. C. 1933); Yuengling v. Commissioner, 69 F. (2d) 971 (C. C. A. 3d, 1934), aff'g 27 B. T. A. 782 (1933); Cummins v. United States, 3 F. Supp. 728 (Ct. Cl. 1933); Thacher v. United States, 4 F. Supp. 108 (Ct. Cl. 1933). The Wells case has been commented upon or noted in Surrey, *Assignments of Income and Related Devices: Choice of the Taxable Person* (1933) 33 Col. L. Rev. 791, 823; tax comment (1933) 8 St. John's L. Rev. 171; (1934) 22 Calif. L. Rev. 355; (1933) 22 Geo. L. J. 114; (1933) 47 Harv. L. Rev. 137; (1934) 28 Ill. L. Rev. 704; (1933) 32 Mich. L. Rev. 123; (1933) 11 N. Y. U. L. Q. Rev. 127; (1933) 18 St. Louis L. Rev. 347; (1933) 20 Va. L. Rev. 104.

19. DuPont v. Commissioner, *supra* note 6 and text, was decided by the Supreme Court on the same day as the *Wells* case, a majority of the court holding that if section 167 were constitutional as to the irrevocable trusts in the latter case, it must surely be so as to the conditionally revocable trusts in the DuPont case.

might not be conclusive on all life insurance trusts. Speaking for a bare five-to-four majority, Mr. Justice Cardozo found the statute constitutional in an opinion illuminated as much by its broad interpretation of the power of Congress to perfect its system of taxation by preventing evasion as by the absence of reliance upon legalistic conceptions of title.[20] Since, however, prevention of evasion, though a sufficient secondary justification for a tax, has been said to be invalid as a primary cause,[21] the opinion seems to rely upon the idea that the settlor, under the circumstances, must be deemed to be receiving the income, at least constructively. The settlor of such a trust was said both to have retained in fact a sort of continuing control (as well as a moral satisfaction) through the earmarking of the income for the sole purpose of executing his moral obligation to provide for his dependents after his death and also to have retained in law certain definite and substantial contract rights in the insurance policies.[22] The importance in the family budget of insurance for the benefit of dependents was said to justify the conclusion that income used to pay the premiums was being used as much for the settlor's benefit as it would be if used to pay any other item in the budget.[23]

But the question immediately arises as to the constitutionality of the statute in regard to funded life insurance trusts created for the benefit of strangers. Practically, such trusts would be very rare, the very great majority being made for the benefit of wives or children. That the result might be different in such cases is evidenced by the opinion itself, for the possibility of such exceptional cases is noted and decision reserved until they are presented.[24] Patently, the same cogent, practical reasons for imposing the tax on the settlor would not there by present. For this reason, *Burnet v. Wells* does not foreclose controversy on either all irrevocable or all conditionally revocable life insurance trusts. Attempts have been made by some of the inferior courts to apply this benefit theory to living trusts created for other purposes than keeping alive life insurance policies upon the life of the settlor, on the reasoning that, where the income of a trust is used to discharge an obligation of the settlor, it is taxable to him as income used for his benefit. Where the

20. The Supreme Court has frequently asserted that taxation is far more concerned with the actual command of the property than with refinements of title. Saltonstall v. Saltonstall, 276 U. S. 260, 271 (1928); Chase National Bank v. United States, 278 U. S. 327, 336 (1929); Corliss v. Bowers, 281 U. S. 376, 378 (1930); Tyler v. United States, 281 U. S. 497, 503 (1930).

21. Cf. Schlesinger v. Wisconsin, 270 U. S. 230, 240 (1926); Hoeper v. Tax Commission, 284 U. S. 206, 217 (1931); Heiner v. Donnan, 285 U. S. 312, 325 et seq. (1932). The argument for prevention of evasion as a secondary justification for a tax was best stated by Mr. Justice Holmes in his dissent in the *Schlesinger* case, *supra*, at 241: "But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

22. If the insurer should repudiate the policies without cause, the insured would be able to maintain a suit in equity to have the policies declared to be still in effect.

23. The stress laid upon the family circle and the moral obligation to provide for dependents may have been only partially justified in the case itself, for one of the beneficiaries was a distant kinswoman and another a trusted employee, who later became the settlor's wife.

24. 289 U. S. 670, 681 (1933).

obligation has been legal, the tax on the settlor has been upheld,[25] but where the obligation has been only moral,[26] or possibly quasi-legal,[27] the settlor has most often escaped the tax. There is, however, the obvious distinction to be found between this line of cases and the funded life insurance trust set-up in the fact that there is a specific statute covering the latter but not the former so that statutory interpretation rather than constitutionality is the problem in this line of cases.

It is possible that all of the income from the fund of an irrevocable trust may not be used for the payment of premiums. If there is such an excess, the incidence of the tax will be determined by the method of distribution ordained by the trust instrument. If the excess is or may be[28] used for the payment of premiums of additional insurance on the settlor's life, it will be treated in the manner already discussed. If it is or may in the discretion of himself or of any person not having a substantial adverse interest or of both together be distributed[29] to him or accumulated[30] for him, the settlor will be liable for the tax on such surplus. The beneficiary will be liable for the tax on the surplus income if it is to be distributed to him, whether the distribution is made or not,[31] or if the trustee may distribute it to him and does so.[32] The trustee will be liable for the tax only where he may decree either distribution to the beneficiary or accumulation for him, and he decrees the latter.[33]

II. The Federal Estate Tax

The estate tax affects both the simple and the funded types of life insurance trusts. The proceeds of the insurance policies, common to both types, and the corpus of the fund, found only in the latter, offer possible subjects of assessment.

A. *Taxation of the Proceeds of the Policies*

The proceeds of the policies would appear to be taxable under the federal estate tax except where the policies have been irrevocably assigned or their legal incidents surrendered to a named beneficiary.

Section 302(g) of the Revenue Act of 1926 provides that the proceeds of

25. Willcutts v. Douglas, 73 F. (2d) 130 (C. C. A. 8th, 1934), cert. denied, 293 U. S. 626 (1935).

26. Schweitzer v. Commissioner, C. C. A. 7th, Feb. 23, 1935, rev'g 30 B. T. A. 155 (1934); Theodore P. Grosvenor, 31 B. T. A. Nov. 12, 1934; Percy H. Clark, 31 B. T. A. Jan. 17, 1935.

27. Commissioner v. Yeiser, 75 F. (2d) 956 (C. C. A. 6th, 1935); Franklin Miller Handly, 30 B. T. A. 1271 (1934).

28. Charles Stewart Mott, 30 B. T. A. 1040 (1934).

29. Malcolm W. Greenough, 29 B. T. A. 315 (1933); aff'd, 74 F. (2d) 25 (C. C. A. 1st, 1934).

30. Kaplan v. Commissioner, 66 F. (2nd) 401 (C. C. A. 1st, 1933).

31. Estate of Henry Mayer, 16 B. T. A. 1164 (1929).

32. Robert C. Roebling, 28 B. T. A. 644 (1933).

33. State Savings Loan and Trust Co. v. Commissioner, 63 F. (2d) 482 (C. C. A. 7th, 1933), aff'g 25 B. T. A. 228 (1932); St. Louis Union Trust Co. v. United States, 3 F. Supp. 650 (Ct. Cl. 1933); Guitar Trust Estate, 25 B. T. A. 1213 (1932); cf. Helvering v. Butterworth, 290 U. S. 365, 369 (1933).

all policies taken out by the decedent upon his own life are to be included in determining the value of the gross estate if payable to his estate and are to be included after deducting an exemption of $40,000 if payable to other beneficiaries. There is no question as to the inclusion of the proceeds in the gross estate when they are payable to the estate; but in regard to the second part of the statute, where the proceeds are receivable by other beneficiaries, the official regulations[34] now indicate that the Treasury Department considers that only in those cases where the decedent has retained the legal incidents of the policies until his death are the proceeds to be included in his estate for the purposes of the tax.[35] The incidents of ownership include the power to change the beneficiary, to surrender or cancel the policies and receive their cash surrender value,[36] to assign or revoke an assignment of them, to pledge them for loans, or to dispose otherwise of them and their proceeds for his own benefit. Prior to 1930, the regulations stated that the proceeds of the policies were taxable irrespective of the retention of such rights and privileges. An amendment in that year,[37] by more precisely designating those policies whose proceeds were to be included in the gross estate intimates that those which have completely passed out of the decedent's control before his death are exempt. The constitutionality of the statute as limited by the Treasury Department has been upheld on the ground that, since the insured retains the legal incidents of ownership of the policies, the tax falls on the transfer effected by the termination of those powers and privileges by the death of the insured.[38]

Whether policies could be included in the gross estate where those policies had been taken out and the beneficiaries named before the passage of the statute was at one time a source of dispute.[39] The decision in the *Chase National Bank* case[38] rendered the argument academic, however, in holding that since death determined the time of the transfer of the powers retained by the insured, it made no difference when the policies were issued or the

34. U. S. Treas. Reg. 80, Art. 27.

35. Further evidence that the Bureau of Internal Revenue intends to apply the statute only under such circumstances may be found in a letter written by Commissioner David Burnet, Oct. 28, 1930, to Mr. Julian S. Myrick, of the National Association of Life Underwriters, in which he wrote: "Under the existing estate tax regulations, i.e., article 27, Regulations 70, 1929 Edition, as amended by T. D. 4296, promulgated August 6, 1930, where the decedent does not retain until his death any of the legal incidents of ownership in policies of insurance, taken out by himself, the proceeds of such policies are not required to be included in the gross estate of the decedent under the insurance provisions of the estate tax law."

36. Even though the insured has waived the power to change the beneficiaries, the proceeds of insurance in which the insured has retained the right to receive the cash surrender value at maturity or upon surrender during his lifetime and the right to pledge the policy for loans are to be included in his gross estate. Bessie M. Ballinger, 23 B. T. A. 1312 (1931); Pennsylvania Company for Insurances on Lives, 29 B. T. A. 1306 (1934); Edith Huggard Sharp, 30 B. T. A. 532 (1934).

37. U. S. Treas. Reg. 70, Art. 27, as amended by T. D. 4296 (1930).

38. Chase National Bank v. United States, 278 U. S. 327 (1929).

39. Cf. Llewellyn v. Frick, 268 U. S. 238 (1925). This case held that Section 402(f), the analogous section of the Revenue Act of 1918, was not retroactive in application.

beneficiaries named.[40] The statute now makes its application specifically retroactive.[41]

If, then, the proceeds of such policies over which the decedent has retained no control during his life cannot be included in his estate under the section specifically applicable to life insurance, the question remains whether it is possible to include them in the gross estate under any other provision of the Estate Tax. Neither irrevocable assignment of the policies nor surrender of the power to change the beneficiaries would, per se, be within the judicial definitions of transfers made in contemplation of death or to take effect in possession or enjoyment at or after death.[42] Furthermore, the general counsel of the Bureau of Internal Revenue has expressly ruled that even if beneficiaries were named or policies assigned actually in contemplation of or intended to take effect in possession or enjoyment at or after death, they may not be included in the decedent's gross estate under Section 402(c) of the 1926 Act or under similar provisions of subsequent acts.[43] The ground for this ruling was that Congress, by providing specifically for insurance under subsection (g) of the section, meant such provision to govern as to any consideration of insurance, and that if subsection (c) did apply to insurance, then both subdivisions would; and that this would be an arbitrary and invalid double taxation. If, then, the proceeds of such policies are taxable at all, they must be taxable under Section 302(g). Several lower court decisions have held that they could not be included even under the latter section,[44] and presumptive evidence that they will not be is to be found in the Treasury Regulations pertinent to the Gift Tax[45] and in the comprehensive summary of the 1932 Gift Tax requirements on Form 709.[46] These later sources classify both irrevocable assignments and such appointments of beneficiaries as are not subject to change by the insured as examples of absolute gifts and as such subject to the Gift Tax.

Estate Tax provisions in regard to insurance are only concerned with

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40. Heiner v. Grandin, 44 F. (2d) 141 (C. C. A. 3d, 1930), aff'd, 56 F. (2d) 1032 (C. C. A. 3d, 1932), cert. denied, 286 U. S. 561 (1932); Jacob K. Newman, 29 B. T. A. 53 (1933); and cases there cited, at 56.

41. Section 302(h), Revenue Act of 1934, first adopted in 1924. See Scott v. Commissioner, 69 F. (2d) 444 (C. C. A. 8th, 1934).

42. Cf. Matter of Voorhees, 200 App. Div. 259, 263, 193 N. Y. Supp. 168, 171 (3d Dep't, 1922).

43. G. C. M. 1164, VI-1 Cum. Bull. 315.

44. Anthracite Trust Co. v. Phillips, 49 F. (2d) 910 (D. Pa. 1931); Guettel v. United States, 67 Ct. Cl. 613 (1929); David A. Reed, 24 B. T. A. 166 (1931); cf. Helena Liebes, Executrix, 20 B. T. A. 731, 737 (1930), aff'd, 63 F. (2d) 870 (C. C. A. 9th, 1933).

45. U. S. Treas. Reg. 79, Art. 2.

46. Form 709 reads in part: "Examples of transactions resulting in taxable gifts if entered into without an adequate and full consideration in money or money's worth are as follows: . . . (5) The irrevocable assignment of a life insurance policy, the naming of a beneficiary without retaining the unlimited right to change the beneficiary to the insured's creditors, or estate, or the unconditional right to the cash or surrender value, or the relinquishment or assignment of the right to the cash or surrender value to a beneficiary already named, or to any other person, constitutes a gift in the amount of the net cash or surrender value."

policies which are taken out by the decedent upon his own life and on which he pays all the premiums either directly or indirectly.[47] Where all the premiums on the policies are actually paid by the beneficiary, the proceeds receivable by the beneficiary at the insured's death are beyond the statute.[48] This fact suggests the possibility of escaping the tax in the following manner: the husband makes an outright gift of certain securities to his wife. Then she takes out a policy of insurance upon his life, naming herself as a beneficiary. This she assigns to the trustee along with an irrevocable assignment of the securities whose income is to be used to meet the premiums on the policy. Apparently, the proceeds of the policy would not be included in the estates of either husband or wife for estate tax purposes since the insurance would not have been taken out in either case by the decedent on his or her own life. Nor, apparently, would either the husband or the wife[49] be liable for the tax on the income of the fund, since in neither case would the fund be used to pay the premiums of insurance *taken out on the life of the settlor of the trust.* Nevertheless, it seems probable that if the original transfer of securities can be traced, the court would look through the form to the substance of the transactions and tax both the husband for the income and his estate for the proceeds of the policy,[50] unless, as to the latter, the policy had been irrevocably assigned or its legal incidents surrendered.[51] However, were the wife to create the fund out of her own securities, the proceeds of the policies would certainly escape inclusion in the husband's estate.[52]

B. *Taxation of the Securities of the Fund*

The Federal Estate Tax has been designed to reach four main types of inter vivos transfers: (1) transfers in which the transferor has reserved the power to alter, amend or revoke the transfer; (2) transfers made in contemplation of death; (3) transfers which are intended to take effect in possession or enjoyment at or after the transferor's death;[53] and (4) transfers in which the

47. U. S. Treas. Reg. 80, Art. 25. Cf. John Bromley, 16 B. T. A. 1322 (1929).

48. Cf. Wilson v. Crooks, 52 F. (2d) 692 (D. Mo. 1931). This case made no distinction between the payment of premiums by the beneficiaries and the payment of premiums by persons other than the insured or the beneficiaries. The present regulations, however, now make such a distinction. See note 47, *supra.*

49. Lucy A. Blumenthal, 30 B. T. A. 591 (1934).

50. Cf. Jackson v. Commissioner, 64 F. (2d) 359 (C. C. A. 4th, 1933).

51. As to the taxation under the estate tax of the securities in the fund, see text, infra.

52. Policies in which the insured reserves a reversionary interest in the proceeds are to be included in his gross estate under U. S. Treas. Reg. 80, Art. 25. The courts, however, have not uniformly agreed that this reversionary interest is a substantial enough incident of ownership. Cf. Ballard v. Helburn, 9 F. Supp. 812 (D. Ky. 1935) and Industrial Trust Co. v. United States, 9 F. Supp. 817 (Ct. Cl. 1935) noted in (1935) 44 YALE L. J. 1233.

Another interesting set-up relative to the waiver of the power to change the beneficiaries is to be found in *Martha H. Reybine, Executrix,* 31 B. T. A. Oct. 12, 1934. There the insured assigned the policies to trustees and waived the right to change the beneficiaries during their trusteeship. However, he retained the power to change the trustees. Despite this fact, the Board refused to include the proceeds of the policies in the insured's gross estate.

53. Originally, the attempt was made to include among transfers to take effect in possession or enjoyment at or after death all transfers when death marked any diminution in the estate of the donor or any increase in the estate of the donee. The failure of the courts

transferor has reserved the right to the income or the power to designate who shall receive the income from the property transferred. Thus, all revocable trusts and irrevocable trusts of the last three types are to be included in the gross estate of the settlor.

As to revocable trusts, Section 302(d) has been extended by amendment so as to include all transfers where there is reserved to the settlor alone, or in conjunction "with any person," the power to alter, amend or revoke the trust instrument. Even such conditional powers as were retained in *Lewis v. White*[12] and *DuPont v. Commissioner*[6] fall within the section, and the arguments for the validity of their inclusion under the Income Tax apply in regard to the Estate Tax.[54] Judicial interpretation has limited the meaning of the phrase "with any person" to mean "any person not a beneficiary."[55] No part of this section appeared in any revenue act prior to 1924, but the question of its retroactive application does not arise as long as death takes place after the enactment of the law, for the tax falls upon the transfer of economic benefits which occurs at that time.[56] The imposition of such a tax has been held constitutional even in the case where the settlor might alter or amend the trust instrument but not in his own favor on the ground that the settlor's death, by terminating his power, was "the source of valuable assurance passing from the dead to the living" that the latter would not be divested of their interests.[57]

Where the power is lodged solely in a person other than the settlor, the transfer has been held not within the Estate Tax.[58] If the life insurance trust is irrevocable, the transfer of the fund is not, per se, taxable as made in contemplation of death, although it might be so held on the evidence as to the age, health, outlook, motives, and future plans of the settlor in the particular case. Nor, under the existing decisions, would the transfer be, per se, one to take effect in possession or enjoyment at or after death, although such a conclusion is a very distinct possibility for the future.[59] The determination of whether the fund is otherwise taxable under the Estate Tax must depend upon the disposition made of the income. Classifying the cases according to the use to which the income is put, there are, first, those where the income from the corpus is just enough to pay the premiums of the policies, and, second, those where there is a surplus of income and this excess is (a) used for additional

to adopt this interpretation of the statute led to the creation of the classifications of revocable gifts and gifts where the right or the control over the income was retained by the donee.

54. Katherine B. Albrecht, 27 B. T. A. 1091 (1933).

55. Reinecke v. Northern Trust Co., 278 U. S. 339 (1929).

56. Reinecke v. Northern Trust Co., 278 U. S. 339 (1929); Chase National Bank v. United States, 278 U. S. 327 (1929).

57. Porter v. Commissioner, 288 U. S. 436 (1933).

58. St. Louis Union Trust Co., 28 B. T. A. 107 (1933).

59. Cf. Commissioner v. Duke, 62 F. (2d) 1057 (C. C. A. 3d, 1933), aff'd, per curiam, by an equally divided court, 290 U. S. 591 (1933). All that the settlor retained in this case was a remote reversionary interest. The unsubstantiality of this interest would seem hardly to explain the four votes for taxing the trust, unless those four judges incline toward the theory that where the settlor's death brings about any increase in the interest of the beneficiary it is a transfer that brings the trust within the tax as one that takes effect in possession or enjoyment at or after death.

life insurance, (b) merely accumulated and added to the corpus, (c) paid back to the settlor, (d) paid to the beneficiary, and (e) used in whatsoever way the settlor may designate.

In regard to the first situation, the taxability of this part of the corpus will depend on which one of several possible views is adopted by the courts. If it is considered that the use of the income of a trust to pay the premiums of insurance upon the life of the settlor is the equivalent of the reservation by the settlor of a life interest, the corpus out of which the income arises will most probably be included in his gross estate under Section 302(c), as amended March 3, 1931. Before that time, the cases of *May v. Heiner*,[60] *Burnet v. Northern Trust Co.*,[61] *Morsman v. Burnet*,[62] and *McCormick v. Burnet*[63] had held that where the settlor had made an irrevocable trust but had reserved the income to himself for life, the transfer was not taxable as one designed to take effect in possession or enjoyment at or after his death. But the day after the decisions in the last three of these cases were handed down, Congress, to prevent this easy method of avoiding the tax, enacted the above amendment expressly taxing this very type of transfer.[64] If the rationale of the *Wells* case is applied to the estate taxation of funded life insurance trusts (at least when created after March 3, 1931[65]), the amended Section 302(c) would demand the inclusion in the gross estate of the settlor of that part of the corpus which produced the income necessary to pay the premiums. In view of the Supreme Court's decision that such income is being enjoyed by the settlor for the purpose of income taxation,[66] the courts may employ a similar approach to bring the case within Section 302(c). For, to state that the income is being used for the settlor's benefit is but another way of saying that he has not parted with the enjoyment of the income until his death. If he has retained enough control over the income or the corpus to be liable for an income tax, this control would seem adequate to justify an estate tax. Certainly, if the funded life insurance trust is to be so treated under the income tax in order to prevent evasion, a similar treatment under the estate tax is indicated.

No case questioning the constitutionality of the amendment to Section 302(c) has arisen, but the Supreme Court has sustained the validity of a tax upon such a transfer under the Connecticut succession tax.[67] There is also an obiter dictum in *Coolidge v. Long*[68] to the effect that there is no doubt of the government's power to levy such an excise upon property transferred after the effective date of the statute.

However, two other explanations of the irrevocable funded life insurance trust are possible: one, that the trust is formed solely to enable the beneficiary himself to pay the premiums on the policies; the other, that the income of the trust is to be accumulated for the beneficiary during the settlor's life. Under

60. 281 U. S. 238 (1930).

61. 283 U. S. 782 (1932).

62. 283 U. S. 783 (1932).

63. 283 U. S. 784 (1932).

64. 74 Cong. Rec. 7078 (1931). The Treasury Department has announced that this amendment will not be applied retroactively.

65. T. D. 4314, X-1 Cum. Bull. 450.

66. Burnet v. Wells, note 18, *supra*, and text.

67. Guarantee Trust Co. v. Blodgett, 287 U. S. 509 (1933).

68. 282 U. S. 582, 596 (1931).

neither of these explanations would the trust be taxable. In the former, the policy would be relegated to a position of similarity to one taken out by the beneficiary on the life of the insured. The transfer of the trust res would be complete at the time the instrument went into effect, and there would be nothing left to pass at death which could be subjected to a tax. In the latter, a transfer is involved that was formerly considered taxable under the treasury regulations.[69] But when the point was squarely raised before the Supreme Court in *Shukert v. Allen*,[70] no distinction could be found between an irrevocable trust where the income was paid directly to the beneficiaries and one where the income immediately vested in the beneficiaries but was to be accumulated rather than paid over. As a result of this decision, the Treasury Department abandoned its hope of holding such accumulations taxable under the Estate Tax.[71]

It is only, then, if the trust is considered as one under which the income is being enjoyed by the settlor that the corpus of the trust fund would be subject to the estate tax, and this interpretation seems to be the one that the courts are most likely to follow. Irrevocable trusts have been held taxable to the settlor's estate even where the benefits accruing to the settlor are of less substantiality than that of having his life insurance premiums paid. Certainly, the latter is a more important reservation than the power to alter or amend the trust but not in the settlor's own favor,[57] or the right to direct the trustees to distribute the income in unequal shares to the beneficiaries,[72] or the reservation of a reversionary interest to take effect only if the beneficiaries, the children of the settlor, predecease the latter.[73]

Estate taxation of that part of the irrevocable trust fund producing income in excess of the premium requirements will depend upon the use made of this surplus income. If it is used to pay the premiums on additional life insurance, the treatment of this part of the corpus will naturally be the same as the rest. If it is merely accumulated and added to the corpus, it will not cause the estate tax to fall on the securities which produced it as long as the *Shukert v. Allen*[70] decision is followed. Where the surplus income is or may be paid back to the settlor or disposed of according to his wishes, the situation is that envisaged by the 1931 amendment to Section 302(c), and it is clearly taxable unless the original transfer was made before the date of the amendment.[65] However, where the trust instrument recites that the surplus is to be paid over directly to the beneficiary, there would be no question but that this part of the corpus had been completely and finally transferred inter vivos and is free of liability to the estate tax.

The Federal Gift Tax[74]

The closeness of the relation between the estate and gift taxes is shown

69. U. S. Treas. Reg. 70, Art. 18.

70. 273 U. S. 545 (1927).

71. T. D. 4285, IX-1 Cum. Bull. 356.

72. Hoblitzelle v. United States, 3 F. Supp. 331 (Ct. Cl. 1933).

73. Under U. S. Treas. Reg. 80, Art. 17 all transfers conditional upon survivorship are to be included in the gross estate.

74. Although the Gift Tax of 1932 was a new tax in the sense that it did not appear in the previous statutes, it may be said to be a greatly strengthened edition of the 1924 Gift Tax. The two acts are similar enough in application and form, however, so that the up-

nowhere more clearly than in the matter of life insurance. Those transfers which escape the tax on estates—the irrevocable assignment or the surrender of the power to revoke an assignment or the relinquishment of the legal incidents of ownership in the policies before but not in contemplation of death[75] —become the named objectives of the tax on gifts. The value of the gift in those cases will be computed by adding the net surrender value and the prepaid insurance adjusted to the date of the gift.[76] The gift tax will be levied as well on the future premium payments when made by the insured on such policies.[77]

If the trust is considered revocable, the tax will not apply,[78] except as to a payment of surplus income to the beneficiary, in which case there is a gift by the settlor to the beneficiary. For, by retaining the power of revocation, the settlor has never relinquished control of the fund, and it is as if he were making a gift from his own personal income. But where the power of revocation is surrendered, except in contemplation of death or by death itself, the surrender is a transfer by gift within the scope of the tax.[79] This affords no difficulty as to that part of the corpus of a revocable life insurance trust which produces surplus income, for, by the surrender, an irrevocable trust is created, and the settlor has parted with all interest in it, so that future payments of the surplus income will not be gifts by the settlor. But the matter is more involved in regard to that part of the corpus which produces the income necessary for the premium payments. As to that part, also, when the power is surrendered an irrevocable trust is created. But under *Burnet v. Wells* it is an irrevocable trust with the reservation of a life interest in the income to the settlor. Irrevocable trusts are taxable under the Gift Tax, and, therefore, the Gift Tax will be levied on the transfer of the future interest in the corpus.[80] But if the rationale of the *Wells* case is adopted, the estate

holding of the constitutionality of the earlier [Bromley v. McCaughn, 280 U. S. 124 (1929)] is determinative of that of the later. The tax was said not to be a direct tax but one that falls upon the exercise of one of the incidents of ownership, the power of giving the property owned to another. As such, it is an excise tax that need not be apportioned and requires only geographical uniformity. Since the Supreme Court held the retroactive application of the 1924 Gift Tax invalid [Blodgett v. Holden, 275 U. S. 142 (1927); Untermyer v. Anderson, 276 U. S. 440 (1928)], such use has been disavowed in the present law.

75. Cf. U. S. Treas. Reg. 79, Art. 2 and Gift Tax Form 709.

76. The method of computing the value of the gift is set forth in G. C. M. 13147, XIII-22 Cum. Bull. 6820.

77. U. S. Treas. Reg. 79, Art. 2.

78. Formerly there was an express provision, Section 501(c), Rev. Act of 1932, excepting revocable trusts from the gift tax. This, however, was repealed by Section 511, Rev. Act of 1934, since the statute was merely declaratory of the existing law.

79. Burnet v. Guggenheim, 288 U. S. 280 (1933).

80. Cf. Telegram of Adelbert Christy, Acting Deputy Commissioner, dated December 9, 1933, to C. E. Kimball, Trust Officer, Chemical Bank and Trust Co., New York City: "Reference your telegram of December ninth Stop Creation of irrevocable trust with income to grantor for life and remainder to another person constitutes gift of future interest to the other person which is subject to the gift tax Stop Also constitutes transfer subject to the estate tax at death of grantor but credit for gift tax paid allowable against estate tax." cited in 352 C. C. H. § 2045.241.

tax will apply as well at the death of the settlor, although, in computing the latter tax, credit will be given for the gift tax paid. This crediting of the amount paid under the gift tax on the amount due under the estate tax would seem at first blush to result in a sum, paid in two instalments, exactly equal to the total of the estate tax. But such a conclusion ignores the factor of the estate taxes of certain of the states. Section 301(c)[81] of the federal estate tax, as amended in 1932, allows credit up to 80% for state taxes paid upon the estate of the decedent, but it is 80% of the federal estate tax *after* the deduction of the amount paid under the gift tax. Where the rates of the state estate tax are made approximately 80% of the federal tax rates in order to take full advantage of this credit, the amount of the state tax will in this instance be considerably greater than the credit allowed by the federal tax, since it will be computed without deducting the amount of the gift taxes paid to the federal government. As a result, the sum of all taxes paid on the transfer would be greater than if a gift tax had not been paid in the first instance, the increment going to the federal treasury.

To illustrate, assume that the gift tax on the securities of the irrevocable trust fund would be $7,500. When the settlor dies, the estate tax under Section 302(c) would be $10,000, the gift tax being three-quarters of the estate tax. Now the settlor's estate would be given a credit of $7,500 for the gift tax paid, leaving $2,500. Under the 80% clause of Section 301(c), a further credit of 80%, or $2,000, would be allowed for state taxes, and 20%, or $500, would go to the federal government. But New York's estate tax rates,[82] for example, being based upon 80% of the federal estate tax rates, would be applied against the whole of the amount transferred, allowing no credit for a gift tax. New York's tax, then, would be 80% of $10,000, or $8,000—that is, $6,000 more than the credit permitted to the decedent's estate by the federal statute. Thus, the total taxation of the corpus of this irrevocable life insurance trust fund would be $16,000 instead of the $10,000 tax ($2,000 to the federal and $8,000 to the state government) that would be imposed were the trust a revocable one.

All this follows from the premise that the rationale of the *Wells* case will be applied to the estate taxation of the irrevocable funded life insurance trust. If that premise be correct, it would follow that the revocable funded life insurance trust would bear the lighter tax burden in such states as New York and no heavier a burden in the other states. The irrevocable variety would make the settlor liable for an income tax on the income used for the premium payments and for both a gift tax and an estate tax, the former credited against the latter, on the corpus of the fund; while the revocable type would make him liable for only the tax on the income and the estate tax on the fund. This discrepancy might be remedied in one of two ways: either by the adoption of gift taxes by the state governments and the allowance of an

81. Section 301, Rev. Act of 1926, as amended by Section 802, Act of 1932, reads in part: "The credit allowed by this subdivision" for state death taxes actually paid "shall not exceed 80 per centum of the tax imposed by subdivision (a) [after deducting from such tax the credits provided by subdivision (b)]" which latter subdivision allows the credit for gift taxes paid.

82. N. Y. Tax Law (1934) § 249-r-3.

eighty percent credit by the federal government for state gift taxes paid; or by the more practical method of considering the creation of an irrevocable funded life insurance trust a still incompleted gift, and hence, not subject to any gift tax at all.

OPERATION OF FEDERAL STOCK TRANSFER ACT

By a federal statute of long standing a tax is imposed on the act of transferring legal title to stock[1] or rights to receive stock except when transfers are made to and from brokers acting as agents to effectuate a purchase or sale of stock,[2] or when the stock is pledged as collateral security for loans, or when the stock is transferred from a fiduciary to a nominee, or vice versa, and such nominee is limited to using the stock as is the fiduciary.[3] The tax is based on a flat rate, regardless of the value of the stock[4] or whether or not the transfer of title carries with it any beneficial interest in the stock. A literal interpretation of the statute would lead to the supposition that aside from the stipulated exceptions, the tax is imposed upon every transfer of legal title to stock or rights thereto, irrespective of other circumstances. And usually, where the

1. Revenue Act of 1926, 44 Stat. 99, 101, Schedule A-3, 26 U. S. C. A. § 901, Schedule A-3 (1926) as amended by Revenue Act of 1932, 47 Stat. 272, Schedule A-3 (1932), 26 U. S. C. A. § 901, Schedule A-3 (1934). This tax has been in existence in substantially its present form since 1898 (30 Stat. 448, 458) though the act did not specifically tax "transfers of legal title" until the Revenue Act of 1917 (40 Stat. 1135).

The tax is levied on the act of transferring, not on the property transferred. Goodyear Tire and Rubber Co. v. United States, 273 U. S. 100 (1927); Fidelity Investment Ass'n v. United States, 5 F. Supp. 19, 23 (Ct. Cl. 1933).

2. See also 352 C C H 2757.147. But where the broker is dealing with a customer in the purchase and sale of stock at the order of the customer, and settlements are made by a payment of differences, the broker is held to be dealing as a principal and both the fictitious purchase and sale of the stock are taxable. 352 C C H 2757.06. But see McClain v. Fleshman, 106 Fed. 880 (C. C. A. 3d, 1901).

N.B. The citations here and hereafter to 352 C C H, Vol. II of the 1935 Commerce Clearing House Federal Tax Service include various rulings of the Treasury Department and its subsidiary agencies in connection with the administration of the stock transfer tax. This abbreviated citation is more practicable and refers to a more available source of reference than would an attempt to cite each ruling according to the agency issuing it.

3. See 352 C C H 2757.17. Ordinarily, however, the transfer of title to a nominee, though for the mere convenience of the beneficial owner, is taxable. Thus, even though a purchaser of stock directs the issuing corporation to issue the stock in the name of a nominee, it is held that the purchaser first obtains a right to the stock, and then transfers that right to the nominee, and such transfer is taxable under the act. See 352 C C H 2757.305, 2754.01. But see Union Trust Co. v. Heiner, 26 F. (2d) 391 (W. D. Pa. 1928); Dean v. Caldwell, 9 F. Supp. 177 (M. D. Tenn. 1934).

4. The present rate is 4 cents for each $100. par value or fraction thereof, or each share of no-par stock. If the actual value of the stock is more than $20., a rate of 5 cents is applied. These rates become ineffective on July 1, 1935, and the previous rate of 2 cents irrespective of actual value is restored. 47 Stat. 272, 26 U. S. C. A. § 901, Schedule A-3 (1934). See Wickersham, *Taxation of No Par Value Stock* (1926) 39 Harv. L. Rev. 289, 303 (discussion of rates of the tax and operation thereof).

transfer of legal title is unequivocal, the tax is levied even though no benefit may accrue to the transferor, who is primarily liable to pay the tax,[5] or to the transferee as a result of the transfer.[6] Thus, for example, transfers of stock from the name of a decedent's nominee to the name of the estate or the executor or administrator thereof,[7] or from a fiduciary acting in one capacity to himself acting in another capacity,[8] or from a guardian to his ward upon the latter's coming of age,[9] are taxable, because in each instance a transfer of legal title is consummated. Similarly, under the act, the recipient of an option to purchase stock is taxable as having received a right to demand stock, even though the option may never be exercised.[10]

While it would seem that strict adherence to the terms of the statute would require that every transfer of legal title to stock be taxed, in some instances it may be difficult to ascertain whether or not a requisite transfer of legal title, justifying the imposition of the tax, has taken place. This appears to be notably true of transfers made in connection with corporate reorganizations, or consolidations.

A corporate reorganization or consolidation is often effected by the establishment of a new corporation which takes over the assets and assumes the liabilities of the old corporation. In payment therefor, the new corporation either may issue its stock to the old corporation, which in turn would transfer the new stock to its stockholders, or in pursuance of a contract entered into by the old and new corporations, the latter may issue the new stock directly to the stockholders of the old corporation.[11] In either case, the stockholders of the old corporation are ultimately the recipients of the new stock. Under either method at least one taxable transaction occurs, namely the issuance of the stock by the new corporation, which is taxable under the stock issuance tax provision.[12] Where the former method is pursued, the transfer of the stock

5. The transferee or any broker or agent who acts in the transaction, however, is made liable to a penalty by the act for failure to require the transferor to pay the tax or see that it is otherwise paid.

6. See 352 C C H 2757.175, following Bonbright and Co. v. State, 165 App. Div. 640, 151 N. Y. Supp. 35 (3d Dept., 1915). The transfer of stock to a receiver appointed by a court is taxable, 352 C C H 2757.31, as are transfers to trustees or guardians, 352 C C H 2757.21. But if the transfer occurs by operation of law, it is not taxable. 352 C C H 2757.34.

7. 352 C C H 2757.0337.

8. 352 C C H 2757.0334 and 352 C C H 2757.193.

9. 352 C C H 2757.08.

10. Treat v. White, 181 U. S. 264 (1901). See also 352 C C H 2757.04. But when the option is exercised, no additional tax is imposed on the subsequent transfer of the stock to the option holder. 352 C C H 2757.0305.

11. Even though the old corporation sells all its assets and distributes the return consideration to its stockholders, the corporation remains in existence. Dissolution requires other steps to be taken. Williard v. Spartenburg, 124 Fed. 796 (C. C. D. S. C. 1903); Tatum v. Leigh, 136 Ga. 791, 72 S. E. 156 (1911); Brock v. Poor, 216 N. Y. 387, 111 N. E. 229 (1915).

12. Revenue Act of 1926, 44 STAT. 99, 101, 26 U. S. C. A. § 901, Schedule A-2 (1926) as amended by Revenue Act of 1932, 47 STAT. 272 (1932), 26 U. S. C. A. § 901, Schedule A-2 (1934).

received by the old corporation to its stockholders clearly involves another taxable transaction, that is, a transfer taxable under the stock transfer act. But where the latter method is adopted and the stock is issued directly to the stockholders of the old corporation, no apparent transfer from the old corporation to its stockholders occurs, and the basis for the levy of a transfer tax seems to be absent. Under such circumstances it has been held in two recent federal cases that no transfer tax should be levied.[13]

In support of such a holding it may be contended that where the old corporation contracts to turn over its assets in consideration of the delivery by the new corporation of its stock directly to the stockholders of the old corporation, a situation analogous to a third party beneficiary relationship arises.[14] If this analogy is correct, the old corporation does not obtain a right to the new stock in itself; it merely gains the right to have the contract enforced according to its terms. Consequently, since no right to the stock accrues to the old corporation, there can be no transfer of any right by the old corporation to its stockholders; the latter receive the stock directly from the new corporation. On the other hand, however, it is possible to argue that actually, no matter what formula is used in order to put the new stock into the hands of the old stockholders, that stock or the right thereto cannot vest in the stockholders except by a transfer from the old corporation. Instead of having an actual third party beneficiary relationship, it may be said that the right to receive the new stock actually accrued to the old corporation when it voted to sell its assets and shifted to the stockholders when it voted to have the return consideration issued directly to the stockholders. By virtue of such corporate action a right to the return consideration was granted to the stockholders and such grant may plausibly be considered a transfer of a right which is subject to the tax.[15]

Another justification for holding that a transfer tax may not be imposed on such transfers of shares of the new corporation may be found by disregarding the corporate entity of the old corporation, treating the stockholders as virtual owners of the corporate assets, and hence as really constituting the corpora-

13. Minnesota Mining and Mfg. Co. v. Willcuts, 2 F. Supp. 789 (D. Minn. 1932); Westmoreland Coal Co. v. MacLaughlin, 8 F. Supp. 963 (E. D. Pa. 1934), aff'd 73 F. (2d) 1004 (C. C. A. 3d, 1934); cf. Consolidated Equities Inc. v. White, 7 F. Supp. 851 (D. Mass. 1934).

14. This is apparently the argument of the Westmoreland case, 8 F. Supp. 963 (E. D. Pa. 1934), though not specifically labeled as such. The court says at p. 964: "It is perfectly competent for a corporation . . . to agree to sell its assets for a price and to stipulate that the price shall not paid to it but to third parties."

15. Such is the holding and argument in Consolidated Equities Inc. v. White, 9 F. Supp. 145 (D. Mass. 1934); cf. Marconi Wireless Telegraph Co. of America v. Duffy, 273 Fed. 197 (D. C. N. J. 1921). See also 352 C C H 2757.0327; 2757.10; 2757.105. This same refusal to allow any form of procedure to disguise the fact that the old corporation in the first instance necessarily gets a right to the return consideration has been evident in income tax cases. See Rockefeller v. United States, 257 U. S. 176 (1921); West End St. Ry. Co. v. Malley, 246 Fed. 625 (C. C. A. 1st, 1917); Rensselaer and S. R. Co. v. Irwin, 249 Fed. 726 (C. C. A. 2d, 1918); cf. Lucas v. Earl, 281 U. S. 111, 114 (1930).

tion.[16] If such a view is taken, it is immaterial whether such stock comes to the stockholders directly or ostensibly through the medium of the corporation which is merely the alter ego of the stockholders. In either case there is no transfer from the corporation to its stockholders, because the two are not separate. But it may be argued, on the other hand, that the distinction between a corporation and its stockholders which is maintained for other purposes, cannot be ignored in this situation.[17] If the conceptual distinction is rigidly adhered to, so long as the old corporation remains in existence, it is the corporation which is acting in selling its assets, and this is true even though the corporation to take this action requires the consent of its stockholders.[18] The return consideration in turn passes to the corporation as such, and any distribution of the assets so secured to the stockholders in their individual capacity involves the transfer of legal title from the old corporation to them in liquidation of the corporation,[19] thus creating a taxable stock transfer.

Still another justification for a refusal to allow imposition of a transfer tax in this situation has been found when the stock of the new corporation represents substantially the same equities of each stockholder as the old stock represented in the assets which are transferred to the new corporation. It is argued that the act did not intend to tax every technical transfer of stock, but only such transfers as passed an interest in the property of the corporation from one owner to another, or gave the holders of the transferred stock an interest in the corporate property which they had not owned previous to the transfer. Thus it has been held that no transfer tax will be imposed when the reorganization in substance accomplishes nothing more than to give to each stockholder of the old corporation the same number of shares in the new corporation as he previously held in the old corporation, though possibly represented by stock of a different face or par value,[20] because the change of corporate identity is merely

16. This is the apparent basis for the decision in Minnesota Mining and Mfg. Co. v. Willcuts, 2 F. Supp. 789 (D. Minn. 1932). Cf. Anthony v. American Glucose Co., 146 N. Y. 407, 412, 41 N. E. 23, 24 (1895).

17. Marconi Wireless Telegraph Co. v. Duffy, 273 Fed. 197 (D. C. N. J. 1921); Consolidated Equities Corp. v. White, 9 F. Supp. 145 (D. C. Mass. 1934); cf. Eisner v. Macomber, 252 U. S. 189, 208-209 (1920). See also 352 C C H 2757.28.

18. While the consent of stockholders is usually required before a corporation may sell out its assets, the corporation, rather than the stockholders, are deemed to be the owners of the corporate property. Hence the stockholders cannot sell such property in their capacity as stockholders. Sabre v. United Traction and Electric Co., 225 Fed. 601 (D. C. R. I. 1915); De Nunzio v. De Nunzio, 90 Conn. 342, 97 Atl. 323 (1916).

19. Even when a corporation formally dissolves, it is held that title to the assets of such corporation does not vest in the stockholders in a pro rata fashion, but only to the extent of an undivided interest therein. When such assets are divided and distributed to the stockholders in liquidation of the corporation, a transfer of legal title occurs, and if such assets are stock of another corporation, a transfer tax must be paid. 352 C C H 2757.16.

20. The face value of the stock as provided for in the corporate charter rather than as printed on the stock certificates is held determinative of the basis for application of the transfer tax. Goodyear Tire and Rubber Co. v. United States, 273 U. S. 100 (1927), reversing 60 Ct. Cl. 486 (1925). See also 352 C C H 2755.06 and 2755.015.

technical and nominal.[21] The substitution of new stock for old, though achieved by operations which involved technical transfers of legal title, does not, it is said, accomplish any transfer of interest to the old stockholders not previously held by them. On the other hand, however, it may be pointed out that the act plainly taxes all transfers of legal title to stock or the rights thereto with the exception of the transactions specifically exempted. And where there can be shown to have been a transfer of legal title to the new stock from the old corporation to its stockholders, however technical, a holding that such a transfer is non-taxable seems to involve reading into the act elements which do not clearly appear on its face. Moreover such an interpretation raises difficult factual problems as to when the interest represented by the new stock is or is not different from the interest represented by the old stock,[22] such problems being easily avoided by a literal interpretation of the act.

In many instances, corporate reorganizations are effected along the lines of a plan formulated by a committee representing stockholders who have deposited their stock with the committee. The rights of the committee with respect to the stock deposited with it are governed by the deposit agreement, which customarily confers upon the committee broad discretionary powers, including, usually, the power to sell or pledge the stock in their hands.[23] Virtually all deposit agreements at present contain a provision to the effect that the committee is acting solely as the agent of the stockholders and that the deposit with the committee shall not vest title to the stock in the committee until the committee elects to take title.[24] In order to enable the committee to deal with the stock as the agreement authorizes them to do, the stock is indorsed in blank before being delivered to the committee.[25]

21. Shreveport-El Dorado Pipe Line Co. v. McGrawl, 63 F. (2d) 202 (C. C. A. 5th, 1933); see Consolidated Equities Corp. v. White, 9 F. Supp. 145, 146 (D. Mass. 1934).

22. Only a very shady line can be drawn in determining how much of a change in interest would be necessary to warrant the imposition of a tax. Thus in the *Shreveport case, supra* note 21, for example, the new corporation was incorporated under a different charter and in a different state. That change undoubtedly involved some change of interest, although the court held it to be insufficient. In other instances the tax is applied when there is a transfer of legal title even though the change of interest effected thereby is purely nominal. Thus a transfer of stock from the name of a partnership to the names of members thereof on dissolution is taxable. 352 C C H 2757.0326 and 2757.22.

23. See Douglas, *Protective Committees in Railroad Reorganizations* (1934) 47 HARV. L. REV. 565 at 581-582; Lowenthal, *The Stock Exchange and Protective Committee Securities* (1933) 33 COL. L. REV. 1293, 1306-1309, 1315; Lowenthal, *The Railroad Reorganization Act* (1934) 47 HARV. L. REV. 18, 38 et seq.; Rohrlich, *Protective Committees* (1932) 80 U. OF PA. L. REV. 670, 676-678, 682. These discussions emphasize the broadness of the powers possessed by the stockholders committees.

24. CHRISTY, THE TRANSFER OF STOCK (1929) § 563; Rohrlich, *supra* note 23, at 676-677, n. 40.

25. A delivery of stock indorsed in blank is sufficient to transfer legal title. See Travis v. Ann Arbor Co., 180 App. Div. 799, 168 N. Y. Supp. 53 (3d Dept., 1917); UNIFORM STOCK TRANSFER ACT § 1a. However, a restriction on such a delivery may prevent the delivery from passing legal title. Thus delivery of stock indorsed in blank to a mere bailee or custodian would not be deemed a transfer of legal title. See 352 C C H 2757.17.

The federal courts have never had occasion to determine whether a delivery of stock to such a committee under the latter arrangement constitutes a transfer of legal title within the meaning of the stock transfer act. It seems that apart from the provision stipulating that the committee should not be deemed to hold legal title until it deems it expedient to exercise its power to take title, the committee has all the indicia of legal title.[26] The question, then, is whether that provision suffices to render the transfer to the committee non-taxable until the committee shall decide to exercise its power. A New York case decided under a stock transfer tax statute closely analogous to the federal statute, has held that such a stipulation would result in rendering the deposit non-taxable under the statute.[27] It seems at least arguable, however, that this stipulation cannot be effective as against the existence of powers of a virtual owner.[28] Furthermore, it might be pointed out that even conceding that the parties, by agreement, may limit the effect of an apparent transfer of legal title to the stock, since the committee can in its own discretion elect to take title, it is virtually in the position of an option holder, and it is well established that an option agreement is taxable.[10] For, even though the depositing stockholders have an apparent power to withdraw their deposited stock, thus rendering the alleged option of the committee apparently revocable by the stockholders, such power of revocation is usually strictly limited by the fact that under the terms of most agreements the committee may impose an assessment as a condition to such revocation by the depositor.[29] Because of this limitation on the power

26. See note 23, *supra*. Aside from the stipulation in the deposit agreement that the deposit with the committee shall not vest title to the stock in the committee, there appears ample justification for analogizing, in point of powers possessed, the protective committee with voting trustees. It is well settled that legal title passes to voting trustees when stock is deposited with them, and such transfers are taxable. See CUSHING, VOTING TRUSTS (2d ed. 1927) 162-163; Miller, *Voting Trusts* (1929) 4 IND. L. J. 600, 602.

27. International Paper Co. v. State, 210 App. Div. 353, 206 N. Y. Supp. 57 (3d Dept., 1924), aff'd 241 N. Y. 535, 150 N. E. 543 (1925). See (1925) 25 COL. L. REV. 243. The committee involved in that case was not a typical protective committee with the usual powers of such committees. The committee did, however, have an irrevocable power to vote the stock although the power was never exercised.

Sections 77 and 77B of the new federal bankruptcy amendments relating to railroad and other corporate reorganizations, provide that the transfers or issuance of stock "to make effective any plan of reorganization confirmed" under those sections shall not be subject to tax. 47 STAT. 1474 (1933), 11 U. S. C. A. § 205(i) (1934); 48 STAT. 912, 11 U. S. C. A. § 207(f) (1934). This section appears to refer to transfers which occur after a plan of reorganization has been approved by the court, rather than those previous thereto. Hence, transfers to committees, occurring previous to the confirmation of any plan, would not seem to come within this statutory exemption.

28. See dissenting opinion, International Paper Co. v. State, 210 App. Div. 353, 360, 206 N. Y. Supp. 57, 63 (3d Dept., 1924): "The mere recital in the agreement (that the committee is not taking title) cannot be utilized to save a tax which the statute expressly creates. . . . All of the powers granted were not exercised, but if the agreement had not been made and the stock transferred to the committee, who can say that the negotiations thus brought about would otherwise have been an accomplished fact."

29. Douglas, *supra* note 23, at 580-581; Lowenthal, *The Railroad Reorganization Act* (1934) 47 HARV. L. REV. 8 at 39. Some agreements provide that the authority conferred

of revocation, it is arguable that the power is not so absolute as to prevent the committee from being in effect the holder of a taxable option.

In the situations discussed in connection with reorganizations it may be seen that seemingly valid arguments exist either for holding that legal title has or has not been transferred. But there are other situations disclosed in the administration of the tax act or by court decisions where no apparent valid arguments exist negativing the fact that a transfer of legal title has occurred, and yet exceptions to the clear wording of the statute have, in certain circumstances, been made in favor of taxpayers. Thus, for example, in the recent case of *Carman Manufacturing Co. v. Poe,*[30] a new corporation had been formed which had taken over the assets and stock of an old corporation and in payment therefor issued stock and debentures to stockholders of the old corporation, the debentures to be subsequently cashed for such stockholders. A stock transfer tax was imposed on the transfer of the stock of the old corporation to the new corporation. Later the new corporation and its promoters defaulted on the agreement to cash the debentures and the whole agreement was rescinded by mutual agreement. Revenue officials then imposed a tax on the retransfer to the new corporation of the new stock held by stockholders and upon the retransfer of the old stock which the new corporation had received, back to the old corporation stockholders. The court upheld the first tax upon the transfer of stock to the new corporation but held that the taxes imposed on the retransfers, after the rescission, were void on the ground that the tax statute provision stating that sales or transfers are taxable does not include a return or surrender on failure to consummate a reorganization plan. The decision makes no attempt at analysis and in the light of the wording of the tax statute it would appear that if title ever passed under the agreement so as to authorize the imposition of the tax in the first place, the rescission of the agreement necessarily involved a retransfer of title which in the absence of any exception in the tax statute was just as much of a transfer of title subject to tax as was the original transfer.[31]

Illustrative of another departure from a strict interpretation of the statute is the ruling by the treasury department that the borrowing and returning of stock are not taxable transactions if the borrower is an out-of-town customer of a broker, and therefore unable to deliver stock, which his broker has sold upon his order, and which the customer actually owns, in time to meet the

on the committee shall be irrevocable. Lowenthal, *The Stock Exchange and Protective Committee Securities* (1933) 33 Col. L. Rev. 1293, 1306-1307. Often, too, it is provided that the depositors are prohibited from taking any separate action to protect their interests. Rohrlich, *supra* note 23, at 676. This latter provision appears to give the committee, in effect, irrevocable authority. The rights of the committee also often include the discretionary power to limit any of the reserved rights of the depositor. Lowenthal, *supra,* at 1318, 1319.

30. 7 F. Supp. 716 (W. D. Wash. 1934); see (1935) 48 Harv. L. Rev. 1030.

31. A retransfer of stock by a trustee on revocation of the trust is taxable. See 352 C C H 2757.034. A transfer from a husband's name to the names of husband and wife is taxable, as is a retransfer, even though attempted as a rescission. 352 C C H 2757.0329.

delivery requirements of the stock exchange.[32] Such a situation necessitates a borrowing of stock by the broker for the customer until the latter is able to send his own stock. Ordinarily it is held that the loaning and returning of stock involve transfers of legal title, taxable under the act.[33] Thus, in a short sale transaction, separate transfer taxes are levied on the borrowing of stock by the short seller, upon the sale of the borrowed stock, upon the repurchase of the stock, and upon the return of such stock to the lender. It would seem that, in the absence of any exception in the tax statute, the circumstances of the borrowing and returning of stock are immaterial to a determination of the taxability of the transfer, so that a taxable transfer of legal title occurs as much in the case of borrowing for the out-of-town customer, as in the case of the short seller.

In all these situations where there has been a failure to impose the tax there are undoubtedly special circumstances which make it appear that the imposition of the tax would be unusually burdensome. Thus, in the case of reorganization proceedings, the stock is usually virtually worthless, and the numerous transfers involved in such proceedings may constitute a real burden upon such stockholders.[34] Moreover, it may seem inequitable to impose a tax upon transfers which are necessitated by uncontrollable circumstances as in the case of the out-of-town customer who merely because of his remoteness from the stock market must borrow stock in order to complete a valid sale and delivery. The tax is arbitrary and bears no relation to comparative ability to pay, since it taxes worthless stock at the same rate as valuable stock and since it takes no account of the existence or non-existence of any benefit derived from the transfer of title.[35] It is not surprising therefore, when there is a situation of seeming

32. See 352 C C H 2757.052 and 2757.23.

33. Provost v. United States, 60 Ct. Cl. 49 (1924), aff'd, 269 U. S. 443 (1926). See also 252 C C H 2757.0322 and 2757.0323 and 2757.05. An amendment offered in Congress to the stock transfer act providing that loans and returns of stock should not be taxed was defeated. 75 CONG. REC. 11540 (1932).

The New York Stock Exchange rules for delivery require delivery before 2:15 p. m. on the business day following the day of the contract. CHRISTY, op. cit. *supra* note 24, at 787, 789.

34. In cases involving reorganizations the fact that the tax is small would not prevent it from being a real burden, because usually large blocs of stock are transferred a number of times, and the same persons, namely the corporate reorganizers would have to bear this expense. See Wickersham, *supra* note 4, at 303. This burden would be accentuated by reason of the fact that various states have similar tax statutes. See, for example, Mass. Laws 1921, c. 64, § 1; N. Y. TAX LAW § 270.

35. The arbitrary rate, though involving inequality, has been held constitutional. See Thomas v. United States, 192 U. S. 363 (1904) (involving a similar stamp tax). State statutes levying the stock transfer tax have likewise been held constitutional. People ex rel. Hatch v. Reardon, 184 N. Y. 431, 77 N. E. 790 (1906), aff'd 204 U. S. 152 (1907). But cf. People ex rel. Farrington v. Mensching, 187 N. Y. 8, 79 N. E. 884 (1907).

For an example of how unequally the arbitrary basis of taxation may operate, see Clay Products Inc. v. United States, 52 F. (2d) 1033 (Ct. Cl. 1931) where the corporation paid $480. in stamp taxes on its own stock divided up into a large number of no par shares, when it was worth only $1000. See also remarks on burdensomeness of tax in

inequity of the incidence of the tax and any possible doubt as to the question of whether there has been a passage of legal title, that that doubt is resolved in favor of the taxpayer.[36]

On the other hand, however, the tax is seemingly not one designed to take account of various circumstances which make the imposition of the tax appear more inequitable in one case than in another. In a broad sense the tax operates on those who possess ability to pay; that is, one of the supposed advantages of this tax is that it bears on an activity which is indulged in only by those who would be expected to possess more than average ability to pay the tax, at least as compared with some other form of excise tax levied on a different sort of activity or object.[37] Since the rate and yield of the tax are relatively low, it is essential that the tax be administered economically and efficiently.[38] This can be accomplished only by using a simple arbitrary basis of computing the tax and by avoiding exceptions to the simple standard established by the act as to when the tax is incurred.[39] For, as each exception is made, the area for further exception is increased and the line between situations which come within the statute and those which do not becomes increasingly difficult to draw. By the introduction of such exceptions the act will cease to be a relatively simple guide to tax collection and to knowledge as to when the tax is payable, and administrative rulings and court decisions will, in effect, become substitute legislation with complicated differentiations and highly refined distinctions. Whether a rather lenient policy of statutory interpretation so as to make allowances for cases of special hardship is worth the probable cost of complicating the tax administration, not to mention the reduction of revenue, may well be doubted.

75 CONG. REC. 7209-7216, 9525 (1932) and testimony in *Hearings before Committee on Ways and Means*, 73d Cong., 1st Sess. (1933) 629-632, and *Hearings before Senate Finance Committee*, 72d Cong., 1st Sess. (1932) 1206-1260.

36. See Shreveport-El Dorado Pipe Line Co. v. McGrawl, 63 F. (2d) 202 (C. C. A. 5th, 1933); Minnesota Mining Co. v. Willcuts, 2 F. Supp. 789 (D. Minn. 1932); Westmoreland Coal Co. v. MacLaughlin, 8 F. Supp. 963 (E. D. Pa. 1934); International Paper Co. v. State, 210 App. Div. 353, 206 N. Y. Supp. 57 (3d Dep't, 1924).

37. See statement of F. H. LaGuardia, *Hearings before House Committee on Ways and Means*, 72d Cong., 1st Sess. (1932) 56-57.

38. The yield of the tax at its highest was approximately $47,000,000 in 1930 and fell to about $26,000,000 in 1932. Statement by Ogden Mills, Under Sec'y of Treas. *Hearings Before House Committee on Ways and Means*, 72d Cong. 1st Sess. (1932) 20.

39. " . . . the familiar stamp tax of two cents on checks, irrespective of amount, and poll tax of a fixed sum, irrespective of income earning capacity, and many others illustrate the necessity and practice of sometimes substituting count for weight." People ex rel Hatch v. Reardon, 204 U. S. 152, 159 (1906). See (1906) 19 HARV. L. REV. 460. A suggested provision in the amendments of 1932 to the stock transfer act providing that in no case should the tax levied on transfers be less than ¼ of 1% of the selling price was stricken out by the Senate Finance Committee because, in the words of Senator Smoot, it "would cause administrative difficulties." 75 CONG. REC. 11485 (1932). See also 75 CONG. REC. 11487, 11530, 11531 (1932).

EXECUTORS' AND TRUSTEES' BILLS FOR INSTRUCTIONS

"AN executor maketh doubt whether he shall pay debts before a decree in Chancery, decreed they shall be protected."

This brief report of an early seventeenth century case[1] indicates the motive which prompts fiduciaries handling property for the benefit of others to resort to the courts. They are perplexed as to the proper course to pursue, fearing that if they make an unfortunate choice the sufferers therefrom may seek to hold them accountable, and so they immunize themselves against liability by obtaining and following judicial instructions. Thus, the very instrument under which an executor or a trustee is appointed frequently may be unclear or ambiguous in its terms, requiring authoritative construction.[2] It may become important to determine which of conflicting testamentary documents is controlling.[3] In the event of an insolvent estate, question may be raised as to what legacies must be abated to satisfy the outstanding debts.[4] The nature of the fiduciary's power to invest[5] or to sell[6] or lease[7] may be doubtful. There may be uncertainty as to the scope of his duty to collect debts,[8] to discharge obligations,[9] or to pay over a gift.[10] The identity of the beneficiaries[11] or the character and

1. Terrey *contra* Fowler (c. 1600), TOTHILL, TRANSACTIONS OF THE HIGH COURT OF CHANCERY (1872) 89.

2. Berger v. Butler, 159 Ala. 539, 48 So. 685 (1909) (whether instrument is deed of trust or power of attorney); Lincoln v. Aldrich, 141 Mass. 342, 5 N. E. 517 (1886) (ambiguity); Gamel v. Smith, 3 Tex. Civ. App. 22, 21 S. W. 628 (1893) (whether instrument was assignment or deed of trust).

3. Des Portes v. Des Portes, 157 S. C. 407, 154 S. E. 426 (1930) (conflicting codicils).

4. Daniell v. Hopkins, 257 N. Y. 112, 177 N. E. 390 (1931); U. S. Mortgage & Trust Co. v. Ruggles, 137 Misc. 895, 244 N. Y. Supp. 56 (Sup. Ct. 1930); cf. Hill v. Hill, 37 Ariz. 406, 294 Pac. 831 (1931) (effect of provision charging debts on certain property in which divorced wife had life interest; estate solvent).

5. Leonard v. Leonard, 207 App. Div. 375, 201 N. Y. Supp. 113 (1st Dep't, 1922).

6. Casey v. Canavan, 93 Ill. App. 538 (1900) (effect of resignation); Duvall v. Duvall, 213 Ky. 213, 280 S. W. 956 (1926); Kidd's Estate, 293 Pa. 21, 141 Atl. 644 (1928); Koller's Estate, 12 Pa. D. & C. 185 (1928); Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924); Patterson's Executors v. Patterson, 144 Va. 113, 131 S. E. 217 (1926). But cf. Loughlin's Estate, 103 Pa. Super. 409, 157 Atl. 494 (1931).

7. Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S. W. (2d) 1062 (1928); Francis v. Ferguson, 246 N. Y. 516, 159 N. E. 416 (1927) (declaratory judgment); cf. Miller v. E. & M. Theatre Corp., 134 Misc. 634, 235 N. Y. Supp. 595 (Sup. Ct. 1929) (power to rescind lease).

8. Murrell's Executor v. Bohannon, 229 Ky. 13, 16 S. W. (2d) 455 (1929) (interest on instrument on which payment was postponed in will).

9. McFarland v. Crenshaw, 160 Tenn. 170, 22 S. W. (2d) 229 (1929) (tax); Nashville Trust Co. v. Dake, 162 Tenn. 356, 36 S. W. (2d) 905 (1931) (debts of life tenant).

10. Union Trust Co. v. Sheldon, 84 Conn. 494, 80 Atl. 758 (1911); cf. Strong v. Dann, 90 N. J. Eq. 329, 108 Atl. 86 (1919); City Bank Farmers' Trust Co. v. New York Central Rr. Co., 253 N. Y. 49, 170 N. E. 489 (1930) (duty to transfer stock without requiring certain proof).

11. Nagle v. Davison, 124 Kans. 230, 257 Pac. 962 (1927); Mason's Administrator v. Mason's Guardian, 239 Ky. 208, 39 S. W. (2d) 211 (1931); Kutschinski v. Bourginynon, 102 N. J. Eq. 89, 139 Atl. 596 (1927).

extent of their interests may prove troublesome.[12] It may be unwise for an executor to determine at his peril when an interest vests[13] or whether a proposed exercise of a power of appointment is valid.[14] In the case of trusts, there may be difficulty in allocating expenditures or receipts between principal and income[15] or in deciding who is entitled to the income and who to the corpus of the trust. In view of the unending variety of possible problems arising during administration,[16] it is not surprising that the fiducary who "maketh doubt" and whose position is especially delicate when he is subjected to the cross-fire of beneficiaries with conflicting interests has eagerly sought to throw over himself the mantle of the reassuring words, "Decreed they shall be protected."[17]

The proceeding for obtaining such advice and aid from a court is known as a bill for instructions.[18] Its origin is obscure, but this bill or some similar device was probably available to trustees from earliest times, and the right of a trustee, doubtful as to his rights, powers, and duties, to obtain advice from the Chancellor seems to have been accepted so much as a matter of course that the early reports do not deal with this point. As chancery began to take over the administration of decedents' estates, in the sixteenth century, the same pro-

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12. Whether beneficiary has power to sell devised property: Owens v. Owens' Executor, 236 Ky. 118, 32 S. W. (2d) 731 (1930). Determination of beneficiary's rights: Grainger's Executor & Trustees v. Pennebaker, 247 Ky. 324, 56 S. W. (2d) 1007 (1933). Whether beneficiary has complied with a condition: Morris v. Morris, 13 Pa. D. & C. 634 (1930). Conflict as to interest taken by beneficiary: Comstock v. Bridgeport Trust Co., 106 Conn. 514, 138 Atl. 440 (1927); West Haven Bank & Trust Co. v. McCoy, 117 Conn. 489, 169 Atl. 49 (1933); Slack v. Downing, 233 Ky. 554, 26 S. W. (2d) 497 (1930); Livingston v. Livingston, 246 N. Y. 234, 158 N. E. 313 (1927); Dommell's Estate, 286 Pa. 509, 134 Atl. 379 (1926); Schaffler v. Handwerker, 152 Tenn. 329, 278 S. W. 967 (1926).

13. Cf. Chenoweth v. Hall, 133 Kans. 310, 299 Pac. 645 (1931).

14. Union Trust Co. v. Sheldon, 84 Conn. 494, 80 Atl. 758 (1911); Thorp v. Lund, 227 Mass. 474, 116 N. E. 946 (1917); Greenough v. Osgood, 235 Mass. 235, 126 N. E. 461 (1920). But cf. Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930) (declaratory judgment refused); Duff's Estate, 4 Pa. D. & C. 315 (1924) (same).

15. De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930 (1903); Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903).

16. E.g., doubtful validity of gift: Trotter v. Blocker, 6 Port. 269 (Ala. 1838); Black's Estate, 288 Pa. 525, 136 Atl. 778 (1927); Kalbach's Estate, 10 Pa. D. & C. 195 (1927); issues caused by divorce: Wulk v. Fitzpatrick, 124 Kans. 642, 261 Pac. 838 (1927); question whether gift lost by forfeiture: In re Thompson's Estate, 304 Pa. 349, 155 Atl. 925 (1931); testator's rights: Leviston v. Tonningsen, 212 Cal. 656, 299 Pac. 724 (1931) (under land contract); capacity in which petitioner holds fund: Hills v. Putnam, 152 Mass. 123, 25 N. E. 40 (1890) (whether as administrator or trustee).

17. The fiduciary is relieved from liability if he follows the court's instructions. Chapman v. Northern Trust Co., 219 Ill. App. 492 (1920), aff'd, 296 Ill. 353, 129 N. E. 836 (1921); Frazer's Executors v. Page, 82 Ky. 73 (1884); McMaster v. Elliot, 83 N. H. 225, 140 Atl. 708 (1928); Mendenhall v. Benbow, 84 N. C. 646 (1881); Shepherd v. Darling, 120 Va. 586, 586, 91 S. E. 737 (1917); Fisher v. Schwabacher Hardware Co., 109 Wash. 257, 186 Pac. 649 (1920).

18. It has not received attention from the commentators generally, but RESTATEMENT, TRUSTS (Tent. Draft No. 4, 1933) § 251 is devoted to "Application to Court for Instructions."

cedural device was naturally extended to executors and administrators,[19] especially since they are frequently trustees as well[20] and were regarded, in any event, as something in the nature of trustees for the legatees or next of kin.[21] Thereby the position of personal representatives was greatly improved, for at common law they had been held responsible even for mistakes made in good faith. Thus, paying out the property otherwise than in due course of administration, satisfying debts in the wrong order, a slight degree of carelessness, or even a mistake in pleading had sufficed to render the representative personally liable to pay damages and costs out of his own estate just as if he had wasted the assets of the deceased.[22]

The common law courts retained exclusive jurisdiction over the interpretation and determination of the validity of devises, but otherwise the jurisdiction of equity over the administration of descedents' estates had become well established by the end of the seventeenth century.[23] In the United States, those courts which carry on the functions of the English Chancery have yielded at least a share in the jurisdiction over such administration to special statutory tribunals, variously denominated probate, orphans or surrogate courts.[24] But the nature, if not, perhaps, the name of the proceeding whereby fiduciaries invoke the advice of these newer courts has remained substantially unchanged. Therefore, it is unnecessary in setting forth the general principles governing courts in answer-

19. 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1156.

A leading American case, Bowers v. Smith, 10 Paige 193 (N. Y. Ch. 1843), asserted that equity would take jurisdiction to construe a will only when a trust was involved. *Accord:* Strawn v. Jacksonville Female Academy, 240 Ill. 111, 88 N. E. 460 (1909); Torrey v. Torrey, 55 N. J. Eq. 410, 36 Atl. 1084 (1897); Edgar v. Edgar, 26 Ore. 65, 37 Pac. 73 (1894). But cf. Rosenberg v. Frank, 58 Cal. 387 (1881); Angel v. Wood, 153 Ky. 195, 154 S. W. 1103 (1913); Crosson v. Dwyer, 9 Tex. Civ. App. 482, 30 S. W. 929 (1895). In some jurisdictions power to bring suit to construe a will has been given by statute: ILL. REV. STAT. (Smith-Hurd, 1933) c. 22, § 50; ME. REV. STAT. (1930) c. 91, § 36; N. J. COMP. STAT. (Supp. 1924) tit. 33, § 120; N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 205 (real property only); R. I. GEN. LAWS (1923) § 4968; VT. PUB. LAWS (1933) §§ 1592, 2772. For the view that the jurisdiction over bills for instructions is an extension of interpleader, see Tayloe v. Bond, 45 N. C. 5 (1852).

20. The rule that a trustee may apply to a court of equity for instructions is, of course, not varied because he happens also to be a executor and the trust instrument, a will. Crosby v. Mason, 32 Conn. 482 (1865); Whitman v. Fisher, 74 Ill. 147 (1874); Bridges v. Rice, 99 Ill. 414 (1881); Woods v. Fuller, 61 Md. 457 (1883); In re Baptist Church, 51 N. H. 424 (1871); Douglas v. Yost, 64 Hun 155, 18 N. Y. Supp. 830 (Sup. Ct. 1892); Alsbrook v. Reed, 89 N. C. 151 (1883); Osborne v. Taylor, 53 Va. 117 (1855); Gooch v. Trust Co., 121 Va. 29, 92 S. E. 846 (1917); Pendleton v. Bower, 49 W. Va. 146, 38 S. E. 487 (1901); McDonald v. Jarvis, 64 W. Va. 62, 60 S. E. 990 (1908).

21. 6 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1924) 655.

22. 3 id. at 586-590.

23. 6 id. at 652.

24. This may variously affect the power to reply to bills for instructions, depending particularly on whether such jurisdiction is regarded as concurrent or exclusive. See 3 POMEROY, op. cit. *supra* note 19, §§ 1152-1154. One statute, however, expressly specifies that a fiduciary may maintain an action asking the direction of the court "in the manner, and as fully, as formerly was entertained in the courts of equity." OHIO GEN. CODE (Page, 1931) § 10857.

ing or dismissing bills for instructions to differentiate among the various courts which perpetuate equitable traditions.[25] The nature of the bill is substantially the same in all of them. The fiduciary who is in doubt must set forth the particular portion of the instrument concerning which he requests the determination of the court, and the facts on which he grounds his right to relief,[26] showing that he has a present interest in a definitive adjudication of the question raised and supplying the names of any other parties who may be affected by the determination.[27] The court, if it sees fit to grant the application, will then cite such parties as it deems requisite to show cause why the determination requested by the fiduciary should not be made. Whatever decree is then made, unless reversed or modified, is thereafter conclusive on all parties to the proceeding and compliance with instructions given relieves the fiduciary from liability.[17]

Proceedings brought under declaratory judgment acts may encroach on the field of the bill for instructions. In general, however, it may be said that such acts do nothing more than codify preexisting rules so far as they relate to resolving a fiduciary's doubts.[28] And if an actual controversy is a sine qua non of such relief,[29] a declaration will not be available in the large number of instances where a fiduciary may be in doubt but is unopposed by any interested person. In the latter situation, a prudent fiduciary will, in order to guard

25. But in Pennsylvania the courts have constantly stated that they lack the advisory jurisdiction of the English Court of Chancery. In re Teller's Estate, 215 Pa. 263, 64 Atl. 525 (1906); Freeman's Estate, 7 Pa. D. & C. 289 (1926). An early case seems to indicate that the law in Pennsylvania might well have developed otherwise: Ashurst v. Montour Iron Co., 35 Pa. 30 (1860). Yet they have been at some pains to indicate to petitioners other types of suits whereby they might secure the instructions desired. In re Morton, 201 Pa. 269, 50 Atl. 933 (1902) (trustee should file fictitious account); Archambault's Estate, 19 Pa. Dist. 672 (1910) (account filed, instructions given).

26. Instructions will be refused when insufficient facts are stated: Wardens, etc. of St. Paul's Church v. Attorney-General, 164 Mass. 188, 41 N. E. 231 (1895). Or when the facts are disputed: Stultz v. Kiser, 37 N. C. 538 (1843). Or when the questions are indefinite: Russell v. Russell, 145 Atl. 648 (Conn. 1929); Bartlett v. Pickering, 113 Me. 96, 92 Atl. 1008 (1908); Bailey v. Smith, 222 Mass. 600, 111 N. E. 684 (1916); McElwain v. Allen, 241 Mass. 112, 134 N. E. 620 (1922).

27. There is disagreement as to whether the necessary parties include all parties having a contingent interest, or whether it is proper to join merely those who have a present interest.

28. The leading authority on the subject has said: "Among the most common actions which result in declaratory judgments, though not so dominated, are actions for the construction of written instruments, especially wills." BORCHARD, DECLARATORY JUDGMENTS (1934) 69. The weight of authority seems to be that the declaratory judgment acts have given no additional advisory powers to equity: cf. Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927); Bankers Trust Co. v. Greims, 110 Conn. 36, 147 Atl. 290 (1929); Norton v. Moren, 206 Ky. 415, 267 S. W. 171 (1924); Wethered v. Safe Deposit & Trust Co., 79 Md. 153, 28 Atl. 812 (1894); Rothgeb v. Manck, 35 Ohio St. 503 (1880); Duff's Estate, 4 Pa. D. & C. 315 (1934); Nashville Trust Co. v. Dake, 162 Tenn. 356, 36 S. W. (2d) 905 (1931). See, also, 2 PAGE, THE LAW OF WILLS (2d ed. 1926) § 1401. n. 16.

29. See BORCHARD, op. cit. *supra* note 28, at 26 et seq.

himself against future claims, use the traditional bill for instructions to secure the protection of a judicial decree before acting, since those who were complaisant at the time he acted, or their successors in interest, will be likely to seek to hold him to account in the event that the course he selects should result in a loss to the estate. But when an actual controversy exists, the question arises whether there is any advantage in seeking a declaratory judgment, admittedly an alternative remedy,[30] rather than filing a bill for instructions. In some states actions for a declaratory judgment are given preference, going to the head of the calendar.[31] And in cases involving title or other purely legal questions, a petitioner for a declaratory judgment would not run the risk of dismissal on the ground of adequacy of the remedy at law,[32] as declaratory relief is neither legal nor equitable in its nature. Or such a petitioner might avoid the application of peculiar equitable doctrines, such as that making decrees conditional on the "doing of equity." And in a few states courts of general jurisdiction in the exercise of their equity powers will not construe a will when it does not create a trust, yet will grant similar relief under the law authorizing declarations.[33]

Unless declaratory relief is deemed preferable in a given case, a perplexed fiduciary should always file a bill for instructions. Indeed, some courts have indicated that it is the duty of a doubting trustee to seek the court's directions;[34] and in certain unusual circumstances, as when a trustee was appointed by the court after the original trustees had died without naming a successor,[35] or when a trustee's or an executor's personal interests are in conflict with those which he is representing in his fiduciary capacity,[36] it should be obligatory upon him to apply for orders from a disinterested court. Yet it is never obligatory upon a court to entertain a bill for instructions. The right to instructions is limited by the tradition of the chancellor's discretion.[37] But certain principles

30. See id. at 147 et seq.; (1935) 44 YALE L. J. 694.

31. CAL. CODE CIV. PROC. (Deering, 1931) § 1062a; KY. STAT. (Carroll, 1930) § 639a-3; MICH. COMP. LAWS (1929) § 13904.

32. BORCHARD, op cit. *supra* note 28, at 147 et seq. But cf. Loughlin's Estate, 103 Pa. Super. 409, 157 Atl. 494 (1931). A bill for instructions will not be answered when there is an adequate remedy at law. Adams v. Dixon, 19 Ga. 513 (1855); Dodge v. Morse, 129 Mass. 423 (1880); Moore v. Rankin, 172 N. C. 599, 90 S. E. 759 (1916); McDonald v. Jarvis, 64 W. Va. 62, 60 S. E. 990 (1908).

33. Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930); In re Ungara's Will, 88 N. J. Eq. 25, 102 Atl. 244 (1917); cf. Miers v. Persons, 92 N. J. Eq. 17, 111 Atl. 638 (1920) (rights declared when no relief asked).

34. Nagel v. Zumstein, 9 Ohio N. P. N. S. 385 (1910); Downes v. Long Timber & Lumber Co., 99 W. Va. 267, 128 S. E. 385 (1925) (duty implied in statute); see Frazer's Executors v. Page, 82 Ky. 73 (1884); see In re Windsor Steam Coal Co. [1929] 1 Ch. 151, 159; BORCHARD, op. cit. *supra* note 28, at 337.

35. Lowe v. Convention of Protestant Episcopal Church, 83 Md. 409, 35 Atl. 87 (1896); Peckham v. Newton, 15 R. I. 321, 4 Atl. 758 (1886).

36. Shanley's Estate v. Fidelity Union Trust Co., 157 Atl. 160 (N. J. Ch. 1927); Rogers v. Rogers, 111 N. Y. 228, 18 N. E. 636 (1888); Irving v. Irving, 21 Misc. 743, 47 N. Y. Supp. 1052 (Sup. Ct. 1897).

37. Hoagland v. Cooper, 65 N. J. Eq. 407, 56 Atl. 705 (1903).

governing the exercise of that discretion have developed from consideration, conscious or intuitive, of conflicting policies. On the one hand these policies point to the desirability of a liberal attitude toward granting instructions, which, by removing any unwarranted risk of liability,[17] would encourage responsible persons to assume positions of trust; and on the other hand they suggest the advisability of developing some limitations, so as to require the fiduciary to bear the burden of the responsibility for which he is receiving compensation and to avoid consuming the time of the court and the money of the estate[38] and to prevent the adjudication of the interests of parties not before the court.[39] It is only by weighing these factors that general rules for the grant or refusal of instructions can be properly formulated.

In the first place, the petitioner must have a real interest in the determination of the question. But the statement is meaningless unless the requisite interest is defined. Since the object of answering a bill is to offer immunity to the fiduciary, it seems reasonable to require that the question to which the bill for instructions seeks an answer be related to the validity of a proposed course of action which, if held invalid after it had been pursued, would subject the fiduciary to liability. If his inquiry, for example, pertains solely to a question, as between a devisee and an heir,[40] or between antagonistic devisees,[41] as to the legal title passed by a will, such interest is considered lacking, and the interested parties are left to their remedy at law. But the fact that the questions seek determination only of legal title does not of itself demonstrate a lack of interest, for such a determination may be necessarily involved in defining the scope of the fiduciary's duties.[42] Similarly, where legacies and devises are interdependent, the devises may properly be construed.[43] But some sort of

38. Costs are ordinarily payable out of the estate. Collins v. Morgan County National Bank, 226 Ala. 376, 147 So. 161 (1933); Keys v. Wohlgemuth, 240 Ill. 586, 88 N. E. 1041 (1909); Dunne v. Cooke, 197 Ill. App. 422 (1916); Dunne v. Cooke, 231 Ill. App. 281 (1924); Wedekind v. Hallenberg, 12 Ky. L. Rep. 46 (1890); Bailey v. Worcester, 103 Me. 170, 68 Atl. 698 (1907); Alford v. Richardson, 120 Me. 316, 114 Atl. 193 (1921); Jones v. Stockett, 2 Bland. 409 (Md. 1838); Cotten v. Tyson, 121 Md. 597, 89 Atl. 113 (1913); Bowditch v. Soltyk, 99 Mass. 136 (1868); Howland v. Green, 108 Mass. 277 (1871); Baker v. Clark Institute, 110 Mass. 88 (1872); Deane v. Home for Aged Colored Women, 111 Mass. 132 (1872); Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076 (1907); RESTATEMENT, TRUSTS (Tent. Draft No. 4, 1933) § 251. But the fiduciary may be required to pay costs when he brings the bill without reason. Baxter v. Baxter, 43 N. J. Eq. 82, 10 Atl. 814 (1887); Powell v. Demming, 22 Hun 235 (N. Y. Sup. Ct. 1880); In re Brewer, 43 Hun 597 (N. Y. Sup. Ct. 1887); Vaccaro v. Cicalla, 89 Tenn. 63, 14 S. W. 43 (1890); LORING, A TRUSTEE'S HANDBOOK (1928) 119.

39. Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222 (1924); Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719 (1895); cases cited in note 51, *infra*.

40. Miles v. Strong, 60 Conn. 393, 22 Atl. 959 (1891); Torrey v. Torrey, 55 N. J. Eq. 410, 36 Atl. 1084 (1897).

41. Huston v. Dodge, 111 Me. 246, 251; 88 Atl. 888, 890 (1913); Tyson v. Tyson, 100 N. C. 360, 6 S. E. 707 (1888); cf. Austin v. Bailey, 163 Mass. 270, 39 N. E. 1022 (1895) (question answered).

42. Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222 (1889); Bailey v. Burgess, 11 R. I. 330 (1876); Read v. Citizens' St. Rr. Co., 110 Tenn. 316, 75 S. W. 1056 (1903).

43. Haywood v. Wachovia Loan & Trust Co., 149 N. C. 208, 62 S. E. 915 (1908).

conduct related to the administration of the trust must be involved;[44] instructions as to matters outside the instrument[45] or arising after termination of the trust[46] will be refused.

Secondly, the doubt should be reasonable,[47] and the question confronting the fiduciary must be one of admitted difficulty.[48] Courts are too busy to entertain unnecessary questions concerning the construction of a will or trust instrument which is clear and unambiguous.[49] Thus, if a power to sell is plainly granted, there is no reason why an over-timid fiduciary should consume the time of the court and cause expense to the estate by seeking unnecessary protection.[50] Similarly, instructions will not be given on purely legal questions, because they fall outside the equity jurisdiction, perhaps on account of the adequacy of the remedy at law.[51] Nor should a court be asked to act as a

44. McAllister v. Elliot, 83 N. H. 225, 140 Atl. 708 (1928); Coe v. Beckwith, 31 Barb. 339 (N. Y. Sup. Ct. 1860); cf. Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202 (1917) (trustee not entitled to instructions as to propriety of tax payment made by executor).

45. Suffolk v. Lawrence, 32 Wkly. Rep. 899 (Eng. Ch. 1884); Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719 (1895).

46. Hyde v. Wason, 131 Mass. 450 (1881).

47. It has been so considered and instructions given in the following cases: Dimmock v. Bixby, 37 Mass. 368 (1838); Treadwell v. Cordis, 71 Mass. 341 (1855) (to whom to make distribution); Jones v. Harsha, 225 Mich. 416, 196 N. W. 624 (1923) (power to mortgage; construction of "improvement"); Hackley Bank v. Farmer, 252 Mich. 674, 691, 234 N. W. 135, 141 (1931) (whether trust had been revoked); Hayden's Executors v. Marmaduke, 19 Mo. 403 (1854) (fund not contemplated by testator); Mersman v. Mersman, 136 Mo. 244, 37 S. W. 909 (1896) (nature of grant); Trustees of Princeton University v. Wilson, 78 N. J. Eq. 1, 78 Atl. 393 (1910) (site of graduate school); Holland Trust Co. v. Sutherland, 177 N. Y. 327, 69 N. E. 647 (1904); rev'g 65 App. Div. 252, 72 N. Y. Supp. 584 (1st Dep't, 1903); Commercial National Bank of Charlotte v. Alexander, 188 N. C. 667, 125 S. E. 385 (1924) (ratification of contract as to widow's share); Gamel v. Smith, 3 Tex. Civ. App. 22, 21 S. W. 628 (1893) (nature of instrument); Downes v. Long Timber & Lumber Co., 99 W. Va. 267, 128 S. E. 385 (1925); Loughlin v. Building Co., 169 Wis. 50, 171 N. W. 755 (1919) (right to inspect securities in absence of co-trustee); see Kinney v. Robinson, 30 Hawaii 246, 257 (1927); Diggs v. Fidelity & Deposit Co., 112 Md. 50, 63, 75 Atl. 517, 518 (1910).

48. Hutchins v. Dante, 40 App. D. C. 262 (1913); Wheeler v. Perry, 18 N. H. 307 (1846); Coe v. Beckwith, 31 Barb. 339 (N. Y. Sup. Ct. 1860); cf. James v. Spann, 35 S. C. 614, 14 S. E. 955 (1892).

49. Shurtleff v. Schoenleber, 106 Neb. 870, 184 N. W. 814 (1921); Crawford v. Watson, 34 App. Div. 457, 54 N. Y. Supp. 246 (1st Dep't, 1898); Hollister v. Howe, 6 Ohio Dec. 157 (1897); Goodrich v. Henderson, 221 Mass. 234, 108 N. E. 1062 (1915) semble.

50. Browning v. Stiles, 65 Atl. 457 (N. J. Ch. 1906); cf. George v. Zinn, 57 W. Va. 15, 49 S. E. 904 (1905); see Vanness' Executors v. Jacobus, 17 N. J. Eq. 153, 154 (1864).

51. Hill v. Moors, 224 Mass. 163, 112 N. E. 641 (1916) (title to realty); Harris v. Bow, 156 Mich. 28, 120 N. W. 17 (1909) (same; ejectment proper remedy); Hoagland v. Cooper, 65 N. J. Eq. 407, 56 Atl. 705 (1903); Goetz v. Sickel, 71 N. J. Eq. 317, 63 Atl. 1116 (1906) (whether a valid trust exists in view of rule against perpetuities); Hoe v. Hoe, 84 N. J. Eq. 401, 93 Atl. 882 (1915) (title to realty); Mellen v. Mellen, 139 N. Y. 210, 34 N. E. 925 (1893) (power of sale); Hanna v. Galford, 55 W. Va. 160, 47 S. E. 359 (1904) (legal remedy adequate to determine validity of claim). See cases cited in note 32, *supra*.

mere legal adviser simply because the petitioner is not familiar with the law, as he could obtain such advice from any competent attorney at the expense of the estate.[52]

There are situations, however, in which the fiduciary is unable to obtain the advice of a court although he is faced with problems of great complexity. This is the case when he has been given discretion as to the management of the estate confided to his control. Although the fiduciary cannot be entirely removed from the control of the court,[53] the settlor's intention to vest a large amount of discretion in him will be respected except when there are strong grounds for interference. Ordinarily the court prefers not to decide a question which was left by the settlor to the fiduciary's judgment.[54] This is especially true when advice is sought on matters of business policy, and is easily justifiable on the ground that usually the fiduciary has been appointed and is receiving compensation because of his experience and ability in such affairs.[55] Instructions have been given on such matters, however, because of the unusual conditions caused by the depression.[56] And in applying the general rule as to trustees with managerial discretion, a distinction must be drawn between cases in which an attempt is made to shift to the court responsibility for the manner of exercise of a power, and those in which the question presented is the existence of the power rather than the advisability of exercising it.

Another limitation on the availability of instructions is that they will be given only when they concern immediate duties of the petitioner, and affect interests which are in existence. Obviously, a court ought not to decide merely specula-

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52. Clay v. Gurley, 62 Ala. 14 (1878); Koolan Kaikainahaole v. Allen, 14 Hawaii 527 (1902); Bishop Trust Co. v. Oahu Sugar Co., 19 Hawaii 183 (1908); Crawford v. Winston, 34 App. Div. 457, 54 N. Y. Supp. 246 (1st Dep't, 1898); cf. Greene v. Mumford, 4 R. I. 313 (1856). But cf. BORCHARD, op. cit. *supra* note 28, at 335 (validity and extent of claims).

53. Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927); Kirwin v. Attorney-General, 275 Mass. 34, 175 N. E. 164 (1931); In re Laverelle's Estate, 101 Pa. Super. 448 (1931); Viall v. R. I. Hospital Trust Co., 45 R. I. 432, 123 Atl. 570 (1924); Adrian v. Koch, 83 N. J. Eq. 484, 91 Atl. 123 (1914) semble, aff'd, 84 N. J. Eq. 195, 93 Atl. 1083 (1915); LORING, A TRUSTEE'S HANDBOOK (1928) 73.

54. Cromey v. Ball, 4 Ky. L. Rep. 787 (1883); Huston v. Dodge, 111 Me. 246, 88 Atl. 888 (1913); Bartlett v. Pickering, 113 Me. 96, 92 Atl. 1008 (1915); Cronan v. Cronan, 190 N. E. 721 (Mass. 1934); Haydel v. Harch, 72 Mo. 253 (1880); Portsmouth v. Shackford, 46 N. H. 423 (1866); Swetland v. Swetland, 100 N. J. Eq. 196, 134 Atl. 822 (1926); Matter of White, 125 Misc. 901, 212 N. Y. Supp. 267 (Surr. Ct. 1925); Freeman's Estate, 7 Pa. D. & C. 289 (1926); Metcalf v. Gladding, 35 R. I. 395, 87 Atl. 195 (1913); Rutland Trust Co. v. Sheldon, 59 Vt. 374, 10 Atl. 90 (1887).

55. Tierney v. Tierney, 38 Atl. 971 (N. J. Ch. 1897) (advisability of sale); Browning v. Stiles, 65 Atl. 457 (N. J. Ch. 1906) (same); Matter of Goldfarb, 93 Misc. 401, 157 N. Y. Supp. 137 (Surr. Ct. 1916) (sale of realty); Matter of Ebbet, 139 Misc. 250, 248 N. Y. Supp. 179 (Surr. Ct. 1931) (consent to mortgage); Matter of Pulitzer, 139 Misc. 575, 249 N. Y. Supp. 87 (Surr. Ct. 1931), aff'd without opinion, 237 App. Div. 808, 260 N. Y. Supp. 975 (1st Dep't, 1932) (manner of sale of stock); Matter of Wander, 141 Misc. 584, 252 N. Y. Supp. 813 (Surr. Ct. 1931); R. I. Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273 (1916) (retention of certain shares).

56. Matter of Rosenberg, 145 Misc. 581, 261 N. Y. Supp. 640 (Surr. Ct. 1932).

tive or academic matters with respect to which, by the time they ripen into actuality, wholly different instructions may be required.[57] Yet this does not mean that a court may not consider and declare "future rights." An executor's present conduct, for example, may be affected by the nature of a remainder after the life interest has expired;[58] or the establishment of a power to sell may be of present interest even though no immediate sale is contemplated.[59] But if the answer depends on a future event which may be a mere contingency,[60] or if it affects the rights of persons not yet in being,[61] instructions should be refused. Similarly, although instructions may be sought as to the distribution of a trust estate when it is about to be wound up,[62] they will not be given unless the fiduciary can show that the time at which a determination is essential has come. The questions which ordinarily remain unanswered be-

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57. May v. May, 167 U. S. 310, 323 (1897); Eaton v. Eaton, 88 Conn. 269, 286, 91 Atl. 191, 196 (1914); Wethered v. Safe Deposit & Trust Co., 79 Md. 153, 28 Atl. 812 (1894); Coghlan v. Dana, 173 Mass. 421, 53 N. E. 890 (1899); Goodrich v. Henderson, 221 Mass. 234, 108 N. E. 1062 (1915); Mitton v. Burrill, 229 Mass. 140, 118 N. E. 274 (1918); Murray v. Roman Catholic Home, 232 Mass. 384, 122 N. E. 557 (1919); Lich v. Lich, 158 Mo. App. 400, 138 S. W. 558 (1911); Stewart v. Stewart, 61 N. J. Eq. 25, 47 Atl. 633 (1900); Cuskaden v. Steelman, 88 N. J. Eq. 93, 102 Atl. 261 (1917); Tayloe v. Bond, 45 N. C. 5, 16 (1852); Rexrod v. Wells, 13 W. Va. 812 (1878); see Kinney v. Robinson, 30 Hawaii 246, 257 (1927); Diggs v. Fidelity & Deposit Co., 112 Md. 50, 63, 75 Atl. 517, 518 (1910).

58. Meacham v. Graham, 98 Tenn. 190, 39 S. W. 12 (1897).

59. Haseltine v. Shepherd, 99 Me. 495, 504, 59 Atl. 1025, 1029 (1905).

60. Security Co. v. Pratt, 65 Conn. 161, 32 Atl. 396 (1894) (power to sell for benefit of life tenant when life tenant does not request sale); Gorham v. Gorham, 99 Conn. 137, 121 Atl. 349 (1923); Van Roy v. Hoover, 96 Fla. 194, 117 So. 887 (1928); Strawn v. Academy, 240 Ill. 111, 88 N. E. 460 (1909); Huston v. Dodge, 111 Me. 246, 88 Atl. 888 (1913); Connolly v. Leonard, 114 Me. 29, 95 Atl. 269 (1915); Minot v. Taylor, 129 Mass. 160 (1880); Allen v. Allen, 217 Mass. 338, 104 N. E. 727 (1914) (disposition of any balance after settlement of the estate); Goodrich v. Henderson, 221 Mass. 234, 108 N. E. 1062 (1915); Mitton v. Burrill, 229 Mass. 140, 118 N. E. 274 (1918) (taxes due when life estates pass); Fuller v. McKim, 187 Mich. 667, 154 N. W. 55 (1915); Sterrett's Estates, 300 Pa. 116, 150 Atl. 159 (1930) (death without issue or failure to exercise power of appointment); Searles v. Charitable Baptist Society, 30 R. I. 478, 76 Atl. 160 (1910); Rexroad v. Wells, 13 W. Va. 812 (1878); see McAllister v. Elliot, 83 N. H. 225, 140 Atl. 708 (1928); Hewitt v. Green, 77 N. J. Eq. 345, 77 Atl. 25 (1910). It has been said that even if such a decree were rendered it would not be binding: Meacham v. Graham, 98 Tenn. 190, 39 S. W. 12 (1897).

61. Walker v. First Trust & Savings Bank, 12 F. (2d) 896 (C. C. A. 8th, 1926); Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414 (1887); Hall v. Cogswell, 183 Mass. 521, 67 N. E. 644 (1903); Murray v. Roman Catholic Home, 232 Mass. 384, 122 N. E. 557 (1919); Stewart v. Stewart, 61 N. J. Eq. 25, 47 Atl. 633 (1900); Cuskaden v. Steelman, 88 N. J. Eq. 93, 102 Atl. 261 (1917); Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971 (1894); Matter of Graham, 98 Misc. 518, 162 N. Y. Supp. 861 (Surr. Ct. 1917).

62. Hayden's Executors v. Marmaduke, 19 Mo. 403 (1854); Caperton v. Huddleston, 7 Humph. 452 (Tenn. 1846). Some state statutes provide that the fund itself may be paid into court for this purpose. CAL. CODE CIV. PROC. (Deering, 1931) § 572; IOWA CODE (1931) § 12778; MONT. REV. CODE (1921) § 9308; N. D. COMP. LAWS ANN. (1913) § 7593; OHIO GEN. CODE (Page, 1931) § 11899; OKLA. STAT. (1931) § 778 (receivers); WYO. REV. STAT. ANN. (1931) § 89-3606.

cause of prematurity fall into two principal categories:[63] first, those seeking a determination of future rights during the existence of the particular estate on which they are limited;[64] second, those seeking directions as to the distribution of a fund not yet reduced to possession[65] or not yet ready for distribution.[66]

63. For additional types of cases refusing enlightenment because the bills were prematurely brought, see: Treadwell v. Salisbury Manufacturing Co., 73 Mass. 393 (1856) (trustees' powers and duties under a contemplated reorganization of a corporation); Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927) (directions in advance as to apportionment of taxes and assessments); Gebhard v. Lenox Library, 74 N. H. 416, 68 Atl. 540 (1907); Matter of Storts, 142 Misc. 54, 253 N. Y. Supp. 834 (Surr. Ct. 1931) (duration of permissible retention of non-legal investments); Nashville Trust Co. v. Dake, 162 Tenn. 356, 36 S. W. (2d) 905 (1931) (compromise of contingent claim).

64. Dahlgren v. Pierce, 270 Fed. 507 (C. C. A. 6th, 1921) cert. denied 256 U. S. 692, and appeal dismissed 256 U. S. 682 (1921); Russell v. Hartley, 83 Conn. 654, 78 Atl. 320 (1910); Bridgeport Trust Co. v. Bartholomew, 90 Conn. 517, 97 Atl. 758 (1916); Wilmington Trust Co. v. Blades, 171 Atl. 757 (Del. Ch. 1934); Norton v. Moren, 206 Ky. 415, 267 S. W. 171 (1924); Minot v. Taylor, 129 Mass. 160 (1880); Chase v. Chase, 132 Mass. 473 (1882); Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951 (1889) (disposition of fund on occurrence of future event, even though it is certain that such event must occur); Bullard v. Attorney-General, 153 Mass. 249, 26 N. E. 691 (1889) (whether remainderman may take); White v. M. I. T., 171 Mass. 84, 50 N. E. 512 (1898); Tibbetts v. Tomkinson, 217 Mass. 244, 104 N. E. 562 (1914) (future disposition of part of trust set aside to provide annuities); Old Colony Trust Co. v. Jackson, 243 Mass. 543, 137 N. E. 874 (1923) (final disposition of principal on death of cestuis); North Adams National Bank v. Commissioner, 268 Mass. 42, 167 N. E. 294 (1929) (gift over, in certain contingency, on the death of a nephew to the issue of any of his brothers who may have predeceased him); Flye v. Jones, 283 Mass. 136, 186 N. E. 64 (1933); Boyden v. Stevens, 285 Mass. 176, 188 N. E. 741 (1934) (although trustee believed that determination would aid him in the exercise of his discretion); Campbell v. Spotts, 331 Mo. 974, 55 S. W. (2d) 986 (1932); Adams v. Carrie F. Wright Hospital, 82 N. H. 260, 132 Atl. 525 (1926) (effect of death without children); Traphagen v. Levy, 45 N. J. Eq. 448, 18 Atl. 222 (1889); Varick v. Smith, 69 N. J. Eq. 505, 61 Atl. 151 (1905); Swetland v. Swetland, 100 N. J. Eq. 196, 134 Atl. 822 (1926) (contingency of certain defendants predeceasing settlor's widow); Matter of Klumpf, 95 Misc. 436, 158 N. Y. Supp. 1094 (Surr. Ct. 1916); Matter of De Witt, 139 Misc. 138, 247 N. Y. Supp. 835 (Surr. Ct. 1931); Goddard v. Brown, 12 R. I. 31 (1878); Blair v. Johnson, 64 Vt. 598, 24 Atl. 764 (1892); Morse v. Lyman, 64 Vt. 167, 24 Atl. 763 (1892); Messer v. Reitz, 81 W. Va. 483, 94 S. E. 952 (1918); Prichard v. Prichard, 83 W. Va. 652, 98 S. E. 877 (1919); Callison v. Bright, 85 W. Va. 700, 102 S. E. 675 (1920).

65. Bullard v. Waterman, 153 Mass. 249, 26 N. E. 691 (1891); Proctor v. Heyer, 122 Mass. 525 (1877); Norris v. Beardsley, 62 Atl. 425 (N. J. Ch. 1905).

66. Stapyleton v. Neeley, 44 Fla. 212, 32 So. 868 (1902) (no showing that assets are in shape for distribution or ever will be); Kinney v. Robinson, 30 Hawaii 246 (1929) (distribution of a possible surplus); Wheaton v. Batcheller, 211 Mass. 223, 97 N. E. 924 (1912) (prior to time for distribution of principal, only disposition of income will be determined); Saltonstall v. Treasurer, 256 Mass. 519, 153 N. E. 4 (1926) (no present duty to perform as to excise on corpus of fund); Tuttle v. Woolworth, 62 N. J. Eq. 532, 50 Atl. 445 (1901) (entitled to direction only as to estate ready for distribution); Kellogg v. Burnett, 74 N. J. Eq. 304, 69 Atl. 196 (1908) (as to distribution before estate ready to distribute); Passaic Trust & Safe Deposit Co. v. East Ridgelawn Cemetery, 101 Atl. 1026 (N. J. Ch. 1917); Matlock v. Matlock, 98 N. J. Eq. 572, 131 Atl. 212 (1925) (as to distribution before time to distribute).

Although it is thus possible to summarize the general principles governing the decisions, there are still many questions on which prediction as to whether or not a bill will be answered would be unsafe. Courts are troubled when asked for instructions as to whether a fiduciary may deviate from the express terms of a will or trust. In such cases it can hardly be maintained that the fiduciary is in doubt or that a matter of construction is involved. The bill asking for instructions as to whether he has certain powers which the instrument clearly does not confer upon him is really a petition to enlarge his powers by judicial alteration of the terms. Yet when conditions have changed so radically that adherence to the original terms would nullify the testator's intent or even endanger the existence of the corpus of the trust, such requests have occasionally been granted.[67] But the question here ultimately involved is whether a *favorable* instruction will be given, rather than whether the bill will be answered at all.

Another group of inquiries which seems to be in the doubtful category is that relating to past events. It has been frequently stated that instructions will be refused to a trustee if they relate to matters of his past administration and that an executor cannot obtain a determination of the effect of a distribution

67. Bankers Trust Co. v. Greims, 108 Conn. 259, 142 Atl. 796 (1928) (authorizing sale of mansion and estate, although will stipulated trustees should maintain it as family home until 1935); Russell v. Russell, 109 Conn. 187, 145 Atl. 648 (1929) (permission granted to mortgage and make extensive improvements); Dante v. Hutchins, 48 App. D. C. 66 (1918) (authorized purchase of part of ground under business block belonging to the estate, where lease could not be renewed advantageously unless such purchase was made); March v. Reed, 184 Ill. 263, 56 N. E. 306 (1900) (99-year lease authorized); Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905) (same); Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S. W. (2d) 1062 (1928) (trustee doubted power to make 99-year lease which cestuis desired under terms of will, obtained construction under declaratory judgment act); Matherly v. Executors, 254 Ky. 307, 71 S. W. (2d) 663 (1934) (empowering executors to give a mortgage for purpose of paying debts); Young v. Young, 255 Mich. 173, 237 N. W. 535 (1931) (instruction to sell granted, although forbidden by will, because building destroyed by fire and income reduced); Drake v. Crane, 127 Mo. 85, 29 S. W. 990 (1895) (donation from trust funds to aid in building of a hotel, which would enhance value of trust real estate, approved); Pennington v. Museum, 65 N. J. Eq. 11, 55 Atl. 468 (1903) (change of scheme for management of trust); Matter of Pulitzer, 139 Misc. 575, 249 N. Y. Supp. 87 (Surr. Ct. 1931), aff'd without opinion, 237 App. Div. 808, 260 N. Y. Supp. 975 (1st Dep't, 1932) (power to sell the assets of the company controlling the New York World although the will expressly prohibited such sale); City of Cincinnati v. McMicken, 6 Ohio Cir. Ct. Rep. 188 (1892) (trustees authorized, because of changed conditions, to move college buildings to new site, although will stipulated grounds on which they were to be erected); Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5 (1913) (99-year lease authorized). But cf. Northern Trust Co. v. Thompson, 245 Ill. App. 20 (1927); Cady v. Tuttle, 127 Me. 104, 141 Atl. 188 (1928) (bill dismissed, but court shows beneficiaries how they may circumvent the trust instrument); Alexander v. Herring, 99 Miss. 427, 55 So. 360 (1911) (reversing decree authorizing administrator to engage in business); In re Caswell's Will, 197 Wis. 327, 222 N. W. 235 (1929) (mere fact that 99-year lease would be beneficial both to life-tenant and to remaindermen held insufficient to justify modification of terms of trust, which may only be done to preserve corpus thereof). See Scott, *Deviation from the Terms of a Trust* (1931) 44 HARV. L. REV. 1025.

which has already been made.[68] Naturally a court is ordinarily averse to giving its judicial blessing ex post facto to acts concerning which the petitioner should have secured its ratification in advance.[69] But if the fiduciary is still in a position to rectify his mistake, the court may properly aid him to do so. Thus if he has made erroneous excessive part payments to certain beneficiaries, and still has funds in his control, the court will often ratify the act of past administration and include in the decree an order to adjust such mistakes by an equivalent withholding or scaling down of the payments still to be made.[70]

It is also unsettled as to whether instructions will be given regarding the compromise or arbitration of disputes, for the power of the court to sanction such procedure has been questioned,[71] though it has received express statutory

68. LORING, A TRUSTEE'S HANDBOOK (1928) 118; 2 PAGE, THE LAW OF WILLS (2d ed. 1926) § 1502; 2 PERRY, TRUSTS AND TRUSTEES (7th ed. 1929) § 476a; 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 1157; Tayloe v. Bond, 45 N. C. 5 (1852) (dictum). In the following cases the bills were dismissed because they related to matters of past administration: Miles v. Strong, 60 Conn. 393, 22 Atl. 959 (1891) (after estate had been fully settled and distributed, executor could not maintain suit for adjudication of exact estate a devisee took); Stover v. Webb, 114 Me. 386, 96 Atl. 721 (1916); Schier v. Burr, 127 Mass. 221 (1879); Hill v. Moors, 224 Mass. 163, 112 N. E. 641 (1916) (ratification asked); Forbes v. Brigham, 232 Mass. 177, 122 N. E. 396 (1919) (as to past administration of trust and rights of remaindermen at time of a beneficiary's death, which had occurred some years previously); Tierney v. Tierney, 38 Atl. 971 (N. J. Ch. 1897); Nagel v. Zumstein, 9 Ohio N. P. N. S. 385 (1910) (erroneous distribution without asking instructions); Hall v. Lawton, 80 Vt. 535, 68 Atl. 657 (1908) (bill to construe will where there had been a decree of distribution by probate court); cf. Clark v. Carter, 200 Mo. 515, 98 S. W. 594 (1906) (after an executrix had sold land to *A*, who paid part cash and gave a mortgage for the balance, it was too late for *A* to bring a suit to construe the will and have it determined whether she had power to make a sale to him).

69. The proper proceeding for reviewing past conduct is accounting. But the function of an account is to show the status of the estate and is not for the trial of disputed claims. Dodd v. Winship, 133 Mass. 359 (1882); see New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69 (1886).

70. In re Eilert's Estate, 131 Cal. App. 409, 21 P. (2d) 630 (1933) (where trustee erroneously paid certain funds to life tenant, court directed him to take steps to recoup the loss suffered by the trust estate); In re Lawson's Estate, 215 Iowa 752, 244 N. W. 739 (1932) (court ratified investments made by trustee); Hammond v. Hammond, 169 Mass. 82, 47 N. E. 535 (1897) (executors held entitled to retain income to make good payments made to the wife by mistake); Bailey v. Smith, 222 Mass. 600, 111 N. E. 684 (1913) (where trustees had erroneously overpaid certain beneficiaries, they were authorized to withhold future income until reimbursed for the over-payments); List's Estate, 283 Pa. 255, 129 Atl. 64 (1925) (on a bill for a declaration, confirmation of executor's account was held proper).

71. Holding that the power exists: Chadbourn v. Chadbourn, 91 Mass. 173 (1864) (administrator); Reynolds v. Brandon, 50 Tenn. 593 (1871) (court ratified family settlement and compromise at request of trustee). *Contra:* Morris v. Boyd, 110 Ark. 468, 162 S. W. 69 (1913) (no jurisdiction to approve compromise which altered the terms of the will); Stephens v. Collison, 274 Ill. 389, 113 N. E. 691 (1916) (reversed decree granting executors authority requested to accept a compromise of litigation, which amounted to a destruction of the trust); Northern Trust Co. v. Thompson, 245 Ill. App. 20 (1927) (exigencies insufficient to demand modification of trust); Brown v. Brown, 72 N. J. Eq. 667, 65 Atl. 739 (1907) (executor told he must compromise at his peril).

authorization in some states.[72] And it is unsettled whether instructions will be given on questions involving the assignability of a beneficiary's interest even though the question may become important in determining whether a claimant is a proper distributee.[73] Divergent results have also been reached on a number of minor points, such as approval of investments,[74] control of discretion to make payments out of a spendthrift trust,[75] and settlement of disagreement between co-trustees.[76] But in general instructions should be given in such cases if the court finds that the fiduciary is really confronted with a problem.

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72. CONN. GEN. STAT. (1930) § 5010; GA. CODE ANN. (Michie, 1926) §§ 4005, 4005; ME. REV. STAT. (1930) c. 82, § 9; MD. ANN. CODE (Bagby, 1924) art. 16 § 268; MASS. GEN. LAWS (1932) c. 204, § 13; R. I. GEN. LAWS (1923) § 4413. Such a statute has been held constitutional. Clarke v. Cordis, 86 Mass. 466 (1862).

73. Jackson v. Thompson, 84 Me. 44, 24 Atl. 459 (1891) (equity cannot determine the validity of assignments made by beneficiaries); Montignani v. Blade, 145 N. Y. 111, 39 N. E. 719 (1895) (especially if the assignee is not a party to the suit). *Contra:* Cary v. Talbot, 120 Me. 427, 115 Atl. 166 (1921) (court answered trustee's questions as to whether beneficiaries had assignable interests); Haskell v. Haskell, 234 Mass. 442, 125 N. E. 601 (1919) (beneficiary took equitable estate which did not pass to assignees); Stowell v. Ranlett, 238 Mass. 599, 131 N. E. 451 (1921) (instructed trustee to distribute funds in accordance with assignments of their shares made by the beneficiaries).

74. Cf. In re Petition of Conwell, 13 Del. Ch. 55, 115 Atl. 309 (1921) (instruction refused); Hackett's Executors v. Hackett's Devisees, 180 Ky. 406, 202 S. W. 864 (1918) (instruction granted).

75. Cf. Eaton v. Eaton, 82 N. H. 216, 132 Atl. 10 (1926) (instruction refused); In re Walters, 278 Pa. 421, 123 Atl. 408 (1924) (instruction granted).

76. McCarthy v. Tierney, 116 Conn. 588, 165 Atl. 807 (1933) (instruction refused); Appeal of Chaplin, 131 Me. 446, 163 Atl. 774 (1933) (instruction granted). These cases involve disputes on business judgment, see note 55, *supra*.